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Indian Penal Code (Act XLV of 1860)

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Chapter I

Introduction

Preamble--WHEREAS it is expedient to provide a general Penal Code for [1][India]; It is enacted as follows:

COMMENT

The offences under the 1944 Central Excise Act cannot be equated with offences under the Indian Penal Code .[2]

1 The words 'British India' have successively been subs by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule, to read as above.

2 *Om Prakash v Union of India* AIR 2012 SC 545, 2012 Cr LJ 779 (SC) .

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Indian Penal Code (Act XLV of 1860)

Chapter I

Introduction

S. 1.

Title and extent of operation of the Code.--

This Act shall be called the Indian Penal Code, and shall [3][extend to the whole of India [4][except the State of Jammu and Kashmir].]1

Comments

1. Legislative Changes

Section 1 as originally enacted stood as follows:

> This Act shall be called the Indian Penal Code and shall take effect on and from the first day of May 1861, throughout the whole of the territories which are, or may become, vested in Her Majesty by the Statutes 21 and 22 Victoria, Chapter 106, entitled 'An Act for the better Government of India,' except the Settlement of Prince of Wales' Island, Singapore and Malacca.

This section has undergone several amendments by Act 6 of 1861, the Repealing and Amending Act 12 of 1891, the Adaptation Orders of 1937, 1948 and 1950, and Act 3 of 1951, as shown below, successively so as to read as above in its present form. The words 'British India' were replaced by the words 'The Provinces of India' by the Adaptation of Laws Order 1948. The same Order had the effect of replacing the words 'take effect throughout British India' by the words 'extend to all the Provinces of India'. The Adaptation of Laws Orders 1950, replaced the words 'the Provinces of India' by the words 'the whole of India except Part B States' and substituted the words 'the whole of India except Part B States' for the words 'all the Provinces of India.' Finally, under Part B States (Laws) Act 3 of 1951, the word 'India' was substituted in the Preamble as well as in this section for the words 'the whole of India except Part B States.' The same Act also substituted the words 'except the State of Jammu and Kashmir' for the words 'except Part B States'.2

2. Commencement of Code

Under s 1 as originally enacted, the Indian Penal Code (IPC or the Code) was to take effect on and from the first day of May 1861. This date was, however, changed to the 'first day of January 1862' by Act 6 of 1861, and it was on this latter date that the Code came into effect. The reason for changing the date of the commencement of the Code was that it was thought that it would not be right to allow the Code, which altered the whole criminal law of the country, to take effect before it was translated and published for the information of the people and before the Indian courts had ample time to study it thoroughly. The date was subsequently omitted by the Repealing and Amending Act 1891 (12 of 1891), as no longer necessary.

3. Territorial Extent of the Original Code

Under s 1 as it originally stood, the Code took effect 'throughout the whole of the territories which are or may become vested in Her Majesty by the Statute, 21 and 22 Victoria, Chapter 106,'[5] and 'India' was declared to mean 'the territories vested in Her Majesty as aforesaid, and all territories which may become vested in Her Majesty by virtue of any such rights as aforesaid.' By s 15 of the Code[6] these territories constituted 'British India' for the purpose of the Code.

The Code was also declared to be in force in the Santhal Parganas,[7] Arakan Hill District,[8] Upper Burma generally except the Shari States,[9] British Baluchistan,[10] Angul district and the district of Khondmals,[11] Kachin Hill Tracts, as regards Hill tribes (with modification),[12] the Chine Hills (with certain minor modifications as to punishments)[13] and Perim.[14]

It was also declared by notification under s 3(a) of the Scheduled Districts Act, 14 of 1874, to be in force in (a) the North Western Provinces Tarai Districts,[15] (b) the districts of Hazaribagh, Lohardaga and Manbhum,[16] and (c) Pargana Dhalbhum and the Kolhan in the district of Singbhum.[17]

The Code has been extended to the State of Sikkim (with certain modifications).[18]

4. Straits Settlements

The Indian Penal Code was in force in the Straits settlements, having been extended by Act 5 of 1867. Before the Indian Independence Act came into force on 13 August 1947, India was divided into: (a) British India, consisting of nine governor's provinces and five chief commissioner's provinces; and (b) native states, numbering3 about 562. These native states were ruled by sovereign princes who were directly under the paramountcy of His Majesty, the King of England. The central legislature of British India had no legislative power in respect of these native states and the British Indian laws had no direct application to them. The Indian Penal Code had, therefore, no direct application to the native states.

The Indian Independence Act ushered into existence two separate dominions: (a) Pakistan, comprising the former British Indian Provinces of Sind, Baluchistan, West Punjab, the North-West Frontier Province and East Bengal, (b) India, comprising the rest of British India. On the passing of that Act the paramountcy of the British King over India was left undetermined. But by a rapid process of accession and merger, the native states lying in the Dominion of India became integrated with the Indian Union.

5. India

Before the Indian Independence Act 1947 came into force on 15 August 1947, India was divided into British India (consisting of nine governor's provinces and five chief commissioner's provinces) and native states (numbering about 562). The Indian Independence Act 1947, ushered into existence, two separate dominions:

(i) Pakistan (consisting of the former British Indian Provinces of Sind, Baluchistan, West Punjab, the North West Frontier Provinces and the East Bengal (now Bangladesh); and
(ii) India (comprising the rest of the British India).

By a rapid process of accession and merger, the Indian states, lying in the Dominion of India, became integral units of the Indian Union. 'India' shall, therefore, mean:

(i) as regards the period before the establishment of the Dominion of India, British India, together with all territories of the Indian rulers, then under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, and the tribal areas;
(ii) as regards any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories, for the time being, included in that Dominion; and
(iii) as regards any period after the commencement of the Constitution, all territories, for the time being comprised in the territory of India.[19]

Under art 1(3) of the Constitution of India, the territory of India shall comprise:

(a) the territories of the states;
(b) the union territories specified in the First Schedule; and
(c) such other territories as may be acquired.

The territories of the states and the union territories are specified in the First Schedule of the Constitution.

6. Extent of the Code at Present

The IPC now extends to the whole of India, except the State of Jammu and Kashmir. It does not mean that the State of Jammu and Kashmir has to be regarded as some4 place outside India.[20] The power of the Parliament to extend the Code to all states except the State of Jammu and Kashmir is beyond question.[21] In the State of Jammu and Kashmir, the Jammu and Kashmir Ranbir Penal Code is in force. It is a replica of the Indian Penal Code with the addition of half a dozen sections,[22] relating to dissemination of contents of prescribed documents, wrongful obstruction to use of public tanks and wells and slaughter of cattle, and three sections[23] relating to whipping. Under art 1 of the Constitution, India shall be a union of states. The states and the territories thereof are specified in the Sch I to the Constitution. At present, there are 29 states, *viz*.: (i) Andhra Pradesh, (ii) Assam, (iii) Bihar, (iv) Gujarat, (v) Kerala, (vi) Madhya Pradesh, (vii) Tamil Nadu, (viii) Maharashtra, (ix) Karnataka, (x) Odisha, (xi) Punjab, (xii) Rajasthan, (xiii) Uttar Pradesh, (xiv) West Bengal, (xv) Jammu and Kashmir, (xvi) Nagaland, (xvii) Haryana, (xviii) Himachal Pradesh, (xix) Manipur, (xx) Tripura, (xxi) Meghalaya, (xxii) Sikkim, (xxiii) Mizoram, (xxiv) Arunachal Pradesh, (xxv) Goa, (xxvi) Chhattisgarh, (xxvii) Uttarakhand, (xxviii) Jharkhand, (xxix) Telangana[24] and seven union territories *viz.* (i) Delhi, (ii) The Andaman and Nicobar Islands, (iii) Lakshadweep, (iv) Dadra and Nagar Haveli, (v) Daman and Diu, (vi) Puduchery, and (vii) Chandigarh.

7. Extension of Code to Extra-territorial Offences

By virtue of s 4 of this Code, the provisions of the Code apply also to any offence committed by:

(i) any citizen of India in any place without and beyond India,
(ii) any person on any ship or aircraft registered in India wherever it may be.

Thus the provisions of this Code will apply to all places in the world whenever an offence under this Code is committed by a citizen of India even outside the country. Likewise all offences defined by this Code, even if committed at any place outside India by any person--whether he is a citizen of India or not--on any ship or aircraft registered in India, are to be dealt with according to the provisions of this Code. In such cases the provisions of s 1 will not restrict the application of the Code.

Section 3 of the Code also makes a provision for a person liable by any Indian law to be tried for an offence committed beyond India for dealing with in accordance with other provisions of this Code for committing such acts beyond India, in the same manner as if such act had been committed within India. Section 188 of the Code of Criminal Procedure 1973 (CrPC) expressly provides that offences committed outside India (a) by a citizen of India or (b) by a person not being such citizen on any ship or aircraft registered in India, may be dealt with as if such offences had been committed at any place within India, with the previous sanction of the Central Government. The Kerala High Court has, however, held that for the pre-inquiry stage, no such sanction is needed. Investigation has been held to be the pre-inquiry stage.[25]

For exhaustive comments see *Sohoni's, Code of Criminial Procedure*, vol 2, twenty-first edn, s 188, Lexisnexis.5

8. Maritime Territory

(a) International Law

It has been held that besides the land territories of a state, it has jurisdiction over the sea, within the marine league or three miles and this is so by the assent of the nation.[26] The international law assigns to a state, territorial jurisdiction in respect of acts done within a marine league or three geographical miles from the low watermark of the shore.[27] In other words, the territories, strictly speaking, of a state, include not only the compass of land in the ordinary acceptance of the term, belonging to such state, but also that portion of the sea lying along and washing its coast which is commonly called its maritime territory.[28]

The territory of a state consists, in the first place, of the land within its boundaries. To this must be added, in the case of a state with a sea coast, certain waters which are within or adjacent to its land boundaries, and these waters are of two kinds--national and territorial.

(b) 'National Waters'

These consist of the waters in its lakes, canals, rivers together with their mouths, ports and harbours, and in some of its gulfs and bays.

(c) 'Territorial Waters'

These consist of the waters contained in a certain zone or belt, called the maritime or marginal belt, which surrounds a state, and that includes a part of the waters in some of its bays, gulfs and straits.[29]

(d) Marginal Belt (*Maritime belt*)

Whatever theory might ultimately find acceptance with the family of nations as to the true basis of the right which a state possesses over territorial waters, there cannot be any doubt that with reference to the rights of fishery, the marginal belt must be regarded as part of the territory of the littoral state. There has been some divergence of juristic opinion on the extent of the marginal waters. Various tests have from time to time been propounded for defining them such as the range of cannon-shot, the limit of visual horizon and so forth. This was one of the three subjects discussed in the Hague Codification Conference 1930, which ended without any agreement being reached. It cannot, therefore, be said that the law on the subject is finally settled.[30] Hyde remarks:[31] 'There has long been a disposition on the part of some publicists of distinction to advocate an extension of three marine miles as the limit of territorial waters'.

6Oppenheim, in *International Law,* after stating that the three-mile limit has the support of a large majority of states, observes: 'Although the three mile limit of territorial waters must still be regarded as the rule of International law on the subject, it is a rule which is in need of modification in relation to the various interests involved'.

Thus, according to international law, the real boundary of a state is not the low-water line on its shores, but a line out at sea, usually stated as being an imaginary line drawn at three miles from the low-water mark.

(e) State can Legislate for the Seas Surrounding its Coasts

In *ER Corft v Sylvester Dunphy* ,[32] their Lordships of the Privy Council observed:

> It may be accepted as a general principle that states can legislate effectively only for their own territories. To what distance seaward the territory of a state is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But, whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory.

Upon the question of the ownership of minerals in the bed of the sea and below the low-water mark, in *Lord Advocate v Wemys* ,[33] the statement of Lord Watson was expressed as follows:

> I see no reason to doubt that by the law of Scotland the solum underneath the waters of the ocean, whether within the narrow seas or from the coast outward to the three mile limit, and also the minerals beneath it, are vested in the Crown.

In the opinion of the Board of the Judicial Committee of the Privy Council, this is also the law of India. The crown is the owner, and the owner in property of an island arising in the sea within the territorial limits of the Indian Empire.[34]

9. Title

Prior to 1854, the title of a statute was not a part of the Statute in England, but now it is.[35]The title is part of the Act itself, and it is legitimate to use it for interpreting the Act as a whole and ascertaining its scope.[36] In *National Telephone Co Ltd v Post-Master General* ,[37] Lord Moulton has observed:

> While it is admissible to use the full title of an Act to throw light upon its progress and scope, it is not legitimate to give any weight in this respect to the short title which is chosen merely for convenience, its object being identification and not description.

The policy and purpose of a given measure may be deduced from the long title and preamble thereof.[38]

7The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the legislature and indicate the scope and purpose of the legislation itself.[39] The title is not, however, conclusive of the intent of the legislature, and constitutes only one of the numerous sources from which assistance might be obtained.[40] When the meaning of the legislature is clear in the enacting part of the statute, there is no necessity to refer to the title, long or short, or to the preamble. It is only in cases where the meaning of the legislature is not clear beyond doubt that recourse may be had to the title or to the preamble.[41]

10. Title of Chapter

The title of a chapter cannot be legitimately used to restrict the plain terms of an enactment.[42]

11. Preamble

The preamble of a statute is a prefatory statement at its beginning, following the title and preceding the enacting clause, explaining or declaring the reasons and motives for, and the objects sought to be accomplished by the enactment of the statute.[43] The preamble precedes the words of an enactment, and is in the nature of a recital of the facts operative in the mind of the law-giver in proceeding to enact such law.[44]

(a) English Law

In England different opinions have been held at different times on the subject of the true place of the preamble in a statute. Eminent lawyers have considered the preamble as undoubtedly a part of the Act.[45]According to Chief Justice Dyer, it is 'a key to open the minds of the makers of the Act, and the mischief which they intended to redress'.[46] But in *Mills v Wilkins* ,[47] Lord Holt has observed that a preamble of a statute is no part of it. The same view has been taken in the State of Jammu and Kashmir.[48] A different view was taken in *J Nageswara Rao v State of Madras* .[49] According to *Halsbury's Laws of England*:[50]

> The preamble may now be regarded, like the title, as part of the statute for the purpose of explaining, restraining, or even extending enacting words, but not for the purpose of qualifying or limiting express provisions couched in clear and unambiguous terms.8

(b) Indian Law

The view taken in India has been that a preamble is not an operative part of the statute,[51] and cannot be read as a part of any particular section of the statute.[52] But the preamble may possibly be called in aid for the purpose of removing any difficulty in interpreting the language of a particular section in the Act, though it cannot control or delimit the plain and natural meaning of any part of the enactment. It is not open to a court to refuse to give effect to a plain statutory provision on the ground that it is beyond the scope and object of the Act as declared in the preamble thereto.[53] The preamble to the Act cannot be brought in aid while interpreting a rule whose language itself is clear. The rule cannot be so interpreted as to give effect to the preamble of the Act.[54] The preamble of a statute is the key to its interpretation, but the intention of the legislature is not necessarily to be gathered from the preamble taken by itself. In fact, the intention of the legislature can only be gathered from the Act as a whole.[55] The preamble has been said to be a good means of finding out the meaning of the enactment and, as it were, a key to the understanding of it.[56]It may always be referred to for the purpose of ascertaining generally the scope of the Act where the enacting words are ambiguous.[57] The enacting words of the Act are not always to be limited by the words of the preamble and must, in many instances, go beyond it, and where they do, they cannot be cut down by reference to it.[58] On the9 other hand, the preamble does not extend the provisions of the Act beyond what the enacting part of the Act contains.[59]

Where a word or words or a sentence in an Act is capable of two meanings, a meaning consonant with the preamble is to be preferred. On the other hand, the preamble of an Act cannot be used to cut down the scope and plain meaning of a provision in an Act. Two propositions are quite clear, one that preamble affords useful light as to what a statute intends to reach and another that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment.[60] The preamble may show the motive for enacting a piece of legislation. But it does not by any means follow that in doing so the legislature did not go further than giving merely effect to the motive.[61]

Elucidiate Intention of Legislation

It may be assumed that the *via media*is to regard the preamble as conclusive in so far as it elucidates the intention of the legislature. The preamble alone however, cannot be held to be conclusive of the intent and purpose of the legislature. The object, purpose and intent of the legislature have to be gathered from the various provisions of the statute itself, and not merely an isolated examination of the preamble which may indicate the primary object in view, but may not refer in detail to certain other objects which are incidental and essential to the working out of the primary object of the legislature. It is, therefore, open to the court to judge the purpose and intention of the legislature from the various provisions contained in the Act, and this makes it easier to decide on the question of its legislative competence.[62] The underlying purpose and policy of the Act are disclosed by its title, preamble and provisions.[63] The correctness of the recitals in the preamble to a statute cannot be disputed.[64]10

12. Consolidation and Codification--Meaning

Essence of the Code

The Code is a codifying statute, which may be defined as a statute intended to be complete in itself with regard to the subject-matter with which it deals. No doubt a codifying statute does not exclude reference to earlier case-law on the subject covered by the statute, for the purpose of throwing light on the true interpretation of the words of the statute where they are, or can be, contended to be open to rival constructions, but it cannot be argued that the matter outside the statute can be invoked, not by way of construing its provisions, but of adding something to it which is admittedly not to be found within it.[65] The essence of a code is to be exhaustive on matters in respect of which it declares the law, and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction.[66] The terms 'codification' and 'consolidation' are sometimes used as synonyms, but they may be distinguished. Consolidation means the combination into a single statute

of several statutes or parts of a statute dealing with the same subject. Codification means the reduction into a systematic form of the whole of the law, statute or common law, relating to a given subject. Consolidation deals with statute alone as interpreted and explained by judicial divisions. Codification deals both with common law and with statute law.[67]

13. Criminal Law before the Commencement of the Code

The Common Law of England was never made applicable to this country by any Act of Parliament or by any enactment of the Indian legislature. It was only the Charters granted to the East India Company that enjoined upon the Company and its servants due obedience to the common and statute law of England. It was only towards the close of the 18th century that the Supreme Courts in Madras, Calcutta and Bombay were established, where the King's Judge administered the common law of England. Outside the jurisdiction of the Supreme Courts, the law of the land with regard to civil matters and the Mahommadan law as regards offences, were administered by the Company's courts. From 1802 onwards, various regulations[68] were passed with regard to the trial of offenders and the trial of civil suits.[69] It was the law declared in these regulations that governed the trial and punishment for offences before the commencement of this Code.[70]

The principles of construction applicable to a codifying statute like the IPC do not exclude reference to earlier case law on the subject covered by the statute for the purpose of throwing light on the interpretations of the words of the statute were they are, or can be contended to be, open to rival constructions.[71]11

AIDS TO INTERPRETATION OF STATUTES

14. Reports of Commissioners and Committees

While legislative debates, partaking of necessity very largely of impromptu statements and opinions, cannot be resorted to, with any confidence, as showing the true intent of Congress in the enactment of statutes, a somewhat different standard obtains with reference to the pronouncement of a committee having charge of the preparation of such proposed laws. These committee announcements do not of course carry the weight of a judicial opinion, but are rightfully regarded as possessing very considerable value of an explanatory nature regarding the legislative intent where the meaning of a statute is obscure.[72] It is permissible to refer to them as they form a history of the legislation.[73] If the basic purpose underlying construction of a legislation is to ascertain the real intention of the Parliament, why should the aids, which Parliament availed of, such as the request of special committee impeding the enactment of law, the environment necessitating enactment of legislation and the object sought to be achieved be denied to the court whose function is primarily to give effect to the real intention of Parliament in enacting the legislation. Such denial would deprive the court of substantial and illuminating aid to construction. Therefore, reports of the committee which preceded the enactment of legislation, reports of the Joint Parliament Committee, report of a commission set up for collecting information leading to the enactment, are permissible external aids to construction.

Quotation from Report not a Legitimate Guide

The court can look into the history of evolution of the enactment concerned, the reports of committees and such other external aids to construction.[74] The report of a drafting committee may not be read to control the meaning of a section, but it can be seen in case of an ambiguity.[75] Such reports have been referred to in some cases.[76] With reference to the report of the Indian law commissioners, who drafted the IPC, in a case their Lordships of the Supreme Court observed:

> A quotation from the report may be valuable as a matter of history, it cannot be a legitimate guide for the construction of the section. That construction must be based on the meaning of the words used, to be gathered according to the ordinary rules of interpretation and in consonance with the generally accepted principles of exercise of criminal jurisdiction. It is not necessary and indeed not permissible to construe the Indian Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the code was enacted. The notions relating to this matter have very considerably changed between then and now during nearly a century that has elapsed. It is legitimate to construe the Code with reference to the12 modern needs wherever this is permissible, unless there is anything in the Code or in any particular section to indicate the contrary.[77]

15. Proceedings in Parliament

Relevancy of

The object of interpretation is to discover the intention of Parliament and the intention of Parliament must be deduced from the language used, for it is well accepted that the beliefs and assumptions of those who framed the Act of Parliament cannot make the law.[78] In *Kadir Bakhsh v Bhawani Prasad* ,[79] Edge, CJ observed:

> In my humble judgment, if Judges were to allow their minds to be influenced in the construing of a statute, by debates in Parliament or reports of Select Committees or other bodies on the bill, statute law would be reduced to confusion and, instead of there being one principle of construction of statutes well understood by lawyers, the construction of statutes would be reduced to no principle at all.

In *AK Gopalan v State of Madras* ,[80] Kaniya, CJ observed:

> While it is not proper to take into consideration the individual opinions of members of Parliament or convention to construe the meaning of the particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted.

Justices Fazal Ali and Mukerjee considered it to be a doubtful proposition. Justice Sastri attached no importance to the speeches made by some of the members of the Constituent Assembly in the course of the debate on art 15 (now art 21 of the Constitution). In *Charanjit Lal Chaudhary v Union of India* [81]Fazal Ali J held that although legislative proceedings cannot be referred to for the purpose of construing an Act or any of its provisions, they are relevant for the proper understanding of the circumstances under which it was passed and the reasons which necessitated it.[82]

16. Statement of Objects and Reasons

The facts stated in the preamble and the statement of objects and reasons appended to any legislation are evidence of legislative judgment. They indicate the thought process of the elected representatives of the people and their cognizance of the prevalent state of affairs, impelling them to enact the law. These, therefore, constitute important factors which amongst others will be taken into consideration by the court in judging the reasonableness of any restriction imposed on the fundamental rights of13 the individuals. The court would begin with a presumption of reasonability of the restriction, more so when the facts stated in the statement of objects and reasons and the preamble are taken to be correct and they justify the enactment of law for the purpose sought to be achieved.[83] The statement of object and reasons is not otherwise admissible as an aid to the construction of a statute but the same simply assists as to the necessity of introduction of such a law. While construing the clear terms of an Act the court is not required to ascertain the object of the

enactment. Though in case of an urgent need of the situation by reason where for the intent of the legislature is to be assessed, the statements and objects can be looked into for the limited purpose of ascertaining the conditions prevailing at the time which prompted or actuated the proposer of the Bill to introduce the same and the extent of remedying the existing evil of the society.[84]

The object of an Act is not to be lost sight of while interpreting its provisions. The interpretation, which promotes the purpose and brings about an effective result, is to be preferred.[85] Unlike the preamble, the headings and the marginal notes, the statement of object and reasons which accompanies the draft bill when it is first introduced in the legislative body, is no part of the Act as passed by the legislature.[86]The statement of objects and reasons for introducing a bill in the legislature is not admissible as an aid to the construction of the statute as enacted as it can control the meaning of the actual words used in the Act. It can only be referred to for the limited purpose of ascertaining the circumstances which actuated the sponsor of the Bill to be introduced and the purpose for doing so. While construing a statute one has also to bear in mind the presumption that the legislature does not intend to make any substantial alteration in the existing law beyond what it expressly declares or beyond the immediate scope and object of the statute.[87] Although the statement of objects and reasons appended to a bill is not admisible as an aid to the construction of the Act as passed[88] it may be referred to only for the limited purpose of ascertaining the conditions prevailing at the time which necessitated the making of the law.[89] It is also permissible to refer to the objects and reasons for the correct appreciation of:

(a) what was the law before the Act was passed;
(b) what was the mischief or defect for which the law had not provided;
(c) what remedy the legislature had provided; and (d) the reason for the remedy.[90]14

17. Headings

The headings in a statute can be referred to for the purpose of finding out the meaning of a doubtful expression in a section.[1] The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections,[2] and may legitimately be consulted to solve any ambiguity, or to fix the meaning of words, which may have more than one, to keep the effect of the Act within its real scope whenever the enacting part in any of these respects is open to doubt.[3]While the court is entitled to work at the headings in an Act of Parliament to resolve any doubt, the law is quite clear that you cannot use such headings to give a different effect to clear words in the section, where there cannot be any doubt as to their ordinary meaning.[4] Even the inference that the enacting words of a section are clear or ambiguous may only be drawn after the Act as a whole including the heading of the section is read. But if the conclusion after reading the Act as a whole is that the enacting words in the section are clear and cannot bear the construction suggested with the aid of the heading the construction so suggested cannot be accepted for the heading in such situation has no controlling effect.[5] If the language of a section is clear, headings are not to be taken into consideration.[6] They are like preambles which supply a key to the mind of the legislature but do not control the substantive sections of an enactment.[7] The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words. If there is any doubt in the interpretation of the words in the section, the heading certainly helps the court to resolve that doubt.[8]

'Heading' or 'title' prefixed to sections or group of sections have a limited role to play in the construction of statutes. They may be taken as very broad and general indicators or the nature of the subject matter dealt with thereunder but they do not control the meaning of the sections if the meaning is otherwise ascertainable by reading the section in proper perspective along with other provisions.[9]

18. Marginal Notes

A marginal note to a section cannot ordinarily be used in connection with interpretation of the terms of a section, but it may be referred to in case of ambiguity15 or doubt.[10] A marginal note is not an operative part of the section, and if the words used in a section are clear and unambiguous, the marginal notes cannot control the section.[11] There can be no justification for restricting the contents of the section by them.[12]

(a) Marginal Notes are Helpful in Determining Drift of the Section

Marginal notes in an Indian statute, as in an Act of Parliament, cannot be referred to for the purpose of construing the statute.[13]But if they are inserted by or under the authority of the legislature, they form part of the Act and as such, like the headings of chapters or the headings of groups of sections, can properly be regarded as giving *contemporanea expositio* of the meaning of a section where the language of a section is obscure or ambiguous.[14] A marginal note can be looked at for the purpose of constructing a statute.[15] The marginal note to a section though not part of the Act, may assist interpretation of the section.[16] In modern legislation marginal notes are assented to expressly or tacitly by the legislature.[17] It is true that a marginal note is not strictly a part of a section, but it is now well established that the court may look, and indeed should look, at them in order to determine what is the drift of the section or what is being aimed at by the legislature in enacting a particular section.[18]

(b) Section Overrides Marginal Note

In *Russell's Legislative Drafting and Forms*,[19] it is observed:

> Marginal notes should be framed with great care. Their object is to give a concise indication, not a summary, of the contents of the sections and to enable a reader to glance quickly through them relying upon their accuracy. They form the basis of any index dealing with the Act. Although there are decisions of the Courts purporting to disregard them, they should not be considered trivial or unimportant, since most people are likely to accept the guidance of a marginal note. And the marginal note, though it forms no part of the section, is of some assistance, inasmuch as it shows the drift of the section.[20]

If there is a discrepancy between the marginal note and the enacting part of the section, the section overrides the marginal note.[21]16

19. Illustrations

Illustrations merely illustrate a principle, and what the court should try and do is to deduce the principle which underlies the illustrations.[22] An illustration is a simple statement of facts to which the section itself has got to be applied.[23] It only exemplifies the law as enacted in a statute.[24]

Afford Guidance to Construction

Being part of the statute,[25] and not standing on the same footing as marginal notes,[26] the illustrations go a great way to explain the intention of the legislature.[27] Sections must be read and construed in connection with the illustrations to be found in the Act.[28] It is true that illustrations cannot control the language of a section, but they certainly afford a guidance to its construction.[29]

The statement of law in illustrations used in the Act cannot be taken as laying down substantive law,[30] and does not bind the courts to place a meaning on the section which is inconsistent with the language.[31] If there be any conflict between the illustration and the main enactment, the illustration must give way to the latter.[32] An illustration cannot have the effect of modifying the language of the section which alone forms the enactment.[33] They are not to be regarded as exhaustive, and are intended only as a guide to the working of the section to which they are appended.[34]

20. Proviso

The purpose and idea of a proviso is always to limit or qualify something provided in that provision, to which it is aided as a proviso. But at the same time, it is a settled rule of law that a proviso has to be interpreted in the spirit of the preceding provision, to which it is appended, a proviso cannot plough through the parent provision to destroy its impact or make it completely nugatory.[35] If the language of the proviso makes it plain that it was intended to have an operation more extensive than that of the provision which it immediately follows it must be given such wider effect. Undoubtedly the general rule is that a proviso is added to an enactment to qualify or17 create an exception to what is in the enactment and ordinarily a proviso is not interpreted as stating a general rule.[36]

A proviso does not travel beyond the provision to which it is a proviso. The golden rule is to read the whole section inclusive of the proviso in such a manner that they throw light on each other and result in a harmonious construction.[37]

The natural presumption when a proviso is inserted to a section, is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso also, the proviso is also a useful guide in the choice of one or other of two possible constructions of words in the enactment or to lift the mist as to the scope of the latter in a doubtful case.[38]

A proviso to a section is not always an exception to the main part of it, it may be a saving clause or in exceptional cases, even a substantive provision itself, when the substantive provision to which it is appended as a proviso deals with a different subject altogether.[39]

A proviso has to be considered in relation to the main enactment, it is now well settled that the proviso has to be considered in relation to the main enactment and should not be allowed to completely take away the effect of the enactment itself.[40] It is true that a proviso is limited in its operation to the ambit of the section which it qualifies. This is the general principle of interpretation of a proviso. But where there is a *non-obstante* clause appearing in the proviso it cannot reasonably be so construed as contradicting the main enactment only when 'it has to be interpreted on the principle that it speaks the last intention of the makers'.[41]

21. Non-obstante Clause

The effect of *non-obstante* clause in legislation is to enable that legislation to prevail over the provisions in any other legislation, which are contrary to it. In case of conflict, the legislation having a *non-obstante* clause would prevail.[42]

A *non-obstante* clause is primarily used in a statutory provision to indicate that the provision shall prevail in disregard of any provision which may stand in the way.[43] A *non-obstante* clause has to be strictly construed.[44]

22. Explanation

An explanation appended to a section or clause gets incorporated into it, and becomes an integral part of it, and has no independent existence apart from it. There is only one enactment of which both the section and the explanation, are two inseparable parts; they move in a body if they move at all.[45] The orthodox function of18 an explanation is to explain the meaning and effect of the main provision to which it is an explanation and to clear up any doubt or ambiguity in it. But ultimately it is the intention of the legislature which is paramount and mere use of a label cannot control or deflect such intention. The legislature has different ways of expressing itself and in the last analysis the words used by the legislature are the true repository of the intent of the legislature and they must be construed having regard to the content and setting in which they occur. A provision even though called an explanation must be construed according to its plain and not in any *a priori* consideration.[46]

23. Schedule to Act

A schedule forms part of the statute and must be read together with it.[47]

24. Punctuation

Prior to 1849, no punctuation normally appeared in the Acts on the rolls of Parliament in England and it was, therefore, held that punctuation could not be relied on in construing statutes. But in India there is no unpunctuated original statute book, and there is no reason why the punctuation of editions of an Act issued by the Government of India should be disregarded.[48] The better rule is that punctuation is a part of the Act and may be considered in the interpretation of the Act, but may not be used to distort or defeat the intention of the legislature. Where the intent is uncertain, punctuation, if it affords some indication of the true intention, may be looked to as an aid.[49] Reference to be made to the undermentioned case.[50]

25. Repeal

It is one of the cardinal principles of the interpretation of statutes that a repeal means a complete obliteration of the Act repealed unless it is otherwise expressed.[51] The effect of a repealing statute is to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was existing law.[52]But where an enactment is repealed, unless a different intention appears, the repeal shall not affect the previous operation of the enactment repealed or anything duly done or suffered thereunder, nor will it affect any legal proceeding or remedy in respect of any right, privilege or liability or forfeiture under the repealed Act.[53] Repeal does not affect the notifications issued under the earlier Act.[54]Where an Act repeals a previous Act and provides that all orders issued thereunder shall, so far as may be deemed to have been issued under the new law, the provision is designed to safeguard the validity of the orders,19 appointments, *etc*., issued under the repealed Act and not to give retrospective effect to the new Act.[55]

Where a particular clause in an Act of Parliament is repealed, the effect of repeal is that it is to be taken as if that clause had never been enacted. No judge ever laid down as law that where a particular clause in an Act is repealed, the whole Act must be read as if that clause had never been enacted.[56] In considering the effect of a repeal of a section, it is necessary to consider the nature of what is repealed.[57] There is a presumption against an implied repeal.[58]However, where the existence of two sets of provisions is destructive of the object with which the later Act was passed, the court would treat the earlier provision as impliedly repealed. A later Act which confers a new right would repeal an earlier Act if the effect of the two rights co-existing together produces conflict or inconvenience.[59]

Repeal of Repealing Act

Where an Act is repealed and the repealing enactment is then repealed by another which manifests no intention that the original Act shall continue to remain as repealed, the common law rule was that the repeal of the second Act revived the first *ab initio*.[60]

26. Saving Clause

It is well settled that the repealing and saving provision by its very nature can repeal or save only a law or thing which continues to be in force until the saving provisions itself came into play and can save only such order or action, *etc*., which is in force under the law they were passed which law is then repealed. If the law sought to be repealed itself stands lapsed or expired, then that saving provision cannot revive or restore only dead or defunct law.[61]

27. General Rules of Interpretation

(a) Use of 'and' and 'or'

It is permissible to look upon the word 'and' as 'or' in some cases, and vice versa in some cases, depending upon facts and circumstances of a particular case.[62]

(b) Means and includes

The words 'means and includes' in definition clause does not attract or take away from the primary meaning of the word.[63]20

(c) Harmonious Interpretation

The court is entitled, and indeed bound when construing the terms of any provision, found in a statute, to consider any other part of the Act which throws light upon the intention of the legislature and which may serve to show that the particular provision ought not to be construed, as it would be, if considered alone, apart from the rest of the Act.[64] A section is to be read in its entirety.[65]

Provisions of statutes should be read so as to harmonise with one another.[66]

(d) Overlapping Provisions

According to the well known canon of interpretation, when there are two provisions in an enactment, overlapping each other, which cannot be reconciled, they should be interpreted harmoniously so as to give effect to both. The construction which makes one of the provisions useless cannot be said to be harmonious. If a special provision has been made in a statute on a particular matter that has to be excluded from the general provision.[67]

(e) Conflict between Judge-made-law and Statute Law

In the presence of a specific provision, which the legislature in its wisdom has thought to operate, the conflict, between the same and the judge-made-law has necessarily to be resolved in favour of the specific provision.[68]

(f) Provisions Mandatory or Directory

Broad purpose of the Act is important, mere language is not a decisive factor

There is no ready test or invariable formula to determine whether a provision is mandatory or directory. The broad purpose of the statute is important. The object of the particular provision must be considered. The link between the two is most important. The weighing of the consequences of holding a provision to be mandatory or directory is vital and, more often than not, determinative of the very question whether the provision is mandatory or directory. Where the design of the statute is the avoidance or prevention of public mischief, but the enforcement of a particular provision literally to its letter will tend to defeat that design, the provision must be held to be directory, so that proof of prejudice in addition to non-compliance of the provision is necessary to invalidate the act complained of. It is well to remember that quite often many rules though couched in language which appears to be imperative, are no more than mere instructions to those entrusted with the task of discharging statutory duties for public benefit.[69]

One of the tests for holding a provision to be of mandatory character, is, whether there is any penalty provided for the non-observance of such a provision or not.[70]

21Even the provisions, which are mandatory in form, have been understood as merely directory. For a proper determination of this question, the background of the provision will have relevance.[71]

Not form but intention of Legislature is material

It is not the form of the provision or the use of the word 'shall' that can be considered to be conclusive in interpreting or deciding whether the provision in a statute is mandatory or not. It is the difference in the intention of the legislature that distinguishes between a directory and a mandatory provision in a statute. What matters, therefore, is the intention of the legislature. This legislative intent can be ascertained by a due consideration of facts like the whole of the provision, its nature, its object and purpose, its previous history, the consequences which would follow from construing the provision one way or the other and also the ground of policy and reasonableness.[72]

Use of 'shall' Not Conclusive

The use of the word 'shall' is not conclusive and decisive of the question whether a particular provision is directory or mandatory. The court has to ascertain the true intention of the legislature, which is the determining factor and that must be done by looking carefully to the whole scope, nature and design of the statute. The two considerations for regarding a provision as directory are: (a) absence of any provision for the contingency of a particular provision not being complied with or followed; and (b) serious general inconvenience and prejudice that should result to the general public if the act of the government or an instrumentality is declared invalid for non-compliance with two particular provisions.[73]

Purposive Construction

A purposive construction of an enactment is one which gives effect to the legislative purpose by following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose or by applying a strained meaning where the literal meaning is not in accordance with the legislative purpose.[74]

Permissibility of the use of the Dictionaries

It is no use turning to dictionaries. Dictionaries give variegated meanings to words. What meaning is to be adopted depends on the context.[75]

While it may be permissible to refer to dictionaries to find out the meaning in which a word is capable of being used or understood in common parlance, the well known canon of construction should not, even for a minute be overlooked that the meaning of the words and expressions used in a statute ordinarily take their colour22 from the context in which they appear. So, dictionaries are not dictators of statutory construction where the benignant mood of law may furnish a different denotation.[76]

28. Construction of Penal Statutes

To be Strictly Construed

A penal provision is to be strictly construed.[77] It has been held in several cases that a penal statute should be construed very strictly in favour of the subject.[78]When it is said that all penal statutes are to be construed strictly it only means that the court must see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It has also been held that in construing a penal statute it is a cardinal principle that in case of doubt, the construction favourable to the subject should be preferred. But these rules do not in any way affect the fundamental principles of interpretation, namely that the primary test is the language employed in the Act and when the words are clear and plain, the court is bound to accept the expressed intention of the legislature.[79] The Supreme Court has also held that the provisions of a penal section have to be very strictly construed and in case of ambiguity or possibility of two views, the benefit of construction must be in favour of the accused.[80] In the absence of clear compelling language, the provision should not be given a wide interpretation. If two constructions are possible upon the language of the statute, the court must choose the one which is consistent with good sense and fairness and escheat the other which makes its operation unduly oppressive unjust or unreasonable or which would lead to

strange inconsistent results or otherwise introduce an element of bewildering uncertainty and practical inconvenience in the working of the statute.[81] The golden rule of criminal jurisprudence is that an accused is presumed to be innocent till he is proved guilty; hence the law requires the accuser to prove all facts compatible with his guilt and incompatible with his innocence.[82] In the interpretation of a penal provision the well-settled rule is that the subject should be held to be free unless he can be found guilty according to the clear and unambiguous language of the statute.[83]

23It is settled canon of interpretation that the penal provisions, particularly with harsher punishments and with clear intendment of the legislature for definite compliance, ought to be construed strictly. The doctrine of substantial compliance cannot be called in aid to answer such interpretations. The principle of substantial compliance would be applicable in the cases where the language of the provision strictly or by necessary implication admits of such compliance.[84]

It is settled principle of interpretation of criminal jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect unless legislative intent and expression is clear beyond ambiguity. The amendments to criminal law would not intend that there should be undue delay in disposal of criminal trials or there should be retrial just because the law has changed. Such an approach would be contrary to the doctrine of finality as well as avoidance of delay in conclusion of criminal trial.[85]

So, when provisions which are penal in nature are to be interpreted, a strict construction has to be placed thereon keeping in view the fact that the breach results in inflictment of punishment which may include not only fine but imprisonment also.[86] It is not open to the court to add something to or read something in the statute on the basis of some supposed intendment of the statute. It is not the function of this court to supply the *casusomissus*, if there be one. As long as the presumption of innocence of the accused prevails in this country, the benefit of any lacuna or *casusomissus* must be given to the accused. The job of plugging the loopholes must strictly be left to the legislature and not assumed by the court.[87]

Mens Rea when Material

> No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used...Where the thing is brought within the words and within the spirit, then a penal enactment is to be construed like any other instrument according to the fair commonsense and meaning of the language used.[88]

Unless the statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, an accused should not be found guilty of an offence against the criminal law unless he has a guilty mind.[89] If there is any ambiguity or doubt, the benefit of it must go to the subject.[90] If therefore, a clause or expression in a penal statute is capable of being interpreted either in favour of or against the accused, the former interpretation ought to prevail.[91]24

When Two Views are Possible

If the words are capable of two constructions, one of which is more favourable to the accused than the other, the court will be justified in accepting the one which is more favourable to the accused.[1] In applying a criminal statute and before convicting a person of a criminal offence, care must be taken not to go beyond the obvious intention of the legislature.[2] But where penalties for infringement are imposed, it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language.[3] It is a well settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. Or if the language of the section is ambiguous, the person charged is entitled to the benefit of the doubt and, where an equivocal word or ambiguous sentence leaves a reasonable doubt

of its meaning which the canons of interpretation fail to solve, the benefit of doubt should be given to the subject and against the legislature which failed to explain itself.[4] It is not competent to the court to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature.[5]

Plain Meaning to be Seen

The Court cannot proceed with an assumption that the legislature enacting the statute has committed a mistake and where the language of the statute is plain and unambiguous, the Court cannot go behind the language of the statute so as to add or subtract a word playing the role of a political reformer or of a wise counsel to the legislature. The Court has to proceed on the footing that the legislature intended what it has said and even if there is some defect in the phraseology etc., it is for others than the Court to remedy that defect. The statute requires to be interpreted without doing any violence to the language used therein. The Court cannot re-write, recast or reframe the legislation for the reason that it has no power to legislate.[6]

There can be no justification however for adding any words to make provision of law less stringent than the legislature has made it.[7] Courts have to interpret the statutes primarily according to their plain meaning. There is no authority for the view that the meaning of the words used has to be strained so as to make it conform to some assumed latent intention of the legislature.[8]

According to Maxwell:[9]

> The tendency of modern decisions upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more attentive regard to the language, and criminal statutes with a25 more rational regard to the aim and intention of the legislature, than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind, for it is required by the spirit of our free institutions that the interpretation of all statute should be favourable to personal liberty, and this tendency is still evinced in a certain reluctance to supply the defects of language, or to eke out the meaning of an obscure passage by strained or doubtful influences. The effect of the rule of strict construction might almost be summed up in the remark that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are if the language permits, to be held to fall within its remedial influence. That the same rules would govern the construction of penal statutes as in the construction of other statutes be taken to be the present law. I am supported in this view of mine by Craies. The learned author says that: 'All statutes whether penal or not are now construed by substantially the same rules.' The distinction between a strict and liberal construction has almost disappeared.

A penal statute must be read in a manner consistent with commonsense. It has to be construed no doubt strictly but the intention of the legislature must govern in the construction of a penal statute as much as in any other statute.[10]

Penal statutes like other statutes must undoubtedly be construed according to their plain provisions. But it is now well recognised that it is the paramount duty of the courts to put upon the language of the legislature honestly and faithfully its plain and rational meaning so as to promote the object of the legislature.[11] Penal statutes are negative commands and the meaning attached to the words should as far as possible, be the same as understood in popular parlance in preference to articulate or special or scientific connotations. The task of interpretation has to be performed to achieve the purpose and the object of a given statute and suppress the mischief for which the prohibition or the penalty was enacted.[12]

General Rule of Construction

It is a well settled general rule of interpretation that the primary and foremost task of the court in

interpreting the statutory provision is to ascertain the intention of the legislature actual or imputed and after ascertaining the intention, the court will make every endeavour to interpret the statute with a view to promote the object and purpose of the enactment. It is also well settled that the words, phrases and the sentences should be construed according to the intendment of the legislature that passed the Act. If the words of the statute are clear and precise among themselves no more is necessary than to expound those words, phrases and sentences in their natural and ordinary sense. Only in case of ambiguity or confusion the other rules of interpretation are to be followed with a view to finding out the intention of the legislature.[13]

While interpreting a statute the Court may not only take into consideration the purpose for which the statue was enacted, but also the mischief it seeks to suppress.26 It is this mischief rule, first propounded in *Heydon's* case[14] which became the historical source of purposive interpretation. The Court would also invoke the legal maxim of construction, *ut res magis valeat guam pereat*, in such cases *i.e.* where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way.[15]

The Court cannot proceed with an assumption that the legislature enacting the statute has committed a mistake and where the language of the statute is plain and unambiguous, the Court cannot go behind the language of the statute so as to add or subtract a word playing the role of a political reformer or of a wise counsel to the legislature. The Court has to proceed on the footing that the legislature intended what it has said and even if there is some defect in the phraseology etc., it is for others than the Court to remedy that defect. The statute requires to be interpreted without doing any violence to the language used therein. The Court cannot re-write, recast or reframe the legislation for the reason that it has no power to legislate.[16]

No word in a statute has to be construed as surplusage. No word can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely.[17]

Context of Words also Material

It is no doubt true that if the words used in a criminal statute are reasonably capable of two constructions, the construction which is favourable to the accused should be preferred; but in construing the relevant words, it is obviously necessary to have due regard to the context in which they have been used.[18]

An optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law.[19]

29. Retrospective Effect

On the ordinary principles of penal legislation, a penal provision does not have retrospective effect.[20]A new Act or statute which penalises what otherwise is not an offence must be so construed as to make it strike at future acts or omissions unless the legislature has clearly said so.[21] Statutes, particularly statutes creating liabilities, ought not to be so construed as to give them a retrospective operation unless there is a clear provision to that effect or a necessary intendment implied in the provisions.[22]

The cardinal principle is that statutes must always be interpreted prospectively, unless the languages of the statutes makes them retrospective, either expressly or by necessary implication. Penal statutes which create new offences are always27 prospective, but penal statutes which create disabilities, though ordinarily interpreted prospectively, are sometimes interpreted retrospectively when there is a clear intendment that they are to be applied to post events.[23]

30. English Law as Aid to interpretation

In this country, where we have got definite statutes, we have to follow the same. The rules of the

common law of England or the legal maxims embodying certain judicial principles, however wholesome they may be, cannot be engrafted upon the Code.[24] In order to ascertain the true meaning and intent of the provisions, we have to turn to the very terms of the statute itself, divorced from all considerations as to what was the state of the previous law or the law in England or elsewhere at the time when the statute was enacted. To do otherwise would be to make the law, not to interpret it.[25] But where we have a Code like the IPC which defines with particularity the ingredients of a crime and the defences open to an accused charged with any of the offences there set out, it would not be proper or justifiable to permit the invocation of some common law principle outside that Code for the purpose of treating what on the words of the statute is a crime, into a permissible or other than unlawful act.[26] It must be remembered that the IPC exhaustively codifies the law relating to offences with which it deals and the rules of the Common Law cannot be resorted to for inventing exemptions which are not expressly enacted.[27]

> The Indian Penal Code defines the offence and also states what matters will afford a defence, and therefore, it may be said that this Code deals specifically with the question and it follows that the Court is not entitled to invoke the common law of England in the matter at all.[28]

Recourse to the law as is obtained in England or in other countries would be permissible only if there was any latent or patent ambiguity and the courts were required to find out what was the true intendment of the legislature. Where, however, the terms of the statute do not admit of any such ambiguity, it is the clear duty of the courts to construe the plain terms of the statute and give them their legal effect.[29] As was observed by Lord Herschell in *Bank of England v Vagliano Brothers* :[30]

> I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated.

28

Reference to the history of legislation can only be legitimately made, as was done by the Judicial Committee in *Baboo Deep Narain Singh v Lal Chutterput Singh* [31] and *Brown v Mclachlan* ,[32] when reasonable doubt is entertained as to the construction of a statute. The proper course is, in the first instance, to examine the language of the statute, to interpret it, to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law; to begin with an examination of the previous state of the law on the point, is to attack the problem on the wrong end; and it is a grave error to force upon the plain language of the section an interpretation, which the words will not bear, on the assumption of a supposed policy on the part of the legislature not to depart from the rules of the English Law on the subject.[33] That the criminal law of India is prescribed by and, so far as it goes, is contained in the IPC, that accordingly (as the Code itself shows) the criminal law of India and that of England differ in sundry respects, and that the Code has first of all to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before, are, though common places, considerations which it is important never to forget. It is, however, equally true that the Code must not be assumed to have sought to introduce differences from the prior law. It continues to employ some of the older technical terms without even defining them, as in the case of 'abetment'.[34]

31. *Mens Rea* in the Case of Statutory Offences

Unless the statute either clearly or by necessary implication rules out *mens rea* as a constituent part of the crime, an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind.[35] There is a presumption that guilty intent is an essential element of an offence. It is a well established rule that none is guilty under the criminal law unless he has a guilty mind.[36] Before presumption as to *mens rea* is to be displaced strict liability must be required to give practical effect to the legislative intent.[37]

32. Investigation and Trial of Offences under the Code

All offences under this Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions contained in the CrPC)]. Section 188 of the CrPC makes a special provision for offences committed outside India. If during the investigation stage the person, known or reasonably suspected to be the offender having committed the offences outside India, is not available in India, extradition proceedings may have to be resorted to: 'Extradition is the surrender by one state to another of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justifiable in courts of the other states'.[38]29

3 The original words have successively been amended by Act 12 of 1891, s 2 and Sch I, the AO 1937, the AO 1948 and the AO 1950 to read as above.

4 Subs by Act 3 of 1951, s 3 and Schedule for 'except Part B States'.

5 The Government of India Act 1858; The Short Title Act 1899, 59 and 56 Vic C 14.

6 Now repealed by the Government of India (Adaptation of Indian Laws) Order 1937.

7 Regulation 3 of 1872, as amended by Regulation 3 of 1899, s 3 .

8 Regulation 9 of 1874, s 4 .

9 Act 13 of 1898, s 4 .

10 Regulation 1 of 1890, s 3 .

11 Regulation 5 of 1936, s 3 and Sch and Regulation 4 of 1936, s 3 and Sch, respectively.

12 Regulation 1 of 1895, s 3 .

13 Regulation 5 of 1896, s 3 .

14 Notification of Government of India, dated 13 February 1884; *R v Mangal Teckchand* 10 ILR Bom 258 .

15 *Gazette of India* 1876, Pt I, p 505.

16 *Gazette of India* 1881, Pt I, p 501.

17 Ibid, p 504.

18 Wef 13-9-1994 (*vide* Notification No. S.O. 516 (E), dt. 9-7-1994).

19 General Clauses Act 1897, s 3(28) .

20 *Virender Singh v General Officer Commanding* (1974) J&K LR 101 .

21 *KRK Vara Prasad v Union of India* (1980) 1 ALT 381 .

22 Ranbir Penal Code, ss 190A and 291A - 291D .

23 *Ibid*, 513-15.

24 *Vide* the Andhra Pradesh Reorganisation Act 2014, s 10 (wef 2-06-2014).

25 *Remla v SP of Police* (1993) 1 KLT 412 .

26 Re *Kastya Ram*(1871) 8 BHC 63 (Cr C).

27 *Rolet v R* LR 1 PCC 198 ; *Q v Anderson* LR 1 CC 161 ; *Q v Musson* 8 E&B 900 ; *Emleton v Brown* 30 LJMC 1 ; Re *Kastya Ram*(1871) 8 BHC 63 (Cr C); *Potestalern Terrofinlrubt Fainter Armorum v iz* (Deominion Mariss, Ch II); *R v Elmstone* 7 BHCR 89 (Cr) ; *Emperor v (Dr) Sylva* LR 33 Bom 380, 9 Cr LJ 291 .

28 Per Kemball J, in Re *KastyaRam*(1871) 8 BHC 63 (Cr C), 9 Cr LJ 291.

29 *Openheim's International Law*, vol I, seventh edn, p 415; *Hyde on International Law*, vol I, second edn, p 152 and *Higgins and Colombos on International Law of the Sea,* second edn.

30 *AMSSVM & Co v State of Madras* AIR 1954 Mad 291, p 299 .

31 *Hyde onInternational Law*, vol I, second edn, pp 464-65.

32 *ER Corft v Sylvester Dunphy* AIR 1933 PC 16, p 17 .

33 *Lord Advocate v Wemys* (1900) AC 48 .

34 *Secy of State v Chellikani Rama Rao* AIR 1916 PC 21, p 25 .

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91 *Joseph D' Silva v Emperor* AIR 1947 Bom 310, 48 Cr LJ 305, 229 IC 178, 49 Bom LR 6 ; *Emperor v Tehl Ram* (1946) ILR Lah 291, AIR 1947 Lah 261 ; *Madho Saran v Emperor* (1944) ILR 42AIR 1943 All 379, 45 Cr LJ 491, 1943 All LJ 511 ; *Bhai Chand v Emperor* AIR 1942 Lah 253, 43 Cr LJ 849, 202 IC 452 ; *King v Aug Nyun* AIR 1940 Rang 259, 42 Cr LJ 124 ; *Parmanand v Emperor* AIR 1939 Lah 81, 40 Cr LJ 497, 180 IC 835, 41 PLR 137 ; *Dewan Singh v Emperor* AIR 1936 Nag 55, 37 Cr LJ 474, 19 Nag LJ 84 ; *Guranditta v Emperor* 39 Cr LJ 970, AIR 1938 Lah 691, 40 PLR 942 ; *Ishar Das v State of Punjab* (1972) SCD 262, (1972) SC Cr R 198, (1972) Cr App Rep 102, (1972) 2 SCA 16, AIR 1972 SC 1295 ; *Sheonandan Paswan v State of Bihar* (1983) Cr LJ 348, (1983) 1 SCC 433, 1983 SCC 224 (Cr), (1983) Cr LR 58 (SC), AIR 1983 SC 194, (1983) PLJR 35, (1983) Cr App Rep 61 .

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2 *Shridhar v State* AIR 1954 HP 67, p 68, (1954) Cr LJ 1465 .

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8 *Bansraj v State* AIR 1956 All 27, p 29 .

9 Maxwell, *Interpretation of Statutes,* eleventh edn, p 284.

10 Per Sadut Ali Khan J in *State v Hydar Ali* AIR 1955 Hyd 128, p 140 .

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12 *State of Maharashtra v Laxmi Narsimham,* 1977 Mah LJ 715, p 721 .

13 *Sarjug Sah v State of Bihar* (1991) 2 Bih LJ 68, p 70 .

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15 *Badshah v Urmila Badshah Godse* 2014 Cr LJ 1076, p 1083 (SC), AIR 2014 SC 869, (2014) 1 SCC 188 .

16 *Hardeep Singh v State of Punjab* 2014 Cr LJ 1118, p 1132, AIR 2014 SC 1400, (2014) 3 SCC 92 .

17 *Hardeep Singh v State of Punjab* 2014 Cr LJ 1118, p1132, AIR 2014 SC 1400, (2014) 3 SCC 92 .

18 *Alamgir v State of Bihar* AIR 1959 SC 436, p 439, (1959) Cr LJ 527 .

19 *Shabnam Hashmi v Union of India* AIR 2014 SC 1281, p 1285, (2014) 4 SCC 1 .

20 *Naga Po Ngwe v Emperor* 7 ILR Rang 355, AIR 1929 Rang 278 ; *Paras Ram v Emperor* AIR 1931 Lah 145 ; *Sukhdev Singh v State of Haryana* 2013 Cr LJ 841, AIR 2013 SC 953, (2013) 2 SCC 212 .

21 *Gadai Sahu v Emperor* AIR 1934 Pat 361 .

22 *S Ganesan v AK Goscelyne* AIR 1957 Cal 33, p 38 ; *Salig Ram v Emperor* AIR 1943 All 26 .

23 *State of Bombay (now Maharashtra) v Vishnu Ramchandra* AIR 1961 SC 307 .

24 *Emperor v Joti Prasad* AIR 1932 All 18, p 22 .

25 *Sales Tax Officer v Kanhaiya Lal* AIR 1959 SC 135, p 140 ; *Gwynne v Bumell* (1840) 7 Cl & Fn 572, p 696; *Kumar Kamlaranjan Roy v Secy of State* 66 IA 1, p 10, AIR 1938 PC 281, p 283 .

26 *Cherubin Gregory v State of Bihar* (1964) 1 Cr LJ 138 (SC), AIR 1964 SC 205 .

27 *MC Verghese v TJ Ponnan & Anor* AIR 1970 SC 1876 .

28 *Gopal Naidu v Emperor* AIR 1923 Mad 523, p 526 (FB) .

29 *The Sales Tax Officer v Kanhaiya Lal* AIR 1959 SC 135, p 138 .

30 *Bank of England v Vagliano Brothers* (1891) AC 107, p 144 .

31 *Baboo Deep Narain Singh v Lal Chutterput Singh* 3 MIA 100, 6 WRPC 27 and *Brown v Mclachlan* (1872) 4 PC 543 .

32 *Brown v Mclachlan* (1872) 4 PC 543 .

33 *Satish Chandra Chakravarti v Ram Doyal De* AIR 1921 Cal 1, p 6, 7 .

34 *Barindra Kumar Ghosh v King-Emperor* AIR 1925 PC 7, p 8 .

35 *State Govt, Madhya Pradesh v Maganbai Dasanibhai* AIR 1954 Nag 41, p 42 .

36 *Laxmi Narayan v State of Bihar* 1983 BBCJ 518 (Pat) .

37 *Hari Krishna v State* (1980) 17 All Cr C 43 .

38 *State of West Bengal v Jugul Kishore* AIR 1969 SC 1171 ; *Remla v SP of Police* (1993) 1 KLT 412 .

Indian Penal Code (Act XLV of 1860)

Chapter I

Introduction

S. 2.

Punishment of offences committed within India.--

Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within [39][India] [40][* * *].

Comments

1. Legislative Changes

This section, as originally enacted, stood as follows:

> Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, which he shall be guilty within the said territories on or after the 1st day of May 1861.

By Act 6 of 1861, the words 'on or after the 1st day of May 1861' were altered to 'the 1st day of January 1862.' Subsequently, the words 'the 1st day of January 1862' were altogether deleted by Act 12 of 1891 and the words 'British India' by the Government of India (Adaptation of Indian Laws) Order 1937. In 1948, the words 'the Provinces' were substituted for the words 'British India' by the Adaptation of Laws Order 1948. Again, the words 'the Provinces' were replaced by the words 'the States' by the Adaptation of Laws Order 1950, finally the words 'the States' were altered to the word 'India' by the Part B States (Laws) Act 3 of 1951, both in the margin and in the body of the section.

2. Scope of the Section

The first question that naturally arises in connection with a body of substantive criminal law like the IPC is, within what time, within what local limits and over what persons is the Penal Code enforceable.

30As regards time, there is no general law of prescription in English Common Law,[41] a maxim of which has always been *nullum tempus occurrit regi* (lapse or time does not bar the right of the Crown), and in accordance with this principle, this section specifies no period within which criminal proceedings must be brought. A prosecution may therefore, be brought at any time after the commission of an offence.[42] A time limit has since been fixed for prosecution of minor offences punishable with fine only or with imprisonment for a term not exceeding three years by s 468 of the CrPC,[43] which applies to offences punishable under the IPC . These provisions, however, do not apply to economic offences.[44]

As regards the territorial and personal jurisdiction, the jurisdiction of criminal courts in India is both territorial and personal. *Prima facie*, the IPC is intended to deal with all unlawful acts and omissions defined to be offences and committed within India and to provide for the punishment thereof of the person or persons found guilty therefor. This is implicit in the preamble and s 2 of the IPC . Sections 3 and 4 deal with offences committed beyond the territorial limits of India and s 2 obviously and by contract refers to offences committed within India. It appears clear, therefore, that it is s 2 that has to be looked to, to determine the liability and punishment of persons who have committed offences within India. If all the ingredients of the offence occur within the municipal territory of India, and the presence of the offender in India for his trial can be secured, the municipal courts have jurisdiction to punish him.[45] Punishment for an offence committed within India is covered by s 2 of the IPC as well as by the

procedure as laid down under the CrPC, it is stated that offences under the IPC shall be investigated, inquired into, tried and otherwise dealt with according to the provision contained therein. Therefore, if an offence under the IPC is alleged, the criminal courts in India unless otherwise expressly barred, have power to deal with the matter after complying with the procedure laid down in the CrPC .[46]

3. 'Every Person'

The section asserts categorically that every person shall be liable to punishment under the Code for every act or omission contrary to the provisions of the Code and of which he shall be guilty within India. This recognises the general principle of criminal jurisdiction over persons with reference to the locality of the offence committed by them being within India. The use of the phrase 'every person' in s 2 as contrasted with the use of the phrase 'any person' in s 3 as well as s 4(2) of the Code is indicative of the idea that to the extent of the guilt for an offence committed within India can be attributed to a person, every such person without exception, is liable for punishment under the Code.[47] There is no provision of law by which parties of any sect have a right to be exempted from the operation of the criminal law applicable to all the citizens.[48]

31The plain meaning of the phrase 'every person' in s 2 is that it comprehends all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed. If offence was committed by officers of foreign company in India, they shall be tried under the provisions of the Indian Penal Code, the fact that at the time of the commission of offence the accused were not present in India, their residence/abode outside India, their foreign nationality would not come in the way of their being prosecuted/tried under the Indian Penal Code .[49]

This section must be understood as comprehending every person without exception, barring such as may be especially exempt from criminal proceedings or punishment thereunder by virtue of the Constitution[50] or any statutory provisions or some well recognised principle of international law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.[51]

4. Juridical Person

Section 11 of the Code itself defines the word 'person' as including 'any company or association, or body of persons, whether incorporated or not'. A corporation is, therefore, liable to punishment under this Code.[52] Knowledge and intention of its servants may be imputed to the body corporate.[53] However, it cannot be said that in every case, where an agent of a limited company, acting in its business commits a crime, the company is automatically to be held guilty. A company cannot be indictable for offences like bigamy, perjury, and rape, *etc*., which can only be committed by a human individual, or for offences punishable with imprisonment or corporeal punishment. Barring these exceptions, a corporate body ought to be indictable for criminal acts or omissions of its directors or authorised agents or servants, whether they involve *mens rea*or not, provided they have acted or have purported to act under the authority of the corporate body or in pursuance of the aims or objects of the corporate body. The question, whether a corporate body should or should not be liable for criminal action, resulting from the acts of some individual, must depend upon the nature of the offence, disclosed by the allegations in the complaint or in the charge sheet, the relative position of the officer or agent *vis-à-vis* the corporate body and the other relevant facts and circumstances which should show that the corporate body, as such, meant or intended to commit such act. Each case will have necessarily to depend on its own facts which will have to be considered before deciding whether to proceed against the corporate body or not.[54]

5. Foreigner

A foreign subject comes within the purview of all Acts in force in India, if he chooses to come into this country, unless indeed the Act itself makes an exception in their favour. There is no presumption that a foreigner knew the law enforceable in India--the law makes no such absurd presumption but ignorance of the law does not in any way affect his liability thereunder. Such ignorance might be

pleaded in32 mitigation of sentence, if he is convicted of a crime, but it affords him no sort of privilege or immunity.[55] On a plain reading of this section, therefore, the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside.

A reference to s 3 of the Code clearly indicates that it is implicit therein that a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time. For if it were not so, the legal fiction implicit in the phrase 'as if such act had been committed within India' in s 2 would not have been limited to the supposition that such act had been committed within India, but would have extended also to a fiction as to his physical presence at the time in India. The fastening of criminal liability on a foreigner in respect of culpable acts or omissions in India which are juridically attributable to him notwithstanding that he is corporeally present outside India at the time, is not to give any extra-territorial operation to the law: for it is in respect of an offence whose locality is in India, that the liability is fastened on the person and the punishment is awarded by the law, if his presence in India for the trial can be secured. Exercise of criminal jurisdiction depends on the locality of the offence and not on the nationality of the alleged offender (except in a few specified cases such as ambassadors, princes, *etc.*). The fact that this is part of ordinary jurisdiction of a municipal court is well recognised in the Common Law of England.[56] The exercise of criminal jurisdiction at common law is limited to the crime committed within the territorial limits of England,[57] and in specified cases even in respect of acts outside English territory.[58] Offences, the authors of which, at the moment of commission, are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offences and more especially its effects, have taken place there. The old concept that the exercise of jurisdiction over a foreigner by municipal courts depends on the theory of temporary allegiance to the state by reason of his entry into the state, which carries with it the protection of its laws and, therefore, his submission thereto, is no longer tenable. There are a number of early cases of the High Courts in India[59] which support the view that criminal jurisdiction cannot extend to foreigners outside India. These are, however decisions rendered at a time when the competence of the Indian legislature was considered somewhat limited, under the influence of the decisions like those in *Macleod's* case[60] in spite of the decision in *Queen v Burah* .[61] These concepts are no longer tenable.[62] Where a foreigner in foreign territory initiates an offence which is completed in Indian territory, he if found within Indian territory is liable to be tried by the Indian court within whose jurisdiction the offence was committed.[63]33

PERSONS EXEMPT FROM PROSECUTION

6. The King

During British Rule, the Code could not affect the King because the Code was an Act of the Governor-General-in-Council, and he could not legislate so as to 'affect the prerogative of the Crown or the authority of the Parliament or any part of the unwritten law or Constitution of the United Kingdom'. Now India has become an independent sovereign free republic, but the sovereign of England is still exempt from the Code as a foreign sovereign (see Note below under the heading 'Foreign Sovereigns').

7. President and Governors of States

Under art 361(2) of the Constitution of India, no criminal proceedings whatsoever can be instituted or continued against the President of India or the Governor of a State in any court during his term of office.

8. Foreign Sovereigns

In accordance with the law of nations a sovereign prince, resident in the dominion of another, is

exempt from the jurisdiction of the court there[64] as the exercise of such jurisdiction would be incompatible with the regal dignity, that is to say, with his absolute independence of every superior authority.[65]

9. Ambassadors

The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nations, and not by any municipal Constitution. For, as they represent the person of their respective masters, who are not subject to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made, but an ambassador ought to be independent of every power except that by which he is sent, and in consequence, ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions. If he grossly offends or makes an ill-use of his character, he may be sent home and accused before his master, who is bound either to do justice upon him or avow himself the accomplice of his crimes.[66]

It is said that the immunity of ambassadors extends only to such crimes as are *mala prohibita*, and not to those that are *mala in se*, as murder.[67] For a direct attempt against the life of the sovereign, an ambassador and members of his staff would be directly punishable by the state.[68]

34***

10. Diplomatic Agents

These may be classified as follows.

Ambassadors, Legates and Nuncios

These form the highest rank. They alone have the representative character. Legates and nuncios are papal ambassadors representing the Pope.

Envoys, Ministers or Other Person Accredited to Sovereigns

While ambassadors have access to the foreign sovereign, ministers have access to secretary for foreign affairs of the country to which they are accredited. Special envoys are employed to conduct negotiations on specific matters.

Ministers Resident, Accredited to the Various Courts

These are generally sent to the minor states.

***Chargé d' Affaires*, Accredited to Ministers for Foreign Affairs**

A *Chargé d' affaires* takes control of the mission during the temporary absence of the head of the mission. A *Charge d' affaires* is entitled to have audience of the foreign minister only.

Diplomatic agents enjoy immunity from the criminal jurisdiction of the receiving state *vide*art 31 of the Vienna Convention on the Diplomatic Relations 1961. The said article has force in India by virtue of the Diplomatic Relations (Vienna Convention) Act 1972, enacted by the Indian Parliament.

Attaches

Attaches do not hold diplomatic rank but their names are included in the diplomatic lists as members of the staff of a diplomatic mission.

Prior to the enactment of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952, the High Commissioners exchanged between the commonwealth countries were not entitled to any immunities which belong to 'diplomatic agents'. By this Act, the United Kingdom has conferred on these High Commissioners (including those of India and Pakistan) the same privileges and immunities as belong to diplomatic agents, their staffs, families and servants.

As the representative of a sovereign state, and in order that he may exercise his functions in a foreign state, certain privileges are given by International Law to a diplomatic agent in the state to which he is accredited.

11. Immunities Extended to Family Members of Diplomatic Agents

The immunities of the diplomatic agent are extended to his family living with him, because of their relationship to him, to secretaries and attaches, whether civil or military, forming part of, the mission but not personally accredited, because of their necessity to him in his official relations, and perhaps also to domestics and other persons in his service not possessing a diplomatic character because of their necessity to his dignity or comfort.[69]

35The diplomat, his family and suite are immune from criminal action and arrest in the accredited state. The only remedy for crimes committed by them is to apply to the state which they represent, for the recall of the diplomat. But if they conspire against the foreign state, they may be expelled.[70]

Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the sovereign or of the official superior of the agent.[71]

12. Alien Enemies

In respect of acts of war, alien enemies cannot be tried by criminal courts as traitors, though they may be dealt with by martial law.[72] But aliens may be proceeded against for any other crime committed by them. Thus, a prisoner of war who shot a sentry in order to escape would not be liable to the criminal law; but if he committed a crime unconnected with an attempt to recover his liberty, such as theft,[73] he would be liable.[74] Protection and allegiance are co-extensive.[75] Even in cases where protection is imposed against the will of the foreign subject;[76] but a wrongful extension of protection does not carry with it a corresponding extension of criminal law.[77]

13. Public Servants

Under s 132 of the CrPC, public servants, officers, members of the Armed Forces and other persons acting in good faith under ch 10 of that Code are immune from prosecution in a criminal court,[78] except with the sanction of the state or Central Government.

14. Men-of-war

There is a partial exception as a result of international courtesy, in the case of a ship of war on the high seas, the officers and crew of which are exempt from the local law in all that concerns the discipline and internal government of the ship, and on board where neither civil nor criminal process can be executed.[79] But this immunity does not extend to Indian subjects who may happen to be on board such vessels.[80] The immunities extend to internal disputes between the crew. Over offences committed on board ship by one member of the crew upon another, the local courts would not exercise jurisdiction.36

15. Two Theories on Jurisdiction in International Law

On the question of jurisdiction two theories have found favour with persons professing a knowledge of the principles of international law. One is that a public ship of a nation for all purposes either is, or is to be treated by other nations as part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There will, therefore, be no jurisdiction in fact in any court where jurisdiction depends upon the act in question being done or the party to the proceedings being found or resident in the local territory. The other theory is that a public ship in foreign waters is not and is not treated as territory of her own nation. The domestic courts in accordance with principles of international law will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view the immunities do not depend upon an objective ex-territoriality, but on implication of the domestic law. They are conditional and can in any case be waived by the nation to which the public ship belongs. Their lordships of the Privy Council have held that the latter is the correct conclusion and observed:

> The true view is that in accordance with the conventions of international law, the territorial sovereign grants to foreign sovereigns and their envoys and public ships and the naval forces carried by such ships certain immunities. Some are well settled: others are uncertain. When the local court is faced with a case where such immunities, come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the Court will of its own initiative give effect to it. The sovereign himself, his envoy, and his property including his public armed ships are not to be subjected to legal process. These immunities are well settled.[81]

This immunity which is undoubtedly enjoyed by men-of-war has been, by international comity, extended to troopships,[82] and indeed, to all ships of the state. The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty;[83] and it is on this ground that the exemption of warships has been justified. 'The exemption of a public ship of war of a foreign Government from the jurisdiction of our Courts depends rather upon its public than upon its military character'.[84]

16. 'And not Otherwise'

The use of the words 'and not otherwise' is a sufficient basis for holding that the rules of English common law or the legal maxims embodying certain judicial principles, even though they be very wholesome, cannot be engrafted on the IPC .[85] These words repeal all former laws for the punishment of every offence which is made punishable by the IPC . The effect of s 5, however, is to qualify this general repeal. The two sections taken together declare that offences defined by special and local laws continue to be punishable as before; in other words, all acts or omissions contrary to the provisions of the Code itself, or of the provisions of special and local laws, and the other laws enumerated in s 5, and these alone and none others, are punishable as offences.[86]

37As observed by their Lordships of the Privy Council, the criminal law of India is prescribed by, and so far as it goes, is contained in, this code, and the criminal law of India and that of England differ in sundry respects. The Code, therefore, has got to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before.[87]

The IPC is a codifying statute, intended to be complete in itself with regard to the subject-matter with which it deals. No doubt a codifying statute does not exclude reference to earlier case-law on the subject covered by the statute for the purpose of throwing light on the true interpretation of the words of the statute where they are, or can be contended to be, open to rival constructions, but it cannot be argued that matter outside the statute can be invoked, not by way of construing its provisions, but by adding something to it which is admittedly not to be found within it.[88]

17. 'Act or Omission'

The word 'act' denotes as well a series of acts as a single act; the word 'omission' denotes as well a series of omissions as a single omission.[89]

18. 'Contrary to the Provisions thereof'

A person is liable to be punished under the IPC only for an act or omission contrary to its provisions. It is not, however, an offence to do an act in anticipation of a statute or enactment which would make that act an offence.[90] The then existing criminal law of India was not specifically repealed by the IPC, the commissioners being of the opinion that it was possible that a few actions which were punishable under the old law, and which the legislature would not desire to exempt, had been omitted from the Code.[91]Accordingly, if after 1 January 1862, the date on which the Code came into operation, a person committed an act which would have been criminal before the Code was passed into law, but which is not forbidden by its provisions, he would still be liable to punishment under the old law. Moreover, since the Code came into operation only from the above date, offences committed before the first day of January 1862, were still punishable under the old regulations.[92]

19. 'Of which he shall be Guilty'

In general a man is responsible only for his own acts, but there are exceptional cases in which the law imposes on him vicarious liability for the acts of others.

20. Vicarious Liability for Acts of Others--General Rule

The reference is to the maxim *Qui facit per alium facit per se, i.e*., he who does an act through another does it himself. But this is a maxim of the civil law of agency. The law of agency is not a doctrine of criminal law, but of civil law. The principal can be made responsible for, and found guilty of, the acts of his agents, under the criminal code, only where it is proved that he has instigated or otherwise abetted the38 acts of the persons who actually committed the crime. The law of abetment[93] was enacted to deal with such cases.[94]As a general proposition of law, it cannot be doubted that the master is not liable for the criminal acts of his servants not done at his instigation. There is no criminal liability of the principal for any act or omission of his agent unless the principal himself takes part in, authorises, or connives at, such act or omission. A man cannot be guilty of an illegal act by his agent and be held responsible for that act, unless he has given the agent authority, directly or indirectly, to do that illegal act. No one who is an agent for a legal purpose can make the principal responsible for an illegal act, unless the principal has in some way, directly or indirectly, authorised it. The reason for the rules is obvious. It is a general principle of criminal law that there must be some blameworthy condition of mind or *mens rea*, there may be negligence, malice, guilty knowledge or the like.

Master not Criminally Liable for the Act of Servant

The other well-known principle is that there is no vicarious liability in criminal law, the condition of the mind of the servant is not to be imputed to the master.[95] It has been held that the master cannot be held criminally liable for the acts of his grazier in taking without licence, his cattle into a government forest unless he permits the cattle so to graze by some overt acts or by some negligent omission.[96] The general rule of law that a master is not criminally responsible for the acts of his servants, unless he expressly commands or personally co-operates in them, is well established. In criminal cases they must each answer for their own acts, and stand or fall by their own behaviours.

Exceptions to the General Rule

However, there are exceptions to the general rule of master not criminally liable for the act of the servant. In some cases criminal liability is imposed by the statute upon the master as regards the acts or omission of his servants, both in England and in India. In some enactments provision to that effect

is expressly made; in the cases of other enactments, principals have been held criminally liable for the illegal acts of their agents by virtue of constructions placed by the courts on the language of the statute concerned. But in all such cases the question is whether upon the true construction of the statute in question, the master is intended to be made criminally liable for the acts of his servants, done within the scope or in the course of their employment.

Licence Cases

> Licence cases form a class by themselves, in which the master is generally held responsible by reason of his contractual undertaking to use his licence in a particular manner and to avoid acts which are penal and on the occurrence of which, the licensee becomes liable to the penalties imposed...Statutes passed for the benefit of the public health and sanitation are construed in the same way as licensing Acts...The principle governing all these cases is that by statute or by contractual undertaking there is some39 public duty legally binding upon the master, for the breach of which a criminal liability is imposed on him, whether such breach is committed by him personally or by persons whom he chooses to employ in the discharge of that obligation: subject to this that the acts of the servants fall within the scope of their authority. If it is shown that the principal directed the agent to do an illegal act, or really meant he should so act, or afterwards ratified the illegal act, or that he appointed one to be agent to do both legal and illegal acts, to do everything in short which he might think proper to support the interests of the principal, then responsibility can be fastened on the principal.[1]

These principles have been followed in numerous other decisions where mostly the English authorities have been discussed.[2]Where a particular intent or state of mind is not of the essence of an offence, a master can be criminally liable for his servant's acts if an act is expressly prohibited, but not otherwise; and he cannot be so made liable if the act provides for liability for permitting and causing a certain thing unless it can be shown that the act was done with the master's knowledge and assent express or implied.[3]

A licensed vendor of arms and ammunitions was held liable for the sale by his servant of ammunitions to possess them. It was observed:

> We fail to see how it can be contended that under these circumstances a delivery of goods by the man in charge would not be a delivery by the owner of the shop. It is not a question of intention, *mens rea*, or of knowledge; it is the delivery which the Act makes penal and the delivery by the manager is clearly in this case a delivery by the licensee.[4]

When a servant does anything within the scope of his employment for that purpose, his action will be binding on the master, and the master will be criminally liable for any wrongful act of the servant.[5] But to support the conviction of the master under s 56 of the Bengal Excise Act, it is necessary to show not only that a servant was in the employ of the master, but also that he was acting within the scope of his employment and for the benefit of the latter.

Where a servant, whose duty was to remain at his master's shop and to conduct the business there, was found travelling to another place with *ganja* in his possession, in contravention of s 46(a) of the Bengal Excise Act, it was held, that the master could not be convicted under s 56, as his servant acted beyond the scope of his employment and for his own private purpose.[6]

Where a particular intent or state of mind is not of the essence of an offence punishable under criminal law, the master is criminally liable for the act of his servant if that act is committed by the servant in the course of his employment even without his master's knowledge or consent but for his master's benefit.[7]40

Law of Liability of Master Summarised

The effect of the authorities has been summarised in *Halsbury's Laws of England*,[8] where the cases of the liability of the masters for the crimes of their servants are divided into four classes:

(i) The first class consists of cases where the statute might make the master liable for his servant's act in any event. In that case it is only necessary to show that the act is done by the servant in the course of his employment and within the scope of his general authority, and the liability of the master arises solely from his relation to the servant, and the absence of personal guilt is immaterial.

(ii) The second class consists of cases where the statute might make the master liable for his servant's act unless he could prove that he himself was not in default.

(iii) The third class consists of cases where the statute might make the master liable for his servant's act only if the prosecution proves affirmatively that he knew, either actually or constructively, of the servant's act or that he connived at its commission.

(iv) The fourth class consists of cases where the statute might make the master liable, not for his servant's act, but only for his own. These principles have been followed in India.[9]

21. 'Within India'

When offences are charged under the IPC, punishment of the offence committed within India is covered by s 2 of the Penal Code as well as by the procedure laid down under the CrPC 1973.[10] The exercise of criminal jurisdiction depends on the locality of the offence and not on the nationality of the alleged offender (except in a few specified cases such as ambassadors, princes, *etc.*)--The words 'within India' at the end of the section must be read with the words immediately preceding them, namely, 'of which he shall be guilty' and not with the words 'every person' which occur at the beginning of the section. Hence, a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time.[11] The courts of many countries interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory. If one of the constituent elements of the offence, and more especially its effects, have taken place there.[12]Thus the offence must be one of which the offender is guilty within India. Accordingly, in the absence of special provisions to the contrary, an act or omission contrary to the provisions of the Code but committed outside India is not punishable under the Code.

But a transfer of Indian territory (to a native state) where an offence has been committed, subsequent to its commission, does not prevent the court in which an appeal had been filed prior to the transfer from having jurisdiction to hear the41 appeal.[13] Where a foreigner in foreign territory initiates an offence which is completed in Indian territory, he is, if found within Indian territory, liable to be tried by the Indian court within whose jurisdiction the offence was completed.[14]

22. Abetment in India of Offence Beyond

Formerly, the abetment in India of an act or omission outside India was not punishable since it was not the abetment of an offence under the Code.[15] But exceptions to this rule were gradually established. The abetment in India of counterfeiting coins outside India was made punishable by s 236 of IPC and so was the abetment in India of waging war against the Queen (now the Government of India) by s 121 of IPC .[16]By s 4 of Act 9 of 1891 it was provided that the abetment in India of an act thereof, which if committed within India would be an offence under the Merchandise Marks Act, or under any section of Chapter 18 of the Code (offences relating to trade, property or other marks) may be tried and punished as if the abettor had committed in India the act which he abetted.

The principle involved in these enactments is now applied generally to the abetment of all offences committed beyond India, for by s 3 of Act 4 of 1898 a new section was added to the Code, *viz.* s 108A

. Thus for the purpose of abetment, a breach of the Code committed outside India is an offence.[17]

23. Territorial Jurisdiction

Under this section a person is liable to punishment under the Code only for an act or omission of which he is guilty within India.[18]

24. Jurisdiction over Offences Committed at Sea

States can legislate effectively only for their own territories. To what distance seaward the territory of a state is to be taken as extending is a question of international law. Whatever be the limits of territorial water in the international sense, it has long been recognised that for certain purposes, notably those of police, revenue, public health and fisheries State may enact laws effecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory.[19] The criminal jurisdiction of the courts over offences committed at sea beyond the low water mark, was vested in them by virtue of imperial legislation, for the Indian government had no power to legislate with reference to offences committed at sea.[20] This legislation was connected with what is known as admiralty jurisdiction. The then Supreme Courts of Calcutta, Madras and Bombay, and the High Courts which were substituted for them, had admiralty jurisdiction by virtue of the Acts by which they were constituted and by the Charters issued under the42 provisions of these Acts.[21] This jurisdiction was at first local, but was extended to the whole sea by the Statute 33, Geo III c 52, s 156 . In 1849 the Statutes 12 and 13 Vic. c. 96 was passed, and was extended to India in 1860 by the Statutes 23 and 24, Vic. c. 88. Under its provisions persons charged with crimes within the jurisdiction of the admiralty could be proceeded against in the courts of British India in the same way as if the offence had been committed upon any waters situate within the limits of British India and within the limits of the local jurisdiction of its criminal courts and on conviction could be punished as if their crimes had been committed in England. Thus the offence had to be one under English Law,[22] and the procedure had to be the ordinary Indian criminal procedure,[23] whilst the punishment had to be according to English Law.[24]

In 1867, Statute 30 and 31 Vic. c. 124, ss 2, 11, extended the above provisions to all persons of whatever nationality on board British ships. In 1874 the Statute 37 and 38 Vic. c. 27, s 3 enacted, in effect, that if the crime or offence were committed within British India; but if the crime or offence was not punishable by the law of British India, he should be liable to such punishment (other than capital punishment) as should seem to the court most nearly to correspond to the punishment to which the offender would have been liable if he had committed the offence in England. The question of procedure and punishment was thus determined by this enactment.

Thus where an offence under the IPC had been committed on a British ship on the high seas, the charge should be under the Code, and the punishment, on conviction, should be awarded under the Code.[25] Even under s 361 of the Merchant Shipping Act 1958, the investigating court is also directed to commit the offence to the proper court. No other special form of procedure is prescribed so as to attract s 5 of CrPC therefore, if an offence under the IPC is alleged, the criminal courts in India, unless otherwise expressly barred, have the power to deal with the matter after complying with the procedure as laid down in the CrPC, and merely because there are provisions in the Merchant Shipping Act for detailed enquiry and investigation, the same does not amount to a bar for taking action under the CrPC when offences under the IPC are alleged to have been committed.[26]

The Territorial Waters Jurisdiction Act of 1878 enacted:

(i) that the jurisdiction of the Crown extended over the open seas adjacent to the coasts of all Her Majesty's Dominions to such a distance as was necessary for the defence and security of such Dominions, and that such distance was for the purpose of that Act one

marine league from the low-water mark;

(ii) that any offence punishable on indictment under English Law committed by any person, whether a subject of Her Majesty or not, and whether committed on a British or foreign vessel, committed within the said limit was an offence within the jurisdiction of the admiralty. Accordingly, applying the statute to British India, indictable offences under English Law, committed on board vessels of any nationality by British or foreign43 subjects within three miles from the low-water mark, fell within the jurisdiction of the admiralty *i.e.* they could be tried by the ordinary criminal courts of this country. But by virtue of s 3 of the Act, if the offender was a foreign subject, he could not be tried except with the consent of the Governor of the place where the proceedings were to be instituted.

25. Indictable Offences

All offences under English criminal law are either: (a) offences punishable upon summary conviction, or (b) offences punishable upon indictment. The former, known as petty offences, are triable and punishable without the intervention of a jury. The latter, known as indictable offences, can be finally disposed of, after a 'bill of indictment' has been preferred against the accused before the 'Grand Jury' of the court to which he has been committed for trial. The jurisdiction of the Admiralty, and consequently the jurisdiction of criminal courts of British India thus embraced: (a) offences committed by British or foreign subjects on British ships on the high seas or the extensions thereof in foreign countries; (b) offences committed by British or foreign subjects on foreign ships on that portion of the high seas known as British territorial waters; (c) the offences committed by pirates of whatever nation and sailing under whatever flag. But the jurisdiction extended to foreign pirates only when they committed piracy by the law of nations. The chief ingredient in piracy is the throwing off the authority of the state of which the vessel belongs, and piratical acts are robbery (whether of a vessel by a mutinous crews, or by a vessel cruising for the purpose of robbery and murder).[27]

Under s 18 of the Indian Independence Act 1947,[28] a Statute of Parliament which applied to British India continued to apply to the Indian Dominion even after India attained independence. Article 395 of the Indian Constitution has repealed the Indian Independence Act 1947, but art 372(1) of the Constitution is stated as under:

> Notwithstanding the repeal by this Constitution of the enactments referred to in art 395, but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by competent legislature or other competent authority.

39 The original words 'the said territories' have successively been amended by the AO 1937, the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule, to read as above.

40 The words and figures 'on or after the said first day of May 1861, rep by Act 12 of 1891, s 2, Sch I.

41 There are a few statutory exceptions, but they are of little importance; Stephen, *History of the Criminal Law of England*, vol II, p 2.

42 *Queen-Empress v Ajudhia Singh* 10 ILR All 350 ; *Queen-Empress v Nageshappa* 20 ILR Bom 543 .

43 Chapter 36 of the Code of Criminal Procedure 1973.

44 The Economic Offence (Inapplicability of Limitation) Act 1974.

45 *Mobarik Ali Ahmed v The State of Bombay* AIR 1957 SC 857, p 868-69, (1957) Cr LJ 1346 ; *Gokaldas Amarsee v Emperor* AIR 1933 Sind 333 .

46 *Unnikrishnan & etc v Divisional Inspector of Police, Cochin & Ors* (2001) Cr LJ 4558 (Ker) .

47 *Mobarik Ali Ahmed v State of Bombay* AIR 1957 SC 857, p 869 .

48 *Emperor v Mahabir Singh* 25 ILR All 31, p 33 .

49 *Lee Kun Hee v State of UP* 2012 Cr LJ 1551, p 1564, AIR 2012 SC 1007, (2012) 3 SCC 132 .

50 The Constitution of India, art 361(2) .

51 *Mobarik Ali Ahmed v State of Bombay* AIR 1957 SC 857, p 870 .

52 *Emperor v Dhanraj Mills Ltd* AIR 1943 Bom 182 .

53 *Director of Public Prosecutions v Kent Contractors* (1944) 1 All ER 119 .

54 *State of Maharashtra v Syndicate Transport Co (Pvt) Ltd* (1964) 2 Cr LJ 276, p 280-81, AIR 1964 Bom 195, 66 Bom LR 197, (1964) Mah LJ 308 .

55 *Jitendra Nath Ghosh v Chief Secy to the Bengal Govt* AIR 1932 Cal 753, p 755 ; *Nazar Mohammad v State* AIR 1953 Punj 227, p 231 ; *Emperor v Baldewa* 28 ILR All 372, 3 Cr LJ 247 ; *Rex v Esop* (1836) 173 ER 203 .

56 *Halsbury's Laws of England*, vol 10, fourth edn, Butterworths, London, p 318.

57 *Ibid*, para 580.

58 *Ibid*, para 581.

59 *Reg v Elmstone, Whitewell* 7 Bom HCR 89(Cr); *Reg v Pirtai* 10 Bom HCR 356 ; *Kishen Kour (Mst) v Crown* (1878) 13 Punj Rep 49(Cr); *Gokaldas Amarsee v Emperor* AIR 1933 Sind 333 .

60 *Macleod's* case [1878] 3 AC 889.

61 *Queen v Burah,* [1891] AC 455, 60 LJPC 55 .

62 *Mobarik Ali Ahmed v State of Bombay* AIR 1957 SC 857, p 868-70 ; *ER Croft v Sylvester Dunphy* AIR 1933 PC 16 ; *Governor General-in-Council v Raliegh Investment Co Ltd* AIR 1944 PC 51 .

63 *Emperor v Chhotulal Babar* 36 ILR Bom 524 .

64 Per Lord Langdale in the *Duke of Brunswick v King of Hanover* (1844) 6 Beav 1, p 50 .

65 Re *The Parliament Belge* LR 5 PD 197, p 205; *Secy of State v Moment* 17 CWN 169 .

66 William Blackstone, *Commentaries*, pp 253-54. The Diplomatic Privilege Act 1708 (7 Anne C 21). As to when he may be arrested, see *Hall's International Law,* third edn, pp 168-69, *Magdalena Steam Navigation Co v Martin* (1859) 2 E&E 94 ; *Musurus Bey v Gadban* (1894) 2 QB 352 .

67 *Kerr on Blackstone*, vol I, fourth edn, p 224; *Phillmore's International Law*, vol II, third edn, p 202

68 2 Black 254, 1 Hale PC' s 96, p 99; *Phillmore's International Law*, vol II, third edn, p 202.

69 *Hall's International Law*, third edn, pp 174-75.

70 William Blackstone, *Commentaries*, 1: 254; 1 Hale PC' s 96, p 99; *Phillundri's International Law*, third edn, p 202.

71 *Dickinso v Del Solar* (1930) 1 KB 376 .

72 1 Hawk PC c 2, s 6 .

73 *Foster's Discourse on High Treason*, p 88; *R v Johnson* 29 St Tr 398 .

74 *R v Sattler* D & B 525, 543 and SHCLE II, 8 and 9.

75 SHCLE II, 8 eg, *R v Lopez* D & B 525; *R v Anandersen* LR 1 CCR 161 .

76 *R v Sattler* D&B 525.

77 *R v Serve* 1 Den CC 104 .

78 Code of Criminal Procedure 1973, s 132 .

79 Stephen*, History of the Criminal Law of England*, vol II, p 46.

80 *Ibid*, p 43 as to the nature of the immunity given to foreign war vessels within British waters.

81 *Chung Chi Cheung v King* AIR 1939 PC 69, p 70, 73 .

82 Re *The Athol*(1842) 1 Wm Rob 374.

83 *Briggs v The Lightships* 11 Allen 157 .

84 Re *The Thomas A Scott* 10 LT 726; Re *The Parliament Belge*(1880) LR 5 PD 197, p 213.

85 *Emperor v Joti Prasad Gupta* AIR 1932 All 18, 53 ILR All 642 ; Re *Kari Singh* 40 ILR Cal 433.

86 *Satish Chandra Chakravarti v Ram Dayal De* AIR 1921 Cal 1, p 4-5 ; High Court Proceedings, 22 Dec 1866, (1866) 3 Mad HC App 11.

87 *Barendra Kumar Ghose v King Emperor* 52 ILR Cal 197 (PC), AIR 1925 PC 1 .

88 *Tiruvengada Mudali v Tripurasundari Ammal* AIR 1926 Mad 906, p 908 .

89 Indian Penal Code 1860, s 33 . See notes under s 33 .

90 Re *Baron V on Dincklage*AIR 1942 Mad 182, p 193 .

91 *Commissioner's Second Report* 1847, pp 536, 538.

92 *R v Mulua* 1 ILR All 599 ; *R v Diljour Misser* 2 ILR Cal 225 .

93 Indian Penal Code 1860, s 107 .

94 *Maung New v Maung Po Hla* AIR 1937 Rang 117, p 118, 38 Cr LJ 764 .

95 *Harish Chandra Bagla v Emperor* AIR 1945 All 90, p 92 .

96 *Emperor v Mohmmad Khan* AIR 1938 Nag 365 ; **but see***Emperor v Mangal Chand* AIR 1934 Rang 182 .

1 *Saiyyad Rahim v Emperor* AIR 1915 Nag 2, 16 Cr LJ 485, p 486, 487 .

2 *L Uttam Chand v Emperor* AIR 1945 Lah 238 ; *Harish Chandra Bagla v Emperor* AIR 1945 All 90 ; *Mahommad Bashir v Emperor* AIR 1946 Bom 315 ; *Manager, Krishna Vinodha Sabha v Emperor* AIR 1928 Mad 473 .

3 *Varaj Lall v King-Emperor* AIR 1924 Cal 985, p 986, 25 Cr LJ 1209 **followed**; *Shanta Ram Rama Wadkar v Emperor* AIR 1932 Bom 474 .

4 *Queen-Empress v Tyab Ali* 24 ILR Bom 423 .

5 *Emperor v Haji Shaik Mohammed Shustari* 32 ILR Bom 10 .

6 *Uttam Chand v Emperor* 39 ILR Cal 344 .

7 *Emperor v SMANGALCHAND* AIR 1934 Rang 182, p 184 ; Refer to the cases cited therein.

8 *Halsbury's Laws of England*, Hailsham edn, vol 22, p 232, art 412, cited in *Mahommad Bashir v Emperor* AIR 1946 Bom 315 .

9 *Mahommad Bashir v Emperor* AIR 1946 Bom 315 and the cases cited therein.

10 *Unnikrishnan & etc v Divisional Inspector of Police* , *Cochin & Ors*(2001) Cr LJ 4558 (Ker).

11 *Mubarik Ali Ahmed v State of Bombay* (1957) Cr LJ 1346, AIR 1957 SC 857 .

12 Re *Lotus*, quoted in *Hyde's International Law*, vol I, second edn, p 798.

13 *R v Mahabir* 33 ILR All 578 .

14 *Emperor v Chhotalal Babar* 13 Cr LJ 426, 36 ILR Bom 524 ; *Mubarik Ali Ahmed v State of Bombay* AIR 1957 SC 857 .

15 *R v Elmstone* 7 Bom HCR CC 89, p 118; *R v Ganpatrao Ram Chandra* 19 ILR Bom 105 .

16 Refer to the Indian Penal Code 1860, s 125 .

17 Refer to Notes under s 108A .

18 For territorial extent of India, see Notes under s 1 .

19 *ER Crost v Sylvester Dunphy* AIR 1933 PC 16 .

20 *R v Elmstone* 7 Bom HCR CC 89; *R v Kastya Raina* 8 Bom HCR 63 .

21 24 and 25 V ic c 104, s 9, and the Letters Patent of 1865, ss 32 and 33 .

22 *R v Thomson* 1 BLR Cr 1 ; *R v Elmstone* 7 Bom HCR CC 89.

23 *R v Thompson* 1 BLR Cr 1 ; *R v Elmstone* 7 Bom HCR CC 89; *R v Barton* 16 ILR Cal 238 .

24 *R v Thompson* 1 BLR Cr 1 ; *R v Elmstones* 7 Bom HCR CC 89.

25 *R v Chief Officer of SS 'Mushtari'* 25 ILR Bom 636 .

26 *Unnikrishnan etc v Divisional Inspector of Police, Cochin & Ors* (2001) Cr LJ 4558 (Ker) .

27 *Wheaton's International Law,* Boyd edn, s 122 and SH CL EI, 27, p 28.

28 10 and 11 Geo V I C 30.

Indian Penal Code (Act XLV of 1860)

Chapter I

Introduction

S. 3.

Punishment of offences committed beyond, but which by law may be tried within India.--

Any person liable, by any [29][Indian law] to be tried for an offence committed beyond [30][India] shall be dealt with according to the provisions of this Code for any act committed beyond [31][India] in the same manner as if such act had been committed within [32][India].44

Comments

1. Legislative Changes

This section as originally enacted was as follows:

> Any person liable, by any law passed by the Governor-General of India in council to be tried for an offence committed beyond the limits of the said territories, shall be dealt with according to the provisions of this Code for any act committed beyond the said territories the same manner as if such act had been committed within the said territories.

The various amendments by which the section has taken its present shape have been noted in the

footnotes to the section.

2. Scope

This and the next section deal with offences committed beyond the territorial limits of India and relate to the extra-territorial operation of the Code.[33]

Just as a foreign subject is liable under the IPC for a crime committed in India, an Indian citizen is liable under the criminal law of a foreign state which he violates. It is open to that state to punish a subject for an offence under its law committed in a foreign state, and accordingly in some cases a breach of the Code committed outside India is dealt with as if it had been committed within India, on the return of the offender thereto.[34]This liability is derived from legislation of the Government of India and not from any Imperial legislation. An Indian citizen shall be deemed to have committed an offence in India even if he has committed the offence outside the limits of the Indian territory, and even if the act complained of does not constitute an offence under the law prevailing in the place in which the offence has been committed.[35] It is implicit in this section that a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time. For, if it were not so, the legal fiction implicit in the phrase 'as if such act had been committed within India' would not have been limited to the supposition that such act had been committed within India, but would have extended also to a fiction as to his physical presence at the time in India.[36]

3. Competency of State to Legislate for Trial and Punishment for Offences Committed beyond India

As regards the competency of the state to punish offenders for offences not committed within its territorial jurisdiction, the fetter imposed upon the federal legislature, by s 99(2) of the Government of India Act 1935, has now been removed by s 6(1) of the45 Indian Independence Act 1947, and under art 245(2) of the Constitution of India . 'No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation'. This clause of the Constitution may be taken to confer unlimited extra-territorial jurisdiction upon the Union Parliament.

The rulers of the native states had, prior to 1947, the authority to pass extra-territorial laws relating to offences committed by their own subjects and vesting in their own courts the power to try them, except where the contrary is made out by evidence in the case of any individual state. That power has not in any way been curtailed either by the Integration Covenant or by the Instrument of Accession. Therefore, ss 3 and 4 of this Code and s 188 of the CrPC, at least in so far as it affected the subjects and courts of the state, were entirely within the legislative competence of the states concerned for all purposes of adaptation and amendments, and having been so adapted, they were validly in force, at least in the erstwhile Vindhya Pradesh.[37] Of course, in international law it is not competent for a state to enact laws for foreigners beyond the jurisdiction of the state[38] or for vessels on the high seas.[39] But whatever be the weight of an extra-territorial law in international law, the municipal courts of the state which passed the law are bound to obey it, leaving it to the government to justify its action with other countries. This view has been taken in England[40] and the Dominions.[41] Though of course extra-territorial operation will not be presumed unless that arises from the statute expressly or by necessary implication.[42]Nor are the municipal courts concerned with the question whether the extra-territorial law is capable of execution. Whenever it shall appear, by a proper construction of an Act of Parliament, that extra-territorial operation was intended, the courts of India must give effect to such an Act, without questioning the competence of the Parliament with reference to any rule of international law. For, what the municipal court is concerned with is the competence of the legislature according to its constitutional powers. Even though it appears that it would not be possible to enforce the law outside the territory of the country, the municipal courts cannot declare the law to be invalid on that account, but must enforce the law with the machinery available to it.[43]

4. 'Liable, by any Indian Law, to be Tried'

The Indian laws referred to are the Indian Extradition Act 1903[44] (15 of 1903) and s 188 of the Indian Criminal Procedure Code 1898 (5 of 1898),[45] which has since been replaced by the CrPC (2 of 1974). Where, by virtue of such an Act, a person may be tried for an offence committed outside India, he is to be 'dealt with according to the provisions of this Code', *i.e.*, according to its definitions, exceptions, and penal provisions. Now, under s 188 of the CrPC, 'When an offence is committed outside India (a) any citizen of India whether on the high seas or elsewhere or (b) by a person not being such citizen on any ship or aircraft registered in India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found', *i.e.*, where he is actually present whether discovered there46 or not,[46] subject to a certificate from the political agent for the territory in which the alleged offence was committed, that the charge should be inquired into in India, or subject to the sanction of the state government, where there is no political agent.

Thus, for *e.g.*, under this provision a native Indian subject could be tried for an offence committed in England, Cyprus,[47] or a foreign settlement in India,[48] or on the high seas.[49] The absence of such certificate or sanction, as the case may be, is an absolute bar to the trial, and the proceedings without it are void.[50] Under the proviso to s 188 of the CrPC, previous sanction of the Central Government is necessary for initiating action under the said section.

5. Offence Committed by a Foreign National in a Foreign Vessel

The territorial waters are all lines every point of which is at a distance of 12 nautical miles from the nearest point on the appropriate baseline. If the occurrence took place when the ship was 850 miles away from seashore, even if those 850 miles are taken as nautical miles or land miles, it is clear that the offence is alleged to have been committed by a foreign national in foreign vessel outside the territory of India. Indian courts have no jurisdiction to try an offence which is alleged to have been committed by a foreign national in a foreign vessel outside the territory of India.[51]

6. Presumption Against Extra-territorial Operations of Statutes

A legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account and the courts of each country must enforce the law with the machinery available to them.[52] The enforcement of law is by its nature territorial, for no state allows other states, as a general rule, to exercise powers of government within it.[53]

It is an established rule of construction that municipal courts will interpret and apply every statute, so far as its language admits, so that it may not conflict with the right of other states or the established rules of international law, and that is why every statute is prima facie construed as territorial in its operation. The presumption against extra-territorial operation has its most rigid application as regards criminal or penal laws. Acts committed by foreigners outside the territory of the enacting state are not taken to be covered by a criminal[54] or penal[55] law unless such construction is irresistible. One exception to this rule is piracy *jure gentium*.[56]

7. Procedure in such Cases

Section 177 of the CrPC 1973 provides that every offence shall 'ordinarily' be inquired into and tried by a court within whose local jurisdiction it was committed. The47 Supreme Court has held in *Narumal v State of Bombay* [57] that with the use of the word 'ordinarily' the provision has to be understood as 'except as otherwise provided in the Code or special law'. Thus the provisions of s 188 of the CrPC which specifically make a provision or offence committed outside India override the provisions of s 177 as it provides that an offence committed outside India: (a) by a citizen of India; or (b) by a person not being such citizen on any ship or aircraft registered in India may be dealt with as if it had been committed at any place within India with the sanction of the Central Government. Pre-inquiry stage substantially relates to investigation and no sanction is needed for making an investigation in such cases.[58] In case, during the investigation stage the person known or reasonably suspected to be the

offender having committed the offence outside India is not available in India, extradition proceedings may be resorted to. Extradition is the surrender by one state to any other of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justiciable in courts of the other state.[59]

29 Subs by the AO 1937, for 'law passed by the Governor-General of India in Council.'

30 The original words 'the limits of the said territories' have successively been amended by the AO 1937, the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

31 The original words 'the limits of the said territories' have successively been amended by the AO 1937, the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

32 The original words 'the said territories' have successively been amended by the AO 1937, the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule, to read as above.

33 *Mobarik Ali Ahmad v State of Bombay* AIR 1957 SC 857, p 869, (1957) Cr LJ 1346 ; *L Schussler v Director of Enforcement* 1969 LW (Cr) 274 .

34 *Bishen Das v Emperor* 11 Cr LJ 390 ; *Pheroz Jehangir Dastoor v Roshan Lal Nanavati* (1964) 2 Cr LJ 533, AIR 1964 Bom 264, 66 Bom LR 225 .

35 *Pheroz Jehangir Dastoor v Roshan Lal Nanavati* (1964) 2 Cr LJ 533, AIR 1964 Bom 264, 66 Bom LR 225 .

36 *Mobarik Ali Ahmed v State of Bombay* AIR 1957 SC 857, p 870, (1957) Cr LJ 1346 .

37 *Shiv Bahadur Singh v State of V indhya Pradesh* AIR 1953 SC 394 on appeal from *State of V indhya Pradesh v Shiv Bahadur* AIR 1951 VP 17 .

38 *Lopez v Burslem* (1843) 4 Moo PC 300 .

39 *R v Keyn* (1876) 2 Ex D 220 .

40 *Jeffreys v Boosey* (1854) 4 HL 815, p 939 .

41 *British Columbia Electric Rly Co v King* AIR 1946 PC 180 .

42 *Jeffreys v Boosey* (1854) 4 HL 815, p 939 .

43 *British Columbia Electric Rly Co v King* AIR 1946 PC 180, [1946] AC 527, p 542 .

44 Now repealed by the Extradition Act 1962.

45 Refer to notes under s 4 .

46 *R v Maganlal* 6 ILR Bom 622 .

47 *R v Sarmukh Singh* 2 ILR All 218 .

48 *R v Daya Bhima* 13 ILR Bom 147 ; **following***R v Maganlal* 6 ILR Bom 622 .

49 *Po Thaung v Emperor* 12 Cr LJ 198 .

50 *R v Ram Sundar* 19 ILR All 109 ; *R v Kathaperumal* 13 ILR Mad 423 ; *Bapu Daldi v R* 5 ILR Mad 23 ; *R v Baku* 24 ILR Bom 287 .

51 *Raymund Gencianeo v State of Kerala* (2004) Cr LJ 2296 (Ker) .

52 *British Columbia Electric Rly Co Ltd v King* AIR 1946 PC 180 .

53 *Salmond's Jurispudence*, 1948, p 75.

54 *R v Jameson* (1896) 2 QB 245 .

55 *Cooke v Vogeler Co* (1901) AC 102 .

56 *R v Walkem* (1908) 14 BC 1 .

57 *Narumal v State of Bombay* AIR 1960 SC 1329 .

58 *Remla v SP of Police* (1993) 1 Ker LT 412 .

59 *State of West Bengal v Jugal Kishore* AIR 1973 SC 1173 .

Indian Penal Code (Act XLV of 1860)

Chapter I

Introduction

S. 4.

[60][Extension of Code to extra-territorial offences].--

The provisions of this Code apply also to any offence committed by--

[61][(1) any citizen of India in any place without and beyond India;
(2) any person on any ship or aircraft registered in India wherever it may be.]
[62][(3) any person in any place without and beyond India committing offence targeting a computer resource located in India.]

[63][*Explanation.*--In this section--

(a) the word "offence" includes every act committed outside India which, if committed in India would be punishable under this Code;
(b) The expression "computer resource" shall have the meaning assigned to it in clause (*k*) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000).]

[64]*[Illustration]*

[65][* * * *A,*[66][Who is [67][a citizen of India]], commits a murder in Uganda. He can be tried and convicted of murder in any place in [68][India] in which he may be found.

[69][* * *].48

Comments

1. Legislative Changes

The original section was substituted by the following by s 2 of the Indian Penal Code Amendment Act 1898 (4 of 1898):

The provisions of this Code apply also to any offence committed by.--

(1) any Native Indian subject of Her Majesty in any place without and beyond British India;
(2) any other British subject within the territories of any Native Prince or Chief in India;
(3) any servant of the Queen, whether a British subject or not, within the territories of any Native Prince or Chief in India.

Explanation.--In this section the word 'offence' includes every act committed outside British India which, if committed in British India, would be punishable under this Code.

Illustrations

(a) *A,* a coolie, who is a Native Indian subject, commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found.
(b) *B,* a European British subject, commits a murder in Kashmir. He can be tried and convicted of murder in any place in British India in which he may be found.
(c) *C,* a foreigner who is in the service of the Punjab Government, commits a murder in Jhind. He can be tried and convicted of murder at any place in British India in which he may be found.
(d) *D,* a British subject living in Indore, instigates *E* to commit a murder in Bombay. *D* is guilty of abetting murder.

By the Adaptation of Laws Order 1950, cll (1) and (2) of the old section were replaced by the new clauses which now stand in the section and cl (3) was deleted. The old section had four illustrations. Illustrations (b), (c) and (d) were deleted and in illustration (a) the words 'a coolie who is a Native Indian subject' were replaced by the words 'who is a British subject of Indian domicile' by the Adaptation of Laws Order 1948. Subsequently, the words 'a citizen of India' were substituted for 'a British subject of Indian domicile' by the Adaptation of Laws Order 1950.

In 2008, a new sub-s (3) has been inserted and old explanation to s 4 has been substituted by the existing new one *vide* s 51 of the Information Technology (Amendment) Act 2008 (10 of 2009), (wef 27-10-2009).

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2. Scope

This section gives certain extra-territorial jurisdiction in respect of acts committed outside India by certain classes of persons, but it does not affect the nature of the offence.[70] The doctrine that the law of the country where a crime has been committed governs the nature of the offence and that the courts of that country alone have jurisdiction to try the offender is a well established principle of international law.[71] The two classes of persons specified in this section are almost the same as in s 188 of the CrPC and offences by them are thereunder liable to be 'investigated, inquired into, tried, and otherwise dealt with' according to the provisions contained therein.[72] Any investigation of an offence, punishable under the Indian Penal Code and alleged to have been committed outside India by an Indian citizen will not require sanction of the Central Government under s 188 of the CrPC, but an enquiry by a Court into an offence committed outside India can only be with the sanction of the Central Government.[73] These offences may be offences under the IPC, or under other laws.[74] In the former case the IPC applies to them also, *i.e.,* its definitions, exceptions and penal provisions, by virtue of this section. Thus like all offences under the Code committed within India, offences committed outside thereof and which come within s 4 are subject alike to the substantive and

adjective criminal law of India.

For applicability of s 4 IPC, the offence must be committed within the territory of India. If the offence has not been committed within the territorial limits of India, the provisions of the Indian Penal Code as also the Code of Criminal Procedure would not apply. Where the accused was not a citizen of India, the offence was committed in Kuwait, outside India, the order of cognizance taken by CJM in India on complaint filed for offences under ss 498A and 506(2) of IPC was illegal and as such was quashed.[75]

Police in Kerala has no jurisdiction to investigate into an incident which occurred at a distance of 20.5 nautical miles from the outline of Kerala beyond its coastline but within Contiguous Zone, only the Union of India can investigate and try such an offence.[76]

3. Clause 1: Offence Committed by a Citizen of India without and beyond India

The language of this section and s 188 of the CrPC plainly means that if at the time of the commission of the offence, the person committing it is a citizen of India, then even if the offence is committed outside India, he is subject to the jurisdiction of the courts in India. The rule enunciated in the sections is based on the principle that *qua* citizens, the jurisdiction of courts is not lost by reason of the venue of the offence. If however, at the time of the commission of the offence the accused person is not a citizen of India, the provisions of these sections have no application whatsoever.

50In the illustration to s 4, if *A* was not a Native Indian subject at the time of the commission of the murder, the provisions of s 4 could not apply to his case. The circumstance that after the commission of the offence a person becomes domiciled in another country, or acquires citizenship of that state, cannot confer jurisdiction on the courts of the territory retrospectively for trying offences committed and completed at a time when that person was neither a national of that country nor was he domiciled there.[77]

The provisions of the Indian Penal Code have been extended to offences committed by any citizen of India in any place within and beyond India by virtue of s 4 thereof. As such, offences committed in Botswana by an Indian citizen would also be amenable to the provisions of the Indian Penal Code, subject to the limitation imposed under the proviso to s 188, CrPC .[78]

Where persons, who were British India subjects and after partition became subjects of the Indian Dominion, commit an offence at a place without and beyond the limits of the provinces, but which place was, according to agreement with India and the foreign country administered by Indian Government, the courts in India have jurisdiction to try such offences as if it had been committed within the provinces of India.[79]

4. Citizens of India

The population of a state is divided into two classes--citizens and aliens. Citizens are members of the political community to which they belong. They are the people who compose the State and enjoy full civil and political rights. Aliens do not enjoy all of them-- articles 5 - 10 of the articles 10- 10 of the Constitution of India and the Indian Citizenship Act 1955 deal with the provisions relating to Indian citizenship. The Constitution does not define citizen or citizenship.[80]

Citizenship may be acquired by birth, descent, registration, naturalisation or incorporation of territory.[81] But no person shall be, or be deemed to be a citizen of India if he has voluntarily acquired the citizenship of any foreign state.[82]

5. Offence Committed by a Foreigner Outside India

An offence committed by a person who is not an Indian citizen in a foreign country, is not triable in ordinary criminal courts in India under the IPC .[83] But when the offence is committed by a foreigner in

India, he will be liable for criminal trial in India.[84]If an offence is committed by (a) a foreigner in India, or (b) by a foreigner in a foreign territory but he continues the criminal act in India, he can be tried by a court in India. But where an offence is committed wholly by a foreigner in a foreign51 territory, he cannot, on the principles of international law, be tried in India. The doctrine that the law of the country where a crime has been committed governs the nature of the offence and that the courts of that country alone have jurisdiction to try the offender is a well established principle of international law.[85] The courts in India have always declined jurisdiction against foreigners for offences committed outside India, *e.g.,* for theft although the stolen property was found in British India;[86] for criminal breach of trust;[87] for being in possession in a native state of property stolen from British India;[88] for kidnapping though the person kidnapped is concealed in British India;[89] for instigating the offence of murder outside British India although the offence is committed in British India;[90] of abduction in a native state although the abducted woman was brought by the accused into British India.[91]

6. Clause 2: Offence Committed on Ship or Aircraft Registered in India

This clause expressly provides that the provisions of the Code would apply also 'to any offence committed by any person on any ship or aircraft registered in India wherever it may be.' It has been held that the 'territory' of a state also includes its ships, whether armed or unarmed, and the private ships of its subjects on the high seas or in foreign tidal waters, and foreign private ships while within its ports.[92] But this theory was rejected by their Lordships of the Privy Council and it was held that in accordance with the convention of international law the territorial sovereign grants to foreign sovereigns and their envoys and public ships and the naval forces carried by such ships, certain immunities. A public ship in foreign waters is not and is not treated as territory of her own nation. The domestic courts, in accordance with the principles of international law, will accord to the ship, its crew and its contents certain immunities, some of which are well settled, though others are in dispute. The immunities do not depend upon an objective extra-territorially but on implication of the domestic law. They are conditional and can, in any case, be waived by the nation to which the public ship belongs.[93] The same principle applies to aircraft also.

It is to be noted that the use of the expression 'any person' in this clause is in contrast with the expression 'any citizen' used in the earlier clauses. This clause would, therefore, apply not only to citizens of India, but also to foreigners.

7. Offence Committed by a Foreign National in a Foreign Vessel

See under the same heading in s 3, *ante*.52

8. Procedure in Case of Offences Outside India

Where an offence is committed in any place without and beyond India and the offender is found in India, he may either be: (a) given up or surrendered to the country where the offence was committed, that is, he may be extradited; or (b) tried by a court in India in the exercise of its extra-territorial jurisdiction.

Sections 3 and 4 of this Code read with s 188 of the CrPC give ample power to the courts and authorities to deal with the offences committed outside India: (a) by a citizen of India whether on high seas or elsewhere; or (b) by a person not being such citizen on any ship or aircraft registered in India in the same manner as if such offences had been committed at any place within India. The sanction of the Central Government is, however, necessary for inquiry and trial of such cases in India. An investigation has been held to be a pre-inquiry matter and no sanction is required for making the investigation in respect of the offences committed outside India.[1]

9. Extradition

During the investigation stage of a person known or reasonably suspected to be the offender having

committed the offence outside India, if not available in India, extradition proceedings may have to be resorted to. Extradition is the surrender by one state to another of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justiciable in courts of the other state.[2] A person accused of an offence, i.e., of an act which if committed in India would constitute an offence, committed on a ship on the high seas which comes into any port of India may, on the requisition of 'the Government of any State outside India' be dealt with under the provisions of the Indian Extradition Act 1903.[3]

The law about to be briefly referred to refers to the question which arises when a person commits a crime in country *A,* and escapes from justice to country *B.* What is country *B* to do with him. A distinction must at once be made as regards country *B,* according to whether *B* is a foreign state, or a part of state *A, e.g.*, India.

Where *A* and *B* are foreign states the question is governed by the law of extradition, where they are parts of the same state by the law relating to 'fugitive offenders.'

The British Law of Extradition is regulated by the Extradition Acts of 1870, and 1873, 33 and 34 Vic. c. 52 and 36 and 37 Vic. c. 60 and the Extradition Act of 1895, 58 and 59 Vic. c. 33 and these are 'cited collectively as the Extradition Acts 1870 to 1895'.[4]

In India, extradition is governed by the statutes of 1870 and 1873 and by the Indian Extradition Act 1903[5], which provides 'for the more convenient administration' of the two Statutes of 1870 and 1873, and for the extradition of criminals in cases in which they do not apply.[6] A distinction exists between foreign states, which are either 'foreign states,' *i.e.,* states to which for the time being the Acts of 1870 and53 1873 apply.[7] And states other than foreign states in that sense, *i.e.,* states where there is a political agent. Chapter III, ss 7 - 18 of the Indian Extradition Act deals with extradition in the case of the second class of states.

10. Foreign States

The general principle of extradition as held by majority of international jurists is that, apart from any treaty, there is no duty on country *B* to deliver the escaped offender to country *A.* But Great Britain has entered into extradition treaties with nearly all foreign states.[8] Since the passing of the Extradition Acts of 1870 and 1873, the rules and exceptions laid down in those Acts are embodied in all such treaties:

> Extradition is based on the common assumption that all mankind have a common interest in the punishment of acts universally considered as crimes. On the one hand, just as the interest of mankind justifies extradition, the same interest justifies States in regulating extradition by Treaties, and not exposing the extradited criminal to vindictive proceedings or charges, which are not common ground among civilised communities.[9]

These rules and exception are as follows:

(i) The crime in question must be an offence under the laws of both countries.
(ii) The crime must have been committed in the territory of the state demanding extradition.
(iii) The offender is not a subject of the state from which his surrender is sought.

Exceptions.--

(1) That the crime in question is not one 'of a political character.'
(2) That the offender shall not be tried for any other offence than the one in question, until he has had an opportunity of returning to the country surrendering him.
(3) That if on demand the offender is undergoing punishment for some other offence, he shall not be surrendered until he has undergone or has been discharged from such punishment.

11. Offence of a 'Political Character'

Exception I, which is embodied in s 5(1) of the Indian Extradition Act is the chief difficulty in the subject, and the meaning of a crime of 'a political character' has been fully discussed in Sir JF Stephen's *History of the Criminal Law of England*.[10]

12. Extradition Offences

The offences under the IPC for which extradition may be granted are termed as 'extradition offences,'[11] and are set out in Sch 1 of Act 15 of 1903.[12] They appear under the head of extradition in the notes to the sections herein.

54In addition to the extradition offences under the Code there are others specified in Sch 1 of the Indian Extradition Act, *viz*.:

(i) Desertion from any unit of the armed forces.
(ii) Piracy by law of nations.
(iii) Sinking or destroying a vessel at sea, or attempting or conspiring to do so.
(iv) Assault on board a ship on the high seas, with intent to destroy life or to do grievous bodily harm.
(v) Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.
(vi) Any offence against any section of the Indian Penal Code or against any other law which may, from time to time, be specified by the Central Government by notification in the official Gazette either generally for all States or specially for any one or more states.

13. Fugitive Offenders

Fugitive offenders from the British Islands or other parts of the Empire, or *vice versa*, or from the British possession to another are dealt with under the Fugitive Offenders' Act 1881, (44 and 45 Vic. c. 69) and the rules 'for the more convenient administration of this Statute' in India are laid down in s 19 of the Indian Extradition Act 1903[13].

14. Extra-territorial Jurisdiction

Courts in India possess extra-territorial jurisdiction to try offences committed on land, on high seas and in the air and these powers have been conferred by ss 3 and 4 of the IPC and by s 188 of the CrPC .[14]

The warrant issued by a magistrate will not have an extra-territorial effect. It will run inside India and not beyond. And then for offences committed beyond India, if the offender is found in India, as ss 186 and 188 of the CrPC contemplate, he should be either arrested and tried here, (an extra-territorial operation) or extradited into the country where it is said he had committed the offence.[15]

15. Previous Sanction under Proviso to Section 188 , CrPC

The provisions of the Indian Penal Code have been extended to offences committed by any citizen of India within and beyond India by virtue of s 4, IPC . Offences committed in Botswana by an Indian citizen would also be amenable to the provisions of the Indian Penal Code subject to the limitation imposed under the proviso to s 188, CrPC . The Court in India may proceed with the trial relating to offences alleged to have been committed in India. However, in respect of offences alleged to have been committed by an Indian citizen outside India, the Courts shall not proceed with the trial without the sanction of the Central Government as envisaged in proviso to s 188, CrPC .[16]55

16. Form of Charge

As seen, this section, which in effect supplements the provisions of s 2 of the IPC, does not define or state any new offence but simply extends the territorial limits or extents of operation of the Code to make certain offences committed beyond India triable by the courts of this country with its aid. In cases falling under this section, the charge may be worded as follows with necessary modifications:

For cases falling under cl (1):

> (1) I, (name and office of Session Judge, *etc.*) hereby charge you (name of the accused person) as follows:That you, being a citizen of India on or about the ...day of...at Rome (name the place and country) in Italy committed murder (name the offence) by causing the death of A, and thereby committed an offence punishable under s 302 read with s 4 of the Indian Penal Code and after the occurrence you were found at Bombay (name the place in India) within the jurisdiction of this court.And I hereby direct that you be tried by this court on the said charge.
>
> Signature and Seal of the Court

For cases falling under cl (2):

> (2) That you, though not an Indian citizen, on or about the...day of...while travelling by air bus, (or ship named...) registered in India between Madras and Colombo (describe the route etc.) committed murder by causing the death of co-passenger A, and thereby committed an offence punishable under s 302, read with s 4 of the Indian Penal Code, and after the occurrence you were found at Bangalore, (name the place within India) within the jurisdiction of this Court.And I hereby direct that you be tried by this court on the said charge.
>
> Signature and seal of the Court

60 Subs by Act 4 of 1898, s 2, for the original section.

61 Subs by the AO 1950 for cll (1)-(4).

62 Ins by the Information Technology (Amendment) Act, 2008 (10 of 2009), s 51 (wef 27-10-2009).

63 Subs by the Information Technology (Amendment) Act, 2008 (10 of 2009), s 51 (wef 27-10-2009) for *Explanation*. Before substitution, it stood as under: '*Explanation*.--In this section the word "offence" includes every act committed outside India which, if committed in India would be punishable under this Code.'.

64 Subs by Act 36 to 1957; s 3 and Sch II for 'Illustrations' (wef 17-9-1957).

65 The brackets and letter '(a)' omitted by s 3 and Sch II of Act 36 of 1957 (wef 17-9-1957).

66 Subs by the AO 1948 for 'a coolie, who is a Native Indian Subject'.

67 Subs by the AO 1950 for 'a British subject of Indian domicile.'

68 The words 'British India' have been successively amended by the AO 1948, the AO 1950, and Act 3 of 1951, s 3 and Schedule to read as above.

69 Illustrations (b), (c) and (d) repealed by the AO 1950.

70 Re *Ram Bharthi Hirabharthi*AIR 1924 Bom 51, p 53, 25 Cr LJ 233 .

71 *Gokaldas Amarsee v Emperor* AIR 1933 Sind 333, p 335 .

72 Code of Criminal Procedure 1973, s 5 .

73 *Muhammad Rafi v State of Kerala* 2010 Cr LJ 592, p 595 (Ker) (DB) .

74 Code of Criminal Procedure 1973, ss 4 and 5 .

75 *Fatma Bibi Ahmed Patel v State of Gujarat* 2008 Cr LJ 3065, p 3068, AIR 2008 SC 2392, (2008) 6 SCC 789, 2008 (7) Scale 519 .

76 *Republic of Italy v Union of India* 2013 (1) KLT 367, 2013 (4) SCC 721, 2013 AIR SCW 836 .

77 *Central Bank of India Ltd v Ram Narain* AIR 1955 SC 36, p 38-39 ; **affirming***Ram Narain v Central Bank of India Ltd* AIR 1952 Punj 178 .

78 *Thota Venkateswarlu v State of AP* 2011 Cr LJ 4925, p 4927, 2011 AIR SCW 5236, AIR 2011 SC 2900, (2011) 9 Scale 603 .

79 *Guddar Singh v State* AIR 1954 Punj 37 ; *Pheroz Jehangir Dastoor v State* (1964) 2 Cr LT 533, AIR 1964 Bom 264 .

80 For the definition of these terms see the Indian Citizenship Act 1955, s 2 .

81 *Ibid*, ss 3, 4, 5, 6 and 7 .

82 Constitution of India, art 9 .

83 *Mohd Mohy-ud-Din for Burham-ud-Din-Petitioner v Emperor* AIR 1946 Lah 158, p 169 .

84 *Mobarik Ali Ahmed v State of Bombay* AIR 1957 SC 857, (1957) Cr LJ 1346 (SC) .

85 *Gokaldas Amarsee v Emperor* AIR 1933 Sind 333, **relying on***McLeod v Attorney General for New South Wales* (1891) AC 455, 60 LJPC 55, 65 LT 321, 17 Cox CC 341 .

86 *Reg v Advigadu* (1876) ILR 1 Mad 171 ; *Reg v Lakha Govind* (1875) ILR 1 Bom 50 ; *Emperor v Sunker Gope* (1881) 6 Cal 307, 7 CLR 411 ; *Queen-Empress v Abdul Latif* (1886) 10 Bom 186 ; *Queen-Empress v Ranchhod Daya* (1900) 2 Bom LR 337 .

87 Re *Babu Daldi*(1882) 5 Mad 23; *Hemandas v Chellaram* (1911) 5 SLR 267, 15 IC 836 .

88 *Queen-Empress v Kirpal Singh* (1887) 9 All 523, (1887) AWN 131 ; *Moheshwari Prasad Singh v Emperor* AIR 1914 Cal 725, 24 IC 945, 15 Cr LJ 537 .

89 *Bhute Santal v Dam Santal* (1916) 17 Cr LJ 128, 33 IC 304 .

90 *Reg v Pittai* (1873) 10 BHCR 356 .

91 *Emperor v Koochri* (1913) 7 SLR 71, 14 Cr LJ 439, 20 IC 599 ; *Emperor v Anandgir* (1914) 7 SLR 128, 15 Cr LJ 511, 24 IC 599 ; **But See***Mobarik Ali Ahmed v State of Bombay* AIR 1957 SC 857 .

92 *R v Lewis* 7 Cox CC 277, (1857) 26 LJMC 104 .

93 *Chung Chi Cheung v King* AIR 1930 PC 69, p 73 .

1 *Remla v SP Police* (1993) 1 Ker LT 412 .

2 *State of West Bengal v Jugul Kishore* AIR 1969 SC 1171 .

3 Indian Extradition Act 1903, ss 2(e) and 20 thereof. Now repealed by the Extradition Act 1962.

4 58 and 59 Vic c. 33 s 2 .

5 Now repealed by the Extradition Act 1962.

6 Preamble to Act 15 of 1903.

7 Indian Extradition Act 1903, s 2(c) .

8 For a list of such treaties, see *Encyclopaedia of the Laws of England* under 'Extradition.'

9 Barclay, *Encyclopaedia of the Laws of England*, 'Extradition'.

10 Sir JF Stephen, *History of the Criminal Law of England,* vol II, pp 65-74; For the whole subject of extradition see the standard work on the subject by Sir E Clarke, *Treaties on the Law of Extradition,* fourth edn, 1903, to which the reader is referred.

11 Indian Extradition Act 1903, s 2(b) .

12 Now repealed by the Extradition Act 1962.

13 Now repealed by the Extradition Act 1962.

14 See Notes under s 3 .

15 *Jugal Kishore More v Chief Presidency Magistrate, Calcutta* (1968) Cr LJ 604, AIR 1968 Cal 220, 71 CWN 408 .

16 *Thota Venkateswara v State of UP* AIR 2011 SC 2900, p 2903, (2011) 3 SCC (Cri) 772, (2011) 9 SCC 527, 2011 (9) Scale 603, 2011 Cr LJ 4925 . **See also***Mahesh Kumar Dhawan v State of MP* 2012 Cr LJ 1639, 2012 (3) Crimes 417 (MP) (DB) (Registration of FIR and investigation in India of an offence committed by an Indian citizen in Abu Dhabi (UAE) held illegal in the absence of previous sanction from the Central Government).

Indian Penal Code (Act XLV of 1860)

Chapter I

Introduction

17[S. 5.

Certain laws not to be affected by this Act.--

Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.]56

Comments

1. Legislative Changes

The present section was substituted by the Adaptation of Laws Order 1950, for the original section as amended by Act 14 of 1870, 10 of 1927, 35 of 1934, AO 1937 and AO 1948, which stood as follows:

Nothing in this Act is intended to repeal, vary, suspend or affect any of the provisions of the Statutes 3 and 4, William IV, Chapter 85 or of any Act of Parliament passed after that Statute in any way affecting the East India Company, or the said territories, or the inhabitants thereof, or any of the provisions of any Act for punishing mutiny and desertion of Officers and Soldiers in the service of Her Majesty or of the East India Company, or of any Act for the Government of Indian Navy, or of any special or local law.

2. Scope of the Section

This section saves the operation of certain laws which would otherwise appear to have been repealed by the sweeping general provisions of s 2 . Taken by itself, s 2 would appear to repeal all other laws for the punishment of every offence which is made punishable by the IPC . The effect of s 5 is to qualify the general repeal prescribed by s 2 . The two sections taken together declare that offences defined by special and local laws continue to be punishable as before, in other words, all acts or omissions contrary to the provisions of the Code itself, or of the provisions of special and local laws, and the other laws enumerated in s 5, and these alone and none others are punishable as offences.[18]Though the Code was intended to be a general one, it was not thought desirable to make it exhaustive, and hence, offences defined by local or special laws were left out of the Code, and merely declared to be punishable as heretobefore.[19]

The section as originally enacted purported to save certain enactments of the British Parliament. But the Penal Code, being an Act of the Governor-General-in-Council, a non-sovereign body, could, in no way, repeal, vary, suspend or affect the statutes or Acts of Parliament relating to India. With respect to these Acts of Parliament, this section was enacted only *ex majori cautela.* Now the section saves only:

(i) The provision of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India, and
(ii) The provision of any special or local law.

3. Provisions for Punishing Mutiny and Desertion

Provision for these offences is now made in the Indian Army Act 46 of 1950, the Navy Act 62 of 1957, and the Indian Air Force Act 45 of 1950.

4. Meaning of Special Law and Local Law

A 'special law' is a law applicable to a particular subject,[20] while a 'local law' is a law applicable only to a particular part of India.[21] In other words a 'special law'57 means a law enacted for special cases in special circumstances in contradiction to the general rules of law laid down as applicable generally to all classes with which the general law deals.[22]

5. Special and Local Law may Co-exist

Section 5 clearly declares that the IPC is not intended to repeal, vary, suspend or affect any provisions of any special or local law. The one enactment has not the effect of repealing the other. The two co-exist without conflict. In order to leave no doubt on this point, the law on the subject has been declared by the express provision of s 26, General Clauses Act 1897, which provides that where an act or omission constitutes an offence under two or more enactments, the offender shall be liable to be prosecuted and punished under any one of those enactments but shall not be liable to be

punished twice for the same offence. It is clear, therefore, that where an act is punishable under a special law and also under a general statute, the offender could be proceeded with under either or both, but could not be punished twice for the same act or omission which constituted the offence. Where there is nothing in the Special Act to exclude the operation of the general criminal law, it cannot be inferred that there was an intention on the part of the legislature to exclude it.[23]

6. Simple Rule of Interpretation of the Indian Penal Code 1860 and other Criminal Laws

The simple rule of interpretation in such cases is that the IPC will apply wherever its application is not expressly, or by necessary implication, excluded, and where the requirements prescribed under the IPC for the offence charged are satisfied.[24] The general rule *generalia specialibus non derogant* (the general does not detract from the specific) has not been held to be of universal application by courts in India.[25] The general principle of law is that the IPC would apply if the acts fall within it, though there may be specific offences and penalties under the special Act. It is idle to contend that a special law repeals the provisions of the IPC because both of them deal with offences arising under both the Acts.[26]But no prosecution under the Code is admissible if it appears upon the whole frame of the Special Act that it was intended to be complete in itself and to be enforced by the penalties created by it.[27]

7. Statutes Creating New Offence and Statutes Enlarging Ambit of Existing Offence

The distinction between a statute creating a new offence with a particular penalty and a statute enlarging the ambit of an existing offence by including new acts within it58 with a particular penalty, is well settled. In the former case the new offence is punishable by the new penalty only; in the latter it is punishable also by all such penalties as were applicable before the Act to the offence in which it is included.[28] In *Emperor v Abdul Hamid* ,[29] Das J, observed:

> It has been held in numerous cases that where a statute creates a new offence, which was not an offence at common law, and imposes a penalty in respect of such offence, a person committing such an offence can only be proceeded against under the statute which creates the offence and cannot be indicted under the general law.

The principle is stated with clearness and precision by Hawkins as:[30]

> Also where a statute makes a new offence which was in no way prohibited by the common law, and appoints a peculiar manner for proceeding against the offender as by commitment, or action of debt, or information, etc without mentioning an indictment, it seems to be settled to this day that it would not maintain an indictment, because mentioning the other methods of proceedings seems impliedly to exclude that of indictment.

But as pointed out by Wild J in *Bhalchandra Trimbak Ranadive v Emperor* ,[31] the true principle is: 'Where a new offence is created and the particular manner in which proceedings should be taken is laid down, then proceedings cannot be taken in any other way'. Where a new law makes an act punishable, which is already penal under an existing law and there is nothing in the latter enactment, which either expresses or implies that the operation of the earlier law is excluded, an offender can be prosecuted and punished under either of the two enactments. The earlier law will not be put out of operation merely because there is some change in procedure or some difference in penalties. The effect of the new enactments is to add a remedy and not to repeal the former remedy.[32]

8. Same Act Punishable under Different Acts--Special Law Prescribing Smaller Penalty will Apply

Where the ordinary criminal law is not excluded by a special law, the provisions of the special law cannot be applied as restriction to the ordinary operation of the criminal law.[33]It cannot be laid down as a general rule of law that where there is a special law making a particular act an offence and providing penalties for such an offence, the general law must be held to be inapplicable. It is possible that the same act may be an offence under two different Acts and both may be applicable simultaneously, and the offender may be prosecuted and convicted under either Act. It may, however, be conceded that where the offence falls strictly within the provisions of a section of a special Act and does not go beyond it, it would be more appropriate to prosecute the offender and convict him under that special Act, rather than fall back upon a more general law which prescribes a heavier penalty. In such a case, it may be assumed that the legislature in prescribing the smaller penalty has59 considered recourse to the special law as the proper course.[34] The principle that where a particular set of acts or omissions constitute an offence under the general law and also under a special law, the prosecution should be under the special law, is confirmed to cases where the offences are coincident or practically so.[35]

9. Application of Criminal Law to Acts Required by Particular Statutes

Whenever there is an intention to apply the provisions of the criminal law to acts authorised or required by particular statutes, that intention is always made clear by express words to that effect. Instances of this may be found in the Cess Act,[36] s 94 ; in the Estates Partition Act,[37]s 148 ; in the Income Tax Act 1886, ss 35 and 37 ; in the Land Acquisition Act 1894,[38]s 10, and in many other Acts. Where, as in the Bengal Municipal Act there are no such words as are necessary to make the provisions of the IPC applicable, the court will have no power to import them.[39]

10. Conflict between Special and General Act

Where a special Act with an offence similar to an offence dealt with by a general enactment, it does not follow that the provisions of the general enactment have been repealed to that extent.[40] Where there is a conflict between a special Act and a general Act, the provisions of the special Act prevail.[41]Where an act is punishable under a special law and also under the Penal Code the offender can be proceeded with under either or both, but cannot be punished twice for the same act or omission which constituted the offence.[42] It is, however, ordinarily desirable that the sentence should be passed under the special law.[43]

If the road traffic offences, which can be regulated and adequately dealt with under the provisions of Motor Vehicles Act, resort to the provisions of the general law *i.e*. IPC should be avoided.[44]

The prosecution of road traffic offenders under various penal provisions of Motor Vehicles Act is the rule and the prosecution of such guilty persons under various provisions of the Indian Penal Code is violative of the settled principles of law as well as contrary to the legislative intent.[45]60

11. Common Law Power to Punish Contempt of Court Saved

Contempt is a special subject and the jurisdiction is conferred by a special set of laws peculiar to courts of record.[46] The IPC does not affect the power of a court of record to punish an offender. Contempt of court or contempt of the High Court by a libel published out of court when the court is not sitting, is not an offence under the Code. 'A contempt of the High Court by a libel such as the present published out of court when the court is not sitting,' is not included in the words 'offences under the Indian Penal Code ', although the contempt may include defamation. Such an offence is something more than mere defamation, and is of a different character. It is an offence which, by the common law of England, is punishable by the High Court in a summary manner by fine or imprisonment, or both.

The High Courts in the presidencies are superior courts of record, and the offence of contempt, and the powers of the High Court for punishing it, are the same there as in this country, not by virtue of the IPC for British India and the CrPC 1882, but by virtue of the common law of England.[47]

Even a non-presidency High Court in India is vested with an inherent right to punish for contempt of the court itself. It cannot be disputed that a non-presidency High Court is a superior court of record, and this being so, the jurisdiction to punish for contempt of itself is inherently vested in every High Court. It is a necessary incidence of this jurisdiction that such contempts are punishable summarily by committal.[48] The inherent power of the High Courts as superior Courts of Record to punish contempt of themselves has not been taken away by the Contempt of Courts Act 1926; it has been left undisturbed and consequently the High Courts in India continue to have power to deal with contempt of themselves in the same manner as a Court of Record has under the Common Law of England.[49] It has been held by the Bombay High Court that if a High Court considers that a person has committed contempt of that court, although the contempt may have been committed outside the jurisdiction of that court, it can deal with that person if he were within its jurisdiction.[50] But dissenting from this view, the Allahabad High Court has held that where contempt has been committed within the territorial jurisdiction of a High Court in India, such court is competent to issue process to secure the attendance of the offender wherever he may be residing in British India, as in the case of an offence under the IPC or under any other Act for the time being in force.[51] The legislature has given effect to this decision. (Now under s 4 of the Contempt of Courts Act 1952, which has repealed the Contempt of Courts 1926).

A High Court shall have jurisdiction to inquire into or try a contempt of itself or of any court subordinate to it, whether the contempt is alleged to have been committed61 within or outside the local limits of its jurisdiction and whether the person alleged to be guilty of the contempt is within or outside such limits.

Though the Contempt of Courts Act 1952 has been repealed, s 11 of the Contempt of Courts Act 1971 has retained this provision.

If in its true name and effect, the act complained of is really 'scandalising the court' rather than a mere insult, then it is clear that on the ratio of decision in *Bathina Ramakrishna Reddy v State of Madras* ,[52] the jurisdiction of the High Court is not ousted by reason of the provisions in s 3(2) of the Contempt of Courts Act 1952. When serious aspersions are made against the magistrate which amount to 'scandalising the court', the High Court has jurisdiction to take cognizance of offence.[53]

The jurisdiction conferred on the High Court under art 215 of ConstitutionIndia to punish for contempt of itself is a special one, not arising or derived from the Contempt of Courts Act 1952 and therefore, not within the preview of the IPC . Such a position is also clear from the provisions of the Contempt of Courts Act. The effect of s 5 of that Act is only to widen the scope of existing jurisdiction of a special kind and not conferring a new jurisdiction. So far as contempt of the High Court itself is concerned, as distinguished from that of a court subordinate to it, the Constitution vests these rights in every High Court, and the Act of a legislature could take away that jurisdiction and confer it afresh by virtue of its own authority. That being the position, s 25, General Clauses Act 1897 cannot apply.[54]62

17 Subs by the AO 1950 for the original s 5 as amended by Acts 14 of 1870, 10 of 1927, 35 of 1934, AO 1937 and AO 1948.

18 *Satish Chandra Chakravarti v Ram Dayal De* AIR 1921 Cal 1, p 5 ; 3 Mad HCR App 11.

19 3 Mad HCR App 11.

20 Indian Penal Code 1860, s 41 .

21 Indian Penal Code 1860, s 42 .

22 *Kaushalya Rani v Gopal Singh* AIR 1964 SC 260, p 263, [1964] 4 SCR 982, (1964) Cr LJ 152 .

23 *Emperor v Joti Prasad* AIR 1932 All 18, 21 ; *Jiwan Ram v Emperor* AIR 1932 All 69, 33 Cr LJ 309 ; *Emperor v Bishan Sahai Vidyarthi* AIR 1937 All 714 ; *Bhup Narain v State* AIR 1952 All 35 ; *Queen v Husain Ali*, 5 NWPH CR 49; Re *Motilal Amratial Shah*AIR 1931 Bom 141, 32 Cr LJ 280 ; *Emperor v Bhogilala Chimanlal Nanavati* AIR 1931 Bom 409, 32 Cr LJ 1145 ; *Kuloda Prosad Majumdar v Emperor* 4 Cr LJ 439 ; Proceedings of the high court dated 22 February 1876, ILR 1 Mad 55; *Queen v Ramchandrappa* 6 ILR Mad 249 ; Re *V V Satyanarayanamurthy*AIR 1953 Mad 137 ; *Kaulashia v Emperor* AIR 1933 Pat 142 .

24 Re *Mrs B Gervaes*AIR 1950 Mad 599, p 600 ; *Kuloda Prosad Majumdar v Emperor* 4 Cr LJ 439, 11 CWN 100 .

25 *Bhup Narain v State* AIR 1952 All 35, p 37 .

26 Re *V V Satyanarayanamurthy*AIR 1953 Mad 137 .

27 *Chandi Pershad v Abdur Rahman* 22 ILR Cal 131, p 138 .

28 *Bonnerjee's Interpretation of Deeds, Wills and Statutes in British India*, Tagore Law Lectures, 1901, p 919; *Balchandra Trimbak Ranadive v Emperor* AIR 1929 Bom 433, p 439 ; *Lowe v Dorling & Son* (1906) 2 KB 772, 75 LJ KB 1019, 22 TLR 779, 95 LT 243 .

29 *Emperor v Abdul Hamid* AIR 1923 Pat 1 .

30 *Pleas of the Crown,* Book II, ch 25, s 4 .

31 *Bhalchandra Trimbak Ranadive v Emperor* AIR 1929 Bom 433, p 443 .

32 *Om Prakash v State* AIR 1955 All 275, p 281 ; *State v Raj Kumar* AIR 1956 Pepsu 1 .

33 Proceedings of the High Court, 22 February 1876, ILR 1 Mad 55.

34 *Jewa Ram v Emperor* AIR 1932 All 69 **dissenting from***Mohan Lal Saxena v Emperor* AIR 1930 Oudh 497, and **relying on***Joti Prasad Gupta v Emperor* AIR 1932 All 18 ; *Emperor v Ganesh V arma Joshi* AIR 1931 Bom 140 .

35 *Suchit Raut v Emperor* AIR 1930 Pat 622, p 623 .

36 Bengal Act 9 of 1880.

37 Bengal Act 8 of 1876.

38 Now repealed by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013.

39 *Chandi Prasad v Abdur Rahman* 22 ILR Cal 131, p 139 .

40 *Segu Baliah v Ramasamiah* AIR 1918 Mad 460, p 461, 18 Cr LJ 992 ; *Emperor v Joti Prasad* AIR 1932 All 18, p 24 .

41 *Collector of Bombay v Kamalavahooji Maharaj* AIR 1934 Bom 162, p 163 .

42 Re *VV Satyanarayanamurthy*AIR 1953 Mad 137 ; *Emperor v Joti Prasad* AIR 1932 All 18, p 21 ; *Sukhanandan Rai v Emperor* AIR 1918 Pat 649, 19 Cr LJ 157 ; *Queen v Ramchandrappa* 6 ILR Mad 249 ; Re *Kasimuddin* 8 WR 55 (Cr); *Bhagat Singh v Emperor* AIR 1930 Lah 266 ; Re *Naiken Veerarami*AIR 1931 Mad 18 ; *Rex v Husson Ali* 5 NWP 49, General Clauses Act 1897, s 26 .

43 *Kuloda Prosad Mazumdar v Emperor* 4 Cr LJ 439, 11 CWN 100 .

44 *Ramchandra Rabidas v State of Tripura* 2009 Cr LJ 1342, p 1352, (2009) 2 GLR 741, 2009 (1) GLT 90 (Gauh) .

45 *Ramchandra Rabidas v State of Tripura* 2009 Cr LJ 1342, p 1354, (2009) 2 GLR 741, 2009 (1) GLT 90 (Gauh) .

46 *Sukhdev Singh v Hon'ble CJ, S Teja Singh* AIR 1954 SC 186 .

47 *Surrendra Nath Banerjee v Chief Justice and Judges of High Court at Fort William in Bengal* 10 ILR Cal 109, pp 131-32 (PC), 10 IA 171 ; **followed** in *Governor of Bengal v Motilal Ghose* AIR 1914 Cal 9 ; Re *Tarit Kanti Biswas*AIR 1918 Cal 988 ; Re *Habib*AIR 1926 Lah 1 ; Re *Tushar Kanti Ghosh*AIR 1935 Cal 419 .

48 Re *Lala Harkishan Lal*AIR 1937 Lah 497, p 498 ; Re *Muslim Outlook, Lahore*AIR 1927 Lah 610 ; Re *KL Gauba*AIR 1942 Lah 105 ; *Hadi Hussain v Nasiruddin Haider* AIR 1926 All 623 ; *Emperor v Murli Manohar Prasad* AIR 1929 Pat 72 ; Re *Benjamin Guy Horniman*AIR 1944 Bom 127 .

49 Re *Lala Harkishan Lal*AIR 1937 Lah 497, p 499 .

50 Re *Benjamin Guy Horniman*AIR 1944 Bom 127, p 129 ; **relying on***HD Rajah v CH Witherington* AIR 1934 Mad 423 and *Chanda Mall Karnani v Sardari Lal Thaper* (1937) ILR 1 Cal 345, 40 CWN 1285 .

51 *Emperor v Benjamin Guy Horniman* AIR 1945 All 4 .

52 *Bathina Ramakrishna Reddy v State of Madras* AIR 1952 SC 149 .

53 *State of Madhya Pradesh v Revashankar* AIR 1959 SC 102 .

54 *RK Kapur v State of Tamil Nadu* AIR 1972 SC 858 .

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Chapter II

General Explanations

INTRODUCTION

This chapter is for the most part an elaborate interpretation clause, a key to the interpretation of the whole Code. The leading terms are defined and explained, and the meanings thus announced, are steadily adhered to throughout the subsequent chapters. Sir James Stephen suggests that the object of this chapter is to prevent captious judges from willfully misunderstanding the Code, and cunning criminals from evading its provisions. It does not provide explanations for all cases indiscriminately, but only for those where difficulty may arise, when it will be necessary to refer to this chapter to see what the meaning of the Code is.[1]

1 1860 Proceedings of Council, p 1261 quoted in Ejaj Ahmed '*Law of Crimes*', third edn, ch II.

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S. 6.

Definitions in the Code to be understood subject to exceptions.--

Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions", though those exceptions are not repeated in such definition, penal provision, or illustration.

Illustrations

(a) The sections, in this Code, which contain definitions of offences, do not express that a

child under seven years of age cannot commit such offences, but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

(b) *A,* a police-officer, without warrant, apprehends *Z,* who has committed murder. Here *A* is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend *Z* and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it".

Comments

1. Scope

This section refers to ch IV, ss 76 - 106 of the IPC and might as well have found its place at the commencement, of that chapter.63

All definitions of offences, illustrations thereof, and punishments contained in the Code are subject to the exceptions provided for in ch IV of the IPC . The section provides a part of the definition of every offence.[2] Section 105 of the Indian Evidence Act 1872 (Evidence Act), must be read with this section.[3]Section 6 of the IPC is an extraordinary provision which obligates the court to consider whether a case is covered by any of the exceptions under ch IV of the IPC . Section 6 of the Code should be read as a proviso to ss 105 - 106 of the Evidence Act. That apart, s 6 of the Code imposes statutory obligation on the court to consider as to whether the case is covered by the exception or not.[4]

The provisions of this section are mandatory and the court must consider whether the case of a particular accused is covered by the provisions of ch IV of this Code even if no plea or defence is taken by the accused.[5] Whenever and wherever the court is to consider any provision of the IPC, the court is bound to consider whether the said section is subject to the exceptions contained in ch IV of the Code.[6]

The Indian Penal Code (Amendment) Act 1870, s 13 (as amended by Act 12 of 1891, Sch II) made ch IV of the Code applicable to its newly introduced sections, *viz.* ss 121A, 124A, 225A, 225B, 294A and 304A .

When under attack by an assailant, *i.e*., where an offence is sought to be committed by an aggressor, the defenders have been given a statutory right to defend their lives and those of others. If the right is taken away, the innocent will suffer and muscle power will prevail as the master of the society. To secure this right a warning note is found in s 6 of the IPC . The courts should always bear in mind s 6 and try to find out the circumstances whenever and wherever they peep from materials on record. Necessary allowance should always be given to the accused until it can be affirmatively said that the law has been broadcast and made known to all.[7]

An investigation officer before filing charge sheet shall not mechanically lay charge against any person for such offence, for the mere reason that those acts constitute offence as defined in IPC . He shall further confirm that an offence is made out against a person despite what is contained in the General Exceptions *i.e.* Ch IV (ss 76 to 106),[8] because of the mandate in s 6, IPC .

2. Definitions

The Law Commissioners responsible for the first draft of the Code remarked:

> In criminal cases, one with which we are now more immediately concerned, we think that the accused party ought always to have the advantage of a doubt on a point of law, if that doubt be entertained after mature consideration by the highest judicial authority, as well as of a doubt on a matter of fact. In civil suits which are actually pending, we think it, on the whole, desirable to leave to the Courts the office of deciding doubtful questions of law which have actually arisen in the course of litigation.[9]

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In criminal cases, therefore, the law must be precise and intelligible, and the facts proved must be clear and unequivocal. And so far as regards law, while it may be so, still there may be doubts and difficulties which it is the function of the rules to solve. Indeed, as human language is never so precise and inflexible as to admit of no misinterpretation, it is always necessary, and indeed, desirable, that these rules, which form as it were, the grammar of the Code, should be carefully observed. And for this purpose, it is necessary to examine the whole Code, analyse its scheme and study its vocabulary. Indeed, in order to facilitate this work the draftsmen have avowedly adopted a plan the object of which is to make the Code self-contained, so far as possible, regarding its construction. In the first place, they have added definitions of terms used in the Code, the object of which is to provide a uniform nomenclature and thus avoid the perplexing variety of senses in which the same term may have been used in cognate enactments or parlance. They observe that in the definitions:

> We have repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using harsh expressions because we could find no other expressions which would convey our whole meaning and no more than our own meaning. Such definitions, standing by themselves, might repel and perplex the reader, and would perhaps be fully comprehended only by a very few students after long application. Yet, such definitions are found, and must be found in every system of law which aims at accuracy. A legislator may, if he thinks fit, avoid such definitions and by avoiding them he will give a smoother and more attractive appearance to his workmanship; but in that case, he flinches from a duty, which he ought to perform, and which somebody must perform. If this is necessary, but most disagreeable work be not performed by the law-giver once for all, it must be constantly performed in a rude and imperfect manner by every Judge in the Empire, and will probably be performed by no two Judges in the same way. We have, therefore, thought it right not to shrink from the task of framing these unpleasing but indispensable parts of a Code.[10]

Importance of Definitions Given in the Indian Penal Code 1860

There is no doubt that when the Code itself provides a dictionary for the words used, we must look into that dictionary first for an interpretation of the words used in the statute. We are not concerned with any presumed intention of the legislature; our task is to get at the intention as expressed in the statute. It is true that an artificial definition may include a meaning different from or in excess of the ordinary acceptation of the word which is the subject of definition; but there must then be compelling words to show that such a meaning different from or in excess of the ordinary meaning is intended. Where, within the framework of the ordinary acceptation of the word, every single requirement of the definition clause is fulfilled, it would be wrong to take the definition as destroying the essential meaning of the word defined.[11]

It is true that generally definitions in statutes or enactments are provided in order to give some artificial meaning to words or phrases used therein, but it does not follow, nor is there any such rule of law, that once a phrase or word is defined in a statute or enactment that definition is necessarily artificial and something different to its natural or grammatical meaning.[12]65

2 *Prabhoo v Emperor* AIR 1941 All 402, (1941) All LJ 619, 43 Cr LJ 177, (1941) ILR All 843 .

3 *Rishi Kesh Singh v State* AIR 1970 All 51, (1970) Cr LJ 132, (1969) All LJ 657 .

4 *Khuraijam Samoi Singh v State of Manipur* (1997) Cr LJ 1461 (Gau) ; *Abdul Latif v State of Assam* (1981) Cr LJ 1205 (Gau) ;

Patras Mardi v State of Assam (1982) Cr LJ 7 (NOC) (Gau) ; *Shibu v State of Kerala,* 2013 (4) KLT 323 (Ker), 2013 (4) KLJ 300 .

5 *Dharm Singh Nath v State of Assam* 1978 Cr LJ 10 (Gau) (NOC) .

6 *Sandhya Ram Bardhan v State* (1977) Assam LR 36, p 39 .

7 *Subodh Tewari v State of Assam* (1987) 1 Crimes 791, 1988 Cr LJ 223 (Gau) .

8 *Shibu v State of Kerala* 2013 (4) KLT 323, 2013 (4) KLJ 300 (Ker) .

9 Prefatory Address, p 18.

10 Prefatory Address, pp 11, 15.

11 *Hari Prasad Shivshanker Shukla v AD Divelkar* AIR 1957 SC 121, p 126-27 .

12 *N Baksi v Accountant-General, Bihar* AIR 1957 Pat 515, p 524 .

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S. 7.

Sense of expression once explained.--

Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

Comments

1. Scope

The express mention of one thing implies the exclusion of another.[13] The generality of this maxim renders caution necessary in its application. It is not enough that the express and the tacit are merely incongruous. It must be clear that they cannot reasonably be intended to co-exist.[14] The rule cannot be applied unless the statute by its language shows that all things different in genus and description from those which are enumerated are intended to be excluded.[15]

2. Meaning of Expressions Same throughout

To say that every expression 'shall have a particular meaning everywhere,' is to say that it shall have no other meaning anywhere. The point, therefore, is to ascertain the meaning of that explanation, and if the words, taken grammatically, have a definite, certain and unequivocal meaning, if they constitute a perfectly complete expression susceptible grammatically of that one unequivocal meaning and of that only, then, however absurd and pernicious the consequences, that meaning is to be followed.

It is an ordinary canon of construction that a word which occurs more than once in the same Act must be given the same meaning throughout the Act, unless some definition in the Act or the context shows that the legislature used the word in different senses.[16]

Words Conveying Several Meanings

If, however, the expression does not include the complete thought of the legislature or if the words are equally susceptible of several meanings we are to seek in other parts of the same statute, or, in other statutes, certainly in those *in pari materia* with this, the one of the several possible meanings which ought to be put upon the words.[17]

Qualifying Clause

The qualifying clause, 'unless there is anything repugnant in the subject or context', not appended to the definitions given in the IPC, must always be understood to exist in the context of definitions given in the IPC .[18]66

13 *Blackburn v Flavelle* (1881) 6 AC 628, p 634, 50 LJPC 58 .

14 *Lowe v Dorling & Son* (1906) 2 KB 772, 75 LKJB 1019, per Farwell LJ.

15 *Shidrao Narayanrao v Municipality of Athni* AIR 1943 Bom 21, p 23 .

16 *Emperor v Mukunda* 8 Cr LJ 18, 19 ; *Rameshwar Prasad v Emperor* AIR 1931 Nag 177 .

17 Re *Proceedings of 22 December*(1866) 3 MHCR App 11; *Fateh Chand v Emperor* AIR 1917 Cal 123, p 136 .

18 *State of Maharashtra v Syndicate Transport Co* AIR 1964 Bom 195, p 197, 66 Bom LR 197, (1964) 2 Cr LJ 276, (1964) Mah LJ 308 ; *Kartic Chandra v Harsha Mukhi Dasi* AIR 1943 Cal 345, 77 Cal LJ 252 (FB) ; *Darbari Lal v Dham Wati* AIR 1957 All 541, (1957) All LJ 559 (FB) ; *Edmund N Sohuster v Asst Collector of Customs* AIR 1967 Punj 189, (1967) Cr LJ 58 .

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S. 8.

Gender.--

The pronoun "he" and its derivatives are used of any person, whether male or female.

Comments

1. Scope

Under s 13 of the General Clauses Act 1897, unless there is anything repugnant in the subject or context, words importing the masculine gender include females, even s 4 of Lord Broughams Act 1850 was in similar terms.

Under this section the pronoun 'he' and its derivatives have been used for males as well as females. But the section be held to declare that the pronoun 'he' is used everywhere in the Code even to denote a female, is only partially true, for there are sections in which the appropriate pronoun has been and could not but be used, *e.g.*, ss 354, 375, 493 - 94 and 498 . The Madhya Pradesh High Court has, however, held that, in s 354, the pronoun 'he' used in the expression 'that he will thereby outrage her modesty' must be taken under s 8 as importing 'a male or a female'.[19] In view of provisions of s 2(4) of the CrPC, read with s 8 of the IPC and s 13(1) of the General Clauses Act 1897, the pronoun 'his' as used in cl (d) of s 125(1), CrPC, includes both a male and a female. In other words, the parents will be entitled to claim maintenance against their daughters provided, however, the other conditions as mentioned in the section are fulfilled.[20]

19 *Girdhar Gopal v State* AIR 1953 MB 147 .

20 *Vijaya Manohar Arbat v Kashirao Rajaram Sewai & Ors* (1987) BLJ 527, (1987) BLJR 32, (1987) 2 SCC 278 ; *M Areefa Beevi v Dr KM Sahib* (1983) Cr LJ 412 (Ker) .

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S. 9.

Number.--

Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

Comments

1. Scope

The section conveys the sense expressed in s 2 of the English Interpretation Act 1889,[21] and s 13 of the General Clauses Act (10 of 1897). All that it means is that a word need not be construed as 'singular' under 'all' circumstances, and that it merely indicates the intention of the legislature that the word may be interpreted in the plural wherever the circumstances require that it should be so construed.[22]The word 'include' is important. It is not correct to say that for all words in the singular appearing in any Central Act, the plural shall be substituted. A word in the singular may be interpreted in the singular number as well as in the plural number and vice versa.[23]

21 52 & 53 Vict, C 63, SI; *Emperor v Tatia Mahadeo* 17 IC 794 (Bom) .

22 *Shambatta v Narayana* AIR 1951 Mad 917, p 920 .

23 Re *Phool Din*AIR 1952 All 491 ; *Budhai Sheik v Emperor* 33 ILR Cal 292, p 294 ; *Abdul Karim v Nangoo* AIR 1942 Oudh 407 ; *Moti Lal v State* AIR 1959 Pat 54 ; *Nathu v State* AIR 1958 All 460, p 470 .

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S. 10.

"Man" "Woman".--

The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age.

Comments

1. 'Of any Age'

Under this section the word 'man' or 'woman' denotes a male or a female of any age. A girl of the age of six years is a woman within the meaning of s 354 .[24] The67 expression 'women' is used in s 354 in conformity with this explanation. A female child of seven-and-a-half months was held to be a 'woman' within the meaning of this section and so may be the victim of an assault with the intention of outraging her modesty as described under s 354 of IPC .[25]

24 *Emperor v Tatia Mahadev* 13 Cr LJ 858, p 859 .

25 *State of Punjab v Major Singh* (1966) 1 SCWR 945, (1966) Cur LJ 730, (1966) All LJ 916, (1966) SCD 940, (1966) All Cr R 389, (1966) All WR 668 (HC), 68 Punj LR 794, (1967) Cr LJ 1, (1967) 1 SCA 468, [1966] Supp SCR 286, (1967) 2 SCJ 726, (1967) Mad LJ 868 (Cr), AIR 1967 SC 63 .

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S. 11.

"Person".--

The word "person" includes any Company or Association or body of persons, whether incorporated or not.

Comments

1. Scope

The wording of this section is the same as that of s 3(42) of the General Clauses Act 1897. The definition of the word 'person' in this section is not exhaustive and must be taken to include artificial or juridical persons as well.

Company, firm and other juristic persons come within the definition 'person' given in s 11 of the IPC and, for the purpose of s 415 of the Code.[26]Section 11 of IPC defines the word 'person' to include any company or association or body of persons whether incorporated or not, filing of a complaint by an aggrieved company through its authorized representative is in accordance with law and the same is maintainable.[27] An idol is a juridical person and, therefore, 'person' as defined in s 11 .[28] 'Person' in s 11, IPC includes a company, association or body of persons.[29]

Person in s 11, IPC does not include State.[30]

The word 'person' includes a municipality which is a body of persons incorporated,[31] and so is a corporation,[32] a firm[33] and a club.[34] The Madhya Pradesh High Court has, however, held that a partnership firm is not included in the definition of 'person' and, therefore, a partnership firm cannot be held guilty of an offence68 under the Code though its partners can be held criminally liable for the acts of the other partner and vice versa.[35] A contrary view has been expressed in *SK Agarwalla v ESI Corporation* ,[36] and it has been held that the word 'person' includes any company or association or body of persons whether incorporated or not. Any artificial or juridical person is, however not competent to execute a surety bond under the provisions of the CrPC .[37] A proprietary concern is not a legal entity or juridical person. The properties of a firm are not included in the definition of 'person' as given in s 11 of the Code.[38] The definition of the word 'person' is sufficiently wide to include the Government as representative of the whole community, so that possession of wood by a forest inspector, who is a servant of the Government, is possession of the Government itself.[39]

A Hindu Undivided Family (HUF) is a legal entity and can be punished for offence under s 138 of the Negotiable Instruments Act, but being an artificial person cannot be sentenced to imprisonment.[40]

2. 'Includes'

'Including' is a term employed generally where the scope of the class indicated by the words preceding it is wider than that of the class specified by the terms which follow.[41]

3. Qualifying Clause

The qualifying clause 'unless there is something repugnant in the subject or context' must be appended to the definitions in the Code. If this is not done, reading s 11 and s 2 together, a company or a corporate body would be liable to indictment for all kinds of offences. Hence, a body corporate or a company cannot be indicted for offences which can only be committed by a human individual, such

as murder, treason, bigamy, rape, perjury, *etc.*, or offences which must be punished with imprisonment.[42]

A municipal council, being a corporate body, can be prosecuted for offences which are only punishable with fine, for, imprisonment of a municipal council is out of the question.[43]

Child in Womb

The word 'person' has not been defined by the Code in such a way as to involve a separate existence of the living creature spoken of as 'a person'. As there is no such technical definition, the court prefers to adopt the ordinary meaning of the term 'persons' as including a 'child' whether born or unborn. Even if the child is unborn69 and within the womb of the mother, it is capable of being spoken of as a 'person' if its body is developed sufficiently to make it possible to call it a 'child'.[44]

State not Person to Avail Revisional Power of High Court

Under s 11 of the Code, 'person' includes any company or association or body of persons, whether incorporated or not. The word 'person' would, therefore, include not only natural persons but juridical persons as well in whatever form designated and whether incorporated or not. By implication, the State stands excluded from the purview of the word 'person' for the purpose of limiting its right to avail the revisional power of the High Court under s 397(1) of CrPC for the reason that the State, being the prosecutor of the offender, is enjoined to conduct prosecution on behalf of the society and to take such remedial steps as it deems proper.[45]

26 *Regi Michael v M/s Vertex Securities Ltd & Anor* (1999) Cr LJ 3787 (Ker) .

27 *CM Ibrahim v Tata Sons Ltd* 2009 Cr LJ 228, p 230, 231 (Kant) .

28 Re *Vadlivelu v Arusthiyar* AIR 1944 Mad 77 ; *Ramalinga Chetti v Sivachidambara Chetti* AIR 1919 Mad 809 .

29 *Standard Chartered Bank v Directorate of Enforcement* 2005 Cr LJ 4917 (SC), AIR 2005 SC 2622, (2005) 4 SCC 530 ; *Krishnan v Krishnaveni* AIR 1997 SC 987, 1997 Cr LJ 1519, (1997) 4 SCC 241 .

30 *Krishnan v Krishnaveni* AIR 1997 SC 987, 1997 Cr LJ 1519, (1997) 4 SCC 241 .

31 *Municipal Committee of Lahore v Ratton Chand* AIR 1923 Lah 31 ((1)) ; *Pallonjee Edulijee & Sons v Lonavala City Municipality* (1937) ILR Bom 782, AIR 1937 Bom 417 ; *Prabhudas Mulji Doshi v Governor General of India in Council* (1951) ILR 1 Cal 443 ; *State of Maharashtra v Syndicate Transport Co Pvt Ltd* AIR 1964 Bom 195, (1964) 2 Cr LJ 276, (1964) Mah LJ 308 .

32 *Nagpur Corpn v NEL & P Co Ltd* AIR 1958 Bom 498 ; *Shri Gurdwara Sahib v Harnam Singh* AIR 1960 Punj 73 ; *Mani Bhai Patel v State* AIR 1952 Cal 761 ; *Girdharilal v Lalchand* AIR 1970 Raj 145, (1970) Cr LJ 987 .

33 *Punjab National Bank v Punjab Property Development Co* AIR 1958 Punj 57 ; *CIT, Madras v Thilai* AIR 1925 Mad 1043 ; *Kadar Bux v Bukt Behari* AIR 1932 Cal 768 ; *Senaji Kapur Chand v Pannaji Devichand* AIR 1930 PC 300 ; Re *Swaranath Bhatia*AIR 1948 Mad 427 (Defence of India Rules).

34 *Emperor v AG Cooke* AIR 1914 LB 23 .

35 *Chandra Prakash Bhargava v GT Industries* (1980) Cr LR (MP HC Notes) 91, pp 92-93.

36 *SK Agarwalla v ESI Corporation* (1985) 1 CHN 113, (1985) 89 CWN 646 .

37 *Edmund N Schuster v Asst Collector of Customs, New Delhi* (1967) Cr LJ 586, AIR 1967 Punj 189 .

38 *Satish Jayantilal Shah v Pankaj Mashruwala & Anor* (1996) Cr LJ 3099 (Guj) .

39 *R v Hanmanta* 1 ILR Bom 610 .

40 *Arpit Jhanwar v Kamalesh Jain* 2012 (117) AIC 566, 2013 ACD 366 (Mad .).

41 *Dayabhai Poonambhai Patel v Regional Transport Authority* AIR 1951 MB 121, p 128 .

42 *State of Maharashtra v M/s Syndicate Transport Co Ltd* AIR 1964 Bom 195, (1964) Mah LJ 308, (1964) 2 Cr LJ 276 .

43 *Girdhari Lal v Lalchand* (1980) Cr LJ 897, p 991, AIR 1970 Raj 145 .

44 *State of Uttar Pradesh v Jagdish* AIR 1966 All 244, (1965) All LJ 977, (1965) All WR 711 (HC), (1965) All Cr R 486, (1966) Cr LJ 503 .

45 *Krishnan & Anor v Krishnaveni & Anor* AIR 1997 SC 987, (1997) Cr LJ 1519 .

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter II General Explanations/S. 12.

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S. 12.

"Public".--

The word "public" includes any class of the public or any community.

Comments

1. Scope

In popular parlance the word 'public' means the general body of mankind or of a nation, state or community. It is also sometimes used in a more restricted sense of denoting only a particular body or aggregation of people such as an author's public.[46]

The definition in this section is inclusive and does not define the word 'public'. It only says that a class of public or community is included within the term 'public'. A class or community residing in a particular locality may come within the term 'public'.[47] The words 'the public' mean human beings in general and do not include animals.[48]

46 *Webster's Dictionary*.

47 *Harnandan Lal v Rampalak Mahato* AIR 1939 Pat 460, p 461 .

48 *Sita Ram v Emperor* 7 Cr LJ 278, p 279, 3 PRC 1908 .

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter II General Explanations/S. 13.

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S. 13.

"Queen".--

[*Repealed by the AO 1950.*]

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General Explanations

[49][S. 14.

"Servant of Government".--

The words 'servant of Government' denote any officer or servant continued, appointed or employed in India by or under the authority of Government.]

Comments

1. Legislative Changes

The present section has been substituted for the old one by the Adaptation of Laws Order 1950.70

2. 'Servant of Government'

The term 'Government' is defined in s 17 as denoting the Central Government or the Government of a State. The expression 'servant of Government' will, therefore, denote any officer or servant continued, appointed or employed in India by or under the authority of the Central or any State Government.

49 Subs by the AO 1950, for the original section.

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S. 15.

"British India".--

[*Repealed by the AO 1937*.]

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter II General Explanations/S. 16.

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S. 16.

"Government of India".--

[*Repealed by the AO 1937*.]

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter II General Explanations/S. 17.

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[50][S. 17.

"Government".--

The word 'Government' denotes the Central Government or the 'Government' of a [51][* * *] State.]

Comments

1. Legislative Changes

The original section ran as follows:

> The words 'government' denotes the person or persons authorised by law to administer executive government in any part of British India.

The words 'persons...British India' were omitted and replaced by the words 'Central Government or the Government of a Part A State' by the Adaptation of Laws Order 1950 and the words 'Part A' were omitted by s 3 of Act 3 of 1951.

2. 'Government'

Section 3(23) of the General Clauses Act 1897 (General Clauses Act), also lays down that 'Government' or 'the Government' shall include both the Central Government and any State Government. It has been held that the expression 'Government' in s 3(23) of the General Clauses Act did not include the British Government.[52] It does not include a District Board or any local authority.[53]

Under the old section, a collector acting in the management of a *khas mehal,* the property of the Government, was held to be as much 'the Government', within the meaning of this section, as when he was exercising any other of the duties of his official position.[54]

It may be noted that under sub-s (4) of s 263A of the IPC, which was inserted by s 2 of the Indian Criminal Law (Amendment) Act 1895, as a result of the Vienna Convention, notwithstanding anything in s 17 the word 'Government' in ss 255 - 263A, includes any persons or persons authorised by law to administer executive government in any part of India and also in any part of Her Majesty's Dominion or in any foreign country.71

'Government', however, as defined in s 17 of the IPC, denotes more than the governor and his advisors; it denotes the person or persons authorised by law to administer executive government in any part of British India.[55]

50 Substitute by the AO 1950, for the original section.

51 The words and letter 'Part A', omitted by Act 3 of 1951, s 3 and Schedule.

52 *Jeramdas Vishendas v Emperor* AIR 1934 Sind 96 .

53 *Mahalingam v Reghunatha* AIR 1940 Mad 916 .

54 *Bajoo Singh v Queen-Empress* 26 ILR Cal 158 .

55 *Bhagwati Charan Shukla v Provincial Govt* , *CP and Berar*AIR 1947 Nag 1, (1947) Cr LJ Nag 994 .

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[56][S. 18.

"India".--

"India" means the territory of India excluding the State of Jammu and Kashmir.]

Comments

1. Legislative Changes

Before 1937 this section defined the word 'presidency' as denoting the territories subject to the government of a presidency. It was repealed by the Adaptation of Laws Order 1937.

The section was again inserted by the Adaptation of Laws Order 1950, as: 'The word 'State' denotes a Part A State or a Part C State, and the word 'State' denotes all the territories for the time being comprised within Part A States and Part C States'. The present section was substituted for it by s 3 of Act 3 of 1951 and the Schedule.

2. Territory of India

See s 1, *ante*.

3. Section not Unconstitutional

The validity of this section came to be examined before a Division Bench of the Andhra Pradesh High Court in *KRK Vara Prasad v Union of India* ,[57] and it was held that the power of Parliament to extend the Code to all states except State of Jammu & Kashmir is beyond question and the definition given in the section is not unconstitutional.

56 Substituted by the Act 3 of 1951, s 3 and Schedule, for the former section which was inserted by the AO 1950. The original s 18 was repealed by the AO 1937.

57 *KRK Vara Prasad v Union of India* (1980) 1 ALT 381 .

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General Explanations

S. 19.

"Judge".--

The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person,--

who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or

who is one of a body of persons, which body of persons is empowered by law to give such a judgment.72

Illustrations

(a) A Collector exercising jurisdiction in a suit under Act 10 of 1859, is a Judge.
(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment, with or without appeal, is a Judge.
(c) A member of a panchayat which has power, under Regulation VII, 1816, of the Madras Code, to try and determine suits, is a Judge.
(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another court, is not a Judge.

Comments

1. Scope

Under this section, the word 'Judge' denotes not only every person who is officially designated as a judge, but also every person who is empowered by law to give, in any legal proceedings, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive. The illustrations to the section would, however, show that a person other than the one who is officially designated as a judge, and who is empowered to give a definitive judgment, is a judge only when he is exercising jurisdiction in a suit or in a proceeding. So far as that suit or proceeding, revenue, civil or criminal is concerned, he is a judge, but he is not a judge when he has not the seisin of the case in which he can give a definitive judgment. This is obvious from the last words of the section under which a body of persons may come under the definition of 'Judge' when it is empowered by law to give a judgment.[58]

It may be stated broadly that what distinguishes a court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. When a question therefore arises as to whether an authority created by an Act is a court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Code it possesses all the attributes of a court.[59]73

2. Persons who are Judge

Judicial officers of district courts presiding over civil and criminal courts and judges of the High Courts and Supreme Court who give any definitive judgments in legal proceedings are obviously covered under the definition of 'Judge', however there are other authorities and officers who are found to be covered within this definition of 'Judge', as mentioned below:

(a) Magistrate

A member of a Bench of Magistrates being, for instance, individually incompetent, to deliver a definitive judgment, is, nevertheless, a judge, because the Bench of which he is a member, is so competent. But a magistrate is not a person officially designated as a judge, and he would be a judge within the section read with s 4(2), CrPC, only when he is exercising jurisdiction in a suit or other proceeding. He is not a judge when he has not the seisin of a case in which he can give a definitive judgment,[60] so that an affidavit sworn before him is not a legal affidavit.[61]

(b) Member of Panchayat Adalat/Village Panchayat

Every member of a panchayat adalat in Uttar Pradesh is a judge.[62] The same is true of a member of the village *panchayat* in Madhya Pradesh.[63]

(c) *Panch* or *Sarpanch*

A *panch* or *sarpanch* of a *panchayat* is a judge.[64] But only when he sits for deciding cases and not throughout the tenure of his office.[65]

(d) Village Police *Patel*

A village police *patel* deciding a case under s 14 of the Bombay Village Police Act 1867 is a judge.[66]

(e) Election Officer

An election officer empowered to remove names from the electoral rolls is a judge.[67]

(f) President of Union Board

President of a union board when he accepts or rejects a nomination paper gives a definitive judgment and is, therefore, a judge.[68]

(g) Manager under the Chota Nagpur Encumbered Estates Act 1876

A manager under the Chota Nagpur Encumbered Estates Act of 1876 is a judge while exercising the functions referred to in Pt 4 of the Act relating to the settlement of debts.[69]74

(h) Arbitrators

Unlike the Indian Arbitration Act 1940, now, under the Arbitration and Conciliation Act 1996, it is not required that the award of the arbitrator should be made rule of the court. The arbitral award is final and binding on the parties and persons claiming through them as per s 35 of the 1996 Act. The arbitral award, after the time for making an application for setting it aside under s 34 of the 1996 Act has expired, or such application having been refused, is enforceable under s 36 of the 1996 Act in the same manner as if it were a decree of the court. Thus now, there is no requirement under the 1996 Act for making an award, the rule of the court unlike the earlier Arbitration Act 1940. Thus the arbitral award, now, is a definitive judgment and the arbitrator unlike in the old Act, now seems to be covered under the definitions of a judge.

3. Persons who are not Judge

The following officers/authorities under different Acts are held not covered within the definition of 'Judge' under this section.

(a) Returning Officer

The decision of a returning officer scrutinising the nomination papers in connection with the election of the Managing Committee of a cane-growers' Co-operative Society under the Punjab Co-operative Societies Act 1961, cannot be called judgment in a civil proceeding or a judicial decision as commonly understood and he therefore does not act as a 'Judge' within the meaning of the section, when he gives a decision as aforesaid.[70]

The function of returning officer acting under s 36 of the Representation of Peoples Act 1951 is judicial in character, but he is not to act judicially in discharging it. The Returning officer deciding on the validity of a nomination paper is not a court for the purpose of s 195(1)(b) of the CrPC .[71]

(b) Revenue Officer

A revenue officer not empowered to administer oath while recording statements in the mutation

proceedings under ss 34 and 36 of the Punjab Land Revenue Act, who does not give any definitive judgment on the rights of the parties, is not a judge.[72]

The definition of 'Judge' in this section is for a special purpose and has no bearing on the question whether a particular officer belongs to the revenue department or the judicial department.[73]

(c) Commissioners

A commissioner appointed under the Public Servants (Inquiries) Act 1850 has to form his opinion upon legal evidence; he has been given the power to summon witnesses, administer oath to them and also to compel production of relevant documents. These may be some of the trappings of a judicial tribunal, but they cannot make the proceeding anything more than a mere fact finding inquiry. At the75 close of inquiry, the commissioner has to submit a report to the government regarding his finding on each one of the charges made. This is a mere expression of opinion and it lacks both finality and authoritativeness which are the essential tests of a judicial pronouncement. The opinion of the commissioner is not binding upon the government.[74] Therefore, a commissioner appointed under Public Servants (Inquiries) Act is not a 'Judge' within s 19 of the IPC .

4. 'Definitive Judgment'

'Definitive judgment' simply means a final judgment.[75] Illustration (d) to the section says that 'A magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another court, is not a judge'. No doubt, such a magistrate is empowered to give a definitive judgment in the other cases in which he is trying; still as he is not empowered to give a definitive judgment in the case in which he is only empowered to commit, he is not a judge for the purpose of that case.[76]

The definitions of the words 'Judge' and 'Court of Justice' in ss 19 - 20 of the IPC indicate that the pronouncement of a definitive judgment is considered the essential *sine qua non* of a court and unless and until a binding and authoritative judgment can be pronounced by a person or body of persons, it cannot be predicated that he or they constitute a court.[77]

5. 'Legal Proceeding'

In this section the expression 'legal proceeding' means a proceeding regulated or prescribed by law in which a judicial decision may or must be given.[78]

6. Act 10 of 1859--Illustration (A)

Act 10 of 1859 is an Act to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal. It has been repealed in the Chota Nagpur Division of Bengal (except as to the district of Manbhum and the Tributary Mahals) by the Chota Nagpore Landlord and Tenant Procedure Act 1879 (Bengal Act 1 of 1879); refer to the Chota Nagpur Tenancy Act 1908 (Bengal Act 6 of 1908), and in the rest of Bengal (except as to Calcutta, Orissa and the scheduled districts) by the Bengal Tenancy Act 1885 (8 of 1885). It is now in force in the district of Manbhum, in the Darjeeling district and in part of the Jalpaiguri district in Bengal and such parts of it as are not inconsistent with the provisions of Act 8 of 1885 which have been extended to the Orissa division are in force in that Division.

It has also been repealed in the Province of Agra (except as to certain Scheduled Districts) by the United Provinces Tenancy Act 1901 (2 of 1901), and in the Central Provinces by the Central Provinces Tenancy Act 1920 (1 of 1920).

7. Regulation VII of 1816

It has been repealed by the Madras Civil Courts Act 3 of 1873. Consequential amendment in illust (c) or its repeal is overdue.76

58 *Ram Chandra Modak v King Emperor* AIR 1926 Pat 214, p 217 .

59 *Virender Kumar Satyawadi v State of Punjab* AIR 1956 SC 153 .

60 *Ram Chandra Modak v Emperor* AIR 1926 Pat 214, 5 ILR Pat 110 .

61 *Bishan Lal v State* AIR 1954 HP 57 .

62 *Asharafi Lal v State* AIR 1952 All 306, (1951) All LJ 551, (1952) Cr LJ 621 .

63 *Kamla Patel v Bhagwan Das* 37 Cr LJ 294 .

64 *Prabhu Dayal v Milap Chand* AIR 1959 Raj 12, p 14 ; *Kishan Swarup v Brijendra Singh* (1961) 2 ILR All 682, (1961) All LJ 859, (1961) All WR 689 (HC), (1962) 2 Cr LJ 408 .

65 *Ranjit Singh v State* AIR 1956 All 134, p 135 .

66 *Emperor v Shankar Sayaji Dalvi* AIR 1938 Bom 439, 40 Cr LJ 116, 40 Bom LR 1106 .

67 *Hanumantha Rao v Lakshmayya* 1937 Mad WN 74 .

68 *SC Abboy Naidu v Kaniappa Chettiar* AIR 1929 Mad 175 ; *Sarvothamma Rao v Chairman, Municipal Council, Suddapet* AIR 1923 Mad 475 .

69 *Hamendra Nath Gupta v Emperor* AIR 1937 Pat 160, p 162 .

70 *Data Ram v Ved Prakash Chopra* AIR 1970 Punj 21, (1970) Cr LJ 67 .

71 *Virender Kumar Satyawade v State of Punjab* AIR 1956 SC 153 .

72 *Guman Singh, Tehsildar Ist Grade,Amritsar v Kartar Singh & Anor* (1989) 2 96 PLR 279.

73 *State of Madras v CS Rajgopala Ayyar* AIR 1956 Mad 613, (1956) Cr LJ 1330 .

74 *SA Venkataraman v Union of India & Anor* AIR 1954 SC 375 .

75 *Emperor v Shankar Sayaji Dalvi* AIR 1938 Bom 489 .

76 *Ramchandra Modak v King Emperor* AIR 1926 Pat 214, p 217 .

77 *Brajanandan Sinha v Jyoti Narain* AIR 1956 SC 66, (1956) Cr LJ 156 .

78 *SC Abboy Naidu v Kanniappa Chettiar* AIR 1929 Mad 175, p 176 .

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S. 20.

"Court of Justice".--

The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

Illustration

A panchayat acting under [79]Regulation VII, 1816, of the Madras Code, having power to try and determine suits, is a Court of Justice.

Comments

1. 'Court of Justice'

The word 'court' originally meant the King's palace, but subsequently acquired the meaning of (a) a place where justice is administered, and (b) the person or persons who administer it.[80]*Coke on Littleton and Stroud* defined the word 'court' as the place where justice is judicially administered. According to *Stephen*:

> In every court, there must be at least three constituent parts the actor, *reus* and *judex;* the actor or plaintiff, who complains of an injury done; the *reus,* or defendant, who is called upon to make satisfaction for it; and the judex, or judicial power, which is to examine the truth of the fact, and to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy.

Section 3 of the Evidence Act defines 'Court' as including all judges and magistrates, and all persons, except arbitrators, legally authorised to take evidence. This definition however, has been held to be not exhaustive but framed only for the purpose of the Evidence Act and is not to be extended where such an extension is not warranted.[81] The term 'Court' in s 195 of the CrPC is not restricted to a 'Court of Justice' as defined in the IPC .[82]

The definition of expression 'Court of Justice' is not a definition of the expression 'court' as used in the CrPC . The expression 'court' in ordinary parlance is a generic expression and in the context in which it occurs may mean a 'body or organisation' invested with power, authority or dignity.[83]

Reading this section along with s 19, it is clear that in order to constitute a court in the strict sense of the term, an essential condition is that it should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness, which are the essential tests of a judicial pronouncement. The pronouncement of a definitive judgment is the essential *sine qua non* of a court and unless and until a binding and authoritative77 judgment can be pronounced by a person or body of persons, it cannot be predicted that he or they constitute a court.[84]

2. The Test of a Judicial Tribunal

The test of a judicial tribunal has been laid down in *Cooper v Wilson* ,[85] as follows:

'A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites:

(1) the presentation (not necessarily orally) of their case by the parties to the disputes;

(2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties on the evidence;
(3) if the dispute between them is a question of law, the submission of legal argument by the parties; and
(4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed questions of law.'

This view has been adopted by the Supreme Court in India.[86]

3. Distinction between Court and a Quasi-judicial Tribunal

It is a familiar feature of modern legislation to set up bodies and tribunals, and entrust to them work of a judicial character, but they are not courts in the accepted sense of that term, though they may possess, as observed by Lord Sankey LC, in *Shell Co of Australia v Federal Commr of Taxation* ,[87] some of the trappings of a court. The distinction between courts and tribunals exercising quasi-judicial functions is well established, though whether an authority constituted by a particular enactment falls within one category or the other may, on the provisions of that enactment be open to argument.

Though all 'Courts' are tribunals all the 'Tribunals' are not courts. The distinguishing feature between the court and tribunal or special forum is that the court is constituted by a state as a part of the normal hierarchy of courts of civil judicature maintained by the state under its constitution exercising judicial power of the state except those which are excluded by law from their jurisdiction, whereas a tribunal is constituted under a special Act to exercise special jurisdiction in order to decide certain controversy arising under special laws.[88]

It may be stated broadly that what distinguished a court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. To decide in a judicial manner78 involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it.

And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question, therefore, arises as to whether an authority created by an Act is a court as distinguished from a quasi-judicial tribunal, what has to be decided is whether, having regard to the provisions of the Act, it possesses all the attributes of a court.[89]

79 Repealed by the Madras Civil Courts Act 1873.

80 *Halsbury's Laws of England,* vol 10, fourth edn, Butterworths, London, p 313, para 701.

81 *Brajnandan Sinha v Jyoti Narain* AIR 1956 SC 66, p 69, (1956) Cr LJ 156 ; *Queen-Empress v Tulja* 12 ILR Bom 36, p 43 ; *Attorney-General v Moore* LR 3 Ex D 276.

82 Re *Venkatachala Pillai* 10 ILR Mad 154, p 157; Re *Nanchand Shivchand* 37 ILR Bom 365; *Bajaji Appaji Kote v Emperor* AIR 1946 Bom 7, p 11 ; *Raghoobuns Sahay v Kokil Singh* 17 ILR Cal 872, p 875 ; *Nand Lal Ganguli v Khetra Mohan Ghosh* AIR 1918 Cal 932, p 933, **but see** per contra *Emperor v Hayat Fateh Din* AIR 1948 Lah 184, p 188 .

83 *Ramrao v Narayan* AIR 1969 SC 724 .

84 *Brajnandan Sinha v Jyoti Narain* AIR 1956 SC 66, p 70 ; *SA Venkataraman v Union of India* AIR 1954 SC 375 ; *Maqbool Hussain v State of Bombay* AIR 1953 SC 325 ; *Bharat Bank Ltd v Employees of Bharat Bank Ltd* AIR 1950 SC 188 ; *Cooper v Wilson* (1937) 2 KB 309 ; *Shell Co of Australia v Federal Commr of Taxation* (1931) AC 275 ; *Huddart Parkar & Co v Moorehead* (1909) 8 CLR 330 ; *Rex v Electricity Commrs* (1924) 1 KB 171 ; *Krishna Mishra v State of Uttar Pradesh* 1976 All Cr C 209 .

85 *Cooper v Wilson* (1937) 2 KB 309, p 340 .

86 *Bharat Bank Ltd v Employees of Bharat Bank Ltd* AIR 1950 SC 188 ; *Maqbool Hussain v State of Bombay* AIR 1953 SC 325 .

87 *Shell Co of Australia v Federal Commr of Taxation* (1931) AC 275, p 286 .

88 *Union of India v M/s Mysore Paper Mills Ltd* AIR 2004 Kant 1 (FB) .

89 *Virinder Kumar Satyawadi v State of Punjab* AIR 1956 SC 153, p 157 ; *Shell Co of Australia v Federal Commr of Taxation* (1931) AC 275 ; *R v London County Council* (1931) 2 KB 215, *Cooper v Wilson* (1937) 2 KB 309 ; *Huddart Parkar& Co v Moorehand* (1909) 8 CLR 330 ; *Rola C v Commonwealth* (1944) 69 CLR 185 ; *Bharat Bank Ltd v Employees of Bharat Bank Ltd* AIR 1950 SC 188 .

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Chapter II

General Explanations

S. 21.

"Public Servant".--

The words "public servant" denote a person falling under any of the description hereinafter following; namely:--

90[* * *]

Second--	Every Commissioned Officer in the Military, 91[Naval or Air] Forces 92[of India];
93[*Third--*	Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;]
Fourth--	Every officer of a Court of Justice 94[(including a liquidator, receiver or commissioner)] whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties;
Fifth--	Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;
Sixth--	Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;
Seventh--	Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;
Eighth--	Every officer of 95[the Government] whose duty it is,

	as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;
Ninth--	Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of [1][the Government], or to make any survey, assessment or contract on behalf of [2][the Government], or to execute any revenue process, or to investigate, or to report, on any matter affecting the pecuniary interests of [3][the Government], or to make, authenticate or keep any document relating to the pecuniary interests of [4][the Government], or to prevent the infraction of any law for the protection of the pecuniary interest of [5][the Government] [6][* * *];
Tenth--	Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;
[7][*Eleventh*--	Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;]
[8][*Twelfth*--	Every person--

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;

(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government Company as defined in section 617 of the Companies Act, 1956 (1 of 1956).]

Illustration

A Municipal Commissioner is a public servant.

Explanation 1.--Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.--Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.80

[9][*Explanation 3*--The word 'election' denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.]

[10][* * *]

STATE AMENDMENT

Rajasthan--In section 21 of the Indian Penal Code 1860 (45 of 1860), in its application to the State of Rajasthan, after clause twelfth the following new clause shall be added, namely--

"*Thirteenth*--Every person employed or engaged by any public body in the conduct and supervision of any examination recognised or approved under any law.

Explanation--The expression "Public Body" includes--

(a) a University, Board of Education or other body, either established by or under a Central or State Act or under the provisions of the Constitution of India or constituted by the Government; and
(b) "a local authority."[11]

Comments

1. Legislative Changes

The first clause, which has now been omitted by the Adaptation of Laws Order 1950, read as:

'Every covenanted servant of the Queen'.

The Criminal Law Amendment Act 1958, had added a twelfth clause creating an additional class of public servants; it had also added another explanation to define the expression, 'corporation engaged in any trade or industry', used in the new twelfth clause. The government felt that for dealing with the evil of corruption in public services, it was necessary to bring within the scope of the anti-corruption law, the employees of statutory trading corporations and government companies as defined in s 617 of the Companies Act 1956. The original cl 12 was substituted by Act 40 of 1964 and as a consequence thereof, expln 4 was also omitted besides replacing it by the present clause.

The other changes are noted in the footnotes to the section.

2. Scope and Effect of Amendment

The process by which a part of the ninth clause was deleted and it was re-enacted with some modification in the form of sub-cl (a) of the twelfth clause and the original twelfth clause was also deleted and re-enacted in the form of sub-cl (b) of that clause, was a process to which the principle contained in s 8 of the General Clauses Act 1897, would clearly be attracted. Section 8 contemplates that the principle contained therein applies in a case not only where the whole enactment has been repealed and re-enacted with or without modification, but also where any provision of the former enactment is re-enacted. In the Anti-Corruption Laws (Amendment) Act 1964 there is no indication of an intention contrary to the principle contained in s 8 of the General Clauses Act. On the contrary, the intention positively appears to be that the legislature wanted the amendments to several enactments to be carried out with a view to make adequate provisions relating to prevention of corruption. It could not be the intention of the Legislature while enacting the Anti-Corruption Laws (Amendment) Act that when s 21 of the IPC was being amended by providing that every person who was in the service or pay of the Government was to be a public servant, that amendment was not to ensure for working out the provisions of the Prevention of Corruption Act.[12]82

The crucial date for the purpose of attracting the provisions of the Prevention of Corruption Act 1947[13] and West Bengal Criminal Law Amendment (Special Courts) Act 1949 is whether the offence has been committed by a public servant within the definition of s 21 of the IPC, is the date of the commission of the offence when the person and object arraigned must be a public servant.[14] Having regard to the Preamble of the Prevention of Corruption Act 1947[15] and the IPC, there can be no doubt that the Act was a statute supplement to the IPC . Therefore, the definition of 'Public Servant' borrowed from s 21 of the Code must be read into s 2 of the Act, not only at the time when it was borrowed, *i.e.* 1947, but even at the material date when the offence is committed.[16] Members of

Parliament and State Legislature are public servants liable to be prosecuted for offence under the Prevention of Corruption Act but they cannot be prosecuted for offences under ss 7, 10 - 11 and 13 thereof because of want of an authority competent to grant sanction thereto. The Supreme Court entertained the hope that Parliament will address itself to the task of removing this lacuna with due expedition.[17]

3. Analogous Law

The term 'public servant' bears some analogy to the term 'servant of government' in s 14 of the IPC which states: 'The words 'servant of government' denote any officer or servant continued, appointed or employed in India by or under the authority of government'.

4. 'Public Servant'

(a) Relevance of Definition

The expression 'public servant' denotes only a natural person and not a corporate body.[18] The definition of 'public servant' is very important, for the entire ch IX[19] of the Code formerly dealt with offences by or relating to public servants, and ch X[20] deals with contempts of the lawful authority of public servants. The definition is also important for the purposes of the CrPC as cl (a) of the first proviso to s 200 of the CrPC enacts that when a written complaint is made by a court or a public servant acting or purporting to act in the discharge of his official duties, the complainant is not required to be examined, as in the case of a conciliation officer who is a statutory public servant by virtue of s 11(6) of the Industrial Disputes Act 1947, and who files a complaint, of an offence under the said Act, in a competent court.[21]Again, if a person who is a public servant is to be prosecuted for an offence committed by him while acting or purporting to act in the discharge of his official duty, prior sanction as required by the terms of s 197 of the CrPC is essential before a court can take cognizance of the offence. Again, if a person who is a public servant is to be prosecuted for an offence committed by him while acting or purporting to act in the83 discharge of his official duty, prior sanction as required by the terms of s 197 of the CrPC is essential before a court can take cognizance of the offence.[22]

(b) This Section Describes but Does Not Define Guilty Servants

The section does not actually define public servants, but describes them only by enumeration, which itself is merely illustrative and by no means exhaustive. But the framework of the section would indicate that though the various items are illustrative and not exhaustive, the wordings of the different heads, especially the ninth, tenth and twelfth are so elaborate and comprehensive that it virtually amounts to an exhaustive definition.[23]

The too comprehensive nature of the description of 'public servant' was objected to at the time of the draft, but the Indian Law Commissioners defined it, adding:

> Supposing the several descriptions he (Mr Norton) specifies to be as comprehensive as he takes them to be, yet it does not appear to us that they are faulty in this respect, with reference to the provisions in the two chapters relating to public servants in the application of which recourse will be had to them. We think they will be found sufficiently distinct and definite for the purpose they are to serve. We have no apprehension that there will be any difficulty in determining who are positively excluded as not falling under any of the descriptions in clause 14 (Penal Code.)[24]

(c) Public Servant Denotes Natural Person

The expression 'public servant' denotes only a natural person. A municipal corporation cannot be a public servant.[25]

(d) Public Servant to be a Servant

A public servant must, generally speaking, be a servant. The word 'servant' has come for judicial interpretation, and it has been held to signify any person duly appointed and invested with authority to administer any part of the executive power of the government or to execute any other public duty imposed by law, whether it is judicial, executive or ministerial.

A *mukhia* was held not to be a government servant as he is not a servant at all,[26] but in a case under the Representation of the People Act 1951, the Supreme Court has held that a headman or *mukhia* is a government servant, within the meaning of s 123(8) of that Act.[27] The *sarpanch* of a *Gram Panchayat* also falls within the definition of public servant.[28]

In *Goolbai Motabhai v Pestonji Cowasji* ,[29] Wadia J, of the Bombay High Court observed:

> A servant is a person who voluntarily agrees, whether for wages or not, to subject himself at all times during the period of his service to the lawful orders and directions84 of another in respect of the work to be done by him. It is that other person who is entitled in law to give orders and to have them obeyed. The relationship, therefore, exists only between persons of whom the one has the control of the work done by the other, and it does not depend merely on the mode of payment for service or for the time for which services are engaged, or the nature of those services or on the power of dismissal, though these are certainly matters which the court may take into consideration in assessing the relationship. The test, therefore, is the right of control which a person has in the manner in which the other does the work.

A *mukhia* cannot be said to be under the control either of the State Government or the Central Government or any of the local authority or a *nyaya panchayat* and does not conform to the description of a servant as given by Justice Wadia. The mere fact that a *mukhia* like the owner or occupier or the agent, as the case may be, has to convey some information, would not make him a government servant.[30] The view expressed by the Supreme Court in the above cases is not of general applicability and is confined to cases governed by the Representation of the People Act 1951.

(e) Whether Payment of Salary Determines Status

For a person to be a public servant it is not necessary that he should receive any salary or emoluments for his work. 'Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant and performs these duties, accepts those responsibilities, and is recognised as filling the position of public servant, must be regarded as one'.[31] Thus, a peon who was remunerated by a fee on processes served by him in a collector's court,[32] and a candidate entertained without any pay in the *tahsil* office for learning work in the hope and expectation of eventually being taken on the staff,[33] would both be public servants. But in order to be a public servant, the person should not only be performing the duties of a public servant, but should also be recognised as filling that position. If this factor is missing, the mere fact that at the request of one of the clerks in the deputy commissioner's office an unpaid candidate is assisting him in some work connected with the duties of an arms clerk, is not sufficient to make him a public servant.[34]

(f) Must be in Charge of Public Duty though Not Appointed by the Government

It is essential that a public servant must be in charge of some public duty.[35] Public duty is nowhere defined in the IPC, and no general definition of the word would be complete. It may, however, be said that all persons having to discharge, delegated functions of the administration of a State are public servants.[36] The duty imposed upon such a public servant may be exalted or menial, but so long as he is discharging a public duty, he is a public servant. It matters little that there is some flaw in his appointment. As long as he has, in fact, 'taken the duties and responsibilities belonging to the position of a public servant, performs those duties, accepts the85 responsibilities, and is recognised as filling the position of a public servant', he would be a public servant.[37]

Another important point to be noted is that a public servant need not necessarily be appointed by the government. This is obvious from expln 1 and from the illustration to the twelfth clause, in which a municipal commissioner is declared to be a public servant, though he is elected by the suffrage of his constituency subject only to the approval of or confirmation by the government. This illustration however, no longer appears to be wholly valid in view of the decision of the Supreme Court in *Ramesh Balkrishna Kulkarni v State of Maharashtra* .[38]

An extra-departmental branch postmaster may be a 'public servant' within the meaning of this section.[39] A person, who is temporarily carrying on the duties of a particular office, say that of a branch post-master, purely as a nominee of the latter without any authority being given by government by a letter of appointment, cannot be regarded as a public servant within the meaning of this section. He cannot be said to be in actual possession of the situation of the holder of that office merely from the fact that at the material time he was performing all the functions attached to it. As there is absolutely no appointment by government in favour of such a person, no question of any legal defect in his right to hold the situation arises. Explanation 2 has, therefore, no application to such a case.[40]

Similarly, where the son of an extra department agent of a branch post office attended to the duties of his father without himself being appointed or recognised as such by the department it was held that he was not a public servant and did not come within the mischief of expln 2 to the section.[41]

The appellant *R* was not formally appointed to work in the pass section but while holding the post of *khalasi* drawing pay from the railway carriage section, his services were actually utilised in the pass section of the works manager. He was, therefore, in actual possession of the situation of a public servant, and in view of expln 2 to s 21 would be 'public servant', notwithstanding the defect in his right to hold that situation.[42]

(g) Consideration for Determination

In order to determine whether a person is a public servant or not, the first thing to be seen is whether he is a servant, If he be found to be servant, then it has to be seenwhether he is staturory public servant or falls within any of the clauses enumerated in this section. On referring to these clauses it will sometimes be found that a give case is covered by more than one clauses which is quite possible, for the clauses are not mutually exclusive and exhaustive, and only a casual reference to them is sufficient to show that a case might conceivably fall within two or more clauses at the same time. But the fact that a man is a public servant within the meaning of more than one clause does not affect his status, if it is once so established.86

5. Statutory Public Servants

Statutory public servants are those who have been declared to be public servants by any statute. The following are the specimens of some such public servants:

(i) Delegates appointed under the Parsi Marriage and Divorce Act 1865.
(ii) Protectors and medical inspectors of immigrants under the Indian Emigration Act 1908.
(iii) Registrars under the Indian Registration Act 1908.
(iv) Judges, assessors, officers and surveyors under the Merchant Shipping Act 1880.
(v) Bailiffs and appraisers appointed under the Small Cause Courts Act 1882.
(vi) Persons authorised to hear appeals relating to licences for steam boilers, *etc.*, under the Burma Steam-boilers *etc.* Act 1882.
(vii) Presidents of a board appointed to investigate charges against pilots under the Burma Pilots' Act 1883.
(viii) Surveyors of Steamships and investigators of explosions thereon under the Inland Steamvessels and Steamship Acts of 1884.
(ix) Registrars under the Births, Deaths and Marriages Registration Act 1886.

(x) *Kanungos* and *patwaris*under the NW Provinces and Oudh Act 1889.
(xi) Examiners, officers and servants of the University of Allahabad by s 18 of the Allahabad University Act 1887.[43]
(xii) Councillors, *etc.*, of the Bombay (City of) Municipality, under Bombay Act (3 of 1888), s 521 .
(xiii) Prisoners who have been appointed officers of prisons, (convict warders and overseers) under the Prisons Act (9 of 1894), s 23 .[44]
(xiv) Inspectors of mines under the Indian Mines Act (8 of 1901),[45] s 4 .
(xv) Officers and servants employed by the trustees under the Victoria Memorial Act (10 of 1903), s 4 .
(xvi) Census officers, under Act 14 of 1880,[46] s 4 .
(xvii) Coroners of Presidency Towns under Act 4 of 1871, s 5 .
(xviii) Emigration officers, under Act 7 of 1871,[47] s 14 .[48]
(xix) Managers of encumbered estates.[49]
(xx) Factory inspectors, under Act 15 of 1881,[50] s 3 .
(xxi) Forest officers under Act 7 of 1878,[51] s 72 .87
(xxii) Servants and officers of the Indian museums, under s 14 of Act 22 of 1876.[52]
(xxiii) Officers executing warrants of marine courts, under s 15 of Act 4 of 1875.
(xxiv) Municipal commissioners and servants.[53]
(xxv) A Municipal Councillor, is a public servant within the meaning of s 2(c) of the Prevention of Corruption Act 1988 and s 87 of the Rajasthan Municipalities Act 1959.[54]
(xxva) A member of the Municipal Board is a public servant within the meaning of s 2(c) of the Prevention of Corruption Act 1988 and s 87 of the Rajasthan Municipalities Act 1959.[55]
(xxvi) Officers and servants of local and district boards.[56]
(xxvii) Canal officers appointed under s 14 of Pegu and Settang Canal Act (2 of 1881).
(xxviii) Embankment officers, under s 2 of Act 15 of 1865.
(xxix) Delegates of Parsi matrimonial courts under s 5 of Act 19 of 1873 and s 8 of Act 8 of 1882.
(xxx) Pound-keeper under s 6 of Act 1 of 1871.
(xxxi) Railway servants under s 27 of Act 4 of 1879.
(xxxii) Telegraph officers of a private company under s 18 of Act 1 of 1876.
(xxxiii) Rangoon Port Commissioners, their officers and servants under s 64 of Act 15 of 1879.
(xxxiv) Sanitary inspectors under s 12 of the Bengal Food Adulteration Act 1884;[57] or s 19 of the Bengal Food Adulteration Act (6 of 1919).
(xxxv) Special judge under Jhansi Encumbered Estates Act under s 50 of Act 7 of 1880.
(xxxvi) Judge and assessors of court of survey and ship surveyors, under s 24(c) of Madras Act 5 of 1879.
(xxxvii) Head of a village for purposes of Madras Abkari Laws Amendment Act under s 17 of Act 15 of 1872.[58]
(xxxviii) Conciliation officers under s 11(6) of the Industrial Disputes Act (14 of 1947.)[59]
(xlix) Clerks appointed under the Broach Thakurs' Relief Act, whose duty it was to receive rents and execute revenue processes.[60]88

(xl) Sarpanch of *Gram Panchayat* holding office under Madhya Bharat Village Panchayat Act.[61]
(xli) A bill collector under s 358 of the Madras District Municipalities Act (5 of 1920).[62]
(xlii) A *Karkun* employed, to execute a revenue process.[63]
(xliii) Central Vigilance Commissioner and staff of the Central Vigilance Commission are public servants within the meaning of s 21 of the Indian Penal Code (*vide*Central Vigilance Commission Act 2003, s 16).
(xliv) Chairperson, Members, officers and employees of a Cyber Appellate Tribunal are public servants within the meaning of s 21 of the Indian Penal Code (*vide*Information Technology Act 2000, s 82).
(xlv) Protection officers and members of services acting under the provisions of the

> Protection of Women from Domestic Violence Act 2005 are public servants within the meaning of s 21 of the Indian Penal Code (*vide*Protection of Women from Domestic Violence Act 2005, s 30).

Under the Civic Guard Ordinance, 8 of 1940, until such time as the Civic Guard has been legally called out for duty and the order calling them out for duty has been notified in the *Calcutta Police Gazette*, the members of the Civic Guard are merely empowered to perform duties which an ordinary citizen may perform, and are not public servants.[64]

6. Clause 2--Commissioned Officers in Military, Naval or Air Forces

The word 'Forces' seems to include not only the regular forces but also other forces such as the auxiliary force, volunteer forces and the militia.[65]

But a servant of the soldier's board which is primarily a private organisation though patronised by the government, is not a public servant.[66]

7. Clause 3--'Every Judge'

The word 'Judge' is defined in s 19 .[67] A *panch* is a judge within the meaning of that term under s 19 of the IPC . A judge is also a public servant as defined in s 21 of the said Code. Under s 19 any one of the body of persons, which is empowered by law to give a definitive judgment is a judge. A *Sarpanch* is one of the *Pancha*sunder the Rajasthan Panchayat Act and can, therefore, be said to be a judge.[68] A *sarpanch* and an *upsarpanch*are deemed to be public servants by virtue of s 145 of the Hyderabad Gram Panchayats Act (17 of 1956).[69]*Sarpanch* of *Gram Panchayat* is a public servant even in Bihar.[70] The president of a village *panchayat* in Madras is a judge and therefore a public servant.[71]89

However, an MLA would not be a public servant within the meaning the expression in cl (3) of s 21 .[72]

8. Meaning of 'Officer'

The meaning of the word 'Officer' which has been used in cll 4, 8, 9-10 of this section has come to be considered in several cases. In *Reg v Ramajirao Jivbajirav* ,[73] the case before the court concerned an *Izaphatdar*, that is a lessee, of a village who had undertaken to keep an account of its forest revenue and pay a certain proportion to the government, keeping the remainder for himself. The question for consideration was whether he was an 'Officer' within the meaning of this clause. Justice West, observed:

> We think that the word 'Officer' there means some person employed to exercise to some extent and in certain circumstances, a delegated function of Government. He is either himself armed with some authority or representative character, or his duties are immediately auxiliary to those of some one who is so armed.

Accordingly the court came to the conclusion that *Deshmukhs* and *Deshpandes* would be sufficiently within the meaning of the clause, they being appointed to perform for the state a portion of its functions or to aid those who were its active representatives, but not so an *Izaphatdar* or the lessee as he was not an officer, but a mere contractor and there was no delegation to him of any authority for coercion or interference, nor was he an assistant appointed to help anyone who was vested with such authority. In *Nazaimuddin v Queen* ,[74] it was held that an 'officer in the service of pay of government' within the terms of this clause is one who is appointed to some office for the performance of some public duty, and that in this sense a peon attached to the office of a superintendent of the salt department would come within the clause. In *Ismail Mohamed Hajee v King* ,[75] the head clerk to the controller of prices has been held to be a 'public servant' within the meaning of r 2(9) of Defence of

Burma Rules.

In *Ahad Shah v Emperor* ,[76] it was pointed out that the expression 'Officer' is not to be restricted to its colloquial meaning of a commissioned or non-commissioned officer; it means a functionary or holder of some 'officium or office. The office may be one of dignity or importance; it may equally be humble. But whatever its nature, it is essential that the person holding that office should have in some degree delegated to him certain functions a government.

True Test for Determination of Officer of Government

Reviewing the case-law on the subject, their Lordships of the Supreme Court held that:[77]

> The true test, therefore, in order to determine whether a person is an officer of the government, is: (1) Whether he is in the service or pay of the Government, and (2) whether he is entrusted with the performance of any public duty. If both these requirements are satisfied it matters not the least what is the nature of his office, whether the duties he is performing are of an exalted character or very humble indeed.

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The changes made in the definition of public servant by the subsequent Amendment Act 40 of 1964 are, however, to be kept in view before following the below mentioned ratio of this decision.

> If, therefore, on the facts of a particular case the court comes to the conclusion that a person is not only in the service or pay of the government but is also performing a public duty, he has delegated to him the functions of the government or is in any event performing duties immediately auxiliary to those of some one who is an officer of the government and is therefore 'an officer' of the government within the meaning of section 21(9),Penal Code.

Applying this test, it was held that a person who is employed as a metal examiner known as chaser in the railway carriage workshop, and is working under the works manager who is certainly an officer of the government and the duties which he performed are immediately auxiliary to those of the works manager, is a public servant within the meaning of s 21(9) .[78]

A chartered accountant who is directed by an order of the Central Government to investigate into the affairs of an insurance company under s 33(1) of the Insurance Act does not *ipso facto* become an officer. There is no office which he holds. He is not employed in service and, therefore, the definition under this clause does not apply to him, even if he is to get some remuneration for the work he is entrusted with.[79] The person, to be an officer, must hold some office. The holding of office implies a charge of duty attached to that office.[80]

9. Clause 4--Officers of a Court of Justice, Liquidator, Receiver, Commissioner, *etc.*

As has been stated in *Bacon's Abridgment*,[81] in the article headed 'Of the Nature of an Officer and the Several Kinds of Officers'.

> The word 'officium' principally implies a duty, and in the next place the charge of such duty; and that it is a rule that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it is an officer.

There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices; such as an agreement to make hay, herd a flock, *etc*; which differ widely from that of steward of a manor' *etc*.[82]

A *nazir* has authority to delegate the execution of warrants of arrest,[83] and a peon acting under such delegation, is a public servant within the meaning of this clause.[84] A sales officer of a co-operative society, whose duty is to take property in execution of decree,[85] is a commissioner appointed by a court to divide the properties by metes91 and bounds as a result of a preliminary decree for partition,[86] and a *mukaddam* whose duty is to report the commission of certain offices under the IPC,[87] have been held to be public servants within the meaning of this clause.

Payment of wages is not the test.[88] Thus in *Queen v Ram Kanto Das* ,[89] a supernumerary collectorate peon, whose sole remuneration was the amount received as fees on such occasions as he was entrusted with the service of processes, was deputed, on 21 June 1871, to keep order in the special sub-registrar's office for which duty he was to get no remuneration at all. It was held by Ainslie and Paul JJ, that the peon was a public servant while keeping order in the special sub-registrar's office. A candidate peon*, i.e.*, a person who does not get pay or remuneration but who has a chance of being appointed as a process-server, when entrusted with a service of warrant for attachment by the *munsif* is a public servant within the meaning of s 21(4) as he is specially authorised by the *munsif* and also under s 21(9) as he has accepted the duties and responsibilities of executing the warrant.[90] A person in the position of a peon may be a public servant,[91] but labourers or menial servants employed to do work of labour on account of the government are not officers and do not fall within the definition of 'public servant' in this section. A carter employed by the government is not a public servant.[92]

A receiver in insolvency has been held to be public servant;[93] so is a commissioner appointed by a civil court.[94] But a commissioner appointed to seize books of accounts by a civil court has been held not to be a public servant as such appointment is without jurisdiction.[95]

10. Person 'Specially Authorised' by Court of Justice

This clause clearly distinguishes between the person who is an 'Officer of a Court of Justice' and a person who is not: the latter is not a 'Public servant' within the meaning of the section unless he is 'specially authorised' by a court of justice to perform the duties of an officer of a court of justice (for the meaning of the term 'officer', refer above (no 8), and for definition of court of justice refer to s 12).

When a person who has no general power to execute a judicial process is authorised by a court to execute the same, he is 'specially authorised' within the meaning of the section.[96] The words 'specially authorised' obviously imply that the92 delegation of authority is (a) legal; (b) by a person who himself possesses the authority to authorise another;[1] and (c) to a person who is a ministerial officer as against a judicial officer.[2] Again, the authorisation must be express, though in certain cases it may even be implied.[3] The question whether the authority is or is not properly exercised is immaterial so long as it is clothed with the legality necessary to afford protection to the public servant.[4]

Commissioners appointed by civil court under the provisions of the Code of Civil Procedure 1908 are public servants.[5]

11. Clause 5--Jurymen, Assessors and Panchas

Jurors, assessors and *panchas,* when engaged in the discharge of their duties, are public servants. The *sarpanch* of *gram panchayat* has been held to be a public servant.[6]Under s 3(1) of the Punjab Gram Panchayat Act also, *panch* and *sarpanch* of a *gram panchayat* are public servants.[7] Members of a *panchayat* are public servants under cl 3 also (refer to notes under that clause). An assessor of an insurance company is, however, not a public servant as defined by this section[8] unless he is in the

regular appointment of a nationalised insurance company.

12. Clause 6--Arbitrators and Commissioners

In the case of a reference to a person 'to whom any cause or matter has been referred for decision or report,' the 'cause or matter' must be one in controversy.[9] It has been held that an arbitrator appointed by parties to a proceeding under s 145 of the CrPC, 1898, is not an arbitrator within this definition.[10] A person appointed as an arbitrator in pursuance of an arbitration clause in an agreement between the Central Government and a private party is not a public servant under the provisions of this section.[11] A commissioner appointed without jurisdiction can also not be a public servant.[12] For the application of this clause, the person should be a referee or an appointee of the court to whom some subject-matter of the case is referred for decision or report[13] and whose appointment is permissible under the law and is within the jurisdiction of the court.[14]93

13. Clause 7--Persons Empowered to Place or keep any Person in Confinement

Convict warders who, under the jail rules, are empowered to keep persons in confinement fall under the definition of public servant under this clause.[15] Policemen are empowered to place persons in confinement and are, therefore 'public servants' under this clause.[16] A police officer submitting a report under s 173(2), CrPC disclosing an offence under the Essential Commodities Act is undoubtedly a public servant within s 21 of the IPC .[17] But a villager assisting a headman in the discharge of his duties and required to bring an accused person into a police station in arrest is not a 'public servant' within the meaning of this section.[18] The deputy commissioner of police, special branch, Delhi, is a public servant.[19] An MLA is not a public servant within the meaning of cl (3) or cl (7) of s 21, IPC .[20]

14. Clause 8--Officers Preventing Offences, etc

Persons holding office by virtue of which it is their duty to: (a) prevent offences, (b) to give information of offences, (c) to bring offenders to justice, or (d) to protect the public health, safety or convenience, are declared to be 'public servants' under this clause. The term 'officer' has been explained in above.

One of the duties of the *mukaddam* is to report the commission of certain offences under this Code and he, therefore, falls within the definition of 'public servant'.[21] The clause would include forest officers, officers of the salt, excise or opium departments, or indeed, of any department whose duty it is to protect the interests of their department by preventing the commission of an offence against it. A *kotwal* is a public servant.[22]

The Bombay High Court has held that the duties of a *kotwal* certainly relate to bringing the offenders to justice, to protect public health, safety and convenience. The post of a *kotwal*, therefore, would fall under cll (8) or (12)(a) of s 21 of the Indian Penal Code and it must be held that the *kotwal* is a public servant within the meaning of this section.[23]

15. Clause 9--Other or Miscellaneous Officers of the Government

This clause includes officers whose business it is to care for the pecuniary interests of the Government *e.g.*, a surveyor employed by a collector in the *khas mehal* department,[24] and any person appointed to some office for the performance of some public duty.[25] Although the position is different under the ninth clause as the words 'by the Government' did not follow the words 'performance of any public duty'94 although at every other appropriate place, the word, 'Government' was to be found in the ninth clause. The omission of these words shows that the clause was wider when it came to the case of an officer who was remunerated by fee or commission for the performance of any public duty and it was not necessary that the remuneration by way of fee or commission should be paid by the Government as is now necessary under sub-cl (a) of cl 12 after the amendment.[26] The driver of the roadways bus, charged with the care and maintenance of the vehicle

in his charge, is a public servant within the meaning of the first part of cl 9. In any case he is covered by the second part of the clause, (sub-cl (a) of cl 12 after the 1964 Amendment) even though he is a Government employee in the commercial undertaking of a State Government for he is in the service or pay of that Government entrusted with the performance of a public duty.[27] A person appointed as an examiner by the university even if he is a lecturer of a Government college is not an officer and therefore not a public servant within s 21, cl 9.[28]

16. Persons held to be Public Servants under Clause 9

A person appointed to be a public prosecutor under s 24, CrPC[29] a teacher in the service of the Government,[30] a canal mate,[31] a PWD *Lascar*,[32] a minister of state,[33] the chief minister of a State,[34]*talayari* while assisting the village officer in the matter of the collection of the *kist*,[35] a *lambardar* collecting land revenue,[36] a toll collector and his servant employed under s 11 of the Bombay Tolls on Roads and Bridges Act 1875,[37] a head clerk in the supply depot whose duty is to put up bills to his officers,[38] a clerk in a government collectorate,[39] a sub-inspector of police belonging to the fingerprint bureau,[40] and *patwaris* and other minor officials who prepare maps and plans of rural areas for purposes of assessment of land revenue,[41] have all been held to be public servants within the meaning of this section.

A lady health visitor, in the service and pay of the Government, is a public servant employed in connection with the affairs of the State though the health center where she works is run by a municipal committee.[42]95

17. Railway Servants

(a) Position under the Railways Act, 1989

The Railways Act 9 of 1890 has been repealed and replaced by the Railways Act 1989 (Act 24 of 1989). Section 2(34) of the new Act defines 'railway servant' as follows:

> ...
>
> (34) "Railway servant" means any person employed by the Central Government or by a railway administration in connection with the service of a railway; including member of the Railway Protection Force appointed under clause (c) of sub-section (1) of section 2 of the Railway Protection Force Act, 1957 (23 of 1957);

Sub-section (2) of s 197 of the Railways Act 1989 supplements the above definition of 'Railway servant' and runs as follows:

> ...
>
> (2) For the purposes of sections 7, 24, 113, 146, 172 to 176 and 188 to 190, the expression "railway servant" includes a person employed under a railway in connection with the service thereof by a person fulfilling a contract with the railway administration.

(b) Railway Servant Not-necessarily be Government Servant

Further, despite the nationalisation of railways, the Railways Act 1989 contemplates that a railway can still be owned by persons other than government. Sub-section (20) of s 2 of this Act defines 'government railway'. Sub-section (25) defines the 'non-government railway' and provides that 'non-government railway' means a railway other than a 'government railway'. Sub-section (32) of s 2 defines 'railway administration' and its cl (b) provides that 'railway administration' in relation to a non-government railway, means the person who is the owner or lessee of the railway or the person working in the railway under an agreement. In view of these provisions it is evident that every railway servant may not necessarily be a government servant so as to become a public servant under any of the clauses of s 21 of the Code. Keeping this thing in view one can easily appreciate the object behind the exhaustive definition of public servant given in s 188 of the new Railways Act which runs as follows:

> ...
>
> (1) Any railway servant, who is not a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860), shall be deemed to be a public servant for the purposes of Chapter IX[43] and section 409 of that Code.
>
> (2) In the definition of "legal remuneration" in section 161[44] of the Indian Penal Code (45 of 1860) the word "Government" shall, for the purposes of sub-section (1), be deemed to include any employer of a railway servant as such.

(c) All Railway Servants are Public Servants for the Limited Purpose

Thus broadly speaking, according to the provisions of the Railway Act 1989 all the railway servants employed by the Government Railways are public servants under that deleted part of cl (9), which now distinctly forms part of cl (12) of this section as96 sub-cl (a) and those railway servants, who are employed by 'non-government railway' shall be deemed to be public servants for the limited purposes of ch 9 and s 149 of this Code under s 188 of the Railways Act 1989, which should take in its ambit even those railway servants of Government Railways, who for any reason do not become public servants under s 21 of the Code. This s 188 is analogous to s 137(1) of the old Railways Act 1890, as it stood after the 1955 amendment.

Khalasis in railway carriage section doing work of preparation and issue of passes are officers of the government and, therefore, public servants.[45]

However, if a teacher of a railway school can be declared to be a public servant, there is no reason why the person who at the relevant time was working as a traffic service officer cannot be called a public servant.[46]

18. Clause 10--Officers of Local Bodies

Municipal engineers, who receive money from the municipality and pay it out to contractors are, within the definition,[47] though an engineer, who is merely empowered to sign a bill or cheque upon which a different official pays the money, might be conceivably classed otherwise, on the ground that he does not 'expend any property' of the municipality.[48] Municipal or local board overseers, octroi and cattle-pound *moharrirs*, cess collectors,[49] goods clerks,[50] or union *karmans*,[51] are persons who take or receive money for their municipality or local boards, as the case may be. They are, therefore, public servants. But a local board *sircar* who merely supervises road work is not.[52] The executive officer of a notified area council is a public servant.[53]

The chairman of the managing committee of a municipality is a public servant within the meaning of the section as he has power to expend money of the municipality on payment of bills for fixed recurring charges. This clause merely requires that the person should have the duty to expend property for certain purposes. The power which the chairman has to make payment of fixed recurring charges, such as pay bills, imposes a duty on the chairman to do so when necessary as the power is vested in him for the benefit of the persons entitled to receive those recurring charges.[54] The mere fact that the power of the chairman has to be exercised with respect to fixed recurring charges and in anticipation of the Committee passing the bills does not affect the question whether the power constitutes a duty or not. Clause 10 of s 21 of the IPC is not restricted to such cases only where there is no limitation on the power of expending the property.[55]

A *Qarq Amin*, though in receipt of wages by way of commission only, is vested with the authority to attach and sell properties and realise the dues from the97 defaulters payable by them to the Co-operative Development Federation. He is a public servant having regard to expln 1 to the section.[56]

The words 'for any secular common purpose of any village, town or district' govern the whole clause and it must be for a public purpose that the money was received or expended. Accordingly, the chairman of a co-operative society is not a public servant within the meaning of this clause.[57]

A port is 'a place for the loading and unloading of ships'.[58] The port trust estate does not fall within the term 'village, town or district' within the meaning of this clause. The chief store-keeper and assistant superintendent of machinery for the port trust estate entrusted with the keeping and the expending of property by the port on their behalf upon their estate are not therefore public servants.[59]

The chairman of a municipality acting under r 13 (1) of the Bihar Municipal Election Rules 1937, appointed the head clerk of the municipality, as his assistant to prepare the electoral rolls of all persons entitled to be registered as voters in each of the five wards into which the municipality was divided at that time. Subsequently by a government notification the municipality was divided into 16 single-seated wards instead of the previous five plural-seated wards and it became necessary to prepare electoral rolls of the new wards. The chairman made no new appointment for this work. The head clerk, however, acted as if he had been appointed to do the work, and electoral rolls written by him were accepted by the chairman when delivered to him by a *locum tenens* during the absence of the head clerk on short leave. It was held that, inasmuch as the appointment of the head clerk was not revoked subsequent to the government notification and he continued to work as such, he was a public servant, and the absence of his formal appointment subsequent to the notification was immaterial as the head clerk was indubitably 'in actual possession of the situation of the public servant'.[60]

19. Clause 11--Persons Connected with Elections

A clerk empowered to prepare electoral rolls is a public servant.[61] An employee of a government company who acted as a polling agent for a candidate in a general election cannot be said to be in service of government so as to attract electoral offences.[62] The election officer of a co-operative society is, however, not a public servant.[63]

20. Clause 12--"In the Pay of the Government"

(a) A Person may be in the Pay without being the Servant of his Pay Master

It is not implicit in the expression 'in the pay of' that there ought to exist a master-servant relationship between payer and payee. One can be in the pay of another without being in employment or service of the other.98

The setting and the context are very relevant for ascertaining the true meaning of the expression. In order to avoid the charge of tautology, the phrase 'in the pay of government' in cl 12(a) may comprehend a situation that a person may be in the pay of the government without being in the employment of the government. So, this phrase does not import necessity of a master-servant relationship. It is not unusual in common parlance to speak of a person being in the pay of another if he is paid for acting at the behest or according to the desire of the other without the other being his master and he the servant, that is to say, without the control over the manner of doing the work which a master-servant relationship implies. It is such a category in addition to the one 'in the service of the government' that is sought to be comprehended in cl 12(a).[64]

(b) Chief Minister, Ministers and Speaker are Public Servants but Members of Parliament and State Assembly are Not so

A Minister and Chief Minister have however, been held to be public servants.[65] Similarly, the speaker of State Legislative Assembly is a public servant and so can be proceeded against under the Prevention of Corruption Act.[66]

The Members of Parliament and State Legislative Assemblies get their pay and allowances from their respective Governments but their pay masters do not have any control over the doing of their work, which a master-servant relationship implies. They are, therefore, not servants or public servants within the meaning of s 21, cll (3), (7) or 12(a) of the Code.[67]

(c) Nature of Office, Exalted or Humble, not Material

Only a person in the pay, or service of the Government or remunerated by fees or commission by the Government for the performance of any public duty would fall within the sub-cl (a) of the twelfth clause of this section.[68] The word 'pay' in the light of the context, means wages or money given for service, and the words 'in the pay of', construed in the light of the context of the whole clause would carry the meaning 'in the employment of'.[69] Payment of pay or salary is not an essential requirement to call a person as public servant. He may be remunerated for his work by fee or commission.[70] It matters not the least what is the nature of the office, *i.e.*, whether the duties, which a public servant is performing are of an exalted nature or very humble indeed.[71] A public prosecutor,[72] a lady health visitor,[73] a commissioner99 appointed by the civil court,[74] for taking accounts; an extra departmental agent working as village postmaster,[75] police officer filing challan under s 173, CrPC,[76] are public servants.

21. Clause 12(a)--Expression 'Or' not Disjunctive

The use of the expression 'or' in the context in which it is found in cl 12(a) is not disjunctive, the reason being that once it is accepted that 'a person in the pay of the government' connotes a specific and independent category of public servant other than 'a person in the service of the government' and the expression 'in the pay of the government' does not inhere a master-servant or command-obedience relationship between the government as the payer and the public servant as the payee, no part of the section is rendered superfluous. Each part will receive its own construction.[77]

22. Teachers, Invigilators and Examiners

(a) University Examiner, Teachers

Before the Amendment Act 40 of 1964, a lecturer of a government college was appointed as an examiner by the Gujarat University for conducting some practical examination. On the allegation that

he had accepted illegal gratification from a candidate for showing some favour, the question that arose for consideration was whether the accused was a public servant at the time of the acceptance of the money. The Gujarat High Court held that (i) the ninth clause [omitted part of it is now sub-cl (a) of cl 12] indicated that the connection with the government was necessary either in respect of the payment of remuneration or in respect of performance of public duty; (ii) the person to be an officer must hold some office. The Supreme Court concurred with the findings of the High Court and held that a university examiner cannot be considered to hold an office in the sense in which that work has been understood and employed in the ninth clause. As such the accused cannot be held to be an officer covered by the said clause of s 21 of the IPC .[78] However, a teacher who is in the service of the government and is paid by the government and who is entrusted with the performance of a public duty, namely, to teach boys, is a public servant within the meaning of the ninth clause of s 21 .[79] But a lecturer of a private college appointed by the university for specified works, *viz,* to evaluate answer scripts is not covered by definition of public servant under s 21 of the IPC though he is covered by definition of public servant under s 73(a) of the Shivaji University Act 1974.[80]

(b) Teachers and Principals are not, but Invigilators are Public Servants

Teachers and principals of private aided schools and colleges, though receiving pay from the public exchequer are not public servants.[81] Persons appointed as invigilators have, however, been held to be public servant.[82]100

23. Clause 12(b)--'Persons in the Service or Pay of a Local Authority'

The expression 'local authority' is to be given the same meaning as given in the General Clauses Act 1897. Section 3(31) of the General Clauses Act 1897, defines the term 'local authority' as follows:

...

> (31) "Local authority" shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the government, with the control or management of a municipal or local fund.

A corporate body/corporation/local body like MCD or DDA cannot be a public servant within the meaning of s 21 of IPC .[83] Persons in the employment of a local authority, including municipal boards, district boards, *panchayats*, are public servants within the meaning of this clause.[84] The chairman of a municipal board;[85] a member of a municipal board;[86] a member of a district board;[87] a superintendent in a municipal or district board;[88] a *sarpanch* or *upsarpanch* of a village *panchayat* or *nyaya panchyat*;[89] a sanitary inspector;[90] a municipal commissioner;[91] and the *pradhan* of a *gram sabha* of a village[92] have been held to be public servants.

Without adverting to the only illustration to s 21 the Supreme Court in *Ramesh Balkrishna Kulkarni v State of Maharashtra* ,[93] following its earlier decision in *RS Nayak v AR Antulay* ,[94] has, however, held that a municipal councillor is not a public servant and cannot be prosecuted under the Prevention of Corruption Act.

The executive officer of a notified area council is a public servant.[95]

A vice-chairman of a local board is a public servant.[96] The chairman is also a member of the board. The chairman, therefore, must be held to be a public servant.[97]101

24. Office Bearers and Employees of a Co-operative Society

The office bearers and employees of a co-operative society are not public servants. A co-operative society does not fall within the definition of a 'local authority' as given in s 3(31) of the General Clauses Act 1897 as such it is not a local authority. The secretary of a co-operative credit society is not a public servant within the meaning of cll (9), (10) or (12) s 21 of this Code.[1] The president and secretary of a co-operative society are not public servants.[2]

The Chairman of the Maharashtra Co-operative Society though is a public servant under the Societies Act but he is not so under s 21 of IPC . Public servants exercising power under the Co-operative Societies Act by legal fiction become public servants only for the purpose of the said Act but not under s 21 of IPC .[3] The Chairman of a Co-operative Society under West Bengal Co-operative Societies Act, though is a public servant as defined by s 2(3) of the Act, is not a public servant as intended by s 21, IPC, and cannot be prosecuted for offences under the IPC .[4] The office bearers of a co-operative society have also not been held to be public servants.[5]

A co-operative society registered under the Uttar Pradesh Co-operative Societies Act is not a corporation established by the Uttar Pradesh state,[6] and is not covered by sub-cl (b) of s 21(12) . The same is the position regarding the employees of the co-operative societies registered under other state Acts.[7]

A secretary of co-operative society, being a paid employee of society, is a public servant as defined under Karnataka Co-Operative Societies Act 1959.[8]

25. Civil Servants on Deputation with a Co-operative Society

A civil servant working on deputation with a co-operative society does not work there as a civil servant. He is, therefore, not a public servant.[9] A Government officer on deputation posted in a Co-operative Society is not a public servant.[10]102

26. Corporation 'Established' under the Act--Explained

Sub-clause (b) of cl 12 of s 21 treats every person in the service or pay of a corporation established by or under a central, provincial or state act as a public servant. The question for determination before the Allahabad High Court in a case was whether a co-operative society registered under the Uttar Pradesh Co-operative Societies Act is a corporation established by or under that State Act. The High Court observed that this necessarily involves the question as to what is the semantic juristic sweep of the expression 'established' and when that has been answered, there would be the question as to what is meant by the words 'by the Act' or 'under the Act'. It was held that the term 'established' in cl 12 of s 21 of the IPC connotes 'created'. It does not mean 'registered' or 'incorporated'. A co-operative society registered under the Co-operative Societies Act is not established by or under the Co-operative Society Act. A society registered in accordance with the provision of the Co-operative Societies Act is a corporation which comes into existence in accordance with the provisions of that Act, but it is not established by the Act or pursuant to the Act or by virtue of the Act or under the Act.[11]

27. 'Person' in the Service or Pay of a Corporation

Employees of Heavy Electricals, Bhopal, are 'public servants'.[12]Persons in the service or pay of the Board of Trustees of the Port of Bombay, established under the Bombay Port Trust Act 1879, are public servants.[13] All members, officers and servants of a road transport corporation, while acting or purporting to act under the provisions of the Road Transport Corporation Act 1850, are also public servants.[14] An employee of Indian Airlines Corporation is a public servant.[15] But the branch manager of Assam Warehousing Corporation which is not a statutory body, is not a public servant and sanction under s 197 of the CrPC for his prosecution is not required.[16] The Oriental Bank of Commerce is not a corporation though it is a 'body corporate'.[17]

28. 'Government Company'

'Government Company' is defined in s 2(45) of the Companies Act 2013, thus:

...

> (45) "Government company" means any company in which not less than fifty one per cent. of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a government company.

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The Indian Telephone Industries Ltd, Bangalore, is a company, falling within the purview of s 617 of the Companies Act 1956 and as such, its servants are 'public servants'.[18]However, an employee in Indian Telephone Industries who acted as a polling agent for candidate in a general election and facing charges of electoral offences under the Representation of People Act (s 134), cannot be said to be in the service of the government to attract such violation.[19] But if the prosecution establishes that a particular corporation is a Government company within the meaning of s 617 of the Companies Act all persons working in that corporation or in a subsidiary unit of such corporation would necessarily be public servants within the meaning of s 21, IPC .[20] The criteria that is laid down by the Supreme Court is that, firstly, the officers of the public undertakings or Government companies are not public servants and even if they are so unless they are included in s 197 of the CrPC, protection of obtaining sanction or requirements of obtaining sanction would not be applicable to them. Thus no sanction under s 197 of the CrPC was required for prosecution of employees, members including chairman of ONGC.[21]

A Government company is not a 'public servant', but every employee of the Government company is a 'public servant'.[22]

29. Employees of Banks

A nationalised bank is not only a body corporate (which word is interchangeable with the word 'corporation') established under a Central Act but also a 'Government company' within the meaning of s 617 of the Companies Act 1956 and the employees of such a bank are 'public servants' within the meaning of clause twelfth (b) of s 21 of the IPC .[23] A Constitution Bench of the Supreme Court in *Ashoka Marketing Ltd v Punjab National Bank* ,[24]has held that a nationalised bank is a corporation established by a Central Act and is owned and controlled by the Central Government. The Delhi High Court in *Oriental Bank of Commerce v Delhi Development Authority* ,[25] and the Calcutta High Court in *Ashoka Kumar Mitra v State of West Bengal* ,[26] has taken the view that an employee of a nationalised bank cannot be a public servant. The said view no longer holds good and in *Union of India v Ashoka Kumar Mitra* ,[27] the Supreme Court specifically overruling the Calcutta view has held that an employee of a nationalised bank is a public servant under s 21, IPC . Subsequently, Delhi High Court has also held that a nationalised bank is a corporation owned and controlled by the Central Government. Bank employees are public servants within the meaning of the twelfth clause of s 21, IPC, for the purpose of s 197, CrPC .[28]104

The controversy, whether a nationalised Bank is only a body corporate or is a corporation is no longer *res integra* on account of the nationalisation, the nationalised banks are not only established by a Central Act but are also owned and controlled by the Central Government.[29]

The State Bank of India was established by the State Bank of India Act 1955, and by virtue of the provisions of s 21(12)(b), IPC, its employees are public servants.[30]

30. Employees of Insurance Companies

In view of the express provisions of s 107A of the Insurance Act 1938 read with s 31 of the General Insurance Business Act, there is no scope for any doubt that officers/employees, *etc*, of an insurance company are public servants but they are deemed to be public servants for a different purpose to make them subject to the penal provisions of ch IX of the IPC .[31]

The General Insurance Corporation of India (GIC) is a nationalised general insurance corporation and the employees of this corporation and its subsidiary companies are public servants under s 21(12)(b), IPC .[32] The Supreme Court has also held that the employees of the LIC and GIC are public servants.[33] An assessor of insurance company has, however, not been held to be a public servant.[34] The person appointed as investigator under s 33 of the Insurance Act is also not a public servant.[35]

31. Medical Officer Acting as Authorised Medical Attendant

None of the ingredients, mentioned in any one of the limbs of cl 12(a) of s 21 are satisfied in the case of a medical officer acting as an authorised medical attendant and therefore, he cannot be said to be a public servant under this sub-clause.[36] A private medical practitioner even if his name is included in the panel of doctors is not a public servant.[37]

32. Advocates Engaged by Government

An advocate engaged by the Government to conduct a particular matter, is not a public servant within the meaning of cl 12(a) of s 21 of the IPC . When an advocate is engaged by the Government official, he has no duty prescribed by such engagement or under the statute in relation to such engagement. An advocate so engaged does no other work except as an advocate and that is no public duty. He is free to return the brief at any time. He is free to appear against the government in the next case. The engagement, if any, is to act as an advocate. But, in the case of a public prosecutor or a Government pleader, it is the office that makes him the public servant.[38]105

33. Persons held not to be Public Servants

The following have been held not to be public servants.

(i) A lessee of a village who keeps accounts of the forest revenue and pays a portion thereof to the Government;[39]
(ii) A clerk in a bank carrying on treasury business;[40]
(iii) A police officer under suspension;[41]
(iv) A manager of an estate under a court of wards;[42]
(v) A carter employed by Government;[43]
(vi) A clerk appointed by a sub-registrar and paid out of an allowance given to the latter;[44]
(vii) A municipal corporation is not a public servant, as distinct from its individual members;[45]
(viii) A local board road sircar;[46]
(ix) The chairman of a co-operative credit society,[47] or the president of a co-operative society;[48]
(x) The sanitary inspector of a *panchayat* board is not a public servant within the contemplation of this section. The fact that he is authorised by the president of the *panchayat* board to collect fees for sealing animals before slaughter would not make him a public servant.[49]

(xi) A person who is temporarily carrying on the duties of the branch post master purely as a nominee of the latter without authority given by the Government is not a public servant.[50]

(xii) A cashier in bank;[51]

(xiii) A peon employed by the manager of an estate in charge of the court of wards;[52]

(xiv) Labourers and menial servants employed to do work or labour on account of the government do not fall within the definition of 'public servants'.[53]106

(xv) Though a *lascar* in Madras has been held to be a public servant,[54] the receiver of an estate appointed *pendente lite* is not,[55] for his position is that of a guardian of the estate for the protection of which he is appointed.

(xvi) While municipal officers may be, and ordinarily are, classed as public servants, it does not follow that all servants of the municipality are also public servants. A municipal water-rate collector was held not to be a public servant: *et hoc genus omne.*[56] Similarly, a quarter master's clerk is not a public servant.[57]But officers of a municipal corporation as enumeration in s 680 of the Hyderabad Municipal Corporation Act 1955 would also be deemed to be public servants like commissioner of the corporation who as per illustration of s 21 are public servants.[58]

(xvii) A villager assisting a headman in the discharge of his public duties is no more a public servant than a person whom a magistrate may require to assist him in the discharge of his public duties.[59]

(xviii) The *malguzari* holding an inquiry in the matter of damage done to a government forest, though it may be his duty under the Forest Act to assist government.[60]

(xix) A private person chosen by parties to settle their dispute, though he is referred to in the order of the court, cannot be regarded as a 'public servant' for he was not appointed by the court.[61]

(xx) A person nominated by the collector under s 69 of the Bengal Tenancy Act .[62]

(xxi) A public servant would cease to be so on suspension from duty.[63] A contrary view was, however, expressed in *Dhanpal Singh v State* ,[64] and it was held that a public servant would not cease to be a public servant on being placed under suspension. The latter appears to be sound.

(xxii) A corporation, though a juridical person, is not a natural person so as to be a public servant within the meaning of the section.[65]

(xxiii) A corporate body/corporation/local body MCD or DDA cannot be a public servant within the meaning of s 21 of the IPC .[66]

(xxiv) A *mukhia* is not a Government servant as contemplated by s 5A of the Uttar Pradesh Panchayat Raj Act.[67] The argument that as the *mukhia* (village headman) was not paid by the state, he cannot be in the service of the state, is not sound, for the payment is not the test. All that is required under the definition under s 123(8) read with s 100(2)(b) of the107 Representation of People Act 1951 that he should be a headman employed in the state.[68] Unpaid candidate in the office of the deputy commissioner assisting some clerk in work connected with duties of an arms clerk is not a public servant.[69]

(xxv) An assessor working with an insurance company is not a public servant.[70]

34. Illustration to Twelfth Clause

The term 'Municipal Commissioner', has not been defined anywhere in the IPC . The word 'Commissioner' in the illustration appears to have been used in the sense of a municipal member or councillor and not in the sense of an officer in the employment of a municipality who is sometimes designated by that name.[71] Under the Bengal Municipal Act 1932, a municipality consists of elected municipal commissioners. The members of the municipalities in Bengal are thus called municipal commissioners and they are elected by the public. Even in some other states the elected members of municipalities are called municipal commissioners. Under s 87 of Rajasthan Municipalities Act 1959, the Chairman and the Members of the Municipal Board are public servants within the meaning of s 21 of the IPC . Under the Bombay District Municipal Act 1901 the chairman of a municipality is a public

servant.[72]Therefore, it follows that the elected members of the municipalities in some states of this country are called municipal commissioners and they are public servants. On the other hand, in Indore, the municipal commissioner for the city of Indore is appointed by the Government under s 13(1) of the Indore Municipal Act 1909. The position appears to be the same under the City of Nagpur Corporation Act 1948, Madhya Pradesh Municipal Corporation Act 1956 and Bombay Municipal Corporation Act 1888. They all speak of municipal commissioners appointed by the Government. Such municipal commissioners are supposed to be full time public servants like other Government servants appointed by the Government. In case a municipal commissioner elected by the public enjoys the status of a public servant under any local Act, the difference between an elected municipal commissioner and a municipal commissioner appointed by the Government for the purposes of the present discussion, loses its significance as both enjoy the position of a public servant.

In some states the municipal committees or municipal boards are called Municipal Councils and their elected members are known as Municipal Councillors. It is so under the Gujarat Municipalities Act, Bangalore Municipal Corporation Act 1949, the Madhya Pradesh Municipal Corporation Act 1956, the Himachal Pradesh Municipal Act 1979 and the Maharashtra Municipalities Act 1965. Though there is a difference in the nomenclature but for all practical purposes there appears to be no difference in the official position and status of the elected members of municipal Boards, municipal councils and corporations. They are not full time government servants but by virtue of local laws of the various states, they are deemed to be public servants for certain specific purposes.108

35. Explanation 1

As stated earlier, this section does not define public servants and describes them only by enumeration, which is merely illustrative and not exhaustive. Some provisions or descriptions may apparently look conflicting or incomplete. Explanation 1 to the section removes this difficulty and doubts, and clarifies that persons falling under any of the descriptions mentioned in cll 1-12 are public servants and it is not material whether they were appointed by the Government or not.

36. Explanation 2

By virtue of this explanation a person who is actually performing the duties of the office which brings him under one of the classes of this section is a public servant even though there may be some legal defect in his right to hold the office.[73] A person in actual possession of the situation and performing the duties assigned to him is a public servant even if there is a defect in his appointment.[74] But if there was absolutely no appointment at all, no question of any defect in it arises and the explanation has no application.[75] It is necessary for the application of this explanation that the person connected should be in actual possession of the pre-existing office of a public servant. If there be no office or post, there can be no question of any one being in actual possession thereof, and of the person concerned coming within the terms of this explanation. If there is no post or office in existence and a person is appointed to it without jurisdiction, he is not a public servant within the meaning of this section.[76]

Members of the civic guard were not in actual possession of the situation of police officers until there were legally called out for duty under the terms of ordinance of 1940 read with the rules.[77]

90 Clause First omitted by the AO 1950.

91 Substituted by Act 10 of 1927, s 2, Sch I, for 'or Naval'.

92 The original words 'of the Queen while serving under the Government of India or any Government' have successively been amended by the AO 1937, the AO 1948 and the AO 1950 to read as above.

93 Substituted by Act 40 of 1964, s 2 for the former clause (wef 18-12-1964).

94 Inserted by Act 40 of 1964, s 2 (wef 18-12-1964).

95 Substituted by the AO of 1950 for 'the Crown' which had been substituted by the AO 1937 for 'Government'.

1 Substituted by the AO of 1950 for 'the Crown' which had been substituted by the AO 1937 for 'Government'.

2 Substituted by the AO of 1950 for 'the Crown' which had been substituted by the AO 1937 for 'Government'.

3 Substituted by the AO of 1950 for 'the Crown' which had been substituted by the AO 1937 for 'Government'.

4 Substituted by the AO of 1950 for 'the Crown' which had been substituted by the AO 1937 for 'Government'.

5 Substituted by the AO of 1950 for 'the Crown' which had been substituted by the AO 1937 for 'Government'.

6 Certain words omitted by Act 40 of 1964, s 2 (wef 18-12-1964).

7 Inserted by Act 39 of 1920, s 2 .

8 Substituted by the Act 40 of 1964, s 2 for the former clause (wef 18-12-1964).

9 Inserted by the Indian Elections Offences and Inquiries Act 1920, (39 of 1920), s 2 .

10 Explanation 4 inserted by Act 2 of 1958, s 2 and omitted by Act No 40 of 1964, s 2 (wef 18-12-1964).

11 *Vide* Rajasthan Act 1993, (4 of 1993), s 2 (wef 11-02-1993).

12 *Ambadas v State of Maharashtra* 1974 Mah LJ 442 .

13 Since repealed by the Prevention of Corruption Act 1988.

14 *State of West Bengal v Mammal Bhutoria & Ors* AIR 1977 SC 1772, (1977) Cr LJ 1164 .

15 Since repealed by the Prevention of Corruption Act 1988.

16 *State of Madhya Pradesh v MV Narasimhan* AIR 1975 SC 1835 .

17 *PV Narsimha Rao v State etc.* (1998) Cr LJ 2930 (SC) .

18 *Municipal Corpn of Delhi v SK Jain* (1985) 27 Del LT 52 (Del) .

19 Sections 166 - 71 . Sections 161 - 65A since omitted by s 31 of the Prevention of Corruption Act 1988.

20 Indian Penal Code 1860, ss 172 - 90 .

21 *State of Bihar v Deodar Jha* AIR 1958 Pat 51, (1958) Cr LJ 81 .

22 *Balbir Prasad Bagish v State of Bihar* 2008 Cr LJ 1323, 2009 (1) PLJR 577 (Pat) .

23 *State of Vindhya Pradesh v Shiv Bahadur Singh* AIR 1951 VP 17, p 35 .

24 First Report, s 78 . This section was cl 14 in the Draft Bill.

25 *Municipal Corpn of Delhi v SK Jain* (1985) 27 Del LT 52 (Del) ; *Municipal Corpn of Delhi v Amrti Lal* 1981 Cr LJ 422 (Del) .

26 *Swami Nath v SDO, Machhlishahr* AIR 1958 All 660, p 662 .

27 *Harishankar Prasad Gupta v Shibbanlal Saksena* AIR 1956 SC 314 .

28 *Bindeshwari Sharma v State of Bihar* (1980) BLJR 89 .

29 *Goolbai Motabhai v Pestonji Cowasji* AIR 1935 Bom 333, 37 Bom LR 410 .

30 *Swami Nath v SDO, Machhlishahr* AIR 1958 All 660 .

31 *Queen-Empress v Pameshwar Dat* 8 ILR All 201, 1886 All WN 63, per Straight J, **followed** in *Emperor v Ram Chandra* AIR 1933 Pat 187 .

32 *Queen v Ramkrishna Dass* 7 BLR 446, 16 WR 27 (Cr) .

33 *Queen-Empress v Parmeshar Dat* 8 ILR All 201 ; *Subramanya v Somasundaram* 21 ILR Mad 428 ; *Mahendra Prosad v Emperor* 9 IC (C) 698 .

34 *Harbilas v Crown* AIR 1950 EP 167 .

35 *Nazamuddin v Queen-Empress* 28 ILR Cal 344 .

36 Cf 55 & 56 Vict C 61.

37 *Harvilas v Crown* AIR 1950 EP 167, *vide* expln 2 to this section.

38 *Ramesh Balkrishna Kulkarni v State of Maharashtra* AIR 1985 SC 1655, (1985) 2 Crimes 378, 379, (1985) Cr AR 259 (SC), (1985) 3 SCC 606 ; *Municipal Corpn of Delhi v SK Jain* (1985) 27 DLT 527 .

39 *Ch Venkata Swamy v Supdt, Post Offices* AIR 1957 Ori 112, p 116, per Narasinham J.

40 *Elahi Bux Khan v State* AIR 1955 Cal 482, p 483 .

41 *State of Orissa v Bira Kishore Naik* AIR 1964 Ori 202, p 203, (1964) 2 Cr LJ 325, 30 Cut LT 176, (1964) OJD 119 .

42 *Bajrang Lal v State of Rajasthan* (1976) Cr LR 133 (SC), (1976) SC Cr R 197, (1976) 2 SCC 217, (1976) SCC 272 (Cr), (1976) UJ 277(SC), (1976) Cr AR 119 (SC).

43 Act 15 of 1865 s 23 ; 17 of 1908, ss 12(3) and 14(2) ; Act 16 of 1908, s 84 ; Act 7 of 1878, s 72 ; Act 7 of 1880, s 50 ; Act 15 of 1882, s 52 ; Act 18 of 1882, s 12 ; Act 12 of 1883, s 8 ; Act 6, ss 7 and 42 ; Act 7 of 1884, ss 9, 37 ; Act 6 of 1886, s 14 ; Act 9 of 1889, s 17 ; Act 18 of 1887.

44 *R v Muhammadan* 22 PR 1908 (Cr) .

45 Now see Act 35 of 1952, s 5 .

46 Now see the Census Act (37 of 1948), s 5 .

47 Now see the Emigration Act (31 of 1983), s 8 .

48 Section 3, Act 3 of 1876; s 50, Act 5 of 1877; s 5, Madras Act 15 of 1886.

49 Local Encumbered Estates Act, s 21, Act 6 of 1876 (Chota Nagpur) s 22, Act 24 of 1870 (Taluqdars of Oudh), 33 Reg 4 of 1877, (Taluqdars, Thakurs and Jagirdars in Ajmer) s 33, Act 21 of 1881 (Broach and Kaira Thakurs, *etc.*) s 33 Act 20 of 1881 (Sind).

50 Now see the Factories Act (63 of 1948), s 8 .

51 Now see the Indian Forest Act (16 of 1927), s 73 .

52 Now see the Indian Museum Act (10 of 1910), s 13 .

53 Local Municipal Acts and s 25 Act 15 of 1873; s 22, Act 8 of 1874; s 56, Madras Act 5 of 1878; s 51, Bombay Act 3 of 1872; s 15 Bombay Act 6 of 1873.

54 *Manish Trivedi v State of Rajasthan* 2014 Cr LJ 429, p 435, AIR 2014 SC 648, (2014) 133 AIC 137, (2014) 14 SCC 420 .

55 *Manish Trivedi v State of Rajasthan* 2014 Cr LJ 429, p 435, AIR 2014 SC 648, (2014) 133 AIC 137, (2014) 14 SCC 420 .

56 Refer to Local Acts, *Queen-Empress v Mudali Tiruvengada* 21 ILR Mad 428 .

57 *Shailesh Chandra v Nehal Chand* 59 ILR Cal 234 .

58 Re *Isub Musa* BUC 117.

59 *State of Bihar v Deodhar Ghose* AIR 1958 Pat 51 .

60 Re *Dina Nath Gangooly* 8 DLR App 58, 17 WR 12 (Cr).

61 *Narayan v State* AIR 1956 MB 51, (1956) Cr LJ 27 .

62 Re *Govindaswami*(1954) Cr LJ 480.

63 Re *Isub Musa* BUC 117.

64 *Jitendra Mohan De v Emperor* AIR 1944 Cal 79 .

65 (1881) 44 & 45 Vic C 56, s 177 (7).

66 *Ramniwas Sharma v State* AIR 1951 Ajmer 76, p 77, 52 Cr LJ 513 .

67 See notes under that section.

68 *Prabhu Dayal v Milap Chand* AIR 1959 Raj 12, p 14 .

69 *Kon Kati Narayana v Balakanti Verrayya* AIR 1959 Andh Pra 27 .

70 *Bindeshwari Sharma v State of Bihar* (1980) BLJR 89 .

71 *Poonuswami Thevan v Emperor* AIR 1922 Mad 62 .

72 *RS Nayak v AR Antulay* AIR 1984 SC 684 .

73 *Reg v Ramajirao Jivbajirav* (1875) 12 Bom 1 .

74 *Nazaimuddin v Queen* 28 ILR Cal 344, 4 CWN 798 .

75 *Ismail Mohamed Hajee v King* AIR 1941 Rang 349, 43 Cr LJ 287 .

76 *Ahad Shah v Emperor* AIR 1918 Lah 152, p 157 (2).

77 *GA Monterio v State of Ajmer* AIR 1957 SC 13 .

78 *GA Monterio v State of Ajmer* AIR 1957 SC 13 .

79 *RK Dalmia v Delhi Admn* AIR 1962 SC 1821, p 1870 .

80 *State of Gujarat v Manshankar Prabhashankar Dwivedi* AIR 1973 SC 330, (1972) Cr LJ 1247, (1972) 2 SCC 392 .

81 *Bacon's Abridgement,* vol 6, p 2, article headed 'Of the Nature of an Officer and Several Kinds of Officers'.

82 *R v Ramajirao Jivbaji* 12 Bom HCR 1 ; **quoted with approval** in *GA Monterio v State of Ajmer* AIR 1957 SC 13, p 16-17 .

83 *Dharam Chand Pal v Queen-Empress* 22 ILR Cal 596 .

84 *Sheo Progash Tewari v Bhoop Narain Prasad Pathak* 22 ILR Cal 759 .

85 Re *Thimmakka*AIR 1942 Mad 552 ((2)) .

86 Re *S Ramiah* 52 Cr LJ 847.

87 *Lonkaran Mullinchand v Emperor* AIR 1946 Nag 60 .

88 *Ram Pal Singh v State* 1960 All WR 279 (HC), 1960 All LJ 357 .

89 *Queen v Ram Kanto Das* 16 WR 27, 7 BLR 446 .

90 *Emperor v Ram Chandra Sahu* AIR 1933 Pat 187, p 188 ; *Rajshahi Banking and Trading Corpn Ltd v Surendra Nath Mitra* AIR 1942 Cal 434 .

91 *Queen v Ram Kristo Dass* 16 WR 27, 7 Beng LR 446 ; *Emperor v Ram Chandra Sahu* AIR 1933 Pat 187 ; Re *RL Bhagai Dafadin* 2 BLR 21; *Rajshahi Banking & Trading Corpn Ltd v Surendra Nath Mitra* AIR 1942 Cal 434, 43 Cr LJ 410, (1942) 2 ILR Cal 108 ; *Nizamuddin v Queen-Empress* 28 ILR Cal 344 ; *Saheb Ali v Emperor* 14 Cr LJ 274 .

92 *Queen v Naihimulla* 7 ILR Mad 18, 1 Weir 27 .

93 *State of Orissa v Ganesh Prasad Dutta* (1962) 1 Cr LJ 658, (1961) All Cr R 402 .

94 *Chinubhai Keshavlal Nanavati v KJ Mehta, Commr for Taking Account* (1977) Mad Cr R 8, (1977) Guj LR 1022, p 1024 ; Re *S Ramaiah* 52 Cr LJ 847; *Ram Pal Singh v State* (1960) All WR 279 (HC), (1960) All LJ 357 .

95 *PadamSen v State of Uttar Pradesh*AIR 1961 SC 218, (1961) 1 Cr LJ 322 .

96 *Emperor v Ram Chandra Sahu* AIR 1933 Pat 187 .

1 *Padam Singh v State of Uttar Pradesh* AIR 1961 SC 218 .

2 *Walsh v Southworth* LR 6 Ex 150, per Pollock CB.

3 *Dharam Chand v Queen Empress* 22 ILR Cal 596, **followed in***Sheo Progas v Bhup Narain* 22 ILR Cal 759 ; *Abdul Karim v Bullen* 6 ILR All 385 .

4 *Abdul Ghafur v Queen-Empress* 23 ILR Cal 896 ; *Satish Chandra v Jadu Nandan* 3 CWN 741 ; *Conville v Kristo Kishore* 26 ILR Cal 746 ; *Durga Charan v Nabin Chandra* 25 ILR Cal 274 .

5 *Chinubhai Keshavlal Nanavati v KJ Mehta* 1977 Guj LR 1022, p 1024 .

6 *Bindeshwari Sharma v State of Bihar* (1980) BLJR 89 .

7 *Sukhdev Singh v State of Punjab* (1988) Cr LJ 265 .

8 *AR Puri v State* (1987) 2 Crimes 102 .

9 *Empress v Debi Din* (1886) WN 295 .

10 *Sunder v R* 30 ILR Cal 1084 .

11 *Maheshwar Vishambhar Sahai v State of Madhya Pradesh* (1985) 2 Cr LC 229, (1985) MPLJ 337, (1985) Jab LJ 424 .

12 *Padam Sen v State of Uttar Pradesh* AIR 1961 SC 218, (1961) 1 Cr LJ 322 .

13 *Sunder v R* 30 ILR Cal 1084 ; *Emperor v Debi Din* (1886) AWN 195 .

14 *Padam Sen v State of Uttar Pradesh* (1961) 1 Cr LJ 322, p 324 .

15 *Queen v Kallachand Moitree* 7 WR 63, p 99 (Cr) ; *Safin Rasual v Emperor* AIR 1924 Bom 385 ; *Maula Buksh v Emperor* AIR 1929 Lah 631, 30 Cr LJ 1103 .

16 *Kedarnath Sharia v State* AIR 1962 Cal 410 ; *Jagannath Prasad Keshri v State of Bihar* AIR 1968 Pat 506, p 508 .

17 *Satya Narain Musadi & Ors v State of Bihar* AIR 1980 SC 506, (1980) Cr LJ 227 (SC) .

18 *Nga Paw E v Emperor* 18 Cr LJ 351 .

19 *FD Larkins v State (Delhi Admn)* (1984) 2 Crimes 734, (1984) 26 Del LT 486 (Del) .

20 *RS Nayak v AR Antulay* AIR 1984 SC 684 .

21 *Lonkaran v King-Emperor* AIR 1946 Nag 60, 47 Cr LJ 636, p 637 .

22 *Shriram v State of Madhya Pradesh* 1957 MPLJ 173 (notes) .

23 *Doma v State of Maharashtra* 1981 Cr LJ 653 (Bom), 1981 Cr LR 232 (Mah) .

24 *Bajoo Singh v R* 26 ILR Cal 158(2).

25 *Nazamuddin v Queen-Empress* 28 ILR Cal 344 .

26 *State of Gujarat v I Manishankar Prabhshankar Dwivedi & Anor* AIR 1973 SC 330, (1972) Cr LJ 1247 .

27 *Ranjeet Singh v State* (1964) All LJ 1076, (1964) All WR 741 (HC), (1965) 2 Cr LJ 449(2); **following***GA Monterio v State of Ajmer* AIR 1957 SC 13 .

28 *State of Gujarat v I Manishankar Prabhashankar Dwivedi & Anor* AIR 1973 SC 330, (1972) Cr LJ 1247 .

29 *Kuber Nayak v State* AIR 1962 Cal 195, p 196 .

30 *State of Ajmer v Shivji Lal* AIR 1959 SC 847 .

31 *Badri Prasad v State* AIR 1953 All 494, p 495 .

32 *Public Prosecutor v Kimidi Annam Naidu* AIR 1925 Mad 1093 .

33 *Shiv Bahadur Singh v State of Vindhya Pradesh* AIR 1953 SC 394, p 401 ; *State of Vindhya Pradesh v Shiv Bahadur Singh* AIR 1951 VP 17 ; *Emperor v Sibnath Banerji* AIR 1945 PC 156 .

34 *Ram Ditta Mal and Devi Chand v Emperor* AIR 1939 Pesh 38, p 39 ; *M Karunanidhi v Union of India* 1979 SC 898, p 915, AIR 1980 SC Cr R 273 ; *M Karunanidhi v Union of India* (1977) Cr LJ 1876, p 1890 (Mad)(FB).

35 Re *Karani*AIR 1944 Mad 183 ; **distinguishing** Re *Venkatiganda*(1879) 1 Weir 342 and *Arjun Mal v Emperor* AIR 1923 Lah 260 .

36 *Said Mahommad v Emperor* AIR 1935 Pesh 189 .

37 *Emperor v Suleman* AIR 1935 Bom 24 .

38 *Emperor v Karam Chand Govind Ram* AIR 1943 Lah 255, p 258 .

39 *Jugal Singh v Emperor* AIR 1943 Pat 315, p 316 .

40 *Karam Chand v Emperor* AIR 1924 Lah 355 .

41 *Madhusoodan*(1870) 2 NWP 148; *Bajoo Singh v Queen-Empress* 26 ILR Cal 158 .

42 *MB Kanwar v State* 64 Punj LR 1074, (1963) 1 Cr LJ 609, AIR 1963 Punj 201 .

43 Sections 161 - 65A (both inclusive) of the Indian Penal Code 1860 have been omitted by s 31 of the Prevention of Corruption Act 1988.

44 *Ibid.*

45 *Bajrang Lal & Anor v State of Rajasthan* AIR 1976 SC 1008 .

46 *Satish Chandra v Union of India* (1997) Cr LJ 1210 (Del) .

47 *R v Nantamram* 6 BHCR 64 .

48 *Ibid* per Gibbs J.

49 *R v Babulal* 33 ILR Bom 213 .

50 Re *Zakaria* 9 PR 1898.

51 *Gopalasaminatha Aiyar v R* 1 Weir 128 .

52 *Addaita v Kali Dass* 12 CWN 96 .

53 *Ram Chandra Shau v G Basak* (1987) 63 Cut LT 546 (Ori) .

54 *Julius v Bishop of Oxford* (1880) 5 AC 214 .

55 *Maharudrappa Danappa Kesarappanavar v State of Mysore* AIR 1961 SC 785, p 786 .

56 *Ram Pal Singh v State* (1960) All LJ 357, p 359, (1960) AWR 279 (HC) .

57 *Shridhar Mahadeo Pathak v Emperor* AIR 1935 Bom 36, 36 Cr LJ 532 ; *Kamam Siddappa v State of Mysore* AIR 1958 Mys 82 ; *Sombari Behari v Emperor* (1935) MWN 1337 .

58 *Wharton's Law Lexicon*, fourteenth edn.

59 *SE Naylor v Emperor* AIR 1941 Sind 30, p 31 .

60 *Brij Bihari v Emperor* AIR 1941 Pat 539, 194 IC 108, 22 PLT 443 .

61 *Brij Bihari v Emperor* AIR 1941 Pat 539, 42 Cr LJ 508, 194 IC 108, 22 PLT 443 .

62 *Abdul Rehman v State of Kerala & Anor* (1999) Cr LJ 4801 (Ker) .

63 *Suryanarayan Tripathy v Ch Kamalanatham* (1990) 2 Crimes 391 .

64 *RS Nayak v AR Antulay* AIR 1984 SC 684, (1984) Cr LJ 613, (1984) SCC 172 (Cr), (1984) Cr LR 163(SC), (1984) Cr App R 141(SC), (1984) SC Cr R 138, (1984) All Cr LR 410, (1984) 1 Crimes 568, (1984) 1 Ser LR 619, (1984) 2 SCC 183, (1984) Cur Cr J 133.

65 *M Karunanidhi v Union of India* AIR 1979 SC 898, p 915-16, (1979) Cr LJ 779, (1979) SCC 691 (Cr), [1979] 3 SCR 254 ; *Jajwanlal v Krishan Chand Sharma* (1987) Cr LJ 1149, (1987) Sim LJ 152 .

66 *P Nallammal & Ors v State* (1999) Cr LJ 1591 (Mad) .

67 *RS Nayak v RR Antulay* AIR 1984 SC 684, (1984) Cr LJ 613, (1984) SCC 172 (Cr), (1984) Cr LR 163(SC), (1984) Cr App 141(SC), (1984) SC Cr R 138, (1984) Cur Cr J 133, (1984) All Cr LR 410, (1984) 21 Crimes 568, (1984) 1 SLR 619, (1984) 2 SCC 183.

68 *State of Gujarat v MP Dwivedi* AIR 1973 SC 330, (1972) Cr LJ 1247, (1973) 2 SCJ 211, (1972) 2 SCC 392 .

69 *Manshanker Prbhashanker Dwivedi v State of Gujarat* AIR 1970 Guj 97, p 103, (1970) Cr LJ 679 ; **confirmed** in *State of Gujarat v MP Dwivedi* AIR 1973 SC 330, (1972) Cr LJ 1247 .

70 *RP Singh v State* (1960) All LJ 357 ; *Sahebzadee v Fargusson* 7 ILR Cal 499 (an official trustee was held to be a public servant).

71 *GA Monterio v State of Ajmer* AIR 1957 SC 13, [1956] SCR 682, (1957) Cr LJ 1 ; *Ratanji v State of Maharashtra* (1970) Mah LJ 626, (1970) 72 Bom LR 304 (a peon is a public servant).

72 *Kumar Nayak v State* AIR 1962 Cal 195, (1962) 1 Cr LJ 409 .

73 *MB Kanwar v State* AIR 1963 Punj 201, (1963) 1 Cr LJ 609, (1962) 64 Punj LR 1074 .

74 *Chinubhai Keshavlal Nanavati v KJ Mehta* (1977) Guj LR 1022, p 1024 .

75 *Manhar Prasad v State of Bihar* AIR 1971 SC 2479, (1971) Cr LJ 1712 .

76 *Satya Narain v Musadi v State of Bihar* AIR 1980 SC 506 .

77 *RS Nayak v AR Antulay* AIR 1984 SC 684, (1984) Cr LJ 613, (1984) SCC 172 (Cr), (1984) Cr LR 163 (SC), (1984) All Cr LR 410, (1984) 1 Crimes 568, (1984) 2 SCC 183, (1984) 1 Serv LR 619 .

78 *State of Gujarat v Manshanker Prabhashanker Dwivedi* AIR 1973 SC 330, (1972) Cr LJ 1247 (SC) .

79 *State of Ajmer (now Rajasthan) v Shivaji Lal* AIR 1959 SC 847, (1958) Cr LJ 1127 .

80 *Dilawar Babu Kurane v State of Maharashtra* AIR 2002 SC 564, 2002 Cr LJ 980, (2002) 2 SCC 135 .

81 *Govind Prasad v State* (1971) All Cr R 297 .

82 *Raj Kumar v State* (1971) All Cr R 610 .

83 *MCD v Amrit Lal* (1981) Raj LR 1, (1981) Cr LJ 422 (Del) .

84 *Maharudrappa v State of Mysore* AIR 1961 SC 785, (1961) 1 Cr LJ 857, [1962] 1 SCR 129, 39 Mys LJ 464, (1962) 1 SCJ 454 ; *State v Banshi Lal* AIR 1962 Raj 250, (1962) 2 Cr LJ 786, (1962) Raj LW 307, (1962) 12 ILR Raj 327 ; *Prem Narain v State of Uttar Pradesh* (1975) Cr LJ 1783 ; *State of Maharashtra v Moreshwar* (1971) Mah LJ 852, (1971) Bom LR 823 .

85 *Maharudrappa v State of Mysore* AIR 1961 SC 785, (1961) 1 Cr LJ 857, [1962] 1 SCR 129, 39 Mys LJ 464, (1962) 1 SCJ 454 ; *Shrilal v Manmath Kumar* AIR 1960 Raj 173, (1960) Cr LJ 996 ; *JM Pendse v Chandra Gopal* (1972) Cr LJ 1207, (1972) MPLJ 166 ; *State of Maharashtra v Moreshwar* (1971) Mah LJ 852, (1971) Bom LR 823 ; *Thimmaiah v Narasappa* AIR 1955 Mys 113, (1955) Cr LJ 1269 .

86 *Bahiron Prasad v Emperor* AIR 1928 All 756 .

87 *State v Banshi Lal* AIR 1962 Raj 250, (1962) 2 Cr LJ 786, (1962) Raj LW 307, (1962) 12 ILR Raj 327 .

88 *Bradley v Emperor* AIR 1932 Lah 188 .

89 *Narayan v State* AIR 1956 MB 51, (1956) Cr LJ 227 ; *Pukhraj v Umaid Ram* AIR 1964 Raj 174, (1964) Raj LW 238, (1964) 2 Cr LJ 339 .

90 *Ambalal v Manibhai* (1968) 9 Guj LR 672 ; *Queen-Empress v Tiruvengada* (1898) 21 ILR Mad 428 .

91 *State v Banshi Lal* AIR 1962 Raj 250, (1962) Raj LW 307, (1962) 2 Cr LJ 786 .

92 *Swami Prasad v Hargovind Sahai* AIR 1970 All 251, (1969) All LJ 743 (FB) ; **but see***SDO, Faizabad v SN Singh* AIR 1970 SC 140 .

93 *Ramesh Balkrishna Kulkarni v State of Maharashtra* (1985) 2 Crimes 378 .

94 *RS Nayak v AR Antulay* AIR 1984 SC 684 .

95 *Ram Chandra Sahu v G Basak* (1987) 63 Cut LT 546 (Ori) .

96 Re *Champat Rao Deshmukh* 38 Cr LJ 444, 19 Nag LJ 221.

97 *Shrilal v Manmath Kumar Misra* AIR 1960 Raj 173, (1959) 9 ILR Raj 808, (1959) Raj LW 609 .

1 *Somsetti Lakshmi Narasimayya v State of Andhra Pradesh* (1971) 2 Andh WR 392, (1971) Mad LJ 678 (Cr) ; *Yeshwant Gunaji Sorte v State of Maharashtra* (1981) Cr LR 336 (Bom), (1981) Bom CR 752 ; *Shri Kisan Mahadeo Hedgine v State of Maharashtra* (1993) 1 Bom CR 631 ; *Rabindra Nath Bera v State of West Bengal,* 2012 Cr LJ 913 (917), 2011 (5) CHN 377 (Cal) . (Previous sanction under s 197, CrPC is necessary for prosecuting him for offence under s 409, IPC).

2 *State of Punjab v Kesari Chand & Anor* (1987) Cr LJ 549 (P&H)(FB); *Shanmugam v State* (1997) Cr LJ 2042 (Mad) .

3 *State of Maharashtra v Laljit Rajshi Shah & Ors* (2000) Cr LJ 1494 (SC), (2000) I CCR 283(SC); **See also***Haladhar Sasmal v State of West Bengal* 2012 Cr LJ 1726, p 1734 (Cal) .

4 *Haladhar Sasmal v State of West Bengal* 2012 Cr LJ 1726, p 1734 (Cal) *State of Maharashtra v Laljit Rajshi Shah* AIR 2000 SC 937 **followed**). President of a Primary Agricultural Co-operative Society may be a public servant under the Co-operative Societies Act, but is not a public servant within the meaning of s 21, IPC . *Pinjari Pandlapuram Pedda Hussain Saheb v Government of AP* 2010 Cr LJ (NOC) 992 (AP) .

5 *Gurmit Singh v State of Punjab* (1976) Cr LT 686 (P&H) ; *Suryanarayan Tripathy v Ch Kamalanatham* (1990) 2 Crimes 391 (Ori) ; *K Sumasundaram v State by Inspector of Police, Coimbatore* (1990) Mad LJ (Cr) 529 .

6 *State of Uttar Pradesh v Vishwa Nath Kapoor* (1980) Cr LJ 494 (All) ; *Madho Ram Sharma v State* (1966) All LJ 1070**overruled**.

7 *Prahlad Shambhurao Newale v State of Maharashtra* (1988) 16 Reports 103 (Bom) ; *Khudiram Bhoumik v State of Assam and Premlal Gayari* (1988) 1 Crimes 562 (Gau) .

8 *MC Gangadharappa v State* (2002) Cr LJ 2755 (Kant) .

9 *SS Dhanoa v Municipal Corpn of Delhi* AIR 1981 SC 1395, (1981) 3 SCC 431, (1981) UJ 803 (SC), (1981) Cr LR 456(SC), (1981) SCC 733 (Cr), (1983) SC Cr R 139, (1981) Cr LJ 871.

10 *NK Sharma v Abhimanyu* 2005 Cr LJ 4529, AIR 2005 SC 4303, 2005 (13) SCC 213, 2005 (35) AIC 107 .

11 *State of Uttar Pradesh v Vishwa Nath Kapoor* (1980) Cr LJ 494 (All) ; *Madho Ram Sharma v State* (1966) All LJ 1070**overruled**.

12 *State of Madhya Pradesh v MV Narasimhan* AIR 1975 SC 1835, (1975) Cr LJ 1639 .

13 *Naoraze Dorabji v Labhsankar Hariram Mehta* (1973) 75 Bom LR 493, p 497 .

14 *State of Maharashtra v Jagatsingh* AIR 1964 SC 492, [1964] 4 SCR 299, (1964) 1 Cr LJ 432, (1964) 2 SCJ 215, (1963) 2 SCWR 464, (1964) Mah LJ 404 (Cr) ; Re *Chief Executive Officer*AIR 1963 AP 491, (1963) 2 Cr LJ 601 .

15 Re *HV Jagdesh*AIR 1966 AP 35 (FB), (1966) Cr LJ 120(FB).

16 *Ghulam Rabbani v State of Assam* (2001) Cr LJ 2331 (Gau), (2002) I CCR 476(Gau).

17 *Oriental Bank of Commerce v DDA* (1982) Cr LJ 2230 (Del), (1983) Cr LT 6 (Del), (1983) Punj LR 1 (Del)(DB).

18 *Subramanya v State* (1976) 1 Kant LJ 178, p 180 .

19 *Abdul Rehman v State of Kerala & Anor* (1999) Cr LJ 4801 (Ker) .

20 *M Muniswami v State of Karnataka* (1993) 3 Crimes 809, p 813-14(Kant) .

21 *Essar Construction Ltd v Central Bureau of Investigation* (1999) Cr LJ 1861 (Bom) .

22 *National Small Industries Corporation Ltd v State (NCT of Delhi)* 2009 Cr LJ 1299, p 1302 (SC), AIR 2009 SC 1284, 2009 (1) SCC 407 .

23 *State of Maharashtra v LD Kanchan, Branch Manager, Indian Overseas Bank* (1989) 1 Bom CR 59, p 65-67 ; *Kurian v State of Kerala* (1982) Cr LJ 780, (1982) KLT 280 (DB) ; *MP Kimi v State represented by the Supdt of Police, CBI* (1990) 2 Andh WR 287, (1991) 1 Crimes 127, (1991) Cr LJ 272 (AP) .

24 *Ashoka Marketing Ltd v Punjab National Bank* (1990) 4 SCC 406 .

25 *Oriental Bank of Commerce v Delhi Development Authority* 1982 Cr LJ 2430 .

26 *Ashoka Kumar Mitra v State of West Bengal* (1995) 1 Crimes 234 .

27 *Union of India v Ashoka Kumar Mitra* (1995) 1 Crimes 852 .

28 *State v SR Vij* (1999) Cr LJ 4762 (Del) .

29 *Union of India v Ashok Kumar Mitra* AIR 1995 SC 1976, (1995) Cr LJ 3633 (SC) .

30 *Republic of India v Khagendranath Jha* (1981) 52 Cut LT 197, (1982) Cr LJ 961 (Ori) .

31 *Oriental Insurance Co Ltd v State of Bihar* (2004) Cr LJ 1951 (Pat) (DB) .

32 *Rajendra Vithalrao Suryavanshi (Dr) v State of Maharashtra* (1991) Cr LJ 2068, (1991) 2 Crimes 141 (Bom) .

33 *State through CBI v OP Dogra* (1985) 4 SCC 319 ; *KP Modi v Basant Kumar Sinha* (1978) BLJ 279 (284), (1978) BLJR 158 .

34 *AR Puri v State* (1987) 2 Crimes 102, (1987) 32 DLT 115 .

35 *RK Dalmia & Ors v Delhi Admn* AIR 1962 SC 1821 .

36 *Kaliyaperumal v State* (1982) Mad LJ 197 (Cr) ; *State v K Srinivasan* (1984) LW 127 (Cr) (Mad); *SD Usman v State* (1982) Cr LJ 255 (Mad) .

37 *Arvind C Shah (Dr) v State of Gujarat* (1986) 1 Guj LR 481, (1986) 2 Cr LC 59 .

38 *Adi P Gandhi v State of Maharashtra* (1989) MPLJ 588, p 599 .

39 *R v Ramajirao* 12 Bom HCR 1 .

40 Re *Madun Mohun* 5 ILR Cal 376.

41 *R v Dinanath* 8 BLR App 58 .

42 *Nazamuddin v R* 28 ILR Cal 344 ; **dissenting** from *R v Mathura Prasad* 21 ILR All 127 .

43 *R v Nachimuttu* 7 ILR Mad 18 .

44 *Mahendra Prosad v Emperor* 9 IC 698 (Cal) ; *Bhagwati Sahai v Emperor* 32 ILR Cal 664 .

45 *R v MC of Calcutta* 3 ILR Cal 758 .

46 *Addaita Bhia v Kali Das* 6 Cr LJ 393, 12 CWN 96 .

47 *Shridhar Mahadeo Pathak*AIR 1935 Bom 36, 36 Cr LJ 532, 36 Bom LR 1133 .

48 *Karnam Siddappa v State of Mysore* (1957) ILR Mys 68, (1957) 1 Mad LJ Cr 71, (1958) Cr LJ 784, AIR 1958 Mys 82 ; *Sombari Behari v Emperor* 1935 MWN 1337 ; *State of Bihar v Amulya Ratan Pathak* AIR 1969 Pat 173, p 180 ; *Shanti Rajan Bhattacharya v State* AIR 1970 Cal 557, p 558 .

49 *Subramania Pillai v Ponnian* AIR 1939 Mad 569, 40 Cr LJ 822 (2), (1939) Mad WN 469, (1939) 1 Mad LJ 729.

50 *Elahi Bux Khan v State* AIR 1955 Cal 482, p 483 .

51 *Madan Mohan* 4 ILR Cal 376.

52 *R v Araji* 7 ILR Mad 17, **but see***Nazamuddin v Queen-Empress* 28 ILR Cal 348 and *Mathura Prasad* 21 ILR All 127.

53 *R v Nachimuttu* 7 ILR Mad 18 .

54 *Public Prosecutor v Kamidi Annan Naidu* 48 ILR Mad 867 .

55 *Ebrahim v Emperor* 29 ILR Cal 236 .

56 Re *Gulab* 1 All LJR 1252 (Notes).

57 *Ahad Shah v Emperor* AIR 1918 Lah 152, 45 IC 150, (1918) PR 18 (Cr) .

58 *GSK Janardana Rao & Anor v Guntapalli Guru Prasad & Anor* (2000) Cr LJ 2927 (AP)(DB).

59 *Nga Paw v Emperor* 38 IC 735 .

60 Re *Meharban* 9 IC 669 (All).

61 *Sunder Majhi v Emperor* 30 ILR Cal 1084, p 1087 .

62 *Chattar Lal v Thacoor Pershad* 18 ILR Cal 518 .

63 Re *Dinanath* 8 BLR App 58.

64 *Dhanpal Singh v State* AIR 1970 Punj 514 .

65 Re *Municipal Corpn* 3 ILR Cal 763, p 764.

66 *MCD v Amrit Lal* 1981 Raj LR 1 (Del) .

67 *Swami Nath v SDO, Machhlishahr* AIR 1958 All 660 .

68 *Hari Shankar Prasad Gupta v Sibban Lal Saksena* AIR 1956 SC 314 .

69 *Harbilas v Crown* AIR 1950 EP 167 .

70 *AR Puri v State* 32 (1987) DLT 115, (1987) 2 Crimes 102 (Del) .

71 *State v Banshilal Luhadia* AIR 1962 Raj 250, p 257, (1962) 12 ILR Raj 327, (1962) Raj LW 307, (1962) 2 Cr LJ 786 .

72 *Maharudrappa Danappa Kesarappanayar v State of Mysore* AIR 1961 SC 785, (1961) 1 Cr LJ 857, (1961) All Cr R 196,

(1961) 2 Lab LJ 402 .

73 *Queen v Ram Kistodos* 16 WR 27 (Cr), 7 BLR 446 .

74 *Sailesh Chandra Lahiri v Nihal Chand Marwari* AIR 1932 Cal 462, 33 Cr LJ 521 ; *Brij Behari v Emperor* AIR 1941 Pat 539, 42 Cr LJ 508 ; *Emperor v Fazal Rahman* AIR 1937 Pesh 52 .

75 *Elahi Bux Khan v State* AIR 1955 Cal 482, p 483 ; *State of Orissa v Bira Kishore Naik* AIR 1964 Ori 202, p 203, (1964) 6 Ori JD 119 .

76 *Padam Singh v State of Uttar Pradesh* AIR 1961 SC 218, p 221, **reversing**AIR 1959 All 70 .

77 *Jitendra Mohan De v Emperor* AIR 1944 Cal 79, p 82 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 22.

"Movable property".--

The words "movable property" are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.109

Comments

1. Definition of Movable Property Differs from one given in other Central Acts

This section defines the words 'movable property'. The definition given here differs from the one in other Acts of the Indian Legislature.[78] Under the Indian Registration Act 1908, 'movable property' includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except 'immovable property'. Under s 3(36) of the General Clauses Act 1897, 'movable property' shall mean property of every description except immovable property, and under s 3(26) 'immovable property' shall include land, benefit to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. Under s 3 of the Transfer of Property Act 1882, immovable property does not include standing timber, growing crops or grass. Section 3 of the Indian Companies Act 1913, provides that 'the shares or other interest of any member in a company shall be movable property, transferable in manner provided by the articles of the company'. The definition in this section restricts 'movable property' to corporeal property, that is to say, tangible movable property as distinguished from intangible rights which law regards as property and clothes the holder with rights of ownership therein. The definition, thus, excludes all incorporeal objects such as legal relations and rights which are included in the term in civil law. In other words, it takes no account of rights or interest in things apart from the things themselves. The definition in this section is meant only for the special purposes of the IPC and is much narrower than the definition in other Acts.

This definition is of importance in relation to offence of theft and its kindred offences. Electricity has

not been held to be movable property though its theft has been made punishable under the Indian Electricity Act.[79]

2. Standing Tree, Growing Crop, Fish, Electricity, *etc*

Standing teak trees are immovable property.[80] Under s 2(13) of the Code of Civil Procedure 1908, movable property includes growing crops, but under this section or s 3(36), General Clauses Act, movable property does not include growing crops.[81] So is a tree when cut down, growing fruit when severed,[82] and lead piping or other fixtures, when stripped from a house.[83] Fish is a corporeal property and when separated from the waters becomes the subject-matter of theft.[84] Electricity is not movable property.[85]110

3. Property

Property means things or thing owned. There is no good reason to restrict the meaning of the word 'property' to movable property only when it is used without any qualification in other sections of the IPC . Whether the offence defined in a particular section of the IPC can be committed in respect of any particular kind of property will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by that section. It is in this sense that it may be said that the word 'property' in a particular section covers only that type of property with respect to which the offence contemplated in that section can be committed. The word 'property' is used in the Code in a much wider sense than the expression 'movable property'.[86]

4. Corporeal Property

Corporeal or tangible property is property which may be perceived by the senses, in contradistinction to incorporeal rights which are not so perceivable. Thus a cheque is movable property[87] and so also the papers forming part of the record of a case.[88] But the right in the cheque or record of the case is incorporeal property.

A Thing Thrown Away as a Waste

In an Allahabad case, it was observed by Knox J:

> It would be difficult to hold that an envelop thrown by its owner into a waste paper basket and picked up or carried away by another person would be property within the meaning of 'movable property' as used in the Penal Code.[89]

The underlying idea appears to be that a thing thrown away as waste loses its value and can no longer be regarded as a property. The general exceptions provided by s 95 of the IPC should also apply to such cases.

5. 'Except Land and things Attached to the Earth'

Land and things attached to the earth are here excepted from the category of movable property. In fact, 'land and things attached to the earth, or permanently fastened to anything attached to the earth' are also immovable property under the General Clauses Act.[90] Land, as such, is immovable property. Land is the solid part of the surface of the earth, as opposed to water as constituting a part of such surface. The expression 'land and water' includes 'buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property',[91] for the purposes of s 145 of the CrPC .

6. Meaning of the Expression 'Attached to Earth'

The expression 'attached to earth' means (a) rooted in the earth, as in the case of trees and shrubs, (b) embedded in the earth, as in the case of walls or buildings, (c) attached to what is embedded for the permanent beneficial enjoyment of that to111 which it is attached.[92] Earth, *i.e.*, the soil, and all the component parts thereof inclusive of stones and minerals, when severed from the land to which it was attached, is 'movable property'.[93] In *R v Sivram* ,[94] where the accused were charged with stealing 100 cart-loads of earth from the complainant's land, the court upheld their conviction for theft, observing:

> It appears to us that earth when dug or ploughed up, so as to be in a state in which it can be put into a cart and taken away, ceases to be land or a thing 'attached to the earth' within the meaning of section 22 of the Indian Penal Code . By the process of digging or ploughing, earth may become severed from 'the earth' or form 'any land' to which it was attached; and may become 'movable property' within the definition contained in that section.

In another case where a swamp had been taken possession of by the Government, and the accused gathered salt, which had spontaneously formed on it, it was held that the removal of salt from the swamp converted it into movable property, so that the accused were rightly convicted of this theft. The court observed:

> We cannot distinguish this case from theft of wood in a reserved forest, except that salt is actually a part of the soil, while trees are not; yet things immovable become movable by severance, and this would apply to severed parts of the soil, *e.g.*, stone quarried, minerals, iron, or salt collected, as well as to timber which has grown or edifices which have been raised on the land.[95]

78 See also s 2 of the General Clauses Act 1 of 1868, s 3(36) of the General Clauses Act 1897, s 3 of the Registration Act 1897, s 2(9) of the Indian Registration Act 1908, s 3 of the Indian Succession Act 1865, s 2 of the Indian Trustees Act 1866, s 3 of the Transfer of Property Act 1882, s 82 of the Companies Act 1956.

79 *Autar Singh v State of Punjab* AIR 1965 SC 666, p 668, (1965) 1 Cr LJ 605, [1965] 1 SCR 103, (1965) 1 SCWR 289, (1965) Cur LJ 308 .

80 Re *U Ka Deo*AIR 1930 Rang 158, p 159 .

81 *Nallamadan Chettiar v Emperor* AIR 1930 Mad 509 .

82 Section 378, illust (a).

83 *R v Cooper* 24 TLR 867, (CCA); *R v Richard* LR [1911] 1 KB 260.

84 *State v Pooran Singh* (1977) Cr LJ 1055 (Raj) .

85 *Autar Singh v State of Punjab* AIR 1965 SC 666, p 668, (1965) 1 Cr LJ 605 .

86 *RK Dalmia v Delhi Admn* AIR 1962 SC 1821, p 1833 .

87 *SF Rich v Emperor* AIR 1930 All 449, p 450 ; *RK Dalmia v Delhi Admn* AIR 1962 SC 1821, (1962) 2 Cr LJ 805 .

88 *Ramaswamy Aiyar v Vaithilinga Mundali* (1882) 1 Weir 28 .

89 *Ashbey Clarke Harrison v Emperor* AIR 1918 All 353, p 354 .

90 Section 2(5), Act 1 of 1868, s 3(26) Act 10 of 1897.

91 Code of Criminal Procedure 1973, s 145(2) .

92 Transfer of Property Act 1882, s 3 .

93 *R v Sivram* 15 ILR Bom 702, and s 278, expln 1; *Suri Venkatappayya v Madula* 27 ILR Mad 531, see also Digest 47, 2, 57, **overruling** Kotayyan 10 ILR Mad 255 and **following***R v Tamma Ghantayya* 4 ILR Mad 228 ; *R v Sivram* 15 ILR Bom 702 .

94 *R v Sivram* 15 ILR Bom 702, expln 1 to s 378 of the Indian Penal Code 1860.

95 *R v Tamma Ghantayya* 4 ILR Mad 228 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 23.

"Wrongful gain".--"

Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful loss"--"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Gaining wrongfully, losing wrongfully--A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.112

Comments

1. 'Wrongful Gain' and 'Wrongful Loss'

This section defines 'wrongful gain' and 'wrongful loss' which are the main ingredients of the definition of the word 'dishonestly' in s 24 . The expressions refer exclusively to the gains and loss of property. 'Wrongful gain' or 'wrongful loss' may be effected either by negative or positive means, as pointed out in the third clause of this section. Two things are essential to constitute wrongful gain or its correlative wrongful loss: by (a) wrongful acquisition, retention or deprivation of property and (b) unlawful means.[1] Under this section, 'wrongful gain' includes wrongful acquisition as well as wrongful retention and 'wrongful loss' includes wrongful deprivation of property as well as wrongfully being kept out of property.[2] Wrongful gain or wrongful loss may be temporary,[3] it may also be permanent.[4] Wrongful gain includes wrongful retention and wrongful loss includes being kept out of the property as well as being deprived of property.[5]

2. There must be Gain or Loss

'For either wrongful loss or gain, the property must be lost to the owner, or the owner must be

wrongfully kept out of it'.[6] The 'gain' in this section means acquisition of the specific property in respect of which a person causes wrongful loss to another. If, therefore, a person maliciously impounds another's cattle with a view to put him to expense, the latter would be put to pecuniary loss generally, but not of the property in question, and, therefore, the person impounding his cattle cannot be, as stated before, proceeded against for their theft.[7]

Where the accused, the pledgee of a turban, was convicted of criminal breach of trust for using it, the conviction was set aside on the ground that the wrongful beneficial use of property by him was not a gain to him, nor was it a wrongful loss to the real owner.[8]

Where a person maliciously impounded another's cattle with a view to cause him expense, inconvenience and annoyance, there being neither 'wrongful gain' nor 'wrongful loss' of the property, he could not be convicted of theft.[9]

Where a servant being piqued at being wrongly suspected of the theft of a box, removed it and concealed it in a cowshed to teach his master a lesson, the question arose whether his act caused wrongful gain to him, or wrongful loss to his master, so as to justify his conviction for theft. It was held that as there was no wrongful gain or loss, the accused could not be so convicted.[10] When a particular thing has gone into the hands of a servant, he will be guilty of misappropriating the thing in all113 circumstances which show a malicious intent to deprive the master of it.[11] When, however, the owner is kept out of possession of a property with the object of depriving him of the benefit arising from its possession even temporarily, the case will come within the definition. But where this is done, not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense.[12] But forcible or illegal seizure of a woman's bullocks in satisfaction of an alleged debt owed by her husband, would be causing wrongful loss to her.[13]

3. The Person Losing should be Legally entitled to such Property

The person losing must be legally entitled to such property; in other words, he must have some legal right in that property.[14] A bull dedicated and set at large at the *shradh* of a Hindu in accordance with religious usage, ceases to be the property of its former owner, so that a person capturing and killing it cannot be said to cause 'wrongful loss' of any property to any one.[15]

4. Gain or Loss must Relate to Property

The term 'property' as used in this section means anything which not only may be, but is, the subject of ownership. Where, for instance, a student forged a certificate to get another so as to secure his admission to a higher class, the certificate which he so procured was held to be property within the meaning of this section.[16] In *Empress R v Bandhu* ,[17] Straight J remarked:

> It was not only not the subject of ownership by any person but the original owner had surrendered all his rights as its proprietor, and had given the beast its freedom to go whithersoever it chose; it was therefore, *nullius proprietas* and is incapable of larceny being committed in respect of it as if had been *ferae naturae.*

The fact that the bull was given rice by the dedicator's family and their permission was taken by the villagers using it for breeding purposes would not convert it into the property of the family.[18]

A gold *mohar* found on the plain must be taken to have been abandoned and is not property within the meaning of this section.[19]

In *Paltu Goswami v Ram Kumar Das* ,[20] there was a dispute between the complainant and the accused regarding the right to use a pond. The complainant kept his jute dipped in the pond. The accused removed the jute from the pond and kept it114 outside and asked the complainant to take it away, but he refused. It was held that the complainant had not been kept out of possession of his property or deprived of his property, and hence no wrongful loss was caused to him within the meaning of this section.

5. Gain or Loss must be Material and not Remote

The 'gain' and 'loss' in this section must be taken to mean material gain or loss.[21] In *Jan Mahomed v Queen-Empress* ,[22] it was held that a recognition from a settlement officer that a person was entitled to the little of *loskur* was not 'gain' within the meaning of s 24 . In *Queen-Empress v Haradhan Rakhal Dass* ,[23] the accused used as genuine a forged certificate purporting to have been given to him by the headmaster of a school in order to obtain permission to sit for the entrance examination of the Calcutta University and it was held that a fraudulent or dishonest intent had not been established and that, therefore, the accused was not guilty under s 471 of the IPC . In this case all the immediate gain that the accused could have obtained by means of the false certificate was permission to sit for the entrance examination of the Calcutta University. Assuming that he passed that examination and there afterwards obtained distinction, he might have eventually at some future time derived some material benefit from having done so; yet such material benefit would be very remote. But where a candidate for a lucrative post made a false statement in his application and also produced a forged certificate, the applicant's intention being to obtain a lucrative appointment immediately, the gain which he might have obtained through his deception, had it succeeded, could be measured in rupees, and it would have been a wrongful gain.[24]

Mere permitting of cattle by the accused to stray does not establish his intention to cause, or knowledge that he was likely to cause, wrongful loss or damage to the public or any person.[25]

6. Gain or Loss must be by Unlawful Means

The term 'wrongful loss' is defined under s 23, IPC, and according to that definition, loss would be wrongful if it is done by wrongful means.[26]The Code does not define the word 'unlawful', though it says in s 43 what the word 'illegal' means. But the two concepts bear an identical meaning as was explained by the law commissioners.[27] The words 'by unlawful means' in the definition of 'wrongful gain' and 'wrongful loss' are intended to refer to an act which would render the doer liable either to a civil action or to a criminal prosecution. Thus the holder of the stakes of a wager is not legally entitled to the stakes; he may return them to the depositors and may be compelled to do so by civil suit; he may absolve himself from civil liability by paying them over, before they are demanded back, to the winner; but there is no law or rule which justifies him in converting them to his own use. If he does so, he acts with the intention of causing to himself 'wrongful gain' within the meaning of115 the definition and he acts 'dishonestly'. The stakeholder may not have caused wrongful loss to the depositor but he has caused wrongful gain to himself.[28] Obtaining money by deception or false pretences is to obtain money by unlawful means.[29] Taking away cattle belonging to a person forcibly and against his consent is depriving him of property to which he was legally entitled by unlawful means, and, therefore, causing wrongful loss to him.[30]

Gain to One and Loss to Other by Lawful Means--Instances

In *Jamesetji*'s case,[31] the servant of a liquor contractor was entrusted with liquor by his master for sale. For selling the liquor, he was to receive a certain quantity for himself and was to account for the remainder to his master, with whom he made a legal contract that he would not adulterate it with water before selling it. In violation of that contract he adulterated the liquor with water and sold it at the rate of unadulterated liquor, appropriating the profit thus made to his own use. It was held that he obtained by unlawful means, namely, adulteration, property to which he was not legally entitled. However, a milkman who sells adulterated milk cannot be said to cause wrongful loss to his customers.[32]

Where the case was that a particular crop belonged to *A* and that *B* by deceit unlawfully reaped it; it was held that the allegations involved that *B* intended to gain unlawfully by taking possession of the crop and to cause loss unlawfully to *A* by doing so.[33]

Where the accused had gathered and demolished a part of the terrace and the walls, which another person had built, on the pretext that the construction was an encroachment on a public street, it was held that the demolition of the building was not justified by law and that the loss caused to the owner of the building by reason of the demolition was caused by unlawful means within the meaning of this section. Further, if the demolition of the walls and the terrace undertaken by the accused had no justification in law, then the loss caused to the complainants by reason of that demolition must be deemed to be by unlawful means. Unless these accused have got a right of abating a public nuisance, the acts done by them can in no sense be deemed to be lawful.[34]

Where *A* was keeping, in storage, rice and paddy, delivered to him on behalf of the government, it was held that the removal of the food grains, from storage, by *A's* partner to his own house and telling the civil supply officer that he would not return the same, amounted to intentionally keeping *A* out of the property which had been kept in his charge by the government and wrongful loss to *A* and dishonest removal within the meaning of s 403 of the IPC .[35]116

No Gain to One and no Loss to Other by Unlawful Means--Instances

Where *A* closed a water-course and thereby prevented the water from flowing to *B's* fields, but there was nothing to show that *B* had a legal right to the water intercepted, it was held that no wrongful loss was caused to *B*.[36] It is not unlawful to do something on your own land without trespassing on your neighbour's land which necessarily causes injurious effects to the property of your neighbour.[37]

Where the accused was sold rice by a famine relief officer at 16 *seers* per rupee on condition that he should sell it at the rate of 15 *seers*, instead of which he was discovered having sold it at the rate of 12 *seers*, it was held that it did not amount to a crime, the reason given for the finding being, that as the property on sale became vested in him, it could not be said that his sale at otherwise than the stipulated rate caused wrongful loss to the famine relief officer, nor was there a gain on the part of the accused by unlawful means, for the rice having been sold to him and he having paid for it, it was not unlawful for him to sell it again at such price as he though fit.[38]

7. Acquisition, Retention and Deprivation

As pointed out in the third clause of this section the words 'gaining wrongfully' or 'losing wrongfully' need not be confined only to the actual acquisition or to the actual deprivation of property and would cover also cases of wrongful retention of property in the one case and wrongfully being kept out of property in the other.[39] 'Wrongful gain' according to the definition in s 23 is constituted not only by wrongful acquisition of property (which is in accordance with the ordinary meaning of the words) but also by wrongful retention of the same, even though such retention does not result in any profit to the person retaining it; 'wrongful loss' is, therefore, constituted not only by wrongful deprivation of property, but also by being wrongfully kept out the same.[40] For wrongful loss or gain, the property must be lost to the owner, or the owner must be wrongfully kept out of it.[41] The reference to being kept out of the property in this section means being kept out of possession of property. If a man is kept out of possession of his property, wrongful loss can be said to have been caused.[42]

In *Matabar Shekh v Emperor* ,[43] the accused was an employee of a steamer company and his business was to check the tickets of the passengers. The complainant, a passenger, had no ticket, and the accused, therefore, took possession of his umbrella as security, so that the complainant might be compelled to pay his fare. It was held that as he did not intend either to make any wrongful gain to himself by compelling payment of the fare or to cause any wrongful loss to the complainant, who was bound to pay his fare, there was no wrongful gain or wrongful loss.117

8. Wrongful Loss or Gain Covers Temporary Loss or Gain

Wrongful loss covers temporary wrongful loss, and wrongful gain covers temporary wrongful gain.[44] If the owner is kept out of the possession with the object of depriving him of the benefit arising from possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense.[45] The gain or loss contemplated need not be a total acquisition or a total deprivation, but it is enough if it is a temporary retention of property by the person wrongfully gaining or a temporary 'keeping out' of property from the person legally entitled. This is clearly brought out in illust (1) to s 378 . Thus, the taking out of aircraft owned by government by a person for an unauthorised flight gives him the temporary use of the aircraft for his own purpose and temporarily deprives the owner of the aircraft, namely, the Government, of its legitimate use for its purposes. Such use being unauthorised is a gain or loss by unlawful means. It is wrongful gain to the person and wrongful loss to the government.[46]

In *Nabi Buksh v Queen-Empress* ,[47] the Calcutta High Court observed:

> To constitute the offence of theft it is not necessary that the taking should be permanent or with an intention to appropriate the thing taken, or that there should be wrongful gain to some one in addition to wrongful loss to the real owner.[48] ...Of course, when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense.

Gain by Wrongful Retention--Instances

Under this section a person is said to gain wrongfully also when he retains wrongfully.

When delivery of VP parcels cannot be made to the addressees, the postman (accused) is bound to return the parcels to the post master. But where, instead of doing this, he signed the postal receipts himself and made it appear that they were received by some person for and on behalf of the addressees and the accused retained them for himself, such retention is wrongful gain within the meaning of this section.[49]

9. Burden of Proof

The burden of proving wrongful loss is on the complainant.[50]Where wrongful loss is caused, it may be presumed that the accused intended to cause wrongful loss as every man is presumed to intend the natural consequences of his act.[51]118

1 *Bhima Mahapatra v Krishna Chandra Rath* (1966) 32 Cut LT 788 ; *Ram Krishna v Kishan Shivraj* (1974) Mah LJ 659, 661, (1974) 76 Bom LR 424 .

2 *RL Mallick v PG Menon* (1968-69) 73 CWN 371.

3 *Local Govt v Madho Patwari* AIR 1923 Nag 146 .

4 Re *Nanak Singh*(1968) 1 Andh LT 254, (1968) ILR AP 1094.

5 *Krishna Kumar v Union of India* AIR 1959 SC 1390, (1959) Cr LJ 881 .

6 Proceeding, 8 November 1866, 3 MHCR App (vi).

7 *Aradhun v Myan Khan* 24 WR 7, 8 (Cr); *Dayal v Emperor* AIR 1943 Oudh 280, 44 Cr LJ 640 .

8 Proceeding, 8 November 1866, 3 MHCR App (vi).

9 *Aradhun v Myan Khan* 24 WR 7, p 8 (Cr) .

10 *Nabi Baksh v R* 25 ILR Cal 416 .

11 *Krishna Kumar v Union of India* AIR 1959 SC 1390, (1959) Cr LJ 881 ; *Harakrishna Mahatab v Emperor* AIR 1930 Pat 209 .

12 *Nabi Baksh v R* 25 ILR Cal 416 .

13 *Queen v Preonath Banerjee* 5 WR 68 (Cr) ; *Queen-Empress v Chum Chungo* 22 ILR Cal 1022 (FB), **overruling***Prosonno Kumar Patra v Udoy Sant* 22 ILR Cal 669 and cases cited therein.

14 *Bhima Mohapatra v Krishna Chandra Rath* (1966) 32 Cut LT 788 .

15 *Empress v Bandhu* 8 ILR All 51 ; *R v Nihal* 9 ILR All 348 ; *Romesh Chander v Hiru Mondul* 17 ILR Cal 852 .

16 *Sashi Bhusan v R* 15 ILR All 210 .

17 *Empress R v Bandhu* 8 ILR All 51, (1885) All WN 326 .

18 *Romesh Chander v Hiru Mondul* 17 ILR Cal 852 .

19 *Queen-Empress v Sita* 8 ILR Bom 212 .

20 *Paltu Goswami v Ram Kumar Das* AIR 1960 Tri 40 .

21 *Nga Ba Thein v King-Emperor* AIR 1925 Rang 9 .

22 *Jan Mahomed v Queen-Empress* (1884) 10 Cal 584 .

23 *Queen-Empress v Haradhan Rakhal Dass* 19 ILR Cal 380 .

24 *Nga Ba Thein v King-Emperor* AIR 1925 Rang 9, p 11 .

25 Re *Toorebaj Khan* BUC 11.

26 *Shiram & Anor v Thakurdas & Anor* 1978 Cr LJ (Bom) 715 (Nagpur Bench).

27 First Report, s 658 .

28 *Nag Te v King-Emperor* 1 Cr LJ 730 (FB) **overruling***Queen-Empress v Po Twe* (1881) SJLB, BUC 130.

29 *Nadir Ali Barqa Zaidi v State of Uttar Pradesh* AIR 1960 All 103, p 111 ; *Re MK Srinivasan*AIR 1944 Mad 410 ((2)), 46 Cr LJ 266 .

30 *Queen v Madwill Chowkeedar* 3 WR (Cr) 2 ; *Tarinee Prosad Banerjee v Babii Diirga Mohan Dass* 18 WR 8 (Cr) ; *Queen v Preonath Banerjee* 5 WR 68 (Cr) .

31 *Jamesetji*'s case (1888) BUC 395.

32 Re *Hiri*(1888) BUC 367.

33 *Naraindas v Kashi Prasad* AIR 1935 All 264, (1935) All WR 36, (1935) All LJ 248 .

34 *Gujjula Narasimhu v Nagur Sahi* AIR 1934 Mad 95, p 97 .

35 *Khandeshwar v State* (1964) 1 Cr LJ 525, AIR 1964 Ori 119, (1963) ILR Cut 869 .

36 *Tun Aung v Emperor* 7 Cr LJ 448 .

37 Re *Athi Ayyar*AIR 1921 Mad 322, p 323 .

38 *Queen v Lal Mohammed* 22 WR 82 (2).

39 *Dharmaendra Nath Shastri v Rex* AIR 1949 All 353, p 358 .

40 *Queen-Empress v Sir Churn Chungo* 22 ILR Cal 1017, p 1024 .

41 Proceeding, 8 November 1866, 3 MHCR App (vi).

42 *Budhan Singh v State* AIR 1960 Pat 518, (1960) Cr LJ 1485, (1960) BLJR 275 .

43 *Matabar Shekh v Emperor* 11 Cr LJ 444, 14 CWN 936 .

44 *Local Govt, CP v Madho Patwari* AIR 1923 Nag 146, p 147, 23 Cr LJ 557 .

45 *Queen-Empress v Sir Churan Chungo* 22 ILR Cal 1017 (FB) ; **overruling***Prosonna Kumar Patra v Uddy Sant* 22 ILR Cal 669 .

46 *KN Mehra v State of Rajasthan* AIR 1957 SC 369, p 372, (1957) Cr LJ 552 .

47 *Nabi Buksh v Queen-Empress* 25 ILR Cal 416, p 418 .

48 Indian Penal Code 1860, s 378, illust (1).

49 Re *Mahalingayya Muddayya Pujari*AIR 1959 Mys 185 .

50 *Bhima Mahapatra v Krishna Chandra* (1966) Cut LT 788 .

51 *Sheodani Singh v State of Bihar* (1961) 2 Cr LJ 364, p 366, AIR 1961 Pat 362 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 24.

"Dishonestly".--

Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

Comments

1. Meaning of 'Dishonestly'

This section defines the word 'dishonestly'. The word 'dishonestly' is used here in a technical sense which is at variance with its popular significance as implying deviation from probity. Dishonesty in law is at times different from the dishonesty of the market place.[52] The expression 'dishonestly' used in the Code should not, therefore, be confused with the commonly used word 'dishonesty' which is understood to involve an element of fraud or deceit.[53] The deceit is, however, not an ingredient of the definition of the word 'dishonestly'.[54]As will appear from the next section the two terms are not used in the same sense. An act may be fraudulent without being dishonest or dishonest without being fraudulent.[55] The definition in this section applies only to wrongful gain or wrongful loss.[56]

2. 'Dishonestly' refers only to Property

When a person does anything with the intention of causing wrongful gain or wrongful loss, he is said to do that thing 'dishonestly'. Hence the word 'dishonestly' is restricted in meaning to an intention to cause a wrongful gain or loss of property or pecuniary or economic gain or loss.[57]

It has been held that this section does not give an exhaustive definition of the word 'dishonestly'. It does not say that the word 'dishonestly' is applicable only when there is an intention of causing wrongful gain to one person or wrongful loss to another person but, properly construed means, that cases of intention of causing such wrongful gain or loss are to be considered as coming within the wider class of dishonest actions.[58]119

3. 'With the Intention'

The question whether an act was dishonest or not does not depend, for its answer, on the question whether wrongful gain or wrongful loss was actually caused. The determining factor is the intention with which it was done.[59] It is the intention which is important and not whether a man is under a legal duty to disclose or suppress facts within his knowledge. Therefore, where a person with the intention of causing wrongful loss to another makes a false representation to him or suppresses certain facts, he will be said to have acted dishonestly even if the law does not require him to state the truth.[60] If the intention is not to cause wrongful loss but to conceal a fraud which had been previously committed, it is not the intention referred to in this section, even if wrongful loss might have been caused.[61]

4. Primary and not the Remote Intention must be looked at

The word 'intent', by its etymology, seems to have metaphorical allusion to archery, and implies 'aim' and thus connotes not a casual or merely possible result, foreseen perhaps not as an improbable incident, but not desired, but rather the one object for which the effort is made; and thus has reference to what has been called the dominant motive, without which the action would not have been taken.[62] In considering ss 24 - 25, it is the primary, and not the remote, intention of the accused that must be looked at.[63]

Where the accused without attending the necessary proportion of the first year course of law lectures presented a false certificate of having so attended and obtained admission to the second year law class and again presented the false certificate with a view to his obtaining a consolidated certificate necessary to enable him to become a candidate for pleadership examination, it was held that the certificate was made not only dishonestly but also fraudulently.[64]

The court has to look to the real intent in the mind of the accused person and not to speculate as to some other intent over and above it which might have presented itself to him.[65]Mere knowledge of the consequence is not the intention to cause them. It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to a certain result.[66]

5. Antedating of Receipt for using Forged Receipt in lieu of Lost Genuine Receipt

The wrongful gain or wrongful loss involved in 'dishonestly' is pecuniary or economic gain or loss. The antedating of a receipt cannot be said to have been done 'dishonestly'.[67] Using forged receipts in lieu of genuine receipts which have been120 lost is not using them dishonestly.[68] In *BK Birla v PN Agarwal* ,[69] the Bombay High Court has held that the word 'dishonestly' as defined in the IPC implies that the act of investment of money in the two companies must have been done 'with the intention of causing wrongful gain' to the company or 'wrongful loss to another person'. If the accused invested the money by exercising the authority given to them by law, there is no question of dishonesty in such transactions. In order to do a thing dishonestly, there must be the intention to cause wrongful gain to one person or wrongful loss to another person.[70] In order to ascertain the existence or otherwise of dishonest intention, it is not necessary that there must be wrongful gain to the thief; it also does not matter whether the intention of the thief was, or was not, to derive profit from the property; it is

sufficient if the removal of movable property causes wrongful loss to the owner.[71]

6. 'Intention' Distinguished from Motive

Motive is the longing for the satisfaction of desire which induces the mind to wish and then to intend doing something which would bring about the realisation aimed at. The word 'intention' is used to denote the mental attitude of a man who has resolved to bring about a certain result if he can possibly do so. He shapes his line of conduct so as to achieve his desired end.[72] Motive and intention are thus two different things. While motive is directed to the ultimate end, good or bad, which a person hopes to secure, his intention is concerned with the immediate effects of his acts. End cannot justify the means, in other words, the motive does not justify the intention.[73] The motive, object or design, of a person should never be confused with his intention.

7. Intentions and not Motives are Material

Criminal law regards only a man's intentions and not his motives. The motive of the creditor seizing his debtor's goods to coerce him to pay up his debt was certainly not to cause permanent loss of the goods to the debtor but he did cause him loss, however temporarily, and he did so intentionally. He was, therefore, held guilty of theft.[74] The law commissioners explained:[75]

> We do not find that it is permitted to any person to set up his private intentions, or to allege virtuous motives, simply as defence or excuse under a criminal charge. We hold with the English Criminal Law Commissioners that to allow any man to substitute for law his own notions of right would be in effect to subvert the law. To investigate the real motive, in each case, would be impracticable, and even if that could be done, a man's private opinion could not possibly be allowed to weigh against the authority of law.121

8. Intention must be to Cause Wrongful Gain or Wrongful Loss

For definition of 'wrongful gain' and 'wrongful loss' refer to Notes under s 23 of the IPC . Dishonesty involves wrongful gain to one person or wrongful loss to another. It has been held that this section does not apply to a case where no pecuniary question arises.[76] If no wrongful gain or wrongful loss is caused, a thing is not done dishonestly.[77]For an act to be dishonest it is not necessary that the intention should be to cause both wrongful gain and wrongful loss. It is enough if the intention is to cause either wrongful gain or wrongful loss.[78]

A person, who, by falsely pretending to be the winner of a lottery prize, dishonestly induces the lottery officials to pay the prize to him, does not cause 'wrongful loss' to the rightful winner of the prize; but causes a 'wrongful gain' to himself by obtaining by false pretence what he is 'not legally entitled' to and therefore he acts 'dishonestly' within the meaning of this section.[79]

9. Wrongful Gain need not be to the Accused Himself

The question whether or not the act of the accused was dishonest does not, as a matter of fact, depend on the question whether wrongful gain or loss was actually caused. The determining factor is the intention with which payment is made.[80] The wrongful gain need not be to the accused himself.[81]

In *Queen-Empress v Raghunath Rai* ,[82] several Hindus, acting in concert, forcibly removed an ox and two cows from the possession of a Mohammadan, not for the purpose of causing 'wrongful gain' to themselves or 'wrongful loss' to the owner of the cattle, but for the purpose of preventing the killing of the cows, and it was held that there was no dishonest intention and that Hindus could not be properly convicted of dacoity, but only of riot. In a subsequent Division Bench case,[83] in which the facts were

almost similar, a contrary view was taken and it was held that the offence of which the Hindus were guilty was dacoity under s 395, and not merely riot. Referring to the previous decision it was observed:

> We have the authority of Mr Justice Tyrrell, for saying that his judgment in the *Queen-Empress v Raghunath Rai* ,[84] was a judgment based solely on the facts found in that case. We have also his authority for saying that he never ruled that it is not theft to deprive a man of his property under the influence of religious prejudices and that in his opinion such a deprivation is theft, and might, according to circumstances, be dacoity. Mr Justice Tyrrell, informs us that in that case he was dealing with the facts found by the court below and his judgment must be so read.122

10. Proof and Presumption of Intention

For conviction of an offence of which dishonest intention is an essential ingredient such intention must be proved.[85]But intention being a mental act, it is not always possible to give direct evidence of it. It is nothing more than the expectation of particular consequences at the moment of action. 'The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time of natural consequences of his conduct'.[86] This agrees with Austin's analysis of 'intention' which has been widely accepted. No doubt a common notion prevails that there is something more in intention than the expectation of consequences at the moment of action. This, however, is not correct.[87] In *Queen v Hickin* ,[88] Blackburn J said:

> I take the rule of law to be as stated by Lord Ellenborough in *Rex v Dixon* ,[89] in the shortest and clearest manner: 'It is a universal principle that when a man charged with doing an act (that is, a wrongful act without any legal justification) of which the probable consequence may be highly injurious the intention is an inference of law resulting from the doing of the act.

And although the appellant may have had another object in view, he must be taken to have intended that which is the natural consequence of the act. Reference may also be made to similar remarks of Lord Coleridge CJ, in *Queen v Martin* ,[90] and to *R v Lobett* ,[91] in which Littledale J, said: 'With respect to the intent of the defendant, a man must be taken to intent the natural consequences of what he has done'.

11. Presumption is that a Person intends to bring about the Possible Result of his Act

The result of these authorities is that, although there is no presumption that a person intends what is merely a possible result of his action or a result which, though reasonably certain, is not known to him to be so, still it must be presumed that when he voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result.[92] Every man is presumed to intend the natural consequences of his act and it is from the consequences that the court has often to presume his intention in doing a particular act.[93] A dishonest intention may, therefore, be presumed from the facts and circumstances of a case,[94] but only if an unlawful act is done or if a lawful act is done by unlawful means.[95]123

Where the accused, without the consent of the proper authorities, took out a government aircraft for an unauthorised flight to Pakistan, it was a legitimate inference that he took out the aircraft with a dishonest intention.[1]

Where a person makes use of money belonging to another without the latter's consent, and contrary

to the purpose for which possession thereof has been given by the latter to him, his intention must *prima facie* be dishonest within the meaning of s 24 .[2]

Where the accused manifestly took away the bamboos with the intention of causing wrongful loss to the proprietors who were entitled to them, it cannot be said that their intention was not dishonest within the meaning of the word as used in the IPC .[3] The suppression of a vital detail influencing the decision of a party to stand guarantee for another may be evidence of dishonesty and/or fraud.[4]

12. Claim of Right as a defence

The question of dishonest intention plays a prominent part in cases of theft. In such cases the accused often asserts a claim of right. To constitute theft, it is sufficient if property is removed, against his wish, from the custody of a person who has an apparent title or even a colour of right to such property.[5] In *Hari Bhuimali v Emperor* ,[6] Woodroffe J said:

> In criminal law what is generally understood by theft and its kindred offences are such acts as those of the pickpocket, the shoplifter, the house-breaker, the dacoit and so forth--acts in fact of a truly criminal nature in which no claim of title is made. No doubt an accused cannot escape the penalty of crime by the mere pretence of a *bona fide* claim which has clearly no foundation. But I think that the Criminal Courts should not convict of theft any person who asserts a claim of right, unless it is in a position to say that claim is a mere pretence.

Justice Das of the Patna High Court agreed with this view.[7] The expression 'dishonestly' used in this Code should not be confused with the commonly used word 'dishonesty' which is understood to involve an element of fraud or deceit. To a charge of theft, the plea that the property was removed under the bona fide claim of right would not avail. For example, a person who bona fide believes that the fountain pen on his neighbour's desk is his, has no right in law to trespass into the neighbour's house and snatch away the pen without the latter's consent. The offence of theft is essentially against the possession of another of the movable property involved. The accused are thus clearly guilty of the offence charge against them.[8] But whenever there is an assertion of a claim of right, it is the bounden duty of the court to inquire into the question whether that claim is a *bona fide* claim or is a mere pretence. If when that claim is actually put forward, the court fails to decide124 the question whether the claim is a *bona fide* claim or is a mere pretence, the conviction cannot be sustained.[9]

13. Test of Dishonesty is the Mental Element of belief

A tenant cutting trees standing on his own agricultural land, and for which he has executed an agreement, which gives the landlord only a claim for compensation for trees so cut cannot be said to be acting 'dishonestly' within the meaning of this section and is not guilty of theft.[10] The test of dishonesty is the mental element of belief; and if a person believes that he has title to property although there is none, no offence is committed.[11]

14. Dishonest intention as against Joint Property

Dishonest intention consists, as defined in s 24 of the IPC, in causing wrongful gain or wrongful loss. A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.[12] Therefore a co-owner of a movable property having a defined share can be held guilty of theft, if he is found to remove the joint property without even an implied consent of the co-owner with dishonest intention, that is, with a view to cause wrongful loss to the co-owner and consequently wrongful gain to himself or anybody else. Joint possession of the parties does not alter the liability of the accused.[13]

52 *Sardar Singh v Emperor* AIR 1934 All 711 ; *Budhan Singh v State* AIR 1960 Pat 518 .

53 *Boddepalli Lakshminarayana v Suvvari Sanyasi Appa Rao* AIR 1959 AP 530, p 533 .

54 *Vimla v Delhi Admn* AIR 1963 SC 1572, (1963) 2 Cr LJ 434, (1963) All LJ 999, (1963) MLJ (Cr) 560 .

55 *Kedar Nath Chatterji v King-Emperor* 5 CWN 897 ; *Emperor v Mohit Kumar Mukherjee* AIR 1926 Cal 89 ; *Sanjiv Ratnappa v Emperor* AIR 1932 Bom 545 ; *Balaram Rai v Emperor* 32 ILR Cal 775, p 779, Cr LJ 368.

56 *Sanjiv Ratnappa v Emperor* AIR 1932 Bom 545, p 547 ; *Ramsharanagat Singh v State of Bihar* 1966 Cr LJ 856, p 861 .

57 *Ram Krishna v Shivraj* 1974 Mad LJ 659, p 661 ; *Jagdish Prasad v State of Rajasthan* 1981 Raj Cr C 101 .

58 *Baju Jha v Emperor* AIR 1929 Pat 60, p 63 .

59 *Dharamdas Lilaram v Emperor* AIR 1932 Sind 169, p 173 ; Re *Ram Bilas*AIR 1955 Mad 600, 15 Cr LJ 688 ; *King-Emperor v Srinvasan* 25 ILR Mad 726 .

60 *Kuldip Singh v State* AIR 1954 Punj 31, p 33 .

61 *Queen-Empress v Girdhari Lal* 8 ILR All 653, p 662 .

62 *Bhagwant Appaji v Kedari Kashinath* 25 ILR Bom 202, p 226 .

63 *Queen-Empress v Haradhan* 19 ILR Cal 380 ; *Queen-Empress v Girdhari Lal* 8 ILR All 653 .

64 *Queen-Empress v Soshi Baushan* 15 ILR All 210 .

65 *Queen-Empress v Syed Hussain* 7 ILR All 403 .

66 *Queen-Empress v Rayapadayachi* 19 ILR Mad 240 .

67 *Jagdish Prasad v State of Rajasthan* (1981) Raj Cr C 101 .

68 *Queen-Empress v Sheo Dayal* 7 ILR All 459 .

69 *BK Birla v PN Agarwal* (1990) 1 Crimes 440 (Bom) .

70 *Jagdish Prasad v State of Rajasthan* (1981) Raj Cr C 101 .

71 *Ahmad v State* (1967) Cr LJ 1053, AIR 1967 Raj 190, (1967) Raj LW 54 .

72 *Russell on Crimes*, eleventh edn, p 44.

73 *Sheodani Singh v State of Bihar* AIR 1961 Pat 362, p 364 .

74 Re *Balok Khan* 4 SLR 38; *Vithoo v Emperor,* 7 NLR 185 ; *Waris Ali v Emperor* 7 NLR 180, 13 IC 919 .

75 First Report, s 114 ; *Dawkins v Lord Pouler* LR 5 QB 94, 112 ; *Bowen v Hall* 6 QBD 333 .

76 *Sanjiv Ratnappa v Emperor* AIR 1932 Bom 545, p 547 .

77 *State of Uttar Pradesh v Joti Prasad* AIR 1962 All 582 .

78 *Ajodhya Nath Parlu v Emperor* AIR 1920 Pat 582, p 583 ; *WS Shamarsundariah v State of Mysore* (1968) Cr LJ 1149, (1968) 1 Mysore LJ 294 .

79 *Nga Thayin v Emperor* AIR 1914 LB 220 .

80 *Dharamdas Lilaram v Emperor* AIR 1932 Sind 169, p 173, Re *Ram Bilas*AIR 1915 Mad 600, 15 Cr LJ 688 ; *Kalyanmal Mulchand Marwari v Emperor* AIR 1937 Nag 89 .

81 *PS Hay v Emperor* AIR 1925 Oudh 469 .

82 *Queen-Empress v Raghunath Rai* 15 ILR All 22, (1892) All WN 220 .

83 *Queen Empress v Ram Baran* 15 ILR All 299 .

84 *Queen-Empress v Raghunath Rai* 15 ILR All 22, (1892) AWN 220 .

85 *Sarsar Singh v Emperor* AIR 1934 All 711 ; *Venkatapathi v Kalaman* 1936 MWN 1017 .

86 *Stephen's History of the Criminal Law*, Vol II, p 111.

87 *Empress v Girdhari Lal* 8 ILR All 653, 659.

88 *Queen v Hickin* (1868) LR 3 QB 375 .

89 *Rex v Dixon* 3 M&S, p 15.

90 *Queen v Martin* (1881) 8 QBD 58 .

91 *R v Lobett* (1839) 9 C&P 462, p 466 .

92 *Emperor v Lakshman Raghunath* 26 ILR Bom 558, p 562, 4 Bom LR 280 .

93 *Sheodeni Singh v State of Bihar* AIR 1961 Pat 362, p 364 ; *Empress v Girdhari Lal* 8 ILR All 653, p 659 .

94 *FS Hay v Emperor* AIR 1925 Oudh 469 .

95 *Sarsar Singh v Emperor* AIR 1934 All 711 .

1 *KN Mehra v State of Rajasthan* AIR 1957 SC 369 .

2 *NN Burjorjee v Emperor* AIR 1935 Rang 453, p 455 .

3 *Lal Mahommad v Emperor* AIR 1931 Pat 337, p 338 .

4 *N Vaghul v State of Maharashtra* 1987 Cr LJ 385, (1987) 2 Crimes 289, (1987) 1 Rep 402, (1986) Bank J 634 (Bom), (1986) 3 Bom CR 422 .

5 *Queen-Empress v Gangaram Sant Ram* 9 ILR Bom 135 ; *Pandita v Rahimulla Akundo* 27 ILR Cal 501 ; *Alguraswami Tevan v Emperor* 28 ILR Mad 304, 2 Cr LJ 754 .

6 *Hari Bhuimali v Emperor* (1905) 9 CWN 974, 2 Cr LJ 836 .

7 *Ajodhya Nath Parhi v Emperor* AIR 1920 Pat 582, p 583 .

8 *Boddepalli Lakshminarayana v Suvvari Sanyasi Appa Rao* AIR 1959 Andh Pra 530, p 533 .

9 *Ajodhya Nath Parhi v Emperor* AIR 1920 Pat 582, p 583 ; *Empress of India v Budhsingh* 2 ILR All 101 .

10 *Reddi Yeranna v Emperor* AIR 1915 Mad 270(1) .

11 *Halsbury's Laws of England*, vol 11, fourth edn, Butterworths, London, p 675, para 1263; *R v Turner* (1971) 2 All ER 443, [1971] 1 WLR 901 (CA) .

12 *KN Mehra v State of Rajasthan* AIR 1957 SC 369 .

13 *Ramsharangat Singh v State of Bihar* 1966 Cr LJ 856 (Pat) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 25.

"Fraudulently".--

A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

Comments

1. Scope

The section, simply explains the circumstances or the manner, when one is said to act fraudulently. As a definition, s 25 is obviously defective since it leaves undetermined125 the meaning of the word 'defraud'.[14] The section does not define or describe 'fraudulently' but only limits its sense for the purposes of the Code. Fraud is a term which enters largely in the law of contract and it has there received a meaning much too extensive for the purpose of the Code. This section, therefore, enacts that there can be no fraud unless there is an intention to defraud. Thus the code eliminates from its consideration all constructive frauds and only confines the use of the term of deception, planned and practiced.

In *Emperor v Harjivan Vallejo* ,[15] Faucet J had expressed the view that the word 'defraud' is popularly used in a sense which differs from its legal sense and that a man may be said to intend to defraud in a popular sense whenever he resists a claim which is well founded in law, and that in this statue the word is used in its popular sense. But dissenting from this, in *Visram Valji v Emperor* ,[16] Beaumont CJ, with whom Wadia J agreed, observed:

> I do not agree with the learned Judge. To my mind 'defraud' always denotes some form of dishonesty. But even if the learned Judge were right in thinking that the expression 'intend to defraud' has one meaning in law and another in popular usage, I fail to see why the court should give to the expression its popular, rather than its legal, meaning in a penal statute as against an accused person. Such a construction infringes the principle that penal statutes must be construed strictly.

According to Le Blanch J: 'By fraud is meant an intention to deceive, whether it be from any expectation of advantage to the party himself, or from ill-will towards the other, the fact is immaterial'.[17]

The definition of 'fraudulently' does not give much help as it is used tautologically. The word 'fraud' or 'fraudulently' must be understood in the general and popular sense. It involves two elements, namely: (a) deceit, and (b) injury caused or likely to be caused to the person deceived or someone else in consequence of the deception of a person by deceiving another derives any advantage from it, which he could not have had, if the truth had been known and thereby causes injury to the body, mind or reputation of the deceived, he commits fraud. In all cases where an advantage has been obtained by the deceiver, there will be invariably an equivalent disadvantage in loss or risk of loss to the deceived or to someone else.[18]

2. Double Meaning of Fraud

The word 'defraud' is of double meaning in the sense that it either may or may not imply deprivation. It should not be confined to transactions of which deprivation of property forms a part. Thus it is not an essential quality of fraud that it should result in or aim at the deprivation of property, *i.e.*, a 'fraudulent' act need not necessarily be a 'dishonest' act, though that may often be the case.[19]126

3. Elements of Fraud

The elements which make an act fraudulent are deceit or intention to deceive and in some cases even mere secrecy. Where there is neither the intention to deceive nor secrecy, the act though dishonest, is not fraudulent. A dishonest concealment of facts is a deception.[20] Where property is removed openly in the light of day and there is no question of concealment, secrecy, clandestine action, deception or anything else covered by the word, the act cannot be said to be done fraudulently.[21] The matter also

came up for consideration before the Supreme Court in *Vimla (Dr) v Delhi Admn* ,[22] and it has observed thus:

> The expression 'defraud' involves two elements, namely, deceit and injury to the person deceived. Injury is something more than economic loss, that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.

The person who deceives another and derives benefit or advantage, possibly causing injury to the deceived in body, mind or reputation and such others commits fraud and even if no corresponding loss or disadvantage to the deceived is established, it could be inferred that if one gets benefit or advantage; someone will incur loss or disadvantage to some extent.[23]

4. Deceit

Deceit is the first element in fraud. A person is deceived when he is induced to believe as true that which is untrue. As to what is sufficient to constitute deception must be decided on the facts of each case.[24]

(a) Means of Deceit

The means of deceit are false representations, and representations may be made by writing, words or conduct.[25]

(b) Representation is Essential for Deceit

A representation of some sort, however mad, is essential, and without it one person cannot be said to deceive another, though the latter may as a fact be deceived. Deceiving involves causing a person to believe the false representation to be true. Thus where *A*, knowingly buys watered milk from *B,* and prosecutes him for cheating, *B* cannot be said to have deceived *A*.[26]127

(c) False Representation must be of Fact and not of Opinion

The representation must be of a fact and not of a mere matter of opinion. A man, in seeking to influence another, may express what opinion he likes, so long as he does not misrepresent the facts upon which the opinion is based. Thus, a vendor of property may say that in his opinion the property is worth so much, but he must not falsely state that he gave so much for it. So a statement of confident expectation of profits must be distinguished from an assertion as to profits actually made.[27] A dishonest concealment of fact is deception for the purposes of cheating.[28]

5. Injury

Mere deceit is not fraud.[29] Fraud also involves another element, namely, some injury to the person deceived. The word 'injury' denotes any harm whatever illegally caused to any person in: (a) body; (b) mind; (c) reputation; or (d) property.[30]There are thus two elements in a fraudulent act: (a) An intention to deceive; and (b) an intention to thereby cause an injury of one or other of the four kinds specified.

As regards the fourth kind of injury, *viz*, to property, a person suffers injury in respect thereto either by its destruction or damage, or by loss of possession thereof; and if the intention of a person is to deceive another, and thereby cause a wrongful loss of possession of property, his intention is dishonest, and his act is done, dishonestly.[31]If, on the other hand, his intention is to cause, by means

of his deceit, destruction or damage to that other's property, or injury to him in his body, mind or reputation, his intention is fraudulent, and his act is done fraudulently.[32]

The expression 'intent to defraud' implies deceit and consequent injury or intended injury, *i.e.*, the infringement or intended infringement of some legal right possessed by the person deceived. It does not necessarily imply that the person deceived should be deprived of property. It includes deceit which causes or is likely to cause any damage or harm to the person deceived in respect of his property or otherwise.[33] The word 'fraudulently' is not confined to transactions in which there is wrongful gain on the one hand or wrongful loss on the other, either actual or intended. The word 'defraud', which is not defined in the Code may or may not imply deprivation, actual or intended.[34] In Re *Somasundaram Pillay,*[35] Ayling J, referred to *Emperor v Ali Hasan* ,[36] and *Kotamraju Venkatrayudu v Emperor* ,[37] and observed:

> It was clearly laid down that an intent to defraud implies something more than mere deceit. The object for which the deceit is practiced has to be considered. The advantage intended to be secured, or the harm intended to be caused need not have relation to property to be such as is implied in the term 'dishonestly' but it must be something to which the party perpetrating the deceit is not entitled either legally or equitably.

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The latter portion of this observation cannot, however, be supported. The intention to defraud need not necessarily be to obtain something which a person is not legally or equitably entitled. It is sufficient if by means of the perpetration of the fraud somebody is defrauded.[38] Intention to cause injury clearly exists in a case where a judgment-debtor gives an undertaking to the court not to transfer certain property and immediately thereafter transfers the same by a sale-deed in favour of his son with the knowledge that the son would be in a position to claim the property as his own. The object of the transfer is thus to injure the creditor and to prevent execution against the property.[39] The definition of injury in s 44 of the Code is very wide. *Priyanath Gupta v Lal Jhi Chowkidar* ,[40] shows how the threat of a decree that could not be executed by any competent authority, is a threat of harm or injury within the meaning of the Code.[41]

6. 'To do a thing'

To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. To put it more tersely 'to deceive' is, by falsehood to induce a state of mind: 'to defraud' is by deceit to induce a course of action.[42]

7. Fraud and Forgery

Where there is an intention to deceive and to obtain an advantage by means of the deceit, there is fraud and if a document is fabricated with that intent, it is forgery.[43]

8. Intent to Defraud

The expression 'with intent to defraud' used in s 25 is thus of great significance for the proper construction of this section. The essential elements to constitute an intent to defraud are: (a) an intent to deceive another, and (b) an intent to cause, by that deception, injury to some person (ordinarily but not necessarily, the person deceived). The injury intended need not necessarily be pecuniary, or even economic, amounting to a deprivation of property, but may be any harm, whatsoever, to any person in body, mind or reputation. The words 'intent to defraud' are not synonymous with 'intent to deceive'. These words indicate not a bare intent to deceive, but an intent to cause a person to act, or to omit to act, as a result of deception, played upon him, to his disadvantage. Fraud, thus, involves two concepts, namely: (a) deceit; and (b) injury to some person as a result of such deception.[44]

(a) No Fraud unless there is Intention to Defraud

There can be no fraud unless there is an intention to defraud. A general intention to defraud without an intention of causing wrongful gain to one person or wrongful loss129 to another, would, if proved, be sufficient to support a conviction.[45] Justice Maule, *R v Nash* , stated:[46] 'There may be an intent to defraud without the power or the opportunity to defraud', and at p 503; 'It is not necessary that any person should be in a situation to be defrauded.

An offence is committed under s 471 whenever a document known or believed by the accused to have been forged is used as genuine with the intention that some person should, thereby, be deceived, and by means of such deception that either an advantage should accrue to the person so using the document or injury should befall some other person or persons.[47] Where the accused altered the date of the certified copy of a decree sought to be executed by him from 2-24 August under the erroneous impression that the decree had become time-barred while the decree in fact was within time by reason of a subsequent amendment, it was held that a sufficient intent to defraud was involved in the advantage directly aimed at by the accused on the basis of the altered dates, and it was immaterial that the alterations were brought about under an erroneous impression that the decree was time-barred. A fraud was attempted upon the court. It was unnecessary for the prosecution to establish further an intent to cause loss or risk of loss.[48] The question whether fraud was fruitless or unnecessary is immaterial. Justice Norris observed:

> Let a person's title to property be ever so good, yet if, in the course of an action brought against him to gain possession of the property, he uses by way of supporting his title, though there may be no necessity for the use of it, a forged document, such as this *hiba* (gift), I am clearly of opinion that he uses it fraudulently.[49]

(b) Words 'Intent to Defraud' not Synonymous with 'Intent to Deceive'

The words 'with intent to defraud' in this section, indicate not a bare intent to deceive, but an intent to cause a person to act, or to omit to act, as a result of deception, played upon him to his disadvantage. This is the most extensive meaning that may be given to the expression 'with intent to defraud' in the IPC, and the words 'but not otherwise' clearly show that the words 'with intent to defraud' are not synonymous with 'intent to deceive' and require some action resulting in some disadvantage which, but for the deception, the person deceived would have avoided.[50]

When the prosecution has not proved that the accused has in any way benefitted by getting the petrol coupons nor it is suggested that he utilised them in the black market or otherwise in order to get a profit and when the conspiracy is not proved, it cannot be said that the accused would have knowingly or willfully made false representation with dishonest or fraudulent intention.[51]

9. Only Primary Intention to be Looked at

In construing ss 24 - 25 of the IPC, the primary, and not the more remote, intention must be looked at.[52] The question of primary and secondary intention generally arises130 in cases of forgery. In some cases, it has been held that it would not amount to forgery under the IPC, if the intention with which a false document was made was to conceal a fraud which had been previously committed.[53] But, dissenting from this view, it has been held in other cases that even if the intention with which the false entries are made is to conceal a fraudulent or dishonest act previously committed, the intention would be to defraud and the case would fall within s 477A of the IPC .[54] As to whether or not there is an intent to defraud in any particular case manifestly must depend on the actual circumstances of that case.

Where the real purpose of an alteration of accounts was not to defraud but to remove the evidence of a crime, it was held that no offence under s 465 or s 477A was committed.[55]

10. Distinction between 'Dishonestly' and 'Fraudulently'

There is a significant difference between the word 'dishonestly' defined in s 24 and 'fraudulently' defined in s 25 of the IPC . In order to do a thing dishonestly there must be an intention to cause wrongful loss or wrongful gain of property, but in order to do a thing fraudulently it is not necessary that there should be the intention to cause wrongful loss or wrongful gain of property. The legislature advisedly uses the terms 'dishonestly' and 'fraudulently'. To say that to do a thing fraudulently there must be the intention to cause wrongful loss or wrongful gain would be attributing redundancy to the Legislature. On the other hand, the words 'dishonestly' and 'fraudulently' are used to denote two different things.[56]The difference between an act done dishonestly and an act done fraudulently is this. If there is the intention by the deceit practised to cause wrongful loss that is dishonesty; but even in the absence of such an intention, if the deceitful act wilfully exposes any one to risk of loss, there is fraud.[57] The word 'defraud' is of double meaning in the sense that it may or may not imply deprivation. The word 'fraudulently' is not confined to transactions in which there is wrongful gain on the one hand, or wrongful loss on the other, either actual or intended. The word 'defraud', which is not defined in the Code, may or may not imply deprivation, actual or intended. On the other hand a person is said to do a thing 'dishonestly' if he does it with the intention of causing wrongful gain to one person or wrongful loss to another.[58] An act may be dishonest and yet not fraudulent.[59]A dishonest act is not necessarily a fraudulent act. The elements which make an act fraudulent are deceit or intention to deceive and in some cases even mere secrecy. Where there is neither the intention to deceive nor secrecy, the act, though131 dishonest, is not fraudulent.[60] On the other hand, an act may be fraudulent though not dishonest.[61]

11. Illustrative Cases

A, desiring to appear at an examination in order to qualify as an engineer on ocean-going steamers presented a false testimonial, of service and good character, such a testimonial being a condition precedent to appearance at the examination. It was held that he acted 'fraudulently' and was guilty of forgery.[62] Similarly the use of a forged document of title in an action,[63] or of forged letter of recommendation for a vacant post[64] are both fraudulent, but not the fabrication of receipts in lieu of lost genuine ones.[65]

A presented to *B*, the principal of a college, a false certificate purporting to have been signed by *C*, the principal of another college, to the effect that he *A* had attended a course of law lectures for one year in *C's* college.

Thereby *A* obtained admission into the second year law class in *B*'s college, without paying the fee for the first year course. At the end of the year *A* again presented the false certificate to *B*, in order to obtain a consolidated certificate for the two years. Held, that *A* acted 'dishonestly', since he caused wrongful gain to himself of the first year course fee, and wrongful loss to the college thereof; and that he also acted 'fraudulently', since he intended to deceive *B*, and obtain admission to the second year class in consequence thereof.[66]

14 *Queen-Empress v Abbas Ali* 25 ILR Cal 512 (FB) ; *Baburam Rai v Emperor* 32 ILR Cal 775, 2 Cr LJ 358 .

15 *Emperor v Harjivan Vallejo* AIR 1926 Bom 231, 27 Cr LJ 1335 .

16 *Visram Valji v Emperor* AIR 1935 Bom 162, p 164 .

17 *Haycraft v Creasy* 2 East 92 (1908) **followed** in *Queen-Empress v Vithal* 13 ILR Bom 515 ; *Queen-Empress v Khandu Singh* 22 ILR Bom 768 ; *Queen-Empress v Lalit Mohan* 22 ILR Cal 313, p 322 ; *Rash Behari v Emperor* 35 ILR Cal 450 ; *Balkrishna* 32 ILR Bom 666.

18 *Daniel Hailey Walcott & Anor v State* (1968) Cr LJ 1282, (1968) 1 Mad LJ 229, (1968) Mad LJ 161 (Cr), (1968) Mad LW 49 (Cr), (1968) 2 ILR Mad 843, AIR 1968 Mad 349 .

19 *Queen Empress v Abba Ali* 25 ILR Cal 512 (FB) ; *Baburam v R* 32 ILR Cal 775, p 779 ; *Emperor v Bansi Sheikh* AIR 1924 Cal 718 .

20 Explanations to s 415 ; notes thereunder.

21 *Y Kothandarama Reddi v Kandra Balarami Reddy* AIR 1937 Mad 713 .

22 *Vimla (Dr) v Delhi Admn* (1963) Sup 2 SCR 585, AIR 1963 SC 1572, p 1576 ; re-affd in *GS Bansal v Delhi Admn* AIR 1963 SC 1577, p 1580 .

23 *Daniel Hailey Walcott & Anor v State* AIR 1968 Mad 349, (1968) Cr LJ 1282, (1968) 1 Mad LJ 220, (1968) Mad LJ 161 (Cr), 1968 Mad LW 49 (Cr), (1968) 2 ILR Mad 843 .

24 *Ramanath v Emperor* 3 Cr LJ 160, 2 Cal LJ 524 .

25 *Khoda Bux v Bakeya* 32 ILR Cal 941 ; *Ramanath v Emperor* 3 Cr LJ 160, 2 Cal LJ 524 ; *Ramchand v Jai Dial* 13 Cr LJ 456 .

26 *R v Kalu Modock* 18 WR 61 (Cr) .

27 *Bellairs v Tucker* 13 QBD 562 .

28 Indian Penal Code 1860, s 415, expln.

29 *R v Jungle Lall* 19 WR 40 (Cr) ; *R v Lal Gumul* 1870 NOW 11 ; *R v Fateh* 5 ILR All 217 ; *R v Jiwanand* 5 ILR All 221 ; *R v Shankar* 4 ILR Bom 657 .

30 See the Indian Penal Code 1860 1860, s 44 .

31 *Ibid*, s 24 .

32 See the Indian Penal Code 1860, s 25 .

33 *Ram Chand Gurvala v King-Emperor* AIR 1926 Lah 385 ; *Surendra Nath Ghose v Emperor* 38 ILR Cal 75 (FB), 11 Cr LJ 505, case-law discussed there.

34 *Babu Ram Rai v Emperor* 32 ILR Cal 775, 2 Cr LJ 358 .

35 Re *Somasundaram Pillay*(1909) 6 Mad LT 266, 3 IC 736, 10 Cr LJ 367.

36 *Emperor v Ali Hasan* (1906) 28 ILR All 358, 3 All LJ 149, (1906) All WN 48 .

37 *Kotamraju Venkatrayudu v Emperor* (1905) 28 ILR Mad 90 (FB) .

38 Re *Sivananda Mudali*AIR 1926 Mad 1072, p 1074 .

39 *Crown Prosecutor v T Sellamuthu* AIR 1940 Mad 271 .

40 *Priyanath Gupta v Lal Jhi Chowkidar* AIR 1923 Cal 590, 72 IC 508, 24 Cr LJ 396, 37 Cal LJ 526, 27 Cal WN 479 .

41 *Baij Nath Bhagat v Emperor* AIR 1940 Pat 486, p 492 .

42 Re *London & Globe Finance Corpn Ltd*[1903] 1 Ch 726, 72 LJ Ch 368, 51 WR 651, per Buckely J.

43 *Queen-Empress v Mahommad Saeed Khan* 22 ILR All 113, p 115 ; *Emperor v Raghu Ram* AIR 1933 All 525 ; *State of Uttar Pradesh v Joti Prasad* AIR 1962 All 582 .

44 *Katamaraju Venkata Rayadu v Emperor* 28 ILR Mad 90, p 96 (FB) ; *Vimla v Delhi Admn* AIR 1963 SC 1572, (1963) 2 Cr LJ 434 ; *S Dutt v State of Uttar Pradesh* AIR 1966 SC 523, (1966) Cr LJ 549, 1966 SCD 139 ; *Daniel v State* (1968) Cr LJ 1282, p 1287, AIR 1968 Mad 349 .

45 *Empress v Dhunum Kazee* 9 ILR Cal 53, 11 Cr LJ 169 .

46 *R v Nash* 2 Dearsly's CCR, 500.

47 *Emperor v Mohit Kumar* AIR 1926 Cal 89, 27 Cr LJ 177 .

48 *Baijnath Bhagat v Emperor* AIR 1940 Pat 487 ; Re *Sevananda Mudali*AIR 1926 Mad 1072, p 1074 .

49 *Empress v Dhunum Kazee* 9 ILR Cal 53, p 61 .

50 *S Dutt v State of Uttar Pradesh* AIR 1966 SC 523, (1966) Cr LJ 549, (1966) SCD 139, [1966] 1 SCR 493 .

51 *Jumman v State of Punjab* AIR 1957 SC 466, (1957) Cr LJ 583 .

52 *Queen-Empress v Haradhan* 19 ILR Cal 380, p 391 ; the observations of Edge CJ, in *Queen-Empress v Girdhari Lal* 8 ILR All 653 .

53 *Empress of India v Jiwanand* 5 ILR All 221 ; *Empress v Mozhar Hussain* ILR 5 All 553 ; *Queen-Empress v Girdharilal* 8 ILR All 653 .

54 *Emperor v Rash Bahari Das* 35 ILR Cal 450, p 452 ; *Lalit Mohan Sarkar v Queen-Empress* 22 ILR Cal 313 ; *Queen-Empress v Sabapati* 11 ILR Mad 411 ; *Emperor v Balkrishna Vaman Kulkarni* 37 ILR Bom 666 .

55 *Jyotish Chandra Mukherjee v Emperor* 36 ILR Cal 956, 10 Cr LJ 531 .

56 Re *Sivanand Mudali*AIR 1926 Mad 1072, p 1074 ; *Y Kothandarama Reddi v Kundra Balarami Reddy* (1937) ILR Mad 713 .

57 *Sukhamoy Maitra v Emperor* AIR 1938 Pat 165, p 169 **relying on***Queen-Empress v Abbas Ali* 25 ILR Cal 512 (FB) ; *Queen-Empress v Mahommad Saeed Khan* 2 ILR All 113 ; *Kotamraju Venkatarayudu v Emperor* 28 ILR Mad 90 (FB) .

58 *Queen-Empress v Abbas Ali* 25 ILR Cal 512 (FB) ; **overruling***Queen-Empress v Karadhan* 19 ILR Cal 380 ; *Babu Ram Rai v Emperor* 32 ILR Cal 775, 2 Cr LJ 358 .

59 *Y Kothandarama Reddi v Kundra Balarama Reddy* AIR 1937 Mad 713 .

60 *K Jayarama Iyer v State of Hyderabad* AIR 1954 Hyd 56, p 59 .

61 *PL Causley v Emperor* 43 ILR Cal 421, 17 Cr LJ 69 .

62 *R v Abbas Ali* 25 ILR Cal 512, **overruling***R v Haradhan* 19 ILR Cal 380 ; *R v Ali Hasan* 28 ILR All 358, p 364 .

63 *R v Dhunum Kazee* 9 ILR Cal 58 .

64 *Abdul Hamid v R* 13 ILR Cal 349 .

65 *R v Sheo Dayal* 7 ILR All 459 ; *R v Syed Husain* 7 ILR All 403 .

66 *R v Sosi Bhushan* 15 ILR All 210 ; *R v Ali Hasan* 28 ILR All 358, p 364 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 26.

"Reason to believe".--

A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise.

Comments

1. 'Reason to Believe'

This expression is used in ss 411 - 14 relating to receipt of stolen property. A person can be supposed to 'know' where there is a direct appeal to his senses. A person 'has reason to believe' under this section if he has sufficient cause to believe the thing but not otherwise.[67] The expression 'Reason to believe' has been defined under s 26, IPC, and it lays down that a person is said to have a 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise. A person can be supposed to know where there is a direct appeal to his senses. Suspicion or doubt cannot be raised to the level of 'reason to believe'.[68]132

2. 'If he has Sufficient Cause'

The words used are 'if he has sufficient cause to believe' and not 'if there is sufficient cause to believe'. This shows that the mere existence of a sufficient cause is not enough, if it was not brought to his knowledge. Sufficient cause must exist and he must know of its existence, otherwise he has no 'reason to believe a thing'. Suspicion will not amount to sufficient cause to believe, the word 'believe' is much stronger than the word 'suspect'.[69] The court has to see whether the person concerned had sufficient cause to believe. This section is confined to finding out whether an alleged offender could have sufficient cause to believe. Where circumstances exist on which two views may reasonably be possible, the court will not hold the accused guilty of the offence.[70]

3. 'Knowledge' and 'Reason to Believe'

'Knowledge' means state of mind entertained by a person with regard to existing facts which he has himself observed, or the existence of which has been communicated to him by persons whose veracity he has no reason to doubt.[71] The word 'knowledge' means 'a mental cognition' and not necessarily 'visual perception'. It implies a notice to the receiver of such facts as could not but have led him to believe that the property was stolen and could not but have been dishonestly obtained.[72]

The word 'knowledge' is much stronger than 'reason to believe' and the word 'believe' in s 414 of the IPC is a stronger word than 'suspect'. If the circumstances are such that a reasonable man would be led by the chain of probable reasoning to the conclusion or inference that the articles, that were found in the possession of the accused, were stolen properties, although the circumstances may fall short of carrying absolute conviction, to his mind, on the point, a person must be held to have reason to believe.[73] It is not enough that the receiver suspects the goods to be stolen property,[74] nor is it sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired.[75]

67 *Emperor v Latoor* AIR 1930 All 33, p 34, 31 Cr LJ 288 .

68 *Prabha Malhotra (Dr) & Ors v State* (2000) Cr LJ 549 (All) .

69 *Hamid Ali v State* (1961) 2 Cr LJ 801, AIR 1961 Tri 46 .

70 *Balwant Singh v Director of Inspection* , *Income-tax*AIR 1969 Del 91, p 99 .

71 *Emperor v Zamin* AIR 1932 Oudh 28, p 30, 33 Cr LJ 275 .

72 *Abdur Rahim v Emperor* AIR 1927 Nag 40, p 41 .

73 *Abdul Kareem v State of Mysore* 1972 Cr LJ 217, p 218, (1971) 2 Mys LJ 337, 1971 Mad LJ 648 (Cr) .

74 *Emperor v Sankara Narayana Chetti* AIR 1917 Mad 418(1), 17 Cr LJ 312 .

75 *Abdur Rahim v Emperor* AIR 1927 Nag 40, p 41 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 27.

Property in possession of wife, clerk or servant.--

When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code.

*Explanation.***--**A person employed temporarily or on a particular occasion in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.133

Comments

1. 'Possession and Custody'

The doctrine expressed in this section is that the physical or *de facto* possession of a wife, clerk or servant who holds the thing possessed for the husband or master, is the possession in law of the latter. The section is based on the distinction made by English law between 'possession' and 'custody'. When a person has power to deal with a thing as owner to the exclusion of any other person, (the *corpus*, or physical element of possession) and where he intends so to deal with it in case of need, (the *animus*, or mental element), then he has 'possession'. But wives, clerks and servants do not have this intention to deal with things in their charge, as owners. They exercise their control on behalf of the husband and master respectively. They do not, therefore, have the *animus* and, therefore, do not have possession, and are consequently said merely to have custody. The word 'custody' means 'such a relation towards a thing as would constitute possession, if the person having custody had it on his own account'.[76] Thus a servant who is carrying his master's gun to a blacksmith for repairs is not in possession of the gun, and cannot, therefore, be convicted for the unlawful possession of the arm under the Indian Arms Act 1878.[77]

2. Section Abolishes Distinction between Possession and Custody

The distinction is of importance in relation to the law concerning 'theft',[78] and the other offences based thereon, which are essentially offences against possession. Thus, by reason of s 27 of the IPC a third party who dishonestly deprives a man's wife of his goods in her charge, takes them out of the husband's possession, thus steals from him;[79] and likewise, the dishonest wife who, during her husband's absence, for instance, dishonestly converts his property in her charge, commits theft from him.[80]

This section abolishes the distinction, recognised in English law between 'possession' and 'custody'.[81] Strictly speaking the two ideas are mixed up in the section.[82]

Clauses 17--19 which were originally framed and were altered into this section ran thus:

> 17. When property is put into the possession of a person's wife or servant, in trust for that person, it is put into that person's possession if it was not before in his possession, and continues in his possession if it was before in his possession.134

> 18. Property in the possession of a child under 12 years of age, of a lunatic, or of an idiot, if such child, lunatic or idiot, be in the keeping of a guardian or guardians, is in the possession of such guardian or guardians.

> 19. Property is not said to be in the possession of any party other than a person.

It was felt that it was both arbitrary and inconsistent to attribute possession to *cestui que* trusts and to guardians of those things which are put into a wife's or servant's possession in trust for the husband or master, or into an idiot's possession, as for instance, without the consent or knowledge of the husband or master or guardian. The three clauses were consequently altered and simplified as enacted in the section, which does away with the distinction recognised in English Law between 'possession' and 'custody'.[83]

It is interesting to note that Mr Norton, senior, objected to cll 17 and 18 (the original sections corresponding to s 27) when the Code was under discussion, as it did not contain the words 'with the consent and knowledge of the husband or master'. The law commissioners, although they made some alterations which do not affect this point, though the objections would have weight if such constructive possession could be charged against the party possessing, as a criminal possession, in order to bring him within the definition of any offence, and to render him liable to a penal prosecution, but said that they were not aware that the clauses in question were capable of being so perverted under the provisions of the Code.[84]

3. Interpretation of Term 'Possession'

The term 'possession' in the Code has to be interpreted in the light of s 27, which by virtue of s 7 is applicable wherever the term is used in the Code.[85]

4. Section not Applicable to Offences under Special Laws

Section 27 extends the meaning of the expression 'possession' for the purpose of offences under the IPC in such a manner so as to include the possession of person's wife, clerk or servant to be on account of that person. The provisions contained in this section are not made applicable to cases or offences under any special law such as Rajasthan Prohibition Act[86] or the Arms Act.[87] The reason appears to be that the concept of possession under the Penal Code is not necessarily the same as that under any special law.

5. 'Wife'

A view has been taken that the word 'wife' seems to have been used in this section in a wide sense so as to include a permanent mistress.[88] But the correctness of this decision is open to doubt. It is, however, evident that the possession of the wife must be on account of the husband and during the continuance of the marital tie.135

6. 'Clerk or Servant'

The expression 'clerk or servant' is borrowed from English law and is used in some of the sections.[89]

The clerk or servant may be permanent or temporary or for a particular occasion.

7. 'On Account of that Person'

This clause is very important. It means that there must be recognition, express or implied that the property is held by the wife, clerk or servant merely as its custodian. When a man furnishes a house for his mistress' occupation, he may reasonably be presumed to be in possession of all articles therein which can reasonably be inferred to belong to him or to be in the possession of his mistress on his behalf. But the inference must be inapplicable to articles of which the mistress is in possession illegally or contrary to the provisions of law, especially when the article in question is such that he might well remain in ignorance that it was in his mistress' possession. The prosecution in cases of this kind must prove something more than that the article was found in the possession of the wife (or mistress). They must establish facts from which a court is justified in presuming that such possession was on account of the husband (or protector). That such must be the law, is clear from the terms of the section and also from the fact that under those terms a clerk or servant is placed in the same position as a wife.[90] It is true that s 27, IPC, requires proof that the possession of a wife, which is deemed to be the possession of the husband, must be shown to be on account of the husband. In proper cases a conclusion may however, be arrived at on the basis of presumption or inference under s 114 of the Evidence Act and on the circumstantial evidence in the absence of direct evidence of entrustment by him to the wife.[91]

Possession of wood by a forest inspector, who is a servant of the government, is possession of the government itself; and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, constitutes theft, within the meaning of s 378 of the Code, if that consent was unauthorised or fraudulent.[92] So also the possession of the driver and cleaner of a lorry is possession of their master.[93] But where a servant uses his master's premises as his private residence, the possession is his and not of the master.[94] Temporary possession by a wife should always be attributed to the husband.[95]

8. Doctrine of Possession cannot be Extended to Illegal Possession of Wife, Servant

The doctrine of possession cannot be extended to illegal possession of things by the wife on her own account.[96] Where there is nothing to show that a pistol is a sort of136article that one can reasonably expect to be for sale in the shop of the accused, possession by servant of the accused of the pistol is not possession on account of master.[1] But where in the husband's absence from home, the accused entered his house with his wife's consent in order to commit adultery with her, it was held, (a) that the accused was guilty of the offence specified in s 451, IPC ; (b) that the house being in the wife's possession on account of her husband, it was in his possession within the meaning of s 27, and the consent of the wife to the entry of the accused could not save him.[2] There are cases where the wife happened to associate with bad characters and some incriminating articles were recovered from the house, yet the husband could not be held responsible for the same as it was possible that he did not know of the presence of those incriminating articles in the house at all. This view is supported by Re *Marimuthu Kavadan*,[3] where it was held that the production of stolen property by the wife from the house in which both husband and wife were living could not warrant the conviction of the husband under s 411 . A similar view was taken in *Emperor v Santa Singh* .[4]

9. Joint Possession

In *Beoparia v State of Ajmer* ,[5] it was held that where a house is occupied jointly by the husband and wife, it cannot, in the absence of positive evidence be held that one is in exclusive possession. Hence, where stolen articles are produced from the house of the accused women, who are living with their husbands, the possession cannot be said to be exclusively theirs for the purpose of s 411 . The theory that the head of the family or the husband is responsible for the incriminating articles recovered from the house occupied by many persons jointly has long been exploded.[6] It is not the law that every

person in a joint family should, merely on the ground that a bomb is found in the joint family residence, be liable to be tried for an offence under the Explosive Substances Act. If the article is found in a portion of the house, of which one member of the family has the exclusive use, then such member must *prima facie* be held to be liable. But if it is found in a portion of the house of which all the members of the family have the use, then *prima facie*, the managing head of the family is responsible. But in either case it is only a presumption which may be rebutted; and if the police act on information showing that an article found in a house is in the exclusive possession of one member of the family and the article is found in a portion of the joint family residence of which all the members of the family have the use, the head of the family is not liable merely on the ground that the article is found in a portion of the house, to which all the family can resort.[7]

10. Rebuttable Presumption about the Possession of Head of Family

In Re *Wahib Basha,*[8] the Madras High Court has ruled that possession implies dominion and consciousness in the mind of the person having dominion over an137 object that he has it and that he can exercise it. It is well settled that in the case of a family living jointly in the same house the head of the family is presumed to be in possession of any illicit article found in the house. The presumption is however rebuttable and weight attached to it must vary according to the circumstances. Such presumption also varies according to the improbabilities that the article owing to its size, *etc*, should have escaped notice of the head of the family, or any of the sons could have hidden it in the house without informing him or some such other reasons. Where two or more persons are charged with joint illegal possession, it is incumbent on the state to prove: (a) that each of the accused had either physical or constructive possession of the property; or (b) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of latter.[9]

On the other hand in *Ram Charan v Emperor* ,[10] wherein the police and magistrate had proceeded on the assumption that property found in a house occupied by several male and female members residing therein should be considered to be in possession of the head of the family, it was held that this is a wholly unwarranted assumption and can have no place in cases in which possession and criminal intent form the essential elements of an offence. It is equally unwarranted to assume that everyone residing in the house should be deemed to be in possession of an article recovered from it. Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and can exercise it. A person cannot be said to be in possession of a thing unless it is shown by evidence that he had dominion over it and knew that he had it. The mere fact that a thing is found in a house occupied by a person in common with others or at a place in the house which is as much accessible to others as to him is no proof that he was in possession of it.

11. Explanation

The explanation is in accordance with English Law where the word 'servant' includes any person acting as a servant for any particular purpose or occasion.[11]

12. Burden of Proof

Where an incriminating article is found in a house occupied by several persons the onus is not thrown upon those persons to establish their innocence. The onus of proving the conscious possession of the accused always rests on the prosecution and it never shifts on the accused.[12]

76 *JW Seager v Hukma Kessa* 24 ILR Bom 458 .

77 *R v Tota Ram* 16 ILR All 276 .

78 Indian Penal Code 1860, s 378 .

79 *Ibid*, illust (o).

80 *R v Butchi* 17 ILR Mad 401 .

81 *Fatehchand Agarwalla v Emperor* AIR 1917 Cal 123, p 127 (FB), 44 ILR Cal 477, 18 Cr LJ 385, per Mookerjee J.

82 *Ibid*, *Fatehchand Agarwala v Emperor* AIR 1917 Cal 123, per Chaudhari J.

83 Law Commissioner's First Report, ss 83 and 84 .

84 *Fatehchand Agarwala v Emperor* AIR 1917 Cal 123, p 135-36 (FB) .

85 *Abdur Rahim v Emperor* AIR 1927 Nag 40, p 41, per Chaudhary J, p 136.

86 *Chela Ram v State of Rajasthan* 1984 Cr LJ 1143, p 1144 (Raj) .

87 *Norendra Nath Mazumdar v State* AIR 1951 Cal 140, p 142 .

88 *Banwari Lal v Emperor* AIR 1914 Lah 455, p 456, 15 Cr LJ 172 .

89 Indian Penal Code 1860, s 381, and notes thereunder.

90 *Banwari Lal v Emperor* AIR 1914 Lah 455, p 457, 15 Cr LJ 172 ; *Dharam Singh Mangal Singh v State* AIR 1961 Punj 30 .

91 *Prem Raj v State* (1971) All Cr C 40, (1971) All Cr R 337 .

92 *R v Hanmanta* 1 ILR Bom 610, p 622 .

93 *HJ Ransom v Triloki Nath* AIR 1942 Oudh 318 .

94 *Margam Aiyar v SJ Mercer* AIR 1914 Mad 196, 15 Cr LJ 225 .

95 *Wazir v Emperor* AIR 1935 Pesh 68, 36 Cr LJ 1437 .

96 *Banwari Lal v Emperor* AIR 1914 Lah 455 .

1 *Chhotey v Emperor* AIR 1923 All 33(2), 23 Cr LJ 729 .

2 *Anand Ram v Emperor* 22 Cr LJ 118 .

3 Re *Marimuthu Kavadan*AIR 1941 Mad 684 .

4 *Emperor v Santa Singh* AIR 1944 Lah 339 (FB) .

5 *Beoparia v State of Ajmer* AIR 1955 Ajmer 10 .

6 *Emperor v Santa Singh* AIR 1944 Lah 339, 46 Cr LJ 1 (FB) .

7 *Queen Empress v Sangam Lal* 15 ILR All 129 ; *Peary Mohan Das v D West* 13 Cr LJ 65 ; *Emperor v Budh Lal* 29 ILR All 598, 6 Cr LJ 23 .

8 Re *Wahib Basha*AIR 1961 Mad 162 .

9 *Satyanarayana v State* AIR 1953 Mad 534, (1953) Cr LJ 1048, (1953) 1 Mad LJ 175, (1953) Mad WN 96 (Cr) .

10 *Ram Charan v Emperor* AIR 1933 All 437 .

11 *Stephen's Criminal Law*, p 210; *Smith v Webb* 12 TLR 450 .

12 Re *Wahib Basha*(1961) 1 Cr LJ 533, p 535, AIR 1961 Mad 162 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 28.

"Counterfeit".--

A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

[13][*Explanation 1.*--It is not essential to counterfeiting that the imitation should be exact.138

Explanation2--When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.]

Comments

1. Legislative Changes

The present explns 1 and 2 were substituted for the original explanations by s 9 of the Metal Tokens Act 1889.

2. Counterfeit

It appears from the definition of the word 'counterfeit' that counterfeiting is a process by which one thing is caused to resemble another thing. It supposes that there is an original. The act of counterfeiting is the effect of producing another so as to resemble the original and the object of which is to practise deception or knowing it to be likely that the deception will thereby be practised.[14]

This section defines the word 'counterfeit' which occurs in chs 12 (offences relating to coin and government stamps) and 18 (offences relating to documents and to trade or property marks). The main ingredients of counterfeiting as laid down in this section are:

(i) causing one thing to resemble another thing, and
(ii)
  (a) intending by means of that resemblance to practise deception, or
  (b) knowing it to be likely that deception will thereby be practised.[15]

Thus, if one thing is made to resemble another thing and the intention is that by such resemblance deception would be practised, or even if there is no intention, but it is known to be likely that the resemblance is such that deception will thereby be practised, there is counterfeiting.[16] Where a stamp-vendor caused some used stamps to resemble genuine ones and attached them to the licences issued for grazing cattle, it was held that his act amounted to counterfeiting.[17] The passing off a one-anna stamp as a one rupee stamp is not counterfeiting a one-anna stamp.[18]

3. Analysis of the Section

The analysis of the section shows that there is no necessity of importing words like 'colourable imitation' therein.[19] The definition of the word counterfeit in this section139 is not confined to coins

alone.[20] When the court shrinks the content of the expression 'currency note', to make it referable to only 'Indian currency note', it is defeating the intention of the legislature partly in as much as the court makes it lawful to counterfeit notes other than Indian currency notes. The manifest purpose of the provision is that the citizens should be protected from being deceived or cheated. It is inconceivable why the legislature should be anxious to protect citizens from being deceived or cheated only in respect of Indian currency notes and not in respect of currency notes issued by other sovereign powers.[21]

4. 'Explanation 1'--Imitation Need not be Exact

Explanation 1 lays down that it is not essential to counterfeiting that the imitation be exact. 'Counterfeit' in s 28, IPC does not connote an exact reproduction of the original counterfeited.[22]

Section 28, IPC defines the word 'counterfeiting' in very wide terms. The main ingredients of counterfeiting as laid down in Section 28 are:

(1) Causing one thing to resemble another thing;
(2) Intending by means of that resemblance to practice deception; or
(3) Knowing it to be likely that deception will thereby be practiced.[23]

'Counterfeiting' in s 28 does not connote an exact reproduction of the original counterfeited. Explanation 2 of s 28 lays down a rebuttable presumption where resemblance is such that a person might be deceived thereby. In such a case the intention or the knowledge is presumed unless the contrary is proved. There is no necessity of importing words like 'colourable limitation' therein. In order to apply s 28, what the Court has to see is whether one thing is made to resemble another thing and if that is so and if the resemblance is such that a person might be deceived by it, there will be a presumption of the necessary intention or knowledge to make the thing counterfeit, unless the contrary is proved.[24] Ordinarily, counterfeiting implies the idea of an exact imitation; but, for the purpose of this Code, it would amount to counterfeiting even if the imitation is not exact, and there are differences in detail between the original and the imitation, so long as the resemblance is so close that deception may thereby be practised.[25] The word 'counterfeit' does not connote an exact reproduction of the original counterfeited and it follows that the difference between the counterfeit and the original is not limited to a difference existing only by reason of faulty reproduction.[26] For the purpose of the Code there can be counterfeiting even though the imitation is not exact and even if there are differences in detail between the original and the imitation so long as the resemblance is so close that the deception may thereby be practised.[27]140

In order that coins may be counterfeit, it is not essential that they should exactly resemble genuine coins, or that they should be of silver and not of some other inferior metal. It is sufficient if they are of the same size as the King's coins and bear the imitation of the Crown and surrounding decorations as are found in a genuine coin.[28] It is sufficient if resemblance to genuine currency note is so caused that it is capable of being passed as such. In this regard, expert's evidence can be considered by the Court.[29]

5. Deception is one of the Ingredients of Counterfeiting

Although the resemblance need not be exact, it is essential that the counterfeit must be of such a character that it would be possible to pass it off as a genuine coin, and, unless that is so, it would not be possible to practise deception, and to practise deception is one of the ingredients of the definition of counterfeit in this section.[30] Where the edges of the alleged counterfeit coins are irregular and none could be deceived by such coins, they cannot be said to be counterfeit coins.[31] But if the resemblance is so great that one is likely to be mistaken for the other, slight differences do not matter.[32]

6. Intention to Deceive

For the purposes of the section, there must be an intention to practise deception or knowledge that deception will be practised. The deception meant is with regard to the nature of the coins. It is deception through the resemblance of the true coin with the false and it means that someone must be led to believe that the false coin is a true one. Where the accused counterfeited some coins and introduced them into another's house with the sole object that he should be thought to be the counterfeiter and be prosecuted accordingly, the accused cannot be said to counterfeit the coins.[33]

7. Explanation 2--Presumption of Intention is Rebuttable

Explanation 2 lays down that where the resemblance is such that a person might be deceived thereby it shall be presumed, until the contrary is proved, that the person causing one thing to resemble another was intending by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised. This explanation lays down a rebuttable presumption where the resemblance is such that a person might be deceived thereby. In such a case the intention or the knowledge is presumed unless the contrary is proved.[34] In order to apply the section, what the court, therefore, has to see is whether one thing has been made to resemble141 another thing. If it finds that in fact one thing has been made to resemble another, it has further to decide whether the resemblance is such that a person might be deceived. If it comes to the conclusion that the resemblance is such that a person might be deceived by it, it can presume the necessary intention or knowledge (until the contrary is proved) and counterfeiting would then be complete.[35] If the coins manufactured by the accused are very good imitations of genuine coins and persons might be deceived by the resemblance, the presumption referred to in the explanation arises, and it is for the accused to prove that their intention was innocent or that they did not know that it was likely that deception would be practised.[36] Where in a case of alleged counterfeiting of a trademark the trademark similar to that of the complainant had been moulded in the glass of the bottles on which the name of the hair oil had also been moulded: it was held that according to s 28, it must be presumed that the accused intended to sell that hair oil in those bottles and thereby cause deception. In this case, the onus was on the accused to show that in making these bottles he had no fraudulent intention.[37]

8. Counterfeiting may be Inferred from Facts and Circumstances

It may be noted that the general onus of establishing the elements of the offence in a particular case rests entirely upon the prosecution, but the prosecution can successfully discharge that onus by praying in aid the presumption under expln 2 to this section. Thus, in the case of an offence under s 485 of the code, the onus of proving either of the purposes mentioned in s 485 is discharged by the prosecution establishing possession of the instrument for counterfeiting and the close resemblance between the counterfeit trademark and the genuine trademark whereby deception becomes inevitable.[38] Where no direct evidence as to ingredient of counterfeiting is available they may be inferred from the facts and circumstances of the case.[39]

13 Substituted by Act 1 of 1889, s 9, for the original Explanation.

14 *Golo Mandla Ram Rao v State of Jharkhand* 2004 Cr LJ 1738 (Jhar) (DB) .

15 *K Hasim v State of Tamil Nadu* AIR 2005 SC 128, 2005 Cr LJ 143, p 152 .

16 *State of Uttar Pradesh v Hafiz Mohd Ismail* AIR 1960 SC 669, p 670, (1960) Cr LJ 1067 .

17 *Ramlal v Emperor* AIR 1921 Nag 86(2) .

18 *Queen v Shuroot Chander Dass* (1865) 2 WR 65(Cr).

19 *State of Uttar Pradesh v Hafiz Mohd Ismail* AIR 1960 SC 669, p 670 .

20 *Bachan Singh v State of Punjab* 1981 Cur LJ 93 (Cr) .

21 *State of Kerala v Mathai Verghese* AIR 1987 SC 33, (1987) Cr LJ 308 .

22 *K Hasim v State of Tamil Nadu* AIR 2005 SC 128, 2005 Cr LJ 143, p 152, 2005 (1) SCC 237 .

23 *K Hashim v State of Tamil Nadu* 2005 (1) SCC 237, AIR 2005 SC 128, 2005 Cr LJ 143 .

24 *Liyakat Ali v State of Rajasthan* 2010 Cr LJ 2450, p 2459 (Raj) .

25 *State of Uttar Pradesh v Hafiz Mohd Ismail* AIR 1960 SC 669, p 670, (1960) Cr LJ 1017 ; *State of Mysore v Natarajan* (1971) Mad LJ 400, p 402 (Cr), (1971) 1 Mys LJ 508 ; *Local Govt v Motilal Jain* AIR 1937 Nag 341, p 342 .

26 *Local Govt v Seth Motilal Jain* AIR 1937 Nag 341, p 342 ; *Golo Mandla Ram Rao v State of Jharkhand* (2004) Cr LJ 1738 (Jhar) .

27 *Golo Mandla Ram Rao v State of Jharkhand* (2004) Cr LJ 1738 (Jhar) .

28 *Amrit Sonar v Emperor* AIR 1919 Pat 330, 20 Cr LJ 439, 51 IC 263 ; *Narayan Maruti Wagmode v State of Maharashtra* 2011 Cr LJ 3318 (Bom) (DB) ; *Shahid Sultan Khan v State of Maharashtra* 2007 Cr LJ 568 (Bom) (DB) .

29 *Narayan Maruti Wagmode v State of Maharashtra* 2011 Cr LJ 3318, p 3320 (Bom) (DB) .

30 *Gulam Rabbani Gulam Umam v State* AIR 1956 Bom 511, (1956) Cr LJ 881 ; *Satyanarayana Rao v State of Mysore* (1972) Mad LJ 321 (Cr) .

31 *Ranchhod Mula v State* (1961) 2 Cr LJ 472 .

32 *Jitendra Mohan Pal v Durga Pado Banerjee* 16 Cr LJ 719, 14 CWN 957 .

33 *Sahebrao Awadhut Maratha v Emperor* AIR 1938 Nag 444, p 445, 39 Cr LJ 838 ; *Velayudham Pillai v Emperor* AIR 1937 Mad 711, p 712, 39 Cr LJ 51, (1939) ILR Mad 80 ; *Lalchand v Emperor* 13 Cr LJ 252 ; *Gulam Rabbani Gulam Umam v State* AIR 1956 Bom 511, (1956) Cr LJ 881 ; *Dinanath v State* AIR 1963 All 133, (1963) Cr LJ 282, (1962) All LJ 1038 .

34 *K Hasim v State of Tamil Nadu* AIR 2005 SC 128, 2005 Cr LJ 143, 2005 (1) SCC 237 .

35 *State of Uttar Pradesh v Hafiz Mohd Ismail* AIR 1960 SC 669, p 670-71 .

36 *Emperor v Qadir Bakhsh* ILR 30 All 93, 6 Cr LJ 395 ; *Nemi Chand v Secy of State for India* 34 ILR Cal 511 ; *Supdt & Remembrancer of Legal Affairs v Prafulla Kumar* AIR 1954 Cal 277, p 279, (1954) Cr LJ 841 .

37 *Sheikh Abdul Sovan v Jitendra Nath Dutta* AIR 1931 Cal 445 .

38 *Supdt & Remembrancer of Legal Affairs v Prafulla Kumar* AIR 1954 Cal 277, p 279, (1954) Cr LJ 841 .

39 *Ram Nath v State* (1968) All Cr R 359 (HC) .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 29.

"Document".--

The word "document" denotes any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

Explanation 1.--It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power-of-attorney is a document.142

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

*Explanation 2.***--**Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

Illustration

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

Comments

1. What is 'Document'

This section defines the term 'document'. It has also been defined in two other Central Acts, namely, the Indian Evidence Act 1872, s 3 and the General Clauses Act 1897, s 3(18) . The definitions in the Indian Evidence Act 1872 and the General Clauses Act 1897, are wider in scope than the definition given in this section.[40] In the definition given in this section the words used are 'as evidence of that matter' in place of the words ' for the purpose of recording that matter' used in the other Acts. A document need not necessarily be something which is signed, sealed or executed.[41]

2. 'Matters Expressed or Described on any Substance by Letters, Figures or Marks'

An assessment order[42] or a skiagram or X-ray photoplate,[43] is a document within the meaning of this section. Letters imprinted on trees and intended to be evidence that the trees have been passed by the forest ranger and, consequently, could be removed from the place, where they were lying in the forest, are also 'documents' within the meaning of this section.[44] A hammer bearing certain letters, used for making sleepers, passed by a special officer, has also been held to be a document.[45] Currency notes are written on paper by means of letters, figures and marks and the substance, namely, the paper is intended to be used for the purpose of recording the matter. In such a case, the matter written will mean a document and the matter written on paper143 makes it a 'currency note'. In the same way in the case of coins, the substance used is metal on which the matter is written expressly or described by means of letters, figures or marks and it is that matter which makes it a coin and so it cannot be said that coin is not a document within the meaning of this section.[46]

3. Difference between English and Indian Law

The definition of 'document' in the Indian Acts differs from that in the English law. In *R v Daye* ,[47] Darling J defined a document as 'any writing or printing capable of being made evidence, no matter on what material it may be inscribed'. Citing this case Best says that under the term 'are properly included all material substance on which the thoughts of men are represented by writing, or any other species of conventional marks or symbol'.[48]Section 6(1) of the English Evidence Act enacts that 'document includes books, maps, plans, drawings and photographs'. Thus, in English law, the word 'document' applies to the material on which the writing is written, whereas in Indian law it applies not to the material but to the matter written.[49]

4. Mere Expression of Ideas does not Convert writing into a Document

The mere expression of ideas does not convert a writing into a document unless the writing was 'intended to be used or which may be used as evidence of that matter'. What constitutes the 'making' of a document, depends essentially upon the nature and the use it is intended for. Indeed the definition of a document does not necessarily require that it would in every case be in the writing, or contain the signature or facsimile, of any person, but includes what is done by way of printing. A printed marriage invitation has, therefore, been held to be a document.[50]

5. 'Intended to be used as Evidence of that Matter'

The word 'evidence' occurring in this section precedes the words 'of that matter' and the word 'matter' as occurring in the opening portion of the section, is qualified by the words 'expressed or described upon any substance by means of letters,' etc. This means that the matter contemplated by this section is what is expressed or described upon any substance, and the question is whether such a matter can be evidence of its existence. The matter expressed or described upon any substance, would certainly be the evidence of the fact that that matter exists, though it may not by itself be a proof of the truth of the contents of that matter. The word 'evidence' in this section does not imply evidence of the truth of the matter expressed. The word 'evidence' or the word 'evident' only means 'that which can be seen with the naked eye'. It is not necessarily synonymous with the word 'proof'.[51] In *Madapusi Srinivasa Ayyangar v Queen* ,[52] it was remarked:

> The term 'evidence' in its ordinary sense signifies that which makes apparent the truth of a matter in question. It is no doubt more frequently applied to proof by a judicial tribunal, but it is not necessarily confined to this sense.

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A writing though not legal evidence may yet be a 'document' if the parties framing it believed and intended it to be evidence of such matter.[53]

40 *Syama Charan Saha v SDM* AIR 1962 Tri 50, p 54, (1962) 2 Cr LJ 794 .

41 *Emperor v Krishtappa Khandappa* AIR 1925 Bom 327, 87 IC 838, 26 Cr LJ 1014, 27 Bom LR 599 .

42 *Iswarlal v State of Maharashtra* AIR 1969 SC 40, 70 ITR 95, (1969) Cr LJ 271 .

43 *Harun Rashid v State* (1962) 1 ILR Cal 392 .

44 *Emperor v Krishtappa Khandappa* AIR 1925 Bom 327, 26 Cr LJ 1014, 87 IC 838, 27 Bom LR 599 .

45 *AV Joseph v King-Emperor* AIR 1925 Rang 122, p 128, 3 ILR Rang 11, 26 Cr LJ 492 .

46 *Shyama Charan Sahu v SDM* AIR 1962 Tri 50, p 54, (1962) 2 Cr LJ 794 .

47 *R v Daye* (1908) 2 KB 233 .

48 Best Ev, s 215 .

49 Law Commissioner's First Report on the Indian Penal Code, s 88 ; *Dharmendra Nath Shastri v Rex* AIR 1949 All 353, 50 Cr LJ 550, (1949) All LJ 183 .

50 *LK Siddappa v Lalithamma* AIR 1954 Mys 119 .

51 *Dharmendra Nath Shastri v Rex* AIR 1949 All 353, p 355 .

52 *Madapusi Srinivasa Ayyangar v Queen* 4 ILR Mad 393, p 395 .

53 *R v Sheefait Ally* 2 BLR, 12 (A Cr), 10 WR 61 (Cr).

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Chapter II

General Explanations

[54][S. 29A.

"Electronic record".--

The words "electronic record" shall have the meaning assigned to them in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000.]

54 Inserted by the Information Technology Act 2000 (21 of 2000), s 91 and Sch I (wef 17-10-2000).

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Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 30.

"Valuable security".--

The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or where by any person acknowledges that he lies under legal liability, or has not a certain legal right.

Illustration

A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security".

Comments

1. 'Valuable Security'

Section 29 defines the term 'document'. This section defines 'valuable security', as a document creating or extinguishing a legal right, or acknowledging a liability.[55] A document conferring or creating rights is a valuable security, even though all the signatures which it is intended to obtain or is necessary to obtain have not been affixed.[56] The expression 'valuable security' is used in ss 324 - 331, 347 384, 420, 467 and 477 of the Code.

2. Copy of a Document

Under this section it is the original document which creates or purports to create or extinguish legal rights, that is a valuable security. A copy of a document which is a valuable security is not itself a valuable security.[57] But the counterpart of a document is not a copy and might be a valuable security.[58]145

3. Cancelled or Spent Document

A cancelled instrument cannot be a valuable security. The law commissioners said:

> Sir H Seaton asks, would not a cancelled instrument be a valuable security under this clause? We think not: for an instrument available for the purpose for which it was made is clearly what the clause intended; a cancelled instrument, therefore, though by the cancelling of it a legal right may be extinguished, inasmuch as the instrument upon which such right depended, is thereby voided, does not fall within its scope.[59]

But a *qabuliat* though it relates to a period which has passed away, is a valuable document, though a suit thereon would be barred by time because, it can even then be used, at any rate to show the lessor's right to possession and the contract of tenancy during these years between him and the lessee.[60]

4. 'A Document which is or Purports to be a Document'

The words 'purports to be' appearing in the definition of valuable security show that a document, though not a legal document receivable in evidence in any court complying with the provisions of the Registration Act 1908 or other enactment, will be a valuable security even if it purports to be a document whereby a legal right is created, extended, transferred, restricted, extinguished or released and the said document will be receivable in evidence for the purposes of the IPC .[61] The use of the words 'which is, or purports to be', in this section, indicates that a document which, upon certain evidence being given, may be held to be invalid but on the face of it creates, or purports to create, a right to immovable property, although a decree could not be passed upon the document, is contemplated within the purview of the section. Had it not been so, any forged document, if the forgery was admitted, or any document which was not executed or stamped according to law, and on which no decree could be passed by a civil court, could not be called a valuable security.[62] If on the face of it a document creates or extinguishes a legal liability, it is immaterial that it might subsequently, upon certain evidence being given, be held to be of no effect against the executant. Even a hand note executed by a minor is a valuable security as it purports to be a document whereby a legal right is

created.[63]

5. Documents found to be Valuable Securities

Even if a document, not signed by a competent authority, is void, it is still a valuable security.[64] A cinema ticket, with a forged stamp, has been held to be a valuable security.[65]146

A document which was not stamped and was, therefore, not admissible in evidence, may nevertheless be a valuable security.[66]

Where a blank promissory note and a blank receipt contained the forged signatures of the executant but contained no specification of the person in whose favour either document purported to be executed, nor yet of the date or place of execution, nor yet of the money involved, it was held that the two purported to be documents whereby a legal right was created and were, therefore, valuable securities.[67] Where the accused intentionally put a person in fear of injury to himself and thereby dishonestly induced him to place his thumb-impression upon certain pieces of paper, being in each case something signed which could be converted into a valuable security, it was held that the document was a valuable security within the meaning of this section.[68] A settlement of account in writing may be a valuable security, though not signed.[69]

An unregistered document, although it may not be an effectual document so as to pass title until it is registered, purports to be a valuable security from the date of its execution.[70]

A time-barred document is valuable security.[71]

A forged certificate enabling a dealer to get exemption from the levy on general sales taxes has been held to be a valuable security, even though the dealer had no licence and had no right to furnish the certificate and get the exemption.[72] A *qabuliat* is a valuable security, because it creates a legal right, namely, the right of a tenant to hold the land. It is also an acknowledgement by the tenant that he is legally bound to pay the rent and to hold the land in accordance with the conditions of the *qabuliat*.[73] A deed of divorce is a valuable security because it extinguishes a legal right of the parties.[74] An import licence is a valuable security because it creates a right in the licence to import goods.[75] So also a certificate in 'K' form under s 9 of the Bombay Sales Tax Act 1953, as it creates a legal right in the purchasing dealer to get exemption from payment of general sales tax.[76] The original of a transit pass without which no forest produce can be removed, is a valuable security.[77] The Income Tax Assessment Order is a valuable security under s 420 read with s 29, IPC .[78]

6. Documents not found to be Valuable Security

Academic certificates[79], certificates of good character and having passed certain examinations issued by a school or private institutions[80] which are found to be forged147 certificates,[81] are, however, not 'valuable security'. An acknowledgement of receipt of an insured parcel[82] or a decree[83] or character certificate, issued by an educational institution[84] or a mere endorsement for calling a particular candidate for interview[85] or an application for compromise, filed by a party but not accepted by the court and, therefore, returned to the applicant[86] have also not been held to be valuable security. A *sanad* conferring a title of dignity on a person is also not a valuable security.[87]

7. What is 'Legal Right'

A legal right is one which is either enforceable, or recognised, by a rule of law.[88] The test of enforceability, though it may be a normal one, is not the only a test for determining a legal right. A legal right may be asserted even, before administrative agencies. It includes the liberty of freedom from penalty.[89] If the body of the blank paper ticket, giving details of journey and the cost of the ticket, is filled in without the signature of the station master, or a person authorised by him, appended thereon, such a document cannot be deemed to be a valuable security as it does not create any right

to the passengers to travel by rail on the basis of that ticket.[90]

8. Decree or Administrative Order of Court

A 'decree' does not come within the definition of a 'valuable security'; a decree merely declares the existence of legal rights or the extinguishment, extension, transfer or restriction of legal rights, etc; the rights are there, and all that the decree does is that it formally expresses the adjudication by the court on the rights of the parties. A 'decree' is not, therefore, a 'valuable security'.[91] An administrative order of a court, by which the *nazir* of the court was asked to take a document of suretyship from the accused for his being released on bail and the necessary certificate for the solvency of the surety was to be taken, does not by itself create any legal right in favour of the *nazir* and it is not, therefore, a valuable security.[92]

9. Account Books

Ordinarily speaking account books do not by themselves create any right or liability to become 'valuable security', though they may evidence the existence of such rights and liability. In other words, an account book, generally speaking may be valuable evidence but is not valuable security within the definition given in s 30 .[93] Account148 books, as such, do not create any right, and entries therein cannot be the basis of charging an accused with the liability of what is noted against him. These entries can be merely evidence of certain alleged facts and are, as such, relevant evidence in view of s 34, Evidence Act. Certain entries which might be signed by a constituent may form the basis of a charge against him in view of his acknowledging his liability and the correctness of the contents noted in that entry. Where they are not so signed, the account-books are not 'valuable security'.[1] But a title page in an account book containing the names of the partners and the amount of the capital contributed by each is, if signed by them, a 'valuable security'.[2]

10. Document Purporting to be Acknowledgement

The words 'valuable security' denote not only a document which creates or extinguishes legal rights, but also a document whereby any person acknowledges that he lies under legal liability or has not a certain legal right. An account paper which purports to be a document whereby a person acknowledges that he lies under legal liability is a valuable security.[3] The expression 'legal liability' has a wide import and embraces every legal liability though not directly pecuniary.[4] Account books are not valuable security unless the entries in them are signed by the constituents in acknowledgement of their liability or the correctness of the entries.[5] A counterfoil of a paying-in slip purporting to be an acknowledgement of receipt of a sum of money by the bank is a document within the definition of valuable security.[6] A discharge receipt purporting to have been signed by a fictitious nominee in an insurance policy is, on the face of it, a valuable security within the meaning of this section, or a 'document purporting to be an acquittance or receipt acknowledging the payment of money' within the meaning of s 467 of this Code.[7] An acknowledgement of receipt of an insured parcel is not a valuable security. It merely evidences that a parcel of some sort was delivered to the complainants and cannot operate as a discharge of any liability and is not, therefore, a valuable security.[8]

Where the accused gave a post-dated cheque for certain goods delivered to him at an earlier date and got a receipt, but the cheque was dishonoured, it was held that the receipt was not a valuable security as it was only an acknowledgement of the receipt of a cheque.[9]******

55 *Neki Ram v State of Haryana* (1974) 76 Punj LR 780 .

56 *GS Ramassami Iyer v Emperor* AIR 1918 Mad 150, 19 Cr LJ 177, 41 ILR Mad 589 .

57 *Govind Prashad Pauri v State* AIR 1962 Cal 174 ; *Supdt and Legal Remembrancer of Legal Affairs*, *Bengal v Daulatram Modi* AIR 1932 Cal 390, 33 Cr LJ 685, 59 ILR Cal 1233 ; *Charu Chandra Ghose v King-Emperor* AIR 1924 Cal 502, 25 Cr LJ

1034 ; *Reg v Khushal Hirman* 4 Bom HCR 28 ; *Emperor v Nano Gopal* 5 Bom HCR 56 .

58 *Ismail Panju v King-Emperor* AIR 1925 Nag 337 .

59 Law Commissioner's First Report on the Indian Penal Code, s 89 .

60 *Ismail Panju v King-Emperor* AIR 1925 Nag 337, p 339, 26 Cr LJ 1115 .

61 *Jaswant Singh v State of West Bengal* (1977) Cr LJ (NOC) 260 (Cal) ; **See also***John Paul v State* 2012 (118) AIC 659 (Mad) .

62 *Ram Harakh Pathak v Emperor* AIR 1926 All 57, p 58, ILR 48 All 140, 26 Cr LJ 1617 .

63 *Ram Narain Sahu v Emperor* AIR 1933 Pat 601(1), 35 Cr LJ 123 ; *Ram Harakh Pathak v Emperor* AIR 1926 All 57, 27 Cr LJ 1617 ; *Ram Kamal v Chandra Nath* (1971) Cr LJ 708, p 709, (1970) Assam LR 101 (DB) ; *SK Gupta v State* (1967) All WR 527 (HC) .

64 *SK Gupta v State* (1967) All WR 527 (HC) ; *GS Ramasami Iyer v Emperor* AIR 1918 Mad 150, 19 Cr LJ 177 ; *Ram Harakh Pathak v Emperor* AIR 1926 All 57, 27 Cr LJ 1617 ; *Ram Kamal v Chandra Nath* (1971) Cr LJ 708, p 709, (1970) Assam LR 101(DB).

65 *Abraham John v State of Kerala* (1968) Mad LJ 476 (Cr), (1968) KLT 552 ; *Ratanchand Radha Krishandas v State* AIR 1960 Bom 146, (1960) Cr LJ 461, 61 Bom LR 1161 ; *Batisa Singh v Emperor* AIR 1932 Pat 335, 34 Cr LJ 81 ; *GS Ramasami Iyer v Emperor* AIR 1918 Mad 150, 19 Cr LJ 177, 41 ILR Mad 589 .

66 High Court Proceedings of 5 August 1873, 7 MHCR App 26; *Queen-Empress v Ramasami* 2 ILR Mad 148 ; *Jawahar Thakur v Emperor* AIR 1916 All 197, 17 Cr LJ 203, 38 ILR All 430 .

67 *Jawahar Thakur v Emperor* 17 Cr LJ 203 .

68 *Batisa Singh v Emperor* AIR 1932 Pat 335, 34 Cr LJ 81 .

69 *R v Kapalavaya Saraya* 2 Mad HCR 247 .

70 *Kashi Nath Naek v Queen-Empress* 25 ILR Cal 207, 7 CWN 681 .

71 *Ismail Panju v King-Emperor* AIR 1925 Nag 337, p 339, 26 Cr LJ 1115 ; *Chacko v State of Kerala* (1970) KLT 358, (1970) Cr LJ 173 (Ker) .

72 *Ratanchand Radha Kisordas v State* AIR 1960 Bom 146, 61 Bom LR 1161 .

73 *Ismail Panj v King-Emperor* AIR 1925 Nag 337, p 338, 26 Cr LJ 1115 .

74 *R v Azimooddeen* 11 WR 15 (Cr) .

75 *Durga Das Tulsiram v State* AIR 1955 Bom 82, 56 Bom LR 188 .

76 *Ratanchand Radha Kisondas v State* AIR 1960 Bom 146 .

77 *Supdt & Remembrancer of Legal Affairs, Bengal v Daulatram Mudi* AIR 1932 Cal 390, 59 ILR Cal 1233 .

78 *Ishwarlal Girdharilal Parikh v State of Maharashtra & Ors* AIR 1969 SC 40, (1969) Cr LJ 271 .

79 *Shrinivas Pandit Dharamadhikari v State of Maharashtra* (1980) All Cr C 336 (SC), (1980) Cr AR 342 (SC), (1980) 4 SCC 551, (1980) UJ 908(SC), (1980) Cr LR 560 (SC); **see also***John Paul v State* 2012 (118) AIC 659 (Mad) .

80 *Govind Prasad v State* (1971) All Cr R 297 .

81 *Bhausaheb Kalu Patil v State of Maharashtra* (1980) Cr LJ 1312 (SC) ; *Shaik Noor Mohammad Shaik Fazal v State of Maharashtra* (1980) Cr LR 406 (SC), (1980) Cr LJ 1345 (SC) .

82 *Sadholal v Emperor* AIR 1917 Pat 699, 17 Cr LJ 272 .

83 *Charu Chandra Ghose v King-Emperor* AIR 1924 Cal 502, p 507, 25 Cr LJ 1034 .

84 *Govind Prasad v State* (1971) All Cr R 297, (1971) All WR 345 (HC) .

85 *KK Pandey v Narpal Singh* (1973) Cr LJ 1640 (Raj), (1972) WLN 980 .

86 *Prayag Das v State* (1963) 1 Cr LJ 279 (280), AIR 1963 All 131 .

87 *Jan Mohomed v Queen-Empress* ILR 10 Cal 584, p 587 .

88 *KK Pandey v Narpat Singh* (1973) Cr LJ 1640 (Raj) ; *Govind Prasad v State* (1971) All Cr R 297, (1971) All WR 345 (HC) ; *Daniel Hailey Walcott v State* (1968) Cr LJ 1282, (1968) 1 Mad LJ 229, 1968 Mad LJ 161 (Cr), AIR 1968 Mad 349 .

89 *Daniel Hailey Watcott v State* (1968) Cr LJ 1282, (1968) 1 Mad LJ 229, (1968) Mad LJ 161 (Cr), 1968 Mad LW 49 (Cr), (1968) 2 ILR Mad 843, AIR 1968 Mad 349 .

90 *Jagdish Prasad Verma v State* (1980) Cr LR 284, p 287 (UP) .

91 *Charu Chandra Ghose v King-Emperor* AIR 1924 Cal 502, p 507, 25 Cr LJ 1034 .

92 *Emperor v Sher Alam Khan Sahib* AIR 1933 Bom 494, p 495, 35 Bom LR 1062 .

93 *Kishakkeppallike Moosa & Ors v State* AIR 1963 Ker 68 .

1 *Hari Prasad v State* AIR 1953 All 660, p 661 .

2 *Hari Charan Gorai v Sirish Chandra Sadhukhan* 38 ILR Cal 68, 11 Cr LJ 525 .

3 *Idu Jolaha v Emperor* AIR 1918 Pat 274, p 275, 19 Cr LJ 709 ; *Queen-Empress v Ramasami* 12 ILR Mad 148 .

4 *Prayagdas v State* (1963) 1 Cr LJ 279, p 280, (1962) Ker LJ 1075, AIR 1963 Ker 68 .

5 *Hari Prasad v State* AIR 1953 All 660, (1953) Cr LJ 1496, (1953) All LJ 318 ; *Moosa v State of Kerala* AIR 1963 Ker 68, (1963) 1 Cr LJ 180, (1962) Ker LJ 1075, (1962) KLT 815 .

6 *AH Tumer v Emperor* AIR 1926 Cal 425 .

7 *Harol Narmada Prasad Singh v State of Vindhya Pradesh* AIR 1956 VP 30, p 32, (1956) Cr LJ 1246 .

8 *Sadho Lal v Emperor* AIR 1917 Pat 699, 17 Cr LJ 272 .

9 *HK Shaw v Suresh Chandra Mitter* AIR 1936 Cal 324, p 325, 37 Cr LJ 828 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 31.

"A will".--

The words "a will" denote any testamentary document.

Comments

1. Scope

The term 'Will' has been defined under s 2(h) of the Indian Succession Act (39 of 1925), 'as the legal declaration of the intentions of the testator with respect to his149 property which he desires to be carried into effect after his death'. Section 3(64) of the General Clauses Act 1897, defines it so as to 'include a codicil, and every writing making a voluntary posthumous disposition of property. 'Will' means the whole testamentary instruments including codicils'.[10] This term has been used in ss 467 and 477 of the Code.

A testament is a declaration for the last will of a person as to what he desires to be done after his death. According to the *Judicial Dictionary* by Aiyar,[11] 'testament' means 'a disposition of personal property to take place after the owner is deceased, according to his desire and direction'.

10 *Pigot v Wilder* 26 Beav 92 .

11 Aiyar, *Judicial Dictionary*, eleventh edn, p 1105.

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 32.

Words referring to acts include illegal omissions.--

In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

Comments

1. Scope

According to this section throughout the IPC except where a contrary intention appears from the context, acts done also include illegal omissions. Acts and omissions or action and non-action are closely connected with an 'event' or 'events',[12] which are sensibly external[13] matters, and may be defined as 'transient arrangements of permanent sensible objects',[14] such as the burning of a house, the killing of a man, the removal of silver spoons to a servant's room. Events may or may not have to do with human agency, but they concern criminal law only if they have something to do with it.[15] As per s 32 of the IPC, the word which refer to 'acts done' extends also to illegal omissions. The word 'omission' is used in the sense of intentional non-doing. Thus, according to this section 'act' includes intentional doing as well as intentional non-doing. The omission or neglect must no doubt be such as to have inactive effect conducing to the result, as a link, in the chain of facts from which an intention to bring about the result may be inferred. The Code makes punishable omissions which have caused, which have been known to be likely to cause, a certain evil effect in the same manner as it punished acts, provided they were illegal. And when the law imposes on a person a duty to act, his illegal omission to act renders him liable to punishment.[16]

2. Action and Non-action of Human Agency

Human agency consists of either *action* or *non-action*, of doing something, or of not doing something,[17] or in other words, of positive or negative conduct.

Action consists of an act or acts.

(a) Action

Action consists of an act or acts. Acts are classified and defined by Austin as: (a) Internal acts, or 'determinations of the will', and (b) External acts, or 'such motions of the body as are consequent upon determinations of the will'.[18] In considering determinations of the will, *i.e.*, a state of things within a man's breast, which we have to infer or presume, as 'act', Austin followed Bentham,[19] but the ultimately abandoned the view,[20] and limited the meaning of 'acts' to external ones.

Now although strictly speaking the meaning of an 'act' is restricted to a motion of the body consequent upon a determination of the will, yet in ordinary language, as Austin points out,[21] the word 'act' includes some of the more immediate and obvious consequences of the bodily movement, *i.e.* consequences very near and very certain; *e.g.*, *A* intentionally stabs *B* in the heart. *B* dies. *A's* 'act' is, strictly speaking, his bodily movement, or the thrusting of the knife into *B*'s heart, but in ordinary language *A's* act would be designated the killing of *B*, *i.e.*, the immediate and certain consequence of *A*'s bodily movement, *viz*, *B*'s death, is included in the word 'act'.

According to Austin if the bodily movement is not in consequence of a determination of the will it is not an 'act'; *e.g.*, a man falling into the water.[22]

The word 'act' cannot be applied to involuntary motions of the body. Whether this view be adopted or not[23]is, for the purpose of criminal law, of no importance, for the consequences of an involuntary act are never punishable; *e.g.*, *A* and *B* are on a tour through the Alps. *A* is suddenly seized with an epileptic fit, throws out his arm and pushes *B* over a precipice. *B* is killed. *A* is not liable for *B*'s death. Thus practically the word 'act' means a voluntary act, or bodily movements which are in consequence of volition or will.

The word 'act' accordingly means a motion or motions of the body consequent upon a determination of the will, coupled with the more immediate consequences of such motion or motions.

(b) Non-action

Non-action (or not doing) as contrasted with action (or doing) is frequently termed omission 'doubtless from the attractive antithesis between omission and commission'.[24] Non-action may be either (a) intentional or (b) unintentional; *e.g.*, *A*, a woman, intentionally omits to give her child food, in order that the child may die, *B*, a151 hospital nurse, omits to give a patient his medicine, because she forgets all about it. *C*, a pointsman, sends a train on the wrong rails, by intentionally omitting to pull the right lever, in order that the engine driver may be killed in a collision, or he sends to train on the wrong rails, because he omits to pull the right lever, since he is asleep or forgetful.

(c) Intentional and Non-intentional Non Doing/Omission

There is a marked distinction between non-doing which is intentional, and non-doing which is not intentional--a distinction of great practical importance in criminal law; for in intentional non-doing there is an exercise of will, and therefore it involves a greater criminal liability than non-doing in which the volition is dormant. To intentional non-doing Austin has given the term 'forbearance', which he defines as 'the not doing some given external act in consequence of a determination of the will'.[25] Unintentional non-doing he terms 'omission' and defines it as 'the not doing a given act, without adverting to the act'[26]*i.e.*, a man does not do a given act because he never thinks about it.

(d) 'Act'

As a general rule, the word 'act' in the Code is not confined to its ordinary meaning, as explained above, of positive conduct, of doing something, but includes also illegal omission.

It may be noted that an act, properly speaking, means something voluntarily done by a human being and having an effect in the sensible world. It involves an operation of the mind as well as of the body. But, as understood in the Code, the term may signify only an operation of the mind, for, under s 32 an act includes an illegal omission which implies bodily inaction.[27]

3. 'Omission'

This word is not used here in the sense in which Austin uses the word, but in the same sense as he employs the word 'forbearance' *i.e.*, in the sense of intentional non-doing. By the force of this section then, 'act' includes intentional doing ('act' in its strict sense) and intentional non-doing or conscious abstinence from action (Austin's 'forbearance'), if that non-doing is illegal.

The employment of the word 'omission' in this sense in the Code is shown in several of its illustrations. Thus, in the illustration to s 36 in 'omitting' to give *Z* food intentionally causes *Z*'s death; so also in illusts (b) and (c) to s 37 .[28]

'The illegal omission or neglect must be such as to have an active effect conducing to the result as a link in the chain of events from which an intention to bring about the result may be inferred'.[29]Even an omission can, in certain circumstance, amount to an act. This is the purpose of s 32 of the Code. So, the act mentioned in s 34 of the Code need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act.[30]152

4. 'Illegal'

Not only must the non-action be intentional, but it must be illegal as well. 'In the case of a clearly proved forbearance, although this is in all mental conditions exactly on a level with action, and may be preceded by the strongest wish, and even purpose, so far as the forbearance is concerned, of consequences which would be criminal when resulting from a positive act; yet, if the train of events which ends in these consequences is not due in any point to the person, who is merely a complacent spectator, he does not appear to be, in actual legal systems, criminally liable, whatever moral abhorrence his conduct would naturally excite; unless the act from which he forbore was one which he was under a legal obligation to perform'.[31]

Criminal law fastens liability on persons who omit to perform the duty required by law such as to provide food, clothing, shelter, or medical aid to another, but a refusal to perform acts of mere charity or mercy, not coupled with a legal duty, does not entail legal punishment even if death ensues from such refusal or neglect. Thus where the wife is in a helpless state and unable to appeal elsewhere for aid, and the husband who has the means to provide necessaries for existence, deliberately withholds them with the intention to kill her, he commits murder. To the rule of culpability for acts or omission of the nature mentioned above there is one rider. The criminal liability of such persons is conditional on their capacity, means, and ability to perform the legal duty.[32] Illegal omission is an 'act' under s 304A of the IPC and may constitute offence if it is negligent.[33]

Illustrations of Lawful Omissions

(i) *A*, a stranger, sees *B*, a small child, struggling face downwards in a pool of water. *A* does not interfere. *B* is drowned. *A* is not liable for *B*'s death.[34]

(ii) A woman's head-dress catches fire; water is at hand. A man, instead of assisting to quench the fire, looks on and laughs at it. He is not liable for the injury inflicted.[35]

(iii) Gunpowder lies scattered about in a room. *A* knows of it, but allows *B* to go in with a lighted candle without warning him. *B* is injured by an explosion. *A* is not liable.[36]

(iv) *A*, a stranger on whom *Z* has no other claim than that of humanity, intentionally omits to tell *Z* that a river is swollen so high that *Z* cannot safely attempt to cross it. *Z* attempts to

do so and is drowned. *A* is not liable for his death.[37]

(v) *A*, a passer-by, sees a savage dog attack *Z*. He does not try to call off the dog, although he knows it is likely that *Z* will be killed. *A* is not liable for the death of *Z*, if *Z* is killed.[38]

It is no wonder that Bentham asked,[39] 'who is there that in any of these cases would think punishment misapplied?' and suggested that it should be the legal duty of every153 one, when another is in danger, to save him from mischief, when it can be done without prejudicing himself. But, happily, such cases are rare, or a speedy imposition of legal obligations to meet the emergency would be made.

'The word 'illegal' is applicable to everything which is an offence'; (*i.e.*, a thing made punishable by the Code, s 40, IPC), 'or which is prohibited by law; or which furnishes ground for a civil action (s 43 of the IPC). Thus, if the omission is *per se* an offence under the Code, or is prohibited by law*, i.e.,* there is a duty imposed by law to do the thing abstained from, or will give grounds for a civil action, then the omission is illegal, and the agent will be as liable for the consequences thereof as if he had brought them about by his own act.

Illustrations of Illegal Omissions

(i) If *A* in illustration 4 above is a peon stationed by the authority to warn travellers, *A* is liable for *Z*'s death. So also if he is a guide who had contracted to conduct *Z*.[40]

(ii) If *A* in illustration 5 above is the owner of the dog, he is liable for *Z*'s death.[41]

(iii) *A*, a guide hired by *B*, deserts *B* in a jungle, knowing that *B* is likely to die. *A* is liable for *B*'s death.[42]

(iv) *A* keeps *B* in wrongful confinement, and omits to procure medical advice for *B*, knowing that *B* is likely to die for want of it. *A* is liable for *B*'s death.[43]

(v) *A*, a policeman, stands by and acquiesces in an assault on a prisoner committed by *B*, another policeman, for the purpose of extorting a confession. The law requires *A* to prevent *B* using torture but he did not even expostulate. The law, therefore, punishes his failure to act, *Queen-Empress v Latif Khan* ,[44] it is no defence to *A* that *B* was his superior or that *B* had been ordered by his superior to commit the torture.[45]

When the law places a duty to act on a person, his illegal omission to act is to be judged by the same principles. It may be a form of abetment under s 107 of the IPC ; while s 116 of the IPC takes particular notice of the omission of a police officer whose duty it is to prevent a crime. So where a police officer purposely kept out of the way, knowing that some persons were likely to be tortured to get confessions out of them, he was pronounced guilty of abetment. It was not a defence to say that he was not present at the time of the torture, as by withdrawing from the spot he facilitated the commissions of the torture.[46]

The codified criminal law of India does not render a mere casual inadvertence of criminal duty, but such neglect of duty as either directly results in loss of life or injury to person (ss 304A, 337 - 338, IPC and in certain special cases) or such neglect154 as endangers life or property (ss 279 - 89, IPC and ss 102 and 128 of the old Indian Railways Act).[47] But the mere fact that the offence of extortion under s 384 of the IPC is committed in the presence of the village chowkidar, without eliciting any disapproval on his part, will not render him liable as an abetter of the offence. There was no illegal omission on the part of the *chowkidar* in this case. He was not bound by s 89 or by s 90 of the CrPC to report the offence of extortion; and even if he were so bound, his subsequent omission to report the commission of the offence could not be said to be intentionally aiding the doing of the thing itself which must have been done before it could be reported by the *chowkidar*.[48]

5. Burden of Proof

No doubt, an omission is included in an act, but it is incumbent that such an omission must be illegal and the onus lies on the prosecution to show that the omission, which is being treated as an act, was

either an offence or was prohibited by law or was one which furnished ground for a civil action as required by s 43 .[49]

12 *Austin's Jurisprudence*, 1 Lect 14.

13 *Ibid*, p 375 includes under the word 'event', internal determinations of the will, but the ordinary meaning of the word is limited to external matters. Clark, *Analysis of Criminal Liability*, ch II, p 13.

14 *Austin's Jurisprudence*, 1, p 386, and Clark, *Analysis of Criminal Liability*.

15 For example, a house destroyed by lightning; a man killed by an avalanche; spoons removed by the magpie of the story; Clark, *Analysis of Criminal Liability*.

16 *Narendra v State of Rajasthan* (2003) Cr LJ 1995 (Raj) .150

17 Clark, *Analysis of Criminal Liability*, ch 3, p 21.

18 *Austin's Jurisprudence*, 1, pp 376, 377.

19 Introduction, chs 7 and 11, p 73.

20 *Austin's Jurisprudence*, 1, Lect 19, p 433.

21 *Ibid*.

22 *Austin's, Jurisprudence*, 1, Lect 14, p 376.

23 Thus Prof Clark in *Analysis of Criminal Liability* (ch 3, p 22) defines an 'act' as an external state of things produce by the body of the agent whether voluntarily or involuntarily.

24 Clark, *Analysis of Criminal Liability,* ch 3, p 40.

25 *Austin's, Jurisprudence*, 1, Lect 14, p 377.

26 *Ibid*, Lect 20, p 438.

27 Thomotti, Madathill Poker, 1 Weir 495.

28 See also the illustrations given by the Commissioners in the Report of 1837 to s 294 of the Code as originally drawn, p 55.

29 Thomotti, Madathill Poker, 1 Weir 495.

30 *Suresh v State of Uttar Pradesh* (2001) Cr LJ 1462 (SC) .

31 Clark, *Analysis of Criminal Liability,* ch 3, pp 43-44.

32 *Om Prakash Tilak Chand v State* AIR 1959 Punj 134, 145 .

33 *Captain D'Souza v Pashupati Nath Sarkar* 1968 Cr LJ 405 (Cal) .

34 *Stephen's Digest*, art 212, and *Ct* Bentham, *Principles of Morals and Legislation*, p 323, note.

35 *Ibid*.

36 *Stephen's Digest*, art 212, and *Ct* Bentham, *Principles of Morals and Legislation*, p 323, note.

37 Commissioner's Report on Penal Code 1837, s 55 .

38 *Ibid*.

39 Bentham, *Principles of Morals and Legislation*, p 323.

40 Commissioners' Report on Penal Code 1837, s 55 .

41 *Ibid*.

42 Illustration to s 94 of Indian Penal Code 1860, as originally drawn.

43 Illustration to s 94 of Indian Penal Code 1860, for other examples of homicide in consequence of omission, notes to s 299 .

44 *Queen-Empress v Latif Khan* 20 ILR Bom 394 .

45 *Queen v Behari Singh* 7 WR 3 (Cr) ; *Queen v Sonoo* 10 WR 48 (Cr) ; *Queen-Empress v Magan Lal* 44 ILR Bom 115 .

46 *Queen v Baboo Ashutosh Dhur* 21 WR 11 (Cr) .

47 *Frank Crossley Woodward v Crown* AIR 1925 Sind 233 .

48 *Gopal Chunder Sirdar v Foolmoni Bewa* 8 ILR Cal 728 ; *Khajah Noorul Hossein v C Fabre-Tonneree* 24 WR 26 (Cr) ; *R v Khadim* 4 LBRA Cr 7 ; *R v Coovirji* 5 Cr LJ 176 .

49 *Basharate v Emperor* AIR 1934 Lah 813, p 814 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 33.

"Act"; "Omission".--

The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission.

Comments

1. Meaning of 'Act'

See commentary under s 32 *ante.*

Act has nowhere been defined in the IPC . It must be construed in the light of common and not metaphysical sense.[50] It must necessarily be something short of a transaction which is composed of a series of acts, but cannot, in ordinary language, be restricted to every separate willed movement of a human being; for when we speak of an act of shooting or stabbing, we mean the action taken as a whole, and not the numerous separate movements involved.[51]

The word 'Act' does not only mean any particular specific, instantaneous act of a person, but denotes, according to s 33, a series of acts.[52] Where the action, which ultimately results in the death of a person, is continuous and it is impossible to resolve the different incidents into wholly separate actions, inspired by different motives and committed for different reasons, the person, who did that act, must be deemed as having done it with the intention of causing death and as having155 succeeded in carrying out his object and must, therefore be held to be guilty of murder.[53]An act may constitute an offence under two or more enactments,[54] but a man cannot be punished twice for the same offence.[55] An 'act' generally means something voluntarily done by a person but in the Code the term 'act' is not confined to its ordinary meaning of positive conduct of doing something but also includes illegal omission. The effect of ss 32 - 33 of the IPC taken together is that the term 'act' comprises one or more 'acts' or one or more illegal omissions. The Code makes punishable omissions which have caused, which have been intended to cause or which have been known to be likely to

cause certain evil effect in the same manner as it punishes acts provided they were illegal and when the law imposes on a person a duty to act, his illegal omission to act renders him liable to punishment.[56]

Liability for an omission requires a legal duty to act; a moral duty to act is not sufficient. The duty may arise either from the offence definition itself or from some other provision of criminal or civil law. A duty arises from the former when an offence is defined in terms of omission.[57]

2. Effect of Sections 32 and 33 taken Together

Not only does the word 'act' include an illegal omission, but by virtue of s 33, it includes a series of acts and a series of omissions. The effect of ss 32 - 33, taken together is, consequently, that, unless the contrary appears from the context, the word 'act' comprises one or more acts, and one or more illegal omissions. For an example of an offence caused partly by an act and partly by an omission, refer to the illustration to s 36 ; by a series of acts, illust (a) to s 37 ; and by a series of illegal omissions, illusts (b) and (c) to s 37 .

From the foregoing discussion it will be seen that crimes or criminal events are caused either: (a) by intentional action, or (b) by intentional non-action, or (c) by unintentional non-action. The first species of conduct is termed an 'act', the second a 'forbearance', or in the language of the Code an 'omission', which if 'illegal' is comprised with an act (in its strict positive sense) under the term, 'act', as used in the Code, which therefore means intentional doing or intentional non-doing, if the non-doing is illegal. Crimes or criminal events are usually caused by an act or acts in the strict sense of the word, but the same events are sometimes caused by an illegal non-act. Thus, *A* desires to kill *B*. This crime may be effected, according to circumstances, either by shooting *B*, or by starving *B*, *i.e.*, by illegally omitting to supply *B* with food. Again a railway pointsman may cause the same effect either by pulling a wrong lever or by omitting to pull the right one.

3. Unintentional Non-action

The consequences of such conduct are not regarded as criminal unless; (a) the conduct amounts to what is termed 'negligence', and this must be of a certain kind; and (b) the act not done must be one which it was the legal duty of the person to perform.156

4. Negligence

Negligence must be culpable or criminal, but it is not possible to define the amount of negligence necessary to constitute criminal negligence;[58] and the same may be said of what is termed 'gross' negligence, which affords a ground for recompense to the individual sufferer in the case of torts. The same negligence, as it affects the individual, and the state is, in fact, respectively 'gross' negligence, and 'criminal' negligence[59] and the question whether negligence is 'gross' or 'criminal' is in each a question of fact to be decided in the circumstances of each particular case.

5. A Breach of Legal Duty

The general nature of this duty is one tending to the preservation of persons from injury or death in the doing of *prima facie* dangerous acts, such as the use of machinery, and the keeping of dangerous animals.[60]

6. Two Forms of Criminal Negligence

Criminal negligence is of two species: (a) It may exist in reference to the very act which is not performed, as where a pointsman, from pure carelessness, say, chatting with a friend, omits to set his points right and the train runs off the line in consequence; or where a parent causes death or bodily injury to his or her child by neglecting to feed the child; (b) Negligence, however, is in practice more

often combined with a positive act, *i.e.*, it does not exist in reference to the very act, but with regard to the neglect of certain necessary precautions in doing the act.[61] Thus, through the fault of his gaoler a prisoner escapes from his cell. Apart from any intentional conduct on the gaoler's part the escape may be due either to the fact that the gaoler forgot to lock the cell door, or he fastened the door, but neglected to do so securely. In the first case the negligence is in respect of the act itself, in the second, it exists in reference to the accompanying precautions.

7. Criminal Liability Depends on Mental Attitude towards Consequences of Act or Omission

All crimes then are the results of one or other of these three species of conduct, which are thus, conversely, the means whereby crimes are committed. But it does not necessarily follow that the results of such conduct are always crimes, for this depends, in the case of the first two species of conduct, upon the mental attitude of the agent in regard to the consequences of his physical action or inaction.[62]

50 *Emperor v Bhogilal Chimanlal Nanawati* AIR 1931 Bom 409, p 410, 32 Cr LJ 1145, per Beaumont CJ.

51 *Emperor v Bhogilal Chimanlal Nanawati* AIR 1931 Bom 409, p 410, 32 Cr LJ 1145, per Beaumont CJ, per Murphy J, p 411.

52 *Om Prakash v State of Punjab* AIR 1961 SC 1782, (1960) 1 Cr LJ 848 .

53 *Emperor v Gajjan Singh* AIR 1931 Lah 27, p 29, 32 Cr LJ 483 ; *Nehal Mahto v Emperor* AIR 1939 Pat 625, and the case-law discussed therein.

54 *Sesha Ayyar v Venkatachala Chetty* AIR 1924 Mad 487, 25 Cr LJ 442 .

55 General Clauses Act 1897, s 26 ; *Emperor v Bhogilal Chimanlal Nanawati* AIR 1931 Bom 409 ; Re *V v Satyanarayana Murthy* AIR 1953 Mad 137 .

56 *Raj Karan Singh v State of Uttar Pradesh* (2000) Cr LJ 555 (All) .

57 *PB Desai v State of Maharashtra* 2014 Cr LJ 385, p 396, (2013) 15 SCC 481, AIR 2014 SC 795, (2013) 131 AIC 94 (SC) .

58 *R v Eyre* Fin Rep 57, per Blackburn.

59 *Beven's Negligence in Law*, second edn, pp 1, 7- 8.

60 *Wharton on Homicide*, ch 4, s 72 .

61 Clark, *Analysis of Criminal Liability*, ch 9, pp 103-04.

62 For which topic, refer to Notes under s 39 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

[63][S. 34.

Acts done by several persons in furtherance of common intention.--

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.]157158159

Comments

1. Legislative Changes

As the section stood originally, the words 'in furtherance of the common intention of all' were not there. By s 1 of Act 27 of 1870, the present section was substituted for the previous one with the addition of the words 'in furtherance of the common intention of all'. This was done in order to make the object of this section clear.[64]

2. Scope

Section 34 of the IPC has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under s 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime.[65]Section 34, IPC does not create any distinct offence, but it lays down the principle of constructive liability.[66]Section 34, IPC carves out an exception from the general law that a person is responsible for his own act as it provides that a person can also be held vicariously responsible for the act of others, if he has the 'common intention' to commit the offence.[67]

Section 34 of the IPC deals with the doing of separate acts, similar or diverse, by several (two or more) persons; if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself.[68]Section 34 is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them.[69] The leading feature of s 34 of the IPC is participation in action: a common intention connotes meeting of minds to commit an offence and participation in the commission of offence in furtherance of that common intention. Participation need not in all cases be by physical presence. Existence of a common intention in several persons, who commit the criminal act, and the doing of the criminal act in furtherance of that common intention are the essential requirements for the applicability of s 34 . When these two requirements are satisfied, each of such persons is liable for the entire criminal act in the same manner as if he alone had done it irrespective of the fact whether he was present at the spot or not. Thus, the essence of s 34 is a simultaneous consensus of the minds of the persons participating in the criminal action to bring160 about a particular result.[70] It is well settled that for the applicability of s 34, IPC, the prosecution is required to prove prior meeting of minds or a prior concert or a pre-arranged plaint.[71]To invoke the aid of this section successfully, it must be shown that the criminal act, complained of was done by one of the accused persons in furtherance of the common intention of all; if this is shown, then the liability for the crime may be imposed on any one of the persons in the same manner as if the act was done by him alone.[72]This being the principle, the common intention within the meaning of the section implies a pre-arranged plan and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan.[73]

Section 34 is applicable even if no injury has been caused by the particular accused himself.[74]

For holding a person liable for commission of murder of the deceased with the aid of s 34, IPC, it must be established that there was common intention in the sense of a pre-arranged plan between the two, or such intention had developed on the place of occurrence at the spur of moment prior to commission of the offence. The acts may be different in character, but it should have been proved that they must

have been actuated by one and the same common intention in order to attract the provisions of s 34, IPC . Though accused A2 came with accused A1, but he only attacked the witness (PW9), and neither assaulted the deceased nor assisted the co-accused (A1) to assault the deceased. The accused (A2) could not be convicted for offences under ss 302 / 34 and 307 / 34 IPC .[75]

But the plan need not be elaborate nor a long interval of time is required and presence of offender sought to be rendered liable may not be one of the conditions of its applicability.[76]

Section 34 of the IPC embodies the principle of joint liability in doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application.[77] The leading feature of this section is, therefore, 'participation in action'.[78]A particular criminal act, done by an individual, in order to constitute a constructive liability against others, must be one which is done, in furtherance of a common intention, as a step-in-aid to attain it or as a means to the161 end underlying that or must be one which is a link in the chain of acts, all originating out of the common intention and culminating in its attainment. Once the criminal act becomes independent of the common intention, though done in pursuance of an intention, similar to that common intention or giving rise to consequences similar in nature, as contemplated by the common intention, the rule of constructive liability, as laid down in s 34, ceases to operate and others, who were parties to the original common intention, cannot be held liable constructively for that criminal act.[79] Where main accused is acquitted, his associates cannot be convicted with the aid of s 34 or s 149, IPC .[80]

For applicability of s 34, IPC it is not necessary that the name of each accused must be known.[81]

Section 34 does not say 'the common intention of all', nor does it say 'and intention common to all' Under the provisions of s 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s 34, when an accused was convicted under s 302 read with s 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone.[82]

The true concept of the s 34 is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself.[83]

The existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.[84]

Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying s 34 it is not necessary to show some overt act on the part of the accused.[85]

3. Acts Partly in Jurisdiction of one Court and Partly in Other

The section provides not only for liability to punishment but also for subjection of a conspirator to the jurisdiction of court, even if he conspires at a place beyond its jurisdiction, provided overt acts are done within such jurisdiction.[86]162

4. Parties to Crime

Under English law persons who are in any way connected with the perpetration of a crime are divided into two classes. Those who take part in the actual execution of the crime called 'principals', *i.e.*, those who 'counsel, procure or command' the execution; and those who in any way assist the criminal after the crime with a view to shielding him from justice, called 'accessories'; the former being 'accessories

before the fact', and the latter 'accessories after the fact'.[87]

This subject of 'parties to a crime' has not been dealt with at one place in the Code: for, while ss 34 - 38 of the IPC deal with 'principals', the law in regard to 'accessories before the fact' is to be found in ss 107 - 120 (abetment), and 'accessories after the fact' are treated in scattered sections, *viz*, ss 130, 136, 157, 212 and 216, under the title 'harbouring'. Even if, in a given case, the charge disclosed only the named persons as co-accused and the prosecution witnesses confined their testimony to them, even then it would be permissible to come to the conclusion that others named or unnamed, besides those mentioned in the charge or the evidence of the prosecution witnesses, acted conjointly with one of the charged accused if there was other evidence to lead to the conclusion, but not otherwise.[88]

5. Principals in Crime (Sections 34-38)

Principals are of two kinds: (a) Those who actually commit the crime, *i.e.*, principals in the first degree, and (b) those who aid in the actual commission, *i.e.*, principals in the second degree. No distinction has, however, been made, in regard to the punishment of such persons, all being liable to be punished alike. The purpose of ss 34 - 38 of the IPC is to show under what circumstances a person is a 'principal in the second degree' and therefore punishable as if he were a 'principal in the first degree'. The following observations of their Lordships of the Judicial Committee in this connection in *Barendra Kumar Ghosh v King Emperor* ,[89] would be of some interest:

> The Code must not be assumed to have sought to introduce differences from the prior law. It continues to employ some of the older technical terms without even defining them, as in the case of abetment...One object which those who framed the Code had in view, was to simplify the law; and to get rid of the terms 'principal in the first degree' and 'principal in the second degree' and others, was no doubt a step in that direction, but to introduce a general section, section 34, which has little, if any content, and to attach a wholly new importance to abetments and attempts, was to complicate, not to simplify the administration of the law, for participation and joint action in the actual commission of crime are, in substance, matters which stand in antithesis to abetments or attempts.

Section 34 of the IPC contemplates the doing of an act by several persons as principals and not as principals and agents.[90]

6. Liability of Principal Offender not Whittled Down

Section 34 of the IPC applies when a criminal act is done by several persons in furtherance of the common intention of all. In such a case, the other offenders are163 liable for that act in the same manner as the principal offender, as if the act were done by such offenders also. This section does not whittle down or do away with the liability of the principal offender committing the principal act; it merely provides that all other offenders are also vicariously liable.[91]

7. Combinations of Persons in Crimes

In *Joel Prentiss Bishop's Commentaries on the Criminal Law,*[92] there is a discussion in ch 45 on 'Combinations of Persons In Crime'. The general principles enunciated by the learned author are given as follows.

> If one employs another to do a thing we commend or blame him precisely as though it were done with his own hands. In like manner, we commend or blame the other, if his will concurred, the same as though he had proceeded self-moved. And if two act together in the doing, it is the same as to each...The doctrine of combination in crime is, that, when two or more persons unite to accomplish a criminal object, whether through

> the physical volition of one, or of all, proceeding severally or collectively, each individual whose will contributed to the wrong-doing is in law responsible for the whole, the same as though performed by himself alone. It may be particularised thus. If persons, combining in intent, perform a criminal act jointly, the guilt of each is the same as if he had done it alone; and it is the same if, the act being divided into parts, each proceeds with his several parts unaided. Since an act by an agent has in, law, the effect of a personal act, if one employs another to do a criminal thing for him, he is guilty of the same as though he had done it himself. Nor is his guilt the less if the agent proceeds equally from his own desires or on his own account. Finally, by this sort of reasoning we reach the conclusion, that every person whose corrupt intent contributes to a criminal act, in a degree sufficient for the law's notice, is in law guilty of the whole crime. Thus, it may be said in a sort of general way, that all who by their presence countenance a riot or a prize fight or any other crime--especially if ready to help should necessity require, are liable as principal actors. But this statement needs to be made more exact. A mere presence is not sufficient; nor is it alone sufficient in addition, that the person present, unknown to the other, mentally approves what is done. There must be something going a little further; as for example, some word or act. The party to be charged 'must', in the language of Cockburn CJ, 'incite, or procure, or encourage the act'. His will must, in some degree, contribute to what is done...From the proposition that mere presence at the commission of a crime does not render a person guilty, it results, that, if two or more are lawfully together, and one does a criminal thing without the concurrence of the other, they are not thereby involved in guilt. But, however, lawful the original coming together, the after-conduct may satisfy a jury that all are guilty of what is done...The true view is doubtless as follows: Every man is responsible for what of wrong flows directly from his corrupt intention; but not, though intending wrong, for the product of another's independent act. If he sets in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable though it is produced in a manner he did not contemplate. If he did not contemplate it in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action in an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible. But, if the wrong done was a fresh and independent product of the mind of the doer, the other is not criminal therein merely because, when it was done, he meant to be a partaker with the doer in a different wrong. These propositions may not always be applied readily to cases arising, yet they seem to furnish the true rules.164

Referring to the above passage, Sankar Saran J, of the Allahabad High Court, in *State v Saidu Khan* [93] observed:

> I do not know whether it is possible to summarise the legal position of joint responsibility any better than has been done, if I may say so with respect, by the learned author in his Commentaries on the Criminal Law. The Indian Law has embodied these principles in sections 32 - 38,Penal Code, specially sections 34, 35, 37 and 38 .

8. Two Conditions of Joint and Vicarious Liability

The vicarious or constructive liability under s 34 of the IPC can arise only where the two conditions stand fulfilled: *i.e.*, (a) the mental element, called the intention to commit the criminal act conjointly with another or others; and (b) actual participation in one form or the other in the commission of the offence. The accused is not liable to be punished under s 34, IPC, for what another or others have done by himself or themselves, but only for what he had done in furtherance of the common intention to commit the offence conjointly with another or others. Neither the entertaining of the common intention for the commission of the criminal act by itself, nor the participation in the commission of the offence by itself, would render the accused liable to be punished under s 34, IPC . To convict an accused under s 34, it should be proved that the criminal act was done in concert, pursuant to the pre-arranged plan.[94] In *Suresh v State of UP* ,[95] the Supreme Court observed:

> Thus to attract Section 34IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

Accused Jointly Transporting Sandal Wood Billets - Section 34 applied

Where the charge-sheet material disclosed that all the accused persons were jointly transporting sandal wood billets, they shared common intention and were jointly transporting sandal-wood billets. Section 34IPC was applicable.[96]

9. Constructive Liability

A person may be constructively liable for an offence which he did not actually commit by reason of:

(1) the common intention of all to commit such an offence (s 34);
(2) his being a member of a conspiracy to commit such an offence (s 120A);
(3) his being a member of a unlawful assembly, the members whereof knew that an offence was likely to be committed (s 149).[97]165

10. Doer of Fractional Act is Doer of Entire Act

Section 34 of the IPC deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself, s 35 in effect provides for a case where several persons join in an act which is not per se criminal, but is criminal only if it is done with a criminal knowledge or intention; in such a case each of those persons who joins in the act with that particular knowledge or intention will be liable for the whole act as if it were done by him alone with that knowledge or intention, and those who join in the act but have no such knowledge or intention will not be liable at all. Section 37 of the IPC, in effect, provides for a case where several persons co-operate in the commission of an offence by doing separate acts at different times or places, which acts, by reason of intervening intervals of time, may not be regarded as one act or which may not be necessarily committed with a common intention. Section 38 of the IPC provides that if several persons are engaged or concerned in the commission of a criminal act, having been set in motion by different intentions, they may be guilty of different offences by means of that act. This section which is the converse of s 34, provides for different punishments for different offences where several persons are concerned in the commission of a criminal act, whether such persons are actuated by one intention or the other.[1]The basic principle which runs through all these sections is that an entire act is to be attributed to a person who may have performed only a fractional part of it. Sections 35 , 37 - 38 of the IPC begin by accepting this proposition as axiomatic, and each of them then goes on to lay down a rule by which the criminal liability of the doer of a fractional part (who is to be taken as the doer of the entire act), is to be adjudged in different situations of *mens rea*. The axiom itself is laid down in s 34 of the IPC in which emphasis is on the act. What has to be carefully noted is that in ss 35, 37 - 38 of the IPC, this axiom that the doer of the fractional act is the doer of the entire act is taken up as the basis of a further rule. Without the axiom these sections would not work, for it is the foundation on which they all stand.[2]

11. Principle of Joint Liability

Section 34 of the IPC has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under s 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved

circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more166 persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself.[3]

Section 34 envisages a principle of fault liability in doing a criminal act and renders every person liable irrespective of the role which he had in its perpetration.[4]

Sections 34 - 38 are Explanatory Sections

Section 34, as well as ss 35 - 38 of the IPC, which follow on its heels are all explanatory sections. They are provisions of an interpretative character and, being so, they are automatically imported into the definition of every substantive offence with which an accused is charged. They are, therefore, to be applied in every case according to the facts disclosed by the evidence in that case. The necessary consequence of the above position is that the mention or non-mention of s 34, IPC, in the charge along with the substantive offence cannot be treated as an illegality under the CrPC necessarily vitiating the conviction or trial of an accused and entitling him to claim a re-trial irrespective of the question of prejudice.[5]

12. Principle Underlying the Section

The principle embodied in s 34 of the IPC is that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. As the Privy Council pointed out in *Barendra Kumar Ghosh v King Emperor* ,[6] ' s 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself'. The essence of this principle of joint liability in the doing of a criminal act is the existence of a common intention. Participation, in the commission of the offence, in furtherance of the common intention, invites its application.[7] The participation need not, in all cases, be by physical presence.[8]

The section really means that if two or more persons intentionally do a common thing jointly, it is just the same as if each of them had done it individually. It is a well recognised canon of criminal jurisprudence that the courts cannot distinguish between co-conspirators, nor can they inquire, even if it were possible as to the part taken by each in the crime. Where parties go with a common purpose to execute a common object each and every person becomes responsible for the act of each and167 every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment only. In combination of this kind a mortal stroke, though given by one of the party, is deemed in the eye of law to have been given by every individual present and abetting. But a party not cognizant of the intention of his companion to commit murder is not liable, though he has joined his companion to do an unlawful act. The leading feature of this section is the element of participation in action. The essence of liability under this section is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention. The essence is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result.[9]

13. Section does not Create Substantive or Distinct Offence

This section does not create a substantive offence; it is merely a rule of evidence.[10] The section is really nothing more than explanatory and embodies, in the IPC, the ordinary common sense principle that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually.[11] The section does not create a distinct offence; it only lays down the principle of joint (constructive) liability.[12] The Kerala High Court, in *Mathai v State of Kerala* ,[13] has held that s 34 does not, by itself, create an offence; it only lays down the rule of law without creating a definite head

of criminality.

A charge framed against the accused person, referring to s 34 of the IPC is but a convenient form of giving notice to him that the principal of joint liability is sought to be invoked. Section 34 does not create an offence, it merely enunciates a principle of joint liability for criminal acts done in furtherance of the common intention of the offenders. Conviction of an accused person recorded, relying upon the principle of joint liability, is, therefore, for the offence committed in furtherance of the common intention of himself and others, a reference in the order recording conviction to s 34 may appear to be surplus.[14]

14. Common Intention may be Inferred from Conduct

If one of the three accused opens fire and, after the deceased falls down, the other two inflict injuries on the deceased with the iron rods which they had in their hands, the irresistible conclusion is that all the three accused were actuated by common168 intention to cause his death.[15] The appellants accused had come armed in a body and acted in a pre-concerted and coordinated manner to the spot to do away with the life of the victim, attacked the victim and therefore there was no escape from the obvious conclusion that all the appellants shared the common intention to commit the murder of the victim. All the accused appellants were convicted under s 302 read with s 34, IPC .[16]

No overt act was attributed to the second accused to kill the deceased, he was on the spot and prevented the eye-witness from intervening. Section 34 , IPC was attracted in the case, he was convicted under s 302 read with s 34 .[17]

The accused police officials indulged in indiscriminate firing at the hard core wanted criminal in retaliation to killing of innocent police official. Their conviction with the help of s 34, IPC was held proper.[18]

The manner in which the accused appellants had scaled down from the roof top and had unlatched the entrance of the campus where deceased was murdered gives a clear picture that they were definitely sharing common intention and that was to do away with the life of the deceased on that fateful night. The three appellants accused were convicted under s 302, IPC read with s 34, IPC .[19]

The appellant armed with a lathi went along with another accused who was carrying an axe, entered inside the house of the deceased, took part in the incident by giving blows of lathi on the person of the deceased when other appellant was giving blows of axe. Held, the appellant shared common intention with another co-accused, and he was convicted under s 302 read with s 34, IPC .[20]

Appellant No. 2 was alleged to have given lathi blow on the knees of the victim who fell down. Appellant No. 1 was alleged to have caused serious injuries with gandasa. It was highly doubtful if the Appellant No. 2 shared common intention with Appellant No. 1 and if both of them wanted to kill the injured victim. Appellant No. 2 was acquitted of the charge under s 307 read with s 34, IPC .[21]

15. Applicability

Applicability of s 34 of the IPC depends upon the facts and circumstances of each case. As such no hard and fast rule can be laid down as to the applicability or non-applicability of s 34 . For applicability of the section it is not necessary that the acts of several persons charged with commission of an offence jointly, must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.[22]169

Requisite Conditions for Applicability

It may be noted that the words 'in furtherance of the common intention of all' were not to be found in

the original section. They were added by s 1 of Act 27 of 1870. But even before these words were added, Sir Barnes Peacock CJ (with whom Trevor and Norman JJ, concurred), held in *Queen v Gorachand Gope* ,[23] that before the section could be applied to a particular case, it must be shown first that a criminal act was done by several persons, secondly that all of them intended that the criminal act should be committed and lastly that the criminal act was done in furtherance of the common intention.

Before the section can be applied to a particular case, it must be shown: (a) a criminal act was done by two or more persons; (b) all of them intended that the criminal act should be committed; and (c) the criminal act was done in furtherance of the common intention.[24] To establish the common intention of several persons so to attract the mischief of s 34, IPC, the following two fundamental facts have to be established: (i) common intention to commit an offence and (ii) participation of the accused in commission of the offences. If the above two ingredients are satisfied, even overt act on the part of some of the persons sharing the common intention was held to be not necessary.[25]If common intention is proved but no overt act is attributed to the individual accused, s 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, s 34 cannot be invoked. In any case, it is not possible to have direct evidence of the common intention. It has to be inferred from the facts and circumstances of each case.[26]

For holding a person liable for commission of murder of the deceased with the aid of s 34, IPC, it must be established that there was common intention in the sense of a pre-arranged plan between the two, or such intention had developed on the place of occurrence at the spur of moment prior to commission of the offence. The acts may be different in character, but it should have been proved that they must have been actuated by one and the same common intention in order to attract the provisions of s 34, IPC . Though accused (A2) came with accused A1, but he only attacked the witness (PW9), and neither assaulted the deceased nor assisted the co-accused (A1) to assault the deceased. The accused (A2) could not be convicted for offences under ss 302 / 34 and 307 / 34, IPC .[27]

Mere participation of all the accused persons, in the alleged assault, even if believed, does not necessarily signify prior concert of mind or pre-arranged plan having developed at the spot of incident. In a given case, several persons can simultaneously attack a man and each one may individually inflict separate fatal blows and yet none may have the common intention required by s 34 if there is no evidence of prior meeting of minds. In such a case, each would be individually liable for whatever injury one causes, but none could be vicariously convicted for the act of any of the others.[28]170

Section not Applicable to Certain Acts

Section 34 of the IPC can be applied when a criminal act is committed by several (two or more) persons. There can be a criminal act which cannot be committed by several persons. If, in such a case, the criminal act is done by several persons, it amounts to a repetition of the criminal act. For example, a currency note can be forged by several persons, each doing a part of the forgery. In such a case, s 34 cannot be applied. But each of the persons, taking part in the forgery, would be guilty of the substantive offence of forgery.[29]Section 34 pre-supposes the sharing of a particular intention, by more than one person, to do a criminal act.[30]

16. Ultimate Criminal Act

The dominant feature for attracting s 34 of the IPC is the element of participation in absence resulting in the ultimate 'criminal act'. The 'Act' referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such on interpretation is accepted, the purpose of s 34 shall be rendered infructuous.[31]

17. Section not Applicable without a Substantive Charge

This section can be invoked only when there is a substantive charge of an offence having been committed.[32]

18. Section not Applicable in case of Sudden Fight

A charge under s 34, IPC, presupposes the sharing of a particular intention by more than one person, to do a criminal act.[33] Where there was a melee at the time of the incident and the two groups indulged in a free fight resulting in injuries on persons of both groups and death of two, if the court comes to the conclusion that the injuries sustained by the persons were in the course of a free fight, then only those persons who are proved to have caused injuries or death can be held guilty for the offences individually committed by them. In such cases s 34, IPC, is not attracted.[34]

This section does not normally apply if the fight has begun suddenly. In such cases, every person, who participates in the fight, is held guilty for his individual acts,[35] the reason being that it may not be easy to find whether there was any common intention and if there was any, what that common intention was. In such cases, there is commonly a cry for assistance or a call for assault or the doing of a certain act which is criminal. The person, who asks for assistance cannot possibly be sure of the171 reaction of others. All those, who come, may come with different designs and different intentions. If they immediately engage in transaction, it will be an extremely difficult task to discover, whether they have any common intention, from their acts alone. They do not have any chance of disclosing their minds to the others.[36] But where there is proof that some of the persons, participating in the fight, which had suddenly arisen, went and jointly committed an offence and there are indications that their object was to commit that offence, there is no bar for the courts to hold that they had formed a common intention there and that they had done the act of violence.[37]In a particular case, it may be found from the injuries inflicted or the conduct of the accused, that they had the common intention to kill even though the occurrence may be sudden. The question, whether there was a common intention and the act, complained of, was done in furtherance of the common intention is a question of fact dependent on the circumstances of each case.[38]

Section not Applicable to Cases under Section 285, Part I

Section 34 of the IPC cannot be applied in cases falling under s 285, Pt I, as the question of common intention does not arise in such cases.[39]

The sentence for offence under s 397 of the IPC cannot be awarded to those of the members of the group dacoits who did not use any deadly weapon. Guilt under s 397 can be attributed only to that offender who uses any deadly weapon or causes grievous hurt to any person during the course of the commission of the robbery. The provision postulates that only the individual act of accused will be relevant to attract s 397, IPC . The provisions of s 397, IPC negate the use of the principles of constructive or vicarious liability engrafted under s 34, IPC .[40]

There Ought to be at Least Two Offenders

The section can well be applied, and it has been applied, to cases in which the offence was committed only by one of the two or three persons who all had a common intention.[41]Before a person is convicted of an offence under s 326, read with s 34, it must be established that some other specified person, whose intention the accused shared, committed the act resulting in causing grievous hurt.[42] It is thus clear that the criminal act referred to in s 34, IPC, is the result of the concerted action of more than one person if the said result was reached in furtherance of the common172 intention and each person must be held liable for the ultimate result as if he had done it himself.[43]However, the prosecution is not bound to prove that the act was done by a particular specified person.[44]

19. Mob/group Fight

In cases of mob and groups fights, s 34 does not apply, and every person is liable for his individual act.[45]

20. Two Aspects of the Section

A perusal of the section shows that it deals with an offence from two aspects, the first of which may be described as the physical and the second as the mental aspect. The physical aspect of the offence referred to above has been described as 'the criminal act' in the section. This 'criminal act' must be 'done by several persons'. The emphasis in this part of the section is on the word 'done'. It naturally follows from this that before a person can be convicted by following the provisions of this section that person must have done something along with other persons. In other words, he must be shown to have individually participated in the commission of the criminal act. The second or mental aspect is termed in s 34 as the 'common intention' which permeates the criminal act and in furtherance of which the said act is done. The common intention required under this section need not, however, be identical with the guilty intention or *mens rea* which is the ingredient of the offence and is to be distinguished from it.[46]

21. Liability in case of Exceeding the Right of Private Defence

In order to attract s 34 of the IPC, a criminal act has to be done by a number of persons, if a number of persons are doing a lawful act, this section has no application. Persons lawfully exercising the right of private defence and rescuing cattle illegally seized cannot be said to be committing any illegal act. But if one of them exceeds the right of private defence he may be liable, but the others cannot be held responsible on the principle of s 34 .[47] Where, of several accused persons, only one accused has exceeded the right of private defence, constructive liability on other accused under s 34 IPC is not attracted.[48]If, however, the act of the one who exceeded the right of private defence is done in pursuance of the common intention of all, the section173 applies and all of them can be held liable.[49] The mere fact of a person being present on a certain lawful occasion raises no presumption of that person's complicity in an offence then committed.[50]

The liability for a criminal act done by several persons in furtherance of a common intention is allotted to each of such persons as if he alone and unaided had done that act. In such circumstances each of such persons is guilty of the one offence and it is not possible to so grade this offence as to hold, in the case of a murderous assault committed in furtherance of a common intention, that some are guilty of murder and others only of causing grievous hurt.[51]

This section provides not only for liability to punishment but also for subjection of a conspirator to the jurisdiction of a court, though he conspires at a place beyond the jurisdiction, provided overt acts are done within such jurisdiction.[52]

22. Effect of Sections 32 and 34 taken together

Even an omission can, in certain circumstances, amount to an act. This is the purport of s 32 of the IPC . So, the act mentioned in s 34, IPC, need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, *e.g.*, a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation.[53]

23. Effect of Sections 33 and 34 taken together

When s 34, IPC, speaks of a criminal act, it embraces all the series of acts by which the injuries were inflicted. This is clear enough from a reading of ss 33 - 34 .[54]When s 34 is read alongwith the preceding s 33, it makes it clear that 'act' spoken of in s 34, indicates a series of acts as a single act.[55]

Section 34 is to be read alongwith the preceding s 33 which makes it clear that the 'act' spoken of in s 34 includes a series of acts as a single act.[56]

24. Distinction between Sections 34 and 35

Section 35 of the IPC also embodies the principal of joint liability and supplements the principle embodied in s 34 . Under it, where several persons are concerned in committing an act which is criminal only by reason of its being done with a criminal knowledge, each of such persons, who joins in the act with such knowledge, is liable for the act in the same manner as if the act were done by him alone with that knowledge.[57]Section 34 requires common intention whereas s 35 requires criminal174 knowledge or intention. The common intention required by s 34 is different from the *mens rea* mentioned in s 35 (refer to notes under s 35).

25. Distinction between Sections 34 and 37

If common intention is the hub of s 34 of the IPC, intentional co-operation is the spindle of s 37 of the IPC . One who shares common intention can as well co-operate in the commission of the offence intentionally. In that sense the two sections are not contradictory to each other. The former does not necessarily exclude the other. Cooperation in the commission of the offence need not be for the entire gamut of the offence committed. It is enough if he cooperates in one of the several acts which constitute the offence.[58] The distinction between ss 34 and 37 of the IPC is that while the former requires common intention for a criminal act which is done by a number of persons in order that they should become liable as if the act was done by each of them, the latter deals with the intentional co-operation in the offence which has resulted from several acts, each of which standing by itself is not the offence with which the accused are charged.[59] In *Barendra Kumar Ghosh v King-Emperor* ,[60] Lord Sumner pointed out that the intentional co-operation required by s 37 may not be the same as the common intention required by s 34 .

> Now, if, as Lord Sumner says, intentional co-operation may not be the same as a common intention, it must in my opinion, include action which contributes to the offence and is done with the consciousness that the offence is on foot, though without sharing the intention to commit that offence.[61]

Section 37 of the IPC can have no application where a number of persons are charged with the offence of causing simple and grievous hurt by use of *lathis* and it is not possible to say that there were several acts which resulted in the offence of causing grievous or simple injuries. But the case would fall under s 34 if there was a common intention amongst them to commit a crime punishable under the IPC .[62]

26. Distinction between Sections 34 and 38

Section 38 of the IPC is the converse of this section and provides for different punishments for different offences where several persons are concerned in the commission of a criminal act, whether such persons are actuated by one intention or the other.[63] Where the three accused were assaulting the victim, two used their weapons and the manner in which they gave blows clearly showed their intention to kill the victim. The third accused did not use his *lathi* for causing injuries to the victim. It was held that on facts and circumstances that liability of the two accused for the murder of victim was established with the aid of s 34 of the IPC . However, applying the principle of law under s 38 of the IPC, the third accused could be held guilty only under s 304, Pt II as he had intentionally joined in the commission of the act with the knowledge that the assault on victim was likely to result in his death and that he never had intention to commit murder.[64]175

27. Distinction between Sections 34 and 107 (Abetment)

Section 34 of the IPC embodies the principle of joint liability in doing of a criminal act. The existence of common intention is the essence of that liability. Section 109 on the other hand may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence.[65] This section requires participation in crime, whereas mere instigation is sufficient for abetment under s 107 of the IPC . Generally under s 34 a criminal act must be done in furtherance of a common intention, but, to constitute the offence of abetment it is not necessary that the act abetted should be committed or that the effect required to constitute the offence should be caused [s 108, expln (2)]. Again, it is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge [s 108, expln (3)], but these are the pre-requisites of liability under this section. further, a preconcert and the abettor's presence at the scene of the offence are not necessary for abetment [s 108, expln (5)] but they are necessary under this section.[66]

28. Whole Object of Sections 34 and 114

The whole object of ss 34 and 114, IPC, is to provide for cases in which the exact share of one of several criminals cannot be ascertained, though the moral culpability of each is clear and identical. Neither of these two sections should be so interpreted as to defeat the very object which underlies them.[67]

29. Distinction between Sections 34 and 114

Section 114 of the IPC deals with persons who, having previously abetted (as accessories before the fact), are also present when the offence is committed.[68]

Abetment does not in itself involve the commission of the crime abetted. It is a crime apart, s 114 deals with the case not merely where there has been the crime of abetment, but also where there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitory. Because participation, *de facto* (as this case shows) may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by section 114 brings the case within the ambit of s 34 .[69]

Section 114 resembles s 34, in that it rather regulates procedure and punishment than creates an offence. But the basis of the liability under the two sections is not identical. In the case of s 34 there need not be any abetment which is necessary under176 s 114, and in the case of s 114 there need not be any common intention which is necessary under s 34 .

> Section 114 marks the fact that where it can be proved that the accused, if absent, would be liable as an abettor, his mere presence when the offence is committed is, without more sufficient proof of common intention, to make him an accessory at the fact or principal.[70]

A mere direction from one person to another and the carrying out of that direction by the other may be the only instigation of the latter's act and may not be a case of joint act falling under s 34 . But where two persons with their followers, all of them armed, move about together for a said purpose and one gives instructions to other and keeps himself on the spot in readiness to see it carried out and the other carries it out, it is hardly possible to say that the act is not one which was done in furtherance of common intention of both.[71] Actual presence plus prior abetment can mean nothing else but participation. The presumption raised by s 114 brings the case within the ambit of s 34 .[72]Even if the evidence makes out no more than mere instigation by the person present at the scene of the offence

where the act is committed, the instigator is deemed to commit the offence by virtue of s 114 .[73]

30. Distinction between Sections 34, 120A and 120B

The general principle of criminal liability is that it primarily attaches to the person who actually commits an offence and it is only such person that can be held guilty and punished for the offence. Sections 34 and 149 of the IPC deal with the liability for constructive criminality. Section 149 creates a specific offence and postulates an assembly of five or more persons having a common object. Section 34 has enacted a rule of co-extensive culpability when the offence is committed with common intention by more than one accused. The offence of criminal conspiracy punishable under s 120, IPC, consists in the very agreement between two or more persons to commit a criminal offence. Before these sections can be applied, the court must find with certainty that there were at least two persons sharing the common intention or five persons sharing the common object or two persons entering into an agreement.[74]

There is not much substantial difference between, 'conspiracy' as defined in s 120A of the IPC and 'acting on a common intention' as contemplated in s 34 . While the gist of the offence in the former case is the bare engagement and association to break the law, even though the illegal act does not follow that of the offence under s 34, is the commission of a criminal act in furtherance of a common intention of all the offenders which means a unity of criminal behaviour resulting in something for which an individual would be punishable as if it were done all by himself.[75] If evidence of conspiracy has once been rejected, the same evidence cannot be used for finding a common intention under s 34 .[76]177

31. Distinction between Sections 34 and 149

The distinction between 'common intention' under s 34 and 'common object' under s 149 of the IPC is of vital importance. The words 'in furtherance of common intention of all' are the most essential part of s 34 . Common intention is the intention to commit the crime actually committed and this common intention is anterior in time to the commission of the crime. On the other hand, s 149 speaks of an offence that has been committed by any member of an unlawful assembly in pursuance of the common object of that assembly.[77] The 'common intention' in s 34 should not be mixed up with the 'common object' required by s 149 . The two expressions are not synonymous.[78] In *Barendra Kumar Ghose v Emperor* ,[79] Lord Sumner pointed out that there is a difference between 'object' and 'intention', for although the object may be common, the intentions of the several members of an unlawful assembly may differ and indeed may be similar only in respect that they are unlawful.[80]

Common intention and common object stand on different footing. For common intention, evidence is required showing previous meeting of minds and pre-arranged plan. In case of common object, there is no need for prior concert and common meeting of minds before the commission of crime. Common intention may develop on the spot, but to that effect, there must be very specific and cogent evidence.[81]

There is a substantial difference between ss 34 and 149, IPC . When several persons, numbering five or more, do an act or intend to do it, both ss 34 and 149, IPC may apply. Section 149 , IPC is of wider scope than s 34, IPC and in a case where s 149 applies, a constructive liability arises in respect of those persons who do not actually commit the offence.[82]

The 'common intention' as used in s 34 should not be mixed up with the 'common object' as required in s 149 . The two expressions are not synonymous and they have been used in different senses and should be kept distinct, though both the sections relate to vicarious or collective liability and on the surface involve some amount of resemblance and overlapping. Section 34 is restricted to 'common intention' and does not embrace any knowledge. Under s 149 it is the knowledge which is necessary to attract culpability.[83]

The facts constituting the common intention and those of common object may in some cases overlap.[84] In such a situation, both ss 34 and 149, IPC are attracted.[85] There are two vital differences between this section and s 149 . They are:[86]178

(i) Whereas s 34 does take into account the fact of the participation of every individual offender in the offence which is therein described as a 'criminal act' as well as his mental state which is therein connoted by the word 'intention'; Section 149 ignores both these factors completely.

(ii) Whereas s 34 is merely declaratory of a rule of criminal liability and does not create a distinct offence; s 149 is not merely a declaratory provision and does create a distinct offence. As pointed out by Lord Summner in his classic judgment in *Barendra Kumar Ghosh v King-Emperor* ,[87] there is much difference in the scope and applicability of ss 34 and 149, though they have some resemblance and are to some extent overlapping. The two sections are again compared and contrasted in *Karnail Singh v State of Punjab* .[88] As stated above, s 34 does not by itself create any offence, whereas s 149 does. In a charge under s 34, there is active participation in the commission of the criminal act; under s 149, the liability arises by reason of the membership of the unlawful assembly with a common object, and there may be no active participation at all in the perpetration or commission of the crime. The overlapping arises in those cases where two or more persons commit a murder in furtherance of the common intention, but it is not possible to say which of them was responsible for the fatal injury and the others are sought to be made liable for the result owing to the common intention involved.[89] The leading feature of s 34 is the element of participation in action, whereas membership of the assembly at the time of committing of the offence is the important element in s 149 . The two sections have a certain resemblance and may to a certain extent overlap, but it cannot be said that both have the same meaning.[90]

(iii) Some active participation, especially in crime involving physical violence, is necessary under s 34, but s 149 does not require it and the liability arises by reason of mere membership of the unlawful assembly with a common object and there may be no active participation at all in preparation and commission of the crime;

(iv) Section 34 speaks of common intention, but s 149 contemplates common object which is undoubtedly wider in its scope and amplitude than intention; and

(v) Section 34 does not fix a minimum number of persons who must share the common intention, whereas s 149 requires that there must be at least five persons who must have the same common object.[91]

To sum up, s 149 differs from s 34 of the IPC in the following respects:

(i) It requires an assembly of five persons.

(ii) The common object must be one of those specified in s 141, whereas according to the strict language of s 34 'common intention' may be any intention whatsoever.179

(iii) The offence actually committed is required by s 149 to be one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object. It need not be a criminal act in actual furtherance of the common object which under s 34 it has to be.

(iv) Section 34 requires some act, however, small, to be done whereas under s 149 mere membership of the unlawful assembly is sufficient.

(v) Section 34 enunciates a mere principle of liability, but creates no offence; s 149 creates a specific offence.[92]

(vi) Section 149 is of wider scope than s 34 IPC .[93]

Section 149 applies not only where an offence is committed by a single member of an unlawful

assembly but also where an offence is committed by two or more members of such an assembly acting in furtherance of a common intention. Therefore, where two or more members of an unlawful assembly are found guilty of an offence by reason of s 34, the other members of the assembly may be liable for that offence under s 149 .[94]

32. Sections 34, 109 and 120B Considered Together

Section 34 of the IPC embodies the principle of joint liability in doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109 of the IPC, on the other hand, may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission. Criminal conspiracy differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by s 107, IPC . A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact, because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for providing both conspiracy and the offences committed pursuant thereto.[95]180

The accused who only keeps the common intention in his mind, but does not do any act, overt or covert, at the scene, cannot be convicted with the aid of s 34, IPC . There may be other provisions in the IPC like s 120B or s 109 which could be invoked then to catch such non-participating accused. Thus participation in crime in furtherance of common intention is *sine qua-non* s 34, IPC .[1]

33. Sections 34, 120A and 149 Considered Together

Participation of the individual offender in the criminal act in some form or the other, which is the leading feature of s 34, differentiates it not only from s 149, but also from other similar offences like criminal conspiracy and abetment. A bare agreement between two or more persons to do or cause to be done an illegal act might make a person liable for the offence of criminal conspiracy as defined in s 120 . If the said agreement is to commit an offence, such an agreement would by itself be enough to make a man guilty and no overt act apart from the agreement would be necessary. If, however, the agreement is to commit an act which is not tantamount to an offence, then some overt act in pursuance thereof will be necessary. Such overt act may, however, be performed by any person who is a party to the agreement and not necessarily by the particular accused who might be guilty of the offence without having participated in the act. On the other hand, under s 34, a mere agreement, although it might be sufficient proof of the common intention, would be wholly insufficient to sustain a conviction with the application of s 34, unless some criminal act is done in furtherance of the said common intention and the accused himself has in some way or the other participated in the commission of the said act.[2] The offence of criminal conspiracy consists in the very agreement between two or more persons to commit a criminal offence irrespective of the further consideration whether or not those offences have actually been committed.[3] While under this section, criminality ensues from the doing of a criminal act in furtherance of the common intention, criminal liability under s 120A of the IPC ensues from the moment two or more persons agree, which confines *mens rea*within narrower limits, though, if there is an agreement, the act need not be criminal. Under this

section there need be no proof of agreement, since a mere common intention would suffice; but in that case the act itself must be criminal and proved to have been done in furtherance of the common intention.

Section 149 requires the presence of at least five participants in the crime, but under ss 34 and 120A, their number may be less. Again under s 149, there need be no common intention as required by s 34, nor common agreement as required by s 120A . All that s 149 requires is a common object or failing this, even knowledge on the part of any member that the object of that assembly was to commit any of the acts enumerated in s 141, though he may himself have had neither the intention to commit that act nor have agreed to do so.

34. Both Sections 34 and 149 may or may not Apply/Overlap

It is well settled by a catena of decisions that s 34 as well as s 149 of the IPC deal with liability for constructive criminality, *i.e.*, vicarious liability of a person for acts181 of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre-concert. Though there is substantial difference between the two sections, they also overlap to some extent and it is a question to be determined on the facts of each case whether the charge under s 149 overlaps the ground covered by s 34 . Thus, if several persons, numbering five or more, do an act and intend to do it, both ss 34 and 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of s 34 for s 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of s 34 for s 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of s 149 is, therefore, no bar in convicting the appellants under s 302 read with s 34, IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all.[4]

35. Section 34 and Ss 192 and 199

Neither s 192, IPC, incorporate the principle of vicarious liability, and therefore, it was incumbent on the complainant to specifically aver the role of each of the accused in the complaint.[5]

[I] PARTICIPATION IN A CRIMINAL ACT

36. 'Criminal Act'

This section contemplates the case where more than one person share in the doing of an act; and it is necessary to bear in mind the definition of 'act' given in s 33 and also the provisions of ss 35 and 37 - 38 .[6] As defined by s 33, the word 'act' denotes as well a series of acts as a single act, and by the word 'act', s 34 contemplates a series of acts though done by several persons[7] but all these acts must be done in pursuance of a common intention.[8]The 'criminal act' obviously may include not only a single act, but also a series of acts or omissions; different actors may be responsible for doing different acts or different omissions. It is, however, necessary that every such act, or omission, or a combination of both, must be in furtherance of the common intention shared by all.[9] It is not necessary that the particular act, detached from the other acts, shall itself be a criminal act.[10] The 'criminal act' must include at least two acts; it182 must be a series of acts. If only one act has been done, s 34 cannot apply, for its applicability it is essential that the criminal act is done by several persons. Obviously, one act cannot be done by several persons. If several persons do an act, they must do several acts even though they may be of the same nature and effect. If only one blow with a *lathi* is

given by *A, B,* who is present there at the time, may be guilty as an abettor but would not be guilty under s 34, unless his presence at the spot is itself deemed to be an act. In certain cases, it may be deemed to be an act but not in all. The 'criminal act' is the whole series of acts. It is, what Lord Summer called, 'unity of criminal behaviour' in *Barendra Kumar Ghosh v Emperor* .[11]

37. Criminal Act is the Totality of the Series of Acts

The criminal act mentioned in s 34 of the IPC is the physical act or totality of the series of acts which result in the offence and not the offence as a whole. In the case of a person assaulted by several persons the criminal act is the offence when finally results though achievement of that criminal act may be the result of action of several persons: Provided there is common intention, the whole of the result achieved by several offenders is attributed to each offender notwithstanding that individually they might have done separate acts, diverse or similar. The common intention must ordinarily be with regard to act of beating or stabbing.[12]

Even omission to prevent an offence being committed may be an act.[13] As held by their Lordships of the Privy Council in *Barendra Kumar Ghose v Emperor* ,[14]s 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, 'because they refer to it'. In other words, 'a criminal act' means that variety of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.[15]The criminal act contemplated in this section is a joint act which is the result of several persons individually acting in a particular manner. Every individual member of the entire group charged with the aid of s 34, must therefore, be a sharer in the joint act which is the result of their combined activity.[16]

In a statute the singular is deemed to include the plural, and it is plain that the words in the beginning of s 34 : 'When a criminal act is done by several persons' means, and can only mean, 'when criminal acts are done by several persons', or to put it more broadly, 'when several persons engage in a criminal enterprise'. The acts may be different acts, as when several men set out to burgle a house, and one of them keeps watch outside and the others enter the house, and one of the latter uses a firearm and shoots one of the inmates; or they may be similar acts as where several men combine to assault another. In either case, in order that s 34 may apply, it is183 incumbent on the prosecution to show in the first place, the existence of a common purpose or design or enterprise. When the acts done are similar, as where a number of blows are struck with *lathis,* then each of them is liable for every one of the blows struck, and if in the event of every blow having been struck by one man, that man would have been guilty of murder, each of them is guilty of murder, it being immaterial as to whose blow it was which was the direct and immediate cause of death.[17]

The 'criminal act' mentioned in the section is the physical act that has been done. It must be distinguished from the effect or result or consequence of it.[18]

The word 'criminal act' is used in s 34 of the IPC in the broadest possible sense. It would cover any word, gesture, deed or conduct of any kind on the part of a person, whether active or passive, which tends to support the common design. A 'criminal act' consists of the entire bundle of acts or omissions, tied together with the chain of common intention, that have combined to constitute the offence.[19]

38. 'Done by Several Persons'

The next requirement of this section is that the 'criminal act' must be done by several persons. If it is done by one person, even if it consists of a series of acts, s 34 will not apply.[20] The essence of s 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring such a particular result. Such consensus can be developed at the spot and thereby intended by all of them.[21] In a case of an attempted murder only three persons, *A, B* and *C* were named in the charge under s

307 read with this section and it was not even suggested that any other unknown person or persons were involved in the commission of the crime, and *B* and *C* were acquitted. It was held that *A* alone could not be convicted under s 307 with the aid of s 34 . Section 34 speaks of joint liability and there can be no question of joint liability where all others charged are acquitted and only one accused remains.[22]

Similarly, in another case, it has been observed by the Bombay High Court that before a person may be convicted of an offence under s 326 read with s 34, it must be established that some other specified person, whose intention that accused shared, committed the act resulting in causing grievous hurt.[23]These observations have, however, to be read in the context of the facts of these cases. In order that the section may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and, on the facts of the case, it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime.[24] It has also been held that where the accused, alleged to be the actual assailants, are acquitted, such acquittal means that there is no such person who took part in the assault resulting in causing grievous hurt and hence, the conviction of184 the remaining accused under s 326 read with s 34 cannot be upheld.[25] But where four persons are prosecuted under s 302 read with this section, failure of the prosecution to prove that one of them took part in the commission of the offence does not introduce any infirmity in its case against the remaining accused at all. The acquittal of one cannot render the conviction of the remaining accused unreasonable or illegal.[26]

Like s 149 of the IPC, s 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by s 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of s 34 .[27]

All accused appellants came together. They were also searching for one P. The very fact that all of them came heavily armed and that too with many firearms clearly goes to show that a common intention was formed to commit a murder. Merely because they did not find P, who they were looking for, and instead committed the murder of M, by itself, may not be sufficient to arrive at a conclusion that they had no intention to commit the offence of murder.[28]

39. Participation in Action Necessary

The accused who is to be fastened with liability on the strength of s 34 of the IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act, it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. In other words, the accused who only keeps common intention in mind, but does not do any act at the scene, cannot be convicted with the aid of s 34, IPC .[29] Participation in the commission of the offence in furtherance of the common intention invites the application of s 34, IPC .[30] To apply s 34, IPC, apart from the fact that there should be two or more accused, two factors must be established: (a) common intention and (b) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, s 34 will be attracted as essentially it involves185 vicarious liability, but if participation of the accused in the crime is proved and a common intention is absent, s 34 cannot be invoked in every case.[31] Participation in the crime is an essential condition for a person's liability under this section.[32] The principle embodied in s 34 is participation in some action with intention of

committing a crime. Once such participation is established, s 34 is attracted at once.[33]

Where the appellant accused did not participate in the assault on the injured, held he did not share common intention with the co-accused of causing grievous hurt to the victim. He was acquitted of the charge under s 307 read with s 34, IPC .[34]

Where there was no evidence to show the actual participation of the appellant accused T in causing the death of the deceased or sharing of common intention with the appellant R, appellant T was acquitted of the charge under s 302, IPC read with s 34, IPC .[35]

In *Shreekantiah Ramayya Munipalli v State of Bombay* [36] the Supreme Court analysed s 34 and observed:-

> It is the essence of Section 34 that the person must be physically present at the actual commission of the crime. He need not be present in the actual room; he can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger or wait in a car on a nearby road ready to facilitate their escape, but he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or other at the time the crime is actually being committed. .... The emphasis in Section 34 is on the word 'done'. It is essential that the accused join in the actual doing of the act and not merely in planning its perpetration. If the accused was not present he cannot be convicted with the aid of section.

In the case of an offence involving physical violence, it is essential for the application of s 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Presence of those who in one way or the other facilitate the execution of the common design, itself tantamounts to actual participation in the criminal act. The essence of s 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring such a particular result. Such consensus can be developed at the spot and thereby intended by all of them.[37]All the persons who are sought to be made liable by virtue of s 34 must have done some act which is included in the 'criminal act'. One who has not taken any part in doing the criminal act cannot be made liable under the section.[38]

Where there was no reliable and clinching evidence against accused A5, A6 and A7 who were also alleged to have participated in the commission of offence, they were acquitted of the charge under s 302 / 34 IPC .[39]186

Accused (A3) armed with stick and another armed with iron pipe had assaulted the deceased. The eye-witness neither assigned any role to the accused (A3), nor deposed that the accused (A3) assaulted the deceased on the head by a stick. The doctor who conducted the postmortem deposed that the death was caused by head injuries. The conviction of the appellant accused (A3) under s 302 / 34 IPC was set aside.[40]

It is essential that the several persons join in the actual 'doing of the act' and not merely in planning and preparation.[41] The antithesis is between the preliminary stages, the agreement, the preparation, the planning, which is covered by s 109 of the IPC, and the stage of commission when the plans are put into effect and carried out. Section 34 of the Code is concerned with the latter.[42]Where the accused persons were found to be armed with firearms as well as other deadly weapons, they went in as a body of persons and participated in the occurrence of the act, in such a situation even s 34, IPC is attracted, particularly having regard to the fact that four persons were killed and several others received injuries at the hands of the members of the unlawful assembly. The participation of each of the accused persons was established. Therefore, all of them shared the common object and s 149 was also attracted.[43] There was evidence that the four accused appellants armed with weapons reached the place of occurrence, two of the appellants dragged the deceased, on the exhortation of

one, fired a shot at the deceased causing death. Held, it could be said that not only the two appellants were present at the scene of offence but they actively participated in the commission of the offence by doing acts in furtherance of the common intention of killing the deceased. Their conviction under s 302 / 34 was held proper.[44] The principle which the section embodies is participation in some action with the common intention of committing a crime; once such participation is established, s 34 is at once attracted.[45] But the participation need not in all cases be by physical presence.[46]

The three appellants accused approached armed with lethal weapons the field where the deceased was cultivating the land. All of them chased when the deceased ran for his life. Their conviction under s 302, IPC read with s 34, IPC was held proper.[47]

Simply because a person was sitting in the vehicle without doing anything more, it cannot be said that he a shared common intention for driving the vehicle in a particular manner for committing a specific offence.[48] The petitioner no. 2 was driving the vehicle and the petitioner no. 1 was sitting by the side of petitioner no. 2. The petitioner no. 2 driver tried to run over the complainant constable who tried to stop the vehicle for checking. No overt act was attributed to the petitioner from which it could be inferred that petitioner no. 1 shared common intention with petitioner no. 2. The order framing charge against petitioner no. 1 under s 307 read with s 34, IPC was set aside.[49]187

The prosecution evidence showed that all the eight accused were present at the scene of occurrence. They had demanded money and extended threat of dire consequences, if their demand was not satisfied. Thereafter, they had altercation with the deceased and the deceased was strangulated by the accused persons and then his body was disposed of by cutting it into pieces and packing the same in gunny bags and abandoning the same at a deserted place. Thus, all these acts obviously were in furtherance to the common intention of doing away with the deceased, if he failed to given them Rs. 40,000/- as demanded. The offence having been committed with common intention and collective participation, each of the accused had common intention. Section 34 was attracted in the case. Accused appellants were convicted under ss 300 / 34, IPC .[50]

When no overt act whatsoever has been attributed to two of the accused persons in spite of the fact that they were known to the eyewitnesses very well, non-mention of their names in the evidence as to their participation in firing upon the deceased throws a great doubt as to their sharing of the common intention and it is difficult to hold that they had shared common intention with other accused persons who actively participated in the crime.[51]

Co-accused was empty handed, the evidence that he caught hold of the deceased was given for the first time before the Court, his presence/participation in the commission of crime was doubtful, he was given benefit of doubt and acquitted of the charge under ss 302 / 34 .[52]

Co-accused was present on the spot but did not take any part in the assault, and PWS having deposed that the co-accused persons arrived on the spot after the assault was completed, co-accused were acquitted of the charge under ss 307 / 34, IPC .[53]

Where there was evidence that the two accused persons dragged the deceased and assaulted him with fists and kicks, they were convicted under ss 325 / 34, IPC .[54]

Where the participation of the accused charged with the offence of murder *etc*, in the occurrence is not proved beyond reasonable doubt, he was held to be entitled to acquittal.[55]

A5 to 8 did not take part in the assault at all and the allegations made against them were not established by the evidence on record, particularly the medical evidence. It was doubtful if A5 to 8 took part in the occurrence though the eye-witnesses stated that they assaulted the deceased but no corresponding injury was found on the person of the deceased. Having regard to the fact that there was certain amount of animosity between the villagers of the two villages, one could not rule out the possibility of false implication. It was considered proper to give benefit of doubt to them. They were acquitted of the charge under s 302 read with s 34, IPC .[56]188

Evidence showed that the intention conceived by appellant no. 1 was known to appellant no. 2 and shared by him. The presence of appellant no. 2 was established by the prosecution, but the prosecution did not prove any circumstance or conduct of appellant no. 2 from which sharing of his common intention with appellant no. 1 could be gathered. There was discrepancy in the evidence of eye-witnesses relating to the alleged conduct of appellant no. 2 and except his presence, nothing could be gathered with certainty from their evidence. Held that though the presence of appellant no. 2 at the place of occurrence was established by the version of the prosecution witnesses, it was not established that appellant no. 2 shared common intention with appellant no. 1 to commit murder of the deceased or to cause such body injury to the deceased. The conviction of the appellant no. 2 under ss 302 / 34, IPC was set aside.[57]

40. Individual Participation Required

Before a person can be convicted with the aid of provisions of s 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement.[58]

63 Substituted by Act 27 of 1870, s 1, for the original section.

64 *State v Saidu Khan* AIR 1951 All 21, p 22 (FB) ; *Mahbub Shah v Emperor* AIR 1945 PC 118, p 120 ; *Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1, p 9 ; Re *Basappa*AIR 1951 Mys 1, p 3 ; *Kamaldin v Emperor* AIR 1947 Sind 41, p 47 . Refer to notes below under the heading 'Criminal act must be done in furtherance of the common intention of all'.

65 *Surinder Singh alias Chhinda v State of Punjab* (2007) Cr LJ 49 (SC), 2006 AIR SCW 5454, 2006 (8) Scale 745 ; *Harbans Kaur v State of Haryana* 2005 Cr LJ 2199, AIR 2005 SC 2989 ; *Gharbharan v State of Chhattisgarh* 2010 Cr LJ 471, p 473 (Chhat) (DB) .

66 *Virendra Singh v State of Madhya Pradesh* 2011 Cr LJ 952 (SC), 2011 AIR SCW 31, (2010) 8 SCC 407, 2010 (8) Scale 27 .

67 *State of Haryana v Satender* 2014 (139) AIC 22 (SC), 2014 AIR SCW 4471, JT 2014 (7) SC 616 ; *Umedbhai Parshottambhai Talpada v State of Gujarat* 2014 (136) AIC 519 (Guj) .

68 *Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1, p 7, 26 Cr LJ 431, 23 All LJ 314 ; *Dhansai Sahu v State* AIR 1969 Ori 105, 35 Cut LT 18 ; *Umelbhai Parsho Hambhai Talpada v State of Gujarat* 2014 (136) AIC 519 (Guj) ; *Bogadhar Munda v State of Assam* 2018 (118) AIC 950 (Gauh) .

69 *Rajeev Lochan v State of Madhya Pradesh* 2011 Cr LJ 631, p 637 (MP) .

70 *Arjun Thakur v State* (1994) Cr LJ 3526 (SC) .

71 *Megh Singh v State of Rajasthan* (1983) 2 Crimes 134, p 140 (Raj)(DB).

72 *Mahbub Shah v Emperor* AIR 1945 PC 118, p 120 ; *Chik-Karange Gowda v State of Mysore* AIR 1956 SC 731 ; Re *Kamraj Govinda*AIR 1960 Mad 125 ; *Matiullah v State of West Bengal* AIR 1965 SC 132, (1965) 1 Cr LJ 126 ; *Hethuba v State of Gujarat* AIR 1970 SC 1266, (1970) Cr LJ 1138, p 1141 ; *Bhaba Nand Sharma v State of Assam* AIR 1977 SC 2252, p 2254 ; *State of Uttar Pradesh v Iftikhar Khan* AIR 1973 SC 863, (1973) Cr LJ 636 ; *Jagir Singh v State of Punjab* (1968) 1 SCJ 244 ; *State v Dharanidhar Mohanty* AIR 1976 Ori 79, (1976) 42 Cut LT 29 ; *Hadibandhu Mohalik v State* (1986) 61 Cut LT 167, p 175-76 ; *Kartar Singh v State* (1992) 1 Crimes 924, p 929-30 .

73 *Mahbub Shah v King-Emperor* AIR 1945 PC 118 ; *Shankarial Kacharabhai v State of Gujarat* AIR 1965 SC 1260 ; *Karatar Singh v State of Haryana* (1992) 1 Crimes 924, p 929-30 (P&H) .

74 *C Phulla Reddy v State of AP* AIR 1993 SC 1899, 1993 Cr LJ 2246, 1993 Supp (3) SCC 134 .

75 *Jumman v State of Madhya Pradesh* 2013 Cr LJ 697, p 701 (Chh) (DB) .

76 *Hadibandhu Mohalik v State* (1986) 61 Cut LT 167, p 175-77 .

77 *Noor Mahommad Mohd Yusuf Momin v State of Maharashtra* AIR 1971 SC 885, (1971) Cr LJ 793 .

78 *Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1, p 7 ; *Hethuba v State of Gujarat* AIR 1970 SC 1266, (1970) Cr LJ 1138, 1140 ; *State of Uttar Pradesh v Iftikhar Khan* AIR 1973 SC 863, (1973) Cr LJ 636 .

79 *State of Bihar v Lalu Mahto* AIR 1955 Pat 161, p 169, (1955) Cr LJ 597 ; *Ramkrishnaiah v State* AIR 1965 Andh Pra 361, p

366, (1965) 2 Cr LJ 458 .

80 *Harandra Sah v State of Bihar* 2013 (130) AIC 666 (Pat) .

81 *Md Asir Ali v State of Assam* 2010 Cr LJ (NOC) 687 (Gauh) (DB).

82 *Harbans Kaur v State of Haryana* 2005 Cr LJ 2199, p 2201 (SC), AIR 2005 SC 2989, 2005 (2) Scale 457, (2005) 9 SCC 195 .

83 *Sachin Jana v State of West Bengal* 2008 Cr LJ 1596 (SC), 2008 AIR SCW 885, (2008) 3 SCC 390 .

84 *AshokKumar v State of Punjab,* AIR 1977 SC 109, (1977) 1 SCC 746 .

85 *Chinta Pulla Reddy v State of AP* AIR 1993 SC 1899, 1993 Cr LJ 2246, 1993 Supp (3) SCC 134 ; *Hemchand Jha v State of Bihar* 2008 Cr LJ 3203 (SC), 2008 AIR SCW 4291, 2008 (9) Scale 211, (2008) 11 SCC 303 .

86 *Emperor v Chhotelal Babar* 36 ILR Bom 524, 13 Cr LJ 426 .

87 *Russell on Crime*, eleventh edn, p 137.

88 *State of Andhra Pradesh v K Venkata Reddy & Ors* AIR 1976 SC 2207, (1976) Cr LJ 1723 (SC) ; *Maina Singh v State of Rajasthan* AIR 1976 SC 1084, (1976) Cr LJ 835 (SC) .

89 *Barendra Kumar Ghosh v King Emperor* AIR 1925 PC 1, p 8-9, 26 Cr LJ 431, 23 All LJ 314 .

90 *Narayan v State* (1982) 81 DLT 256 .

91 *Kalawati v State of Rajasthan* (1994) Cr LJ 691 (Raj) .

92 Joel Prentiss Bishop, *Commentaries on the Criminal Law,* vol I, sixth edn, quoted in *State v Saidu Khan* AIR 1951 All 21, p 35 .

93 *State v Saidu Khan* AIR 1951 All 21 .

94 *Mathai v State of Kerala* (1983) 1 Crimes 429, (1982) KLT 692, (1982) Cr LC 642 (DB) ; *Sunny Kapoor v State (UT of Chandigarh)*(2006) Cr LJ 2920 (SC); *Saravanan v State of Pondicherry* (2005) Cr LJ 117 (SC) .

95 *Suresh v State of UP* (2001) 3 SCC 673, AIR 2001 SC 1344 .

96 *State of Karnataka v Abdul Rasheem* 2006 Cr LJ 3169, p 3170 (Kant) .

97 *Krishnan v State represented by Inspector of Police* (2003) 7 SCC 56, 2003 Cr LJ 3705 ; *Sham Shankar Kankaria v State of Maharashtra* (2005) Cr LJ 502 (Bom) .

1 *Sultan v Emperor* AIR 1931 Lah 749, p 750 .

2 *Ibra Akanda v Emperor* AIR 1941 Cal 339, p 358, 45 Cr LJ 771, per Khundkar J.

3 *Girija Shankar v State of Uttar Pradesh* (2004) Cr LJ 1388 (SC) ; *State of Madhya Pradesh v Deshraj* (2004) Cr LJ 1415 (SC) ; *Raju Pandurang Mahale v State of Maharashtra* (2004) Cr LJ 1441 (SC) ; *Janak Singh v State of Uttar Pradesh* (2004) Cr LJ 2533 (SC) ; *Harbans Kaur v State of Haryana* 2005 Cr LJ 2199 (SC), p 2200, 2201, AIR 2005 SC 2989, 2005 (2) Scale 457, (2005) 9 SCC 195 ; *Pasupuleti Siva Ramkrishna Rao v State of Andhra Pradesh* 2014 (137) AIC 129 (SC), (2014) 5 SCC 369, 2014 (85) ACC 7145 .

4 *Birendra Das v State of Assam* 2013 (128) AIC 225 (SC), JT 2013 (9) SC 182, 2013 (12) SCC 236, 2013 (8) Scale 113 .

5 *Om Prakash v State* AIR 1956 All 241, p 248 .

6 *Barendra Kumar Ghosh v King Emperor* AIR 1925 PC 1, p 7, 52 IA 40, p 51, 26 Cr LJ 431, 23 All LJ 314 .

7 *NNMY Momin v State of Maharashtra* AIR 1971 SC 885, p 888, [1971] 1 SCR 119, (1971) Cr LJ 793 ; *Mahbub Shah v Emperor* AIR 1954 PC 118, p 120 ; *Chik-Karange Gowda v State of Mysore* AIR 1956 SC 731 ; Re *Kamaraj Govinda*AIR 1960 Mad 125 ; *Ethuba v State of Gujarat* AIR 1970 SC 1266, (1970) Cr LJ 1138, p 1141 ; *Bhaba Nand Sharma v State of Assam* AIR 1977 SC 2252, p 2254 ; *State of Uttar Pradesh v Iftikhar Khan* AIR 1973 SC 863, (1973) Cr LJ 636 ; *Hadibandhu Mohalik v State* (1986) 61 CLT 167, p 175-76 .

8 *Hadibandhu Mohalik v State* (1986) 61 Cut LT 167, p 175-76 .

9 *Ramaswami Ayyanagar v State of Tamil Nadu* AIR 1976 SC 2027 ; *Parasa Raja Manikyala Rao v State of Andhra Pradesh* (2004) Cr LJ 390 (SC) .

10 *BN Srikantiah v State of Mysore* AIR 1958 SC 672, p 676 ; *Virendra Singh v State of Madhya Pradesh* 2011 Cr LJ 952, (2010) 8 SCC 407 ; *Umrao Singh v State of Madhya Pradesh* AIR 1961 MP 45 ; *Parmeshware Kurup v Krishna Pillai* (1966) Cr

LJ 1269, (1966) KLT 295 .

11 *Waryam Singh Arur Singh v Emperor* AIR 1941 Lah 214, p 215 .

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46 *Hadibandhu Mohalik v State* (1986) 61 Cut LT 167, p 175-76 .

47 *Brihaspati Mahali v State of West Bengal* 2008 Cr LJ 3659 (Cal) .

48 *Chuhru Ram v State of Himachal Pradesh* 2013 Cr LJ 1824, p 1825 (HP) .

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Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

[S. 34.

Acts done by several persons in furtherance of common intention.--

41. Mere Presence may Amount to Commission of the Offence

The essence of s 34 of the IPC is simultaneous consensus of minds of several persons participating in criminal action to bring about particular results. When a scheme is carried out and the murderer turns up according to a pre-arranged plan, the very presence of the person would be an act contributing as effectively to the perpetration of murder as the actual act of killing. It reflects criminal behaviour resulting in the offence. Participation in commission of an offence in furtherance of common intention is discernible from conduct of the accused.[59] The accused had killed the deceased by assault with stone was proved by the prosecution evidence. The mere fact that the co-accused wife and the daughter of the deceased were present on the spot and their clothes were stained with human blood did not prove that they also participated in the assault on the deceased. Both the co-accused were not convicted under s 302 read with s 34 IPC .[60]

Where the PWS had not attributed any overt act to the accused appellant, the mere fact that he was in the company of the accused who were armed would not be sufficient to attract s 34, IPC . Appellant was not armed and he had no animosity with the deceased. In view of this evidence, the conviction of the accused appellant under s 302 read with s 34 IPC was not sustained, and was set aside.[61]

42. For Participation not Physical Presence but Common Consent Necessary

In order to justify the application of s 34 of the IPC, an element of participation in action needs to be proved. Physical presence at the scene of occurrence may189 sometimes be dispensed with, but there must be common consent which implies acting in concert.[62]

In order to convict a person for an offence with the aid of the provisions of s 34, it is not necessary that that person should actually with his own hand commit the criminal act. Several persons share the common intention of doing a particular criminal act and if in furtherance of that common intention all of them join together and aid or abet each other in the commission of the act, then although one of these persons may not actually with his own hand do the act, but if he helps by his presence or by other acts in the commission of the act, he would be held to have done that act within the meaning of s 34 .[63]

Evidence was not adduced to show that all the accused were present at the time when the deceased was strangulated, and as to which of the accused strangulated the deceased. Charge under ss 302 / 34, IPC was not proved.[64]

Where one of the two accused persons gave a *lathi* blow on the head of the deceased and medical evidence showed that the skull of the deceased was fractured and that internal injuries to the brain of deceased were sufficient to cause his death, the accused who gave the *lathi* blow was held rightly convicted under s 300, IPC . But although no clear evidence regarding the co-accused was on record of the case that he caused any fatal injury to the deceased, but his participation in murderous assault with co-accused was proved beyond doubt, it was held that the other accused was liable to be convicted under s 300 read with s 34, IPC .[65] The manner in which looted properties are distributed between the accused persons is also one of the circumstances which may prove joint participation of accused persons in the commission of crime.[66] A number of injuries suffered by the deceased would point out that it could not have been inflicted by one person. Common intention on the part of the accused no. 1 together with others to commit the murder of the deceased was inferred.[67]

In a case of human sacrifice, mere presence of the accused cannot amount to attribution of common intention, and as such, accused cannot be convicted with the aid of s 34, IPC . Accused were acquitted of the charge under s 302 read with s 34, IPC .[68]

Common intention on the part of accused persons to commit murder cannot be inferred in view of circumstantial evidence. The mere fact that medical evidence shows more than one weapon was used is not sufficient to infer participation of accused persons in crime.[69]190

43. Co-accused--Liability

Co-accused cannot escape liability under s 34, IPC by pleading that no overt act was attributed to him/them.[70]

Where the only allegation against the co-accused was that he dragged the deceased from behind, and the co-accused had no enmity with the deceased, held, co-accused could not be said to have shared common intention, and he was acquitted of the charge under ss 326 / 34, IPC .[71]

A1 caused head injury to the deceased causing his death. Though A2 had no motive or grouse against the deceased, still his involvement was apparently clear. He sat on the deceased, thereby disabling the deceased from moving, as a result of which, A1 beat the deceased with the stone. The evidence of PW1 was found reliable. A1 was found guilty for offence under s 302, IPC, while A2 was found guilty for offence under s 302 read with s 34, IPC .[72]

44. Overt Act not Necessary

It is the settled law that overt act of the co-accused is not always necessary in applying s 34 . If the prosecution succeeds in establishing that the accused shared the intention with the other for the acts committed by him, he can be held liable by invoking the aid of s 34, IPC .[73] It is always not necessary that every accused must do a separate act to be responsible for the ultimate criminal act. What is required is that an accused person must share the common intention to commit the act.[74]The act need not necessarily be overt, even if it is only a covert act. It is enough, provided such a covert act is proved to have been done by co-accused in furtherance of the common intention.[75]There must, however, be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly.[76]Where no overt act is proved or established on the part of the accused which might show that he shared common intention of the person or persons who inflicted the injury or injuries, the accused persons cannot be fastened with liability and convicted with the aid of s 34, IPC .[77]

If a common intention is proved but no overt act is attributed to the individual appellant, s 34 will be attracted as it involves vicarious liability, but if participation191 of the accused in the crime is proved and a common intention is absent, s 34 cannot be invoked.[78]

No overt act was attributed to the appellant accused G. From his mere presence on the spot it could not be inferred that he shared common intention to commit the murder of the deceased. Appellant G was held entitled to benefit of the charge under ss 302 / 34, IPC .[79]

Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying s 34 it is not necessary to show some over act on the part of the accused.[80]

If it is not clear which of the accused caused which particular injury, it will not matter where s 34, IPC is clearly attracted to the facts of the case. When persons go together armed with deadly weapons and cause fatal injuries to the deceased, all of them are equally liable in view of s 34, IPC .[81]

The appellant and the accused no. 1 had entered the house of the deceased, and accused no. 1 poured a watery substance over her from the pot carried by him on the deceased leading to her death. The deceased had refused sexual favour to them. However, no overt act was attributed to the appellant. Held, in absence of any active role played by the appellant or overt act being done by the appellant, it cannot be said with certainty that the appellant had accompanied the accused no. 1 to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under s 302 read with s 34, IPC was not sustained. The appellant was convicted under s 326, IPC and s 304, Part II, IPC . As the death ensued after twenty six days of the incident as a result of septicemia and not as a consequence of burn injuries, the sentence was reduced to the period already undergone.[82]

It was not proved that all the accused persons came together to the place of occurrence or near the place of occurrence, and then two of them entered into the shop and committed the offences. Either of the two accused (A3 and A4) did not come in the second round or if they came here, they were standing at a distance of 20-25 feet from the shop of the deceased; they were unarmed; they did not do any overt act. The above evidence showed that they (A3 and A4) did not share common intention

with accused (A1 and A2), either for commission of murder of the deceased or for making an attempt on the life of the injured. These two accused (A3 and A4) were thus acquitted of the charges under ss 302 / 34 and 307 / 34, IPC .[83]192

45. Participation may be of Passive Character

Mere distance from the scene of the crime cannot exclude culpability under s 34 which lays down the rule of joint responsibility for a criminal act performed by a plurality of persons. Criminal sharing, overt or covert, by active presence or by direction from a distance, of the act is the essence of s 34 . Even assuming that presence at the scene is pre-requisite to attract s 34 and that such propinquity is absent, s 107, which is different in one sense, still comes into play to rope in the accused.[84]In the case of an offence involving physical violence, it is essential for the application of s 34 that person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of common design, itself tantamounts to actual participation in the criminal act.[85] Where the co-accused prevent the witnesses from rescuing the deceased from the clutches of the main accused assailant, the co-accused are liable to convicted under s 302, IPC with the aid of s 34, IPC .[86]The participation required by the section may be of a passive character, such as standing by a door, proved that it is done with the intention of assisting in furtherance of the common intention of them all and there is a readiness on the part of the man so standing to play his part in the pre-arranged plan when the time comes for him to act.[87] Where three persons took the deceased to the jungle, two took the victim inside the jungle and one person stood in guard, the question arose whether the person who did not go inside the jungle could be held liable under s 34, IPC as he had no common intention to commit the murder. It was held that all the three persons were liable for the offence of murder.[88] Where the appellants V and J caught hold of the father of the deceased, caused injuries on his person, continued to hold him till the very end, and facilitated the commission of the murder of the deceased, held V and J shared common intention with two other appellants, and they were rightly convicted under ss 302 / 34, IPC .[89] Where the appellant nos. 1, 2 and 3 dragged the deceased in a gali, and the appellant no. 1 suddenly took out a knife from his pocket, gave repeated knife blows and the three co-accused appellants were holding the deceased causing death, the fact that appellant nos. 2 and 3 were holding the deceased was not stated by the PWS in their statements under s 161, CrPC . There being no evidence on record even to show that appellant nos. 2 and 3 were having knowledge that appellant no. 1 was holding a knife in his back pocket, held it could not be said that appellant nos. 2 and 3 shared a common intention for commission of murder of the deceased, and the conviction of the appellant nos. 2 and 3 under ss 302 / 34, IPC recorded by the lower Court was set aside.[90]

Where the co-accused caught hold of the collar of the eye-witness, put knife blade on his stomach, and thereby prevented the eye-witness from rescuing his master193 deceased, though had not caused any injury to either the deceased or the eye-witness, the co-accused was convicted under ss 302 and 323 read with s 34, IPC .[91]

Where no overt act was attributed to the co-accused G, brother of the main accused L, and he had not inflicted any injury on the victim, there was no evidence of prior meeting of minds between the two accused G and L, thus, the co-accused G was held entitled to acquittal and was acquitted of the charge under ss 307 / 34, IPC .[92]

The fact that accused (A3) M was standing outside the house was testified by the eye-witness. The murder was committed inside the house. There was no evidence of the formation or sharing of any common intention with the other accused. There was neither any reference to a third person in the FIR; nor was there any evidence that he came with the other accused or left with them. No weapon was seized from him, nor was any property connected with the crime, seized. M (A3) was acquitted of the charge under ss 302 / 34, IPC .[93]

Where the informant and the PW5 deposed before the court that when they reached almost 30-40 yards away from the place of occurrence, two accused S and P who were holding fire arms threatened them not to proceed ahead otherwise they would also be killed like the deceased, held there was participation of the accused persons and the common intention also. Section 34 , IPC was attracted in the case, and conviction of the accused persons under ss 302 / 34, IPC was proper.[94]

Accused persons armed with axe and jambia had assembled at one place and the moment deceased came out of the house to spit, one of the accused started abusing him. By catching and immobilizing the deceased the two accused nos. 3 and 4 facilitated the assault by accused no. 5. Accused no. 5 stabbed the deceased with jambia over the left side of the chest. The blow was so severe that it penetrated into the heart and liver. The fact that these appellants held the deceased and facilitated the other accused to give the fatal blow and made no effort to prevent him from assaulting the deceased leads to irresistible and inescapable conclusion that these two appellant nos. 3 and 4 shared the common intention with accused no. 5. Accused nos. 3, 4 and 5 were convicted under s 302 with the aid of s 34, IPC .[95]

Co-accused Preventing Persons from Saving the Deceased on the Point of Knife - Section 34 Attracted

In the instant case, the appellant accused prevented PWS present on the spot from saving the deceased, threatened them with knife, such that he facilitated the other accused in furtherance of common intention to commit the murder of the deceased. Section 34 , IPC was attracted in the case, and conviction of accused under s 302 read with s 34, IPC was held proper.[96]194

46. Criminal Act may be Act of One Individual

In *Emperor v Nirmal Kanta Roy* ,[1] Stephen J had taken the view that s 34, applied only where a criminal act was done by several persons of whom the accused charged thereunder was one, and not where the act was done by some person other than the latter. In that case, two persons had fired at another. Only one hit the victim who was killed. The accused had not hit the deceased, and it was held that he could not be convicted under s 302 read with s 34 . But this view is no longer good law. A Full Bench of Calcutta High Court held in *Emperor v Barendra Kumar Ghose* ,[2] that if several persons armed with pistols go to a place with the common intention of robbing a person, and, if necessary to kill him, and one of them fires a fatal shot in furtherance of their common intention, all of them would be guilty of murder under s 302 read with s 34 . And this view was upheld by their Lordships of the Privy Council in *Barendra Kumar Ghose v Emperor* ,[3] s 34 will therefore, be applicable equally to those cases in which the criminal act done in furtherance of a common intention of several persons is the act of a single individual.[4] The principle of vicarious liability also does not depend upon the necessity to convict a requisite number of persons.[5]

Once it is found that accused are liable to be convicted for their individual acts, s 34 cannot be invoked to hold them liable.[6]

Courts have stood as one holding that a person who participates in a crime with the *mens rea* of that crime alone is responsible and not one who is neither perpetrator nor a person acting with necessary *actus reus*. A person cannot be convicted if he is not the perpetrator as a secondary party unless he was aware of all the essential matters which made the act done a crime. He may not have noted that his act amounted in law to a crime, but he must be aware of all the essential matters of the act done, which essential matters together make the act done a crime. It thus follows that if several persons bear a common unlawful object and one of them does a criminal act within the scope of a common purpose, all are responsible for that act whether it was originally contemplated or not; where, however, one of them does an act which was not contemplated by the others and it is outside the common purpose, the others are not criminally liable in respect of that act, even though they may all have been engaged in an unlawful enterprise. In such circumstances, those who claim a secondary role may be

liable for any other crime and their individual acts may become relevant.[7]

47. Presence at Scene of Occurrence--Presumption of Participation

Section 34 of the IPC is intended to meet a situation wherein all co-accused have also done something to constitute the commission of a criminal act. Even the concept of presence of a co-accused at the scene is not a necessary requirement to attract s 34,195*e.g.*, co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: one of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. There is no reason why s 34 cannot apply in the case of the two persons indicated in the illustration.[8] In the leading case of *Barendra Kumar Ghose v Emperor* ,[9] Lord Summer, explaining s 114 of the Code observed:

> Because participation 'de facto' (as this case shows) may sometimes be obscure in detail, it is established by the presumption '*juris et de jure*' that 'actual presence' plus prior abetment can mean nothing else but 'participation'. The presumption raised by section 114 brings the case within the ambit of section 34 .

Relying on this observation, in *Kantiah Ramayya Munipalli v State of Bombay* ,[10] it was observed by their Lordships of the Supreme Court:

> It is true there must be some sort of preliminary planning which may or may not be at the scene of the crime and which may have taken place long beforehand, but there must be added to it the element of physical presence at the scene of occurrence coupled with actual participation which, of course, can be of a passive character such as standing by a door, provided that it is done with the intention of assisting in furtherance of the common intention of them all and there is readiness to play his part in the pre-arranged plan when the time comes for him to act.

A person present on the scene might or might not be guilty by the application of s 34 . If he is present on the scene for the purpose of participating in the offence, he would certainly be guilty as a participator in the offence. On the other hand, if he is there merely as a spectator, he would not be so guilty. Thus, where a person, who is an eyewitness of the incident, is present at the spot for the purpose of facilitating or promoting the offence, his presence is itself tantamount to actual participation in the criminal act.[11] Appellant accused immobilized the deceased by attack on his legs. Co-accused thereafter caused fatal injuries leading to death. Held, the appellant had common intention to cause death, and his conviction under s 304, Part I read with s 34, IPC was held proper.[12]

48. Presence at the Scene not Necessary

Following this decision, it was held in some cases that presence at the scene of occurrence is a necessary condition for fixing liability under this section.[13] But this is not quite correct. As observed by their Lordships of the Supreme Court in a relevant case:[14]

> 196To establish joint responsibility for an offence it must, of course, be established that a criminal act was done by several persons, the participation must be in doing the act, not merely in its planning...But this

> participation need not, in all cases, be by physical presence. In offences involving physical violence, normally presence at the scene of offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consists of diverse acts which may be done at different times and places. In *Kantiah*'s case,[15] misappropriation was committed by removing goods from a government depot and on the occasion of the removal of the goods, the first accused was not present. It was, therefore, doubtful whether he had participated in the commission of the offence, and this court in those circumstances held that participation by the first accused was not established. The observations in *Kantiah*'s case,[16] in so far as they deal with section 34 of the Indian Penal Code must, in our judgment, be read in the light of the facts established and are not intended to lay down a principle of universal application.

Absence of physical presence of an accused in the room is not sufficient to absolve him from vicarious liability. It is true that participation in actions is one of the prominent features in s 34 . Its essence is to be found in the existence of common intention animating the perpetrator to the doing of the act. Physical presence at the very spot is not always a necessary ingredient to attract the action. He need not be present in the actual room; he can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger. What is required is his actual participation in the commission of the offence in some way or other at the time when the crime is actually being committed.[17]

49. Mere Presence not Sufficient for Common Intention for Crime

The mere presence without proof of any act or omission done to facilitate the offence or at least without proof of the existence of a common intention will not be sufficient to support a conviction with the aid of this section.[18] Where no act or conduct on the part of the accused has been proved from which an inference of a pre-arranged plan to commit a murder may be drawn, the mere fact that the accused were seen at the spot at the time of the murder is not enough to prove a common intention to murder.[19]If, in cases where there is no direct evidence of the actual participation of the accused in a specific act of violence, though the accused are proved at a particular point of time to be members of the mob, but they are not shown to have taken part in the specific act, they are to be found guilty of that act by force of s 34, it must be clearly found that, that act was in furtherance of the common intention of the mob while these accused were in it, or if s 149 is used, that the act was also in prosecution of the common object or such as these accused knew to be likely to be committed in prosecution of their common object. It is not the law, that a court is to presume that any and every person who is proved to have been present in a riotous mob at any time or to have joined it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must, from the beginning, have anticipated and contemplated resistance to the organised forces of order, that is, the police, or have made up his mind before the riot197 began, to oppose such resistance and overcome such forces as stood in the way of the mob accomplishing its common object.[20]

The mere circumstance of a person being present on a lawful occasion does not raise a presumption of that person's complicity in an offence then committed so as to make s 34 applicable.[21] But mere presence of the accused persons together at the spot is not sufficient to hold that they share common intention to murder or injure the victim.[22] A person, merely because he or she was present at or near the scene of occurrence without doing anything more, without carrying a weapon and even without marching along with other assailants, would not be convicted with the aid of s 34, IPC for the offence committed by the other accused.[23]

50. Exhortation

Appellant accused D exhorted co-accused R who was armed with pistol to kill the deceased. On exhortation, the co-accused R fired at the deceased from behind causing death. The evidence of exhortation was reliable. Section 34 , IPC was held attracted in the case. Both the accused D and co-accused R were convicted under s 302 read with s 34, IPC .[24]

All the accused appellants of the same family, living close together in the same locality, had come out armed and raised a lalkara that the opposite party be done away with and inflicted injuries on PW and one injury to deceased which proved fatal. A case of common intention was held spelt out.[25]

Conviction under Section 302 / 34 Upheld

The accused H and his two sons K and V (appellants) armed with weapons went to the house of the deceased to eliminate him. K on exhortation of his father H, fired a pistol shot and killed B. On the principle of vicarious or constructive liability, the appellant was convicted under ss 302 / 34, IPC along with his father H and his brother K.[26]

Acquittal of the Accused

Where only the role of exhortation was assigned to the appellant no. 3, and no overt act was attributed, he was acquitted of the charge under ss 302 / 34, IPC .[27]

51. Accused Merely Passerby-Conviction not Proper

The accused appellants A2 and A3 were merely passers-by and near the spot who picked up stone on the spur of the moment causing one simple injury each on the198 person of the deceased, held, their conviction under s 304, Part II read with s 34, IPC was not proper, and was set aside.[28]

Two accused, L and S, set the huts of the complainant on fire. Appellant B was merely standing on the spot. There was absolutely no evidence to hold that he also had common intention with the other co-accused. Appellant B was acquitted of the charge under ss 436 / 34, IPC .[29]

Rule of Exhortation

Where the co-accused was attributed the role of exhortation, he was unarmed, another appellant co-accused who had also been assigned the role of exhortation was given benefit of doubt, the appellant co-accused was also given benefit of doubt and was acquitted of the charge under ss 302 / 34, IPC .[30] Where the appellant accused exhorted after infliction of injuries were completed, he by no means can be held guilty of sharing a common intention with other accused. Appellant accused was given benefit of doubt and acquitted of charge under ss 302 / 34, IPC .[31]

Mere exhortation by itself may not be sufficient to draw an inference that the persons shared the common intention. Co-accused who was attributed the role of exhortation was not convicted under s 302 / 34, IPC .[32]

(II) 'IN FURTHERANCE OF COMMON INTENTION OF ALL'

52. Criminal Act 'In Furtherance of the Common Intention of All'

The section does not say 'the common intention of all', nor does it say 'and intention common to all'. Under the provisions of s 34, the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention.[33] To attract the application of s 34, it must be established beyond any shadow of doubt that the criminal act was done by several persons in furtherance of the common intention of all. In other words, the prosecution must prove facts justifying an inference that all the participants of the act shared a common intention to commit the criminal act which was finally committed by one or more of the participants.[34] Common intention must exist before the commission of the crime.[35]

One accused P had given beating with her plastic shoes to the deceased, an old lady, causing her

death. Petitioners, persons who arrived on the spot, were not armed, nor did they indulge in or facilitated the shoe beating by the accused P. Held, the199 petitioners accused did not share common intention of the accused P, so, all were acquitted of the charge under ss 325 / 34, IPC .[36]

For the application of s 34 of the IPC, a furtherance of a common design is condition precedent for convicting each of the persons, who take part in the commission of a crime. The mere fact that several persons took part in a crime will not, in the absence of a common intention, be sufficient for convicting them of that crime.[37]The view that even the person not committing the particular crime could be held guilty of that crime with the aid of s 34 if the commission of the act was such as could be shown to be in furtherance of a common intention not necessarily intended by every one of the participants, is not correct. The common intention must be to commit the particular crime although the actual crime may be committed by any one sharing common intention, then only can others be held to be guilty.[38] Both ss 149 and 34 deal with a combination of persons who become liable to be punished as sharers in commission of offences. The non-applicability of s 149 is, therefore, no bar in convicting an accused under the substantive section read with s 34 if evidence discloses commission of an offence is in furtherance of the common intention of them all.[39]

The rule of law laid down in this section, comes into play only when as a fact it has been found that the criminal act done by an individual is in furtherance of the common intention and not without it.[40] Where the prosecution case was that the accused *A* went to the house of *B* and told him to vacate the house and on his refusal, *A* exhorted co-accused *K* to finish *B* and that *K* fired two shots from his pistol and caused injuries to *B* and *M*, in the circumstances, accused persons were held to have acted in furtherance of common intention.[41] A common intention--a meeting of minds--to commit an offence and participation in the commission of the offence in furtherance of that common intention would invite the application of s 34 .[42]It is true that in order to convict persons vicariously under s 34 or s 149, it is not necessary to prove that each and every one of them had indulged in overt acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly.[43] Where the testimony of the PWS about the presence/involvement of the two appellants in the commission of the murder was contradictory, there was no material to show that the appellants had committed the alleged offence in the furtherance of their common intention, the appellants were acquitted of the charge under ss 302 / 34, IPC .[44]

There was evidence that in the scuffle between the deceased and the accused to take possession of lathi, co-accused caught hold of the deceased which facilitated the accused in taking possession of the lathi, but in the meanwhile the accused gave stab200 blow to the deceased. Held it could not be said that the co-accused shared common intention with the accused to commit the murder of the deceased. Co-accused was acquitted of the charge under ss 302 / 34, IPC .[45]

Both the accused D and K, in furtherance of their common intention, caused injuries on the vital organs of H and P, resultantly, H died whereas P survived. Both were armed with the deadly weapons, therefore, case of both these accused could be segregated from the case of S, K and M who caused injuries on the non-vital parts of the persons of P and K. As such, both can be stated to have pre-planned to inflict grievous injuries to H and P, whereas the remaining three accused who had inflicted injuries on the non-vital parts of the body of witnesses cannot be said to have shared common intention with the accused inflicting the fatal blows.[46]

The evidence of PW1, PW2 and PW3 made it clear that the deceased was attacked by A1, A2, A3 and A4 in furtherance of their common intention and therefore, all the four accused persons (the appellants) were liable for the criminal act of causing the death of the deceased under s 34, IPC, as if the criminal act was done by each of them alone.[47]

Two accused appellants assaulted the victim with lathi on head, causing injuries in temporal region. Accused shared common intention, had knowledge also that their act was likely to cause death. Accused were convicted under s 308 read with s 34, IPC .[48]

53. Foundation of Constructive Liability

The foundation of the constructive liability is the common intention animating the accused to doing of the criminal act, and the doing of such act in furtherance of such intention.[49] When the two accused persons armed with sticks, participated equally in actual assault on the deceased as also in abuses hurled on him, having come together and having gone together, there was no room for doubt about the common intention of both the accused causing the murder of the deceased.[50] Where the deceased had illicit relations with the mother of the accused, both accused came together to the place where deceased was working and assaulted him in furtherance of their common intention. The evidence of eyewitnesses was consistent and did not suffer from any infirmity. The conviction of both the accused was held proper.[51] But where accused persons were charged with causing the death of five persons by inflicting gunshot injuries, the testimony of eyewitnesses was found not truthful, there was no material showing as to who had caused whose deaths, the defence version was that they fired shots in self-defence and it was supported by evidence, the evidence on record did not show that while firing shots, the accused were acting in furtherance of their common intention. The acquittal of accused was found proper.[52]201

54. Crucial Test of Applicability of Constructive Liability

The crucial test as to the applicability of constructive liability under this section is to be found in the phrase 'in furtherance of the common intention of all'. It is, therefore, clear that a particular criminal act done by an individual in order to constitute a constructive liability against others must be one which is done in pursuance of a common intention as a step-in-aid to attain it or as a means to the end underlying it or must be one which is a link in the chain of acts all originating out of the common intention and culminating in its attainment. Once a criminal act becomes independent of the common intention, though done in pursuance of an intention or giving rise to consequences same or similar in nature as contemplated by the common intention, the rule of constructive liability as laid down under s 34 ceases to operate and others, who are a party to the original common intention, will not be held liable constructively for that criminal act.[53]The essence of joint liability under this section 'is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention'.[54]

55. Meaning and Significance of the Words 'In Furtherance Of'

In the *Oxford English Dictionary* the word 'furtherance' is defined as 'the action of helping forward'. Adopting this definition, Russell says: 'It indicates some kind of aid or assistance producing an effect in the future', and adds that any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony. Thus the driving of a motorcar in order to reach the spot where the felony is to be committed is done in furtherance of the felony; but if while on the way the driver runs over and kills a pedestrian, this collision is merely incidental and the running over of the pedestrian is not done in furtherance of the felony, for the driver did not purposely drive over the pedestrian as a means of getting to his desired destination. If, however, *A*, who wishes to commit a felony involving violence against *B*, is impeded by *X*, and throws *X* aside in order to get at *B* then this attack upon *X* is made in furtherance of the felony. So also, any act of preparation for the commission of the felony is done in furtherance of it.[55]

In a Lahore case, the common intention of the culprits was to commit robbery and in furtherance of that intention different acts were committed by different persons. While *S*, one of the accused had gone to fetch *K* for carrying out that common intention, another accused shot down the deceased who was the son of *K* in furtherance of the same. If was held that *S* also was constructively liable for the murder.[56]

56. Prior Concert and Prearranged Plan is Foundation of Common Intention

A charge under s 34 of IPC presupposes the sharing of a particular intention by more than one person to commit a criminal act. The dominant feature of s 34 is the element of participation in actions. This

participation need not in all cases be by202 physical presence. Common intention implies acting in concert. There is a pre-arranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in s 34 of the IPC . The existence of common intention is to be the basis of liability. That is why the prior concert and the pre-arranged plan is the foundation of common intention to establish liability and guilt.[57] The common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a pre-arranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting attack. It can also be developed at the spur of the moment, but there must be a pre-arrangement or premeditated concert. This being the requirement of law for applicability of s 34, IPC, from the mere fact that the accused 'RP' and 'RY' came and caught hold of the deceased, whereafter 'SY' and 'SL' came with the gandasa (chopper) in their hands and gave blows by means of gandasa, it cannot be said that the accused 'RP' and 'RY' shared the common intention with 'SY' and 'SL'. Consequently, accused 'RP' and 'RY' cannot be held guilty of the charge under ss 302 / 34, IPC but the accused 'SY' and 'SL' did not compute the offence under ss 302 / 34, IPC having assaulted deceased on his head by means of gandasa on account of which he died.[58] There was no evidence of pre-concert or proof of a prior meeting of minds between the appellant and his co-accused, they reached on the spot one after the another. Appellant's shot by gun missed the deceased. His conviction under s 302, IPC read with s 34 was set aside. Appellant accused was convicted under s 307, IPC .[59] Where occurrence had taken place suddenly in the heat of the moment without any provocation, s 34 would not apply.[60]

None of the PWS stated that the appellant accused A2 had pre-mediated with A1 and A3 before the offence was committed. The witnesses admitted that the appellant was not armed with weapon and no overt act was attributed to him. He was coming from a different direction and, therefore, the question of his sharing the common intention was not there. His conviction under s 302, IPC with the aid of s 34, IPC was set aside.[61]

There was no evidence of a plan or prior meeting of minds between the two accused appellants A1 and A2. A1 had assaulted and caused injuries to the PW5, hence his conviction under ss 302 / 34, IPC was altered to one under s 323, IPC . The appellant A2 had assaulted the deceased with a tabbal, and had caused as many as 8 incised wounds on various parts of the body of the deceased, thus, his conviction under s 302, IPC was upheld.[62]203

Criminal Act must be Connected with Common Intention and not Opposed to it

The criminal act for which all the conspirators are sought to be made liable must be connected with the common intention; it must have been done while, or for the purpose of, executing or carrying out the common intention. If it is extraneous to the common intention or is done in opposition to it, or is not required to be done at all for carrying out the common intention, it cannot be said to be in furtherance of it. If *A* and *B* jointly decide to strike *X* then all the striking done by them, whatever be the result, is done in furtherance of it, provided there is nothing unusual or nothing that was not contemplated or anticipated in the striking or the means used for the purpose.[63] Only such acts are not to be deemed to be the acts done in furtherance of the common intention as could not have taken place ordinarily in carrying out of the common intention. Such acts would be mostly unpremeditated ones by some of the persons joining in the criminal act. For such an unpremeditated act of one person, the others cannot be made liable. But there is no justification for others not to be liable for such acts of the other confederates as were likely to be committed in the carrying out of the common intention and which would have been normally foreseen and even contemplated by those persons.[64]

Importance of Facts and Circumstances of the Case

Under s 34, IPC, the question of common intention is one of fact.[65] The facts and circumstances of cases vary and each case has to be decided in view of the actual facts.[66] Kenny in his *Outlines of Criminal Law*,[67] writes: 'The act done must relate to the common design and not totally or substantially vary from it'.

A slight variation will not prevent the act from being in furtherance of the common intention; what is required to prevent that is altogether departing from the agreement or direction. Whether an act is in furtherance of the common intention or not depends upon the common intention and the nature of the act. It is an incident of fact and not of law.[68] It should not be altogether foreign, entirely different, from the aim of the concerted action.[69] Whether the criminal act complained of in any particular case has been done by one or more accused persons in furtherance of the common intention of all, must depend upon the facts of such case.[70]

Pre-meditated Attack

Where it was a case of pre-meditated attack at the instance of the three appellants, the appellant accused R must be deemed to have shared the common intention with the attackers for murder even though the weapon used by him caused no injury. Conviction of the appellant R under ss 302 / 34, IPC was held proper.[71]204

57. A Different Common Intention may Develop while Committing the Crime

The case of *Mukunda Murari Lal v Emperor* ,[72]is distinguishable. There the two accused, who were armed with guns and had plenty of ammunition, entered a shop for the purpose of committing robbery: they were disturbed in their act by a large number of villagers; they decided to retreat and in so retreating they fired a large number of shots and one of the pursuers was killed by one of the shots fired by one of them. It was held that though their primary intention was to effect their escape and not to kill any of their pursuers, still it must be concluded from the circumstances that their intention was to effect their escape even though, for that purpose, it was necessary to shoot any of the pursuers mortally, and that the other accused should be convicted under s 302 read with s 34 or s 114 . The decision is justified because though their original intention was only to commit robbery, the court found that the subsequent intention of the accused was to effect their escape from their pursuers and the shooting was in furtherance of that intention.

Though there may not be a pre-arranged plan to commit a major offence when some men start with a pre-arranged plan to commit a minor offence, their conduct may show that in the course of committing the minor offence, they came to an understanding to commit even the major offence and that therefore, a common intention of committing that offence came into existence. If the major offence was committed in furtherance of this common intention, each one of them will be liable for the offence as if he himself committed it.[73]

Common intention can develop on the spot.[74]

It is not necessary that common intention should exist from the beginning and it can develop at the last minute before commission of the offence.[75]

Three Types of Acts Included in Furtherance of Common Intention

The act done in furtherance of the common intention includes three types of acts:

(i) the act which is directly intended in between all the confederates;
(ii) the act which the circumstances of the case leave no doubt to conclude that though the act was not directly intended in between them it was taken by all of them as included in the common intention; and
(iii) the act which any one of the confederates commits in order to avoid or remove any obstruction or resistance put up in the way of the proper execution of the common intention.

In doing the third type of the act the individual doer may cause a result not intended by any other of the confederates.[76]

58. 'Common intention'--Meaning of

The section requires that there must be a general intention shared by all the persons concerned in the offence, that is to say, when several persons unite with a common205 purpose to commit a criminal offence, even those who assist in the accomplishment of that object would be equally guilty. The foundation of the constructive liability is, therefore, the common intention animating the accused to the doing of the criminal act, and the doing of it in furtherance of that intention.[77]The essence of the liability under this section is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the common intention.[78] What is meant by 'common intention' is the 'community of purpose' or 'common design' or 'common intent'. It will not be wrong to interpret the words 'common intention' to mean 'community of purpose', 'common design' or 'common enterprise'.

Common intention implies a pre-arranged plan or preconcert, though such intention can develop at the spot just before the overt act. Common intention cannot be limited to *mens rea* or guilty mind necessary for the constitution of the crime actually committed. Common intention should not be confused with the intention that is an ingredient of many of the offences defined in the IPC . The intention, is the intention formed by a person himself committing the offence. The common intention is the common design and common intent of two or more persons acting together. Common intention may be intention to do a particular criminal act or bring about a particular result not necessarily the act or the result which constitutes the crime charged. When several persons act in furtherance of a common design, each is responsible for the doing of others provided what the others actually do is something which may have been in the contemplation of all at the time when the common intention was entertained by them.[79]

Common Intention is Akin to Motive or Object

'Common intention' as pointed out, is not to be confused with the intention. It is more akin to motive or object. It is remoter than the intention with which each act included in the criminal act is done; it is what the persons jointly decide to achieve. It is the reason or object for doing all the acts forming the criminal act. The common intention may be to do a certain act regardless of the end and the means, it may be to achieve a certain end regardless of the means, or it may be to do an act with certain means regardless of the end. These may be common intention in which only the doing of a certain physical act is fixed and the end of the means is not decided upon.[80]

Common Intention to be Shared by all the Members

In order that an intention should be common, it should be attributable to every member of the group. This is also clarified by the fact that the section itself characterises the common intention to be 'the common intention of all'. The section does not ignore the intention of the individual offender. It only adds some more persons in the commission of the offence and postulates that the same intention jointly existed in the mind of every individual member of the group as well. It may be that the intention is alleged to be common. But that only means that every member206 shared it along with others and not that some members shared it and others did not.[81] Where all the accused persons belonged to one family and there was evidence that each one participated in the assault, held that they shared common intention in assaulting the deceased.[82]

Where participation of the accused in the crime is proved, but common intention is absent, s 34, IPC would not be attracted.[83]

Where the accused no. 1 came to the house of the deceased and gave an axe blow to him, accused nos. 2 and 3 who were bare handed and caught hold of the deceased when the accused no. 1 inflicted fatal blow on the deceased, it could not be said beyond reasonable doubt that they shared common intention with the accused no. 1 to commit the murder of the deceased.[84]

59. Common Intention Implies Preconcert And Pre-arranged Plan

It is one of the settled principles of law that the common intention must be anterior in time to the commission of the crime.[85] In the leading case, *Mahboob Shah v Emperor* ,[86]their Lordships of the Privy Council held that common intention within the meaning of this section implies a pre-arranged plan, and that to convict an accused of an offence, applying this section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. And this view has been followed in subsequent cases in India.[87] It is thus well established that a common intention presupposes prior concert. It requires a pre-arranged plan, as before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all.[88] Accordingly, there must have been a prior meeting of minds.[89] There was land dispute between two brothers. The accused assaulted the victim with chura, his minor son *i.e.* co-accused, caught hold of the victim. Evidence was lacking to show that there was prior meeting of minds between the accused and his minor son co-accused, thus, the conviction of the co-accused minor son under s 300 read with s 34, IPC was not proper, and was set aside.[90]207

All the three accused appellants along with one more person acquitted by the Courts below were lying in wait near the spot for the deceased. All of them belaboured the deceased and continued their assault and aggression even when the deceased had fallen to the ground on account of the head injuries sustained by him. The appellants fled from the place of occurrence only when they felt that the deceased was dead. All these circumstances left no manner of doubt that the appellants shared the common intention to kill the deceased and that they had acted under a premeditated plan. Accused appellants were convicted under s 302 read with s 34, IPC .[91]

If there is no evidence of any act or conduct on the part of the accused from which an inference of the pre-arranged plan to commit the offences may be drawn, the mere presence of all the accused on the spot at the time of the commission of the offence is not enough to prove a common intention to commit the offence and this section will have no application.[92]But this does not mean either that there should be confabulation, discussion and agreement in writing or by word, nor that the plan should be arranged for a considerable time before the doing of the criminal act.[93]

> A pre-arranged plan does not mean that there should be a conference at which resolutions are moved and a decision arrived at to commit a particular crime. All that appears necessary in such circumstances is that before the actual criminal act is performed, an agreement, not necessarily vocal, should be arrived at amongst those who participate in the crime.[94]

The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as, *e.g.*, when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds; there is a pre-arranged plan however hastily formed and rudely conceived. In pre-arrangement, there must be a premeditated concert.[95]

To constitute common intention it is necessary that the intention of each one of them should be known to the rest of the accused. Mere participation in the crime with others is not sufficient to attribute common intention to one of others involved in the crime.[96]

There was no evidence of pre-plan, accused no. 1 had fired shot at the deceased, accused nos. 2 and 3 had not fired at the deceased. Accused nos. 2 and 3 were acquitted of the charge under ss 302 / 324, IPC .[97]

In the case in hand, the prosecution led the evidence that the accused I slapped PW1. He had not participated in the crime nor exhorted to accused H to give knife blows to the deceased. He only caught hold of PW1 from behind and exhorted him to cause fatal blow on the person of PW1. Thus, the participation of accused I while causing injuries by knife blows to deceased was not proved. He did not participate in208 giving knife blows to the deceased. There was nothing in the evidence to show that due to instigation of accused I, accused H gave knife blows on the person of the deceased.

Held, it could not be inferred that accused I had a common intention to cause the death of the deceased; thus, his conviction under ss 302 / 34, IPC recorded by the Sessions Judge was set aside.[1]

Intention of one should be known and shared by the other

In order that intention may be common, the test which is applied is whether the intention of one was known to the other and shared by that other.[2] To constitute common intention it is necessary that the intention of each one of them is known to the rest of them and be shared by them.[3] Appellant accused held the hands of the deceased, while two other accused assaulted the deceased with deadly weapons causing death. There was no evidence of prior meeting of mind and pre-planning between the appellant and the other accused. Sudden quarrel was the reason of assault. The appellant accused could not be attributed with knowledge that other accused persons would assault the deceased on the vital parts of the body causing death. Appellant accused was convicted for his individual act under s 323, IPC .[4]

60. Common Intention may Develop on the Spot

That the common intention referred to in s 34 of the IPC presupposes a prior concert, a pre-arranged plan, *i.e.*, a prior meeting of minds, does not mean that there must be a long interval of time between the formation of the common intention and the doing of the act.[5] Common intention can be formed at the spur of the moment.[6]

The participators may concert immediately before the commission of the offence or even at the time of the commission of the offence.[7]But the pre-concert or the meeting of minds should be distinct from the act itself.[8]

The common intention or state of mind and the physical act, both may be arrived at the spot. Common intention is not alike or identical to *mens rea*. The latter may be co-incidental with or collateral to the former but they are distinct and different.[9]

Common intention may be conceived of, immediately before or at the time of the offence,[10] or as soon as the people get together,[11] or in the course of occurrence.[12]209 The Judicial Committee of the Privy Council in the case of *Mahboob Shah v Emperor* ,[13]did not lay down that a certain interval should elapse between the formation of a pre-arranged plan and the doing of the criminal act and did not negative the formation of a pre-arranged plan just a moment before the doing of the criminal act.[14] A preconcert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation.[15] Common intention may be formed just before or even during the course of the assault.[16] Common intention can develop even during the course of occurrence.[17] Common intention can develop at the spur of the moment. Therefore, what was the common intention of the accused can only be adjudicated after the entire trial is complete. The trial Court on the facts of the case was justified in framing charge under s 34 .[18] The criminal intention need not be present to start with, and it may be developed in the course of events; and may be inferred from the conduct of assailants.[19] The common intention to commit an offence graver than the one originally designed may develop during the execution of the original plan, *e.g.*, during the progress of an attack on the person who is intended to be beaten up but the evidence in that behalf should be clear and cogent for suspicion, however strong, cannot take place of the proof which is essential to bring home the offence to the accused.[20]

There was cogent evidence to hold that even at the spot, common intention had developed amongst the accused persons. The participation of all the accused persons in the offence was found to be doubtful. Thus, conviction under ss 302 / 34, IPC was not proper.[21]

Where the deceased himself was aggressor, took out a danda and had given danda blows to the five boys, there was no common intention to cause any injury till the deceased got down and gave danda blows to the five boys. Thereafter, the acts of the assailants were spontaneous. At the most, there could be common intention to cause serious injuries on the person of the deceased but there was no

common intention to cause injuries with the intention or knowledge to cause death of the deceased.[22]

Common Intention in Cases of Sudden Quarrel and Fight

Normally, this section will not apply, if the fight has begun suddenly. In such cases every person who takes part in the fight will be taken to be responsible for his210 individual acts. But where there is proof that some of the persons taking part in the fight, which has suddenly arisen, go and jointly commit an offence and there are indications that their joint object was to commit that offence, there is no bar for the courts to hold that they had formed a joint intention there and then to do the act of violence.[23]In cases where there is a sudden quarrel without any premeditation, where there is no previous design for killing or for murder or even for assault, but something happens and tempers flare up and then several persons engage in a transaction, which ends in an offence or offences, it may not be easy to find if there was any common intention and, if there was, what that common intention was. In such cases there is commonly a cry for assistance or a call for assault or the doing of a certain act which is criminal. Now the person who asks for assistance or who gives a certain direction or a certain order, cannot possibly be sure of the reaction of others. All those who come may come with different designs and different intentions. If they immediately engage in the transaction, it will be an extremely difficult task to discovery whether they had any common intention from their acts alone. They do not have any chance of disclosing their mind to the others.[24]

Where in a case of sudden fight the common intention of the party of the accused appears to have been merely to abuse and possibly to use fists on the opposite party for an alleged insulting behaviour on their part, and there was mutual exchange of abuse before the fight ensued, a common intention to commit a murder cannot be inferred, even though death is caused in the course of the fight.[25]

Where the accused P mounted the assault all of a sudden by snatching the axe from the deceased before anybody could perceive or think about such an act by a person unarmed and the co-accused in quick succession inflicted the second blow on a non-vital part of the body of the deceased, held the co-accused P would not be liable under s 302, IPC inasmuch as he cannot be said to have shared the common intention with P to cause murder of the deceased. He may be held guilty for his individual act alone and not by aid of s 34, IPC .[26]

In this context the undermentioned cases can be referred to.[27]

61. Presumption of Common Intention

It is true that presumption of common intention is subject to the same restrictions as other presumptions and it must not take the form of a bare surmise, conjecture or suspicion. Inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. A common intention must be anterior in time to the commission of crime showing a pre-arranged plan and prior concert, and though, it is difficult in most cases to prove the intention of an individual, it has to be inferred from the act or conduct or other relevant circumstances of the case. No hard and fast rule can be laid down in this regard and the question whether inference of common intention can be drawn depends upon211 facts and circumstances of each case. Sometimes this inference can be gathered by the manner in which the accused persons arrived on the scene of occurrence and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them, the others to assist those causing the injuries, the concerted conduct subsequent to the commission of the offence for instance that all of them left the scene of occurence together and other acts which all or some may have done as would help in determining the common intention. In other words, totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence with which they could be connected.[28]

In *Mamand v Emperor* ,[29] the existence of common intention was presumed as one of the persons had strong grounds for entertaining feelings of enmity against the deceased, the other conspirators were related to, or connected with him, all lived together and all of them ran away together after the

assault. Their Lordships did not ascertain what was the exact common intention formed by the three accused but concluded that the murder was committed in furtherance of it.

In a case it has been held that 'when several persons inflict numberless injuries, the common intention should be safely presumed'. What is meant, perhaps, is that when several persons inflict numerous injuries, a common intention may safely be presumed. In a sudden altercation between the complainant and one of the three accused, all the accused beat the complainant in a fit of anger and without any pre-arranged plan, with the result that one of them caused a grievous hurt to the complainant, and there was no evidence as to who caused the grievous hurt. It was held that s 34 was inapplicable and all the accused could be convicted under s 323, but none under s 325 .[30]

Presumption of Common Intention of Partners

Where the knowledge of the transaction is admitted by the four partners and they are beneficiaries of the wrongful gain, merely because of the contention that some documents have been signed by one of them, would not be sufficient to absolve the remaining partners of the liability that arises where the offence is held to be established. It is true that there may be cases where a particular partner is able to demonstrate to a court that he had no knowledge of a transaction or for that matter, that he was opposed to a particular course of action but that will have to be brought on record by the defence and cannot merely be canvassed on the basis of a vague statement under s 313 of the Cr PC to the effect that a particular partner was looking after the transaction.[31]

Common Intention must be known and Shared by All

To invoke the aid of s 34 of the IPC successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all.[32] Common intention does not mean similar intention of several persons. To constitute common intention it is necessary that the intention of212 each one of them be known to the rest of them and be shared by them.[33] The section requires that there must be a general intention shared by all the persons concerned in the offence.[34] In order that an intention may be said to be common, it should be attributable to every member of the group. This is also clarified by the fact that the section itself characterises the common intention to be the 'common intention of all'. This clearly means that every member shared the intention along with others, and not that some members shared it and others did not.[35]To apply the section it must be shown that all the persons who did the 'criminal act' intended that it should be committed.[36]

Where a charge against police officers was that they killed the occupants of a speeding vehicle by chasing them, there was no evidence showing that there was common intention to kill when the police officers left the police station for chasing the vehicle, the police officials were armed with revolvers and constables with rifles and police started indiscriminate firing at a particular place where vehicle of deceased was found stationary. The postmortem report showed that the deceased were killed on account of firing from rifles. However, the vehicle in which the deceased were moving was found to have been fired at, by revolvers. On these facts it was held that all police personnel developed common intention to kill at a particular place and were liable to be convicted under ss 300 / 34, IPC .[37] Where the three accused persons came to the victim's place on a motorcycle and two of them threw acid on the victim, thereafter all the three accused attacked the victim by knives. Evidence in this aspect was found un-impeachable. Acid burn injuries were also found on the person of two of the accused persons. Conviction of the accused under ss 300 / 34 was held proper.[38] Where the accused had borrowed money from the deceased and had failed to return the same, the deceased went to the house of the accused and demanded money. The accused armed with a gun, alongwith the co-accused came out of his house and the demand by the deceased led to exchange of words between parties followed by grappling between the accused and the deceased. The co-accused also took part in assault and after holding deceased by his hairs, gave *lalkara* to the accused to fire a shot. The death of the deceased was caused by a gunshot wound on the chest. The co-accused can be said to have shared common intention to cause death of the deceased and his conviction under ss 302 and 34 of the IPC was maintained by the Apex Court.[39]

The three accused G, K and L armed with rods appeared at the scene at an odd hour. Accused G and K

caught hold of the deceased tightly and accused L hit her with iron rod, causing injuries leading to death. There was union of minds of the three accused G, K and L to commit the offence, thus, all of them were held liable to be convicted with the aid of s 34, IPC .[40]213

Effect of Common Intention not shared after a Stage

For the application of this section the common intention must be shared by all throughout the enterprise. In *Mutukdhari Singh v Emperor* ,[41]*A* was keeping watch over his master's crop. The four accused *B*, *C*, *D* and *E*, who had formerly an interest in the land, went to it armed and proceeded to cut the crop. *A* remonstrated, but seeing that the accused were armed, ran away, *B* and *C* pursued and assaulted him. *D* and *E* also joined in the pursuit of *A*, but they soon stopped and did not go up to *A* or strike him or molest him. It was held that *D* and *E* could not 'with the aid of this section' be held liable for the assault and the injuries caused by *B* and *C*. Similarly, where the two accused, namely *NH* and *NY* took the deceased to their house and caused 13 incised wounds. The accused *NH*, however, left the spot before fatal injuries were inflicted by accused *NJ*. It was held that the accused *NH* can be held guilty only for sharing common intention of causing fatal injuries and not for murder.[42]

Where a gang of persons making preparations to commit dacoity were discovered and pursued by a body of villagers who succeeded in arresting two members of the gang, and just about this time one of the dacoits at large fired his gun and killed one of the pursuing party, it was held that inasmuch as the separation of the two accused from the gang was prior to the murder, neither s 149 nor s 34 applied, and the members arrested could not be held liable for a murder committed by a member of the gang to which they no longer belonged.[43]

Where the common intention of all the accused extended only to the causing of simple hurt but one of them exceed that common intention by causing grievous hurt, others cannot be held guilty under s 325 .[44]

62. Same or Similar Intention not to be Confused with Common Intention

In order to constitute a constructive liability under this section, the intention of the different confederates should not only be same or similar, but also 'common' between them, though the acts done by each one of them in pursuance of the common intention may either be the same, similar or diverse.[45] Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet they may not have the common intention required by the section if there was no prior meeting of minds to form a pre-arranged plan. In a case like this, each would be individually liable for whatever injury he happens to cause, but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one, he cannot be convicted of the murder however clearly an intention to kill could be proved in his case.[46]Section 34 uses the words 'in furtherance of the common intention of all'. It does not say 'the common intentions of all' in the plural which might mean similar intentions. Nor does the214section say 'an intention common to all' which might mean same intention. Care must, therefore, be taken:

> Not to confuse same or similar intention with common intention; the partition which divides 'their bounds' is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.[47]

In *Gajraj Singh v Emperor* [48] it was observed:

> Persons who have a common intention must have the same intention. 'Same intention' must, to make it 'common intention', be indicated in some way by words or acts between the persons who share it. Such indication may be inferred from circumstances.

Common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan and that must mean a prior meeting of minds. Cases to which s 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different, may vary in their character, but they are all actuated by the same common intention. The common intention required by s 34 is different from the same intention or similar intention.[49] There is a material difference between the sharing of similar intention and common intention. Section 34 , IPC can be attracted only if the accused share a common intention and not where they share only similar intention.[50] A similar intention would not be enough to bring the case with the meaning of s 34 . Suppose several persons, each acting independently of the other, intend to commit a crime and all of them choose the same moment and commit the crime which each of them intended separately; there would be no common intention in such a case.[51] In order to attract the provisions of this section it is not enough that every accused possessed the same intention.[52] Common intention does not mean similar intention of several persons. To constitute common intention it is necessary that the intention of each one of them be known to the rest of them and be shared by them.[53] Whether in a situation all the individuals concerned therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and thereby intended by all of them, is a question that has to be determined on the facts.[54] Where five men assault at one and the same time, each of them seeing that the other four are assaulting also, the assault may be regarded as a common one though the impulse to assault may have arisen independently.[55]

Acts of all the accused need not be same or identical, but must be actuated by some common intention and even if the accused has not caused any injury to the deceased, but some overt act is shown to have been committed by him in furtherance of the common intention to cause death, he would be liable to be convicted under s 302,215IPC with the aid of s 34, IPC .[56] In the instant case, all the three accused appellants came together to the place of occurrence, they attacked the deceased concertedly, one of them dealing the dagger blow on the head of the deceased which caused death. Thus the accused appellants came with preplanning and with a meeting of minds to commit the offence. There was active participation by all the accused persons in attacking the deceased. All the three appellants were convicted under s 302, IPC read with s 34 .[57]

63. Does 'Common Intention' Mean *Mens Rea* or Guilty Knowledge or Intention to Commit the Particular Offence Committed?

Taking up the question of knowledge first, s 34 is restricted to common intention and does not embrace any knowledge.[58] Knowledge that an offence is likely to be committed is not what is contemplated in this section.[59] In *Sanlaydo v Emperor* ,[60] Dunkley J, (with whom Cunliffe J concurred), observed:

> It seems to me that it would be going very far to hold that, because a man takes part in a robbery in which some of the robbers are armed with deadly weapons, it can be presumed that he thereby becomes a party to an intention to kill any person who may happen to resist them in carrying out the robbery. Of course, when a man accompanies robbers, who are armed with such weapons, he must know it to be likely that a murder will be committed if the attempt to rob is resisted, but further than that, in my opinion, it is not safe to go. Knowledge is not the same thing as intention.

Knowledge of a likely result does not amount to an intention to bring about that result; knowledge of the likely result and the actual result may justify the determination of the intention of the actual doer, but are not the right factors to determine the common intention of others who had made a common cause with the actual doer and whose liability for the actual acts of the doer will be dependent on the question whether the actual acts done were done in furtherance of 'the common intention of all or not'.[61]

As for intention, it has been held in some cases that 'common intention' in s 34 means the *mens rea* or

mental ingredient required by law to constitute the very offence which has, in fact, been committed, and must therefore, embrace the results or consequences of the physical act of the accused, and further that it means intention in the narrow sense as opposed to mere knowledge that certain consequences may follow.[62] But if 'common intention' in s 34 be limited to *mens rea*, or criminal intention or knowledge, necessary for the commission of the crime actually216 committed, the provisions of ss 35 and 37 - 38 of the IPC would become unworkable. It is no doubt true that a certain kind of common intention, *i.e.*, to co-operate in the doing of an act animating all the doers of the fractional acts is necessary for the working of the provisions of s 35 and 37 - 38, yet the common intention within the meaning of those sections is different from an intention common to all within the meaning of s 34 . The observations of the Judicial Committee of the Privy Council in the case of *Barendra Kumar Ghose*,[63]respecting the scope of s 37 as well as respecting a 'criminal act' in s 34, would come in conflict if 'common intention' is understood in the sense of *mens rea* which makes the act an offence. Again the expression 'where a criminal act is done' as used in s 34 is also applicable to the criminal act which is punishable as an offence under this Code without the requirement of any *mens rea* or guilty knowledge or intention, *e.g.*, a public nuisance as defined in s 268 and made punishable in s 290 . Section 34 is applicable to such offence as it is applicable to any others.[64]Lastly, the intention which is an ingredient of many of the offences, is the intention formed by a person himself committing the offence; it is a personal matter, it is the intention immediately behind the act done by the doer. On the other hand, 'common intention' is the common design or common intent of two or more persons acting together.[65] The principle which the section embodies is participation in some action with the common intention of committing a crime; once such participation is established, s 34 is at once attracted.[66] It is not necessary that the common intention must be to commit the very crime which is actually committed.[67] In order that s 34 may be applicable, there must be a common intention to commit some crime, that is, something punishable under the IPC or any other law; if that is so, everyone would be liable for the result of their joint act in committing the crime' if the result was such as was likely to follow from their joint act in committing the crime intended and was not foreign to their common intention; and it is not necessary in order that s 34 should apply that the common intention should have been to cause the particular result which came about in committing the crime.[68]

It is not necessary that in case of a gangrape, the victim should have been raped by all the accused persons. If she is raped by one or more in a group of persons, each of the persons shall be 'deemed to have committed gangrape', provided those persons are acting in furtherance of their common intention. The common intention of all the five accused persons can be gathered from their conduct, prior to the incident and during the course of the incident.[69]

64. Application of Section 34 to Cases under Section 304, Part II

The question may arise whether common intention could be attributed for an act which does not require intention but only knowledge. An offence punishable under the second part of s 304 of the IPC does not require any intention to cause death or intention to cause such bodily injury as is likely to cause death. What is required is217 only knowledge of the likelihood of death. That does not mean that for that reason, s 34 is excluded. Knowledge is only regarding the possible result of the act. Every act is done with an intention, which can take in common intention also. An act done with common intention even if it is done without the intention to bring about the particular result but only with the knowledge of the likelihood of that result happening can also attract s 34 . Each of the persons could have had such knowledge when they were doing the act. Common intention required for the application of s 34 is only the common intention of perpetrating the act. When common intention along with knowledge available is taken into account, s 34 is attracted.[70]

It has been held in some cases that this section, which is based on a common intention, cannot possibly be used with the second part of s 304 which expressly includes intention.[71]But although to constitute an offence under s 304, Part II, there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act they are jointly doing is one that is likely to cause death but have no intention of causing death, yet they may certainly have the common intention to do that act.

No one will dispute that such an act is a criminal act. Clearly, therefore, s 34 can apply to a case under s 304, Part II.[72] In *Ibra Akanda v Emperor* ,[73] Lodge J, was of the view that 'there is no difficulty in applying ss 34 - 35 to culpable homicide punishable under s 304(2) ',[74] and Das J, was of the view that s 34 can in no case be read with Part II of s 304 .[75] Khundkar J, to whom the case was referred did not wholly agree with either and held that ' s 34 can be applied to an offence punishable under s 304, Part II, in some cases and not all'.[76] Following this it has been held by a Full Bench of the Allahabad High Court that if the common intention of s 34 is not necessarily confined to an intention to commit the very crime with which the accused are charged, a number of persons may act in pursuance of a common intention with this result that the doer of a fractional part would, in law, be deemed to be the doer of the whole and, if any or all persons participating in the action is or are shown to have a knowledge that the act done either singly or jointly with others is likely to bring about death, every such person can be punished under s 304, Part II. There is no possible conflict between the kind of 'knowledge' contemplated by s 304, Part II and the kind of 'common intention' contemplated by s 34 in pursuance of which the group of persons in question started the operations. If any one or more of them is proved to have the requisite kind of intention, *e.g.*, the intention expressed in the earlier part of the s 299, he will be punishable either under s 302 or under s 304, Pt I, as the case may be. If, however, there is only guilty 'knowledge' as distinct from guilty 'intention', *i.e.*, knowledge that the act which is being performed may result in death, he will be punishable under Part II of s 304 . There is no difficulty in applying s 34 so interpreted to a case which falls under218 s 304, Pt II. The common intention in the one case and the knowledge that the act is likely to bring about death in the other, do not come into conflict at all. The result is that it is possible to convict an accused person of an offence under s 304, Pt II read with s 34, provided the court is of the opinion that each person taking part in committing the crime in furtherance of the common intention of all had knowledge that their act was likely to cause death.[77] And this is now the prevailing view.[78] In a case where one act of the two accused caused injuries to the deceased by a sharp-edged weapon and the other by a blunt-edged weapon, and the assault on the deceased by them was with prior concert, the acquittal of the latter was held improper. In such a case, conviction of the accused who had caused the injury that was likely to result in death, for having committed culpable homicide not amounting to murder punishable under ss 304(2) and 323 and the other accused under s 304 Pt II read with s 34 would be proper.[79]

65. Single Injury - Common Intention not Inferred

Where only accused B inflicted fatal injury on the deceased, common intention was not inferred. Other accused persons were not convicted under s 302, IPC with the aid of s 34, IPC .[80]

[III] PROOF AND INFERENCE OF COMMON INTENTION

66. Proof Required for Application of Section 34

In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s 34, be it pre-arranged or at the spur of the moment; but it must necessarily be before the commission of the crime.[81] Proof of participation by acceptable evidence in certain circumstances would lead to a conclusion that the accused had a common intention to commit the offence. Presence or absence of community of interests may not be of much significance. Each case, however, has to be considered on its own merit. Facts of each case may have to be dealt with differently.[82]

Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances.[83]219

The section cannot be pressed into use unless there is sufficient evidence to establish common intention.[84] The court must record a finding as to the common intention.[85] Different High Courts have

expressed different but almost similar views in this respect. In *Santosh v State of Kerala* ,[86] the Kerala High Court has stated that common intention is seldom capable of direct proof, it is almost invariably to be inferred from proved circumstances relating to the entire conduct of all the persons and not only from the individual act actually performed. The criminal act actually committed would certainly be one of the important factors to be taken into consideration but should not be taken to be the sole factor. Common intention can always be presumed from proved circumstances, but the presumption is subject to some restrictions as other presumptions; it must not take the form of a bare surmise or conjecture or suspicion. There must be data from which it can be inferred and the presumption in favour of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case. It must be inferred with the least amount of flights of fancy.

The Orissa High Court has held that the common intention referred to in s 34, presupposes a prior concert, a pre-arranged plan, *i.e.*, a prior meeting of minds. This does not mean that there must be a long interval of time between the formation of the common intention and the doing of the act. It is not necessary to adduce direct evidence of the common intention. Indeed, in many cases, it may be impossible to do so. The common intention may be inferred from the surrounding circumstances and the conduct of the parties.[87]

The common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the nature and injury caused by one or some of them. Therefore, for arriving at a conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the totality of circumstances must be taken into consideration.[88]

The Allahabad High Court has expressed the view that undoubtedly it is a difficult thing to prove the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. But however difficult may be the task, the prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered. In most cases it has to be inferred from the act or conduct or other relevant circumstances of the case in hand. This reference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them.[89] The Patna High Court has held that common intention cannot be proved by actual fact. It has to be inferred from the subsequent conduct of the accused persons and their220 previous behaviour.[90] The Rajasthan High Court has also taken a almost similar view and it has been held that common intention implies a pre-arranged plan and acting in concert. Direct evidence relating to formation of common intention is seldom available and it is generally inferred from the acts and conduct of accused persons and such other relevant circumstances. The existence of common intention is, thus, largely inferential from surrounding circumstances and antecedents and subsequent conduct of the culprits. The inference of common intention should never be raised unless it is a necessary inference deducible from the circumstances of case.[91]

The common intention can be inferred from the circumstances of the case and can also be gathered from the circumstances as they arise even during the course of an incident.[92]

67. Omission of Name of Accused in FIR

Where the name of the accused was not mentioned in the FIR, he was acquitted of the charge under s 302 read with s 34 .[93]

68. Difficulty in Procuring Direct Evidence to be Inferred in most Cases

As has often been observed, it is difficult, if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.[94] Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the

case and the proved circumstances.[95] When the common intention is formed by conduct, obviously it can be proved only from the conduct of all the persons. Direct evidence to prove the formation and nature of the common intention is possible in theory only when it is formed in writing or by word of mouth, but in practice it is difficult to procure. Conspiracies are not hatched within the sight or hearing of others. Presumption of 'common intention' is subject to the same restrictions as other presumptions. It is not the form of a bare surmise or conjecture or suspicion. There must be data from which it can be inferred. When the nature of the 'common intention' is to be inferred it must be inferred with the least amount of flights of fancy. It does not matter whether the inference is to be drawn in favour of the prosecution or the defence. In either case there must be evidence to support it. As stated above, it is not essential in every case to find out the exact nature of the 'common intention'. If the 'common intention' is formed by or to be inferred from conduct, the court can infer only a general outline of the common intention and not its details.[96]221

In *Jogendra Singh v State of Haryana* ,[1] the Supreme Court has held that it is settled law that intention of the individual has to be inferred from the overt act or conduct or from the relevant circumstances. Therefore, the totality of the circumstances have to be taken into consideration to arrive at a conclusion to see whether the accused had a common intention to commit the crime.

The two accused along with others came fully armed with iron rods and both of them gave two blows each on the vital part of the body *i.e*. head and forehead which proved fatal for the deceased. Their conviction under ss 302 / 34 was held proper.[2]

59 *Dileep Kumar v State of Kerala* (1985) Cr LJ 114 (Ker), (1984) Ker LJ 672 .

60 *Popat alias Bhujangrao Bhausaheb Mahurkar v State of Maharashtra* 2010 Cr LJ (NOC) 1276, 2010 (2) Bom CR (Cri) 518, 2010 (3) All MR (Cri) 2060 .

61 *Munnilal v State of MP* 2009 Cr LJ 1590, p 1592, AIR 2009 SC 1759, 2009 (3) SCC 439 .

62 *Nepal Ghosh v State* (1992) 1 Crimes 833, p 837 (Cal)(DB).

63 *Harihar Singh v Emperor* AIR 1926 Pat 182, p 183-84 .

64 *Sunny Kapoor v State (UT of Chandigarh)* 2006 Cr LJ 2920 (SC), AIR 2006 SC 2242, 2006 SCC (Cri) 522 .

65 *Hari Singh & Anor v State of Rajasthan* AIR 1997 SC 1505, (1997) Cr LJ 733 (SC) .

66 *Mukund alias Kundu Mishra & Anor v State of Madhya Pradesh* AIR 1997 SC 2622, (1997) Cr LJ 534 (SC) .

67 *Rotash v State of Rajasthan* 2007 Cr LJ 758, p 761 (SC), 2007 (50) All Ind Cases 374, 2007 (2) SCC (Cri) 382, 2006 (13) Scale 186 .

68 *State of UP v Sahrunnisa* AIR 2009 SC 3182, 2009 (9) Scale 170, 2009 Cr LJ 4151 (SC) .

69 *Kamal Murmu & Anor v State of West Bengal* AIR 1997 SC 3802, (1997) Cr LJ 4411 (SC) .

70 *Ram Naresh v State of UP* 2009 Cr LJ (NOC) 304, 2009 (1) All LJ 218 (All) (DB) .

71 *Raja Hiralal Boyat v State of Maharashtra* 2010 Cr LJ (NOC) 538 (Bom) (DB).

72 *Satish Kumar v State of Andhra Pradesh* 2009 Cr LJ 1099, p 1103 (AP) (DB) .

73 *Sunny Kapoor v State (UT of Chandigarh)* 2006 Cr LJ 2920, AIR 2006 SC 2242 ; *Lakhma v State of Rajasthan* (1983) Raj LW 593, (1984) 1 Cr LC 50 (Raj) (DB) ; *Rajeev Lochan v State of Madhya Pradesh* 2011 Cr LJ 631, p 637 (MP) ; *Pasupulati Siva Ramkrishna v State of AP* 2014 (137) AIC 129 (SC), (2014) 5 SCC 369 ; *Ram Adhar v State of Uttar Pradesh* 2009 Cr LJ (NOC) 568, 2009 (2) All LJ 485 (All) (DB) .

74 *Syed TYOUSUF Hussain v State of Andhra Pradesh* 2013 Cr LJ 2172, AIR 2013 SC 1677, 2013 (5) Scale 346, (2013) 4 SCC 517 .

75 *Suresh & Anor v State of Uttar Pradesh* (2001) Cr LJ 1462 (SC) .

76 *Rambilas Singh v State of Bihar* AIR 1989 SC 1593, (1989) SCJ 280, (1989) SCC 659 (Cr), (1989) 2 JT SC 101, (1989) All

WC 657, (1989) 15 All LR 115 (Summary) ; *Pappu Yadav v State of Bihar* 2015 (149) AIC 322 (Jhar) .

77 *State of Rajasthan v Manoj Kumar* 2014 Cr LJ 2420, p 2423, 2424 (SC), (2014) 2 SCC (Cri) 702, (2014) 138 AIC 261 (SC) ; *Munshi Ram v Delhi Administration* AIR 1968 SC 702, 1968 Cr LJ 806 **referred to**; *Joginder v State of Bihar* AIR 1971 SC 1834, (1971) 3 SCC 449 .

78 *Bhaktu Gorain v State* 2010 Cr LJ 4524, p 4533, 4534 (Cal) (DB) (Common intention proved though overt act not attributed, accused appellants convicted under ss 302 / 34, IPC).

79 *Girind Singh Yadav v State of UP* 2008 Cr LJ 1978, p 1983 (All) (DB) .

80 *Chaman v State of Uttarakhand* 2009 Cr LJ 978 (SC), AIR 2009 SC 1036, (2008) 5 Scale 385 ; *Anil Sharma v State of Jharkhand* (2004) 5 SCC 679 ; *Harbans Kaur v State of Haryana* (2005) 9 SCC 1951 ; *Amit Singh Bhikamsingh Thakur v State of Maharashtra* (2007) 2 SCC 310 ; *Sewa Ram v State of UP* 2008 Cr LJ 802, p 805 (SC), 2007 AIR SCW 7797 . **See also***State of Sikkim v Rakesh Rai* 2012 Cr LJ 2737 (Sikk) (DB) .

81 *Balwant Singh v State of Punjab* 2008 Cr LJ 1648, p 1650 (SC), AIR 2008 SC 1243, 2008 AIR SCW 1253, 2008 (2) Scale 247 .

82 *Bengali Mandal v State of Bihar* 2010 Cr LJ 1420 (SC), AIR 2010 SC 686, 2010 AIR SCW 877, (2010) 2 SCC 91, 2010 (1) Scale 182 .

83 *Jumman v State of Madhya Pradesh* 2013 Cr LJ 697, p 701, 702 (Chh .) (DB).

84 *Tukaram Ganpat Pandare v State of Maharashtra* AIR 1974 SC 514, (1974) Cr LJ 469 (SC) .

85 *Ramaswamy Ayyangar & Anor v State of Tamil Nadu* AIR 1976 SC 2027, (1976) Cr LJ 1562 (SC) .

86 *Laxmi Devi v State* 2011 Cr LJ 3515, p 3526 (Del) (DB) (Co-accused prevented the parents of the deceased from rescuing their son); *Kishore Eknath Nikam v State of Maharashtra* (2006) 10 SCC 666, 2006 AIR SCW 5477, 2007 Cr LJ 1007 .

87 *Kantiah Ramayya Munipall v State of Bombay* AIR 1955 SC 287, p 294 ; *Bijay Singh Dangal Singh v State of Madhya Bharat* AIR 1956 MB 170 ; *Ramchand v State* AIR 1956 MB 262 .

88 *Kalayan Singh v State of Madhya Pradesh* (1994) 3 Recent CR 49 (MP) .

89 *Joginder v State* 2010 Cr LJ 1770, p 1787 (Del) (DB) .

90 *Satya Prakash v State of MP* 2010 Cr LJ 4562, p 4566 (Chh) (DB) .

91 *Fulchand alias Fulya v State of Maharashtra* 2008 Cr LJ (NOC) 177, 2007 (6) AIRBOM R 664 (Bom) (DB) .

92 *Lugga Singh v State of Punjab* 2008 Cr LJ 90, p 92 (P&H).

93 *Raju v State of Chhattisgarh* 2014 Cr LJ 4425, p 4430 (SC), (2014) 9 SCC 299 .

94 *Pappu Yadav v State of Bihar* 2015 (149) AIC 322 (Jhar) (DB).

95 *Goudaxppa v State of Karnataka* 2013 Cr LJ 1762 (SC), AIR 2013 SC 1677, 2013 (4) SCC 517, 2013 (5) Scale 346 ; **see also***Ramesh Singh v State of AP* (2004) 11 SCC 305, AIR 2004 SC 4545 .

96 *Kishore Eknath Nikam v State of Maharashtra* 2007 Cr LJ 1007, p 1009 (SC), (2006) 10 SCC 666 .

1 *Emperor v Nirmal Kanta Roy* AIR 1914 Cal 901, 15 Cr LJ 460 .

2 *Emperor v Barendra Kumar Ghose* AIR 1924 Cal 257 (FB), 25 Cr LJ 817 .

3 *Barendra Kumar Ghose v Emperor* AIR 1925 PC 1, **overruling**; *Emperor v Nirmala Kanta Roy* AIR 1914 Cal 901, and also **impliedly overruling***Hamam Singh v Emperor* AIR 1919 Lah 256, 20 Cr LJ 635 .

4 *Irshadullah v Emperor* AIR 1933 All 528, p 533 ; *Emperor v Rachpal Singh* AIR 1924 Bom 502 .

5 *Brathi alias Sukhdeo Singh v State of Punjab* (1991) 1 Crimes 74, p 78 (SC), (1991) Cr LJ 402 .

6 *Nagarathinam v State* 2006 Cr LJ 2120 p 2125 (SC), AIR 2006 SC 1736, 2006 (4) Scale 92, (2006) 9 SCC 57 .

7 *Ram Yadav v State of Bihar* (1988) 15 Reports 319 (Pat), (1988) PLJR 129 .

8 *Suresh & Anor v State of Uttar Pradesh* (2001) Cr LJ 1462 (SC) .

9 *Barendra Kumar Ghose v Emperor* AIR 1925 PC 1 .

10 *Kantiah Ramayya Munipalli v State of Bombay* AIR 1955 SC 287, p 293-94 .

11 *Om Prakash v State* AIR 1956 All 241, p 246 .

12 *Prakash v State of Madhya Pradesh* 2007 Cr LJ 798, p 802 (SC), (2007) 2 Crimes 74 (SC), 2006 (4) Scale 92, (2006) 9 SCC 57 .

13 *Bijaysingh Dangulsingh v State of Madhya Bharat* AIR 1956 MB 170 ; *Ranchod v State* AIR 1956 MB 262 .

14 *Jai Krishandas Manohardas Desai v State of Bombay* AIR 1960 SC 889, 892; *Hadibandhu Mohalik v State* (1986) 61 Cut LT 161, p 175-76 .

15 *Kantiah Ramayya Munipalli v State of Bombay* AIR 1955 SC 287 .

16 *Ibid*.

17 *Justus v State of Kerala* (1987) 2 KLT 330 .

18 *Mahadeo Nath Khetri v Emperor* AIR 1941 Pat 550, 553; *Basharat v Emperor* AIR 1934 Lah 813 .

19 *Ram Nath Madho Prasad v State of Madhya Pradesh* AIR 1953 SC 420, 424; *Public Prosecutor, AP High Court v Pulicherla Govinda Reddy* (2004) Cr LJ 238 (AP) (DB) .

20 *Ganpathi Sarma v Emperor* AIR 1923 Mad 369, p 371 (2).

21 *Queen-Empress v Maganlal* 14 ILR Bom 115, p 125 (FB) ; *Reguia v Farler* 8 C&P 106 .

22 *State of Uttar Pradesh v Rohan Singh & Anor* (1996) Cr LJ 2884 (SC) .

23 *Dhruv Lal Chandrakar v State of Chhattisgarh* 2012 (119) AIC 479 (MP) (DB).

24 *Damodar v State of UP* 2005 Cr LJ 330 (SC), AIR 2005 SC 1247, (2005) 1 SCC 543, (2004) 8 Supreme 136 .

25 *Gurmail Singh v State of Punjab* 2012 Cr LJ 665, p 667 (SC), 2011 (6) Scale 322, (2011) 15 SCC 412 .

26 *Virendra Singh v State of Madhya Pradesh* 2011 Cr LJ 952 (SC), 2011 AIR SCW 31, (2010) 8 SCC 407, 2010 (8) Scale 27 .

27 *Vithal Laxman Chalawadi v State of Karnataka* 2011 Cr LJ 83 (SC), 2010 AIR SCW 6408, AIR 2011 SC 173, (2010) 14 SCC 739 .

28 *Swaminanthan v State of Tamil Nadu* 2011 Cr LJ 1683, p 1684 (SC), 2011 AIR SCW 1301, 2011 (2) Scale 229, AIR 2011 SC 1592, (2011) 15SCC196.

29 *Bhupendra v State of Madhya Pradesh* 2008 Cr LJ 2479, p 2481 (MP) (DB) .

30 *Lulu alias Ram Pratap v State of UP* 2011 Cr LJ (NOC) 117 (All) (DB).

31 *Idrish Bhai Daudbhai v State of Gujarat* 2005 Cr LJ 1422, p 1426, AIR 2005 SC 733, 2005 (1) Supreme 372 ; *Nirmal Singh v State* 2011 Cr LJ 2258 (Del) (DB) .

32 *Nirmal Singh v State* 2011 Cr LJ 2258, p 2265 (Del) (DB) .

33 *Harbans Kaur v State of Haryana* (2005) Cr LJ 2199 (SC) ; *Girija Shankar v State of Uttar Pradesh* (2004) Cr LJ 1388 (SC) ; (2004) Cr LJ 1415 (SC) (DB) ; *Raju Pandurang Mahale v State of Maharashtra* (2004) Cr LJ 1441 (SC) ; *Janak Singh v State of Uttar Pradesh* (2004) Cr LJ 2533 (SC) ; *State of Madhya Pradesh v Deshraj* (2004) Cr LJ 1415 (SC) ; *Mohd Abdul Ali v State of Tripura* 2012 Cr LJ 1944 (Gauh) (DB) .

34 *Bhaba Nanda Sarma & Ors v State of Assam* AIR 1977 SC 2252, (1977) Cr LJ 1930 (SC) .

35 *Dhani Ram v State of UP* 2009 Cr LJ (NOC) 1196 (All) (DB).

36 *Dhian Singh v State of Himachal Pradesh* 2009 Cr LJ 1977 (HP) .

37 *Dhian Singh v Emperor* 13 Cr LJ 265, p 266 .

38 *Hardev Singh & Anor v State of Punjab* AIR 1975 SC 179, (1975) Cr LJ 243 (SC) .

39 *Nemala Pothuraju & Ors v State of Andhra Pradesh* AIR 1991 SC 2214, (1991) Cr LJ 3133 (SC) .

40 *State of Bihar v Lala Mahto* AIR 1955 Pat 161, p 169 ; *Bhabhataran Mahto v King-Emperor* AIR 1925 Pat 706, p 707 ; *Rajaram Raghu Patil v State* AIR 1958 Bom 460 ; *Joginder Singh v State of Himachal Pradesh* (1995) Cr LJ 124 (HP) .

41 *Surjan Singh & Anor v State of Haryana* (1998) 4 Scale 657 (SC), (1998) 3 Crimes 208 (SC) .

42 *Jai Krishnadas Manohardas Desai v State of Bombay* AIR 1960 SC 889, p 892 .

43 *Ramvilas Singh & Ors v State of Bihar* AIR 1989 SC 1593, (1989) Cr LJ 1782 .

44 *Md Abdul Ali v State of Tripura* 2012 Cr LJ 1944, p 1954 (Gauh) (DB) .

45 *Sanat @ Chaku Jena v State of Orissa* 2008 Cr LJ (NOC) 358 (Ori) .

46 *Mohinder Singh v State of Punjab* 2007 Cr LJ 2478, p 2487 (P&H) (DB).

47 *Dhanna v State of MP* (1996) 10 SCC 79, AIR 1996 SC 2478, 1996 AIR SCW 3066 ; *Babu v State* 2013 Cr LJ 2176, AIR 2013 SC 1769, (2013) 4 SCC 448, 2013 (4) Scale 557 .

48 *Rajpal v State of Uttarakhand* 2014 Cr LJ (NOC) 509 (Utr) .

49 Re *Kamaraj Goundar*AIR 1960 Mad 125, p 128 .

50 *State of Maharashtra v Kalu Sivram Jagtap & Ors*AIR 1980 SC 879, (1980) Cr LJ 570 (SC) .

51 *State of Punjab v Bhola Singh & Anor* AIR 1998 SC 1983, (1998) Cr LJ 2836 (SC) .

52 *Harjinder Singh v Karnail Singh & Ors* (1998) Cr LJ 2556 (SC) .

53 *State of Bihar v Lala Mahto* AIR 1955 Pat 161 p 169; *State v Saidu Khan* AIR 1951 All 21, p 33 (FB) ; *Hulliah v State* AIR 1954 Hyd 54, 55 (FB); *Irshadullah Khan v Emperor* AIR 1933 All 528 .

54 *Mahbub Shah v Emperor* AIR 1945 PC 118, p 120 ; *Kamaldin v Emperor* AIR 1947 Sind 1 .

55 *Russell on Crime*, eleventh edn, p 555.

56 *Indar Singh v Emperor* AIR 1933 Lah 819 .

57 *Krishnan v State* (2003) Cr LJ 3705 (SC) ; *Ramashish Yadav v State of Bihar* (2000) Cr LJ 12 (SC) ; *Mohinder Singh v State of Punjab* (2007) Cr LJ 2478 (P&H) .

58 *Mohinder Singh v State of Punjab* 2007 Cr LJ 2478, p 2487 (P&H) (DB).

59 *Alkoo Ahir v State of Bihar* 2010 Cr LJ 3822, p 3823 (SC), 2010 AIR SCW 3950, 2010 (4) Scale 313, (2010) 12 SCC 424 .

60 *Dalip Singh v State of Haryana* 2008 Cr LJ (NOC) 871 (P&H).

61 *Shashi Mohan v State of MP* 2008 Cr LJ 3863, p 3864 (SC), AIR 2008 SC 2961, 3 (2008) CLT 832, ILR (2009) MP 897, JT 2008 (7) SC 546, 2008 (10) Scale 165, (2008) 8 SCC 145 .

62 *Gharbharan v State of Chhattisgarh* 2010 Cr LJ 471, p 475 (Chhat) (DB) .

63 *Bashir v State* AIR 1953 All 668, p 673 .

64 *Nazir v Emperor* AIR 1948 All 229, p 234 .

65 *Mitter Sen & Ors v State of Uttar Pradesh* AIR 1976 SC 1156, (1976) Cr LJ 857 (SC) ; *Rishideo Pande v State of Uttar Pradesh* AIR 1955 SC 331, (1955) Cr LJ 873 (SC) ; *Maqsoodan & Ors v State of Uttar Pradesh* AIR 1983 SC 126 .

66 *Emperor v Ram Newaz* 14 Cr LJ 615 .

67 Kenny, *Outlines of CriminalLaw,* fifteenth edn, p 162.

68 *Bashir v State* AIR 1953 All 668, p 673-74 .

69 *State v Saidu Khan* AIR 1951 All 21, p 33 (FB), per Wali Ullah J.

70 *Photo v Emperor* AIR 1933 Sind 407, p 409 ; *State of Bihar v Lal Mahto* AIR 1955 Pat 161 .

71 *Girind Singh Yadav v State of UP* 2008 Cr LJ 1978, p 1983 (All) (DB) .

72 *Mukunda Murari Lal v Emperor* AIR 1934 Cal 10 .

73 Re *Basappa*AIR 1951 Mys 1, p 4 .

74 *Murai v State* 2011 Cr LJ 3750 (Del) (DB) .

75 *Dev Cyrus Colabawala v State of Maharashtra* 2010 Cr LJ 758, p 761 (Bom) .

76 *State of Bihar v Lal Mahto* AIR 1955 Pat 161, p 171 .

77 Re *Kamaraj*AIR 1960 Mad 125, p 128 ; *Bachchulal v State* AIR 1957 All 184 .

78 *Jaikrishnadas Manohardas Desai v State of Bombay* AIR 1960 SC 889, p 892 ; *Mahboob Shah v Emperor* AIR 1945 PC 118 ; *Joginder Singh v State of Himachal Pradesh* (1995) Cr LJ 124 (HP) .

79 *Santosh v State of Kerala* (1991) Cr LJ 570, p 584 (Ker)(DB).

80 *Bashir v State* AIR 1953 All 668, p 671 ; *Om Prakash v State* AIR 1956 All 241, p 244 .

81 *Om Prakash v State* AIR 1956 All 241, p 244 .

82 *Vaman Jaidev Raval v State of Goa* 2007 Cr LJ (NOC) 431 (Bom) (DB).

83 *Namubhai Karsanbhai Rathod v State of Gujarat* 2009 Cr LJ (NOC) 775 (Guj) .

84 *Namubhai Karsanbhai Rathod v State of Gujarat* 2009 Cr LJ (NOC) 775 (Guj) .

85 *Joginder Singh v State of Haryana* (1994) Cr LJ 134 (SC) .

86 *Mahboob Shah v Emperor* AIR 1945 PC 118, p 120 .

87 *Jai Krishen v Thotaram* AIR 1953 Hyd 160 ; *Fakirchand Nandram v State* AIR 1950 MB 76 (FB) ; *Kamaldin v Emperor* AIR 1947 Sind 41 ; *Bishwanath v Emperor* AIR 1946 All 153 ; *Gajraj Singh v Emperor* AIR 1946 Oudh 250 ; *Kinaram Das v State* AIR 1953 Assam 2 ; *Ramchand Tolaram Khatri v State* AIR 1956 Bom 287 ; *Mohindar Singh v State* AIR 1960 Punj 135 ; *Hasan Abdulla v State of Gujarat* AIR 1962 Guj 214 ; *Pandurang v State of Hyderabad* AIR 1955 SC 216 ; Re *Kamaraj Goundar*AIR 1960 Mad 125 ; *State v Saidu Khan* AIR 1951 All 21, p 37 (FB) ; *Bashir v State* AIR 1953 All 668 ; *Gheba v Crown* AIR 1949 Lah 44 ; Re *Padmaraja*AIR 1951 Mad 746 ; Re *Basappa*AIR 1951 Mys 1 ; *Bijay Singh Dangal Singh v State of Madhya Bharat* AIR 1956 MB 170 ; *Sitaram Dhaku Charan v State* AIR 1958 Bom 439 ; *Periathamtri v State* (1994) 1 ALT (Cr) 20 (DB) (Mad) .

88 *Mahbub Shah v Emperor* AIR 1945 PC 118, p 120-21 ; *Santosh v State of Kerala* (1991) Cr LJ 570, 584 (DB).

89 *Pandurang v State of Hyderabad* AIR 1955 SC 216, 222 ; *Rishideo v State of Uttar Pradesh* AIR 1955 SC 331, p 332 ; *Kanvi Nagji Kala v State* AIR 1956 Sau 107 ; *Alakunta Narsimloo v State of Andhra Pradesh* (1994) 1 Andh LT 248 (Cr), (1994) 1 Andh LT 53, (1994) Cr LJ 1721 (AP)(DB).

90 *Baijnath Mahto v State of Bihar* 2014 Cr LJ (NOC) 180 (Pat) (DB).

91 *Chinnam Kameswara Rao v State of AP* 2013 Cr LJ 1540, p 1546 (SC), AIR 2013 SC 3602, 2013 (1) Scale 643, (2013) 12 SCC 689 .

92 *Ram Nath Madho Prasad v State of Madhya Pradesh* AIR 1953 SC 420, p 424 .

93 *Bashir v State* AIR 1953 All 668, p 671 .

94 *State v Saidu Khan* AIR 1951 All 21, p 37 (FB), per Sankara Saran J.

95 *Pandurang v State of Hyderabad* AIR 1955 SC 216, p 222 .

96 *Om Prakash v State of UP* 2009 Cr LJ 1677, p 1682 (All) (DB) .

97 *Om Prakash v State of UP* 2009 Cr LJ 1677, p 1682 (All) (DB) .

1 *Hari Singh v State* 2008 Cr LJ 133, p 140 (Utr) (DB) .

2 *Oswal Danji Tejsi v State* AIR 1961 Guj 16, p 19, 1961 Cr LJ 251 .

3 *Tilu Ahir v Rex* AIR 1949 All 89, p 90 ; *Om Prakash v State of UP* 2009 Cr LJ 1677 (All) (DB) .

4 *Dhulya @ Dhulji v State of MP* 2008 Cr LJ (NOC) 495 (MP) (DB).

5 *Rishideo Pande v State of Uttar Pradesh* AIR 1955 SC 331, p 332 .

6 *Balram Singh v State of Punjab* 2003 (6) AIC 106 (SC), AIR 2003 SC 2213 ; *Raju v State* 2015 (149) AIC 598 (Del) (DB).

7 *Hasan Abdulla v State of Gujarat* AIR 1962 Guj 214, p 217 ; *Oswal Danji Tejsi v State* AIR 1961 Guj 16, p 18 ; *Kundan Lal v State of Rajasthan* 1983 Raj Cr C 281 (DB) ; *Satish Sah v State of Bihar* 1995 Cr LJ 213 (Pat) ; *Joginder Singh v State of Himachal Pradesh* (1995) Cr LJ 124 (HP) .

8 *Kanbi Nagji Kala v State* AIR 1956 Sau 107, p 109 .

9 *Nand Kishore v State of Madhya Pradesh* 2011 Cr LJ 4243, p 4248 (SC), AIR 2011 SC 2775, 2011 (7) Scale 386, 2011 AIR SCW 4350 .

10 *Kassim Pillai Asmane Kutty v State* AIR 1952 Tr & Coch 565; *Jaimangal v Emperor* AIR 1936 All 437 .

11 *Harijan Behar Badha v State of Gujarat* (1987) 2 Guj LR 1164 ; *Kundan Lal v State of Rajasthan* 1983 Raj Cr C 281 (DB) and *Ibrahim Kutty v State of Kerala* 1984 Cr LJ 221 (Ker), 1983 Ker LJ 656 .

12 *Hari Om v State of Uttar Pradesh* (1994) Mad LJ 42 (Cr)(SC); *Ramji Sonkar v State of West Bengal* (2004) Cr LJ 4398 (Cal) (DB) .

13 *Mahboob Shah v Emperor* AIR 1945 PC 118 .

14 *Bashir v State* AIR 1953 All 668, p 671 ; *State v Saidu Khan* AIR 1951 All 21, p 37 (FB) .

15 *Kripal v State of Uttar Pradesh* AIR 1954 SC 706, p 710 ; *Sharif Ahmad v State of Uttar Pradesh* AIR 1957 All 50 ; *Bhesu Singh v State* AIR 1956 MB 269 ; *Amrik Singh v State of Punjab* (1972) Cr LJ 465(SC); *Khem Karan v State of Uttar Pradesh* (1991) Cr LJ 2138, p 2142 (All) ; *Santosh v State of Kerala* (1991) Cr LJ 570, p 584 (Ker)(DB); *Joginder Singh v State of Haryana* (1994) Cr LJ 19 (SC) ; *Nand Kishore v State of Madhya Pradesh* AIR 2011 SC 2775, 2011 Cr LJ 4243, 2013 (15) SCC 252, 2014 (1) JT 331, 2013 (9) Scale 363 .

16 *Mohanlal v State* AIR 1961 Raj 24 .

17 *Rajesh Govind Jagesha v State of Maharashtra* (2000) Cr LJ 380 (SC) ; *Jai Singh v State of Rajasthan* 2011 Cr LJ 3628 (Raj) .

18 *Jai Singh v State of Rajasthan* 2011 Cr LJ 3628, p 3632 (Raj) .

19 *Mohinder Singh v State* AIR 1960 Punj 135, p 140 ; *Kassim Pillai Asmane Kutty v State* AIR 1952 Tr & Coch 565, p 568; Re *Nachimuthu Gounder*AIR 1947 Mad 259, p 261 .

20 *Dharam Pal & Ors v State of Haryana* AIR 1978 SC 1492, (1978) Cr LJ 1538 (SC) .

21 *Gani Miah v State of Tripura* 2013 Cr LJ 49, p 55 (Gauh) (DB) .

22 *Murari v State* 2011 Cr LJ 3750, p 3761 (Del) (DB) .

23 *Dost Mohammad v Emperor* AIR 1935 Pesh 29, p 32 (2), **explaining and reconciling***Masti Khan v Emperor* AIR 1935 Pesh 41 ; *Mohd Zaman v Emperor* AIR 1938 Pesh 18 .

24 *Kinaramdas v State* AIR 1955 Assam 2, p 5 ; *Tadidugi Rammurty v State of Orissa* 2011 Cr LJ 2791, p 2794 (Ori) (DB) .

25 *Mian Singh Nand Lal v Emperor* AIR 1938 Lah 747, p 749 .

26 *Tadidngi Rammurty v State of Orissa* 2011 Cr LJ 2791, p 2794 (Ori) (DB) .

27 *Lal Chand v Emperor* AIR 1931 Lah 523 ((1)) ; Re *Padmaraja Chetty*AIR 1951 Mad 741 ; *Bhramarbar Prusty v State of Orissa* (1994) Cr LJ 378 (Ori) .

28 *Munney v State of Uttar Pradesh* (2002) Cr LJ 1541 (All) (DB) .

29 *Mamand v Emperor* AIR 1946 PC 45 .

30 *Gorey v Rex* AIR 1949 All 191 ; *Dipu v Emperor* AIR 1947 All 408 ; *Emperor v Bishwanath Tiwari* AIR 1946 All 153 .

31 *State of Maharashtra v Chandraprakash Keshavdeo Shinghaniya* (1991) Cr LJ 3187, p 3192 (Bom) .

32 *Mahboob Shah v Emperor* AIR 1945 PC 118, p 120 .

33 *Oswal Danji Tejsi v State* AIR 1961 Guj 16, p 19 ; *Tillu Ahir v Rex* AIR 1949 All 89, p 90 ; *Liaqat v State of Uttar Pradesh* (1994) 3 Crimes 269 (All)(DB); *Jakir Hussain v State of Madhya Pradesh* 2012 Cr LJ 1289 (Chh) (DB) .

34 Re *Kamaraj*AIR 1960 Mad 125, p 128 .

35 *Om Prakash v State* AIR 1956 All 241, p 244 .

36 Re *Basappa*AIR 1951 Mys 1, p 3 ; *Shangara v State of Punjab* (1994) Cr LJ 1098 (SC) .

37 *Brijlala Prasad Sinha v State of Bihar* AIR 1998 SC 2443, (1998) Cr LJ 3611 (SC) .

38 *Asha alias Ashanand & Ors v State of Rajasthan* AIR 1997 SC 2828, (1997) Cr LJ 3508 (SC) .

39 *Harpal Singh v State of Haryana* AIR 1998 SC 1553, (1998) Cr LJ 1563 (SC) .

40 *Gita Rani Ghosh v State of West Bengal* 2012 Cr LJ 794, p 798 (Cal) (DB) .

41 *Mutukdhari Singh v Emperor* AIR 1942 Pat 376 .

42 *Nanhoo v State of Madhya Pradesh* (1994) Cr LR 217(MP).

43 *Hari Bijal v Emperor* AIR 1915 Bom 247 .

44 *Sankata Prasad v Emperor* AIR 1935 Oudh 178 .

45 *State of Bihar v Lala Mahto* AIR 1955 Pat 161, p 170 .

46 *Pandurang v State of Hyderabad* AIR 1955 SC 216, 222, **relying on***Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1, p 5-6 ; *Mahboob Shah v Emperor* AIR 1945 PC 118 .

47 *Mahboob Shah v Emperor* AIR 1945 PC 118, 121 ; *Pandurang v State of Hyderabad* AIR 1955 SC 216, 222 ; *Kinaram Das v State* AIR 1955 Assam 2, 5 ; *Dewji Moti Bhil v State* AIR 1955 MB 26, 27 ; *Ramsakal Koiri v State* AIR 1955 Pat 268, 270 ; *Sahibzada v Crown* AIR 1950 Pesh 24 ; *Gajraj Singh v Emperor* AIR 1946 Oudh 250, 253 ; *Megh Singh v State of Rajasthan* (1983) 2 Crimes 134, 140 (Raj)(DB) ; *Wakil Khan v State of MP* 2005 Cr LJ 3410 (MP) (DB) .

48 *Gajraj Singh v Emperor* AIR 1946 Oudh 250, 253 .

49 *Mohan Singh & Anor v State of Punjab* AIR 1963 SC 174 .

50 *State of Uttar Pradesh v Rohan Singh & Anor* 1996 Cr LJ 2884 (SC) .

51 Re *Kamraj Goundar*AIR 1960 Mad 125, 128 ; Re *Basappa*AIR 1951 Mys 1 .

52 *Mohinder Singh v State* AIR 1960 Punj 135, p 140 .

53 *Tillu Ahir v Rex* AIR 1949 All 89, p 90 .

54 *Kripal v State of Uttar Pradesh* AIR 1954 SC 706, p 710 ; **followed in***Ramsakal Koiri v State* AIR 1955 Pat 268, p 270 .

55 *Emperor v Ebrahim* AIR 1931 Rang 321 .

56 *Girja Shanker v State of UP* AIR 2004 SC 1808, 2004 Cr LJ 1388, (2004) 3 SCC 793 .

57 *Haren Pao v State of Assam* 2008 Cr LJ 3290, p 3293 (Gauh) (DB) .

58 *Sunder Singh v Emperor* AIR 1939 Oudh 207, p 209 .

59 Re *Basappa*AIR 1951 Mys 1, p 4 .

60 *Sanlaydo v Emperor* AIR 1933 Rang 204, p 206 .

61 *Nazir v Emperor* AIR 1948 All 229, p 233 .

62 *Ibra Akanda v Emperor* AIR 1944 Cal 339, per Das J; Re *Kamraj Goundar*AIR 1960 Mad 125, p 128 ; *Nga Zun Baw v King-Emperor* 7 Cr LJ 205 ; *Queen-Empress v Duma Baidya* 19 ILR Mad 483, 1 Weir 29 ; *Nga E v King-Emperor* AIR 1931 Rang 1 (FB), 32 Cr LJ 493; *Nga Tha Aye v Emperor* AIR 1935 Rang 294, 36 Cr LJ 1380 ; *Zahid Khan v Emperor* AIR 1939 Oudh 40, 40 Cr LJ 187 ; *Sundar Singh v Emperor* AIR 1939 Oudh 207 ; *Jai Mangal v Emperor* AIR 1936 All 437, 37 Cr LJ 864 ; *Emperor v Bhola Singh* 29 ILR All 282, 5 Cr LJ 13 ; *Emperor v Dharam Rai* 1887 All WN 236, 237 ; *Anirudha Mana v Emperor* AIR 1925 Cal 913 ; *Faiyaz Kahn v Rex* AIR 1949 All 180, p 184 ; *Raja Ram v Emperor* AIR 1938 Oudh 256, p 258 ; *Ram Nath v Manna* AIR 1955 All 250, p 251 ; *Emperor v Mujjaffar Sheikh* AIR 1941 Cal 106, p 109 ; Re *Basappa*AIR 1951 Mys 1 .

63 *Barendra Kumar Ghose* 52 ILR Cal 197, AIR 1925 PC 1, 26 Cr LJ 431 .

64 *Ibra Akanda v Emperor* AIR 1944 Cal 339, p 358, per Khundkar J.

65 *Bashir v State* AIR 1953 All 668, p 671 .

66 *Bharwad Mepa Dana v State of Bombay* AIR 1960 SC 289, p 296 .

67 *Mohanlal v State* AIR 1961 Raj 24, p 28 ; *Bashir v State* AIR 1953 All 668 ; *State v Saidu Khan* AIR 1961 All 21 (FB); *Nazir v Emperor* AIR 1948 All 229 .

68 *Halliah v State* AIR 1945 Hyd 54, p 55 (FB) ; *State v Saidu Khan* AIR 1951 All 21 (FB); *Madhuwa Pyare Lal v State of Vindhya Pradesh* AIR 1954 VP 36 .

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70 *Benny v State of Kerala* (1991) 2 Crimes 576, p 581 (Ker), 1991 Cr LJ 2411 ; *Afrahim Sheikh v State of West Bengal* AIR 1964 SC 1263 .

71 *Aniruddha Mana v Emperor* AIR 1925 Cal 913, p 914 ; *Sher Ali v Emperor* AIR 1942 Pesh 51 ; *Ramnath v Emperor* AIR 1943 All 271 ; *Sahibzada v Crown* AIR 1950 Pesh 24 .

72 *Adam Ali v King-Emperor* AIR 1927 Cal 324, p 325 ; *Panchaiah v State of Karnataka* (1994) Cr LJ 1213 (SC), AIR 1994 SC 963 .

73 *Ibra Akanda v Emperor* AIR 1944 Cal 339 .

74 *Ibid*, p 345.

75 *Ibid*, p 355.

76 *Ibid*, p 363.

77 *State v Saidu Khan* AIR 1951 All 21, p 33-34 (FB) ; *Ankeri v State of Rajasthan* (1994) Cr LJ 947 (Raj) .

78 *Muklene Rahman v King* AIR 1950 Assam 98 ; *Bashir v State* AIR 1953 All 668 ; *Rajindra Kumar v State* AIR 1960 Punj 310 ; *Oswal Danji Tejsi v State* AIR 1961 Guj 16 ; *Rex v Sadlal* AIR 1950 All 418 ; *Santosh v State of Kerala* 1991 Cr LJ 570, p 584 (Ker)(DB).

79 *State of Punjab v Mann Singh & Anor* AIR 1983 SC 172, (1983) Cr LJ 229 .

80 *Mukati Prasad Rai v State of Bihar* AIR 2005 SC 1271, 2005 Cr LJ 681, 2005 SCC (Cri) 69, (2004) 7 Supreme 695 .

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82 *Prakash v State of Madhya Pradesh* (2007) Cr LJ 798 (SC) .

83 *Sewa Ram v State of UP* 2008 Cr LJ 802, p 805 (SC), 2007 AIR SCW 7797, AIR 2008 SC 682, 2007 (14) Scale 145, (2007) 15 SCC 75 .

84 *Shariff Ahmad v State* AIR 1957 All 50, p 53 ; *Alakunta Narsimloo v State of Andhra Pradesh* (1994) 1 Andh LT (Cr) 248, (1994) 1 Andh LT 53, (1994) Cr LJ 1721 (AP)(DB).

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86 *Santosh v State of Kerala* (1991) Cr LJ 570, p 584 (Ker)(DB); *Mathai v State of Kerala* (1983) 1 Crimes 428, (1982) Ker LT 692 .

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88 *Goudappa v State of Karnataka* 2013 Cr LJ 1762, p 1766 (SC), AIR 2013 SC 1677, 2013 (4) SCC 517, 2013 (5) Scale 517 .

89 *Khem Karan v State of Uttar Pradesh* (1991) Cr LJ 2138, p 2142-43 (All)(DB) ; *Mohar Singh v State of Uttar Pradesh* (1995) Cr LJ 649 (All) .

90 *Bishwanath Singh v State of Bihar* (1987) BLJ 695 ; *Satish Sah v State of Bihar* (1995) Cr LJ 213 (Pat) .

91 *Mal Singh v State of Rajasthan* (1984) Raj LW 307, (1984) Cr LJ 299 (Raj) .

92 *State of AP v M Sobhan Babu* 2011 Cr LJ 2175, p 2177 (SC), 2011 AIR SCW 1914, 2011 (3) Scale 451, (2010) 15 SCC 69 .

93 *Ajuram v State of Chhattisgarh* 2010 Cr LJ (NOC) 408 (Chh) (DB).

94 *Mahbub Shah v Emperor* AIR 1945 PC 118, p 120 ; *Rishideo v State of Uttar Pradesh* AIR 1955 SC 331 ; *Ramchand Takaram Khatri v State* AIR 1956 Bom 287 ; *Narayan v State* AIR 1953 Hyd 161 ; *Irshadulla v Emperor* AIR 1933 All 528 ; *Kriaram v State* AIR 1955 Assam 2 .

95 *Harbans Kaur v State of Haryana* 2005 Cr LJ 2199, p 2200, 2201 (SC), AIR 2005 SC 2989, 2005 (2) Scale 457, (2005) 9 SCC 195 .

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Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

[S. 34.

Acts done by several persons in furtherance of common intention.--

69. Inference of Common Intention should be a Necessar Inference Deducible

Common intention is a question of fact. It is subjective. But it can be inferred from facts and circumstances,[3] which existed and which are brought on record (*Dev Cyrus Colabawala v State of Maharashtra* 2010 Cr LJ 758, p 761 (Bom) (DB) . The inference of common intention within the meaning of s 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case.[4]

> But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of cases. At bottom, it is a question of fact in every case and, however, similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, 'the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis.[5]

The presence of motive and recovery of blood-stained clothes and *dharias* from accused persons are wholly insufficient for sustaining charge under s 302 read with s 34, IPC .[6] The true rule of law which is to be applied is the rule which requires that guilt is not to be inferred unless that is the only inference which follows from the circumstances of the case and no other innocuous inference can be drawn. If after bearing in mind this rule for the appreciation of circumstantial evidence, on the facts of a particular case, the court can reach the conclusion that the events as they developed indicated a common intention, then, there is no reason why, in law, the court should be deterred from drawing such an inference.[7] The presumption of constructive intention must not be too readily applied, or pushed too far. It is only when a court can, with some judicial certitude, hold that a particular accused must have preconceived or premeditated the result which ensued, or acted in concert with others in order to bring about the result, that s 34 may be applied.[8]222

Common Intention to be inferred from all Circumstances and not Merely from any Individual Act

There is no uniform inflexible rule for applying the principle of common intention. The inference therefore must be drawn from the totality of the facts and circumstances of each case. It is difficult to find out two similar cases.[9] For common intention, there could rarely be direct evidence. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case. The common intention or the intention of the individual concern in furtherance of common intention could be proved either from direct evidence or by inference from the acts or

attending circumstances of the case and conduct of the parties.[10]The common intention should be inferred from the whole conduct of all the persons concerned and not merely from any individual act. As a criminal act is not to be assumed to be in furtherance of the common intention, the common intention is not to be inferred exclusively from the criminal act done. The criminal act done is certainly one of the factors to be taken into consideration, but it should not be taken to be the sole factor.[11]

No premeditation or previous meeting of minds is necessary for the applicability of s 34, IPC . The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary.[12] It is not possible to have direct evidence of common intention. It has to be inferred from the facts and circumstances of each case.[13]

The 'common intention' ought to be determined from such known facts and circumstances which existed before the commencement of the criminal act, as the criminal act itself is committed in furtherance of that common intention.[14]In order to invoke s 34 against the accused, prior concert or a pre-arranged plan has to be established. And though common intention has to be inferred from his act, or conduct and other relevant circumstances, it is not necessary that any overt act must have been done by any particular accused. It is enough if the criminal act has been done by one of the accused in furtherance of common intention.[15] All the relevant circumstances of the case are to be taken into consideration.[16]

The inference aforesaid may be drawn from the conduct of the assailants or their participation in the commission of the crime, and from circumstances such as the character of the attack, the nature of the injuries inflicted, and the nature of the weapons employed.[17]223

Accused A2 and A3 held the hands of the deceased, disabled the deceased, then accused A1 assaulted the deceased, held all the accused A1, A2 and A3 shared common intention, thus, all were convicted under s 302 read with s 34, IPC .[18]

> Community of purpose may be proved by independent facts, but it need not be. If the other defendant is shown to be committing other acts, tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge.[19]

70. Random Acts

Once accused hitting the deceased with a bottle on his head which did not cause even a visible injury and the other accused throwing a burning kerosene lamp from a distance cannot be said to be acts done in furtherance of a common intention to cause the death of the deceased. These are random acts done without meeting of minds. They can only be held guilty for the individual overt acts.[20]

71. Inference from Conduct

Section 34, IPC implies an element of participation of action on the part of the accused person. Though the acts may be different and there may be variations in their character but they must have the element of common intention. This common intention is to be gathered from the acts and conduct of the accused persons preceding, attending and succeeding the occurrence.[21] Prior concert and arrangement may, and indeed often is, determined from subsequent conduct as, *e.g.*, by a systematic

planned campaign unfolding itself during the course of the action, which could only be referable to prior concert and pre-arrangement or a running away together in a body, or a meeting together subsequently.[22] Thus, there may be circumstances where incidents subsequent to the act may also have to be considered in arriving at a conclusion as to whether or not there was a common intention if the subsequent act is so proximate in point of time that the act and the incident may be co-related.[23]

Co-accused B was riding the motorcycle, and had gone with the accused R to commit the murder of the deceased. Main accused R fired the shot which hit the head of the deceased causing death. Co-accused kept the motorcycle running, facilitating the escape from the spot. The behavior and active role of the co-accused B depicted his knowledge as well as common intention of the two accused to commit the crime.224 Held, common intention being proved, s 34, IPC was attracted in the case. The co-accused was convicted under s 302 read with s 34, IPC .[24]

The main accused, the co-accused and the deceased were travelling in a car when the main accused assaulted the deceased in the car, and the co-accused was present in the car throughout the journey. Held that the conduct of the co-accused amply demonstrated that he shared common intention with the main accused. Co-accused was convicted under s 302 read with s 34, IPC .[25]

Where five men assault at one and the same time, each of them seeing that the other four are assaulting. The assault may be regarded as a common one, though the impulse to assault may have arisen independently.[26]

The complainant and his father (deceased) were returning home from the police station at 9 PM. The accused persons appeared on the way, being armed with lathi, sword and iron rod, and assaulted the deceased, gave continuous beating, caused serious injuries, including fractures, resulting in death. The injuries sustained by the deceased were caused by the accused persons in pursuit of their common intention to cause the death of the deceased. The accused appellants were convicted under ss 302 / 34, IPC .[27]

Common intention has to be judged by the part played by all the accused, nature of injuries inflicted and the surrounding circumstances.[28] As the appellant R was not carrying any deadly weapon with him, the two other co-accused who accompanied him could not be said to have shared common intention with R to attempt to commit murder. Only R had hit the injured on the head with a hard substance, and the injuries were sufficient in the ordinary course to cause the death, but injured was saved on account of timely treatment, so R was convicted under s 307, IPC, while the two other co-accused were convicted under s 323, IPC read with s 34, IPC .[29] Appellant no. 2 had assaulted with a sharp cutting weapon, and the injury caused was sufficient to cause the death of the victim. As regards appellant no. 1, the prosecution failed to prove beyond reasonable doubt that he had a common intention to inflict the said fatal injury on the person of the injured. Also, the informant having turned hostile in the Court, it was difficult to say that the appellant no. 1 had any common intention to commit murder of the injured. Appellant no. 1 was given the benefit of doubt and acquitted of offences under ss 326, 307, IPC read with s 34, IPC .[30]

Conduct of Accused in Running or Advancing towards Victim shows Common Intention

In *Mamand v Emperor* ,[31] there was evidence of enmity on the part of the accused who only joined in the attack, but had no hand in the killing, and none on the part of the two who did the actual murder. There was evidence that all three lived together and that one was a younger brother and the other a tenant of the appellant in question. There was evidence that they all ran away 'together'. Their Lordships of the Privy225 Council held that the evidence justified the inference that the murder was committed in furtherance of the common intention of all the accused. In one case, there was some distance between the accused and the deceased. The accused, who were three brothers and were armed with sticks, covered the distance and attacked the deceased. In the circumstances, it was held

that the when each brother advanced, for making an assault on the deceased, he knew what the intention of the other brothers was and shared that intention.[32]

Where on being attacked with *lathis* by the accused the complainant ran away raising an alarm, but the accused pursued him and persisted in assaulting him and those who came to his help, the inference is clear that the second attack was the result of a previous concert.[33] The accused appellant though herself did not assault the deceased, the conduct of the appellant was such that s 34 was attracted in the case, and appellant was convicted for principal offences under ss 302 / 201 / 379, IPC and s 34, IPC .[34]

Prosecution evidence revealed that the accused appellants firstly assaulted the deceased in his house, thereafter, they dragged the deceased on the lane and again assaulted him by axe and stick and caused repeated injuries on head. Held, accused appellants shared common intention to cause the death of the deceased. They were convicted under ss 302 / 34 and ss 323 / 34, IPC .[35]

Appellants accused trespassed into the courtyard of the deceased, being armed with bombs they hurled bombs causing death of the deceased, and left the spot in a body such that common intention to commit the murder of the deceased was inferred.[36]

Where the accused, one of whom had an axe in his hand, chased the deceased and two of them caught hold of the deceased and the other inflicted injuries on the neck and body with the axe, common intention to commit murder can be inferred from their act.[37] Merely because a person runs away from the spot, it cannot be said that he shared common intention, and he was given the benefit of doubt and was acquitted of charge under ss 302 / 34, IPC .[38]

The commonality of intention to cause death of the deceased was established from the fact that the appellants had all come armed with weapons like lathi, bat and moongri and continued beating the deceased even after he had fallen down on the ground. All the accused were convicted under ss 302 / 325 read with s 34, IPC .[39]

72. Inference from Presence on Spot at the Time of Commission of Offence

It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an226 understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf. A criminal court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender. The common intention to commit an offence graver than the one originally designed may develop during the execution of the original plan, *e.g.*, during the progress of an attack on the person who is intended to be beaten but the evidence in that behalf should be clear and cogent, for suspicion, however strong, cannot take the place of proof which is essential to bring home the offence to the accused.[40]

Out of eight accused persons, four accused persons A5 to A8 at 9.30 p.m. were found near the house

of the complainant, they shared common intention, thus, they were convicted with the aid of s 34, IPC .[41]

The deceased who had come to the field of the accused unexpectedly was attacked by accused by gandasa. The accused were not waiting for him to come or had come to assault him with any common intention. Held, the accused did not have common intention to cause the death of the deceased. The accused who gave fatal blow was convicted under s 302, IPC, others were convicted under s 323, IPC .[42]

73. Purpose of Presence Determines the Intention

A person present on the scene might or might not be guilty by the application of this section. If he is present on the scene for the purpose of participating in the offence, he would certainly be guilty as a participator in the offence. On the other hand, if he is present there merely as a spectator, he is not guilty at all.[43] Even if it is proved that all the accused were seen at the spot at the time of murder, this fact by itself cannot prove a common intention to commit the murder. It can well be that all the accused were standing together and one of them suddenly seeing the deceased fired at him. If this possibility is not eliminated by some evidence on the record and it is not known who fired the fatal shot none of the accused can be convicted under s 302 and this section can have no application.[44] When a murder takes place, and when there are more than one accused, it is not necessary for the prosecution to lead evidence as to which accused has dealt which blow on what part of the body of the deceased. Any227 inquiry into the question as to who among the accused has dealt the fatal blow is clearly not warranted.[45]

The mere presence of a person at the time of the commission of an offence by his confederates is not in itself sufficient to bring his case within the purview of s 34 of the IPC, unless the community of design is proved against him.[46]A mere presence without proof of any act or omission done to facilitate the offence or at least without proof of the existence of a common intention will not be sufficient to support a conviction.[47] The physical presence must be 'coupled' with actual participation which, of course, may be of a passive character such as standing by a door, provided that is done with the intention of assisting in furtherance of the common intention and there is a readiness to play his part in the pre-arranged plan when the time comes for him to act.[48]Although a man is present when a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it or to apprehend the felon. But if several persons go out together for the purpose of apprehending a man and to bring him to the *thana* on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel violent conduct, it might properly be inferred that they were all assenting parties and acting in concert and that the beating was in furtherance of a common intention.[49]

To constitute common intention, it is necessary that the intention of each of the accused is known to the others and is shared by them. It is true that in crimes as in other cases, 'they also serve who stand and wait', but then what is necessary for application of the principle of joint liability, embodied in s 34, is that the accused, by his presence and behaviour, has served or sub-served that common cause in some way or the other. Where the overt act or the rule ascribed to one of the accused persons is disbelieved by the sessions judge, his conviction, with the aid of s 34 of the IPC, only because he was present at the scene of offence, is wrong as there is nothing from which any inference of meeting of minds can be deduced.[50]

The co-accused S along with main accused R had gone to commit the murder of the deceased. He was a pillion rider. He was not attributed any role by the eye-witness. During investigation of the case, the prosecution tried to portray that he had also fired a shot from his pistol but it had missed. The eye-witnesses did not depose that S co-accused was armed with any weapon. Co-accused S was thus acquitted of the charge under ss 302 / 34, IPC .[51]

Where the accused, who was in the company of others who had fired shots, did not try to run away or even try to prevent his companions from doing what they did, but he was seen putting his hand on his waist belt where a dagger lay to wound those228 who were surrounding him, it was held that he was also guilty of the murder like his companions.[52]

Sudden Attack--Common Intention

Accused no. 2 inflicted lathi blow on the knees of victim as a result of which the victim fell down. Thereafter the accused no. 1 attacked the victim with a gandasa causing serious injuries on the head and arms. Also it took place suddenly in a public place. Held, it was highly doubtful if the accused no. 2 shared a common intention with accused no. 1 to commit the murder of the victim, thus, the conviction of the accused no. 2 under s 307 read with s 34, IPC was set aside.[53]

74. Interference of Common Intention from Nature of the Attack

If the assault is not sudden, common intention may be easily presumed, unless there is something to show that there was no opportunity for the accused to have a prior concert.[54] A1 and A2 hit on the head of the deceased almost simultaneously with such force as to fracture his skull. They are certainly guilty of the offence under s 302 read with s 34, IPC . A2 was dead. A1 was convicted under s 302 read with s 34, IPC .[55]

The manner in which all the accused assaulted the deceased even after he fell to the ground and the act of continuously inflicting blows on the body of the deceased, clearly showed that they had a pre-determined mind to kill the deceased at any cost, which they did. Accused were liable to be convicted under s 302 read with s 34, IPC .[56]

There was evidence that all the accused persons had come with weapons, assaulted the deceased and taken him inside the house where he was again assaulted by the accused persons and after sometime, his body was dragged by the accused persons, including the appellant and thrown near the hand pump. In such case(s), s 34, IPC would be attracted, and it is of no consequence if all or any of them had not assaulted or inflicted injuries on the victim.[57]

Inference of Common Intention from Number of Injuries Inflicted

A number of injuries suffered by the deceased clearly point out that it could not have been inflicted by one person. Common intention on the part of the accused persons to commit the murder of the victim can, therefore, be inferred.[58] When several persons inflict numberless injuries, the common intention may be safely presumed.[59] It is not material, to bring the case under s 34, IPC, as to who, in fact, inflicted the fatal blow.[60]229

Inference from Nature of Weapons Used

A common intention to use a loaded revolver for the purpose of killing, if necessary, has to be presumed against bandits, and highway robbers, who are armed with these weapons, and if a man is killed, the robbers so armed and acting in concert are all clearly guilty of murder under s 302, read with s 34, though each may not have actually fired a fatal shot.[61] As observed by Richardson J, in *Emperor v Barendra Kumar Ghose* .[62]

> Without mincing matters, the ascription of a common intention to add murder, if necessary to robbery, is not easily avoided, where all, or some to the knowledge of the rest, of those engaged in the enterprise, are proved to have carried firearms, and firearms have been used with fatal effect.[63]

The two accused armed with country made pistols accompanied the other accused armed with SBBL gun and DBBL gun respectively, went to the place of occurrence, way-laid the deceased party and attacked the deceased. It cannot be said that they accompanied the other accused out of idle curiosity. Common intention was inferred, thus, conviction under s 302 read with s 34, IPC was held justified.[64]

However, where evidence proved that the accused inflicted a solitary blow with a sharp edged weapon on the neck of the victim but there was no evidence as to the presence and involvement of other accused persons nor was there any evidence to show by whom further blows were given to the deceased, it was held that the accused cannot be said to have killed the deceased in furtherance of common intention of himself and some others and considering the nature of weapon and part of the body on which the blow was given, the conviction of the accused was altered from s 302 read with s 34 to one under s 326, IPC .[65]

Co-accused Holding the Deceased, Facilitating Assault by Main Accused-Co-accused Convicted

Evidence of the eye-witnesses that the co-accused were holding the deceased by hand, exhorted the accused to bring gun and shoot at the deceased was found reliable. Co-accused convicted under s 302 read with s 34, IPC .[66]

Stone Throwing Cases

In case(s) where the role of the accused is restricted to throwing a stone toward the deceased, and the accused harbours no intention to kill, s 34, IPC would not be attracted. Accused cannot be convicted under s 302, IPC read with s 34, IPC .[67]230

75. Applicability to Cases of Thefts--Presumption from Possession of Stolen Property

When a person is found in possession of stolen goods soon after the theft, the court may presume that such person is either the thief or the receiver of stolen goods.[68] In some cases it is suggested that the presumption is not confined to charges of theft, but extends to all charges however penal, not excluding even murder.[69] But in *Nga Thein Pe v King* ,[70] Roberts CJ, (with whom Dankely J agreed) observed:

> I desire, with respect, but with emphasis, to dissent from this expression of the law. The highest presumption which can be drawn from possession of stolen property, by itself, and in the absence of any other evidence, is presence at the scene of the theft. Where it is shown that only one person is present at the scene of the theft and it is clear that the crime has been committed, it may well be that the logical conclusion to be drawn from that is that the possessor of the stolen property is the person who committed the crime; but, in a case in which there are several persons involved and the question of common intention arises, great care must be taken not to assume that a person merely found in possession of stolen property should have attributed to him, for this reason alone, a common intention respecting the guilt of murder.

But if a stolen article, almost at the very moment when it is stolen, is handed over by the thief to a companion who was with him at the time of the commission of the offence, the proper inference to be drawn from this circumstance is that the second person was in concert with him and not that he merely received the stolen property.[71]

76. Common Intention--A Question of Fact

Intention is a question of fact, which is to be gathered from the acts of the parties.[72] Common intention is a question of fact, it is subjective, but it can be inferred from facts and circumstances.[73] The existence or otherwise of the common intention depends upon the facts and circumstances of each case.[74] The question whether or not a number of persons who joined in the commission of an offence had a common intention is one of fact not of law. Although, as laid down by the judicial committee in *Mahbub Shah v King-Emperor* ,[75] there is distinction between 'same' or 'similar' and common intention, the difference does not relate to a point of law.[76] After all, the existence of common intention said to have been shared by the accused persons is, on ultimate analysis, a question of fact.[77] Whether or not an act is in furtherance of the common intention depends upon the common intention and the nature of the act. It is, therefore, an incident of fact and not of law.[78] Refer to the undermentioned cases.[79]231

77. In-laws of Deceased Acquitted

There was no evidence of common intention and demand of money by the father-in-law and mother-in-law of the deceased. They were entitled to benefit of doubt and acquittal, charge under s 34, IPC was not established.[80]

78. Co-accused acquitted

Only the appellant accused armed with gun, fired a shot at the deceased, the common intention on the part of the co-accused who were not armed, was not proved, thus, the other co-accused were acquitted for offence under ss 302 / 34, IPC .[81]

[IV] LIABILITY UNDER THE SECTION

79. 'Each of Such Persons is Liable for that Act'

Section 34 of the IPC deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each one of them will be liable for the result of them all, as if he had done them himself, for the words 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, as they refer to it.[82]In other words, 'a criminal act' means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by him alone, *i.e.*, in a criminal offence.[83] This means that whatever acts are done by several persons in furtherance of the common intention of all constituted as a whole the particular criminal act for which each person will be liable. All such acts which were either contemplated or were to be done ordinarily in furtherance of that common intention will be included in the criminal act.[84] If the conditions mentioned in the section are fulfilled, then each of the culprits will be responsible for the whole criminal act done by all of them.[85] When a number of persons are engaged in the commission of something criminal, and are acting in furtherance of a common intention, each one of them is of course punishable for what he has done. But his liability does not end there, for he is liable not only for his own acts, but also for those which he thereby facilitates, provided of course they are done in pursuance of the common intention.[86]

All the appellants will be constructively liable under s 302 read with s 34, IPC for the commission of the crime, though the fatal injury was inflicted by A1 only, as the other appellants participated in giving beatings to the deceased which caused injuries on other parts of his body.[87]232

80. Extent of Liability

If the conditions mentioned in s 34 of the IPC are fulfilled, each one of the culprits is responsible for the whole criminal act done by all of them. If *A* and *B* do a criminal act in furtherance of their common intention, each of them is guilty of that offence of which he would have been guilty if he alone had done the whole criminal act. The law makes no distinction between them or between the parts played

by them in doing the criminal act; each is guilty of the same offence. If s 34 applies, it is impossible to convict the conspirators of different offences.[88]Even if a confederate did not inflict any blow on the deceased, yet if he shared in the common intention to kill him and actually participated in the criminal act by being present on the spot armed with his *lathi*, in the eye of law he is as much guilty of the whole criminal act as is the person who actually dealt the fatal blow on the deceased.[89]

81. Lesser Sentence in Certain Cases

If the common intention was only to beat the deceased with weapons, which were likely to produce grievous injuries, and one of the confederates stabbed him to death, he alone will be guilty of murder under s 302 and the others would be liable only for the offence under s 326 .[90]The liability for a criminal act done by several persons in furtherance of a common intention is allotted to each of such persons as if he alone and unaided, had done that act. In such circumstances each of such persons is guilty of the one offence, and it is not possible to so grade this offence as to hold, say, in the case of a murderous assault, committed in furtherance of a common intention, that some are guilty of murder and others only of causing grievous hurt.[91] Where the common intention was to kill the deceased, and it is not known which of the two assailants was responsible for the fatal injuries, both of them are equally liable and no distinction is to be made in awarding punishment to them.[92] But in *Dalip Singh v State of Punjab* ,[93] the Supreme Court has laid down that where it is evident that some alone among the appellants might have inflicted fatal injuries, and it is impossible to ascertain who had done so, it will be a sound exercise of judicial discretion to award lesser sentence, in a case in which each is convicted for murder under s 302 read with s 34 .[94] A distinction in awarding sentences was made in the undermentioned case.[95] In a Lahore case Coldstream J, was of the opinion that 'the degree of constructive guilt' of the appellants would be sufficiently punished by a much lighter sentence than had been inflicted.[96]233

82. Necessity of Mentioning Section 34 in Charge--Effect of Omission

Section 34 does not create an offence. It simply lays down a principle of criminal liability. Omission to mention s 34 in the charge, be it of a substantive offence or a substantive offence read with s 149, is no bar to the recording of a conviction for that offence read with s 34, if the facts alleged and proved justify the application of that section against the accused.[1] It is, therefore, open to the court to take recourse to s 34 of the IPC, even if the said section was not specifically mentioned in the charge and instead s 149, IPC, has been included. A finding that the assailant concerned had a common intention with the other accused is of course, necessary for resorting to such a cause.[2] Therefore, an accused charged under ss 302 / 149, IPC, can be convicted under ss 302 / 34, IPC .[3] Where charge under ss 302 / 149, IPC has been framed against the accused, if evidence shows common intention, the accused can be convicted under ss 302 / 34, IPC if no prejudice is shown to the accused. It would be immaterial if charge under s 34, IPC has not been framed against the accused.[4] It does not, however, mean that the magistrate and judges should not indicate, in the charge, that s 34 would be used against the accused.[5] There is a grave lapse on the part of the trial court in not invoking s 34, IPC for holding joint trial. The failure to do so would become fatal to the prosecution case. The absence of s 34, IPC, in the charge could enable each of the accused to disclaim possession throwing blame on the others and thus ultimately making the case of prosecution vulnerable at trial. This type of lapse has become a routine order in umpteen number of criminal cases. It is necessary that the trial Judges should always bear in mind that unless the provisions of law relating to common intention, common knowledge, conspiracy and common object are invoked in the charge, it is not permissible to hold joint trial of two or more accused be it for the offences under IPC or under any special penal enactments.[6]

Where there is clear evidence that the accused persons by use of deadly weapons inflicted as many as 16 injuries on the vital parts of the body of the deceased, the234 accused persons can be convicted under s 302, IPC even in the absence of a charge under ss 302 / 34, IPC .[7]

Chandrasekhar Aiyar J, observed in *Willie (William) Slaney v State of Madhya Pradesh* :[8]

> Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; 'and the charge is a rolled up one involving the direct liability and the constructive liability' without specifying who are directly liable and who are sought to be made constructively liable. In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.

Where the Court finds that the strength of the assembly was insufficient to constitute it into 'unlawful assembly', but the remaining persons who participated in the crime had shared common intention with the main perpetrators of the crime, the Court can take the aid of s 34 of the IPC even if the said section was not specifically mentioned in the charge.[9]

A person can be convicted of an offence read with s 34 or s 149, if the facts of the case justify it and if the accused has not been misled in his defence, and if there has been no failure of justice, irrespective of the fact that in the charge framed against him, s 34 or s 149 is not specifically mentioned.[10]

Where the charge under s 34 was not framed, but the facts showed that the two accused shared common intention, both the accused were present on the spot where the deceased was assaulted, both of them left the spot together, conviction of the two accused under ss 302 / 34, IPC was held proper.[11]

83. Omission to Mention Section 34 in Charge cannot affect the Case unless Prejudice is shown

The omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted. The provisions of s 464, Cr PC would apply to cases of inadvertence to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specification, and where the facts proved by the prosecution constitute a separate and distinct offence, but closely relevant to and springing out of the same set of facts connected with the one charged.[12] As was laid down by the235 Privy Council in *Begu v Emperor* ,[13] and also by the Supreme Court in *Lachhman Singh v State* ,[14] 'a man may be convicted of an offence, although there has been no charge in respect of it if the evidence is such as to establish a charge that might have been made'.[15] Omission to mention s 34 in the charge cannot affect the case unless prejudice is shown to have resulted in consequence thereof.[16] Only when the accused persons plead and satisfactorily demonstrate that prejudice had indeed resulted from the omission of a charge under s 34 of the IPC that any such omission may assume importance.[17] The object of the charge is to warn the accused of the case he is to answer. It cannot be treated as if it was a part of a ceremonial. Imperfection in the charge is, therefore, curable provided no prejudice has been shown to have resulted because of it.[18] It is true that in certain circumstances a conviction for liability under s 34, can be entered even though the charge mentions only s 149, IPC . But there can be no doubt that the proper procedure is to give the accused person notice of the precise ground on which liability is cast upon him.[19]

Where there is neither any proof of conspiracy between the accused (father and son) or pre-meditation to kill the deceased, nor is there any other evidence of common intention, and the accused, who are charged under s 302, have not been given any notice either by framing a charge under s 34, or putting the necessary question in their examination under s 313, CrPC that this was the case of the prosecution which they had to meet, the accused cannot be made liable on the ground of any vicarious liability. Each of the accused can be convicted and punished for what is actually done by him.[20]

84. Belated Plea of Juvenile after Framing of Charge

If no plea is taken that the accused were juvenile at the time of framing of charge under s 302 read with s 34 of IPC, such plea cannot be allowed to be raised at the belated stage after 25 years of commission of crime.[21]

85. Charge under Section 34 --Conviction for Substantive Offence *Simpliciter*

Where an accused is charged with a substantive offence by invoking the aid of s 34 there is no legal bar to his conviction under the substantive offence *simpliciter*.[22]In law there is little or no distinction between a charge for an offence under a particular section and a charge under that section read with s 34 . By the application of this section the accused is not charged for being responsible for anything done by one of his companions, but for the act done by himself along with some others. In a case where other persons are not proved to have joined in committing the offence, but the236 offence is proved to have been committed by the accused himself, there is no reason why he cannot be convicted for his own acts and for committing the offences himself. No question of prejudice arises, for the accused is convicted for the offence for which he was charged.[23]

86. Appellate or Revisional Court can Apply Section 34

It is a misnomer to say 'acquittal of s 34 ' as the section does not create a substantive offence. An appellate or revisional court can apply s 34 while maintaining a conviction for a substantive offence, even if it was not applied by the lower courts.[24] Even there no charge was framed under s 34 and the lower court convicted the accused under s 302 alone, the appellate court can convict them under s 302 read with s 34 .[25] Mention of section in the judgment is not a requirement of law to convict a person. If the ingredients of the offence are present, conviction can be made.[26]

87. Substitution of Charge under Section 34 for Charge under Section 149 --Permissibility

Though there is a substantial difference between ss 34 and 149, but as observed by Lord Summer in *Barendra Kumar Ghose v Emperor* ,[27] they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under s 149 overlaps the ground covered by s 34 . If the common object which is the subject-matter of the charge under s 149 does not necessarily involve a common intention, the substitution of s 34 for s 149 might result in prejudice to the accused and ought not, therefore, to be permitted.[28] But if the facts to be proved and the evidence to be adduced with reference to the charge under s 149 would be the same if the charge were under s 34, failure to charge the accused under s 34 could not result in any prejudice, and in such cases the substitution of s 34 for s 149 will be a formal matter.[29] Although there is difference in 'common object' and 'common intention', they both deal 'with combination of persons who become punishable as sharers in an offence', and a charge under s 149 is no impediment to a conviction by the application s 34 if the evidence discloses the commission of the offence in furtherance of the common intention of all.[30] In *Lachman Singh v State* ,[31] the substitution of s 34 or s 149 was upheld on the ground that the facts were such 'that the accused could have been charged alternatively either under s 302 read with s 149, or under s 302 read with s 34 '. The court cannot enter a conviction for an offence237 read with either section unless it finds that the elements justifying its application have been made out on the evidence. In such cases the court must record a finding as to the common intention of the participants, and as in the case of the common object of an unlawful assembly, it cannot be left for conjecture on inference from other facts set out in the judgment.[32] A conviction made with the aid of s 149 may be maintained with the aid of s 34 even in the alternative.[33]

88. Substitution of the Charge under Section 149 for Charge under Section 34 --Divergent Views

There is no unanimity on this point and some High Courts have expressed divergent opinions despite that opinion expressed by the Supreme Court in *Willie (William) Slavey v State of Madhya Pradesh* .[34] The Kerala High Court in *Benny v State of Kerala* ,[35] has held that when unlawful assembly and common object were not alleged, but s 34 alone was invoked, conviction with the aid of s 149 may be illegal. Membership of an unlawful assembly itself is a substantive offence, for which there must be a

charge and in order to fix constructive liability under s 149, the act must be proved to be in prosecution of the common object of the assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object. In the absence of prejudice, there is no legal bar to the recording of conviction under s 302 read with s 149 when the accused were charged under s 302 read with s 34 . Where the charge for rioting with deadly weapons, resulting in brutal murders, against the several accused clearly stated that the common object of the unlawful assembly was to commit murder and all the accused were also charged under s 302 read with s 34 in respect of the murders on the footing that they were committed in furtherance of the common intention of all the accused, and the evidence did not establish which of the accused had actually participated in the attack on the deceased persons, it was held that the accused whose participation in the rioting had been proved beyond doubt should be convicted under s 302 read with s 149 for the murders.[36]

89. Conviction under Section 302 Read with Section 34 can be altered to one under Section 326 read with Section 149

In the case of *Tilkeshwar Singh v State of Bihar* ,[37] the Patna High Court had, in appeal, altered the conviction of the accused under s 302 read with s 34, to one under s 326 read with s 149 and it was contended that the High Court had no power to substitute s 149 for s 34 . The Supreme Court held that the High Court had the power to do so.

90. Conviction under Section 304 / 34 can be altered under Section 326 / 34

Where the High Court was not justified in convicting the accused persons for offence punishable under s 304 read with 34, IPC, while the appropriate conviction would238 have been one under s 326 read with s 34, IPC . The Supreme Court modified the conviction and sentence recorded by the High Court and converted it to one under s 326 read with 34, IPC .[38]

91. Effect of Acquittal of some Accused on Conviction of others

When more persons than one are prosecuted and one of them is convicted and others are acquitted, the order of acquittal cannot be set aside unless an appeal has been duly preferred in that behalf against the said order. But there is no bar to the appellate court acting under s 386 of the Cr PC to appreciate the whole evidence in a given case for the purpose of accepting or rejecting the appeal before it. The evidence as a whole may show that the appellant is guilty under s 34 of the IPC having shared a common intention with the other accused who are acquitted and the acquittal of these persons was bad. There is nothing in law to prevent the appellate court from expressing that view and recording that finding. The conviction of the appellant in such a case could be maintained on the basis of that finding. This is the correct legal approach to prevent miscarriage of justice. A wrong and erroneous order of acquittal though irreversible in the absence of an appeal by the state would not operate as a bar in recording constructive liability of the co-accused when concerned action with common intention stands proved.[39]

Cases sometimes arise where persons are charged with being members of an unlawful assembly and other charges are framed against him in respect of offences committed by such assembly. In these cases, if the names of the persons constituting the unlawful assembly are specifically and clearly recited in the charge and it is not suggested that any other persons, known or unknown, also were members of the unlawful assembly, it may be that if one or more persons specifically charged are acquitted, that may introduce a serious infirmity in the charge in respect of the others against whom the prosecution case may be proved. It is in this class of cases, for instance, that the principle laid down in the case of *Plumer*[40] may have some relevance. If out of the six persons charged under s 149 along with other offences, two persons are acquitted, the remaining four may not be convicted because the essential requirement of an unlawful assembly might be lacking. Where, however, four persons are prosecuted under s 302 read with s 34, failure of the prosecution to prove that one of them took part in the commission of the offence does not introduce any infirmity in its case against the remaining accused at all. Even if he is held not to be present at the scene of the offence, that in law, cannot prevent the prosecution from presenting its case against the remaining accused if the evidence

adduced by it is otherwise satisfactory and cogent.[41] Even if one of the co-accused is acquitted, that does not by itself absolve other co-accused of their conjoint liability of the crime. In spite of acquittal of one o-accused it is open to the Court to convict the other accused on the basis of joint liability under s 34, if there is evidence against them of committing the offence in 'furtherance of the common intention'.[42]239

Where more than one accused are charged under s 302 read with s 34 and all except one are acquitted, the remaining one accused cannot be convicted under s 302 read with s 34, IPC on the basis of constructive liability. A1 and A2 were charged under s 302 read with s 34, IPC, A1 was acquitted for want of evidence, A2 could not be convicted under ss 302 / 34, IPC as the element of sharing the common intention by both the accused was the core of the charge.[43]

Where the finding is that the number of persons who constituted the unlawful assembly was more than five, though the identity of only four was established and the killing was done in prosecution of the common object of the entire unlawful assembly, there can be no serious difficulty in applying s 149 to such a case. Whether or not such a finding can be given must depend on the facts of each case and on the evidence led. A mere error, omission or irregularity in the charge will not invalidate the finding as a matter of law in the absence of prejudice to the convicted persons. If it is found that all the four accused and others had the common intention to kill the deceased, and the four accused took part in the assault in furtherance of the common intention, they can be convicted under s 302 read with s 34 even though others are acquitted.[44] Where one out of the two accused caused injuries to the deceased by a sharp edged weapon and the other by a blunt edged weapon, and the assault on the deceased by them was with prior concert, the acquittal of the latter was held improper. In such a case, conviction of the accused who had caused the injury that was likely to cause death, for having committed culpable homicide not amounting to murder punishable under s 304, Pt 2 and s 323 and the other accused under s 304, Pt 2 read with s 34 would be proper.[45]

In a case where some of the co-accused stand acquitted and the common intention to cause death is not established beyond a reasonable doubt, the prosecution must establish the exact nature of the injuries caused to the deceased by the accused with a view to sustain the conviction of that accused for inflicting that particular injury.[46] Where all accused but one were acquitted and even through there was no evidence that the said one accused caused one of the fatal injuries, he cannot escape conviction under s 302 read with s 34, IPC, when his participation with three other assailants in the attack on the victim has been established beyond reasonable doubt by the prosecution.[47]

92. When Acquittal of other Accused is not Material

In *Prabhu Babaji Navle v State of Bombay* ,[48] it was held that if a person is charged under s 302 read with s 34 for having shared a common intention of four named persons and for having participated in the crime, and the four persons are all acquitted, the element of sharing a common intention with them disappears; and240 unless it can be proved that he shared a common intention with the actual murderer or murderers, he cannot be convicted with the aid of s 34 .[49]Before one of the accused can be convicted of an offence under s 326 read with s 34, it must be established that some other specified persons, whose intention the accused shared, committed the act resulting in causing grievous hurt. When the accused alleged to be the actual assailants are acquitted such acquittal means that there is no such person who took part in the assault resulting in causing grievous hurt and hence the conviction of the remaining accused under s 326 read with s 34 cannot be upheld.[50]

An almost similar view was taken by the Rajasthan High Court in *Moolaram v State of Rajasthan* ,[51] where a number of persons were charged with an offence read with s 34, IPC, and all of them except one were acquitted, it was held that the 'one' could not be convicted for the offence read with s 34, IPC, the reason being that the essential element of the offence being committed by more than one person in pursuance of their common intention is absent. In such a case, that 'one' of course, can be convicted of the offence which he had individually committed. The basic requirement for applying s 34, IPC, is that it requires at least two persons to form common intention. It is not necessary that the identity of all of them should be established. But where the prosecution case is that the accused

committed the offence is furtherance of the common intention of known and identified co-accused and these co-accused are acquitted, the remaining accused cannot be convicted with the applicability of s 34 because there were none with whom he can be said to have share the common intention.

93. Conviction of Single Accused with the Aid of Section 34

In a situation when all the accused but one have been acquitted of the charge, it is possible to convict even the solitary accused under s 302 with the aid of s 34 .[52]

94. In Evaluating Evidence the High Court is Free to Reach its Own Conclusion without Disturbing Acquittal

In *Bratri alias Sukhdeo Singh v State of Punjab* [53] the Supreme Court held that the High Court is entitled to evaluate the prosecution evidence and arrive at its own conclusion. Such assessment is for the limited purpose of determining whether the infirmity which led to the acquittal of one of the accused persons could be availed of by the other accused who had been convicted on re-examination of the evidence the appellate court is free to reach its own conclusion which may be contrary to the one reached by the trial court while acquitting the co-accused. It can certainly come to an independent finding that evidence against the acquitted accused was satisfactory and should not have been discarded. On the basis of such a finding, the appellate court does not proceed to disturb the order of acquittal which has become final. It can241 certainly consider the impact of its conclusion on the case of the appellant before it. If on the evidence, the High Court can unmistakably arrive at the conclusion that the appellant and acquitted person had acted in furtherance of their common intention, the conviction of the appellant with the aid of s 34 is legal. It would be a travesty of justice if no conviction can be founded with the aid of s 34 notwithstanding the finding that the acquitted person was in fact one of the participants in the offence.[54] This view was taken by the Supreme Court even earlier in *Wasim Khan v State of Uttar Pradesh* ,[55] the High Court found that the appellant along with two others committed the offences of robbery and murder, but the two co-accused were acquitted. The Supreme Court held that on the finding of the High Court that, the appellant could be convicted by the application of s 34, even though the two co-accused of the appellant were acquitted. That was a case in which the number came down to one by the acquittal of the two co-accused. The same view was taken in *Mathur Dhana v State* .[56] Where two co-accused are charged under s 302 read with s 34 and one of them is acquitted or found not guilty of the offence charged, the other co-accused can be convicted of murder under s 302, provided of course the evidence justified it. That there was no alternative charge under s 302 against the convicted person is not of much consequence.[57] It is thus not essential that more than one person should be convicted of the offence and that s 34, IPC can be invoked if the court is in a position to find that two or more persons were actually concerned in the criminal offence sharing a common object. Where the evidence examined by the appellate court unmistakably proves than the appellant was guilty under s 34 having shared a common intention with the other accused who were acquitted and the acquittal was bad, there is nothing to prevent the appellate court from expressing that view and giving the finding and determining the guilt of the appellant before it on the basis of that finding.[58] Where the charge against three accused persons was that they committed murder in furtherance of their common intention and the two accused person were acquitted and the third accused was convicted under s 302, IPC (*simpliciter*) by the trial court, the decision was confirmed by the High Court and no conclusive evidence was adduced by the prosecution to prove that the injury inflicted by the third accused resulted in the death of the victim. Though the evidence on record showed that the third accused inflicted grievous injuries on the person of victim, the conviction of the accused was altered from s 302, IPC (*simpliciter*) to s 326, IPC .[59]

An order recording the conviction for the offence under s 409 when the accused were charged under that section read with s 34, is not therefore illegal.[60] Where two co-accused are charged under s 302 read with s 34 and one of them is acquitted or found not guilty of the offence charged, the other co-accused can be convicted of murder under s 302, provided of course the evidence justifies it. That there was no alternative charge under s 302 against the convicted person is not of much consequence.[61]242 A conviction of an accused person under s 420 would be valid though the charge is under s 420 read with s 34, unless prejudice is shown to have occurred.[62]

Where certain persons are charged with the offence under s 302, with the aid of s 34, any one of them who is found to have actually committed the offences under ss 304 and 324 can be convicted of them even if the offence against the other accused is not proved and s 34 is not applicable.[63]

95. Section 34 where Held Applicable--Illustrative Cases

Where both the accused were armed with weapons, and one waited for the other, and as a group attacked the deceased, both were convicted under s 304, Pt I read with s 34, IPC .[64]

The appellants came on a motorcycle, entered the clinic of the injured, fire shots at the injured who suffered two injuries. Both the appellants were convicted under ss 307 / 34, IPC .[65]

In prosecution for offence under ss 7 and 13 of the Prevention of Corruption Act 1988 read with s 34, IPC, the allegation was that accused appellant and accused no. 2 demanded Rs. 100/- as illegal gratification from the complainant for alleged violation of traffic rules, the accused appellant directed the complainant to meet the accused no. 2, the complainant met the accused appellant in the presence of the accused no. 2, the accused no. 2 accepted the bribe amount of Rs.100/- in the presence of the appellant, no complaint for traffic violation was filed, the appellant was convicted for offence under ss 7 / 13 of the Prevention of Corruption Act 1988 read with s 34, IPC .[66]

Three accused persons entered the house of the victim forcibly, lifted her, carried her to the shop of one accused, committed rape on her, the testimony of the prosecutrix having been found reliable, the accused were convicted under ss 366 / 457, 376 / 34, IPC .[67]

Accused H and K came on a motorcycle on the spot, H was driving the motorcycle. They stopped the motorcycle, accused K came near the deceased and shot at him with a pistol. Both fled away on motorcycle. Held, s 34 was attracted in the case, and accused H was convicted under s 302 read with s 34, IPC, while accused K was convicted under s 302, IPC .[68]

Victim was travelling in TSR. Accused, driver of the TSR, along with three other co-accused, robbed the victim of his valuables at knife point, pushed down the victim and tried to flee away, and after chase was arrested. Valuables of the victim and the offending weapon knife were recovered from his possession. Accused, in furtherance of common intention with other co-accused, committed the offence. Conviction under ss 392 / 34 and 397 / 34, IPC was held proper.[69]243

Prosecution evidence was not very specific with regard to the role played by A1, A2 and A3. It was the prosecution version that A4 had the knife in his pocket which he suddenly brought out and stabbed the deceased. Section 34 , IPC was not attracted in the case. The conviction of Accused 1, 2 and 3 with the aid of s 34, IPC was not proper, and was set aside. Only A4 was convicted under s 304, Pt II, IPC .[70]

When the evidence indicates that the three accused had repeatedly given blows with lathi, farsi and tanchia, and it is not possible to identify and ascribe a particular accused, there would be nothing illegal in convicting the accused of the charge of s 302 with the aid of s 34, IPC .[71]

Accused A1 and A2 Brothers--conviction proper

Accused A1 and A2 were real brothers, and had enmity with the deceased. Prosecution witnesses deposed that A2 was sitting on the chest of the deceased and A1 was assaulting him with stone, causing his death. Held, both accused A1 and A2 shared common intention, and were convicted under ss 302 / 34, IPC .[72]

The accused appellant struck the first blow on the right side of the head of the deceased, and the post-mortem report stated that this blow itself might have caused the death of the deceased. Held, s 34, IPC was attracted in the case, and the accused appellant was convicted under ss 302 / 34, IPC .[73]

The two brothers accused A1 and A2, dragged the deceased outside the house and accused A1 gave the

blows. A2 did not give the blow, but his participation from the beginning till the end was proved, which revealed that he shared the common intention with his brother. He also assaulted the other witnesses who had tried to intervene. Thus, though A2 might not have inflicted the injury, yet it could be concluded that he shared the common intention making him jointly liable. Accused A2 was convicted for offence under s 302 read with s 34, IPC .[74]

The accused husband was already married, but had sexual intercourse with the prosecutrix, and did not disclose his earlier marriage to the prosecutrix, *prima facie* a case under s 376, IPC is made out against the accused. The parents of the accused husband residing with him did not disclose the fact of earlier marriage to the complainant, and were part of the conspiracy, thus, they can be prosecuted under s 376, IPC, read with ss 120B and 34, IPC .[75]

Accused persons had dragged the deceased out of the car, the co-accused fired upon the victim's car from another car in which the accused persons were sitting. The prosecution evidence proved that the accused persons had acted in furtherance of their common intention, their acquittal giving them benefit of doubt was held not proper, and was set aside.[76]244

Accused appellants along with others had gone to the shop of the complainant to settle certain dispute. One of the accused persons with the assistance of the accused appellant who had caught hold of the injured, inflicted knife injuries, thus, the conviction of the accused appellant under ss 307, 323 with the aid of s 34, IPC was held proper.[77]

There was evidence of the prosecution witness that all the four accused holding weapons in their hands opened fire towards the deceased, who started to run and after the initial firing, two of the accused continued to fire pursuant to which the deceased fell down and finally, accused R ensured that the deceased lost his breath. Held, s 34 was fully applicable in the case, thus, accused appellants were convicted under ss 302 / 34, IPC .[78]

The evidence of the victim that the two accused together assaulted him with arms causing grievous injuries was fully corroborated by medical evidence. The assault was voluntary and not in exercise of right of private defence on sudden and grave provocation. Accused were convicted under ss. 325 / 34, IPC .[79]

Where A and B accused caught hold of the deceased and the C accused with knife inflicted two fatal blows on the deceased, the intention was not to cause death but to create terror, all would be guilty and convicted under ss 304 Pt I/34, IPC .[80]

There was reliable evidence of the eye-witness that the accused C along with other three accused persons attacked the deceased with knife, corroborated by the recovery of knife. Accused were convicted under ss 302 / 34 and 120B, IPC .[81]

Out of seven accused persons put on trial five accused persons were acquitted by the trial Court. Two accused H and M armed with lathi and sharp-edged weapon had come together on the spot, gave abuses, and had inflicted injuries with the said weapons and had left together from the spot. Held, common intention was proved, thus, the Supreme Court upheld the conviction of the two accused appellants not with the aid of s 149, IPC, but with the aid of s 34 .[82]

The prosecution evidence showed that the appellant J came to the place of occurrence and made inquiries from the father of the deceased about the whereabouts of the deceased, the appellant J remained present at the place of occurrence throughout the time when the three other appellants S, V and B were stabbing the deceased. These facts strongly suggested that appellant J shared a common intention with the other appellants to murder the deceased and that the role assigned to him was to lure the deceased who was a tough guy to come out of his house and entrap him so that the other appellants could overpower and murder him.[83]

The evidence of PWS and the eye-witnesses established that the appellant accused A armed with pistol on the extortion of the co-accused AK and V had shot at the deceased. Co-accused AK and V had caught hold of the deceased. The evidence of the eye-witnesses was corroborated by medical evidence. Held, s

34 was attracted in245 the case. Conviction of the all the appellants accused under s 302, IPC was held proper.[84]

Evidence showed that the appellant J was armed with a bow and the appellant T was armed with falia, who intercepted the deceased when he was returning to the village. Appellant J shot arrows causing injuries on chest and other parts of the body, in total 8 arrows and appellant T gave blow by falia causing injury on the waist of deceased. Held, appellant T caused falia injury after 5 arrow shot injuries caused by appellant J, was sufficient to establish that they were having common intention to commit murder of deceased and in furtherance of their common intention, they acted. Both the appellants were convicted under ss 302 / 34, IPC .[85]

In the instant case, appellants P and K, initially in order to strike terror in the market opened fire in the air, thereafter S made fire from his katta at deceased, hitting deceased on the left side of the abdomen and killed him. Held, P and K were rightly held guilty under ss 302 / 34, IPC .[86]

Where the deceased and injured victim were bare handed, while the accused persons were armed with deadly weapons *viz*. knife and kencha, and nine incised wounds were found on the persons of the deceased, three of them being on the abdominal region, the appellants M and G had given kencha blows in the abdominal region of the deceased, and the other appellants M and K had dealt knife blows on the back of the deceased, the act of the accused appellants indicated that they shared common intention to kill the deceased, thus, their conviction under ss 302 / 34, IPC was held proper.[87]

Appellant H had gone to the house of the deceased along with the other appellants who were armed with deadly weapons like knife, danda and banda. When they tried to attack the deceased, he went inside his house and hid himself in the puti but the appellant went inside the house, searched out the deceased; took him out from the puti, forcefully dragged him out of the house and then assaulted him with danda, knife, banda & hands and fists. The act of appellant H clearly showed that he was sharing a common intention with the other appellants to commit the murder of the deceased and nothing less than that. His conviction under s 302, IPC was held proper.[88]

96. Section 34 where held Inapplicable - Illustrative Cases

Allegation was that the appellants no. 1 and no. 2 caught the deceased, and thereafter fatal knife blow was given by the appellant no. 3. In the FIR there was no specific allegation against the appellant nos. 1 and 2 about catching of the deceased by them to facilitate the appellant no. 3 to give knife blow to the deceased. The appellant nos. 1 and 2 were not convicted under s 302, IPC with the aid of s 34, IPC .[89]246

A3 and A4 admittedly did not assault the deceased. They simply caught hold of the deceased with a view to facilitate the others to assault. Since the common intention of the accused was only to cause grievous hurt and not murder, conviction of A3 and A4 under s 302 read with s 109, IPC was set aside and they were convicted under s 324 read with s 109 .[90]

In the present case, evidence was that PW14 took away the lathi from the accused appellant and threw it out. Thereafter, the only role played by the accused according to the prosecution witnesses was that he was running. He did not pick up the lathi which had been thrown by PW14 and the prosecution witnesses accepted that he did nothing thereafter except running. The conviction of the accused appellant under ss 302 / 34, IPC was set aside.[91]

Prosecution evidence was not very specific with regard to the role played by A1, A2 and A3. It was the prosecution version that A4 had the knife in his pocket which he suddenly brought out and stabbed the deceased. Section 34 , IPC was not attracted in the case. The conviction of A 1, 2 and 3 with the aid of s 34, IPC was not proper, and was set aside. Only A4 was convicted under s 304, Pt II, IPC .[92]

Eleven accused persons including the two appellants surrounded the deceased and caused injuries. Accused 9 to 11 were acquitted. The accused appellant no. 1 caused injuries armed with ballam and accused appellant no. 2 armed with pharsa assaulted the deceased. In post mortem examination,

eleven injuries were found on the persons of the deceased. The doctor opined that the death occurred due to excessive bleeding and shock on account of the injuries. The death had not taken place as a result of the injuries caused by the two appellant nos. 1 and 2. Hence, they could not be held guilty under s 302, IPC*simplicitor* or with the aid of s 34, IPC . The conviction of the two appellants under s 302 was altered to one under s 326, IPC .[93]

Eleven persons named in FIR were alleged to have inflicted five incised wounds on the deceased. The Courts below convicted only two accused appellants 1 and 2 and acquitted nine other accused persons. Medical evidence showed that the death of the deceased was due to excessive bleeding and shock as a result of the five injuries sustained. Held, the death had not taken place as a result of the injuries caused by the appellants or any one of them. Hence, they could not be held guilty under s 302, IPC*simplicitor* or with the aid of s 34, IPC . The conviction of the accused appellants under ss 302 / 34, IPC was altered to one under ss 326 / 34, IPC .[94]

Co-accused (father), assaulted the deceased with stone and when the deceased fell down, main accused assaulted the deceased with sword, giving several blows causing death. Only main accused had motive as the deceased was having illicit relations with his wife. Held, s 34, IPC was not attracted. Co-accused was convicted under s 325, IPC instead of s 302, IPC, and conviction of main accused under s 302, IPC was held proper.[95]247

The victim had received grievous injuries on his hand and head. The prosecution case that two co-accused along with two other accused had assaulted the victim was not proved by medical evidence, and neither was any overt act attributed to the co-accused, nor was any common intention on their part proved. Conviction of the two accused under s 325 read with s 34, IPC was not proper, and was set aside.[1]

The delinquent accused had pulled down the victim from the roof when the victim was painting the kitchen roof. Other co-accused gave khhoncha blow to the victim on left ear, causing injuries. As the delinquent accused had not prompted other co-accused to bring khhoncha and give blow to the victim, the delinquent accused was acquitted of the charges under ss 307, 324 read with s 34, IPC .[2]

There was evidence that the main accused assaulted the deceased on his head with an axe resulting in death. Two other accused assaulted the other victims with clubs. The other victims had suffered simple injuries. There was bare allegation but no evidence that all the accused shared common intention to cause the death of the deceased. The two other accused were convicted not under s 304, Pt I, but were convicted under s 323, IPC .[3]

Where the accused appellant A5 had caused simple injury by bamboo stick to the deceased, while other accused A1 had given fatal blow, he was convicted under s 323, IPC and not under s 302 read with s 34, IPC .[4]

Where all the accused had attacked the deceased together and only two blows, one by axe and another by knife were given, there was no common purpose, thus, s 34, IPC was held not attracted in the case.[5]

The incident occurred at the spur of the moment. The accused caught the hands of the deceased, his brother co-accused suddenly brought a glass bottle, broke it and stabbed the deceased causing death. Held, accused did not share common intention of his brother to cause the death of the deceased. He was acquitted of the charge under ss 302 / 34, IPC .[6]

Appellant A parted with the company of the main accused R before the prosecutrix was raped by the accused R. There was no evidence that the accused A guarded the place where the main accused R committed rape on the prosecutrix. Appellant A was acquitted of the charge of gang rape.[7]

Where it was alleged that the Appellant nos. 2 and 3 had assaulted the deceased with kicks and fists, their overt act was not corroborated by medical evidence, and there was no evidence available on record that they had any pre-meditation, pre-meeting of mind and pre-plan with the appellant no. 1,

thus, held that the two appellants deserved to be acquitted of the charge under ss 302 / 34, IPC .[8]

Where the prosecution case was that when the victim crossed the appellants accused persons he received gun shot at back and then both the appellants ran away, and victim deposed that he did not see as to which of the appellants accused had248 fired, held that the common intention was not proved, thus, both the accused persons were acquitted of the charges under ss 307, 326 / 34, IPC .[9]

Where there was testimony of solitary witness that the co-accused chased and caught hold of the deceased, his conviction under s 302 with the aid of s 34, IPC was not proper and was set aside.[10]

Father and son were alleged to have gone to the house of the deceased, where father caught hold of the deceased and son attacked the deceased with Gupti. Father was not named in FIR, hence he was acquitted of charge under ss 302 / 34, IPC .[11]

3 *Maqsoodan & Ors v State of Uttar Pradesh* AIR 1983 SC 126, (1983) Cr LJ 218 (SC) .

4 *Mahbub Shah v Emperor* AIR 1945 PC 118, p 121 ; Re *Shankarappa*AIR 1958 AP 380 ; *Mal Singh v State of Rajasthan* 1984 Raj LW 307, (1984) Cr LR 299 (Raj) .

5 *Pandurang v State of Hyderabad* AIR 1955 SC 216, p 222 ; *Bashir v State* AIR 1953 All 668, p 672 ; *Kinaram v State* AIR 1952 Assam 2 ; *State of Bihar v Lala Mahto* AIR 1955 Pat 161, p 169 ; *Mohinder Singh v State* AIR 1960 Punj 135 ; *Kamaldin v Emperor* AIR 1947 Sind 41 ; *Oswal Danji Tejsi v State* AIR 1961 Guj 16 ; *Aruna v State of Hyderabad* AIR 1956 Hyd 98 .

6 *Narsingh Bhai Haribhai Prajapati etc. v Chhatra Singh & Ors* AIR 1977 SC 1753, (1977) Cr LJ 1144 (SC) .

7 *Oswal Danji Tejsi v State* AIR 1961 Guj 16, p 18 .

8 *Satrughan Patar v Emperor* AIR 1919 Pat 111, p 119 .

9 *Rotash v State of Rajasthan* (2007) Cr LJ 758 (SC) .

10 *State of Uttar Pradesh v Jhinkoo Nai* (2001) Cr LJ 3965 (SC) .

11 *Bashir v State* AIR 1953 All 668, p 672-73 ; *State v Hira Dubey* AIR 1952 Pat 135, p 137 ; *Abu Bahar Siddik v State of Tripura* (2005) Cr LJ 1332 (Gau) (DB) .

12 *Rajesh Govind Jagesha v State of Maharashtra* (2000) Cr LJ 380 (SC) ; *Harbans Kaur v State of Haryana* (2005) Cr LJ 2199 (SC) .

13 *Surendra Chauhan v State of Madhya Pradesh* (2000) Cr LJ 1789 (SC) .

14 *Nazir v Emperor* AIR 1948 All 229, p 232 .

15 *State of Uttar Pradesh v Iftikhar Khan & Ors* AIR 1973 SC 863, (1973) Cr LJ 636 (SC) .

16 *Mahbub Shah v Emperor* AIR 1945 PC 118 ; *State of Bihar v Lala Mahto* AIR 1955 Pat 161, p 169 ; *Irshadullah Khan v Emperor* AIR 1933 All 528 ; *Narayan v State* AIR 1953 Hyd 161 ; *Nga E v Emperor* AIR 1931 Rang 1, p 4 (FB) .

17 *Kassim Pillai Assanaru Kutty v State* AIR 1952 Tr & Coch 565, p 568.

18 *Ramesh Singh v State of AP* (2004) 11 SCC 305, AIR 2004 SC 4545 .

19 *King and the Attorney-General of the Commonwealth v Associated Northern Collieries* 14 CLR 387, p 400, per Issacs J.

20 *Sree Vijayakumar v State by Inspector of Police* 2005 Cr LJ 3085, p 3091 (SC), 2005 SCC (Cri) 1896, (2005) 10 SCC 737, (2005) Supp(1) SCR 398.

21 *Arbind Kumar Singh v State of Bihar* (1990) 1 BLJR 393, p 410 .

22 *Pandurang v State of Hyderabad* AIR 1955 SC 216, p 222 .

23 *Abdul Bari v State of West Bengal* 1984 Cr LJ 201, (1984) 1 Cal HN 49, (1983) 87 CWN 1108 (Cal), (1983) 2 Crimes 922 (Cal)(DB).

24 *State of Haryana v Satendra* 2014 Cr LJ 4052, p 4058 (SC), (2014) 7 SCC 291 .

25 *Sandeep v State of UP* 2009 Cr LJ (NOC) 1198 (All) (DB).

26 *Emperor v Ibrahim* AIR 1931 Rang 321, **but see***Mahbub Shah v Emperor* AIR 1945 PC 118 .

27 *Ram Kumar v State of MP* 2014 Cr LJ 3694, p 3697 (SC), (2014) 13 SCC 128, (2014) 140 AIC 61 (SC) .

28 *Mohinder Kumar v State of HP* 2009 Cr LJ 4235, p 4240 (HP) .

29 *Mohinder Kumar v State of HP* 2009 Cr LJ 4235, p 4240 (HP) .

30 *Shano Singhdeo v State of Jharkhand* 2009 Cr LJ 4718, p 4720 (Jhar) .

31 *Mamand v Emperor* AIR 1946 PC 45 .

32 *Oswal Danji Tejsi v State* AIR 1961 Guj 16, p 19 ; *State of Punjab v Jagtar Singh* (1995) Cr LJ 833 (P&H) .

33 *Khacheru Singh v State of Uttar Pradesh* AIR 1956 SC 546 .

34 *Deepak Pradhan v State of Sikkim* 2013 Cr LJ 4834 (Sikk) (DB) .

35 *Mehttar Ram v State of Chhattisgarh* 2011 Cr LJ 1584, p 1588 (Chh) (DB) .

36 *Ali Akbar Mondal v State of West Bengal* 2011 Cr LJ (NOC) 312 (Cal) ; *Mehttar Ram v State of Chhattisgarh* 2011 Cr LJ 1584 (Chh) (DB) .

37 *Narayan v State* AIR 1953 Hyd 161, p 165 .

38 *Manoj Budha Chavan v State of Maharashtra* 2012 Cr LJ (NOC) 358 (Bom) (DB), (2012) 4 Bom CR (Cri) 69).

39 *Rakesh Kumar v Stat,* 2014 Cr LJ 3401, p 3409 (Del) (DB) .

40 *Dharam Pal & Ors v State of Haryana* AIR 1978 SC 1492, (1978) Cr LJ 1538 (SC) .

41 *Kareem v State* 2009 Cr LJ 1236 (Kant) .

42 *State of HP v Nazar Singh* 2009 Cr LJ 3984, p 3987 (SC), 2009 AIR SCW 4243, 2009 (7) Scale 666, (2009) 12 SCC 89 .

43 *Om Prakash v State* AIR 1956 All 241, p 246 .

44 *Ramnath Madho Prasad v State of Madhya Pradesh* AIR 1953 SC 420, p 424 .

45 *State of Sikkim v Rakesh Rai* 2012 Cr LJ 2737, p 2768 (Sikk) (DB) (Four accused persons convicted under ss 302 / 34, IPC) *Alakunta Narsimloo v State of Andhra Pradesh* 1994 Cr LJ 1721**followed**; *Pandurang v State of Hyderabad* AIR 1955 SC 216, 1955 Cr LJ 572 **referred**.

46 *Basharat v Emperor* AIR 1934 Lah 813, p 814 .

47 *Mahadeo Nath Khetri v Emperor* AIR 1941 Pat 550, p 553 ; *Basharat v Emperor* AIR 1934 Lah 813, p 814 .

48 *Kantiah Ramayya Munipalli v State of Bombay* AIR 1955 SC 287, p 294 .

49 *Queen v Gorachand Gope* 5 WR Cr 45, p 48 (FB) .

50 *Rewaram v State of Maharashtra* (1983) Cr LJ 1845 (Bom) .

51 *State of Haryana v Satendra* 2014 Cr LJ 4052, p 4058 (SC), (2014) 7 SCC 291 .

52 *Emperor v Motilal Malik* AIR 1935 Cal 526, p 534 ; *Irshadulla Khan v Emperor* AIR 1933 All 328 .

53 *Jagdish v State of Haryana* 2005 Cr LJ 3073, p 3075 (SC), (2005) 11 SCC 146, AIR 2005 SC 2576 .

54 *Ganpat v State* 1961 Raj LW 313 .

55 *Pichai v State of Tamil Nadu* 2005 Cr LJ 5111, p 5113, (2005) 10 SCC 505, 2005 SCC (Cri) 1617 .

56 *Atmaram v State of Madhya Pradesh* 2012 Cr LJ 2882, p 2888 (SC), AIR 2012 SC 1956, 2012 (5) Scale 300, (2012) 5 SCC 738 .

57 *Kuria v State of Rajasthan* 2012 Cr LJ 4707 (SC), 2012 AIR SCW 5259, AIR 2013 SC 1085, 2012 (9) Scale 42, (2012) 10 SCC 433 .

58 *Rotash v State of Rajasthan* (2007) Cr LJ 758 (SC) .

59 *Mohanlal v State* AIR 1961 Raj 24, p 29 .

60 *Narender Singh v State of Punjab* (2000) Cr LJ 3462 (SC) .

61 Re *Ramaswami*AIR 1952 Mad 411, p 413 ; Re *Muniyandi*AIR 1954 Mad 196, p 197 .

62 *Emperor v Barendra Kumar Ghose* AIR 1924 Cal 257, p 258 .

63 *Emperor v Nga Aung Thein* AIR 1935 Rang 89 (FB) .

64 *State of UP v Ganga Ram* 2005 Cr LJ 4643, p 4647, AIR 2006 SC 20, 2005 (4) Crimes 198 (SC) .

65 *Ramchandra Ohder v State of Bihar* (1999) Cr LJ 1449 (SC) ; *Mukati Prasad Rai v State of Bihar* AIR 2005 SC 1271, 2005 Cr LJ 681, 2004 (9) Scale 1, (2004) 13 SCC 144 (Other accused were not convicted under ss 302 / 34, IPC).

66 *Mahesh v State of Madhya Pradesh* 2012 Cr LJ 2713 (SC), AIR 2012 SC 2172, 2011 (9) SCC 626 ; **see also***State of Haryana v Shakuntala* 2012 Cr LJ 2850 (SC), AIR 2012 SC 2123, 2012 (4) Scale 526, (2012) 5 SCC 171 .

67 *Manoj v State of Karnataka* 2014 Cr LJ 60, p 63 (SC), AIR 2013 SC (Supp) 116, (2013) 14 SCC 666, 2013 AIR SCW 5547, 2013 (8) Scale 387 . (Conviction under ss 302 / 34, IPC altered to one under s 325, IPC).

68 Indian Evidence Act 1872, s 114, illust (a).

69 *Ram Sarup Singh v Emperor* AIR 1930 Pat 513 ; *Emperor v Niamat Ullah* 14 Cr LJ 556 ; *Queen Empress v Sami* 13 ILR Mad 426, p 432, 1 Weir 290 ; *Emperor v Chintamoni Shahu* AIR 1930 Cal 379, 31 Cr LJ 497 ; Re *Venkataswamy*AIR 1950 Mad 309, 51 Cr LJ 497 ; *Ram Prashad Mukundram v Crown* AIR 1949 Nag 227, 50 Cr LJ 713 ; *Sadashiva Daulat v State* AIR 1950 MP 104, p 105 and cases cited therein .

70 *Nga Thein Pe v King* AIR 1939 Rang 361, p 365 .

71 *Ganga v State* AIR 1957 All 678, p 680 .

72 *BN Srikantiah v State of Mysore* AIR 1958 SC 672, (1958) Cr LJ 1251 (SC) .

73 *Maqsoodan & Ors v State of Uttar Pradesh* AIR 1983 SC 120, (1983) Cr LJ 218 (SC) .

74 *Dharam Pal & Ors v State of Haryana* AIR 1978 SC 1492, (1978) Cr LJ 1538 (SC) .

75 *Mahbub Shah v King-Emperor* AIR 1945 PC 118, 46 Cr LJ 689 .

76 *Har Sahai v Rex* AIR 1949 All 582, p 584 .

77 *Rishideo v State of Uttar Pradesh* AIR 1955 SC 331, p 333 .

78 *Bashir v State* AIR 1953 All 668, p 674 ; *State of Bihar v Lala Mahto* AIR 1955 Pat 161, p 169 .

79 *Pandurang v State of Hyderabad* AIR 1955 SC 216 ; *BN Srikantiah v State of Mysore* AIR 1958 SC 672 ; *Nga v Emperor* AIR 1931 Rang 1 (FB) ; *Shariff Ahmad v State* AIR 1957 All 50 ; *Mamand v Emperor* AIR 1946 PC 45 ; *Kripal v State of Uttar Pradesh* AIR 1954 SC 706 ; *Emperor v Nga Aung Thein* AIR 1935 Rang 89 .

80 *Laxman Anaji Dhundale v State of Maharashtra* 2007 Cr LJ 3191, p 3193, AIR 2007 SC 1876, (2007) 5 Scale 330, 2007 (3) Supreme 502 .

81 *Anil v State of Haryana* 2007 Cr LJ 4294, p 4298 (SC), 2007 (7) Scale 56, 2007 (5) Supreme 15 .

82 *Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1, p 7 .

83 *Ibid*, p 9.

84 *Nazir v Emperor* AIR 1948 All 229, p 232 ; *Madhawa Pyare Lal Kurmi v State of Vindhya Pradesh* AIR 1954 VP 36 .

85 *Bashir v State* AIR 1953 All 668, p 674 ; *Mian Khan v Emperor* 29 Cr LJ 474 .

86 *Mangla v Emperor* 38 Cr LJ 628, p 630 ; *Joginder Singh v State of Himachal Pradesh* (1995) Cr LJ 124 (HP) .

87 *Rajender Singh v State of Haryana* 2009 Cr LJ 1561, p 1567 (SC), AIR 2009 SC 1734, 2009 (1) Scale 751 .

88 *Bashir v State* AIR 1953 All 668, p 674 .

89 *Rishideo v State of Uttar Pradesh* AIR 1955 SC 331, p 333-34 ; *Emperor v Nga Aung Thein* AIR 1935 Rang 89 (FB) ; *Nga Tha Aye v Emperor* AIR 1935 Rang 299 ; *Nga E v Emperor* AIR 1931 Rang 1 (FB) ; *Bhikari Pati v Emperor* AIR 1930 Pat 545 .

90 *Kripal v State of Uttar Pradesh* AIR 1954 SC 706 ; *Bachan Lal v State* AIR 1957 All 184 .

91 *Sultan v Emperor* AIR 1931 Lah 749, p 750 ; *Fateh Khan v Emperor* AIR 1930 Lah 950 .

92 *Wazir Singh v State of Punjab* AIR 1956 SC 754, p 757 ; *Ram Chandra v State of Uttar Pradesh* AIR 1957 SC 381 .

93 *Dalip Singh v State of Punjab* AIR 1953 SC 364 .

94 Re *Periaswami*AIR 1960 Mad 362 .

95 Re *Nachimuthu Goundan*AIR 1947 Mad 259 .

96 *Lal v Emperor* AIR 1927 Lah 831 .

1 *Rawalpenta Venkalu v State of Hyderabad* AIR 1956 SC 171 ; *Harbans Singh v State* (1960) 62 Punj LR 286 ; *Harwant Singh v State* AIR 1969 NSC 79 ; *Bhoor Singh v State of Punjab* AIR 1974 SC 1256, (1975) Cr LJ 929 (no prejudice caused to the accused); *Amar Singh v State of Haryana* AIR 1973 SC 1409 ; *Jagir Singh v State of Punjab* AIR 1968 SC 43, (1968) Cr LJ 89 ; *Mohan Singh v State of Punjab* AIR 1963 SC 174, (1963) 1 Cr LJ 100 ; *Karan Singh v State of Madhya Pradesh* AIR 1965 SC 1037, (1965) 2 Cr LJ 142 ; *Kartar Singh v State of Punjab* AIR 1961 SC 1787, (1961) 2 Cr LJ 855 ; *Ram Murti v State of Haryana* (1977) 79 Punj LR 12 (SC) ; *Karnail Singh v State of Punjab* AIR 1954 SC 209, (1954) Cr LJ 580 ; *Sivapada v State* AIR 1969 Cal 28, p 31, (1969) Cr LJ 160 ; *Nemal Adak v State* AIR 1965 Cal 89, (1965) 1 Cr LJ 160 ; *Lachman Singh v State* AIR 1952 SC 167, p 170, (1952) Cr LJ 863 ; *Harmohan v State of Orissa* (1970) 36 Cut LT 731 ; *Anasi Sabara v State* (1975) Cr LJ 567 ; *A Gopaiah v State of Andhra Pradesh* (1978) Cr LJ 789, p 804 (AP) ; Re *Poreddi Venkata Reddy*(1961) 1 Cr LJ 42; *Narayanan v State of Kerala* (1978) KLT 197, (1963) MPLJ (Notes) 14 ; *Dalip Singh v State of Punjab* AIR 1953 SC 364, (1953) Cr LJ 1465 ; *Dhansai v State* AIR 1969 Ori 105, (1969) Cr LJ 626 ; *Garib Singh v State of Punjab* AIR 1973 SC 460, p 464, (1972) Cr LJ 1286 ; *Anshad v State of Karnataka* (1995) 1 East Cr C 14 (SC), (1996) 10 SCC 79, AIR 1996 SC 2478, 1996 (Supp-4) SCR 28, 1996 Cr LJ 3516 ; *Babu v State* 2013 Cr LJ 2176, (2013) 4 SCC 448, AIR 2013 SC 1769 .

2 *Dhanna etc. v State of Madhya Pradesh* (1996) Cr LJ 3516 (SC) .

3 *State of Orissa v Arjun Das Aggarwal & Ors* (1999) Cr LJ 4078 (SC) .

4 *Dhaneswar Mahakud v State of Orissa* 2006 Cr LJ 2113 (SC), AIR 2006 SC 1727, 2006 (4) Scale 170 .

5 *State v Babulal* AIR 1956 Raj 68, p 75 ; *Dewji Moti Bhil v State* AIR 1955 MB 20 ; *State v Hanumatha Nath Das* AIR 1960 Cal 183, p 185 .

6 *State of Karnataka v Abdul Rasheem* (2006) Cr LJ 3169 (Kant) .

7 *Dhulya @ Dhulji v State of MP* 2008 Cr LJ (NOC) 495 (MP) (DB).

8 *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116, p 137 .

9 *Dhanna v State of MP* (1996) 10 SCC 79, AIR 1996 SC 2478, 1996 AIR SCW 3066 ; *Babu v State* 2013 Cr LJ 2176, AIR 2013 SC 1769, (2013) 4 SCC 448, 2013 (4) Scale 557 .

10 *Madhuwa Pyarelal Kurmi v State of Vindhya Pradesh* AIR 1954 VP 36, p 38 ; Re *Theethumalai Gounder*AIR 1925 Mad 1 (FB) .

11 *Benu Namasudra v State of Tripura* 2010 Cr LJ 781, p 793 (Gauh) (DB) .

12 *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116, p 137-38 ; Re *Sankarappa*AIR 1958 AP 380 .

13 *Begu v Emperor* AIR 1925 PC 130, p 131 .

14 *Lachhman Singh v State* AIR 1952 SC 167, p 170 .

15 *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116, p 132 .

16 *BN Srikantiah v State of Mysore* AIR 1958 SC 672, p 675 ; *Chinhan Kameswara Rao v State of AP* 2013 Cr LJ 1540, AIR 2013 SC 3602, (2013) 12 SCC 689 ; Re *Periaswami*AIR 1960 Mad 362 ; *Murao Singh v State of Madhya Pradesh* AIR 1961 MP 45 .

17 *Chinnam Kameswara Rao v State of AP* 2013 Cr LJ 1540, p 1546 (SC), AIR 2013 SC 3602, (2013) 12 SCC 689 .

18 *Ibid*.

19 *Krishnan Bala Krishnan v State of Kerala* AIR 1958 Ker 95 .

20 *Dewji Moti Bhil v State* AIR 1955 MB 20 .

21 *Jogi v State of Uttar Pradesh* (2005) Cr LJ 3216 (All) (DB) .

22 *Om Prakash v State* AIR 1956 All 241 ; *Bishwanath v Emperor* AIR 1946 All 153 **dissented from**.

23 *Bachan Singh v State* AIR 1955 Pepsu 162 .

24 *Murao Singh v State of Madhya Pradesh* AIR 1961 MP 45, p 46, (1961) 1 Cr LJ 270 ; *Nana Gangaram v State of Maharashtra* 1970 Mah LJ 172 ; *Taga v State of Rajasthan* 1976 Raj LW 589, p 600 .

25 Re *Periaswami*AIR 1960 Mad 362 ; *Kalayan Singh v State of Madhya Pradesh* (1994) 3 RCR 49 (MP) .

26 *Narender Singh & Anor v State of Punjab* (2000) Cr LJ 3462 (SC) .

27 *Barendra Kumar Ghose v Emperor* AIR 1925 PC 1 .

28 *Dalip Singh v State of Punjab* AIR 1953 SC 364 ; *Kashi Ram Nanda v State* AIR 1954 MB 143 ; *State of Bihar v Rahim Nadaf* AIR 1957 Pat 52 ; *Madhu Yadav & Ors v State of Bihar* II (2002) CCR 236 (SC) .

29 *Karnail Singh v State of Punjab* AIR 1954 SC 204, p 207 ; *B Bhadriah v State of Andhra Pradesh* 1995 (1) East Cr C 41 (SC) .

30 *BN Srikantiah v State of Mysore* AIR 1958 SC 672, p 675 ; *Bhondu Das v Emperor* AIR 1929 Pat 11 ; *Nethuraji v State of Andhra Pradesh* 1991 Cr LJ 3133, p 3134 (SC) ; *Benny v State of Kerala* (1991) 2 Crimes 576, p 581 (Ker) .

31 *Lachman Singh v State* AIR 1952 SC 167, p 170 ; *Bollneedi Venkataramiah v State of Andhra Pradesh* 1994 Cr LJ 61 (SC) .

32 *Krishna Pillai Vasu Pillai v State* AIR 1956 Tr & Coch 230, p 232.

33 *Bolineedi Venkataramaiah v State of Andhra Pradesh* (1994) Cr LJ 61 (SC) .

34 *Krishna Pillai Vasu Pillai v State* AIR 1956 Tr & Coch 230, p 232.

35 *Benny v State of Kerala* (1991) 2 Crimes 576, p 581 .

36 Re *Poreddi Venkata Reddy*AIR 1961 AP 23, p 28 ; **relying on***Tilkershwar Singh v State of Bihar* AIR 1956 SC 238 .

37 *Tilkeshwar Singh v State of Bihar* AIR 1956 SC 238 .

38 *Chowa Mandal v State of Bihar* (2004) Cr LJ 1405 (SC) .

39 *Brathi alias Sukhdeo Singh v State of Punjab* (1991) 1 Crimes 74, p 78 (SC), (1991) Cr LJ 402 ; *AmrikSingh Satnam Singh v State of Punjab* (1994) 1 Crimes 297 (SC), (1994) 1 SCC 563, (1994) SCC (Cr) 147 .

40 *King v Plumer* (1901) 2 KB 339 .

41 *Sunder Singh v State of Punjab* AIR 1962 SC 1211, p 1215 ; **distinguishing***King v Plumer* (1902) 2 KB 339 .

42 *Y Venkaiah v State of AP* 2009 Cr LJ 2834, p 2839 (SC), AIR 2009 SC 2311, 2009 (4) Scale 154 ; *Gurunath Donkappa Keri v State of Karnataka* 2009 Cr LJ 2995 (SC), 2009 AIR SCW 3540, 2009 (7) Scale 482 .

43 *Irapa Kumbhar v State of Goa* 2010 Cr LJ 1498, p 1504 (Bom) (DB) ; **see also***Krishna Govind Patil v State of Maharashtra* AIR 1963 SC 1413, [1964] 1 SCR 678, 1963 Cr LJ 351 ; *State of West Bengal v Vindu Lachandas Sakhrani* AIR 1994 SC 772, 1994 Cr LJ 919, 1995 SCC (Cr) 175 .

44 *Bharwad Mepa Dana v State of Bombay* AIR 1960 SC 289, p 295 ; *Kapildeo Singh v King* AIR 1950 Tr & Coch 80; *Dalip Singh v State of Punjab* AIR 1953 SC 364 ; *Narisingh v State of Uttar Pradesh* AIR 1954 SC 457 ; *Bolineedi Venkataramiah v State of Andhra Pradesh* (1994) Cr LJ 61 (SC) ; *Jadu Yadav v State of Bihar* (1994) Cr LJ 1209 (SC), AIR 1994 SC 957, (1994) 2 East Cr C 535 (SC) .

45 *State of Punjab v Mann Singh & Anor* AIR 1983 SC 172, (1983) Cr LJ 229 .

46 *Nadodi Jayaraman v State of Tamil Nadu* AIR 1993 SC 777, (1993) Cr LJ 426 .

47 *Subhash and Shiv Shankar v State of Uttar Pradesh* AIR 1987 SC 1222, (1987) Cr LJ 991 (SC) .

48 AIR 1956 SC 51.

49 *Prabhu Babaji Navle v State of Bombay* AIR 1956 SC 51 ; *Babulal Bajpai v State* AIR 1959 Cal 693 ; *Sheo Shankar alias Chhotey v State of Uttar Pradesh* 1995 Cr R 45, 50 (UP).

50 *Raja Ram Raghu Patil v State* AIR 1958 Bom 469 ; *Fazoo Khan v Jatoo Khan* AIR 1931 Cal 643 **relied on**.

51 (1987) Cr LR 344 (Raj); *State of West Bengal v VL Sakharani* 1994 Cr LJ 919 (SC), AIR 1994 SC 772 .

52 *Mangu Khan v State of Rajasthan* 2005 Cr LJ 1748, p 1753 (SC), AIR 2005 SC 1912, 2005 (2) Scale 365, (2005) 10 SCC 374 ; *Sukh Ram v State of UP* AIR 1974 SC 323 ; *Pipal Singh v State of Punjab* (2001) 2 SCC 292, 2001 Cr LJ 740, 2001 SCC (Cr) 344, 2001 (1) Crimes 20 (SC) .

53 (1991) 1 Crimes 74, p 79, (1991) Cr LJ 402 (SC).

54 *Brathi alias Sukhdeo Singh v State of Punjab* (1991) 1 Crimes 74, p 79 (SC), (1991) Cr LJ 402 .

55 *Wasim Khan v State of Uttar Pradesh* AIR 1956 SC 400 .

56 *Mathur Dhana v State* AIR 1956 Bom 393 .

57 *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116 ; *Basanta Gohain v State* AIR 1957 Assam 45 .

58 *Brathi alias Sukhdeo Singh v State of Punjab* (1991) 1 Crimes 74, p 81 (SC), (1991) Cr LJ 402 .

59 *Rupa Ram v State of Rajasthan* (1999) Cr LJ 2901 (SC) .

60 *Jai Krishanadas Manohardas Desai v State of Bombay* AIR 1960 SC 889, p 893 .

61 *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116 ; *Basanta Gohain v State* AIR 1957 Assam 45 .

62 *Mobarik Ali Ahmed v State of Bombay* AIR 1957 SC 270 .

63 *Ram Chandra v State* (1957) Cr LJ 857 .

64 *Mohsin v State* 2012 Cr LJ (NOC) 82 (Del) (DB).

65 *Babloo v State of Uttarakhand* 2012 Cr LJ 198, p 200 (Utr) .

66 *Syed Yousuf Hussain v State of Andhra Pradesh* 2013 Cr LJ 2172, p 2176 (SC), AIR 2013 SC 1677, [2013] 2 SCR 528, (2013) 4 SCC 517 .

67 *Balwan Singh v State through P/S Katra* 2013 Cr LJ (NOC) 553 (J&K).

68 *Hemchand Jha v State of Bihar* 2008 Cr LJ 3203, p 3205 (SC) .

69 *Lalit Kumar v State* 2014 Cr LJ (NOC) 437 (Del) .

70 *Sripathi v State of Karnataka* 2009 Cr LJ 4646 (SC), 2009 AIR SCW 5927, 2009 (5) Scale 5 .

71 *Mangu Khan v State of Rajasthan* 2005 Cr LJ 1748, p 1753 (SC), AIR 2005 SC 1912, 2005 (2) Scale 365, (2005) 10 SCC 374 .

72 *State of Rajasthan v Shobha Ram* 2013 Cr LJ 2227 (SC), AIR 2013 SC 1760, (2013) 14 SCC 732, 2013 (2) Scale 10, 2013 (1) SLT 690 .

73 *Lokesh Shivakumar v State of Karnataka* AIR 2012 SC 926, 2012 (3) SCC 196, 2012 (2) Scale 420, 2012 Cr LJ 1625, p 1629 (SC) .

74 *Thoti Manohar v State of Andhra Pradesh* 2012 Cr LJ 3492, p 3500 (SC), 2012 AIR SCW 3752, 2012 (7) Scale 215 .

75 *Surekha Singh v State of Madhya Pradesh* 2014 Cr LJ 1194, p 1196 (MP), ILR (2013) MP 3000 .

76 *Papa Laxmi Kant v State of Madhya Pradesh* 2014 Cr LJ (NOC) 28 (MP) .

77 *Satbir v State of Haryana* 2013 Cr LJ 7 (SC), 2013 AIR SCW 5780, 2012 (10) Scale 371 .

78 *Sheo Shankar Singh v State of UP* AIR 2013 SC 2853, 2013 Cr LJ 3788, p 3794 (SC), (2013) 12 SCC 539 .

79 *Papa Laxmi Kant v State of Madhya Pradesh* 2014 Cr LJ (NOC) 28 (MP) .

80 *Babloo alias Babu v State* 2013 Cr LJ (NOC) 578 (Del) (DB).

81 *Raju v State of Chhattisgarh* 2014 Cr LJ 4425 (SC), (2014) 9 SCC 299 .

82 *Murli v State of Rajasthan* 2010 Cr LJ 2228, p 2234 (SC), 2011 AIR SCW 412, (2009) 9 SCC 417 .

83 *Virender Pal v State* 2011 Cr LJ 3082, p 3093 (Del) (DB) .

84 *Vinay Kumar Rai v State of Bihar* 2008 Cr LJ 4319, p 4322 (SC), AIR 2008 SC 3276 ; *Aizaz v State of UP* 2008 Cr LJ 4374, p 4376 (SC), 2008 (6) All LJ 228, [2008] 12 SCR 13, (2008) 12 SCC 198, 2008 (11) Scale 46 (Defence plea that only one accused had enmity, other accused did not use weapon was repelled).

85 *Janiya Chamayadiya Bhill v State of MP* 2009 Cr LJ 2456, p 2459 (MP) (DB) .

86 *Pintoo v State of Rajasthan* 2009 Cr LJ 748, p 757, 758 (Raj) (DB) .

87 *Mullu Singh v State of Madhya Pradesh* 2009 Cr LJ 273, p 279 (MP) (DB) .

88 *Markami Deva v State of Chhattisgarh* 2009 Cr LJ 585, p 589 (Cal) (DB) .

89 *Jakir Hussain v State of Madhya Pradesh* 2012 Cr LJ 1289, p 1294 (Chha) (DB) .

90 *Pichai v State of Tamil Nadu* 2005 Cr LJ 5111, p 5113, (2005) 10 SCC 505, 2005 SCC (Cri) 1617 .

91 *Rajesh Kumar v State of HP* 2009 Cr LJ 335, p 338 (SC), 2008 AIR SCW 6833, AIR 2009 SC 1, [2008] 14 SCR 234, (2008) 15 SCC 705 .

92 *Sripathi v State of Karnataka* 2009 Cr LJ 4646 (SC), 2009 AIR SCW 5927, AIR 2010 SC 249, [2009] 5 SCR 309, 2009 (11) SCC 660, 2009 (7) JT 146, 2009 (5) Scale 5 .

93 *Vijay Singh v State of Madhya Pradesh* 2014 Cr LJ 2158, p 2160 (SC), (2014) 137 AIC 78, (2014) 12 SCC 293 .

94 *Vijay Singh v State of Madhya Pradesh* 2014 Cr LJ 2158 (SC), (2014) 12 SCC 293, (2014) 137 AIC 78 .

95 *Manoj v State of Karnataka* 2014 Cr LJ 60, p 63 (SC), AIR 2013 SC (Supp) 116, (2013) 14 SCC 666, 2013 AIR SCW 5547, 2013 (8) Scale 387 .

1 *Papa Laxmi Kant v State of Madhya Pradesh* 2014 Cr LJ (NOC) 28 (MP) .

2 *Ravinder Kumar v State of Himachal Pradesh* 2013 Cr LJ (NOC) 15 (HP) (DB).

3 *Amol Singh v State of Madhya Pradesh* 2014 Cr LJ 4688 (Chh) (DB) .

4 *Pratap Singh v State of Madhya Pradesh* 2006 Cr LJ 314 (SC), AIR 2006 SC 518 .

5 *Mevabhai Bhikabhai Gamar v State of Gujarat* 2014 (140) AIC 553 (Guj) .

6 *Ramesh Kumar @ Mahesh v State of Delhi* 2010 Cr LJ (NOC) 36 (Del) (DB).

7 *Amit v State* 2010 Cr LJ 3154, p 3161 (Del) (DB) .

8 *Ramesh v State of Madhya Pradesh* 2009 Cr LJ 3268, p 3271 (MP) (DB) .

9 *Raju Lahiri v State of West Bengal* 2008 Cr LJ (NOC) 473 (Cal) (DB).

10 *Sasthi Bagdi v State of West Bengal* 2007 Cr LJ 2600 (Cal) (DB) .

11 *Baijnath Chullu Kanwar v State of Madhya Pradesh* 2012 Cr LJ (NOC) 514 (Chh) (DB).

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 35.

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

Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

Comments

1. Scope

This section supplements the principle embodied in s 34 .[12]It is applicable to a case where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention.[13]

This section deals with those cases in which acts are crimes by reason only of a particular intent or knowledge. In order to convict a person assisting the individual who actually performs the act, it must be shown that he had the particular criminal intent or knowledge. In the Bhopal gas tragedy case which resulted in several deaths, permanent and temporary disablement, the Apex Court held that the mere fact of running of a plant with proper permission could not be a criminal act and the mere act of storing hazardous substance or having a defective plant could not suggest *prima facie* that the accused had knowledge that they were likely to cause death of human beings. Framing of charge under s 304, Pt II read with s 35, IPC, therefore, was not proper and was quashed.[14]

2. Criminal Facts may be Offences of Two Kinds

Section 34 of the IPC begins by speaking of 'a criminal act'. It starts with the assumption that a criminal act has been committed. Now a criminal act may be an offence of one of two kinds:249

(a) one which is punishable even if there is no *mens rea* such as an offence under s 283 or s 290 of the IPC ;
(b) one which requires the *mens rea* stated in the section of the IPC defining the offence which that criminal act may turn out to be.

As regards class (a), there is no difficulty, for it is per se an offence, and by operation of what s 34 enacts, each and every person who performs even a fractional part of the act is to be regarded as the performer of the whole of it. But class (b) raises an obvious difficulty, for the doer of a fractional portion of the act may not have the necessary *mens rea.* Is he to be considered as culpable as others who have *mens rea*? As already pointed out, such a result has been avoided by the introduction of the words 'in furtherance of the common intention of all,' which means that before a particular doer of a fractional portion of the criminal act can be fastened with criminal liability for the entire act, it will have to be shown that he shared the common purpose of all the doers, and also that the entire criminal act furthered the accomplishment of that purpose. Before the Amendment of 1870, the section as it then stood literally rendered liable class (b) as well class (a). But at that time s 34, in so far as it was express, was only a partial enunciation of the real principle. As far as its language went, it was incomplete, and the remainder of the principle had to be provided for in other sections. Section 35 took the matter up, and it started at the point where s 34 left off. Class (a) being offences for which no *mens rea* was required, had been already completely legislated for by s 34 . But as to class (b) it was necessary to say something further in order to make it clear that culpability in this class of offences depended upon the nature of the offender's *mens rea.*Section 35 accordingly started with the words: 'Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention'.[15]

3. Overlapping of Sections 34 and 35

The section simply makes it clear that where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention, each person is liable for the act to the extent of his knowledge or intention; in other words, that the court or jury have to consider what is the knowledge or intention with which each person joined in the act.[16] If the offence which the criminal

act is found to constitute, requires knowledge, then only that fractional doer who was possessed of such knowledge is to be adjudged liable for the offence. This is clear from the closing words of the section: 'as if the act (meaning the whole act) were done by him alone with that knowledge'. If the offence, which the criminal act is found to constitute, requires intention, then only that fractional doer who was animated by such intention is to be adjudged liable for the offence. Here again this is made plain by the closing words of the section, 'as if the act (meaning the whole act) were done by him alone with that...intention.[17] From this it would appear that the introduction of the words 'in furtherance of the common intention of all' into s 34 has caused a certain overlapping with s 35 . In those cases where, on facts, common intention is, as it may very well be, exactly the same in its actual range as the *mens rea* needed to convert the criminal act into an offence, the same principle is contained in s 35 as it stated in s 34 .[18] Where beating results in death of the victim and each of250 the assailants possess the knowledge that death is the likely consequence of the criminal act, *i.e.*, the beating, there is no reason whys 34 or s 35 should not be read with the second part of s 304, IPC to make each assailant liable individually.[19]

4. 'Act which is Criminal'

Section 35 like s 34 of the IPC assumes that a criminal act has been committed. It says 'an act, which is criminal', except in the grammatical structure of the phrase, there is no difference between these words and the expression 'criminal act' which is what occurs in s 34 .[20]

5. Distinction between Sections 34-35

It may be noted that the expression 'in furtherance of the common intention of all' which is found in s 34 is absent in s 35 . The latter section deals with an act which is criminal only by reason of its being done with a criminal knowledge or intention. Thus s 35 applies also to a case of criminal knowledge whereas s 34 does not. Again the 'common intention' required by s 34 is different from the *mens rea* mentioned s 35 . Synopsis notes under s 34 under same heading may be referred to.

12 *Ghurey v Rex* AIR 1949 All 342, p 345, 50 Cr LJ 535, (1949) All LJ 87 .

13 *Mallappa Shivappa v State of Mysore* (1961) 2 Cr LJ 515, (1961) Mys LJ 293 .

14 *Keshub Mahindra v State of Madhya Pradesh* JT (1996) 8 SC 136 .

15 *Ibra Akanda v Emperor* AIR 1944 Cal 339, p 362, per Khundkar J.

16 *Adam Ali Taluqdar v King-Emperor* AIR 1927 Cal 325, p 325-26 .

17 *Ibra Akanda v King-Emperor* AIR 1944 Cal 339, p 362 .

18 *Ibid*, p 363.

19 *Abrahim Sheikh v State of West Bengal* AIR 1964 SC 1263, p 1268, (1964) 2 Cr LJ 350 .

20 *Ibra Akanda v King-Emperor* AIR 1944 Cal 339, p 362, 45 CLJ 771, 48 CWN 336 .

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Chapter II

General Explanations

S. 36.

Effect caused partly by act and partly by omission.--

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

Illustration

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

Comments

1. Scope

This section can be better understood keeping in view the provisions of s 32 of the IPC . The legal nature and consequences of an 'act' and of an 'omission' being identical,[21] it follows that it matters not in the eye of the law whether the criminal injury (*e.g.*, murder) be caused either by an act (*e.g.*, beating), or by an omission or omissions, (*e.g.*, starving), or partly by one and partly by the other (*e.g.*, beating and starving). This is what is pointed out by s 36 .[22] Sometimes there may be more than one factor contributing to the damage and the ultimate result may be on account of interplay of several factors. When causes are in a chain the last and nearest to the occurrence may be treated as proximate and efficient cause but there may be cases where the causes are not in a chain but like a net interlinked, interwoven, overlapping and so interdependent on each other that without one or the other, the ultimate incident could not have been taken place. The entire net then is the '*causa causans*'.[23]251

21 Synopsis notes under ss 32 - 33 .

22 *King-Emperor v Barendra Kumar Ghosh* AIR 1924 Cal 257, p 273 (FB), 25 Cr LJ 817, 28 CWN 170 .

23 *Sushil Ansal v State* (2002) Cr LJ 1369 (Del) .

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Chapter II

General Explanations

S. 37.

Co-operation by doing one of several acts constituting an offence.--

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

Illustrations

(a) *A* and *B* agree to murder *Z* by severally and at different times giving him small doses of poison. *A* and *B* administer the poison according to the agreement with intent to murder *Z*. *Z* dies from the effects of the several doses of poison so administered to him. Here *A* and *B* intentionally co-operate in the commission of murder and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

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

(c) *A*, a jailor, has the charge of *Z*, a prisoner. *A,* intending to cause *Z's* death, illegally omits to supply *Z* with food; in consequence of which *Z* is much reduced in strength, but the starvation is not sufficient to cause his death. *A* is dismissed from his office, and *B* succeeds him. *B*, without collusion or co-operation with *A*, illegally omits to supply *Z* with food, knowing that he is likely thereby to cause *Z's* death. *Z* dies of hunger. *B* is guilty of murder, but, as *A* did not co-operate with *B*, *A* is guilty only of an attempt to commit murder.

Comments

1. Scope

Section 37 of the IPC deals with the liability of a person who intentionally co-operates in the commission of an offence.[24]It deals with cooperation between several accused persons in the completion of a criminal act.[25] It provides that when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence.[26] The principle is that any one supplying a link (by way of an act or omission) to the chain, or series of acts or omissions which causes the evil, is liable for that consequent evil as if he were the author of the whole chain of acts and omissions.

2. Section Commences with Certain Assumptions

Section 37 of the IPC commences by assuming that an offence has been committed, which implies a criminal act plus *mens rea.*It further assumes that the criminal act is made up of distinct acts done by different persons as exemplified in the illustration.252 And then it provides that each of those persons is guilty of the offence, provided he performed his own act with the *mens rea* which the offence requires. This *mens rea* as the Privy Council pointed out in *Barendra Kumar Ghose v King-Emperor* ,[27] need not necessarily be the same thing as the intention common to all, or in other words the purpose by which all the performers were animated. Looked at from one point of view, the section, in effect, says that in the circumstances assumed, it is no defence for the doer of any of the distinct acts, who had the *mens rea*for the offence, to say that as his own act was one entire completed act, the offence which was constituted by the totality of all the separate acts of the individual performers, was not his offence.[28]

3. 'Whoever Intentionally Co-operates'

If, as pointed out by the Privy Council in *Barendra Kumar Ghose v King-Emperor* ,[29] the intentional co-operation mentioned in this section is not the same as a common intention, it must include action which contributes to the offence and is done with the consciousness that the offence is on the same footing, though without sharing the intention to commit that offence.[30]

Where several offenders by diverse acts and with prior concert chased the deceased, throwing him to the ground and beating him to death, the conviction of all offenders under s 304, Pt II read with s 34 was held legal, notwithstanding that s 304, Pt II speaks only of knowledge, while s 34 deals with common intention.[31]

Where the two accused rushed at the deceased, the first accused striking him savagely with a heavy stick, held in both hands, and the second accused smashing his skull by a blow dealt with a stone, not thrown as a missile but held firmly in second accused's hands, it was held that the attack was a single indivisible thing in which the first accused intentionally co-operated in the commission of the murder and that both of them were, by virtue of this section, liable for the result which ensued.[32]

4. Co-operation may be by Active Participation or a Passive One

The co-operation required by the section need not be by active participation, it may be of a passive character. As Lord Sumner pointed out in *Barendra Kumar Ghose v King-Emperor* ,[33] in crime as in other things 'they also serve who only stand and wait'.

5. Distinction between Sections 34 and 37

Notes under the same heading in s 34 may be referred to.

24 *Emperor v Itwa Munda* AIR 1938 Pat 258, 39 Cr LJ 554 (SB) .

25 *Abrahim Sheikh v State of West Bengal* AIR 1964 SC 1263, p 1267, (1964) 2 Cr LJ 431 .

26 *Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1, p 7, 52 IA 40 .

27 *Barendra Kumar Ghose v King-Emperor* 52 IA 40, AIR 1925 PC 1, 26 Cr LJ 431 .

28 *Ibra Akanda v King-Emperor* AIR 1944 Cal 339, p 362, per Khundkhar J.

29 *Barendra Kumar Ghose v King-Emperor* AIR 1925 PC 1, p 7 .

30 *Emperor c Itwa Munda*AIR 1938 Pat 258, p 262 (SB), per Dhavle J.

31 *Afrahim Sheikh v State of West Bengal* AIR 1964 SC 1263, (1964) 2 Cr LJ 350 (SC) .

32 *Subbappa Channapa v Emperor* 14 CR LJ 235, 15 Bom LR 303 .

33 *Barendra Kumar Ghose v King-Emperor* AIR 1925 PC 1, p 7 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 38.

Persons concerned in criminal act may be guilty of different offences.--

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

253Illustration

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

Comments

1. Scope

Section 38 of the IPC is the converse of s 34 of the IPC and provides for different punishments for different offences where several persons are concerned in the commission of a criminal act, whether such persons are actuated by one intention or the other.[34]Sections 34 and 35 deal with cases in which the joint completed act is one offence. But as one criminal act may be done by one person with one intention or *mens rea* and by another with some other *mens rea*, it is possible that the same criminal act may in law amount to one offence in the case of one fractional doer, and another offence in the case of another. The tail here is taken up by s 38, which deals with several fractional doers of a joint act in circumstances where it is possible that one had one kind of *mens rea* and the other had another.[35] When several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.[36]

2. Responsibility for the Completed Act may be of Different Grades

Section 38 of the IPC applies where a criminal act is jointly done by several persons and several persons have different intentions or states of knowledge in doing of joint act.[37] The section provides that the responsibility for the completed act may be of the different grades according to the share taken by the different accused in the compilation of the criminal act; the section does not mention anything about the intention, common or otherwise or knowledge.[38]

Where the evidence on record only indicated that both the accused had joined in the beating of the victim (*i.e.*, the thief who had gone to their field to steal the crop), as a result of which he died, and they had no intention to kill him, it was held that s 38 was applicable and each of the accused was responsible for the individual acts, committed by him.[39] Where the death of the victim was as a result of the criminal acts, committed by accused *P* and *H* in furtherance of their common intention; and *B254* intentionally joined in the commission of an act with the knowledge that the assault on the victim was likely to result in his death it was held that *P* and *H* could be convicted for murder with the aid of s 34 and *B* could be convicted under s 304, Pt II with the aid of s 38 .[40]

The accused A2 and A3 caught hold of the deceased and the accused A1 swiftly took out knife from his waist and stabbed the deceased causing death. Held, the acts on the part of A2 and A3 stood on a different footing than the act committed by A1. The common intention to attack the deceased was there in the mind of A2 and A3 along with A1. They suddenly jumped together in front of the deceased. It stood proved that all the appellants came together and they wanted to attack the deceased. A2 and A3 were having knowledge that their acts alongwith the acts of A1 were likely to cause the death of the deceased. At the same time, an intention to commit murder could not be attributed to A2 and A3. Apart from catching hold of the deceased and stopping him, A2 and A3 had

not attacked the deceased. Applying the principle of law under s 38 of IPC, the case of A2 and A3 can be separated from that of A1. A2 and A3 can be held guilty only under s 304, Pt II, IPC as they had intentionally joined in the commission of an act, with the knowledge that the assault of the deceased was likely to result in his death. A1 was convicted under s 302, IPC, while the A2 and A3 were convicted under s 304, Pt II read with s 34, IPC .[41]

3. Principle of Section 38 Applies to Offences under Section 149

The effect of s 149 of the IPC may be different in the case of different members of the same assembly.[42] So the principle of s 38 applies to offences under s 149 and the liability of individual members of an unlawful assembly depends on the intention or knowledge of the members.[43]

4. Distinction between Section 34 and Section 38

Notes under the s 34, [*ante*] may be referred to.

34 *Sultan v Emperor* AIR 1931 Lah 749, p 750, 32 Cr LJ 1219 ; *Mallappa Shivappa Kankanwadi v State of Mysore* (1961) 2 Cr LJ 515, p 517, (1961) Mys LJ 293 ; *Ibra Akanda v Emperor* AIR 1944 Cal 339, p 362-63, 45 Cr LJ 771, per Khundhkar J; *State v Bhimshankar* (1968) Cr LJ 898, AIR 1968 Bom 254 ; *Ajith Kumar v State of Kerala* 2014 Cr LJ 2313 (Ker) (DB) .

35 *Ibra Akanda v Emperor* AIR 1944 Cal 339, p 362-63, per Khundhkar J.

36 *Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1, p 6, 26 Cr LJ 431 .

37 *State v Bhimshankar* 1968 Cr LJ 898, p 903, AIR 1968 Bom 254 ; *Bala Nandan Sharma v State of Assam* AIR 1977 SC 2252, (1977) Cr LJ 1930 .

38 *Abrahim Sheikh v State of West Bengal* AIR 1964 SC 1263, (1962) 2 Cr LJ 350, p 353 .

39 Re *Mallappa*(1961) 2 Cr LJ 515, p 517, (1961) Mys LJ 293.

40 *Baba Nandan Sharma v State of Assam* (1977) Cr LJ 1930, AIR 1977 SC 2252, p 2254 .

41 *Ajithkumar v State of Kerala* 2014 Cr LJ 2313, p 2320, 2321) (Ker) (DB) ; *Bhaba Nanda Sharma v State of Assam* AIR 1977 SC 2252, 1977 Cr LJ 1930, and *Afrahim Sheikh v State of West Bengal* AIR 1964 SC 1263, 1964 Cr LJ 350, **relied on**.

42 *Queen Empress v Sabid Ali* 20 WR 5, p 11 (Cr), Beng LR 147 (FB), per Phear J; *Behari v Emperor* AIR 1924 All 670, 26 Cr LJ 154 ; *Barakan Singh v Emperor* AIR 1920 Oudh 152, 22 Cr LJ 279 ; *Ahmed v Emperor* AIR 1927 Sind 108 .

43 *Bhagwat Singh v Emperor* AIR 1936 Pat 481, p 485, 37 Cr LJ 630 ; **dissenting from***Ram Prasad Singh v Emperor* AIR 1923 Pat 50, 24 Cr LJ 65 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 39.

"Voluntarily".--

A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, *A* may not have intended to cause death, and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.255

Comments

1. Scope

This section expresses in detail the well known rule of law that a man is presumed to intend the probable consequences of his act and, therefore, in performing the act he voluntarily causes the consequences. The maxim that everyone must be taken to intend the natural consequences of his acts is incorporated in the definition of 'voluntarily' in s 39, and thus made applicable in every section where that word is used.[44]

A bare reading of this section shows that person need not intend to cause a certain effect. If an act is probable consequence of the means used by him, he is said to have caused it voluntarily whether he really means to cause it or not. The section implicitly lays down the principle that a man is presumed to intend the probable consequences of his act.[45]

2. Definition of 'Voluntarily'

This is an important section, and one to which frequent reference must be made while studying the IPC . The question for criminal law to decide in each case is: 'Is *A* liable for the consequences (*i.e.,* the 'effect') of his conduct?' The reply is, '*A* is liable for those consequences or effects, if he caused them voluntarily, unless he is justified or excused by law in acting as he did'. See the General Note prefixed to ch 4.

'Voluntarily' is defined in s 39 of the IPC as an act done to cause the effect whereby the doer intended to cause that effect, (or he knew or had reason to believe that the effect would be that). The word is given a peculiar meaning which is different from the widely understood ordinary meaning of it. The word 'voluntarily' is thus to be understood in relation to the causation of effects and not to the doing of acts from which those effects result. Hence, if the accused were unaware that the person whom they confined was a public servant, offence under s 332 is not attracted.[46]

This section defines the term 'voluntarily' with reference to the causation of effects and not with reference to volition. The word 'voluntarily' has, for the purpose of the IPC, been given an artificial meaning at variance with its ordinary sense. The definition overlooks the difference between 'intention' and 'knowledge of likelihood'. The Indian law commissioners justified the definition on the ground that as the penal consequences in the two cases is the same, the distinction between the256 two terms is a distinction without a difference.[47] It is stated in *Halsbury's Laws of England*:[48]

> For the purpose of criminal law, an act or omission is voluntary if it might have been avoided by the exercise of reasonable care; thus a negligent act or omission is willed, because the person responsible does not will to prevent the commission or omission.

Voluntary offenders will include not only those who directly intend to inflict a particular injury, but also all such as willfully and knowingly incur the hazard of causing it.[49]

> The proper test of guilty in such cases is that of knowledge and consciousness on the part of the malefactor that damage is likely to result or will probably result from what he does; his criminality consists in the willfully incurring the risk of causing loss or suffering to others. The case of a party so misconducting himself; and so regardless of the interest of others seems to be indistinguishable in point of legal guilt and penal consequences from that of a criminal who acts with the most direct intention to execute an illegal purpose, and it seems to us that he may properly be described as the voluntary author of the mischief produced.[50]

3. Intention and Knowledge may be Express or Implied

This section defines the term 'voluntarily' by applying to it the test of 'intention'. The intention may be express or implied. It is express if the agent expects a given consequence as a result of his act. It is implied if he has knowledge of the likelihood of the consequence. A person does not intend what is merely a possible result of his action, or a result which, though reasonably certain, is not known to be so. But it must be presumed that when a man voluntarily does an act, knowing at the time, that in the natural course of events, a certain result will follow, he intends bringing about that result.[51] Knowledge may also be express or implied, *i.e.*, a man may actually realise that a given consequence is likely to happen or he may have reason to believe so, though he actually did not realise the fact. No distinction is made, in law, between these states of mind, coupled with an act, each constitutes voluntary conduct.[52] If *A* strikes *B* on the head with a heavy stick, and thereby kills *B,* and, as a an ordinary reasonable human being, he had reason to believe that his stoke would be likely to kill *B,* it is of no avail to urge in defence that as a fact he did not know that such was likely or that he did not intend to kill *B.*

Intention or knowledge of the offender may be determined from the nature of the injury, the weapon used, the part of the victim's body attacked, force used and other related circumstances.[53]

4. Means of Committing Crime

The word 'means' in the section means an act or omission. It has been seen in the notes under ss 32 - 33 of the IPC that the means or physical conduct by which crimes257 or penal consequences are brought about consist of intentional doing or non-doing, or of unintentional non-doing, or, in other words, of acts for positive conduct; of forbearance (or 'omission' in the language of the IPC) or negative conduct, and of negligence.

5. Criminal Responsibility Depends on Mental Attitude Towards Consequences or Degree of Negligence

Now whether the agent is criminally responsible for the consequences of his conduct depends upon his mental attitude towards those consequences, in the case of acts and omission, and upon the degree of his negligence in the third case. Thus, in this section the word 'means' signifies acts and omissions only, for it is clear that the agent who is guilty of a negligent act can have no mental attitude whatever towards the consequences of a non-act of which he is unconscious, and thus cannot cause those consequences voluntarily. Therefore, the criminality of negligence consists in the non-doing of that which ought to have been done, and not, as in the case of acts or omissions, in the mental attitude towards the consequences of the conduct. Refer to notes under s 33, *ante*.

6. Three States of Mind Constitute Voluntary Attitude Towards Consequences

A person who acts or omits to act may or may not possess a mental attitude towards the consequences of his act or omission *i.e.*, he may or may not think about them. In the former case his conduct is either voluntary or rash; in the latter it is heedless. Section 39 of the IPC sets out the three states of mind which constitute a voluntary attitude towards the consequences of given conduct. In rashness, the party guilty of a rash act neither intends evil, nor does he know that evil is likely, nor has he reason to believe that it is likely. On the contrary, he does not think that evil will ensue. He thinks of the probable consequences of his act or omission, but from insufficient advertence, assumes that they will not ensue.[54] He does think about the consequences (although insufficiently) and it is this fact which distinguishes 'rashness' from 'heedlessness' for in 'heedlessness' the person acts because he does not think about the probable consequences of his conduct at all.[55]

In present systems of law, however, this distinction does not seem to be made, and in the IPC . 'heedlessness' is included in the term 'rashness', which thus signifies an insufficient advertence or complete inadvertence on the part of the agent to the consequences of his conduct. And this state of mind is contrasted with 'negligence', which denotes entire inadvertence to some act which ought to have been performed and, *a fortiori,* to the consequences of its non-performance. As Holloway J, pointed out in *R v Widamarts Naga Ulurshanam* :[56]

> Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they may not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal or mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon258 him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.

An act or omission must be treated as a voluntary act or omission, for the purpose of criminal law, if it may have been avoided by the exercise of reasonable care. Therefore, negligent acts or omissions are to be treated as voluntary acts or omissions. One *R,* who was the proper driver and in control of a lorry carrying passengers allowed *H,* a minor, with full knowledge that *H* did not know driving well, to drive the lorry so rashly and negligently as to endanger the lives and personal safety of the passengers inspite of the requests of the passengers. *R* was sitting by the side of *H* when the accident took place and some passengers suffered grievous hurt, it was held that *R* was liable as a principal offender under the provisions of s 114 . In fact, he was the person driving through the hand and instrumentality of boy *H* to whom he had consciously and knowingly given the steering wheel. Therefore, he intentionally aided him (both by not preventing him from driving as well as by allowing him to drive) in his act endangering human life and personal safety of others likely to cause hurt or injury to them. Therefore, *R* was himself liable to be punished for offence under ss 338 and 279, IPC .[57]

7. Three Forms of *Mens Rea*

According to Salmond:

> There are in reality three forms of mens rea or fault: (1) that in which the consequences are foreseen and wrongfully intended, (2) that in which they are not intended but are foreseen and should have been avoided, and (3) that in which they are neither foreseen nor intended, but ought to have been foreseen and avoided. In the present work (1) is called intention, (2) is called advertent negligence (or recklessness), and (3) is called inadvertent negligence...

> The practical importance of the distinction between (2) and (3) is that, as already seen, recklessness is frequently for legal purposes classed with intention.[58]

Thus all crimes consist of voluntary acts or omissions; or negligent non-action, or, adopting the language of the IPC which makes 'act' include 'omission' (s 32), crimes consist of voluntary acts, rash acts or negligence.

Crimes Usually Consist of Voluntary Acts

The great majority of crimes, consist of voluntary acts, since the very consequences of the agents conduct constitute his primary motive for the crime; and of these the large majority are the product of acts or positive conduct, and not doing something, and not by leaving something undone.

8. Provisions of Code Relating to Rashness and Negligence

Rashness and negligence accompanying an act or omission are punishable under the following provisions of the Code:

(i) Irrespectively of any consequence, if their effect is to endanger human life or the personal safety of other persons (refer to s 336).259

If the act or omission is one connected with certain *prima facie* dangerous occupations (riding and driving navigation, use of poisons, combustibles, explosives, machinery, the constructing or pulling down of buildings, and the care of animals) then the rash or negligent conduct is punished more severely (refer to ss 279 - 289). Negligence in respect to the custody of prisoners and their consequent escape is punishable under ss 129, 223 and 225A (refer to also s 269, negligence in matters affecting the public health.)

(ii) If hurt (s 319) is the result of rashness or negligence which renders an act or omission dangerous to human life or the personal safety of others, then the offence falls under s 337 ; and if grievous hurt (s 320) be the result, then the offence is punishable under s 338 .

(iii) Finally, if death is caused by any rash or negligent act, the offence falls under s 304A .[59]

9. Intention and Knowledge of Consequences

It is clear from a perusal of the various sections of the Code that a difference has been drawn between 'intention' and 'knowledge of consequences', and that the Code takes notice of actual and not presumed intention in determining criminality, though in determining what a man's actual intention was, courts can raise all inferences that can be fairly drawn from his acts. When an act is made an offence by reason of its having been committed with a specified intention, the intention has to be found as a matter of fact upon evidence which justifies the inference that the accused had the intention required to render his action criminal. When proof of intention is necessary it is clear that, unless the accused admits that his intention was such as would render him guilty of the offence charged, intention, which is a psychological fact, can only be proved by having regard to the nature of the act he commits, and a criminal intent is often presumed from acts which are reasonably susceptible of but one interpretation. The rule of law that a man must be taken to intend the natural consequences of his act is really a rule of evidence. The court is not bound to accept the statement of the accused as to his intention but may find the same from the facts what his intention was, and in order to arrive at a conclusion may hold that when a man uses means which at the time he used them knew or had reason to believe to be likely to cause a result, his intention was to cause the result.

Where the accused was charged with adulterating liquor with methyl alcohol, a poisonous substance, the consumption of liquor resulted in death and permanent loss of eyesight of several persons, the accused pleading that they had no knowledge that the effect of consumption of the adulterated liquor would be so injurious. It was held that the contention of the accused was not sustainable as adulteration itself was an illegal act under the Kerala Abkari Act and having regard to the percentage of methyl alcohol, the poisonous substance, in the liquor, it is clear that the persons responsible for mixing the same had knowledge that consumption of liquor was likely to cause very serious adverse effects and the fact that all the consumers were not adversely affected is not material and the accused were held to have voluntarily caused grievous hurt under s 326 read with s 39, IPC .[60]260

As pointed out by Sir William Markby,[61] expectation that a consequence would follow or a knowledge that it is likely to follow, without any desire that should follow is an attitude of mind which is distinct from intention, and the framers of the Act clearly keep the two distinct and treat knowledge as a state of mind differing from intention. In some sections, *e.g.,* ss 118 - 20, 153 - 54, 217, 293, etc, the words used are: 'intending or knowing it to be likely'. In others only intention is referred to *e.g.,* in ss 124, 140, 174 - 76, 193, 211, 509, *etc*. In some sections the word used is 'knows' as in ss 127, 130, 188, 196, 260, *etc*, in some the words are 'knowing' or 'having reason to believe' or 'believing' *e.g.,* in ss 136, 181 - 83, 201 - 03, 499, *etc*. In some the words are 'reason to believe' *e.g.*, in ss 155 and 156 and in others 'for the purpose of', *e.g.,* ss 189 - 90 . In s 298, the words used are 'deliberate intention'.[62]

10. Intent and Knowledge of Likelihood--Law Commissioners' View

The Law Commissioners expressly said:

> The Commissioners saw clearly the difference between 'intent' and 'knowledge of likelihood' and meant to express it distinctly in order to avoid the necessity of fiction in laying a charge as for example by imputing 'intent' constructively when the circumstances imply only 'a knowledge of likelihood', advisedly intending as they did that there should be no distinction in general, in respect of penal consequences between cases in which a man causes an effect which is an offence designedly, and cases in which he causes it by doing what 'he knows is likely to cause it'. Advisedly intending this in general they worded the enactment so that the charge may be always expressed in according to the truth.[63]

11. 'Reason to Believe'

This expression means sufficient cause to believe (refer to notes under s 26).

12. 'Likely'

An effect is 'likely' to take place when there is a likelihood of its being caused, and likelihood is distinguishable from mere possibility. A thing is possible when it may happen; likely when the chances are in favour of its happening, and probable when the chances are strongly in its favour. Thus probability is the stronger degree of likelihood. A thing may, therefore, be likely without being probable, though a thing probable must be likely.

44 *Vullappa v Bheema Row* AIR 1918 Mad 136, p 139 (FB) .

45 *Meeru Bhatia Prasad v State* (2002) Cr LJ 1674 (Del) .

46 *Abdul Majeed & Anor v State of Kerala* (1994) Cr LJ 1404 (Ker) .

47 First Report, s 101 .

48 *Halsbury's Laws of England,* vol 9, second edn, p 10, fn (h); **cited** in *Ram Rup v Crown* AIR 1951 Punj 418, p 419 .

49 English Law Commissioner's Seventh Report, s 22, **approved and followed** in First Report, s 105 .

50 *Ibid*, s 23, cited in First Report, s 106 .

51 *R v Lakshman* 26 ILR Bom 558 ; *Sell Muthu v Pallamuthu* 12 Cr LJ 30, p 31 ; *R v Sunku Seethiah* 11 Cr LJ 400, 4 ILR Mad 92 ; *Killikykyetra Bomma v R* 14 Cr LJ 207 .

52 *R v Sunku Seethiah* 11 Cr LJ 400 .

53 *Shyamlal v State of Uttar Pradesh* (1968) 2 SCWR 801, p 804 .

54 *Austin's Jurisprudence,* Lecture 20, pp 440-41.

55 *Ibid*.

56 *R v Widamarts Naga Ulurshanam* 7 Mad HCR 119, p 120 .

57 *Ram Rup v Crown* AIR 1951 Punj 419, (1952) Cr LJ 930 (Punj) (DB) .

58 *Salmond's Jurisprudence,* 1947 edn, p 393.

59 *R v Morgan* 36 ILR Cal 302, 9 Cr LJ 393 .

60 *EK Chandrasenan v State of Kerala* (1995) 2 SCC 99 .

61 *Elements of Law*, para 222.

62 *Vullappa v Bheema Row* AIR 1918 Mad 136(2) (FB) ; *Bageshwari Devi v Indian Union* AIR 1950 Pat 295 ; *Brij Mohan Lal v Emperor* AIR 1947 All 61 ; *Gaya Bhan v Emperor* AIR 1916 All 152 ; *Queen-Empress v Rayapadayachi* 19 ILR Mad 240 ; *Emperor v SD' Cunha* AIR 1936 Bom 15 .

63 First Report, s 100 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

[64][S. 40.

"Offence".--

Except in the [65][Chapters] and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, [66][Chapter VA] and in the following sections, namely, sections [67][64, 65, 66, [68][67], 71], 109, 110, 112, 114, 115, 116, 117, [69][118, 119 and 120],261 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the words "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

Comments

1. Legislative Changes

In para 2 of s 40, after the figures 117, new figures (118, 119 and 120) have been inserted by the Information Technology (Amendment) Act 2008 (10 of 2009) (wef 27-10-2009).

2. 'Definition': Its History and Scope

As a general rule the word 'offence' denotes a thing made punishable by the IPC, but not a breach of a 'special' or local law.

Under s 2, things, punishable by the IPC are acts or omissions; (a) 'contrary to the provisions thereof'; and (b) 'committed within the territories of India'. The word 'offence' has thus a two-fold limitation; it is limited to breaches of a particular body of law, *viz,* the IPC, and to breaches of such law within a certain territory, *viz,* India.[70] Therefore apart from special exceptions, nothing is an 'offence', and punishable under the IPC, unless it satisfies these two conditions. But special exceptions have been made to the second or territorial limitation, by ss 3 - 4 of this IPC,[71] and by s 188 of the CrPC .[72]

'Offence' means 'an act or instance of offending'; 'commit an illegal act' and illegal means, contrary to or forbidden by law'. 'Offence' has to be read and understood in the context as it has been prescribed under the provisions of ss 40, 41 and 42, IPC which cover the offences punishable under IPC or under special or local law or as defined under s 2(n) CrPC or s 3(38) of the General Clauses Act 1897.[73]262

This section provides certain exceptions to the first limitation, by extending the term 'offence' in certain cases to things made punishable by any 'special' or 'local' Law. The provision for these exceptions was not to be found in the IPC as originally enacted, but was introduced for the first time by s 1 of Act 27 of 1870. The effect of the amendment is to enlarge the scope of the IPC by making offences under special laws also offences under the IPC . The result, therefore, was that offences under the Excise Act 1896, under the Explosive Substances Act 1908, the Police Act 1861, under the Registration Act 1908, or under the Arms Act 1959[74] also became offences under the IPC .[75]In these Acts, the abetment of certain offences has been provided for as a substantive offence for which reference may be made to s 70 of the Post Office Act, s 12 of the Explosives Act, s 6 of the Explosive Substances Act, s 82 of the Registration Act and s 36 of the Police Act. Therefore, if we read this section in conjunction with the relevant penal sections of the special or local Acts,[76] it would follow that:

(i) all acts or omissions in contravention of special or local Acts which are punishable under the said Acts, fall under the definition of 'offence' in the IPC ; and
(ii) abatement of offences which are offences under the special or local Acts and are punishable under the said Acts, also fall under this definition of 'offence'.

But an abetment of an offence committed in foreign territory is not an offence punishable under this IPC .[77]

The scope of this definition has been further enlarged by an explanatory definition added to s 216 which provides for the punishment of a person who harbours an offender.

The definition of 'offence' in s 2(n) CrPC is only applicable for the purpose of the CrPC and is not applicable to the IPC .[78]

There are three essential attributes of criminal offence: (i) the crime is an act of commission or omission on the part of human being, which is considered harmful by the State; (ii) the transgression of such harmful act is prevented by the threat or sanction of punishment administered by the State;

and (iii) the guilt of the accused is determined after the accusation against him has been investigated in legal proceeding of a special kind in accordance with established procedure contained in the relevant provisions of law.[79]

3. Offences under Special or Local Law

Nothing contained in the Amending Act 27 of 1870, which added the second and third clauses to s 40 is to be taken to effect any of the provisions of any special or local law.[80]Section 5 clearly declares that the IPC is not intended to repeal, vary, suspend or263 affect any of the provisions of any special or local law. The one enactment has not the effect of repealing the other. The two co-exist without conflict. In order to leave no doubt on this point, the law on the subject has been declared by the express provisions of s 26, General Clauses Act 1897, which provides that where an act or omission constitutes an offences under two or more enactments, the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence. It is clear, therefore, that where an act is punishable under a special law and also under a general statute, the offender could be proceeded with under either or both but not twice for the same act or omission which constituted the offence. Where there is nothing in the special Act to exclude the operation of the general criminal law, it cannot be inferred that there was an intention on the part of the legislature to exclude it.[81]

4. Definition of 'Offence' in other Enactments

The definition of 'offence' in this section differs somewhat materially from the definition in s 2(o) of the CrPC under which 'offence' means any act or omission made punishable by any law for the time being in force'. This definition is the same as in s 3(38) of the General Clauses Act 1897. It may be noted that this definition is much wider than the definition in this section, under which 'offence' denotes anything made punishable only by the IPC or by any special or local law, whereas under the two other enactments it means an act or omission made 'punishable by any law for the time being in force'. To constitute an offence under these two enactments all that is necessary is that the act or omission should have been made punishable by a law enacted by a legislature or by a body of persons authorised to do so[82] and that the law must be in force in the territories of India.[83]

From a reading of s 2(n), CrPC and s 40, IPC, it is clear that s 40, IPC refers to offences prescribed by IPC while s 2(n), CrPC, refers to offences under different laws, apart from those under the IPC . Thus, the definition of 'offence' under s 2(n), CrPC is wide enough to enable the police to investigate offences under other enactments also, apart from those under the IPC .[84]

The word 'offence' as used in the Extradition Act 1879 is not restricted to the definition of 'offence' in the IPC or in the CrPC .[85]

5. Clause 1--'Thing Made Punishable by the Code'

The word 'offence' is not used in its ordinary meaning but has a technical meaning in the IPC . Section 40 says that, 'except in the chapters and sections mentioned in clauses 2-3, of this section the word 'offence' denotes a thing made punishable by this Code'. It follows that an act or omission is not an 'offence' under the IPC if it is punishable only under some other enactment. Reading ss 40, 43 and 176 together it follows that, though failure to furnish information is an offence under s 10 of the Mussalman Wakf Act 1923 (as amended) in Bombay by the Mussalman Wakf (Bombay Amendment) Act 1935, yet it is not an offence punishable under the IPC .[86]264

In *Emperor v Moorga Chetty* ,[87] Melville J, observed:

There is an inaccuracy in section 40 . 'A thing' meaning an act or omission, is not susceptible of punishment. What is meant is 'a thing for which he who is guilty of it, is punishable'. It had been provided already in sections 2, 3 and 4, what persons, in what places acting contrary to the Code, might be punished under it. What remained was to define the acts themselves. They are the things which make the person punishable--things' determined by themselves as having the particular attribute, and thus fulfilling one, not all, of the three requisites as to person, place and quality of the act done. It is obvious, indeed, that an 'act or omission' having no corporeal existence has really no locality, fills no place in space, but is merely a movement or abstinence from movement of one who does fill such a place. Locality is, therefore, rightly connected in the Code with the person and the general conditions of possible responsibility. These being ascertained, the definitions or descriptions follow the acts and omissions themselves, abstracted generally from time and place (and indeed from personality also), which in each case induce punishableness. These are offences, though a personal or local condition of liability may be wanting.

6. Things Punishable and Preventive Remedies

The IPC defines an offence as a 'thing punishable', and (a) a 'thing' (compare ss 32 - 33 of the IPC) must be an act, or a series of illegal acts or an illegal omissions, or a series of illegal omission; or, to use the words of Mr Bentham, 'we give the name of offence to every act which we think ought to be prohibited by reason of some evil which it produces or tends to produce'; (b) 'punishable' must mean that the commission or omission of the act, the commission or omission of which is prohibited renders the person who commits or omits it liable to the sanction of the law, *i.e.*, to 'punishment'.

An order under s 118 of the CrPC, to furnish security is what Bentham calls a 'preventive remedy', as contrasted with a 'penal remedy' or a 'punishment'. Mr Bentham defines 'punishment' as an evil resulting to an individual from the direct intention of another, on account of some act that appears to have been done or omitted'; and he adds: 'An evil resulting to an individual, although it be from the direct intention of another, if it be not on account of some act that has been done or omitted, is not a 'punishment'.'[88]

7. Certain Provisions are not Offences

An order for payment of maintenance is not a conviction for an 'offence'.[89] The offence under r 35, Defence of India Rules 1939, is not an offence defined in this section.[90] A complaint under s 28 of the Bombay Public Conveyances Act 1887, is not a complaint in respect of an 'offence'.[91]Section 149 and ch 8, in which s 149 occurs, are not mentioned in cll (2) and (3) of this section and consequently the word 'offence' in s 149 means only an offence under the Penal Code, and does not include an offence, *e.g.*, under the Railways Act.[92]265

8. Attempt to Commit Offence, if an Offence

An attempt to commit an offence is itself an offence within the definition of an offence as given in s 40, and where no express provision is made in any other part of the IPC for the punishment of such offence, it is punishable under s 511 .[1] But s 511 is omitted from s 40 . Therefore, unless an attempt to commit an offence under a special or local law has been expressly made punishable under the special or local law, it cannot be punished under the IPC .[2]

Suicide

The word suicide in itself is nowhere defined in the Indian Penal Code . 'Sui' means 'self' and 'cide' means 'killing', thus implying an act of self-killing. A person committing suicide must commit it by himself, irrespective of the means employed by him in achieving this object of killing himself.[3]

Suicide not Offence

Suicide by itself is not an offence under either the English or Indian Criminal Law, though at one time it was a felony in England. Attempt to commit suicide is an offence under s 309, IPC .[4]

9. Contempt of Court and Technical Offences

The contempt of a High Court is an offence though it may not be an offence under the IPC . The High Court being a court of record is the sole and exclusive judge of what amounts to contempt of court.[5] Though generally contempt of court as such is not an offence under the IPC but when the facts are covered by s 228, IPC, then in such cases it may be an offence under the IPC also.

The IPC does not exempt an act done under a mistake of law from the operation of the penal law but, it is obvious that if a person accepts the decision of a full Bench of the High Court in the state (from which no appeal has been preferred to the Supreme Court), as a guide to his conduct, he commits nothing more than a technical offence if that view is later not accepted as laying down the correct law.[6]

10. Clause 2 and Chapter IV

Section 79, IPC, comes within ch IV and, therefore, an offence to which that section refers, includes an offence under a local or special law.[7]Section 82 is in ch IV of the IPC and under cl (2) of this section the word 'offence' denotes a thing punishable under this IPC or under any special or local law. So the exemption under s 82 in266 favour of a child under seven years of age is not confined to offences made punishable by this IPC .[8]

11. Special or Local Law

Notes under ss 41 - 42 may be referred to.

12. Clause 2 and Section 109

The words 'punishment provided for the offence' in s 109 of the IPC, mean the punishment provided for the offence either in the IPC or in some special or local law: (ss 40 - 41 may be referred to).[9] Where a local law declares a breach of the rules made under its authority to be punishable, a breach of such rules might constitute an offence within the meaning of this section.[10] But a local law does not necessarily include a rule made under the provisions of a local law.[11]The abetment of a breach of the byelaws framed by a district council under the authority of the Burma Rural Self-Government Act is not punishable under s 109 of the IPC as it is not an abetment of an offence within the meaning of that section.[12]

13. Clause 3 and Section 216

No doubt s 216 is included in the sections mentioned in cl (3) of this section, but the definition of the word 'offence' in this section cannot affect the clear provision made in s 216 for the punishment of a person who harbours an offender. Section 216 very clearly provides for the punishment of harbourers only where the person harboured is wanted for an offence for which the minimum sentence of one year's imprisonment is provided. No provision whatever is made in s 216 for the punishment of a harbourer where the man harboured is wanted for an offence punishable with imprisonment of less than one year.[13]

14. Presumption that *Mens Rea* is an Integral Part of a Statutory Offence

There is a presumption that *mens rea* is an essential ingredient of a statutory offence. This may be rebutted by the express words of a statute creating the offence or by necessary implication.[14] It is a well settled principle of common law that *mens rea* is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded

mens rea. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. The nature of *mens rea* that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.[15]267

Mens rea (guilty intentions) is a very essential and important element/constituent of crime. Unless it is proved that the accused has the guilty intention, he cannot possibly be held guilty of committing the offence. In the instant case, the allegations were that the accused and co-accused (since deceased) were involved in illegal trade of kerosene. Twelve drums were recovered from a Tata vehicle, the deceased co-accused Y was driving the vehicle and the accused appellant R was seated by his side. There was not an iota of evidence on record to suggest or to involve the appellant in the crime in question. How, when, in what manner and to what extent, he was connected with the ownership, sale and recovery of kerosene, remains an unfolded mystery. The mere presence of surviving appellant in the vehicle and in the complete absence of prosecution evidence of intention (*mens rea*), specific role or overt act, the case of the prosecution was doubtful and deserved to be outrightly rejected. The conviction of the accused for contravention of the provisions of the Haryana Kerosene Dealers Licensing Order 1976 read with s 7 of the Essential Commodities Act 1955 was found not sustainable, and was set aside.[16]

15. No Conviction without Proving *Mens Rea* unless Provided Otherwise

The well established rule is that unless a statute clearly or by necessary implication rules out *mens rea* as a constituent part of crime, the accused could not be held guilty of an offence under a criminal law unless he has a guilty mind.[17] Thus the general rule is that to bring home the guilt to the accused the prosecution should also prove that the accused had a guilty mind in committing the offence.

64 Substituted by Act 27 of 1870, s 1, for the original section.

65 Substituted by Act 8 of 1930, s 2 and Sch I, for 'Chapter'.

66 Inserted by Act 8 of 1913, s 2 .

67 Inserted by Act 8 of 1882, s 1 .

68 Inserted by Act 10 of 1886, s 21(1) .

69 Inserted by the Information Technology (Amendment) Act, 2008 (10 of 2009), s 51 (w.e.f. 27-10-2009).

70 *R v Moorga Chetty* 5 ILR Bom 338, p 347 .

71 Notes under s 4 .

72 Indian Penal Code 1860, ss 2 - 4 and notes thereunder.

73 *S Khushboo v Kanniammal* 2010 Cr LJ 2828, p 2835, AIR 2010 SC 3196, (2010) 5 SCC 600, 2010 AIR SCW 2770 ; *Standard Chartered Bank v Directorate of Enforcement* AIR 2006 SC 1301, (2006) 4 SCC 278, 2006 (3) JT 421, 2006 (2) Scale 638 .

74 *Ram Swarup v State* (1972) Cr LJ 1159, (1972) All Cr R 49, (1972) All WR 287 (HC) .

75 *Emperor v Joti Prasad* AIR 1932 All 18, p 21 ; *Kishnan Lal Sharma v Girish Chander Dutt* 29 ILR Cal 496 .

76 *Emperor v Joti Prasad* AIR 1932 All 18, p 21 .

77 *Queen-Empress v Ganpatrao Ramchandra* 19 ILR Bom 103 ; *Empress v Moorga Chetty* 5 ILR Bom 338 (FB) ; *Regina v Elmstone* 7 BHCR Cr C 89.

78 *State of Maharashtra v Govind Mhatarba Shinde* 2010 Cr LJ 3586, p 3590 (Bom) (DB) .

79 *Abdul Rashid v State of Haryana* 2014 Cr LJ 1588, p 1594 (P&H).

80 Act 27 of 1870, s 15 .

81 *Emperor v Joti Prasad* AIR 1932 All 18, p 21 .

82 *Raj Narain Singh v Atmaram* AIR 1954 All 319 .

83 *Govind Kesheo Powar v State of Madhya Pradesh* AIR 1955 Nag 236 .

84 *Dharma Reddy v State & Anor* 1991 Cr LJ 1476 (AP) .

85 *Adams v Emperor* 26 ILR Mad 607, 614.

86 *Ali Mahommad Adamalli v Emperor* AIR 1945 PC 147, 151 .

87 *Emperor v Moorga Chetty* 5 ILR Bom 338, 353 (FB).

88 *Queen-Empress v Kandhaia* 7 ILR All 67, p 71 **relying on** the *Empress v Shasti Chum Napit* 8 ILR Cal 331 .

89 Re *Pomrammal* 16 ILR Mad 234; *Queen v Golam Hussain Chowdhary* 7 WR Cr 10 ; *R v Thakur Ira* 5 B No CR 81.

90 *Gopi Lal v Emperor* AIR 1945 Nag 186, p 187 .

91 Re *Valli Mitha*AIR 1920 Bom 350(1) .

92 *Inder Sain v Emperor* AIR 1920 Lah 144, p 159 ; *Vasudeva Mudaliar v Emperor* AIR 1929 Mad 880 ; *Aydrooss v Emperor* AIR 1923 Mad 187 ; Re *Puvanur Athamu*AIR 1925 Mad 239 .

1 *Queen-Empress v Ajudhia* 17 ILR All 120, p 123 .

2 *Md Akram v State* AIR 1951 Assam 17, p 18 .

3 *Gangula Mohan Reddy v State of Andhra Pradesh* 2010 Cr LJ 2110, p 2111 (SC), AIR 2010 SC 327, (2010) 1 SCC 750, 2010 (1) Scale 1 .

4 *Gangula Mohan Reddy v State of Andhra Pradesh* 2010 Cr LJ 2110, p 2111 (SC), AIR 2010 SC 327, (2010) 1 SCC 750, 2010 (1) Scale 1 .

5 *PL Jaitely v Sir Iqbal Ahmad* , *Chief Justice, Allahabad & Ors*AIR 1945 Oudh 266 (DB) .

6 *State v Kishna Murari* AIR 1995 All 397 .

7 *Abdul Aziz v Emperor* AIR 1943 Pesh 72, p 73, 45 Cr LJ 95 **dissenting from***KB Lewis v Emperor* AIR 1914 Mad 277, 15 Cr LJ 171, which itself **dissented from** in *Emperor v Kassim Isub Sab* 13 Cr LJ 530, 14 Bom LR 365 .

8 *King v Ba Ba Sein* AIR 1938 Rang 400 .

9 *Emperor v Po Han* AIR 1914 LB 145 .

10 *Bux Soo Meah Chowdry v King* AIR 1938 Rang 350, p 351 .

11 *Gonda Shah v Queen-Empress* 23 PR 1894 (Cr) .

12 *Ma Khwet Kyi v Emperor* AIR 1929 Rang 75 .

13 *Deo Baksh Singh v Emperor* AIR 1943 Oudh 51, p 52 .

14 *State of Maharashtra v Mayer Hans George* AIR 1965 SC 722, p 731 .

15 *State of Maharashtra v Mayer Hans George* AIR 1965 SC 722, p 731-32 ; *Madan Lal Arora v State* AIR 1961 Cal 240, p 244 ; *Nathulal v State of Madhya Pradesh* AIR 1966 SC 43, p 45 .

16 *Abdul Rashid v State of Haryana* 2014 Cr LJ 1588 (P&H), 2013 (4) RCR (Cri) 738 .

17 *Atul Chandra Pal v State* AIR 1970 Cal 88, p 89 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 41.

"Special Law".--

A "special law" is a law applicable to a particular subject.

Comments

1. Scope and Definition of 'Special Law'

This section defines 'special law' as a law applicable to a particular subject.[18] Taking this definition by itself, the expression, 'special law' means a provision of law, which is not applicable generally, but applies to a particular or specified subject or class of subjects.[19]Expression 'special law' means a provision of law which is not applicable generally but which applies to a particular or specific subject or class of subjects. Sometimes a particular act or part of a procedural law may be considered as general and can be given effect to with reference to some act. But it may be special with reference to other act.[20] 'Offence' has to be read and understood in the context as it has been prescribed under the provisions of ss 40, 41 and 42, IPC which cover the268 offences punishable under IPC or under special or local law or as defined under s 2(n), CrPC or s 3(38) of the General Clauses Act 1897.[21]

While it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of 'adultery' as defined under s 497, IPC .[22]

According to the Supreme Court as observed in *Kaushalya Rani v Gopal Singh* :[23] 'A 'special law' means a law, enacted for special causes, in special circumstances, in contradiction to the general rules of the law, laid down as applicable generally to all cases with which the general law deals'.

The 'particular subject' cannot be defined in any general words. It is always a question whether an Act or a particular section of the Act is a 'special law' dealing with a particular subject or not by comparison with the law with which there is an apparent conflict. It may be that a particular Act may be considered to be general with reference to another Act and be considered to be a 'special law' with reference to some other Act. Thus, in other words, the question whether a particular Act or particular section is or is not a 'special law' is entirely a relative matter and can only be considered in comparison with a particular Act or section with which it has an apparent conflict. As Dalip Singh J pointed out in *Hakam Khuda Yar v Emperor* :

> Viewed from this point the Evidence Act may be taken to be a 'special law' dealing with evidence. On the other hand, there are provisions in the Criminal Procedure Code which deal with evidence in criminal traits and such provisions would, it seems to me, naturally be 'special laws, as compared with the Evidence Act in general which deals with evidence in all classes of suits whether civil or criminal.[24]

Salmond's Division of Laws in Two Parts and Special Law

Salmond divides the whole body of law--the entire *corpus juris* into two parts:

(i) general, consisting of the ordinary law of the land; and
(ii) special, which, according to his division, includes international law, martial law, foreign law, conventional law, etc.

It is obvious that in the IPC and the CrPC the expression 'special law' is not used in this sense. Here, it has been given a specific meaning, namely that a 'special' law is one which deals with a particular subject.[25]

2. Special Law Contemplated In Sections 40 And 41

In *Emperor v Po Han* ,[26] Twomey J, held, 'The special laws contemplated in Sections 40 and 41 of the Code are only laws, such as the Excise, Opium and Cattle Trespass Acts, creating fresh offences, that is, laws making punishable certain things which269 are not already punishable under the general Penal Code'; and that the Whipping Act (now repealed) was not a Special Act as it did not create a fresh offence but merely provided a supplementary or alternative punishment for offences already punishable under the IPC . The interpretation of ss 40 - 41 was accepted by the Madras High Court in the case of *Swami Arunagirinatha*,[27] where it was held that the Criminal Law (Amendment) Act 1932, was a special law as it made picketing in certain circumstances an offence, and also in *Public Prosecutor v Annadham Annamalai* ,[28]where it was held that the Madras Maintenance of Public Order Act 1 of 1947, was not a special law as it created no fresh offences but merely provided supplementary or alternative punishment for offences already primarily punishable under the IPC .

Special law is a provision of law, which is applicable to a particular and specified subject or class of subject, it will apply to a special class of case and have no application in general cases. Special law prevails over the general law. Where there is a specific punishment provided in a special Act, it takes precedence over the general punishment prescribed under the IPC, but when there is no specific punishment provided under special law then the punishment prescribed under the general law *i.e.*IPC comes into operation.[29]

Section 92 of the Factories Act prescribes punishment for the occupier or manager of the factory for contravention of any of the provisions of the Factories Act or any rules made thereunder or any order in writing given thereunder. There is nothing in the Factories Act which prescribes punishment for the rash and negligent act of occupier or manager of the factory which results in the death of any worker or any other person. In such a case, the general law *i.e*. IPC will apply.[30]

3. Specific Punishment takes Precedence over General Punishment

In *Hakam Khuda Yar v Emperor* ,[31] Bhide J dissented from *Emperor v Po Han* ,[32] and held that the language of s 41 being plain enough, there could be no justification for ignoring the general language of the section and putting a restricted meaning on it. But this criticism applies only to the interpretation of s 41 . So far as s 40 is concerned, the context in which the expression 'special law' is used would appear to show that the section contemplates only those special laws which create fresh offences, that is, laws making punishable certain things which are not already punishable under the general IPC, as was held by Twomey J in *Emperor v Po Han* .[33]

4. Simple Rule of Interpretation

The simple rule of interpretation in such cases is that the IPC will apply wherever its application is not expressly, or by necessary implication, excluded, and where the requirements prescribed under the

IPC for the offence charged are satisfied. The usual rule of law is that where there is a specific punishment provided in a special Act it takes precedence over the general punishment under the IPC, and where there270 is no specific punishment provided the general law of the land, under the IPC, comes into operation if the requirements under any section thereof are satisfied.[34]

5. Special Laws

The Indian Evidence Act 1872[35] of the Coroner's Act 1871,[36] special rule of limitation, laid down in s 378(5) and ch 36 of the CrPC 1973,[37] law relating to Contempt of Court,[38] the Rajasthan Municipalities Act 1959[39] and the Calcutta Municipalities Act 1899[40] have been held to be the special laws within the meaning of this section. The last two Acts are also local laws within the definition of s 42 of the IPC . The Central Reserve Police Force Act 1949 is a special law within the meaning of the term defined in s 49, IPC, and therefore by virtue of the effect of s 5, CrPC, the provisions of the CrPC are inapplicable to the matters covered by the said Act of 1949.[41]

18 *Isak Chand Palkar v Myamothibi* (1980) Cr LJ 1180, (1980) Cr LR 466 (Guj), (1980) Mah LJ 287 .

19 *Anjanbai Yeshwant Rao v Yeshwantrao Daulatrao Dudhe* AIR 1961 Bom 154, p 155 .

20 *Kirpalsingh Pratapsingh Ori v BKH Lobana* (2004) Cr LJ 3786 (Guj) .

21 *S Khushboo v Kanniammal* 2010 Cr LJ 2828, p 2835, AIR 2010 SC 3196, (2010) 5 SCC 600, 2010 AIR SCW 2770 ; *Standard Chartered Bank v Directorate of Enforcement* AIR 2006 SC 1301, (2006) 4 SCC 278, 2006 (3) JT 421, 2006 (2) Scale 638 .

22 *S Khushboo v Kanniammal* 2010 Cr LJ 2828, p 2836 (SC), AIR 2010 SC 3196 .

23 *Kaushalya Rani v Gopal Singh* (1964) 1 Cr LJ 152, p 155, AIR 1964 SC 260 .

24 AIR 1940 Lah 129, p 136 (FB); *Gunepally Thammayya v Rajah Tyadapusapati Khandendu Dora* AIR 1930 Mad 963, p 968, per Ramesan J.

25 *Hakam Khuda Yar v Emperor* AIR 1940 Lah 129, p 133 (FB), per Takchand J.

26 *Emperor v Po Han* AIR 1914 LB 145, p 146 .

27 *Swami Arunagirinatha*AIR 1939 Mad 21, p 25, 26 .

28 *Public Prosecutor v Annadham Annamalai* AIR 1954 Mad 321, p 322-23 .

29 *Ejaj Ahmad v State of Jharkhand* 2010 Cr LJ 1953, p 1955 (Jhar) .

30 *Ejaj Ahmad v State of Jharkhand* 2010 Cr LJ 1953, p 1956 (Jhar) .

31 *Hakam Khuda Yar v Emperor* AIR 1940 Lah 129, p 139 (FB) .

32 *Emperor v Po Han* AIR 1914 LB 145 .

33 *Emperor v Po Han* AIR 1914 LB 145 .

34 Re *B Gervase*AIR 1950 Mad 599, p 600, 51 Cr LJ 1578 .

35 *Emperor v Faujdar* AIR 1933 All 440, p 442 ; *Hakam Khuda Yar v Emperor* AIR 1940 Lah 129, p 133, 138 (FB), per Takchand and Bhide JJ; observations of Dalip Singh J, p 135.

36 *Queen-Empress v Mahomed Rajuddin* 16 ILR Bom 159 ; *Emperor v Jogeshwar Passi* 31 ILR Cal 1, p 6 .

37 *Kaushalya Rani v Gopal Singh* (1964) 1 Cr LJ 152, p 155, AIR 1964 SC 260 .

38 *Narayan Nambiar v MS Namboodripad* 1968 KLT 299, p 309-10 (FB) .

39 *Dhoopa v State* AIR 1966 Raj 238, p 240-41, (1966) Cr LJ 1329, (1966) Raj LW 408 .

40 *Sukhdeo Singh v Calcutta Corpn* (1953) Cr LJ 196, p 197, AIR 1953 Cal 41 .

41 *Hanuman Singh v Union of India* (1997) Cr LJ 1054 (Raj) .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 42.

"Local law".--

A "local law" is a law applicable only to a particular part of [42][43][* * *] [44][India]].

Comments

1. Local Law

'Offence' has to be read and understood in the context as it has been prescribed under the provisions of ss 40, 41 and 42, IPC which cover the offences punishable under IPC or under special or local law or as defined under s 2(n), CrPC or s 3(38) of the General Clauses Act 1897.[45]

Just as a 'special law' is confined to a particular subject a 'local law' is confined to a particular locality.[46]Thus, the Madras Maintenance of Public Order Act 1947,[47] the Calcutta Municipalities Act 1899[48] and the Rajasthan Municipalities Act 1959[49] are local laws within the meaning of this section.271

2. Law does not Necessarily include Rules made thereunder

A local law does not necessarily include a rule made under the provisions of a local law.[50] Where a local law declares a breach of the rules made under its authority to be punishable, a breach of such rules might constitute an offence within the meaning of s 40 of the IPC .[51]But if the local Act itself does not declare a breach of byelaw to be an offence, it would not be an offence within the meaning of s 40 even if the authority framing the byelaw has made the breach of it punishable.[52]

42 Substituted by the AO 1948 for 'British India'.

43 The words 'the territories comprised in' omitted by Act 48 of 1952, s 3 and Sch II.

44 Substituted by Act 3 of 1951, s 3 and Schedule, for 'the states' which had been substituted by the AO 1950, for 'the Provinces'.

45 *S Khushboo v Kanniammal* 2010 Cr LJ 2828, p 2835, AIR 2010 SC 3196, (2010) 5 SCC 600, 2010 AIR SCW 2770 ; *Standard Chartered Bank v Directorate of Enforcement* AIR 2006 SC 1301, (2006) 4 SCC 278, 2006 (3) JT 421, 2006 (2) Scale 638 .

46 Reference 3 MHCR (App) 21.

47 *Public Prosecutor v Annadham Annamalai* AIR 1954 Mad 321 .

48 *Sukhdeo Singh v Calcutta Corpn* 1953 Cr LJ 196, p 197, AIR 1953 Cal 41 (*obiter*).

49 *Dhoopa v State* AIR 1966 Raj 238, p 240, (1966) Cr LJ 1329 .

50 *Ganda Shah v Queen-Empress* 23 PR Cr 1894 .

51 *Public Prosecutor v Anadham Annamalai* AIR 1954 Mad 321, p 323, (1954) Cr LJ 396 .

52 *Ma Khwet Kyi v Emperor* AIR 1929 Rang 750 .

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Chapter II

General Explanations

S. 43.

"Illegal", "Legally bound to do."--

The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

Comments

1. Scope

This section defines the word 'illegal' and the expression 'legally bound to do'.

The word 'illegal' has here been given an extensive meaning, including anything and everything which is prohibited by law or which constitutes an offence and which furnishes the basis for a civil suit, ending in damages.[53]

Where the managing committee of a co-operative society passed a resolution recommending to the general body that a certain grant made by the general body to one of its members on certain considerations be rescinded as those considerations had failed, it was held that the passing of such a resolution cannot possibly be said to be an offence or an act prohibited by law or to afford a ground for a civil action.[54]

2. Distinction between 'Unlawful' and 'Illegal'

The IPC defines the word 'illegal', but not the word 'unlawful' which is used in some sections (*e.g.,* s 23). Generally the word 'illegal' has the same meaning as 'unlawful'.[55] The law commissioners themselves say that the two terms are intended to be used in the same sense and bear the same meaning.[56] But in *Punjabi Bapuji Bagul v Emperor* ,[57] Beaumont CJ, with whom Wadia J, agreed, observed:

> Generally speaking I should say that there is no difference in meaning between the word 'unlawful' and the word 'illegal' but it does not follow that if one of those words is specially defined' in a statute, and the other is not, the two words must necessarily have272 the meaning given to the one word by the definition. Prima facie, I should have thought that the word 'unlawful' or the word 'illegal' used in a Penal Code would not cover anything which gives rise to a civil suit. The word 'illegal' has been defined as covering everything which gives rise to a civil suit but, but I am not prepared to say that in the Penal Code the word 'unlawful' which has not been so defined, must be taken throughout as having that very wide meaning. The word 'unlawful' in its general connotation means what is not justified by law. It is akin to the word 'illegal' but has been used in a more elastic manner and not in the same restricted sense as the word 'illegal'.[58]

The word 'illegal' as defined in the section and the word 'unlawful' as used in s 3 of the Madras Gift Goods (Unlawful Possession) Act 1961 have the same meaning.[59]

3. 'Which is Prohibited by Law'

Where a *mukhtar* appearing for an accused person threatened the complainant to put to him and the ladies of his household such questions in cross examination, as were scandalous and irrelevant to the matters at issue and were intended to insult and annoy the complainant, it was held that such a case of conduct on the part of the *mukhtar* was forbidden by law and was, therefore, illegal.[60]But sexual intercourse between two unmarried persons out of consent does not amount to an illegal act.[61]

4. 'Which Furnishes Ground for a Civil Action'

The section covers a breach of contract, and not merely a tort. The breach of contract, however, must be one which furnishes a ground for a civil action, that is to say, in respect of which damages could be obtained under s 73, Contract Act, or which could be enforced specifically.[62]The act of publishing a defamatory pamphlet would be illegal within the meaning of this section as it would furnish grounds for a civil action to the persons defamed.[63]

5. 'Legally Bound to do'

If ss 40, 43, and 176 of the IPC are read together it would follow that one who fails to furnish information which he is legally bound to furnish, is punishable under s 176, that he is legally bound to furnish what it is illegal for him to omit, that it is illegal for him to omit what is an offence and that and offence is what is punishable under the IPC . The statement is no doubt true, but it is not of much assistance in ascertaining what is punishable under the IPC . In order to ascertain what is punishable under the IPC one must look elsewhere than to s 176 and if no other section of the IPC deals with the matter, one must conclude that the particular crime may be punishable under some other enactment but not under the IPC . Thus, the failure to furnish the information may be an offence under the Mussalman Wakf (Bombay Amendment) Act 1935, but it is not an offence punishable under the Penal Code, so a person cannot be said to be legally bound to furnish the information within the meaning of s 176 of the IPC .[64] So also the furnishing of false returns or the273 preparation of a false diary by a government servant may be a breach of departmental rules, but is not contrary to law, and is not, therefore, 'illegal'.[65] A *chowkidar* is not legally bound to apprehend or keep, in confinement any person charged with or liable to be apprehended for an offence and it is not illegal for him to do so.[66]

53 *Bhagwan Din v Emperor* AIR 1929 All 935, p 936, 31 Cr LJ 12, 52 ILR All 203 ; *Punjabi Bapuji Bagul v Emperor* AIR 1935 Bom 164, p 165, 36 Cr LJ 940 .

54 *Jhamandas Thawerdas v Khemchand Gellaram* AIR 1933 Sind 196, p 198, 34 Cr LJ 834 .

55 *Emperor v Fazlur Rahman* AIR 1930 Pat 593, p 595, 32 Cr LJ 87 .

56 First Report, s 658 .

57 *Punjabi Bapuji Bagul v Emperor* AIR 1935 Bom 164, p 165, 36 Cr LJ 940 .

58 Re *Mahendra Nath Chakravarti*(1934) 62 ILR Cal 629, pp 633-34.

59 1977 Cr LJ 231 (NOC).

60 *Emperor v Fazlar Rahman* AIR 1930 Pat 593, p 595, 32 Cr LJ 87 .

61 *Mailsami v State* 1994 Cr LJ 2238 (Mad) .

62 *Ganpat Subrao Kashyapi v Emperor* AIR 1934 Bom 202, p 204, 35 Cr LJ 1429, 36 Bom LR 373 .

63 *Rahamatalli Mahomedalli v Emperor* 22 Cr LJ 513, p 515, AIR 1923 Bom 402 .

64 *Ali Mohammad Adamalli v Emperor* AIR 1945 PC 147, p 151 .

65 *Queen-Empress v Appayya* 14 ILR Mad 484 ; **dissenting from** High Court Proceedings, dated 21 December 1871, 6 Mad HCR App 48; *Veeraswami Mudali v Queen* 4 ILR Mad 144 .

66 *Bhagwan Din v Emperor* AIR 1929 All 935, p 936, 31 Cr LJ 12, 52 ILR All 203 .

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Chapter II

General Explanations

S. 44.

"Injury".--

The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

Comments

1. Scope and Meaning of 'Injury'

An injury is an act contrary to law.[67] The definition, in this section, shows that 'injury' embraces only such harm to body, mind, reputation or property as may be caused illegally. A threat by a landed proprietor to report to the police smuggling of liquor by the complainant is not a threat to cause injury to him as there is nothing illegal in the proprietor asking the police to investigate a suspected case of smuggling liquor.[68] Before a person can be said to put any person in fear of any injury to that person, it must appear that he has held out some threat to do or to omit to do what he is legally bound to do in the future. On the other hand, if a person promises to speak favourably to a person in authority and to do his best to induce him to do something, and in consideration of this promise receives money, it cannot be said that he threatened to cause injury to the person who gives the money.[69] If someone illegally causes harm to any person in body, mind *etc.* then injury would be caused within the ambit of s 44, IPC .[70]

When the accused committing rape kept his hand on the mouth of the prosecutrix, so that she should

not shout and in that process if she died due to suffocation, then certainly the accused caused an injury to the prosecutrix which caused the death of the prosecutrix, and offence falls within the purview of s 376A . The conviction of the accused appellant under s 376A, IPC was held proper.[71]

Where due to any illegal act, if a person suffers any bodily injury, mental injury or injury to his reputation or to property, then such sufferings can be called an 'injury'.[72]

Obtaining money against the will of a person on the threat of loss of appointment is extortion by putting the person in fear of an injury.[73]274

An unlawful detention of a cart at a toll-gate caused as a result of illegal demand if toll has been paid, has been held to cause injury.[74]

Taking bribe for releasing arrested persons on bail under threat of not releasing them unless the money was paid would amount to extortion under threat of an injury.[75]

A false charge held before the police and never intended to be prosecuted in court, may obviously subject the accused party to a very substantial injury, as defined in s 44 of the IPC .[76] But the case would be different if the charge is proceeded with.[77]

Threat of a decree that cannot be executed by any competent authority is a threat of injury within the meaning of the IPC .[78]

Definition Wide to include Tortious Act

The definition of 'injury' in this section is very wide,[79] and has been held to include every tortious act.[80] 'Injury' is wider in import than damage. As defined in this section 'injury' denotes any harm whatever illegally caused to any person in body, mind, reputation or property. But if a person does an act to save himself from injury such as a conviction in a criminal case, that does not mean that he caused injury to another.[81]

2. Social Boycott, if Amounts to Injury

Excommunication may, in some cases, give a cause of action for a civil suit, but not for a criminal case. Thus, where certain labourers try to improve their lot by bargaining with the *mirasdars* to obtain better conditions, and try to persuade their fellow labourers not to work until they have secured better terms, they are entitled to enforce a social boycott against those who decide to work; for that would not amount to an injury within the meaning of this section.[82]

3. Injury to Widow by Causing Death of her Husband

On a question whether the widow of a man who has been killed by the criminal act of another can be said to have suffered an 'injury' within the meaning of this section, the majority of the judges in *Yalla Gangulu v Mamidi Dali* ,[83] answered the question in the negative, Shepard J, observed:

> In my opinion it is impossible to answer that question in the affirmative. She has certainly not suffered in body, or reputation, nor has she suffered any injury in mind for which an action would lie, and I do not think it can be said that she has suffered in275 property. I take it that the term 'property' means something in existence and that it cannot, with any property, be applied to the reasonable expectation of pecuniary benefit for the loss of which an action is maintainable by the representative of a deceased person. Such a claim on behalf of a widow is analogous to that which may be made by a master in respect of wrongful acts done to his servants. He is entitled in such cases to recover damages for the loss of service. There is no question of loss of property. If the claim of the widow in such a case as the present is maintainable, it must follow that the master of a servant, who has been disabled or put in wrongful confinement, may equally apply for compensation to be paid out of

> the fine inflicted on the offender. In my opinion it would be putting an undue strain on the language of the section to hold that it refers to and includes actions which may be brought on account of loss of service.

The same view had earlier been taken in the undermentioned cases.[84] The Calcutta High Court has taken a contrary view.[85] In *Queen-Empress v Sab Ali* ,[86] the Punjab Chief Court also held that the loss of her husband's support affecting the widow prejudicially is a legal right and is therefore an 'injury' within the meaning of this section for which substantial compensation can be allowed by a civil court. Now, under s 357, CrPC compensation is payable to any person for any loss or injury caused by an offence, if it is recoverable by such person in civil court. And under cl (c) of the same section, when any person is convicted of any offence for having caused the death of any person or having abetted the omission of such an offence the compensation is payable not only to the widow but to all the persons who are, under the Fatal Accidents Act 1855, entitled to recover damages from the person sentenced 'for the loss resulting to them such death'.[87]

4. 'Property'

'Property' means something in existence.[88] In this section, 'property' means something tangible and capable of being destroyed or damaged in value or utility.[89]

67 *Swami Nayudu Subramania Mudali* 2 Mad HCR 158, p 160, per Halloway J.

68 Re *Mantripragada Mattapalli Narasimha Rao*AIR 1919 Mad 954, p 955, 19 Cr LJ 445 .

69 *Habibul Razak v King-Emperor* AIR 1924 All 197 .

70 *Sessions Judge v Arvind* 2014 Cr LJ 4024, p 4030 (MP) (DB) .

71 *Sessions Judge v Arvind* 2014 Cr LJ 4024, p 4030 (MP) (DB) .

72 *Meharunnissa v Syeed Habeeb* 2015 Cr LJ 1836, p 1843 (Kant) .

73 *Ameer Abbas Ali v Umed Ali* 18 WR 17 (Cr) ; *Shamumal v RA Gordon* AIR 1936 Sind 29, 37 Cr LJ 457 .

74 Re *B Appalaswami*(1892) 1 Weir 441.

75 *Jagdish Narain v Emperor* AIR 1942 Oudh 163 .

76 *Ashraf Ali v Empress* 5 ILR Cal 281, p 282 .

77 *Ramaswami v Queen-Empress* 7 ILR Mad 292, 1 Weir 185 .

78 *Priyanath Gupta v Lal Jhi Chowkidar* AIR 1923 Cal 590, 23 Cr LJ 396 ; *Baijnath Bhagat v Emperor* AIR 1940 Pat 486 .

79 *Baijnath Bhagat v Emperor* AIR 1940 Pat 486, 492, 41 Cr LJ 427 ; *Jagdish Narain v Emperor* AIR 1942 Oudh 163, 168, 43 Cr LJ 139 ; *Shamumal v RA Gordon* AIR 1936 Sind 29, 37 Cr LJ 457 .

80 *Shamumal v RA Gordon* AIR 1936 Sind 29, 37 Cr LJ 457 .

81 *Prayag Das v State* AIR 1963 All 131, p 133, (1963) 1 Cr LJ 457 .

82 *Arumuga Mudaliar v Muthiah Mudaliar* (1933) Mad WN 736 ; Re *Selathu*AIR 1949 Mad 546, 50 Cr LJ 797, (1948) 2 Mad LJ 522 .

83 *Yalla Gangulu v Mamidi Dali* 21 ILR Mad 74 (FB) .

84 Re *Lutchmaka* 12 ILR Mad 352; Re *Roop Lal Singh* 10 WR 39 (Cr); *R v Shivbassappa* 7 Bom HCR 73 .

85 *Emperor v Morgan* 36 ILR Cal 302, 9 Cr LJ 393 .

86 *Queen-Empress v Sab Ali* 112 PR 1898 (FB) .

87 See Commentary on s 357 of *Sohoni's Code of Criminal Procedure*, vol 4 twenty-first edn, Lexisnexis.

88 *Yalla Gangulu v Mamidi Dali* (1898) 21 ILR Mad 74 (FB) .

89 *Abid Ali Khan v Prabhakara Rao* 1968 Cr LJ 398, 401 (AP).

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Chapter II

General Explanations

S. 45.

"Life".--

The word "life" denotes the life of a human being, unless the contrary appears from the context.

Comments

1. Scope

No definition of 'human being' is given in the IPC . Under English law, a child becomes a human being when it has completely proceeded in a living state from the body of its mother, and the killing of such is homicide, whether it is killed by injuries inflicted before, during or after birth.[90] Indian law is contrary. Under s 299, expln 3, a276 child is a human being if 'any part of that child has been brought forth', and under s 315 a person who causes an injury before birth, from which the child dies after birth is not guilty of murder or culpable homicide, but punishable under the section for the particular offence. The word 'life' in s 45 denotes the life of a human being.[91]

2. Life Imprisonment

'Imprisonment for life' means imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned. But in no case, with the possible exception of the powers vested in the President under art 72 of the Constitution and the power vested in the Governor under art 161 of the Constitution, even with remissions earned, can a sentence of imprisonment for life be reduced to below 14 years. It is thereafter left to the discretion of the concerned authorities to determine the actual length of imprisonment having regard to the gravity and intensity of the offence.[92]

A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under s 432 of the CrPC which in turn is subject to the procedural checks in that section and the substantive check in s 433A of the CrPC .[93]

90 *R v Poulton* 5 C&P 329 ; *R v Brain* 6 ib 349 ; *R v Trilloe* 650, 3 Russ Cr 7, 8; *R v Enoch* 5 C&P 539 ; *R v Wright* 9 C&P 754 ; *R v Sellis* 7 C&P 850 .

91 *Duryodhan Rout v State of Orissa* AIR 2014 SC 3345, 2014 (140) AIC 109 (SC) .

92 *Ramraj v State of Chhattisgarh* 2010 Cr LJ 2062, p 2066 (SC), AIR 2010 SC 420 ; *Rajendra Prasad v State of UP* (1979) 3 SCC 646, AIR 1979 SC 916 ; *Maru Ram v Union of India* (1981) SCC 107, AIR 1980 SC 2147 ; *State of Punjab v Joginder Singh* (1990) 2 SCC 661, AIR 1990 SC 1396 ; *Laxman Naskar v Union of India* (2000) 2 SCC 595, 2000 AIR SCW 646 ; *Subhash Chander v Krishan Lal* (2001) 4 SCC 458, 2001 AIR SCW 1492 ; *Mohd Munnna v Union of India* 2005 AIR SCW 4524 ; *Swamy Sharaddananda v State of Karnataka* AIR 2008 SC 3040, 2008 Cr LJ 3911 .

93 *Sangeet v State of Haryana* AIR 2013 SC 447, 2013 Cr LJ 425 .

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Chapter II

General Explanations

S. 46.

"Death".--

The word "death" denotes the death of a human being, unless the contrary appears from the context.

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Chapter II

General Explanations

S. 47.

"Animal".--

The word "animal" denotes any living creature, other than a human being.

Comments

1. Scope

This 'definition', says Sir James Stephen, is 'not only superfluous, but of doubtful correctness. It would include an angel, frogspawn, and probably a tree'.[94] But perhaps the definition is intended to include in the term 'animal' fauna such as fish, and insects and other creatures which are generally not classed as animals.

A 'hen', though, in common parlance, would fall within the category of the bird, would be covered by the definition of 'animal'.[95]

94 SHCLE III, 306.

95 *Syed Ali v State* (1972) All WR 901 (HC), (1972) All Cr R 590 .

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Chapter II

General Explanations

S. 48.

"Vessel".--

The word "vessel" denotes anything made for the conveyance by water of human beings or of property.277

Comments

1. Scope

The IPC does not define the word 'property'. But since only movable property can be carried from one place to another, the word 'property' in the definition should refer to movable property, which expression has been defined under s 22 .

'Property' would include livestock also.

The train compartment is neither a building, tent or vessel used as a human building nor a place for worship nor a place used for the custody of property. The train compartment cannot be deemed to be the property in possession of the passenger travelling therein to attract the ingredients of the offence.[1]

1 *P Balaraman v State* (1991) Cr LJ 166 (Mad) .

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Chapter II

General Explanations

S. 49.

"Year", "Month".--

Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British calendar.

Comments

1. Scope

The terms 'year' and 'month' are defined in the same terms in s 3(35) and (66) respectively, of the General Clauses Act 1897. But for this statutory meaning, the expression 'month' would mean a lunar month.[2]

The British calendar has, since the 2 September 1752, been the same as the Gregorian calendar.[3] The true measure of the 'year' is the period in which one revolution of the earth round the sun is completed, and that is about 365 days, 5 hours 48 minutes and 51.6 seconds. To do away with the odd hours, the new style calendar has adopted the average length of 365 days per every ordinary year and 366 days for a leap year, which is every fourth year.[4] By statute 21 Hen III, the increased day in the leap year and the preceding day all counted as one day only. By statute Geo II c 25, it was enacted that the commencement of the year shall be from the 1 January instead of the 25 March as hitherto before.

2. Computing Period of Sentence of Imprisonment

With regard to computing the period of a sentence in *Migothi v Colvill* ,[5] Denman J, said:

> I am of opinion that a sentence of imprisonment for one calendar month, passed on any given day of any given month, is to be held to begin to run from the first moment of that day, and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month, not having so many days as the preceding month, then by analogy to the law278 established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its first day.[6]

In calculating sentence of imprisonment, the day upon which the sentence is passed and the day of release both ought to be included and considered as days of imprisonment, *e.g.*, a man sentenced on 1 January to one month's imprisonment should be released on 31 January, not on 1 February.[7] In the case of imprisonment for one day, as the day on which the sentence is passed counts as one day, the accused could not be detained in jail on a warrant issued for such period. In other words, there should be no further trouble on this point. The accused must be taken to have suffered this imprisonment.[8]

2 *South British Fire & Marine Insurance Co v Brojonath Shaha* 36 ILR Cal 516, p 540-41 .

3 Limitation Act 1908, s 25 .

4 Statute 25, Geo II c 25.

5 *Migothi v Colvill* (1879) 4 CPD 233, p 236 .

6 *Field v Jones* 9 East 151 ; *Glassington v Rawlins* 3 East 407 ; Re *Edwards* 9 Ex 628; Re *Wright Mills* 4 H&N 488.

7 Madras GO No 2411, dated 22 November 1881; *Migotti v Colvill* (1879) 4 CPD 233, p 236 .

8 *Mulluckchand Sheikh v King* AIR 1949 Cal 104 .

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Chapter II

General Explanations

S. 50.

"Section".--

The word "section" denotes one of those portions of a Chapter of this Code which are distinguished by prefixed numeral figures.

Comments

1. Scope

Even the word 'section' has been defined under the IPC . A chapter is sometimes sub-divided into different sub-chapters or sections, each headed by a separate heading. That will not be regarded as section, but only such portions of a chapter as are given a separate distinctive numerical figure in the beginning.

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Chapter II

General Explanations

S. 51.

"Oath".--

The word "Oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorised by law to be made before a public servant or to be used for the purpose of proof, whether in a Court of Justice or not.

Comments

1. Scope

An oath is a solemn appeal to the creator of the universe that the truth only shall be witnessed. It is an adjuration to God to punish the affiant if he swears falsely. It is an outward pledge given by the person taking it that the attestation or promise is made under an immediate sense of responsibility to God. An oath is a religious act by which the party invokes God not only to witness the truth and sincerity of his promise, but also to average any imposture or violated faith. In *Taylor's Works*[9]279 'oath' is defined on the authority of *R v White* ,[10] and the *Queen*'s case[11] to be 'a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven if he does not speak the truth'.

But a much more complete definition of oath is given by Bentham (who has been rightly denominated as the father of English Jurisprudence). In his *Work* he says:[12]

> By the term 'oath', taken in its largest sense, is universally understood a ceremony composed of words and gestures, by which the Almighty is engaged eventually to inflict on the taker of the oath, or swearer, as he is called, punishment in quantity and quality, liquidated, or more commonly unliquidated, in the event of his doing something which he, the swearer, at the same time and thereby engages not to do or omitting to do something which he in like manner engages to do.

Considering the efficiency of an oath he goes on to say:[13]

> When the question has been concerning a Muhammadan, a Hindu, a Chinese, or even a Christian, if a Catholic, great doubts have been entertained by pious and learned Church of England men, lawyers and non-lawyers concerning the degree of binding force, which in any such heterodox bosom ought to be ascribed to the ceremony of an oath.

The doubts to which this passage refers have, however, been set at rest by the leading case of *Omichand v Barker* ,[14] where the Lord Chancellor and three other judges concurred in laying down the rule that the depositions of witnesses professing the Gentoo (Hindu) religion, who were sworn according to the ceremonies of their religion, taken under a commission out of Chancery, could be admitted and read as evidence.

Affidavits are not included in the definition of evidence in s 3 of the Evidence Act and can be used only if the Court permits it to be so used for sufficient reasons. The Magistrate is not bound to accept affidavit at the stage of s 200 CrPC, and s 51, IPC does not apply.[15]

2. 'Solemn Affirmation'

Act 5 of 1940, substituted 'solemn affirmation' for an 'oath' and s 6 of the Oaths Act 1873, provided that 'where the witness, interpreter, or juror is a Hindu or Mahommadan, or has an objection to making an oath, he shall, instead of making an oath make an affirmation,' and that 'in every other case the witness interpreter or juror shall make an Oath'. Section 5 of the new Oaths Act 1969 now gives full option to a witness, interpreter or juror to take an oath or make an affirmation.

An affirmation is a solemn and formal declaration or assertion that a declaration or affidavit is true, that the witness will tell the truth, etc, this being substituted for an oath in certain cases.[16]

3. Object of Oath

The real object of giving oath is the idea that there will be superhuman retribution in case of falsehood and consequently actual words or ceremonies are immaterial. The280 purpose of giving oath is not to call the attention of God to the party but to call the attention of the party to God.[17]

Idea of Oath

The idea of the oath, *viz,* that the person swearing renounces the mercy and imprecates the vengeance of heavens if he does not speak the truth, the idea of binding the conscience of the witness which still prevails in England and which in the former times led to the swearing of Hindus on *tulsi* or water from the *Gangas*, and that of Mahommadans on the *Qoran* find no place in the Oaths Act. The superstition of religious sanction has been disregarded and the legal sanction alone is relied upon.[18]

Religious and Moral Sanctity of Oath

The practice of supporting a promise by an oath is practically as old as the existence of belief in God and it appears to have been utilised from the very earliest times to ratify and insure the fulfillment of any special contract or undertaking by importing into the transaction the fear of Divine wrath in case of wilful failure to perform the delegation entered into. The use of oath to bind the conscience was practiced even by the Greeks and Romans and is virtually as old as creation itself.

Legal Sanctity of Oath

Apart from the religious and moral sanctity of an oath legal sanctity is also attached to it where a person is a non-believer or has no belief in the supreme being, he can do nothing which would be binding on his conscience as an oath.[19] Law fully takes notice of such persons, making false statement on oath is an offence as defined by s 191 of this IPC and is punishable with imprisonment from three years of life imprisonment under the provision of ss 193 - 95, IPC . A great weight and sanctity is attached to sworn testimony of a witness under the provisions of the Indian Evidence Act 1872 and cannot be easily brushed aside unless there are cogent reasons to do so.

4. Statutory Provisions Relating to Oaths and Affirmations

Indian Oaths Act 1873 has been Replaced by Oaths Act 1969

Formerly, the law relating to the judicial oaths, special oaths and oaths for other purposes was contained in the Indian Oaths Act 1873, which was repealed and with effect from 26 December 1969 has been replaced by the Oaths Act 1969. The new Act has made some drastic changes. According to its s 5, 'a witness interpreter or juror may, instead of making an oath, make an affirmation'. Section 6 of the old Act, which was analogous to s 5 of the present Act provided that 'where the witness, interpreter or juror is a Hindu or Mohammedan; or has an objection to making an oath, he shall, instead of making an oath, make an affirmation. In every other case the witness, interpreter, or juror shall make an oath'. Thus under the old law oath was the rule and affirmation an exception. This is not the position now under the new Act. In order to give every person the liberty of making an affirmation irrespective of his religious persuasions or whether or not he raises any objection to make an oath this281 new provision has been made. Sections 9 - 12 of the old Act contained some provisions relating to the conclusive or binding character of special oaths. These provisions were opposed to juristic principles and public policy. These provisions have not been retained in the new Act and the provisions of s 6, which is s 5 of the new Act, have been modified as above.

Under sub-s (2) of s 6 the present Act the oaths and affirmations are to be administered by the presiding officer of the court himself except in the case of the Supreme Court and the High Courts. For the sake of uniformity in the form to be adopted in the matter of oaths, affirmations affidavits etc, in the

courts throughout the country the proforma forms have been given in the Schedule to the Act. Section 4 of the Oaths Act 1969, which is the main section in the Act, may be quoted here for the sake of proper appreciation. It runs as follows:

> **4. Oaths or affirmations to be made by witnesses, interpreters and jurors.--**
>
> (1) Oaths or affirmations shall made by the following persons, namely:--
>
> (a) all witnesses, that is to say, all persons who may lawfully be examined or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;
> (b) interpreters of questions put to, and evidence given by, witness; and
> (c) jurors.
>
> *Provided* that, where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of s 5 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.
>
> (2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

5. Administration of Oath to Child Witness

Before the Indian Oaths (Amendment) Act 1939 there was a conflict of opinion on the question whether it was necessary to administer an oath or affirmation to a child witness. This controversy has been completely set at rest by the provisions contained in the proviso to sub-s (1) of s 4 of the Oaths Act 1969. Every witness under s 118, Evidence Act, is competent to testify unless the court considers that he is prevented from understanding the questions put to him, or from giving rational answers to those questions by reason of tender years, extreme old age, disease etc. Competency of a witness is the rule and incompetency is an exception. The net effect of ss 4 and 7 of the Oaths Act 1969 is that oath or affirmation must be administered to every witness unless the court is of the opinion in case of a child 12 years of age, that he does not understand the nature of the oath.[20] Thus an oath can be and should be administered to every child witness above 12 years and in case of witnesses below 12 years only if on a preliminary examination by the court, it appears that they understand the nature and sanctity of oath.282

In case of a child below 12 years, the omission to take oath will not affect the admissibility of his evidence and such evidence might be acted upon if the court is of the opinion that he understands the duty to speak the truth. Even if there is failure on the part of the court to formally record the requisite opinion, it should be merely an irregularity curable under s 7 and might not in all cases affect the evidence. There is no legal requirement to hold a preliminary examination to determine the competence of a child witness. However, as a rule of prudence it is not only desirable that a preliminary examination should be made by the court but that a formal record of such examination should also be maintained. In the case of criminal prosecution, where the fate of the accused depends

on the testimony of such a witness, the imperative necessity of *voir dire* has been underlined with the greater emphasis.[21]

6. Omission does not Invalidate Proceedings

Under s 7 of the Oaths Act, 'no omission to take any oath or make any affirmation...and no irregularity whatever in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever...or shall affect the obligation of a witness to state the truth'.

7. Object of Oath and Effect of Omission

Under s 4 of the Oaths Act, oath shall be administered only to those witnesses who may lawfully be examined which means who can understand the sanctity of oath. A witness may be a competent witness, and yet he may not be in a position to understand the sanctity of an oath. In such a case s 7 of the Act comes into play. A witness of this type can be examined without an oath, and his testimony is as good as that of a witness to whom oath has been administered.[22] The Oaths Act does not deal with competency. Its main object is to render persons who give false evidence liable to prosecution. It is true, a subsidiary object is to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth. But in view of s 118 of the Indian Evidence Act these matters touch the credibility and not the admissibility of the evidence.

9 *Taylor's Works*, 1382, eighth edn, p 1175.

10 *R v White* 1 Lea 403 .

11 *Queen*'s case 2 B&B 185.

12 Volume 5, p 191.

13 Volume 5, p 195.

14 *Omichand v Barker* 1 Sim LC 381 .

15 *U Valvi Basha v Mohd Bashu* 2008 Cr LJ 1011, p 1013 (Kant) .

16 *Black's Law Dictionary.*

17 *Indar Prasad v Jagmohan Das* AIR 1924 Oudh 442, 11 OLJ 485, 84 IC 314, 1 OWN 167 .

18 *Gobind Chandra v Queen-Empress* 19 ILR Cal 355 .

19 *Attorney-General v Bradlaugh* 14 QBD 667 .

20 *Sataji Nathaji v State of Gujarat* 1976 Guj LR 254 .

21 *Sataji Nathaji v State of Gujarat* 1976 Guj LR 254 .

22 *Ghasi* Ram *v State*AIR 1952 Bhopal 25 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

S. 52.

"Good faith".--

Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.283

Comments

1. 'Good Faith' in Civil and Criminal Law

The expression 'good faith' in criminal jurisprudence has a definite connotation. Its import is totally different from saying that the person concerned has honestly believed the truth of what is said.[23]

Good faith plays an important part in criminal law, as it affords a good defence in a number of cases.[24]

The definition of 'good faith' in this section is a negative definition,[25] and means that if an act is done without due care and attention it will not be deemed to have been done in good faith. 'Good faith' in criminal law is different from 'good faith' as understood in civil law. If an act is not done with due care and attention, it cannot be said to be done in good faith as far as criminal law is concerned.[26]

The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acted. 'Good faith' requires not logical infallibility but due care and attention. The question of good faith is always a question of fact to be determined in accordance with the proved facts and circumstances of each case.[27]

2. Distinguishing Features of Definition of 'Good Faith' in General Clauses Act 1897

Under s 3(22) of the General Clauses Act 1897, 'A thing shall be deemed to be done in 'good faith' where it is done in fact honestly whether it is done negligently or not'. The definition in this IPC, as pointed out above is a negative one. The term 'good faith' is not attempted to be defined there but all that is stated is that if an act is not done with due care and attention, it would not be said to be done in 'good faith'. This definition comes into conflict with the definition in the General Clauses Act to this extent that if a thing has been done negligently, though honestly, it would not be deemed to have been done in 'good faith'. The definition in the General Clauses Act lays stress on one aspect only, while the one in this section emphasises two aspects; the honesty of intention as well as due care and attention. Thus this section excludes the element of negligence from the purview of 'good faith'. Both the definitions retain the real essence of 'good faith', which is that a thing is done 'honestly'. This is a feature common to both the definitions without which the term 'good faith', will lose its real meaning. 'Good faith', therefore implies, not only an upright mental attitude, and clear conscience of a person, but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable person. 'Good faith' contemplates an honest effort to ascertain the facts upon which exercise of the power must rest. It must, therefore, be summed up as 'an honest determination from ascertained facts'. 'Good faith' precludes pretence or deceit, and also negligence and recklessness. A lack of diligence, which an honest man of284 ordinary prudence is accustomed to exercise, is in law, a want of good faith. Once this is shown, good faith does not require a sound judgment.[28] This section, however, makes no reference to the moral elements of honesty and right motive which are involved in the popular significance of 'good faith' and which are predominant in the positive definition enacted in the other Acts of the legislature. It, therefore, follows that while an honest

blunderer acts in good faith within the meaning of the General Clauses Act, he can never act in good faith within the meaning of the IPC for being negligent, he has not acted with due care and attention.[29]

The element of honesty which is introduced by the definition prescribed by the General Clauses Act is not introduced by the definition of the IPC and we are governed by the definition prescribed by s 52 of that IPC .[30] Absence of good faith in this connection, and within the meaning of this (ss 52 and 79), means simply carelessness or negligence. Absence of good faith, under the General Clauses Act, means 'want of honesty'.[31] Negligence does not by itself show want of good faith, where General Clauses Act applies. This definition in the General Clauses Act applies to the Limitation Act, s 14 . It is only in the IPC that good faith requires due care and attention. Such requirement is not mentioned in the General Clauses Act.[32] The element of honesty has been introduced by the latter and good faith therein has been defined in a positive form.[33]

3. Proper Inquiry before Making Imputation

Before a person proposes to make an imputation on another, the author must first make an inquiry into the factum of imputation which he proposes to make. It is not enough that he just does a make believe show for an inquiry. The inquiry expected of him is of such a depth as a reasonable and prudent man would make with the genuine intention in knowing the real truth of imputation. If he does not do so he cannot claim that what he did was bona fide, *i.e.*, done in good faith. When the President of India determines question of age of Chief Justice of India, it is not open for the contemnor to raise this question over again and again.[34]

4. 'Due Care and Attention'

A person cannot be said to have acted in good faith if he has not proceeded with 'due care and attention'.[35]Section 52 of the IPC starts in the negative tone including all except what is allowed to be within its amplitude. Insistence sought to be achieved through the commencing words of the definition 'nothing is said to be done or believed in good faith' is that the solitary item included within the purview of the expression 'good faith' is what is done with 'due care and attention'. Due care285 denotes the degree of reasonableness in the care sought to be 'such a degree of care, precaution or diligence as may fairly and of the subject-matter and the circumstances surrounding the transaction. It is such care as an ordinary prudent person would exercise under the conditions existing at the time he is called upon to act.[36]

Where poisonous propaganda was made by the accused against the school, no sane parents would send their ward to such an institution and where there was defamation of character of the lady principal before the general public, and particularly before the authorities, so that she and her institution may suffer in many ways, the action of the accused was held not in good faith, attracting the exception of s 499, IPC .[37] Good faith does not attach to belief or action done without due care and attention.[38]

Where the question is whether a public servant was justified in doing a certain thing, his justification must have a better foundation than his mere private belief, for a man may be very foolish in believing himself justified, but the law cannot adopt so vague and unsafe a criterion.[39]

5. Writer of a Defamatory Statement

Where the allegations against the accused were of defamation under s 499, IPC, it was held that in order to establish good faith and bona fides, it has to be seen first the circumstances under which the letter was written or words uttered; secondly, whether there was any malice; thirdly, whether the accused made any inquiry before he made the allegations; fourthly, whether there are reasons to accept the version that he acted with care and caution and finally whether there is preponderance of probability that the accused acted in good faith.[40]

The writer of a defamatory statement cannot be said to have acted in good faith when he ignores the sources of truth which were open to him.[41] In a case of defamation the defence therefore must prove that accused used 'due care and attention'. It is certainly not using due care and attention to publish defamatory statements about a person and also to publish his denial and leaving the public to take their choice.[42] Dealing with the expression 'good faith' in relation to the exceptions enumerated under s 499 of the IPC (relating to the offence of defamation) the Apex Court in *Harbhajan Singh v State of Punjab & Anor* [43] has stated thus:

> The element of honesty which is introduced by the definition prescribed by the General Clauses Act is not introduced by the definition of the code; and we are governed by the definition prescribed by s 52 of the Code. So, in considering the question as to whether the appellant acted in good faith in publishing his impugned statement, we have to enquire whether he acted with due care and attention. There is no doubt that the mere plea that the accused believed that what he stated was true by itself, will not sustain his case of good faith under the Ninth Exception. Simple belief or actual belief by itself is not enough. The appellant must show that the belief in his impugned statement had a rational basis and was not just a blind simple belief. That is where the element of due286 care and attention plays an important role. If it appears that before making the statement the accused did not show due care and attention, that would defeat his plea of good faith.

The above observations in *Harbhajan Singh*'s case were quoted with approval by the Supreme Court in Re *SK Sundaram.*[44]

6. Ayurvedic Doctor

A *vaid* (ayurvedic doctor), uneducated in the matter of surgery, cannot be said to have acted in good faith if he operates on a man and causes his death, even if he thought he was acting for the benefit of the patient.[45]

7. Magistrate

A magistrate tendering pardon without complying with the provisions of the CrPC acts either in ignorance or in conscious disregard thereof. He cannot be said to have bestowed due care and attention within the meaning of this section in tendering the pardon. He cannot, therefore, be said to have acted in good faith.[46]

In a case, the district supply officer who was also a magistrate of the first class ordered the arrest of a person against whom a report had been placed before him that the person had contravened the Brick and Cement Control Order made under r 81 of the Defence of India Rules. The facts also disclosed that he had acted with care and circumspection and in the belief that he could arrest the offender. There was also no previous enmity between the officer and the offender and nothing to show that the officer acted in a high handed or harsh manner. It was held that the officer, in arresting the person, acted in good faith.[47]

8. Police Officials

So also, a sub-inspector of police cannot be said to have acted in good faith in making a search without complying with the provisions of s 165 - 66, CrPC .[48]

In the undermentioned case[49] the warrant was executed by constables different from the constables who had been authorised to execute them because the man whose arrest was required was not in the village where he had been supposed to be, and the officer of the police station on discovering this made a copy of the warrant from the register in the *thana* and endorsed in it the names of other constables who were directed by him to make the arrest. The warrant was executed by these constables who were held to have acted in good faith under colour of their office. There is nothing to

suggest that with due care and attention these police constables could have ascertained that they were not legally authorised to make the arrest.

Where a police constable having an honest suspicion that the complainant was in possession of stolen property, questioned him and not receiving satisfactory answers detained the property for examination and there was scuffle, it was held that the287 constable acted in good faith.[50]But where a police officer acted on unfounded suspicion without taking the trouble of getting any credible information, it was held that he did not act in good faith.[51]

Qurq Amin

If a *qurq amin* knowing fully well that the date fixed for the execution of a warrant of attachment had expired, proceeded to execute it, it cannot be said that he acted in good faith.[52] An execution warrant sought to be executed is bad if the date on or before which it is to be executed and the date on or before which it is to be returned to the court is not specified in it, and the person executing it cannot be said to have acted in good faith.[53] Where warrants issued by an assistant collector authorised a particular *qurq amin* to execute them and he returned them unexecuted on account of resistance offered to him, and the *naib-tahsildar* on his own initiative asked for police help and ordered another *qurq amin* to execute the warrants, it was held that *naib-tahsildar* may have acted with the best of intentions and may have believed himself entitled to act as he did, but if he had examined the warrants he would have seen at once that only the *qurq amin* named in it, was authorised to execute them and if he had considered the matter for a moment, he must have realised that it was not within his power to authorise any other *qurq amin*to execute them, and it could not therefore be held that he acted with due care and attention, and if he did not act with due care and attention he could not be said to have acted in good faith.[54] But where the warrant of attachment had been signed by the deputy collector instead of the collector and was valid in all other respects and executed by the *qurq amin,* it was held that the *qurq amin* acted in good faith under colour of his office.[55]

9. Bank Manager

Where a bank manager in the normal course and in the discharge of his legal duties received from an auditor a report containing defamatory matter and placed it before his official superiors without an expression of his own opinion in the matter, it was held that he did not act in good faith.[56]

10. Standard of 'Due Care and Attention'

Good faith requires due care and attention, but there can be no general standard of care and attention applicable to all persons and under all circumstances.[57] As pointed out in *Emperor v Abdool Wadood Ahmed* :[58]

> The standard of care and caution must be judged according to the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusion of a calm and philosophical mind may differ very largely from the288 honest conclusions of a person excited by sectarian zeal and untrained to the habits of reasoning.

11. Question of Good Faith

The question of good faith must be considered with reference to the position of the accused and the circumstances under which he act. The law does not expect the same standard of care and attention from all persons regardless of the position they occupy.[59] 'What is due care and attention depends on the position in which a main finds himself and varies in different cases'.[60] The court in determining the

question of good faith should have to take into account the intellectual capacity of the person, his predilections and the surrounding facts.[61] The care and attention required by law must have relation to the occasion and the circumstances, and the question as to what would be due care and attention must be determined with reference thereto.[62] Justice Markby in the case of Re *Shibo Prosad Paidah*,[63] in dealing with the question of good faith within the meaning of the exceptions to 499 and in view of s 105, Evidence Act, observed:

> The law in the *mofussil* is apparently that which commonsense seems to me to teach, namely, that in a care of this kind the court had a right to call upon the party making the imputation to show that he has some reasonable ground for making it.

12. Belief must be Reasonable

The question of good faith is a question of fact and must be gathered from the surrounding circumstances. Mere actual belief without any reasonable grounds for believing is not synonymous with good faith; but good faith does not require logical infallibility but due care and caution which must in each case be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. The law does not expect the same care and attention from all persons regardless of the position they occupy.[64]

Due care and attention implies a genuine effort to reach the truth and not the ready acceptance on ill-natured belief.[65] There must be some reasonable foundation for the belief.[66] Good faith does not attach itself to belief or action done without due care and attention.[67] It does not constitute good faith necessarily that the person making the imputation believed it to be true. Where the question is whether a public servant289 was justified in doing a certain thing, his justification must have a better foundation than his mere private belief, for a man may be very foolish in believing himself justified, but the law could not adopt so vague and unsafe a criterion.[68] In a case where a police officer acted on suspicion that certain cloth was stolen property, Birdwood J, observed:

> We are forced, therefore, to consider whether there was some ground for suspicion, and whether the accused, in the circumstances in which he was placed, acted with such care as is sufficient to shield him from a criminal prosecution. Though we think that there was very little ground, indeed, to justify a reasonable suspicion that the cloth was stolen property, yet we think that there was some ground which gave rise to an honest belief on the part of the accused, after such inquiry as he was able to make, that such a state of facts existed as would justify his action. We think, therefore, that the magistrate ought to have found in this case that the accused acted in good faith.[69]

In the case of defamation, good faith in the formation or expression of an opinion can afford no protection to an imputation which does not purport to be based on that which is the legitimate subject of public comment.[70]

Where a person killed what he considered to be ghosts, and from the circumstances under which the apparition appeared before him and his predisposition, it could be reasonably inferred that he believed that he was attacking a ghost and not a human being, it was held that he acted in good faith.[71]

13. Blind Simple belief is not Enough

In considering the question whether one has acted in good faith or not, the court has to examine whether the said person acted with due care and attention. Simple belief or actual belief by itself is not

enough. On the other hand, it must be shown that the belief in the impugned statement had a rational basis and was not just a blind simple belief. The element of due care and attention plays an important role. Good faith does not require logical infallibility. The true test to be applied for the proof of the existence of good faith is whether there is no lack of good faith and it must be gathered only from the surrounding circumstances.[72]

14. Sections 52 and 79

Section 79 of the IPC provides that nothing is an offence which is done by any person who is justified, or who by reason of mistake of law, in good faith, believes himself to be justified by law, in doing it. Under this section, although an act may not be justified by law, yet if it is done under a mistake of fact, in the belief and in good faith that it is justified by law it will not be an offence. Such cases are not uncommon where the courts in the facts and circumstances of the particular case have exonerated the accused under s 79 on the ground of his having acted in good faith under the belief, owing to a mistake of fact that he was justified in doing the act which constituted an offence. As laid down in s 52 of the IPC, nothing is said to be done or believed to be done in good faith which is done or believed without due care and290 attention. The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acted. 'Good faith' requires not logical infallibility but due care and attention. The question of good faith is always a question of fact to be determined in accordance with the proved facts and circumstances of each case.[73]

23 *Re SK Sundaram,* suo motu contempt petition (Cr) 5 of 2000, I (2001) CCR 45 (SC).

24 Indian Penal Code 1860, ss 76 - 79, 81, 88-89 and 92.

25 Re *Ganapathia Pillai*AIR 1953 Mad 936, p 937 ; *Harbhajan Singh v State of Punjab* AIR 1961 Punj 215, p 222 ; reversed on another point in *Harbhajan Singh v State of Punjab* AIR 1966 SC 97 ; *Bibhuti Bhushan Das v Sudhir Kumar Majumdar* AIR 1966 Cal 473, p 476, (1966) Cr LJ 986 ; *Gulab Chand Bhunder Bhai Soni v State of Gujarat* AIR 1970 Guj 171, (1970) Cr LJ 1100 .

26 *Pagla Baba v State* AIR 1957 Ori 130, p 147 ; *State of Bihar v Shiv Prasad Lal Seth* AIR 1960 Pat 326, p 328 .

27 *State of Orissa v Bhagaban Barik* AIR 1987 SC 1265, (1987) Cr LJ 1115 (SC) .

28 *Harbhajan Singh v State of Punjab* AIR 1961 Punj 215, p 222-23 ; *Kailash Sizing Works v Municipality of Bhivandi* AIR 1969 Bom 127, p 131, 70 Bom LR 554, (1968) Mah LJ 916, (1968) ILR Bom 564 (DB) .

29 Re *Ganapathia Pillai*AIR 1953 Mad 936, p 937 ; *Shimbhu Narain v King-Emperor* AIR 1923 All 546, p 547 .

30 *Harbhajan Singh v State of Punjab & Anor* AIR 1966 SC 97 .

31 *Bux Soo Meah Chowdry v King* AIR 1938 Rang 350, p 352 .

32 *Gopal Chandra v Bepin Behari* AIR 1955 Cal 353, p 354 ; *Public Prosecutor v Vattem Venkataramayya* AIR 1963 Andh Pra 106, p 108 .

33 *Md Abdur Rauf v Shib Kumar Khanna* (1980) 1 CHN 276 .

34 Re *SK Sundaram,* suo motu contempt petition (Cr) No 5 of 2000, I (2001) CCR 45 (SC).

35 *Deivasigamani v MS Kamsudeen Rawther* (1977) Mad LJ 86, p 90 (Cr) ; *Mithu Khan v State of Rajasthan* AIR 1969 Raj 121, p 123, (1969) Cr LJ 515, (1969) 19 ILR Raj 559 .

36 Re *SK Sundaram,* suo motu contempt petition (Cr) No 5 of 2000, (2001) I CCR 45 (SC).

37 *Dogar Singh v Shobha Gupta* (1998) Cr LJ 1541 (P&H) .

38 *Channing Arnold v King Emperor* AIR 1914 PC 116, p 119, 15 Cr LJ 309 .

39 *Gayadin v Emperor* AIR 1934 All 124, p 126 ; *Prag v Emperor* AIR 1942 *Oudh* 256, p 257, 43 Cr LJ 518.

40 *Chaman Lal v State of Punjab* AIR 1970 SC 1372, (1970) Cr LJ 1266 (SC) .

41 *Emperor v PC Tarapore* AIR 1940 Sind 239, p 246, 42 Cr LJ (1)(FB).

42 *Emperor v JM Chatterjee* AIR 1933 All 434, p 435, 34 Cr LJ 926 .

43 *Harbhajan Singh v State of Punjab & Anor* AIR 1966 SC 97 .

44 Suo motu contempt petition (Cr) No 5 of 2000, (2001) I CCR 45 (SC).

45 *Sukaroo Kobiraj v Empress* 14 ILR Cal 566, p 568 .

46 Re *Mukhesh Ramachandra Reddy*AIR 1958 AP 165, p 168, (1958) Cr LJ 343 .

47 *Ram Narain Singh v A Sen* AIR 1958 All 758, p 763 .

48 *Gopi Mahto v Emperor* AIR 1932 Pat 66, p 68, 33 Cr LJ 233 (DB) ; *Dhanna v State of Rajasthan* (1964) Raj LW 126 (Raj) .

49 *Queen Empress v Dalip* 18 ILR All 246 .

50 *Bhawoo Jivaji v Mulji Dayal* 12 ILR Bom 377 .

51 *Sheo Saram Sahai v Mahommad Fazil* 10 WR 720 (Cr) .

52 *Raghubir v Emperor* AIR 1942 Oudh 57, p 58, 43 Cr LJ 60 ; *Mahadeo v Emperor* AIR 1927 Oudh 71, 28 Cr LJ 157 ; *Nand Lal v Emperor* AIR 1924 Nag 68, 25 Cr LJ 233 ; *Kishailal v Emperor* AIR 1934 All 1016, 36 Cr LJ 295 ; *Prag v Emperor* AIR 1942 Oudh 256, p 257, 43 Cr LJ 518 .

53 *Kishori Lal v Emperor* AIR 1934 All 1016, 36 Cr LJ 295 .

54 *Prag v Emperor* AIR 1952 Oudh 256, p 257 .

55 *Sundar Lal v Emperor* AIR 1933 Oudh 276, 34 Cr LJ 732 ; *Queen-Empress v Dalip* 18 ILR All 246 .

56 *Brij Ballabh Goyal v Satya Dev* AIR 1960 Raj 213, 1960 Cr LJ 1136 .

57 *State of Orissa v Ram Bahadur Thapa* AIR 1960 Ori 161, 163, 1960 Cr LJ 1349 .

58 *Emperor v Abdool Wadood Ahmed* 31 ILR Bom 293 .

59 *Bhawo Jivaji v Julji Dayal* 12 ILR Bom 377 ; Re *Ganpathia Pillai*AIR 1953 Mad 936, 937, 1953 Cr LJ 1730 .

60 *Po Mye v King* 1940 Rang LR 109, 118, AIR 1940 Rang 129, 132, 41 Cr LJ 634 .

61 *Mahommad Gul v Hazi Fazle Karim* AIR 1929 Cal 346, 349, 31 Cr LJ 369; *Yad Ali v Emperor* AIR 1929 Cal 779 .

62 *Anandrao Balkrishna Rangnekar v Emperor* AIR 1915 Bom 28(2), 35(FB), 16 Cr LJ 177 (FB) .

63 Re *Shibo Prosad Paidah*(1879) 4 Cal 124, 3 CLR 122.

64 Re *Ganapathia Pillai*1953 Cr LJ 1703, AIR 1953 Mad 936, 937; *Harbhajan Singh v State of Punjab* AIR 1966 SC 97 ; *Deivasigamani v MS Kamrudeen Rowther* 1977 Mad LJ 86, p 96 (Cr) ; *Thangavelu Chettiar v Pannamal* AIR 1966 Mad 363, p 364, (1966) 1 Mad LJ 547 (Cr), 1966 Mad LW 115 (Cr) ; *Gulabchand Bhunder Bhai Soni v State of Gujarat* (1970) Cr LJ 1100, AIR 1970 Guj 171, p 173 .

65 Re *Ganapathia Pillai*AIR 1953 Mad 936, p 937, (1953) Cr LJ 1730 ; *Anandrao Balkrishna Rangnekar v Emperor* AIR 1915 Bom 28 (2), 35, 16 Cr LJ 177 (FB) .

66 *State of Orissa v Ram Bahadur Thapa* AIR 1960 Ori 161 ; *Bonda Kui v Emperor* AIR 1943 Pat 64 ; *Chandrasekhara v K Karthikeyan* AIR 1964 Ker 277, p 283, (1964) 2 Cr LJ 549, 1964 Ker LJ 422 .

67 *Channing Arnold v King-Emperor* AIR 1914 PC 116, p 119 .

68 *Gaya Din v Emperor* AIR 1934 Oudh 124, p 126 .

69 *Bhawoo Jivaji v Mulji Dayal* 12 ILR Bom 377, p 394 .

70 *Emperor v Abdool Wadood Ahmed* 31 ILR Bom 293 .

71 *State of Orissa v Ram Bahadur Thapa* AIR 1960 Ori 161 ; *Waram Singh v Emperor* AIR 1926 Lah 554 ; *Bondakui v Emperor* AIR 1943 Pat 64 .

72 *Daulat Shinandar v P Karuna Bai* 1979 LW 115, p 118-19(Cr) .

73 *State of Orissa v Bhagaban Barik* AIR 1987 SC 1265 .

Indian Penal Code (Act XLV of 1860)

Chapter II

General Explanations

[74][S. 52A

"Harbour".--

Except in section 157, and in section 130 in the case in which the harbour is given by the wife or husband of the person harboured, the word "harbor" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means or conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension.]

Comments

1. Legislative Changes

This section defining the term 'harbour' is new and was inserted by s 2 of the IPC (Amendment) Act 8 of 1942. Before this the term 'harbour' was defined by s 216B of the IPC which had been inserted by the Criminal Law (Amendment) Act 1894. That definition was intended only of the purposes of ss 212, 216 and 216A and ran as follows:

> In Sections 212, 216 and 216-A, the word 'harbour' includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person in any way to evade apprehension.

Section 216B has now been repealed by the Indian Penal Code (Amendment) Act 1942 (8 of 1942), s 3 and the present section inserted instead.

2. Reasons for the Change

The reason for the above change is stated in the Statement of Objects and Reasons of the Amending Act of 1942 is as follows:

Section 216-B of the Indian Penal Code widens the meaning of the word 'harbour' as used in ss 212, 216 and 216-A . The word is also used in Sections 130, 136 and 157, and as used in those sections bears its narrower dictionary meaning. There is no rational justification for differentiating between the meaning of the word as used in different sections of the Code and the fact that the word is used in sections other than sections 212, 216 and 216-A, appears to have been overlooked when section 216-B was inserted by Act 3 of 1894. The fact that the wider meaning does not attach to the word as used in section 130 which provides for the punishment of persons who harbour an escaped prisoner of war might well produce untoward results in existing circumstances, and it is proposed to render the definition in section 216-B applicable to the Code generally by transferring that section to Chapter II of the Code. It is also proposed to insert words in the definition with a view to resolve a conflict of judicial

opinion on the question whether the concluding words of the definition as contained291 in section 216-B embrace all forms of assistance or only forms of assistance *ejusdem generis* with those previously mentioned in the section. The Allahabad High Court[75] has held that the meaning is so limited, while the Calcutta[76] and Lahore High Courts[77] have taken the contrary view. It is proposed to clarify the point in the sense of the views taken by the Calcutta and Lahore High Courts.292

74 Inserted by the Indian Penal Code (Amendment) Act 1942 (8 of 1942), s 2 .

75 *Emperor v Hussain Baksh* 25 ILR All 261 .

76 *Muchi Mian v Emperor* 18 Cr LJ 731, AIR 1918 Cal 826, 26 Cr LJ 141, 21 CWN 1062 .

77 Re *Tara Singh* 7 ILR Lah 30.

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

GENERAL INTRODUCTION

1. Evolution of Legal Punishment

The IPC not only defines the offences thereby created, but also prescribes the punishments to which the offenders are to be liable.[1] According to Blackstone[2] and Holland,[3] crimes are violations of public rights and duties due to the whole community Austin,[4] in criticising Blackstone's theory, points out that the greater portion of crimes are violations of rights due to individuals directly, *e.g.*, murder, mischief, assaults and thefts) and therefore affect individuals in the most direct way, and further that all offences affect both the community and individuals. Bentham[5]also says that the consequences arising from a harmful act affect both the individual 293injured thereby and the public, the former directly and the latter indirectly. The injured individual suffers directly by the harmful results of the act, whilst those connected with him suffer indirectly. The public suffers: (1) alarm, through fear and expectation of similar conduct towards its component individuals, and (2) danger, from the evil example set, and the weakening of the restraining sanction. Now when the alarm from apprehension, and especially when the dangers from example are sufficiently great to call for state interference, the state will itself call for the enforcement of a penalty, on the ground of pre-eminent public injury, and, owing to the special nature of such injury, *viz*, the spread of the sense of alarm and danger, the sanction enforced will be one of punishment, inflicted for the purpose of deterring the offender and others (by way of example).

The origin of crimes and criminal law lies in a primitive system, by which all wrongs were redressed by private revenge.

Mayne states:

A system of self-redress in the form of private vengeance, preceded everywhere the establishment of a regular judicature. The development of unlicensed revenge into a system of legal punishment, or criminal law, may be divided into three states:

First. --	A custom arose for the injured party to accept pecuniary satisfaction in lieu of vengeance.
Second.--	Then followed the stage of arbitration, the amount of the fines being settled by the tribal assembly. In its earlier form arbitration was entirely non-coercive; it was merely suggestive. But a system of coercive arbitration followed in due course, the means of coercion being outlawry whereby he who refused to obey the law was deprived of its benefits.
Third. --	Punishment then took the place of fines. The object of both system being to check private retaliation, those acts which tended to provoke vengeance were the earliest crimes.[6]

2. Punishment if must follow Conviction

In a *Nagpur* case,[7] Hallifax AJC, observed, 'There is no law that says a penalty must always follow a conviction. The maximum penalty for each breach of the law is fixed by it, but there is no minimum, except in a few special cases'. But dissenting from this it has been held that it is imperative that every conviction of an offence shall be followed by the prescribed punishment while, in case no minimum is prescribed, to reduce it to something nominal is completely within the discretion of the court.[8]

In ss 255 and 248 of the CrPC it has been laid down that in summons and warrant cases, respectively that in case the magistrate finds the accused guilty but does not proceed in accordance with the provisions of s 325 or s 360 of the CrPC, he shall pass sentence on him according to law. This lends support to the idea that leaving the minor offences, some penalty must be inflicted on a conviction.

Imperative that every Conviction must follow Punishment unless the Convict Released is on Probation

As their Lordships of the Supreme Court observed in a case, the law does not envisage a person being convicted for an offence without a sentence being imposed 294therefor. The power to impose a sentence, on a conviction, is a power which can and ought to be exercised by all the courts which, having jurisdiction to decide whether the accused is guilty or not, find that he is. The power is preserved to the appellate court by s 386 of the CrPC . When a conviction is affirmed in appeal and no sentence had been awarded by the trial magistrate, the award of a sentence is consequential on and incidental to the affirmation of the conviction, and it is a just and proper order to be passed under the law.[9] But s 360 of the CrPC and the provisions of the Probation of Offenders Act 1958, give the courts wide discretionary powers to release on probation, in all suitable cases, an offender found guilty of any offence not punishable with death or imprisonment for life. And an order directing release on probation is not a punishment.[10] Reading ss 255 and 248 with s 360 of the Crpc and the Probation of Offenders Act 1958, it would appear that unless he releases the accused under s 360, CrPC or other analogous provision of law, a magistrate must inflict some punishment on an offender whom he finds guilty of an offence.[11]

Demanding of security[12] or release on probation[13] is not a punishment.

3. Principle and Object of Punishment

Almost two centuries and a decade back thus spoke Edmund Burke.[14]

> Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters.

A similar note was expressed by E Barrett Prettyman, a retired chief judge of US court of appeals:[15]

> In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematized restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive globe of faceless animations but as a perfect realization of each separate human mind, soul, and body; not in mute, motionless meditation but in flashing, threshing activity.

> Thus, liberty, the priceless treasure of human soul, is not an absolute abstract concept. True it is, individual liberty is the most important aspect of human existence but it has 295to be guided and governed by law. The individuality and the power to exercise free will cannot be given total freedom. Liberty is to be achieved by rule of law which includes the procedural law. Procedures are to be followed as they are the hallmark of authenticity and exposit sacrosanctity. Sometimes procedure is evolved to curb wanton moves of the unscrupulous litigants and to curtail the unwarranted passion of an unethical and unprincipled mind and further to nip the unnecessary and uncalled for problems in the bud.[16]

In all punishments, there is the element of vindictiveness, which cannot be left out of sight, notwithstanding what has been said by Plato on the subject. Both personal and public sentiments demand that the person, who has made others suffer unjustly, should himself be made to suffer in return. This is quite distinct from the moral side of an act with which the courts have nothing to do. Their concern is solely with the nature of the act viewed as a crime or breach of the law. The law indicates the gravity of the act by the maximum penalty provided for its punishment and the courts have to judge whether the act committed falls short of the maximum degree of gravity, and, if so, by how much.[17] Bentham regarded the prevention of mischief as the sole aim of punishment.[18]

Every Punishment is Intended to have Double Effect

The object of punishment is the prevention of crime, and every punishment is intended to have a double effect, namely, to prevent the person who has committed a crime from repeating the act or omission, and to prevent other members of the community from committing similar crimes.

As regards the particular offender, there are three ways of prevention by punishment against the recurrence of an offence: (1) by taking from him power of offending (incapacitation); (2) by taking away the desire of offending (reformation); (3) by making him afraid of offending (intimidation).

As regards other members of the community who are disposed to commit similar offences, the only

way of providing by punishment against the commission of the offence is by the deterrent effect which the punishment of an individual has upon others. In recent years the reformative aspect of punishment; viewed in relation to both penal treatment and the avoidance of the possibility of a new offender becoming a persistent offender has received increasing attention, particularly with regard to young offenders.[19] It has been said that the chief end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him.[20] But it is now generally acknowledged that the principal object of punishment ought to be not merely the prevention of offences but also the reformation of the offender.[21] 'The causing of merely retributive harm, whether by the community or individual, is itself a crime. Punishment is in itself an evil, justified only by its prevention of greater evil, *ie*, by its effect in deterring the offender from a repetition of the offence and in deterring others, by his example, from the commission of it. In each case it must obviously be the least that will produce both these effects.[22]296

In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be made stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.[23]

Punishment is Designed to Protect Society by Deterring Potential Offenders

In *BC Goswami v Delhi Admn* ,[24] their Lordships of the Supreme Court pointed out:

> The main purpose of the sentence, broadly stated, is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an individual and as a member of the society.

Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law-abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining this question. In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentences both lose their efficaciousness. One does not deter and the other may frustrate making the offender a hardened criminal.

In *Ram Narain v State of Uttar Pradesh* ,[25] their Lordships of the Supreme Court, observed:

> The broad object of punishment of an accused found guilty in progressive civilized societies is to impress on the guilty party that the commission of crimes does not pay and that it is both against his individual interest and also against the larger interest of the society to which he belongs.

So, the main object of punishment is prevention of crime and every punishment is intended to have a double effect, namely, to prevent the person who has committed a crime from repeating the act and also to prevent others from committing similar crimes.[26]

A substantive sentence of imprisonment for a term and a sentence of imprisonment for a term in default of payment of fine are two different sentences. A sentence or imprisonment in default of fine is intended to operate in addition to a substantive sentence of imprisonment.[27]297

4. Quantum of Punishment

The policy of the law is, as regards most crimes, to fix a maximum penalty, which is intended only for the worst cases, and to leave to the discretion of the judge the determination of the extent to which in a particular case the punishment awarded should approach to or recede from the maximum limit.[28] The law indicates the gravity of the act by the maximum penalty provided for its punishment and the courts have to judge whether the act committed falls short of the maximum degree of gravity, and, if so, by how much.[29] While awarding sentence the Court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The Court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.[30]

There are no statutory guidelines to regulate punishment. Therefore, in practice, there is much variance in the matter of sentencing. In many countries, there are laws prescribing sentencing guidelines, but there is no statutory sentencing policy in India. The IPC, prescribes only the maximum punishment for offences and in some cases minimum punishment is also prescribed. The Judges exercise wide discretion within the statutory limits and the scope for deciding the amount of punishment is left to the judiciary to reach decision after hearing the parties. However, what factors which should be considered while sentencing is not specified under law in any great detail. A sentence is a compound of many factors, including the nature of the offence as well as the circumstances extenuating or aggravating the offence.[31]

The IPC has made different provisions for punishing different offences. With regard to some offences, the minimum sentence is provided for, but, in most of the remaining cases, the discretion is left to the court to award sentence of imprisonment which may extend to a particular period. The very nature of these provisions requires the judges, while awarding sentences, have to exercise their discretion and determine the quantum of sentence to be awarded on the basis of the facts of the case, the gravity of the offence, the instigating or extenuating circumstances of the case and other circumstances, which may justify the award of the lesser or the maximum sentence.[32] But when there has been considerable delay in the disposal of the case, the ends of justice would be met by awarding a sentence lesser than the minimum prescribed.[33] The accused if a first offender, is by itself, no reason for awarding sentence less than the prescribed minimum.[34]298

Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter productive in the long run and against the interest of the society.[35]

As regards the punishments provided in the IPC, the authors of the Code themselves wrote:

> We entertain a confident hope that it will shortly be found practicable greatly to reduce the terms of imprisonment which we propose. Where a good system of prison discipline exists, where the criminal without being subject to any cruel severities, is strictly restrained, regularly employed in labour not of an attractive kind and deprived of every indulgence not necessary to his health, a year's confinement will generally prove as efficacious as confinement for two years in a goal where the superintendence is lax, where the work exacted is light and where the convicts find means of punishment is increased, its length may safely be diminished. As members of the Committee which is now employed in investigating the system followed in the goals of this country, we have had access to information which enables us to say with confidence that, in this department of the administration, extensive reforms are greatly needed and may easily be made. The researches of that community, may yet be a terror to the most hardened wrong-doers. Wherever such a Code shall come into operation, we conceive that it will be advisable greatly to shorten many of the terms of imprisonment which we have proposed.[36]

Limit of Sentence prescribed by Law does not mean Maximum Sentence in Every Case

The sections prescribing sentences give the limit to which a sentence can be passed, but that does not mean that the maximum sentence should be awarded in each case. The extent of the sentence

has to be judged upon the circumstances of each case.[37] The maximum punishment prescribed by the law should not automatically follow upon a conviction. When the legislature has laid down a maximum punishment for an offence or a series of offences, it is the duty of the trial court to apportion punishment in each case after considering all the circumstances having a bearing upon it, and not to shirk its responsibility by imposing the maximum penalty upon every offender.[38] The determination of the right measure of punishment is often a point of great difficulty, and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations, but the court has always to bear in mind the necessity of proportion between an offence and the penalty.[39] The law leaves the measures of punishment to the discretion of the court. Nevertheless, it insists that the discretion be used judiciously and not arbitrarily. This implies that it is the bounden duty of the court to apply its mind to the question and decide it after the due consideration of all relevant circumstances.[40] Although no hard and fast rule can be laid down for measuring what in a particular case would be a proper sentence, yet courts are expected to observe a desirable proportion between the gravity of the offence and the punishment for it.[41]299

The court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence and the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he has received, if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his age and character. Moreover, among the factors which may be considered are particular circumstances such as the prevalence of a particular offence, or the abuse of a position in a public service, or the need to keep secure a particular public service, or that by the nature of legislation creating the offence it is apparent that heavy pecuniary penalties may be required. It is the practice of criminal courts generally to punish persistent offenders more severely than those who have not been previously convicted or have not committed other crimes, but it is not right to be guided merely by previous convictions, and it is a well recognised principle that a severe sentence for a trifling offence cannot be justified merely on the ground that the offender has had many previous convictions. On the other hand, a first offender may commit an offence of such malignity that a severe sentence is properly imposed. Previous convictions in another country may be taken into consideration in passing sentence.[42]

It is an elementary proposition in criminal jurisprudence that the sentence in each case should be proportionate to the nature and gravity of the crime,[43] irrespective of whether the sentence inflicted will involve a right of appeal or not. To say that the court ought to take into consideration the prayer of the petitioner in deciding what is the proper sentence is wholly wrong.[44]

Punishment to be as Moderate as is Consistent with the object Aimed at

It may generally be taken as a safe principle to follow, that punishments should be made as moderate as is consistent with the object aimed at. Punishment in excess is apt to defeat its own object, and to produce a reaction of popular feeling, as experience shows. To shut a man up in prison longer than is really necessary is not only bad for the man himself, but is a useless piece of cruelty, and economically wasteful and a source of loss to the community.[45] But where a dastardly attack was made on the assistant manager of a colliery by a labourer who happened to be an active member of the labour union, for the reason that he did not get the post he wanted, it was held that a deterrent sentence was called for in the case, as unless such acts were put down no colliery could work, particularly as such attacks might too often be made in the pits when absolutely no evidence would be available.[46] A breach of the peace, even if involving an assault on a public officer of a mild character, unless, there be some elements of criminality in it, should not ordinarily be punished by sentences of imprisonment. So far as possible the jails should be kept for the reception of persons who perform criminal acts of not merely a technical but of a criminal character.[47]300

The use of clubs in a petty quarrel cannot be checked by a lenient sentence.[48] Theft in a railway train is a heinous offence for which a deterrent sentence should be passed.[49]

5. Sentence to be as Low as is Commensurate with the Nature of Offence

The sentence should be as low as is commensurate with the nature of the offence and as the facts would justify, but at the same time it should not be so low as to encourage the commission of the crime.[50] The principle object of punishment is the prevention of crime and the measure of punishment must consequently vary from time to time, according to the prevalence of a particular form of crime and other circumstances. An amount of severity may be very appropriate at one time which would be quite uncalled for at another, and the converse of this holds equally good, namely, where at one time leniency may be appropriate, such would be quite uncalled for later. In determining the appropriate sentence it is also necessary to bear in mind the time, place and circumstances existing at or about the period during which the crime was committed. Previous convicts deserve to be punished more severely. Leniency to those, who are old enough to understand the nature and consequences of their acts, is indefensible.[51]

Law demands that the offender should be adequately punished for the crime, so that it can deter the offender and other persons from committing similar offences.[52]

Economic Offences require Severe Punishment

The offence of black-marketing is very generally prevalent in this country at the present moment and when it is brought home against a person, no leniency in the matter of sentence should be shown and a certain amount of severity may be very appropriate and even called for.[53]

No Leniency to be shown to Rich People

An offence like profiteering which is of highly anti-social character must be put down with a heavy hand. Usually a fine is imposed when the offence is the result of cupidity. When a person wants to make more money and to get rich and to amass a fortune at the cost of society and of its poor and needy members, the only way to deter others from following in his footsteps is to make it clear that crime is not easy and that he should not be permitted to enjoy his ill-gotten wealth. If the only sentence were the sentence of imprisonment and if the accused is permitted to come back after serving his sentence to enjoy the wealth which he has amassed by anti-social acts or by committing offences, it certainly would not deter others from following in his footsteps. Therefore, not only must a fine be imposed, but the fine must be of such a character and of such an amount as to be really deterrent in its character.[54]301

If rich or influential persons are too lightly dealt with though they are guilty, the respect for law and order will be seriously impaired.[55]

Sentences in Dacoity Case to be deterrent unless there are mitigating Circumstances

Unless there is satisfactory proof of the existence of mitigating circumstances, the sentence of a dacoit should invariably be heavy and deterrent. A reasonable circumstance in mitigation can be the extreme youth of an offender, for in his case it is arguable that he acted under the domination of the will of his seniors. There can also be, what for the sake of convenience might be termed, a 'technical dacoity', eg, where two parties in a village have a dispute over some agricultural land and one of them numbering five or more forcibly harvests the crop and removes it. Gang leaders and previous convicts deserve to be punished even more severely. Leniency to those who are old enough to understand the nature and consequences of their acts is indefensible, and in the interest of society it is imperative for criminals to be made to learn that dacoity will not pay.[56]

Sentence in case of Hurts

In awarding sentence in case of grievous hurt, the court should take into account the weapon used, the manner in which the offence was committed and the consequences that had ensued.[57]

Leniency in Certain Cases

A delinquent is sometimes driven to commit a crime not only by his evil and reckless disposition, or bad motives, but even by his social or sympathetic impulses. In such a case, although there should be no sympathy for the criminal who voluntarily places himself in active co-operation, the presence of such temptation in itself calls for severity of punishment. But compelling temptation, as pointed out by some of the text-writers on criminal jurisprudence as a disproof of the degraded disposition which usually accompanies wrongdoing, demands leniency.[58]

Persons responsible for maintenance of Law and Order to be dealt with Severely

If persons charged with the maintenance of law have themselves transgressed the law and had recourse to illegal means in order to obtain the credit of detecting crimes, they ought to be severely dealt with.[59]

6. Other Considerations in Awarding Sentence

It is desirable to avoid sending a first offender to prison for an offence which is not of a serious character, and thereby running the risk of turning him into a regular criminal. In applying the provisions of s 360 of the CrPC, it is better to err (if err one must) on the side of liberality. But where a man has shown from his past actions that he intends to adopt a criminal career, three things should be remembered: In the first place, it is necessary to pass a sentence which will make the criminal realise that a life of crime becomes increasingly hard, and does not pay. In the second place, the 302sentence should serve as a warning to others who may be thinking of adopting a criminal career. In the third place, the public must be protected against people who show that they are going to ignore the rules framed for the protection of society. One cannot, of course, determine sentences on old offenders by any thumb rule. One cannot say that so many past convictions justify such and such a sentence. In each case the circumstances have to be considered. The number of past convictions is one matter to be looked at; the interval of time which has elapsed between one conviction and another, and particularly since the last conviction and another, is important; and so, of course, the nature of the offences previously proved.[60]

7. Desirable Proportion between the Gravity of Offence and Sentence to be Observed

Law is good, but justice is better, although no hard and fast rule can be laid down for measuring what, in a particular case, would be a proper sentence, yet courts are expected to observe a desirable proportion between the gravity of the offence and the punishment for it.[61] The courts should, however, act judicially, and not arbitrarily. This implies that it is the bounden duty of the court to apply its mind to the question and decide it after due consideration of all relevant circumstances.[62] If the facts of the case so justify, the courts would be justified in imposing a sentence which is more than the minimum.[63] The sentence should commensurate with the nature of the offence.[64] It should neither be too lenient, nor disproportionately severe. The former loses its deterrent effect and the latter has a tendency to tempt the offender to commit a more serious offence if there is an opportunity to do so.[65] If the court thinks that leniency can be shown on the facts of a case, it may impose a lighter sentence. But the court should never be a party to a bargain by which money is recovered, for the complainant, through its agency.[66]

Subsequent Notoriety Not to be Considered

In order to judge the appropriateness of the sentence, a court cannot take into account the subsequent notoriety which the accused acquired.[67] Bentham says:[68]

> The same punishment for the same offence ought not to be inflicted upon all delinquents. It is necessary to pay some regard to the circumstances which affect sensibility, and...age, sex, rank, fortune and many other

> circumstances ought to modify punishments inflicted for the same offence.303

He mentions the following circumstances in mitigation of punishment:

(i) absence of bad intention;
(ii) provocation;
(iii) self-preservation;
(iv) preservation of some near friend;
(v) transgression of the limits of self-defence;
(vi) submission to menaces;
(vii) submission to authority;
(viii) drunkenness; and
(ix) childhood.

In many cases in India, youth[69] and old age[70] have been held to be sufficient ground for passing a lesser sentence, though a contrary view has also been taken in some others.[71] In *Bhagwan Swarup v State of Uttar Pradesh* ,[72] the Supreme Court has, however, ruled that age alone cannot be taken as a sufficient ground for awarding lesser punishment though it may be taken into consideration in a mercy petition. The social position of the accused and the social degradation which a sentence of imprisonment will entail on him should be considered in passing sentence on him.[73] The Baluchi custom of killing for unchastity cannot be taken into consideration in the mitigation of sentence.[74]

Reconciliation between the parties may be a good guiding factor for the courts to reduce the sentence.[75] Women and aged persons should be awarded lesser punishment.[76] The fact, that the accused was on bail for a pretty long time, would be a relevant ground in exercising the discretion to impose a lesser sentence.[77] But the fact, that the accused is a legal practitioner, is by no means a circumstance which can be accepted in mitigation or extenuation.[78]

8. Summary

The principles deducible from the decided cases have been summarised in a case as follows:[79]

> The twin objects of punishment are to prevent a person who has committed a crime from repeating it and to prevent others from committing similar crimes. The sentence passed on the offender must be the least that will achieve both these objects. In deciding the measure of punishment the Court ought to take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender and his age, character and antecedents.304

> The prevalence of a particular crime in a particular area or during a particular period should also be taken into account. One's political, sentimental or religious pre-conceptions should be strictly disregarded. The Court must bear in mind the necessity of proportion between an offence and the penalty. The maximum penalty provided for any offence is meant for only the worst cases.

> No sentence should ever appear to be vindictive. An excessive sentence defeats its own object and tends to further undermine the respect for the law. The jails should be reserved for the reception of those who perform criminal acts of not merely a technical but of a criminal character. If the law permits a sentence of fine as an

alternative, there is no need of the sentence of imprisonment, unless of course the gravity of the offence or the antecedents of the offender demand it.

First offenders or youthful offenders should invariably be treated leniently, and in applying provisions of law like the First Offender's Probation Act or section 360 of the CrPC, it would be better for the Court to err on the side of liberality. On the other hand, a person who has taken to a life of crime or who has refused to take a lesson form his previous convictions should be meted out severe punishment.

A deterrent sentence is wholly justifiable when the offence is the result of deliberation and pre-planning, is committed for the sake of personal gain at the expenses of the innocent, is a menace to the safety, health or moral well-being of the community or is difficult to detect or trace. Unlike those acts which are universally acknowledged to be of a criminal nature, an act which has only recently been made an offence or which is not unlawful in other parts of the country or State, or which is not essentially criminal in character, deserves leniency, except in the case of persistent offenders.

Criminal Responsibility of Deaf-Mutes

The law in England appears to be that though great caution and diligence are necessary in the trial of a deaf and dumb person, yet if it be shown that such person had sufficient intelligence to understand the character of his criminal act, he is liable to punishment.[80] The same is the law and practice in India.[81] But owing to the difficulty which he clearly would have in putting forward his defence, the safe course to pursue would be to convict him only of the least offence which the prosecution evidence proved.[82] To escape punishment, a deaf-mute to whom ss 82 - 83 of the IPC do not apply must, like his brother who can hear and speak, come within s 84, IPC, in other words, if his mind is sound, his inability to hear and speak will not excuse him. The law does not provide for a sane deaf-mute who has never been instructed, being exempted from punishment.[83] Although a presumption may be made in his case in favour of an absence of mind, it cannot always be taken as an irrebuttable presumption; every case must be judged on the evidence available in that particular case. The conduct of the accused immediately after the occurrence may be taken into 305consideration in determining whether he is incapable of understanding the nature of the Act.[84]

9. Suspension, Remission and Commutation of Sentences

Refer to ss 432 - 33 CrPC and ss 54 - 55 of the IPC .

1 *Surendra Nath Banerjee v Chief Justice and Judges of the High Court at Fort William in Bengal* 10 ILR Cal 109, p 129 (PC) .

2 *Commentaries*, Book 4, 5.

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81 *Queen v Bowka Hari* (1874) 22 WR 35 (Cr) ; *Queen-Empress v Bowka* (1874) 22 WR 72 (Cr) ; *Queen-Empress v Reubin Samuel* (1894) Ratanlal 696 ; *Emperor v A Deaf and Dumb* AIR 1917 Bom 288 ; Re *Peethambaran*AIR 1959 Ker 165 .

82 *Emperor v Kalimuthu Thevar* (1934) Mad WN 924 .

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Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 53.

Punishments.--

The punishments to which offenders are liable under the provisions of this Code are--

First.	-- Death;
[85][*Secondly.*	-- Imprisonment for life;]
[86][***]	
Fourthly.	-- Imprisonment, which is of two descriptions, namely:--(1) Rigorous, that is, with hard labour;(2) Simple;
Fifthly.	-- Forfeiture of property.
Sixthly.	-- Fine. 306

Comments

1. Forms of Punishment

This section enumerates five forms of punishments, *viz*: (i) death, (ii) imprisonment for life, (iii) imprisonment which may be either--(a) rigorous, that is with hard labour, or (b) simple; (iv) forfeiture of property; and (v) fine. They are the only authorised forms of punishment to which offenders are liable under the IPC . A magistrate has no jurisdiction to pass a sentence, otherwise unlawful and unauthorised, merely because the accused asks for it.[87] An order of disqualification for holding a driving licence under the Motor Vehicles Act is not a punishment.[88] A contrary view was, however expressed by Bombay High Court in *Mohammad Shabir v State of Maharashtra* .[89]

An order or dismissal after a departmental enquiry, or removal of an advocate form the rolls cannot be called a punishment for an offence.[90]

2. Punishment and Penalty Distinguished

There is a gulf of difference between 'punishment' and 'penalty'. In s 53, IPC, various types of punishments have been prescribed, of which fine is one. It is doubtful if liability to pay fine makes an act or omission an offence. Imposition of fine may be treated as penalty, because penalty generally means payment of fine for breach of law, rule or contract; in sports it means a disadvantage imposed on competitor for breaking a rule, the essence of penalty is payment of money in terrorem by a party at fault.[91]

Transportation

Till sometime ago transportation was another form of punishment which was ranked next only to death. Transportation meant transportation beyond the seas. Transportation was always for the remaining life of a convicted person. Such convicts too could be granted remission. Transportation was a favorite method of putting rebels, revolutionaries, political offenders, *etc* out of the way. For many years, the only place where such convicts were sent was the Andaman Islands. In view of the provisions of s 368(2) of CrPC 1898, a court was not required to specify the place of transportation. The appropriate government was also under no obligation to provide any overseas place to receive such convicts after the passing of the 307Prisoners Act 1900. However, this was abolished by the CrPC (Amendment) Act 1955.[92]

Other forms of Punishment

The list of punishments enumerated in this section is not exhaustive. Other punishments beside them can be inflicted by criminal courts in certain cases, for *eg*, detention in a borstal institute, or a training school, an order under s 565 (now s 356) of the CrPC, *etc*.[93]Youthful offenders can also be dealt with under the Children Act 1960.

An order under s 360 of the CrPC directing release on probation is not a punishment.[94] The Allahabad and Rajasthan High Courts have also held that probation is not punishment.[95]

Whipping

Whipping was yet another form of punishment, which has now been abolished by s 3(a) of the Abolition of Whipping Act 1955.

Imposition of Hard Labour on Prisoners

It is lawful to employ prisoners sentenced to rigorous imprisonment to do hard labour whether he

consents to do it or not. It is open to the jail officials to permit other prisoners also to do any work which they choose to do, provided such prisoners make a request for that purpose. It was also held by the Apex Court that the prisoners are entitled to equitable wages for work done and the state was directed to constitute a wage-fixation body.[96]

3. Plea Bargaining--Earlier Position

Earlier, the concept of 'plea bargaining' was not recognised and was considered against public policy under our criminal justice system. Section 320 , CrPC provides for compounding of certain offences with the permission of the court and certain others even without permission of the court. Except the above, the concept of negotiated settlement in criminal cases is not permissible. This method of short circuiting the hearing and deciding the criminal appeals or cases involving serious offences required no encouragement. Neither the State, the public prosecutor nor even the judge could bargain that evidence would not be led or appreciated in consideration of getting a fleabite sentence by pleading guilty.[97]

Concept of Plea Bargaining and its Present Position

By opting for plea bargaining an accused trades conviction and lesser sentence, for a long, expensive and torturous process of undergoing trial where he may be convicted. A plea bargain is an agreement reached in a criminal case to finally settle the case. 308The parties to the agreement are the accused, the investigating officer, prosecutor and the victim; all of them should agree to settle the criminal case in which the accused pleads guilty to the offence in exchange for lesser punishment. The concept of plea bargaining is has been accepted in Indian law recently. Section 265A to 265L were inserted in the CrPC in a separate ch no XXI-A by Act 2 of 2006, *vide* its s 4, wef 05 July 2006. The concept being at the infancy stage, the practical utility of the concept would unfold in due course of time. It will take sometime before judicial pronouncements by the High Courts and the Apex Courts would come to the domain of legal fraternity and, general public on the interpretation and efficiency of ch XXI-A of the CrPC .

4. Considerations for Awarding Punishments

The question of sentence has to be determined, not with reference to the volume or character of the evidence adduced by the prosecution in support of the prosecution case, but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime.[1] If the court is satisfied that there are such mitigating circumstances, only then, it would be justified in imposing the lesser of the sentences provided by law. In other words, the nature of the proof has nothing to do with the character of the punishment.[2] Where the family history of the accused indicated that he probably suffered from an unbalanced mind and it appeared that in committing the offence he was actuated by jealously or by indignation which would tend further to disturb the balance of his mind, and he had, besides, been awaiting the execution of his death sentence for over a year, it was held by the federal court in appeal that the lesser sentence would be more appropriate than the sentence of death.[3] In the case of child offenders the sentence should not be too harsh.[4]

The court cannot ignore the social impact of crimes. Usually three approaches are made while awarding sentence:

(i) Punitive
(ii) Therapeutic
(iii) Preventive

Among the above, therapeutic approach seems to have been found more effective and acceptable. That satisfies the requirement of law and protects the society, but at the same time reforms the

accused to a great extent. Therapeutic approach aims at treating the convict as a human being.[5]

There may be a number of circumstances which lead the court to take a lenient view against the accused to award imprisonment on a lesser side. These mitigating circumstances justify the award of lesser punishment on the facts and circumstances of the case, for instance, a person accused of committing rape marrying the prosecutrix during his trial for offence under s 376, IPC or an accused causing an accident taking the victim to the hospital and bearing all medical expenses.309

But with regard to punishment for the offence of rape, socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection thorough imposition of appropriate sentence by the court.[6]

5. Imposition of Sentence - Relevant Factors

The Supreme Court held that these are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:

(a) Motive or previous enmity;
(b) Whether the incident had taken place on the spur of the moment;
(c) The intention/knowledge of the accused while inflicting the blow or injury;
(d) Whether the death ensued instantaneously or the victim died after several days;
(e) The gravity; dimension and nature of injury;
(f) The age and general healthy condition of the accused;
(g) Whether the injury was caused without pre-meditation in a sudden fight;
(h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;

(i) The criminal background and adverse history of the accused;
(j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;
(k) Number of other criminal cases pending against the accused;
(l) Incident occurred within the family members or close relations;
(m) The conduct and behavior of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?

These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused. The list of circumstances enumerated above is only illustrative and not exhaustive.[7]

Proper Sentence-Duty of Court

Proper and appropriate sentence to the accused is the bounded obligation and duty of the Court. The endeavour of the Court must be to ensure that the accused receives appropriate sentence, the

sentence should be according to the gravity of the offence.[8]310

6. Totality of Factors to be Considered in Awarding Punishments

The quantum of punishment is entirely in the discretion of the judge. The law has fixed a maximum penalty which is meant only for the worst case.[9] Sentencing being the crucial strategy of criminal law in achieving social defence and delinquent rehabilitation, the courts must consider the totality of factors bearing on the offence and the offender and fix a punishment which will promote effectively the punitive objective of law-deterrence and rehabilitation.[10] In fixing the nature and quantum of sentence, the court can take into consideration the prolonged harassment and the expense suffered by the accused, which are the necessary concomitants of protracted criminal proceedings extending over a number of years.[11]

7. Proportion Between Crime and Punishment

Criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case in essence affirm that punishment ought always to fit the crime; yet in practice, sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence; sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just dessert as the basis of punishment and create cases of apparent injustice that are serious and widespread.[12]

It is the duty of the court to impose proper punishment depending upon the degree of criminality and desirability to impose such punishment. As a measure of social necessity and also as a means of deterring other potential offenders, the sentence should be appropriate befitting the crime.[13]

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction, drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.[14]

After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating 311and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Council Mc Gautha v California* ,[15] that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate, punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.[16]

8. Consideration of effect of Punishment on Social Order

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, for *e.g.* where it relates to offences against

women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter-productive in the long run and against societal interests which need to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.[17]

9. Clause (1)--'Death'

This is the severest form of punishment authorised by law. There is a growing volume of public opinion against this form of punishment and several countries have abolished capital punishment.[18] In India, this section recognises 'death' as a form of punishment, and the IPC prescribes it for the following offences:

(i) waging or attempting to wage war, or abetting waging of war, against the Government of India (s 121);
(ii) abetment of mutiny, if mutiny is committed in consequence thereof (s 132);
(iii) perjury resulting in an innocent person being convicted of a capital offence and executed (s 194);
(iv) murder (ss 302 - 03);
(v) abetment of suicide committed by a minor insane delirious person, an idiot, or a person intoxicated (s 305);
(vi) attempt by life-convict to murder, if hurt is caused (s 307);
(vii) murder in dacoity (s 396).

It may be noted that death is the only form of punishment without an alternative, for an offence under s 303 . Although the draftsmen of the IPC retained this form of punishment, they added that the death sentence should be very sparingly inflicted.[19] In *Dalip Singh v State of Punjab* ,[20] it was held by the Supreme Court:312

> In a case of murder of the death sentence ordinarily be imposed unless the trying Judge, for reasons which should normally be recorded, considers it proper to award the lesser penalty. But the discretion is his and, if he gives reason on which a judicial mind could properly found an appellate Court should not interfere.

After the above decision the provision of s 367(5) of the CrPC 1898, requiring the judge to state in the judgment, the reason why the sentence of death is not passed was repealed by s 66 of the CrPC (Amendment) Act 1955. The present CrPC which came into force with effect from 1 April 1974 made further drastic changes in the law relating to the death sentence. It can now be awarded only in exceptional cases and not as a rule.

In offence inviting extreme penalty of imprisonment for life or death, it is expected that every point urged would be dealt with the razor sharp precision and sound logical reasoning and not on the *ipse dixit* of a Judge.[21]

Special Reasons for awarding Death Sentence

Under s 367(5) of the repealed CrPC 1898, death sentence and sentence of imprisonment for life were alternative sentences. In the discretion of the trial judge either sentence could be given. On the recommendations of the Law Commission a complete change has been brought out in the corresponding s 354(3) of the CrPC 1973. This section provides that if an offence is punishable with

death or with imprisonment for life or imprisonment for a term of years, the court should give reasons for awarding the particular sentence and in the case of sentence of death the judgment shall state the special reasons for awarding such sentence (See also commentary under s 302, vol III).

'Special Reasons' mean Exceptional Circumstances

Special reasons mean exceptional circumstances necessitating the imposition of death sentence. Secondly, while awarding the death sentence, the court should take into consideration not only the crime committed but also the criminal who committed the crime. Since the legislature has given a discretion, it is not possible to lay down rigid standards as to when capital sentence can be, and when it cannot be, awarded. Under s 354(3) of the CrPC, life imprisonment is the rule and death sentence is an exception.[22] The case law as to the imposition of death sentence under the old Code of 1898 is now no longer good law (See also commentary under s 302, vol III).

Special Reasons when can exist

All murders are terrific and if the fact of murder being terrific is an adequate reason for imposing the death sentence then every murder shall have to be visited with that sentence. In that event, the death sentence will become the rule, not an exception and s 354(3) of the CrPC will become a dead letter.[23] The legislature, therefore, was right in leaving it to the discretion of the judicial decision as to what should be the sentence in the particular circumstances of a case. The legislature has, however put a 313rider that when the extreme penalty is inflicted it is necessary for the court to give special reasons thereof.[24] When culpability assumes the proportion of extreme depravity, 'special reasons' can legitimately be said to exist.[25]

'Special reasons' must indicate the sentence and so must be related as to why the murderer must be hanged and why life imprisonment will not suffice. The punishment is on the person though for the offence. The only correct approach is to read into s 302 and s 354(3) of the CrPC, the human rights and human trends in the Constitution.[26] The mere use of adjectives like 'cruel' and 'brutal' supplies the special reasons contemplated by s 354(3), CrPC .[27]

It is incumbent upon the prison authorities to facilitate and allow a final meeting between prisoner, his family and friends prior to his execution.[28]

Death Sentence in the Rarest of the Rare Cases

Reviewing the history of sentencing as well as the policy of the legislature and the legality and constitutionality of the death sentence the Supreme Court in *Bachan Singh v State of Punjab* ,[29] has held that under s 354(3), CrPC, life imprisonment is the rule and death sentence is an exception. Death sentence ought not to be given save in the rarest of rare cases when alternative option is unquestionably foreclosed. Luring small girls, gagging them and cutting their private parts and ruthlessly defiling the bodies in order to prevent identification of the victims, and mysterious motive for the murders call for but one sentence. Nothing short of death sentence can atone for such callous and calculated transgression of law. Morbid pity can have no place in the assessment of murders, which in any respects will remain unparalled in the annals of crime. Such cases are rarest of the rare cases.[30] The taking place of triple murder is no ground to award death sentence as it does not become a 'rarest of rare case'.[31]

The assassination case of the former Prime Minister Indira Gandhi was also found to be the rarest of rare cases, in which the Supreme Court upheld the capital sentence awarded to not only the actual murderer but also to the conspirator.[32]

In *Anjuman v State* ,[33] three persons in a family were murdered together in a few minutes in one and the same place for which the accused no 1 played the main role. He attacked all the three with a *vattukathi,* one after the other and killed them on the spot. He acted as a butcher in a slaughter house. There was a dispute over the enjoyment of the well between the parties. The trial court did not award the death sentence to the accused but on appeal against conviction, the Madras High Court felt that

the accused no 1 should not have resorted to such brutal violence and taken away the lives of three persons in a family and observed that in the circumstances, the session judge might not have been wrong if he had awarded the maximum penalty of 314death sentence to him. In the opinion of their Lordships it was one of the rarest of the rare cases, suitable for awarding death sentence (see also commentary under s 302, vol III).

The Court while considering the case for awarding capital punishment must understand that an exceptional authority must be exercised in most exceptional case, with utmost care, caution and only after arriving at the conclusion that no other punishment in any circumstance shall serve and satisfy the injury caused to the social order. The Indian society is a multilayer, multi dimensional, multi class, multi caste and multi cultural society with several virtues and several ills of every variant. An individual living in such society carries these virtues and ills with him. The courts cannot ignore all these factors while making necessary consideration for settling a severest sentence.[34]

Death Sentence and its Constitutional Validity

The history of capital punishment indicates a trend against the sentence of death and there is a shift from the sentence of death to a lesser sentence but, there is also a clear intention of maintaining this sentence to meet the ends of justice in appropriate cases.[35] Imposition of capital sentence under s 302, IPC, has been held to be constitutional by the Supreme Court.[36] The constitutionality of death sentence again came up to be examined before the Supreme Court in *Bachan Singh v State of Punjab* ,[37] and it was held that s 354(3), CrPC, is valid and does not violate arts 14, 19 or 21 of the Constitution .

In certain states, there are Acts which have done away with the sentence of death or imprisonment for life in the case of children below the age of 16.[38] The provisions of ss 360 - 61 of the CrPC further lay stress on releasing the offenders on probation of good conduct in specified types of cases and the courts are under an obligation to give special reasons, when they are not so released. These provisions are, therefore, to be given due consideration before awarding any punishment to an offender.

Aboriginals cannot be judged entirely by the standards which are applicable to more civilised races. Such people are liable to sudden accessions of rage, when they are not perhaps entirely responsible for their actions. Where a young aboriginal who was little more than a boy was convicted of murder on purely circumstantial evidence, and it could not be known what the reason for the murder was, and the court could not be sure that there was no grave provocation, it was held that it is would not be proper to impose the death sentence on him.[39]

In the case of brutal murder committed by a woman the existence of an extremely young baby born to her since the murder may perhaps be taken into consideration by 315the state government when she prefers an application for mercy, but would not be a ground for passing the 'lesser sentence'.[40]

Form of Death Sentence and its Validity

When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.[41]

Hanging in Public View not Permissible

Article 21 of our Constitution only interdicts execution of death sentence in a cruel, barbarous and degrading manner but does not ban the execution of death sentence. It is not unlawful in the abstract and in the absolute to execute a lawful order on the command of a judicial verdict. The method prescribed by s 353(5), CrPC for executing death sentence by hanging does not violate art 21 of the Constitution . The system of hanging is as painless as is possible in the circumstances; it causes no greater pain than any other known method of executing the death sentence and it involves no barbarity, torture or degradation.[42] Hanging in public view would, however, amount to violation of art 21 of the Constitution .[43]

Confirmation of Death Sentence

A sentence of death passed by a sessions judge or an additional sessions judge is subject to confirmation by the High Court. It shall not be executed unless it is conformed. As to submission of sentences for confirmation, refer to ch 28, ss 366 - 71, CrPC .

Undue Long Delay in Execution of Death Sentence

Delay in execution of death sentence is violation of Article 21 of the Constitution . Undue long delay in execution of sentence of death will entitle the condemned prisoner to approach the Supreme Court under Article 32 . However, the Supreme Court will only examine the circumstances surrounding the delay that has occurred and those that have ensued after sentence was finally confirmed by the judicial process. The Supreme Court would not reopen the conclusion already reached, however may consider the question of inordinate delay to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life.[44]

10. Clause (2)--Imprisonment for Life

The words 'imprisonment for life' have been substituted for 'transportation for life', which meant transportation for the whole of the remaining period of the convict's natural life.[45] The imprisonment for life ordinarily means imprisonment for the whole of the remaining period of the convicted person's natural life.[46] But for certain 316purposes the sentence was assumed to be one for 20 years,[47] under the Prison Rules there is no indefeasible right of a prisoner to be unconditionally released on the expiry of 20 years imprisonment, including remissions. Therefore, solely on the basis of completion of a term in a jail serving imprisonment and remission earned under the relevant rules or law will not entitle an automatic release, but the appropriate government must pass a separate order remitting the unexpected portion of the sentence.[48]

Equally spending 13½ years in jail does not mean that the accused has undergone a sentence for life.[49] Awarding a sentence of life imprisonment means life and not a mere 14 years in jail.[50] In this case the Supreme Court held thus--

> It is conclusively settled by a catena of decisions that the punishment of imprisonment for life handed down by the Court means a sentence of imprisonment for the convict for the rest of his life.[51]

Imprisonment for life means rigorous imprisonment for life.[52]

Life imprisonment is not equivalent to imprisonment for fourteen years or for twenty years.[53]

The word "imprisonment" has not been defined either in the Code of Criminal Procedure or in the Indian Penal Code . A person sentenced to life imprisonment is bound to serve the remainder of his life in prison unless the sentence is commuted by the appropriate Government in terms of the ss 55, 433 and 433A of the Code of Criminal Procedure .[54]

Transportation was a common sentence in England; but transportation beyond the seas ceased as a punishment in 1854. But when framing the IPC the draftsmen undoubtedly intended the sentence of transportation as one whereby those on whom it was passed should be sent overseas. Section 58 of the CrPC 1898 (now repealed by Act 26 of 1955) however, provided that until transported the offender should be dealt with as if sentenced to rigorous imprisonment and should be held to have been undergoing his sentence of transportation during the time of the imprisonment. That section was intended by the authors of the IPC to provide only for temporary 317detention of prisoners awaiting transportation. The Prisoners Act 1900, as amended in 1903, effected a radical change and transportation become in truth, only a name given in India to a sentence for life and, in a few special

cases for a lesser period. So a prisoner sentenced to transportation could be sent to the Andamans or be kept in one of the jails in India appointed for transportation prisoners where he could be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment.[55] The fiction of transportation has now been given up by substituting 'imprisonment for life' for 'transportation'.

Without Formal Remission, Imprisonment of Life cannot be treated for a Definite Period

There is no provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate government, can be automatically treated as one for a definite period. Section 57 does not say that transportation for life shall be deemed to be transportation for 20 years for all purposes; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted persons' natural life.[56]Section 57 simply provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. If a person is awarded imprisonment for life, the sentence would tenure till the life time of the accused.[57] In the absence of an order of commutation having been passed either under s 55 of the IPC or under s 433(b), CrPC, a life convict is not entitled to be released even if he has undergone a term of imprisonment exceeding 14 years' (inclusive of remission).[58]

Whereas 'imprisonment' can be for any period form 24 hours to 14 years in accordance with the period prescribed in the IPC, a sentence of 'imprisonment for life' can mean but one thing, namely, rigorous imprisonment for 20 years.[59]

Imprisonment for Life means Rigorous Imprisonment for Life[60]

Section 302, IPC, as amended by the Schedule to the Code of Criminal Procedure (Amendment) Act 1955, only states that the alternative punishment for murder shall be 'imprisonment for life' and not rigorous imprisonment for life or simple imprisonment for life. It has been held that the court passing the sentence has to keep in view the provisions of s 60 of the IPC and choose one or the other form in view of all the circumstances.[61] But s 60 applies only to a case in which the offence is punishable with imprisonment of either description. It has no application to a case in which the offence is punishable with 'imprisonment for life', which is a class of punishment from imprisonment which is of two descriptions. Imprisonment for life 318means rigorous imprisonment for life. It can never mean simple 'imprisonment'. It is not, therefore, necessary for the court when imposing a sentence of imprisonment for life' to specify that it should be rigorous.[62] Whereas imprisonment simpliciter can be of two categories simple and rigorous but 'imprisonment for life' can only be rigorous and whereas 'imprisonment' can be for any period from 24 hours to 14 years in accordance with the period prescribed in the IPC, the sentence of 'imprisonment for life' can mean but one thing, namely, rigorous imprisonment for 20 years.[63] The life imprisonment is necessarily rigorous imprisonment.[64]Indian Penal Code does not recognize/permit award of simple imprisonment for life, if awarded, it is an error which can be rectified by the appellant court under s 386 IPC .[65]

The sentence of imprisonment for life is the maximum sentences reserved for offences under ss 121, 121A, 122, 124A, 125, 128, 130-32, 194-95, 225, 232, 238, 255, 302, 305, 307, 311, 313-14, 326, 329, 364, 371, 376-77, 388-89, 394-96, 400, 409, 412-13, 436, 438, 449, 459-60, 467, 472, 474, 477, 485, 489A, 489B, 589D of this Code.

11. Clause (4)--Imprisonment

The expression 'imprisonment' has not been defined by the IPC or the CrPC . According to the definition of imprisonment given by Tomlins 'imprisonment' means:

> The restraint of a man's liberty under the custody of another; this extends not only to gaol, but to a house, stocks, or where a man is held in the street, etc, for in all these cases the party so restrained is said to be a prisoner as long as he has not his liberty to go about his business as at other times.[66]

A division bench of the Allahabad High Court has observed that the very word 'imprisonment' means 'putting in prison'. Placing its reliance on s 418, CrPC the Bench further observed that the concept of 'imprisonment' implies 'putting into prison or other place of custody'.[67]

Neither this Code nor the CrPC directs where a sentence of imprisonment shall be served. It has, however, been held that punishment by imprisonment under the IPC means that the offender shall go to goal.[68] In fact the very word 'imprisonment' means 'putting in prison'. But in the well-known case of *Bird v Jones* ,[69] Coleridge J, quoted the dictum of Coke that, 'Every restraint of the liberty of a free man will be an imprisonment although he be not within the walls of any common prison', and Williams, J quoted Blackstone's statement that 'Every confinement of the person is an imprisonment whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public street'.[70]319

The definition of imprisonment to be gathered from these judgments was accepted by the Madras High Court in *P Narasayya Pantulu v Capt RAC Stuart* .[71] It was there stated that the retaining of a person in a particular place or compelling him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action is an imprisonment on the part of the person who exercised that exterior will.

Confinement in the court premises till the court rises is imprisonment as, although the person sentenced is not confined in goal, his liberty is restricted.[72]

Every confinement of a person and every restraint of liberty of a free man is imprisonment. It includes undertrial detention also.[73]

Rigorous, Simple and in Default Imprisonment

The imprisonment referred to in cl (4) of s 53 may be (a) rigorous, that is with hard labour, or (b) simple. The court may award partly rigorous or partly simple imprisonment. With regard to this sentence the framers of the Code said:

> Of imprisonment we propose to institute two grades, rigorous imprisonment and simple imprisonment, but we do not think the Penal Code is the proper place for describing with minuteness, the nature of either kind of punishment. This has been left to gaol discipline.

But rigorous imprisonment is described as imprisonment with hard labour which may mean digging earth, cutting wood, grinding corn, drawing water and pressing oil. Hard labour does not mean harsh labour victimising a prisoner by forcing on him particularly harsh and degrading jobs, violates the law's mandate.[74] When nature of imprisonment is not disclosed the imprisonment will be simple.[75] Nature of imprisonment on the other hand in simple imprisonment is simple detention in gaol custody. If an offence is punishable with imprisonment and fine, some term of imprisonment must be awarded in addition to the fine.[76]

Imprisonment in default of payment of fine is a distinct sentence. It is awarded under s 64 of the IPC and not under this section. It can neither run concurrently with the substantive punishment awarded for the offence nor can the period of detention of the accused before conviction can be set off against such imprisonment.[77]

Lenient View in Awarding Punishment

There may be a number of circumstances which lead the court to take lenient view against the accused to award imprisonment on lesser side. These mitigating circumstances justify award of lesser punishment on the facts and circumstances of the case, for instance, a person/accused committing rape marrying the prosecutrix during his trial for offence under s 376 of the IPC or an accused causing an accident taking the victim to the hospital and bearing all medical expenses. 320

Term of Imprisonment

The authors of the IPC proposed to fix both minimum and maximum punishments but the select committee was of the opinion that, considering the general terms in which the offences had been defined and the presence of mitigating circumstances adherence to the prescribed minimum may become a matter of hardship and even injustice. It was, therefore, ultimately resolved to leave the minimum punishment for all offences except those of the gravest nature to the discretion of the judge who would have the means in each case, of forming an opinion as to the character of the offender and the circumstances, whether aggravating or mitigating under which the offence had been committed.[78] Only in the case of offences under ss 397 - 98 of the IPC, a minimum sentence of imprisonment for seven years has been fixed. In all other cases only the maximum punishment has been specified. The policy of law is to fix a maximum penalty which is intended only for the worst cases. Quantum of punishment has been left to the discretion of the court.[79] The minimum term of imprisonment prescribed under this Code is 24 hours for an offence punishable under s 510 . In the case of offences under s 194 or s 449, the punishment is to be only imprisonment for life or rigorous imprisonment. On the other hand, the following offences are punishable with simple imprisonment only, *viz*, offences under ss 168 - 69, 172-80, 188, 223, 225A(b), 228, 291, 341, 500-02, 509-10. However the offences under Pt 3 of s 176, Pt 2 of s 177 and Pt 3 of s 188 are punishable with imprisonment of either description like a number of other offences.

Solitary/Single Cell Confinement

The IPC recognises solitary confinement as a form of punishment. Sections 73 - 74 of the IPC deal with such punishments. But it is only a form of rigorous imprisonment and not distinct from it. Solitary confinement as a punishment is reserved for the most exceptional cases of unparalleled atrocity and brutality.[80]

Solitary or single cell confinement prior to rejection of the mercy petition by the President is unconstitutional. Almost all the Prison Manual of the States provide necessary rules governing the confinement of death convicts.[81] The rules should not be interpreted to run counter to the ruling in *Sunil Batra v Delhi Administration* [82] and violate art 21 of the Constitution .[83]

Imprisonment till the Rising of the Court

Unless the punishment section fixes a minimum, the court has full discretion to pass a sentence of imprisonment for any period less than the maximum, for instance, for five minutes if this would fit the offence.[84] Imprisonment literally means 'putting in prison' and so it has been held in some cases that punishment by imprisonment means that the offender should go to gaol and that a sentence of imprisonment till the rising of the court is not a sentence according to law.[85] The sentence of imprisonment till the rising of the court is unknown to law, for the sentence of imprisonment 321involves the suffering of it outside the custody of the court. On the date on which the case comes on for hearing, if the accused is taken into custody by the court, he would only be regarded as being in the custody of the court and that would not amount to the suffering of imprisonment. Section 420 , CrPC, requires that when the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor. Since all these requirements are laid down for the execution of the sentence of imprisonment a sentence of imprisonment till the rising of the court is incapable of execution as provided by the CrPC and does not therefore amount to the suffering of imprisonment within the meaning of the Code.[86] In a Calcutta case, however, it has been held that rigorous imprisonment for one day, and detention till the rising of the court are not different punishments, that in the case of imprisonment for one day, as the day on which the sentence is passed counts as one day, the accused could not be detained in jail on

a warrant issued for such a period. In other words, the accused must be taken to have suffered this imprisonment, and there should be no further trouble on the point.[87]

In *Public Prosecutor v Kanniappan* ,[88] a learned judge of the Madras High Court observed:

> When the statute says that for an offence the offender shall be imprisoned, it normally means that he should be sent to jail. To impose a sentence of imprisonment till the rising of the court, and I have no doubt about it at all. Is an evasion of the statutory provision and such an evasion would be justified only in very exceptional circumstances, as for instance, where the offence is found to be very severely technical or where there are extenuating circumstances possessing unusual force. It is difficult to understand how an evasion of a statutory provision can ever be justified.

It was held by a division bench of the Madras High Court that a direction by the court that a person shall be confined in the court premises till the court rises constitutes imprisonment within the meaning of the IPC and the CrPC .[89] In another case the Madras High Court held that sentence "till the rising of the Court" is not contemplated by s 53 IPC .[90] The same view was taken by the Punjab Chief Court in *Baghel Singh v Emperor.* [91] Refer to the undermentioned cases,[92] where the High Court passed a sentence of imprisonment till the rising of the court. According to the Gujarat High Court in a case of imprisonment only for one day, the prisoner has to be released on the very day, on which he was sentenced.[93] In this way the punishment of imprisonment till the rising of the court should be treated and reckoned as an imprisonment for one day and there can be no illegality in awarding such sentence in appropriate cases.

Discouragement of Sentence of Imprisonment for Short Term

After the passing of the present CrPC the policy of the law is to discourage short term imprisonment as a sentence for any offence. Sub-section (4) of s 354 provides:

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>
> When the conviction is for an offence punishable with imprisonment for a term of one year or more, but the court imposes a sentence of imprisonment for a term of less than three months, it shall record its reasons for awarding such sentence, unless the sentence is one of imprisonment till the rising of the court or unless the case was tried summarily under the provisions of this Code.

Thus in cases when an offence is punishable with imprisonment for one year or more if the court does not find it to be a fit case for awarding a sentence of three months or more, the intention of the law is not to award imprisonment for a period of less than three months unless for the reasons to be recorded in the judgment the court finds it necessary to do so under the peculiar circumstances of the case because a short period of imprisonment increases the probability, that a casual offender may become the habitual offender.[1]

Probation--Whether Amounts to Punishment

In *State of Uttar Pradesh v Dev Dutt Sharma* ,[2] the Allahabad High Court has held that a direction to release an offender, after his conviction for a certain offence, on probation on furnishing the required security is not a punishment and is not covered by this section.

Commencement of Sentence

A sentence of imprisonment ought to commence from the time the sentence is passed, unless there is some lawful reason for ordering it to commence from some future period.[3] Although there is no direct provision in the IPC which lays down that the sentence passed against an accused should commence from the date of the judgment convicting him, a sentence of imprisonment must operate from the date of conviction and not from a date prior to the date on which the sentence is passed.[4] The day on which the sentence is passed counts as day one of imprisonment.[5] In calculating a sentence of imprisonment the day upon which the sentence is passed and the day of release ought both to be included and considered as days of imprisonment, *eg* a man sentenced on 1 January to one month's imprisonment should be released on 31 January, not on 1 February.[6]Section 427, CrPC provides for an exception to the general rule that sentences commence to run from the time of their being passed.[7] Sentences of imprisonment imposed upon the same person in separate trials on the same day take effect by the terms of this section one after the other, in the order in which they were passed and a magistrate need not, therefore, give any direction in his judgment in respect of the same.[8]

A person is 'undergoing' imprisonment within the meaning of this section from the moment the sentence is passed; consequently, when at the time of passing a second sentence the accused is 'undergoing imprisonment', though on bail, and the order 323does not make the second sentence run concurrently, the sentence will be treated as consecutive.[9]

Period of detention before Conviction to be Set Off against the Sentence of Imprisonment except Life Imprisonment and Imprisonment in default

Under s 428 of the CrPC, the period of detention, undergone by an accused in connection with any case before his conviction, is to be set off against the sentence of imprisonment imposed upon him in that case. The benefit of the said section is available even though the conviction was before the enforcement of the CrPC .[10] This benefit is available only when the accused has been sentenced to 'imprisonment for a term', and not where he has been sentenced to suffer imprisonment for life.[11]Section 428 provides only for a 'set off', it does not equate an 'under-trial detention or remand detention with imprisonment on conviction'.[12] The sentence of imprisonment in default of fine cannot be subjected to a set-off after the amendment in s 428, CrPC in 1978.[13]

Procedure to avail benefit of Set-off

The procedure to invoke the benefit of s 428, CrPC could be a miscellaneous application by the accused to the concerned court at any time while the sentence runs for passing an appropriate order for reducing the term of imprisonment which is the mandate of the section.[14]

12. Clause (5)--Forfeiture

The statutes 33 and 34, Vict c 23, 1870 abolished forfeiture and escheat in England (except when forfeiture is consequent upon outlawry) and provided for the appointment of an administrator to the property of the convict. In India total forfeiture was a part of the punishment for offences under ss 121 - 22 of this Code, till 1921. Sections 61 - 62 which provided for forfeiture of all the property of an offender were repealed by s 4 of the IPC (Amendment) Act 16 of 1921. But forfeiture of certain property is still a form of punishment[15] reserved for offences under ss 126 - 27 and 169 of the IPC . Section 263A provides for the forfeiture of seized fictitious stamps and the material used for making such stamps but this forfeiture is not a part of the sentence imposed on the accused. Forfeiture provided in s 13(3) of Criminal Law Amendment Ordinance 1944 in case of offences which involve the embezzlement, *etc*, of government money or property is really a speedier method of realising government property as compared to a suit which the government could bring for realising the money or the property and is not punishment or property within the meaning of art 20(1) of the Constitution of India . But the forfeiture by the 324district judge under s 13(3) cannot be equated to forfeiture of property which is provided in s 53 of IPC .[16]

13. Clause (6)--Fine

Advantages and Disadvantages of Fine as a Punishment

Fine, as a form of punishment is allied to forfeiture, the one relating to money and the other to property. One great advantage of fine as a punishment is that it affords the means for compensating the complainant and relieves the tax-payer by reducing the cost of prevention and punishment of crime. It is a peculiarly appropriate punishment for all offences in which men are prompted by cupidity, for it is a punishment which operates directly on the very feeling which impels men to such offences. But it has some disadvantages also. First, it affects the family and dependents of the offender who are innocent. Secondly, it is not exemplary as at its execution no spectacle is exhibited. Lastly, it is inappropriate for serious crimes. It even enables well-to-do persons to flout the provisions of law and avoid punishment in the real sense by offering to pay the fine the amount whereof does not make any material difference to him.

Fine is the only punishment for certain offences, and there too it is unlimited in the case of offences under ss 155 - 56 and 171, limited to Rs 1,000 in the cases of offences under ss 154 and 294A, limited to Rs 500 in the case of offences under ss 137, 171H, 171I, 278, and limited to Rs 200 in the case of offences under ss 263A, 283 and 290 . In other cases fine is an alternative or additional punishment.

14. When Fine is Permissible as an Alternative to Sentence, no Need of Imprisonment

The IPC sanctions either a term of imprisonment or a fine or both, and it is left to the discretion of the court whether to inflict a sentence of imprisonment or fine or both. But in practice, it can only be in very exceptional circumstances that it is suitable and appropriate to inflict a fine as well as a substantial term of imprisonment.[17] Jails should be reserved for the reception of those who perform criminal acts not merely of a technical but of a criminal character. If the law permits a sentence of fine as an alternative, there is no need of the sentence of imprisonment, unless of course the gravity of the offence or the antecedents of the offender demand it.[18]

In *Turner Monism & Co v KN Tapuria* ,[19] the accused was the director of the appellant company and had misappropriated a sum of Rs 7,00,000 in 1969. He was acquitted by the trial court but in appeal, the Bombay High Court finding him guilty under s 406 of the IPC, sentenced him to rigorous imprisonment for two years and to pay a fine in the sum of Rs 70,00,000 (Rs seventy lacs) and in default to undergo further rigorous imprisonment for nine months within the consideration that since 1969 the rupees value was very much higher and the accused was benefited tremendously and the amount taken by the accused must have multiplied at least fifty-fold during the two decades. 325

15. Quantum of Fine

In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases.[20] It is quite unnecessary to impose fine on persons who have been sentenced to death or to substantive terms of punishment.[21] Where long terms of imprisonment are given to convicts, it is not desirable that in addition to imprisonment a sentence of fine should be passed upon them, for the sentence of fine will be a burden upon the family of the convicts and not the convicts themselves.[22] It is not proper, in the case of a poor peasant to add to a very long term of substantive imprisonment a fine which there is no reasonable prospect of the accused man paying and for default in paying which he will have to undergo a yet further term of imprisonment.[23] While deciding the question of the quantum of fine to be imposed, the courts should always bear in mind that there should be some sort of nexus between amount of the fine sought to be imposed and the potentiality of the accused to pay it. There is no point in imposing such an enormous amount as fine which is beyond the paying capacity of the accused.

Therefore, where the accused has been sentenced to life imprisonment under s 302 of the IPC, and who was a domestic servant, having hardly any means, she should not have been saddled with a fine of Rs 5,000 on each of the counts.[24] A sentence of fine in addition to imprisonment can only be suitable in cases where the court thinks that the justice of the case will be met by inflicting a substantial fine, and at the same time thinks that a short term of imprisonment in addition will serve as a salutary lesson to the accused, or in cases where it is desired to compensate the complainant or in cases where the accused has profited financially by his misdeed.[25]

Legality of Daily Fine or Fine Payable in Future

It is illegal to direct an accused to pay a fine in future[26] or for an indefinite future period.[27] It is also not permissible in law to enforce a daily fine for an indefinite future period.[28] Such imposition of fine is, however, provided and is permissible under some local or special laws such as Municipalities Act, Uttar Pradesh Roadside Land Control Act 1945, whereunder the court can award a daily fine till the removal of nuisance or encroachment from public property or road.

Sentence of Fine Payable Jointly or Severally--Not Legal

A sentence of fine must be specific as to each person fined. A sentence of fine payable jointly and severally is illegal.[29] When however, the payment of a fine or fee is ordered to be made jointly by several persons convicted together it may be 326recovered from all or any one of them, and if payment made by one is nullified by the reversal of the order as to him, the liability of all and each of the others revives, as what was done subject to appeal was but provisional or subject to a condition subsequent.[30] An appeal against the sentence of fine by an accused does not abate by the death of the accused pending the appeal. If the conviction of the deceased accused is allowed to stand in appeal, the fine imposed upon him can be realised from his legal representatives.[31]

Imprisonment in Default of Fine

Section 64 of the IPC may be referred to.

16. Undue Delay in Execution of Death Sentence

Exorbitant delay in disposal of mercy petition renders the process of execution of death sentence arbitrary, whimsical and capricious and, therefore, inexecutable. Furthermore, such imprisonment, occasioned by inordinate delay in disposal of mercy petitions, is beyond the sentence accorded by the court and to that extent is extralegal and excessive. Therefore, the apex constitutional authorities must exercise the power under art 72 / 161 within the bounds of constitutional discipline and should dispose of the mercy petitions filed before them in an expeditious manner.[32]

Acceptance of Admission, if Guilt Ground for Reduction of Sentence

Every court is bound to impose sentence commensurating with the crime committed by the accused. Mere acceptance or admission of the guilt, should not be a ground for reduction of sentence. Sentence should be imposed on the basis of the gravity of offences committed by the accused.[33]

85 Substituted by Act 26 of 1955, s 117, Sch for 'Secondary--Transportation' (wef 1-1-1956).

86 Clause '*Thirdly*' omitted by Act 17 of 1949, s 2 (wef 6-4-1949).

87 Re *Krishanand Bhuttacharjee* 3 BLR App Cr 50.

88 Re *KV Subramani Ayyar*AIR 1945 Mad 27, 46 Cr LJ 300 .

89 *Mohammad Shabir v State of Maharashtra* (1977) Mah LJ 338, PP 341-42.

90 *Venkataraman v Union of India* AIR 1954 SC 375, (1954) Cr LJ 993 .

91 *K Singh Deo v Jenson & Nicholson India Ltd* (1985) Cr LJ 464 (Cal) .

92 Section 117 and the Schedule to Act 26 of 1955.

93 *Garanand Singh v Emperor* AIR 1933 Rang 329, 146 IC 454(2), 35 Cr LJ 116; but **contra***Emperor v Krishna* 27 IP(M) 198 and *Fhugroo* 9 Nag LR 88.

94 *Baba v Emperor* AIR 1924 Nag 37, 24 Cr LJ 738, 22 Nag LR 166 .

95 *State of Uttar Pradesh v Dev Dutt Sharma* (1985) 1 Cr LC 80 (All) ; *Sultan Singh v State* (1981) 2 Raj LR 505 .

96 *State of Gujarat v Hon'ble High Court of Gujarat* (1998) Cr LJ 4561 (SC) .

97 *State of Uttar Pradesh v Chandrika* (2000) Cr LJ 384 (SC) .

1 *K Duraiswamy v State of Tamil Nadu* AIR 1982 SC 512 .

2 *Vadivelu Thevar v State of Madras* AIR 1957 SC 614 .

3 *Paire Dusadh v Emperor* AIR 1944 FC 1 .

4 *Sheoji Ram v State of Rajasthan* (1981) Cr LJ 1131, p 1133 .

5 *Rijo v State of Kerala* 2010 Cr LJ 1315, p 1335 (Ker) (DB) .

6 *State of Karnataka v Krishnappa* (2000) Cr LJ 1793 (SC) .

7 *Gurmukh Singh v State of Haryana* 2010 Cr LJ 450, p 454 (SC), AIR 2009 SC 2697, [2009] 13 SCR 548, (2009) 15 SCC 635 .

8 *Gurmukh Singh v State of Haryana* 2010 Cr LJ 450, p 454 (SC), (2009) 11 Scale 688, 2009 AIR SCW 6710, AIR 2009 SC 2697, [2009] 13 SCR 548, (2009) 15 SCC 635 .

9 *Zulfiquar Ali v Ram Chander* (1986) All Cr R 429 .

10 *Ashok Kumar v State of Delhi Admn* (1980) Cr LJ 444, p 445, AIR 1980 SC 636 .

11 *Supdt and Remembrancer of Legal Affairs v Anil Kumar Bunja* AIR 1980 SC 52, p 57, (1979) Cr LJ 1390 .

12 *Adu Ram v Mukna* (2004) Cr LJ 4674 (SC) .

13 *Mulla v State of UP* 2010 Cr LJ 1440, p 1459 (SC), AIR 2010 SC 942, (2010) 3 SCC 508, 2010 AIR SCW 1194, 2010 (2) Scale 179 .

14 *Ibid*.

15 *Dennis Council Mc Gautha v California* 402 US 183, 28 LD 2d 711.

16 *Adu Ram v Mukna* (2004) Cr LJ 4674 (SC) .

17 *Adu Ram v Mukna* (2004) Cr LJ 4674 (SC) .

18 *Ram Singh v State* AIR 1960 All 748, p 751 ; section 5 of the Homicide Act 1957, 5 & 6 Eliy 2, C 11.

19 Note A, reprint, p 93.

20 *Dalip Singh v State of Punjab* AIR 1953 SC 364, p 367 ; *Satya Vir v State* AIR 1958 All 746 .

21 *Gurucharan v State* 2010 Cr LJ 3339, p 3346 (Del) (DB) .

22 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1980) Cr LJ 636 ; *Charles Sobraj v Supdt, Central Jail* AIR 1979 SC 964 ; *Rajendra Prasad v State of Uttar Pradesh* AIR 1979 SC 916 overruled.

23 *Maniappan v State of Tamil Nadu* (1981) Mad LJ (Cr) 600 (SC) ; *Babubahi Satyaamrai State of Gujarat*(1986) Guj LR 771; *State of Bihar v Yashoda Kanu* (1987) BLJ 603, (1988) Cr LJ 470 (Pat) ; *State of Gujarat v Anwar Hasan Subhania* (1988) Cr LJ 1335 (Guj) .

24 *Triveniben v State of Gujarat* (1990) Cr LJ 1810, p 1819, AIR 1989 SC 1335 .

25 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1980) Cr LJ 636, [1983] 1 SCR 145 .

26 *Sheo Shankar Dubey v State of Uttar Pradesh* (1979) SCC 750, p 751 (Cr), (1979) 3 SCC 646 .

27 *Bishnu Deo Shaw v State of West Bengal* (1979) SCC 817, p 829 (Cr), (1979) 3 SCC 714 .

28 *Shatrughan Chauhan v Union of India* 2014 Cr LJ 1327, 2014 AIR SCW 793, (2014) 3 SCC 1, 2014 (2) JT 106, 2014 (1) Scale 437 .

29 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1980) Cr LJ 636 .

30 *Dagu & Ors v State of Maharashtra* (1977) Cr LJ 1206 (SC), AIR 1977 SC 1579, (1977) SCC 421 (Cr), (1977) 3 SCC 69 .

31 *Babubahi Satyamarai v State* (1986) 1 Guj LR 771 .

32 *Kehar Singh v State (Delhi Admn)* AIR 1988 SC 1883, (1989) Cr LJ 1 (SC) .

33 *Anjuman v State* (1993) Cr LJ 3113 .

34 *State of Rajasthan v Devilal* 2013 Cr LJ 1963, p 1968 (Raj) (DB) . (Accused husband committing triple murder of in-laws, aged 23 years. In view of age and the fact that the possibility of reformation could not be ruled out, death sentence modified into life imprisonment).

35 *Triveniben v State of Gujarat* AIR 1989 SC 1335, (1990) Cr LJ 1810, p 1818 .

36 *Jagmohan Singh v State of Uttar Pradesh* AIR 1973 SC 947, (1973) Cr LJ 370 .

37 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1980) Cr LJ 636 .

38 Bombay Act 71 of 1948; Central Provinces Act 1928, Bengal Act 2 of 1922 and Madras Act 4 of 1920.

39 *Emperor v Remis Christian* AIR 1947 Pat 152 .

40 Re *Thalappil Thithachumma*AIR 1941 Mad 27 .

41 Code of Criminal Procedure 1973, s 354(3) .

42 *Amar Singh v State of Madhya Pradesh* (1983) SCC 879 (Cr), (1983) 4 SCC 645 .

43 *Attorney-General of India v Lachmea Devi* AIR 1986 SC 467, (1986) Cr LJ 364, (1986) 1 SCJ 166, (1986) Cr LR 15 (SC) .

44 *Shatrughan Chauhan v Union of India* 2014 Cr LJ 1327 (SC), (2014) 2 SCC (Cr) 1, (2014) 3 SCC 1, 2014 (2) JT 106, 2014 (1) Scale 437 ; **see also***Sridharan v Union of India* AIR 2014 SC 1368, 2014 Cr LJ 1681 (SC), (2014) 4 SCC 242, 2014 (3) JT 112, 2014 (2) Scale 505 .

45 *Nga Tha Byit v Queen-Empress* (1893-1900) LBR 13; *PO Kun v King* AIR 1939 Rang 124 .

46 *Gopal Vinayak Godse v State of Maharashtra* (1961) 3 SCR 440, AIR 1961 SC 600, (1961) 1 Cr LJ 736 (SC) .

47 *Kishori Lal v Emperor* AIR 1945 PC 64 .

48 *Laxman Naskar v State of West Bengal* (2000) Cr LJ 4017 (SC) .

49 *Mohd Arif v The Registrar, Supreme Court of India* 2014 Cr LJ 4598, p 4615 (SC), (2014) 9 SCC 737 .

50 *Swamy Shraddananda (2) v State of Karnataka* AIR 2008 SC 3040, (2008) 13 SCC 767 .

51 See *Gopal Vinayak Godse v State of Maharashtra* AIR 1961 SC 600, 1961 Cr LJ 736, (1961) 3 SCR440) (Constitution Bench); *Dalbir Singh v State of Punjab* AIR 1979 SC 1384, (1979) 3 SCC 745, 1979 Cr LJ 1058 ; *Maru Ram v Union of India* (Constitution Bench) AIR 1980 SC 2147, (1981) 1 SCC 107, 1980 Cr LJ 1440 ; *Naib Singh v State of Punjab* AIR 1983 SC 855, (1983) 2 SCC 454 1983 Cr LJ 1345; *Ashok Kumar v Union of India,* AIR 1991 SC 1792, (1991) 3 SCC 498, 1991 Cr LJ 2483 ; *Laxman Naskar v State of WB* AIR 2000 SC 2762, 2000 Cr LJ 4017, JT 2000 (10) SC 29, 2000 (6) Scale 223, (2000) 7 SCC 626 ; *Zaihid Hussein v State of WB* AIR 2001 SC 1312, 2001 Cr LJ 1692, 2001 (2) Crimes 42 (SC), 2001 (2) Scale 479, (2001) 3 SCC 750 ; *Kamalanantha v State of TN* AIR 2005 SC 2132, (2005) 5 SCC 194, [2005] 3 SCR 182 ; *Mohd Munna v Union of India* AIR 2005 SC 3440, (2005) 7 SCC 417 and *CA Pious v State of Kerala* AIR 2007 SC 3221, 2007 Cr LJ 4697, JT 2007 (11) SC 344, 2007 (4) KLT 380 (SC), 2007 (11) Scale 123, (2007) 8 SCC 312 ; *Swamy Shraddananda (2) v State of Karnataka* AIR 2008 SC 3040 : (2008) 13 SCC 767 .

52 *Md Munna v Union of India* 2005 Cr LJ 4124, p 4128, AIR 2005 SC 3440, (2005) 7 SCC 417 .

53 *Md Munna v Union of India* 2005 Cr LJ 4124, p 4129, AIR 2005 SC 3440, (2005) 7 SCC 417 ; *Goptal Vinayak Godse v State of Maharashtra* AIR 1961 SC 600, 1961 (1) Cr LJ 736 .

54 *Duryodhan Rout v State of Orissa* 2014 Cr LJ 4172, p 4176, 4177 (SC), AIR 2041 SC 3345, 2014 (140) AIC 109 (SC), 2014 (86) ACC 574 .

55 *Kishori Lal v Emperor* AIR 1945 PC 64 .

56 *Gopal Vinayak Godse v State of Maharashtra* AIR 1961 SC 600, p 602-03 .

57 *Ram Dayal v State of Uttar Pradesh* 1982 Cr LJ 2180 (All) (DB) .

58 *Naib Singh v State of Punjab* AIR 1983 SC 855, (1983) SCC 536 (Cr), (1983) Cr LJ 1345 (SC), (1983) Cr AC 293 (SC) .

59 *Sibbu Munnilal v State of Madhya Pradesh* AIR 1968 MP 97 (FB), (1968) Cr LJ 631 (MP).

60 *Naib Singh v State of Punjab* AIR 1983 SC 855, (1983) Cr LJ 1345 (SC), (1983) Bih Cr Cas 144 (SC), (1983) SCC (Cr) 536, (1983) 2 SCC 454, (1983) Cr Cas 144 (SC) ; *Satpal alias Sadhu v State of Haryana* (1992) 3 Crimes 576 (SC) .

61 *Mathammal Saraswathi v State of Kerala* AIR 1957 Ker 102, p 103 .

62 *Urlikia Median v State* AIR 1964 Ori 149 **dissenting** from *Mathammal Quaraswathi v State of Kerala* AIR 1957 Ker 102 ; *Naib Singh v State of Punjab* AIR 1983 SC 855, (1983) SCC 536 (Cr) .

63 *Sibbu Munnilal v State of Madhya Pradesh* AIR 1968 MP 97 (FB), (1968) Cr LJ 631 (MP).

64 *Sat Pal alias Sadhu v State of Haryana & Anor* AIR 1993 SC 1218, (1993) Cr LJ 314 (SC) .

65 *Balaji Gangaram Navghare v State of Maharashtra* 2009 Crlj (NOC) 907 (Bom) (DB), 2009 All MR (Cr) 2558 (Bom) .

66 *Aiyar's Judicial Dictionary*, eleventh edn, p 586.

67 *Ram Lakhan v State* (1984) All Cr R 477, p 480 .

68 *Kunhi Bava v Emperor* AIR 1929 Mad 226 .

69 *Bird v Jones* (1845) 7 QB 742, 115 ER 668 .

70 3 Bl C 127.

71 *P Narasayya Pantulu v Capt RAC Stuart* (1864-65) 2 MHCR 396.

72 Re *Muthu Nadar*AIR 1945 Mad 313 .

73 *Prahlad Dnyanober Gajbhiye v State of Maharashtra* (1994) Cr LJ 2555 (Bom) .

74 *Sunil Batra v Delhi Admn* AIR 1980 SC 898, (1980) 3 SCC 488, (1980) Cr LJ 636 (SC) .

75 *Shivaji Narayan Shinde v State of Maharashtra* (1971) Bom LR 215, (1971) Mah LJ 864 .

76 *R v Chanviora* 1 Bom HC Rep 4; *R v Ramabin Rabhaji* 1 Bom HC 34 ; *R v Menazoodin* (1864) 2 WR Cr 33, s 64 of the Indian Penal Code 1860.

77 *Sukamaran v State* (1993) Cr LJ 3228, p 3229 (Ker) and s 428, Code of Criminal Procedure 1973.

78 PLC (1856), p 718.

79 *Zulfiquar Ali v Ram Chander* (1986) All Cr R 429 .

80 Re *Munuswamy*AIR 1947 Mad 386 .

81 *Sunil Batra v Delhi Administration* AIR 1978 SC 1675, (1978) 4 SCC 494 .

82 *Sunil Batra v Delhi Administration* AIR 1978 SC 1675 .

83 *Shatrughan Chauhan v Union of India* 2014 Cr LJ 1327, p 1377 (SC), (2014) 2 SCC (Cr) 1, (2014) 3 SCC 1, 2014 (2) JT 106, 2014 (1) Scale 437 .

84 Re *Muthu Nadar*AIR 1945 Mad 313 .

85 Re *Kunbi Bava*AIR 1929 Mad 226 ; Re *Thammana Ramalingayya*AIR 1942 Mad 723 .

86 *Boddepalli Lakshminarayana v Suvvari Sanyasi Appa Rao* AIR 1959 Andh Pra 530, p 534 .

87 *Mulukchand Sheikh v King* AIR 1949 Cal 104 .

88 *Public Prosecutor v Kanniappan* AIR 1955 Mad 424 .

89 Re *Muthu Nadar*AIR 1945 Mad 313 .

90 *P Jebac Angel Martin v State* 2008 Cr LJ 3147, p 3154 (Mad) .

91 *Baghel Singh v Emperor* 5 Cr LJ 217, 2 PWR (Cr) 21 .

92 *Public Prosecutor, Madras v Pingali Mallikarjan Kota Paneswara Rao* AIR 1946 Mad 173 .

93 *Bhanuprasad Manishakar Ravel v State of Gujarat* (1985) 2 Guj LR 759 .

1 *Dayaram Jagannath v State of Madhya Pradesh* 1992 MPLJ 784, p 785 ; *Panchu Parida v State of Orissa* (1993) Cr LJ 953 (Ori) .

2 *State of Uttar Pradesh v Dev Dutt Sharma* (1985) 1 Cr LC 80 .

3 Re *Kishen Soonder Bhattacharjee*(1869) 12 WR 47.

4 *State v Jernelsingh* (1954) 4 ILR Raj 438 .

5 *Mulukchand Sheikh v King* AIR 1949 Cal 104 .

6 Madras GO No 2411, dated 22 November 1881.

7 Re *Krishnanad Bhatacharjee* 3 BLR App Cr 50; *Queen v Sabrai Gowallah* 20 WR 70 .

8 Re *Muthuswami Gounden* 2 Weir 451; *Bhajna v Supdt, Central Jail, Patiala* AIR 1952 Pepsu 2 .

9 *Gulzar Mahommad v Crown* 59 Cr LJ 238 .

10 *Boucher Pierre Andre v Supdt, Central Jail, Tihar* AIR 1975 SC 194, (1975) Cr LJ 182 ; *Suraj Bhan v Om Prakash* AIR 1976 SC 648, (1976) Cr LJ 577 .

11 *Rajahusein Gulamhusein Lakhani v State of Maharashtra* (1976) Cr LJ 1294 (Bom) ; *State of Rajasthan v Bhim* 1976 WLN 563 .

12 *Government of Andhra Pradesh v Anna Venkateswara Rao* AIR 1977 SC 1096, (1977) Cr LJ 935 .

13 Re *Chief Judicial Magistrate*(1990) 1 KLT 762; *Bagdaram v State of Rajasthan* (1989) Cr LJ 414, (1988) 1 Raj LW 32 .

14 *Suraj Bhan v Om Prakash* AIR 1976 SC 648, p 650, (1976) Cr LJ 577 .

15 *Lal Chand v Emperor* AIR 1948 All 107 ; *Aziz Khan v State* AIR 1954 All 642 .

16 *State of West Bengal v SK Ghosh* AIR 1963 SC 255, (1963) 1 Cr LJ 252 (SC) .

17 *Islam v Emperor* (1931) Cal 710(2), 711.

18 *Dulla v State* AIR 1958 All 198, p 204 ; Re *Thammana Ramalinggaya*AIR 1942 Mad 723, p 724 .

19 *Turner Monism & Co v KN Tapuria* (1993) Cr LJ 3384 (Bom) .

20 *Adamji Umar Dalal v State of Bombay* AIR 1952 SC 14, p 16 .

21 Re *Shakaruppa*AIR 1958 AP 380 .

22 *Singram Marak v State* AIR 1953 Assam 201, p 202 .

23 *Emperor v Mendi Ali* AIR 1941 All 310, p 311 ; *Jagpal v State* AIR 1957 All 764, (1957) Cr LJ 1205 (DB) .

24 *Philip Bhim Sant Aind v State of Maharashtra* (1995) Cr LJ 1694 (Bom) (DB) .

25 *Islam v Emperor* AIR (1931) Cal 710(2), p 711 .

26 *Aisha v Emperor* AIR 1926 Cal 248 .

27 *Nauhar Chand v Ved Prakash* AIR 1953 Pepsu 73, p 74 .

28 *Pancham Sao v Emperor* AIR 1925 Pat 322, 25 Cr LJ 1357 ; *Trilok Chand v CN Srivastava* AIR 1961 All 88, (1961) Cr LJ 202 .

29 High Court Proceedings of 15 November 1869, 5 Mad HCR App 5; *Nemkhoting v Kamkhogin* AIR 1957 Assam 34 .

30 Re *Ratnagiri Magistrate's letter No 205* Ratanlal 90.

31 *Ramdhani Gope v Jagesher Mahto* AIR 1941 Pat 526, p 527 ; *Bhulan Lal v State* AIR 1954 All 783 .

32 *V Sriharan v Union of India* 2014 Cr LJ 1681, p 1685, AIR 2014 SC 1368, (2014) 2 Scale 505, (2014) 4 SCC 242 .

33 *P Jebac Angel Martin v State* 2008 Cr LJ 3147, p 3155 (Mad) .

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Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

[34][S. 53A.

Construction of reference to transportation.--

(1) Subject to the provisions of sub-section (2) and sub-section (3), any reference to "transportation for life" in any other law for the time being in force or in any instrument or order having effect by virtue of any such law or of any enactment repealed shall be construed as a reference to "imprisonment for life".

(2) In every case in which a sentence of transportation for a term has been passed before the commencement of the Code of Criminal Procedure (Amendment) Act, [35][1955] (26 of 1955), the offender shall be dealt with in the same manner as if sentenced to rigorous imprisonment for the same term.

(3) Any reference to transportation for a term or to transportation for any shorter term (by whatever name called) in any other law for the time being in force shall be deemed to have been omitted.

(4) Any reference to "transportation" in any other law for the time being in force, shall,--

(a) if the expression means transportation for life, be construed as a reference to imprisonment for life;327

(b) if the expression means transportation for any shorter term, be deemed to have been omitted.]

Comments

1. Legislative Changes

This is a new section inserted by s 117 of the CrPC (Amendment) Act 26 of 1955, consequent on the abolition of transportation as a punishment under the Code.

2. Scope

The section is meant for the construction of the reference to transportation in any law other than the IPC . Under sub-s (1), a reference to 'transportation for life' is to be construed as a reference to 'imprisonment for life'. The effect of this is that a person transported for life or any other term before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term. Briefly stated the legal position is that before Act 26 of 1955 a sentence of transportation for life could be undergone by prisoner by way of rigorous imprisonment for life in a

designated prison in India. After the said Act, such a convict shall be dealt with in the same manner as one sentenced to rigorous imprisonment for the same term. Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the IPC or the CrPC, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. There can be no release from prison on the government's merely deemed commutation.[36] The rules framed under the Prisons Act enable such a prisoner to earn remissions ordinary, special and state and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions, the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predict the time of his death. The result is that even if some remissions are made by the appropriate government, the prisoner is not entitled to release, unless the entire sentence is remitted.[37]

Sub-section (3) of this section is not properly worded. If the words 'transportation for a term' mean 'transportation for a period shorter than life', the words which follow, *ie*, 'transportation for any shorter term become meaningless and superfluous. The language seems to be ungrammatical. If the question is asked, 'shorter than what term'?; we get no answer and find ourselves looking for help.

34 Inserted by Act 26 of 1955, s 117 and Schedule (wef 1-1-1956).

35 Substituted by Act 36 of 1957, s 3 and Sch II, for '1954'.

36 *Satpal v State of Haryana* (1992) 2 SCC 172 .

37 *Gopal Vinayak Godse v State of Maharashtra* AIR 1961 SC 600 ; *Kishorilal v Emperor* AIR 1945 PC 14 .

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 54.

Commutation of sentence of death.--

In every case in which sentence of death shall have been passed, [38][the appropriate Government] may, without the 328consent of the offender, commute the punishment for any other punishment provided by this Code.

Comments

1. Analogous Law

Section 433 of the CrPC empowers the appropriate government to commute sentences of one form for those of another form. Section 416 of the same Code empowers the High Court also to commute a

sentence of death to imprisonment for life, in the case of a pregnant woman. The present section may, therefore, appear to be superfluous. But the power under this section is wider than that under s 433, CrPC, for under this section a sentence of death may be commuted to any other punishment provided by the IPC, whereas under s 433, CrPC, it can be commuted only to imprisonment for life.

2. Meaning of Commutation

The word 'commutation' means the change of a penalty or punishment from a greater to a less; or giving one thing in satisfaction of another as commuting titles into a rent-charge.[39] In this section the word 'commutation' has been used in the sense of its first meaning 'change of a penalty or punishment from a greater to a less'.

3. Principle of the Section

It is evidently fit that the government should be empowered to commute the sentence of death for any other punishment provided by the IPC . In proper cases, an inordinate delay in the execution of death sentence may be regarded as a sufficient ground by the government for commuting it.[40] Further, some offences are committed in peculiar circumstances, which are not correctly established before a law court and when the true facts come to the notice of the executive the government may be under an obligation to commute the death sentence awarded on altogether different grounds.

4. Grounds for Commutation of Death Sentence

In *Nawab Singh v State of Uttar Pradesh* ,[41] their Lordships of the Supreme Court observed:

> It is true that in proper cases an inordinate delay in the execution of the death sentence may be regarded as a ground for commuting it, but we desire to point out that this is no rule of law and is a matter primarily for consideration of the local Government. If the court has to exercise a discretion in such matter, the other facts of each case would have to be taken into consideration. In the case before us, we find that the murder was a cruel and a deliberate one and there was no extenuating circumstances whatsoever which would justify us in ordering a commutation of the death sentence.329

A temporary postponement in execution of death sentence supported by some reasons cannot entitle a condemned prisoner to seek alteration in the sentence. In this case the execution of the death sentence was postponed due to the sudden illness of the executioner a day earlier. It was not due to any deliberate or intentional default of jail authorities. It was held that the last minute physical disability of the executioner furnished a good cause for deferring the execution even when the stage had been set to carry out the same. The pain, agony and horror suffered by the prisoner after he was informed about the execution was inevitable, but could not be treated as the sole circumstance for substituting death sentence.[42]

5. Who can Move Appropriate Government for Commutation of Sentence

A careful study of the provisions of this section and s 433, CrPC, goes to show that the appropriate government may be moved by the condemned prisoner himself or by any of his well-wishers for commutation on the grounds that either under the peculiar facts or circumstances of the case the death sentence should not have been passed or it should not be executed. In either case the consent of the prisoner for commutation is not necessary.

Meaning of Appropriate Government

Section 55A of the IPC and the notes thereunder may be referred to.

38 Substituted by the AO 1950, for '*the Central Government or the Provincial Government of the Province* within which the offender shall have been sentenced'. The words in italics were substituted by the AO 1937, for 'the Government of India or the Government of the place'.

39 *Wharton's Law Lexicon*, 1976, reprint, p 224.

40 *Nawab Singh v State of Uttar Pradesh* AIR 1954 SC 278, p 279 .

41 *Nawab Singh v State of Uttar Pradesh* AIR 1954 SC 278, p 279 .

42 *Shiromani Akali Dal (Mann) v State of Jammu & Kashmir* (1993) Cr LJ 927, p 937 (J&K).

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 55.

Commutation of sentence of imprisonment for life.--

In every case in which sentence of [43][imprisonment] for life shall have been passed, [44][the appropriate Government] may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

Comments

1. Scope

A sentence of imprisonment for life, if not commuted under this section or under s 433(b), CrPC, the prisoner is bound in law to serve the life term in prison,[45] and is not entitled to be released even if he has undergone a term of imprisonment exceeding 14 years (inclusive of remissions). There is no automatic release on deemed commutation unless a formal order in that behalf is passed.[46]330

2. Power of Court to Interfere with the Matter

The court cannot give any direction in the matter of commuting or remitting the sentence. It cannot compel the executive to exercise the power nor can prevent it from exercising such power.[47]

3. No Deemed Commutation under the Law

In *Naib Singh v State of Punjab* ,[48] the accused had remained in jail for more than 14 years (inclusive of remissions) while undergoing the sentence of imprisonment for life awarded to him by the court. It was contended on his behalf before the Supreme Court that the jail authorities were under a legal obligation to execute the sentence indirectly by way of commuting his sentence for imprisonment of either description for a term not exceeding 14 years under this section or s 433(b), CrPC, and his

further detention in jail was illegal. His contention was rejected and it was held that there can be no deemed commutation by the state government under s 55, IPC, or under s 433(b) of the CrPC without a final order in that behalf. This view has been followed in *Satpal alias Sadhu v State of Haryana* [49] by the Supreme Court.

43 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation' (wef 1-1-1956).

44 Substituted by the AO 1950, for '*the Provincial Government of the Province* within which the offender shall have been sentenced'. The words in italics were substituted by the AO 1937, for 'the Government of India or the Government of the place'.

45 *Gopal Vinayak Godse v State of Maharashtra* AIR 1961 SC 600 .

46 *Naib Singh v State of Punjab* AIR 1983 SC 855, 1983 SCC (Cr) 536, (1983) 2 SCC 454, 1983 Cr LR 348 (SC), 1983 Cr LR (SC) 293, 1983 Cr LJ 1345 (SC), 1983 Bih Cr Cas 144 (SC), 1983 UP Cr Cas (SC) 144 ; *Satpal alias Sadhu v State of Haryana* 1992 (3) Crimes 576 (SC) .

47 *Datta v Chimanrao v State* (1986) 2 Guj LR 1044 (Guj) .

48 *Naib Singh v State of Punjab* 1983 Cr LJ 1345, (1983) 2 SCC 454 .

49 *Satpal alias Sadhu v State of Haryana* 1993 Cr LJ 314, AIR 1993 SC 1218 .

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

[50][S. 55A.

Definition of "appropriate Government".--

In sections 54 and 55 the expression "appropriate Government" means,--

(a) in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(b) in cases where the sentence (whether of death or not) is for an offence against any law relating to a matter to which the executive power of the State extends, the Government of the State within which the offender is sentenced.]

Comments

1. Scope

This section defines the expression 'appropriate government' used in ss 54 and 55 . Similarly, 'appropriate government' has also been defined in sub-s (7) of s 432 of the CrPC as follows:

In this section and in section 433, the expression "appropriate Government" means,--

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed. 331

2. 'Matters to which the Executive Power of the Union Extends'

Article 73 of the Constitution of India provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws, and art 246 specifies the matters with respect to which Parliament has power to make laws. For the sake of convenience the relevant extracts of these articles are reproduced below:

73. Extent of executive power of the Union.--(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend--

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) ...

> **246.Subject-matter of laws made by Parliament and by the Legislatures of States.--**(1) Notwithstanding anything in clauses (2) and (3) Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
>
> (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
>
> (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").
>
> (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

A combined reading of these articles will go to show that the Parliament has powers to make laws with respect to all matters enumerated in 'Union List' and 'Concurrent list' given in the Seventh Schedule to the Constitution and the executive power of the Union extends to all such matters. The Central Government is, therefore, the appropriate government for the purposes of ss 54 and 55 of the IPC where the sentence is a sentence of death or is for an offence against any law relating to matters enumerated in 'Union List' and 'Concurrent List' aforesaid.

3. 'Matters to which the Executive Power of the State Extends'

Article 162 of the Constitution prescribes the extent of the executive power of the state. It runs as follows--

> **162. Extent of executive power of State.--**Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:
>
> *Provided* that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject 332to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

The provisions of this article read with art 246 of the Constitution make it clear that the legislature of a state has exclusive power to make laws with respect to all matters enumerated in the 'State List' and subject to the powers of the Union or its authorities, it also has power to make laws in respect of the

matters enumerated in the 'Concurrent List' of the Seventh Schedule to the Constitution and when a sentence is passed in respect of any such matter the government of the state within which the offender is sentenced is the 'appropriate Government' for the purpose of ss 54 and 55 of the IPC .

50 Substituted by the AO 1950, for s 55A which had been inserted by the AO 1937.

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter III Of Punishments/S. 56.

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 56.

Sentence of Europeans and Americans to penal servitude. Proviso as to sentence for term exceeding ten years but not for life.--

[*Rep. by the Criminal Law (Removal of Racial Discriminations) Act, 1949 (17 of 1949)* (wef 6-4-1949).]

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter III Of Punishments/S. 57.

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 57.

Fractions of terms of punishment.--

In calculating fractions of terms of punishment, [51][imprisonment] for life shall be reckoned as equivalent to [52][imprisonment] for twenty years.

Comments

1. Scope and Object

The IPC views certain offences very seriously as it has provided the same punishment even for an attempt to commit such offences. Waging or attempting to wage war against the Government of India and sedition or attempt to commit sedition punishable under ss 121 and 124A respectively may be cited as examples. This is not so in the case of murders. An attempt to commit murder has been

distinctly made punishable under s 307, IPC . A similar provision has, however, not been made in the IPC by prescribing any punishment for attempting to commit many other offences. To cover the cases relating to such remaining offences provision has been made in s 511, which, though does not prescribe any specific punishment, provides that the offender in such cases shall be punished with imprisonment of either description provided for the principal offence for a term which may extend to one-half of the imprisonment for life, or, as the case may be, one-half of the longest term of imprisonment, provided for that offence. A proper punishment or sentence, therefore, cannot be awarded in the cases made punishable under s 511, IPC, or similar other provisions, in which the principal offence is punishable with imprisonment for life unless the term of life imprisonment is ascertainable in the number of years. To meet such situations, s 57 was enacted, which lays down that in calculating fractions of terms of punishment, imprisonment for life, shall be reckoned as equivalent to imprisonment for 20 years. For the purpose of calculation, the 'life imprisonment' can be reckoned as equivalent to 'imprisonment for twenty years'.[53] The scope of this 333section is, however, limited and it does not lay down that life imprisonment is equivalent to imprisonment for 20 years for all purposes.[54]

2. Imprisonment for Life means Imprisonment for the Remaining Natural Life

Under s 53A of the IPC a person transported for life or any other term before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term. There is no provision in the IPC or Crpc or the Prisoners Act, whereunder a sentence of life imprisonment, without any formal remission by the appropriate government under s 432, CrPC, can be automatically treated as one for a definite period. It was sometimes assumed that having regard to this section, 20 years imprisonment was equivalent to transportation (now imprisonment) for life.[55] Unless commuted or remitted a prisoner is bound to serve the life term in prison--a sentence of transportation for life (now imprisonment for life) means a sentence of transportation (now imprisonment) for the whole of the remaining period of the convicted person's natural life.[56] But in the case last cited, their Lordships of the Privy Council distinctly said that a life sentence must not in all cases be treated as one of not more than 20 years or that the convict is necessarily entitled to remission. It is only for calculating fractions of punishment as contemplated under ss 116 and 511 of the IPC that this section provides that transportation for life shall be regarded as equivalent to imprisonment for 20 years. It does not say that transportation for life shall be deemed to be transportation for 20 years for all purposes,[57] nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all embracing fiction.

Section 57IPC does not in any way limit the punishment of imprisonment for life to a term of twenty years. Section 57 is only for calculating fractions of terms of punishment and provides that imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. The punishment of imprisonment for life handed down by the court means a sentence of imprisonment for the convict for the rest of his life.[58]

A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under s 432 of the CrPC which in turn is subject to the procedural checks mentioned in the said provision and further substantive check in s 433A of the CrPC .[59]334

Once a person is sentenced to undergo life imprisonment unless imprisonment for life is commuted by the competent authority, he has to undergo imprisonment for the whole of his life. Section 57 of the IPC does not, in any way, limit the punishment of imprisonment for life to a term of 20 years.[60]

3. Implication of Conditional Remission of Sentence

Solely on the basis of completion of term in jail serving imprisonment and remission earned under the relevant rules and law will not entitle an automatic release, but the appropriate government must pass

a separate order remitting the unexpired portion of the sentence.[61] If the sentence of imprisonment for life passed on a person is conditionally remitted by the government under s 432 of the CrPC, and the person is released such person must still be deemed to be under sentence of imprisonment for life despite the fact that he is not actually under sentence. Where, therefore, such a person after his release on remission, breaks the conditions on which remission was granted and commits an offence of murder, his case falls under s 303 and such person must be sentenced to death.[62]

A sentence for life would tenure till the lifetime of the accused as it is not possible to fix a particular period of the prisoner's death; so, any remissions given under the rules, cannot be regarded as a substitute for a sentence of imprisonment for life. An accused, as already stated above, is not entitled to be released as of right, on completing the term of 20 years, including the remissions.[63]

51 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation' (wef 1-1-1956).

52 *Ibid*.

53 *Syed Ghouse v State of Andhra Pradesh* 2009 Cr LJ 311, p 315 (AP) (DB) .

54 *Abdul Azad v State* (1976) Cr LJ 315, p 316 ; *State of Madhya Pradesh v Ratan Singh* AIR 1976 SC 1552, (1976) Cr LJ 1192, (1976) SCC (Cr) 428, (1976) SC Cr R 353 .

55 *Sumar Khamiso v Emperor* AIR 1932 Sind 168 ; *Kishorilal v Emperor* AIR 1945 PC 64 ; *Laxman Naskar v State of West Bengal* (2000) Cr LJ (SC) 4017 .

56 *Nga Tha Byit v Queen-Empress* (1893-1900) LBR 13; *KV Chacko v State of Kerala* (2004) Cr LJ 481 (Ker) ; *Gopal Vinayak Godse v State of Maharashtra* AIR 1961 SC 600 ; *Bag Ali, Ali Mohammed v State of Rajasthan* AIR 1959 Raj 273 ; *Subhash Chander v Kishanlal* (2001) Cr LJ 1825 (SC) ; *Lakkhi and etc v State of Rajasthan* (1996) Cr LJ 2965 (Raj) (DB) ; *Laxman Naskar v State of West Bengal* (2000) Cr LJ 4017 (SC) ; *Ram Dayal v State of Uttar Pradesh* (1980) Cr LJ 2180 (All) (DB) .

57 *Abdul Azad v State* (1976) Cr LJ 315, p 316 (Cal) .

58 *Swamy Shraddananda v State of Karnataka* 2008 Cr LJ 3911, p 3927 (SC), AIR 2008 SC 3040, 2008 (10) Scale 669 .

59 *Mohindr Singh v State of Punjab* 2013 Cr LJ 1559, p 1565 (SC), 2013 AIR SCW 1120, (2013) 3 SCC 294, 2013 (2) Scale 24 .

60 *Life Convict Bengal v BK Srivastava* AIR 2013 SC 1163, 2013 Cr LJ 1446, p 1453, 1454 ; *Sunil Damodar Gaikwad v State of Maharashtra* 2013 AIR SCW 5836, (2014) 1 SCC 129, 2013 (12) JT 310, 2013 (11) Scale 232 .

61 *Laxman Naskar v State of West Bengal* (2000) Cr LJ 4017 (SC) .

62 *Po Kun v King* AIR 1939 Rang 124 .

63 *State of Madhya Pradesh v Ratan Singh* AIR 1976 SC 1552, (1976) Cr LJ 1192, (1976) SCC (Cr) 428 ; *Bag Ali, Ali Mohammed v State of Rajasthan* AIR 1959 Raj 273, (1959) Cr LJ 1365 ; *Ram Dayal v State of Uttar Pradesh* (1982) Cr LJ 2180 (All) (DB) ; *Subhash Chandra v Kishan Lal* (2001) Cr LJ 1825 (SC) ; *Satpal alias Sadhu v State of Haryana* (1992) 3 Crimes 576 (SC) .

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Chapter III

Of Punishments

S. 58.

Offenders sentenced to transportation how dealt with until transported.--

[*Rep. by the Code of Criminal Procedure (Amendment) Act 1955 (26 of 1955), sec 117 and Sch* (wef 1-1-1956).]

The repealed section ran as follows:

In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment.

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter III Of Punishments/S. 59.

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Chapter III

Of Punishments

S. 59.

Transportation instead of imprisonment.--

[*Rep. by the Code of Criminal Procedure (Amendment) Act, 1955 (26 of 1955), sec 117 and Sch* (wef 1-1-1956).]

The repealed section ran as follows:--

In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation 335for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment.

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter III Of Punishments/S. 60.

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 60.

Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.--

In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the court which sentences such offender to direct in the sentence

that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

Comments

1. Scope and Applicability

This section applies only to cases in which the offence is punishable with imprisonment of either description. It has no application to a case in which the offence is punishable with 'imprisonment for life' which is a class of punishment different from imprisonment which is of two descriptions. Imprisonment for life is imprisonment of only one description, *ie*, rigorous imprisonment.[64]

According to this section, the nature of imprisonment, to be undergone by an accused, must be specified in the judgment itself, and not in the warrant for the first time. The warrant has to be in conformity with the final orders, embodied in the judgment.[65] If by inadvertence or otherwise the nature of the imprisonment is not described in the judgment, the imprisonment has to be treated to be simple.[66]

Before the enforcement of the CrPC, a sentence of imprisonment for the period already passed in the lock-up was illegal,[67] which has been permitted now by inserting the provisions of s 428 regarding set off in the new CrPC, though the sentence awarded by the court may be rigorous. Thus in such cases the part of the imprisonment undergone or passed in the lock-up is simple (without hard work) and the period to be undergone after conviction is rigorous.

64 *Urlikia Medina v State* AIR 1964 Ori 149, (1964) 1 Cr LJ 685 ; *Naib Singh v State of Punjab* AIR 1983 SC 855, (1983) Cr LJ 1345, (1983) SCC (Cr) 536 .

65 *Shivraj Narayan Shinde v State of Maharashtra* (1971) Bom LR 215, (1971) Mah LJ 864 .

66 *Ibid.*

67 *Baghel Singh v Emperor* 5 Cr LJ 217 .

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 61.

Sentence of forfeiture of property.--

[*Rep. by the Indian Penal Code (Amendment) Act, 1921 (16 of 1921), sec 4.*]

The repealed section ran as follows:

In every case in which a person is convicted of an offence for which he is liable to forfeiture of all his property, the offender shall be incapable of acquiring any property, except for the benefit of Government, until he shall have undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned.

Illustration

A, being convicted of waging war against the Government of India, is liable to forfeiture of all his property. After the sentence, and whilst the same is in force, *A*'s father dies, leaving an estate, which but for the forfeiture, would become the property of *A.* The estate becomes the property of Government. 336

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter III Of Punishments/S. 62.

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 62.

Forfeiture of property in respect of offenders punishable with death, transportation or imprisonment.--

[*Rep. by the Indian Penal Code (Amendment) Act, 1921 (16 of 1921), sec 4.]*

The repealed section ran as follows:

Forfeiture of property in respect of offenders punishable with death, transportation, or imprisonment.--Whenever any person is convicted of an offence punishable with death, the court may adjudge that all his property, movable and immovable, shall be forfeited to Government; and whenever any person shall be convicted of any offence for which he shall be transported, or sentenced to imprisonment for a term of seven years or upwards, the court may adjudge that the rents and profits of all his movable and immovable estate during the period of his transportation or imprisonment, shall be forfeited to Government, subject to such provision for his family and dependants as the Government may think fit to allow during such period.

Reintroduction of ss 61 - 62 was recommended by the Apex Court to combat the cancerous growth of corruption and to have a different effect on those who are bent upon accumulating wealth at the cost of the society by misusing their past or power.[68]

68 *Shobha Suresh Jumani v Appellate Tribunal* , *Forfeited Property*(2001) Cr LJ 2583 (SC).

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter III Of Punishments/S. 63.

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 63.

Amount of fine.--

Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

Comments

1. Scope and Applicability

Sections 63 - 70 of the IPC deal with the punishment of fine as given in s 53 .

This section lays down a general rule as to the amount of fines. Sections 64 - 69 refer to imprisonment in default of fines. Section 70 deals with the means of levying fines.

Sections 63 - 70 apply to all fines imposed under any Act, Regulation, rule or byelaw, unless the Act *etc*, contains an express provision to the contrary,[69]*eg*, s 64 applies to a sentence of fine under the Police Act 1859, and the Town Nuisances Act, Madras Act 1889. These sections have been made applicable to fines imposed under several local Acts.[70] Under s 19 of the Madras General Clauses Act 1891, ss 63, 68 - 70 only of the IPC apply to fines imposed under any Madras Act.337

Under s 21 of the Cantonments Act 1889, all fines recovered from offenders against the Act, go to the Cantonment fund, subject to the deductions under s 357 of the CrPC, 1973.

As a rule, where the sum to which the fine may extend is not stated in the section prescribing the punishment for an offence, the rule laid down in this section may be taken, as the general rule as to the amount of fines. By its terms the section applies only to cases in which the amount of fine is not limited by law. Now, the power of a magistrate to fine is in all cases under the penal and criminal procedure codes, limited to Rs 5,000 and it is only the court of the chief judicial magistrate or of session or High Court that can inflict fines to an unlimited amount. So it has been held that it is doubtful whether the section has any application to fines inflicted by a magistrate.[71] A magistrate for an offence punishable under this Code cannot pass a sentence of fine exceeding the limit prescribed by s 29 of the CrPC .

2. Matters to be Considered in Sentence of Fine

No sentence of fine should be passed by a criminal court on an accused person without regard to his means to pay the fine.[72] Their Lordships of the Supreme Court have however, observed:

> In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases.[73]

Fine should be Commensurate with the Offence

The fine imposed should be such as is commensurate with the offence, the character and conduct of the accused, the circumstances leading to the commission of the offence, the degree of *mens rea*, as well as with the financial circumstances of the accused. To impose a fine which the accused has no means to pay, really means to compel him to undergo imprisonment or subject himself to further legal process. The fine in no event should be either excessive or such as to make an accused feel, however, wrongly, that he is being persecuted instead of being prosecuted.[74] But if rich or influential persons are too lightly dealt with though they are guilty, the respect for law and order will be seriously impaired.[75] A fine of Rs 5,000 on a substantial military contractor was considered to be too light.[76] The imposition of an unduly heavy fine of Rs 15,000 on a commission agent was held to be not justified, even 338though it might be justified in the case of the principals.[77] On the other hand where no minimum is prescribed, the court has discretion to impose even a nominal fine of one rupee.[78]

Fine in the Case of Youths

In imposing a sentence of fine, the court should not ignore the youth of the offender, but even in the case of a youthful offender, a sentence of fine is not inappropriate. No doubt, the fine will probably have to be paid by the parent, but after all parents may reasonably be expected to restrain the activities of their children when those activities conflict with the law. The effect of imposing a fine is to give the parents the option of keeping the child out of jail by a moderate payment.[79]

3. Quantum of Fine

Commentary under same heading in s 53 may be referred to.

4. Fine alone may be Sufficient when Offence not Serious

Either an offence is serious, or it is not. If it is serious adequate imprisonment ought to be given and short-term imprisonment would be inappropriate--anything less than three months is short-term. If the offence is not serious, imprisonment should not be inflicted. Fine alone would be sufficient. The amount of fine should be such as would be within the means of the accused to pay, though he must be made to feel the pinch of it. Of course, imprisonment in default cannot be helped. Even that imprisonment should be long enough to induce the convict to pay his fine rather than suffer the imprisonment.[80] In a case of an offence of profiteering it was observed by the Bombay High Court:

> Usually a fine is imposed when the offence is the result of cupidity. When a person wants to make more money and to get rich and to amass a fortune at the cost of society and of its poor and needy members, the only way to deter others from following in his footsteps is to make it clear that crime is not easy and that he should not be permitted to enjoy his ill-gotten wealth. If the only sentence were the sentence of imprisonment and if the accused were permitted to come back after serving his sentence to enjoy the wealth which he has amassed by anti-social acts or by committing offences, then it certainly would not deter others from following in his footsteps. Therefore, not only must a fine be imposed, but the fine must be of such a character and of such an amount as to be really deterrent in its character.[81]

5. Sentence on Two or more Accused Jointly, Illegal

A sentence on two accused 'to pay a fine jointly' with imprisonment in default in case of each of them, is illegal as it is impossible to say whether either of the convicted persons should suffer the entire term of imprisonment and for what proportion of the default.[82]339

6. Payment of Daily Fine

An order for the payment of a daily fine is illegal inasmuch as it is an adjudication so far as the future

is concerned in respect of an offence which has not been committed when the order is passed.[83] But where the statute[84] makes default on every subsequent day an offence for which a fine can be imposed, no fresh order is necessary to authorise the imposition of a daily fine.[85] Daily fine is permissible under s 13(1)(b) of the Uttar Pradesh Roadside Land Control Act 1945 in case of continuing contravention of law and under some other special or local laws.

7. Recovery of Fine

Section 421 of the CrPC prescribes the various modes of recovery of fine imposed in any case. Death of the offender does not discharge from liability the property left by him.[86]

8. Refund of Fine when Conviction Reversed

On reversal of conviction any fine levied must, as a matter of course, be refunded, even though the appellate judgment may be silent on the point.[87]

9. Payment of Compensation out of Fine

Sub-section (1) of s 357 of the CrPC provides that when a court imposes a sentence of fine, with or without imprisonment, it may order the whole or any part of the fine recovered to be applied:

(i) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, recoverable by such person in a civil court;
(ii) in paying compensation to the persons who are, under the Fatal Accidents Act 1855, entitled to recover damages from the person for the loss resulting to them from death caused by him;
(iii) in compensating any bona fide purchaser of property, being the subject-matter of the offence, in certain specified circumstances.

Such direction has to be given while passing the judgment and cannot be given subsequently. An order to this effect may also be made by the courts of appeal or revision. When an appeal lies against the sentence imposing such fine the compensation can be paid only after the period for appeal has elapsed and in case the appeal is filed only after its decision.

10. Appropriation of Fines Paid

Where there are several sentences of fine against an offender and a certain sum is recovered from him, he is entitled to pray that it should be appropriated towards certain sentences.[88]340

69 General Clauses Act 1897, s 25 .

70 Bombay General Clauses Act 1904, s 26 ; Bengal General Clauses Act 1899, s 26 ; United Provinces General Clauses Act, s 25 ; Assam General Clauses Act 1915, s 28 ; Bihar and Orissa General Clauses Act, s 29 ; Madhya Pradesh General Clauses Act, s 26 ; Orissa General Clauses Act, s 27 ; Punjab General Clauses Act, s 23 ; Travancore and Cochin Interpretation and General Clauses Act, s 24 ; Rajasthan General Clauses Act, s 28 ; Mysore General Clauses Act, s 25 ; Hyderabad General Clauses Act, 3 of 1308F, s 20 ; Jammu and Kashmir General Clauses Act 1925, s 25 ; Frontier Crimes Regulation 1901, s 61 .

71 Re *Abdoor Rahman* 7 WR (Cr) 37 (2); Re *Mohana* 20 PR 1895; Re *Subhan* 18 PR 1878, per contra.

72 *Abdulla v Emperor* AIR 1924 Lah 81, 24 Cr LJ 278 ; *Dip Chand v Emperor* 27 Cr LJ 480, 27 Punj LR 199 .

73 *Adamji Umar Dalal v State of Bombay* AIR 1952 SC 14, (1959) Cr LJ 542 ; *Narayan Singh v State* (1968) Cr LJ 216, p 218, AIR 1968 Raj 46 ; see also commentary in s 53 under heading 'Quantum of fine'.

74 *State of Hyderabad v Kaneez Fatima* AIR 1953 Hyd 155, (1953) Cr LJ 827 .

75 *State of Mysore v K Basappa* AIR 1953 Mys 75, (1953) Cr LJ 1064 ; *Emperor v Kesri Chand* AIR 1945 All 207 .

76 *Emperor v Kesri Chand* AIR 1945 All 207, per Iqbal Ahmad CJ.

77 *Adamji Umar Dalal v State of Bombay* AIR 1952 SC 14 .

78 *King v Tushtipada Mandal* AIR 1951 Ori 284, 25 Cr LJ 837 .

79 *Emperor v Kamal Dattaraya Sohoni* AIR 1943 Bom 304 .

80 *Jivan Trikam v Kutch Govt* AIR 1950 Kutch 73 ; *Lalbahadur v State* AIR 1957 Assam 74, (1957) Cr LJ 502 .

81 *Mohan Lal Gokuldas v Emperor* AIR 1948 Bom 358 .

82 *Safder Khan v Gaya Municipality* AIR 1918 Pat 271, 19 PLT 748, 39 Cr LJ 531 .

83 *Ram Krishna Biswas v Mohendra Nath Mozumdar* 27 ILR Cal 565 ; *Emperor v Wazir Ahmad* 24 ILR All 309 ; Re *Sagar Dutt, Queen v Justice of the Peace* 1 BLR O Cr 41; *Kristodhone Dutt v Chairman of the Municipal Commrs for the Suburbs of Calcutta* 25 WR 6 ; Re *Limbaji Tulsi Ram* 22 ILR Bom 766.

84 Calcutta Municipal Act 1899, s 580 .

85 *Nom Lal Sett v Corpn of Calcutta* 7 CWN 853 .

86 Indian Penal Code 1860, s 70 .

87 MHC Cr Misc Pet No 45 of 1904.

88 *Yacoob Jama Khan v Emperor* AIR 1931 Sind 73, 32 Cr LJ 922 .

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Chapter III

Of Punishments

S. 64.

Sentence of imprisonment for non-payment of fine.--[89]

[In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable [90][with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine,]

it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, in which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

Comments

1. Scope and Applicability

In *Queen-Empress v Yakoob Sahib* ,[91] Benson J, said:

> The wording of section 64, it must be admitted, is not happy, but I am of opinion that the Legislature intended by it to provide for the award of imprisonment in default of payment of fine in all cases in which fine can be imposed.

This section enables the court in every case in which an offender is sentenced to fine, to direct that in default of payment of the fine the offender shall suffer imprisonment.[92] Imprisonment in default of payment of fine may be awarded even where the statute creating the offence, (*e.g.*, s 65 of the Bihar Waqfs Act 1948), provides only for fine and not for imprisonment in default.[93]Sections 65 and 67 of the IPC and ss 30 - 31 of the CrPC prescribe the norms as well as the limits for awarding the sentence of imprisonment in default of payments of fine. This section has, therefore to be read with ss 65 - 67 of the IPC and ss 30 - 31 of the CrPC .[94]

The provisions of this section are applicable to a sentence of fine imposed under ss 177 - 81 of the Motor Vehicles Act 1988.[95] But where a special law provides a 341definite mode of dealing with the sentence of fine, the provisions of this section would not apply.[1] This section would also not apply to an amount, such as compensation awarded under s 357(3), CrPC, which is not imposed as a sentence of fine.[2]

2. Meaning of Offence

In this section the word 'offence' means anything punishable under this Code or under any special or local law.[3]Thus a magistrate convicting under the Madras Act 1889, s 3 [which forms a part of the Police (Madras) Act 1859], can fine and pronounce a sentence of imprisonment in default thereof, under this section.[4]

3. Section not Applicable to cases under the Cattle Trespass Act 1871

No fine can be imposed under s 22, Cattle Trespass Act 1871, and a magistrate can only award compensation for illegal seizure of cattle. A sentence of imprisonment in default of payment of compensation is illegal. A magistrate is not competent to pass a sentence of imprisonment under s 22, Cattle Trespass Act.[5]

4. 'Punishable with Imprisonment, as well as Fine', etc

At first sight the words 'as well as' appear to mean the same thing as 'and', and to be contrasted with the word 'or' in the second clause. Such a construction of the words 'as well as' is, however, negatived by the concluding words of the first clause, *viz*, 'with or without imprisonment' and as to 'imprisonment or fine', there is no offence under the Code so punishable, *ie*, without some qualification.

The punishments relating to imprisonment and fine have been expressed in the Code in one or the other of the following ways:

(1) Imprisonment of either description (Sometimes the words 'of either description' are omitted, and the word 'imprisonment' is prefixed by the word 'simple' or 'rigorous', as the case may be) for a term which may extend to...years, or with fine or with both.
(2) Imprisonment of either description for a term which may extend to...years, and shall also

be liable to fine.

(3) Imprisonment of either description for a term which may extend to...years, with or without fine. (This is very rare form. Refer to sections 216, 221 and 222).

(4) Whoever...shall be punished with fine which may extend to...rupees.

The first is the most usual form, and gives the widest discretion, for under its terms, the punishment may be imprisonment, or fine, or imprisonment and fine.

Under the second and third, imprisonment and fine or imprisonment alone can be inflicted.342

Under the fourth fine only can be imposed.

It will thus be seen that under the first three forms the offence is 'punishable with imprisonment as well as fine', *i.e.,* both punishments can be inflicted though both need not necessarily be inflicted. But offences under the first form are also punishable with 'imprisonment or fine'[6] (which is not the case with offences punishable under the second or third forms), though they are likewise punishable 'with imprisonment as well as fine'. Under the fourth form offences are punishable 'with fine only'.

The effect of s 64 thus is that wherever a fine is imposed, whether it is added to imprisonment, or it stands alone, then in default of the payment of the fine the offender shall suffer imprisonment for a certain term.

5. Award of Imprisonment in Default of Payment of Fine

The jurisdiction of the trial court to impose a sentence of imprisonment in default of payment of fine is merely permissive. It is not imperative to award a term of imprisonment in default of payment of a fine. Section 64 of the IPC only states that it shall be competent to the court to impose a sentence of imprisonment for non-payment of fine. Further, imprisonment in default of payment of fine does not liberate an accused person from his liability to pay the fine imposed on him.[7] Such imprisonment does not serve as a discharge or satisfaction of the fine, but is imposed as punishment for non-payment. The fine would remain alive for collection for six years after the passing of the sentence. Assuming the accused has no means now to pay the same, it can be recovered from any property acquired by him within the period specified.

Even his death will not discharge from the liability, any property which would, after his death, be legally liable for his debts (s 70 of the IPC).[8]

6. Term of Imprisonment in Default of Payment of Fine

Imprisonment in default of payment of fine should be long enough to induce the accused to pay the fine rather than suffer the imprisonment.[9]Section 65, however prescribes the limit to imprisonment for non-payment of fine and a court cannot award imprisonment longer than such limit.[10]

It is undesirable to impose a fine in addition to imprisonment where the term of imprisonment to be undergone in default will bring the aggregate sentence of imprisonment to more than the maximum term of imprisonment sanctioned by the particular section under which the accused is convicted.[11]

7. Sentence of Imprisonment in Default of Payment of Fine cannot be made to Run Concurrently

This section which authorises the court to award imprisonment in default of payment of the fine expressly enacts that such imprisonment shall be in excess of any other imprisonment to which the offender may have been sentenced, or to which he may be 343liable under a commutation of a sentence. Accordingly, the sentence of imprisonment in default of payment of fine, must be in excess of, and not concurrent with, any other sentence of imprisonment to which an accused may have been

sentenced.[12] The default sentence for non-payment of fine cannot be ordered to run concurrently.[13]

It is not competent for the court to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently. Such an order, if passed, is illegal; such direction can only be given in respect of sentences of imprisonment.[14]

The provision in s 31, CrPC, for the passing of concurrent sentences refers to substantive sentence only and not to sentences of imprisonment in default of payment of fine.[15]

It is demonstrably clear from a reading of ss 53 and 64, IPC, that substantive sentence and in default of fine are two distinct sentences, and hence they cannot be made concurrent.[16] The Madhya Pradesh High Court has also held that there is no provision in law enabling a court to direct a sentence of imprisonment in default of payment of fine to run concurrently with the sentence of imprisonment passed either at the same trial or at a different trial.[17]

8. Imprisonment in Default of Payment of Fine is a Penalty and not a Sentence

A sentence is something which must be undergone unless it is remitted in part or in whole, on appeal or otherwise. When however, a term of imprisonment is imposed in default of payment of fine, the accused may always avoid it, by paying the fine. In such a case of sentence of fine, the imprisonment in default is merely a penalty for non-payment of fine. The imprisonment awarded in the event of default of payment of fine, cannot be added up to the substantive sentence of imprisonment to negative the jurisdiction of the trial judge.[18]

9. Imprisonment in Default does not Discharge Liability for Fine

The undergoing of imprisonment awarded in default of payment of the fine does not operate as a discharge or satisfaction of the fine which may nevertheless be levied in 344the manner prescribed by s 386(1), CrPC 1898. Where the offender has undergone the whole of the sentence of imprisonment in default of payment of the fine, the warrant for the levy or realisation of the fine will not be issued unless the court considers it necessary to do so for special reasons to be recorded in writing. Where no special reasons have been recorded by the magistrate for issuing the warrant and if in law and fact the accused has undergone the whole of the period of imprisonment imposed upon him in default of payment of the fine the issue of the warrant would be illegal as they are issued contrary to the provisions of the proviso to s 386(1) .[19]

10. Imprisonment in Default of Payment of Fine cannot be Remitted by State

The sentence of imprisonment in default of payment of the fine is not punishment for the offence for which the offender has been convicted but is punishment for his failure to pay the fine imposed upon him by way of punishment for the offence. The sentence of imprisonment in default of payment of the fine, not being punishment for the offence for which the offender is convicted, cannot be remitted by the state government under s 401(1) of the CrPC 1898.[20]

11. Sentence in default of Payment of Compensation

While awarding compensation under s 357(3) CrPC, the Court is within its jurisdiction to add a default sentence of imprisonment.[21]

There is no reason why the court cannot impose a sentence in default of payment of compensation as it can be done in case of death in payment of fine under s 64 of the IPC .[22]

89 Substituted by Act 8 of 1882, s 2 for 'In every case in which an offender is sentenced to a fine'.

90 Inserted by Act 10 of 1886, s 21(2) .

91 *Queen-Empress v Yakoob Sahib* 22 ILR Mad 238, p 240 .

92 *Empress v Darba* 1 ILR All 461 (FB) ; *Bashiruddin Ashraf v State of Bihar* AIR 1957 SC 645, (1957) Cr LJ 1063 .

93 *Bashiruddin Ashraf v State of Bihar* AIR 1957 SC 645, (1957) Cr LJ 1023 ; *Raj Kumar Chauhan v State* (1967) Cr LJ 1063, AIR 1967 Tri 13 .

94 *Empress v Darba* 1 ILR All 461 (FB) ; *Emperor v Mitho Maroo Machi* AIR 1942 Sind 80 ; *State v Krishna Pillai* AIR 1953 Tr & Coch 233, (1953) Cr LJ 1265; *Public Prosecutor v Balla Venkayya* AIR 1944 Mad 448, 45 Cr LJ 770 .

95 *Raj Kumar Chauhan v State* (1967) Cr LJ 1063, p 1066, AIR 1967 Tri 13 (ss 112 and 123 of the Motor Vehicles Act 1939).

1 *Dhoopo v State* AIR 1966 Raj 238, (1966) Cr LJ 1329 .

2 *M Kunju v State* AIR 1960 Ker 86, (1959) KLJ 826 ; *R v Rampal* 20 ILR All 95 ; *Ram Dularey v Manohar* AIR 1930 Nag 149 .

3 Re *Pillayya* 7 Cr LJ 180, 12 UCCR 51; *VK Mitra v Corpn of Calcutta* AIR 1932 Cal 63 ; *Ram Gopal v State* 1974 All WR 231, (1974) All Cr R 152 ; s 40 and the notes of s 63 *ante*; **but see***Basanta Kumari Devi v Corpn of Calcutta* 12 Cr LJ 375, 11 IC 1431, 15 CWN 906 .

4 *R v Rappel* 18 ILR Mad 490 ; *R v Yakoob Sahib,* 22 ILR Mad 238 .

5 *Ramdularey v Manohar* AIR 1930 Nag 149, 31 Cr LJ 278 .

6 *Queen-Empress v Yakoob Sahib* 22 ILR Mad 238 .

7 *Gopal v Union of India* AIR 1963 Bom 21, (1963) 1 Cr LJ 152 ; *Paras Nath v State* AIR 1969 All 116, 1969 Cr LJ 350 ; *Kishan v State* AIR 1967 All 276 .

8 *State v Krishna Pillai Madhavan Pillai* AIR 1953 Tr & Coch 233, p 234.

9 *Jivan Trikam v Kutch Govt* AIR 1950 Kutch 73 .

10 Refer to s 65, Indian Penal Code 1860.

11 *Emperor v Mendi Ali* AIR 1941 All 310, p 311 .

12 *Bhedu Tatma v Hari Jha* 1958 Cr LJ 80, AIR 1958 Pat 35, p 36 ; *State v Krishna Pillai Madhavan Pillai* AIR 1953 Tr & Coch 233, (1953) Cr LJ 1265; *Aditya Ram Krishna v State of Gujarat* 1974 Guj LR 670 ; *Paras Nath v State* AIR 1969 All 16, (1969) Cr LJ 350 ; *Brahmananda Mohanty v State of Orissa* (1969) Cut LT 1292 ; *State of Mysore v Fakirappa* (1968) Mad LJ 116 (Cr), (1968) 1 Mys LJ 210 ; *Babu Lal Ambaram v State of Madhya Pradesh* (1987) MPLJ 480 .

13 *Donatus Tony Ikwanusi v Investigating Officer NCB* 2013 Cr LJ 1938 (Mad) (FB) .

14 Re *Kanda Moopan*AIR 1937 Mad 406, 38 Cr LJ 796 ; *Emperor v Subrao Sesharao* AIR 1926 Bom 62, 27 Cr LJ 111 ; *Emperor v Ghulam Ahmad* AIR 1929 Sind 179, 30 Cr LJ 907 ; *Emperor v Akidullah* 13 Cr LJ 536 ; *State of Uttar Pradesh v Bati* AIR 1950 All 625 ; *Emperor v Chaman Singh* AIR 1940 Lah 388 .

15 *Mrithyunjay Bose v State of Bihar* (1967) Cr LJ 1180, AIR 1967 Pat 286 ; *State v Krishna Pillai Madhavan Pillai* AIR 1953 Tr&Coch 233, 234; *Emperor v Mitho Maroo Machi* AIR 1942 Sind 80 ; *Emperor v Ghulam Ahmed* AIR 1929 Sind 179(1), 30 Cr LJ 907 ; *Shidlingappa Gurulingappa v Emperor* AIR 1926 Bom 416, 28 Bom LR 668, 27 Cr LJ 926, 96 IC 270 ; Re *Kanda Moopan*AIR 1937 Mad 406, (1937) ILR Mad 362, 38 Cr LJ 796, 169 IC 607, (1937) 1 Mad LJ 74, (1937) Mad WN 52, 45 Mad LW 87 ; *Public Prosecutor v B Venkayya* AIR 1944 Mad 448 ; *Haji v Emperor* AIR 1941 Lah 209 .

16 *Sukumaran v State* (1933) Cr LJ 3228, p 3229 (Ker), (1993) 2 Crimes 892 ; *State v Raman* (1970) KLT 1018 .

17 *Badu Lal Ambaram v State of Madhya Pradesh* (1987) MPLJ 480 .

18 *P Balaraman v State* (1991) Cr LJ 166, p 176-77 (Mad) .

19 *Paras Nath v State* AIR 1969 All 116, (1969) Cr LJ 350 (SC) .

20 *Ibid.*

21 *Vijayan v Sadanandan K* 2009 Cr LJ 2957 (SC) ; *Hari Singh v Sukhbir Singh* 1989 Cr LJ 116, AIR 1988 SC 2127 ; *Ranga Laxmi Ammal*2008 Cr LJ 3359 (Ker).

22 *R Mohan v AK Vijaya Kumar* 2012 Cr LJ 3953 (SC), 2012 AIR SCW 4085, 2012 (6) Scale 113 .

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Chapter III

Of Punishments

S. 65.

Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.--

The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

Comments

1. General

Two questions, namely: (a) the extent of the 'certain term' of imprisonment stated in s 64 ; and (b) the nature or description of such imprisonment have been dealt with in ss 65 - 67 of the IPC . This section prescribes the maximum limit of imprisonment that can be awarded in default of payment of fine. 345

2. Scope and Applicability

This section limits imprisonment in default of payment of fine to a maximum of one-fourth of the maximum term of imprisonment prescribed for the offence, if the offence is punishable with imprisonment as well as fine. The section does not apply to a case in which the sentence passed is fine only. Such a case is dealt with in s 67 .[23] As for the meaning of the expression 'punishable with imprisonment as well as fine', refer to synopsis notes under s 64 .

3. Section to be Read with section 30,Code of Criminal Procedure 1973

This section must be read with s 30 of the CrPC, for its application to the courts of magistrates as its proviso imposes certain further restrictions on the powers of the magistrates in awarding an imprisonment in default of payment of fine. The proviso to that section, does not extend the period of imprisonment which may be awarded under this section.[24] It only regulates the procedure of the magistrates whose powers are limited.[25]

4. Meaning of Offence

Commentary under s 64 may be referred to.

5. Imprisonment need not be Proportionate to Fine

Sentence of imprisonment in default of payment of fine need not, in all cases, be proportionate to the amount of fine imposed.[26]

Description of Imprisonment for Non-Payment of Fine

Section 66 may be referred to.

6. Maximum Term Permissive

Under this section the alternative term of imprisonment should not exceed one-fourth of the sentence of imprisonment permissible for the offence.[27]

The maximum sentence which can be imposed in default of payment of fine, in a case pertaining to s 325, IPC, which is punishable by imprisonment of seven years and also fine by magistrate, is not to exceed one-fourth of the maximum imprisonment, *ie*, seven years.[28]

The punishment provided for an offence under s 3, cl 10 of the Madras Act 1889 is a fine not exceeding Rs 50 or imprisonment of either description not exceeding eight days. Therefore, in default of payment of fine the maximum term of imprisonment that can be awarded under that section is two days.[29]346

In a case of assault, a sentence inflicting a fine of Rs 50 and awarding imprisonment for one month in default of payment of the fine is illegal, with reference to ss 65 and 352 of the IPC .[30] For the same reasons for an offence punishable with one year's imprisonment, the infliction of five months' imprisonment in default of payment of fine is not legal in view of s 65 .[31]

Where an accused was convicted under s 419, read with s 109, the order for two years' rigorous imprisonment, in default of payment of fine imposed, was held illegal because the maximum sentence, imposable under s 419, being three years, the maximum term of imprisonment, in default of payment of fine, could be only nine months, being one-fourth of the three years.[32]

Section 67 of this Code further prescribes the maximum limit of imprisonment for the offences punishable with fine only.

23 Re *Chander Pershad Singh* 10 WR 30 (Cr); *R v Yakoob Shahib* 22 ILR Mad 238 .

24 *Gokul Chandra Nandi v Sribodh Chandra Banerji* AIR 1941 Pat 48 ; *Queen-Empress v Venkatesagadu* 10 ILR Mad 166 (FB) .

25 *Empress v Darba* 1 ILR All 461 (FB) .

26 *Queen-Empress v Nga Chin* (1893-1900) LBR 483; *Empress v Asghar Ali* 6 ILR All 61 ; *King v Po Htwa* AIR 1940 Rang 171 ; *Ghulam v Emperor* AIR 1943 Sindh 124 .

27 *Kunjali Meeran v State of Kerala* AIR 1960 Ker 285, (1960) Cr LJ 1212 ; *Ram Jas v State of Uttar Pradesh* AIR 1974 SC 1811, (1974) Cr LJ 1261 ; *Chhajulal v State of Rajasthan* AIR 1972 SC 1809, (1972) Cr LJ 1184 ; *Nanalal Harishankar v State* AIR 1969 Guj 62, p 65, (1969) Cr LJ 38 .

28 *Kuna Maharama v State* (1996) Cr LJ 170 (Ori) .

29 *R v Yakoob Sahib* 22 ILR Mad 238, p 240, 1 Weir 32 .

30 *Jehan Buksh v Babo Ashootosh Dhur* 16 WR 42 (Cr) .

31 *Nur-ud-Din v King-Emperor* AIR 1925 Oudh 109(1) .

32 *Ram Jas v State of Uttar Pradesh* AIR 1974 SC 1811, (1974) Cr LJ 1261 ; *Changanlal Aggarwal v State of Uttar Pradesh* (1981) All LJ 196 ; *Pratap Kuer v State of Punjab* AIR 1976 Punj 818, (1975) 2 Cr LJ 150 .

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Chapter III

Of Punishments

S. 66.

Description of imprisonment for non-payment of fine.--

The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

Comments

1. Scope

This section determines the nature or description of imprisonment that can be imposed in default of payment of fine and lays down that imprisonment may be of the same description to which the offender might have been sentenced for the offence. If the offence, of which the accused is found guilty, is punishable with imprisonment as well as fine, the imprisonment, which can be imposed in default of payment of fine, cannot be simple; it must, be rigorous imprisonment. It should, however, not be imprisonment for life.[33] But where the offence was punishable with imprisonment of either description and fine, such as an offence under s 332 of the IPC, the imprisonment in default may also be of either description.

This section prescribes the description of imprisonment imposed in default of payment of fine and states that such imprisonment may be of any description to which the offender might have been sentenced for the offence. To quote an example, an offence under s 166, IPC is punishable with simple imprisonment for one year, or fine, or both. The imprisonment that can be awarded to an offender for non-payment of fine under this section can, therefore, be simple only. Section 67 of the IPC further provides that if the offence be punishable with fine only the imprisonment in default of payment of fine shall be simple.[34]

33 *Queen v Srimonto Kotal* 7 WR (Cr) 31(2).

34 Refer to notes under ss 66 - 67, Indian Penal Code 1860.

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Chapter III

Of Punishments

S. 67.

Imprisonment for non-payment of fine, when offence punishable with fine only.--

If the offence be punishable with fine only, [35][the imprisonment which the Court imposes in default of payment of the fine shall be simple, and] 347the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

Comments

1. Scope and Applicability

This section deals with cases where only fine can be awarded. It has no reference to cases where the offence is punishable with imprisonment also.[36]

If the offence is one punishable with fine only, a sentence of imprisonment in default of fine must be simple and in accordance with the scale laid down in this section,[37] but in the case of magistrates the term imposed must not be in excess of their powers under s 29 of the CrPC .

The maximum term of imprisonment under this section cannot exceed six months.[38]

Where it is provided by a special or local law that the punishment is a fine or imprisonment in default thereof, the offence is one, punishable by fine only, and falls under s 67, and not under s 65 .[39]

The nature of the imprisonment inflicted under this section must be simple.[40] This section is not affected by s 262(2) of the CrPC .[41]

2. Scale

The scale mentioned in this section refers to the actual fine imposed and not to fines that are permissible under the section under which the accused is convicted or the court might have imposed if it had so pleased.[42]

3. Offences under Local Acts

The word 'offence' in ss 65 - 67 denotes a thing punishable under this Code or under any special or local law.[43]

Section 27 of the Bihar Prevention of Food Adulteration Act 1947, imposes for a first offence a fine only, as given in the table appended to the section. So in the case 348of first offence thereunder s 67, IPC, will apply and the imprisonment in default of the payment of fine can only be simple imprisonment.[44]

4. Imprisonment in Default of Fine in the Absence of any Provision in the Special or Local Acts

This section applies not merely to offences under the IPC, but also under the special law and the local law. So, a sentence of imprisonment can be awarded in default of the payment of fine even though no

such imprisonment in default of the payment of fine is provided for by a local or special statute.[45]Section 65 of Bihar Wakfs Act 1948, does not provide for any imprisonment in default of payment of fine, but a sentence of 15 days' simple imprisonment in default of payment of fine of Rs 100 imposed thereunder was held valid under s 33 (now s 30) of the CrPC read with ss 40 and 67 of the IPC .[46]

35 Inserted by Act 8 of 1882, s 3 .

36 *Queen-Empress v Yakoob Sahib* 22 ILR Mad 238 .

37 *State v Narhar Sakharam* (1971) Mah LJ 494, (1971) Cr LJ 873 .

38 *Ibid*; *Bashinuddin Ashraf v State of Bihar* AIR 1957 SC 645, p 647 .

39 *R v Chunder Pershand Singh* 10 WR 30 (Cr) .

40 *R v Santu* 5 Bom HCR App Cas 45.

41 *King v Po Hwa* AIR 1940 Rang 171 ; Re *Asghar Ali*(1883) 6 All 61.

42 Re *Karuppanna* 43 Cr LJ 121, p 122, (1941) 2 Mad LJ 446.

43 *Ram Gopal v State* (1974) All Cr R 152, (1974) All WR 231 ; *Kishanlal Sindhi v Executive Officer* (1980) Cr LJ 365 (Ori) .

44 *Devabrata Ganguli v State of Bihar* AIR 1950 Pat 301, p 302 .

45 *Kishanlal Sindhi v Executive Officer* (1980) Cr LJ 365, p 366 .

46 *Bashiruddin Ashraf v State of Bihar* AIR 1957 SC 645, p 647, (1957) Cr LJ 1023, (1957) SCC 325, (1957) SCJ 714, (1957) 1 Mad LJ 680 (Cr) .

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter III Of Punishments/S. 68.

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Chapter III

Of Punishments

S. 68.

Imprisonment to terminate on payment of fine.--

The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

Comments

1. Levy of Fine

The word 'levy' in this section and s 69 of the IPC, means 'realise'.[47] The power of levying the fine is restricted to the court sentencing the offender, but the successor of a sessions judge may levy a fine imposed by his predecessor, and the same rule applies to other officers by whom fines are imposed.

[48] Where a warrant under cl (b) of s 421(1) of the CrPC is issued by the court to the collector of the district authorising him to realise the amount of fine as arrears of land revenue the fine can also be realised by the said collector.

The period to deposit the amount of fine cannot be extended by the High Court and the convict can avail the remedy or provisions of s 68 of IPC . The convict shall surrender before the court and if the fine amount is paid into the court, the mandate of law, as had been provided under s 68 IPC is to operate and the imprisonment, in default of payment of fine, has to terminate on the payment of the fine amount into the concerning court.[49]349

2. Expiry of Limitation does not affect the Liability to Imprisonment

The expiry of limitation to levy fine; imposed under s 70, IPC, would in no way affect the liability of the convict to undergo sentence of imprisonment in default of payment of fine under this section. His liability to undergo imprisonment in default of payment of fine will cease only after the fine imposed is paid or levied, irrespective of the expiry of limitation for its recovery.[50]

3. Punishment in Default is Co-terminous with Payment of Fine

Sentence imposed in default of payment of fine has not to be misconstrued and taken as an imprisonment for commission of the offence. It is only a punishment in default of depositing the fine imposed and this punishment/imprisonment is, therefore, coterminous with the payment of fine. Hence, there is no basis for inferring that since the time granted by the High Court has expired, the fine cannot be deposited. When the High Court grants time, it should not be mistaken that it is putting a bar for realising the fine after the particular date. The point of starting the realisation is deferred till the time is granted because the time to be granted by the court cannot take away otherwise the rights given to the accused under ss 68 / 69, IPC .[51] After the expiry of the period of depositing fine, if fine is deposited the imprisonment is to be terminated. As the convict petitioner had deposited the fine, he was released forthwith.[52]

4. Section 68 is Independent of Section 70

Commentary in s 70 with same heading may be referred to.

47 *Ramaswamy Iyer Angellus Lawrence Goplan v Union of India* AIR 1963 Bom 21, (1963) 1 Cr LJ 152 ; *Keshav Datta v State* AIR 1967 All 276, p 278 ; *Mahtab Singh v State of Uttar Pradesh* AIR 1979 SC 1263, p 1265 .

48 *Chunder Coomar Mitter v Modhoosoodun Dey* 9 WR 50 (Cr) .

49 *Prahlad Singh v State of MP* 2009 Cr LJ 3161, p 3165 (MP) ; **See also**, *Ram Lakhan v State* 1986 Cr LJ 617 (All) .

50 *Sham Singh v State of Punjab* (1980) 82 Punj LR 353, p 354 .

51 *Babulal v State* 1989 R Cr C 259, p 260 ; *Chimnaparaju v State* (1992) 3 Crimes 185 (Mad) ; *Kanha v State of Rajasthan* 1991 RCC 569 .

52 *Usman v State of Uttar Pradesh* 2007 Cr LJ 3868, p 3869 (All) (DB) ; *Ram Lakhan v State* 1986 Cr LJ 617 (All), **relied on**.

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Chapter III

Of Punishments

S. 69.

Termination of imprisonment on payment of proportional part of fine.--

If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Illustration

A is sentenced to a fine of one hundred rupees and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, *A* will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while *A* continues in imprisonment, *A* will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, *A* will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while *A* continues in imprisonment, *A* will be immediately discharged. 350

Comments

1. No Refund of Fine even if Full Imprisonment Undergone

Where *A* was sentenced to a further term of imprisonment in default of payment of a fine, and he paid a portion of the fine, but the fact was not made known to the jailor, and he underwent the full term of imprisonment, it was held that the court had no power to order the fine to be refunded.[53] The convict may, however, apply to the appropriate government for refund.

2. 'Levy' of Fine

Text under s 68, may be referred to.

3. Punishment in Default is Co-terminous with Payment of Fine

Refer to matter under same heading in s 68 .

53 *R v Natha Mula* 4 Bom HCR CC 37.

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Chapter III

Of Punishments

S. 70.

Fine leviable within six years, or during imprisonment--Death not to discharge property from liability.--

The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

Comments

1. Scope

This section prescribes the period of limitation within which fine may be levied. Not only the magistrate or judge who sentenced the offenders but his successor may also levy the fine awarded.[54] The section applies even where the sentence of fine has been awarded by a court-martial, and a copy of it has been sent to a magistrate under s 174 of the Army Act for recovery of the fine,[55] or to cases where the fine is being realised by civil process.[56]351

2. This section Applicable to Fines Imposed by Nyaya Panchayats

This section can also apply to fines imposed by a *panchayat adalat*.[57] But the limitation prescribed by this section is no impediment in the recovery of fine imposed by the High Court for its contempt.[58] Likewise the execution of the warrant issued under s 421(1)(b) of the CrPC, is not controlled by this section.[59]

3. Procedure for Realisation of Fine

The section only speaks of the period of limitation within which the fine imposed has to be levied. The procedure relating to the realisation of fine is provided in ss 421 and 425 of the CrPC, and the rules framed thereunder.[60] According to s 421, CrPC, the court passing the sentence may take action for the recovery of fine in either or both of the following ways, that it to say; it may:

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;
(b) issue a warrant to the collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both of the defaulter.

4. Section 68 is Independent of Section 70

Section 68 is independent of s 70 . The expiry of limitation for levy of fine imposed under s 70 would, therefore, in no way affect the liability of the convict to undergo imprisonment in default of payment of fine under s 68 .[61]

5. Written off Fine can also be Recovered

The fact of a magistrate having written off a fine as irrecoverable is no bar to the realisation thereof at any time within the period allowed by law, if subsequently it transpires that the person from whom the fine was due has acquired the means of paying it.[62]

6. No Time Limit for Completing Recovery Proceeding Prescribed

An application for realisation of fine presented after the prescribed period of six years from the date of the sentence is barred by this section.[63] It was held in one case that the word 'levying' meant actual realisation of the fine and, therefore, even if the application is made, but the fine is not realised, within the period, further proceedings cannot be taken against the offender.[64] But, dissenting from this view, the Bombay High Court has held that although the expression 'levy' has been used in ss 68 and 69 in the sense of realising, its meaning in this section is to seize for the purposes of collecting the fine or to enforce an execution for a certain sum, and, therefore, if an application for recovery of fine has been made and properties have been seized 352within the prescribed period, there is no bar to the magistrate dealing with the properties and proceeding to sell that property for the purpose of realisation of the fine. This is because there is no legislative provision which has prescribed any limit for completing the proceedings taken in court for the purposes of realisation of money through court. But, on the other hand, in every case the legislature has prescribed the period within which a party seeking aid of the court to recover money must move the court for the purposes of the recovery of the amount through court. It is difficult to accept that the legislature prescribed an outside limit within which the entire process, commencing from attachment of the property and ending with conversion thereof in cash by sale has to be completed. To hold so may result in tempting convicts to resort to questionable methods for preventing sale of their attached properties by protracting the proceedings.[65]

7. Unless Stayed, Limitation Runs from the Sentence Passed by Trial Court

Under this section, the proceedings for the realisation of fine, or any part thereof which remains unpaid, may be commenced at any time within six years of the passing of the sentence. If, however, the offender be liable to imprisonment for a longer period than six years, then the proceedings may be commenced at any time before the expiration of that period. The period of six years is to be counted from the date of conviction and sentence in the court of first instance unless the operation of the sentence has been stayed or suspended. During stay the fine ceases to be leviable.[66] Dissenting from the view of the Allahabad High Court in *Keshav Datta Misra v State* ,[67] the Patna High Court has held that where the sentence of fine has been modified by a superior court, the word 'sentence' in the expression 'within six years after passing the sentence' occurring in s 70, IPC, means the sentence of the superior court and not the sentence passed by the trial court and the period of six years has to be computed with reference to the date of the order of the superior court and not of the court of first instance.[68] This view appears to be more sound as when a sentence of fine passed by the trial court is modified in appeal or revision, the modified sentence for the first time came into existence on the date it was passed and the limitation for its realisation should come into operation only from the date of modification and not from the date of the order of the trial court. If the distress warrant has been issued within limitation, the proceedings for realisation of fine are not barred by limitation.[69]

8. Whether Imprisonment in Default Discharges Liability for Fine

The law before the passing of CrPC 1973, was that imprisonment in default of payment is intended as a punishment, and not as a satisfaction and discharge of the amount due, and the fine may be levied, although the full term of imprisonment in 353default has been undergone,[70] within six years, after which period the offender's property cannot be attached, though he remains liable to undergo the sentence of imprisonment awarded in default.[71]

9. Recovery only when Special Reasons Exist for it

The proviso to sub-s (1) of s 421, CrPC has made a material change in this respect as it provides that

if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary to do so, or unless it has made an order for the payment of expenses or compensation out of the fine under s 357, CrPC .

10. Death does not Discharge Liability

Section 70, IPC, later portion, clearly indicates that in spite of the death of the offender/convicted accused, the liability of paying fine by the deceased accused devolves upon the successors or the legal representatives and the fine levy proceedings can be initiated against the successors or the legal representatives.[72]Section 70IPC enables the State to recover the fine from any property which would, after death of the accused be legally liable for his debts.[73]

Appeal/Revision against Sentence of Fine does not Abate on Death of Convict

An appeal against the sentence of fine by an accused does not abate by the death of the accused pending the appeal. If the conviction of the deceased accused is allowed to stand in appeal, the fine imposed upon him can be realised from his legal representatives.[74] The same principle applies to revision also, so a revision against a sentence of fine would not abate by reason of the death of the applicant.[75]

Successor of Deceased Appellant Liable even if they do not Contest Appeal Against Fine

In view of the scheme under IPC for recovery of fines by initiating fine levy proceedings especially ss 66 to 70, even if the successors of the deceased do not contest the conviction or imposition of sentence of fine, they cannot escape the liability of paying the fine. If they come on record, it is well and good, the court would consider if arguments are advanced regarding the conviction as well as the adequacy or otherwise of the fine. If they do not come on record in order to avoid the payment of fine under the shelter of non-executability of the default sentence, the 354duty is cast upon the court to direct the successors to be brought on record and hear them accordingly and if the sentence is affirmed and in spite of such affirmation, the LRS, or successors do not pay fine, the court has to proceed with the fine levy, warrant as prescribed under the IPC as well as the procedure as per s 421 of the CrPC .[76]

11. Property Liable

Fines are enforced by the court passing the sentence by the issue of a warrant for the levy of the amount by the distress and sale of any movable property,[77] belonging to the offender or by issuing a warrant to the collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter.[78] If in realisation of the fine the ancestral property of the convict is put to sale, what is transferred to the government, or rather to the purchaser through the government, are the personal rights of the convict in the property and nothing which he could not have assigned away.[79] If the offender is alive and has no present means to pay the fine, it can be recovered from any property acquired by him within the period specified.[80]

54 *Chunder Coomar Mitter v Modhoosoodun Dey* 9 WR 50 (Cr) .

55 *Ramaswamy Iyer Angellus Lawrence Gopalan v Union of India* AIR 1963 Bom 21, (1963) 1 Cr LJ 152 .

56 *Mir Ahmad v Collector, Peshawar District* AIR 1943 Pesh 56, p 57, 54 Cr LJ 650 ; *Collector of Broach and Panch-Mahals v Ochhavlal Bhikalal* AIR 1941 Bom 158, 42 Cr LJ 534 .

57 *Palakdhari Singh v State of Uttar Pradesh* (1962) 2 Cr LJ 256, AIR 1962 SC 1145 .

58 *RL Kapur v State of Tamil Nadu* AIR 1972 SC 858, (1972) SCC (Cr) 380 .

59 *PV Muhammed v Collector of Palghat* AIR 1967 Ker 254, p 256, (1967) Cr LJ 1519 .

60 *Ramaswamy Iyer Agnellus Lawrence Gopalan v Union of India* AIR 1963 Bom 21, p 23 ; *Jadeja Gajasinghji Harishingji Lakadia v Kutch Govt* AIR 1950 Kutch 20, 51 Cr LJ 643 .

61 *Sham Singh v State of Punjab* (1980) Cr LJ 1160 (P&H), (1980) 82 Punj LR 353, p 354 .

62 *Latif-ul-Hasan v Mumtaz Ali Khan* 4 Cr LJ 404 (All) .

63 *Collector of Broach and Panch Mahals v Ochhavlal Bhikalal* AIR 1941 Bom 158, 42 Cr LJ 534 .

64 *Mir Ahmad v Collector, Peshawar District* AIR 1943 Pesh 56, p 57 .

65 *Ramaswamy Iyer Agnellus Lawrence Gopalan v Union of India* AIR 1963 Bom 21, p 24-25, (1963) 1 Cr LJ 152 .

66 *State of Uttar Pradesh v Kamal Kishore* (1992) 1 SCC 148 ; *Palakdhari Singh v State of Uttar Pradesh* AIR 1962 SC 1145, (1962) 2 Cr LJ 256 ; *Mahtab Singh v State of Uttar Pradesh* AIR 1979 SC 1263, p 1265 ; *Kamal Kishore Singh v State of Uttar Pradesh* (1980) Cr LJ 217, p 219 (All), (1980) 17 All Cr C 131 ; *Keshav Dutta Misra v State* AIR 1967 All 276, (1967) Cr LJ 679 ; *Brahmeshwar Prasad Sinha v State of Bihar* (1983) Cr LJ 8, (1982) BLJ 529 ; *Ramaswamy Iyer v Union of India* AIR 1963 Bom 21, p 24-25, (1963) 1 Cr LJ 152 .

67 *Keshav Datta Misra v State,* (1967) Cr LJ 679, AIR 1967 All 276 .

68 *Brahameshwar Prasad Sinha v State of Bihar* (1983) Cr LJ 8, p 12, (1982) BLJ 529 (DB) .

69 *Ibid*.

70 *R v Modhoosoodun* 3 WR Cr 61 ; *R v Sagwa* 23 ILR All 497 ; *Emperor v Digamber Kashinath* 37 Bom LR 99 ; *Collector of Broach and Panch Mahals v Ochhavlal Bhikalal* AIR 1941 Bom 158, 24 Cr LJ 434 ; *Vaman Sheoy v Collector of South Kanara* AIR 1964 Mys 64 ; Re *Report by Dy Registrar*1978 Mah LJ 689, pp 691, 693-97; *Nikantha Pal v Bisakha Pal* AIR 1935 Cal 546 ; *Siddappa v State of Mysore* AIR 1957 Mys 52 ; *Paras Nath v State* AIR 1969 All 116 ; *State v Krishna Pillai* AIR 1953 Tr & Coch 233, (1953) Cr LJ 1265.

71 *R v Gantu Sakharam BR* 8 October 1884 ; *Collector of Broach and Panch Mahals v Ochhavlal Bhikalal* AIR 1941 Bom 158 ; *State v Krishna Pillai Madhavan Pillai* AIR 1953 Tr & Coch 233; *Sham Singh v State of Punjab* (1980) Cr LJ 1160 (P&H) .

72 *PR Anjanappa v Yurej Agencies Pvt Ltd* (2004) Cr LJ 2565 (Kar) ; *State v Krishna Pillai Madhavan Pillai* AIR 1953 Tr & Coch 233, p 234, (1953) Cr LJ 1265.

73 *Ravendran v State of Kerala* 2015 Cr LJ 1, p 5 (Ker) (DB), 2014 (4) KLT 382 .

74 *Ramdhani Gope v Jagesher Mahto* AIR 1941 Pat 526, p 527, 42 Cr LJ 653 ; *Bhulan Lal v State* AIR 1954 All 783, (1954) Cr LJ 1720 .

75 *Sita Ram v Emperor* AIR 1937 Oudh 320, 38 Cr LJ 509 .

76 *PR Anjanappa v Yurej Agencies Pvt Ltd* (2004) Cr LJ 2565 (Kant) .

77 Criminal Procedure Code 1898, ss 386 - 89 .

78 Code of Criminal Procedure 1973, s 421 .

79 4 Punj Re 1913 (FB) and 18 Punj Re 1908 (FB) **followed in***Hamam Singh v Hira Singh* AIR 1955 Pepsu 170 .

80 *State v Krishna Pillai Madhavan Pillai* AIR 1953 Tr & Coch 233, p 234, (1953) Cr LJ 1265.

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 71.

Limit of punishment of offence made up of several offences.--

Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

[81][Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences.]

Illustrations

(a) *A* gives *Z* fifty strokes with a stick. Here *A* may have committed the offence of voluntarily causing hurt to *Z* by the whole beating, and also by each of the blows which make up the whole beating. If *A* were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b) But if, while *A* is beating *Z*, *Y* interferes, and *A* intentionally strikes *Y*, here, as the blow given to *Y* is no part of the act whereby *A* voluntarily causes hurt to *Z*, *A* is liable to one punishment for voluntarily causing hurt to *Z*, and to another for the blow given to *Y*. 355

Comments

1. Analogous Law

The provisions of this section are analogous to those of s 26 of the General Clauses Act 1897, and ss 31 and 220 of the CrPC .

Section 26 of the General Clauses Act runs as follows:

> **Section 26 . Provision as to offences punishable under two or more enactments.--**Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

Sections 31 and 220 of the CrPC, run as follows:

> **Section 31 . Sentence in cases of conviction of several offences at one trial.--**

(1) When a person is convicted at one trial of two or more offences, the court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860) sentence him for such offences, to the several punishments, prescribed therefor which such Court is competent to inflict; such punishments, when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the 356punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher court:

Provided that--

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the court is competent to inflict for a single offence;

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.

Section 220 . Trial for more than one offence.--

(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) When a person charged with one or more offences of criminal breach of trust or dishonest misappropriation of property as provided in sub-section (2) of section 212 or in sub-section (1) of section 219, is accused of committing, for the purpose of facilitating or concealing the commission of that offence or those offences, one or more offences of falsification of accounts, he may be charged with, and tried at one trial for, every such offence.

(3) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(4) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(5) Nothing contained in this section shall affect section 71 of the Indian Penal Code (45 of 1860).

Illustrations to sub-section (1)

(a) *A* rescues *B,* a person in lawful custody, and in so doing causes grievous hurt to *C,* a constable in whose custody *B* was. *A* may be charged with, and convicted of, offences under sections 225 and 333 of the Indian Penal Code (45 of 1860).

(b) *A* commits house-breaking by day with intent to commit adultery, and commits, in the house so entered, adultery with *B*'s wife. *A* may be separately charged with, and convicted of, offences under sections 454 and 497 of the Indian Penal Code (45 of 1860).

(c) *A* entices *B,* the wife of *C,* away from *C,* with intent to commit adultery with *B,* and then commits adultery with her. *A* may be separately charged with, and convicted of, offences under sections 498 and 497 of the Indian Penal Code (45 of 1860).

(d) *A* has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under section 466 of the Indian Penal Code (45 of 1860). *A* may be separately charged with, and convicted of, the possession of each seal under section 473 of the Indian Penal Code (45 of 1860).

(e) With intent to cause injury to *B, A* institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding, and also falsely accuses *B* of having committed an offence, knowing that there is no just or lawful ground for such charge. *A* may be separately charged with, and 357convicted of, two offences under section 211 of the Indian Penal Code (45 of 1860).

(f) *A,* with intent to cause injury to *B*, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, *A* gives false evidence against *B*, intending thereby to cause *B* to be convicted of a capital offence. *A* may be separately charged with, and convicted of, offences under section 211 and 194 of the Indian Penal Code (45 of 1860).

(g) *A,* with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. *A* may be separately charged with, and convicted of, offences under sections 147 , 325 and 152 of the Indian Penal Code (45 of 1860).

(h) *A* threatens *B, C* and *D* at the same time with injury to their persons with intent to cause alarm to them. *A* may be separately charged with, and convicted of, each of the three offences under section 506 of the Indian Penal Code (45 of 1860).

The separate charges referred to in Illustrations (a) to (h), respectively may be tried at the same time.

Illustrations to sub-section (3)

(i) *A* wrongfully strikes *B* with a cane. *A* may be separately charged with, and convicted of, offences under sections 352 and 323 of the Indian Penal Code (45 of 1860).

(j) Several stolen sacks of corn are made over to *A* and *B*, who know they are stolen property, for the purpose of concealing them. *A* and *B*, thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain-pit. *A* and *B* may be separately charged with, and convicted of, offences under sections 411 and 414 of the Indian Penal Code (45 of 1860).

(k) *A* exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. *A* may be separately charged with, and convicted of offences under section 317 and 304 of the Indian Penal Code (45 of 1860).

(l) *A* dishonestly uses a forged document as genuine evidence, in order to convict *B*, a public servant, of an offence under section 167 of the Indian Penal Code (45 of 1860). *A* may be separately charged with, and convicted of, offences under sections 471 (read with section 466) and 196 of that Code.

Illustration to sub-section (4)

(m) *A* commits robbery on *B*, and in doing so voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offences under sections 323 , 392 and 394 of the Indian Penal Code (45 of 1860).

2. Scope of the Section

This section deals with the limit of punishment. The first part of the section deals with a continuous or continual series of similar acts each forming the same offence or offence of the same nature as the whole series; for instance, giving a man fifty strokes with a stick.[82] The intention, expressed in this part of the section, therefore, is that the court, in awarding punishment under it, should pass one sentence for one of the offences in question, and not a separate one for each offence.[83] The second part of the section makes a provision for a contingency when the same act constitutes more 358offences than one. The third part deals with a case where several acts, one or some of which by itself or themselves, constitute one offence and the totality of the acts constitute a different offence.

The first part of s 71, broadly speaking, provides or limits punishment for such offences as are triable under ss 219 and 220(1) of the CrPC, while the second provides for those cases which are triable under s 220(3) of the CrPC . The third part provides for the punishment of such offences as are triable under s 220(4) of the same Code.[84]

It will thus be evident that while there is no objection to several such offences being charged with and tried together, the Code limits the punishment to which the offender may be sentenced on conviction. It may, however, be noted that while s 220 of the CrPC speaks of the person accused being 'charged with and tried', the illustrations all refer to cases in which the person accused may not only be charged with and tried but also convicted of separate offences. The conflict, if any, must then be with these illustrations and the section. But s 71 of the IPC prohibits punishment for, and not conviction under, two offences. So the conflict is more apparent than real, are cases in which the legislature saw no objection to the separate conviction of the offender. These cases furnish an apt contrast to the two illustrations appended to this section.

Where the court convicts a person for two or more offences at one trial, it may exercise its discretion and direct that sentence for each offence may either run consecutively or concurrently subject to the provisions of s 71, IPC .[85]

3. Rule of Law Contained in the Section

The rule of law contained in this section is, that in such contingencies as stated above the offender is not to be punished with a more severe punishment than could be awarded to him for any one of such offences. The prohibition is against punishing a man more than once for the same act or the same combination of acts. In a case falling under the first part, the offender cannot be punished with the

punishment of more than one of the offences committed. As the second and the third parts deal with offences differing from one another committed by an accused, the restriction is not that he can be punished with the punishment of only one of the offences, but that he should not be given a punishment exceeding the maximum that could be given for any of the offences.[86] The court is not expressly debarred from punishing him separately for the various offences committed by him, nor is it debarred from making the sentences for the various offences cumulative. There is only one restriction and it is that the punishment should not exceed the maximum provided for any of the offences.[87]359

The test to ascertain whether the two offences are the same is not identity of the allegations but the identity of the ingredients of the offence. Motive for committing offence cannot be termed as ingredients of offences to determine the issue.[88]

4. A Separate Sentence for each Conviction

So, where the accused is convicted for more offences than one, a separate sentence must be passed in respect of each such conviction subject to the provisions of this section.[89] The failure of the trial court to specify the sentences under each count may, however, be treated as an irregularity and the sentences passed may be treated as concurrent sentences under all the sections.[90]

An offence under s 279 is distinct from an offence under ss 337 or 338 and, therefore, a person convicted of an offence under s 337 or s 338 can also be convicted for an offence under s 279 . If, however, the two offences are committed in the same transaction, s 71 will govern the assessment of punishment.[91]

Where all the injuries were caused to the injured by the same person and one of them was a grievous hurt and the person is convicted of an offence under s 325 which is a graver offence, no separate conviction ought to be recorded for the offence under s 323, IPC .[92] So, where a person was convicted, under ss 379 and 429 of the IPC, for stealing a calf and killing it, it was held, dissenting from *Emperor v Ramla Ratanji* [93] and *Hussain Buksh Mian v King-Emperor* ,[94] that not only were the two offences distinct but both of them were covered by two separate definitions and a separate conviction and sentence for each was legal.[95] The word 'may' in the section not only confers a power, but also imposes a duty of putting it in use.[96] The Bombay High Court has, however, held that the word 'may' in this section does not mean 'must' and it is not necessary to pass separate sentences.[97]

Separable Offences

By a 'separable offence' it is meant, according to the section, one which includes in itself another or other offences. Thus, if *A* breaks into a house with intent to steal, and steals property therefrom, he commits an offence under s 380 . But part of his offence is, house-breaking with intent to commit theft (ss 454 or 457). *A*'s offence is therefore separable, since it includes two offences. Where the accused commits distinct offences which, when combined, are not punishable under any single section of the IPC, s 71 does not apply.[98]360

Where cheques issued for separate purchase transaction are dishonoured, s 71 IPC would not apply.[1]

None of the parts of the offence defined in s 338 of the IPC are sufficient to constitute an offence under s 279, because under s 279, the ingredient of driving any vehicle or riding on a public way is essential which is not necessary under s 338 . The offence under s 338, IPC, need not be committed by driving a vehicle or riding on a public way and therefore s 71, cannot be applied to ss 338 and 279, IPC .[2]

5. Continuity of Time, Place, Person and Commodity

There has to be continuity of time, place, person and commodity in order to apply the provisions of this section,[3] Where an accused steals property, at night, belonging to different persons from the

same room, he cannot be sentenced separately for different offences of theft, nor when he steals, at one time, from different parts of a house.[4] Where stolen property, belonging to different persons, is found in possession of the accused at the same time, he cannot be sentenced separately for receiving each property.[5] Likewise, making of any number of false statements in the course of the same deposition is only one offence.[6]

6. No Distinction between Sentence and Punishment

The section is limited to the question of punishment only, for where an offence comprises another or other offences, an accused person may be charged with, tried, and convicted of such offences, as provided by s 220 of the CrPC . The Bombay High Court,[7] took the view that this section relates not to sentences but to punishments; but, with respect, the better view is that, as the punishment is the sentence, no distinction can be drawn between the two.[8]

7. This Section and Section 26, General Clauses Act 1897

If the offences committed by the accused are distinct, there is no question of the rule as to double jeopardy as embodied in art 20(2) of the Constitution being applicable. Though s 26 of the General Clauses Act in its opening words refers to 'the act or omission constituting an offence under two or more enactments', the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to 'shall not be liable to be punished twice for the same offence'.

If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked.[9] Section 26 of the General Clauses Act only applies when an act or omission constitutes an offence under two or more different enactments. It has 361no application when the act or omission amounts to two or more different offences under the same enactment.[10] But this section contemplates separate punishments for an offence against the same law, and not under different laws.[11]

Where the accused has committed two offences under s 201, IPC, by the same act, the case is not covered either by s 71 of the IPC or by s 26 of General Clauses Act, and the punishment for the two offences cannot be limited under those sections.[12]

Section 26 of the General Clauses Act does not act as a bar to a trial or conviction. The only bar it creates is a bar to a second punishment.[13] Under this section the court is not expressly debarred from punishing the offender separately for the various offences committed by him nor is it debarred from making the sentences for the various offences cumulative. There is only one restriction and it is that the punishment should not exceed the maximum provided for any one of the offences.[14]

8. This Section and Section 31 of Code of Criminal Procedure 1973

A perusal of s 31, CrPC, makes it clear that the power of the court to sentence several offences at one trial is made subject to provisions of s 71, IPC . A combined reading of both these provisions shows that although guidelines have in law been provided to indicate the manner in which the courts should exercise the powers to sentence concurrently or consecutively as the same would necessarily involve the exercise of judicial discretion yet in cases where the offences committed by an accused are totally independent of one another, it may not be possible for the trial court to direct that the sentence imposed by it should run concurrently just as in cases where offences charged merely form part of a series of offences which are only aggravated form of one another, the court would be obliged in view of the provisions of s 71, IPC, to direct that the sentences imposed should run concurrently. The basic principle which may have to be borne in mind is that the accused should not yet an impression that he has on account of the court's order, been able to get away without being sentenced for an offence which was totally independent of the other offences for which he has been convicted and sentenced.[15]

9. This Section is to be Read with Sections 31 and 220, Code of Criminal Procedure 1973

This section is to be read with ss 31 and 220 of the CrPC . It has no bearing upon the question of convictions, and relates only to the measure of punishment for offences falling under its purview. Neither s 31, nor s 220 of the CrPC stands in the way of separate convictions and separate sentences for each offence of which the accused is found guilty in the same trial, though, as a matter of substantive law, this section affects the measure, or, rather the limit of punishment, while as a matter of adjective law, s 31 of the CrPC has a bearing upon the same question with reference to the powers of the court awarding the sentence, and with reference to the right of 362appeal.[16] The provisions of s 71 would prevail in case of conflict with ss 31 and 220 of the CrPC .[17] It may be noted that s 31 of the CrPC does not embrace the case of separate trials held on the same or subsequent days for separate offences committed by the same accused person, but covers only conviction, of the same accused, for two or more offences at one trial.[18] This section does not control sentences passed at different trials.[19] It may also be noted that the present s 31 of the CrPC does not contain the word 'distinct' which the previous s 31 did.[20] It may also be observed that, that s 31 is specifically made 'subject to the provisions of s 71 of the Indian Penal Code ', and s 220(5) of the CrPC lays down that 'nothing contained in this section shall affect s 71 of the Indian Penal Code '. This section (s 71), would, therefore, prevail in case of conflict with ss 31 and 220 of the CrPC . Cases occur in which the plurality of sentences, though legal under s 220 of the Cr PC, would be illegal under this section. But in such cases, the CrPC yields to the rule under the sections of the IPC, which is paramount wherever its principle collides with the former.

Indeed, the two Codes provide two different rules intended for two different purposes. As was observed by Muttuswamy Ayyar J, s 220 of the CrPC provides rules of criminal pleading only, the rules for assessing punishments being provided by s 71 of the IPC, supplemented by s 31 of the CrPC .[21] In other words, the combined effect of the three sections is that while it is legal under the CrPC that the accused should be tried for more than one offence whether they are parts of a greater or another offence or not, in awarding punishment the provisions of this section shall be observed. There is thus no conflict between the three sections, and cases which note a conflict are cases in which this difference has been overlooked.

Analysis of this Section and Section 220, Code of Criminal Procedure 1973

It is very easy to introduce confusion and difficulty by raising quibbles which are made possible by the infirmities of language. Section 220 must be interpreted in a broad and commonsense way; when reading the section with s 71, IPC, we get a four-fold result. First--a repetition in the same transaction of several criminal acts of exactly the same character may constitute one crime, *e.g.*, a number of blows on one person, *etc.*, that is a case covered by s 71 of the IPC . Secondly--a single transaction may give rise to either: (a) several offences of a different character each complete in itself and distinct from the other, *e.g.*, criminal breach of trust accompanied by falsification of account; (b) several offences of the same character but affecting different person, *e.g.*, a gunshot which injures two or more persons. Such cases come under the first sub-s 220. Separate sentences must follow.[22] Thirdly--The same series of acts may constitute different offences. *A* may be charged for all, but only on 363offence can be regarded as committed for the purpose of inflicting punishment, *e.g.*, a person who sets fire to a warehouse commits offences under ss 435 - 36, IPC . This falls under s 220(3), CrPC and s 71, IPC . Fourthly--An act in itself an offence may become either an aggravated form of that offence, or a different offence when combined with some other acts innocent or criminal. Here we have a combined offence which as well as its component minor offence may be charged under s 220(4) and again s 71, IPC controls the punishment. These provisions of law must not be confused with the provisions laid down in s 31 .

10. First Paragraph

Separate Punishments Forbidden in Such Cases

The first paragraph of this section deals with a case where there are several parts of an offence, of which any of the parts may itself amount to an offence. In such a case, the offender cannot be punished with the punishment of more than one of such offences.[23] The obtaining of money for each bill supported by false inspection note, amounted to offence of cheating in pursuance of the conspiracy. All such individual offences, on the basis of various bills, were of the same kind as the single offence of obtaining the total amount as a result of the presentation of the various bills and in view of s 71 of the IPC, the accused could not be punished for more than one of such offences.[24] A repetition in the same transaction of several criminal acts, may constitute one crime of exactly the same character, *eg*, a number of blows on one person.[25] The provisions of this paragraph forbid the infliction of separate punishments for the two offences in a case to which these provisions apply.[26] Its application and that of sub-s (1) of s 220 of the CrPC is illustrated by the case in *Nilmony Poddar v Queen-Empress* ,[27] which approves of *Empress v Ram Partap* ,[28] and overrules *Empress v Lokenath Sarkar* .[29] The illustrations appended to s 220, CrPC furnished an apt contrast to the two illustrations appended to this section.[30]

Illustrative Cases

Theft of Property Belonging to Several Persons

Where an accused stole property at night belonging to two different persons from the same room, he cannot be sentenced separately as for two offences of theft,[31] nor where a person steals at one time from different parts of a house.[32]364

Where the accused was charged with theft of cattle stolen at one time, he should not be tried and convicted in two separate trials merely because the two bullocks found in his possession belonged to two separate owners.[33] Nor when a guard in charge of a train stole at one time articles from separate bags of two different persons in a truck.[34]

Possession of Stolen Property Belonging to Several Persons

Where stolen property belonging to two different persons is found in the possession of the accused at the same time, he cannot be sentenced separately for receiving each property, there being nothing to show that two distinct offences had been committed.[35]

False Statements in One Deposition

The making of any number of false statements in the course of the same deposition is only one offence.[36]

Causing Two Injuries of Different Nature

Where a person causes two injuries one grievous and another simple, he cannot be convicted for each separate blow separately having been dealt with on same person. He was accordingly convicted under s 324, IPC, for causing both the major and minor injuries.[37]

Where the accused was convicted under ss 307 and 325 for attempt to murder and causing grievous hurt, the injuries inflicted were the result of a one series of acts. On appeal, the Madhya Pradesh High Court held that the accused could commit only one offence and the punishment could be awarded under major offence as act of the accused did not fall within the meaning of para 3 of this section or under cl (3) of s 220 of the CrPC . The conviction only under s 307 of the IPC was accordingly affirmed and the conviction under s 325, IPC was not found legal under s 220, CrPC .[38] But where two murders of persons of one party were committed in a fight between the two parties and the trial court had passed only single sentence under ss 302 / 149, IPC though charged on double count despite verdict of guilt having been recorded on both these counts. On appeal the Madhya Pradesh High Court observed that this was clearly a legal error.[39]

Rule Regarding Punishment in Cases Falling in Second Paragraph

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences.[40] This section obviously contemplates separate punishment for an offence against the same law, and not under different laws.[41]365

Where a person is found guilty of a criminal act which is punishable under two different sections of the IPC, he may be convicted under both the sections, but should be punished only under that section which imposes the higher penalty.[42]

Where, however, there are two provisions, one specific and the other general, the specific provision ought to be applied in preference to the general one. So where the offence falls under s 171F and also under s 465 of the IPC, it must be treated as one under s 171F and not under s 465 .[43]

No Separate Punishment for Consequences or Different Offence in Certain Cases

Where an unlawful act is committed and certain consequences flow from it in the usual course and the person concerned is punished in respect of such consequences, he cannot be punished over again, *i.e.*, additionally for the act which produced those consequences. So, under s 121, IPC, a person can be convicted for waging war against the government but he cannot be given an additional punishment, under s 122 for preparing to wage war.[44]

Where the act, constituting two different offences, forms part of the same transaction, the imposition of separate sentences is not justified.[45] Though offences under ss 347 and 384 of the IPC, come within two definitions, yet, if they form one transaction, they constitute one offence and it is improper to award two sentences for the same set of facts.[46] So also where acts constitute offences under ss 426 and 447, IPC .[47] As an offence under s 328 is a part of an offence under s 326, IPC, no separate sentence can be passed for it.[48]

But the second paragraph does not apply where under the same section two offences can be said to have been committed by the act of the accused. Where the accused has caused the evidence of the two offences under ss 330 and 348 of the IPC committed by the same act to disappear, commits by the same act two separate offences under s 201, the case is not covered either by s 71, IPC or s 26 of the General Clauses Act and the punishment for the two offences can not be limited under those sections. But, normally, no court should award two separate punishments for the same act constituting two offences under s 201 .[49]

11. Offence under this Code and under Special Law

Where an act is an offence under this Code and also under a special law, the accused cannot be punished twice.[50]

In *Emperor v Sohanlal* ,[51] where the accused was charged under ss 420 and 511 of this Code and s 29 of the Telegraph Act 1885, for sending a false telegram in 366furtherance of an attempt to cheat, the High Court on appeal passed sentences of three years under each charge to run concurrently.[52]

12. House-breaking to Commit Theft

Where a person commits house-breaking in order to commit theft he may be charged with, and convicted of, each of these offences. In awarding punishment under the provisions of this section, however, the court should pass one sentence for either of the offence in question and not a separate sentence for each offence.[53]

13. Criminal Trespass and Murder

Whereas a person commits house-trespass and attempts to murder an occupant of the house, he

may be convicted of both these offences, but a separate sentence for each offence is not justified.[54]

14. Adultery and Enticing for Illicit Intercourse

A person convicted of adultery under s 497 of the IPC, need not be convicted also under s 498 ; far less where there is no taking or enticing away of the woman.[55]

15. Stealing and Killing an Animal

Where a person was convicted under ss 379 and 429, IPC, for stealing a calf and killing it, it was held, dissenting from *Emperor v Ramla Ratanji* ,[56] and *Hussain Buksh Mian v King-Emperor* ,[57] that not only were the two offences distinct, but both of them were covered by two separate definitions and a separate conviction and sentence for each was legal.[58]

16. Attempt and Abetment

A person cannot be punished for attempting as well as for abetting the same offence.[59]

17. Forgery and Fraudulent Destruction of Document

Where the act of the accused which constituted forgery and was the basis of his conviction under s 467, IPC, was the same as the act which amounted to fraudulent destruction or defacement and was the basis of his conviction under s 477, he could be separately sentenced under ss 471 and 477 of the IPC .[60]

18. Abetment of theft and Receiving Stolen Property

It has been held by the Allahabad High Court that it is irregular to convict and punish a person for abetment of a theft and at the same time to convict and punish him for 367receiving the stolen property.[61] The two offences are, however, quite distinct, based on quite distinct facts. The second offence being after the first one has been completed. There is no reason, therefore, why it should not be possible to punish the offender for both these offences.

19. Abduction with Intent to Ransom and putting a Person in Fear of Death in Order to Commit Extortion

Where a person is abducted in order that money may be extorted from his relatives, a conviction under s 365 of the IPC would be justifiable. And if, in order to compel the relatives of the abducted person to ransom him they are put in fear of death of the victim, the provisions of s 387 of the IPC would be applicable. But regard being had to the third paragraph of this section, separate sentences cannot be passed under both ss 365 and 387 of the Code.[62]

20. Assaulting Public Servants

Where a number of persons were tried on various charges consisting of rioting armed with deadly weapons (s 148, IPC), assaulting or obstructing a public servant when suppressing a riot (s 152 IPC), and voluntarily causing hurt and grievous hurt to deter a public servant from his duty (ss 332 - 33); it was held that resistance to the police was one of the component parts of the offence of rioting, of which the accused were convicted and sentenced to the maximum punishment provided by s 148, and having regard to the provisions of this section, the additional sentences under s 152 were illegal.[63]

The provisions of this section are applicable to the offences under ss 147 and 353, IPC, and therefore an accused cannot be punished with a more severe punishment than the court can award for any one

of them.[64]

21. Third Paragraph: Acts Constituting Several Distinct Offences when Combined Constitute a Different Offence

Sometimes an act which is in itself an offence becomes either a different offence or an aggravated form of the same offence when combined with other facts either in themselves innocent or criminal.[65] In such cases, it is proper the frame charges and convict the accused for the several distinct offences as well as for the combined offence; but the question of punishment is to be determined with reference to this section and s 31 of the CrPC .[66]

22. Rioting and Hurt

Where the hurt caused by a member of an unlawful assembly did not by itself convert the unlawful assembly into rioting, it does not form part of the rioting within the meaning of this section, and separate sentences on the particular accused would, 368therefore, be proper.[67] But where the hurt caused by the individual member is itself the force which converts the assembly into rioting, it is a part of the rioting under this section, and separate sentences cannot be passed on the accused.[68]

The Madras High Court, however, took the view in a case that the accused may be punished separately for both hurt and rioting as the force necessary to constitute rioting might fall short of causing hurt and the excess force will constitute a different offence.[69]

Rioting and Hurt Caused by other Members

The entire case-law was exhaustively reviewed by Desai J, of the Allahabad High Court in *Behari v State* ,[70] as a result of which he came to the following conclusions:

(1) If only one blow is given by a member of an unlawful assembly, all the members can be separately punished under sections 143 and 323 without any restrictions, or under section 147 and 323 subject to the restriction imposed by the second or the third part of s 71 .
(2) The second and the third parts of section 71 bar not separate punishments for the various offences, but the aggregate punishment exceeding the punishment provided for any of them.
(3) When more than one blow is given, every member can be punished separately without any restriction under sections 147 and 323 . Section 71 will not apply.
(4) The law makes no distinction between the actual assailant and other members. If any member does one more criminal act than the others, it does not follow that the law must provide for him a severer punishment than that provided for the other members or that it must provide for a less severe punishment for the other members than that provided for him. The other members must not be liable to be punished more severely than the actual assailant but they can be made liable to be punished as severely as the actual assailant.
(5) If any member uses force or violence not amounting to an offence punishable under section 323 and then hurt is caused by any member, all are liable to be punished separately under sections 147 and 323 without any restriction and section 71 will not apply.

23. Rioting and Criminal Trespass-- Sections 147 and 447, Indian Penal Code 1860

Where the accused was found with several others to have criminally trespassed on another's land and

caused hurt in prosecution of the common object, it was held he could not be convicted and sentenced under s 447, IPC, in addition to a conviction 369and sentence under s 147, IPC, the common object of the riot, and the intention in criminal trespass being substantially the same, but he might have been separately charged and convicted of mischief.[71]

24. Rioting and using Criminal Force-- Sections 147 and 353

Where the force which was used and formed one of the component elements of the offence of rioting was the criminal force used by public servants in the execution of their duty, to pass separate sentences under s 147 and under s 353, IPC, is in fact to punish an offender twice for the same offence. Similarly, to punish an offender for actually committing an assault and again for committing the offence constructively, is illegal.[72]

25. Dacoity and Murder

Offences under ss 147 and 395 read with s 149 are covered by the provisions of s 396 and it is unnecessary to pass separate sentences in respect of them.[73]

81 Added by Act 8 of 1882, s 4 .

82 Indian Penal Code 1860, illust (a) to s 71 .

83 *R v Baradi* 11 Cr LJ 415 ; *R v Malu* 23 ILR Bom 706 ; *R v Fatehkhan* 4 Cr LJ 450 .

84 *Behari v State* (1953) Cr LJ 1222, AIR 1953 All 510, p 512 ; *Sunder Singh v State* AIR 1955 All 232, p 238 (FB) .

85 *Cherian v State of Kerala* 2014 (4) KLT 678 (SC) .

86 *Behari v State* AIR 1953 All 510, p 512, (1953) Cr LJ 1222 ; *Sunder Singh v State* AIR 1955 All 232 (FB) ; *Tiny v State* AIR 1952 All 92, p 93 ; *Dharam Deo Singh v Emperor* AIR 1916 All 49, 17 Cr LJ 418 ; *Virabhadrappa v State of Mysore* AIR 1962 Mys 138, (1962) 2 Cr LJ 81 ; *Surjit Singh v Karan Singh* 1973 Mah LJ 371 .

87 *Behari v State* 1953 Cr LJ 1222, AIR 1953 All 510, p 512 ; *Sunder Singh v State* AIR 1955 All 232, 238 (FB) ; *Tiny v State* AIR 1952 All 92, p 93 ; *Dharam Deo Singh v Emperor* AIR 1916 All 40, 17 Cr LJ 418, 14 All LJ 738 .

88 *Sangeetaben Mahendrsabhai Patel v State of Gujarat* 2012 Cr LJ 2432, p 2439 (SC), AIR 2012 SC 2844, 2012 (4) Scale 549, (2012) 7 SCC 621 .

89 *Emperor v Dharmdas Lilaram* AIR 1933 Sind 9, 34 Cr LJ 143 ; **But see***Pujamal v State of Bombay* AIR 1951 Bom 244, p 247 ; *Roshanlal v State of Punjab* AIR 1965 SC 1413, (1965) 2 Cr LJ 426 .

90 *Zamir Hussain v Crown* AIR 1950 Lah 97 .

91 *Nanalal Harishanker v State of Gujarat* AIR 1969 Guj 62 ; *State v Gulam Meer* AIR 1956 MB 141 (FB) .

92 *Jayanthilal Vrajlal Barot v State of Gujarat* AIR 1968 Guj 218, (1968) Cr LJ 1173, 9 Guj LR 886 .

93 *Emperor v Ramla Ratanji* 5 Bom LRD 640 .

94 *Hussain Buksh Mian v King-Emperor* 3 ILR Pat 804 .

95 *Emperor v Bhawan Surji* AIR 1936 Bom 172, 60 ILR Bom 627 ; *Nga Pan Din v King* AIR 1938 Rang 138, (1938) Rang LR 63 ; *Empress v Sitaram Rai* 3 ILR All 181 .

96 *Emperor v Dharamdas Lilaram* AIR 1933 Sind 9, 26 Sind LR 416, 34 CLJ 143 .

97 *Pujamal v State of Bombay* AIR 1951 Bom 244 and cases cited therein.

98 *Queen-Empress v Sakhram Bhai* 10 ILR Bom 493 ; *Queen-Empress v Nirichan* 12 ILR Mad 36 .

1 *Nova Vision Electronics Pvt Ltd (M/s) v State* 2011 Cr LJ 868 (Del) .

2 *Babulal Chhotalal v State of Gujarat* (1968) Cr LJ 1274, AIR 1968 Guj 240 .

3 *Delhi Municipality v Motilal* (1972) Cr LJ 1536, p 1539, 74 Punj LR 316 (FB) .

4 *Emperor v Mahommad Hadi* 7 UBR 1904, 1 Cr LJ 537 .

5 *Kalu Singh v Empress* 14 PR 1885 ; *Nga Po E v Emperor* AIR 1936 Rang 94, 37 Cr LJ 530 .

6 *Emperor v Rakhal Chander Laha* 36 ILR Cal 808 .

7 *Queen-Empress v Bana Punja* 17 ILR Bom 260 (FB) ; *Emperor v Piru Rama* AIR 1926 Bom 64, 49 ILR Bom 916, 27 Cr LJ 113 .

8 *Haji v Emperor* AIR 1943 Sind 212, **following***Nilmony Poddar v Queen-Empress* 16 ILR Cal 44 (FB) ; *Kiamuddi Karikar v King-Emperor* AIR 1924 Cal 771, 51 ILR Cal 79, 25 Cr LJ 945 ; Y AIR 1934 Mad 388, 57 ILR Mad 643, 35 Cr LJ 1226, 66 Mad LJ 572 .

9 *State of Bombay v SL Apte & Anor* AIR 1961 SC 578, (1961) 1 Cr LJ 725 (SC) .

10 *State v Pandurang Baburao* AIR 1955 Bom 451, p 452 (FB) ; *KP Sinha v Aftabuddin* AIR 1955 Pat 453 ; **but see***K Jayaram Iyer v State of Hyderabad* AIR 1954 Hyd 56, per contra.

11 *Sukhanandan Rai v Emperor* AIR 1918 Pat 649 ; *Rahamatulla v Emperor* AIR 1916 Pat 86(1) ; *Bhagat Singh v Emperor* AIR 1930 Lah 266 ; Re *PS Ananth Narayanan*AIR 1933 Mad 337 .

12 *Roshan Lal & Ors v State of Punjab* AIR 1965 SC 1413, (1965) 2 Cr LJ 426 (SC) .

13 *Russol v State of Mysore* AIR 1959 Mys 136, p 139 ; Re *KB Prabhu*AIR 1944 Mad 369(2) ; *Arsala Khan v Emperor* AIR 1935 Pesh 18 .

14 *Behari v State* AIR 1953 All 510, p 512 .

15 *Dinu v State of Haryana* (2001) IV CCR 263 (P&H) .

16 *Queen-Empress v Wazir Jan* 10 ILR All 58, p 67-8 ; *Behari v State* AIR 1953 All 510, p 512, (1953) Cr LJ 1212 .

17 *Queen-Empress v Narichan* 12 ILR Mad 36 ; *Kali Das Chakravarty v Emperor* 38 ILR Cal 453 .

18 High Court Proceedings, 5 June 1879 extra No 13, 2 Weir 30 and High Court Proceedings, 7 December 1880, No 2506, 1 Weir 31; *Emperor v Tukaram* 4 Bom LR 876 ; *Girdhari Lal v Emperor* 12 Cr LJ 217, 146 PLR 1911 .

19 *Queen v Puban* 7 WR 1 ; *Bahadur v Emperor* 14 PR 1886 ; Re *Dalatia* 3 ILR All 305; *Makbul Hussain v Emperor* 11 All LJ 263, 14 Cr LJ 240 ; *Harak Narain v Emperor* 19 All LJ 310 ; *Dulli v Emperor* ILR 47 All 59 .

20 *Emperor v Bhawan Surji* AIR 1960 Bom 172, p 174, 37 Cr LJ 553, 60 ILR Bom 627, 16 IC 283, 38 Bom LR 164 ; *Pujamal Awadayoppa v State of Bombay* AIR 1951 Bom 244 .

21 *Queen-Empress v Nirichan* 12 ILR Mad 36 .

22 *Kali Das Chukerbutty v Emperor* 38 ILR Cal 453 .

23 *Elyangbam Chandra Singh v Yansembanu Mainu Singh* AIR 1962 Mani 23, p 24, (1962) 1 Cr LJ 618 .

24 *Banwarilal v Union of India* AIR 1963 SC 1620, (1963) Cr LJ 529 (SC) .

25 Indian Penal Code 1860, illust (a), s 71 .

26 *Kiamuddi Karikar v King-Emperor* AIR 1924 Cal 771, p 773, 57 ILR Cal 79, 25 Cr LJ 945, 81 IC 593, 28 CWN 347 .

27 *Nilmony Poddar v Queen-Empress* 16 ILR Cal 442 .

28 *Empress v Ram Partap* 6 ILR All 121 .

29 *Empress v Lokenath Sarkar* 11 ILR Cal 349 ; *Sahadev Ahir v Emperor* 8 CWN 344 ; *Queen v Durzoola* 9 WR 33 ; *Queen v Dina Sheikh* 10 WR 63 ; *Queen v Wahed Ali* 13 WR 42 ; *Queen-Empress v Pershad* 7 ILR All 414 (FB) ; Re *Chandra Kant Bhattacharjee* 12 ILR Cal 495; *Queen-Empress v Croft* 23 ILR Cal 174 ; *Queen-Empress v Bana Punja* 17 ILR Bom 260 ; *Queen-Empress v Malu* 23 ILR Bom 706 .

30 Commentary on ss 31 and 220 in *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

31 *Queen v Sheikh Moneeak* 11 WR 38 ; *Queen-Empress v Kashinath Vamanlal* , Ratanlal 927.

32 *Emperor v Mahommad Hadi* 7 UBR 1904, 1 Cr LJ 537 .

33 *Nga Po E v Emperor* AIR 1936 Rang 94, 37 Cr LJ 530 .

34 *Har Dial v King-Emperor of India* 58 PR 1905 .

35 *Kaku Singh v Empress* 14 PR 1885 .

36 *Rakhee Chandra Laha v Emperor* 36 C 808 **following** 6 Mad HCR App 26.

37 *Choudhary v State of Bihar* 1989 BBCJ 369 .

38 *Sayad Ashgar v State of Madhya Pradesh* (1990) Cr LR (MP) 120 (Notes) .

39 *Akram v State of Madhya Pradesh* (1993) Cr LJ 1630, p 1635 (MP) .

40 *Puranmal Agarwala v State of Orissa* AIR 1958 SC 935, p 937 .

41 *Sukhnandan Rai v Emperor* AIR 1918 Pat 649 ; *Rahmatullah v Emperor* AIR 1916 Pat 86(1) ; *Bhagat Singh v Emperor* AIR 1930 Lah 26 ; Re *Anantanarayanan*AIR 1933 Mad 337, 34 Cr LJ 277 .

42 *Emperor v Lavji Mandan* AIR 1939 Bom 452, p 453 .

43 *Ram Nath v King-Emperor* AIR 1925 All 230, p 232 ; *Perianna Muthirian v M Vengu Ayyar* AIR 1929 Mad 21 .

44 Re *Sahadevan*AIR 1955 Mad 548 .

45 *Sheikh Idris v Emperor* AIR 1939 Pat 349, 40 Cr LJ 751 .

46 *Durga Charan Singh v Isamuddin* AIR 1948 Cal 6, 48 Cr LJ 389 .

47 *Muksud Ali v Sajan Ali* AIR 1953 Tri 8, 1953 Cr LJ 1536 .

48 *Emperor v Sheo Nandan* AIR 1945 Oudh 48 .

49 *Roshan Lal v State of Punjab* AIR 1965 SC 1413, (1965) 2 Cr LJ 426 (SC) .

50 *Queen v Hussun Ali* 5 NWPHCR 49 .

51 *Emperor v Sohanlal* (1903) All WN 26 .

52 Refer also to the General Clauses Act 1897, s 26 .

53 *Queen-Empress v Malu* 23 ILR Bom 706, 1 Bom LR 142 (FB) .

54 *Barkat v Emperor* AIR 1920 Lah 312 .

55 *Queen v Pochun Chung* 2 WR (Cr) 35 .

56 *Emperor v Ramla Ratanji* 5 Bom LR 460 .

57 *Hussain Buksh Mian v King-Emperor* 3 ILR Pat 804 .

58 *Emperor v Bhawan Surji* AIR 1936 Bom 172, 60 Bom 627 ; *Nga Paw Din v King* AIR 1938 Rang 138, 1938 Rang LR 63

59 *Emperor v Fateh Khan Bahadur Khan* 8 Bom LR 855, 4 Cr LJ 450 .

60 *Pirbhu Dial v Emperor* 4 PR 1913 (Cr), 14 Cr LJ 183 .

61 *Empress v Sita Ram Rai* 3 ILR All 181 .

62 *Po Lan v Emperor* 14 Cr LJ 167 ; *Queen-Empress v AWWA* 1 LBR 33 .

63 *Farasat v Queen-Empress* 19 ILR Cal 105 ; *Zarkhan Nurkhan v Emperor* 1940 Pesh 10, 41 Cr LJ 543 .

64 *Zarkhan Nurkhan v Emperor* AIR 1940 Pesh 10 .

65 Refer to the Indian Penal Code 1860, s 7 ; and s 220(4), Code of Criminal Procedure 1973, and illust (m) thereto.

66 Re *Sahadevan*AIR 1955 Mad 548 .

67 *Queen-Empress v Ram Sarup* 7 ILR All 757 (FB) ; *Queen-Empress v Pershad* 7 ILR All 414 (FB) ; *Queen-Empress v Dungar Singh* 7 ILR All 29 ; *Katwaru Rai v Emperor* 39 ILR All 623, AIR 1917 All 11 ; *Queen-Empress v Bana Punja* 17 ILR Bom 260 ; *Anath Nath Dey v Emperor* 40 ILR Cal 511 ; *Prokash Chander v Emperor* ILR 41 Cal 836 ; *Mathura Rai v Emperor* AIR 1927 Pat 323 ; *Ramnath Rai v Emperor* AIR 1921 Pat 374 .

68 *Loke Nath Sarkar v Queen-Empress* 11 ILR Cal 349 ; *Fearsat v Queen-Empress* 19 ILR Cal 105 ; *Ramdilal v Empress* 3

Cal WN 174 ; *Hazura Singh v Emperor* AIR 1927 Lah 786 ; *Manak Chand v Emperor* AIR 1926 Lah 581 .

69 *Sothavalam v Rama Kone* AIR 1933 Mad 338, 56 ILR Mad 481 .

70 *Behari v State* AIR 1953 All 510, p 515 .

71 *Bhup Singh v Emperor* 8 Cal WN 305 .

72 *Ramdial v Empress* 3 CWN 174 .

73 *Sharif v Emperor* AIR 1944 Sind 113 .

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 72.

Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.--

In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences, he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all.

Comments

1. Analogous Law

This section should be read along with ss 221(1) and 354(2) of the CrPC . They run as follows:

Section 221 . Where it is doubtful what offence has been committed.--

(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

...

Illustrations

(a) *A* is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged 370with having committed theft, or receiving stolen property or criminal breach of trust or cheating.

(b) In the case mentioned, A is only charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be), though he was not charged with such offence.

(c) *A* states on oath before the magistrate that he saw *B* hit *C* with a club. Before the Sessions Court *A* states on oath that *B* never hit *C. A* may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

Section 354 . Language and contents of judgment.--

...

(2) When the conviction is under the Indian Penal Code (45 of 1860) and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

...

2. Scope and Object

The scope and object of this section as observed by the authors of the Code may be stated here:

This provision is intended to prevent an offender, whose guilt is fully established, from eluding punishment on the ground that the evidence does not enable the tribunals to pronounce with certainty under what penal provision his case falls.

> Where the doubt is merely between an aggravated and mitigated form of the same offence, the difficulty will not be great. In such cases the offender ought always to be convicted of the minor offence, but the doubt may be between two offences, neither of which is a mitigated form of the other. The doubt, eg, may lie between murder and the aiding of murder. It may be certain, eg, that either *A* or *B* murdered *Z*, and that whoever was the murderer was aided by the other in the commission of the murder; but who committed the murder, and who aided the commission, it may be impossible to ascertain. To suffer both to go unpunished, though it is certain that both are guilty of capital crimes, merely because it is doubtful under what clause each of them is punishable, would be most unreasonable. It appears to us that a conviction in the alternative has this recommendation, that it is altogether free from fiction, that is exactly consonant with the truth of the facts. If the court finds both *A* and *B* guilty of murder, or of aiding murder, the court affirms that which is not literally true; and on all occasions, but especially in judicial proceedings, there is a strong presumption in favour of literal truth. If the court finds that *A* has either murdered *Z* or aided *B* to murder *Z*, and that *B* has either murdered *Z* or aided *A* to murder *Z*, the court finds that which is the literal truth; nor will there, under the rule which we have laid down, be the smallest difficulty in prescribing the punishment.

> It is chiefly in cases where property has been fraudulently appropriated that the necessity for such a provision as that which we are considering will be felt. It will often be certain that there has been a fraudulent appropriation of property; and the only doubt will be, whether this fraudulent appropriation was a theft or a criminal breach of trust. To allow the offender to escape unpunished on account of such a doubt would be absurd. To subject him to the punishment of theft, which is the higher of the two crimes, between which the doubt lies, would be grossly unjust. The punishment to which he ought to be liable is evidently that of criminal breach of trust; but that a court should convict an offender of a criminal breach of trust, when the opinion of the court perhaps is, that it is an even chance, or more than an even chance, that no trust was ever reposed 371in him, seems to us an objectionable mode of proceeding. We will not, in this stage of our labours, venture to lay it down as an unbending rule that the tribunals ought never to employ phrases which, though literally false, are conventionally true. Yet we are fully satisfied that the presumption is always strongly in favour of that form of expression which accurately sets forth the real state of the facts. In the cases which we have supposed, the real state of the fact is, that the offender has certainly committed either theft or criminal breach of trust, and that the court does not know which. This ought, therefore, in our opinion, to be the form of the judgment.[74]

3. Requisite Doubt

The doubt must be as to which offence has been committed, not as to whether either has been committed.[75] The section applies only to cases where the actual facts are established but there is a doubt as to the application of the law of the proved facts.[76] If there is doubt in the mind of the court as to whether the facts brought on record are not sufficient to prove are of the two offences charged alternatively against the accused, then the court has to acquit the accused of the offence regarding which there is doubt and has to convict the accused regarding which there is no doubt. The alternative conviction as contemplated under s 72 of the IPC and under s 354(2) of the CrPC cannot be awarded in case of doubt regarding facts.[77]

4. This Section, Sections 221(1) and 354(2), Code of Criminal Procedure 1973

The provisions of this section, and of ss 221(1) and 354(2) of the CrPC, apply only to cases where the actual facts are established, but there is doubt as to the application of the law to the proved facts.[78] An accused may be convicted in the alternative on separate and alternative charges framed, or which might have been framed under s 221(1) of the CrPC .[79]

5. Alternative Charge cannot be Framed in Respect of an Offence under the Penal Code and an offence under a Special Law

Both the provisions of the law as to judgment and punishment in the case of an alternative charge are limited to offences under the IPC . Section 354(2) of the CrPC contains an express limitation to that

effect and this section is, by s 40, limited to offences under the IPC . The word 'offence' in s 221(1) of the CrPC includes offences under special laws and such offences may be charged cumulatively. But the limitations in s 354(2) aforesaid and this section seem to indicate that an alternative charge cannot be framed in respect of an offence under the IPC and an offence under a special law.[80]

6. Conviction for Doubtful Offences

In a case, where the court is in doubt as to the offence, the CrPC expressly provides that an alternative finding is perfectly legal and the offender is to be punished for the 372offence for which the lowest punishment is provided.[81] It may be open to the court to give judgment that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty. Such a finding is in accordance with s 354(2) of the CrPC, and will have the consequence that under this section the offender is to be punished for the offence for which the lowest punishment is provided, the same punishment not being provided for all.[82] Thus where the doubt entertained was whether there was sufficient proof that the accused had in fact committed the murder of the deceased, or had merely been guilty of causing evidence of the commission of that murder to disappear, an alternative conviction of both offences is not contemplated by law and the judge is bound to acquit the prisoner of the more serious offence, once he found the evidence insufficient to support that charge.[83]

74 Note A, pp 105-06.

75 *R v Jamurha* 7 NWPA 137 ; Commissioner's Report, 1847, s 527 .

76 *Partapa v Emperor* 14 Cr LJ 14 .

77 *Tatyarao v State of Maharashtra* (2000) I CCR 484 (Bom) (DB) .

78 *Emperor v Khan Mahommad* 11 PR 1887 (Cr) ; *Queen-Empress v Jamurha* 7 NWPA 137 ; *Wafadar Khan v Queen-Empress* 21 ILR Cal 955, p 973 .

79 *Maktaili v Emperor* AIR 1945 Cal 421, p 422-23 .

80 *Ganesh Krishna v Emperor* 12 Cr LJ 224 .

81 *Queen-Empress v Tarine Mytee* 7 WR (Cr) 13(3).

82 *Nebti Mandal v Emperor* AIR 1940 Pat 289, p 290, ILR 19 Pat 369, 7 BR 59, 190 IC 457, 41 Cr LJ 910, 22 PLT 98 .

83 *Partapa v Emperor* 14 Cr LJ 664, 665, 21 IC 904 .

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 73.

Solitary confinement.--

Whenever any person is convicted of an offence for which under this Code the Court has power to

sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say--

a time not exceeding one month if the term of imprisonment shall not exceed six months;

a time not exceeding two months if the term of imprisonment shall exceed six months and [84][shall not exceed one] year;

a time not exceeding three months if the term of imprisonment shall exceed one year.

Comments

1. Principle and Scope of the Section

This section deals with solitary confinement which means isolation of the prisoner from human intercourse and society. Although the imposition of the sentence of solitary confinement was legal under, the Larceny Act of 1861[85] the power was very rarely exercised by a criminal court. By the Law Revision Act 1893,[86] the provisions 373in the Larceny Act 1861 relating to solitary confinement, which had become obsolete for several decades by then, were formally repealed. A century of experience has thus led to its abandonment in the United Kingdom, and at the present day it stands condemned and has generally given place to work in association during the day and confinement in a cell for the night in cases where isolation at night is considered necessary for a brief time for particular prisoners, and exclusively for the maintenance of prison discipline. Although in the medieval times, under the influence of the Ecclesiastics it was considered that cellular confinement was a means of promoting reflection and penitence, it came since to be realised that this kind of treatment leads to a morbid state of mind and infrequently to mental derangement, and as a form of torture it fails in its effect on the public. This form of punishment is rarely imposed by the courts as it is thought to be out of time with modern thinking. It must, therefore, so long as it is part of the IPC, be administered, if ever, in the most exceptional cases of unparalleled atrocity or brutality.[87]

2. It is a Substantive Punishment

Solitary punishment is by itself a substantive punishment which can be imposed by a court of law.[88]

3. When can Solitary Confinement be Ordered

Solitary confinement should not be ordered unless there are special features appearing in the evidence, such as extreme violence or brutality in the commission of the offence. The mere fact that to the accused convicted under s 379, IPC, sanctity of home life has become a mockery and 'the desire to take what he wants regardless of ownership is not in him' cannot be a circumstance justifying the passing of an order of solitary confinement.[89] Although the fact of previous convictions is an element in determining the sentence, essential regard should be had to the facts of the case, the gravity of the offence and the circumstances in which it was committed in assessing the punishment, and the mere circumstances that there were previous convictions should not result in the infliction of a sentence that is far out of proportion to the merits of the main case.[90]

4. Distinction between Solitary Confinement under this Code and Separate and Cellular Confinement under Prisons Act

Solitary confinement is the extremely severe and is awardable only by the court. 'Separate confinement' envisaged under s 46(8) of the Prisons Act is of less severity than 'solitary confinement' and allows one hour's exercise *per diem* and to have meals in association with one or more other

prisoners. 'Cellular confinement' contemplated under s 46(10) of the said Act is somewhat more strict than 'separate confinement' and in relation to this confinement there is no provision for allowing the prisoner to have one hour's exercise and also to have his meals in association with one or more other prisoner's. Both these 'separate confinement' and 'cellular confinement' are punishments contemplated under s 46 for offences committed under 374 s 45 of the Prisons Act 1894, and the superintendent of prison is invested with the power of awarding such punishment.[91]

Where the petitioner, an undertrial prisoner, who was arrested in connection with assassination of the late Prime Minister was put in a separate cell only as a disciplinary measure, in order to avoid his mingling with other criminals and remand prisoners in central prison and to ensure proper security to petitioner, himself in exercise of powers under r 215 of the Tamil Nadu Prison Manual, the keeping of petitioner in separate cell was held to not amount to either solitary confinement or separate or cellular confinement. More so, when the liberty of petitioner is in no way curtailed, he is allowed to remain outside cell for not less than six hours a day and when he is outside the cell, he is allowed to communicate with other prisoners and is also allowed as an ordinary remand prisoner all the concessions admissible to the 'B' class prisoner.[92]

5. Summary Trial and Solitary Confinement

It is not illegal to impose solitary confinement as a part of the sentence in a case tried summarily. There is nothing in the terms of s 262 of the CrPC, to make it illegal to impose solitary confinement as part of the sentence in summary trials. The effect of s 262, CrPC, is only to limit the imprisonment to a term of three months; it does not interfere with a court's powers under this section to order solitary imprisonment with the similar powers given by s 29(1) of the CrPC .[93]

Solitary Confinement for Offences under Special or Local Laws

Solitary confinement cannot be awarded for offences under special or local Acts, for, solitary confinement can be awarded, under this section, only for offences under the IPC .[94]

Solitary Confinement in Default of Furnishing Security for Good Behaviour

The power to impose confinement conferred by this section applies only where a person has been convicted of an offence under the IPC and is not applicable to convictions under other laws, unless expressly made so, and therefore an order for solitary confinement for failure to furnish security under s 110 of the CrPC, is without jurisdiction.[95] Those who have been called on to provide security and have failed to do so, and have been confined in jail in consequence, are not to be kept in solitary confinement unless they have been liable to it for some infringement of the jail rules.[96]

Solitary Confinement in Case of Imprisonment in Lieu of Fine

The section provides that solitary confinement must be a portion of the substantial sentence of rigorous imprisonment; and where rigorous imprisonment is not part of the substantive sentence, solitary confinement cannot be awarded.[97] It is, therefore, 375illegal to award solitary confinement in a case in which the offender has been sentenced to imprisonment in default of payment of fine.[1]

Duration of Solitary Confinement

Solitary confinement is a sentence, where an accused is sentenced to rigorous imprisonment or in a case where rigorous imprisonment is the sentence provided by the IPC . In such a case, this section empowers the court to direct that a portion of the imprisonment, not exceeding three months, shall be suffered in solitary confinement. In the case of simultaneous convictions, the award of separate terms of solitary confinement exceeding three months in the aggregate is legal.[2] The separate sentences of solitary confinement are not illegal, but as a matter of practice, a sentence of more than three months' solitary confinement should not be passed on a person convicted at one trial of more than one

offence.[3] Cumulative sentences of solitary confinement are contrary to the intention of this section.[4] Solitary confinement must be a portion of the substantial sentence of rigorous imprisonment, and if the substantial sentences are to be consecutive, the periods of solitary confinement cannot possibly be concurrent.[5]

84 Substituted by the Indian Penal Code (Amendment) Act 1882, s 5, for 'be less than a'.

85 24 of 25 Vic C 96.

86 56 of 57 Vic C 54 on 22 September 1893.

87 Re *Munuswamy*AIR 1947 Mad 386, (1947) 1 Mad LJ 336, 60 Mad LW 333, 1947 Mad WN 609, ILR 1948 Mad 359 ; *Re Ramanjulu Naidu*AIR 1947 Mad 381 .

88 *Sunil Batra v Delhi Admn* AIR 1978 SC 1675, 1699, 1978 Cr LJ 1741 .

89 Re *Ramanjulu Naidu*AIR 1947 Mad 381(1) .

90 Re *Munuswamy*AIR 1947 Mad 386(1) .

91 *K Valamlal v Govt of Tamil Nadu* (1981) LW (Cr) 58, (1981) Mad LJ (Cr) 218 .

92 *Perrari Valan v Emperor General of Prisons, Madras* (1992) Cr LJ 3125 (Mad) .

93 *Empress v Annu Khan* 6 ILR All 83, 3 All WN (1883) 224.

94 *Empress v Gurdil Singh* (1889) 17 PR 1889 (Cr) ; *Harnarain v Crown* (1870) 20 PR 1870 (Cr) ; *Crown v Munawar* (1875) 4 PR 1875 (Cr) ; *Empress v Mukh Ram* (1879) 24 PR 1879 (Cr) ; *King-Emperor v Nazir Singh* AIR 1924 Lah 667 ((1)), 25 Cr LJ 120, 76 IC 184 .

95 *King-Emperor v Phakkar* AIR 1927 All 472, p 473, 28 Cr LJ 534, 103 IC 342 .

96 *Sundar Lal v Emperor* AIR 1933 All 676, p 678, 35 Cr LJ 218, 146 IC 900, (1933) All LJ 777 .

97 *Crown v Umar Singh* (1869) PR No 20 ; *Bunsi v Emperor* (1882) PR No 9 .

1 *Crown v Jita* (1873) PR No 26 ; *Emperor v Jamdad* (1887) PR No 53 .

2 *Nihala*(1877) PR No 4 of 1877; *Khushal*(1877) PR No 13 of 1877.

3 *Ibrahim v Queen-Empress* (1897) 7 PR 1897 (Cr) ; *Abdulla Jan v Emperor* 2 Cr LJ 707, (1905) PR No 37 ; *Queen-Empress v Nga Po Thaing* (1897) PLJR 596 ; *Queen-Empress v Nga Kaing* (1897-1901) 1 UBR 247; Ratiram, 5 CPLR 23; *Dangar Khan v Emperor* AIR 1923 Lah 104, 68 IC 817, 5 Lah LJ 224 .

4 *Queen-Empress v Po Thaing* (1897) PJLB 596 ; *Queen-Empress v Nga Kaing* (1897-1901) 1 UBR 247; *Emperor v Nga Sein Po* AIR 1923 Rang 197, 1 ILR Rang 306, 2 Bur LJ 92, 25 Cr LJ 85, 76 IC 21 .

5 *King-Emperor v Nga Sein Po* AIR 1923 Rang 197, p 198, 1 ILR Rang 306, 2 Bur LJ 92, 25 Cr LJ 85, 76 IC 21 .

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

S. 74.

Limit of solitary confinement.--

In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods; and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

Comments

1. Scope

This section, which deals with the mode of executing a sentence of solitary confinement and not with the legality of such a sentence,[6] has been enacted on medical grounds. Continuous solitary confinement, instead of reforming the prisoner, results in the deterioration rather than improvement of mental faculties. Therefore, it has been decided that it shall be at least regularly intermittent.

Where a prisoner was sentenced to imprisonment for one year and a day, including three months solitary confinement, the Madras High Court reduced the solitary confinement to 84 days.[7] Solitary confinement must never be imposed for the whole period of imprisonment, although not exceeding 14 days.[8]376

6 Fatta (1878) PR No 7.

7 1 Weir 35.

8 *Nyan v Suk Mether* 3 BLRA (Cr) 49 .

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter III Of Punishments/S. 75.

Indian Penal Code (Act XLV of 1860)

Chapter III

Of Punishments

[9][S. 75.

Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.--

Whoever, having been convicted,--

(a) by a court in [10][India], of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, [11][* * *]

[12][(b) * * *]

shall be guilty of any offence punishable under either of those Chapters with like

imprisonment for the like term, shall be subject for every such subsequent offence to [13][imprisonment for life], or to imprisonment of either description for a term which may extend to ten years.]

Comments

1. Object and Principle underlying the Section

The object of the section being to provide for an additional sentence on subsequent conviction, recourse should not be had to the section if the punishment for the offence committed is itself sufficient, and even then the CrPC requires that the prisoner should be first convicted of that offence.[14] The sole object of proving a previous conviction is not to eke out weak evidence against the accused but to help 377the court to determine the measure of punishment.[15] Offenders committing economic offences have a tendency to repeal such offences. More stringent provisions of law are, therefore, required to deal with such offenders. This section is a step towards that direction. According to the social and economic conditions prevailing in the country at the time, when this Code was enacted the offences relating to coins and government stamps and offences against property dealt with in chs 12 or 17 respectively of this Code, were considered to be of a class for which a special provisions of enhanced punishment had been made in this section. Similar provisions have been incorporated in various special acts enacted thereafter to discourage the repetition of particular types of offences by habitual criminals.

Section 75 of the IPC provides enhanced punishment for persons who commit offences against property, coins and government stamps more than once. It thus attempts to deal with the problem of habitual offenders, as, in their case the previous sentence fails in its object of deterring them from committing the crime. The law, as a measure of last resort, concentrates on protecting the society from such offenders by sending them to jail for a longer term than before. Based on this policy of protecting the public, this section enhances the powers of the courts for awarding sentence on the second and subsequent conviction for certain specified category of cases. The principle, underlying this section, therefore, is that, if the previous sentence, borne by the accused, had no effect on him, a more severe sentence should be awarded. But it does not follow, as a rigid and inflexible rule, that in all cases of previous convictions, an enhanced sentence has to be awarded.[16] While the sentences, imposed on criminals should be adequate to the offence, they should not be excessive. The circumstances of each case have to be taken into account in inflicting punishment.[17]

2. Scope

Previous convictions are not relevant except in cases where the application of this section is sought by the prosecution.[18] Ordinarily, the fact of previous convictions is not to be taken into account either in judging the guilt or in fixing the punishment. This section is an exception to this general rule. It empowers the court to inflict a greater measure of punishment for the repetition of the crime.[19] It provides that persons previously convicted of certain offences will be liable to higher punishment than what they otherwise would be. The section only provides for a special maximum sentence. It does not provide for a minimum. It is not necessary in every case that in assessing the punishment, the previous conviction should be taken into consideration.[20] The section only enables a court to pass a sentence commensurate with the nature of the offence on the accused person; it does not empower it to pass a sentence disproportionate to the nature of the actual offence.[21] The proper application 378of this section is to cases where it is intended to pass sentences more severe than those provided in the IPC for the particular offences charged. But that does not involve a complete exclusion from consideration of previous convictions in cases where it is not intended or possible to exceed the limit fixed by the IPC . Proof of a previous conviction in cases not contemplated by the section may be adduced provided the previous conviction is relevant under the Evidence Act. There is no reason why previous conviction should not be used by the court in exercising its discretion in regard to the

quantum of the sentence even in cases where it is not intended or possible to exceed the limits fixed by the IPC .[22]

3. Consideration for Applicability

This section applies in cases of convictions prior to the conviction of the offence for the enhanced punishment of which it is to be invoked.[23] The section does not apply to an accused who commits a second offence after the date of the first offence, but before his conviction for the latter.[24] The section is not to be applied mechanically in a case where the previous convictions for petty offences are 10 years old and the subsequent one is also for a very similar offence. The interval of time that may have since elapsed, the age and character of the accused during this interval and the necessity of enhanced sentence should all be considered.

Section 75 does not state that the accused should have been sentenced with imprisonment of either description for period of three years or upwards; it only lays down that the accused should be convicted for an offence, punishable, under ch 17, with imprisonment of either description for a period of three years or upwards. Thus, it is not necessary that the accused should have been sentenced previously for a term of three years or upwards; the only requirement is that he should be convicted of an offence punishable with imprisonment of either description for a term of three years or upwards.[25]

The previous offence must have been committed since the IPC came into force,[26] and the subsequent offence since the offender's release from prison.[27] The section cannot be applied where the offences were committed at one and the same time.[28] The fact, date, and place of the previous conviction should be entered in the charge.[29]

Section 39 of the Madras Children's Act does not prohibit the taking into account of previous convictions under s 75, IPC .[30]379

Section Not to be Applied to Enhance Heinousness of Petty Offences

The section is not to be applied mechanically to enhance enormously the heinousness of petty offences.[31] To justify enhanced punishment under s 75, the conviction must be of offences punishable under the IPC and committed after it came into force, and as such the section is not retrospective.[32] It does not impose any disqualification on persons with previous convictions. It only makes permissible a sentence which exceeds the normal sentence for an offence. The section applies only when a person is sought to be punished with imprisonment exceeding the maximum imprisonment provided for the offence. So long as the maximum punishment provided for the offence is not to be exceeded there is no need to resort to its provisions, and any reference to them would be irrelevant.[33] Even if there is no limitation against the applicability of the section, still, as a matter of judicial discretion, the court is loathe to take up an old conviction only for the purpose of awarding enhanced sentence.[34] One previous conviction does not reasonably mean that the convict is a habitual criminal, though a subsequent offence, shortly upon release from jail, is certainly a matter which enables the trial court to impose a more severe sentence than would be the case if there has been no other conviction.[35] Although the fact of previous conviction is an element in determining the sentence, regard should be had in assessing the same to the facts of the case, the gravity of the offence and the circumstances in which it was committed, and the mere circumstances that there were previous convictions should not result in the infliction of a sentence which is out of proportion to the merits of the main case.[36]

No Separate Offence is Created

No separate offence is created hereby, the section merely imposes a liability to enhance punishment.[37]

Three Essentials

Three things are necessary to bring an offence within the terms of this section:

(i) The offence must be one under either ch 12 or 17 of this Code.380
(i) The previous conviction must have been for an offence therein punishable with imprisonment for not less than three years.
(iii) The subsequent offence must also be so punishable.[38]

4. Provisions of the Section are only Permissive and not Obligatory

The age and antecedents of the offender, the number of previous convictions earned by him as also the interval during which the same were earned, the nature and gravity of the offence for which the punishment is to be awarded and the circumstances in which the same was committed are some of the factors which need to be taken into consideration while determining the quantum of punishment. Simply because the provisions of s 75 of the IPC are attracted in a particular case, is no ground for inflicting the extreme punishment provided in that section. The provisions of this section are only permissive and not obligatory. They do confer jurisdiction on the courts to inflict enhanced punishment but that jurisdiction is to be exercised in a judicial manner after taking into consideration the circumstances and the factors narrated above.[39]

It may be an excellent thumb rule, but in imposing sentences such a rule cannot be safely followed in the interests of the proper administration of criminal justice. While the sentences imposed on criminals should be adequate to the offence, there is every reason why they should not be excessive. Apart from the injustice to the offender which an excessive sentence entails, such a sentence tends to undermine public confidence in the administration of criminal justice. The circumstances of each case should therefore, be taken into account in inflicting punishment.[40]

5. Requirement of Enhanced Punishment--Limitation of Court

Enhanced punishment' must be taken to mean not merely more and above the sentence, provided for a particular offence, but also a deterrent sentence even within the range of the maximum sentence that the court is competent to impose.[41] It is only when an offender, after having been punished with imprisonment for a crime under ch 12 or 17, again, after his release from prison, commits a crime of a similar description or a crime punishable under the same chapter, he would be liable, under this section, to enhanced punishment on the ground that the sentence already borne has had no effect in preventing a repetition of his crime and has therefore, been insufficient as warning.[42] The previous conviction must be in operation on the date of the subsequent conviction. If the previous conviction is, in the meanwhile, set aside, the accused would not be liable to enhanced sentence because, on the date of the subsequent judgment, it cannot be said that the accused has a previous conviction.[43]

6. 'Having been Convicted'--Conviction must be under Penal Code

This section declares that if any person having been convicted of any offence punishable under certain parts (*viz*, ch 12 or 17) of the IPC, is again guilty of any offence punishable under these parts of the Code, he shall for every such subsequent 381offence be liable to the penalties therein declared. The section then prescribes enhanced punishment for the particular offences committed after a previous conviction for any one of such offences and not merely on a second conviction.[44] The word 'offence' in this section means anything punishable under the IPC or under any special or local law.[45] The section cannot be invoked where the offenders were committed at one and the same time.[46] It is only when an offender, after having been punished with imprisonment for a crime under ch 17, again, after his release from prison, commits a crime of a similar description or a crime punishable under the same chapter, he would be liable under this section to enhanced punishment on the ground that the sentence already borne has had no effect in preventing a repetition of his crime and has been,

therefore, insufficient as a warning. The previous conviction must be in operation on the date of the subsequent conviction. If the previous conviction is in the meantime, set aside the accused would not be liable to an enhanced sentence, because on the date of judgment it cannot be said that the accused has a previous conviction.[47] Where the prisoner's conviction had taken place a very short time before, and where no imprisonment under it has yet been undergone, and no time has been given for reformation, it cannot be said that a prisoner has had any opportunity of showing what the effect of the first sentence would have been upon him, and it would not be just to punish him as though he were an incorrigible offender where no comparatively light punishment could wear from evil causes.[48] An order under s 110 of the CrPC, cannot be correctly described as a conviction and as such it cannot be used in order to bring an offender within the ambit of this section.[49]

7. 'By a Court in India'

The previous conviction must be by a court in India.[50] A conviction in a foreign state cannot be taken into consideration for awarding enhanced sentence under this section.[51] Since a conviction outside India cannot be made the basis of any charge under this section, evidence of these convictions can be admissible only as evidence of bad character and there is no provision of law which compels a magistrate to consider the antecedents of the accused before determining the sentence to be imposed upon him.[52]

Previous Conviction in a Foreign State

Where the accused was previously convicted in a Feudatory State, under a law identical in terms with the IPC, such previous conviction might be taken into account by a magistrate in India when awarding punishment under the IPC . But the sentence passed must not exceed the ordinary limits imposed by the particular section of the IPC under which the accused is convicted, and by s 32 or (new s 29) or s 34 (no 382corresponding section in the CrPC, as the case may be. In such a case, it would be illegal to apply this section or s 4 of the Whipping Act 1864 (now repealed) or s 565 (now s 356) of the CrPC .[53]

8. Conviction by Court-martial

The word 'punishable' used in this section should be read as if it was followed by the words 'by a court administering the Indian Penal Code '. For the purpose of this section, it has been held that previous conviction before a court-martial cannot be taken into consideration with a view to enhancement of punishment under this section, even if the conviction was in respect of an offence falling under ch XII or XVII of the Code.[54]

Previous Conviction under Local Laws

It has been held that a conviction under a local law like the Frontier Crimes Regulation does not come under the purview of this section and its provisions cannot be applied with reference to such a conviction.[55]

Convictions under Other Laws

This section deals only with previous convictions under two specified chapters (chs 12 and 17) of the Code and a conviction under some other law cannot attract its operation.[56]

9. Previous Conviction must be for Offences under Chapter XII or XVII

This section declares that if any person having been convicted of any offence punishable under certain parts, *viz*, ch XII, which deals with offences relating to coin and government stamps (ss 230 - 63A) and ch XVII, which deals with offences against property (ss 378 - 462) of the IPC, shall be guilty of any offence punishable under these parts of the Code, he shall for every such subsequent

offence be liable to the penalties therein declared. The section then prescribes enhanced punishment for particular offences committed after conviction of any one of such offences and not merely on a second conviction.[57] The section is not applicable to offences comprised in other chapters, for instance, s 369,[58] or s 511 .[59] It refers only to offences committed and made punishable, under ch XII or XVII of the Code, with imprisonment for three years or upwards. Penal statutes must be strictly construed and it would not be right 383to include ch XXIII (which deals with attempts to commit offences) within the purview of this section when that section only mentions other chapters of the Code, and not the one relating to attempts.[60] But though this section does not apply to an offence punishable under s 511 of the IPC, the fact that the accused had previous convictions can be taken into account and a much higher sentence imposed than would be proper if there had been no previous conviction.[61] The court can take the previous convictions into consideration when considering the sentence to be imposed under the ordinary provisions of the law even where this section is not applicable.[62]

10. Summary Trial

Trial in a summary way though not illegal, is not an appropriate procedure, when s 75 is to be applied. In *Emperor v Shiv Bux Amro* ,[63] Davis CJ, observed:

> So far as the application of section 260 of the Criminal Procedure Code, is concerned, we are of the opinion that while the circumstances of a case where section 75, Penal Code, can be applied make it desirable that the offence should not be tried in a summary way and that in such cases, if the trial has started in a summary way the provisions of sub-section (2) of section 260Criminal Procedure Code, should be followed, nevertheless we do not think it can be said that a trial in which a charge under section 75, Penal Code, could be framed is necessarily bad in law because the offence is tried summarily. It is, therefore, clear that trial in a summary way is not an appropriate procedure when section 75,Penal Code, is to be applied. Nor, indeed would it appear an appropriate procedure when section 75Penal Code, is not to be applied but previous convictions are to be taken into account in determining what punishment within his ordinary powers a magistrate should impose because of the limited nature of the sentence which may be passed under section 262 of the Criminal Procedure Code .

11. Magistrate's Duties and Powers

It is not obligatory on the magistrate to commit the accused to sessions in all cases governed by s 75 and under all circumstances without any regard to the nature and the gravity of the offence. In fact, s 324 of the CrPC, directs him to send the accused for trial to the chief judicial magistrate or commit him to sessions only if he himself is not competent to try the case. Whenever he feels and is of opinion that he can pass an adequate sentence if the accused is convicted, there is no need to send the accused to the chief judicial magistrate or commit him to session. In such cases the magistrate is duty bound to try the case himself and there is no other option with him.384

The Andhra Pradesh and Madras Criminal Rules of practice require that the magistrate and judges should append to their judgments a list of previous convictions.[64]

Facts about previous convictions have to be mentioned in the charge only when it is intended to punish the accused with imprisonment exceeding the maximum punishment provided for the offence, by invoking the provisions of this section. If the magistrate or sessions judge trying the case does not want to use that provision, *ie*, does not intend to inflict punishment more than the maximum provided for the offence, he is not required to state the particulars of the previous convictions in the charge.[65]In order to support a charge of a previous conviction, there should be on the record a copy of judgment or extract from a judgment or some other documentary evidence of the fact of such previous conviction, as is required by s 91 of the Evidence Act or s 298 of the CrPC . Examination by a magistrate of the accused in respect of such previous conviction is without legal warrant or jurisdiction.

[66] The previous convictions must, for the purpose of this section be proved in accordance with law.[67]

12. Procedure for Enhanced Punishment

The provisions of ss 211(7), 248(3), 236, 324 and 356 of the CrPC should be read as supplementing the law set out in this section.[68] These statutory provisions show that three elements are necessary to prove a previous conviction against an accused:

(i) It must form the subject-matter of a charge.
(ii) It must be proved.
(iii) The enhanced sentence must be within the jurisdiction of the magistrate.

In *Emperor v Dalip Singh* ,[69] Blacker J, observed:

> When it is proposed to charge an accused person with previous convictions under section 75 no evidence on the point should be led before the charge is framed. The accused should not be questioned about his previous convictions when examined under section 342 (new section 313) as clearly that is only for the purpose of enabling him to explain matters appearing in evidence against him at this stage.

> When, however, the learned magistrate considers it fit to prove a charge under section 254 [new section 246(1)] in respect of the substantive offence, he should then have recourse to section 221(7) [new section 211(7)] and in that charge should include the previous convictions. He should then ask the accused to plead to that charge making it clear to him that he is pleading to the previous convictions. He should then ask the accused to plead to that charge making it clear to him that he is pleading to the previous conviction distinctly from the original offence. Then comes section 255A [new section 248(3)] and it seems to us that under section if the accused admits his previous conviction or convictions, they do not have to be proved separately and the magistrate 385can take them into consideration in convicting and sentencing him for the main offence. If, however, the accused does not admit his previous convictions, the magistrate has to proceed to judgment on the substantive charge and if that is a judgment of conviction, he has then to take evidence according to law, *ie,* under section 511 (new section 298) of the Criminal Procedure Code as to the previous convictions and then come to a separate finding upon them, after which he will pass the proper sentence under the substantive section read with section 75,Penal Code.

Section 310 (s 236) CrPC, modifies the procedure in the case of a trial before the court of session in respect of the previous convictions. The sessions judge should include the previous convictions in his charge under this section and get the accused to plead to them, and should then set them out in a tabular form at the end of his judgment.[70] But this procedure has to be followed only where the provisions of this section are brought into action. They are not to be brought into action where the sentence intended to be awarded is within the competence of the court to award under the ordinary provisions of the Code, and in such a case the fact that the previous convictions were not stated in the charge does not render the conviction illegal.[71]

13. Form of Charge

Refer to Code of Criminal Procedure 1973, Sch II Form No 32 (iii), for the form of charge for theft after previous conviction. In all other cases the charges may be in the following form:

> I (name and office of the Magistrate/Judge) do hereby charge you (name of accused person) as follows:

That you, on or about the.....day of....., at.....committed.....and thereby committed an offence punishable under Section..... (or section.....where charge is in the alternative) of the Indian Penal Code and within my cognizance.

And you the said (name of accused) stand further charged that you, before the committing of the said offence, had been convicted on the .....day of.....of an offence punishable under Chapter XII (or Chapter XVII) of the Indian Penal Code with imprisonment for a term of.....years, that is to say, the offence of....., which conviction is still in full force and effect, and that you are thereby liable to enhanced punishment under s 75 of the Indian Penal Code .

And I hereby direct that you be tried by this Court on the said charge.

Particulars of Charge

If a prisoner is to be tried under this section, a separate charge under that section must be framed and recorded.[72] There must be a specific charge under s 75, IPC .[73] In order to prove the previous convictions standing against an accused person for the purpose of this section, it is necessary that the provisions of law as contained in s 298 of the CrPC be observed. Before a charge can be framed there must be some evidence of the previous convictions on the record to justify their inclusion in the charge.[74] It is not correct to say that additional charge under s 75, IPC, should be 386framed after recording conviction of the accused. The additional charge under s 75, IPC, has to be framed with the main charge. What is required is that evidence in proof of previous conviction be had only after a judgment recording conviction is pronounced.[75]

Section 211(7) of the CrPC provides that if it is intended to prove a previous conviction for the purpose of awarding enhanced punishment the fact, date and place of the previous conviction should be stated in the charge.[76] If such a statement is omitted, the court may add it at any time before sentence is passed.[77] The effect of ss 211(7) and 248(3) of the CrPC read together is that the accused is to be charged with the previous convictions at the same time when he is charged with the subsequent offence, and if he is found guilty of that offence, he will be tried on the charge of previous convictions, by reason which he is liable to enhanced punishment.[78] A mere allegation that at the time when the prisoner committed the offence (no offence whatever being mentioned in the charge), he has been previously convicted of offences punishable under the IPC,[79] or that he 'is an old offender', does not satisfy the requirements of this section, as that does not bring home to the accused person the particular offence or class of offences which renders him liable to a more severe sentence than would otherwise be imposed.

A previous conviction which it is intended to prove for the purpose of affecting the punishment should be entered in the charge and the accused should be called on to plead thereto. But where one accused does not plead guilty to the charge the previous convictions must be proved in accordance with law.[80] His mere admission that he had been to jail once is insufficient to show that he pleaded guilty to a previous conviction.[81] It has, however, been held that a mere omission to set out the previous convictions in the charge is no ground for interfering with the sentence unless it has caused a failure of justice.[82] An order under s 356 is not such a punishment as is meant by the words in s 211(7) .[83]

14. Effect of Omission to State Previous Conviction

The Madhya Pradesh High Court has held that a formal charge under s 75, IPC, has to be framed only when the trying magistrate feels that he himself is incompetent to award adequate sentence which goes beyond the maximum sentence awardable under the section. In that event, he has to commit the accused to the court competent to pass the adequate sentence. If, on the other hand the magistrate finds that he himself is competent to pass the adequate sentence and that sentence does not exceed the maximum awardable under the section the recourse to frame a charge under s 75, IPC, is not necessary.[84] Mere omission to set out the previous conviction is not 387sufficient reason for interfering in appeal or revision with the sentence passed unless there has been a failure of justice caused by such omission.[85]

But where the previous conviction did not form part of the charge, the enhanced sentence was set aside and the sessions judge was directed to re-open the trial, with the same set of jurors, on that charge giving the accused an opportunity of making a fresh defence to it.[86]

In *Empress v Rughib Ali* ,[87] the accused was held not prejudiced by the omission as he was then actually undergoing the sentence imposed on the previous conviction.[88]

Sub-section (7) of s 211 of the CrPC, however, provides that if it is intended to prove previous conviction for the purpose of affecting the punishment for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge, and if such statement is omitted, the court may add it at any time before the sentence is passed. The repealed Code of 1898 also contained a similar provision in s 221(7) and as such the case-law under the old Code will still hold good.

15. Sentence on Charge of Previous Conviction not to be Separate

Where previous conviction is proved for the purpose of this section, the prisoner cannot be dealt with under s 31, CrPC, as if he had been convicted of two offences.[89]

16. Charge of Previous Conviction may be Added at any Time before Sentence

The previous conviction, if not stated in the charge, cannot be used for the purpose of enhancing the punishment. If it is omitted, it may be added at any time before the sentence is passed, and not afterwards.[90]

Proof of Previous Convictions

Section 211 (7) of the CrPC lays down that 'the fact, date and place of the previous conviction shall be stated in the charge', but it is not thereby intended that the principles governing the trial of an accused person on a charge under this section should differ from the principles governing the trial of an accused person on a charge under this section should differ from the principles governing the trial of an accused person on any other charge. Rather the contrary is the case. Consequently, before the accused is committed on a charge under this section, there should be on record, before committal, evidence, on which, if unrebutted, he could be convicted. He cannot properly be convicted on a mere conviction slip or a mere record of his previous crimes kept by the authorities on a mere history-sheet as it may be called. Such a conviction slip greatly facilitates proof, but is not proof itself of previous convictions, nor can an accused be convicted on its basis without further proof.[91] A previous conviction may be charged and proved in the ordinary manner in a case in which the magistrate, while not thinking it necessary that increased punishment 388should be imposed, nevertheless desires to obtain information as to the accused's antecedents for the purpose of determining the duration of the sentence.[92] In order to determine the proper sentence, it is necessary for the magistrate to know all the previous convictions of the accused.[93] It is primarily the duty of the prosecutor to see that matters, such as the existence of previous convictions, are brought definitely to the notice of the court at the

proper time.[94] Records of previous conviction should not be put in until the prisoner has been convicted in the case then under trial. They are of use only in determining the amount of punishment to be inflicted, and are no evidence in the case.[95] To warrant a sentence awarding additional punishment under s 75 of the IPC as on a second conviction, the evidence that there was a previous conviction against the accused under the IPC must be clear and precise.[96]Section 298 of the CrPC runs as follows:

> **S. 298 .--Previous conviction or acquittal how proved.--**In any inquiry, trial or other proceeding under this Code a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force,-
>
> (a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order, or
>
> (b) in case of a conviction either by a certificate signed by the officer-in-charge of the jail in which the punishment or any part thereof was undergone or by production of the warrant of commitment under which the punishment was suffered,
>
> together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

The provisions of this section are extremely wide. It provides for modes proof 'in addition to any other mode provided by any law for the time being in force...'. The fact of previous conviction can be proved in the simple way the section provides, or in any other way any other law provides. The identity of the accused can be proved by a comparison by an expert of the thumb-impressions of the accused taken in court and the thumb-impression on the record. But the previous convictions, or the identity of the accused, cannot be proved by the mere production of a conviction slip which is nothing but the criminal record of the convicts kept by the authorities. Where the records of previous conviction have been destroyed they can be proved by secondary evidence under s 65(c), Evidence Act.[97] Previous convictions must be proved strictly and in accordance with law. Unless they are so proved no court can properly take such previous convictions into consideration against an accused person.[98]

Under s 298 of the CrPC a certified copy of the record of the court or of the sentence or order is sufficient; but a *kaifiyat* (note) from the record office is not sufficient to prove a former conviction. There should be sworn testimony to the fact, 389and also to the identification of the prisoner with the person previously convicted.[1] To sum up, the proper way to prove the previous conviction is either: (a) by an extract certified under the hand of the officer in whose custody are the records of the court which convicted; or (b) by a certificate under the hand of the officer in charge of the jail in which the punishment or any part thereof was undergone or else by production of the actual warrant of commitment under which the punishment was suffered. In every case there must be evidence as to the identity of the accused person with the person so convicted.[2]

17. Section 54, Evidence Act does not Bar Proof of Previous Convictions

The imposing of sentence is, within the wide limits allowed by the law, a matter of discretion; it is not a matter of proof. That is, it is a matter within the sphere, not of evidence, but of penology. Section 54, Evidence Act, is a part of the law of evidence, not a part of the penal law. It regulates what is relevant for the purpose of proof at the inquiry or trial, not what is relevant for the purpose of deciding whether a long or a short sentence should be imposed. That section is, therefore, no bar to proof of previous convictions for the purposes of enhanced punishment under s 75 of the IPC .[3]

18. Jurisdiction-- Section 29 of the Code of Criminal Procedure 1973 and Section 75 of the Indian Penal Code 1860

Punishment in Excess of his Powers Cannot be Awarded by the Magistrate

Section 75, IPC, does not authorise a magistrate to pass a sentence in excess of his power under s 29, CrPC .[4] The difference should be noted between a case of previous convictions where under s 75, IPC, enhanced punishment is to be imposed and a case, where previous convictions are only to be taken into account for the purpose of necessary punishment imposed by a magistrate within the limits of the maximum punishment with which the offence is ordinarily punishable.[5]

19. Deserving Cases may be Committed to the Court of Session

Enhanced punishment, within the view of this section is a sentence of more than three years imprisonment or imprisonment for life for offence ordinarily punishable under ch 12 or 17, IPC, with imprisonment of either description for a term of three years or upwards, after previous conviction of an offence similarly punishable. It is obvious that no magistrate under the magisterial powers conferred by s 29, CrPC, can pass a sentence enhanced under this section. But magistrates who pass a severe sentence within their magisterial powers under this section because of a previous conviction, frequently err in citing s 75, IPC, as authority for passing a sentence within their powers under s 29, CrPC .[6] Where an offence appears to be deserving of a 390greater punishment than the magistrate trying it can award, the best course for him to adopt is to commit the accused for trial to the Court of Session.[7]

20. Automatic Enhanced Punishment not Allowed

The imposing of enhanced sentence is, within the wide limits allowed by the law, a matter of discretion.[8] But this section and s 211 of the CrPC, were not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction. The reason for passing a mere severe sentence in the case of a criminal with a previous conviction is primarily to protect society from the predations and offences committed by a habitual rogue, who has shown no signs of repentance. But there are a large number of men who commit offences more than once but do not seek to live by crime. They stand on a different footing from the professional criminal. On the other hand, a man may have few, if any, previous convictions and may yet be a dangerous criminal whose powers of mischief need curtailment by a long sentence. A magistrate or judge should make some inquiry into the repute and antecedent behaviour of men whom he proposes to sentence severely, and regard should be had to their career and to the term that has elapsed between the convictions passed upon them.[9] Although the fact of previous convictions is an element in determining the sentence, essential regard should be had to the facts of the case, the gravity of the offence, and the circumstances in which it was committed, in assessing the punishment, and the mere circumstances that there were previous conviction should not result in the infliction of a sentence that is far out of proportion to the merits of the main case.[10]

21. A mere Conviction not Sufficient for Heavy Punishment

The mere fact that a man has been convicted many times is not in itself sufficient reason for passing a heavy sentence on him for an offence which is trivial in itself.[11] When an accused person has had a certain number of previous convictions against him, it is not in accordance with enlightened ideas of

the administration of criminal justice to sentence him to imprisonment for life for the commission of a subsequent offence, which is trivial. The previous record of the prisoner is of course an element which the court should take into consideration in substantially increasing the punishment for a subsequent offence, but when the subsequent offence is in itself of a trivial nature, this section should not be applied for the purpose of imposing a sentence of imprisonment for life.[12] There is no minimum imprisonment prescribed for a previous convict. A previous convict can be given imprisonment prescribed for a term of one year or less.[13] A sessions judge cannot, under this section or otherwise, by amalgamating a sentence, which he is competent to pass upon a prisoner, with a 391sentence under which such prisoner is already undergoing imprisonment, and commuting the latter sentence, condemn such prisoner to a larger period of imprisonment than he is liable to suffer for the crime of which he has last been convicted.[14]

22. Effect of Section on Compoundable Offences

Where an offence is compoundable, permission under s 320 of the CrPC to compound the offence cannot be refused on the ground that the accused is a previous convict and is liable to enhanced punishment under s 75, IPC . Section 75 is invoked for enhancement of the sentence only at the time when the sentence is to be imposed. Section 75 does not give a different colour to the offence.[15]392

9 Substituted by Act 3 of 1910, s 2, for the original section.

10 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

11 The word 'or' at the end of cl (a) and cl (b) omitted by Act 3 of 1951, s 3 and Schedule.

12 *Ibid*.

13 Substituted by Act 26 of 1955, s 117 and Schedule for 'transportation for life' (wef 1-1-1956).

14 *Sheikh Chamman v Emperor* AIR 1920 Pat 526, 21 Cr LJ 113, 54 IC 623, 1 PLT 11 ; *Sheo Saran Tato v Emperor* 9 ILR Cal 877 .

15 *Queen-Empress v Gulab* (1894) Ratanlal Un Cr C 688, 6 MHCR (App) 2, 1 Weir 36, p 37 .

16 *Public Prosecutor v Palapati Ramakrishnaiah* AIR 1955 Andh Pra 190, 56 Cr LJ 1235 .

17 Re *Abdul Gani Sahib*AIR 1937 Mad 231, 37 Cr LJ 1150 ; Re *Nattayan*(1970) Mad LJ 833 (Cr), (1970) 2 Mad LJ 668; Re *Munuswamy*AIR 1947 Mad 836(1), (1947) 1 Mad LJ 336 .

18 Re *Kattima Bai*1955 NUC 932, (1954) Mad WN 318, (1954) 2 Mad LJ 190.

19 Re *Narayana Panicker*(1968) Cr LJ 410, p 411, (1967) Ker LT 298.

20 *Haramohan Deb Nath v Jaha Baksha Patwari* AIR 1943 Cal 25, p 26, 44 Cr LJ 66, 203 IC 265, 46 Cal WN 846 ; *State of Kerala v Krishna Kutty* (1966) Mad LJ 296, p 297 (Cr), (1965) Ker LJ 841 ; Re *Narayana Panicker*(1967) KLT 298, (1968) Cr LJ 410.

21 *Sheikh Chamman v Emperor* AIR 1920 Pat 526, p 527, 54 IC 623, 1 PLT 11, 21 Cr LJ 113 ; *Tato v Empress* 9 ILR Cal 877 ; Re *Narayana Panicker*(1967) KLT 298, (1968) Cr LJ 410.

22 *Subhan Saheb v Emperor* AIR 1929 Mad 306, p 307, 56 Mad LJ 595, 52 ILR Mad 358, (1929) Mad WN 393, 115 IC 483, 30 Cr LJ 471 ; *Emperor v Ismail Ali Bhai* AIR 1914 Bom 216, 39 ILR Bom 326, 26 IC 995, 16 Bom LR 934 .

23 *Emperor v Chuttal Imambaksh* AIR 1941 Sind 207 .

24 *Sayed Abdul Sayid Imam v Emperor* AIR 1926 Bom 305, 27 Cr LJ 726 ; *R v Sakya Valad Kamiji* (1868) 5 BMC (Cr) 38 .

25 *Paras alias Paras Ram v State of Rajasthan* 1984 Cr LR 262 (Raj) .

26 *R v Hurpaul* 4 WR (Cr) 9 ; *R v Moluck* 3 WR (Cr) 17 ; *R v Kushya* 4 Bom HC (Cr) 11; *Budhun v R* 10 CLR 392 .

27 *R v Sakya* 5 Bom HCR 36 (Cr) ; *R v Megha* 1 ILR All 637 .

28 *Jhoomuck Chamar v Emperor* 6 WR 90 (Cr) .

29 Re *Abbulu* 11 Cr LJ 217, 7 Mad LT 77; *Dungri v Emperor* 12 Cr LJ 233 .

30 *Public Prosecutor v Rajam Ammal* AIR 1942 Mad 674, 43 Cr LJ 924 .

31 *Kasim Ali v Emperor* 7 Cr LJ 293 ; *Jahavahir Singh v Emperor* AIR 1914 Lah 476, 4 PLR 1914, 22 IC 759, 15 Cr LJ 183 ; Re *Shamjee Nashyo*(1878) 1 CLR 481; Re *Guhi Jana* 12 Cal WN 83; *Dayal Ram v Emperor* AIR 1929 Lah 768, 30 Cr LJ 1082 ; *Maulu v Emperor* AIR 1929 Lah 787, 121 IC 419, 11 ILR Lah 115, 31 PLR 217, 31 Cr LJ 264 ; *R v Olvier Tayler* 18 Cr App Rep 143; *Harnam Das* 31 PLR 333; *Ujagar Singh v Emperor* AIR 1933 Lah 147, 145 IC 1002, 34 PLR 903, 34 Cr LJ 1153 .

32 *Queen v Moluck Chand Khalifa* 3 WR 17 ; *Queen v Harpaul* 4 WR 9 ; *Queen v Puban* 5 WR 66 (Cr) ; *R v Kushiya* 4 Bom HCR 11 .

33 *Mahommad v State* (1957) Cr LJ 275, p 276, (1956) All LJ 611 ; *State v TM Picha* AIR 1970 Ker 251 ((252)) ; Re *Nattayan*1970 LW (Cr) 194, (1970) 2 Mad LJ 668.

34 *Nga Lu Gyi v Queen-Empress* (1884) SJLB 291 ; *Isar Singh v Emperor* AIR 1926 Lah 617, 27 Cr LJ 944, 96 IC 400 ; *Alladin* 20 PLR 59; *(Sami) Karuppa Tevan v Emperor* AIR 1929 Mad 841(2), 57 Mad LJ 743, 53 ILR Mad 80 ; *Murido v Emperor* AIR 1930 Sind 58, 31 Cr LJ 763, 125 IC 46 ; *Ishar Singh v Shama Dusudh* AIR 1937 Pat 131, 17 PLT 627, 1936 PWN 561, 167 IC 881, 38 Cr LJ 412 ; *Jumo Idris v Emperor* AIR 1934 Sind 195, 28 Sind LR 199, 153 IC 316 ; *Kunj Lal v Emperor* AIR 1929 Lah 278, 30 PLR 52, 30 Cr LJ 376, 114 IC 719 ; *Khusdil v Emperor* AIR 1927 Lah 647(1), 28 Cr LJ 160, 29 IC 416 .

35 *Sabha Singh v Crown* AIR 1926 Lah 336, p 337 .

36 Re *Munuswamy*AIR 1947 Mad 386(1) .

37 4 Mad HCR App III, 1 Weir 87; *State v TM Picha* AIR 1970 Ker 251, (1970) Cr LJ 1498 .

38 1 Weir 38; *Chandaria v Emperor* 12 Cr LJ 439 .

39 *Daulat Singh v State of Himachal Pradesh* (1981) Cr LJ 1347 (HP), (1981) Cr LT 147 (HP) ; Re *Munuswamy*AIR 1947 Mad 386(1) .

40 Re *Abdul Gani Sahib*AIR 1937 Mad 231, 37 Cr LJ 1150, 59 ILR Mad 995, 165 IC 387, 1936 Mad WN 985 (FB) ; followed in *Public Prosecutor, Andhra Pradesh v Palapati Rama Krishnaiah* AIR 1955 Andh Pra 190 ; Re *Munuswamy*AIR 1947 Mad 386(1) .

41 Re *Nattayam*(1970) LW (Cr) 194, (1970) Mad LJ 833 (Cr).

42 *Queen v Pubon* 6 WR (Cr) 66, p 67 .

43 *Dilip Kumar Sharma v State of Madhya Pradesh* (1975) Cr LR 624 (SC), AIR 1976 SC 133 .

44 *Empress of India v Magha* 1 ILR All 637 ; *Sayad Abdul Sayad Iman v Emperor* AIR 1926 Bom 305, 27 Cr LJ 726, 95 IC 54, 28 Bom LR 484 ; *R v Sakya Vala Kanji* (1868) 5 BHC (Cr) 36 ; *Emperor v Chuttal Imambaksh* AIR 1941 Sind 207, 43 Cr LJ 122, 197 IC 135, (1941) ILR Ker 450 .

45 *Aman*(1875) 1 Weir 39.

46 *Jhoomuck Chamar v Emperor* 6 WR (Cr) 90 .

47 *Dilip Kumar Sharma v State of Madhya Pradesh* (1975) Cr LR 624 (SC), AIR 1976 SC 133 .

48 *Queen v Puban* 6 WR 66, p 67 .

49 *Jumo Idris v Emperor* AIR 1934 Sind 195, p 196 ; *Po So v Emperor* AIR 1918 LB 121 .

50 *Crown Prosecutor v Muthuswamy* AIR 1935 Mad 198, 36 Cr LJ 793, 58 ILR Mad 707, 155 IC 438, 68 Mad LJ 176, 41 Mad LW 184, (1934) Mad WN 1355 ; *Emperor v TBAV John* AIR 1933 Pesh 6, 141 IC 445 .

51 *Bahawal v Emperor* 14 Cr LJ 527, 20 IC 1007 .

52 *Crown Prosecutor v Muthuswamy* AIR 1935 Mad 198 .

53 *Ghasia Teli v Emperor* 1 Nag LR 137 ; *Empress v Lal Singh* 7 CPBR 24 ; *Empress v Methia* 4 PR 1881 .

54 *Emperor v (Private) TBAW Johnson* AIR 1933 Pesh 6, p 9 .

55 *King-Emperor v Khan Mahommad* 1 Cr LJ 1061 .

56 *Emperor v Chottan Hashmat Ali* AIR 1935 Bom 188, p 189, 37 Bom LR 182, 59 ILR Bom 514, 36 Cr LJ 1376, 158 IC 378 ; *Queen v Muluck Chand Khalifa* 3 WR 17 ; *Queen v Harpaul* 4 WR 9 ; *Emperor v (Private) TBAW Johnson* AIR 1933 Pesh 6 ;

Contra*Mazar Attamahommad v Emperor* AIR 1917 Sind 17, 42 IC 141, 11 Sind LR 46, 18 Cr LJ 909 .

57 *Empress of India v Megha* 1 ILR All 637 ; *Sayad Abdul v Emperor* AIR 1926 Bom 305, 27 Cr LJ 726 ; *Paras alias Paras Ram v State of Rajasthan* 1984 Cr LR 262 (Raj) .

58 *Fathu alias Badra v Crown* AIR 1923 Lah 286(1), 75 IC 368, 6 Lah LJ 110, 29 Cr LJ 944 .

59 *Brij Behari Lal v Emperor* AIR 1926 All 44, 23 All LJ 926, 25 Cr LJ 1204, 88 IC 724 ; *King-Emperor v Banne* AIR 1921 Oudh 156 ((1)), 22 Cr LJ 750, 64 IC 142 ; *Queen-Empress v Bharosa* 17 ILR All 123 ; Re *Duraiswamy Mudali*AIR 1942 Mad 521, 55 Mad LW 297, (1942) 1 Mad LJ 591, (1942) Mad WN 376, (1942) M Cr C 98 ; *Emperor v Yasin* AIR 1943 Sind 172, 210 IC 115 ; *Emperor v Ramzan Ghulam Hyder* AIR 1939 Sind 207, 188 IC 602, 40 Cr LJ 816, (1939) ILR Ker 676 ; *Emperor v Kashia Antoo* 10 Bom LR 26, 7 Cr LJ 32 ; *Mahommad Hasim v Emperor* 29 Cr LJ 4 ; *Cheddi v Emperor* AIR 1942 All 337, 43 Cr LJ 858 ; Re *Tamalampudi Veeranna*AIR 1942 Mad 440, 43 Cr LJ 715, 200 IC 740, (1942) Mad WN 297, 55 LW 229, (1942) 1 Mad LJ 455 .

60 *Queen v Daru Haree* 21 WR 35 ; *Queen-Empress v Sricharan Bansi* 14 ILR Cal 357 ; *Empress v Nama Rahim* 5 ILR Bom 140 ; *Queen-Empress v Ajudhia* 17 ILR All 120, (1895) 15 All WN 21 ; *Empress of India v Ram Dayal* 3 ILR All 773 ; *Jhamman Lal v Emperor* 5 Cr LJ 85, 12 PLR 1907, 15 PWR 1907 ; *Emperor v Kashiya Antoo* 7 Cr LJ 32, 10 Bom LR 26 ; *King-Emperor v Banar* AIR 1921 Oudh 156(1) ; *Harnam* 29 Cr LJ 4, 106 IC 340; *Brij Behari Lal v Emperor* AIR 1926 All 44 ; *Chhedi v Emperor* AIR 1942 All 337, 43 Cr LJ 858, 202 IC 569, (1942) All LJ 324 ; *Nandan v Emperor* AIR 1933 Lah 433(1), 34 Cr LJ 1181, 146 IC 20 ; Re *Tamalampudi Veeranna*AIR 1942 Mad 440 ; *Chandria v Emperor* 12 Cr LJ 439, 11 IC 623 .

61 Re *Duraiswamy Mudali*AIR 1942 Mad 521, 55 LW 297, (1942) Mad LJ 591, (1942) Mad WN 376, (1942) Mad LJ 98 .

62 *Emperor v Yasin* AIR 1943 Sind 172, 173 ; *Emperor v Ramzan Ghulam Hyder* AIR 1939 Sind 207, 40 Cr LJ 816, 183 IC 602, (1939) ILR Kant 676 ; *Emperor v Kashia Antoo* 10 Bom LR 26, 7 Cr LJ 32 ; *Emperor v Shivbux Amro* AIR 1941 Sind 107, (1941) ILR Kant 305, 194 IC 819, 42 Cr LJ 627 .

63 *Emperor v Shiv Bux Amro* AIR 1941 Sind 107, 108, (1941) ILR Kant 305, 194 IC 819, 42 Cr LJ 627 .

64 Re *Pasupuleti Venkata Subbayya*AIR 1943 Mad 418, (1956) ILR Ker 10, (1943) Mad WN 126, (1943) 1 Mad LJ 192, 207 IC 238, 44 Cr LJ 585 ; *Public Prosecutor, Andhra Pradesh v Palapati Rama Krishnaiah* AIR 1955 Andh Pra 190, (1956) Cr LJ 1235 .

65 *Mahommad v State* (1957) Cr LJ 275, p 276, (1956) All LJ 611 .

66 *Yasin v King-Emperor* 28 ILR Cal 689, 5 CWN 670 ; *Basanta Kumar Ghattack v Queen-Empress* 26 ILR Cal 49 ; *Sardar Ahmad v Emperor* AIR 1934 Lah 693, 35 PLR 697, [1934] AC 1008 ; *State v Govinddas* (1957) Cr LJ 448 .

67 *State v Govinddas* (1957) Cr LJ 448 .

68 For details read the commentary on these provisions in *Sohoni's Code of Criminal Procedure*.

69 *Emperor v Dalip Singh* AIR 1944 Lah 25, p 26, 45 Cr LJ 369, 211 IC 283, 25 PLR 414, (1943) ILR Lah 477 (FB) .

70 Re *Pasupuuleti Venkata Subbayya*AIR 1943 Mad 418, 419, 56 LW 107, 1943 Mad WN 126, (1943) 1 Mad LJ 192, 207 IC 238, 44 Cr LJ 585 .

71 *Abdul Karim v Emperor* AIR 1933 Nag 315, 316, 146 IC 15, 29 Nag LR 309, 34 Cr LJ 1166, (1933) Cr C 1313 ; *Mohammadi v State* (1957) Cr LJ 275 .

72 *Empress v Doraisami* 9 ILR Mad 284 .

73 Re *Kanya*AIR 1960 AP 490, p 491, (1960) Cr LJ 1302 .

74 *Said Ali v Emperor* 35 Cr LJ 1387, p 1388, 151 Cr LJ 749 .

75 *Khanmamad v State* AIR 1953 Kutch 1 .

76 Y11 Cr LJ 217, 7 Mad LT 77, 5 IC 743; *Empress v Haider* 1883 All WN 32 ; *Pokar Churamal v Emperor* AIR 1941 Sind 173 .

77 Code of Criminal Procedure 1973, s 221(7) .

78 *State of Bombay v Govind Masu* AIR 1951 Bom 332 .

79 *Queen v Sheikh Fakir* 21 WR 39 .

80 *State of Uttar Pradesh v Asha* (1971) All Cr R 25 ; *State v Govinddas* (1957) Cr LJ 448, (1956) MBLJ 434 .

81 *King-Emperor v Govind* 4 Bom LR 177 ; *State of Bombay v Govind Masu* AIR 1951 Bom 332 .

82 Re *Abbulu* 11 Cr LJ 217(1).

83 *Emperor v Jhagroo* 14 Cr LJ 390 .

84 *Prakash v State of Madhya Pradesh* (1983) Jab LJ 448 (MP) .

85 Re *Abbulu* 11 Cr LJ 217.

86 *Queen v Esan Chunder Dey* 21 WR 40 .

87 *Empress v Rughib Ali* 1881 All WN 32 .

88 *Ismail Alibhai v Emperor* 39 ILR Bom 326 ; Re *Subramanian* 17 Cr LJ 288; *Khanmamad v State* AIR 1953 Kutch 1 .

89 *Queen-Empress v Khalak* 11 ILR All 393 .

90 *Queen v Rajcoomar Bose* 19 WR 41 .

91 *Pokar Chuharmal v Emperor* AIR 1941 Sind 173 .

92 High Court Proceedings, 3 February 1874, 2 Weir 265.

93 Re *Duraiswamy Madali*AIR 1942 Mad 521, 44 Cr LJ 501 .

94 *Emperor v Prem* AIR 1929 All 290, 30 Cr LJ 529, 115 IC 868, 1929 All LJ 39 .

95 *Queen v Jehan Mullick* 5 WR 67, p 68 ; *Queen v Shiboo Mundle* 3 WR 38 ; *Kishto Behari Day* 21 CLR 555; *Behim Behari* 13 CLR 110.

96 *Queen v Naimuddi Sheikh alias Abbas Sheikh* 14 WR 7 ; *Emperor v Abdul Malik* AIR 1929 Mad 744, 52 ILR Mad 795, 30 Mad LW 180, 57 Mad LJ 470, 121 IC 76, 2 MCR 201 .

97 *Pokarmal Chuharmal v Emperor* AIR 1941 Sind 173, p 174 .

98 *Emperor v Sheikh Abdul* AIR 1916 Cal 344, p 345, 17 Cr LJ 185, 20 CWN 725, 43 ILR Cal 1128, 33 IC 825 .

1 *Queen v Sheikh Ramzan* 15 WR 53 .

2 *Feroze Khan v Emperor* AIR 1928 Lah 107, 28 Cr LJ 961, 105 IC 673, 26 PLR 843 .

3 *Ismail Alibhai v Emperor* AIR 1914 Bom 216 ; *Subhan Sahib v Emperor* AIR 1929 Mad 306 ; *Emperor v Nga Ba Shein* AIR 1928 Rang 200, 29 Cr LJ 809 (FB) .

4 *Ratanlal and Dhirajlal's the Indian Penal Code*, p 638; *Queen-Empress v Nga Tum Tha* (1893-1900) LBR 78.

5 *Pokar Chunharmal v Emperor* AIR 1941 Sind 173, p 176 ; *King-Emperor v Govind Sukharam* 4 Bom LR 117 .

6 *Emperor v David Narsu* 1 Bom LR 548 .

7 *Queen-Empress v Khalak* 11 ILR All 393, p 394 .

8 *Ismail Alibhai v Emperor* AIR 1914 Bom 216, 39 ILR Bom 326, 26 IC 995, 16 Cr LJ 83, 16 Bom LR 934 .

9 *Po Nyein v Emperor* AIR 1918 LB 60, p 61, 145 IC 847, (1918) 19 Cr LJ 655 .

10 Re *Munuswamy*AIR 1947 Mad 386(1), (1947) 1 Mad LJ 336, 60 Mad LW 333, 1947 Mad WN 609, (1948) ILR Mad 359 .

11 *R v Olivier Taylor* 18 Cr App Rep 143; *Maulu v Emperor* AIR 1929 Lah 787, 121 IC 419, (1929) ILR 11 Lah 115, 31 PLR 217, 31 Cr LJ 264 ; *Harnam Das v Emperor* AIR 1930 Pat 100(1), 31 PLR 333 ; *Nga Po Hnyin v Emperor* 12 Cr LJ 243(2), 10 IC 772, 4; *Ujagar Singh v Emperor* AIR 1933 Lah 147, 1933 Cr C 269, 145 IC 1002 34 Cr LJ 1153 ; *Jawahir Singh v Emperor* AIR Cr C 269 476, 4 PLR 1914.

12 *Daya Ram v Emperor* AIR WR 1914 (Cr), 15 Cr LJ 183.

13 *Mohammadi v State* 1957 Cr 30 PLR 530, 30 Cr LJ 1082.

14 *R v Sakya* 5 Bom HCR 36 .

15 *Mohmmadi v State* (1957) Cr LJ 275, p 276 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

Comments

1. Topical Introduction

The chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations. Some limitations relate only to a single provision, or to a very small class of provision. Every such exception evidently ought to be appended to the rule which it is intended to modify. But there are other exceptions which are common to all the penal clauses of the Code, or to a great variety of clauses dispersed over many chapters. Such are the exceptions in favour of infants, lunatics, idiots, persons under the influence of delirium, the exceptions in favour of acts done by the direction of the law, of acts done in the exercise of the right of self-defense, of acts done by the consent of the party harmed by them. It would obviously be inconvenient to repeat these exceptions several times in every page. We have, therefore, placed them in a separate chapter, and we have provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision, shall be construed subject to the provisions contained in that chapter.[1]393

2. General Exceptions are Applicable to Special or Local Law

The 'General Exceptions' set out in this chapter apply to every offence, penal provision, and every illustration thereof contained in the Code.[2] The General Exceptions are applicable not only to offences under the Code, but also to offences under special or local laws.[3]

3. Two Parts of Substantive Criminal Law

The substantive code of criminal law, as distinguished from the adjective Code, or CrPC, is divided into two important parts, (i) the law relating to the definition of crimes, and (ii) the law regarding criminal responsibility. The second body of law is indeed the real foundation of the substantive Code, and its maxim is *actus non facit reum nisi mens sit rea*, *i.e.*, an act is not criminal unless the mind too is criminal.[4] In other words, in all crimes there is an outward physical element, and an inward mental element, which must be criminal and co-operate with the first.[5] This general rule is sometimes expressly displaced by statute when creating particular offences.[6] Thus, a mere criminal intention never amounts to an offence, with the possible exception of conspiracy, under Explanation to s 121A, IPC . For example, the mere possession of salt water with the intention of manufacturing salt is not an offence under the Salt Act.[7] A mere intention to dedicate a daughter to a goddess, and therefore to a life of prostitution, does not constitute an offence.[8]Moreover, the physical act involved must form a part of the offence itself and not merely an act of preparation.

Mere intention not followed by any act cannot constitute an offence, and an indirect preparation, which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence, or attempt of abetment of the same.[9]

4. Chapter IV Deals with Mental Element in Crimes

In every 'exception', the physical element in the *prima facie* crime, is present and the chapter deals with the general mental conditions of criminal responsibility by enumerating the circumstances under which either the mental element is for various reasons wanting, or, if present, is not criminal, the result being that some acts which *prima facie* appear to be crimes are not crimes. Some examination of the grounds for these important exceptions will now be made, and it will be seen that what at first appears as a heterogeneous class of exemptions are in reality founded on the application of principles which, once understood, will reveal clearly the rationale of the law comprised in this chapter.

5. Events of More Injurious Character and Connected with Human Agency become Subject of Criminal Investigation

Events of a more or less injurious character, which are of everyday occurrence in all communities, are either the consequences of human agency or not. If they are394 connected with human agency, then it is the duty of the state to enquire into them, directly or indirectly, should the event be one of very limited consequences, the state indirectly interferes by allowing the sufferer to apply for compensation from the author of the injury, and such is the rule in the case of civil injuries. Should the consequences of the event be more far-reaching, then the state will, as explained in the introduction, interfere directly, proceeding against the person in question *i.e.*, the event becomes the subject of criminal investigation.

Human Agency not Physical Compulsion

To constitute human agency there must be conduct, positive or negative; a voluntary act or omission on the part of some human being. Thus, if one person's body is used by another as a means of inflicting an injury on a third person, the second person is the agent and not the first. It has been thought worthwhile to say that if *A,* by pushing *B* against *C*, pushes *C* over a precipice, *A* and not *B* is guilty of pushing *C* over a precipice.[10]

The victim of physical compulsion can never be the agent of the resulting consequence.

Human Agency not Pure Accident or Instinctive Acts

Pure accident does not constitute voluntary conduct and human agency. There are two species of accidents, *viz*, pure accident, *i.e.*, when the act itself is accidental, being purely involuntary, and accidental consequences, *i.e.*, the involuntary consequences of a voluntary act. 'A man who stumbles forward to save himself from falling acts mechanically, and cannot be called a voluntary agent in doing so',[11]*e.g. A* and *B* are on the brink of a precipice. *A* slips and clutches at *B* to save himself from falling. *A* saves himself, but *B* falls over the precipice and is killed, *A's* act is not voluntary but instinctive, and *A* is not criminally responsible for *B's*death. The other species of accident is, of course, much more common, as it may arise as a consequence of any act. Accident in this sense really means 'accidental consequences'. In this kind of accident, unlike pure accident, the act itself is voluntary; it is of the consequences that the agent is unconscious when he acts, and for which he is, therefore, held blameless.[12]

The Problem for Solution

Thus, an event occurs in connection with the conduct of an individual, and of sufficiently injurious character to call for the direct intervention of the state. On enquiry the individual in question is found to be *A*. The problem then is whether *A* is liable for event or not. The answer depends in the first place upon whether the event was a consequence of *A*'s conduct or not.

6. First Step--Was the Event the Consequence of Given Conduct

In order that a given event should be a consequence of a given conduct, it is necessary that the first should be connected with the second in some appreciable degree, though in what degree is uncertain,

being dependent upon the circumstances395 of each case. But the connection must, at any rate, be direct and distinct, and it must not be too remote. Thus, *A* repairs a gun with lead instead of proper material, in a dangerous manner. Being fired in an ordinary way, it explodes and kills *B*.[13]*A* substitutes poison for medicine, which is subsequently innocently given to *B* by *C*. *B* dies of poisoning.[14] In both these cases the death of *B* is a consequence of *A*'s conduct, and *A* has, therefore, killed *B*. On the other hand, where *A* carries on the manufacture of fireworks in a house unlicensed for the purpose, and a rocket explodes and sets fire to the next house whereby *B* is killed,[15] or where *A* and *B*, road trustees under an Act of Parliament, neglect to procure the execution of necessary repairs to a road, and *C* passing along is killed,[16] in neither case, although the death of *B* is connected with *A's* conduct in the first case and the death of *C* is connected with *A* and *B's* conduct in the second case, can the death be said to be in consequence of his or their conduct, respectively, the connection being too remote. A practical test of whether an event is a consequence of given conduct is to be found in the answer to the question 'was it likely to happen'.[17]

7. Second Step--Can the Conduct be Justified or Excused

When it is shown that for the injurious event in question in consequence of *A's* conduct, he is *prima facie* liable for it, and his conduct, plus its more immediate consequences from his offence, it does not, however, necessarily follow that he is really liable, for his *prima facie* liability may be rebutted, and he may be freed from all blame, for certain special reasons. These reasons are comprised under the heads of justification or excuse.

(a) Where *A* is bound by law to act as he did (s 76).
(b) Where *A* is a judge acting judicially (s 77).
(c) Where *A* acted under a judgment or order of a court of justice (s 78).
(d) Where *A* is justified by law in acting as he did (s 79).
(e) Where *A* through a *bona fide* mistake believes his conduct to be justified under point nos (a), (b), (c) or (d) (ss 76 - 79).
(f) Choice of evils--Where *A* acts as he does in order to avoid other harm to person or property (s 81).
(g) Where the harm (other than death or grievous hurt) was inflicted by *A* with the consent of the sufferer (ss 87 - 92).
(h) Where the harm was caused by a communication made in good faith by *A* for the benefit of the sufferer (s 93).
(i) Where the harm was so slight that nobody of ordinary sense or temper would complain of it (s 95).
(j) Where an act is done in private defence of person or property (s 96 - 106).
(k) Where *A* acts under compulsion by threats (s 94).
(l) Where *A,* owing to insanity or intoxication, is incapable of knowing that his act is wrong or illegal (ss 84 - 86).396

Ground of Non-liability is Absence of *Mens Rea*

The plea of justification or excuse forms the first application of the doctrine of the maxim quoted above, and it amounts to this, that, though an injurious event is the consequence of an individual's conduct, yet that conduct is not criminal because the mind was innocent. Employing the wording of the maxim, the plea of innocence may be thus put. '*Actus*' and '*mens*' did combine, but the '*mens*' was not '*rea*', and therefore the '*actus*' was not '*reum*'.

8. Third Step--Was the Accused Unconscious at the Time

An injurious event having been shown to be a consequence of *A*'s conduct, and *A* being unable to

rebut his *prima facie* liability on the plea of either justification or excuse, his innocence may still be established on the ground of 'unconsciousness'.

9. Ground of Non-liability--Mental Element Wanting no Mens, Therefore no *Mens Rea*

In 'unconsciousness', the mental element in *A's* conduct is wholly wanting, and therefore his conduct, according to the doctrine of the maxim, cannot be criminal, *i.e.*, there being no *mens* in the case, there obviously can be no *mens rea*, and hence there can be no crime. This defence in popular language, amounts to plea that '*A* did not know what he was doing', in other words, that his conduct was involuntary, *i.e.*, that he neither intended the effect that was produced by what he did, nor did he know, nor had he reason to believe that it was likely (s 39).

10. Unconsciousness is Actual or Virtual

The unconsciousness in involuntary conduct may exist in respect to the act itself or to its consequences. In the first case, the agent is unconscious of what he is doing; in the second case, he is aware of what he is doing, but is unaware of the effect which will be caused thereby. The first obviously includes the second, which may exist, however apart from the first. The first is actual unconsciousness, the second is virtual.

Unconsciousness, actual or virtual, exists in the following conditions: Sleep and somnambulism, infancy and childhood, accident (accidental consequences), insanity and intoxication.

11. Sleep and Somnambulism

The IPC nowhere refers to crimes committed by a person in his sleep, or in walking in his sleep. The Law of England is similarly silent on this matter, but it cannot be doubted that on principle, the *prima facie* criminality of an act committed by a person in a state of somnambulism could be successfully rebutted on the ground of unconsciousness. Sir JF Stephen states that he 'does not know that it has ever been suggested that a person who in his sleep set fire to a house or caused the death of another would be guilty of arson or murder'. Of course the practical danger in such a case is the case with which sleep may be feigned.[18]

12. Infancy and Childhood (Sections 82 - 83)

In the case of infants and very young children, many of their movements are actually unconscious, like those of a person asleep. This actual unconsciousness of infancy is397 presumed law in the case of children up to seven years of age, who are treated as being virtually unconscious of their conducts, *e.g.*, a child who has never seen or heard of a gun before cannot be said to 'know what he is doing' (consciousness) when he pulls the trigger. This presumption is conclusive in the eye of the law, and consequently the non-liability of children under seven is absolute.[19]

However, in the case of children over seven but under 12 years of age, under the IPC this presumption not only ceases, but, following the general rule[20] becomes a contrary one, consciousness, and maturity of understanding being presumed; but nevertheless unconsciousness and immaturity of understanding if established is a ground of exemption in such cases under s 83 .

13. Accident or Accidental Consequences (Section 80)

Accident in the usual sense of the term has already been distinguished from pure accident, or an accidental act.

In the illustration to s 80, *A* voluntarily struck *B* with the hatchet in the cause of his work. There was

nothing accidental about his act. But he did not intend to hurt any one thereby, and unless he was working incautiously, he was not likely, to his knowledge in ordinary belief, to injure *B*. Thus, the effect or consequences of *A*'s voluntary act were not voluntarily caused by him, as he did not know of their probability.

14. Insanity or Unsoundness of Mind (Section 84)

Insanity is a ground of exemption if it causes an incapacity of 'knowing the nature of the act'. An 'act in its strict sense denotes a bodily movement consequent upon determination of the will', and in its wider and popular sense, as used in the Code, such a movement coupled with the more immediate consequences. A person by reasons of mental disease may be so insane as to be unaware of what he is actually doing ('act', in strict sense) or though aware of what he is doing, unaware of the consequences thereof. In either case he is ignorant of the 'nature of the act'.

Illustrations

(i) *A* kills *B* under an insane delusion that he is breaking a jar.[21]
(ii) *A* sets fire to valuable ricks of straw belonging to *B* in order to enjoy the blaze.[22]

In the first illustration, *A* is unaware of the act in its strict sense, *viz*, that he is killing a man; in the second he is unaware of the consequence, *viz*, the pecuniary loss to *B*.

15. Intoxication (Sections 85 - 86)

Whilst voluntary intoxication (Intoxication resulting from a man's voluntary act in drinking alcohol or partaking of poisonous drugs) is no ground of exemption from an act committed under its influence (s 85), though it may alter the nature of the offence committed thereby (s 86), involuntary intoxication and disease caused by voluntary398 intoxication constitute temporary insanity and are subject to the same rules as that disease (s 85).

Illustrations

(i) *A* under the influence of a drug fraudulently administered to him (involuntary intoxication) shoots *B* dead, not knowing what he does. *A*'s act is not a crime.[23]
(ii) *A* in a fit of *delirium tremens* shoots *B* dead, thinking him to be a python about to attack him. *A*'s act is not a crime.[24]

16. Analysis

The above statement of the grounds upon which the law holds certain classes of persons or persons under certain circumstances exempted from criminal liability, may be thus briefly stated.

Given an event connected with human agency, and sufficiently injurious to be the subject of criminal investigation.

(i) On finding who is the agent concerned (say *A*), prove that the connection between the given event and the conduct of *A* is sufficient to render the event a consequence of *A*'s conduct.

A is *prima facie* liable for the event, and his conduct plus its consequences form his offence.

(ii) *Mens* but not *rea*. This *prima facie* liability can be removed by showing that the mental element (*mens*) in the alleged offence was not criminal (*mens rea*) and that therefore there was no offence.

This is the plea of justification or excuse.

(a) Acts of a person bound by law to act as he did (s 76).
(b) Acts of a judge acting judicially (s 77).
(c) Acts done under judgment or order of a court of justice (s 78).
(d) Acts of a person justified by law in acting as he did (s 79).
(e) Acts of a person who through mistake believes his acts to be under (a), (b), (c) or (d) above.
(f) Choice of evils (s 81).
(g) Acts done with consent of injured party (ss 87 - 92).
(h) Communication in good faith (s 93).
(i) Acts causing slight harm (s 95).
(j) Private defence (ss 96 - 106).
(k) Compulsion by threats (s 94).
(l) Incapacity of knowledge arising from insanity (including intoxication) of the wrongfulness or illegality of an act (ss 84 - 86).

(iii) No *mens.* Where the *prima facie* liability cannot be removed on the ground that the mental element in the conduct was not criminal, it may be rebutted on proof that there was no mental element involved, and hence no *mens rea*, there being no *mens*; in other words that the act was done in a state of unconsciousness, and was, therefore, involuntary.399

(a) Sleep and somnambulism (implied on principle).
(b) Infancy and childhood (ss 82 - 83).
(c) Accident and accidental consequences (s 80).
(d) Insanity (s 84).
(e) Intoxication (ss 85 - 86).

17. Evidence--Burden of Proof

Under the English law, there is a distinction between the burden on the prosecution and the burden on the accused. As pointed out by Phipson:[25]

> Where the burden of the issue is on the prosecution, the cause must, as we have seen, be proved beyond a reasonable doubt; though a *prima facie* case made by the prosecution and not rebutted by the accused may often amount to this and sufficient for conviction.[26]

When, however, the burden of an issue is upon the accused, he is not, in general, called on to prove it

beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeeds in proving a *prima facie* case, for then the burden is shifted to the prosecution, which has still to discharge its original onus, that never shifts, *i.e.*, that of establishing, on the whole case, guilt beyond a reasonable doubt.[27]

Explaining the position under the English law, Lord Goddard CJ, speaking for the court of criminal appeal in *Regina v Lobell* ,[28] said:

> It must, however, be understood that maintaining the rule that the onus always remains on the prosecution does not mean that the Crown must give evidence-in-chief to rebut a suggestion of self-defense before that issue is raised, or indeed need give any evidence on the subject at all. If an issue relating to self-defense is to be left to the jury there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily no doubt such evidence would be given by the defence. But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him. The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If on a consideration of all the evidence the jury is left in doubt whether the killing or wounding may not have been in self-defense the proper verdict would be not guilty.[29]

An exception is made in the cases of insanity[30] and bigamy. As regards these[31] it has been pointed out that 'A defence of insanity must, however, be proved beyond a reasonable doubt'.[32]

In India, there is no conflict between the general burden, which is always on the prosecution which never shifts and the special burden that rests on the accused to400 make out his defence of insanity.[33] The burden of proof that the mental condition of the accused was, at the crucial point of time such as described by s 84, IPC, lies on the accused who claims the benefit of this exemption.[34] Where plea of insanity is involved it is for the accused to establish that fact though burden of proving offence lies on the prosecution.[35]

18. Burden to Prove the Existence of General Exception is on the Accused

In India, s 105 of the Indian Evidence Act lays down that where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the IPC, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances. Most of the High Courts, however, follow the English decisions cited above. The view taken by them is that although this section casts the burden of proving an exception on the accused, there is a subtle but fundamental distinction between the degree of certainty required in cases where the burden of proving a fact is on the prosecution and those where the burden of proof is on the accused. When the burden of the issue is on the prosecution the case must be proved beyond a reasonable doubt. Where, however, the burden of an issue is on the accused, he is not required to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeeds in proving a *prima facie* case, for then the burden of proving such issue is shifted to the prosecution which has still to discharge its original and major onus that never shifts, *i.e.*, that of establishing, on the whole case, guilt beyond a reasonable doubt. If upon a review of all the evidence the court is left in doubt whether the circumstances bringing the case of the accused within a general exception exists or not, the accused is entitled to acquittal. The test is not whether the accused has proved beyond all reasonable doubt that he comes within the exception but whether a reasonable doubt is thrown on the guilt of the accused.[36]

But as pointed out by Ahmad J, in *Kamal Singh v State* :[37]

> Section 105, Evidence Act, in my opinion, in substance lays down three propositions; firstly, that the

> prosecution case shall be judged on the presumption that no exception existed; secondly, that presumption is rebuttable, and thirdly, that the facts, if any, sufficient to rebut that presumption has to be proved by the defence. That being so, the moment that presumption is rebutted by the defence and the court is brought to a point where it becomes doubtful of the fact or when it cannot positively hold that the prisoner was then not of unsound mind and that he was capable of knowing the nature of the act alleged against him, the onus under section 105, in my opinion, has to be taken as401 discharged: for by reason of the neutralisation of the force of presumption, the prosecution is thrown back to its original position where it has to discharge its onus beyond reasonable doubt.

19. Onus can be Discharged in two Ways

On a review of the entire evidence, if the court entertains a reasonable doubt about the guilt of the accused, he is entitled to an acquittal, on the cardinal principle of criminal justice which has not been affected by the special provisions of s 105 of the Indian Evidence Act .[38] The onus can be discharged in two ways: It can be discharged by affirmatively establishing the plea taken up by an accused person, by eliciting such circumstances which would create a doubt in the mind of the court that the reasonable probability of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself. Where on consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused.[39]

20. Burden of Proving Insanity and Unsoundness of Mind

Refer to notes under s 84 .

21. Motive

Refer to commentary under s 81 .

22. Doctrine of *mens rea*

Refer to commentary under s 81 .

23.*Mens Rea* and Negligence

Refer to commentary under s 81 .

1 Note B, reprint, p 106.

2 *Vide* s 6 .

3 *King v Tustipad Mandal* AIR 1951 Ori 284, p 288 .

4 *Chisholm v Doulton* LR 22 QBD 736 ; *R v Tolson* 23 QBD 168 .

5 Notes to s 39 .

6 Notes to ss 76 and 79 .

7 *R v Dabhai Kabhai* 23 ILR Bom 788 .

8 *R v Baku* 24 ILR Bom 287 .

9 *Ibid*, p 291.

10 SHCLE II, 100; Hale, PC 434.

11 SHCLE II, 101.

12 For 'accidental consequences' refer *post* and s 80 .

13 *R v Carr* 8 C&P 163 .

14 *Donellan*'s case, SHCLE, III, 372 *et seq*.

15 *R v Bennett* Bell Vol l CCI.

16 *R v Pocock* 17 QB, 34; SD art 240 .

17 For consequences refer further to the notes to s 299, vol 3.

18 Maudsley, *Responsibility in Mental Diseases*, pp 250-251.

19 An exception has, however, been expressly created by s 130 of the Railways Act 1890. Refer to synopsis notes under s 82 .

20 Indian Evidence Act 1872, s 105 .

21 SD Art 28 III (1) .

22 *R v Davies* 1 F&F 69 .

23 SD Art 30 III (2) .

24 *Ibid* (3).

25 Phipson *Evidence*, fourteenth edn, p 73.

26 *R v Lovett* 1 Cr App R 111; *R v Schama* 84 LJKB 396 ; *R v Fuschillo* (1940) 2 All ER 489 ; *R v Aves* (1950) 2 All ER 830 .

27 *Mancini v DPP* (1942) AC 1 ; *Woolmington v DPP* (1935) AC 462 ; *R v Stoddart* 25 TLR 612 ; *R v Schamn* 84 LJKB 396 ; *R v Ward* (1915) 3 KB 696 ; *Rex v Curr-Briant* (1943) KB 607 .

28 *Regina v Lobell* (1957) 1 QB 547, p 551 .

29 *HM Advocate v Doharty* (1954) SLT 169, (1954) SCJ 1 ; *Chan Kau v Queen* (1955) AC 206, [1955] All ER 206 .

30 *Chan Kau v Queen* (1955) AC 206 .

31 Phipson, *Evidence*, fourteenth edn, p 62.

32 *R v Jefferson Times*, 20 July 1908, per Ligham J, reversed on other grounds, 1 Cr App R 95; Cf *R v Wilson* 55 LJ 157 ; *Sademan v R* (1936) 2 All ER 1138 (PC), where the burden was stated as not being higher than in civil proceedings; **but see***Attorney-General v Fennell* (No 1), (1940) Ir R 445, 450, where the decision in *Sodeman v R* , which is not binding in England, was severely criticised.

33 *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) 2 Cr LJ 422 (SC) .

34 *State of Madhya Pradesh v Ahmadulla* AIR 1961 SC 998, (1961) 2 Cr LJ 43 (SC) .

35 *Bhikari v State of Uttar Pradesh* AIR 1966 SC 1, (1966) Cr LJ 63 (SC) .

36 *Emperor v U Damapala* AIR 1937 Rang 83, 14 ILR Rang 666, 168 IC 193, 38 Cr LJ 254 (FB) ; *Prabhoo v Emperor* AIR 1941 All 402 (FB), (1941) ILR All 843, 197 IC 525, (1941) All LJ 619, (1941) All WR 320 (FB) (HC), per majority of four against three; *Ambika Singh v State* AIR 1961 All 38 ; *Bala Prasad Dhansukh v State of Madhya Pradesh* AIR 1961 MP 241 ; *Basappa Bhimappa Doddamani v State* AIR 1961 Mys 21, (1961) 1 Cr LJ 120 ; *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) 2 Cr LJ 422 (SC) ; *State of Madhya Pradesh v Ahmadulla* AIR 1961 SC 998, (1961) 2 Cr LJ 43 (SC) ; *Bhikari v State of Uttar Pradesh* AIR 1966 SC 1 ; *Shrikant Anandrao Bhosale v State of Maharashtra* (2002) VIII AD (SC) 500 .

37 *Kamal Singh v State,* AIR 1955 Pat 209, p 213, 56 Cr LJ 825 .

38 *Nitai Naik v State* AIR 1957 Ori 168 .

39 *Babu Lal v State* AIR 1960 All 223, p 225, (1960) Cr LJ 437 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 76.

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

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

Illustrations

(a) *A*, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. *A* has committed no offence.
(b) *A*, an officer of a court of Justice, being ordered by that court to arrest *Y,* and, after due enquiry, believing *Z* to be *Y*, arrests *Z*. *A* has committed no offence.402

Comments

1. Relative Scope of Sections 76 - 79

Sections 76 - 79 are at first sight somewhat confusing, owing to the fact that each section deals with two distinct questions, since in each is included acts done under a bona fide mistake.

The sections provide for eight states of things:

(i) Acts done by a person who is bound by law to do them (s 76).
(ii) Acts done by a person who is justified by law in so doing them (s 79).
(iii) Acts done by a judge acting judicially (s 77).
(iv) Acts done by a person in pursuance of a judgment or order of court (s 78).
(v) Acts done by a person who, owing to a mistake of fact, believes himself bound to do such acts (s 76).
(vi) Acts done by a person who by reason of mistake of fact believes himself to be justified in so doing (s 79).
(vii) Acts done by a judge under a mistake as to his powers (s 77), and by a person in pursuance of the order of a Court which, owing to a mistake, he believes to have jurisdiction in the matter (s 78).
(viii) Acts of a person done in pursuance of an order of a court, which, owing to a mistake, he believes, had jurisdiction to make the order (s 78).

2. Sections 76, 79, 80 and Legislative Intent in General Exceptions

Sections 76 and 79, IPC provide that nothing is an offence if an action is taken by any person, who has taken action believing that he is justified in taking action by law. Section 80 of the IPC provides that nothing is an offence if it is done by accident of misfortune and without any criminal intention or knowledge in doing a lawful act in a lawful manner by lawful actions and with proper care and caution.

Therefore, the general exceptions provided under ch IV of the IPC make it clear that the intention of the legislature was to keep such actions which are provided in the category of general403 exceptions out of the sweep of various offences which are made as punishable under the IPC .[40]

3. Special Importance for Military and Police Acting under Commands

The section is of special importance in regard to the military and police acting under their officers' commands and in respect of private persons assisting the police. This deals with the circumstances which, when proved, make the act, complained of, not an offence.[41]

4. Like Civilians, Soldiers are Subject to Ordinary Law

Members of the armed forces of the state are essentially subject to military law. Is therefore the military law to be applied in their case and can a soldier who is guilty of a *prima facie*crime avoid liability on the ground that he was bound by the military law to act as he did? According to English law:

> A soldier stands in a two-fold relation: the one is his relation towards his fellow-citizens outside the army; the other is his relation towards the members of the army, and especially towards his Military superiors; any man, in short, subject to Military law, has duties and rights as a citizen as well as duties and rights as a soldier.[42]

As the latter, he incurs special obligations, but he is not exempted from the ordinary liabilities of citizenship. Accordingly, the law to be applied in the case of crime committed by soldiers is the ordinary law of the land, a soldier being subject to the same criminal liability as a civilian,[43] and, this being so, obedience to superior orders, *i.e.*, obedience called for and enforced by military law, is of itself no defence to a charge of crime. The position of a soldier both in theory and practice is therefore, a difficult one. 'He may', as it has been well said, 'be liable to be shot by a court martial if he disobeys an order, and hanged by a Judge and Jury if he obeys it'.[44] Nevertheless, it is an incontrovertible principle of English Law that the facts of a person being a soldier and of his acting strictly under orders, does not of itself exempt him from criminal liability for acts which would be crimes if done by a civilian. Thus, *A*, a sentinel, on board a man-of-war when she was laying off, had orders, to keep off boats from coming alongside the ship, and had ammunition for his musket given to him. *B* in a boat persisted, in spite of repeated warnings from *A*, in approaching the ship. *A* fired and killed *B*. It was held that *A* was guilty of murder.[45]

5. Legal Position of a Soldier when Military and Civil Laws Conflict

So long, of course, as military and civil law agree no difficulty can arise from this double status of the soldier. Thus, where, as in illust (a) to s 76, a superior officer gives a command, which is legal in the eye of the ordinary law, the soldier is exempted from all liability. But a command may be given which is not lawful according to civil law. The soldier in question may know it to be illegal, in which case his obligation to obey the command under the military law is no answer to his404 responsibility under the ordinary law. He cannot avoid liability on the ground of obedience to superior orders for an act which a man of ordinary sense must have known to be a crime. On the other hand, he may not know the command to be illegal. In such a case he would be held as justified in obeying the order, if it were one which the soldier might fairly suppose his officer to have good reasons for giving.[46] In other words, he might be exempted from liability on the ground of a *bona fide* mistake of fact.

6. Indemnity under Indian Law-- CrPC, Sections 129 - 32

The employment of military force for the dispersal of unlawful assemblies in India is regulated by the CrPC 1973, ss 129 - 132 .[47]No act purporting to be done by an officer or soldier, sailor or airman under those sections can form the subject of criminal proceedings except with the sanction of the

Central Government. Moreover no executive magistrate or police officer, or of armed forces acting in good faith under those sections 'shall be deemed to have thereby committed an offence'.[48] and 'no person or member of the armed forces doing any act in obedience to any order which he was bound to obey shall be deemed thereby to have committed an offence'.

7. Private Persons Assisting the Police and Magistrate

Under s 37 of the CrPC private persons are bound to assist a magistrate or police officer reasonably demanding their aid, in: (a) making an authorised (i.e., lawful) arrest, or preventing the escape of any person; or (b) in the prevention or suppression of a breach of peace or (c) in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property. A refusal is punishable under s 187 of the IPC, but proof of the unreasonableness of the demand would be a good defence. Acts of a person committed in the course of, and for the purpose of, so aiding or preventing would be justified under s 76 .

Also by s 132(2)(b) of the CrPC, no person doing any act in good faith, in compliance with a requisition under s 129 or s 130 shall be deemed thereby to have committed an offence.

[I] PERSONS ACTING UNDER SECTIONS 76 -79 THROUGH MISTAKE ACTS OF A PERSON UNDER MISTAKE

8. Essentials of Mistake

The primary essentials regarding mistake under the four sections are these:

(i) Mistake is no ground for exemption unless it is bona fide, *i.e.*, 'good faith' is essential under each section.

(ii) In general, *i.e.*, under ss 76 and 79, IPC, the mistake must be one of fact and not of law,[49] and this rule is expressly stated therein. In the particular cases of a judge (s 77, IPC) and of a person bound by an order of court of justice (s 78, IPC) the mistake need not necessarily be a mistake of fact,405 (indeed in such cases it will usually be a mistake of law), and neither section contains a proviso confining mistake to one of fact.

9. Mistake as a Defence under Sections 76 and 79

When Mistake can be Admitted as Defence

The defence of mistake is a special privilege allowed by law to a person accused of crime, the rule nowadays being that where a man, in his course of conduct which resulted in the unlawful harm which is being charged against him, had gone on the belief that the facts of his situation were different from that it has now been established that they really were, then his trial should proceed on the legal fiction that the facts were as he supposed them to be, and not on the true facts. That is to say, the tribunal is to come to its decision on the basis of a pretended set of facts which the prosecution is not allowed to deny. This means that for the purposes of this trial the facts are taken to have been what the accused person mistakenly imagined them to be.[50]

More often, however, the defence of mistake relates to the absence of *mens rea*, that is to say, the mistake negatives the existence of the particular intent, or of that foresight of the consequences which the law requires to render the prisoner guilty. Mistake can be admitted as a defence provided (a) the state of things believed to exist would, if true, have justified the act done;[51] (b) the mistake is

reasonable; and (c) the mistake relates to fact and not to law.

10. Reasonable Mistake

Reasonable mistake means the mistake committed by a reasonable person. If the facts upon which the accused relies are such that they would not have misled an ordinary 'reasonable' man to think what the prisoner alleges they misled him to think, then the court may well refuse to believe that he was misled and will decide that he is telling a lie when he now alleges that he did the act under a mistake.

11. Mistake of Law

Sections 76 and 79 apply to mistakes of fact and not to mistakes of law.[52] Mistake of law ordinarily means mistake as to existence or otherwise of any law on a relevant subject as well as mistake as to what the law is.[53]

12. Presumption that Every one Knows the Law

Sections 77 - 78, IPC provide an exception to the general rule that mistake of law is no ground of defence. Every person of capacity to understand is presumed to know the law.[54]*A,* a foreigner, kills *B* in a duel in England. He believes dueling to be406 lawful in England. *A* is guilty of murder.[55]A certain act is for the first time made an offence by statute. *A* commits the act. He proves that he was at sea at the time the statute was passed, and could not possibly have known of it. This is no bar to conviction.[56] The rule *ignorantia juris non excusat* is really a rule of evidence and the reason for the rule is, in the words of Austin:

> If ignorance of law were admitted as a ground of exemption, the courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable. If ignorance of law were admitted as the ground of exemption, ignorance of law would always be alleged by the party, and the court in every case, would be bound to decide the point.[57]

Hence, there is a presumption *juris et de jure,* a conclusive presumption of law, that everyone knows the law, ignorance of which therefore cannot be pleaded in defence.

In England, the view has unanimously been taken that if the accused is misled into the error of fact on account of an error of law, his mistake shall be treated as a mistake of fact rather than of law.[58] This sort of conclusion appears to be more a matter of policy of criminal jurisprudence rather than of strict logical deduction.[59] There may arise circumstances neutralising the presumption of knowledge of law in every individual. Such circumstances make out an exception to the general rule that ignorance of law is no excuse.[60]

Ignorance of Law

Ignorance of law although no defense *per se*, may be evidence of some mental condition which negatives the guilty knowledge which is essential in some offences *e.g.,* under s 170 .[61] In holding a citizen guilty of any offence, the existence of *mens rea*in him is fundamental. It is only when the mind is at fault, that a man can be held guilty of an offence. It is fundamental, too, that whenever and wherever there is a mistake of fact on which is founded a belief in good faith of justification by law of an act, the requisite state of mind that would make the author of the act guilty is absent. Considered in this aspect, there is hardly any difference between mistake of fact and mistake of law, but it has been the policy of criminal jurisprudence of civilized countries that every individual shall be presumed to know the law and shall be debarred from pleading ignorance of law as an excuse.[62]

13. Mistake as to Criminal and Civil Law are Treated Differently

A mistake as to criminal law only will not give rise to claim of right; an error as to civil law may do so.[63]407

14. *Bona Fide* Mistake of Law Entitles Accused the Lower Sentence

Yet even in those cases in which a bona fide mistake (whether of law or of fact) happens not to be admissible as a defence to the criminal charge it may nonetheless afford a good reason for the infliction of a mitigated or even nominal punishment.[64] Ignorance of the law is ordinarily very much of an excuse, as it leads to a reduction of the sentence though it cannot lead to an acquittal.[65]

15. Mistake of Fact

The question whether the accused believed in good faith on account of a mistake of fact that he was bound by law to do the act, which is alleged to constitute an offence, would arise only if the order or command of the superior officer is not justified or is otherwise unlawful. Where the situation prevailing at the scene of offence was such as to justify the order given by the deputy commissioner of police, to open fire, the accused can seek the protection of that order and plead in defence that they acted in obedience to that order and, therefore, they cannot be held guilty of the offence of which they are charged.[66]

Sometimes persons, intending to do one thing, do, by existential error, something else. Such a mistake may be a ground for defence.[67]

Mistake has a recognised place in civil law and means that parties intending to do one thing have by unintentional error done something else.[68] It may[69] or may not, be due to forgetfulness, ignorance, imperfect information or faulty ratiocination. It may be due to chance, negligence, stupidity or even superstition, but it must not be due to design, pre-arrangement or pre-concert.[70] Thus, where a man assaults and kills a human being believing in good faith that the object of the assault was not a human being at all but a ghost,[71] or a tiger[72] there is a mistake of fact which affords a good defence to a charge under ss 302, 304 or 304A, IPC . Whether a man is or is not a proclaimed offender is a question of fact within the meaning of ss 76 and 79, IPC .[73]

Arrest of a person in the *bona fide* belief that he committed a non-bailable offence, which as a matter of fact had not been committed, is a mistake of fact.[74] But believing an offence to be non-bailable or cognizable, when, in fact, it is bailable or non-cognizable according to law, is not a mistake of fact; it is an erroneous view of the law.[75]408

Where a police commissioner acted under what purported to be a lawful order, but it was subsequently discovered that the order was invalid; it was held that the commissioner was protected by the provisions of ss 76 and 79, as he laboured under a mistake of fact.[76]

A bailiff endorsed a warrant of arrest for service to the process server. The process server made the arrest and returned the warrant to the bailiff without any endorsement on it. The bailiff returned the warrant to him for endorsement, but the process server re-executed the warrant and rearrested the complainant. It was held that the re-arrest was illegal, but the process server would be protected under s 79, as he made a genuine mistake of fact and thought that the process was returned to him for re-execution and not actuated by malice.[77]

Where the object of the Students Federation of India was to wrongfully restrain the Minister and the accused police officials, on the command given by their superiors lathi charged the students, the action of the accused police officials was fully protected by s 76, IPC .[78]

16. Two Essential Conditions for Sections 76 and 79

For a mistake to be a good defence under this section and s 79, two conditions must exist:[79] (a) the mistake must be a mistake of fact, and not a mistake of law; and (b) the mistake must have been committed in 'good faith', as contemplated in s 52 of the IPC .

17. Mixed Question of Law and Fact

An error on a mixed question of law and fact is treated as a mistake of fact.[80]

In civil causes, it would seem that if law and fact are blended as a mixed question, or if one's ignorance of fact is produced by ignorance of law, the whole may be regarded as ignorance of fact, of which the party is at liberty to take advantage. So, in criminal jurisprudence if the guilt or innocence of the prisoner depends on the fact, to be found by the jury, of his having been or not, when he did the act in some precise mental condition, which mental condition is the gist of the offence, the jury, in determining this question of mental condition, may take into consideration his ignorance or misinformation in a matter of law. Thus, to constitute larceny, there must be an intent to steal, which involves the knowledge that the property taken belongs not to the latter. Yet if all the facts concerning the title are known to the accused, and the question is merely one of law whether the property is his or not, still he may show, and the showing will be a defence to him against criminal process, that he honestly believed it his, through a misapprehension of law. A mere pretence of claim set up by one who does not himself believe it to be valid does not prevent the act of taking from being larceny.[81]409

18. Superstitious and Quasi-religious Beliefs

In many cases unusual superstitions and other quasi-religious beliefs have been regarded as examples of mistake, but that defence has been rejected on the ancient doctrine that the mistake must be reasonable. It is hardly necessary to point out that such a doctrine, based purely on an objective test, is out of keeping with the modern principle that the *mens rea* required by the common law is a subjective element.

It would, therefore, be an advantage if cases of strange beliefs[82] could be taken as turning upon the evidence in each instance, so as to settle first whether or not the accused really did hold that belief, and then, if that point be decided in his favour, the case could be approached to see if it comes within the established Macnaughten answer:[83] (a) as to knowledge of what is right or wrong,[84] and (b) insane delusions.[85]

19. 'Good Faith'

Mistake without good faith is no ground of exemption. Where an offence is committed by reason of a mistake of fact in good faith the accused is entitled to the benefit of ss 76 and 79 .[86] To get the protection of these sections, it is sufficient if the accused can show that he, in good faith, believed that an offence was going to be committed: it is immaterial that their suspicion may ultimately prove to be false.[87] 'Nothing is said to be done in good faith which is done or believed without due care and attention'.[88] Hence, if a person has acted without due care and attention, the mistake, under which he acts, will not exonerate him from blame. Mistake is no ground of exemption from criminal liability unless it exists along with good faith, *i.e.*, due care and attention with which the mistaken person has acted. Due care and attention is thus always the test as to whether or not a mistake is a good ground of defence. If they are absent the mistake exists in consequence of willful or negligent conduct.[89] Good faith requires due care and attention,[90] but there can be no general standard of care and attention applicable to all persons and under all circumstances.[91] As pointed out in *Emperor v Abdool Wadood Ahmad* :[92]

> The standard of care and caution must be judged according to the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusion of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal untrained to the habits of reasoning.

The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acts. The law does not expect the410 same standard of care and attention from all persons regardless of the position they occupy,[1] and under all the circumstances.[2] What is due care and attention depends on the position in which a man finds himself and varies in different cases.[3]

20. Conduct must be Lawful under the Supposed State of Things

From the foregoing it is clear that for mistake to be a good defence under either of the ss 76 and 79, two conditions must be fulfilled:[4]

There must be good faith, *i.e.*, due care and attention, and the mistake must be a mistake of fact and not of law. Thus in illust (b) to s 76, *A* makes 'due enquiry' first, (hence he acts in good faith) and thinks *Z* to be *Yi.e.*, he acts under a mistake of fact. So in the illustration to s 79, he thinks *Z* is committing murder, whilst as a fact he was acting in self-defence, but *A* exercised his judgment in the matter in good faith.

But a third condition of non-liability is also necessary, *viz,* that under the supposed state of things the conduct of the accused would have been lawful, for otherwise he could not contend that he believed himself to be 'bound or justified by law' in acting as he did.[5] Thus, in the above illustrations, *A* believed a certain state of facts to exist, under which, if they had existed, he was bound to act or was justified in acting as he did, and therefore he is exempted from liability. If the facts upon which he relies are such that, in the opinion of the court they would not have misled an ordinary 'reasonable' man to think what the prisoner alleges they misled him to think, then the court may well refuse to believe that he was misled and will decide that he is telling a lie when he now alleges that he did act under a mistake.[6]

21. 'Bound by Law'

In a prosecution for defamation in respect of a defamatory statement made by the accused as a witness in a case it was held that s 76 did not apply as the accused person was not bound by law to go into the witness box and make the statement at all.[7]

No instructions from his client can justify an advocate in writing a letter to a magistrate demanding the return of money alleged to have been paid to him as a bribe for the purpose of hushing up the matter and threatening the magistrate, if the demand is not met, with the consequences of his act. In writing the letter the advocate makes himself a party to an attempt to compound an uncompoundable offence, and he cannot set up the alleged instructions of his client in justification of his action. Sections 76 and 79 cannot apply to his case.[8]

Where an overseer, in compliance of the orders of the chief officer of the municipal council, demolished the constructions of the complainant and removed the material thereof to the municipal premises, it was held that the overseer was legally411 bound to obey the orders of the chief officer and, therefore, protected by the provisions of this section.[9]

Acting in strict accordance with the order of a superior is a part of discipline in police force. Where an order to fire was given by the superior officer in charge of the force, it was expected that they would obey it promptly, as was their duty, if the order was not on the face of it illegal. In such circumstances, the police officers acting under him were bound by r 25 of the Police Regulations, to carry out the order. As such, if the accused actually fired leading to the unfortunate death of two persons are fully

protected by the order passed by the superior officer and cannot be deemed to have committed any offence.[10]

But obedience of an unlawful order of a superior officer does not exonerate or excuse the person who commits an offence as a consequence of the order. Even when a soldier obeys the orders of a superior officer it has been held that if the order is obviously improper or illegal, the soldier is not excused even though he may be put in the awkward predicament of choosing whether he will risk being shot by order of a court martial for not obeying the order, or being hanged by the criminal court for murder for obeying it. Obedience to an illegal order can only be used in mitigation of punishment.[11]

22. Wrongs Rendered Crimes by Reason of Some Independent Fact

Under some definition of 'crime', certain conduct does not amount to the crime defined unless some particular independent fact co-exists with it. Thus, in case of the offence of 'abduction'[12] the girl abducted must be under the age of 16 years under the English law.[13] Suppose that *A* takes away *B,* a girl, about whose age he has made a mistake *i.e.*, whom he believes to be 17 years of age. Will this mistake of fact excuse him? The point was fully considered in *R v Prince* .[14] The jury had found that *A* honestly believed on good grounds that *B* was 17 years old, but the court held that the legislature intended persons abducting young girls to act at their peril, and therefore to take the risk of a belief about the girl's age being wrong. The mistake was, therefore, held to be no defence. The same principle was applied in the case for *R v Bishop* .[15] No person may receive into a house two or more lunatics, unless the house is duly licensed as an 'asylum'.[16] The defendant did receive more than two lunatics, in her private house, but she honestly, on reasonable grounds, believed them not to be lunatics. The court held that the legislature intended persons keeping such establishments to receive patients at their peril, and that her mistake of fact was no defence.[17] In the case also of *R v Fischer* [18] it was held, applying the same principle,412 that a person who is not authorised under the Indian Christian Marriage Act 1872, to solemnise a marriage in the absence of a marriage registrar, knowingly solemnises a marriage in the absence of such registrar, is guilty of an offence under s 68 of the Act.[19]If the accused did not know that such an act was forbidden by law, his mistake or ignorance of law cannot avail him.[20] Such mistake cannot be a bona fide one since it is due to his negligence in not satisfying himself as to the provisions of the law on the question.[21]

23. Intention of the Legislature to be Decided by the Court in Each Case

But no rule or rules as to 'mistake' applicable to the case of all offences may be deduced from the case-law discussed earlier, for it is a question for the court to decide in each case whether it was the intention of the legislature that the person doing the forbidden act should do it at his peril, as where there is an absolute prohibition, and knowledge is therefore immaterial[22] or that his ignorance of the independent fact or his honest belief in its non-existence should excuse him.[23] In other words, *mens rea* is an essential ingredient in every offence, but this general rule may be displaced either by the words of the statute creating the offence, or by the subject-matter with which it deals, and both must be considered.[24]

24. Master and Servant

While some statutes impose an absolute prohibition, as a result of which masters are criminally responsible for the acts of their servants in the course of their employment, even though such acts were not authorised by the masters, or even expressly forbidden by him, others leave the question of criminal responsibility of the general rule of *mens rea*.

The question of a master's criminal liability for the acts of his servant, therefore, turns upon what is the true construction to be placed upon the state in question.[25]Speaking generally, the object of an Act cannot be allowed to be defeated by employing a servant to do that which is forbidden to the master. *Qui per alium facit, per seipsam facere videtur, i.e.* he who does an act through the medium of another party is in law considered as doing it himself.[26]

25. Act Done by Subordinate under Instructions of Higher Authority

If order of the superior is justified and is therefore lawful, no further question can arise as to whether the subordinate servants who acted in obedience to that order believed or did not believe that order to be lawful. Such an enquiry becomes necessary only when the order of the superior officer which is pleaded as a defence, is found not to be in conformity with the commands of the law. Indeed, in the413 aforesaid eventuality no occasion arises for applying the provisions of s 76, IPC . Thus, where on receiving of injuries by one of the members of the police force on patrol duty in Calcutta in the early 70's as a result of the mob violence, the deputy commissioner ordered the police force to open fire and in the firing resorted to in pursuance of that order, some persons in the mob were killed. The order to open fire was justified by the situation that prevailed in the city during the period in question, and members of police who opened fire could seek the protection of the order in question and plead in defence that they acted in obedience to that order and therefore they could not be held guilty of the offence of murder with which they were charged.[27]

Where a raid was conducted by custom officials on a jewellery shop and the customs party was manhandled by the shop owner before they resorted to violence, the complaint was filed by the shop owner for prosecution of the raiding officials for offences under ss 307, 452, 504, 342 and 148 read with s 149, IPC, alleged to be committed during raid. The complaint was quashed by the High Court by giving custom officials the benefit of s 108, Gold (Control) Act. The Apex Court held that the case did not call for any interference under art 136 of the Constitution, even though further evidence might have been necessary before the order quashing the complaint could be held to be fully justified.[28] Where, at about the period certain parts of the State of West Bengal including the city of Calcutta passed through turbulence caused by what was known as the 'Naxal Movement'; the locality in which the incident took place was particularly a troublesome area in which several policemen had been attacked on 11 November 1970, a police party on patrol duty came to the locality. Some sort of skirmish took place in which a policeman was injured. The deputy commissioner of police, who headed the party, considered it necessary to give an order to fire. On these facts it was held that after such orders the members of the police force were not expected to hold a discussion among themselves as to whether the order was legal and whether they should carry it out. They were expected to obey it promptly as it was their duty, and the order was on the face of it not illegal. As such, if the police actually fired leading to unfortunate deaths, they were fully protected by the superior order and they could not be deemed to have committed any offence. The defence of acting under superior orders has an important bearing on the moral and discipline of police force which undoubtedly plays a vital role in maintenance of law and order in any state. Acting in strict accordance with the order of a superior is part of discipline.[29]

26. Commission of Suicide by Subordinate on Departmental Action by Higher Authority

If complaint is received of serious misconduct against any employee, the higher officer normally can be expected to take departmental action. The things, which are otherwise than normal, would be contrary on account of abnormal circumstances. If on account of any abnormal reaction, the employee has committed suicide, the conduct of the complainant or of higher officer of taking departmental action by way of resorting to legal remedy or enforcement of law, cannot be termed as leaving no option to the delinquent employee but to commit suicide and, therefore, cannot be414 said as abetment or incitement to suicide under such circumstances. In any case any action for resorting to legal remedy for grievances or for enforcement of law in exercise of powers or purported exercise of power, cannot be said to contain any element of criminality unless such action is *ex facie* without any competence, authority or jurisdiction.[30]

The action of filing complaint by the contractor against the deceased, the action of suspension, the inaction for revocation of suspension, after representation made by the deceased or recommendations by the Vigilance Commission or after the recommendations by the Commission for Minorities or the action of issuing charge-sheet for contemplating to hold departmental inquiry, cannot

be said as not falling under any categories of general exceptions as provided under ss 76, 79 and 80 of the IPC . Even if the allegations of conspiracy is considered, the same is for harassment and is not for leaving the deceased with no option but to commit suicide and, therefore, the action of suicide can be said as misfortune which may, in any case, fall under the exceptions provided in s 80 of the IPC .[31]

27. Mistake as Defence to be Determined According to Provisions of the Code

With regard to offences under the IPC, it should be carefully borne in mind that the question of mistake as a defence must in all cases be determined by reference to the definition of the offence in question, and the provisions of ss 76 - 79, as the case may be, which apply to the definitions of all offences in the IPC .[32]

28. Rules Regarding Justification of Offence due to Mistake

The following five invaluable rules were laid down by 15 judges, in the case of *R v Prince* ,[33] which has been the guiding star in England and elsewhere whenever the question of justification of an offence either due to mistake of fact or mistake of law has arisen:

(i) When an act is, in itself plainly criminal, more severely punishable if certain circumstances co-exist, ignorance of the existence of such circumstances is no answer to a charge for the aggravated offence.

(ii) Where an act is *prima facie* innocent and proper, unless certain circumstances co-exist, ignorance of such circumstances is an answer to the charge.

(iii) The state of the defendant's mind must amount to absolute ignorance of the existence of the circumstances which alters the character of the act, or to a belief in its non-existence.

(iv) An act which is in itself wrong is, under certain circumstance, criminal; a person who does the wrong act cannot set up as a defence that he was ignorant of the facts which turned the wrong into a crime.

(v) Where a statute makes it penal to do an act under certain circumstances, it is a question upon the wording and object of the particular statute, whether415 the responsibility of ascertaining that the circumstances exist is thrown upon the person who does the act or not. In the former case his knowledge is immaterial.[34]

40 *AK Chaudhary v State of Gujarat* (2006) Cr LJ 726 (Guj) .

41 *Nagraj v State of Mysore* AIR 1964 SC 269, (1964) 1 Cr LJ 161, p 166 .

42 *Dicey's Law of the Constitution*, third edn, p 276.

43 *Dicey's Law of the Constitution*, third edn, p 276.

44 *Ibid*.

45 *R v Thomas* 4 MS 441 . He was however, pardoned, on the recommendation of his judges.

46 *Stephen's History of Criminal Law of England,* vol 1, pp 205-06.

47 For details refer to *Sohoni's Code of Criminal Procedure*, twenty-first edn Lexisnexis.

48 Code of Criminal Procedure, s 132(2) .

49 *Maung Pu v R* 8 Cr LJ 68, 4 LBR 253 .

50 *Russell on Crime*, eleventh edn, p 77, **referring to** the Mcnaughten Rules and *R v Tolson* (1889) 23 QBD 168, p 181 .

51 Archbold, *Pleading, Evidence and Practice in Criminal Cases*, thirty third edn, p 23.

52 *Karimullah v Ghulam Rassulshah* AIR 1936 Sind 153, p 154 ; *Emperor v Nanak Chand* AIR 1943 Lah 208, 209 ; *Emperor v Kassim Isubsab* 13 Cr LJ 530 .

53 *King v Tustipada Mandal* AIR 1951 Ori 284, p 289 .

54 *R v Fischer* 14 ILR Mad 342, p 354 ; *King v Tustipada Mandal* AIR 1951 Ori 284, p 289, 52 Cr LJ 837 (DB) ; *Ramalinga Nadar v Gandhi* 1969 LW 103(Cr); *State v Siddhanath Gangaram* AIR 1956 MB 241, p 243, (1956) Cr LJ 1327 .

55 *Ex p Barronel*, 1 E&B, I.

56 *R v Bailey* Russ & Ry 1.

57 *Austin's Jurisprudence*, vol 1, p 499.

58 Vide *R v Reed* C&M 306, 174 ER 519; *R v Hall* 3 C&P 409 .

59 *King v Tustipada Mandal & Anor* AIR 1951 Ori 284, p 290 .

60 *Ibid*, p 289; *Bums v Newell* (1880) 6 QBD 444, 49 LJQB 488 .

61 1 Weir 40, p 74.

62 *King v Tustipada Mandal & Anor* AIR 1951 Ori 284, p 290 .

63 *Pappu v Damodaran* AIR 1968 Ker 126, (1968) Cr LJ 625 .

64 *R v Esop* (1836) 7 C&P 450 ; *R v Wheat and Stocks* (1921) 2 KB 119, p 125 .

65 *Sitaram Kunbi v Emperor* AIR 1928 Nag 188 ; *State of Maharashtra v MH George* AIR 1965 SC 722, (1965) 1 Cr LJ 641 .

66 *State of West Bengal v Shew Mangal Singh* AIR 1981 SC 1917, [1982] 1 SCR 360, (1981) 4 SCC 2, (1982) Cr LR 501 (SC), (1981) SCC 782 (Cr), (1981) Cr LJ 1683 .

67 *Harendra Lal Roy Chowdhari v Haridasi Debi* AIR 1914 PC 67, p 71 ; *Chiranji v State* AIR 1952 Nag 282, 53 Cr LJ 1212 ; *Chaitan Bhujan v State of Orissa* (1978) Cr LJ 1303 .

68 *Harendra Lal Roy Chowdhari v Haridasi Debi* AIR 1914 PC 67, p 71 .

69 *Kelly v Soldari* 9 M&W 54 ; *Brownlie v Campbell* 5 AC 952 ; *Barrow v Issae & Sons* (1891) 1 QB 417, p 425 .

70 *Sandford v Bede* (1894) 65 LJQB 73, p 74, 73 LT 406 .

71 *Waryam Singh v Emperor* AIR 1926 Lah 554, 28 Cr LJ 39 ; *Bonda Kui v Emperor* AIR 1943 Pat 64 .

72 *Chiranji v State* AIR 1952 Nag 282 .

73 AIR 1937 Sind 254, p 257; *Pramatha Nath v PC Lahiri* AIR 1920 Cal 725, 47 ILR Cal 818, 22 Cr LJ 5 .

74 *Raghunath Dass v Emperor* AIR 1920 Pat 502 .

75 *State of Mysore v Parappa Yalappa* (1965) 2 Mys LJ 263, p 269 .

76 *Pramatha Nath v PC Lahiri* AIR 1920 Cal 725, 22 Cr LJ 5 .

77 *Maung Htwe v Ba Thant* AIR 1940 Rang 112 .

78 *NP Prathap Kumar v Ramadas* 2010 Cr LJ (NOC) 991 (Ker) .

79 *Baistab Charan v R* 30 ILR Cal 95 ; *Emperor v Po Chon* 1 Cr LJ 1118 ; *R v Sunku Seethiah* 34 ILR Mad 92 ; *R v Kassim Isubsab* 13 Cr LJ 530, p 531, 14 Bom LR 365 .

80 *King v Tustiapada Mandal & Anor* AIR 1951 Ori 284, p 290, 52 Cr LJ 837 .

81 *Bisho's Criminal Law*, third edn, s 378 .

82 See for example *R v Machekequonabe* (1897) Ont Rep 309 ; *R v Senior* (1879) 1 QB 283 .

83 Refer to notes under s 84, post.

84 Answers 2 and 3; *R v Codere* (1916) 12 Cr App R 21 .

85 Answer 4. This answer deals with the case of a man who 'labours under such partial delusion only and is not in other respects insane'.

86 *Kallan Beg v Emperor* AIR 1936 All 306 ; *Bondu Kuin v Emperor* AIR 1943 Pat 64 ; *Bahadur Khan v Emperor* AIR 1944 Pesh 30 ; *King v Tustipada Mandal & Anor* AIR 1951 Ori 284 ; *Pryag v State* AIR 1963 All 121 .

87 *Kesho Sahu v Slaigram* (1977) Cr LJ 1725, p 1728, (1977) Cut LR 166 (Cr) .

88 Refer to s 52, ante.

89 *R v Fischer* 14 ILR Mad 312 pp 351, 354; *R v Rajammal* 12 Cr LJ 566 ; *Jwala Prasad v Emperor* AIR 1934 All 331 .

90 Indian Penal Code 1986, s 52 .

91 *State of Orissa v Ram Bahadur* AIR 1963 Ori 161, p 163 .

92 *Emperor v Abdool Wadood Ahma* d 31 ILR Bom 293.

1 *Bhawoo Jiwaji v Mulji Dayal* 12 ILR Bom 377 .

2 *State of Orissa v Ram Bahadur* AIR 1960 Ori 161, p 163, (1960) Cr LJ 1349 (DB) .

3 *Po Mye v King* 1940 Rang LR 109, p 118, AIR 1940 Rang 129, p 132 .

4 *Baistab Charan v R* 30 ILR Cal 95 ; *Emperor v Po Chon* 1 Cr LJ 1118, 2 LBR 311 ; *R v Sunku Seethiah* 34 ILR Mad 92 ; *R v Kassim Isub Sab* 13 Cr LJ 530 .

5 Indian Penal Code, ss 76 and 79 .

6 *Russell on Crimes,* eleventh edn, p 80.

7 *Bhagwan Singh v Arjun Dutt* AIR 1920 All 232(2), 21 Cr LJ 564 .

8 *U San Win v U Hla* AIR 1931 Rang 83, p 85, 32 Cr LJ 934 .

9 *Shriram Damodar v Thakurdas* 1977 Mah LJ 581, p 596 ; *Mahommad Biloo v Kirti Nath Gogoi* (1986) 1 Gau LR 141 .

10 *Shew Mangal Singh v State* (1981) Cr LJ 84 (Cal) .

11 *Niamat Khan v Emperor* 17 PR (Cr) 1833 ; *Charan Das Narain Singh v State* AIR 1950 EP 321 ; *Chaman Lal v Emperor* AIR 1940 Lah 210 . Refer also to commentary under heading 'Legally bound to do' under s 43 .

12 Indian Penal Code 1860, s 361 .

13 24 and 25 Vic c 100, s 55, under s 361 of the Indian Penal Code 1860, the age of the girl should now be 18 years.

14 *R v Prince* LR 2 CCR 154, for this case refer further to the note of s 361 .

15 *R v Bishop* LR 5 QBD 259 .

16 8 and 9 Vic c 100, s 44 .

17 This case belongs to a class of acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Refer to similar cases collected in *Sherras v De Rutzen* (1895) LR 1 QB 918, p 922 .

18 *R v Fischer* 14 ILR Mad 342, 1 Weir 802 .

19 14 ILR Mad 342, p 355.

20 *Ibid*, p 354.

21 *Ibid*, pp 351, 354.

22 *Emary v Nolloth* (1903) 1 KB 264, p 269 ; *Brooks v Mason* (1902) 2 KB 743 ; *Cawasji v GIP Railway* 26 ILR Bom 609, p 614 .

23 *Stephen's Digest,*art 35.

24 *Sherras v De Rutzen* (1895) 1 QB 918, p 921, per Wright J; *Provincial Motor Cab Co v Dunning* (1909) 2 KB 599, p 603 .

25 *R v Jeevanji* 31 ILR Bom 611, p 627 .

26 *Ibid*, pp 627-28.

27 *State of West Bengal v Shew Mangal Singh & Ors* AIR 1981 SC 1917, (1981) Cr LJ 1683 (SC) .

28 *Bhappa Singh v Rampal Singh & Ors* AIR 1982 SC 779, (1982) Cr LJ 627 (SC) .

29 *Shew Mangal Singh & Ors v State* (1981) Cr LJ 84 (Cal) (DB) .

30 *AK Chaudhary v State of Gujarat* (2006) Cr LJ 726 (Guj) .

31 *Ibid*

32 Indian Penal Code 1860, s 6 .

33 *R v Prince* (1683) 2 Ch D 15 .

34 *King v Tustipada Mandal & Anor* AIR 1951 Ori 284, p 290 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 77.

Act of Judge when acting judicially.--

Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

Comments

1. Scope

This and the next section protect judicial officers and their ministerial officers from criminal process just as the Judicial Officers' Protection Act 1850, protects them from civil liability.[35] In *Chunder Narain Singh Roy Bahadur v Brojobullub Gooie* ,[36] Markby J, observed:

> Now, as a general rule, every magistrate does act judicially in discharge of his judicial duty whenever he performs any of the duties which are imposed upon him by the law. The duties which he usually performs are of such a nature as to render it absolutely necessary for their sure performance that he should have that protection. He has generally either to punish an offender or to vindicate the rights of a private individual; an if he were hampered by fear of the consequences which might arise from a mistaken conclusion, he could not have that independence of mind which is essential to the discharge of such functions as these.

> This protection is not confined to persons holding and exercising a regular judicial office, but it extends to any person whose duty it is to adjudicate upon the rights, or punish the misconduct of any given person, whatever form their proceedings may take, or however informal they may be. This has been so held in England[37] and I

do not see any reason to doubt that the same would be held here.

2. Protection Extends to Even Oral Remarks

Section 77, IPC, is not the only section which is concerned with the protection of judges and magistrates in the exercise of their office. There are also the exceptions to s 499 to be considered and their very existence indicates that the provisions of s 77 cannot by themselves cover the case of remarks made by a judge or magistrate in the course of his office, so as to exempt him from any liability under s 500, IPC .[38] For the purposes of the protection afforded by this section no distinction can be made between a written judgment and the remarks made in the course of a judgment delivered orally.[39] So, whenever a plea under this section is raised, the court has to go416 into the question to find out whether the plea of the accused under this section was available to him and, for this purpose, to his conduct.[40]

3. Judge

Synopsis notes under s 19, *ante*, may be referred to.

4. Mistake may be one of Law

Mistake under ss 77 and 78, IPC differs from that under ss 76 and 79, IPC in that it may be a mistake of law or a mistake of fact. The particular status of the person concerned (judges and officers of a court) and the nature of their duties make this necessary. A judge may act wrongly owing to a bona fide mistake of fact, and s 77 declares that he shall not be liable for so doing. Where a judge took certain proceedings against a European, which were irregular because he was a European, he was exempted on the ground that he was ignorant of the fact, and had no such information as made it incumbent upon him to ascertain the fact.[41]Again, a judge may act wrongly through a mistake of law. The questions to be answered in such a case would be: (a) Did he believe he was acting legally? (b) Was such belief under all the circumstances reasonable or so irrational as to impute malice or corruption?[42]

5. 'Acting Judicially'

A judge is protected by this section only when he is acting judicially and not ministerially.[43] 'Acting judicially' means professionally acting as a judge. Thus, a collector merely arranging a revenue question, or a magistrate removing an obstruction[44] or an officer in command of a cantonment who arrests and confines a supposed lunatic,[45] are not, when so employed, 'acting judicially'.

6. Within Jurisdiction

Again, the judge must be acting actually, within his jurisdiction. The acts that are protected under this section are acts done within their jurisdiction, though erroneously or irregularly done.[46] Thus, a judge would not be protected for doing things wholly without jurisdiction. Although he will be protected if he has a bona fide belief that he is acting under a lawful power (see below), yet a mistaken belief on his part that he has jurisdiction, when as a fact he has none, will not protect him unless (probably) his want of jurisdiction is due only to some formal defect.[47]

7. Nature of the Acts Protected

All acts of a judicial nature, not merely acts in court are protected.[48]417

8. Civil Immunity

As to the civil immunity of 'Judges, magistrates, justice of the peace, collectors, and other persons acting judicially', and of persons bound to execute their lawful warrants and orders, refer to the Judicial Officers Protection Act 1850.

9. Good Faith

Under s 77, if a judge exercising the power given to him by law does any act as a judge, such as delivering a judgment when acting judicially, same will not be treated as an offence. Here, the words 'good faith' are in respect of exercise of any power which he believes to be given to him by law. Similarly, protection is given to a Judge under the Judges (Protection) Act 1985. Initially, the Judicial Officers' Protection Act 1850 gave protection to Judges while they were discharging duties as Judicial Officers in deciding civil suits. However, the Act was repealed and under the Judges (Protection) Act 1985 the Judge is also granted protection from being prosecuted in a criminal case as per the provisions of s 3(1) .[49] A Regional Fund Commissioner, when passing an order under s 7A of the Employees' Provident Funds and Miscellaneous Provision Act (19 of 1952) is a Judge, and is protected by s 77, IPC .[50]

Commentary under s 52, *ante* may be referred.

35 *S Pande v SC Gupta* AIR 1966 Pat 194 .

36 *Chunder Narain Singh Roy Bahadur v Brojobullub Gooie* 21 WR 126, p 127, **affirmed** in 21 WR 391 (FB).

37 *Tozer v Child* 7 E&B 377 .

38 *Kamla Patel v Bhagwandas* AIR 1934 Nag 123, p 124 .

39 *Ibid.*

40 *State of Maharashtra v YP Sawant* (1977) Cr LJ 1477, p 1485 (Bom) .

41 *Y*2 MIA 293, p 306; *Herman v Seneschal* 32 LJCP 43 ; *Roberts v Orchard* 33 LJ Ex 65 .

42 *Seshaiyangar v Ranganatha* 5 Mad HCR 345 ; *King v Daya Shankar* 1 Cr LJ 146, 13 Ker LR 332 .

43 *R v Loggen* (1718) 1 Str 74 .

44 *Chunder Narain v Brijo* 14 Bom LR 254 .

45 *Sinclair v Broughton* 9 MIA 152 .

46 *Y*2 MIA 293; *Pedley v Davis* 30 LJCP 374 ; *Kempt v Evil* 31 LJCP 158 .

47 *Stephen's Digest*, art 218, and of language of s 77 .

48 *Calder v Halket* 2 MIA 293 .

49 *ES Sanjeeva Rao v Central Bureau of Investigation (CBI), Mumbai* 2012 Cr LJ 4053, p 4061 (Bom) (DB), 2013 (1) RCR (Criminal) 284 .

50 *ES Sanjeeva Rao v Central Bureau of Investigation (CBI), Mumbai* 2012 Cr LJ 4053, p 4081 (Bom) (DB), 2013 (1) RCR (Criminal) 284 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 78.

Act done pursuant to the judgment or order of Court.--

Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice; if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

Comments

1. Scope

This section which is a corollary to s 77, IPC, protects the acts of a person acting under the judgment or order of a court.[51]

The protection given to an officer under this section, is wider than that given to a judge, under s 77, inasmuch as the officer under this section is protected in carrying out an order of a court, having, as a fact, no jurisdiction at all while, under s 77, the judge must be acting within his jurisdiction to be protected by the section.418

2. Mistake may be one of Law

Notes under s 77 may be referred to.

3. 'Court of Justice'

Section 20 of the IPC may be referred to.

4. 'Judgment or Order'

'Judgment' means the statement given by the judge on the grounds of a decree or 'order' and 'order' means the formal expression of any decision of a civil court which is not a 'decree'.[52] The words 'judgment' and 'order' have not been defined by the IPC or the Crpc . Section 354 , CrPC, however, deals with the requirements of a judgment to be delivered by a judge or magistrate in a criminal case. It provides that: (a) every judgment shall be in writing; (b) it shall contain the point or points for determination, decision thereon and the reasons for the decision; (c) it shall specify offence (with section and Act) under which the accused is convicted and the punishment to which he is sentenced and; (d) in case of acquittal, the judgment shall state the offence of which the accused is acquitted and the direction to set him at liberty. 'Order' may be defined as the formal expression of any decision of a criminal court, which is not a judgment. An order must therefore be in the form prescribed by law and must be in writing.[53] An order given by a judge to a court bailiff to keep a person arrested by him in custody is not an 'order', and the bailiff in obeying such a direction is not protected by s 78 .[54]

5. 'No Jurisdiction'

The protection given to an officer under s 78 is wider than that given to a judge under s 77, inasmuch as the officer under s 78 is protected in carrying out an order of a court having as a fact no jurisdiction at all, while under s 77, the judge must be acting within his jurisdiction to be protected by the section.

6. Execution of Lawful Order may become Unlawful

Though an order may have been lawfully given, its execution may become in the interim period illegal, and the officer executing it will, in that case, not be protected by this section. Thus, an order is given to arrest *A* under a civil process. The officer on meeting *A* is given notice by *A* that he is on his way to a court to give evidence in some case. As a witness *A* is privileged from such arrest. The officer is not justified under this section in then arresting *A*.[55] Again, the order must be executed in a lawful manner, *e.g.*., a bailiff in executing a process against movable property of a judgment-debtor, must not break open a gate. He will not be protected by this section in doing so.[56]

7. Good Faith

Refer to commentary under s 52, *ante.*419

8. Sanction for Prosecution, when Necessary

Where a person was appointed as a receiver of certain collieries by the court; it was held that for any offence allegedly committed by him while acting under that order (as a receiver) he can be prosecuted only after receiving sanction from the court appointing him receiver. Prosecution without obtaining sanction is liable to be quashed.[57] This rule should apply to all persons executing any process or order in pursuance of a judgment or other order of the court.

51 *Kapoor Chand v State* (1976) 3 Cr LT 370 (HP) ; *Muta Mehto v State of Bihar* (1990) 1 BLJ 122, p 124 (Pat) .

52 Code of Civil Procedure 1908, ss 2(9) and (14) .

53 Code of Criminal Procedure 1973, s 142 .

54 *Maung Pu v R* 8 Cr LJ 68, 4 LBR 253 .

55 5 RJ and 43; *Thakoordoss v Shunkur* 3 WR (Cr) 53 .

56 *John Amderson v J Mcqueen* 7 WR (Cr) 12 .

57 *Ramabadan Choubey v State* 86 CWN 984, (1982) 1 CHN 470 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 79.

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

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

Illustration

A sees *Z* commit what appears to *A* to be a murder. *A*, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes *Z*, in order to bring *Z* before the proper authorities. *A* has committed no offence, though it may turn out that Z was acting in self-defense.

Comments

1. Scope and Applicability

This section which is complementary to s 76, is in two parts. According to the first part, an act, which a person is justified, by law, in doing, is not an offence. According to its second part, an act, which the person, doing it, believed, in good faith, by reason of a mistake of fact, and not by reason of a mistake of law, to be justified, by law, in doing, is not an offence. The section, therefore, deals with cases in which a person acts in the belief that he is justified by law to so act, as s 76 deals with cases in which a person acts in the belief that he is bound by law to so act. In other respects, the two sections are identical. Mistake of law is not justification under this section also. The IPC does not exempt an act done under a mistake of law from the operation of the penal law.420

If a person accepts the decision of a full Bench of the High Court in the state (from which no appeal has been preferred to the Supreme Court) as a guide to his conduct, he commits nothing more than a technical offence, if that view is later not accepted as laying down the correct law.[58]Section 79 of the IPC makes an offence a non-offence only when the offending act is actually justified by law or is bona fide believed by mistake of fact to be so justified. If the petitioner acting in good faith collected land revenue depositing the same in the government treasury, received *paujotra* and attested certain documents he does enter the statutory harbour and is protected from the prosecution under s 170 of the IPC because s 79 exonerates him at least in view of his bona fide belief that the identification card issued to him by the Revenue Authorities was justificatory.[59]

This section is not exhaustive. There are cases in which intention and knowledge are ingredients of the offence and have to be established either by evidence or legal inference which do not necessarily come within the ambit of this section.[60]

In view of s 79, IPC, nothing would constitute an offence under the IPC if the act done is:

(i) justified in law
(ii) done by a person who by reason of mistake of fact in good faith believes himself to be justified by law in doing so *Sushil Ansal v State* .[61]

Relative Scope of Sections 76 and 79

Under both these sections there must be a bona fide intention to *advance the law,*manifested by the circumstances attending the act which is the subject of charge; and the party accused cannot allege generally that he had a good motive; he must specifically allege that he believed in good faith that he was bound by law (s 76) to do as he did, or that, being empowered by law (s 79) to act in the matter, he had acted to the best of his judgment exerted in good faith.[62]

For detailed discussion, notes under s 76 may be referred to.

2. Sections 76, 79, 80 and Legislative Intent in General Exceptions

Commentary in synopsis s 76, *ante*, may be referred to.

3. Relative Scope of this Section and Section 132, Code of Criminal Procedure 1973--the two Provisions are not Identical

Under s 132(2)(b), CrPC, no person doing any act in good faith in compliance with a requisition under s 129 or s 130 of that Code shall be deemed to have thereby committed an offence. But the protection afforded by s 132, CrPC, is different from that afforded by this section. This s 79 can only be applied when all the facts are known, *i.e*., when the trial is over while s 132, CrPC can operate only before the trial begins. Protection given by this section is a protection against conviction, while the421 protection given by s 132, CrPC, is a protection against trial. Thus these provisions are not identical.[63]

Section 79, IPC, deals with circumstances, which when proved makes the act complained of not an offence. The circumstances to be established to get the protection of s 132, CrPC are not circumstances which make the acts complained of 'no offence' but are circumstances which require sanction of the government in taking of cognizance of a complaint with respect to the offences alleged to have been committed by the accused.[64]

If the act complained of is wholly justified by law, it would not amount to an offence at all in view of the provisions of s 79, IPC . Many cases may, however, arise where in acting under the provisions of the Police Act, or other law conferring powers on the police, the police officer or some other person may go beyond what is strictly justified in law. Though s 79 of the IPC will have no application to such cases, s 53 of Madras District Police Act will apply. But s 53 applies to only limited class of persons.[65]

If the circumstances to be established for seeking the protection of s 132, CrPC were to make the alleged conduct 'no offence', there could be no question of prosecution with the sanction of the state government.[66]

4. Applicability of this Section to Offences under Special or Local Laws

In *Emperor v Kassim Esub Sah* [67] the Bombay High Court held that this section applied to offences under s 32(a) and (b) of the Forest Act 1878. Dissenting from this view the Madras High Court wrongly held that this section cannot apply to offences created by the Forest Act as the definition of 'offence' in s 40 covers only a thing made punishable by the IPC, except when the word is used in certain sections which do not include s 79 .[68] As pointed out in *Abdul Aziz v Emperor* ,[69] the learned judges who decided the latter case appear to have misread s 40, which states that in ch IV, IPC, the word 'offence' denotes a thing punishable under the Code or under a special or local law. Section 79 , IPC, comes within ch IV and, therefore, an offence to which s 79, IPC, refers includes an offence under a local or special law. Not only this section but the principles underlying all the 'general exceptions' in ch IV of the IPC are applicable to offences under a special or local law.[70]This section has been applied to local laws like the Punjab Pure Food Act 1929,[71] and the Burma Land Revenue Act 1876.[72]

Where the obscene scene was totally unconnected with the English film 'Girl' and the obscene film had been connected to the film 'Girl' and shown as part of the film just prior to 'intermission' it was held that it cannot at all be stated that the offending act of exhibition of the blue film containing the obscene scene, which is totally422 unconnected with the censored film 'Girl' is actually justified by law or is bona fide believed by mistake of fact to be justified.[73]

For the exhibition of the film '*Andha Qanoon*' an 'A' certificate was granted under s 5A of the Cinematograph Act 1952. It was alleged that the film scandalises courts and the actor *etc.* were guilty of contempt of court. The Allahabad High Court held that contempt of court was not committed in view of the exemption under this section.[74]

5. Mistake of Fact

Synopsis notes under s 76, *ante*, may be referred to.

6. Mistake of Law

Synopsis notes under s 76, *ante*, may be referred to.

7. 'Good Faith'

Synopsis notes under s 76 under the same heading may be referred to.

8. Mistake as a Defence Under Sections 76 and 79

Commentary under same heading in s 76, *ante*, may be referred to.

9. Two Essential Conditions for Sections 76 and 79

Commentary under same heading in s 76, *ante*, may be referred to

10. Acts Justified by Law

If the act complained of is wholly justified by law, it would not amount to an offence at all in view of s 79 of the IPC . Many cases may, however, arise where in acting under the provision of the Police Act or other law conferring powers on the police, the police officer may go beyond what is strictly justified in law. Though s 79 of the IPC will have no application to such cases, s 53 of the Madras District Police Act will apply.[75] It is one of the 'General Exceptions' recognised by the IPC that when a person is justified by law in doing an act, the commission of that act cannot amount to an offence. Thus, a person is entitled to cut off those portions of a tree growing on his neighbour's land which overhang his land. As he is justified by law in doing such an act it does not, by virtue of this section, amount to an offence of mischief punishable under s 427 .[76] Likewise, where a person kills his servant bona fide thinking him to be a burglar he commits no offence and he is protected under this section.[77]

By ss 72 - 73 of the CrPC, private persons may under certain circumstances have warrants granted to them for the arrest of offenders, and under s 38, CrPC a private423 person may (it is optional) assist the person acting under the warrant, and his conduct in so doing would be justified under this section. Again under s 43, CrPC a private individual may (it is optional) arrest a person without a warrant who in his presence commits a non-bailable cognizable offence, or who is a proclaimed offender. His act in so doing is justified and protected by this section.

11. Acts not Justified by Law

Where the appellants formed an unlawful assembly and in prosecution of the common object to eliminate the deceased under the belief that he was practising witchcraft and was an undesirable person, committed his brutal murder. The appellants knew that the deceased was very much a living person with a family, yet they killed him in cold blood. It was held that there was neither any good faith nor any mistake of fact or law by which the appellants could be protected by s 79, IPC . If to a case of this nature the exception extended by s 79, IPC, is made applicable, there shall be murders unlimited.[78]

Under s 79, although an act may not be justified by law, yet if it is done under a mistake of fact, in the belief in good faith that it is justified by law, it will not be an offence. The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acted. 'Good faith' requires not logical infallibility but due care and attention. The question of good faith is always a question of fact to be determined in accordance with the proved facts and circumstances of each case. It may be laid down as a general rule that an alleged offender is deemed to have acted

under that state of things which be in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. Under the facts and circumstances of this case it was held that the respondent was entitled to the protection under this section and was guilty of culpable homicide not amounting to murder.[79]

12. Breach of Obligations

Breach of obligations is not frustrated by law. The duty to take care for the safety of the patrons is cast upon the occupier of cinema, both in common law as also in terms of statutory provisions on the subject. Where in Uphaar Cinema building in New Delhi, the building caught fire causing death of 59 persons, accused AI and A2, owners of the cinema building had not taken sufficient safety measures, which led to the tragedy, the accused were not exonerated of the charges simply because license to exhibit films had been granted and was renewed from time to time in favour of the occupier/licensee of the cinema house.[80]

13. Normal and Abnormal Law

The law considered above is the usual or municipal law, but a person may also be excused from what is a *prima facie*crime, because he was bound to act or justified in acting as he did, owing to some abnormal or exceptional law, which is opposed to the ordinary law of the country.424

Acts of War

Numerous as have been the wars in which Great Britain has participated, there has never been a prosecution for anything done as a military measure.

The essence of war is, of course, that each side shall do as much harm to the other as it can, extreme cases of cruelty being guarded against by the restrictions imposed by international law. No court of law would enquire into the conduct of individuals of whatever rank in the Army or Navy engaged in hostilities within or without its ordinary territorial jurisdiction. An act being an act of war, there is an end of the question of liability under the ordinary law of the country. The state adopts the acts of its citizens engaged in war as its own.

Conquest in the Course of War

Foreign conquest suspends the ordinary law of the conquered country, the inhabitants being compelled to submit to the laws imposed by the conquering power. So long as a state can protect its citizens, its sovereignty lasts, but no longer. Even in the case of civil war, where one side at first must necessarily be guilty of rebellion or treason, persons assisting or obeying a king *de facto*, *i.e.*, the head of the rebellious side, which is the stronger at the time, is freed from penalty.[81] The abnormal law imposed upon him by the rebels thus excuses him.

Acts of State

These are acts done by the State in its sovereign character, for some State purpose, and avowedly upon grounds higher than municipal law. Such acts are final, and can only be called into question by war or by an appeal to the justice of the State itself, for 'even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy'.[82]

Acts of State may take place either by express direction of the government, or by subsequent ratification.[83]

There are two important points to be noted in regard to acts of State. First, the doctrine only applies to acts which affect foreigners. 'As between the sovereign and his subjects there can be no such thing as an act of State. Courts of law are established for the express purpose of limiting public authority in its

conduct towards individuals...but as between British subjects and foreigners, the orders of the Crown justify what they command, so far as British Court of Justice are concerned'.[84]

Thus in the case of *Musgrave v Pulido* ,[85] where the Governor of Jamaica committed certain acts (affecting those under his charge, *i.e.*, British subjects) beyond his authority as governor, and pleaded that they were acts of State, the Privy Council held that in such cases the municipal courts should determine the true character of the acts done. 'Though it may be that when it is established that the particular act in question is really an act of State policy, done under the authority of425 the Crown, the defence is complete, and the courts can take no further cognizance of it'.[86] And so, in the case of *Walker v Baird* ,[87] where the captain of an Englishman-of-war, under general instructions from the Admiralty, seized a lobster factory belonging to a British subject, on the ground that the establishment of such on the particular part of the Newfoundland coast, was prohibited by the terms of a treaty concluded between Her Majesty and the French government, the Privy Council held that it was a question as to whether the Crown had the power otherwise than by the legislature to compel its subjects to obey the provisions of a treaty made by the Crown, but that it was no defence merely to plead that the matter was an act of State and therefore could not be enquired into by the court.

Secondly, an act of State must avowedly be done under the sanction of sovereign power, and not under colour of the municipal law, for if it be done under a claim of right given by municipal law, it is not an act of State but an act done by the State, and its legality depends upon the doctrine of the ordinary law.[88]

14.Martial Law--Justification of Acts Done During Time of War

According to English constitutional law, where a state of war, or an insurrection amounting to war, exists, it is competent for the Crown, in the exercise of its prerogative, to place the country affected under martial law.[89] The existence of martial law places all citizens in the area to which it extends under the unfettered control of the military authorities, whose acts are not justiciable by the civil courts.[90] As Malgavkan J observed in *Chanappa Shatirappa v Emperor* :[91]

> The justification for the acts of the military lies not merely in their *bona fides* but in the existence of necessity, i.e., in the proof of such a state of war, insurrection or armed resistance, as to justify the cessation of the ordinary law and its replacement by military force pure and simple. The question of necessity or whether the proved facts amount to necessity is a question of fact for the courts. If necessity is proved, then the acts of the military are not justiciable by the ordinary courts. Unless it is proved, they are so justiciable.

The courts have, at any rate in time of peace, jurisdiction in respect of acts which have been done by military authorities and others during a state of war.[92]

The protection of military men and others against actions or prosecutions in respect of unlawful acts done during a time of war, *bona fide,* and in the service of the country, is an act of indemnity.[93]

An act of indemnity is a statute the object of which is to make legal transactions which, when they took place, were illegal, or to free individuals to whom the statute applies from liability for having broken the law.[94]

This doctrine of immunity is however open to the very strongest objections.[95]426

15.Commission of Suicide by Subordinate on Departmental Action by Higher Authority

Commentary under same heading in s 76, *ante*, may be referred to.

58 *State v Krishna Murari* AIR 1955 All 397, p 399 .

59 *Jarnial Singh v Dilbagh Singh* (1993) 3 Crimes 314, p 316 (P&H).

60 *Emperor v Nanak Chand* AIR 1943 Lah 208, p 209 .

61 *Sushil Ansal v State* (2014) 6 SCC 173, p 277, 2014 AIR SCW 2689, 2014 (3) Scale 174 .

62 First Report, s 114, p 219.

63 *MN Schamnad v MN Rama Rao* AIR 1933 Mad 268, p 269, 34 Cr LJ 528 .

64 *Nagraj v State of Mysore* AIR 1964 SC 269, (1964) 1 Cr LJ 161 (SC) .

65 *State of Andhra Pradesh v Venugopal & Ors* AIR 1964 SC 33, (1964) 1 Cr LJ 161 (SC) .

66 *Nagaraj v State of Mysore* AIR 1964 SC 269, (1964) 1 Cr LJ 161 (SC) .

67 *Emperor v Kassim Esub Sah* 13 Cr LJ 530(1), 14 Bom LR 365.

68 Re *KR Lewis*AIR 1914 Mad 277, 38 ILR Mad 773, 15 Cr LJ 171 **following** Re *Penchul Reddy Kottur* 12 Cr LJ 99.

69 *Abdul Aziz v Emperor* AIR 1943 Pesh 72, p 73 .

70 *King v Tustipada Mandal & Anor* AIR 1951 Ori 284, p 288 .

71 *Abdul Aziz v Emperor* AIR 1943 Pesh 72 .

72 *Bux Soo Meah Chowdry v King* AIR 1938 Rang 350 .

73 *Mahommad Raffi v State* (1992) Mad LJ 599, p 601 (Cr) (Mad) .

74 *Nurul Huda v Amitabh Bachchan* (1985) 1 Cr LC 135 (All) .

75 *State of Andhra Pradesh v N Venugopal & Ors* AIR 1964 SC 33, (1964) (1) Cr LJ 16 (SC) .

76 *Ouseph Thommen v Joseph Antony* (1957) Cr LJ 166 (Tr & Coch); *Mahommad Ali v Ramaswaroop* AIR 1965 All 161, (1965) 1 Cr LJ 413 ; *Ramalinga Nadar v Gandhi* (1969) Mad LW 103 (Cr) .

77 *Raising Mohmia v State* AIR 1962 Guj 203, (1962) 1 Cr LJ 717 ; *Surinder Kaur v Mohinder Singh* (1978) Punj LR 12, p 16 .

78 *B Somnath Patra v State* (1988) 1 Crimes 794 (Ori) .

79 *State of Orissa v Bhagaban Barik* (1987) 2 SCC 498, AIR 1987 SC 1265, (1987) Cr LJ 1115, (1987) 2 Cr LC 329, (1987) 3 JT (SC) 96, (1987) 2 SCJ 188, (1987) 2 Cur LJ 97 (Civ & Cr).

80 *Sushil Ansal v State* 2014 AIR SCW 2689, (2014) 6 SCC 173, 2014 (3) Scale 174 .

81 Statute 11 Hen VII, c I.

82 *Secy of State for India v Kamachee Boye Sahiba* 7 MIA 476, 13 Moo PCC 22, 86; *Salaman v Secy of State for India* 1906 1 KB 613 ; *Cook v Sprigg* (1899) AC 572 ; For examples of such acts see in addition *EI Co v Syed Ally* 7 MIA 555 ; *Jijoyamba v Bayi Saiba* 3 Mad HCR 424 ; *Raja Saligram v Secy of State for India* 12 Bom LR 167 .

83 *Secy of State for India v Kamachee Boye Sahiba* 13 Moo PCC 22 .

84 SHCLE, vol 11, 65.

85 *Musgrave v Pulido* 1879 5 AC 102, [1879] 5 App Cas 102 .

86 *Ibid*.

87 *Walker v Baird* (1892) AC 491 .

88 *Forester v Secy of State* 12 Bom LR 128 (PC) ; *Secy of State v Hari Bhanji* 5 ILR Mad 273 .

89 *Chanappa Shatirappa v Emperor* AIR 1931 Bom 57, p 58 .

90 *Chanappa Shatirappa v Emperor* AIR 1931 Bom 57, p 67 ; *Ex p DF Marais*[1902] AC 109; *Attorney-General for the Cape of Good Hope v Van Reenen* (1904) AC 114 .

91 *Chanappa Shatirappa v Emperor* AIR 1931 Bom 57, p 65 .

92 *Dicey's Law of the Constitution*, fifth edn, p 545.

93 *Ibid*, p 547.

94 *Ibid*.

95 *Ibid*, p 551.

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 80.

Accident in doing a lawful act.--

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

Illustration

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

Comments

1. Scope

Section 80, IPC is a part of ch IV, IPC, dealing with 'General Exceptions'. The 'general exceptions' contained in ss 76 to 106 make an offence a non-offence. The 'general exceptions' enacted by the IPC are of universal application and for the sake of brevity of expression, instead of repeating in every section that the definition is to be taken subject to the exceptions, the legislature, by s 6, IPC enacted that all the definitions must be regarded as subject to the general exceptions. Therefore, general exceptions are part of definition of every offence contained in the IPC but the burden to prove their existence lies on the accused.[1]The section exempts the doer of an innocent or lawful act in an innocent and lawful manner from any unforeseen result that may ensue from accident or misfortune. If either of these elements is wanting, the act will not be excused on the ground of accident.[2]

Accident and misfortune afford a good defence in certain cases and in certain circumstances.[3]The defence of accident or 'inadvertence without culpability' is available in all those cases in which a particular intent or state of mind is of the essence of the offence. A person who is accused of such an offence may excuse himself by showing that, although he did the act or made the omission which is the subject of the charge, he did it while he was acting lawfully and through inadvertence427 and without culpable negligence.[4] If he kills a man under the bona fide belief that he is shooting at a bear or ghost, he is protected by the provisions of this section.[5]

This section is applicable to some lawful act done in a lawful manner by lawful means with proper care and caution.[6]

2. Ingredients

To claim the benefit of the provisions of s 80, it has to be shown: (1) that the act in question was without any criminal intention or knowledge; (2) that the act was being done in lawful manner and by lawful means; (3) that the act was being done with proper care and caution.[7]

3. Sections 76, 79, 80 and Legislative Intent in General Exceptions

Commentary in synopsis under s 76, *ante*, may be referred to.

4. Primordial Requirement

Section 80, IPC protects an act done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. The primordial requirement of s 80 is that the act which killed the other person must have been done 'with proper care and caution'. In *Bhupendrasinh A Chaudasama v State of Gujarat* ,[8]it was held that where the accused shot his own colleague at close range without knowing the identity of his target, the act smacked of utter dearth of any care and caution.

The amount of care and circumspection taken by an accused must be one taken by a prudent and reasonable man in the circumstances of a particular case. Where the act of the accused is itself criminal in nature, the protection under s 80 is not available. If the accused pleads exception within the meaning of s 80 there is a presumption against him and the burden to rebut the presumption lies on him.[9] Where the evidence on record as substantiated by the testimony of two witnesses of the prosecution showed that the accused picked up the gun, unlocked it, loaded it with cartridges and shot the gun from a close range of about 4/5 ft, aimed at his chest, certainly, in view of unimpeachable evidence of the said two witnesses, s 80 has no application.[10]

5. Accident or Misfortune

An accident is not the same as an occurrence, but something that happens out of the normal or ordinary course of things. An effect is said to be accidental when the act is not done with the intention of causing it, and its occurrence as a consequence of such428 act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done to take reasonable precautions against it. The idea of something fortuitous and unexpected is involved in the word 'accident'.[11] 'Misfortune' means an unfortunate incident, mishap or disaster. On the other hand, an 'accident' is something that happens unexpectedly or is done unintentionally.[12] An injury is said to be caused accidentally when it is not caused willfully or negligently.[13] When steering wheel of offending vehicle was broken all of sudden, which resulted into accident causing death of a person, it can be said that the incident was merely an accident.[14]

The accused and the deceased were friends and were fond of wrestling. The accused invited the deceased for a wrestling bout. They went to an *akhara* and wrestled there. Whilst wrestling, the deceased was thrown and his head came in contact accidentally with the hard edge of the adjoining *chabutra*, which resulted in the fracture of his skull and death. It was held that there was a clear absence of intention on the part of the accused to cause the death of the deceased, that the injury was sustained by the deceased accidentally and that the accused was protected by this section.[15]

6. Elements of Non-liability under Section 80

The purely accidental consequences of a man's voluntary conduct will not be imputed to him, if: (a) he had no criminal intention or knowledge; (b) his conduct is lawful; and (c) the consequences are purely

accidental.[16]

7. 'Without any Criminal Intention or Knowledge'

To constitute a crime, the act must, except in the case of certain statutory crimes, be accompanied by a criminal intent or by such negligence or indifference to duty or to consequences as is regarded by the law, as equivalent to a criminal intent. Intention, however, is not capable of positive proof; it can only be implied from overt acts. As a general rule, every sane man is presumed to intend the necessary or the natural and probable consequences of his acts and this presumption of law will prevail unless, from a consideration of all the evidence, the court entertains a reasonable doubt whether such intention existed. This presumption, however, is not conclusive, nor alone sufficient, to justify a conviction and should be supplemented by other testimony.[17]

The accused and deceased, both brothers, were in a state of sleep. The accused in his dream felt someone was throttling him. He took the *dao* and dealt a blow, resulting in the death of the deceased. It was held that due to semi-sleep it could not be said that the accused had criminal intention and motive in killing the deceased. In view of the involuntary act, therefore, in absence of motive or malice, the accused was entitled to benefit of doubt.[18]429

Where the accused labourer was digging the earth with a spade and the deceased came near him to collect the earth dug by him thereby suffering a spade injury at the hands of the accused, the act of the accused was held neither within s 302 nor within s 304 nor under s 80, IPC but constituted criminal negligence and case came under s 304A .[19]

When the accused was aiming *lathi* blow at the aggressor in lawful exercise of his right of private defence of body, unfortunately, the deceased came in between and the *lathi* blow, meant for the aggressor, landed on the deceased's head causing him fatal injury. There was nothing on record to show that the accused caused injury to the deceased with any criminal intent or knowledge or to show that there was absence of proper care and caution on the part of accused. In such a case, the case of the accused would clearly fall within the purview of s 80, IPC .[20] The primordial requirement of the exception under s 80, IPC, is that the act by which the offence is committed should have been done 'with proper care and caution'.[21]

8. The Consequences must be Purely Accidental--Plea of Accident is Negatived by Negligence

The consequences of a man's conduct are not purely accidental if he has acted with any degree of negligence, *i.e.*, without due care and caution, in which case he will be liable for the consequences. 'Negligence' is to be distinguished from 'rashness'. Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.[22]

> Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have the consciousness. The imputability arises from the neglect of the civic duty of circumspection.[23]

These interpretations were approved in *HW Smith v Emperor* ,[24] by a division Bench which also referred to the following dictum of Alderson B, in *Blyth v Brimingham Water Works Co* :[25]430

> Each case must be judged in reference to the precautions, which, in respect to it, the ordinary experience of men has found to be sufficient, though the use of special or extraordinary precautions might have prevented the particular accident which happened.

Justice Mukerji, in the division Bench case then pointed out that the question whether the accused's conduct amounted to culpable rashness or negligence depended directly on the question as to what was the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient upon all the circumstances of the case.

9. Care and Caution

The primordial requirement of the exception under s 80, IPC, is that the act which killed the other person should have been done 'with proper care and caution'. The very fact that accused shot his own colleague at close range without knowing the identity of his target shows utter dearth of any care and caution.[26] The amount of caution to be used is not the utmost possible, but reasonable precaution, having regard to the facts of the case[27](see illusts 4 and 5 above). The man, pleading accident in terms of s 80 must act as a man of ordinary prudence. He should exercise that care and exercise those precautions which as a reasonable and prudent man, he should exercise or take.[28]

10. Burden of Proof

Where the accused puts forward a substantive defence of accident, it is incumbent upon him to prove it. The court is entitled to a full and, so far as possible, detailed account of what happened.[29]

If an accused pleads an exception within the meaning of s 80, IPC, there is a presumption against him and the burden to rebut that presumption lies on him.[30] But the accused is not required to prove his case beyond a reasonable doubt; it is sufficient if he succeeds in proving a preponderance of probability.[31] The Calcutta High Court has also taken a similar view and it was held that the meaning of s 105 of the Evidence Act 1872, is that it is not for the prosecution to examine all possible defences which might be put forward on behalf of the accused and to prove that none of them applies. The onus that lies on the accused, is, however, not that rigid as on the prosecution to prove their case. The test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception, but whether in setting up the defence, he has established a reasonable doubt in the case for the prosecution and thereby earned his right of acquittal. But this does not mean that he must lead evidence. If it is apparent from the evidence on record furnished by the prosecution that a general exception would apply, then the presumption is removed and it is open to the court to consider whether the evidence proves to the satisfaction of the court that the accused comes within the exception.[32]431

Even where the evidence raised a possibility of accident, the accused is entitled to benefit of doubt.[33] Likewise, where the accused has failed to substantiate the plea of accident, the accused is still entitled to acquittal if from the prosecution evidence, the case otherwise fails.[34]

11. Medical Negligence

When a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as 'criminal'. It can be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death

results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.[35]

12. Contributory Negligence

It is well-established that the doctrine of contributory negligence is so well known in the law of tort that it has, as such, fortunately, no place in criminal law. The question is purely one of causation and the facts of each case would be examined in the light of the principles suggested above. It may, in some cases, then, appear that it was the sufferers' own conduct which can alone be regarded as the cause of his misfortune.[36] But where this is not so the victim's carelessness or folly does not per se limit the liability of one who has in fact caused him harm.[37] Refer to synopsis notes under s 304A .

13. Commission of Suicide by Subordinate on Departmental Action by Higher Authority

Commentary under same heading in s 76, *ante*, may be referred to.

14. Singapore Law

In *Ismail Bin Abdul Rahman v Public Prosecutor* it was observed, 'A firearm is, as we all know, a very lethal weapon, and when fired, it can cause death or injury even to innocent bystanders in the vicinity, whatever the intention of the accused may be. Therefore, arms and firearms must be distinguished from other weapons like knives, parangs and so on.'[38]

In a case from Singapore, the accused appellant, a former CISCO officer, known to the deceased on the date of the incident had discharged three bullets from a revolver at the deceased, a CISCO officer on duty. At trial, the accused appellant took plea432 that it was a case of accidental fire. The appellant pointed the revolver at the deceased and pulled the trigger thrice, thinking that it was not loaded. It was loaded and two rounds hit the deceased. The appellant accidentally pulled the trigger a third time and another shot hit the deceased. Held, the appellant had fired the three shots with intention to cause death of the deceased. It was not a case of accidental fire. The death sentence awarded to the appellant was held proper.[39]

1 *Shankar Narayan Bhadolkar v State of Maharashtra* (2004) Cr LJ 1778 (SC) .

2 *Sukhdev Singh v Delhi State (Govt of NCT of Delhi)* AIR 2003 SC 3716, (2003) Cr LJ 4315 (SC) .

3 *Halsbury's Laws of England*, fourth edn, Butterworths, London, 1976, pp 23-24, para 22.

4 *Batting v Bristol & Exeter Rail Co* (1860) 3 LT 665 ; *R v Noakes* (1866) 4 F&F 920 ; *R v Finney* (1874) 12 Cox CC 625 .

5 *State of Orissa v Khora Ghasi* (1978) 45 Cut LT 593, p 596 (DB) ; *Bonda Kui v Emperor* (1942) 43 Cr LJ 787 (Pat) .

6 *Ramesh Chandra v State of Uttar Pradesh* (1994) 31 ACC 673 (DB) .

7 *Sukhdev Singh v Delhi State (Govt of NCT of Delhi)* AIR 2003 SC 3716, (2003) Cr LJ 4315 (SC) .

8 *Bhupendrasinh A Chaudasama v State of Gujarat* AIR 1997 SC 3790, (1998) 2 SCC 603, (1998) Cr LJ 57 .

9 See *KM Nanavati v State of Maharashtra* AIR 1962 SC 605, (1962) 1 Cr LJ 521 .

10 *Shankar Narayan Bhadolkar v State of Maharashtra* (2004) Cr LJ 1778 (SC) .

11 *Sukhdev Singhg v Delhi State (Govt of NCT of Delhi)* AIR 2003 SC 3716, (2003) Cr LJ 4315 (SC) .

12 *Webster's Dictionary*.

13 10th Par Rep 16.

14 *Mahadev v State of Madhya Pradesh* (2006) Cr LJ 4246 (MP) .

15 *Tunda v Rex* AIR 1950 All 95 .

16 *R v Murray* 5 Cox CC 509 .

17 *Ismail v Emperor* AIR 1947 Lah 220, p 221 ; *Mohan Singh v State* AIR 1965 Punj 291, (1965) 2 Cr LJ 127 .

18 *Pateswar Basumatary v State of Assam* (1989) Cr LJ 196 (Gau) .

19 *Sita Ram v State of Rajasthan* (1998) Cr LJ 287 (DB) .

20 *Hori Lal v State of Uttar Pradesh* (1983) Cr LR 473 (UP), (1983) All LJ 1316, (1983) All Cr R 516, (1984) 1 Crimes 64 (All), (1984) All Cr C 112 .

21 *Bhupendrasingh A Chudasama v State of Gujarat* AIR 1997 SC 3790, (1998) Cr LJ 57 (SC) .

22 *Empress v Idu Beg* 3 ILR All 776, per Straight J; *Bhalchandra v State of Maharashtra* AIR 1968 SC 1319, (1968) Cr LJ 1501 ; *State v Narhari* AIR 1969 Goa 87, (1969) Cr LJ 977 .

23 *R v Nidamarti* 7 Mad HCR 119, per Halloway J.

24 *HW Smith v Emperor,* AIR 1926 Cal 300, 27 Cr LJ 153, 53 ILR Cal 333 .

25 *Blyth v Brimingham Water Works Co* (1856) 11 Ex 781, p 784 .

26 *Bhupendrasinh A Chudasama v State of Gujarat* AIR 1997 SC 3790, (1998) Cr LJ 57 (SC) .

27 *Alison's Criminal Law*, p 143.

28 *Ram Das v State* (1967) All Cr R 445, (1967) All WR 710 (HC) ; *Horilal v State of Uttar Pradesh* (1984) 1 Crimes 64 (All), (1983) All LJ 1316, (1984) 1 Cr LC 44 (All), (1984) All Cr C 112 .

29 *Emperor v Dwijendra Chandra Mukherjee* AIR 1916 Cal 633 .

30 *KM Nanavati v State of Maharashtra* AIR 1962 SC 605, (1962) 1 Cr LJ 521, p 534 ; *Harbhajan Singh v State of Punjab* AIR 1966 SC 97, p 102, (1967) ILR Ker 640 (DB) .

31 *Harbhajan Singh v State of Punjab* AIR 1966 SC 97, p 102, (1967) ILR Ker 640, p 678 (DB) .

32 *Karali Bauri v Subhas Das Musib* (1983) Cr LJ 1474, (1983) 87 CWN 844 (Cal) (DB).

33 *Mohd Saddiq v Crown* 50 Cr LJ 397, AIR 1949 Lah 85 .

34 *Dahyabhai v State of Gujarat* AIR 1964 SC 1563, (1964) 2 Cr LJ 472 ; *Harbhajan Singh v State of Punjab* AIR 1966 SC 97, (1967) ILR Ker 640 .

35 *Katcherla Venkata Sunil v Vanguri Seshumamba* 2008 Cr LJ 853, p 857 (AP) .

36 *R v Dalloway* (1847) 3 Cox 273, 478 ; post p 478.

37 *Russell on Crime*, eleventh edn, p 33, citing *R v Walker* (1824) l C&P 320, post p 478; *R v Swindall and Osbome* (1846) 2 C&K 230, post p 473.

38 *Ismail Bin Abdul Rahman v Public Prosecutor* (2004) SGCA 7, (2004) 2 SLR 74, 3 March 2004 .

39 *Ismail Bin Abdul Rahman v Public Prosecutor* (2004) 2 SLR 74 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 81.

Act likely to cause harm, but done without criminal intent, and to prevent other harm.--

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

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

Illustrations

(a) *A,* the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat *B*, with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat *C* with only two passengers on board, which he may possibly clear. Here, if *A* alters his course without any intention to run down the boat *C* and in good faith for the purpose of avoiding the danger to the passengers in the boat *B*, he is not guilty of an offence, though he may run down the boat *C* by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat *C*.

(b) *A*, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. Here if it be found that the harm to be prevented was of such a nature and so imminent as to excuse *A*'s act, *A* is not guilty of the offence.433

Comments

1. Scope and Applicability

This section comes into play when the person, causing harm, say by confining another, has a genuine and reasonable apprehension that to allow the other to remain at large will endanger the person and property of others. So, in order to attract this section, it should be shown that the act, complained of, was done in good faith in order to prevent, or avoid, harm to the person or property of others.[40] If a person threatens to commit an assault, he can be disarmed and, if necessary, put under restraint to prevent harm to persons or to property. A private person is justified in doing an act which would prevent any harm, happening to himself or another person, provided he does that act bona fide and without unnecessary force or violence.[41] So it is no offence to pull down houses to prevent a fire from spreading or to enter a person's house to put out a fire.[42] But where some persons dug the road to avoid their field being flooded, it was held that there was no question of there being a more likelihood of causing damage to public property and, therefore, no protection under this section could be taken.[43]

Under the section, the other harm to be prevented must be of such nature, and so imminent, as to justify causing the harm inflicted; and this is a question of fact depending on the circumstances of each case.[44]

2. Choice of Evils, or Compulsion by Necessity

This section deals with what is known, in English law, as 'compulsion by necessity', *i.e.*, where a person confronted with two evils, one of which is inevitable, chooses the lesser rather than the greater, the law justifies his doing so, and does not render him responsible for the consequences of his action. The ground for his non-liability is justification or excuse, by reason of the absence of mens rea.[45]

The same principle is recognised in the civil law, for there is some old authority for saying that in certain cases a man can justify the commission of a tort on the ground of necessity, *e.g.*, a trespass on property for the purpose of saving life, or extinguishing a fire.[46]

Sir JF Stephen says:

> Compulsion by necessity is one of the curiosities of law, 'on which the law of England is so vague that if cases raising the question should ever occur, the Judges would practically be able to lay down any rule which they considered expedient.[47]434

The first framers of the Code, recognising the difficulties involved, preferred not to lay down any exception at all, but to leave the whole matter to the executive discretion of government, 'which in the exercise of its clemency, will doubtless be guided in great measure by the advice of the courts'.[48]

3. Motive as a Justification of Harm

Motive may sometime justify the infliction of harm, *viz*, where it is to prevent other and greater harm. Harm may thus be caused to prevent harm. But the harm caused must not be an offence intentionally committed, *i.e.*, a man may not intentionally commit a crime to prevent other harm.

The harm may be caused intentionally, or the risk of causing it may be run.

4. The Three Essentials of the Section

The application of the section thus depends upon:

(i) the presence of the particular motive specified;
(ii) the existence of good faith; and
(iii) the absence of intention to commit crime, *i.e.*, criminal intention.[49]

5. Motive 'for the Purpose of Preventing or Avoiding other Harm to Person or Property'

This section comes into play when the person causing harm, say by confining another, has a genuine and reasonable apprehension that to allow the other to remain at large will endanger the person and property of others. So, in order to attract this section it should be shown that the act complained of was done in good faith in order to prevent or avoid, harm to the person or property of others.[50]If a person threatens to commit an assault, he can be disarmed and, if necessary, put under restraint to prevent harm to persons or to property. A private person is justified in doing an act which would prevent any harm happening to himself or to another person provided he does that act, bona fide and without unnecessary force or violence.[51]

In an Allahabad case the complainant having molested a *chamar* girl, about 200 *chamars* of the village collected together. They were determined to punish the complainant, and caught hold of him. Some villagers intervened and called a *panchayat* to settle the dispute. With a view to avoid harm to the complainant, and in his interest and for his benefit, the *panchayat* decided to blacken his face and that he should be beaten with shoes. The decision having been carried out, the accused who formed the *panchayat* were prosecuted for offences punishable under ss 323 and 506 read with s 114, IPC . It was held that the accused acted in good faith, without any criminal intent, in order to save the complainant from serious consequences resulting from his own indecent behaviour, and were entitled to the benefit of the exception contained in this section.[52]435

Under the section the other harm to be prevented must be of such a nature, and so imminent as to justify causing the harm inflicted; and this is a question of fact depending on the circumstances of each case.[53]

6. Knowledge and Intention

Knowledge as contrasted with intention would properly signify a state of mental realisation in which the mind is a passive recipient of certain ideas and impressions arising in it or passing before it. It would refer to a bare state of conscious awareness of certain facts in which the human mind might itself be supine or inactive, on the other hand, intention connotes a conscious state in which mental faculties are aroused into activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself.

Mental faculties which might be dispersed in the case of knowledge are in the case of intention concentrated and converged on a particular point and projected in a set direction. The difference between the shades of meaning of the two words is fine but clear and the use of the one in place of the other by the legislature cannot be without purpose. A distinction must be made between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge.[54]

7. Demarcating Line is thin Between Knowledge and Intention

Motive is not to be confused with intention. If a man knows that a certain consequence will follow from his act, it must be presumed in law that he intended that consequence to take place, although he may have had some different ulterior motive for performing the act.[55] While intention is a state of mind consisting of a desire that certain consequences shall follow from the party's physical act or omission,[56]motive is an ulterior intention, the intention with which an intentional act is done (or more clearly the intention with which an intentional consequence is brought about).

Intention, when distinguished from motive, relates to the means, motive to the end.[57] In *Basdev v State of Pepsu* ,[58] their Lordships of the Supreme Court pointed out the distinction between motive, intention and knowledge as:

> Motive is something which prompts a man to form an intention, and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less, and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin, but it is not difficult to perceive that they connote different things.436

It may be remarked that the word 'intention' is wrongly employed in illust (b), which affords an example

of the not common confusion in popular language between 'intention' and 'motive' or 'purpose'.[59] *A's* real intention in the illustration is to destroy the houses; his purpose or motive in so doing is to save human life or property.

8. Desire and Intention

There is a distinction between a desire to do a thing and an intention to do it. A man, for instance, may intentionally carry out an unpleasant duty although he may much prefer not to carry it out, or he may, much against his immediate desires intentionally undergo a painful operation with the ultimate object of recovering his health.[60]

9. Proof of Motive

There are both Indian and English authorities which make it perfectly clear that it is not at all necessary for the prosecution, in order to establish a charge of crime, to prove a motive for it, much less the adequacy of that motive.[61] Indeed, for the purpose of proving the offence or the incident itself, when there is direct evidence, motive pales into insignificance.[62] Where there is clear proof of motive for the crime, it lends additional support to the finding of the court that the accused was guilty, but its absence does not necessarily lead to a contrary conclusion.[63] Merely because it is not possible to find out the exact motive, direct evidence relating to the crime cannot be disbelieved, if it is reliable.[64] But while the prosecution is not bound to prove the motive of an occurrence, it is necessary for the court to consider the matter carefully when, in fact, the prosecution suggests a motive.[65] Though evidence of motive is not necessary for convicting an accused, the evidence about motive throws considerable light on the actions of those who are involved in the case. In the absence of such evidence, the setting is not proper, and the test of arriving at the truth is rendered somewhat difficult. It may be that in certain cases the motive cannot be ascertained, yet an effort should be made by the prosecution to find it.[66]

Since the application of this section depends upon the presence of the particular motive specified, it is submitted that an accused pleading the exception must prove the motive.

10. 'Good Faith'

The act must be done with 'due care and attention',[67] *i.e.*, so as to avoid or minimise, as the case may be, the contemplated harm, if possible.437

11. 'Without any Criminal Intention'

If harm is intended, the intention must not be 'criminal'.[68] A harm or injury accompanied by a criminal intention (*mens rea*) constitutes a crime. Hence, a man may not intentionally commit a crime in order to avoid another harm, though he may intend a harm or injury, or run the risk thereof for that purpose. In illust (a) the intentional running down of boat *C* would constitute culpable homicide, if one of the persons therein is killed in consequence,[69] and hence *A* alters his course 'without any intention to run down the boat *C*'. Nor does *A* intend harm, for he 'may possibly clear', though he may run down the boat *C*. He thus merely risks causing harm. In illust (b) *A* runs no risk, he intentionally demolishes houses and causes harm thereby to their owners. But since he has no *mens rea* in so doing the section protects him from criminal liability for causing such harm.[70]

Again in the case of an offence under s 328, causing hurt by means of poison, *etc.*, the criminal intention is to cause hurt. Where *A*, in order to detect an unknown thief, placed juice of the milk bush in his toddy pots, and the toddy was drunk by some soldiers, who suffered hurt thereby, it was held that this section afforded no defence.[71] The offences of 'theft' and 'murder' may now be considered, in this connection.

12. Theft

The criminal intent in theft is the intent 'to take dishonestly'[72] and a person does a thing 'dishonestly' when he does it with the intention of causing wrongful gain to one person, or wrongful loss to another[73] and wrongful gain or loss is caused by unlawful means.[74] Can a *prima facie* thief of a loaf of bread exempt himself under s 81 from liability on the plea that although he took the loaf, thereby injuring the baker, he took it for the purpose of avoiding other harm, *e.g.*, starvation to himself and his family? He intends to take and takes by unlawful means, causing thereby a wrongful loss. He, therefore, takes 'dishonestly', and his case would be excluded from the section by reason of his dishonest and criminal intention. This is accordance with the English law under which necessity from the want of food or clothing can never excuse the sufferer from committing theft, though it may go in mitigation of punishment.[75]

13. Murder

If an individual may not steal in order to avoid starvation, it would seem conclusive that under no circumstances in the absence of express provision of the law to the contrary, may intentionally take the life of another in order to preserve his own. There is no doubt that such is the law, though 'casuists have for centuries amused themselves, and may amuse themselves for centuries to come, by speculating as to438 the moral duty of two persons in the water struggling for the possession of a plank capable of supporting only one'.[76] Thus, it has been said that if *A* and *B* get hold of a plank in the sea after a shipwreck which is not large enough to support both, and *A* pushes *B* off, this is no crime.[77] This dictum of Bacon was considered in the case of *R v Dudley* ,[78] the only case on the point under consideration which has come before an English Court. The facts of the case as found by the jury were: *A*, *B* and *C*, three seamen, were, together with *D*, a boy, cast away on the high seas in an open boat. After the 18th day, when they had seen seven days without food and five days without water, and were about 1,000 miles from land, *A* killed *D*, and the three fed on his body for four days being then rescued by a passing vessel. Without so doing, *A*, *B* and *C* would probably not have survived, and the boy being very weak was likely to have died before them.

The judges were all of opinion that no question of manslaughter, (*i.e.*, culpable homicide not amounting to murder) arose. This would be the case also under the IPC . No intentional killing can be merely 'culpable homicide', unless it falls within one or other of the exceptions to s 300 . An intention to kill is the criminal intention in murder, and such intention is expressly excluded by the terms of this section. No intentional killing therefore can ever be exempted under it.[79] Thus Coleridge LC J, remarked in *R v Dudley* ,[80]

> If Lord Bacon meant to lay down (by the dictum quoted above) the broad proposition that a man may, say save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day. Consequently, a man who, in order to escape death by starvation, kills another for the purpose of eating his flesh is guilty of murder.

It is undoubtedly an inflexible rule of law that the 'necessity' arising from temptation, however terrible, is never exempted from criminal liability. The starving man who steals, the castaway who kills a companion to sustain life by eating his flesh, the woman who during a great famine, kills a child for the sake of its ornaments to sell for food, are all guilty. Their respective temptations afford no justification, however, much they may mitigate the punishments.[81]

14. Doctrine of *mens rea*

It is an almost immemorial commonplace of English judges to state that there can be no conviction on a criminal charge unless the prisoner has a *mens rea*, or guilty mind. The maxim which lays down this doctrine (*Actus non facit reum, nisi mens sit rea/Non est reus nisi mens sit rea*) has been traced by Sir James Stephen backwards through Lord Coke to the laws of Henry I,[82] Lord Kenyon CJ, long ago

declared: 'It is a principle of natural justice and of our law that *actus non facit reum nisi mens sit rea* the intent and the act must both concur to constitute the crime.'[83] Tracing the evolution of this principle, Russell[84] says:

> The new conception that merely to bring about a prohibited crime should not involve a man in liability to punishment unless in addition he could be regarded as morally439 blameworthy came to be enshrined in the well-known maxim, actus non facit reum nisi mens sit rea. This ancient maxim has remained unchallenged as a declaration of principle at common law throughout the centuries up to the present day. So long, therefore, as it remains unchallenged, no man should be convicted of crime at common law unless the two requirements which it envisages are satisfied, namely, that there must be both a physical element and a mental element in every crime.

Mens Rea in the Case of Statutory Offences

But the above maxim has not so wide an application as it is sometimes considered to be. It has undergone a modification owing to the greater precision of modern statutes. It is impossible to apply it generally to all statutes, and the substance of all reported cases is that it is necessary to look at the object of each Act that is under consideration, to see whether and how far knowledge is of the essence of the offence created. Crimes are at the present day much more accurately defined by statutes or otherwise than they formerly were.[85]*Mens rea* is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of *mens rea*, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. *Mensrea* by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of *mens rea* that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof.[86] The presumption that *mens rea*, intention or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence is liable to be displaced either by the words of the statute creating the offence, or by the subject-matter with which it deals, and both must be considered.[87]

Mens rea in the sense of actual knowledge that the act done is contrary to law is not an essential ingredient of the offence under s 8(1) read with s 23(1A) of the Foreign Exchange Regulation Act 1947.[88] Similarly, requirement of *mens rea* is not a necessary ingredient of s 35(1) of Bombay Public Trusts Act 1950.[89]

Now, though it is true that *actus non facit reum nisi mens sit rea*is a cardinal doctrine of criminal law, the legislature can create an offence which consists solely in doing an act, whatever the intention or state of mind of the person acting may be. Whether *mens rea* is a constituent part of a crime or not must in every case depend upon the wording of the particular enactment.[90] As Goddard J, held in *Evans v Dell* :[91]

> With the complexity of modern legislation one knows that there are times when the court is constrained to find that, by reason of the clear terms of an Act of Parliament, *mens rea* or the absence, of *mens rea*becomes immaterial and that if a certain act is done, an offence is committed whether the person charged knew or did not know of the Act.440

In *Brend v Wood* ,[1] Lord Goddard CJ said:

> It is of the utmost importance for the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

So far as statutory offences are concerned the law relating to mens rea in England is thus summed up in *Halsbury's Laws of England*:[2]

> A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, willfulness or recklessness. On the other hand, it may be silent as to any requirement of *mens rea,* and in such a case, in order to determine whether or not *mens rea* is an essential element of the offence, it is necessary to look at the objects and terms of the statute. In some cases the courts have concluded that, despite the absence of express language, the intention of the legislature was that *mens rea* was a necessary ingredient of the offence. In others, the statute has been interpreted as creating a strict liability irrespective of *mens rea.* Instances of this strict liability have arisen on the legislation concerning food, and drugs, liquor licensing, and many other matters.

In India also the law is the same with respect to offences under statutes other than the IPC . In the case of an offence under the Defence of India Rules 1939, their Lordships of the Privy Council agreed with the view expressed by the Lord Chief Justice of England in *Brend v Wood* ,[3] quoted above.[4] In a case, their Lordships of the Supreme Court dealing with an offence under the Motor Spirit Rationing Order 1941 observed that the view of the law as propounded by the Privy Council in the above case was the correct view.[5] The same principles have been applied or reiterated in a number of other cases.[6] The position is thus summed up in the case of *State v Ismail Shakur Morani:* [7]441

> Thus, there is a judicial agreement that in order to find whether *mens rea*is or is not a constituent element of an offence created by a statute we must turn to the words of the statute and see what the intention of the legislature was when it created the offence, by enacting the statute. Did the legislature intend that the doing of an act per se, without anything more, should constitute an offence or did it intend that the doing of it with a certain state of mind should amount to an offence? If the essence of an offence lay solely in the doing of an act and nothing more was required, the question of *mens rea* would not arise and the state of mind, knowledge or intention of the doer would be irrelevant. On the other hand, if the legislature intended that the state of mind of the doer should be a constituent of the offence, the prosecution would fail without the proof of *mens rea.*

Statutory Offences may be Classified under Three Heads

Now, statutory offences may be classified under three heads for purposes of consideration of the aforesaid principle. In one class the offences are so worded as to indicate clearly that *mens rea* is an essential ingredient of the same. This is usually done by the use of such words as 'knowingly', 'willfully', 'fraudulently', *etc*. There are others offences, called offences of strict or absolute liability, where the maxim of *mens rea* is excluded expressly or by necessary implication. There is a third class of cases, where the language used is such that it neither expressly includes nor avowedly excludes the ingredient of *mens rea*. In such a case the presumption that *mens rea* is an essential ingredient of the offences not having been displaced by the wording of the statute, there can be no conviction without proof of *mens rea*. The absence of the words 'knowingly' or 'willfully' cannot lead to the inference that the presumption of *mens rea* was impliedly excluded by the statute.[8]

Three Classes of Exceptions to *Mens Rea*

The principal classes of exceptions to *mens rea*may perhaps be reduced to three. One is a class of

acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Another class comprehends some, and perhaps all, public nuisance. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right. But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of someone whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence.[9]

Mens Rea in Case of Offences under the Indian Penal Code 1860

Under the IPC, the maxim relating to *mens rea* is wholly out of place. Every offence is defined, and the definition states not only what the accused must have done, but even the state of his mind with regard to the act when he was doing it. It must have been done, knowingly, voluntarily, fraudulently, dishonestly, or the like. And when it is stated that the act must be done with a particular knowledge or intention, the definition goes on to state what he must have known, or what he must have442 intended.[10] If the legislature has omitted to prescribe a particular mental condition, the presumption is that the omission is intentional, and in such a case the doctrine of *mens rea* is not applicable.[11] 'Criminal law connotes only the quality or such acts of omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the Act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality...unless the moral code necessarily disapproves acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence'; for the domain of 'criminal jurisprudence' can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess that they are prohibited by the State and that those who commit them are punished.[12]

Proof of *Mens Rea*

In the Indian penal statutes, where the doctrine of *mens rea* is intended to come into operation and a guilty mind is deemed essential for the proof of an offence, the statute itself uses the words like 'knowingly', 'willingly', 'fraudulently', 'negligently' and so on. Such knowledge or intention or negligence can always be brought home by adducing circumstantial evidence, in fact as pointed by Dr Kenney,[13]*mens rea* must necessarily be proved by circumstantial evidence alone (except where the accused actually confesses and what is more in India sticks to it and which is highly problematical). It may also be useful to recall that, in establishing such guilty knowledge, actual or direct, knowledge is not absolutely essential, there being no doubt that a person who deliberately shuts his eye to an obvious means of knowledge is equally liable. In the large class of penal Acts, the state as well as Central Acts which are really not criminal but which are prohibited by the levy of a penalty in the interests of the public, unless qualifying words are used, the prosecution need only prove the prohibited act and then must the defendant bring himself within the statutory defence. The absence of qualifying words connotes that the offence is intended to be one of absolute prohibition.

On the other hand, if qualifying words like 'knowingly', 'wilfully', 'fraudulently' and 'negligently' are used, the prosecution must bring home to the offender either by direct or circumstantial evidence the precise and particular elements connoted by these terms, *i.e.*, showing liability of a guilty mind based in the form of actual knowledge or connivance. Where the offence is intended to be dependent upon a blameworthy mind in the form of knowledge of the facts constituting the offence, the term wilfully is used to denote this requirement. It denotes the necessity for proving that the accused had a guilty mind. If qualifying words like 'permitting', 'suffering', 'causing' or 'allowing' are used, it would be enough if the evidence makes out blameful inadvertence on the part of the offender, *i.e.,* first the accused must be shown under this third group to have had guilty knowledge that the forbidden event443 is happening, and secondly that the accused, with such knowledge and being in a position to prevent the event happening, does nothing about it.[14]

Intention can be Implied from Overt Acts

To constitute a crime the act must, except in the case of certain statutory crimes, be accompanied by a criminal intent or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to a criminal intent. Intention, however, is not capable of positive proof; it can only be implied from overt acts. As a general rule, every sane man is presumed to intend the necessary or the natural and probable consequences of his acts, and this presumption of law will prevail unless from a consideration of all the evidence, the court entertains a reasonable doubt whether such intention existed. This presumption, however, is not conclusive or alone sufficient to justify a conviction and should be supplemented by other testimony.[15] The purpose or intention with which a crime is committed is a matter to be deduced from the facts and circumstances of each case. Where no offence is actually committed, and the purpose of the accused has to be judged by reference to the surrounding circumstances and the conduct of the accused, the proper test would be that the circumstances sought to be relied upon must be consistent with the one and the only purpose or intention set out in the charge.[16]

***Mens Rea* and Negligence**

Negligence, in the sense of blameful inadvertence, describes the state of mind of a person who ought to have known, and is obviously not so reprehensible as the state of mind of a person who willfully shuts his eyes to the obvious. Hitherto, strong objection has been voiced to basing criminal liability upon mere inadvertence. But where the phrase *mens rea* is used to denote a state of mind, it is possible to argue that the only state of mind which is pertinent is the positive form known as advertence, *i.e.,* realisation on foresight of consequences, in which event the ambit of *mens rea* is restricted to intention and subjective recklessness. Conversely, it is possible to argue that although inadvertence involves the negative form of absence of realisation or foresight of consequences, it too can justifiably be termed a state of mind and, therefore, as forming, in certain conditions, part of the doctrine of *mens rea.* Negligence or blameful inadvertence or failure to supervise may properly be designated as *mens rea*.[17]

If directors, who are responsible for the management of a company and who presumably know the duties imposed upon them by law, make no attempt to see that those duties are carried out, they may be held guilty for non-compliance with the provisions of the Indian Companies Act.[18]

15. Explanation

Explanation to s 81, IPC says that it would be a question of fact, whether the harm to be prevented or avoided was of such a nature and so imminent so as to justify the risk of doing the act with the knowledge that it was likely to cause harm. This exception444 is a question of fact and that may help the buyer and not the seller for consideration. In the present case, accused A38 had supplied food and fuel to a ship in distress on payment. If accused A38 had ventured to supply food and fuel free of cost to the ship in distress, the question of application of s 81, IPC could be considered. On facts, accused A38 was not protected by s 81, IPC .[19]

40 *Dendati Sannibabu v Varadapureddi Sannibabu* AIR 1959 AP 102, p 103, (1959) Cr LJ 167 ; *State of Mysore v P Yallappa Mali* (1965) Mad LJ (Cr) 868, p 871, (1965) Mys LJ 263 .

41 *Gopal Naidu v Emperor* AIR 1923 Mad 523(2), 24 Cr LJ 599 (FB) ; Re *Ramaswamy Ayyar* 44 ILR Mad 913, 22 Cr LJ 412; *Denidati Sannibabu v Varadarpureddi Sannibabu* AIR 1959 AP 102, (1959) Cr LJ 167 .

42 *Dr Kenny's Outlines of Criminal Law*, nineteenth edn, p 72, para 47; *Halsbury's Laws of England*, vol 11, fourth edn, Butterworths, London, 1976, p 26, para 26; *R v Bostan Valad Futtekhan* 17 ILR Bom 626 .

43 *Prayag Dass v State* (1967) All WR 572 ; *R v Maganlal* 14 ILR Bom 115, p 146 ; *State of Mysore v P Yallappa Moti* (1965) Mad LJ 868 (Cr), (1965) Mys LJ 263 .

44 *R v Stration* 21 St Tr 1045 .

45 *Gope v Sharpe* (1910) 1 KB 168 ; *R v Moganlal* 14 ILR Bom 115, p 146 .

46 *Gope v Sharpe* (1910) 1 KB 168, [1911] 2 KB 837 .

47 SHCLE, vol II, p 108.

48 Note B to *Macaulary's Works* (edited by Lady Trevelyan, 1875).

49 *State of Mysore v P Yallappa Malli* (1965) Mad LJ 868, p 871, (1965) Mys LJ 263 .

50 *Dendati Sannibabu v Varadapureddi Sannibabu* AIR 1959 AP 102, p 103 .

51 *Gopal Naidu v Emperor* AIR 1923 Mad 523 (2), p 531 (FB), 46 ILR Mad 605, 24 Cr LJ 599 ; Re *Ramaswamy Ayyar* 44 ILR Mad 913, 22 Cr LJ 412; *Dendati Sannibabu v Varadapureddi Sannibabu* AIR 1959 AP 102 .

52 *Bishamber v Roomal* AIR 1951 All 500, 52 Cr LJ 179 .

53 *R v Stratton* 21 St Tr 1045, SD Art 33 ; SHCLE, vol 11, p 109.

54 Re *Kuttayam alias Nambi Thevar*AIR 1960 Mad 9 (DB), (1960) Cr LJ 85 (DB).

55 *Mir Chittan v Emperor* AIR 1937 All 13, p 14 .

56 *Mark on Elements of Law,* fourth edn, p 220.

57 Glanville Williams, *Criminal Law*, p 41, s 15 ; cited in *Kunju Moideen Methararu v Kandan* AIR 1959 Ker 146, p 148 .

58 *Basdev v State of Pepsu* AIR 1956 SC 488, p 490 .

59 *Vide* the first paragraph of the section.

60 *Emperor v Ram Sukh* AIR 1933 Oudh 436 ; *Emperor v Jagmohan Das* AIR 1924 Oudh 297 ; *Ram Saran v Emperor* 4 Cr LJ 293 .

61 *Chandu v Emperor* AIR 1928 Lah 657, p 659 .

62 *Nitai Naik v State* AIR 1957 Ori 168, p 170 ; *Ratan Lal v Emperor* AIR 1933 Oudh 333 ; *Hazaratgul Khan v Emperor* AIR 1938 Cal 430 ; *Arjun Raghu Patil v State* AIR 1956 Bom 183 ; *State v Durgacharan Barik* AIR 1963 Ori 33, (1963) 1 Cr LJ 213 .

63 *Atley v State of Uttar Pradesh* AIR 1955 SC 807, p 810 ; *Satya Vir v State* AIR 1958 All 746 .

64 *Ghansa Singh v State* AIR 1958 Raj 226, p 232 .

65 *Hari Bag v State* AIR 1958 Cal 118, p 120 ; *Hans Raj v Emperor* 30 Cr LJ 478 .

66 *Ram Lal Singh v State* AIR 1958 MP 380, p 387 .

67 Indian Penal Code 1860, s 52 .

68 *State of Mysore v P Yallappa Mali* (1965) Mad LJ 868, p 871, (1965) Mys LJ 263 .

69 Indian Penal Code 1860, s 299 .

70 *R v Dhania* 5 Bom HCR 59 .

71 *Ibid*.

72 Indian Penal Code 1860, s 378 .

73 *Ibid*, s 24 .

74 *Ibid*, s 23 .

75 1 Hale 54, 2 East PC 698; per curiam in *R v Dudley* 14 QBD 273 and Note A to the Draft Code of the English Criminal Code Commissioners in 1879.

76 Note A, Draft (English) Criminal Code, 1879.

77 *Bacon's Maxims*, No 5.

78 *R v Dudley* 1884 14 QBD 273 .

79 Compare the words 'without any intention to run down the boat C' in illust (a).

80 *R v Dudley* 1884 14 QBD 273 .

81 The remarks of Scott J, in *R v Manganlal* 14 ILR Bom 115, p 146 .

82 2 Stephens Criminal Law 94.

83 *Fowler v Padget* (1798) 7 TLR 509, p 514 .

84 *Russell on Crime,* vol I, eleventh edn, p 23.

85 *R v Tolson* (1889) 23 QBD 168 .

86 *Nathulal v State of Madhya Pradesh* AIR 1966 SC 43, (1966) Cr LJ 71 .

87 *Sherras v De Rutzen* (1895) 1 QB 918, 921, 64 LJMC 218, per Wright J.

88 *State of Maharashtra v Mayer Hans George* AIR 1965 SC 722, (1965) 1 Cr LJ 641 (SC) .

89 *State of Gujarat v Acharya Shri Devendra Prasadji Pande & Ors* AIR 1971 SC 866, (1971) Cr LJ 760 .

90 *State v Ismail Shakur Morani* AIR 1958 Bom 103, p 109 .

91 *Evans v Dell* (1937) 53 TLR 310, p 313 .

1 *Brend v Wood* (1946) 110 CP 317, p 318, 62 TLR 462, p 463, 175 LT 306 .

2 *Halsbury's Laws of England*, vol 10, third edn, Butterworths, London, s 58, pp 273-74.

3 *Brend v Wood* (1946) 110 JP 317, p 318 .

4 *Srinivas Mall v King-Emperor* AIR 1947 PC 135, p 139 .

5 *Hari Prasad Rao v State* AIR 1951 SC 204, p 206 .

6 *State v Sheo Prasad Jaiswal* AIR 1956 All 610, (1956) Cr LJ 1156, (neither cl 13 of the VP Oilseeds and Oilseed Products Control Order nor s 7 of the Essential Supplies (Temporary Powers) Act 1946, necessarily excluded *mens rea*); *State Govt of Madhya Pradesh v Maganbhai Desaibhai* AIR 1954 Nag 41 (DB), (1953) ILR Nag 501, 1953 Nag LJ 514, 1954 Cr LJ 89 ; Re *Ramchandra Gupta*(1957) 1 Andh WR 279 (offences under the Defence of Indian Rules are not of a minor character so as to rule out *mens rea* as an integral part of the offence); *State v BD Meattle* AIR 1957 Punj 74, (1957) Cr LJ 472 (no offence is committed under s 29 of the Industrial Disputes (Appellate Tribunal) Act, if there was no *mens rea*); *State v SP Bhadani* AIR 1959 Pat 9 (barring sub-s (1) of s 14 of the Employee's Provident Funds Act 19 of 1952, the legislature deliberately avoided making *mens rea*a constituent part of the offence under the Act or the scheme); *Isak Soloman Macmull v Emperor* AIR 1948 Bom 364 (*mens rea* is an essential ingredient of an offence against the provisions of the Motor Spirit Rationing Order 1941); *State v Ismail Shakur* AIR 1958 Bom 103, (1957) ILR Bom 437, 59 Bom LR 491, (1958) Cr LJ 352 ; *AP Misra v State* (1958) Cr LJ 1386, AIR 1953 Cal 612 (absence of *mens rea* in the case under the Calcutta Wheat (Movement Control) Order 1956, absolves the accused from liability); *Shrinath v Municipality, Gwailor* AIR 1957 MP 247, (1957) Jab LJ 11, (1957) MPLJ 89 ; (in the absence of reference to *mens rea* in s 139 of the Madhya Bharat Municipal Act 1954, the section does not attract the doctrine of *mens rea*); *State of Coorg v PK Assu* AIR 1956 Mys 31 [*mens rea*not necessary in the case of offence under s 7 of the Essential Supplies (Temporary Powers) Act 1946].

7 *State v Ismail Shakur Morani* AIR 1958 Bom 103, p 109-10 .

8 *Lalit v State* AIR 1957 All 636, p 637-38 ; the case-law discussed therein.

9 *Sherras v De Rutzen* (1895) 1 QB 918 ; *State of Gujarat & Anor v Acharya Shri Devendra Prosadji Pande & Ors* AIR 1971 SC 866, (1971) Cr LJ 760 (SC) .

10 *Mayne's Criminal Law of India*, second edn, p 243, para 9.

11 *Legal Remembrancer, Bengal v Ambika Charan Dulal* (1946) 2 ILR Cal 127 .

12 *Proprietary Articles Trade Assn v Attorney-General of Canada* AIR 1931 PC 94, p 99 .

13 *Outline of Criminal Law,* fourteenth edn, p 396.

14 Re *Arcot Citizen Bank Ltd, Arcot*AIR 1957 Mad 675, p 677-78 .

15 *Ismail v Emperor* AIR 1947 Lah 220, p 221 ; *Emperor v Ram Chandra Raoji Guzin* AIR 1938 Bom 87 .

16 *Rishipal v State* AIR 1962 All 13, p 17 .

17 Re *Arcot Citizen Bank Ltd, Arcot*AIR 1957 Mad 675, p 677 .

18 *Ibid*; *Bhagirath v Emperor* AIR 1948 Cal 42, 48 Cr LJ 236 .

19 *Mariya Anton Vijay v State* 2015 Cr LJ 107, p 125 (Mad) .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 82.

Act of a child under seven years of age.--

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

Comments

1. Privilege of Infancy

In English law there is a *presumptio juris et de jurei.e.*, a conclusive presumption which admits of no contradiction, that children under seven cannot commit a crime,[20] the ground of the doctrine being that children of such, immature years are actually or virtually unconscious of what they do. The same rule is embodied in this section. The terms of this section are equally conclusive. On proof of age the exemption must apply.[21]

2. Applicability of Section to Offences under Special or Local Law

Section 40, IPC, governs this section, being in ch 4, and according to s 40 the word 'offence' denotes a thing punishable under this Code, or under any special or local law. Section 82, therefore, applies even to offences under special or local laws.[22]From a bare reference to various provisions of the Bihar Childrens Act 1982 and the Juvenile Justice Act 1986[23], it is apparent that an extraordinary procedure has been prescribed for enquiring into the offence alleged to have been committed by a child/juvenile and punishment thereof. The basic approach appears to be curative instead of punitive. Even the IPC, which was framed more than a century ago, had taken note of the age factor in respect of persons committing offences which is evident from ss 82 - 83 of the IPC .[24]

A boy, aged seven years of age, found a disc of gold (treasure). He did not report the same to the collector as required to do so under the provisions of the Indian Treasure-Trove Act 1878. It was held that he was not liable in view of the protection granted by this section.[25]445

3. Exception to the Rule

By s 168 of the Indian Railways Act 1989 a minor under the age of 12 who commits any act or omission specified in ss 150 - 154 of the Act is deemed to have committed an offence despite the provisions of this section and s 83 of the IPC .

Where boys under the age of 7 and 12 years throw stones at a railway train, their act would ordinarily be protected under ss 82 - 83, IPC, and would not be punishable as an offence under s 152, Railways Act or under any provision of the IPC . But such act would be deemed to be an offence under the special provisions of s 168, Railways Act, and punishable under that section.[26]

4. Master Liable when Agent is Below Seven

Though a child below seven years of age is incapable of committing an offence, an adult may employ the child as an agent to commit a crime. In such a case, the adult will be liable as an abettor.[27]

5. Consequences of the Arrest of Child

Since the child below the age of seven years is not criminally liable for any act done by him, his arrest is also unlawful.[28]

20 *Marsh v Loader* 14 CBNS 535, 2 WR 784 (Eng) .

21 Re *Lukhmi Agradrmini*(1874) 22 WR (Cr) 27.

22 *King v Ba Ba Sein* AIR 1938 Rang 400, 40 Cr LJ 80 ; *Uttam Chand v Emperor* AIR 1945 Lah 238, 47 Cr LJ 516 (FB) ; *Shyam Bahadur v State* AIR 1967 Pat 312, (1969) Cr LJ 1360 .

23 Now repealed by the Juvenile Justice (Care and Protection of Children) Act 2000 (56 of 2000).

24 *Krishna Bhagwan v State of Bihar* AIR 1989 Pat 217 (FB), (1989) Cr LJ 1283 (Pat) (FB).

25 *Shyam Bahadur v State* AIR 1967 Pat 315, (1969) Cr LJ 1360 .

26 *Emperor v Wali Mahommad* AIR 1936 Sind 185 .

27 Section 108 , expln 3, illusts (a) and (b) of the IPC .

28 *Marsh v Loader* (1863) 14 CBNS 535 ; *Walters v Lunt* (1951) 2 All ER 645 ; Re *Santa Cruj Morais* 16 Cr LJ 602, p 603, AIR 1916 Mad 642(1) .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 83.

Act of a child above seven and under twelve of immature understanding.--

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

Comments

1. Scope--Qualified Privilege of Children Above Seven and under Twelve

A child under seven years of age is absolutely immune from criminal liability.[29]But a child above seven years and under 12, has only a qualified privilege. He may or may not be liable according to his individual maturity of understanding. He is immune from liability only if he has not attained sufficient maturity of understanding to judge the nature and consequences of his act. Full criminal responsibility commences after the age of 12, though civil liability does not commence till a person attains the age of majority, *i.e.*, 18 years in India. So even if a person is a minor, he446 can be held guilty so long as his case is not covered by ss 82 - 83 of the IPC . A child between 7-12 years of age is still presumed to be *doli incapax*; but the presumption is no longer conclusive and it may be rebutted by evidence.[30] The IPC provides no protection from culpable liability on ground of tender age to one who is aged 12 years or more. In a child's life the period between 7-12 years of age is rather a twilight period of transition to a minimal workable level of understanding of things in the firmament of worldly affairs, and that is why the IPC and the Oaths' Act have made special provision for children below 12 years in respect of matters dependent on a minimal power of understanding.[31] Any offence punishable under the IPC, including an offence punishable under s 408, can be committed by a person, more than 12 years of age. Criminal liability is quite distinct from civil liability. A person may be criminally liable even though he may not be civilly liable.[32]

2. Applicability of Section to Special or Local Laws

Commentary under s 82 may be referred to.

3. Evidence Regarding Age

It is generally desirable that, when it is procurable, there should be some reliable evidence as to the age of the accused, though a court is competent to find the age from the appearance of the accused.[33]

It is not possible for the appellate court to determine the age of an accused on the date of the commission of offence because that has to be determined on the basis of evidence to be adduced and other materials in support thereof being produced. This determination should not be based merely on written opinion of the doctors produced before the appellate court. Prosecution has a right to cross-examine such medical or forensic experts who have given their opinion about the age of the accused in order to demonstrate that the accused was not a juvenile on the date of commission of offence. This is necessary because by the time the plea is taken before the appellate court in almost all the cases, the accused concerned must have ceased to be a juvenile due to lapse of time making it more difficult for the appellate court as well as the juvenile court to determine as to what was his age at the time of the commission of the offence. In such a situation, the courts, including juvenile courts, should get the accused held guilty of serious offences, examined by a medical board and should determine the age of such accused on the basis of the materials on the record, including the opinion of the medical board.[34]

4. Maturity of Understanding to Judge the Nature and Consequences of his Conduct

A child between 7-12 years of age cannot be convicted of any offence unless it is expressly found that he has attained sufficient maturity of understanding to judge the nature and consequences of the act done.[35] The capacity of doing that which is wrong447 is not so much to be measured by year as by the strength of the prisoner's understanding and judgment.[36] The 'consequences of his conduct' mentioned in the section are apparently not the penal consequences of the offence but the natural consequences which flow from a voluntary act, such as for instance, when fire is applied to an inflammable substance, it will burn, or that a heavy blow with an axe or a sword will cause death or grievous hurt.[37] What this section contemplates is that, to escape liability, the child should not know

the natural and physical consequences of his conduct.[38]

5. No Presumption as to Capacity to Commit Rape

The presumption of English law against the possibility of the commission of the offence of rape by a boy under the age of 14 years has no application in this country. The law on the subject of infancy in connection with criminal liability is laid down in ss 82 - 83 of the IPC and nowhere else. It is a question of fact as to whether in the course of the assault perpetrated by the accused on the person of a girl; such penetration had been effected as is required by law to constitute the offence of rape.[39] A person physically incapable of committing the offence of rape, *i.e.*, a boy of 12 years, can yet be held guilty of an attempt to commit it,[40] in certain circumstances.

6. Burden of Proof as to Maturity of Understanding

If the accused is child under seven years of age, the proof of that fact would be *ipso facto*an answer to the prosecution. But where the accused is above seven years and under 12, the incapacity to commit an offence only arises where the child has not attained sufficient maturity. Such non-attainment should be specially pleaded and proved, like the incapacity of a person who, at the time of doing an act charged as an offence, is alleged to have been of unsound mind.[41]

The English law presumes that owing to immaturity of understanding, children between 7-14 years of age cannot be a judge of the nature and consequences of the conduct. Nothing however is said in the IPC as to the presumption to be drawn on the latter question but by s 105 of the Indian Evidence Act 1872, the burden of proof of the circumstances establishing 'any of the General Exceptions in the IPC is on the accused and the court 'shall presume' the absence of such circumstances'.[42] Owing to the silence of the IPC, 'it would seem that maturity of understanding is to be presumed'. It is, therefore, clear that in India the rule on presumptions in these cases is contrary to the English rule, and consequently in India, the court will presume maturity of understanding, and the onus of proving immaturity thereof is on the defence. A child between 7-12 years, of age cannot be convicted of any offence unless it is expressly found that the child has attained sufficient maturity of understanding to judge the nature and consequences of the acts done.[43] The IPC provides no protection from culpable liability on ground of tender age to one who is aged 12 years or more. In a child's life the period between 7-12 years of age is rather448 like a twilight period of transition to a minimal workable level of understanding of things in the firmament of worldly affairs, and that is why both the IPC and the Oaths Act have made special provisions for children below 12 years in respect of matters dependant on a minimal power of understanding.[44] But it is not necessary for the prosecution to prove, by positive evidence to show that the accused person, below 12 years of age had arrived up to sufficient maturity of understanding within the meaning of this section. It would be permissible to arrive at the finding even on a consideration of the circumstances of the particular case.[45]Nature of act, preparation, previous and subsequent conduct, manner and means of committing the offence may help the court in this respect.

29 Indian Penal Code 1860, s 82 .

30 *Hiralal v State of Bihar* AIR 1977 SC 2236, (1977) Cr LJ 1921 .

31 *Santosh Roy v State of West Bengal* (1992) Cr LJ 2493 (Cal)(FB).

32 *Kalka Prasad v State* AIR 1959 All 698, p 699 .

33 *Queen-Empress v Makimuddin* 27 ILR Cal 133 ; *R v Marimuthu* 9 Cr LJ 392 ; *Hiralal v State of Bihar* AIR 1977 SC 2236, (1977) Cr LJ 1921 .

34 *Krishna Bhagwan v State of Bihar* AIR 1989 Pat 217 (FB), (1989) Cr LJ 1283 (Pat)(FB).

35 *Queen-Empress v Makimuddin* 27 ILR Cal 193 ; Re *Marimuthu* 9 Cr LJ 392; *Rakesh Kumar v State* 1977 FAJ 97, (1977) 1

FAC 95 (All) .

36 *Queen v Aimona* 1 WR 43, p 44 .

37 *Queen v Lukhini Agradanini* 22 WR 27, p 28 .

38 *Ulla Mahapatra v King* AIR 1950 Ori 261, 16 Cut LT 102 .

39 *Emperor v Paras Ram Dube* AIR 1915 All 134 .

40 *Emperor v Naga Tun King* AIR 1918 LB 96(1) .

41 *Queen v Lukhini Agradanini* 22 WR 27, p 28 .

42 Compare The Commissioner's Report 1847, s 117 .

43 *Queen-Empress v Makimuddin* 27 ILR Cal 133 ; Re *Marimuthu* 9 Cr LJ 392 (Mad).

44 *Santosh Roy v State of West Bengal* (1992) Cr LJ 2493 (Cal) (FB) .

45 *Abdul Sultan v Crown* AIR 1949 Lah 51, 50 Cr LJ 336, p 337 ; *Queen v Begarayi Krishna Saranu* 6 ILR Mad 373 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 84.

Act of a person of unsound mind.--

Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.449

Comments

1. Scope and Applicability

This section embodies the fundamental maxim of criminal law, *i.e.*, *actus non facit reum nisi mens sit rea*(an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and the act must concur; but in the case of insane persons no culpability is fastened on them as they have no free will--*furiosi nulla voluntas est.*[46]If a person, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, he cannot be guilty of any criminal intent. Such a person lacks the450 requisite *mens rea* and is entitled to an acquittal.[47] He is best punished by his own madness.[48] The insanity contemplated under s 84, IPC, to be recognised as an exception to criminal liability must be such as to disable an accused person from knowing the character of the act he was committing when he commits a criminal act. If at the time of commission of the offence, the accused knew the nature of the act he was committing, he cannot be absolved of the responsibility for the offence.[49]Insanity or unsoundness of mind are the stages when a person is incapable of knowing the nature of the act or

unable to understand what it wrong or right and must relate to the period in which the offence has been committed.[50] It is only the unsoundness of mind which materially impairs the cognitive faculty of the mind that can form a ground for exemption from criminal liability under s 84, IPC .[51] Protection under s 84, IPC is restricted to cases where cognitive faculties of the accused are completely impaired and not cases where insanity affects only emotion and will.[52]

Under this section, a person is legally insane when he is incapable of knowing:

(i) the nature of the act, *i.e.*, the physical act, which is done; or
(ii) that he is doing wrong; or
(iii) that he is doing what is contrary to law.

The first one refers to the offender's consciousness of the bearing of his act on those, who are affected by it, and second and third to his consciousness of its relation to himself.[53]

Principles for the Application of the Section

The following principles are to be kept in mind in applying this section:

(a) every type of insanity is not legal insanity; the cognitive faculty must be destroyed as to render one incapable of knowing the nature of his act or that what he is doing is wrong or contrary to law;
(b) the court shall presume the absence of such insanity;
(c) the burden of proof of legal insanity is on the accused, though it is not as heavy as the prosecution;
(d) the court must consider whether the accused suffered from legal insanity at the time when the offence was committed;
(e) in reaching such a conclusion, the circumstances which preceded, attended or followed the crime are relevant consideration; and451
(f) the prosecution in discharging its burden in the face of the plea of legal insanity has merely to prove the basic fact and rely upon the normal presumption of law that everyone knows the law and the natural consequences of his act.[54]

In dealing with insanity, following principles have to be borne in mind:

(a) Unsoundness of mind as contemplated by s 84, IPC, is legal insanity which requires that cognitive faculties of the accused are such that he does not know what he has done or what will follow from his act.
(b) The court shall presume absence of insanity.
(c) To get the benefit of s 84, IPC, the accused must establish any one of the three elements, necessary under the section, incapability of knowing--(1) the nature of the act, or (2) that the act was contrary to law or (3) that it was wrong.[55]

Ingredients of the Section

A dichotomy of s 84, IPC, reveals the following ingredients of this section, namely:

(i) the accused was of unsound mind;

(ii) he was of unsound mind at the time he did the act and not merely before or after the act; and
(iii) as a result of unsoundness of mind he was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.[56]

When a plea of insanity is raised by way of defence, the court has essentially to look for evidence on these points.[57]

To bring a crime under the exception of s 84, IPC, the following essential ingredients of s 84, IPC, are to be fulfilled:

(a) The act must be done by a person who is incapable of knowing--(i) the nature of the act, or (ii) that what he is doing is either wrong or contrary to law.
(b) Such incapacity must arise by reason of unsoundness of mind.
(c) Such incapacity must exist at the time of doing the act.[58]452

Elements

To establish that an act done cannot be said to be an offence as covered by s 84, IPC, the following elements must be present:

(i) the accused was of unsound mind at the time of commission of the act; and
(ii) by reason of unsoundness of mind, the accused was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.[59]

Every kind of Unsoundness of Mind does not Exempt from Responsibility

The IPC does not define 'unsoundness of mind'. But to exempt a man from criminal liability, unsoundness of mind, must reach that degree which is described in the later part of this exception. It is not every person suffering from mental disease that can avoid responsibility for a crime by invoking the plea of insanity.[60]

An idiot or a lunatic, even if he is conscious of his act, has no capacity to know its nature and quality, he is not responsible. Madmen, especially those under the influence of some delusion, may have capacity enough to know the nature of the act, but unless they also know that they are doing 'what is either wrong or contrary to law' they are not responsible. A common stance is where a man fully believes that the act he is doing, *e.g.*., killing another man, is done by the immediate command of God.[61]

According to s 84, IPC, unsoundness of mind, to exempt a person from criminal responsibility, must reach that degree which is described in the latter part of the section. It is not every kind of unsoundness of mind that would exempt a person from responsibility for a crime by invoking the section; but it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility; the nature and the extent of the unsoundness of mind required be such as would make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law. Section 84 limits the exemption from liability to those cases where the cognitive features are completely impaired and not to cases where the insanity affects only emotion and will. Under the section it is not insanity of every description that will be a defence to a criminal charge. From the medical point of view there are many states of mind which may amount to insanity. But this section draws a distinction between medical insanity and legal insanity. 'Unsoundness of mind', which may amount to insanity from the medical point of view, will not

necessarily be legal insanity for the purpose of this section so as to confer immunity for the insane person from criminal liability for any act done by him while he is in that state of mind. Mere unsoundness of mind is not *ipso facto* a ground of defence under s 84, IPC, unless, in consequence of such unsoundness, the accused was incapable at the time of his committing the alleged offence, of knowing either the nature of his act or that the act was either wrong or contrary to law.[62]

Insanity of a Particular Kind Provides Exemption

In order to succeed in a plea of defence of insanity, it is not enough to prove that the accused person was having certain abnormal personality traits or imbalances in his453 behaviour or that he was a maladjusted person. He might have been suffering from bouts of depression or exhibiting neurotic behaviour and may be a maladjusted individual. It is not every imbalance in behaviour or mal-adjustment in the personality that will entitle him to claim exemption under s 84, IPC, from the penal consequences of his acts. The language and message of s 84 is clear and definite as to the requirements of law. At the time of committing the offence charged, the accused, by reason of unsoundness of mind, must be incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. In other words, the unsoundness of mind should be of such a nature which will cloud or affect the perception of facts by the accused person so that he does not know the nature of the act he is doing or such that he does not know that he is doing something wrong or contrary to law. To express in more abstract language, his cognitive faculties must be affected by the unsoundness of mind so that he does not know the nature of the act he is doing or such that he does not know that he is doing something wrong or contrary to law. This has to be arrived at by the court from the medical evidence in the case and the other evidence adduced.[63]

2. Defence of Insanity in England

English law, even in its harshest days, recognised insanity as a possible defence. On the other hand it has never held (as a popular error imagines it to hold) that the mere existence of any insanity whatever will suffice to exempt the insane person from criminal responsibility. Only insanity of a particular and appropriate kind will produce exemption. For lunatics are usually capable of being influenced by ordinary motives, such as the prospect of punishment; hence they usually plan their crimes with care, and take means to avoid detection. English criminal law, therefore, divides insane persons into two classes:

(a) those over whom the threats and prohibition of the criminal law would exercise no control, and on whom therefore it would be gratuitous cruelty to inflict its punishment; and
(b) those whose form of insanity is only such that to use Lord Bramwell's apt test 'they would not have yielded to their insanity if a policemen had been at their elbow'.

But the very difficult question as to where the line of demarcation should be drawn, is one upon which the law has undergone grave though gradual, changes. Two centuries ago, a view prevailed that no lunatic ought to escape punishment unless he were so totally deprived of understanding and memory as to be as ignorant of what he was doing as a wild beast. But ever since the epoch-making speech of Erskine in defence of Hadfield, a more rational view has prevailed, which bases the test upon the presence or absence of the faculty of distinguishing right from wrong in the crime committed. This modern view has acquired a degree of authoritative precision unusual for any common law doctrine, through its formulation in an abstract shape, in 1843, by a set of answers delivered by the judges in reply to questions propounded to them by the House of Lords.

Stand of Judges in the Mcnaughten Case

One Daniel Mcnaughten had aroused public excitement by the murder of one Drummond, the private secretary of Sir Robert Peel, who had been mistaken for that454 statesman. The acquittal of

Mcnaughten on the ground of insanity provoked such widespread dissatisfaction that it became the subject of debate in the House of Lords (though the case never came before the House in its judicial capacity). In consequence of the debate, the Lords submitted to the judges certain abstract questions respecting persons afflicted with insane delusions. The replies given by the judges may be summed up thus:

(i) Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of a jury.

(ii) To establish a defence on the ground of insanity, it must be clearly shown that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or (if he did know this) not to know that what he was doing was wrong morally.

(iii) As to his knowledge of the wrongfulness of the act, the judges say: 'If the accused was conscious that the act was one which he ought not to do and if that act was at the same time contrary to the law of the land, he is punishable'. Thus the test is the power of distinguishing between right and wrong, not, as was once supposed, in the abstract, but in regard to the particular act committed.

(iv) Where a criminal act is committed by a man under some insane delusion as to the surrounding facts, which conceals from him the true nature of the act he is doing, he will be under the same degree of responsibility as if the facts had been as he imagined them to be. He may, for instance, kill under the imagination either that he is an executioner lawfully carrying out a judicial sentence, or on the other hand, merely that the person killed had once cheated him at cards.

In over a hundred years which have passed since the Mcnaughten, rules were formulated they have been subjected to criticism from both medical and legal quarters.[64]

In 1916, the Mcnaughten rules were considered by the court of criminal appeal in the case of *R v Codere* .[65]In that case the court expressed the opinion that in using the language 'nature and quality' the judges in their answers to the Mcnaughten questions were only dealing with the physical character of the act, and were not intending to distinguish between the physical and moral aspects of the act. As to the second branch of the test laid down in the Mcnaughten rules, namely, 'if the prisoner knew the physical nature of the act did he know that he was doing what was wrong', the court of criminal appeal has thus made it plain: (a) that in this connection a moral test to be applied must be objective, 'the ordinary standard adopted by reasonable men'; (b) that if (at any rate in indictable crimes) an act done is punishable by law, then it must be regarded as wrong according to the ordinary standard adopted by reasonable men; and (c) that if the prisoner was aware that the act was wrong in law,455 he was thereby 'conscious that the act was one that he ought not to do', and thus can be held to 'know he was doing what was wrong'; (d) that the words 'nature and quality' have nothing to do with the moral aspect of the case at all, and refer solely to the physical character of the act. The objective moral test was applied in the case of *R v Windle* [66] in 1952. Following the principles to be extracted from *R v Codere* ,[67] Lord Goddard CJ, said:[68]

> A man may be suffering from a defect of reason, but, if he knew that what he is doing is wrong--and by wrong is meant contrary to law--he is responsible...Courts of law can only distinguish between that which is in accordance with law and that which is contrary to law.[69]

The English law on the subject is thus: Where it can be shown that a person at the time of his committing or omitting an act, the commission or omission of which would otherwise be criminal, was labouring under such a defect of reason, from disease of the mind, as not to know the nature and

quality of the act or omission,[70] or as not to know that what he was doing was wrong,[71] then such a person is not in law responsible for his act.

'The defence of insanity is not available to a person who retains the power of reasoning, but who in a moment of confusion or absentmindedness fails to use that power to the full'.[72]

'The criminal law is not concerned with the origin of the disease but with its effect; it matters not whether the defect of reason is due to a degeneration of the brain cells, or to some other form of mental derangement, or to a physical disorder, such as arteriosclerosis, which, by cutting off the supply of blood to the brain, impairs the reasoning process; nor does it matter whether the disease is curable or incurable, temporary or permanent'.[73]

'Where an underlying mental condition which would not otherwise produce a disease of the mind sufficient to satisfy the other parts of the M'Naghten Rules is aggravated by external factors so that the defendant has a defect of reason such that he does not know the nature and quality of his act (or that it is wrong), this does not bring the M'Naghten Rules into play'.[74]456

3. Defence of insanity in Canada

In circumstances where the accused did not have voluntary control over conduct that would otherwise be an offence, the defence of automatism may be available.[75]

4. Defence of Insanity in America

In regard to defence of insanity in the United States of America, *Underhill's Criminal Evidence*[76] states the following:

> Insanity is everywhere a defence to a charge of crime, for without a sound mind there can be no criminal intent. The existence, character and extent of insanity are ordinarily questions of fact for the jury, and a defendant who has offered proof of his insanity is entitled to an instruction that he may be found not guilty by reason of insanity.

The authorities are not agreed on the legal test for determining insanity. Most of the states have adopted the right and wrong test, as set forth by the House of Lords in the leading case of Mcnaughten in 1843. The Mcnaughten opinion states:

> To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did not know it, that he did not know what he was doing was wrong.

The right and wrong test is the exclusive test today in 29 states. The test has been much criticised. An additional test is the irresistible impulses test, which holds that the right and wrong test is not sufficient in all cases and that a person who knew that the act he was committing was both morally and legally wrong may still not be held responsible if he lacked the power to resist the impulse to commit it. The irresistible impulse test has been adopted in at least 14 states. It is an additional test to the right and wrong test, *i.e.*, an accused in a state which has adopted the irresistible impulse test should be acquitted if he meets either that test or the right and wrong test.

Under the irresistible impulse test, the impulse must be the product of mental disease rather than the

uncontrollable passion or fury of a sane man. Similarly, moral and emotional insanity are not considered as defences, whether the courts do or do not admit irresistible impulses as a defence.[77]

In regard to burden of proof the American law is the same as in England and in India. The law presumes that everyone charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorises the jury[78] to assume at the outset that the accused is criminally responsible for his acts. The presumption, which is rebuttable, is justified by the general experience of mankind as well as by considerations of public safety. All courts adhere to it.[79]457

5. Position of Defence of Insanity in India

In India the law on the subject is laid down in s 84 of the IPC, the provisions of which are in substance the same as those laid down by the House of Lords in *Daniel Mcnaughten*'s case.[80]

In the answer to the second and third questions put to them in that case, the learned judges laid down that to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act the accused was labouring under such a defect of reason, disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. Section 84 , IPC, borrowed this definition of unsoundness of mind which alone is recognised by law as a good defence to a crime.[81]

This section has received strict interpretation, and is held as governing only those cases where the cognitive faculties of the accused are completely impaired.[82] According to medical and legal authorities who have considered the subject of responsibility in mental disease,[83] insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions, and the will by which our actions are performed. But our law, like the law of England, limits non-liability only to those cases in which insanity affects the cognitive faculties; because it is thought that those are the cases to which the exemption rightly applies, and the cases, in which insanity affects only the emotions and the will, subjecting the offender to impulses, whilst it leaves the cognitive faculties unimpaired, have been left outside the exception, because it has been thought that the object of criminal law is to make people control their sane as well as their insane impulses, or to use the words of Bramwell LJ in *R v Hamphreys* ,[84] 'to guard against mischievous propensities and homicidal impulses'.[85]The section lays down the legal test of responsibility in cases of alleged unsoundness of mind, and it is by that test, as distinguished from the medical test, that the criminality of an act is to be determined.[86]

The defence of insanity is raised mostly in cases where the accused has been charged with offences under s 302 or s 304, IPC . Insane individuals seem to display a marked propensity for the commission of atrocious crimes. Their objects of attack have usually been those whom they had loved and cherished.[87]

6. Ground of Exemption

Insane persons are exempted from criminal responsibility because imposition of any penalty for their criminal acts militates against the fundamental maxim, *actus non458 facit reum nisi mens sit rea* (an act does not constitute guilt unless done with a guilty intention). In order to constitute crime, the intent and act must concur, but in the case of insane persons, no culpability is fastened on them, as they have no free will *(furiosi nulla voluntas est)*.[88] The law treats a mad man as an absent person *(furiosus absentis loco est), i.e.*, his presence is of no effect. In the case of a mad man a blameworthy condition of mind which is an essential ingredient in a criminal offence cannot be justly imputed to him.[89] Every person of the age of discretion is, unless the contrary is proved, presumed by law to be sane, and to be accountable for his actions.[90] But if there is an incapacity, or defect of the understanding, as there can be no consent of the will, the act is not punishable as a crime.[91] Insanity or unsoundness of mind is *per se* no ground of exemption from criminal responsibility,[92] whatever

ground it may afford for mitigation of punishment by the court;[93] or for the exercise of the prerogative of pardon by the state. As a ground of exemption insanity must be coupled with an incapacity of knowledge caused thereby, *viz*, an incapacity of knowing:

(i) the nature of the act; or
(ii) the wrongfulness of the act; or
(iii) the illegality of the act.

The ground of exemption, therefore, is incapacity of knowledge. A person of unsound mind is not merely on that account excused, but he is exempted by reason of his want of knowledge of either of the three things stated, which is a result of the unsoundness of mind. Thus, if the unsoundness of mind deposed to is not such as to render the accused incapable of such knowledge, it is sufficient to exonerate him from criminal responsibility on the ground of insanity.[94]

> The Penal Code contemplates, as grounds of exemption from criminal responsibility, two completely different mental conditions arising from unsoundness of mind, *viz,* an incapacity: (1) to know the nature of the act; (2) to know that he is doing what is either wrong or contrary to law. Of these the first seems to refer to the offender's consciousness of the bearing of his act on those who are affected by it; the second, on his consciousness of its relation to himself. Each species of consciousness is ordinarily present to the mind of a normally sane person. Either, or both, or neither may be absent from the mind of one who is mentally diseased. The absence of both, or either, relieves the offender from liability to punishment.[95]459

Underlying principle of this section is that the act contemplated therein lacks basic ingredient of an offence which is *mens rea* or criminal intention.[1] If the evidence adduced by the prosecution and by the defence raises a reasonable doubt in the mind of the court that the accused might have been insane when he/she committed the offence, the accused is entitled to the benefit of s 84 of the IPC .[2]

In the instant case, the appellant accused had committed the murder of her daughter. The report of Thane Mental Hospital indicated that the appellant was under treatment for mental illness or insanity. It was noted in the medical papers that her behavior was abnormal; she got excited and engaged herself in irrelevant talks. It was stated that she had auditory hallucinations and was suspicious about her neighbours. So was also the evidence of mother of the appellant. Accused appellant was aquitted on the ground of insanity.[3]

7. 'At the Time of Doing it'--Crucial Point of Time

The crucial point of time at which unsoundness of mind should be established is the time, when the crime was actually, committed.[4] In order to get the benefit of this section, it must be shown that the accused suffered from unsoundness of mind, as defined in the section, when the offence was committed. That is the crucial point of time.[5] In absence of medical certificate and treatment papers with regard to unsoundness of mind of the accused, mere oral statements of the prosecution witnesses cannot give rise to an inference that the accused was of unsound mind at the time of commission of the offence.[6] The mere fact that on former occasions he had been occasionally subject to insane delusions or had suffered from derangement of mind and subsequently he had behaved like a mentally deficient person is *per se* insufficient to bring his case within the exemption. The antecedent and subsequent conduct of the man is relevant only to show what the state of his mind was at the time when the act was committed.[7] In other words, so far as s 84 is concerned, the460 court is only concerned with the state of mind of the accused at the time of the act.[8] Where the evidence adduced in the case did not indicate the unsoundness of mind of the accused soon before the alleged incident, held the accused was not entitled to the protection of s 84, IPC .[9] When there is nothing to show that the cognitive faculties of the accused have been impaired so that he could not judge the consequence of what he was doing, s 84 of IPC is inapplicable.[10]

The fact that the accused was not in a sound state of mind after the incident does not mean that he was of unsound mind at the time of the incident. In any case, totality of circumstances has to be taken into account. Immediately after assaulting his wife with an axe, the appellant ran away from the house and disappeared, act of running away immediately after the incident shows that the appellant knew the nature and consequences of the act. The accused appellant was found not entitled to the benefit of s 84, IPC, and was convicted on the charge of murder.[11] In Re *Henny Perry,*[12] the defence was that the accused had been prone to have fits of epileptic insanity. During the course of the argument Reading CJ, observed:

> The crux of the whole question is whether this man was suffering from epilepsy at the time he committed the crime. Otherwise, it would be a most dangerous doctrine if a man could say. 'I once had an epileptic fit, and everything that happens hereafter must be put down to that'.

In dismissing the appeal his Lordship said:

> It must be shown that the man was suffering from an epileptic seizure at the time when he committed the murders; and that has not been proved.[13]

In order that benefit may be given to an accused under this section, it is not sufficient to show that he was of unsound mind before the commission of the crime or that he became so afterwards. It must be established by the defence that, first, he was incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law and secondly that such unsoundness of mind existed 'at the time of doing' the act. If either of these two elements is not positively proved, no benefit can be given under this section.[14] In the absence of any evidence of the accused's state of mind at the actual time of the commission of the acts in question, the presumption of sanity remains unweakened by any evidence of earlier insanity.[15] There was no evidence to show that the accused appellant was suffering from mental insanity at the time of the commission of the offence. The relations between the461 accused appellant and the deceased were strained, thus, the accused had motive to commit the murder of the deceased, and the accused was held not protected by s 84, IPC . He was convicted on the charge of murder.[16]

In order to get the benefit under s 84, IPC onus is on the defence to prove that at the time of occurrence, the accused was mentally sick. The accused appellant had severed the head of his grand-daughter by axe. Neither the son nor the wife of the accused, examined in the case, deposed that the accused was mentally sick. During his statement recorded under s 313, CrPC, the accused stated that he had become mentally weak on account of his illness and he explained that it had happened after his stay in jail. Held, the accused was not mentally sick at the time of occurrence and, therefore, was not entitled to benefit under s 84, IPC .[17]

The appellant accused had pushed the deceased and inflicted five blows of axe on the deceased causing death, and while the eye-witnesses account inspired confidence, evidence on the record did not reveal that the appellant at the time of the commission of offence was incapable of knowing the nature of his act and was of unsound mind, thus, plea of unsoundness of mind was rejected, and he was convicted under s 302, IPC .[18]

The allegation was that the accused assaulted his wife and the parents of the child with stone slab at midnight as he suspected illicit relations between his wife and father of the child. The child witness was the most natural witness, and his evidence was found reliable. There was no reason for false implication. Confessional statement recorded by the Special Executive Magistrate also implicated the accused. Conviction of the accused for offence under s 302, IPC was upheld.[19]

The physical and mental condition of the person concerned at the time of commission of offence is paramount for bringing the case within the purview of s 84 . Medical certificate filed in the case did not relate to the period when the offence was committed. Accused appellant was held not entitled to protection of s 84, IPC .[20]

8. No Rule that once Insane Always Insane

The mere fact, that on some former occasions, the accused had been occasionally subject to insane delusions or had suffered from derangement of the mind, or that subsequently behaved like a mentally deficient person, is *per se* insufficient to bring his case within the exemption. Not every person suffering from mental disease can avoid responsibility for a crime by invoking the plea of insanity. It is only legal insanity which furnishes a ground for exemption and there can be no legal insanity unless the cognitive faculties of the accused are, as a result of derangement or unsoundness, completely impaired. The unsoundness must be such as to make the offender incapable of knowing the nature of the act or that what he is doing is wrong or contrary to law.[21]462

There is no rule that 'once insane always insane' or that now insane the accused must have been insane before.[22]Past conduct cannot lead to any inference that the accused was incapable of understanding the nature of his act at the time when the act in question was committed.[23] Conduct remote in time is however not relevant.[24]

9. Different Effects of Insanity at the Time of Offence and at the Time of Trial

It is not always realised that there is distinction having a widely differing effect, between incapacity at the time of doing the act charged and incapacity at the time of trial. While both are induced by unsoundness of mind the former is substantive which excuses the offence under s 84 of the IPC, the latter affects procedure and merely postpones the trial under s 329, Crpc.[25]

10. Insanity is not *per se* a Defence

Insanity is not *per se* a defence under s 84, IPC, which embodies the fundamental maxim of criminal law that an act does not constitute guilt unless done with a guilty intention. The section provides that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. To establish that the act done is not an offence, it must clearly be proved that at the time of commission of the act, the accused was suffering from legal insanity as defined in the section. Under the section, a person is legally insane when he is incapable of knowing the nature of the act, *i.e.,* the physical act, which is done, or that he is doing wrong or that he is doing what is contrary to law. There can be no legal insanity unless the faculties of the mind are, as a result of unsoundness of the mind, at the crucial time, so materially impaired that he was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. For purposes of criminal law, the emphasis is, therefore, on unsoundness of mind which incapacitates the person from knowing the nature of the act or that what he does is either wrong or contrary to law. The fact, that the accused caused the death of a child over a trifling matter would not warrant the conclusion that he was of unsound mind. The crucial point of time at which unsoundness of mind should be established is the time when the crime is actually committed, and the burden of proving this lies on the accused. The defence of insanity cannot be admitted upon arguments merely derived from the character of crime. The absence of motive or the attachment of accused with the victim, or the ghastly nature of the crime is not relevant consideration, in the absence of positive proof that the mental faculties of the appellant were materially impaired at the crucial time by reason of unsoundness463 of mind. Manifestations evidencing derangement of mental function by themselves do not offer relief from criminal responsibility.[26]

The Bombay High Court has also held that epileptic insanity must exist at the time of commission of the act. Ordinary stresses and disappointments of life do not constitute defence. Where a minor

quarrel took place between brothers on cultivation and the accused came the next morning with an axe and hit the sleeping brother on the neck, pre-meditation was writ large on conduct of accused, no benefit of s 84 could be given.[27]

Mere Abnormality of Mind, Partial Delusion, Irresistible Impulse or Compulsive Behaviour Not Enough

The Supreme Court in *Sheralliwalli Mohammed v State of Maharashtra* ,[28]held that the mere fact that no motive has been proved why the accused murdered his wife and child or the act that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have the necessary mens rea for the offence. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under s 84, IPC as the law contained in that section is still squarely based on the outdated Mcnaughten rules of 19th century England. The provisions of s 84 are, in substance, the same as that laid down in the answers of the judges to the questions put to them by the House of Lords, in *McNaughten's* case.[29]

Mere abnormality/partial delusion affords no protection

Mere abnormality of mind or partial delusion affords no protection under s 84, IPC .[30]

Retarded Mind

Accused appellant assaulted his brother deceased by wooden plank over the head causing his death. One of the PWS admitted in cross-examination that the mental position of the appellant was not normal, and he was under treatment. But the appellant accused did not adduce any evidence, oral or medical, to show that he was of unsound mind at the time of the commission of the offence. The evidence showed that the accused was not of unsound mind but a man of retarded mind. Plea of unsoundness of mind available under s 84, IPC was repelled.[31]

Queer Behavior, Epileptic Fits

The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and464 mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts in the past or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behavior, or that his behavior was queer, cannot be sufficient to attract the application of this section. The plea of unsoundness of mind taken by the accused was rejected, and conviction of the accused appellant under ss 302 / 201, IPC was held proper.[32]

11. Material Circumstances to draw Inference Regarding Mental Condition

The circumstances from which inference can be drawn regarding mental condition of the accused at the time of commission of the act are:

(i) motive;
(ii) deliberation and preparation;
(iii) desire for concealment;
(iv) conduct after commission of the crime showing consciousness of guilt and effort to avoid detention;
(v) offer of excuse of making statements which are false; and
(vi) conduct before, at the time and after the commission of offence.

Keeping in mind the aforesaid principles, the plea of insanity is to be judged.[33]

12. What is Unsoundness of Mind

The IPC does not define 'unsoundness of mind'. But to exempt a man from criminal liability, unsoundness of mind, must reach that degree which is described in the later part of this exception. It is not every person suffering from mental disease that can avoid responsibility for a crime by invoking the plea of insanity.

An idiot or a lunatic, even if he is conscious of his act, has no capacity to know its nature and quality, he is not responsible. Madmen, especially those under the influence of some delusion, may have capacity enough to know the nature of the act, but unless they also know that they are doing 'what is either wrong or contrary to law', they are not responsible. A common stance is, where a man fully believes that the act he is doing, for *e.g.*, killing another man, is done by the immediate command of God.[34]

It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law.[35] Unsoundness of mind as contemplated by s 84, IPC, is legal insanity which requires that cognitive faculties of the accused be such that he does not know what he has done or what will follow from his act.[36]465

The IPC does not define 'unsoundness of mind'. The courts have treated this expression as equivalent to insanity. There are four kinds of persons who may be said to be *non compos mentis* (not of sound mind), *i.e.*: (a) an idiot; (b) one made *non compos* by illness; (c) a lunatic or a madman; and (d) one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; and those are said to be idiots who cannot count 20, or tell the days of the week, or who do not know their father or mother, or the like.[37] A person made *non compos mentis* by illness is excused in criminal cases from such acts as are committed while under the influence of this disorder.[38] A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason.[39] Madness is permanent; lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.[40] The term 'insanity' itself has no precise definition. It is a term used to describe varying degrees of mental disorder, ranging from a mild delusional state to extreme cases of paranoia or schizophrenia. Mental deficiency, which the law recognises, must be of a character so as to incapacitate the person afflicted, from forming an intent, or from distinguishing between right and wrong, and in that case alone, the disturbed and diseased state of his mind will be a defence.[41] In all cases of real insanity, the intellect is more or less affected--hence the term 'intellectual insanity'. In the medical sense this implies a deviation of the mental faculties from an assumed normal or healthy standard. In an insane person there may be no bodily disease, but his language and habits are changed, the reasoning power which he may have enjoyed in common with others is lost or perverted, and he is no longer fit to discharge those duties which his social position demands. Further, from perversion of reason, he may show a disposition to commit acts which may endanger his own life or the lives of those around him. It is at this point that the law interferes for his own protection, and for that of society.[42]

Where there was no medical evidence to prove insanity of the accused, and accused had caused grievous injuries, the acquittal of the accused by the trial court on the mere ground that the accused was unable to look after his own interest was not proper.[43]

No Precise Definition of Insanity Applies to All Cases

Unsoundness of mind, as understood in medical science, would admit of a variety of conditions of varying degrees of severity manifesting far too many characteristics to justify any precise definition applicable to all cases. It is for this reason that we find that in law the expression 'unsoundness of

mind' of a person has been given different content according to the nature and degree of the protection it is intended to give him. For example, in the Indian Contract Act 1872 (Contract Act), when defining a 'sound mind' the emphasis is on the capability of understanding and on the person's capacity to form a rational judgment as to the effects of the contract on his interest (s 12 of the Contract Act). In probable cases, the test usually employed is 'was the testator of a sound disposing mind, *i.e.,* was he able to understand the nature of the466act and its effect, the extent of the property which he was disposing and the claims he ought to give effect to'? In s 65(2) of the Indian Lunacy Act 1912, the law is concerned with 'whether the person is not unsound mind so as to be incapable of managing his affairs'.[44] In the Mcnaughten Rules the words used were 'labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the fact', *etc*. Referring to these words in *R v Kemp* ,[45] Dalvin J, said:

> The law is not concerned with the brain but with the mind in the sense that 'mind' is ordinarily used, the mental faculties of reason, memory and understanding...In this statement the adjective 'mental' must refer either (a) to the mind or (b) to the brain. Now if, it refers to (a) the mind then the statement is meaningless for it amounts to the proposition 'mind--the faculties of the mind'. It must therefore refer (b) to the brain, and thus the statement must mean 'the sense in which the word 'mind' is ordinarily used is the brain's faculties of reason, *etc.*'. But these words 'reason, memory and understanding' are abstractions denoting functions of the brain which is the visible tangible content of the cranium. Just as, for example, a gas engine operates to produce power, so also does the human brain operate to produce reason, memory and understanding, none of which can exist if the material engine, the brain, is destroyed, and any of which may be impaired if the brain is crippled by disease. But it is not easy to see how these functions can themselves be diseased, a puzzle which is not solved by groping them together under the single word 'mind'. In my judgment the condition of the brain is irrelevant and so is the question of whether the condition of the mind is curable or incurable, transitory or permanent...in the Mcnaughten Rules...the primary thing that has to be looked for is the defect of reason...In my judgment the words 'from disease of the mind'...were put in for the purpose of limiting the effect of the words 'defects of reason'...The words ensure that the defect is due to a diseased mind and not simply to an untrained one...Hardening of the arteries is a disease which is...capable of affecting the mind. Here the word 'mind' seems to be used as synonymous with 'brain', since his Lordship speaks of 'its reasoning understanding, and so on' in such a way as to cause a defect, temporarily or permanently, of its reasoning, understanding and so on, and so is in my judgment a disease of the mind which comes within the meaning of the Rules. In *R v Charleston* ,[46] the pressure on the brain caused by the assumed tumor prevented the prisoner from knowing what he was doing; and in *R v Kemp* the lack of a proper blood supply to the brain caused by the proved arteriosclerosis had the same effect upon the prisoner. It is extremely difficult to see any real difference between the two sets of facts. If a tumor, which by its presence on the brain impairs its functions, is not a 'disease of the mind', how can the interference with the flow of blood in the brain caused by hardening of the arteries be a 'disease of the mind'?[47]

In *Murthy v State* [48] the Madras High Court has dealt with this matter thus:

> The term 'insanity' is not clearly defined either in the medical or in the legal literature, and sanity is said to exist when the brain and the nervous system are in their conditions and the mental functions of feeling and knowing can be performed in their usual manner. Insanity is an abnormal state when one or more of the above said mental functions is not performed in the normal way or not performed at all due to some defect or disease of the mind. Instead of furnishing a clear and workable definition of insanity, authoritative medical books give only descriptions of various states of mind such as total insanity, partial insanity, moral insanity, impulsive insanity, pyromania and kleptomania and cases of insanity are numerous. But, what we are concerned in a case467 wherein insanity is set up as a defence is whether the accused, at the time of committing the offence, was labouring under such defect of reason from disease of mind *viz,* insanity, as not to know the nature and quality of the act he was doing or if he did know it, that he did not know he was doing what was wrong.[49]

The unsoundness of mind referred to in s 84, IPC, is a disease of the brain, and not merely a disorder of the senses. The unsoundness is an inherent and organic affliction.[50] The mere fact, that the crime was attended with some giddiness, or that the accused was not feeling well for the last one month, or that he was running after the village children or the cattle-heads does not establish that he was a person who would be called *non compos mentis.*

Insanity implies the existence of either or both of the mental conditions namely, an incapacity: (a) to know the nature of the act; and (b) to know that the act is wrong or contrary to law. 'The disordered mind in insanity may be subject of delusions or hallucinations. A delusion is a pervasion of judgment whereby the individual accepts as real an erroneous perception or conception which has no real existence'. Thus it can be said that the insanity is the disorder of the conduct in that the process of adjusting the self to the circumstances is deranged.[51]

13. Lucid Intervals

A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of mind sufficiently to enable the person soundly to judge the act.[52] But the expression does not necessarily mean complete or perfect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act; but merely a cessation of the violent symptoms of the disorder is not sufficient.[53]

Difficult to Locate Lucid Intervals

Even in extreme case of insanity, there may be lucid intervals. If the act is committed during lucid intervals, the culprit would not be entitled to the benefit under s 84 of the IPC . It is sometimes very difficult to exactly locate the moment when an insane person has the lucid intervals. In such cases, the surrounding circumstances assume importance.[54]

Law Presumes the Offence to have been Committed in Lucid Interval

In cases where a person, subject to attacks of insanity, has lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval unless it appears to have been committed in the time of his distemper. It lies, in such468 a case, on the accused person to prove that he was insane at the time of the commission of the offence so as not to be liable to punishment as a sane person.[55]

14. Mere Eccentricity does not Amount to Insanity

To establish a defence on the grounds of insanity under s 84, IPC in a case, it must clearly be proved that at time of committing an act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know that he was doing what was wrong or contrary to law. It is only unsoundness of mind which materially impairs the cognitive faculties of the mind and that can form a ground of exception from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law. Only a person who by reason of mental disease is prevented from controlling his own conduct or a person who is deprived, by mental affliction of the power to rationalising on the moral conduct of the act, would be entitled to the benefit of this section. Mere eccentricity or strange behaviour or a mental set up not amounting to insanity as known to the law, could not absolve a person of the consequences of his acts.[56]

15. Homicidal Tendency, if Sign of Insanity

Homicidal tendency in a person, accused of an offence, is no sign of insanity. It is not necessary that every insane person should have homicidal tendencies.[57]

16. Intoxication must be Distinguished from Unsoundness of Mind

Intoxication resembling a temporary form of insanity resulting from drinking or *ganja* smoking, which is of such a temporary nature as to pass off a few hours after the consumption of the liquor or drug must

be distinguished from unsoundness of mind, even temporary unsoundness of mind, coming under this section. Such intoxication should be dealt with under ss 85 - 86 .[58]

17. Legal Test of Insanity

Before the *McNaughten* case,[59] the defence of insanity was very narrowly restricted. In the case of *Edward Arnold*,[60] Tracy J, observed that it is not every kind of frantic humour or something unaccountable in a man's actions that points him out to be such a madman as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory and doth not known what he is doing, no more than an infant, than a brute or a wild beast. This view has been followed in India in *Tola Ram v Emperor* ,[61] and *Baswant Rao Baji Rao v Emperor* .[62] At the same469 time, the incapacity of understanding was related to morality, for in *Arnold's* case, the jury were directed to consider 'whether the condition this man was in, as it is represented to you on one side, or the other, doth show a man, who knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did...'.[63] But the rules laid down in the *McNaughten*'s case did not recognises any ground of excuse based upon innate weakness of will power, upon moral insanity, nor upon disease of the emotional system; moreover they have been held not to admit that irresistible impulse, due to mental disease, could be a defence.[64] The test of legal insanity laid down in the rules is: 'To establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did not know he was doing what was wrong'.

Considering this test, the court of criminal appeal in *R v Codere* ,[65] made it plain that the words 'nature and quality' have nothing to do with the moral aspect of the case at all, that a moral test to be applied must be objective, *i.e.*, 'the ordinary standard adopted by reasonable men', and that if the prisoner knew that his act was wrong in law, then he was doing an act which he was conscious he ought not to do, and as it was against the law, it was punishable by law. Following these principles, in a latter case,[66] Lord Goddard CJ, said:

> A man may be suffering from a defect of reason, but, if he knew that what he is doing is wrong--and by wrong is meant contrary to law--he is responsible...courts of law can only distinguish between that which is in accordance with law and that which is contrary to law.

18. Concern for Trial Court and Duty of Investigating Agency

The court in *Kamla Bhuniya v State of West Bengal* [67] in case of like nature has occasion to consider the plea of insanity threadbare and summed up the legal position in the following way:

(i) It would be a concern for the trial court whether the accused was insane at the time of commission of the offence and whether the accused was incapable of understanding the impact of wrongful act committed by him or her at the time of commission of the offence.

(ii) The investigating agency is duty bound to ascertain at the initial stage whether there is any indication about the mental condition of the accused.[68] He shall have accused examined by a psychiatrist at the earliest470 opportunity to ascertain whether he was acting under unsoundness of mind at the time of occurrence, without knowing nature of acts, *etc.*[69]

Indian Courts have Adhered to Views Expressed by English Courts

The courts in India have adhered to the view expressed by the courts in England as to the narrow and restricted nature of the plea of insanity. The test that law insists upon is the 'right and wrong test' of Mcnaughten Rules as recognised in this section and has been accepted in India as a correct guide for determining the guilt or innocence of the person who pleads insanity as a defence.[70]The burden lies on the defence to show that the accused, at the time of committing the offence, was, 'by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law'. Nothing short of this particular degree of insanity would bring the case within the exception.[71] It must be clearly proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, which he did not know that what he was doing was wrong. If he was conscious that the act was one which he ought not to do and if that act was at the same time contrary to the law of the land, he is punishable. The standard to be applied is whether according to the ordinary standard adopted by reasonable men, the act was right or wrong.[72]A very common way of applying the test under this section is to ask, in the circumstances, whether the man would have committed the act if a policeman had been at his elbow.[73]

19. Different Kinds of Insanity

Unsoundness of mind may be congenital or accidental. Mental incapacity arising from post-natal causes, such as illness (fever or palsy), or accident, injury, or shock to the brain, which makes the person suffering from it not criminally responsible for acts done by him while it continues, is described by the older writers as *dementia accidentalis vel adventitia,* and is separately regarded as total or partial, or temporary or permanent. Persons afflicted by the mental disorder only at certain periods and vicissitudes, having intervals of reason are described as lunatics. Such persons during their frenzy are criminally as irresponsible as those whose disorder is fixed and permanent.[74]

Idiocy is congenital imbecility or unsoundness of mind. A person has been deemed an idiot who cannot count up to 20, tell the days of the week, does not know his father or mother, his own age, *etc.*, but these are mentioned as instances only, for whether idiot or not is a question of fact for the jury or court. A person deaf and dumb from birth is in presumption of law an idiot; but if it appears that he has the use of understanding, he is criminally responsible, and may be tried and convicted, though great caution should be used in such a proceeding. This form of mental incapacity has been described as *dementia naturalis.*[75]471

Under s 1 of the Mental Deficiency Act 1913, persons who are mentally defective are classified as follows:

(1) The following classes of persons who are mentally defective shall be deemed to be defective within the meaning of this Act:

(a) Idiots, that is to say, persons in whose case there exists mental defectiveness of such a degree that they are unable to guard themselves against common physical dangers;
(b) Imbeciles, that is to say, persons in whose case there exists mental defectiveness which, though not amounting to idiocy, is yet so pronounced that they are incapable of managing themselves or their affairs or, in the case of children, of being taught to do so;
(c) Feeble-minded persons, that is to say, persons in whose case there exists mental defectiveness which, though not amounting to imbecility, is yet so pronounced that they require care, supervision and control for their own protection or for the

protection of others or, in the case of children, involves disability of mind of such a nature and extent as to make them for the purposes of s 57 of the Education Act 1944, incapable of receiving education at school;

(d) Moral defectives, that is to say, persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who require care, supervision and control for the protection of others.[76]

Every Form of Insanity Not Recognised by Law

It is trite that the legal conception of insanity differs considerably from the medical conception. It is not every form of insanity or madness that is recognised by law as a sufficient excuse. All minor aberrations of mind which are recognised by the medical science as amounting to madness are excluded in the eye of law. Even eccentricity or unsoundness of mind of a very minor type is not sufficient. It is not every kind of idle and frantic humour of a man or something unaccountable in his actions, which will show him to be such a madman as is to be exempted from punishment.[77]

Legal and Not Medical Insanity Matters--Distinction Needs to be Made

An accused who seeks exoneration from liability of an act done under s 84, IPC is to prove legal insanity and not medical insanity. Every person who is suffering from mental disease is not *ipso facto* exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer are not sufficient to attract the application of s 84 of IPC .[78]

It is not every person, mentally diseased, who is exempted from criminal responsibility under s 84, IPC . Such exemption can be claimed only when the insane472 person is incapable of knowing the nature of the act or he is doing either wrong or contrary to law. It is by this test, as distinguished from the medical test, that the criminality of the act is to be determined. Even assuming that there is some material to indicate that there is medical insanity, unless it is established that the accused was suffering from legal insanity, s 84, IPC, cannot be invoked. There is a good deal of difference between 'medical insanity' and 'legal insanity' and courts are concerned only with the legal and not the medical aspect of the matter. In other words, it is not every kind of frantic humour or something unaccountable in a man's action that points him out to be a madman, to be exempted from punishment. It is not mere eccentricity or singularity of manner that would suffice the plea of insanity. Abnormality of mind is not by itself sufficient to show that the accused must have acted while of unsound mind. These are all the principles, laid down by various courts, including the Supreme Court.[79]

It is settled law that a distinction is to be made between legal insanity and medical insanity[80] as a court is concerned with legal insanity, and not with medical insanity.[81] According to medical science, insanity is another name for mental abnormality due to various causes and existing in various degrees. Even an uncontrollable impulse driving a man to kill or wound comes within its scope. But a man whom medical science would pronounce as insane does not necessarily take leave of his emotions and feelings. Hope, ambition, revenge, *etc.*, may still govern his mind. Fear may exercise its influence over him, and threats may have a deterrent effect. Such persons, though insane, would refrain from committing any acts of violence or mischief if more powerful men are present.[82] It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law. The test of insanity, as viewed from a legal point, does not coincide with the medical idea, and in many cases a man who is in the opinion of the medical experts of unsound mind, cannot claim the benefit of this section.[83]

Courts Concerned only with Legal Insanity

In order to earn immunity from criminal liability, the disease, disorder or disturbance of the mind must be of a degree, which should obliterate perceptual or volitional capacity. A person may be a fit subject for confinement in a mental hospital, but that fact alone will not permit him to enjoy exemption from punishment. Crotchetiness, cranks, feeble mindedness, any mental irresponsibility, mere frenzy, emotional imbalance, heat of passion, uncontrollable anger or jealousy, fits of insensate hatred or revenge, moral depravity, dethroning reason, incurable perversions, hypersensitive473 excitability, ungovernable fits of temper, stupidity, obtuseness, lack of self-control, gross eccentricity and idiosyncrasy and other similar manifestations, evidencing derangement of mental functions, by themselves, do not offer relief from criminal responsibility. These are forms of mental deficiency which will not excuse the commission of the crime. Such persons, in the words of Lord Barnwell 'would not have yielded to their insanity if a policeman had been at their elbow'. The presence of these disorders of the mind is not in law equivalent to want of capacity, so as to prevent the punitive effect of the criminal act.[84]

For the purposes of criminal law, therefore, the emphasis appears to be on unsoundness of mind which incapacitates the person from knowing the nature of the act or that he is doing what is either wrong or contrary to law. In this phrase, the word 'mind' has been used as the term is generally understood in the sense of mental faculties of reason, memory and understanding, and consequently it is sometimes said that it is only unsoundness of mind which materially impairs its cognitive faculties that can form the ground of exemption from criminal 'responsibility', the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law.[85] In this view, insanity affecting the will and the emotions has been left outside the exception, though it is difficult to say that those disturbances can have no connection with the unsoundness of mind.[86] There is thus a clear distinction between medical and legal insanity, and the courts are concerned only with the legal and not the medical view of the question. A man may be suffering from some form of insanity in the sense in which the term is used by medical men, but may not have that unsoundness of mind which is described in this section. If the facts show that the accused knew that he had done something wrong, it did not matter how, though he might be insane from the medical point of view, he will not be exonerated under this section.[87]

As already pointed out the courts are concerned with legal insanity and not with the medical aspect of it. The fact that the mind was partially deranged or that he was subject to some uncontrollable impulse due to insanity is not a valid defence. A person conscious of the nature of his act is presumed to have been conscious of its criminality. Absence of motive or secrecy, multiplicity of murders, want of pre-arrangement and want of accomplices are insufficient to support inference of unsoundness of mind.[88]

Epileptic Insanity

Modi'sMedical Jurisprudence and Toxicology,[89] describes the nature of epileptic insanity thus:474

> The disease is generally characterized by short transitory fits of uncontrollable mania followed by complete recovery. The attacks, however, become more and more frequent. Lastly, there is general impairment of the mental faculties with loss of memory and self-control. At the same time, hallucinations of sight and hearing occur and are followed by delusions of a persecuting nature. Epileptic insane persons are deprived of all moral sensibility, are given to the lowest forms of vice and sexual excesses, and are sometime dangerous to themselves as well as to others. In many long-standing cases there is usually feeble-mindedness leading to progressive *dementia* of the most degraded character. True epileptic insanity is that which is associated with epileptic fits. This may occur before or after the fits, or may replace them, and is known as pre-epileptic insanity, post-epileptic insanity and masked or psychic insanity.

Pre-epileptic insanity is very common and may replace the epileptic aura, lasting in some cases for

hours or even days. It is characterised by violent fits of maniacal excitement or by depression, fussiness, suspiciousness and general malaise. Hallucinations of various kinds are experienced and, owing to delusions, the patient may commit violent assaults, or may bring false charges against innocent persons. Sometimes, the patient may refuse to take any food.

Mere physical weakness, which made the accused moody and silent, and at times affected his mind, is not sufficient to bring his case within the provisions of this section. It would be dangerous to hold that, because a monstrous crime like murder is committed for no apparent reason and for no proved motive, the offender must have been insane at the time; and that without any proof whatsoever of prior insanity.[90] A person can be exempted under this section only if it is shown that he was suffering from epilepcy at the time he committed the crime. "It would be a most dangerous doctrine if a man could say, 'I once had an epileptic fit, and everything that happened hereafter must be put down to that"'.[91] In one case, the accused was subject to periodic epileptic fits from his childhood and symptoms of an impending epileptic seizure were seen on the day he killed his aged mother. It was held that the complete absence of motive or provocation, the nature and multiplicity of the weapons used, the duration of attack, the maniacal fury with which the attack was delivered and his subsequent conduct were all indications that the accused was acting under some insane impulse, and therefore his act was saved by this section from constituting the offence.[92]

In a case from Canada the accused was charged with dangerous driving causing death. The Crown alleged that the accused driving at a high speed of 80-100 km/hr caused the accident resulting in the death of the pedestrian. There was no dispute that the accused was going 80-100 km/hr in a 50 km/hr zone. The defence argued that the accused had experienced an epileptic seizure and the Crown had not established *mens rea.* It was contended that the accused had a pre-existing epileptic condition, but had been seizure-free for several years and his driver's license had been reinstated. While acquitting the accused it was held that the Crown failed to establish *mens rea* and it failed to prove beyond a reasonable doubt that it was unreasonable for the accused to be driving a car knowing he had a pre-existing epileptic condition. Prior to the accident his epilepsy appeared to be under control, his medication was working and he had not had a seizure for almost three years and as such he was legally permitted475 under provincial law to drive a car. In the alternative, the accused was acquitted on the defence of automatism. An epileptic seizure could not be characterized as a disease of the mind, and the defence ought to be described as non-mental disorder automatism. The defence had overwhelmingly proved that the accused had an epileptic seizure at the time of the accident, given the high rate of speed involved, the absence of skid-marks, the absence of evidence of braking or steering, and the combined evidence of the witnesses that the accused was not impaired but was still acting inappropriately. Everything that happened as described by the witnesses and analyzed by the neurologist was wholly consistent with an epileptic 'partial complex' seizure. The defence of non-mental disorder automatism had been established on a balance of probabilities. The accused was acquitted.[1]

The occurrence had taken place on 11 August 2000. Medical prescriptions of the years 1987 and 1998 of the accused showed that he was a psychiatric patient with paranoid features. The allegation against the accused was that he had shot the deceased from a point blank range. It was further alleged that the accused, after shooting, threatened his driver with dire consequences and ran away from the place of occurrence. He threw the pistol in the well in order to conceal himself from the crime. Held, the accused knew that as a consequence of his act he was not entitled to protection of s 84, IPC . His conviction under s 302, IPC was proper.[2]

Mental Imbalance, Abnormal Behaviour or Mental Aberrations

Mere mental imbalance or abnormal behaviour of a person does not reduce the seriousness of the offence which he has committed.[3] Insanity, in order to absolve a person from all criminal responsibility, must affect his cognitive faculties. If the insanity merely affects his emotions or will, leaving his cognitive faculties substantially unimpaired he cannot plead exemption though it may be a case of extenuation. Any mental aberration, short of complete damage to the cognitive faculties, will not constitute an excuse under the IPC .[4]

Psychotic Disorder

The only evidence placed on record was that the accused appellant had been treated in a Psychiatric Hospital for 13 days in the year 1985. Even at that time the doctor had diagnosed the disease as psychotic disorder. The record did not indicate that the patient was suffering from such mental disability which incapacitated him to know the nature of the act that he had committed. There was no evidence to indicate that the appellant suffered from mental illness post 1985. The evidence showed that the accused appellant was capable of knowing the nature of the act and the consequences thereof on the date of the alleged incident. Whilst he had brutally and callously committed the murder of his wife, he did not cause any hurt or discomfort to the child. Rather, he made up his mind to insure that the child be put into proper care and custody after the murder. The conduct of the accused appellant before and after the incident was sufficient to negate any notion that he was mentally insane, so as not to be possessed of the necessary *mens rea*, for committing the murder of his wife.[5]476

Meaning of Hallucination

Hallucination has been described as a trick of the senses, as when one, in a delirium, sees serpents, spiders or other things, where there are no such things.[6] The primary meaning of 'hallucination', is a blunder, an error, a fallacy, a mistake, an error of eye sight, hearing, and the like, as where the patient imagines that he sees an object, where there is none, or hears a voice, where no sound strikes his ear.[7] The mere fact, that so many injuries have been caused to an unarmed and undefended victim, does not show that the accused was under some hallucination.[8] Similarly, the mere fact that the accused was under some hallucination, does not attract s 84, IPC .[9]

Puerperal Insanity

Puerperium, pregnancy, lactation, and other affections of the female generative organs are known occasionally to produce a mental condition in which a mother may not be responsible for her acts; puerperal mania is frequently associated with homicidal violence inflicted on a child. The killing of the child is usually either the result of a sudden fit of delirium or a sudden impulse, with a full knowledge of the wickedness and illegality of the act. The legal test of responsibility can be applied to such cases only on the assumption that insanity already exists. Women have been known to ask that the child may be removed, but afterwards seized an opportunity for killing it. Such cases are distinguished from deliberate child-murder by the fact that there is no motive, no attempt at concealment, and no denial of the crime. In this connection the merciful provisions of the Infanticide Act should be borne in mind.[10]

Lactational Insanity

Lactational insanity comprises all cases which occur from six weeks after confinement. It occurs most frequently in cases in which lactation has been unduly prolonged, and is usually of a depressed deconfusional type with ideas of unworthiness and delusions affecting the husband and child. Suicide or infanticide may occur as a result of these conditions.[11]

Dipsomania or Drunkenness

Insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged.[12] Under this section unsoundness of mind producing incapacity to know the nature of the act committed or that it is wrong or contrary to law is a defence to a criminal charge, but such incapacity is no defence, if produced by voluntary drunkenness. If, however, voluntary drunkenness causes a disease which produces such incapacity, then this section would apply, though the disease may be of a temporary nature.[13] There is a distinction, however, between the defence of insanity477 in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete an answer to a criminal

charge as insanity induced by any other cause.[14]

Somnambulism

Somnambulism (or walking in sleep) is an abnormal condition allied to epilepsy and the artificially induced state of mesmerism or hypnotism.[15] This is a species of mental unsoundness connected with sleep.[16] In this condition the mental faculties are partially active and are so concentrated on one particular train of ideas that a somnambulist is capable of performing most remarkable and incredible pieces of work, which would have baffled his intelligence during his waking hours. A somnambulist may thus solve a very difficult problem or may commit theft or murder. A person who is the victim of a somnambulistic habit has generally no recollection of the events occurring during the fit after he awakes. In some cases, he remembers the events of one fit in subsequent fits and follows them with exact precision though he forgets them in the normal state. Somnambulism, constitutes unsoundness of mind and forms a very good plea of defence for exemption from criminal liability, if it can be proved that the accused committed the offence during such fit.[17]

Schizophrenia

Schizophrenia is a mental disorder involving a breakdown in the relation between thought, emotion, and behaviour, leading to faulty perception, inappropriate actions and feelings, and withdrawal from reality into fantasy and delusion. Therefore, it is a temporary disorder and it can be cured.[18] Schizophrenia indicates a splitting of the mind. It was also known as *dementia praecox*. Persons suffering from schizophrenia may commit serious criminal acts. Indecent exposures or outrageous sexual proposals or attacks, brutal assaultiveness, gross destructiveness, threats, murder, *etc.* may be carried out with reckless abandon by such persons.[19] It is one form of insanity. The accused was suffering from schizophrenia. Doctor examining the accused a little before as also a little after the occurrence found him insane. Detailed reasons were given by the doctors corroborating each other's conclusions about the accused's insanity. In such a case, accused was found entitled to the benefit of provisions of s 84, IPC .[20]

When an accused took his eight year old daughter to visit a deity. On the way he cut her head with the sickle and carried her head in one hand and sickle in another hand. There was no struggle or resistance on his part when apprehended. He had also made no attempt to conceal himself and had no reason for committing this crime. He478 was diagnosed as a case of schizophrenia and its symptom were of aggravated form. It was held that the accused did not know the nature of his act and was entitled to get protection under s 84, IPC .[21] The accused appellant had cut his son, aged about 11½ years, to death and was intercepted by his wife while he was preparing to bury the dead body by digging pit. Medical evidence proved that the accused appellant was suffering from schizophrenia. He was acquitted of the charge under s 302, IPC .[22]

Where accused alleged to have killed his stepfather by an axe but there was no ill-will or any animosity in the mind of the accused against deceased, testimony of witnesses was that the accused was a lunatic and living with the deceased for treatment, the medical evidence was that the accused was suffering from a schizophrenic form of psychosis, the accused was also confined in lunatic jail, on these facts the case was held falling under s 84 of IPC .[23] Where the accused was suffering from schizophrenia and the behaviour of the accused was found to be strange before and after the incident, the prosecution was unable to prove requisite *mens rea* when the accused stabbed the deceased, it was held that the accused was entitled to the benefit of s 84, IPC, and for acquittal under s 302 .[24]

The law presumes every person to be sane. In order to establish the defence of insanity, the accused must satisfy the test prescribed by s 84, IPC . The medical evidence adduced in the case did not establish that the accused in fact was suffering from schizophrenia. The conduct of the appellant during the relevant period would show that the appellant searched for the axe and launched murderous assault on his wife while all others were asleep. Even after inmates of the house awoke, when appellant heard groaning of his wife, he tried to inflict another blow, in presence of all the relatives, saying that he is determined to end her life. This conduct of the appellant at the time of the

commission of the offence would show that he was in full control of his cognitive faculties. The appellant accused was held not entitled to the protection of s 84 . His conviction under s 302, IPC was held proper.[25]

Temporary Insanity

The behaviour of a human being has continuity, there is marked day-to-day consistency of action and attitude in the individual. There are changes and modifications, but these are usually gradual. Psychosis is characterised by a marked change in personality. The change is gradual and progressive, extending over periods of weeks and months or more. True, the onset of psychosis is more rapid in some cases than in others, but even when we speak of a sudden onset, we are thinking in terms of days and weeks. 'Sudden' here means relatively rapid, but not abrupt, without warning, overnight. Once the psychotic act has been precipitated, recovery is a matter of gradual progressive building up, reintegration, re-organization. The person neither is sane one day and psychotic the next, nor is he psychotic one day and sane the next. Temporary insanity may be within the realm of theoretical possibility but not of probability. If no increasing signs of abnormality are to be found in the defendant's life, no history of instability and increasing tension leading up to the alleged psychotic incident, and if, after the incident, there are no psychotic479 hangovers, no persisting symptoms of abnormality, then a plea of temporary insanity is suspect indeed.[26]

Where the accused attempted to end her life by jumping into a well alongwith her female child in her lap, life of the female child lost in the incident and mental condition of the accused at the time of the incident was not normal as she was suffering from an old illness of tuberculosis coupled with serious and continuous stomach pain but the accused was in full senses when she was brought out of the well and had narrated to witnesses the reason justifying her act, the case was not found to be a fit case which could be covered for purposes of a plea of insanity under s 84 .[27]

Irresistible Impulse

This is a peculiar form of insanity, a mania which may co-exist with perfect sanity (apparently) in other respects. Its commonest form is impulsive homicidal mania. Cases of this kind are very numerous;[28] their chief characteristic being an entire absence of motive. The victims are usually those who are nearest and dearest to the person who is assailed with this violent temptation to slay, who, in many cases, knows that the temptation is coming on, and begs those around him to have him confined until the impulse has passed away. An impulse to be irresistible must be one which cannot be resisted: not merely one which is not resisted. A person has no choice about feeling an insane impulse, but this is not the same thing as an impulse which cannot be resisted. Innumerable cases have occurred of persons feeling insane impulses, who have successfully resisted them, and if this be possible, it is of course the legal duty of the persons assailed to resist them.[29]

To get the protection under s 84, IPC, it is necessary that the person concerned by reason of unsoundness was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The mental impulse which had led to the commission of the crime has to be irresistible and not only unresisted, to regard the same as 'impulsive insanity'. The mere fact, that it was committed on a sudden impulse, is not sufficient.

Upon principle, it might seem that a person committing a crime under irresistible impulse should be exempted from criminal responsibility by reason of constraint, or compulsion, *i.e.*, he cannot help himself, being deprived of the power of self-control, and thus at the mercy of the temptation. The power of self-control means:

> A power to attend to distant motives and general principles of conduct, and to connect them rationally with the particular act under consideration, and a disease of the brain which so weakens the sufferer's powers, as to prevent his attending or referring to such considerations, or from connecting the general theory which the particular fact deprives him with the power of self-control.[30]

Sir JE Stephen[31] has opined that a person cannot be said to know that his conduct is wrong, when, through loss of self-control, he is unable to make that comparison and480 application upon which knowledge that a thing is wrong depends. But the doctrine of irresistible impulse as a ground of exemption has been rejected by the courts both in England,[32] as well as in India,[33] where it has been held that a crime committed under such an impulse does not fall within the scope of s 84 . The Orissa High Court has, however, taken a contrary view and it has been held that on a plain reading of s 84, IPC, it is found that 'irresistible impulse' seems to be a defence which on account of such impulse the accused is incapable of knowing the nature of the act he is doing and what he is doing is either wrong or contrary to law. Such impulse or abnormal urge to perform certain activity due to mental disease might be covered by s 84, IPC .[34] Probably the practical difficulty of determining whether an impulse was irresistible or merely unresisted, and the fact that no available restraint in such cases should be withdrawn (for religion, conscience and law afford such restraints),[35] have determined the legal doctrine on this subject. Though case-law and the general trend of legal discussions have finally rejected Sir Stephen's interpretation, the courts have developed in practice an elasticity of the sort he was seeking. Where it is clear that the prisoner is insane, the Mcnaughten Rules have often been so construed or so avoided as to dispose satisfactorily the cases which come before the courts.[36]

But whatever modification of practice there may have been, the law has remained in substance unchanged since the Mcnaughten Rules were laid down.

Fear, complex excitement or irresistible impulses with loss of self-control, even if such be taken as proved in the case, affords no defence to a crime under the Indian law and is therefore irrelevant except for a mitigation of the offence from murder to culpable homicide in certain circumstances.[37]

Major Depression

Merely because the accused at time of the commission of offence was under major depression, same would not entitle him to the benefit of unsoundness of mind. The observation report of the Institute of Mental Health showed that the accused was suffering from major depression and nothing more. The fact that after stabbing the child, the accused appellant attempted to slit his throat and commit suicide, belied the contention that he was not in a mentally fit condition when he committed the murder of his child. In this case, the accused had not produced any credible evidence to show481 that he suffered from legal insanity and had failed to discharge the burden cast on him by s 105 of the Evidence Act . The conviction of the accused under ss 302 and 309, IPC was confirmed.[38]

20. Crime Pattern of Homicidal Monomaniac *vis-à-vis* that of Ordinary Criminal

The circumstances under which the homicidal act is perpetrated furnishes strong grounds for believing that they depend on mental alienation in some form or the other; so different are these circumstances from those which attend the commission of crime. In homicidal insanity, murder is without any motive strictly deserving the name; or at most, with one totally inadequate to produce the act in a sane mind. On the contrary, murder is never criminally committed without some motive adequate to the purpose in the mind that is actuated by it and with obvious reference to the ill-fated victim.

Thus, the motive may be theft, or the advancement of any personal interest, in which case it will be found that the victim had or was supposed to have property, or was an obstacle to the designs or expectations of another, or it may be revenge, and then the injury, will be found to have been received by the murderer from the object of his wrath. In short, with the criminal, murder is always a means for accomplishing some selfish object, and is frequently accompanied by some other crime; whereas, with the homicidal monomaniac, murder is the only object in view, and is never accompanied by any other improper act.

The homicidal monomaniac, after gratifying his bloody desires, testifies neither to remorse, not to repentance, nor to satisfaction, and if judicially condemned, perhaps acknowledges the justice of the sentence. The criminal either denies or confesses his guilt; if the latter, he either humbly sues for mercy or glories in his crimes, and leaves the world cursing his judges and with his last breath

exclaiming against the injustice of his fate.

The criminal never sheds more blood than is necessary for the attainment of his object; the homicidal monomaniac often sacrifices all within his reach to the cravings of his crimes, and leaves the world cursing his judges with murderous propensity.

The criminal lays plans for the execution of his design; time, place and weapons are all suited to his purpose; and, when successful, he either flees from the scene of his enormities, or makes every effort to avoid discovery. The homicidal monomaniac on the contrary, for the most part, consults none of the usual conveniences of crime; he falls upon the object of his fury, oftentimes without the most proper means for accomplishing his purpose; and perhaps in the presence of a multitude, as if expressly for court observation; and then voluntarily surrenders himself to the constituted authorities. When, as is sometimes the case, he does prepare the means, and calmly and deliberately executes his project, his subsequent conduct is still the same as in the former instance.

The criminal often has accomplices and always vicious association; the homicidal monomaniac has neither. The acts of homicidal insanity are generally, perhaps always, preceded by some striking peculiarities in the conduct or character of the482 individual, strongly contrasting with his natural manifestations; while those of the criminal are in correspondence with the tenor of his past history or character.

In homicidal insanity, a man murders his wife, children, or others to whom he is tenderly attached; this the criminal never does, unless to gratify some evil passion, or gain some other selfish end, too obvious to be overlooked in the slightest investigation.[39]

21. Wrong

The word 'wrong', in s 84, IPC must mean morally wrong, otherwise it will be redundant and will serve no useful purpose.[40]

It is, necessary for the court to reach the conclusion that at the time the offending act was committed the accused was deprived of his cognitive faculties to such extent that he was not capable of distinguishing between the right and the wrong or the legal and the illegal so that he could not be held responsible for his own actions. The onus to prove such a mental state is on the person charged with the crime. A person who has the judgment to weigh his own actions and being conscious of their illegality, is able to offer an exculpatory explanation can certainly not be said to be suffering from any legal insanity so as to keep such actions outside the purview of penal provisions.[41]

'Incapable of Knowing'

A Division Bench of the Allahabad High Court observed:

> The significant word in the above section is 'incapable'. The fallacy of the above view lies in the fact that it ignores that what s 84 lays down is not that the accused claiming protection under it should not know an act to be right or wrong, but that the accused should be 'incapable' of knowing whether the act done by him is right or wrong. The capacity to know a thing is quite different from what a person knows. The former is a potentiality, the latter is the result of it. If a person possesses the former, he cannot be protected in law, whatever might be the result of his potentiality. In other words, what is protected is an inherent or organic incapacity and not a wrong or erroneous belief which might be the result of a perverted potentiality. It was further observed: 'What the law protects is the case of a man in whom the guiding light that enables a man to distinguish between right and wrong and between legality and illegality is completely extinguished. Where such light is found to be still flickering, a man cannot be heard to plead that he should be protected because he was misled by his own misguided intuition or by any fancied delusion which had been haunting him and which he mistook to be a reality. Our beliefs are primarily the offsprings of the faculty of intuition. On the other hand, the content of our knowledge and our realisation of its nature is born out of the faculties of cognition and reason. If cognition and

> reason are found to be still alive and gleaming, it will not avail a man to say that at the crucial moment he had been befogged by an overhanging cloud of intuition which had been casting its deep and dark shadows over them.[42]483

The Penal Code contemplates, as grounds of exemption from criminal responsibility, two completely different mental conditions arising from unsoundness of mind, *viz,* an incapacity: (1) to know the nature of the act; (2) to know that he is doing what is either wrong or contrary to law. Of these, the first seems to refer to the offender's consciousness of the bearing of his act on those who are affected by it; the second, on his consciousness of its relation to himself. Each species of consciousness is ordinarily present to the mind of a normally sane person. Either, or both, or neither may be absent from the mind of one who is mentally diseased. The absence of both, or either, relieves the offender from liability to punishment.[43]

In *R v Layton* ,[44] Rolfe B, said: 'Perhaps it would be going too far to say that a party was responsible in every case, where he had a glimmering knowledge of what was right and wrong'. Says Mayne:

> When we talk of a man knowing that murder is wrong and contrary to law, we mean that the knowledge forms an essential part of the stock of principles which govern every moment of his life. That whenever he is tempted to commit a murder, his mind must necessarily at the same time contemplate the fact, that if he does commit it, he will probably be hung, and in any case his life will become a burden to him, from the constant chance of his being found out. There is no ordinary murderer of whom this, at least, may not be stated with certainty. But can it be said of all lunatics? Of many, no doubt, it can, but certainly not of all. When we say of a lunatic that 'his mind is unhinged', we use a phrase which seems to me to embody a very important truth. His mind is still there, but it is dislocated. The facts which make up his knowledge are still there, but they have ceased to be in connection with, or to bear upon, each other. They have passed from being principles of conduct to being barren pieces of information such as the statement that we may each drop down dead at any moment which everyone believes, and by which no one is influenced.[45]

Following this, in a case,[46] where the accused killed his wife and child without any motive and, at the commencement of his trial, admitted his guilt and prayed to be hanged, a Division Bench of the Madhya Pradesh High Court held that in a vague way the accused knew that he had killed human beings and that he ought to be hanged, but that, applying the test laid down by Lord Kenyon CJ, in *R v Hadfield* ,[47] the accused could not be said to be 'under the guidance of reason so that we can reasonably infer that he was of unsound mind at the time he committed the act'. Referring to the observations of Mayne quoted above, their Lordships of the Madhya Pradesh High Court observed:

> Every criminal when he commits a crime has an instinctive dread of the consequences. To a normal man, the sanction provided by the criminal law acts as a deterrent, 'influencing, guiding and controlling his conduct'. But in the instant case we find that though the accused had a 'glimmering knowledge' that his act was contrary to law, the facts which made up 'his knowledge' had ceased to be in connection with each other or to bear upon each other. They had passed from being principles of conduct to being barren pieces of information which were absolutely incapable of influencing, guiding or controlling his conduct.484

22. Two Different Conditions of Capability of Knowing Illustrated

A prisoner may be capable of knowing the nature of the act but not that the act was wrong or contrary to law.[48] Two illustrations commonly cited to distinguish the two different conditions of mind may here be set out. A person strikes another and in consequence of an insane delusion believes that he is striking a bird. In such a case, he does not know the nature of his act. In the other case, he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing, by reason of his insanity, that he is doing what is morally wrong, though he is

aware of the nature of the act.[49]

23. 'Incapable of Knowing the Nature of the Act'--Meaning

As Mayne points out:

> The words 'incapable of knowing the nature of the act' may refer to two different states of mind, which are distinguished in the answers of the Judges in the *McNaughten* case,[50] and in the English Draft Code of 1879, by the words 'nature and quality'. A man is properly said to be ignorant of the nature of his act when he is ignorant of the properties and operation of the external agencies which he brings into play. As if, for instance, an idiot should fire a gun at a person looking upon it as a harmless firework. He is ignorant of the quality of his act if he knows the result which will follow, but is incapable of appreciating the elementary principles which make up the heinous and shocking nature of that result; as if, for instance, an idiot was unable to perceive the difference between shooting a man and shooting an ape. Both the states of mind are no doubt intended by the authors of the Penal Code to be included under the words they have used. This ground of exemption will hardly ever be found to exist, except in the case of idiots, or of lunatics whose insanity is so complete as to sweep away substantially all the reasoning power which distinguishes a man from a beast. But it seems to me most important to point out, that a person in this condition might have that consciousness, which is equally possessed by the lower animals, that the act which he intended to do so was wrong in the sense of being forbidden, and one for which he might be punished. This, however, would not render him liable under the words of the second clause if he was incapable of knowing the nature of the act which he really did, and for which alone he could be indicated. A good illustration is to be found in the case mentioned by Sir Jame Stephen, of the idiot who cut off the head of a man whom he found sleeping, because, as he explained it would be such fun to watch him looking about for his head when he awoke. It is probable that the idiot was quite aware that the man was entitled to the possession of his head, and expected that, if he was detected, he would be well cuffed by the man, and very probably taken up by the police. It is quite certain he had no idea that his fun would be lost, because the man would never awake.[51]

This has been held to be a correct statement of the law.[52]

24. Three Grounds for Exemption from Criminal Liability

On general form of the questions is improbable, implies that the effect of insanity upon the emotions and will is not to be taken into account in deciding whether the act of an insane person is a crime or not.485

On general principles underlying exemptions from criminal liability, there are three grounds upon one or other of which an insane person may be exempted from criminal responsibility for his conduct:

(i) Unconsciousness of what he was doing, *i.e.*, of the nature of his physical act: *A* kills *B* under an insane delusion that he is breaking a jar.[53]

(ii) Unconsciousness of the consequences of his physical act: *A* sets fire to valuable ricks of straw belonging to *B*, knowing that he is doing so, and in order to enjoy the blaze, but his mind is so imbecilic that he does not know that he will injure *B* by so doing.[54]

(iii) Ignorance that his conduct is either morally or legally wrong: *A*, believing that he has received a divine command to kill *B*, and to undergo capital punishment for so doing, kills *B*. Here *A* believes his act to be morally right, though he knows it to be legally wrong.[55]

Incapacity or Unconsciousness to know the Nature of the Physical Act--Head (1)

Unconsciousness of the nature of a physical act denotes extreme insanity, and is not common.

Illustrative Cases

(1) *A*, a married woman, killed *B*, her husband, immediately after an apparent recovery from a brain disease which caused insane delusions, which were renewed at the time of the homicide. It was held, that she did not know the nature of the act.[56]

(2) *A*, a man of absurd extravagance and eccentricity of conduct, of excessive intemperate habits, and who suffered occasionally from delirium tremens, whilst not so suffering killed *B* under circumstances showing deliberation and sense. It was held that he did know the nature of the act.[57]

(3) *A*, a habitual consumer of *ganja*, killed his wife and two children, on provoking words being uttered by the former, and then attempted to commit suicide. It was held that he did know the nature of the act.[58]

(4) *A*, who had been suffering from fever which caused him paroxysms, and being in consequence very irritable and sensitive to sound, on a sudden impulse killed his two children, on hearing them cry. It was held that he knew the nature of his act.[59]

Incapacity or Unconsciousness to Know the Nature of the Acts--Head (2)

Unconsciousness of the consequences of a physical act denotes a less degree of insanity than that under Head (1) and is therefore more common. It is the state of mind commonly known as idiocy.486

In ordinary language, the word 'act' is used as including the more immediate consequences of the act pure and simple (*i.e.*, the bodily movements of the agent). Thus, the words 'nature of the act' in this section include both the nature of the physical act [Head (1)] and the nature of its more immediate consequences [Head (2)]. In illust (2), *A* was quite aware of the nature of his physical act, the setting fire to the straw, but he was too imbecilic to realise the mischievous nature of the act, the consequential loss caused to *B*.[60]

Incapacity or Unconsciousness to Know that he is Doing what is Either Wrong, or Contrary to Law--Head (3)

The next ground of exemption is the most important, as it is generally the test in the very numerous cases, where mental disease has only partially extinguished reason. One familiar instance of such partial extinguishment is the case of delusions, which apparently leave the mind unaltered outside the special ideas which they affect. The questions put by the House of Lords to the judges (in the *McNaughten*'s case) seem to have been specially addressed to this form of insanity. Their answers are perfectly clear, and are embodied in the following clause of the Draft Code of 1879, which puts the law in the most satisfactory manner.

A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act. Provided that insanity before or after the time he committed the act, and insane delusions, though only partial, may be evidence that the offender was, at the time, when he committed the act, in such a condition of mind as to entitle him to be acquitted on the ground of insanity.[61]

Where a person, otherwise sane but labouring under the influence of an insane delusion, commits an act of revenge for some supposed grievance or injury, he is nevertheless punishable according to the nature of the crime committed, if at the time he understood that he was committing a wrong and unlawful act. In other words, he must be considered in the same situation as to responsibility as a sane person would be, if the facts with regard to which the delusion exists were true.[62]To be within this exemption an accused person must be, by reason of his unsoundness of mind, unconscious at the time he committed the act that was a crime.[63]

If an individual is not sane, and by reason of his insanity, he is incapable of knowing, that a given conduct is either legally or morally wrong, for *e.g..*, he believes that something which he knows to be contrary to law to be right in a particular instance, then he will not be responsible for doing the forbidden act, by reason of his unconsciousness of wrong, consequent upon his insanity. Usually this ignorance of the wrongfulness of certain conduct, this belief is its rightfulness, is accompanied by delusions, into which the supernatural delusion frequently enters, *e.g.*, the conviction of fanatics or madmen. It was so in the case of *Hadfield*,[64] who, believing that he was called upon by the voice of Heaven to sacrifice himself for the487 salvation of the world, proceeded to the theatre in order to shoot the king (George the third) who was there, so that he might be executed for the crime, and there shot at him. Here the moral perversion coupled with the delusion outweighed his knowledge of the criminality of the act, and was held as evidence of his insanity, and consequently he was exempted from punishment.

Illustrative Cases

An accused, who was a disciple of a *Pir*, on being told by the *Pir's* mistress, whom he respected as mother that he would go to heaven if he offered a human head in sacrifice on the auspicious first day of *Ramzan,* cut off the heads of two persons including that of his own daughter and offered the same to the *Pir*. It was held that the accused did not know that what he was doing was wrong or contrary to law and was therefore entitled to the protection of s 84, IPC .[65]

The accused killed his wife under a delusion that she was unchaste, but it could not be said that he was incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law, it was held that he was not entitled to the benefit of s 84 .[66] The accused appellant, suspecting illicit relation between his wife PW and the deceased, on the day of occurrence, repeatedly assaulted the deceased with wooden plank. The wife PW, son of the accused appellant and one more witness PW whose presence on the spot could not be doubted, deposed about the assault. The plea of insanity was rejected and the accused was convicted on charge of murder under s 302, IPC .[67]

The incident happened on the 18 February 1996 and even before the challan had been filed on the 26 April 1996, the accused had been sent to the Medical Hospital, for treatment and she had remained admitted in the hospital for treatment till 12 October 1999. When she had been produced before the concerned court, on that day it was found that she was still behaving in an abnormal manner, and she was again sent to the Medical Hospital where she remained under treatment from 12 October 1999 till 20 November 2001. The accused was suffering from insanity and therefore, was acquitted.[68]

Appellant accused had hit his wife on the head with a spade and caused death. Evidence brought on the record showed that the accused appellant was suffering from insanity which had incapacitated him from knowing the nature of his act. Held, the appellant accused was entitled to the benefit of s 84 and was acquitted of the charge under s 302, IPC .[69]

There was evidence that the accused was found standing naked by a road side with a hasua stained with blood. The investigating officer did not have the accused medically examined whether the accused was of a sound/unsound mind at the time of the commission of the offence. The appellant accused was held entitled to the protection of s 84, IPC .[70]488

Accused appellant had committed murder of 11 persons including eight children of his family. In the fardbeyan (FIR) itself the informant stated that the appellant was behaving like an insane person since the last 2-3 years and was living in loneliness. He occasionally used to go away from the house and he did not respond to the call of any person and he was undergoing treatment but since last month when his voice started trembling he stopped taking medicine. The medical report of Medical Board, consisting of three experts, showed that the appellant was suffering from Paranoid Schizophrenia even at the time of the commission of the alleged offence of murder and, therefore, it could very well be inferred from the facts and circumstances that at the time of alleged commission of crime the appellant was suffering from Paranoid Schizophrenia, which is one of the kinds of insanity and unsoundness of mind. The appellant accused was acquitted of the charge of murder.[71]

The appellant, with her two children, jumped into a well. When a rope was lowered in the well, the appellant caught hold of the rope then she was taken out. On questioning as to why she had jumped into the well the appellant answered that her husband did not provide food to her and beat her and so she jumped into the well. Her conduct in coming out of the well and her answer suggest that she was not insane and she knew the consequences of her act. In such a case, the plea of insanity by the appellant cannot be said to be true and sustainable.[72]

The fact that the accused was treated for sometime for some kind of mental disorder over two and a half years prior to the incident or a year after incident, is no indication of his mental disorder at the relevant time. Facts that the accused after using a dagger tried to suppress evidence by washing off blood from his face and weapon and remained absconding over a year show that he was well aware and fully conscious of what he was doing.[73]

Where the plea of insanity of the accused was not taken at any stage of the trial, no questions were put to the PWS about the insanity of the accused, and documents relating to treatment of the accused were not filed in the court, held the accused appellant was not entitled to the protection of s 84, IPC .[74]

When it is not a case of clear insanity, but is just a case of some aberration in the mind of the accused that had resulted in abnormal behaviour leading to the assault on his wife, children and others who came to their rescue. The evidence otherwise indicates that the man was a normal human being, who was not remiss in the matter of providing his wife and children with shelter and food. There may have been some circumstances, some kind of stress and strain resulting in a momentary imbalance robbing him of rational thinking so on and so forth. Many reasons may be spelled out for his act and conduct, but none of them would suffice to hold that he was totally insane in which event alone he could be bailed out by the court taking resort to s 84, IPC . Only to save the accused from the throes of punishment, one should not brand a person a madman or call him insane.[75]

The investigating officer was never told about the alleged insanity of the appellant accused. The appellant accused was also not medically examined in the case. When489 the burden was on the appellant, the defence should have discharged it by quoting instances and by bringing on record the earlier medical evidence *etc.* No efforts were made even during the entire period of trial to get the appellant medically examined so that an opinion may have been obtained regarding alleged unsoundness of mind which defence the appellant had half-heartedly taken at the trial. There was no observation of the Sessions Court in this regard. Even in the statement of the appellant, recorded under s 313, CrPC, nothing was observed nor the answers to the questions put to him were given in such a manner on which the court may have proceed in that line. The plea of insanity was repelled.[76]

When the accused obviously and completely knew everything that he was doing as also consequences of his acts, in these circumstances, the defence of insanity cannot avail him. The evidence in this case indicated that the accused put the young girl on a bicycle and took her to a lonely place, this is in keeping with the conduct of a sane person and one who was planning an offence of this type rather than a madman who in a fit of insanity would attack a woman or child. Secondly, after committing the offence and after sexually assaulting the young child the accused not only ran away but he took the precaution of lifting the body and throwing it into the canal with obvious reason of screening of the evidence or the consequences of his act. This is a carefully thought out and manipulated action and certainly not the act of an insane human being. Tested from these angles therefore, the defence of insanity requires to be rejected.[77]

Where it was established that the accused killed his son by stabbing him with knife in the fields, on account of the unsoundness of the mind he was incapable of knowing the nature of the act or that what he was doing is either wrong or contrary to law; it was held that he was entitled to acquittal on the ground.[78] Where the evidence on record showed (a) that father of the appellant was a madman and his brother was half mad; (b) that for about four or five years the appellant was found moving like a madman and he was not particular about his food, and after moving around throughout the day, he used to return home in the evening; (c) that the appellant killed his wife without any rational motive; (d)

that he made no effort to escape from the scene or to conceal anything; (e) that he showed no feeling of remorse or repentance for what he had done; (f) that after killing his wife, he remained completely unmindful of what had happened, meaning thereby that he did not exhibit any feeling or reaction whatsoever; and (g) that he inflicted injuries on his own person and attempted to cut his own penis; it was held that the said circumstances are indicative of the fact that at the time when the appellant killed his wife, he was mentally incapable of knowing what he was doing.[79]

Where the appellant husband killed his wife by dao, the prosecution witnesses deposed that the accused was suffering from mental disorder and insanity for a long period, the appellant was held protected by s 84, IPC and acquitted of the charge of murder.[80] Appellant accused had inflicted sickle blow on his wife and killed her. The appellant accused after commission of murder ran away from the spot and the dead body of the deceased was cremated before the arrival of the police. Record of mental Hospital showed that on psycho diagnosis, the appellant was not seen to have any490 gross psycho-pathology findings. Plea of insanity was rejected, and appellant accused was convicted on the charge of murder.[81]

The appellant-accused had an altercation with the deceased in her house, followed her to the house of PW3 where PW3, PW4 and PW5 were watching TV. He took out a kulhari, severed her head, threw it in the courtyard and told PW3 'take it'. Events showed that the appellant had taken a conscious decision to kill the deceased. Appellant soon after the incident was examined by doctor, when he was found conscious, co-operative and oriented to time and place. Appellant was not protected by s 84, IPC .[82]

In an undernoted identical case before the Gujarat High Court the accused imagining himself to be 'Arjun' killed his wife and his elder son and disclosed this fact before the Sarpanch of the village addressing the Sarpanch of the village as 'Bhishma Pitamaha'. The Gujarat High Court, considering the totality of the circumstances of the said case, came to the conclusion that the accused was suffering from a delusion or a hallucination that he was a pure blooded 'Suryabanshi and Arjun of the Mahabharat'. There was absence of provocation for the accused to commit the brutal act of killing his wife and his elder son and after killing them, he openly told the Sarpanch that he has killed his wife and son. There was no attempt on his part to conceal what he had done or conceal the incriminating pieces of evidence, *i.e.* the weapon of offence and his blood-stained clothes. There was no repentance on his part. On the above grounds, benefit of s 84, IPC was extended to the accused in the said case.[83]

25. Insanity is a Question of Fact

The question, whether the accused was mad at the time of occurrence so as to attract the application of this section, is a question of fact to be decided on merits in each case on the facts of that case.[84]

26. To Claim Benefit of Section Specific Plea and Evidence Necessary

It must be borne in mind that to claim the benefit of the provisions of s 84 of the IPC, there must be specific plea at the time of trial and the evidence must indicate that, by reason of unsoundness of mind the accused did not know the nature of the act he did. No such material had been placed before the trial Court and no such plea had been taken. This abnormal behaviour of the accused in attempting to cut the penis of his nephew aged about five years and leaving his wife in his parent's house, at the most indicates a sexual deficiency in the accused expressed into a positive act of cutting the penis of some other person. That indicates a medical imbalance of the accused, which has to be treated and it does not reduce the culpability of the accused.[85]

27. Burden of Proof

From the plain reading of the said provision, it is clear that in order to claim the benefit under the section, the defence has to show that at the time of occurrence of the incident, he was of unsound

mind.[86]491

The burden to prove that the accused was of unsound mind and as a result thereof he was incapable of knowing the nature and consequences of his acts is on the accused.[1]

In case of defense taken under s 84 of IPC, burden lies on the accused to prove that the accused was incapable of knowing the nature of the act at the time of commission of crime.[2]

The rules of burden of proof in the context of the plea of insanity are:

(i) that the prosecution must prove beyond reasonable doubt that the offence was committed by the accused that the requisite *mens rea* and the burden continues from the beginning till the end of the trial;
(ii) that it is a rebuttable presumption that the prisoner was not insane when he committed an offence in the sense set forth in s 84, IPC ;
(iii) that the accused may rebut the presumption of sanity at the relevant time bringing the case within s 84, IPC, by producing oral, documentary, circumstantial and other materials and he may discharge the burden by establishing a reasonable probable case. The accused is not called upon to establish the element of s 84, IPC, by producing evidence beyond reasonable doubt and;
(iv) that even the accused fails to establish affirmatively or conclusively, that he was of unsound mind and committed the act under the circumstances set out in s 84, IPC, but raises a reasonable doubt in the mind of the court as regards presence of essential ingredients of the offence, which of course includes, *mens rea* the requisite criminal intention, the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.[3]

The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the court and if this is not done, it creates serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly, every person is also presumed to know the law.[4]

It lies on the accused to prove that he was insane at the time of the commission of an offence, so as not to be liable to punishment as a sane person.[5] The burden of492 proof to prove that the mental condition of the accused at the crucial point of time was such as is described by s 84 of the IPC, lies on the accused who claims the benefit of this exemption.[6] The only question is as to the nature and extent of the burden of proof that lies on the accused. The law on the subject with regard to the general exception in the Code has been discussed in the general note on this chapter. The leading case on the subject is *Woolmington v Director of Public Prosecutions* [7] which has been generally followed in India. But the law bearing on the question of insanity stands on a different footing. The rule in *Woolmington*'s case is not with reference to a case in which the plea of insanity was set up.[8] Viscount Sankey LC, who delivered the judgment of the House in *Woolmington*'s case[9] observed:

> *McNaughten*'s case stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In *McNaughten*'s case the onus is definitely and exceptionally placed upon the accused to establish such a defence...where it is stated that the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defence, must be established by the defendant...It is not necessary to refer to

McNaughten's case again in this judgment, for it has nothing to do with it.

According to the Mcnaughten's rules, every man possesses a sufficient degree of reason to be responsible for his crime, until the contrary is proved to the satisfaction of the jury; that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong.[10]

Where accused is found to be man of sound mind during trial by the court below, it is the duty of the accused to prove his case to be falling under any of the exception including under s 84 of IPC to avoid his conviction and sentence. Appellant accused, a security guard of the bank, entered the bank and fired shots at the deceased who died. Evidence showed that the behavior of the accused before and after the incident was normal. Plea of insanity was rejected.[11]

Where accused killed his own son aged three years for no apparent reason and was detained in a mental hospital for about two years and was thus not a normal man at the time when he committed alleged crime. No evidence was led by prosecution to show his state of mind during custody, the accused took plea of insanity and it was held that the accused rebutted presumption of sanity and was entitled to acquittal.[12]493 Where the evidence as to the state of mind pleaded is conflicting, he should be convicted as on him lies the burden of proving his defence, which in the case of conflicting evidence cannot be said to be sufficiently discharged.[13]

The accused appellant threw petrol over his nephew deceased causing death. His father took plea that the accused was insane, however, he was not examined. The medical evidence did not prove that the accused appellant was of unsound mind. He was held not entitled to protection of s 84, IPC .[14]

In order to get the benefit of s 84, IPC, the onus is on the appellant accused to prove that the act was done by him while he was insane or of unsound mind. The appellant did not adduce any evidence to prove that he was insane at the time of occurrence. On the other hand, the evidence of PWS showed that the appellant was not insane. The benefit of s 84, IPC was not extended to the appellant.[15]

The evidence ought to be sufficient for a categorical finding that at the time when the accused committed the act he was of unsound mind to such an extent that he was incapable of knowing that what he was doing was wrong or contrary to law.[16] Where there is a mere possibility that the accused may have been insane at the time of commission of the act of murder, then in the absence of proof in the affirmative of the kind of insanity referred to in this section the presumption is that the accused is responsible for his act.[17] But when the accused was not feigning insanity nor could it be said with any certainty or definitively that the accused was absolutely sane on the date and at the time when he assaulted the deceased with a knife, the burden on the accused is not to prove his defence beyond a shadow of doubt, as in the case of prosecution, but he has only to establish it with preponderance of probability. When the doctor also could not categorically state that the accused had or did not have capacity to understand the nature of his act at the time of the alleged incident or that the accused was suffering from this mental abnormality prior to or at the time of the incident, it was held that the benefit under s 84 must go to the accused.[18]

Mere taking treatment in the mental hospital, itself is not sufficient proof of total insanity of person.[19]

If the evidence on record *vis-à-vis* the mental state of the accused casts a doubt with regard to the mental capability of his, to that extent, it has to be inevitably held that the prosecution has failed to prove the charge of murder against him. This is permissible even if the accused/appellant has not been able to prove beyond doubt that at the relevant point of time he was of unsound mind. He is relieved of that burdensome responsibility.[20]

In the instant case, there was no evidence led by the defence with regard to the insanity of the

appellant at all. PWS 1 and 2, the mother and wife of the appellant, merely stated that during the relevant time of occurrence the appellant was behaving erratically and was moving with tangi in a furious mood. On the contrary, the494 evidence of PWS 5 and 9 showed that the accused was of sound mind and never behaved erratically like a mad man. There was no evidence worth-the-name that the accused was ever suffering from unsoundness of mind or at any point of time, during or prior to the occurrence. There was neither any evidence of his madness nor any family history of unsoundness of mind. He had never been treated for madness. The evidence on record rather showed that soon after assaulting the deceased girl and other injured girls, he ran away from the spot with the tangi. The appellant accused was held not protected by s 84, IPC, thus, he was convicted under ss 302 and 326, IPC .[21]

Doctrine of Burden of Proof in Context of Plea of Insanity

Doctrine of burden of proof in the context of plea of insanity may be stated in the following words:

(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea*; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.
(2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by s 84 of the IPC ; the accused may rebut it by placing before the court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.
(3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including *mens rea* of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.[22]

The doctrine of the burden of proof and the nature of evidence necessary to discharge this burden in cases where the accused claims the benefit of the general exceptions in the IPC or of any special exception or proviso contained in any other part of the same Code or in any other law can be stated as below:

(1) The case shall fall in one of the three categories depending upon the wording of the enactment;
    (i) The statute places the burden of proof of all or some of the ingredients of the offence on the accused himself;
    (ii) The special burden placed on the accused does not touch the ingredients of the offence but only the protection given on the assumption of the proof of the said ingredients; and
    (iii) The special burden relates to an exception to some of the many circumstances required to attract the exception, which if proved, affects the proof of all or some of the ingredients of the offence.

(2) In the first two categories the onus lies upon the accused to discharge the special burden and on failure he can be convicted of the offence provided495 that the prosecution has succeeded to discharge its general burden of proof that is to establish the case beyond any reasonable doubt.
(3) In cases falling under the third category inability to discharge the burden of proof shall not, in each and every case automatically result in the conviction of the accused. The

court shall still have to see how the facts proved affect the proof of the ingredients of the offence. In other words, if on consideration of the total evidence on record a reasonable doubt exists in the mind of the court as regards one or more of the ingredients of the offence including *mens rea* of the accused he shall be acquitted of the main offence even though he had not been in a position to prove the circumstances to bring his case within the exception. This shall be on the ground that the general burden of proof resting on the prosecution was not discharged.

(4) The burden of proof on the prosecution to establish its case rests from the beginning to the end of the trial and it must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea.*

(5) The burden placed on the accused is not so onerous as on the prosecution. The prosecution has to prove its case beyond reasonable doubt but in determining whether the accused has been successful in discharging the onus, the court shall look into the preponderance of probabilities in the same manner as in a civil proceeding. In other words, the court shall have to see whether a prudent man would, in the circumstances of the case, act on the supposition that the case falls within the exception or proviso as pleaded by the accused.

(6) In a case in which any General Exception in the IPC, or any special exception or proviso contained in another part of the same Code or in any law defining the offence is pleaded or raised by an accused person and the evidence led in support of such plea, judged by the test of the preponderance of probability, as in a civil proceeding, falls to displace the presumption arising from s 105 of the Evidence Act, in other words, to disprove the absence of circumstances bringing the case within the said exception, but upon a consideration of the evidence as a whole, including the evidence given in support of the plea based on the said exception or proviso, a reasonable doubt is created in the mind of the court, as regards one or more of the ingredients of the offence, the accused person shall be entitled to the benefit of the reasonable doubt as to his guilt and hence to acquittal of the said offence.[23]

Prosecution Not Required to Prove Insanity of Accused

When an accused raises a plea falling under s 84, IPC, it being in the nature of an exception the burden of proof is on him to establish the same as per s 105 of the Evidence Act . Every person is presumed to know the law, and the natural consequence of his act; and as per s 105 of the Evidence Act, court shall presume the absence of the exception. In such circumstances in discharging its burden, the prosecution need probe only the basic facts and can rely upon the normal presumption; prosecution is not bound to show that the accused at the relevant time was not insane.[24]496

Burden to Prove Insanity is Heavy-- Section 105, Indian Evidence Act 1872

The case law as far as defences in support of the plea of insanity are concerned is well crystallised that the onus of establishing that the accused is covered by an exception, namely, the fact that he is of unsound mind shifts essentially to the defence. Furthermore, the case law is very clear with regard to the fact that it must be established that the gravity of the mental illness or ailment is so serious and of such a nature as to disqualify the accused person from being aware of what exactly he is doing and that it must also be demonstrated that he is incapable of being able to distinguish between right and wrong. This burden is a heavy one and unless the burden is fully discharged merely because it is demonstrated that the accused is given to wayward habits or that he has demonstrated peculiarities in his behaviour, the law will not take cognizance of such facts nor will he qualify for being declared legally insane.[25]The burden of proving that the mental condition of the accused was not proper at the time when the said offence was committed lies on the accused in view of s 105 of the Evidence Act . It is a settled position in law that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved.[26]

In India it has been held in some cases that the burden placed on the accused by s 105 of the

Evidence Act should be discharged by clear and cogent evidence. The accused is not entitled to any benefit of doubt as to his insanity because the burden is on him to prove strictly that he committed the act while being in a state of unsound mind, in terms of s 84, IPC . The burden of proof that the mental condition of the accused was at the crucial point of time, such as described in s 84 of the IPC lies on the accused who claims the benefit of the exemption. In a trial court the accused leads satisfactory evidence in the case as to his insane condition before the incident of the offence and condition after the incident of the offence and all circumstances preceding the act, at the time of act and subsequent to the act of alleged crime are shown to be clear pointers to the insane mental condition of the accused. The presumption of sanity stands rebutted by the accused and the case of the accused stands proved as falling within scope of s 84 of the IPC and he is entitled to an acquittal.[27]This view is claimed to be based on what is said to be the plain meaning of s 105 of the Evidence Act, read with the definition of the word 'proved' as found in s 3 of the same Act which says that a fact is said to be 'proved when after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. It is said that the burden placed on the accused is not substantially different from the burden placed on the prosecution to establish its case.

Burden of Proof of Insanity can be Discharged as in Civil Cases

The onus of proving insanity of the accused as pointed out by the Privy Council in *Sodeman v Rex* ,[28] is not higher than the burden which rests upon a plaintiff, and has received a strict interpretation, and is held as governing only those cases or defendant497 in civil proceedings. In the case *R v Dunbar* ,[29] Lord Goddard CJ, who delivered the judgment of the court of criminal appeal said:

> That case, *R v Carr-Briant* ,[30] which is binding on us, decided that where, either by statute or at Common Law, some matter is presumed against an accused person, unless the contrary is proved the jury should be directed that it is for them to decide that the contrary is proved, and that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt and that this burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called on to establish. This is often cited as showing that where an onus is placed on an accused person it may be discharged by proving what would be enough to support a verdict in a civil action, and that to use the words of Willes J, in *Cooper v Slade* ,[31] 'in civil cases the preponderance of probability may constitute sufficient ground for a verdict'.

It is clear, therefore, that the English Courts have not departed from the Mcnaughten's rules excepting that the more recent cases have clarified the nature and the extent of the burden placed on the accused in establishing his plea of insanity. It has been held that the burden placed on the accused will be discharged if he shows preponderance of probability in favour of the plea taken by him.[32]

Burden of Proving Offence Never Shifts

The question of burden of proof in such cases has been dealt with by the Kerala High Court thus:

> The burden of proving an offence is always on the prosecution and it never shifts. The state of mind of a person can ordinarily only be inferred from circumstances. Section 84 of the IPC can be invoked by a person for nullifying the evidence adduced by the prosecution. When a plea of legal insanity is set up, the court has to consider whether at the time of commission of the offence the accused by reason of unsoundness of mind was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. This is a matter of inference from proved circumstances. In order to decide question of burden of proof the court has to examine the available material such as oral and documentary evidence and should have due regard to admissions, presumptions and even the prosecution evidence. The burden which rests on the accused is, however, not higher than that which rests upon a party in civil litigation. The crucial point of time at which unsoundness of mind should be established is the time when the crime was actually committed. For this purpose, the state of his mind, both before and after the commission of the act, is also relevant. The court has

to pay due regard to the circumstances which preceded, attended and followed the act.[33]

Burden to Prove Sanity--When Shifts on Prosecution

Burden to establish that at the time of committing the crime the accused was not of unsound mind shifts on the prosecution once it is found that the accused had a previous history of lunacy. Even if the plea of the accused, that he was not of sound mind at the time of committing the crime, is not affirmatively established and a reasonable doubt is created in the mind of the court, then too the accused is entitled498 to be acquitted.[34] Where the conduct of the accused demonstrates abnormality, the prosecution should place before the court some evidence to indicate that the accused was in a proper state of mind at the time of commission of the offence. Where the accused cut the neck of his mother with axe without quarrel or dispute and after putting down the axe started weeping and did not flee from scene, nor did he conceal the weapon, in such a case the prosecution cannot ask for conviction without discharging that burden. In judging insanity, all cumulative circumstances are to be taken into account.[35]

28. Mode of Proof

Although the onus of proving circumstances which give the benefit of the exception to an accused person lies on him and in the absence of evidence the presumption is against him, this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record whether produced by the prosecution or the defence, that the general exception would apply, the presumption is removed and it is open to the court to consider whether the evidence proves to the satisfaction of the court that the accused comes within the exception.[36]

29. Standard of Proof

The standard to be applied is whether according to the ordinary standard, adopted by reasonable man, the act was right or wrong. The mere fact that an accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts in the past or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behavior, cannot be sufficient to attract the application of this section.[37]

30. Closer and Stricter Scrutiny of Evidence Required

Though as already pointed out it is not necessary that the accused must, in all cases where such a plea is taken, adduce evidence of an affirmative nature to bring the case within the meaning of the exception provided for in s 84, IPC . However, the mode of proving a plea of self-defence stands on a somewhat different footing from a plea of legal insanity so as to exempt the person committing the act from any criminal liability whatsoever. In the case of self-defence, the accused acts in defence against aggression upon him and in such a situation, it is easier for the defence to establish the existence of circumstances upon the prosecution evidence itself or on other materials on record. In the case of a plea of insanity, the case, stands on a different footing in the sense that here the plea is taken by a person who is alleged to have taken the role of the aggressor himself and necessarily the question whether the499 burden is discharged or not would call for a closer and stricter scrutiny than in the case of a person taking a plea of self-defence against aggression.[38]

It is the relations who are likely to remain in intimate contact of the accused and, therefore, competent to state whether he was, or was not, sane at the time of commission of the crime. If, apart from the evidence of relative witnesses, there are independent witnesses who have come forward to state the insanity of the accused, it is difficult to say that the defence has not proved the insanity of the accused

at the crucial time of the commission of the offence.[39]

The Karnataka High Court has gone a step ahead in this connection and its observations made with regard to the duties of the prosecution and investigation agency may be usefully quoted here:

> Prosecution must negative lunacy at the time of committing the offence if there is previous history of the accused suffering from lunacy. Though there is no burden cast on the prosecution to establish negatively that the accused was not of unsound mind when he committed the acts of violence resulting in the death of the person or persons murdered, yet where the accused has a previous history of mental disease or lunacy and it is revealed during the course of investigation that the accused had such previous history of mental disease or lunacy, fairness in investigation does require probing into this aspect with an unbiased approach, particularly when the accused himself cannot, in the very nature of things, assist in unravelling the necessary facts, being in custody and may be being mentally unbalanced. Therefore, it becomes obligatory on the part of the investigating agency, particularly when the accused is apprehended at about the time of commission of the offence or shortly thereafter, to subject the accused to medical examination, at least to ensure itself that the accused was in fact a person of ordinary state of mind. If that is done, it necessarily rules out the possibility of the accused having committed the acts of violence attributed to him on account of mental disease or lunacy.[40]

31. Evidence of Insanity--two Points for Consideration

The burden of proving the plea of insanity rests on the accused and that onus can be discharged by producing evidence as to his conduct at the time or immediately afterwards, and by evidence of his mental condition and other relevant facts. In adjudging on such a plea the court has to consider two points, first whether the accused has established that at the time of committing the act he was of unsound mind and, second, if he succeeds in proving it, then whether he has established that the unsoundness of mind was of such a degree and nature that by reason thereof he was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law.[41] The non-exhibition of feelings and the absence of secrecy on the part of the accused are only some of the relevant circumstances which have to be considered along with the other circumstances of the case, and by themselves, they do not make out sanity or insanity.[42]500

Facts and Conduct not Sufficient to Establish Unsoundness

The fact that the accused did not try to run away from the scene of the crime is not indicative of insanity.[43] Where accused husband gave two blows with pestle on head of the deceased--his wife--and set fire to her by pouring kerosene, and the plea of insanity of the accused was not supported by evidence showing that he was of unsound mind at the time of committing murder and the accused ran away from the spot after the incident, which cannot be expected from a person of unsound mind and the weapon used for the offence was recovered at the instance of the accused, it was held that the accused was not entitled to benefit under s 84 and his conviction under s 302, IPC, was proper.[44] The fact, that the accused was not mentally normal at the relevant time, would also not amount to establishing the plea of insanity.[45] Where the accused was charged with murder and he took the plea that he was suffering from paranoia but the facts established on record proved that he understood the implications of his acts at the time he committed the offence, the accused was held not entitled to the benefit of s 84, IPC .[46] Where the accused killed his wife by causing multiple injuries and lodged an FIR himself immediately after occurrence and death of the deceased occurred while in custody of the accused when she was asleep and the statement of accused was that he had decided to kill her since she had spurned him and looked at him with hatred prior to the incident, the police officer did not notice any abnormality in the behaviour of the accused, there was no clear medical evidence as to insanity of the accused and from the conduct of the accused before and after the incident no mental disorder was demonstrated, it was held that the plea of insanity set up by the accused was not maintainable.[47] Where the involvement and complicity of the accused in the murder was proved by the eyewitnesses, medical evidence supported the prosecution case, motive for the murder also

existed and was established, the evidence showed that at the time of occurrence before and thereafter, conduct of accused was not abnormal and plea of unsoundness was only an afterthought. It was held that the accused was rightly convicted under s 302, IPC and he was not entitled to benefit under s 84, IPC .[48] Where the accused killed his wife after bolting the door of the house from the inside, evidence of witnesses showed that accused opened the door of his house and attempted to escape which proves his conduct after occurrence, so a plea that the accused was mentally unstable was held not tenable and conviction of the accused was found proper.[49] The accused's refusal to take food or taking insufficient food after great persuasion, whether in itself or combined with other circumstances, is not sufficient to establish unsoundness of mind.[50] But the legal insanity of the accused is negatived by the following circumstances:

(a) He entered into the place of incident concealing the axe under his clothes and after inflicting injury on the head of victim, he fled away.
(b) The second circumstance was that after his arrest he disclosed that he had hidden the axe under the soil near the hill and on the basis of his disclosure501 statement the axe was recovered from the said place by the investigating officer.
(c) The third circumstance was that in his explanation under s 313, CrPC, he stated that he was falsely implicated in the case because of group rivalry and the prosecution witnesses deposed against him as his relations with them were inimical. All the questions put to the appellant were properly answered by him.

All these circumstances show that the appellant was not insane, his cognitive faculties were not lost and he was not incapable of knowing the nature of his act.[51]

Facts and Conduct Sufficient to Establish Unsoundness

The act of the accused coming to the house of the deceased mother without any preparation for the crime including not bringing any weapon, sitting quietly along with prosecution witness and others and while the deceased was serving him tea, suddenly picking up a sickle lying nearby and giving a blow coupled with the fact of his mental disturbance earlier and during trial, as evidenced from the record indicates that this was not an act of a sane person out of any malice or ill-will towards the deceased.[52] The facts and conduct was found sufficient to establish insanity of accused where the circumstances that stand proved: (a) the accused had a family history, his father was suffering from psychiatric illness; (b) cause of ailment not known, but heredity plays a part; (c) accused was being treated for unsoundness of mind since 1992, diagnosed as suffering from paranoid schizophrenia. Within a short span, soon after the incident from 27 June 1994 to 5 December 1994, he had to be taken for treatment of ailment 25 times to hospital. (d) The accused was under regular treatment for the mental ailment; (e) the motive of killing of wife was weak being that she was opposing the idea of resigning from the job of a police constable; (f) killing one's wife in day light, and no attempt made to hide or run away.[53]

32.Inferences from the Conduct of Accused and Attending Circumstances

If on the evidence, it is found that the accused had a guilty conscience the plea of insanity has to be rejected.[54] The attempt to run away on the part of the accused after the commission of the crime would indicate that he was conscious of the crime which he had committed.[55] Where the charge against the accused was that he inflicted blows with an axe on deceased thereby causing his death and evidence of eyewitnesses was that the accused was of unsound mind prior to date of occurrence, the conduct of the accused at the time of assaulting the deceased in broad daylight within sight of his relatives and leaving the blood stained axe on the spot demonstrate abnormality and the circumstances of the case show that the accused at the time of performing the act of assault, by reason of unsoundness of mind was incapable of knowing the nature of the act. So, the accused was held entitled to benefit of doubt.[56]502

The premises, the manner, in which the occurrence took place the nature of the injuries inflicted by the accused the duration of the attack, maniacal fury, with which the attack was delivered, considered along with the evidence of unsoundness of the accused's mind, just prior to the occurrence, his subsequent conduct and his mental condition at the beginning of the trial, coupled with the absence of any motive or provocation to commit such an offence, are all indications that the accused was acting under some insane impulse at the time when he committed the offence.[57] Where the members of the family of the accused shifted to another house and did not dare to live with the accused and the accused, after committing the murder, did not run away, though he had sufficient and convenient opportunity to do so, and pointed out the dead body, it was held that the accused was of unsound mind and was protected by this section.[58]

33. Accused not Fleeing from Spot--No Indication of Insanity

The conduct of the accused of not fleeing from the spot would not in itself show that the accused was insane at the time of the commission of the offence.[59]

The accused killed his own brother by using 'Latth'. When the complainant brother of the accused reached on the spot, the accused who was standing with a 'Latth' in his hand, threatened to kill his brother. No medical evidence was adduced to prove that the accused was suffering from insanity or unsoundness of mind. The plea of insanity was rejected.[60]

34. Pre-planned and Calculated Murder

Where the offence was pre-planned and committed in a calculated manner, the plea of unsoundness of mind of the appellant accused was repelled.[61] Where the accused in a well-planned manner set the victim on fire, and ran away from the spot after commission of the offence, the plea of insanity was rejected.[62]

35.Plea of Insanity can be Raised Even in Confirmation Proceedings on Reliable Evidence

If, even in confirmation proceedings, some reliable evidence about the incapacity of the accused to defend himself is placed before the court, and the accused moves an application for a medical examination, the application is not to be rejected merely because the trial court after applying its mind to the same material has concluded against the accused.[63]

Prior, Present and Subsequent Conduct--When Relevant

Under the law, the crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. The question whether the503 accused was in such state of mind as to be entitled to the benefit of s 84, IPC, can only be established and determined from the circumstances which preceded, attended and followed the crime.[64] It is settled law that whether an accused was in such a state of mind as to entitle him to the benefit of s 84, IPC, it can only be established from the circumstances which preceded, attended and followed the crime. Where conduct of the accused did not show any abnormality prior to, and at the time of the occurrence, and the only evidence on record was that the accused did not do any household work, remained loitering in the village, and used to quarrel with his mother, it was held that from such behaviour, it could not be concluded that the accused had developed insanity prior to the occurrence.[65] The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, and it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility.[66]

But where the fact that the accused killed his wife was not disputed, the testimony of witnesses

showed that the accused's mind was affected about 10 days prior to the incident and was intended to be treated by a sorcerer, conduct of the accused prior to, at the time of and subsequent to the commission of offence showing that he was not in a fit state of mind, the case of accused was held falling within the purview of s 84 and the accused was entitled to benefit of doubt.[67]

The proof of insanity of accused at the nick of time is highly improbable. As such, behaviour antecedent, attendant and subsequent to the commission of offence is relevant and must be taken into consideration in finding the mental condition of the accused at the time of commission of the offence.[68] If the accused ran away from the place after committing murder of his wife, it bears testimony of his guilty mind. Had he been suffering from unsoundness of mind, he would not have disappeared from the scene of occurrence.[69] But if after the murderous attack on the deceased the accused did not make any attempt to escape from there and soon after the incident the accused was seen lying down on the muddy ground and he remained motionless and unperturbed even after a bucket of cold water was poured over him, and he laid there for hours till the police came and took him into custody, these circumstances are amongst the circumstances which raise inference that accused was of unsound mind at the relevant time.[70]

Where in a case, there were several circumstances, namely that the accused was sitting near the dead body without running away, that he also put the cut lemon, turmeric and sindur near the dead body and curiously, he was also treated for unsoundness of mind coupled with the evidence of a defence witness, who deposed504 that at the time of commission of the offence, there is every possibility of the accused being ill. Therefore, it was found to be a case where the accused should be given the benefit of s 84 of the IPC .[71]

The accused appellant disappeared from the place of occurrence after the commission of the murder. His conduct in disappearing from the spot after the occurrence indicated that he understood the nature of his act and therefore, in order to save himself, he escaped and fled away. In the absence of medical evidence showing that the appellant was suffering from unsoundness of mind, the appellant was held not entitled to the benefit of s 84, IPC .[72]

In the present case, the respondent husband had committed the murder of his wife. In the FIR itself reference was made about the mental illness of the accused. There was no motive, there was no preparation for the commission of the offence. The accused was granted protection of s 84, IPC and acquitted of the charge of murder.[73]

Where there was no record of any abnormality of mind prior to commission of offence and there was only a possibility of mere loss of balance of mind after the incident, it was held that the accused is not entitled to benefit of s 84 .[74] Where in view of the conduct of the accused before and after the incident, it was impossible to hold that the accused demonstrated any mental disorder, the plea of insanity taken by the accused was held not maintainable.[75] In view of the conduct of the accused in threatening the deceased a day prior to the occurrence and on the next day trespassing into the house of the deceased and thereafter deliberately striking deceased with a deadly weapon on her head resulting into her death, it could be said that the accused had the intention to cause the death of deceased.[76]

Where complicity of the accused in the murder was proved by eyewitnesses, medical evidence supported the prosecution case, motive for the murder also existed and was established and the evidence showed that the conduct of the accused before, at the time of occurrence and thereafter was not abnormal and plea of unsoundness was only an afterthought, it was held that the accused was rightly convicted under s 302 and not entitled to the benefit under s 84, IPC .[77]

The accused appellant on the date of the incident killed his brother's wife, daughter, son and a neighbour's son aged 4 years. There was absolutely no motive for committing the ghastly murder of four persons. He neither ran away from the spot nor concealed the axe *i.e.* the weapon used. Held, the accused appellant did not know the implication of his act. He was protected by s 84, IPC and

acquitted of all the charges.[78]

36. Family Antecedents

The onus that lies on the accused may be discharged by producing evidence as to the offence and his conduct at the time or immediately afterwards, also by evidence of505 his mental condition, his family history, and so forth.[79] Family antecedents were taken into consideration in the case of *Anandi v Emperor* .[80]

37. Relevancy of Absence of Motive or Atrocity of Crime

The mere fact that an act or omission is without apparent motive is not by itself sufficient to establish insanity, but if there is other evidence of insanity, such a fact may be of importance as helping to prove insanity.[81] The various circumstances disclosed by the evidence taken along with the absence of any motive may establish the plea of insanity. Absence of motive is only a factor which may be worthwhile to consider, but, however, by itself would never be conclusive of the fact.[82] It would be dangerous to hold that, because a monstrous crime like murder is committed for no apparent reason and for a non proved motive, the offender must have been insane at the time, and that without any proof whatsoever of prior insanity.[83] In a case where a plea of insanity has been taken in connection with a murder of a close relation of the accused, motive always assumes much importance and if there is no evidence indicating motive of murder, a conclusion will certainly follow in favour of the plea of insanity.[84]

The plea of unsoundness of mind was not taken by way of cross-examination or suggestion to any witness or by way of defence evidence or during arguments before the trial court, and the answers given by the accused appellant in examination under s 313, CrPC showed that the accused was intelligent. The accused was held not protected by s 84, IPC .[85]

Absence of motive is not by itself proof of insanity on the part of the accused.[86] The atrocity of the crime and absence of motive are not the criterion to constitute unsoundness of mind and are only some of the features ordinarily associated with it.[87] In *Reg v Haynes* ,[88] Bramwell B, in summing up to the jury, said:

> As to the defence of insanity, it has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But I must remark as to that that the circumstances of an act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to506 be termed irresistible, so much more the reason is there why we should not withdraw any of the safeguards tending to counteract it.[1]

Inadequacy of motive standing by itself is no proof of insanity.[2] So also absence of motive.[3] The absence of a strong motive cannot be conclusive.[4]

For the purposes of proving the offence of the incident itself, when there is direct evidence, motive pales into insignificance; but in the matter of the plea of insanity, absence of motive is a great circumstance which is always taken into consideration.[5] The absence of all motive for a crime, when corroborated by independent evidence of the prisoner's previous insanity, is not without weight.[6]

Accused appellant holding a bhujali indiscriminately assaulted five persons, as a result of which three of them died and two were severely injured. The appellant had no enmity with the deceased persons nor did he have any motive to commit their murders. The evidence of the witnesses showed that the

appellant was suffering from insanity since 1990 and had spells of insanity. Held, the appellant accused was entitled to the benefit of insanity, and being protected by s 84, IPC, was acquitted of the charge of murder.[7]

Mere absence of motive for a crime however, atrocious, cannot in the absence of proof of legal insanity, bring the case within ambit of s 84, IPC .[8]

A medical expert's evidence in case of a ghastly murder, where the plea of insanity is taken by the accused, should be such which would assist court in coming to the correct conclusion.[9]

38.Insanity is to be Proved by Medical Evidence or Undisputed Surrounding Circumstances

It is an undisputed position of fact that whether a person suffers from mental illness is not a lay man's guess work, but it is to be established by cogent medical evidence and it is also undisputed fact that where there is no such medical evidence, the court is to draw such conclusion from the surrounding circumstances which were not disputed from the record.[10]

If plea of insanity is raised by the accused, it is the duty of the prosecution to subject the accused to a medical examination immediately. This is important, because if it is revealed during the course of investigation that the accused was suffering from mental disease, the prosecution is further duty bound to place before the court all the evidence that could be available to show that the accused was in a proper state of507 mind when he committed the alleged offence. This is to rule out the plea of mental disease or insanity that may likely to be raised at the trial. The failure of the prosecution to do so creates serious infirmity in the prosecution case of murder. In case of failure on the part of the prosecution, it may entitle the accused to seek benefit of doubt.[11]

39. Evidence of Medical Expert

It is usual, but not essential, in a question of insanity to call a medical witnesses or lunacy experts.[12]The Supreme Court has, however, observed that evidence of insanity should be dependably given by experts with regard to the period of time prior to occurrence, at the time of occurrence and immediately following the occurrence. Observation if any made by the court regarding demeanour, conduct, appearance, is relevant. Evidence must be of total loss of cognitive faculty and incapacity to understand nature and consequences of the act alleged.[13]

Mere oral statements of witnesses would not prove insanity.[14] Where the accused did not produce any evidence on record in support of his plea of insanity except bare words, the plea of insanity was rejected. Accused was convicted under ss 302 and 324, IPC .[15]

Where the medical evidence clearly shows that the accused was not suffering from insanity, the plea of insanity would not be available to him under s 84, IPC .[16] The evidence of the doctors showed that the accused was a person of normal mind and was not suffering from any mental ailment. Section 84 was not attracted in the case; the accused appellant was not entitled to benefit of s 84, IPC . Accused was convicted on the charge of murder.[17] Where the accused was not feigning insanity nor could it be said with any certainty or definiteness that the accused was absolutely sane on the date and at the time when he assaulted the deceased with a knife, and the doctor could not categorically state that the accused had capacity to or not to understand the nature of his act at the time of the alleged incident or that the accused was suffering from this mental abnormality prior to or at the time of the incident, it was held that the benefit of s 84 must go to the accused.[18]

Where medical evidence adduced was not sufficient to show that the accused was mentally unsound, he was held not entitled to the protection of s 84, IPC .[19]

No medical evidence was adduced to show that the accused was of unsound mind at the time of the

commission of the offence. In examination under s 313, CrPC the court did not observe any sign of insanity. Mere oral statement that the accused was508 suffering from mental disorder at the time of the commission of offence was held not sufficient. Plea of insanity was not accepted.[20]

It is the duty of the medical expert who is called to prove insanity of the prisoner at the time of the commission of the offence, but who is sane at the time of the trial, to offer to keep the prisoner under his observation. He cannot base his opinion on the summary of evidence at the trial, supplied to him. It was held that a medical man, conversant with the disease of insanity, who has never seen the prisoner before the trial but who is present at the whole trial, cannot in strictness be asked his opinion as to the state of the prisoner's mind at the time of the commission of the crime or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law or whether he was labouring under a delusion at the time or whether by reason of any disease affecting the mind, the accused was incapable or prevented from controlling his conduct. These questions are no more questions upon a matter of science.[21]

There is a distinction between appreciation of facts and an expression of opinion on questions of science. The opinion of a medical man on the state of the mind of the accused at the time of the commission of the murder is merely relevant as being helpful. It is for the judge or the judge and the jury, as the case may be, to give a decision on these matters, and the function of the medical witness is to assist, not to supersede the judge.[22]

In *R v Holme* ,[23] however, it was held that a doctor may be asked, and may answer, whether in his opinion the accused's conduct immediately after the murder (described by another witness) would indicate that he knew: (a) the nature of the act which he was committing or; (b) that his act was contrary to law. On this Russell remarks:

> Since it is arguable that a man's behaviour after the deed does not necessarily prove what his attitude and state of mind were immediately before and at the moment of the deed (which is the crucial moment) this case would seem to establish *a fortiori* that the same questions would be permissible when the accused person's behaviour immediately before the deed has been described.[24]

Where no clear medical evidence as to insanity of accused was made out and in view of the conduct of the accused before and after the incident, no mental disorder was demonstrated, the plea of the accused regarding insanity was held not maintainable.[25]

The accused appellant killed his minor child and also caused injuries to his wife and mother, and did not allow his wife and mother to go outside the house throughout the night. The accused neither had any history of insanity, nor did the medical evidence adduced in the case establish the same. The plea of unsoundness taken by the accused appellant was rejected. Accused was convicted under s 304, Pt II, IPC, and sentence of ten years RI was imposed.[26]509

Value of Medical Expert and Section 45 of the Indian Evidence Act 1872

Under s 45, Evidence Act 1872, the opinion of an expert is relevant where a question of science is involved. The questions, whether the accused was of unsound mind at the time of the commission of the act, or by reason thereof he was incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law, are questions of fact which in England are decided by a jury and in India by the judge. But in arriving at a finding the opinion of an expert in mental diseases is relevant.[27]

40. Evidence of Medical man and Mcnaughten's Case

In *McNaughten*'s case,[28] question 5 and its answer were as follows:

> Q 5--Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time.
>
> A 5--We think the medical man, under the circumstances supposed, cannot, in strictness, be asked his opinion in the terms above stated, because, each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not questions upon a mere matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

In *R v Francis* ,[29]where the defence to an indictment for murder was that the prisoner was insane at the time he committed the act, and witnesses were called to prove that insanity had existed in many members of the prisoner's family and that he had been insane for three years, a physician, who had been in court during the whole trial, was asked by the counsel for the prosecution 'whether from all the evidence he had heard, both for the prosecution and defence, he was of the opinion that the prisoner, at the time he did the act, was of unsound mind', and the opinion of the judges in answer to the fifth question in *McNaughten*'s case was cited in support of the question, Alderson B and Cresswell J, held that the question ought not to be put. The proper mode is to ask what are the symptoms of insanity, or to take particular facts, and assuming them to be true, to ask whether they indicate insanity. To take the course suggested is really to substitute the witness for the jury, and allow him to decide upon the whole case. The jury have the facts before them, and they alone must interpret them by the general opinions of scientific men. So also in *R v Rivett* [30] it was laid down that it is for the jury, and not for medical men of whatever eminence, to determine the issue of insanity.510

41.Evidence of Relations of the Accused Regarding his Insanity

The evidence of the witnesses of the accused should not be discarded because they are the relations of the accused as it is the relations who are likely to remain in intimate contact of the accused.[31]

42. Duty of Court

There is no doubt, that to extend benefit of s 84, the court must be satisfied that at the time of commission of the offence the appellant was suffering from mental illness or she was in such a state of insanity that she was not capable of understanding the consequence of her wrongful act.[32]Section 84, IPC, casts the burden on accused to adduce evidence and prove that at the time of occurrence, his mental condition was such that he did not know what he was doing. In such a case, a duty is also cast on the court itself to find out from the materials on record, *viz*, conduct of the accused, as to whether any doubt arises in the mind of court that at the time of occurrence, the accused was not in a fit mental condition to have the requisite *mens rea* for the commission of offence and that he did not have the element of *mens rea* required under s 299 of the IPC .[33] The court, while considering the defence of insanity must look at and consider the totality of the emerging situation and position in the light of facts and circumstances relating to the mental condition of accused preceding the occurrence, at about the time of the occurrence as also after the occurrence.[34] Failure of the accused to raise the plea of insanity as a defence does not preclude him from setting up such a plea if, it is borne out by the evidence on record. It is the duty of the court to take the plea into consideration if the circumstances of the case and the evidence adduced by the prosecution justify such a plea.[35] In proper cases, it is also the duty of the court in the interest of justice, to get the accused medically examined.[36]

A man who pleads insanity and who, according to the prosecution witnesses, had shown abnormality of mind on previous occasions, and the medical evidence tends in the same direction, cannot be expected to look after his defence as an accused in an ordinary case. It is the duty of the court to watch his interest with unusual degree of care and circumspection.[37] Where the counsel for the accused did not make any suggestion as to the insanity of the accused, but the sessions judge trying the case put certain questions to a witness as to the behaviour of the accused prior to the offence as the judge thought that it was necessary to explore that possibility, it was held by the High Court:

> The learned judge was no doubt justified in eliciting the information, and, whether the plea was taken by the accused or not, the fact does remain that if the evidence discloses the insanity of the accused at the material time, then it has to be considered in weighing the criminality of the accused and in adjudging whether he was responsible for the crime or not.[38]511

43. Court not Competent to Hold Insanity Established on the Basis of its own Observations

In an appeal against acquittal the Karnataka High Court held:

> Although the learned trial Judge may not have erred in taking upon himself the responsibility of raising an issue touching the insanity of the accused, but had certainly erred in holding the same to be established merely on the basis of his own observations of the accused and impressions he gained during the trial of the accused. It seems that the learned Judge has allowed himself to be overwhelmed by the physical condition of the accused during the trial and the circumstances that each and everyone of the witnesses tended to lavish sympathy on him, that the wife and daughter of the accused who were brought into the court but not examined, had burst out in deep grief at the plight of the accused imploring the court to restore the accused back to the fold of the family. It has been both on human and compassionate grounds that the learned Judge reacted in his Judgment.[39]

It was further observed:

> The Judge may be entitled to resolve an issue of insanity all by himself although not pleaded by the accused, but before reaching any conclusion in that behalf he must necessarily have a set of facts produced in evidence by appropriate medical sources which could only be through doctors competent to testify in that behalf. In the absence of such evidence, the Judge in this case could not have proceeded to acquit the accused on grounds of insanity on his own.[40]

Explaining the probable cause of abnormal conduct of the accused in court, the High Court further observed:

> The trial Judge was wrong in branding the accused a lunatic and a totally insane person by merely observing his physical condition and his conduct in court which to a large extent could possibly be traced to the solemn atmosphere in the court and circumstances that the accused was before a Judge who could sentence him either to death or imprisonment for life. All these possibly could have not merely unnerved him, but also depicting him as a person not in normal state of mind.[41]

44. Trial on Issue of Unsoundness of Mind

When a magistrate holding an inquiry or if at the trial before a magistrate or a court of session, it appears to such magistrate or court that the person against whom the enquiry is being held or standing trial, is of unsound mind and consequently incapable of making his defence, the magistrate or the court of session, shall first inquire into the fact of such unsoundness of mind after recording such evidence as may be found necessary and other evidence, and if satisfied that the accused is of unsound mind, postpone further proceedings in the case.[42]

Where the medical evidence was that the accused was of unsound mind at the time when offences were committed and the said evidence was found reliable, the accused was held not to be detained in prison but to be admitted to a mental hospital and the authorities were further directed to follow the procedure as laid down in s 335 of the CrPC and the plea of unsoundness of mind of the accused was accepted.[43]512

45. Postponement and Resumption, *etc*, of Trial of Person of Unsound Mind

See ss 328 to 339 of the Code of Criminal Procedure 1973.[44]

46 *Ambi v State of Kerala* (1960) Ker LJ 1375, (1962) 2 Cr LJ 135, p 140, (1961) Mad LJ 356 (Cr) ; *Digendra Nath Roy v State* (1970) Cr LJ 529, p 531, (1969-70) 74 CWN 231; *Shiv Raj Singh v State of Madhya Pradesh* (1975) Cr LJ 1458 (MP) ; *Ajoya Mahakud v State* (1993) Cr LJ 1201, p 1204 (Ori) (MP) ; *Lok Bahadur Dahal v State of Sikkim* 2013 (128) AIC 367 (Sikk) .

47 *Jai Lal v Delhi Admn* AIR 1969 SC 15, p 17, (1969) Cr LJ 259 .

48 *Digendra Nath Roy v State* (1970) Cr LJ 529, p 531, (1969-70) 74 CWN 221.

49 *Tola Ram v State of Rajasthan* (1996) Cr LJ 8 (Raj) (DB) ; *Kishore Kumar v State of Chhattisgarh* 2013 (131) AIC 844 (Chh) .

50 *Mariappan v State of Tamil Nadu* 2013 Cr LJ 2334, p 2337 (SC), 2013 AIR SCW 2415, 2013 (6) Scale 185 .

51 *State of Orissa v Duleswar Barik* 2008 Cr LJ 1065, p 1070 (Ori) (DB) .

52 *State of Goa v Sameer Shetya,* 2015 (1) Crimes 75 (Bom) (Murder of wife, protection of s 84 IPC refused); *Sudhakaran v State of Kerala* 2010 10 SCC 582, 2010 AIR SCW 6688, AIR 2011 SC 265 .

53 *Shiv Raj Singh v State of Madhya Pradesh* (1975) Cr LJ 1458, p 1460, (1975) MPLJ 98 .

54 *SSunil Sandeep v State of Karnataka* (1993) Cr LJ 2554 (Kant) ; *StateofJharkhand v Lakhan Rai and Ors*(2007) Cr LJ 2410, p 2414 (Jhar); *Atrup v State of Rajasthan* (2003) Cr LJ 4031 (Raj) (DB) ; *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332 (Raj) (DB) .

55 *Rajendra v State of Rajasthan* (2004) Cr LJ 2458 (Raj) (DB) .

56 *Jai Lal v Delhi Admn* AIR 1969 SC 15, (1969) Cr LJ 259 ; Re *Navier Marolla*(1970) LW 149 (Cr), (1970) Mad LJ 718 (Cr); Re *Thangavelu*(1971) 1 Mad LJ 484, (1971) Mad LW 54 (Cr); *Ambi v State of Kerala* (1962) 2 Cr LJ 135, 140, (1960) Ker LJ 1375, (1960) Ker LT 1116 ; *Ram Bharose v State of Madhya Pradesh* (1974) Jab LJ 348, (1974) MPLJ 406 ; *State of Madhya Pradesh v Godhe* (1974) MPLJ 203, (1974) Jab LJ 348 ; *Charan Singh v State of Punjab* (1973) 75 Punj LR 734 ; *Sukru Sa v State of Orissa* (1973) Cr LJ 1323, p 1324, 39 Cut LT 322 (DB), (1974) 1 Cr LJ 494, (1974) Punj LJ 364 (Cr) ; *Kasheoroa v State of Maharashtra* (1979) Cr LJ 403, p 404 (Bom) ; *Madga & Lusu alias Chandramohan Majhi v State* (1979) 47 Cut LT 197 ; *Sankaran v State of Kerala* (1993) 2 KLT 852, p 855 (DB) .

57 *AG Bhagat (Dr) v Union Territory of Chandigarh* (1989) Cr LJ 214, p 219 (P&H).

58 *State of Jharkhand v Lakhan Rai and Ors* (2007) Cr LJ 2410 (Jhar) (DB) .

59 *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332 (Raj) (DB) .

60 *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332 (Raj) (DB) .

61 *Ibid*.

62 *Murthy v State* (1988) 1 Crimes 326 (Mad) .

63 *Venugopalan Venu v State of Kerala* (1996) Cr LJ 3363 (Ker)(DB).

64 Stephen, *History of Criminal Law of England,* vol 2, p 156 *et seq*; Report of the Royal Commission, 1953 CMD 8932, paras 227, p 228; Stallybrass, 'Comparison of Criminal Law, etc' in *Modern Approach to Criminal Law*, ch 20, p 415 *et seq*; Maudsley, *Responsibility in Mental Diseases*; Sullivan, *Crime and insanity*; Hall, 'Mental Disease and Crime', Columbia Law Review, no 45, 1945, p 679; Meredith, 'Insanity as a Criminal Defence', Canadian Bar Review, no 25, 1947, p 251.

65 *R v Codere* (1916) 12 Cr App R 21 .

66 *R v Windle* 1952 2 QB 826 .

67 *R v Codere,* (1916) 12 Cr App R 21 .

68 [1956] 2 QB, 832, p 833.

69 103 LJ 148; *Wrong in the Mcnaughten Rules*; The High Court of Australia has refused to follow the doctrine of *R v Windle* (1952) 2 QB 826, [1952] 2 All ER 1 ; *Stapleton v Queen* (1952) 86 Commonwealth LR 358, in which full reasons are given for the court's repudiation of the views of the English CCA; (1954) Crime LR 276, 16 Mad LR 435.

70 The words 'nature and quality of the act in the text refer only to the physical character of the act and are not intended to distinguish between its physical and moral aspects; *R v Codere* (1916) 12 Cr App R 21 .

71 'Wrong' means. 'contrary to law'; *R v Windle* (1952) 2 QB 826, [1952] 2 All ER 1, *R v Holmes* (1953) 2 All ER 324, compare the answers of the judges to second and third, question put to them in *McNaughten*'s *case*(1843) 10 Cl & Fin 200 (HL), compare *R v Codere* (1916) 12 Cr App Rep 21, p 27, per Lord Reading CJ (where the proposition seems to be enunciated that 'wrong' means wrong by the standard of ordinary reasonable men, which must include acts known by the accused to be contrary to law).

72 *R v Clarke* (1972) 1 All ER 219, 56 Cr App Rep 225, CA.

73 *Regina v Kemp* (1957) 1 QB 399, 40 Cr App Rep 121.

74 *A-G for Northern Ireland v Gallagher* (1963) AC 349, 45 Cr App Rep 316.

75 *R v Taylor* 2008 OJ No 946 [*videHalsbury's Laws of Canada*].

76 *Underhill's Criminal Evidence*, vol 2, fifth edn, Bobbs-Merrill Co Ins Publishers, Indianapolis, ch 34, p 1128.

77 *Davis v United States* (1895) 160 US 469, 40 Law Ed 499 .

78 In India, the jury system has since been abolished.

79 *Lee v United State* (1937) 32 US 745, 82 Law Ed 576 ; *McDonald v Hydspeth* 109 Fed 843 (2nd); *Asley v Pessor* 147 Fed (2nd) 318; *Tatum v United States* 88 App DC 386, 190 Fed 612 (2nd); *Holloway v United States* 148 Fed 665 (2nd); *Queenan v Oklahama* (1903) 190 US 548, 47 Law Ed 1175 ; *Matheson v United States* (1913) 227 US 540 .

80 *Daniel Mcnaughten*'s case. (1948) 10 CL&Fin 200, 8 ER 718.

81 *Kalicharan v Emperor* AIR 1948 Nag 20(2) ; *Deorao v Emperor* AIR 1946 Nag 321, p 329 ; *Pancha v Emperor* AIR 1932 All 233 ; *State v Durga Charan* AIR 1963 Ori 33 ; *Kanbi Kurji Duba v State* AIR 1960 Guj 1 ; *State v Chhotelal Gangadin Gadriya* AIR 1959 MP 203 ; Re *Pappathi Ammal*AIR 1959 Mad 239 .

82 *Kalicharan v Emperor* AIR 1948 Nag 20 (2) ; *Queen-Empress v Lakshman Dagdu* 10 ILR Bom 512 ; *Queen-Empress v Venkataswami* 12 ILR Mad 459 ; *Queen-Empress v Razai Mia* 22 ILR Cal 817 .

83 Maudsley, *Responsibility in Mental Disease*, ch 3; Bucknill and Tuke, *Psychological Medicine*, p 269; Stephen, *History of the Criminal Law of England*, vol 2, ch 19.

84 *R v Hamphreys* 10 C&F 200 ; *Taylor's Manual of Medical Jurisprudence*, tenth edn, p 745.

85 *Queen-Empress v Kadar Nasyer Shah* 23 ILR Cal 604, p 608, the cases cited therein.

86 *Kanbi Kurji Duba v State* AIR 1960 Guj 1(2) .

87 Re *Puppathi Ammal*AIR 1959 Mad 239, p 244 .

88 *Ambi v State of Kerala* (1960) Ker LJ 1375, (1962) 2 Cr LJ 135, p 140, (1961) Mad LJ 356 (Cr) ; *Digendra Nath Roy v State* (1970) Cr LJ 529, p 531, (1969-70) 74 CWN 231; *Shivraj Singh v State of Madhya Pradesh* (1975) Cr LJ 1458 (MP) .

89 *Hazara Singh v State* AIR 1958 Punj 104, p 107-08, per Tek Chand J.

90 *R v Oxford* 4 St Tr 497(NS); 9 C&P 525; *R v Stokes* 3 C&K 185 ; *R v Layton* 4 Cox 149 .

91 Archbold, *Pleading, Evidence and Practice in Criminal Cases*, thirty third edn, pp 15-16.

92 *R v Katay Kisan* 1 Cr LJ 854, 17 CPLR 105 .

93 *R v Harka* 4 Cr LJ 88, 26 AWN 193 .

94 *R v Razai Mia* 22 ILR Cal 817 ; *Ghatu Pramanik v King-Emperor* 28 ILR Cal 613 ; *Chajju Mal v R* 11 Cr LJ 105, 94 PLR 1909 ; *R v Smith* 26 TLR 614 ; *Emperor v Nag San Myin* 12 Cr LJ 386 ; *Mahommad Husain v Emperor* 14 Cr LJ 81 ; *Lachhman v Emperor* AIR 1924 All 413 .

95 *Mayne's Criminal Law of India*, fourth edn, Pt 2, p 172 cited with approval in *State v Chhotelal Gangadin Gadariya* AIR 1959 MP 203, p 207 ; *Rajkumar v State of Madhya Pradesh* (2006) Cr LJ 2472 (Chattisgarh) .

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4 *Kuttappana v State of Kerala* (1986) Cr LJ 271(Ker), (1986) KLT 364, (1986) 1 Crimes 155; *Rajan v State of Kerala* (1984) Cr LJ 874, (1984) KLT 367 (Ker), (1984) Ker LJ 225 ; *Autar Singh v State of Himachal Pradesh* (1984) 1 Crimes 636 (HP) ; *Rajkumar v State of Madhya Pradesh* (2006) Cr LJ 2472 (Chattisgarh) ; *Bihari Lal v State of Himachal Pradesh* (2006) Cr LJ 3832 (HP) ; *Narayan Chandra Dey v State* 1988 Cr LJ 387(Cal); *Brushabha Digal v State* (1993) Cr LJ 3149, p 3150 (Ori)(DB); *Ajaya Mahakud v State* (1993) Cr LJ 1201, p 1204 ; *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332 (Raj) (DB) ; *Dhaneswar Pradhani v State of Assam* (2003) Cr LJ 733 (Gau) (DB) ; *Dipam Hazarika v State of Assam* 2013 (129) AIC 807 (Gauh) ; *Ramanand Singh v State of Bihar* 2013 (124) AIC 666 (Pat) .

5 *State of Madhya Pradesh v Ahmadulla* AIR 1961 SC 998 ; Re *Govindswami Padayachi*AIR 1952 Mad 174 ; *Bagga v Emperor* AIR 1931 Lah 276 ; *Narain Shah v Emperor* AIR 1947 Pat 222 ; *Chajju Mal v Emperor* 11 Cr LJ 105 ; *Golla Chinna Venkadu v Emperor* 15 Cr LJ 161 ; *DC Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) 2 Cr LJ 472 ; *Bhikai v State* AIR 1966 SC 1, (1966) Mad LJ 561 (Cr) ; *Ratan Lal v State of Madhya Pradesh* AIR 1971 SC 778, (1971) Cr LJ 654 ; *Oyami Ayatu v State of Madhya Pradesh* AIR 1974 SC 216, p 217, (1974) Cr LJ 305 ; *State of Madhya Pradesh v Godhe Faguwa* (1974) MPLJ 203, (1974) Jablj 302 ; *State of Orissa v Bagh Syama* (1976) Cut LT 958, p 961 ; *Tarseem Singh v State* AIR 1979 J&K 53, p 58 ; *Chaggan v State* (1975) WLN 479, (1975) Raj LW 360 .

6 *Kirtanram Mansai Uranv v State of Madhya Pradesh* 2011 Cr J 4658, p 4661 (Chh) (DB) (Case law referred) .

7 *Jai Lal v Delhi Admn* AIR 1969 SC 15, (1968) 2 SCWR 455, (1968) 70 Punj LR 377 (D), (1969) Cr LJ 259 ; *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332 (Raj) (DB) .

8 *Kunbi Kurji Duba v State* AIR 1960 Guj 1, p 3, (1960) Cr LJ 1200 ; *Rajan v State of Kerala* (1984) Cr LJ 874, (1984) Ker LT 367, (1984) 2 Ker ILR 340, (1984) Ker LJ 225 ; Re *Parvathi Ammal*(1960) 1 Mad LJ 332; *Thangal Kunkikoya v State of Kerala* (1963) 1 Ker LR 47 ; *Hiranya Kumar v State* (1969) All WR 339, (1969) All Cr R 215 ; *Sukru Sa v State of Orissa* (1973) Cr LJ 1323, p 1324 ; *Kesheorao v State of Maharashtra* (1979) Cr LJ 403, p 406 (Bom)(DB); Re *Jinnappa*(1961) 2 Cr LJ 250, 39 Mys LJ 288.

9 *Rajendra Yeshwant Kadam v State of Maharashtra* 2008 (4) Mah LJ (Cri) 36 (Bom) .

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15 *State of Kerala v Madhavan Pillai* AIR 1958 Ker 80, p 81 .

16 *Lok Bahadur Dahal v State of Sikkim* 2012 Cr LJ 4996 (Sikk) (DB) .

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18 *Gopal Prasad Kabre v State of Madhya Pradesh* 2009 Cr LJ (NOC) 16 (MP) (DB), *Ganesh v State of MP* 2004 Cr LJ 2327, 2004 (1) MPLJ 387, **distinguished**.

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24 *Nago Atmaramji v State of Maharashtra* (1977) Mad LJ 163 ; *Kesheorao v State of Maharashtra* (1979) Cr LJ 403, p 406 (Bom) ; *Kanna Kunummal Ammad Koya v State of Kerala* (1966) Mad LJ 807 (Cr) .

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31 *Vijay Kumar Dhruv v State of Chhattisgarh* 2013 Cr LJ 1786, p 1789 (Chh) (DB) ; *Babu alias Gajraj Singh v State of Rajasthan* (2007) 8 SCC 66, 2007 AIR SCW 3808 .

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33 *Raghu Pradhan v State of Orissa* (1993) Cr LJ 1159, p 1161-62 (Ori) (DB) .

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36 *Atrup v State of Rajasthan* (2003) Cr LJ 4031 (Raj) (DB) .

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53 *SC Team v Brayant* 51 SE 148, p 150, 71 SC 331 ; *Ricketts v Jallif* 62 Min 440, p 448 ; 44 *Corpus Juris Secondum*, p 36.

54 *Nagili v State of Rajasthan* (1982) Raj Cr C 331, (1982) Raj LW 226 .

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57 *Ratan Lal v State of Madhya Pradesh* AIR 1971 SC 778, (1971) Cr LJ 654, p 657 .

58 *Withoo v Emperor* 13 Cr LJ 164 .

59 *McNaughten* case (1843) 4 St Tr (No 5) 897, 10 CL&F 200, 8 ER 718.

60 *Edward Arnold*(1724) 16 St Tr 695, p 750.

61 *Tola Ram v Emperor* AIR 1927 Lah 674, p 677 .

62 *Baswant Rao Baji Rao v Emperor* AIR 1944 Nag 66, p 71 ; *State v Durgacharan Barik* AIR 1963 Ori 33 .

63 *Hadfield*(1800) 27 St Tr 1281; *Bowler*(1812) 1 Collinson Lunacy 673; *Billingham*, Old *Bontey*, 15 May 1812. The '*Times*' May 16, all noticed in *Russell on Crime*, eleventh edn, pp 114-15.

64 Although Sir James Stephen so interpreted them, *History of the Criminal Law of England,* vol 2, p 167; **see** the observations of Cockburn CJ, in *R v Burton* (1863) 3 F&F 772, on p 15 of his letter of 12 June 1879, to the Attorney-General containing 'Comments and suggestions in Relation to the Criminal Code (Indicatable Offences) Bill 1879', Accounts and Papers 18, 1878-79, pp 59 233, 247.

66 *R v Windle* (1952) 2 QB 826 .

67 *Kamla Bhuniya v State of West Bengal* (2006) 1 CHN 439, (2006) Cr LJ 998 .

68 *Sahadeb Mondeal v State of West Bengal* (2007) Cr LJ 1728 (Cal) ; *Shibu v State of Kerala* 2013 (4), KLT 323 (Ker).

69 *Shibu v State of Kerala* 2013 (4) KLT 323 (Ker) .

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71 *Paneha v Emperor* AIR 1932 All 233, p 286 .

72 *Bazlur Rahman v Emperor* AIR 1929 Cal 1, p 7 .

73 *Karma Urang v Emperor* AIR 1928 Cal 238, p 240 ; *Panchu v Emperor* AIR 1932 All 233, p 235 ; *Hazara Singh v State* AIR 1958 Punj 104 ; *State v Durga Charan Barik* AIR 1963 Ori 33 .

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78 *Surendra Mishra v State of Jharkhand* 2011 Cr LJ 1161, AIR 2011 SC 627, 2011 AIR SCW 458, 2011 (1) Scale 124 .

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82 *Pancha v Emperor* AIR 1932 All 233, p 235 .

83 *Chhajju Mal v Emperor* 11 Cr LJ 105 .

84 *Hazara Singh v State* AIR 1958 Punj 104, p 108 ; *Surendra Mishra v State of Jharkhand* 2011 Cr LJ 1161, AIR 2011 SC 627, (2011) 11 SCC 495, 2011 (1) JT 83, 2011 (1) Scale 124 .

85 *Channabasappa v State of Mysore* AIR 1957 Mys 63 ; *Baswantrao Bajirao v Emperor* AIR 1949 Nag 66 ; *Narain Sahi v Emperor* AIR 1947 Pat 222 ; *Ramzan v Emperor* AIR 1919 Lah 478 ; *Queen-Empress v Kadar Nasyer Shah* 23 ILR Cal 604 ; *Mantajali v Emperor* AIR 1920 Cal 39 ; *Chhaju Mal v Emperor* 11 Cr LJ 105 ; *Ramzan v Emperor* AIR 1919 Lah 470 ; *Kalicharan v Emperor* AIR 1948 Nag 20(2) ; *State v Koli Jeram Duda* AIR 1955 Sau 105 ; *Tola Ram v Emperor* AIR 1927 Lah 674 .

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87 Re *Pappathi Ammal*AIR 1959 Mad 239, p 245 ; *Sankaran v State* (1994) Cr LJ 1173 (Ker) .

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91 Re *Henry Perry* 14 Cr App Rep 48; **quoted with approval** in *State of Madhya Pradesh v Ahmudullah* AIR 1961 SC 998, p 1001 .

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4 Re *Thomans*(1973) 1 Mad LJ 179, p 186.

5 *Sudhakaran v State of Kerala* 2011 Cr LJ 292 (SC), 2011 AIR SCW 6688, (2010) 10 SCC 582 .

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29 *Dove*'s case, *Stephen's History of the Criminal Law of England*, vol 2, p 426, *et seq*.

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31 *Ibid*, pp 170-71.

32 *R v Stokes* 3 C&K 185 ; *R v Bargon* 3 Cox CC 275 ; *R v Burton* 3 F&F 772 ; *Sodeman v R* (1936) 2 All ER 1138 ; *R v Flavell* 19 Cr App R 141; *R v Kopsch* 19 Cr App R 50.

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38 *Madesh v State* 2014 Cr LJ 96, p 101 (Mad) (DB), 2013 AIR SCW 2415 ; *Surendra Mishra v State of Jharkhand* 2011 AIR SCW 458, AIR 2011 SC 627, 2011 Cr LJ 1161, 2011 (1) Crimes 192 (SC), 2011 (1) Scale 124, (2011) 11 SCC 495, **followed**.

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47 *R v Hadfield* (1800) 27 St Tr 1281 .

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49 *Kanbi Kurji Duba v State* AIR 1960 Guj 1, p 4 .

50 See the commentary under head note 1.

51 *Mayne's Criminal Law of India,* fourth edn, para 185.

52 *Baswantrao Bajirao v Emperor* AIR 1949 Nag 66, p 72 .

53 SD art 28 (1) .

54 *R v Dav* ies 1 F&F 69; *R v Vyse* 3 F&F 247, per Crompton J.

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56 *R v Law* 2 F&F 836 .

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68 *State of Rajasthan v Vidhya Devi* 2012 Cr LJ 3398 (SC), 2012 AIR SCW 3556, (2011) 15 SCC 228 .

69 *Rintu Das v State of Assam* 2008 Cr LJ (NOC) 779 (Gauh) (DB).

70 *Sahadeb Mondal v State of West Bengal* 2007 Cr LJ 1728, p 1733 (Cal) (DB) .

71 *State of Jharkhand v Lakhan Rai* 2007 Cr LJ 2410 (Jhar) (DB) .

72 *Surjali v State of Rajasthan* (1982) Cr LR 405 (Raj)(DB).

73 *Mahommad v State of Kerala* (1985) KLT 937 ; *Dahyabhai Chhaganbha Thakkar v State of Gujarat* AIR 1964 SC 1563 ; *Oyami Ayatu v State of Madhya Pradesh* AIR 1974 SC 216 **reliedon**.

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33 *Aboobacker v State* (1987) Ker LJ 567 .

34 *Dharam Pal v State of Uttar Pradesh* (1984) 2 Crimes 788, (1984) All Cr R 533, (1984) All WC 947 .

35 *Machi Parvaiah v State of Andhra Pradesh* (1985) Cr LJ 1824, (1985) 2 APLJ 388, (1985) 2 Cr LC 591 .

36 *Anandi v Emperor* AIR 1923 All 327(2), 328.

37 *Babu alias Gajraj Singh v State of Rajasthan* 2007 (8) SCC 66, p 74, 2007 AIR SCW 3808 .

38 *Lala Sk v State* (1983) Cr LJ 1675, (1993) 2 Crimes 166 (Cal)(DB); *Bhikari v State of Uttar Pradesh* AIR 1966 SC 1, (1966) 1 Cr LJ 63 ; *Kusnu Murari v State* (1971) Cr LJ 869 (Assam) ; *Satwant Singh v State of Punjab* (1975) Cr LJ 1605 (Punj) .

39 *Ganpat v State of Rajasthan* (1984) Cr LR (Raj) 411 .

40 *Sanna Eranna v State of Karnataka* (1983) Cr LJ 619, (1983) 2 Cr L 279, (1983) 1 Kant LJ 115, (1983) 1 Kant LC 39 .

41 *State v Koli Jeram Duda* AIR 1955 Sau 105, p 107 ; *Luvana Vaghumal Kherajmal v State* AIR 1955 Sau 13 ; *Hemu Bechar v State* AIR 1951 Sau 19 ; Re *Govindaswami*AIR 1952 Mad 174 .

42 Re *Govindaswami*AIR 1952 Mad 174 ; *Emperor v Bahadur* AIR 1928 Lah 795 ; *Velayudhan v State of Kerala* (1967) KLT 19(SN).

43 Re *Subromaniam*AIR 1964 Mad 526, (1964) Cr LJ 683 (684) ; *State of Madhya Pradesh v Ahmadullah* AIR 1961 SC 998, (1961) 2 Cr LJ 43 .

44 *Sheik Ahmed v State of Andhra Pradesh* (1996) Cr LJ 2582 (AP)(DB).

45 *Chetram v State* (1971) Cr LJ 1246, (1971) Del LT 19 .

46 *SK Nair v State of Punjab* (1997) Cr LJ 772 (SC) .

47 *Laxmandas Mangaldas Manikpuri v State of Maharashtra* (1997) Cr LJ 950 (Bom)(DB).

48 *Nathu Bapu Mhaskar v State of Maharashtra* (1996) Cr LJ 2120 (Bom)(DB).

49 *Tola Ram v State of Rajasthan* (1996) Cr LJ 8 (Raj)(DB).

50 *Ganesh Sharwan v State* (1970) Mah LJ 75, (1969) 71 Bom LR 643 .

51 *Atrup v State of Rajasthan* (2003) Cr LJ 4031 (Raj) (DB) .

52 *Sannatamma v State of Karnataka* (2004) Cr LJ 2257 (Kant) (DB) .

53 *Shrikant Anandrao Bhosale v State of Maharashtra* AIR 2002 SC 3399, (2002) Cr LJ 4356 (SC) .

54 *Parmananda Patra v State* (1969) Cut LT 261 .

55 *Netrananda Behara v State* AIR 1968 Ori 223, (1968) Cr LJ 1626 ; Re *Navier Marolle*(1970) LW 149(Cr), (1970) Mad LJ 718(Cr); *Savitri Devi v State* (1973) Cut LT 1156 ; *Surendera Mishra v State of Jharkhand* 2011 Cr LJ 1161, AIR 2011 SC 627 .

56 *Gulab Manik Surwase v State of Maharashtra* (2001) Cr LJ 4302 (Bom)(DB).

57 *Makra Singh v State* (1973) Cut LT 1289 .

58 *Surju Maraudi v State of Bihar* (1978) BLJR 267, p 273 (HC) ; *State v Dhannaram* (1973) WLN 463, (1973) Raj LW 535 .

59 *Elavarasan v State* 2011 Cr LJ 4329, p 4337 (SC), AIR 2011 SC 2816 ; **see also***Prabhu Ram v State of Rajasthan* 2014 Cr LJ 4264 (Raj) (DP) .

60 *Prabhu Ram v State of Rajasthan* 2014 Cr LJ 4264 (Raj) (DB) .

61 *CT Raveenran v State of Kerala* 2011 Cr LJ 1408 (Ker) (DB) .

62 *Hitendra Shrikrishna Patil v State of Maharashtra* 2010 Cr LJ (NOC) 114 (Bom), 2010 (1) Bom CR (Cri) 730 .

63 *State v Sindhi Dalwai* (1970) 72 Bom LR 396 .

64 *Bihari Lal v State of Himachal Pradesh* (2006) Cr LJ 3832 (HP) (DB) ; *Siddhapal Kamala Yadav v State of Maharashtra* 2009 Cr LJ 372, 2008 AIR SCW 6984 (SC) .

65 *Nandeswar Kalia v State of Assam* (1983) Cr LJ 1515 (Gau)(DB).

66 *Siddhapal Kamala Yadav v State of Maharashtra* 2009 Cr LJ 372, p 374, 375 (SC), 2008 AIR SCW 6984 .

67 *Raval Mohanbhai Laxmanbhai v State of Gujarat* (1998) Cr LJ 4325 (Guj)(DB).

68 *Mangla Ram v State of Rajasthan* (1984) Cr LR 174 (Raj), (1984) Raj Cr Cas 138 (Raj) ; *Narayan Chandra Dey v State* (1988) Cr LJ 387 (Cal) ; *Kuzhiyaramadihil Madhavan v State* (1994) Cr LJ 450 (Ker) .

69 *Chandra Bhan v State* (2005) Cr LJ 351 (All) (DB) .

70 *Hussain v State of Kerala* (2005) Cr LJ 3916 (Ker) (DB) .

71 *Sudaboina Malliah v State* (1990) 1 Crimes 608, p 609(AP)(DB).

72 *Kodulal v State of MP* 2010 Cr LJ 2145, p 2148 (MP) (DB) .

73 *State of Maharashtra v Govind Mhatarba Shinde* 2010 Cr LJ 3586 (Bom) (DB) .

74 *Valusamy v State* (1985) Cr LJ 981 (Mad), (1985) Mad LW 260 (Cr), (1970) Mad LJ 718 (Cr) ; Re *Kandasami Mudali*(1960) Cr LJ 930 (Mad) **distinguished**.

75 *Laximandas Mangaldas Manikpuri v State of Maharashtra* (1997) Cr LJ 950 (Bom)(DB).

76 *Mariappan v State* (2007) Cr LJ (NOC) 330 (Mad) (DB).

77 *Nathu Bapu Bhaskar v State of Maharashtra* (1996) Cr LJ 2120 (Bom)(DB).

78 *Sita Ram v State* 2011 Cr LJ 1082 (All) (DB) ; **see also***Virendra Kumar v State of Chhattisgarh* 2011 Cr LJ (NOC) 94 (Chh) (DB) (Accused appellant acquitted).

79 *Emperor v Bahadur* AIR 1928 Lah 796, p 797 .

80 *Anandi v Emperor* AIR 1923 All 327(2) .

81 *Dulal Nayak v State* (1987) 2 Crimes 342 (Cal) ; *Ramhitram Ramadhar Dube v State of Madhya Pradesh* AIR 1956 Nag 187, p 191 ; *State v Koli Jeram Duda* AIR 1955 Dau 105 ; *Unniri Kumar v State* AIR 1960 Ker 241 ; *Pancha v Emperor* AIR 1932 All 233 ; *Dearao v Emperor* AIR 1946 Nag 321 .

82 *Basanti alias Anti Dei v State* (1988) 2 Crimes 424 (Ori) ; *Brushabha Digel v State* (1993) 2 Crimes 948, p 950(Ori); *Kamala Bhuniya v State of West Bengal* (2006) Cr LJ 998 (Cal) (DB) .

83 *State of Kerala v Madhewan Pillai* AIR 1958 Ker 80, p 81 ; Re *Rajagopala Ayyanager*AIR 1952 Mad 289 ; *Dulal Nayek v State* (1987) 2 Crimes 342 (Cal) .

84 *Kamala Bhuniya v State of West Bengal* (2006) Cr LJ 998 (Cal) (DB) .

85 *Turam Sundi v State of Jharkhand* 2011 Cr LJ 1872, p 1874 (Jhar) (DB) .

86 *State of Goa v Sameer Shatya* 2015 (1) Crimes 75 (Bom) .

87 *Channabasappa v State of Mysore* AIR 1957 Mys 68, p 70 ; *Dulal Nayek v State* (1987) 2 Crimes 342 (Cal) ; *Mangla Ram v State of Rajasthan* (1984) Cr LR 174 (Raj), (1984) Raj Cr Cas 138 (Raj) ; *Narain v State* (1990) 27 All Cr C 269 .

88 *Reg v Haynes* (1859) 1 F&F 666, 175 ER 898.

1 Quoted with approval in *Baswantrao Bajirao v Emperor* AIR 1949 Nag 66, p 76 .

2 Re *Kundasami Mudali*AIR 1960 Mad 316, p 318 ; Re *Pappathi Ammal*AIR 1959 Mad 239, p 245 ; *Mangla Ram v State of Rajasthan* (1984) Cr LR 174 (Raj), (1984) Raj Cr C 138 (Raj) ; *State of Goa v Sameer Shatya* 2015 (1) Crimes 75 (Bom) .

3 *Mani Ram v Emperor* AIR 1927 Lah 52 ; *Srinivasan Chettiar v Arunachalam Chettiar* AIR 1952 Mad 288 ; Re *Sankappa Shetty*AIR 1941 Mad 326 .

4 *Pancha v Emperor* AIR 1932 All 283 .

5 *Nitai Naik v State* AIR 1957 Ori 168, p 170 .

6 *Queen v Sheikh Mustafa* 1 WR Cr 10 ; *Nga Pigam v Emperor* 13 Cr LJ 49 .

7 *State of Orissa v Kalia* 2008 Cr LJ 3107 (Ori) (DB) .

8 *Brushabha Digel v State* (1993) 2 Crimes 948, p 950 (Ori)(DB).

9 *Shaik Ahmed v State of Andhra Pradesh* (1996) Cr LJ 2582 (AP)(DB).

10 *Kamala Bhuniya v State of West Bengal* (2006) Cr LJ 998 (Cal) (DB) ; *Kirtanram Mansai Uranu v State of Madhya Pradesh* 2011 Cr LJ 4658 (Chh) (DB) .

11 *State of Maharashtra v Govind Mhatarba Shinde* 2010 Cr LJ 3586, p 3590 (Bom) (DB) .

12 *Russell on Crime*, eleventh edn, p 127.

13 *Nimdhari Singh v State* (1985) l Crimes 425 (Cal) ; *Bhikari v State of Uttar Pradesh* AIR 1966 SC l; *Surka Junduses v State* (1969) Cr LJ 75 referred .

14 *Kirtanram Mansai Uranv v State of Madhya Pradesh* 2011 Cr LJ 4658 (Chh) (DB) ; *Kapilnath Sahu v State of Chhattisgarh* 2013 Cr LJ (NOC) 162 (Chh) (DB).

15 *Gelsing Pida Pawar v State of Maharashtra* 2010 Cr LJ 4097, p 4100 (Bom) (DB), 2010 (3) Bom CR (Cri) 78 .

16 *Venugopalan Venu v State of Kerala* (1996) Cr LJ 3363 (Ker)(DB).

17 *Siddhapal Kamala Yadav v State of Maharashtra* 2009 Cr LJ 372, p 374, 375 (SC), AIR 2009 SC 97, 2008 AIR SCW 6984 .

19 *Madhusudan v State of Karnataka* 2011 Cr LJ 215 (Kant) (DB) .

20 *Kapilnath Sahu v State of Chhattisgarh* 2013 Cr LJ (NOC) 162 (Chh) (DB).

21 *Baswant Rao Bajirao v Emperor* AIR 1949 Nag 66, p 75 .

22 *State v Koli Jeram Duda* AIR 1955 Sau 105, 110 .

23 *R v Holme* (1953) 1 WLR 686, 37 Cr App R 61.

24 *Russell on Crime*, eleventh edn, p 129, footnote 73.

25 *Laxmandas Mangaldas Manikpuri v State of Maharashtra* (1997) Cr LJ 950 (Bom)(DB); *Kodulal v State of MP* 2010 Cr LJ 2145 (MP) (DB) . (There was no medical evidence about the unsoundness of mind of the accused, and he fled away after commission of murder. Benefit of s 84, IPC was not given).

26 *Elavarasan v State* 2011 Cr LJ 4329, p 4337 (SC), AIR 2011 SC 2816 .

27 *Deo Rao v Emperor* AIR 1946 Nag 321, p 335 .

28 *McNaughten*'s case, (1843) 10 Cl&F 200, 8 ER 718.

29 *R v Francis* (1849) 4 Cox 157 .

30 *R v Rivett* (1950) 34 Cr App R 87 .

31 *Ratan Lal v State of Madhya Pradesh* (1971) Cr LJ 654, AIR 1971 SC 778 .

32 *Kamala Bhuniya v State of West Bengal* (2006) Cr LJ 998 (Cal) (DB) .

33 *Khageswar Pujari v State of Orissa* (1984) Cr LJ 1108 (Ori), (1984) 57 Cut LT 58, (1984) All Cr LR 390, (1984) 1 Orissa LR 142 .

34 *Balu Ganpat Koshire v State of Maharashtra* (1983) Cr LJ 1769, (1983) 2 Bom CR 321 (Bom) .

35 *Mangla Ram v State of Rajasthan* (1984) Cr LR 174 (Raj), (1984) Raj Cr Cas 138 (Raj) .

36 *Mohan Ram v State of Rajasthan* (1983) Cr LR 503 (Raj) .

37 *Pancha v Emperor* AIR 1932 All 233, p 238, per Niamatullah J.

38 *State v Koli Jeram Duda* AIR 1955 Sau 105, p 106 .

39 *State of Karnataka v Jatti* (1992) 2 Kant LJ 505, p 510 (DB), (1933) 1 Crimes 73 .

40 *Ibid*; *Queen-Empress v Kedar Nasyer Shah* 23 ILR Cal 604 reld on.

41 *State of Karnataka v Jatti* (1993) 1 Crimes 73, p 83 (Kant)(DB).

42 *State of Maharashtra v Umesh Krishna Pawar* (1994) 1 Bom CR 575, (1994) Cr LJ 774 ; Code of Criminal Procedure 1973, ss 328 - 29 .

43 *Chandrashekhar v State of Karnataka* (1998) Cr LJ 2237 (Kant)(DB).

44 For details, see commentary on these sections from *Sohoni's Code of Criminal Procedure, twenty-first edn*, Lexisnexis.

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 85.

Act of a person incapable of judgment by reason of intoxication caused against his will.--

Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

Comments

1. Scope and Applicability

Sections 85 - 86 crystallise in a tabloid form the law relating to intoxication or drunkenness as a defence or plea in mitigation of a criminal offence. Section 85 gives the same protection to a person as s 84, IPC does to a person of unsound mind, who is by reason of intoxication 'incapable of knowing the nature of the act or that the thing which intoxicated him was administered without his knowledge or against his will'.[45] For the applicability of this section, it must be shown that the accused was in the state of intoxication, when he committed the crime and not otherwise.[46] This section applies only to involuntary and not voluntary drunkenness.[47] In order to get its benefit the intoxication should not have been incurred voluntarily.

Another essential requisite of the section is that the drunkenness must be such that the offender was incapable of knowing the nature of the act or that what he was doing was wrong or contrary to law.[48] Hence, the correct test is whether by reason of involuntary drunkenness, the accused was incapable of forming an intention of committing the offence.[49] Evidence of involuntary drunkenness, falling short of a proved incapacity in the accused to form the necessary intent to constitute the crime but merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, would not, however, rebut the presumption that a513 man intends the natural consequences of his act.[50] This section deals with the question of the knowledge possessed by an accused person at the time he commits the offence and leaves quite open the question of intention.[51]A person, who gets into a state of intoxication voluntarily, is presumed to have the same knowledge he would have had if he had not been intoxicated. When the state of intoxication is such as to make him incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, he can only

be punished on the basis of knowledge and not of a particular intention.[52]

Voluntary drunkenness/intoxication cannot itself excuse the commission of a crime; and it is not a defence to prove that a man's mind was so affected by drink that he more readily gave way to passion, or that he would not have acted as he did had he been sober, nor will drunkenness be a defence in case of strict liability, since, if an honest and reasonable mistake by a sober person cannot afford a defence, a mistake while drunk cannot do so. The appellant accused attacked the deceased resulting in as many as seven grievous injuries which suggested that the appellant was quite conscious of the consequences of his act. The appellant, as was apparent from the evidence, had control over his senses and tried to make good his escape after the incident in a calculated manner. The evidence of PW9 showed that immediately after the incident, the appellant accused tried to conceal his wearing apparel and the weapon of offence. It was not a case of involuntary intoxication. Appellant accused was convicted under s 302, IPC .[53]

The accused appellant committed the murder of his wife, three daughters and one son. The plea of drunkenness can never be an excuse for the brutal, diabolic acts of the accused. The accused was convicted under s 302, IPC and death sentence was confirmed.[54]

2. English Law

Involuntary intoxication refers to the case where intoxication is produced by others, as where a defendant's drink was 'laced' with alcohol without his knowledge. Evidence of such intoxication may be taken into account in deciding whether the defendant had the necessary *mens rea* for the offence (whether or not a specific intent is required); if it does not prevent the defendant having that *mens rea*, it is irrelevant to liability, but may well be a substantial mitigating factor.[55]

3. Canadian Law

There are three legally relevant degrees of intoxication. First, there is 'mild' intoxication. This is where there is alcohol-induced relaxation of both inhibitions and socially acceptable behaviour. This has never been accepted as a factor or excuse in determining whether the accused possessed the requisite *mens rea*. Second, there is 'advanced' intoxication. This occurs where there is intoxication to the point where514 the accused lacks specific intent, to the extent of an impairment of the accused's foresight of the consequences of his or her act sufficient to raise a reasonable doubt about the requisite *mens rea*. This will most often be the degree of intoxication the jury will grapple with in murder trials. A defence based on this level of intoxication applies only to 'specific intent offences'. Before a trial judge is required by law to charge the jury on intoxication, he or she must be satisfied that the effect of the intoxication was such that it might have impaired the accused's foresight of consequences sufficiently to raise a reasonable doubt. This is the threshold for instructing juries on advanced drunkenness. The third and final degree of legally relevant intoxication is 'extreme intoxication akin to automatism', which negates voluntariness and thus is a complete defence to criminal responsibility. Such a defence would be extremely rare, and by operation of s 33 .1 of the Criminal Code, limited to non-violent types of offences.[56]

The defence of extreme intoxication requires that the defendant establish his absence of basic intent on a balance of probabilities and further, that he present expert evidence in support.[57]

The distinction between specific and general intent is often difficult to discern and is not necessarily apparent from a reading of the offence in the Criminal Code. Its application to a particular offence is equally fraught with challenges. However, the serious ramifications of this determination demands that courts distinguish between them in a principled and transparent manner. In Canada, the law is clear that evidence of voluntary or self-induced drunkenness may only be put to the jury to determine whether the Crown has proved beyond a reasonable doubt the *mens rea* required where the offence is categorized as one of 'specific' intent rather than 'general' or 'basic' intent. Although not properly a defence, for ease of reference, the law frequently is stated to allow the defence of drunkenness only

to offences of specific intent. For offences of general intent, only extreme drunkenness akin to insanity or automatism may be considered.[58]

4. Three Prepositions Regarding Scope and Ambit

The defence of drunkenness can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. Basically, three propositions as regards the scope and ambit of s 85 of the IPC are as follows:

(i) The insanity whether produced by drunkenness or otherwise is a defence to the crime charged;
(ii) Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into account with the other facts proved in order to determine whether or not he had this intent; and
(iii) The evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely515 establishing that his mind is affected by drink so that he more readily give to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.[59]

5. 'Against his will' and 'Without his Knowledge'

Section 85, IPC, deals with act of a person incapable of judgment by reason of intoxication caused against his will. As the heading of the provision itself shows, intoxication must have been against his will and/or the thing which he intoxicated was administered to him without his knowledge. The expression 'without his knowledge' simply means an ignorance of the fact that what is being administered to him is or contains or is mixed with an intoxicant.[60]

6. Involuntary Drunkenness

Drunkenness (intoxication) is either voluntary or involuntary; it is involuntary when the person suffering from it has had the intoxication administered to him either: (a) by force (against his will); or (b) by fraud (without his knowledge). The protection can only be claimed by a person who had been made drunk through stratagem or the fraud of another or through ignorance, or coercion practised by his friend or foe, as if a person is drugged by his enemies or given to eat or drink such a thing as causes frenzy, or his unskillful physician gives him to drink an intoxicant, in all of which cases the person intoxicated may be said not to have been a free agent and, therefore, not responsible for the consequences of his act.[61] In order to bring a case within this section, the thing, which intoxicated the person, should have been administered to him 'without his knowledge' or 'against his will'. The expression 'without his knowledge' means ignorance of the fact that what is being administered to him is or contains or is mixed with an intoxicant. Consequently, where the intoxicant is administered to the accused by stratagem or fraud of another, as when mixed with his food or drink, and given to him in confidence, he is excused. The connotation of the expression 'against his will' is equally clear, as a little reflection shall show. 'Will' is the faculty of our minds which guides or controls our actions. So where the mind goes with the act it can be said that a person had acted in accordance with his will. An act which is against the 'will' must be an act which the performer performed not out of his own conscious volition but on compulsion by some outside agency by overpowering or paralysing his will by overt physical acts. Moral persuasion, acting as an incentive, has never been considered as an adequate excuse, nor imposition on young, experienced or weak minds his calculating adults of superior strength of mind or will. On this view if friends or relatives persuaded a person to drink a little more than he can reasonably digest, he cannot complain that he was made to drink against his will.

Where the accused drank liquor at the persuasion of his father to alleviate his pain it was held that the drinking of the liquor by the accused could not be said to be administration of liquor to him against his will.[62]516

Where a boy of 16 was admitted to a gaming house, where the proprietor plied him with whiskey in order to cheat him in the game, and the boy, drunk to the point of extreme intoxication admitted 'temporary insanity', and in a fight killed the calloused operator, it was held that involuntary intoxication is a very rare thing and can never exist where the person intoxicated knows what he is drinking, and drinks the intoxicant voluntarily, and without being made to do so by force or coercion.[63]

Where a person took liquor presented by a physician (presumably with the knowledge that it was liquor), the court in *Johnson v Commonwealth* ,[64] was unwilling to entertain the plea that the accused drank to obtain relief from an acute pain.[65]

Involuntary Drunkenness as a Defence

A person under intoxication can be excused if he had committed any offence provided the intoxicating material was given to him without his knowledge and consent.[66] Involuntary drunkenness as a ground of exemption is treated in just the same way as insanity under s 84 .[67] Disease of the mind, caused by voluntary drunkenness (*e.g.,* delirium tremens), which produces mental incapacity, constitutes insanity and an offence, committed thereunder, would fall under s 84, although the disease may be of a temporary nature, and not under this section.[68] Thus involuntary drunkenness *per se* is no ground of exemption. It would be no ground of excuse for crime merely to plead involuntary drunkenness. To be a ground of exemption, the involuntary drunkenness must answer one of the three tests given in the section. The accused must show that he was so drunk that he did not know either: (a) 'the nature of the act'; or (b) that it was 'wrong'; or (c) that it was 'contrary to law'.[69]

Thus, *A*, under the influence of a drug, fraudulently administered him, shoots *B* dead, not knowing what he does. *A's* act is not a crime.[70]

7. Voluntary Drunkenness no Excuse for Crime

Voluntary drunkenness, according to the well-known rule of English law, and under the terms of this section is no excuse for crime. The incapacity specified in the section is no defence if produced by voluntary drunkenness,[71] though it may go towards mitigation of punishment.[72] A person cannot become himself drunk with liquor and commit an offence and then come and say that he had consumed the liquor and, therefore, the benefit of s 85, IPC, should be given to him.[73] Thus, *A*, in a state517 of voluntary drunkenness, shoots *B* dead, not knowing what he does. *A* is guilty of causing *B's* death: for whether he was drunk or sober, the law presumes that he intended to kill *B*.[74] When death is caused under a state of voluntary intoxication, offence committed is one under s 302 and is not reduced to one under s 304, Pt II. Exceptions under ss 85 - 86 are not applicable.[75]Drunkenness does not in the eye of the law make an offence more heinous, though it is no excuse; and an act, which if committed by a sober man, is an offence, is equally an offence if committed by one when drunk, if the intoxication was voluntarily caused.[76] Where the accused after consuming liquor quarrelled with his wife and then poured kerosene on her and set fire to her, the wife died due to burn injuries after giving a dying declaration showing that the accused after consuming liquor quarrelled with his wife and then poured kerosene on her and set fire, it was held that offence did not fall under s 85, IPC .[77]

Where evidence was lacking to show that the accused under the influence of intoxication committeed rape on the prosecutrix and was incapable of knowing the nature of his act, he was held not entitled to the benefit of s 85, IPC .[78]

Temporary Insanity Caused by Voluntary Drunkenness Falls under Section 84

But disease of the mind caused by voluntary drunkenness, (*e.g.*, delirium tremens) which produces mental incapacity constitutes insanity, and an offence committed thereunder would fall under s 84, although the disease may be of a temporary nature, and not under this section.[79] If the mental faculties are not completely dominated by intoxication, this section would not apply.[80] There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as a result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause.[81]

A, addicted to the excessive use of opium, met *B* in a field and killed him with a single stroke of his *dao* as he passed. The killing was unpremeditated, and there was no quarrel or dispute. It was held that *A* was not guilty of murder, the case falling under s 84 .[82]

45 Re *Macherla Balaswamy of Guntur*AIR 1953 Mad 827, p 828, (1953) Cr LJ 1587 .

46 *Sohan Maghi v State* AIR 1970 Pat 303, (1970) Cr LJ 1245, p 1246 .

47 *Samman Singh v Emperor* AIR 1941 Lah 454, p 457, 43 Cr LJ 332 ; *Prabhunath v State* AIR 1957 All 667, (1957) All LJ 572 ; *Kanji v State* AIR 1953 Raj 40, (1953) Cr LJ 434 ; *Chet Ram v State* (1971) Cr LJ 1246, p 1250, (1971) Sim LJ 153 ; *R v Howell* (1974) 2 All ER 806, p 810 .

48 Re *Balaswami*AIR 1953 Mad 827, (1953) Cr LJ 1587 ; Re *Suruttayyam*AIR 1954 Mad 523, (1954) Cr LJ 672 ; *Warayam Singh v Emperor* AIR 1926 Lah 428, 27 Cr LJ 764 .

49 *Muthu Goundan v Emperor* (1931) Mad WN 113 ; *Samman Singh v Emperor* AIR 1941 Lah 454, 43 Cr LJ 332 .

50 *Nga Sein Gale v Emperor* AIR 1934 Rang 361, 12 Rang 445 ; *State of Orissa v Lachmi Mushli* (1978) 46 Cut LT 122, p 128 (DB) .

51 *Prabhunath v State* AIR 1957 All 667, p 670, (1957) All LJ 572, (1957) Cr LJ 1056 .

52 Re *Macherla Balaswamy of Guntur*AIR 1953 Mad 827, p 828 .

53 *Shankar Jaiswara v State of West Bengal* 2007 Cr LJ 3271, p 3280 (SC), (2007) 9 SCC 360, (2007) 56 AIC 164 .

54 *Bablu Hussain v State of Rajasthan* 2007 Cr LJ 1160 (SC), AIR 2007 SC 697 .

55 *Halsbury's Laws of England.*

56 *R v Daley* (2007) SCJ No 53 .

57 *R v Cedeno* (2005) OJ No 1174 .

58 *R v SJB* 2002 AJ No 726*[Halsbury's Laws of Canada]*.

59 *Bablu alias Mubarik Hussain v State of Rajasthan* (2007) Cr LJ 1160 (1167) (SC), AIR 2007 SC 697, (2006) 13 SCC (Cri) 590, (2007) 50 AIC 89 (SC) .

60 *Ibid*.

61 1 Hale PC 32.

62 *Jethuram Sukhra Nagbanshi v State of Madhya Pradesh* AIR 1960 MP 242 ; *Prabhunath v State* AIR 1957 All 667, p 670, (1957) All LJ 572, (1957) Cr LJ 1956 .

63 *Perryam v State* 12 Okla Cr A 500.

64 *Johnson v Commonwealth* 115 SE 673 .

65 Harvard Law Review, 57, p 1055.

66 *Venkappa Kannappa Chowdhari v State of Karnataka* (1996) Cr LJ 15 (Kant)(DB).

67 Re *Macherla Balaswamy*AIR 1953 Mad 527, p 528 ; *Basdev v State of Pepsu* AIR 1956 SC 488, 57 Cr LJ 919(2).

68 *Sammon Singh v Emperor* AIR 1941 Lah 454 ; *R v Bhelakha Aham* 29 ILR Cal 493 ; *R v Sakharam* 14 ILR Bom 564, p 570 ; *Basdev v State of Pepsu* AIR 1956 SC 488, 57 Cr LJ 919(2).

69 *Waris Ali v Emperor* 13 Cr LJ 167 .

70 Ct Hale PC 32-33.

71 *R v Bheleka Aham* 24 ILR Cal 493 ; *Karim Khan v R* 9 Cr LJ 156, 4 PWR Cr 5 ; *Queen v Bodhee Khan* 5 WR 79(Cr); *Nga Chit So v King* AIR 1937 Rang 467 ; *Prabhunath v State* AIR 1957 All 86 ; *Shankar Jaiswara v State of West Bengal* 2007 Cr LJ 3271, (2007) 9 SCC 360 .

72 *Nga Sein Ge v Emperor* AIR 1934 Rang 10 ; *Nga Chit v King* AIR 1937 Rang 467 ; *R v Mavji Talshi* 1 Cr LJ 495, 14 Ker LR 30 ; *Waris Ali v Emperor* 13 Cr LJ 167 ; *Kunji v State* (1953) Cr LJ 434 ; *Summan Singh v Emperor* AIR 1941 Lah 545 .

73 *Venkappa Kannappa Chowdhari v State of Karnataka* (1996) Cr LJ 15 (Kant)(DB).

74 *Pearson*'s case 2 Lewin CC 144.

75 *Ramsing Prahladsing Chauhan v State of Gujarat* (1985) 1 Guj LR 40 ; [Re *Mancherla Balaswamy of Guntur*(1952) 1 Mad LJ 772; Re *Suru Hayyam alias Vayyapuri Goundan*(1954) Cr LJ 672**relied on**; *Basdev v State of Pepsu* (1956) SCR 363**followed**].

76 *Queen v Joolfkar Khan* 16 WR 36(Cr).

77 *Venkappa Kannappa Chowdhari v State of Karnataka* (1996) Cr LJ 15 (Kant)(DB).

78 *Prem Singh v State of Uttar Pradesh* 2007 Cr LJ (NOC) 245 (Utr) .

79 *Samman Singh v Emperor* (1941) ILR Lah 454 ; *R v Bheleka Aham* 29 ILR Cal 493 ; *R v Sakharam* 14 ILR Bom 564, p 570, 1 Hale PC 32-33; *Director of Public Prosecutions v Beard* (1920) AC 479, 500(HL), per Lord Birkenhead IC; *R v Davis* (1881) 14 Cox CC 563 ; *Basdev v State of Pepsu* AIR 1956 SC 488, 57 Cr LJ 919 (2), [1956] SCR 363.

80 *Mavari Surya Satyanarayan v State of Andhra Pradesh* (1995) Cr LJ 689 (AP) .

81 *Russell on Crime*, eleventh edn, p 86 **cited with approval** in *Basdev v State of Pepsu* AIR 1956 SC 488, 57 Cr LJ 919(2).

82 *R v Bheleka Aham* 29 ILR Cal 493 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 86.

Offence requiring a particular intent or knowledge committed by one who is intoxicated.--

In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of518 intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

Comments

1. Scope and Applicability

The IPC does not require any particular knowledge or intent to be shown in connection with some acts in order to constitute them offences, but in the majority of offences, it requires that the act in order to constitute an offence must have been done with some specified knowledge or intent, which may be taken to be synonymous with 'specified' knowledge or intent in order to constitute it an offence.[83]Although neither voluntary nor involuntary drunkenness, which does not involve one or the other of the three states of mind mentioned in s 85, is an excuse for a crime committed under its influence, the fact of drunkenness may alter the nature of the legal offence committed, though it is no excuse for the act. The reason for it is that in many crimes some particular knowledge or intention is necessary, in order to render, the accompanying act the crime in question; in such cases it is for the court to take into account the fact of drunkenness in order to determine whether the accused had that particular and essential knowledge or intention.[84]

This section deals with such cases. The opening words of the section 'in cases where an act done is not an offence unless done with a particular knowledge or intent' govern the whole section. On first thought, they may appear to limit the application of the section to a small number of cases, for usually most acts charged as offences speak for themselves, and the idea of there not being an offence at all unless done with a particular knowledge or intent scarcely strikes the mind. The main part of the section lays down that in such cases a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated.

2. Intoxication is Essential Ingredient of Section

If on perusal of the medical report of the appellant, who was examined on the same day at 4.45 pm, *i.e.*, within two hours of the crime, does not show or record any signs of drunkenness or alcohol having been consumed, the benefit of s 86 is not available to the appellant.[85]519

Section Applies only to Voluntary Intoxication

The last part of the section shows that what is said in the main part of the section does not apply to a case of involuntary drunkenness. It applies only to a case of voluntary drunkenness. Voluntary intoxication is not a plea which is recognised in law, as an exception to criminal liability.[86]A person claiming benefit under s 86 has to prove that thing which intoxicated him was administered to him without his knowledge or against his will.[87] The accused appellant, had himself taken liquor and under influence of liquor beat his wife, threw burning lamp on her causing death. It was not the case of the accused appellant that somebody administered or forced him to consume the liquor. Held, he was not entitled to protection of s 86, IPC .[88]If a man has voluntarily drunk, then, even if he, by reason of intoxication, is, in fact, incapable of knowing the nature of his act, or that he is doing what is either wrong or contrary to law, he is liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. His incapacity, which arose by his own act, will not excuse him.[89]If there is evidence on record to show that the liquor was administered to the accused without his knowledge or against his will, the Court must attribute, to the accused, the same knowledge of the consequences of his act as if he were quite sober.[90] If the thing which intoxicated him was administered to him without his knowledge or against his will, he need not be dealt with as if he were sober, and his drunkenness, may be taken into consideration in determining whether he had the knowledge and intent necessary to constitute the offence.[91]

3. 'State of Intoxication'

There may be varying degrees of intoxication, but the section does not refer to any particular degree as s 85, IPC does. The man who has by his own act made himself so drunk as to be incapable of knowing what he is doing or whether what he is doing is wrong or contrary to law, is left in the same position as the man who has made himself only slightly intoxicated. That position is that he is liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. If he is a voluntary drunkard, then though by reason of his intoxication he is as a fact incapable of

knowing the nature of his act or that it is wrong or contrary to law, such incapacity so arising will not excuse him.[92] A contrary view has been taken by a Division Bench of the Madras High Court in the case of *Macherla Balaswamy,*[93] and by Chandra Reddy J, of the same court in a Division Bench case of Re *Rurtlayan*,[94] where it was held that the words 'state of intoxication' in this section can only mean intoxication, which renders a person incapable of knowing the nature520 of the act in question or that he is doing something which is either wrong or contrary to law, when he commits it. In the latter case, Chandra Reddy J, observed:

> In order to get the benefit of this section, the intoxication should not have been incurred voluntarily. Another essential requisite of the section is that the drunkenness must be such that the offender was incapable of knowing the nature of the act or that what he was doing was wrong or contrary to law. I do not think that the state of intoxication envisaged in section 86 is in any way different from that contemplated in the preceding section. In my opinion, the absence of qualifying words in section 86 cannot lead to the inference that even if the insobriety is not such as to impair the reason of the offender the requisite intent cannot be presumed. It is an ordinary rule that every man is presumed to intend the consequences of his acts but this presumption can be rebutted by showing that the person concerned could not have formed the intent by reason of his drunkenness. To be a sufficient answer to a charge of a crime case involving a specific intent, it should be established not merely that the offender had consumed liquor but as a result of it, his mind at the time in question was so obscure that he was incapable of forming the requisite intention. It is not unusual for people committing grave crimes of violence to prime themselves with liquor.

It is submitted, however, with respect, that the test applicable to a case under this section is the capacity to have the requisite knowledge and form the requisite intent, and not the capacity to know the nature of the act, or to know what is being done is wrong or contrary to law. It is wrong to apply the test applicable to cases falling under s 85, IPC to a case falling under s 86, IPC .

4. Defence of Drunkenness

It is only in cases where it is proved that the accused was in such a condition of drunkenness that his reason was 'dethroned' and was incapable of forming any intention that the defence of drunkenness would be available.[1]

In *R v Beard* ,[2] the jury were directed that if the accused had satisfied them by evidence that he was so absolutely drunk at the time that he did not know what he was doing or did not know that he was doing wrong, then the defence of drunkenness succeeds to the extent, that it reduces the crime from murder to manslaughter'. On a further appeal to the House of Lords,[3] it was held that the direction of the judge at the trial was unsatisfactory in that it wrongly applied the test applicable to cases of insanity to a case of drunkenness which did not amount to insanity, and that the relevant considerations in defence of insanity and drunkenness were not the same.[4]

5. 'Shall be Liable to be Dealt With'

In Offences Requiring Specified Intention Drunkenness is an Excuse

With regard to the 'particular knowledge or intent', s 86, IPC lays down in effect, that the drunken offender, not exempted under the conditions, laid down in s 85, 'is liable to be dealt with as if he had the same knowledge as he would have had, had he not been intoxicated'. The section does not say 'shall be dealt with', but imposes a521 liability only. Knowledge, on the part of the drunkard, is not to be presumed. He is only to be dealt with in the same way as if he had that knowledge. But from actual knowledge it is possible to presume intent; from a knowledge that had by law to be presumed, it might have been argued that intention must also be presumed in law. The legislature was, therefore, careful not to say that a voluntary drunkard should be presumed to have the same knowledge as he would have had, had he been sober, but stated that he should be dealt with as if he had that knowledge which *ex hypothesi* he did not have; and lastly as it intended that drunkenness should be an excuse for

certain offences, it used an indeterminate term 'shall be liable to be dealt with'. In cases, therefore, when a specified intention is an essential ingredient of the offence, as for example in all cases of theft, robbery, dacoity and wherever an act in order to be an offence must be done dishonestly as defined in the IPC, drunkenness is an excuse, provided the drunkard proves that he had not, as a fact, the knowledge which would enable the requisite intention to be inferred.[5]

> *Illustration**A* knows that he has a counterfeit rupee in his pocket along with other genuine rupees. *A* gets drunk and passes the bad rupee. His intoxication will not prevent an assumption of his knowledge of what he was doing, but evidence of his intoxication will be admissible for the purpose of showing that *A* in consequences thereof did not know that he was offering the bad coin.[6]

6. Presumption Regarding Intention

The mere fact of intoxication of the accused does not rebut the presumption that a man intends the natural consequences of his act.[7]Under this section, the court has to gather, from the attending general circumstances of the case, the intention paying due regard to the degree of intoxication. If the man was beside his mind altogether for the time being, it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking and, from the facts, it can be found that he knew what he was about to do, the rule, that a man is presumed to intend the natural consequences of his act or acts, will apply.[8] Simply because the mind of the accused was so affected by drink that he more readily gave way to some violent passion would not rebut the presumption that a man intends the natural consequences of his act.[9]Ordinarily, drunkenness makes no difference to the knowledge, with which a man is credited, and if an accused knows what the natural consequences of his acts were, he must be presumed to have intended to cause them. Intention, in many cases, is an inference from knowledge, but there may be cases in which a person, by reason of intoxication, may, under certain circumstances, be incapable of knowing the nature of a particular act, which he commits, or that it is either wrong or contrary to522 law although his state of intoxication may not be such as to render him incapable of knowing the nature of his acts. In such cases, in determining the quality of the offence, evidence may be necessary of a specific state of mind which must be found as a fact, and not assumed.[10]

7. Reason for Omitting Intention

The wording of the section is not perhaps as clear as it might have been. The first part of the section refers to offences involving a particular 'knowledge or intent' as an ingredient while the latter part refers only to knowledge. The omission of an express provision in the section regarding the intention to be attributed to a drunk man doing an act which is an offence when done with a particular knowledge or intent raises a doubt as to the interpretation of the section. If in voluntary drunkenness knowledge is to be presumed can intent be placed on the same footing and, if so, why has the section omitted intent in the latter part of it. The question has been discussed at length in many decisions in India.[11] In *Basdev v State of Pepsu* ,[12] their Lordships of the Supreme Court summarised the result of the decisions as follows:

> So far as knowledge is concerned, we must attribute to the intoxicated man the same knowledge as if he was quite sober. But so far as intent or intention is concerned, we must gather it from the attending general circumstances of the case paying due regard to the degree of intoxication. Was the man beside his mind altogether for the time being?

If so, it would not be possible to fix him with the requisite intention. But if he had not gone so deep in

drinking, and from the facts it could be found that he knew what he was about, we can apply the rule that a man is presumed to intend the natural consequences of his act or acts.

Even in some English decisions, motive, intention and knowledge are sometimes used interchangeably and this has led to a certain amount of confusion. Their Lordships, therefore, further pointed out:

> We have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less, and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin, but it is not difficult to perceive that they connote different things.

8. Drunkenness Causing Insanity and Falling Short of Incapacity

Russell[13] has stated:

> There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If523 actual insanity in fact supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act.

The law is the same in India.[14]

9. Illustrative Cases

(i) The accused shot and killed another and it was found that at the time of the killing, the accused was in state of voluntary drunkenness, but was not so much under the influence of the drink as to be incapable of forming the intention necessary for an offence under s 302, IPC . It was held that he must be presumed to have intended the natural consequences of his act and that the offence was not reduced from murder to culpable homicide not amounting to murder under the second part of s 304 .[15]

(ii) *A* is indicted for inflicting on *B* a dangerous injury with intent to murder. The fact that *A* was drunk at the time is no excuse for the infliction of the dangerous injury, but it must be taken into account, in determining whether he intended to murder *B*.[16]

(iii) *A*, being so drunk as not know what she is doing, attempts to drown herself. *A* has not attempted to commit suicide.[17]

(iv) *A*, in a state of intoxication, is provoked by a blow he received from *B*, *A* kills *B* with a weapon he happens to have in his hand. *A's* drunkenness must be considered on the question whether he acted in passion or from malice, *i.e.*, the intention necessary to make the killing murder.[18]

(v) *A*, when drunk, passes a forged bank note, or passes off a counterfeit rupee. The criminal intent must be proved from the surrounding circumstances, of which his state of

intoxication is an important one.[19]

(vi) *A*, a volunteer having his rifle with him (for the purpose of joining in the firing of a salute on New Year's day) got very intoxicated on the previous evening and on his way home at about 2.00 am broke into various small shops, and obtained by means of exhibiting his gun various small sums of money from different persons therein. *Prima facieA* committed robbery by extortion (ss 383 and 390). But since the delivery of property in extortion must be 'dishonestly' induced, *i.e.*, with an intention to cause a wrongful-gain or loss of property (s 24) it was held that *A* was not guilty, there being no evidence of such intention, he having 'acted under the unreflecting524 influence of intoxication'. But it was held that *A* was guilty of house-breaking by night with intent to commit the offence of criminal intimidation (ss 457 and 506).[20]

10. Knowledge and Intent in Case of Involuntary Drunkenness

Section 85, IPC protects an accused who can substantiate that, when he committed the act charged against him, he was in such a state of intoxication, in consequence of something administered to him without his knowledge or against his will, that he was incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law. Further, if an accused can show that he was intoxicated at the time he committed the act and that the thing which intoxicated him was administered to him without his knowledge or against his will, he is not liable under s 86, IPC to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. The case of the man-made drunk by another or others without his knowledge or against his will is not free from difficulty, but such a case rarely occurs.[21] It would appear that the state of his intoxication has to be considered along with other evidence without any presumption or assumption in determining whether he had the knowledge and intention necessary to constitute the offence.

11. Burden of Proof

The 'state of intoxication', as envisaged in this section, must be such as would render the accused incapable of forming the specific intent essential to constitute the crime. The mere proof of drinking some liquor would not be proof of intoxication because each man has his own level of intoxication. To substantiate the plea based on s 86, IPC, the onus is squarely on the shoulder of the accused. The normal presumption is that a man intends the natural consequences of his act. It is, therefore, for the accused to lead evidence of his drunkenness and prove the degree of intoxication to show that his mind was so affected by drink that he was not in a position to form any intent essential to constitute the crime in question.[22] This he can do either by leading independent evidence or by bringing out, in cross-examination, from prosecution evidence.[23]

83 *Nga Tun Baw v Emperor* 13 Cr LJ 864, p 866 (FB) .

84 *R v Gamlen* 1 F and F 90; *Nga Tun Baw v Emperor* 13 Cr LJ 864 (FB) .

85 *Sheikh Falsar v State* (2006) Cr LJ 1105 (Delhi) (DB) .

86 *Chetram v State* (1971) Cr LJ 1246, p 1250, (1971) Sim LJ 153 ; Re *Balaswamy*AIR 1953 Mad 827, p 823, (1953) Cr LJ 1587 (DB) ; Re *Rurtlayan*AIR 1954 Mad 523, p 526, (1954) Cr LJ 672 (DB) .

87 *Gautam Bhila Ahire v State of Maharashtra* 2010 Cr LJ 4073 (Bom) (DB), 2010 (2) Bom Cr (Cri) 741 .

88 *Gautam Bhila Ahire v State of Maharashtra* 2010 Cr LJ 4073 (Bom) (DB), 2010 (2) Bom Cr (Cri) 741 .

89 *Naga Tun Ban v Emperor* 13 Cr LJ 864, p 866-73 (Rang) (FB) ; *Sarthi v State of Madhya Pradesh* (1976) Jab LJ 66, (1975) MPLJ 847 ; *State of Orissa v Buda Muduli* (1978) 45 Cut LT 576, (1978) Cr LJ (NOC) 239 ; *Basdev v State of Pepsu* AIR 1956 SC 488, (1956) Cr LJ 919 ; *Prabhunath v State* AIR 1957 All 667, p 670, (1957) Cr LJ 1056 ; *Ajmer Singh v State* AIR 1955 Punj 13, (1955) Cr LJ 305 ; *Sadhu Kumbhar v King* AIR 1951 Ori 354, 52 Cr LJ 1136 .

90 *Sarthi v State of Madhya Pradesh* (1975) MPLJ 847, (1976) Jab LJ 66 .

91 *Ibid*; *Nga Tun Baw v Emperor* 13 Cr LJ 864, p 866 (Rang)(FB).

92 *Nga Tun Baw v Emperor* 13 Cr LJ 864, p 866, 873 (FB) .

93 *Macherla Balaswamy,*AIR 1953 Mad 827, p 828, (1953) Cr LJ 1587, p 1589 .

94 Re *Rurtlayan*, AIR 1954 Mad 523, p 526, (1954) Cr LJ 672 (DB) .

1 Re *Suruttayyam*AIR 1954 Mad 523, p 526, (1954) Cr LJ 672 (DB) ; *Sheru v Emperor* AIR 1926 Lah 232, 27 Cr LJ 630 ; *Waryam Singh v Emperor* AIR 1926 Lah 428, 27 Cr LJ 764 ; *Nga Sein Gale v Emperor* AIR 1934 Rang 361 ; Re *Balaswamy*AIR 1953 Mad 827, (1953) Cr LJ 1587 (DB) ; *Basdev v State of Pepsu* AIR 1956 SC 488, (1956) Cr LJ 919 ; *Russel on Crime*, twelfth edn, 1964, pp 83-84.

2 *R v Beard* (1919) 14 Cr App R 110 .

3 [1920] AC 479.

4 *Russell on Crime*, eleventh edn, p 89.

5 *Nga Tun Baw v Emperor* 13 Cr LJ 864, p 874 (FB), per Young J; *Krushna Singh v State of Orissa* (1971) Cr LJ 1497, 37 Cut LT 321 .

6 Bishop, 499, No 3.

7 *Harihar Dehury v State* (1984) 1 Crimes 955, (1984) 57 Cut LT 533 (Ori) .

8 *Basdev v State of Pepsu* AIR 1956 SC 488, p 490, (1956) Cr LJ 919 ; *State of Orissa v Mutuka Barik* (1978) Cut LT 604, p 608 (DB) ; *Balkari v State of Rajasthan* (1975) WLN 812, p 820, (1975) Raj LW 435 (DB) ; *Enrique F Rio v State* (1975) Cr LJ 1337, p 1338-39(Goa) ; *Narayanan v State of Kerala* (1959) Ker LJ 623, p 625, (1959) KLT 634 ; *Prabhunath v State* AIR 1957 All 667, (1957) Cr LJ 1056 ; *Sarthi v State of Madhya Pradesh* (1975) MPLJ 847, (1976) Jab LJ 66 ; *Ajmer Singh v State* AIR 1955 Punj 13, (1955) Cr LJ 305 ; *Sadhu Kumubhar v King* AIR 1951 Ori 354, 52 Cr LJ 1136 ; *Samman Singh v Emperor* AIR 1941 Lah 454, 43 Cr LJ 332 .

9 *Balkari v State of Rajasthan* 1975 WLN 812, p 820, (1975) Raj LW 435 (DB) .

10 *State of Orissa v Mutuka Balkavi* (1978) 45 Cut LT 604, p 608 (DB) .

11 *JM v Emperor* 11 Cr LJ 659 ; *Nga Tun Baw v Emperor* 13 Cr LJ 864 (FB) ; Re *Mandru Gadala*AIR 1916 Mad 489 ; *Public Prosecutor v Budipiti Devasikamani* AIR 1928 Mad 196 ; *Bishen Singh v Emperor* AIR 1929 Lah 637 ; *Samman Singh v Emperor* AIR 1941 Lah 454 ; *Nga Sein Gale v Emperor* AIR 1934 Rang 361 ; *Sadhu Kumbhar v King* AIR 1951 Ori 354 ; *Basdev v State* AIR 1955 Pepsu 165 ; *Nga Hpeik v King* AIR 1938 Rang 219 ; *Oil Mahommad v Emperor* AIR 1941 Pat 420 .

12 *Basdev v State of Pepsu,* AIR 1956 SC 488, p 490 on appeal from AIR 1955 Pepsu 165 .

13 *Russell on Crime*, eleventh edn, pp 86-87.

14 *Basdev v State of Pepsu* AIR 1956 SC 488 ; *Prabhunath v State* AIR 1957 All 667 .

15 *Ibid*; *Ajmer Singh v State* AIR 1955 Punj 13, (1955) Cr LJ 305 ; *Suddu Kumbhar v King* AIR 1951 Ori 354 ; *Samman Singh v Emperor* AIR 1941 Lah 454 .

16 *R v Cruse* 8 C&P 546 ; *R v Zulfukar Khan* 8 BLR AC 21 ; *R v Ramasahoy Bhur* (1864) WR (Cr) 24 ; *R v Meakin* 7 C&P 297 .

17 *R v Moore* 3 C&K 319 .

18 *R v Thomas* 7 C&P 817 .

19 Bishop, p 499, No 3.

20 *FM v R* 11 Cr LJ 659, 1 UBR 17 .

21 *Nga Tun Baw v Emperor* 13 Cr LJ 864, p 866 (FB) .

22 *Basdev v State of Pepsu* AIR 1956 SC 488, (1956) Cr LJ 919 ; *Dasa Kandha v State* (1976) 42 Cut LT 499, (1976) Cut LR 41 (Cr), (1976) Cr LJ 2010, p 2013-14 (DB) ; *State of Orissa v Mutuka Barik* (1978) 45 Cut LT 604, p 609 (DB) ; *Manmath Singh v State of Orissa* (1989) 1 Crimes 17 (Ori) .

23 *Dasa Kandha v State* (1976) 42 Cut LT 499 (DB) ; *State of Orissa v Mutuka Barik* (1978) 45 Cut LT 604, p 609 (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 87.

Act not intended and not known to be likely to cause death or grievous hurt, done by consent.--

Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.525

Illustration

A and *Z* agrees to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if *A*, while playing fairly, hurts *Z*, *A* commits no offence.

Comments

1. Scope

This section proceeds upon the maxim *volenti non fit injuria*(he, who consents, suffers no injury). This maxim is founded upon two very simple propositions: (a) every person is the best judge of his own interest; and (b) no man will consent to what he thinks hurtful to himself. The mere consent of a person above 18 years of age will justify, under this section, any harm, resulting from an act which is not intended by the doer to cause and which is not known to the doer to be likely to cause death or grievous hurt. The protection, under the section, thus, extends even to injuries which actually cause death or grievous hurt, provided it was not intended, for instance, if an eye is put out in fencing, or one is killed by a cricket ball. It is essential, however, that the act consented to, though not intended to cause death or grievous hurt, should be one which, from its nature, is not likely to have such result.[24] Ordinarily, games, such as fencing single sticks, boxing, football and the like, are protected by this section.

As a general rule, if consent is freely given by a rational and sober person, knowing the nature of the act, it is an answer to an indictment for assault unless the consent is to do bodily injury amounting to mayhem or to acts likely or intended to do bodily harm or to an injury constituting a breach of the public peace.[25] With respect to this section, the authors of the IPC said:

> We conceive the general rule to be that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life is

concerned.[26]

The object of this section is the protection from liability of persons who cause harm to one another in the course of innocent sports or games in which both are taking part.

2. Sections 87 - 93 refer only to Personal Injuries

Consent plays a very important part not only in offences relating to injury to the person but also in offences relating to property, such as theft and sexual relations,526 such as rape. But the general exceptions in these sections refer only to the operation of consent on physical injuries.[27]

3. Legal Nature of Injuries

Sections 87 - 93 of the IPC refer to four kinds of injuries:

(i) *Death*-- ss 87 - 89, 92-93 (Illustration), *i.e.*, death of human being (s 46).
(ii) *Grievous hurt*-- ss 87, 89(3), 92(2) and 93 . As to what constitutes grievous hurt, see s 320 .
(iii) *Hurt*-- ss 92(3) and 93, *i.e.*, 'bodily pain, disease or infirmity' (s 319).
(iv) *Harm*-- ss 87 - 89, 92-93. Harm may be caused to a person in respect to his body, mind, reputation or property (s 44). But harm to the body if it amounts to death, grievous hurt or hurt, is so designated; consequently, harm denotes injury to the person other than the kinds mentioned above, *e.g.*, cutting or disfigurement of the hair, or injury to the mind, reputation or property.

4. Consent as a Defence

Under the civil law no suit can be brought in consequence of anything done, or arising of what is done, with the consent of the person complaining of it--*volenti non fit injuria*.[28] Consent is a complete answer in such suits, because the court is only concerned with the wrong asserted to have been done to the complainant. In criminal law it is different. Acts are punished as crimes, because it is for the interest of society that they should be prevented. The consent of the immediate sufferer is immaterial if the injury to society remains.[29]

Prima facie, the person who causes injury to another is liable therefor. Sections 87 - 93 lay down the rules for determining when the claims of society are satisfied by the consent of the individual. They deal with the special circumstances under which: (a) consent, express or implied, to incur or run the risk of injury, may be given (ss 87 - 91); and (b) where, owing to certain urgent reasons, consent in fact is altogether dispensed with, but is given by construction of law; the result in either case being that the person causing the injury is exempted from all liability (ss 92 and 93).

Sections 87 - 91 deal with express or implied consent, and ss 92 and 93 with constructive consent. Sections 88, 89 and 92 cover all cases of surgical operation.

5. Consenting Party must be above 18 Years of Age

Anyone may inflict the harm on anybody above 18 years of age, who has consented. Thus, in an Allahabad case, the complainant having molested a *chamar* girl, about 200 *chamars*, who were enraged and armed with *lathis*, collected together determined to punish the complainant, and caught hold of him. The accused intervened and tried to bring about a settlement. They constituted a *panchayat*, and with a view to avoid other harm to the complainant and with his consent, the

panchayat decided in the interest and for the benefit of the complainant, to blacken his face and beat him with shoes. The decision having been carried out, the members527 of *panchayat* were prosecuted for offences under ss 323 and 506 read with s 114, IPC . It was held that the accused were entitled to the benefit of this section and it was further observed:

> It is true that if an act is unlawful in the sense of being in itself a criminal act, it cannot be rendered lawful because the person to whose detriment it is done consents to it; but there are many acts, the commission of which in the circumstances mentioned in the section, may not amount to an offence.[30]

6. Consent

Consent contemplated in this section and ss 88 - 91 of the IPC, may be express or implied.[31]

7. Death or Grievous Hurt Cannot be Consented to

The mere consent of a person above 18 years of age will justify under this section any harm resulting from an act which is not intended to cause, and which is not known by the doer to be likely to cause death or grievous hurt. The protection thus extends even to injuries which actually cause death or grievous hurt, provided it was not intended, for instance, if an eye is put out in fencing, or one is killed by a cricket ball. It is essential, however, that the act consented to though not intended to cause death or grievous hurt, should be one which from its nature is not likely to have such a result.[32] But no consent will authorise any act which is intended to cause death or grievous hurt. No amount of consent would protect a person who entered into a fencing match, however friendly, which was conducted with naked swords.[33]

A person cannot consent to suffer death, or to run the risk of death, under this section; but to cause death with such a consent, though an offence, will not amount to murder, but only to culpable homicide.[34] The section does not permit a man to give his consent to anything intended or known to be likely to cause his own death or grievous hurt. It only justifies any harm short of grievous hurt. The question of benefit to the person harmed is immaterial under this section.

The person, causing harm, other than death or grievous hurt, with consent, may either intend to cause it or know that he is likely to cause it. The person, consenting, agrees to suffer the harm in the former case; in the latter case, he agrees to run the risk.

Illustrations

(i) *A* and *B* agree to fight a duel together with swords, if either is killed or wounded his consent is immaterial.[35]

(ii) *A* gets *B* to shoot off his thumb, in order that he may be discharged from the army. *A* and *B* are guilty of causing grievous hurt.[36]528

(iii) *A* and *B* engage in a prize fight. *A* breaks *B*'s nose, or knocks out a tooth. *A* is guilty of causing grievous hurt.[37]

(iv) During a game of football, *A* losing his temper deliberately causes an injury to B, from the effect of which *B* dies. *A* is guilty of culpable homicide.[38]

(v) The deceased, a middle-aged man, believed to have rendered himself *da*-proof by charms, asked the accused to try a *da* on his right arm. The accused believed in the pretence of the deceased and inflicted a blow with a *da* with moderate force, with the result that the arteries were cut and the deceased bled to death. It was held that the case was governed by this section as the accused had no intention of causing death or grievous hurt and he might not even have known that his act was likely to have any such result.[39]

8. Duelling

By the law of England, duelling, *i.e.*, fighting with deadly weapons by common consent, has always been held illegal, and 'no consent can make so dangerous a diversion as fighting with naked swords lawful'.[40]

9. Prize Fight

The law seems equally clear now on the subject of prize fights. 'The fists of trained pugilists are dangerous weapons of this kind which they are not at liberty to use against each other'.[41] 'Every fight in which the object and intent of the combatants is to subdue the other by violent blows is, or has, a direct tendency to a breach of the peace'.[42] Wherever two persons go out to strike each other, and do so, each is guilty of an assault,[43] and, therefore, no agreement to fight can render the contest lawful.[44] Under English law then, prize fights are illegal on the grounds that they are breaches of the peace and assaults.

Under the terms of this section it seems clear that such contests are not protected, for each of the combatants must know that it is likely at least that he will break his opponent's nose, knock one or more of his teeth down his throat, or cause him by reason of his injuries to be unable to follow his ordinary pursuits for a space of 20 days. Such injuries as these, constitute 'grievous hurt' (s 320, IPC), which cannot be consented to under s 87, IPC .

10. Athletic Games

The sort of contests which are protected by s 87, IPC are those 'where life and limb are exposed to no serious danger in the common course of things...as in wrestling, single stick, sparring with gloves, football and the like.[45] It must be remembered that by the terms of s 87, which exclude 'death' or 'grievous hurt', the only harm that can be consented to is simple 'hurt' (refer to s 319), *i.e.*, bodily pain. Thus, in the case of a boxing match with gloves, if the gloves are merely a sham, and the contest is in529 consequence really a fight, and not a friendly sparring match, then the combatants are not protected from liability. The distinction between a friendly match and a prize fight fought with or without gloves is well recognised by law.[46]

A person cannot consent to suffer death, or to run the risk of death, under the provisions of this section; but to cause death with such a consent though an offence, will not amount to murder, but only to culpable homicide.[47]

11. The Word 'Harm' and its Meaning

The expression 'harm' connotes hurt, injury, damage, impairment, moral wrong or evil. In ss 81, 87 - 89, 91-92, 100, 104 and 106 of the IPC, it means physical injury; in s 93, an injurious mental reaction; in s 415, injury to a person in body, mind, reputation or property; in ss 469 and 499, harm to reputation of the aggrieved party. In s 95, the expression has a wide connotation and includes physical injury.[48]

12. Hurt or Harm other than Death, or Grievous Hurt, may be Intended or Known to be Likely

The person causing harm other than death or grievous hurt with consent may either intend to cause it, or known that he is likely to cause it. The person consenting agrees to suffer the harm in the former case, and in the latter he agrees to run the risk.

24 *Mayne's Criminal Law of India*, fourth edn, para 203.

25 *R v Donovan* (1934) 2 KB 498, where the law is reviewed.

26 Note B, p 106.

27 *Durga Charan v State of Orissa* AIR 1966 SC 1775, (1966) Cr LJ 1489 .

28 *Thomas v Quartermine* 18 QBD 685 ; *Membery v Great Western Rly* 14 AC 179 .

29 *Maynes' Criminal Law of India*, fourth edn, para 202.

30 *Bishambher v Roomal* AIR 1951 All 500, 52 Cr LJ 179 ; *Nagwa Shwe Kin v Emperor* (1915) LB 101, 16 Cr LJ 581 .

31 *Ibid*; s 90 and the commentary thereunder.

32 *Maynes' Criminal Law of India*, fourth edn, para 203.

33 Hale PC 473, 1 Hawk PC 86; *R v Denoven* (1934) 2 KB 498 .

34 Indian Penal Code, s 300, explanation 5.

35 *R v Barronet* Dear 51.

36 SD art 28 .

37 YLR 8 QBD 549; *R v Billingham* 2 C&P 234 .

38 *R v Moore* 14 LTR 229 .

39 *Nagwa Shawe Kin v Emperor* AIR 1915 LB 101 .

40 Hawk, PCL 484.

41 *R v Coney* LR 8 QBD 534, p 547, per Mathew J.

42 *Ibid*.

43 *R v Lewis* IC&K 419, per Coleridge J; *R v Coney* LR 8 QBD, 534, p 539, Cave J.

44 *Boulter v Clark* Bulter NP 16, per Parker CB.

45 *R v Coney* 8 QBD 534, p 539, per Stephen J .

46 *R v Orton* 39 LTR 293 ; Foster, *Crown Law*, p 219.

47 Indian Penal Code 1860, s 300, exception 5.

48 *Veeda Menezes v Yusuf Khan & Anr* AIR 1966 SC 1773 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 88 . Act not intended to cause death, done by consent in good faith for person's benefit.--

Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or

implied, to suffer that harm, or to take the risk of that harm.

Illustration

A, a surgeon, knowing that a particular operation is likely to cause the death of *Z,* who suffers under a painful complaint, but not intending to cause *Z's* death and intending in good faith, *Z's* benefit, performs that operation on *Z,* with *Z's* consent. *A* has committed no offence.

Comments

1. Scope

Under this section, any harm, except the intentional death, may be caused if the act (*i.e.*, harm) is done, by the doer, in good faith and for the benefit of the consenting530 person who must, by virtue of the second clause of s 90, IPC, be, at least, of 12 years of age. The act, consented to, may be done either: (a) with a knowledge that death is likely (though death must not be intended); or (b) with intention to cause 'grievous hurt', or 'hurt' or other harm; or (c) with a knowledge that either of these three kinds of harm is likely. Where the accused, in good faith and for the benefit of his patient and in accordance with the recognised Indian method of treatment for cataract, operated upon her for cataract with the result that she lost the sight of her left eye, it was held that the act of the accused was not an offence under this Code.[49]

When a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as 'criminal'. It can be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.[50]

But the section does not excuse dangerous operations performed by unqualified persons.[51]

2. Distinction between Sections 87 and 88

This section differs from s 87 of the IPC in the following ways:

(i) Any harm may be inflicted, except the intentional causing of death under this section, while besides death even grievous hurt cannot be consented to under s 87 .

(ii) There is no provision as to the age of the consenting person in this section; but s 90, cl (2) provides that the consent of a child under 12 years of age is not such a consent as is intended by the IPC . The effect of this is therefore that the consenting party under this section must be at least 12 years of age. The consenting party must be above 18 years of age under s 87 .

(iii) Under this section the act must be done for the benefit of the person consenting thereto. There is no such condition for the act done under s 87 .

(iv) It must be done in good faith to bring any act under this section. For seeking the benefit of s 87 it is not a pre-requisite.

3. Any Harm Except Intentional Causing of Death

The act consented to, may be done either: (i) with a knowledge that death is *likely* (though death must

not be intended); or (ii) with intention to cause 'grievous hurt', 'hurt' or other harm, or; (iii) with a knowledge that either of these three kinds of harm is likely.

Illustration of (i)

Illustration to s 88, IPC may be referred to. In one other case the accused operated upon a patient for cataract with the result that the patient lost the sight of her left eye.531 The operation was performed with the consent of the patient, and in good faith and for her benefit, and in accordance with the recognised Indian method of treatment for cataract. It was held that the act of the accused was not an offence under the IPC .[52]

Illustration of (ii) and (iii)

(i) *A* pulls a diseased tooth out of *B*'s jaw, with *B*'s consent. *A* is not liable for causing 'grievous hurt' to *B*.
(ii) *A* vaccinates *B* with his consent. *A* is not liable for causing 'hurt' to *B*.
(iii) *A* in setting *B*'s dislocated ankle has to cut off *B*'s boot. *A* is not liable for the 'harm' done to the boot.

4. Right of Private Defence is Subject to Restrictions of this Section

The Supreme Court in a catena of cases has held that a right of private defence given by the IPC is essentially one of defence or self protection and not a right of reprisal or punishment. It is subject to the restrictions indicated in s 88 which are so important as the right itself.[53]

5. 'Consent'

Consent of children under 12 years, under this section, by virtue of the second clause of s 90, IPC is no true consent. Where *A* performs a surgical operation of a dangerous or painful nature on *B* with his consent, *B* being a child of 10 years of age, who is living with his parents, whose consent could have been obtained, *A* is liable for the consequences.

But where an operation of cataract was done by qualified doctor with the patient's (major) consent, operation resulted in loss of sight, the doctor was held not guilty under s 338 by reason of s 88 .[54] Where the allegations were that due to negligence of doctor, the right ovary of the patient was lost while performing surgery, surgery of ovary was done by gynecologist when it was diagnosed that the right ovary had been covered by a cystic mass, the fact that the consent of the complainant for such a surgery was duly obtained was suppressed in the complaint, reports of the medical college hospital show that removal of right ovary was necessary and done for, safety of patient, on these facts it was held that allegations against the doctor were baseless and the complaint was liable to be quashed.[55]

The consent may be express or implied.[56] Thus, when a child over 12 years of age goes to a school, it may be assumed that the child gives an implied consent to subject itself to the discipline and control of the school authorities and to receiving such reasonable and moderate corporal punishment as may be necessary for its correction or for maintaining school discipline. Under the IPC, a valid consent to suffer harm may be given by a person over 12 years of age. Hence *A*, a teacher administering corporal punishment to a pupil is not guilty of any offence under the Code.[57]532

But where a teacher exceeds the authority and inflicts such harm to the pupil as may be considered to be unreasonable and immoderate, he would lose the benefit of this section. Whether he is entitled to the benefit of this section or not, in a given case, will depend upon the particular nature, extent and severity of the punishment inflicted.[58]

6. Corporal Punishment to Child/Student by Teacher, Parents

When a child is sent to a *Madrassa*or a school, the parents of the said child give an implied authority to the master or the class teacher or headmaster/headmistress to enforce discipline and correct the students who commit errors in front of him or her or in the classes if a corporal punishment is given by any of them. In the process of maintaining such discipline, and also to make him/her adhere to the prescribed standards of the school, which are necessary for the upliftment and development of the child including the development of his character and conduct in and outside the school, so that he is trained to be aware of the good qualities of a citizen, it cannot be said to be an act intended to injure the student. In such a situation, if no intentional injury is caused, considering the age of the student, it cannot be said that the said school teacher has inflicted injury to harm him. But again, the act of the teacher on the student, in imposing corporal punishment, depends upon the circumstances of each case. If a teacher, out of fury and excitement, inflicts injuries which is harmful to the health of a tender aged student, it cannot be accepted as a right conferred on such a teacher to inflict such punishment, because of the express or implied authority granted by the parents of that student. Therefore, there cannot be any generalised pattern of principle in such situations. The acts of a teacher has to be appreciated and assessed depending upon the circumstances that are placed before the court, in each case. It is the duty of the teachers to have a restrained and controlled imposition of punishments on the pupils under their care and charge. Unwieldy, uncontrolled and emotional attacks or actions on their part cannot be accepted.[59]

Child has human rights. Now it is a recognized social principle that even parents of the child are made to understand the basic human rights of the child and instead of corporal punishment, correctional methods are recognized in law. It is universally felt that children can be corrected by correctional measures rather than physical punishment.[60]

Where the accused supervisor in a School had slapped the deceased student who was found sitting on the scooter of the accused, his conviction under s 323, IPC was held justified, and he was held not entitled to the protection of ss 88 and 89, IPC .[61]

7. Intended

Something is intentionally done, if it is done deliberately or purposely.[62]533

8. Harm

Synopsis notes under s 87 may be referred to.

9. 'Benefit'

Synopsis notes on this heading under s 92 may be referred to.

10. 'Good Faith'

Sections 52 and 92, and commentary thereunder, may be referred to.

11. Operation by Unqualified Doctors

This section will not excuse dangerous operations performed by unqualified persons.

The Law Commissioners observed in this connection:

> We apprehend that 'an unqualified and ignorant quack' could hardly be excused, for it is not to be conceived that such a one could obtain the free and intelligent consent of any person to his performing upon him an operation dangerous to life, but by misrepresentation; and such a one could hardly satisfy a court of justice that he had undertaken the operation in good faith under clause 72 (this section), for good faith must surely be construed here to mean a conscientious belief that he had skill to perform the operation and by it to benefit the party, while the supposition is that he was unskilled and ignorant.[63]

A *kobiraj* operated on a man for internal piles by cutting them out with an ordinary knife. The man died from haemorrhage. The *kobiraj* was charged under s 304A of the IPC, with causing death by doing a rash and negligent act. It was held that as the accused was admittedly uneducated in matters of surgery, and having regard to the meaning of 'good faith' as defined in s 52 of the IPC, he was not entitled to the benefit of s 88 . It was further held that s 88 did not apply to the case, as it was not shown by the accused, on whom the burden of proving that fact lay, that the deceased knew the risk he was running in consenting to the operation, and he could not, therefore, be said to have accepted the risk.[64]

49 *Emperor v Surajbali* 7 Cr LJ 306, 5 All LJ 155 .

50 *Katcherla Venkata Sunil v Vanguri Seshumamba* 2008 Cr LJ 853, p 857 (AP) .

51 *Juggankhan Jamshankhan v State* AIR 1963 MP 102, (1963) 1 Cr LJ 296 ; *Sukaroo v Emperor* 14 ILR Cal 566, p 568 .

52 *Emperor v Surajbali* 7 Cr LJ 306, 5 All LJ 155 .

53 *Bathusingh v State of Madhya Pradesh* (2004) Cr LJ 4850 (SC) .

54 *RP Dhanda (Dr) v Bhurelal & Anr* (1987) Cr LJ 1316 (MP) (Indore Bench).

55 *Gopinatha Pillai TM (Dr) v State of Kerala & Anr* (2000) Cr LJ 3682 (Ker) .

56 *Bishamber v Roomal* AIR 1951 All 500, 52 Cr LJ 179, s 90 and commentary thereunder.

57 *GB Ghatge v Emperor* AIR 1949 Bom 226, 50 Cr LJ 789 ; *Natesan v State of Madras* AIR 1962 Mad 216, (1962) 1 Cr LJ 727 ; *Ganesh Chandra Saha v Jiw Raj Somani* AIR 1965 Cal 32, (1965) 1 Cr LJ 24 ; *Sankunni v Venkataramani* AIR 1922 Mad 200, 42 Mad LJ 460 .

58 *Natesan v State of Madras* AIR 1962 Mad 216, (1962) 1 Cr LJ 727 .

59 *KA Abdul Vahid v State of Kerala* (2005) Cr LJ 2054 (Ker) (see commentary on s 89 *post*).

60 *Hasmukhbhai Gokaldas Shah v State of Gujarat* 2009 Cr LJ 2919 (2919) (Guj) (DB) (Case law referred).

61 *Hasmukhbhai Gokaldas Shah v State of Gujarat* 2009 Cr LJ 2919 (Guj) (DB) ; *Ganesh Chandra Saha v Jiw Raj Somani* 1965 (1) Cr LJ 24 (Cal), and *M Natesan v State of Madras* AIR 1962 Mad 216, **dissented from**.

62 *SSKVK Kara v State* AIR 1970 Ker 98, (1970) Cr LJ 688, p 693 .

63 First Report, s 123, p 221.

64 *Sukaroo Kobiraj v Empress* 14 ILR Cal 566, p 568 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 89.

Act done in good faith for benefit of child or insane person, by or by consent of guardian.--

Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:

Provisos.--*Provided*--

First.	--	That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;
Secondly.	--	That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death,534 for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;
Thirdly.	--	That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;
Fourthly.	--	That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration

A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. *A* is within the exception in as much as his object was the cure of the child.

Comments

1. Scope

This section protects harm caused to a person below 12 years of age or of unsound mind by his guardian himself or by another with his consent in good faith for the benefit of the said child or the person of unsound mind. With regard to this section, which was cl 71, the authors of the IPC said:

> A lunatic may be in a state which makes it proper that he should be put into a strait waistcoat. A child may meet with an accident which may render the amputation of a limb necessary. But to put a strait waistcoat on a

> man without his consent is, under our definition, to commit an assault. To amputate a limb is, by our definition, voluntarily to cause grievous hurt, and, as sharp instruments are used, is a very highly penal offence. We have, therefore, provided, by clause 71 (this section), that the consent of the guardian of a sufferer who is an infant or who is of unsound mind shall, to a great extent, have the effect which the consent of the sufferer himself would have, if the sufferer were of ripe age and sound mind.[65]

They appended the following illustrations to the clause:

(i) *A*, a parent, whips his child moderately, for the child's benefit. *A* has committed no offence.
(ii) *A* confines his child, for the child's benefit, *A* has committed no offence.535
(iii) *A*, in good faith, for his daughter's benefit intentionally kills her to prevent her from falling into the hands of *pindarries*. *A* is not within the exception.
(iv) *A*, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. *A* has committed no offence, inasmuch as his object was the preventing of death or grievous hurt to the child.
(v) *A*, in good faith, for his child's pecuniary benefit, emasculates his child. Here, inasmuch as *A* has caused grievous hurt to the child for a purpose other than the preventing of death or grievous hurt to the child, *A* is not within the exception.
(vi) *A*, intending in good faith the pecuniary benefit of *Z,* his daughter, a child under 12 years of age, abets a rape committed by *B* on *Z*. Neither *A* nor *B* is within the exception.

Of these, illust (iv) has been enacted with slight modification as an illustration to this section. The rest have been omitted. But these are covered by the provisos to the section.

2. Provisions of the Section when can be Invoked

The consent may be express or implied. A person, above 12 years of age, is considered to be capable of giving his consent under s 88 of this IPC . Only the guardian, or the person having lawful charge of the person, upon whom the harm is to be inflicted, or the person, acting with the consent of either a guardian or person having charge, as the case may be, can inflict the harm. The person, upon whom the harm is to be inflicted, must be either a child under 12 years of age or a person of unsound mind because the consent of such a person is implied in that of his guardian.

To invoke the provisions of this section, it is necessary to show that the act done was for the benefit of the person under 12 years of age or of unsound mind.[66] But the principle, underlying this section, would be available even to a case of child above the age of 12 years.[67]

3. Difference between this Section and Sections 87 and 88

The section differs from both ss 87 and 88, IPC in that:

(i) The people who may inflict the harm are confined to one or other of three classes, *viz*, guardians, or persons having lawful charge of the person upon whom the harm is inflicted; or persons acting with the consent of either a guardian or person having charge, as the case may be.
(ii) The person so caused to suffer must be either (a) a child under 12 years of age, or (b) a person of unsound mind. Their consent is implied in that of their guardians.

4. Difference between Sections 88 and 89

Section 89 differs from s 88, IPC in that no act be done if the person doing it (one of the abovementioned classes) knows that it is likely to cause death, or intends536 thereby to cause grievous hurt or knows that such is likely, except for special reasons mentioned in s 89, in addition to his acting in good faith, *etc.*, which provision is common to both sections.

5. Nature of Harm that may be Inflicted and Justifying Circumstances

Under s 89, the following kinds of harm may be inflicted on the child or lunatic:

Hurt or harm intentional or known to be likely, grievous hurt intentional or known to be likely.	To prevent death or grievous hurt. or To prevent death or grievous hurt or to cure grievous disease or infirmity.	If (1) inflicted in to be likely. 'good faith' and (2) for the benefit of the sufferer.

But the infliction of death must never be intended or attempted.

Illustrations

(i) *A*, a schoolmaster, by way of punishment, gives, *B*, a pupil under 12, four strokes on the hand with a cane, in a judicious manner. *A* has not committed 'hurt' nor is he guilty of an 'assault'.68

(ii) *A*, a surgeon, with the consent of *B*, *C*'s guardian, performs a dangerous operation on *C*, who is suffering from cancer, *C* dies. *A* is not liable.

(iii) *A*, a child of two years of age, is suffering from a disease and is in awful pain, *B, C* and *D*, physicians, agree that death is inevitable. They administer several grains of acetate of morphia in order to cause a painless death, doing this with the consent of A's parents. *A* dies, B, *C* and *D* and A's parents are liable for *A*'s death.[69]

6. Acts ' *Per Se*' Offences not Exempted

Sections 87, 88 and 89, IPC have no application to acts which are offences, *i.e.*, punishable under the IPC, or under any special or local law (refer to ss 41 - 42) independently of any harm that they may cause. Each of these sections is by its terms limited to acts which are offences 'by reason of any harm' (refer to s 91).

7. Abetment of an Offence not Exempted

Under the last proviso to this section the exemption does not extend to the 'abetment' of any offence to the committing of which offence it would not extend. Thus:

A, a woman, believing herself to be with child, but not being with child, conspires with *B* and *C* to administer drugs to herself, in order to procure a miscarriage. *A* is liable for abetting the offence of criminal conspiracy.[70]

8. 'Benefit'

Mere pecuniary benefit is not a benefit within the meaning of this section and ss 88 and 92 .[71] Infliction of chastisement by way of parental discipline by parent or537 guardian, or moderate punishment, inflicted by a schoolmaster, for maintaining school discipline, would come within the ambit of this section.[72]

9. 'Harm'

Notes on this heading under s 87, *ante*, may be referred to.

10. Delegation of Parental Authority for Corporal Punishment by Schoolmaster and its Extent

The infliction of chastisement by way of parental discipline by the parent or guardian as stated above, would come within the scope of this section, provided it was inflicted in good faith for the benefit of the child. And, when a child is sent by its parent or guardian to a school, the parent or guardian must be held to have given an implied consent to the infliction of such reasonable punishment as may be necessary for the purposes of school discipline.[73] As regards the extent to which the right of the schoolmaster to punish his pupils, in *Cleary v Booth* ,[74] Collins J said:

> It is clear that the relation of master and pupil carries with it the right of reasonable corporal chastisement. As a matter of commonsense, how far is this power delegated by the parent to the schoolmaster? Is it limited to the time during which the boy is within the four walls of the school, or does it extend in any sense beyond that limit? In my opinion the purpose with which the parental authority is delegated to the schoolmaster, who is entrusted with the bringing up and discipline of the child, must to some extent include an authority over the child while he is outside the four walls.

Lawrence J, said:

> It is difficult to express in words the extent of the schoolmaster's authority in respect of the punishment of his pupils; but in my opinion the authority extends not only to acts done in school, but also to cases where a complaint of acts done out of school at any rate while going to and from school, is made to the schoolmaster.

(See also commentary in heading 'Corporal punishment to child/student by teacher, parents' in s 88, *ante*).

Where the accused supervisor in a school had slapped the deceased student who was found sitting on scooter of the accused, his conviction under s 323, IPC was held justified, and he was held not entitled to the protection of ss 88 and 89, IPC .[75]

Questions to be Considered in Punishment by School Master to Discipline Student

If the offence of which the boy had been found guilty had been committed in school, there would be no difficulty. Nor would there be any difficulty if it were committed538 whilst the boy was on the way to or from school. In other cases of acts committed out of school, the authority of the schoolmaster to inflict punishment would depend largely on the facts of each case. The questions for decision would be: 'In the circumstances of the case is it a reasonable inference that the boy was at the time the offence was committed under the authority of the schoolmaster and was the punishment bona fide, reasonably considered necessary for the purpose of school discipline?' If the school was closed for any length of time for a period of regular holidays, the boy would have to be held to have returned to the charge of his parents and the authority of the schoolmaster would cease. But if the school were closed only for two days and a boy of the school assaulted another boy of the school while he was on his way to visit his master, it would be a reasonable inference that the implied consent of the parents of the boy to his being under the discipline and control of the schoolmaster extended to the alleged offence for which the schoolmaster found it necessary to punish him, and that the boy must be held at the time to have been under the authority of the schoolmaster.[76]

65 Note B, p 109.

66 *Nanku v Emperor* AIR 1935 All 916, 37 Cr LJ 35 .

67 *Natesan v State of Madras* AIR 1962 Mad 216, (1962) 1 Cr LJ 727 .

68 *Gardner v Bygrave* (1889) 63 JP 743 .

69 For a discussion on such cases, see the *New York Medico-Legal Society's Journal*, December, 1888.

70 *R v Whitchurch* (1890) 24 QBD 420 .

71 Indian Penal Code 1860, s 92, expln.

72 *Sankunni v Venkataramani* AIR 1922 Mad 200, 42 Mad LJ 460 ; *Emperor v Maunga Ba Thaung* AIR 1926 Rang 107, p 108, 27 Cr LJ 636 ; *GB Ghatge v Emperor* AIR 1949 Bom 226, 50 Cr LJ 789 ; *Natesan v State of Madras* AIR 1962 Mad 216, p 218, (1962) 1 Cr LJ 727 ; *Ganesh Chandra Saha v Jiw Raj Somani* AIR 1965 Cal 32, (1965) 1 Cr LJ 24 .

73 *Emperor v Manug Ba Thaung* AIR 1926 Rang 107, 108 **relying on***R v Hopely* 2 F&F 202 ; *Clearly v Booth* (1893) 1 QB 465, 41 WR 391 ; *Fitzgerald v Northcote* (1865) 4 F&F 656 ; *Mansell v Griffin* (1908) 1 KB 160 .

74 *Cleary v Booth* (1893) 1 QB 465 .

75 *Hasmukhbhai Gokaldas Shah v State of Gujarat* 2009 Cr LJ 2919 (Guj) (DB) ; *Ganesh Chandra Saha v Jiw Raj Somani* 1965 (1) Cr LJ 24 (Cal), and *M Natesan v State of Madras* AIR 1962 Mad 216, **dissented from**.

76 *Emperor v Maung Ba Thaung* AIR 1926 Rang 107, p 108-09 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 90.

Consent known to be given under fear or misconception.--

A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.--if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.--unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Comments

1. Scope and Object

This section does not define 'consent' but describes the nature of 'consent' as the term is used in the IPC . 'Two or more persons are said to consent when they agree539 upon the same thing in the same sense'.[77] Sir James Stephen defined consent in criminal law to mean 'a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents'. And he goes on to add that 'consent is said to be given freely when it is not procured by force, fraud or threats of whatever nature'.[78] The object and effect of this section obviously is not to lay down that a child under 12 years of age is in fact incapable of expressing or withholding his or her consent to an act, but to provide that where the consent of a person may afford a defence to a criminal charge such consent must be a real consent, not vitiated by immaturity, fear or fraud. Further, in the IPC a distinction is drawn between an act which is done 'against the will' and an act done 'without the consent' of a person.[79] Every act done 'against the will' of a person, no doubt, is done 'without his consent', but an act done 'without the consent' of a person is not necessarily 'against his will', which expression, imports that the act is done in spite of the opposition of the person to the doing of it.[80] Where a husband being in sore distress, desired to commit suicide, his wife asked him to first kill her and then to kill himself. He accordingly killed her, but was caught before he killed himself, it was held that the consent of the wife was a consent within the meaning of exception 5 to s 300, IPC .[81] Though given under peculiar circumstances it did not fall under any of the exceptions provided by this section and is a valid consent under the section.

Scheme of s 90, IPC is couched in negative terminology. Consent is different from submission. Consent given under fear/coercion or misconception/mistake of fact is not consent at all.[82]

2. Factors in First and Second Part from Point of View of Victim and Accused Respectively

The factors, set out in the first part of s 90, IPC, namely, that the consent given by a person under fear of injury or under misconception of fact is not consent, are from the point of view of the victim; whereas the factors, set out in the second part of s 90, namely, that the person doing the act knows, or has reason to believe, that consent was given in consequence of such fear or misconception are corresponding provisions from the point of view of the accused.[83]

Two Conditions

Two conditions must be fulfilled for the application of s 90, IPC . First, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception.[84]

3. Twin Requirement of Section should be Cumulatively Satisfied

The second part of s 90 lays emphasis on the knowledge or reasonable belief of the person, who obtains consent, that the consent given by the victim is in consequence540 of fear of injury or misconception of fact. What is, however, of paramount importance to note is that the existence of the twin requirements of s 90 must be cumulatively satisfied in order to enable a court to hold that no consent in law existed at the relevant time. In other words, when these two conditions precedent are co-existent in a case, it can be safely held that no consent, as envisaged under the IPC, existed. Such a finding can be reached by examining as to whether the person, giving consent had given the same under fear of injury or misconception of fact and, further, whether the offender knew, or had reason to believe, that but for fear or misconception of fact, 'consent' would not have been given.[1]

4. Consent

According *Stroud's Judicial Dictionary*,[2]'Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side'.[3] Consent always means free will or voluntary act.[4]

Consent and Submission

However subtle may be, there is, indeed, a firm and fine distinction between 'consent' and 'submission'. Every 'consent' involves 'submission', but 'submission' is not 'consent'.[5]Submission of her body under the influence of fear or terror is not consent. There is a difference between consent and submission. Every consent involves a submission but the converse does now follow and a mere act of submission does not involve consent.[6] Mere absence of dissent or submission would not amount to consent.[7]

'Harm'

The word 'harm' is not synonymous with the word injury as defined by s 44 of the IPC . 'Harm' in this section is confined to physical injury only.[8]

Circumstances which Render a Consent Invalid

A 'consent' given under either of the following circumstances is not a true or valid contract under this section:

1. Under fear of injury or Under a misconception of fact.	and the person doing the act knows and has reason to believe that the consent was given under such fear or misconception.
2. By a person of unsound mind or a drunken person.	if he is unable to understand the nature and consequences of that to which he 'consents'.541
3. By a person under 12 years of age unless the contrary appears from the content.	

Fear of Injury

The word 'injury' denotes any harm whatever, illegally caused to any person in body, mind, reputation or property.[9] For the meaning of 'illegal' see s 43 of the IPC . 'Fear or injury' means fear of an injury other than that which, it is supposed, will be the result of the proposed course of action. *A* proposes to engage in a boxing match with *B*, *B* refused. *A* threatens to flog *B* with a stick, for being a coward, if he will not consent, *B* consents. In the course of the match *A* gives *B* a blow which causes him a 'black eye'. 'B's consent' not being a true one, *A* is not exempted from having caused *B* 'hurt'. The offence of rape may be committed, though the woman at last yielded to the violence, if her consent was forced by fear of death or by duress.[10] If non-resistance on the part of a prosecutrix proceeds merely from her being overpowered by actual force, or from her not being able, for want of strength, to resist any longer, or from the number of persons attacking her, she considered resistance dangerous and absolutely useless, the crime is complete.[11]

'Misconception of Fact'

Consent given under a misconception of fact is no consent.[12] In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. If a girl allows a person to have sexual intercourse with her on his promise that he would marry her, and, subsequently, he fails to keep his promise, it cannot be said that she consented for sexual intercourse under a misconception of fact. The matter would have been different if her consent was obtained by creating a belief in her that they are already married. In such a case, the consent can be said to result from a misconception of fact.[13] Where consent to remove timber was given on the understanding that the timber to be removed is timber covered by a licence when in fact it was not covered by a licence at all, there is no consent as is meant by s 378, IPC, and the removal of the timber is theft.[14] Where the accused, a snake-charmer, persuaded the

deceased to allow themselves to be bitten by a poisonous snake inducing them to believe that he had power to protect them from harm, the consent having been founded on a misconception of fact, and the accused knowing that the consent was given in consequence of such misconception, the accused was not protected by it.[15]Even if the consent was given under a misconception of fact, if the doer of the act did not know, or had a reason to believe, that the consent was given in consequence of the misconception, the consent would be valid and protect the doer of the act. When a full grown girl consented to sexual intercourse on a promise of542 marriage and continued to indulge in such act till pregnancy, it was held that consent on the part of the girl was not induced under misconception of fact.[16]

A promise to marry without anything more will not give rise to misconception of fact within the meaning of s 90 .[17]

In a Burma case, the deceased, a middle-aged man, believed himself to have been rendered *da*-proof by charms and asked the accused to try a *da* on his arm. The accused believed in the pretence of the deceased and inflicted a blow with a *da* with a moderate force with the result that the arteries were cut and the deceased bled to death. Here the deceased gave his consent to be cut under a misconception of fact erroneously believing that he was immune to *da* cuts. But it could not be said that the accused knew of the misconception or had reason to believe that the deceased was mistaken in thinking himself invulnerable. It was held that he was protected by ss 87 and 90 of the IPC .[18]

Sexual Intercourse with False Promise of Marriage and Misconception of Fact

It appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the IPC . But there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.[19] Accused appellant was alleged to have had sexual intercourse with the prosecutrix on the false promise to marry. This continued for a long period of six months. Accused held entitled to benefit of doubt and acquitted of charge under s 376, IPC .[20] If a woman, believing in the promise of marriage made by a man, consents to the promisor having sexual intercourse with her, the promisor would be liable for the offence of rape if the court finds, on examination of the materials on record, that the promise of marriage made by the promisor was really a hoax to obtain consent of the woman, for, such a consent given by the woman would not, in the light of the provisions of s 90, IPC, amount to consent in law and the sexual intercourse by such a promisor with a woman, so induced, would constitute an offence of rape.[21]

The accused must know at very inception itself that representation made by him is false and he also knows that the victim yielded believing that representation to be true.[22]543

The 'failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term 'misconception of fact', the fact must have an immediate relevance.' Section 90 , IPC cannot be called into aid in such a situation to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.[23]

Obtaining consent by exercising deceit cannot be legitimate defence to exculpate an accused.[24]

In the instant case, there was no evidence that bad act was committed by the appellant on the prosecutrix

against her consent or will or after promise for marriage. The prosecutrix remained in the company of the appellant and moved from one village to another village and from one town to another town for about one month and did not make any complaint against the appellant to anybody. She nowhere stated that she submitted herself because of promise made by the appellant to marry her and she was having full belief and faith upon the appellant that he will marry her. Held, it could not be said that the consent of the prosecutrix was obtained on misconception of fact. Appellant accused was acquitted of the charge under s 376, IPC .[25]

Fraudulent consent cannot be said to be a consent so as to condone the offence of the accused.[26] Promise to marry without anything more will not give rise to misconception of fact within the meaning of s 90 . A representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her will vitiate the consent.[27]

In the instant case, the prosecutrix came from lower rung of the society. Her father was a day labourer. She had read upto Class VI only. The appellant accused exploited the position by making her believe that he would marry her. Pinning faith on such repeated assurance, the prosecutrix consented to her having physical relationship with the accused. It was not a case of simple allurement or mere promise to marry. The accused hailing from a well to do family made her believe that their physical relationship would culminate in marriage. Plea of consent was rejected, and appellant accused was convicted under s 376, IPC .[28]

Misrepresentation as to Facts and Intention

It has been held that the expression 'under a misconception of fact' is broad enough to include all cases where the consent is obtained by misrepresentation leading to a misconception of the facts with reference to which the consent is given, and that a consent given on a misrepresentation of a fact, is not useful as a consent under the IPC .[29] A misrepresentation as to the intention of a person (in stating the purpose for which the consent is asked) is a misrepresentation of a 'fact' within the meaning of 544 s 3 of the Evidence Act .[30] But it is difficult to say that any misrepresentation of fact inducing consent would result in that consent not being a consent within the meaning of s 378, IPC, for in that case it is difficult to see what distinction can be drawn between the offence of theft and claiming property dishonestly by means of cheating.[31] If consent is given by the prosecutrix under a misconception of fact, it is not voluntary consent, and it is vitiated. Conviction of the accused under s 376, IPC was upheld.[32]

Accused was prosecuted on allegations that he threatened the prosecutrix, promised to marry her and committed rape on her. The prosecutrix was major, knew that the accused was already married and so the accused husband could not marry her. She also became pregnant. The court held that the consent of the prosecutrix was not under misconception of fact. The acquittal of the accused on charge under ss 376 and 417, IPC recorded by court below was proper.[33]

Where the prosecutrix and the accused continued sex for a long period, and she never resisted the overtures of the accused appellant for a long time, she freely exercised a choice between resistance and assent. Further, the evidence showed that the prosecutrix was well aware that the accused was already married and had children. Furthermore, no marks of violence were found on her person. Thus, held that there was no misconception of fact/misrepresentation by the accused, and since it was a case of consensual sex, accused could not be convicted on the charge of rape under s 376, IPC .[34]

Consent Obtained by Fraud

A consent obtained by fraud, or threats, or violence, is no answer to proceedings for assault. Where the defendants told the mother of a newborn infant that it was to be taken to a nursery or institution to be brought up, and they put the child in a bag and hung it upon some park-poles at the side of a footpath, and it was likely that the putting a child of so tender an age into a bag and hanging the bag on the poles would cause its death, Tindal CJ held that the defendants were guilty of an assault, for the mother gave consent in reliance on the pretence that the child was to be taken to some institution, and as that pretence was false, it was no consent at all.[35] Obtaining consent by exercising deceit does not exculpate an accused of

the charge of rape.[36]

A has connection with *B*, a married woman who permits the act, because owing to *A's* fraud she believes him to be her husband. This misconception of fact prevents *B's* consent being a valid one, and *A* is guilty of rape (refer to s 375 'fourthly').[37] 'A man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape'.[38]545

Submission to an act of carnal intercourse by a quack doctor on the faith of his statement that he was performing a surgical operation was held not to amount to consent, and he was convicted of rape.[39]

Consent must be with Full Knowledge of Risk

Consent under the IPC is not valid if obtained by either misrepresentation or concealment, and implies not only a knowledge of the risk but a judgment in regard to it, a deliberate free act of the mind. In other words, before exception 5 to s 300 can be applied, it must be found that the person killed, with a full knowledge of the facts, determined to suffer death or take the risk of death, and this determination continued up to and existed at, the moment of his death.[40] Where the accused alleged to have promised the victim to marry her and thereafter consent was given by her to have sexual intercourse with him, the fact that at the time of occurrence the victim was an adult, was not disputed, evidence on record showed that accused sincerely wanted to marry victim but his parents were against it, it could be said that accused never practised any deception upon the complainant nor did he make any attempt to create some false conception of facts in mind of the complainant. On these facts it was held that accused neither committed the offence of rape nor any offence of cheating as defined in s 375 and 420, IPC respectively.[41] An accused pleading consent as a defence must show that the person consenting did know what risk he was undertaking. A patient can hardly be said to accept a risk of which he is not aware. A doctor pleading consent to an operation that might prove fatal must show that the patient did accept the risk and that, consequently, he was aware of it.[42]

Consent of Persons of Unsound Mind and Under Intoxication

An idiot is a person who from birth has never had any reason, is obviously unable to understand the nature and consequences of his conduct. Thus *A* has connection with B, an idiot, who by reason of her idiocy submits to the act. *A* is guilty of rape.[43] In the case of surgical operations, and the like, the consent of the guardian or person having lawful charge of a lunatic or drunken person, should, if possible, be obtained.[44] Persons should not run the risk of acting upon a 'consent' given by such sufferers under s 88, IPC ; for though such a consent might be good, it might turn out to be bad, on the ground that the nature and consequences of the act 'consented' to were not as a fact understood.

Consent of Children under 12 Years of Age

The consent of children under 12 years of age is quite immaterial. It is to be borne in mind that under this section, the legislature did not purport to enact that a child under 12 years of age could not in fact consent to an act or a course of conduct, but provided that in sections of the IPC in which reference is made to consent, the consent of a child under 12 years of age, unless the contrary appears from the context, is not such a consent as should afford a defence to a criminal charge.[45]546

'Unless the Contrary Appears From the Context'

As explained by s 6 of the IPC, every definition or penal provision contained in this Code is to be understood subject to the exceptions contained in ch 4, as a measure of abundant precaution the expression 'unless the contrary appears from the context' has been used in the last para of this section to denote that unless a different age is provided by any other provision of the Code, the consent given by a person who is under 12 years of age is not a valid consent. Originally the age of 10 years was considered sufficient and provided in clause 'fifthly' of s 375 to consent for sexual indulgence. It was raised to 12 years by s 1 of the Criminal Law (Amendment) Act, 10 of 1891; to 14 years by s 2 of the Amendment Act 29 of 1925, and to 16 years by s 3 of Amendment Act 42 of 1949. The exception provided by s 90 is thus now no more applicable to the offence of rape after the amendment of 1949 as in view of the sixth clause

of s 375 a girl above 12 years and below 16 years of age cannot give a valid consent for having sex.

The expression 'unless the contrary appears from the context' applies only to the provisions of para 3 of the section relating to the age of the child and has nothing to do with the other provisions of this section.

77 Indian Contract Act 1872, s 13 .

78 *Stephen's Digest of Criminal Law*, art 224 .

79 Indian Penal Code 1860, s 375 ; *R v Fletcher* (1859) 8 Cox CC 131, 7 WR 20 .

80 *Khallilur Rahman v Emepror* AIR 1933 Rang 98, p 101 (FB) .

81 *Dasrath Paswan v State of Bihar* AIR 1958 Pat 190 ; *Queen v Anunto Rumagat* 6 WR (Cr) 57 .

82 *Satpal Singh v State of Haryana* 2010 Cr LJ 4283, p 4289 (SC), 2010 AIR SCW 4951, (2010) 3 SCC (Cri) 1081, 2010 (7) Scale 322 .

83 *Md Jakir Ali v State of Assam* (2007) Cr LJ 1615 (Gau)

84 *Uday v State of Karnataka* AIR 2003 SC 1639, (2003) Cr LJ 1539 (SC) .

1 *Md Jakir Ali v State of Assam* (2007) Cr LJ 1615 (Gau) ; **See also***Jose Thettayil v Station House Officer* 2013 (3) KLT 552 (Ker) .

2 *Stroud's Judicial Dictionary*, fifth edn, p 510.

3 *Uday v State of Karnataka* AIR 2003 SC 1639, (2003) Cr LJ 1539 (SC) .

4 *Ibid*.

5 *Md Jakir Ali v State of Assam* (2007) Cr LJ 1615 (Gau) ; *Laddoo Singh v State of Punjab* 2008 Cr LJ 2885 (P&H) (DB) ; *Rao Harnarani Singh v Sheoji Singh* AIR 1958 Punj 123, 1958 Cr LJ 563 .

6 *Rao Harnarain Singh v State* AIR 1958 Punj 123, (1958) Cr LJ 563 ; *Uday v State of Karnataka* AIR 2003 SC 1639, (2003) Cr LJ 1539 (SC) .

7 *Jose Thettayil v Station House Officer* 2013 (3) KLT 552, 2013 (3) KLJ 646 .

8 *Durga Charan v State of Orissa* AIR 1966 SC 1775, (1966) Cr LJ 1491 .

9 Indian Penal Code 1860, s 44 .

10 1 Hawk C 41, s 6 ; 1 East PC 444; *Bhimrao Harnooji Wanjari v State of Maharashtra* (1975) Mah LJ 660 (DB) .

11 *R v Hallett* (1941) 9 C&P 748 ; *R v Jones* (1861) 4 LT 154 (NS) .

12 *Purshottam Mahadev v State of Maharashtra* AIR 1963 Bom 74, (1963) 1 Cr LJ 573 ; *Sat Pal Singh v State of Haryana* 2010 Cr LJ 4283, (2010) 3 SCC (Cri) 1081, (2010) 8 SCC 714, 2010 (7) JT 500, 2010 (7) Scale 322 .

13 *Jayanti Rani Panda v State* (1984) Cr LJ 1535 (Cal), (1983) 2 Cal WN 290 (Cal) .

14 *Maung Ba Chit v Emperor* AIR 1930 Rang 114, p 121 .

15 *Queen v Poonai Fattemah* 12 WR (Cr) 7 .

16 *Sukumar Ghosh v State* (1985) 2 Crimes 377 (Cal) .

17 *Pradeep Kumar Verma v State of Bihar* 2007 Cr LJ 4333, p 4337 (SC), AIR 2007 SC 3059, (2007) 7 SCC 413 .

18 *Nga Shew Kin v Emperor* AIR 1930 Rang 114, p 120 .

19 *Uday v State of Karnataka* AIR 2003 SC 1639, (2003) Cr LJ 1539 (SC) .

20 *Sandeep Kaniram Rathod v State of Maharashtra* 2011 Cr LJ (NOC) 196 (Bom) .

21 *Bipul Medhi v State of Assam* 2008 Cr LJ 1099, p 1108 (Gauh) (DB) .

22 *Jose Thettayil v Station House Officer* 2013 (3) KLT 552, 2013 (3) KLJ 646 .

23 *Deepak Gulati v State of Haryana* AIR 2013 SC 2071, 2013 Cr LJ 2990, p 2996 (SC), 2013 (7) Scale 383 .

24 *Karthi v State* 2013 Cr LJ 3765, 2013 AIR SCW 4315 (SC) (Offence of rape).

25 *Vinod Mangilal v State of Madhya Pradesh* 2009 Cr LJ 1204, p 1206, 1207 (MP) .

26 *Yedly Srinivasa Rao v State of UP* 2007 (1) SCC (Cr) 557, 2006 (Supp-6) SCR 760, (2006) 11 SCC 615, 2006 (9) Scale 692 .

27 *Pradeep Kumar Verma v State of Bihar* 2007 Cr LJ 4333, AIR 2007 SC 3059, (2007) 7 SCC 413 .

28 *Swapan Chatterjee v State of West Bengal* 2009 Cr LJ 16, p 19 (Cal) (DB) .

29 Re *N Jaladu*AIR 1941 Mad 49, p 50, 15 Cr LJ 24 ; *R v Hanmanta* (1877) 1 ILR Bom 610 ; *Purshottam Mahadev v State* AIR 1963 Bom 74, (1963) 1 Cr LJ 573, p 575 .

30 Re *N Jaladu*AIR 1914 Mad 49, p 50, 36 ILR Mad 453, p 456 ; **followed** in *Emperor v Soma* AIR 1916 Lah 414 .

31 *Maung Ba Chit v Emperor* AIR 1930 Rang 114, p 120 .

32 *State of UP v Naushad* AIR 2014 SC 384, (2014) 6 SCC (Cri) 364, (2014) 1 All LJ 450, 2014 Cr LJ 540 .

33 *State v Muniyappa* 2012 Cr LJ (NOC) 183 (Kar) (DB); *Uday v State of Karnataka* AIR 2003 SC 1639, 2003 Cr LJ 1539, 2003 (2) Scale 329, (2003) 4 SCC 46**relied on**.

34 *Babu v State of Kerala* 2013 Cr J 4286, p 4298 (Ker) (DB) .

35 *Russell on Crime*, eleventh edn, pp 754-55, **relying on***R v March* (1844) 1 C&K 496 ; *R v Sandas* (1938) 8 C&P 265 ; *R v Williams* (1858) C&P 286 .

36 *Karthi v State* 2013 Cr LJ 3765, 2013 AIR SCW 4315 (SC), AIR 2013 SC 2645, (2013) 12 SCC 710 .

37 *R v Barrow* LR 1 CCR 156 ; under English law before 1885, *A* would only have been guilty of an indecent assault. But by 48 and 49 Vict c 69, s 4, such an act is made rape.

38 Section 1(2) of the Sexual Offences Act 1956 (4 and 5 Eliz 2) C 69.

39 *R v Flattery* 1877 2 QBD 414 ; *R v Williams* 1923 1 KB 340, **overruling***R v O'Shay* (1898) 19 Cox 76, and **affirming***R v Flattery* to be still good law.

40 *Queen-Empress v Nayamuddin* 18 ILR Cal 484, p 492 (FB), per O'Kinealy J.

41 *Abhoy Pradhan v State of West Bengal* (1999) Cr LJ 3534 (Cal)(DB).

42 *Sukaroo Kobiraj v Empress* 14 ILR Cal 566, p 568 .

43 *R v Barratt* LR 2 CCR 81 ; *R v N Fletcher Bell CC 63,* 28 LJ (MC) 85 ; *R v Camplin* 1 Den CC 89 .

44 Indian Penal Code 1860, s 89 .

45 *Khalilur Rahman v Emperor* AIR 1933 Rang 98, p 101 (FB), 34 Cr LJ 696 (FB) .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 91.

Exclusion of acts which are offences independently of harm caused.--

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

Illustration

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence 'by reason of such harm'; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

Comments

1. Scope

This section is a sort of exception to the exceptions contained in ss 87 - 89, IPC . These sections have no application of acts which are offences (*i.e.*, punishable under the IPC, or under any special or local law) independently of any harm that they may cause. Each of these sections is by its terms limited to acts which are offences 'by reason of any harm'. This section has now to be read with the provisions of the Medical Termination of Pregnancy Act 1971.547

2. 'Harm'

The word 'harm' is not synonymous with the word injury as defined by s 44 of the IPC . 'Harm' in this section is confined to physical injury only.[46]

3. Overriding Effect of the Medical Termination of Pregnancy Act 1971

Section 3 of the Medical Termination of Pregnancy Act 1971, permits the causing of miscarriage or termination of pregnancy by registered medical practitioners under the conditions and circumstances enumerated in sub-s (2) of that section. The provisions of that Act have overriding effect. The illustration to this section and the provisions of ss 312 - 316 of the IPC, therefore stand modified to the extent contrary provisions have been made in Act 34 of 1971. The relevant extract of ss 3(1) and 5(2) of the said Act are reproduced below:

> **3. When pregnancies may be terminated by registered medical practitioner.--**(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
>
> ...
>
> **5. (2)** Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

...

46 *Durga Charan v State of Orissa* AIR 1966 SC 1775, (1966) Cr LJ 1491 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 92.

Act done in good faith for benefit of a person without consent.--

Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit:

Provisos--*Provided--*

First.	--	That this exception shall not extend to the intentional causing of death, or the attempting to cause death;
Secondly.	--	hat this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;548
Thirdly.	--	That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the pre-venting of death or hurt;
Fourthly.	--	That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustrations

(a) *Z* is thrown from his horse, and is insensible. *A*, a surgeon, finds that *Z* requires to be trepanned. *A*, not intending *Z*'s death but in good faith, for *Z*'s benefit, performs the trepan before *Z* recovers his power of judging for himself. *A* has committed no offence.

(b) *Z* is carried off by a tiger. *A* fires at the tiger knowing it to be likely that the shot may kill *Z,* but not intending to kill *Z,* and in good faith intending *Z*'s benefit. *A*'s ball gives *Z* a mortal wound. *A* has committed no offence.

(c) *A*, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. *A* performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. *A* has committed no offence.

(d) *A* is in a house which is on fire, with *Z,* a child. People below hold out a blanket. *A* drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here even if the child is killed by the fall, *A* has committed no offence.

Explanation.--Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92 .

Comments

1. Scope

Sections 92 and 93 deal with cases of what may be termed constructive consent, *i.e.*, cases where, owing to certain urgent reasons, consent, in fact, is altogether dispensed with, but is given by construction of law, the result being that the person causing the harm is exempted from liability.

The essence of s 92 is that if it is impossible for a person to give consent under s 88, or, being an incapable person, under s 89, it is impossible to obtain in time the consent of his lawful custodian under that section, then, the person, desiring to act, bona fide for his benefit, may proceed to do so without obtaining consent.

Illustrations (a) and (b) are illustrations of cases where an ordinary person is unable to consent, *i.e.*, consent is impossible. Illustrations (c) and (d) illustrate cases where persons are legally incapable of giving consent and have no custodian at hand to do so.549

The most familiar illustration of this section is that of the surgical operation [refer to illust (c) to the section]. Consent to a surgical operation frees the operator from criminal responsibility for assault, when freely given with knowledge of the purpose of the operation and when the purpose is lawful and the operation is performed with professional skill. And the trend of legal opinion is in favour of the proposition that no criminal responsibility should be incurred by a surgeon who, with proper care and skill, and for the physical benefit of a sick person, performs on him a surgical operation even without his consent. By the English Draft Code of 1880, cl 68:

> Everyone is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit: provided that performing the operation was reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

The proposition contains no direct reference to the consent or dissent of the patient. It was accepted as the law by Sir JF Stephen.[47] It corresponds to part of this section, and has been embodied in the Criminal Code of Canada,[48] New Zealand,[49] Queensland,[50] Western Australia,[51] and Northern

Nigeria.[52]

2. Object

The object underlying this section and ss 88 and 89, is to provide protection to the medical practitioners in the larger interest of the society. Under the terms of these sections life may be risked for the purpose of saving life, and pain inflicted for the purpose of relieving pain.

3. Difference between Sections 89 and 92

The terms of s 92, IPC are almost identical with those of s 89, IPC ; but they differ in one aspect. Section 89 ('thirdly') speaks of 'grievous hurt' while ' s 92 ' ('thirdly') speaks of 'hurt'. The effect is that whereas under s 89 grievous 'hurt' may be caused, so long as the doer is acting in good faith for the benefit of the child and lunatic, under s 92 he can only cause 'hurt' (and *a fortiori* 'grievous hurt' if, in addition, he does so in order to prevent death or hurt) thus, a schoolmaster chastising a pupil would not be justified under this section, but under s 89 .

4. 'Harm'

Commentary on this heading under s 87, *ante*, may be referred to.

5. 'Benefit'

As indicated by the illustrations, the benefit, contemplated in ss 88, 89 and 92 is something physical, and not merely a fancied intangible one, such as the attainment550 of greater spiritual excellence. It does not include pecuniary benefit.[53] The real object of these three sections is the protection of medical practitioners; under the terms thereof life may be risked for the purpose of saving life, and pain inflicted for the purpose of relieving pain.

6. 'Good Faith'

Commentary under s 52, *ante*, may be referred to.

7. Two Rules as to Knowledge and Skill of Medical Practitioner

Two rules should be remembered in connection with this topic:

(i) The skill required is not the highest possible skill, but a fair, reasonable and competent degree of skill,[54] but grossly unskillful or incautious use of remedies which result in death render the practitioner guilty of manslaughter or culpable homicide.[55] The want of competent skill of a nature less serious than this renders the practitioner liable in damages.[56]

(ii) The fact of a practitioner not being duly qualified as a doctor makes no difference as regards his liability;[57] though the advantage of a recognised diploma is that a court would naturally consider it strong *prima facie* evidence of sufficient skill. The question is one for a court to decide.[58]

47 *Stephen's Digest of Criminal Law*, sixth edn, art 226 .

48 Rev Statt Can, 1906, C 146, s 65 .

49 1893, No 56, s 69 .

50 1899, No 9, s 282 .

51 1901, No 14, s 257 .

52 *Russell on Crime*, eleventh edn, p 756.

53 *R v Baboolun Hizrat* 5 WR (Cr) 7 .

54 *R v Spiller* 5 C&P 333 .

55 *Lanphier v Phipos* 8 C&P 475 ; *Rich v Pierpont* 3 F&F 35 .

56 *R v Spilling* 2 M&Rob 107 ; *R v Webb* 1 M&Rob 405 ; 2 Lewin, CC 196; *R v Markuss* 4 F&F 356 ; *R v Croik* 1 F&F 521 ; *R v Crick* 1 F&F 519 ; *R v Williamson* 3 C&P 635 . As to criminal negligence in a medical man generally; *Commonwealth v Pierce* 138 Mass 165, 52 Am R 264, 42 Am R 5 .

57 *R v Van Butcheel* 3 C&P 629 .

58 I Hale PC 429; *R v Crick* 1 F&F 519 ; *Ruddock v Lowe* 4 F&F 519 ; *Jones v Fay* 4 F&F 525 ; *R v Spiller* 5 C&P 333 ; *R v Simpson Lewin* CC 172; *R v Ferguson* 1 Lewin CC 181 ; *Sukaroo v R* 14 ILR Cal 566 ; *R v Van Butchell* 3 C&P 629 ; *R v St John Long* 4 C&P 398 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 93.

Communication made in good faith.--

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

Illustration

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. *A* has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

Comments

1. Pre-requisites

The essentials of non-liability under this section are 'good faith', *i.e.*, 'due care and attention'[59] and 'benefit'. It is not easy what meaning the latter word bears in this551 section. The illustration shows that the benefit need not be a physical one. There is nothing to confine the exemption under this section to medical practitioners. The communication may be of any kind. For the meaning of the word 'harm', synopsis under s 87 may be referred to.

59 Indian Penal Code 1860, s 52 .

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 1/Chapter IV General Exceptions/S. 94.

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 94.

Act to which a person is compelled by threats.--

Except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1.--A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.--A person seized by a gang of dacoits, and forced, by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

Comments

1. Scope

This section deals with compulsion and necessity as a defence, and is based on the law of England.[60]Compulsion is of two sorts, it either arises from the act of an authority which, rightly or wrongly, has for the time being superseded the government of the country, or from the acts of private persons, who, without any show of legality, proceed in open defiance of law. Section 94 appears to refer exclusively to this latter class of cases.[61]

A person may be compelled to do an act by physical force or by threats or moral force. A person compelled by physical force to do an act which, if voluntarily done,552 would be a crime, is free from criminal responsibility, but the person compelling him is criminally liable.[62] Thus, *A,* by overpowering force takes the hand of *B* in which is a weapon, and therewith kills *C. B* is not criminally liable, because it was not his act, but was the act of *A.* In modern law the defence would be based on the absence of the mental element of free will.[63] This section does not deal with such a case. It deals only with compulsion by threats or moral force.

With regard to acts done under compulsion by threats, Sir James Stephen said:

> Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty, and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder: 'If you do it, I will hang you'. Is the law to withdraw its threats if some one else says: 'If you do not do it, I will shoot you?
>
> Surely, it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course, a misfortune for a man that he should be placed between two fires, but it would be much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands. If impunity could be so secured, a wide door would be opened to collusion and, encouragement would be given to associations of malefactors, secret or otherwise. Not doubt the moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment.
>
> These reasons lead me to think that compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may and ought to operate in mitigation of punishment in most, though not in all, cases. If a man chooses to expose, and still more if he chooses to submit, himself to illegal compulsion, it may not operate even in mitigation of punishment. It would surely be monstrous to mitigate the punishment of a murderer on the ground that he was a member of a secret society by which he would have been assassinated if he had not committed the murder.[64]

But under this section compulsion by threats is a good defence in the cases covered by it. For compulsion to be a defence under this section: (a) the fear induced must be reasonable; (b) it must be fear of instant death, and (c) to the person himself.

2. Canadian Law

The common law defence of necessity by extraneous circumstances is not available where its role would be to legitimise conduct which is contrary to the clear legislative policy and scheme adopted in relation to controlled drugs.[65]553

The defence of necessity is narrow and of limited application in criminal law. The accused must establish the existence of the three elements of the defence. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.[66]

3. English Law

Legislative scheme did not permit defence of necessity in circumstances of child abduction.[67] The defence of necessity is not available to the offences of complicity in another's suicide or murder in the form of euthanasia.[68]

4. Murder Excepted

No duress excuses the taking of an innocent life.[69] In the case of murder, compulsion by threats is no defence at all, and it is not even an extenuating circumstance.[70] Even marital duress is no defence to a charge of murder against a wife. 'On a charge against a wife for any offence other than treason or

murder, it is a good defence to prove that the offence was committed in the presence of, and under the coercion, of the husband'.[71] But the word 'murder' in s 94 does not include abetment of murder punishable under s 109, IPC .[72] Thus, where a person abets murder by holding the legs of the deceased under threat of being himself killed if he refused to do so, he commits no offence in view of the provisions of this section.[73]

5. Offences Against State Punishable with Death also Excepted

Waging or attempting to wage war, or abetting waging war, against the Government is, under s 121, IPC, an offence against the State punishable with death. Under s 94, therefore, compulsion is no defence to a charge under s 121 .[74]

In this respect the law in India as laid down in this section differs from the rule laid down in the English case of *R v Mc Growther* .[75] In that case the prisoner was accused of high treason, and raised the defence of duress in that he had been forced to join the rebel forces under threats of burning his house and laying waste all that554 belonged to him. Chief Justice Lee, in summing up, observed that the fear of having houses burnt, or goods spoiled, is no excuse in the eye of the law for joining and marching with rebels.

> The only force that doth excuse, is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defence, to show an actual force, and that he quitted the service as soon as he could. Mc Growther was convicted but not executed.[76]

But in India, although compulsion cannot be pleaded by way of defence to a charge under s 121, IPC, the same may be considered in determining the punishment that ought to be inflicted.[77]

Threat Must Reasonably Cause Apprehension of Instant Death

To obtain the benefit of the exception allowed by this section, it must be shown that the prisoners were compelled to act, as they did from apprehension that their instant death would be the consequence of a refusal.[78] In less serious cases coercion can only be pleaded in mitigation of punishment.[79]

Justification of Act in Fear of Instant Death Explained

With regard to the general rule taken from the English law and enacted as s 94, that no fear, except of instant death, justifies a criminal, in note B to the First Draft of the Penal Code, Macaulay says:

> We cannot count on the fear which a man may entertain of being brought to the gallows at some distant time as sufficient to overcome the fear of instant death. But the fear of remote punishment may often overcome the motives which induce a man to league himself with lawless companions in whose society no person who shrinks from any atrocity that they may command can be certain of his life. Nothing is more usual than for pirates, gang-robbers and rioters to excuse their crimes by declaring that they were in dread of their associates, and durst not act otherwise. Nor is it by any means improbable that this may often be true. Nay, it is not improbable that crews of pirates and gangs of robbers may have committed crimes which everyone among them was unwilling to commit, under the influence of mutual fear. But we think it clear that this circumstances ought not to exempt them from the full severity of the law.

> A man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime.[80]555

Fear to Continue till Offence Committed

The fear must continue until the offence is completed. Thus, where in a case under s 201, IPC, the accused pleaded that they took away the body of a murdered man to the jungle and threw it in a ravine as a sub-inspector of police threatened to shoot them if they refused, but they admitted that the sub-inspector accompanied them only for a short distance and then left them, it was held that the accused were not protected by s 94, IPC, as the offence under s 201 was not completed till they had disposed of the body in a place where it was not likely to be discovered soon, and the apprehension of death ceased long before that, when the sub-inspector left them.[81]

Fear Must be to the Person Himself

The fear of instant death must be to the person himself and not to another. *A* and *B* are taken prisoners by brigands. *A* is informed that unless he joins them in a contemplated robbery, his companion *B* (who is ill and unable to move) will be shot. *A* joins in the robbery. His act is a crime.

6. Necessity

Necessity, in the sense of compulsion arising from hunger or from imminent danger to a person's own life or property, is no excuse for crime.[82] In *R v Dudley and Stephens* ,[83] the defence of necessity was rejected on the ground of the difficulties and danger of framing and accepting a general defence of necessity in such a situation as this. Stephen[84] said, 'It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand'.

Limits of Application of Doctrine of Necessity

The limits of the application of the doctrine of necessity as an excuse for an act otherwise criminal are those prescribed in this section.[85] The apprehension must be of instant death. Fear of injury to house or goods, or apprehension of personal violence, short of death, is no excuse whatever.[86] Mere threats of 'burning his house and laying waste of all that belonged to him' are not sufficient.[87]

A was charged with giving false evidence. His plea that he was coerced into doing so by a police inspector was not accepted.[88]556

Certain witnesses, in order to avoid apprehended pecuniary injury and personal molestation, offered or gave bribes to a public servant. It was held that they were abettors of the offence of taking illegal gratification and that their fears were no defence.[1]

The fear must be of instant death. *A,* a member of a secret society, is instructed to throw an explosive bomb at a high official whilst driving in a street. By the rules of the society any member failing to obey its orders is liable to be, and is invariably put to death. *A* throws the bomb. *A's* act is a crime.

A, in the last illustration, is accompanied by some members of the society who threaten to immediately assassinate him if he does not throw the bomb as directed. *A* throws it. His act is not a crime. But if he voluntarily joined the society, the case would fall under the proviso to the section and his act would be a crime.

7. Proviso

If a man voluntarily joins a society in which he is subsequently the victim of coercion, he cannot plead

s 94 in defence.[2] Where an accused did, of his own accord, place himself in the situation by which he became subject to the threats of another owing to which he alleged that he committed the offence of robbery, the provisions of this section can avail him nothing.[3]

8. Burden of Proof

Where a person is accused of an offence, the burden of proving the existence of the circumstances, bringing the case within any of the general exceptions, provided in this Code, or within any special exception or proviso, contained in any part of the Code, or in any other law defining the offence, is upon him and the court shall presume the absence of such circumstances.[4] The same applies to the defence of compulsion, contemplated in this section where it is sought to rely on compulsion as a defence, the accused must show a proper foundation for the same. But once it is done, it is for the prosecution to establish, beyond a reasonable doubt, that the defence is not made out.[5]

60 *Queen-Empress v Magan Lal and Motilal* 14 ILR Bom 115 .

61 *Mayne's Criminal Law of India*, para 210.

62 *Halsbury's Laws of England,* vol 10, third edn, Butterworths, London, p 290 citing 1 Hale PC 434 and *R v Bourne* (1952) 36 Cr App Rep 125, p 128 .

63 *Russell on Crime*, eleventh edn, pp 92-93.

64 *Stephen's History of Criminal Law*, vol 2, p 107 cited with approval in *Aung Hla v Emperor* AIR 1931 Rang 235, p 241 (SB) in the case of an offence under s 121, Indian Penal Code 1860.

65 *R v Quayle* , *A-G's Reference* (No 2 of 2004) 2005 EWCA Crim 1415. [*Halsbury's Laws of Canada*].

66 *R v Latimer* 2001 SCJ No 1 [*Halsbury's Laws of Canada*].

67 *R v S(C)* 2012 EWCA Crim 389, 2012 1 WLR 3081, 2012 All ER (D) 06 (Mar) .

68 *R (on the application of Nicklinson) v Ministry of Justice; R (on the application of AM) v DPP* 2013 EWCA Civ 961, 2014 2 All ER 32**(affirmed in part**), 2014 UKSC 38, 2014 3 All ER 843. [*Halsbury's Laws of England*]

69 1 Hale PC 434; *R v Bourne* (1952) 36 Cr App Rep 125, p 128 .

70 *Emperor v Itwa Munda* AIR 1938 Pat 258 ; *Killikyatara Boma v Emperor* 14 Cr LJ 207, 1912 MWN 1108 .

71 *Halsbury's Laws of England*, vol 10, fourth edn, Butterworths, London, 1976, p 292.

72 *Umadasi v Emperor* AIR 1924 Cal 1031, 26 Cr LJ 11 ; *Karu Masukh Gond v Emperor* AIR 1937 Nag 254 ; *Bachchan Lal v State* AIR 1957 All 184, (1957) Cr LJ 344 .

73 *Umadasi v Emperor* AIR 1924 Cal 1031, 26 Cr LJ 11 .

74 *Aung Hla v Emperor* AIR 1931 Rang 235, p 241 (SB), 33 Cr LJ 205 .

75 *R v Mc Growther* Special Comuriss 1746; Foster 13, 18 St Trials 391.

76 *Russell on Crime*, eleventh edn, p 97.

77 *Aung Hla v Emperor* AIR 1931 Rang 235, p 241 (SB), 33 Cr LJ 205 .

78 *Queen v Sonoo* 10 Wr Cr 48 ; *Queen-Empress v Magan Lal* 14 ILR Bom 115 ; *Queen-Empress v Latif Khan* 20 ILR Bom 394 .

79 *Queen-Empress v Latif Khan* 20 ILR Bom 394, p 403, per Renade J.

80 *Queen v Dudley & Stephens* 14 QBD 273, p 288, per Lord Coleridge CJ.

81 *Mirza Zahid Beg v Emperor* AIR 1938 All 91, 93; *R v Mcgrowther* 18 St Tr 391 .

82 *Halsbury's Laws of England*, fourth edn, p 291; Butterworths, London, 1976; *Russell on Crime*, eleventh edn, pp 98-100.

83 *R v Dudley and Stephens* (1884) 14 QB 273 .

84 *History of Criminal Law*, vol 2, p 109.

85 *Queen-Empress v Maganlal and Motilal* 14 ILR Bom 115 .

86 1 Russ, 19; *R v Tyler* 8 C&P 620 .

87 *R v Mc Growther* 18 St Tr 391 ; Foster 13.

88 *R v Sonoo* 10 WR (Cr) 48 ; *R v Gonowri* 22 WR (Cr) 2 .

1 *R v Maganlal* 14 ILR Bom 115 .

2 *R v Ismail Hasan* 1 Cr LJ 282 .

3 *Sanalydo v Emperor* AIR 1933 Rang 204 .

4 Section 105 of the Indian Evidence Act 1872.

5 *Halsbury's Laws of England*, vol 11, fourth edn, Butterworths, London, 1976, p 25, para 24; *Emperor v Autai* AIR 1925 All 315, 26 Cr LJ 676, p 677 (accused held entitled to benefit of doubt) .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 95.

Act causing slight harm.--

Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.557

Comments

1. Scope

One of the first principles of law is *de minimis non curat lex*(law does not take account of trifles). This has found expression in this section, which lays down that an act which causes only a slight harm is not an offence.[6] This provision is unknown to the English law, under which such cases are left to the discretion of the court. In India, however, the section is useful owing to the extreme fondness of the people for setting the criminal law in motion against one another on the most trivial occasions. In practice the largest fees seem sometimes to be paid in the most trumpery prosecutions. Trifling acts may also sometimes wound susceptibilities which have their origin in religion and in caste.[7]

As stated above this section is founded on the maxim of *de minimis non curat lex* (the law does not take account of trifles). The reason is that intercourse in civilised society will come to an end if for certain for such trifle offence a person is exposed to criminal prosecution. The section is intended to provide for those cases which though, from the imperfections of language, they fall within the letter of

the penal law, are yet not within its spirit, and are all over the world considered by the public, and for the most part dealt with by the tribunals, as innocent. According to this maxim the courts of justice generally do not take trifling and immaterial matters into account except under peculiar circumstances. Courts will not, for instance, take notice of fraction of a day except in cases where there are conflicting rights, for the determination of which it is necessary that they should do so. There are some injuries of so little consideration in the law that no action will lie for them.[8]

2. Object

The object of this section is 'to exclude, from the operation of the Penal Code, those cases which, from the imperfection of language, may fall within the letter of the law, but are not within its spirit'.[9] This section is intended to exempt, from criminality, offences, which from their triviality, do not deserve the name of crimes558 even though, in one sense, they are crimes because they fall within the definition of crimes, and, but for this section, the said crimes are punishable.[10] Where the allegations, in the complaint, amount, at the most, to some technical offence, the matter would be covered by this section.[11] Even intentional causing of harm, specified in the section, is excused if it is a trivial one.[12]If the harm, caused by an act, is so small that no man of ordinary sense and temper would complain of it, the act does not amount to an offence.

With regard to this section, which was cl 73, the authors of the Code observed:

> Clause 73 is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public, and for the most part dealt with by the tribunals, as innocent. As our definitions are framed, it is theft to dip a pen in another man's ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, hurt to incommode him by pressing against him in getting into a carriage. There are innumerable acts without performing which men cannot live together in society, act which all men constantly do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evident, and we think it far better expressly to except them from the penal clauses of the Code than to leave it to the judges to except them in practice; for if the Code is silent on the subject, the judges can except these cases only by resorting to one of two practices which we consider as most pernicious, by making law, or by wresting the language of the law from its plain meaning.[13]

3. Section not Applicable Unless Act is Otherwise an Offence

This section would not apply unless the act, complained of, amounts to an offence either under this Code,[14] or under any special or local law,[15] but for the operation of this section.

'Offence' means act punishable under this Code or under any special or local law (s 40).

4. 'By Reason that it Causes any Harm'

Some acts are made offences independently of any harm that they may cause *mala prohibita, e.g.*, being intoxicated in a railway or railway station[16] or the abetment of559 an offence, though no offence is, in fact, committed.[17] To such offences this section has no application.[18] Other acts are offences on account of the harm caused thereby *mala in se,* and, to such offences, this section applies.

There is no doubt that if the harm is so light that no person of ordinary sense and temper would complain of it, is only excluded by s 95 of the IPC . A case where a poisonous drug like copper sulphate was administered to a child of about 15 years which caused severe vomiting and diarrhoea will certainly come under the definition of hurt under s 319 of the IPC : 'It was the grace of God, that the condition of the complainant did not deteriorate further and he was saved. But it cannot be said

that this is such a harm which can be ignored...'.[19]

5. 'Harm'

The expression 'harm' has not been defined in this Code. In its dictionary meaning, it connotes hurt, injury, damage, impairment, moral wrong or evil. This expression is used in many sections of the IPC . In ss 81, 87 - 89, 91, 92, 100, 104 and 106, this expression means physical injury. In s 93, it means an injurious mental action. In s 469 and 499, 'harm', it is plain from the context, means to cause damage to the reputation of the aggrieved party. There is nothing in this section which warrants a restricted meaning of 'harm'. This section is a general exception and if the expression has, in many other sections, dealing with general exceptions, a wide connotation, including physical injury, there is no reason to suppose that the legislature intended to use the expression 'harm' in this section, in a restricted sense.[20]

6. Slight Harm

This section, as already mentioned above is intended to prevent penalisation of negligible wrongs or offences of trivial character. Whether an act, which amounts to an offence, is trivial, would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act is done and other related circumstances.[21]There can be no absolute standard or degree of harm which may be regarded as so slight that a person of ordinary sense and temper would not complain of the harm. It cannot be judged solely by the measures of physical or other injury which the act causes.[22] Where the complaint itself contains560 allegations of a petty nature, of which hardly any cognisance can be taken, no criminal proceedings should be taken.[23]

It is an offence under the Arms Act to have an empty cartridge case in one's possession, but, in the normal course, where it is not suspected that the empty cartridge case is to be reloaded or to be used in future as ammunition, the matter would be of such slight importance that it would be ignored under the provisions of this section, or under the maxim, *di minimis non curat lex*.[24]

In *Abdul Rashid v Harish Chandra* ,[25] it was held that the charge of obstructing peons of a municipality is very slight, so slight that no person of ordinary sense and temper would complain of such harm, and where the municipality has not been active in proving the other offences of gravity, namely, evasion of octroi duty and causing hurt to peons, the complaint against the accused should be dismissed, and this section may be applied. This case, however, appears to be of doubtful authority.

The taking of pods worth about three *pies* off a tree on government waste land[26] has been held under this section not to be theft, but it would probably have been otherwise if the owner of the tree had been a very poor private person. The pain from a blow of an umbrella on the chest is not such a slight harm as the section contemplates.[27]

In course of the quarrel, the appellants A, P and D (since deceased) caused S to fall down, the appellant M threw down a heavy stone on the head of S, the deceased, who sustained head injury and died on the spot. Held, the act of the appellant A in causing the deceased to fall down formed part of the joint yet a murderous assault on the deceased, an old man, and was not covered by exception contemplated in s 95, IPC .[28]

Instances of Slight Harm

Where in a case of cheating, the person deceived merely suffered, owing to deception, a momentary annoyance and nothing else, the case held to be covered by this section.[29]561

Where a person kills a goat by the *jhatka* process and exposes its flesh for sale in the presence of

Mahommadans, even if it were intended to cause harm and insult to some Mahommadans by so doing, that harm is so slight that no person of ordinary sense and temper would complain of it and this section applies.[30]

Using abuse[31] or indecent language by a person towards another has become a part of present behaviour and, therefore, this act is protected by this section.[32]

Where the accused pushed aside the complainant, lifted the barrier and drove away, he was held protected under this section.[33]

Where there had been hot altercation between the accused and the complainant, even abuses were hurled and accused gave two slaps to the complainant, it was held that the matter was a trivial one and the offence of the accused was covered by this section.[34]

Where the complainant and the accused petitioner both were advocates and the alleged offensive words were uttered by the petitioner when they were on their legs in criminal proceedings before a court and the petitioner apparently lost his temper while defending his client. The offensive utterance were trivial in nature and held to be covered by provision of s 95, IPC .[35]

Where the allegation was that the accused kicked on the head of his follower complainant when the latter tried to touch the feet of the accused and no physical injury was caused; held, harm caused was slight, thus, no action was called for in view of the provisions of s 95, IPC .[36]

Where the objectionable words were uttered on provocation by the lady complainant in the heat of the moment without intention to cause harm to the complainant's reputation though the relations between the complainant and accused were otherwise cordial, s 95 was held applicable.[37]

Temporary embezzlement

Temporary embezzlement by the accused clerk employed in the office of Deputy Superintendent of Police of a paltry sum *viz*. Rs. 1839/- for a period of 21 days was held covered by s 95, IPC . The accused was granted benefit of s 95, IPC, and acquitted of charges under ss 409, 471, 477, IPC .[38]562

Harm which are not Slight--Instances

A criminal complaint of defamation based upon a mere trivial remark no harm being suffered by the complainant by the remark, should not be entertained as the matter is one falling properly within s 95 .[39]

Among Hindus it would cause the gravest harm to allege that one was out of caste. Such an imputation is defamatory and would not be covered by this section.[40]

But, the offence of misbranding is a serious one and the offender should not be given the benefit of this section.[41]

Where the accused pulled the *dhoti* of a businessman to drag him from his shop and used abusive language, it was held that the harm was not trivial and the accused was not protected by this section.[42]

Where the accused, an advocate, used filthy language in the cross-examination of a witness, it was held that the accused was not protected by this section.[43]

But where the alleged act of a topmost official of the state police in slapping a senior lady officer on her posterior in the presence of a gathering of the elite of society amounted to an outraging of modesty of the lady officer and nothing in the FIR showed that the alleged act was committed accidentally or by mistake, or it was a slip, the offences attracted ss 354 and 509, IPC relating to

modesty of women not being trivial, s 95, IPC was held not attracted and quashing of FIR and complaint by High Court under s 482, CrPC, was held illegal.[44]

Removal of hose pipe could bring a train to a halt. Its removal does not cause a slight harm as contemplated under s 95, IPC . The petitioner was not found entitled to benefit of s 95, IPC as prayed by him.[45]

In a case where the complainant and the accused were related to each other and the ingredients of s 342, IPC, were established it was held that as minimal harm was caused to appellant. The case was clearly covered by s 95, IPC . His appeal was accordingly dismissed.[46]563

Putting the garland of shoes around the neck of a person by the accused is not a trivial matter which can fall within the scope of this section.[47]

Where one woman was dragged by her hair by another woman in an aggressive manner in the course of an attack, it was held that this section could not apply to the case.[48]

7. 'Person of Ordinary Sense and Temper'

General law does not take notice of abnormal persons, there being special provisions for such persons. Taking the common sense view a 'person of ordinary sense and temper' must mean a person, who is not unduly touchy and devoid of reasonable tolerance and sense of humour. The words 'persons of ordinary sense and temper', in this section, must be taken to mean a person taken from the class to which the complainant belongs.

8. Applicability to Offences under Special or Local Acts

The various High Courts are not unanimous on the applicability of the provisions of this section to offences under the special or local Acts. The Gauhati High Court has held that s 95 applies to offences under the IPC and it will not apply to offences under special or local Acts unless so made applicable by those Acts.[49] A similar view has been expressed by the Orissa High Court in *Razak Rice & Oil Mills v Bharat Narayan Patnaik, Food Inspector* ,[50] and the Mysore High Court in *Union of India v Yesudoss* .[51]Contrary view has, however, been taken by the Madhya Pradesh High Court in a case under the Railway Property (Unlawful Possession) Act and it has been held that s 95 of the IPC occurs in ch IV of the Code and under s 40, IPC, the offence in that chapter includes an offence under any special or local Act.[52] However, a contrary view seems to have been taken by the Apex Court in a case and it was held that if a person is charged with an offence, however trivial it may be, then unless there is some provision for composition of it, the law must take its course and the charge enquired into, resulting either in conviction or acquittal. If composition of an offence was permissible under the law, the effect of such composition would depend on what the law provided for. If the effect of composition is to amount to an acquittal, then it may be said that no stigma should attach to the character of the person, but unless that is expressly provided for, the mere rendering of compensation would not amount to the vindication of the character of the person charged with the offence.[53]564

6 *Sadnand Jash v Shibakali Hazara* AIR 1954 Cal 288, (1954) Cr LJ 800 ; *Abdul Qudar Jan v Emperor* AIR 1935 Lah 225 ; *Emperor v Bhopal Singh* AIR 1936 All 392 ; *KG Sukumaran Nair v State of Kerala* 1961 Ker LT 110 ; *Selvaraj v State of Tamil Nadu* (1991) 1 Cr LC 916, p 918 (Mad) .

7 *Watson's Principles of the Indian Criminal Law*, p 49.

8 *District Food Inspector v Kedarnath Chirnaia* (1981) Cr LJ 904 (Gau), (1981) FAJ 543 (Gau) .

9 *Veeda Menzes v Yusuf Khan* AIR 1966 SC 1773, (1966) Cr LJ 1489, p 1490 ; *Queen-Empress v Ramaswami* 12 ILR Mad 148 .

10 *Devendrappa v State of Mysore* (1970) Cr LJ 1188, p 1190, (1970) 2 Mys LJ 260 ; *Mohendra Singh v State of Bihar* (1986)

BLJ 740, (1986) BBCJ 752 ; *Kurmanai Kulu v DME, SE Rly* AIR 1964 Ori 253 (acceptance of eight annas (50 paise) as *bakshish* no offence).

11 *KG Sukumaran Nair v State of Kerala* (1961) Ker LT 110 .

12 *Veeda Menzes v Yusuf Khan* AIR 1966 SC 1773, (1966) Cr LJ 1489, p 1490 ; *Devendrappa v State of Mysore* (1970) Cr LJ 1188, p 1190, (1970) Mad LJ 263 (Cr) .

13 Note B, pp 109-10.

14 *Emperor v Preo Nath Chowdhry* 29 ILR Cal 489, p 490 ; *State Govt, Madhya Pradesh v Amrit Lal Amanlal* AIR 1953 Nag 141, (1953) Cr LJ 801 ; *Union of India v Yesudoss* (1973) 1 Mys LJ 350, p 351 .

15 *Amritsar Municipality v Arjun Singh* (1973) Cr LJ 721, p 723 (Punj) ; *BK Varma v Corpn of Madras* AIR 1971 Mad 40, p 41 ; *Public Prosecutor v K Satyanarayana* (1975) Cr LJ 1127 (AP) ; *Bichitrananda v State of Orissa* (1978) Cr LJ 1050, p 1052, 45 Cut LT 369 ; *State of Madhya Pradesh v Mahadeo* (1972) Cr LJ 1097, p 1098, (1972) MPLJ 44 .

16 Indian Railway Act 1989, s 145 .

17 Indian Penal Code 1860, ss 115 - 16, *e.g.,* s 122 .

18 Refer to s 91 ; *R v John Scott* 2 Cr LJ 751, 1 NLR 139 .

19 *Manzoor Ahmed v State* (1984) 2 Crimes 542, (1984) All Cr R 488, (1984) All Cr Cas 406 (All) .

20 *Veeda Menzes v Yusuf Khan* AIR 1966 SC 1773, (1966) Cr LJ 1489 ; *Devendrappa v State of Mysore* (1970) Cr LJ 1188, (1970) Mad LJ (Cr) 263 .

21 *Neelam Mahajan Singh v Commr of Police* (1994) 53 Del LT 389, p 399 (FB) .

22 *Veeda Menzes v Yusuf Khan* AIR 1966 SC 1773, (1966) Cr LJ 1489 ; *Bindeswari Prasad Singh v Kali Singh* AIR 1977 SC 2432, (1978) Cr LJ 187 .

23 *Bindeswari Prasad Singh v Kali Singh* AIR 1977 SC 2432, (1978) Cr LJ 187 ; *Sharif Ahmed v Qabul Singh* 43 ILR All 497, 22 Cr LJ 715 ; *Jas Raj Jagga v Emperor* AIR 1929 Lah 234, 30 Cr LJ 379 ; *Empress v Vansiltart* 1883 AWN 46 ; *Empress v Amir Hasan* 1883 AWN 167 ; *Bhagirathi v Saiyed Ali Hamid Sahib* AIR 1931 Oudh 392, 32 Cr LJ 991 ; *Sadananda Jash v Shibakali Hazra* AIR 1954 Cal 28 ; *Moro Balwant Marathe v Emperor* AIR 1914 Bom 126, 15 Cr LJ 14 ; *Crown v Atma Singh* AIR 1926 Lah 412 ; *Phillip Rangle v Emperor* AIR 1932 Bom 193 ; *Mahommad Ibrahim Maracayar v Ismail Maracayar* AIR 1949 Mad 760, (1949) 1 Mad LJ 445 ; *Kundanlal v Emperor* AIR 1943 Sind 196, 45 Cr LJ 105 ; *Mahommad Sabed Ali v Thalesver Bovan* AIR 1955 Assam 211, (1955) Cr LJ 1318 ; *Abdul Rashul v Harish Chandra* AIR 1929 All 940, 30 Cr LJ 1153 .

24 *Emperor v Bhopal Singh* AIR 1936 All 392, p 393, 37 Cr LJ 727 .

25 *Abdul Rashid v Harish Chandra* AIR 1929 All 940 .

26 *R v Kasya* 5 Bom HCC 35 ; *Parma Singh v R* 12 Cr LJ 103 ; *Kirpa Singh v R* 13 Cr LJ 601 .

27 *Bengal Govt v Sheo Gholan* 24 WR (Cr) 67 .

28 *Athai v State of MP* 2010 Cr LJ 995, p 999 (MP) .

29 *Sunder Singh v Emperor* 2 Cr LJ 126, (1905) 6 Punj LR 62 (DB) .

30 *Kirpa Singh v Emperor* 13 Cr LJ 601 .

31 *Ram Shankar Pandey v Uttar Pradesh Police Station Officer, PS Kotwali, Ghazipur* (1995) 1 East Cr C 23 (All) .

32 *H Obedulla v State of Karnataka* (1975) 1 Kant LJ 335, p 336 .

33 *Ramesh Chandra Sharma v State* (1965) All LJ 449, (1965) All WR (HC) 49 ; *P Sriramulu Subudhi v State* (1967) Cut LT 1071 ; Re *Ethitrajan*AIR 1955 Mad 264, (1955) Cr LJ 816 .

34 *Pundalik v Wasudeo* (1974) Mah LJ 54 (Notes of cases).

35 *Heramba Sarma v Ajoy Shankar Das* (1990) Gau HCC 402 .

36 *Asharam Babu v Aman Singh Dangi* 2015 Cr LJ 1765 (MP) .

37 *Nisar Khan v State of Madhya Pradesh* (1985) C Cr J (MP) 43 .

38 *NK Illiyas v State of Kerala* AIR 2012 SC 3790, 2012 AIR SCW 2496, 2012 Cr LJ 2418 (SC) .

39 *Sharif Ahmad v Qabul Singh* 43 ILR All 497, 22 Cr LJ 715 ; *Jas Raj Jagga v Emperor* AIR 1929 Lah 234 ; *Empress v*

Vansiltart 1883 AWN 46 ; *Empress v Amir Hasan* 1883 AWN 167 ; *Bhagirathi v Saiyad Ali Hamid Sahib* AIR 1931 Oudh 392 ; *Sadananda Jash v Shibakali Hazra* AIR 1954 Cal 288 ; *Moro Balwant Marathe v Emperor* 15 Cr LJ 14 ; *Crown v Atma Singh* AIR 1926 Lah 412 ; *Phillip Rangel v Emperor* AIR 1932 Bom 193 ; *Mahommad Ibrahim Maracayar v Ismail Maracayar* AIR 1949 Mad 760 ; *Kundanmal v Emperor* AIR 1943 Sind 196 ; *Mahommad Sabed Ali v Thulesver Borah* AIR 1955 Assam 211 .

40 *Mohan Lal v Ram Charan* AIR 1928, 29 Cr LJ 451, All 213, p 214; *Ramanuja Chariar v Prathivathi Bayankaram* 12 Cr LJ 497(1)(Mad).

41 *Public Prosecutor v K Satyanarayana* (1975) Cr LJ 1127, p 1129 (AP) .

42 1970 Raj LW 135.

43 *Bheema Rao v Venkat Rao* AIR 1964 My 285, (1964) 2 Cr LJ 692 ; *H Obedulla v State of Karnataka* (1975) 1 Kant LJ 335 .

44 *Rupan Deol Bajaj & Anor v KPS Gill & Anor* (1996) Cr LJ 381 (SC) .

45 *Mahendra Singh v State of Bihar* (1987) Pat LJR 43, (1987) 2 Crimes 173 .

46 *Anoop Krishna Sharma v State of Maharashtra* (1992) Cr LJ 1861 (Bom), (1992) 1 Cr LC 299 .

47 *Kishori Mohan v State of Bihar* (1976) Cr LJ 654, (1976) Pat LJR 270 .

48 *K Ranganayakamma v Subamma* AIR 1967 AP 208, (1966) Mad LJ 675 (Cri) .

49 *District Food Inspector v Kedarnath Chirnaia* (1981) Cr LJ 904 (Gau), (1981) FAJ 543 (Gau) .

50 *Razak Rice & Oil Mills v Bharat Narayan Patnaik, Food Inspector* (1989) Cr LJ 648 (Ori) .

51 *Union of India v Yesudoss* (1973) 1 Mys LJ 350, (1973) Mad LJ 330 (Cri) .

52 *State of Madhya Pradesh v Mahadeo* (1972) MPLJ 447, (1972) Jab LJ 320, (1972) MPWR 262, (1972) Cr LJ 1097 .

53 *Biswabation Das v Gopal Chandra Hazarika & Ors* AIR 1967 SC 895 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 96.

Things done in private defence.--

Nothing is an offence which is done in the exercise of the right of private defence.571

Comments

1. Scope

The right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly.[81] This section does not define the right of private defence; it merely declares that nothing is an offence which is done in the exercise of the right of private defence.[82] Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in

the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea.[83]

The right of private defence arises only against an act which would otherwise constitute an offence,[84] and not against an act which is not an offence.[85] Thus, the infliction of the injuries by the deceased on the accused in exercise of his right of private defence is not an offence so as to entitle that latter to the right of private defence under this section.[86] But an actual commission of the offence is not572 necessary in order to give rise to the right of private defence. It is enough if the accused apprehends that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.[87] The law does not confer a right of self-defence on a man who goes and seeks an attack on himself by his own threatened attack which is likely to end in the death of the other. The right of self-defence, conferred by the law, or preserved by the law, for an individual is a very narrow and circumscribed right and can be taken advantage of only when the circumstances fully justify the exercise of such a right.[88]

The right exists against the perpetrators of offence under this Code.[89] There is a distinction between 'enforcing a right' and 'maintaining a right'. A party in possession is entitled to resist and repel an aggression and his action, in so doing, would be in the maintenance of his right.[90] Unless a right to the exercise of private defence is established, the claim of right or title will not avail the accused.[91] Where a party of men are determined to vindicate their right or supposed right by unlawful force and they engage in a fight with another party of men, equally determined to vindicate their right or supposed right by unlawful force, no question of the right of private defence can arise.[92] So, if both parties go armed to have a trial of strength, then neither party can be held to have acted in exercise of the right of private defence, irrespective of whether one or the other party was the aggressor or the first to attack.[93] Even in a case of sudden fight it is immaterial as to which party had opened the attack first according to the explanation to Exception 4 to s 300, IPC .[94] The High Court ought to consider the plea of private defence which goes to the root of the matter.[95]

The right of private defence is designed to serve a social purpose and deserves to be fostered within the prescribed limits.[96]573

2. Effect of Section

The plea of self-defence means that the harm which the accused had inflicted on the alleged aggressors is not an offence because the circumstances entitled them to exercise the right of self-defence. If, therefore, the plea of self-defence fails, the harm so caused would undoubtedly be a punishable offence. If, in addition, the accused acted in concert in the purported exercise of the right of self-defence to which they were not entitled, there is no escape form the conclusion that they together constituted an unlawful assembly with the common object of committing the offence constituted by the harm inflicted by them.[1] The right of private defence will in certain circumstances, completely absolve the accused from all guilt, even where the accused has voluntarily caused the death of another person.

3. When even Death can be Caused in Private Defence

The following are the circumstances in which the right of private defence will completely absolve the accused from all guilt, even when he has voluntarily caused the death of another person:

(i) Where whenever the right is exercised in the private defence of the body of the accused, it affords a complete defence--(a) if the deceased was the actual assailant of the accused, and (b) if the offence committed by the deceased which occasioned the

exercise of the right was of any of the six descriptions enumerated in s 100, IPC .

(ii) Where the right is exercised in private defence of the property of the accused, it equally affords a complete defence if the offence, the committing of which, or the attempting to commit which, by the deceased, occasioned the exercise of the right which was of any of the four descriptions enumerated in s 103, IPC .

A person accused of murder may be unable to establish such a right of private defence and so fail to obtain an acquittal on that charge, yet, it is possible for him to be convicted only of culpable homicide not amounting to murder, if: (i) he exercised his right of private defence, whether of person or of property, in good faith, although he exceeded the power given to him by law; and (ii) he caused the death of the deceased against whom he was exercising such right of defence both--(a) without premeditation, and (b) without any intention of doing more harm than was necessary for the purpose of defence.[2]

Appellant accused had disappeared with the daughter of the deceased, which had created bad blood between the appellant and the deceased. The deceased had brought back his daughter and had got her married elsewhere, which antagonized the appellant and on the day of the incident the appellant accused lethally assaulted the deceased with a stick having a metallic sharp edged piece attached on one side of the stick. The deceased was taking a siesta underneath the tees outside his house. The appellant claimed right of private defence, and alleged that he had plied lathi to save himself. The lathi blows could not have resulted in the wounds which are cut wounds on the face of the deceased. The injuries were caused on the deceased when he was lying on the cot. The body was horizontally placed and this explains the horizontal574 wounds on the person of the deceased. Besides, if five people had assaulted the appellant as claimed by him, and the appellant had yielded a lathi in retaliation to save himself, the assailants if not all, at least two or three would have received random lathi blows. That all injuries on the deceased had been directed towards the face are indicative of a targeted assault on to the face and the skull of the deceased, which is just not possible if the appellant had swung at random the lathi of his mother. The plea of private defence was rejected. Appellant accused was convicted under s 302, IPC .[3]

4. Right not available to an Aggressor, *etc*

The right of private defence is essentially a defensive right circumscribed by the governing statute *i.e.*, the IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in IPC not to provide a loophole whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.[4] When the accused party is the aggressor, they are not entitled to right of private defence of property.[5] Right of private defence is not available to a person who himself first inflicted knife blows on the deceased.[6]No right of private defence can be exercised against the act of a person who is himself exercising the right of private defence of his person.[7] The complainant party had not attacked before the accused inflicted injuries by kulhari; and evidence showed that the accused were aggressors, thus, the plea of the accused that they inflicted injuries on the complainant party in the exercise of the right of private defence was rejected.[8] The number of injuries is not always a safe criterion for determining who the aggressor was.[9]

Right of private defence should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, it is expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in the IPC not to provide and has not devised a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived. Accused appellants armed with jailies had gone to plough the field belonging to the deceased. The deceased tried to prevent them from sowing

jawar in the field, and the accused appellants assaulted him causing the death of the deceased. The accused appellants were aggressors, and were not entitled to exercise the right of private defence.[10]575

Right of private defence is a defensive right. It is neither a right of aggression nor of a reprisal. There is no right of private defence where there is no apprehension of danger.[11]

It is an established principle of law that the right of private defence cannot be claimed by an aggressor; in fact, it is the person aggressed upon who is on the defensive. The assailant cannot say that although he had, begun the attack he should be protected if the opposite party uses force in repelling it.[12] When the *marpit* in which a person was killed, had started upon an aggressive act of the accused, he cannot plead the right of self-defence against the opposite party.[13] Where the accused and his companions were aggressors and started assaulting the injured, causing injury with an axe on his head, the blow given with great force caused a fracture. The accused were held not entitled to right of private defence being the aggressors.[14] There is a distinction between 'enforcing a right' and 'maintaining a right'. A party in possession is entitled to resist and repel an aggression and his action in so doing would be in the maintenance of his right.[15] Right of private defence can be exercised only to defend an unlawful action and not to retaliate.[16] Unless a right to the exercise of private defence is established, the claim of right or title will not avail the accused.[17] Where a party of men are determined to vindicate their right or supposed right by unlawful force and they engage in a fight with another party of men equally determined to vindicate their right or supposed right by unlawful force, no question of the right of private defence can arise.[18] In *Queen Empress v Prag Dutt* ,[19] it was observed:

> When a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with men, who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself, but each side is trying to get the better of the other.

Where the accused are aggressors being armed with lethal weapons, attack to wreak vengeance, they would not be said to have acted in exercise of right of private defence.[20]

The appellants/accused had gone to the house of the deceased, there they caused injuries to the deceased and his two sons. Held, the appellants/accused were aggressors, and as such, they were not entitled to the right of private defence.[21]

Where the accused had not taken the plea of private defence in statement under s 313, CrPC, in view of the number/nature of the injuries sustained by the deceased576 and the PWS, the complainant party could not be called aggressor, thus, the plea of right of private defence was rejected.[22]

The accused were aggressors, and after forming unlawful assembly, without any reason they threw bricks towards the houses of the injured persons. Held, the accused appellants were not entitled to the benefit of private defence.[23]

5. No Right of Private Defence when no Party is in Possession

In such a case the claim of right becomes reduced to a mere pretext for fighting. The assembly is unlawful, not because the claim of right is immaterial, but because it was not the real object of the fight. And if the object of an assembly was from the very outset unlawful and every one of the accused was clearly a member of an unlawful assembly, no question of self-defence arises in the case.[24] The principle which is thus well settled by precedents is that, if neither party can be held to be in actual possession of the property in dispute, and if both parties go armed to have a trial of strength, then neither party can be held to have acted in exercise of the right of private defence, irrespective of

whether one or the other party was the aggressor or the first to attack. If, however, a party is held to be in actual possession, it cannot be deprived of its right of private defence of property simply because it goes armed to defend its property after seeing the other party committing, or on feeling a reasonable apprehension that the other party would commit, any of the offences referred to in the second clause of s 97 of the IPC .[25]

6. Land vacant--No Right of Private Defence

In the present case dispute regarding the land was pending before the Court. The complainant along with others started ploughing the land, the accused persons armed with weapons arrived on the spot, and one appellant accused fired gunshot which hit at the forehead of the deceased. The land in question was lying vacant and the matter regarding possession was pending adjudication before the revenue authorities. After the order of remand passed by the Commissioner, there was no material to show who was in possession of the land in question. The plea of the accused persons that they acted in exercise of right of private defence was not accepted. Further held, even if the accused had right of private defence, they exceeded the right. The accused appellant was convicted under s 304, Pt I, read with s 149, IPC .[26]

7. Nature of Plea of Private Defence and when it can be taken

It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea, if the prosecution evidence would support it.[27] For invoking this section it is essential that the prior evidence577 duly recorded must be formally proved and marked.[28] The plea of right of private defence may be taken during trial and not at the investigation stage.[29] A plea of self-defence can also be raised for the first time in appeal if facts on record justify such a plea, but not otherwise.[30] The analogy of estoppel or of technical rules of civil proceedings is in cases where right of private defence is not specifically pleaded but emerges from the records of the case is inappropriate, and the courts are expected to administer the law of private defence in a practical way with reasonable liberality so as to effectuate its underlying object, bearing in mind that the essential basic character of this right is preventive and not retributive.[31] Right of private defence is one of self defence or self protection and not the right of reprisal or punishment. It is subject to restrictions indicated in s 88 .[32]

8. Plea of Private Defence and Alibi

Fact that the accused pleaded alibi, in itself, will not preclude the Court from giving him also the right of private defence if on proper appraisal of the evidence and other material on record, the Court finds it to be available to him.[33]

9. Consideration of Plea of Private Defence

It is true that an accused in a criminal case is not required to take up the plea of self-defence and the criminal court would be justified in inferring the same from the circumstances of a given case if it is proved on record that the accused caused injuries to a person in his own defence. However, when the prosecution witness had only admitted that the deceased hit the accused with a wooden shaft on his head, but it was not stated by them that it was the deceased who first hit the accused with a *lathi* and the accused had nowhere in his statement under s 313, CrPC, taken up the plea of self-defence, but raised this plea at the time of arguments, conviction of the accused was held proper.[34] A plea of right of private defence cannot be based on surmises and speculations.[35] There must be some evidence to establish the circumstances which necessitated the exercise of such a right.[36] While considering, whether the right of private defence is available to an accused, it is not relevant whether 'he may have a chance to inflict severe and mortal injury on the aggressor'. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. The injuries received by the accused, the imminence of threat to his safety and

the injuries caused by the accused are all relevant factors to be considered on a plea of private578 defence.[37] The injuries received by the prosecution party must also be taken into consideration. Where the plea of private defence is not consistent with the facts and circumstances of the case, the court must reject the plea.[38] When evidence is partisan on both sides and quite a large number of persons are injured on either side, the duty of the court is to try to find out the aggressive party and, for such finding, the place of incidence becomes important.[39]

The failure of the prosecution to explain the injuries of the accused does not make the accused's case of self-defence probable.[40] Where the injuries, found on the person of the accused, are of superficial nature, they do not necessarily lead to the inference that the accused acted in the exercise of the right of private defence.[41] Where the injuries, found on the person of the accused, have not been received during the occurrence, the accused has no right of private defence.[42]

10. Right of Private Defence--Entire Incident to be Seen

A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right exists, the entire incident must be examined with care and viewed in its proper setting.[43]

11. Plea of Private Defence need not be Specifically taken

If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case, the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record.[44] Even if the accused does not plead the right of private defence, but in case there is sufficient evidence to show the existence of the said right, the trial Court should consider the said aspect. In the present case, since there was evidence to show that the complainants were trying to snatch away accused's only son, obviously, the accused persons could exercise the right of defence.[45]

In the absence of any injury on the person of the accused(s), the plea of self defence would be rejected. Where the plea of self defence was taken during the course of appeal before the High Court for the first time, and the accused in their further statement under s 313, CrPC also took no such plea and even in the cross-examination of any witnesses, no plea of self defence was taken, the plea of self defence was rejected.[46]579

The right of self-defence need not be specifically pleaded by the accused.[47] It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case, the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record.[48] Its benefit can be given to the accused if circumstances show that he may have acted in exercise of it.[49] Plea of self-defence can be entertained by the court even in the absence of evidence of proof and also not withstanding that such stand is highly belated. But this does not mean that whenever there is any injury on the defence side, the defence is to go scot-free and the prosecution case is to fail. All the facts and circumstances have got to be considered before coming to any conclusion.[50]It is not open to the court to call out a plea for defence by applying its imagination to facts and circumstances of the case. The onus is on the accused to establish this right and he might for this purpose take a specific plea or adduce defence evidence. He may, on the basis of material on record, show that apparently criminal act which he committed was justified in exercise of his right of private defence of person or property or both. An accused person can, however, avail of the plea of self-defence without specifically pleading it and without examining any witness by reference to circumstances appearing in prosecution evidence itself.[51] Where the complainant party was the aggressor, no case of right of private defence of person had been pleaded by the accused persons nor put forth in the cross-examination to the eyewitness, it was held that it is well settled that if there is a reasonable probability of the accused having acted in exercise of the right

of private defence, the benefit of such a probability can be given to the accused person.[52] The law does not accord to the statement of the accused under s 313, CrPC, full evidentiary value and if the accused desires the court to believe that he acted in the exercise of his right of private defence the burden of proof shall lie on him.[53] It is thus not necessary for the accused to plead, in so many words, that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea.[54] So, if the same arises from580 the material on record, the court can consider it even if the accused might not have taken it up.[55] But where the plea of self-defence is not taken by the accused and there is no evidence on record to support the plea, the court commits error in acquitting the accused on the basis of their stand of the right of self-defence.[56]

Where the plea of the accused, when read with the evidence of the eye-witnesses, brings out a set of facts and circumstances showing that the accused acted in exercise of the right of private defence, the fact that the accused in his statement under s 313, CrPC referred only to the acts of the deceased and his son hitting him, and he did not admit that he hit back the deceased, is not a ground to reject the plea of private defence.[57]

Introduction and Proof of Plea of Private Defence During Cross-Examination of Prosecution Witness, *Etc.*

An accused may introduce the plea of self-defence by suggestion in the cross-examination of the prosecution witnesses.[58] Of course, it is settled law that the accused need not plead self-defence by examining some witnesses on his behalf or by making any statement. If there are materials, culled out from the cross-examination, that indicate the occurrence had taken place while exercising the self-defence, then, the court can conclude that it is a case of private defence, in order to decide about the nature of the offence committed by the accused.[59] Evidence, establishing a plea of private defence, may be introduced by the prosecution itself, or it may be introduced by the defence by the cross-examination of the prosecution witnesses, or by the statement of the accused under s 313 of the CrPC, or by defence evidence.[60]

Where right of private defence emerges from the material on record, the Court shall consider the same, and it cannot refuse to consider it merely because the accused persons have not taken the plea in their statement recorded under s 313, CrPC .[61]581

Plea may be Taken in the Alternative

Even in a Case of Total Denial, Such Plea can be Taken

When there is evidence proving that a person accused of killing or injuring another acted in the exercise of the right of private defence, the court may not ignore that evidence and convict the accused merely because the latter set up a different defence and denied having committed the assault.[62]

It is open to a prisoner to adopt a defence in the alternative, and if he cannot satisfy the jury that he did not strike the complainant but can satisfy them, either by the cross-examination of the complainant's witnesses or by adducing evidence on his own behalf, that in striking the complainant, he acted in self-defence, then he is entitled to an acquittal.[63] Even if the accused has, in his statement, taken up a plea to total denial of the offence, it is open to him to raise an alternative plea of the right of private defence if he is able to prove the same on the strength of the prosecution evidence itself.[64] Even where a plea of self-defence on behalf of the accused is inconsistent with the express plea (*i.e.*, plea of alibi) raised by them, but if, on the material placed on record, the plea of private defence could be made out consistent with the provisions of s 105 of the Evidence Act, there will be no justification to deny the benefit of it to the accused.[65] The right of private defence may be pleaded even alternatively with the plea of alibi. It should not be denied to an accused person merely because he does not specifically plead it, provided that circumstances found by the court are such as clearly entitle him to the exercise of that right.[66] A contrary view has, however, been taken by the Calcutta High Court in *Dhirendra Nath v State* ,[67] where it has been observed:

A plea of the right of private defence can be taken by a person, who admits the act charged against him but pleads an excuse, if a person, however, states that he had not done the act at all, it is difficult to see how at the same time the question of right of private defence would arise.

Plea of Private Defence, Even if not taken in the Trial Court, can be taken in Appeal

If an accused has a right of private defence, he can raise such a plea in appeal, for the first time, even if he omitted to set it out in the trial court.[68] Where the accused has abandoned the plea of self-defence in a trial court but, if the circumstances, established in the case, go to show that the plea of self-defence is well founded, the582 appellate court cannot refuse to consider the plea merely on the ground that the plea has been abandoned in the trial court.[69]

Belated plea of self defence

A belated plea of self defence taken by the accused would not be accepted.[70]

12. Pure Question of Law

The existence of the right of private defence, in a particular case, is a pure question of law.[71]

13. Exercise of the Right of Private Defence--A Question of Fact

Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case and no test in the abstract for determining such a question can be laid down.[72] In determining this question of fact, the court must consider all the surrounding circumstances.[73]

Right of Private Defence Against Lawful Acts not Available

The right of private defence is not available against lawful acts.[74]There is no right of private defence against an act which is itself an act of self-defence.[75] It is axiomatic that there is no right of private defence against private defence.[76]

Right of Private Defence--Against whom Available

The right of private defence is available against the person or persons from whom imminent danger to life or property is apprehended.[77]The right of private defence of an accused does not extend to the act of causing of death of an unarmed intervener583 who, in no way, assaults him nor in any way, incites him to any trouble against him (deceased).[78] Right of private defence is also not available when the accused inflicts blows on vital parts of the body of unarmed trespasser in sitting position.[79] But this right arises to the accused not only against the person, who actually inflicted a blow, but also against all members of that party which had deliberately formed an unlawful assembly with a common object.[80]

The right of private defence is available only to such person who is suddenly confronted with the necessity of averting danger, which is not self created. Such necessity must be real and apparent.[81]

14. Making of Assault Explained

Showing a knife or chopper by itself may not amount to an assault in all situations. But, if the person who shows the knife or chopper utters words conveying the threat that hurt would be caused with it, such gesture would amount to assault. The distance between the aggressor and the target may have

bearing on the question whether the gesture amounted to assault. No precise yardstick can be provided to fix such distance, since it depends upon the situation, the weapon used, the background and the degree of the thrust to attack, etc. When appellant stood near the deceased's shop and displayed the chopper saying that he would not leave the place without killing the deceased and hurled the challenge to the deceased to come out, the appellant committed assault as defined in s 351 of the IPC . The distance of 11 metres is not appreciably so as long to dispel the possibility of instilling the apprehension, when the entire conspectus including the background is viewed. There is no doubt that deceased had the right to repel the assault by resorting to such steps as he considered necessary in the situation. It was held that the appellant was the aggressor and the deceased was acting in exercise of his right of private defence when he went out of his shop and dealt a blow on the appellant with a stick.[82]

15. Burden of Proof

It is well-settled that even in a case where the right of private defence is pleaded, the prosecution is not absolved of its obligation of proving its case beyond reasonable doubt and only when it has discharged that obligation, of primary burden; with the terms of s 101 of the Evidence Act, is the burden shifted on the accused within the terms of s 105 of the Evidence Act .[83] Under s 105 of the Evidence Act 1872, the burden of proof is on the accused, who sets up the plea of self-defence (*i.e.*, private defence), and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence.[84] The burden of bringing a case under any of the584 exceptions enumerated in s 100, IPC, is on the accused, however, that burden is not that onerous as that lies on the prosecution.[1] Such burden can be discharged by probabilizing the defence.[2] The court shall presume the absence of such circumstances. It is for the accused to place the necessary material on record either by themselves adducing positive evidence by eliciting necessary facts from the witnesses examined for the prosecution.[3] An accused person, taking the plea of the right of private defence, is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself.[4] But the question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden.[5]

When an accused person sets up a plea of self-defence, the onus to establish that plea lies on him. It is well established that the accused is not required to prove that plea beyond reasonable doubt but has merely to show it as probable. The onus to probablise the defence version, from the salient facts and circumstances appearing in the prosecution case, or otherwise set up by the accused in form of defence evidence, is always on him.[6] A person taking the plea of right of private defence is not required to call evidence on his side, but he can establish that plea by reference to the circumstances transpiring from the prosecution evidence itself.[7] of the prosecution evidence itself.[8] Even if the accused fails to establish, to the satisfaction of the court, the plea of private defence, he is entitled to be acquitted if, upon a consideration of the evidence, as a whole, reasonable doubt has crept into the mind of the court whether the accused person is or is not entitled to the benefit of the said plea.[9]585

Accused Can Rely Upon Prosecution Evidence to Prove Self-Defence

An accused can take advantage of the prosecution evidence as it stands; his failure to set up an express plea of private defence cannot preclude him from making out such a defence on the basis.

In a criminal case, if the prosecution adduces reliable evidence for proving all the ingredients of the charges against the accused persons, the prosecution is entitled to succeed, unless the accused relies on any general or special exception, in which case the burden is on him to prove the exception. In a case where the accused was said to have attacked the complainant or members of the complainant's party, it was sufficient for the prosecution to prove that the accused did so with the requisite intention. In the examination-in-chief of the prosecution witnesses, it is not necessary for the prosecution to put questions as regards matters which are not included in the ingredients of the offence charged against the accused. Of course the prosecution must be fair and if there are any circumstances tending to show that the accused may have acted in the exercise of private defence,

the prosecution must place such circumstances before the court. If the accused had sustained injuries, the prosecution must place the fact that the accused had injuries before the court, but it is not necessary for the prosecution to cogently explain how the accused sustained injuries. The prosecution must prove the alleged criminal acts of the accused and the alleged criminal intention. But it is not necessary for it to cogently explain a fact, which is not one of the ingredients of the offence charged. It is open to the defence to put questions to the prosecution witnesses in order to show that their evidence is not entitled to credit, or that they have given false or unsatisfactory answers to the questions put to them in the cross-examination. The defence can use such answer given in the cross-examination in order to discredit the testimony of the prosecution witnesses.[10]

16. Plea of Private Defence Need not be Proved beyond Reasonable Doubt

When the accused has taken a specific plea of self-defence he need not prove the same beyond all reasonable doubt. The court has to examine the probabilities in appreciating such a plea.[11] The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.[12] But if586 there is any reasonable doubt, even from prosecution evidence, that the aggressor in the occurrence was not the accused but would have been the deceased party, then the benefit of that reasonable doubt has to be extended to the accused. It does not matter that he did not adduce any evidence in that direction.[13] In *Salim Zia v State of Uttar Pradesh* ,[14] their Lordships of the Supreme Court observed:

> It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution-witnesses or by adducing defence evidence.

It is trite law that an accused can rely on the prosecution evidence itself to substantiate his plea of self-defence. When no such evidence is available as where there are no indicative circumstances which would enable the accused to plead right of private defence, court cannot act on mere conjectures or bold suggestions.[15] It is not necessary that the accused should affirmatively prove the exercise of the right of private defence; if, upon evidence, it appears that he is entitled to the right of private defence, neither the ignorance of the accused, nor his fear, nor the falsity, nor weakness in his defence will deprive him of the benefit of right of private defence if the evidence, adduced either by him or by the prosecution, shows that he might have acted in the lawful exercise of the right of private defence.[16] The accused need not prove the existence of the right of private defence beyond reasonable doubt,[17] it is enough for him to show, as in a civil case, that the preponderance of probabilities is in favour of his plea.[18] It would be sufficient in the case if the accused person, from the evidence on the record, merely makes out a prima facie case and if, from the evidence it appears probable that the defence version is true and he is entitled to a decision in his favour though he has not proved the truth of his version beyond reasonable doubt.[19] Where the prosecution has given a truncated, false and suppressed version of the prosecution story, the accused is entitled to the benefit of doubt in his plea of self-defence,[20] even if the accused has not conclusively and completely established the right of self-defence. If the court, after review of the entire evidence on the record, finds that the plea is a plausible theory and if the court entertains a reasonable doubt in its mind as to the guilt of the accused, the accused is587 entitled to the benefit even though the accused person has not been able to establish his plea of self-defence.[21]

It is well settled that the burden of establishing the plea of self-defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self-defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of

the material on record.[22]

17. Injuries on either Party, how Far Determine the Right of Private Defence

The absence of any injury whatever on the side of the accused is eloquent to discount the plea of private defence.[23] The presence of injuries on the side of the accused shows that the accused acted in the exercise of the right of private defence.[24] Where both the sides had received injuries, and the injuries of the accused were not explained by the prosecution, the accused persons were held entitled to the benefit of doubt, and acquitted of the charges under ss 149, 307, IPC .[25] Where the death of the deceased was due to injury on the head and evidence showed that the accused himself sustained injuries inflicted on him by the deceased first and there was no explanation as to injuries on the person of the accused, it was held that the accused was entitled to the right of private defence and his conviction was set aside.[26] Where the prosecution was not able to prove that the accused persons were aggressors, the accused persons suffered injuries on vital parts of their bodies but no explanation was given by the prosecution of the said injuries, the accused were held entitled to right of private defence of person and property.[27] The accused had sustained grievous and simple injuries, which were not explained by the prosecution. The defence plea that the accused acted in exercise of right of private defence was accepted, and accused was held entitled to the benefit of doubt and was acquitted of the charge of murder.[28] Where the injuries sustained by the accused persons alleged to be received during the course of the incident are not on vital parts of the body and as such insignificant, the non-explanation of those injuries cannot be advantageous to the defence nor can it be588 said that the prosecution, in not explaining those injuries, had suppressed the genesis of the incident.[29] There cannot be any nexus between injuries being wet and their being manufactured. Even in case of a genuine injury if water was to fall, it would become a wet injury. Thus possibility of water falling on the injuries of the accused prior to his arrest cannot be eliminated.[30]

Where there was a scuffle between the accused and complainant party, the deceased and his son caused head injuries to the accused person, the first accused had six injuries including head injury while the second accused had one head injury, the said injuries were not explained by the prosecution and a version of self-defence became probable in view of the injuries caused to the accused by the deceased and his son, accused cannot be said to have exceeded the right of self-defence.[31] Where the admission was made by the prosecution witness about registration of a cross-case by the accused persons against the complainant party but it was not clear as to what happened to that case, there was no explanation of injuries received by the accused persons, from the side of the prosecution, the plea of self-defence was found acceptable and the accused were held entitled to be acquitted.[32] Where the injuries alleged to be received by the appellant accused were self suffered, or the appellant had received the same in some other manner, the non-explanation of the injuries of the accused appellant was held not fatal to the prosecution case.[33]

Mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases and the said principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested and so probable, consistent and creditworthy that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.[34]

Where the injuries suffered by the accused are minor and superficial, the prosecution is not required to explain those injuries.[35]

Where the evidence on record showed that the injured first gave two *lathi* blows to one of the accused on the date of the incident causing three injuries including a grievous one, the brother of the accused gave a single blow to the injured at that moment, cannot be said to have exceeded the right of private defence, conviction of the accused persons was set aside.[36] The number of injuries is not always a safe criterion for determining who the aggressor was.[37] Where injuries were suffered by both sides and were not explained and both sides came out with only the partial truth,589 the prosecution is not the gainer in these circumstances. The lacerated wound on the head of the accused which was

bleeding when medically examined, was not explained by the eyewitness of prosecution, it was sufficient to acquit the accused.[38]

Where the injuries on the side of the accused are numerous and extensive, they support the defence version that the accused acted in the exercise of the right of private defence.[39] Number of injuries on the accused side, by itself, may not be sufficient to establish the right of private defence. The defence was able to probabilise that the complainant party attacked first. A5 received six injuries and few of these injuries were grievous. A8 sustained eight injuries while A7 received nine injuries, some of which were grievous. A6 also received injuries. Held, the accused persons acted in exercise of right of private defence, and the case was covered by Exception 2 to s 300, IPC . Conviction of accused under ss 302 / 34 was altered to conviction under s 304, Pt I.[40] If there is a great disproportion between the number of injuries inflicted on the two sides, it certainly indicates that those, who had inflicted the larger number of injuries, were likely to be aggressors.[41] But the number of injuries is not always a safe criterion for determining who the aggressor was.[42] Non-explanation of injuries sustained by the accused cannot be a ground to disbelieve the prosecution case in view of cogent evidence regarding assault by accused on deceased.[43] The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.[44] It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries, so caused on the accused, probablise the version of the right of private defence.[45] Where accused persons arrived at the scene of occurrence and started indiscriminate firing and killed one person and injured two persons, the failure of the prosecution to explain some minor injuries on the person of the accused was held not590 fatal and plea of private defence of property or person was held not available to accused persons.[46] Where accused persons proved that injuries were caused to them by the complainant party in the alleged incident, the prosecution did not explain injuries caused to the accused persons. It was held that the accused were entitled to the right of self-defence.[47] Where the injuries, received by the party of the deceased, are serious and extensive, they do not, by themselves, countenance the accused's plea of self-defence,[48] or that they exceeded their right of self-defence.[49] Where all the accused had received injuries and one of them had also received an incised wound while the deceased and his companions were caused injuries by the accused with *lathis* and *dandas,* it cannot be said that the accused had at all exceeded their right of self-defence.

The accused pleaded a theory of self defence contending that the injured persons and the deceased persons had come to his hotel armed with deadly weapons challenging him when he was alone in the hotel and that they attempted to assault him. He contended that when he ducked to avoid a blow, it fell on the head of the person who was holding him, such that this person sustained injuries and that, in the meantime, he managed to snatch one of the weapons held by the assailants and in self defence, a wide hit was given by him to the assailants and thereafter, he escaped from the blows. As such he was not responsible for any injuries found on the body of the deceased and the injured. The plea was found devoid of substance. Plea of self defence was rejected. Accused appellant convicted under s 302, IPC .[50]

The accused fired a gun on the deceased causing death. The deceased was not armed, nor did he make any attempt on the life of the appellant. Held, the plea of the right of private defence was found not sustainable. Accused appellant was convicted under s 302, IPC .[51]

Plea that the accused acted in exercise of right of self defence was not suggested to the prosecution witnesses in their cross-examination. There was no evidence that the complainant party was approaching the accused party with an intention of causing a bodily harm, for they were wholly unarmed. It was the accused party which appeared to be armed with weapons like lathi, farsi, tanchia and katta. Further, the evidence on record did not suggest that any member of the complainant party had done any act which could have created a reasonable apprehension in the minds of accused of

danger to their person or to their property. Thus, the plea of self defence was found devoid of substance, and was rejected.[52]

18. Right of Self-Defence Accepted--Illustrative Cases

The deceased R and two PWS had gone to the field of the accused appellants and there was a fight between the two groups. The appellants fought to repel the attack591 and in the course of the incident, both sides sustained injuries, as a result of which R died. In such circumstances, it was possible for the Court to accept the claim of the appellants that since they were defending themselves, they had a right of private defence.[53]

The evidence showed that P (since deceased) was not present at the place where R was assaulted, and after inflicting injuries on the person of R, the accused appellants ran towards P (second deceased) who was standing ten steps away from the place of incident. After seeing the incident relating to the death of R, P started running and he was chased by the accused persons and they inflicted lathi blows on his person. Held, in such a situation, the accused appellant had no right to invoke right of self defence by chasing P and causing fatal injuries to him. Reasonable apprehension disappeared when P was running away from the scene to escape from the scene. The conviction of the accused appellants under ss 302 / 34 was held proper.[54]

Quarrel between the parties arose in Panchayat meeting in the village. Accused appellants were not armed, and evidence did not establish that the accused persons were aggressors. The injuries sustained by the appellants on the vital parts of their body were not explained by the prosecution. Part of incident was also suppressed by the prosecution. Held, the possibility of the appellants accused having acted in the exercise of the right of private defence could not be ruled out. Thus, appellants accused were held entitled to acquittal, and were acquitted of the charges under ss 147, 326, 302 read with s 34, IPC .[55]

Appellant accused had caused simple injury to the victim, and in the same incident, he had also received injuries. Held, appellant was justified in causing injuries in the exercise of private defence, and his conviction under s 324, IPC was set aside.[56]

19. Right of Self-Defence Rejected--Illustrative Cases

The accused only claimed the right of private defence but failed to place necessary material on record, either by himself adducing positive evidence or by eliciting any necessary facts from the witness examined by the prosecution. There was no reasonable apprehension of death or grievous hurt to the appellant. There was property dispute between rival parties and in the assault, the appellant caused the death of the deceased and injuries to the injured witness. The claim of private defence was rejected.[57]

The prosecution case was that the accused persons armed with weapons went to the house of the complainant, assaulted the family members of the complainant and caused the death of one person. The accused persons took plea that they caused injuries in exercise of right of self defence. The presence of the dead body in the house of the complainant falsified its version. The injuries suffered by the accused were superficial, as such, no explanation of the injuries by the prosecution was592 inconsequential. Conviction of the accused for offences under ss 302 and 149, IPC was held proper.[58]

The defence was able to probabilise that the complainant party attacked first. A5 received six injuries and few of these injuries were grievous. A8 sustained eight injuries while A7 received nine injuries some of which were grievous. A6 also received injuries. Number of injuries on the accused side by itself may not be sufficient to establish the right of private defence.[59]

The accused in examination under s 313, CrPC stated that the deceased armed with axe *etc.* entered the house with his sons and attacked one of the accused, such that the accused acted in exercise of

their right of self defence. The deceased was an old man, his sons, female members of his family were carrying only axe and sticks, it could not be imagined that they would have gone to another village for a fight. They were not aggressors. The plea of self defence taken by the accused persons was rejected.[60]

The defence plea that the deceased was a hardcore criminal, and had old enmity with the accused and therefore the accused acted in the exercise of right of private defence was rejected as the accused shot him with a 12 bore gun causing the death.[61]

81 *Naveen Chandra v State of Uttaranchal* (2007) Cr LJ 874 (SC) ; *Vidya Singh v State of Madhya Pradesh* AIR 1971 SC 1857 .

82 *Sekar v State* (2003) Cr LJ 53 (SC) ; *Rizan v State of Chhatisgarh, through the Chief Secretary, Govt of Chhatisgarh, Raipur* (2003) Cr LJ 1226 (SC) ; *Laxman Singh v Poonam Singh* (2003) Cr LJ 4478 (SC) ; *V Subramani v State of Tamil Nadu* (2005) Cr LJ 1727 (SC) ; *Shahjahan v State of Kerala* (2007) Cr LJ 2291 (Ker) ; *Naveen Chandra v State of Uttaranchal* (2007) Cr LJ 874 (SC) ; *Dharam v State of Haryana* (2007) Cr LJ 791 (SC) ; *Ranveer Singh v State of MP* 2009 Cr LJ 1534, AIR 2009 SC 1658, 2009 (1) Scale 740 .

83 *Ranveer Singh v State of MP* 2009 Cr LJ 1534, p 1536, AIR 2009 SC 1658, 2009 (1) Scale 740 .

84 *State of Mysore v Raju Shetty* AIR 1961 Mys 74, p 81 ; *Chandra Bhan v State* AIR 1954 All 39, p 41, (1954) Cr LJ 26 ; *State of Orissa v Igni Dalal* (1963) Cut LT 200 ; *Munney Khan v State* AIR 1971 SC 1491, p 1494, (1970) MPLJ 893 .

85 *Nga Chit Tin v King* AIR 1939 Rang 225, p 229 .

86 *Kelu Sahu v State* (1963) Cut LT 245 ; *Durgapal v State* AIR 1963 All WR 746 (HC); *Gorie Sankar v Sultan* AIR 1971 LB 12 (1) ; *State v Narayanan* AIR 1956 Tr & Coch 89, p 90; *Mustaquim Jagga v Emperor* AIR 1939 Lah 416 ; *Munney Khan v State of Madhya Pradesh* AIR 1971 SC 1491, p 1494, 1970 SCC 491 (Cr) ; *Benudhar Naik v State of Orissa* (1985) 59 Cut LT 155, (1985) 1 Crimes 436 .

87 *Pagla Baba v State* AIR 1957 Ori 130, p 150 ; *Ram Saiya v Emperor* AIR 1948 All 205, 49 Cr LJ 422 ; *State of Orissa v Rama Muduli* (1973) Cut LT 44, (1973) Cr LJ 1326 ; *Raising Mohima v State of Gujarat* (1962) 1 Cr LJ 717, AIR 1962 Guj 203 ; *Deo Narain v State* (1973) Cr LJ 677, p 679, AIR 1973 SC 473 ; *Puran Singh v State* (1975) Cr LJ 1479, AIR 1975 SC 1674 ; *Mukhtiar Singh v State of Punjab* (1975) Cr LJ 132, p 135, (1974) Punj LJ 338(Cr); *Madan Chandra Dutta v State of Assam* (1977) Cr LJ 506, p 508 (Gau) ; *Raja Ram v State* (1977) All Cr C 25 .

88 *Dhanno Khan v State* AIR 1957 All 317, p 318 ; *Navratan Chand v State of Rajasthan* (1977) Cr LR 513, p 516 ; *Majin Thomas George v State of Madhya Pradesh* (1977) Cr LR 89 (MP) ; *State v Adwaita Behera* (1961) Cut LT 367 ; *Rama Kant Tiwary v State of Bihar* (1968) Pat LJR 544 ; *Durgapal v State* (1963) All WR 746 (HC) ; *Munney Khan v State* AIR 1971 SC 1491, p 1494, (1970) MPLJ 893 ; *Bhajan Suna v State* (1974) 40 Cut LT 325, (1975) Cr LJ 1555, p 1557 .

89 *Ganouri Lal Das v Queen-Empress* 16 ILR Cal 206, p 208 .

90 *Ram Nandanprosad Singh v Emperor* 14 Cr LJ 463, p 464, 17 CWN 1132 ; *State v Kartar Singh* AIR 1958 All 90 ; *Gyasuddin Ahmad v Emperor* AIR 1932 Pat 215 .

91 *Ram Nandanprosad Singh v Emperor* 14 Cr LJ 463, p 464, 17 CWN 1132 ; *Basan Bhowmick v State* AIR 1963 Cal 3, p 5 .

92 *Kabiruddin v Emperor* 35 ILR Cal 368 ; *Muniruddine v Emperor* 35 ILR Cal 384 ; *State v Banwari Singh* AIR 1951 Pat 473 ; *Bindaban Swain v State* AIR 1957 Ori 117, (1957) Cr LJ 644 ; *Mahommad Ibrahim v Emperor* AIR 1929 Nag 43, p 47 ; *Bhairon Singh v Emperor* AIR 1935 Nag 141 ; *Queen-Empress v Prag Dutt* (1898) 20 ILR All 459 .

93 *Barlsa Mudi v State* AIR 1959 Pat 22, p 26, (1959) Cr LJ 71 .

94 *Rohtash v State of Haryana* 1993 Cr LJ 3303, p 3309 (P&H) (DB).

95 *Krishnan v State of Tamil Nadu* (2006) Cr LJ 3907 (SC) .

96 *Darshan Singh v State of Punjab* AIR 2010 SC 1212, (2010) 2 SCC 333, 2010 Cr LJ 1393 .

1 Re *Ningappa Balappa Hadli*AIR 1960 Mys 294, p 295 .

2 *Nga Chit Tin v King* AIR 1939 Rang 225, p 229-30 ; *Sujya v State of Rajasthan* (2003) Cr LJ 1612 (Raj) .

3 *Hamil Singh v State* 2009 Cr LJ 3671 (Del) (DB) .

4 *Shahjahan v State of Kerala* (2007) Cr LJ 2291 (SC) ; *Dharam v State of Haryana* 2007 Cr LJ 791, AIR 2007 SC 397 ; *Haren Das v State of Assam* 2012 Cr LJ 1467 (Gauh) (DB) .

5 *Pahar Singh & Ors v State of Rajasthan* (1999) Cr LJ 1150 (Raj)(DB); *Bhagwan Singh v State* 2009 Cr LJ 1987 (Utr) .

6 *Mohammad Iqbal v State of Madhya Pradesh* 2012 Cr LJ 337, p 342 (Chh) (DB) .

7 *Benudhar Naik v State of Orissa* (1985) 59 Cut LT 155, (1985) 1 Crimes 436 .

8 *Himalu Ram v State of Himachal Pradesh* 2012 Cr LJ (NOC) 325 (HP) .

9 *Bihari Rai v State of Bihar* 2009 Cr LJ 340 (SC), AIR 2009 SC 18 .

10 *Narain Singh v State of Haryana* 2008 Cr LJ 2613, AIR 2008 SC 2006, 2008 AIR SCW 2641, 2008 (6) Scale 45 .

11 *Haren Das v State of Assam* 2012 Cr LJ 1467, p 1471 (Gauh) (DB) .

12 *ZD Samuel v Emperor* AIR 1937 Pesh 23, p 27 ; *Dhananjai v State of Uttar Pradesh* AIR 1994 SC 551, (1994) SCC 184 (Cr), (1994) Cr LJ 614 ; *Pandarinath Punjaram v State Maharashtra* 2008 Cr LJ (NOC) 79 (Bom) .

13 *Guptar v Rex* AIR 1949 All 109 .

14 *AC Gangadhar v State of Karnataka* (1998) Cr LJ 3602 (SC) .

15 *Ram Nandanprosad Singh v Emperor* 14 Cr LJ 463, p 464, 17 CWN 1132 ; *State v Kartar Singh* AIR 1958 All 90 ; **but see***Ghyasuddin Ahmed v Emperor* AIR 1932 Pat 215 .

16 *Manjeet Singh v State of HP* 2014 AIR SCW 4195, (2014) 5 SCC 697, 2014 (140) AIC 266 (SC) .

17 *Ibid;Basan Bhowmick v State* AIR 1963 Cal 3, p 5 .

18 *Kabiruddin v Emperor* 35 ILR Cal 368 ; *Manisuddin v Emperor* 35 ILR Cal 384 ; *State v Banwari Singh* AIR 1951 Pat 473 ; *Bindaban Swami v State* AIR 1957 Ori 117 .

19 *Queen Empress v Prag Dutt,* (1898) 20 ILR All 459 .

20 *Jangli Ram v State of Chhattisgarh* 2010 Cr LJ (NOC) 366 (Chh) (DB).

21 *Bhagwan Singh v State* 2009 Cr LJ 1987, p 1996 (Utr) .

22 *Mahesh v State of Madhya Pradesh* 2009 Cr LJ (NOC) 953 (MP) (DB).

23 *Munaf v State of UP* 2009 Cr LJ (NOC) 1202 (All) (DB).

24 *Mahommad Ibrahim v Emperor* AIR 1929 Nag 43, p 47 ; *Bhairon Singh v Emperor* AIR 1935 Nag 161 .

25 *Barisa Mudi v State* AIR 1959 Pat 22, p 26, (1959) Cr LJ 71 .

26 *Salim v State of Haryana* 2008 Cr LJ 4327, p 4331 (SC), 2008 AIR SCW 5553, (2008) 12 SCC 705, 2008 (8) JT 677, 2008 (11) Scale 255 . **See also***Ashok Kumar v State of Tamil Nadu* 2006 Cr LJ 2931, AIR 2006 SC 2419, (2006) 10 SCC 157 .

27 *Nga Ba Sein v Emperor* AIR 1936 Rang 1, p 2 ; Re *Pachai Gounden*AIR 1915 Mad 532 ; Re *Jogali Bhaigo Naik*AIR 1927 Mad 97, 27 Cr LJ 1198 ; *Bahadur Khan v Emperor* AIR 1933 Oudh 63, p 65 ; *Govindam Neelambaran v State of Kerala* AIR 1960 Ker 258, p 259 .

28 *Thommen v State of Kerala* AIR 1958 Ker 74, p 76 ; *Thommen Thomas v State of Kerala* AIR 1957 Ker 53 .

29 *Bhadur Singh v State of Punjab* (1992) 4 SCC 503 .

30 *Nur Dad v Emperor* AIR 1932 Lah 606 ; *Ajudhia Prasad v Emperor* AIR 1925 All 664 ; *Yusuf Hussain v Emperor* 40 ILR All 284, 19 Cr LJ 371 ; *Ambika Singh v State* AIR 1961 All 38 ; *Veerama Nadar v Emperor* 13 Cr LJ 470, (1912) Mad WN 404 ; *Rehman Shah v Emperor* AIR 1926 Nag 202 ; *Kartar Singh Kishan Singh v Raj* AIR 1951 Raj 129 .

31 *GVS Subrayanam v State of Andhra Pradesh* AIR 1970 SC 1079 .

32 *Bathusingh v State of MP* (2004) Cr LJ 4850 (SC) .

33 *State of Rajasthan v Shiv Singh* 2011 Cr LJ 580, p 589 (Raj) (DB) .

34 *Madan v State of Madhya Pradesh* 2008 Cr LJ 3950, AIR 2008 SC 3083, [2008] 10 SCR 855, (2008) 11 SCC 657 ; *Salim v State of Haryana* 2008 Cr LJ 4327 (SC), (2008) 12 SCC 705, 2008 (8) JT 677, 2008 (11) Scale 255 ; *Mahinder Kumar v State* (1996) Cr LJ 2945 (Del) (DB) ; *Jagan Ram v State of MP* 2014 (137) AIC 749 (Chh) .

35 *Kuduvakuzinyil Sudhkarar v State* (1995) Cr LJ 721, p 723 (P&H).

36 *Dwaru Patra v State* (1968) Cut LT 110, p 111-17, (1968) JD 1471 ; *Kailov v State of Madhya Pradesh* (1966) MPLJ 877, (1966) Cr LJ 841 .

37 *Biran Singh v State of Bihar* (1974) Cr AR (SC) 321, AIR 1975 SC 87, p 90 ; *Sekar v State* (2003) Cr LJ 53 (SC) .

38 Re *Thangavelu*(1972) Cr LJ 390, pp 392-93, (1971) Mad LJ 663 (Cr) (DB).

39 (1970) Raj LW 604.

40 *Risala v State* (1970) All Cr R 443 .

41 1974 WLN (UC) 414.

42 1974 WLN (UC) 73.

43 *Madan v State of Madhya Pradesh* 2008 Cr LJ 3950, p 3952, AIR 2008 SC 3083, 2008 (10) Scale 33, (2008) 3 SCC (Cr) 942 ; *Salim v State of Haryana* 2008 Cr LJ 4327 (SC), 2008 AIR SCW 5553, (2008) 12 SCC 705, 2008 (8) JT 677, 2008 (11) Scale 255 .

44 *V Subramani v State of Tamil Nadu* (2005) Cr LJ 1727 (SC), (2005) 10 SCC 1983 ; *Budh Singh v State of UP* 2005 Cr LJ 2005 (All) (DB) .

45 *Kanhaiya Lal v State of Rajasthan* 2012 Cr LJ 252, p 255 (Raj) .

46 *Natvarsingh Bhalsingh Bhabhor v State of Gujarat* 2008 Cr LJ 4074, p 4079 (Gauh) (DB) .

47 *Ram Dhani & Ors v State of Uttar Pradesh* (1977) Cr LJ 2287 (All) (DB) ; *GVS Subrayanam v State of Uttar Pradesh* AIR 1970 SC 1079 .

48 *V Subramani v State of Tamil Nadu* 2005 Cr LJ 1727, p 1729, 1730, (2005) 10 SCC 358, AIR 2005 SC 1983, 2005 (2) Scale 546 (SC) ; *Budh Singh v State of UP* 2005 Cr LJ 2005, p 2009 (All) (DB) .

49 *Ghanshyam v State* (1982) Cr LJ 138 (All), (1982) All Cr C 43, (1932) Cr LR 1 (UP), (1981) All Cr R 394 .

50 *Shivaji Ganu Naik v State of Maharashtra & Anor* (1999) Cr LJ 471 (Bom) (DB) .

51 *Ram Manohar v State of Madhya Pradesh* (1989) 1 Cr LC 717 (MP) ; *Malleshi Sharnappa Bargude v State of Maharashtra* (1994) 1 Andh LT 2 (NOR) (AP) ; *Adhimoolam v State* (1995) Cr LJ 1051, p 1056 (Mad) .

52 *State of Maharashtra v Tanji Dagadu Ohavan & Ors* (1998) Cr LJ 4515 (Bom) (DB) .

53 *Ali Shaikh v State* (1992) 96 Cal WN 560 .

54 *Govindam Neelambaran v State of Kerala* AIR 1960 Ker 258, p 259 ; *Satar Khan v State* (1969) All WR 356(HC); *State of Uttar Pradesh v Jagdish* AIR 1966 All 244, (1966) Cr LJ 503 ; *Taranath v State of Rajasthan* (1973) RLW 704, (1973) WLN 736, p 739 ; *Sandhya Rani Bardhan v State* (1977) Assam LR 36 ; *Mathai Mathews v State of Maharashtra* (1969) 2 SCWR 255, (1969) UJ (SC) 466 ; *M Kondian v Venkataratnam* (1962) 1 Cr LJ 634, (1961) Mad LJ 585 (Cr) ; *Raghunandan Yadav v State of Bihar* (1971) Pat LJR 124 ; *Allappa Ningappa Mugalkhod v State of Mysore* (1972) 1 Mys LJ 406, (1972) MLJ 292 (Cr) ; *State of Orissa v Gollari Damo* (1973) Cr LJ 117, p 119 (Ori) ; *State of Orissa v Rama Mudali* (1973) Cr LJ 1326, p 1328 (Ori) ; *State of Uttar Pradesh v Ram Swaroop* AIR 1974 SC 1570, (1974) Cr LJ 1035 ; *Saitua v State of Madhya Pradesh* (1973) MPLJ 122 ; *Dhanno v State of Madhya Pradesh* (1974) MPLJ 34 (NOC) ; *State of Karnataka v Shivashankar* (1978) Mad LJ 224 (Cr), (1978) 1 Kant LJ 197 .

55 *Munshi Ram v Delhi Admn* (1968) 2 SCJ 521, AIR 1968 SC 702, [1968] 2 SCR 455 ; *Rajnikant v State of Maharashtra* (1971) Cr LJ (N) 5 ; *Raghunandan Yadav v State of Bihar* (1972) BLJR 35 (Summary of Cases), (1969) Cr LJ 1577, p 1580, (1969) Ker LR 471; *State of Gujarat v Bai Fatima* AIR 1975 SC 1478, (1975) Cr LJ 1079 ; *State of Uttar Pradesh v Mohd Munsheer Khan* AIR 1977 SC 2226, (1977) Cr LJ 1897 ; *Saiduddin v State* (1973) Cr LJ 1643, p 1645 (All) ; *State of Orissa v Ghenu* (1978) Cr LJ 262, p 264 (Ori) ; *Saitua v State of Madhya Pradesh* (1973) MPLJ 122 ; *BV Survada v State of Gujarat* (1972) Cr LJ 1574, p 1577 (Guj) (DB) (plea of self-defence can be established form the prosecution's evidence); Re *Narsingh Naik*(1972) Cr LJ 1150, p 1157, (1972) Mad LJ 38 (Cr), (1971) 2 Mys LJ 552; *Taranath v State of Rajasthan* (1973) Raj LW 704, (1973) WLN 736 (DB) ; *Gulijara Singh v State* (1971) Cr LJ 498, p 505, AIR 1971 Raj 68, AIR 1968 SC 702, AIR 1973 Mad 97 relied on), (1975) Punj LR 93 (Cr) (DB); *State of Karnataka v Shivshankar* (1978) Ker LJ 197, p 199, (1978) Mad LJ 224 (Cr) ; *Malleshi Sharnappa Burgude v State of Maharashtra* (1994) 1 Andh LT 2 (NOR) (AP) .

56 *State of Uttar Pradesh v Mohd Munsheer Khan* AIR 1977 SC 2226, (1977) Cr LJ 1897, (1977) 3 SCC 562 ; *State of Gujarat v Bai Fatima* AIR 1975 SC 1478, (1975) Cr LJ 1079 ; *Salim Zia v State of Uttar Pradesh* AIR 1979 SC 391, p 395 .

57 *Krishnan v State of Tamil Nadu* 2006 Cr LJ 3907, p 3913 (SC), AIR 2006 SC 3037, (2006) 11 SCC 304 .

58 *Kamta v State* (1978) All WC 281, (1979) Cr LJ 56 (NOC) (All) ; *Ram Kishan v State of Rajasthan* 2007 Cr LJ 2865 (Raj) .

59 *Nagaraj v State* (2006) Cr LJ 3724 (Mad) (DB) .

60 *Dhansukh v State of Madhya Pradesh* AIR 1961 MP 241, p 243 ; *Kamta v State* (1978) All WC 281, (1979) Cr LJ (NOC) 56 (All) ; **but see** also *Govt of Bombay v Sakur* AIR 1947 Bom 38 ; *Ghanshyam v State* (1982) Cr LJ 138 (All), (1982) All Cr C 43, (1982) UP Cr LR 1, (1981) All Cr R 394 .

61 *State of Rajasthan v Manoj Kumar* 2014 Cr LJ 2420, p 2422, 2423 (SC), (2014) 2 SCC (Cri) 702, (2014) 138 AIC 261 (SC), (*Munshi Ram v Delhi Administration* AIR 1968 SC 702, 1968 Cr LJ 806 **referred to**); *Sumer Singh v Surabhajan Singh* 2014 Cr LJ 3246, p 3252 (SC), AIR 2014 SC 2840, (2014) 3 SCC (Cri) 184 .

62 *Ghulam Rasul v Emperor* AIR 1922 Lah 314, p 315, 22 Cr LJ 507 .

63 *Afiruddi Chakdar v Emperor* AIR 1919 Cal 439, p 441 ; *Sagar Chandia v State* AIR 1962 Cal 85, p 86, (1962) 1 Cr LJ 137 ; *Ambika Singh v State* AIR 1961 All 38 .

64 *Ramachandra v State* AIR 1969 Bom 20, p 21, (1969) Cr LJ 112, 70 Bom LR 399 ; *Sagar Chandia v State* AIR 1962 Cal 85, p 86 (1962) 1 Cr LJ 137.

65 *State of Mysore v Raju Shetty* AIR 1961 Mys 76, p 80, (1961) 1 Cr LJ 403, p 409 ; *GVS Subbrayanam v State of Andhra Pradesh* AIR 1970 SC 1079, p 1088, (1970) Cr LJ 1004 ; *Raghunandan Yadav v State of Bihar* (1972) BLJR 35 (Summary of Cases).

66 *Janki Mahto v Emperor* AIR 1933 Pat 568, p 570 .

67 *Dhirendra Nath v State,* AIR 1952 Cal 621, p 624 .

68 *Gangada v State of Rajasthan* (1975) Cr LJ 1445, p 1447 (Raj) ; *Nur Dad v Emperor* AIR 1932 Lah 606 ; *Ajudhia Prasad v Emperor* AIR 1925 All 664 ; *Yusuf Hussain v Emperor* 40 ILR All 284, 19 Cr LJ 371 ; *Ambika Singh v State* AIR 1961 All 38 ; *Kartar Singh Kishan Singh v Raj* AIR 1951 Raj 129 ; *Abdul Latif v State of Madhya Pradesh* (1988) 17 Rep (MP) 568 .

69 *Ahir Raj Ladha v State of Gujarat* (1969) 2 SCWR 828, p 831 .

70 *Ajit Singh v State of Haryana* 2010 Cr LJ (NOC) 201 (P&H) (DB).

71 *Baburam Raut v Emperor* 14 Cr LJ 295, p 296, 17 Cal LJ 394 .

72 *V Subramani v State of Tamil Nadu* (2005) Cr LJ 1727 (SC) ; *Shahjahan v State of Kerala* (2007) Cr LJ 2291 (Ker) ; *Naveen Chandra v State of Uttaranchal* (2007) Cr LJ 874 (SC) ; *Sekar v State* (2003) Cr LJ 53 (SC) ; *Laxman Singh v Poonam Singh* (2003) Cr LJ 4478 (SC) ; *Dhanna v State of Rajasthan* (1964) Raj LW 126, p 130 ; *Bharwad Vibha Ghoga v State* (1955) Cr LJ 23, p 24, AIR 1955 Sau 1 (decided cases are not of much help except as indicating generally the principles which should be borne in mind in deciding the question); *Gundicha Bhoi v State* (1963) 1 Cr LJ 700, p 702, 29 Cut LT 15 .

73 *V Subramani v State of Tamil Nadu* (2005) Cr LJ 1727 (SC) ; *Sekar v State* (2003) Cr LJ 53 (SC) ; *Laxman Singh v Poonam Singh* (2003) Cr LJ 4478 (SC) ; *Shahjahan v State of Kerala* (2007) Cr LJ 2291 (Ker) ; *Naveen Chandra v State of Uttaranchal* (2007) Cr LJ 874 (SC) ; *Delhi Admn v Mahadev* (1966) Cr LJ 358, p 361 (Punj) .

74 *Raising Mohima v State of Gujarat* (1962) 1 Cr LJ 717, p 720, AIR 1962 Guj 203 ; *Faiyaz Khan v Rex* AIR 1949 All 180, p 183, 50 Cr LJ 232 ; *Nazir v Rex* AIR 1951 All 3, p 4, (1950) All LJ 770 (FB) ; *Chandra Bhan v State* AIR 1954 All 39, (1954) Cr LJ 26 (FB) ; *Guru Charan Singh v State* (1965) Cr LJ 582, AIR 1965 All 543 ; *State v Ram Bai* (1953) Cr LJ 1081, (1954) Nag LJ 429, AIR 1953 Nag 211 ; *Ranbaran v State of Bihar* (1965) 2 Cr LJ 18, AIR 1963 Ori 52 ; *Basan Bhowmick v State* (1963) 1 Cr LJ 46, AIR 1963 Cal 3 .

75 *Raising Mohima v State of Gujarat* (1962) 1 Cr LJ 717, p 720, AIR 1962 Guj 203 ; *Ram Saiyor v Emperor* 49 Cr LJ 422, p 425-26, AIR 1948 All 205 (FB) ; *Falyaz Khan v Rex* AIR 1949 All 180, 183, 50 Cr LJ 232 ; *Nazir v Rex* AIR 1951 All 3, p 4, (1950) All LJ 770 (FB) ; *Gauri Shankar v Emperor* AIR 1917 LB 11 .

76 *Mathews alias Mathai v State of Kerala* (1993) Cr LJ 213 (Ker)(DB); *State of Madhya Pradesh v Mohandas* (1992) MPLJ 30 .

77 *Bhima v Parmananda* (1972) Cr LJ 820, p 822, 37 Cut LT 1040 .

78 *Mukhtiar Singh v State* (1971) Cr LJ 1049, p 1054-55 (Punj) ; *Gurbachan Singh v State of Haryana* 1974 Cr LJ 463, p 464, AIR 1974 SC 496 ; *Kuduvakuzinyil Sudhakarar v State* (1995) Cr LJ 721 (Ker) .

79 *Maguni Charan Pradhan v State of Orissa* (1991) 72 Cut LT 413 (SC) .

80 *Mod Singh v State* (1954) ILR 4 Raj 7, (1954) Raj LW 392 ; *Guljara Singh v State* (1971) Cr LJ 498, 505, AIR 1971 Raj 68 .

81 *Haren Das v State of Assam* 2012 Cr LJ 1467, p 1471 (Gauh) (DB) .

82 *Mathew alias Mathai v State of Kerala* (1993) Cr LJ 213, p 215-16 (Ker) .

83 *SS Gayakwad & Anor v State of Maharashtra* (1997) Cr LJ 3839 (Bom)(DB).

84 *MC Dutta v State of Assam* (1977) Cr LJ 506, p 508 (Gau) ; *Chacko Mathai v State of Kerala* (1964) 2 Cr LJ 297, p 299, AIR 1964 Ker 222 ; *State of Karnataka v Shivshankar* (1978) 1 Kant LJ 197, p 200 ; *Padia Patra v State* AIR 1966 Ori 199, p 202-03, (1966) Cr LJ 1176 ; *Narain Singh v State of Punjab* (1964) 1 Cr LJ 730, (1963) SCD 297 ; *Ram Dahin v State of Bihar* (1970) SC Cr R 557, (1970) SCD 672 ; *State of Uttar Pradesh v Ram Swaroop* AIR 1974 SC 1570, 1974 Cr LJ 1035, 1041 ; *Salim Zia v State of Uttar Pradesh* AIR 1979 SC 391, (1979) Cr LJ 323 ; *Mohindra Pal v State of Punjab* AIR 1979 SC 577, (1979) Cr LJ 584 ; *V Subramani v State of Tamil Nadu* (2005) Cr LJ 1727 (SC) ; *Laxman Singh v Poonam Singh* (2003) Cr LJ 4478 (SC) ; *Naveen Chandra v State of Uttaranchal* (2007) Cr LJ 874 (SC) .

1 *State of Rajasthan v Chatra Ram & Ors* (1998) Cr LJ 248 (Raj)(DB); *V Subramani v State of Tamil Nadu* (2005) Cr LJ 1727 (SC) ; *Laxman Singh v Poonam Singh* (2003) Cr LJ 4478 (SC) ; *Naveen Chandra v State of Uttaranchal* (2007) Cr LJ 874 (SC) .

2 *Ranbir Singh v State of Haryana* 2009 Cr LJ 3051 (SC), (2009) 16 SCC 193 .

3 Re *Ningappa Balappa Hadli*AIR 1960 Mys 294, p 296 ; *Mithu Pandey v State of Bihar* AIR 1966 Pat 464 ; *GVS Subbrayan v State of Andhra Pradesh* (1970) Cr LJ 1004, AIR 1970 SC 1079 ; *Kaloo v State* (1966) Jab LJ 587 ; *Dholia Rayji v State* 1 Cr LJ 813 (Guj) ; *Public Prosecutor v Konjiti Nagabhusanam* (1962) 2 Andh LT 291 ; *State of Uttar Pradesh v Ram Sarup* AIR 1974 SC 1570, (1974) Cr LJ 1035 ; *V Subramani v State of Tamil Nadu* (2005) Cr LJ 1727 (SC) ; *Laxman Singh v Poonam Singh* (2003) Cr LJ 4478 (SC) ; *Naveen Chandra v State of Uttaranchal* (2007) Cr LJ 874 (SC) .

4 *Gopal v State of Rajasthan* 2013 Cr LJ 1297, (2013) 2 SCC 188 ; *Rai Singh v State* AIR 1965 HP 49, p 52 ; *George v State of Kerala* AIR 1960 Ker 142, p 143 ; *Mithu Pandey v State of Bihar* AIR 1966 Pat 464 ; *Dhirendera Nath v State* AIR 1952 Cal 621, p 624 ; *Govindan Neelambaran v State of Kerala* AIR 1960 Ker 258, p 259 .

5 *Dhirendera Nath v State* AIR 1952 Cal 621, p 624 ; *Govindan Neelambaran v State of Kerala* AIR 1960 Ker 258, p 259 .

6 *Bhaiya Bahadur Singh v State of Madhya Pradesh* (1996) Cr LJ 3231 (SC) .

7 *Ram Dhani & Ors v State of Uttar Pradesh* (1997) Cr LJ 2286 (All)(DB).

8 *Thommen v State of Kerala* AIR 1958 Ker 74, p 76 ; *State of Uttar Pradesh v Mohd Musheer Khan* AIR 1977 SC 2226, (1977) Cr LJ 1897 ; *Gurdas v State of Punjab* (1978) Cr LJ 264, p 267 (Punj) ; *Ambika Singh v State* AIR 1961 All 38, (1961) 1 Cr LJ 15 .

9 *Parbhoo v Emperor* AIR 1941 All 402 (FB) ; *Narayan Raut v Emperor* AIR 1948 Pat 294, 49 Cr LJ 406 ; *T Mahto v State of Bihar* (1972) Cr LJ 835, p 843, (1972) BLJR 265 ; *Bala Prasad Dhansukh v State of Madhya Pradesh* AIR 1961 MP 241 ; *Rishikesh Singh v State* (1970) Cr LJ 132, AIR 1970 All 51 (FB), wherein the majority of a court of nine judges affirmed; *Parbho v Emperor* AIR 1941All 402 (FB); *Parmannade Mahakkud v State* (1970) Cr LJ 931, p 935 (Ori) ; *Bising Saura v State* (1962) ILR Cut 360 ; *Munshi Ram v Delhi Admn* AIR 1968 SC 702 ; *State of Uttar Pradesh v Ram Swaroop* AIR 1974 SC 1570, (1974) Cr LJ 1035 ; *State of Gujarat v Bai Fatima* AIR 1975 SC 1478, p 1483, (1975) Cr LJ 1079 ; *State of Uttar Pradesh v Mohd Musheer Khan* (1977) Cr LJ 1897, p 1899, AIR 1977 SC 2226 ; next heading under this section.

10 *State v Kolis Hira Bhaga* AIR 1961 Guj 8, p 10 .

11 *Savita Kumari v Union of India* (1993) Cr LJ 1590, p 1593 (SC) ; *Ranveer Singh v State of MP* 2009 Cr LJ 1534, AIR 209 SC 1658, (2009) 3 SCC 384 .

12 *Munshi Ram v Delhi Admn* (1968) Cr LJ 806, AIR 1968 SC 702 ; *State of Gujarat v Bai Fatima* AIR 1975 SC 1478, p 1483, (1975) Cr LJ 1079 ; *State of Uttar Pradesh v Mohd Musheer Khan* (1977) Cr LJ 1897, p 1899, AIR 1977 SC 2226 ; *Mohindra Pal v State of Punjab* AIR 1979 SC 577, (1979) Cr LJ 284 ; *Ranchod v State* (1974) MPLJ 42 (NOC) ; *Gulzara Singh v State* AIR 1971 Raj 68, p 75 ; *Manik Malakan v State of Assam* 1976 Assam LR 288 ; *Nena Ram v State of Rajasthan* (1977) RLW 395 ; *Mohinder Singh v State of Rajasthan* (1977) Raj LW 187, p 193 ; *State of Orissa v G Harijan* (1977) 44 Cut LT 267, p 273, (1978) Cr LJ 262 ; *State of Karnataka v Shivshankar* (1978) 1 Ker LJ 197, p 199 ; *Brindaban Prasad v State* AIR 1964 Pat 138, (1964) 1 Cr LJ 346 ; *Mangal Khan v State* (1960) All LJ 234 ; *Kammu v State of Madhya Pradesh* (1972) MPLJ 129 (NOC) ; *Lakshmanan v Lakshmanan* AIR 1964 Mad 418, (1964) 2 Cr LJ 525 .

13 *Periaswam & Anor v State of Tamil Nadu* (1997) Cr LJ 219 (SC) .

14 *Salim Zia v State of Uttar Pradesh,* AIR 1979 SC 391, (1979) Cr LJ 323, p 328 .

15 *Kuduvakuzinyil Sudhakarna v State* (1995) Cr LJ 721, p 723 (Ker) .

16 *Noothy Raghavalu v State* (1975) 1 APLJ 307 ; *Brindavan Prasad v State* AIR 1964 Pat 138, (1964) 1 Cr LJ 346 .

17 *State v Dharanidhar Mohanty* AIR 1976 Ori 79, (1976) 42 Cut LT 29 ; *MC Dutta v State of Assam* 1977 Cr LJ 506, p 508 (Gau) .

18 *State of Uttar Pradesh v Ram Swaroop* AIR 1974 SC 1970, (1974) Cr LJ 1035 ; *Mohan Singh v State of Punjab* AIR 1975 SC 2161, (1975) Cr LJ 1865 ; *Salim Zia v State of Uttar Pradesh* AIR 1979 SC 391, (1979) Cr LJ 323 ; *Mohinder Pal v State of Punjab* AIR 1979 SC 577, (1979) Cr LJ 584 ; *Ranveer Singh v State of MP* 2009 Cr LJ 1534, p 1536, AIR 2009 SC 1658, 2009 (1) Scale 740, (2009) 3 SCC 384 ; *Brindaban Prasad v State* AIR 1964 Pat 138, (1964) 1 Cr LJ 346 ; *Gulijara Singh v State* (1971) Cr LJ 498, p 505, AIR 1971 Raj 68 ; *Kasimuddin v State of Assam* (1974) Cr LJ 105 (Gau) ; Re *Narsing Naik*(1972) Cr

LJ 1150, p 1154, (1971) 2 Mys LJ 254.

19 *Thakur Mahton v State of Bihar* (1972) Cr LJ 835, (1972) BLJR 265 .

20 Re *Veerabehu Konar*(1972) LW 137(Cr).

21 *Gunidicha Bhoi v State* (1963) 1 Cr LJ 700, p 702, 29 Cut LT 15 (Ori) ; *State of Orissa v Chakradhar* AIR 1964 Ori 262, (1964) 2 Cr LJ 696, (1969) ILR Cut 887 ; *Nakul Barik v State* 1967 Cr LJ 97, p 100, AIR 1967 Ori 1 ; *Padia Patra v State* AIR 1966 Ori 199, p 202-03, (1966) Cr LJ 1176 ; *State of Orissa v Igni Dalai* (1963) 29 Cut LT 200, 207 ; *Rishikesh Singh v State* AIR 1970 All 51, (1970) Cr LJ 132 (FB) ; *Gulijara Singh v State* AIR 1971 Raj 68, p 75 ; *State v Dharanidhar Mohanty* AIR 1976 Ori 79, (1976) 42 Cut LT 29 ; *Lakshmanan v Lakshmanan* (1964) 2 Cr LJ 425, p 429-30, AIR 1964 Mad 418 ; *Narayana Pillai v State of Kerala* (1968) Cr LJ 1362, (1969) Mad LJ 553 (Cr) ; Re *Narsing Naik*(1972) Cr LJ 1150, p 1156, (1972) Mad LJ 38 (Cr).

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23 *Ravulappali Kondaiah v State of Andhra Pradesh* AIR 1975 SC 216, (1975) Cr LJ 262 ; *Gangada v State of Rajasthan* (1975) Cr LJ 1445, p 1448 (Raj), (1975) Raj LW 91 ; *Kasimuddin Sarkar v State of Assam* (1974) Cr LJ 105 (Gau) .

24 *Antu v State of Haryana* (1971) Cr LJ 1059, AIR 1971 SC 1213 ; *Tarachand v State of Haryana* AIR 1971 SC 1891, (1971) Cr LJ 1411 ; *Ragjava Kurup v State of Kerala* (1965) 1 Cr LJ 173, AIR 1965 Ker 44 .

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29 *Bheeru Lal v State of Rajasthan* 2009 Cr LJ 4118, p 4121 (SC), AIR 2009 SC 3208, (2009) 9 SCC 119, 2009 (11) Scale 40 .

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31 *Govindbhai M Raval & Anor v State of Gujarat* (1997) Cr LJ 4270 (Guj) .

32 *Hardeep Singh & Ors v State* (1996) Cr LJ 3091 (Raj) .

33 *Mohan Thagu Singh v State* 2009 Cr LJ (NOC) 780 (Utr) ; *Gurbachan Singh v State of Punjab* 2009 Cr LJ 3109 (P&H) .

34 *Thoti Manohar v State of Andhra Pradesh* 2012 Cr, LJ 3492, p 3500 (SC), 2012 AIR SCW 3752, 2012 (7) Scale 215 ; **See also***Mohd Khalid Chisti v State of Rajasthan* 2013 Cr LJ 637 (SC), (2013) 2 SCC 541, 2012 (12) JT 405, 2012 (12) Scale 254 ; *Ram Vishambhar v State of UP* 2013 Cr LJ 1311 (SC) .

35 *Ram Vishambhar v State of UP* 2013 AIR SCW 628, 2013 (1) Scale 3098, (2013) 2 SCC 71, 2013 Cr LJ 1131 .

36 *Jagdish & Ors v State of Madhya Pradesh* (1999) Cr LJ 2326 (MP) .

37 *Bihari Rai v State of Bihar* 2009 Cr LJ 340, p 343 (SC), 2008 AIR SCW 6864, AIR 2009 SC 18, [2008] 13 SCR 1027, (2008) 15 SCC 778, 2008 (12) Scale 876 .

38 *SS Gayakwad & Anor v State of Maharashtra* (1997) Cr LJ 3839 (Bom) (DB) .

39 *Gopal v State of Rajasthan* AIR 1972 SC 1838, (1972) Cr LJ 1191, p 1192 ; *Tarachand v State of Haryana* AIR 1971 SC 1891, (1971) Cr LJ 1411 .

40 *Ranbir Singh v State of Haryana* 2009 Cr LJ 3051 (SC), 2009 AIR SCW 3683, 2009 (7) Scale 310 .

41 *Mangat v State* (1967) Cr LJ 598, p 902, AIR 1967 All 204 ; *Sekar v State* (2003) Cr LJ 53 (SC) ; *Rizan v State of Chhatisgarh, through the Chief Secretary, Govt. of Chhatisgarh, Raipur* (2003) Cr LJ 1226 (SC) ; *Laxman Singh v Poonam Singh* (2003) Cr LJ 4478 (SC) ; *Shahjahan v State of Kerala* (2007) Cr LJ 2291 (Ker) ; *Naveen Chandra v State of Uttaranchal* (2007) Cr LJ 874 (SC) ; *Bihari Rai v State of Bihar* 2009 Cr LJ 340, 2008 AIR SCW 6864, AIR 2009 SC 18, [2008] 13 SCR 1027, (2008) 15 SCC 778, 2008 (12) Scale 876 .

42 *Hukum Singh v State* AIR 1959 All 690, (1959) Cr LJ 1258, p 1260 ; *Sekar v State* (2003) Cr LJ 53 (SC) ; *Rizan v State of Chhatisgarh, through the Chief Secretary, Govt of Chhatisgarh, Raipur* (2003) Cr LJ 1226 (SC) ; *Laxman Singh v Poonam Singh* (2003) Cr LJ 4478 (SC) ; *Shahjahan v State of Kerala* (2007) Cr LJ 2291 (Ker) ; *Naveen Chandra v State of Uttaranchal* (2007) Cr LJ 874 (SC) .

43 *Harabailu Kariappa & Ors v State of Karnataka* (1996) Cr LJ 321 (Kant) (DB) ; *Sekar v State* (2003) Cr LJ 53 (SC) ; *Rizan v State of Chhatisgarh, through the Chief Secretary, Govt of Chhatisgarh, Raipur* (2003) Cr LJ 1226 (SC) ; *Laxman Singh v Poonam Singh* (2003) Cr LJ 4478 (SC) ; *Shahjahan v State of Kerala* (2007) Cr LJ 2291 (Ker) ; *Naveen Chandra v State of*

Uttaranchal (2007) Cr LJ 874 (SC) ; *Muhammad Khalil Chisti v State of Rajasthan* 2013 Cr LJ 637, (2013) 2 SCC 541, 2012 (12) JT 405, 2012 (12) Scale 254 (Case-law referred).

44 *Babu Ram v State of Punjab* 2008 Cr LJ 1651, p 1654 (SC), AIR 2008 SC 260, (2008) 3 SCC 709, 2008 (2) Scale 499 ; *Laxmi Singh v State of Bihar* AIR 1976 SC 2263, 1976 Cr LJ 1736, **referred to**.

45 *Ram Swaroop v State* (1972) WLN 507, p 515, (1972) Raj LW 325 ; *Onkarnath Singh v State of Uttar Pradesh* AIR 1974 SC 1550, (1974) Cr LJ 1015, p 1023 .

46 *Ayodhya Ram alias Ayodhya Prasad Singh & Ors v State of Bihar* (1999) Cr LJ 5005 (SC) .

47 *Heera Mani Tiwari v State of Uttar Pradesh* (2000) Cr LJ 4960 (All) (DB) .

48 *Ram Narain v State of Uttar Pradesh* (1973) Cr LJ 29, p 32, AIR 1972 SC 2544 .

49 *Jabbar v State* AIR 1955 J&K 9, p 11, (1955) Cr LJ 1179 ; *Bhartu v State* (1954) Cr LJ 54, AIR 1954 All 35 ; Re *Rajesa Husena*(1968) Cr LJ 194, p 197, AIR 1968 Mys 33 .

50 *Hanumantappa Bhimappa Dalavai v State of Karnataka* 2009 Cr LJ 3045, p 3049 (SC), 2009 AIR SCW 3675, 2009 (5) Scale 142 .

51 *Narinder Kumar v State of Jammu & Kashmir* 2010 Cr LJ 3905, p 3910 (SC), AIR 2010 SC 3015, (2010) 9 SCC 259 .

52 *Mangu Khan v State of Rajasthan* 2005 Cr LJ 1748, p 1752, 2005 SCC (Cr) 1535, AIR 2005 SC 1972 .

53 *Gopal v State of Rajasthan* 2013 Cr LJ 1297 (SC), 2013 AIR SCW 889, (2013) 2 SCC 188, 2013 (1) Scale 445 .

54 *Gopal v State of Rajasthan* 2013 Cr LJ 1297 (SC), 2013 AIR SCW 889, (2013) 2 SCC 188, 2013 (1) Scale 445 ; *Krishna Kant Chaturvedi v State of UP* 2013 Cr LJ 1491 (All) (DB) .

55 *Nagarathinam v State* 2006 Cr LJ 2120, p 2128, AIR 2006 SC 1736, 2006 (4) Scale 92 .

56 *Kailas Barku Sonawane v State of Maharashtra* 2009 Cr LJ (NOC) 456 (Bom) (DB).

57 *Krishan Kant Chaturvedi v State of UP* 2013 Cr LJ 1491, p 1500 (All) (DB) .

58 *Ram Vishambhar v State of UP* 2013 AIR SCW 628, 2013 (1) Scale 3098, (2013) 2 SCC 71, 2013 Cr LJ 1131 .

59 *Ranbir Singh v State of Haryana* 2009 Cr LJ 3051, p 3056 (SC), 2009 AIR SCW 3683, 2009 (7) Scale 310 .

60 *Dattu Shamrao Valake v State of Maharashtra* 2005 Cr LJ 2555 (SC), AIR 2005 SC 3331, 2006 SCC (Cri) 114 .

61 *Arshad Hussain v State of Rajasthan* 2013 Cr LJ 3955, p 3958 (SC), AIR 2013 SC 3001, 2013 (9) Scale 358 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 97.

Right of private defence of the body and of property.--

Every person has a right, subject to the restrictions contained in section 99, to defend--

First.	--	His own body, and the body of any other person, against any offence affecting the human body;
Secondly.	--	The property, whether movable or

immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.593

Comments

1. Scope and Applicability

This section deals with the subject-matter of the right of private defence. The subject-matter of the right comprises the body or property: (a) of the person exercising the right; or (b) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. A person has a right to defend the property, whether movable or immovable, of himself or of any other person against any act, which is an offence falling under the definition of theft,594 robbery, mischief or criminal trespass.[62] The right of private defence conferred by this section is subject to limitations contained in s 99 .[63] The question, whether the accused had a right of private defence or not, has got to be answered by reference to the provisions contained in this section and s 99 .[64] The right does not arise if there is time to have recourse to the protection of the public authorities, and it will not extend to the infliction of more harm than is necessary for the purpose of defence. Another limitation is that when death is caused, the person exercising the right must be under reasonable apprehension of death, or grievous hurt, to himself or to those whom he is protecting and in the case of property, the danger to it must be of the kinds specified in s 103, the scope of the right is further explained in ss 102 and 105 .[65]

The right of private defence, thus, rests on three ideas: first, there should be no more harm inflicted than it is necessary for the purpose of defence; secondly, there must be reasonable apprehension of danger to body; and thirdly, the right does not commence until there is apprehension.[66] The right of self-defence conferred or preserved by the law for an individual is a very narrow and circumscribed right and can be taken advantage of only when the circumstances fully justify its exercise.[67] Where there is clinching evidence to show that the accused inflicted injuries by taking out a knife belonging to him from his shoes, there could be no occasion for him to exercise right of private defence.[68] The law does not confer a right of self-defence on a man who goes and seeks an attack on himself by his own threatened attack on another, an attack which was likely to end in the death of that other.[69] The law does permit the use of a degree of force as is necessary to contain an attack of or in other words to defend oneself, but the right of self-defence does not stop there because it extends to the limited extent of repulsing the attack. This is a necessary part of the exercise of the right because where a party is faced with an attack, it is insufficient to contain it unless it can be beaten back as the danger does not cease unless the latter has been accomplished. A fair and necessary degree of force can be595 used and it can even be extended to instances of taking of life if the danger is so imminent that the victim reasonably apprehends danger to his own life if he does not strike back in time. All those ingredients must be pleaded and established. In a given instance, the courts could apply the doctrine or the principles to a particular record and test as to whether the accused would be entitled the benefit of that right.[70]

The plea of self defence was not taken by the accused during the trial of the case. Even in statement under s 313, CrPC, the accused did not state that he acted in exercise of right of self defence. Thus, the plea of self defence was rejected.[71]

A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire evidence must be examined with care and viewed in its proper setting.[72]

2. Right once available may also be Lost

An act done in the exercise of this right, is not an offence and does not, therefore, give rise to any right of private defence in return,[73] even if the person exercising the right of private defence, has the better of his aggressor provided he does not exceed his right because the moment he exceeds it, he commits an offence.[74] In *Ajodhya v Emperor* ,[75] it was held that the right of private defence, even originally available, is lost when the party, which was attacked, far outnumbered and the violence used by that party was far in excess of the occasion.

If deceased's act was a step in exercise of his right of private defence, then the appellant's attack cannot have the protection of law because it is axiomatic that there is not right of private defence against private defence for right of private defence conferred by law was designated to serve a social purpose.[76]

3. Actual Commission of Offence not Necessary for Exercise of Right

It is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehends that such an offence is contemplated and that it is likely to be committed if the right of private defence is not exercised.[77] The right of private defence of property arises as soon as there is a reasonable apprehension of danger to the property. The person entitled to exercise that right can act before actual harm is done. It is not a right of retaliation, and hence he need not wait until the aggressor has started committing the596 offence which occasions the exercise of his right of private defence.[78] It is not necessary, nor does the law require, that the accused should wait till he receives a grievous injury for the purpose of exercising his right of private defence. When the occurrence took place in front of the appellant's door it proved that the deceased and not the appellant was the aggressor. The deceased came to the accused's house brandishing an iron rod and shouting that he would kill the deceased. An iron rod is undoubtedly a heavy material which could easily smash the head of a person and cause serious and grievous injuries on any part of body. The appellant was confronted with such a situation. He came out with *katari*. In order to save himself he had no other alternative than to use the *katari* while defending his person and at such a moment it was not possible on his part to weigh the blows in golden scales. The instinct of self-preservation being predominant and uppermost in his mind it was not unlikely that he gave repeated blows to the deceased by means of the *katari* on different parts of the body. In such circumstances, the appellant is entitled to the benefit of right of private defence under s 97, IPC .[79] In considering whether one is entitled to exercise the right of private defence, one has to place himself in the position of the accused in the midst of circumstances in which the accused stood and then form an opinion whether under the peculiar circumstances, he had not the apprehension of such injuries to his body as would entitle him to exercise his right. These things cannot be weighed in too fine a set of scales or as it is said in 'golden scales'.[80]An act done in the exercise of this right is not an offence and does not, therefore, give rise to any right of private defence in return.[81]

4. Right of Private Defence only against Particular Kind of Offences

The right of private defence of property under this section is available only against an act which is an offence, or an attempt to commit an offence, falling under the definition of theft, robbery, mischief or criminal trespass.[82] In other words, the right private defence of property only comes into operation when certain specified offences against property are committed, or attempted to be committed.[83]In the first instance, the act against which the right is available must be not merely an unlawful act, but also an offence or attempt to commit an offence.[84] Secondly, it must fall within the definition of any of

the aforesaid offences mentioned in the section. There is no right of private defence of property if none of these offences is committed or attempted to be committed.

In a Patna case, the complainant, with his men, went to plough the field to which he had a good title and of which his vendor had been recently put in possession. The597 field was unoccupied. The complainant's party was opposed by the party of the accused consisting of more than five persons because one of the accused claimed that the field belonged to him. On objection by the complainant, the accused's party made a violent attack on his party with deadly weapons which resulted in the death of three persons of the complainant's party. There was no crop on the field which was in danger of being damaged or removed, and the object with which the accused took the law into their own hands was clearly not to prevent either theft or mischief but to enforce their own right or supposed right to the land. It was, therefore, held that the accused had no right of private defence.[85]

A right of private defence does not arise merely because an unlawful or wrongful act has been done. It arises only when that unlawful or wrongful act is an offence. Further, it must be an offence of a particular kind. In the case of defence of person, it must be an offence 'affecting the human body,' and in the case of defence of property, it must be theft, robbery, mischief or criminal trespass or an attempt to commit any of these offences. The commission of an offence under s 20, Cattle Trespass Act, would not give rise to the right of private defence of property. The owner of the cattle, therefore, cannot plead this right in defence of charge of offences like rioting, hurt, *etc*., alleged to be committed by him while rescuing by force cattle being illegally taken away to the pound although such illegal act is an offence under s 20 as aforesaid.[86]

Where a decree-holder, who has obtained possession of a field through court, goes to cultivate it, he cannot be said to commit criminal trespass and the judgment-debtor has no right of private defence.[87]

Entry under even an *ex parte* order for possession under s 145, CrPC, is not an offence, and the opposite party has no right of private defence against it.[88]

The section protects only acts done in defence of body or property. It has no application where the object of the assault is not to defend any alleged right to property, but to liquidate a person who had dared to assert his rights.[89]

In *Queen v Gokool Bowree* ,[90] an old woman caught stealing a crop was beaten to death. The plea of defence of property was rejected and the accused were convicted of murder.

In *Ajodhya v Emperor* ,[91] it was held that the right of private defence, even if originally available, is lost when the party which was attacked far out numbered and the violence used by the former was far in excess of the occasion.

5. Robbery Covers Dacoity--No Right of Private Defence to Stolen Property

Theft becomes robbery in certain circumstances, but there may be robbery by extortion without theft. Hence, not only theft but robbery is also mentioned in the section. But dacoity is not separately mentioned, because it is only an aggravated598 orm of robbery and comes within the definition of robbery. House breaking falls within the definition of criminal trespass and s 103 expressly mentions it as one against which the right of private defence of property exists. The Code does not give any right of private defence of property in regard to which an offence under s 403 or 411, IPC, has been committed.[1] There is also no right of private defence to a thief or robber in respect of stolen property.[2]

6. Right of Easement not under the Protected Section

An 'easement' does not come within the purview of 'property', an obstruction to an easement of light and air cannot give rise to a right of private defence of property.[3] Likewise, a mere protest does not amount to an invasion of property and does not give a right of private defence.[4]

7. Right not available to an Aggressor

Refer to synopsis of s 96 and of s 100 . The plea of private defence is not available to an aggressor. This is a settled position. Hence the plea of private defence cannot be raised merely on the premise that the deceased reached the scene armed with a chopper, particularly when it is proved that the deceased reached there where he found his brother being surrounded by armed assailants.[5]Where the accused admitted himself that accused party went to the house of one of the prosecution witnesses equipped with firearms to settle scores, such entry particularly at night is an act of aggression and was enough to instil reasonable apprehension in the mind of occupants of the house, therefore, plea of private defence of accused cannot be accepted.[6] The firing of a gun at persons at a distance of 25 yards, without a reasonable apprehension of danger and without any necessity for so doing, is not justifiable by the right of private defence.[7] But an arrest by a private person on a mere suspicion is illegal and the person going to be arrested, has a right of private defence against such illegal arrest.[8] Where evidence showed that the accused continued to assault the deceased even after he fell on the ground, it was held that the possibility of the accused causing injuries in exercise of private defence is ruled out and his conviction for murder was held proper.[9] Where the accused party and not the complainant party was aggressors, the accused persons were armed with dangerous weapons and none from the complainant party were armed with dangerous weapons showing the intention of the accused and not the complainant to attack, blows were given on vital parts of the deceased's body by the accused persons, the accused599 persons were held not entitled to the right of private defence.[10] Appellant accused first wielded the rod on the head of the deceased, causing as many as eight injuries. He being the aggressor was not entitled to the right of self defence.[11] Appellants accused, armed with kirpan, came to the field of the complainant, thus, they were aggressors).

Aggressor--Determination of

The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilises the version of the right to private defence. Non-explanation of the injuries sustained by the accused at the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.[12]

The accused had taken a loan from the deceased. Deceased went to the accused and demanded repayment, which the accused refused, and this led to an altercation. The deceased was going to police station to lodge FIR when the appellant accused and others attacked the deceased, his brother and eye-witness with barchi and lathi causing injuries. Held, the appellants accused were aggressors, and having attacked the deceased first, were not entitled to any right of private defence.[13]

8. Accused Aggressor--Omission to explain injuries--Not fatal

Where the accused persons are aggressors, omission to explain the injuries of the accused is insignificant.[14]

9. Circumstances in which Absolute Right of Self-defence is Available

The following are the circumstances in which the right of private defence will completely absolve the accused from all guilt even when he has voluntarily caused the death of another person:

(i) Where the right is exercised in the private defence of the body of the accused, it affords a complete defence--(a) if the deceased was the actual assailant of the accused and (b) if the offence, committed by the deceased, which occasioned the exercise of the right, was of any of the five descriptions, enumerated in s 100, IPC .600

(ii) Where the right is exercised in the private defence of the property of the accused, it equally affords a complete defence if the offence, the committing of which, or the attempting to commit which, by the deceased, occasioned the exercise of the right, was of any of the six descriptions, enumerated in s 103, IPC .

Even if a person accused of murder, may be unable to establish such a right of private defence and so fail to obtain an acquittal on that charge yet, it is possible for him to be convicted only of culpable homicide not amounting to murder if: (a) he exercised his right of private defence, whether of person or of property, in good faith, although he exceeded the power given to him by law; and (b) he caused the death of the deceased, against whom he was exercising such a right of defence, both (i) without premediation and (ii) without any intention of doing more harm than was necessary for the purpose of defence.[15]

A right of private defence cannot be pleaded by persons who, expecting to be attacked, go out of their way to court an attack.[16]

The driver of a vehicle, who has caused an accident, cannot be said to have a right of private defence in running away from the scene of occurrence and cause the death of a multitude of people.[17] Where the accused persons alongwith their associates went to the field of the deceased to forcibly evict the latter, therefore, the facts showed that the accused party were the aggressors, one of the accused persons died at the hands of the deceased but the deceased can be said to have exercised the right of private defence of self and property, such act of the deceased would not amount to causing provocation to the accused to cause death of deceased in exchange.[18] Where the accused persons were aggressors, mere presence of injuries on the person of the accused would not by itself establish a plea of self-defence.[19]

Every person has a right of private defence including against the act of a person of unsound mind subject to restrictions contained in s 99, IPC . It is not every assault but only assaults enumerated in s 100 qualified by s 101 which would justify killing. An aggressor is not entitled to set up private defence,[20] even if he suffers minor injures.[21]

Looking to the number and nature of injuries received by them in comparison to the injuries received by the prosecution witness, the accused were held entitled to the benefit of right of private defence.[22]

Right Can be Exercised even when the Aggression is by the Police

The law does not confer a right of self-defence on a man who goes and seeks an attack on himself by his own threatened attack on another, an attack which was likely601 to end in the death of that other.[23] The right of private defence cannot be claimed by an aggressor even if he is a public servant. In fact it is the person aggressed upon who is on the defensive. The assailant cannot say that although he had begun the attack he should be protected if the opposite party uses force in repelling it.[24] In order to determine whether the accused acted in exercise of the right of private defence of property or person, it is absolutely necessary to find who started the assault first. Where the police party were the aggressors and the accused began the attack in desperation finding a large body of the police party advancing against them with loaded rifles, revolvers and *lathis*, their attack was taken to be in defence of their bodies and property and, therefore be protected.[25] Where a complainant himself was the aggressor, it was held that the accused must be held to have exercised the right of private defence.[26] An aggressor has no right of private defence even against persons who come to the rescue of the victim of his attack.[27] When a man is being attacked by a party, he is not in a position to distinguish which person in the party of aggressors is his real assailant and which merely an onlooker:

he is, therefore, not deprived of the right of private defence merely because a person in the party of the aggressors, has not attacked him.[28]

Where a public officer, *viz*. a policeman acts *bona fide* under the colour of his office, the right of private defence would not be available against him though the act of the public officer may not be strictly justified by law.[29]

Number of Injuries not always a Safe Criterion to Determine Aggression

If during the course of the attack, made by one party, one member of that party falls to the ground due to the defensive action of the members of the other party, it does not give rise to any right of private defence to any member of the party committing aggression.[30]

The number of injuries is not always a safe criterion for determining who the aggressor was.[31] Where the total number of injuries on the side of the complainant are somewhat more than those on the side of the accused person, the injuries by themselves do not necessarily prove that the accused were the aggressors or had602 exceeded their right of self-defence.[32] Even if a death has taken place in the complainant's party, it cannot be said that the accused were the aggressors and exceeded their right of self-defence.[33]

Where the accused suffered 10 injuries mostly incised wounds on various parts of his body and the injured suffered one injury by knife at the hands of the accused, it was held that the accused did not exceed the right of private defence.[34]

It is true that there is no inflexible rule of law that the party which sustained the smallest number of injuries is the aggressor and that which suffers a larger number of injuries is the victim of aggression. However, more than often, it is found, that the number of injuries is a very significant circumstance for determining as to who is the aggressor. The rationale on which this principle is founded is that a party which goes to launch the assault would go well prepared and well armed in defence and, therefore, naturally would inflict more injuries than which it receives from the other side in self-defence. If a larger number of injuries have been sustained on the side of the defence as compared to the prosecution side, it shows that it was the prosecution side which was the aggressor.[35] Where medical evidence showed that the accused party had received more injuries than the deceased party, the explanation as to how and when accused party received injuries was vague, the finding of the High Court that the prosecution story as to manner of incident was untrue and the deceased party were aggressors and injuries caused to them were in the exercise of right of private defence of the accused. The finding was confirmed by the Apex Court.[36]

Unpreparedness is Proof of Non-Aggressiveness

Unpreparedness for attack is the proof of non-aggressiveness.[37] From the mere fact that the accused were not in possession of the disputed land or the accused used one or two guns in the occurrence, it cannot be inferred that the accused were the aggressors.[38]

No Right of Private Defence in a Free Fight

There are many cases where it cannot be decided on the evidence which side or which individual began the attack. When this is so, the difficulty is usually avoided by holding that there was a 'free fight'. 'A free fight is one when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders'.[39] In a free fight where both parties intend603 to attack each other, no right of private defence accrues to either party,[40] and each individual is responsible for his acts.[41]

When a body of men are determined to vindicate their rights, or supposed rights by unlawful force, and when they are engaged in a fight with men who, on the other hand, are equally determined to vindicate, by unlawful force, their rights, or supposed rights, no question of self-defence arises.[42]

Where two parties come armed, ready to fight with each other, the mere fact that one party strikes the other party first does not, by that reason and that reason alone, give a right of private defence to the other party.[43] If neither party is in actual possession of the property in dispute, and if both parties go armed to have a trial of strength, neither party can be held to have acted in exercise of the right of private defence, irrespective of whether one or the other party was the aggressor or the first to attack. If, however, a party is in actual possession, it cannot be deprived of its right of private defence of property simply because it goes armed to defend its property after seeing the other party committing, or on feeling a reasonable apprehension that the other party would commit any of the offences referred to in the second clause of s 97 .[44] Where there was a free fight between the parties, facts proved showed that prosecution witnesses were the aggressors and the accused persons had to take up *lathis* to defend themselves and both parties suffered injuries, nature of injuries suffered by the accused persons did not show that they exceeded the right of private defence, the acquittal of accused persons was found proper.[45]

There can, however, be no question of a free fight where there is a clear finding that one of the two parties were the aggressors.[46] Right of private defence is not available to an aggressor.[47]604

Chance-Medley--Sudden or Free Fight--Free Fight and Intentional Fight Distinguished

If two persons gather together at a place and some dispute suddenly arises, as a result of which the parties attack each other, or one person attacks another, that would be a case of a sudden fight. If some persons deliberately go to another with the intention of attacking him that can never be a case of free fight or sudden fight. That would be a case where the latter would be entitled to the right of private defence in order to ward off the attack on him by the former.[48]

In England, it was held at one time that when a man was assaulted in the course of such sudden brawl or quarrel, he might, under certain conditions, protect himself by killing his assailant and rely upon the excuse of self-defence, and thus reduce his offence from murder to homicide which only involved forfeiture. The conditions were that he must show, first, that before the mortal stroke given he had declined further combat; secondly, that he then killed his adversary through necessity, in order to avoid his own immediate death.[49]But the old special law of chance-medley has now been declared to be a thing of the past. The offences against the Persons Act 1928[50] provided: 'No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony'.

The exclusion of forfeiture removed the difference in consequence which previously distinguished a homicide caused by way of defence in chance-medley from one caused in self-defence which could be fully justified as being without any blame at all on the killer. It has accordingly been laid down by the court of criminal appeal in *R v Semini* ,[51] that the old doctrine of chance-medley has no longer any place in the law of homicide. Each case, therefore, must now be decided upon the established principles of justifiable homicide, or provocation, as the case may be.[52]

In India, it has been held that where there is a spontaneous fight between two parties, each individual is responsible for the injuries he causes himself and for the probable consequences of the pursuit by his party of their common object. He cannot plead that because he might, at any moment, be struck by some member of the other party, his own blows were given in self-defence.[53] In an Allahabad case, there was a dispute between the deceased and the two accused, who were father and son, as to the ownership of a cattle trough. There was no evidence to show that there was a pre-arranged plan or preparation to fight, and it could not be said that the intention of the parties was to decide the question of ownership of the cattle trough by an armed fight. At first there was only exchange of abuses and no danger to the person of the deceased, but he struck the first blow with a *lathi* on the head of the first accused. It was then that the two accused gave *lathi* blows to the deceased as a result of which he died. It was held that, under the circumstances the accused were protected by the right of private defence.[54]605

10. Considerations for Determining Free Fight

An appropriate test to determine whether a fight is a free one, is that both the parties should voluntarily enter into a fight and there should be a mutual intent to harm each other. A desire to fight and mutual intent to harm each other can easily be entertained at the spur of the moment and the resulting fight will be a free-fight.[55] Where one party is found to be the aggressor and the other party has not made any pre-planned scheme of fighting with the other party, there is no question of a free-fight in the case.[56]

In a case of sudden fight it is immaterial as to which party had opened the attack first.[57]

11. Right Of Private Defence Of Body--General

In the case of causing injuries to another in self-defence, there must be two things: no more harm is to be inflicted than is necessary for the purpose of defence and there must be a reasonable apprehension of danger to the body from the attempt or threat to commit some offence; and the right does not commence until there is that reasonable apprehension. The firing of a gun at persons at a distance of 25 yards, without a reasonable apprehension of danger, and without any necessity for so doing, is not justifiable by the right of private defence.[58]

12. 'Against any Offence Affecting the Human Body'

Under this section, a person has a right to defend his own body or the body of another person against 'any offence affecting the human body'. The right of private defence does not arise merely because an unlawful or wrongful act is committed or attempted to be committed. The Code confers a right of private defence only when that unlawful or wrongful act is an offence,[59]*i.e.*, it arises only against the commission of an offence,[60] and not against any mere physical act which may not be to one's liking, but is not punishable under the provisions of this Code.[61] Further, it must be an offence of a particular kind. In the case of defence of person, it must be an 'offence affecting the human body'. Offences affecting the body are dealt with in ch XVI of the IPC which opens with the words 'Of Offences Affecting the Human Body', and includes ss 299 - 377 . It has been held that the use of the words 'offences affecting the human body' both in this section, which gives the right of private defence, and in the beginning of ch XVI makes it clear that the right of private defence of persons arises in favour of a person in cases when any of the offences mentioned in ss 299 - 377 is contemplated to be committed against the person who606 seeks to exercise this right.[62] A wife, against whom her husband uses force enforcing his supposed right of marital intercourse, has a right of private defence of her person.[63]

It is not necessary that the person (making the private defence) himself must have been the target of assault.[64]

Where some police constables assaulted the accused by attempting to drag him forcibly to a dispensary, it was held that he had the right of private defence against the action of the constables.[65]

Where the accused's sister was being abducted, even though by her husband, and there was an assault on her and she was being compelled by force to go away from her father's place, it was held that the accused had the right of private defence of the body of his sister against an assault with the intention of abducting her by force, and that right extended to the causing of death.[66]

But where the accused assaulted the sales tax inspector, who was trying to catch the accused's son, committing an offence under s 46(h) of the Madhya Pradesh General Sales Tax Act 1958, it was held that he could not plead the right of private defence.[67]

Where a vaccinator attempted to vaccinate a child against the wishes of his father and the father and some of his relations intervened and assaulted the vaccinator, it was held that they were perfectly justified in interfering with what the vaccinator was doing and preventing him from vaccinating the child against their wishes.[68]

Right Available Against Offence Affecting Human Body Under Local or Special Law

The expression 'any offence affecting the human body' is not limited to offences under ch XVI of the IPC . There may be an offence affecting the human body under a special or local law, and in view of the second clause of s 40 of the IPC, it would appear that such an offence also may give rise to the right of private defence of a person. A person is perfectly justified under this section in offering resistance to his being taken away against his will with the object of being impressed for service or employment.[69]607

There should be Apprehension of Danger

There can be no right of private defence unless there is at least an apprehension of danger.[70] Where the complainant raised his fist at the accused and took a step forward with the threat of striking him, it was held that the accused had the right of self-defence.[71] But a mere threat, not carried out, and later completely abandoned, followed by retracing of steps by the threatener, would not justify any assault from the person threatened, as he must have been convinced that the person threatening did not mean to carry out the empty threat.[72] The mere presence of persons who do not take steps to protect the accused from the assault of the deceased does not take away the right of private defence of the accused.[73]

Right to Defend Body of another Person

The right of private defence need not necessarily be exercised for the defence of one's own person; it can be exercised for the defence of the person of another.[74] A person has the right not only to defend his own body but even that of any other person.[75] If an incident, relating to the death of more than one person, is an integrated one and cannot be divided into parts, the accused will have the same right of private defence in respect of each individual death. It cannot be held that the accused had the right of private defence in respect of the first death, but not in respect of the other one which occurred under, more or less, the same circumstances.[76]

Accrual of Right does not Depend upon Causing any Injury

The question of the accrual of the right of private defence to a person does not depend upon an injury being caused to him. If the facts and circumstances of a particular case indicate that the accused could have had a reasonable apprehension, in his mind, of a grievous injury being caused to him, then the right of self-defence is available to him.[77] It is not necessary that he should wait until he himself is attacked.[78] This right, not being a right of retaliation, he need not wait until the aggressor has started committing the offence which occasions the exercise of his right of private defence. He can act before actual harm is done.[79] A person is entitled to exercise the right of private defence if he reaches the conclusion that the threat to his person or property is real or immediate.[80] If it is found that there was apprehension to life or property or of grievous hurt, the right of private defence is in operation. The person, exercising the right of private defence, is entitled to overcome608 the threat.[81] So the harm, inflicted in self-defence, must be no more than it is legitimately necessary for the purpose of the defence.[82]

Mere Exchange of Abuses does not give a Right of Private Defence

An exchange of abuses from both sides does not give any of them a right to strike the other by a *lathi*. No danger to person arises when one is merely abused, and, as such, no right accrues to the person abused to strike another with a *lathi*. If, however, abuse is accompanied by a threat to assault, a right of private defence arises.[83] There is no provision in the IPC where an accused person can be excused for an insulting outburst in the exercise of the alleged right of private defence.[84]

Consideration of the Question of Right of Private Defence to another Person

In considering whether one is entitled to exercise the right of private defence, one has to place himself

in the position of the accused in the midst of circumstances, in which the accused stood and then form an opinion whether, under the peculiar circumstances, he had not the apprehension of such injuries to his body as would entitle him to exercise his right. These things cannot be weighed in too fine a set of scales or, as it is said, in 'golden scales'.[85] But the law does not give a person a right to defend another man's person or property when he finds some unknown persons engaged in a free-fight. Even if dacoities and robberies are common in the locality, a person has no right to shoot at a crowd of five or seven persons without knowing who are the robbers and who are the victims.[86]

Time when such Right is Available

Under s 102, IPC, this right can be exercised as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit any of the offences, mentioned in ss 100 and 101, IPC and continues as long as such apprehension of danger to the body continues. Under s 100, the right extends, under the restrictions, mentioned in s 99, IPC to the voluntarily causing of death or of any other harm to the assailant if the offence, which occasions the exercise of the right, be, inter alia, such an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault.[87]Such apprehension must be reasonable and the violence inflicted must not be greater than is reasonably necessary for the purpose of self-defence. It must be proportionate and commensurate with the quality and character of the act, it is intended to meet and what is done in excess is not protected.[88]609

No Right when there is Time to have Recourse to the Authorities

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.[89]

No Right against the Right of Private Defence

The right of private defence is available against an offence. Where an act is done in exercise of the right of private defence, such act cannot give rise to any right of private defence in favour of the aggressor in return.[90] Where the deceased can be said to have exercised right of private defence of self and property, such act of the deceased would not amount to causing provocation to the accused to cause death of the deceased in exchange.[91]

Illustrative Cases--Defence of Person

Where evidence on record showed that the accused received blows in the midst of altercations when he came there and thereafter left for home and returned with a *tangi* with which he inflicted the fatal blow on an unarmed deceased, the conduct of the accused showed the right of private defence of the person ceased to exist as soon as he left the place of occurrence for his house.[92]

M, who had gone to a certain house with the intention of committing an offence, was discovered and was pursued by *A* and *G*. *A* was killed by *M* and when *G* tried to catch hold of *M*, he was also killed by *M*. It was held that when *M* had killed *A* the right of arrest at that moment would arise. *G* was exercising that right and the right of self-defence therefore would not then arise to justify the killing of *G* by *M*.[93]

When the accused armed with a gun sitting in his tractor was stopped by the victim party armed with *lathi* and *ballam* the accused got down from the tractor and fired shots from his gun killing the victim, the plea of self-defence of body and tractor set up by the accused was not accepted as the accused with the gun was in a dominating position.[94] Where the deceased was assaulted but accused was not present on the spot, so he could not have participated in assault, the question of accused exceeding right of private defence cannot arise.[95]

Deceased had gone to the house of the accused and inflicted injuries by kapa on the accused and his wife. Accused A3 in order to defend himself and his wife had inflicted single injury on the chest of the deceased with cobbler's instrument with whom he was working. The plea of the accused that they acted in exercise of right of private defence was accepted and the accused appellants were acquitted of the charge under s 302, IPC .[96]610

Where the deceased threatened the accused with a scythe and the accused, apprehending that he was about to be hit on the head with the scythe, aimed a blow with a *lathi* at the right hand of the deceased with the object of knocking the scythe out of his hand but by accident the blow fell on the deceased's head and resulted in the fracture of the skull. It was held that the accused dealt the blow in self-defence and did not exceed the right of private defence.[1]

An eye-witness deposed that the knife was taken out by the deceased and there was a scuffle between the accused and deceased. The deceased was held by his collar by the accused. The knife had fallen from the hands of the deceased in the scuffle and the same was taken by the accused and the deceased was stabbed with it. First blow was inflicted on the thigh, second was on the hand and the third one was on the chest. Held, the accused exceeded the right of private defence, thus, his conviction under s 302, IPC was altered to one under s 304, Pt I.[2]

Where there was a grapple and during that struggle the accused received injuries at the hands of the deceased with a blunt weapon and apprehending danger to his life, inflicted one injury on the neck of the deceased. The accused had not intended to cause that particular injury, which unfortunately was on the neck cut the carotid artery. The Supreme Court held that the accused was rightly found entitled to the right of self-defence by the High Court.[3]

The appellant did not use his gun even at the time when he and his brothers were attacked and inflicted with numerous and extensive injuries but resorted to firing only as a last resort when the prosecution party persisted in entering into the house by scaling over the wall of the house and threatened that they would not allow the appellant and *P* to remain alive and declared that they had already put an end to the life of *V*. These circumstances, lend ample support to the case set up in defence which is not an afterthought, that being the appellant fired shots, only in the exercise of his right of private defence of his person and his brother. Presumably, the appellant might have thought that *V* who was lying with severe injuries outside the house and who could not get up and enter into the house was dead and might have entertained, in such circumstances a reasonable apprehension of imminent danger to his and to his brother's life. In view of the peculiar facts and circumstances of the case the appellant is entitled for a complete acquittal on the plea of the right of private defence.[4]

13. Burden of Proof

Whenever the plea of right of private defence is taken it is not necessary for the defence to lead specific evidence. The defence is entitled to substantiate their case from the evidence of the prosecution. It is not incumbent upon the defence to substantiate right to private defence if it can be substantiated from the prosecution611 evidence. Therefore, the burden of establishing the defence is not that rigorous on the part of the defence as that of the prosecution.[5]

Section 105 of the Evidence Act provides that burden of proof that case of the accused comes within an exception, lies upon him. General exceptions are contained in ch IV of the IPC, comprising the right of private defence too. It is not necessary for the accused to lead evidence to prove that he acted in exercise of right of private defence and it may be inferred on the scrutiny of the prosecution evidence itself together with attending circumstances brought on record. But the entire scenario has to be viewed for coming to the right conclusion.[6] The correct position in law is that in a criminal case there are many methods of establishing a defence which can even be done by building up a case in cross-examination or in the alternative, it is equally permissible to argue that the facts on the basis of the record spell out a defence on a point of law. Also, one needs to bear in mind the fact that where such a defence is pleaded that it has got to be established only to the extent of preponderance of

probability and not beyond reasonable doubt. That burden has been discharged by the accused in the case.[7]

The burden of proving self defence is always on the accused but it is not as onerous as the one which lies with the prosecution. Such burden can be discharged by probabilizing the defence. The accused may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross examination of prosecution witness or by adducing defence evidence.[8]

If the evidence shows clearly that the injuries on the complainant, were caused by the accused it is for him to show that he was justified in inflicting the injuries, or rather that he acted in self-defence.[9] When an accused person commits an act of violence upon another person in circumstances which prove that he was apprehending further violence from that person, nothing further need be proved to establish that he was acting in the exercise of his right of self-defence. But in the case of a charge of murder, it is for the accused to make out that circumstances existed which would justify his causing the death of the deceased.[10]

14. Right of Defence of Property--General

The right of private defence need not be specifically pleaded. It may be apparent or may be gleaned from the evidence of the prosecution and the circumstances emerging therefrom. All that is required to give rise to the right of private defence of property is that a reasonable apprehension of danger to the property should commence. The persons who exercise the right of private defence of property do a perfectly legitimate act. In case any one of them exceeds that right and gives a blow which causes death, then that is his individual act and he alone would be liable for the consequences thereof.[11] Under s 97 of the IPC every person has a right to defend his own body, and the body of any other person, against any offence affecting the612 human body, but that right is subject to the restrictions contained in s 99 .[12] The right of private defence under this section also embraces the protection of property, whether movable or immovable or of one's own or of another person,[13] against certain specified offences, namely theft, robbery, mischief and criminal trespass.[14] Law does not require a person, whose property is forcibly tried to be occupied by trespassers, to run away and seek the protection of the authorities.[15] Law entitles him to defend himself and his property from the attack of the trespasser by using necessary force against the latter.[16] This right is, however, a restricted right. Section 99 expressly lays down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities, and that it, in no case extends to doing more harm than is necessary for the purpose of defence. Sections 100 - 105 make the right depend on the circumstances of each case.[17]Where the accused claims the right of private defence, it has to be investigated and decided whether the other party committed any act which is an offence against body or property of the type described in this section against which the section confers upon the accused a right of private defence.[18] Private defence of property necessarily involves possession of the property by the person acting in defence. Whether the possession is on his own account or on that of another is immaterial. Consequently, the doctrine of private defence of property has no application where, a property being in dispute, rival claimants seek to obtain possession thereof by force. A man may defend his possession by force; he cannot obtain possession by force. The accused must have acted on the defensive, and not on the offensive side.[19] Where concurrent findings of the trial court and High Court were that the accused had no right, title, interest or possession of the land in issue, the Apex Court held that the right of private defence of property does not vest in the accused.[20] Where there was no proof that the accused were owners of a heap of wood, the accused assaulted the complainants, the right of private defence was held not available to the accused persons. But where documentary evidence proves beyond doubt that accused were in peaceful possession of the land in dispute, one person was killed and others injured when the complainant went to the disputed land for ploughing, admittedly the complainant party had come to the disputed land for the first time on the date of occurrence after they allegedly purchased it from the tenure holder, it was held that the right of private defence of property accrued to the accused when the complainant tried to dispossess them and the accused persons613 cannot be held guilty of forming an unlawful assembly and causing blunt injuries and so were entitled to be acquitted.[21]

The right of private defence is essentially a defensive right circumscribed by the statute and available only when the circumstances clearly justify it. It cannot be allowed to be pleaded or availed of as a pretext for a vindictive, aggressive or retributive purpose. This right is available against an offence and, therefore, where an act is done in exercise of the right of private defence, such an act cannot give rise to any right of private defence in favour of the aggressor in return.[22] There is no right of private defence against a person going to cultivate a plot of land in pursuance of an order passed in a proceeding under s 145, CrPC even if that order is an *ex parte* order.[23] The right of private defence of property pre-supposes that the person exercising the right, or the person, on whose behalf the right is exercised, is in possession of the property which has to be defended.[24]

Where the deceased was found to be in possession of the property, one of the accused was a trespasser on the said land and tried to forcibly dispossess the deceased from the disputed land, assaulted the deceased and caused his death, the said accused thus cannot be said to have any right of private defence and was guilty of murder.[25] There was land dispute between the parties. The accused was in possession of the land, and the deceased came with oxen and started cultivating the land of the accused. The accused lifted stone boulders and gave three blows to the deceased causing his death. Held, the incident occurred all of a sudden. Thus, the accused exercised the right of private defence to save the agricultural land in his possession, but he exceeded his right by giving repeated blows of stone boulders and, therefore, he committed the offence under s 304, Pt I, IPC . A sentence of ten years RI was imposed.[26]

Appellants A1, A2 and A3 had cultivated the banana crop on more land than what was leased out to them by the deceased. The deceased raised dispute in this regard and wanted to get his remaining field from the bund. The three appellants beat the deceased indiscriminately causing his death. There was no allegation that the deceased attempted to commit theft, robbery, mischief or criminal trespass. Held, the appellants accused were not entitled to right of private defence of property. They were convicted under ss 302 / 34, IPC .[27]

Fight Between Two Factions

Whenever there is a fight between two factions, one has to discover: (a) whether there was an apprehension to the accused's person or property by an attempt or threat to commit an offence against them such as is mentioned in this section; and (b) whether the danger was so trivial or unsubstantial that if recourse were had to the public authorities for protection, no more serious injury than had already been inflicted would have resulted by waiting for the help of the public authorities.[28]614

Where the fight between the two parties took place and the accused himself received nine injuries out of which two were on vital parts, accused firing one shot from his gun cannot be said to have acceded the right of private defence despite the fact that the gunshot by the accused did not hit the assailants but an innocent person present on the scene of occurrence, the right of private defence extending to cause death was held still available to the accused and his conviction under s 304, Pt I, IPC, read with s 27 of the Arms Act was set aside.[29]

15. Right of Private Defence of Property Extends to Persons who help others in Protecting their Right

The right of private defence is not limited only to persons, who are in actual possession of the property, but extends to such other persons who act in helping the former to protect their right in the property.[30]

Right of Private Defence of Property can be Exercised from a Distance also

It is not essential that the right of private defence of property can be exercised on the property itself. Even if the person, who is claiming that right, happens to be placed at some distance from the

property, he can exercise that right provided he finds that damage to property will accrue if the right is not exercised immediately.[31]

Right of Private Defence of Property does not Extend to Chasing and Killing any Person

The question of the right of defence to property does not arise where it is found that the accused aimed at and fired a shot at the victim when he was running away from the place of incident,[32] as the right of private defence does not extend to chasing and killing a person who is running away from the scene.[33] Where accused persons apprehending that the complainant party had come to take forcible possession of their land and to attack them and chased the complainant party and killed some persons by firing 30-40 rounds of gunshots at the complainant party which was not necessary, the accused were held to have exceeded the right of private defence.[34] Threat to property was over as soon as the intruder started running. There can be no right of private defence where the riot is premeditated on both sides, unless the object of the assembly is shown to have been to repel forcible and criminal aggression.[35]

A distinction must be drawn between enforcing a disputed right and maintaining an existing right.[36]

16. Enforcing a Disputed Right and Maintaining Existing Right, Distinguished

Where a party of men are determined to vindicate their right or supposed right by unlawful force and they engage in a fight with another party of men equally615 determined to vindicate their right or supposed right by unlawful force, no question of right of private defence can arise.[37]

Where the complainant with his men went to plough a field to which he had a good title and the party accused, claiming title to the field, attacked them it was held that since there was no crop on the filed which was in danger of being damaged or removed, and the object with which the accused took the law into their own hands was clearly not to prevent either theft or mischief but to enforce their own supposed right to the land, they had no right of private defence of property.[38]

No Right of Private Defence when no Party is in Possession

The right of private defence of property can only exist in favour of the person who possesses a clear title to that property, and where no such title has been determined no right of private defence of property can exist.[39] But where a person in possession of property sees an actual invasion of his rights which invasion amounts to an offence under the IPC, he is entitled to defend himself and his property by force, if there is no time to get the help of the public authorities.[40] The question of possession is very material in such cases.[41] Where neither party was in peaceful possession of the property and there was a scramble for possession, no right of private defence is available.[42]

Where the accused assaulted/killed the deceased at a distance of 1½-2 kilometers from the field which was the matter of dispute between the parties, the accused was held not entitled to the right of private defence.[43]

Right of Private Defence in Respect of Right to Cut Wood

In a Patna case, there was a dispute regarding a customary right to cut fuel from a jungle. On the day of occurrence the complainant's party came as a body with a number of carts and cut fuel wood, and, while they were carting them, they were opposed by the accused party on the ground that they had no such right and, therefore, their action was an encroachment upon their rights. There was a mutual *marpit* and a large number of persons belonging to the accused party were injured, as against only three men of the complainant's party. It was found that the complainant's party had no right to cut the fuel while the party of the accused had a subsisting right. It was held that the action of the complainant's party in cutting the fuel wood amounted to direct encroachment on the subsisting rights of the accused persons and, therefore, they were completely protected by the right of private defence

of property. The fact that the accused persons had come prepared to fight could not deprive them of their right of private defence of property.[44]

Right of Private Defence in Respect of a Creature Killed in Hunting

If a person kills a wild animal or wild bird on the property of another person, such dead creature does not belong to the killer, but to the proprietor of the property: and616 such proprietor either himself or by his duly authorised agent can lawfully demand and, if refused, seize such dead creature from the possession of the killer; and such persons as help him to exercise his right are doing no wrong. They would be protected by the provisions of this section, provided they do not exercise more force than is necessary.[45]

Right of Easement of Light and Air does not give Rise to a Right of Private Defence

An easement does not come within the purview of 'property'. An obstruction to an easement of light and air cannot give rise to a right of private defence of property.[46]

17. Right is Subjected to the Restriction Imposed by sections 99, 103 and 105

When a conspectus of the facts would lead to the inevitable conclusion that the accused clearly exceeded his right of private defence and caused much more harm than necessary, he cannot claim immunity under the garb of s 97, IPC . The right of private defence under s 97, IPC is expressly subject to the restriction contained in s 99 .[47] This section is itself subject to the restriction contained in s 99 that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.[48] This section declares that every person has a right, subject to certain restrictions mentioned in s 99, to defend the property of himself or any other person against any act which is an offence falling within the definition of theft, robbery, etc.

Section 105, IPC declares that the right of private defence of property commences when a reasonable apprehension of a danger to the property commences, and s 103, IPC says that the right of private defence of property extends, under the restrictions mentioned in s 99, IPC to the voluntary causing of death or of any other harm to the wrongdoer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions therein enumerated.[49]

18. Right to Defend another's Property

Under this section every person has a right to defend the property whether movable or immovable of himself or of any other person against any act which is an attempt to commit theft, robbery or criminal trespass.[50] Further, the right of private defence is not limited only to persons, who are in actual possession of the property, but extends to such other persons who act in helping the former to protect their right in the property.[51] A person employed to guard the property of his employer is, therefore, protected, if he causes death in safeguarding his employer's property, when there is reason to apprehend that the person whose death has been caused was about to commit one of the offences mentioned in s 103, IPC or was about to attempt to617 commit one of those offences. The fact that the property to be guarded is public property does not extend the protection given to a guard.[52]

19. Theft and Robbery

'Theft' and 'robbery' have been defined by ss 378 and 390 of the IPC respectively of the IPC . Movable property or immovable property when severed from earth alone can be the subject of theft or robbery. In *Bootka alias Lootka v State of Rajasthan* ,[53] the accused committed robbery by taking away the mare of a person by threatening him by stabbing. Some witnesses pursued him to take back the mare from his possession. The accused stabbed one of them and the victim died. In these circumstances, the accused cannot claim the right of private defence, he not being the owner of the mare.

20. Mischief

'Mischief' has been defined by s 425 of the IPC . Every person has a right, subject to the restrictions, contained in s 99, IPC to defend the property, whether movable or immovable, of himself or of any other person, against the offence of mischief or an attempt to commit the offence of mischief.[54] It cannot be said that a person intentionally joins an unlawful assembly, or continues in it, when it appears from the evidence that he went to the place, where the members of the unlawful assembly were gathered, to prevent mischief being done to his own property which he had a right to protect.[55]

Where the complainant damaged the outer door of the house of the accused which amounted to 'mischief' within the meaning of s 425, IPC, the accused was entitled to exercise the right of private defence so long as the complainant continued in commission of mischief and not after commission of mischief.[56]

Where the accused, who were walking in procession carrying a pot, containing consecrated water, were obstructed and their pot was broken by the complainants, caused injuries to them in resisting the obstruction, it was held that the resistance by the complainants amounted to an attempt to commit mischief in respect of the pot of water, and the accused were justified in exercising their right of private defence.[57]

Where the accused drove a loaded bullock cart unlawfully across the deceased's field on which there were standing crops, it was held that the act of the accused amounted to criminal trespass and mischief regardless of the amount of loss thereby caused and that the deceased had a right to defend his property.[58]618

Right of Private Defence against Co-Sharer against Mischief

One of several co-sharers in constructive possession of joint land has no right to dig part of it with a view to appropriating it for his exclusive use. If he does so in opposition by another who is also in constructive possession, the act amounts to criminal trespass. The removal of the earth from part of the land is calculated to diminish its value or utility and at all events, to affect it injuriously, so as to constitute an offence of mischief. Hence, the other co-sharers have a right of private defence of property.[59]

Where a person, over whose land project, some poles inserted for supporting a scaffolding erected by the owner of the adjoining house, honestly believes that the projection is a trespass and removes the projected poles by reasonable means, the person must be deemed to have acted *bona fide* in the exercise of what he believed to be his rights and cannot therefore be guilty of an offence of mischief.[60]

Mere Obstruction does not give Rise to Right of Private Defence, Alleging Mischief

Where the accused is attempting to assert a *bona fide* claim of his right, however, ill founded in law that claim may be, he cannot be held guilty of the criminal offence of mischief.[61] Mere causing obstruction in the cutting of crops does not amount to the offence of mischief, or any of the offences, mentioned in s 97, so as to give the right of defence of property.[62]

Right of Private Defence does not Extend to cause Death by Laying a Trap

The accused, in order to prevent the ingress of persons, like the deceased, into his latrine by making such ingress dangerous, fixed up a naked and uninsulated copper wire across the passage, leading up to his latrine, and carried current from the electric wiring of his house to which it was connected. There was no warning that the wire was live. The deceased managed to pass into the latrine without contracting the wire, but when she came out, she happened to touch it and got a shock as a result of which she died soon after. It was held that the type of injury, caused by the trap, laid down by the accused, could neither be brought within the scope of s 97, nor of s 103, IPC, and he had no right of

defence of property.[63]

Right of Private Defence against Cattle Trespass

A person cannot intentionally kill or maim an animal trespassing upon his property. But he has a right to use reasonable force to protect his property against trespass so long as the trespass continues.[64] A person seizing cattle trespassing on his land and taking them to the cattle pound is not guilty of mischief [65] or theft.[66] But when it is not proved that cattle trespassed the field of the complainant and caused damage to his crops, evidence on record leads to the inference that the cattle were seized from a619 grazing field, it amounted to a theft of cattle by the complainant, attack by the accused in execution of his right of private defence of property by giving axe-blow to deceased, though without intention of killing is a clear case of exceeding the right of private defence.[67]It has been held that the commission of an offence under s 22, Cattle Trespass Act 1871 would not give rise to the right of private defence of property.[68]

If the owner of cattle offers resistance, it will be an offence and the person, taking the cattle to the cattle-pound, has a right of private defence.[69]

In a Lahore case it has been held that the act of seizure of cattle may be within s 10 of the Cattle Trespass Act 1871, if it is effected at a spot within easy reach of the field damaged, but where the distance is very great, and the cattle have already come not merely constructively but actually within their owner's possession, the act of the pursuers in seizing and attempting to remove the animals, is not only not covered by s 10 Cattle Trespass Act, but it also amounts technically to an offence of theft within the meaning of s 378, IPC and consequently the owners of the cattle are entitled, in the exercise of their right of private defence of property, to use force, under s 104, IPC to any extent short of causing death in order to prevent the pursuers from carrying out their purpose.[70]

The right of private defence does not arise merely because an unlawful or wrongful act has been done. It arises only when that unlawful or wrongful act is an 'offence'.[71] When a person acts in good faith in taking away a property, and does not intend to take it dishonestly, he does not commit the offence of theft[72] though he may be guilty of a civil wrong. He may be sued for damages in a civil court, but he cannot be punished for an offence under the IPC .[73]

There is some conflict on the question as to whether if the seizure of cattle was unlawful, the owner of the cattle would be justified in exercising the right of private defence of property in rescuing them. One view is that the owner is entitled only to compensation in a civil court or to apply to the magistrate concerned under s 20 of the Cattle Trespass Act and that he has no right to rescue the animals by the use of force.[74] But a contrary view was taken in the undermentioned cases,[75] where it was held that illegal seizure of cattle with a view to impound them is theft, because though the person who has seized the animals had no intention to cause wrongful gain to himself, nevertheless, his intention was to cause wrongful loss to the owner of the animals.620

Where the accused, as owners of the cattle, were still in possession of them and the complainants tried to seize the cattle, it has been held that the accused had a right to use reasonable force to defend their possession, and s 97(2) had no application, for the right of private defence exercised by the accused in this case, though exercised with the object of defending property, is in reality a right of private defence of the body.[76]

Right of Private Defence against Criminal Trespass

This section given a right of private defence of property against an act which amounts, *inter alia*, to an offence of criminal trespass or mischief.[77] It covers attempt to commit criminal trespass.[78] It is not the law that the rightful owner in peaceful possession of property must run away, if there is an actual invasion of his right or an attempt on his person. The person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms, as are

necessary for that purpose, if he sees an actual invasion of his rights, which invasion amounts to an offence under the IPC, and when there is no time to get police help. It is lawful for a person, who has seen an invasion of his rights, to go to the spot and object. It is also lawful for such person, if the opposite party is armed, to take suitable weapons for his defence.[79] Where an incident arose out of a land dispute, occurrence took place in the land in possession of the accused persons, the deceased and his sons came to the land in the possession of the accused group to irrigate the land which amounted only to criminal trespass under and within the meaning of s 441, IPC, the right of the accused does not extend to causing death but extended only to causing harm other than death.[80] A person in peaceful possession of land cannot be dispossessed by mere use of force and he has a right to maintain his possession by the use of necessary force if anyone attempts to assail it[81] but he has no right to use a gun and inflict injury when the trespasser has only a *kassiya*.[82] When persons engaged in the exercise of the right of private defence of property are resisted and themselves attacked, the right of private defence of the body at once arises[83] and extends to causing of death.[84] As observed in *Mayne's Criminal Law*:[85] 'If the trespasser resists, and in so doing assaults the party in possession, that party may repel the assault, and for that purpose may use any force which he would be justified in using in defence of his person'.[86]621

There is considerable distinction between enforcing a right and maintaining a right. People who are maintaining a right, or in other words enjoying a right, of which they had been given possession by a competent court of jurisdiction, are justified in repelling an attack upon them by persons who had no right to obstruct them.[87]

The evidence on the record showed that the victims who had attacked the appellants and the deceased by trespassing into the land in possession of the appellants were the aggressors, and that the deceased was unarmed. Held, the accused appellants faced with criminal trespass by the victim did not exceed the right of private defence of own body, and the body of any other person, such that the role attributed to the appellants by the prosecution is fully covered by their right of private defence. Thus, the accused appellants were acquitted of the offence under s 302, IPC .[88]

A was in possession of certain property as mortgagee from *B*. In a dispute between *A* and *B* as to possession, the *mamlatdar* held *A* to be in possession and referred *B* to civil court. Subsequently, while *A* was sowing the field, *B* and his relations entered the field and tried to stop the sowing. It was held that though *B* and the other members of his party did not use actual force against *A*, his right to eject them by force was in no way affected.[89] Where the accused is attempting to assert a *bona fide* claim of his right, however, ill-founded in law that claim may be, he does not commit the offence of criminal trespass.[90] Where *A* entered into the land of *B* to carry out repairs of boundary fencing between the land of the two, without, any intention to annoy, intimidate or insult *B*, and the latter caused injury to *A*, it was held that the act of *A* did not amount to criminal trespass and *B* had no right to cause injury to *A* in exercise of the light of private defence.[91]

A necessary postulate of the exercise of right of private defence is the commission of an offence of criminal trespass. Mere entry on the property even by a *bona fide* claimant is not such trespass unless there is the requisite criminal intent.[92]

Possession at the Material Time Determines the Right of Private Defence

In determining whether a party had a right of private defence of property, the question of possession of the disputed property at the time of the occurrence in question is material.[93] A person in actual and peaceful possession of property is entitled to maintain that possession even by use of force, if necessary. The question whether he had or had not the right to possession is immaterial.[94] When once a person has taken possession of, cultivated and sown, the field and remained in possession of it for a couple of months, another person, even though he was the owner, is not entitled to take the law into his own hands and use force in ousting the former person.[95]622

Trespasser's Right of Self-Defence

The right of self-defence under this section is confined to the protection of person and property. By no stretch of legal imagination can the word 'property' by extended to forcible possession usurped by a rank trespasser against a protesting owner. A person who has sown crops without let or hindrance is in cultivatory possession, but one who uproots another's crops and follows this act of *goondaism* by sowing his own crop cannot claim that he is in such cultivatory possession as will entitle him to the right of self-defence under this section. Self-help is permitted by law as a deterrent against lawless aggression, not in aid of it. It was never intended to be a charter of immunity for any ruffian to acquire possession by a surprise move backed by overwhelming force and then claim the right to defend the fruits of his robbery.[1] Where the accused persons trespassed on the land of the complainant and opened fire and killed the deceased persons, they are not entitled to the right of private defence.[2] Where there was a sudden quarrel over cutting of a tree, the accused gave a blow with a wooden reaper on the head of the deceased causing his death, and the tree in question was standing on the land belonging to the deceased and was in his actual possession, the right of private defence was not available to the accused.[3] A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession.[4] Where there was a fight between two parties, where the revenue records showed that the complainant party was in possession of land where occurrence took place, the accused party trespassing into the land fully armed with fire arms and *lathis* for taking possession of land, the complainant party consisted of only two persons. The intention on the part of the complainant party to commit an offence or to intimidate, insult or annoy the accused was not proved. It was held that the use of deadly force by the accused merely to expel two persons was not justified and the plea of self-defence of properly was not available to the accused party in such case as offence of criminal trespass was not proved to have been committed by the complainant party.[5]

It has been held that even if a person is a trespasser and has wrongfully cultivated a certain portion of a field of which he was bound in law to deliver possession to another person, the latter person had no right to take law into his own hands and beat the former in order to dispossess him from the field, and that if the latter person is an aggressor, there is no doubt that the former person, though a trespasser, has a right of self-defence.[6] When once a person has taken possession of a field and remained in possession of it for some time, another person even though he is the owner is not entitled to take the law into his own hands and use force in ousting the former person.[7]623

Trespasser can be Dispossessed by Force Till he is in the Process of Trespassing

A true owner has every right to dispossess or throw out a trespasser while the trespasser is in the process of trespassing and has not accomplished his possession; this right is not available to the true owner if the trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances, the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies available under the law.[8] Ploughing of land by the trespasser does not impair its value so as to necessitate immediate action on the part of the owner to remove that person from the land by causing injury to him.[9] The law protects even a rank trespasser in the peaceful enjoyment of the land trespassed upon, the only remedy of the rightful owner is to take appropriate proceedings in that regard in a court of law.[10] A trespasser, unless he is evicted in due course of law, is entitled to defend his possession even against the rightful owner.[11]

Nature of Possession which can be Defended by a Trespasser

It may, therefore, be considered settled law that a trespasser acquires the right to defend his possession against physical attack only if he has come to it by the acquiescence, express or implied, of the rightful owner and his possession has become peaceful and settled. The passage of time does not necessarily confer any right on the trespasser. For example, a man may be away when another takes forcible possession of his property behind his back, and on his return he can assert his right of property by throwing out the trespasser. The question of lapse of time becomes relevant only if the rightful owner or occupier sits quiet and does nothing to assert his rights even after knowing that the

trespasser is in possession of his property.[12]

It may also be noted that right of self-defence of property under this section is available to a trespasser only against some act of the rightful occupier which amounts to theft, robbery, mischief or criminal trespass or any attempt to commit any of these four crimes. But if the rightful owner somehow resumed possession of his own land in the absence of the trespasser, he commits no crime and the trespasser on his return cannot invoke the right of self-defence to oust the rightful occupier. The property does not belong to him, he is no longer in possession and there is nothing which he can defend. The question of self-defence may arise if a vigilant trespasser keeps ceaseless watch over the property and prevents the rightful occupier from making a re-entry. But if he is not vigilant and permits the owner to regain possession of what still belongs to him, his right to defend his wrongful possession is gone, for the simple reason that there is no possession.[13]

But the possession, which a trespasser is entitled to defend against a rightful owner, must be a settled possession extending over a sufficiently long period624 indicative of acquiescence on the part of the true owner. A casual act of possession or mere entry on a vacant part of the land cannot have the effect of interrupting the possession of the rightful owner.[14] Where the deceased allegedly committed criminal trespass in the land of the accused, and the accused pleaded right of private defence of the property, the sale deed established transfer of possession in favour of the father of the accused, it was held that it was for the prosecution to prove that the possession of the accused had not remained undisturbed.[15] The owner may re-enter and reinstate himself, provided he does not use more force than necessary. Such entry will be viewed only as a resistance to an intrusion upon possession which had never been lost.[16] A rightful owner or his agent has every right to eject a trespasser by all lawful means. That would include prevention of the trespasser from persisting in his trespass.[17]

The mere fact that the trespasser was in possession for a few hours does not amount to an acquiescence on the part of the person in possession.

Where the complainant party began to erect some huts on the land stealthily in the darkness of the night and at day-break, the accused, on coming to know what was happening, came to the place fully armed in order to drive off the trespassers. There was a free fight between the parties in which both sides were wounded. Taking that into consideration, it was held that the accused were in actual physical possession of the property in question, that they took the earliest opportunity to exercise the right of private defence that they had no time to have recourse to the public authorities and that the injuries inflicted by them were within the limits allowed to the right of private defence, they were not guilty of rioting.[18]

21. Principles Governing Private Defence of Property

In *Paras Ram v Rex* ,[19] Agarwala J, after a very elaborate survey of several decisions of the various High Courts in India, enunciated certain principles governing the question of private defence of property in a case of criminal trespass thus:

(a) There can be no danger to property if the accused is not in possession. If he has merely a bare title to the property, his remedy is to seek possession from a court of law and not to enforce it by force himself.
(b) If the accused was previously in peaceful possession, but the other side has dispossessed him, and the accused has acquiesced in the dispossession for some time, then again he must have recourse to law and not to enforce his right to take back possession by his own force.
(c) The accused may have lost possession but if, immediately on coming to know of the other side having entered on his land or taken possession of his625 property, he rushes to oust the trespasser, he is entitled to oust him by force. He is not bound to have

recourse to lengthy process of a trial in a civil court. But this rule cannot be applied to a case in which the trespasser has already peacefully established himself in the enjoyment of the property for sometime.

(d) If, however, there is no question of permanent deprivation of one's possession over property and the question is of infringement of enjoyment of a mere right over property, then in that case, unless the injury to be caused by the obstruction of the enjoyment to one's right is expected to be enhanced if recourse is had to public authorities for protection, one is bound to take such recourse.

(e) In every case, however, if one is already in possession of one's property or in enjoyment of a right, one is entitled to reach the spot earlier than the other party with arms and reinforcements and wait in readiness to defend such property or right from the expected aggression from the other side.

(f) If the information of the expected aggression is of a definite kind it would be proper for the party in possession to inform the public authorities and seek their help, unless an apprehension of danger to such property has actually commenced.

(g) If the apprehension of danger has actually commenced and if one can have recourse to the public authorities before an actual injury is caused to the property or right, he must do so, or else he will lose his right of private defence. This contingency usually arises when one has got definite information about the other side proceeding towards the land in dispute and the public authorities are within such a reach that one could inform them before actual damage to the property is done, *e.g.*, when the police station falls on the way to the land in dispute and the accused can inform them while proceeding towards it for its protection.

(h) When a fight takes place not because property or person has to be protected but because parties want to measure their strength, and protection of property is merely a pretext, no question of self-defence arises, but this finding can be arrived at only when the possibility of either party fighting for the protection of his property has been excluded.

(i) When the determination to fight is *bona fide* to protect one's property, that would not be a case which it can be said that the right of self-defence is excluded. In this connection, it would be important to note whether one is fighting for maintaining one's possession or maintaining one's enjoyment of a right which has been enjoyed for some time previously, or one tries to obtain possession of a property which he thinks belongs to him, or to enforce a right which may be his but which he had never enjoyed before. In the latter class of cases there is no right of self-defence. In the former class of cases there is.

(j) Again, where a fight takes place in an open field, not on or near the property to be protected but far away from it, this fight cannot be said to be one for the protection of that property and there will be no right of self-defence in such cases.

(k) Again, where one party challenges the other party for a fight, then also the right of private defence is excluded, even though the fight be near or on the property. One is, however, entitled to say to the aggressor, 'if you attack626 you will be met by force, but it would be challenging another to fight if one were to abuse him and say 'come on, try strength if you like.

(l) Where there is a dispute over ownership or possession of property and parties quarrel, and there is an exchange of abuses, but the party out of possession has neither attempted nor threatened to take possession immediately, nor attempted or threatened to cause injury to the party in possession, the party in possession has no right to strike first, and if he does so, he gives the other party the right to strike back in self-defence.[20]

It may be noted that possession is presumed to follow the title. Where a tree standing in land, which is in the possession of a tenant, is blown down in the wind, the *malguzar*, who is the owner of it, becomes entitled to remove it and for this purpose he has a right of ingress over the tenant's land and a right of private defence of property in the fallen tree.[21]

22. Dispossession and Disturbance of Possession Distinguished

There is a distinction between dispossession and disturbance of possession. A person in possession does not lose his right of private defence because there has been a disturbance of his possession on the previous day.[22] So, there must be clear and positive evidence of continuous possession over a reasonable period.[23]

23. When Trespass cannot Cease without Committing further Trespass

In an Allahabad case the appellants forcibly took two loaded carts through the field of one Harphool (deceased) in which there were standing crops. While the carts were still in the field, the deceased protested, the appellants indicated their intention to cease the criminal trespass and take their carts out of the field, but the deceased prevented them and there was a fight. Their Lordships of the Supreme Court held that the appellants and their carts were still inside the field when the incident took place, that the criminal trespass had not therefore ceased and the deceased had the right to prevent the appellants from continuing to commit criminal trespass for whatever short distance they had still to cover before leaving the field and reaching the public pathway. It is true that the appellant's party had to get out of the field and this they could not have done without committing further criminal trespass. But it does not follow that this difficult position in which the party found itself gave them any right for insisting that they must continue the criminal trespass. They had to abide by the directions of Harphool, whatever be the degree of patience required in case they were not allowed to move in any direction in order to leave the field. They had no right to attack the deceased.[24] But in the exercise of the right of private defence the trespasser cannot be kept in wrongful confinement.[25]

Illustrative Cases--Defence of Property

(1) In a murder case where the right of self-defence of property was taken by the accused persons, the allegations were that the accused persons formed an627 unlawful assembly and armed with *lathis* assaulted the complainant party thereby causing death of the deceased, both the complainant party and the accused party were inimical on account of right of way on disputed land. Evidence showed that the complainant party had right of way vested in them prior to the incident. The accused party were aggressors and therefore were held not entitled to the right of private defence of property.[26]

(2) There was a dispute over construction of a wall of the house. The deceased was making preparations to construct a wall on his own land and committed no mischief within the meaning of s 425, IPC, the accused did not take recourse to public authorities and opened fire on the deceased, the accused was not entitled to claim any right of private defence of the property.[27]

(3) Where accused were getting demarcation of land done between fields of the accused and the complainant party from the appropriate authority. Prior to the incident, the accused were digging *khal* in between two fields. At the time of incident, allegations that the accused entered land belonging to the complainant and fired on being objected, were doubtful as the incident occurred in the field of the accused. Witnesses examined by the prosecution were interested witnesses and their evidence was not reliable. Independent witnesses were not examined though available, in these circumstances, the possibility that the complainant party attacked the accused first and the accused fired in the exercise of right of private defence was there and the accused persons were found entitled to acquittal.[28]

(4) Complainant party had been informed that the accused had dismantled the common boundary ridge of their fields and encroached upon their land. However, the complainant party found on reaching their field the place of occurrence that the accused were levelling their own land. Even if it was taken that the accused had earlier demolished the common ridge of their field, it could not be said that the complainant party was entitled to assault the accused in the exercise of the right of protection of their property.[29]

(5) The accused wanted to take water through the field of the informant which was resisted

by the informant. Even in the FIR the informant said that the accused wanted to take water through his field in the northern portion which was objected to by the informant by saying that he would not allow the water to be taken through his own field. So if the accused wanted to make a *nali* through the field of the informant, they had definitely no right to make *nali* and take water through the field of the informant without his permission. The informant party was well within jurisdiction to object to that one and in these circumstances, no right of self-defence accrued to the accused-appellants.[30]

(6) Where accused persons claimed to be landlords of the land in dispute, members of the prosecution party claimed to be *bataidars* over land, accused persons though obliged to approach ex magistrate and police628 posted at the place of occurrence, however, arrived at scene of occurrence and started indiscriminate firing, on these facts, the plea of private defence of property or person of the accused person was held not tenable.[31]

(7) Where quarrel ensued between the accused and the deceased (a younger brother), in regard to position of parental house, the accused was alleged to have inflicted at the spur of the moment, a single blow of the blunt side of an axe on the head of the deceased who died after 48 hours, the defence plea that injury was accidental was found to be a false and concocted one, there was no evidence that accused was subjected to assault by the deceased, on these facts the right of self defence was held not available with the accused but conviction of the accused was altered from s 302 to one under s 304, Pt II.[32]

(8) Where the prosecution party went to the house of the accused determined to take back its possession by using force, the accused had to exercise the right of private defence of property and person, only one shot was fired at the deceased that ultimately resulted in his death, there was no previous enmity between accused and deceased, deceased was not the allottee of the house about whose possession the entire dispute was, it was held that the accused did not exceed the right of private defence and was entitled to benefit of doubt.[33]

(9) Where the injured, with his axe, tried to cut the apple trees belonging to the accused, and accused appellant in exercise of his right of defence of property shot from his gun at the victim causing injuries to him, held, the accused appellant did not exceed his right of private defence of property as the shot was not fired at a vital part of the body of the victim. Thus, his conviction under s 307, IPC was set aside.[34]

62 *Gurcharan Singh v State* AIR 1965 All 543, p 546, (1965) 2 Cr LJ 584 ; *Datti Genu v State of Maharashtra* AIR 1974 SC 387, (1974) Cr LJ 446 ; *Sekar v State* (2003) Cr LJ 53 (SC) .

63 *Mohindra Pal Golly v State of Punjab* (1979) Cr LJ 584, p 588 (SC), AIR 1979 SC 577 ; *State v Bharat Singh* (1961) 1 Cr LJ 649, p 651 (Guj) .

64 *Bhagirathi v State* (1965) 1 Cr LJ 744, p 746, AIR 1965 Ori 99 ; *Nakula Barik v State* AIR 1967 Ori 1, p 3, (1967) Cr LJ 97 ; *Satar Khan v State* (1969) Cut LT 802, (1969) ILR Cut 916 ; Re *Govindu*(1969) Cr LJ 1157, p 1160 (AP); *State v Bharat Singh* (1961) 1 Cr LJ 649 (Guj) ; Re *Gangaram Sankariah*(1970) Cr LJ 1029, p 1035 (AP); *Ram Chandra v State* AIR 1969 Bom 20, (1969) Cr LJ 112 ; *Mohindra Pal Jolly v State of Punjab* AIR 1979 SC 577, (1979) Cr LJ 584 ; *Onkar Nath v State of Uttar Pradesh* AIR 1974 SC 1550, (1974) Cr LJ 1015 ; *Mukhtiar Singh v State of Punjab* (1975) Cr LJ 132, p 134, (1974) Punj LR 338 (Cr) ; *Tarachand v State of Haryana* (1971) Cr LJ 1411, p 1417, AIR 1971 SC 1891 ; *Cherubin Gregory v State of Bihar* (1964) 1 Cr LJ 138, p 139, AIR 1964 SC 205 .

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33 *Ram Bilas Singh v State of Bihar* (1968) Pat LJR 32 (SC) ; *Jai Deve v State of Punjab* AIR 1963 SC 612, (1963) 1 Cr LJ 495 .

34 *Harjinder Singh v Karnail Singh & Ors* (1998) Cr LJ 2053 (SC) .

35 *Queen-Empress v Prag Dutt* 20 ILR All 459 ; *Hira v Emperor* AIR 1923 All 194 .

36 *Ramnandan Prasad Singh v Emperor* 17 CWN 1132, 14 Cr LJ 463 ; *Ghyasuddin Ahmad v Emperor* AIR 1932 Pat 215 ; *Basan Bhowmick v State* AIR 1963 Cal 3, p 5 .

37 *Kabiruddin v Emperor* 25 ILR Cal 368 ; *Maniruddin v Emperor* 35 ILR Cal 384 ; *State v Banwari Singh* AIR 1951 Pat 473 ; *Dorik Gope v Emperor* AIR 1946 Pat 251 .

38 *Hariram Mahto v Emperor* AIR 1942 Pat 96 ; *Narayan Raut v Emperor* AIR 1948 Pat 294 .

39 *Jaipal v Emperor* AIR 1916 Oudh 345, p 347 .

40 *Fauzdar Rai v Emperor* AIR 1918 Pat 96 ; *Narayan Raut v Emperor* AIR 1948 Pat 294 .

41 *Brindaban Swain v State* AIR 1957 Ori 117 .

42 *Sikhar Behera v State of Orissa* (1993) Cr LJ 3664 (SC) .

43 *Akhilesh Kumar v State of Chhattisgarh* 2008 Cr LJ (NOC) 502 (Chh) (DB).

44 *Nathu Mahto v Emperor* AIR 1947 Pat 51, p 53 .

45 *King-Emperor v Artu Rautra* AIR 1924 Pat 564, p 565, 568 .

46 Re *Rao Nihalkaran*AIR 1958 MP 341, p 342 ; the cases cited therein.

47 *State of Haryana v Sher Singh* (2002) Cr LJ 4120 (SC) .

48 *Madra Damri v Emperor* AIR 1946 Nag 221, p 224 ; *Ram Kishan v State of Rajasthan* 2007 Cr LJ 2865 (Raj) .

49 *Emperor v Jamuna Singh* AIR 1945 Pat 150, p 152 .

50 *Dalganjan v King-Emperor* AIR 1924 All 696, p 697 (2).

51 *Pitei Bewa v State* (1971) Cut LT 1164 .

52 *Emperor v Jamuna Singh* AIR 1945 Pat 150, p 152 .

53 *Bootka alias Lootka v State of Rajasthan* (1982) Cr LR (Raj) 47 ; *Queen v Karrim Bux* 3 WR 12 ; *Queen v Mokee* 12 WR 15 .

54 *Chhoteylal v State* (1972) Cr LJ 59, p 60 (All) ; Re *Rao Nihalkaran*AIR 1958 MP 341, (1958) MPLJ 674 ; *Munnuswami Chetti v Munnuswami Chetti* AIR 1948 Mad 477, 49 Cr LJ 716 ; *Haribilash Sahu v Narayan Das Agarwal* AIR 1938 Cal 669, 40 Cr LJ 10 ; *Zipru Tanaji Patil v Emperor* AIR 1927 Bom 363, 28 Cr LJ 476 ; *Empress v Shankar Lal* (1887) All WN 101 ; *Jambulingam Pillai v Ponnuswami Pillai* AIR 1939 Mad 400 ; *Hareshi Sahu v State of Orissa* (1971) 37 Cut LT 159 .

55 *Birjoo Singh v Khub Lall* 19 WR 66 .

56 *Rajesh Kumar v Dharamveer* (1997) Cr LJ 2242 (SC) .

57 *Regula Bheemappa v Emperor* 26 ILR Mad 249 .

58 *Hukum Singh v State* AIR 1959 All 690, **affirmed** in *Hukum Singh v State of Uttar Pradesh* (1961) 2 Cr LJ 711, AIR 1961 SC 1541 .

59 *Abdul Hadi v Emperor* AIR 1934 All 829, 831 (2).

60 *Jambulingam Pillai v Ponnuswami Pillai* AIR 1939 Mad 400 .

61 *Ram Chandra v State* AIR 1969 Bom 20, p 23, (1969) Cr LJ 112 .

62 *Narayan Sahu v Srinibas Sahu* (1968) All Cr R (2), (1967) 33 Cut LT 969 .

63 *Cherubin Gregory v State of Bihar* (1964) 1 Cr LJ 138, p 139, AIR 1964 SC 205 .

64 *Bhagwan Rana v State* AIR 1953 Sau 158, p 159 ; *Queen v Janoo Shikdar* 3 WR 47(Cr); *Emperor v Gulshah* 13 Cr LJ 766(1) (Sind).

65 *Empress v Ramjiwan* (1881) AWN 158 .

66 *Dayal v Emperor* AIR 1943 Oudh 280, p 281 ; *Aradhun Mandal v Mayan Khan Takadjir* 24 WR (Cr) 7 ; *Jhaman Lal v Emperor* 10 CWN 228 ; *Faiyaz Khan v Rex* AIR 1949 All 180, 50 Cr LJ 232 .

67 *Govind Singh v State of Rajasthan* (1997) Cr LJ 1562 (Raj) (DB) .

68 *Faiyaz Khan v Rex* AIR 1949 All 180, 50 Cr LJ 232 .

69 *Shankar Baksh Singh v Emperor* 37 Cr LJ 931, p 932, AIR 1937 Oudh 54 ; **but see***Jiwan v Emperor* AIR 1947 Lah 380, 48 Cr LJ 903 ; *Madra Damri v Emperor* AIR 1946 Nag 221, 47 Cr LJ 348 ; *Bridha v State* AIR 1959 Raj 124, (1959) Cr LJ 770 ; *Lokenath Sahu v Rahas Beura* AIR 1963 Ori 52, (1963) 1 Cr LJ 303, 28 Cut LT 613 ; *Maide Khan v State* AIR 1965 Raj 72, (1965) 1 Cr LJ 476, p 478 ; *Emperor v Gulshab* 13 Cr LJ 766 (Sind) ; *Dayal v Emperor* AIR 1943 Oudh 280, 44 Cr LJ 232 .

70 *Jiwan v Emperor* AIR 1947 Lah 380 .

71 *Ganouri Lal Das v Queen-Empress* 16 ILR Cal 206, p 218 .

72 *Emperor v Shib Lal* AIR 1933 All 620, 55 ILR All 617 .

73 *Faiyaz Khan v Rex* AIR 1949 All 180, p 183, 50 Cr LJ 232 .

74 *Dayal v Emperor* AIR 1943 Oudh 280 **following***Aradhun Mundal v Myan Khan* 24 WR (Cr) 7 and *Empress v Ramjiawan* (1881) All WN 158 .

75 *Madra Damri v Emperor* AIR 1946 Nag 221 ; *Jiwan v Emperor* AIR 1947 Lah 380 ; *Bridha v State* AIR 1959 Raj 124 ; *Lokenath Sahu v Rahas Beura* AIR 1963 Ori 52 .

76 *Emperor v Gulshah* 13 Cr LJ 766 (1).

77 *Abdul Hadi v Emperor* AIR 1934 All 829(2), p 831 ; *Salim v State* (1963) MPLJ 219 (Notes) ; *Prankhang v Emperor* 13 Cr LJ 746 ; *Kanchan Singh v State of Bihar* 1968 Pat LJR 98 (SC) ; *A Sattar Khan v State* (1969) 35 Cut LT 802, (1969) ILR Cut 916 ; *Ram Prakash v State* (1971) All Cr R 450 ; *Hukam Singh v State of Uttar Pradesh* AIR 1961 SC 1541 ; *Het Ram v State* AIR 1970 Punj 85, (1970) Cr LJ 352 ; *AN Mughalkood v State of Mysore* (1972) Mad LJ 292(Cr), (1972) 1 Mys LJ 406; *Karnail Singh v State of Rajasthan* (1977) Raj LW 336 .

78 *Noothy Raghvanulu v State* (1975) 1 APLJ 307 .

79 *Summa Behera v Emperor* AIR 1945 Pat 283, p 285 ; *Satnarain Das v Emperor* AIR 1938 Pat 518 .

80 *Jai Bhagwan & Ors v State of Haryana* (1999) Cr LJ 1634 (SC) .

81 Re *Kanakraj*(1970) LW 242 (Cr); *Ram Prakash v State* (1971) All WR 592 (HC), (1971) All Cr R 450 ; *A Sattar Khan v State* (1969) ILR Cut 916, (1969) 35 Cut LT 802 ; *Natabar v Radhamohan* AIR 1969 Ori 250 .

82 *Dilip Singh v State of Rajasthan* (1994) Cr LJ 2439 (Raj) .

83 *Re Panthala Narisi Reddi*AIR 1915 Mad 250, p 251, per Wallis J.

84 *Allappa Ningappa v State of Mysore* (1972) 1 Mys LJ 406, (1972) Mad LJ 292 (Cr) ; *Paramananda v State of Orissa* 1970 Cr LJ 931, p 936 (Ori) .

85 Citing, 1 *Rolle's Abridgment Trespass*, G 8, para 233.

86 Re *Panthala Narisi Reddi*AIR 1915 Mad 250, p 251, per Wallis J.

87 *Fateh Singh v Emperor* AIR 1914 Cal 286 .

88 *Haren Das v State of Assam* 2012 Cr LJ 1467, p 1471 (Gauh) (DB) .

89 *Aher Kama Rukhad v State* AIR 1955 Sau 2 .

90 *Rama Chandra v State* AIR 1969 Bom 20, p 30, (1960) Cr LJ 112 ; *Aher Kama Rukhad v State* AIR 1955 Sau 2 .

91 *Govinda Chandra Barik v Baidhar Barik* (1964) ILR Cut 706 ; *Muthri v State of Punjab* AIR 1964 SC 986 ; *Lalman v State of Madhya Pradesh* (1970) MPLJ 512 .

92 *Mathari v State of Punjab* AIR 1964 SC 986 ; *Lalman v State of Madhya Pradesh* (1970) MPLJ 512 .

93 *Brindaban Swain v State* AIR 1957 Ori 117, p 120 .

94 *Bachan Singh v State* AIR 1955 Pepsu 162, p 165 .

95 *Hazara Singh v State* AIR 1959 Punj 570, p 571 **relying on***Phula Singh v Emperor* AIR 1927 Lah 705 ; *Bhartu v State* AIR 1954 All 35 .

1 *Ambika Singh v State* AIR 1961 All 38, p 42, (1961) 1 Cr LJ 15 ; *Khemasil Rout v State of Orissa* (1974) 40 Cut LT 428 ; *Emperor v Bandha Singh* AIR 1928 Pat 124, p 126 ; *Ram Sumer Ahir v Emperor* AIR 1934 Cal 273 .

2 *State of Uttar Pradesh v Akshey Kumar & Ors* (1999) Cr LJ 2987 (All) (DB) .

3 *Arjunan and etc v State by Inspector of Police* 1997 Cr LJ 2987 (Mad) (DB) .

4 *Browne v Dawson* (1840) 12 Ad&El 624, quoted in *Scott v Mathewe* , *Browne & Co Ltd*(1884) 51 LT 716, **relied on** in *Ambika Singh v State* AIR 1961 All 38, p 43 and *Emperor v Bandha Singh* AIR 1928 Pat 124, p 126 ; *Ram Sumer Ahir v Emperor* AIR 1934 Cal 273 .

5 *Adya Singh v State of Bihar* (1998) Cr LJ 4052 (SC) .

6 *Bhartu v State* AIR 1954 All 35 ; *Horam v Rex* AIR 1949 All 564 ; *Queen v Sachee* 7 WR 112 (Cr) ; *Mahrajdin v State of Uttar Pradesh* (1968) Cr LJ 666 (All) .

7 *Hazara Singh v State* AIR 1959 Punj 570 ; *Phula Singh v State* AIR 1927 Lah 705 ; *Maharajdin v State of Uttar Pradesh* (1968) Cr LJ 666 (All) ; *Khuddu v State of Uttar Pradesh* (1993) Cr LC 2008 (SC) .

8 *Ram Rattan v State of Uttar Pradesh* AIR 1977 SC 619, p 622-23 ; *State of Madhya Pradesh v Saligram* (1971) Jab LJ 292, (1971) MPLJ 450 ; *Puran Singh v State of Punjab* AIR 1975 SC 1674, (1975) Cr LJ 1479 ; *State of Orissa v Ravdranath Dalai* (1973) ILR Cut 393 (DB) ; *Iswar Behera v State* (1975) 41 Cut LT 904 .

9 *Jainandan Sao v State of Bihar* (1972) Pat LJR 347, p 349 .

10 *Ambika Singh v State* AIR 1961 All 38, (1960) All LJ 782, (1961) 1 Cr LJ 15 ; *Maharajdin v State of Uttar Pradesh* (1968) Cr LJ 666, p 667 (All) ; *Adhimoolam v State* (1995) Cr LJ 1051 (Mad) .

11 *Munshi Ram v Delhi Admn* AIR 1968 SC 702, (1968) Cr LJ 806 ; *Kondiah Chetti v Commr of Police, Egmore, Madras* (1970) LW 207 (Cr) ; *Puran Singh v State of Punjab* (1975) Cr LJ 1479, p 1484, AIR 1975 SC 1674 ; *Maguni Charan Pradhan v State of Orissa* (1991) 71 Cut LT 710 .

12 *Ambika Singh v State* AIR 1961 All 38, p 43, (1961) 1 Cr LJ 19 .

13 *Ambika Singh v State* AIR 1961 All 38, p 43, (1961) 1 Cr LJ 19 .

14 *Bachan Singh v State* AIR 1955 Pepsu 162, p 165 ; *Mahommad Khan v Crown* AIR 1949 Lah 128, p 131 ; *Munshi Ram v Delhi Admn* AIR 1968 SC 702, (1968) Cr LJ 806 ; *Khemasit Rout v State of Orissa* (1974) Cut LT 428 ; *Chandulla Sheikh v Emperor* AIR 1914 Cal 623, p 624 ; *Puran Singh v State of Punjab* AIR 1975 SC 1675, (1975) Cr LJ 1479 ; *Natbar v Radhamohan* AIR 1969 Ori 250, p 252, (1969) Cr LJ 1260 .

15 *Deepa alias Deep Chand & Anor v State of Madhya Pradesh* (1999) Cr LJ 413 (MP) (DB) .

16 *Mahommad Khan v Crown* AIR 1949 Lah 128 ; *Emperor v Bandhu Singh* AIR 1928 Pat 124, p 126 ; *Munshi Ram v Delhi Admn* AIR 1968 SC 702, (1968) Cr LJ 806 ; *Puran Singh v State of Punjab* AIR 1975 SC 1674, (1975) Cr LJ 1479 .

17 *Anantram v Emperor* AIR 1940 Nag 117, p 118 .

18 *Chandulla Sheikh v Emperor* AIR 1914 Cal 623(2), 624.

19 *Paras Ram v Rex* AIR 1949 All 274, p 283, (1948) All WR 280(HC), 50 Cr LJ 445.

20 These principles are referred to with approval in *Ambika Singh v State* AIR 1961 All 38, p 42 .

21 *Pusu v Emperor* AIR 1914 Nag 7 .

22 *Bindeswari Prasad Singh v Emperor* AIR 1918 Pat 239 .

23 *State of Orissa v Bhagabat Mahanta* (1978) 46 Cut LT 23, p 27 .

24 *Hukam Singh v State of Uttar Pradesh* AIR 1961 SC 1541, p 1542 **affirming***Hukam Singh v State* AIR 1959 All 690, (1959)

Cr LJ 1258 .

25 *Shurufooddin v Kassinath* 13 WR 64 (Cr) .

26 *Pahar Singh & Ors v State of Rajasthan* (1999) Cr LJ 1150 (Raj) (DB) .

27 *Pratap Singh & Ors v State of Uttar Pradesh* (1996) Cr LJ 2387 (All) .

28 *Ram Kumar & Anor v State of Haryana* (1998) Cr LJ 2049 (SC) .

29 *Jaggar Singh & Anor v State of Punjab* (1989) Cr LJ 1980 (P&H) .

30 *Arbind Kumar Singh v State of Bihar* (1990) 1 BLJR 393, p 404, 407 .

31 *Ayodhya Ram alias Ayodhya Prasad Singh Ors v State of Bihar* (1999) Cr LJ 5005 (SC) .

32 *Har Chand v State of Rajasthan* (1997) Cr LJ 345(Raj) (DB).

33 *Bharate Lal Tewari & Anor v State of Uttar Pradesh* (1999) Cr LJ 288 (UP) (DB) .

34 *Rajinder Kumar v State of Himachal Pradesh* 2009 Cr LJ (NOC) 411 (HP) .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 98.

Right of private defence against the act of a person of unsound mind, etc.--

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

Illustrations

(a) *Z*, under the influence of madness, attempts to kill *A*; *Z* is guilty of no offence. But *A* has the same right of private defence which he would have if *Z* were sane.

(b) *A* enters by night a house which he is legally entitled to enter *Z*, in good faith, taking *A* for a house-breaker, attacks *A*. Here *Z*, by attacking *A*, under this misconception, commits no offence. But *A* has the same right of private defence against *Z*, which he would have if *Z* were not acting under that misconception.629

Comments

1. Scope

The right of private defence given by ss 96 and 97 is against offences. This section extends that right to certain acts which are not offences. So, the right of private defence is not affected by the fact that

the threatened act cannot constitute an offence technically, because of the agent's youth (refer to s 82), want of maturity of understanding (refer to s 83), unsoundness of mind (refer to s 84 and illust (a) to this section);[35] intoxication (refer to ss 85 and 86), or misconception, *i.e.*, mistake of fact (refer to illust (b) to this section). These circumstances may render the need of self-defence still more urgent than in ordinary cases. Therefore, a person does not lose the right of defence of property because the other party is under some misapprehension.[36] Through a person, entering into a property in the possession of another under a misconception may not be guilty of any offence, that would not deprive the right of private defence of property of the person to actual possession.[37] Likewise, if drunken men break the law and attack either the person or the property of people, any member of the public is entitled to exercise the right of private defence provided he does not do more harm than the necessities of private defence require.[38]

35 Indian Penal Code 1860, s 84 and illust (a) to s 98 .

36 *Ram Prasad v State* (1959) Cr LJ 1394, p 1395, AIR 1959 All 790 ; *Raising Mohima v State of Gujarat* (1962) 1 Cr LJ 717, AIR 1962 Guj 202 .

37 *Madhavan Nair v Sankara Pillai* (1967) KLT 463, (1967) Mad LJ 674 (Cr)

38 *Mani Karki v Emperor* AIR 1927 Rang 121, 29 Cr LJ 445, p 446 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 99.

Acts against which there is no right of private defence.--

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

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

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

Extent to which the right may be exercised.--The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

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

Explanation 2.--A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded.630

Comments

1. Scope

This section lays down the limits of the right of private defence. Sections 96 - 98, IPC give a right of private defence against certain offences and acts. The right of given under ss 96 - 98 and 100-06, IPC are controlled by this section.[39] The first three clauses of this section define the acts against which there is no right of private defence. The fourth clause of the section lays down the general extent of the right of private defence. The first two clauses lay down that there is no right of private defence against:

(i) By a public servant.	(a) in good faith and	though the act done may not be strictly justifiable by law
(ii) By direction of a public servant.	(b) under colour of his office, ditto	though the direction may not be strictly justifiable by law

These clauses in favour of public servants rest, partly on the probability that their acts will be lawful, in which case resistance must necessarily be unlawful, partly on the theory that resistance is unnecessary since the law will set right what has been wrongly done in its name, and partly on the ground that it is good for society that631 public servants should be protected in the execution of their duty even where they are in error.[40]

2. Object underlying Enactment of Paragraph 1 is to Protect Public Servant

Under this clause, an act: (a) done or attempted to be done; (b) by a public servant; (c) acting in good faith; (d) under colour of his office; (e) though that act may not be strictly justifiable by law, does not give rise to the right of private defence.[41] This para is designed to protect a public servant and to limit the amount of resistance which may be offered to him.[42]It was enacted to meet cases which would not fall within s 332 by reason of the public servant not being, at the time when the assault was committed on him in discharge of a duty imposed on him by law. It applied to those cases in which the public servant was acting in good faith under colour of his office, though the particular act being done by him may not be justifiable by law.[43]

3. Right under Section 97 is Subject to Restrictions Imposed by sections 99, 103, 105

Commentary under same heading in s 97, *ante*, may be referred to.

4. Act which does not Reasonably Cause Apprehension of Death or Grievous Hurt

The first two paragraphs of the section declare that there is no right of private defence against an act done or attempted to be done by, or by the direction of a public servant, but that is subject to the condition that the act 'does not reasonably cause the apprehension of death or of grievous hurt'. If the act reasonably causes an apprehension of death or of grievous hurt, the right of private defence is not taken out simply because it is an act done by, or by the direction of a public servant. If the danger is

continuing, the right is there, but if the danger or the apprehension has ceased to exist, there is no longer the right of private defence.[44]

An excise inspector pursuing the accused, an opium-smuggler, fired his revolver twice to frighten him. When he was about to overtake the accused, the latter drew his sword and cut the inspector on the thigh. It was held that the accused had reasonable ground to apprehended that the inspector intended to cause death or grievous hurt, and, therefore, he had a right of private defence against him.[45]

Nature of Apprehension is a Question of Fact

The right of private defence of the body extends, under the restrictions mentioned in this section, to the voluntary causing of death or any other harm to the assailant if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence632 of such assault. Whether the apprehension was reasonable is always a question of fact to be determined by the surrounding circumstances. The test in such a case is not whether there was any actual danger, but whether there was reasonable apprehension that such danger existed. At the same time, it must be borne in mind that a man acting under apprehension of death or grievous hurt cannot be expected to judge too nicely the situation and modulate his defence step by step. And where the assault has assumed a dangerous form every allowance must be made for one, who, with instincts of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander would seem absolutely necessary.[46] There should not be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehends that such an offence is contemplated and that it is likely to be committed if the right of private defence is not exercised. The apprehension may be a mistaken one, but if it is *bona fide*, it would give rise to the right of private defence. Thus, the march of a police party with *lathis* in horizontal position and armed with rifles and revolvers is enough to give rise to the right of private defence. Such march under the circumstances of a case may also amount to an assault as may reasonably cause the apprehension that death or grievous hurt would otherwise be the consequence of such assault, and the case is then taken out of this section, and directly covered by cll (1) and (2) of s 100 . Even assuming that the march by the police party was a lawful one and that the police party never intended to cause grievous hurt or death, the accused are justified by law to exercise the right of private defence if they were under a *bona fide* impression, though mistaken, that the march amounted to an assault causing an apprehension that otherwise death or grievous hurt would be the result.[47] In the case of *Reg v Rose* ,[48]there were circumstances which might have induced a belief that a man was cutting the throat of his wife. Their son shot and killed his father. It was held by Lopes J, that: 'If the accused had reasonable grounds for believing and honestly believed that his act was necessary for the defence of his mother, the homicide was excusable'. If by the exercise of the right of private defence a person escapes death or grievous hurt, it cannot be said that he had no apprehension of the same.[49]

Where after exchange of hot words, the deceased had hurled stones causing injury to one accused, while the deceased was unarmed, and the injuries of the accused were not proved by the production of medical evidence, held that the accused were not entitled to right of private defence, thus, their conviction on the charge of murder was held proper.[50]

5. Public Servant

A *vakil* appointed to make an attachment is a public servant within the meaning of this section. Omission to record reasons for his appointment to make the attachment does not render the attachment made by him illegal, and no right of private defence arises against his act of attaching the property.[51]633

6. 'Acting' in 'Good Faith'

'Good faith' in this section has to be read with s 52 of this Code, wherein it is provided that: 'Nothing is

said to be done or believed in good faith which is done or believed without due care and attention'.[52]Good faith in criminal law is different from 'good faith' as understood in civil law. If an act is not done with due care and attention, it cannot be said to be done in good faith as far as criminal law is concerned.[53]

Where an act is done by a public servant in contravention of the mandatory provisions of law, it must be held to have been done without due care and attention and cannot be said to have been done in good faith.[54]Section 52 makes no reference to the moral elements of honesty and right motive which are involved in the popular significance of 'good faith' and which are predominant in the positive definition enacted in the other Acts of the legislature.[55] It is obviously the duty of all police officers to acquaint themselves with at least the general scope of their powers. Where the action of a police officer is altogether outside the scope of his powers, he cannot be said to have acted with due care and attention and therefore in 'good faith'.[56] Where a police officer arrests a woman in execution of a bailable warrant, deliberately refusing to give her an opportunity of giving bail he cannot be said to have acted in good faith.[57]The act of executing an illegal warrant lacks due care and attention.[58] Due care and attention implies a genuine effort to reach the truth and not the ready acceptance of an ill-natured belief.

7. Good Faith is a Question of Fact

The question of good faith is a question of fact and must be gathered from the surrounding circumstances.

> Mere actual belief without any reasonable grounds for believing is not simultaneous with good faith; but good faith does not require logical infallibility but due care and caution which must, in each case, be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. The law does not expect the same care and attention from all persons regardless of the position they occupy.[59]

Where a magistrate ordered the police 'to see that the status quo is maintained', but a police officer proceeded to demolish a wall, it was held that he could not be said to have acted in good faith, as he did not understand the meaning of the expression 'status quo' in the magistrate's order and did not take proper steps to ascertain what the magistrate intended him to do.[60]

An *amin* executing a warrant, knowing that the date fixed for execution had already expired, cannot be said to have acted in good faith.[61]634

However, where an *amin*, through inexperience or negligence failed to notice that the duration of his warrant had expired, but proceeded to arrest, honestly believing that he was entitled to do so under the warrant, it was held that there was no right of private defence against his act.[62]

In *Queen-Empress v Dalip* ,[63] the warrant was executed by constables different from those who were authorised to execute it as the man who was to be arrested was not in the village where it was supposed to be, and the officer of the police station on discovering this, made a copy of the warrant from the register in the *thana* and endorsed in it the names of other constables who were directed by him to make the arrest. The warrant was executed by these constables who were held to have acted in good faith under colour of their office, and there was nothing to suggest that with due care and attention these police could have ascertained that they were not legally authorised to make the arrest.[64]

But in *Prag v Emperor* ,[65] where the warrant authorised a particular *amin* to make the attachment, and he having failed to do so, a *naib-tahsildar* authorised another *amin* to make the attachment, it was held that the *naib-tahsildar*may have acted with the best of intentions and may have believed himself

entitled to act the way he did, but if he had examined the warrants he would have at once seen that only the *kurk amin* named in it was authorised to execute them and if he had considered the matter for a moment, he must have realised that it was not within his power to authorise any other *kurk amin* to execute them and it could not therefore be said that he acted with due care and attention and therefore in good faith.

Commentary under s 52, *ante*, may be referred to.

Meaning of 'Under Colour of his Office'

The words 'under colour of his office' should be carefully construed. They refer to irregular, as distinguished from illegal, acts. They show that though the act was within the jurisdiction, the jurisdiction had been exercised irregularly or on insufficient grounds. In short, the act has been done wrongly, though it might have been done rightly. In other words, the clause is not intended to cure the want of jurisdiction; it only cures an erroneous exercise of it,[66] when the error affects the procedure rather than the principle, such an irregularly--*e.g.*, as initialling a warrant instead of signing it, the mode of delivering possession or the like--would be covered by this clause.[67]

Where the bailiff's party broke the lock open and entered the hut of the judgment-debtor, in order to attach his wheat it was held that this was an act done by a public servant acting in good faith under colour of his office though that act might not be635 strictly justifiable by law, and that the judgment-debtor or people on his behalf had no right of private defence against it.[68] Similarly, where the accused resisted, and inflicted injuries on, the sales tax officer, who attempted to seize his account books under s 41(3) of the Madras General Sales Tax Act 1959 it was held that the sales tax officer purported to act under the colour of his office and the plea of self-defence was not available to the accused.[69]

Where the search proceedings started by a sub-inspector of police against an accused, are illegal and without jurisdiction, the accused has a right of private defence of property and has every right to prevent him from entering his house.[70]

Where a search warrant was defective, but a head constable carried it out in good faith under colour of his office, it was held that there was no right of private defence against it.[71]

This section contemplates only such cases in which the public servant concerned had no legal authority to do the act but he proceeded to do it in an irregular manner. It does not protect those acts of public servants for which they have no legal authority.

Where certain *tahsil* peons forcibly seized for military purposes a bullock-cart not let on hire and a scuffle ensued and one of the peons was hurt by the cartman; it was held that the latter acted in the exercise of his right of private defence, because the peons had no legal authority to take the cart in their charge by criminal force and without his consent, and thus their act being one not done under colour of their office, this section could be of no avail to them.[72]

The words 'public servant acting in good faith under colour of his office though that act may not be strictly justifiable by law' in this section have no application to a case where the initial proceeding and the power under which a public servant purports to act are altogether without jurisdiction and are ultra vires.[73]

Phrases 'Under Colour of his Office' and 'in the Lawful Discharge of his Duty'--Distinction

The words 'under colour of his office' are to be distinguished from the words 'in the lawful discharge of his duty' in s 332 of the IPC .[74]

In *Provincial Govt, CP and Berar v Nonelal* ,[75]it was held: 'The words 'in the discharge of his duty as such public servant' mean in the discharge of a duty imposed by law on such public servant in the particular case and do not cover an act done by him in good faith under colour of his office'.636

A public servant executing an invalid warrant of arrest cannot be said to be acting in the discharge of his duties but may be acting *bona fide* under colour of his office.[76]

'Not Strictly Justifiable by Law'

The protection afforded by this section to a public servant refers to a public servant actually doing a specific act and, so long as he is acting in good faith under colour of his office, he is protected from assault though the act may not be strictly justifiable by law.[77] As stated by Mayne:[78]

> The words 'not strictly justifiable by law' seem to point to cases where there is an excess of jurisdiction, as distinct from a complete absence of jurisdiction, to cases where the official has done wrongly what he might have done rightly, and not to cases where the act could not possibly have been done rightly.

Generally speaking, the exception contained in the first paragraph of this section applies where a public servant acts irregularly in the exercise of his powers, and not where he acts outside the scope of his powers.[79]The section does not apply to cases where there is a complete absence of jurisdiction and the act could not possibly have been done rightly.[80] Where two constables arrested a person illegally at night from the village, and on way to the police station, the accused rescued the arrested person after assaulting the constable and another person of the village who died later on; under these circumstances, it was held that the object of the respondents was not to assault or murder and the High Court rightly acquitted them of the offence.[81]

In *Gograj Mahto v Emperor* ,[82] Meredith J, (with whom Harries CJ, concurred) emphasised the word 'strictly' in the expression 'strictly justifiable by law' and observed that it must have been deliberately inserted by the legislature to show that this section was not intended to apply to cases where the act was wholly unjustified. It does not extend to cases where there is a complete want of jurisdiction. So also in the case of *Anand Ballabh Prasad v State of Bihar* ,[83] it was held that the words 'strictly justifiable by law' show that the section does not contemplate a case of initial want of jurisdiction. If there was no jurisdiction to issue a warrant of arrest or to make an arrest, this section cannot be of any help to the public servant. In the case of *Sukar Sao v Emperor* ,[84] Shearer J, held that the words 'not strictly justified by law' in this section apply to cases in which there is an excess of jurisdiction as distinct from a complete absence of jurisdiction. An arrest made by a police officer under s 151, CrPC, where there is no emergency contemplated by that section is illegal and neither cl (1) nor cl (2) can afford protection to him.[85] This part of the section protects the public servant against the right of private defence even if the637 authority be defective in minor particulars or even if the officer exceeds his duty in a minor particular, and it merely leaves the right of private defence open when the alleged authority is no authority at all and is wholly defective in form or the officer goes clearly and widely outside the duties imposed on him.[86] If the authority has no defect, the section has no operation.[87] Where in a proceeding under s 144 of the CrPC, the magistrate makes an order which is illegal and *ultra vires*, the person against whom the order is directed is not deprived of his right of private defence against the execution of the illegal and unjustifiable order.[88] Similarly, where a public servant attaching property removes it from the custody of the owner contrary to the rules of the court having the force of law, this section is no bar to the exercise of the right of private defence by the owner.[89]

Where a warrant of arrest is good and valid on the face of it, and it is sufficient to inform the person, against whom it is issued, of the reason for its issue, and the magistrate is justified in issuing the warrant on the materials before him, such a warrant would not be invalid merely by reason of the fact that the magistrate did not record in writing on the order-sheet of the case the reason for its issue which might be the same as that which he had stated in the warrant itself. There can be no right of private defence against the execution of such warrant.[90] Where accused attacked and fired at a police constable trying to arrest him, right of private defence was not available to accused.[91]

In *Khuda Bux v State* ,[92]there was an order of a competent magistrate to arrest a person. A police

officer cannot, it was held, be said to have acted without jurisdiction in arresting that person. Assuming that the warrant of arrest was defective or irregular, it would, at the most, be a case of his exceeding jurisdiction and not of acting absolutely without jurisdiction. Hence, in executing such a warrant of arrest if the police officer acts in good faith under colour of his office, there is no right of private defence against his act.

In the case of *Kalan Beg v Emperor* ,[93] it was held:

> Where constables are acting under colour of their office in executing a search warrant in a village, even if their act is not strictly justifiable by law, the villagers have no right of private defence since the constables were acting in good faith. Any technical flaw in the warrant is immaterial in considering the question whether the villagers have a right of private defence.

This section protects the public servant against the right of private defence even if the authority be defective in minor particulars or if the officer exceeds his duty in a minor particular. It merely leaves the right of private defence open when the alleged authority is no authority at all and is wholly defective in form or the officer goes clearly and widely outside the duties imposed on him. If the authority has no defect,638 the section has no operation.[1] Mere irregularities in the execution of a warrant would not take the case outside the scope of the section and entitle the accused person to have a right of private defence.[2]An act of a public servant may not be strictly within his rights, but if he has acted in good faith under colour of his office, there is no right of private defence against his act.[3]

Where an order which a sub-inspector of police was carrying out was apparently lawful but was found to be unlawful on account of a technical defect, it was held that there was no right of private defence against his act.[4]

But where the order of a police head constable was wholly beyond the scope of his powers it was held that the accused had a right of private defence against force sought to be used against his person in pursuance of that order.[5]

Distinction between Illegal Acts and Acts not Strictly Justifiable by Law

The distinction between acting contrary to law and without jurisdiction and acting in a way not strictly justifiable by law has to be made.[6] There is a marked difference between the acts which are wholly illegal on one hand and the acts which may not be strictly justifiable by law. If the public servant acts without jurisdiction, it cannot be said that he acted in good faith and that this act should be protected even if it is not strictly justifiable by law. The law does not protect the illegal acts and the acts committed by a public servant without jurisdiction. 'Act not strictly justifiable by law' does not cover an act which is wholly illegal and totally without jurisdiction. Section 99 applies to acts where jurisdiction is wrongly exercised but not where there is complete absence of jurisdiction.[7] The words 'though that act may not be strictly justifiable by law' are significant. The inference from these words is that while the protection of the section extends to acts that are not strictly justifiable by law, it does not extend to acts which are ultra vires and have no legal basis. The section applies indeed to a case where an official has done wrongly what he might have done rightly but not to cases where the act could not have been done rightly at all by the official concerned.[8] In other words, the clause is not intended to cure the want of jurisdiction, but only an erroneous exercise of it. When the error affects the procedure rather than the principle, it would be covered by the clause.[9]

8. Explanation 1

Explanation 1 goes with para 1 and it is intended to protect persons who may have acted in ignorance of the fact that the person, they were dealing with, was a public servant.[10]639

In a case, the police entered a house at night to arrest the accused. The latter had no means of knowing who they were and fired at them. It was held that expln 1 to this section gave him a right of private defence.[11]

Where the public servant has a distinctive badge or uniform, his position would be manifest to all who have to deal with him. But if the public servant has no distinctive badge or attire, he has to state, who he is, before he can claim exceptional treatment. If he was, however, attended by peons whose badges proclaim his position, or if he was already known in the locality or to the other party, it would be sufficient.[12] In *Emperor v Abdul Hamid* ,[13] it was observed:

> We consider it necessary here to point out that it is not only proper and advisable, but really necessary, that when police officers act in the discharge of their official duty, they should be clothed in their uniform so that the public should always know that they are officers of the law acting in the discharge of their duty. That rule undoubtedly applied to ordinary cases and we can easily conceive of emergent cases in which the police officers might act without being clothed in their uniform, but in such cases it is their duty to take some steps to make it clear to the person whom they intend to arrest that they are officers of the law. If they fail to do so as the two constables did in the present case, they cannot validly seek the protection of the court.

Where an excise officer, acting *bona fide* and without malice, went to search the accused's house and the accused was informed of the fact that the officer was a public servant, it was held that the accused had no right of private defence against the act of the excise officer.[14]

9. Paragraph 2--Acts done by Direction of Public Servant

Under the second paragraph of this section, persons directed to do certain things by a public officer are similarly protected in the performance thereof. It is important to note how far private persons who seek to arrest others will be protected by it. A private person may arrest another under any of the following circumstances, under the provisions of the CrPC :

(i) When reasonably demanded to assist a police officer in either--(a) making an authorised arrest, or (b) in the prevention of injuries to public property, breaches of peace and riots and affrays (see s 37, CrPC).
(ii) When requested by a private person seeking to arrest under a warrant (see s 38, CrPC).
(iii) When acting under a warrant granted to himself (see ss 72 and 73, CrPC).
(iv) When ordered by a magistrate to arrest a person who has committed an offence in his presence (see s 44(1), CrPC).
(v) When he sees another person committing a non-bailable, cognizable offence in his presence (see s 43, CrPC).

Arrests must be effected in the manner laid down in s 46 of the CrPC .640

Cases 3 and 4 are clear cases of 'direction' by a public servant, and, therefore, persons acting under them, are protected by the second paragraph of this section, and there is no right of defence against them in doing what they are ordered to do.

At first sight, it appears questionable whether private persons, acting under the circumstances, given in either cases 1 or 2 can be said to act under the 'direction' of a public officer; but this difficulty is more apparent than real. Under s 37 of the CrPC, a person is bound to obey the reasonable demand of the magistrate or police officer. In the other case (s 38) the private person, called upon, is not bound to render assistance, such a course being optional with him. But, having once consented to aid, he then acts with the original grantee of the warrant, under the protection thereof. A warrant, granted

to a private individual under s 72 or 73, is, in fact, a direction given not only to him, but to anyone else who, being called upon, chooses to assist the former in executing the warrant under s 38 . Resistance, then, to persons, acting under either s 37 or 38 of the CrPC, cannot be justified on the ground of 'self-defence'.

As to case 5, *viz,* persons acting under s 43 of that Code, it seems clear that a person who chooses to act under its provisions, must act at his peril, though practically the risk of acting unlawfully (and thereby giving the supposed guilty persons, the right of self-defence) is very slight, as the act, for which arrests may be made under that section, must be one which has actually been seen by the person making the arrest. If lawful, he is protected by s 352 ; but if unlawful, he is not. Thus, *A* sees *B* killing *C*. If *B* has murdered *C,A* may arrest *B*, his act in so doing being lawful under s 43, CrPC, and a lawful act cannot be resisted by any species of force.[15] If *B* killed *C* in self-defence, *A's* act in attempting to arrest *B* is unlawful, and *B* has the right of self-defence against *A,* for it does not come within the exceptions given by this section.[16]

10. 'Good Faith' in Paragraph 2

'Good faith' in para 2 also has to be read with s 52 of the IPC . Where a police sub-inspector, who is not entitled to give verbal instructions to private individuals to arrest persons whom it is his own duty or the duty of his own subordinates to arrest, gives such directions to private individuals in total disregard to the provisions of the CrPC, which apply to matters of arrest, he cannot be said to act in good faith, and this part of s 99 cannot be applied to deprive an individual of his right to defend himself against an unlawful arrest in such circumstances.[17] In *Bhailal v Emperor* ,[18] a magistrate issued a proclamation, under s 87 of the CrPC, and an order of attachment, under s 88, of the property of certain absconding accused persons. During the attachment an objection was raised that the property being attached did not belong to the absconders. The police officer, on being informed by the *patwari*that it was their property continued the attachment. A mob, amongst whom were the accused, assembled, and by assuming a threatening attitude prevented the police officer from further attaching the property. It was held that even supposing that the order of attachment might not have been properly made, that would be no sufficient ground to give the rightful owner of the property a right of private defence against the act of the police officer acting in good faith under colour of his office.641

11. Explanation 2

A private person, acting by direction, must state his authority, or produce his written authority (if he had one) if demanded. Section 75 of the CrPC, requires that both police officers and private persons acting under a warrant must notify the substance thereof to the offender, and show it to him, if demanded.[19]

12. Paragraph 3--Time to have Recourse to Public Authorities

The third paragraph of this section must be read with s 102 and the first clause of s 105 .[20] The right of defence commences when a reasonable apprehension of danger arises, and if there is no time to have recourse to the public authorities, the accused would be practically in a trapped position. The right of private defence of property is restricted by this clause. There is no right of private defence where there is time to take recourse to such protection.[21] A large number of cases have clustered round the words 'in which there is time', in s 99 of the IPC as those words have some ambiguity. Unless they are applied in the proper sense, they are liable to be misapplied and an unjust result would follow. In one sense, there is always time to have recourse to the protection of public authorities when immovable property is in danger. But if the restriction contained in s 99 is given such an interpretation, the prized legal right envisaged in the IPC regarding private defence of property would elude from those who deserve it. 'Time' referred to in the section in this context means, there must be a reasonable interval between development of apprehension and commission of the offence so that commission of the offence could be pre-empted by such authorities. Time element in s 99 does not depend on the gravity of the offence threatened. If the accused reasonably fears that the offence

threatened would be completed by the time the public authorities act, the accused is not under any legal obligation to proceed to the police or other authorities, instead of exercising his right of private defence at the spot itself. If one is to go to the police station after commencement of apprehension that his property is in danger, he allows the mischief threatened to his property to be completed. He cannot be expected to run the risk of depriving himself of his private defence of property by punctiliously, insisting on his obligation to inform the police. Law is not that he should resort to public authorities by scarifying his interest in the property.[22]

No use of Force when there is Time to have Recourse to Public Authorities

Everyone has a right to protect himself in the actual enjoyment of his property, and in the actual exercise of his rights, unless the case be such that the third clause of this section applies, that is, where there is time to have recourse, instead, to the protection of public authorities in which case there is no right of private defence.[23] Right of private defence is not available where the accused had time to have recourse to the642 public authorities.[24] Referring to *Hyde v Graham* ,[25] Holloway J,[26] says: 'The natural tendency of the law of all civilized states is to restrict within constantly narrowing limits the right of self-help, and it is certain that no other principle can be safely applied to a country (like this)...'. The right of self-help, when it causes, or is likely to cause, damage to the person or property of another person be restricted, and recourse to public authorities must be insisted on. If a person prefers to use force in order to protect his property, when he could, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the IPC . No matter what the intention of that person may be, the law says that he must not use force in such a case. To hold otherwise would be to encourage and put a premium on offences of rioting which are so frequent in this part of India. The country would, in the language of Holloway J, 'be deluged with blood', if an offender who could get relief by recourse to law were allowed to take the law into his own hands.[27] Once a person has lost possession of his land he should proceed to the police station and obtain the assistance of the police, instead of himself ousting the trespasser. He has no right of self-defence in such a case.[28]

In *Narayan Raut v Emperor* ,[29] one Narayan was in possession of certain land which was not under crop at the time of occurrence. Bhujawan and his party, claiming the land, began ploughing it. Narayan struck Bhujawan and killed him. It was held:

> The land was not under crop at the time of the occurrence. All that the prosecution party were doing was to plough the land. They were not doing any immediate harm. There was, therefore, ample time for Narayan to have recourse to the public authorities for the protection of his rights. Hence, Narayan was not protected by any right of private defence of property.

No Recourse to Public Authorities when Right of Private Defence has Already Arisen

But property need not be abandoned to marauders in view of applying to the police,[30] nor must a person flee from a violent assault to seek their protection.[31]The law does not intend that when a person is attacked while doing a lawful act, he is not entitled to stand on his ground and defend himself, but must run away.[32] It could not have been the intention of the framers of ss 97 and 99 to compel a person having the rights of private defence of property to acquiesce in criminal trespass or mischief, and not exercise his right of private defence at all. In most cases, if recourse is had to public authorities the mischief complained of will have been committed before the public authorities come to his rescue. It follows that if the act of mischief has already begun, there is more than an apprehension of danger to the property and the right of private defence has come into existence. If the right of private defence has already arisen, it is not expected that a person, entitled to exercise it, should have recourse to the643 permission of the public authorities. He is entitled, in view of the immediate danger of injury, to defend it by exercising his right instead to having recourse to the public authorities.[33]The

right of private defence against an act of trespass on one's property is not lost by reason of the omission to send word to a police station which is at some distance from the place of occurrence.[34]

In *Jageshwar Rai v Emperor* ,[35] one *J*, lawfully and legally obtained possession of certain land and sowed in it *rabi* crop. One *B* in bad faith and dishonestly, with a party of men went upon the land and commenced to cut the crops for the purpose of removing them. When *J* was informed of this, he in company with a band of men, went to the spot to protect his property. A fight ensued in which, however, very slight damage was done to anybody. The sessions judge suggested that the accused had plenty of time to go to the police station and to make a report of the theft. Justice Tudball held that it was true that they had ample time to do that, but that would have been of very little use so far as the protection of the property was concerned. The damage and loss would have been completed before the police could have arrived. The case of *Queen-Empress v Prag Dat* ,[36] was distinguished and it was observed that the case before him was not one in which the opposite party were merely ploughing up the land and preparing it for sowing. In the latter case, no significant damage would be done and there was ample time to have recourse to the protection of the public authorities for the enforcement of their right. In the case before his Lordship, property was actually being cut and damaged if the applicants had gone to the police station and returned with the police help, the damage would have been completed (for a fuller discussion refer to notes under head 'Trespasser's right of self-defence' under s 97).

Where an application for protection is made it should be made on information of a definite kind as to the time and place of the danger threatened.[37]

13. Burden of Proof

This section, which is the more general section, lays down that there is no right of private defence at all when there is time to have recourse to the protection of the public authorities. The burden of proof is on the accused. It would also be for them to prove that there was no time to have recourse to the protection of the public authorities.[38]

14. Para 4--Extent to Which the Right may be Exercised

The extent of the harm which it is lawful to inflict in self-defence is limited, first by the rule that it is unlawful to kill an assailant unless the crime he is attempting is one of special gravity (ss 100 and 103), and secondly, by the general principle that the injury inflicted upon the assailant must never be greater than is necessary for the purpose of defence.[39] The English commissioners, in their report of 1879, said:[40]644

> We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet this is all subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means, and that the mischief done by, or which might reasonably be anticipated from the force used, is not disproportioned to the injury or mischief which it is intended to prevent.

Again, at p 45 they quote a passage from the first report of the commissioners who drafted the IPC,[41] in which, while admitting that it would be illegal for a man to kill another to prevent that other from pulling his nose, they assume that it would be lawful to inflict upon him any harm short of death; 'to give the assailant a cut with a knife across the fingers, which may render his right hand useless to him for life, or to hurl him down stairs with such force as to break his leg,' and speak of a man so threatened as 'merely exercising a right by fracturing the skull and knocking out the eye of an assailant'. Upon this the commissioners say:

> (i) If we thought that the common law was such as is here supposed, we should without hesitation suggest that it should be altered. But we think that such is not, and never was, the law of England. The law discourages people from taking the law into their own hands. Still, the law does permit men to defend themselves. And when violence is used for the purpose of repelling a wrong, the degree of violence must not be disproportionate to the wrong to be prevented, or it is not justified.

This latter limitation is not expressly stated in para 4 of this section, but it is probable that its language would be held to forbid any flagrant excess in resisting minor wrongs.[42] It would be atrocious for anybody to think of using a heavy and mechanically propelled vehicle like a jeep as a means or weapon to exercise the right of private defence, even if any existed, and to uphold the plea would be to set at naught the limitations imposed by this section.[43]

A person is not justified in causing the death of a weak half-starved woman detected stealing his paddy.[44]

But where the accused, whose property had frequently been stolen, went out with a *lathi* to watch his property, and struck with it a thief, who died from the effects of the blows, it was held that 'the mere fact that the accused carried a heavy stick to defend himself and his property from plunderers by night does not seem to lead fairly to any other inference than that he carried with him, and used, such a weapon as a prudent man might reasonably carry, and use for the purpose of defence in such a case' and that he inflicted no more harm than was necessary for the purpose of his defence.[45]

In *Queen v Durwangeer* ,[46] the thief was endeavouring to escape, but the accused called for a *kudali* with the express purpose of killing him, and killed him on the spot accordingly. It was held that the right of self-defence under s 100 is subject to the restriction contained in para 4 of this section and the accused having intended to kill the thief, it was impossible to suppose that the killing was necessary for the purpose of defence.645

In *Nakafodi v State* ,[47] it was held 'While a case of self-defence may be made out on the evidence, if the blow, which causes death is on a vital part of the body, when the deceased was armed only with a lathi, it would be a case of exceeding the right of private defence'. Whilst on the one hand the infliction of death by way of self-defence can only be justified on the ground that such infliction is strictly necessary in order to prevent the offence in question being committed,[48] a man assailed as above is not bound to resort to less violence than the infliction of death, or to run away.[49]

15. Violence Inflicted in Self-defence must be Proportionate

In *Hari Ram v State of Rajasthan* ,[50] it has been laid down that the apprehension of danger to life and risk of grievous hurt must be reasonable and the violence inflicted must not be greater than is reasonably necessary for the purpose of self-defence. It must be proportionate and commensurate with the quality and character of the act it is intended to meet and what is done in excess is not protected.

Assault by Unarmed Person not to be Repelled by Causing Fatal Injuries

As to the quantum of force which might be employed, that would depend upon the nature and the fierceness of the assault; and the ordinary rule is that the force used should be proportionate to the force of the attack or the threatened danger. It must be such as the circumstances reasonably indicate to be necessary for self-defence. Differences of age or physical strength apart, an assault by an unarmed person is not permitted to be repelled by causing fatal injuries with a deadly weapon. Of course, the courts do not expect a person assaulted to modulate his defence step by step according to the waxing or the waning tempo of the attack. Once the assault has assumed a dangerous form, courts make all reasonable allowances in favour of a person, who, in fear of his life or limb, gives

harder blows than appear necessary to a calm spectator watching from a safe distance. An accused person, when placed in such a predicament, is not expected to maintain sangfroid and remain composed and unperturbed. To use the words of Holmes J, 'detached reflection cannot be demanded in the presence of an uplifted knife'.[51] While the law does not expect from the man whose life is placed in danger to weigh with precision the extent and the degree of the force he employs in his defence, the law does insist that the person claiming such a right does not resort to force which is out of all proportion to the injuries received or threatened and far in excess of the requirements of the case. In certain eventualities, it is the duty of the accused even to retreat in order to avoid danger to himself before inflicting fatal injury. This is a necessary corollary that follows from the right of self-defence being based on necessity.[52]

Prosecution case was that when the deceased with dao rushed towards the father of the accused, the father of the accused retaliated with lathi as a result of which the dao fell down from the hand of the deceased, and thereafter, the accused attacked with lathi causing the death. Held, the right of private defence was lost when the dao fell down from the hand of the deceased. Thus, right of private defence was not available to the accused.[53]646

Shooting from Close Range

Where the accused had committed murders by shooting from a close range, the plea of self defence was held not to be available.[54]

16. Extent of Right of Private Defence Depends on the Circumstances of each Case

It is difficult to judge the extent of the right of private defence by any hard and fast rule. It depends on the circumstances of each case. Once an occasion for the exercise of the right of private defence has arisen, the accused cannot be expected to regulate the extent of force to be used by him by any precise standard.

> Where a man has been attacked by another man and uses a weapon such as a *lathi*, it is impossible to lay down with any sort of accuracy the extent to which the attacked person rightfully acts in his defence. Where in a *marpit* brought about by the illegal act of the dead person himself the accused, while resisting the attack of the deceased, happens to hit him on the head, rather harder than perhaps he intended to have done and thus kills him, he cannot be said to be exceeding his right of self-defence and should not be convicted.[55]

17. Force to be used cannot be Weighed in Golden Scales

A person who is apprehending death or bodily injury cannot weigh in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium, it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation which is commensurate with the danger apprehended to him where assault is imminent by use of force. It would be lawful to repel the force in self-defence and the right of private defence commences as soon as the threat becomes imminent. If the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private defence can legitimately be negatived. The Court dealing with the plea has to weigh the material to conclude whether the plea is acceptable.[56]

The right of private defence under s 100 of the IPC cannot be weighed in golden scale in the spur of

moment and in the heat of circumstances. What is necessary for the defence to prove under the first explanation to s 100 of the IPC is that there was a reasonable apprehension that if death of the assailant is not caused, death will otherwise be the consequence of such assault.[57]

When firing at a crowd, some of whom were advancing and some were retreating, a shot may very well hit one of the retreating persons. That would not indicate that the person threatened by the crowd was exceeding his right of private defence.[58] Where a person, seeing that his friend is being chased by another person with a *da*,647 strikes the pursuer, he would certainly have a right of private defence. Whether or not the blow which he struck was in excess of that right would of course depend upon the circumstances, upon the amount of danger which his friend was in, and the measures which the accused took to ensure his friend's safety.[59] If a person has a reasonable apprehension of danger to his life, he is justified in completely disabling his adversary, and if in that attempt he happens to inflict the injury with a little more force than absolutely necessary, he cannot be held liable.[60] It is for such a situation that it is often said that one cannot weigh in golden scales the maximum amount of force necessary to keep within the right of private defence.[61] The law makes every allowance to a person who apprehends a reasonable danger to his life from his adversary, and with intent of self-preservation strong upon him, pursues his defence a little further than what to a bystander may seem absolutely necessary.[62]

Expecting Blow for Blow with same Measure is Erroneous

When *lathis*, *talbar* and other sharp-edged weapons are being used by both the parties in the fight, it is very difficult for any side to weigh the strokes that are inflicted by him and to inflict injuries only up to a certain limit and no more.[63] It is difficult to expect that a blow given would be returned with just the same degree of violence.[64] It would be circumscribing the right of private defence of the body with meticulous and unjustifiable restrictions if it were to be held that, when the person attacked had managed to obtain the weapon from the grasp of the attacker, he was not to be allowed to use that weapon in his defence in order to prevent the attacker from regaining possession of it.[65] It is not correct to say that a person apprehending danger to life or grievous hurt should inflict an injury of the same nature to the assailant as was caused to him. The man placed in a grave and imminent danger to his life, cannot be expected to wield the weapon with the same force or impact which has been wielded against him by the assailant and aggressor. Expecting blow for blow with the same measure from a person placed in the accused's situation, when grave and imminent danger to his life exists, would be a wholly erroneous and injudicious approach.[66] The only restriction imposed is that the person exercising the right should not use more force than is reasonably necessary and should not inflict an injury out of all proportion to the injury which he received or which he was threatened with.[67]

While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting.[68]648

In a case in Gujarat,[69] the deceased attempted to commit an unnatural offence on the accused and the latter in self-defence shot some arrows at the deceased, as a result of which he died. There were nine arrow injuries on the deceased and each of them was sufficient in the ordinary course of nature to cause death. It was held that the right of private defence came to an end after the infliction of first injury sufficient in the ordinary course of nature to cause death, and the injuries inflicted thereafter could not be saved by any right of private defence.

The plea of the accused was that the complainant attacked him first when he was taking his turn of water and thereafter, he assaulted the complainant. Revenue records showed that the accused did not have turn of water. Held, the accused was not entitled to the right of private defence, thus, the accused appellant was convicted under ss 326 / 323, IPC .[70]

Where a forest guard tried to seize the accused's cattle trespassing a protected forest after they

returned to the field of the accused, and the accused beat him even after he fell down, it was held that since the guard could not round up the cattle after he fell down, the beating after he fell down could not be said to be in the exercise of the right of defence of property.[71] Where the seizure of timber by the forest guard was not legal, the accused had the right of private defence of property and were not liable under s 332, IPC .[72]

But the question whether the accused had the right of private defence is in every case essentially a question of fact to be decided according to the circumstances of each case; and decided cases are not of much help except as indicating generally the principles which should be borne in mind in deciding the question. It cannot be said that in every case the accused cannot claim the right of private defence of person the moment the deceased is disarmed.[73]

Excess of Right is a Question of Fact

It is also entirely a question of fact in the circumstances of a particular case as to whether there has been an excess of the right of private defence.[74] The court must take into consideration, all the surrounding circumstances and the matter should not be weighed in golden scales.[75] The court must have regard to comparative physical strength to the accused and the deceased and their conduct at the time of the649 occurrence.[76] So, no hard and fast rule can be laid down to determine the amount of harm which is legally justifiable or permissible in law for the exercise of the right of private defence. Individual cases are to be considered on their own peculiar facts.[77] Mere number of injuries, inflicted upon the complainant, does not show that the accused has exceeded the right of private defence.[78] In *Jai Dev v State of Punjab* ,[79] their Lordships of the Supreme Court considering the quantum of force to be applied in making private defence observed:

> There can be no doubt that, in judging the conduct of a person, who proves that he has a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. He is faced with an assault, which causes a reasonable apprehension of death or grievous hurt, and that inevitably creates in his mind, some excitement and confusion. At such a moment, the uppermost feeling in his mind would be to ward off the danger and to save himself and his property, and, so, he would naturally be anxious to strike a decisive blow in exercise of his right. It is no doubt true that, in striking a decisive blow, he must not use more force than it appears to be reasonably necessary. But in dealing with the question, as to whether more force is used than what is necessary or justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a Court room, for instance, long after the incident has taken place. That is why in some judicial decisions it has been observed that the means, which a threatened person adopts, or the force, which he uses, should not be weighed in golden scales.

The deceased was unarmed. The accused persons caused as many as 33 injuries. Held, the accused appellants exceeded their right of private defence.[80]

Exercise of Such Right not to be Vindictive

The violence, which the person, defending himself or his property, is entitled to use, must not be unduly disproportionate to the injury, which is to be averted or which is reasonably apprehended, and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious.[81] Where, by the first stroke of the accused, who gave it in his legitimate right of private defence, the deceased fell defenceless on the ground, it was held that he exceeded his right of private defence when he gave five further strokes of a serious nature as a result of which the deceased died on the spot.[82] The right of private defence of body is exceeded if the accused caused fatal injuries, after snatching the pistol from the deceased, when there is no cause for apprehension that death or grievous injury would be caused to them.[83] But where, in the exercise of the right of self-defence, the first blow, on the neck of the deceased, was sufficient to cause death, it was held that650 the repetition of similar strokes thereafter did not make the position worse and the right of self-defence cannot be said to have been exceeded for that reason.[84]

18. When Death is Caused in Exceeding the Right of Private Defence

A person may resist the execution of an illegal warrant, but he must not voluntarily inflict grievous hurt in so doing. If he does he is guilty of that offence.[85] Where the head constable entered the house of the accused without warrant or authority in law to search it and tried to molest the womenfolk, it was held that the accused had every right to inflict injuries and apprehend the said constable in exercising their right of private defence.[86]If, in exceeding the right, death is caused, the act may amount to murder or only to culpable homicide. If the person has exercised his right: (a) in good faith; (b) without premeditation of death; and (c) without any intention of doing more harm than it was necessary, his offence will be culpable homicide.[87] But these three conditions must concur[88] otherwise the offence will be murder. Where an accused has exceeded the right of private defence, he can be convicted under s 304, Pt I, and not under s 302 .[89] But if there is no initial right of private defence, the question of exceeding that right does not arise.[90]

> When it is not a case of premeditation and also it appears that the accused has no intention to murder the deceased, but all of a sudden he in exercise of his right of private defence stabbed him, therefore, although the accused was guilty of committing culpable homicide, but his act falls within the Exception 2 as envisaged under651Section 302 of the IPC, therefore, the accused was not guilty for the offence of murder, but was guilty for the offence punishable for culpable homicide not amounting to murder *i.e*. under Section 304 Part II of the IPC .[91]

The deceased was killed mercilessly by inflicting twenty incised injuries, which were mostly on the vital parts of the body. The injuries alleged to be received by the accused were minor and superficial. Held, even if the accused had the right of private defence, he exceeded the right of private defence.[92]

Evidence on record proved that there were altercations between the accused and the deceased, and there was threat that the informant and others would take over possession of the disputed property. There was a threat to the property of the accused and he made an effort to drive away the informant and others. Though the prosecution did not allege that the accused persons were trying to take over possession, yet on a scrutiny of the evidence it becomes quite vivid that the informant party was in a hurry to raise construction at the site and, accordingly, were taking steps. The accused had fired a gunshot but it was really not with the intention to cause the death of the deceased. The prosecution did not bring any material on record that the said accused was vindictive, or that he had any malicious intention to cause the death of the deceased. Held, the accused exceeded the right of private defence, and the case was covered by Exception 2 to s 300 . The accused was convicted under s 304, Pt II.[93]

The accused from a distance of 5 paces fired a shot causing the death of the deceased and injuries to his brother. Held, it could not be said that the accused exceeded his right of private defence. Conviction under s 302, IPC was proper.[94]

Where the accused had right of private defence of person and property, but he exceeded the right, he was convicted under s 304, Pt I, IPC .[95]

In a sudden quarrel between the deceased and the appellant accused, the deceased took out a bamboo stick and he assaulted the appellant with a bamboo stick. The appellant then snatched the bamboo stick from the hand of the deceased and started assaulting the deceased with it. The deceased fell down and died. Held, the accused appellant had the right of private defence, however he exceeded that right. Thus, accused appellant was convicted under s 304, Pt I.[96]

19. Injuries of accused not explained by the prosecution

In *Lakshmi Singh v State of Bihar* ,[97] the Supreme Court held--

> It is well settled that fouler the crime, higher the proof, and hence in murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been652 deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence.

It is clear that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witness is untrue and (2) that the injuries probabilize the plea taken by the appellants. In a murder case, non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

"(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. However, there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would apply to cases where the injuries sustained by the accused are minor and superficial, or where the evidence is so clear and cogent that it outweighs the effect of the omission on the part of the prosecution to explain the injuries.[1]

39 *R v Dhananjai Poly* 14 WR (Cr) 68 .

40 Re *Ganapathia Pillai*AIR 1953 Mad 936, p 937 ; *Mayne's Criminal Law of India*, para 216.

41 Re *Ganapathia Pillai*AIR 1953 Mad 936, p 937 .

42 *Sakharam Rawaji Pawar v Emperor* AIR 1935 Bom 233, p 234 .

43 *Queen-Empress v Dalip* 18 ILR All 246, p 252 ; *Tara Ramchand v State* (1971) Cr LJ 1201, p 1207 (Punj) ; *Sampat v Emperor* 18 Cr LJ 803 .

44 *Jai Dev v Delhi Admn* AIR 1963 SC 612, (1963) 1 Cr LJ 495 ; *Bharat Singh v State of Rajasthan* (1972) WLN 394 ; *Mukhtiar Singh v State of Punjab* (1975) Cr LJ 132, (1974) Punj LJ 338 (Cr) .

45 *Naga Nan Da v Emperor* AIR 1920 WB 35, AIR 1920 UB 135 ; *Pagla Baba v State* AIR 1957 Ori 130, p 150 ; *State of Orissa v Govind Chandra* (1979) Cut LR 49 (Cr) .

46 *Devisingh Bapusingh v State* AIR 1955 MP 34, p 36 .

47 *Pagla Baba v State* AIR 1957 Ori 130, p 150 .

48 *Reg v Rose* (1884) 15 Cox CC 540 .

49 *Bhagaram v State* AIR 1958 MP LJ 119 (notes).

50 *Sheshrao Nana Dhawale v State of Maharashtra* 2009 Cr LJ (NOC) 869 (Bom) (DB).

51 *Tej Singh v Emperor* AIR 1935 All 490, p 491 . See commentary of s 21, *ante*.

52 *Razu v Emperor* AIR 1946 Sind 17, p 19 ; *ED Samuel v Emperor* AIR 1937 Pesh 23, p 27 .

53 *Pagla Baba v State* AIR 1957 Ori 130, p 147 .

54 *Mithukhan v State* AIR 1969 Raj 121, p 123, (1969) Cr LJ 515, (1969) 19 ILR Raj 559 ; *Mangal Singh v Ghulam Mahommad* AIR 1939 Lah 280, 184 IC 6 ; *Sukar Sao v Emperor* AIR 1941 Pat 560 ; *Emperor v Mahommad Shah* AIR 1946 Lah 456, 48 Cr LJ 161 .

55 Re *Ganapathia Pillai*AIR 1953 Mad 936, p 937 .

56 *Deoman Shamji Patil v State* AIR 1959 Bom 284, p 286 .

57 *Ramji Lal v Emperor* AIR 1936 All 913 .

58 *Nand Singh v State* AIR 1951 Raj 105 .

59 Re *Ganapathia Pillai*AIR 1953 Mad 936, p 937 and cases cited therein .

60 *Sukar Sao v Emperor* AIR 1941 Pat 560 .

61 *Raghubir v Emperor* AIR 1942 Oudh 57 ; *Mahadeo v Emperor* AIR 1927 Oudh 91 .

62 *Emperor v Sahib Lal* AIR 1933 All 620 .

63 *Queen-Empress v Dalip* 18 ILR All 246 .

64 *Sunder Lal v Emperor* AIR 1933 Oudh 276 .

65 *Prag v Emperor* AIR 1942 Oudh 256 .

66 Re *Ganapathia Pillai*AIR 1953 Mad 936, p 938, (1953) Cr LJ 1730 ; *Sulaiman v State of Kerala* (1964) (2) Cr LJ 34, p 38-39, AIR 1964 Ker 185 ; *Parshadi Pasi v Baljit Singh* 14 Cr LJ 409 ; *Ram Harakh v Emperor* 15 Cr LJ 436 ; *Verkey v State of Kerala* (1963) Ker LJ 76, (1964) 1 Cr LJ 592 .

67 *Queen-Empress v Tiruchittambala* 21 ILR Mad 78 ; *Queen-Empress v Poomalal* 21 ILR Mad 296 ; *Queen-Empress v Ramayya* 13 ILR Mad 148 ; *Queen-Empress v Pukotkotu* 19 ILR Mad 349 ; *Bhawoo v Mulji* 12 ILR Bom 377 ; *R v Janki Prasad* 8 ILR All 293 ; *R v Bhailal* 29 ILR Cal 417 ; *Doraiswami Pillai v Emperor* 27 ILR Mad 52 ; *Ghulam v Emperor* AIR 1936 Lah 851 ; Re *Muni Reddi*AIR 1948 Mad 472, 49 Cr LJ 705 ; *Khuda Bux v State* AIR 1951 All 637 ; *Kallan Beg v Emperor* AIR 1936 All 306 .

68 *Ghulam v Emperor* AIR 1936 Lah 851, p 853, 38 PLR 298 ; *Preo Lal Mukherjee v Emperor* AIR 1914 Cal 908 .

69 *Krishna Chettiar v State of Madras* (1968) 21 STC 258 (SC) ; *Kesho Ram v Delhi Admn* AIR 1974 SC 1158, (1974) Cr LJ 814, p 816 ; *Narasayya v State* AIR 1953 Nag 292, (1953) Cr LJ 1569 ; *Udayanath Swami v State* (1969) 35 Cut LT 343 .

70 *State of Uttar Pradesh v Ram Sanehi* (1969) Cr LJ 952, 954 (All), (1968) All WR 39 (HC) (DB).

71 *Emperor v Juman* 14 Cr LJ 142 ; the case law discussed therein.

72 *Parshadi Pasi v Baljit Singh* 14 Cr LJ 409 ; *Ram Harakh v Emperor* 15 Cr LJ 436 .

73 *Asa v Emperor* 14 Cr LJ 512 ; Re *Rakhmaji* 9 ILR Bom 858; *Queen-Empress v Jogendra Nath Mukherjee* 24 ILR Cal 320 ; *Queen-Empress v Tulsiram* 13 ILR Bom 168 .

74 *Provincial Govt, CP & Berar v Nonelal* AIR 1946 Nag 261 ; *Narasayya Lachmayya v State* AIR 1953 Nag 292 ; *Queen-Empress v Dali* 18 ILR All 246, p 250 .

75 *Provincial Govt, CP and Berar v Nonelal* AIR 1946 Nag 261 .

76 *Narasayya Lachmayya v State* AIR 1953 Nag 292, (1953) Cr LJ 1569 .

77 *Attar Singh v Emperor* AIR 1918 Lah 332, p 333 ; *Kanwar Singh v Delhi Admn* AIR 1965 SC 781, (1965) Cr LJ 367 ; *Sulaiman v State of Kerala* (1964) 2 Cr LJ 34, p 38-39, AIR 1964 Ker 185 ; *Varkey v State of Kerala* (1963) Ker LJ 76, (1964) 1 Cr LJ 592 ; *Nakula Barik v State* (1967) Cr LJ 97, p 100, AIR 1967 Ori 1 .

78 *Mayne's Criminal Law of India*, para 255.

79 *Deoman Shamji Patil v State* AIR 1959 Bom 284, p 286, (1959) Cr LJ 25 ; *Bharo Murid Jagirani v Emperor* AIR 1941 Sind 82, p 83 ; *Dharma v State of Rajasthan* (1964) Raj LW 126 .

80 *Bisa Haldar v Emperor* 11 CWN 836, 6 Cr LJ 38 .

81 *State of Uttar Pradesh v Niyamat* (1987) Cr AR 119 (SC), AIR 1987 SC 1652 .

82 *Gograj Mahto v Emperor* AIR 1940 Pat 696, p 698 .

83 *Anand Ballabh Prasad v State of Bihar* AIR 1953 Pat 313, p 315 .

84 *Sukar Sao v Emperor* AIR 1941 Pat 560 .

85 *Jaman v Emperor* AIR 1930 Lah 348 ; *Queen-Empress v Jogendra Nath Mukherjee* 24 ILR Cal 320, 1 CWN 154 .

86 *Queen-Empress v Poomalal Udayan* 21 ILR Mad 296, 1 Weir 135 .

87 *Queen-Empress v Janak Prasad* 8 ILR All 293 ; *Puna Mahto v Emperor* AIR 1932 Pat 315, p 317 .

88 *Sheik Moinuddin v Emperor* 22 Cr LJ 442 ; *Queen-Empress v Janak Prasad* 8 ILR All 293 ; *Puna Mahto v Emperor* AIR 1932 Pat 315, 317; *Achhru Ram v Emperor* AIR 1926 Lah 326 ; *Haq Dad v Crown* AIR 1926 Lah 19 ; *Deoman Shamji Patil v State* AIR 1959 Bom 284, p 287 .

89 *Emperor v Ahammad Sheikh* AIR 1928 Cal 815 .

90 *Govt of Assam v Sahebulla* AIR 1924 Cal 1 (FB) .

91 *Ranveer Singh alias Rama v State of Uttar Pradesh* (1997) Cr LJ 2266 (All) .

92 *Khuda Bux v State* AIR 1951 All 637 .

93 *Kalan Beg v Emperor* AIR 1936 All 306 .

1 *Puna Mahto v Emperor* AIR 1932 Pat 315 .

2 *Ramjit v Emperor* AIR 1938 All 120 ; *Puna Mahto v Emperor* AIR 1932 Pat 315 .

3 *Supdt and Remembrancer of Legal Affairs, Bengal v Sona Mia* AIR 1948 Cal 95 ; *Narasayya Lachmayya v State* AIR 1953 Nag 292 ; *Mahommad Ismail v Emperor* AIR 1936 Rang 119 ; *Public Prosecutor v Amritham Sewai* AIR 1940 Mad 18 ; *State v Yamanappa Limhaji* 1956 ILR Bom 661, 58 Bom LR 551 ; Re *Baburao*(1969) 1 Mad LJ 88, p 90, (1968) Mad LW 217 (Cr).

4 *State v Yamanappa Limhaji* (1956) ILR Bom 661, 58 Bom LR 551 .

5 *Deoman Shamji Patil v State* AIR 1959 Bom 284, p 287 .

6 *Pagla Baba v State* AIR 1957 Ori 130, p 147, (1957) Cr LJ 769 .

7 *Ramji Lal & Ors v State of Rajasthan* (1989) 1 Raj LR 281, p 285 .

8 *Bhairo Murid Jagirani v Emperor* AIR 1941 Sind 82, p 83 .

9 Re *Ganapathia Pillai*AIR 1953 Mad 936, p 938, (1953) Cr LJ 1730 ; *Ram Singh v State of Madhya Pradesh* (1973) Jab LJ 971 .

10 Re *Ganapathia Pillai*AIR 1953 Mad 936, p 938 .

11 *Dhara Singh v Emperor* AIR 1947 Lah 249 ; *Lachmi Koeri v State of Bihar* AIR 1960 Pat 62 .

12 Re *Ganapathia Pillai*AIR 1953 Mad 936, p 938 ; *Abdul Gafur v Empress* 23 ILR Cal 896 ; *Moinuddin v Emperor* AIR 1921 Pat 415 ; *Raman Singh v Empress* 28 ILR Cal 411 ; *Empress v Dalip* 18 ILR All 246 ; *Birbal v Emperor* 30 ILR Cal 97 ; *Puna Mahto v Emperor* AIR 1932 Pat 315 ; *Ramji v Emperor* AIR 1938 All 120 ; *Emperor v Kisanlal* AIR 1939 Nag LJ 387 ; *Ramaswami Chetti v King* AIR 1949 Mad 434 ; *Emperor v Abdul Hamid* AIR 1942 All 74 .

13 *Emperor v Abdul Hamid* AIR 1942 All 74, p 76 .

14 *Emperor v Bhopo* AIR 1933 Sind 174 .

15 Section 352, para 3.

16 *Codd v Cobe* LR 1 Ex D 352.

17 *Raza v Emperor* AIR 1946 Sind 17, p 19 .

18 *Bhailal v Emperor* 29 ILR Cal 417 .

19 *Codd v Cobe* LR 1 Ex D 352.

20 *Queen-Empress v Narsang Pathabhai* 14 ILR Bom 441 .

21 *Baris Mudi v State* AIR 1959 Pat 22, p 26 ; *Amjad Khan v State* AIR 1952 SC 165, 166 ; *Gonouri Lal Das v Queen-Empress*

16 ILR Cal 206 ; *Jogeshwar Rai v Emperor* AIR 1917 All 119, 18 Cr LJ 663 ; *Shankar Singh v Burmah Mahto* 23 WR (Cr) 25 ; *Sampath v State* 1993 Cr LJ 2468 (Mad) ; *Sheshrao Nana Dhawale v State of Maharashtra* 2009 Cr LJ (NOC) 869 (Bom) (DB).

22 *Kumaran v State of Kerala* (1991) 2 Ker LT 679, p 681-82 .

23 *Shanker Singh v Burmah Mahto* 23 WR (Cr) 25 .

24 *Sheshrao v State of Maharashtra* 2009 (1) Mah LJ (Cri) 281 (Bom) .

25 *Hyde v Graham* (1862) 1 H&C 593 .

26 In Madras High Court Proceedings, 8 January 1873, (1873) 7 Mad HC App 35.

27 *Jairam Mahton v Emperor* 35 ILR Cal 103, p 109-10 .

28 *Phula Singh v Emperor* AIR 1927 Lah 705 ; *Jasu Ram v Emperor* AIR 1924 Pat 143 ; *Bhartu v State* AIR 1954 All 55 ; *Hazara Singh v State* AIR 1959 Punj 570 .

29 *Narayan Raut v Emperor* AIR 1948 Pat 294 .

30 *Hafiz Ali v R* 6 Cr LJ 271 ; *Empress v Anumantan* 1 WR 44 .

31 *R v Khnanu* 1 Cr LJ 161 ; *Pokhar v R* 5 Cr LJ 218, 2 PWR (Cr) 22 .

32 *Hafiz Ali v Emperor* 6 Cr LJ 271, p 274 .

33 *Abdul Hadi v Emperor* AIR 1934 All 829(2), p 832 followed in *Jabar Das v State* AIR 1955 J&K 9 .

34 *Penumetsa Thirumalraju v Emperor* AIR 1919 Mad 885, 19 Cr LJ 248 .

35 *Jageshwar Rai v Emperor* AIR 1917 All 119, 18 Cr LJ 663 .

36 *Queen-Empress v Prag Dat* 20 ILR All 459 .

37 *Queen-Empress v Narsang Pathabhai* 14 ILR Bom 441 .

38 *Punjabrao Sadasheo Deshmukh v Emperor* AIR 1945 Nag 269, p 271 ; *Marudevi Avva v State of Kerala* AIR 1958 Ker 8 . See commentary under same heading in s 97, *ante*.

39 *Queen v Dhananjai Poly* 14 WR 68 ; *Munshi Ram v Delhi Admn* AIR 1968 SC 702, (1968) Cr LJ 806 ; *Kartar Singh v State* (1970) WLN 688 ; *Khem Singh v State of Rajasthan* (1978) Cr LR 371, p 375 (Raj) .

40 Draft Penal Code, at p 11.

41 Appendix *M*, p 147.

42 *Mayne's Criminal Law of India*, para 230.

43 *Marudevi Avva v State of Kerala* AIR 1958 Ker 8, p 11 .

44 *Queen v Gokul Bowree* 5 WR 33 ; *Queen v Fukeera Chamar* 6 WR 50 .

45 *Queen v Mokee* 12 WR 15 .

46 *Queen v Durwangeer* 5 WR 73 .

47 *Nakafodi v State* AIR 1958 Ori 113, p 117 .

48 *Queen v Dhananjai Poly* 14 WR Cr 68 .

49 *Alingal v R* 28 ILR Mad 454 ; *Puran v R* 3 Cr LJ 232, 7 PLR 21 .

50 *Hari Ram v State of Rajasthan* (1992) Cr LJ 3168, p 3172 (Raj) .

51 *Brown v United States* (1921) 256 US 335, p 343 .

52 *Balbir Singh v State* AIR 1959 Punj 332, p 336-37 .

53 *Md Sahar Ali v State of Assam* 2008 Cr LJ (NOC) 755 (Gauh) (DB).

54 *State of UP v Babu* 2008 Cr LJ (NOC) 440 (All) (DB).

55 *Allah Ditta v Emperor* AIR 1934 Lah 696 ; *Chattar v Emperor* AIR 1929 All 897 ; *Ahmed Din v Emperor* AIR 1927 Lah 194 ;

Mahommad Habib v Emperor AIR 1940 Pat 595 ; *Inzargul Khan v Emperor* AIR 1936 Nag 234 ; *Ramji Lal v Emperor* AIR 1935 All 1913 ; *Queen v Moizuddin* 11 WR (Cr) 41 ; *Ghasi Ram v State* AIR 1952 Bhopal 25 ; *Khanbi Nagji Kala v State* AIR 1956 Sau 107 .

56 *Ranveer Singh v State of MP* 2009 Cr LJ 1534 (SC), AIR 2009 SC 1658, 2009 (1) Scale 740 ; *Butta Singh v State of Punjab* AIR 1991 SC 1316, 1991 Cr LJ 1464 ; *Arun v State of Maharashtra* 2009 Cr LJ 2065 (SC), 2009 AIR SCW 2318, 2009 (3) Scale 803, (2009) 4 SCC 615 .

57 *Rati Ram Khadiya v State of Chhattisgarh* 2009 Cr LJ 2563, p 2566 (Chh) (DB) .

58 *Ashutosh Hait v Indra Hait* AIR 1952 Cal 217 .

59 *Nga Kyaw Win v King* AIR 1940 Rang 55 .

60 *Bala Prasad Dhansukh v State of Madhya Pradesh* AIR 1961 MP 241, p 244 .

61 *Amjad Khan v State* AIR 1952 SC 165 .

62 *Bahadur Khan v Emperor* AIR 1933 Oudh 63, p 65 .

63 *Bhartu v State* AIR 1954 All 35, p 37 .

64 Re *Pachai Gounder*AIR 1915 Mad 532 .

65 *Nga Nw U v Emperor* AIR 1935 Rang 391, p 392 .

66 *State v Nathu* 1988 WLN (UC) 73 (Raj) .

67 Re *Pattu*AIR 1954 Mad 319 ; *Allingal Kunhinayan v Emperor* 28 ILR Mad 454, p 456, 3 Cr LJ 43 ; *Devi Singh v State* AIR 1955 MB 34 ; *Nisar Hussain v Emperor* AIR 1942 Oudh 147, 43 Cr LJ 436, (1941) OWN 1331 ; *Keshi Ram v State* AIR 1951 Bhopal 2, 52 Cr LJ 1426 ; *Khetri Bewa v State* AIR 1952 Ori 37, 17 Cut LT 220 ; *Ratna Munda v State* AIR 1951 Ori 245, 52 Cr LJ 685, 16 Cut LT 227 ; *Sakku v Crown* AIR 1951 Nag 349, (1951) ILR Nag 508, (1951) Nag LJ 252 ; *Madhava Kurup v State* AIR 1953 Tr & Coch 340, (1953) KLT 31.

68 *Madan v State of Madhya Pradesh* 2008 Cr LJ 3950, p 3952 (SC), AIR 2008 SC 3083, 2008 (10) Scale 33 .

69 *Guria Bucha v State of Gujarat* AIR 1962 Guj 39, p 41 .

70 *Sucha Singh v State of Punjab* 2008 Cr LJ 2475 (P&H) .

71 *Bridah v State* AIR 1959 Raj 124 ; *Kunja Bhuiya v Emperor* 39 ILR Cal 896 ; *Nga Tun Nyein v Emperor* 18 Cr LJ 284 .

72 *Banamali Sahu v State of Orissa* (1992) 73 Cut LT 183 .

73 *Bharwad Vibha Ghoga v State* AIR 1955 Sau 1, p 2 .

74 *Puran Singh v State of Punjab* (1975) Cr LJ 1479, p 1489, AIR 1975 SC 1674 ; *Dominic Varkey v State of Kerala* AIR 1971 SC 1208, (1971) Cr LJ 1057, p 1058 ; *Delhi Admn v Mahadeo* 1966 Cr LJ 358, 361, (1965) 67 Punj LR 948 ; *Public Prosecutor v Balkrishna* (1979) 23 Mad LJ 131, p 137(Cr)(AP)(DB); *Nga Kyaw Win v King* AIR 1940 Rang 55 ; *Lakshmanan v Lakshmanan* (1964) 2 Cr LJ 425, p 428, AIR 1964 Mad 418 ; *State of Uttar Pradesh v Ram Swarup* AIR 1974 SC 1570, (1974) Cr LJ 1035 .

75 *Saitna v State of Madhya Pradesh* (1973) MPLJ 122 ; *Ramesh Chandra Sutradhar v State* AIR 1969 Tripura 53 ; *Inder v State* (1970) 72 Punj LR 473 ; *State of Orissa v Tolu Gopeda* (1963) Cut LT 488 ; *Parichhat v State* (1972) Cr LJ 322, p 328, AIR 1972 SC 535 ; *Purna Chandra Naik v State of Orissa* (1974) Cut LT 233, (1974) Cut LR 254 (Cr) ; *Het Ram v State* AIR 1970 Punj 85, (1970) Cr LJ 352 ; *Kammu v State of Madhya Pradesh* (1972) MPLJ 129 (NOC) ; *Dominic Varkey v State of Kerala* AIR 1971 SC 1208, (1971) Cr LJ 1057, p 1058 ; *Khar v State of Bihar* (1972) Pat LJR 158, (1973) ILR Kant 1450 .

76 *Rama Yashwant Kamat v State* (1978) Cr LJ 1843, p 1845 (Goa) .

77 *Lakshmanan v Lakshmanan* (1964) 2 Cr LJ 425, p 428, AIR 1964 Mad 418 ; *Shyamsher Biswas v State* 1977 Cal WN 294 .

78 *SK Kalimuddin v SK Riazuddin* (1963) 5 Ori JD 297*Mangru v State of Rajasthan* (1976) Raj Cr C 273, (1976) WLN 448 ; *Sheo Lochan v State* (1971) All Cr C 211 .

79 *Jai Dev v State of Punjab,* AIR 1963 SC 612, p 617, (1963) 1 Cr LJ 495 .

80 *Ram Kishan v State of Rajasthan* 2007 Cr LJ 2865, p 2873 (Raj) .

81 *Jai Dev v State of Punjab* AIR 1963 SC 612, p 617, (1963) 1 Cr LJ 495 ; Re *Rajesa Husensa*AIR 1968 Mys 33, (1968) Cr LJ 194 ; *Marudevi v State of Kerala* AIR 1958 Ker 8, p 11 .

82 *State v Pabitra Guru* AIR 1969 Ori 287 ; *Ramesh Chandra v State of Madhya Pradesh* 1981 Cr LR 155, p 157 (SC) ; *Guriya*

Bucha v State of Gujarat AIR 1962 Guj 39, p 41 ; *Bridha v State* AIR 1959 Raj 124 ; *Kunja Bhuiya v State* 39 ILR Cal 896 ; *Nga Tun Nycin v Emperor* 18 Cr LJ 284 (LB) ; *Nanu Kahar v State of Bihar* AIR 1971 SC 2143, (1971) SCC 433 (Cr) ; *Prabhulal v State of Rajasthan* (1994) Raj CC 19, (1994) Cr LR 54 (Raj) .

83 *Ghunnu v State of Uttar Pradesh* AIR 1980 SC 864, p 869 .

84 *Cherungu Bolpari v State* (1966) 32 Cut LT 530, p 542 .

85 *Umacharan v R* 29 ILR Cal 244 .

86 *Basti v State of Haryana* (1980) Cr LJ 92 (NOC) (Punj) .

87 *Siryan v Emperor* 17 Cr LJ 270 (Lah) ; *State of Madhya Pradesh v Saligram* (1977) MPLJ 539, p 544 ; *Baljit Singh v State of Uttar Pradesh* (1976) Cr LJ 1745, p 1755 ; *Nathan v State of Madras* AIR 1973 SC 665, p 666, (1973) Cr LJ 608 ; *Parichhat v State* (1972) Cr LJ 322, p 328, AIR 1972 SC 535 ; *Tarachand v State of Haryana* (1971) Cr LJ 1411, p 1417 ; *Iswar Singh v State of Rajasthan* (1973) Cr LJ 811, p 816 . *Nanhu v State of Bihar* 1971 Cr LJ 1467, p 1468, AIR 1971 SC 2143 ; *Vidya Singh v State of Madhya Pradesh* AIR 1971 SC 1857, (1971) Cr LJ 1296 ; *Kasimuddin v State of Assam* (1974) Cr LJ 105, p 108 (Gau) ; Re *Marappa Gounder*(1973) Cr LJ 1044, p 1047 (Mad) (DB); *Saiduddin v State* (1973) Cr LJ 1643, p 1645 ; *Kartar Singh v State* (1970) WLN 988 ; *Padmeshwar Phukan v State of Assam* (1971) Cr LJ 1595, p 1596 ; *Shyamsher Biswas v State of Uttar Pradesh* (1977) CWN 294 .

88 Indian Penal Code 1860, s 300, Exception 2, and illustration thereto.

89 *Jhalam Singh v State* (1977) Cr LR 434 (Raj) ; *State of Madhya Pradesh v Saligram* (1977) MPLJ 539, 544 ; *Baljit Singh v State of Uttar Pradesh* (1976) Cr LJ 1745, p 1755 ; *Nathan v State of Madras* AIR 1973 SC 665, p 666, (1973) Cr LJ 608 ; *Parichhat v State* (1972) Cr LJ 322, p 328, AIR 1972 SC 535 ; *Tara Chand v State of Haryana* (1971) Cr LJ 1411, p 1417 ; *Iswar Singh v State of Rajasthan* (1973) Cr LJ 811, p 816 ; *Nanhu v State of Bihar* (1971) Cr LJ 1467, p 1468, AIR 1971 SC 2143 ; *Vidya Singh v State of Madhya Pradesh* AIR 1971 SC 1857, (1971) Cr LJ 1296 ; *Kasimuddin v State of Assam* (1974) Cr LJ 105, p 108 (Gau) ; Re *Marappa Gounder*(1973) Cr LJ 1044, p 1047 (Mad) (DB); *Saiduddin v State* (1973) Cr LJ 1643, p 1645 ; *Kartar Singh v State* (1970) WLN 988 ; *Padmeshwar Phukan v State of Assam* (1971) Cr LJ 1595, p 1596 ; *Shyamsher Biswas v State of Uttar Pradesh* (1977) CWN 294 . Refer to the following cases where in the right of private defence, it has been held, was not exceeded; *Dalip Singh v State* (1974) 76 Punj LR 336 ; *Shiv Ram v State* (1971) MPLJ 103 (NOC) ; *Hira v State of Bihar* AIR 1972 SC 244, (1972) Cr LJ 225 ; *Ganesh v State* (1976) Mah LJ 71 (NOC) ; *Jainandan Sao v State of Bihar* (1972) Pat LJR 347, p 350 ; *State of Uttar Pradesh v Chidda* (1969) All LJ 1127 ; *Mohan v State of Haryana* (1968) Cr LJ 1302, p 1304, AIR 1968 Punj 467 ; *Delhi Admn v Mahadeo* (1965) 67 Punj LR 948, (1966) Cr LJ 358, p 361 ; *Baree Dewa v State* (1962) MPLJ 227(Notes); *State of Orissa v Chenu Harijan* (1977) 44 Cut LT 267, 272 ; *Saitna v State of Madhya Pradesh* (1973) Cr LJ 350, p 354, (1973) MPLJ 122 ; *Ashokan v State of Kerala* (1994) SCC 1747 (Cr) .

90 *Munney Khan v State* AIR 1971 SC 1491, p 1494, (1970) Mah LJ 883 .

91 *Ravishankar v State of Madhya Pradesh* (2007) Cr LJ 261 (Chh) (DB) .

92 *Moorthy v State of Tamil Nadu* 2009 Cr LJ 1104 (SC), 2009 AIR SCW 457, 2008 (15) Scale 315 .

93 *State of Rajasthan v Manoj Kumar* 2014 Cr LJ 2420, p 2423, 2424 (SC), (2014) 2 SCC (Cri) 702, (2014) 138 AIC 261 (SC) ; *Munshi Ram v Delhi Administration* AIR 1968 SC 702, 1968 Cr LJ 806 **referred to**.

94 *State of Madhya Pradesh v Ramesh* 2005 Cr LJ 652 (SC), AIR 2005 SC 1186, 2005 (3) JLJ 420 (SC), JT 2004 (10) SC 584, 2004 (9) Scale 435, (2005) 9 SCC 705 .

95 *State of Haryana v Kuldip Singh* 2007 Cr LJ 4059 (P&H) (DB) .

96 *Beersingh Jagatsingh v State of Maharashtra* 2013 Cr LJ 2248 (Bom) (DB) .

97 *Lakshmi Singh v State of Bihar* (1976) 4 SCC 394, AIR 1976 SC 2263 .

1 *Mohammad Khalil Chisti v State of Rajasthan* 2013 Cr LJ 637 (SC), (2013) 2 SCC 541 ; **See also***Waman v State of Maharashtra* (2011) 7 SCC 295, AIR 2011 SC 3327, 2011 AIR SCW 4973 ; *Raghbir Singh v State of Rajasthan* (2011) 12 SCC 235, AIR 2011 SC (Cri) 2225, 2011 AIR SCW 5678 ; *Krihnan v State of Tamil Nadu* (2006) 11 SCC 304, AIR 2006 SC 3037, 2006 AIR SCW 4185 ; *Sekar v State* AIR 2002 SC 3667, 2002 AIR SCW 4315 ; *Nagarathinam v State* 2006 Cr LJ 2120, AIR 2006 SC 1736, 2006 (4) Scale 92, (2006) 9 SCC 57 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 100.

When the right of private defence of the body extends to causing death.--

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

First.	--	Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
Secondly.	--	Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
Thirdly.	--	An assault with the intention of committing rape;
Fourthly.	--	An assault with the intention of gratifying unnatural lust;
Fifthly.	--	An assault with the intention of kidnapping or abducting;653
Sixthly.	--	An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.
[2][*Seventhly*.	--	An Act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.]

Comments

1. Legislative Changes

New clause 'Seventhly' has been added by the Criminal Law (Amendment) Act 2013 (13 of 2013), s 2 (wef 3-02-2013).

2. Scope

This section provides circumstances when death or other harm can be caused in private defence.

This section and s 101 define the extent of the right of private defence of body.[3] If a person has a right of private defence of body under s 97, that right extends, under this section, to causing death if there is reasonable apprehension that death or654 grievous hurt would be the consequence of the assault.[4] So, this section provides the circumstances when the right of private defence of the body extends to the voluntary causing of the assailant's death or any other harm to him,[5] subject to the restrictions, specified in s 99 .[6] This right arises only if an offence against the human body is committed,[7] attempted or threatened,[8] or in exercise of the right of private defence of property as provided by s 103 of the IPC . Section 100 gives an extended right of private defence of a person in cases where the offence which occasions the exercise of the right is of any of the descriptions enumerated therein. Each of the six clauses of this section talk of an assault, and assault is an offence against the human body (s 352, IPC). So, before the extended right under this section arises, there has to be the offence of assault, and this assault has to be of one of the six types mentioned in the six clauses of the section. What this section lays down is that, if the assault is of an aggravated nature, the right of private defence extends even to the causing of death.[9] Under this section and s 96, a person intentionally killing another in self-defence does not commit any offence, if he keeps within the limits prescribed by s 99, that is to say, if the assault could not be prevented by anything short of killing.[10] It has further to be borne in mind that the assault, referred to, does not mean the assault, if any, already committed, but an assault of which an apprehension can reasonably be caused, and that assault must be one which would amount to an offence. The right is a defensive one. It is granted to a citizen to be exercised for the purpose of preventing an offence affecting his body being committed. It is not, as it is sometimes misconceived, a right of retaliation against the completed offence (of assault).[11] Right of private defence is one of self defence or self protection and not right of reprisal or punishment. It is subject to restrictions indicated in s 88 of the IPC .[12]

In order to find out whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities, are all relevant factors to be considered.[13]

3. Right Commences from the mere Apprehension

The right of private defence of body commences as soon as reasonable apprehension of danger to the body arises from an attempt, or threat, to commit any of the offences, enumerated in this section; the person need not wait till he is hit by his adversary,[14]655 or he actually receives injuries.[15] It is not the actual injuries, sustained by a person, which gave him the right of private defence. Apprehension of grievous injury is enough for the exercise of the right.[16] If the evidence does not establish that the accused has sustained injuries while exercising right of private defence, the accused cannot claim benefit of right of private defence.[17]

4. Homicide in Self-defence when Justified

The person exercising the right should not use more force than is reasonably necessary and should not inflict an injury out of all proportion to the injury which he received or which he was threatened with.[18] But it must be remembered that it is a little difficult to expect a man, when he is quite alone and is attacked by several persons, to count the number of blows that he is to inflict and weigh the force with which he is to inflict them.[19] Homicide in self-defence maybe justifiable irrespective of the fact that the party killing was guilty of an assault or was engaged in an unlawful contest, provided that:

(i) the party killing did not either commence or provoke the attack with intent to kill or do grievous bodily harm;
(ii) he declined further conflict and quit and retreated from it, so far as was practicable with safety; and
(iii) he killed the assailant because he had reasonable cause for believing it to be

> necessary to do so in order to avoid immediate death or the other offences here enumerated.[20]

There was evidence that the deceased in a drunken stage, armed with iron pipe, had come to the hut of the accused at the time of the incident. In such a situation, there was a reasonable cause for the accused to entertain the possibility of sustaining grievous hurt. The accused snatched the iron pipe from the deceased and gave three blows on the head of the deceased, which resulted in his death. The accused was found entitled to exercise the right of private defence, and he did not exceed this right. Thus, the accused was acquitted of the charge under s 302, IPC .[21]

The Real Test

To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden in this behalf is on the accused.[22]656

The real test to determine as to whether the right of private defence of person intended even to cause the death of one of the aggressors would be, as to whether the accused party had reasonable apprehension in its mind that the death or grievous hurt would be the consequence of assault on the accused party by the complainant party.[23]

To plead a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him.[24]

Whether the apprehension was reasonable or not is always a question of fact to be determined by the surrounding circumstances. The test, in such a case, is not whether there was any actual danger, but whether there was reasonable apprehension that such danger existed. At the same time, it must be borne in mind that a man acting under apprehension of death, or grievous hurt cannot be expected to judge the situation too well and modulate his defence step by step or to weigh the force used in golden scales.[25]

The reasonable apprehension of the accused that he may be subjected to death or with grievous injury, cannot be subjected to microscopic scrutiny but has to be looked into from the facts and circumstances of each case emerging from such incriminating evidence, which leads to no other conclusion except to the guilt of the accused.[26] In the present case, when the villagers were not armed with lathis and the accused had not received any such injury which could have been apprehended to be of grievous nature, it cannot be said that the accused acted in the right of private defence of his body. There was not even a scuffle between the villagers and the accused, who brutally killed three persons. The accused were not entitled to the plea of self defence.[27]

Two Cases

The life of an antagonist may not be taken if it can be avoided by retreating, and if retreat is practicable consistently with one's safety. Where there are two courses equally feasible, open to a person, one leading to and the other from the difficulty, he must take the latter in order to rely on the right of self-defence, if he can do so without adding to his peril. But where such a course is not possible because of suddenness or fierceness of the attack, he is not obliged to retire and in such a case he might stand his ground and inflict counter-blows. The strict Common Law doctrine of 'retreat to the wall' or 'retreat to the ditch'[28] has undergone modification. A person attacked in his own premises, or where he has a legal right to be, is not bound to retreat. The exemption from retreating is available to the faultless, but those in fault must if able to do so, there being a safe avenue of escape unless prevented by fierceness of the attack.[29] Where the assault has once assumed a dangerous form, every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander657 would seem absolutely necessary. So where the accused are fighting for life like rats in a trap with a murderous mob in front

of them and an enemy has made his way to the room where they had taken refuge, they cannot be held guilty if they purposely kill their assailant.[30]

Right of Private Defence can be Claimed Against Unarmed Assailant Also

The law of private defence does not envisage that the right of private defence of body cannot be claimed against an assailant who is not armed with some weapon. The language of this section makes it clear that the question, whether a person has a right of private defence in a given case, depends on the manner in, and the ferocity with which, he is attacked and the apprehension in his mind, resulting from such an attack, and not on the question, whether he was armed or otherwise. If, in view of the manner of attack, he has a genuine apprehension that the person, assaulting him, would either cause his death or grievous hurt to him, he would be justified in causing the death of his assailant in exercising the private defence irrespective of the fact whether the assailant was armed or not.[31] For exercising the right of private defence of body by causing the death of the aggressor, it is not necessary that some injury must always be caused to the person acting in the right of private defence. The right of private defence of body commences as soon as a reasonable apprehension of danger to the body arises from an attempt and lasts so long as the reasonable apprehension of danger to the body continues.[32] The complainant party was unarmed but the accused persons armed with kattas and guns, had gone to the place of occurrence, and the accused persons fired with guns causing the death of the deceased. Held, accused persons had no right of private defence, thus, they were convicted under ss 302 / 149, IPC .[33]

Cardinal Conditions for Taking Life in Self-Defence

Four cardinal conditions must exist before the taking of the life of a person on the plea of self-defence:[34]

(i) the accused must be free from fault in bringing about the encounter;
(ii) there must be present and impending peril to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity;
(iii) there must be no safe or reasonable mode of escape by retreat; and
(iv) there must have been a necessity for taking life.

The rule that a felonious attack may be resisted by deadly force does not apply to any crime unaccompanied with force, such as pocket-picking. The intent to murder, ravish, or commit a felony attended with force or surprise should be apparent, and not be left in doubt; so that if *A* makes an attack on *B*, it must plainly appear by the manner of the assault, the weapon, *etc*, that the life of B is in imminent danger; otherwise his killing the assailant will not be justifiable self-defence. There must be an intention on the part of the person killed to rob, or murder, or to cause some658 serious bodily injury to the person killing; or the conduct of the party must be such as to render it necessary on the part of the party killing to do act in self-defence.[35]

Merely because an accused has received injuries during the course of an occurrence, does not *ipso facto* entitle him to right of private defence.[36]

Ordinarily, no Right of Private Defence against Woman

Woman by her feminine nature and with a feeble body, ordinarily would not pose threat or danger to life of a well-bodied man with a *lathi*.[37]

5. Homicide when Justifiable

Death, if necessary for the purpose of defence, may be caused in the following cases:

(i) In the case of defence of body (s 100) when:
  (a) Assault causes fear of death.
  (b) Assault causes fear of grievous hurt.
  (c) Assault is with intent to commit rape.
  (d) Assault is with intent to commit unnatural offences.
  (e) Assault is with the intention of kidnapping or abduction.
  (f) Assault is with the intention of wrongfully confining a person and, thus, preventing recourse to the public authorities.

and

(ii) In the defence of property (s 103) when any of the following acts is committed.
  (a) Robbery.
  (b) House-breaking by night.
  (c) Mischief by fire on any building, tent or vessel, used as a human dwelling or as a place for the custody of property.
  (d) Theft, mischief, or house-trespass, reasonably causing apprehension by death, or grievous hurt.

The right of private defence against affords a complete defence to homicide in the circumstances mentioned in this section and s 103 . Causing of death is not justified where this section or s 103 is not attracted.[38]

6. Burden of Proving Exception is on the Accused

The law in India places the burden of proof upon the prosecution to bring the guilt home to the accused, and does not admit of any exception. The presumption of innocence has to be dislodged by the prosecution by leading evidence pointing to the guilt of the accused. Under s 105 of the Indian Evidence Act, the burden of proving the existence of circumstances bringing the case within any of the general or special exceptions is placed on the accused. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt659 would be caused to him.[39] The burden is on the accused to show that he had a right of private defence which extended to causing of death. Where the deceased had a number of injuries, the accused must prove that, at the time of causing each injury, he was acting in the exercise of his right of private defence.[40]

It is for the accused claiming the right of private defence to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution, if a plea of private defence is raised.[41]

Accused has to Discharge his Burden when Prosecution Proves its Case

Where a person, accused of committing an offence, set up, at his trial, a plea that he is protected by one of exceptions, general or special, in the IPC or any other law, the burden of proving the exception undoubtedly lies upon him. But this burden is to be discharged by the accused only if the prosecution case establishes that, in the absence of such a plea, he would be guilty of the offence charged.[42] The accused however, need not establish their right beyond all reasonable doubt. It is enough if a reasonable doubt arises on examination of the probabilities of the case.[43] Onus of proof to establish the right of the private defence is not as onerous as that of the prosecution to prove its case. And where the facts and circumstances lead to preponderance of probabilities in favour of the defence case, it would be enough to discharge the burden to prove the case of self-defence.[44] Where the evidence on the record raises some doubt as to whether the accused exceeded their right of private defence, they are entitled to an acquittal.[45] Every case is to be considered on its own facts and, before giving to any accused person the benefit of the right of private defence, a court of law must be

satisfied that this case is clearly covered by the general exception.[46] In order to reject the theory that the accused are not entitled to the right of private defence, it is the duty of prosecution to come with a true story. If the true story is presented, the court would be in a position to say that the action of the accused persons was illegal and they had no right of private defence. If, on a thorough scanning of the prosecution case, the court is not in a position to say that the accused were guilty beyond reasonable doubt, they are entitled to an acquittal.[47]

7. Not Necessary to Set up Plea of Self Defence at Investigation Stage

In the absence of evidence in a categorical manner as to how the occurrence started, the benefit of doubt has to be given to the accused and it may be accepted that they were not the aggressors and on being attacked they had a right of private defence.[48] Normally, if there is non-explanation of the injuries of the accused, it may give scope to argue that the accused had the right of private defence or in general that the prosecution evidence should be rejected as they have not come out with the whole660 truth particularly regarding the genesis of the occurrence.[49] But when once it is found that the evidence of the prosecution witnesses is cogent, convincing and trustworthy, failure to explain the trivial injuries found on the accused is of no consequences and on the ground it cannot be stated that the entire prosecution has to be thrown out as false.[50] It is not necessary that the accused should set up the plea of self-defence during the investigation of the case. Without putting forward the plea of right of self-defence even during the trial the accused can rely on the circumstances and admissions made by the witnesses in support of his plea without even setting up a specific plea.[51] Burden to prove self-defence is on accused but where the accused failed to discharge the burden and prosecution also failed to establish story set up by it, incriminating part of the statement of accused cannot be picked out for his conviction.[52]

8. Clauses 1 and 2--Reasonable Apprehension of Death or Grievous Hurt

It is true that no person exercising right of private defence can inflict more harm on the assailants than necessary for the purpose of defence, but if the facts of the case disclose that the accused party was in an eminent and reasonable danger of losing their lives or limbs, therefore, if they in exercise of right of their private defence, inflicted any harm even extending to death, it cannot be said that they exceeded right of defence and inflicted more harm on the complainant party than was necessary for the purpose of private defence. The approach in deciding this question should be from the vision of a common man. The matter should not be judged with a vision of cool by stander but with empathy. The act of the accused person is covered by cl (1) of s 100, IPC . Where the accused persons acted in the right of private defence the violence inflicted by them would not be penal but would be a justifiable violence and hence immune from punishment.[53] If homicide is to be justified under these clauses, the person exercising the right of private defence must have been under a reasonable apprehension of death or grievous hurt,[54] to himself or to those whom he is protecting, and in the case of property the danger to it must be of the kinds mentioned in the s 103 .[55] These clauses do not lay down that grievous hurt must be actually caused by the assailant before the right of private defence comes into play. No court expects the citizens not to defend themselves particularly when they have already suffered grievous injuries.[56]

All that this section lays down, is that the person claiming the right of private defence must be under a *bona fide* apprehension or fear that death or grievous hurt would otherwise be the consequence of the assault on him, if he does not defend661 himself.[57] Four persons of complainant party, armed with lathi and balkati had come at the house of the accused appellant well prepared. The appellant was assaulted on the head by a sharp edged weapon 'balkati' causing a bone deep injury. In such a situation, the accused persons could have a reasonable apprehension of death or at least of grievous hurt. One of the accused persons in self-defence fired a shot at the deceased causing death. Held that the accused persons acted in exercise of right of private defence. It was a case of single gun shot which was not repeated. Therefore, it cannot be said that the accused persons had exceeded their right of private defence in any manner. Accused persons were acquitted of the charge under s 302, IPC .[58] And where the assault has assumed a dangerous form every allowance must be made for

one, who, with instincts of self-preservation pursues his defence a little farther than what to a perfectly calm bystander would seem absolutely necessary.[59] But the mere protest gives no cause for any reasonable apprehension that death or grievous hurt would be caused.[60] In considering whether one is entitled to exercise the right of private defence of his body, he has to place himself in the position of the accused in the midst of the circumstances in which he stood and to form his opinion whether for him, in those circumstances, it was not fairly wise to apprehend such an injury to the body as would entitle him to exercise the right that he claims to have done. Where, an accused charged with murder, asserts that he killed in self-defence, his state of mind at the time of the killing, becomes material and an important element in determining his justification or his belief in an impending attack by the deceased. The previous relationship between the deceased and the accused and the deceased's aggressive temperament and disposition shown in his conduct of trespassing into the accused's house in order to assault her, while she was retracting her steps, must go a great way to cause belief, in the accused, in an impending danger to life accompanied with little chance of escape.[61] There was long standing enmity between the accused respondent and the deceased. The deceased with his armed henchmen had entered the house of the accused to assault, and thereupon the accused gave warning to the deceased, fired on him, and repeated the fire. The accused acted in exercise of right662 of private defence to protect his life, and that of his family members, Clause I of s 100 was attracted in the case, such that he was acquitted of the charge of murder.[62] The mind of the accused, at that particular point of time, cannot be determined with the detached objectivity prevalent in court room.[63]

A partition dispute between the father of the accused and the deceased was pending. The deceased inflicted axe blow, hitting the father of the accused on the head. The accused entertained apprehension of death or grievous injury, therefore, in exercise of right of private defence fired from his 12 bore double barrel gun, causing death of the deceased. Held, the accused acted in exercise of right of private defence. Thus, accused was acquitted of the charge under s 302, IPC .[64]

In the instant case, as soon as three victims along with one V had gone to the house of the appellant, all of them were brutally assaulted by him. Held, the act of the appellant did not fall within the purview of right of private defence.[65]

Merely because there was a quarrel and accused persons claimed to have sustained injuries, that does not confer a right of private defence extending to the extent of causing death as in this case. Though such right cannot be weighed in golden scales, it has to be established that the accused persons were under such grave apprehension about the safety of their life and property that retaliation to the extent done was absolutely necessary. No evidence much less cogent and credible was adduced in this regard. The accused had cut both the legs of the deceased and caused injuries in brutal manner. The conviction of the accused appellant on the charge of murder was upheld.[66]

There was evidence that the deceased in a drunken stage armed with iron pipe had come to the hut of the accused at the time of the incident. In such a situation there was reasonable cause for the accused to entertain the possibility of sustaining grievous hurt. The accused snatched the iron pipe from the deceased and gave three blows on the head of the deceased resulting in death. The accused was found entitled to exercise right of private defence, and did not exceed the right of private defence. The accused was acquitted of the charge under s 302, IPC .[67]

Merely because there was a quarrel and some of the accused persons sustained injuries, would not confer a right of private defence extending to the extent of causing death. It has to be established that the accused persons were under such grave apprehension about the safety of their life and property that retaliation to the extent done was absolutely necessary. In the instant case, no evidence was adduced in this regard. Thus, the right of private defence, claimed by the appellants accused persons, was discarded.[68]

Where the deceased along with two persons had gone to the house of the deceased in dead of night, and the accused had sustained five injuries, held that the accused was entitled to right of self defence.

[69]663

Totality of Occurrence has to be taken into Consideration

Section 105 of the Evidence Act provides that the burden of proof, if case of the accused comes within an exception, lies upon him. General exceptions are contained in ch IV of the IPC, comprising the right of private defence too. It is not necessary for the accused to lead evidence to prove that he acted in exercise of right of private defence and it may be inferred on the scrutiny of the prosecution evidence itself together with attending circumstances brought on record. But the entire scenario has to be viewed for coming to the right conclusion.[70] In appreciating the defence version, the totality of the occurrence from the beginning of the dispute to the assault on the accused should be taken into account.[71] Where the party of the deceased appeared in a lane and exits at both the ends of the lane were closed, it was held that the violent and threatening attitude of the party of the deceased was sufficient to give a reasonable apprehension to the accused to believe that he was in danger of receiving grievous hurt at the very least.[72] Where the totality of the circumstances brought on record do not point out to the guilt of the accused persons, they are entitled to be acquitted.[73]

Where the complainant party wanted to settle the issue of turning the flow of water from the canal, came to the field of the accused duly armed with *lathis* and other weapons, a fight took place and on an attack by the complainant party first, the accused in his right of self-defence caused the death of one of them, it was held that mere apprehension that a person would get grievous hurt extends his right of causing death, so the accused were entitled to be acquitted of the charge under s 302, IPC .[74] But when life of the accused was not endangered from ladies alleged to be armed with broomsticks and chappals and not with any deadly weapon, the accused could not have caused death of one of the ladies in exercise of self-defence.[75]

The accused may have the right of self defence in the beginning, but once the deceased was caught and tied to a tree, the threat to the life and property of the accused terminated, and if the accused inflicted injuries on the deceased thereafter, he exceeded the right of self defence. Thus, he was convicted under ss 302 and 324, IPC .[76] The right of private defence ceased when the deceased retreated to his house.[77]

Where the accused, on hearing his widowed sister-in-law's cry for help, rushed to her house with *gandasa* and found her house open, and the injured grappling with her and trying to outrage her modesty, the accused saved his sister-in-law and inflicted a blow with the *gandasa* while the injured was running away, it was held that the accused was entitled to right of private defence under s 100, IPC .[78]664

Where the land where occurrence took place belonged to the accused party and was in their possession, the complainant party went there and tried to assault the accused while the accused were putting up a shed in their land. The deceased sustained fatal injuries in the scuffle, injuries suffered by the accused persons were not explained by the prosecution, the accused were entitled to the benefit of doubt.[79] Where some amount remained unpaid by the deceased to the accused running a betel leaf shop who refused to give betel leaves to the deceased. The deceased returned to the shop of the accused for a second time, abused the accused and tried to cause damage to the shop property. Faced with such danger, the accused reacted and caused injury by stabbing the deceased with a sharp weapon on the apprehension of sustaining grievous injury at the hands of the deceased. The accused could not be said to have exceeded self-defence.[80]

Plea of Right of Private Defence cannot be based on Surmises and Speculations

It is trite that a plea of right of private defence cannot be based on surmises and speculation. Burden to prove the plea is on the accused and it stands discharged by showing preponderance of probabilities in favour of that plea of the basis of material on record. Defence must be reasonable and probate version satisfying the court that the harms caused by the accused was necessary for either

warding off the attack or for forestalling any further reasonable apprehension from the attacker. The right of self defence preserved by the law for an individual is a very narrow and circumscribed right and can be taken advantage of only when the circumstances fully justify the exercise of such a right.[81] But the mere fact that the deceased and his companions were armed with weapons, is not sufficient to create apprehension in the mind of the accused that they would kill him. A plea of right of private defence cannot be based on surmises and speculations. There must be some evidence to establish the circumstances which necessitated the exercise of such a right.[82] Where there was no evidence showing that the assault by the deceased by some weapon would have reasonably caused apprehension in the mind of the accused that grievous hurt would otherwise be caused, evidence of the doctor showed that injuries found on the person of the accused would not have been caused with forceful assault with such weapon. The accused himself had chosen to be examined as a witness but did not utter a word about his apprehension, the plea of right of private defence of the accused was found not sustainable.[83] Where there was mere exchange of words between the accused and the deceased and the deceased did not attack the accused and the accused stabbed the deceased resulting in his death; it was held that there was no reasonable apprehension of death or grievous hurt and the right of private defence was not available.[84] Such apprehension of danger to life or risk of grievous hurt must be reasonable and the violence inflicted must not be greater than is reasonably necessary for the purpose of self-defence. It must be proportionate and665 commensurate with the quality and character of the act it is intended to meet, and what is done in excess is not protected.[85]

Where at the relevant time the deceased and the accused were sitting together and drinking liquor, both started quarrelling and exchanging blows with fists, the accused therefore gave two blows on a vital part of the body of the deceased with a knife, there was no evidence that the deceased had posed danger to accused either by holding out a threat or brandishing a weapon, on these facts the plea self defence was held not tenable.[86]

Where during a communal riot the mob approached and started beating the doors of the accused's shop and the accused fired two shots as a result of which a member of the mob was killed, it was held that the circumstances in which the accused was placed were amply sufficient to give him the right of private defence even to the causing of death.[87]

Where a person sees his enemies following him with dangerous weapons he may reasonably apprehend grievous hurt to himself.[88]

The IPC puts no restriction either upon the weapon, or upon the mode of using it, in those particular cases in which it provides that the voluntary causing of death is justified when acting in exercise of the right of private defence of the body, but, of course, all the circumstances of the case must be considered together.[89]

Where a party marches with *lathis* in horizontal position and armed with rifles and revolvers, it may amount to an assault as may reasonably cause the apprehension that death or grievous hurt would be the consequence of the assault.[90]

The occurrence had taken place in front of the house of the appellant. He had categorically stated that the two deceased persons, had come alongwith another person and opened fire at him. The doctor had found several gunshot injuries on the person of the appellant. These circumstances probabalise his version. Even if the explanation given by the prosecution has to be accepted, the fact remains that the accused received gunshot injuries at the hands of one of the companions of the two deceased persons. In that event also he could exercise his right of self-defence to the extent of protecting his own person. Held, that in view of the specific plea of right of self-defence and the attendant circumstances, the plea set up by him appears to be probable. Therefore, he is entitled to the benefit of doubt.[91]

An attack with a *dang*[92] or a scythe may cause a reasonable apprehension of death or grievous hurt being caused.[93]

Lathis are deadly weapons.[94] If a man is attacked by another armed with such a weapon, he cannot be sure that the intention of the aggressor is not to kill. He666 therefore is entitled in his own defence to take every precaution that he is not killed, even if that entails killing his adversary.[1] In *Janabali Sheikh v State of West Bengal* ,[2] where the accused was hit by a *lathi,* it was ruled by the Supreme Court that at best there could be simple injury on the person of the accused and for that purpose he had no right to hit the assailant with such force so as to cause the fracture of the frontal bone of his head. It was held that the accused was not entitled to get the benefit of the right of private defence.

Squeezing of testicles can cause death, and where a person's testicles are squeezed, he may reasonably apprehend death or grievous hurt.[3]

If the assailant is disarmed or otherwise disabled,[4] or runs away from the scene so as to escape therefrom *Gopal v State of Rajasthan* ,[5] there can be no further apprehension of death or grievous hurt, and killing him by a subsequent blow cannot be justified under this section.

Responsibility of Accused cannot be Judged by Meticulous Standard

However, while it is sure that the exercise of the right of private defence subsists only so long as an apprehension of the aggressive attack continues, it is also well-settled that an accused who has had to face an aggressive murderous attack by the deceased and who had to struggle with him in order to get possession of the weapon which was used against him, cannot be expected to exercise any calm and logical judgment in the situation. His responsibility is not to be judged by any meticulous standard.[6] The Shimla High Court has held that thrust of the assault is not expected to be weighed by the accused in golden scales, since it is really a question of do or die.[7]

When the appellant saw that the aggressors were numerically stronger, they started the assault and his wife was assaulted by one of them by means of a stick or a *lathi,* it was normally difficult on his part to remain calm. On the other hand, like a normal human being having the instinct to protect himself and his near and dear ones from the approaching danger, it was possible that he was convinced from the surrounding circumstances that unless he could seriously resist the attack and strike, he would be further assaulted and could be killed. At such a critical moment it was neither possible nor likely for the appellant to deliberate in a calm mood about the pros and cons of the situation in a golden scale and then inflict injuries on the right persons so that no harm greater than what was required was caused.

The appellant acted in exercise of his right of private defence and that of his wife and was protected by s 100, IPC .[8]667

In one case there was a quarrel and an exchange of abuses between the deceased and the accused. While the exchange of abuses was going on, the deceased gave the accused a *lathi* blow. The accused happened to have a sword with him and struck the deceased with in return. The first blow was stopped by the deceased on his *lathi* and then the accused gave a second blow on the left leg of the deceased with the result that the deceased fell down injured. Thereafter the accused went away. The deceased died in the hospital the next day. It was held that the apprehension that had arisen in the mind of the accused must still have continued, for the deceased was still in the possession of the *lathi,* So long, therefore, as the deceased had a *lathi* in his hand, the accused could repeat the attack. Under the circumstances the second blow given by the accused was justified.[9]

Where the accused having succeeded in appeal, had gone to the field with a view to ask the prosecution party to vacate the premises, that by itself does not render them to be aggressors for the purpose of denying them the benefit of the right of self-defence.[10]

9. Clause 3--Assault with Intent to Commit Rape

Where the accused found his wife being assaulted by the deceased with the intention of committing

rape and inflicted certain injuries which resulted in his death, it was held that the case was covered by the third clause of this section, and the homicide was completely justified.[11] In a similar case it has been held that though the right of private defence laid down in this section is a restricted right and has to be read subject to the provisions of s 99, still the action of the accused in the particular case was covered by the third clause of this section and that the accused was entitled to an acquittal.[12]

Where the complainants went to the house of the accused at 9.00 pm and started dragging and beating a 25 year old young lady of the family with an ulterior motive to force her to sexual intercourse, it was held that these circumstances were sufficient for the accused to have taken law in their own hands entitling them to cause harm or even death to the assailants while exercising the right of private defence of body.[13]

Evidence showed that heated arguments took place between the accused and the deceased for more than an hour, the deceased under the influence of liquor, had trespassed into the house of the accused with an intention of molesting accused, who in fact was his real sister-in-law. Accused persons were attacked and had suffered serious injuries and had, therefore, acted in their right of private defence. There was no explanation from the prosecution about the injuries sustained by the accused persons. Accused persons may have retaliated to ward off the blows given by the deceased. Held, the accused persons acted in exercise of their right of private defence. Accused persons were acquitted of the charge under ss 302 / 34, IPC .[14]668

Where in order to save her honour, the accused, a young widow, stabbed the deceased who was attempting to commit rape, it was held that she was entitled to protection in exercise of her right of private defence. No offence was committed by her.[15] Even a woman of immoral character is entitled to protect herself from attack of an intending rapist.[16]

In the instant case, the accused pleaded that the incident occurred as the deceased had attempted to rape his wife. Mere ejaculation of semen on penis was held not sufficient evidence of attempt to commit rape. The plea of the accused was rejected.[17]

Where accused on hearing his widowed sister-in-law's cry for help rushed to her house with *gandasa* and her house was found open by the accused and the injured was found grappling with her and trying to outrage her modesty and rape her, the accused saved his sister-in-law from the clutches of the injured and inflicted a *gandasa* blow while the injured was running away, it was held that the accused was entitled to right of private defence under s 100 of the IPC .[18] Where the deceased was alleged to have taken the opportunity of the absence of the mother of the prosecutrix and after alluring the accused to consume liquor made an attempt to rape the daughter of the accused, who was pregnant, and the accused in anger stabbed the deceased with a sword lying in the room, he was found entitled to the benefit of the right of private defence of person of his daughter.[19]

Consent of Minor Girl for Sexual Intercourse

Where the sexual intercourse is committed with a minor girl of 15 years, her consent for the same is immaterial and in such a case, the right of private defence arises and the case is fully covered by ss 96 - 97 read with s 100, IPC, as the sexual indulgence would amount to rape within the meaning of cl 6 of s 375, IPC .[20]

10. Clause 4--Assault with Intent to Commit Unnatural Lust

The deceased attempted to commit an unnatural offence against the accused, the accused attacked him, and even when he fell down, the accused inflicted further injuries. The victim died soon thereafter. It was held that the right of private defence, which the accused had, came to an end with the infliction of the first injury, and he exceeded that right when he inflicted more injuries after the deceased had fallen down.[21] Where the accused was caught by witnesses while trying to run away after opening the door of the house of the deceased and the body of the deceased was found in

naked state in his house, the defence of the accused that the deceased stripped and attacked the accused with a view to have unnatural sex with him and hence he assaulted deceased in order to protect himself appearing to be probable, the injuries on the person of the accused supporting his case as the said injuries were possible due to the fall during scuffle, the accused was found entitled to benefit of the right of private defence. However, as he exceeded right of private defence by causing death of the deceased he was held liable to be convicted under s 304, Pt II.[22]669

Section 377 of the IPC deals with the offence of unnatural lust. For the definition and ingredients of this offence see the commentary thereunder.

11. Paragraph 5--Assault with the Intention of Kidnapping or Abduction

Sections 359 - 69 of the IPC deal with the offences of kidnapping and abduction (for the definition and ingredients of these offences see the commentary thereunder). The view taken in *Emperor v Ram Saiya* ,[23] and followed in *State v Badri* ,[24] that the word 'abducting' used in the fifth clause of this section, refers to such abducting as is an offence under the IPC and not merely to the act of abduction, as defined in s 362 thereof, and that mere abduction is not an offence and, therefore cannot give rise to any right of private defence, is not correct. It is true that the right of private defence of a person arises only if an offence against the human body is committed. This section gives an extended right of private defence of person in cases where the offence, which occasions the exercise of the right, is of any of the descriptions, enumerated therein. Each of the six clauses of this section talks of an assault, and the assault is an offence against human body (refer to s 352, IPC). So, before the extended right under this section arises, there has to be the offence of assault and this assault has to be of one of the six types mentioned in the six clauses of the section. In each of the six clauses enumerated in the section, there is an offence against the human body, namely, assault. Thus, the right of private defence arises against that offence and what this section lays down is that if the assault is of an aggravated nature, as enumerated in that section, the right of private defence extends even to the causing of death. Where the accused's sister was being abducted from her father's house by her husband, and there was an assault on her and she was being compelled, by force, to go away from her father's place: it was held that the accused had the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right extended to the causing of death.[25] The same view was taken in the undermentioned cases,[26] though there is no discussion on this point there. In order to attract the fifth clause of this section, there must be an assault, which is an offence against human body, and that assault should be with the intention of abducting.[27]

Seizure of the person and dragging a debtor to his creditor by the peons of the creditor against his will, constitutes an offence of abduction within the meaning of s 362, thereby giving the person so dragged the right of private defence of his body even to the extent of causing of death, subject to restrictions mentioned in s 99 .[28]

Where a girl is being carried away forcibly against her will, those who attempt to rescue her are entitled to use sufficient force to achieve that purpose. If stones are670 hurled for the purpose and accidentally a stone hits someone on the head and he is killed, it cannot be said that the person who threw the stone exceeded the right of private defence.[29]

12. A Woman's Right of Private Defence against Husband

A woman, who is free to refuse to go with a person who claims to be her husband and if such person attempts to take her away by force from her father's house with a view to abduct her, then she is justified in using force in resisting his assault, even if such force were to result in his death.[30]

A woman was being brutally beaten by her husband, a very brutal and dangerous man. She rushed out of her room and asked her brother, who was sleeping nearby, to protect her. She was followed by her husband who said that he was going to continue the beating. The brother thereupon seized a

hatchet and killed him. There was evidence that if he had not done so, the deceased might have killed him. It was held that considering the brutal character of the deceased, the brother had reasonable apprehension for his own life, the killing was justified.[31]

13. Clause 6--Assault with the Intention of Wrongfully Confining a Person

'Wrongful confinement' has been defined by s 340 of the IPC . This is a minor offence punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to Rs 1,000, or with both.[32] So, it is not every type of wrongful confinement, which is covered by this section. Under the sixth clause of this section, the right of private defence is available to a person against an assault: (a) when such assault has been made with the intention of wrongfully confining a person; (b) when such assault has been made in circumstances as may reasonably cause him an apprehension that it will not be possible for him to have recourse to the public authorities for his release; and (c) when such assault falls under the restrictions mentioned in s 99 .[33] The causing of injuries in exercise of a right of private defence postulates an intention to cause injury in self-defence. Even if the accused was wrongfully confined at the time when he fired a second shot at the person who was moving towards him probably to release him, he can have no right of private defence under the said clause.[34] In another case, the accused, after causing injuries to a person, was running away when he was caught by the deceased. The accused was followed by persons armed with *lathis*. The accused gave a stab wound to the deceased resulting in his death. It was held that the case fell under this clause, the act of the deceased in arresting the accused amounted to assault with intention of wrongfully confining him in the circumstances of the case and the accused did not exceed the right of private defence.[35] This clause must be read with s 101, and the effect of reading this section and s 101 together is not to render an individual entirely helpless in the matter of his unlawful arrest, but to limit the force which he may exercise to hurt, which is something less than voluntarily671 causing death. Where the person arrested kills the person arresting by using force against him s 101 does not apply. And if the person arrested knows that he is wanted by the police and that he is being taken to the police station for the purpose of being handed over to the police, he has no right of private defence under s 100, cl 6.[36]

Where the accused had gone to meet a lady with whom his illicit relationship was suspected, his mere presence with the lady at her house could not amount to an offence. Consequently, forcibly preventing the exit of the accused was an offence. It was held that the accused had a right of private defence to make good his escape.[37]

14. Clause 7--Act of throwing or Administering Acid

Under the new clause "Seventhly", added by the Criminal Law (Amendment) Act 2013, against the act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act, a person has also been given the right to cause the death or any other harm to the assailant.

15. Exceeding Right of Private Defence

Where the accused are not found entitled to any right of private defence the question of exceeding such right does not arise.[38] To determine the question whether the accused exceeded the right of private defence, the court must consider the part played by the accused person, the gravity of the offence committed and the nature of the attack made by the accused.[39] If the right of private defence is exceeded, by the non-observance of any of the foregoing rules, it cannot be availed by the accused as a defence. Where, however, the right is exceeded and the case falls within Exception 2 to s 300 of the IPC, the offender is not completely absolved, but the offence is reduced from murder to culpable homicide not amounting to murder.[40] In case of mischief of property the accused has the first degree of right of private defence which extends to committing murder of the wrongdoers but the right must be held to have exceeded when there was no fear that but for the exercise of the right the death or grievous hurt might ensue.[41]

Prosecution evidence was that there was grave and sudden provocation as stones from the side of the house of the deceased had fallen on the house of the appellant accused. The appellant had every right to protect his properties, but he exceeded672 the right by inflicting repeated blows leading to the death of the deceased. Held, case was covered by Exception 2 to s 300, and appellant was convicted under s 304, Pt I, IPC .[42]

Where accused, in the confessional statement made by him under s 313, CrPC, stated that he inflicted two or more blows after the deceased fell down, the accused was held to have exceeded his right of self-defence and so was liable to be consisted under s 304, Pt II, IPC .[43] Where there was nothing to show that the accused side was outnumbered by the complainant's side, there was no evidence adduced by the accused to show that the circumstances necessitated shooting dead three persons and injuring other, the accused persons can be said to have exceeded right of private defence and are liable to be convicted on the basis of their individual acts.[44] Where the complainant party attacked the mother of the accused causing grave injury with a sharp weapon, the accused, in order to rescue the mother inflicted a *lathi* blow with great force on the head of the deceased, it was held that by inflicting the *lathi* blow with great force the accused had exceeded the right of private defence and his conviction under s 304, Pt II was proper.[45]

On account of previous enmity, the complainant party first attacked the accused and gave blows, and thereafter the accused gave solitary knife blow to the deceased causing his death. Held, the accused exceeded his right of private defence of property.[46]

Where deceased committed criminal trespass but he was unarmed, and there was no apprehension that death or grievous hurt was likely to be caused to the accused. The accused gave two knife blows on the chest of the deceased in quick succession, it was held that accused exceeded the right of private defence of property and was liable under s 304, Pt I and not under s 302 .[47] However, where there was a dispute regarding the victim's obstructing the watercourse to the accused's field, it let to the victim's assaulting the accused with an agricultural instrument causing injury. The accused grappled with the victim, the victim freed himself and again appeared to assault the accused. The accused in defence inflicted a blow of his instrument on the victim but inflicted no further blows after the victim fell down. The accused did not exceed his right of private defence and was entitled to acquittal.[48]

Right of Private Defence

In the instant case, the accused S and his sons were in established possession of the land in dispute, where the occurrence took place, and had sown the crops therein. The members of the complaining party damaged the crops by ploughing the same with a tractor, with an intention to take forcible possession thereof. The appellants were, therefore, entitled to resist the invasion of the members of the complainant party, as they were armed with guns and sharp edged weapons. S, one of the accuseds, had received as many as seven injuries, at the hands of the members of the complainant party. Out of these injuries, one was declared grievous in nature. In such a situation, in which S and his sons were placed, it was not possible for them to weigh their673 blows in golden scales in order to assault the members of the complainant party. Since S and his sons entertained a real apprehension that the members of the complainant party, with their fire-arms and sharp edged weapons, could cause death or grievous hurt to them, they were fully justified in causing the death of the deceased in exercise of their right of private defence. Thus, all the appellants accused were acquitted of the charge of murder.[49]

But when accused persons dragged the deceased in the middle of the road and one of them gave a blow on the chest of the deceased with a dagger which caused grievous injury that resulted in his death, it was held that right of private defence of person was exceeded as the fact that the deceased was holding a shoe in his hand could not cause reasonable apprehension in the mind of the accused that there would be danger to their lives.[50] Where in a property dispute between brothers, the injuries sustained by the accused were minor in nature and needed no explanation, the dispute was not very

serious and injuries caused on the head of the deceased by *lathi* were not commensurate with the apprehension that could reasonably arise. The injuries were disproportionately severe and could not be justified, the accused was found to have exceeded right of self-defence and his conviction under s 302, IPC, was altered to one under s 304, Pt I.[51] Where an accused entertaining apprehension that the complainant party had come to take forcible possession of land and to attack them chased the complainant party and killed some persons by firing 30-40 rounds of gunshots at the complainant party which was not necessary, the accused were held to have exceeded the right of private defence and thereby committed offences under s 304, Pt I read with s 34, IPC .[52] So long as an assembly of persons is acting in exercise of the right of private defence, it cannot be an unlawful assembly as the object of members is not unlawful but once they exceeded the right of private defence, the assembly ceased to be lawful and became an unlawful assembly. Therefore, only such of the members of the assembly who share the object of doing anything in excess of the exercise of right of private defence, alone would be liable to be punished for the acts committed in prosecution of the common object or for their individual unlawful acts.[53] A person may resist the execution of an illegal warrant, but he must not voluntarily inflict grievous hurt in so doing. If he does, he is guilty of that offence.[54] Where the accused assaulted the deceased while being chased by him, the injuries found on the body of the deceased were more grievous than those found on the body of the accused, it was held that accused exceeded their right of private defence and their conviction was altered from s 300 to s 304, Pt I, IPC .[55]

Where the evidence on record did not show that complainant side was armed with weapons other than sticks, neither in cross-examination of witnesses nor in his statement under s 313, CrPC, the accused stated that he had given a knife-blow to the deceased while he feared death or grievous injury from deceased or persons who were with deceased on these facts the Apex Court held that it could be said that the accused exceeded his right of private defence when he gave a chattel knife-blow to the deceased, conviction of accused under s 304, IPC, was held proper.[56]674

PWs deposed that it was the deceased who first pulled the collar of appellant's shirt and tried to press his neck, and in the process, the appellant inflicted knife blow in the abdomen of the deceased with a view to escape from the clutches of the deceased. The appellant accused clearly exceeded the right of private defence. In these circumstances, his case fell under s 304, Pt I, IPC . The conviction of the accused appellant under s 302 was altered to one under s 304, Pt I.[57]

When Marginal Excess may be Excused

If the person exercised his right: (a) in good faith; (b) without premeditation of death; (c) without any intention of doing more harm than was necessary, then his offence will be culpable homicide.[58] But these three conditions must concur (refer to s 300, Exception 2, and illustration thereto); otherwise the offence will be murder. In case there is marginal excess of the exercise of the right of self-defence it may be possible to say that the means the accused uses could not be weighed in golden scales in judging whether or not the right of private defence would exceed. However, when the mode of exercise of the right of private defence (stengun in that case) is such for which there cannot be any justification and the injury inflicted is clearly in excess of the right of private defence, then Exception 2 to s 300, IPC, would be applicable and the offence would be culpable homicide not amounting to murder.[59]

16. Right of Private Defence not Available to Aggressors

Commentary under same heading in ss 96, 97 *ante*, may be referred to.

The law protects the victims of assault or aggression and not the aggressors. Notwithstanding injuries received by the accused on their persons, right of private defence was not available where the accused persons were initial aggressors. The incident had taken place at a place which was in the possession of the deceased. The accused persons had gone to that place and inflicted injuries on the complainant party. The accused persons were, therefore, held to be the aggressors.[60] Besides being

an aggressor, if a person uses excess force in self-defence, he cannot claim the right of private defence.[61] When a person, even if he was the aggressor, has retreated and reached the rear of the house where he had gone for aggression, the right of private defence would not continue. This right is always limited to the extent that it can repeal the aggressor, it is not a matter of defence but a matter of retaliation which cannot be permitted for looked upon with an eye of approval.[62]

Right of private defence is not available to an aggressor.[63] Where the accused persons armed with guns and kattas had gone to the place of occurrence, they were675 the aggressors as they opened fire causing the death of the deceased, thus, they were not entitled to the right of private defence.[64]

Where evidence showed that the accused continued to assault the deceased even after he fell on the ground, the possibility of the accused causing injuries in exercise of private defence was ruled out.[65] Where the testimony of the independent witness corroborated by the prosecution version showed that the accused chased and killed one of the deceased who fled away from the scene of the occurrence, accused cannot be said to have the right of self-defence as regards killing of such deceased. Acquittal of the accused was set aside and the accused were convicted under ss 302 / 149, IPC .[66]

The accused, though not entitled, allowed his buffalo to graze in the field of the deceased. On the deceased's driving the buffalo from his field, the accused assaulted the deceased as well as another person who came to rescue the deceased in exercise of the right of private defence of person of the deceased. There was also a reliable natural eyewitnesses who gave evidence that the accused assaulted the deceased and another person, on these facts it was held that no right of private defence arose to the accused.[67] Where the accused persons armed with *gandasa*, *bhala*, spade, *kudali etc* inflicted various cut injuries on the prosecution witnesses who died and the accused persons were aggressors having come to the place of incident armed with deadly weapons, they were found not entitled to the right of private defence or of Exception 2 of s 300, IPC, so as to make the offence of murder culpable homicide.[68]

17. Illustrative Cases

The appellant accused armed with a kulhari in his hand went to the house of the deceased and hacked both deceased to death one after another. The appellant had not received any injury on his person. The very fact that the appellant committed the murder of two persons one after another ruled out the plea of private defence. Woman, by its feminine nature, and having a feeble body, ordinarily would not pose a threat or danger to the life of a well bodied man with a lathi. The plea of private defence was rejected, and accused respondent was convicted under s 302, IPC .[69]

There was no imminent danger to the property or person of the accused from the act of the deceased who had merely gone to the spot and asked the accused party to get the measurement of the land and tried to dislodge one of the poles fixed in the land by the accused party. There was neither any occasion nor any cause to attack the complainant party with weapons like axes and crowbars and to cause injuries on the vital parts of the body including the head. There was no evidence on record to show that any of the accused appellants has sustained injuries to deduce the factum of imminent danger to their person or property. The presence of the witness, as put forth by the defence to substantiate the plea of private defence was doubtful, hence his evidence was rejected. The plea of private defence was not accepted, and appellants accused were convicted under ss 302 / 34, IPC .[70]676

2 Inserted by the Criminal Law (Amendment) Act 2013 (13 of 2013), s. 2 (wef 3-2-2013).

3 *Khetri Bewa v State* AIR 1952 Ori 37, p 39 ; *Ram Dahin v State of Bihar* (1970) 19 Jab LJ 76 ; *State ofMadhya Pradesh v Ramesh* (2005) Cr LJ 652 (SC) .

4 *Piara Singh v State of Punjab* (1979) Cr LJ 498, p 501 (DB) ; *Paramananda v State of Orissa* (1970) Cr LJ 931, p 936 (Ori) ;

Purna Chandra Naik v State of Orissa (1974) Cut LT 233, (1974) Cut LR 254 (Cr) ; *Vishvas v State of Maharashtra* AIR 1978 SC 414, p 418, (1978) Cr LJ 484 .

5 *Shivapada v State* (1969) Cr LJ 160, p 162, AIR 1969 Cal 28 .

6 Re *Patlu*AIR 1954 Mad 319 ; *Queen v Darwan Geer* 5 WR 73(Cr); *Khetri Bewa v State* AIR 1952 Ori 37, p 39 ; *Sardara v Emperor* AIR 1929 Lah 494, 30 Cr LJ 863 ; *Karnail Singh v State of Punjab* (1994) SCC 273 (Cr) .

7 *Vishwanath v State of Uttar Pradesh* AIR 1960 SC 67, p 69, (1960) Cr LJ 154 .

8 *Mahant Narain Das v Emperor* AIR 1922 Lah 1, 21, p 23 Cr LJ 513 (DB) .

9 *Vishwanath v State of Uttar Pradesh* AIR 160 SC 67, p 69 .

10 *Jaipal Kunbi v Emperor* AIR 1922 Nag 141 ; *Mohinder Singh v State of Punjab* (1955) Cr LJ 244 (P&H) .

11 *Khetri Bewa v State* AIR 1952 Ori 37, p 39 .

12 *Bathusingh v State of Madhya Pradesh* (2004) Cr LJ 4850 (SC) .

13 *Dhaneswar Mahakud v State of Orissa* 2006 Cr LJ 2113, p 2119, 2120 (SC), AIR 2006 SC 1727, 2006 (4) Scale 170, (2006) 9 SCC 307 .

14 *Mukhtiar Singh v State of Punjab* (1975) Cr LJ 132, p 135 (Punj), (1974) Punj LR 338 (Cr) ; *Ganesh v State* (1976) Mah LJ 71 (NOC) ; *Jaduram v State of MP* 2013 (122) AIC 757 (Chh) .

15 *Deo Narain v State of Uttar Pradesh* (1973) Cr LJ 677, p 679, AIR 1973 SC 473 .

16 *Puran Singh v State of Punjab* (1975) Cr LJ 1479, p 1490, AIR 1975 SC 1674 ; *Madan Chandra Dutta v State of Assam* (1977) Cr LJ 506, p 508 (Gau) ; *Raja Ram v State* (1977) UP Cr C 91, p 96 (All), (1977) All Cr C 25 ; *State of Orissa v Rama Mudali* (1973) Cr LJ 1326, (1973) Cut LT 44 ; *Ganga Prasad v Emperor* 37 Cr LJ 1135, p 1137, (1935) OWN 974 ; *Amjad Khan v State* AIR 1952 SC 165 ; *Govindan Neelambaran v State of Kerala* AIR 1960 Ker 268 ; *Pagla Baba v State* AIR 1957 Ori 130, p 150 ; *Raising Mohima v State of Gujarat* (1962) 1 Cr LJ 717, p 719, AIR 1962 Guj 203 .

17 *Anwar Musa Sayyed v State of Maharashtra* 2014 Cr LJ (NOC) 312 (Bom) (DB).

18 Re *Paltu*AIR 1954 Mad 319 ; *Queen v Darwan Geer* 5 WR 73 Cr ; *Khetri Bewa v State* AIR 1952 Ori 37, 39.

19 *Sardara v Emperor* AIR 1929 Lah 494, 30 Cr LJ 863 ; *Mukerji v Emperor* 5 PR 1901 (Cr) .

20 10th Pt Rep, p 35.

21 *Sheshreddi Gopireddi Changati v State of Maharashtra* 2013 Cr LJ (NOC) 312 (Bom) .

22 *State of Madhya Pradesh v Nivedanlal* 2010 Cr LJ 2647, p 2650 (Chh) (DB) .

23 *Mohinder Singh v State of Punjab* (1995) Cr LJ 244, p 248 (P&H).

24 *Arjun v State of Maharashtra* 2012 Cr LJ 2641, p 2644, 2645 (SC), AIR 2012 SC 2181, 2012 (5) Scale 52, (2012) 5 SCC 530 ; *Anwar Musa Sayyed v State of Maharashtra* 2014 Cr LJ (NOC) 312 (Bom) .

25 *Raj Singh v State of Punjab* (1995) Cr LJ 680 (P&H) .

26 *State of Rajasthan v Brijlal* 2010 Cr LJ 1000, p 1005 (MP) (DB) .

27 *State of Rajasthan v Brijlal* 2010 Cr LJ 1000, p 1004, 1005 (MP) (DB) .

28 *Blackstone's Commentaries*, Book 4, p 185.

29 *Balbir Singh v State* AIR 1959 Punj 332, p 337 ; see also Notes under fourth para of s 99 .

30 *Gurlinagappa Shidramappa v Emperor* AIR 1921 Bom 335 .

31 *BV Survade v State of Gujarat* (1972) Cr LJ 1574, p 1577 (Guj) (DB) .

32 *Rati Ram Khadiya v State of Chhattisgarh* 2009 Cr LJ 2563, p 2566 (Chh) (DB) .

33 *Yogendra v State of Rajasthan* 2008 Cr LJ (NOC) 879 (Raj) (DB).

34 *Balber Singh v State* (1959) Punj 332, p 337, (1959) Cr LJ 901 ; *State of Karnataka v Shiva Shanker* (1978) Kant LJ 197, p 200 .

35 *Russel on Crime*, eleventh edn, p 493.

36 *Pandharinath Punjaram Lahane v State of Maharashtra* 2008 Cr LJ (NOC) 79 (Bom) (DB).

37 *State of Uttar Pradesh v Chatur Singh* (2006) Cr LJ 545 (SC), AIR 2006 SC 745 .

38 *Krishna Narain v State of Uttar Pradesh* 1992 Cr LJ 196 (All) .

39 *Vishvas v State of Maharashtra* AIR 1978 SC 414, p 418, 1978 Cr LJ 484 .

40 *Dholia Rayjit v State* 1961 (1) Cr LJ 813 (Guj) .

41 *Arjun v State of Maharashtra* 2012 Cr LJ 2641, p 2644 (SC), AIR 2012 SC 2181, 2012 (5) Scale 52, (2012) 5 SCC 530 .

42 *Narain Sing v State of Punjab* 1964) 1 Cr LJ 730, 733, (1963) 2 SCJ 324.

43 *Ram Phal v State of Haryana* 1993 Cr LJ 2603 (SC) .

44 *Dharmindra v State of Himachal Pradesh* 2002 Cr LJ 4302 (SC), AIR 2002 SC 3097 .

45 *Raghunath Pradhan v State* 24 Cut LT 215 .

46 *Abu Zar v Emperor* AIR 1934 Lah 748 .

47 *Bansidhar Sahu v State* 35 Cut LT 278, p 286 .

48 *Hari Ram v State of Rajasthan* 1992 Cr LJ 3168, p 3177 (Raj) .

49 *State of Karnataka v Jinappa Payappa Kudachi* (1993) Cr LJ 3915 (SC) .

50 *Sampath v State* (1993) Cr LJ 2468 (P&H) .

51 *Bahadur Singh v State of Punjab* (1992) Cr LJ 3709, p 3710 (SC) .

52 *Ramesh Chand v State* (1986) All LJ 245, (1986) All Cr R 211 .

53 *Sheikh Bashir v State of Madhya Pradesh* (2005) Cr LJ 73 (MP) (DB) .

54 See the Indian Penal Code 1860, s 320, for the definition and ingredients of grievous hurt.

55 *Amjad Khan v State* AIR 1952 SC 165, p 166, (1952) Cr LJ 848 ; *Sampat Singh v State of Rajasthan* AIR 1969 SC 956, (1969) Cr LJ 1430 ; *Shivapada Senapati v State* AIR 1969 Cal 28 ; *Somnath Das v State* (1969) Cut LT 165, (1968) Ori JD 193, (1968) Cr LJ 643 ; *Vishvas v State of Maharashtra* AIR 1978 SC 414, p 418, (1978) Cr LJ 484 .

56 *Raghavan Achari alias Njoonjappan v State of Kerala* (1992) Cr LJ 3857 (SC) ; *Abdul Rasheed v State of Kerala* 2013 (1) KLT 236, 2013 (I) KLT 150 (Ker) .

57 *Gaya Prasad v Emperor* 37 Cr LJ 1135, p 1137, (1935) CWN 974 ; *Francis Alfred v State of Rajasthan* (1980) Raj Cr Cas 81, p 86 (DB) ; *Amjad Khan v State* AIR 1952 SC 165 ; *Govindan Neelambaran v State of Kerala* AIR 1960 Ker 268 ; *Pagla Baba v State* AIR 1957 Ori 130, p 150 ; *MK Somiah v State of Karnataka* (1978) Kant LJ 93, p 95 ; *Madan Chandra Dutta v State of Assam* (1977) Cr LJ 506, p 508 (Gau) ; *Raja Ram v State* (1977) UP Cr C 91, p 96, (1977) All Cr C 25, p 29 ; *Jai Dev v State of Punjab* AIR 1963 SC 612, p 617, (1963) 1 Cr LJ 495 ; *Puran Singh v State of Punjab* AIR 1975 SC 1674, (1975) Cr LJ 1479 ; *Francis Alfred v State of Rajasthan* (1980) Raj Cr Cas 81, p 86 (DB) ; *Sheshreddi Gopireddi Changati v State of Maharashtra* 2013 Cr LJ (NOC) 312 (Bom) .

58 *State of UP v Gajey Singh* 2009 Cr LJ 2274, p 2278 (SC), 2009 AIR SCW 2222, 2009 (3) Scale 337 .

59 *Devisingh Bapusingh v State* AIR 1955 MB 34, p 36 ; *State v Jhabar Singh* (1966) 68 Punj LR 296 ; *Ratna Munda v State* AIR 1951 Ori 245, p 247 ; *Dalip Singh v Emperor* AIR 1923 Lah 155, 25 Cr LJ 676 ; *Ahmad Din v Emperor* AIR 1927 Lah 194, 28 Cr LJ 252 ; *Chheda v Emperor* AIR 1933 Oudh 380, 35 Cr LJ 55 ; *Pheli v State* AIR 1952 Raj 158, p 159 ; *Delhi Admn v Mahadin* 1966 Cr LJ 358, p 360 (Punj) ; *Mukhtiar Singh v State of Punjab* (1975) Cr LJ 132, p 135, (1975) Punj LJ 338 (Cr) ; *MK Somiah v State of Karnataka* (1978) Kant LJ 93, p 95 .

60 *Banamali Sahu v State* 1969 Cut LT 126 .

61 *Khetri Bewa v State* AIR 1952 Ori 37, 39, p 40; *Govindan Neelambaran v State of Kerala* AIR 1960 Ker 258, p 260 ; *Bharat Singh v State of Rajasthan* (1972) Raj LW 393, (1972) WLN 394, p 398 ; *Piara Singh v State of Punjab* (1979) Cr LJ 498 (Punj) ; *Mana v State of Rajasthan* (1978) Cr LR 380, p 390 (Raj), (1978) Raj LW 245 ; *Narain Singh v State of Punjab* (1975) Cr LJ 132, p 135, (1974) Punj LR 338 (Cr) ; *Kartar Singh v State* AIR 1956 Punj 122 ; Re *K Gounder*(1970) Cr LJ 547, p 549, (1969) Mad LJ 31 (Cr); *Lal Singh v State* (1967) All WR 175, p 177 (HC), (1967) All Cr R 154 ; *Puran Singh v State of Punjab* (1975) Cr LJ 1479, p 1490, AIR 1975 SC 1674 .

62 *State of Orissa v Panchanan Jena* 2010 Cr LJ (NOC) 1112 (Ori) (DB).

63 *State v Pabitra Guru* AIR 1969 Ori 287, p 288, (1969) Cr LJ 1515 .

64 *Darshan Singh v State of Punjab* 2010 Cr LJ 1393, p 1404 (SC), AIR 2010 SC 1212, 2012 AIR SCW 832, 2010 (1) Scale 467, (2010) 2 SCC 333 .

65 *Mukesh Rathore v State of Chhattisgarh* 2010 Cr LJ 1289, p 1290, 1291 (Chh) .

66 *Radhe v State of Chhattisgarh* 2008 Cr LJ 3520 (SC), AIR 2008 SC 2878, 2008 (9) Scale 638, 2008 (3) SCC (Cri) 928 .

67 *Sheshreddi Gopireddi Changati v State of Maharashtra* 2013 Cr LJ (NOC) 312 (Bom) .

68 *Jesu Asir Singh v State* 2007 Cr LJ 4310, p 4313 (SC), AIR 2007 SC 3015, 2007 (10) Scale 110 .

69 *Vishnu Ghule v State of Maharashtra* 2008 Cr LJ (NOC) 63 (Bom) (DB).

70 *Budh Singh v State of Uttar Pradesh* (2005) Cr LJ 2005 (All) (DB) .

71 *Cherangu Bolpari v State* (1966) 32 Cut LT 530 .

72 *Kalloo v State of Madhya Pradesh* (1966) MPLJ 877, (1966) Cr LJ 841 ; *Shivapada Senapati v State* AIR 1969 Cal 28, (1969) Cr LJ 160 ; *Amjad Khan v State* AIR 1952 SC 165, p 167, (1952) Cr LJ 848 ; *Guljara Singh v State of Rajasthan* (1970) WLN (Pt I) 265 .

73 *Nagarathinam v State* (2006) Cr LJ 2120 (SC) ; *Hira Bhaga*AIR 1961 Guj 8, p 11 ; *State v Ghabar Singh* (1966) 68 Punj LR 296 ; *State of Orissa v Sanyasi Madi* 29 Cut LT 464 ; *Parmananda v State of Orissa* (1970) Cr LJ 931, p 936 (Ori) ; *Ajit Singh v State* (1971) Cr LJ 494, p 496, AIR 1971 Punj 494 .

74 *Subhash & Ors v State of Haryana* (1996) Cr LJ 4064 (P&H) (DB) .

75 *Vishnu Narain Moger & Anor v State of Karnataka* (1996) Cr LJ 1121 .

76 *Vishnu Ghule v State of Maharashtra* 2008 Cr LJ (NOC) 63 (Bom) (DB).

77 *Ravishwar Manjhi v State of Bihar* 2007 Cr LJ (NOC) 151, 2007 (1) AIR Jhar R 416 (Jhar) .

78 *Bhadar Ram v State of Rajasthan* (2000) Cr LJ 1174 (Raj) .

79 *State of Karnataka v Siddegowda & Ors* (1999) Cr LJ 3819 (Kant) (DB) .

80 *Sunil Gangrade v State of Madhya Pradesh* (1997) Cr LJ 4238 (MP)(DB).

81 *Buddhi Lal v State of Rajasthan* (2004) Cr LJ 4420 (Raj) (DB)

82 *Dwaru Patra v State* (1968) 34 Cut LT 1107, (1968) 10 Ori JD 147 .

83 *Kasam Abdulla Hafiz etc v State of Maharashtra* (1998) Cr LJ 1422 (SC) .

84 *Narayana Pillai v State of Kerala* (1968) Cr LJ 1362, p 1371, (1969) Mad LJ 553 (Cr) ; *Jai Prakash v State (Delhi Admn)* (1991) 2 Sim LC 330 (HP) ; *Vishwas v State of Maharashtra* (1978) Cr LJ 484, 489, AIR 1978 SC 414 ; *Nihal Singh v Emperor* AIR 1935 Pesh 155, p 157 ; *Abu Zar v Emperor* AIR 1934 Lah 748 ; *Emperor v Lal Baksh* AIR 1945 Lah 43 ; *Guriya Bucha v State of Gujarat* AIR 1962 Guj 39, (1962) 1 Cr LJ 324 (DB) ; *Somnath Dass v State* AIR 1969 Ori 138, (1969) Cr LJ 922 .

85 *Hari Ram v State of Rajasthan* (1992) Cr LJ 3168, p 3177 (Raj) .

86 *Inaciu Manuel Miranda v State of Goa* (1999) Cr LJ 422 (Bom) .

87 *Amjab Khan v State* AIR 1952 SC 165, p 167 .

88 *State v Kolis Hira Bhaga* AIR 1961 Guj 8, p 11 .

89 *Nga Chit Tin v King* AIR 1939 Rang 225, p 239 ; *State v Jhabar* (1966) 68 Pun LR 296 (Delhi section) .

90 *Pagla Baba v State* AIR 1957 Ori 130, p 150 .

91 *Jagtar Singh v State of Punjab* (1993) Cr LJ 306, p 308 (SC) .

92 *Mahommad Akbar v Emperor* AIR 1924 Lah 227 .

93 *Ata Mahommad v Emperor* AIR 1934 Lah 995 .

94 *Chhailu v State of Uttar Pradesh* 1994 UP Cr R 18 (All) .

1 *Man Singh v Emperor* AIR 1933 All 401 ; *Chheda v Emperor* AIR 1933 Oudh 380 .

2 *Janabali Sheikh v State of West Bengal* (1992) Cr LJ 2530 .

3 *Sardari Lal v Emperor* AIR 1937 Lah 108, p 110 ; *Queen Empress v Kalyani* 19 ILR Mad 356, 1 Weir 313 .

4 *Abu Zar v Emperor* AIR 1934 Lah 748 ; *Emperor v Lal Baksh* AIR 1945 Lah 43 ; *Guriya Bacha v State of Gujarat* AIR 1962 Guj 39 .

5 *Gopal v State of Rajasthan* 2013 Cr LJ 1297, (2013) 2 SCC 188 .

6 *Ratna Munda v State* AIR 1951 Ori 245, p 247 ; *Dalip Singh v Emperor* AIR 1923 Lah 155, 25 Cr LJ 676 ; *Ashmad Din v Emperor* AIR 1927 Lah 194, 28 Cr LJ 252 ; *Chheda v Emperor* AIR 1933 Oudh 380, 35 Cr LJ 55 .

7 *State of Himachal Pradesh v Vijay Kumar* (1994) 1 Sim LC 9(HP).

8 *Purna Chandra Barik v State of Orissa* (1988) Cr LJ 731 (Ori) .

9 *Pheli v State* AIR 1952 Raj 158, p 159 .

10 *Jarnail Singh v State of Punjab* (1992) Cr LJ 3863 (SC) .

11 *Mahommad Shafi v Emperor* AIR 1934 Lah 620 ; *Mohinder Singh v State of Rajasthan* (1977) Raj LW 187, (1977) Raj Cr C 333 .

12 *Suraj Narain Lal v Emperor* AIR 1933 All 213, p 214 ; **following***Jhakri Chamar v Emperor* 13 Cr LJ 905 (FB) .

13 *Prakash Chandra v State of Rajasthan* (1991) Cr LJ 2566, p 2573 (Raj)(DB).

14 *State of Himachal Pradesh v Bhikham Ram* 2011 Cr LJ 910, p 915 (HP) .

15 *State of Orissa v Nirupama Panda* (1989) 67 Cut LT 219 .

16 *Ibid*.

17 *Kanubhai Virjibhai v State of Gujarat* 2014 (1) Guj LR 655 (Guj) .

18 *Bhadar Ram v State of Rajasthan* (2000) Cr LJ 1174 (Raj) .

19 *Badan Nath v State of Rajasthan* (1999) Cr LJ 2268 (Raj)(DB).

20 *Yeshwant Rao v State of Madhya Pradesh* (1992) Cr LJ 2779, p 2780 (SC) .

21 *Guriya Bucha v State of Gujarat* AIR 1962 Guj 39, p 41, (1962) 1 Cr LJ 324 .

22 *Samir Nijam Landge v State of Maharashtra* (2006) Cr LJ 3429 (Bom) (DB) .

23 *Emperor v Ram Saiya* AIR 1948 All 205, (1948) ILR All 165 .

24 *State v Badri* AIR 1957 All 714 .

25 *Vishwanath v State of Uttar Pradesh* AIR 1960 SC 67, overruling *Emperor v Ram Saiya* AIR 1948 All 205 and reversing *State v Badri* AIR 1957 All 714 ; *Gendia v State* (1968) Jab LJ 51 (SN) ; *Dhani Ram v State of Madhya Pradesh* (1972) MPLJ 1011, (1972) Jab LJ 889 ; *Abdulla v State* AIR 1959 J&K 5, (1959) Cr LJ 42 ; *Mir Akbar v Emperor* AIR 1937 Pesh 86, 39 Cr LJ 339 .

26 *Jagat Singh v King-Emperor* AIR 1923 Lah 155 ; *Daroga Lohar v Emperor* AIR 1930 Pat 347, 32 Cr LJ 84 ; *Sakhu v State* AIR 1951 Nag 349 ; *Dayaram Laxman v State* AIR 1953 MB 182, (1953) Cr LJ 1185 ; *Public Prosecutor v Balakrishna* (1979) 23 Mad LJ 131, p 136 (Cr) (AP) .

27 *Public Prosecutor v Balkrishna* (1979) 23 Mad LJR 131, p 136 (Cr) (AP) (DB) ; *Ram Sewak v Emperor* AIR 1925 All 313(2) ; *Daroga Lohar v Emperor* AIR 1930 Pat 347 .

28 *Daroga Lohar v Emperor* AIR 1930 Pat 347 .

29 *Daya Ram Laxman v State* AIR 1953 MB 182 .

30 *Sakhu v Crown* AIR 1951 Nag 349 .

31 *Karamat Hussain Mulla v Emperor* AIR 1938 Lah 269 .

32 Indian Penal Code 1860, s 342 .

33 *Abdul Habib v State* (1974) Cr LJ 248, p 253 (All) .

34 *Ram Kishun v State* (1966) All WR 249, p 252 (HC), (1966) All Cr R 144 .

35 1975 WLN (UC) 82 (DB).

36 *Razu v Emperor* AIR 1946 Sind 17, p 18 .

37 *Krushna Chandra Bisoi v State of Orissa* (1992) Cr LJ 1766 (Ori) .

38 *Sampath v State* (1993) Cr LJ 2468, p 2484 (Mad) .

39 *State of Karnataka v Jinappa Payappa Kudachi* (1944) SCC (Cr) 330 ; *Kulwant Singh v State of Punjab* (1994) Cr LJ 1109 (SC), AIR 1994 SC 1271 .

40 *Nga Chit Tin v King* AIR 1939 Rang 225, p 229 ; *Siryan v Emperor* 17 Cr LJ 270 (Lah) ; *State of Madhya Pradesh v Saligram* (1977) MPLJ 539, p 544 ; *Baljit Singh v State of Uttar Pradesh* (1976) CR LJ 1745, p 1755 ; *Nathan v State of Madras* AIR 1973 SC 665, p 666, (1973) Cr LJ 608 ; *Parichhat v State* (1972) Cr LJ 332, p 328, AIR 1972 SC 535 ; *Tarachand v State of Haryana* (1971) Cr LJ 1411, 1417 ; *Ishwar Singh v State of Rajasthan* (1973) Cr LJ 811, p 816 ; *Nanhu v State of Bihar* (1971) Cr LJ 1467, p 1468, AIR 1971 SC 2143 ; *Vidya Singh v State of Madhya Pradesh* AIR 1971 SC 1857, p (1971) Cr LJ 1296; *Kasimuddin v State of Assam* (1974) Cr LJ 105, p 108 (Gau) ; Re *Marappa Gounder*(1973) Cr LJ 1044, p 1047 (Mad) (DB); *Saiduddin v State* (1973) Cr LJ 1643, p 1645 ; *Kartar Singh v State* (1970) WLN 988 ; *Padmeshwar Phukan v State of Assam* (1971) Cr LJ 1595, p 1596 ; *Shyamsher Biswas v State of Uttar Pradesh* (1977) CWN 294 ; *Kesha v State of Rajasthan* (1993) Cr LJ 3674 (SC) ; *State of Karnataka v Jinappa Payappa Kudachi* (1993) Cr LJ 3915 (SC) .

41 *Mahabir Chaudhary v State of Bihar* (1996) Guj 2860 (SC) .

42 *Puran Singh v State of Uttaranchal* 2009 Cr LJ (NOC) 850 (Utr) (DB).

43 *Ginder Singh & Anor v State of Punjab* (1999) Cr LJ 4811 (P&H) (DB) .

44 *Heera Mani Tiwari & Ors v State of Uttar Pradesh* (2000) Cr LJ 4960 (All)(DB).

45 *State of Rajasthan v Mst Bhuri & Ors* (1997) Cr LJ 708 (Raj) (DB) .

46 *Bhagwan Singh v State of Madhya Pradesh* 2009 Cr LJ (NOC) 516 (MP) .

47 *Deepa alias Deepchand & Anor v State of Madhya Pradesh* (1999) Cr LJ 413 (MP) (DB) .

48 *Surdeo Singh & Ors v State of Rajasthan* (1996) Cr LJ 1270 (Raj) (DB) .

49 *Harbhagwant Singh v State of Punjab* 2009 Cr LJ 1659 (P&H) (DB) .

50 *State of Uttar Pradesh v Zalim & Ors* (1996) Cr LJ 2537 (SC) .

51 *Man Bharan Singh v State of Uttar Pradesh* (1996) Cr LJ 2707 (MP) (DB) .

52 *Harjinder Singh v Karnail Singh & Ors* (1998) Cr LJ 2053 (SC) .

53 *Kashi Ram & Ors v State of Madhya Pradesh* AIR 2001 SC 2902 .

54 *Umacharan v R* 29 ILR Cal 244 .

55 *Suresh Singh & Ors v State of Haryana* (1999) Cr LJ 2585 (SC) .

56 *State of Uttar Pradesh v Laeeq* (1999) Cr LJ 2879 (SC) .

57 *Raman v State of Kerala* 2008 Cr LJ 4695, p 4697 (SC), 2008 (11) Scale 385, (2008) 11 SCC 797 .

58 *Siryan v Emperor* 17 Cr LJ 270 ; *Krishna Narain v State of Uttar Pradesh* (1992) Cr LJ 196 (All) ; *Jasbir Singh v State of Punjab* (1993) Cr LJ 301 SC ; *Jagtar Singh v State of Punjab* (1993) Cr LJ 306 (SC) ; *Khudu v State of Uttar Pradesh* (1993) Cr LJ 2008 (SC) ; *Bahadur Singh v State of Punjab* (1992) Cr LJ 3709 (SC) .

59 *Hari Ram v State of Rajasthan* (1992) Cr LJ 3168, p 3178 (Raj) .

60 *Jaggu v State of Rajasthan* (1988) Raj Cr C 240 ; *Krishna v State of UP* 2007 Cr LJ 3525 (SC), AIR 2007 SC 2452, JT 2007 (9) SC 184, 2007 (8) Scale 634, (2007) 15 SCC 320, [2007] 7 SCR 1157 .

61 *Dhananjai v State of Uttar Pradesh* (1994) Cr LJ 614 (SC) ; *Dharampal v State of Uttar Pradesh* (1994) Cr LJ 615 (SC) ; *Shanmugam v State of Tamil Nadu* (2003) Cr LJ 418 (SC) ; *Dharam v State of Haryana* (2007) Cr LJ 791 (SC) .

62 *Ram Avtar v State of Uttar Pradesh* (2003) Cr LJ 480 (SC), AIR 2003 SC 209 .

63 *Pandharinath Punjaram Lahane v State of Maharashtra* 2008 Cr LJ (NOC) 79 (Bom) (DB).

64 *Yogendra v State of Rajasthan* 2008 Cr LJ (NOC) 879 (Raj) (DB).

65 *Harabailu Kariappa & Ors v State of Karnataka* (1996) Cr LJ (Kant) 321 (DB) .

66 *State of Uttar Pradesh v Roop Singh & Ors* (1996) Cr LJ 410 (SC) .

67 *Nanhakoo & Ors v State* 1998 Cr LJ 2890 (All) .

68 *Ram Bilas Yadav & Ors v State of Bihar* AIR 2002 SC 530 .

69 *State of UP v Chatur Singh* 2006 Cr LJ 545, p 546 (SC), AIR 2006 SC 745, 2005 (9) Scale 444, 2006 (1) All LJ 649 .

70 *Dhaneswar Mahakud v State of Orissa* 2006 Cr LJ 2113, p 2120 (SC), AIR 2006 SC 1727 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 101.

When such right extends to causing any harm other than death.--

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

Comments

1. Scope

This section supplements the provisions of s 100 and provides that if the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to voluntary causing of death to the assailant, but it extends, under the restrictions mentioned in s 99, to the voluntary causing to the assailant, of any harm other than death. In other words, where the violation of persons or liberty is not of the aggravated nature of the offences mentioned in s 100, it may still be resisted by any necessary degree of violence short of killing. Under this section, therefore, a person is entitled to exercise his right of private defence of the body, as against any assault other than the first, and second of s 100, to the extent of causing grievous hurt. It will have to be borne in mind, that if, after commission of an assault of a simple or grievous nature, as there is, in any case, no further apprehension of assault, occasion for exercise of the right of private defence of the body should not arise. At the same time, the possibility of infliction of further assault likely to cause grievous bodily injury cannot, as a rule, be ruled out on the mere ground that the injury or the injuries already inflicted are simple. The law, in this respect, honours the human instinct of self-preservation. It is a matter for serious consideration of a judge, that the immunity from punishment for inflicting more grievous injuries in order that he may defend his body against infliction of simpler ones, however slight, is guaranteed by the law of private defence of person, which is codified in the IPC . It would amount to erring to hold, irrespective of any consideration of the surrounding circumstances, amongst which must be included the state of feelings between the assaulted and the

assailant, that apprehension of an injury of a graver kind by the injured is unfounded as the assault that preceded produced very simple injuries. In considering whether one is entitled to exercise the right of private defence of his body, one has to place himself in the position of the accused in the midst of the circumstances in which he or she stood and to form his opinion whether for him or her in those circumstances, it was not fairly wise to apprehend such an injury to the body as would entitle him or her to exercise the right that he or she claims to have done.

Where an accused, charged with murder, asserts that he killed in self-defence, his state of mind, at the time of the killing, becomes material and an important element in determining his justification or his belief in an impending attack by the deceased.[71]

Injuries of the accused which appear to be superficial in nature are required to be explained by the prosecution.[72]

Where the accused person saw his son under detention, from whom Rs 4 were extorted, and with a view to rescuing his son from duress, detention and extortion, he inflicted simple injury, it was held that the right of private defence was established.[73]677

Where the injuries sustained by the accused appellant are not serious, the prosecution is not enjoined to explain those injuries. The appellant accused was not entitled to right of private defence.[74]

On a reading of this section and s 104 together, it would appear that any harm other than death can be voluntarily inflicted in defence of the body in any case which does not fall within the offences enumerated in s 100,[75] and any such harm can be voluntarily inflicted in defence of property against theft, mischief, or house trespass which are not of the description specified in cll 3 and 4 of s 103 .

71 *Khetri Bewa v State* AIR 1952 Ori 37, p 39, 17 Cut LT 220 (DB) .

72 *Sucha Singh v State of Punjab* 2008 Cr LJ 2475, p 2477 (P&H).

73 *Cherungu Boipari v State* (1966) 32 Cut LT 530, p 540 .

74 *Gokul Prasad v State of Madhya Pradesh* 2007 Cr LJ 4634 (MP) (DB) .

75 *Baburam Raut v R* 14 Cr LJ 295 ; *Shivaji Ganu Naik v State of Maharashtra & Anor* (1999) Cr LJ 471 (Bom) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 102.

Commencement and continuance of the right of private defence of the body.--

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

Comments

1. Scope

This section deals with the commencement and continuance of the right of private defence of body, and the corresponding s 105 with the commencement and continuance of the right of private defence of property. The right commences, if it is of the body as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed, and it continues as long as such apprehension of danger to the body continues.[76] If it is of the property, it commences when a reasonable apprehension of danger to the property commences, and its continuance is regulated by the provisions of s 105 .[77] Under s 102 of the IPC, the right of public defence would cease to exist as soon as the apprehension ended and such apprehension must be said to have ended after the first shot was fired through the body of the deceased. Pumping bullets one after another cannot also be said to be acts in excess of the private defence because the right of private defence would cease after the deceased was shot through and through his chest.[78]678

2. Distinction between Sections 102 and 105

With regard to the commencement of the right of private defence, the law draws a distinction between defence of person and defence of property. This section provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed, whereas s 105, which deals with the commencement of the right of defence of property, says that the right of private defence of property commences when a reasonable apprehension of danger to the property commences. So, though, in both cases, the right commences when there is a reasonable apprehension of harm, the circumstances under which there can be said to be a reasonable apprehension differ; a mere threat being sufficient in the case of an attack on the person, whereas, in the case of an attack on property, there must be something more than a mere threat and it must be a threat which is so imminent as to amount to an attempt to commit the offence.[79]

3. Sections 102 and 105 --Commencement, Continuity and Conclusion of Right of Private Defence

Sections 102 and 105, IPC, deal with commencement and continuance of the right of private defence of body and property respectively. The right commences as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues.[80] In *Jai Dev v State of Punjab* ,[81] it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence.

Plea of the accused was that he stabbed the deceased in the exercise of the right of private defence as the deceased had destroyed his properties and was dragging him for throwing him into the fire. The evidence established that the properties of the accused were destroyed after he had stabbed the deceased. As such, there was no imminent threat to the properties of the accused which could entitle the accused to stab the deceased in exercise of right of private defence. Held, the accused was not entitled to exercise the right of private defence.[82]

4. Commencement of Right

The right of private defence commences as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat to commit the offence, although the offence may not have been

committed,[83] but not until there is that reasonable679 apprehension.[84] The right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger which is not self-created. Necessity must be present, real or apparent. As the accused appellants were aggressors, they were held not entitled to the right of self defence. The accused appellants were convicted under ss 302, 148, 149 and 307, IPC .[85] The fact that the deceased was holding a shoe in his hand could not cause reasonable apprehension in the mind of the accused that there will be danger to their lives. The accused dragged the deceased in middle of the road and one of the accused gave a blow on the chest of the deceased with a dagger which caused grievous injuries that resulted in death, it was held that the right of private defence was exceeded by accused persons.[86]

Where a right of private defence is set up the question to be considered is not whether there was an actually continuing danger, but whether there was a reasonable apprehension of the danger.[87] It is not necessary that the person exercising the right of private defence should wait until he himself is attacked.[88] The law does not require a person labouring under a reasonable apprehension of death or grievous hurt to his companion to postpone his right of defending the body of his companion till it is seen that the latter, unaided, fails to eradicate the source of danger.[89]

Where a person is about to be hit by another with a weapon just like a *lathi* or *gandasa,* he can be said to have a reasonable apprehension of danger to his body and the right of private defence of body commences.[90]

5. Threat to Commit the Offence

The threat referred to in this section must be a real threat which might cause a reasonable apprehension of danger, and not mere idle words used by a drunkard.[91] The threat must reasonably give rise to the present and imminent, and not a remote or distant, danger.[92] If the apprehension is real and reasonable even if a mistaken one, there is right of private defence.[93]680

> The previous relationship between the deceased and the accused, and the deceased's aggressive temperament and disposition, shown in his conduct of trespassing into the accused's house in order to assault her, while she was retracing her steps, must go a great way to cause a belief, in the accused of an impending danger to life accompanied with little chance of escape.[1]

Where, after being threatened by the deceased, the accused left the place quite unmolested, and then returned and struck the deceased on the head with a heavy stick, it was held that the threat could not be said to give rise to an apprehension of danger and a right of private defence.[2]

6. Continuance of the Right

The right of private defence of body lasts so long as the reasonable apprehension of danger to the body continues.[3] As soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence. In the instant case, the accused gave a fatal blow after the mob had stopped pelting stones. Held, the accused was not entitled to right of private defence.[4] Where the accused snatched a crowbar from the hands of the aggressor-deceased, and the deceased was accompanied by his wife and daughter who had sticks in their hands, it was held that the right of self-defence did not come to an end on snatching the crowbar and it also extended to causing injuries to two ladies who were part of the aggressor party.[5] The right of private defence of person continues so long as the other party is armed with the same weapon; the right ends immediately after the other party is dispossessed of the weapon.[6] In *Jai Dev v State of Punjab* ,[7] their Lordships of the Supreme Court observed:

> As soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence. If the danger is continuing, the right is there; if the danger or the apprehension about it has ceased to exist, there is no longer the right of private defence.[8]

The right is co-extensive to the reasonable apprehension of the danger to the body continuing. Therefore, if a claim is being made that the accused acted in exercise of power of right of private defence, he must show that there were prevailing circumstances giving rise to reasonable apprehension that either death or grievous hurt would be caused if the right is not exercised.[9]681

The question is not whether there was an actually continuing danger, but whether there was a reasonable apprehension of the same, and in answering this, allowance must be made for the frame of mind in which a person would be, who had just been in danger of his life or serious injury, and was defending himself against such danger. But to deal blows on the body of an assailant already struck senseless to the ground is not an act of self-defence.[10] The assault referred to does not mean the assault, if any, already committed; but it is the assault of which an apprehension can reasonably be caused, and that assault must be one which would amount to an offence. The right is a defensive one. It is granted to a citizen to be exercised for the purpose of preventing an offence affecting his body being committed. It is not a right of retaliation against a completed offence of assault. If, after commission of an assault, there is no further apprehension of the same occasion, exercise of the right of private defence will not arise. But the possibility of infliction of further assault likely to cause grievous bodily injury cannot, as a rule, be ruled out on the mere ground that the injury or the injuries already inflicted are simple.[11] Where a person charged with murder asserts that she killed in self-defence, her state of mind at the time of the killing becomes material, and an important element in determining her justification for her belief in impending attack by the deceased. The reputation of the deceased for a violent, dangerous or turbulent disposition is thus a circumstance which would cause such a belief. The previous relationship between the deceased and the accused and the deceased's aggressive temperament and disposition shown in his conduct of trespassing into the accused's house in order to assault her while she was retracing her steps must go a great way to cause belief in the accused in an impending danger to life accompanied with little chance of escape.[12]

A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.[13]

7. Defence not to be Modulated Step-by-step

A man who is assaulted is not bound to modulate his defence step-by-step, according to the attack, before there is reason to believe that the attack is over. He is entitled to secure his victory as long as the contest is continued. He is not obliged to retreat but may pursue his adversary till he finds himself out of danger; and if in a conflict between them, he happens to kill, such killing is justifiable and every allowance has to be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little farther than to a perfectly calm bystander would seem absolutely necessary.[14]

Where, although the deceased started the attack, he was soon disarmed and he started running away from the place, there could no more be a right of private defence against him.[15]682

8. Test for Determining Continuance of Apprehension

One of the tests for determining, whether reasonable apprehension of danger to the body continued, would be to discover whether the accused was still acting under the instinct of self-preservation or whether other feelings, such as those of anger, malice and reprisal, had intervened.[16] The real point which has to be ascertained, is the state of the knowledge of the accused and what a reasonable man, acting under the circumstances without any malice, would reasonably come to know when he

was fighting to save his life. Where the accused fired at the deceased, resulting in his death, when the latter was running away in fear of his life, it was held that there was no justification for killing the deceased. The right of defence ends with the necessity for it.[17] As soon as a person disables his adversary by infliction of a blow or blows on his head, or on any other part of his body, and throws him (the adversary) on the ground and there is nothing to show that he (the fallen adversary) could stand up or make any attempt to do so, the apprehension of danger to body disappears and the right of private defence of body comes to an end.[18] Where the assailant runs from the scene in order to escape, the reasonable apprehension of danger disappears.[19] It is for the accused pleading the right of private defence to prove the continuance of the right till he had given the last blow.[20]

76 *Nga Chit Tin v King* AIR 1939 Rang 225, p 226 ; *Gopinath Das v Alekh Sahu* (1970) Cr LJ 478, AIR 1970 Ori 50 ; *Cherungu Boipari v State* (1966) 8 Ori JD 4, (1966) 32 Cut LT 530 ; *Jai Dev v State* (1962) 64 PLR 945 ; Re *Narasingh Naik*(1972) Cr LJ 1150, p 1157, (1971) 2 Mys LJ 552; *Deo Narain v State* (1973) Cr LJ 677, p 679, AIR 1973 SC 473 ; *Onkarnath Singh v State of Uttar Pradesh* (1974) Cr LJ 1015, p 1025, AIR 1974 SC 1550 ; *State of Uttar Pradesh v Ram Swarup* AIR 1974 SC 1570, p 1574, (1974) Cr LJ 1035 ; *Mukhtar Singh v State of Punjab* (1975) Cr LJ 132, p 135, (1974) Punj LJ 338 (Cr) .

77 *Nga Chit Tin v King* AIR 1939 Rang 225, p 229 .

78 *Rajkumar Anandilal v State of Maharashtra* (2005) Cr LJ 4665 (Bom) (DB) .

79 *Mohd Rafi v Emperor* AIR 1947 Lah 375, p 376-77 .

80 *Naveen Chandra v State of Uttaranchal* (2007) Cr LJ 874 (SC) ; *Dharam v State of Haryana* (2007) Cr LJ 791 ; *Sekar v State* AIR 2002 SC 3667, (2003) Cr LJ 53 (SC) .

81 *Jai Dev v State of Punjab* AIR 1963 SC 612 ; **see also***Naveen Chandra v State of Uttaranchal* (2007) Cr LJ 874 (SC) ; *Dharam v State of Haryana* (2007) Cr LJ 791 ; *Sekar v State* AIR 2002 SC 3667, 2003 Cr LJ 53 (SC) .

82 *Ranjitham v Basavaraj* 2012 Cr LJ 2135, p 2139 (SC), AIR 2012 SC 1856, (2012) 1 SCC 414, 2012 AIR SCW 2205, 2011 (3) Scale 221 .

83 *Hafiz Ali v Emperor* 6 Cr LJ 271, p 274 ; *Gopinath Das v Alekh Sahu* AIR 1970 Ori 50, (1970) Cr LJ 478 ; *Naya Nahak v State of Orissa* (1982) 4 Ori JD 17 (though the offence may not be committed); *Dara Singh v State* (1964) 66 Punj LJ 281 ; *State v Jang Singh* 1969 Raj LW 301 ; *Deonarain v State of Uttar Pradesh* AIR 1975 SC 473, (1973) Cr LJ 677 ; *Dhanno v State of Madhya Pradesh* (1974) MPLJ 34 (NOC) ; *Onkarnath Singh v State of Uttar Pradesh* (1974) Cr LJ 1015, p 1025, AIR 1974 SC 1550 ; *Ramesh Chandra v State* AIR 1969 Tri 53, p 55, (1969) Cr LJ 1545 ; *Poovan v State* (1994) Mad LJ (Cr) 504 ; *Sikander Singh v State of Bihar* 2010 Cr LJ 3854, AIR 2010 SC 3580, (2010) 7 SCC 477, (2010) 7 SCC 47 .

84 *Queen v Husainuddy* 17 WR 46, p 47 . However, **see also***Jai Dev v State* (1962) 64 Punj LR 954 and *Telanatle Anjaiah v State of Andhra Pradesh* (1994) Cr LJ 2302, (1994) 2 Andh LT 2 (NRC), (1994) 1 Andh LT 525 (Cr) (AP) .

85 *Sikandar Singh v State of Bihar* 2010 Cr LJ 3854, p 3860, 3861 (SC), AIR 2010 SC 3580, 2010 AIR SW 4426, 2010 (6) Scale 632, (2010) 7 SCC 477 .

86 *State of Uttar Pradesh v Zalim & Ors* (1996) Cr LJ 2537 (SC) .

87 *Alingal Kunhinayan v Emperor* 28 ILR Mad 454, p 456 .

88 *State v Koli Hira Bhaga* AIR 1961 Guj 8, p 11, (1961) 1 Cr LJ 57 .

89 *Nga Than v Emperor* AIR 1933 Rang 273, p 275 .

90 *Mukhtiar Singh v State of Punjab* (1975) Cr LJ 132, p 135, (1974) Punj LJ 338 (Cr) ; *R v Moizuddin* 11 WR 41 (Cr) ; *Dara Singh v State* AIR 1957 Punj 306, (1964) 66 Punj LR 281 .

91 *Queen v Gobadur Bhooyan* 13 WR 53, p 56 (Cr) .

92 *Deo Narain v State of Uttar Pradesh* AIR 1973 SC 473, (1973) Cr LJ 677 ; *Onkarnnath Singh v State of Uttar Pradesh* (1974) Cr LJ 1015, p 1025, AIR 1974 SC 1550 ; *State of Uttar Pradesh v Ram Sanehi* (1968) All Cr R 34, (1968) All WR 39 (All) ; *Radha Krishna v State of Uttar Pradesh* AIR 1963 SC 822, (1963) 1 Cr LJ 809 ; *Parichhat v State of Madhya Pradesh* AIR 1972 SC 535, (1972) Cr LJ 322, p 328 .

93 *Raising Mohima v State* AIR 1962 Guj 203, (1962) 1 Cr LJ 717 ; *Onkarnnath Singh v State of Uttar Pradesh* AIR 1974 SC 1550, (1974) Cr LJ 1015, p 1025 .

1 *Khetri Bewa v State* AIR 1952 Ori 37, p 40 .

2 *Nga Chit Tin v King* AIR 1939 Rang 225, p 240 .

3 *Poovan v State* (1994) Mad LJ (Cr) 504 ; *Katta Surendra v State of UP* 2008 Cr LJ 3196, 2008 AIR SCW 4271, (2008) 11 SCC 360 .

4 *Katta Surendra v State of UP* 2008 Cr LJ 3196 (SC), (2008) 9 Scale 359, 2008 AIR SCW 4271 ; *Raj Pal v State of Haryana* (2006) 9 SCC 678 ; *Jai Dev v State of Punjab* 1963 (3) SCR 489, AIR 1963 SC 612 .

5 *SS Gayakwad & Anor v State of Maharashtra* (1997) Cr LJ 3839 (Bom)(DB).

6 *Jomna v State* (1978) Raj LW 234, (1978) Cr LR 161 ; *State of Orissa v Khora Gagaru* (1963) 29 Cut LT 33, p 36 .

7 *Jai Dev v State of Punjab* AIR 1963 SC 612, (1963) 1 Cr LJ 495, p 501 .

8 Re *Narasingh Naik*(1972) Cr LJ 1150, p 1157, (1971) 2 Mys LJ 552; *Kochu Pillai Nair v State of Kerala* (1992) 2 Ker LJ 5 (NOC) (DB) ; *Nabia Bai v State of Madhya Pradesh* AIR 1992 SC 602, (1992) Cr LJ 526, (1992) All Cr Cas 121 ; *State of Gujarat v Mamadrahim Haji* (1992) 1 Guj LR 385, (1992) Cr LR 276 (Guj) .

9 *State of Madhya Pradesh v Nivedanlal* 2010 Cr LJ 2647, p 2650 (Chh) (DB) .

10 *R v Vastazuka* (1904) 1 Cr LJ 593, 14 Ker LR 61 ; *Mukhtiar Singh v State of Punjab* (1975) Cr LJ 132, p 135 (Punj) .

11 *Khetri Bewa v State* AIR 1952 Ori 37, p 39-40 .

12 *Khetri Bewa v State* AIR 1952 Ori 37, p 39, 40 .

13 *Shajahan v State of Kerala* 2007 Cr LJ 2291, p 2296 (SC), 2007 AIR SCW 2123, 2007 (3) Supreme 792, 2007 (5) Scale 618 .

14 *Jai Dev v State* (1962) 64 Punj LR 954 ; *Charungu Boipari v State* (1966) 32 Cut LT 530 ; *Umakaran v State* (1961) 1 Cr LJ 653, p 654 (Guj) .

15 *Ranjit Singh v State* AIR 1957 Punj 306, p 307 . However, **alsosee** Re *Rajendran*(1992) Mad LJ 719 (Cr) (Mad).

16 *Umakaran v State* (1961) 1 Cr LJ 653, p 654 (Guj) .

17 *State of Uttar Pradesh v Ram Swarup* AIR 1974 SC 1570, (1974) Cr LJ 1035, p 1040-41 ; *Nicholas Khadia v State* (1965) 31 Cut LT 1013, p 1018 ; *State of Madhya Pradesh v Saligram* (1971) MPLJ 408, (1971) Jab LJ 292, p 301 ; *Ranjit Singh v State* (1975) Cr LJ 132, p 135, (1974) Punj LJ 338 (Cr) .

18 *Mukhtiar Singh v State of Punjab* 1975 Cr LJ 132, 136, 1974 (Punj) LJ 338 (Cr) .

19 *Gopal v State of Rajasthan,* 2013 Cr LJ 1297, (2013) 2 SCC 188 .

20 *Ibid*.

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 103.

When the right of private defence of property extends to causing death.--

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

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

STATE AMENDMENTS

State of Karnataka:

(1) In clause Thirdly.--

(i) after the words 'mischief by fire', the words 'or any explosive substance' shall be inserted;683

(ii) after the words 'as a human dwelling, or' insert the words 'as a place of worship, or'.

(2) After clause Fourthly, the following clause shall be inserted, namely:--

'*Fifthly.*	--	Mischief by fire or any explosive substance committed on any property used or intended to be used for the purpose of Government or any local authority, statutory body or company owned or controlled by Government or railway or any vehicle used or adapted to be used for the carriage of passengers for hire or reward'.*Chandra Shekhar Tewari v State* [21]

[*Vide*Karnataka Act 8 of 1972, s 2 (wef 7-10-1972)].

State of Maharashtra:

In section 103, add the following at the end, namely:--

'*Fifthly.*	--	Mischief by fire or any explosive substance committed on any property used or intended to be used for the purpose of Government or any local authority, statutory body, company owned or controlled by Government, railway or tramway, or on any vehicle used or adapted to be used, for the carriage of passengers for hire or reward'.

[*Vide* Maharashtra Act 19 of 1971, s 26 (wef 31-12-1971)].

State of Uttar Pradesh:

In section 103, after clause fourthly, add the following clause, namely:

'*Fifthly.*	--	Mischief by fire or any explosive substance committed on--

(a) Any property used or intended to be used for the purpose of Government, or any local authority or other corporation owned or controlled by the Government, or
(b) any railway as defined in clause (4) of section 3 of the Indian Railways Act, 1890 or railways stores as defined in the Railways Stores (Unlawful Possession) Act, 1955, or
(c) any transport vehicle as defined in [22]clause (33) of section 2 of the Motor Vehicles Act, 1939.'

[*Vide* UP Act 29 of 1970, s 2 (wef 17-7-1970)]

Comments

1. Scope

The right of a person to private defence of property would extend to the causing of death only against certain crimes which are enumerated in s 103, IPC .[23] This section684 is analogous to s 100 with the difference that s 100 deals with the defence of body and this section with that of property. Under both these sections, killing of a person in the exercise of the right of private defence is justifiable under certain circumstance. This section has to be read with s 99 . The section does not apply to trespass on land.[24]Section 103 states that the right of private defence may even extend to causing death, but this right of private defence can be exercised only as against certain criminal acts which are enumerated in the section. The right of private defence of property would extend to causing death only in the case of robbery, house-breaking by night; mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as place for the custody of property. It is further stated that in the case of theft, mischief or house-trespass these offences must have been committed under such circumstances as may reasonably cause apprehension that death or grievous hurt would be a consequence. Though private defence is available in respect of criminal trespass or mischief as against the property owned by a person himself or of any other person, but criminal trespass is not enumerated as one of the offences under s 103, IPC . Therefore, the right of private defence of property will not extend to the causing of death of the person who committed such acts, if the act of trespass is in respect of an open land. Only a house-trespass committed under such circumstances as may reasonably cause apprehension that death or grievous hurt would be the consequence, is enumerated as one of the offences under s 103 .[25]

Section 97, IPC declares that every person has a right to defend the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit any of these offences. This section justifies homicide in case of: (a) robbery; (b) house-breaking by night; (c) arson; and (d) theft, mischief or house-trespass causing apprehension of death or grievous hurt. This right is, however, subject to the two limitations contained in s 99, namely, that there is no right of private defence in case in which there is time to have recourse to the protection of the public authorities, and that the right of private defence, in no case, extends to the inflicting of more harm than is necessary for the purpose of defence.[26]

But a mere act of ploughing the land does not give right to a person in possession of the land to voluntarily cause the death of the former.[27] The right of self-defence is not dependent on the actual criminality of the person resisted; it depends solely on the wrongful or apparently wrongful character of the act attempted.[28]

A person in possession of a particular property is protected by this section, under the restriction, mentioned in s 99,[29] if he causes death in safeguarding his property when there is reason to apprehend that the person, whose death has been caused, was about to commit one of the offences mentioned therein. Persons in possession of land are not guilty for causing injuries or death if they merely try to maintain their685 possession.[30] The appellants accused before the Court below did not take plea that they had been in possession of the land. It was necessary for them to allege and prove that they were in possession of the land and the deceased trespassed thereinto. The plea of right of private defence was not available.[31]

Where the accused party assaulted the complainant with lathi and knife causing the death of the deceased, and the accused persons were in settled possession of the land where the occurrence took place, right of private defence accrued to the accused party as soon as the complainant party trespassed on the land. The injuries sustained by the accused in the same incident were not explained by the prosecution. Held, accused persons acted in exercise of right of private defence of person and property, thus, they were acquitted of the charge of murder under s 302, IPC .[32] Where the accused persons were in settled possession of the land, the deceased and the complainant had no right to enter into the field and prevent the accused from reaping the crops sown by them. The complainant party used force against the labourers employed by the accused. The accused appellants inflicted a single blow on the head of the deceased causing death. Held, the accused persons acted in exercise of right of private defence, and were acquitted of the charge of murder under s 302, IPC .[33]

In the instant case, the accused respondent alleged that deceased came to the place where he was working and she started abusing him. Thereafter, the deceased picked up tangia against him and said that she would kill him. On hearing this, he also picked up a tangia and gave a blow of it, because of which the deceased fell down. The deceased had received 4-5 injuries, while the respondent accused did not receive any injury. Only one tangia was recovered from the spot. Only on making a gesture of picking a tangia by the deceased, who was aged about 50 years, the respondent had no right either to kill the deceased or to cause grievous hurt to her. The plea of right of private defence taken by the accused respondent was not accepted.[34]

2. Right is Subject to Restriction Imposed by Sections 99, 103 and 105

Commentary under same heading in s 97, *ante*, may be referred to.

3. Homicide in Defence of Property

The right of private defence of property to the extent of causing death arises not only when the house is broken into, but when an attempt is made to break into the house. It is not the intention of the law that the right to defend property is available only when the thief has already effected entry, for property may be protected by attacking the thief inside the house as much, as by preventing his entry into it.686

When a man finds another close to a hole which has been with cut burglarious intent in his house, and further, when that man is attacked by the other party, a reasonable apprehension of danger to the property of the accused so attacked exists, such as to justify that person exercising his right of private defence of his property.[35]

A trespasser is entitled to defend his possession even against a rightful owner if the latter tries to evict him by use of force.[36]

Where *A* is in actual peaceable possession of land, *B's*attempt to recover possession of it by force is an illegal act, which *A* has a right to resist. If *B* uses force in carrying out his attempt, *A* has a right to oppose force to force, and to inflict upon *B* such injury as is necessary to compel him to desist.[37]

4. Person Employed to Guard the Property

A person, employed to guard the property of his employer, is protected under this section if he causes death in safeguarding his employer's property when there is reason to apprehend that the person, whose death has been caused, was about to commit one of the offences, mentioned in this section, or to attempt to commit one of those offences.[38]

A person employed to guard the property of his employer, is protected by these provisions of the law, if he causes death in certain circumstances in safeguarding his employer's property as stated above. But the fact that the property to be guarded is public property does not, in any way, extend the protection given to a guard. Therefore, a police constable on guard duty at a magazine or other public building is not entitled to fire at a person who does not answer his challenge, when he has no reason to apprehend that the person was about to commit any offence against the magazine or its contents or against himself.[39] Where the accused constable killed the head constable and the incident took place while the accused was doing patrolling duty on a bridge; the accused claimed to have fired on seeing someone with fire near the valve tower. The valve tower was neither used for human dwelling nor for custody of property, no plea was taken by the accused that he apprehended death or grievous hurt, the plea of private defence of the accused extending to causing of death was not tenable.[40]

5. Robbery--Snatching Seized Cattle Amounts to Robbery

Where *A* seizes cattle trespassing on his land and *B*, the owner of the cattle, attempts to forcibly remove them from *A's* possession, it amounts technically to robbery and *A* is entitled under this section to prevent this. But he is not entitled to inflict on *B* more harm than is necessary to prevent the rescue of the cattle. If he could have no reasonable apprehension of death or grievous hurt, he would not be justified in causing the death of *B*.[41]687

Where the deceased were cutting the crops under the protection of the police and none of the deceased was in possession of any deadly weapons, it was held that the act of the deceased in cutting the crops did not amount to robbery and as such the right of private defence was not available.[42]

6. Every Robbery does not give Rise to a Right to Cause Death

In the case of robbery, the causing of death may be justified as an act done in reasonable and necessary self-defence under certain circumstances and conditions: but the measure of self-defence must always be relevant and proportionate to the quantum of force used and which it is necessary to repel. But the IPC does not provide that in every case where a robbery is committed, the person attacked is entitled to cause death. It means no more than this, the robbery by violence may be resisted by violence sufficient to overcome the force employed by the attacker, and that if in the exercise of that right death is caused, it may be justified if it is reasonably and properly asserted in defence of property.[43] The extent of the right of private defence depends upon the circumstances of each case. Each case must be decided on its own particular facts.[44] Theft becomes robbery if, in carrying away the property, the thief voluntarily causes hurt, and if grievous hurt is caused to the accused when he tries to recover the property, it cannot be disputed that he apprehended grievous hurt. In such a case, the accused would have the right of private defence extending to the causing of death.[45]

7. House-breaking

As already discussed above, the right of private defence of property to the extent of causing death arises not only when the house is broken into, but also when an attempt is made to break into the house. Where a person, under a mistake of fact, kills a person who attempts to enter the accused's house, thinking him to be a burglar, though he is not, he is not guilty of any offence.[46] Where the intruder committed house-breaking by night for committing the offence of adultery, it was held that the right of self-defence extended to causing of the intruder's death.[47]

8. Theft

When a person sees another trespassing upon his property and committing theft, he has a right of private defence of property under this section or s 104, IPC . The right under this section extends to voluntarily causing death, provided there are circumstances reasonably causing apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised.[48] If there are not such circumstances, the right of private defence of property, if any, would not come688 under this section,[49] but under s 104 which does not extend to the voluntary causing of death, but subject to the restrictions, mentioned under s 99, IPC to the voluntarily causing to the wrongdoer, of any harm other than death. One of the restrictions contained in s 99 is that the right of private defence should, in no case, extend to the inflicting of more harm than is necessary to inflict for the purpose of defence. If, in such a case, death is caused, the right of private defence is exceeded.[50]

In the instant case, the deceased was committing theft of jack fruits from the tree owned by the accused, and when the accused protested, the deceased started abusing the accused, got down from the tree and assaulted him with an axe. In self-defence, the accused assaulted the deceased causing death. Held, the accused acted in exercise of right of private defence of body as well as of property. He was acquitted of the charge of murder.[51]

Appellant accused seeing the deceased plucking Mahua from his tree, protested against the same. There was exchange of hot words between them, in course of which, the appellant accused by means of an axe assaulted the deceased, who succumbed to the injuries. Held, in the due exercise of private defence of person and property, and as a result of the exchange of hot words, appellant accused got excited and assaulted the deceased. Therefore, the act committed by the accused did not attract the provisions of s 302, IPC, but it fell under the purview of s 304, Pt I, IPC .[52]

9. Mischief

Clause (4) of this section does not justify the causing of death in all cases of theft, mischief or house-trespass. It is only when the act which amounts to theft, mischief or house-trespass is such as per se causes a reasonable apprehension that death or grievous hurt will be the result, that the causing of death in order to prevent the commission of such act, is justified.[53] It does not apply when the apprehension of death arises by reason of the intervention of the persons exercising the right of private defence.[54] A person, in rightful possession of the property, is entitled to defend his possession of the same, under this section, even to the extent of causing death of the member of the aggressive party, subject to the restrictions mentioned in s 99, in order to prevent mischief to his land and the crop thereon within the meaning of s 425 .[55]

In case of mischief to property, the accused has the first degree of right of private defence which extends to committing murder of wrongdoers but this right available to the accused must be held to have exceeded when there was no fear that but for exercise of this right, the death as grievous hurt might ensue.[56]689

In a case, the deceased was wrongfully diverting water. The accused intercepted and there was an exchange of hot words between the two. The accused, who had a spade in his hand, hit the deceased on his head as a result of which the latter died. It was held that the act of the deceased amounted to mischief and the accused, therefore, had the right of private defence, but he exceeded the right.[57]

10. House-trespass

It is not every sort of house-trespass which under cl (4) of this section gives the extended right. The right is conferred in the case of house-trespass only when it is committed under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if the right of private defence is not exercised.[58]

Where the accused inflicted injuries on *A*, who committed house-trespass, and shot at *B*, who came on the spot on hearing alarms, it was held that the act of *B* did not amount to house-trespass and as such, the accused had no right of private defence against *B*.[59] Though private defence is available in respect of criminal trespass or mischief as against the property owned by himself or of any other person, but criminal trespass is not enumerated as one of the offences under s 103, IPC . Therefore, the right of private defence of property will not extend to causing of death of the person who committed such acts, if the act of trespass is in respect of an open land. Only a house-trespass committed under such circumstances as may reasonably cause apprehension that death or grievous hurt would be the consequence is enumerated as one of the offences under s 103 .[60]

Where the accused establish or are able to show that there was apprehension in their mind that there was a threat of trespass in their land, they can exercise the right of private defence. If the accused persons are not aggressors, they have the right of private defence.[61]

A plea of self-defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused-persons recorded under s 313, CrPC or by adducing defence evidence; and even if the plea is not introduced in any one of these three modes, it can still be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case.[62]

11. Defence of Land Against Trespasser

Private defence can be used to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention. So far as defence of land against trespasser is concerned, a person is entitled to use necessary and moderate force both for preventing the trespass or to eject the trespasser. For the said purposes, the use of force must be the minimum necessary or reasonably believed to be690 necessary. A reasonable defence would mean a proportionate defence. Ordinarily, a trespasser would be first asked to leave and if the trespasser fights back, a reasonable force can be used.[63]

Though private defence is available in respect of criminal trespass or mischief as against the property owned by himself or of any other person, but criminal trespass is not enumerated as one of the offences under s 103, IPC . Therefore, the right of private defence of property will not extend to the causing of death of the person who committed such acts, if the act of trespass is in respect of an open land. Only house-trespass committed under such circumstances as may reasonably cause apprehension that death or grievous hurt would be the consequence is enumerated as one of the offences under s 103 .[64]

It is true that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in due course of law he is entitled to defend his possession even against the rightful owner. But stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be a settled possession extending over a sufficiently long period and acquiesced in by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than necessary. Such entry will be viewed only as a resistance to an intrusion upon possession which has never been lost. The persons in possession by a stray act of trespass, a possession which has not matured into settled possession, constitute an unlawful assembly, giving right to the true owner, though not in actual possession at the time to remove the obstruction even by using necessary force.[65]

12. Exceeding the Right of Private Defence of Property

Commentary in s 100, *ante*, may be referred to.

Where death was caused under grave and sudden provocation while exercising the right of private defence of property which had been exceeded, the assailants are guilty under s 304, Pt I of the IPC and not under s 302, IPC .[66]

Where evidence on record leads to an inference that cattle were seized from a grazing field which amounted to theft, the attack by the accused in execution of his right of private defence of property by way of an axe-blow given to the deceased, though without intention of killing, but it was held to be a clear case of exceeding right of private defence and the accused was convicted for culpable homicide not amounting to murder and not for murder.[67] To put it simply, if, in a case of homicide a case for private defence is made, the accused is entitled to be acquitted and if not he691 will be convicted of murder. But in case of use of excessive force, he would be convicted under s 304, IPC .[68]

Where the deceased fell down after receiving injuries from the assault made by the accused appellants, but the accused appellants continued attacking the deceased causing death, held that the accused appellants exceeded the right of private defence of property as well as of person.[69]

Crucial Factor

The law is settled that in spite of the plea of right of private defence of property having not been taken by the accused in their statements under s 313, CrPC the said defence is available if it is borne out and sustainable from the testimony adduced on record. The crucial factor is not what the accused pleaded, but whether the accused could show the existence of right of private defence of person or property from the record itself.[70]

Force used in Defence Cannot be Weighed in Golden Scale

While it is true that in exercise of the right of private defence only such force may be used as may be necessary, but it is equally well settled that at a time when a person is faced with imminent peril of life and limb of himself or other, he is not expected to weigh in golden scales the precise force needed to repeal the danger. Even if he, in the heat of moment, carries his defence a little further than what would be necessary when calculated with precision and exactitude by a clam and unruffled mind, the law makes due allowance for it.[71]

21 (1993) Cr LJ 2159, p 2164 (All).

22 Now see Cl 47 of s 2 of the Motor Vehicles Act, 1988.

23 *Ram Bilas Yadav v State of Bihar* AIR 2002 SC 530, (2002) Cr LJ 978 (SC) .

24 *Ram Bilas Yadav v State of Bihar* AIR 2002 SC 530, (2002) Cr LJ 978 (SC) .

25 *Jassa Singh & Ors v State of Haryana* AIR 2002 SC 520 .

26 *Dina Nath Balik Ram v Emperor* AIR 1948 Lah 117, p 119 ; *State v Sidhnath Rai* (1959) Cr LJ 413, AIR 1959 All 233 ; *Emperor v Jamuniya Singh* AIR 1945 Pat 150 ; *Khetu Mahanta v State* AIR 1965 Ori 99, (1965) 1 Cr LJ 744 ; *Ram Dahin v State of Bihar* (1976) 19 Jab LJ 76 (SN)(SC).

27 (1972) 1 ILR Del 372.

28 *Raising Mohmia v State* AIR 1962 Guj 203, (1962) 1 Cr LJ 717 .

29 *Karnail Singh v State of Punjab* 1994 SCC (Cr) 273 .

30 *Union Territory v Tarini Das* (1968) Cr LJ 1676, p 1678-79 ; *State of Rajasthan v Naltej Singh* (1968) Raj LW 133, (1968) ILR 18 Raj 935 ; *Braham Singh v State of Uttar Pradesh* (1970) UJ (SC) 559, (1970) SCC 367 (Cr) ; *State v Ali Hafiz Mia* AIR 1955 Mani 21, (1955) Cr LJ 705 ; *Thommen v State of Kerala* AIR 1958 Ker 74, (1958) Cr LJ 509 ; *State v Kartar Singh* AIR 1958 All 90, (1958) Cr LJ 129 ; *Diljan Choudhary v State of Bihar* AIR 1958 Pat 492, (1958) Cr LJ 1215 ; *Chandrakant Shamrao Patil v State of Maharashtra* (1994) Bom Cr C 91 (Bom) ; *State of Rajasthan v Manoj Kumar* (2014) 5 SCC 744, 2014 (138) AIC 261 (SC), 2014 (4) Scale 724, 2014 (3) Supreme 346, 2014 (4) SLT 308, 2014 Cr LJ 2420, 2014 (2) SCC (Cr) 702, 2014 (2) Crimes

187 (SC) .

31 *Ashok Kumar v State of Tamil Nadu* 2006 Cr LJ 2931, p 2934, AIR 2006 SC 2419 .

32 *Ramsingh v State of Madhya Pradesh* 2009 Cr LJ (NOC) 238 (MP) .

33 *Rameshchandra Ramratan Patidar v State of Madhya Pradesh* 2008 Cr LJ (NOC) 371 (MP) .

34 *State of Madhya Pradesh v Nivedanlal* 2010 Cr LJ 2647, p 2651 (Chh) (DB) .

35 *Queen v Pelko Nushyo* 2 WR 43, p 44 .

36 *Maguni Charan Pradhan v State of Orissa* (1991) 71 Cut LT 710 .

37 *Queen v Sachee alias Sachee Boler* 7 WR (Cr) 76 ; *Queen v Gooroo Churun Chung* 14 WR (Cr) 69(2).

38 *Emperor v Jamunia Singh* AIR 1945 Pat 150, p 152 ; *State of Orissa v Sabu Dalbehera* 1965 Cut LT 265 .

39 *Emperor v Jamuna Singh* AIR 1945 Pat 150, p 152 .

40 *Bhupendrasinh A Chudasama v State of Gujrat* (1998) Cr LJ 57 (SC) .

41 *State v Ram Khelwan* AIR 1953 All 555, p 556 .

42 *Gurdatta Mal v State of Uttar Pradesh* AIR 1965 SC 257, 258, (1965) 1 Cr LJ 242 .

43 *Ram Prasad Mahton v Emperor* AIR 1919 Pat 534, p 537, 20 Cr LJ 375 .

44 *Ram Khelawan Singh v Emperor* 36 ILR Cal 827, 16 Cr LJ 245 .

45 *Ajab Narain Singh v Emperor* AIR 1939 Pat 575, p 576, 40 Cr LJ 611 (DB) .

46 *Ali Mea v King-Emperor* AIR 1926 Cal 1012, p 1013, 27 Cr LJ 128 ; *Bachchulal & Ors v Emperor* AIR 1935 Oudh 442, 36 Cr LJ 1209 ; *Ram Ratan Mahton v King* AIR 1949 Pat 61 .

47 *Gurdev Singh v State of Punjab* (1974) Cr LR 154 .

48 *Ramratan Mahton v King* AIR 1949 Pat 61, 26 ILR Pat 550 ; *Mithu Pandey v State of Bihar* AIR 1966 Pat 464, (1967) Cr LJ 102 ; *State of Orissa v Sabu Dalbehera* (1965) Cut LT 265 ; *Sattar Khan v State* (1969) Cut LT 802 ; *Banamali Sahu v State* (1969) Cut LT 126 ; *State of Orissa v Raghuram Sahu* (1979) Cr LJ 502 (Ori) ; *Parmeshwar Phukan v State of Assam* (1971) Cr LJ 1595, p 1596, (1971) Assam LR 293 ; *Parmanand Singh v State* (1968) Cr LJ 958, AIR 1968 Pat 258 ; *Hira Rai v State of Bihar* (1972) Cr LJ 225, AIR 1972 SC 244 ; *Jagat Ram v State of MP* 2014 (137) AIC 749 (Chh) .

49 *State of Orissa v Raghuram Sahu* (1979) Cr LJ 502, p 506 (Ori) (DB), (1979) 47 Cut LT 39, p 46 ; *Mohinder Pal Jolly v State of Punjab* (1979) Cr LJ 584, p 588, AIR 1979 SC 577 ; *Ghansham Das v State (Delhi Admn)* AIR 1979 SC 44, p 49 .

50 *Ladha Gova v State* AIR 1951 Sau 1, p 2 ; *Ram Ratan Mahton v King* AIR 1949 Pat 61, 26 ILR Pat 550 ; *Mithu Pandey v State of Bihar* AIR 1965 Pat 464, (1967) Cr LJ 102 ; *SK Shamsul v State of Bihar* (1969) Pat LJR 496 .

51 *Jaya Ram v State of MP* 2014 (137) AIC 749 (Chh) .

52 *Bipin Bihari Nag v State of Orissa* 2009 Cr LJ 3610, p 3613 (Ori) (DB) .

53 *Mathai v State of Kerala* (1962) Ker LT 868, p 872 ; *State of Orissa v Raghuram* (1979) Cr LJ 502 (Ori) .

54 *Ramras Mahton v King* AIR 1949 Pat 61, p 62 ; *Ajab Narain Singh v Emperor* AIR 1939 Pat 575 ; *Banamali Shau v State* (1969) Cut LT 126 .

55 *Union Territory of Tripura v Tarani Das* (1968) Cr LJ 1676 .

56 *Mahabir Chaudhary v State of Bihar* (1996) Cr LJ 2860 (SC) .

57 *Public Prosecutor v Semalai Pannadi* (1960) 1 Mad LJ 341 (accused was convicted under s 304, Pt II, IPC ; *Het Ram v State* (1970) Cr LJ 352, p 359-60, AIR 1970 Punj 85 ; Re *Rajesa Husena*(1968) Cr LJ 194, p 198, AIR 1968 Mys 33 .

58 *State v Badri* AIR 1957 All 714, p 716 ; *Raising Mohmia v State* AIR 1962 Guj 203, (1962) 1 Cr LJ 717 ; *Banamali Sahu v State* (1969) Cut LT 126 ; *Mathai v State of Kerala* (1962) KLT 868 .

59 *Venkatachalam Iyer v State of Kerala* (1969) 1 Mys LJ 4 (Journal Section) .

60 *Jassa Singh v State of Haryana* AIR 2002 SC 520 .

61 *Jalaram v State of Rajasthan* 2006 Cr LJ 528 (SC), AIR 2006 SC 618 .

62 *Ram Kishan v State of Rajasthan* 2007 Cr LJ 2865, p 2873 (Raj) .

63 *Jalaram v State of Rajasthan* (2006) Cr LJ 528 (SC) ; *Bishna alias Bhiswadeb Mahato v State of West Bengal* (2005) JT 9 SC 290, (2005) 9 Scale 204 .

64 *Jassa Singh v State of Haryana* (2002) Cr LJ 563 (SC), AIR 2002 SC 520 .

65 *Subramani v State of Tamil Nadu* (2002) Cr LJ 4102 (SC), AIR 2002 SC 2980 ; *Munshi Ram and others v Delhi Administration* AIR 1968 SC 702, (1968) Cr LJ 806 (SC) ; *Puran Singh and others v The State of Punjab* (1975) 4 SCC 518, AIR 1975 SC 1674, (1975) Cr LJ 1479 (SC) .

66 *Krishna Narain v State of Uttar Pradesh* (1992) Cr LJ 196 (All) (DB) .

67 *Govind Singh v State of Rajasthan* (1997) Cr LJ 1562 (Raj)(DB).

68 *Jalaram v State of Rajasthan* (2006) Cr LJ 528 (SC) ; *Bishna alias Bhiswadeb Mahato v State of West Bengal* (2005) 9 SC 290, (2005) 9 Scale 204 .

69 *Ananta Deb Singha Mahapatra v State of West Bengal* 2007 Cr LJ 1705 (Cal) (DB) .

70 *State of Uttar Pradesh v Dhakan* (2005) Cr LJ 4206 (SC) .

71 *Mohd Remzani v State of Delhi* (1980) Supp SCC 215, AIR 1980 SC 1341, (1980) Cr LJ 1010 (SC) ; *Subramani v State of Tamil Nadu* (2002) Cr LJ 4102 (SC), AIR 2002 SC 2980 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 104.

When such right extends to causing any harm other than death.--

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

Comments

1. Scope

This section supplements the provisions of s 103 and is analogous to s 101, IPC .

If the offence, the commission, or the attempt to commit which occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, but not of any of the descriptions enumerated in s 103, that right will not extend to the692 voluntary causing of death, but does extend, subject to restrictions mentioned in s 99, IPC to the voluntary causing to the wrongdoer of any harm other than death.[72]Where a person sees another trespassing upon his property and in the act of committing theft, he has a right of private defence under s 103 or 104, IPC . This right, under s 103, extends to

voluntarily causing death provided there are such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised. But where there is absolutely no indication that the trespasser showed any fight or semblance of a fight, the right, if any, would come under this section, which does not extend to the voluntarily causing of death but extends, subject to the restrictions mentioned under s 99, to the voluntarily causing to the wrong-doer any harm other than death. One of the restrictions contained in s 99 is that the right of private defence should, in no case, extend to the inflicting of more harm than is necessary to inflict for the purpose of defence. But, if death is caused, the right is exceeded and the court will have, in that case, to see whether the case comes under Exception 2 to s 300, IPC . Unless the case can be brought under the provisions of this exception he would be guilty of murder, provided of course, that the usual conditions required by s 300 are complied with.[73]

This section applies in cases where an injury, but not death, is inflicted, on the offender in the course of his committing the offence of theft, mischief or criminal trespass, by the persons exercising the right of private defence.[74] Under this section, a person can, in defending his property, cause any harm short of death. He will not be justified in causing death.[75] But if the right of private defence under this section is exceeded, a light punishment may meet the ends of justice.[76]

The act of cutting another's crop clearly amounts to an offence of theft and the owner thereof has a right to resist and to inflict such injuries on the thieves as are necessary to compel them to desist. The owner has, in such a case, the right of private defence of property, if he has not much time to redress his grievances through the legal process.[77]

When the complainant begs the accused to be excused for having passed through their field and to allow him to go out of it, the criminal trespass, if any, ceases to exist and the accused would not be justified in severely beating him. The accused cannot, therefore, get the benefit of this section.[78]693

Where the accused persons were found to have constituted an unlawful assembly, it was held that the right of self-defence could not be acceded to under this section even though the complainants were doing something in contravention of an order of the court.[79]

In another case, the complainant *A* employed labourers for the repair of the fence of his orchard. The accused *B* objected to it and the work was stopped. The complainant came on the spot and asked the labourers to start the work. There was an exchange of words between the complainant and the accused and the accused was hurt in the scuffle. The evidence showed that the complainant was going beyond his line and hence trouble arose. It was held that the accused acted in exercise of his right of private defence under this section.[80]

2. Effect of Concurrent Finding of Trial and Appellate Court as to Title and Provision

Where there were concurrent findings of the trial court and High Court that the deceased were the owners and in possession of the land in question and the accused persons had no right, title, interest or possession therein, the Apex Court observed that it must be held that the accused persons were not entitled to any right of private defence of property.[81]

3. Right Extends to Causing any Harm other than Death

Under the section, a person can, in defending his property, cause any harm short of death. He will not be justified in causing death.[82] But even if the right of private defence under this section is exceeded, a light punishment may meet the ends of justice.[83]

Harm in this section means physical injury.[84] The section justifies any harm short of death, but it does not justify the use of abusive language. The right of private defence of property is no defence to a charge under s 504 of the IPC .[85]

For the meaning of 'harm', s 95 of the IPC may be referred to. Where an incident arose out of a land dispute and its occurrence took place on land in possession of the accused persons, the deceased and his sons came to the land in possession of the accused group to irrigate the land which amounted only to criminal trespass within the meaning of s 441, IPC, right of the accused persons does not extend to causing death but extended only to causing of harm other than death.[86] But where the accused constable while on patrol duty on a bridge killed the head constable, the accused did not disclose to any prosecution witnesses that he was unable to identify his immediate superior and thought him to be a miscreant and fired to protect the valve694 tower. The plea of private defence was taken by the accused only in his statement under s 313, CrPC, it was held that the right of private defence was far from the contemplation of the accused when he opened fire at the deceased and the accused was held not entitled to restricted right of private defence under s 104 .[87] Where the accused inflicted knife-blows leading to instantaneous death of the deceased, in view of the provisions contained in ss 101 and 104 of the IPC and the circumstances of the case, the accused had the right of private defence of property and person to cause to the deceased harm short of death and since he caused his death, he only exceeded the right of private defence of property and person and was liable under s 304(2), IPC .[88] Where *A* trespassed on the lands of *B*, whose servants seized and confined *A* till the following day, when *B* gave information to the police, it was held that the conduct of *B* and his servants in confining *A* could not be supported on the ground that they were exercising the right of private defence of property.[89]

Where a co-sharer entitled to joint possession of land had obtained unlawful possession over it, but remained in such possession for only a couple of hours it was held that his possession was no better than that of a mere trespasser and could not give him a right of private defence, but that the person already in possession had the right of private defence under this section and could eject him, inflicting such harm short of death as might be necessary.[90]

In *Ismail v Crown* ,[91] the accused found that a burglar was in his house in the middle of the night in a dark room. He had every reason to suppose that the burglar had committed theft or was going to do so and that if he met him, he would presumably strike him. He could not know in the dark whether or not the burglar was armed. He struck him on the head with a stick and the burglar died. It was held that the accused did not exceed the right of private defence.

Where a police constable, at midnight, entered upon the premises of a person who was regarded by the police as a suspicious character, and knocked at his door to ascertain if he was there, whereupon he came out and abused and pushed the constable and lifted a stick as if he were about to hit him with it, it was held that the constable was not engaged in the execution of his duty as a public servant and was technically guilty of house-trespass, that the person on whose premises the constable was, was justified under this section, inflicting on him the slight harm he did.[92]

72 *Gaman v Crown* 48 Cr LJ 590, p 595 ; *Kalu Sahu v State* (1993) Cut LT 245 ; *Francis Alfred v State of Rajasthan* (1980) Raj Cr C 81, p 86 ; *Ramanand Singh v State of Bihar* AIR 1968 Pat 256 .

73 *Ladha Gova v State* AIR 1951 Sau 1, p 2 ; *Bhagirathi Burhia v State* AIR 1965 Ori 99, (1965) 1 Cr LJ 744 ; *B Pradhan v State of Orissa* (1976) Cr LJ 1347, p 1349-50, (1976) 42 Cut LT 80 .

74 *SK Shamshul v State of Bihar* (1969) Pat LJ 496 ; *Kamal Singh v State of Rajasthan* (1977) WLN 258, 265, (1977) Cr LJ 1729 ; *Inder Singh v Emperor* AIR 1938 Lah 60 .

75 *Gullu Din Sharaf Din v Emperor* AIR 1940 Pesh 6 ; *Mahant Narain Das v Emperor* AIR 1922 Lah 1, p 20-21 ; *Ramras Mahton v King* AIR 1949 Pat 61, p 62 ; *Queen v Millo Singh* 3 WR 41, p 42 ; *Bhagirathi Burhia v State* AIR 1965 Ori 99, (1965) 1 Cr LJ 744 ; *Nanthan v State of Madras* (1973) Cr LJ 608, AIR 1973 SC 665 ; *Ugrah Kahar v State of Bihar* 1972 Pat LJR 158, p 162 ; *B Pradhan v State of Orissa* (1976) Cr LJ 1347, p 1349, (1976) 42 Cut LT 80 .

76 *Hasham v Emperor* AIR 1936 Lah 28, p 30 ; *Ismail v Crown* AIR 1926 Lah 28, p 29 ; *Emperor v Koli Mopa Bhaga* 1 Cr LJ 285 ; *Bag v Emperor* 29 PR 1902 (Cr) ; *Queen v Gobardhan Pari* 14 WR 74(2); *Queen v Mokee* 12 WR 15 ; *Bachhu Lal v Emperor* AIR 1935 Oudh 442 ; *Nanthan v State of Madras* (1973) Cr LJ 608, AIR 1973 SC 665 .

77 *State of Orissa v Raghuram Sahu* (1979) 47 Cut LT 39, p 46-47 (DB) .

78 *Kunwar Sen v Vir Sin* (1969) Cr LJ 76 (All) .

79 *Chand Singh v State* (1965) 1 Cr LJ 209, AIR 1965 Punj 90 .

80 *Bhagwan v Balwantrao* (1974) Mah LJ 24 (NOC) ; *Doraisamy Pillai v Emperor* 27 ILR Mad 52 ; *Nemchand v State of Madhya Pradesh* (1962) MPLJ (Notes) 318, (1963) 2 Cr LJ 95 .

81 *Ansaram Rambhau Yelve & Ors v State of Maharashtra* (1996) Cr LJ 1718 (SC) .

82 *Gulla Din Sharaf Din v Emperor* AIR 1940 Pesh 6 ; *Mahant Narain Das v Emperor* AIR 1922 Lah 1, p 20-21 ; *Ramras Mahton v King* AIR 1949 Pat 61, 62; *Queen v Millo Singh* 3 WR 41, p 42 .

83 *Hasham v Emperor* AIR 1936 Lah 28, p 30 ; *Emperor v Koli Mapa Bhaga* 1 Cr LJ 285 ; *Bag v Emperor* 29 PR 1902 Cr ; *Queen v Gobardhan Pari* 14 WR 74(2); *Queen v Mokee* 12 WR 15 ; *Bachchu Lal v Emperor* AIR 1935 Oudh 442 .

84 *Durga Charan v State of Orissa* AIR 1966 SC 1773, p 1775, (1966) Cr LJ 1489 .

85 *Rakhal Das Roy v Kailash Banu* 11 Cr LJ 213 (1).

86 *Jai Bhagwan v State of Haryana* (1999) Cr LJ 1634 (SC) .

87 *Bhupendrasinh A Chudasama v State of Gujarat* (1998) Cr LJ 57 (SC) .

88 *Shivaji v Ganu Naik v State of Maharashtra & Anor* (1999) Cr LJ 471 (Bom) (DB) .

89 *Shurufooddin v Kassinath* 13 WR 64, p 66 .

90 *Indar Singh v Emperor* AIR 1938 Lah 60 .

91 *Ismail v Crown* AIR 1926 Lah 28, p 29 .

92 *Dorasamy Pillai v Emperor* 27 ILR Mad 52 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 105.

Commencement and continuance of the right of private defence of property.--

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

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

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or695 wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

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

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

Comments

1. Scope

This section prescribes when the right of private defence of property commences and how long it would continue against the apprehension of commission of different offences. It is analogous to s 102, in which similar provision is made for the right of private defence of the body. The first clause of this section lays down the rule as to the commencement of the right and the remaining clauses, the duration of the right in respect of the various offences against which it is exercised. The right is co-extensive with the reasonable apprehension of the danger to the body continuing. Therefore, if a claim is being made that the accused acted in exercise of power of right of private defence, he must show that there were prevailing circumstances giving rise to reasonable apprehension that either the death or grievous hurt would be caused if the right is not exercised.[93]

The right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger which is not self-created. Necessity must be present, real or apparent. As the accused appellant were aggressors, they were held not entitled to the right of self defence. The accused appellants were convicted under ss 302, 148, 149 and 307, IPC .[94]

2. Right is subject to Restrictions Imposed by Sections 99, 103 and 105

Commentary under the same heading in s 97, *ante*, may be referred to.696

3. Clause 1--Commencement of the Right--Right arises on Apprehension of Danger

The right of private defence of property arises as soon as there is a reasonable apprehension of danger to the property. The person entitled to exercise the right can act before actual harm is done. It is not a right of retaliation and hence he need not wait until the aggressor has started committing the offence which occasions the exercise of his right of private defence.[1] As to the meaning of the expression 'reasonable apprehension of danger', see notes under s 102 . What is relevant to investigate is whether reasonable apprehension of danger to property had commenced. Once a reasonable apprehension of danger to the property has commenced, the right of private defence of property becomes available and it is not necessary that the offence should actually have been commenced.[2]

The right of private defence of body and property commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat, to commit offence, although the offence may not have been committed, but not until there is that reasonable apprehension. The right lasts so long as reasonable apprehension of danger to the body continues.[3]

Where the complainant damaged after door of house of the accused which amounted to 'mischief' within the meaning of s 425, IPC, the accused was entitled to exercise the right of private defence so long as the complainant continued in commission of mischief and not after commission of mischief.[4]

A commits no offence, if in exercise of the right of private defence of his property against *B*, whom he finds near a hole in his house, and on being attacked by *B*, he strikes a blow at random in the dark with a stick in his hand, whereby he is killed.[5]

If the act of trespass and theft have already begun when the owner finds the trespasser and the thief, there is more than an apprehension of danger to the property and the right of private defence comes into existence.[6] The law does not require that, when a person is being wrongfully deprived of property of which he is in possession he should leave the thief alone and run to the police station at a distance to seek redress from the police.[7]

Duration and Cessation of the Right

Under s 102, IPC the right of private defence of the body continues as long as the apprehension of danger and not the danger itself, to the body continues. The same principle applies in the case of defence of property, though this section enters697 into the question in relation to property more minutely. The right ceases on the cessation of the apprehension of danger to the property.

As soon as the reasonable cause disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence.[8]

4. Clause 2--Continuance of the Right Against Theft

As against theft, cl 2 of the section declares that the right of private defence of property continues: (a) till the offender has effected his retreat with the property; or (b) either--(i) the assistance of the public authorities is obtained, or (ii) the property has been recovered. These alternatives have created some difficulty in interpreting the clause. It is not altogether clear what is meant by the expression 'the offender has effected his retreat with the property'. In the first report on the IPC,[9] it was suggested that the offender can probably be said to have effected his retreat when he has once got clear off, having escaped immediate pursuit, or pursuit not having been made.[10] It will be observed that while in all other cases the right only exists for the purpose of prevention of the offences named, in the particular case of theft, the right continues for the recovery of the property even after the theft has been accomplished.[11] If the property is recovered on the spot the right ends with the recovery. But if it is not so recovered and the thief runs away with it, the owner can pursue him to recover the property.[12] The right continues till either the assistance of the public authorities is obtained or the property has been recovered. But in the meanwhile, the thief may effect his retreat with the property. Does the right continue, after the retreat, until the assistance of the public authorities is obtained or the property has been recovered? With reference to cl 2 of this section, Mayne observed:

> The right of defence against injuries to property is governed by the same principle, *viz*, the continuance of an injury which may be prevented (s 105). Therefore, resistance, within justifiable limits, may be continued as long as the wrongful act is going on. But when the robber, for instance, has made his escape, the principle of self-defence would not extend to killing him if met with on a subsequent day. If, however, the property were found in his possession, the right of defence would revive for the purpose of the recovery.[13]

Following this in *Jarha Chamar v Surit Ram* ,[14] it was observed:

> If *A* runs away with *B's* watch, *B* may chase him until he effects his escape, but the right of self-defence does not end with the escape as the Sessions Judge seems to have held. If *B* sees *A* in the street the next day, the next month, or the next year, wearing the stolen watch, *B* may forthwith seize *A* and recover his watch, using for the purpose as much force as the case allows. If a policeman should be at hand, *B's* proper course would be to hand *A* over to him and let him recover the watch. But *B* is not bound to put off the capture of *A* until he can find assistance from public authority. Again, suppose that on a day after the theft thereof, *B* sees his watch lying on a table in a house or garden. If he can get the assistance of a policeman without losing sight of it, no doubt698 he would be bound to do so. But he would be under no legal obligation to risk a further loss or removal of the stolen property for the purpose of having recourse to the public authorities. If the circumstances are such that immediate seizure seems to offer the only reasonable prospect of recovery, *B* is entitled to enter the house or garden and recover his watch. The capture of the thief would not be an assault in the one case,

and the entry into the house or garden would not be a criminal trespass in the other.

No Revival of Right

But there is no warrant for the theory of revival of the right either in this Code or at Common Law. The clause must be taken to mean that as soon as the offender has effected his retreat with the property, no right of private defence of that property against theft subsists, but that, until the offender has so completed his retreat, the right of private defence of that property continues until the property has been recovered, *i.e.*, during the retreat of the offender, or until the assistance of the public authorities is obtained.[15] It would be meaningless to say that the right of private defence continues till the offender has effected his retreat with property, if in fact it always continues till the property has been recovered.[16]

The words 'till the offender has effected his retreat with the property', in this section, mean that the right of defending the property would come to an end when the offender has finally succeeded in finding an escape from the chasers. It will depend upon the circumstances of each case as to when the offender can be said to have finally escaped from the chase of the searching party. Where the offender has been chased up to his own house, in that event, the pursuers shall not have a right of forcible entry in the offender's house; the offender shall be taken to have successfully effected his retreat and the right of private defence comes to an end.[17]

Recapture of Property when Permissible

When a person takes away the property of another by trespassing over his land, and such an act amounts to an offence of theft and criminal trespass, the person in whom the right of possession is vested may, while the trespass and the act of theft are in progress, turn the trespasser out of the land by force and may also resist the act of the taking away of his property: and if in so doing he inflicts such injuries on the trespasser or on the thief as are warranted by the situation, he commits no offence, and his action will be covered by the principle of self-defence embodied in ss 95 - 105 of the IPC . If, on the other hand, the trespasser or the thief had already accomplished his act and the person with the right has acquiesced in the accomplishment, it is not open to the latter to avail himself of the doctrine of self-defence by inflicting injuries on the trespasser or the thief to acquire possession of his property. In such a case, if the person with the right be an aggressor, there is no doubt that the other has a right of self-defence. Recapture of the stolen or plundered property, while it is in the course of being carried away, is authorised under this section, for the taking and retaking is one transaction.

But when the offence has been committed and the property removed, a recapture after an interval of time by the owner, or by another person on his behalf, however justifiable, cannot be deemed an exercise of the right of defence of property. The recovery which this section contemplates seems to be a recovery either immediate or699 made before the offender has reached his final retreat, as where stolen cattle are tracked until ultimately overtaken in their retreat and recaptured.[18] There should be no lapse of time between the theft and the accused's effort to recover the property before the offender effects his retreat.[19] If the thief runs away throwing away or leaving the stolen property, the right of private defence ceases and the owner of the property has no right to proceed with violence against the thief.[20] But if the thief has not effected his retreat with the property, the right of private defence continues.[21]

The IPC does not give any right of private defence of property in regard to which an offence under s 403 or s 411, IPC, has been committed.[22]

5. Clause 3--Continuance of the Right Against Robbery

This clause declares the duration of the right of private defence against robbery and states that the

right continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restrain continues. It may be noted that robbery involves theft. The right of private defence against the theft may continue after the cessation of the right of private defence against the robbery.

6. Clause 4--Continuance of the Right Against Criminal Trespass

Against criminal trespass, the person in possession of the property has the right of private defence of property so long as the trespass continues.[23]

Where the deceased committed criminal trespass but he was unarmed so there was no apprehension that death or grievous hurt was likely to be caused to the accused, the accused causing two knife-blows on the chest of the deceased in quick succession was held exceeding the right of private defence of property and was liable under s 304 I and not under s 302, IPC .[24]

Where complainant party committed trespass on the land of the accused armed with a knife, a scuffle between the accused party and the complainant party took place, the accused party caused grievous injuries to the complainant, injuries inflicted by the accused not motivated or out of aggression, it is a clear case of right of private defence of body and property, though the accused persons exceeded right of private defence.[25] But where the accused persons themselves trespassed on the land of the complainant and opened fire killing the deceased persons, they were not entitled to right of self-defence.[26] Similarly, when in a sudden quarrel over the cutting of a tree, the accused gave a blow with a wooden reaper on the head of the deceased and caused his death. The tree in question standing on the land belonging to the deceased700 and was in his actual possession, the right of private defence was not available to the accused.[27] In both these cases accused(s) were themselves trespassers so they did not have any right of self-defence which was available to the complainant party, who were in possession of the land in question.

Where the deceased having entered the house of the accused with the intention of outraging the modesty of his wife, was beaten by the accused with a stick and he fell down, but the accused continued to beat him and he died, it was held that it could not be said that after the deceased fell down he continued the trespass, because whatever intention he entertained at the time of entering the house, it had disappeared and he continued on the premises not because he intended to commit an offence but because he was physically unable to get out.[28]

Appellant accused had taken the deceased to his house. Even if it is assumed that deceased had committed house trespass, the right of private defence exercisable by the appellants did not extend to causing his death as there was no apprehension of death or grievous hurt as contemplated under s 105 of the IPC .[29]

Criminal Trespass when Ceases

But criminal trespass does not cease when the trespasser indicates his intention to cease the trespass. The right of private defence of property continues until the trespass actually ceases. In a case which came up before the Supreme Court a curious situation arose. The accused forcibly took loaded carts through a field of one *H* on which there were some crops standing. While the carts were still in the field, *H* protested. The accused asked to be excused and permitted to take the carts out of the field. This was not allowed and there was a fight, and *H* died as a result of injuries received in the incident. The accused being charged with the murder, pleaded that the criminal trespass which they committed terminated when they indicated their intention to cease the criminal trespass, that it was the deceased who prevented them from leaving the field and attacked them and that they acted in self-defence. It was held that since the accused were still inside the field when the incident took place, criminal trespass had not come to an end and, therefore, *H* had the right to prevent the accused from continuing to commit criminal trespass for whatever short distance they had still to cover before reaching the public pathway. Their Lordships further observed:

It is true that the appellants' party had to get out of the field and that this they could not have done without committing further criminal trespass. But it does not follow that this difficult position in which the party found itself gave them any right for insisting that they must continue the criminal trespass. They had to abide by the directions of *H*, whatever be the degree of patience required, in case they were not allowed to move in any direction in order to leave the field. If *H* had started the attack in the circumstances alleged by the appellants, there may have been some scope for saying that he acted unreasonably in taking recourse to force in preference to taking recourse to public authorities or to such action which a less obstinate person would have taken and had, therefore, lost any right of private defence of property against the offence of criminal trespass.30701

7. Clause 5--Continuance of Right Against House-breaking by Night

The right of private defence of property against house-breaking by night continues only so long as the house-trespass, which has been begun by such house-breaking continues. So a person would be justified in using his spear against the house-breaker so long as he remained on his premises; but he is not justified in running after the house-breaker and killing him in the open after the house-trespass had ceased.[31]

8. Sections 102 and 105 --Commencement, Continuity and Conclusion of Right of Private Defence

Commentary under same heading in s 102, *ante*, may be referred to.

93 *State of Madhya Pradesh v Nivedanlal* 2010 Cr LJ 2647, p 2650 (Chh) (DB) .

94 *Sikandar Singh v State of Bihar* 2010 Cr LJ 3854, p 3860, 3861 (SC), AIR 2010 SC 3580, 2010 AIR SW 4426, 2010 (6) Scale 632, (2010) 7 SCC 477 .

1 *Barisa Mudi v State* AIR 1959 Pat 22, p 28 ; *Mozam Ansari v State* (1961) BLJR 824 ; *Khetri Bewa v State* AIR 1952 Ori 37 ; Re *Rajesa Husena*AIR 1968 Mys 33, (1968) Cr LJ 194 ; *State of Orissa v Chakradhar Behra* AIR 1964 Ori 262, (1964) 2 Cr LJ 969 ; *State of Orissa v Sabu Dalbehera* (1965) Cut LT 265 ; *Ugrah Kahar v State of Bihar* (1972) Pat LJ R 158, p 161 .

2 *Ram Autar v State* AIR 1954 All 771, p 772-73, (1954) Cr LJ 1710 ; *Ugrah Kahar v State of Bihar* (1972) Pat LJR 158, p 161 .

3 *Sikandar Singh v State of Bihar* 2010 Cr LJ 3854, p 3860, 3861 (SC), AIR 2010 SC 3580, 2010 AIR SW 4426, 2010 (6) Scale 632, (2010) 7 SCC 477 .

4 *Rajesh Kumar v Dharmveer & Ors* (1997) Cr LJ 2242 (SC) .

5 *Queen v Pelko Nushyo* 2 WR (Cr) 43 .

6 *Madhava Kurup Velayudha Kurup v State* AIR 1953 Tr & Coch 340, p 343.

7 *Har Chand v Emperor* AIR 1930 Lah 314 ; *Abdul Hadi v Emperor* AIR 1934 All 829 ; *Kripa Ram v Emperor* 48 Cr LJ 503 .

8 *Madan v State of Madhya Pradesh* 2008 Cr LJ 3950, p 3952 (SC), AIR 2008 SC 3083, 2008 (10) Scale 33 ; *Jai Dev v State of Punjab* AIR 1963 SC 612, 1963 (1) Cr LJ 495 .

9 First report on Indian Penal Code, at p 158.

10 *Punjabrao Sadasheo Deshmukh v Emperor* AIR 1945 Nag 269, p 270 .

11 *Jarha Chamar v Surit Ram* 7 Cr LJ 49, p 52, 3 Nag LR 177 .

12 *Ibid*.

13 *Mayne's Criminal Law of India*, para 237.

14 *Jarha Chamar v Surit Ram* 7 Cr LJ 49, p 52 .

15 *Mir Dad v Crown* AIR 1926 Lah 74 ; *Punjabrao Sadasheo Deshmukh v Emperor* AIR 1945 Nag 269 **dissenting** from *Jarha Chamar v Surit Ram* 7 Cr LJ 49 ; *Karam Ali v Crown* AIR 1927 Lah 355(2) .

16 *Punjabrao Sadasheo Deshmukh v Emperor* AIR 1945 Nag 269, p 270 .

17 *Amar Singh v State* AIR 1968 Raj 11, (1968) Cr LJ 79, p 81, (1968) Raj LW 107 .

18 *State v Sidhnath Rai* AIR 1959 All 233, p 235, (1959) Cr LJ 413 ; *Amar Singh v State* AIR 1968 Raj 11, (1968) Cr LJ 79 .

19 *State of Orissa v Subu Dalbehera* (1965) 31 Cut LT 265, p 267 .

20 *Rakhia v Emperor* AIR 1934 Lah 595, relying on *Mir Dad v Crown* AIR 1926 Lah 74 ; *Nga Pu Ke v Emperor* AIR 1933 Rang 340 ; *Amar Singh v State* AIR 1968 Raj 11, (1968) Cr LJ 79 .

21 *Hasham v Emperor* AIR 1936 Lah 28, p 30 ; *Hari Mahto v Ram Ratan* (1963) 11 BLJR 27 (Summary of cases).

22 *Agra v Emperor* AIR 1914 Lah 579, p 581 .

23 *Dukhit Sha v Emperor* AIR 1920 Pat 752, p 767 ; *Hukam Singh v State of Uttar Pradesh* AIR 1961 SC 1541, (1961) 2 Cr LJ 711 ; *Sardar Khan v State* (1969) 35 Cut LT 802, p 810 .

24 *Deepa alias Deepchand & Anor v State of Madhya Pradesh* 1999 Cr LJ 413 (MP) (DB) .

25 *State of Gujarat v Panday Premshanker alias Bachubhai Pevashanker & Anor* (1999) Cr LJ 1841 (Guj) (DB) .

26 *State of Uttar Pradesh v Akshey Kumar & Ors* (1999) Cr LJ 2987 (All) DB) .

27 *Arjunan and etc v State by Inspector of Police* (1997) Cr LJ 2327 (Mad) (DB) .

28 *State v Bhima Devraj* AIR 1956 Sau 77, p 80 .

29 *Wazir Singh v State of Madhya Pradesh* 2009 Cr LJ 2916, p 2918 (MP) .

30 *Hukam Singh v State of Uttar Pradesh* AIR 1961 SC 1541, p 1542, (1961) 2 Cr LJ 711 .

31 *R v Balakee Jolahed* 10 WR (Cr) 9 ; *R v Gour Chand Chung* 18 WR 29 (Cr) ; *R v Gendo* 1 Cr LJ 114 ; *R v Koli Mepa* 1 Cr LJ 285, 13 Ker LR 294 .

Indian Penal Code (Act XLV of 1860)

Chapter IV

General Exceptions

S. 106.

Right of private defence against deadly assault when there is risk of harm to innocent person.--

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

Illustration

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are

mingled with the mob. *A* commits no offence if by so firing he harms any of the children.

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 107.

Abetment of a thing.--

A person abets the doing of a thing, who--

First.-- Instigates any person to do that thing; or

Secondly.--Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal704 omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.-- Intentionally aids, by any act or illegal omission, the doing of that thing.

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

Illustration

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

Explanation 2.--Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.705

Comments

1. Scope and Applicability

This section defines abetment of a thing in general. It does not define any offence, its purpose being merely to explain the meaning of the word 'abetment'. If 'the thing' in question is an offence, then the abetment of it becomes an offence (s 108) and the 'offence of abetment' is constituted (s 108, expln 2), which is thus a separate and distinct offence.[1]

The definition of 'abetment' given here applies to all Central Acts and Regulations made on or after the 14 January 1887.[2] It was applied to a case under the Legal Practitioners Act 1879, which is a special law within the meaning of s 41 of this Code,[3] and also to a case under the Madras Act 5 of 1920, which is a local law.[4] It may be noted that under cl 2 of s 40, IPC, the word 'offence' in ss 109, 110,

112 and 114 - 17, IPC dealing with abetments, denotes a thing punishable under the IPC or under any special or local law.[5]Sections 107 and 109 are applicable to cases under706 s 182, IPC . Where, therefore, a person instigates another person to make a false report, he can be convicted under s 182 read with s 109 .[6]

Under this section, a person abets the doing of an act in either of the three ways which can be: (a) instigating any person to do an act; or (b) engaging, with one or more persons, in any conspiracy for the doing of that act; or (c) intentionally aiding the doing of that act. If a person instigates another or engages with another, in a conspiracy for the doing of an act, which is an offence, he abets such an offence and would be guilty of abetment, under s 115 or s 116, IPC even if the offence abetted is not committed in consequence of the abetment. The offence of abetment is complete when the alleged abettor has instigated another, or engaged, with another, in a conspiracy to commit the offence. It is not necessary for the offence of abetment that the act abetted must be committed.[7]

2. Essentials of Abetment-- It takes Place in One of Three Ways

Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing.[8]A person, who instigates any person to do a thing or who engages, with one or more other person or persons, in any conspiracy for the doing of that thing, or who intentionally aids, by any act or illegal omission, the doing of that thing, abets that thing.[9] Thus an act of abetment may take place in one of three ways: (a) instigation, (b) conspiracy, or (c) intentional aid.[10] In order, therefore, there may be abetment, there must be either instigation, or intentional aiding or engaging in a conspiracy as laid down in this section.[11] General advice is far too vague an expression to prove abetment.[12]'Abetment' in this section includes not merely instigation, which is the normal form of abetment, but also conspiracy and aiding. The section, therefore, comes to this: Where an act is abetted, and the abetment takes the form of instigation of an act, and a different act is done, that different act must be a probable consequence, and committed under the influence of the instigation; and where the abetment takes the form of aiding or a conspiracy, the different act must be a probable consequence and also with the aid or in pursuance of the conspiracy.[13] The mere fact that certain persons have been named in the suicidal note by the deceased to be responsible for his death is not by itself a ground to fasten one with the charge of abetment.[14]

The act or conduct of the accused, even if there may be any, however insulting and abusive those may be, will not by themselves suffice to constitute abetment of707 commission of suicide, unless those are reasonably capable of suggesting that the accused intended by such acts consequence of suicide.[15]

Where the accused demanded money due to him from the deceased and the deceased committed suicide, the demand so made would not amount to abetment within the meaning of s 107, IPC .[16]

Mere Connivance does not Constitute Abetment

An offence of abetment is committed only when a person abets the doing of a thing either by instigation, or by conspiracy, or by intentionally aiding, by an act or illegal omission, the doing of that thing by the principal offender. What, therefore, constitutes an offence of abetment is actual complicity, which precedes the actual commission of the offence by the principal offender, either through substantial assistance to the principal offender for the commission of the offence or through some word or action which instigates the commission of the offence.[17] An association, between the person accused of abetment, and the principal offender, which does not measure up to an instigation, conspiracy or intentional aid in respect of the commission of an offence, does not constitute abetment. Likewise, a mere connivance does not constitute abetment.[18] Abetment does imply a certain degree of activity in the abettor.[19]

Abetment brings the Abettor and the actual Offender on Equal Footing

A person who abets, incites, instigates, goads, urges or exhorts to do an offence is equally liable for the offence which is done by the person who was incited, instigated, exhorted, goaded or abetted as he must have intended all the results that follow by such exhortation and the like. If the exhorter and the like is a member of the unlawful assembly and has exhorted the killer to kill a man, then the exhorter being the member of the unlawful assembly is equally liable for the offence as he has shared the common intention to cause death. Thus, the offence which is committed as a result of incitement, extortion, abetment, goading or instigation will bring the extorter and the like on the same and equal footing as the person who committed the offence as a result thereof.[20]

Mere Interposition of the Abettor does not Constitute Abetment

In order to constitute 'abetment', the abettor must be shown to have 'intentionally' aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of s 107 .[21]708

Mere Assertion of Abetment

Mere assertion that the act committed by one of the accused could not have been committed without the interposition of the alleged abettor is not the enough compliance with the requirements of s 107, IPC . But, in the absence of material to show that *A-1* was brought to the scene of occurrence by *A-2* for the purpose of attacking the deceased and also in the absence of material that only on the instigation through words or by catching hold of the deceased, *A-1* began to attack the deceased, it cannot be held that the concluded act on the part of the alleged abettor in catching hold of the deceased for preventing the deceased from moving further would be to facilitate the commission of the crime.[22]

3. Parameters of Abetment

The parameters of the 'abetment' have been stated in s 107 of the IPC . Section 107 states that a person abets the doing of a thing, who instigates any person to do that thing; or engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, or the person should have intentionally aided any act or illegal omission. The explanation to s 107 says that any wilful misrepresentation or wilful concealment of a material fact which he is bound to disclose, may also come within the contours of 'abetment'.[23]

4. Sections 107 and 34 Distinguished

Section 34, IPC requires participation in crime, whereas mere instigation is sufficient for abetment under this section. Generally, under s 34, a criminal act must be done in furtherance of a common intention, but to constitute the offence of abetment, it is not necessary that the act abetted should be committed or that the effect required for constituting the offence should be caused. A preconcert and the abettor's presence at the scene of offence are not necessary for abetment, but they are necessary under s 34 .[24]

5. Section 107 , Indian Penal Code 1860 and Section 113A of the Indian Evidence Act 1872 are not Contradictory

The word 'intentionally aids' figuring in clause 3rd of s 107 of the IPC is wide enough to conclude that treating a married woman with cruelty would certainly fall within its ambit. The legislature, in its wisdom, by inserting the provisions of s 113A of the Evidence Act had further clarified the import of the definition of abetment of suicide by a married woman in view of social challenges of the present times. Thus, it cannot be said by any stretch of imagination that the provisions of s 113A, Evidence Act are contradictory to the one contained in s 107 of the IPC . On the other hand, these can be said to be supplementary to it.[25]709

6. Abettor and Punishment for Abetment

A person abets an offence, who abets either the commission of the offence, or the commission of an act, which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.[26]To constitute an abetment, it is not necessary that the act abetted should be committed.[27] It is also not material that instead of the act abetted some act different from that act is committed.

Section 109 of the IPC provides the punishment for abetment in case the act abetted is committed and prescribes the same punishment which has been provided for the substantive offence. Sections 115 and 116, IPC deal with punishment for abetment in cases when the act abetted is not committed. Remaining sections of this chapter provide for punishment for abetment in different other situations depending upon the manner of abetment and the nature, *etc.*, of the act committed.

7. Commission of an Offence--Whether Necessary to Constitute an Abetment

'Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart',[28] the general law as to abetment is laid down in ss 107 - 20, IPC . According to it, 'to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused. This applied to the abetment of the waging-of-war against the government as much as to the abetment of any other offence under the IPC .[29]In the case of abetment by instigation or by engaging in a conspiracy, it is immaterial whether or not the person instigated commits the offence, or the persons conspiring together actually carry out the object of conspiracy. But, in the case of abetment by aid a person can be said to abet by aiding only when by the commission of an act he intends to facilitate the commission of the offence and does facilitate the same. Therefore, where a person is charged with abetment by aid, of an offence under s 161, IPC and the person charged with the offence is acquitted on the ground that he had not committed the offence, no question of intentionally aiding, by any act or omission, the commission of that offence arises. Whether, therefore the acquittal is right or wrong, the conviction of the abettor also cannot be allowed to stand in the circumstances.[30] An abetment may be complete though the effect contemplated was not caused.[31] But where a person is incited or exhorted to commit an offence, then that offence must be committed as a result of or in pursuance of exhortation or incitement.[32]

Mens Rea--Knowledge or Intention

There can be no abetment without knowledge or intention. The word 'intentionally' is used only with aiding in the third clause of the section but, as will be seen710 presently, even instigation and conspiracy involve *mens rea*.[33] In order to secure a conviction for abetment of murder under this section, it is essential for the prosecution to prove that the accused knew that the actual murderer did intend to commit the murder.[34] Mere proof, that the crime charged could not have been committed without the interposition of the alleged abettor, is not enough compliance with the requirements of this section. Intentional aiding and, therefore, active complicity is the gist of the offence of abetment under the third paragraph of the section.[35] In order to constitute the offence of abetment, there must be *mens rea*, *i.e.*, guilty intention or knowledge. In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal.[36]

8. Mere Presence is not Enough

Mere knowledge or standing while an offence is being committed by others is not covered by the definition of abetment. It may well be that there is neither conspiracy nor instigation nor intentional aid by some act or illegal omission.[37] A person who happens to be present and witnesses the commission of a crime without himself either aiding in its commission and without giving the criminal any support or encouragement, does not become a principal in the second degree although he makes

no effort to prevent or deter the criminal.[38] A person witnessing a crime and not giving information is not an accomplice.[39]

Mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly inform the authorities, does not make him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiation for the payment.[40] The mere omission to intervene or raise an alarm on the part of a person witnessing a murder does not constitute an abetment.[41] The interposition of the accused as a mere spectator to the exhibition of a blue-film without any further complicity cannot be taken to be amounting to abetment of the main offence under ss 292 - 94 of the IPC .[42]

Mere presence at the commission of a crime even with the awareness that a crime was being committed is not in itself an intentional aid.[43] Where the only evidence against the accused was that he was found within a few yards of the scene of the711 murder, but no weapon was found on him and no overt act was alleged tending even remotely to facilitate the commission of the crime, it was held that he could not be convicted of abetting murder.[44] Intentional aiding is the gist of abetment.[45]

9. Presence of Abettor not Required at the Scene

Now the true principle is that so long as the accomplice is participating by rendering aid, assistance or even mere encouragement'[46] to the actual perpetration at the very time when the latter is effecting the criminal purpose, no matter how far away from the spot he may be,[47] he is certainly aiding and abetting it and will be principal in the second degree.[48]Explanation to this section shows that abetment by aiding may be by doing something to facilitate the commission of the act abetted prior to the commission of that act.

Maharashtra Control of Organised Crime Act, 1999

Section 2(1)(a)(iii) of MCOC Act has defined the word 'abate' as, the rendering of any assistance whether financial or otherwise to the organised crime syndicate, would amount to abating the crime. The meaning of the term 'abetment' as mentioned in the IPC under s 107 has been further expanded by the definition of s 2(1)(a) of the MCOC Act and therefore the presence of the accused at the scene of offence and that, they were assisting in the commission of crime, undoubtedly falls, within the purview of the definition of s 2(1)(a)(iii) read with s 3(2) of the MCOC Act.[49]

10. Clause 1--'Instigate' and 'Instigation'

It is clear from the above discussion that to constitute 'instigation', a person who instigates another has to provoke, incite, urge or encourage doing of an act by the other, by goading or urging forward. Going by the dictionary meaning[50] the word 'goad' means, 'keep irritating or annoying somebody until he reacts,' So also, 'urge' means 'to advise or try hard to persuade somebody to do something or to make a person to move more quickly in a particular direction especially by pushing or forcing' such person. 'Urge forward' means in this context, 'urge' a person 'forward'. Thus, a person who instigates another has 'to goad or urge forward' the latter, with intention to provoke, incite, urge or encourage doing of an act by the latter.[51]

A close, combined reading of the meaning of the word 'instigation' with the meaning of the terms 'goad' and 'urge' will reveal that 'instigation' involves two things. One is a physical act or omission, while the other is a mental act. The physical act or omission involved in 'instigation' is, 'goading or urging forward' another. Such physical act of goading can be committed either by words or deed, as the meaning of the word suggests. 'Goading' can be committed also by any other wilful conduct may be, by even an adamant silence. Thus, by words, deeds wilful712 omission or wilful silence also, one can goad a person *i.e.*, keep irritating or annoying a person until he reacts.[52]

So also, the physical act of 'urging forward' or 'instigation' involves doing of an act by strongly

advising, persuading to make a person do something or by pushing or forcing a person in order to make him move more quickly in a forward direction. Thus, both the physical acts in 'goading or urging forward' can be committed by doing some act, either verbal or physical or even by a wilful omission or conduct.[53]

But, apart from such physical act or omission, one more factor has to be established to constitute 'instigation'. That is a mental act. While a person instigates another by the act of 'goading or urging forward', such person must also have, the intention to provoke, incite, urge or encourage doing of an act by the other. Such intention to provoke, incite, urge or encourage doing of an act by the other is an essential factor in 'instigation'. A person can be said to have instigated another, if such person, with intention to provoke, incite, urge or encourage the latter to do an act, has goaded or urged forward the other person.[54]

The offence of abetment by instigation depends upon the intention of the person who abets and not upon the act which is done by the person who has abetted. The abetment may be by instigation, conspiracy or intentional aid as provided under s 107, IPC, The words uttered in a fit of anger or omission without any intention cannot be termed as instigation.[55]

This section lays down that a person who instigates another to do a thing abets him to do that thing. In this sense it makes instigation tantamount to abetment. The word 'instigate' literally means 'to goad or urge forward or to provoke, incite, urge or encourage doing an act'.[56] The word 'instigate' in the *Concise Oxford Dictionary* is defined as 'urge on, incite, bring about by persuasion', and in *Webster*, as 'urge, forward, provoke', with the synonyms of 'stimulate, urge, spur, provoke, tempt, incite, impel, encourage, animate'. A person is said to instigate another to do an act when he actively suggests or stimulates him to the act by any means or language, direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragement.[57] Instigation consists in actively suggesting and stimulating another to act.[58] A person who by wilful misrepresentation or by wilful concealment of fact which is bound to be disclosed, voluntarily causes or713 procures or attempts to cause or procure a thing to be done, is said to instigate the doing of that thing.[59]

The mere fact that the husband treated the wife with cruelty is not enough. Where no element of investigation to constitute abetment to suicide is found in the evidence led by the prosecution, the accused would not be convicted under ss 107, and 306, IPC .[60]

Instigation need not be in any Particular Form

It is not necessary that express and direct words should be used to indicate what exactly should be done by the persons to whom directions are given.[61] The law does not require that instigation should be in a particular form or that it should be only in words and may not be by conduct; for instance, a mere gesture indicating 'beat' or a mere offering of money by an arrested person to the constable who arrests him, may be regarded as instigation, in the one case to beat, and in the other to take a bribe.[62]

Instigation has wider meaning

The meaning of the word 'instigate' used in s 107, IPC, which defines the meaning of the word 'abets', cannot be restricted to the use of the actual words, 'instigating to commit suicide'. It has to be given wider meaning commensurate with the common experience of life.[63] Therefore, it has been held to be 'instigation' in the context of conduct of husband towards wife where the husband created a situation by conduct whereby the victim (his wife), who was in complete dependence and at the mercy of the accused, saw no other way out, except to end her life.[64]

Instigation must be conveyed

There is no instigation unless it is communicated to the author of the act in some form or the other. The instigation may be personal or through a letter or a third party.[65] If the instigation is by means of a

letter sent through post, the offence of 'abetment by instigation' is completed as soon as the contents of such letter become known to the addressee, and the offence is triable at the place where such letter is received.[66] A question may arise as to what will be the consequences, if the letter does not reach the addressee? In England, it has been held that a person may be guilty of an attempt to procure the commission by another person of an act of gross indecency with himself by writing a letter to the other person, which in fact does not reach him, if the letter is in such terms as would convey to an understanding mind, an invitation to commit the act.[67]

Act causing Humiliation is not Instigation

The case of the prosecution was that due to the acts of the accused, the deceased felt humiliated and committed suicide. It was held the act causing humiliation may be the offence, but if there is no material on record to show that there was 'abetment' as714 defined in s 107, IPC for the deceased committing suicide, a charge under s 306, IPC, cannot be framed against the accused.[68]

Instigation may be Direct or Indirect

Instigation may be direct, as by counsel of command, or indirect, as by exercising an express liking or approbation or assent to another's design.[69] But in neither case it is necessary to show that the mind of the person instigated was affected thereby.[70]

'Any person', *i.e.*, a person or persons (s 9) and any company or association or body of persons, whether incorporated or not (s 11) and the person or persons instigated may be known, or unknown, as where the instigation is directed to the public at large, as by a newspaper or book, *etc.*[71]

Instigation may be Personal or through a Third Party

The instigation may be personal or through a third party.[72]

When Instigation by Letter completes Abetment

If the instigation is by means of a letter sent through post, the offence of abetment by instigation is completed as soon as the contents of such letter become known to the addressee, and the offence is triable at the place where such letter is received.[73]

Advice *per se* may not be Instigation

Instigation necessarily indicates some active suggestion, or support or stimulation to the commission of the act itself, and advice can become instigation only if it is found that it was an advice which was meant actively to suggest or stimulate the commission of an offence. Advice per se cannot necessarily be instigation.[74]

Instigation must have reference to thing Done

The instigation must have reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation.[75]

Good Object of Instigator

Even if the object of the person who instigated another to commit a crime is to catch him in the act of committing the crime, instigation by him nevertheless amounts to abetment of the offence, and the abettor must be regarded as an accomplice when the object of the instigation is to make the offender commit the offence, and the person who was instigated actually commits the offence.[76] There is no reason why *agents provocateurs* are not guilty of abetment on the ground that715 their ultimate motives may be good, provided, however, they are guilty of active suggestions to their victims.[77]

Abetment by Instigation--Instances

When the persons who were members of an unlawful assembly set fire to a hut in consequence of order of the accused, it would be too unreal to hold that the persons who set fire to the hut did so irrespective or independently of the order given by the accused. The conviction of the accused for the offence under s 436 read with s 109, IPC, was therefore not bad in law.[78]

Where the accused gave the call 'assault the rascal' and injuries were caused by spear; it was held that the instigation was to assault with a deadly weapon and the accused was guilty under s 324, read with s 109, IPC .[79] Where accused persons went to the house of the deceased, hurled abuses at her and cast aspersions on her character only to hurt and harm her, the words used by them were highly provocative and stimulating, the deceased as a result committed suicide, the acts of the accused persons amounted to instigation and they were held liable to be convicted under s 306 read with s 107, IPC .[80]

Explanation 1--Instigation by Misrepresentation or Concealment

A wilful misrepresentation of a fact amounts to an abetment of an act within the meaning of s 107, expln I.[81] A passive or negative conduct, such as mere silence, does not constitute 'Instigation'. If there is something more than mere silence, if there is concealment, *i.e.*, if something is done by one to conceal from another a material fact which the former is bound to disclose, then by virtue of expln I, the conduct of the former would constitute 'instigation'. A person can be convicted of abetment of theft under the expln I, only if he either procures or attempts to procure the commission of the theft. Mere subsequent knowledge of the offence is insufficient.[82] When the law places a duty to act on a person, his illegal omission to act is to be judged by the same principles. It may be a form of abetment under this section, while s 116 takes particular notice of the omission of a police officer whose duty it is to prevent a crime. So where a police officer purposely kept out of the way, knowing that some persons were likely to be tortured to get confessions out of them, he was pronounced guilty of abetment.[83] Abetment by omission is punishable only if the omission is an illegal omission. The owner of a motorcar cannot, therefore, be held guilty of abetment in merely omitting to give information to his employees as to the rules framed under the Bombay Motor Vehicles Act 1904.[84]716

Instigation through Innocent Agent--*Mens Rea*

The offence of abetment depends upon the intention of the person who abets.[85]Under the English law, the person incited to commit a certain act must know that the act is criminal, in order that the person, who incited him thereto may be guilty of instigation; for if the person incited does not know that what he is urged to do is illegal, he is really an innocent agent, and the person who incited him is liable as a principal for what is done, and not merely for incitement.[86] Under the IPC, however, a person acting through an innocent agent is not liable as a principal but only as an abettor (s 108, expln 3) so that the question of the criminality of the mind of the actual perpetrator of the offence makes no difference to the legal responsibility of the person who has incited him. Under this section, it is the instigation to the commission of the act itself which constitutes the offence that is regarded as abetment. To ask a person, as a mere threat to fire a gun, without intending that he should really fire it, is not to instigate him to fire the gun. The threat would become instigation only if it is intended that in the event of the threat having no effect, the gun should in fact be fired.[87] Threatening words used by accused would not be sufficient to be described as instigating in the commission of offence.[88]

Mens rea is an essential ingredient of the offence of abetment. Where the deceased wife on account of stress, depression or family problem commits suicide, the accused cannot be held liable for abetment of suicide. The husband and his brother were habituated to drinking and often demand money and as a result the wife commits suicide, the accused husband cannot be convicted for offence under s 306, IPC .[89]

A person is said to instigate any other person to do an act which makes the other person to do such

act by any means possible, either direct or indirect. *Mens rea* is necessary concomitant for instigation.[90]

Instigation through Newspapers

It cannot be said that by publication of the articles, which are said to be of defamatory character, in a daily newspaper, the editor or the other respondents who are also said to have published those articles meant to instigate or intentionally aid the commission of suicide by the victim. The reaction against an article published can be different from different people who read it. A person may get enraged and retaliate or read it and commit suicide. Therefore, the reaction to a defamatory article which cannot be predicted will not be attributable as an intention to illegally aiding or instigating the suicide by the person concerned. A more active role which can be described as instigating or aiding the doing of a thing, is required before a person can be said to be abetting the commission of offence under s 306 of the IPC .[91]

717For the purpose of preventing incitement to murder, or to commit any offence under the Explosive Substances Act 1908, appearing in newspapers, provision has been made for the forfeiture to the state, under a summary procedure, of the printing press, and copies of any newspaper containing matter constituting incitement of such a nature.[92]

The keeper of any printing press who is required to make a declaration under s 4 of the Press and Registration of Books Act 1867, is bound to deposit with the magistrate (unless he be for special reasons to be recorded exempted from so doing) security which may, by notice, in writing given by the state government, be declared to be forfeited should any newspaper, book or other document printed in such press contain an incitement, direct or indirect, to commit any offence specified in s 4(1) of the Indian Press Act 1910. But nothing contained in this Act shall be deemed to prevent a prosecution under any law for an offence against the Act.[93]

Exact Words of Instigation need not be proved

There has to be a reasonable certainty in regard to the meaning of the words used by the 'inciter' in order to judge whether or not there was an incitement, but it is not necessary, in law, to prove the actual words used for the incitement.[94]

Withdrawal of Instigation

Hawkins[95] states:

> Those who by showing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it, that he could not be encouraged by the hopes of any immediate help or assistance from them, are all of them accessories before the act, both of the felony intended, and to all other felonies which shall happen and by the execution of it, if they do not expressly retract and countermand their encouragement, before it is actually committed.

Thus it was said by Hale[96] that if *A* commands *B* to kill *C*, but before the execution thereof repents and countermands *B* yet *B* proceeds in the execution thereof; *A* is not an accessory, for his consent does not continue, and he gave a timely countermand to *B.* But even though *A* had repented, yet if *B* had not been actually countermanded before the act committed, *A* would be an accessory before the act.[97] In the absence of such withdrawal, retraction or countermanding, the person who abets an offence would be liable even if the offence abetted is not committed.[98]

A prisoner, who consented to form one of a party who committed theft, and resiled from his agreement, but was present at the commission of the theft, would not come within cl 2 of this section

and will not be convicted of the act, but of abetment thereof under cl 3 of this section and s 109 read together.[99]718

Limits of Liability

Where, of several persons constituting, an unlawful assembly, some only are armed with sticks, and *A,* one of them, is not so armed, but picks up a stick, and uses it, *B* (the master of *A*), who gave a general order to beat, is guilty of abetting the assault made by *A.*[1] A person taking away a cow from its owner without his consent for the purpose of liquidating that owner's debt, is guilty of theft; and it follows that the person ordering such taking would be guilty of abetment of theft.[2]

11. Clause 2--Conspiracy

Unlawful Combination is Conspiracy

A 'conspiracy' is a species of association or union of two or more persons for some common purpose. When such association is legal, it is termed in law a 'combination', as where persons combine in furtherance of their professional, commercial or industrial interests, and when it is against law and public opinion or by unlawful means, it is styled a 'conspiracy', and is thus always used in English law in *mala parte* as importing a legal wrong.

Before the insertion of ch VII, comprising ss 120A and 120B in the Code, criminal conspiracy was not a substantive offence and was treated only as a species of abetment.[3] In *King-Emperor v Tirumal Reddi* ,[4] Bhashyam Ayyangar J, observed:

> Under the Indian Criminal Law conspiracy is a mere species of abetment when an act or an illegal omission takes place in pursuance of that conspiracy and amounts to a distinct offence for each distinct offence abetted by conspiracy. Under the English law the agreement or combination to do an unlawful thing or to do a lawful thing by unlawful means amounts in itself to be a criminal offence. The Indian Penal Code follows the English law of conspiracy only in a few exceptional cases which are made punishable under section 311 (thug), section 400 (belonging to a gang of dacoits), section 401 (belonging to a gang of thieves), section 402 (being a member of an assembly of dacoits), section 121A (conspiring to wage war). In these cases whether any act is done or not or offence committed in furtherance of the conspiracy, the conspirator is punishable and he will also be punishable separately for every offence committed in furtherance of the conspiracy. In all other cases, conspiracy is only one species of 'abetment of an offence' as that expression is defined and explained in s 108 and stands on the same footing as abetment 'by intentional aiding'. In regard to both these species of abetment an act or illegal omission, in pursuance of the conspiracy or for the purpose of intentional aiding, is essential.

Now s 120A, IPC defines a criminal conspiracy and s 120B, IPC provides for its punishment.

Abetment by Conspiracy

In order to constitute abetment by conspiracy, three things are essential: (a) the person abetting must engage, with one or more other person or persons in a conspiracy; (b) the conspiracy must be for doing the thing abetted; and (c) an act or illegal omission must take place in pursuance of the conspiracy and in order to do the719 doing of that thing. Under the second clause of the section it will be observed that, when the abetment is by conspiracy, the elements which constitute the offence are, first, the combining together of two or more persons in the conspiracy, and secondly, an act or illegal omission takes place in pursuance of that conspiracy, and in order to do the doing of that thing.[5] All these elements must combine to constitute abetment by conspiracy.[6]

Abettor or Conspirator cannot be Punished when Principal Offender Acquitted

The petitioner was charged with the offence of abetment by conspiracy of the commission of the offence of theft by one Major Trilok Chand. The High Court of Allahabad had clearly held that there

was no evidence that Major Trilok Chand has committed the theft, therefore, unless the substantive offence against the principal offender is established, the question of abettor being held guilty under these circumstances does not arise. The petitioner was alleged to have entered into a conspiracy along with eight others and abetted the commission of the offence. All the other alleged abettors and the principal offender Major Trilok Chand were acquitted. The petitioner alone remained in the picture as one having abetted the offence by entering into conspiracy. It is axiomatic that there cannot be a conspiracy of one. It was held that the charge against the petitioner was not sustainable.[7]

'Abetment by Conspiracy' distinguished from 'Conspiracy'

A conspiracy will not amount to an abetment unless an act or illegal omission takes place in pursuance of the conspiracy. Hence, if the offence, alleged to be the object of the conspiracy, has been committed, the conspiracy amounts to an abetment under s 107 and, in such a case, it is unnecessary to invoke the provisions of s 120A and 120B .[8] There may be an element of abetment in a conspiracy, but conspiracy is something more than an abetment.[9] In order to constitute the offence of abetment by conspiracy, first, there must be a combining of two or more persons in the conspiracy; secondly, an act or illegal omission must take place in pursuance of that conspiracy and in order to do that thing. It is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. But the gist of the offence of criminal conspiracy is in the agreement to do an illegal act or an act, which is not illegal, by illegal means. When the agreement is to commit an offence, the agreement itself becomes the offence of criminal conspiracy. Where however, the agreement is to do an act which is not illegal, by illegal means, some act besides the agreement is necessary. Therefore the distinction between abetment by conspiracy and criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this that for abetment by conspiracy, mere agreement is not enough while in the offence of criminal conspiracy, the very agreement or plot is, in itself, is an act720 and is the gist of the offence.[10] It is a substantive offence in itself[11] and has nothing to do with abetment.[12]

Two or More Persons must conspire

To constitute abetment by conspiracy, two or more persons must conspire and one of them must be the person abetting. A person cannot conspire with himself or abet his own act.[13] To constitute conspiracy, there must be at least two persons engaged therein, and evidence must always be given to prove that there was another person or other persons engaged besides the accused, though his or their names may not be known.[14] So, if one of two persons charged is acquitted, the conviction of the other for conspiracy cannot stand.[15]

Person Abetting must Engage in a Conspiracy

Abetment by conspiracy 'consists' in the combination and agreement of persons to do some illegal act or to effect some purpose which is not illegal by illegal means.[16]

Gist of Offence

'A conspiracy', it has been said, 'consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable'.[17] The gist of the offence lies, not in doing the act, or affecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. The external or overt act of the crime is concert by which mutual consent to a common purpose is exchanged.[18] The agreement or engagement postulates knowledge of the scheme or design. It is not necessary that all the conspirators should be equally informed of all the details of the scheme. But there must be mutual consent to a common purpose.

One *D* impersonated *G* and withdrew from a treasury, money payable to *G.* The commission of the offence of cheating by impersonation by *D* was facilitated by *R*, a *mukhtar*, identifying him as *G.* It was

held that *R* could not be convicted for abetment of the offence committed by *D* unless it could be found that *R* knew that the person whom he identified was not *G* and the offence of cheating by impersonation was being committed.[19]

Though, to establish the charge of conspiracy there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into721 each other's presence: the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design.[20]

So far as proof goes, conspiracy, as Grose J said in *R v Brissae* ,[21] 'is generally matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.'[22]

Under expln 5 to s 108, IPC, it is not necessary for the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.[23]

Not necessary that all must Join from First Stage

It is also not necessary that all should have joined in the scheme from the first: those who come in at a later stage are equally guilty, provided the agreement is proved.[24] But if the offence, which is the object of the conspiracy, or one which naturally flows from it, is actually committed, it must have been committed in consequence of the conspiracy,[25] and it must, therefore, be proved that the accused was engaged in the conspiracy down to the time when the offence was committed, or when the act was put in the course of actual execution.[26]

The Conspiracy must be 'For the doing of that thing'

In the case of abetment by conspiracy, obviously a person can be said to abet the doing of a thing only if the conspiracy is for the doing of that particular thing. If *A* and *B* conspire to rob *C*, and *B* not only robs but even kills *C*, *A* cannot be said to abet the killing unless it can be said that *A* must have foreseen it as a probable consequence of the conspiracy. The test, in such cases, must always be whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and common sense, the abettor must have foreseen as probable.[27]

Act or Illegal Omission to be in Pursuance of Conspiracy

For abetment by conspiracy, not only must the person abetting engage in a conspiracy, but there must be an overt act or illegal omission in furtherance of the conspiracy and for the doing of the thing abetted. Mere intention not followed by any act cannot constitute an offence, and an indirect preparation which does not amount to an act commencing the offence, does not constitute either a principal offence, or an attempt or abetment of the same.[28] For the abetment of conspiracy, a mere combination of persons or agreement between them is not enough. An act or illegal722 omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for.[29]The conspiracy itself is not 'an act committed' which can be abetted.[30] The act itself may not be the immediate object of the conspiracy, but it must be an act committed in pursuance of the conspiracy and a probable consequence of it.[31]

Where the accused conspired with other persons to prepare a document, purporting to be a valuable security, which he knew would be a false document, and must have known was to be used for purposes of fraud, and to that end he prepared a draft which he was about to copy on a stamp of sufficiently early date procured for the purpose, and asked a witness for information to a fact to be inserted in such false document, it was held that he was guilty of abetment of forgery as he conspired to commit the offence of forgery and did an act which facilitated the commission of the offence and thereby facilitated it.[32]

Withdrawal from Conspiracy

If a conspirator withdraws from a conspiracy before the offence which is the object thereof is effected by the other parties thereto, he is not liable under ss 100 and 109 or ss 111 - 13 and to the more severe punishment thereunder, but he still remains guilty of abetment by conspiracy under s 115 or 116 .[33]

Joint Liability--Each Conspirator is the Agent of the Other

Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of all. Each party is an agent of the others in carrying out the objects of the conspiracy, and doing anything in furtherance of the common design.[34]

Where four persons combine to attack with *lathis* their common enemy, each is abetting the conduct of the other within the meaning of this section.[35]

It is not essential that there should have been an agreement in express terms as to what the principal in the first degree should do; the aider and abettor will be responsible for anything done in the joint enterprise which the evidence shows was within his contemplation. Thus, in cases where several persons have come together for the purpose of committing some breach of the peace, their general resolution must be considered, and if it appears upon evidence either to have been actually and explicitly entered into by the confederates, or may be reasonably collected from their number, equipment or behaviour at or before the scene of action, that some kind of violence shall in certain eventualities be resorted to, then every individual in the723 group will be involved in the guilt of any who do any such act which has thus been established to have been within the contemplation of the group.[36]

12. Clause 3--Abetment by Aiding

The third way of abetting is by intentionally aiding the doing of a thing by an act or illegal omission. In abetment by 'aid', it is not the intention to aid the commission of crime, that is punished, but the fact that something is done or not done, whereby the commission of a crime is rendered easier. In instigation, the criminal intention is punished; in conspiracy, the intention plus some act; in aid, the act itself. Reading cl 3 of the s 107, IPC with expln 2, which goes with it, for abetment by aid, four things must be combined:

(i) aid must be actually afforded by means of an 'act or illegal omission';
(ii) there must be an intention to aid thereby;[37]
(iii) the commission of the offence must be facilitated thereby; and
(iv) the act or omission must take place either prior to, or at the time of, the commission of the act intended to be aided (expln 2).

If one of these elements is wanting, *e.g.*, the offence is not, in fact, facilitated by the conduct in question[38] there can be no abetment.

It is clear that under the third clause, when a person abets by aiding, the act so aided should have been committed in order to make such aiding an offence. In other words, unlike the first two clauses of s 107, IPC, the third clause applies to a case where the offence is committed.[39] When accused charged under s 5 of the Prevention of Corruption Act 1947 is acquitted as no *prima facie* case was made out against him, the charge against co-accused for abetment of said offence is not maintainable.[40] The word 'intentionally aids' figuring in clause third of s 57 of IPC is wide enough to conclude that treating a married woman with cruelty would certainly fall within its ambit.[41]

Where a person sends a girl to her matrimonial house on false pretext where she is raped by her husband accused, the case is covered by clause 3 of s 107, IPC . Conviction under s 109, IPC was held proper.[42]

Aiding to Constitute Abetment must Snowball into Intentional Aiding

An act which merely amounts to aiding the commission of an offence is not an abetment. The aiding must snowball into 'intentionally aiding' the doing of a thing. The commission of the act must be the dominant intention of the person who aids it. If a person only knows or has only reason to believe that his act would facilitate the724 commission of offence, it cannot be said that his dominant intention was that.[43] In the absence of a specific allegation against a counsel as to in what way he abetted or aided the offence, preparation and presentation of affidavit before the assistant commercial taxes officer by the counsel in discharge of his duties cannot be construed as aid or abetment of the offence.[44]

The Aid must be actually afforded by an 'Act or Illegal Omission'

The word 'illegal' means against or not authorised by law and omission is something that has not been done either deliberately or accidently.[45] For the meaning of 'act' and 'illegal omission', refer to synopsis notes under s 33, IPC and s 3(2) of the General Clauses Act 1897.

At times even refraining from action and mere impassivity makes a person liable to penalty. There are two kinds of 'impassivity'. In the one, a person remains passive because although he has formed an intention to accomplish something prohibited, he does nothing and thereby he fails to accomplish it. In these circumstances he commits no offence. In the other, by remaining passive and doing nothing a person accomplishes something prohibited. It is the latter form of 'impassivity' which is punishable as an offence.[46] Where abetment is by an omission, the omission must, of course, be an illegal omission, *i.e.*, a breach of a legal obligation.[47] Where accused persons went to the house of the deceased, hurled abuses at her and cast aspersions on her character only to hurt and harm her, the words used by them were highly provocative and stimulating and led the deceased to commit suicide, accused persons were held to have abetted the commission of suicide by the prosecutrix.[48]

There is no duty cast on the president of a meeting to interrupt songs or to forbid their continuance. Hence no illegal omission is committed by him where revolutionary songs are sung in his presence and he has done nothing.[49]

To prove abetment by 'illegal omission', it would be necessary to show that the accused intentionally aided the commission of the offence by his non-interference.[50] In a case of custodial rape by co-accused, the prosecutrix was forcibly taken to the police station by the accused who kept watch over the husband of the prosecutrix while she was being raped by the co-accused. The accused did not do anything and turned a deaf ear towards the cries of the prosecutrix. The conviction of accused for abetting commission of rape with the aid of s 107, IPC was upheld.[51]

The mere fact that the offence of extortion under s 384 of the IPC is committed in the presence of the village *chowkidar*, without eliciting any disapproval on his part, will not render him liable as an abettor of the offence. There was no illegal omission on the part of the chowkidar as he was not bound by s 89 [now s 85(3)] or by s 90 (now s 87) of the CrPC to report the offence of extortion; and even if he were so bound, his subsequent omission to report the commission of the offence could not be725 said to be intentionally aiding the doing of the thing itself which must have been done before it could be reported by the *chowkidar*.[52] But he could have been guilty if it could be shown that his non-interference was intentional, *i.e.*, that he omitted to interfere with the intention or motive of assisting in the extortion.[53]

A, a head constable, knowing that prisoners likely to be tortured, keeps out of the way. *A* has abetted that torture.[54]

A policeman stands by acquiescing in an assault on a prisoner committed by *B*, another policeman, for the purpose of extorting a confession. *A* abets an offence under s 330 .[55]

Where a wife, who was having illegal connection with the accused, knowing that the accused was waiting for an opportunity' to ambush and murder her husband, did not warn the husband against the danger to his life and let him go, and he was murdered by the accused, it was held that, in the circumstances, the conduct of the wife in not warning her husband, though certainly open to censure, did not amount to abetment of the murder committed by the accused.[56]

13. Mere Silence, Doing Nothing and Failure to Prevent Offence, not Abetment

Mere silence is not necessarily an illegal omission.[57]Simply doing nothing is not an act, and unless there is a duty to do something, it cannot be said that it is an illegal omission. Where nothing has been pointed out on behalf of the prosecution to show that accused's act of not making any endeavour to save the life of the deceased is against law or the accused was under an obligation by law to prevent such incident, it may be possible that the accused, seeing the flames, was so shocked that he did not react or he might not have attempted to put off the fire apprehending danger to his life, as individuals act differently in the same situation, the act of the accused was held not falling within the expression 'illegal omission'.[58]

Mere failure to prevent commission of an offence is not, by itself, an abetment in the absence of anything to show that the accused helped in, or instigated, the commission of the offence,[59] nor does the omission by a public servant to bring to the notice of his higher authorities, offences by the fellow-servant amount to abetment of the offence though it may form the foundation for a disciplinary action against him in a departmental manner.[60] A superior officer, like an excise officer, though present on the spot, is not under a legal obligation to prevent his subordinate, a preventive726 officer, from taking a bribe,[61] as being cases in which the accused was legally bound to prevent the commission of offences.

There must be an Intention to Aid

Clause 3 of this section relates only to intentional aiding. Intention to aid the commission of the crime is the gist of the offence of abetment by aiding.[62] In order to constitute abetment, the abettor must be shown to have 'intentionally' aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of s 107, IPC .[63]An act which merely amounts to aiding the commission of an offence is not an abetment. The aiding must snowball into 'intentionally aiding' the doing of a thing. The commission of the offence must be the dominant intention of the person who aids it.[64] A mere giving of an aid will not make the act an abetment of an offence, if the person who gave the aid did not know that an offence was being committed or contemplated. The intention should be to aid an offence or to facilitate the commission of an offence. But if the person who lends his support does not know or has no reason to believe that the act which he was aiding or supporting was by itself a criminal act, it cannot be said that he intentionally aids or facilitates the doing of the offence.[65] It must be shown that the commission of the crime was not possible without the specific aid rendered by the abettor.[66]

In *Shri Ram v State of Uttar Pradesh* ,[67] their Lordships of the Supreme Court observed:

> Thus, in order to constitute abetment, the abettor must be shown to have 'Intentionally' aided the commission of the crime. Mere proof, that the crime charged could not have been committed without the interposition of the alleged abettor, is not enough compliance with the requirements of s 107 . A person may, for example, invite another causally or for a friendly purpose and that may facilitate the murder of the invitee. But, unless the invitation was extended with intent to facilitate the commission of the murder, the person inviting cannot be said to have abetted murder. It is not enough that an act on the part of the alleged abettor, happens to facilitate commission of the crime. Intentional aiding and, therefore, active complicity is the gist of the offence of abetment under the third paragraph of s 107 .

A, the editor of a paper, inserted advertisements not obscene in themselves but relating, as he knew, to the sale of obscene books and photographs. *A* abetted their sale.[68]727

A printed a letter in his newspaper urging Indian soldiers to give up their allegiance to the British Crown, and also sent copies of the letter for distribution amongst the troops. *A* was guilty of abetment of an offence under s 124A, by way of aid.[69]

A, a debtor, paid a sum of money, to *B*, his creditor, and accepted an unstamped receipt from *B*, promising to affix a stamp himself. *A* did not thereby abet the offence of giving an unstamped receipt.[70]

A gave a *doe* to *B* who had declared his intention of coercing *C*. *B* wounds *C*. *A* abetted the offence by way of aid.[71]

Assisting a murder by holding the legs of the deceased when he was being murdered would be abetting the murder, if the assistance given was intentional. If it was not intentional but was given only under a threat of being put to death in case of non-compliance, the person assisting would be saved by s 94 .[72]

A priest who knowingly celebrates a bigamous marriage would be guilty of abetting the offence of bigamy.[73]

But mere presence at the commission of a crime even with the awareness that a crime was being committed is not in itself an intentional aid.[74]

Where in a murder case a co-accused stated that she remained an unwilling spectator while the murder was being committed by the other accused, her omission to intervene or raise an alarm did not constitute abetment as her inaction did not constitute criminality.[75]

Where a person who joined a conspiracy to wage war subsequently left it, but he omitted to report the plot under s 39, CrPC, it was held that in the absence of evidence to show that his intention in omitting to report was with a view to aiding the waging of war, his omission to report could not constitute abetment.[76]

The bare fact of an attestation is not sufficient to justify an inference that the attester knew that he was attesting a forged document,[77] but a person who attests a forged document knowing that it is intended to prove the discharge of a debt is guilty of abetment even if the document required no attestation.[78]

Single utterance of words leading towards death or suicide would not constitute abetment under s 107, IPC . Continuous conduct either by words or deeds is required in case those words or deeds do not directly indicate death or suicide to deceased.[79]

Time when the Aid is given

The act or omission must take place either prior to or at the time of, the commission of the offence. There can be no abetment (in the restricted sense in which the word is728 employed in the IPC) of an offence after it has been committed;[80] and it should be remembered that aid given at the time of an offence, renders the aider a principal in the offence under ss 34 - 38 . Mere subsequent knowledge of an offence is no evidence of abetment of that offence.[81]

Aid by Concealment

There is one important species of aid which can be given to the commission of crime, *viz*, concealment of the design to commit the crime; this kind of aid is dealt with separately under ss 118 - 20, IPC .

Facility by Supplying Food--Whether Amounts to Abetment

Supplying food to a person about to commit a crime is not necessarily an abetment of the crime. The supplying of necessary food to a person known to be engaged in crime is not per se criminal; but if food were supplied in order that the criminal might go on a journey to the intended scene of the crime or conceal himself while waiting for an opportunity to commit the crime, the supplying of food would be in order to aid the commission of the crime and might facilitate it.[82]

14. Abetment of Theft--Accessory before Fact

A and *B* went to steal horses. *A* remained half a mile from the place where the horses were. *B* alone went and brought horses to him, and they both rode away the horses. It was held that *A* was an accessory before the fact.[83]

A servant let a man into his master's house in order that he might steal the master's money. The servant left the house before the theft was committed by the man. It was held that the servant the fact.[84] A person who knowingly aids in the disposal of stolen property falls under the third definition and is an accomplice, and that whatever may have been the case in India before the Penal Code, he is an accomplice under the Code.[85]A person aiding in the disposal of stolen property is no doubt an accomplice or accessory, but he is an accessory after the fact. Such persons are dealt with in ss 410 - 414 . The chapter on abetment is restricted to accessories before the fact. Explanation 2 in this section itself shows that the thing facilitating the act abetted or aided must be done prior to or at the time of the commission of the act. In *Davies v DPP* ,[86] the House of Lords has declared that receivers of stolen goods are held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny. But the judgment goes on to distinguish a receiver as such from either an aider or an abettor, or an accessory before the fact or an accessory after the fact. On the other hand, the thief himself is treated as the aider and abettor of the receiver of the stolen property.[87]729

15. Abetment of Suicide (*Sati* or *Suttee*)

Abetment of Suicide--Essentials

There should be an intention to provoke, incite or encourage the doing of an act by the latter. Each person's suicidability pattern is different from the others. Each person has his own idea of self esteem and self respect. It is not possible to lay down any straitjacket formula in dealing with such cases. Each case has to be decided on the basis of facts and circumstances of the case.[88]

Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.[89]

Where a Hindu having died, his widow prepared to commit *sati*, in the presence of the accused who at first dissuaded her but finding that she was determined, yielded and gave her ghee which she poured over the pyre prepared for her husband's cremation and over herself sitting on the pyre. The pyre was then burned and consumed her and the corpse of her husband. It was held that the accused were guilty of abetting suicide of the woman.[90] In another case of *sati*, where the accused were members of the crowd who had joined the funeral procession from the house of the deceased to the cremation ground, while the widow of the deceased was walking in front of the procession with an intention to commit *sati* and they were shouting '*Sati Mata Ki Jai*' and as the procession proceeded, about 100 or 150 of the crowd surrounded the police in order to make it impossible for them to prevent her from becoming *sati* and ultimately the funeral pyre was set on fire with the widow sitting on it, it was held that the accused who were in that procession including the accused, were throughout intentionally aiding the widow in her decision to commit suicide by taking her with the bier to the cremation ground. They were further aiding her inasmuch as they prevented the police from interfering.[91] If there is no evidence showing that accused had acted at point of time suggested or hinted for commission of suicide. No case for instigation or abetment of suicide made out against accused.[92] The case law on *sati* has now to be read in the light of the provisions of the enactment the commission of Sati

(Prevention) Act 1987.

Appellant accused, supervisor in a school, had slapped the deceased, a student who was found sitting on his scooter. The student committed suicide. Held, the slapping of the child by the appellant did not constitute abetment to the deceased to commit suicide. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences, which is of common in the society and it could not be said that such petulance, discord and differences to the induced and ordinary person to commit suicide. Even if the accused had beaten the deceased, it could not be said that it is an act of attempt to commit suicide or instigating the commission of suicide by the deceased. It could not also be said that730 no other alternative to the deceased, except, to end his life was open. The appellant accused was acquitted of the charge under s 306, IPC .[1]

Section 306 penalises abatement of suicide. It is a unique legal phenomenon in the IPC that the only act, the attempt of which alone will become an offence. The person who attempts to commits suicide is guilty of the offence under s 309, IPC, whereas the person who commits suicide cannot be reached at all. Section 306 renders the person who abets the commission of suicide punishable for which the condition precedent is that suicide should necessarily have been committed. It is possible to abet the commission of suicide. But nobody would abet a mere attempt to commit suicide.[2]

Abetment in context of offence under s 306 IPC means inciting, encouraging, provoking or urging forward to commit conspiracy for doing of a thing.[3]

The pronouncement of Appex Court in *P Rathinam Nagbhusan Patnaik v Union of India* ,[4] that attempt to commit suicide is violative of art 21 of the Constitution, does not make the offence of abetment to commit suicide *ultra vires* the Constitution because the attempt to commit suicide is volitional and well planned act of the person concerned whereas abetment of the offence of suicide is on different footing as third person is aiding the other person to take his life by committing suicide.[5]

Appellant No 1 had illicit relations with the wife (accused no 2) of the deceased, he had taken the wife of the deceased in the presence of the relatives of the deceased as a result the deceased suffered humiliation and committed suicide. The close relatives of the deceased who were also examined as witnesses had categorically stated in their statements that on coming to know of the fact that Appellant No 1 has taken Accused No 2 from the house of PW5 and left her on 06.01.1996 at her parents' house, the deceased stated before the inmates of his house that because of the said insult and humiliation he does not like to live. It is also established that immediately thereafter in the night between 7th and 8th of January 1996 the deceased committed suicide. Held, the facts lead to only one conclusion that it is on account of humiliation and insult due to the behaviour and conduct of Appellant No. 1 and Accused No. 2 that deceased committed suicide. The conviction of the appellant under ss 107 and 306, IPC was held proper.[6]

Abetment of suicide is a distinct offence punishable under s 306 of the IPC . The provisions of abetment as contained in and explained by s 107 fully apply to an offence under s 306 of the IPC . The person against whom charge of abetment is levelled has to do something purposefully which facilitates the commission of the offence. It cannot be said with any stretch of imagination that a person subjecting a woman to cruelty is guilty of abetment of suicide.[7] Direct evidence of instigation to commit suicide is not necessary. When purposely or knowingly result is caused, and actual result is within the knowledge of the abettor, he can be held liable for abetting731 suicide.[8] Where suicide was committed by the wife within three months of marriage, demand of dowry articles at the time of marriage and thereafter was established, the harassment and cruelty on the past of husband and mother-in-law was proved, no effort was made by them to save her when she was burning and even no doctor was called to give any medical help, the version of defence that wife was mentally ill, was not supported by reliable evidence, conviction of the accused husband and mother-in-law under s 306 read with s 107, IPC, read with s 4, Dowry Prohibition Act 1961 was maintained.[9] Where there was a normal dispute between the deceased and her husband regarding not sending the deceased to her parent's house, it cannot be presumed, that the husband appellant instigated or abetted the deceased wife to commit suicide.[10] It often happens that there are disputes and discords in the matrimonial

home and a wife is harassed by the husband or her in-laws. This, however, would not by itself and without something more attract s 306, IPC read with s 107, IPC . Thus mere harassment of wife by husband due to differences per se does not attract s 306 read with s 107, IPC, if the wife commits suicide.[11]But where the wife who committed suicide by pouring kerosene and setting her ablaze stated in her dying declaration that the accused husband used to drink liquor after borrowing money from villagers and beat her after drinking liquor. The accused however had not instigated the deceased to commit suicide at the time of committing suicide by doing any act. The accused was held not guilty of abetting commission of suicide. However, the act of the accused in harassing the deceased, drinking continuously and beating her amounted to cruelty to wife so conviction of accused was altered from s 306 read with s 107 to s 498A, IPC .[12] Where the accused husband after consuming liquor beat his wife, and asked her to go and die so that he may marry another woman, held it did not amount to instigation within the meaning of s 306, IPC . Accused husband was acquitted of the charge under s 306, IPC .[13]Presumption under s 113A of Evidence Act is rebutted by circumstances that deceased was rushed to doctor by husband who promptly informed her brother as also his own brother and made arrangements to take deceased to hospital. So, intention to drive deceased to commit suicide cannot be inferred.[14]Act done to facilitate the commission of suicide should be closely proximate in time to the time of incident. The acts done at a distant time with no close, nearness or proximity to the time of a suicide will obviously have to be ruled out, as acts facilitating and accelerating the commission of suicide. There was a dispute between the family members of the deceased at one side and with the family of the petitioner on the other side. One case was pending in the court also. After consuming the poisonous substance, the deceased informed the present witnesses that being afraid of the petitioners and on account of their terror; he has opted to die by committing suicide. Held, the act of the accused did not amount to abetment, the accused were discharged.[15]

732The wife committed suicide within few days of marriage. Allegation was that wife committed suicide on account of harassment by the husband and the close relatives of the deceased wife. Sweeping allegation would not amount to abetment of offence of commission of suicide and something more is required under s 107 of the IPC which provides that the harassment should be of such a nature which should amount to instigation to any person to commit suicide. On the evidence adduced in the case, the accused were not convicted under ss 107 and 306, IPC .[16]

Special rules of evidence contained in s 113A, Evidence Act 1872 apply to a case of suicide by a married woman within seven years of her marriage.

The deceased employee in a company was not satisfied with the working conditions of his office; he sent his resignation letter which was accepted. He committed suicide, his dead body was found on the railway track. In the suicide note left by him, except referring to the name of the appellant accused at two places, there was no reference of any act or incidence whereby the appellant accused was alleged to have committed any willful act or omission or intentionally aided or instigated the deceased in committing the act of suicide. There was no case that the accused appellant has played any part or any role in any conspiracy, which ultimately instigated or resulted in the commission of suicide by the deceased. No case of abetment of suicide was made out against the appellant accused. Proceedings registered against the accused appellant under ss 107 / 306 IPC were quashed. [17]

Where hypersensitivity of the deceased induced him/her to commit suicide, none else can be convicted on charge under ss 107 / 306 IPC .[18]

16. Sting Operation--Liability of a Private Person

The offence of abetment defined by s 107 of the IPC or the offence of criminal conspiracy under s 120A of IPC would, require criminal intent (*mens rea*) on the part of the offender like any other offence. Both the offences would require existence of a culpable mental state which is a matter of proof from the surrounding facts established by the materials on record. Therefore, whether the commission of offence under s 12 of the Prevention of Corruption Act read with s 120B, IPC had been occasioned by the acts attributed to the accused (appellants) or not, ideally, is a matter that can be

determined only after the evidence in the case is recorded. What the accused appellant asserts is that in view of the fact that the sting operation was a journalistic exercise; no criminal intent can be imputed to the participants therein. Whether the operation was really such an exercise and the giving of bribe to A-1 was a mere sham or pretence or whether the giving of the bribe was with expectation of favours in connection with mining projects, are questions that can only be answered by the evidence of the parties which is yet to come. Such facts cannot be a matter of an assumption. Charge sheet against accused was not quashed.[19]

17. Abetment of Extortion

A purchased a tin of kerosene and was carrying it in a cart. *B*, a constable who was accompanied by *C* and *D*, members of the civil guard, challenged, *A* and demanded733 the cash memo. *A* produced the cash memo, *B* took possession of it and then the party moved on to the Thana. After going some way *B* demanded five rupees from *A* saying that he would let *A* go if the same was paid, *C* and *D* themselves did not ask for money but they were pushing *A* and telling him to go along. When the money was refused, the constable tore up the cash memo without any protest from *C* and *D* and the party moved to the *thana*. It was held that *C* and *D* intentionally aided the constable in his demand and were guilty of abetting an attempt by the constable to extort money from *A*.[20]

18. Abetment by giving Bribe

The authors of the Code said:

> The person who, without any demand, express or implied, on the part of a public servant, volunteers an offer of a bribe, and induces that public servant to accept it, will be punishable under the general rule as an instigator. But a person who complies with a demand, however signified, on the part of a public servant, cannot be considered as guilty of instigating that public servant to receive a bribe.[21]

But the IPC does not give effect to their views.[22] In an Orissa case,[23] after a review of the case-law on the subject, it has been held that the giver of the bribe is, in law an abettor of the offence and therefore, an accomplice, irrespective or whether the giving was voluntary or in response to a demand accompanied by threat or fear. But in the later case, *i.e.*, of bribe-giving under threats, whether the evidence of the accomplice is safe to be acted upon, depends on circumstances.

It has been held by the Allahabad High Court[24] that ss 107 and 109 are applicable to the cases under s 182 . Where, therefore, a person instigates another person to make a false report, he can be convicted under s 182 read with s 109, IPC .

The abetment by aid requires that the act of aid in question must have been done with the intention of aiding the commission of the offence. This principle also applied to cases of acts of aid in taking bribe.[25] When considering whether the bribe-giver is guilty of abetment, the definition of abetment given in the section will have to be construed along with illust (a) to s 109 .[26] The giver of the bribe is, in law, an abettor of the offence and therefore, an accomplice irrespective of whether the giving was voluntary or in response to a demand accompanied by threat or fear.[27] But when no prima facie case is made out against the accused of their having committed the offence under s 7 of Prevention of Corruption Act 1988, the question of the other accused committing an offence under s 12 of the said Act of abetment by aiding, does not arise.[28]

The bribe-givers are not exonerated merely because the public servant takes the money without any guilty intention. If a public servant solicits a bribe and the person734 solicited complies with the demand and hands him the money, he intentionally aids by his act, and therefore, abets the taking of the bribe by the public servant; the fact that the bribe was solicited may at most, render the abetment less culpable than it would otherwise be.[29] The offer of the bribe would amount to an abetment under

s 116 and would necessarily constitute an offence under s 165A (now replaced by s 12 of the Prevention of Corruption Act 1988). The definition of the word 'instigation' in this section leads to the same result.

Where a constable and others entered a house and apprehended certain persons as gamblers, and afterwards released them on payment of a sum of money by the latter, the offence committed is not house-trespass and extortion, but taking a bribe as regards the constable, and abetment of that offence as regard the other.[30] Where the head constable who took the bribe, gave it to the constable, was caught red-handed, the villagers attacked and assaulted member of raiding party on instigation of the accused constables and the head constable and snatched the personal belongings and currency notes used in the trap and also deterred them from discharging their duties, rescued the accused from the lawful custody of the inspector of the raiding party. The head constable who instigated and abetted other accused persons in snatching currency notes in possession of the inspector of the raiding party was convicted under s 3(a) read with s 109, IPC .[31]

19. Abetment of Attempt to Wage War

If the criminal acts took place pursuant to the conspiracy, the accused, as a party to the conspiracy, shall be deemed to have abetted the offence when he took active part in a series of steps taken to pursue the objective of conspiracy. The offence of abetting the waging of war, having regard to the extraordinary facts and circumstances of this case, justifies the imposition of capital punishment.[32]

20. Abetment of Personation--When it Amounts to an Offence

Commentary under the same heading in s 171D, vol 2, may be referred to.

21. Explanation 2--Act or Illegal Omission must Facilitate Commission of the Act Abetted

A person abets by aiding when by the commission of an act or illegal omission he intends to facilitate, and does facilitate, the commission of the crime abetted.[33] In order that expln 2 to this section may apply, it is necessary to determine whether an aid was given and whether with that aid the act or the offence was committed.[34] In abetment by aid, it is not the intention to aid the commission of crime, that is punished, but the fact that something is done or not done, whereby the commission of the crime is rendered easier. In instigation the criminal intention is punished; in conspiracy the intention plus some act; in aid, the act itself.

735Abetment as given in s 107, IPC not only includes instigation but also intentional aiding by an illegal omission. The appellant husband being the person responsible for creating circumstances provoking or forcing his deceased wife to take the extreme step to avoid a more miserable life and not making any attempt to save her life, was liable to be convicted for the offence of abetment of suicide.[35]

For establishing abetment covered by cl 3 read with expln 2, of s 107, IPC it has to be established that there was intentional aiding. Mere aiding may not amount to abetment unless it is intentional. Mere act or omission on the part of a person which in fact, results in facilitating the commission of the offence will not satisfy the requirements of expln 2 of cl 3. What is, therefore, required is that the person against whom charge of abetment is levelled has to do something purposefully which facilitates the commission of the offence. It cannot be said with any stretch of imagination that a person subjecting a woman to cruelty is guilty of abetment.[36]

In the case of a bigamous marriage, the act of throwing holy rice on the couple does not facilitate the commission of the offence and does not, therefore, amount to abetment, but the holding of the *antarpat* with the full knowledge that the marriage is a void marriage would fall under the purview of the explanation and amount to abetment.[37] A priest, who knowingly celebrates a bigamous marriage,

abets the offence of bigamy.[38]

Mere consent of persons to be present at the illegal marriage, or their presence in pursuance of such consent, or the grant of an accommodation in a house for the marriage, does not necessarily constitute abetment of such marriage.[39]

A, with the consent of *B*, a pregnant woman, pledges *B's* jewels in order to buy drugs for the purpose of causing *B* to miscarry. *A* is guilty of abetting an offence under s 312 .[40]

Where *A* facilitates the stabbing of *C* by *B* by holding *C's* hands while *B* stabbed *C*, *A* must be deemed to have aided the commission of the offence within the meaning of the explanation.[41]

Where *A* gave a *dao* to *B*, who had given out his intention to coerce the party against whom he was acting and who inflicted grievous hurt on such party with it, *A* was guilty of abetment within the meaning of second head of the third clause of this section.[42]

Where *A* ordered *B* and *C* to seize and forcibly take *D* in the contemplation of an assault upon him, and *D* was so beaten and tortured as to have died in consequence, *A* was guilty at least of abetting the commission of voluntarily causing grievous hurt.[43]

736But where a head constable deputed two *chowkidars* to take an arrested person to his house to fetch a bribe and the *chowkidars* confined him at various places and maltreated him, it was held that the head constable could not be held guilty of abetting the offence under s 347 in the absence of proof that he gave definite orders to that end.[44]

The fact that a motorcar of a person was used for the purpose of abduction does not make him an abettor of the abduction in the absence of evidence that the motor car was so used with his knowledge or under his orders.[45]

The fact that a person is the part-owner of a house, in which a woman is leading the life of a prostitute, is not sufficient to establish that the person abets prostitution.[46]

To prepare in conjunction with others a copy of an intended false document, and to buy a stamped paper for the purpose of writing such false document, and to ask for information as to a fact to be inserted in such false document does not constitute forgery nor an attempt to commit forgery, but are facts which would support a conviction for abetment, as being acts done to facilitate the commission of the offence.[47]

Illustrations

A wrote and took an active part in the preparation of a document but it was not he who signed the name of the alleged executant thereto. It was held that *A* abetted the forgery.[48]

A makes a false charge against *B*, *C* gives evidence in support of the charge. This is no evidence to hold that *C* abetted the institution of the charge.[49]

Mere subsequent knowledge of an offence is also no evidence of abetment of the offence.[50]

22. Charge of Abetment

There has been some difference of opinion in the High Courts on whether a person can be convicted of abetment on a charge of a substantive offence. The majority opinion is that where the case is covered by ss 236 - 37 of the CrPC 1898 [ss 236 and 237 of the CrPC 1898 (ss 221(1) and 221 (2) of the CrPC 1973)] and the accused has notice of all the facts which go to make up the charge of abetment, he can be convicted of it, even though the charge framed against him was only of the

substantive offence.[51] In some cases it has been held that it is not permissible for a737 court to find an accused person guilty of abetment of an offence, when he is charged only with the substantive offence.[52]

Conviction for Abetment may be made without Charge in Certain Cases

Their Lordships of the Privy Council had taken the view that a man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made.[53] A review of the authorities on the point shows that it cannot be laid down as an inflexible rule that an accused cannot be convicted for abetment if he was charged with the main offence only, and no separate charge was framed for abetment. If the accused had notice of the facts, which constituted abetment, although the charge was one for the main offence, and if there has been no prejudice to the accused by the omission to frame a separate charge for abetment, he can be convicted for abetment even though the charge for the main offence fails.[54] But in the absence of facts stated in the charge which constitute the offence of abetment, a conviction for abetment could not be substituted by an appellate court if it finds that the conviction for the substantive offence itself is unsustainable. But if the facts charged are sufficient to frame a charge for the abetment, it is then open to an appellate court to alter the conviction for the offence into one of abetment.[55]

Accused Charged with Abetment can be Convicted of Substantial Offence

It is now settled law that an accused may be convicted of a substantive offence even if he is charged only with its abetment. It will not be correct to put forward as a proposition of law that on a charge of abetment of a particular offence, an accused cannot be convicted of that substantive offence. In each case what has to be shown is whether there had been any prejudice caused to the accused. Certainly, on a charge of abetment the accused cannot be convicted of a substantive offence if he has been prejudiced in his defence of a case based on a substantive charge.[56]

Accused Charged with one Form of Abetment can be Convicted of other Form of Abetment

It is open to the prosecution to charge abetment generally, and then if the evidence does not establish abetment except in one particular form, to rely on that particular form for the conviction of the accused. The charge will amount to notice to him that he has to meet a case of abetment in one or more of the different ways indicated in this section.[57]738

On a Charge under Sections 304, 149, Conviction under Sections 304, 107 cannot be made

In order to attract Section 221(2) , CrPC offence must be a cognate offence and not a distinct offence. The offence of rioting and the offence of constructive liability as members of an unlawful assembly for the offence of culpable homicide not amounting to murder are distinct offences from the main offence of s 304, IPC, under s 221(2) of the CrPC an accused charged under s 304, IPC could have been convicted under s 304 read with s 107, IPC, but an accused charged under s 304 / 149, IPC, cannot be convicted under s 304 / 107, IPC, without framing a proper charge.[58]

Charge in Conspiracy Cases

Where a criminal conspiracy amounts to an abetment under this section, it is unnecessary to invoke the provisions of ss 120A and 120B, as the IPC has made specific provision for the punishment of such a conspiracy.[59] When the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been actually committed in pursuance thereof these two sections are wholly irrelevant. Conspiracy, it should be borne in mind, is one form of abetment, and where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy with the offence of abetment under s 109 . The explanation to s 109 makes this quite clear. An offence is said to be committed in consequence of abetment, when it is committed in pursuance of the conspiracy, and the abettor by conspiracy is made punishable (under s 109) with

the punishment provided for the actual offence.[60] But in *Emperor v Karamalli Gulamalli* ,[61] it has been held:

> The punishment for the offence of conspiracy under section 120B depends upon whether the illegal act has or has not been carried out. In the former case the punishment will be in accordance with section 109, ie, it will be the same as for the offence itself. In the latter case it will be in accordance with section 116 . When conspiracy is charged, therefore, it is always open to the prosecution to charge further that the illegal acts which were the object of the conspiracy have been carried out. In the present case proof having been given that the illegal acts were done in furtherance of the conspiracy, the offence under section 120B is punishable under section 109 and not under section 116 . But acts done in pursuance of the conspiracy cannot be separately punished unless these acts are separately charged and particularised as required by the Code.[62]

23. Proof--Specific Allegations be made and Proved

In case of an allegation that a person is liable to be punished because of his having abetted the commission of the crime, specific allegations ought to be made against him and proved in the course of the trial to bring home the guilt to the accused regarding the manner in which he might have abetted the commission of the crime. It must be shown that the commission of the crime was not possible without the739 specific aid rendered by the abettor.[63] Specific allegations must be made in order to attract the application of this section.[64]

24. Mere Association not Sufficient to Prove Conspiracy

Abetment by conspiracy, as set forth in cl (2), s 107, is not established merely by proof of association together, nor by mere suspicion of guilt.[65]

Abettor--Whether can be Convicted if Principal Offender is Acquitted

It cannot be laid down as a rule of law that a person cannot, at all, be convicted of abetting a certain offence when the person, alleged to have committed that offence in consequence of the abetment, has been acquitted. The question of the abettor's guilt depends on the nature of the act abetted and the manner, in which the abetment was made.[66]

Abetment by itself being a substantive offence, an abettor can be convicted before the principal is apprehended and put on trial.[67] It is only in a case, where a person has abetted an offence by intentionally aiding another to commit that offence, which the charge of abetment against him would fail when the person, alleged to have committed the offence is acquitted of the offence.[68]

Where the accused was charged with the offence of abetment of conspiracy of commission of offence of theft by his officer, substantive offence against principal offender was not established and the principal offender was acquitted of the charges, it was held that the alleged abettor cannot be convicted and he also has to be acquitted.[69]

When no *prima facie* case is made out against the accused of their having committed the offence under s 7 of the Prevention of Corruption Act 1948, the question of other accused committing an offence under s 12 of the said Act, of abetment by aiding, does not arise.[70] When the accused charged under s 5 of the Prevention of Corruption Act 1947 is acquitted as no prima facie case was made out against him, the charge against co-accused for abetment of the said offence is not maintainable.[71]740

1 *V Sesha Ayyar v Venkatasubba Chetty* AIR 1924 Mad 487, 25 Cr LJ 442 .

2 General Clauses Act 1897, ss 3(1), 4(2) .

3 Re *Prabati Charan Chatterji* 17 ILR All 498.

4 *V Sesha Ayyar v Venkatasubha Chetty* AIR 1924 Mad 487, p 488, 25 Cr LJ 442 .

5 *Queen v Kullimoodden* 7 WR 53 and other rulings to the contrary are no longer good law.

6 *Dawar Singh v Emperor* AIR 1937 All 755, p 756 .

7 *Jamuna Singh v State of Bihar* AIR 1967 SC 553, (1967) Cr LJ 541 .

8 *State of Gujarat v Pradyuman Ramanlal Mehta* (1999) Cr LJ 736 (Guj) (DB) .

9 *Ummed Mal v State of Rajasthan* (1974) Raj LW 459, (1974) WLN 495 ; *Anil Kr Sarkar v State of West Bengal* 2009 Cr LJ 4678 (Cal) .

10 *Malan v State of Bombay* AIR 1960 Bom 393, (1960) Cr LJ 1189 ; *Tha La Aung v Emperor* 3 Cr LJ 437 ; *Bashir Mahommad v Peer Khan* (1972) WLN 139, (1972) Raj LW 159 .

11 *Banwari Lal v State of Haryana* (1979) CLR 233, p 235 (P&H); *Rupa v State of UP* 1 (2014) DMC 226 (All) .

12 *Pramatha Nath v State* AIR 1951 Cal 581, p 584, 52 Cr LJ 1480 .

13 *Sonappa Shina Shetty v Emperor* AIR 1940 Bom 126, p 127, 41 Cr LJ 481 .

14 *Anil Kr Sarkar v State of West Bengal* 2009 Cr LJ 4678, p 4682 (Cal) ; *Brij Lal v Premchand* AIR 1989 SC 1661, 1989 (2) Crimes 612 (SC), JT 1989 (3) SC 1, 1989 (1) Scale 1076, 1989 Supp (2) SCC 680, [1989] 2 SCR 612 .

15 *Anil Kr Sarkar v State of West Bengal* 2009 Cr LJ 4678, p 4682 (Cal) ; *Brij Lal v Premchand* AIR 1989 SC 1661, 1989 (2) Crimes 612 (SC), JT 1989 (3) SC 1, 1989 (1) Scale 1076, 1989 Supp (2) SCC 680, [1989] 2 SCR 612 .

16 *Santosh Nathumal Goenka v State of Maharashtra* 2010 Cr LJ (NOC) 219 (Bom), 2010 (1) Bom CR (Cr) 233, 2009 All MR (Cr) 3377 .

17 Re *Kogga Pai*(1970) Mad LJ (Cr) 379, p 385 (Mys).

18 *Shyam Bahadur v State* (1967) Cr LJ 1360, p 1362, AIR 1967 Pat 312 .

19 *Bashir Mahommad v Peer Khan* (1972) WLN 139, (1972) Raj LW 159 ; *Anandha Thandavam v Udaya Sundaram* (1989) 3 Crimes 209 (Mad) .

20 *Arbind Kumar Singh v State of Bihar* (1990) 1 BLJR 393, p 414 .

21 *Siaram v State of Uttar Pradesh* AIR 1975 SC 175, (1975) Cr LJ 240 ; *Hemanta Kumar Mandal v State of West Bengal* (1993) Cr LJ 82 (Cal) .

22 *Chinnaswamy v State* (2005) Cr LJ 488 (Mad) (DB) .

23 *Netai Dutta v State of West Bengal* (2005) Cr LJ 1737 (SC) .

24 *Noor Mahommad Mohd Yusuf v State of Maharashtra* AIR 1971 SC 885, (1971) Cr LJ 793 . Refer to note under s 34 .

25 *Kishan Lal & Ors v Union of India* (1994) Cr LJ 3472 (P&H) (FB) .

26 Indian Penal Code 1860, s 108, and commentary thereunder.

27 *Ibid*, expln 2.

28 *Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1, p 7, 26 Cr LJ 431 .

29 *Emperor v Ganesh Damodar Savarakar* 11 Cr LJ 264, p 266, 22 Bom LR 105 ; *Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1, p 7 .

30 *Gaguna Kanta Nath v State of Assam* AIR 1959 SC 673, p 676, (1959) Cr LJ 917 ; *Jamuna Singh v State of Bihar* AIR 1967 SC 553, (1967) Cr LJ 541 .

31 *Emperor v Parimal Chatterjee* AIR 1932 Cal 760, p 761, 34 Cr LJ 78 .

32 *Arbind Kumar Singh v State of Bihar* (1990) 1 BLJR 393 .

33 *Re Nennur Rami Reddi*AIR 1917 Mad 351, 17 Cr LJ 175 ; Re *Laskshminarayana Aiyar*AIR 1918 Mad 738, 19 Cr LJ 29 ; *Tha La Aung v Emperor* 3 Cr LJ 437 ; *Ram Nath v King-Emperor* AIR 1925 All 230, 26 Cr LJ 362 ; *State v Aziz* AIR 1962 Bom 243, p 248, (1962) 2 Cr LJ 472 (abetment of the contravention of the order would not require any kind of mens rea).

34 Re *Nennur Rami Reddi*AIR 1917 Mad 351, 17 Cr LJ 175 ; *R v Imamdi Bhooyah* 21 WR (Cr) 8 ; *Shrilal v State* AIR 1953 MP 155, p 156, 54 Cr LJ 995 .

35 *Shri Ram v State of Uttar Pradesh* AIR 1975 SC 175, p 177, (1975) Cr LJ 240 ; *Hemanta Kumar Mondal v State of West Bengal* (1993) Cr LJ 82 (Cal) .

36 *R Puthuswamy v Union Territory of Pondicherry* (1992) Mad LJ 665, p 670 (Cr) .

37 *Mataro v Emperor* AIR 1929 Sind 9, 19 Cr LJ 924 .

38 *Russell on Crime,* eleventh edn, p 155.

39 *Vemireddy Satyanaraya Reddy v State of Hyderabad* AIR 1956 SC 379, p 381, (1956) Cr LJ 777 .

40 *Queen-Empress v Deodhar Singh* 27 ILR Cal 144, p 155 ; the case-law discussed therein.

41 *Sarju Prasad v Emperor* 15 Cr LJ 617, p 618 .

42 *B Resaiah (Dr) v State of Andhra Pradesh* (1991) Cr LJ 189 (AP) .

43 *Malan v State of Bombay* AIR 1960 Bom 393, p 394, (1960) Cr LJ 1189 ; *Jag Narain Prasad v State of Bihar* (1998) Cr LJ 2553 (SC) .

44 Re *Nunnur Rami Reddi*AIR 1917 Mad 351, 17 Cr LJ 175 .

45 *Salaiyappan v State* (1990) LW (Cri) 469 (Mad) .

46 *Wilcox v Jefferey* (1951) 1 All ER 464 .

47 *Breese v State* (1861) 12 Ohio 146 .

48 *Russell on Crime,* seventeenth edn, pp 146-47.

49 *Sachin Bansilal Ghaiwal v State of Maharashtra* 2014 Cr LJ 4217, p 4224 (Bom) (DB) .

50 *Oxford Advanced Learners Dictionary*, sixth edn.

51 *Cyriac v Sub-Inspector of Police, Kaduthuruthy* (2005) Cr LJ 4322 (Ker) .

52 *Ibid.*

53 *Ibid.*

54 *Cyriac v Sub-Inspector of Police, Kaduthuruthy* (2005) Cr LJ 4322 (Ker) ; see also *Ramesh Kumar v State of Chhattisgarh* (2001) 2 Andh LD 873(Cr) (SC), (2001) 9 SCC 618, (2001) Cr LJ 4724; *Praveen Pradhan v State of Uttranchal* 2012 Cr LJ 4925, (2012) 9 SCC 734 .

55 *Praveen Pradhan v State of Uttaranchal* 2012 Cr LJ 4925, 2012 AIR SCW 5372, (2012) 9 SCC 734 .

56 *Emperor v Parimal Chatterjee* AIR 1932 Cal 760, p 761, 34 Cr LJ 78 ; *Girjashankar Jagannath Prasad v State of Madhya Pradesh* (1988) MPLJ 421 ; *State of Punjab v Shyam Lal* (1992) 1 DBC 477 (P&H)(DB).

57 *Emperor v Amiruddin Salebhoy Tyabjee* AIR 1923 Bom 44 ((2)), p 46, 23 Cr LJ 466 ; *Damodar v State* AIR 1955 Bom 61, (1955) Cr LJ 181 ; *Girja Shankar Jagannath Prashad v State of Madhya Pradesh* (1988) MPLJ 421 ; *Emperor v Mihan Singh* AIR 1924 Lah 440, p 444, 26 Cr LJ 1352 ; *Baby John v State* AIR 1953 Tr & Coch 251, p 252, 54 Cr LJ 1273; *Ved Prakash Bhaiji v State of Madhya Pradesh* (1995) Cr LJ 893, p 895 (MP) .

58 Re *Lakshminarayana Aiyar*AIR 1918 Mad 738, p 740, 19 Cr LJ 29 ; *Raghunath Dass v Emperor* AIR 1920 Pat 502, p 503, 21 Cr LJ 213 ; *Pramatha Nath v State* AIR 1951 Cal 581, p 584, 52 Cr LJ 1480 .

59 *State of AP v Monica Bedi* (2006) Cr LJ 4457 (AP) .

60 *Kajal Datta v State of Tripura* 2013 Cr LJ 4939, p 4945 (Gauh) .

61 *Baby John v State* AIR 1953 Tr & Coch 251, p 252, 54 Cr LJ 1273.

62 Re *G Ananthachari*AIR 1938 Mad 996, p 998, 40 Cr LJ 302 .

63 *Ram Kumar v State of Madhya Pradesh* (1998) Cr LJ 952 (MP) .

64 *Ibid*.

65 *R v Earl of Somerset* 19 St Tr 804 .

66 *R v Sheo Dial Mal* 16 ILR All 389 .

67 *R v Cope* (1921) 16 Crapp R 77 ; *R v Miskell* (1954) 1 All ER 137 .

68 *Bura Manohar v State of AP* (2002) Cr LJ 3322 (AP) .

69 2 Hawk Co 29 s 16 ; *Girja Shankar Jagannath Prasad v State of Madhya Pradesh* 1988 MPLJ 421 .

70 *R v Krause* (1902) 66 JP 121, 18 TLR 228 .

71 *R v Savarkar* 34 ILR Bom 394, 12 Bom LR 105 .

72 *R v Earl of Somerset* 19 St Tr 804 .

73 *R v Sheo Dial Mal* 16 ILR All 389 .

74 *Raghunath Dass v Emperor* AIR 1920 Pat 502, p 503, 21 Cr LJ 213 ; *Pramatha Nath v State* AIR 1951 Cal 581, p 584, 52 Cr LJ 1480 .

75 *Baby John v State* AIR 1953 Tr & Coch 251, p 252, 54 Cr LJ 1273.

76 Re *Koganti Appayya*AIR 1938 Mad 893, p 895, 40 Cr LJ 108 .

77 Re *Lakshminarayana Aiyar*AIR 1918 Mad 738, p 740, 19 Cr LJ 29 .

78 *Gallu Shah v State of Bihar* AIR 1958 SC 813, (1958) Cr LJ 1352 (SC) .

79 *Jai Narain v State of Bihar* (1972) Cr LJ 469, p 472, AIR 1972 SC 1764 ; *Dawar Singh v Emperor* AIR 1937 All 755 ; *Ram Jiwan v King-Emperor* AIR 1926 Oudh 448, 27 Cr LJ 822 .

80 *CP Malik v State* (1999) Cr LJ 4525 (Del) .

81 *Lakshminarayan v State* (1962) MPLJ (246) (Notes) .

82 *Queen v Shumeeruddin* 2 WR (Cr) 40 .

83 *Queen-Empress v Kali Charan* 21 WR (Cr) 11 ; *Queen-Express v Latifkhan* 20 ILR Bom 394 .

84 *Emperor v Cooverji Nasarwanji* 5 Cr LJ 173, 9 Bom LR 159 .

85 *R v Imamdi Bhooyah* 21 WR (Cr) 8 .

86 *R Welham* 1 Cox CC 193; *R v Williams* 1 Den CC 39 . See *Russell on Crime*, p 189 Note (f) and SD Appendix; for other cases on instigation, *R v Higgins* 2 East PC 522 ; *R v Scofield* Caldecotts Settlement case 397; *R v Gregory* LR I CC 77. As to the right of action for damages which an innocent agent has against one who by misrepresentation has induced him to commit a *prima facie* offence *Burrow W Rhodes* LR [1899] 1 QB 816.

87 *Shri Lal v State* AIR 1953 MB 155, p 156, 54 Cr LJ 995 .

88 *V Adinarayana v State of Andhra Pradesh* (2000) Cr LJ 1182 .

89 *State of Maharashtra through PSO, Police Station, Hinganghat v Natthu Laxman Thutarkar* 2013 Cr LJ (NOC) 294 (Bom) .

90 *B Ammu v State of Tamil Nadu* 2009 Cr LJ 866, p 870 (Mad) .

91 *State of Gujarat v Pradyuman Ramanlal Mehta* (1999) Cr LJ 736 (Guj) (DB) .

92 Newspapers (Incitements to Offences) Act 1908.

93 Section 26 .

94 *Prem Narain v State* AIR 1957 All 177, p 183 .

95 Hawkins 2 PCC 29, s 16 .

96 Hale 1 PC 618.

97 *Russell on Crime,* eleventh edn, pp 161, 173.

98 Indian Penal Code 1860, s 116 .

99 *Queen v Boodhun Mooshur* 8 WR 78 .

1 *Queen v Rasookoollah* 12 WR 51 .

2 *Tarinee Prosaud Banerjee v Baboo Doorga Mohan Dass* 18 WR 8 ; *Queen v Madaree* 3 WR 4 .

3 *Kali Munda v King-Emperor* 28 ILR Cal 797, 802.

4 *King-Emperor v Tirumal Reddi* 24 ILR Mad 523, 547(FB).

5 *Kalil Munda v King-Emperor* 28 ILR Cal 797, p 803 **followed** in *State v Jai Govind* AIR 1951 Raj 89, 52 Cr LJ 646 .

6 *King-Emperor v Tirumal Reddi* 24 ILR Mad 523, p 546 .

7 *Ex Sepoy Haradhan Chakrabarty v Union of India* (1990) 2 SCC 143, p 146, AIR 1990 SC 1210, p 1212 .

8 *Jugeshwar Singh v Emperor* AIR 1936 Pat 346, p 348, 37 Cr LJ 893 .

9 *State of Andhra Pradesh v Kandimalla Subbaiah* AIR 1961 SC 1241, p 1244, (1961) 2 Cr LJ 302 ; *Noor Mahommad v State of Maharashtra* 1970 SCC 274(Cr), (1970) 1 SCC 696.

10 *Pramatha Nath Talukadar v Saroj Ranjan Sarkar* AIR 1962 SC 876, p 886, (1962) 1 Cr LJ 770 ; *Basi Reddy v State of Mysore* (1972) Mad LJ 118 (Mys) (Cr), (1972) Cr LJ 1141 ; *Madhukar Dasrath Nandekar v State of Mysore* (1972) Cr LJ 978, (1972) Mad LJ (Cr) 123 .

11 *Emperor v Pursumal Gerimal* AIR 1938 Sind 108, 39 Cr LJ 630 .

12 *Chandiram v Emperor* AIR 1926 Sind 17, 27 Cr LJ 286 .

13 *Gulab Singh v Emperor* AIR 1916 All 141, 17 Cr LJ 431 ; *NMMY Momin v State of Maharashtra* (1971) Cr LJ 793, p 796, AIR 1971 SC 885 .

14 *R v Lalit Mohan* 12 Cr LJ 2, 15 CWN 98 .

15 Re *Abdool Kurreem* 4 ILR Cal 10; *R v Plummer* (1802) 2 KB 539 ; *Topandas v State of Bombay* AIR 1956 SC 33, (1956) Cr LJ 138 .

16 *Emperor v Abdul Hamid* AIR 1944 Lah 380, p 381 ; *Kalil Munda v King-Emperor* 28 ILR Cal 797 .

17 *Mulcahy v Queen* (1868) LL 3 HL 306, p 317 .

18 *Russell on Crime,* eleventh edn, pp 215-16.

19 *Radhe Kishun v Emperor* AIR 1929 Pat 157, p 159, 30 Cr LJ 642 .

20 *Barindra Kumar Ghosh v R* 37 ILR Cal 467, p 507 . As to proof of conspiracy by means of communications between co-conspirators, or between conspirators, and third persons, s 10 of the Indian Evidence Act 1872, and *R v Abani Bhusan* 11 Cr LJ 710, 15 CWN 25 .

21 *R v Brissae* (1803) 4 East 164, p 171 .

22 Quoted with approval in *Malcalay v R* LR (1868) 3 HL 306, p 317 which is cited with approval in *R Meyrick*(1928) 21 CR App R 94, p 99; *Emperor v Abdul Hamid* AIR 1944 Lah 380, p 381 .

23 *Queen v Gobind Dobey* 21 WR 35, p 36 ; Re *P Rama Naidu*AIR 1942 Mad 92 ((1)), 43 Cr LJ 227 .

24 *Barindra Kumar Ghosh v R* 37 ILR Cal 467 .

25 *R v Gobind Dobey* 21 WR Cr 35 ; ss 109 - 10 and 111-13.

26 *R v Amrita Gobinda* 10 Bom HC Rep 497; *R v Tika* 26 ILR All 197 .

27 *Queen-Empress v Mathura Das* 6 ILR All 491, p 495 .

28 *Queen-Empress v Baku* 24 ILR Bom 287, p 291 .

29 *Pramatha Nath v Saroj Ranjan* (1962) 1 Cr LJ 770, p 781, AIR 1962 SC 876 ; *Regina v Padala Venkatasami* ILR 3 Mad 4, 1 Weir 543 .

30 *B Jone Bin v A Manuel* AIR 1936 Rang 358, p 360 .

31 Indian Penal Code 1860, s 111, proviso; *Kasho Chaudhary v State of Bihar* (1968) BLJR 10 (summary of cases).

32 *Regina v Padala Venkatasami* ILR 3 Mad 4, 1 Weir 543 .

33 *Sushil Chandra Lahiri v Emperor* AIR 1919 Oudh 160, p 175 .

34 *Queen v Ameer Khan* 17 WR 15, p 16 .

35 *Jaimangal v Emperor* AIR 1936 All 437, p 439, 37 Cr LJ 864 .

36 *Russell on Crime,* eleventh edn, pp 152-53.

37 Indian Penal Code 1860, ss 107 - 08 ; *Trilok Chand v State of Delhi* AIR 1977 SC 666, p 671, (1977) Cr LJ 234 ; *Shri Ram v State of Uttar Pradesh* AIR 1975 SC 175, p 177, (1975) Cr LJ 240 ; *Jainoon v State* 1990 LW (Cr) 346 (Mad) .

38 *Bondili Sankara v R* 1 Weir 47 ; *Parapravan v Morgan* 1 Weir 48 ; *Jainoon v State* (1990) LW (Cr) 346 (Mad) .

39 *CBI v VC Shukla* AIR 1998 SC 1406, (1998) Cr LJ 1905 (SC) .

40 *State of Maharastra v Ramdas Shankar Kurlekar* (1999) Cr LJ 196 (Bom) (DB) .

41 *Krishan Lal v Union of India* (1994) Cr LJ 3472 (P&H) (FB) .

42 *Om Prakash v State of Haryana* 2015 (2) Crimes 25 (SC), 2015 (2) SCC 84, 2014 (12) JT 401, 2014 (12) Scale 68, 2014 (10) SLT 142, 2015 Cr LJ 586 .

43 *Purushothaman v State of Kerala* (1989) 1 Ker LJ 340 .

44 *Chandresti Singhvi v State of Rajasthan* (2000) Cr LJ 1632 (Raj) .

45 *Surendra Agnihotri v State of Madhya Pradesh* (1998) Cr LJ 4443 (MP) .

46 *Majara v Queen* PCA No 29 of 1953 dated 14 January 1954 (PC).

47 *R v Cooverji* 5 Cr LJ 176, 9 Bom LR 161 .

48 *CP Malik v State* (1999) Cr LJ 4525 (Del) .

49 *Emperor v Bepin Behari Ganguly* AIR 1932 Cal 549, p 550, 33 Cr LJ 699 ; *Sarju Prasad v Emperor* 15 Cr LJ 617 .

50 *Khajah Noorul Hossein v C Fabre-Tonnerre* 24 WR 26 .

51 *Ram Kumar v State of Himachal Pradesh* (1995) Cr LJ 3621 (SC), AIR 1995 SC 1965 .

52 *Gopal Chunder Sirdar v Foolmonibewa* 8 ILR Cal 728, p 729 .

53 *R v Lakshmi BR* 19 August 1886 ; *Noorul Hossein v Fabre Tonnerre* 24 WR 26 .

54 *R v Kali Churn* 21 WR (Cr) 11 .

55 *R v Latif Khan* 20 ILR Bom 394 ; **see also***R v Appana* 1 Weir 52 ; *R v Krishna Shetti* 1 Weir 50 .

56 *Mst Rup Devi v State of Himachal Pradesh* AIR 1955 HP 15, 56 Cr LJ 265 .

57 *R v Tun Aung Gyaw* 4 Cr LJ 483, 3 LBR 222 .

58 *Surendra Agnihotri v State of Madhya Pradesh* (1998) Cr LJ 4443 (MP) .

59 *Upendra Chandra v Emperor* AIR 1941 Cal 456 ; *Emperor v Bepin Behari Ganguly* AIR 1932 Cal 549, p 550, 33 Cr LJ 699 ; *Sarju Prasad v Emperor* 15 Cr LJ 617 ; *Gopal Chunder Sirdar v Foolmoni Bewa* 8 ILR Cal 728, p 729 ; *R v Kali Churan* 21 WR (Cr) 11 ; *Rup Devi v State of Himachal Pradesh* AIR 1955 HP 15 ; 56 Cr LJ 265 ; *Shayam Bahadur v State* (1967) BLJR 3, (1967) Cr LJ 1360, AIR 1967 Pat 312 .

60 Re *Ananthachari*AIR 1938 Mad 996 .

61 *State of Kerala v Janardhanan Chettiar* (1965) KLT 377, p 382, **distinguishing***Queen-Empress v Latif Khan* 20 ILR Bom 394 ; *Queen v Kali Churan Gangooly* (1872) 21 WR (Cr) 11 .

62 *Tilok Chand v State of Delhi* AIR 1977 SC 666, p 671, (1977) Cr LJ 254, *Shri Ram v State of Uttar Pradesh* AIR 1975 SC 175, p 177, (1975) Cr LJ 240 ; *KG Patel v State of Maharashtra* AIR 1973 SC 1388, p 1395, (1973) SCC 512 (Cr) ; *Bachchan Lal v State* AIR 1957 All 184, p 187, (1957) Cr LJ 344 ; *State of Rajasthan v Kesa* (2002) Cr LJ 432 (Raj) .

63 *State of Rajasthan v Kesa* (2002) Cr LJ 432 (Raj) ; *Rajat Prasad v CBI* 2014 Cr LJ 2941, (2014) 6 SCC 495 .

64 *Purushothaman v State of Kerala* (1989) 1 Ker LJ 340 .

65 *Ram Nath v King-Emperor* AIR 1925 All 230, p 234, 26 Cr LJ 362 .

66 *Inder Bhushan Ghosh v State* AIR 1950 All 639 ; *MM Behi v NSSI Corpn* (1971) Cr LJ 1378, p 1380-81 (Del) .

67 *Shri Ram v State of Uttar Pradesh* AIR 1975 SC 175, p 177, (1975) Cr LJ 240, (1974) Cr AR (SC) 342 .

68 *R v De Marny* LR [1907] 1 KB 338.

69 *Pindi Das v R* 6 Cr LJ 411, 2 PWR Cr 97 .

70 *R v Mithulal* 8 ILR All 18 ; *R v Janki,* 7 ILR Bom 82 ; **but see***R v Somasundram* 23 ILR Mad 155 .

71 *R v Eshan Meah* 12 WR Cr 52 .

72 *Bachchan Lal v State* AIR 1957 All 184, p 187 .

73 *Empress v Umi* 6 ILR Bom 126 ; *R v Rughunath* 3 Cr LJ 488, 16 Ker LR 57 .

74 *Empress v Umi* 6 ILR Bom 126 ; *Malan v State of Bombay* AIR 1960 Bom 393, p 394, (1960) Cr LJ 1189 .

75 *Sarju Prasad v Emperor* 15 Cr LJ 617, p 618 .

76 *Goman Saya v Emperor* 14 Cr LJ 610, p 615 .

77 *Chinna Vira Reddy v Emperor* AIR 1939 Mad 730, 41 Cr LJ 11 .

78 *Re P Rama Naidu*AIR 1942 Mad 92 ((1)), 43 Cr LJ 227 .

79 *K Ramesh (Dr) v State of Andhra Pradesh* 2013 Cr LJ (NOC) 190 (AP) .

80 *Harji v State of Rajasthan* (1978) Raj LW 1, p 6 .

81 *R v Shumeeruddeen* 2 WR (Cr) 40 .

82 *Re Lingam Ramanna* ILR 2 Mad 137, p 139.

83 *R v Kelly* (1820) R&R 421 .

84 *R v Suckwell & Parkins* (1841) *C*&M 215.

85 *Mavuthalayan v Emperor* AIR 1934 Mad 721, 722.

86 *Davies v DPP* (1954) AC 378 .

87 *R v Norris* (1916) 86 LJ KB 810, 12 Cr App R 150; *Charter Patersons & Pickfords Carriers Ltd v Wessel* (1947) KB 849 .

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3 *Vishal Agarwal v State of Assam* 2012 (120) AIC 914 (Gauh) .

4 *P Rathinam Nagbhusan Patnaik v Union of India* (1994) Cr LJ (SC) 1605, (1994) 3 JT SC 392 .

5 *Kishan Lal v Union of India* (1994) Cr LJ 3472 (P&H) (FB) .

6 *Dammu Sreenu v State of Andhra Pradesh* 2009 Cr LJ 3728, p 3730 (SC), AIR 2009 SC 2532, (2009) 8 SCALE 71 .

7 *Rameshbhai Ranchhodbhai v State of Gujarat* (1989) 2 Guj LR 834, p 835-36 ; *Bhagwan Das v Kartar Singh* (2007) 11 SCC 205, AIR 2007 SC 2045 ; *Jetha Ram v State of Rajasthan* 2012 Cr LJ 2459 (Raj) .

8 *Girja Shankar Jagannath Prasad v State of Madhya Pradesh* (1988) MPLJ 421 .

9 *Arvind Kumar v State of Madhya Pradesh* (2001) Cr LJ 2317 (MP) .

10 *Jetha Ram v State of Rajasthan* 2012 Cr LJ 2459, p 2463 (Raj) ; *Bhagwan Das v Kartar Singh* AIR 2007 SC 2045, 2007 Cr LJ 3420, JT 2007 (7) SC 36, RLW 2007 (4) SC 2980, 2007 (7) Scale 167, (2007) 11 SCC 205, **relied on**.

11 *Bhagwan Das v Kartar Singh* (2007) 11 SCC 205, AIR 2007 SC 2045 ; *Jetha Ram v State of Rajasthan* 2012 Cr LJ 2459, p 2463 (Raj) .

12 *Panchipala Laxmaiah v State of Andhra Pradesh*(2001) Cr LJ 4063 (AP); **See also***State of Gujarat v Yusujbhai Aibhai Sipai* 2013 (3) Guj LR 2260 .

13 *State of Gujarat v Yusufbhai Alibhai Sipai* 2013 (3) Guj LR 2260 (Guj) .

14 *Devassia v State of Kerala* (2006) Cr LJ 3480 (Ker) .

15 *Khyaliram v State of MP* 2007 Cr LJ 4634 (MP) (DB) .

16 *Darbar Singh v State of Chhattisgarh* 2013 Cr LJ 1612, p 1617 (Chh) .

17 *Netai Dutta v State of West Bengal* 2005 Cr LJ 1737, p 1738 (SC), 2005 SCC (Cr) 543, (2005) 2 SCC 659 .

18 *Hasmukhbhai Gokaldas Shah v State of Gujarat* 2009 Cr LJ 2919, p 2926, 2927 (Guj) (DB) .

19 *Rajat Prasad v CBI* 2014 Cr LJ 2941, p 2948 (SC), (2014) 6 SCC 495, (2014) 139 AIC 143 (SC) .

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21 Note B cited in *Emperor v Chaube Dinkar Rao* AIR 1933 All 513, p 516 .

22 *Queen-Empress v Maganlal* ILR 14 Bom 115 ; *Emperor v Chaube Dinkar Rao* AIR 1933 All 513, p 516, 34 Cr LJ 623 .

23 *Biswabhusan Naik v State* AIR 1952 Ori 289, (1952) Cr LJ 1533, p 1542 .

24 *Dawar Singh v Emperor* AIR 1937 All 755 ; *Ram Jiawan v King-Emperor* AIR 1926 Oudh 448, 27 Cr LJ 822 .

25 *Trilok Chand v State of Delhi* AIR 1977 Del 666 (SC), (1977) Cr LJ 254 (SC).

26 *State v Minaketan Patnaik* AIR 1952 Ori 267, p 275, 53 Cr LJ 1393 .

27 *Biswabhusan Naik v State* AIR 1952 Ori 289, p 299, 53 Cr LJ 1533 .

28 *CBI v VC Shukla* AIR 1998 SC 1406, (1998) Cr LJ 1905 (SC) .

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30 *Government v Mahommad Hossein* 5 WR 49 .

31 *Ami Lal v State of Rajasthan* (1996) Cr LJ 1585 (Raj) .

32 *State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC) .

33 *Faguna Kanta Nath v State of Assam* AIR 1959 SC 673, p 676 ; *Shri Ram v State of Uttar Pradesh* AIR 1975 SC 175, (1975) Cr LJ 240 ; *Harji v State of Rajasthan* (1978) Raj LW 106 .

34 *Malan v State of Bombay* AIR 1960 Bom 393, p 395, (1960) Cr LJ 1189 .

35 *Jamnalal Pande v State of Madhya Pradesh* 2010 Cr LJ 538, p 544 (MP) .

36 *Rameshbhai Ranchhodhbhai v State of Gujarat* (1989) 30 (2) Guj LR 834, pp 835, 836.

37 *Malan v State of Bombay* AIR 1960 Bom 393, p 395, (1960) Cr LJ 1189 .

38 *Empress v Umi* 6 ILR Bom 126 ; *Emperor v Rughnath Giga* 3 Cr LJ 488, 16 Ker LR 57 .

39 *R v Umi* 6 ILR Bom 126 ; *Emperor v Rughnath Giga* 3 Cr LJ 488 ; **but see** Re *Faiyaz Hussain*(1896) All WN 194.

40 *R v Mariam Sidi* 10 Cr LJ 19, 19 Raj LR 40 . The law regarding miscarriage has now undergone a drastic change after the

passing of Medical Termination of Pregnancy Act 1971.

41 *Aiyappan Kuttan v State* AIR 1955 Tr & Coch 266, 56 Cr LJ 1535.

42 *Queen v Eshan Meah* 12 WR 52 .

43 *Queen v Doorgessur Surmah* 7 WR 61 .

44 *Emperor v Luchmun Singh* 31 ILR Cal 710, 1 Cr LJ 797 .

45 *Maung Bayone v Ma Hla Kin* AIR 1933 Rang 297, 35 Cr LJ 52 .

46 *Padmamoni Dassi v Emperor* AIR 1932 Cal 457, 33 Cr LJ 681 .

47 *Regina v Padala Venkatasami* ILR 3 Mad 4, 1 Weir 543 .

48 *Kashinath Naek v R* 25 ILR Cal 207 .

49 Re *Jugut Mohini Dassee* 10 CLR 4; *R v Ram Panda* 9 BLR App 16, 18 WR Cr 28 .

50 *R v Shumeeruddeen* 2 WR Cr 40 .

51 *Balmukun v State* AIR 1952 Raj 123, 53 Cr LJ 1136 ; *Kankanwari v State* (1957) Cr LJ 658 ; *Sbrahamanyam v State of Andhra Pradesh* AIR 1956 Andh Pra 31 ; *Bhagatram v State of Punjab* AIR 1954 SC 621, 55 Cr LJ 1645 ; *Damodar Sahu v State* AIR 1955 Ori 156, 56 Cr LJ 1373 ; *Provincial Govt v Saidu* AIR 1947 Nag 113, 47 Cr LJ 968 ; *Shyamo Maha Patro v Emperor* AIR 1932 Mad 391 (FB), 33 Cr LJ 418; *Hira Sah v Emperor* AIR 1947 Pat 350 ; *Emperor v Jayanti Lal* AIR 1947 Sind 130, 48 Cr LJ 419 ; *Provincial Govt v Gomaji* AIR 1944 Nag 192, 46 Cr LJ 80 ; *Debi Prosad v Emperor* AIR 1932 Cal 455, 33 Cr LJ 720 ; *Subbayya v Emperor* 23 Mad LJ 752, 15 IC 35 ; *Khuman v Emperor* AIR 1931 Oudh 274, 32 Cr LJ 905 .

52 *Shir Lal v State* AIR 1953 MB 155, 54 Cr LJ 995 ; *Narvir Chand v State* AIR 1952 MB 17, 53 Cr LJ 246 ; *State of Hyderabad v Baquer Hussain* AIR 1952 Hyd 40, 53 Cr LJ 352 ; *Mahabir Prasad v Emperor* AIR 1927 All 35, 27 Cr LJ 1118 ; *Chotey v Emperor* AIR 1948 All 168, 49 Cr LJ 168 ; *Mangal Singh v Rex* AIR 1949 All 599 ; 50 Cr LJ 923 ; *Padmanabha v Emperor* 33 ILR Mad 264 ; *Dhanpat Rai v Emperor* AIR 1940 Lah 112, 41 Cr LJ 540 .

53 *Begu v Emperor* AIR 1925 PC 130, p 131, 26 Cr LJ 1059 .

54 *Damodar Sahu v State* AIR 1955 Ori 156, p 158, 56 Cr LJ 1373 .

55 *P Subrahmanyam v State* AIR 1956 Andh Pra 31 .

56 *State v Ruplal Koeri* AIR 1953 Pat 394, p 397-98, 54 Cr LJ 1809 ; *Emperor v Jayanti Lal* AIR 1947 Sind 130 .

57 *Harendra Kumar Mondal v Emperor* AIR 1938 Cal 125, p 126 .

58 *Ramesh Chandra Mondal v State* (1991) Cr LJ 2520, p 2522-2523 (Cal) .

59 *State of Bihar v Kailash Prasad Sinha* AIR 1961 Pat 451, p 460 ; *State of Bihar v Srilal Kejriwal* AIR 1960 Pat 459, p 468, (1960) Cr LJ 1360, **following***Jageshwar Singh v Emperor* AIR 1936 Pat 346, p 348, 37 Cr LJ 893 ; *Karan Singh v State* (1957) Cr LJ 234 .

60 *Re Mallimoggala Venkatarmiah*AIR 1938 Mad 130, p 132, 39 Cr LJ 266 .

61 *Emperor v Karamalli Gulamalli* AIR 1938 Bom 481, p 484 .

62 Refer to notes under s 120B .

63 *MM Behi v NSSI Corpn* (1971) Cr LJ 1378, p 1380-1381 (Del) .

64 *Madan v NSSI Corpn* (1971) CLJ 1484 (Del) .

65 Re *Krishnamoorty*(1961) 1 Mad LJ 379, p 381, (1961) MLT 280(Cr); *Bhagat Singh v Balwant Singh* (1978) Crlr 340, p 342 (Raj) .

66 *Jamuna Singh v State of Bihar* AIR 1967 SC 553, (1967) Cr LJ 541 ; *Maddan Raj v State of Rajasthan* AIR 1970 SC 436, p 439 ; *Umadasi Dasi v Emperor* AIR 1924 Cal 1031, 52 ILR Cal 112 (as a general rule, charge of abetment fails when the substantive offence is not established, but there may be exceptions); *Gallu Sah v State of Bihar* AIR 1958 SC 813, (1958) Cr LJ 1352, (1974) 1 ILR Punj 449 .

67 *State of Kerala v Syed Mahommad Rawther* (1969) Ker LJ 215, (1969) Mad LJ (Cr) 842 .

68 *Faguna Kanta Nath v State of Assam* AIR 1959 SC 673, (1969) Cr LJ 617 ; *Jamuna Singh v State of Bihar* AIR 1967 SC 553, (1967) Cr LJ 541 ; *Dayaram Phukan v State* AIR 1967 Assam 66, (1967) Cr LJ 1270 ; *State of Kerala v Syed Mahommad Rawther* (1969) Ker LJ 215, (1969) Mad LJ (Cr) 842 .

69 *Ex Sepoy Haradhan Chakrabarty v Union of India & Anor* AIR 1990 SC 1210, (1990) Cr LJ 1246 (SC) .

70 *CBI v VC Shukla* (1998) Cr LJ 1905 (SC), AIR 1998 SC 1406 .

71 *State of Maharashtra v Ram Das Shankar Kurlekar* (1999) Cr LJ 196 (Bom)(DB).

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 108.

Abettor.--

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

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

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

Illustrations

(a) *A* instigates *B* to murder *C*. *B* refuses to do so. *A* is guilty of abetting *B* to commit murder.
(b) *A* instigates *B* to murder *D*. *B* in pursuance of the instigation stabs *D*. *D* recovers from the wound. *A* is guilty of instigating *B* to commit murder.

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

Illustrations

(a) *A*, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as *A*. Here *A*, whether the act be committed or not, is guilty of abetting an offence.
(b) *A*, with the intention of murdering *Z*, instigates *B*, a child under seven years of age, to do an act which causes *Z*'s death. *B*, in consequence of the abetment, does the act in the absence of *A* and thereby causes *Z*'s death. Here, though *B* was not capable by law of committing an offence, *A* is liable to be punished in the same manner as if *B* had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.
(c) *A* instigates *B* to set fire to a dwelling-house. *B*, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is

wrong or contrary to law, sets fire to the house in consequence of *A*'s instigation. *B* has committed no offence, but *A* is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment, provided for that offence.

(d) *A,* intending to cause a theft to be committed, instigates *B* to take property belonging to *Z* out of *Z*'s possession. *A* induces *B* to believe that the property belongs to *A*. *B* takes the property out of *Z*'s possession, in good faith, believing it to be *A*'s property. *B*, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But *A* is guilty of abetting theft, and is liable to the same punishment as if *B* had committed theft.

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

Illustration

A instigates *B* to instigate *C* to murder *Z*. *B* accordingly instigates *C* to murder *Z*, and *C* commits that offence in consequence of *B*'s instigation. *B* is liable to be punished for his offence with the punishment for murder; and, as *A* instigated *B* to commit the offence; *A* is also liable to the same punishment.741

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

Illustration

A concerts with *B* a plan for poisoning *Z*. It is agreed that *A* shall administer the poison. B then explains the plan to *C* mentioning that a third person is to administer the poison, but without mentioning *A's* name. *C* agrees to procure the poison, and procures and delivers it to *B* for the purpose of its being used in the manner explained. A administers the poison; *Z* dies in consequence. Here, though *A* and *C* have not conspired together, yet C has been engaged in the conspiracy in pursuance of which *Z* has been murdered. *C* has therefore committed the offence defined in this section and is liable to the punishment for murder.

Comments

1. Scope

Abetment of a thing, as defined in s 107, becomes an offence in itself, if the thing which is abetted, comes with in the terms of the first paragraph of this section, *i.e.,* if it is an offence, *etc*.[72] Thus, conspiracy per se is no wrong, and is not illegal, *e.g.,* a combination of person in, pursuit of a legitimate trade object,[73] but it becomes unlawful when the thing which is the subject of the conspiracy involves a civil injury to another,[74] thereby giving him a right of action, and it becomes a crime when its subject is a crime. Given therefore an instigation, conspiracy or aid in reference to an offence, the instigation, *etc.*, becomes the offence of abetment directly after it has taken place, and it is a substantive offence quite irrespective of the other offence which forms its subject-matter, and which perhaps will never take place at all.[75] Persons, punished as principals, cannot also be punished for abetment of the same offence.[76] The abettors of crime are accomplices in the eye of law.[77]742

2. Three Essentials to Constitute an Offence under this Section

Three things are essential to complete abetment as a crime. There must be an abettor; he must abet; and the abetment must be of an offence,[78]an act which would be an offence if committed by a person capable by law of committing the offence with the same intention or knowledge as that of the abettor.

If the thing abetted is not an offence at all, the person abetting it is not an abettor.[79] Where a counsel is liable for defamation, he is the principal accused, and not an abettor.[80] In the absence of material showing the accused's complicity, connivance or abetment, mere circumstance of carrying on criminal activity by the accused's brother in the accused's house is not sufficient to hold the accused guilty of an offence under ss 108 and 34, IPC .[81]

Persons, who are forced to pay illegal gratification, are constrained to heed to the demand for illegal gratification on apprehension that unless they pay, they would lose business, cannot be styled as abettors.[82]

3. Abetment, a Distinct Offence

If 'the thing' in question is an offence, its abetment becomes an offence (s 108) and the 'offence of abetment' is constituted (s 108, expln 2), which is thus a separate and distinct offence.[83] The offence of abetment is complete notwithstanding that the person abetted involuntarily fails in doing the abetted, or is interrupted before the act is complete. The offence of abetment by instigation depends upon the intention of the person who abets and not upon the act which is actually done by the persons abetted.[84] As a general rule, an offence of abetment falls through if the principal offence is not sustained.[85] But there might be an exception to this general rule, as abetment of an offence is a distinct offence.[86]

4. Accessories after the Fact

Abetment by aiding or instigating necessarily means some active suggestion or support or stimulation to the commission of the offence itself. If the offence had already been complete before anything was done by the alleged abettor, any subsequent action of his which might, in any way, help the main offender, will not be abetment within meaning of s 107, being an accessory after the fact which is no offence under the Indian law.[87] This section does not contemplate any acts of subsequent abetment, and the IPC does not provide for the punishment of such offences, except when they are such as are defined in ss 212 - 18 of ch XI of the743IPC .[88] Persons punished as principals cannot also be punished for abetment of the same offence.[89]

5. Explanation 1--Abetment by Illegal Omission

For an omission to be criminal, the act which is omitted must be one which the person who omits was legally bound to do,[90]but it matters not, under expln 1, whether or not the abettor was legally bound to do the act, the omission of which he abets.[91] Thus *A,* a private person, instigates *B*, a police officer, to leave the scene of a cognizable offence which it is his duty to prevent. If, in consequence, *B* illegally omits to prevent the commission of the cognizable offence, he would be guilty of abetting the offence but *A* would not guilty of abetting the abetment committed by *B* by his illegal omission, which is also an offence under expln 4 to this section.

In a charge for outraging the modesty of the woman, accused persons denuded the victim lady in the presence of the co-accused woman, but co-accused lady did not make any effort to save the modesty of the victim lady, she was convicted under s 109, IPC .[92]

6. Explanation 2--Effect Immaterial--Abetment is Complete without the Commission of the Act Abetted

Explanation 2 makes it clear that to constitute the offence of abetment, it is not necessary that the act abetted should be committed.[93] The offence of abetment is complete notwithstanding that the person abetted involuntarily fails in doing the act abetted, or is interrupted before the act is complete. The offence of abetment by instigation depends upon the intention of the person who abets and not upon the act which is actually done by the person abetted.[94] It has been held that an offence can be

abetted even though the means intended to be employed are such that it is physically impossible to produce the effect by them.[95]

Justice Darling's view and its Criticism by Russell

In *R v Brown* [96] where the defendant induced a woman to take a concoction in order to procure an abortion, Darling J, in the course of his summing up to the jury, said: 'But if the thing supplied is to his knowledge not capable of procuring abortion, such person is not guilty of inciting her to commit an offence under the statute, although he knows that she will take it in the belief that it is a noxious thing in order to procure abortion'. Criticising this, Russell says:

> At all events the dictum should be confined to the facts of the particular case and the statutory provision, by emphasising the words 'under the statute'. Otherwise the744 untenable conclusion would follow that if *A,* for his own purposes, incites *B* to attempt to steal money from the pocket or safe of *X*, knowing fully well that the pocket or safe is empty so that it is impossible for *B* to steal anything from it, then *A* is not guilty of the crime of incitement. This could surely not be so: for it is irrelevant whether *A* knows or does not know the law applicable to the facts, ie, that what he is procuring *B* to do will be a criminal offence, if *B* does exactly what *A* has told him to do. This is different, of course, from a mistake of fact: for example, if *A*, thinking a colourless liquid to be water, tells *B* (who knows the liquid to be poison) to give some to *C*, then *A*, if charged with criminal incitement, can set up the defence of reasonable mistake of fact, namely, that what he honestly thought he was recommending was a drink of water for *C*. To take another possibility: if *A*, knowing that *B* desires to poison *C*, persuades *B* to use for the purpose a certain liquid which *A* knows to be harmless, then *B* will be guilty of the criminal attempt but *A* will have the defence of justification, namely, that what he had done was a reasonable method of preventing *B* from achieving a serious offence.[97]

Criticism of Justice Darling's view appears to be Fallacious

But the criticism levelled against the view taken by Darling J in *R v Brown* ,[98] appears to be fallacious. The offence of abetment by instigation will always depend upon the intention of the alleged abettor. If in the earlier instance given by Russell, *A* knows that there is no money in the pocket or safe of *B*, and yet, if he incites *C* to pick his pocket or steal money from his safe, he could not possibly be guilty of abetment of the offence of theft, for no theft could possibly be committed, though so far as *C* is concerned, he could be guilty of the offence of attempt to commit theft. *A* could be convicted of the offence of inciting *C* to pick *B's* pocket or cut or break open his safe, but not of inciting him to steal for to his own knowledge no theft could be committed. In the other instance cited by Russell, if *A* incites *C* to offer a harmless coloured liquid to *B* so as to poison him, knowing fully well the liquid is absolutely harmless, *C* may be guilty of attempt to commit *B's* murder, but how can *A* be held guilty of the offence of abetment of murder, when *B's* murder by administering the coloured liquid to him was neither intended by *A* nor was it by any chance possible. It is, of course, quite a different thing if *A* believed the liquid to be poison and believing it to be so, incited *C* to administer it to *B*.

In the case before Darling J, *C* was induced by *A* to take a concoction in order to procure abortion. The concoction was to his knowledge not capable of that effect. There could, not therefore, be abetment of the offence of causing abortion, as, by what *A* did, an abortion could never have been caused, though *C* might be guilty of attempt to commit that offence if she took that concoction with the intention of causing abortion and believing the concoction to have that effect. *A* may be guilty of cheating or playing false with *C* or subjecting her to a hoax, his action may or may not be punishable under the Code, but he certainly cannot be guilty of the offence of abetment.

7. Explanation 2 to be read with Sections 115 and 116

Explanation 2 should be read together with ss 115 - 16, IPC, under which simple abetment, *i.e.*, abetment not followed by the commission of the offence abetted, is745 punishable.[1] The offence of abetment is complete when the alleged abettor has instigated another, or engaged with another, in a

conspiracy to commit the offence.[2]

8. Offence of Abetment

Abetment is thus a separate and distinct offence, quite independent of its consequences, and to be an offence, it must take place within India, though the offence abetted may take place beyond India.[3] Abetment is a substantive offence quite irrespective of the other offence which forms its subject matter, and which may perhaps never take place at all.[4]

9. Explanation 3--Two Fold Effect

Section 108 and expln 3, IPC should be read together. The effect is two-fold. Abetment to be criminal must be the abetment of either: (a) that which is an offence; or (b) that which would be an offence, but that the person abetted is incapable by law (refer to ch IV) of committing an offence, or has no guilty knowledge or intention.[5]

10. 'Offence'

The word 'offence' in this section must be interpreted by ss 40 and 108A of the IPC . By virtue of the former it means 'a thing made punishable by this Code', *i.e.*, an act or omission contrary to the provisions thereof and committed within India.[6] But by s 108A 'offence' denotes a thing made punishable by the Code, although it is committed without and beyond India. Consequently, the abetment of an offence means the abetment in India of a thing made punishable by the Code,[7] whether such thing is committed within or without and beyond India.

Illustrations

(i) *A* instigates *B* help him steal from *C*, *B's* master. *B* does so, with the consent of *C*, whom he had informed of *A*'s instigation. *A* instigated an act contrary to the provision of s 378 of the Code, and is, therefore guilty of abetment of theft.[8]

(ii) *A* offers a bribe to *B*, a servant of *C*, to induce him to sell certain goods of *C* at less than their value. *A* abets an offence under s 408 of the Code.[9]

(iii) *A*, a Mahommedan guardian of a young married girl, caused her marriage ceremony to be performed, whilst her husband was living, but in her absence and without her knowledge. Under these circumstances the girl could not be guilty of an offence under s 494, and *A*, therefore, did not abet an offence.[10]

(iv) 746*A*, in India, instigates *B* to commit an offence under the Penal Code on a ship on the high seas. *A* instigates an 'offence' and his abetment is now punishable.[11]*A*'s abetment was held not to be punishable, because the decision was under the old law existing prior to the enactment of s 108A .

(v) *A*, in India, incites *B* and *C*, Portuguese subjects, to murder *D* in Portuguese territory. *A* abets an 'offence', and his abetment is punishable.[12]

11. Abetment of Act Done by Innocent Agent

Explanation 3 to this section makes it clear that the person abetted need not have any guilty intention in committing the act[13]

Illustrations

(i) *A* tells a child under seven to bring him money belonging to *B*.[14] A has abetted theft, although the child is incapable in law of committing an offence. (s 82 .)

(ii) *A*, knowing a note to be forged, asks *B*, who does not know it to be forged, to get it changed for him. *B* does so and gives *A* the money.[15]*A* has abetted cheating (s 415), although *B* had no guilty intention or knowledge.

Conviction of Abettor not Dependent on the Conviction of Principal

Under English law, *A* would in such cases be principal in the first degree, but under the IPC he is an abettor only. But abetment is a substantive offence, and the conviction of an abettor is in no way dependent on the conviction of a principal at all. Refer to expln 2.[16] According to expln 3, it is not necessary that the person abetted should have committed the offence and be punished.[17]

12. Explanation 4--Abetment of Abetment

In view of expln 4 appended under s 108 of the IPC, it cannot be said that there cannot be any abetment of an abetment and it is unknown to criminal jurisprudence.[18] Under expln 4, when the abetment is an offence, the abetment of such abetment is also an offence. The words 'when the abetment of an offence is an offence' do not mean when an abetment of an offence is actually committed. What is meant is when the abetment of an offence is by definition or description an offence under the IPC, which is when the abetment of an offence is punishable under s 109 or 116 or some other provision of the IPC, then the abetment of such abetment is also an offence.[19] Explanations 2 and 4 lead to the conclusion that the abetment of an abetment is an offence though the second abetment is ineffective.[20] It is not necessary to prove that the principal offence abetted was actually committed.[21] The offence of abetment747 being a substantive offence, the conviction of the abettor is in no way dependent on the conviction of the principal.[22]

It is possible to abet the commission of suicide. But nobody would abet a mere attempt to commit suicide. It would be preposterous if law could afford to penalise an abetment to the offence of a mere attempt to commit suicide. It is wrong to convict the accused under s 116 linked with s 306, IPC but the crux of the offence under s 306 itself is abetment. In other words, if there is no abetment, there is no question of offence under s 306 coming into play. It is inconceivable to have abetment of an abetment. Hence there cannot be an offence under s 116 read with s 306, IPC and conviction of accused was altered by substituting s 306 with s 304B, IPC, read with s 116 .[23]

13. Explanation 5--Abetment Relates to an Offence and not the Offender

This explanation applies only to abetment by conspiracy.[24] A conspiracy to publish an article in a newspaper may be inferred if the article could not have appeared therein without the concurrence of the persons charged with conspiracy.[25] 'Abetment', as defined in the IPC, relates not to an offender but to an offence. A person may constitute himself an abettor by the intervention of a third person without any direct communication between himself and the person employed to do the thing, and under expln 5 in the case of abetment by conspiracy, it is not necessary that the abettor should

concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.[26]

14. Provisions of Section 10, Indian Evidence Act 1872, Apply

The provisions of s 10 of the Evidence Act may be usefully quoted here. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, anything said, done, or written by anyone of such persons in reference to their common intention after the time when such intention was first entertained by any one of them may be proved, both for the purpose of proving the existence of the conspiracy as also for showing that any such person was a party to it.[27]

15. Evidence of Abettor

In the absence of material showing accused's complicity, connivance or abetment, the mere circumstance of carrying on criminal activity by the accused's brother in the accused's house is not sufficient to hold the accused guilty of offence under ss 108 and 34, IPC .[28]

748Where the only evidence against the accused was that he exhorted the main accused to fire at the victim from the top of the roof and the evidence as regards exhortation was not satisfactory, the benefit of doubt should go to the accused.[29]

72 *V Sesha Ayyar v Venkatasubba Chetty* AIR 1924 Mad 487, 25 Cr LJ 442 .

73 *Mogul Steamship Co v Mcgregor Gow & Co* LR 21 QB 544, 23 QB 598, [1892] AC 25 ; *Huttley v Simons* (1898) 1 QB LR 181 .

74 *Kearney v Lloyd* 26 LR 268 ; *R v Warburton* LR 1 CC 274, p 276 .

75 Indian Penal Code 1860, expln 2 and ss 115 - 116 .

76 *Queen v Jeetoo Chowdhary* 4 WR (Cr) 23 ; *Queen v Ram Narain Josh* 4 WR (Cr) 37 .

77 *Shashi Bhusankar v State of Orissa* (1985) 59 Cut LT 510 .

78 *Emperor v Parimal Chatterji* AIR 1932 Cal 760, p 761, 34 Cr LJ 78 .

79 *Purna Chandra Kundu v Emperor* AIR 1914 Cal 272, p 273, 14 Cr LJ 494 .

80 *Deep Chand v Samathraj* AIR 1970 Mys 34, (1969) 1 Mys LJ 606 .

81 *Marry Perara Lilly v State of Kerala* (1987) Supp SCC 182 .

82 *GM Thippanna v Central Bureau of Investigation, Cochin* 2011 Cr LJ 4034, p 4042 (Ker) .

83 *V Sesha Ayyar v Venkatasubba Chetty* AIR 1924 Mad 487, 25 Cr LJ 442 .

84 *DP Minwalla v Emperor* AIR 1935 Sind 78, p 79, 36 Cr LJ 877 ; *Queen v Imamdi v Bhooyar* 21 WR Cr 8 ; Re *Dinonath Burooa* 18 WR 32 (Cr) ; *State of Maharashtra v Pandurang Ramji Sanap* (1971) Bom LR 245, (1971) Mah LJ 408 ; *Raja Khan v Emperor* 22 Cr LJ 448 ; *Empress v Hary Dyal* 4 ILR Cal 16 ; *Uma Dasi v Emperor* AIR 1924 Cal 1031, p 1032, 26 Cr LJ 11 .

85 *Raja Khan v Emperor* 22 Cr LJ 448 ; *Empress v Hary Dyal Karmokar* 4 ILR Cal 16 .

86 *Uma Dasi v Emperor* AIR 1924 Cal 1031, p 1032, 26 Cr LJ 11 .

87 *Hazari Lal v Emperor* AIR 1921 Pat 286, p 289, 22 Cr LJ 452 ; *Raghunath Dass v Emperor* AIR 1920 Pat 502, 21 Cr LJ 213 .

88 *Queen v Paun Pundah* 18 WR 28 ; *Joghut Mohini v Madhu Sudhan* 10 CLR 4 .

89 *Queen v Jeetoo Chowdhry* 4 WR (Cr) 23 ; *Queen v Ramnarain Josh* 4 WR (Cr) 37 .

90 Refer to Notes to ss 32 - 33 .

91 Refer to Notes to s 107 .

92 *Jeet Singh v State of Uttarakhand* 2013 Cr LJ (NOC) 365 (Utr) (DB).

93 *State of Maharashtra v Pandurang Ramji* (1971) Bom LR 245, (1971) Mah LJ 408 ; *Ugrah Khan v State of Bihar* (1972) Pat LJ 158, p 162 .

94 *DP Minwalla v Emperor* AIR 1935 Sind 78, p 79, 36 Cr LJ 877 ; *Queen v Imamdi v Bhooyah* 21 WR 8 ; Re *Dinonath Burooa* 18 WR 32 (Cr).

95 Re *Sahib Datta* PR No 20 of 1885; Re *Pestonji Dinsha* 10 Bom HCR 75.

96 *R v Brown* (1899) 63 JP 790 .

97 *Russell on Crimes,* eleventh edn, p 212.

98 *R v Brown* (1899) 63 JP 790 .

1 Re *Dinonath Burooa* 18 WR Cr 32.

2 *Jamuna Singh v State of Bihar* AIR 1967 SC 553, (1967) Cr LJ 541 ; *Trilok Chand v State of Delhi* AIR 1977 SC 666, p 671, (1977) Cr LJ 254 ; *State of Maharashtra v Pandurang Ramji Sanap* (1971) Bom LR 245, (1971) Mah LJ 408 .

3 Indian Penal Code 1860, s 108A .

4 *Ibid*, expln 2 and ss 115 - 16 .

5 Re *Kushi Mohamad*(1940) 42 PLR 477.

6 Section 2 and notes thereunder.

7 The provision of this ch were made expressly applicable to certain sections added to the IPC, *viz* ss 121A, 124A, 225A, 225B, 294A and 304A by Act 27 of 1870, s 13 as amended by Act 12 of 1891, Sch II.

8 *R v Troylukho* 4 ILR Cal 366 .

9 *R v De Kromme* 17 Cox CC 492, 66 LT 301 .

10 *R v Abdool Kurreem* 4 ILR Cal 10 .

11 *R v Elmstone* 7 Bom HCR 89, p 118 .

12 *R v Ganpatrao* 19 ILR Bom 105 ; Remarks in the previous footnotes.

13 *Emperor v Chaube Dinkar Rao* AIR 1933 All 513, p 516, 34 Cr LJ 623 ; *Emperor v Nga Hnin* 18 Cr LJ 32 ; *Emperor v Kesri Chand* AIR 1945 All 207, 47 Cr LJ 132 . Refer to notes under s 107 .

14 *R v Manley* 1 Cox CC 104 .

15 *R v Palmer* Russ Cr 53; R&R, CC 2, 2 Leach CC 978.

16 *R v Maruti Dada* 1 ILR Bom 15 .

17 *State v Keshavrao Ingle* AIR 1956 MB 65, p 66, (1956) Cr LJ 229 .

18 *Gundala Reddeppa Naidu v State of Andhra Pradesh*(2005) Cr LJ 4702 (AP).

19 *Srilal Chamaria v Emperor* AIR 1919 Cal 654, 20 Cr LJ 49 ; *Empress v Treylukhu Nath Chowdhry* 4 ILR Cal 366 ; *Ghazi Khan v Emperor* AIR 1934 Pesh 110, (1934) Cr LJ 1315 .

20 *Re Reddy Rajaratnam Reddi*AIR 1950 Mad 827, p 830 .

21 *Empress v Troylukno* 4 ILR Cal 366 .

22 *R v Maruti Dada* 1 ILR Bom 15 ; *Gallu Sah v State of Bihar* AIR 1958 SC 813, (1958) Cr LJ 1352 ; *Jamuna Singh v State of Bihar* AIR 1967 SC 553, (1967) Cr LJ 541 ; *State of Kerala v Syed Mahommad Rawther* (1969) KLT 849, (1969) Ker LJ 215, (1969) Mad LJ 482 (Cr) ; **but see***Uma Dasi v Emperor* AIR 1925 Cal 1031, 26 Cr LJ 11 .

23 *Sat Vir Singh & Ors v State of Punjab* (2001) Cr LJ 4625 (SC) .

24 *Emperor v Chaube Dinkar Rao* AIR 1933 All 513, p 516, 34 Cr LJ 623 .

25 *R v Tibbits* LR [1902] 1 KB 77.

26 *Mahommad Ayoob Khuro v Emperor* AIR 1946 Sind 1, 47 Cr LJ 455 ; refer to illustration to expln 5.

27 *Kalil Munda v R* 28 ILR Cal 797, p 804 .

28 *Marry Perara Lilly v State of Kerala* (1987) Supp SCC 182 .

29 *Ishtiaq v State of Uttar Pradesh* (1987) Supp SCC 241 .

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

[30][S. 108A.

Abetment in India of offences outside India.--

A person abets an offence within the meaning of this Code who, in [31][India], abets the commission of any act without and beyond [32][India] which would constitute an offence if committed in [33][India].

Illustration

A, in [34][India], instigates *B*, a foreigner in Goa, to commit a murder in Goa. *A* is guilty of abetting murder.]

Comments

1. Scope

This section puts the abetment of offences to be committed outside India on the same footing as abetment of offences to be committed in India. As regards the necessity for such a rule, see *Stephen's History of Criminal Law of England*.[35] Under this section, although the offence abetted may be committed outside India, the abetment itself must be committed in India.

Mere intention not followed by any act cannot constitute any offence, and an indirect preparation which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence or an attempt or abetment of the same.[36]

The illustration in the case of *R v Ganpatrao Ramchandra* ,[37] in which it was held that such abetment was not punishable, a decision which no doubt suggested the amendment of the law.[38]

2. Legislative Changes

This section was added by s 3 of the Indian Penal Code (Amendment) Act 1898.

749Formerly the abetment in India of an act or omission without and beyond India was not punishable, since it was not the abetment of an offence under the IPC .[39]But exceptions to this rule were gradually established. The abetment in India of counterfeiting coin outside India was made punishable by s 236, and so was abetment in India of waging war against the queen (now the Government of India) by s 121 (refer to s 125). By s 4 of Act 9 of 1891, it was provided that the

abetment in British India of an act outside thereof, which if committed within British India would be an offence under Merchandise Marks Act, or under any section of ch XVIII of the IPC which relates to trade, property, or other marks, may be tried and punished as if the abettor had committed in British India the act which he abetted. The principle involved in these enactments is now, after the insertion of this section in the IPC, applied to the abetment of all offences.

With regard to this section the Select Committee observed:

> We have made it an offence for a person in British India to abet any act which would be an offence if committed in British India, but, as a fact, is committed outside. In short, to put it in popular language, we have extended the law of abetment of offences committed outside British India. It has been held by the Bombay High Court that if a person in British India abetted or incited a murder in Goa, he would not be guilty of any offence. We have come to the conclusion that he ought to be deemed guilty of an offence and that India is not to be made an Alsatia for instigator of crime.[40]

The other changes are noted in the footnotes to the section.

3. 'Offence'

The word 'offence' in s 108A denotes an act or acts made punishable under the IPC, and not under any special Act. A child marriage celebrated outside India is not an act, punishable under the IPC, and hence its abetment is not punishable as an abetment within the meaning of this section.[41]

4. Abetment in Foreign Territory

Where a subject of an Indian state was charged with abetting an offence committed in India and the alleged abetment consisted entirely of what the accused did or said at a place within the foreign territory, it was held he could not be tried in a court in India for such abetment.[42] Courts in India have no jurisdiction to try a person who is not a citizen of India for abetting out of India an offence committed by another in India.[43]

5. Procedure

No court shall take cognizance of any offence punishable under this section except with the previous sanction of the Central Government or of the state government. The Central Government or the state government may, before according sanction,750 order a preliminary investigation by a police officer not below the rank of inspector.[44]

30 Added by Act 4 of 1898, s 3 .

31 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

32 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

33 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

34 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

35 *Stephen's History of Criminal Law of England* Vol 2, p 13 (cited in *Queen-Empress v Ganapatrao Ramchandra* 19 ILR Bom 105, 111-112 .

36 *Queen-Empress v Baku* 24 ILR Bom 287 .

37 *R v Ganpatrao Ramchandra* 19 ILR Bom 105 .

38 *R v Baku* 24 ILR Bom 287 ; refer to notes to s 2 .

39 *R v Elmstone* 7 Bom HCR CC 89, p 118; *R v Ganpatrao Ramchandra* 19 ILR Bom 105 .

40 Gazette of India (1897) Pt 6, p 238.

41 *Sheikh Haidar Sheikh Rahimmo Attar Musalman v Syed Issa Syed Rahiman Musalman* AIR 1938 Nag 235, 39 Cr LJ 651 .

42 *Balwant Singh v Emperor* AIR 1919 Lah 459, 20 Cr LJ 65 ; *R v Pirati* (1873) 10 Bom HCR 356 .

43 *Raj Bahadur v Emperor* AIR 1918 Lah 49, 19 Cr LJ 391 ; *Sheikh Haider Sheikh Rahimmo Attar Musalman v Syed Issa Syed Rahiman Musalman* AIR 1938 Nag 235 .

44 Code of Criminal Procedure 1973, s 196, refer to notes to s 121 .

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 109.

Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.--

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence

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

Illustrations

(a) *A* offers a bribe to *B*, a public servant, as a reward for showing *A* some favour in the exercise of *B's* official functions. *B* accepts the bribe. *A* has abetted the offence defined in section 161 .

(b) *A* instigates *B* to give false evidence. *B*, in consequence of the instigation, commits that offence. *A* is guilty of abetting that offence, and is liable to the same punishment as *B*.

(c) *A* and *B* conspire to poison *Z*. *A* in pursuance of the conspiracy, procures the poison and delivers it to *B* in order that he may administer it to *Z. B,* in pursuance of the conspiracy, administers the poison to *Z* in *A's* absence and thereby causes *Z's* death. Here *B* is guilty of murder. *A* is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.751

Comments

1. Scope

Sections 109 - 10 of IPC deal with the state of things that may arise after an abetment has been committed,[45]*viz,* where the very act abetted happens in consequence thereof. This section is concerned only with the punishment of abetments and lays down nothing more than that if the IPC has not separately provided for the punishment of an abetment as such, then it is punishable with the punishment provided for the original offence.[46] Active abetment, at the time of committing the offence is covered by this section.[47] s 109, IPC, is by itself an offence though punishable in the context of other offences.[48] A person, who aids and abets the perpetration of a crime at the very time the crime is committed, is a principal of a second degree and this section applies to him.[49] Mere failure to prevent the commission of an offence is not by itself an abetment, in the absence of anything to show that the accused helped in or instigated the commission of the offence.[50] Likewise, the mere omission to bring certain facts, within the knowledge of the accused, to the notice of the higher authorities does not itself constitute abetment as defined in the IPC, unless the omission is one which can be said to be an illegal omission, *i.e*., involves a breach of a duty imposed by law, and not merely a breach of a departmental rule of conduct or discipline. Thus, if a clerk does not report to the superior authorities what is known to him about his fellow clerks' taking bribes, such omission does not amount to abetment of bribery though it may form the foundation for disciplinary action against him in a departmental way.[51]

"Abetted" in s 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence.[52]

This section is attracted even if the abettor is not present, where the offence abetted is committed, provided that he has instigated the commission of the offence or has engaged, with one or more other persons, in a conspiracy to commit the offence, and in pursuance of that conspiracy some act or illegal omission takes place, or has intentionally aided the commission of an offence by an act of illegal omission.[53]

2. Section is Attracted even when Abettor is not Present

Servants and partisans, not unoften, on their own responsibility, do things which they consider to be in the interest of their master or principal, without the latter's knowledge or consent. Hence, where the master was nowhere near the scene of occurrence, the mere fact, that the unlawful assembly consisted mostly of his servants and tenants and that its common object was to do something which was in the interests of their master, cannot lead to the conclusion that the master must752 necessarily have ordered or instigated the formation of the unlawful assembly or the commission of the crime, so as to make the master liable as an abettor.[54]

3. Essentials to Constitute an Offence under this Section

For the application of the section three things are essential: (a) there must be abetment of an offence, (b) the act abetted must have been committed in consequence of the abetment,[55] and (c) there must be no express provision in the IPC, for the punishment of such abetment. Such express provision made in ss 110 - 23, 130, 132, 133, 134, 136 and 138 of the IPC, s 182 not being such section, there is no reason why this section should not be applicable to cases under s 182 of the IPC .[56]

4. Distinction between Sections 109 and 114

This section is punitive and provides for punishment of abetment of an offence. Section 114, on the other hand, is not punitive, but only raises a presumption. The presumption raised by that section brings the case within s 34 .[57] The effect of this section and s 114 is to supersede the English law relating to principals of the first and second degrees and accessories before the act.[58]

Section 114 of the IPC is only brought into operation when circumstances amounting to abetment of a

particular crime have first been proved, and then the presence of the accused, at the commission of that crime, is proved in addition. The real test, to see whether or not the section is applicable, lies in its words; 'who if absent would be liable to be punished as an abettor'. Abetment, to come under this section, must be one which is prior to the commission of the offence and complete by itself, and not an abetment which is done immediately before or at the time of the commission of the offence, for in the latter case, the abettor would not have committed the abetment if he had not been present and would not, therefore, have been liable to punishment as an abettor. When a person is present and abets another to commit an offence, then s 114 will not be applicable to the case. Active abetment at the time of the committing of the offence is covered by this section and s 114 is clearly intended for an abetment previous to the actual commission of the crime at any time, that is, before the first steps have been taken to commit it.[59]

It may be noted that while abetment by instigation and abetment by intentionally aiding the offence can both be done either immediately before the omission of the753 offence or prior to it, abetment by conspiracy can hardly be committed at the time of the commission of the offence.[60]

The distinction between the two sections has, however, no practical effect, for whichever of the two is applicable; the accused is liable to exactly the same punishment.[61]

5. Sections 34 , 109 and 120B, Indian Penal Code 1860--Distinction

Synopsis of s 34 may be referred to.

6. Abetment of an Offence

For a conviction under this section, it must be established that the accused abetted the commission of an offence. There must be some legal basis for the conclusion that the accused abetted the commission of an offence. To constitute abetment of an offence intentional and active participation of abettor must be established. The accused, the owner of the lorry, was not held guilty for the negligence of person, who actually drove the lorry negligently.[62] The instigation or intentional aiding is necessary to bring the charge under this section.[63] In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but, in some way or other, it is absolutely necessary to connect him with those steps of the transaction which are criminal. Thus what the law punishes is only the abetment of an offence, and not the abetment of mere acts which are not offence.[64]

Where the complainant-wife alleged that her in-laws incited her husband to marry for a second time, there was no averment in the complaint or in the summoning order that the in-laws ever negotiated or arranged the so-called marriage nor was there any allegation of their presence at the time of performance of the second marriage, no case of abetment under s 109 against the in-laws was made out.[65]Where in a case of death by strangulation, there was nothing on record to show any conspiracy between co-accused and the main accused for committing murder, no overt act was alleged against co-accused, alleged exhortation by co-accused also not appearing to be cause of murder, the co-accused was held entitled to the benefit of doubt and was acquitted of charge of offences under s 109 read with s 300, IPC .[66] Where there was no material showing the role played by the accused persons in performance of a second marriage, mere blessings alone would not amount to abetment of offence of bigamy.[67] In cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. The mere fact that the husband treated the deceased wife with cruelty is not enough.[68]

754Majority of the fourteen prosecution witnesses, both civilian and police personnel accompanying the procession did not support the prosecution version that A2, A3 and A4 also exhorted accused B to shoot at the deceased, it was not found safe to convict A2, A3 and A4 for the offence of abetment of the murder of the deceased. Accused A2, A3 and A4 were acquitted of the offence under ss 302 / 109, IPC .[69]

Where the alleged offence of offering a bribe was committed in the year 1948, the accused could not be convicted for its abetment under s 165A, (since repealed) since that section was introduced for the first time in the IPC by s 3 of the Criminal Law Amendment Act (46 of 1952), which came into force on 28 July 1952, but it was held that the accused could still be convicted on the same facts under s 161 read with this section.[70]

Where a head constable who took a bribe gave it to a constable and he was caught red-handed, the villagers attacked and assaulted members of the raiding party on instigation of the accused constable and head constable and snatched the personal belongings and currency notes used in the trap and also deterred them from discharging their duties and rescuing accused from lawful custody of the inspector of the raiding party. The head constable who instigated and abetted other accused persons in snatching currency notes in possession of the inspector of the raiding party was convicted under s 395 read with s 109, IPC .[71]

Where it was alleged that the accused, by mixing methyl alcohol and ethyl alcohol caused hurt to the persons consuming the poisonous adulterated arrack, the accused suffered trial for substantive offences under the IPC and the Kerala Abkari Act, his direct involvement therein could not be established. It was held that accused cannot be convicted for abetment of the said offences by employing s 109 .[72]

Where in a case of illegal cutting of excess trees on government land by allottee and the assistant *gram sewak* (one of the accused) proved privy to the illegal cutting of excess trees, the accused was held guilty under s 167, IPC, and also under s 5 of the Prevention of Corruption Act, considering all the circumstances, he was also held guilty under ss 427 / 109, IPC, as he did aid and abet in committing the mischief which caused loss to the government.[73]

The appellant was charged under s 109 IPC for abetting the offences committed under ss 326, 327 and 328, IPC but the appellant was convicted under s 109, IPC for making abetment in consequence of which offences under ss 18, 19 and 20 of the Transplantation of the Human Organs Act has been committed, whereas no charge was framed under ss 18, 19 and 20 of the Transplantation of the Human Organs Act either against this appellant or the other accused. Therefore, the order of conviction and sentence passed under s 109, IPC was quite illegal.[74]

Where the accused took a room on rent in his own name and facilitated the main accused in committing rape on the prosecutrix, he was convicted under s 376 read with s 109, IPC .[75]755

7. 'Any Offence'

'Any offence' in this section means anything punishable under this Code or any special or local law,[76] and committed within or outside India (refer to synopsis notes under s 108).

8. Act Abetted must have been Committed

The 'act abetted' here obviously means the specific offence abetted. If the act committed is different from the act abetted, the case would fall under s 111, IPC . A person cannot be convicted for abetment under this section unless the offence alleged to have been abetted has been committed.

Where *A* was charged with offences under ss 280 (rash and negligent navigation) and 304A (causing death by a rash and negligent act) of the IPC and *B* with abetment of those offences and *A* was acquitted on the ground that there was no negligence on his part and the occurrence was a pure accident, it was held that *B* could not be convicted of abetment as the principal offences were not substantiated.[77]

Assistance in the preparation of an offence which ultimately was not committed cannot amount to an abetment under this section.[78] Offering gratification as a reward or motive to withdraw a case against

the accused, which had already been dismissed, was held not to amount to an abetment of an offence under s 161 (since repealed) of the IPC .[79]

9. Conviction of Principal Not Always Necessary--Exceptions to the General Rule

This section requires only that the act abetted should have been committed, and not that the principal should have been convicted. An offence of abetment falls through if the principal offence is not substantiated.[80] But it cannot be laid down as a general proposition that in every case where an abettor and principal are tried together, the abettor, if charged with having abetted the principal in the commission of an offence, must be acquitted if the principal is acquitted. Such a general statement might hold good in the majority of cases, but there may be exceptions to the general rule. Thus *A* and *B* were tried together, *A* for committing a murder and *B* for abetting the offence. The jury found *A* not guilty and he was accordingly acquitted. There was, however, no doubt that the offence of murder was committed. There was the retracted confession of *B* on the basis of which the jury could have formed as against her that the murder was committed by *A*. It was held that *B* could be convicted of abetting murder although *A* was acquitted.[81]*B* was, however, acquitted as she was protected by s 94 . So, the conviction of the abettor is not dependent upon the conviction of the principal offender. The abetment by itself being a substantive offence, an abettor can be convicted before the principal is apprehended and put on trial.[82] Where the principal accused was756 acquitted merely on benefit of doubt for lack of his identity, by said acquittal, the prosecution case that the deceased was abducted for being compelled to marry another person or forced to have illicit intercourse with him with the complicity of appellant was not rendered false. Prosecution case was found true by the High Court. Hence the appellant could not be absolved of the charge as abettor.[83]

The Punjab and Haryana High Court has however, held that where there was no evidence to show as to who, when, where and how killed the deceased there was also no evidence of abetment. Unless the principal accused responsible for killing the deceased was found and named, charge under s 302 read with s 109, IPC was rendered nugatory.[84]

The accused was a member of an unlawful assembly, the common object of which was to attack a certain hut and commit assault on remonstrance.

The accused was found to have given orders to one *B*, a member of the unlawful assembly to set fire to the hut. The hut was set fire to and burnt. The accused was charged, among other counts, under s 436 read with this section. *B* was charged under s 436, but was acquitted as the evidence of the witnesses that *B* had set fire to the hut was not believed. But their evidence that the accused had ordered to set fire to the hut and the hut was actually burnt by one of the members of the unlawful assembly was believed. It was held that the hut was set on fire by one of the members of the unlawful assembly and it was in consequence of the orders given by the accused and, therefore, the conviction of the accused under s 436 read with s 109 was not illegal.[85]

10. Act must be Committed in Consequence of the Abetment--Explanation

For the application of this section it must be found that the act abetted was committed in consequence of the abetment.[86] According to the explanation, an act or offence is said to be committed in consequence of the abetment if it is committed in consequence: (a) of the instigation; or (b) in pursuance of the conspiracy; or (c) with the aid which constitutes the abetment. These three clauses clearly follow the three corresponding clauses of s 107, IPC .

The law does not require that instigation should be in a particular form or that it should be only in words and may not be by conduct: for instance, a mere gesture indicating 'beat' or a mere offering of money by an arrested person to the constable who arrests him may be regarded as instigation, in the one case to beat and, in the other to take a bribe.

Whether there was instigation or not is a question to be decided on the facts of each case. It is, however, not necessary, in law, for the prosecution to prove that the actual operative cause in the mind of the person abetted was the instigation, and nothing else, so long as there was instigating and the offence has been committed, or the offence would have been committed, if the person committing the act had the same757 knowledge and intention as the abettor. It is impossible for any human tribunal to decide exactly how much the instigation actually weighed in the mind of the person abetted when he committed the act or offence.[87]

Accused Charged under Section 300 , read with Section 149,Indian Penal Code 1860 cannot be convicted under Section 300 read with Section 109, Indian Penal 1860

Where the accused along with other accused persons was charged with an offence under s 302 read with s 149, IPC, no charge undisputedly was framed against the accused with the aid of s 109, IPC, the offence under s 109, IPC, is a distinct offence, the accused having faced trial for being a member of an unlawful assembly with achieved the common object of killing the deceased, could in no event be substitutedly be convicted for an offence under s 302, IPC, with the aid of s 109, IPC . Such a conviction of the accused would not only be a legal flaw but also a great prejudice to the accused in projecting his defence.[88]

11. Procedure

The general procedure in respect of an offence under this section is the same as that for the principal offence.

The offence is bailable or non-bailable and cognizable or non-cognizable according to the procedure for the offence abetted and is triable by the court by which the offence abetted is triable (refer to CrPC, Sch I).

12. Arrest

Police may arrest without warrant, if arrest for the offence abetted may be made without warrant, but not otherwise.

13. Warrant or Summons

A warrant or summons shall ordinarily issue in the first instance, according as a warrant or summons may issue for the offence abetted. An offence under s 117 of this Code and s 17(1) of the Criminal Law Amendment Act 1908, can be tried as a summons-case.[89]

14. Joint trial

Under s 223, CrPC, judicial discretion has been given to the court to try the principal offender and the abettor either jointly or separately; and the manner, in which this discretion should be exercised, must depend on the facts of each case.[90]Section 3(1) (b) encompasses the offences committed in conspiracy with others or by abetment of 'any of the offences' punishable under the Prevention of Corruption Act 1988 (PC Act). If such conspiracy or abetment of 'any of the offences' punishable under the PC Act can be tried 'only' by the Special Judge, it is inconceivable that the abettor or the conspirator can be delinked from the delinquent public servant for the purpose of trial758 of the offence. If a non-public servant is also a member of the criminal conspiracy for a public servant to commit any offence under the PC Act, or if such non-public servant has abetted any of the offences which the public servant commits, such non-public servant is also liable to be tried along with the public servant before the court of a Special Judge having jurisdiction in the matter.[91] Where accused a public servant is tried under s 13(2) of the Prevention of Corruption Act for being found in possession of assets disproportionate to his known source of income, his wife who is not a public servant where evidence *prima facie* shows his involvement can be prosecuted with the aid of s 109,

IPC .[92]

15. Jurisdiction

Every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed (refer to s 177 CrPC 1973). A charge of abetment may be inquired into or tried either by the court within the local limits of whose jurisdiction the abetment was committed, or by the court within the local limits of whose jurisdiction the offence abetted was committed (refer to s 180, CrPC). The principal offender and the abettor can be tried together not only at the place where the abetment takes place, but also at the place where the offence abetted is committed.[93]

Jurisdiction in Case of Abetment by Conspiracy

It cannot be said that s 180, CrPC, has no longer any application to cases of abetment by conspiracy as the conspiracy itself has been made an offence under s 120B . The offence of abetment by conspiracy as defined in s 107 was not repealed when s 120B, was enacted.[94] Conspiracy is one form of abetment (s 107, IPC) and where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under s 109, IPC .[95]

It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the Court and it has been consistently held that in an indictment for conspiracy the venue should be laid where the conspiracy was, and not when the result of such conspiracy was put in execution.[96]

Conspiracy is a substantive offence in itself. It is not one of the offences named in s 181 .[97]

It has accordingly been held in some cases that where a conspiracy is entered in district *A* and offences in pursuance of the conspiracy are committed in district *B*, the offence of conspiracy itself can be tried only at *A* and not at *B*.[98] In some other cases it has been held that where the conspiracy was an offence by reason of its relation to759 the other acts committed by the conspirators which are offences by themselves, then by reason of s 180, the offence of criminal conspiracy could be tried at the places where the other offences with which it is related, can be tried. Thus, it was held that where a conspiracy was hatched at Howrah but the offence of kidnapping in pursuance thereof was committing at Balia, the court at Balia had jurisdiction to try the offence of conspiracy.[1]

Apart from the question of law, it will be more convenient if the offence of conspiracy and the various other offences committed in pursuance of it are tried together at one place because it will be more convenient and also less expensive to both the parties. It has been held by the Privy Council in *Babulal Chawkhani v Emperor* ,[2] that if several persons conspire to commit offences and commit overt acts in pursuance of the conspiracy, these acts are committed in the course of the same transaction, which embrace the conspiracy and the acts under it, and the conspiracy and the various other offences committed in pursuance of the conspiracy can be tried together.

16. Place of Trial for Abetment by Letter sent through Post

Where one person instigates another to the commission of an offence by means of a letter sent through post, the offence of abetment by instigation is completed so soon as the contents of such letter become known to the addressee, and such offence is triable at the place where such letter is received.[3] For the purpose of giving jurisdiction, a letter speaks continuously from the moment of its being posted until its receipt by the addressee.[4]

17. Abetment in India of an Offence Committed in Foreign Territory

The accused, an Indian subject of Her Majesty, abetted the commission of murder, or of rioting under ss 302 and 147, by words spoken in British territory, inciting certain Portuguese subjects to kill one Bhama, if he attempted to remove the produce of certain lands situated in the Portuguese territory of Daman. A disturbance afterwards occurred at Daman in connection with this matter, in which one man was killed and another wounded. It was held that s 188, CrPC, had no application to the case, the alleged offence of abetment not having been committed outside British India.[5]

This difficulty is now removed by the addition of s 108A in the IPC under which a person abets an offence within the meaning of this Code, who in India abets the commission of any act without and beyond India, which would constitute an offence if committed in India.

Illustration

A in India instigates *B*, a foreigner in Goa, to commit a murder in Goa. *A* is guilty of abetting murder.760

18. Abetment of Foreign Territory of Offence Committed in India

A subject of an Indian state, who by acts done in that state, and not in British territory, abetted the commission of an offence in British territory, was not liable to be tried in British India,[6] but if he were an Indian subject, he could be tried in British India if a certificate was obtained.[7]

Where a foreign subject, resident in a foreign territory, instigated the commission of an offence which in consequence was committed in British territory, it was held that the instigation not having taken place in any district created by this Code, the instigator was not amenable to the jurisdiction of a British court established under the Code.[8]

19. Complaint Necessary in the case of Abetment of Certain Offences

Sub-clause (i) of cl (a) of s 195(1) of the CrPC provides that no court shall take cognizance of any offence punishable under ss 172 - 88 (both inclusive) of the IPC except on the complaint in writing of the public servant concerned or some other public servant to whom he is administratively subordinate. Similarly for the offences punishable under ss 193 - 96 (both inclusive), 199, 200, 205-11 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any court or of any offence described in s 463, or punishable under ss 471, 475 or 476 of the IPC, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court cognizance can be taken only on the complaint in writing of that court by such officer of the court as that court may authorise in writing in this behalf, or some other court to which that court is subordinate. The same procedure has to be followed for the prosecution of the abettors of the aforementioned offences in view of the provisions of sub-cl (ii) of cl (a) and sub-cl (iii) of cl (b) of s 195(1) of the said Code. The cognizance is, therefore, barred without the written complaint of the public servant or the court concerned as the case may be.[9]

20. Sanction

Under the provisions of the present CrPC, previous sanction of the Central Government or of the state government is required for taking cognizance of abetment described in s 108A of the IPC and not in respect of any abetment described in s 109, where *A* submitted false claims to the government of

Burma and obtained payment of money in respect of works not carried out by him for the government, *A* was tried for cheating along with the trial of a public servant for abetment of the offence of cheating, by falsely certifying correctness of the claims. It was contended that trial of *A* was vitiated for want of sanction under s 197, CrPC, for the prosecution of the public servant. It was held that the trial was not vitiated for want of sanction as neither *A* was a public servant nor the act of abetting the principal offenders could possibly be held to have been done. The conviction of the accused persons under s 420 read with s 109, IPC was maintained[10] (s 196, CrPC).[11]761

21. Proof

Commentary under s 107, *infra*, may be referred to.

Where the accused merely introduced the co-accused to a bank for opening an account and the co-accused after six months, presented bogus drafts and withdrew the amount, there was no evidence showing involvement of accused in fraud committed by the co-accused nor did he instigate the co-accused to present bogus drafts. The bank passed self cheque of the co-accused when there was not sufficient money in his credit by acting on bogus drafts. It was held that the accused was not responsible for loss sustained by the bank and conviction of the accused for abetment of cheating under ss 420 / 109, IPC, was not proper.[12]

Evidence of PW3 showed that the Accused A1 re-married with Accused A5 in the presence of the other co-accused, after his marriage with the complainant was dissolved, but the other co-accused (A3 and A4) had no knowledge that the decree of divorce had already been set aside by the court. The other co-accused (A3 and A) could not be held guilty of abetment of bigamy. They were held entitled to benefit of doubt. Their conviction under s 494 read with s 109, IPC was set aside.[13]

22. Sentence

Courts do not have to make any distinction in the quantum of sentence to be awarded to the principal offender and that awarded to the offender who abetted the commission of offence.[14] It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property.[15] Persons, charged as principals, cannot be punished for the abetment of the same offence without a charge.[16] The rules of the perpetrator and abettor of the crimes are distinct. In the absence of definite information about the actual words used by an accused in abetting an offence, other circumstances, relied by the prosecution against the accused, lose much of their force, and it is unsafe to convict an accused person of the offence of abetment.[17] Where an accused has been found guilty under s 302 read with ss 109 and 120B, IPC, no conviction or sentence under the charge for the offence under s 120B, IPC, need be recorded.[18]

Where two persons *A* and *B* have been charged for abetment and the case against the two is inextricably mixed-up and cannot be severed, *B*, on the acquittal of *A*, should be given the benefit of doubt and should also be acquitted.[19]762

23. Charge

In a charge of abetment, the section of the principal offence, and the particular section of this chapter, under which the case falls should be mentioned with the circumstances which bring it under the said section.[20] It is not possible to frame a charge under this section alone because that section has, for its application, to be read with some other section defining the offence, say, s 420 read with s 109, or s 467 read with s 109 and so on. A charge under s 109, when framed, is along with the charge of some substantive offence.[21] Where the charge against the accused is for an offence under s 304, Pt I, read with s 34 IPC, the accused cannot be convicted under s 304, Pt I, read with s 109, IPC, in the absence of charge under s 109, IPC .[22] However, it cannot be laid down as an inflexible rule that a conviction for abetment cannot be made in a case where the accused is charged with the main offence only, and no separate change has been frame under this section. If the accused had notice of

the facts which constituted abetment, although the charge was one for the main offence, and if there has been no prejudice to him by the omission to frame a separate charge for abetment, he can be convicted for abetment even though the charge for the main offence fails.[23] Where a charge is framed under ss 467 and 120B of IPC for the offence of conspiracy to forge a valuable security and also an additional charge of abetment under ss 467 and 109 and the former charge is subsequently, after evidence on aforesaid charge has been led by prosecution, cancelled for want of sanction under s 196, CrPC, the court would be justified in convicting the accused under ss 467 and 109 .[24]

Where the offence charged is only a conspiracy to commit a single act, the persons concerned can be charged with the actual commission of the offence or with abetment of the offence as abetment includes abetment by conspiracy. In such circumstances, as the entire case would be covered by framing a charge of the offence or its abetment, a charge under this section read with the section creating the substantive offence, would be sufficient and proper and it would be improper and certainly unnecessary to frame a charge of conspiracy separately under s 120B . But where the specific charges are only but two acts and the charge of conspiracy is not with respect to these two only but with respect to several others also, the entire case cannot be covered by a mere charge of abetment under s 109 read with sections defining the substantive offence, and a charge under s 120B, of conspiracy separately would be necessary.[25] Conspiracy, is one form of abetment (see s 107, IPC), and where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission of the offence, should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy, with the offence of abetment under this section.[26] Where a person has been convicted under s 379, IPC, of theft, it is not competent for the appellate court,763 while finding him not guilty of theft, to modify the conviction into one of abetment of theft.[27]

Accused Convicted without framing Charge

Section 211 of the CrPC requires that the charge against the accused be precisely stated. Sub-section (4) of s 211 of the CrPC specifically requires that the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.[28] In the absence of a charge being framed against the accused under s 302 or 109, IPC, it would certainly cause prejudice to him, if he is convicted under either of these offences at the end of the trial. It is not permissible for the trial court to convict the first for the offence under s 302 read with s 109, IPC, without framing charge. His conviction under s 302 read with s 109, IPC is, therefore, illegal and is liable to be set aside.[29] Where the accused was not notified at any stage that he would be tried for the offence of having abetted the deceased to cause miscarriage, it was held that the conviction of the accused for having abetted the deceased to cause miscarriage was not proper.[30]

Form of Charge

The charge has to be framed in the following form:

'I (*name and office of Magistrate, Sessions Judge, etc.*) hereby charge you (name of accused) as follows:

That *A B* (*name the principal: if the person is unknown, say that an unknown person*) on the.....day of..... at..... committed the offence of.....and that you at ..... abetted the said *AB* (*or person unknown*) in the commission of the said offence of ..... which was committed in consequence of your abetment and you have thereby committed an offence punishable under s 109 read with section ..... of the Indian Penal Code, and within my congnisance (or *within the cognizance of the Court of* .....)

And I hereby direct that you be tried by this court (or the said court) on the said charge.

When the abettor is charged with the principal offender, the charge should run thus:

That you ..... on or about the ..... day of ..... at .....abetted the commission of the offence of ..... by ..... which was committed in consequence of your abetment, and that you have thereby committed an offence punishable under s 109 and ..... of the Indian Penal Code, and within the cognizance of my Court (or the Court of .....).'

45 Refer to the the general notes to this chapter.

46 *V Shesha Ayyar v Venkatasubba Chetty* AIR 1924 Mad 487, p 488, 25 Cr LJ 442 .

47 *Ahmed Hasham v Emperor* AIR 1933 Bom 162, 34 Cr LJ 559 ; *Jadunandan Jha v Emperor* AIR 1937 Pat 317, 38 Cr LJ 790 .

48 *Joseph Kurian Philip Jose v State of Kerala* (1995) Cr LJ 502 (SC), AIR 1995 SC 4 ; *Wakil Yadav & Anor v State of Bihar* (1999) Cr LJ 500 (SC) .

49 *Brinchipada Dafadar v Emperor* AIR 1938 Cal 625, p 626, 39 Cr LJ 964 .

50 *Upendra Chandra Poddar v Emperor* AIR 1941 Cal 456, 42 Cr LJ 796 .

51 Re *G Ananthachari*AIR 1938 Mad 996, p 997 .

52 *Anil Kr Sarkar v State of West Bengal* 2009 Cr LJ 4678, p 4682 (Cal) .

53 *NMMY Momin v State of Maharashtra* AIR 1971 SC 885, (1971) Cr LJ 793, p 796 .

54 *Hira Singh v Emperor* AIR 1946 All 457, p 463, 47 Cr LJ 955 ; *MN Bhatia v State of Uttar Pradesh* 1968 Cr LJ 555 (All) .

55 1 WR (Cr) Letters, 9, 2 WR (Cr) 1, 8; *Sangili Nadan v R* 12 Cr LJ 495 ; *Singaravelu Pillay v R* 13 Cr LJ 203 .

56 *Dawar Singh v Emperor* AIR 1937 All 755, p 756 .

57 *Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1, p 7, 26 Cr LJ 431 .

58 *Emperor v Nirmal Kanta Roy* AIR 1914 Cal 901(2), p 906, 15 Cr LJ 460 .

59 *Chet Ram v State of Uttar Pradesh* AIR 1958 All WR 158 (HC), (1958) All Cr R 153, (1958) All LJ 82; *Chotey v Emperor* AIR 1948 All 168, 49 Cr LJ 168 ; *Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1 ; *Nanboo Kedar v State* AIR 1962 MP 91, (1962) 1 Cr LJ 435 ; *Mian Gul v Emperor* AIR 1932 Lah 483, 33 Cr LJ 564 ; *Re Jogali Bhaigo Naik*AIR 1927 Mad 97, 27 Cr LJ 1198 ; *Vijayarama Naidu v King-Emperor* AIR 1927 Mad 1115, 29 Cr LJ 72 ; *Basharat v Emperor* AIR 1934 Lah 813 ; *Sital v Emperor* AIR 1935 Oudh 468, 36 Cr LJ 1151 ; *Ahmed Hasham v Emperor* AIR 1933 Bom 162, 34 Cr LJ 559 ; *Jadunandan Jha v Emperor* AIR 1937 Pat 317, 38 Cr LJ 790 .

60 *Sital v Emperor* AIR 1935 Oudh 468, p 470, 36 Cr LJ 1151 .

61 *Jadunandan Jha v Emperor* AIR 1937 Pat 317, p 319, 38 Cr LJ 490 .

62 *Kannadikara Rajendran v State* (1990) LW (Cr) 482 (Mad) .

63 *Dilawar Khan v State of Madhya Pradesh* (1990) C Cr J (NOC) 44 (MP) .

64 *MN Bhatia v State of Uttar Pradesh* (1968) Cr LJ 555, p 556 (All) ; *Hira Singh v Emperor* AIR 1946 All 457 .

65 *Ram Singh v State of Punjab* (1999) Cr LJ 1406 (P&H) .

66 *State of Uttar Pradesh v Sarju Prasad* (1996) Cr LJ 3833 (All) (DB) .

67 *Manjula v Mani* (1998) Cr LJ 1476 (Mad) .

68 *Anil Kr Sarkar v State of West Bengal* 2009 Cr LJ 4678, p 4682 (Cal) **See also***Mahinder Singh v State of MP* 1995 AIR SCW 4570, 1996 Cr LJ 894 .

69 *Anand Mohan v State of Bihar* 2013 Cr LJ 2644 (SC), 2013 AIR SCW 2613, 2012 (7) SCC 225 .

70 *Om Prakash v State* AIR 1957 All 388, p 389, (1957) Cr LJ 695 .

71 *Ami Lal v State of Rajasthan* (1996) Cr LJ 1585 (Raj) .

72 *Joseph Kurian v State of Kerala* AIR 1995 SC 4, (1995) Cr LJ 502 (SC) .

73 *Krishna Govind Patil v State of Maharashtra* AIR 1973 SC 1388 .

74 *Shyam Sundar Prasad v State of Bihar* 2007 Cr LJ 1989 (Jhar) (DB) .

75 *Ramakant Tiwari v State of Madhya Pradesh* 2007 Cr LJ (NOC) 306 (MP) .

76 Indian Penal Code 1860, s 40 ; *V Sesha Ayyar v Venkatasubba Chetty* AIR 1924 Mad 487, 25 Cr LJ 442 .

77 *Sangili Nandan v Emperor* 12 Cr LJ 495 ; Re *Kanniah Maistry*AIR 1939 Mad 796 ; *Raja Khan v Emperor* AIR 1920 Cal 834 ((1)), 22 Cr LJ 448 .

78 *Surat Bahadur v King-Emperor* AIR 1925 Oudh 15, 25 Cr LJ 1162 .

79 *Shamual Haq v King-Emperor* AIR 1921 Cal 344, 23 Cr LJ 1 .

80 *Sangili Nadan v Emperor* 12 Cr LJ 495 ; *Raja Khan v Emperor* AIR 1920 Cal 834 ((1)), 22 Cr LJ 448 .

81 *Uma Dasi v Emperor* AIR 1924 Cal 1031, p 1032, 26 Cr LJ 11 .

82 *State of Kerala v Syed Mohammed Rowther* (1969) KLT 849, p 851 .

83 *Pyare Lal v State of Uttar Pradesh* (1987) 1 SCC 525, AIR 1987 SC 852, (1987) SC JT 236, (1987) Cr LJ 789, 1987 SCC (Cr) 209, (1987) 1 Crimes 494, (1987) SC Cr R 97 .

84 *Didar Singh v State of Punjab* (1990) 1 Chand Cr C 411 (P&H)(DB).

85 *Gallu Sah v State of Bihar* AIR 1958 SC 813, p 816, (1958) Cr LJ 1352 .

86 1 WR Letters 9; 2 WR (Cr) 1, 8.

87 Re *G Ananthachari*AIR 1938 Mad 996, p 998 .

88 *Wakil Yadav v State of Bihar* (1999) Cr LJ 5000 (SC) .

89 *Narsinha Narayan Chandur v Emperor* AIR 1931 Bom 199, 32 Cr LJ 718 .

90 *Dwarka Singh v Emperor* AIR 1915 Cal 743, 16 Cr LJ 348 ; Code of Criminal Procedure 1973, ss 223 (b), (c) and (g) .

91 *Sanjeet Ranjan v State of Jharkhand* (2004) Cr LJ 1043 (Jhar) ; *P Nallammal v State, rep by Inspector of Police, Respondent* (1999) Cr LJ 1591 (Mad) ; *Shirpa Kumar v State of Orissa* 2014 Cr LJ 94 (Ori) ; *Menon Eka v State of Jharkhand* 2013 (126) AIC Jhar 528 (Jhar) .

92 *Shipra Kumar v State of Orissa* 2014 Cr LJ 994 (Ori) .

93 *Mohan Singh v State* (1962) 54 Punj LR 1933, p 195 .

94 *Harol Narmada Prasad v State of Vindhya Pradesh* AIR 1956 VP 30 .

95 Re *M Venkataramiah*AIR 1938 Mad 130, 39 Cr LJ 266 .

96 *Russell on Crimes and Misdemeanours,* eighth edn, p 185.

97 *Emperor v Pursumal Gerimal* AIR 1938 Sind 108, 39 Cr LJ 630(2).

98 *Harol Narmada Prasad Singh v State of Vindhya Pradesh* AIR 1956 VP 30 ; Re *Dani*AIR 1936 Mad 317, 37 Cr LJ 634 ; *Bisseswar v Emperor* AIR 1924 Cal 1034, 26 Cr LJ 207 .

1 *State v Keshari Singh* (1951) AWR 678 (HC) ; *Bachan Pande v State* AIR 1957 All 130 ; *Karam Singh v State* (1957) Cr LJ

234 .

2 *Babulal Chawkhani v Emperor* AIR 1938 PC 130, 39 Cr LJ 452 .

3 *Queen-Empress v Sheo Dial Mal* 16 ILR All 389 ; *Emperor v Chhotalal Babar* 36 ILR Bom 524 ; *Queen-Empress v Ram Dei* 18 ILR All 350 ; Code of Criminal Procedure 1973, s 182 .

4 *R v Rogoos* (1877) 3 QBD 28 ; *Emperor v Chhotalal Babar* 36 ILR Bom 524 ; *Queen-Empress v Thaku* 8 ILR Bom 312 ; *Queen-Empress v Ram Dei* 18 ILR All 350 .

5 *Queen-Empress v Ganpatrao Ram Chandra* 19 ILR Bom 105 ; *Empress v Moorga Chetty* 5 ILR Bom 338 ; *R v Elmastone* 7 Bom HCR (CC) 89.

6 *Kishen Koer v Crown* 20 PR 1878 .

7 Madras CMP No 97 of 1911.

8 *R v Pirtai* 10 BHCR 356 ; *Kishen Koer v Crown* 20 PR 1878 ; *Feytnmal v Empress* 35 PR 1880 .

9 *Assudomal Ramandas v Jhamandas Hotchand* AIR 1940 Sind 100, 41 Cr LJ 861 ; *Behari Lal v Abdul Qadir* AIR 1940 Lah 292, p 295, 41 Cr LJ 843 ; *Tarachand v Emperor* AIR 1944 Sind 130 .

10 *Bakshish Singh Dhalimal v State of Punjab* AIR 1967 SC 752, (1967) Cr LJ 656 SC .

11 *Amarlal Wasanmal Hingorani v Emperor* AIR 1945 Sind 51, p 53, 47 Cr LJ 84 ; *Emperor v Pir Muniuddin* AIR 1944 Sind 225, 46 Cr LJ 739 ; *Pramatha Nath v Saroj Ranjan* (1962) 1 Cr LJ 770, p 780, AIR 1962 SC 876 ; *Bakshish Singh v State of Punjab* AIR 1967 SC 752, (1967) Cr LJ 656 .

12 *Manoranjan Das v State of Jharkhand* (2004) Cr LJ 3042 (SC) .

13 *Kannan v Selvamuthukani* AIR 2012 SC 1217, 2012 AIR SCW 1278, 2012 (2) Scale 9, 2012 (5) SCC 570, 2012 Cr LJ 1576, p 1578 .

14 *Ashoka Nivruti Desai v State of Maharashtra* (1995) Cr LJ 826, p 831 (Bom) .

15 *Empress of India v Sita Ram Rai* ILR 3 All 181 .

16 *Joseph Kurian v State of Kerala* (1995) Cr LJ 502, p 507 (SC) .

17 *Rai Hari Prasad v Emperor* AIR 1936 Pat 608, 38 Cr LJ 90 .

18 *State v Savithri* (1976) Cr LJ 37, p 38, (1974) Mad LW (Cr) 205 .

19 *Harun Rashid Laskar v State of Assam* (1978) Cr LJ 256, p 259 (Gau) ; *Sangiti Nadan v Emperor* 12 Cr LJ 495 ; Re *Kaniah Maistry*AIR 1939 Mad 976 ; *Raja Khan v Emperor* 22 Cr LJ 448, AIR 1920 Cal 834 .

20 Cr Letter 3 WR 5; 1 WR (Cr) Letter 9; 2 WR (Cr) 1.

21 *Rex v Alimuddin* AIR 1950 All 77, p 79, 51 Cr LJ 365 .

22 *Babu v State of Tamil Nadu* 2013 Cr LJ 3649, p 3652, 2013 AIR SCW 3963 ; *Wakil Yadav v State of Bihar* 1999 Cr LJ 5000 (SC), (2000) 10 SCC 500**referred**.

23 *Damodar Sahu v State* AIR 1955 Ori 156, p 158, 56 Cr LJ 1373 .

24 *Syed Yawar Bakht Chowdhury v Emperor* AIR 1940 Cal 277, 41 Cr LJ 719 .

25 *Rex v Alimuddin* AIR 1950 All 77, 51 Cr LJ 365 .

26 *Re M Venkataramiah*AIR 1938 Mad 130, 39 Cr LJ 266 ; *Karam Singh v State* (1957) Cr LJ 234 (Raj) .

27 *Singaravelu Pillay v Emperor* 13 Cr LJ 203(1); *Padmanabha Payi Kanniah v Emperor* 11 Cr LJ 49 ; Re *Varayal Krishnan Nair* 13 Cr LJ 223; *Yeditha Subbaya v Emperor* 13 Cr LJ 453 (Mad) .

28 *Sohan Lal v State of Punjab* (2003) Cr LJ 4569 (SC) .

29 *Ibid*.

30 *Madan Raj v State of Rajasthan* (1970) Cr LJ 519, AIR 1970 SC 436 ; *Prasanna Kumar v Anand Chandra* (1970) Ori 10, p 11, (1970) Cr LJ 62 .

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 110.

Punishment of abetment if person abetted does act with different intention from that of abettor.--

Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.764

Comments

1. Scope

Under expln 3 to s 108, it is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same intention or knowledge as that of the abettor, or any guilty intention or knowledge. This section provides for cases in which the intention or knowledge of the person abetted is different from that of the abettor. Even in such a case, the abettor is liable for the offence which would have been committed if the act abetted had been done with the intention or knowledge of the abettor. In other words, the variation in the intention or knowledge of the person abetted does not affect the liability of the abettor. For a concrete example of this section **see** illust (d) to expln (3) of s 108 . In the case illustrated, the abettor is guilty of abetting theft although the act committed by the person abetted is not theft.[31]

Where allegations were that the co-accused by using an abusive term exhorted the main accused who thereby killed the deceased. Conviction of the main accused for the offence of murder was found proper, however, the co-accused was held not sharing common intention with the main accused to cause death of the deceased, though words were used by the co-accused in an abusive way but from that it could not be said that he exhorted main accused to kill the deceased. The co-accused was held guilty for abetment of offence of hurt and his conviction under s 302 read with s 34, IPC was altered to one under ss 324 / 110 IPC .[32]

Where the abettor's intention was only to cause simple hurt to a woman, but the person abetted hit her with the intention of causing grievous hurt, it was held that the abettor was liable only for what he intended so that he could be convicted only for an offence under s 323 read with s 110 .[33]

It has been held that the principle of ss 38 and 110 applies to offences under s 149 and the liability of individual members of an unlawful assembly under the latter section depends on the intention or knowledge of the members.[34]

2. Procedure

The procedure is the same as that for the offence abetted (refer to the CrPC, Sch I).

31 *Mumtaz Ali v Emperor* AIR 1935 Oudh 473, p 474, 36 Cr LJ 1201 ; *Bhagat Singh v Emperor* AIR 1936 Pat 481, p 485, 37 Cr LJ 360 .

32 *Matadin etc v State of Maharashtra* (1999) Cr LJ 22 (SC) .

33 *Mumtaz Ali v Emperor* AIR 1935 Oudh 473, p 474, 36 Cr LJ 1201 .

34 *Bhagat Singh v Emperor* AIR 1936 Pat 481, p 485, 37 Cr LJ 630 .

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 111.

Liability of abettor when one act abetted and different act done.--

When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it:

Proviso.--*Provided* the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.765

Illustrations

(a) *A* instigates a child to put poison into the food of *Z,* and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of *Y,* which is by the side of that of *Z.* Here, if the child was acting under the influence of *A'*sinstigation, and the act done was under the circumstances a probable consequence of the abetment, *A* is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of *Y.*

(b) *A* instigates *B* to burn *Z's* house. *B* sets fire to the house and at the same time commits theft of property there. *A,* though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(c) *A* instigates *B* and *C* to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. *B* and *C* break into the house, and being resisted by *Z*, one of the inmates, murder *Z.* Here, if that murder was the probable consequence of the abetment, *A* is liable to the punishment provided for murder.

Comments

1. Scope and Applicability

Sections 109 - 110 provide for cases in which the act done is the act abetted. This section provides for the liability of the abettor when the act done is different from the act abetted. It lays down that in such a case the abettor is liable for the act committed. Reading with s 107, this section comes to this. Where an act is abetted and the abetment takes form of instigation of an act, and a different act is done, that different act must be probable consequence, and committed under the influence of the instigation; and where the abetment takes the form of aiding or a conspiracy, the different act must be a probable consequence and also with the aid or in pursuance of the conspiracy. In the latter case, for conviction under this section, the prosecution must show, not only that assault on the complainant was a probable consequence of the conspiracy to assault the complainant but also that it has been done in pursuance of that conspiracy.[35]

It is clear law that if one man instigates another to perpetrate a particular crime, and that other, in pursuance of such instigation, not only perpetrates that crime, but, in the course of doing so, commits another crime in furtherance of it, the former is criminally responsible as an abettor in respect of such last mentioned crime, if it is one which as a reasonable man, he must, at the time of the instigation, have known would, in the ordinary course of things probably have to be committed in order to carry out the original crime. For example, if *A* says to *B:* 'You waylay *C* on such and such a road and rob him, and if he resists, use this sword but not more than is absolutely necessary'; and *B* kills *C, A* is responsible as an abettor of the killing, for it was a probable consequence of the instigation. To put it in plain terms, the law virtually says to a man: 'If you choose to run the risk of putting another in motion to766 do an unlawful act, he, for the time being, represents you as much as he does himself; and if, in order to effect the accomplishment of that act, he does another which, you may fairly, from the circumstances, be presumed to have foreseen, would be a probable consequence of your instigation, you are as much responsible for abetting the latter act as the former'.[36]

A person is guilty of abetment provided only that the act which he does is a probable consequence of the abetment and is committed under the influence of the instigation.[37]

The illustrations to this section, show that it contemplates cases not only where a different act is done but also where a different person is attacked in pursuance of the conspiracy.[38] But where the offence is totally different from the one instigated, the liability of the abettor does not accrue.[39]

2. English Law

As to the liability of the accessory when the crime committed is other than that commanded, is dealt with in this section, Russell says:[40]

> If the principal totally or substantially varies from the terms of the instigation, if being solicited to commit a felony of one kind, he wilfully and knowingly commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt (Fost 369: 1 Hale 436).

Thus if *A* commands *B* to burn *C's* house, and he in so doing commits a robbery now *A*, though accessory to the burning, is not accessory to the robbery: for that is a thing of a distinct and inconsequential nature.[41] And if *A* counsels *B* to steal goods of *C* on the road, and *B* breaks into *C's* house and steals them there, *A* is not accessory to the breaking the house, because that is a felony of another kind. He is, however, accessory to the stealing.[42]

But if the principal complies in substance with the instigation of the accessory, varying only in circumstances or time or place, or in the manner of execution, the accessory will be involved in his guilt: as, if *A* commands *B* to murder *C* by poison, and *B* does it by a sword or other weapon or by any

other means, *A* is an accessory to this murder; for the murder of *C* was the object principally in contemplation, and that is effected.[43]

And where the principal goes beyond the terms of the solicitation, yet if, in the event, the felony committed was a probable consequence of what was ordered or advised, the person giving such order or advice will be an accessory to that felony. Thus if *A* advises *B* to rob *C*, and in robbing him *B* kills him, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery, in such a case *A* is an accessory to the murder as well as to the robbery.[44]767 And if *A* solicits *B* to burn the house of *C*, and *B* does it accordingly; and the flames taking hold of the house of *D,* that likewise is burnt: *A* is accessory to *B* in the burning of the houses both of *C* and of *D*. The advice, solicitation, or orders of *A* were pursued in substance; and the events, though possibly falling out beyond his original intention, were, in the ordinary course of things, the probable consequences of what *B* did under the influence and at the instigation of *A.*[45]

3. Liability of Abettor for Act Committed

The abettor is liable for the act committed, if:

(a) it was a probable consequence of the abetment; and
(b) it was committed:

(i) under the influence of the abetment, or
(ii) in pursuance of the conspiracy which constituted abetment.[46]

4. Principle

The principle involved is that an abettor is liable for the probable consequences of his abetment. The test in these cases must always be whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one, which according to ordinary experience and common sense, the abettor must have foreseen as probable. The determination of this question as to the state of a man's mind at a particular moment must necessarily always be a matter of serious difficulty, and conclusions should not be formed without the most anxious and careful scrutiny of all the facts.[47] Russell says in this connection:[48]

> Nowadays, it is submitted, the test should be subjective, and the person, charged as accessory, should not be held liable for anything but what he either expressly commanded or realised might be involved in the performance of the project agreed upon. It would, on this principle, therefore, be a question of evidence to satisfy the jury that the accused did contemplate the prospect of what the principal has in fact done. Of course, in considering the evidence, the jury will naturally bear in mind the probability that what the ordinary average man would have foreseen was also foreseen by the accused, and that his present denial, now that he is charged, may be false.

5. 'When an Act is Abetted'

When this section speaks of an act, which is abetted, it means instigation of a criminal act. It does not follow as a natural and probable consequence of the instigation of a lawful action that an offence will be committed. Peaceful picketing is not an unlawful act and a person instigating another to picket a

liquor shop peacefully cannot be said to abet a criminal act. But where the accused instigates some volunteers to stop the sale of liquor by use of criminal force, he, in other words,768 instigates them to commit an offence under s 143, IPC . He will, then, be guilty of abetting the offence under that section.[49]

6. Probable Consequence

A probable consequence of an act is one which is likely, or which can reasonably be expected, to follow from such an act. An unusual or unexpected consequence cannot be described as a probable one. When the consequence of an act is such that a reasonable man could not be expected to foresee that it would follow from such an act, such a consequence cannot be described as a probable one. On the contrary, it can only properly be described as an unexpected, unlikely or improbable consequence. It is a well-established rule of construction that words in a statute creating a criminal offence must be construed strictly. A wider meaning to the phrase 'probable consequences' in this section should not and cannot be given; otherwise it would be impossible to fix any limits to a abettor's liability. When the act done is different from the act instigated, an abettor is only liable for such a different act if it was a likely consequence of the instigation or if it was an act which the instigator could reasonably have been expected to foresee might be committed as a result of his instigation.[50]Sections 111 - 13 make it abundantly clear that if a person abets another in the commission of an offence and the principal goes further thereafter and does something more which has a different result from that intended by the abettor and makes the offence an aggravated one, the abettor is liable for the consequences of the acts of his principal. If the offence committed is totally different from that which had been instigated, the abettor is not liable for the same even though his liability remains for the probable consequences of his abetment.[51] The crux of the problem, in an enquiry of this sort, is whether the abettor, as a reasonable man at the time of his instigation or intentionally aiding the principal, would have foreseen the probable consequences of his abetment.[52] When the chances are in favour of a certain event happening, that event is probable; when the chances are against its happening, it is improbable. When the chances are even, we get the middle line between probability and improbability. Improbability if increased to the extreme limit, becomes impossibility, probability if increased to the limit becomes certainty. The halfway line is neither probability nor improbability.

In a robbery, if there is no previous enmity of any sort, firearms are taken, it has been held, with the main object of frightening the villagers, and it is not the intention of the robbers to use the firearms with deadly effect, unless it should be necessary to do so in order to effect their escape. Where four persons set out to commit a robbery and one of them commits a murder in the course of robbery, it cannot in all cases be said that murder is a probable consequence of robbery so that the other three persons may be held guilty of the murder by abetment.[53]

Where a person orders his men to beat the other party and in consequence of that order, the people of that party are beaten and as a result, some men are killed, that769 person is guilty of abetment of murder.[54] Where the prisoner abetted an assault, and a murder was committed, it was held, under the peculiar circumstances of the case, that they were guilty of abetment of grievous hurt, and not of abetment of murder.[55]

7. Procedure

The procedure, in the case of an offence under this section, is the same as in the case of the offence abetted. Punishment is the same as that for the offence intended to be abetted.

For arrest, warrant or summons, bail, compounding, and court, refer to commentary under s 109 *ante*.

8. Proof

The facts, necessary to establish an offence under this section, are:

(i) that the accused abetted the commission of a particular act;
(ii) that the act, actually committed, was done under the influence of such abetment; and
(iii) that the act done was a probable consequence of the abetment.[56]

35 *Sonappa Shina Shetty v Emperor* AIR 1940 Bom 126, 41 Cr LJ 481 .

36 *Queen-Empress v Mathura Das* 6 ILR All 491, p 494-495 .

37 *Naimuddi v Emperor* AIR 1943 Cal 47, p 48, 44 Cr LJ 307 ; *Mumtaz Ali v Emperor* AIR 1935 Oudh 473, p 474, 36 Cr LJ 1201 .

38 *Mangta v Emperor* 38 Cr LJ 628, p 632 (Nag) .

39 (1967) 1 ILR Ker 30.

40 *Russell on Crime,* eleventh edn, pp 170-71.

41 1 Hale 617, 4 Bl Com 37.

42 1 Hale 617.

43 Fost 369, 370, 2 Hawk c 29, s 20, 4 Bl Com 37.

44 Fost 370.

45 Fost 370; *R v Bernard* (1858) 1 F&F 240 . Note the return to this objective test in *R v Betts & Riddey* (1930) 22 Cr App R 148, p 153, 2 Hawk c 29, s 18 .

46 *Nanboo Kedar v State* AIR 1962 MP 91, (1962) 1 Cr LJ 435 ; *Naimuddi v Emperor* AIR 1943 Cal 47, p 48, 44 Cr LJ 307 ; *Mumtaz Ali v Emperor* AIR 1935 Oudh 473,p 474, 36 Cr LJ 1201.

47 *Queen-Empress v Mathura Das* 6 ILR All 491, p 495 .

48 *Russell on Crime,* eleventh edn, p 172.

49 *Ganesh Prasad v Emperor* AIR 1931 Pat 52, p 54 .

50 *Girja Prasad Singh v Emperor* AIR 1935 All 346(2), p 349, 36 Cr LJ 438 ; *Queen-Empress v Mathura Das* (1884) 6 ILR All 491 .

51 (1967) 1 Ker ILR 30.

52 Re *IP Ramiah*AIR 1957 AP 231, p 235, (1957) Cr LJ 815 .

53 *Harnam Singh v Emperor* AIR 1919 Lah 256, p 258, 20 Cr LJ 635 .

54 *Nawab Ali v Emperor* AIR 1928 Cal 752 ; *Ghanshyam Singh v Emperor* AIR 1928 Pat 100, 29 Cr LJ 239 .

55 *Queen v Goluck Chung* 5 WR 75, p 76 ; *Queen v Doorgessur Surmah* 7 WR 61 .

56 *Nanboo Keder v State* (1962) 1 Cr LJ 435, AIR 1962 MP 91 .

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 112.

Abettor when liable to cumulative punishment for act abetted and for act done.--

If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

Illustration

A instigates *B* to resist by force a distress made by a public servant. *B*, in consequence, resists that distress. In offering the resistance, *B* voluntarily causes grievous hurt to the officer executing the distress. As *B* has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, *B* is liable to punishment for both these offences; and, if *A* knew that *B* was likely voluntarily to cause grievous hurt in resisting the distress *A* will also be liable to punishment for each of the offences.

Comments

1. Scope

Under this section an abettor may render himself liable for two offences, when he only intended to bring about one, if the one which he intended caused another which he ought to have anticipated, and if the two are distinct offences so as to be subject to distinct punishments.

Supposing an act, as is contemplated under s 111, is committed in addition to the act abetted, the abettor is liable for both. In the illust, *A* abets resistance of the officer by force. If *B* was armed for the purpose then the grievous hurt inflicted was clearly a probable consequence of the abetment, and was inflicted under the influence of the770 abetment, and, therefore, would be punishable under s 111, IPC . But having been inflicted in addition to the act abetted, *A* is liable for both the offences.

For the principle underlying the section, refer to commentary under s 111 .

As to 'distinct offences', refer to synopsis notes to s 71 .

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Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 113.

Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.--

When an act is abetted with the intention on the part of the abettor of causing a particular effect, and

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

Illustration

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

Comments

1. Scope

Where a certain act is abetted with the object of producing a certain effect but it causes a different one, the abettor is liable for it, if he knew that the act which he abetted was likely to cause that effect.[57] Under the terms of this section the liability depends on the question of the abettor's knowledge.[58] Under the English law the question seems to be one of fact, *i.e.,* whether or not the effect which happened was likely.[59] Thus, *A* describes *B* to *C*, and instigates *C* to murder *B*. *C* murders *D*, who corresponds to *A's* description of *B*. Under the English law, *A* is accessory before the fact to the murder of *D*.[60] Under s 113, *A* is an abettor of the murder of *D*, only if he knew that the killing of *D* was likely. But he is guilty of the abetment of murder of *B* under s 115, *A* advises *B* to murder *C* (*B's* wife) by poison. *B* gives *C* a poisoned apple, which *C* gives to *D* (*B's* child). *D* dies, *A* is guilty of abetment of murder of *C*, but not of the murder of *D*,[61] but *B* is guilty of murder.

B and *C* instigated *A* to rob *X*. *A* in so doing killed *X*. *B* and *C* did not abet the murder of *X* by *A*. It would be otherwise if they knew that *A* was armed with a deadly weapon.[62]771

2. Difference of Means--Effect of

Supposing the act abetted is committed in a manner different from the one suggested, it would make no difference to the abettor's liability for the effect abetted.[63] Thus if *A* advises *B* to murder *C* by shooting, and *B* stabs *C* who dies, *A* abets the murder of *C*. Similarly it would seem where *A* instigates *B* to kill *C* by sorcery or other impossible means, and *B* kills *C* otherwise.[64]

3. Procedure

For arrest, warrant or summons, bail, compounding, and court, refer to commentary under s 109 .

57 *Rajwant Singh v State of Kerala* AIR 1966 SC 1874, (1966) SCD 959 .

58 *R v Mathura Das* 6 ILR All 491 ; *R v Rasookolah* 12 WR (Cr) 51 .

59 SD art 42 ; Foster, 370.

60 Foster 370.

61 *Saunder*'s case Plowd 475; 1 Hale PC 431.

62 *R v Mathura Das* 6 ILR All 491 ; *R v Rasookolah* 12 WR Cr 51 .

63 Foster 369-70.

64 *R v Pestanji Dinsha* 10 Bom HCR 75 .

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Chapter V

Of Abetment

S. 114.

Abettor present when offence is committed.--

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

Comments

1. Scope

The person, who has abetted an offence, whether by instigation, conspiracy, or aid, may be present when the offence abetted is committed. He is, under this section, treated as a principal, *i.e.,* he is deemed to have committed the offence, though in fact, it was committed by another.[65] This section is a provision which is only brought into operation when the circumstances amounting to abetment of a particular crime has first been proved, and then the presence of the accused at the commission of that crime is proved in addition.[66] Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. Section 114 of IPC deals with the case where there has been not only the abetment of a crime, but also actual commission of the crime abetted and the abettor is present at the time of such commission. The way in which it deals with such a case is as follows.

772Instead of the crime being still abetment with circumstances of aggravation, abetment becomes the very crime abetted. The section is evidentiary not punitory. Because participation de facto may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus prior abetment means nothing else but participation. The presumption raised by this section brings the case within the ambit of s 34 .[67] The presumption is irrebuttable.[68]

The quarrel/incident between the deceased and the appellant A1 ensued over the issue of dashing the victim with a bicycle. The victim was chased by A1 and was over powered in front of his house. The victim was assaulted on his head with an axe provided by A2, the mother of the assailant. The victim sustained head injuries and collapsed on the ground. Only one incised wound over the scalp of the deceased was caused. Accused A2 was convicted under Section 304 , Part II IPC . It was not a pre-meditated action on the part of A1 and A2 who supplied the incriminating axe as per asking of his son instantaneously without considering its pros and cons. The accused A2 was convicted under ss 326 / 34, IPC instead of ss 326 / 114, IPC .[69]

2. Object

The whole object of ss 34 and 114 of the IPC is to provide for cases in which the exact share of one of

several criminals cannot be ascertained, though the moral culpability of each is clear and identical. Neither of these two sections should be so interpreted as to defeat the very object which underlies them.[70] This section introduces a statutory legal fiction whereby an abettor is treated as if he himself committed the offence by reason of his presence at the time and place of the offence. It does not apply to the case of an abettor whose abetment consists in something done or omitted when the offence was committed in his presence.[71] To bring a person within this section, the abetment must be complete apart from the presence of the abettor.[72]

3. Applicability

It is necessary first to make out the circumstances which constitute abetment, so that, if absent, he would have been 'liable to be punished as an abettor', and then to show that he was also present when the offence was committed.[73] This section would apply to a case where a person abets the commission of an offence, sometime before it takes place and happens to be present at the time when the offence is committed. It is not applicable to a case where the abetment is at the time when the offence takes place, and the abettor helps in the commission. When a person, who abets the773 commission of an offence, is present and helps in the commission of the offence, he is guilty of the offence itself and not merely of abetment except in a few cases like rape or bigamy.[74] Where neither any community of intention, nor any abetment prior to their presence at the spot, is established against the accused, the accused cannot be convicted with the aid of this section.[75] Where the accused is present on the spot and on his instigation, made on the spot, an offence is committed; the case falls under s 109, and not under this section.[76]

The section would be applicable only where the act at the time of doing of which the abettor is present, would itself amount to an offence and not otherwise.[77]

4. When Individual Acts become Relevant

Courts have stood as one holding that a person, who participates in a crime with the *mens rea* of that crime, alone is responsible and not one who is neither perpetrator nor a person acting with necessary actus reus. A person cannot be convicted if he is not a perpetrator as a secondary party, unless he was aware of all the essential matters which made the act done a crime. He may not have noted that his act amounted to crime in law, but he must be aware of all the essential matters of the act done, which essential matters together make the act done a crime. It thus follows that if several persons bear a common purpose, all are responsible for that act whether it was originally contemplated or not, where, however, one of them does an act which was not contemplated by the others and it is outside the common purpose, the others are not criminally liable in respect of that act, even though they may all have been engaged in an unlawful enterprise. In such circumstances, those who claim a secondary role may be liable for any other crimes and their individual acts may become relevant.[78]

5. The Real Test

The real test to see whether or not this section is applicable, lies in the words of the section. 'Who if absent would be liable to be punished as an abettor'. Abetment to come under this section must be one which is prior to the commission of the offence and complete by itself and not an abetment which is done immediately before or at the time of the commission of the offence, for in the latter case the abettor would not have committed the abetment if he had not been present and would not therefore, have been liable to punishment as an abettor.[79]774

Distinguishing Features of Sections 114 and 34

Commentary under s 34, may be referred to.

Distinguishing Features of Sections 114 and 109

Commentary under s 109, *ante*, may be referred to.

Distinguishing Features of Sections 114, 111 and 149

Where a number of persons are engaged in the commission of something criminal, all acting in furtherance of a common intention, each is of course punishable for what he has done. But his liability does not end there, for he is liable not only for the act he himself does, but also for those, which he thereby facilitates, provided of course, they are done in pursuance of the common intention. There may be cases where, the common intention is to do one act but a different act is done. When this is so, and there has been prior abetment, each abettor is liable as an abettor for the crime actually committed, provided the conditions specified in s 111, IPC have been fulfilled. That of course applies when the abettor is not actually present at the crime. But when he is there, this section comes into operation and makes him liable for the crime for which he would have been punishable 'as an abettor' if he had not been there. A parallel is to be found, in s 149, IPC, in cases of riot of an unlawful assembly. Each member of the assembly is liable not only for the acts done in furtherance of the common object, but also for acts which he knows were likely to be committed in the prosecution of that object. The law, then, reduces itself to this. In offences of this nature each person is liable for all crimes committed in furtherance of the common intention. What that intention was and whether each accused shared it are questions of fact which must be determined afresh, in each case with reference to the circumstances, which exist there, and not with reference to what other judges have decided in other cases on other facts. When, however, offences are committed, which travel beyond the common intention, each is still liable for these other offences provided there has been prior abetment and provided he would have been liable as an abettor under s 111, if he had not been present.[80]

Sections 114 and 149, IPC, both deal with constructive liability. Section 149 applies only when the person, composing the assembly of rioters, are at least five in number. There is no such limitation under this section. Again a person liable under s 149 need not be 'present' when the offence is committed as under this section.

Section 114 and not s 149, was held to apply to a case where, upon a charge of mischief by fire, the prisoner admitted that he was an abettor, and that he was present at the time when the offence was committed.[81]

'Who, if Absent, would be liable to be Punished as an Abettor'

In order to bring a person within the ambit of this section, it is necessary first to make out the circumstances which constitute abetment, so that, 'if absent', he would have been 'liable to be punished as an abettor', and then to show that he was also present when the offence was committed.[82] The real test lies in the words 'who, if absent,775 would be liable to be punished as an abettor'. They clearly show that abetment, to come under this section, must be one which is prior to the commission of the offence and complete by itself and not an abetment which is done immediately before or at the time of the commission of the offence, for, in the latter case the abettor would not have committed the abetment if he had not been present and would not, therefore, have been liable to punishment as an abettor.[83] Some persons commit grievous hurt, whilst *A* and *B* merely stand by. The attack is not pre-meditated. *A* and *B* cannot be punished as principals under s 114 because if they had been absent they would not be punished at all.[84] But where one of the accused was standing with an open knife, while the offence of rape was being committed by the other accused, the former was held guilty under ss 376 / 114, IPC .[85] Where the co-accused facilitated the main accused in committing rape on the prosecutrix, his conviction under s 376 / 114, IPC and of main accused under s 376, IPC was found proper.[86] This section applies to a case where a person abets the commission of an offence sometime before it takes place and happens to be present at the time when the offence is committed, and is not applicable to a case where the abetment is at the time when the offence takes place and the abettor helps in the commission.[87] In order to bring a case within s 114, the abetment must be complete, apart from the presence of the abettor.[88]

The incident had not occurred all of a sudden. There was no evidence to show that accused no. 2, 3 or 4 aided accused No. 1 in assaulting the deceased. Held, the accused No. 2 could not be held guilty for causing the death of the deceased by employing s 114 for aiding or abetting accused No. 1.[89]

6. 'Is Present when the Act or Offence is Committed'

For the application of this section, there must be not only prior abetment, but also the presence of the abettor when the act or offence is committed.[90] For abetment under s 107, presence of the abettor at the time of the commission of the act abetted is not necessary. Explanation 2 to that section shows that abetment by aiding may be by776 doing something to facilitate the commission of the act abetted prior to the commission of that act. To constitute the offence of abetment it is not even necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.[91]There can, therefore, be no question of the presence of the abettor when the act or offence is committed. But for an abettor to be liable under this section, he must be present when the act or offence abetted is committed. The ground of liability is participation in the crime, and that is established by the presumption *juris et de jure* that actual presence plus prior abetment can mean nothing but participation.[92]

In a case of cheating, a person is guilty of abetment under ss 109 and 114 of the IPC, who introduces the complainant to the cheater, knowing full well that the offence is going to be committed, is present at the time when the agreement and the payment are made but remains silent and, while taking no share of the money takes no steps to inform the complainant of what is going to happen with him.[93]

Where four persons tacitly agree to beat their common enemy with *lathi*s, each is abetting the conduct of the other within the meaning of s 107 . If they actually beat their enemy and cause grievous hurt to him, each one of them can be convicted under s 325, IPC ; even if it cannot be ascertained which one of them caused the grievous hurt. As the agreement to beat constituted abetment and as each one of them is present at the beating this section fully applies.[94]

Where the accused persons were convicted for abetting rape committed on the prosecutrix. The evidence did not show that the accused persons had any conspiracy or desire to abet commission of rape on the prosecutrix, and even evidence in regard to their presence at the time of commission of rape was not very clear and the prosecutrix was not examined in this regard, conviction of the accused persons for abetting commission of rape was held not proper.[95]

Entrustment to the accused is a necessary element of the offence of criminal breach of trust under s 406 of the IPC . A jewel was entrusted to *A* who gave it to *B*, for being pledged to some person. *C*, who was aware that the jewel did not belong to *B*, took *B* to a money-lender and induced him to give a loan to *B*, on the pledge of the jewel. Both *B* and *C* acted at the instance of *A*. Here *C* was no doubt present at the pledging but pledging by itself would not constitute the offence under s 406 . *C* was not present at the time of the entrustment, the other element necessary to constitute the offence. So *C* cannot be convicted under s 406 read with this section.[96]

A mere direction from one person to another and the carrying out of that direction by the other may be only instigation of the latter's act and may not be a case of a joint act falling under s 34 . But where two persons with their followers, all of them armed, move about together for a set purpose and one gives instructions to the other and keeps himself on the spot in readiness to see it carried out and the other carries it out, it is hardly possible to say that the act is not one which was done in the777 furtherance of the common intention of both. The accused's saying 'people are collecting, let us fire' brings out the common intention clearly. But if the evidence makes out no more than mere instigation, it is even so, instigation by a person who is present at the scene of offence when the act is committed. In such a case the instigator is deemed to commit the murder by virtue of this section. Actual presence plus prior abetment can mean nothing else but participation. That is the irrebuttable presumption raised by this section and brings the case under s 34 .[1]

The appellant *R* was present when appellant *K* inflicted the fatal *lathi* blow. It was he who had abetted and at his command *K* had acted. It was held that he cannot escape from offence of murder under s 302, IPC, on account of act of '*K*' in terms of s 114, IPC .[2]

There was evidence that the appellant accused S actually participated in the conspiracy. There was also an independent evidence to prove that he made all the arrangements pursuant to the criminal conspiracy and induced appellant to commit the murder of the deceased. S was present at the scene of the occurrence and that fact was proved by the evidence of PWS. It was proved that S abetted the commission of the murder and as he was present at the scene of occurrence at the time of commission of the crime, s 114 IPC also would apply. Appellant S was convicted under s 302 read with ss 120B and 34, IPC .[3]

7. 'He shall be deemed to have Committed such Act or Offence'

This is a statutory fiction whereby an abettor, who is present at the commission of the offence abetted, is treated as if he had actually committed the offence himself.[4] In a case reported[5] in the Madras High Court Reports the said court stated that the section simply provides for the punishment of what the English law calls principals in the second degree, that is, persons who abet a crime and countenance it by their presence at it, but who do not actually engage in it. In *Emperor v Atmaram Govind* ,[6] Chandavarkar J, observed:

> When one thing is not the same as another thing, but the Legislature says that it 'shall be deemed to be' the same thing, it creates a legal fiction, and in that case 'the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to'.[7] And fictions created by law shall never be contradicted so as to defeat the ends for which they are invented, though for every other purpose they may be contradicted.[8]

In the case of *Emperor v Kashia Antoo* ,[9] which was decided by a single judge of the High Court of Bombay, an offender was convicted of theft under s 379 read with this section, and the question raised was whether or not the provisions of s 75 of the IPC could be applied to the case, that is to say, whether or not he was guilty of the offence of theft. Relying on the above observations of Chandravarkar J, it was held778 that the effect of s 114, therefore, is that if a man is present at the commission of an offence he is to be deemed to have committed it, not that he has committed it, and that a previous conviction of an accused for an offence, cannot be taken into consideration at a subsequent conviction for abetment, for the purpose of enhancing punishment under s 75 of the IPC . But this has been dissented from by a Full Bench of the Rangoon High Court in *Emperor v Maung Pu Kai* ,[10] in which Heald J, (with whom Maung Ba J, and Ratledge J concurred) observed:

> With all respect for the opinion of the learned Judge, I suggest that the legal fiction in this case was created by the Legislature between the Court and the offender for the purpose of enabling the court to punish the offender for the substantive offence, and that as the learned Judge says 'for that purpose he is to be treated in the same way as if he had committed the offence, that is to say, he must be regarded by the Court as having committed the offence'. In my opinion a person who is convicted of an offence under a particular section of the Indian Penal Code read with s 114 of that Code is not convicted of abetment but is convicted of the substantive offence. Section 114 deals expressly with a person who if absent would be liable to punishment as an 'abettor', and provides that such person if present when the offence for which he would be punishable 'in consequence of the abetment' is committed, he shall be deemed to have committed the offence. I cannot read that section otherwise than as meaning that such a person is more than an abettor, and that he is in fact what is called in English law a principal in the second degree.

The presumption, raised by the section, brings the case within the ambit of s 34 and is an irrebuttable presumption.[11]

Where a person, inciting others to commit an offence under s 447, is himself present when the offence is committed, he is guilty under s 447 .[12]

Illustrative Cases

Where one of the accused standing with an open knife while the offence of rape was being committed by the other accused, the former was held guilty under ss 376 / 114 .[13]

If the dispute in question is nothing but a dispute regarding non-payment of dues of the complainant, which can be said to be the dues of an unpaid seller, the complainant, therefore, after affixing appropriate court fee stamp, as required by law, should have filed money suit for obtaining money decree instead of that the complainant has rushed to the criminal court. In a given case, both civil and criminal proceedings may arise from a particular transaction but in the instant case, there is no scope for both the proceedings. This is not a case where any post-dated cheques are given by the accused which have bounced back nor any security is given by the accused. It is purely a simple money transaction between a seller and purchaser and no provision of IPC can be said to have been attracted in the present case. The complaints were quashed by High Court.[14] The accused was alleged to have fired a shot at the deceased from close range; the co-accused was proved to have actually779 participated in the conspiracy. Independent evidence was produced by the prosecution to prove that the co-accused made all arrangements pursuant to criminal conspiracy and induced the main accused to commit murder of the deceased. The co-accused was present at the scene of occurrence at the time of commission of crime, and s 114 of IPC would be attracted, further independent evidence adduced against the co-accused was corroborated by confession made by the main accused, the conviction of the co-accused under s 302 read with ss 120-B and 34, IPC was found proper.[15]

Where a court finds that parties came with a number of armed men and carried off a crop, the finding amounts to that of a forcible carrying off without the consent of the owner. Even if they took no part in the actual taking, they must, with reference to s 114 of the IPC, be considered guilty of the substantive offence under s 378 .[16]

R, who was the proper driver and in control of a lorry carrying passengers allowed *H*, a minor, with full knowledge that *H* did not know driving well, to drive the lorry so rashly and negligently as to endanger the lives and personal safety of the passengers in spite of the protests of the passengers. *R* was sitting by the side of *H* when an accident took place. The accident resulted in causing grievous hurt to some passengers. It was held that *R* was liable as a principal offender under the provisions of this section. In fact he was the person driving, through the hand and instrumentality of the boy *H*, to whom he had consciously and knowingly given the steering wheel. Therefore, *R* was himself liable to be punished for offences under ss 338 and 279 .[17]

The appellant *K* had been convicted under s 302, IPC, along with other appellants, namely *R*, *Kr*, *D* and *C* the latter under ss 302 / 149 . Appellants *Kr, D* and *C* were further convicted s 201, IPC . It was alleged that the deceased had protested against the grazing in the field by the buffalos of the appellants, which led to an exchange of hot words. Appellant *R* then ordered to kill the deceased and throw him in the water. Following his command, appellant *K* gave a fatal blow on head of the deceased with a *lathi* and appellants *Kr*, *D* and *C* lifted the deceased bodily and threw him in the river and pressed his body under the water and then pushed it into the deep running water. In an appeal before the Patna High Court, the question arising in appeal was whether appellant *K* alone was responsible for murder and other appellants *R, Kr, D* and *C* did not share in the common object and/or common intention to kill or not.

Except the evidence that appellants *Kr*, *D* and *C* who were members of the assembly also responded to the command of appellant *R*, one of members of assembly, there was nothing done by them prior to appellant *K* one of members of assembly inflicting *lathi* injury on the head of the deceased. Their participation in the occurrence, therefore, came at a point when the fatal blow had already been inflicted to the head of the deceased. Although very narrowly, yet appellants *Kr*, *D* and *C*, for their role

in the occurrence, escape liability under ss 34 and 149, IPC . The case of appellant *K* satisfied all tests of culpable homicide committed with the intention of causing bodily injury with the knowledge that the same would cause the victim's death. His act is one punishable under s 302, IPC . Appellant *R* was present when appellant K inflicted the *lathi* blow. It was he who had abetted and at his command *K* had acted. He cannot escape from offence of murder under s 302, IPC on account of780 act of *K* in terms of s 114, IPC . Others pushed the deceased's body in the river with the intention of causing the evidence of the commission of the offence to disappear, and thus they participated in the occurrence at that stage and by their act, an offence punishable under s 201, IPC instead of s 302, IPC was made out.[18]

Where the accused armed with lathis trespassed into the house of the deceased and voluntarily caused hurt to the victims, and the witnesses gave evidence that the accused instigated others to beat up the victims who received lathi injuries, the accused were found liable to be convicted under s 324 read with s 114 .[19]

Accused abettor snatched spade, did not cause any injury to the deceased nor passed on the spade to the accused for causing injuries to the deceased. The accused was not held abettor, his conviction under s 114, IPC was not sustained.[20]

In one case the father exhorted his sons to beat the deceased on latter's asking them why he indulged in abusing his children, whereupon one son *T,* inflicted a *lathi* injury on his head and exhorted his brother *G* to fire. The deceased sustained head injury and firearm injuries in his stomach and died. According to the medical evidence the cause of death was fire arm injuries. The Allahabad High Court found the father guilty of an offence under s 323 read with s 114, IPC, and not of an offence under s 302 read with s 114, IPC .[21]

8. Procedure

Same as that for the offence abetted. For arrest, warrant or summons, bail, compounding and court, see commentary under s 109 .

9. Conditions Requisite for Initiation of Proceedings

Though there is no express provision in the IPC for the punishment of abetment of an offence punishable under s 494, IPC, such abetment is punishable with the punishment provided for the offence falling under s 494, IPC by reason of ss 109 and 114, IPC . Abetment of an offence punishable under s 494 is thus also an offence which falls under s 494, within the meaning of s 198, CrPC . The fact, that there is no specific provision like s 195(1), CrPC in s 198 of that Code, does not make that section (*i.e.* s 198, CrPC) any less applicable where the charge is abetment of an offence punishable under s 494, IPC . The intention of the legislature plainly is that in the case of bigamy, the aggrieved person must take the initial steps by means of a complaint made to a magistrate before the latter can take cognizance of the offence.[22]

The contrary opinion expressed in *Bhawani Dutt v Emperor* ,[23] and *Jatra Shekh v Reazat Shekh* ,[24] is no longer good law.781

10. Charge

Sections 34, 114 and 149 of the IPC provide for criminal liability viewed from different angles as regards actual participants, accessories and men, actuated by a common object or a common intention; and the charge is a rolled up one involving the direct liability and the constructive liability, without specifying who are directly liable and who are sought to be made constructively liable. In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind,

evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is, of course, relevant.[25]

11. This Section and Section 138 of Negotiable Instrument Act

As the ingredients of the offence under s 138 of Negotiable Instrument Act, and of offences under ss 114, 407 and 420, IPC are distinct, a person once tried for dishonour of cheque under s 138, NI Act, can be tried again for offence of criminal breach of trust, cheating and abatement, the bar contained in the doctrine of double jeopardy would not operate.[26]

65 1 Weir 49, 4 Mad HCR App 37.

66 *Abhi Misser v Lachmi Narain* 27 ILR Cal 566 .

67 *Barendra Kumar Ghose v Emperor* AIR 1925 PC 1, p 7, 26 Cr LJ 431, 52 ILR Cal 197 .

68 *Mathurala Adi Reddy v State of Hyderabad* AIR 1956 SC 177, p 180, (1956) Cr LJ 341 .

69 *Md Muklesur Rahaman v State* 2010 Cr LJ 4488, p 4495 (Cal) (DB) .

70 *Jaimangal v Emperor* AIR 1936 All 437, p 439, 37 Cr LJ 864 .

71 *SP Ghose v Emperor* AIR 1915 LB 39, p 43, 16 Cr LJ 676 .

72 *Jadunath Das v State of Orissa* (1979) 47 Cut LT 349, p 353 ; *Vijayaranga Naidu v King-Emperor* AIR 1927 Mad 115, 29 Cr LJ 72 ; *Ram Ranjan Roy v Emperor* 42 ILR Cal 422, p 426 ; *Aanavi v Emperor* AIR 1925 Mad 364 ; *Mia Gul v Emperor* AIR 1932 Lah 483, 33 Cr LJ 564 ; *Basharat v Emperor* AIR 1932 Lah 813 ; *Nga Po Kyone v Emperor* AIR 1935 Rang 236, 35 Cr LJ 41 ; *Re Jogali Bhaigo Naiks*AIR 1927 Mad 97, 27 Cr LJ 1198 .

73 *Queen v Mussamat Niruni* 7 WR 49, p 50 ; *R v Chatradhari Goala* 2 CWN 49, as explained in *Abhi Misser v Lachmi Narain* 27 ILR Cal 566, p 569, 570 ; *Yeditha Subbaya v R* 13 Cr LJ 453 ; *Abhi Misser v Lachmi Narain* 27 ILR Cal 566 ; *Hansa v Bansi* 1 Cr LJ 449, 8 CWN 519 ; *R v Phalaung* 5 Cr LJ 414, 3 LBR 264 ; *Tha Mya v R* 8 Cr LJ 472, 4 LBR 271 ; *Chandra Bhusan v R* 7 Cr LJ 200, 7 CLJ 172; *Chotey v Emperor* AIR 1948 All 168, 49 Cr LJ 168 ; *Ahmed Hasham v Emperor* AIR 1933 Bom 162, 34 Cr LJ 559 ; *Aiyappan Kuttan v State* AIR 1955 Tr & Coch 266, (1955) 56 Cr LJ 1535.

74 *Aiyappan Kuttan v State* AIR 1955 Tr & Coch 266, p 267, (1955) 56 Cr LJ 1535; *Nanboo Kedar v State* (1962) 1 Cr LJ 465, AIR 1962 MP 91 ; *Poran v State of Kerala* (1964) 1 Cr LJ 375, (1963) Mad LJ (Cr) 491 ; *Sital v Emperor* AIR 1935 Oudh 468, p 470, 36 Cr LJ 1151 ; *Chotey v Emperor* AIR 1948 All 168, 49 Cr LJ 168 ; *Jadunandan Jha v Emperor* AIR 1937 Pat 317, 38 Cr LJ 790 .

75 *Raman v State of Kerala* (1964) 1 Cr LJ 375, (1963) Mad LJ (Cr) 491 ; *Mataro v Emperor* AIR 1929 Sind 9, 9 Cr LJ 924 ; *Harji v State of Rajasthan* (1978) Raj LW 1, 6 ; *Vimireddy Stayanarayan Reddy v State of Hyderabad* AIR 1956 SC 379, p 381, (1956) Cr LJ 777 ; *Trilochan Singh v Karnail Singh* AIR 1968 Punj 416, (1968) Cr LJ 1199 ; *Malan v State of Bombay* AIR 1960 Bom 393, p 394, (1969) Cr LJ 1189 ; *Queen-Empress v Doedhar Singh* 27 ILR Cal 144, p 155 .

76 *Nanboo Kedar v State* (1962) 1 Cr LJ 435, p 436, AIR 1962 MP 91, (1961) MPLJ (Notes) 205, (1962) Jab LJ 42 .

77 *Yeditha Subbaya v Emperor* 13 Cr LJ 453, p 454 .

78 *Ramyadav v State of Bihar* (1988) 15 Rep (Pat) 319, (1988) PLJR 129 .

79 *Sital v Emperor* AIR 1935 Oudh 468, p 470, 36 Cr LJ 1151 ; *Mangta v Emperor* 38 Cr LJ 628 ; *Ahmed Hasham v Emperor* AIR 1933 Bom 162, 34 Cr LJ 559 ; *Jadunandan Jha v Emperor* AIR 1937 Pat 317, 38 Cr LJ 790 .

80 *Mangta v Emperor* 38 Cr LJ 628, p 630 (Nag) .

81 *Queen v Peer Mahomed* 17 WR (Cr) 52 .

82 *Queen v Mst Niruni* 7 WR 40, p 50 ; *Abhi Misser v Lachmi Narain* 27 ILR Cal 566 ; *Hansa Pathak v Bansi Lal Dass* 1 Cr LJ 449 ; *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1, 26 Cr LJ 431 ;*Chotey v Emperor* AIR 1948 All 168, 49 Cr LJ 168 ; *Jadunandan Jha v Emperor* AIR 1937 Pat 317, 38 Cr LJ 790 ; *Ahmed Hasham v Emperor* AIR 1933 Bom 162, 34 Cr LJ 559 ; *Sital v Emperor* AIR 1935 Oudh 468, 36 Cr LJ 1151 ; *Nga Po Kyone v Emperor* AIR 1933 Rang 236, 35 Cr LJ 41 ; *Ram Ranjan Roy v Emperor* AIR 1915 Cal 545, 16 Cr LJ 170 ; *Ram v Crown* AIR 1951 Punj 418, 52 Cr LJ 930 ; *Jadunath Das v State of Orissa* (1979) 47 Cut LT 349, (1979) Cut LR 106 .

83 *Sital v Emperor* AIR 1935 Oudh 468, p 470, 36 Cr LJ 1151 ; *Nanboo Kedar v State* (1962) 1 Cr LJ 435, AIR 1962 MP 91 ;

Calcutta Singh v State (1977) Punj LR 592, (1977) Crlt 310 .

84 *R v Mahommad Kazim* 4 Wym (Cr) 29, if they had aided therein, they would be guilty of the offence under s 4 ; *Mya v Emperor* 8 Cr LJ 672 ; *R v Shib Chunder Mundle* 8 WR (Cr) 59 .

85 *Lalu Kamumal v State* AIR 1953 Ajmer 12, 54 Cr LJ 1196 ; *Nga Shwe Din v Emperor* AIR 1934 Rang 98, 35 Cr LJ 905 ; *Mumtaz Ali v Emperor* AIR 1935 Oudh 473, 36 Cr LJ 1201 ; *Meghraj Singh v State of Rajasthan* 2010 Cr LJ (NOC) 62 (Raj) .

86 *Meghraj Singh v State of Rajasthan* 2010 Cr LJ (NOC) 62 (Raj) .

87 Re *Jogali Bhaigo Naiks*AIR 1927 Mad 97, p 98, 27 Cr LJ 1198 ; *Jadunandan Jha v Emperor* AIR 1937 Pat 17, 38 Cr LJ 790 ; *SP Ghosh v Emperor* AIR 1915 LB 39, p 43, 16 Cr LJ 676 ; *Chotey v Emperor* AIR 1948 All 168, 49 Cr LJ 168 ; *Aiyappankuttan v State* AIR 1955 Tr & Coch 266, (1955) 56 Cr LJ 1535.

88 *Ram Ranjan Roy v Emperor* AIR 1915 Cal 545, 16 Cr LJ 170, 42 ILR Cal 422 ; *Vijayaranga Naidu v King-Emperor* AIR 1927 Mad 1115, 29 Cr LJ 72 ; *Mian Gul v Emperor* AIR 1932 Lah 483, 33 Cr LJ 564 ; *Basharat v Emperor* AIR 1934 Lah 813 ; *Nga Po Kyone v Emperor* AIR 1933 Rang 236, 35 Cr LJ 41 .

89 *Kalubhai Maganbhai Vaghela v State of Gujarat* 2009 Cr LJ 2317, p 2320 (Guj) (DB) .

90 *Emperor v Ganesh Damodar Savarkar* 34 ILR Bom 394, p 404, 11 Cr LJ 264 .

91 *Emperor v Ganesh Damodar Savarkar* 34 ILR Bom 394, p 404, 11 Cr LJ 264 .

92 *Barendra Kumar Ghosh v King-Emperor* AIR 1925 PC 1, p 7, 26 Cr LJ 431 ; *Mathurala Adi Reddy v Emperor* AIR 1956 SC 177, (1956) Cr LJ 341 .

93 *Muradi v Emperor* AIR 1917 Lah 291, 18 Cr LJ 827 .

94 *Jaimangal v Emperor* AIR 1936 All 437, p 439, 39 Cr LJ 864 ; *Janual Haque v State of Bihar* AIR 1974 SC 45, 1974 Cr LJ 143 .

95 *Mangia & Ors v State of Rajasthan* (2000) Cr LJ 4814 (Raj) .

96 *Yeditha Subbaya v Emperor* 13 Cr LJ 453, p 454 .

1 *Mathurala Adi Reddy v State of Hyderabad* AIR 1956 SC 177, (1956) Cr LJ 341 .

2 *Ramyadav v State of Bihar* (1988) 15 Rep (Pat) 319, (1988) PLJR 129 .

3 *Sidharth v State of Bihar* 2005 Cr LJ 4499, p 4508, AIR 2005 SC 4352, 2006 SCC (Cr) 175 .

4 *R v Atmaram* 31 ILR Bom 480, p 490 ; *R v Kashia Antoo* 7 Cr LJ 32, p 34, 10 Bom LR 26 ; *Chidambaram Pillai v R* 32 ILR Mad 3 ; *SP Ghosh v Emperor* AIR 1915 LB 39, p 43, 16 Cr LJ 676 .

5 **See** appendix to vol 4.

6 *Emperor v Atmaram Govind* 31 ILR Bom 480, p 490, 6 Cr LJ 47, 9 Bom LR 681 .

7 *Ex parte Waltan*[1881] 17 Ch D 746, p 756, per James LJ.

8 *Mostyn v Fabrigas* (1774) Crown 177 .

9 *Emperor v Kashia Antoo* (1908) 10 Bom LR 26, 7 Cr LJ 32 .

10 *Emperor v Maung Pu Kai* AIR 1929 Rang 203, 30 Cr LJ 961 .

11 *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1, p 7, 26 Cr LJ 431 ; *Mathurala Adi Reddy v State of Hyderabad* (1956) Cr LJ 341, AIR 1956 SC 177, p 180 .

12 *Patilbuva Raojibala Gavli v Emperor* AIR 1926 Bom 512, 27 Cr LJ 1153 ; *Emperor v Ranchhod Sursang* AIR 1924 Bom 502, 26 Cr LJ 1000 ; *Queen v Mahommad Asgar* 23 WR 11 ; *Emperor v Maung Pu Kai* AIR 1929 Rang 203, 30 Cr LJ 961 .

13 *Lalu Kamumal v State* AIR 1953 Ajmer 12, 54 Cr LJ 1196 .

14 *Kuber Rolling Mill Private Limited, M/s v State of Gujarat* (2006) Cr LJ 2350 (Guj) .

15 *Sidharth v State of Bihar* (2005) Cr LJ 4499 (SC) .

16 *Queen v Shib Chunder Mundle* 8 WR 59 .

17 *Ram Rup v Crown* AIR 1951 Punj 418, 52 Cr LJ 930 .

18 *Ramyadav v State of Bihar* (1988) 15 Rep 319 (Pat), (1988) PLJR 129 .

19 *Mukati Prasad Rai v State of Bihar* (2005) Cr LJ 681 (SC) .

20 *Manoj Kumar alias Mehar v State of Chhattisgarh* 2014 Cr LJ (NOC) 5 (Chh) (DB).

21 *Khem Karan v State of Uttar Pradesh* (1991) Cr LJ 2138 (All) .

22 *Srinivasa Aiyar v Saraswathi Ammal* AIR 1952 Mad 193, 53 Cr LJ 434 ; *Shivnarain v State* AIR 1955 MB 176, 56 Cr LJ 1359 ; *Empress of India v Kallu* 5 ILR All 233 ; *Emperor v Imankhan Rasukhan* 14 IC 671 (Bom) ; Re *Kishen Das Hirachand* 18 IC 145(Bom); *Jagdamba Prasad v Emperor* AIR 1933 All 626, 34 Cr LJ 1227 ; *Chemon Garo v Emperor* 29 ILR Cal 415 ; *Bangaru v Emperor* 27 Mad 61 .

23 *Bhawani Dutt v Emperor* AIR 1916 All 307 .

24 *Jatra Shekh v Reazat Shekh* 20 ILR Cal 483 .

25 *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116, p 117, (1956) Cr LJ 291 .

26 *Sangeetaben Mahendrsabhai Patel v State of Gujarat* 2012 Cr LJ 2432, p 2440 (SC), AIR 2012 SC 2844, 2012 (4) Scale 549, (2012) 7 SCC 621 .

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 115.

Abetment of offence punishable with death or imprisonment for life--If offence not committed.--

Whoever abets the commission of an offence punishable with death or [27][imprisonment for life] shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

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

Illustration

A instigates *B* to murder *Z*. The offence is not committed. If *B* had murdered *Z*, he would have been subject to the punishment of death or [28][imprisonment for life]. Therefore *A* is liable to imprisonment for a term which may extend to seven years and also to a fine; and if any hurt be done to *Z* in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.782

Comments

1. Scope and Applicability

Section 109 of the IPC provides for punishment of abetment of an offence if the act abetted is committed in consequence of the abetment. Sections 115 - 16 provide for punishment of abetment pure and simple, *i.e.*, abetment of an offence, when the offence is not committed in consequence of the abetment.

Where an act is abetted and it is not committed but a different act is committed in consequence of the abetment s 111 applies. But if the commission of the different acts is not in consequence of the abetment, s 115 or 116, as the case may be, may be applicable.[29]

This section deals with the abetment of an offence punishable with death or imprisonment for life, whereas s 116 deals with the abetment of an offence punishable only with imprisonment.

Under s 115, abetment of an offence punishable with death or imprisonment for life is punishable with imprisonment up to seven years and fine. If any act is done in consequence of such abetment, the term of imprisonment may be extended to 14 years.

Offences, punishable with death or imprisonment for life, are those under ss 121, 132, 194, 302, 305, 307 (second para), and 396; with death only, s 303 ; with imprisonment for life, ss 121A, 122, 124A, 125, 128, 130, 131, 194, 222, 225, 232, 238, 255, 226, 304, 304B, 307, 311, 313, 314, 326, 329, 364, 371, 376, 377, 388, 389, 394, 395, 400, 409, 412, 413, 436, 438, 449, 459, 460, 467, 472, 474, 475, 477, 489A, 489B and 489D of the IPC .

This section would apply if there is no express provision made by this Code for the punishment of 'such abetment', *i.e.*, abetment of the offences specified in this section. If s 117, IPC applies, the offence would not fall under this section.

Where a person instigated another to commit an offence under s 436, IPC, and the offence committed was not by the person instigated but by someone else, it was held that the person instigating was guilty of the offence of abetment not under s 436 read with s 109 but under s 436 read with s 115 since commission of offence was not in consequence of his abetment.[30]

Where a person was charged with the offence of abetment of conspiracy for commission of an offence of theft, by his officer, a substantive offence against the principal offender was not established and the principal offender was acquitted, the alleged abettor could not be convicted and he had also to be acquitted.[31]

2. 'Whoever Abets the Commission of an Offence'

'Offence', in this section means a thing punishable under any special or local law (see s 40 of IPC). Abetment under this section need not be abetment of the commission of an offence by any particular person against any particular persons. It may include abetment of the commission of an offence by unspecified persons against a class or number of other persons described generally and not particularly783 specified.[32] Abetment has a reference both to the person or persons abetted, and to the offence or offences the commission of which is abetted. Section 117 , IPC deals with the former whatever be the nature of the offence abetted, while s 115, IPC deals with the latter, without having regard to the person or persons abetted. Section 115 is not confined to the abetment of a single person or specified individual or individuals, and covers the case of the abetment of a class of persons also. It does not apply only if an express provision is made by the IPC for the punishment of such abetment. The words 'such abetment' evidently refers to the abetment of the offence specified in the section itself, an offence punishable with death or transportation for life.

3. 'Express Provision' for Punishment of such Abetment

This section applies only if there is no express provision, made by this IPC, for the punishment of 'such' abetment, *i.e.*, abetment of the offence, specified in this section, namely, an offence punishable

with death or imprisonment for life. Sections 121 and 131, IPC provide for the punishment of the abetment of some such offences. Therefore, the words 'no express provision is made by this Code for the punishment of such abetment', in this section, refer to ss 121 and 131, whereunder punishment is provided for the specific cases of abetment and not to section like s 117, which provides for punishment for a mere abetment.

4. Distinguishing Features of Sections 115 And 117

In a Lahore case it was held that s 115 applies only when the abetment is not punishable under another provision of the IPC . So if s 117 applies the offence would not fall under s 115, IPC . Where in a speech addressed to a number of persons exceeding ten the speaker incited the audience to commit an offence, s 117 was the more appropriate section to apply. But as has been pointed out by Lokur J, in *Emperor v Lavji Mandan* ,[33] abetment has a reference both to the person or persons abetted, and to the offence or offences the commission of which is abetted. Section 117 deals with the former whatever be the nature of the offence abetted, while s 115 deals with the latter, without having regard to the person or persons abetted. It is not disputed that s 115 is not confined to the abetment of a single person or a special individual or individuals, and covers the case of the abetment of a class of persons also. It does not apply only where 'an express provision is made by this Code for the punishment of such abetment'. The words 'such abetment' evidently refer to the abetment of the offence specified in the section itself, namely, an offence punishable with death or imprisonment for life, and only ss 121 and 131, IPC, provide for the punishment of the abetment of such offences. There is no express provision in the Code for the punishment of the abetment of murder. Hence, the abetment of the commission of murder, whether by a single individual or by a class of persons exceeding ten, falls under s 115 . In the latter case, it may fall under s 117 also, but as s 117 prescribes a lesser punishment, s 115 is the more appropriate provision for such an offence. Although both the sections may apply, there cannot be separate sentences under the two sections for the same criminal act, and the conviction should properly be under that section which inflicts the higher punishment.784

5. Procedure

For arrest, warrant or summons, compounding and court, see commentary under s 109 . The offence is not bailable. The accused is not entitled to bail as of right.[34]

6. Charge

An offence under this section may be charged thus:

> 'I (*name and office of Magistrate or Judge*) hereby charge you (*name of accused*), as follows:
>
> That you, on or about the.....day of..... at ..... abetted the commission by one A B, of an offence of.....punishable with death (*or imprisonment for life*) which said offence was not committed in consequence of the abetment, (*or and in consequence of the said abetment hurt was caused to....*) and thereby committed an offence punishable under s 115 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of....)* by this Court (*or by the said Court*).
>
> And I hereby direct that you be tried on the said charge.'

7. Punishment

For a case, falling under the first paragraph of this section, imprisonment upto seven years can be awarded. Infliction of 10 years sentence in such a case is illegal.[35] In case hurt is caused to any person in consequence of the abetment, imprisonment upto 14 years can be awarded under the second paragraph.

27 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation for life' (wef 1-1-1956).

28 Substituted by Act 26 of 1955, s 177 and Sch, for 'transportation for life' (wef 1-1-1956).

29 *Amode Ali Sikdar v Emperor* AIR 1931 Cal 757 (SB), 33 Cr LJ 79.

30 *Jamuna Singh v State of Bihar* AIR 1967 SC 553, (1967) Cr LJ 54 (SC) .

31 *Ex Sepoy Haradhan Chakraborty v Union of India & Ors* AIR 1990 SC 1210 .

32 *Emperor v Dwarika Nath Goswami* AIR 1933 Cal 47, p 48, 38 Cr LJ 164 .

33 *Emperor v Lavji Mandan* AIR 1939 Bom 452, p 453, 41 Bom LR 980, 185 IC 413(2), 41 Cr LJ 183; *Emperor v Dwarika Nath Goswami* AIR 1933 Cal 47, 34 Cr LJ 164 .

34 *King-Emperor v Abhiraj Kumar* 40 Cr LJ 481, p 482, AIR 1940 Oudh 8 .

35 *Alijan Bibi v Emperor* AIR 1937 Cal 578, 39 Cr LJ 31, p 32 .

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 116.

Abetment of offence punishable with imprisonment--if offence be not committed.--

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

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

Illustrations

(a) *A* offers a bribe to *B*, a public servant, as a reward for showing *A* some favour in the exercise of *B's* official functions. *B* refuses to accept the bribe. *A* is punishable under this section.
(b) *A* instigates *B* to give false evidence. Here, if *B* does not give false evidence, *A* has nevertheless committed the offence defined in this section, and is punishable accordingly.785
(c) *A*, a police-officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, *A* is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.
(d) *B* abets the commission of a robbery by *A*, a police-officer, whose duty it is to prevent that offence. Here, though the robbery be not committed, *B* is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

Comments

1. Scope

This section supplements s 115, IPC which is similarly worded and deals with the abetment of an offence punishable with death or imprisonment for life in like circumstances. This section deals with the abetment of an offence punishable with imprisonment if the offence be not committed in consequence of the abetment. Like s 115, this section applies only if the offence abetted is not committed and no express provision is made by this Code for the punishment of such offence.[36]

This section discriminates between public servant, whose duty it is to prevent the commission of the offence abetted, and the public by prescribing an enhanced penalty on the former. The section is in two parts; under the first part, which deals with the public in general, abetment of an offence punishable with imprisonment may be punished by the infliction of one-fourth of the longest term of imprisonment provided for that offence. Under the second part, if the abettor or the person abetted is a public servant whose duty it is to prevent the commission of such offence, the term of imprisonment may be double.[37]

It will be observed that no punishment under this section is provided for the abetment of offences which are punishable with fine only, and which are not committed in consequence of such abetment. Offences under the following sections are punishable with fine only. Sections 137, 154 - 56, 278, 283, 290 and 294A (second para) of the IPC .

For the definition of public servant, see s 21 and the commentary thereunder.

2. Relative Scope of Sections 116 and 117 of the Indian Penal Code 1860

This section applies where the offence abetted is punishable with imprisonment. If a class of persons, exceeding ten, be abetted to commit such an offence, s 117 also would be applicable. If the offence abetted is theft, and the offence is not committed in consequence of the abetment, the punishment under s 116 would be only a quarter of three years, that is to say, nine months, but under s 117, it would be three years. Hence one, who abets the public or a class of persons exceeding ten to commit theft,786 should be charged under s 117 rather than this section. In other words, where a person is found guilty of a criminal act which is punishable under two different sections of the IPC, he may be convicted under both the sections, but should be punished only under that section which imposes the higher penalty.[38]

3. Offence

'Offence', in this section, means a thing punishable under this Code or under any special or local law (see s 40). Thus, where *A*, a *vakil* of a High Court, offered to give *B*, a *vakil* practising in a court subordinate thereto, a gratification contrary to s 36 of the Act, 18 of 1879, it was held that he was guilty of abetment of an offence by way of incitement under this section.[39]

Where the accused were charged with abetting a bigamous marriage, it was held that if the second celebration would have resulted in a valid marriage, then the offence of bigamy which they were charged with having abetted, would have been fully committed; but if the celebration of the second marriage would not have resulted in a valid marriage, the offence of bigamy, which they were charged with having abetted, would not have been fully committed. In the former case, they would be liable to the punishment prescribed by s 114 and in the latter only to the punishment prescribed by this section.[40]

It is possible to abet commission of suicide but nobody would abet a mere attempt to commit suicide. It is wrong to convict the accused under s 116 linked with s 306, IPC, in case of an attempt to commit suicide. The crux of the offence under s 306, IPC, itself is abetment. In other words, if there is no abetment, there is no question of the offence under s 306, IPC, coming into play. It is inconceivable to have abetment of an abetment. Hence, there cannot be an offence under s 116 read with s 306, IPC, and the conviction of the accused was liable to be altered by substituting s 306 with s 304B, IPC, read with s 116, IPC .[41]

Meaning of Offence Punishable with Imprisonment

The sentence or punishment of imprisonment used in this section neither includes neither imprisonment for life nor imprisonment in default of payment of fine. Imprisonment for life is an offence distinct from imprisonment as is clear from the provisions of s 53 of this IPC . Section 115 deals with the abetment of offences punishable with death or imprisonment for life. The abetment of offences punishable with imprisonment (other than imprisonment for life), which is of two descriptions, namely: (a) rigorous and (b) simple, is governed by the provisions of this section. Imprisonment awarded by a court for an offence punishable with fine only, in default of payment of fine, does not make that offence punishable with imprisonment and is not covered by this section.

'Public Servant whose Duty it is to Prevent the Commission of such Offence'

The enhanced punishment provided in the second clause of this section applies only to the abettors, where the abettor or the person abetted is a public servant whose duty it is to prevent the commission of such offence. The words 'such offence' occurring787 in the second clause of this section are of significance to suggest that abetment of all categories of offences involving public servants are not covered by this clause. But this clause embraces within its ambit only those offences, which are either abetted by or the person abetted are such public servants, who were duty bound to prevent their commission. A railway booking clerk, travelling ticket examiner or any other railway servant, whose duty includes the prevention of sale and use of forged railway tickets if abets the sale or use of such tickets will fall in the category of such public servants. The abettor or the person abetted both need not be public servants.

For the application of the provisions of enhanced punishment contained in cl 2 it is sufficient if one of them only is a public servant. If the person abetted is a public servant, the abettor will be liable to enhanced punishment under this clause, though he is not a public servant. Abettors, not falling in this category, will be dealt with under the first clause.

A civil surgeon is a public servant. His duty as a public servant is to act in the way of his profession, *i.e.*, the profession of a medical man. It is not his duty to prevent the commission of the particular offence of bribing any further than it is the duty of every good citizen to do what he can to keep people about him honest, and to prevent the commission of any offence whatever. Cases might be readily supposed to which this latter half of the section would directly apply; for instance, it is the duty of a

custom-house officer to prevent fraud upon the revenue in the way of smuggling; and, consequently, abetting him in the commission of such a fraud would be abetting the commission of an offence by a public servant whose duty it is to prevent the commission of such offence. It is not, however, the special duty of the civil surgeon as a public servant to prevent the commission of the offence of bribing. Therefore, the latter portion of the section does not apply to him and the punishment which is to be inflicted on him must be measured according to the provisions of the first part.[42]

A head constable of police is a public servant, but it is not his duty to prevent the commission of an offence under s 161 . Where, therefore, a person was accused of abetment of bribing a head constable; it is the first part of this section that applied and not the second.[43]

4. Abortive Attempt to give Bribe

Section 116, IPC makes an abortive attempt at giving a bribe, an offence, from the point of view of the person who offers it.[44] But as already pointed out, this section applies only if no express provision is made by the Code for the punishment of such abetment. Section 165A (since repealed) which was inserted in the Code by s 3 of the Criminal Law Amendment Act 1952 provided for the punishment for abetment of offences under ss 161 and 165 of the Code. So it was s 165A and not this section which applied[45] after the enactment of s 165A . Section 165A is now no more on the statute book and has been replaced by s 12 of the Prevention of Corruption Act 1988.

788Where petitioners entered into a conspiracy with the co-accused and tried to bribe the deputy commissioner for availing of NOC. The deputy commissioner was newly posted and had no reason to falsely implicate them; it was held that abetment for commission of bribery is punishable under s 12 of Prevention of Corruption Act 1988 even if bribery is not completed. So, prima facie case against the petitioner was made out for taking cognizance against the petitioner and proceedings pending before the chief metropolitan magistrate were not quashed and writ petitions were dismissed.[46]

5. Procedure

Same as that for the offence abetted.

6. Charge

The following form may be adopted in framing the charge:

I (*name and office of Magistrate, Session Judge etc,*).....hereby charge you (*name of accused*).....as follows:

That you (*if a public servant*) being a public servant.....whose duty it was to prevent the commission of such offence, on or about the....day of....at.....abetted the commission by one X of an offence of.... Punishable with imprisonment, though the said offence was ultimately not committed in consequence of the abetment, and thereby committing an offence punishable under the second part of s 116 of the Indian Penal Code and within my cognizance (*or the cognizance of the said Court*).

And I hereby direct that you be tried by this Court (*or by the said Court*) on the said charge.

Or

'I (*name and office of Magistrate or Session Judge, etc*).....hereby charge you (*name of accused*)....as follows:

That you on or about the.....day of.....at...abetted the commission by one X (*name the person abetted*), whose duty it was to prevent the commission of such offence, of an offence of....punishable with imprisonment, though the said offence was ultimately not committed as a consequence of the abetment, and thereby committed an offence punishable under the second part of s 116 of the Indian Penal Code and within my cognizance (*or the cognizance of the said Court*).

And I hereby direct that you be tried by this Court (*or by the said Court*) on the said charge.

For offences punishable under the first part of this section a charge may be similarly worded omitting the fact that the abettor or the person abetted is a public servant, whose duty it was to prevent the commission of such offence.

36 *Bhajahari Mondal v State of West Bengal* AIR 1959 SC 8, (1959) Cr LJ 98 ; **reversing**AIR 1956 Cal 385, (1956) Cr LJ 991 .

37 *Puran Singh v Emperor* AIR 1928 Lah 840, p 841, 29 Cr LJ 610 ; *Emperor v Amiruddin Salebhoy Tyabjee* AIR 1923 Bom 44 ((2)), 23 Cr LJ 466 .

38 *Emperor v Lavji Mandan* AIR 1939 Bom 452, p 453, 41 Cr LJ 183 .

39 *Re Parbati Charan Chatterji* 17 ILR All 498.

40 *Ganwan Budho v Emperor* AIR 1917 Sind 14, p 16, 18 Cr LJ 478 .

41 *Sat Vir Singh v State of Punjab* (2001) Cr LJ 4625 (SC) .

42 *Queen v Ramnath Surma Biswas* 21 WR (Cr) 9 .

43 *Puran Singh v Emperor* AIR 1928 Lah 840, Indian Penal Code 1860, s 161 has since been repealed and replaced by s 7 of the Prevention of Corruption Act 1988.

44 *Qazi Rahimullah v Emperor* AIR 1935 Pesh 26, p 27, 36 Cr LJ 626 ; *Emperor v Phul Singh* AIR 1941 Lah 276, 42 Cr LJ 636 .

45 *Bhajahari Mondal v State of West Bengal* AIR 1959 SC 8, (1959) Cr LJ 98 reversing AIR 1956 Cal 385 .

46 *Gopal Krishna Saram v State of Bihar* (2000) Cr LJ 3609 (Pat) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 117.

Abetting commission of offence by the public or by more than ten persons.--

Whoever abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.789

Illustration

A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. *A* has committed the offence defined in this section.

Comments

1. Scope

This section provides punishment for abetment of an offence by the public generally or by any number or class of persons exceeding ten.[47] The offence, under the section, is an aggravated form of abetment,[48] and has reference both to the person or persons abetted, and to the offence or offences the commission of which is abetted. This section deals with the former whatever be the nature of the offence abetted, and s 115 with the latter without having regard to the person or persons abetted.[49] Though this section contemplates the abetments of the commission of an offence by the public generally, or by any number or class of persons exceeding 10, it does not necessarily follow that the offence is to be committed by all the ten or more persons at one and at the same time or that there should be an unlawful assembly. The offence of abetment, under this section does not; therefore necessarily involve an offence under s 143 of this Code.[50]

The first thing to be proved under this section is the abetment of an offence, *i.e.*, a thing punishable by the Code, or under any special or local law (see s 40 of IPC) and secondly, that the intention of the abettor was that the offence should be committed by more than ten persons, or by the public generally.

2. Relative Scope of Sections 115 and 117

Synopsis notes under s 115, may be referred to.

3. Applicability of Section to Offences under the Salt Act

The effect of s 40 of the IPC is that all acts or omissions in contravention of special or local Acts which are punishable under the Acts, fall under the definition of 'offences' in the IPC, and all abetments of offences which are offences under the special or local Acts and are punishable under the said Acts also fall under the definition of 'offences' in the IPC .

Section 40 enlarges the ambit of this section so as to include within its scope the offence under s 9 of the Salt Act. The result is that where an offence under s 9(a) of the Salt Act by the public generally or by a number of persons exceeding790 ten is abetted, it satisfies all the conditions of the offence under s 117 and this section applies.[51]

The offence under this section is not the offence of abetment simply, but abetment by the public generally or by any number or class of persons exceeding ten and the abetment referred to in s 9 of the Salt Act of 1882, is simply abetment within the meaning of the IPC, which may be abetment by a single person. The offence under this section is different from the offence under s 9 of the Salt Act and therefore this section is applicable to an abetment of an offence punishable even under Salt Act provided the abetment is by public generally or by any number or class of persons exceeding ten.[52]

The gravamen of a charge under this section is the abetment itself, *i.e.*, the instigation to general lawlessness, and not the particular offence of which the commission is instigated. Section 74 of the Madras Salt Act 1899 obviously refers to the direct abetment of particular acts and to try to make it embrace the offence under this section is merely a legal quibble. Section 74 of the Madras Salt Act does not supercede the provision of this section.[53]

4. Abetment must be of an Offence

The first thing that has to be proved for the application of this section is the abetment of an offence. A person is said to abet the doing of a thing who intentionally aids it by an act or illegal omission. The omission must be illegal, and before there can be an illegal omission, there must be a duty cast by the law upon the person said to be guilty of the omission to do something or the other.

There is no duty cast on the president of a meeting to interrupt songs or to forbid their continuance. Hence, no illegal omission is committed by the president where such songs are sung in his presence and he has done nothing. Simply doing nothing is not an act unless there is duty to do something, it cannot be said that it is an illegal omission. Where, therefore, in a meeting of more than ten persons some revolutionary songs were sung, the mere fact that the president omitted to interrupt the songs and forbid the singing of them, could not render him liable under this section.[54]

Instigating railway workers to lie on the line in the event of a strike is an offence even though the strike is only a contingent matter. The illustration to this section shows that an instigation to attack a procession which is going to be taken is an offence under the section. It is immaterial, therefore, whether the accused was urging an immediate strike and instigating the workers to lie across the line or was merely instigating their doing so in case of a strike, which he advised if some retrenchment proposals, which were temporarily held up, were carried out.[55]

The abetment must be of an offence. Where an alleged abetment was by way of instigation by means of isolated passages contained in a literary work, published in791 the ordinary way towards the close of serious religious riots, but not distributed among the rioters, and the general spirit of the work was in favour of peace and reconciliation, it was held that it would not be a proper construction of the words, though objectionable in themselves, to allow them to override the whole context of the work.[56]

A person, who instigates the formation of an association, the objects and purpose of which are such as to constitute it an unlawful one, brings himself within the ambit of this section, as any one becoming a member of it, or contributing funds to it, would be guilty of an offence under s 17(1) of the Criminal Amendment Act 14 of 1908.[57]

5. 'By the Public Generally...or Persons Exceeding Ten'

To convict a person under this section, there must be an abetment of the commission of an offence by the public generally or by any number or class of persons exceeding 10. If, however, there is no abetment within the meaning of this section, there is no offence; in other words, if the public have not been instigated or incited, etc., there is no offence. A mere intention or preparation to instigate is neither instigation nor abetment. Where the allegation is that the accused posed seditious leaflets on the gate of a public library, to bring the accused within this section, it must be shown that either the public read the leaflets in question or that the leaflets were exposed to the public gaze. If the leaflets were posted in the dead of night and were removed by the police shortly afterwards, before the public

could either see or read them, the case does not come within the purview of this section. Even if the police constables read the leaflets, they cannot be classed as 'public'.[58]

6. Procedure

The procedure applicable to an offence under this section is the same as in the case of the offence abetted.

7. Charge

The following form may be adopted in framing the charge:

> 'I (*name and office of Magistrate or Sessions Judge etc...*) hereby charge you (*name of the accused*) as follows:
>
> That you, on or about the.....day....at.....abetted the commission of the offence of.....by.....numbering more than ten persons (*or the public generally*) by (*state the act done by accused in instigation*), and thereby committed an offence punishable under s 117 of the Indian Penal Code, and within any cognizance (*or the cognizance of the Court of.....*)
>
> And I hereby direct that you be tried by this court (*or by the said court*) on the said charge.'

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It may, or it may not, be a duplication to have s 117 as well as s 120B, but there can be no objection to charge under both ss 117 and 120B .[59]

47 *Santa Singh Kamal v Emperor* AIR 1933 Lah 660, 34 Cr LJ 1207 .

48 *Agha Nazarali Sultan Muhammed v Emperor* AIR 1941 Sind 186, p 187, 43 Cr LJ 68 .

49 *Emperor v Lavji Mandan* AIR 1939 Bom 452, p 453, 41 Cr LJ 183 .

50 *Agha Nazarali Sultan Muhammed v Emperor* AIR 1941 Sind 186, p 188, 43 Cr LJ 68 .

51 *Emperor v Joti Prasad Gupta* AIR 1932 All 18, pp 21 and 23, 33 Cr LJ 236 dissenting from *Mohan Lal Saksena v Emperor* AIR 1930 Oudh 497, 32 Cr LJ 104 ; *Emperor v Ganesh Vaman Joshi* AIR 1931 Bom 140, 32 Cr LJ 471 ; *KondaSatyavatamma v Emperor* AIR 1932 Mad 371, p 372, 32 Cr LJ 1131 .

52 *Emperor v Ganesh Vaman Joshi* AIR 1931 Bom 140, 32 Cr LJ 471 .

53 *KondaSatyavatamma v Emperor* AIR 1932 Mad 371, p 372, 32 Cr LJ 1131 .

54 *Emperor v Bepin Behari Ganguly* AIR 1932 Cal 549, p 550, 33 Cr LJ 699 .

55 *SSubramania Ayyar v Emperor* AIR 1933 Mad 279 ((1)), 34 Cr LJ 524 .

56 *R v Kahanji* 18 ILR Bom 758 .

57 *Emperor v Mohan Singh* AIR 1924 Lah 440, 6 Cr LJ 1352 ; *Kripal Singh v Emperor* AIR 1926 Lah 115, 26 Cr LJ 1374 ; *R v Kahanji* 18 ILR Bom 758 ; *Subramania Ayyar v Emperor* AIR 1933 Mad 279, 34 Cr LJ 524 .

58 *Emperor v Parimal Chatterjee* AIR 1932 Cal 760, p 761, 34 Cr LJ 78 .

59 *Tarapada Mitra v Emperor* AIR 1933 Cal 603, 34 Cr LJ 1073 .

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 118.

Concealing design to commit offence punishable with death or imprisonment for life.--

Whoever intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or [60][imprisonment for life], [61][voluntarily conceals by any act or omission or by the use of encryption or any other information hiding tool, the existence of a design] to commit such offence or makes any representation which he knows to be false respecting such design,

If offence be committed--if offence be not committed.--shall, If that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or, if the offence be not committed, with imprisonment of either description, for a term which may extend to three years; and in either case shall also be liable to fine.

Illustration

A, knowing that dacoity is about to be committed at *B*, falsely informs the Magistrate that a dacoity is about to be committed at *C*, a place in an opposite direction and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at *B* in pursuance of the design. *A* is punishable under this section.

Comments

1. Legislative Changes

In second paragraph of the section, the words "voluntarily conceals by any act or omission or by the use of encryption or any other information hiding tool, the existence of a design" have been *substituted*for words "voluntarily conceals, by any act or illegal commission, the existence of a design," by the Information Technology (Amendment) Act 2008, (10 of 2009), s 51(c) .

2. Scope

This and the next two sections refer to a special form of abetment by way of aid, *viz*, concealment of a design to commit a crime. It follows from the nature of abetment, which involves participation of two or more persons, that the concealment, contemplated by these sections, is the concealment by one person of the existence of a criminal design on the part of another.[62] All the three sections deal with concealment prior to the commission of an offence. Subsequent concealment is dealt793 with in ss 202 - 03 . These sections apply to the concealment of all offences except those punishable with fine

only.

The following points should be proved in order to secure a conviction under these sections:

(i) that there was a designed offence, *i.e.*, a thing made punishable by the IPC (see s 40) with imprisonment;
(ii) that the design was known to, and not merely suspected by the accused;
(iii) that the accused voluntarily (see s 39) concealed the existence of the intention, whether by an act on his part or by an illegal omission; or that he knowingly made a false representation respecting such design; and
(iv) that the accused intended, or knew, that he was likely thereby to facilitate the commission of the offence. It is not necessary, however, to prove that the offence was actually facilitated thereby.

3. 'Offence'

Section 40,*ante* and commentary thereunder, may be referred to.

4. 'Voluntarily'

Commentary under s 39, *ante*, may be referred to.

5. 'Conceals'

The concealment must be the result of some conduct, positive or negative, directed to that end. It must be active, as distinguished from passive non-disclosure. Thus, mere denial of the existence of a design to commit an offence does not constitute concealment.[63]

There must be an obligation on the person concealing the offence to disclose it. The concealment to be criminal must be intentional or, at least, with knowledge that it will facilitate the commission of an offence.

Knowing of a design to commit a dacoity, and voluntarily concealing the existence of that design with the knowledge that such concealment would facilitate the commission of dacoity, does amount to an abetment of the dacoity.[64]

6. 'By an Act or Illegal Omission'

Where the conduct consists of an omission, the omission must be 'illegal'; it must be in itself either an offence, *i.e.*, a thing punishable under the IPC (s 40), or prohibited by law, or furnishing ground for a civil action (s 43). In the case of public servants, under s 119, every omission to disclose a design to commit any offence which would affect the particular state department, to which he belongs, must be illegal.[65]794

7. Duty to give Information

As to the duty of the public to give information to the police, or to the magistrate, in the case of the commission or intended commission, of certain crimes, 'in the absence of a reasonable excuse', a person, who is aware of the intention of the commission of a serious offence like murder and does not lay information before the nearest magistrate or the police officer, is guilty of an offence. He is practically a consenting party to the crime and is an accomplice.[66]

As to the duty of village officials, persons living in the villages and others, to report certain matters, refer to s 40, CrPC . When there are several *lambardars* and one of them to the knowledge of others directs the village *chowkidar* to make a report of burglary at the *thana,* it cannot be said that any of them had intentionally failed to give the information, prescribed by law, or that there was no reasonable excuse for not giving it, if the *chowkidar* had disobeyed the order.[67]

The fact that the omission was likely to facilitate the commission of the offence is material and must be clearly established.[68]

8. Procedure

For arrest, warrant or summons, compounding and court, in regard to offences under this section and s 119, refer to commentary under s 109 .

Bail

An offence under this section is not bailable; nor is one under s 119 when the principal offence is committed and is punishable with death or imprisonment for life. It is bailable if the offence is not committed (CrPC, Sch I).

9. Charge

The following form may be adopted in framing the charge:

> 'I (*name and office of Magistrate, Sessions Judge etc.*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the .....day of ....., at ....., with the intention of facilitating, or with the knowledge that you will thereby facilitate the commission of the offence of ..... (*specify the act*) omitted to do ..... (*specify the omission*) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under s 118 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of .....*)
>
> And I hereby direct that you be tried by this court (*or the said court*) on the said charge'.

60 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation for life' (wef 1-1-1956).

61 Substituted by the Information Technology (Amendment) Act, 2008 (10 of 2009), s. 51(c), for "voluntarily conceals, by any act or illegal omission, the existence of a design" (wef 27-10-2009).

62 *R v Rajcoomar* I Ind Jur OS 105.

63 *R v Ram Sarup* 28 ILR All 302 .

64 *Queen v Jhugroo* 4 WR (Cr) 2 .

65 *Mayne's Criminal Law of India,* p 259.

66 *Anna v State of Hyderabad* AIR 1956 Hyd 99, (1956) Cr LJ 887 .

67 *Sher Singh v Empress* 5 PR 1889 .

68 Re *Kesree*(1886) 1 Agra 31.

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 119.

Public servant concealing design to commit offence which it is his duty to prevent.--

Whoever, being a public servant, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence which it is his duty as such public servant to prevent;

795[69][voluntarily conceals by any act or omission or by the use of encryption or any other information hiding tool, the existence of a design] to commit such offence, or makes any representation which he knows to be false respecting such design;

if offence be committed.--shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both;

if offence be punishable with death,*etc*.--or, if the offence be punishable with death or [70][imprisonment for life], with imprisonment of either description for a term which may extend to ten years;

if offence be not committed.--or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-fourth part of the longest term of such imprisonment or with such fine as is provided for the offence, or with both.

Illustration

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that *B* designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here *A* has by an illegal omission concealed the existence of *B's* design, and is liable to punishment according to the provision of this section.

Comments

1. Scope

This section is an adaptation of s 118, IPC to public servants, whose duty, as such public servants, is

to prevent the commission of offences, and prescribes an enhanced punishment in their case. Refer to commentary under the preceding s 118 .

2. Public Servant

Section 21 and commentary thereunder, may be referred to.

3. Procedure

An offence, under this section, is non-bailable if the offence concealed is committed, or if it is punishable with death or imprisonment for life; otherwise it is bailable (refer to s 159, Act 18 of 1923). It is cognizable and compoundable if the offence abetted is so, and it is triable by the court by which the offence abetted is triable.796

4. Charge

The following form may be adopted in framing the charge:

> 'I (*name and office of Magistrate, Sessions Judge etc*) hereby charge you (*name of accused*) as follows:
>
> That you, ...on or about the .....day of .....at..... being a public servant, ..., whose duty it was to prevent the commission of the offence of ....., with the intention of facilitating, or with the knowledge that you will thereby facilitate, the commission of the offence of ..... did (*specify the act*) or omitted to do ..... (*specify the omission*), to conceal the existence of the design to commit the said offence, and thereby committed an offence, punishable under s 119 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of.....*)
>
> And I hereby direct that you be tried by this Court (*or the said Court*) on the said charge.'

Legality of Charge under Section 409 , Indian Penal Code 1860 and Conviction under Section 119 , Indian Penal Code 1860

No person can be convicted of less an offence without a charge, unless it is a case falling under ss 221(2) or 222, CrPC . Even in cases, where a conviction without charge is permissible, it is necessary to guard against the question of prejudice, because the accused is entitled to know with certainty and accuracy, the exact nature of the charge of which he is going to be convicted. If the facts are such as to give the accused notice of the offence for which he is going to be convicted, though not charged with it, the question of prejudice may not arise; but the court should, in any event, satisfy itself that the accused was not misled in his defence. Sections 119 and 409, IPC are in different chapters of the Code. The ingredients of both the offences are not the same. *A* charge under Section 409, obviously, therefore, cannot cover any of the ingredients excepting the ingredient of being a public servant which by itself is not an offence. Such a case is not one contemplated by either Section 221(2) (s 237 old) or s 222 (s 238 old), CrPC . When the fact constituting an offence under s 119, IPC, were neither stated in the charge sheet nor was the accused, at any time, put on notice of the same. The charge under s 409 being disproved, the accused cannot be taken by surprise for an offence under this section, such

a conviction without a charge is against the law.[71]

69 Substituted by the Information Technology (Amendment) Act, 2008 (10 of 2009), s. 51(c), for "voluntarily conceals, by any act or illegal omission, the existence of a design" (wef 27-10-2009).

70 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation for life' (wef 1-1-1956).

71 Re *Saifuddin Ahmed Khan*(1957) 2 Andh WR 298, 1957 Mad LJ (Cr) 509.

Indian Penal Code (Act XLV of 1860)

Chapter V

Of Abetment

S. 120.

Concealing design to commit offence punishable with imprisonment.--

Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

if offence be commited--if offence be not committed.--shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, if the offence be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.797

Comments

1. Scope

This section supplements the provisions of s 118 . That section applies to abetment by concealment of offences punishable with death or imprisonment for life, and this section applies the same rule to abetment by concealment of offences punishable with imprisonment. No such provision is made for offences punishable with fine only. Refer to commentary under s 118 .

Where specimen writings and specimen signatures of the accused charged under ss 120, 420, 468 of the IPC and s 5(1)(d) of Prevention of Corruption Act 1947 were taken by a magistrate who neither knew the accused personally nor got the accused person's identified before taking the specimen writings, the specimen writings and signatures so taken could not be said to be of the accused persons and their comparison with the disputed writings done by the expert would not connect the accused persons with the crime.[72]

2. Procedure

For arrest, warrant or summon, compounding and court in regard to offences under this section. (Refer to commentary under s 109, *ante*).

Where enquiry under ch 18 of the old CrPC was pending when new Code came into force, procedure is governed by the new Code and not by old Code, complaint under s 466 / 469 and s 120 IPC pending on the date of new Code must be proceeded with as a warrant case and not as a sessions inquiry.[73]

Bail

An offence under this section is bailable or non-bailable according as the offence abetted is bailable or non-bailable, if the offence be committed. It is bailable if the offence be not committed (refer to CrPC, Sch I).

3. Charge

The following form may be adopted in framing the charge.

I (*name and office of Magistrate, Sessions Judge etc.*) hereby charge you (*name of accused*) as follows:

That you, on or about the .....day of ....., at ....., with intention of facilitating, or with the knowledge that you will thereby facilitate, the commission of the offence of ..... (*specify the act*) omitted to do ..... (*specify the omission*) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under s 120 of the Indian Penal Code, and within my cognizance (*or the cognizance of the Court of .....*)

And I hereby direct that you be tried by this court (*or the said Court*) on the said charge.798

72 *State of Rajasthan v Dr JP Sharma* (1983) Cr LJ 858 (Raj)(DB).

73 *Babu Ram v Mohd Ali* (1977) Cr LJ (NOC) 117 (All), (1997) All Cr R 49 .

Indian Penal Code (Act XLV of 1860)

Chapter VA

Criminal Conspiracy

[22][S. 120A.

--Definition of criminal conspiracy.--

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

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

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

Explanation.--It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.]805

Comments

1. Scope

The offence of criminal conspiracy under s 120A, IPC is a distinct offence introduced for the first time in 1913 in ch V-A of the IPC . The very agreement, concert or league is the ingredient of the offence.[23] It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performance in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal, several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or over-shooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy.[24]

This section defines 'criminal conspiracy' and the next section prescribes the punishment for that offence. This section contemplates two classes of conspiracy. It defines criminal conspiracy as an agreement between two or more persons to do, or cause to be done: (a) an illegal act, or (b) an act which is not illegal by illegal means. Under s 43 of the IPC an act would be illegal, if it is an offence, or if it is prohibited by law or if it furnishes the ground for a civil action. One class of conspiracy, contemplated by this section, is that in which the agreement is to do, or cause to be done, an illegal act which is an offence. Such an agreement amounts to a criminal806 conspiracy even if there is no other act besides the agreement in pursuance thereof. The second class of conspiracy is that in which the act agreed to be done does not amount to an offence. In such a case the agreement to do the act does not amount to a criminal conspiracy unless some act besides the agreement is done by one or more of the parties to the agreement in pursuance thereof. The *proviso* to this section excludes the agreement to commit an offence from the category of such conspiracies in which it is necessary that the agreement should be followed by some act.[25]

It has been held that ss 120A and 120B appear to have been introduced to fill a gap in s 107, IPC, defining abetment. Under cl 'secondly' of s 107 a person abets the doing of a thing who engages with others in a conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy. Abetment of an offence is punishable under s 109 or 114 as the case may be, if the offence is committed, or under ss 115 or 116, as the case may be, if the offence be not committed; but it is clear that a conspiracy will not amount to an abetment unless an act or illegal omission takes place in pursuance of the conspiracy. Thus, whereas s 120A provides an extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy within the meaning of s 107, s 120B provides a punishment for 'criminal conspiracy' where no express provision is made

in this Code for the punishment of such a conspiracy. Therefore, if the offence alleged to be the object of the conspiracy has been committed, the conspiracy amounts to an abetment under s 107 and it has been held that it is unnecessary to invoke the provisions of ss 120A and 120B because the Code has, in ss 109 and 114, made specific provision for the punishment of such conspiracy.[26] But there is no analogy between ss 120B and 109 . There may be an element of abetment in a conspiracy; but conspiracy is something more than an abetment. Offences created by ss 109 and 120B, IPC, are quite distinct and there is no warrant for limiting the prosecution to only one element of conspiracy, *i.e.*, abetment, when the allegation is that what a person did was something over and above that. Where a number of offences are committed by several persons in pursuance of a conspiracy it is usual to charge them with those offence as well as with the offence of conspiracy to commit those offences.[27] One who commits an overt act with the knowledge of conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.[28]

The elements of a criminal conspiracy have been stated to be (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish the objects, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act.[29]807

2. It is a Substantive Offence

Criminal conspiracy is a substantive offence and has nothing to do with abetment.[30] It is a substantive offences in itself. It is not one of the offences which is an offence because of its relation to another offence, such as abetment, which would give the court jurisdiction either where the principal offence or the connected offence was committed, nor can it be brought within the meaning of s 180, CrPC .[31]

3. Constructive Liability

Commentary under same heading in s 34, *ante*, may be referred to.

4. Conspiracy and Offences Pursuant to it--Distinction to be made

In *Ajay Aggarwal v Union of India* ,[32] while discussing the question whether the conspiracy is a continuing offence, the following pertinent observations were made by K Ramaswamy, J speaking for the Bench at para 11:

> Conspiracy to commit a crime itself is punishable as a substantive offence and every individual offence committed pursuant to the conspiracy is separate and distinct offence to which individual offenders are liable to punishment, independent of the conspiracy. Thus, a distinction was maintained between the conspiracy and the offences committed pursuant to the conspiracy.[33]

5. Gist of the Offence

The gist of the offence of conspiracy lies not in doing that act or effecting the purpose for which the conspiracy is formed nor in attempting to do any of the acts, nor in inducing others to do them, but in the forming of the scheme of agreement between the parties.[34] The offence of a conspiracy to commit a crime is an offence different from the crime which is the object of the conspiracy, because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed; equally the crime attempted or completed does not require the element of conspiracy as

one of its ingredients. They are therefore, quite separate offences.[35] The gist of the offence is a bare agreement and association to break the law.[36] The offence of criminal conspiracy consists in the conspiracy without any reference to the subject-matter of the conspiracy.[37] It is correct to say that the gist of an offence of conspiracy, or more accurately, the gist of an offence under s 120A is the conspiracy808 or agreement between the accused persons. In other words, a mere agreement between two or more persons to do an illegal act, or an act which is not illegal by illegal means is itself a criminal conspiracy. But criminal conspiracy may come into existence, and may persist and will persist so long as the persons constituting the conspiracy remain in agreement and so long as they are acting in accord, in furtherance of the objects for which they entered into the agreement.[38] A conspiracy is not 'an act committed' which can be abetted.[39]

The essential ingredient of the offence of 'criminal conspiracy', defined in s 120A, IPC, is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event, unless the statute so requires, no overt act is necessary to be proved by the prosecution because in such a fact-situation criminal conspiracy is established by proving such an agreement.[40]

The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts.[41] The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, *per se* enough.[42]

The essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. The circumstances proved before and after the occurrence have to be considered to decide about the complicity of the accused.[43]

6. Essence of Criminal Conspiracy

The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Encouragement and support which co-conspirators give to one another, rendering enterprise possible, which, if left to individual effort, would have been impossible; furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be809 continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design.[44]

The offence of conspiracy created under s 120A is bare agreement to commit an offence. It has been made punishable under s 120B . The offence of abetment created under the second clause of s 107 requires that there must be something more than mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy; that would be evident by s 107 (secondly), 'engages in any conspiracy for the doing of that thing, if an act or omission took place in pursuance of that conspiracy'.[45]

7. Section Not Retrospective in Operation

Sections 120A and 120B did not find a place in the IPC before the 27 March 1913, when the Criminal Law (Amendment) Act 1913, which inserted them in the IPC, became law. The sections have no

retrospective effect and a conviction under s 120B cannot stand if the offence was committed before that section came into force, though the accused may be convicted of abetment under s 109 .[46]

Conspiracy Distinguished from Other Offences

Conspiracy differs from other charges in this respect that in other charges, the intention to do a criminal act is not by itself a crime until something is done amounting to the doing or attempting to do some act, to carry out that intention; conspiracy, on the other hand, consists simply in the agreement or confederacy to do some act, no matter whether or not it is done.[47] It is true that the law does not take notice of the intention or the state of mind of the offender and there must be some overt act too under s 120B, consisting the agreement of the parties. The definition of criminal conspiracy in this section excludes the agreement to commit an offence from the category of such conspiracies in which it is necessary that the agreement should be followed by some act.[48]

8. Theory of Agency

The offence cannot be spelt out by applying the principle of agency if the statute does not say so.[49] The theory of agency cannot be extended thus far, that is to say, to find all the conspirators guilty of the actual offences committed in execution of the common design even if such offences were ultimately committed by some of them, without the participation of others. Those who committed the offences pursuant to the conspiracy by indulging in various overt acts will be individually liable for those offences in addition to being liable for criminal conspiracy; but, the non-participant conspirators cannot be found guilty of the offence or offences committed by the other810 conspirators. There is hardly any scope for the application of the principle of agency in order to find the conspirators guilty of a substantive offence not committed by them. Criminal offences and punishments therefor are governed by statute. The offender will be liable only if he comes within the plain terms of the penal statute. Criminal liability for an offence cannot be fastened by way of analogy or by extension of a common law principle.[50]

9. Sections 120A and 34 Distinguished

In the case of s 34, IPC, the constructive liability for the crime is specifically fastened on each of those who participate in the crime in furtherance of the common intention. But s 120B does not convey that idea.[51]

There is not much substantial difference between conspiracy as defined in this section, and acting on a common intention as contemplated in s 34 . In the former case, the gist of the offence is the bare engagement and association to break the law even though the illegal act does not follow; the gist of the offence under s 34, IPC, is the commission of a criminal act in furtherance of a common intention of all the offenders which means that there should be a unity of criminal behaviour resulting in something for which an individual would be punishable as if it were all done by himself alone.[52]Section 34 only enunciates a principle of liability. It is not an offence in itself; on the other hand, criminal conspiracy is, by itself, a substantive offence.[53]Section 34 requires not only common intention, but also participation in the crime; when a specific offence is committed by some of the conspirators in pursuance of the conspiracy, the common intention of all would not be enough to fasten the guilt on all of them. It is only those who had actually participated in the crime that would be held responsible for its commission.[54]

Distinction Between Sections 34, 120A and 120B

Commentary under same heading in s 34, *ante*, may be referred to.

10. Sections 34, 120A and 149 Read Together

Commentary under s 34, *ante*, may be referred to.

11. Section 120A of the IPC and Section 10 of the Indian Evidence Act 1872

The essence of conspiring is that there should be an agreement between persons to do one or the other of the acts described in s 120A . It can be established by direct evidence or by circumstantial evidence. But, s 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co-conspirators. Section 10 of the Evidence Act, as the opening words show, will come into play only when the court is satisfied that811 there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be *primafacie* evidence that a person was a party to the conspiracy before his acts can be used against the co-conspirators.[55]

12. Effect of Termination of Conspiracy--Joinder and Splitting of a Conspiracy

It has been said that a criminal conspiracy is a partnership in crime and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two a more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by co-conspirators after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.[56]

13. Distinction between Criminal Conspiracy and Abetment by Conspiracy

In order to constitute the offence of abetment by conspiracy, first, there must be a combining of two or more persons in the conspiracy; secondly, an act or illegal omission must take place in pursuance of that conspiracy and in order to do the doing of that thing. It is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. It is worthy of note that a mere conspiracy or a combination of persons for the doing of a thing does not amount to an abetment. Something more is necessary, namely, an act or illegal omission must take place in pursuance of the conspiracy and in order to do the doing of the thing for which the conspiracy was made. The gist of the offence of criminal conspiracy is in the agreement to do an illegal act or an act, which is not illegal, by illegal means. When the agreement is to commit an offence, the agreement itself becomes the offence of criminal conspiracy. Where, however, the agreement is to do an illegal act which is not an offence or an act which is not illegal, by illegal means, some act, besides the agreement, is necessary. Therefore, the distinction between abetment by conspiracy and criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this, that, for abetment by conspiracy, mere agreement is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the812 doing of the thing conspired for. But in the offence of criminal conspiracy, the very agreement or plot is an act in itself and is the gist of the offence.[57]

The gist of the offence of criminal conspiracy created under s 120A, IPC is a bare agreement to commit an offence. It has been made punishable under s 120B, IPC . The offence of abetment created under the second clause of s 107 requires that there must be something more than a mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by the wordings of s 107, 'Secondly', 'engages in any conspiracy...for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy...'. The punishments for these two categories of crimes are also quite different. Section 109 , IPC, is concerned only with the punishment of abetments for which no express provision is made under the IPC . A charge under s

109 should, therefore, be along with some other substantive offence committed in consequence of abetment. The offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under s 120B for which a charge under s 109, IPC is unnecessary and indeed inappropriate.[58] A conspiracy is not 'an act committed' which can be abetted.[59]

So far as abetment by conspiracy is concerned, the abettor will be liable to punishment under varying circumstances detailed in ss 106-17 . It is unnecessary to detail those circumstances for the present case. For the offence of criminal conspiracy it is punishable under s 120B .[60] There is no analogy between ss 120B and 109, IPC . There may be an element of abetment in a conspiracy; but conspiracy is something more than an abetment. Offences created by ss 109 and 120B, IPC, are quite distinct and there is no warrant for limiting the prosecution to only one element of conspiracy, *i.e.*, abetment when the allegation is that what a person did was something over and above that. Where a number of offences are committed by several persons in pursuance of a conspiracy, it is usual to charge them with those offences as well as with the offence of conspiracy to commit those offences.[61]

14. Summoning Additional Accused\Conspirators During Trial

Where the charges against existing accused persons were that they entered into criminal conspiracy and created a forged and fabricated document, on the basis of examination of witnesses, the additional accused persons were summoned by taking recourse to s 319, CrPC, on these facts it was held that the order cannot be set aside in appeal on the ground that the witnesses had not made it clear as to what role those additional accused persons had played in creating forged documents; at that stage only a *prima fa*cie case has to be formed and detailed examination of allegations was not called for.[62]813

15. Ingredients of Criminal Conspiracy

The ingredients of the offence of conspiracy are:

(i) there should be an agreement between the persons who are alleged to conspire;
(ii) the agreement should be--(a) for doing an illegal act, or (b) for doing by illegal means, an act, which may not itself be illegal;
(iii) in cases, other than an agreement to commit an offence, the agreement must be followed by an overt act.[63]

The ingredients of the offence of criminal conspiracy are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which by itself may not be illegal.[64]

So long as such a decision rests in intention only, it is not indictable.[65]

Criminal conspiracy would not be inferred from the mere fact that there were official discussions between officers of the Government, Chief Minister, Minister and Representatives of Management which were unheard. A wrong or incorrect decision or poor management by iteslf would not be said to be the product of criminal conspiracy [66]

Single Conspiracy Distinguished from a Number of Unrelated Conspiracies

A general conspiracy is to be distinguished from a number of separate conspiracies having a similar general purpose. In order to constitute a single general conspiracy, there must be a common design and common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in the general conspiracy though he may not know all its secrets or the

means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few; some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may, from time to time, be found to be expedient. New techniques may be invented and new means may be devised for advancement of the common plan.[67] But where different groups of persons co-operate towards their separate ends without any unity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators, then, is to work for the furtherance of the common design of his group only.[68] Where the charge, as framed, discloses one single conspiracy, although spread over several years, there is only one object of the conspiracy, *i.e.*, to cheat members of the public, and the fact, that, in the course of years others joined the conspiracy or that several incidents of cheating took place in814 pursuance of the conspiracy, does not change the conspiracy and does not split up a single conspiracy into several conspiracies.[69]

16. Agreement

The definition of criminal conspiracy under this section postulates an agreement to do an illegal act, or a legal act by illegal means. The essence of the offence of conspiracy is the bare agreement and association to break the law,[70] or to do an illegal act.[71] The generally accepted definition of the offence is that as given in *Mulcahy v R* ,[72] and accepted by the House of Lords in that[73] and subsequent cases:[74]

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

The meeting of minds of two or more persons for doing an illegal act or an act by illegal means is *sine qua non* of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. An offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement.[75]

For the charge under s 120B to be proved, an agreement between two or more persons to do or cause to do an illegal act which is not illegal by illegal means, must be established. From the mere fact that the deceased was seen at the police station it cannot be held that he was brought at the police station in pursuance of some criminal conspiracy entered into between the accused No. 1 and accused No. 2 Police officers.[76]

Physical Manifestation of Agreement is Essential

It is essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved815 nor is it necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient.[77]

17. Conspiracy Comes into being the Moment the Agreement is Reached

To make out an offence of criminal conspiracy, it is not sufficient to establish that a number of persons had a common intention to commit an act opposed to, or forbidden by the law; it has further to be

proved that they 'agreed' to commit the relevant act. The agreement is the gist of the offence. Conspiracy comes into being just the moment the agreement to commit the crucial act is reached and it continues to exist so long as the object, for which the association was formed, continues in the process of fulfillment as per the agreement.[78]

Agreement is the Base of the Offence of Conspiracy

The offence of criminal conspiracy consists in the 'combining'. So long as such a design rests in intention, it is not indictable. When two or more persons agree to carry it into effect, the very plot is an act in itself. The offence is, therefore, complete though no further act is done in pursuance of the agreement or even where the parties do not settle the means to be employed.[79] The 'agreement' is the rock-bottom of the offence of criminal conspiracy under this section and unless it is shown that the several accused persons had agreed either to do an illegal act or an act, which is not illegal, by illegal means, no charge of criminal conspiracy can succeed.[80]

Legality of Means--Agreement may Comprise a Number of Illegal Acts

The same is the law in India.[81] The offence of criminal conspiracy is a highly technical one and the essential ingredient is the agreement to commit an offence, irrespective of the means decided upon to carry out the object of the conspiracy. Whether those means are legal or innocuous would not affect the question of criminality.[82] As pointed out in *Barindra Kumar Ghose v Emperor* ,[83] although there must be agreement there need not be proof of direct meeting or combination; the agreement may be inferred from circumstances raising a presumption of a concerted plan to carry out the unlawful design;[84] it may also be inferred from acts and conduct of parties.[85] There must be unity of will and purpose amongst all the conspirators. It is necessary that there should be one conspiracy and not a series of conspiracies and816 criminal acts unconnected by unity of intention.[86] Persons must know what the conspiracy is about, otherwise they cannot be said to have conspired.[87] Where the object of the agreement is to do an unlawful act, and not to do a lawful act, by an unlawful means, it is sufficient to specify the unlawful object without specifying the means adopted by all or any of the conspirators to gain that object.[88] Privacy and secrecy are more characteristics of a conspiracy than a loud discussion in an elevated place open to public view, in the garden of a stranger.[89] It is not necessary that the agreement of conspiracy should be confined to the commission of only a single act; it may comprise the commission of a number of illegal acts.[90]

Agreement need not be Formal or Express but may be Inherent in and Inferred from the Circumstances

It is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement which is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.[91]

All Conspirators need not Know Every Detail--There must be Unity of Object or Purpose

In *Yashpal v State of Punjab* ,[92] their Lordships of the Supreme Court observed:

> The very agreement, concert of league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to

> achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal, several offences may be committed by some of the conspirators even unknown to the other. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of conspiracy; even though there may be sometimes misfire or overshooting by some of the conspirators without the knowledge of the others, it will not affect the culpability of those others when they are associated with the object of the conspiracy.[93]817

The essence of conspiracy is, that there should be an agreement between persons to do one or the other of the acts described in the section.[94]

18. Two or More Persons

When two or more person agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and everyone who joins in the agreement. There has thus to be two conspirators and there may be more than that.[95] By the terms of the definition itself, there ought to be two or more persons who must be parties to such an agreement and it is trite to say that one person alone can never be held guilty of criminal conspiracy for the simple reason that one cannot conspire with oneself. It has, therefore, been held that if four named individuals are charged with having committed the offence of criminal conspiracy and three of them are acquitted, the fourth one alone cannot be held guilty of the offence of criminal conspiracy.[96] This holds good in a case where the only persons, alleged to have been guilty of the offence of conspiracy, were the persons placed on trial and there was no allegation, nor any evidence forthcoming, that any other persons were, though not placed on trial, concerned with the crime. But where the charge alleges, or there is evidence forthcoming, that other persons, though not named in the charge and placed on trial were concerned with the conspiracy, there can be no objection to one accused only being convicted. It is not essential that more than one person should be convicted of the offence of criminal conspiracy. It is enough if the court is in a position to find that two or more persons were actually concerned in the criminal conspiracy.[97]Section 212, CrPC, which requires the particulars of the offence to be stated, does not in terms further require that in an offence like conspiracy the names of the co-conspirators should also be mentioned. Any defect in not mentioning the names of the conspirators not placed on trial can be cured under ss 215, 464 and 465, CrPC .[98] Where, therefore, on the findings of the courts below, apart from the persons placed on trial, there was the approver also who implicated himself equally with the other accused persons and a number of other prosecution witnesses as having been privy to the conspiracy, it was held that the conviction of one of the accused only was not illegal.[99]818

19. Every Conspirator need not be Capable

It is not necessary that everyone of the persons, agreeing to do the illegal act or acts, should be capable, in law, of committing an offence in respect of that act.[1]It may be specified in a charge that a certain act has been committed which could not possibly be committed by one of the alleged conspirators; nevertheless such conspirator may be guilty of that conspiracy in the course of which such act was committed.[2]It is not an ingredient of the offence of criminal conspiracy that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts.[3] Where, however, several persons are charged with the same conspiracy, the prosecution must prove that there is one large conspiracy involving all the persons charged and not a number of unrelated conspiracies entered into by different groups of the accused. Unity of will and purpose amongst all the accused must be proved; and an accused not shown to be a member of a large conspiracy is entitled to acquittal, however bad his record may be and, however, much he may be suspected of this or that offence.[4]

In order to constitute the offence of conspiracy as defined in this section it is only necessary for the prosecution to show that the persons concerned had agreed to do or cause to be done an illegal act or an act which is not illegal, by illegal means, and it is immaterial whether the illegal act is the ultimate

object of such agreement or is merely incidental to the object.

Where it cannot be said, except by straining the language, that everyone of the accuseds was in agreement to do the same illegal act or cause the same illegal act to be done, they cannot be held to have been parties to one and the same conspiracy within the meaning of this section.[5]

A Conspiracy may be Spread Over Several Years

Where the charge, as framed, discloses one single conspiracy, although spread over several years, there is only one object of the conspiracy, and that is to cheat members of the public, the fact that in the course of years others joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy, does not change the conspiracy and does not split up a single conspiracy into several conspiracies.[6]

20. Different Persons may enter the Conspiracy at Different Stages

It is true that a mere agreement may bring the conspiracy into existence but the IPC does not say that thereafter the offence no longer exists. Criminal conspiracy may come into existence, and may and will persist so long as the persons constituting the same remain in agreement, and so long as they are acting in accord, in furtherance of the objects for which they entered into the agreement.[7] It is not by any means819 necessary that each conspirator should be aware of all the acts done by each of the conspirators in the course of the conspiracy. His offence is the conspiracy. The acts done by any of the conspirators in furtherance of the purpose of the conspiracy are merely indication of what the object of the conspiracy was. What is necessary, however, is that there should be one conspiracy and not a series of conspiracies and criminal acts unconnected by unity of intention. It is quite possible that there may be a band of conspirators working for a common criminal end, and for the purpose of that conspiracy, they may find it necessary to procure the doing of unlawful acts by persons, who are not members of the conspiracy. In that case, if the persons so seduced into unlawful acts are not aware of the conspiracy, the fact that they do unlawful acts, does not make them members.[8] It is the object which the court has to consider when deciding the question of conspiracy and its members. Different persons may enter a conspiracy at different stages and persons joining the conspiracy can properly be convicted of that conspiracy so long as the object of the conspiracy exists.[9] Each conspirator must be aware of the object of the conspiracy,[10] but it is not the law that every conspirator must be present at every stage of the conspiracy. If the conspirator concerned had agreed to the common design and had not resiled from that agreement, it can be presumed that he continued to be a party to the conspiracy.[11]

A Conspirator can Join and Leave the Conspiracy at any Stage but Still Would be Liable

A conspirator can join the conspiracy at any stage and similarly leave it at any stage and will still be liable for the acts of the other conspirators. Where it was not in dispute that when the contract was awarded, the accused was one of the parties to the decision taken by the conspirators, the plea of the accused that he retired from services and cannot be made liable for the subsequent acts of the other conspirators would not be tenable.[12]

Conspirators may be Enrolled in Chain

Conspirators may, eg, be enrolled in chain, *A* enrolling *B*, *B* enrolling *C* and so on and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrolment, where a single person at the centre doing the enrolling and all the other members being unknown to each other though they know that there are to be other members.[13]

The Conspirators may not know each other

Persons may be members of a single conspiracy even though each is ignorant of the identity of many others who may have diverse roles to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.[14]820

Conspirators Not Liable for Acts after Termination of Conspiracy

Once the object of conspiracy has been achieved, any subsequent act which may be unlawful, would not make the accused a part of the conspiracy, like giving shelter to an absconder.[15] A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy.[16]

21. Illegal Act--There can be no Conspiracy if the Act is not Illegal

Under s 43 of the IPC an act would be illegal, among other things, if it is an offence or if it is prohibited by law.[17]So to sustain a charge of conspiracy to do an illegal act, the prosecution must allege and prove the committing of an illegal act by the conspirators. If the act alleged is not illegal, the question of conspiracy becomes irrelevant.[18] Conspiracy differs from other charges in this respect. In other charges, the intention to do a criminal act is not a crime itself, until something is done amounting to the doing or attempting to do some act, to carry out that intention; conspiracy, on the other hand, consists simply in the agreement or confederacy to do some act, no matter whether or not it is done.[19]

Where an accused was aware of the fact that a large amount of jewellery had been handed over to another accused in order that he might deposit it for safe custody in a bank and also of the fact that the latter had pawned the jewellery and kept the proceeds, but he did not inform the person, whose property had been misappropriated, of the fact, but told her deliberate untruths upon the subject, it was held that both the accused were engaged in a criminal conspiracy to commit an offence under s 409 .[20]

If the conspiracy is merely to do an act which is not illegal, though in the hope and belief that that act may result in the death of, or injury to, some persons, that does not amount to a conspiracy to do an illegal act, *e.g.*, if *A* and *B* agree that they will induce '*Y*' to point his finger at *X*, believing that '*Y*' is endowed with some special power which will enable him to kill by so doing, there is no agreement to do an illegal act and no conspiracy to commit an offence.[21]

22. 'Explanation'

The definition of conspiracy as given in this section makes it amply clear thateither the very act agreed to be done by the conspirators be illegal or if it is not illegal, it should be agreed to be done by illegal means. Therefore every conspiracy involves an element of illegality or illegal act. Under the Explanation to this section, it is immaterial whether the illegal act is the ultimate object of the agreement or is merely incidental to it.821

23. 'By Illegal Means'

Obtaining credit without means to pay, though not criminal, is unlawful. It has been held that it is criminal to conspire to enable a person to get goods on credit by means of a false certificate, knowing that he did not intend to pay for them.[22]

24. Mere Suspicion of Motive is not Sufficient to Frame Charges

Mere suspicion of motive is not sufficient to frame charges against the accused. There should be some reasonable ground to believe that the person has taken part in the conspiracy or in other words reasonable likelihood of participation. There should be something to connect the accused with the crime.[23] Where there was no *prima facie* evidence that the signature was made by the accused in reference to the common design of the conspirator and also no knowledge of the conspiracy was attributed to the accused, order framing charge of conspiracy against the accused was not proper.[24]

25. Proof

There is no difference between the mode of proof of the offence of conspiracy and that of any other offence. It can be established by direct evidence or by circumstantial evidence.[25] The essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both and it is a matter of common experience that direct evidence to prove conspiracy is rarely available.[26]To establish a charge of criminal conspiracy, the prosecution must prove an agreement between two or more persons to do or cause to be done some illegal act or some act, which is not illegal, by illegal means provided that where the agreement is other than one to commit an offence the prosecution must go further and prove that some act, besides the agreement, was done, by one or more of the parties, in pursuance of it. Where the agreement, therefore, is one to do or cause to be done an act which is itself an offence, no overt act, *i.e.*, any act done, by one of the parties to the agreement, in pursuance of it, need be proved; the crime of criminal conspiracy is established once such an agreement is proved.[27]Agreement between two or more persons for committing an illegal act is sufficient and thereafter, it becomes immaterial as to whether the offence has been committed or not. The agreement arrived at for violating the law is an essential ingredient to hatch the criminal conspiracy.[28]

822The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done.[29]

A person may be guilty of criminal conspiracy even though the illegal act which he has agreed to do or caused to be done, has not been done.[30] But the mere exhortation to take to the Naxalite method, without anything more, would not satisfy the requirements of this section.[31] If no common interest between the two accused is found to exist, it cannot be concluded that they were deriving profits out of the criminal conspiracy.[32] Where the agreement is to commit an offence, the offence of criminal conspiracy consists in the very agreement between two or more persons to commit a criminal offence irrespective of the further consideration whether or not those offences have actually been committed. The very fact of the conspiracy constitutes the offence and it is immaterial whether anything has been done in pursuance of the unlawful agreement,[33] as pointed in *Mulcahy v R* [34] :'When two persons agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable, if for a criminal object of for the use of criminal means.'[35] Where the conspiracy alleged is one to commit a series of crimes, mere proof of such an agreement between the accused is sufficient to sustain a conviction and no overt act need be proved. Proof of overt acts is not necessary, but if some of them were concerned in the overt acts that would go a long way to establish that the agreement was in fact made by them.

Prosecution case was that the deceased had a love affair with the sister of the appellant. The appellant and his family members hatched a conspiracy to murder the deceased when they came to know about the marriage of the deceased with some other girl. There was no direct evidence, thus, the mother, sister, father and other co-accused were discharged. Held, the appellant was also entitled to be discharged and was discharged.[36]

Where the prosecutrix did not name the co-accused persons, in the absence of any other evidence of criminal conspiracy, the co-accused were acquitted of the charge under ss 376 / 120B .[37]

26. Where some overt Act is Necessary

Where, however, the agreement is not to commit an offence but to commit an illegal act, or an act, which is not illegal, by illegal means, it does not amount to criminal823 conspiracy unless some act besides the agreement, is done by one or more parties to the agreement in pursuance thereof.[38]

Once a conspiracy to commit an illegal act is proved, act of one conspirator becomes the act of another.[39] There must be meeting of minds conspirators to commit the offence. The conspiracy can

be inferred even from circumstances giving rise to exclusive or irresistible inference of an agreement between two or more persons to commit an offence.[40]

27. Inference from Circumstantial Evidence

Mostly, conspiracies are proved by circumstantial evidence, as a conspiracy is seldom an open affair. Usually both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.[41] The well-known rule governing circumstantial evidence is that each and every incriminating circumstance must be clearly established by reliable evidence and 'the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible'. Justice GN Ray J, in *Tanviben Pankajkumar Divetia v State of Gujarat* ,[42] observed that this court should not allow the suspicion to take the place of legal proof.

As pointed out by Fazal Ali J, in *VC Shukla v State* ,[43] 'in most cases it will be difficult to get direct evidence of the agreement, but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence'. In this context, the observations in the case *Noor Mohammad Yusuf Momin v State of Maharashtra* [44] are worth noting: '...in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material'.

Conspiracy is a matter of inference deducted from certain criminal acts of the accused done in pursuance of the apparent criminal purpose in common between them. The fact that some members of conspiracy are not members from the start but joined the conspiracy only later does not make them any less liable to conviction. In a conspiracy persons are often required to do various acts at various stages, and if some of the accused come in only at a later stage, it cannot be said that they are not members of conspiracy. They are members thereof, provided their act is calculated to promote the object of the conspiracy. It can be inferred from the circumstances proved.[45]

824A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused in the offence of criminal conspiracy. The circumstances before, during and after the occurrence can be proved to decide about the complicity of the accused.[46]

Lord Bridge, in *R v Anderson* ,[47] aptly stated that the evidence from which a jury may infer a criminal conspiracy is almost invariably to be found in the conduct of the parties. In *Daniel Youth v King* ,[48] the Privy Council warned that in a joint trial care must be taken to separate the admissible evidence against each accused and the judicial mind should not be allowed to be influenced by evidence admissible only against others. 'A co-defendant in a conspiracy trial', observed Jackson, J, 'occupies an uneasy seat' and 'it is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together'.[49]

Cumulative Effect of Proved Circumstances

One more principle which deserves notice is that cumulative effect of the proved circumstances should be taken into account in determining the guilt of the accused rather than adopting an isolated approach to each of the circumstances.[50] The circumstances proved before, during and after the occurrence have to be considered to decide the complicity of the accused. But if those circumstances are compatible also with the innocence of the accused person, then it cannot be held that the prosecution had successfully established its case. Even if, some acts are proved to have been committed it must be clear that they were so committed in pursuance of an agreement made between the accused who were parties to the alleged conspiracy. Inference from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation.[51]

28. Advocate on Bank Panel--Submitted False Legal Opinion on House Loans

An advocate on panel of bank giving legal opinion in loan cases cannot be mulcted with criminal prosecution unless evidence shows conspiracy between him and the conspirators accused. The liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. In the present case, there was no such evidence. Charges framed against the accused advocate under ss 120B, 420, 467 *etc.* of the IPC were quashed.[52]825

29. Concurrent Findings by Courts below--No Interference by Supreme Court

Where the entire gist in a case of conspiracy is the agreement to commit the offence, all the three courts below have examined the material on record and, particularly, taking into consideration that sixteen applicants did not receive the loans in the manner alleged by the accused, took the view that the offence of conspiracy is made out, the Apex Court declined to interfere with the concurrent findings arrived at by the courts below.[53]

22 Inserted by Act 8 of 1913, s 3 .

23 *Amit Jogi v State of Chhattisgarh* (2006) Cr LJ 3349 (Chhattisgarh) ; *Sushil Suri v CBI* 2011 Cr LJ 2939, (2011) 5 SCC 708 .

24 *Yash Pal Mittal v State of Punjab* AIR 1977 SC 2433, (1978) Cr LJ 189 (SC) .

25 *Nirmal Chandra De v King Emperor* AIR 1927 Cal 265, 28 Cr LJ 241 ; *Amritalal Hazra v Emperor* AIR 1916 Cal 188, 16 Cr LJ 497, ILR 42 Cal 957, 21 Cr LJ 331 ; *State of Bihar v Kailash Prasad Sinha* AIR 1961 Pat 451, p 459, (1961) Cr LJ 677 .

26 *Jugeshwar Singh v Emperor* AIR 1936 Pat 346, p 348, 37 Cr LJ 677 .

27 *State of Andhra Pradesh v Kandimalla Subbaiah* AIR 1961 SC 1241, p 1244, (1961) 2 Cr LJ 302 . Refer to notes under s 120B for further discussion on the point.

28 *Bhupinder Singh Patel v CBI* 2008 Cr LJ 4396, p 4409, 4410 (Del), (3) CCR 247, p 261 (Del).

29 *K Hasim v State of Tamil Nadu* 2005 Cr LJ 143, p 148, AIR 2005 SC 128, 2004 (9) Scale 422, (2005) 1 SCC 237 .

30 *Chandi Ram v Emperor* AIR 1926 Sind 174, 27 Cr LJ 286 .

31 *Emperor v Pursumal Gerimal* AIR 1938 Sind 108, 39 Cr LJ 630 .

32 *Ajay Aggarwal v Union of India,* (1993) 3 SCC 609, AIR 1993 SC 1637, (1993) Cr LJ 2516 .

33 *State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC), AIR 2005 SC 3820 .

34 *Domina Regina v Best & Co* (1800) 1 East 462 ; *Rex v John Spragg and Mary Elizabeth Spragg* (1760) 2 Burr 993, 97 ER 669 ; *O'Connel v Reg* (1844) 11 Cl&F 155, 1 Cox CC 413, 8 ER 1061.

35 *Leo Roy Frey v Supdt District Jail, Amritsar* AIR 1958 SC 119, p 121, (1958) Cr LJ 260 ; *Kangla v State of Madhya Pradesh* (1980) Cr LR (High Court Notes) 271, p 277(MP) (DB); *State of Bihar v Kailash Prasad Sinha* AIR 1961 Pat 451, (1961) 2 Cr LJ 677 ; *Nathu Ram Godse v Rex* ILR 1956 Punj 499 (FB) ; *Firm Govind Moti & Co v Sindhu Resettlement Corpn Ltd* AIR 1954 Kutch 33, 55 Cr LJ 1086 .

36 *Major EG Barsay v State of Bombay* AIR 1961 SC 1762, p 1778, (1961) 2 Cr LJ 828 ; *Major EG Barsay v State* AIR 1958 Bom 354, p 359, (1958) Cr LJ 1144 ; *Firm Govind Moti & Co v Sindhu Resettlement Corpn Ltd* AIR 1954 Kutch 33, 55 Cr LJ 1086 ; *Man Mohan Thapar v State of Goa* 2009 Cr LJ (NOC) 796 (Bom) .

37 *Niral Chandra De v King Emperor* AIR 1927 Cal 265, p 266, 28 Cr LJ 241 ; *State of Bihar v Kailash Prasad Sinha* AIR 1961 Pat 451, p 459, (1961) 2 Cr LJ 677 .

38 *Abdul Rahman v Emperor* AIR 1935 Cal 316, p 324, 36 Cr LJ 982 .

39 *SJone* Bin *v A Manuel*AIR 1936 Rang 358, p 360 .

40 *Sushil Suri v CBI* 2011 Cr LJ 2939, p 2946 (SC), AIR 2011 SC 1713, (2011) 5 SCC 708, (2011) 5 Scale 412 .

41 *State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC), AIR 2005 SC 3820 ; *EG Barsay v State of Bombay* AIR 1961

SC 1762 .

42 (2005) Cr LJ 3950 (SC).

43 *Central Bureau of Investigation, Hyderabad v K Naryana Rao* 2012 Cr LJ 4610, p 4621 (SC), 2012 AIR SCW 5139, (2012) 9 SCC 512, 2012 (9) Scale 228 .

44 *K Hasim v State of Tamil Nadu*(2005) Cr LJ 143 (SC), AIR 2005 SC 128 ; See *American Jurisprudence*, vol II, s 23, p 559; *Sushil Suri v CBI,* 2011 Cr LJ 2939, AIR 2011 SC 1713, (2011) 5 SCC 708 ; *Sunil Kumar v State of Maharashtra* 2009 Cr LJ 2599 (Bom) .

45 *Arjun Singh v State of HP* 2009 Cr LJ 1332, p 1335 (SC), AIR 2009 SC 1568, (2009) 4 SCC 18 .

46 *Supdt & Remembrancer of Legal Affairs v Mon Mohan Roy* 17 Cr LJ 439, p 440 ; *Amritlal Hazara v Emperor* AIR 1916 Cal 188, p 195, 16 Cr LJ 497 .

47 *Amritlal Hazara v Emperor* AIR 1916 Cal 188, p 193, 16 Cr LJ 497 **relying on***R v Hibbert* (1875) 13 Cox CC 82 ; *Noor Mohammad Mohd Yusuf Momin v State of Maharashtra* 1970 SCC (Cr) 274, (1970) SCC 696 ; *Gutta Sriramulu Naidu v State* (1962) 1 Andh LT 57 .

48 *Nirmal Chandra De v King Emperor* AIR 1927 Cal 265, p 266-67, 28 Cr LJ 241 .

49 *State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC), AIR 2005 SC 3820 .

50 *State (NCT of Delhi) v Navjot Sandhu*(2005) Cr LJ 3950 (SC), AIR 2005 SC 3820 ; see also commentary under the heading 'Principles of Agency--Duration of its Operation' under s 120B, *post*.

51 *Ibid*

52 *Provincial Govt CP and Berar v Dinath Lala Ganpatrai* AIR 1939 Nag 263, p 264, 41 Cr LJ 27 .

53 *Firm Govind Moti & Co v Sindhu Resettlement Corpn Ltd* AIR 1954 Kutch 33, p 36, 55 Cr LJ 1086 .

54 *Ram Raj v State* AIR 1969 Cal 481, p 488, (1969) Cr LJ 1224 .

55 *VR Nedunchezhian v State* (2000) Cr LJ 976 (Mad), 1999 (2) ALD Cri 559 .

56 *State of Tamil Nadu v Nalini & Ors* (1999) Cr LJ 3124 (SC), AIR 1999 SC 2640 .

57 *Pramatha Nath Talukdar v Saroj Ranjan Sarkar* AIR 1962 SC 876, p 866, (1962) 1 Cr LJ 770 ; *Basi Reddy v State of Mysore* (1972) Mad LJ (Cr) 118 (Mys), (1972) Cr LJ 1141 ; *Madhukar Dasarath Nendekar v State of Mysore* (1972) Cr LJ 978, (1972) Mad LJ (Cr) 123 .

58 *Keher Singh v State (Delhi Admn)* AIR 1988 SC 1883, (1989) Cr LJ 1 (SC) .

59 *SJone* Bin *v A Manuel*AIR 1936 Rang 358, p 360 .

60 *Ibid.*

61 *State of Andhra Pradesh v Kandimalla Subbaiah* AIR 1961 SC 1241, p 1244, (1961) 2 Cr LJ 302 ; *Noor Mohammad v State of Maharashtra* 1970 SCC (Cr) 274, (1970) 1 SCC 696 .

62 *Ajay Kumar Rana v State of Bihar & Ors* (2001) Cr LJ 3837 (Pat) .

63 *Chandiram v Emperor* AIR 1926 Sind 174, p 175, 27 Cr LJ 286 ; *Sirima Narasimha Rao v State of AP* 2010 Cr LJ 769 (AP) (DB) .

64 *Leela Das v Union of India & Ors* (1999) Cr LJ 1807 (Cal) .

65 *Jatin Dutta v Central Bureau of Investigation* 2013 (124) AIC 448 (Gauh) .

66 *Pramod v Oommen Chandy* 2013 (4) KLT 171 .

67 *SK Khetwani v State of Maharashtra* AIR 1957 SC 340 ; *Basi Reddy v State of Mysore* (1972) Mad LJ (Cr) 118 (Mys), (1972) Cr LJ 1141 ; *Dhurvasalu Naidu v State* (1980) LW (Cr) 241, p 244 .

68 *R v Griffiths* (1965) 2 All ER 448 ; *Sardul Singh v State* (1967) 69 Punj LR 168 (DS) ; *Basi Reddy v State of Mysore* (1972) Mad LJ (Cr) 118 (Mys), (1972) Cr LJ 1141 ; *Mohd Hussain Umar Kochra v KS Dalip Singhji* (1970) Cr LJ 9, p 15, AIR 1970 SC 45 .

69 *SSwamirathnam v State of Madras* AIR 1957 SC 340, p 344, (1957) Cr LJ 422 ; distinguishing *Shaporji Sorabji v Emperor* AIR 1936 Bom 154, 37 Cr LJ 688 ; *Choragudi Venkatadri v Emperor* 33 ILR Mad 502 ; *Sardul Singh v State* (1967) 69 Punj LR 168, p 181-182 .

70 *Major EG Barsay v State* AIR 1958 Bom 354, p 359, (1958) Cr LJ 1144, **affirmed** in appeal in AIR 1961 SC 1762, (1961) 2 Cr LJ 828 ; *Nadir Ali Barqa Zaidi v State of Uttar Pradesh* AIR 1960 All 103, p 109, (1960) Cr LJ 84 ; *Hiralal Jain v Delhi Admn* (1973) SC Cr R 304, (1973) Cr LR 224, (1973) Cr LJ 47 ; *Yash Pal Mittal v State of Punjab* (1978) Cr LJ 189, p 191, AIR 1977 SC 2433 ; *Teji Chand v State of Uttar Pradesh* (1977) UP Cr C 281, p 283 (All) .

71 *CN Nair v Govt of India* (1962) KLT 690, (1963) 1 Cr LJ 675 ; *Karnera v Director of Public Prosecutions* (1973) 2 All ER 1242, [1974] AC 104 (HL) ; *Leela Das v Union of India & Ors* (1999) Cr LJ 1807 (Cal) .

72 *Mulcahy v R* LR (1868) 3 HLR 306, 317, cited with approval in *R v Meyrick* (1928) 21 Cr App R 94, p 99 .

73 LC 324.

74 *Quinn v Leathem* (1901) AC 495, p 529 ; *R v Brailsford* (1905) 2 KB 730, p 746 .

75 *Yogesh Joshi v State of Maharashtra* 2008 Cr LJ 3872, p 3876 (SC), AIR 2008 SC 2991, 2008 (6) Scale 469 .

76 *Madhu Dessai v State of Goa* 2011 Cr LJ 4078, p 4098, 4099 (Bom) (DB) .

77 *State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC), AIR 2005 SC 3820 ; *Kehar Singh v State (Delhi Administration)* (1988) 3 SCC 609, AIR 1988 SC 1883, (1989) Cr LJ 1 .

78 *NS Jain v State* (1978) PLR 442, p 444-445 ; *Abdul Rahman v Emperor* AIR 1935 Cal 316, p 324, 36 Cr LJ 982

79 *Kuruchiyan Kunhaman v State of Kerala* (1974) KLT 328 ; *P Pillai v State* (1969) KLT 155, (1969) Mad LJ (Cr) 100 ; *BN Mukerjee v Emperor* AIR 1945 Nag 163, 47 Cr LJ 69 ; *Nirmal Chandra v King-Emperor* AIR 1927 Cal 265, 28 Cr LJ 241 ; *Gulab Singh v Emperor* AIR 1916 All 141, 17 Cr LJ 431 ; *Gutta Sriamulu Naidu v State* (1962) 1 Andh LT 57, (1963) 2 Cr LJ 546 (AP) ; *Harihar v State of Bihar* (1972) Cr LJ 707, p 725, (1972) SCC (Cr) 409 .

80 *Jagannath Misra v State of Orissa* (1974) Cut LT 1253 .

81 *BN Mukerji v Emperor* AIR 1945 Nag 163, 47 Cr LJ 69 ; *Nirmal Chandra Deg King Emperor* AIR 1927 C 265, 28 Cr LJ 241 ; *Gulab Singh v Emperor* AIR 1916 All 141, 17 Cr LJ 431 .

82 *Emperor v Shankarayya Gurushiddhayya Hiremath* AIR 1940 Bom 365, p 368, 42 Cr LJ 111 .

83 *Barindra Kumar Ghose v Emperor* ILR 37 Cal 467, p 470 .

84 *BN Mukerji v Emperor* AIR 1945 Nag 163, p 166, 47 Cr LJ 69 .

85 *Shiv Narayan Laxmi Narayan v State of Maharashtra* AIR 1980 SC 439, (1980) Cr LJ 388 (SC) ; *Bhagwan Swarup Lal Bishan Lal v State of Maharashtra* AIR 1965 SC 682 .

86 *Mahommad Isamil v Emperor* AIR 1936 Nag 97, 38 Cr LJ 106 ; *Chandiram v Emperor* AIR 1926 Sind 174, 27 Cr LJ 286 ; *Kishanchand v Emperor* AIR 1926 Sind 171, 27 Cr LJ 243 ; *Emperor v Nonigopal* ILR 38 Cal 59, 12 Cr LJ 286 .

87 *Parasram v Emperor* AIR 1937 Sind 8, 38 Cr LJ 651 .

88 *Haji Samo v Emperor* AIR 1927 Sind 161, p 163, 28 Cr LJ 426 **relying on***R v Gill* (1818) 2 B&Ald 20, 106 All ER 341 ; *Taylor v R* (1895) 1 QB 25, 18 Cox CC 45, 13 WR 240 .

89 *Biyappanavara Muniswamy v State* AIR 1954 Mys 81, p 83, 55 Cr LJ 905 .

90 *Major EG Barsay v State* AIR 1958 Bom 354, p 359, (1958) Cr LJ 1144, **affirmed** on appeal in AIR 1961 SC 1762, (1961) 2 Cr LJ 828 .

91 *State of Tamil Nadu v Nalini & Ors* (1999) Cr LJ 3124 (SC), AIR 1999 SC 2640 .

92 *Yashpal v State of Punjab* (1978) Cr LJ 189, p 191, AIR 1977 SC 2433 .

93 *Manmohan Singh v State* AIR 1969 Punj 225, p 228, (1969) Cr LJ 932 .

94 *VR Nedunchezhian v State* (2000) Cr LJ 976 (Mad), 1999 (2) ALD Cri 559 .

95 *State of Tamil Nadu v Nalini & Ors* (1999) Cr LJ 3124 (SC), AIR 1999 SC 2640 .

96 *Topandas v State of Bombay* AIR 1956 SC 33, (1956) Cr LJ 138 ; **relying on** 2 Hawk, c 47, s 8 ; 3 Chit Cr L second edn 1141; *R v Thompson* (1886) 16 QBD 832 ; *R v Manning* 12 QBD 241 ; *R v Plummer* (1902) 2 KB 339 ; *Gulab Singh v Emperor* AIR 1916 All 141, 17 Cr LJ 431 ; *King-Emperor v Osman Sardar* AIR 1924 Cal 809, 25 Cr LJ 1048 ; *Kasem Ali v King-Emperor* AIR 1927 Cal 949, 28 Cr LJ 449 ; *Prafulla Kumar Roy Chowdhury v Emperor* AIR 1926 Cal 345 ; *Kannangara Aratchize Dharmasena v King* (1951) AC 9 (PC) ; *Fakhruddin v State of Madhya Pradesh* (1967) Jab LJ 441, p 443, AIR 1967 SC 1326 ; *Bhagat Ram v State of Rajasthan* AIR 1972 SC 1502, (1972) SCC (Cr) 751 ; *Karim v State* (1971) KLT 672 ; *Kunhaman v State of Kerala* (1974) KLT 328 ; *State of Rajasthan v Tekchand* (1977) WLN 473, p 477 (one person cannot conspire with himself) .

97 *Bimbadhar Pradhan v State of Orissa* AIR 1956 SC 469, p 473, 1956 Cr LJ 831 ; *State of Rajasthan v Tekchand* (1977) WLN 476, (1977) Cr LR 564 .

98 *Haji Samo v Emperor* AIR 1927 Sind 161, 28 Cr LJ 426 .

99 *Bimbadhar Pradhan v State of Orissa* AIR 1956 SC 469, (1956) Cr LJ 831 ; *State of Rajasthan v Tekchand* (1977) WLN 476, (1977) Cr LR 564 .

1 *Major EG Barsay v State* AIR 1959 Bom 354, p 359, (1958) Cr LJ 1144 .

2 *Chandiram v Emperor* AIR 1926 Sind 174, p 175, 27 Cr LJ 286 .

3 *Major EG Barsay v State of Bombay* AIR 1961 SC 1762, p 1778, (1961) 2 Cr LJ 828 .

4 *Mahommad Ismail v Emperor* AIR 1936 Nag 97, p 99 ; *Chandiram v Emperor* AIR 1926 Sind 174, 27 Cr LJ 286 ; *Kishan Chand v Emperor* AIR 1926 Sind 171, 27 Cr LJ 243 ; *Emperor v Nani Gopal* 38 ILR Cal 559, 12 Cr LJ 286 .

5 *Rash Behari Shaw v Emperor* AIR 1936 Cal 753, p 760 ; the case law discussed there.

6 *SSwamirathnam v State of Madras* AIR 1957 SC 340, p 344, (1957) Cr LJ 422, **distinguishing***Shaporji Sorabji v Emperor* AIR 1936 Bom 154, 37 Cr LJ 688 ; *Choragudi Venkatadri v Emperor* ILR 33 Mad 502, (1910) 20 MLJ 220 .

7 *Abdul Rahman v Emperor* AIR 1935 Cal 316, p 324, 36 Cr LJ 982 .

8 *Chandiram v Emperor* 1926 Sind 174, p 175, 27 Cr LJ 286 .

9 *Lakhmichand Ghandamal v Emperor* AIR 1947 Sind 49, p 54 .

10 *Parasram v Emperor* AIR 1937 Sind 58, 38 Cr LJ 651 .

11 *V Govindrajulu v State of Mysore* AIR 1962 Mys 275, p 278, (1962) 2 Cr LJ 765 .

12 *R Balakrishna Pillai v State* (1996) Cr LJ 757 (Ker) .

13 *State of Tamil Nadu v Nalini* (1999) Cr LJ 3124 (SC), AIR 1999 SC 2640 .

14 *Ibid*.

15 *Ibid*.

16 *Ibid*.

17 *Major EG Barsay v State* AIR 1958 Bom 354, p 359, (1958) Cr LJ 1144 ; **affirmed** on appeal in AIR 1961 SC 1762, (1961) 2 Cr LJ 828 .

18 *State of Bihar v Dewat Ram* AIR 1959 Pat 207, p 210, (1959) Cr LJ 686 .

19 *Amritlal Hazra v Emperor* AIR 1916 Cal 188, p 193, 16 Cr LJ 497 .

20 *Mahommad Hadi Husain v King Emperor* AIR 1928 Oudh 277, 29 Cr LJ 983 .

21 *Emperor v Shankaraya Gurushiddhayya Hiremath* AIR 1940 Bom 365, p 366, 42 Cr LJ 111 per Beaumount CJ.

22 *R v Orman* (1880) 14 Cox 381 .

23 *Gangaram Kondiba Ingle & etc v State of Maharashtra* (2000) Cr LJ 336 (Bom) .

24 *VR Nedunchezhian v State* (2000) Cr LJ 976 (Mad), 1999 (2) ALD Cri 559 .

25 *VR Nedunchezhian v State* (2000) Cr LJ 976 (Mad), 1999 (2) ALD Cri 559 .

26 *Leela Das v Union of India & Ors* (1999) Cr LJ 1807 (Cal) ; *Keher Singh v State (Delhi Admn)* AIR 1988 SC 1883, (1989) Cr LJ 1 (SC) .

27 *Bacha Babu v Emperor* AIR 1935 All 162, p 166, 36 Cr LJ 684 ; *Lennart Schussler v Director of Enforcement* (1970) SC Cr R 369, AIR 1970 SC 549 ; *Marsi Balayya v State of Orissa* (1976) Cut LT 374 .

28 *Pravindbhai Kashiram Patel v State of Gujarat* 2011 Cr LJ 3174, p 3177 (Guj) .

29 *Major EG Barsay v State* AIR 1961 SC 1762, p 1778, (1961) 2 Cr LJ 828, **affirming**AIR 1958 Bom 354, 1958 Cr LJ 1144 ; *Lennart Schussler v Director of Enforcement* AIR 1970 SC 549, 1970 SC Cr R 369 ; *Bimbadhar Pradhan v State of Orissa* AIR 1956 SC 469, p 474, 1956 Cr LJ 831 ; *Gulab Singh v Emperor* AIR 1916 All 141, p 146 ; *Yogesh Joshi v State of Maharashtra* 2008 Cr LJ 3872, AIR 2008 SC 2991 .

30 *Amritlal Hazra v Emperor* AIR 1916 Cal 188, p 193, 16 Cr LJ 497 .

31 *Marsi Balayya v State of Orissa* (1976) 42 Cut LT 374 ; *Jagannath Misra v State of Orissa* 1974 Cut LT 1253 .

32 *Om Prakash v State of Haryana* 1980 SC Cr R 152, p 155, 1980 SCC (Cr) 101 .

33 *Bimbadhar Pradhan v State of Orissa* AIR 1956 SC 469, p 474, 1956 Cr LJ 831 .

34 *Mulcahy v R* LR (1868) 3 HL 306, p 317 .

35 *Gulab Singh v Emperor* AIR 1916 All 141, p 146 .

36 *Yogesh Joshi v State of Maharashtra* 2008 Cr LJ 3872, p 3877 (SC), AIR 2008 SC 2991 .

37 *Ramesh Umesh Tanti v State of Bihar* 2010 Cr LJ (NOC) 730, (2012) 2 AIR Jhar R 44 (Jhar) .

38 *State of Bihar v Kailash Prasad Sinha* AIR 1961 Pat 451, p 459, 1961 Cr LJ 677 .

39 *Shiv Narayan Laxmi Narayan v State of Maharashtra* 1980 Cr LJ 388, p 391(SC), AIR 1980 SC 439 .

40 *M Srinivasulu Reddy v State, Inspector of Police, ACB Nellore* (1991) 3 Andh LT 542 .

41 Per Wadhwa J in *State v Nalini* (1999) 5 SCC 253, AIR 1999 SC 2640, (1999) Cr LJ 3124 ; **see also***State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC) .

42 *Tanviben Pankajkumar Divetia v State of Gujarat* (1997) 7 SCC 156, AIR 1997 SC 2193 ; **see also***State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC)

43 *VC Shukla v State* (1980) 2 SCC 665, AIR 1980 SC 1382 ; **see also***State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC) .

44 *Noor Mohammad Yusuf Momin v State of Maharashtra* AIR 1971 SC 885 ; **see also***State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC) .

45 *Sirima Narasimha Rao v State of AP* 2010 Cr LJ 769, p 775, 776 (AP) (DB) .

46 *Esher Singh v State of AP* (2004) 11 SCC 585, AIR 2004 SC 3030, (2004) Cr LJ 5021 ; **see also***State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC) .

47 *R v Anderson* (1985) 2 All ER 961 ; **see also***State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC), AIR 2005 SC 3820 .

48 *Daniel Youth v King* AIR 1945 PC 140 .

49 *Alvin Krumlewitch v United States of America* 93 L Ed 790l; **see also***State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC), AIR 2005 SC 3820 .

50 *State (NCT of Delhi) v Navjot Sandhu* (2005) Cr LJ 3950 (SC), AIR 2005 SC 3820 .

51 *Leela Das v Union of India & Ors* (1999) Cr LJ 1807 (Cal) ; **see** commentary under the heading 'Direct Evidence Seldom Available--Inference from Circumstantial Evidence' under s 120B .

52 *Central Bureau of Investigation, Hyderabad v K Naryana Rao* 2012 Cr LJ 4610 (SC), 2012 AIR SCW 5139, (2012) 9 SCC 512, 2012 (9) Scale 228 ; *Thomas AV v State of Kerala* 2013 (4) KLT 410 (Ker) .

53 *Shambeher Singh etc v State of Uttar Pradesh* AIR 1994 SC 1595, (1994) Cr LJ 1584 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter VA

Criminal Conspiracy

[54][S. 120B.

Punishment of criminal conspiracy.--

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, [55][imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.]826

Comments

1. Scope and Applicability

Sections 120A and 120B of the IPC have brought the law of conspiracy in India in line with the English law by making the overt act unessential when the conspiracy is to commit any punishable offence. The most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of the agreement, but the very agreement is an offence and is punishable.[56]Resorting to s 120B of the Penal Code is permissible only when there is a conspiracy to commit an offence, but the offence is not actually committed, or, when there is conspiracy to do an illegal act, which itself827 is not an offence.[57] It is not illegal to try accused persons on a charge of conspiracy to commit an offence even if the substantive offence has been committed.[58]

Conspiracy is the substance of offence.[59] This section provides for the punishment of 'criminal conspiracy' as defined in the previous section.[60] Sub-section (1) imposes a penalty equal to the punishment for abetment, on participation in a criminal conspiracy to commit an offence punishable with death, imprisonment for life, or rigorous imprisonment for a term of two years or upwards, in case no express provision is made in the IPC for the punishment of such a conspiracy. Sub-section (2) imposes a lighter penalty in the case of a criminal conspiracy not covered by sub-s (1). Thus, for the purposes of punishment the section contemplates two classes of criminal conspiracies, *viz*, the first, in which the conspiracy is formed for the commission of a serious offence but no act or illegal omission has taken place in pursuance of it; and the second in which the conspiracy is formed in order to do an illegal act or an act which is not illegal, by illegal means; this sort of conspiracy, in no case amounts to abetment and does not amount to a criminal conspiracy unless some act besides the agreement is done in pursuance thereof.[61]

If a matter has gone beyond the stage of mere conspiracy and offences have actually been committed in pursuance thereof, a conviction, also under this section, for conspiracy *simpliciter* is unnecessary.[62] When an accused is convicted and sentenced for composite charge under s 120B read with some other offences no separate sentence is called for those offences.[63] The section will have no application even when there is no offence which is punishable under the various sections of this IPC .[64] The section would apply to those who are members of the conspiracy during its continuance. The emphasis is on the words 'is party'. It is not that the agreement as such that is punishable. Conspiracy is intended to be tried as continuing offence and whoever is a party to conspiracy during the period for which he is charged, is liable under this section.[65] So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice as necessity.[66] The section will have no application even when there is no offence which is punishable under the various sections of this Code.[67]

Offence created by ss 109 and 120B are distinct offences. Where a number of offences are committed by several persons in pursuance of a conspiracy, it is not illegal to charge them with those offences as well as with the offence of conspiracy to commit those offences. Cases in which a different view was taken, will, in view of828 the Supreme Court decision in *State of Andhra Pradesh v Kandimalla Subbaiah* ,[68] no longer be good law.[69] Referring to the observations of Finnemore J, in *R v Dawson* ,[70] their Lordships of the Supreme Court observed in *State of Andhra Pradesh v Kandimalla Subbaiah* :[71]

> We agree that it is not desirable to charge the accused persons with conspiracy with the ulterior object of letting in evidence which would otherwise be inadmissible, and that it is undesirable to complicate a trial by introducing a large number of charges spread over a long period. But then this is only a question of propriety and it should be left to the Judge or the magistrate trying the case to adopt the course which he thinks to be appropriate in the facts and circumstances of the case. It cannot be said as a matter of law that such a trial is prohibited by the CrPC .

This decision has been cited with approval in *Pramatha Nath Talukdar v Saroj Ranjan Sarkar* .[72] Where the offence has been actually committed, it would be more appropriate to proceed for the trial of the principal offence and abetment thereof rather than with the offence of criminal conspiracy. In such a case, even if the charge of criminal conspiracy does not become irrelevant, at least it cannot be regarded as the primary charge where offence in pursuance of the conspiracy has been committed.[73]

The petitioner Chartered Accountant had issued a certificate to the company which was submitted by the company to the excise official while seeking renewal of the licence for the ensuing year. Allegation against him was of conspiring with the officers in charge of the affairs of the company to prepare false documents and based thereon seek a benefit from the excise authorities at Delhi, benefit being of renewal of the L-1 licence. Where the chartered accountant merely certifies a statement of fact based on the records produced by a company on the allegation that the record is fabricated, charge of a conspiracy cannot be framed against the Chartered Accountant unless there is some more material against the Chartered Accountant. The petitioner had not applied for extension of licence. Charge under s 120B, IPC could not be framed against the accused appellant.[74]

To attract the applicability of s 120B it has to be proved that all the accused had the intention and they had agreed to commit the crime. There is no doubt that conspiracy is hatched in private and in secrecy for which direct evidence would rarely be available. It is also not necessary that each member to a conspiracy must know all the details of the conspiracy.[75]

Once a conspiracy is given effect to, the individual acts of the conspirators thereafter do not brush the others with the same taint for the reason that once a829 common intention is given effect to, the theory of constructiveness no longer remains in operation.[76]

2. Section is not Retrospective in Operation

Commentary under s 120A may be referred to.

3. The Word "Whoever" in Sections 415 and 120B does not include Company

The IPC does not contain any provision similar to that in the Income-tax Act 1961, which specifically states that a company, being a person within the meaning of the word as defined in s 11, IPC can be punished even for offences involving *mens rea* as an essential ingredient. The Income-tax Act, the Essential Commodities Act, the Prevention of Food Adulteration Act, *etc.*, do contain specific provisions to deal with offences by companies.[77]

Prosecution against the company which being a juridical person is, in a sense, *doliincapax* and it cannot commit an offence of cheating within the meaning of s 415, which positively involves criminal intention to deceive others. The same is also true in respect of the offence of conspiracy which involves a guilty mind to do an illegal thing. Therefore, although a person who is victim of deception can be a company, the perpetrator of deception cannot be a corporate body like a company or association. It can only be a natural person who is capable of having *mens rea* to commit the offence. Consequently, the words 'whoever' occurring at the beginning of ss 415 and 120B cannot include in its sweep, a juridical person like a company. In view of this position the objection raised on behalf of the petitioner to the maintainability of the complaint will have to be upheld.[78]

4. Where No Express Provision is made in the Code for the Punishment of such Conspiracy

Whereas s 120A, IPC provides an extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy within the meaning of s 107 ; s 120B provides a punishment for criminal conspiracy 'where no express provision is made in this Code for the punishment of such a conspiracy'. These words do not mean that when there is proof of an abetment of an offence, the charge should be for such abetment. It only includes cases where there is an express provision for the punishment of the particular conspiracy alleged and the only such case in the IPC is that under s 121A, IPC . It is optional for the prosecution to proceed for the abetment of the offence by conspiracy under s 107 or for the conspiracy as a substantive offence under s 120B . This is in accord with the law in England.[79] Where a criminal conspiracy amounts to an abetment under s 107, it is unnecessary to invoke the provision of ss 120A and 120B, as the IPC has made specific provision for the punishment of such a conspiracy.[80] There is no express provision made in the830IPC for the punishment of conspiracy to fabricate false evidence. Hence the section applies to a conspiracy to fabricate false evidence.[81]

5. Subsistence of Conspiracy

The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence, whenever any one of the conspirators does an act or series of acts, he would be held guilty under s 120B of the IPC .[82]

Most Important Ingredient--Duty of Court

The most important ingredient of the offence is the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators, but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved.[83]

To make out an offence under s 120B, IPC, the prosecution must adduce evidence to show the existence of some agreement between the accused persons. In the instant case, the allegation was that the accused appellants informed the accused that the victim was carrying money which could be looted. But there was absence of specific evidence as to where and when the conspiracy was hatched and what was the purpose of the conspiracy. Appellants were acquitted of the charge under s 120B, IPC .[84]

Sections 71 and 120B Considered Together

Section 71, IPC, limiting punishment of offences in certain cases does not apply to conspiracy as defined in this section, *i.e.*, in connection with an offence committed in consequence of a conspiracy; in other words, the conspiracy to commit an offence and the actual commission of the offence are two

separate and distinct transactions. This section provides punishment for conspiracy; it is ideal to say that persons can be punished under this section if they only conspire and do not commit an offence, but cannot be punished under it if, besides conspiring, they actually proceed to commit the offence.[85]

Section 34, 109 and 120B Considered Together

Commentary under same heading in s 34, *ante*, may be referred to.

Distinction between Section 34, Section 120A and Section 120B

Commentary under same heading in s 34, *ante,* may be referred to.831

6. Cognizance

It is well settled that at the stage of cognizance and issuance of process, the magistrate has only to see whether the FIR discloses an offence and whether there is sufficient ground for proceeding against the accused. The magistrate at this stage is not to appreciate the evidence meticulously. When the FIR of the instant case shows that the allegations made therein disclosed criminal offence and the order shows that the learned CJM, after perusing the case diary has found a *prima facie* case under ss 420, 467, 468, 471, 120B, IPC, the order of taking cognizance is proper.[86]

If Allegations, FIR/Complaint *Prima Facie* do not Constitute the Offence of Conspiracy and other Offences, FIR/Complaint can be Quashed under Section 482 , Code of Criminal Procedure 1973

The complainant firm, a manufacturer of *bidis*, lodged an FIR against the accused for the offence of cheating, conspiracy and infringement of trademark or copyright. There was a dispute between the complainant and its partners regarding sale of *bidis* within specified areas as per an agreement and the accused were *bona fide* purchasers of goods and were neither manufacturers nor partners of complainant firm. The allegations made in the FIR against the accused, even if taken at face value and accepted in their entirety, *prima facie* were held not to constitute any offence within the provisions of ss 78 - 79, Trade and Merchandise Marks Act 1958, ss 63 - 64 of the Copyright Act 1957 and ss 420, 120B, IPC, the FIR against the accused was quashed by the High Court on petition filed by the accused persons under s 482, CrPC .[87]

Where the accused was summoned under ss 420 and 120B, IPC, on a criminal complaint, the accused allegedly floated a company for a fraudulent purpose. The complainant had given large amounts to the accused to purchase its units, the company owned 250-300 acres of land in which over one lakh eucalyptus trees were planted, thus the company had substantial assets and this was not so only on paper. The accused had executed a sale deed of 6 acres of land in favour of the petitioner, merely because the accused retained the sale proceeds of the trees, it cannot be inferred that he had fraudulent intentions from the beginning. On these facts it was held that no criminal offence is made out and it was a case of breach of contract as liability of the accused was of a civil nature. The complaint was quashed.[88]

But where the cognizance of offence was taken under ss 120B and 116, IPC and ss 5 and 12 of the Prevention of Corruption Act 1988, the accused entered into conspiracy with the co-accused and tried to bribe the Deputy Commissioner for availing an NOC. The Deputy Commissioner was newly posted and had no reasons to falsely implicate them. The co-accused was an employee of the department and was suspended and facing a departmental enquiry, from the facts of the case and as revealed in the FIR, it was clear that a *prima facie* case could be made out, not only for conspiracy between accused and the co-accused but for direct abetment for the purpose of bribing the Deputy Commissioner, so cognizance taken against the accused persons regarding offences was found proper and the proceedings arising out of the FIR lodged in the police station were not quashed.[89]

832Where the complainant and the accused persons were contesting the election of the Board of Directors of the bank, an agreement was reached between the complainant and the accused person for withdrawal of candidature on deposit of some money by the accused persons, the complainant filed a complaint alleging that he withdrew his candidature but the agreed amount was not deposited, the order of magistrate taking cognizance of offences and issuing process under ss 417 and 120B was held illegal as such contract is against law and not enforceable by virtue of s 23 of the Indian Contract Act 1872, as a result the order of the judicial magistrate first class was set aside and criminal proceedings initiated were quashed by the Karnataka High Court by exercising inherent powers under s 482, CrPC .[90] But where the charges were under ss 120B, 409, 420, 468, 471, 477A of the IPC, the appellant/accused obtained overdraft facilities from the bank which was much beyond financial power of branch manager of the bank. The branch manager was alleged to be in the habit of receiving illegal gratification from the customers. The Apex Court observed that there may not be any direct evidence against the appellant/accused as regards payment of illegal gratification by him to the branch manager or accountant but a natural inference may be drawn that he did take advantage of said overdraft facility upon some other consideration. Continuation of prosecution against appellant/accused in the circumstances it was held, would not be travesty to justice or prejudicial. The order of the High Court refusing to quash proceeding under s 482, CrPC, against appellant/accused was upheld.[91]

Where the complaint was filed against the accused persons alleging commission of offences under ss 406, 420, 120B, 409, IPC, allegations made by the complainant were that he was duped by accused company. The complainant supplied consignment to accused, no dispute regarding payment of price was alleged, dispute related only to non-conveyance of form 'H', intention to deceive the complainant was not evident on the part of the accused. The dispute being of a civil nature, on these facts it was held that continuance of proceedings against the accused person was an abuse of the process of court so the proceedings pending before the judicial magistrate were quashed.[92] Where defamatory matter was published in a newspaper, allegations of criminal conspiracy between the editor, executive editor, managing editor and resident editor with clear intention of defamation of the complainant were made, all of them were held liable to be prosecuted and application for quashing proceedings on the ground that only the editor was responsible for the said publication was not allowed.[93]

A complaint against bank manager was that cheque was issued by accused *A* in favour of complainant. Accuseds *B* and *C* encashed cheque on behalf of the complainant as he was not holding account in bank. They, however, did not send the amount to complainant as assured by them, and the signature on reverse of cheque was admittedly that of the payee. The bank manager (accused) cannot be held responsible for passing cheque without verifying signature of payee on reverse of cheque and crediting it to account of accused *B* and accused *C* whose names were mentioned above signature of payee, no offence is made out against him and complaint against accused bank manager is liable to be quashed.[94]833

7. Conditions Requisite for Initiation of Proceedings

Chapter V-A, comprising ss 120A and 120B, was inserted by the Indian Criminal (Amendment) Act 1913, making criminal conspiracy itself an independent and substantive offence for the first time in India.[1] The word 'illegal' used in the definition of the offence in s 120A has been defined by s 43 as applicable to everything which is an offence, which is prohibited by law or which furnishes ground for a civil action. The very wide scope of the definition would make even a civil trespass indictable as a criminal conspiracy. Under English law to which the Indian law has been assimilated, indictments for conspiracy extend to almost every possible sort of case.[2]

Sections 195 and 196A of the CrPC 1898 have been repealed and replaced by ss 195 and 196 of the CrPC .[3]

8. Prosecution of Certain Classes of Criminal Conspiracy

It is apparent from these sections that there is no condition precedent to a court taking cognizance of a criminal conspiracy the object of which is to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for two years or upwards and not specified in ss 195 and 196 .[4] No consent was necessary to a prosecution for criminal conspiracy to commit a non-cognizable offence when s 195(4) of the old CrPC was applicable.[5] Under the *proviso* to sub-s (2) of s 196 where the criminal conspiracy is one to which the provisions of s 195, CrPC apply, no consent for prosecution is necessary.

Where in a case tried under the old CrPC, a charge under s 467 read with s 120B, IPC was framed, but there was no sanction obtained before the complaint was entertained, it was held that conviction under s 467 read with s 109 would be quite proper, although the charge under ss 467 / 120B could fail for want of sanction.[6] But where the accused persons were charged with the substantive offence of forgery under s 467, IPC, and abetment of that offence under s 467 read with s 114, IPC, it was held unnecessary to charge the accused also for conspiracy to commit forgery under s 120B, so as to attract the provisions of s 196A,[7] of the old CrPC .

Accused appellant had aided and abetted the co-accused Army Havaldar, a public servant, in obtaining a sum of Rs. 25000/- as illegal gratification for securing appointment of the son of the prosecution witness. He was convicted under s 120B, IPC and ss 7, 13(2) of the Prevention of Corruption Act 1988.[8]

834Where the accused was charged under ss 120B and 409, IPC, and no sanction for prosecution was obtained, it was held that the absence of sanction for charge under s 120B, IPC, did not vitiate the trial on the substantive charge under s 409, IPC .[9]

Where the object of criminal conspiracy is cheating by impersonation under s 419, IPC, sanction for prosecution under s 196, CrPC, is not necessary.[10]

There is no bar to prosecuting an offender for abetting, under s 109, IPC . An offence, which has, in fact, been committed in pursuance of a conspiracy, notwithstanding the fact that a prosecution under s 120B, cannot be launched without previous consent. When the second clause of s 107 is read with the definition of conspiracy in s 120A, it is clear, apart form any decision on the subject, that the State has a right to file a prosecution under s 120B, whether or not in pursuance of the conspiracy to commit an offence, the offence takes place. If it does take place, the prosecution has the option to treat the person, who has conspired with another, as an abettor within the meaning of s 107, IPC .[11]

Where Object of Conspiracy and means Adopted are Separable, Sanction is not Necessary

There is a recognizable difference between the object of a conspiracy and the means adopted to realise the object. If they are separable, then sanction is not necessary. It does not matter if the object is erroneously mixed up with the statement of the method of attaining it in the body of the complaint. It is perfectly open to the magistrate, upon the evidence to dissect the facts in order to decide the question of sanction.[12]

Where the offence is a cognizable one punishable with rigorous imprisonment for two years or more, s 196, CrPC, does not necessitate a previous sanction.[13]

Where the conspiracy is to obtain money (property) by cheating, an offence punishable under s 420, IPC, no consent under s 196, CrPC, is necessary as the punishment may extend to more than two years, imprisonment.[14]

If the object of the conspiracy was not to commit an offence under s 471, IPC, but to make a false claim in a court of justice and to obtain a decree on it, s 196, CrPC, has no application whatever. It is s 195, CrPC, which would apply.[15]

The words 'not punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards' in s 196, CrPC, now govern both a cognizable as well as a non-cognizable offence. Whether a sanction has been granted835 under s 196 is a question of fact which ought to be urged at the trial, and not before the High Court.[16]

Sanction under s 197, CrPC, is not necessary for instituting proceedings against a public servant on charges of conspiracy and of bribery.[17]

The fact that s 196A had been inserted in the CrPC 1898 and almost the same provision has been introduced in s 196 of the new CrPC shows that the Legislature is anxious that prosecutions under s 120B should not be started indiscriminately. No person should be allowed to be convicted of an offence under s 120B punishable with imprisonment for less than two years if his prosecution under that section is neither sanctioned by the State Government or the district magistrate, nor was within the contemplation of the officer making complaint under s 340 (s 476 old), CrPC .[18]

9. Conspiracy -- Kidnapping for Ransom

The prosecution witness identified by voice, the person who on telephone had demanded ransom for releasing the victim. Scientific officer of the CBI who examined the Voice Spectrography of the caller deposed that the tape recorded voice was that of the accused. On the information given by the accused, remaining accused were arrested and victim was rescued. Accused was convicted under s 120B and s 364 IPC .[19]

Accused persons had kidnapped the son of the complainant, and demanded rupees five lacs as ransom threatening the safety of the kidnapped boy on telephone. Trap was laid, accused were arrested and on the disclosure statement made by them, the kidnapped boy was recovered. The testimony of the father of the boy was believed. Non-examination of the independent witnesses was held immaterial. Accused persons were convicted under ss 120B and 364A, IPC .[20]

10. Procedure

In the case of conspiracies falling under sub-s (1) of this section, the procedure is the same as in the case of the offence which is the object of the conspiracy. The offence under sub-s (1) of this section is cognizable or non-cognizable, bailable or non-bailable, according as the offence, which is the object of conspiracy, is cognizable or non-cognizable, or bailable or non-bailable. It is triable by the court by which abetment of the offence, which is the object of conspiracy, is triable. The offence under sub-s (2) is non-cognizable and bailable and triable by a magistrate of the first class. In view of the specific provisions of s 320(9) of the CrPC no offence under this section is compoundable. This question is, however, debatable as in the matter of sentence, the conspiracy has been equated with abetment, and this section provides that whoever is a party to criminal conspiracy to commit an offence, shall be punished in the same manner as if he had abetted such offence. According to s 320(3), CrPC, when any offence is compoundable under that section, the abetment of such offence may be compounded in like manner. The same provisions should,836 therefore, apply to an offence under this section in the matter of the composition of the offence.

If there is specific allegation by the prosecution that the accused in question was a party to the criminal conspiracy, neither the Special Court nor the High Court is justified in granting bail to the said person.[21]

Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing a serious threat to the financial health of the country. While granting bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the

accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. In case registered under s 120B read with s 420, 409 and 477A, IPC, and s 13(2) read with s 13(1)(c) and (d) of the Prevention of Corruption Act 1988, the allegations against the accused appellant sitting MP and son of Chief Minister were of amassing huge illegal wealth. Pending CBI investigation, bail was refused.[22]

11. Place of Trial

Sections 177, 180, 181 and ch 13 of Code of Criminal Procedure 1973, may be referred to.[23]

12. Joint Trial

Sections 218, 220, 223 Code of Criminal Procedure 1973, may be referred to.[24]

Facts of Some Accused not being Common in all Cases does not affect their Joint Trial

If the alleged offences of conspiracy, in a number of given cases, relate to one and the same transaction, they may be tried together in order to avoid multiplicity of proceedings and conflict of decisions. In *Dhuruvasalu Naidu v State* ,[25]where a common FIR was filed and a reading of it and other records showed that there was only one criminal conspiracy, the object of which was to commit theft of valuable timber from a reserve forest and to transport it by dishonestly using the permits, obtained for purposes other than cutting and removing trees, and to share the profits, arising out of that act, it was held that the joint trial of the accused was not illegal. It was further observed that the mere fact, that some of the accused, in the alleged cases, would be different, would not change the nature and character of the conspiracy.837

Validity of Joint Trial Depends on Initial Accusations and not on Facts Ultimately Proved--Effect of the Validity of Joint Trial when Offences Not Committed in same Transaction Pursuant to Conspiracy

In a case of conspiracy, it is not necessary for the validity of a trial to ultimately prove that the conspiracy alleged actually existed. The validity of a joint trial upon charges for offences, alleged to be parts of the conspiracy, is determined by the initial accusations levelled by the prosecution against the whole body of accused persons.[26] Even if the charge of a conspiracy under s 120B, IPC, is not established, it is open to the prosecution to prove the offence of unlawful assembly.[27] However, in *KTMS Mohd v Union of India* ,[28] where three persons were prosecuted on the complaint of the Income-tax Officer Madras under s 120B, IPC, read with s 193 IPC, read with s 277 of the Income Tax Act and under s 193 *(simpliciter)*IPC and two of them were also indicted under s 277 *(simpliciter)* of the Income Tax Act 1961, the charge under s 120B, IPC, could not be established but the accused were convicted and sentenced under s 193, IPC, under s 277 of the Income Tax Act 1961 by the trial court. The conviction was confirmed in appeal and also in revision by the Madras High Court. On appeal by the accused before the Supreme Court, the Apex Court observed that the complaint was ill-drafted and the necessary ingredients to make out a case for conspiracy were not brought out therein and with the further observation that in the facts and circumstances of the case, the misjoinder of charges cannot be said to be a mere irregularity, it was held that by the joint trial with misjoinder of charges, a failure of justice has, in fact, been occasioned, since all the courts below have clubbed all the allegations levelled against all the three appellants and two other accused together and considered the same as if all the offences were committed in the same transaction pursuant to a conspiracy, which is neither supported by the allegations in the complaint nor by the evidence as required under the law and the conviction of the appellants under s 193, IPC and s 277, Income Tax Act 1961 was accordingly set aside.

13. Charge

It is well settled that if a charge is framed for a substantive offence, a person may, without any additional charge being framed, be convicted of an attempt to commit that offence. He may similarly be convicted of abetment to commit that offence, though on this point conflicting views have been expressed in cases decided under the old Code. But no person can be convicted of the offence of criminal conspiracy without there being a charge under s 120B, IPC .[29] The conspiracy to commit an offence is, by itself, distinct from the offence for which the conspiracy is entered into. Such an offence, if actually committed, would be the subject-matter of a separate charge.[30]

838Where a number of offences are committed by several persons in pursuance of a conspiracy, it is not illegal to charge them with those offences, as well as with the offence of conspiracy to commit those offences.[31]

A charge of conspiracy may prejudice the accused because it has forced them into joint trial and the court may consider the entire mass of evidence against every accused. In the charge of conspiracy, the court has to guard itself against the danger of unfairness to the accused.[32]

It is also well-settled that the indictment in all cases of conspiracy must, in the first place, charge the conspiracy, but that in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed.[33]Where the object of the agreement is to do an unlawful act, and not to do a lawful act by unlawful means, it is sufficient to specify the unlawful object without specifying the means adopted by all or any of the conspirators to gain that object.[34] The mere fact that the charge is vague because it does not disclose the mode in which the offence was committed, would not make the trial illegal especially if no prejudice is thereby caused to the accused.[35] It is convenient in a charge of conspiracy to draw attention to the existence of facts which form a connecting link between what might otherwise have appeared to be a series of different individual offences.[36]

Even at the stage of framing charge, it is the duty of the court to see whether there is sufficient material to go into trial.[37] A presumption against an accused to be drawn at the stage of framing charge would be a logical and sensible presumption, but certainly not a leap in the dark or stretch in imagination.[38]

For framing a charge for offence under s 120B of the IPC, the Court has to *prima facie* take into account the material placed on record by the prosecution. The accused, a Registering and Licensing Authority, without complying with the Rules, signed the endorsement and issued licence, thus, the framing of charge under s 120B, IPC against the petitioner was held proper.[39]

Where the accused persons were charged for offences under ss 120B, 409 and 420, IPC, materials collected were sufficient for raising a strong suspicion to form a presumptive opinion as to the existence of the factual ingredients constituting alleged offences, circumstantial evidence *prima facie s*howing alleged criminal conspiracy was executed with ingenuity, dexterity and adroitness, the order framing charge against the accused persons was found proper.[40]

Once the Court finds an accused guilty of s 120B, where the accused had conspired to commit an offence and actually committed the offence with other accused with839 whom he conspired, they all shall individually be punishable for the offence *viz*. s 300 read with s 120B, IPC for which such conspiracy was hatched. On facts, conviction of the accused for offence under s 120B read with s 302, IPC was held proper.[41]

No Charge of Conspiracy Without Charge of Primary Offence

Under the scheme of the IPC the charge is to be framed on the basis of the evidence contained in the case diary. Section 120-B is an offence of conspiracy. The said section cannot be applied *simpliciter* unless and until some offence is disclosed. There cannot be any conspiracy without any offence. Section 120B has to be appended with a primary offence.[42] Charge framed against the accused

under s 120B, IPC*simpliciter* was quashed.[43]

Agreement Necessary for Charge of Conspiracy

To constitute the offence under s 120B IPC, first, there must be an agreement between the persons who are alleged to conspire.

The agreement should be;

(i) for doing of an illegal act or;
(ii) for doing by illegal means an act which may not itself be illegal.

Thus it is clear that for a charge of conspiracy, only an agreement itself is sufficient.[44]

The essential ingredients of criminal conspiracy are (i) there has to be an agreement between two or more persons; (ii) the agreement must relate to the doing or causing to be done either of (a) an illegal act or (b) an act which is not illegal in itself but is done by illegal means. What is, therefore, necessary, is to show the meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. Mere knowledge or discussion or generation of a crime in the mind of the accused, is not sufficient to constitute an offence.[45]

The offence can be proved by adducing circumstantial evidence or by necessary implication. Meeting of minds to form a criminal conspiracy has to be proved by adducing substantive evidence in cases where circumstantial evidence is incomplete or vague. The gist of the offence of conspiracy lies in the forming of the scheme or agreement between the parties, thus, agreement is essential.[46]840

Charge when not to be Framed on Insufficient Material or Inference or Mere Suspicion

Conspiracy cannot be proved merely on the basis of inferences. The inferences have to be backed by evidence. If the material put forward by the prosecution is insufficient to bring home the guilt of the accused then he is entitled to be discharged.[47] Some general evidence pertaining to the conspiracy would be sufficient to form part of the charge of conspiracy in the charge sheet. As a matter of fact some connecting link or connecting factors somewhere would be enough for framing charge since framing of charge and to establish the charge of conspiracy cannot possibly be placed at par: To establish the charge of conspiracy, cogent evidence of meeting of two minds in the matter of commission of an offence is required, in the absence of which the charge cannot be sustained, this is, however not so, in the matter of the framing of a charge since the incidence of the offence shall have to be investigated.[48]

A conspirator need not be present during the entire period of the conspiracy, if it is shown that he contributed his part for the furtherance of the conspiracy, it is sufficient to hold, that charges have to be framed against him.[49]

Test for Sending a Person to Trial

The test to send a person for trial is whether there is a strong suspicion against him. The suspicion must be aroused in a judicial mind. It is not every suspicion that justifies the trial of an accused. The suspicion must be strong enough to justify the trial.[50] Where in the facts and circumstances of the case at least a strong suspicion arises that there was a conspiracy between the accused persons with the object of deceiving the department, on basis of a certificate, the charge under s 120B, IPC, cannot be quashed.[51] Where the co-accused was alleged to have helped the accused to retrieve his vehicle from a spot and the former had witnessed the shooting of the deceased by the latter, and thereafter he met other co-accused and gave them his vehicle to retrieve the vehicle of the accused from the spot, it was held that these facts raised a strong suspicion of his being party to the conspiracy and so

he was liable to be charged under s 201 read with s 120B, IPC .[52] Where the guilt of criminal conspiracy or cheating against a bank official could not be proved for want of evidence, the summoning order was quashed.[53]

Charge when some Conspirators are Unknown

In a conspiracy case, the accused can be charged with conspiring with persons unknown, but if they are charged with conspiring with persons known, then such persons must be named in the charge.[54]Section 212, CrPC, which requires the particulars of the offence to be stated does not in terms further require that in an841 offence like conspiracy the names of the co-conspirators should also be mentioned, but it is always advisable to give those particulars also in order to give a reasonable notice to the accused that he has been charged with having conspired with so and so (persons named) as also persons unnamed to commit a certain offence.[55]

Charge When Conspiracy is Spread Over Several Years

Where a charge, as framed, discloses one single conspiracy, although spread over several years, there is only one object of the conspiracy (to cheat members of the public). The fact that in the course of years others joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy does not change the conspiracy and does not split up a single conspiracy into several conspiracies.[56]

Charge in Case of Conspiracy of Acts Committed in Pursuance Thereof

Conspiracy to commit an offence is itself an offence and a person can be separately charged with respect to such a conspiracy.[57] There is no analogy between ss 120B and 109, IPC . Where a number of offences are committed by several persons in pursuance of a conspiracy, it is usual to charge them with those offences as well as with the offence of conspiracy to commit those offences. Though it is not desirable to charge the accused persons with conspiracy with the ulterior object of letting in evidence which would otherwise be inadmissible and though it is undesirable to complicate a trial by introducing a large number of charges spread over a long period, this is only a question of property. It should be left to the judge or the magistrate trying the case to adopt the course which he considers appropriate in the facts and circumstances of the case. Such a trial is not prohibited by the CrPC .

When Sanction is Required But Not Obtained--Effect on Charge

If the substantive offence does not require sanction, though the offence of conspiracy does and the sanction is not obtained, the court can proceed with the trial as to the substantive offence as if there were no charge of conspiracy.[58]

Where the accused involved in conspiracy was charged for offences under s 161, IPC and s 5 of the Prevention of Corruption Act 1947, the sanction for their prosecution was obtained under s 197, CrPC but not under s 6 of the Prevention of Corruption Act, charges were held liable to be quashed.[59] But when sanction for offences including criminal conspiracy against a public servant is not necessary since such offences cannot be said to have been committed in discharge of official duties, proceedings cannot be quashed for want of sanction.[60]

***Prima Facie*Evidence for Charge--Charge when not Substantial**

It is convenient, in a charge of conspiracy, to draw attention to the existence of facts which form a connecting link between what otherwise would have appeared to be a842 series of different individual offences.[61] Where no negligence or rashness in performing an operation endangering the life of the patient was averred or proved, surgical injury for curing diseases cannot be said to be injury caused voluntarily punishable under s 326 . By performing an operation no wrongful gain is made to doctors or to a hospital, it was held that no criminal offence under ss 326, 338, 420 read with s 120B was made out and an order for framing of charges against the accused was quashed.[62] Where the charge

against the accused, the erstwhile finance minister, was of conspiring to approve for purchase of TV set at a hiked price, the evidence showed that the accused only put a signature on the file under the direction of the then chief minister, there was no *prima facie* evidence that said signature was done by the accused, in reference to common design of conspirator, also, no knowledge of conspiracy was attributed to the accused, it was held that the order framing the charge of conspiracy against the accused was not proper.[63] But where circumstantial evidence *prima facie* showing alleged criminal conspiracy was executed with ingenuity, dexterity and adroitness, the order framing charge against accused persons was held proper.[64]

Where the co-accused alleged to have helped the accused to retrieve his vehicle from the spot and the former had witnessed the shooting of the deceased by the accused, thereafter he met other co-accused and gave them his vehicle to retrieve the vehicle of the accused from spot, it was held that the facts raised a strong suspicion of his being party to the conspiracy and so he was liable to be charged under s 201 read with s 120B, IPC .[65]

Where statement of complainant's son indicated threat of putting complainant in fear, framing of charge under s 120B read with s 387, IPC was held not illegal.[66] Mere suspicion of motive is not sufficient to frame charges against accused. There should be some reasonable ground to believe that the person has taken part in the conspiracy or in other words, reasonable likelihood of participation. There should be something to connect him with the crime.[67] The evidence of prosecution witnesses, that the person, against whom the evidence was offered, was a person so conspiring, by itself, and without more, is sufficient to pass the *prima facie* standard to enable the judge to frame the charge of conspiracy.[68]But the mere presence in the meeting is not sufficient to frame a charge, against any person, under s 120B, unless it is shown that he was guilty of some overt act.[69] Where the accused is neither a party to the conspiracy, nor is there material on the record to prove *mens rea* on his part, charge for criminal conspiracy against him is not sustainable.[70] Persons once charged under s 120B could not be charged again with abetment under s 114 of the IPC .[71]

843Where the charge against the accused is that they had committed the offence under s 120B read with s 420, IPC, they cannot be convicted separately under ss 120B and 420, IPC .[72]

Framing of charge of conspiracy is generally based on circumstantial evidence as direct evidence of conspiracy is rarely available.[73]

Conviction on Substantive Charge can be made even if Conspiracy not Established

It may or it may not be a duplication to have s 117 as well as s 120B, but there can be no objection to charge under both ss 117 and 120B .[74] A charge under s 120B, read with s 395 of the IPC is not, therefore, artificial.[75] If the charge of conspiracy to commit breach of trust is followed by a substantive charge of criminal breach of trust in pursuance of such conspiracy, there is nothing to prevent the court from convicting an accused under the second charge even if the prosecution fails to establish conspiracy.[76] 'The offence of conspiracy is an entirely independent offence and though other offences are committed in pursuance of the conspiracy, the liability of the conspirators for the conspiracy itself cannot disappear.'[77]

Conviction of One Conspirator Alone--Whether Possible

Where the only persons alleged to have been guilty of the offence of conspiracy are the persons placed on trial and there is no allegation nor any evidence forthcoming that any other persons were, though not placed on trial, concerned with the crime, if all the accused persons except one are acquitted for a charge of conspiracy, the conviction of one only on that charge cannot be sustained.[78] The conspiracy by just one person is unheard of.[79] Where the prosecution was not able to prove that one of the two accused was a party to a conspiracy, charge of conspiracy under s 120B cannot stand against other accused as in a conspiracy there must be two parties.[80]

The conviction under s 120B cannot be sustained when the other accused persons have been

acquitted, for an offence of conspiracy cannot survive if there is acquittal of the other alleged co-conspirators. Where other co-accused conspirators had been acquitted, the conviction of the accused appellant under s 120B, IPC was set aside.[81]

But where, on the findings of the courts below, apart from the persons placed on trial, there was the approver who implicated himself equally with the other accused persons and a number of other prosecution witnesses as having been privy to the conspiracy, the conviction of one only is not illegal. Even if the charge does not844 specifically mention the name of the approver as having been one of the conspirators, s 215, CrPC, will cure the defect if the accused is not misled or the charge has not occasioned a failure of justice. Further, s 464, CrPC will apply.[82] But, where it is not clear as to with whom the accused conspired and to do what, the charge under s 120B, IPC, against him, is groundless.[83]

14. Form of Charge

The following form of the charge may be adopted:

> I (*name and office of the Magistrate, Sessions Judge etc.*) hereby charge you (*name of the accused*) as follows:
>
> That you, on or about the.....day of.....at..... agreed with (*name of the co-conspirator*), to do (*or cause to be done*) an illegal act, to wit ..... (*or an act, which is not illegal, by illegal means to wit.....*) and that you did some acts, to wit ..... besides the agreement, in pursuance of the said agreement, to commit the offence of ..... punishable with death (*or imprisonment for life, etc*) and thereby committed an offence punishable under s 120B of the Indian Penal Code ; and within my cognizance (*or the cognizance of the Court of.....*)
>
> And I hereby direct that you be tried by this Court (*or by the said Court*) on the said charge.

15. Proof of Conspiracy

To substantiate a charge of conspiracy the prosecution must prove:

(i) that the accused conspired with another or others;
(ii) that he did so to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means; and
(iii) that an overt act was done by one or more of the conspirators in pursuance of the conspiracy, but this is not necessary if the agreement was to commit an offence.

The aforesaid can be established by either direct evidence or circumstantial evidence,[84] or by necessary implications.[85] Meeting of minds between the conspirators has to be proved by adducing substantive evidence in cases where circumstantial evidence is vague or incomplete.[86] Confession of accused can be used against co-accused to establish the charge of criminal conspiracy.[87] To establish the charge of conspiracy, there is required cogent evidence of meeting of two minds in the

matter of commission of offence--in the absence of which the charge cannot be845 sustained.[88] The law is well settled that for establishing a criminal conspiracy, the prosecution must place on record some connecting link or connecting evidence of the meeting of minds of the conspirators for achieving a particular object.[89]

Direct evidence, being extremely rare, criminal conspiracy can be proved by the circumstantial evidence.[90]

The appellants accused who were driving a car, intercepted the truck, assaulted the driver and cleaner of the truck, snatched bags which contained cash and silver coins. The appellant no. 3 was the only person who had information about the cash and ornaments in the two bags kept in the cabin of the truck. His involvement in conspiracy was proved. He was convicted under s 120B, IPC, while the appellant nos. 2 and 3 were given benefit of doubt and were acquitted.[91]

The conspiracy cannot be proved merely on the basis of inferences. The inferences have to be backed by evidence.[92] In a charge of conspiracy the court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided.[93]

There must be evidence of meeting of minds between the conspirators resulting in an ultimate decision taken by the conspirators regarding commission of the crime. In the instant case, the only witness examined by the prosecution to prove the alleged meeting between the appellant and the other accused turned hostile. In the absence of the evidence about the meeting of minds between the conspirators, conviction of the accused appellant under s 324 read with the aid of s 120B, IPC recorded by courts below was not sustained, hence was set aside.[94]

Unless there is evidence of criminal conspiracy, merely because deceased N died on account of injury on his abdomen, it cannot be presumed that he died on account of injury inflicted by accused K at the instigation of accused H in conspiracy with other accused persons.[95]

A conspiracy within the meaning of s 120B, IPC, presupposes an agreement by the accused proposed to be charged thereunder to do an illegal act or an act by illegal means.[96]

Where the accused persons lay in wait for deceased, and after the commission of the offence, flee away together, it showed the existence of conspiracy between the accused perosns.[97]

No Conspiracy without an Agreement--Mere Proof of Agreement Sufficient for Conviction under Section 120B

The essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence.[98] The illegal act may or may not be done in pursuance of an846 agreement, but the very agreement is an offence and is punishable.[1] In the case of a criminal conspiracy what is to be proved is an agreement and common design.[2]One of the essential ingredients that the prosecution should establish is that there was an agreement between two or more persons to do an illegal act or a legal act by illegal means, there can be no conspiracy without such an agreement.[3] Where conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in s 120B read with the *proviso* to sub-s (2) of s 120A of the IPC, then, in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under s 120B and the proof of any overt act by accused or by any one of them would not be necessary.[4]The illegal act may or may not be done in pursuance of an agreement, but the very agreement is an offence and is punishable. Reference to ss 120A and 120B, IPC, would make these aspects clear beyond doubt.[5] Where there was no material showing that there was an agreement between both accused to commit murder of deceased, the mere fact that accused was nephew of the co-accused is not sufficient to lead to an inference of conspiracy.[6] Where there was no specific evidence as to where and when the conspiracy was hatched, and what was the specific purpose of such conspiracy, the conviction and sentence under s 120B, IPC awarded to the accused were set

aside.[7]

To constitute a conspiracy, agreement between two or more persons for doing an illegal act, or an act by illegal means, is a *sine qua non*. As there was no link to show that the conspirators agreed to misappropriate the gold while the gold ornament was being prepared, accused was held not guilty of offence under ss 120B and 149, IPC .[8]

Direct Evidence Seldom Available--Inference from Circumstantial Evidence

Direct evidence in proof of conspiracy which is generally treated in the stealth of darkness is seldom available, and even when available it is tainted, being that of an accomplice, and requires corroboration.[9] Conspiracy is difficult to establish by direct847 evidence. However, there should be material showing a connection between the alleged conspiracy and act done pursuant to that conspiracy.[10] Conspiracy is hatched in secrecy and for proving the said offence, substantial direct evidence may not be possible to be obtained. An offence of criminal conspiracy can also be proved by circumstantial evidence.[11]

As criminal conspiracy is hatched in secrecy; offence of conspiracy can be established on basis of legitimate inference to be drawn from facts on record.[12]

The conspiracy need not necessarily be proved by direct evidence. It is also capable of being proved by circumstances pointing out the existence of a conspiracy to commit an unlawful act. It is also to be taken into account that there is seldom direct evidence for proof of the conspiracy in the very nature of things. In almost all cases, it is to be inferred from the presence of proved circumstances pointing out the one and only hypothesis of the existence of a conspiracy to commit any unlawful or illegal act.[13] The circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. But if these circumstances are compatible also with the innocence of the accused persons, then it cannot be held that the prosecution had successfully established its case. Even if, some acts are proved to have been committed it must be clear that they were so committed in pursuance of an agreement made between the accused who were parties to the alleged conspiracy. Inference from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation.[14]

Direct evidence being extremely rare, criminal conspiracy can be proved by circumstantial evidence. When there were serious infirmities in the evidence relating to conspiracy, accused A3 was given benefit of doubt and acquitted of the charge of criminal conspiracy.[15]

When deciding the question of sufficiency of circumstantial evidence for the purpose of conviction, what the court has to consider is the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt, and if the combined effect of all those facts, taken together, is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that any one or more of those facts, by itself, is not decisive.[16] Where the accused administered poison and caused the death of a woman and her two children, there was sufficient evidence to show that the four accused persons entered into a criminal conspiracy to murder the deceased persons, evidence regarding the movements of accused persons at relevant time near the house of the deceased and the fingerprints of one of the accused on one of the glasses seized from the house of the deceased were present, one of the accused made a confession. On these facts, the Apex Court848 held that the prosecution proved the guilt of the accused beyond reasonable doubt.[17] It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object which the conspirators set before themselves as the object of the conspiracy, and about the manner in which the object of the conspiracy is to be carried out--all this is necessarily a matter of inference.[18] Privacy and secrecy are more characteristic of a conspiracy, than a loud discussion in an elevated place open to public view.[19]In cases, where persons act in concert by virtue of a common intention and of a criminal conspiracy their activities cannot normally, in the very nature of things, be brought out in evidence by direct evidence because they are done in privacy.[20]

Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will more often rely upon circumstantial evidence.[21] To prove conspiracy, there need not be evidence of direct concert, nor even of any meeting together of the conspirators. The agreement can be inferred from collateral acts, but these acts must show a common plan so as to exclude a reasonable possibility of the acts of the conspirators having been done separately and connected only by coincidence.[22] A reasonable inference of conspiracy is not permissible unless, in addition to the proof of association, there is also evidence of something suspicious in the association.[23] See commentary under heading 'Inference from Circumstantial Evidence' in s 120A, *ante*.

The prosecution case was that the appellant and the co-accused D (deceased) conspired with each other to commit the murder of the boy and the trial court convicted the appellant/accused for the said offence. But there was absolutely no evidence with regard to the conspiracy hatched between the two accused. The motive was only against the appellant accused and not against the co-accused D. Appellant accused was acquitted of the charge under s 120B, IPC .[24]

Cumulative Effect of Proved Circumstances

Commentary under same heading in s 120A, *ante*, may be referred to.849

16. Proof of Criminal Conspiracy -- Confession of Accused

Where there is overwhelming evidence independent of confession of accused, which shows involvement of co-accused in the criminal conspiracy, the confession of the accused can be used for recording the conviction of the co-accused on the charge of murder.[25]

Extra Judicial Confession of Co-accused

In the absence of other corroborative evidence, accused cannot be convicted on the basis of extra judicial confession made by a co-accused.[26]

17. Agreement to Cheat--How Proved

To substantiate a charge of conspiracy the prosecution must prove the agreement between two or more persons to do an unlawful act or a lawful act by unlawful means.[27] Where there was no direct or circumstantial evidence to hold that the accused had prior meeting of minds and an agreement to commit the alleged crime, the mere suspicion of the informant about the conspiracy of the accused cannot be a ground to convict them under s 120B, IPC .[28] There can be no conspiracy without such an agreement.[29] The agreement may be proved by direct evidence or inferred from other proved facts. But the inference of fact may be drawn only when the circumstances are such as to be incapable of any other reasonable interpretation. The law requires specific proof against each of the conspirators participating in a particular design to do a particular criminal thing. The object of the conspiracy must be proved.[30] The circumstances to lead an inference of conspiracy must be of such a nature so as to be incompatible with the innocence of the accused.[31] The essence of criminal conspiracy is an agreement to do an illegal act, for instance, to commit cheating. Such an agreement can be proved either by direct evidence or by circumstantial evidence or by both. It is not necessary that there should be express proof of the agreement, as it can be inferred even from the acts and conduct of the parties to the agreement.[32] For instance, if it can be proved that the accused pursued,850 by similar acts, the same object, often by the same means, one performing one part of the act and the other another, so as to complete it with a view to the attainment of the object which they were pursuing, the court will be at perfect liberty to conclude that they had conspired together to effect that object. Proved acts of cheating by various persons belonging to one group, at various times at various places, by the same devices would furnish strong evidence of the existence of a conspiracy to cheat, as also of the membership of those persons of the conspiracy.[33]In several cases, it has been laid down that there may be an agreement without each conspirator being aware of each and every

act of the others and also that the conspiracy may be proved by other than oral evidence, by evidence of surrounding circumstances and the conduct of the accused.[34] In *Barindra Kumar Ghosh v Emperor* ,[35] Jenkins CJ said:

> Though to establish a charge of conspiracy there must be agreement, there need not be proof of direct meeting or combination nor need the parties be brought into each others' presence; the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design.

From the mere fact that the deceased was seen at the police station, it cannot be held that he was brought at the police station in pursuance of some criminal conspiracy entered into between the accused no. 1 and accused no. 2 Police officers.[36]

Marriage between the appellant accused and the deceased wife took place about 9 years prior to the date of occurrence. No cogent evidence was led by the prosecution to show that there was conspiracy amongst the accused over such a long period of time to force the deceased to commit suicide. Held, the case under s 120B, IPC was not made out against the accused.[37]

18. Burden of Proof

The burden is upon the prosecution to prove a case of conspiracy. Nevertheless, where groups of persons are found in constant communication and each group appears to have a single form of activity which is characteristic of the group, communications between the two must receive the interpretation that the common objective of the two groups is the subject thereof unless a satisfactory explanation is offered.[38] Where several persons are charged with the same conspiracy, the prosecution must prove that there is one large conspiracy involving all the persons charged and not a number of unrelated conspiracies entered into by different groups of the accused. Unity of will and purpose amongst all the accused must be proved; and any accused not shown to be a member of that large conspiracy is entitled to acquittal, however bad his record may be and however much he may be suspected of this or that offence.[39]851

Two Conspiracies

When two conspiracies are alleged, and one is larger than the other, there may be some common factors, but the nature of offence would differ. An offence committed would not be judged by mere mentioning of the sections but the mode and manner in which the same was committed and also the nature thereof.[40]

19. Criminal Conspiracy--Explosion case--Proof

In case of a conspiracy, there cannot be any direct evidence. Express agreement between the parties cannot be proved. Circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. Such a conspiracy is never hatched in open and, therefore, evaluation of proved circumstances play a vital role in establishing the criminal conspiracy.[41] In the instant case, there was evidence that the accused persons were meeting frequently at a Madrasa in the village where they used to have discussion about the place suitable for planting the bomb. The evidence about the purchase of ammonia nitrate and other relevant items, and carrying of boxes to the Madrasa cumulatively established that the accused appellants hatched conspiracy to commit the blast on Republic Day. Accused were convicted.[42]

20. 2G Spectrum Scam--Criminal Conspiracy--Prosecution of Finance Minister

Criminal conspiracy cannot be inferred from the mere fact that there were official discussions between the officers of the Ministry of Finance and that of Department of Telecommunications and between two Ministers, which were all recorded. Suspicion, however strong, cannot take the place of legal proof and the meeting between two Ministers would not, by itself, be sufficient to infer the existence of a criminal conspiracy so as to indict one of them.[43]

21. Conviction of more than one not Essential

In a prosecution for conspiracy, it is necessary to prove that there were two or more persons agreeing for purposes of the conspiracy.[44] But it is not essential that more than one person should be convicted of the offence of criminal conspiracy. It is enough if the court is in a position to find that two or more persons were actually concerned in the criminal conspiracy.[45]

Charge to be Established Against each Individual

The offence of conspiracy under s 120B, IPC is one which requires detailed and specific proof against each of the accused that he individually participated in a852 particular design to do a particular criminal thing,[46] and unless a detailed and specific proof against each of the accused has been established, there can be no conviction under this section.[47]The prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of the conspiracy but also of the agreement.[48] Flimsy and unreasonable evidence does not firmly establish the guilt of the accused.[49] The fact that the appeal against the conviction of the main accused was dismissed is not sufficient to say that the charge of conspiracy against the other accused would be deemed to be proved.[50] Similarly, when the charge of conspiracy fails against one accused, the prosecution case so far as the actual assault being given by appellant/co-accused cannot be *ipso facto* thrown away.[51]

What the prosecution has to establish is an agreement between two or more persons to do an illegal act or a legal act by illegal means. There can be no conspiracy without an agreement in this behalf.[52] A charge of conspiracy can only be sustained if the prosecution alleges and proves an agreement to commit an illegal act or a legal act by illegal means.[53]

Where it is manifest from the evidence that the accused has not been a party either for any conspiracy or for forging the documents and making use of the same and there is no acceptable evidence that the co-accused did all this with the knowledge and consent of the appellant, his conviction under s 120B, IPC cannot be sustained.[54] Similarly, mere lack of supervision or even negligence on the part of the accused is not sufficient to draw an inference of criminal conspiracy against him.[55]

22. Whether Proof of Overt Act Necessary

In the case of a conspiracy other than a conspiracy to commit a crime, it must be proved that some act, besides the agreement to do an illegal act, has been done by one or more of the conspirators. Where the conspiracy alleged is one to commit a series of crimes, mere proof of such an agreement between the accused is sufficient to sustain a conviction and no overt act need be proved.[56] In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event, no overt act is necessary to be proved by the prosecution because in such a fact situation, criminal conspiracy is established by proving such an agreement. In other words, where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in s 120B read with the *proviso* to sub-s (2) of s 120A, IPC, then in that event, mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under s 120B and the proof of any overt act by the accused or by anyone of them would not be necessary.[57] Proof of overt acts is not necessary, but if some of them were concerned in the overt acts, that would go a long way to establish that the853 agreement was in fact made by them.[58] But, as has already been stated above, it is not always possible to give direct evidence of the conspiracy, and it can only be inferred from the acts of the conspirators. In the case of a conspiracy to cheat if a specific instance of cheating is proved beyond doubt against any of the accused that would furnish the

best corroboration of the offence of conspiracy because conspiracy was the root and the specific instances were the fruit.[59] The fact that several conspirators played different roles is wholly irrelevant in considering that charge. Each one is responsible for the acts of the other conspirators as well. It is not the law that every conspirator must be present at every stage of the conspiracy. If the conspirator concerned had agreed to the common design and had not resiled from that agreement, it can be presumed that he continued to be a party to the conspiracy.[60] A conspirator need not be present during the entire period of the conspiracy.[61] But where the accused kept himself away from the scene of occurrence and did not actively participate, this excludes his possibility of hatching a criminal conspiracy.[62] The conspirators must have unity of object through plurality of acts.[63]

Every Conspirator need not know Every Step of the Transaction

In a conspiracy, it is not necessary that every person knows each and every step of the transaction, which is known to the principal conspirators; simply because some one knows only a small part of the transaction, it cannot be held that he did not participate in the conspiracy.[64] In pursuance of the criminal conspiracy, when the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offence.[65]

The principle in such cases is that once an agreement among the conspirators is proved, it is not necessary that the participants in these offences should take, or intend to take, some part in the course of conduct that amounts to, or involves the commission of offence for establishing their guilt.[66] The proof of conspiracy in law is very largely inferential, but the inferences which are to be drawn must be, even if they are mere inferences, supported by solid evidence.[67] The mere fact, that a person had, at one time, been involved in a rebellion, would not necessarily warrant the inference that he had organized a conspiracy to shield another from legal punishment.[68]Where no actual act was attributed to the accused, there was no proof of planning or conspiracy or execution thereof, the ingredients necessary to attract s 120B, IPC, are not made out.[69]

Appellant accused wife of the main accused was keeping a watch on the victim. But there was no evidence that she was part of 'pressurize tactics' or had terrorized854 the victim or the members of his family. She was entitled to benefit of doubt and acquitted of the charge under s 364A read with s 120B .[70]

Where some persons committed murder and the accused persons were proved to be assisting them in causing the dead body to disappear clandestinely, in furtherance of the conspiracy between them, conviction of the accused persons under s 201 read with s 120B was held proper.[71] Where the charge against the accused was under ss 300 and 120B, IPC, for murder and conspiracy to kill the former Prime Minister of India, Rajiv Gandhi, one of the main accused (Nalini) made a voluntary confession assigning her pivotal role in the conspiracy, and the confession was corroborated by witnesses and material documents, conviction of the accused persons under ss 300 and 120B was maintained.[72]

A bomb blast occurred at the State Stadium where the Republic Day function was to be celebrated. The approver examined in the case proved the involvement of all the accused appellants in the case. Explosive articles in huge quality used in preparation of the bombs were recovered from the possession of the accused. Documentary evidence filed in the case also proved offence of conspiracy in the case. The appellants were convicted under the Explosive Substances Act (6 of 1908), ss 3, 4, 5 of the Explosive Act (4 of 1884) and ss 9B and 120B of the IPC .[73]

Where the concerted conduct of the accused showed that they had agreed to prepare forged railway passes, with the intention of causing wrongful loss to the railway, and in pursuance of the conspiracy they prepared forged passes, the conviction of the accused for offences under ss 120B, and 465, IPC, and 5(2) of the Prevention of Corruption Act was held proper.[74]

Prosecution case being that the appellant accused hatched conspiracy with co-accused to provide liquor mixed with 'Nitrazepam' to security guards so that the security guards would facilitate them in

the commission of dacoity as after taking liquor the security guards would become unconscious, was falsified. Prosecution did not adduce evidence to show that the liquor taken by the appellant and the security guards was having Nitrazepam. The appellant had also become unconscious. Appellant accused was acquitted of the charge under s 120B, IPC .[75]

Where the only evidence of conspiracy, adduced by the prosecution, is the solitary and uncorroborated testimony of an interested witness, conviction of the accused for offence under s 120B, IPC cannot be recorded.[76] Where the charge against the accused was of printing counterfeit currency notes, but the evidence did not show that the machinery brought and transported was used for printing counterfeit currency notes, it was held that the accused could not be convicted of conspiracy under s 120B, IPC .[77]

In pursuance of the criminal conspiracy hatched out by accused R and U, the victim girl was kidnapped from the lawful guardianship and she was concealed and wrongfully confined at several places from 1 January 1996 to 26 February 1996, and855 she was subjected to illicit sexual intercourse by several persons. The appellant was convicted for the offences under ss 120B, 363, 365, 366A and 368 of the IPC .[78]

Where there is no evidence of any meeting of the minds of the accused and the actual assailants, the suspicion cannot be allowed to eclipse the requirement of the objective facts.[79] In the absence of any agreement link, nexus of conspiracy, the mischief of s 120B is not attracted.[80]Where the accused persons alleged to have conspired with the main accused in murdering the deceased, there was an omission of the fact of their complicity in statement before the investigating agency, besides there was previous enmity between the complainant and the accused and so there was possibility that the accused persons were falsely implicated, the act of criminal conspiracy and abetment against the accused was held not proved.[81] PW9 deposed before the Court that in his presence the accused persons had discussed their plan to kill the deceased. PW9 knew the deceased for the last 15 years, but he did alert the deceased or his family members or his relatives beforehand about the diabolical plan of the accused to kill him. The Investigating Officer (IO) recorded the statement of PW9 on 17 August 2004 under s 161, Cr PC, but he sent it to the Court only on 14 May 2005 along with the final report. The unreasonable delay on the part of the IO in sending the statement to the Court was not explained. Held, the criminal conspiracy propounded by the prosecution was not established. Appellants accused were acquitted of all the charges.[82]

The accused Chairman and member of a Subordinate Staff Selection Board in conspiracy with the accused candidate increased the marks awarded in viva voce test and included him in the list of selected candidates for pecuniary benefits. The act of the three accused persons did not amount to offence of forgery, and the accused persons prepared false record of the final result and also committed cheating. They were held guilty of offence under s 218, s 420, s 477A and s 120B, IPC .[83]

In criminal conspiracy hatched to eliminate the deceased, the co-accused, an RMP Doctor was assigned the role of administering injection containing poison to the deceased. The doctor who conducted post-mortem examination did not find any poisonous substance in the stomach of the deceased. Accused persons were acquitted of the charge under s 120B read with s 34, IPC .[84]

Where an old intimacy and love affair between a concubine (accused no 2) and the deceased paramour was broken for sometime but revived subsequently, there was no evidence to prove that accused no 1 with whom accused no 2 was living happily as his concubine, was aware of such revival, and there was also no evidence to show that accused no 2 was averse to revival of intimacy with deceased. There was no occasion for accused no 2 to agree with accused no 1 to commit murder of her previous paramour, circumstances that the deceased was last seen in the company of the accused nos 1 and 2 was found not sufficient to hold that both accused agreed to kill him, screaming of woman heard by witnesses from the house of the accused no 1 would suggest the reluctance of accused no 1 to share common intention to kill the856 deceased, on those facts the Apex Court held that the High Court was justified in holding that charge of conspiracy against accused no 2 was not

proved.[85]

Appellant accused Bank Manager was alleged to have sanctioned loan for obtaining pecuniary advantage. Evidence showed that the loan sanctioned was secured by collateral security, and the senior officer of the bank after conducting pre-sanction inspection had recommended the sanction of loan. Held, the appellant had not sanctioned loan dishonestly for obtaining pecuniary advantage. Appellant was acquitted of charges under ss 120B, 420 and 468 of the IPC .[86]

Where the co-accused BDO on the loan applications verified by the accused Gram Sewak sanctioned loan and the co-accused Branch Manager of the Bank disbursed the loan, there was no evidence of any conspiracy between the three accused, the two co-accused BDO and the Branch Manager were acquitted of the charge under s 120B, IPC .[87]

Where the accused were charged for criminal conspiracy and forgery under ss 120B, 477A, IPC, the allegations were forgery of Rs 52,000 belonging to High Court, there was no proof to show that appellant/accused was entrusted with receipt of stamps by the Registrar, no evidence was produced before the trial court to show that the accused/appellant had in any manner conspired with other accused and had made false entries in the register. The Registrar of the High Court was not examined as a witness. The appellant/accused suffered trial and the appeal was fought for 10 years, on these facts conviction and sentence passed against accused was set aside.[88] There was evidence that the appellant Junior Engineer entered into criminal conspiracy with the co-accused Assistant Engineer for preparation of false muster roll, and as such false muster rolls were prepared showing names of casual labourers who had not even worked. Accused appellant verified, co-signed muster-rolls, gave false certificates. His conviction under ss 120B, 467, 468, 471 and 420, IPC was held proper.[89]

The prosecution did not lead any evidence to show any animosity or that the appellant had a strong motive to commit the murder of the deceased. To establish an offence under s 364, IPC, it must be proved that the person charged with the offence had the intention at the time of kidnapping or abduction that the person kidnapped or abducted was in danger of being murdered. The appellant was not convicted under s 364, IPC read with s 120B, IPC .[90]

Death by Poison--Not Proved

Appellants were prosecuted for offences under ss 302, 120B and 201 of the IPC on allegations that the accused persons made the deceased and his wife drink coffee in which they had mixed sleeping pills, and also administered five injections of poison. The doctor in post mortem report had opined that the cause of death could not be ascertained as the body was decomposed. According to FSL report, medicine called Diazepam 'Tranquilizer' was found in the stomach, intestine, liver, heart, kidney and lungs *etc.* The mere recovery of injections from a lane near the house of the accused857 was held not sufficient to record the conviction of the accused appellants. Conviction of the accused appellants for offences under ss 302, 120B and 201, IPC was held not proper and was set aside.[91]

23. Special Rules of Evidence in Section 10, Indian Evidence Act 1872

Section 10 of the Evidence Act prescribes a special rule of evidence and renders admissible, in cases of conspiracy, such evidence which is not ordinarily admissible under the English or the Indian law.[92] Section 10 of the Evidence Act, as the opening words show, will come into play only when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be *prima facie* evidence that a person was a party to the conspiracy before his acts can be used against the co-conspirators.[93] Before the provisions of that section can be invoked it has to be established from independent evidence that there is reasonable ground to believe that two or more persons conspired together to commit an offence or an actionable wrong. When this is shown, anything said, anything done or anything written by any one of such persons would be a relevant fact as against each of the other conspirators, provided that it is in reference to their common intention. Such things said, done or

written would be relevant: (a) for the purpose of proving the existence of the conspiracy and also; (b) of showing that any such person was a party to it.[94] The existence or fact of conspiracy must be proved before evidence can be given of the acts of any person not done in the presence of the accused. This must, generally speaking, be done by evidence of the party's own acts.[95] But, owing to the difficulties in the way of such proof, a deviation has, in many cases, been made from the general rule, and evidence of the acts and conduct of others have been admitted to prove the existence of a conspiracy previous to the proof of the accused's privity.[96] But in respect of such conduct a distinction has been made between declarations and confessions of persons not being mere 'hearsay' are not evidence even to prove the existence of a conspiracy. There cannot be, strictly speaking, direct evidence of the inception of a conspiracy, if any of the conspirators themselves do not choose to speak of the same.[97] The agreement to conspire may be inferred from circumstances which raise a presumption of a concerned plan to carry out an unlawful design.[98]858 After the existence of a conspiracy has been established, the particular accused must be proved to have been parties to it.[1]

24. Conviction--Essentiality

Before a person can be convicted constructively with the addition of s 120B of the IPC, the requirement of s 120A of IPC, defining criminal conspiracy would have to be met.[2]

25. Two Objections to the Applicability of Evidence under Section 10

It is true that the provision as contained in s 10 is a departure from the rule of hearsay evidence. There can be two objections to the admissibility of evidence under s 10 and they are: (a) the conspirator whose evidence is sought to be admitted against the co-conspirator is not confronted or cross-examined in court by the co-conspirator and; (b) prosecution merely proves the existence of reasonable ground to believe that two or more persons have conspired to commit an offence and that brings into operation the existence of agency relationship to implicate the co-conspirator. But then precisely under s 10, Evidence Act, the statement of a conspirator is admissible against co-conspirator on the premise that this relationship exists. Prosecution, no doubt, has to produce independent evidence as to the existence of the conspiracy for s 10 to operate but it need not prove the same beyond a reasonable doubt. Criminal conspiracy is a partnership in agreement and there is in each conspiracy a joint or mutual agency for the execution of a common object which is an offence or an actionable wrong. When two or more persons enter into a conspiracy any act done by any one of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution of or in reference to the common intention is deemed to have been said, done or written by each of them. A conspirator is not, however, responsible for acts done by a conspirator after the termination of the conspiracy as aforesaid. The court is, however to guard itself against readily accepting the statement of a conspirator against the co-conspirator. Section 10 is a special provision to deal with dangerous criminal combinations. The normal rule of evidence that prevents the statement of one co-accused being used against another under s 30 of the Evidence Act does not apply in the trial of conspiracy in view of s 10 of that Act. When it is said that the court has to guard itself against readily accepting the statement of the conspirator against the co-conspirator what is meant is that court looks for some corroboration to be on the safe side. It is not a rule of law but a rule of prudence bordering on law. All said and done ultimately it is the appreciation of evidence on which the court has to embark.[3]

Effect of the Two Parts of Section 10 of the Evidence Act

Section 10 of the Evidence Act mainly could be divided into two: the first part talks of where there is a reasonable ground to believe that two or more persons have859 conspired to commit an offence or an actionable wrong, and it is only when this condition precedent is satisfied that the subsequent part of the section comes into operation. The second part of s 10 permits the use of evidence which otherwise could not be used against the accused person. It is well settled that act or action of one of the accused could not be used as evidence against the other. But an exception has been carved out

in s 10 in cases of conspiracy. The second part operates only when the first part of the section is clearly established, *i.e.*, there must be reasonable ground to believe that two or more persons have conspired together in the light of the language of s 120A, IPC . It is only then the evidence of action or statements made by one of the accused could be used as evidence against the other.[4]

26. Inference in Case of Possession of a Document

When it is shown that there is reasonable ground to believe that two or more persons have conspired to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention becomes a relevant fact. 'Anything said' would include the statements made, speeches delivered, or knowledge of the person. Anything 'written' would include: (a) a manuscript, whether signed or unsigned, written by the person; and (b) matter transcribed by him on a typewriter. But an unknown document found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents as against the other accused. The fact of possession would be evidence to show that the conspirator in whose possession it is found, had received and preserved it.[5] The possession of a document creates an inference that the possessor was aware of its contents.[6]

Any statement made by one conspirator to another indicating in any way the complicity of a third conspirator is a relevant fact and as such may be admitted. Whether it should be believed or not is another question.[7]Section 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co-conspirators.[8]

27. Principle of Agency--Duration of its Operation

The principle of agency imported by s 10, Evidence Act, operates from the point of time when the common intention or purpose was first entertained by any one of the conspirators till the point of time when the object of the conspiracy is achieved. This is clear also from the illustration to that section. It is thus not necessary either that every one of the conspirators should be associated with the conspiracy right from the beginning or that each should be associated with it till the common purpose is accomplished.[9] Commentary under Heading 'Theory of agency' in s 120A, *ante*, may be referred to.860

28. Evidentiary Value of Cipher Code

A cipher code cannot be treated as 'the act, words, or deed' of a particular person. But the fact that it exists and that the name and addresses of a number of persons, who are alleged to be parties to a conspiracy as charged are mentioned in it, the fact that it is in a peculiar form such as is not likely to be found in any code intended to be used for lawful purposes, taken along with other matters brought out in evidence may give rise to a legitimate inference that the ciphers were prepared in connection with some unlawful purpose requiring secrecy; and in the absence of evidence that the matters appearing form the secret document were associated with some legitimate or lawful purpose, the cipher code is in itself a good ground for supposing that the persons named in it had conspired to commit an offence and any other acts or writings of individual conspirator in furtherance of the common design become admissible under this section.[10]

29. Applicability of Section 10 of the evidence act not affected by any Conspirator Turning an Approver

The said section does not cease to apply to 'anything said, done, or written' by a conspirator simply because that conspirator gives evidence as an approver. The evidence of a conspirator becoming approver must be read subject to the rules of prudence and corroboration which apply to the evidence of approvers generally, but once the court is satisfied that the approver is speaking the truth, his evidence can be accepted as to anything he has 'said, done or written,' as in the case of any other

conspirator.[11]

Where in order to prove a conspiracy the prosecution produced the statement of an approver before the trying magistrate, as to the existence of a conspiracy, and a number of letters written by the conspirators to each other using code words, it was held that the statements and the letters were admissible under this section.[12]

In this connection the decisions of the Supreme Court in *Sardual Singh Caveeshar v State of Bombay* ,[13] and *Badri Rai v State of Bihar* ,[14] may be referred to.

Relevancy of the Confession of a Conspirator

A confession by a conspirator made to a magistrate after arrest disclosing the existence of a conspiracy, its object and the names of its members, is not admissible under this section against the co-conspirators jointly tried with him, except under s 30, Evidence Act.[15]Section 10 is intended to make as evidence communications between different conspirators while the conspiracy is going on with reference to the carrying out of the conspiracy. The confession of a co-accused is not intended to be861 put on the same footing as a communication passing between conspirators or between conspirators and other persons with reference to the conspiracy.[16]

30. Intercepted Correspondence and the Statements of the Accused

Any intercepted correspondence between the respondents in divorce cases cannot be considered as evidence against the person to whom it is addressed for any purpose whatever.[17] But a letter written by a respondent to a co-respondent is evidence against the former.[18] In other cases copies of letters from the accused to his co-conspirators which were intercepted and reported are admissible in evidence.[19]

31. Extent of Admissibility

If *prima facie* evidence of the existence of a conspiracy has been led, and reasonable ground shown to believe in its existence, things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention.[20] But it would be very different matter to hold that any narrative or statement or confession, made to a third party, after the common intention or conspiracy was no longer operating and had ceased to exist, is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference.[21]

Where the object of the conspiracy had been carried out and the conspiracy had come to an end, a subsequent statement cannot be said to have reference to the common intention of the conspirators.[22] Any statement made by an accused person during the trial is also not a statement made by a conspirator in reference to the common intention of the members of the conspiracy, and the statements made under s 342 (now s 313), CrPC, in the course of the trial are not, therefore, admissible in evidence against the other accused.[23]

32. Motive

In the absence of any other evidence of conspiracy, mere evidence of motive is not sufficient to connect a man with the conspiracy.[24] What may be a sufficient motive for an individual or a group of individuals may or may not be sufficient motive for others, and it is, therefore, necessary to give importance to the occurrence itself, to the participation of the accused persons in the same, and see if they were responsible862 for the crime, although it may not be possible definitely to hold that the motive ascribed was not sufficient or commensurate with the nature of the crime.[25]

33. Punishment--Offence of Conspiracy is Separately Punishable

The punishment for the offence of conspiracy under s 120B, IPC depends upon whether the illegal act has or has not been carried out. In the former case, the punishment will be in accordance with s 109, IPC, *i.e.*, it will be the same as for the offence itself. In the latter case it will be in accordance with s 116, IPC . When, therefore, conspiracy is charged, it is always open to the prosecution to charge further that the illegal acts which were the object of the conspiracy have been carried out. Acts done in pursuance of the conspiracy cannot be separately punished unless these acts are separately charged and particularised as required by the IPC .[26] The offence of criminal conspiracy is a separate offence punishable separately from the main offence. There is no illegality in recording separate convictions and awarding separate sentences for the offence of criminal conspiracy and the offence committed in pursuance thereof.[27] However, in *CR Mehta v State of Maharashtra* ,[28] where the accused were convicted and sentenced for the composite ss 161 and 165A, IPC, by the trial court, the Bombay High Court had held that no separate sentence was called for under s 165A read with s 161, IPC . Conspiracy is intended to be treated as a continuing offence and whoever is a party to conspiracy during the period, for which he is charged, is liable under s 120B, IPC .[29]

Where the accused is charged for conspiracy under s 120B and also for the offence committed in furtherance of the conspiracy and is convicted on both the counts, it is not necessary to award a separate sentence under s 120B, especially if the offence was committed within a short time of the hatching of the conspiracy.[30]

Where the accused appellants were convicted for the offences of criminal conspiracy, cheating and forgery, and the occurrence took place 15 years, and before the conviction, the appellants had remained in custody for about one month, sentence was reduced to the period already undergone.[31]

So, where the accused has been found guilty and convicted of an offence under s 302, read with s 34, IPC, and sentenced to imprisonment for life and no separate sentence has been awarded to him for conviction under s 302, read with s 109, IPC, no conviction or sentence under the charge for the offence under s 120B, IPC, need be recorded, and, if recorded, it is illegal.[32]

863Where a person is charged with an offence under s 302, IPC, read with s 120B, he can be convicted either under s 302 read with s 109 if the conspiracy to murder is proved or under s 302 read with s 115, if conspiracy is not proved. In either case he cannot be sentenced to 10 years' rigorous imprisonment and such punishment, if passed, is illegal.[33]

34. Stage at Which a Conspirator Joins is Material for Sentence

So far as punishment is concerned, a distinction must be drawn between the case of a person who joins a conspiracy before the actual crime which is the object of the conspiracy is committed, and the case of a person who joins it subsequent to a commission of such a crime. If, therefore, *A* and *B* conspire to commit murder and *B* subsequently does commit murder, *A* is punishable as if he had abetted that murder (s 109, IPC). But if *B* has already committed a murder before *A* conspires with him to commit it, *A* would be liable to be punished (if in point of fact no other murder is committed) only to the extent provided in s 115, IPC .[34]

Where the accused was the chief person to carry out the main work of the conspiracy, the fact that he made no profit for himself out of the impugned transactions, that he was old and had already been in jail for 10 days were held to be not sufficient for reducing the sentence to the period already undergone.[35] In such cases, the other accused should be treated on par in the matter of sentence and they cannot be awarded a different or more severe punishment.[36]

To say that as an accused was not admitted to the full dignity of membership of the conspiracy and was not treated as a member and he deserves leniency is a very dangerous doctrine, and would, if accepted, palliate the offence of every hired assassin. If the accused knew perfectly well what he was doing, there is no justification for awarding a lenient punishment to him.[37]

35. Acquittal on Charge of Conspiracy has no effect on other Offences

Acquittal of some of the co-accused from the charge of conspiracy cannot really affect the accusations under s 471, IPC .[38] In *Madan Lal v State of Punjab* ,[39] two persons were tried for alleged commission of offences punishable under ss 409, 465, 477A and 120-B, IPC . Though the accusations under s 120B were set aside, the High Court confirmed the conviction under s 409 *simpliciter*. A contention was raised before the Supreme Court that if the charge relating to criminal breach of trust was along with the charge of conspiracy, conviction *simpliciter* for criminal breach of trust would not be valid. The Supreme Court held that if the charge of conspiracy is followed by substantive charge of another offence there is nothing to prevent the court convicting an accused for the substantive charge even if the prosecution had failed to establish conspiracy.[40] Where the occurrence took place 26 years ago, and864 accused persons remained in custody for about 15 days and one month respectively, considering the circumstances, sentence reduced to period already undergone.[41]

Illustrative Cases

Where the accused were charged with offences of kidnapping, murder and conspiracy under ss 300, 364 and 120B, of the IPC, the case was based on circumstantial evidence with missing links. The conspiracy of sacrificing the life of a virgin girl for begetting a child was alleged. The chain of circumstances did not unerringly point towards guilt of the accused. The accused was held entitled to the benefit of doubt.[42]

The accused had developed intimacy with the wife of the deceased. The accused caused multiple injuries to the husband (deceased) of the wife, resulting in death. It could be true that the relations between the deceased and the wife were strained, but from this circumstance alone it could not be inferred that the wife entered into criminal conspiracy to cause the death of the husband. The conviction of the wife under s 300 read with s 120B, IPC was found not sustainable, and was set aside.[43]

In one case, about 25-30 Muslim boys, formed an unlawful assembly in prosecution of the common object of beating and killing Hindus and assaulted bus passengers. The accused no 1, the bus driver was proved to have stopped the bus at the place of occurrence, a Muslim locality, went to the mob and induced them to attack the passengers, thereafter the mob attacked the bus, and accused driver was held to have an agreement between him and the said unlawful assembly, therefore, his conviction under s 120B, IPC was upheld.[44]

Where the accused persons were convicted by the session court under ss 120B / 302 and 302 / 34, IPC, evidence of the approver was found trustworthy and corroborated on material particulars by other witnesses, the conviction of accused persons was held justified.[45]

Where one accused sprinkled petrol on a bus and another accused lit the matchstick thereafter, the accused persons had knowledge that their acts were imminently dangerous and would cause the death of passengers or bodily injuries likely to cause death, their conviction under s 302 read with s 120B was held proper.[46]

Where the charge against the accused was under s 120 read with s 201, IPC, of criminal conspiracy and causing disappearance of evidence, the evidence on record corroborated with the evidence of approver, the conviction of the accused was maintained by the Apex Court.[47]

Where there was not an iota of evidence to prove the charge of conspiracy by the prosecution under s 120B, IPC, and even the circumstances did not prove it, the other offence for which the accused were charged were also not proved, the accused persons were held entitled to be acquitted of the charges under ss 419, 420, 120B IPC .[48]

865The accused persons prompted by previous enmity in pursuance of criminal conspiracy committed

the murder of the Head priest of the temple and his disciple. The names of the alleged assailants surfaced three days after the incident when the statement of PWS were recorded. No acceptable explanation was given for delay in recording the statements. The reluctance of the prosecution witnesses to come out with the truth and name the assailants, the delay in recording the statements of eye-witnesses and statement of PW3, the unnatural dying declaration giving minute diverse particulars about the assailants reflected on the credibility of the prosecution case. Thus, the accused were acquitted of the charges under ss 302 and 120B, IPC .[49]

Where in a case of death by poisoning the accused was charged with criminal conspiracy and murder, there was no evidence that the accused persons had pre-planned or conspired to poison the deceased, the deceased was not invited to the *puja* but was offered *prasad* when he incidentally passed by, the prior meeting of mind or conspiracy to poison deceased was thus not proved and the accused were held entitled to acquittal.[50]

The accused husband was already married, still, he got married to the prosecutrix, and had sexual intercourse with her, without disclosing his earlier marriage to the prosecutrix. *Prima facie* a case under s 376, IPC was made out against the accused. The parents of the accused husband residing with him did not disclose the fact of earlier marriage to the complainant, and were part of the conspiracy; thus, they can be prosecuted under s 376, IPC, read with ss 120B and 34, IPC .[51]

Where allegations were that the accused in pursuance of conspiracy with the co-accused persons passed bills and made a payment of the entire amount to the firm without receipt of the material subject of the bills, evidence showing that bills for payment were routed though various official channels including the accountant with the certificate of the incharge of schemes, there was no other evidence to link the accused with the commission of alleged offences, it was held that the action of the accused in passing payment of bills cannot be faulted with and acquittal of accused persons of offences under ss 409, 420, 120B, IPC, was found proper.[52]

Where the accused withdrew a non-refundable amount from the PF account standing in the credit of his colleague, the accused forged the signature of his colleague in the advance application form and in the account opening form in the bank and the amount deposited in the bank was also withdrawn in a fictitious name. When the crime was detected, the accused requested his colleague not to resort to criminal proceedings and he would refund the amount to him. The prosecution case against the accused was proved beyond reasonable doubt and the conviction of the866 accused under ss 120B, 419, 420, 468, 471 of the IPC read with s 13(1)(d) read with s 13(2) of the Prevention of Corruption Act 1988 was found proper.[53]

Where in case of criminal conspiracy of robbery and murder there was a confessional statement of the accused that he participated in the looting of the bank and while escaping his companion killed the deceased outside the bank, charge under s 120B was held fully established against the accused.[54]

Where the co-accused, a foreign national was found staying in the country without a valid passport and visa, his movements from one place to another with the main accused were established, large quantities of arms and ammunitions were recovered from the premises occupied by the main accused, on these facts the Apex Court held that the inference of criminal conspiracy can be drawn.[55]

Conspiracy was entered into to obtain fake passport. Accused filed application for passport, but bogus particulars were filled up in the application form. Conviction under s 120B was held proper.[56]

Where the appellant/accused and the main accused allegedly hired a killer working together in a plantation and were seen together before and after the incident, near the place of incident, these facts were held not sufficient to prove that they met each other in furtherance of conspiracy to murder the deceased, so prosecution failed to prove the charge of conspiracy against the appellant/accused who was held entitled to the benefit of doubt.[57]

The accused Bank Manager had sanctioned loan to Government employees, without making any inquiry, without inspecting the site; the accounts of the Government employees were not opened and the loan amount sanctioned was credited to the accounts of the co-accused. Held, the accused Bank Manager and co-accused entered into conspiracy and defrauded the Bank; thus, their conviction under ss 420 / 120B, IPC was upheld.[58]

Mere recoveries of a 9mm pistol and the rounds from the bungalow of the accused would not be sufficient to connect him with the said articles. The recoveries made must be found to have been made as a consequence of the statement made by the accused in custody. If the nexus between the two is not established, the said statement made would be inadmissible in evidence. Acquittal of the accused for offence under s 6 of TADA Act and s 120B, IPC was held proper.[59]

There was evidence of rivalry and strained relations between the accused persons and the deceased as the deceased was creating hurdle in the business,running of educational institution, and the family life of the accused. The evidence of the eye-witnesses proved the assault and firing indulged in by the accused persons. The manner in which the accused fled after the commission of the crime clearly indicated867 their involvement in the offence to conduct a conspiracy. The ocular evidence adduced in the case was in accordance with medical evidence. The conviction of the accused appellants under s 302, IPC read with s 120B, IPC was held proper.[60]

Appellant accused, wife of the main accused kept the kidnapped person inside her house, supplied him food knowing fully that her husband and his companions had kidnapped the victim. Her conviction under ss 364A, 365, 346, 343 read with 120B of the IPC was held proper.[61]868

54 Inserted by Act 8 of 1913, s 3 .

55 Substituted by Act 26 of 1955, s 117 and Schedule for 'transportation for life' (wef 1-1-1956).

56 *Kehar Singh v State (Delhi Admn)* (1988) SC 1883, (1989) Cr LJ 2(SC).

57 *Sunil Kumar v State of Maharashtra* 2009 Cr LJ 2599, p 2608 (Bom) .

58 Re *Surjapal Singh Indra Pal Singh*AIR 1938 Nag 328, p 333, 39 Cr LJ 818 ; *Emperor v Ramrao Mangesh* AIR 1932 Bom 406, 33 Cr LJ 666, 56 ILR Bom 304, 34 Bom LR 598 ; *Patri Venkata Hanumantha Rao v Emperor* AIR 1934 Mad 88, 35 Cr LJ 631, 57 ILR Mad 545 ; *Abdul Salim v Emperor* AIR 1922 Cal 107, 23 Cr LJ 657, 49 ILR Cal 573 ; *Kunwar Sen v Emperor* AIR 1933 Oudh 86, 34 Cr LJ 124, 8 ILR Luck 286 ; *Rash Behari Shaw v Emperor* AIR 1936 Cal 753, 38 Cr LJ 545 .

59 *Ajay Agarwal v Union of India* (1994) 1 Mah LR 514(SC), (1994) 1 East Cr C 210 (SC).

60 Notes under s 120A .

61 *Jugeshwar Singh v Emperor* AIR 1936 Pat 346, p 348, 37 Cr LJ 89 .

62 *State of Bihar v Kailash Prasad* AIR 1961 Pat 451, p 460, (1961) Cr LJ 677 ; *Paveed Pillai v State* AIR 1969 Ker 156, p 160 .

63 *Chandrakant Ratilal Mehta v State of Maharashtra* (1993) Cr L 2863 (Bom), 1993 (3) Bom CR 99 .

64 *Sheo Kumar Singh v Bhuneshwar Singh* (1971) BLJR 61 .

65 *Abdul Kadar Saleh Mohammad v State of Maharashtra* (1963) 65 Bom LR 864, (1964) Mah LJ 95 .

66 *Ajay Agarwal v Union of India* (1994) 1 Mah LR 514 (SC), (1994) 1 East Cr C 210 (SC) .

67 *Sheo Kumar Singh v Bhuneshwar Singh* (1971) BLJR 61 .

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49 *Ramanlal Baldevdas Shah v State of Gujarat* (1992) Cr LJ 3164, p 3166 (SC) .

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63 *Babubhai Satyanarain Rai v State of Gujarat* (1986) Guj LR 771 .

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61 *Suman Sood v State of Rajasthan* 2007 Cr LJ 4080 (SC), AIR 2007 SC 2774, (2007) 5 SCC 634, 2007 (7) Scale 312 .

Indian Penal Code (Act XLV of 1860)

Chapter VI

Of Offences Against the State

S. 121.

Waging, or attempting to wage war, or abetting waging of war, against the Government of India.--

Whoever, wages war against the [6][Government of India], or attempts to wage such war, or abets the waging of such war, shall be punished with death, or [7][imprisonment for life] [8][and shall also be liable to fine].

[9]*[Illustration]*

[10][* * *] *A* joins an insurrection against the [11][Government of India]. *A* has committed the offence defined in this section.

[12][* * *]872

Comments

1. Scope

Sections 121, 121A and 122, IPC specifically relate to offences against the state. While s 121 provides punishment for those engaged in waging of war against the Government of India, the other two sections relate to conspiracy and preparation to commit such offence by collecting arms, *etc.*, respectively.[13] Sections 121 - 124A deal with offences against the security of the state. Of these, s 121 deals with the highest form of treason, which is punishable with death or imprisonment for life and also fine. What is punishable under this section is not only the actual waging of war against the Government of India, but also attempting or abetting such war.

The Statute of Treason 1351,[14] which superseded the rules of Common Law in England restricted high treason to seven classes only. These seven classes as set out by Hale[15] are as follows:

(i) When a man doth compass of imagine the death of our Lord the King, or our lady his Queen, or of their eldest son and heir; or
(ii) If a man do violate the King's companion (*i.e.*, consort) or the King's eldest daughter

unmarried, or the wife of the King's son and heir;[16] or

(iii) If a man do levy war against our Lord the King in his realm; or

(iv) Be adherent to the King's enemies in his realm, giving them aid and comfort in the realm or elsewhere, and thereof be provably attained of open deed by the people of their condition; and

(v) If a man counterfeits the King's great or privy seal, or his money; and

(vi) If a man brings false money into this realm counterfeit to the money of England...knowing the money to be false, to merchandise or make payment in deceit of our Lord the King and of his people; and

(vii) If a man slays the Chancellor, Treasurer, or the King's Justices of the one Bench or the other, Justice in Eire, or Justices of Assise, and all other Justices assigned to hear and determine, being in their places doing their offices.

Of these the first two were omitted in India as it was considered unlikely for the king to visit India.[17] Offences (v) and (vi) above cannot be said to be treason in the proper sense and have been relegated to Chapter XII of the IPC . The seventh is only applicable to the Chancellor, Treasurers and the king's judges in England. The remaining two are the only high treasons which have been incorporated and enacted in India but in a modified form.

The fundamental characteristics of high treason was the betrayal of the faith and allegiance which were due from a subject to his sovereign as the supreme head of the state.[18] Every citizen is entitled to claim the protection of the state and for that reason, has the corresponding duty of allegiance to the state. Allegiance follows protection as a matter of course.

873This section is remarkable for the fact that it specifically provides for the offence of abetment of waging war. Under expln 2 of s 108, the offence of abetment is constituted even when the act abetted is not committed and, as was pointed out in *Emperor v Ganesh Damodar Savarkar* ,[19] while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded and abetment which has failed, s 121 does away with that distinction and deals equally with an abettor whose instigation has led to a war and one whose instigation had no effect whatsoever. Another unusual feature is that by virtue of the provisions of s 94 of the IPC, compulsion is not a defence to a charge under s 121, although it might well, according to the circumstances, operate in mitigation of punishment.[20]

2. 'Whoever'

This word is a substitute for the words 'if a man' in the Statute of Treason. It includes all persons, whether Indian citizens, who owe allegiance by birth or naturalisation, or foreigners who owe allegiance by virtue of their residence.[21]

Articles 5 - 10 of the Articles 10- 10 of the Constitution of India and the Indian Citizenship Act 1955 deal with the subject of 'acquisition and termination of Indian citizenship'.

The word 'whoever' is a word of broad import. Advisedly such language was employed departing from the observations made in the context of Treason statute. There is no good reason why the foreign nationals stealthily entering into the Indian territory with a view to subverting the functioning of the Government and destabilizing the society should not be held guilty of waging war within the meaning of section 121 . The section on its plain terms, need not be confined only to those who owe allegiance to the established Government.[22]

3. Insurrection

Organizing or joining an insurrection against the Government of India is also a form of war. 'Insurrection' as defined in dictionaries and as commonly understood connotes a violent uprising by a group directed against the Government in power or the civil authorities.

Rebellion, revolution and civil war are progressive stages in the development of civil unrest, the most rudimentary form of which is 'insurrection'--*videPan American World Air Inc v Actna Cas and Sur Co* .[23]An act of insurgency is different from belligerency. It needs to be clarified that insurrection is only illustrative of the expression 'war' and it is seen from the old English authorities that it would cover situations analogous to insurrection if they tend to undermine the authority of the Ruler or Government.[24]

874The following statement of law by Sir Michael Foster is instructive :

> There is a difference between those insurrections which have carried the appearance of an army formed under leaders, and provided with military weapons, and with drums, colours *etc.*, and those other disorderly tumultuous assemblies which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary shew and apparatus of war before mentioned. I do not think any great stress can be laid on that distinction. It is true, that in case of levying war the indictments generally charge, that the defendants were armed and arrayed in a warlike manner; and, where the case would admit of it, the other circumstances of swords, guns, drums, colours, *etc.*, have been added. But I think the merits of the case have never turned singly on any of these circumstances.[25]

4. Concept of War in the Section

War, terrorism and violent acts to overawe the established Government have many things in common. It is not too easy to distinguish them, but one thing is certain, the concept of war imbedded in s 121 is not to be understood in international law sense of inter-country war involving military operations by and between two or more hostile countries. Section 121 is not meant to punish prisoners of war of a belligerent nation. Apart from the legislative history of the provision and the understanding of the expression by various High Courts during the pre-independence days, the illustration to s 121 itself makes it clear that 'war' contemplated by s 121 is not conventional warfare between two nations.[26]

The concept of war in s 121 which includes insurrection or a civilian uprising should not be understood in the sense of conventional war between two nations or sovereign entities. The normative phenomenon of war as understood in international sense does not fit into the ambit and reach of s 121 .[27]

5. 'Wages War'--Old Law

The provision as originally framed (s 109, the first section of Chapter Five, 'Of offences against the State') was confined to the waging of war, or the attempt to wage war, or the abetment thereof 'against the Government of any part of the territories of the East India Company', and three illustrations to the section were given by way of example, namely:

(i) the joining 'an army of a Foreign Power' invading the said territories;
(ii) conspiring 'to cause an insurrection against the East Indian Company's Government in one of the Presidencies;
(iii) instigating a native power to make war on the Government of India.

6. Views of the Law Commission

In their Second Report on the draft Code (under date 24 June 1847), the Indian law commissioners quoted with approval the opinion of the English Criminal Law Commission that the crime specified in

the Statute of Treasons 'is in plain and unambiguous terms declared by the Statute to consist in a levying of war', and that 'there is nothing in the Statute to indicate that these terms were intended to be used875 otherwise than according to their literal sense', and they consequently deprecated the latitude of construction (of the Statute) beyond what, in their opinion, the Statute of Treasons contemplated, but which had been sanctioned by high Judicial authority'.

The commissioners on the Indian Penal Code continued:

> So also we conceive the terms 'waging war against the Government' naturally to import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do; and it seems to us, as we presume it did to the authors of the Code, that any definition of terms so unambiguous, would be superfluous.[28]

7. Meaning of the Term 'Waging War'

The expression 'waging war' means and can only mean waging war in the manner usual in war.[29] The draft of the IPC as prepared in 1837 received careful and elaborate revision at the hands of the first Legislative Council of the Governor-General which was established by the East India Company Act 1853, and in 1860, after the passing of the Government of India Act 1858, (which transferred the Government of East India Company's territories to the Crown) the Code as revised became law, the words 'the Queen' (or 'the Sovereign for the time being of the United Kingdom of Great Britain and Ireland', s 13) being substituted in s 121 for the words 'the Government of any part of the territories of the East India Company' which appeared in the corresponding s 109 of the draft IPC . It will be observed that like the latter section, s 121 is confined to waging war, in the sense above explained, and the Code nowhere expressly provides for acts of violence directed against the person of the sovereign. Both the framers of the IPC[30] and the Indian Law Commissioners[31] were of the opinion that the imperial legislature should do what cannot be done by the local legislature, and should pass a law of high treason for the territories of the East India Company:

> 'as far, indeed, as respects the Royal person, the present state of the law, though in theory unseemly, is not likely to cause any practical evil. It is highly improbable that any English King will visit his Indian dominions,[32] (*tempora mutantur*) or that any plot, having for its object the death of an English King, will ever extend its ramifications to India'.

No such statute has, however, been passed. The term 'wages war' must therefore be taken to mean the taking part in the open and avowed hostilities of an invading army or guerrilla warfare or in an armed insurrection, revolution, or mutiny.[33]

Where foreign national(s) enter the territory of India with the object of destabilizing society and subvert the society, they are guilty of the offence of waging war against the Government of India falling under Section 121IPC .[34]

In "waging war", the intent of the foreign enemy is not only to disturb public peace or law and order or to kill many people. A foreign enemy strikes at the sovereignty of the State, and his conspiracy and actions are motivated by that animus.[35]

876The words 'wages war' in s 121 are synonymous with 'levying war' in the Statute, 25 Edward, 3 c 2, which offence is declared to be treason; and the meaning of these words has long been settled, although their full significance is seldom understood.[36] In *Barindra Kumar Ghosh v Emperor* ,[37]

Jenkins CJ, observed:

> It is argued on behalf of the Crown that it was intended by the framers of the Indian Penal Code to reproduce the English Law of Treason in its entirety, that is to say, not only the Statute Law, but also the interpretation placed on it by the cases. But anyone who has studied the history of section 121, which was a part of the law of the land before its incorporation in the Indian Penal Code, and the literature on the subject, must know that this was not the intention of those who framed the provisions.

Relying on these observations, it was contended in a Nagpur case, that the interpretation placed by the English Judges upon the English law of treason should not be followed in India. But this contention overlooks the fact that the learned chief justice's observations referred to the argument advanced in that case that 'it was intended by the framers of the IPC to reproduce the English Law of Treason in its entirety, that is to say, not only the Statute Law but also the interpretation placed upon it by the cases'. The meaning of the observations becomes clear in *Barindra Kumar Ghosh v Emperor* ,[38] where the learned chief justice observed that collection of weapons for a far-off revolution amounts, though not to waging war, to a conspiracy to wage war. What he really laid down was that the words 'wages war' must be understood in their ordinary sense and that overt acts such as the collection of arms and ammunition for that purpose do not amount to waging war.[39]

8. What Constitutes a Levying of War in England

In order to constitute a levying of war against the King, in England it is neither the number of people who got engaged, nor the force they employed, nor the species of weapons with which they may be armed, that will constitute the overt act of treason. It is the purpose and intention, the object which they have in view, which congregates and assembles them together, which gives them the impulse in their arming and in their rising, which constitutes treason, and distinguishes the crime from that of riot, or any other rising. If a rising and insurrection be for a public purpose, to resist the King's authority, to compel him to do or to refrain from doing what it is part of his prerogative to do or not to do as he thinks proper, if it be to compel him to change his measures and councils, it amounts to treason.[40] In *R v Forst* ,[41] Tindall CJ, in his charge to the jury, expressed himself thus:

> An assembly of men, armed and arrayed in a warlike manner with any treasonable purpose, is a levying of war, although no blow be struck; and the enlisting and drilling and marching bodies of men are sufficient overt acts of that treason, without coming to a battle or action. And, if this be the case, the actual conflict between such a body and the Queen's forces must, beyond all doubt, amount to a levying of war against the Queen...and, as has already been adverted to, it is quite unnecessary to constitute the guilt of treason that the tumultuous multitude should appear to be accompanied with the pomp and pageantry of war, or with military array. Insurrection and rebellion are more877 humble in their first infancy, but all such external marks of pomp will not fail to be added with the first gleam of success...It may be proper to inform you, that in the case of treason the law knows no distinction between principal accessory; all who partake in the treason incur the same guilt, and are liable to the same punishment; the treasonable design once evidenced, the man who instigated, incited, procured, or persuaded others to commit the act, though not present in person at the commission of it, is equally a traitor, to all intents and purposes, as the man by whose hand the act of treason is committed. He who leads the armed multitude towards point of attack, and then retires before the blow is struck; he who remains at home, planning and directing the proceedings but leaving the actual execution of such plans to more daring hands; all these are equally guilty in the eye of law of the crime of high treason.

9. English View Followed in India

The English view has been followed by the courts in India.[42] A person taking part in an organised armed attack on the constituted authorities, that attack having for its object the subversion of the

government and the establishment of another in its place, would be guilty of the offence of waging war.[43]

But it is the fundamental right of every citizen to have his own political theories and ideas and to propagate them and work for their establishment so long as he does not seek to do so by force and violence or contravene any provision of law. To work by peaceful means to bring about the end of capitalism and private ownership and the establishment of a socialist state does not amount to waging war.[44] The expression 'waging war' means, and can only mean, 'waging war in the manner usual in war'. In other words, in order to support a conviction on such a charge, it is not enough to show that the persons charged have contrived to obtain possession of an armoury and have, when called upon to surrender it, used the rifles and ammunition so obtained against the government's troops. It must also be shown that the seizure of the armoury was part and parcel of a planned operation and that their intention in resisting the government's troops was to overwhelm and defeat the same and then go on and crush any further opposition with which they might meet until either the leaders of the movement succeeded in obtaining possession of the machinery of government or until those in possession of it yielded to the demands of their leaders.[45]

Where the object of the accused was to overthrow the established government, and with this object in view they raided villages recruiting people to their gang punishing those who refused to do so, it was held that they were guilty of waging war.[46]

A deliberate and organised attack upon the government forces amounts to 'waging war' if the object of the insurgents be to overcome the servants of the government by armed force and violence and thereby prevent the general collection of taxes.[47]878

10. Principles on Waging War

Reviewing the earlier authorities a Division Bench of the Nagpur High Court observed:[48]

From these authorities the following principles emerge:

(i) No specific number of persons is necessary to constitute an offence under s 121, Penal Code.
(ii) The number concerned and the manner in which they are equipped or armed are not material.
(iii) The true criterion is *quo animo,i.e*., did the gathering assemble?
(iv) The object of the gathering must be to attain by force and violence an object of a general public nature, thereby striking directly against the government's authority.
(v) There is no distinction between principal and accessory and all who take part in the unlawful act incur the same guilt.

11. Terrorist Act

It has been aptly said by Sir J F Stephen:

> Unlawful assemblies, riots, insurrections, rebellions, levying of war are offences which run into each other and not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquility of a civilised society is, in each of the cases mentioned, disturbed either by actual force or at least by the show and threat of it.[49]

To this list has to be added 'terrorist acts' which are so conspicuous now-a-days. Though every terrorist act does not amount to waging war, certain terrorist acts can also constitute the offence of waging war and there is no dichotomy between the two. Terrorist acts can manifest themselves into acts of war. Terrorist acts prompted by an intention to strike at the sovereign authority of the State/Government, tantamount to waging war irrespective of the number involved or the force employed.[50]

12. Concept of War in International Law Sphere

It needs to be noticed that even in international law sphere there is no standard definition of war. Prof L Oppenheim in his well-known treatise on International Law has given a definition marked by brevity and choice of words. The learned author said: 'war is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.' Yoram Dinstein, an expert in international law field analysed the said definition in the following words:

> There are four major constituent elements in Oppenheim's view of War: (i) there has to be a contention between at least two States (ii) the use of the armed forces of those States is required, (iii) the purpose must be overpowering the enemy (as well as the imposition of peace on the victor's terms); and it may be implied, particularly from the words 'each other' and (iv) both parties are expected to have symmetrical, although diametrically opposed, goals.

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The learned author commented that Oppenheim was entirely right in excluding civil wars from his definition. Dinstein attempted the definition of 'war' in the following terms:

> War is a hostile interaction between two or more States, either in a technical or in a material sense. War in the technical sense is a formal status produced by a declaration of war. War in the material sense is generated by actual use of armed force, which must be comprehensive on the part of at least one party to the conflict.

In international law, we have the allied concepts of undeclared war, limited war, war-like situation, the nuances of which it is not necessary to unravel.[51]

13. Terrorist's Attack on Parliament is Waging War against the Government

In *State (NCT of Delhi) v Navjot Sandhu* ,[52] the Apex Court held:

> The single most important factor which impels us to think that this is a case of waging or attempting to wage war against the Government of India is the target of attack chosen by the slain terrorists and conspirators and the immediate objective sought to be achieved thereby. The battle-front selected was the Parliament House Complex. The target chosen was the Parliament - a symbol of sovereignty of the Indian republic. Comprised of peoples' representatives, this supreme law-making body steers the destinies of vast multitude of Indian people. It is a constitutional repository of sovereign power that collectively belongs to the people of India. The executive Government through the Council of Ministers is accountable to Parliament. Parliamentary democracy is a basic and inalienable feature of the Constitution. Entering the Parliament House with sophisticated arms and powerful explosives with a view to lay a siege of that building at a time when members of Parliament, members of Council of Ministers, high officials and dignitaries of the Government of India gathered to transact Parliamentary business, with the obvious idea of imperiling their safety and destabilising the functioning of Government and in that process, venturing to engage the security forces guarding the Parliament in armed combat, amounts by all reasonable perceptions of law and common sense, to waging war

> against the Government. The whole of this well planned operation is to strike directly at the sovereign authority and integrity of our Republic of which the Government of India is an integral component. The attempted attack on the Parliament is an undoubted invasion of the sovereign attribute of the State including the Government of India which is its alter ego. The attack of this nature cannot be viewed on the same footing as a terrorist attack on some public office building or an incident resulting in the breach of public tranquility. The deceased terrorists were roused and impelled to action by a strong anti-Indian feeling as the writings on the fake Home Ministry sticker found on the car (Ext. PW 1/8) reveals. The huge and powerful explosives, sophisticated arms and ammunition carried by the slain terrorists who were to indulge in 'Fidayeen' operations with a definite purpose in view, is a clear indicator of the grave danger in store for the inmates of the House. The planned operations if executed, would have spelt disaster to the whole nation. A war-like situation lingering for days or weeks would have prevailed. Such offensive acts of unimaginable description and devastation would have posed a challenge to the Government and the democratic institutions for the protection of which the Government of the day stands. To underestimate it as a mere desperate act of a small group of persons who were sure to meet death, is to ignore the obvious realities and to stultify the wider connotation of the expression of 'war' chosen by the drafters of IPC . The target, the obvious objective which has political and public dimensions and the *modus880 operandi* adopted by the hard-core 'Fidayeens' are all demonstrative of the intention of launching a war against the Government of India.[53]

When an attack on the Parliament was planned, the executors of the plan should have envisaged that they will encounter resistance from the police and other armed security personnel deployed on duty, fairly in large numbers, at the Parliament complex. The slain terrorists and other conspirators should have necessarily aimed at overpowering or killing the armed personnel who would naturally come in their way. Inflicting casualties on the police and security personnel on duty as well as civilians, if necessary, would have been part of the design and planning of these hard-core terrorists and the criminal conspirators. It is not necessary that in order to constitute the offence of waging war, military or other forces should have been the direct target of attack. There is no such hard and fast rule and nothing was said to that effect in the long line of cases referred to *supra*. The act laying siege of Parliament House or such other act of grave consequences to the Government and the people is much more reflective of the intention to wage war rather than an attack launched against a battalion of armed men guarding the border or vital installations.[54] Thus, the criminal acts done by the deceased terrorists in order to capture the Parliament House is an act that amounts to waging or attempting to wage war.[55]

14. Question of Declaration of War by Government

The question of formal declaration of war by the Government would only arise in a case of outbreak of armed conflict with another country or a political group having the support of another nation. It may be, in a case of civil war and a rebellion spreading through the length and breadth of the country, the Government will have to control it on war footing and it might even consider it expedient to declare that a state of war exists, but this theoretical possibility cannot be a guiding factor in construing the expression 'waging war' in s 121 especially when there is no legal provision mandating the Government to make such declaration.[56]

15. Distinction between Riot and Waging War

It is sometimes a matter of difficulty to say whether there has been a levying or waging of war or merely a riot of a serious kind. 'Rioting' is defined in s 146, IPC, and the test to determine 'whether a body of persons are rioters or rebels is *quo animo,i.e*., did the parties assemble?'[57]

Although the offence of waging war against the government and committing a riot may often run into each other, the distinction between them is clear. Where the rioting or tumult is merely to accomplish some private purpose interesting only to those engaged in it, not resisting or calling in question the state's authority or prerogative, then the tumult, however, numerous or outrageous the mob may be, is only a riot. But wherever the rising or insurrection has for its object a general purpose, not confined to the peculiar interests of the persons concerned in it, but common to the whole community, and striking directly against the state's authority,881 then it assumes the character of treason. The numbers concerned and the manner in which they were equipped or armed, are not material.

Prima facie, persons who attack a police station are guilty of rioting, and if the state charges them instead with waging war against the government, it is incumbent upon it to show that there is an insurrection and not a riot, and that insurrection is for the accomplishment of an object of a general nature.[58] In 1820, Lord President Hope in his summing up speech to the jury in *Rex v Andrew Hardie* ,[59] explained the distinction between levying a war and committing a riot in the following words :

> Gentlemen, it may be useful to say a few words on the distinction between levying war against the King and committing a riot. The distinction seems to consist in this, although they may often run very nearly into each other. Where the rising or tumult is merely to accomplish some private purpose, interesting only to those engaged in it, and not resisting or calling in question the King's authority or prerogative then the tumult, however numerous or outrageous the mob may be, is held only to be a riot. For example, suppose a mob to rise, and even by force of arms to break into a particular prison and rescue certain persons therein confined, or to oblige the Magistrates to set them at liberty or to lower the price of provisions in a certain market, or to tear down certain enclosures, which they conceive to encroach on the town's commons. All such acts, though severely punishable, and though they may be resisted by force, do not amount to treason. Nothing is pointed against either the person or authority of the King.[60]

> But, gentlemen, wherever the rising or insurrection has for its object a general purpose, not confined to the peculiar views and interests of the persons concerned in it, but common to the whole community, and striking directly the King's authority or that of Parliament, then it assumes the character of treason. For example, if mobs were to rise in different parts of the country to throw open all enclosures and to resist the execution of the law regarding enclosures wheresoever attempted, to pull down all prisons or Courts of justice, to resist all revenue officers in the collecting of all or any of the taxes; in short, all risings to accomplish a general purpose, or to hinder a general measure, which by law can only be authorised or prohibited by authority of the King or Parliament, amount to levying of war against the King and have always been tried and punished as treason. It is, therefore, not the numbers concerned, nor the force employed by the people rising in arms, but the object which they have in view that determines the character of the crime, and will make it either riot or treason, according as that object is of a public and general, or private and local nature.[61]

16. 'Against the Government of India'

The expression 'Government of India' was substituted for the expression 'Queen' by the Adaptation of Laws Order of 1950.[62] This section uses the expression 'against the Government of India' and not 'government or any state government' as used in s 121A . When a man is attacked by his opponent and receives some injury in any part of his882 body, we do not say that any part or that injured part of the man has been attacked for the simple reason that the various individual parts of the body have no separate existence of their own and all such parts constituent one inseparable body. Similarly, 29 states and 7 union territories constitute one integrated country, *i.e.*, India or Bharat (art 1 and Sch I to the Constitution of India). Every state or union territory forming part of India is an integral part of this country. Under arts 256 - 257 of the Constitution, the Union Government or the Government of India has power to issue necessary directions to the states in certain matters. Under art 260 only the Government of India can enter into agreement with the government of any territory outside India in respect of certain matters and similar power has not been given to any state. Under art 355 it is the duty of the Union to protect every state not only against external aggression but also against internal disturbance and to ensure that the government of every state is carried on in accordance with the provisions of the Constitution. Under art 53(2) the supreme command of the defence forces of the Union vests in the Union and no state is competent to raise its own defence forces. In view of this frame work of our Constitution if anybody wages war against any part of India, it will be deemed that the war has been waged against the Government of India. It is because of these considerations that the terms 'against the state government' has not been used along with the term 'against the Government of India' in this section.

The war contemplated by this section must be waged against the government. Mere violence, however great it may be, cannot amount to waging war against the Government of India.

The expression 'Government of India' is used in s 121 to imply the Indian State, the juristic embodiment of the sovereignty of the country that derives its legitimacy from the collective will and consent of its people.[63]

17. Abets the Waging of such War

Under the English law mere words spoken, however wicked and abominable, if they do not relate to any act or design then actually on foot against the life of the King, or the levying of a war against him, and in the contemplation of the speaker, do not amount to treason. And the same has been held to apply to writings.[64] But under IPC, the waging or levying of war and the abetting of it are put upon the same footing by this section. That is, the abetting of waging war is, under the IPC as much an offence of treason as the waging of war itself. This word 'abetment' is defined in s 107 and one of the ways in which an offence can be abetted is by 'instigating any person to do anything'. The meaning of abetment is not excluded by anything that occurs in s 121, IPC . The general law as to abetment is laid down in ss 107 - 120, IPC . To constitute 'abetment', it is not necessary that the act abetted should be committed or that the effect requisite to constitute the offence should be caused. This applies to the abetment of waging of war against the state as much as to the abetment of any other offence under the IPC . The only difference created between the former offence and other offences is that, while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded, and abetment which has failed, s 121 does away with the distinction so far as the offence883 of waging war is concerned and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatsoever.[65]

So long as a man only tries to inflame feeling, to excite a state of mind he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war.[66] This is the distinction between the offence of waging war and that of sedition under s 124A, IPC .

Under s 39 of the CrPC, every person aware of the commission of, or of the intention of any other person to commit, an offence punishable under ss 121 - 126, or 130, IPC must, in the absence of a reasonable excuse, give information thereof to the nearest magistrate or police officer. 'Offence' in s 39 includes any act committed at any place out of India which would constitute an offence if committed in India. Omitting to so report may amount to abetment by aiding under cl 3 of s 107 . But that clause relates only to intentional aiding. Where it is not proved that the accused's intention in omitting to report a plot, under s 39 of the CrPC, was with a view to aiding the waging war, the accused cannot be convicted of the offence of abetment of waging war. If a conspirator has formed the intention to leave a conspiracy and ceases to be a conspirator by his own act and intention when the other conspirators wage war, he cannot be held guilty under s 121 of the IPC .[67]

The accused was an influential man in a village which was the hotbed of a rebellion. He was the president of an association whose activities in regard to capitation tax were the preliminaries to the rebellion. Then, when the rebellion broke out, he assisted the rebels by feeding them after a battle and he helped in getting persons tattooed, *i.e*., enrolled as participants, or sympathizers of the rebellion. It was held that the accused abetted the waging of war and was guilty of the offence under s 121 .[68]

Conspiracy to wage war is punishable by s 121A, IPC . Refer to notes under that section.

Accused Pakistani nationals who had intruded into Indian territory, were arrested by the members of the Boarder Security Forces. Arms and ammunitions were recovered from their possession. Plea of the accused that they were fishermen was found false. Their conviction under ss 121, 121A, 122 and 123, IPC was held proper.[69]

18. No Distinction between Principal and Accessory

There is no distinction between the principal and accessory in an offence under this section.[70]Where parties concert together and have a common object, the act of one of the parties, done in furtherance of the common object and in pursuance of the concerted plan, is the act of all of them. Each party is an agent of the others in884 carrying out the objects of the conspiracy, and doing anything in furtherance of the common design.[71] But a distinction though fine, must be made between men who plan and execute a raid and those who, swept along in the maelstrom of events and sudden frenzy, participate in an offence of that kind. The latter cannot be held liable under this section.[72]

19. Previous Sanction of Government Necessary

Commentary for s 196, CrPC 1973[73] may be referred to.

20. Joinder of Charges

Where charges under ss 121, 121A and 122, IPC purport to place before the court different aspects of the same transaction, their joinder is not illegal.[74] The offence under this section is a continuing offence, and a charge is not illegal by reason of contravening s 219, CrPC, by mentioning more than three offences spread over a period longer than a year.[75]

21. Limitation

The special limitation of the period of prosecution in cases of treason and misprision of treason under state 7 Wm III C 3, s 5 in England, is an exception to the general rule in criminal cases. In enacting this section in IPC, the legislature has not thought it fit to limit in any way the period within which a prosecution for an offence under the enactment may be commenced, and consequently such limitation does not form part of the IPC .[76] The period of limitation prescribed by s 468, CrPC 1973 also does not apply to offences under this section.

Where an accused was summarily convicted by a magistrate having no jurisdiction on 06 September 1921, under s 149, IPC, and the conviction was subsequently set aside by the High Court on *habeas corpus* proceedings on 30 August 1922, and the government decided on 08 December 1922, to prosecute the same accused under s 121, IPC, it was held that in view of the unexplained delay and the fact that the accused had succeeded before the High Court, he should not be further prosecuted.[77]

22. Arrest, Bail and Court of Trial

An offence punishable under this section is cognizable, non-bailable and triable by a court of session. (Refer to the First Sch to the CrPC 1973). Refer to s 196, CrPC 1973.[78] An accused involved in a case under this section can, therefore, be arrested without a warrant.885

23. Charge

The following form of charge may be adopted:

I, (*name and office of the Sessions Judge, etc.*) hereby charge you (*name of accused person*) as follows:

That you, on or about the day of...at...waged war against the Government of India...(*mention the details, if necessary*) and thereby committed an offence punishable under s 121 of the Indian Penal code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

(*Signature and seal of the Magistrate*)

24. Proof

The treason alleged must be proved by overt acts. The acts, upon which it is intended to rely, must be expressly alleged in the indictment and no evidence is admissible of any overt act that is not so alleged unless it affords direct proof of the overt acts that are laid. Where the overt acts, alleged in the indictment, includes acts of conspiracy, evidence may be given of acts committed by co-conspirators in execution of the common design even if committed after the date of the overt acts alleged and after accused's arrest.[79]

25. Death Sentence

In case of terrorist attack on Parliament, where a conspiracy had been entered into to wage war against the Government of India, there were heavy casualties, The incident shocked the entire nation, and so death sentence awarded was held proper.[80]

Accused appellant Kasab was found guilty of waging war against the Government of India and causing death of several persons. Attack had shocked the conscience of the nation. Death sentence was held justified.[81]

26. Life Imprisonment

In an earlier incident, one person of the 'Jehadi' group was killed. The accused persons in order to take revenge attacked the American Centre causing the death of five police personnel and injuries to others. As many as seventeen persons including the two accused appellants participated in the attack. The accused were found guilty for waging war/attempting to wage war against the Government of India. The attack was supported by foreign nationals. On the facts and circumstances of the case, the imposition of death sentence on the appellants AF and N was held not warranted, the accused appellant N was sentenced to imprisonment for minimum thirty years without remission and accused AF was sentenced to imprisonment for entire life.[82]886

6 Substituted by AO 1950, for 'Queen'.

7 Substituted by Act 26 of 1955, s 117 and Schedule for 'transportation for life' (wef 1-1-1956).

8 Substituted by Act 16 of 1921, s 2, for 'and shall forfeit all his property'.

9 Substituted by Act 36 of 1957, s 3 and Sch II, for '*Illustrations*'.

10 The brackets and letter '(a)' omitted by Act 36 of 1957, s 3 and Sch II.

11 Substituted by the AO 1950, for 'Queen'.

12 Illustration (b) repealed by the AO 1950.

13 *RK Krishna Kumar v State of Assam & Ors* AIR 1998 SC 530, (1998) 1 SCC 474, (1997) 7 Scale 442 (SC) .

14 25 Edw III St 5, c 2.

15 See the Indian Penal Code 1860, pp 89-90.

16 The crime is committed even though the lady consents, in which case, she too is guilty of treason.

17 Note C, pp 118-19, Second Report, s 5 .

18 *Russell on Crime*, eleventh edn, p 219.

19 *Emperor v Ganesh Damodar Savarkar* 34 ILR Bom 394, 22 Bom LR 105, 11 Cr LJ 264 .

20 *Aung Hla v Emperor* AIR 1931 Rang 235, 33 Cr LJ 205 (SB) ; *Maganlal Radhakishan v Emperor* AIR 1946 Nag 173, p 184, 47 Cr LJ 851 .

21 Commissioner's Second Report, 1947, s 3(13) .

22 *State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820, (2005) 11 SCC 600, (2005) Cr LJ 3950 (SC) .

23 *Pan American World Air Inc v Actna Cas and Sur Co* . 505 FR 2d 989 at p 1017--As quoted in *State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820, (2005) 11 SCC 600, (2005) Cr LJ 3950 (SC) .

24 *State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820, (2005) 11 SCC 600, (2005) Cr LJ 3950 (SC) .

25 *Ibid*.

26 *Ibid*.

27 *Ibid*.

28 Commissioner's Second Report, 1847, paras 9-10.

29 *Nazir Khan v State of Delhi* AIR 2003 SC 4427, (2003) 8 SCC 461, (2003) Cr LJ 5021 .

30 *Refer* to Appendix, Note C, p 118, to the draft Code of 1837.

31 Second Report, 1847, p 342, para 5.

32 The commissioners evidently did not anticipate the visit of His Majesty King George V.

33 *Emperor v Savarkar* 34 ILR Bom 394, 22 Bom LR 105, 11 Cr LJ 264 .

34 *State (NCT of Delhi) v Navjot Sandhu* 2005 Cr LJ 3950, AIR 2005 SC 3820, 2005 SCC (Cri) 1715 .

35 *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra* AIR 2012 SC 3565, 2012 Cr LJ 4770, p 4892 (SC) .

36 *Aung Hla v Emperor* AIR 1931 Rang 235, p 236, 33 Cr LJ 205 (FB) ; *Maganlal Radha Kishan v Emperor* AIR 1946 Nag 173, 47 Cr LJ 851 .

37 *Barindra Kumar Ghosh v Emperor* 37 ILR Cal 467, p 505, 11 Cr LJ 453 .

38 *Barindra Kumar Ghosh v Emperor* 37 ILR Cal 467, p 507 .

39 *Maganlal Radhakishan v Emperor* AIR 1946 Nag 173, p 184, 47 Cr LJ 851 .

40 *R v Hardie* (1820) 1 St Tr 765(NS); *Rex v Wilson* (1820) 1 St Tr 1353-54 (NS).

41 *R v Forst* (1839) 4 St Tr 93, 94 (NS).

42 *Maganlal Radhakishan v Emperor* AIR 1946 Nag 173, p 185, 47 Cr LJ 851 .

43 Re *Umayyathantagath Puthen Veetil Kunhi Kadir*AIR 1922 Mad 126, 23 Cr LJ 203, p 205 .

44 *R Vasu Nair v State of Travancore-Cochin* AIR 1955 Tr & Coch 32, pp 37-38, 56 Cr LJ 328.

45 *Mir Hasan Khan v State* AIR 1951 Pat 60, p 63, 52 Cr LJ 462 ; *R Vasu Nair v State of Travancore-Cochin* AIR 1955 TC 32, p 37-38, 56 Cr LJ 328 .

46 *Nga Aung Pa v Emperor* AIR 1933 Rang 116, 34 Cr LJ 929 (FB) .

47 *Aung Hla v Emperor* AIR 1931 Rang 235, 33 Cr LJ 205 (SB) ; **approved in***Maganlal Radhakishan v Emperor* AIR 1946 Nag 173, p 184, 47 Cr LJ 851 .

48 *Ibid.*

49 *State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820, (2005) 11 SCC 600, (2005) Cr LJ 3950 .

50 *Ibid.*

51 *State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820, (2005) 11 SCC 600, (2005) Cr LJ 3950 .

52 *Ibid.*

53 *State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820, (2005) 11 SCC 600, (2005) Cr LJ 3950 .

54 *Ibid*.

55 *State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820, (2005) 11 SCC 600, (2005) Cr LJ 3950 .

56 *Ibid.*

57 Per Sir Michael Foster, *Foster's CrownCases*, p 208; *Aung Hla v Emperor* AIR 1931 Rang 235, p 237 (SB), 33 Cr LJ 205 .

58 *Jubba Mallah v Emperor* AIR 1944 Pat 58, p 62, 45 Cr LJ 606 ; Re *Umayyathantagath Puthen Veetil Kunhi Kadir*AIR 1922 Mad 126, 23 Cr LJ 203 ; *Maganlal Radhakrishan v Emperor* AIR 1946 Nag 173, 47 Cr LJ 851 .

59 *Rex v Andrew Hardie* 1820, 1 State Trials N.S., 610 as quoted in *State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820, (2005) 11 SCC 600, (2005) Cr LJ 3950 (SC) .

60 *State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820, (2005) 11 SCC 600, (2005) Cr LJ 3950 (SC) .

61 *State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820, (2005) 11 SCC 600, (2005) Cr LJ 3950 (SC) .

62 *Ibid.*

63 *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra* 2012 Cr LJ 4770 (SC), AIR 2012 SC 3565, 2012 AIR SCW 4942, (2012) 9 SCC 1, (2012) 7 Scale 553 .

64 *King v Andrew Hardie* (1820) 1 St Tr 610, p 625 (NS) .

65 *Emperor v Ganesh Damodar Savarakar* 11 Cr LJ 264, p 266, 34 ILR Bom 394, 22 Bom LR 105 ; *Maganlal Radhakishan v Emperor* AIR 1946 Nag 173, p 187, 47 Cr LJ 851 .

66 *Emperor v Ganesh Damodar Savarkar* 11 Cr LJ 264, p 268, per Heaton J; *Emperor v Hasrat Mohani* AIR 1922 Bom 284, p 288, 24 Cr LJ 923 .

67 *Goman Saya v Emperor* 14 Cr LJ 610, p 615, 21 IC 658 .

68 *Nga Po Aigyi v Emperor* AIR 1937 Rang 118, 38 Cr LJ 715 .

69 *Stateof Gujarat v Jaman Haji Mamad Jat,* 2007 Cr LJ 1584 (Guj) (DB) .

70 *R v Forst* (1839) 4 St Tr 93 (NS) ; *Maganlal Radhakishan v Emperor* AIR 1946 Nag 173, p 187, 47 Cr LJ 851 ; *Jubba Mallah v Emperor* AIR 1944 Pat 58, 45 Cr LJ 606 .

71 *Queen v Ameer Khan* 17 WR 15, p 16 .

72 *Maganlal Radhakishan v Emperor* AIR 1946 Nag 173, p 187, 47 Cr LJ 851 .

73 For detailed commentary see *Sohoni's Code of Criminal Procedure,* twenty-first edn. Lexisnexis.

74 *Barindra Kumar Ghose v Emperor* 37 ILR Cal 467, 11 Cr LJ 453, p 461 .

75 Re *Gam Mallu Dora*AIR 1925 Mad 690, p 695, 26 Cr LJ 1513 .

76 *Queen v Ameeruddin* 15 WR 25, p 27 .

77 *Public Prosecutor v Palathingal Valia Peediyakkal Muhammad* AIR 1924 Mad 768, p 769, 26 Cr LJ 323 .

78 For detailed commentary see *Sohoni's Code of Criminal Procedure*, twenty-first edn. Lexisnexis.

79 *Halsbury's Law of England,* vol 11, fourth edn, p 483, para 820.

80 *State (NCT of Delhi) v Navjot Sandhu* 2005 Cr LJ 3950 (SC), AIR 2005 SC 3820, 2005 SCC (Cri) 1715 .

81 *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra* 2012 Cr LJ 4770 (SC), AIR 2012 SC 3565, 2012 AIR SCW 4942, (2012) 9 SCC 1, (2012) 7 Scale 553 .

82 *Md. Jamiluddin Nasir v State of West Bengal* 2014 Cr LJ 3589, AIR 2014 Cr LJ 2587 .

Indian Penal Code (Act XLV of 1860)

Chapter VI

Of Offences Against the State

[83][S. 121A.

Conspiracy to commit offences punishable by Section 121 .--

Whoever within or without [84][India] conspires to commit any of the offences punishable by section 121,[85][* * *] or conspires to overawe, by means of criminal force or the show of criminal force, [86][the Central Government or any [87][State] Government [88][* * *], shall be punished with [89][imprisonment for life], or with imprisonment of either description which may extend to ten years, [90][and shall also be liable to fine].

Explanation.--To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.]

Comments

1. Scope

The relevant portion of the section, as it appeared in the Bill which led to its insertion, was:

> Wherever ...conspires to wage or abet civil war shall be punished with transportation for life, or any shorter term, or with imprisonment of either description which may extend to ten years.

Explanation 2 ran thus:

> Civil war means permanent and organised hostile operations carried on by any one section of the community against any other section of it.

Appended to this were two illustrations, one of which was:

An attack upon an arsenal might be civil war if it was intended as the first step towards permanent hostilities.[91]

2. Legislative Changes

This section was added by s 4 of the Indian Penal Code (Amendment) Act 1870 and since then has undergone a number of amendments. The words 'and shall also be887 liable to fine' at the end were inserted by s 3 of the Indian Penal Code (Amendment) Act 1921. The words 'British India' after the words 'within or without' were successively substituted by the Adaptation of Laws Order 1948 and 1950 and the Pt B states (Laws) Act 1951, to read as 'India'. The words 'or to deprive the Queen of the sovereignty of the Provinces or of any part thereof' after the figure '121' as amended by AO 1937 and AO 1948 for the original words were repealed by AO of 1950. The words 'the Central Government or any Provincial Government' after the words 'Criminal force' were substituted for the words 'Government of India or any Local Government' by AO of 1950. The words 'or the Government of Burma' before the words 'shall be punished' were repealed by AO 1948.

3. Marginal Note to the Section

The marginal note to this section is 'conspiracy to commit offences punishable by s 121, IPC . This was a strictly accurate description of the section proposed to be enacted by the bill originally introduced in the legislative council, as the conspiracies aimed at were conspiracies either to wage war against the King in the manner in which it was usual to wage war or conspiracies to raise an insurrection with the object of subverting the constitution. The section, however, as it was finally enacted, brought within its scope other conspiracies also, and the marginal note is, therefore, not a strictly accurate description of what is contained in it. The words 'conspires to overawe by means of criminal force or the show of criminal force the Central Government or any state government' clearly embrace not merely a conspiracy to raise a general insurrection, but also a conspiracy to overawe the Central or a state government, by the organisation of a serious riot or a large and tumultuous unlawful assembly.[92]

4. "Whoever"

Commentary under same heading in s 121 may be *referred* to.

5. Two Kinds of Conspiracies Embraced

The section, as it now stands, embraces two kinds of conspiracies: (a) conspiracies to commit any of the offences punishable by s 121, and (b) conspiracies to overawe, by means of criminal force or the show of criminal force, the Central or any State Government.

The conspiracies dealt with in this section may be distinguished from criminal conspiracies dealt with in ss 120A and 120B . In *Mir Hasan Khan v State* ,[93] Shearer J, (for self and Jamuar J) observed:

> Section 121A occurs in a chapter of the Penal Code which is headed 'Offences against the State', whereas the offence of conspiracy is contained in the preceding chapter, Chapter VA which is headed 'Criminal Conspiracy'. The Legislature in enacting section 121A clearly had in mind the English Treason Felony Act of 1948 and I am very much inclined to think that, in enacting it, it did not aim at conspiracies other than conspiracies which had a political object, that is, conspiracies to overthrow the existing constitution or conspiracies to prevent the enactment of legislation which was888 considered to be obnoxious or to compel the resignation of a member or members of the Government who had become unpopular. As the Section

> stands, however, I am not prepared to say that in certain circumstances persons who organise a strike among policemen or certain other public or municipal employees might not render themselves liable to prosecution under it. Clearly, however, persons do not commit this crime unless it was part and parcel of their plans to overawe the Central or the Provincial Government by criminal force or show of criminal force.

6. Mere Holding of Certain Views not Punishable

The mere holding of communist belief or doctrines is not punishable *per se*. A theoretical communist or a student of communism cannot be said to be guilty of an offence. And if a communist were to work individually, in furtherance of his belief, he would not be guilty of conspiracy. In the case of *SH Jhabwala v Emperor* ,[94] the court observed:

> The question before the Court is whether these non-member communists also conspired with the member communists to deprive His Majesty the King-Emperor of his sovereignty. It may be conceded that 'any conspiracy to change the form of the Government of India or of any Local Government', even though it may amount to an offence under another section of the Code, would not be an offence under s 121A, unless it is a conspiracy to overawe such Government by means of criminal force, or show of criminal force...Depriving His Majesty of the sovereignty of British India would obviously include the severance of the connection of India with the Imperial Government of England. It cannot therefore be questioned that any conspiracy to establish the complete Independence of India, as distinct from obtaining for it the status of a self-governing dominion within the British Empire, would be tantamount to conspiring to deprive His Majesty of the sovereignty of British India. The same result would follow if there was a conspiracy to establish a perfectly democratic or republican form of Government of India outside the British Empire.

The law does not prohibit a person from forming any views, however extreme they may be, and if a person confines himself to an academic discussion as to the soundness of his views, he would not be guilty of any crime. But if he decides to go beyond the stage of academic discussion, he should have regard not merely to the attractive doctrines of political philosophers but to the mundane matter of fact provisions of the IPC . As with the doctrines of political philosophers, so with the theories sound or unsound of constitutional law; they avail nothing against the plain provisions of the IPC . A court has no concern with the justification or otherwise of the claims of the accused or with the rectitude of his political views, but the court may take cognizance of the fact that he does hold certain views, for as a guide to his conduct and intentions these views are most relevant considerations. A person has no justification to attempt violently to overthrow by force the Constitution as by law established.[95]

7. Conspiracy itself is a Crime

It is elementary but it is usual to state that under the law as contained in this section conspiracy in itself is a crime and it is not necessary to establish any illegal act or illegal omission as overt acts of the conspiracy, the existence of which has to be889 established. The illegal act or omission, if established, supports the case of the existence of the conspiracy; the offence being complete even though two persons conspiring together go no further than the original agreement.[1]The offence of criminal conspiracy is complete as soon as two or more persons agree to do or cause to be done an illegal act, or an act which is not illegal, by illegal means. It is immaterial whether the illegal act is the ultimate object of such an agreement or is merely incidental to that object. For the purpose of s 121A, IPC, it is not necessary that any act or illegal omission shall take place in pursuance of the conspiracy. The agreement in itself is enough to constitute the offence. The provisions of law are very comprehensive and do not require any formidable elements either in men or means to satisfy its definition of a conspiracy to wage war. For the conspiracy no act or illegal omission is necessary, the agreement of two or more will suffice, so that the determination of the court that a conspiracy to wage war has been established does not imply as its terms might suggest, the existence of a serious menace to the Constitution or the stability of the constituted authority in India.[2]

The same person may be guilty under s 121A as well as s 123, IPC ; for instance, a person may bring himself within the latter section by concealment of the existence of a design to wage war against the government, and may immediately afterwards join in the conspiracy to wage the war and thereby bring himself within the scope of s 121A .[3] To act as carrier is sometimes enough in a case of conspiracy.[4]

Even when the facts alleged and proved can be brought within the ambit of this section, it is not incumbent on the government to prosecute under that section. The government may consider that it would be impossible to prove facts which would bring the offence under it and may be content to advance evidence of a criminal conspiracy under s 120B .[5]

Where several persons are charged with the same conspiracy, it is a legal impossibility that some should be found guilty of one conspiracy and some of another, and any accused not shown to be a member of that conspiracy is entitled to demand an acquittal.[6] Where charges of conspiracy and sedition were framed on the basis of letters recovered in the search of accused, it could not be said that the charges were not justified as the accused were not the authors of the letters.[7]

Accused Pakistani nationals who had intruded into the Indian territory, were arrested by the members of the Boarder Security Forces, and arms and ammunitions were recovered from their possession. Plea of the accused that they were fishermen was found false. Their conviction under ss 121, 121A, 122 and 123, IPC was held proper.[8]

Conspirators may Appear and Disappear in the Course of Conspiracy

It is also not necessary that a person should be participant in a conspiracy from start to finish. Conspirators may appear and disappear from stage to stage in the course of890 a conspiracy.[9] A conspirator would be guilty under this section even if he subsequently left it and did not take part in the fight that took place in pursuance of the conspiracy.[10]

8. 'To Overawe by Means of Criminal Force'

This section applies not only to a conspiracy to wage war against the Government of India, but also to overawe, by means of criminal force or the show of criminal force, the Central Government or any state government.[11] The word 'overawe' clearly imports more than the creation of apprehension or alarm or fear. It connotes the creation of a situation in which the government is compelled to choose between yielding to force or exposing the government or the members of the public to a very serious danger. Therefore a procession by a few youngsters shouting slogans to the effect that only by an armed revolution, the government of the people can be established would not, by itself, create any public disturbance.[12]

It is not necessary that the danger should be a danger of assassination or of a bodily injury to themselves. The danger might well be a danger to public property or to the safety of members of the general public. Persons who organise a strike among policemen and other public or municipal employees might render themselves liable to prosecution under this section, if it is a part and parcel of their plan to overawe the government by criminal force or show of criminal force.

9. Criminal Force Considered

Where a large number of police *havaldars* and constables conspired to withhold their services with the object of compelling the State Government to yield to their demands and the conspirators seized the armouries and took possession of the arms and ammunition, (though they remained peacefully in the police lines and did nothing to intimidate the general body of citizens) but took steps to ensure that the working of the treasury should not be interrupted, it was held that it could not fairly be said that there was any such show of criminal force as is contemplated by this section.[13]

10. Condition for Initiation of Proceedings

Under s 196, CrPC, no court can take cognizance of an offence punishable under this section, except with the previous sanction of the Central Government or the State Government.[14]

11. Procedure

An offence punishable under this section is cognizable and non-bailable and is triable by a court of session.[15]

891An offence punishable under this section, if committed in the same transaction with any offence punishable under the Prevention of Corruption Act 1988 may also be tried by a special judge appointed under that Act in his deemed capacity as a session judge, without any order of commitment.[16]

12. Charge

The following form of charge may be adopted:

> I, (*name and office of the Session Judge etc.*) hereby charge you (*name of the accused*), as follows:
>
> That you, on or about the.....day of.....at.....conspired to wage war (*or to attempt or abet the waging of war*) against the Government of India, (or conspired to overawe) by means of criminal force or show of criminal force, the Central Government (or any state government) (*specify the act*) and thereby committed an offence punishable under s 121A of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this Court on the said charge.

In a conspiracy case the accused can be charged with conspiracy with persons unknown, but if they are charged with conspiracy with persons known, such persons must be named in the charge.[17] Omission of the prosecution to proceed against all the conspirators does not always vitiate the trial.[18] It may be noted that mention of the names of persons as co-conspirators indiscriminately gives greater facility in the matter of leading evidence under s 10 of the Indian Evidence Act 1872.[19]

Even when the facts alleged and proved can be brought within the ambit of this section, it is not incumbent on the government to prosecute under it, government may consider that it would be impossible to prove facts which would bring the offence under this section.[20]

13. Proof

The offence of criminal conspiracy is complete as soon as two or more persons agree to do or cause to be done an illegal act, or an act which is not illegal, by illegal means. The agreement itself is enough to constitute the offence as contemplated by this section, and it is not necessary that any act or illegal omission shall take place in pursuance of the conspiracy. The rule of evidence forming part of the substantive law is the one formulated in s 10, Indian Evidence Act 1872, the operation of which is strictly conditional upon there being reasonable ground to believe that two or more persons have

conspired together to commit an offence.[21] The question whether the evidence is sufficient to establish a charge of conspiracy under s 121A, IPC is a question which depends upon the view which the trial court892 takes of the evidence adduced before it and of the inferences reasonably to be drawn from that evidence.[22]

In order to support a conviction on such a charge it is not enough to show that the persons charged have contrived to obtain possession of an armoury and have, when called upon to surrender it, used the rifles and ammunition so obtained against the Government troops. It must also be shown that the seizure of the armoury was part and parcel of a planned operation and that their intention in resisting the troops of the Government was to overwhelm and defeat these troops and then to go on and crush any further opposition with which they might meet until either the leaders of the movement succeeded in obtaining the possession of the machinery of Government or until those in possession of it yielded to the demands of their leaders.[23]

14. Punishment

Sections 121, 121A and 122, IPC specifically relate to offences against the state. While s 121 provides for punishment for those engaged in waging war against the Government of India, the other two sections relate to conspiracy and preparation to commit such offence by collecting arms *etc.*, respectively.[24] In awarding sentence, the prevention of crime, the protection of the state, the society and the public, as also the reformation of the offender, have to be kept in view. It has been felt that in the case of political offences, arising out of beliefs of the accused, severe sentences defeat their object,[25] but a distinction must be drawn between political offences of the nature of sedition or spread of ideas of communism and socialism charged under s 121A, IPC, and offences against the state and society involving treason, armed rebellion and murder, in connection with which the name of politics is used. The sentence passed in a case which is required to be a deterrent must be in proportion to the gravity of the offence committed, and if the offence committed was one of the most serious against the state, the court has to keep in view the ends of justice as provided by law, in the matter of conviction of the accused placed on trial, as also in the matter of sentence passed on him commensurate with the nature of the offence committed. Where many of the accused are misdirected persons in the prime of their youth and their guilt as members of the conspiracy has not been of the same description, regard being had to the part actually played by them, different sentences are called for in the case of each so far as the nature of his guilt is concerned.[26] The theory of punishment is based upon (a) the protection of the public, (b) the prevention of crime, and (c) the reformation of the offender. In the case of political offences, arising out of the beliefs of the accused, severe sentences in practice confirm the offenders in their beliefs and create other offenders, thus increasing the evil and the danger to the public.[27] The maximum punishment that can be imposed under this section, when the offence as well as its gravity is established, is imprisonment for life.

893In *Nazir Khan v State of Delhi* [28] the Supreme Court observed:

> However, considering the gravity of the offence and the dastardly nature of the acts and consequences which have flown out and would have flown in respect of the life sentence, incarceration for the period of 20 years would be appropriate. It was also held that the accused-appellants would not be entitled to any remission from the aforesaid period of 20 years. As observed by this Court in *Ashok Kumar v Union of India* [29] and *Satpal v State of Haryana and another* [30] 'imprisonment for life' means imprisonment for the full span of life.[31]

83 Inserted by Act 27 of 1870, s 4 .

84 The words 'British India' have successively been substituted, by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and

Schedule to read as above.

85 The words 'or to deprive the Queen of the sovereignty of the Provinces or of any part thereof' omitted by the AO 1950.

86 Substituted by the AO 1937, for 'the Government of India, or any, local Government'.

87 Substituted by AO 1950, for 'Provincial'.

88 The words 'or the Government of Burma' omitted by the AO 1948.

89 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life or any shorter term' (wef 1-1-1956).

90 Inserted by Act 16 of 1921, s 3, for 'and shall forfeit all his property'.

91 *Gazette of India*, dt 27 August 1870.

92 *Mir Hasan Khan v State* AIR 1951 Pat 60, p 63-64, 52 Cr LJ 462 ; *SH Jhabwala v Emperor* AIR 1933 All 690, p 696, 34 Cr LJ 937 .

93 *Mir Hasan Khan v State* AIR 1951 Pat 60, p 64, 52 Cr LJ 462 ; **but see** Re *Ameer Khan* 6 Beng LR 392.

94 *SH Jhabwala v Emperor* AIR 1933 All 690, p 697, 715, 34 Cr LJ 937 .

95 *Manabendra Nath Roy v Emperor* AIR 1933 All 498, p 508 .

1 *Jitendra Nath Gupta v Emperor* AIR 1937 Cal 99, p 106, 38 Cr LJ 818 .

2 *Emperor v Lalit Mohan Chuckerbutty* 39 ILR Cal 559, p 581, 12 Cr LJ 286 ; *Emperor v Nilakanta* 13 Cr LJ 305, 35 ILR Mad 247 ; *Pulin Behary Das v Emperor* 13 Cr LJ 609 .

3 *Pulin Behary Das v Emperor* 13 Cr LJ 609, p 652 .

4 *Raghubir Singh & Ors v State of Bihar* AIR 1987 SC 149, (1987) Cr LJ 157 (SC) .

5 *Maganlal Bagadi v Emperor* AIR 1934 Nag 71, p 75, 35 Cr LJ 1097 .

6 *Emperor v Lalit Mohan Chuckerbutty* 38 ILR Cal 559, 12 Cr LJ 286 .

7 *Raghubir Singh & Ors v State of Bihar* AIR 1987 SC 149, (1987) Cr LJ 157 (SC) .

8 *Stateof Gujarat v Jaman Haji Mamad Jat* 2007 Cr LJ 1584 (Guj) (DB) .

9 *Ibid.*

10 *Goman Saya v Emperor* 14 Cr LJ 610, p 615 .

11 *SH Jhabwala v Emperor* AIR 1933 All 690, p 697, 34 Cr LJ 937 .

12 *Arvindan v State of Kerala* (1983) Cr LJ 1259, (1983) Ker LN 198, (1983) KLT 193 (Ker), (1984) Mad LJ (Cr) 387 (Ker) .

13 *Mir Hasan Khan v State* AIR 1951 Pat 60, p 65, 67, 52 Cr LJ 462 .

14 Section 196 of the Code of Criminal Procedure 1973; *Drub Kumar v State of Bihar* (1988) BLJ 960 .

15 First Schedule to Code of Criminal Procedure 1973.

16 Sections 3 - 5 of the Prevention of Corruption Act 1988; *State of Bihar v Simranjit Singh Manu* (1987) BLJ 362 (based on the interpretation of the provisions of Criminal Law (Amendment) Act 1952, which has now been repealed by the Prevention of Corruption Act 1988 but its main provisions have been incorporated in the latter Act).

17 *Emperor v Lalit Mohan (Noni Gopal)* 38 ILR Cal 559 .

18 *Amritlal Hazara v Emperor* AIR 1916 Cal 188, p 197, 16 Cr LJ 497 .

19 *Jitendra Nath Gupta v Emperor* AIR 1937 Cal 99, p 103, 38 Cr LJ 818 .

20 *Maganlal Bagdi v Emperor* AIR 1934 Nag 71, p 73, 35 Cr LJ 1097 .

21 *Jitendra Nath Gupta v Emperor* AIR 1937 Cal 99, p 120, 38 Cr LJ 818 ; *S N Jhabwala v Emperor* AIR 1933 All 690, p 697 ; *Barindra Kumar Ghose v Emperor* 37 ILR Cal 467, 11 Cr LJ 453, p 456 .

22 *Purananda Das Gupta v Emperor* AIR 1939 Cal 65, p 72, 40 Cr LJ 199 .

23 *Nazir Khan v State of Delhi* AIR 2003 SC 4427, (2003) 8 SCC 461, (2003) Cr LJ 5021 (SC) .

24 *RK Krishna Kumar v State of Assam & Ors* (1997) (7) Scale 442 (SC) .

25 *SH Jhabwala v Emperor* 55 ILR All 1040 .

26 *Jitendra Nath Gupta v Emperor* AIR 1937 Cal 99, 38 Cr LJ 818 .

27 *SN Jhabwala v Emperor* AIR 1933 All 690, p 732, 34 Cr LJ 937 .

28 *Nazir Khan v State of Delhi* AIR 2003 SC 4427, (2003) 8 SCC 461, (2003) Cr LJ 5021 .

29 *Ashok Kumar v Union of India* AIR 1991 SC 1792, (1992) 4 SCC 172, (1991) Cr LJ 2483 .

30 *Satpal v State of Haryana and another* AIR 1993 SC 1218, (1992) 4 SCC 172, (1993) Cr LJ 314 .

31 *Nazir Khan v State of Delhi* AIR 2003 SC 4427, (2003) 8 SCC 461, (2003) Cr LJ 5021 .

Indian Penal Code (Act XLV of 1860)

Chapter VI

Of Offences Against the State

S. 122.

Collecting arms, etc., with intention of waging war against the Government of India.--

Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the [32][Government of India], shall be punished with [33][imprisonment for life] or imprisonment of either description for a term not exceeding ten years, [34][and shall also be liable to fine].

Comments

1. Scope

Sections 121, 121A and 122, IPC specifically relate to offences against the state. While s 121 provides for punishment to those engaged in waging war against Government of India, ss 121A and 122 relate to conspiracy and preparation to commit such offence by collecting arms, *etc.*, respectively.[35] The acts, made punishable by s 122, are those which amount to preparation to wage war. Preparation is a stage prior to attempt. This section and ss 126 and 399 make preparation to commit an offence punishable. In other cases mere preparation to commit an offence is not punishable.

Accused Pakistani nationals who had intruded into the Indian territory, were arrested by the members of the Boarder Security Forces, and arms and ammunitions were recovered from their possession. Plea of the accused that they were fishermen was found false. Their conviction under ss 121, 121A, 122 and 123, IPC was held proper.[36]894

2. Ingredients

The ingredients required to be proved for an act to constitute an offence under s 122 are: (i) there must be a collection of men, arms or ammunition; (ii) such a collection should be with the intention of either waging war or being prepared to wage a war; (iii) the participation of the accused in such a collection; and (iv) the war is to be waged against the Government of India.[37]

In the instant case the accused appellants had collected themselves in a room and from that room arms, ammunitions and print publication was seized. There was no evidence at all that these four appellants had organized a movement or were part of a movement, attended with violence or attacks against public officials. Nor was there any proof that they had collected the arms with a view to destruct public property, *etc*. Therefore charge under s 122, IPC was held not proved in the case.[38]

3. 'Otherwise Prepares'

This phrase is comprehensive enough to make any kind of preparation to wage war punishable. It would embrace even aiding the ways of preparation.

4. 'Preparation' Distinguished from 'Attempt'

Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards commission after the preparation has been made.[39] There is a greater degree of determination in an 'attempt' as compared with a 'preparation'.[40] Mere intention, not followed by any act, cannot constitute an offence, and an indirect preparation, which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence, or an attempt or abetment of the same.[41]

There is no sharp clear-cut distinction between the two. One fades into the other and the dividing line can only be decided with reference to the facts of each particular case.[42] In *Re R Mac Crea,*[43] it was observed that it is very difficult to frame a satisfactory and exhaustive definition which may lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. The test for determining whether an act constitutes an attempt or preparation895 is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless.[44] The Supreme Court, in an earlier case, held that there is a thin line between the preparation for and an attempt to commit, an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control he is said to have attempted to commit the offence.[45]It was further pointed out in the last cited case that the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependant on the nature of the offence and the step necessary to take in order to commit it.[46]

5. Presumption under Section 111A of Indian Evidence Act

Under s 111A of the Indian Evidence Act 1872, a presumption can be drawn against a person who is accused of having committed an offence punishable under s 122 of the IPC . It can be presumed that a person charged under s 122 of the IPC, is guilty if it is shown that he had been in an area declared to be a disturbed area and where firearms or explosives were used or found to attack or resist the numbers of any armed forces or forces charged with the maintenance of public order, while discharging of their duties.[47]

6. Procedure

Same as in the case of an offence under s 121 .

7. Information to Police or Magistrate

Section 39 of the CrPC, provides that every person, aware of the commission of, or of the intention of any other person, to commit, any offence punishable under ss 121 - 126 and 130 of the IPC shall, in the absence of any reasonable excuse, forthwith give information to the nearest magistrate or police officer of such commission or intention.

For the purpose of s 39, CrPC, the term 'offence' includes any act committed at any place out of India which would constitute an offence if committed in India.

Omission to give information must be intentional. Failure to give information is punishable under ss 118, 176 or 202 of the IPC .

8. Charge

The following form of charge may be adopted:

> I, (*name and office of Session Judge, etc.*) hereby charge you (*name of the accused*), as follows:
>
> That you, on or about the.....day of.....at.....collected men (*or arms or ammunition*) (*if any other means were adopted, mention them*) with the896 intention of waging war (*or being prepared to wage war*) against the Government of India, and thereby committed an offence punishable under s 122 of the Indian Penal Code, and within the cognizance of this Court.
>
> And I hereby direct that you be tried by this Court on the said charge.

9. Proof

To establish that an offence under s 122 has been committed, it is incumbent on the prosecution to prove that the collection of men, arms and ammunition is for no other purpose but to prepare to wage a war against the Government of India.[48]

32 Substituted by the AO 1950, for 'Queen'.

33 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life or any shorter term' (wef 1-1-1956).

34 Substituted by Act 16 of 1921, s 3, for 'and shall forfeit all his property'.

35 *RK Krishna Kumar v State of Assam & Ors* (1997) 7 Scale 442 (SC) .

36 *Stateof Gujarat v Jaman Haji Mamad Jat* 2007 Cr LJ 1584 (Guj) (DB) .

37 *Javed alias Java Ahmed Mohammed Akbar Bhatt & others v State of Maharashtra* (2007) Cr LJ 1386 (Bom) (DB) .

38 *Javed v State of Maharashtra* 2007 Cr LJ 1386, p 1393 (Bom) (DB) ; (*State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820 & *Nazir Khan v State of Delhi* AIR 2003 SC 4427 **relied on**).

39 *Malkiat Singh v State of Punjab* AIR 1970 SC 713, (1970) Cr LJ 750 ; *Empress v Peterson* 1 ILR All 316 ; *R v Padala Venkatsamy* 3 ILR Mad 4, 1 Weir 543 ; *Lakshumi Prasad v Emperor* 23 Cr LJ 108, AIR 1923 Pat 307 ; *Jain Lal v Emperor* AIR

1942 Pat 82, 44 Cr LJ 337 .

40 *State of Bihar v Jagdish Narain Singh* AIR 1959 Pat 376, (1959) Cr LJ 1014 ; *State of Madhya Pradesh v Muratsingh Har Prashad* (1971) Cr LJ 1084, (1971) MPLJ 960, p 965 ; Re *Uppari Nallanna*(1972) Cr LJ 433, (1971) Mad LJ (Cr) 520 (an attempt is a stage of preparation to commit an offence which is very near to the stage of actual commission and from which an intention to commit the offence can be inferred).

41 *Empress v Baku* 24 ILR Bom 287, p 291 ; *Abdullah v Emperor* 15 Cr LJ 265, p 267 ; *Asgarali Pradhania v Emperor* AIR 1933 Cal 893, 35 Cr LJ 97 ; *Parasram Ji v Imtiaz* AIR 1962 All 22, (1962) 1 Cr LJ 7 ; *Ganapathi Udayar v TA Chinnayya Mudaliar* AIR 1953 Mad 609, (1962) 1 Cr LJ 1152 ; *State of Madhya Pradesh v Ram Charan Kishan* AIR 1969 MP 96, (1969) Cr LJ 748 .

42 *Parasram Ji v Imtiaz* AIR 1962 All 22, (1962) 1 Cr LJ 7 .

43 *Re R Mac Crea* 15 ILR All 173, p 179.

44 *Malkiat Singh v State of Punjab* AIR 1970 SC 713, (1970) Cr LJ 750 .

45 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698, (1961) 2 Cr LJ 822, p 824 .

46 *Ibid*; Re *R Mac Crea* 15 ILR All 173, p 180; *Parasram Ji v Imtiaz* AIR 1962 All 22, (1962) 1 Cr LJ 7 ; Re *Munirathnam Reddi*AIR 1955 AP 118, (1955) Cr LJ 917 .

47 *Javed alias Java Ahmed Mohammed Akbar Bhatt & others v State of Maharashtra* (2007) Cr LJ 1386 (Bom) (DB) .

48 *Javed alias Java Ahmed Mohammed Akbar Bhatt & others v State of Maharashtra* (2007) Cr LJ 1386 (Bom) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter VI

Of Offences Against the State

S. 123.

Concealing with intent to facilitate design to wage war.--

Whoever, by any act, or by any illegal omission, conceals the existence of a design to wage war against the [49][Government of India], intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

This section is an adaptation of the principles of ss 118, 119 and 120, IPC with a view to facilitate the waging of war. Commentary under those sections may be referred to.

Offence under s 123, IPC in relation to a charge under s 121, IPC is a minor offence, and the accused can be convicted under s 123, IPC even in the absence of a charge.[50]

Accused Pakistani nationals had intruded into the Indian territory, and were arrested by the members of the Boarder Security Forces, and arms and ammunitions were recovered from their possession. Plea of the accused that they were fishermen was found false. Their conviction under ss 121, 121A, 122 and 123, IPC was held proper.[51]

2. Procedure

Same as in the case of an offence under s 121, IPC .

3. Information to Police or Magistrate

Synopsis notes under s 122 may be referred to.

897When the accused had knowledge of a conspiracy and plans of terrorists to attack the Parliament House, his illegal omission to apprise police or magistrate of the design of conspirators, which is act of waging war, would make him liable for the offence under s 123 of the IPC . The fact that no charge under s 123 was framed against him, would not prejudice him if charge of waging war and other allied offences are subject matter of charges.[52]

4. Charge

The following form of charge may be adopted:

> I, (*name and office of Sessions Judge etc.*) charge you (*name of the accused*), as follows:
>
> That you, knowing that on or about the.....day of.....at.....certain persons had designed to wage war against the Government of India, concealed the existence of the design by (*specify the act or omission*) intending by such concealment to facilitate (*or knowing it to be likely that such concealment would facilitate*) the waging of such war, and thereby committed an offence punishable under s 123 of the Indian Penal Code, and within my cognizance.
>
> And I hereby, direct that you be tried by this Court on the said charge.

5. Proof

To establish the charge under this section the following points should be proved in evidence:

(i) The existence of a design to wage war.
(ii) The accused's knowledge of such design.
(iii) The fact of its concealment by means of an act or illegal omission.
(iv) The intent with which the design was concealed.

49 Substituted by the AO 1950, for 'Queen'.

50 *Shaukat Hussain Guru v State (NCT) Delhi* 2008 Cr LJ 3016 (SC), AIR 2008 SC 2419, (2008) 6 SCC 776, 2008 AIR SCW 3688, 2008 (7) Scale 525 .

51 *Stateof Gujarat v Jaman Haji Mamad Jat* 2007 Cr LJ 1584 (Guj) (DB) .

52 *State (NCT of Delhi) v Navjot Sandhu* AIR 2005 SC 3820, (2005) 11 SCC 600, (2005) Cr LJ 3950 .

Indian Penal Code (Act XLV of 1860)

Chapter VI

Of Offences Against the State

S. 124.

Assaulting President, Governor, *etc*., with intent to compel or restrain the exercise of any lawful power.--

Whoever, with the intention of inducing or compelling the [53][President] of India, or the [54][Governor [55][* * *]] of any [56][State], [57][* * *] [58][* * *] [59][* * *] to exercise or refrain from exercising in any manner any of the lawful powers of such [60][President] or [61][Governor [62][* * *]], 898assault or wrongfully restrains, or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempt so to overawe, such [63][President or [64][Governor, [65][* * *]],

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section is an enlargement of the latter portion of s 121A, IPC and imposes a deterrent punishment for assaults, wrongful restraints *etc.*, to overawe the President or the Governor of any state to exercise or restrain from exercising their lawful, official and constitutional powers.

2. Procedure

Same as in the case of an offence under s 121, IPC .

3. Information to Police or Magistrate

Synopsis notes under s 122 may be referred to.

4. Charge

The following model form of charge under s 124 has been given at serial no. 2 of form no. 32 in the Sch II to CrPC, and may be used with necessary modifications according as to the facts and circumstances of the individual case:

I, (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused person*) as follows:

That you, on or about the.....day of....., at....., with the intention of inducing the President of India [*or, as the case may be*, the Governor of (*name of state*)] to refrain from exercising a lawful power as such President (*or as the case may be,* the Governor), assaulted President (*or as the case may be, the Governor*), and thereby committed an offence punishable under section 124 of the Indian Penal Code, and within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the said charge.

(*Signature and seal of the Session Judge*)

5. Proof

To prove a charge under this section the following points have to be proved:

(i) the accused committed one or other of the acts specified;899
(ii) the person against whom the offence was committed was the person known under the name or title by which he is described in the section;
(iii) the object with which the act in question was committed.

53 Substituted by the AO 1950, for 'Governor General'.

54 Substituted by Act 3 of 1951, s 3 and Schedule, for 'Governor'.

55 The words 'or Rajpramukh' omitted by the AO 1956.

56 Substituted by the AO 1950, for 'Province' which had been substituted by the AO 1937, for 'Presidency'.

57 The words 'or a Lieutenant-Governor' omitted by the AO 1937.

58 The words 'or a Member of the Council of the Governor General of India' omitted by the AO 1948.

59 The words 'or of the Council of any Presidency' omitted by the AO 1937.

60 The original words 'Governor General, Governor, Lieutenant-Governor or Member of Council' have successfully amended by the AO 1937, the AO 1948 and the AO 1950 to read as above.

61 Substituted by Act 3 of 1951, s 3 and Schedule, for 'Governor'.

62 The words 'or Rajpramukh' omitted by the AO 1956.

63 The original words 'Governor General, Governor, Lieutenant-Governor or Member of Council' have successfully been amended by the AO 1937, the AO 1948 and the AO 1950 to read as above.

64 Substituted by Act 3 of 1951, s 3 and Schedule, for 'Governor'.

65 The words 'or Rajpramukh' omitted by the AO 1956.

Indian Penal Code (Act XLV of 1860)

Chapter VI

Of Offences Against the State

[66][S. 124A.

Sedition.--

Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, [67][* * *] the Government established by law in [68][India], [69][* * *] shall be punished with [70][imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1.--The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2.--Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3.--Comments expressing disapprobation of the administrative or other action of the government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.]900

Comments

1. Scope

This section defines, and prescribes punishment for the offence called 'sedition'. The word 'sedition' did not occur anywhere in the old section enacted in 1870. Even in the present section, the word is found only in the marginal note, which is not an operative part of the section, but merely provides the name by which the crime defined in the section will be known.[71]

To understand correctly the precise scope of s 124A, IPC, it is necessary to bear in mind that this section, together with s 121A, IPC, was avowedly inserted in Chapter VI of the IPC, relating to offences against the state, with a view to fill up an inadvertent omission of a special provision for the punishment of the offence of abetment of rebellion. In the words of Sir Fitz James Stephen, it was felt

that as the causes which produce rebellion are wide, and spread over a longer period, a wider definition of abetment in the case of rebellion was necessary than sufficed in the case of theft or murder. In giving effect to this view, the principles of the English statute and common law were followed, and the section, as originally drafted by the Indian Law Commissioners in 1837, was finally incorporated in the Code in 1870, as substantially representing the law of England of the present day 'though much more compressed and more distinctly expressed'.[72]

So construed, the scope of the section has been stated by their Lordships of the Supreme Court:[73]

> The section, it must be noted, penalises any spoken or written words or signs or visible representations, *etc.*, which have the effect of bringing or which attempt to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law. Now, the expression 'the Government established by law' has to be901 distinguished from the persons for the time being engaged in carrying on the administration. 'Government established by law' is the visible symbol of the state. The very existence of the state will be in jeopardy if the Government established by law is subverted. Hence, the continued existence of the Government established by law is an essential condition of the stability of the state. That is why 'sedition', as the offence in s 124A has been characterised, comes under Chapter 6 relating to offences against the state. Hence, any acts within the meaning of s 124A which have the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, would be within the penal statute because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence. In other words, any written or spoken words, *etc.*, which have implicit in them the idea of subverting Government by violent means, which are compendiously included in the term 'revolution', have been made penal by the section in question. But the section has taken care to indicate clearly that strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means would not come within the section. Similarly, comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal. In other words, disloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence...A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words written or spoken, *etc.*, which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section, strikes the correct balance between individual fundamental rights and the interest of public order.

Scope of the Section is Restricted

Criticising the present judicial set up or functioning of the Parliament or legislative assemblies cannot be considered as bringing into hatred or contempt or exciting or attempting to excite disaffection towards the government established by law. Nor are the slogans alleged to have been shouted by the petitioners capable of inciting any class or community of persons to commit any offence. Seldom a day has passed in the state in the last three decades when such or similar slogans have not been shouted in one or other part of the state. The scope of s 124A of the IPC is restricted to cases in which the search, writing or other activity of the accused is prejudicial to public order or public security as it is only in such cases that it can be said that the attack is directed against the government established by law. The approach to the question whether any action brings into hatred or contempt or excites disaffection towards the government should be in the following way. First, the true meaning of the words, the innuendo they convey and the convert meaning, if any, they have, to be gathered.902 Secondly, their probable or natural effect has to be seen. In other words, whether they are calculated

to produce the result, *i.e.*, hatred, contempt or disaffection towards the government. Thirdly, if they do, the intention of the author of the words to produce that result has to be ascertained. The provisions of s 124A, IPC should be limited, in its application, to acts involving an intention or tendency to create disorder or disturbance of law and order or incitement to violence. The ventilation of grievances against officers by means of articles, pamphlets or by demonstrations would not fall within the mischief of s 505(1)(c), IPC . Shouting slogans for a classless society or against the privilege or for establishment of socialism will not come within the mischief of the provisions.[74]

2. Analogous Law

Apart from English law, we have in Indian law itself, several provisions which are analogous to this section. Thus, s 4(1)(c) of the Indian Press Act 1910, has its analogy in ss 124A and 153A of IPC, although the language is not precisely the same.[75]

Section 4(1)(d) of Press (Emergency Powers) Act 1931, cl 6(e) of r 34 of the Defence of India Rules 1939,[76] and r 35(6)(e) of the Defence of India Rules 1962,[77] may be quoted as other similar provisions with not much material distinction.[78]

3. History of the Section and its Amendments

Section 113 originally drafted in Macaulay's Draft Penal Code of 1837-39 was the section corresponding to this section. By some curious omission it seems to have dropped out of the Code as finally passed in 1860.[79]It was adopted with some verbal alteration by Sir James Stephen, and added to the Code by s 5 of the Act 27 of 1870, 'as substantial representation the law of England of the present day, though much more compressed and more distinctly expressed'.[80] The section as then enacted ran thus:

> 124A. *Exciting Disaffection.*--Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.
>
> *Explanation.*--Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government, against unlawful attempts to subvert or resist the authority, is not disaffection. Therefore, the making of comments on the methods of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause.

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The said section was replaced by a new section in 1898 which was also subsequently amended from time to time as indicated in the footnotes.

Notable Cases of Revolutionaries and Nationalist Leaders

This section as enacted in 1870 remained in force till the 18 February 1898. During this period there were several notable cases under it[81] in which the meaning of the word 'disaffection' in the section was much discussed.

(a) Jogendra Chander Bose's Case

In what is known as the *Bangobasi* case,[82] while charging the jury, Sir Comer Petheram CJ, explained the law to the jury in these terms:

> Disaffection means a feeling contrary to affection, in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a man's sentiments or action and yet to like him. The meaning of the two words is so distinct that I felt it hardly necessary to tell you that the contention of Mr Jackson cannot be sustained. If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feelings.

(b) Bal Gangadhar Tilak's Case

In *Queen-Empress v Bal Gangadhar Tilak* ,[83] Strachey J, in the course of his charge to the jury, explained the law thus:

> The offence as defined by the first clause is exciting or attempting to excite feelings of disaffection to the Government. What are feelings of disaffection? I agree with Sir Comer Petheram in *Bangobasi* case that disaffection means simply the absence of affection. It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite; he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or intensity of the disaffection is absolutely immaterial except perhaps in dealing with the question of punishment. If a man excites or attempts to excite feeling of disaffection, great or small, he is guilty under the section. In the next place, it is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication in question...You will observe that the section places on absolutely the same footing, the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them, so that, if you find either of the prisoners has tried to excite such feelings in others, you must convict him even if there is nothing to show that he succeeded. Again, it is important that you should fully realise another point. The904 offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within s 124A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt. I can only account for such a view by attributing it to a complete misreading of the explanation attached to the section, and to a misapplication of the explanation beyond its true scope.

On an application for leave to appeal to the Privy Council, a Full Bench of the Bombay High Court refusing leave, observed:

> The major ground [on which a certificate of fitness for appeal was asked] was that the section cannot be said to have been contravened unless there is a direct incitement to stir up disorder or rebellion. That appears to us to be going much beyond the words of the section, and we need not say more upon that ground. The first of the minor points is that Mr Justice Starchey in summing up the case to the jury stated that disaffection meant the absence of

> affection. But although if that phrase had stood alone it might have misled the jury, yet taken in connection with the context we think it is impossible that the jury could have been misled by it. That expression was used in connection with the law as laid down by the Sir Comer Petheram in Calcutta in the *Bangabasi* case. There the Chief Justice instead of using the words 'absence of affection' used the words 'contrary to affection'. If the words contrary to affection had been used instead of absence of affection in this case there can be no doubt that the summing up would have been absolutely correct in this particular case. But taken in connection with the context it is clear that by the words 'absence of affection' the learned Judge did not mean the negation of affection, but some active sentiment on the other side. Therefore, on that point we consider that we cannot certify that this is a fit case for appeal.

On a further application for special leave to appeal to the Judicial Committee, the Lord Chancellor, delivering the opinion of the Judicial Committee, while dismissing the application, observed that taking a view of the whole of the summing up they did not see any reason to dissent from it.

(c) Ramchandra Narayan's Case

Again in *Queen-Empress v Ramchandra Narayan* ,[84] a Full Bench of the Bombay High Court consisting of Farran CJ, and Parsons and Ranade JJ, had laid it down that the word 'disaffection' in the section is used in a special sense as meaning political alienation or discontent or disloyalty to the government or existing authority. They also held that the meaning of the word 'disaffection' in the main portion of the section was not varied by the explanation. Parsons J, held that the word 'disaffection' could not be construed as meaning absence of or contrary to affection or love. Ranade J, interpreted the word 'disaffection' not as meaning mere absence or negation of love or goodwill but a positive feeling of aversion, which is akin to ill-905will, a definite insubordination of authority or seeking to alienate the people and weaken the bond of allegiance, a feeling which tends to bring the government into hatred and discontent, by imputing base and corrupt motives to it.

(d) Amba Prasad's Full Bench Case

These decisions were reviewed by a Full Bench of the Allahabad High Court in *Queen-Empress v Amba Prasad* ,[85] in which Edge CJ, who delivered the judgment of the court, while generally adopting the reasons for the decisions in the *Bangobasi* case and the case of *Bal Gangadhar Tilak*, observed that a man may be guilty of the offence defined in s 124A of attempting to excite feelings of disaffection against the government established by law, although in a particular article or speech he may insist upon the desirability or expediency of obeying and supporting the government. Referring to the remarks made by the judges in *Queen-Empress v Ramchandra Narayan* ,[86] it was pointed out that if these remarks were meant to be in any sense different from the construction placed upon the section by Starchey J, which was approved, as aforesaid, by the Judicial Committee of the Privy Council, they could not be treated as authoritative.

Keeping these interpretations in view, the section was amended by the Indian Penal Code (Amendment) Act 1898. The single explanation to the section was replaced by three separate explanations as they now stand. The section, in its present form, is the result of further amendments under several Adaptation Orders of 1937, 1948, 1950, 1951 and Act 26 of 1955.

The section inserted in 1898 differed from the old one as: (a) the 'feeling' in the former was limited to one of 'disaffection', whilst under the new section it may be one of 'hatred', 'contempt', or 'disaffection', (b) the object of the 'feeling' under the former section was 'the government established by law in British India' to which under the new section had been added 'Her Majesty', and (c) the offence was termed 'sedition' instead of 'exciting disaffection'. It was however, held by the Privy Council in *Emperor v Sadashiv Narayan Bhalerao* ,[87] that the amendments in 1898 by the inclusion of 'hatred or contempt' and the addition of explns 2 and 3 did not affect or alter the construction of the section laid down in *Tilak*'s case.[88]

4. English Law

In England, the crime has been described by Stephen in his *Commentaries on the Laws of England*,[89] based on the address to the jury by Fitzgerald J, in the case of *R v Alexander Martin Sullivan* ,[90] in

these words:

> Section IX--*Sedition and Inciting to Disaffection*--We are now concerned with conduct which, on the one hand, falls short of treason, and, on the other, does not involve the use of force or violence. The law has here to reconcile the right of private criticism with necessity of securing the safety and stability of the state. Sedition may be defined as conduct which has, either as its object or as its natural consequence, the unlawful display of dissatisfaction with the Government or with the existing order of society.

906

The seditious conduct may be by words, by deed, or by writing. Five specific heads of sedition may be enumerated according to the object of the accused. This may be either:

(1) to excite disaffection against the King, Government or Constitution, or against Parliament or the administration of justice;
(2) to promote, by unlawful means, any alteration in Church or state;
(3) to incite a disturbance of the peace;
(4) to raise discontent among the King's subjects;
(5) to excite class hatred.

It must be observed that criticism on political matters is not of itself seditious. The test is the manner in which it is made. Candid and honest discussion is permitted. The law only interferes when the discussion passes the bounds of fair criticism. More especially this will be the case when the natural consequence of the prisoner's conduct is to promote public disorder'.

In *Halsbury's Laws of England,*[91] 'sedition' has been defined as follows:

> Sedition is a misdemeanour at common law consisting of acts done, words spoken and published, or writings capable of being a libel published, in each case with an intention (1) to bring into hatred or contempt, or to excite disaffection against, the Queen or the Government and Constitution of the United Kingdom, or either House of Parliament, or the administration of justice; or (2) to excite the Queen's subjects to attempt, otherwise than by lawful means, the alteration of any matter in church or State by law established; or (3) to incite persons to commit any crime in general disturbance of the peace; or (4) to raise discontent or disaffection amongst Her Majesty's subjects; or (5) to promote feelings of ill-will and hostility between different classes of those subjects. Where the words are oral the offence is called the speaking of seditious words; where the words are written, the offence is called the publication of seditious libel; where two or more combine for the furtherance of seditious intention the offence is called seditious conspiracy.

In England there is no statutory definition of sedition, and its meaning and content have been laid down in many decisions, but these decisions are not relevant when we have a statutory definition of that which is termed sedition.[92]

5. Language of Section is Borrowed from English Law

The language of the section itself has been adopted from English law and in a well-known English case, a learned Judge observed:

> Sedition is a crime against society, merely allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and embraces all those practices, whether by word,

> deed or writing, which are calculated to disturb the tranquility of the State and lead ignorant persons to subvert the Government. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance, or to lead to civil war, to bring into hatred or contempt the sovereign or Government, the laws or the constitution of the realm and generally all endeavours to promote public disorder.[93]

907 Referring to this view Gwyer CJ, speaking for the Federal Court of India, observed in *Niharendu Dutt Mazumdar v Emperor* :[1]

> Generally speaking, we think that the passage accurately states the law as it is to be gathered from an examination of a great number of judicial pronouncements. The first and most fundamental duty of every Government is the preservation of order, since order is the condition precedent to all civilization and the advance of human happiness. This duty has, no doubt, been sometimes performed in such a way as to make the remedy worse than the disease; but it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill. It is to this aspect of the functions of Government that, in our opinion, the offence of sedition stands related. It is the answer of the state to those who, for the purpose of attacking or subverting it, seek (to borrow from the passage cited above) to disturb its tranquility, to create public disturbance and to promote disorder, or who incite others to do so. Words, deeds or writings constitutes sedition, if they have this intention or this tendency; and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt. This is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law ceased to be obeyed because no respect is felt any longer for them only anarchy can follow. Public disorder, or the reasonable anticipation, or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder, or must be such as to satisfy reasonable men that, that is their intention or tendency.

This statement of the law was followed in the under mentioned cases.[2]

But in *Emperor v Sadashiv Narayan Bhalerao* ,[3] their Lordships of the Privy Council did not approve of this statement of the law and observed that they were unable to find anything in the language of the section to suggest that 'the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency'. The Privy Council also referred to their precious decision in *Wallace Johnson v King* ,[4] which was a case under sub-s (8) of s 326 of the Criminal Code of the Gold Coast, which defined 'seditious intention' in terms similar to the words used in his section. In that case, their Lordships had laid down that incitement to violence was not a necessary ingredient of the crime of sedition as defined in the law. This case was followed in a number of subsequent decisions.[5]

There is thus a direct conflict between the decision of the Federal Court in *Niharendu*'s case,[6] and of the Privy Council in a number of cases from India and the Gold Coast, referred to above. Both the views can be supported on good reasons.

6. Supplementary Provisions

Section 108 of the CrPC, provides for demanding security for good behaviour from persons disseminating or attempting to disseminate or abetting dissemination of any908 seditious matter, that is to say, any matter the publication of which is punishable under this section.

7. Security

An executive magistrate, on receiving information that a person disseminates or attempts to disseminate or abets the dissemination of any matter, the publication of which is punishable under this section may order such person to furnish security for good behaviour.[7]

8. Principle Underlying the Section--Balance Between Fundamental Rights and

Interest of Public Order

This section, which occurs in Chapter VI 'Offences against the state', is based upon the principle that every state, whatever its form of government, has to be armed with the power to punish those who, by their conduct, jeopardize the safety and stability of the state, or disseminate such feelings of disloyalty as have the tendency to lead to disruption of the state or to public disorder. The security of the state, which depends upon the maintenance of law and order, is the very basic consideration upon which legislation, with a view to punishing offences against the state, is undertaken. At the same time, such a legislation has to protect and guarantee the freedom of speech and expression which is the *sine qua non* of every democratic form of government such as we have in India.[8] Explanations 2 and 3 appended to the section are based upon this principle. Properly construed, this section strikes the correct balance between individual fundamental rights and the interest of public order.[9]

With reference to s 4(1) of the Indian Press Act 1910, which is analogous to ss 124A and 153A of IPC, in *Annie Besant v Advocate-General of Madras* ,[10] their Lordships of the Privy Council observed:

> The balancing of important political considerations which is effected by adding Explanation 2 to the enacting words, which are found in the earlier part of the section has its analogy in sections 124A and 153A of the Indian Penal Code . The language is not precisely the same, but there is the same delicate balancing of two important public consideration, the undesirability of anything tending to excite sedition or to excite strife between classes and the undesirability of preventing any *bonafide* argument for reform.

9. Fundamental Right of Citizens

> 'It is the fundamental right of every citizen to have his own political theories and ideas and to propagate them and work for their establishment so long as he does not seek to do so by force and violence or contravene any provision of law. Thus, where the pledge of a Society and the establishment of a socialist State for which others are already working under the lead of the working classes, it was held that it was open to the members of the Society to achieve these objects by all peaceful means, ceaselessly fighting public opinion that might be against them and opposing those who desired the continuance of the existing order of society and the present Government; that it would also be legitimate to presume that they desired a change in the existing Government so909 that they could carry out their programme and policy; that the mere use of the words 'fight' and 'war' in their pledge did not necessarily mean that the Society planned to achieve its object by force and violence'.[11]

10. Broad View of the Matter Required from Court

The provisions of this section are very wide and strictly speaking they would cover everything amounting to defamation of the government if one excludes from the meaning of that term any criticism in good faith of any particular measures or acts of administration.[12] The language of s 124A, if read literally, even with the explanations attached to it, would suffice to make a surprising number of persons in the country guilty of sedition. But no one would suppose that it is to be read in this literal sense. The language itself has been adopted from English law, but it is to be remembered that in England the good sense of jurymen can always correct extravagant interpretations sought to be given by the executive government or even by the judges themselves; and if in this country that check is absent, or practically absent, it becomes all the more necessary for the courts, when a case of this kind comes before them, to put themselves so far as possible in the place of a jury, and to take a broad view, without refining over much in applying the general principles which underlie the law of sedition to the particular facts and circumstances brought to their notice.[13] The words, as well as the acts, which tend to endanger society, differ from time to time in proportion as society is stable or

insecure in fact, or is believed by its reasonable members to be open to assault. Meetings and processions are now held lawful, though 150 years back they would have been held to be seditious, and this is not because the law is weaker now or has changed, but because, the times having changed, society is stronger than before.[14]

Since the decision of their Lordships of Privy Council in *Emperor v Sadashiv Narayan Bhalerao* ,[15] India has attained Independence, and art 19 (1) (a) of the Constitution of India guarantees to all citizens the right to freedom of speech and expression, subject only to reasonable restrictions as laid down in cl (2) of that article. If a literal meaning is given to the words of the section divorced from all the antecedent background in which the law of sedition has grown, it will be true to say that the section is not only within but also very much beyond the limits laid down in cl (2) aforesaid. It is well settled that in interpreting an enactment, the court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress.[16] It is also well settled that if a provision of law comes within the constitutional powers of the legislature by adopting one view of the matter and limit its application accordingly, in preference to the view, would make it unconstitutional.[17] In construing the provisions of ss 124A and 153A, IPC, therefore, the court should give these sections that interpretation which would make them consistent with the Constitution, unless the language of the provisions precludes such910 an interpretation.[18] Taking these principles into consideration the Supreme Court[19] has construed this section so as to limit its application to acts involving all intention or tendency to create disorder, or disturbance of law and order or incitement to violence. This construction is also in consonance with the English law on the subject expounded in *Rex v Aldred* ,[20] where Coleridge J, in the course of his summing up to the jury said:

> Nothing is clearer than the law on this head, namely, that whoever by language, either written or spoken, incites or encourages others to use physical force or violence in some public matter connected with the state, is guilty of publishing a seditious libel. The word 'sedition' in its ordinary, natural signification denotes a tumult, an insurrection, a popular commotion, or an uproar; it implies violence or lawlessness in some form.

11. Acts Constitute Sedition only if they Incite Violence or Disturb Law and Order or Create Public Disorder, *etc.*

The security of the state and organised government are the very foundations of freedom of speech and expression which maintains the opportunity for free political discussion to the end that government may be responsive to the will of the people and it is, therefore, essential that the end should not be lost sight of in an over-emphasis of the means. The protection of freedom of speech and expression should not be carried to an extent where it may be permitted to disturb law and order or create public disorder with a view to subverting government established by law. It is, therefore, necessary to strike a proper balance between the competing claims of freedom of speech and security of the state. This balance has been found by the legislature in the enactment of s 124A, IPC which defines the offence of sedition for our country. The interpretation of s 124A has over the years gone through various vicissitudes and changes. It must, however, be now taken as well settled that words, deeds or writings constitute sedition punishable under s 124A only if they incite violence or disturb law and order or create public disorder or have the intention or tendency to do so. It is in the light of this interpretation of s 124A that the court has to determine whether objected passages constitute seditious matter punishable under s 124A .[21]

Demand for a separate State *e.g.* Khalistan without breach of violence is not punishable. FIR was quashed.[22]

Section 124A is not ancillary to s 124 .[23] The offences under ss 124A and 153A are distinct offences.

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12. Allegation of Sedition on the basis of articles, Pamphlets and Letters

A mere criticism or denunciation of the government established by law is not objectionable. Citizens are certainly entitled to express their grievances and to endeavour to get them redressed through lawful means. However, if these attempts or exhortations bring the established government or tend to bring it into hatred and911 contempt, they certainly come within the ambit of sedition as stated in s 124A, IPC . The test that should be applied is to find out whether any article or articles intend or have the effect of creating feeling of hostility towards the government and to excite disaffection.[25]

Where an FIR was lodged under s 124A, IPC on the basis of a hindi pamphlet published under the caption 'Atrocities of Army on students', it was held that the pamphlet did not incite people to violence against Government and there was no intention of creating public disorder. Whatever was said in the pamphlet amounted to nothing more than an exercise of right guaranteed in sub-cl (a) of cl (1) of art 19 of the Constitution . Proceedings before the trial court were accordingly quashed.[26]

Where charges of conspiracy and sedition were framed on the basis of a letter recovered during a search conducted on the person of the accused, it could not be said that the charges were not justified as the accused were not the authors of the letters. Authorship of seditious material alone is not the gist of any of the offences. Distribution and circulation of seditious material may also be sufficient on the facts and the circumstances of a case.[27]

It is not necessary for the charge to specify the distinct passages in the pamphlets which are alleged to constitute the offence of attempting to promote feelings of hatred and the distinct passages which are alleged to constitute the offence of attempting to excite disaffection. It is sufficient for the charges to allege generally that the pamphlet constitutes an attempt to promote feelings of hatred and also excite disaffection.[28] The two offences, though committed by means of the same pamphlet, are as distinct as two libels on two different persons contained in one book. They do not come within the provisions of s 71, IPC .[29]

The requirement of passing an order of forfeiture of a book, presupposes that the book contains any matter the publication of which is punishable under ss 124A or 153A or 153B or 292 or 293 or 295A of the IPC, for the State Government to declare that every copy of such book be forfeited to the Government. The power can only be exercised and notification can only be issued if the Government forms an opinion that the publication contains a matter which is in an offence under any of the sections of the IPC as aforestated.[30]

13. Sections 124A and 153A

A plain reading of s 124A, IPC, would show that its application would be attracted only when the accused brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India, by words either written or spoken or visible signs or representation, *etc*.[31]

Section 153A, IPC provides for punishment for promoting enmity between groups on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever or brings about dishonesty or feeling of hatred or ill-912will between different religions, races, language or regional groups or castes or communities. It is only where the written or spoken words have the tendency or intention of creating public disorder or disturbance of law and order or affect public tranquillity that the law needs to step in to prevent such an activity. The intention to cause disorder or incite people to violence is the *sine qua non* of the offence under s 153A, IPC and the prosecution has to prove the existence of *mens rea* in order to succeed.[32]

14. Validity of the Section

Clause (1) of art 13 of the Constitution provides that all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency, be void.

Article 19(1), which is in Pt III of the Constitution provides that all citizens shall have the right, *inter alia*, (a) to freedom of speech and expression. Section 124A of the IPC, undoubtedly places restrictions on the right to freedom of speech and expression, and would, therefore, be void under art 13(1) unless saved by some other provision of the Constitution. The only provision that could so save it is cl (2) of art 19 of the Constitution which runs as follows:

> Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the state from making any law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the State.

The scope of this clause came to be considered by the Supreme Court in two cases: (a) *Romesh Thapper v State of Madras* ,[33] and (b) *Brij Bhushan v State of Delhi* .[34] Delivering the majority judgment in the former case, Patanjalli Sastri J, (as he then was) observed:

> Deletion of the word 'Sedition' from the draft article 13(2) [corresponding to article 19(2) in the Constitution as finally framed], therefore, shows that criticism of Government exciting disaffection or bad feelings towards it is not to be regarded as justifying ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security, or tend to overthrow the state. It is also significant that the corresponding Irish formula of 'undermining the public order or the authority of the state',[35] did not apparently find favour with the framers of the Indian Constitution. Thus, very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the process of popular Government is possible. We are, therefore, of opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the state or the overthrow of it, such law cannot fall within the reservation under clause (2) of article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order.

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In view of these observations, the Parliament by the Constitution (First Amendment) Act 1951, substituted the original cl (2) of art 19 of the Constitution by a new cl (2) which reads as follows:

> Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

The changes effected by this amendment, which have been given retrospective effect are:

(i) Several new grounds of restriction upon the freedom of speech have been introduced: (a) friendly relations with foreign states; (b) public order; (c) incitement to an offence.
(ii) Deletion of the ground 'tends to overthrow the state'.
(iii) Widening the scope of the expression relating to 'security of the state', by substituting

the words 'any matter which offends against or undermines the security of the state' by the words 'in the interests of the security of the state'.

(iv) Substitution of the words 'libel, slander' by the word 'defamation', and

(v) Insertion of the expression 'reasonable restrictions', to govern all the above grounds.

In view of these amendments the Supreme Court has now held that the provisions of ss 124A and 505, IPC, impose restrictions on the fundamental freedom of speech and expression, but those restrictions cannot but be said to be in the interest of public order and within the ambit of permissible legislative interference with that fundamental right, and that they are not therefore void. This section strikes the correct balance between individual rights and the interest of the public order.[36]

15. Essential Ingredients

'Whoever'

About the expression 'Whoever' the law Commissioners says: (2nd Report: Section 13)

> 'The laws of a particular nation or country cannot be applied to any persons but such as owe allegiance to the Government of the country, which allegiance is either perpetual, as in the case of a subject by birth or naturalisation, and c., or temporary, as in the case of a foreigner residing in the country. They are applicable of course to all such as thus owe allegiance to the Government, whether as subjects or foreigners, excepting as excepted by reservations or limitations which are parts of the laws in question.'[37]

It is not only the writer of the alleged seditious article, but whoever uses, in any way, words or printed matter, for the purpose of exciting feelings of disaffection to the government, is liable under this section whether or not he is the actual writer.[38]914

'By Words...Or Otherwise'

Seditious libel may be in writing or print, or may be contained in a drawing or engraving, or a painted picture, or a sculpture or any permanent representation.[39] In the word 'written', print is included by the General Clauses Act 1896, and therefore 'by words written' means amongst other things 'by words that are printed'.[40] The exhibition of flags is also a mode of using 'signs or visible representation'.[41] Shouting slogans, such as 'Destroy the dishonest Government' and 'long live the bloody revolution' or reciting poems which incite police to revolt against the government administration,[42] would amount to sedition within the meaning of this section.[43] The words 'or otherwise' cover all possible means of publishing sedition. The concluding words 'or otherwise' indicate the universality of the means by which the offence may be committed. The whole sentence might have been shortly expressed by saying 'whoever by any means' brings, *etc.* The offence may be committed by means of words spoken or written, or by visible representations such as pictures, or by dramatic performances, even in a dumb show, where no words are spoken, but where the feelings of the audience are excited, by the gestures, motions and dramatic actions of the performers. Thus, words of any kind are by no means a necessary element of the offence. It may be committed without any words being spoken or uttered.[44] Even a historical book may be seditious if the author makes no endeavour to be impartial, but presents only the evil deeds of the Government.[45]

'Brings or Attempts to Bring Into Hatred or Contempt'

These words were not used in the original section introduced in 1870. They were first used in India by Sir Comer Petheram CJ, in his charge to the jury in *Queen-Empress v Jogendra Chandra Bose* .[46] There too they were used only to explain the meaning of 'disaffection'. In explaining the law to the jury, the Chief Justice observed:

> Disaffection means a feeling contrary to affection, in other words dislike or *hatred*...It is sufficient for the purpose of the section that the words used are calculated to excite feeling of ill-will against the Government and to hold it up to the *hatred and contempt* of people, and that they were used with the intention to create such feeling.

Strachey J, in his charge to the jury in *Queen-Empress v Bal Gangadhar Tilak* ,[47] said:

> The offence as defined by the first cl is exciting or attempting to excite feelings of disaffection to the Government. What are feelings of disaffection? I agree with Sir Comer Petheram in the *Bangobasi* case that disaffection means simply the absence of affection. It means *hatred,* enmity, dislike, hostility, *contempt* and every form of ill-will to the Government.

So also in *Queen-Empress v Ram Chandra Narayan* ,[48] Sir C Farran CJ, said:

> An attempt to excite feelings of disaffection to the Government is thus equivalent to an attempt to produce *hatred* of Government as established by law, to excite political discontent and alienate the people from their allegiance.

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In the same case, Ranade J, also, defining 'disaffection' spoke of:

> A feeling which tends to bring the Government into *hatred or contempt* by imputing base or corrupt motives to it, makes men indisposed to obey or support the laws of the realm, and promotes discontent and public disorder.[49]

The expression 'to bring into hatred or contempt the sovereign or the government' was used by Fitzgerald J, in his charge to the jury in the case of *R v Alexander Martin Sullivan* ,[50] as an endeavour to promote public disorder. In an old English case, *R v Cobbett* ,[51] Lord Ellenborough told the jury that if a publication is calculated to 'alienate the affections to the people' by bringing the government into disesteem, whether the expedient employed is ridicule or obloquy, the publication is seditious.

It would thus appear from these authorities that bringing the government into hatred or contempt was considered to be a means to 'excite disaffection' and was not an independent head of sedition. The case of bringing into hatred or contempt and that of exciting or attempting to excite disaffection have, in view of the scheme of this section to be considered together, the one resulting from the other.[52]

A plain reading of s 124A, IPC would show that its application would be attracted only when the accused brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the government established by law in India, by words either written or spoken or visible signs of representations, *etc.* Thus where some slogans were raised a couple of times by two accused persons and there was no evidence showing that the accused persons were either leading a procession or were otherwise raising the slogans with the intention to incite people to create disorder and no disturbance, whatsoever, was caused by the raising of slogans and the people, in general, were unaffected and carried on with their normal activities, it cannot be said to be aimed at exciting or attempt to excite hatred or disaffection towards the government as established by law in India. Hence s 124A, IPC, would not be attracted to the facts and circumstances of the case.[53]

The accused appellant was found exciting the people to wage war by armed rebellion against the

Government, and naxalite literature which contained exciting speeches was recovered from his possession, hence, he was convicted under s 124A, IPC .[54]

Hatred and Contempt Explained

The words 'hatred' and 'contempt' need no explanation. Hatred is a passion which every wise and good man endeavours to check himself. With the feeling of hatred, the law can do nothing because it cannot see into the heart and cannot reform it, but law does step in when any attempt is made to excite that feeling in others. And it does so as much for the protection of the individual as for the protection of the state. If it is the individual against whom hatred is excited, the offence is described as defamation, and the law extends similar protection to the collective body which is called the government, and which represents the community as a whole, and whose916 duty it is to perform the functions of preserving order and peace, which are essential to the beneficial co-operation of human beings and to the enjoyment and safety of life and property.[55] Hatred and contempt mean something more than mere disapproval or dislike. Between dissatisfaction on the one hand and hatred, contempt and disaffection on the other, there is a vast gulf.[56] The government may be brought into hatred and contempt by imputing base and corrupt motives to it.[57] It is quite possible, by the abuse of government officials as officials, to make an endeavour to bring into hatred or contempt the government established by law in the country.[58] Where every calamity or evil or misfortune that falls on the country and sufferings by people was imputed to the *zamindars*, *talukdars* and the government which was also accused of hostility and indifference to the welfare of the people and the people were asked to follow the example of Ireland and Russia, it was held that the accused who delivered the speech was guilty under ss 124A and 153A .[59]

Where the predominating idea in the speech delivered by the accused is not only to support the idea of communism and to suggest some other form of government, but to bring the present government and the supporters of the same into hatred and contempt, it attracts the provisions of this section.[60]

But an attack on imperialism as a system or a school of opinion without reference to persons does not involve any incitement to hatred or contempt of those who are in the system or hold the opinion.[61]

It cannot however, be said that a speech, even if it brings the government into hatred and contempt can be considered to be innocuous because such hatred and contempt cannot be increased from the standard that already exists in the minds of the people. To intend a thing is to act in such a way as to expect that certain consequences would follow. Intention, therefore, is correlated with the natural consequences which must follow from a particular act.[62]

'Disaffection'

The sense in which the word 'disaffection' is used in this section has received a considerable amount of judicial consideration. The term is not defined in the IPC, but while on the one hand it 'includes disloyalty and all feelings of enmity' (explanation 1), it does not, on the other hand, mean mere disapprobation of the legislative or executive conduct of the government (explanations 2 & 3). Disapprobation means disapproval which may consist of severe condemnation, even though unreasonably, perversely, or unfairly expressed,[63] and the distinction between this and disaffection is the essence of the section, the object of the second and third explanations being to protect honest journalism and *bona fide* criticism of public measures and institutions917 with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers,[64] and to impair the confidence imposed by the public in the government.[65]

Disapprobation and reasonable criticism are quite compatible with loyalty. Whilst it is open to everyone to express with moderation any disapprobation, he may feel regarding the acts and measures of the government, it is at the same time the duty of every citizen to support the government established by law.[66]

Disaffection is Synonymous with Disloyalty

Although the primary meaning of the word 'disaffection' is the alienation of attachment, affection or goodwill, and the consequent substitution of a contrary feeling of dislike or hatred,[67] yet when used in connection with a people and its government all standard authorities use the term as synonymous with disloyalty[68] and this interpretation of the word 'disaffection' has now been adopted judicially.[69] 'Disaffection' thus means 'political alienation or discontent, a spirit of disloyalty to the government or existing authority'.[70] In the words of Ranade J:[71]

> 'Disaffection', as thus judicially paraphrased, is a positive political distemper, and not a mere absence or negation of love and goodwill. It is a positive feeling of aversion which is akin to disloyalty, a defiant insubordination of authority, or when it is not defiant, it secretly seeks to alienate the people, and weaken the bond of allegiance, and prepossesses the minds of the people with avowed or secret animosity to Government, a feeling which tends to bring the Government into hatred or contempt by imputing base or corrupt motives to it, makes men indisposed to obey or support the laws of the realm, and promotes discontent and public disorder.

Where the effect of the speech delivered by the accused was to suggest to the persons to whom it was addressed that the government was taking sides against them, and was taking the part of their opponents, it was held, 'To make charge of gross partiality of that sort against government is calculated, to inspire feelings of enmity and disaffection towards Government'.[72]

Explanation 1 to the section itself makes it clear that the expression 'disaffection' includes disloyalty and all feelings of enmity. As pointed out by Strachey J, in *Queen-Empress v Bal Gangadhar Tilak* ,[73]

> The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended918 by the articles to excite rebellion or disturbance, his act would doubtless fall within section 124A, and would probably fall within other sections of the Penal Code. But even if he neither excited not intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section.[74]

16. Question of Fact

Whether the words or representations are seditious or merely express disapprobation is a question of fact to be determined on the true construction of the document (if any) and in the light of the surrounding circumstances, and a magistrate's finding thereon is conclusive so far as the revisional jurisdiction of the High Court is concerned, unless some error of law vitiates that finding.[75]

A writer may be guilty of exciting or attempting to excite disaffection no matter how guardedly he may attempt to conceal his real object.[76]

It has been held that to urge an audience to secure *Swaraj*, which literally means self-government, and in its ordinary acceptance 'home-rule' under the government, is not an offence under this section.[77] Nor does one single expression that the people of Bengal are trodden under the feet of strangers, used in a newspaper article, which is innocent in other respects, make the whole article seditious.[78]

17. 'Attempts'

What is made punishable by the section is the bringing or attempting to bring into hatred or contempt, or exciting or attempting to excite feelings of disaffection towards the government established by law

in India. The attempt is made punishable as well as the effect of the attempt. It is immaterial under the section whether the attempt has effected its purpose or not, because it is the attempt that is made punishable. It is no defence, therefore, to say that, granted there is an attempt, still it is an attempt to which the public were too wise to pay any attention. The question then is as to whether the attempt has been made. It is not necessary in order to bring the case within this section that it should be shown that the attempt was successful. Attempt does not imply success. It is merely trying. Whoever tries to excite, attempts to excite, *etc*., is held to come within the section. Whether the intention has achieved the result, is immaterial.[79] In the case of *Queen-Empress v Bal Gangadhar Tilak* , it was observed:

> The section places on absolutely the same footing the successful exciting of feeling of disaffection and the unsuccessful attempts to excite them, so that, if you find that either of the prisoners has tried to excite such feelings in others, you must convict him even if there is nothing to show that he succeeded.[80]

An attempt is an intentional, premeditated action, which if it fails in its object, fails through circumstances independent of the person who seeks its accomplishment. If919 its failure is to be attributed to something which he cannot control, its failure is no excuse.[81]

All that is necessary to constitute such an attempt is some external act, something tangible and ostensible, of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted.[82] As stated by Cave J, in *R v Burns & Ors* :[83]

> A man cannot escape from the uttering of words with intent to excite people to violence solely because the persons whom he addressed may be too wise or temperate to be induced to act with violence.

If the accused tried to excite hatred and contempt, the fact that he failed to do so will be no justification for him, though no doubt that will be a matter to be decided in determining any sentence which may have to follow upon a verdict of guilty.[84]

18. Speech as a whole has to be Considered

In order to decide whether or not a speech constitutes an attempt to excite hatred, contempt or disaffection, it should be viewed from the standpoint of the type of persons to whom it was primarily addressed. On the one hand, their limitations, if any, have to be taken into account; on the other, the fact that the words may convey to them a literal meaning must not be lost sight of. The time and the place are also factors which would be considered. The court must not look to a single sentence or an isolated expression, but take the speech as a whole and give it a full, free and generous consideration.[85]

To distribute amongst Indian troops copies of a letter published in a newspaper urging Indian soldiers to give up their allegiance to the Government of India is such an attempt as is contemplated by this section.[86]

19. 'Attempts to Publish' when Complete

An attempt to publish seditious matter is complete as soon as the accused knowingly sells or distributes the paper containing the seditious matter; and it is nonetheless an attempt because something external to himself happens, which prevents a perusal of the paper by the buyer or

recipient or other member of the public.[87]

20. Intention--*Mens rea*

The language of the section might perhaps be deemed to give rise to some doubt whether, as it stands, the offence is independent of any intention, and that was the view formerly taken by the chief court of Punjab in Re *Ram Nath*,[88] but it is now well settled that intention is essential and that in fact the essence of the crime of sedition920 consists in the intention with which the language is used.[89] Even an attempt to excite hatred or contempt or disaffection implies intention.[90] The question of intention is a question of fact,[91] which must be judged primarily by the language itself used by the accused.[92] Intention for this purpose is really no more than meaning:

> When a man is charged in respect of anything he has written or said, the meaning of what he said or wrote must be taken to be his meaning, and that meaning is what his language would be understood to mean by the people to whom it is addressed.[93]

If a particular article is charged as being seditious, on the ground that it says more than what appears on the face of it, it is the duty of the prosecution to show that it has, in fact, the guilty meaning or intention attributed to it.[94]

The ultimate object of the writer of an article may be one thing, but if, in attaining that object he uses as the means the exciting of disaffection against the government, then he would be guilty under this section.[95]

With reference to intention, in the leading case of *Queen-Empress v Bal Gangadhar Tilak* ,[96] Strachey J, in his charge to the jury said:

> There are various ways in which you must approach the question of intention. You must gather the intention as best you can from the language of the articles; and you may also take into consideration, under certain conditions, the other articles that have been put in evidence. But the first and most important index of the intention of the writer or publisher of a newspaper article is the language of the article itself. What is the intention which the articles themselves convey to your minds? In considering this, you must first ask yourselves what would be the natural and probable effect of reading such articles in the minds of the readers of the *Kesari*, to whom they were addressed? Read these articles, and ask yourselves how the ordinary readers of the *Kesari* would probably feel when reading them. Would the feeling produced be one of hatred to the Government, or would it be simply one of interest in a poem and a historical discussion about Shivaji and Afzul Khan and so forth? If you think that the only feelings which such readers would be excited to are feelings of interest in a poem or a historical or ethical discussion, then you may presume that that is all the accused intended to excite. If you think that such readers would naturally and probably be excited to entertain feelings of enmity to the Government, then you will be justified in presuming that the accused intended to excite feelings of enmity or disaffection. As a matter of commonsense a man is presumed to intend the natural and ordinary consequences of his acts: he cannot, speaking generally, say: 'Although this language would have the natural and ordinary effect of exciting feelings of disaffection, I did not, when publishing it, intend that it should do so. But in considering what sort of effect these articles would be likely to produce, you must have regard to the particular class of921 persons among whom they were circulated, and to the time and other circumstances in which they were circulated. In judging what would be the natural and ordinary consequences of a publication like this, and what, therefore, was the probable intention of the writer or publisher, I must impress on you, as perhaps the most important point in my summing up, that you must bear in mind the time, the place, the circumstances, and the occasion of the publication. When you are considering the probable effect of a publication upon people's minds, it is essential to consider who the people are. Then you have to look at the standing and the position of the prisoner Tilak. But in the next place, in judging the intention of the accused, you must be guided not only by your estimate of the effect of the articles upon the minds of their readers, but also by your commonsense, your knowledge of the words, your understanding of the meaning of words, and your experience of the way in which a man writes when he is animated by a particular feeling. Again, in judging of the intention of the writer or publisher, you must look at the articles as a whole, giving due weight to every part. It would not be fair to judge of the intention by isolated passages or casual expressions without reference

> to the context. You must consider each passage in connection with the others and with the general drift of the whole.

Another learned judge, Jenkins CJ, observed in *Queen-Empress v Luxman Narayan Joshi* :[1]

> To determine whether the intention of the accused was to call into being hostile feelings, the rule that a man must be taken to intend the natural and reasonable consequences of his act must be applied; so that if on reading through the articles the reasonable and natural and probable effect on the minds of those to whom they are addressed appears to be that feelings of hatred, contempt, or disaffection would be excited towards the Government, then it is justifiable to say that the articles are written with that intent, and that they are an attempt to create the feelings against which the law seeks to provide.

Intention is Co-Related with the Natural Consequences

The Judicial Committee of the Privy Council also laid down that in judging the question of intent, the publisher must be deemed to intend that which is the natural result of the words having regard, among other things, to the character and description of that part of the public who are expected to read the words.[2]To intend a thing is to act in such a way as to expect that certain consequences would follow. Intention therefore is correlated with the natural consequences which must follow from a particular act.[3] In order to decide whether or not a speech constitutes an attempt to excite hatred, contempt or disaffection, it should be viewed from the standpoint of the type of persons to whom it was primarily addressed. On the one hand, their limitations, if any, have to be taken into account and on the other, the fact that the words may convey to them a literal meaning must not be lost sight of. The time and the place are also factors which should be considered. The court must not look to a single sentence or an isolated expression, but take the speech as a whole and give it a full, free and generous consideration.[4]

A person accused under this section cannot be attributed the requisite 'intention' if he was not even aware of the contents of the seditious publication.[5]

922While however, these decisions furnish the principle or test to be applied in order to ascertain intention, it is only right to bear in mind that the articles would be read not in any spirit of narrow criticism, but in a fair, free and liberal spirit, and, if any doubt should arise in regard to the intention, the benefit of that doubt should be given to the accused.[6]

21. 'Government Established by Law in India'

Section 17 of the IPC, as it originally stood, defined 'Government' as denoting 'the person or persons authorised by law to administer the executive Government'. But this has been altered by the Adaptation of Laws Order 1950 and Act 3 of 1951. Under the present s 17, the word 'Government' denotes the Central Government or the government of a State. The expression 'the government established by law' has to be distinguished from the persons for the time being engaged in carrying on the administration. 'Government established by law' is the visible symbol of the state. The very existence of the state will be in jeopardy if the government established by law is subverted. Hence, the continued existence of the government established by law is an essential condition of the stability of the state. That is why 'sedition', as the offence in this section has been characterised, comes under Chapter 6 relating to offences against the state.[7] The phrase 'Government established by law in India' means the established authority which governs the country and administers its public affairs and includes the representatives to whom the task of Government is entrusted.[8]

Government and Form of Government not the Same Thing

There is a sharp distinction between the government and the form of the government. To fight against a principle or doctrine is not the same thing as to fight against a government established by law. To suggest a change in the form of government is not tantamount to causing disaffection towards the government established by law. To suggest some other form of government is not necessarily to bring the present government into hatred or contempt.[9]

An attack on imperialism as a system or a school of opinion without reference to persons does not involve any incitement to hatred or contempt of those who are in the system or hold the opinion.[10]

A general criticism of certain officer or officers cannot be deemed to be a criticism of government established by law.[11]

Calling bureaucrats, thugs and profiteers is not sedition. Criticism of the subordinate officials of the government and not of the government itself is not sedition.[12]

An attack upon certain police officers at a particular place does not convey any reflection upon the governing authority.[13]

923To say that an officer of high rank 'played holi with the blood of Indians' does bring government into hatred and contempt.[14]

Ministers are not Government

The feelings, which are the object of this section to prohibit, may be excited towards the government in a variety of ways; and it is possible to excite such feelings towards the government by an unfair condemnation of any of its services. Whether in a particular case the condemnation of any service is sufficient to excite any feeling of hatred or contempt or disaffection towards government by law established, must depend upon the nature of the criticism, the position of the service in the administration and all the other circumstances of that case. It would be a question of fact to be determined in each case with reference to its circumstances. But as a matter of law it cannot be said that the condemnation of a particular service under the government by law established can never be sufficient to excite any of the feelings prohibited by this section towards such government.[15] It is quite possible, by the abuse of government officials as officials, to make an endeavour to bring into hatred or contempt the government established by law.[16] Although in popular language, the ministers may be referred to as 'the Government', they are not 'the Government', within the meaning of ss 7 and 124A, IPC .[17]

Where the article, for publishing which the accused are tried and convicted of an offence under this section amounts in essence to nothing more than a censure expressed in exaggerated, inflated and intemperate language, on a draft bill sponsored by a ministry and is thus an attack not on the ministry but against the policy of the ministry as revealed through the proposed legislation, it is not seditious in the sense that it brings or attempts to bring the ministry into hatred or contempt, or that it excites disaffection in any greater measure than the measure implicit in the working of a democratic constitution, apart altogether from the question whether it is seditious within the narrower limits imposed by the IPC .[18]

22. Explanations 2 and 3

Right of Criticism

In the original section inserted in 1870 there was only one explanation. With regard to this, Strachey J, in his charge to the jury in *Queen-Empress v Bal Gangadhar Tilak* ,[19] said:

> While the first cl shows affirmatively what the offence made punishable by the section is, the explanation states negatively what it is not; it says that something 'is not disaffection', and 'is not an offence within this clause'. Therefore, its object is to protect from the condemnation pronounced by the first clause certain acts which it distinguishes from the disloyal attempts which the first clause deals with. The next and most important point for you to bear in mind is that the thing protected by the explanation is 'the making of comments on the measures of the Government' with a certain intention. This shows that the explanation has a strictly defined and limited924 scope. Observe that it has no application whatever unless you come to the conclusion that the writings in question can fairly and reasonably be construed as 'the making of comments on the measures of the Government'. It does not apply to any sort of writing except that. It does not apply to any writing which consists not merely of comments upon Government measures, but of attacks upon the Government itself...In the next place supposing that you are satisfied that these writings can fairly and reasonably be construed as 'comments on the measures of the Government' and not as attacks upon the Government itself, still you cannot apply the explanation unless you believe that such comments were made with the intention of exciting only such a disapprobation of the measures of the Government, as is compatible with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government, against unlawful attempts to subvert or resist that authority...It shows clearly what a public speaker or writer may do, and what he may not do. A man may criticize or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income Tax Act, the Epidemic Disease Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers, as for instances, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people, then he is guilty under the section, and the explanation will not save him. The object of the explanation is to protect honest journalism and *bona fide* criticism of public measures and institutions with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers. So long as a journalist observes this distinction, he has nothing to fear.

The single explanation in the original section has been replaced by the present Explanations 2 and 3. With regard to them the select committee in their report said:

> We have added Explanation 3 to make it clear that criticism on the action of Government is not confined to cases in which it is sought to bring about an alteration of what has been done. For example, suppose the Government makes an appointment which is considered objectionable. That appointment may be criticised, although the criticism may not have in view that cancellation of the appointment. We have made consequential amendments in Explanation 2 to make the language of the two explanations uniform.

These explanations were added to remove any doubt as to the meaning of the legislature; they do not add to or subtract from the section itself.[20]

In *Emperor v Sadashiv Narayan Bhalerao* ,[21] their Lordships of the Privy Council observed that the amendment of this section in 1898 by the inclusion of hatred or contempt and the addition of explns 2 and 3 did not affect or alter the construction of the section laid down in *Tilak*'s case; and the principles laid down by Strachey J, in *Tilak*'s case[22] have been generally followed by the courts in India.925

Meticulous Care to Balance Two Political Considerations by Explanation

Explanation 2 provides for comments expressing disapprobation of the measure of the government with a view to obtain their alteration by lawful means, and explanation 3 provides for comments expressing disapprobation of the administrative or other action of the government. Both the explanations are in a negative form and in both there is an apparent repetition of the positive enactment in the guise of a qualification. Meticulous care has been taken by the legislature to balance two important political considerations namely, (a) the undesirability of anything tending to excite sedition, and (b) the undesirability of preventing any *bona fide* argument for reform. Prominence is given to the first consideration in the main part of the section and to the second in the two explanations. In applying these balancing principles it is inevitable that different minds may come to

different results, one attaching more weight to the consideration of freedom of argument, and the other to the preservation of law and order or of harmony.[23] As pointed out by their Lordships of the Supreme Court, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on government action, however strongly worded, would be within reasonable limits and consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, *etc*., which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section strikes the correct balance between individual fundamental rights and the interest of public order.[24]

Sedition's Character Changes With Time

In *Bowman v Secular Society Ltd* , Lord Sumner observed:

> The words, as well as the acts, which tend to endanger society, differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings and processions are held lawful, which 150 years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before.[25]

Many judicial decisions in particular cases, therefore, which were no doubt correct at the time when they were given, may well be inapplicable to the circumstances of today. The time is long past when the mere criticism of government was sufficient to constitute sedition, for it is recognised that the right to utter honest and reasonable criticism is a source of strength to a community rather than a weakness. Criticism of an existing system of government is not excluded, nor even the expression of a desire for a different system altogether. The language of this section if read literally, even with the explanations attached to it, would suffice to make a surprising number of persons in this country guilty of sedition; no one however, supposes that it is to be read in that sense. The language itself has been adopted from English law, but it is to be remembered that in England the good sense of jurymen can always correct extravagant interpretations sought to be given by the executive government or even by the judges themselves; and if in this country that check is absent, or practically absent, it becomes all the more necessary for the courts, when a case of this kind comes before them, to put themselves so far as possible in the place of a jury, and to926 take a broad view, without much refining in applying the general principles which underlie the law of sedition to the particular facts and circumstances brought to their notice.[26] In a democratic country such criticisms are to some extent unavoidable, they are made for the purpose of enlisting popular support, and in considering the effect of such criticism no serious notice ought to be taken of crude, blundering attempts or of rhetorical exaggeration by which nobody is likely to be impressed. As Lord Sumner pointed out, with the change of times, the effect of criticism also changes; what was damaging contempt or hatred of a bureaucratic government is not so of a popular government--a government which can neither afford to be hypersensitive, nor impervious, to criticism.[27] In England the law on the subject is thus summarised in *Halsbury's Laws of England*:[28]

> The freest public discussion, comment, criticism, and censure, either at meetings or in the press in relation to all political or party questions, all public acts of the servants of the Crown, all acts of the Government, and all proceedings of Courts of Justice are permissible, and no narrow construction is to be put upon the expressions used in such a discussion, *etc*., but the criticism and censure must be without malignity, and must not impute corrupt or malicious motives.[29] Every man has a right to give every public matter a candid, full and free discussion; something must be allowed for feeling in men's minds and for some warmth of expression, but intention to incite the people to take the power into their own hands and to provoke them to tumult and disorder is a seditious intention.[30]

Object of Explanations

Explanations 2 and 3 are intended to protect criticism of government measures, and of administrative and executive action of government, and they give perfect freedom to journalists, to publicists, to orators and public speakers, to discuss the measures and administrative acts of the government, to disapprove of them, to attack them, and to use forcible and strong language if necessary, and to do everything legitimate and honest in bringing before the public or the government the fact that their measures or their actions are disapproved by a section of the public or by that particular speaker or journalist. But no publicist, no journalist, no speaker has any right to attribute dishonest or immoral motives to government. Criticism, though harsh and uncompromising, must be free from the taint of language which is likely to arouse or calculated to encourage feelings of enmity, hatred, or disloyalty against the government.[31] These explanations have no application whatever unless the criticisms are concerning the measures of government or the administrative or other action of government and that too, without exciting or attempting to excite hatred, contempt or disaffection. The object of the explanations is to protect *bona fide* criticism of public measures and institutions with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers.[32]

927A reasonable criticism of the action of government in a particular matter without any attempt to create hatred or contempt against it is not sedition, but an incitement to insurrection which falls within the scope of s 124A .[33]

It is not sedition to criticise or comment upon administrative machinery or the officers of government or an act or measure of the government and freely express one's opinion thereon. One may express condemnation and so long as he confines himself to that he will be protected; but if he exceeds the limits of fair criticism and attacks the government with the object of creating disaffection, he must pay the penalty for it.[34]

A journalist may comment expressing disapprobation of the measures of the government with a view to obtain their alteration by lawful means, but he must do so without attempting to excite hatred and disaffection.[35]

Fair Criticism of Government not an Offence

Fair criticism of the government is no offence, and it is quite possible to express dissatisfaction without exciting disaffection.[36] It has been said that in the present day an attempt to remove from power the ministers in office, or any agitation for the repeal of an Act of Parliament cannot be seditious if no unlawful means are employed.[37]

It has been laid down in *R v Sullivan* ,[38] that a journalist may canvass and censure the acts of the government and their policy and indeed it is his duty. He is free to discuss their acts and their public policy and he may, if he thinks proper, censure the acts of the government and ministers. While a very large amount of latitude is and must be allowed to writers in the public press, the interests of the state must at the same time be not lost sight of and writers cannot under the guise of criticism of public affairs be allowed to indulge in attributing base, improper or dishonest motives to those who carry on the work of the government of the country.[39] Conditions at present in India are quite different from those which existed in 1897 and far greater freedom is given to the press now than was given in those days, and things which may now be said and written with impunity would have been treated as seditious at the end of the last century. The state of the minds of the people at present and the present conditions have to be considered to decide whether an article is now likely to engender feelings of hatred, enmity or disloyalty in the minds of the readers.[40] Although it cannot be said that language current in the political controversy of a country can never be made the subject of a charge of sedition for something may turn upon the occasion on which it is used, the context in which it occurs and on the surrounding circumstances of the case, but ordinarily it should be difficult to found a charge of sedition upon ideas, sentiments and expressions which have become a part and parcel of the normal political life of the country, and which do not excite people to disorder.[41]928

23. Truth does not Excuse Seditious Commentary

The truth or otherwise of the aspersions cast upon the government is immaterial and it has no justification for seditious utterances.[42] If certain alleged facts are used as a peg on which to hang seditious comments, the truth of the facts does not excuse the seditious commentary.[43]

24. Liability of Editor, Printer and Publisher

The liability under the section arises from certain action, *viz.,* the bringing or attempting to bring into hatred or contempt the government of the country. This is a result which may be effected in various ways, *i.e.*, either by speech, writing, by signs or by visible representations. The offence consists of making use of any means for the purpose. It is quite immaterial whether such means had been previously prepared for the purpose by the person who uses them--or by some other person--if those means are used for the purpose of bringing the government into hatred or contempt. It is, therefore, not sufficient for a person who has published matter calculated to excite hatred, contempt, or disaffection, to say: 'This is not my own work', because the adoption of the means, the publishing thereof, is in itself his work, and therefore it is, that the printer or publisher of an article, which is open to these objections is always to be held liable. Whoever the composer might be, whosoever may have written or caused it to be written, the person who uses it for exciting disaffection, will be guilty of an offence under this section.[44]

The publisher is *prima facie* liable for whatever appears in his paper, and if he seeks to get rid of that liability the onus lies on him. It is for him to prove circumstances which may justify responsibility not being fastened on him. What is necessary for him to establish is that the article was published without his knowledge or authority or consent, or without any acquiescence or intention on his part. It is not sufficient for him to say that what was put into his paper of a seditious character was put in during his absence and without his authority. If he did not authorize it, it is for him to prove that as a fact, because it must be within his knowledge whether any such authority was given. It is not enough for him to say: 'I never authorized publication of this particular article'.[45] Intention is an essential ingredient under this section and a person accused under it cannot be attributed the requisite 'intention' if he was not even aware of the contents of the seditious publication.[46] But the man who is the proprietor and owner of the press and the publishing house connected with it cannot be allowed to contend that he can shut his eyes to everything going on under the premises and then pretend that he has no knowledge of the contents of the publications printed and issued by him.[47] A registered printer and publisher of a newspaper cannot escape liability even if he proves temporary absence and want of knowledge of the seditious matter,[48] though he is not liable, of course, if a concealed seditious object is not proved.[49]929

Editor's Liability for Seditious Matter

Where it is satisfactorily established that the editor was on leave and had entrusted his duties to a responsible person who will have accepted the full responsibility for the publication of the libel, the editor cannot be held to be criminally liable. In such a case there is no necessity for the editor to adduce positive proof to show that he was on leave when the libel was published.[50]

25. Joint Trial of Printer and Publisher

In cases of sedition, the printer and publisher, being concerned in the same transaction, in regard to the publication of the seditious matter, they may be tried jointly in proper cases.[51] Where the charge framed against the accused did not contain any averment that he did anything as against the government, offence under s 124A is not made out.[52]

26. Seditious Pamphlet

The sending of a seditious pamphlet by post, addressed to a private individual not by name, but by

designation as the representative of a large body of students, amounts to publication.[53]

27. Punishment

The punishment for sedition may, under this section, be anything from a mere fine to imprisonment for life. The sentence to be actually imposed will depend upon the circumstances of each case, and the position and age of the accused.[54] In the case of political offences arising out of the beliefs of the accused, severe sentences defeat their object. In practice such sentences confirm the offenders in their beliefs and create other offenders thus increasing the evil and the danger to the public.[55] The test should be whether the speech was a violent one and whether the intention of the accused was to excite people to commit violence.[56] 'Where the speaker in his speech does not in terms advocate violence in any shape and there is nothing in the speech which might by implication or innuendo suggest its use, a heavy sentence is not called for'.[57] Where the speech is mild and the offence a technical one, a light sentence would be enough.[58]930

28. 'Forfeiture'

There is nothing in this section which authorizes a magistrate to confiscate the property of an accused.[59] But under s 95 of the CrPC, any newspaper, book or document containing seditious matter may be forfeited to Government.

A Book Containing Objectionable Matter may be Forfeited

If the book does contain such objectionable matter publication of which would be punishable under s 124A, IPC, the Government has the right to declare the publication forfeited. The mere fact that in the order it is also mentioned that the subject-matter is prejudicial to maintenance of harmony would not make the matter any the less objectionable if it is in fact objectionable under any of the sections. It is not possible to accept that merely because it is also stated in the order that the subject-matter is prejudicial to the maintenance of harmony it would vitiate the order if it is otherwise found that the matter is of such a nature that its publication is punishable under s 124A, IPC .[60]

29. Freedom of Thought and Remedy Available to the Government

There can indeed be no real freedom unless thought is free and unchecked, not free thought for those who agree with us but freedom for the thought that we hate. It is only from a clash of ideas that the truth can emerge, for the best test of truth is the power of thought to get itself accepted in the market. This is not to suggest, that if any words or writings incite violence or disturb law and order or create public disorder with a view to overthrow government established by law, the state would have no power to forfeit a book containing such words or writings in order to prevent disturbance of public tranquility or public order.[61]

30. Conditions for Initiation of Proceedings

This is one of those offences of which no court shall take cognizance except with the previous sanction of the Central Government or of the State Government.[62] Sanction to prosecute constitutes a condition precedent to the institution of the prosecution; the giving of the sanction confers jurisdiction on the court to try the case; and where there is no valid sanction there is a defect in the jurisdiction of the court which can never be cured under s 465, CrPC .[63] The absence of sanction is a defect which vitiates the proceedings *abinitio* and is not a mere irregularity curable under s 465 .[64] It is not necessary for the sanction under this section to be in any particular form or in writing, or for it to set out the facts in respect of which it is given, though it is desirable to do so.[65]931

31. Procedure

An offence under this section is cognizable, non-bailable, non-compoundable and is triable by the

court of session.[66]

As under the CrPC 1973 an offence under this section cannot be tried by a magistrate and it is punishable with imprisonment for life. Section 260 of the CrPC is not applicable to it and it cannot be tried summarily.

32. Charge

Particulars of Charge

In an indictment for seditious words, the words alleged to be seditious must be specified.[67] Where an offence under this section is committed by means of a series of pictures, the requirements of the Code are satisfied if the charge gives such a description of the pictures as is reasonably sufficient to enable the accused to know the matter with which he is charged; and so, if an offence under the section is committed by words spoken, the requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably sufficient to enable the accused to know the matter with which he is charged, that is, if the charge states the words used with substantial, though not absolute, accuracy. Even if the words or the substance of the words used, are not entered at all in the charge, this will amount only to an irregularity and will not afford ground for reversing a conviction, unless the accused has, in fact, been misled by the omission, and it has occasioned a failure of justice.[68] In a trial under this section the substance of the speeches alleged to have been made by the accused was not mentioned in the charge, and all that was stated there was that on certain dates the accused delivered seditious speeches and brought or attempted to bring into hatred or contempt, or excite or attempted to excite, disaffection towards the government established by law in British India. It was held that the charge was defective; but having regard to the simple nature of allegations made by the prosecution as to the substance of the speeches, the accused was not under any misapprehension as to the nature of the charge, and was not prejudiced by the defect in the charge.[69] It is not necessary for the charge to specify the distinct passages in the pamphlet which are alleged to constitute the offence of attempting to promote feelings of hatred and the distinct passages which are alleged to constitute the offence of attempting to excite disaffection. It is sufficient for the charges to allege generally that the pamphlet constitutes an attempt to promote feelings of hatred and also excite disaffection.[70] The two offences, though committed by means of the same pamphlet, are as distinct as two libels on two different persons contained in one book. They do not come within the provisions of s 71, IPC .[71]

Where charges of conspiracy and sedition were framed on the basis of letters, recovered in a search on the person of the accused, it could not be said that the932 charges were not justified as the accused were not the authors of the letters. Authorship of seditious material alone is not the gist of any of the offences. Distribution, circulation of seditious material may also be sufficient on the facts and the circumstances of the case.[72] Where the charge framed against the accused contained no averment that he did anything as against the government, the offence under s 124A, IPC, is not made out.[73]

Form of Charge

The charge under this section may be framed as follows:

I, (*name and office of Sessions Judge, etc.*), hereby charge you (*name of accused*), as follows:

That you, on or about the.....day of.....at.....by writing or speaking the words (*mention them*) (*or*

by signs or by visible representation or otherwise) brought, (*or attempted to bring*) into hatred or contempt (*or excited*) (*or attempted to excite disaffection towards*) the Government established by law in India and thereby committed an offence punishable under s 124A of the Indian Penal Code and within the cognizance of this court.

And I hereby direct that you be tried by this Court on the said charge.

33. Proof

When an information is lodged at the police station and an offence is registered, then the *mala fides* of the informant would be of secondary importance. It is the material collected during investigation and the evidence led in the trial Court which decides the fate of the accused person.[74]

It is not necessary, in order to establish the fact of publication of seditious matter transmitted through the post office, on a charge under this section to prove the actual posting, nor that it was printed and published under the directions of the accused. If the seditious writing is shown to be in the handwriting of the accused, and it is further proved that the contents were in fact printed and published, there is sufficient evidence of publication by him.[75]

On a charge under this section, the sending of a pamphlet by post, addressed to a private individual not by name, but by designation as the representative of a large body of students, amounts to publication.[76]

Where the charge framed against the accused is totally bereft of the crucial allegation that accused did anything with reference to the government, it is not possible to sustain the conviction of the accused under s 124A, IPC .[77]

34. Evidence--Notes of Speech are Admissible

Even though the speech taken down by the reporter may not be verbatim, provided there is nothing to show that such portions as were taken down, were incorrectly taken down or that excerpts of the speech are not a fair representation of the general933 drift of the speeches, and also provided the entire subject-matter of the speech was such as to bring it within the purview of s 124A, the conviction can be justified.[78] Notes of speech are admissible in evidence and a person can be convicted on those notes.[79]

66 Substituted by Act 4 of 1898, s 4, for the original s 124A which had been inserted by Act 27 of 1870, s 5 .

67 The words 'Her Majesty or' omitted by the AO 1950. The words 'or the Crown Representative' inserted after the word 'Majesty' by the AO 1937 were omitted by the AO 1948.

68 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

69 The words 'or British India' inserted by the AO 1937 omitted by the AO 1948.

70 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life or any shorter term' (wef 1-1-1956).

71 *Emperor v Sadashiv Narayan Bhalerao* AIR 1947 PC 82, p 84, 48 Cr LJ 791 .

72 *Queen-Empress v Ramchandra Narayana* 22 ILR Bom 152, p 160 (FB), per Ranade J.

73 *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955, p 967, 968, 969, (1962) 2 Cr LJ 103 .

74 *Alvi v State of Kerala* (1982) KLT 205 .

75 *Annie Besant v Advocate-General of Madras* AIR 1919 PC 31, p 37, 20 Cr LJ 593 .

76 *Harikishan Singh v Emperor* AIR 1946 Lah 22, p 23, 47 Cr LJ 345 .

77 Corresponding to r 34(6)(e) of the Defence India Rules 1939.

78 *Niharendu Dutt Mazumdar v Emperor* AIR 1942 FC 22, p 25, 43 Cr LJ 504 ; *Emperor v Sadashiv Narayan Bhalerao* AIR 1947 PC 82, p 83, 48 Cr LJ 791 .

79 *Queen-Empress v Jogendra Chunder Bose* 19 ILR Cal 35, p 42 .

80 *Queen-Empress v Ram Chandra Narayan* 22 ILR Bom 152, p 160, per Ranade J.

81 *Queen-Empress v Jogendra Chunder Bose* (1892) 19 ILR Cal 35 ; *Queen-Empress v Bal Gangadhar Tilak* (1897) 22 ILR Bom 112 ; *Queen-Empress v Ram Chandra Narayan* (1897) 22 ILR Bom 152 (FB) ; *Queen-Empress v Amba Prasad* (1890) 20 ILR All 55 (FB) .

82 *Queen-Empress v Jogendra Chunder Bose* 19 ILR Cal 35 .

83 *Queen-Empress v Bal Gangadhar Tilak* 22 ILR Bom 112 .

84 *Queen-Empress v Ramchandra Narayan* 22 ILR Bom 152 (FB) .

85 *Queen-Empress v Amba Prasad* 20 ILR All 55 (FB) .

86 *Queen-Empress v Ramchandra Narayan* 22 ILR Bom 152 (FB) .

87 *Emperor v Sadashiv Narayan Bhalerao* AIR 1947 PC 82, p 84, 48 Cr LJ 791 .

88 *Queen-Empress v Bal Gangadhar Tilak* (1897) 22 ILR Bom 112 .

89 Stephen, *Commentaries on the Laws of England*, vol 4, twenty first edn, pp 141-142.

90 *R v Alexander Martin Sullivan* (1867-71) 11 Cox CC 44, p 45.

91 *Halsbury's Laws of England*, vol 11, fourth edn, Butterworths, London, 1976, para 827; Simonds, vol 10, third edn, p 569.

92 *Emperor v Sadashiv Narain Bhalerao* AIR 1947 PC 82, p 84, 48 Cr LJ 791 .

93 *Reg v Alexander Martin Sullivan* (1867-71) 11 Cox CC 44, p 45, Fitzgerald J.

1 *Niharendu Dutt Mazumdar v Emperor* AIR 1942 FC 22, p 26, 43 Cr LJ 504 .

2 *Mufti FakkhrulIslam v Emperor* AIR 1943 All 244, 44 Cr LJ 609 ; *Harkishan Singh v Emperor* AIR 1946 Lah 22, 47 Cr LJ 345 .

3 *Emperor v Sadashiv Narayan Bhalerao* AIR 1947 PC 82, p 84, 48 Cr LJ 791 .

4 *Wallace Johnson v King* (1940) AC 231 .

5 *Tara Singh Gopichand v State* AIR 1951 Punj 27, p 29, 52 Cr LJ 449 ; *Indramani Singh v State of Manipur* AIR 1955 Mani 9, p 14, 56 Cr LJ 139 ; *Ram Nandan v State* AIR 1959 All 101 (FB), 1959 Cr LJ 128 .

6 *Niharendu*'s case AIR 1942 FC 22, 43 Cr LJ 504 .

7 Sections 108, 111, 116 and 117, Code of Criminal Procedure 1973.

8 *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955, p 963, 968, (1962) 2 Cr LJ 103 .

9 *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955, p 969 ; *Annie Besant v Advocate-General of Madras* AIR 1919 PC 31, p 37, 20 Cr LJ 593 .

10 *Annie Besant v Advocate-General of Madras* AIR 1919 PC 31, p 37, 20 Cr LJ 593 .

11 *Nazir Khan v State of Delhi* AIR 2003 SC 4427, (2003) 8 SCC 461, (2003) Cr LJ 5021 (SC) .

12 *Parmanand v Emperor* AIR 1941 All 156, p 157, 42 Cr LJ 463 .

13 *Niharendu Dutt Mazumdar v Emperor* AIR 1942 FC 22, p 26, 43 Cr LJ 504 .

14 *Bowman v Secular Society Ltd* (1917) AC 406, p 466 .

15 *Emperor v Sadashiv Narayan Bhalerao* AIR 1947 PC 82, 48 Cr LJ 791 .

16 *Bengal Immunity Co Ltd v State of Bihar* AIR 1955 SC 661 ; *RMD Chamarbaugwalla v Union of India* AIR 1957 SC 628, (1957) 1 SCR 930 .

17 *RMD Chamarbaugwalla v Union of India* AIR 1957 SC 628, (1957) 1 SCR 930 .

18 *Debi Saran v State* AIR 1954 Pat 254, p 259 .

19 *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955, p 969, (1962) 2 Cr LJ 103 .

20 *Rex v Aldred* (1911-13) 22 Cox CC 1, p 3.

21 *Manubhai Tribhavandas Patel v State of Gujarat* 1971 Guj LR 968 .

22 *Kanwar Pal Singh v State of Punjab* 2012 (119) AIC 948 (P&H) .

23 *Jaswant Roy v Emperor* 5 Cr LJ 439, p 447, 2 Mad LT 272 .

24 *Emperor v Virumal Begraj* 11 Cr LJ 583, p 587, 81 C 203 (Sind) .

25 *P Hemlatha v Govt of Andhra Pradesh* (1976) 2 Andh WR 190 (FB) .

26 *Balbir Singh Saina v State of Haryana* (1989) CC Cases 93 (P&H) .

27 *Raghubir Singh v State of Bihar* AIR 1987 SC 149, (1987) Cr LJ 157 (SC) .

28 *Emperor v Tribhovandas* 33 ILR Bom 77, 1 IC 641, 10 Bom LR 801, 8 Cr LJ 272 .

29 *Emperor v Virumal Begraj* 11 Cr LJ 583 .

30 *Sangharaj Damodar Rupawatev Nitin Gadre*2007 Cr LJ 3860, p 3863 (Bom) (FB).

31 *Balwant Singh & Anor v State of Punjab* AIR 1995 SC 1785 .

32 *Balwant Singh & Anor v State of Punjab* AIR 1995 SC 1785 .

33 *Romesh Thapper v State of Madras* AIR 1950 SC 124, 51 Cr LJ 1514 .

34 *Brij Bhushan v State of Delhi* AIR 1950 SC 129, 51 Cr LJ 1525 .

35 Article 40(6)(i) of the Constitution of Eire 1937.

36 *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955, p 969, (1962) 2 Cr LJ 103, **overruling***Ram Nandan v State* AIR 1959 All 101 (FB), (1959) Cr LJ 128; *Debi Saran v State* AIR 1954 Pat 254, p 259, 55 Cr LJ 758 ; *Tara Singh Gopi Chand v State* AIR 1951 Punj 27, 52 Cr LJ 449 ; *Sagolsem Indramani Singh v State of Manipur* AIR 1955 Mani 9, p 15 will no longer be good law .

37 *Nazir Khan v State of Delhi* AIR 2003 SC 4427, (2003) 8 SCC 461, (2003) Cr LJ 5021 (SC) .

38 *Queen-Empress v Jogendra Chandra Bose* 19 ILR Cal 35, p 41 ; *Queen-Empress v Bal Gangadhar Tilak* 22 ILR Bom 112, p 129 .

39 *R v Piggot* (1868) 11 Cox CC 44 .

40 *Emperor v Bhashker Balwant Bhopatkar* 4 Cr LJ 1, p 4 .

41 Second Report, s 24 .

42 *Jwalamukhi v State of Andhra Pradesh* (1973) ILR AP 114 (FB) .

43 *Sodhi Pindidas v Emperor* AIR 1938 Lah 629, p 631, 39 Cr LJ 930 ; *P Hemlatha v Govt of Andhra Pradesh* AIR 1976 AP 375, p 377-393, (1976) 2 Andh WR 190 (FB).

44 *Mylapore Krishnasamy v Emperor* 32 ILR Mad 384, p 386, 9 Cr LJ 456 .

45 *R Saigal v Emperor* AIR 1930 All 401, 31 Cr LJ 840 (FB) .

46 *Queen-Empress v Jogendra Chandra Bose* 19 ILR Cal 35 .

47 *Queen-Empress v Bal Gangadhar Tilak* 22 ILR Bom 112 .

48 *Queen-Empress v Ram Chandra Narayan* 22 ILR Bom 152 (FB) .

49 *Queen-Empress v Ram Chandra Narayan* 22 ILR Bom 152, p 162 (FB) .

50 *R v Alexander Martin Sullivan* (1867-71) 11 Cox CB 44, p 45. Refer to extract from the charge quoted in note under this section.

51 *R v Cobbett* (1804) 29 St Tr 1, *Holt on Libel*, pp 114-115.

52 *Sachin Das v Emperor* AIR 1936 Cal 524, p 525, 37 Cr LJ 1077 .

53 *Balwant Singh & Anor v State of Punjab* AIR 1995 SC 1785 .

54 *Asit Kumar Sen Gupta v State of Chhattisgarh* 2012 Cr LJ (NOC) 384 (Chh) .

55 *Emperor v Bhaskar Balwant Bhopatkar* 4 Cr LJ 1, p 5, 15, 8 Bom LR 421 .

56 *Annie Besant v Govt of Madras* AIR 1918 Mad 1210, 18 Cr LJ 157 .

57 *Queen-Empress v Ramchandra Narayan* 22 ILR Bom 152, p 162 (FB), per Ranade J.

58 *Satya Ranjan Bakshi v Emperor* AIR 1930 Cal 220, p 222, 31 Cr LJ 313 .

59 *Munshi Singh v Emperor* AIR 1935 Oudh 347, p 349, 36 Cr LJ 541 .

60 *Sachin Das v Emperor* AIR 1936 Cal 524, p 525, 37 Cr LJ 1077 .

61 *BN Mukherjee v Emperor* AIR 1945 Nag 163, p 169, 47 Cr LJ 69 **relying on***Annie Besant v Advocate-General of Madras* AIR 1919 PC 31, 20 Cr LJ 593 ; *Om Prakash v Emperor* AIR 1948 Nag 71, 49 Cr LJ 54 ; Re *Jangi Azadi*AIR 1948 Lah 6, 48 Cr LJ 931 ; *Dhirendra Nath Sen v Emperor* AIR 1938 Cal 231, 40 Cr LJ 82 .

62 *VS Dandekar v Emperor* AIR 1930 All 324, p 325, 31 Cr LJ 429 .

63 *R v Jogendra Chunder Bose* 19 ILR Cal 35, p 44 ; *R v Bal Gangadhar Tilak* 22 ILR Bom 112, p 137 ; *Manmohan Ghose v R* 38 ILR Cal 253 .

64 *R v Bal Gangadhar Tilak* 22 ILR Bom 112, p 137-138 .

65 *R v Bhaskar Balwant* 4 Cr LJ 1, 8 BLR 421 ; *Joy Chandra Sarkar v R* 38 ILR Cal 214 .

66 *Apurba Krishna Bose v R* 35 ILR Cal 141 ; *R v Phanendra Nath Mittar* 35 ILR Cal 945 .

67 *R v Jogendra Chunder Bose* 19 ILR Cal 35 p 44; *R v Bal Gangadhar Tilak* 22 ILR Bom 112, p 134, 151 .

68 *The Century Dictionary and Encyclopaedia* and the definitions given on p 134 of the report of the case last cited, and in *R v Ramchandra Narayan* 22 ILR Bom 152, p 155, 156 .

69 *R v Bal Gangadhar Tilak* 22 ILR Bom 112, p 134 ; *R v Ramchandra Narayan* 22 ILR Bom 152, p 156, 159 ; *R v Amba Prasad* 22 ILR All 55 .

70 *R v Ramchandra Narayan* ILR 2 Bom 152, p 162 .

71 *Ibid.*

72 *Maniben Liladhar Kara v Emperor* AIR 1933 Bom 65, p 67, 34 Cr LJ 231 .

73 *Queen-Empress v Bal Gangadhar Tilak* 22 ILR Bom 112, p 135 .

74 Refer also to *Queen-Empress v Amba Prasad* 22 ILR All 55 (FB) .

75 *R v Ganesh Balvant* 34 ILR Bom 378, p 382 .

76 *Manmohan Ghose v R* 38 ILR Cal 253 .

77 *Beni Bhusan v R* 34 ILR Cal 991 .

78 *Joy Chandra Sarkar v R* 12 Cr LJ 348, 38 ILR Cal 214 .

79 *Emperor v Bhaskar Balvant Bhopatkar* 4 Cr LJ 1, p 4, 5, 17, 8 Bom LR 421 .

80 22 ILR Bom 112, p 134.

81 *Queen-Empress v Laxman* 2 Bom LR 286, p 296 cited with **approval in***Emperor v Bhaskar Balvant Bhopatkar* 4 Cr LJ 1, p

17 .

82 *Emperor v Ganesh Balvant Modak* 34 ILR Bom 378, p 381, 11 Cr LJ 180 .

83 *R v Burns & Ors* (1886) 16 Cox 355, p 365 .

84 *Emperor v Bhaskar Balvant Bhopatkar* 4 Cr LJ 1, p 17 .

85 *U Damadaya v King-Emperor* AIR 1923 Rang 212, p 213, 24 Cr LJ 842 .

86 *Pindi Das v R* 6 Cr LJ 411, 2 PWR Cr 97 .

87 *R v Ganesh Balvant* 34 ILR Bom 378 ; *Surendra Narayan Adhikary v R* 39 ILR Cal 522 .

88 Re *Ram Nath*(1905) 1 PR 1905.

89 *Satyendra Nath Mazumdar v Emperor* AIR 1931 Cal 337 ((2)), p 338, 32 Cr LJ 758 ; *Chunni Lal v Emperor* AIR 1931 Lah 182, p 183, 32 Cr LJ 681 ; *Queen-Empress v Jogendra Chunder Bose* 19 ILR Cal 35 ; *Arjun Arora v Emperor* AIR 1937 All 295, 38 Cr LJ 662 ; *Sachin Das v Emperor* AIR 1936 Cal 524, 37 Cr LJ 1077 ; *Vishambhar Dayal Tripathi v Emperor* AIR 1941 Oudh 33, 42 Cr LJ 40 ; *Queen-Empress v Bal Gangadhar Tilak* 22 ILR Bom 112, p 139 .

90 *Annie Besant v Advocate-General of Madras* AIR 1919 PC 31, p 38, 20 Cr LJ 593 .

91 *Emperor v Ganesh Balvant Modak* 34 ILR Bom 378, 12 Bom LR 21, 11 Cr LJ 180 ; *R v Shankar Shrikrishna* 35 ILR Bom 55, p 62 .

92 *Arjun Arora v Emperor* AIR 1937 All 295, 38 Cr LJ 662 .

93 *Mayne's Criminal Law of India*, third edn, p 520, cited with approval in *Emperor v Bal Gangadhar Tilak* 8 Cr LJ 281, p 325, 10 Bom LR 848 .

94 *Joy Chandra Sarkar v Emperor* 38 ILR Cal 214, p 225, 12 Cr LJ 348 .

95 *Queen-Empress v Jogendra Chunder Bose* 19 ILR Cal 35, p 45 .

96 *Queen-Empress v Bal Gangadhar Tilak* 20 ILR Bom 112, p 139, 140 .

1 *Queen-Empress v Luxman Narayan Joshi* (1900) 2 Bom LR 286 .

2 *Annie Besant v Advocate-General of Madras* AIR 1919 PC 31, 20 Cr LJ 593 ; *Sachin Das v Emperor* AIR 1936 Cal 524, 37 Cr LJ 1077 .

3 *V S Dandekar v Emperor* AIR 1930 All 324, p 325, 31 Cr LJ 429 .

4 *U Damadaya v King-Emperor* AIR 1923 Rang 212, p 212, 213, 24 Cr LJ 842 ; *Chuni Lal v Emperor* AIR 1931 Lah 182, 32 Cr LJ 681 ; *Prithvi Das Sharma v Emperor* AIR 1931 Lah 283, 32 Cr LJ 997 (FB) ; *Secy, High Court Bar Assn v Emperor* AIR 1932 Lah 559, 33 Cr LJ 831 .

5 *Chuni Lal v Emperor* AIR 1931 Lah 182, p 183, 32 Cr LJ 681 ; *Emperor v TK Pitrem* AIR 1923 Bom 255, 25 Cr LJ 150 ; *Emperor v Shankar Sri Krishna Dev* (1910) 35 Bom 55, 11 Cr LJ 546 ; *Emperor v Mahommad Siraj* AIR 1928 All 400, 30 Cr LJ 201 ; *Chellam Pillai v Emperor* AIR 1928 Rang 276 .

6 *Satyendra Nath Mazumdar v Emperor* AIR 1931 Cal 337(2), p 339, 32 Cr LJ 758 .

7 *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955, p 967, (1962) 2 Cr LJ 103 .

8 Re *Sunder Lal*AIR 1919 All 91, 21 Cr LJ 238 (SB) ; *Annie Besant v Govt of Madras* AIR 1918 Mad 1210, 18 Cr LJ 157 ; *Kshitish Chandra Roy v Emperor* AIR 1932 Cal 547, 33 Cr LJ 690 ; *Jagannath Tripathi v Emperor* AIR 1933 Cal 141, 34 Cr LJ 310 .

9 *Arjun Arora v Emperor* AIR 1937 All 295, p 296, 38 Cr LJ 662 ; *Kamal Krishna Sircar v Emperor* AIR 1935 Cal 636, 36 Cr LJ 1370 .

10 *BN Mukerji v Emperor* AIR 1945 Nag 163, p 169, 47 Cr LJ 69 .

11 *Sagolsem Indramani Singh v State of Manipur* AIR 1955 Mani 9, 56 Cr LJ 139 ; Re *Jangi Azadi*AIR 1948 Lah 6, 48 Cr LJ 931 (SB) .

12 *Om Prakash v Emperor* 42 PLR 382 .

13 *Raj Pal v Crown* AIR 1923 Lah 61, 24 Cr LJ 167 ; *Om Prakash Lalchand v Emperor* AIR 1948 Nag 71, 49 Cr LJ 54 .

14 *Sat Parkash v Emperor* AIR 1941 Lah 165, p 166, 42 Cr LJ 682 .

15 *Bal Gangadhar Tilak v Emperor* AIR 1916 Bom 9, 18 Cr LJ 567, per Shah J.

16 *Satya Ranjan Bakshi v Emperor* AIR 1930 Cal 220, p 222, 31 Cr LJ 313 .

17 *Emperor v Hemendra Prosad Ghosh* AIR 1939 Cal 529, p 530, 40 Cr LJ 782 (SB) .

18 *Dhirendra Nath Sen v Emperor* AIR 1938 Cal 721, p 723, 40 Cr LJ 82 .

19 *Queen-Empress v Bal Gangadhar Tilak* 22 ILR Bom 112, p 136-137 .

20 *Niharendu Dutt Mazumdar v Emperor* AIR 1942 FC 22, p 25, 43 Cr LJ 504 .

21 *Emperor v Sadashiv Narayan Bhalerao* AIR 1947 PC 82, p 84, 48 Cr LJ 791 .

22 *Tilak*'s case 22 ILR Bom 112.

23 *Annie Besant v Advocate-General of Madras* AIR 1919 PC 31, p 37, 20 Cr LJ 593 .

24 *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955, p 969, (1962) 2 Cr LJ 103 .

25 *Bowman v Secular Society Ltd* (1917) AC 406, p 466 .

26 *Niharendu Dutt Mazumdar v Emperor* AIR 1942 FC 22, p 25, 43 Cr LJ 504 .

27 *Debi Soren & Ors v State* AIR 1954 Pat 254, p 261, 55 Cr LJ 758 .

28 Simonds, *Halsbury's Laws of England*, vol 11, fourth edn, Butterworths, London, 1976, para 828.

29 *R v Sullivan R v Pigott* (1869) 11 Cox CC 44, p 49 .

30 *R v Collins* (1839) 9 C&P 456, p 461, per Littledale J; *R v Burdett* (1820) 1 St Tr NS 1, p 50 ; *R v Aldred* (1909) 74 JP 55 .

31 *Emperor v Bal Gangadhar Tilak* 8 Cr LJ 281, p 316, 10 Bom LR 848 .

32 *Thakin Lay Maung v King* AIR 1939 Rang 169, p 173, 40 Cr LJ 668 .

33 *Emperor v Phanendra Nath Mitter* 35 ILR Cal 945 .

34 *Vishambhar Dayal Tripathi v Emperor* AIR 1941 Oudh 33, 42 Cr LJ 40 .

35 *Satyaranjan Bakshi v Emperor* AIR 1932 Cal 758, p 759, 33 Cr LJ 702 .

36 Re *SS Batliwala*AIR 1938 Mad 758, p 763, 39 Cr LJ 938 .

37 *Dhirendra Nath Sen v Emperor* AIR 1938 Cal 721, p 723, 40 Cr LJ 82 .

38 *R v Sullivan* (1868) 11 Cox CC 54 .

39 *Satyaranjan Bakshi v Emperor* AIR 1927 Cal 698, p 701, 28 Cr LJ 723 .

40 *Nageshwar Prasad Sharma v King-Emperor* AIR 1925 Pat 99, p 103, 26 Cr LJ 78 .

41 *Mufti Fakkhrul Islam v Emperor* AIR 1943 All 244, p 247, 44 Cr LJ 609 .

42 *Joy Chandra Sarkar v R* 12 Cr LJ 348, 38 ILR Cal 214 ; *P Hemalatha v Govt of Andhra Pradesh* AIR 1976 AP 375, 1976 (2) Andh WR 190 (FB) .

43 *Ram Chandra v Emperor* AIR 1930 Lah 371, p 374, 31 Cr LJ 168, 1947 Nag 1, p 3, 47 Cr LJ 994 .

44 *Emperor v Bhaskar Balvant Bhopatkar* 4 Cr LJ 1, p 13, 8 Bom LR 421 .

45 *Emperor v Bhaskar Balvant* 4 Cr LJ 1, p 12, 14 .

46 *Chuni Lal v Emperor* AIR 1931 Lah 182, p 183, 32 Cr LJ 681, refer to the cases cited therein.

47 *Braja Behari Burman v Emperor* AIR 1931 Cal 349, p 350, 32 Cr LJ 748 .

48 *Ram Nath v R* 2 Cr LJ 31 ; *R v Bhaskar Balvant* 4 Cr LJ 1, 8 BLR 421 .

49 *Manmohan Ghose v R* 38 ILR Cal 253 .

50 *State v D Packiaraj* AIR 1951 Tr & Coch 105, 52 Cr LJ 623.

51 Section 223, Code of Criminal Procedure 1973; *Shantaram S Mirajkar v Emperor* AIR 1928 Bom 139, 29 Cr LJ 683 .

52 *Bilal Ahmed Kaloo v State of Andhra Pradesh* AIR 1997 SC 3483 .

53 *Suresh Chandra Sanyal v R* 39 ILR Cal 606 .

54 *AMA Zaman v Emperor* AIR 1933 Cal 140, 34 Cr LJ 309 ; *Krishna Gopal Sharma v Emperor* AIR 1930 All 836, 32 Cr LJ 161 ; *Anand Kishore v Emperor* AIR 1930 Lah 306, 31 Cr LJ 201 ; *Khushal Chand v Emperor* AIR 1930 Lah 875, 31 Cr LJ 1170 ; *Malik Amir Alam v Emperor* AIR 1930 Lah 885, 32 Cr LJ 199, (1948) Mys HCR 265 (DB) .

55 *SH Jhabwala v Emperor* AIR 1933 All 690, p 732, 34 Cr LJ 967 ; *K Sharma v Emperor* AIR 1930 All 836, p 837, 32 Cr LJ 161 .

56 *Munshi Singh v Emperor* AIR 1935 Oudh 347, p 349, 36 Cr LJ 541 .

57 *Ram Saran Das v Emperor* AIR 1930 Lah 892, p 895, 32 Cr LJ 139 .

58 *Prof Indra v Emperor* AIR 1930 Lah 870, 31 Cr LJ 1187 ; *Satyendra Nath Mazumdar v Emperor* AIR 1939 Cal 270, 40 Cr LJ 630 ; *Lakshman Das v Emperor* AIR 1931 Lah 52, 32 Cr LJ 588 ; *Ram Chandra v Emperor* Cr LJ 381.

59 *Abinash v R* 34 ILR Cal 986 .

60 *P Hemalata v Govt of Andhra Pradesh* (1976) 2 Andh WR 190 (FB) .

61 *Manobhai Trihavandas Patel v State of Gujarat* 1971 Guj LR 968 .

62 Section 196, CrPC ; *Shunmugam v Thangavelu* AIR 1958 Mad 240, (1958) Cr LJ 647(2).

63 *Gokulchand Dwarkadas v King* AIR 1948 PC 82, 49 Cr LJ 261 ; *Jitendra Nath v Emperor* AIR 1937 Cal 99 (SB), 38 Cr LJ 818; *Basdeo Agarwalla v Emperor* AIR 1945 FC 16, 46 Cr LJ 510 ; *Suraj Prakash v Emperor* AIR 1945 FC 24 ; *Abdul Mian v King* AIR 1951 Pat 513, 52 Cr LJ 710(1); *Shamal Khan v Empress* 16 PR 1890 .

64 *Mst Shasina v Empress* 42 PR 1884 .

65 *Biswabhusan v State of Orissa* AIR 1954 SC 359, 55 Cr LJ 1002 ; *Queen-Empress v Bal Gangadhar Tilak* 22 ILR Bom 112, p 130 ; *Queen-Empress v Jogendra Chander Bose* 19 ILR Cal 35 ; *Apurba Krishna Bose v Emperor* 35 ILR Cal 141 .

66 First Schedule to the Code of Criminal Procedure 1973.

67 *Halsbury's Laws of England,* vol 11, fourth edn, Butterworths, London, 1976, p 487.

68 *Mylapore Krishnasami v Emperor* 32 ILR Mad 384, p 387, 9 Cr LJ 456 ; *Chidambaram Pillai v Emperor* 32 ILR Mad 3, 9 Cr LJ 130 ; s 215, Code of Criminal Procedure 1973, illust (b).

69 *Chint Ram v Emperor* AIR 1931 Lah 186, p 187, 32 Cr LJ 1202 .

70 *Emperor v Tribhovandas* 33 ILR Bom 77, p 82, 85, 1 IC 641, 10 Bom LR 801, 8 Cr LJ 272 .

71 *Emperor v Virumal Begraj* 11 Cr LJ 583, p 587 .

72 *Raghubir Singh v State of Bihar* AIR 1987 SC 149, (1987) Cr LJ 157(SC).

73 *Bilal Ahmed Kaloo v State of Andhra Pradesh* AIR 1997 SC 3483, (1997) Cr LJ 4091 (SC) .

74 *P Nedumaran v State* (2003) Cr LJ 4388 (Mad) .

75 *Surendra Narayan Adhicary v Emperor* 39 ILR Cal 522 .

76 *Suresh Chandra Sanyal v Empeor* 39 ILR Cal 606, 13 Cr LJ 289 .

77 *Bilal Ahmed Kaloo v State of Andhra Pradesh* AIR 1997 SC 3483 .

78 *Sant Ram v Emperor* AIR 1930 Lah 86, 31 Cr LJ 562 ; *Krishna Chandra Pangoria v Empeor* AIR 1937 All 466, 38 Cr LJ 972 .

79 *Vishambhar Dayal Tripathi v Emperor* AIR 1941 Oudh 33, p 40, 42 Cr LJ 40 .

Indian Penal Code (Act XLV of 1860)

Chapter VI

Of Offences Against the State

S. 125.

Waging war against any Asiatic Power in alliance with the Government of India.--

Whoever wages war against the Government of any Asiatic Power in alliance or at peace with the [80][Government of India] or attempts to wage such war, or abets the waging of such war, shall be punished with [81][imprisonment for life], to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

Comments

1. Scope

The offences, forbidden by this section, are the same as those under s 121, IPC ; the persons protected hereby being the government of an asiatic power in alliance or at peace with the Government of India. The offences defined in this section were also punishable under the Foreign Enlistment Act 1870,[82] which applied to India, and the preamble of which recited: 'It is expedient to make provision for the regulation of the conduct of Her Majesty's subjects during the existence of hostilities between foreign states with which Her Majesty is at peace'. The section is based upon the principle of international amity and the desire of the state to remain in friendly relations with its neighbours.[83]

An Indian waging war against the Rajah of Manipore who was then an Asiatic sovereign in alliance with the Queen of England and Empress of India, was held guilty of the offence punishable under this section.[84]

2. Whoever

Commentary under same heading in ss 121 and 124A may be referred to.

3. 'Abets'

Commentary under s 121 may be referred to. Section 121A , IPC does not apply to this section, and hence a conspiracy to wage war would have to be followed by an overt act, in order to render it punishable as abetment under this section.934

4. Procedure

It is the same as in the case of an offence under s 121, IPC .

80 Substituted by the AO 1950, for 'Queen'.

81 Substituted by Act 26 of 1955, s 117 and Schedule, 'for transportation for life' (wef 1-1-1956).

82 33 & 34 Vict C 90.

83 Re *Jameson*[1896] 2 QB 425.

84 *Queen v Keifa Singh* 3 WR 16 .

Indian Penal Code (Act XLV of 1860)

Chapter VI

Of Offences Against the State

S. 126.

Committing depredation on territories of Power at peace with the Government of India.--

Whoever commits depredation, or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with the [85][Government of India], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.

Comments

1. Scope

The provisions of this section differ from those of s 125 in the following particulars:

(i) The power in question need not be an Asiatic one.
(ii) The object of the expedition is plunder, not to wage war.
(iii) The depredation must be actually carried out, or preparations made to carry it out.

An attempt to carry out depredation would not *perse* be punishable under this section, but under s 511, and it would of course be evidence of preparation, whilst abetment would be punishable under the provisions of ch V.

2. Whoever

Commentary under same heading in ss 121 and 124A may be referred to.

3. Depredation

Depredate means subject to plunder and pillage. [86]Therefore, in this section depredation means plunder on territories of a state in alliance or at peace with the Government of India.

4. Procedure

It is the same as in the case of an offence under s 121, IPC .

5. Charge

The following form of charge may be adopted:

> I, (*name and office of Sessions Judge etc.*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of....., at....., committed (*or made preparations to commit*) depredation on the territories of....., a Power in alliance (*or at935 peace*) with the Government of India, and thereby committed an offence punishable under s 126 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

85 Substituted by the AO 1950, for 'Queen'.

86 *Webster's Dictionary*.

Indian Penal Code (Act XLV of 1860)

Chapter VI

Of Offences Against the State

S. 127.

Receiving property taken by war or depredation mentioned in sections 125 and 126 .--

Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

Comments

1. Scope

This section provides for punishment of persons who knowingly receive property obtained by waging war against any Asiatic power in alliance with the Government of India or by depredation on its territories. The receivers of such property also are liable as they are accessories after the fact.

2. Whoever

Commentary under same heading in ss 121 and 124A may be referred to.

3. 'Knowing'

Synopsis notes under s 26 may be referred to.

4. Proof

To prove a charge under this section the prosecution has to prove the waging of war against the government of an Asiatic power in alliance or at peace with the Government of India, or the committing of depredation, on the territories of any power in alliance or at peace with the Government of India and the receipt of the property taken therein, and the knowledge of the accused that the property received by him is the property taken in the managing of such war or by such plunder.

5. Procedure

The offence under this section is cognizable, non-bailable and triable by the court of session. Prior sanction of the Central Government is necessary for taking cognizance of this offence by the court.

6. Charge

The following form of charge may be adopted:

> I, (*name and office of the Sessions Judge, etc.*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of....., at.....received (*specify the property*) knowing the same to have been taken in waging war against.....an Asiatic936 power in alliance (*or at peace*) with the Government of India (*of knowing the same to have been taken in the commission of depredation on the territories of.....*) a power in alliance (*or at peace*) with the Government of India, and thereby committed an offence punishable under s 127, of the Indian Penal Code, and within the cognizance of this Court.
>
> And I hereby direct that you be tried by this court on the said charge.

Chapter VI

Of Offences Against the State

S. 128.

Public servant voluntarily allowing prisoner of State or war to escape.--

Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with [87][imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

This and the next two sections deal with escape and rescue of state prisoners. The offence under this section is an aggravated form of the offence under s 225A, IPC . It provides for the punishment of a public servant who voluntarily allows a state prisoner to escape, while the next section provides for the punishment of a public servant who negligently suffers escape of such a prisoner from confinement. Section 130 , IPC provides for the punishment of any person, other than a public servant, who aids in the escape of a state prisoner or rescues him or harbours him after his escape.

2. Whoever

Commentary under same heading in ss 121 and 124A may be referred to.

3. 'State Prisoner'

A state prisoner is a prisoner arrested and confined for 'reasons of state embracing the due maintenance of the alliance formed by the Indian government with foreign powers, the preservation of tranquility and the security of India from foreign hostility and from internal commotion'.[88] The regulations providing for confinement of state prisoners are specified in the footnote.[89]

4. Procedure

It is the same as in the case of an offence under s 121, IPC .937

5. Charge

The following form of charge may be adopted:

I, (*name and office of Session Judge, etc.,*) hereby charge you (*name of accused*), as follows:

That you, being a public servant (*mention the office*), and as such having the custody of.....a state prisoner (*or a prisoner of war*), on or about the.....day of.....at..... voluntarily allowed such prisoner to escape from....., the place in which such prisoner was confined, and thereby committed an offence punishable

under s 128 of Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this Court on the said charge.

87 Substituted by Act 26 of 1955, s 117 and Schedule for 'transportation for life' (wef 1-1-1956).

88 Preamble to Bengal Regulation 3 of 1818.

89 Bengal Regulation 3 of 1818; Bombay Regulation 25 of 1817, Madras Regulation 2 of 1819, substantially reproduced in Act 34 of 1850 and Act 3 of 1858.

Indian Penal Code (Act XLV of 1860)

Chapter VI

Of Offences Against the State

S. 129.

Public servant negligently suffering such prisoner to escape.--

Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

Comments

1. Scope

The previous section deals with voluntarily allowing a state prisoner or prisoner of war to escape from custody by a public servant, while this section deals with an offence of suffering such escape by negligence. The punishment provided under this section is simple imprisonment extending upto three years and fine while the offence under s 128, IPC is punishable with life imprisonment or imprisonment of either description extending upto ten years and fine. The remaining provisions of both the sections are the same.

2. Whoever

Commentary under same heading in ss 121 and 124A may be referred to.

3. Procedure

The offence under this section is cognizable, bailable and is triable by a magistrate of the first class. Prior sanction of the Central Government or state government is necessary for taking cognizance of even this offence.

4. Charge

The following form of charge may be adopted:

I,..... (*the name and office of the Magistrate*) hereby charge you..... (*name of accused*) as follows:

That you, being a public servant (*mention office*) and as such having the custody of.....a state prisoner (*or a prisoner of war*), on or about the.....day of.....at.....938 negligently suffered his escape from.....where he was confined and thereby committed an offence punishable under s 129 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Indian Penal Code (Act XLV of 1860)

Chapter VI

Of Offences Against the State

S. 130.

Aiding escape of, rescuing or harbouring such prisoner.--

Whoever knowingly aids or assists any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner, shall be punished with [90][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.--A state prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in [91][India], is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

Comments

1. Scope

The scope of this section is much wider than the scope of ss 128 - 129, IPC . The said sections deal with only escape of state prisoners or the prisoners of war, while this section also embraces within its ambit rescuing or attempting to rescue, harbouring or concealing, such prisoners, who have escaped from lawful custody, or offering or attempting to offer resistance to the recapture of such prisoners and makes these acts punishable. Its application is not confined to public servants only and it applies to all alike. In doing any of the acts specified in this section the accused must know that the person concerned is a state prisoner or a prisoner of war. In the absence of such knowledge, the offence may fall under s 225 or s 225B, IPC but not under this section.

2. Whoever

Commentary under s 225 may be referred to.

3. Procedure

An offence under this section is cognizable, non-bailable, not compoundable and triable by a court of session. Prior sanction of the Central Government or state government is necessary for taking cognizance of an offence under this section by the court.939

4. Charge

One of the following forms of charge may be adopted:

I,.....(*name and office of the Sessions Judge etc.*) hereby charge you..... (*name of accused*) as follows:

That you, on or about the.....day of..... at.....knowingly aided (*or assisted or rescued or attempted to rescue*).....a state prisoner (*or prisoner of war*) in escaping form lawful custody and thereby committed an offence punishable under s 130 of the Indian Penal Code and within the cognizance of this court.

Or

That you, on or about the.....day of.....at.....knowingly harboured..... (*or concealed*), a state prisoner or prisoner of war, who had escaped from lawful custody (*or offered or attempted to offer resistance to the recapture of...., a state Prisoner*) (*or prisoner of war after he had escaped form lawful custody*) and thereby committed an offence punishable under s 130 of the Indian Penal Code and within the cognizance of this Court.

> And I hereby direct that you be tried by this Court on the said charge.940

90 Substituted by Act 26 of 1955, s 117 and Schedule for 'transportation for life' (wef 1-1-1956).

91 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

Indian Penal Code (Act XLV of 1860)

Chapter VII

Of Offences Relating to the Army, [1][Navy and Air Force]

General Notes

The offences dealt with in this chapter (ss 131 - 140) consist of the abetment of breaches of military law, and the harbouring of offenders against that law. Now, breaches of such law are not likewise breaches of the Code, nor are they breaches of a special or local law, for special and local laws apply to all persons with reference to a particular subject, or in a particular area, whilst military law applies only to a special class of people. Consequently, the abetment of such offences would not, in the absence of the special legislation in this chapter, have been punishable. Hence, arose the necessity for the chapter.[2] The authors of the Code themselves explained the necessity of the provisions of this chapter as follows:

> It is obvious that a person who, not being himself subject to military law, exhorts or assists those who are subject to military law to commit gross breaches of discipline, is a proper subject of punishment. But the general law respecting the abetting of offences will not reach such a person; nor, framed as it is, would it be desirable that it should reach him. It would not reach him, because the military delinquency which he has abetted is not punishable by this Code, and therefore is not, in our legal nomenclature, an offence. Nor is it desirable that the punishment of a person, not military, who has abetted a breach of military discipline, should be fixed according to the principles on which we have proceeded in framing the law of abetment. We have provided that the punishment of the abettor of an offence shall be equal or proportional to the punishment of the person who commits that offence; and this seems to us a sound principle when applied only to the punishments provided by this Code. But the military penal law is, and must necessarily be, far more severe than that under which the body of the people lives. The severity of the military penal law can be justified only by the reason drawn from the peculiar habits and duties of a soldier and from the peculiar relation in which they stand to the Government. The extension of such severity to persons not members of the military profession appears to us altogether unwarrantable. If a person, not military, who abets a breach of military discipline, should be made liable to a punishment regulated according to our general rules, by the punishment to which such a breach of discipline renders a soldier liable, the whole symmetry of the penal law would be destroyed. He who should induce a solider to disobey an order of a Commanding Officer would be liable to be punished more severely than a dacoit, a professional thug, an incendiary, a ravisher, or a kidnapper. We have attempted in this chapter to provide, in a manner more consistent with the general character of the Code, for the punishment of persons who, not being military, abet military crimes.[3]941

1 Substituted by Act 10 of 1927, s 2 and Sch I, for 'and Navy'.

2 Commissioner's Report, p 109.

3 Note D.

Indian Penal Code (Act XLV of 1860)

Chapter VII

Of Offences Relating to the Army, [Navy and Air Force]

S. 131.

Abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty.--

Whoever abets the committing of mutiny by an officer, soldier, [4][sailor or airman], in the Army, [5][Navy or Air Force] of the [6][Government of India] or attempts to seduce any such officer, soldier, [7][sailor or airman] from his allegiance or his duty, shall be punished with [8][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[9][*Explanation.*--In this section the words "officer", [10]["soldier", [11]["sailor"] and "airman"] include any person subject to the [12][Army Act, [13][the Army Act, 1950 (46 of 1950), [14][the Naval Discipline Act, [15][* * *] the [16][Indian Navy (Discipline) Act, 1934 (34 of 1934)], [17][the Air Force Act, or [18][the Air Force Act, 1950 (45 of 1950)], as the case may be]].

Comments

1. Scope

This section supplements, and extends to civilians, the penal provisions of the Army Act 1950, the Air Force Act 1950, and Indian Navy (Discipline) Act 1934, etc, relating to mutiny and desertion.

2. Analogous Law

The provisions of this section are similar to those of the English Incitement to Mutiny Act 1797,[19] the Incitement to Disaffection Act 1934[20] and the Naval Discipline Act 1866.[21]942

The Incitement of Mutiny Act 1797,[22] enacted:

> Any person who shall maliciously[23] and advisedly endeavour to seduce any person or persons serving in His Majesty's forces by sea or land, form his or their duty and allegiance to His Majesty, or to incite or stir up any

> such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony.

Under s 1 of the Punishment of Offences Act 1837,[24] such a person, on conviction 'shall be liable...to be transported beyond the seas for the term of the natural life of such person'.

The Incitement to Disaffection Act 1934[25] provides:

(i) If any person maliciously and advisedly endeavours to seduce any member of His Majesty's forces from his duty or allegiance to His Majesty, he shall be guilty of an offence under this Act.

(ii) If any person, with intent to commit or to aid, abet, counsel or procure the commission of an offence under Section 1 of this Act, has in his possession or under his control any document of such a nature that the dissemination of copies thereof among members of His Majesty's forces would constitute such an offence, he shall be guilty of an offence under this Act.

(iii) A person guilty of an offence under this Act shall be liable, on conviction on indictment to imprisonment for a term not exceeding two years or to a fine not exceeding two hundred pounds, or on summary conviction to imprisonment for a term not exceeding four months or to a fine not exceeding twenty pounds, or (whether on conviction on indictment or on summary conviction) to both such imprisonment and fine.

3. 'Whoever'

In this and the following sections, the word 'whoever' signifies anyone other than a person subject to the Indian Army Act, the Army Act 1950, the Naval Discipline Act, the Indian Naval Discipline Act 1934, or the Air Force Act 1950.[26]

4. 'Abets'

Refer to s 107 of this Code.

5. 'Mutiny'

The term 'mutiny' has not been defined anywhere in this Code. Mutiny appears to mean 'collective insubordination';[27] or a combination of two or more persons to resist, or to induce others to resist, lawful, military authority.[28]

6. 'Soldier'

Under the explanations to this section the word 'soldier' means any person subject to the Naval Discipline Act or the Indian Army Act or the Army Act 1950.943

7. 'Sailor'

'Sailor' means a person subject to the Navy (Discipline) Act 1934.

8. 'Airman'

'Airman' means a person subject to the Air Force Act, or the Air Force Act 1950.[29]

9. 'Attempts to seduce'

To distribute amongst Indian troops copies of a letter published in a newspaper urging Indian soldiers to give up their allegiance to the Indian Government is such an attempt.[30]An indictment upon this statute need not set out the means used for seducing the soldier from his duty and allegiance; and it need not aver that the prisoner knew the person endeavoured to be seduced to be a soldier. Nor, in an indictment for endeavouring to seduce soldiers by means of printed publications addressed to soldiers, is it necessary to specify any particular person or persons serving in Indian forces by sea or land who have been approached by the accused in contravention of the Act. It is sufficient to allege the endeavour to be to seduce persons serving in Indian forces.[31]

10. Procedure

An offence under this section is cognisable and warrant may issue in the first instance. It is both non-bailable and non-compoundable and is triable by the Court of Session.

11. Charge

The form of charge under this section may be:

> I (*Name and office of the Sessions Judge etc*), hereby charge you (*name of accused*) as follows:
>
> That you on or about the.....day of.....at.....abetted the commission of mutiny by....., an officer (*or soldier or sailor or airman*) in the Army (*or Navy or Air Force*) of the Government of India (*or attempted to seduce an officer*) (*or soldier or sailor or airman*) in the Army (*or Navy or Air Force*) of the Government of India from his allegiance (*or his duty*) and thereby committed an offence punishable under s 131 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge'.

4 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or sailor'.

5 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or Navy'.

6 Substituted by the AO 1950, for 'Queen'.

7 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or sailor'.

8 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation of life' (wef 1-1-1956).

9 Inserted by the Indian Penal Code, (Amendment) Act 1870, s 6 .

10 Substituted by Act 10 of 1927, s 2 and Sch I, for 'and soldier'.

11 Inserted by Act 35 of 1934, s 2 and Sch.

12 Substituted by Act 10 of 1927, s 2 and Sch I, for 'Articles of war for the better government of Her Majesty's Army, or to the

Articles of war contained in Act No 5 of 1869'.

13 Substituted by Act 3 of 1951, s 3 and Sch for 'the Indian Army Act 1911'.

14 Inserted by Act 35 of 1934, s 2 and Sch.

15 The words 'or that Act as modified by' omitted by the AO 1950.

16 See the Navy Act 1957.

17 Substituted by Act 14 of 1932, s 130 and Sch, for 'or the Air Force Act'.

18 Substituted by Act 3 of 1951, s 3 and Sch, for 'the Indian Air Force Act 1932'.

19 37 Geo 3 c 70. Now repealed by the Statute Law (Repeals) Act 1998.

20 24 & 25 Geo 5 c 56.

21 29 & 30 Vic c 109.

22 37 Geo 3 c 70.

23 Refer to the Incitement of Mutiny Act 1797, s 1 .

24 7 WK 4 & 1 Vict c 91. Now repealed by the Statute Law (Repeals) Act 2008.

25 24 & 25 Geo 5 c 56.

26 See the Air Force Act 1950, s 139 .

27 *Official Manual of Military Law*, 1914 edn, p 15.

28 *Manual of Indian Military Law,* 1918 edn, p 114.

29 Air Force Act 1950, s 4 (viii).

30 *Pindi Das v Emperor* 6 Cr LJ 411, 2 PWR Cr 97 .

31 *Russell on Crime*, eleventh edn, p 246; citing *R v Fuller* (1797) 2 Leach 790, 1 East PC 92, 1 B&P 180 ; *R v Bowman* (1912) 76 JP 271, per Horridge J.

Indian Penal Code (Act XLV of 1860)

Chapter VII

Of Offences Relating to the Army, [Navy and Air Force]

S. 132.

Abetment of mutiny if mutiny is committed in consequence thereof.--

Whoever abets the committing of mutiny by an officer, soldier, [32][sailor or airman] in the Army, [33][Navy or Air Force] of the [34][Government of India], shall, if mutiny be committed in consequence of that abetment, be punished with944 death or with [35][imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

This is an aggravated form of the offence, dealt within the last section and prescribes the extreme penalty of death where the mutiny abetted is committed in consequence of the abetment.

2. 'In Consequences Thereof'

Refer to explanation to s 109 of this Code.

3. Procedure

The offence under this section is cognisable and a warrant shall ordinarily issue in the first instance. It is neither bailable nor compoundable and is triable by the Court of Session.

4. Charge

The following form of charge may be adopted:

> I..... (*name and office of the Sessions Judge, etc*), hereby charge you..... (*name of accused*) as follows:
>
> That you on or about the.....day of.....at.....abetted the commission of mutiny by....., an officer (*or soldier or sailor or airman*) in the Army (*or Navy or Air Force*) of the Government of India, which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under Section 132 of the Indian Penal Code and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

32 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or sailor'.

33 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or Navy'.

34 Substituted by the AO 1950, for 'Queen'.

35 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation for life' (wef 1-1-1956).

Chapter VII

Of Offences Relating to the Army, [Navy and Air Force]

S. 133.

Abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office.--

Whoever abets an assault by an officer, soldier, [36][sailor or airman], in the Army, [37][Navy or Air Force] of the [38][Government of India], on any superior officer being in the execution of his office, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.945

Comments

1. Scope

The substantive offence, the abetment of which is made punishable under this section is the offence defined in s 40 of the Army and Air Force Acts of 1950. The section applies only if the officer assaulted was at the time of assault in execution of his office. Abetment punishable under s 133, IPC can be committed by any person but the assault has to be made by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India on a superior officer and not an assault on any other person.

2. 'Assault'

Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation

Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.[39]

3. 'Officer'

The expression 'officer' means a person commissioned, gazetted or in pay as an officer in the regular Army, Navy or Air Force.[40]

4. 'Soldier'

Refer to synopsis notes under s 131 .

5. 'Superior Officer'

Section 3(xxiii) of the Army Act 1950, lays down that 'Superior Officer', when used in relation to a person subject to this Act, includes a junior commissioned officer, warrant officer and a non-commissioned officer, and, as regards persons placed under his orders, an officer, warrant officer, petty officer and non-commissioned officer of the Navy or Air Force.

6. 'In the Execution of his Office'

The question whether the superior officer was, at the relevant time, in the execution of his office would depend upon the nature of his duties and the orders of his superior officers. The burden is on the prosecutor to show that the officer was, at the time, in the execution of his duty.

7. Procedure

An offence under this section is cognisable and warrant may issue in the first instance. It is both non-bailable and non-compoundable and is triable by a magistrate of the first class.946

8. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you on or about the.....day of.....at.....abetted an assault by.....an officer..... (*or soldier or sailor or airman*) in the Army (*or Navy or Air Force*) of the Government of India on.....a superior officer being in the execution of his office, and thereby committed an offence, punishable under Section 133 of the Indian Penal Code, and within my cognisance.
>
> And I hereby direct that you be tried by this court on the said charge.

36 Substitued by Act 10 of 1927, s 2 and Sch I, for 'or sailor'.

37 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or Navy'.

38 Substituted by the AO 1950, for 'Queen'.

39 *Vide*Indian Penal Code 1860, s 351 .

40 The definition in s 3(xviii) of the Army Act 1950, and s 4(xxiii) of the Air Force Act 1950.

Indian Penal Code (Act XLV of 1860)

Chapter VII

Of Offences Relating to the Army, [Navy and Air Force]

S. 134.

Abetment of such assault, if the assault is committed.--

Whoever abets an assault by an officer, soldier, [41][sailor or airman], in the Army, [42][Navy or Air Force] of the [43][Government of India], on any superior officer being in the execution of his office, shall, if such assault be committed in consequence of that abetment be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This is an aggravated form of the offence punishable under the previous section. The last section prescribes punishment for abetment of an assault not committed, and this section prescribes punishment for an assault committed in consequence of the abetment.

2. Procedure

The offence is cognisable and a warrant may be issued in the first instance. It is neither bailable nor compoundable, and is triable by a magistrate of the first class.

3. Charge

The following form of charge may be adopted:

> I (*name and office of Magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....abetted an assault which was committed by....., an officer (*or soldier or sailor, or airman*) in the Army (*or Navy or Air Force*) of the Government of India on.....a superior officer being in the execution of his office, and thereby committed an offence punishable under s 134 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this Court on the said charge.947

41 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or sailor'.

42 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or Navy'.

43 Substituted by the AO 1950, for 'Queen'.

Indian Penal Code (Act XLV of 1860)

Chapter VII

Of Offences Relating to the Army, [Navy and Air Force]

S. 135.

Abetment of desertion of soldier, sailor or airman.--

Whoever abets the desertion of any officer, soldier, [44][sailor or airman], in the Army, [45][Navy or Air Force] of the [46][Government of India], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This and the next section refer to offences which are also offences under s 38 of the Army Act 1950, the Air Force Act 1950, and s 49 of the Navy Act 1957. What is made punishable under this section is the abetment of desertion and not desertion itself. It is not necessary that desertion should have taken place. It is enough if desertion is abetted.[47]

2. Desertion

In ordinary language, to desert is to part from, end connection with. In military law it means, to leave without permission, forsake in violation of duty, *i.e.*, to quit service without permission, run away.[48] Desertion must be distinguished from mere absence without leave, which is separately dealt with in s 39 of the Army and Air Force Acts 1950. Desertion implies quitting the service for good, without leave or permission. To establish desertion it would be necessary to prove circumstances justifying an inference that the person deserting has no intention to return to duty.

3. Intention

Under s 108 of this Code a person is said to abet an offence even when he does no more than abet an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor. It is not necessary that the act abetted should be committed, nor is it necessary that the person abetted should have any guilty intention or knowledge.[49]

Where the accused helped a regimental sepoy to desert his regiment, it was held that the accused was guilty of attempting and abetting the desertion of the sepoy under s 135 read with ss 108 and 511 of this Code, even though the regimental sepoy never intended to desert and had offered to do so only to entrap the accused.[50]

4. 'Soldier'

The word 'soldier' in this section must be interpreted as in the explanation to s 131, IPC . The definition given in the Indian Articles of War is expressly confined to those articles and is a very limited

one.[51]948

5. Procedure

The offence is cognisable and warrant may issue in the first instance. It is bailable but not compoundable, and is triable by any magistrate.

6. Charge

The following form of charge may be adopted:

> I (*name and office of the magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you on or about the.....day.....at.....abetted the desertion of....., an officer (*or soldier or sailor or airman*) in the Army (*or Navy or Air Force*) of the Government of India, and thereby committed an offence punishable under s 135 of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

44 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or sailor'.

45 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or Navy'.

46 Substituted by the AO 1950, for 'Queen'.

47 Explanation 2 to s 108 of the IPC .

48 *Webster's Dictionary*.

49 Explanations 2 and 3, s 108, of the IPC .

50 *Saleh Mahomed v Emperor* AIR 1917 Sind 28, p 30, 18 Cr LJ 431 .

51 *Sri Nawas v Emperor* AIR 1920 Lah 114 ((1)), 21 Mad LJ Cr 511.

Indian Penal Code (Act XLV of 1860)

Chapter VII

Of Offences Relating to the Army, [Navy and Air Force]

S. 136.

Harbouring deserter.--

Whoever, except as hereinafter excepted, knowing or having reason to believe that an officer, soldier, [52][sailor or airman], in the Army, [53][Navy or Air Force] of the [54][Government of India], has deserted, harbours such officer, soldier, [55][sailor or airman], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Exception.--This provision does not extend to the case in which the harbour is given by a wife to her husband.

Comments

1. Scope

This section refers to an offence which is also an offence under s 38(2) of the Army and Air Force Acts 1950, s 76 of the Navy Act 1957 and s 153(3) of the English Army Act 1881.

2. 'Harbouring Deserter'

The gist of the offence under this section is the harbouring of a deserter knowing or having reason to believe that he has deserted, The Indian Army, Navy or Air Force. As to the meaning of the word 'harbour', refer to s 52A, IPC and notes thereunder.

3. Procedure

Same as in the case of an offence under s 135 .949

4. Charge

The following form of charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you on or about the.....day of.....at.....knowing or having reason to believe that.....an officer (*or soldier or sailor or airman*) in the Army (*or Navy or Air Force*) of the Government of India had deserted, harboured such officer (*or soldier or sailor or airman*) and thereby committed an offence punishable under s 136 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

52 Substituted by Act 10 of 1927, s 2 and Sch I for 'or sailor'.

53 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or Navy'.

54 Substituted by the AO 1950, for 'Queen'.

55 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or sailor'.

Indian Penal Code (Act XLV of 1860)

Chapter VII

Of Offences Relating to the Army, [Navy and Air Force]

S. 137.

Deserter concealed on board merchant vessel through negligence of master.--

The master or person in charge of a merchant vessel, on board of which any deserter from the Army,[56][Navy or Air Force] of the [57][Government of India] is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred rupees, if he might have known of such concealment but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

Comments

1. Scope

This section punishes the person in charge of a merchant vessel on board which a deserter is concealed. The person is liable, even though he is ignorant of the concealment, if he might have known of such concealment but for his negligence or want of discipline on board the vessel. The section applies only to the person in charge of a merchant vessel and not a man-of-war.

2. Procedure

The offence is non-cognisable and summons may be issued in the first instance. It is bailable but not compoundable and is triable by any magistrate.

3. Charge

The following form of charge may be adopted:

I (*name and office of the Magistrate, etc*) hereby charge you (*name of accused*) as follows:

That....., a deserter from the Army (*or Navy or Air Force*) of the Government of India, had concealed himself on or about the.....day of.....at.....on board.....a merchant vessel of which you were the master (*or person in charge*) through your neglect of duty as such master (*or person in charge*) (*or through want of discipline on board the said vessel*) and that you have thereby committed an offence punishable under s 137 of the Indian Penal Code, and within my cognisance.

And I hereby direct that you be tried by this court on the said charge.950

56 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or Navy'.

57 Substituted by the AO 1950, for 'Queen'.

Indian Penal Code (Act XLV of 1860)

Chapter VII

Of Offences Relating to the Army, [Navy and Air Force]

S. 138.

Abetment of act of insubordination by soldier, sailor or airman.--

Whoever abets what he knows to be an act of insubordination by an officer, soldier, [58][sailor or airman], in the Army, [59][Navy or Air Force] of the [60][Government of India], shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Comments

1. Scope

This section provides punishment for abetment of insubordination, an offence described in s 42 of the Army and Air Force Acts 1950. For a conviction under this section it must be shown that the accused abetted an act knowing it to be an act of insubordination. It is also necessary that the act of insubordination should have been committed in consequence of the abetment.

2. Procedure

The offence is cognisable and a warrant may be issued in the first instance. It is bailable, not compoundable and triable by any magistrate.

3. Charge

The following form of charge may be adopted:

I (*name and office of Magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you on or about the.....day of.....at.....abetted what you knew to be an act of insubordination by.....an officer (*or soldier or sailor or airman*) in the Army (*or Navy or Air Force*) of the Government of India, and such act of insubordination was committed in consequence of the said abetment, and thereby committed an offence punishable under s 138 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

58 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or sailor'.

59 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or Navy'.

60 Substituted by the AO 1950, for 'Queen'.

Indian Penal Code (Act XLV of 1860)

Chapter VII

Of Offences Relating to the Army, [Navy and Air Force]

[61]S. 138A .

Application of foregoing sections to the Indian Marine Service.--

[*Repealed by the Amending Act 1934 (35 of 1934), section2 and Schedule*].

61 Inserted by Act 14 of 1887, s 79 .

Indian Penal Code (Act XLV of 1860)

Chapter VII

Of Offences Relating to the Army, [Navy and Air Force]

S. 139.

Persons subject to certain Acts.--

No person subject to [62][the Army Act, [63][the Army Act 1950 (46 of 1950), or the Naval Discipline Act, [64][[65][* * *] [66][the951 Indian Navy (Discipline) Act, 1934 (34 of 1934)], [67][the Air Force Act[68][the Air Force Act, 1950 (45 of 1950]]]], is subject to punishment under this Code for any of the offences defined in this Chapter.

Comment

The object of this section is to make it clear that persons subject to the Army and Air Force Acts of 1950, the Indian Navy (Discipline) Act 1934 or other laws relating to the armed forces and mentioned in the section shall not be subject to punishment under this Code for the offences defined in this chapter.

62 Substituted by Act 10 of 1927, s 2 and Sch I, for 'any Article of War for the Army or Navy of the Queen, or for any part of such Army or Navy'.

63 Substituted by Act 3 of 1951, s 3 and Schedule, for 'the Indian Army Act 1911'.

64 Inserted by Act 35 of 1934, s 2 and Schedule.

65 The words 'or that Act as modified' omitted by the AO 1950.

66 Now see Navy Act 1957.

67 Substituted by Act 14 of 1932, s 130 and Schedule for 'or the Air Force Act'.

68 Substituted by Act 3 of 1951, s 3 and Schedule for 'the Indian Air Force Act 1932'.

Indian Penal Code (Act XLV of 1860)

Chapter VII

Of Offences Relating to the Army, [Navy and Air Force]

S. 140.

Wearing garb or carrying token used by soldier, sailor or airman.--

Whoever, not being a soldier, [69][sailor or airman], in the Military, [70][Naval or Air] service of the [71][Government of India], wears any garb or carries any token resembling any garb or token used by such a soldier, [72][sailor or airman] with the intention that it may be believed that he is such a soldier, [73][sailor or airman], shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Dummy

1. Scope

The object of this section is to discourage the use of garb (dress or costume) or token of military, navy or air service of the Government of India by any person, who is not a soldier, sailor or airman. The use of such garb or token, which are though not of military, navy or air service but resemble with the garb or token used by a soldier, sailor or airman with the intention that it may be believed that the person wearing the same is a soldier, sailor or airman in the military, navy or air service of the Government of India is an offence punishable under this section. To bring a case under this section it is essential that: (a) the garb or token must resemble such the garb or token used by a soldier, sailor or airman; and (b) the use of such garb or token must be with the intention of impersonation.

2. Procedure

The offence under this section is cognisable but summons may issue in the first instance. It is bailable but not compoundable and is triable by any magistrate.952

3. Charge

The following form of charge may be adopted:

I (*name and office of Magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you not being a soldier (*or sailor or airman*) in the Military (*or Navy or Air*) service of the Government of India, on or about the.....day of.....at..... wore..... *(specify the garb) (or carried.....a token)* resembling (*specify it*) or used by such soldier (*or sailor or airman*) and thereby committed an offence punishable under s 140 of the Indian Penal Code, and within my cognisance.

And I hereby direct that you be tried by this court on the said charge.

4. Proof

To establish an offence under this section the following points must be proved:

(i) The wearing of some garb or token used by a soldier, sailor or airman.
(ii) That the wearer was not entitled to wear it.
(iii) That the purpose in so wearing it was to induce people to believe that the wearer was actually at the time in the service indicated by the garb or token in question.

The wearing of cast-off uniforms for the purpose of clothing, or dressing in naval or military uniform for the purpose of dramatic representation is, of course, no offence.953954

69 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or sailor'.

70 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or Navy'.

71 Substituted by the AO 1950, for 'Queen'.

72 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or sailor'.

73 Substituted by Act 10 of 1927, s 2 and Sch I, for 'or sailor'.

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 141.

Unlawful assembly.--

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

First.-- To overawe by criminal force, or show of criminal force, [5][the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

Second.-- To resist the execution of any law, or of any legal process; or

Third.-- To commit any mischief or criminal trespass, or other offence; or956

Fourth.-- By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.-- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

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

unlawful assembly.957

Comments

1. Legislative Changes

The words 'Central or any Provincial Government or legislature' were substituted in this section for the words 'Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor' by the Government of India (Adaptation of Indian Laws) Order 1937. Subsequently the words 'Central or any Provincial Government or legislature' in their turn were replaced by the words 'the Central or any State Government or Parliament or the legislature of any State' by the (Adaptation of Laws) Order 1950.

2. Scope

This section appears to have been founded on the general principles of the English Common Law to protect public peace from dangers to it caused by the combination of forces of a number of persons.[6] The law suppresses unlawful assemblies because, if not suppressed, they may lead to more serious crimes like rioting and murder. This is done by punishing persons for being members thereof (s 143, IPC). This section defines 'unlawful assembly' and s 142 defines the expression 'being member of an unlawful assembly'. an unlawful assembly is an assembly of five or more persons, if the common object of the persons, composing it, is of the nature specified in items first to fifth of the section.[7] The intention indicated by the heading of the chapter was to constitute certain acts, which endangered the public peace, into offences against public tranquillity. In construing the section regard must be had not only to the general intention deducible from the heading of the chapter, but also to the specific mode in which the legislature intended to carry out that intention.[8] Where fodder belonging to an informant was set on fire, the informant suspected the accused and called the accused by name. The accused got infuriated and called out to the other accused to assault the informant, whereupon all accused persons came there and started assaulting the informant and caused injuries on his person. It cannot, therefore, be disputed that all the accused persons formed an unlawful assembly within the meaning of s 141, IPC .[9]

Where all the accused except one formed an unlawful assembly with the object to commit mischief or to take or obtain possession of the property of the old school and to deprive the brother of the injured, their conduct in facts and circumstances of the case lead to the inference that they were members of an unlawful assembly in pursuance of the common object, as specified in clauses third and fourth of s 141, IPC .[10]

958Mere presence of a person at the place where members of an unlawful assembly have gathered for carrying out their illegal common object does not incriminate him. But the question is one of fact in each case as to whether a person happens to be innocently present at the place of occurrence or was actually a member of the unlawful assembly.[11]

3. Canadian Law

An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, cause others nearby reasonably to fear that they will disturb the peace tumultuously, or will needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously. Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose. Persons are not unlawfully assembled by reason only that they are assembled to protect the dwelling house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence

therein.[12] This is not unconstitutional or contrary to the Charter. To "disturb the peace tumultuously" requires an atmosphere of actual or constructive force or violence. A tumult is a commotion or disturbance caused by a multitude, so that what distinguishes a disturbance of the peace *per se* from a tumultuous one is that in the latter case it is being caused by a "multitude".

A member of an assembly is not culpable where he did not have knowledge of a fact that gave rise to the fear that the peace would be disturbed tumultuously.[13]

4. Object

The object of this section is to prevent resort to criminal force by five or more persons to do any of the five acts set out in the section.[14]

5. Essentials of 'Unlawful Assembly'

The essentials of an unlawful assembly are:

(i) There must be an assembly of not less than five persons.[15]
(ii) They must have a common object.[16]
(iii) The common object must be of the nature of one of the five objects specified in the section.[17]
(iv) The common object must be unlawful.[18]959

To establish that an assembly is unlawful, it is not necessary that it assembled in a public place.[19] The essential requirement is the presence, or likely presence, of innocent third parties, not participating in the illegal activities in question.

Test of Unlawfulness of Assembly

The test of the unlawfulness of an assembly is the means it intends to employ, and it does not lie in the numbers who take part in a meeting, nor in the place of meeting, *e.g.,* a highway,[20] nor in the legality (real or supposed) or illegality of the purpose in view, *e.g.,* an assembly for the purpose of gambling is not an unlawful assembly.[21]

6. Assembly of Five or more Persons

Under the English law, the minimum number of persons required to constitute an unlawful assembly is three. But under this section the number is five.[22] There may be more, but not less. A conviction for being a member of an unlawful assembly or for rioting as a member of an unlawful assembly requires the proof that there was an unlawful assembly consisting of at least five persons. If this ingredient is proved, it is not necessary to prove the identity of five or more persons constituting the unlawful assembly. If the prosecution establishes satisfactorily the presence of at least five members in an unlawful assembly with the requisite common object, one of them may be convicted, even though the remaining four are acquitted on the ground of their identity not being satisfactorily established. It is essential that the prosecution must satisfactorily prove the existence of an unlawful assembly of five or more persons.[23] The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and, even when it is possible to convict less than five persons only, s 147 would still apply if upon the evidence in the case the court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified.[24] When the court can legally find that the actual number of members in the assailants' party was more than five, the said party will constitute an unlawful assembly even when only three persons have been convicted. It is only when the number of the alleged assailants is definite and all of them are named, and the number of persons found to be

proved to have taken part in the incident is less960 than five, then it cannot be held that the assailant's party must have consisted of five or more persons. The acquittal of the remaining named persons must mean that they were not in the incident. The fact that they were named excludes the possibility of other persons to be in the assailants' party and especially when there is no occasion to think that the witnesses naming all the accused could have committed mistakes in recognising them.[25]

There cannot be straight-jacket formula for arriving at a finding as to who was the member of unlawful assembly and for what object the unlawful assembly was formed. an unlawful assembly may initially be formed for achieving any object described in s 141 of the IPC and at subsequent stage, the object of certain members of unlawful assembly may change, in that circumstances, the unlawful assembly may be of more than one part especially in the light of its common object as it is a matter of common knowledge that normally, the prosecution would not be in a position to lead evidence to show that firstly the assembly was gathered, they discussed the matter and decided their object, and thereafter, proceeded for achieving that object. It can be inferred and proved by cogent evidence.[26]

To call an assembly as "an unlawful assembly", it should comprise not less than five persons and all of them should share a common object. Where the Court records finding that the prosecution has failed to prove the guilt for the charge leveled against accused 5 to 8which means accused 5 to 8 were not the members of the alleged assembly. There were only four persons left in the assembly namely A-1 to A-4. The remaining four accused persons cannot be convicted under s 149, IPC .[27]

Where out of seven persons charged under ss 302 / 149, IPC, five were given the benefit of doubt and acquitted by the High Court and the Supreme Court found that there was no scope for introducing the theory of benefit of doubt and that the acquittal of the five persons was wrong, it was held that the acquittal could not affect the conviction of the remaining two under s 302 read with s 149 .[28]

7. Effect of Acquittal of Some of the Members of Unlawful Assembly

Commentary under same heading in s 147, post, may be referred to.

When five named persons are charged with a substantive offence read with s 149, IPC, and some of them are acquitted, conviction of the rest is not possible unless the evidence shows that they formed an unlawful assembly with unidentified and unnamed assailants.[29] In view of the acquittal of two persons by the court without the961 finding that some other known or unknown persons were also involved in the assault, it could be said that for all intents and purposes the two acquitted accused persons were not members of the unlawful assembly. Thus, when only four accused could be said to have been the members of the assembly, such an assembly which comprises of less than five members is not an unlawful assembly within the meaning of s 141, IPC .[30]

Where seven accused persons were hired and five were acquitted, the remaining two accused persons were not convicted with the aid of s 149, IPC .[31]

Where out of total nine accused persons, six accused persons have already been acquitted in two appeals arising out of the same occurrence, no question of formation of unlawful assembly by remaining three accused persons would arise.[32]

Where initially seven accused were charged for offences under ss 148, 149 two of them were acquitted by the trial court and one by the High Court, and no other persons apart from the seven accused were involved in crime. The conviction of the remaining four accused under ss 148, 149 cannot be sustained.[33]

Where the three accused persons were convicted under s 302, IPC and the rest were acquitted, there was no common object of an unlawful assembly constituted of all the accused and to the exclusion of three accused held liable for commission of murder, all the rest had been acquitted, the involvement of only three persons is contrary to the legal provisions of s 141, IPC, as they could not have formed

an unlawful assembly and accordingly, any question of the existence and formation of a common object by any unlawful assembly did not arise in terms of s 149, IPC to make three accused vicariously liable for the commission of murder.[34]Where four of the eight accused persons were women and the only act attributed to them was of throwing chili powder, the charge of unlawful assembly and rioting against them failed in the absence of proof of their participation. The charge of unlawful assembly, rioting, etc., would automatically fail against the other accused because elimination of the four women accused would bring the number of participants to less than five.[35]

8. Finding with Certainty

The court must find with 'certainty' that there were at least five persons sharing the common object. A finding that three of them 'may or may not have been there' betrays uncertainty on this vital point and it consequently becomes impossible to allow the conviction to rest on this uncertain foundation.[36]

Where there is a clear finding that there were more than five persons in the band of attackers, the mere fact that only two of them were satisfactorily identified does not weaken the force of the finding that more than five persons were involved.[37]962

9. When Less than Five Persons can be Convicted being Member of Unlawful Assembly

In *Ram Bilas Singh v State of Bihar* ,[38] the Supreme Court reviewed the case-law on the subject and held that it is competent for a court to come to the conclusion that there was an unlawful assembly of five or more persons, even if less than that number have been convicted by it, if: (a) the charge states that apart from the person named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act and evidence led to prove this is accepted by the court; (b) or the FIR and the evidence show such to be the case even though the charge does not state so; or, (c) though the charge and the prosecution witnesses named only the acquitted and the convicted accused persons, there is other evidence which discloses the existence of named or other persons, provided, in cases (b) and (c), no prejudice has resulted to the convicted persons by reason of the omission to mention in the charge, that the other unnamed persons had also participated in the offence.

10. Persons Forming Unlawful Assembly--How Ascertained

The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in the section.[39] While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly.[40] In ascertaining the number of persons, constituting an unlawful assembly, the acquitted persons must be excluded. Whether the number still remains, at five or more, must depend upon whether the charge and the evidence confine the membership to a certain number of named and enumerated persons, or either the charge, or at any rate, the evidence, indicates that there might possibly be persons, other than those named and enumerated in the charge, who can rightly be described as having been the members of the unlawful assembly, referred to in the charge.[41]

An assembly of five or more persons having a common object does not cease to be an unlawful assembly simply because it splits itself into two parties for the purpose of carrying out their object.[42]

Mere Presence in an Unlawful Assembly not Sufficient

Mere presence does not make a person a member of unlawful assembly and hence vicariously liable for all the acts committed by members of the unlawful assembly either in the prosecution of the common object of the unlawful assembly or for such acts which the members of unlawful assembly

knew were likely to be committed.[43] Mere presence in a crowd or along with members of an unlawful assembly cannot963 render a person liable,[44] unless there was a common object and he was actuated by the common object and that object is one of those set out in this section,[45] or it is shown that he had done something, or omitted to do something which would make him a member of the unlawful assembly, or unless the case falls under s 142 .[46] Mere presence of a person at the time of the commission of rioting is not sufficient to show that he was a member of the unlawful assembly which committed the offence. The primary question for consideration is as to whether the object of the assembly of the accused persons was unlawful.[47] In *Baladin*'s case,[48] their Lordships of the Supreme Court remarked:

> If members of the family of the appellants and other residents of the village assembled, all such persons could not be condemned *ipso facto*as being members of that unlawful assembly. It is necessary, therefore, for the prosecution to lead evidence pointing to the conclusion that all the appellants had done or been committing some overt act in prosecution of the common object of the unlawful assembly.

But these observations must be read in the context of the special facts of that case. It would not be correct, in law, to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. Section 149 makes it clear that in certain circumstances one member of an unlawful assembly may be vicariously liable for an offence committed by another member of that assembly although he had no intention of committing that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly.[49]

Some unmistakable overt act contributing to the prosecution of the common object should always be proved before a person is convicted for membership of an unlawful assembly or for rioting. Mere presence will not usually be that unmistakable act; but presence plus the carrying of weapons will bring him nearer to the common object, unless he explains why he carried the same. If, in addition to his presence and the weapon, there are cries clearly indicating a determination to attack members of another group, the position is stronger still against him. Finally, while going in the crowd with the war cries, if he marches along with the others into the opposing group and uses his weapon, it is complete evidence of membership of the assembly.[50] Mere presence of a person along with members of an unlawful assembly is not sufficient to964 support a finding that he had the common object of the unlawful assembly. There must be other evidence direct or circumstantial to justify that finding.[51]

The mere fact that a person resides in the same street or his mere presence at the time when the offence of rioting is committed, is not sufficient to show that he was a member of the unlawful assembly, which committed the offence.[52] Where the accused, a counsel, came to the spot, in a car, along with his client and was sitting in it at some distance from the place of occurrence and there was no allegation, against him, that he played any direct or indirect role in the commission of the offences, it was held that his mere presence, in a car near about the place of occurrence did not lead to an inference that he shared the common object of those who resorted to acts of violence.[53]

Mere Innocent Presence not Sufficient to make a Member

In *Musa Khan v State of Maharashtra* ,[54] their Lordships of the Supreme Court observed:

> It is well settled that a mere innocent presence, in an assembly, of persons as, for example, a bystander, does not make the accused a member of an unlawful assembly unless it is shown, by circumstantial evidence, that the accused shared the common object of the assembly. Thus, a Court is not entitle to presume that any and every person, who is proved to have been present near a riotous mob, at any time or to have joined or left it, at any stage during its activities, is, in law guilty of every act, committed by it from the beginning to the end, or

> that each member of such a crowd must, from the beginning, have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words, it must be proved, in each case, that the person concerned was not only a member of unlawful assembly at some stage, but, at all the crucial stages, he shared the common object of the assembly. Where the evidence merely shows that some of the accused were members of the unlawful assembly at one particular stage but not at another, the accused, who were not present or who did not share the common object of the unlawful assembly at other stages, cannot be convicted for the activities of the assembly at those stages.

The question, whether a person happens to be innocently present at the place where the members of an unlawful assembly have gathered together to prosecute their common object or is a member sharing their common object, is normally one of fact.[55]

Caution to be Exercised

Where a large number of persons have assembled and some of them resorted to violence or otherwise misbehaved, it need not necessarily mean that every one of the persons present actually shared the opinions, intentions or objects of those who misbehaved or restored to violence. In fact, the possibility of some of the persons965 actually resenting or condemning the activities of the misguided persons cannot be ruled out. Caution should, therefore, be exercised while deciding which of the persons present can be safely described as members of an unlawful assembly. Although, as a matter of law, an overt act on the part of a person is not a necessary factor bearing upon his membership of an unlawful assembly, in a case of this nature it will be safer to look for some evidence of participation by him before holding that he is a member of the unlawful assembly. Otherwise, there is a serious danger of innocent bystanders being punished for no fault of theirs.[56] A person who encourages, or promotes, or takes part in rioting whether by word, signs or gestures, or even by wearing the badge or ensign of the rioters, becomes a rioter, for in this case, all are deemed principals. On the other hand, a mere presence without encouragement is not enough to establish criminality.[57] But active participation in actual violence is not necessary. Persons who by words or by signs or otherwise encourage violence are equally members of the unlawful assembly.[58]

Where there is credible evidence to show that the accused marched in procession with the rioters when they were shouting slogans and pelting stones, it is up to them (the accused) to prove their innocence. It will be very unsafe, in the case of a large mob of rioters to rely on the evidence of 'a single witness' speaking to the presence of an accused in the mob for convicting him, especially, when no overt act of violence, or shouting of slogans, or organising the mob, or giving orders to it, or marching in procession with it, or other similar things are proved against him.[59]

But where the accused took only a passive attitude, it has been held that they were entitled to the benefit of doubt on the question of their being animated by a common illegal object.[60]

Overt Act by a Member of an Unlawful Assembly, whether Necessary

It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of s 141 .[61] The specific and active participation or overt act of the accused forming unlawful assembly is not required to be proved by the prosecution.[62] Mere presence in the crowd is not sufficient to make any person a member of an unlawful assembly, but, at the same time, to make one a966 member of an unlawful assembly, it is not necessary that he should have done any overt act in pursuance of the common object. The only thing, that is necessary, is to find out whether the facts and circumstances warrant the conclusion that the person concerned shares the common object of the unlawful assembly.[63] In *Jagnaya v State of Rajasthan* ,[64] it was observed that what is required of the prosecution to prove against a person, who is alleged to be a member of the unlawful assembly, is that he was one of the persons, constituting the assembly, and he entertained, along with the other members of the assembly, the common object, as defined by s 141, IPC . Once this is proved it is not necessary for the prosecution to prove the overt act of each and every member of the unlawful assembly.[65]

11. Common Object

The essence of the object of an unlawful assembly is common object of the accused persons forming it. It is necessary that the object should be common to the persons and they should all be aware of it and concur in it.[66]In fastening constructive liability, the importance of the common object is very great and it is on this basis alone that an accused is punished for the act of his associates. To establish that the accused was a member of an unlawful assembly; it must be shown, either from his active participation or otherwise, that he shared the common object of the assembly.[67] The word 'object' means the purpose or design, and in order to make it 'common' it must be shared by all. There must be community of object and the object may exist only up to a particular stage and not thereafter.[68] The purpose for which the members of the assembly set out or which was desired to achieve is the object. Each member may have an object in view and may also have his own idea of the means with which that object is to be attained and the extent to which he is prepared to go for attaining it. If the object desired by all the members is the same, the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved, the object becomes the common object of the assembly. Normally a determination to achieve an object includes a resolve to meet with force any resistance that may be offered and to remove any obstruction that may be found to exist in the path leading to the attainment of the object.

An object is entertained in the human mind and it being merely a mental attitude; no direct evidence can be available and, like intention, has generally to be gathered from the acts which the person commits and the result therefrom. Mere words or utterances in excitement are not enough to indicate the real mental attitude. It is the acts, committed and the result therefrom, that are the main features, though in every967 case the result alone does not necessarily indicate the attitude of the mind of the doer of the act.[69]

12. The Assembly must have a Common Object

Under the explanation to s 141, IPC, an assembly which was not unlawful when it assembled may, subsequently become an unlawful assembly and an offence will fall within the purview of s 149 even if members of the assembly view that it was 'likely to be committed' in prosecution of their common object or if the offence was such as the members of that assembly knew to be likely to be committed in prosecution of that object.[70] Under the Explanation to s 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one, comes into existence at the outset. The time of forming an unlawful intent is not material.[71] To constitute an unlawful assembly there must not only be an assembly of five or more persons, they must all have a common object which they are going to carry out by unlawful means.[72] Existence of a common unlawful object is a requisite for an unlawful assembly, and unless there is proof of an agreement amongst persons to do anything or a plan to carry out a design--and if this is not possible, unless it is shown that an inference in support of it can reasonably be drawn from the relations, acts and conduct of the parties, persons cannot be constructively made liable for the acts of others.[73]

Common Object--How Found

A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same.

It may be modified or altered or abandoned at any stage.[74] What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms it carries and the behaviours of its members at or near the scene of the incident.[75] The common object must be common to at least five persons. If out of five persons assembled even one is found not to have shared their common object,968 the assembly cannot constitute an unlawful assembly.[76] A person cannot be said to be a member of an

unlawful assembly when his presence in the assembly was due to duress and he had no common object with the other members of the assembly.[77] Merely coming to the spot even with a *lathi* or other weapon in response to a cry by a person that he was being killed can hardly be considered sufficient to make those who came guilty of rioting.[78] The object should be common to the persons who compose the assembly, that is to say, they should all be aware of it and concur in it.[79]

Same Object and Common Object

There may not be much difference between common object and common intention, but there is distinction between common object and same or similar object.[80] The same object is not necessarily a common object, but it becomes so only when it is known to and shared by all.[81] All the members of the assembly must have a common object. It is not enough if they have a similar object. A common object must be distinguished from a similar object.[82]

13. Opposite Factions Cannot Constitute One Unlawful Assembly

Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one unlawful assembly, and to try them together, inasmuch as they do not have 'one common object' within the meaning of this section.[83]

14. Prior Concert not Necessary

In order to constitute an unlawful assembly, it is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them.[84]

15. Common Object must be an Immediate One

'Common object' refers to the means whereby the purpose of the assembly is to be effected;[85] the common object of the assembly must be an immediate one to be carried in effect forthwith. If a certain number of people meet merely to arrange a plan for some future action, on an uncertain event taking place, it cannot be said that969 they had assembled to carry out some plan forthwith. There should be some present and immediate purpose of carrying into effect the common object. If five or more persons meet for deliberations only to arrange some plans for future action which may be brought into effect individually and not necessarily jointly, that would not constitute an unlawful assembly.[86]

The Madras High Court has also taken a similar view and it has been held that the mere fact, that an assembly consists of five or more persons or is likely to disturb the public peace, does not prove that the common object of the assembly is one of those enumerated in the said section. Further, the common object must be an immediate one, and not to be carried out at some future time.[87]

Common Object must be One of the Five Specified in the Section

An assembly would become unlawful only if it has one or the other of the different objects mentioned in this section.[88] The section requires that there should be a common object which can be brought within the purview of one or the other heads mentioned therein.[89]

Common Object and Common Intention--Distinguished

Common intention required by s 34 and the common object required by s 149 are far from being the same thing.[90] There is a difference between object and intention, for, though the object of the assembly is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful.[91]The object of an assembly as a whole may not be the same as the intention which several persons may have when in pursuance of that intention they perform a criminal act and it may well be that the object of the assembly is lawful, whereas the intention common

to those of the assembly who jointly commit a criminal act is in itself criminal and the joint criminal act is equally imputed to all of them.[92] It is true that 'common object' and 'common intention' sometimes overlap, but they are used in different senses in law and should be kept distinct. In a case of unlawful assembly or riot we are concerned with a common object. A common object is different from a common intention in that it does not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the people get there. Under s 141, IPC, it is enough that each has the same object in view, that their number is five or more and that they act as an assembly to achieve that object.[93]

970It may be noted that for the application of s 34, IPC, which deals with common intention that intention must be to do a criminal act, whereas the common object which falls under this section need not necessarily be to do a criminal act. For instance, the common object may be to recover possession of property from a trespasser. That by itself is not unlawful. It becomes unlawful only if the object is to obtain possession 'by means of criminal force or show of criminal force'. Where, however, the common object of an assembly is 'to commit any mischief or criminal trespass or any other offence' (s 141, third of the IPC) there may not be much distinction between common object' and 'common intention'.[94]

Substitution of Section 34 for Section 149 in the Charge, when Permissible

Common object and common intention as stated above also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under s 149, IPC overlaps the ground covered by s 34, IPC . If the common object which is the subject-matter of the charge under s 149 does not necessarily involve a common intention, then the substitution of s 34 for s 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under s 149 would be the same if the charge were under s 34, then the failure to charge the accused under that section cannot result in any prejudice and in such cases substitution of s 34 for s 149 will be a formal matter.[95]

Common Object must be Unlawful

In order to constitute an 'unlawful assembly', there must be an assembly of five or more persons, the assembly must have a common object and the object must be 'unlawful'.[96] Where the object of an assembly is to do an act which is not an offence, the assembly is not unlawful.[97]

Where a group of accused persons having firearms took position on the terrace of the first floor and fired at the unarmed complainant party standing on road. One person only however, was fatally injured, though it was easy for the accused persons to have murdered many in view of their position. No unlawful object to murder could be attributed to the accused and s 149 is not available to the prosecution.[98]

Where the only facts proved were that a number of persons assembled together armed with bill-hooks and sticks, and they ran away when the police appeared, it was held that those facts alone were insufficient as legal proof of the unlawful character of the assembly, as the persons might have come for a lawful purpose and armed themselves for protection against anticipated violence from others.[99]971

16. Exercising Right of Private Defence by an Assembly is not Unlawful

The assertion of right of private defence within the limits prescribed by law cannot fall within the expression to enforce any right or supposed right in the fourth clause of s 141, IPC . The assembly cannot be designated as an unlawful assembly if its object is to defend person or property by the use of force within the limits prescribed by law. The words 'within the limits prescribed by law' clearly indicate that so long the force used is 'within the limits prescribed by law' no offence is committed, and the provisions of s 141 and consequently that of s 149, IPC would not apply to such a case.[1]

If an assembly of five or more persons resists an attack upon them, the action of such members of the assembly in defending their persons and properties would not take its character as an unlawful assembly.[2] An assembly, lawful in itself, does not become unlawful merely by reason of its lawful acts exciting others to do unlawful acts;[3] an assembly of persons, gathered for election purpose, does not become an unlawful assembly merely because some persons of the assembly carried with them weapons, including firearms.[4] Similarly, the actions of a few members of an assembly, which gathers together for a perfectly lawful purpose, cannot, by themselves, make the whole assembly an unlawful assembly. The mere fact, that they are with the offending members at the time, would not make them members of the unlawful assembly.[5]

17. Initially Lawful Assembly May Turn Unlawful

An assembly, which was initially a lawful assembly, might subsequently be converted into an unlawful assembly. This is a matter of inference deducible from the conduct of persons composing the assembly. The conduct, which may lead to the inference, must, however, be of a clear and unequivocal nature and the inference must be irresistible. If the conduct of the assembly is consistent with its having remained a lawful assembly and a reasonable possibility of its having retained its original lawful character is not excluded, it is not possible to say that the assembly changed into an unlawful assembly.[6] In order that a person may be held to be a member of an unlawful assembly, it is necessary to find out whether that person, being aware of the facts which render the assembly unlawful, intentionally joins that assembly or continues in it obviously with that intention.[7] Where the common object of an unlawful assembly was to abduct a woman and to put her in wrongful confinement during abduction, it was held that the assembly was unlawful and every member of the assembly was guilty under s 147 .[8]

972It is no offence for a person who is acting within his rights to make preparations for resisting an invasion of those rights.[9] Where five persons assembled at a water-head to take water by force and armed themselves with deadly weapons to strike and vanquish anybody who should stand in their way and prevent them from accomplishing their purpose, it was held that they constituted an unlawful assembly and became guilty of rioting when they used their deadly weapons in pursuance of their common object, and further that as every one of them knew that these weapons were likely to be used with deadly effect, they were all responsible if any one of them inflicted a fatal injury.[10] The second clause of this section has not the effect of making an assemblage of persons an unlawful assembly if the object with which they assemble is a perfectly legal one.[11]

Where the accused numbering more than five were exercising their right of speech and assemblage, without arms in a peaceful manner in order to vindicate their right for enforcement of public rights adumbrated in the Manipur State Constitution Act 1947, it was held that the assembly could not deemed to be an unlawful assembly within the meaning of this section.[12]

But where, there being a long-standing dispute as to the possession of certain land, which was not in the undisturbed possession of either party to the dispute, one party goes armed with *lathis* to sow the land, and keep their opponents at a distance by flourishing the *lathis,* whilst the sowing is going on, the aggressive party constitutes an unlawful assembly.[13]

Where the purpose of a crowd is merely to demonstrate with black flags, it cannot be said to be an unlawful purpose, and the crowd does not constitute an unlawful assembly.[14]

People going in the company of a court's officer to take delivery of possession under an order of the court cannot be said to form an unlawful assembly, as the purpose of their going is a lawful purpose.[15]

18. Determination of Common Object--Factors to be Considered

The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it and from a consideration of all the surrounding circumstances.[16]

The circumstances of the case, the attitude and the deportment of the persons assembled very often furnish a key to their mental bend.[17] In the words of the commissioner's second report: 'The common purpose is a matter of inference from973 the overt acts of the members of the assembly, their language and gestures as proved in evidence'.[18] The phrase 'common object' is the central fact on which the liability of persons other than the actual doer of the act depends. The word 'object' means the purpose, intention, or design and, in order to make it 'common', it must be possessed by all. There must be a community of an object which may, however, exist up to a certain point only, beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of the common object will vary not only according to the information at his command but also according to the extent to which he shares the community of object. As a consequence of this, the effect of s 149 may be different on different members of the very same unlawful assembly.[19]

The common object may be gathered from the course of conduct adopted by the members of the assembly.[20] In order to prove common object, it is necessary to establish a connection between those who take active part in a riot and those who merely utter some words intended to provide encouragement,[21] and in order to find what was the common object of the crowd at the beginning, it is not a legitimate method merely to take all the actual offences, committed by it in the course of the riot, and to infer that all these were originally part of its common object. Such common object must be determined as a point of fact, and must normally be based on more evidence than the mere acts themselves.[22]The motive for the crime, the weapons used in the attack and the conduct of assailants, before and at time of attack are relevant considerations. Whether an unlawful assembly was formed and what exactly the common object thereof was, are matters of inference from circumstances, it is not necessary that all persons forming an unlawful assembly must do some overt act.[23]

Other Relevant Considerations for Determination of Common Object

What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms it carries, and the behaviour of its members at or near the scene of the incident.[24] The use of the lethal weapons is, no doubt, a circumstance which weighs against them, but that circumstance alone cannot determine what the common object of the unlawful assembly was. Much depends upon other circumstances of the case.[25] The mere fact, that one of the members of the unlawful974 assembly was carrying a gun and that he used that gun to kill a person, will not make other persons, who are members of that unlawful assembly, liable for the offence of murder under ss 302 / 149, IPC . Everything will depend upon the common object of the unlawful assembly.[26] From the mere fact of instigation by others, it cannot be concluded that all persons present had the same common object to assault.[27] But where the accused were armed with spears with the object to cause grievous hurt, endangering life, can be inferred.[28] In the absence of direct, or *res gestae,* evidence, it has to be inferred from the circumstances, such as the weapons with which the members were armed, or their conduct during the riot.[29]

Conclusion of Common Object to be Drawn when Irresistible

For the determination of common object of an unlawful assembly, the conduct of each of the members of the unlawful assembly is also material. However, non-participation in the assault does not necessarily mean non-sharing of the common object if the common object is otherwise clear and avowed. It is the background, in which the occurrence takes place, which is material and which gives an idea as to what could be the common object of the assembly. Inference or conclusion of sharing a particular object should only be drawn when such a conclusion is irresistible because it involves an incalculable danger as the innocents can be punished for the state of mind which they never had.[30]

Where the accused were found in a temple in the middle of night with house-breaking implements, *aruvals* and guns in their possession, it was held that they were guilty of an offence under s 143 as they must have been there with a common object of an unlawful kind.[31]

19. First Clause--To Overawe by Criminal Force or Show of Criminal Force

The words 'overawe by means of criminal force or the show of criminal force' also occur in s 121A, IPC . In a case under that section,[32] Shearer J, of the Patna High Court, explained the meaning of the word 'overawe' in the following words:

> The word 'overawe' clearly imports more than the creation of apprehension or alarm or even perhaps fears. It appears to me to connote the creation of a situation in which the members of the Central or the Provincial Government feel themselves compelled to choose between yielding to force or exposing themselves or members of the public to a very serious danger. It is not necessary that the danger should be a danger of assassination or of bodily injury to themselves. The danger might well be a danger to public property or the safety of members of the general public.

The overawing must be attended by criminal force or show of criminal force. What the section requires is that the assembly should have the common object to overawe975 and not that it should have the effect of overawing. Thus in an Allahabad case,[33] when a sub-inspector of police was thinking of rearresting a person who had escaped from his custody a crowd of 50 or 60 villagers carrying *lathis* assembled. The sub-inspector considered their appearance so formidable that he desisted from his intention to rearrest the man. It was held that if the intention of the villagers in assembling was to prevent the re-arrest of the person wanted, they would no doubt constitute an unlawful assembly, but if they merely assembled to see what was happening on and without any intention of preventing the police officer from doing his duty, they could not constitute an unlawful assembly. A police party cannot be said to have been overawed by the mere shouting of even dangerous slogans.[34]

This clause contemplates the overawing of: (a) the legislative or executive wings of the Central or State Government, or (b) any public servant. In the case of the latter the common object must be to overawe a public servant in the exercise of his lawful power. That is, the public servant must be 'acting in good faith under colour of his office'. In such a case there is no right of private defence against his acts. Commentary under s 99 may be referred to.

Criminal Force

A person is said to use force on another if he causes motion, change of motion, or cessation of motion to that other in a certain specified manner (refer to s 349, IPC). Section 350 of the IPC defines 'criminal force' as follows:

> ...
>
> Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

20. Second Clause--Resistance

'Resistance' means something more than defiance of disobedience or non-submission. It consists of

an overt act showing an intention to make opposition to the execution of the law. Mere words, when there is no intention of carrying them into effect, will not be sufficient to prove an intention to resist.[35] Resistance to execution of the law is one thing and refusal to disperse is another thing.[36] A mere refusal to obey the order of dispersal given by the police does not amount to resistance to the execution of law.[37] An assembly does not become unlawful merely because it continues without dispersing in defiance of the lawful order to disperse, for there is no clause under this section to say that an assembly refusing to disperse in obedience976 to a lawful command becomes an unlawful assembly.[38] But where the police order was not to direct a procession without a licence and the accused, in defiance of the order, put themselves at the head of the procession and began to direct it, it was held that there was resistance to the execution of law.[39]So also where the organisers of a procession violated the conditions of the licence to take out the procession, and on being ordered by the police and the magistrate, not only resolved to disobey the orders, but, in defiance of the orders, they actually made a determined effort to break through the police cordon, it was held that their action was clearly an overt act amounting to resistance to the execution of the law.[40]

21. Second Clause--Execution of Law

Blackstone defined 'law' as: 'A rule of civil conduct prescribed by the supreme power in a State, commanding what is right, prohibiting what is wrong, and regulating matters in themselves indifferent'.[41]

The essence of the law is that it is enforceable as law, and that, though the courts may construe the law, they cannot reject it, nor quash it. A distinction has to be made between an enactment and a rule made under it. There is a clear authority for the view that, though there is no difference between a rule and enactment where there is a provision in the enactment that the rules shall be of the same effect as if they were contained in the Act, there is a wide difference between the two when there is no such provision; and the difference is this, that though you may not canvass an Act of Parliament, you may canvass a rule.[42]

It has been held that when a notification is issued by an executive authority in exercise of a power conferred by statute, that notification is as much a part of the law as if it had been incorporated within the body of the statute at the time of its enactment. Such a command is in every respect a command by the proper legislative authority, and, therefore, disobedience of a notification under the Police Act is resistance to the execution of a legal process.[43] To the same effect is the decision of the Madras High Court in *Public Prosecutor v Vadlamudi Satyanarayana* ,[44] but it has been held that the police order in such a case is an execution of the law and not of a legal process. When an order is lawfully made under the provisions of a statute, that order is law, and when the police tries to execute that law by preventing a procession from proceeding, any resistance against it would bring the offender within the provisions of this part of the section also.[45]

It is, however, pointed out that the entire case-law discussed above is of a pre-Constitution era. The position has considerably changed after the enactment of the Constitution of India. The Supreme Court of India and the High Courts of the states977 now enjoy full powers under the Constitution to quash any law, if it infringes any fundamental right of the citizens guaranteed by the Constitution or contravenes any other provision of the Constitution. Rules framed or notifications issued under any law or act can also be struck down, if they are beyond the scope of that law or fall outside the authority making the rules or issuing the notification. The said case-law has, therefore, to be read subject to these constitutional changes.

22. Second Clause--Execution of Legal Process

The process, such as a warrant of arrest or a search warrant contemplated under this clause must be 'legal'. Where the object of the assembly was to resist attachment by the court, it was held that the assembly was unlawful.[46] If there is an assemblage of five or more men with the common object of resisting by force or show of force, by the execution of processes of law every one of them is guilty of

being a member of an unlawful assembly, whether or not resistance is offered. If force is used by any member of the assembly, each one of them becomes liable for rioting under s 147, IPC . But if actual resistance is offered, a separate offence of resistance of the process of law punishable under s 186, IPC, is committed.[47] This is so only when the process is legal that the persons, resisting its execution, are deprived of the right of private defence under s 99, IPC . If it is illegal, they have a right of private defence under s 97, IPC .[48]

This provision cannot have the effect of making an assemblage unlawful, if the object thereof is a legal one, *e.g.*, resistance to an order made without authority by an agent of the court of wards[49] or to the execution of a warrant which does not specify the name of the person against whose goods it is to be executed,[50] or resistance to the execution of a time-barred warrant.[51] Where the police attempt to arrest persons without any justification and the persons resist the arrest, they cannot be held guilty of rioting.[52]

Where in execution of a decree, buffaloes not belonging to the judgment-debtor, but to other persons, were attached, it was held that their buffaloes could certainly not be attached, but once they were attached they could not form an assembly of more than four persons with the object of enforcing their right of releasing them from the attachment without committing an offence under s 143, IPC .[53]

Resistance to the execution of law or legal process may amount to an offence. If so, the case would fall under cl (3) of s 141 . Refer to synopsis notes under the next clause.978

23. Third Clause--To Commit Mischief, Criminal Trespass or other Offence

The object under this clause must be to commit mischief, criminal trespass, or some other offence. Where criminal intention is a necessary ingredient in the offence, as it is in those specifically mentioned in this clause the requirement will not be satisfied, if it can be shown that the accused had a right, or honestly believed that he had a right, to do the act complained of, and in this respect this clause differs from cl (4).

This clause is ambiguous to some extent. It specifies two offences, namely, mischief and criminal trespass, and then says 'or other offence'. Now, the phrase 'other offence' would cover every other offence made punishable by the IPC . If all the other offences made punishable by the IPC are meant to be included in the phrase, there can be no meaning in specifically mentioning two offences. It would therefore appear that the legislature intended to include in this clause only mischief, criminal trespass and other offences *ejusdem generis*. But, as will be seen presently, the decided cases indicate that the courts have interpreted the phrase 'other offence' as including any other offence. Illegal seizure of cattle to take them to the cattle pound does not constitute mischief, criminal trespass or theft, and an assembly of five or more persons seizing the cattle does not become an unlawful assembly.[54]

Certain persons entered a vacant *manai* (building site) for the purpose of rebuilding their wall which adjoined the vacant land. It was held that since they did not assemble there for the purpose of committing mischief, criminal trespass, or any other offence, they did not constitute an unlawful assembly.[55]

Causing of annoyance to policemen is not an offence known to the law though disobedience to an order lawfully promulgated under s 144 of the CrPC is a known form of criminal behaviour which the law punishes. Where, therefore, the common object is only to cause annoyance to police officers, the assembly cannot be said to be an unlawful assembly.[56]

Mischief

For definition of mischief refer to s 425, IPC . In a case, the accused finding their fields flooded, cut a channel through a railway to let the water run off their fields. It was held that, though the motive of the accused was to free their fields from water, their intention was to make a ditch through the railway and

so they were guilty of mischief and constituted an unlawful assembly with the common object of damaging the railway.[57]

Where, at a partition, a house in possession of the complainant was allotted to the accused but actual possession of the house was not given to him, and while litigation was still going on between the two, the accused's party dismantled the house, it was979 held that the dismantling of the house amounted to mischief and that the party of the accused were guilty of the offence under s 147, IPC .[58]

Where the intention of the accused was not to commit mischief by causing wrongful loss or damage but to exercise a right which they *bona fide* claimed, it was held that they could not be held to form an unlawful assembly under s 141, cl (3).[59]

Criminal Trespass

For definition of criminal trespass refer to s 441, IPC . Criminal trespass need not have been committed actually, to constitute an offence under s 143, even though the common object of the assembly may have been to commit criminal trespass. The trespass, if committed, cannot be said to be a part of the offence of being a member of an unlawful assembly.[60] Where there is no allegation that the accused intended to commit any offence other than that of criminal trespass, the evidence must establish that the assembly held that particular object.[61] The intention to intimidate, insult or annoy, or to commit an offence must be distinctly found.[62]

Where a person asserts a grazing right which has never been declared against him and which he *bona fide* believes he has, and, in consequence of that belief, he goes, with his party to protest against the land being ploughed up, he cannot be convicted of criminal trespass or of being a member of an unlawful assembly.[63]

Any other Offence

For the purposes of this section the word 'offence' denotes a thing punishable under this code or under any special or local law, if punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.[64] Therefore, an offence punishable under a special or local law for less than six months cannot be taken into consideration as an offence under this clause.

The legislature intended to include, in the third clause of this section, only mischief, criminal trespass and other offences *ejusdem generis*. The courts have interpreted the phrase 'other offence'.[65]

Disobedience of a lawful order passed by a police commissioner under s 62A(4) of the Calcutta Police Act, is an offence under s 62A(6)(ii) of that Act. But that Act being a local law within the meaning of s 42, IPC and the offence under that Act not being punishable with imprisonment for six months and upwards, it is not an offence within the meaning of s 40 or s 141 of this IPC . But as it is also an offence under s 188 of the IPC, it is, therefore, an offence within the meaning of this section.[66]

980Similarly, disobedience of an order under s 23(3) of the Bombay City Police Act,[67] or s 42 of the Bombay District Police Act,[68] is an offence under s 188 of the IPC and falls under the third clause of this section.

Defying the conditions laid down in an order passed under s 30 of the Bihar Police Act amounts to an offence under s 188 of the IPC and falls under the third clause.[69]

The offence of wrongful restraint punishable with simple imprisonment for not more than one month under s 341 of this Code is also an offence within the meaning of the third clause.[70]

Where the common object was to commit the offence of theft and assault and the specific finding was

that the paddy was cut and removed, it was not possible to particularise the accused persons connected with the theft. All the petitioners assembled were armed with different weapons with a view to remove the paddy and cause assault. It was held that on such a finding, a conviction under s 143, IPC must follow.[71]

Where the common object of the unlawful assembly is alleged to be looting of crops, the fact that the title to the land is uncertain and that a *bona fide* dispute exists about it negatives the offence of looting the crops, and the common object cannot be said to be to commit an offence.[72] Where the common object of an assembly of five or more persons is to commit an offence under the latter part of s 188 of this Code, the assembly became unlawful.[73]

24. Fourth Clause--Scope and Object

The Fourth clause mentions 'to take or obtain possession of any property', and, therefore, it does not make any mention of 'maintaining possession or resisting an attempt to take possession'. It will, therefore, not apply to an accused who is defending his possession in any property and the right of private defence as contemplated by the Code is not taken away, if there is any action on the part of the accused persons in maintaining their possession and defending their property.[74]The provision in the Fourth clause is one of those rare instances in which an act, in the view of the criminal law, is legal and gives no right of action to the person affected by it, but is punishable criminally on account of the injurious consequences to the public peace,[75] resulting from the use or show of criminal force. The object of the clause is to prevent breaches of the peace, by compelling everyone, who desires to enforce a disputed right to do so under the authority of the law.[76] There is not even the right of private defence in cases where there is time to have recourse to the protection of the public authorities (s 99, IPC). The principle is the same as that under which the magistrate is authorised, in cases in which a breach of the peace is981 apprehended, to maintain the party in possession, or attach property pending the decision of a competent civil court.[77]

25. 'By Means of Criminal Force or Show of Criminal Force'

As to the meaning of 'criminal force' refer to s 350 of the IPC . The essence of this clause is the use or show of criminal force.[78] People merely shouting slogans or delivering a speech cannot be said to use or show criminal force and cannot be convicted under s 143 of the IPC .[79] The plain object of this clause is to prevent the resort to force in vindication of supposed rights.[80] 'It is perfectly immaterial whether the act which one seeks to prevent by the use of criminal force or show of criminal force is legal or illegal, the test of criminality being the determination to use criminal force and act otherwise than in due course of law, so as to threaten the public peace,[81] unless, of course, the circumstances are such that a right of private defence arises.[82] It must, however, be remembered that the right of private defence of property is a restricted right. Section 99 of the IPC expressly lays down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities and it also lays down that the right of private defence, in no case, extends to doing more harm than is necessary for the purpose of defence. Sections 100 to 105 of the IPC make the right depend on the circumstances of each case. The right of self-help, when it causes, or is likely to cause, damage to the person or property of another person must be restricted, and recourse to public authorities insisted on. If a person prefers to use force in order to protect his property, when he may easily have recourse to the public authorities, his use of force is made punishable by the Code. No matter what his intention may be, the law says that he must not use force in such case. To take any other view would be to encourage and put a premium on offence of rioting. The country would, in the words of Holloway J, be deluged with blood, if an offender who could get relief by recourse to law were allowed to take the law into his own hands.[83] The phrase 'by means of criminal force or show of criminal force to any person' governs all the three sub-clauses of this clause. Thus, if any one is in wrongful possession of his property, the landlord in taking or obtaining possession must not do so by means of criminal force or show of criminal force. But if he can obtain it in a peaceable and easy manner, he has every right to do so, even though this may involve the 'peaceable and easy' enactment of anyone found on the premises.[84] Again, the use or show of criminal force must be

before and for the purpose of taking or obtaining possession and not after taking or obtaining possession.[85]

Where the accused, in order to enforce his right of way, took a funeral procession through a particular road, and in answer to protest said that he would go on his way by force, if necessary, and the processionists used threats and abusive language, it982 was held that this made them an unlawful assembly whether the end and object they proposed were a just and legitimate one or not.[86]

Where both parties are entitled to joint possession neither of them have the right, under the law, to attempt to take forcible possession or take forcible possession after assembling a number of armed men and going to the place and thereby intimidating the people in possession.[87]

26. 'To Any Person'

The words 'to any person' mean to any private individual and not necessarily a public servant as in the first clause. In the case of taking or obtaining possession, the show of criminal force maybe to the owner, or his servant or agent, or to any person in whose charge or custody the property is.

27. 'Possession'

In a case coming under this chapter dealing with the question as to who was in actual occupation just before the occurrence took place, is of paramount importance, and a right to possession, or constructive possession, is not generally of much importance. If a person has the right to possession, and was in law constructively in possession, but was not in actual occupation just before the occurrence, he may ordinarily have recourse to the proper authorities for the prevention of any wrong to him and he should not be allowed to plead the right of private defence of property.[88] In all these cases it should be clear from the evidence that the party exercising the right he claims is in possession of that right and that he is entitled to resist or repel aggression in order to maintain his right.[89]

Where one party alleges that it has been dispossessed by the use or show of criminal force and the other party pleads that it was forced to maintain or defend its possession, the question of possession is of vital importance and it is incumbent on the court to record a clear finding as to possession, as without such a finding it cannot be decided as to who was the aggressor.[90] A single or casual act of possession by the complainant of which the evidence speaks, cannot possibly, in cases of this kind, be safely relied upon as furnishing a firm foundation for a finding of possession, and unless actual possession has been clearly established, it is impossible to hold that the charges of rioting or of mischief could be brought home to the accused.[91]

Formal or symbolical possession delivered by a court must be deemed equivalent to actual possession as against parties to the proceeding, though not as against third parties.[92]

983Where, however, it was only proved that an auction-purchaser was given only symbolical possession of a field formally transferring the ownership to him and not the actual possession thereof with the standing crops, and when the auction-purchaser and his men tried to take actual possession, the lessee of the former owner, whose crop was standing in the field, and his men resisted, it was held that the lessee and his men could not be held guilty of rioting.[1]

An order under s 144 of the CrPC cannot be treated as substantive evidence of possession.[2] Possession given to a party in proceedings under s 145, CrPC, may be maintained.[3] Where both parties are entitled to joint possession, neither of them have the right under the law to attempt to take forcible possession or take forcible possession after assembling a number of armed men and going to the place and thereby intimidating the people in possession.[4] A plea of a right to possession is no answer to a charge of rioting by making a forcible entry on land cultivated even by a trespasser who is in possession and opposes the entry.[5] Even if persons have a right to possession, they would be

guilty of the offence under s 143 of the IPC, if they enforce that right by means of criminal force.[6]

Where a person has been in possession of land under water, the fact that on one occasion another person succeeded in fishing without molestation would amount only to a disturbance of the former's possession and not to his dispossession, and the former is not deprived of his right of private defence.[7]

28. 'To Take or Obtain Possession'

No person is entitled to vindicate his right to possession of any property by resorting to criminal force. That right is subject to the limitations in ss 96 - 106 of the IPC . Where there is an actual invasion of one's property or person and there is no time to seek the aid of public authorities, the right of private defence is available, and that right extends also to this section.[8] This clause speaks of 'to take or obtain possession of any property'. It does not speak of maintaining possession or resisting an attempt by another to take possession. It is therefore, plain, that it can have no application to a case where a person, in lawful possession of any property, proposes to use force in order to maintain his possession.[9] Persons, merely acting in maintenance of an existing peaceful possession, no matter whether possession was with or without title, cannot be said to enforce any right or supposed right and, therefore, cannot be held to form an unlawful assembly within the meaning of the fourth clause of this section. A984 person who is out of possession must enforce his right, if any, in the way prescribed by law and he cannot be permitted to vindicate it by the use of criminal force.[10] However, where possession is already complete before the date of occurrence, the fourth clause of this section is not applicable.[11]

Where the common object is not to use criminal force to get possession but to prevent aggression by others, it cannot be said to be unlawful.[12] Even force can be used to resist trespassers if necessary, and no question of private defence on the part of the trespassers arises.[13] The right of private defence extends to this and subsequent sections, just as much as it extends to any other offence punishable under the Code. Where a person in possession of his property resists an invasion against it, in exercise of his right to that property, and if that invasion amounts to an offence under the Code, he is entitled to resist it by force and to collect for that purpose such number and such arms as may be absolutely necessary for this purpose, provided only that there is no time to have recourse to the protection of the police authorities.[14]

Where the accused numbers 2 and 7 were in possession and the other accused joined them in maintaining that possession, it was held:

> The accused's party sought only to maintain possession and an assembly of more than five persons with this common object would not come within the definition of 'unlawful assembly' given in section 141 , Indian Penal Code 1860. The accused, therefore, cannot be convicted of any offence by virtue of s 149, Indian Penal Code 1860. If they had no right of private defence of the property in the possession of accused 2 and 7, the accused would be responsible for the various acts done by them individually. If they had a right of private defence but some exceeded it, that right not only entitled accused 2 and 7 to defend the land, but also such other persons, as they might have gathered there to help them to protect their rights.[15]

To Enforce a Right to Possession and to Maintain Possession to be Distinguished

Under the fourth clause of the section, an assembly of five or more persons is an unlawful assembly if the common object of its members is to enforce any right or supposed right by means of criminal force or show of criminal force. Section 141 of the IPC must be read with ss 96 and 106 of the IPC dealing with the right of private defence. Under s 96 of the IPC nothing is an offence which is done in the exercise of right of private defence. The assertion of a right of private defence, within the limits

prescribed by law, cannot fall within the expression 'to enforce any right or supposed right in the fourth clause of this section'.[16]The true import of the expression 'to enforce any right' relates to an initial act when it is done in furtherance of any right, and not to an act when it is done to maintain a position already achieved in the lawful exercise of that right.[17] If a person is already in possession of property and he gathers985 five or more persons to defend such possession, he would be doing so to maintain his possession and such action would not be illegal and the assembly would not be unlawful. However if he is not in possession of property, but has got only right to acquire possession, and if he, with five or more persons, goes to the property to acquire it by force, that would be unlawful because that would be a case of enforcing a right. What this sub-clause prohibits is to enforce a right or a supposed right, and not maintaining or defending such right or a supposed right.[18]The fact of exceeding the right of private defence, which a person has, cannot make him a member of an unlawful assembly. He can only be convicted and punished for the individual act which he himself has done in excess of the right of private defence.[19] Where the accused forcibly took away the crops under a *bona fide* belief that they were entitled to the possession, the Supreme Court held that the accused could not be held guilty of having trespassed into the said land or formed an unlawful assembly for committing theft of the crops and that conviction of the accused under ss 143 and 379 of the IPC was bad.[20]

Possession of Trespasser

When two persons are on a field, each claiming it, he who has the title, is in law deemed to be in possession. If the true owner acquiesces or acts otherwise, so that legal possession vests in the trespasser, then he must resort to a civil court and bring a suit either under s 6 of the Specific Relief Act, or for ejectment or damages.[21] If somebody enters on his land during his absence and he does not acquiesce in the trespass, he would still retain possession of the land; and as the possessor of the land, he is entitled to defend that possession. If he brings friends with him and with force of arms resists those who are trespassing on the land, who are also armed, he and his friends would not be guilty of forming themselves into an unlawful assembly; for those who defend their possession are not members of an unlawful assembly. But if a person acquiesces in his dispossession and subsequently, under claim of title, comes again to dispossess his opponents then he and his friends would be members of an unlawful assembly and guilty of rioting.[22]It is true that the courts in India have taken the view that a trespasser who is in peaceful and settled possession of the property in dispute is entitled to defend his right of possession against physical attack. However a trespasser does not acquire this right from his own act of trespass or taking forcible possession. No person can derive any benefit from his own act of the trespass or taking forcible possession. No person can derive any benefit from his own wrongful986 or criminal act. His rights, if any, flow from the conduct of the rightful owner or occupier who may acquiesce in the trespasser's possession. A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, or reinstate himself in his former possession.

It may, therefore, be considered settled law that a trespasser acquires the right to defend his possession against physical attack only if he has come to it by acquiescence, express or implied, of the rightful owner and his possession has become peaceful and settled. The passage of time does not necessarily confer any right on the trespasser. For example, a man may be away when another takes forcible possession of his property behind his back, and on his return, he can assert his right of property by throwing out the trespasser. The question of lapse of time becomes relevant only if the rightful owner or occupier sits quiet and does nothing to assert his rights even after knowing that the trespasser is in possession of his property.[23]

29. 'Property'

Property in this clause includes movable property.[24]

30. 'To Deprive any Person of the Enjoyment of Right of Way'

The use of the words 'or other incorporeal rights' in this sub-clause shows that it applies to all incorporeal rights and is not confined to a right of way or a right to the use of water. In the case of incorporeal rights, such as for instance, a right of way or a right to use water, no one is in possession of it except during the actual moment when he is peacefully exercising it.[25] No person can prevent by force another person dealing with his own land, merely because he may have some right of easement over that land of which right he was not, at the time, in actual enjoyment.[26] A person who interferes with such a right does not 'take or obtain possession of any property' but only deprives the other of the enjoyment of it. This sub-clause applies only when some person is in possession or enjoyment of an incorporeal right and is deprived of the enjoyment of it.

Right of Way--Processions

A person may acquire a right of way over the land of another by way of an easement. Continued use by the public of a way raises a presumption that the way belongs to the public.[27]

Where, at the time of the occurrence, there was a decree of a competent civil court against the complainant having a right of way, it was held that the accused could not be said to have a common object to deprive the complainant of the enjoyment of his987 right of way, even if they debarred the complainants access to the disputed pathway.[28]

All members of the public have a right to carry religious processions through a public way in a lawful manner irrespective of the religions to which they belong.[29] The right to use a public highway is not a right which originates either in an agreement or in custom. The very fact that a particular path or a road is a public highway means that every member of the public has a right to use it. That right is subject only to similar rights of other members of the public to use the public highway and to the power of the state to regulate traffic and to prevent disturbance or breach of public peace. Although the right to use public highways in this manner is not expressly described as a fundamental right in the Constitution of India, it can reasonably be stated to partake of the fundamental right, to assemble peaceably and without arms and to move freely throughout the territory of India, guaranteed under art 19 of the Constitution of India .[30] Where, therefore, the accused who were 'Muslims', prevented certain processionists from proceeding along a mosque on a public highway with music, it was held that the processionists had the right to come in procession along the public highway, whether with or without music, so long as they did so peacefully without being armed and subjected themselves to control by the state in the interest of regulation of traffic or use of the public ways by others and in the interest of the public peace. No person has any right to prevent them from proceeding along the public highway in a procession in that manner. The common object, therefore, of the above assembly of 'Muslims' was clearly to restrain the processionists from proceeding in the way they have a right to, and to compel the processionists to omit to do what they were legally entitled to do, by means of criminal force, or show of criminal force and so the accused formed an unlawful assembly and were liable to punishment under s 143 of the IPC .[31]

Where the petitioners formed part of a *Moharram* procession and while going on a highway placed the *tabuts* (*Tazias*) in a line across the road, thereby preventing the mail tonga from passing along, it was held that the placing of the *tabuts* on the road, was obstructing the highway, and that though they were entitled to the use of the road, they could not so occupy it to the exclusion of others equally entitled to the use of it.[32]

Right of Way--Speech and Dharna

It is true that art 19(1)(b) of the Constitution of India guarantees to every citizen the right to assemble peacefully and without arms and art 19(1)(d) guarantees the right to move freely throughout the territory of India. It is from these rights that the right to take out a procession flows. If the procession carries placards or shouts slogans or halts from time to time and speeches are made, right of speech and expression as988 guaranteed by art 19(1)(a) is also exercised. However, these rights are subject to constitutional and statutory restrictions and can be exercised subject to such restrictions only.

When such rights are exercised on a public high-way, it has to be ensured that it is done peacefully and in an orderly manner without infringement of the rights of others. Every member of the public has a right to use a high-way and such right is subject to similar rights of other members of the public. The acts of sitting in *dharna* and stopping other persons and vehicles from passing through the high-way will not be a lawful exercise of the rights of the processionists and will be violative of the rights of others and will amount to public nuisance, rioting and causing of illegal restraint to others who are stopped from passing/re-passing through the public highway.[33]

31. 'Enjoyment of the Use of Water'

What this sub-clause aims at is a common object to deprive a person of the enjoyment of the use of water and not merely a supposed right to its use. No person can have a right to prevent by force another person dealing with his own land merely because he may have some right of easement or customary right over a portion of that land of which right he was not at the time in actual enjoyment.[34]

Where a party stationed higher up a stream obstructs the flow of water, the people down below may be deprived of the use of the water of the stream. However, they cannot take the law into their own hands and commit a riot to remove the obstructions.[35]

Where the common object of the assembly was by means of criminal force or show of criminal force to deprive the cultivators of a certain village of the use of water or a *pyne* of which they were in enjoyment, or thereby to enforce their right or supposed right to the said water, it was held that they formed an unlawful assembly.[36]

Where people are in possession of water and their intention is to maintain that possession and not to enforce any right or supposed right, their common object is not unlawful. A party in possession is entitled to resist and repel an aggression and his action in so doing would be in the maintenance of his right.[37] In defending what they are possessed of and *bona fide* believe they have a right to, whether it be tangible property or such a right as supply of water, persons who form an assembly for that purpose do not render themselves criminally punishable.[38]

In *Ramnandan Prasad Singh v Emperor* ,[39] across a waterway exclusively belonging to the accused, the complainant's party constructed, without the permission of the accused, a *bund* or dam for their own purpose. The complainant's party had been restrained by an injunction from interfering with the accused in their use and occupation of the *pyne* in question. The accused in attempting to cut the *bund989* were opposed by the complainant's party, two of whom were struck by the accused. It was held that by attempting to cut the *bund*, the accused were not enforcing a right, but only maintaining it and could not be held guilty. However where five persons assembled at a water head to take water by force and armed themselves with deadly weapons to strike and vanquish anybody who should stand in their way and prevent them from accomplishing their purpose, it was held that their common object was not to maintain a right but to enforce a supposed right, and they formed an unlawful assembly.[40]

32. Right to Fish

If persons have a right to fish in a reservoir of water, they have every right to defend or maintain that right, and their common object to assault in defending or maintaining their right will not be unlawful.[41]

33. 'To Enforce Any Right or Supposed Right'

The plain object of the Fourth clause of this section is to prevent resort to force in vindication of one's supposed rights.[42] The words 'by means of criminal force or show of criminal force' in the beginning of this clause govern the sub-clause 'to enforce any right or supposed right'. The test of criminality is the determination to use criminal force and act otherwise than in due course of law, so as to threaten the public peace.[43]

The most important words in this clause are 'to enforce any right or supposed right'. The phrase 'to enforce a right' can apply only when the party claiming the right has not possession over the subject of the right and therein lies the distinction between 'enforcing a right' and 'maintaining a right'. A party in possession is entitled to resist and repel an aggression and his action in so doing would be in the maintenance of his right.[44]

Whether Right of Private Defence Extends to this Section Also

At first sight there may appear to be some confusion between the right of private defence of property as set out in ss 96 and 105 of the IPC, and the provisions of s 141 (fourth clause) of the same Code which make it an offence to 'enforce any right'. A party cannot be said 'to enforce any right' where he is in undoubted possession of the land upon which an attack has been made and he defends that possession. In that case it is only the right of private defence of property which would arise. If, on the other hand, there is real doubt whether the land belonged to one party or the other, then, if either party uses force, that would amount to enforcing a right and there would be no right of private defence of property.[45]The true import of the expression 'to enforce any right' relates to an initial act when it is done in furtherance of any right and not990 to an act when it is done to maintain a position already achieved in the lawful exercise of that right. The distinction may be fine, but it is substantial.[46]Whether a right exists, or is merely supposed to exist, the essence of the fourth clause of this section is the use or show of criminal force to enforce that right. The expression 'enforce a right' implies the existence of two persons--the person who enforces it and the person against whom it is enforced. Such a situation can arise when the property over which, or the subject in respect of which, the right is sought to be enforced is not in the possession of the person trying to enforce that right, but is in the possession of the person against whom that right is sought to be enforced. If that property or subject is in the actual possession of the person to whom the right also belongs, his act in respect of the right cannot be rightly described as enforcing that right. In such a situation he is said to enjoy the right and not enforce it. The import of the phrase used in the section, therefore, relates to an act done in furtherance of any right or claim of right and not to an act done in defending or maintaining the right already in the enjoyment of the person.[47] There is a difference between 'forced to maintain or defend any right' and 'to enforce any right or supposed right'. What this section prohibits is enforcing any right or supposed right, and not maintaining or defending one's right.[48] Where the intention is not to enforce a right, but to maintain undisturbed actual enjoyment of a right, no question of an unlawful assembly arises. It is a question of private defence of property.[49] This section must be read with s 96 of the IPC and the following sections of the Code. The persons in a party are protected by both the clauses of s 97 of the IPC that is to say: (a) they have a right to defend their own person and the person of others against an offence affecting the human body, and (b) they have the right to defend the property against the opposite party who are committing, or attempting to commit at least, the offence of criminal trespass.[50] No person is entitled to vindicate his right to possession of any property by resort to criminal force. That right is subject to the limitations laid down in ss 96 - 106 of the IPC . When there is an actual invasion of one's property or person and there is no time to seek the aid of public authorities, the right of private defence is available and that right extends also to this section. It would depend on the circumstances of each case in order to determine the question as to whether five or more persons having a common object joined together and committed a particular crime. In all these cases, it should be clear from the evidence that the party exercising the right he claims, is in possession of that right and that he is entitled to resist or repel aggression in order to maintain that right.[51]

Under the fourth clause of s 141 of the IPC, an assembly of five or more persons is an unlawful assembly if the common object of its members is to enforce any right or supposed right by means of criminal force or show of criminal force to any person. Section 141 of the IPC must be read with ss 96 - 106 of that Code dealing with the right of private defence. Under s 96 of the IPC nothing is an offence which is done in991 the exercise of the right of private defence. The assertion of a right of private defence within the limits prescribed by law cannot fall within the expression 'to enforce any right or supposed right' in the fourth clause of s 141 of the IPC .[52]

The fact of exceeding the right of private defence, which a person has, cannot make him a member of

an unlawful assembly. He can only be convicted and punished for the individual act which he himself has done in excess of the right of private defence.[53] Persons, merely acting in maintenance of an existing peaceful possession, no matter whether the possession was with or without title, cannot be said to enforce any right or supposed right and therefore cannot be held to form an unlawful assembly within the meaning of the fourth clause of this section. A person who is out of possession must enforce his right, if any, in the way prescribed by law and he cannot be permitted to vindicate it by the use of criminal force.[54]

It has been held in a Madras case that it is little short of self-evident that in defending what they are possessed of and have *bona fide* belief that they have a right to, whether it be tangible property or such a right as that to a water supply, persons who have formed an assembly for that purpose do not render themselves criminally punishable.[55]It has, however, been held that in the case of an incorporeal right no one can be said to be in possession of it except during the actual moment when he is peacefully exercising it, and any attempt to vindicate such a right at any other time by the use of force must necessarily be an attempt to 'enforce a right or supposed right' within the meaning of this clause, and not an act to maintain an existing right of peaceful possession.[56]

When a party is in possession for four or five days, though it may be in wrongful possession, another party, although claiming to be the rightful owner, is not entitled to go in and use force to turn him out, much less is he entitled to take armed men with him for that purpose.[57]

Where an assembly of more than five persons conducted a funeral procession along a public road with the object of vindicating their right of way and intending to resist if obstructed, and, though not armed, they were using threatening language, it was held that they formed an unlawful assembly though they had a right of way.[58]

Peacefully abating private nuisance cannot be said to be an unlawful object. Where a co-owner illegally erected a platform on joint land and the other co-owners came in and without violent or unnecessary force and with no breach of the peace, abated the nuisance by putting down the platform, it was held that they could not be held to form an unlawful assembly.[59]

However where the accused were playing music while celebrating a recognised festival and a neighbour annoyed by the noise came and took away one of their992 drums on which they assaulted him, it was held that they could not be said to have formed an unlawful assembly.[60]

Unless a right of private defence is established, a claim (even if *bona fide*) of title or a claim (even if *bona fide*) of possession will avail nothing.[61] A distinction must be made between a disputed claim and an admitted claim or ascertained right. The distinction has some importance with reference to the fourth clause, the plain object of which is to prevent the resort to force in vindication of supposed rights.[62] Even the assertion of a supposed right, if the right is to be asserted by a show of force, is sufficient in itself for constituting an unlawful assembly.[63] Cultivators cannot be convicted of criminal trespass when they asserted grazing rights which had never been declared against them and which they *bona fide* believed they had, and for the same reason they cannot be said to have formed an unlawful assembly because they went and protested against the land being ploughed up.[64]

34. Fifth Clause--Illegal Compulsion by use or show of Criminal Force

This clause makes it unlawful for any person to compel another person, by means of criminal force, or show of criminal force, to do what he is not legally bound to do, or to omit to do what he is legally entitled to do. A person cannot be said to be acting in any illegal or unlawful manner if he seeks the assistance of a magistrate and the police, and any force used or show of force made by the magistrate cannot be deemed to be force used or show of force made by those persons. Hence they cannot be said to form an unlawful assembly within the meaning of this clause.[65] People simply asserting their *bona fide* right and preventing an unlawful interference with their property cannot be regarded as members of an unlawful assembly. The mere use of criminal force or show of criminal

force by any person to take possession of any property is not sufficient to bring the case within this clause unless some criminal intent is proved against the person so using force or show of force.[66]

'Legally Entitled to Do'

For the application of this clause it is not sufficient to prove that the common object of the accused's party was to compel the complainant by means of force to omit, for the time being, to do a certain act. The act omitted must be one which the complainant was legally entitled to do, and if it was not such an act, cl 5 cannot apply.[67] If the person in question was not legally entitled to do the thing objected to, obstructing him in so doing is no offence, as where the police searched the house of an alleged offender, without having a search warrant, and the search was resisted by force,[68] or where an illegal arrest is resisted by force.[69]993

35. Explanation

Under the explanation to the section an assembly which was not unlawful when it assembled may subsequently become unlawful.[70] Although individuals may, in the first instance, have associated themselves with a mob from motives perfectly innocent, nevertheless, if the mob is or becomes an unlawful assembly and the individuals in question take part in its proceedings, they will be liable as members of an unlawful assembly.[71] Where certain Mohammadans being apprehensive of the breach of the peace being committed by Hindu processionists, assembled either to protect themselves or to protest against the action of the processionists in taking an unlicensed route, it cannot be said that they become members of an unlawful assembly at that stage. But when the Hindus were receding, the Mohammadans chased them; they became members of an unlawful assembly.[72]

Where three out of five persons did not take part in the seizure of the cattle, but when subsequently they were joined by another group of nine persons armed with *lathis* and all of them participated in the subsequent attack on the owners of the cattle, it was held that though the first group was not an unlawful assembly in the beginning, it became so subsequently.[73]

But when a body of men are determined to vindicate their rights, or supposed rights by unlawful force, and when they engage in a fight with men, who on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself but each side is trying to get the better of the other.[74] In such a case the claim of right becomes reduced to a mere pretext for fighting. The assembly is unlawful not because the claim of right is immaterial, but because it was not the real object of the fight.[75] An assembly lawful in itself does not become unlawful merely by reason of its lawful acts exciting others to do unlawful acts.[76]

It was held in *Kunja Bhuniya v Emperor* [77] that an assembly of persons lawfully exercising their lawful rights would not become an unlawful assembly by repelling an attack made on them by persons who had no right to obstruct them, nor by exceeding the lawful use of their right of private defence.

An assembly of persons lawfully exercising their lawful rights would not become an unlawful assembly merely by repelling an attack made on them by persons who had first acquiesced in handing over possession to them.[78]

The test of the unlawfulness of an assembly of five or more persons as laid down by English law is, whether it is the intention of the assembly to carry out its common994 purpose, whether lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly, ground to apprehend a breach of the peace in consequence of it.[79] Thus, although the conduct of an assembly of more than five persons excites others to a breach of the peace, yet, unless it is the object of the assembly to do so, it is not an unlawful assembly on that account.[80] An assembly which is not unlawful in its inception does not become unlawful merely because it continues without dispersing in defiance of a lawful order to disperse, for there is no provision in this section to say that an assembly refusing to disperse in obedience to a lawful command becomes an unlawful assembly.

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An assembly which was lawful in its inception may subsequently turn unlawful all of a sudden without previous concert among its members. Previous concert is not necessary. The common object required under this section differs from the common intention required by s 34 in this respect.[82]

It is not necessary that the intention or the purpose which is necessary to render an assembly an unlawful one, need not come into existence at the outset. The time of forming an unlawful intent is not material. an assembly which at its commencement or even for sometime thereafter is lawful, may subsequently become unlawful, or even riotous.[83]

Applicability in a Case of Sudden Fight

Where no party attacked the members of the opposite party at the commencement of the occurrence and at the stage of remonstrance and counter-remonstrance someone started the fight but it could not definitely be determined as to which of the two parties struck the first blow. It was held by the Supreme Court that as there was no premeditation and the occurrence was a sudden affair hence each assailant should be liable for his individual act and not vicariously liable for the acts of others.[84]

36. Group Clashes/Arson--Evidence

When an unlawful assembly or a large number of persons take part in arson or in a clash between two groups, in order to convict a person, at least two prosecution witnesses have to support and identify the role and involvement of the persons concerned. The normal test is that the conviction could be sustained only if it is supported by two or more witnesses who give a consistent account of the incident in question.[85]995

5 Substituted by the AO 1950 for 'Central or any Provincial Government or legislature'.

6 *King Emperor v Nga Tun Maung* AIR 1925 Rang 362, p 363 .

7 *Komma Neel Kanta Reddy v State of Andhra Pradesh* AIR 1978 SC 1021, (1978) Cr LJ 780 ; *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, p 211, (1965) 1 Cr LJ 226 ; *Khilli v State of Rajasthan* (1977) Raj Cr C 336, p 339 ; *Bhuyan Abdul Esral Huque v Rangu Singh* (1974) 1 Cut WR 149 ; *Lalji v State of Uttar Pradesh* (1973) SCC (Cr) 921, (1973) UJ 790 (SC), (1973) Cr AR 368, (1973) Cr LJ 1969, AIR 1973 SC 2505, (1973) SC Cr R 443, (1973) Cr LR 589 .

8 *Queen Empress v Tirakad* 14 ILR Mad 126, p 130 ; Re *Koylash Chunder Dass* 20 WR 78.

9 *Ganga Singh & Ors v State of Uttar Pradesh* (2000) Cr LJ 1695 (All) (DB) .

10 *Sunder Lal & Ors v State of Uttar Pradesh* 1998 Cr LJ 1058 (All)(DB).

11 *Bishambhar Bhagat & Ors v State of Bihar* AIR 1971 SC 2381 .

12 (CAN) *Criminal Code*, RSC 1985, c C-46, s 63 .

13 *R v Lecompte* (2000) JQ no 2452, 149 CCC (3d) 185 (Que CA). [*Vide Halsbury's Laws of Canada*].

14 *Pranbandhu Misra v State* (1952) ILR Cut 219 .

15 *Mukunda v State* AIR 1957 Raj 331, p 335, (1957) Cr LJ 1187 ; *Mohan Singh v State of Punjab* AIR 1963 SC 174, (1963) 1 Cr LJ 100 ; *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, (1965) 1 Cr LJ 226 ; Re *P Abdul Sattar*AIR 1961 Mys 57, (1961) 1 Cr LJ 201 .

16 *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, (1965) 1 Cr LJ 226 ; Re *P Abdul Sattar*AIR 1961 Mys 57, (1961) 1 Cr LJ 201 .

17 *Ibid*.

18 *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, (1965) 1 Cr LJ 226 ; Re *P Abdul Sattar*AIR 1961 Mys 57, (1961) 1 Cr LJ 201 ; *State of Maharashtra v Sk Ayyub SK Abdul* (1994) 2 Bom CR 126 (DB) .

19 *Kamara v Director of Public Prosecutions* (1974) AC 104, [1973] 2 All ER 1242 (HL) ; *Halsbury's Laws of England*, vol II, fourth edn, Butterworths, London, 1976, p 504.

20 *Burden v Rigler* (1911) LR 1 KB 337 .

21 1 Weir 53.

22 *Mukunda v State* AIR 1957 Raj 331, p 335, (1957) Cr LJ 1187 ; *Mohan Singh v State of Punjab* AIR 1963 SC 174, (1963) 1 Cr LJ 100 ; *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, (1965) 1 Cr LJ 226 ; *Lalgi v State of Uttar Pradesh* (1973) Cr LJ 1769, (1973) SCC (Cr) 921, (1973) Cr AR 368, AIR 1973 SC 2505 .

23 *Motiram Bajirao v State of Bombay* AIR 1960 Bom 515, (1960) Cr LJ 1571 ; *Dalip Singh v State of Punjab* AIR 1953 SC 364, (1953) Cr LJ 1456 ; *Dharampal v State of Uttar Pradesh* AIR 1975 SC 1917, (1975) Cr LJ 1665 ; *Achhaylal v State of Uttar Pradesh* AIR 1978 SC 1233, p 1234, (1978) Cr LJ 1101 ; *Bharwad Mapa Dana v State of Bombay* AIR 1960 SC 289, (1960) Cr LJ 424 .

24 *Kapildeo Singh v King* AIR 1950 FC 80, p 81, 57 Cr LJ 1057 ; *Bharwad Mepa Dana v State of Bombay* AIR 1960 SC 289, p 295, (1960) Cr LJ 424 ; *Nur Singh v State of Uttar Pradesh* AIR 1956 SC 457 ; *Harchanda v Rex* AIR 1950 All 335, 91 Cr LJ 993 ; *Gopinath Nayak v State* ILR 1959 Cal 111 ; Re *Ningappa Balappa Hadi*AIR 1960 Mys 294 ; *Feroze Dui v Emperor* AIR 1929 Lah 59 ; *Emperor v Ram Adhin* AIR 1931 All 439 .

25 *Kartar Singh v State of Punjab* AIR 1961 SC 1787, p 1789 ; *Topan Das v State of Bombay* AIR 1956 SC 33, (1956) Cr LJ 138 ; *Sundar Singh v State of Punjab* AIR 1962 SC 1211 ; *Gulab v State* AIR 1951 All 660 (FB) ; *Motiram Bajirao v State of Bombay* AIR 1960 Bom 515 ; Re *Kondure Adam alias Ramariah*(1955) Andh WR 325; *Nanu v State of Kerala* (1959) Ker LR 1124 ; Re *Gopal Krishnan*AIR 1938 Mad 392 ; *Bhimappa Laxmappa Ganiyal v State* (1962) 1 Cr LJ 51 .

26 *Phodol v State of Chhattisgarh* 2014 Cr LJ 4704, p 4716 (Chh) (DB) ; *Badal Murmu v State of West Bengal* 2014 AIR SCW 1137, AIR 2014 SC 1150, (2014) 3 SCC 366, 2014 (3) JT 307, 2014 (2) Scale 43 ; *Eknath Ganpat Aher v State of Maharashtra* 2010 (3) CGLJ 57 (SC), 2011 Cr LJ (Supp) 683 ; *Mohansingh v State of MP* 2005 (4) MPLJ 183, 2005 Cr LJ 4329 ; *Hallu v State of MP* AIR 1974 SC 1936 ; *Pandurang Chandrakant Mhatre v State of Maharashtra* (2009) 10 SCC 773, 2010 AIR SCW 236 .

27 *Kareem v State* 2009 Cr LJ 1236, p 1238 (Kant) ; **see also***Nethala Pothuraju v State of AP* AIR 1991 SC 2214, 1991 AIR SCW 2476 .

28 *Marachalil Pakku v State of Madras* AIR 1954 SC 648, p 652, 55 Cr LJ 1668 .

29 *Mohan Singh v State of Punjab* AIR 1963 SC 174, (1963) 1 Cr LJ 100 .

30 *Subram alias Subramaninan & Ors v State of Kerala* (1993) Cr LJ 1387 (Ker) (FB) .

31 *Jalalu v Rajan* 2013 (2) KLJ 93 (Ker) ; *Vipin v State of Kerala* 2013 (3) KLJ 1 (Ker) .

32 *State of Rajasthan v Prem Raj* 2008 Cr LJ 2457, p 2458 (Raj) .

33 *Amar Singh & Ors v State of Punjab* AIR 1987 SC 826, (1987) Cr LJ 706 (SC) .

34 *Pahar Singh & Ors v State of Rajasthan* (1999) Cr LJ 1150 (Raj) (DB) .

35 *State of Karnataka v Dodda Hanumantha & Ors* (1999) Cr LJ 658 (Kant) (DB) .

36 *Dalip Singh v State of Punjab* AIR 1953 SC 364, p 366, (1953) Cr LJ 1465 ; *Atma Singh Hazara Singh v State* AIR 1954 Punj 126, 55 Cr LJ 752 ; *Dalla Singh v State* AIR 1952 All 941, 53 Cr LJ 1737 ; *Ram Rup v Emperor* AIR 1945 All 31, 46 Cr LJ 198 ; *Mustiquim Jagga v Emperor* AIR 1939 Lah 416, (1939) 40 Cr LJ 874 ; *Emperor v Abdul Qadir Kasuri* AIR 1930 Lah 1044, 32 Cr LJ 249 .

37 *Nar Singh v State of Uttar Pradesh* AIR 1954 SC 457, p 459, 55 Cr LJ 1167 .

38 *Ram Bilas Singh v State of Bihar* (1964) 1 Cr LJ 573, p 578-579 ; **see also***Shaji v State of Kerala* (2005) Cr LJ 3121 (Ker) (DB) .

39 *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, p 211, (1965) 1 Cr LJ 226 .

40 *Ibid*.

41 Re *Madhu*(1966) Cr LJ 223, p 226, (1965) 1 Mys LR 714; *Mohan Singh v State of Punjab* AIR 1963 SC 174, (1963) 1 Cr LJ 100 .

42 *Rex v Sadla* AIR 1950 All 418, p 419, 51 Cr LJ 1133 .

43 *Babu Hamidkhan Mestry v State of Maharashtra* (1995) Cr LJ 2355 (Bom) .

44 *Mukunda v State* AIR 1957 Raj 331, p 336, (1957) Cr LJ 1187 ; *Pedda v State* AIR 1953 Mys 41, p 42, 54 Cr LJ 1001 ; *Musa Khan v State of Maharashtra* (1976) Cr LJ 1887, p 1889, AIR 1976 SC 2566 ; *Kanhaiya v Kashi Nath* (1979) Cr LJ 409, p 411 (All) ; *State v Bhairu Sattu Berad* AIR 1956 Bom 609, p 611, (1956) Cr LJ 1066 .

45 Re *Kalusingh Motisingh*AIR 1964 MP 30, p 40, (1964) 1 Cr LJ 193 ; *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, 211, (1965) 1 Cr LJ 226 ; *Roshan v State of Maharashtra* AIR 1977 SC 672, (1977) Cr LJ 259 .

46 *Baladin v State of Uttar Pradesh* AIR 1956 SC 181, p 189, (1956) Cr LJ 345 ; *Diljan Choudhary v State of Bihar* AIR 1958 Pat 492, (1958) Cr LJ 1215 ; *Ashakari Nag v State* (1980) 49 Cut LT (SN) 10 .

47 *Kailash Chandra Sahu & Ors v State* (1984) Cr LJ 752 (Ori) (DB) .

48 *Baladin v State of Uttar Pradesh* AIR 1956 SC 181, (1956) Cr LJ 345 .

49 *Nanak Chand v State of Punjab* AIR 1955 SC 274, p 275-76, 56 Cr LJ 721 ; *Vanu v State* AIR 1950 Kutch 94 ; *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, p 211, (1965) 1 Cr LJ 226 .

50 Re *Kalusingh Motisingh*AIR 1964 MP 30, p 40, (1964) 1 Cr LJ 198 ; *T Birasingh v Manipur Admn* (1962) 2 Cr LJ 147, p 154 (Mani) ; *Kali Ram v State* (1967) 69 Punj LR 65 ; *Bishambar Bhagat v State of Bihar* AIR 1971 SC 2381, (1971) Cr LJ 1700 ; *Sitaram Pandey v State of Bihar* (1976) Cr LJ 800, p 806, (1975) ILR Pat 5 ; *Himirika Loknath v State* (1964) 1 Cr LJ 114, 28 Cut LT 435 .

51 Re *Ranga*AIR 1954 Mys 75, p 78, 55 Cr LJ 1254 ; *Deodhan Koeri v Emperor* AIR 1937 Pat 34, 38 Cr LJ 271 ; *Himirika Loknath v State* (1964) 1 Cr LJ 114, 28 Cut LT 435 .

52 *State v Bhairu Sattu Berad* AIR 1956 Bom 609, p 611, (1956) Cr LJ 1066 .

53 *Shantilal v State of Rajasthan* (1977) Cr LR 575 (Raj) ; Re *Ranga*AIR 1954 Mys 75, p 78, 55 Cr LJ 1254 ; *Muktawandas v Emperor* AIR 1939 Nag 13, p 15, 40 Cr LJ 393 .

54 *Musa Khan v State of Maharashtra* 1976 Cr LJ 1987, p 1989-1990, AIR 1976 SC 2566 ; *Roshan v State of Maharashtra* AIR 1977 SC 672, (1977) Cr LJ 259 .

55 *Gokul v State of Rajasthan* AIR 1972 SC 209, (1972) Cr LJ 42 ; *Jagnaya v State of Rajasthan* (1980) Raj LW 341, p 349-50 .

56 Re *Abdul Sattar*AIR 1961 Mys 57, p 61, (1961) 1 Cr LJ 291 .

57 *Durga Das Sohanlal v State* AIR 1960 Punj 271, p 274, (1960) Cr LJ 646 .

58 *Mohanlal v State* AIR 1961 Raj 24, p 28, (1961) 1 Cr LJ 155 .

59 Re *Arulanandu*AIR 1952 Mad 267, p 270, 53 Cr LJ 583 .

60 *Muktawandas v Emperor* AIR 1939 Nag 13, p 15, 40 Cr LJ 393 .

61 *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, p 210, (1965) 1 Cr LJ 226 ; *Bishambar Bhagat v State of Bihar* AIR 1971 SC 2381, (1971) Cr LJ 1700 ; *Prabhakar v State of Maharashtra* AIR 1979 SC 856, p 857 (no overt act is necessary) ; *Sita Ram Pandey v State of Bihar* (1976) Cr LJ 806, p 807, (1975) ILR Pat 5 ; Re *Kasthuriranga*(1970) Cr LJ 1316, (1970) LW (Cr) 155; *Puramasi Khajawan v State* (1969) BLJR 534, (1974) 1 Cut WR 149 ; *Mohd Shariff v State* AIR 1969 Bom 383, (1969) Cr LJ 359 ; *Shamba Gopi v Upendra Ladu* (1971) Cr LJ 559, p 561 (Goa) ; *Kanhaiya v Kaslu Nath* (1979) Cr LJ 409, p 411 (All) (overt act necessary) ; *Public Prosecutor v Govindraja Naidu* (1970) Mad LJ (Cr) 710, (1970) 2 Mad LJ 459 ; *Apren Joseph v State of Kerala* (1972) Cr LJ 1162, p 1170, (1971) KLT 761 ; *Kutubbudin v State of Karnataka* (1976) 2 Kant LJ 421 ; *Roshan v State of Maharashtra* AIR 1977 SC 762, (1977) Cr LJ 259 ; *Choudhry Saket Behari Singh v State of Bihar* (1963) BLJR 332 .

62 *Phodol v State of Chhattisgarh* 2014 Cr LJ 4704, p 4716 (Chh) (DB) .

63 *Public Prosecutor v Govindraja Naidu* (1970) LW (Cr) 160, (1970) Mad LJ (Cr) 710, (1970) 2 Mad LJ 459 .

64 *Jagnaya v State of Rajasthan,* (1980) Raj LW 341, p 350 (DB) .

65 *Bhe Ram v State of Haryana* 1980 Cr LJ 735, 736-37 (SC), AIR 1980 SC 957 ; but see *Sushil Choudhary v State of Bihar* AIR 1980 SC 1716 ; *Fatte v State of Uttar Pradesh* 1980 Cr LJ 829(SC), AIR 1979 SC 1504 (though the mere fact, that no overt act has been attributed to the members of the unlawful assembly, is not sufficient to disprove the charge under s 149, IPC, yet this question depends on the facts of each case); *Maganti Satyanarayana v State of Andhra Pradesh* (1985) 1 Andh WR 40 (AP) .

66 *Kailash Chandra Sahu & Ors v State* 1984 Cr LJ 772 (Ori)(DB).

67 *Prabhakar v State of Maharashtra* AIR 1979 SC 856, p 857(SC).

68 *Harinarain v State* AIR 1953 Bhopal 8, 10, 54 Cr LJ 692 ; *Sailesh Kumar v State* 1968 Cr LJ 110, p 114 (All) .

69 *Moolchand v State* AIR 1955 Bhopal 9, 12, 56 Cr LJ 1033 .

70 *Komma Neelakantha Reddy & Ors v State of Andhra Pradesh* AIR 1978 SC 1021, 1978 Cr LJ 780 (SC) ; *Siyaram (M/s) v State of MP* 2009 Cr LJ 2071, (2009) 4 Scale 162 .

71 *Siyaram (M/s) v State of MP* 2009 Cr LJ 2071, p 2074 (SC), 2009 AIR SCW 2409, (2009) 4 Scale 162 .

72 *Queen v Dinobundho Rai* 9 WR 19 ; *Queen v Gholam Mahommed* 22 WR 17 ; *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, 211, (1965) 1 Cr LJ 226 ; *Musa Khan v State of Maharashtra* 1976 Cr LJ 1987, 1989, AIR 1976 SC 2566 ; *State v Banamali Maharana* 25 Cut LT 433 (in the absence of a clear finding as to the common object conviction under s 147, is not maintainable); *Khalil v State of Rajasthan* 1977 Raj Cr C 336, 339 (the accused, who were sitting and enjoying *hukka*, were held not to be the members of an unlawful assembly).

73 *Pedda v State of Mysore* AIR 1953 Mys 41, p 42, 54 Cr LJ 1001 ; *Harinarain v State* AIR 1953 Bhopal 8, p 10, 54 Cr LJ 692 ; *Shailesh Kumar v State* (1968) Cr LJ 110, p 114 (All) .

74 *Sailesh Kumar v State* (1968) Cr LJ 110, p 114 (All) .

75 *Charan Singh v State* AIR 1959 All 255, p 261-262, (1959) Cr LJ 419, per Srivastava J, *Dalel Ram Sarup v Emperor* AIR 1946 Lah 222, p 225, 47 Cr LJ 730 .

76 *Gajraj Singh v Emperor* AIR 1946 Oudh 250, p 252, 47 Cr LJ 714 ; *Sheikh Yusuf v Emperor* AIR 1946 Pat 127, p 128 ; Re *Vyapuri Chetty* 11 Cr LJ 197.

77 *Bachchanlal v State* AIR 1957 All 184, p 188 .

78 *Deodhari Koeri v Emperor* AIR 1937 Pat 34, p 35 .

79 *Chiramel Varied Devasikutty v State* AIR 1953 Tr & Coch 275, p 278, 54 Cr LJ 1301; *Pedda v State of Mysore* AIR 1965 Mys 41, p 42 ; Re *VS Reddy*(1963) 2 Cr LJ 70, p 74, (1962) ILR AP 313.

80 *Bhaimiya Nathu v State* (1960) Cr LJ 1329, p 1330, AIR 1960 Guj 13 ; *Kanhiyalal Mulchand v State of Madhya Pradesh* AIR 1951 Nag 47, 52 Cr LJ 813 .

81 *Kanhiyalal Mulchand v State of Madhya Pradesh* AIR 1951 Nag 47 ((1)), 52 Cr LJ 813 ; Re *P Abdul Sattar*(1961) 1 Cr LJ 291, p 295, AIR 1961 Mys 57 .

82 *Sepai Bhaimiya Nathu v State* AIR 1960 Guj 13, (1960) Cr LJ 1329 .

83 *Queen v Surroop Chander Paul* 12 WR (Cr) 75 ; *Wajid Ali v King-Emperor* AIR 1927 Oudh 151, p 153, 28 Cr LJ 337 .

84 *Mizaji v State of Uttar Pradesh* AIR 1959 SC 572, p 576, (1959) Cr LJ 777 ; *Sukha v State of Rajasthan* AIR 1956 SC 513, p 518, (1956) Cr LJ 923 ; Re *Mala Narayana*AIR 1962 AP 166, p 170 (1962) 1 Cr LJ 394; *Moti Das v State of Bihar* AIR 1954 SC 657, p 659, 55 Cr LJ 1708 ; *Barendra Kumar Ghose v Emperor* AIR 1925 PC 1, p 7 ; *Mohanlal v State* AIR 1961 Raj 24, (1961) 1 Cr LJ 155 ; Re *Basireddy Venkata Reddi* AIR 1956 Andh Pra 53, (1956) Cr LJ 198.

85 *Field v Receiver of Metropolitan Police* (1907) LR 2 KB 853 .

86 *King-Emperor v Nga Tun Maung* AIR 1925 Rang 362, p 363 ; *Shoukat Ali v State* AIR 1954 Pat 194, p 195, 55 Cr LJ 485 ; *Chiramel Varied Decasikutty v State* AIR 1953 Tr & Coch 275, p 278.

87 *Aravindan v State of Kerala* (1983) Cr LJ 1259, (1983) Ker LN 198, (1983) KLT 193 (Ker), (1984) Mad LJ (Cr) 387 (Ker) .

88 *Harish Chandra Samaddar v State* AIR 1955 Cal 515, p 516, 56 Cr LJ 1338 ; *Barendra Kumar Ghose v King-Emperor* AIR 1925 PC 1, p 7 ; *R v Sabid Ali* 11 Beng LR 359 ; *Queen-Empress v Tirakada* 14 ILR Mad 126, p 130 ; Re *Koylash Chander Dass* 20 WR 78; *Aravindan v State of Kerala* (1983) Cr LJ 1259, (1984) Mad LJ (Cr) 387 (Ker), (1983) KLT 193 (Ker), (1983) Ker LN 198 .

89 *Pedda v State of Mysore* AIR 1965 Mys 41, p 42 .

90 *Dalip Singh & Ors v State of Punjab* AIR 1953 SC 364 .

91 *Barendra Kumar Ghose v King-Emperor* AIR 1925 PC 1, p 7 .

92 *Bhondu Das v Emperor* AIR 1929 Pat 11, p 12, 30 Cr LJ 205 .

93 *Sukha v State of Rajasthan* AIR 1956 SC 513, p 516, 518, 519, (1956) Cr LJ 923 ; *State v Govindaraju Naidu* (1970) LW (Cr) 168, (1970) Mad LJ (Cr) 710, (1970) 2 Mad LJ 459 ; *Mizazi v State of Uttar Pradesh* AIR 1959 SC 572, p 576, (1959) Cr LJ 777 ; Re *Mala Narayana*AIR 1962 AP 166, p 170, (1962) 1 Cr LJ 394 ; *Motidas v State of Bihar* AIR 1954 SC 657, p 659, 55 Cr LJ 1708 ; *Barendra Kumar Ghose v Emperor* AIR 1925 PC 1, p 7 .

94 *Sepai Bhaimiya Nathu v State* AIR 1960 Guj 13 .

95 *Karnail Singh v State of Punjab* AIR 1954 SC 204, p 207, (1954) Cr LJ 580 ; *Lachman Singh v State* AIR 1952 SC 167, 53 Cr LJ 863 ; *Kartar Singh v State of Punjab* AIR 1961 SC 1787, (1961) 2 Cr LJ 853, refer to notes under s 34 .

96 *Sukah v State of Rajasthan* AIR 1956 SC 513, p 518, (1956) Cr LJ 923 .

97 *AK Abdul v State of Mysore* (1971) Cr LJ 1477, p 1479 ; *Tahir Hussain v State* AIR 1955 Cal 513, p 514, 56 Cr LJ 1356 ; *State of Kerala v KJ Thomas* (1961) 1 Cr LJ 661, p 663, 1961 Mad LJ (Cr) 45 ; *Bishnuram Ruhidas v Mahommad Majahar* AIR 1960 Tr & Coch 43, (1960) Cr LJ 1665.

98 *Merambhai Punjabhai Khachar & Ors v State of Gujarat* (1996) Cr LJ 2465 (SC) .

99 *Queen-Empress v Peelimuthu Tevan* ILR 24 Mad 124 .

1 *Arjuna Pradhan v State of Orissa* (1975) Cut LT 186 ; *Kanja Bhuiya v Emperor* (1912) 39 ILR Cal 896 ; *State of Bihar v Nathu* AIR 1970 SC 27, (1970) Cr LJ 5 ; *Mangal Ram v State* (1961) All Cr R 161, 65 CWN 645 ; *Sivapada v State* AIR 1969 Cal 28, p 31, (1969) Cr LJ 160 ; *Kishori Prasad v State of Bihar* (1969) Pat LJR 17 (SC) ; *Ishwar Singh v State of Rajasthan* (1973) Cr LJ 811, p 817, (1972) WLN 269 ; *Pitei Bewa v State* (1971) Cut LT 1164 .

2 *Mangal Ram v State* (1961) All Cr R 161, 65 CWN 645 .

3 Re *Mukka Muthrian*AIR 1916 Mad 1062 ((2)), 16 Cr LJ 743 ; *Hanuman Singh v State* AIR 1969 All 130, p 135, (1969) Cr LJ 359 .

4 *Hanuman Singh v State* AIR 1969 All 130, (1969) Cr LJ 359 .

5 *Ibid*.

6 *Hanuman Singh v State* AIR 1969 All 130, (1969) Cr LJ 359 ; *Khilli v State of Rajasthan* (1977) Raj Cr C 336 ; *Siyaram (M/s) v State of MP* 2009 Cr LJ 2071, 2009 AIR SCW 2409, (2009) 4 Scale 162 .

7 *Gajram v State* 1978 A Cr R 318 .

8 *Bhagwat v State* (1971) Cr LJ 1222, p 1224-1225 (All) ; *State of Uttar Pradesh v Sughar Singh* AIR 1978 SC 191, p 198, (1978) Cr LJ 141 .

9 *Lal Singh Dansingh v State* AIR 1954 Punj 232, 55 Cr LJ 1518 ; *State v Ali Hafiz Mia* AIR 1955 Mani 21 ; *Kupil Deo Singh v King* AIR 1950 FC 80, 51 Cr LJ 1057 ; *Kana v State* AIR 1952 MB 205, 54 Cr LJ 6 .

10 *Hari Singh v Emperor* AIR 1926 Lah 4, p 5, 27 Cr LJ 235 **distinguishing***Bhag Singh v Emperor* AIR 1925 Lah 49, (1924) Cr LJ 625 .

11 *Umacharan Singh v Emperor* 29 ILR Cal 244, p 247 .

12 *Ram Manohar Lohia v VS Sundaram* AIR 1955 Mani 41, p 45 .

13 *Masti v R* 12 Cr LJ 274 .

14 *State of Kerala v KJ Thomas* (1961) 1 Cr LJ 661, (1961) Mad LJ (Cr) 45, (1960) Ker LT 948 .

15 *Bishnuram Rahidas v Mohammaed Majahar* AIR 1960 Tri 43 .

16 *Queen Empress v Peelimuthu* 24 ILR Mad 124, p 129 ; *Lalman v State of Madhya Pradesh* (1972) MPLJ 1021, (1972) Jab LJ 606 ; *Durga Dass Sohan Lal v State* AIR 1960 Punj 273, p 74 ; *Khaja Noorul Hossein v Fabre Tonnerre* 24 WR 26, p 27 .

17 *Durga Dass Sohan Lal v State* AIR 1960 Punj 273, p 274 .

18 *Khaja Noorul Hossein v Fabre Tonnerre* 24 WR 26, p 27 .

19 *Jahiruddin v Queen-Empress* ILR 22 Cal 306, AIR 1946 Lah 29, p 30 ; *Sidhu Gopal v Emperor* AIR 1946 Pat 84, p 90, 48 Cr LJ 63 ; *Delel Ram Sarup v Emperor* AIR 1946 Lah 222, p 225 .

20 *Arjun Raghu Patil v State* AIR 1956 Bom 183 ((185)), (1956) Cr LJ 389 ; Re *VS Reddy*(1963) 2 Cr LJ 70, p 72, (1962) ILR AP 313; *Moti v State* AIR 1967 All 473, (1967) Cr LJ 1124 ; *Sukha v State of Rajasthan* AIR 1956 SC 513, p 518, (1956) Cr LJ 923 .

21 *Kanhaiyalal Mulchand v State of Madhya Pradesh* AIR 1951 Nag 47 ((1)) .

22 *Ganapathi Sarma v Emperor* AIR 1923 Mad 369 ((2)), p 371 ; *Pedda v State of Mysore* AIR 1953 Mys 41 .

23 *Maganti Satyanarayana v State of Andhra Pradesh* (1985) 1 Andh WR 40 (AP) .

24 *Charan Singh v State* AIR 1959 All 255, p 262, (1959) Cr LJ 419 ; *Dalel Ram Sarup v Emperor* AIR 1946 Lah 222, p 225, 47 Cr LJ 730 ; Re *Peta Venkatesu*(1967) Mad LJ (Cr) 3, (1967) 1 Andh WR 5; *Shailesh Kumar v State* (1968) Cr LJ 110, p

114(All); *Sita Ram Pandey v State of Bihar* (1976) Cr LJ 800, p 807, (1975) ILR Pat 5 ; *State of Uttar Pradesh v Sughar Singh* AIR 1978 SC 191, p 198, (1978) Cr LJ 141, (1978) All LJ 466 .

25 *Moti v State* (1967) Cr LJ 1124, p 1128, AIR 1967 All 437 ; *Hanif v State* AIR 1962 All 272, (1962) 1 Cr LJ 698 ; *Shambhy Nath Singh v State of Bihar* AIR 1960 SC 725, (1960) Cr LJ 1144 (SC) ; Re *Peta Venkatesu*(1967) Mad LJ (Cr) 3, (1967) 1 Andh WR 5.

26 *Shailesh Kumar v State* (1968) Cr LJ 110, p 114 (All) ; *Mushtaq v State of Uttar Pradesh* (1994) 31 All Cr C 14, (1994) 1 Crimes 149, (1994) JIC 163 (All) ; *Shivalingappa Kallyanappa v State of Karnataka* (1994) 3 Crimes 176 (SC) .

27 *Kailash Rai v State* (1962) 10 BLJR 81 (Summary of Cases).

28 Re *Peta Venkatesu*(1967) Mad LJ (Cr) 3, (1967) 1 Andh WR 5.

29 Re *VS Reddy*(1963) 2 Cr LJ 70, p 74, (1962) ILR AP 313; *Moti v State* AIR 1967 All 437, (1967) Cr LJ 1124 ; *Emperor v Picha Kone* AIR 1938 Mad 726, 39 Cr LJ 901 .

30 *Golu v State of Rajasthan* (1983) Raj Cr Cas 403 (DB) .

31 *Emperor v Picha Kone* AIR 1938 Mad 726, 39 Cr LJ 901 .

32 *Mir Hasan Khan v State* AIR 1951 Pat 60, p 65, 52 Cr LJ 462 .

33 *Lalji v Emperor* AIR 1925 All 308, 26 Cr LJ 66 .

34 *Durga Das Sohanlal v State* AIR 1960 Punj 271, p 274, (1960) Cr LJ 446 .

35 *Emperor v Abdul Hamid* AIR 1923 Pat 1, p 3, 11, (1923) 23 Cr LJ 625 ; *Queen Empress v Husain* 15 ILR Bom 564 ; *Public Prosecutor v Vadlamudi Satyanarayana* AIR 1931 Mad 484, p 485, 32 Cr LJ 806 .

36 *Public Prosecutor v Vadlamudi Satyanarayana* AIR 1931 Mad 484, p 485, 32 Cr LJ 806 .

37 *Emperor v Abdul Hamid* AIR 1923 Pat 1, p 11, 23 Cr LJ 625 ; *Taher Husain v State* AIR 1955 Cal 513, p 514, (1955) Cr LJ 1336 (wherein it has been held that where the common object is only to cause annoyance to the police officers, which is not an offence the assembly cannot be said to create a resistance to the execution of law).

38 *Girdhara Singh v Emperor* AIR 1922 Lah 135, p 137, 23 Cr LJ 5 .

39 *Public Prosecutor v Vadlamudi Satyanarayana* AIR 1931 Mad 484, p 486, 32 Cr LJ 808 .

40 *Ram Babu v Emperor* AIR 1946 Pat 381, p 383, 47 Cr LJ 388 .

41 Blackstone cited in *Emperor v Abdul Hamid* AIR 1923 Pat 1, 5, 23 Cr LJ 625 .

42 *Emperor v Abdul Hamid* AIR 1923 Pat 1, 7 per Dass.

43 *Emperor v Abdul Hamid* AIR 1923 Pat 1 (FB), per Majority **followed in***Ramchandra Narayan Shastri v Emperor* AIR 1931 Bom 520, 524, 33 Cr LJ 64; *Ram Babu v Emperor* AIR 1946 Pat 381, 47 Cr LJ 380 .

44 *Public Prosecutor v Vadlamudi Satyanarayana* AIR 1931 Mad 484, 486, 32 Cr LJ 806.

45 *Ramendra Chandra Ray v Emperor* AIR 1931 Cal 410, p 413, 32 Cr LJ 844 .

46 *Gokul v State of Rajasthan* AIR 1972 SC 209, (1972) Cr LJ 42 .

47 *Sheo Ahir v Emperor* AIR 1938 Pat 584, 40 Cr LJ 71 ; *Balachandra Trimbak Ranadive v Emperor* AIR 1929 Bom 433, 31 Bom LR 1151 ; *Ramchandra Narayan Shastri v Emperor* AIR 1931 Bom 520, (1931) Cr C 952 ; *Ram Babu v Emperor* AIR 1946 Pat 381, 47 Cr LJ 388 ; *Ram Sahai Ram v Emperor* AIR 1929 Cal 181, p 183, 21 Cr LJ 614 .

48 *Pagla Baba v State* AIR 1957 Ori 130, p 147 ; *Gaman v Emperor* AIR 1930 Lah 348 ; *Queen-Empress v Jogendra Nath Mukherjee* 24 ILR Cal 320 ; *Haq Dud v Emperor* AIR 1926 Lah 19 and also notes under ss 97 and 99 .

49 1 Weir 64.

50 *Uma Charan v R* ILR 29 Cal 244 ; *Tikaram v State* AIR 1960 All 45, p 55, (1960) Cr LJ 1044 .

51 *Abinash v Ananda Chandra* ILR 31 Cal 424 .

52 *Rampat Ahir v Emperor* 26 Cr LJ 1608 ; *Queen-Empress v Jogendra Nath Mukherjee* 24 ILR Cal 320 .

53 *Tika Ram v State* AIR 1960 All 45, p 155, (1960) Cr LJ 1044 .

54 *Dayal v Emperor* AIR 1943 Oudh 280, p 282 **relying on***Queen Empress v Ramjiawan* (1881) All WN 158 ; *Jhamanlal v*

Emperor 10 CWN 228 ; *Aradhum Mundul v Myan Khan Takadgeer* 24 WR (Cr) 7 .

55 Re *Saravana Pillai* 11 Cr LJ 533, 8 Mad LT 222.

56 *Taher Hussain v State* AIR 1955 Cal 513, p 514, 56 Cr LJ 1336 .

57 *Legal Remembrancer v Chulhan Ahir* 13 Cr LJ 138, 16 Cut WN 263 ; *Bhuyan Abdul Isral Haque v Rangu Singh* (1974) 1 Cut WR 149 .

58 *Tanak Choudhry v King-Emperor* AIR 1923 Pat 361, 24 Cr LJ 542 ; *Maiku v State* (1953) Cr LJ 1729, 1730, AIR 1953 All 749 .

59 *Amarendra Nath Chatterjee v King* AIR 1949 Cal 237, 50 Cr LJ 263 .

60 *Elangbam Chndra Singh v Yensembam Maimu Singh*AIR 1962 Mani 23, p 24, (1962) 1 Cr LJ 618 .

61 *Harish Chandra Samadhan v State* AIR 1955 Cal 515, 56 Cr LJ 1388 ; *Elangbam Chandra Singh v Yensembam Maimu Singh*AIR 1962 Mani 23, p 24, (1962) 1 Cr LJ 618 .

62 *Amavasaya Chinna Krishna Reddy v Marri Poliah of Chilamanur* 13 Cr LJ 477 .

63 *Reajaddin Molla v Emperor* AIR 1915 Cal 236, p 237, 15 Cr LJ 725 ; *Bhagwat Jha v Emperor* AIR 1925 Pat 158, p 159, 25 Cr LJ 557 .

64 Section 40, para 3. *Ramendra Chandra Ray* 58 ILR Cal 1303; *Ramchandra Shastri* 55 ILR Bom 725, (1931) 33 Bom LR 1169.

65 *Dayal v Emperor* AIR 1943 Oudh 280, p 282 ; *Aradhum Mandal v Myan Khan Takadgeer* 24 WR (Cr) 7 .

66 *Ramendra Chandra Ray v Emperor* AIR 1931 Cal 410, p 412-13, 32 Cr LJ 844 .

67 *Bhalachandra Trimbak Ranadive v Emperor* AIR 1929 Bom 433, 31 Bom LR 1151 .

68 *Ramchandra Narayan Shastri v Emperor* AIR 1931 Bom 520 .

69 *Ram Babu v Emperor* AIR 1946 Pat 381, 49 Cr LJ 614 .

70 *Ram Sahay Ram v Emperor* AIR 1929 Cal 181, p 183, 21 Cr LJ 614 .

71 *Bhuyan Abdul Esral Huque v Rangu Singh* (1974) 1 Cut WR 149 .

72 *Bhagwat Jha v Emperor* AIR 1925 Pat 158, p 159, 49 Cr LJ 557 .

73 *Ramchandra Narayan Shastri v Emperor* AIR 1931 Bom 520, p 524, 33 Cr LJ 64 .

74 *Thakur Mahto & Ors v State of Bihar* (1971) Pat LJR 636, (1972) LJR 265, (1972) Cr LJ 835 .

75 *Mayne's Criminal Law of India*, para 306.

76 *Ibid*, para 305; *Pranbandhu Misra v State* (1952) ILR Cut 219 .

77 The Code of Criminal Procedure 1973, ss 145 - 46 .

78 *State of Mysore v Raju Shetty* AIR 1961 Mys 74 at p 81, (1961) 1 Cr LJ 403.

79 *Wang Kheimayam Kulabidhu Singh v State* (1962) 1 Cr LJ 827 (Mani) .

80 *Emperor v Ghulam Husein* 10 Cr LJ 427, p 429, 11 Bom LR 849 .

81 *R v Tirakadu* 14 ILR Mad 126, p 130, 132, 1 Weir 59 ; 1 Weir 58 ; *Jairam v R* 35 ILR Cal 103 ; *Mohar Shiekh v Queen-Empress* 21 ILR Cal 392 ; *Lachmi Singh v Emperor* AIR 1928 Pat 562, p 564, 29 Cr LJ 567 ; Re *Perumal Konan*AIR 1941 Mad 71, 42 Cr LJ 263 .

82 1 Weir 58, 7 Mad HCR App 35, 1 Weir 65.

83 *Jairam Mahto v Emperor* 35 ILR Cal 103, p 106 .

84 *Ram Sumer Ahir v Emperor* AIR 1934 Cal 273, p 276, 35 Cr LJ 1313 .

85 *Ibid*.

86 *Nga Kyaw Yaung v Emperor* 2 Cr LJ 832, p 835 .

87 *Bepin Behari Guha v Pranakul Majumdar* 5 Cr LJ 19, p 20, 11 CWN 176 .

88 *Jairam Mahton v Emperor* 35 ILR Cal 103, p 108, 7 Cr LJ 123 ; *Apparu Nayak v Queen* 6 ILR Mad 243, 1 Weir 68 ; *Emperor v Bandhu Singh* AIR 1928 Pat 124, p 127, 29 Cr LJ 99 .

89 *Pranbandhu Mishra v State* ILR 1952 Cut 219 .

90 *Kapildeo Singh v King* AIR 1950 FC 80, p 81, 51 Cr LJ 1057 ; *Deobux v State of Madhya Pradesh* (1980) 1 WN 36 .

91 *Paritosh Jana v State* AIR 1955 Cal 474, p 476, 56 Cr LJ 1246 ; *Bindeswari Prasad Singh v Emperor* AIR 1918 Pat 239, 19 Cr LJ 738 .

92 *Jaggobadhu Mukerjee v Ram Chander Bysack* 5 ILR Cal 584 (FB) ; *Fateh Singh v Emperor* AIR 1914 Cal 286, 14 Cr LJ 380 ; *Radha Krishna Chanderji v Ram Bahadur* AIR 1917 PC 197 ((2)), p 201 ; *Babu Ram Singh v Emperor* 40 Cr LJ 618 ; *Karu Mahto v Emperor* AIR 1932 Pat 244, 33 Cr LJ 862 .

1 *Laxmanrao Narainrao Ajnikar v Emperor* AIR 1934 Nag 172 at p 175, 35 Cr LJ 1213.

2 *Gita Prasad Singh v King-Emperor* AIR 1925 Pat 17, p 20, 25 Cr LJ 919 .

3 *Poresh Nath Sircar v Emperor* 33 ILR Cal 295, p 303 .

4 *Bepin Behari Guha v Pranakul Majumdar* 5 Cr LJ 19, p 20, 11 CWN 176 .

5 *Apparn Nayak v Queen* 6 ILR Mad 243, 1 Weir 68 .

6 *Emperor v Bandhu Singh* AIR 1928 Pat 124, p 127, 29 Cr LJ 99 .

7 *Bindeshwari Prasad Singh v Emperor* AIR 1918 Pat 239, 19 Cr LJ 733 .

8 *Pranbandhu Misra v State* ILR 1952 Cut 219 ; *Fauzdar Rai v Emperor* AIR 1918 Pat 193, p 194, 19 Cr LJ 241 ; *Pachkauri v Queen-Empress* 24 ILR Cal 487 ; *Chandulla Sheikh v Emperor* AIR 1914 Cal 623, 15 Cr LJ 209 ; *Mangal Ram v State* 65 CWN 645, (1961) All Cr R 161 ; *Subedar Singh v Emperor* AIR 1933 Pat 434, 34 Cr LJ 1014 ; *State v Ali Hafiz* AIR 1955 Mani 21 .

9 *Parmeshar Din v King-Emperor* AIR 1923 Oudh 167, p 168, 25 Cr LJ 579 ; Re *Mooka Nadar*AIR 1943 Mad 590 ; *Ambika Singh v State* AIR 1961 All 38, p 42-43, (1961) 1 Cr LJ 15 ; *Thakur Mahton v State of Bihar* 1972 Cr LJ 835, (1972) BLJR 265 ; *Jagua Kandi v State* (1970) 36 Cut LT 620 ; *Pitei Bewa v State* (1971) 37 Cut LT 1164 ; *Paras Ram v State* AIR 1949 All 274, 50 Cr LJ 445 ; *Munshi Ram v Delhi Admn* AIR 1968 SC 702, (1968) Cr LJ 806 ; *Puran Singh v State of Punjab* AIR 1975 SC 1674, (1975) Cr LJ 1479, p 1484 .

10 *Sarabdawan Singh v Emperor* AIR 1914 Oudh 222 at p 223, 15 Cr LJ 232 ; *Emperor v Mahommad Idris* AIR 1933 Oudh 279, 34 Cr LJ 748 ; *Kanhaiya v Kashi Nath* (1979) Cr LJ 409 at p 411 (All), (1979) All Cr R 54, (1979) All WC 75.

11 *Kanhaiya v Kashi Nath* (1979) Cr LJ 409, p 411 (All), (1979) All Cr R 54, (1979) All WC 75 .

12 *Dibakar Das v Saktidhar* AIR 1927 Cal 520, 28 Cr LJ 404 .

13 *Ram Sumer Ahir v Emperor* AIR 1934 Cal 273 .

14 *Fouzdar Rai v Emperor* AIR 1918 Pat 193, p 194, 19 Cr LJ 241 ; *Pachkauri v Queen-Empress* 24 ILR Cal 487 ; *Chandulla Sheikh v Emperor* AIR 1914 Cal 623(2), 15 Cr LJ 209 ; *Subedar Singh v Emperor* AIR 1933 Pat 434, 34 Cr LJ 1014 ; *State v Ali Hafiz Mia* AIR 1955 Mani 21 .

15 *Re Nadimpalli Bangaraju*AIR 1942 Mad 58, p 61 .

16 *State of Bihar v Nathu Pandey* AIR 1970 SC 27, (1970) Cr LJ 5 .

17 *Baijnath v King Emperor* AIR 1925 Oudh 425, p 427, 26 Cr LJ 513 .

18 *Jugna Kandi v State* (1970) 36 Cut LT 620 ; *Picharu Bhati v State* (1964) 1 Cr LJ 117, p 120, (1963) Cut LT 383 ; *Khetu Mohanta v State* 1969 Cut LT 305 ; *Chand Singh v State* 1964 Punj LR 706 ; *Dilijan Chaudhary v State of Bihar* AIR 1958 Pat 492, p 494 ; Re *Nadimpalli Bangaraju*AIR 1942 Mad 58 ; *Parmeshar Din v King Emperor* AIR 1923 Oudh 167 ; *Pachkauri v R* 24 ILR Cal 686 ; *Birjoo Singh v Khub Lall* 19 WR (Cr) 66 ; Re *Shunkar Singh* 23 WR (Cr) 25; *Ahmad Kasam v R* 3 Cr LJ 443 ; *Silajit v R* 36 ILR Cal 865 ; *Sarabdawan Singh v R* 15 Cr LJ 232 ; *Jageshar Din v Emperor* AIR 1917 All 119, 18 Cr LJ 663 ; *Fateh Singh v Emperor* AIR 1914 Cal 286 ; *Suba Ahir v Emperor* AIR 1927 Pat 27, 27 Cr LJ 1078 .

19 *Kunja v R* 13 Cr LJ 48, 39 ILR Cal 896 ; *Nizamudin v R* 40 ILR Cal 163 ; *State of Bihar v Nathu* AIR 1970 SC 27, (1970) Cr LJ 5 ; *Baljit Singh v State of Uttar Pradesh* AIR 1976 SC 2273, p 2282 ; *Ishwar Singh v State of Rajasthan* (1973) Cr LJ 811, (1972) WLN 269 ; *Chand Singh v State* AIR 1965 Punj 90, (1965) 1 Cr LJ 209 ; *Bindeshwari Singh v State* (1958) Cr LJ 59,pp 76-77, AIR 1958 Pat 12 ; *Hanif v State* AIR 1962 All 272, (1962) 1 Cr LJ 698 ; *Mangaria v State* (1963) 1 Cr LJ 712, (1962) Raj LW 657 ; *Pehalwan v State of Rajasthan* (1977) Raj Cr C 173, p 177 .

20 *Ram Eqbal Rai v Jaldhari Pandey* AIR 1972 SC 949, [1972] 1 SCWR 571 .

21 *Emperor v Bandhu Singh* AIR 1928 Pat 124, p 127 .

22 Re *Mooka Nadar*AIR 1943 Mad 590 .

23 *Ambika Singh v State* AIR 1961 All 38, p 42-43, (1961) 1 Cr LJ 15 ; *Paras Ram v Rex* AIR 1949 All 274, 50 Cr LJ 445 and the case-law discussed therein.

24 *Nawab Raza v Emperor* AIR 1934 Oudh 108, 33 Cr LJ 740 ; *King Emperor v Ayya Annaswamy Aiyar* 25 ILR Mad 624, 1 Weir 65 ; *Ram Prasad Singh v King Emperor* AIR 1923 Pat 50, 24 Cr LJ 65 .

25 *Pranbandhu Misra v State* (1952) ILR Cut 219 .

26 *Lila v King-Emperor* AIR 1922 Oudh 228, 25 Cr LJ 538 .

27 *Farquhar v Newbury Rural District Council* (1908) 2 Ch 596, **confirmed in***Farquhar v Newbury Rural District Council* (1909) 1 Ch App 12 .

28 *Safu Mia v State* AIR 1954 Assam 57, 55 Cr LJ 358 .

29 *Mannadu Mudali v Mallayya Goundan* 32 ILR Mad 527 .

30 Re *Abdul Sattar*AIR 1961 Mys 57, p 61, (1961) 1 Cr LJ 55 ; *Budan Shah v Govt of Mysore* 55 Mys HCR 317 ; *Martin & Co v Syed Faiyaz Husain* AIR 1944 PC 33 (reversing *Faiyaz Hussain & Ors v Municipal Board, Amrohi & Ors* AIR 1939 All 280 ; *Manzur Hassan v Mahommad Zaman* AIR 1925 PC 36 ; *Parthasarathi Ayyangar v Chinna Krishana Ayyangar* 5 ILR Mad 304 ; *Sundram Chetti v Queen* 6 ILR Mad 203 (FB) ; *Sadagopachariar v A Rama Rao* 26 ILR Mad 376 ; *Vijja Raghavachariar v King-Emperor* 26 ILR Mad 554 ; *Dilli v King-Emperor* AIR 1925 Oudh 656, 26 Cr LJ 1325 .

31 Re *Abdul Sattar*AIR 1961 Mys 57, p 61 .

32 Re *Mruthyuzar Khan Sab* 9 Cr LJ 321.

33 *Vijay Singh Mankotia v State of Himachal Pradesh* (2002) Cr LJ 3165 (HP) .

34 *Lila v King-Emperor* AIR 1922 Oudh 228, p 229 .

35 *Bachu Singh v Emperor* AIR 1939 Pat 314, p 315, 40 Cr LJ 337 .

36 *Deputy Legal Remembrancer v Matukdhari Singh* AIR 1917 Cal 687, p 691, 17 Cr LJ 9 ; *Bachu Singh v Emperor* AIR 1939 Pat 314, p 315, 40 Cr LJ 337 .

37 *Bagh Singh v King Emperor* AIR 1925 Lah 49, p 51, 25 Cr LJ 625 ; *Deputy Legal Remembrance v Matukdhari Singh* AIR 1917 Cal 687, p 691, 17 Cr LJ 9 .

38 *Veerabadra Pillai v King Emperor* AIR 1927 Mad 986, 28 Cr LJ 945 ; *Pachkauri v Queen Empress* 24 ILR Cal 886 ; *Silajit Mahto v Emperor* 36 ILR Cal 865 ; *Ram Nandan Prasad Singh v Emperor* 14 Cr LJ 463 ; *Diljan Choudhary v State of Bihar* AIR 1958 Pat 492, p 494 .

39 *Ramnandan Prasad Singh v Emperor* 14 Cr LJ 463, p 464 .

40 *Hari Singh v Emperor* AIR 1926 Lah 4 at p 5, 27 Cr LJ 233 .

41 *Diljan Choudhary v State of Bihar* AIR 1958 Pat 492, p 494 .

42 *Emperor v Ghulam Hoosain Ratonsey Nanji* 10 Cr LJ 427, p 429 .

43 *R v Tirakadu* 14 ILR Mad 126, p 130, 132, 1 Weir 59 ; 5 Mad HC R App 6; *Jairam v R* 35 ILR Cal 103, p 109 ; *Runni v Amara* 10 Cr LJ 116, 5 Mad LT 85 ; *Lachmi Singh v Emperor* AIR 1928 Pat 562, p 564, 24 Cr LJ 567 ; Re *Perumal Konan*AIR 1941 Mad 71(2), 42 Cr LJ 263 .

44 *Ram Nandan Prasad Singh v Emperor* 14 Cr LJ 463, p 464 ; *Bagh Singh v King-Emperor* AIR 1925 Lah 49, p 51 .

45 *Emperor v Mehdi Shahwali* AIR 1940 Lah 523, p 525-526 per Young J ; the case-law referred to therein.

46 *Bajinath v King-Emperor* AIR 1925 Oudh 425, p 427, 26 Cr LJ 513 .

47 *State of Mysore v Raju Shetty* AIR 1961 Mys 74, p 81, (1961) 1 Cr LJ 403 .

48 *Diljan Choudhary v State of Bihar* AIR 1958 Pat 492 ; Re *Nadimpalli Bangaruraju*AIR 1942 Mad 580 ; *Parmeshar Din v King-Emperor* AIR 1923 Oudh 167 .

49 *Pachkauri v R* 24 ILR Cal 686 ; *Birjoo Singh v Khub Lall* 19 WR (Cr) 66 ; Re *Shunkar Singh* 23 WR (Cr) 25; *Ahmad Kasam*

v R 3 Cr LJ 443, 16 Ker LR 46 ; *Silajit v R* 36 ILR Cal 865 ; *Sarabdawan Singh v R* 15 Cr LJ 232 ; *Jageshar Din v Emperor* AIR 1917 All 119(2), 18 Cr LJ 663 ; *Fateh Singh v Emperor* AIR 1914 Cal 286 ; *Suba Ahir v Emperor* AIR 1927 Pat 27, 27 Cr LJ 1078 .

50 *Hira v Emperor* AIR 1923 All 194, 24 Cr LJ 189, s 97 and notes thereto.

51 *Pranbandhu Misra v State* (1952) ILR Cut 219 .

52 *State of Bihar v Nathu Pandey & Ors* AIR 1970 SC 27 .

53 *Kunja Bhuly v R* 13 Cr LJ 48, 39 ILR Cal 896 ; *Nazamudin v R* 40 ILR Cal 163 .

54 *Sarabdawan Singh v Emperor* AIR 1914 Oudh 222 at p 223.

55 *Veerabadra Pillai v King-Emperor* AIR 1927 Mad 986 at p 987.

56 *Pranbandhu Misra v State* (1952) ILR Cut 219 .

57 *Moher Seikh v Queen Empress* 21 ILR Cal 392 ; *Gajadhar Singh v King-Emperor* AIR 1923 Pat 299 .

58 *Nga Kyaw Young v Emperor* 2 Cr LJ 832, p 835 .

59 *Emperor v Ram Coomar Singh* 3 ILR Cal 574, p 586 .

60 *Ram Prasad v Emperor* AIR 1917 All 30, p 31, 18 Cr LJ 543 .

61 *Ghyasuddin Ahmed v Emperor* AIR 1932 Pat 215, p 216, **following***Gunouri Lal Das v Queen-Empress* 16 ILR Cal 206 .

62 *Emperor v Ghulam Hoosain* 10 Cr LJ 427, p 429 .

63 *Fatnaya Lal Khan v Emperor* AIR 1942 Lah 89, p 92 ; *Lachmi Singh v Emperor* AIR 1928 Pat 562 .

64 *Reajuddin Molla v Emperor* 15 Cr LJ 725 .

65 *Mahommad Hasnain v Rex* AIR 1949 All 351 at p 352, 50 Cr LJ 571.

66 *Addaita Bhuia v Kali Das De* 6 Cr LJ 393, p 394, 12 CWN 96 .

67 *Bajinath v King-Emperor* AIR 1925 Oudh 425, p 426 .

68 *Idu Mandal v R* 6 CLJ 753 ; *Bajrangi Gope v R* 38 ILR Cal 304 .

69 *Shyama Charan Majumdar v R* 13 Cr LJ 590 (Cal) .

70 Re *Loknath King* 18 WR 2; *State of Uttar Pradesh v Mahendra Singh* (1974) SCC (Cr) 922, 1974 Cr LR (SC) 667 ; *K Neelakantha v State of Andhra Pradesh* AIR 1978 SC 1021, 1025, 1978 Cr LJ 780 ; *Chim Misani v State* 1976 Cut LR 633 (Cr) ; *Khilli v State of Rajasthan* 1977 Raj Cr C 336, 339; *Kutubuddin Hasansab v State of Karnataka* (1976) 2 Kant LJ 421 ; *Siyaram (M/s) v State of MP* 2009 Cr LJ 2071, p 2074, 2009 AIR SCW 2409, (2009) 4 Scale 162 .

71 1 Weir 66; *Queen v Khemee Singh* 1 WR 19 .

72 *Sheikh Mahommad v Emperor* 43 Cr LJ 871, p 874-875 .

73 *Dayal v Emperor* AIR 1943 Oudh 280, p 281 .

74 *Queen Empress v Prag Dutt* ILR 20 All 459 .

75 *Mahommad Ibrahim v Emperor* AIR 1929 Nag 43, p 47, 30 Cr LJ 38 .

76 *Beatty v Gillbands* (1832) 9 QBD 308 ; Re *Mukka Muthrian*AIR 1916 Mad 1062 ((2)), p 1063, 16 Cr LJ 743 .

77 *Kunja Bhuniya v Emperor* 39 ILR Cal 896, 15 IC 481 .

78 *Kana v State* AIR 1952 MB 205, p 206, 54 Cr LJ 6 .

79 *R v Cunningham Graham* 16 Cox CC 420 ; *Ganouri Lal v R* 16 ILR Cal 206, 1 Hawk PC 513, p 516, SD art 75, 1 Russ Cr 406.

80 *R v Clarkson* 17 Cox CC 783, 66 LT 297 ; *Radha Krishanan v R* 13 Cr LJ 476 .

81 *Girdhara Singh v Emperor* AIR 1922 Lah 135, p 136 .

82 *Moti Das v State of Bihar* AIR 1954 SC 657, p 659 ; *Barendra Kumar Ghose v Emperor* AIR 1925 PC 1, 7; *Sukha v State of*

Rajasthan AIR 1956 SC 513, p 516 ; Re *Basareddy Venkata Reddi*AIR 1956 AP 53 ; *Mohanlal v State* AIR 1961 Raj 24 .

83 *Durga Das Sohanlal v State* AIR 1960 Punj 271, p 275 ; *Emperor v Suba Singh* AIR 1916 Pat 176 ((2)) ; *Siyaram (M/s) v State of MP* 2009 Cr LJ 2071 (SC), (2009) 43 OCR 214, 2009 (4) Scale 162, (2009) 4 SCC 792 .

84 *Lalji v State of Uttar Pradesh* (1973) SCC (Cr) 921, (1973) Cr AR 368, (1973) Cr LJ 1769, AIR 1973 SC 2505 .

85 *Busi Koteswara Rao v State of AP* AIR 2013 SC 515, 2013 Cr LJ 418, p 421, (2012) 12 SCC 711 ; *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, 1965 (1) Cr LJ 226 ; **seehowever**, *State of UP v Dan Singh* 1997 (3) SCC 747AIR 1997 SC 1654 (Safe to convict when persons responsible are identified by at least four witnesses).

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 142.

being member of unlawful assembly.--

Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

Comments

1. Scope

The last section defined an 'unlawful assembly', and this section declares who may be said to be a member of an unlawful assembly, for it is only such a person who can be punished under s 143, IPC . For a person to be a member of an unlawful assembly, he must have been aware of the facts which rendered the assembly an unlawful one; and being so aware, he must have either intentionally joined that assembly or, if he joined it before being so aware, he must have continued in it after being so aware.[86] In the words of the commissioner's second report:

> A person is not a member of an unlawful assembly, unless he is aware of the facts making the assembly unlawful, and the intention of the party joining the assembly is to be inferred from his cognisance of the facts characterising the assembly as unlawful, and the common purpose is a matter of inference from the overt acts of the members of the assembly, their language and gestures as proved in evidence.[87]

2. Whether Mere Presence Sufficient

Mere presence of a person in an assembly does not make him a member of an unlawful assembly, unless it is shown that he had done or omitted to do something which would make him a member of such an assembly, or unless the case falls under this section.[88] If there are two explanations for the presence of a particular person on a particular occasion, one of which is lawful and the other unlawful,

it will not be possible to assume an unlawful intention against him.

Where passengers driving in a motor bus decided to engage in some such unlawful activity as would constitute them to be an unlawful assembly there is no reason why the paid driver should be presumed to be a member of the unlawful assembly; his presence there is perfectly well explained by his capacity as the driver. If it is desired to clothe him with further responsibility, the prosecution must prove not merely that he was present there, but that he was present there with a positive intention and object which went beyond his intention to perform his duty in driving the motor bus.[89]

996In a riot case all the ingredients required for an unlawful assembly and rioting are to be strictly proved. The fact that there were a thousand rioters, and only 122 accused before the sessions judge, it will not take away from the prosecution even an iota of the responsibility of proving them guilty. It may be the misfortune of the prosecution. But the misfortune of the prosecution should never be allowed to become the misfortune of the accused.[90]

3. 'Being Aware of Facts which Render any Assembly into Unlawful Assembly'

As is evident from s 141, IPC, the facts which render an assembly unlawful are that the assembly consists of five or more persons and that their common object is to do any one of the acts specified in the five clauses of that section. A person cannot be said to be a member of an unlawful assembly unless he is aware of these facts. Whether he is so aware or not is a question of fact, a matter of inference from proved facts.[91] Spectators, wayfarers, *etc.*, attracted to the scene of rioting by curiosity, as generally happens in the country side when a riot or affray is going on, should not, by reason of their mere presence at the scene of rioting and with the rioters, be held to be members of the unlawful assembly of rioters. But, if they are proved to have marched with the rioters for a long distance, when the rioters were shouting tell-tale slogans and pelting stones, it will be for them to prove their innocence under s 106 of the Evidence Act .[92] No one who intentionally joins or continues in an unlawful assembly can be allowed to say that he was merely a harmless spectator. He must prove that he was there owing to no fault of his own and he could not get out of the crowd.[93]

4. Presumption in a Case of Riot

When a person is found to be amongst a mob of rioters, the law presumes that he shared their common intention and object. If he does not share their common intention and object, the onus is upon him to prove his innocence.[94] The proof of awareness of facts, which render an assembly an unlawful assembly, must normally relate to circumstances or acts, giving rise to such inference, existing or done prior to the execution of such common object.[95]

5. 'Intentionally Joins'

Any person who intentionally joins or continues in an unlawful assembly doing an unlawful act is a member of that unlawful assembly. He cannot help being aware that the action of those men was unlawful. A person, who has innocently got into a crowd and is unable, owing to pressure of numbers to escape from it, is not a member of the997 unlawful assembly; but he would have to make out his case on that point.[1] Although individuals may, in the first instance, have associated themselves with a mob from motives perfectly innocent, nevertheless, if the mob is or becomes an unlawful assembly and the individuals in question take part in its proceedings, they will be liable as members of an unlawful assembly.[2] But where persons, hearing a cry for help, run to rescue a person, they cannot be said to be members of an unlawful assembly.[3] What the section requires is that a person should intentionally join, or continue in, an unlawful assembly.[4]

Where the common object of an unlawful assembly was to seize and carry away a woman, and the accused was the driver of the carriage in which she was carried away, it was held that he was a member of the unlawful assembly as he was present and must have seen that the object of the assembly was to carry off the woman, and when he drove her off against her wish, he joined the

unlawful assembly and assisted in carrying the unlawful object for which it was assembled.[5]

Where in a trial of 34 persons under ss 143 and 379, IPC on allegations that they formed an unlawful assembly with a common object of committing theft and committed theft by cutting and removing paddy crops from the lands, it was found that the possession of land was in dispute and that some of the accused, being only labourers, merely obeyed the orders of their employer and there was no evidence to show that they were aware of any previous quarrel and of the person who grew the crops, nor was there evidence to show that they had gone to the fields with dishonest intention, it was held that they were entitled to the benefit of doubt.[6]

A person cannot be said to be a member of an unlawful assembly when he had no common object with the members of the assembly and his presence in the assembly was due to duress.[7] When two or more mobs start from different localities, operate independently and never mingle together at any time or place, the mere fact that they have a common intention will not make them one assembly. The question whether two groups of men do or do not form one 'assembly' is a question of fact in each case.[8]

6. 'Continues in it'

It is sufficient for the offence of riot to be proved against an individual that he should remain in an unlawful assembly even when he is aware that the assembly is unlawful. The word 'continues' merely means physical presence as a member of the unlawful assembly, that is, to be physically present in the crowd.[9] The mere fact that a person applied to be made a member of a committee nine months before it was declared unlawful cannot, be said to be proof of his membership after the association had been998 declared unlawful. Some overt act as a member subsequent to such declaration must be proved.[10]

Continued whether to be Equated with Physical Presence

But the word 'continued' is not, in all circumstances, to be equated with the physical presence although, unless the contrary is shown either by evidence or by circumstances, physical presence would lead to the inference that it was accompanied by the mental element necessary for the continuance.[11] The word 'continued' in this section, carries the implication that the person concerned remained a part of the assembly, physical presence near about the place, where an unlawful assembly has been formed, cannot, by itself and in all situations, prove remaining a part of the assembly or, to use the words of the section continuing in the assembly.[12]

Where, on the arrival of the procession, people from inside houses started throwing stones and soda water bottles, etc., and the innocent people, from the said houses, could not go because of the apprehension of the police (which immediately cordoned off the locality) and of miscreants, it was held that there was no intention on the part of the innocent persons, when the stones, bricks, etc., were thrown on the procession, to continue in the houses, and they could not be convicted under s 142 .[13]

Withdrawal from Unlawful Assembly

A member of an unlawful assembly may withdraw from it. Such withdrawal can be either actual and voluntary or involuntary. It would be voluntary if he removes himself from the assembly and goes away; clearly indicating that he is averse to taking any further part in the incident. If a member of an unlawful assembly is not able to walk away like this and has perforce to remain on the spot either because he is so injured that he cannot remove himself or because he is held up by others, he may still continue to be a member of the unlawful assembly if he shares the common object of the assembly subsequent to his being made helpless. He can, however, in such a position, disavow his share in the common object by expressions, bearing no doubt that he did not share the object any more. If he is also unable to express himself in this respect, it would be fair to presume that he was incapable of both taking part and of sharing the objects of the unlawful assembly, and that he had

withdrawn from the unlawful assembly.[14]

Presumption of Continuance as Members--Burden of Proof of Innocence

It is not right to presume, from the fact that the man is a member of an association when it is lawful, that he continues to be a member after it is declared unlawful. This is not a matter of presumption; there must be evidence of continuing membership.[15] It may well be that a perfectly lawful assembly of citizens may become later a riotous mob, and it may be that in the mob there will be a number of innocent people who do999 not share the common objects of rioters. When a person, is, however, found to be amongst a mob of rioters, the law presumes that he shares their common object and intention. If he does not share that common object and intention, the onus is upon him to prove his innocence. What the common object and intention of a mob is, can only be inferred from its actions. Where a mob murdered certain men, the only inference which can be drawn is that the common object of the mob was murder. If any of the accused did not share that common object, it is for them to prove that fact.[16]

The point was further considered in *Bindeshwari Singh v State* .[17] In that case Sinha J, referring to the observations made in *Ramhit's* case cited above, observed:

> In my opinion, the proposition is very widely stated. As section 149 stands and this was a case under sections 302 / 149, Indian Penal Code, the ingredients of the offence have to be made out by the prosecution and not by the accused. It has to be proved by the prosecution that at the time of the committing of the offence the accused was a member of the assembly. If it appears that the important expression occurring in section 149 'at the time of the committing of that offence' was missed by their Lordships, and no effect, therefore, was given to that expression in the observations just quoted. It is true that if once the prosecution had led evidence that the accused was present at the time of the commission of the offence as a member of the mob, it would be for the accused, if he so wishes, to give evidence to rebut the prosecution case. But unless there is some evidence to show that the accused was a member of the unlawful assembly at the time of the commission of the offence no burden lies upon the defence to prove his innocence.

But Ahmed J, dissented from this view and relying on the two Allahabad decisions cited above, observed:

> It is true that a man may retire from an unlawful assembly in the course of its transaction before a particular offence is committed, but once it is found that he was a member of the unlawful assembly at the time when the transaction began, the reasonable inference should be that he continued to be there as such till the transaction was completed, unless there is some evidence or circumstances present on the record to show otherwise.
>
> This rule, however, is not without exception because there may be cases where difference in time and space between the presence of a member and the commission of a crime is so that that factors considered in the light of other circumstances may throw doubt as to his continuing to be the member till the time when the offence alleged was committed. In those cases no doubt, as also in a case where an accused specifically pleads that he retired from the assembly after a point of time in the midst of the transaction, the question of his guilt no doubt will have to be weighed on a different footing.
>
> But normally, as stated above, and more particularly when in the course of a single transaction many acts are committed by different members of the unlawful assembly in quick succession within a short time, the rule of

inference should be in favour of his continuing to be the member of that assembly till the close of that transaction. For, if the interval between the different acts is short, the probabilities are more against the inference that any of these members retired in the midst of the transaction and did not continue to be present till the time the transaction lasted. Otherwise, I think the very application of constructive liability, as contemplated by section 149 , IPC, will fail.1000

86 *Hanuman Singh v State* AIR 1969 All 130, p 137, (1969) Cr LJ 359 .

87 *Khajah Noorul Hossein v C Fabre-Tonnerre* 24 WR 26, p 27 .

88 *Baladin v State of Uttar Pradesh* AIR 1956 SC 181, p 189, (1956) Cr LJ 345 ; *Augustinju Anthrayose v State* AIR 1954 Tr & Coch 253, p 254, 55 Cr LJ 684; *State v Bhairu Sattu Berad* AIR 1956 Bom 609, (1956) Cr LJ 1066 ; *Masathi v State of Uttar Pradesh* AIR 1965 SC 202, (1965) 1 Cr LJ 226 ; *Harun Tirkey v State* (1968) Cr LJ 1251, p 1254, 34 Cut LT 215 .

89 *Kammoon v Emperor* AIR 1942 All 225, p 227, 43 Cr LJ 654 .

90 Re *Arulabandu*AIR 1952 Mad 267, p 270, 53 Cr LJ 583 ; *Mela Ram v Emperor* AIR 1931 Lah 361, 32 Cr LJ 1233 ; *Bindeshwari Singh v State* AIR 1958 Pat 12, (1958) Cr LJ 72 .

91 Re *Loganathaiyar* 11 Cr LJ 30, p 36; *Hanuman Singh v State* AIR 1969 All 130, p 137, (1969) Cr LJ 359 ; *Anataryami v State* AIR 1968 Ori 160, p 162, (1968) Cr LJ 1186 .

92 Re *Arulanadu*AIR 1952 Mad 267, p 270, 53 Cr LJ 583 .

93 *Gendo Uraon v Emperor* AIR 1928 Pat 115, p 116, 29 Cr LJ 79 .

94 *Ramhit v Emperor* AIR 1934 All 776, p 781 ; *Abdulla v Emperor* AIR 1924 All 230, p 250, 27 Cr LJ 193 ; *Bindeshwari Singh v State* AIR 1958 Pat 12, (1958) Cr LJ 1956 ; *Emperor v Dharmanand Koshombi* AIR 1931 Bom 203, p 204, 32 Cr LJ 725 .

95 *Antaryami v State* (1968) Cr LJ 1186, p 1187-1188, AIR 1968 Ori 160 .

1 *Gendo Uraon v Emperor* AIR 1928 Pat 115, p 116, 29 Cr LJ 79 .

2 Re *Periaprien* 1 Weir 66.

3 *Ambika Singh v Emperor* AIR 1922 Pat 498, 25 Cr LJ 431 .

4 *Hanuman Singh v State* AIR 1969 All 130, (1969) Cr LJ 359 ; *Mohd Shariff v State* AIR 1969 Bom 383, p 391, (1969) Cr LJ 1351 .

5 *Imperator v Haji Baka* 10 Cr LJ 208, p 209 ; *Emperor v Sheo Dayal* AIR 1933 All 535, p 538, 35 Cr LJ 360 .

6 *Hari Panda v State* AIR 1956 Ori 212, p 214, (1956) Cr LJ 1421 .

7 *Bachchan Lal v State* AIR 1957 All 184, p 188, (1957) Cr LJ 344 .

8 *Wajid Ali v King Emperor* AIR 1927 Oudh 151, p 153, 28 Cr LJ 337 .

9 *Emperor v Sheo Dayal* AIR 1938 All 535, p 538, 35 Cr LJ 360 ; *Iqbal Ahmad v Emperor* AIR 1943 All 49, p 54, 44 Cr LJ 280 ; *Hanuman Singh v State* AIR 1969 All 130, (1969) Cr LJ 359 .

10 *Mela Ram v Emperor* AIR 1931 Lah 361, 32 Cr LJ 1233 .

11 *Hanuman Singh v State* AIR 1969 All 130, p 138, (1969) Cr LJ 359 .

12 *Ibid*.

13 *Mohd Shariff v State* AIR 1969 Bom 383, p 391, (1969) Cr LJ 365 .

14 *Rex v Sadla* AIR 1950 All 418, p 420, 51 Cr LJ 1133 .

15 *Emperor v Dharmanand Kosambi* AIR 1931 Bom 203, p 204, 32 Cr LJ 725 .

16 *Ramhit v Emperor* AIR 1934 All 776, p 781 ; *Abdulla v Emperor* AIR 1924 All 233, 27 Cr LJ 193 .

17 *Bindeshwari Singh v State* AIR 1958 Pat 12 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 143.

Punishment.--

Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Comments

1. Scope

The mere fact of being a member of an unlawful assembly, as defined in ss 141 and 142, IPC, is punishable under this section. If there is an assemblage of five or more men with the common object of resisting by force or show of force, the execution of processes of law, every one of them is guilty of being a member of an unlawful assembly, whether or not resistance is offered. If force is used by any member of the assembly each one of them becomes liable for rioting under s 147, IPC . But if actual resistance is offered, a separate offence of resistance of the process of law punishable under s 186, IPC is committed.[18] Where the common object of an assembly of five or more persons is to commit an offence, the purpose for which they are united constitutes in itself an offence distinct from the criminal offence which the persons assembled agree and intend to commit.[19]

In a Calcutta case it has been held:

> If the evidence is insufficient to prove the substantive charge of criminal trespass, it will be extremely difficult to hold that the petitioners were members of an unlawful assembly, the only common object of which was to commit the offence of criminal trespass. As an abstract proposition of law it might not be inconceivable that some persons might form themselves into an unlawful assembly for the purpose of committing an offence of criminal trespass although no actual offence of trespass was committed by them that would be a position very much divorced from the realities of the situation.[20]

The Madras High Court has, however taken a different view and it has been held that it is difficult to understand how the position can be said to be 'very much divorced from the realities of the situation'. It is a matter of common experience that unlawful assemblies often fail to achieve their common object. The law does not require that for a person to be a member of an unlawful assembly, the common object of the assembly should have been achieved. If the common object of an unlawful assembly is to commit an offence, but the offence has not been committed, the difficulty may be in finding evidence of the common object. But there have been cases where the common object was proved by circumstantial evidence, and people were convicted under this section. Thus, where the

accused were found in a temple at midnight with house-breaking implements, *aruvals* and guns in their possession, it was held that1001 they were guilty of an offence under this section as they must have been there with a common object of an unlawful kind.[21]

Spectators cannot be Convicted under this Section

A distinction has, however, to be made between 'being a member of an unlawful assembly' and 'being present at the place where members of an unlawful assembly have gathered, as mere spectators cannot be convicted for offences under s 143, IPC .[22] The Supreme Court has also held that mere presence of a person at the place where members of an unlawful assembly have gathered for carrying out their illegal common object, does not incriminate him.[23]

2. Sections 143, 147 and 148 Considered Together

Section 143 of the IPC*simpliciter* refers to punishing a person who is a member of an unlawful assembly. Section 147 , IPC refers to punishment for rioting when force or violence is used by an unlawful assembly or by any member of it. Section 148 refers to rioting armed with deadly weapons. Consequently for punishment under any or all these sections an unlawful assembly is *sine qua non*. If there is only one transaction, regarding which the punishment is meted out and if that punishment is under s 147 or to a particular accused under s 148, IPC, it is implicit in the finding that there was an unlawful assembly. If the offender is found guilty of the offence under s 147 or under s 148 the offence under s 143, IPC is automatically proved.[24]

3. Procedure

The offence under this section is cognizable, bailable, but not compoundable and is triable by any magistrate.[25] It is a curious anomaly that where the common object of an unlawful assembly is to commit the offence of criminal trespass, that offence itself is compoundable, but an offence under this section is not. This is presumably because offences under this section are regarded by the legislature as concerning persons other than those immediately involved; these offences are offences which directly affect the public peace and the conclusion of criminal cases relating to them is, therefore, something more than a matter for agreement between individuals.[26]

4. Complaint of Public Servant, if Necessary

Section 195(1)(a) of the CrPC[27] prevents a court from taking cognisance of an offence punishable under ss 172 - 188 of the IPC, except on the complaint in writing of the public servant concerned, or some other public servant to whom he is administratively subordinate. In some cases it has been held that where the real offence alleged to have been committed is one under s 186, IPC, the accused could1002 not be tried for a minor general offence like the one under s 143, IPC, without a proper complaint under s 195, CrPC .[28]

5. Requirement of Charge

It is not obligatory to charge a person under s 143 or s 144, IPC when charging him with s 147 or s 148, IPC . Similarly, it is not obligatory to charge a person under s 145 or s 147, IPC when charging him for an offence with the aid of s 149, IPC . These sections are implied. The ingredients of s 143 are implied in s 147 and the ingredients of s 147 are implied when a charge under s 149 is included. Offences under ss 143 and 147, IPC are always present. When a charge is laid for an offence with the aid of s 149, but the other two charges need not be framed separately unless it is sought to secure a conviction under them. Section 143 is not used when the charge is under s 147 or s 148 and s 147 is not used when the charge is under s 149 . Section 147 may be dispensed with when the charge is under s 149 read with an offence under the IPC .[29] In every charge of rioting and unlawful assembly, the common object of the assembly must be stated.[30] The magistrate should mention one of the objects enumerated in s 141 as the common object.[31] But where there is evidence on record to show

what the common object was and the accused have not been prejudiced, the conviction will not be bad for failure to state the common object.[32] Failure to define expressly and accurately the common object is an error which may be cured by ss 215 and 464 of the CrPC .[33] The Punjab Chief Court in *Dhian Singh v Emperor* ,[34] dissented from *Kuduratullah v Emperor* ,[35] and declined to hold that the specific common object of a riot must be set out in a charge under s 149, IPC, and declined to interfere as the omission in the charge had not in fact occasioned a failure of justice, and s 537 of the CrPC 1898 (now s 464 of the CrPC 1973) covered the omission.[36]

But a different view has been taken by the Orissa High Court in *Markanda Panda v Ronkonidhi Panigrahi* ,[37] and it was held that if the common object is not mentioned, conviction under this section will not be sustained.

Where the common object, alleged in the charge, was 'ousting the petitioner from a certain plot of land' and the charge did not recite 'by means of criminal force or show of criminal force', it was held that no such common object, as alleged in the charge was found to be included in any of the clauses, contained in s 141, IPC . It was not a case of defective charge, but of no charge, as the essential ingredient of the common object, as contained in s 141 of the IPC, was absent and there could be no1003 conviction on such a charge.[38] Where, however, the common object was stated to be 'harassing Hindus', it was held that the phrase used was sufficient to satisfy the requirements of law and to give the accused a sufficiently clear idea of the charge against them.[39]

6. Form of Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*), as follows:
>
> That you on or about the....day of.....at.....were a member of an unlawful assembly, the common object of which was (*here specify the object*) there committed an offence punishable under s 143 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this Court on the said charge.

7. Proof

For a conviction under this section, it must be proved that:

(i) there was an assembly of five or more persons;
(ii) they had a common object to do one of the acts specified in the five clauses of s 141, IPC ;
(iii) the accused was aware of the facts which constituted the assembly an unlawful assembly; and
(iv) being so aware, he intentionally joined or continued in the unlawful assembly.

In a prosecution under ss 143 and 379, IPC for removing paddy crops from the lands, possession of which was in dispute, the main question for consideration by a criminal court is whether the prosecution has established beyond reasonable doubt that the complainant had raised the crops on the disputed land.[40]

It is for the prosecution to show that the common object of a crowd was such as would constitute it an unlawful assembly as defined by s 141, IPC .[41]

Direct Evidence of Common Object not Possible

In order to establish the common intention of an unlawful assembly, it is, however, not necessary to prove that its members actually met and conspired to commit an offence. Such intention can be inferred from the circumstances of the case. In the case of a concerted attack by five or more persons, it is a perfectly valid and reasonable inference that they all had a common intention and were therefore, members of an unlawful assembly.[42] It is not possible for the prosecution to prove what was in the minds of the persons assembled. That can only be inferred by the subsequent conduct of the assembly.[43] To establish common object there cannot be1004 direct evidence. From the established facts, the court will have to come to the conclusion whether the accused were members of an unlawful assembly or whether they were present at the scene of offence as mere spectators. Spectators cannot be convicted for offences under s 143, IPC .[44] It is also not necessary to prove that a particular member of the unlawful assembly committed a particular offence to convict the other members of the unlawful assembly for the said offence.[45]

Only what the witnesses actually saw and heard as to what a mob was doing and saying is admissible to prove the nature of the assembly; their opinion and impressions that the assembly appeared to be unlawful are not admissible.[46] Notes under s 141 *ante*, may be referred to.

8. Conviction when Object of the Unlawful Assembly Fails--Conflicting Views

For punishment under s 143, IPC, an unlawful assembly is *sine qua non*.[47] The various High Courts have, however, expressed conflicting views on the maintainability of a conviction under s 143 when the object of the unlawful assembly has failed. The Patna High Court has held that where accused have been charged under s 379 and 143, IPC and the charge under s 379, IPC fails, the accused cannot be convicted under s 143 .[48] The Cuttack High Court has held that the conviction of the accused persons under s 143, IPC cannot be maintained as the commission of the offence under s 27 of the Act is alleged to be the common object of the assembly and on their acquittal of the said offence the essential element of common object for an offence under s 143, is found lacking.[49]

A contrary view has been taken by the Calcutta High Court and it has been held that it is not necessary under law that in all cases of unlawful assembly with an unlawful common object, the said common object must be translated into action or be successful. In many cases although the requisite number of persons had the unlawful common object and with that common object formed an unlawful assembly yet that common object might have been foiled or unsuccessful due to some reason or other. But that failure cannot be the reason to hold that there was no unlawful assembly as defined under the IPC if the essential ingredients of the offence under s 143, IPC, are proved. Simply because the Sessions Judge gave benefit of doubt to the accused in respect of the charge under s 379 of the IPC it cannot be argued that there could not have been any unlawful assembly having common object to reap the paddy. Persons may be guilty under s 143, IPC, even though the common object is unfulfilled.[50]

In a case before the Supreme Court where the question of cultivating the land and ownership of the crop was a matter of considerable doubt, it has been held that the1005 conviction under ss 143 and 379, IPC, cannot be upheld.[51] The finding arrived at in this case by the Apex Court is based on a question of fact this decision is, therefore, not of any help in resolving the controversy, the Calcutta view appears to be sound.

9. Sentence

Where in the case of an unlawful assembly the common object was to take forcible possession of property, the accused were only servants and acted on behalf of their masters who had a right to possession, and what they did, did not actually cause a breach of the peace, it was held that the sentence should not be too severe.[52] Any calculated interference with the judicial work by a noisy and tumultuous demonstration or by resorting to any other means forbidden by law, cannot be allowed to go unpunished. When the attitude of the accused was that of truculence at the time of the commission of the offence and of recalcitrance during the trial, it was held that a sentence of two months, imprisonment and a fine of Rs 50 on each accused could not be deemed to be excessive.[53]

Where, however, the accused has been acquitted for charges under the substantive offence, a lenient view can be taken for offence under s 143 .[54] Similarly as an offence under s 148, IPC is an aggravated form of offence under s 143 and s 147, separate conviction under these sections is not necessary.[55] It is also to be kept in view that as a riot is more or less a technical offence, harsh sentence has been held to be uncalled for.[56]

10. Security for Keeping the Peace

Under s 106 of the CrPC 1973, power is given to the court convicting an accused of 'any offence involving a breach of the peace' or of any other offence specified in sub-s (2) of s 106 to order the accused to execute a bond for keeping the peace during such period, not exceeding three years, as it may think fit to fix. But, since being a member of an unlawful assembly does not necessarily involve an actual breach of the peace, because the members may abstain from proceeding to such lengths, the magistrate should expressly find that the acts of the person convicted amounted to or involved a breach of the peace before making the summary order requiring security to keep the peace.[57] Otherwise no order under s 106, CrPC, can be passed under this section.[58]

11. Information by Public

Every person aware of the commission of or of the intention of any other person to commit, an offence under s 143, or other specified offences shall, in the absence of1006 reasonable excuse, forthwith give information to the nearest magistrate or police officer of such commission or intention.[59]

12. Information by Village Officers, *Etc.*

Every officer employed in connection with the affairs of a village and every person residing in a village is similarly required to communicate forthwith to the nearest magistrate or to the officer in charge of the nearest police station, whichever is nearer, any information which he may possess respecting the commission of, or intention to commit, in or near such village an offence punishable under s 143, IPC or other offences and matters concerning law and order as specified in s 40 of the CrPC 1973.

Intentionally omission to give notice or information to a public servant under s 40 or s 39, IPC is an offence punishable under ss 176, 118 or 202, IPC and furnishing false information is punishable under s 177 of the IPC .

18 *Sheo Ahir v Emperor* AIR 1938 Pat 548, p 549, 40 Cr LJ 71 .

19 *Mathi Venkanna v Emperor* AIR 1923 Mad 592, 24 Cr LJ 114 .

20 *Harish Chandra Samaddar v State* AIR 1955 Cal 515, p 517, 56 Cr LJ 1338 .

21 *Emperor v Picha Kone* AIR 1938 Mad 726, p 727 .

22 *Shamba Gopi Tari v Upendra Ladu Sawant* (1971) Cr LJ 559 (Goa) .

23 *Bishambar Bhagat & Ors v State of Bihar* (1971) SCD 1012, AIR 1971 SC 2381 .

24 *Avaba Bajirao Nikam & Ors v State of Maharashtra* (1979) Cr LJ 72, p 74 (Bom) .

25 Code of Criminal Procedure 1973, First Schedule.

26 *Agha Nazarali Sultan Mahommad v Emperor* AIR 1941 Sind 186, p 188, 43 Cr LJ 68 ; *Mathi Venkanna v Emperor* AIR 1923 Mad 592, 24 Cr LJ 114, ILR 46 Mad 257 .

27 For detailed commentary on s 195, the Code of Criminal Procedure 1973, see *Sohoni'sCode of Criminal Procedure 1973,* published by Lexisnexis Butterworths.

28 Re *Chinnayya Goundan*AIR 1948 Mad 477 ; *Bansidhar Patnaik v Province of Orissa* AIR 1951 Ori 84 ; *Makaradhwaj Sahu v State* AIR 1954 Ori 175, 55 Cr LJ 950 ; *State v Jathi Unad Ranning* AIR 1955 Sau 10, 56 Cr LJ 52 ; *CH Balamohan v State* 1984 LW (Cr) 250 (Mad) .

29 *Mahadev v State of Bihar* AIR 1966 SC 302, (1966) Cr LJ 197, p 199, (1966) 1 SCJ 17 .

30 *Sabir v Queen-Empress* 22 ILR Cal 276 ; *Tafazzul Ahmed Chowdhry v Queen-Empress* 26 ILR Cal 630 ; *Behari Mahton v Queen-Empress* 11 ILR Cal 106 ; Re *CT Sambandam*AIR 1954 Mad 785, 55 Cr LJ 1254 ; *Markando Panda v Ronkonidhi Panigrahi* (1957) Cr LJ 146 .

31 *Lakshmi Sethi v State* AIR 1957 Ori 190, (1951) Cr LJ 986 .

32 *Basi Reddy v Queen-Empress* 21 ILR Cal 827 ; *Harnam v Crown* 38 PWR 1907 (Cr) .

33 *N Venkadu v Emperor* AIR 1930 Mad 188, 31 Cr LJ 347 ; *Brundaban Swain v State* AIR 1957 Ori 117, (1957) Cr LJ 644 ; *Sardar Singh v State* AIR 1951 MB 85, 52 Cr LJ 507 .

34 *Dhian Singh v Emperor* 16 Cr LJ 869 .

35 *Kuduratullah v Emperor* 39 ILR Cal 781 .

36 *Deep Chand v Emperor* AIR 1935 All 629, 36 Cr LJ 1260 .

37 *Markanda Panda v Ronkonidhi Panigrahi* (1957) Cr LJ 146, p 147 .

38 *Kashi Nath Pathak v Kitu Rajwari* AIR 1964 Cal 436, (1964) 2 Cr LJ 405 .

39 Re *P Ayamad*AIR 1924 Mad 376, p 377, 24 Cr LJ 852 ; *Satyadeo Singh v State* (1972) Cr LJ 700, p 702 (Pat) .

40 *Hari Panda v State* AIR 1956 Ori 212, p 213, (1956) Cr LJ 1421 .

41 *Emperor v Peelimuthu Tevan* 24 ILR Mad 124, 1 Weir 53 ; *Mahommad Ibrahim v Emperor* AIR 1929 Nag 43, p 46 ; *Himirika Loknath v State* (1964) 1 Cr LJ 114 (Ori) .

42 *Lajja v Emperor* AIR 1927 Lah 193, 28 Cr LJ 264 .

43 *T Bira Singh v Manipur Admn* (1962) 2 Cr LJ 147, p 154 (Mani) .

44 *Shamba Gopi Tari & Ors v Upendra Ladu Sawant* (1971) Cr LJ 559 (Goa) .

45 *Himirika Loknath v State* (1964) 1 Cr LJ 114, p 117 (Ori) .

46 *Jogi Raut v Emperor* AIR 1928 Pat 98, p 99, 28 Cr LJ 906 .

47 *AB Nikam v State of Maharashtra* (1979) Cr LJ 72, p 74 (Bom) ; *W Kulabidhu Singh v State* (1962) 1 Cr LJ 827, p 828 (Mani) ; *Sumerchand Trilok Chand v State* (1962) 2 Cr LJ 692, (1962) MPLJ 822 .

48 *Bhag Narain Sinha v Ram Ajodhya Singh* (1965) BLJR 58 (Summary of cases); *Dodraj Mahton v Emperor* AIR 1934 Pat 505, 36 Cr LJ 416 ; this case was **distinguished in***Satyadeo Singh v State* (1972) Cr LJ 700, p 702 (Pat) .

49 *Bahani Santa & Ors v State of Orissa* (1978) 45 Cut LT 611, p 615, (1978) Cut LR (Cr) 119 .

50 *Netai Das & Ors v State* (1975) Cr LJ 957 (Cal) ; *Emperor v Picha Kone* AIR 1938 Mad 726, p 727 .

51 *Ram Ekbal Rai v Jaldhari Pandey* AIR 1972 SC 940, (1972) Cr AR 340, [1972] SCR 420 .

52 *Bepin Behari Guha v Pranakul Majumdar* 5 Cr LJ 19, p 20 .

53 *Ch Inder Singh v State* AIR 1960 Punj 356, p 357 .

54 *Sarju Rai v State of Bihar* (1968) BLJR 151, (1968) Cr LJ 1186, AIR 1968 Ori 160 .

55 *Abraham John v State of Kerala* (1969) Cr LJ 1577, (1969) Ker LR 471 .

56 *Noor Ali v State of Maharashtra* (1977) Cr LR 342 (Mah) ; *Keshubhai Somnath v State of Gujarat* (1971) Guj LR 593 .

57 *Jib Lal Gir v Jogmohan Gir* 26 ILR Cal 576 ; *Sheo Bhajan Singh v SA Mosawi* 27 ILR Cal 983 ; *Chandra Bhusan v R* 7 Cr LJ 200 ; *Subbiah Chetty v Govt of Mysore* 7 Cr LJ 172 ; *Raj Narain v Bhagabat* 35 ILR Cal 315 ; *Bepin Behari v Pranakul Mojumdar* 5 Cr LJ 19 .

58 *Naubat v Emperor* 28 Cr LJ 140, AIR 1927 All 136 .

59 Code of Criminal Procedure 1973, s 39 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 144.

Joining unlawful assembly armed with deadly weapon.--

Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

The offence under s 144, IPC is an aggravated form of the offence under s 143, IPC which makes culpable a membership of an unlawful assembly, and an assembly is unlawful only when the object of the assembly is one of the five things mentioned in s 141, IPC .[60] The aggravation consists in the offender being armed with a deadly weapon.

For a conviction under this section, it is necessary to establish:

(i) that there was an unlawful assembly as defined in s 141, IPC ;
(ii) that the accused was a member of that assembly as defined in s 142, IPC ; and
(iii) that he was armed with a deadly weapon.

2. 'Whoever'

The use of the word 'whoever' in this section suggests that only those persons who are actually armed with deadly weapons in an unlawful assembly, can be held liable under this section. The only way in

which one member of an unlawful assembly can1007 be made liable for the act of another is under s 149, IPC .[61] So, where the accused, though not armed in the mob, shared the common object of the other members of the unlawful assembly, who carried deadly weapons like *garasa, bhalaetc.*, it was held that they were liable for offence under s 149 and the fact, that they were not armed with deadly weapons, could not lessen the guilt.[62] But where a person instigates another to join an unlawful assembly armed with deadly weapons and then himself joins the assembly, he is liable under this section read with s 114, IPC although he himself is not armed with a deadly weapon.[63]

3. 'Deadly Weapon'

The expression 'deadly weapon' is not defined in the IPC . The marginal note to the section uses the expression 'deadly weapon' only. The section itself may appear to make a distinction between a 'deadly weapon' and 'anything which, used as a weapon of offence, is likely to cause death'. But there seems to be no difference between the two expressions and the latter expression may be taken to explain the former. No weapon can be deadly unless it is used. A weapon which when used for its designed purpose is likely to cause death, is a deadly weapon. Deadly weapons are lethal weapons, such as swords, daggers, pistols, guns, spears, hammers *etc.*;[64] it has been held that a spear and a *kanta* (Hindi word for a glove with sharp steel claws) are deadly weapons.[65] Sharp-edged weapons like *kirpans*,[66]*dharia*,[67]*gupti*[68] and *knife*[69] are also deadly weapons. The test of a 'deadly weapon' is not the purpose for which it is carried; it should be of such a nature that, if used as a weapon of offence, is likely to cause death.[70]

4. 'Or with anything which, used as a Weapon of Offence, is Likely to Cause Death'

A crowbar or spade may well be a deadly weapon if used as a weapon for offence, but if it is merely used to destroy a bridge, it certainly cannot be described as a weapon of any sort.[71] not only heavy sticks, but also a pen knife, a chopper, a dagger, a sling and even stones, when used as weapons of offence, may cause death.[72] Whether or not a stick is a deadly weapon would depend upon its size and weight. 'Stout male bamboos' when used as weapons of offence are likely to cause death, but not hollow ones.[73] In *Queen-Empress v Nath* ,[74] it has been held that it is a question of fact to be decided in each case whether the *lathi* used or the *lathi* with which the1008 injury is caused, was or was not in itself a deadly weapon. One *lathi* may by reason of its weight, length, or other peculiarities, be a deadly weapon; another may not. In that case the *lathi* used was held to be a deadly weapon. A *lathi* is not in itself, a deadly weapon. It performs precisely the same function in ordinary life in this country as a walking stick does in others, it is universally used by everybody in the *moffussil*; and it certainly cannot be regarded as, in any way, a deadly weapon unless and until it is used on the head or on some vital part of a person.[75] A *lathi* may be a lethal weapon and anyone who uses it on the head of another with such force as to fracture the skull must know that he was doing an act which in all probabilities must cause death.[76]

5. 'Is Member of an Unlawful Assembly'

This section contemplates the accused being a member of an unlawful assembly as defined in s 141, IPC, in the first instance. The mere fact that he was armed and was one of a crowd, though strongly suggesting that the object of the assembly was unlawful, is no proof thereof.[77]

6. Procedure

The offence under this section is cognizable and warrant may issue in the first instance. It is bailable, but not compoundable, and is triable by any magistrate.[78]

7. Requirements of Charge

A charge under this section must specify the common object of the assembly, as well as the fact that the accused was a member of the unlawful assembly and armed with a deadly weapon. Therefore to sustain a charge under s 144 of the IPC, the prosecution must prove the common object of the unlawful assembly of which the accused is alleged to be a member.[79] If the common object is not mentioned, conviction under this section will not be sustained.[80] The accused should have reasonably distinct notice of the common object imputed to them and of the manner in which that common object was to be brought within the language of s 141, IPC .

Where the common object was stated to be 'harassing Hindus', it was held that the phrase used was sufficient to satisfy the requirements of law and to give the accused a sufficiently clear idea of the charge against them.[81]

8. Form of Charge

Notes under the previous section may be referred to. The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> 1009That you on or about the.....day of .....at..... being armed with a deadly weapon, to wit.....(*or armed with.....which, used as a weapon of offence, is likely to cause death*) were a member of an unlawful assembly, the common object of which was to (*describe the common object*) and thereby committed an offence punishable under s 144 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

60 *Markando Panda v Ronkonidhi Panigrahi* (1957) Cr LJ 146, p 147 .

61 *Sabir v Queen Empress* 22 ILR Cal 276, p 282 ; *Queen Empress v Ram Saran Rai* (1899) All WN 77 .

62 *Satyadeo Singh v State* (1972) Cr LJ 700, p 702 (Pat) .

63 *Shrihari v Lal Khan* 15 CWN 250 .

64 *Lakshmiammal v Samiappa* (1968) Cr LJ 1084, p 1085, AIR 1968 Mad 310 .

65 *Ratan Lal v Emperor* AIR 1933 Oudh 333, p 339, 35 Cr LJ 45 .

66 *Ghansa Singh v State* AIR 1958 Raj 226, p 234, (1958) Cr LJ 1232 .

67 *Prem v State of Rajasthan* (1978) Cr LJ 273, p 277 (Raj) .

68 *Jugal Kishore v State of Rajasthan* (1978) Raj LW 123 .

69 *Lakshmiammal v Samiappa* (1968) Cr LJ 1084, p 1085, AIR 1968 Mad 310 .

70 *Ibid*.

71 *Mir Bayyan Khan v Emperor* AIR 1935 Pesh 65, p 67, 36 Cr LJ 933 ; *Lakshmiammal v Samiappa* (1968) Cr LJ 1084, p 1085, AIR 1968 Mad 310 ; *Jugal Kishore v State of Rajasthan* (1978) Raj LW 123 .

72 *R Vasu Nair v Travancore-Cochin State* AIR 1955 Tr & Coch 33, 56 Cr LJ 414.

73 *Sesher Reddy v Public Prosecutor* (1962) ILR AP 313 ; *Krishna Chetty* 1 Weir 70; *Nardeen v State of Rajasthan* 1977 Cr LR 447, p 455 (Raj) .

74 *Queen Empress v Nath* 15 ILR All 19, p 20, (1892) 12 All WN 158 .

75 *Parma Singh v Emperor* 12 Cr LJ 103 .

76 *Raja Ram v Emperor* AIR 1938 Oudh 256, 257, 40 Cr LJ 14 .

77 *Parma Singh v R* 12 Cr LJ 103 .

78 Code of Criminal Procedure 1973, First Schedule.

79 *Suresh Chandra Yadav v State of Bihar* (1983) Pat LJR 289, (1983) 2 Crimes 557, (1983) BLJ 286, (1983) Bih Cr Cas 9 (Pat) .

80 *Markanda Panda v Ronkonidhi Panigrahi* (1957) Cr LJ 146, p 147 .

81 Re *P Ayamad*AIR 1924 Mad 376, p 377, 24 Cr LJ 852 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 145.

Joining or continuing in unlawful assembly, knowing it has been commanded to disperse.--

Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

The offence punishable under s 143, IPC is being a member of an unlawful assembly; that under s 144 being such member armed with something which, used as a weapon of offence, is likely to cause death; and the one under this section is the continuance in an unlawful assembly 'knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse'.[82] The offence is thus an aggravated offence.[83] Where the assembly is not unlawful, the provisions of this section are not attracted.[84] This and the analogous s 151, IPC have to be read with s 129 of the CrPC, sub-s (1) of which runs thus:...

> (1) Any Executive Magistrate or officer in-charge of a police station or, in the absence of such officer in-charge, any police officer, not below the rank of a sub-inspector may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.
>
> ...

The first part of this sub-section empowers a magistrate or a police officer to command any unlawful assembly to disperse, and s 145, IPC provides the penalty for joining or continuing in the unlawful assembly knowing that it has been commanded to disperse. The second part of sub-s (1) of s 129, CrPC, empowers a magistrate or competent police officer to command any assembly of five or more persons likely to cause a disturbance of the public peace, and s 151 of this Code provides the penalty for knowingly joining or continuing in such an assembly after it has been commanded to disperse. This section contemplates only an unlawful assembly, but the assembly contemplated by s 151 of the Code may be a lawful or an unlawful1010 assembly. If the assembly likely to cause disturbance of the peace is an unlawful assembly within the meaning of s 141, the offender will be punishable under this section (refer to explanation to s 151 of this Code *post)*.

Disobedience to a command to disperse may also be an offence, punishable under s 188 .[85]

2. Essentials of the Offence

In order to constitute an offence under this section, it is necessary for the prosecution to establish:

(i) there was an assemblage of at least five persons;
(ii) the object of the assembly must be any of the five objects mentioned in s 141, IPC ;
(iii) the accused shared that object with at least four others of the meeting or assembly;
(iv) the accused intentionally joined the assembly:
  (a) having knowledge of the assembly, or
  (b) continued therein after having had that knowledge;

(v) such unlawful assembly had been commanded to disperse;
(vi) such command to disperse was in the manner prescribed by law;
(vii) the accused joined or continued in such unlawful assembly after it had been commanded to disperse; and
(viii) he did so knowing that it had been commanded to disperse.[86]

3. 'Joins or Continues in an Unlawful Assembly'

For definition of 'unlawful assembly' refer to s 141, IPC . Before conviction under this section may be recorded, it must be shown that there was an unlawful assembly and that the accused joined or continued in it after the legal command to disperse had been given. If it is not established that at the time when the order to disperse was given, it was addressed to an unlawful assembly, a conviction under this section will not stand. an assembly which is not unlawful at its inception, does not become unlawful merely because it continues without dispersing in defiance of the lawful order to disperse. There is no clause under s 141 to say that an assembly refusing to disperse in obedience to a lawful command becomes an unlawful assembly.[87] It is a question of fact to be dealt with and decided by the court whether the assembly of which the accused persons were members, had an unlawful common object.[88]

People in a procession held by the Congress party were ordered to take a different route, but they refused to do so, and sat on the ground. On being asked to disperse they refused to do that also. It was held that the conduct of the accused, coupled with1011 the fact that the procession was animated by hostility to the established government, showed that they were determined to disregard and disobey any lawful order, and that the conviction under s 145, IPC, was proper.[89]

Where the common object of an assembly was to commit an offence under the latter part of s 188, it was held that the assembly became unlawful, and remaining in it when it was ordered to disperse, constituted an offence under s 145 .[90]

4. 'Knowing that Assembly has been Commanded to Disperse'

If there was no order to disperse or the accused had no knowledge of it, they cannot be convicted under this section.[91]

5. 'Commanded in the Manner Prescribed by Law'

Section 151 uses the word 'lawfully' instead of 'in the manner prescribed by law', but that makes no difference.

Section 129 of the CrPC prescribes the procedure and authorises an executive magistrate or officer-in-charge, of a police station or, in the absence of such officer-in-charge, any police officer, not below the rank of a sub-inspector, to command an unlawful assembly to disperse. The executive magistrate or the police officer exercising powers under the said section must have jurisdiction in that area. Under the old CrPC of 1898, a police officer, who was not in charge of a police station, did not possess such powers.[92] Under the present Code, a sub-inspector of police can command an unlawful assembly to disperse in the absence of the office-in-charge of a police station. Police officers superior in rank to an officer-in-charge of a police station can also command an unlawful assembly to disperse throughout their local area.[93]

6. Procedure

Same as in the case of an offence under s 144, *ante*.

7. Form of Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*), as follows:
>
> That you, on or about the.....(*day of.....at....., joined or continued in*) an unlawful assembly, the common object of which was, to wit.....knowing that such assembly had been commanded in the manner prescribed by law to disperse, and thereby committed an offence punishable under s 145 of the Indian Penal Code, within my cognizance.
>
> And I hereby direct that you be tried, by this Court on the said charge.1012

82 *Queen-Empress v Tirakadu* 14 ILR Mad 126, p 132, 1 Weir 59 ; *Jagmohan v State of Orissa* (1977) Cr LJ 1394, p 1399 (Ori) .

83 *Public Prosecutor v Vadlamudi Satyanarayana* AIR 1931 Mad 484, p 485 .

84 *Jagmohan v State of Orissa* (1977) Cr LJ 1394, p 1399 (Ori) .

85 *Ramchandra Narayan Shastri v Emperor* AIR 1931 Bom 520, p 524 .

86 *Girdhar Singh v Emperor* AIR 1922 Lah 135, p 136, 23 Cr LJ 5 ; *Jagmohan v State of Orissa* (1977) Cr LJ 1394, p 1399 (Ori) .

87 *Girdhara Singh v Emperor* AIR 1922 Lah 135, p 136 ; *Jagmohan v State of Orissa* (1977) Cr LJ 1394, p 1399 (Ori) .

88 *Ambika Charan De v Emperor* AIR 1933 Cal 361, p 362, 34 Cr LJ 814 .

89 *Ambika Charan De v Emperor* AIR 1933 Cal 361, p 362, 34 Cr LJ 814 .

90 *Ram Chandra Narayan Shastri v Emperor* AIR 1931 Bom 520, p 524, 33 Cr LJ 64 .

91 *Public Prosecutor v Vendlamani Satyanarayana* AIR 1931 Mad 484, p 485, 32 Cr LJ 806 .

92 *Hanuman Singh v State* AIR 1969 All 130, p 139, (1969) Cr LJ 359 .

93 Code of Criminal Procedure 1973, s 36 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 146.

Rioting.--

Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

Comments

1. Scope

This section defines rioting and makes it an offence and the next section prescribes the punishment for simple rioting. The remaining sections of this chapter deal with the aggravated forms of rioting and offences relating to rioting.

To constitute a riot, the members of an unlawful assembly must have a common unlawful object,

which means that such persons must have previously intended and arranged a certain procedure stated in one or the other of the five clauses of the s 141, IPC . If a number of persons assembled for any lawful purpose, suddenly quarrel with an intruder without any previous intention or design, they do not commit 'riot' in the legal sense of the word.[94] It is the use of force or violence that distinguishes a riot from an unlawful assembly.[95] Offence of rioting is not made out if evidence of victim is that some other persons came there and attacked and said persons have not been arrayed as accused.[96]

2. Rioting

The offence of rioting consists in the use of force or violence by an unlawful assembly or by any member thereof in prosecution of the common object of such assembly. A mere assembly or gathering of persons is not unlawful, though some of its members may employ force to commit an offence, as it may well be that the presence of some at the time was accidental or may be due to curiosity as mere spectators. Some may have been there as passersby or passive bystanders. Section 141 , IPC requires that there should be a common object which can be brought within the purview of one or the other heads mentioned therein and s 142, IPC expressly states that a person to be a member of an unlawful assembly should be aware of facts which rendered the assembly unlawful and that he should intentionally join the assembly or continue in it. From the mere fact that all or some of the accused being found at the scene of the occurrence at the time when a person was injured it cannot be inferred that they were all members of an unlawful assembly.[97]

1013 If no particular act of violence is established, merely coming to the spot even with a *lathi* or other weapon in response to a cry by a person, that he was being killed, will not make those, who came, guilty of rioting.[1]

Ingredients

To sustain a charge of rioting, the prosecution has to establish: (a) that there was an unlawful assembly as defined in s 141 ; (b) that the accused was member of that assembly as defined in s 142, (c) that force or violence was used by the unlawful assembly or by a member thereof, and (d) that the force or violence was used in prosecution of the common object of the unlawful assembly.[2]

3. Injury or Damage not Necessary

Although the use of force or violence is an essential ingredient of the offence of rioting, the offence has no reference to the injury or damage caused by the same. The offence of rioting is an offence against public tranquillity; it is not an offence affecting the human body or an offence against property.

The section makes every member of the unlawful assembly guilty of rioting, even if the force or violence is used only by one member of the assembly; because it is used in prosecution of the common object of the whole assembly. This liability should not be confused with the constructive liability under s 149 or s 34 .

The requirements of the law under ss 141, 146 and 147 or 148, IPC, must be strictly proved before an accused may be convicted for rioting or any other offence covered by these sections.[3]

4. English Law as to Rioting

Hawkins has defined a riot as 'a tumultuous disturbance of the peace by three persons or more who assembled together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually execute the enterprise, in a violent and turbulent manner to the terror of the people, whether the act intended was, in itself, lawful or unlawful'.[4]

According to the judicial definition in *Field v Receiver of Metropolitan Police* :[5]

> There are five necessary elements of a riot: (1) a number of persons,[6] three at least (2) common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another by force if necessary against any person who may oppose them in the execution of the common purposes; (5) 'force or violence' used in the execution of the1014 common purpose 'not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.

This definition was applied in *Ford v Receiver for the Metropolitan Police District* ,[7] and again in *Munday v Metropolitan Police District Receivers* .[8] It has, however, been stated in a later case,[9] that a riot may involve no noise or disturbance of the neighbours, though there must be some force or violence, and that the fifth element of riot as laid down in *Field*'s case 'may require reconsideration at some future time' since it would be enough that a witness could say that persons appeared to be alarmed, and not necessary to produce a witness who could say 'I was terrified'.[10]

Where 12 or more persons who are present together, use or threaten unlawful violence for a common purpose and the conduct of them, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot. A person is, however, guilty of riot only if he intends to use violence or is aware that his conduct may be violent. Riot may be committed in private as well as in public places.

Overt possession of weapons can amount to a threat of violence, even though they are not waved or brandished. It is immaterial whether or not the 12 or more persons use or threaten unlawful violence simultaneously.[11]

5. Duty of Court/Magistrate

When the offence has been alleged in the complaint in respect of unlawful assembly, the Court is bound to make scrutiny for the purpose of ascertaining whether allegations are making out a case of unlawful assembly. The magistrate has to consider whether the allegations made in the complaint indicate that the unlawful assembly was formed immediately before commission of the alleged offence. The magistrate has to further see whether the members of unlawful assembly were present in the said unlawful assembly with intention of committing the offence or for the purpose of executing object of unlawful assembly or knew that some acts would be committed in prosecution of that object for which the said unlawful assembly was formed and very importantly, whether the said assembly was formed for the purpose of committing the offence of rioting as indicated by the provisions of s 146, of IPC .[12]

6. 'Unlawful Assembly'

Unless there is an unlawful assembly (s 141, *ante*) in the first instance there can be no riot, though there may be an affray (s 159, *post*).[13] Where the common intention of an assembly of more than five persons was to resist by force an unlawful1015 trespass on land, the individuals of the assembly cannot be convicted of rioting in so doing.[14]

Where one party attempts to turn another party away from the land of which it is actually in possession and both parties are accused of rioting, the latter party is not an unlawful assembly (as its object is to maintain undisturbed the actual enjoyment of a right) and hence cannot be convicted of rioting.[15]

Where a trespasser actually in possession of land is attacked by a number of persons who make a forcible entry on the land, a plea of their right to possession is no answer to a charge of rioting.[16]

Commentary under s 97 may be referred to.

7. 'Use of Force or Violence'

To constitute rioting there should be use of either 'force' or 'violence'. Where 'force' or 'violence' has been used, conviction under this section cannot be recorded.[17] As use of force or violence is essential to rioting, an unlawful assembly, which runs away on approach of other people, does not constitute a riot.[18] So also where the use of force is prevented from being carried out because, before the assailants assemble, the persons who were to be attacked, run away, no offence of rioting is established.[19]

Definition of 'Force' in Section 349 not Applicable

Force, which is defined in s 349, IPC, must necessarily be used against a human being and not against an inanimate object.[20] If any motion, change of motion, or cessation of motion is caused to any property without affecting a human being, there is no 'force' within the meaning of the term as used in s 349 . It has been observed by the Kerala High Court that s 349 of the IPC does not purport to be a statutory dictionary for the meaning of 'force' wherever it occurs in the IPC . 'Force' in s 349 applies only when there is 'force to another'. Force as an ingredient of the offence of criminal force or assault required a statutory explanation and coverage and that is provided in s 349 . Section 349 and the group of sections following it are included in ch 16 relating to offences affecting the human body and under the sub-heading 'Criminal Force and Assault'. Force against an inanimate object is thus outside s 349 and force as an ingredient of the offence of rioting cannot naturally have any restricted relevance or logic or application. Force, as understood in common parlance, as defined in the *Oxford Dictionary*, reads: 'Strength exerted on an object,1016 power, impetus'. The word 'force' in s 146 of the IPC, has to be understood in this sense.[21]

Pulling down a man's house,[22] a toddy shop,[23] or a *chappar*,[24] without causing any injury to a human being, amounts to the use of violence within the meaning of this section.

It is not necessary, for the purpose of this section, that force or violence be directed against any particular person or object. Brandishing of bamboos and cutting down the branches of a *pipal* tree were held to amount to the use of force or violence by the members of an unlawful assembly.[25] It is not necessary for an offence under s 147, IPC that force or violence be used to an extent that death or grievous injury or even simple hurt,[26] might be caused. Force or violence, to whatever extent used, would be sufficient if it is used by all or some of the members of an unlawful assembly.[27]

Where, in breaking into a temple and removing the idols for celebrating a festival, the common object of the accused was to enforce a right, and violence was used in prosecution of the common object, it was held that they were guilty of rioting under s 147, IPC .[28]

Violence

The word 'violence' is not necessarily confined to violence used against a human being. The term 'violence' has not been defined in the IPC and must, therefore, be given its ordinary dictionary meaning. If damage is caused by an unlawful assembly to any property without any harm being caused to any person, violence will have been used. 'Violence' is a word of wider import than 'force' and includes force used against inanimate objects also.[29]

8. 'By an Unlawful Assembly, or any Member Thereof'

For the offence of rioting, it is not necessary that force or violence should be used by all the members of the unlawful assembly. It is enough if force or violence is used 'by any member thereof' in prosecution of the common object of such assembly. Actual participation in violence is not necessary to convict a person of rioting. Those who encourage, by signs, symbols or shouts, the unlawful object of the assembly, are also rioters.[30]

Where the common object of an unlawful assembly was simply to march in a procession from a certain place to another, breaking the condition of a proclamation issued by the district magistrate, and the accused instigated the members of the1017 unlawful assembly to use force or violence for overcoming any resistance offered by the army or the police. The force was in fact used by the unlawful assembly, but there was no evidence to show that the actual acts of violence committed by the assembly were instigated by him, it was, therefore, held that the accused was guilty of abetment of rioting only and was not liable for the acts of violence committed by the assembly.[31] The question whether the accused was a member of the unlawful assembly and liable under this section or s 149 was not considered in the case. The reason appears to be that this case was tried under the Travancore Penal Code and not under this Code.

9. 'In Prosecution of the Common object of such Assembly'

One of the essential ingredients of the offence of rioting consists in the members of the assembly having a common object to do or to commit one of the acts mentioned in s 141 .[32] The common object of the unlawful assembly must be definitely found and not left for conjecture or inference from other facts found.[33] The five or more persons must share in a common object as specified. If, for *e.g.*, two persons out of five have no common object with the others, none of them can be held guilty of rioting.[34] As to the meaning of 'common object', refer to comments under s 141 .

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The common object of a riotous mob may be presumed to be that which is indicated by their conduct throughout their proceedings, in the absence of evidence or reasons to the contrary.[35]

This section requires that force or violence should be used 'in prosecution of the common object' of the unlawful assembly, *i.e.,* in the execution of the common object of the unlawful assembly.[36] Use of criminal force is a necessary ingredient in the offence, but any particular kind of voluntary use of such criminal force should be separately stated in the charge.[37] The expression 'in prosecution of the common object' is not defined in the IPC . 'Prosecution', however, means following up or pursuit and, generally speaking, everything that is done for the purpose of achieving the desired object, can be taken to have been done in prosecution of it.[38] The plain literal meaning of the words 'in prosecution of' would seem to be 'in order to achieve or attain'. 'Prosecution' is derived from Latin, and the root meaning of the word is 'to follow'. The words 'in prosecution of the common object' must be strictly construed as equivalent to 'in order to attain the common object'. When a person has already attained or caught up with his object and passed beyond it, it can no longer be said to be pursuing or prosecuting it.[39]1018

Illustrative Cases as to Prosecution of Common object of Assembly

The words 'in prosecution of the common object' do not mean during the prosecution of the common object of the assembly'. It means that the offence committed was immediately connected with the common object of the assembly or the act is one which upon the evidence appears to have been done with a view to accomplish the common object attributed to the members of the assembly.[40] The words 'in prosecution of the common object' have to be strictly construed as equivalent to 'in order to attain the common object'.[41] The common object may exist up to a particular stage and not thereafter.[42] Force or violence used after the common object ceases to exist cannot be said to be 'in prosecution of the common object'.

Where the common object of the unlawful assembly was to cause hurt to *A*, hurt caused to *B* cannot be said to be in prosecution of the common object,[43] but where the common object of the assembly was to take away a buffalo from the house of a third person, and while the buffalo was being taken away, that person came to rescue the animal and was attacked and beaten by some members of the assembly, it was held that force or violence was used 'in prosecution of the common object of the assembly.[44]

A number of *ryots* gathered together in order to prevent a revenue officer from distraint. This formed an unlawful assembly within the meaning of s 141, cl 5. It was held that if one of them beat the officer or rescued the goods seized, they are guilty of rioting.[45]

After the assembly in the above illustration had dispersed, two of the *ryots* commence to fight. The others are not guilty of rioting.[46]

A, B and Co (Hindus) forcibly removed an ox and two cows from the possession of *X* (a Mahommadan) for the purpose of preventing the slaughter of the animals. They were guilty of rioting.[47]

Where altercation took place between two parties and one person was murdered, four of the eight accused persons were women and the only act attributed to them was of throwing chili powder, it could be said that they were falsely implicated and charge of unlawful assembly and rioting against them would fail in the absence of proof of their participation.[48]

On *A, B* and *C* being appointed special constables, the police proceeded to their village informing them of the appointment, and directed them to proceed to the police station. On their refusing to do so, the police attempted to arrest *A,* but he and1019 the others resisted, and compelled the police to withdraw from the village. *A, B* and *C* were guilty of rioting, their common object being to assault the police.[49]

In execution of a decree, property (cattle) not belonging to the judgement-debtor was illegally attached and kept in the custody of a *sapurdar*. The owner and his men numbering more than four went out with the common object of taking away the property by use of force and they did use force in prosecution of the common object. Although the attachment was illegal, that illegality did not entitle the owner and his men to take away cattle from the custody of the *sapurdar* and since they used force in prosecution of the common object, they were guilty of rioting.[50]

10. 'Every Member of such Assembly is Guilty of the Offence of Rioting'

Under this section every member of the unlawful assembly is guilty of rioting even if force or violence is used by only one member of the assembly.

The liability of the members who have not used force or violence is not a constructive liability for the use of force or violence, but a direct liability for being a member of an unlawful assembly in prosecution of the common object of which, force or violence has been used by one or more of its members. There is no such thing as 'constructive liability' for the offence of being a member of an unlawful assembly, or liability for conviction under s 147, IPC by being merely proved to have been found with known or proved rioters.[51]

11. Overt Act not Necessary for Conviction

Before the appellants could be convicted of sharing the common object of the assembly or of being members of the same, it had to be proved by the prosecution that the appellants were members of the unlawful assembly at the time when the assembly became unlawful. The fact that an accused is a member of an unlawful assembly must be shown either from his active participation or otherwise that he shared the common object of the unlawful assembly. It is not necessary that the accused should be guilty of any overt act. It is sufficient if it is shown that as a participant of the unlawful assembly he was sharing the common object of the same.[52]

94 *Khajah Noorul Hossein v C Fabre-Tennerre* 24 WR 26, p 27 .

95 *Russell*1889 PR No 4.

96 *R Srinivasan v State* (2007) Cr LJ (NOC) 339 (Mad) .

97 *Pedda v State of Mysore* AIR 1953 Mys 41, p 42, 54 Cr LJ 1001 .

1 *Deodhari Koeri v Emperor* AIR 1937 Pat 34, p 35, 38 Cr LJ 271 .

2 *Khajah Noorul Hossein v C Fabre-Tonnerre* 24 WR 26, p 27 ; *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, p 211, (1965) 1 Cr LJ 226 ; *State v Banamali Maharana* 25 Cut LT 433 ; *State of Kerala v KJ Thomas* (1961) 1 Cr LJ 661, (1961) Mad LJ (Cr) 45 ; *Upendra Nath v State* (1968) Cut LT 226 ; Re *Peta Venkateser*(1967) Mad LJ (Cr) 3, (1967) Andh WR 5; *Hazara Singh v State of Punjab* (1971) 3 SCR 674, p 678 (if force or violence has not been used, conviction cannot be recorded).

3 Re *Arulanandu*AIR 1952 Mad 267, p 269 .

4 *Russell on Crime*, eleventh edn, p 267.

5 *Field v Receiver of Metropolitan Police* (1907) 2 KB 853, p 860 .

6 *R v Scott* (1761) 2 Burr 1262 ; *R v Beach* (1909) 2 Cr App R 189 .

7 *Ford v Receiver for the Metropolitan Police District* (1921) 2 KB 33 .

8 *Munday v Metropolitan Police District Receivers* (1949) 1 All ER 337 .

9 *R v Sharp and Johnson* (1957) 1 All ER 577, (1957) 2 WR 472, p 475-76 .

10 *Russell on Crime*, eleventh edn, pp 268-269.

11 *I v Director of Public Prosecutions, M v Director of Public Prosecutions, H v Director of Public Prosecutions* (2002) 1 AC 285 . **[***VideHalsbury's Laws of England*].

12 *Jancy Nelson D'Souza v Nelson D'Souza* (2004) Cr LJ 1690 (Bom) .

13 1 Weir 68; *Banga Hadua v R* 11 Cr LJ 245, 11 CLJ 270 ; *AB Nikam v State of Maharashtra* (1979) Cr LJ 72 (Bom) ; *Union Territory of Tripura v Tarani Das* (1968) Cr LJ 1676 (Tri) .

14 Re *Kallee Mundle* 10 CLR 278; Re *Shunker Singh* 23 WR (Cr) 25; Re *Toolsee Singh* 10 WR (Cr) 64; *R v Guru Charan* 6 BLR App 9 ; *Baburam Raut v R* 14 Cr LJ 295 ; *Jhalku Tewari v Emperor* 14 Cr LJ 590 .

15 Re *Toolsee Singh* 10 WR (Cr) 64; *Packhauri v R* 24 ILR Cal 686 ; *Gajendra Ghorai v R* 13 Cr LJ 188 ; *Chandulla Sheikh v Emperor* 15 Cr LJ 209 .

16 *Appavu Nayak v R* 6 ILR Mad 245, 1 Weir 68 ; *Ganouri Lal v R* 16 ILR Cal 206 ; *Anant Pandit v Madhusudan Mandal* 26 ILR Cal 574 ; *Hazara Singh v State of Punjab* (1971) 3 SCR 674, p 678, (1971) SCC (Cr) 237 ; *Prema v State of Rajasthan* (1978) Cr LR 273, p 277 (Raj) ; *Bhajan Suna v State* (1974) 40 Cut LT 325, p 334 .

17 *Hazara Singh v State of Punjab* (1971) 3 SCR 674, p 678, (1971) SCC (Cr) 237 .

18 *Mahommad Ishaq v King-Emperor* 1 Cr LJ 1057, 1 All LJ 402 ; *Hazara Singh v State of Punjab* (1971) SCC (Cr) 529 .

19 Re *Ramdeen Doobay* 26 *WR* 6, p 7.

20 *Lakshmiammal v Samiappa* (1968) Cr LJ 1084, p 1085, AIR 1968 Mad 310 .

21 *Ibrahim Kutty v State of Kerala* (1984) 2 Crimes 358, p 359, (1984) KLT 700 (Ker) .

22 *Samaruddi v Emperor* 13 Cr LJ 821 .

23 Re *Marimuthu Naidu*AIR 1923 Mad 606, 25 Cr LJ 139 .

24 *Maiku v State* AIR 1953 All 749 .

25 *Ghanir Khan v Emperor* AIR 1918 Oudh 171, p 172, 19 Cr LJ 828 .

26 *State of Madhya Pradesh v Rakman* (1969) Cr LJ 80, p 82, (1968) MPLJ 700 .

27 *Mukanda v State* AIR 1957 Raj 331, p 335, (1957) Cr LJ 1187 .

28 Re *Perumal Konan*AIR 1941 Mad 71 ((2)), 42 Cr LJ 263 .

29 *Maiku v State* AIR 1953 All 749, p 750, 54 Cr LJ 729, p 750 ; *Samaruddi v Emperor* 40 ILR Cal 367, p 373-74, 13 Cr LJ 821 ; Re *Marimuthu Naidu*AIR 1923 Mad 606, 25 Cr LJ 139 ; *Venkatambbia v Crown* AIR 1923 Mad 603, 24 Cr LJ 356 ; *Kalidas*

Mukherji v Emperor AIR 1948 Cal 16, p 18, 48 Cr LJ 351 ; *Sunder Singh v State* AIR 1955 All 232, p 233, 56 Cr LJ 671 (FB) ; *Lakshmiammal v Samiappa* AIR 1968 Mad 310, (1968) Cr LJ 1084 .

30 Ratanlal Un Cr C 99; Re *Kasthurirangam*(1970) 2 Mad LJ (Cr) 83, pp 84-85, (1970) Cr LJ 1316.

31 *Balus John v State* AIR 1953 Tr & Coch 251, p 253, 54 Cr LJ 1273.

32 Re *CT Sambandan*AIR 1954 Mad 785, p 787, 55 Cr LJ 1254 .

33 *Krishna Pillai Vasu Pillai v the State* AIR 1956 Tr & Coch 230, p 232.

34 Re *Vyapuri* 11 Cr LJ 197, 5 Mad LT 295; *Salim Mahommad v State of Gujarat* (1972) Cr LJ 1454, p 1458 (Guj) . *Banwaree v State of Bihar* AIR 1965 Pat 45, (1965) 1 Cr LJ 73 .

35 *Sabir v R* 22 ILR Cal 276 ; *Budhu v Lachminia* 2 Cr LJ 275, 9 CWN 599 ; *Poresh Nath v R* 33 ILR Cal 295 ; Re *Dasarathi v Raghu Loganathaiyar* 11 Cr LJ 30, 6 Mad LT 17 .

36 *Field v Receiver of Metropolitan Police* (1907) 2 KB 853 ; *Bajinath v R* 36 ILR Cal 296 ; *Ram Khelawan v R* 36 ILR Cal 827 ; *Masti v R* 12 Cr LJ 214 .

37 *Kanta Neya v R* 12 Cr LJ 82 .

38 *Charan Singh v State* AIR 1959 All 255, p 262 .

39 Re *Manakkal Kumaran*AIR 1942 Mad 446, p 448 ; *Queen v Sabid Ali* 20 WR (Cr) 5, 11 Beng LR 347 (FB) ; Re *CT Sambandam*AIR 1954 Mad 785, p 788 .

40 *Raghunandan v Emperor* 10 ILR Luck 320, AIR 1935 Oudh 52, 36 Cr LJ 268 ; *Tikaram v State* AIR 1960 All 453, (1960) Cr LJ 1040 .

41 *Jit Singh v State* AIR 1957 Punj 278, p 283, (1957) Cr LJ 1307 ; *Queen v Sabid Ali* 20 WR (Cr) 5 (FB).

42 *Harinarain v State* AIR 1953 Bhopal 8, p 10 .

43 Re *CT Sambandam*AIR 1954 Mad 785, p 787, 55 Cr LJ 1254 ; Re *Manakkal Kumaran*AIR 1942 Mad 446, p 448 ; *Queen v Sabid Ali* 20 WR (Cr) 5 (FB).

44 *Agra v Emperor* AIR 1914 Lah 579, 16 Cr LJ 219 ; *Bikaram v State* AIR 1958 All 348, (1958) Cr LJ 588 .

45 Mayne PC, *Criminal Law of India,* fourth edn, p 321.

46 *R v Muzhur* 5 NWP 208 ; *R v Dinobhundo Rai* 9 WR (Cr) 19 .

47 *R v Raghunath* 15 ILR All 22 ; *Sengodan v R* 13 Cr LJ 534 .

48 *State of Karnataka v Dodda Hanumantha & Ors* (1997) Cr LJ 658 (Kant) (DB) .

49 *Raman Singh v R* 28 ILR Cal 411, p 414, **following***R v Dalip* 18 ILR All 246 ; *Prakash Chandra v R* 15 Cr LJ 251 .

50 *Tika Ram v State* AIR 1960 All 453, (1960) Cr LJ 1040 .

51 Re *Arulanandu*AIR 1952 Mad 267, p 269 .

52 *Prabha Shankar Sawant v State of Maharashtra* AIR 1979 SC 1265, p 1266, (1979) Cr LJ 856, (1979) 4 SCC 727, (1979) Cr LR (SC) 698 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 147.

Punishment for rioting.--

Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.1020

Comments

1. Scope

This section prescribes the punishment for the offence of rioting defined in the previous section.[53] The two sections must, therefore, be read together. Where the averment of what happened in a case was that there was a fight in the course of which injury was inflicted, and it is not really a riot in any but the most technical sense, a commonsense view should be taken and the accused should really be punished for fighting with their neighbours and inflicting simple hurt. The section is not to be used for the purpose of enabling a sentence to be given, which is greater than the one prescribed for the offence, of which the accused has really been guilty.[54]

2. Acquittal of Substantial Offence Rules out Rioting

The presence of the accused at the place of the incident does not mean that he formed an unlawful assembly.[55] If force or violence was applied, then only s 147 would come into play. On the acquittal of the accused persons under s 323, IPC, the accused persons cannot be convicted under s 147 in the case because they did not apply force or violence.[56]

A person would be guilty of rioting only when he is a member of an unlawful assembly, the common object of which is to commit some offence. In the given case, the applicants were said to be members of an unlawful assembly the common object1021 of which was to beat the complainant and to frustrate his attempt in taking their cattle from his field to the cattle pound. The trial court acquitted the applicants of the aforesaid two offences, *i.e.,* of beating the complainant and of their having rescued their cattle from being impounded by the complainant. After the applicants had been acquitted of the substantive offences there was no question of their having formed an unlawful assembly for committing an offence. Their conviction under s 147, IPC, was therefore, wholly misconceived.[57]

3. Lawful object of Assembly--Consequences of Unlawful Acts-- Section 147 has no Application to such Cases

The cases are not uncommon where a number of persons (exceeding four) initially assemble to do some lawful act and in order to achieve their lawful object some or one of them may commit an unlawful act. It is also seen that an assembly, which was not unlawful when it assembled, subsequently becomes an unlawful assembly. Sometimes, the right of private defence is exceeded by a member or two of an assembly while exercising the right of private defence of person or property. The question to be seen is whether s 147, IPC applies to such cases. Such a question arose for determination before the Supreme Court in *Maiku v State of Uttar Pradesh* :[58]

> The object was either to recover the dead body of *S* or to recover the stolen property of *P.* This object apparently could not be said to be an unlawful object and therefore these appellants could not be convicted under section 147 . The High Court appears to have ignored this aspect of the matter. It is also clear that if these appellants could not be convicted for an offence under section 147, they also could not be convicted under any section of the Penal Code with the aid of section 149 . The conviction of these appellants under section 147 and with the aid of section 149 could not therefore, be sustained.

Where the main object of the appellants was to demolish the obstruction caused by the complainant on the pathway leading to the well, they could not be said to be inspired by any unlawful object. If, however, in achieving this object some of the accused assaulted the members of the prosecution party, they would be guilty of the individual overt acts committed by them.[59]

Where the accused were ploughing land on *adhir* terms and had taken some labourers with them to plough, there was no unlawful assembly of accused persons as it cannot be said that they had assembled for illegal purposes.[60]

Where at the inception the assembly of the petitioners along with others at the place of occurrence was not an unlawful one as they were there in the exercise of their right of private defence of property and in exercising their said lawful right some of them exceeded the lawful use of that right, and for that the assembly of these persons did not become an unlawful assembly as merely on such facts, it cannot be said that those persons had the common object of acting in excess of their lawful right which is an important requisite for an unlawful assembly. So each one of those1022 persons, who acted in excess of their right, can be held separately liable only for his own individual acts done in excess of such right.[61]

4. Principle of Vicarious Criminal Liability

Section 149, IPC, lays down the principle of constructive or joint criminal responsibility making every member of the unlawful assembly responsible for the act of the other if the act is achieved in the prosecution of the common object of that assembly or as the members of that assembly knew to be likely to be committed. In other words, it will depend upon the circumstances of each case to make one criminally responsible for the act of the other and it would not matter whether the offence is committed by any one of them, or some of them, or all of them, it is very rare, though by no means impossible, to prove by direct evidence, the prior agreement by an assembly or persons more than five in number regarding their achieving one of the unlawful objects specified under s 141, IPC and setting out to achieve it. In most cases, there is no such evidence and hence, the formation of the unlawful assembly with the common unlawful object and the setting out of the members of that assembly to achieve that object (or objects) has to be inferred from the other evidence adduced. A person is not guilty merely because he is present at the scene of crime and does nothing to prevent it. Complicity in a crime may be inferred by exhortation from another to commit a particular crime or his helping him or encouraging him. The concept of help includes co-operation and help may be given even if the member, to whom the help is being given be unaware of it, provided his conduct is such which leads that member to believe, when committing the offence, which he is being helped or will be helped, if necessary, by him. Mere presence may, in certain circumstances, constitute encouragement thereby emboldening the main perpetrator to commit the crime. But there must be a purpose to encourage; accidental presence will not do. Even purposeful presence is not conclusive of co-participation where it does not indicate encouragement to the actual perpetrator. Then the principle of constructive (fictitious or non-actual) or joint responsibility has not to be unduly extended. It has to be strictly construed. A charge for the commissioning of an offence with the help of s 149, IPC (among other sections like ss 34, 109 and 120B), can be embarrassing to the accused because of its vagueness and hence, there is necessity of the proof of overt acts on the part of the constituent member of the unlawful assembly having a common object.[62]

Injured witness had deposed that four accused persons assaulted him and three persons were standing outside the house while the assault was made. There was no allegation or evidence that the three persons standing outside instigated or abetted the assault committed by the four persons. Held, the three persons standing outside did not form unlawful assembly within the meaning of s 147, IPC .[63]

Mere presence would not make a person the member of an unlawful assembly. An act or omission would make a person a member of an unlawful assembly. Existence of common object is the basic thread and such type of evidence is required to be led1023 by the prosecution to link the appellants

with the charge of offences punishable under ss 147, 148 or 149 of the IPC .[64]

5. Sections 147 and 149 --Considered Together

The offences of rioting made punishable under ss 147 and 149, IPC laying down the principle of constructive or joint responsibility have four elements in common. Both of them require:

(i) an assembly of five or more persons;
(ii) all of them having a common object;
(iii) their object being one of those laid down in s 141, IPC, or generally speaking to commit any offence; and
(iv) the assembly using force or violence in the prosecution of the common object of the assembly.

When the trial court found the accused persons guilty under s 304 pt II read with s 149 of the IPC the elements of s 147 of the IPC merged with the elements of s 149 of the IPC . When the main charge was under s 304 read with s 149 of the Indian Penal Code 1860 then the said charge automatically covers elements of s 147 of the Indian Penal Code 1860.[65]

6. Sections 147 and 148 --Considered Together

It is pertinent to note that the offence punishable under s 148, IPC, is a graver offence than the offence punishable under s 147, IPC . When it is fully proven on record that all the accused were armed with deadly weapons, and when the court convicted and sentenced them under s 148, IPC, the conviction and sentence of the accused under s 147, IPC was redundant and was uncalled for.[66]

Where the accused persons having *lathis* in their hands inflicted blows on the deceased, *lathis* are not deadly weapons so accused persons cannot be convicted under s 148, IPC, and their conviction was altered from s 148 to s 147, IPC .[67]

Where all the accused members of an unlawful assembly were having weapons which could be used from the iron blade side for causing fatal injuries but the accused persons preferred not to use the same from that side, instead they assaulted the deceased and his mother only from the blunt side, their conviction under s 148, IPC, cannot be sustained but that under s 147, IPC, was however, maintained.[68]

7. Procedure

It is the same as in the case of an offence under s 144 .

The offence of rioting under this section being an offence against public tranquillity, primarily concerns the state more than an individual, and that is probably one reason why it is not included in the category of the offences which can be1024 compounded by the person immediately affected even with the permission of the court by which the trial is held.[69]

8. Effect of Compromise in Respect of Compoundable Offences Charged with this Section

Where an accused is charged for an offence, which is compoundable along with an offence under ss 143, 147 or 148, IPC, and the charge under the former offence is compounded or allowed to be compounded, it will not result in acquittal for the offence punishable under ss 143, 147 or 148, IPC . Offences under ss 143, 147 or 148, IPC being offences against public tranquillity, have to be tried in spite of the compromise in respect of the former offence.[70] The Bombay High Court in *State v Berulal*

,[71] has expressed the view that where other offences have been compounded, the court must discharge the accused for offences under ss 147, 148 or 149, IPC, also. But the Supreme Court in *Ram Pujan v State of Uttar Pradesh* ,[72] has held that the court should take into account the fact of compromise in determining the sentence even if the offence is non-compoundable. In *Tetan Mandal v State of Bihar* ,[73] the petitioners were convicted under ss 452 and 147, IPC and each of them was sentenced to undergo rigorous imprisonment for six months under each section in respect of which imprisonment was ordered to run concurrently. They were also sentenced to pay a fine of Rs 250 each under s 452, IPC, and in default, to undergo a further rigorous imprisonment for one month each. The High Court, in view of the compromise petition, filed before it by the parties, and the nature of the occurrence, reduced the sentence to the period already undergone which was about seven days in each case. The sentence of fine was also reduced to Rs 20 each, and, in default, to suffer one week's rigorous imprisonment each.[74]

9. Necessity and Particulars of Charge

An accused is entitled to know, with certainty and accuracy, the exact value of the charge brought against him, and unless he has this knowledge he is likely to be seriously prejudiced in his defence, specially when it is sought to implicate him for acts not committed by him but by others with whom he was in company.[75] Where the charge fulfills the requirements of this section, any error or omission in it will not be1025 regarded as material unless in terms of s 215 of the CrPC, 1973 the accused has in fact been misled by such omission or there has been a failure of justice as a result of such error or omission.[76] Where the accused did not complain, in the lower courts, of the defect in the charge, it was held that the omission to mention the object in the charge caused no prejudice to the accused so as to vitiate the trial.[77]

10. Charge under Section 149 Includes Charge under Section 147

When there is charge of s 149, IPC there is no need of framing separate charge under s 147 of the IPC as elements of s 149 of the IPC covers the elements of s 147 .[78]

11. Common object to be set out in Charge

As rioting is an offence with a specific name, it is sufficient to describe the offence by that name and that name only. Section 211(2) , CrPC clearly contemplates a case of this description and was enacted to meet a case of this kind. Where a person is charged with rioting, it means that the prosecution alleges that all the necessary ingredients constituting the offence of rioting are present. It is not necessary to set out what these ingredients are.[79] But, in every charge of rioting and unlawful assembly, the common object must be set out in the charge,[80] though its omission will not necessarily make the conviction bad, except when the accused has been misled thereby and prejudiced in his defence.[81] In some cases, it is said that when there is a dispute and uncertainty as to possession of the parties, it is better to frame a charge of rioting with the common object of assault, but in all cases the principal and the prominent common object should form the subject of the charge and not the incidental happenings.[82] If no charge was framed under this section defining the common object of the assembly, nor was any charge framed under s 149 as to what part of that section applied, it cannot be said that they were not prejudiced at all.[83]

Consequences of Omission to Mention Common Object in Charge

It is incumbent upon the trial court to specify the common object of the unlawful assembly in the charge itself under s 147, IPC . Mere statement of the common object to commit rioting would not be sufficient in law to indicate as to what really their common object was. The court should mention one of the objects enumerated in s 141 as the common object.[84] A conviction of rioting on a charge which does not1026 state the common object is liable to be set aside,[85] but as the offence of rioting can be legally described by its specific name,[86] the question whether any further particulars are necessary under s 213, CrPC must be a question of direction in each case.[87] But where there is evidence on the

record to show what the common object was and the accused have not been prejudiced, the conviction will not be bad.[88] If the variance between the common object charged and the common object found is material, the conviction will be set aside,[89] but if not material, the conviction will not be set aside.[90]

Where the only common object alleged in the charge under s 147, IPC, was to assault the members of the opposite party and to enforce the supposed right and claim over the produce of the disputed fields, whereas in the judgment of the Additional Sessions Judge, it was found that the common object of the assembly was to commit the offence of criminal trespass and theft of the paddy of the opposite party and also for assaulting them if they offered resistance, it was held that the finding was not vitiated on the ground that in the charge, the common object was not stated to be to commit theft and criminal trespass.[91]

Sessions Trial need not be Cumbered with a Medley of Minor Charges

There is no necessity for a sessions trial to be cumbered by a medley of minor charges, particularly in a rioting case in which the overt acts constitute evidence of participation in the riot. This section is quite sufficient in its punitive scope to adequately punish these minor overt acts committed.[92]Section 402, IPC (assembling for the purpose of committing dacoity) fully covers the ingredients of ss 147 and 148 and the accused cannot be said to be prejudiced if the charge mentioned only s 402 and not ss 147 and 148 .[93]

Property when to be Specified

Where the common object is alleged to be to take possession of property, the property must be specified.[94]

Alteration or Variation in the Common Object Alleged and Proved

If a rioter is armed with a deadly weapon he is punishable under s 148, IPC . It is not possible to find him guilty both under s 147 and 148, because, however many weapons he may be armed with, he commits only one offence of rioting in the course of the same riot.[95] A conviction or acquittal on a charge under s 148 cannot on appeal1027 be altered to one under s 147 .[1] Where at the trial the common object charged has been clearly found, and the accused convicted, on appeal the court cannot reject that finding, and on the evidence find another common object, sustaining the conviction thereon. To do so is to convict the accused for an offence for which they have never been tried.[2] It is, however, not a general proposition of law that a conviction under s 147, IPC, cannot be supported, when the common object as stated in the charge is not precisely made out. Where the question in a case was whether the common object as established agrees in essential part with that laid in the charge, the variance between the common object alleged and that found in the case was not such as to invalidate the conviction. Accused persons did not appear to have been prejudiced by such variance between the common object as laid in the charge and that found. Their conviction under s 147, IPC, was, therefore, upheld.[3] Where a charge drawn up by a magistrate alleges several alternate common objects, it is incumbent, on the appellate court to determine whether it is sustainable, and if so, which of the common objects stated has been made out.[4] Notes under s 143, *ante* may be referred to.

12. Form of Charge

The following form of the charge may be adopted:

I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*), as follows:

That you along with (*name the other persons of the assembly or mention their number with a few names if known*) on or about the .....day of at.....were members of an unlawful assembly, and in prosecution of the common object of such assembly, namely.....(*specify the object*) committed the offence of rioting, punishable under s 147 of the IPC, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

13. Proof

To sustain a charge of rioting the prosecution has to establish that there was an unlawful assembly as defined in s 141, IPC, that the accused was a member of that assembly as defined in s 142, IPC, that force or violence was used by such assembly or by any member thereof, and that it was used in prosecution of the common object of the assembly.[5] Where five accused went to the field of the deceased and assaulted him, they could be said to be members of an unlawful assembly so their conviction under s 147, IPC was held proper.[6]

Seven accused persons were alleged to have committed the murder of one KR. The appellants (Accused nos. 6 and 7) were not named in FIR. The eye-witnesses also did not mention the names of the two appellants present on the spot at the time of the occurrence and did not attribute any role to them in the occurrence. It is a settled law that mere presence or association with other members is not *per se* sufficient to hold every one of them criminally liable for the offences committed by the others unless there is sufficient evidence on record to show that one also intended to or knew the1028 likelihood of commission of such an offending act. In this case, there was no legally acceptable material to prove that the appellants acted as members of unlawful assembly to connect them with the murder of the deceased KR. In the absence of reliable evidence to prove that the appellants were either present on the spot or that they had committed any overt act that could show that they shared the common object of the unlawful assembly, the benefit of doubt has to be given to them. The conviction of the two accused appellants under ss 304, Pt II, and ss 147 and 148, IPC as recorded by the High Court was set aside.[7]

Difficulty of the Prosecution Due to the Large Number of Rioters does not Change the Burden of Proof

As in all criminal cases, the burden of proving the charge, substantially as drawn, lies on the prosecution.[8] Notwithstanding the large number of the rioters or of the persons put up in court for rioting, and the consequent difficulty for the prosecution to name the specific acts attributed to a particular accused, the court must see to it that all the ingredients required for unlawful assembly and rioting are strictly proved by the prosecution before convicting that particular accused.

But if some of the accused are proved to have marched with the rioters for a long distance, when the rioters were shouting tell-tale slogans and pelting stones, it will be for them to prove their innocence under s 106 of the Indian Evidence Act .[9]

There must be Nexus between the Common Object and Offence Committed

One of the essential ingredients of the offence of rioting consists in the members of the assembly having a common object to do or commit one of the acts mentioned in s 141 .[10] There must be a nexus between the common object and offence committed.[11] Where the common object of all the

accused persons appears to be to assault the deceased and not to cause his death, but they were members of an unlawful assembly which had a common object and force or violence was used in pursuance of such common object, all the accused persons are guilty of offence of rioting under s 147, IPC .[12]

If more than five people come with *lathis* in a body and some of them beat a person and the others stand-by there is undoubtedly a common object. When *lathis* are carried one can be certain that the common object is at least to cause hurt. It was in evidence that the said petitioners caused hurt to the women who came to the rescue of their husbands. There is, therefore, no escape from the conclusion that these petitioners participated in the common object of the unlawful assembly.[13]

Where there was a clear evidence on record to the effect that a group of nine persons, having enmity with the deceased, and armed with *lathis*, attacked and caused fatal injuries to the deceased and simple injuries to his two rescuers. Such an1029 incident cannot be said to be a free-fight so as to hold individual persons liable for their individual acts only. The accused can validly be convicted under s 147, IPC .[14]

Assailants to be Liable for Individual Acts in the Absence of Common Object

Where the appellants were not present in a group at the scene of occurrence at the initial stage but came one by one to the scene of occurrence on noticing the incident, the appellants could not, be said to be members of an unlawful assembly with the common object of attacking either the deceased or prosecution witnesses nor was there any evidence to infer forming of a common object on the spot. The appellants were therefore, not held liable for offence under ss 147 and 148, IPC . Each of the appellants would be liable only for his individual overt act.[15]

Where accused persons were alleged to have committed murder by forming unlawful assembly, prosecution failed to establish charges against them beyond reasonable doubt, injury caused by one of accused persons was his individual act, possibility of over implication of accused persons could not be ruled out since prosecution witnesses deposing against accused persons were thickly related to deceased, conviction of accused persons was set aside, except one accused who gave a single blow injury and was convicted under s 304 Pt II of the Indian Penal Code 1860.[16]

Where the common object of an assembly, consisting of five or more persons, is to beat the police officers, who are discharging their duties, and some of them are hurt, the assembly is clearly an unlawful assembly, committing rioting, and each of them can be held liable under s 147, IPC .[17] There can be no conviction under this section unless there is a finding that there was an unlawful assembly of five or more persons having a common object as defined in s 141 .[18]

14. Section not Applicable to a case of Sudden Fight

Where there is no satisfactory evidence to prove the formation of any unlawful assembly with the common object of committing a crime and the whole fight starts suddenly on the spur of the moment and in the heat of passion, the accused, though more than five in number can only be liable for the individual acts, committed by them, and they cannot be convicted under ss 147, 148 or 149, IPC .[19]

Where neither party, was the aggressor and after altercation between them, taking place with regard to irrigating the fields, injuries were caused on both sides. There was no common intention or common object on either party to assault or injure the other group. In such a situation, the appellants cannot be held to be the members of an unlawful assembly nor a case of rioting is made out against them and all that can be said is that the occurrence took place suddenly at the spur of the moment, and1030 therefore, they cannot be convicted of offences under ss 323 and 324, read with s 149, IPC .[20]

15. When Lawful Assembly Suddenly Turns Unlawful

No doubt an assembly which was not unlawful when it assembled may subsequently become an unlawful assembly. It was only at the stage of remonstration that one of them started inflicting blows and others followed him. Firstly, as there was a sudden affair, none of the accused can be held guilty for offence punishable under s 147, IPC and secondly the aid of s 149, IPC, cannot be invoked to convict the accused-appellants. Each of the appellants shall be held liable for his individual act and not vicariously liable for the acts of others.[21]

Where no party attacked the members of the opposite party at the commencement of the occurrence and it was only at that stage of remonstration and counter-remonstration that someone started the fight and, according to the trial court, it could not definitely be determined as to which of the two parties struck the first blow. As there was no premeditation and the occurrence was a sudden affair, each of the appellants should be liable for his individual act and not vicariously liable for the acts of others.[22]

Where a sudden fight developed from an altercation at the spur of the moment and the FIR and evidence did not disclose the formation of an unlawful assembly with common object to assault and kill, the offence was held to be committed on individual liability and conviction under ss 147 - 149 was not sustainable.[23]

In the absence of a common object, any act, even if committed by one of the crowd would not make the others liable.[24]

Identity of Participants in a Case of Unlawful Assembly

There can be no conviction under s 147, IPC, unless the prosecution establishes, beyond reasonable doubt, the identity of persons, who were the members of the unlawful assembly, and the part attributed to any of the accused persons. The case of the prosecution must fail if it is difficult to understand as to who the members of the unlawful assembly were and who were the persons who assaulted or attempted to assault, the complainant, and who were mere spectators.[25]

Where out of the mob of 500-600 persons, 50-60 persons allegedly took active part in an assault on the police party and it is difficult to single out an accused who actually inflicted injuries, the appellants are entitled to be acquitted.[26]

Where a number of accused persons were involved in a case of murder and rioting and the evidence disclosed that a few of the accused were falsely implicated due to1031 enmity and it was not possible to single out the accused falsely implicated. It was held that all the accused are to be given the benefit of doubt.[27]

Evidence on record established beyond doubt: (a) that it was accused no 1 who was armed with a spear, and (b) that accused nos 1, 6, 7, 10, 13, 17 and 20 were the members of the unlawful assembly, some of whom were armed with weapons such as spears, sticks and stones. In the said circumstances, accused no 1 can be convicted under s 148, IPC, and the remaining accused persons can be convicted under s 147, IPC .[28] For a conviction under this section it must be remembered that mere presence of a person along with members of an unlawful assembly is not sufficient to support a finding that he had the common object of the unlawful assembly. There must be other evidence, direct or circumstantial; to justify a finding that he had the common object.[29] The finding as to the common object must be supported by evidence.[30]

Mere Presence at the Place of Occurrence not Sufficient to become Member of Unlawful Assembly

Mere presence at the time and place of occurrence without anything more is insufficient to hold them as members of unlawful assembly which was the foundation of their conviction.[31] Where a lady victim was kicked in the abdomen by accused lady resulting in an abortion, other accused though present

did not participate in an assault or abuse, evidence of the victim was reliable and truthful, evidence of other witnesses was found relevant and corroborated with the evidence of victim, guilt of the lady accused was held established and her conviction under ss 313, 147, IPC was maintained but non-participating accused were given benefit of doubt and their conviction for the said offences was set aside.[32]Where there was a mob of about 100 persons, it will be unsafe to infer from the mere presence of these persons, in absence of any overt act on their part or any other evidence on record that they along with the appellant 'J' and others who might be present there, formed an unlawful assembly with the alleged common object. Hence, they are required to be acquitted.[33] It must be shown that the common object was shared by at least five persons including the accused.[34] Mere presence of the accused at the scene of occurrence is not enough; it must be shown that they shared the common object of the unlawful assembly. When people go to defend their rights that cannot be described as enforcing any right or supposed right.[35] If there are two explanations of the presence of a particular person on a particular occasion, one of which is lawful and the other of which is unlawful, the court cannot, as against an accused person, assume the unlawful intention.[36]1032

16. Certain Presumptions in a Case of Rioting

When it is found that the accused came to the place and some of them assaulted the complainant, the presumption is that the assault took place in prosecution of the common object of assaulting the complainant. Assuming that assault was not the original common object with which the accused came to the place, it must be presumed in the circumstances that it was formed at the time the assault took place. *Prima facie*, therefore, the accused formed an unlawful assembly.[37] When the common object of the accused as alleged by the prosecution, is found to be not proved, the charge of rioting under this section cannot be legally sustained.[38] If the common object assigned in the charge is not sustained, the appellate court cannot invent a common object to sustain the conviction under this section.[39] Evidence of injuries on the body of persons is a sure guide that they took part in the riot.[40]

Where the accused persons formed an unlawful assembly and armed with weapons alleged to have trespassed into the house of the victim and assaulted her family members, evidence of eyewitnesses as regards trespass and assault was proved beyond doubt, the conviction of accused persons under ss 147, 451, 323, IPC, was held proper.[41]

Where the trial court examined three injured witnesses but did not record reasons for discarding their testimony, acquittal of the accused under ss 323, 325, 147, IPC, by the trial court for want of availability of independent eyewitness was found not proper and order of acquittal of trial court was set aside.[42]

Where a number of people are jointly tried for an offence under this section along with an offence resulting from specific acts, the court should consider the evidence against each of the accused separately and give definite findings as regards the presence and part taken by each of the accused.[43]

Where the evidence is interested and a considerable amount of enmity exists between the factions who are concerned in the affair, it is necessary to scrutinise the evidence very carefully.[44] The adequacy of evidence to prove the case against any one has to be determined on the peculiar circumstances of the situation in which the crime was committed, and, in the absence of any rule requiring a particular number of witnesses to testify the acts imputed to the accused, the conviction cannot be assailed only because it is based on the evidence of a single witness. What is necessary in such a case is that the evidence should be subject to strict scrutiny.[45]

17. Testimony of Eyewitnesses not to be Rejected because of some Inconsequential Contradiction or Exaggeration

When people are killed during a riot, there may be a possibility of the incident being exaggerated or some innocent persons being named as being part of the assailant's1033 party. But just because

there may be some inconsequential contradictions or exaggeration in the testimony of the eyewitnesses, that should not be a ground to reject their evidence in its entirety. In cases of rioting, where there are a large number of assailants and a number of witnesses, it is but natural that the testimony of the witnesses may not be identical. What has to be seen is whether the basic features of the occurrence have been similarly viewed and/or described by the witnesses in a manner which tallies with the outcome of the riot, *viz* the injuries sustained by the victims and the number of people who are attacked and killed.[46]

18. Certain Guidelines for cases of Mammoth Rioting

Sometimes there are cases of mammoth rioting in which a very large number of people are tried for rioting. Panchapakesa Ayyar J, of the Madras High Court has laid down the following five principles to be observed by the court in such cases:

> The first is that notwithstanding the large number of the rioters or of the persons put up in court for rioting, and the consequent difficulty for the prosecution to name the specific acts attributed to each of the accused, the court must see it that all the ingredients required for unlawful assembly and rioting are strictly proved.

> Secondly, spectators, wayfarers etc. are often attracted to the scene of the rioting by curiosity. They should not be, by reason of their mere presence at the scene of rioting and with the rioters, held to be members of the unlawful assembly or rioters. But if they are proved to have marched with the rioters for a long distance, when the rioters were shouting tell-tale slogans and pelting stones, it will be for them to prove their innocence under section 106 of the Indian Evidence Act .

> The third is that it will be very unsafe, in the case of such large mobs of rioters to rely on the evidence of 'a single witness' speaking to the presence of an accused in that mob for convicting him, especially, when no overt act of violence, or shouting of slogans, or organising the mob, or giving orders to it, or marching in procession with it, or other similar thing is proved against him.

> An ordinary rule of caution and prudence will require that an accused identified only by one witness, and not proved to have done any overt act, etc. should be given the benefit of doubt.

> The fourth principle to be observed in such cases is that where there are such acute factions, one based on agrarian dispute and troubles, another on political wrangling and rivalry, and a third on caste division, or the division of the haves and the have-nots, greatest care must be exercised before believing the evidence of a particular witness belonging to one of these factions against an accused of the opposite view. This principle assumes special importance when there are no overt acts, etc., proved and there are only one or two witnesses speaking to the presence of the accused among the rioters, and they belong to the class or factions opposed to the accused.

> The fifth principle to be observed is that mere 'followers' in rioting deserve a much more lenient sentence than leaders, who mislead them into such violent acts, by emotional appeals, slogans and crimes.[47]

19. Joinder of Charges--Trial of Cross-cases

Where two opposing factions commit a riot, each faction should be committed for trial and tried separately. They should not be treated as constituting one unlawful1034 assembly, not having one 'common object' under s 141, IPC .[48] The desirable procedure in such cases would be that both the cases be tried by the same judge. The first case should be tried to a conclusion. But the judge should postpone judgment in that case till he has heard the second case to a conclusion and he should then pronounce judgments separately in each case. He would of course be bound to confine his judgment in each case to the evidence led in that particular case and would not be at liberty to use the evidence in one case for the purpose of the judgment in the other case and to allow his findings in one case to be influenced in any manner to the prejudice of the accused by the views which he may have formed in the other case. It would be obviously necessary that he should try the two cases in quick succession one after the other. It may be that in some particular cases he might feel some difficulty about trying both cases and in such a case it would always be open to him to get the second case transferred.[49]

In a case of this kind it is rather difficult to keep the two cases wholly separate, but every effort has to be made to do so. In a case, two parties were charged for their attacks on each other in the same occurrence, and the charges were tried separately at two distinct trials. The evidence given for the prosecution was similar to a substantial extent in each case. Each party was a witness against the other, but there was also independent evidence. Although they were tried separately, the High Court gave one judgment, but treated the cases as two cases which had been separately tried. Before their Lordships of the Privy Council it was contended that they imported considerations from one case into the other. Their Lordships held:

> When one looks at it, to some extent that was inevitable, and to some extent it did so happen. There was, however, a body of separate evidence which was applicable to each case and that in itself was enough for the conviction, so that, although technically it might have been better to keep the evidence entirely distinct, and to have delivered two separate judgments, no injustice has followed from what was done.[50]

Evidence of one Cross-Case cannot be used in Another

In the *Mithu Lal v State of Uttar Pradesh* [51] the Allahabad High Court based its conclusions not only on the evidence, recorded in the case against the appellants but also took, into account, the evidence, recorded in the cross-case. In appeal, their Lordships of the Supreme Court strongly deprecated the procedure, adopted by the High Court, and observed:

> It is difficult to comprehend as to how the High Court could decide the appeal, before it, by taking, into account, evidence recorded in another case, even though it might be, what is loosely called, a cross-case. It is elementary that each case must be decided on the evidence, recorded in it, and evidence, recorded in another case, cannot be taken into account in arriving at the decision.1035

20. Effect of Acquittal of Some Members of the Unlawful Assembly--Some

Illustrative Cases

Commentary under s 141, *ante* may be referred to.

Where out of eight accused, three were acquitted by the trial court and the fourth one is being given benefit of doubt by the High Court, it reduces the number of assailants to be four out of whom three have already died, the result would be that remaining one accused cannot be convicted under s 147 of the Indian Penal Code 1860.[52]

There was a charge against six accused, including the two appellants, that they formed an unlawful assembly. Presence of four accused was not proved, and, therefore, the trial court acquitted them. No appeal was filed by the state against the acquittal of the four accused. There was no charge against the appellants that there were some unidentified persons along with them. In such a case, in the absence of any charge to this effect, even if the appellant court comes to the conclusion that there were 3 or 4 persons along with the two appellants, they cannot be convicted for offences under ss 147 and 148, IPC and, therefore, the order of conviction under ss 147 and 148, IPC, passed by the trial court against them, was set aside.[53]

Where there was a charge against six persons under s 302 read with ss 147 and 148, IPC, and four of them were acquitted. One was convicted under s 302 read with s 148 and another under s 147 alone. It was held that conviction of one under s 148 and of another under s 147 was illegal as acquittal of four meant no unlawful assembly. Conviction of one under s 302 alone was justified.[54]

Where there was no finding that after acquittal of five accused what remained was an unlawful assembly of five or more known or unknown persons, the charge under ss 147 and 149, IPC even against two remaining accused would not stand.[55]

The petitioner was convicted under s 147, IPC on account of plea of guilt by him but four other co-accused were let off as according to the trial court the presence of five or more persons was not proved. The court of revision held that in view of the finding of the trial court in regard to other accused, conviction under s 147, IPC could not be sustained.[56]

Complainant alleged that he had been in possession of the disputed land and that he had been living in a mud house made by him in the disputed land. The accused persons on the date of occurrence formed unlawful assembly, entered the disputed land, demolished the mud house and also removed the belongings of the complainant. A civil suit in respect of the disputed land between the parties was pending. The accused were given benefit of doubt and their conviction under s 147, IPC and s 3(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, recorded by the Court below, was set aside.[57]1036

21. Sentence

Where the offence is more or less technical, harsh sentence is uncalled for.[58] Where the criminal proceedings had been pending for a period of more than seven years and the accused had been in jail for a considerable period, the High Court, in appeal, held that the sentence already undergone by the accused, would subserve the ends of justice.[59] Where litigation had been pending between the parties from before the day of occurrence, sentence of fine, instead of imprisonment, could serve the ends of justice.[60]Rioters, who carried no weapons and committed no overt act of violence, and only marched in procession with other rioters for some distance, deserve only a light sentence. Merely because some rioters have received gunshot wounds on police firing, they cannot be presumed to have been more aggressive than other rioters, and they cannot be treated more severely than others.[61] Accused appellants were convicted for offences under ss 147, 149, 323 and 325 of the IPC . Since the occurrence had taken place 25 years ago, and the appellants had remained in custody from 23 to 109 days during trial of the case, sentence imposed on them was reduced to the period already undergone.[62]

The incident was thirty years old and some of the accused appellants had become old. The accused were released on probation of one year.[63]

The occurrence had taken place three decades before. The Court did not think it proper to send the accused appellants to jail to serve the imprisonment awarded to them. The Court upheld the conviction but substituted the substantive imprisonment by a fine of Rs 300/- to be payable in cash by the accused appellants.[64]

Where a case presents a picture of extreme brutality and lawlessness the accused are not entitled to receive any mercy and are liable to maximum penalty.[65]

Cumulative Sentences

Synopsis notes under s 71, *ante*, under the heading 'Rioting and Hurt' may be referred to.

22. Whether an Offence under this Section Involves Moral Turpitude

The Calcutta High Court has held in a case of a police constable that an offence under ss 147 and 323 / 149, IPC committed by a constable involves moral turpitude and he cannot be allowed to act as a member of such disciplined force.[66]1037

53 *Salim Mahommad v State of Gujarat* (1972) Cr LJ 1454, p 1456 (Guj) .

54 *Basdeo v Emperor* AIR 1945 All 340, p 342-343 .

55 *Rama v State of Rajasthan* (1992) Raj CC 2 .

56 *Ramji Tiwari v State of Uttar Pradesh* (1986) 23 All Cr C 366, (1986) All Cr R 394 (HC)(LB).

57 *Bachya v State of Uttar Pradesh* (1979) All Cr C 122, p 124, (1979) All WC 243 .

58 *Maiku v State of Uttar Pradesh* AIR 1989 SC 67, (1989) SCC (Cr) 117, p 121, (1989) Cr LJ 860 (SC), (1989) Cr LR 10(SC).

59 *Hathi Singh v State of Rajasthan* (1979) 4 SCC 340, (1979) Cr LR (SC) 398, p 401, (1979) SCC (Cr) 976, (1979) WLN 141 (SC) .

60 *State of Assam v Jatindra Kumar Das* (1989) 1 Gau LJ 29 (NOC) .

61 *Pitei Bewa v State* (1971) Cut LT 1164 ; *Mangulu Malik v State* (1971) Cut LT 1264 ; *Naina Ram v State* (1990) Raj Cr C 132 (Raj) (DB).

62 *Sohan Lal v State of Madhya Pradesh* (1982) Cr LJ 654 (MP) .

63 *Ramsingh v State of Madhya Pradesh* 2009 Cr LJ (NOC) 238 (MP) .

64 *Rafikbhai S Dodiya v State of Gujarat* 2008 Cr LJ 1197, p 1204 (Guj) .

65 *Ananta Deb Singha Mahapatra v State of West Bengal* (2007) Cr LJ 1705 (Cal)(DB).

66 *Sheo Poajan & Ors v State of Uttar Pradesh* (1998) Cr LJ 2864 (All) ; *Mijajilal v State of UP,* 2009 Cr LJ (NOC) 824, 2009 (3) All LJ 771 (All) (DB) .

67 *Lakhu Singh v State of Rajasthan* (1997) Cr LJ 3638 (Raj)(DB).

68 *Naththoo Ram & Ors v State of Uttar Pradesh* (2000) Cr LJ 3870 (All)(DB).

69 *Emperor v Hira Singh* 6 Cr LJ 336, p 337, 11 PR (Cr) 1907, 34 PWR 1907, 17 PLR 1908 .

70 *State of Uttar Pradesh v Janni* AIR 1970 All 235, (1970) Cr LJ 441 ; *Shabbir Khan v Mohd Ismail* (1972) Cr LJ 666 (All)(FB), **overruling***State of Uttar Pradesh v Chandrapal* (1968) Cr LJ 1342 (All) ; *Satya Narain v State of Uttar Pradesh* (1972) All Cr R 453 ; *State of Madhya Pradesh v Rukman* (1968) MPWR 660, (1969) Cr LJ 80 ; *Crown v Mahommad Hussain* AIR 1950 Lah 121, 51 Cr LJ 1016 ; *Emperor v Jarnail* AIR 1925 Lah 464 ; *Guru Narain Das v Emperor* AIR 1948 Pat 58 (DB); *Deonarain Rai v State of Bihar* (1968) Cr LJ 266, (1967) BLJR 64 ; *Lakhidas v State of Bihar* (1969) BLJR 216, (1968) Pat LJR 626 (View, taken

by the Patna High Court, in *Rampal Gope v State of Bihar* (1964) 2 Cr LJ 111 (Pat) is **opposed** to the view taken by an earlier Division Bench of the same court); *Krishna Jena v State of Orissa* (1969) Cut LT 1272 ; *State v Mohan* AIR 1968 Raj 179, (1968) Raj LW 102, (1968) Cr LJ 545 ; *Agha Nazar Ali v Emperor* AIR 1941 Sind 186 .

71 *State v Berulal* (1970) Cr LJ 1038 (Bom) .

72 *Ram Pujan v State of Uttar Pradesh* AIR 1973 SC 2418, (1973) Cr LJ 1612 .

73 *Tetan Mandal v State of Bihar* (1980) Bih Cr Cas (Pat) 4, 5.

74 *Munnan v State* (1980) (UP) Cr LR 494, p 496 (All) .

75 *Behari Mahton v Queen-Empress* 11 ILR Cal 106 ; *Sabir v Queen Empress* 22 ILR Cal 276 ; *Balmakand Ram v Ghansam Ram* 22 ILR Cal 391, p 402 ; *Rahamat Ali v Empress* 4 CWN 196 ; *Amrita Lal Hazara v Emperor* 42 ILR Cal 957 .

76 *Jaswantrai v State of Bombay* AIR 1956 SC 575, (1956) Cr LJ 1116 ; *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116, (1956) Cr LJ 291 .

77 *Dija Patra v Bimbadher Mallik* (1974) 40 Cut LT 1065 .

78 *Ananta Deb Singha Mahapatra v State of West Bengal* (2007) Cr LJ 1705 (Cal) (DB) .

79 *Emperor v Ramchandra Roy* AIR 1928 Cal 732, p 734, ILR 55 Cal 879 .

80 *Sabir v Queen Empress* 22 ILR Cal 276 ; *Tafazzul Ahmad Chowdhry v Queen Empress* 26 ILR Cal 630 ; *Behari Mahton v Queen Empress* 11 ILR Cal 106 ; Re *CT Sambandam*AIR 1954 Mad 785 .

81 *Sabir v Queen Empress* 22 ILR Cal 276 ; *Budhu v Mussamat Lachminia* 2 Cr LJ 275, 9 CWN 599 ; *Poresh Nath v R* 33 ILR Cal 295 ; *Dasarathi v Raghu* 36 ILR Cal 158 ; *Gowardhan Das v R* 6 Cr LJ 446, 2 PWR (Cr) 106 ; *Nawab Khan v Govt of Mysore* 9 Cr LJ 531 ; *Kudrutulla v R* 39 ILR Cal 781, (1912) 13 Cr LJ 218 ; *Brundaban Swain v State* AIR 1957 Ori 117 ; *Rishipal v State* AIR 1962 All 13, p 18, (1962) 1 Cr LJ 3 .

82 *Aklu Mian v Emperor* AIR 1928 Pat 405, p 408, 29 Cr LJ 390 .

83 Re *CT Sambandam*AIR 1954 Mad 785, p 788, 55 Cr LJ 1254 .

84 *Lakshmi Setti v State* AIR 1957 Ori 190 ; *Nanda Kishore Mohanty v State* AIR 1961 Ori 29, (1961) 1 Cr LJ 132(2).

85 *Chunder Coomar Sen v Queen Empress* 3 CWN 605 ; *Paresh Nath Sarcar v Emperor* 33 ILR Cal 295, 3 Cr LJ 153 .

86 *Emperor v Ram Chandra Roy* AIR 1928 Cal 732, ILR 55 Cal 879 .

87 *Kudarutulla v Emperor* 39 ILR Cal 781 .

88 *Basi Reddi v Queen Empress* 21 ILR Cal 827 ; *Harnam v Crown* 38 PWR 1907 (Cr) .

89 *Silajit v Emperor* 36 ILR Cal 865 .

90 *Babbon Sheikh v Emperor* 37 ILR Cal 340 ; *Maniruddin v State* 35 ILR Cal 384 ; Re *CT Sambandam*AIR 1954 Mad 785, 55 Cr LJ 1254 .

91 *Brundaban Swain v State* AIR 1957 Ori 117 .

92 Re *Subbaratnam*AIR 1949 Mad 663, 50 Cr LJ 950 .

93 *Rishipal v State* AIR 1962 All 13, p 18, (1962) 1 Cr LJ 3 .

94 *Poresh Nath Sircar v Emperor* 33 ILR Cal 295, 3 Cr LJ 153 .

95 Re *Nadimpalli Bangaraju*AIR 1942 Mad 58, p 62 ; *Ram Lakhan v State of Rajasthan* (1980) Cr LR 30 (Raj) .

1 *Nanda Kishore Mohanty v State* AIR 1961 Ori 29, p 30 .

2 *Ahimuddi v Asgar Ali* 27 ILR Cal 990 ; *Ariff Munshi v R* 15 Cr LJ 188 .

3 *Priyabarat Mukhia v State of Bihar* (1981) BLJ 329, (1981) BLJR 370 .

4 *Munaruddi v R* 35 ILR Cal 918 .

5 *Pedda v State of Mysore* AIR 1953 Mys 41 .

6 *Purkha Ram & Ors v State of Rajasthan* (1998) Cr LJ 918 (Raj)(DB).

7 *Nagesar v State of Chhattisgarh* 2014 Cr LJ 2948, p 2951 (SC), (2014) 6 SCC 672, (2014) 140 AIC 225 (SC) .

8 *Panchanon Bose v Emperor* AIR 1919 Cal 505, 20 Cr LJ 721 .

9 Re *Arulanandu*AIR 1952 Mad 267, p 269 .

10 Re *CT Sambandan*AIR 1954 Mad 785, p 787 .

11 *Jakir Ibrahim Khan v State of Maharashtra* (1990) 3 Bom CR 613 .

12 *Toteswar Chutia & Ors v State of Assam* (2002) Cr LJ 1465 (Gau)(DB).

13 *Dija Patra v Bimbadhar Malik* (1974) Cut LJ 1065 .

14 *Heera v State of Rajasthan* (1982) Cr LR 222 (Raj) .

15 *Kathan v State* (1989) 3 Crimes 130 (Mad) .

16 *Ram Gopal v State of Rajasthan* (2006) Cr LJ 362 (Raj) (DB) .

17 *State of Madhya Pradesh v Bhawani Din* (1980) Cr LJ 237, p 240 (MP)(DB).

18 Re *Gopala Krishnan*AIR 1938 Mad 392, 39 Cr LJ 687 ; *Ata Mahommad v Crown* AIR 1923 Lah 692, 25 Cr LJ 494 ; *Ramaswami Koar v King Emperor* AIR 1921 Mad 687 ; *Prakash Rajak v State of Bihar* (2006) Cr LJ 3936 (Jhar) (DB) .

19 *Mariadasan v State of Tamil Nadu* AIR 1980 SC 573, (1980) Cr LJ 412(SC); *Lalji v State of Uttar Pradesh* AIR 1973 SC 2505, (1973) Cr LJ 1769 ; *State v Akbar Dar* (1980) Cr LJ 661, p 669 (J&K)(DB); *Ashresingh v State of Madhya Pradesh* (1980) Cr LR (MP High Court Notes) 280, pp 284-285.

20 *Om Prakash v State* (1983) 23 DLT 50 (Del) .

21 *Khilli v State of Rajasthan* (1977) Raj Cr C 336, p 339 .

22 *Lalji v State of Uttar Pradesh* AIR 1973 SC 2505, (1973) SCC (Cr) 921, (1973) UJ (SC) 790, (1973) SCD 879, (1973) Cr AR 368, (1973) Cr LJ 1769, (1973) SC Cr R 443, 1973 Cr LR 589 .

23 *Mariadasan v State of Tamil Nadu* AIR 1980 SC 573, (1980) 3 SCC 68, (1980) UJ (SC) 300, (1980) Cr App R (SC) 115, (1980) SC Cr R 178, (1980) SCC (Cr) 523, (1980) Cr LJ 412 (SC) .

24 *State of Kerala v KJ Thomas* (1961) 1 Cr LJ 661, p 663, (1961) Mad LJ (Cr) 45 ; *Srihan Rout v State of Orissa* (1973) Cut LT 116 .

25 *Bhika Sahadu Jadhav v State of Maharashtra* (1980) 2 Mah LR 73, p 82-83 (Bom).

26 *Markandey Chand v State of Uttar Pradesh* (1989) All Cr R 442 (All) .

27 *Babu Ram v State of Uttar Pradesh* (1992) 2 Crimes 1037 (All) .

28 *Gambhir Dala Bhil v State of Maharashtra* (1984) Cr LR 70 (Bom)(Mah).

29 Re *Ranga*AIR 1954 Mys 75, p 78, 55 Cr LJ 632 ; *Diljan Chaudhry v State of Bihar* AIR 1958 Pat 492, p 494 ; *Pedda v State* AIR 1953 Mys 41, p 43 .

30 *Jadubar Singh v Emperor* AIR 1919 Pat 375(1), 20 Cr LJ 670 ; *Fateh Singh v Emperor* 14 Cr LJ 693 ; *Banga Hadera v Emperor* 11 Cr LJ 245 .

31 *Latoor v State* (1988) Cr LR 346(Raj).

32 *Tulsi Devi & Ors v State of Uttar Pradesh* (1996) Cr LJ 940(All).

33 *Hamidulla Bismilla Khan v State of Gujarat* (1988) 16 Reports 582(Guj).

34 *Aminulla v Emperor* AIR 1922 Cal 191, 24 Cr LJ 355 ; *Saket Bihari Singh v State of Bihar* (1963) BLJR 332 .

35 *Diljan Choudhary v State of Bihar* AIR 1958 Pat 492, p 494 ; *Pedda v State* AIR 1953 Mys 41, p 43 .

36 *Kammoon v Emperor* AIR 1942 All 225 .

37 *Birjubhukan v Janrao* AIR 1923 Nag 100, 23 Cr LJ 745 .

38 *Gayadin v Emperor* AIR 1934 Oudh 124, p 129, 35 Cr LJ 804 .

39 *King Emperor v Akbar Molla* AIR 1924 Cal 440, 25 Cr LJ 773 .

40 *Sadho v Emperor* AIR 1934 All 881 .

41 *Thamgamuthu & Ors v State* (1996) Cr LJ 3815 (Mad) .

42 *Ram Karan v State of Uttar Pradesh & Ors* (1996) Cr LJ 3972 (All) .

43 Re *Kotta Veeraiah*AIR 1949 Mad 22, p 23, 50 Cr LJ 93 ; Re *Ramasamy Naidu*AIR 1916 Mad 834, 16 Cr LJ 809 .

44 *Majhi v Emperor* AIR 1927 Lah 617, 28 Cr LJ 685 ; Re *Arulunandu*AIR 1952 Mad 267, p 269 .

45 Re *Ranga*AIR 1954 Mys 75, p 77 .

46 *State of Uttar Pradesh v Dan Singh & Ors* (1997) Cr LJ 1150 (SC) .

47 Re *Arulanandu*AIR 1952 Mad 267, p 269-70 .

48 *R v Durzoolla* 9 WR (Cr) 33 ; *R v Saroop Chunder* 12 WR (Cr) 75 ; *Banappa Kallappa Ajawan v Emperor* AIR 1944 Bom 146, p 147, 45 Cr LJ 701 .

49 *BK Ajawan v Emperor* AIR 1944 Bom 146, p 148 ; *Krishna Pannadi v Emperor* AIR 1930 Mad 190, 31 Cr LJ 161 ; *Ujagar Singh v Emperor* AIR 1936 Lah 356, 37 Cr LJ 510 ; *Madat Khan v Emperor* AIR 1927 PC 26, 28 Cr LJ 254 ; Re *Mounaguruswami*AIR 1933 Mad 367, 34 Cr LJ 175 ; *Ganga v Emperor* AIR 1935 All 647, 36 Cr LJ 763 ; *Akhlaq v State* (1962) All WR (SC) 109 ; *Mitthulal v State of Madhya Pradesh* AIR 1975 SC 149, p 150, (1975) Cr LJ 236 .

50 *Madat Khan v Emperor* AIR 1927 PC 26, p 27, 28 Cr LJ 254 (PC) .

51 *Mithu Lal v State of Uttar Pradesh* AIR 1975 SC 149, p 150-51, (1975) Cr LJ 236 .

52 *Narain v State* (2005) Cr LJ 2001 (All)(DB).

53 *Raghunath v State of Maharashtra* (1982) 2 Bom CR 124 .

54 *Preetam Singh v State of Uttar Pradesh* (1985) Cr LJ 10(All), (1985) All Cr C 63, (1984) UP Cr R 146; **See also***Shyam Pyare v State of UP* 2009 Cr LJ (NOC) 1226 (All) (DB).

55 *Jakir Ibrahim Khan v State of Maharashtra* (1990) 3 Bom CR 613 .

56 *Ashok Kumar v State of Rajasthan* (1987) WLN (UC) 100, (1987) Raj Cr C 71 .

57 *Dodi Mahto v State of Bihar* 2014 Cr LJ 977, p 978 (Pat) .

58 *Noor Ali v State of Maharashtra* (1977) Cr LR 342(Mah); *Markando Ho v State* (1978) Cut LR (Cr) 16, p 17 .

59 *Kallu v State of Rajasthan* (1977) Raj Cr C 62, p 64, (1978) Cr LR 528 (Raj) .

60 *B Mohanty v State of Orissa* (1969) 35 Cut LT 1292 .

61 Re *Arulanandu*AIR 1952 Mad 267, p 270-71, (1952) Cr LJ 283 .

62 *Ram Singh v State of Rajasthan* 2014 Cr LJ 78, p 79, 80 (Raj) *Naib Singh v State of Punjab* AIR 1986 SC 2192, (1986) 4 SCC 401 **followed**.

63 *Jagdish Giri v State of UP* 2010 Cr LJ (NOC) 764 (All) .

64 *Jatadhar Jha v State of Bihar* 2013 Cr LJ 565, p 567 (Pat) .

65 *State of Madhya Pradesh v Ganga Singh* (1986) 1 Crimes 643, (1986) Cr LR 65(MP), (1986) JLJ 83, (1987) Cr LJ 128, (1986) 1 Cr LC 254, (1986) Cur Cr J 1(MP) .

66 *State of West Bengal v Ram Nagina Dubey* (1992) 1 CHN 6 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 148.

Rioting, armed with deadly weapon.--

Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope

The offence punishable under this section is only an aggravated form of the offence of rioting punishable under s 147, IPC . It is a distinct offence.[67]

A rioter armed with a deadly weapon, is punishable under s 148, IPC . So the accused who are armed with deadly weapons, are punishable under this section while those, who carry only *lathis*, are punishable under s 147 .[68] Conviction can be under either but cannot be under both, ss 147 and 148, because however many weapons he may be armed with, he commits only one offence of rioting in the course of the same riot.[69]

Where the accused, numbering more than five, had the common object of belabouring a person, used violence in prosecution of their common object, and they were all armed with deadly weapons, it was held that their offence fell under this section.[70]

2. Sections 147 and 148 --Distinguishing Features

This section appears to differ from s 147 precisely in the same way that s 144 differs from s 143, IPC . Under s 143 any member of an unlawful assembly is liable to punishment for upto six months. Under s 144, whoever being armed with a deadly weapon is a member of an unlawful assembly is liable to imprisonment for two years. In exactly the same way, under s 147, whoever is guilty of rioting is liable to imprisonment upto two years; and under s 148 whoever being armed with deadly weapon is guilty of rioting and is liable to imprisonment for three years.[71]1038

Sections 147 and 148 --Considered Together

Commentary under same heading in s 147, *ante* may be referred to.

3. Unlawful Assembly and Common Object--Some Illustrative Cases

In order to constitute an 'unlawful assembly', the assembly, composed of five or more persons, should not only have a 'common object' but the object must also be 'unlawful'.[72] This section will not apply if the number of members of the assembly is less than five or the common object is not unlawful or the offence committed was not in prosecution of the common object of the unlawful assembly.

Where only two accused persons had participated in the occurrence, conviction for forming unlawful assembly under s 148, IPC was set aside.[73]

Where seven accused were tried together in the case but the case against three of the assailants was

not found free from doubt, and they were acquitted thereby reducing the maximum number of the assailants, to only four, in such a case, the conviction of the appellants under s 148, IPC cannot be sustained.[74] Where out of total nine accused persons, six accused persons have already been acquitted in two appeals arising out of the same occurrence, no question of formation of unlawful assembly by remaining three accused persons would arise; the remaining three accused persons cannot be convicted for offences under ss 148 and 149, IPC .[75]

Where only the two appellants were present at the time of the incident and no other persons in their company have been proved to have been seen at the place of incident, the conviction under ss 324 and 325 with the aid of ss 148 and 149, IPC is not tenable.[76]

Where the *challan* was filed against five persons but four persons were acquitted by the trial court, it was held that a single person cannot form unlawful assembly. No case of unlawful assembly was made out and it was wrong to convict a single person for forming unlawful assembly with the aid of s 149 .[77]

Since the object of the appellants' assembly was to exercise the right to self-defence, it could not be held to be unlawful. Therefore, the appellants could not be held to be the members of an unlawful assembly and as such could not be convicted with the aid of s 149 of the IPC . They would individually be liable for their respective acts.[78]

Where an unlawful assembly was formed on the spot itself at the spur of the moment and no deadly weapon was used by any member of the unlawful assembly in the whole occurrence under consideration, in such a case, no conviction can be passed under s 148, IPC .[79]

1039Where the accused were present at the spot to defend their possession over the land but when the complainant party left the scene, some of the accused chased and assaulted them and in a melee, some of the accused and some of the prosecution party resorted to a free fight, in the course of which injuries were caused to some persons of either party. In such a case, charges under ss 148 and 302 read with s 149, IPC, and the charge in respect of offence of causing grievous or simple hurt by the application of s 149, IPC must fail.[80]

Where the common object of the unlawful assembly was not to kill the deceased or *A* and further that the common object was to teach *A* a lesson as PW 3 says and it was with that object in their mind that the appellants were rushing towards the place of occurrence when deceased *N* came in their way. Three of the appellants went to deal with him as he was a brother of *A* and pushed him to the ground as a result of which he was injured. The other four witnesses, all relations of *A* were also injured as they rushed to the aid of *N*. The fact that the appellants other than the three did not take any part in causing the death of deceased shows clearly that killing anybody was not part of that common object. In the circumstances, the charge under s 148, IPC alone may be said to have been fully established against all the appellants, their common object being to assault *A* and his relations with *lathi*, axes etc, an unlawful object altogether.[81]

Where the charge was under s 367 read with s 148 and the State Counsel conceded that charge under s 148, IPC related to murder of the deceased at a place other than the place of his abduction, and was not connected with the accusation of abduction. In such a case, the common object, as stated by the prosecution cannot be available for sustaining the conviction under s 148, IPC in the said background.[82]

Where the appellants formed an unlawful assembly with the object of abducting a woman, their intention being to have her murdered, and each one of the appellants was armed with fire guns and used the said fire guns while abducting the lady; conviction of the appellants under s 148, IPC was upheld.[83]

4. Large Scale Rioting

In a large scale rioting it is generally difficult for the witnesses to observe the details of the attack. However, in the case of injured witnesses their presence cannot be doubted and there is no reason as to why their evidence cannot be accepted in respect of the participation of their own assailants. In a case of this nature, the court generally, to fix the presence of unlawful assembly, would first scrutinise the evidence of the injured witnesses and if the same is corroborated by the medical evidence, that can be accepted as against those accused who caused injuries and they can be held to be members of the unlawful assembly. This is on the ground that the witnesses at least would be in a position to identify their own assailants. Applying this principle out of 43 persons *challanned* by the police only four persons were convicted for rioting.[84]1040

5. Act of Member of Unlawful Assembly may not Bind All

It is not a necessary corollary that whenever there is an unlawful assembly being governed by any particular common object, whatever offence is committed by any particular member or a group of members of that assembly will have to be taken as having been committed by all the members as in pursuance of such a common object it is not unlikely or unusual that one or some members of that assembly may indulge in commission of any act, which may not be prompted by an object common to all.[85]

6. 'Whoever'

It is only the person, or persons, armed with a deadly weapon who can be charged under this section. The only way in which one person can be made liable for the acts of another, is under s 149, IPC .[86] In Re *Muduru Payalagadu*,[87] a view was taken that:

> If some members of an unlawful assembly are armed with deadly weapons in prosecution of the common object of the unlawful assembly, and if rioting is committed, the other members of the unlawful assembly who are not armed with deadly weapons may be convicted under section 148 read with section 149 .

But this view has been dissented in *Muddamsetti Subba Rao's* case.[88]Section 148 deals with direct responsibility and a rioter who does not carry a deadly weapon himself cannot be made liable under that section by virtue of s 149 . The appropriate section to apply to a rioter who is not armed with a deadly weapon is s 147 .[89]

7. 'Being Armed'--Use of Weapon not Necessary

The mere fact of being armed with a deadly weapon is sufficient to convert ordinary rioting into an aggravated rioting under this section. The actual use of the weapon constitutes a different offence, *e.g.*, one under s 324, IPC .[90] For the application of this section, it is, therefore, not necessary that any such weapon or anything which, used as a weapon of offence likely to cause death, is actually used in the rioting. It would suffice if it were merely displayed.[91]

8. 'Deadly Weapon'

The expression 'deadly weapon' is not defined in the Indian Penal Code . However, a weapon, which, when used for its designed purpose, is likely to cause death, is a deadly weapon. A lethal weapon, such as a sword, a dagger, pistol, a gun, a spear, a *kanta* (glove with steel claws) or a hammer,[92] is a deadly weapon.[93] A sharp-edged1041 weapon, like a *kripan*,[1]*dharia*,[2]*gupti*[3] or *knife*,[4] is a deadly weapon. The test of a 'deadly weapon' is not the purpose for which it is carried; it should be of such a nature that, if used as a weapon of offence, it is likely to cause death.[5]

Lathi whether Deadly Weapon

Lathis are not deadly weapons.[6] Ordinary *lathis* cannot be described as deadly weapons.[7] It depends on the size and weight of a *lathi* to determine whether it is a deadly weapon. Stout, solid and thick bamboos have been generally held to be deadly weapons while hollow bamboos have been held to be not so.[8]

Or with anything, which when used as a Weapon of Offence is likely to Cause Death

A crowbar or spade may well be a deadly weapon if used as weapon of offence; but if it is merely used to destroy a bridge, it certainly cannot be described as a weapon of any sort.[9] not only heavy sticks, but also a pen-knife, a chopper, a dagger, a sling and even stones, when used as weapons of offence may cause death.[10] Whether or not a stick is a deadly weapon would depend upon its size and weight. 'Stout male bamboos, when used as weapons of offence, are likely to cause death but not hollow ones'.[11]

Question of Facts

In *Queen Empress v Nathu* ,[12] it was held that it is a question of fact to be decided, in each case, whether the *lathi* used or the *lathi*, with which the injury is caused, was or was not, in itself, a deadly weapon. One *lathi* may, by reason of its weight, length or other peculiarities, be a deadly weapon, another may not.[13]

9. Procedure

The offence under this section is cognizable and warrant may be issued in the first instance. It is bailable but not compoundable and is triable by a magistrate of the first class.[14]1042

10. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:
>
> That you ..... along with (name the other persons or some of them, if known, or mention their number) on or about the.....day of.....at...were a member of an unlawful assembly and were, at the time armed with a deadly weapon (*or with a thing which used as a weapon of offence, was likely to cause death*) to wit, and did, in prosecution of the common object of that assembly, namely, ...commit the offence of rioting and thereby committed an offence punishable under s 148 of the IPC, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

11. Proof

In a trial for an offence under this section all the elements of rioting have to be proved in addition to the fact that the accused was armed with a deadly weapon or with something, which, used as a weapon of offence is likely to cause death. The common object of an unlawful assembly must be

definitely found and not merely left for conjecture or inference from other facts found in the judgment.[15]

Where the common object of all accused persons was proved only to the extent of beating the deceased and not to committing murder, conviction of the accused persons under s 300 was set aside but all accused were held liable to be convicted under ss 324 / 149, IPC as one of the accused was carrying a deadly weapon with the knowledge of the other accused persons, the said accused holding the sharp edged weapon which is a deadly weapon was also liable to be convicted under s 148, IPC .[16]

There was no reliable evidence to prove that the accused persons were present on the spot and no overt act was attributed to them to show that they shared common object of unlawful assembly. They were acquitted of the charge under s 148, IPC .[17]

Force or Violence must be Proved

All the essential ingredients of an unlawful assembly must be proved.[18] For holding a person guilty under this section, a definite finding as to weapon is not necessary. It is sufficient if the court arrives at a finding that the weapon was dangerous or at least a weapon which, if used as a weapon of offence, was likely to cause death.[19] It is also not necessary to prove as to which specific weapon was held by which particular accused.[20] Where the accused persons having *lathis* in their hands inflicted blows on the deceased, *lathis* are deadly weapons, so the accused persons cannot be convicted under s 148 and their conviction was altered to one under s 147, IPC .[21]

None of the prosecution witnesses deposed that the accused formed an unlawful assembly of five or more persons and in prosecution of the common object of the1043 assembly the injured was assaulted. In the absence of proof of these ingredients by prosecution, the accused persons were acquitted of the charge under s 148, IPC .[22]

Where the manner in which occurrence took place proved that the accused were members of an unlawful assembly there was no requirement to go into the question as to which of the accused persons inflicted what particular injury.[23] Where the prosecution has not been able to show how any 'force' (as defined by s 349, Penal Code) or violence is proved to have been used by the appellants in prosecution of the common object of the unlawful assembly of which they were members, and with the exception of the firing of shots in a direction, which cannot be determined and no attempt was made by any of the appellants to use any force or violence on any member of the other (police) party, it was held that the conviction of the appellants under s 148 could not be made.[24] Where the accused persons formed an unlawful assembly and armed with weapons allegedly entered the house of the complainant and assaulted inmates, thereby causing the death of the complainant's mother. The medical evidence regarding injuries corroborated with the testimony of the eyewitness. FIR was promptly lodged and also corroborated with the version of the eyewitnesses, accused persons were identified and evidence showed that they actively took part in the commission of the offence, the accused were held guilty of offence under s 148, IPC .[25]

12. Conviction

Where the allegations were that all the accused persons armed with deadly weapons attacked deceased and the main accused hurled a bomb on the deceased while the other co-accused persons joined the accused in chasing the deceased and beating him indiscriminately with hunting sickles. The presence of eyewitnesses at the time and place of occurrence was not doubtful, the medical evidence showed that injuries found on the person of the deceased were sufficient to cause death in the ordinary course of nature, the conviction of the main accused for offences under ss 148 and 302, IPC and ss 3 and 5 of the Explosive Substances Act was held proper, however, the co-accused persons who could not be said to have caused death of the deceased as vital injuries were not caused from their acts were held liable to be convicted for offences under ss 324 and 148, IPC .[26]

Accused A1 along with some others, armed with weapons, entered the house of the complainant PW1, inflicted knife injuries and looted articles. The prosecution evidence established that the gathering of mob outside the house of PW1 was an unlawful assembly, which was armed with deadly weapons. The same would clearly fall within the ambit of ss 141 and 148 of the IPC . Accused A1 was convicted for offences under ss 148, 392 and 452 of the IPC .[27]

1044Where an accused is charged under s 148, IPC and acquitted, conviction of such accused under s 302 read with s 149, IPC cannot be legally recorded.[28]

Accused armed with lethal weapons gave blows on the head of the deceased causing death. However, there was no evidence to show that the occurrence was a pre-arranged plan. Accused persons were not convicted for offences under ss 148 and 149 of the IPC .[29]

Where the prosecution has established that the common object of the unlawful assembly was to commit the offence of rioting armed with deadly weapons, conviction of the accused persons under s 148, IPC, was found proper.[30]

Where evidence of eyewitnesses was that the accused directed other accused persons to punish the deceased and sever his head and the other accused persons made a murderous assault on the deceased in compliance of such direction and caused as many as 14 incised injuries on his person, the accused persons then chased the deceased to a field nearby and then again assaulted him with deadly weapons, it was held that the accused persons formed an unlawful assembly and the object of the said assembly was to commit murder of the deceased and hence, conviction of the accused under s 300 read with s 148, IPC, was confirmed.[31]

Where the accused persons were armed with deadly weapons and were convicted under s 148, IPC, it is not necessary to record their conviction separately for offence under s 147, IPC .[32]

13. Acquittal

Where the accused persons have a right of private defence of person or property, they cannot be convicted under ss 147, 148 or 149, IPC .[33]

Where earlier the investigating agency, after investigation, had submitted the 'Final Report', and the learned Magistrate, however, on the basis of material available before it took cognisance of the offence under s 307 / 34 IPC and that too, against 3 accused persons only, they could not have been convicted either under s 148 IPC or with the aid of s 149 IPC .[34] The conviction and sentence of the accused persons under s 148 IPC, is liable to be set aside if it is found that the occurrence had taken place in a quarrel.[35]

67 *Mahadeo v State of Bihar* AIR 1966 SC 302, (1966) Cr LJ 197, p 199 .

68 *Pucharu Bhati v State* (1963) Cut LT 383, (1964) 1 Cr LJ 117 ; *Sultan v State of Madhya Pradesh* (1971) MPLJ 13 (Notes on cases).

69 Re *Nadimpalli Bangarurajus*AIR 1942 Mad 58, p 62 ; *Ram Lakhan v State of Rajasthan* (1980) Cr LR 30 (Raj) .

70 *Ghansa Singh v State* AIR 1958 Raj 226, p 234, (1958) Cr LJ 1232 ; *Gharib Das v State* (1973) All Cr R 193 .

71 Re *Subba Rao*AIR 1941 Mad 489, p 490, 42 Cr LJ 831 .

72 *Sukha v State of Rajasthan* AIR 1956 SC 513, p 518, (1956) Cr LJ 923 .

73 *State of Rajasthan & etc v Moti & Ors etc* (2000) Cr LJ 4817 (Raj)(DB).

74 *Lalman v State of Uttar Pradesh* (1983) All Cr R 377(DB); *Preetam Singh v State of Uttar Pradesh* (1985) Cr LJ 10 (All), (1985) All Cr C 63, (1984) UP Cr R 146 .

75 *State of Rajasthan v Prem Raj* 2008 Cr LJ 2457, p 2458 (Raj) .

76 *Shyam Lal v State* (1991) Raj CC 579 .

77 *Kalu v State of Rajasthan* (1990) Cr LR 130 (Raj) .

78 *Brahim Pal v State* (1979) All Cr C 231 .

79 *Narain v State of Rajasthan* (1984) Raj LW 640, (1984) Cr LR 512 (Raj), (1985) 1 Cr LC 459 (Raj) ; *Yudhvir v State of Haryana* (1992) 2 Crimes 514, p 517 (P&H).

80 *Anam Pradhan v State* (1982) Cr LJ 1585 (Ori)(DB).

81 *Kalipada Mahto v State* (1987) 3 Crimes 49 (Cal) .

82 *Vinod Chaturvedi v State of Madhya Pradesh* AIR 1984 SC 911, (1984) Cr LJ 814, (1984) All Cr Cas 174, (1984) Cr LR 202(SC), (1984) Chand Cr C 49, (1984) SCC (Cr) 250, (1984) SC Cr R 225, (1984) Cur Cr J 128, (1984) 1 Crimes 733, (1984) 1 Cr LC 417, (1984) 2 SCC 350, (1984) 2 Chand LR (Cr) 275.

83 *Pati Ram v State of Uttar Pradesh* (1989) All Cr R 59 .

84 *Kutumbaka Krishna Mohan Rao v Public Prosecutor* (1991) Cr LJ 1711 (SC) .

85 *State of West Bengal v Nilkantha Mahato* (2003) Cr LJ 3566 (Cal) (DB) .

86 *Sabir v R* 22 ILR Cal 276 .

87 In Re *Muduru Payalagadu*AIR 1926 Mad 741, 27 Cr LJ 894 .

88 *Muddamsetti Subba Rao's* case AIR 1941 Mad 489, p 490 .

89 *Nanda Kishor Mohanty v State* AIR 1961 Ori 29, p 30 ; *Manga v State* (1958) Raj LW 505 ; *Krishna Pillai Vasu Pillai v State* AIR 1956 PC 230, p 233 ; *Rajab Ali v State* AIR 1955 Assam 105 ; Re *Muthusami Goundan*AIR 1942 Mad 420, 43 Cr LJ 745 ; Re *Muddamsetti Subba Rao*AIR 1941 Mad 489, 42 Cr LJ 821 ; *Ratan Lal v Emperor* AIR 1933 Oudh 333 ; *Fordil v Emperor* AIR 1934 Lah 632 ; Re *Choitano Ranto*AIR 1916 Mad 788, 16 Cr LJ 484 ; *Sabir v Queen-Empress* 22 ILR Cal 276 .

90 *R v Callachund* 7 WR (Cr) 60 ; *R v Ram Adhin* 1 ILR All 130 .

91 *Sohan Lal v State of Madhya Pradesh* (1982) Cr LJ 654 (MP) .

92 *Lakshmiammal v Samiappa* AIR 1968 Mad 310, (1968) Cr LJ 1084, p 1085 .

93 *Ratanlal v Emperor* AIR 1933 Oudh 333, p 339, 35 Cr LJ 45 .

1 *Ghansa Singh v State* AIR 1958 Raj 226, p 234, (1958) Cr LJ 1232 .

2 *Prem v State of Rajasthan* (1978) Cr LJ 273, p 277 (Raj) .

3 *Jugal Kishore v State of Rajasthan* (1978) Raj LW 123 .

4 *Lakshmiammal v Samiappa* AIR 1968 Mad 310, (1968) Cr LJ 1084, p 1085 .

5 *Ibid.*

6 *Lakhu Singh & Ors v State of Rajasthan* (1997) Cr LJ 3638 (Raj)(DB); *Hari Lal v State* (1988) 25 All Cr C 522 .

7 *Hari Lal v State* (1988) 25 All Cr C 522 ; *Jagannath Narayan Nikam v State of Maharashtra* (1995) Cr LJ 795 (Bom), (1995) (1) Bom CR 570 .

8 *Nardeen v State of Rajasthan* (1977) Cr LR (Raj) 447, p 455 .

9 *Mir Bayyan Khan v Emperor* AIR 1935 Pesh 65, p 67, 36 Cr LJ 933 ; *Lakshmiammal v Samiappa* AIR 1968 Mad 310, (1968) Cr LJ 1084, p 1085 ; *Jugal Kishore Singh v State of Rajasthan* (1978) Raj LW 123 .

10 *R Vasu Nair v State of Travancore-Cochin* AIR 1955 Tr & Coch 33, 56 Cr LJ 414.

11 *Sesher Reddy v Public Prosecutor* ILR 1962 AP 313, (1963) 2 Cr LJ 70 ; *Krishna Chetty* 1 Weir 70; *Nardeen v State of Rajasthan* (1977) Cr LR 447, p 455 (Raj) .

12 *Queen Empress v Nathu* 15 ILR All 19, p 20, 12 All WN 158 .

13 *Parma Singh v Emperor* 12 Cr LJ 103 (Cal) ; *Jhagru Gond v Emperor* 2 Cr LJ 746, p 749 ; *R v Gagji Nathu* 10 Cr LJ 102, p 107, 19 Ker LR 48 ; *Raja Ram v Emperor* AIR 1938 Oudh 256, p 257, 40 Cr LJ 14 .

14 First Schedule to the Code of Criminal Procedure .

15 *Krishna Pillai Vassu Pillai v State* AIR 1956 Tr & Coch 230, p 232, (1956) Cr LJ 358; *Sohan v State of Haryana* (1973) Ch LR 138 ; *Harun Trikey v State* (1968) Cr LJ 1251, p 1254, 34 Cut LT 215 .

16 *Gopa Ram v State of Rajasthan* (1996) Cr LJ 2987 (Raj) (DB) .

17 *Nagesan v State of Chhattisgarh* 2014 (140) AIC 225 (SC), 2014 (6) SCC 672, 2014 Cr LJ 2948 .

18 *AB Nikam v State of Maharashtra* (1979) Cr LJ 72 (Bom) .

19 *Sakharam v State of Maharashtra* (1969) UJ (SC) 423, (1969) SCD 892 .

20 *State v Chaitu Kishan* (1966) Cut LT 695 .

21 *Lakhu Singh & Ors v State of Rajasthan* (1997) Cr LJ 3638 (Raj) (DB) .

22 *Narayan Sarkar v State of Tripura* 2010 Cr LJ 986, p 991 (Gauh) .

23 *Dalbir Singh v State of Punjab* AIR 1987 SC 1328, (1987) Cr LJ 1065, (1987) East Cr Cas 590, (1987) 1 IJ Rep 641, (1987) 3 JT 580 (SC), (1987) Cr LR 309 (SC), (1987) 2 SCC 360, (1987) SCC (Cr) 519, (1987) 2 UJ 116 (SC), (1987) BLT (Rep) 226, (1987) All Cr R 626, (1987) All Cr Cas 345 .

24 *Hazara Singh v State of Punjab* (1971) 1 SCC 529, (1971) UJ 326 (SC), (1971) SCC (Cr) 237 .

25 *Amir Hossain alias Ali & Ors v State of Tripura* (1998) Cr LJ 4315 (Gau) .

26 *Setty Balija Panduranga Rao & Ors v State of Andhra Pradesh* (2000) Cr LJ 5029 (AP) (DB) .

27 *Mohammed Ishaq v S Kazam Pasha* 2009 Cr LJ 3063, p 3068 (SC), 2009 AIR SCW 3705, 2009 (7) Scale 575 .

28 *Md Ankoos v Public Prosecutor High Court of AP* 2010 Cr LJ 861 (SC), 2009 AIR SCW 7132, AIR 2010 SC 566, JT 2009 (14) SC 6, 2009 (13) Scale 584, (2010) 1 SCC 94 .

29 *Gunanidhi Parida v State of Orissa* 2013 Cr LJ (NOC) 87 (Ori) (DB).

30 *Anil Rai v State of Bihar* (2001) Cr LJ 3939 (SC) .

31 *Madru Singh & Ors v State of Madhya Pradesh* (1997) Cr LJ 4398 (SC) .

32 *Mijaji Lal v State of UP* 2009 Cr LJ (NOC) 824, 2009 (3) All LJ 771 (All) (DB) .

33 *Kishore Prasad v State of Bihar* (1969) Pat LJR 17 (SC) ; *Sivapada v State* AIR 1969 Cal 28, p 31, (1969) Cr LJ 160 ; *State of Assam v Manohar Ali* (1987) 1 Crimes 748 (Gau) ; *Brahim Pal v State* (1979) All Cr C 231 .

34 *Ghasita v State of Rajasthan* (2006) Cr LJ 2408 (Raj) ; **see also***Shyam Pyare v State of UP* 2009 Cr LJ (NOC) 1226 (All) (DB).

35 *Bhawani Mahto v State of Bihar* (2006) Cr LJ 3931 (Jhar) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 149.

Every member of unlawful assembly guilty of offence committed in prosecution of common object.--

If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in1045 prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.1046

Comments

1. Scope

Section 149 of the Indian Penal Code postulates an assembly of 5 or more persons having a common object *i.e.* one of those named in s 141 of Indian Penal Code 1860 and then doing of the act as the members of it in prosecution of that object. The basis of constructive guilt under s 149 is mere membership of an unlawful assembly. Under s 149, if the accused is a member of an unlawful assembly, the common object of which is to commit a certain crime, and such a crime is committed by one or more of the members of that assembly, every person who happens to be a member of that assembly would be liable for the commission of the crime being a member of it irrespective of the fact whether he has actually committed the criminal act or not. There is a distinction between the common object and common intention. The common object need not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the assembly gathered before the commission of the crime at the spot itself. There need not be prior meeting of the mind. It would be enough that the members of the assembly which constitutes five or more persons have common object and that they acted as an assembly to achieve that object. In substance, s 149 makes every member of the common unlawful assembly responsible as a member for the act of each and all merely because he is a member of the unlawful assembly with common object to be achieved by such an unlawful assembly. At the same time, one has to keep in mind that mere presence in the unlawful assembly cannot render a person liable unless there was a common object and that is shared by that person. The common object has to be found and can be gathered from the facts and circumstances of each case.[36]

1047The scope of this section is very wide.[37] For attracting the provisions of s 149, IPC what is required to be established is that the common object of the unlawful assembly was to commit a particular offence or that the accused who were the members of unlawful assembly, must have known that a particular offence was likely to be committed in prosecution of the common object of the unlawful assembly even if the common object may be different.[38] The Apex Court has held that for applying s 149, IPC, what the court has to see is whether the assailants formed an unlawful assembly and shared the common object either by participation or by being present as members of the unlawful assembly knowing its common object.[39]

To ascertain whether a particular person shared common object of unlawful assembly, it is not essential to prove that he committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object.[40] Undoubtedly, commission of an overt act by such a person would be one of the tests to prove that he shared the common object, but it is not the sole test.[41]While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in unlawful assembly may fasten vicariously criminal liability under s 149, IPC .[42]

When charge under s 149, IPC is made, it is not necessary that each accused should be assigned independent part played in the beating. If it is found that one of them was a member of the unlawful assembly and that unlawful assembly assaulted the deceased, which ultimately caused the death of the deceased, then all who were members of the unlawful assembly can be held liable and convicted.[43]

Mere knowledge of likely commission of an act or the commission of the offence by any member of unlawful assembly also attracts the provison of s 149, IPC .[44]

In other words, this provision, so to speak, takes him out of the region of abetment, and makes him responsible, as a principal for the acts of each and all, merely because he is a member of an unlawful assembly,[45]although he may have no intention to commit that offence and did no overt act, except his presence in the assembly and sharing the common object of that assembly. Without the provisions of this section he could not have been made liable for the offence committed, not by himself, but by another member of that assembly.[46]

In the Full Bench case, Re *Theetumalai Gounder*,[47] it was held that s 40 of the IPC, defines 'offence' as a thing made punishable under the Code or under any special or1048 local law as defined in the Code. A person could not be tried and sentenced under s 149, IPC alone, as no punishment is provided by the section. But by virtue of this section he is guilty of the substantive offence committed and is liable for the punishment provided for that offence.

A group of fifty persons armed with weapons, accused appellants indulged in indiscriminate firing causing the death of a woman and her two children. Post mortem report stated that the death was the result of firearm injuries. Accused persons were convicted under ss 302 read with s149 of the IPC .[48]

Section is Declaratory of Vicarious Liability

This section is declaratory of the vicarious liability of the members of an unlawful assembly for acts done in prosecution of its common object or for such offences as its members knew to be likely to be committed in prosecution of that object.[49] The section declares, in substance, that every member of an unlawful assembly is responsible for an offence committed by another member, or the other members, in prosecution of the common object of such assembly, or one which he must have known was reasonably likely to be committed in the prosecution of such common object.[50]Section 149 creates no substantive offence.[51]

2. Principles of Vicarious Liability

Commentary under s 147, *ante* may be referred to.

In fact, s 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by s 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.[52]

3. Essential Ingredients

Section 149, IPC creates a specific and distinct offence. There are two essential ingredients thereof:

(i) Commission of an offence by any member of an unlawful assembly, and
(ii) Such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed.[53]1049

It is essential to prove that the person sought to be charged with an offence with the aid of s 149 was a member of the unlawful assembly at the time the offence was committed.[54]

Essentials of the Section

For the application of this section, the following elements are necessary:

(i) there must have been an unlawful assembly;
(ii) an offence is committed by a member of that assembly;
(iii)
  (a) the offence is committed in prosecution of the common object of the assembly; or
  (b) the person sought to be made liable knew that the offence was likely to be committed in prosecution of that common object; and

(iv) such person was a member of the same unlawful assembly at the time of the commission of the offence.[55]

Mere Presence not Sufficient

The mere presence at the scene of occurrence as onlooker is not sufficient.[56]

Mere presence in the unlawful assembly cannot render a person liable unless there was a common object and that is shared by that person.[57]

If a person is only a silent spectator, he would not be a member of an unlawful assembly or when a person ceases to be a member of unlawful assembly before the actual commission of the offence, he would not be liable vicariously with the aid of s 149, IPC .[58]

Mere presence of a person on the scene of occurrence is however, not sufficient to make him guilty under this section unless there was a common object.[59]

Sudden or Unexpected Act of a Member

It needs to be emphasised that the basis of liability under s 149, IPC is constructive and not individual. Once the membership of an unlawful assembly is proved and it is established that the act was committed in prosecution of the common object of the unlawful assembly or was such which the members knew was likely to be committed, all the members would be equally liable for it, irrespective of the gravity of their individual roles even though those who do not take part in the actual assault on the victim would be equally liable.[60]

1050Where a member of an unlawful assembly suddenly got enraged at the behaviour of an opponent and hit him with a spear and killed him, it was held that the other members could not be held liable for the murder.[61]

The members of an unlawful assembly are liable for an offence committed by any particular member, only if such offence was contemplated by the members, or was one which they knew to be likely to be committed in prosecution of the common intention[62] and not for a sudden or unexpected act of any member.[63]

This Section must be Construed Strictly

Since the section deals with constructive liability, it must be construed very strictly.[64] The stringency of the section is, therefore, not to be strained so as to make every member of an unlawful assembly liable even for acts which are not committed necessarily in prosecution of the common object of the rioters or which are not immediately connected with the common object of the unlawful assembly, of which the accused were members, nor must a guilty knowledge of the likelihood of the commission of such an offence, in prosecution of the common object, be imputed to all the members of the unlawful assembly in the absence of any clear evidence, direct or circumstantial, adduced on behalf of the prosecution to show that such knowledge could be so legitimately imputed to the members of the

unlawful assembly before they moved to action.[65] The expression 'in prosecution of common object' as appearing in s 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object.[66]

4. Common object upto a Certain Point--Effect

There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this effect of s 149, IPC may be different on different members of the same assembly.[67]

As pointed out in *Emperor v Bhola Singh* :[68]

> A person may join an unlawful assembly with an unlawful object, but it does not necessarily follow that he endorses all that the other members say or do. Nor is he, therefore, responsible for their acts of which he was not clearly cognizant. For example, two persons may be induced by another to assist him in thrashing his enemy with whom he had had a quarrel. They may consent to lend him their assistance so far, but if he had secretly planned to kill him and does so, they cannot be held responsible for his act.

1051In a Calcutta case it was stated:

> Members of an unlawful assembly may have a community of object up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object; and, as a consequence of this, the effect of s 149 of IPC may be different on different members of the same unlawful assembly.[69]

In dealing with such cases, while, on the one hand, it is necessary for the protection of accused persons that they should not, merely by reason of their association with others as members of an unlawful assembly, be held criminally liable for offences committed by their associates, which they themselves neither intended nor knew to be likely to be committed; on the other hand, it is equally necessary for the protection of peace that members of an unlawful assembly should not lightly be let off from suffering the penalties for offences for which, though committed by others, the law has made them liable for punishment by reason of their association with the actual offenders with one common object. The cases of *Sabed Ali*[70] and *Hari Singh*,[71] cited above, emphasise the necessity of keeping in view these two conflicting, but equally necessary, considerations.[72]

Where an accused is charged under s 148, IPC and acquitted, conviction of such accused under s 302 read with s 149, IPC cannot be legally recorded.[73]

Where original common object of the accused persons was to assault the victim, some of the accused however, after entering the house of the victim developing different common object and causing grievous injuries to the victim, the accused standing outside the house of the victim could not be knowing what transpired inside the house, act of those members of original unlawful assembly who entered the house, cannot be attributed to member who stood outside; members who did not share common object and stood outside were liable to be convicted under s 352 read with s 149 of the IPC and not under s 326 read with s 149 .[74]

All the members reaching to the spot together armed with weapons and immediately attacking the persons present there clearly exhibits the intention of the unlawful assembly. Common object of unlawful assembly to kill the deceased persons was inferred. Appellants accused were convicted under s 302, IPC with aid of s 149, IPC .[75]

Where the common object of the assembly was to cause grievous hurt and death was caused by only one of the members of the assembly for which the other members were not responsible, the conviction of the other members under s 326 read with s 149, IPC cannot be held illegal, merely because no member of the assembly1052 was proved to have caused grievous hurt to the victims.[76] Where on account of assault by several accused the complainant's son died, there was no evidence to show that the co-accused persons came to the scene of the incident with the object of trespass and assault on the complainant and his son, the co-accused cannot be made vicariously liable for the overt acts of other accused and so their conviction under s 304, Pt II and s 149, IPC was set aside.[77]

In a Calcutta case, it was held that by appending s 149 to a charge under s 326, the court intimates to the accused persons that some person other than they themselves had committed the substantive offence, with the result that the accused could not be convicted of the substantive offence under s 326 as they had not been charged under it.[78] But dissenting from this a single Judge of the Oudh Chief Court observed:

> I do not see how the conclusion at which they arrived follows from s 149, Penal Code. That section contemplates the commission of an offence by any member of the unlawful assembly. Thus, the addition of s 149, Penal Code, merely indicates that the offence was not necessarily committed by any of the accused persons and might have been committed by some person other than the accused. It does not, however, exclude the possibility of the accused themselves having committed the offence, since the very nature of the charge indicates that they were also members of the same unlawful assembly.[79]

5. Distinction between Section 34 and Section 149

Commentary under same heading s 34, *ante* may be referred to.

Common intention is different from common object.[80] There is a clear distinction between the provisions of ss 34 and 149, IPC, and the two provisions are not to be confused. The principal element in s 34 is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation, s 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone. There is no question of common intention in s 149 . an offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus, if the offence committed by that person is in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every member of the unlawful assembly would be guilty of that offence, although there may have been no common intention and no participation by the other members in the actual commission of that offence.[81] But in the total absence of evidence both in respect of offence under s 34 as well as s 149, the conviction of accused persons with the aid of s 149 or s 34 is not proper.[82]1053

Distinguishing Features of Vicarious Liability under the Two Sections

Under s 149, IPC the liability of the other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members know

beforehand that the offence actually committed was likely to be committed in prosecution of the common object. Common object has to be distinguished from common intention. There is no question of common intention in s 149 of the Indian Penal Code .[83]

Common object, as contemplated by s 149, IPC does not require prior concert or meeting of minds before the attack.[84]Section 149, IPC no doubt provides for creating vicarious liability. However, the main ingredient of the charge under s 149, IPC against the accused person is that he was a member of an unlawful assembly, one or more members of which committed some offence. Section 34 , IPC also provides for vicarious liability, but that is in a case where some act is done in furtherance of the common intention of all. Although the criminal act is done by all the persons, intention of each such person is liable for that act in the same manner as if the whole of it had been done by him alone. There is, therefore, a good deal of difference between the nature of vicarious liability created under s 34, IPC and that created under s 149, IPC although to a certain extent these two sections overlap.[85]

Unlike s 34, this section creates a specific offence and deals with the punishment for that offence alone.[86] This section constitutes a substantive offence and is not merely an enabling one for imposition of vicarious liability,[87] although the punishment for the offence is under the section, to which it is tagged, being committed by the principal offender, in the unlawful assembly, known or unknown.[88] But if one reads s 149 and s 34, IPC, they will go to show that these two sections are related and overlap each other. When an offence is committed with a common object by more than five persons, it will amount to an offence under s 149, whereas if an offence is committed with a common object by persons less than five, the offence will come under s 34 .[89]Even if the offence under s 148 was not proved, the persons actually assaulting together would be liable for each other's act by the operation of s 34, IPC, *i.e.,* acting in furtherance of common intention.[90]

When a charge is for commission of certain offences by an unlawful assembly and vicarious liability is sought to be fixed on a person by operation of s 149, IPC even if1054 unlawful assembly is not established and more than one person is proved to have participated in the violence in furtherance of their common intention, the court shall take resort to s 34, IPC for fastening vicarious liability for each other's act.[91] The accused charged under ss 302 / 149, IPC can be convicted under ss 302 / 34, IPC .[92] Similarly, the accused charged under ss 452 / 149, IPC can be convicted under s 452 with the aid of s 34, IPC when charge under s 149, IPC is not proved.[93]

But where the complicity of the accused in view of the provisions of s 149 has been proved, the court need not advert its attention towards the provisions of s 34, IPC .[94] Where the finding of the High Court was that ingredients of both s 34 and of s 149 were proved as far as all the accused were concerned but the High Court acquitted two of the accused persons as their participation in the crime was not free from doubt, the order of the High Court was not only contradictory to its own finding but was also based on an erroneous interpretation of provisions of both ss 34 and 149, IPC as authoritatively laid down, therefore, the order of the High Court acquitting the two accused cannot stand.[95]

Both Sections 34 and 149 may or may not Apply/Overlap

Commentary under same heading in s 34, *ante* may be referred to.

6. Sections 34, 114 and 149

Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.[96]

In such a situation, the absence of a charge under one or other of the various heads of criminal

liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.[97]

7. Applicability of Section 149 to Part I of Section 304

Commentary under the same heading in s 304, *post* may be referred to.

8. Applicability of Section 149 to Part II of Section 304

Commentary under the same heading in s 304, *post* may be referred to.1055

9. Trite Law

It is trite law that when there are more than one accused, and any of the accused is exceeding right of private defence, he alone would be guilty of commission of culpable homicide not amounting to murder by exceeding right of private defence of person or property falling under exception (2) of s 300 IPC . The other accused persons cannot be held responsible vicariously with the aid of s 34 or s 149 of the Indian Penal Code 1860.[1]

It is now well settled legal position that when the act falls within any of the exceptions of s 300 Indian Penal Code 1860, the accused cannot be convicted with the help of s 34 or s 149 Indian Penal Code 1860. They should be convicted for their individual act.[2]

10. Two Parts of the Section

The section describes the offence which is to be so attributed under two alternative forms or parts: (a) it must be either an offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly; or (b) an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.

In the Full Bench case *Queen v Sabid Ali* ,[3] Couch CJ, pointed out the distinction between the two parts as follows:

> At first, there does not seem to be much distinction between the two parts of the section, and I think the cases which would be within the first offences committed in prosecution of the common object, would be, generally, if not always, within the second, namely offences which the parties knew to be likely to be committed in the prosecution of the common object. But I think there may be cases which would come within the second part, and not within the first.

In a case[4] their Lordships of the Supreme Court have held that the distinction between the two parts of the section cannot be ignored or obliterated and that in every case it would be an issue to be determined whether the offence committed falls within the first part of s 149, IPC or it is an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. As regards the distinction itself their Lordships further held:

> The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be

> a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part, the offence committed must be connected immediately within the common object of the unlawful assembly of which the accused were members.[5]

1056

The two parts of the section are quite distinct though the same act may, and frequently does, fall under both. The first classes of acts are those committed in prosecution of the common object of the assembly. The act may be that of one individual accused, but if it is committed in furtherance of the end which they all have in view, all the accused are liable for it. The second classes of acts are those which the accused knew to be likely to be committed in connection with the carrying out of their common purpose.[6] 'In the first alternative the offence had to be committed before the common object could be achieved and in the second it was not necessary that it should be committed but in all probability it would be'.[7] The first part deals with an offence committed which is in the scheme of the assembly, but the second part embraces such offences which were not in the original scheme, and yet they are committed by some of the members of the assembly for which the others are liable.[8]

These explanations of the two parts were further elaborated by their Lordships of the Supreme Court in *Shambhu Nath Singh v State of Bihar* ,[9] where the two parts were paraphrased as follows:

> If an unlawful assembly is formed with the common object of committing an offence and if that offence is committed in prosecution of the object by any member of the unlawful assembly, all the members of the assembly will be vicariously liable for that offence even if one or more, but not all committed the offence. Again, if an offence is committed by a member of an unlawful assembly and that offence is one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, every member who had that knowledge will be guilty of the offence so committed.

11. Relevant Factors

Section 149 of the Indian Penal Code 1860 provides for vicarious liability. If an offence is committed by any member of an unlawful assembly in prosecution of a common object thereof or such as the members of that assembly knew that the offence was likely to be committed in prosecution of that object, every person who at the time of committing that offence was member, would be guilty of the offence committed. The common object may be commission of one offence while there may be likelihood of commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. Whether a member of such unlawful assembly was aware as regard likelihood of commission of another offence or not would depend upon the facts and circumstances of each case. Background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime would be relevant factors for drawing an inference in that behalf.[10]

1057There was overwhelming evidence that all the accused persons variously armed, including with firearms, came together on the spot and started the assault together; one of them shot the deceased and others caused injuries. After that, all of them left the place of occurrence together. All of them were convicted with the aid of s 149, IPC .[11]

Accused persons armed with weapons went to the cattle shed of the husband of the deceased and carried with them kerosene as well. The common object of the unlawful assembly as revealed by the evidence was to have the cattle shed vacated. Accused persons attacked and the members of the unlawful assembly also set fire to the wife of the owner of the cattle causing her death. All the members of the unlawful assembly were convicted under s 302 read with s 149, IPC .[12]

Eye-witnesses deposed that the attacks on the head of the deceased by the two convicted accused were in quick succession. From the manner in which the injuries were inflicted, inference could be drawn that both the accused R and P shared common intention to cause the death of the deceased. Both were convicted under s 302, IPC read with s 34, IPC .[13]

Accused A1, A5, A16 and A21 were members of the unlawful assembly which had caused the murder of the deceased in terms of s 149, IPC, as they had dragged the deceased after first assault and contributed in preventing the deceased from escaping the assault of A13 and A14. Accused A1, A15, A16, A21 were held guilty of murder along with A13 and A14 under s 302 read with s 149 of the IPC .[14]

12. Pivotal and Crucial Question

The pivotal question is applicability of s 149, IPC . The said provision has its foundation on constructive liability which is the *sine qua non* for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in s 141, IPC . Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of s 149, IPC . The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in s 141 . It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of s 141 . The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not1058 continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in s 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object, may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of s 149, IPC may be different on different members of the same assembly.[15]

Accused appellant was found guilty and convicted for offences under ss 148, 307, 302 / 149, IPC . Merely because the other co-accused died a natural death was no reason to exonerate the present sole appellant-accused.[16]

13. Act Committed by One Member of Unlawful Assembly may not Bind All

This section does not apply to a member of an unlawful assembly who has committed an offence and is directly responsible for it. If a man does commit an offence directly, there is no question of his committing it constructively.[17] The vicarious liability of the members of an unlawful assembly under s 149, IPC extends for acts done in prosecution of the common object of that assembly or for such offences as members of the unlawful assembly knew to be likely to be committed in prosecution of that object. The mere fact, that one of the members of the unlawful assembly was carrying a gun and that he used that gun to kill a person, will not make other accused persons who were members of that unlawful assembly, liable for the offence of murder punishable under ss 302 / 149, IPC . Everything

will depend on the common object of the unlawful assembly.[18] The vicarious liability under s 149, IPC does not always proceed on the basis that the offence has been actually committed by other member of the unlawful assembly. Section 149 makes it clear that if an offence is committed by any member of the unlawful assembly in prosecution of the common object or such as the members of the unlawful assembly knew it likely to be committed in prosecution of that object, every person, who, at the time of the commission of the offence, is a member of that assembly, is guilty of that offence.[19]

14. Overt Act if Necessary

For the purpose of attracting s 149 and/or s 34, IPC, a specific overt act on the part of the accused is not necessary. He may wait and watch and inaction itself on the part of an accused may sometime go a long way to hold that he shared a common object1059 with others.[20]Once it is proved that the unlawful assembly had a common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act, they can be convicted under s 149, IPC .[21] Where the appellant accused persons armed with deadly weapons entered into the house of the deceased, assaulted the deceased, his wife and mother, inference could be drawn that the accused had formed unlawful assembly, the common object was to commit the murder of the deceased. It is not necessary for the prosecution to prove specific role/overt act of each accused appellant when the offence was committed.[22]Even if no overt act is imputed to a particular person when the charge is punishable under s 149 of the IPC and even the presence of the accused as part of unlawful assembly is established, it is sufficient for conviction.[23] For the purpose of application of s 149, IPC the prosecution has to prove the presence and participation in an unlawful assembly.[24] It is true that the commission of an overt act may not always be necessary to prove that a member of an unlawful assembly shared the common object of the assembly, but then, the minimum that the prosecution must prove is that the persons concerned were members of the unlawful assembly.[25]Where the co-accused persons who were 3-4 in number were unarmed, did not commit any overt act towards the commission of the offence, they had only accompanied the main accused to the spot and were seen running by the PWS, co-accused persons were acquitted of the charges under ss 147, 148 and 149 of the IPC .[26] However, the mere fact that no overt act has been attributed to the members of the unlawful assembly, is not sufficient to disprove the charge under s 149, IPC .[27] To attract the mischief of s 149 of the IPC, it is not necessary that each of the accused must commit some illegal overt act. an assembly which is not unlawful when assembled may subsequently become an unlawful assembly.[28]Once an assembly is found to be unlawful, where all the accused armed had come to the spot and attacked the deceased, it is not necessary to assign overt act to each member of the unlawful assembly.[29]

Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the1060 liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object.[30]

There was no enmity between the deceased and the accused appellant; he had not caused any injury to the deceased and no overt act was attributed to the appellant so far as the deceased was concerned. Mere fact that the appellant was armed with a lathi by itself would not prove that he shared common object with which the main accused was inspired. The prosecution had not adduced evidence to establish the nexus between the common object and the offence committed. Held, the accused appellant could not be convicted with the help of s 149, IPC .[31]

It cannot be stated as a general proposition of law that unless an overt act is proven against the person who is alleged to be a member of the unlawful assembly, it cannot be held that he is a member of the assembly. What is really required to be seen is that the member of the unlawful assembly should have understood that the assembly was unlawful and was likely to commit any of the acts

which fall within the purview of s 141, IPC . The core of the offence is the word 'object' which means the purpose or design and in order to make it common, it should be shared by all. All the accused persons who had come together were armed with lathis. Accused H was armed with a gun. The eye-witnesses deposed in an unequivocal manner about the assault by all the accused persons. The common object was clearly evident. In such a situation, attribution of specific individual overt act has no role to play. All the requisite tests to attract s 149, IPC were established by the prosecution.[32]

The punishment prescribed by s 149 is in a sense vicarious, and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.[33]

If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of s 149 of the IPC if they shared common object of the unlawful assembly.[34] When the evidence on record establishes the fact that large number of persons were present, it may be safe to convict only those persons against whom overt act is1061 alleged with the aid of s 149 IPC, lest some innocent spectators may get involved. This is only a rule of caution and not a rule of law.[35]

Where in a case of mass killing by an unlawful assembly the accused were charged with murder *etc.* with the aid of s 149, and the prosecution proved that the accused was a member of an unlawful assembly which shared the common object of murder, loot and burning of the properties, proof of specific overt act in such a situation is not necessary.[36]Where prosecution evidence showed that out of eight accused persons, four accused were not present on the spot, and no overt act attributed to them, they were acquitted of the charge under s 302 read with s 149, IPC .[37] Where witness has not given any definite overt acts regarding the role ascribed to two of the accused persons and has made the general version that all accused surrounded and assaulted, the guilt of these two accused is not established beyond reasonable doubt so their conviction was set aside.[38] The other accused persons had they intended or shared the common object to kill S, they must have used the weapons allegedly carried by them to facilitate the alleged common object of committing murder. Held, it was not safe to convict other accused appellants under s 149, IPC .[39] Where there was no specific allegation against the accused persons for committing an overt act on the injured, the mere fact that at the relevant time they were holding *lathis* would not by itself prove that they shared the common object with which the main accused was inspired, the occurrence took place at the spur of the moment, the accused persons cannot be said to be members of unlawful assembly so their conviction under s 307 read with s 149, IPC, was set aside.[40]An assembly constituted lawfully may be converted into an unlawful assembly at any moment. Normally the evidence relating to common object of unlawful assembly is not possible. It may be inferred from the act committed by the unlawful assembly and the result of such act; once it is proved that unlawful assembly has been constituted, any overt act or active participation of any member of unlawful assembly is not necessary.[41] The assembly had an unlawful object. Therefore, the acquittal of the accused persons on account that specific role was not attributed to them cannot be said to be justified.[42]

Eye-witness in his statement mentioned the name of one accused, and did not attribute overt act to other accused persons. Held, other accused did not share common object with the named accused, thus, the conviction of the co-accused under ss 302 / 149, IPC was set aside.[43]

There was evidence that the appellant accused assaulted the deceased with gupti, while the co-accused who had also come armed caught hold of the deceased. It created suspicion about the prosecution case that the co-accused shared the common1062 object of the unlawful assembly. The co-accused though were armed, did not use the weapons which they had clutched in their hands. The co-accused were held entitled to benefit of doubt and were acquitted of the charge under ss 302 / 149, IPC .[44]

15. Only Role of Exhortation

The three accused appellants were armed with which had not been used by them in any manner and the only allegation against them was that they had exhorted their co-accused to fire at the opposite party. Held, the possibility that the three accused persons were roped in on account of animosity could not be ruled out. The three accused appellants were given benefit of doubt and acquitted of the charge under ss 149, 302 and 307, IPC .[45]

16. Unlawful Assembly - Factum of Causing Injury Irrelevant

The factum of causing injury or not causing injury would not be relevant where accused is sought to be roped in with the aid of s 149, IPC .[46]

17. No Trial for this Section Alone

While this section creates an offence a person cannot be tried and sentenced under s 149, IPC alone because no punishment is provided by the section, but, by virtue of this section, he is guilty of the substantive offence committed and is liable for punishment provided for that offence.[47] There is, therefore, no meaning in charging a person merely with s 149 .[48]

Section 149 creates no substantive offence and separate punishment under this section cannot be awarded. Separate sentence awarded by the Sessions Judge under s 149, IPC was set aside.[49]

18. Sections 149 and 150 Distinguished

Under this section, both the persons, who committed the offence and the persons sought to be held liable for it, must be members of an unlawful assembly. But under s 150, IPC, a person need not be a member of an unlawful assembly yet he would be guilty of being a member of such assembly and of the offence which may be committed by a member of it in the circumstances mentioned in the section.[50]

19. Sections 149 and 301 Considered Together

The two sections apply to two different situations having no similarity. Section 301 applies to a situation where a person causes the death of another, whose death that person neither intends nor knows himself likely to cause. That being so, it is rather1063 difficult, as a process of logical reasoning, to apply s 149, IPC to a situation like that. Section 149 contemplates inter alia the commission of an offence which the members of the assembly knew likely to be committed in prosecution of the common object of the unlawful assembly. If, by the terms of s 301, the offender could not have known it likely that he would cause the death of the person whom he has actually killed, equally, by the terms of s 149, the other members of the unlawful assembly, that is to say, the members other than the member who has actually caused the death of the person, could not have known it to be likely that the death of that particular person would be caused.[51]

20. Sections 34, 120A and 149 Considered Together

Commentary under same heading in s 34, *ante* may be referred to.

Where the court finds that the strength of the assembly was insufficient to constitute it into 'unlawful assembly', but the remaining persons who participated in the crime had shared common intention with the main perpetrators of the crime, the court can take the aid of s 34 of the IPC even if the said section was not specifically mentioned in the charge.[52]

Out of seven accused persons put on trial five accused persons were acquitted by the trial court. Two

accused H and M, armed with lathi and sharp edged weapon, had come together on the spot, gave abuses, had inflicted injuries with sharp edged weapon and lathi and had left together from the spot. Held, common intention was proved; hence, the Supreme Court upheld the conviction of the two accused appellants.[53]

21. Sections 147 and 149 Considered Together

Commentary under same heading in s 147, *ante* may be referred to.

22. Duty of Court/Magistrate

Commentary under same heading in s 146, *ante* may be referred to.

23. Unlawful Assembly--Requirement of

Section 149, IPC applies only where there is an unlawful assembly.[54] Where the persons forming the assembly are shown to be having identical interests in pursuance of which some of them come armed, others though not armed would, under the circumstances, be deemed to be the members of the unlawful assembly.[55] If it is not found that five or more persons took part in the assault, there could be no unlawful1064 assembly within the meaning of s 141 and this section will not apply.[56] Presence of four accused persons does not constitute unlawful assembly. The conviction of the four accused appellants under s 302 read with ss 148 and 149 of the IPC was altered to one under s 304, Pt II read with s 34, IPC .[57] Where a number of persons were alleged to have violently attacked and caused death of five persons, there was no specific evidence as to when the assembly became unlawful, some of the persons retaliated due to assault and counteraction of the police, the conviction for unlawful assembly was held not proper.[58] However, the view that only persons doing overt acts could be members of an unlawful assembly was held to be unreasonable and wrong.[59] The section presupposes a finding that there was an unlawful assembly with a common intention to commit an offence.[60] The court must find with certainty that there were at least five persons sharing the common object. A finding that three of them may or may not have been there betrays uncertainty on this vital point, and it consequently becomes impossible to allow the conviction to rest on this uncertain foundation. But this is not to say that five persons must always be convicted before s 149 can be applied.[61]

Various Categories of Cases

In dealing with the question as to the applicability of this section in such cases, it is necessary to bear in mind the several categories of cases which come before the courts for decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, then it is a clear case where s 149 can be successfully brought home to any member of the unlawful assembly. It may be that less than five persons may be charged and convicted under s 302 read with s149 of the IPC . If the charge is that the person before the court along with others named constituted an unlawful assembly, the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the court does not make this section inapplicable, as both the charge and the evidence seek to prove that the persons before the court and others number more than five. Similarly, less than five persons may be charged under s 149 if the prosecution case is that the persons before the court and others, numbering in all more than five, composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the court along with unidentified and1065 unnamed assailants or members composed an unlawful assembly, those before the court can be convicted under s 149, though the unnamed and unidentified persons are not traced and charged.

Cases may also arise where in the charge; the prosecution names five or more persons and alleges

that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted, leaving before the court less than five persons to be tried then in such a case, s 149 cannot be invoked.[62] Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, the court may come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under s 149, because along with the two or three persons convicted were others who composed the unlawful assembly, but who have not been identified and so have not been named.

In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under s 149, because on the evidence, the court is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five.[63] It is true that in such cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which may come in the way of the court doing so. The failure to refer in the charge to other members of the unlawful assembly unnamed and unidentified may conceivably raise the point as to whether prejudice would be caused to the accused by reason of the fact that the charge did not indicate that unnamed persons also were members of the unlawful assembly. But apart from the question of such prejudice, which may have to be carefully considered, there is no legal bar preventing the court from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not named and identified.[64] Synopsis notes of s 151 under the heading 'Assembly of five or more persons' may be referred to.

Proximity of Time and Place and Sameness of Stages

Section 149, IPC cannot apply unless there is proximity of time and place both between members of an unlawful assembly and the criminal acts of individual members of that assembly, for there obviously cannot be an assembly unless the five or more persons constituting it are at the same place. Section 149 itself speaks distinctly of 'at the time of the committing of the offence'.[65] It has also to be proved that common object was shared at all the stages.[66] But it is not correct to say, while dealing with an offence under this section, that all the persons must combine together1066 or help one another at the time of the assault.[67] In a case, their Lordships of the Supreme Court observed that in the case of a free fight:

> When it is held that the appellant's party was prepared for a fight and to have had no right of private defence, it must follow that their intention to fight and cause injuries to the other party amounted to their having a common object to commit an offence and, therefore, constituted them into an unlawful assembly. The injuries they caused to the other party are caused in furtherance of their common object. There is then no good reason why they be not held liable, constructively, for the acts of the other persons of the unlawful assembly, in circumstances which makes section 149 , IPC, applicable to them.[68]

Where an accused person is acquitted of rioting (s 146, IPC), he cannot be properly convicted of grievous hurt under s 325 by the application of this section, when it has not been found that he was a member of an unlawful assembly in prosecution of the common object of which grievous hurt was caused by any other member of the same assembly, or that the offence was such as each other member of the same assembly, or that the offence was such as each member of that assembly knew to be likely to be committed in prosecution of that object.[69]

Where on account of assault by several accused the complainant's son died, there was no evidence to show that the co-accused persons came to the scene of the incident with the object of trespass and assault the complainant and his son, the co-accused cannot be made vicariously liable for the overt acts of the other accused and so their conviction under s 304, Pt II and s 149, IPC was set aside.[70]

24. Mob--Members of

Accused A1 to A7, members of the mob were not members of the unlawful assembly; thus, they could not be said to have common intention to commit the murder of the deceased. The acquittal of the accused A1 to A7 under s 302 read with s149, IPC was held proper.[71]

A mob consisting of 400-500 persons had assaulted the deceased. Eye-witness in the court gave out the names of 157 persons. His evidence could not be discarded on the mere ground that it was not possible for a person to remember the name of so many persons on the spot. Accused were convicted under s 302 read with s 149 of the IPC .[72]

25. 'An Offence is Committed'

The first essential element of this section is the commission of an offence by any member of an unlawful assembly.[73] The word 'offence' means only an offence under the Indian Penal Code and does not include an offence under a special or local law. The section has, therefore, no application to offences under a special or local law like1067 the Railways Act and the Defence of India Rules.[74] This section cannot be made use of for the purpose of establishing the guilt of the accused constructively except in cases falling under the Indian Penal Code .[75]

In *Empress v Jhabboo Mahton* ,[76] Field J, observed that where a prisoner is constructively guilty of murder under s 34, it is doubtful if he can be said to have committed the offence of murder within the meaning of s 149, so as to make other prisoners, by a double construction, guilty of murder.

26. 'By any Member of an Unlawful Assembly'

For the application of this section it is necessary that an offence should have been committed by any member of an unlawful assembly. not only an offence should have been committed, but the person who committed it must at the time of committing it, have been a member of the unlawful assembly. Where the prosecution version was to the effect that the whole group consisting of women, children and men came to the spot to raise the dispute regarding the cleaning of the well by the prosecution party, it cannot be said that all of them were members of the unlawful assembly with the common object of attacking the deceased. It is during the quarrel that took place that some of the accused particularly A4 and A9 committed certain acts of violence on the deceased and PW 1. Therefore, the High Court rightly held them guilty for their individual acts. In a situation like this the court has always to keep in mind that bystanders or others coming from the village cannot be said to be members of the unlawful assembly with the common object of attacking the deceased as well as PW 1. The individual acts have to be taken into consideration to avoid large scale convictions of the persons by virtue of the application of s 149, IPC .[77] As to who can be said to be a member of an unlawful assembly, s 142 and notes thereunder may be referred to. If an assembly was not unlawful, and one member of it having a right of private defence exceeds the right and commits an offence he alone would be guilty of the offence and the other members of the assembly will not be liable under this section.[78] This section does not require that there must be conviction of the principal before other members of the unlawful assembly may be constructively held guilty. It merely lays down that the offence for which they are convicted must have been committed. Once the court finds that an offence has been committed by some member or members of the unlawful assembly in prosecution of the common object, then whether the principal offender has or has not been convicted, the other members may be constructively convicted of that offence, provided they are found to have had the necessary intention or knowledge.[79]

Where the two appellants accused were not named in the FIR, they were not identified in the document, none of the PWS had taken their names as the persons who committed any overt act, or the persons who chased the deceased; it was not established that they were members of unlawful assembly. Held, they could not be1068 convicted under s 302 read with s 149 of the IPC, and they were given the benefit of doubt and acquitted of the charge under ss 302 read with s 149 of the IPC .

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There was no evidence to prove the formation of unlawful assembly and therefore the conviction of accused under ss 302, 323, IPC with the aid of s 149, IPC was not sustained and was set aside.[81]

All the appellants accused armed with deadly weapons like lathi, tangi and tabbal participated in the assault and committed the murder of two persons. Their conduct at the time of incident would show that they were members of the unlawful assembly and the conviction of the appellants with the aid of s 149, IPC was not illegal.[82]

Every member of unlawful assembly who participated in the act of hunting is liable to be prosecuted for offence under s 51 of the Wild Life (Protection) Act, with the aid of s 149, IPC .[83]

Mere forming of two groups on petty quarrel would not amount to formation of unlawful assembly.[84]

27. Mere Bystander

If a person is a mere bystander, and no specific role is attributed to him, he may not come under the wide sweep of s 149 .[85]

28. Offence Committed by one or more Persons in Concert

A Division Bench of the Calcutta High Court has held that this section applies in terms not only to cases where the offence in question is committed by a single individual but also where it is committed by several individuals acting in concert, and that according to the definition of 'offence' in s 40 of the Code, the word 'offence' as used in s 149, IPC, denotes anything made punishable by the Code. Where a person becomes liable in respect of a criminal act done by him in furtherance of the common intention of himself and others and is punishable in respect of his part in the act, he is himself guilty of an offence. The offence of which he may be guilty may be different from that of the others engaged along with him in the commission of the criminal act (s 38, IPC) but it will nevertheless clearly be an offence within the meaning of the word as used in the section.[86]

All that the section requires is that an offence should have been committed by a member of an unlawful assembly. It is not necessary that the member or members who committed the offence should be known, identified or convicted. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons only, s 147, IPC still applies if upon the evidence in the case the court is able1069 to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified.[87]

If the case of the prosecution and the evidence adduced indicates that a number in excess of five persons participated in the incident and some of them could not be identified, it would be open to the court to convict less than five of the offence of being members of the unlawful assembly or convict them of the offence committed by the unlawful assembly with the aid of s 149, IPC provided it comes to the conclusion that five or more persons participated in the incident.[88]

Where more persons participated in the incident, the accused who participated in the occurrence can be convicted with the aid of s 149, IPC . The mere fact that several accused were acquitted and only four are convicted, does not rule out the application of s 149, IPC . Only four accused were convicted under ss 326 read with 149 and ss 323 read with 149, IPC .[89]

29. Common Object

A common object is essential for an offence under s 149, IPC .[90] Common object as contemplated by s 149, IPC does not require prior concert or meeting of minds before the attack.[91] Even where the

common object is not developed at the initial stage, it may develop at the spot instantly.[92]In fastening constructive liability, the importance of the common object is very great and it is on this basis alone that an accused is punished for the act of his associates.[93] The emphasis in the section is on common object, and not on common intention.[94] If the accused are acquitted on the charge of rioting, there is no unlawful assembly and no common intention on their part to commit an offence. This section cannot, therefore, be applied to them.[95] Mere presence in a crowd or unlawful assembly cannot render a person liable, unless there was a common object; he was actuated by the common object, and that object is one of those set out in s 141 .[96] Where there was a fight between the main accused and1070 deceased over possession of land, the other accused were merely present on the spot, no specific part was assigned to men in causing death of accused, no particular injury was attributed to them, on these facts they cannot be convicted under s 302 with the aid of s 149, IPC on the basis of mere presence on the spot.[1] Where initially only 20-25 accused persons appeared at the place of occurrence and the entire body of 100-125 persons had not come together armed with weapons, the evidence showed that some of the accused persons though named in the FIR were standing at a distance, mixed with other accused persons without carrying any weapons or committing any overt act, they cannot be termed to be members of unlawful assembly.[2] Where there was no evidence regarding the incitement of the accused for the purpose of the alleged killing, accused's alleged shouts (words) were not stated in the FIR, and there was also no use of the accused's weapons in the alleged killing, it was held that the accused's mere standing near the place of occurrence does not bring him within the ambit of s 149 .[3] Therefore, if there is no common object there can be no unlawful assembly.[4] The court found that out of eight accused persons nos. 1 to 8, accused nos. 5 to 8 did not commit any offence, those accused were not members of unlawful assembly, only accused nos. 1 to 4 were left and they could not constitute unlawful assembly; thus, they could not be convicted for offences under ss 143, 144, 147, 323, 324 and 326, IPC read with s 149, IPC .[5] Persons who are members of an unlawful assembly and are guilty of rioting under s 148 would not all be necessarily guilty of the offence of dacoity. That would be so only if robbery and dacoity are also the common object of the unlawful assembly and the offence of dacoity was committed in prosecution of the said common object.[6] Where evidence showed that the accused persons had formed an unlawful assembly with the common object of rioting with deadly weapons the accused only was caught hold of by member of the assembly, he was shot at by one of the accused only when he escaped, another victim was killed by an accused who was not member of the assembly, on these facts it was held that the causing of death of deceased persons were individual ones of two accused and conviction of other accused persons under s 300 with the aid of s 149, IPC was not proper, the conviction of all the accused persons under s 148, IPC was however maintained.[7]

(a) Common Object--Prior Concert not Necessary

A 'common object' does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object.[8]

Where A1, A2 and A3 had knives, and other accused persons had sticks in their hands and all the accused came together, assaulted the deceased with knives and sticks causing death, held all the accused had common object to cause the death1071 of the deceased; thus, they were convicted under s 302, IPC read with s 149, IPC .[9]

(b) Point of Time of Common Object

Common object would mean the purpose or design shared by all the members of unlawful assembly. It may be formed at any stage.[10] The concept of common object, it is well known, is different from common intention. It is true that so far as common object is concerned no prior concert is required. Common object can be formed at the spur of the moment. Course of conduct adopted by the members of the assembly, however, is a relevant factor. At what point of time the common object of the unlawful assembly was formed would depend upon the facts and circumstances of each case.[11] The phrase 'common object' is the central fact on which the liability of persons other than the actual

doer of the act depends. The word 'object' means the purpose, intention, or design and, in order to make it 'common' it must be possessed by all. There must be community of an object which may, however, exist upto a certain point only, beyond which, they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of the common object will vary not only according to the information at their command but also according to the extent to which he shares the community of objects, and as a consequence of this, the effect of this section may be different as different members of the same unlawful assembly.[12] Common object could develop *eoinstanti* and being a question of fact it can always be inferred and deduced from the facts and circumstances of a case projected and proved in a given case.[13]

Common Object can be Formed at the Spur of Moment

Common object is different from common intention. It is true that so far as common object is concerned no prior concert is required. Common object can be formed at the spur of the moment. Course of conduct adopted by the members of the assembly, however, is a relevant factor. At what point of time the common object of the unlawful assembly was formed would depend upon the facts and circumstances of each case.[14]

(c) Common Object at all Stages

It must further be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages he shared the common object of the assembly at all these stages. Where the evidence merely shows that some of the accused were members of the unlawful assembly at one particular stage but not at another, the accused who were not present or who did not share the common object of the unlawful assembly at other stages cannot be convicted for the activities of the assembly at those stages.[15]1072

(d) Definite Finding Required

The common object of the unlawful assembly must be definitely found and not merely left for conjecture or inference from other facts found in the judgment.[16] Before convicting accused with the aid of s 149, IPC the court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object.[17] Ordinarily it is not possible to adduce oral evidence about the object of the accused persons.[18] Generally, no direct evidence is available regarding the existence of common object which, in each case, has to be ascertained from the attending facts and circumstances. When a concerted attack is made on the victim by a large number of persons armed with deadly weapons, it is often difficult to determine the actual part played by each offender and easy to hold that such persons attacked the victim and had the common object for an offence which was known to be likely to be committed in prosecution of such an object. Where the persons forming the assembly are shown to be having identical interest in pursuance of which some of them come armed, others though not armed would, under normal circumstances, be armed to be the members of the unlawful assembly. The facts and circumstances of the case would unequivocally prove the existence of the common object of such persons forming the unlawful assembly who had come to the spot and attacked the complainant party.[19]

(e) Determination of Common Object

The question, as to whether in a given case common object has been made out or not, will depend upon the facts and circumstances thereof; conduct of the parties and the manner in which the occurrence has taken place, will have some bearing on the question.[20] Common object of an unlawful assembly can also be gathered from the nature of the assembly, the weapons used by its members and the behavior of the assembly at or before the scene of occurrence.[21] Whether in a given case the accused persons shared common object or not, must be ascertained from the acts and conduct of the accused persons. The surrounding circumstances are also relevant and may be taken into consideration in arriving at a conclusion in this behalf.[22] Gathering of more than five persons armed

with firearm, betel axe and sticks itself is sufficient to infer that the persons have gathered with definite object and their object was to kill the person by use of firearm and other dangerous weapons. In case of assault by firearm, dangerous weapons, betel axe and sticks, it would not be possible for the person who had also received injury or whose husband/relatives had received injury1073 and ultimately died to describe the details of injury, details of weapons used and part of the body effected.[23]

In the instant case there was evidence that appellants, 24 persons armed with lethal weapons, surrounded the complainant party, killed three persons and caused severe injuries to two persons. Held, the accused appellants had formed unlawful assembly, the common object of which was to commit the murder of the deceased. All were convicted under s 302 read with s 149 of the IPC .[24]

Determination of the common object of an unlawful assembly or the determination of the question whether a member of the unlawful assembly knew that the offence that was committed was likely to be committed is essentially a question of fact that has to be made keeping in view the nature of the assembly, the arms carried by the members and the behavior of the members at or near the scene.[25]

The common object has to be determined with reference to the facts and circumstances of each case. Anything that may be said by a rioter as well as the surrounding circumstances would be relevant.[26] Nature of the injuries as caused by the accused is an index of their object in attacking the deceased.[27] Inference of common object has to be drawn from various factors such as the weapons with which the members were armed, their movements, the acts of violence committed by them and the result.[28]

Enmity between the deceased and the accused party was proved. All the five accused were armed with deadly weapons. Accused S, at the time of incident, exhorted the other accused, 'Kill him. He is the bone of contention'. The attack by the accused party on the victim was pre-planned and premeditated. Held, all the accused persons acted in furtherance of the common object to cause the death of the deceased. Accused appellants were convicted under s 302 read with s 149, IPC .[29] The common object, as pointed out in *Madat Khan v Empress* ,[30] refers to anyone or more of the objects mentioned in s 141 . Such purposes as 'overpowering all resistance', 'resisting to utmost', 'using force if necessary', however convenient the phrases may be, are not recognised by the legislature either as ends or means to an end. Every common object involves the commission of an offence either as the common end or as a means to the common end. It necessarily contemplates an attempt to commit that offence and the commission of every minor offence is involved in the greater offence1074 and any attempt to commit any such minor offence.[31] Where evidence showed that all the accused had gone to the place of occurrence armed with weapons and assaulted the victims, inference can be drawn that they had formed an unlawful assembly before going to the place of occurrence and that they had assaulted the victim in furtherance of their common object, the finding of roles played by each accused individually is not necessary, the conviction of all the accused with the help of s 149 is sustainable.[32] Where several accused persons armed with deadly weapons assemble together at one place at 10 PM without any reason, it conclusively proves that the object of the assembly was unlawful and also common so as to take the life of the deceased.[33]

Where the five accused persons came in jeep, beat the complainant, they had acted in concert with common object, thus, they were convicted under s 149, IPC .[34]

The co-accused was alleged to have assaulted/caused injuries to the deceased by pharsa on the head and ear of the deceased. In post mortem examination no pharsa injury was found on the person of the deceased. In the absence of injury, it could not be said that the co-accused shared common object. The co-accused was not convicted under s 302 read with s 149 of the IPC .[35]

Where a riotous mob chased members of a rival community upto their locality and members of the riotous mob on reaching the locality of the rival community got busy in setting a house on fire while other members of the riotous mob continued to chase members of the rival community and caused the death of four persons, the members who were engaged in burning the house could not be said to

have shared common object of causing murder, and hence, they could not be convicted for murder with the aid of s 34 or s 149, IPC .[36] Actually, in every case under this section, it is not necessary that the common object should directly be to commit a particular offence. It is sufficient that the particular result was such that the member of the assembly knew to be likely to be committed in the prosecution of that common object.[37] Synopsis notes under s 141 may be referred to.

30. 'In Prosecution of the Common Object of that Assembly'

No doubt, the philosophy behind s 149 of the IPC is to fasten a person with vicarious liability for the offence committed by another person. Even then it is essential that the offence should have been committed in prosecution of the common object of the unlawful assembly. One can be convicted with the help of s 149 only if he was a member of the unlawful assembly. He could be tagged with membership of the assembly when the common object of the assembly was to commit the offence which any one among them has committed. Unless the offence was committed prosecution of the common object of that assembly (or such as the members of that assembly knew to be likely to be committed in prosecution of that object), even membership of the assembly is insufficient to drag him to the net. The word prosecution in s 149 1075 means to follow up or pursue. There must be some proximate connection between the offence perpetrated and the common object perceived.

The expression 'in prosecution of common object' as appearing in s 149, IPC have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object.[38] The expression 'in prosecution of the common object', therefore means that the offence committed must have had a perceptible nexus with the common object. For fastening a person with vicarious liability under s 149, it is not enough to show that the particular member of the unlawful assembly intended to commit a particular offence. Unless the court can with reasonable certainty hold that persons assembled together were huddled by a common object, no person can be convicted for what another has done even though the presence of the former at or near the place of occurrence stood established [39]

The phrase 'in prosecution of the common object' is not defined in the Code. It occurs in s 146 also and the notes under that section may also be referred to. 'Prosecution', however, means 'following up or pursuit', and, generally speaking; everything done for the purpose of achieving the desired object can be taken to have been done in prosecution of that object. There must be some connection between the offence and the common object. The connection must be proximate and not too remote. The act must help the attainment of the object or at least smoothen the path towards the goal.[40] The expression 'in prosecution of the common object', therefore, means that the offence committed must have a nexus with the common object and by committing the offence and various other illegal acts, the common object of the unlawful assembly is accomplished or attained.[41] The words 'in prosecution of the common object' have to be strictly construed as equivalent to 'in order to attain the common object'.[42] Under the first part of this section it is essential that the offence must have been committed by a member of the unlawful assembly 'in prosecution of the common object of that assembly'.[43] But the phrase occurs in both parts of the section and the mere fact that the legislature thought fit to express the second alternative appears to show very distinctly that it did not intend the words 'in prosecution' which are found in the first to be equivalent to 'during the prosecution', for if they were, then the second alternative would have clearly been unnecessary.[44] It has been held that in order to fall within the first part of the section, *i.e.,* in order to be committed in prosecution of the common object, the offence committed must be immediately connected with that common object by virtue of the nature of the1076 object.[45] In a case, their Lordships of the Supreme Court held that the first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object, and that in order that the case may fall under the first part, the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members.[46]

Where only accused A2 gave fatal blow, and other accused A2, A3 and A5 had not caused any injury but had carried deadly weapons; the knowledge that grievous injury may be caused can be attributed

to them. Accused A2, A3 and A5 could not be convicted under s 302 read with s 149, IPC ; thus, they were convicted under s 326 read with s 149 of the IPC .[47]

When the seven accused persons of the procession consisting of more than five thousand persons carrying the dead body of the deceased (killed in another incident on road) turned violent and committed the murder of the deceased, District Magistrate (subject matter of the present trial), the members of the procession did not know that the deceased was coming from that direction, the members of the procession were held not members of the unlawful assembly, and could not be said to have common object to commit the murder of the deceased. The conviction of the seven accused persons for offence under s 302 read with s 149, IPC was held not proper.[48]

The accused appellants in furtherance of their common object assaulted the deceased with dharia, axe and sword; inflicting multiple injuries causing death. The conviction of the accused appellants under s 302 read with s 149 of the IPC was held proper.[49]

Three out of six accused persons were armed with fire-arms, but no fire arm was used and as such no fire arm injury was caused to the deceased. Held, the common object of the unlawfully assembly was not to cause the death of the deceased. Accused who were armed with axe and sword had assaulted the witnesses; they were convicted under s 324 read with s 149 of the IPC .[50]

The incident of the accused fleeing away from the place of occurrence together will not be conclusive and determinative of the liability of the accused for the substantive offence under s 302 with the aid of s 149, IPC . In the present case there was no convincing and consistent evidence of any individual overt act on the part of any of the accused appellants to implicate any or all of them for causing the fatal injuries on the body of the deceased. Therefore, it could not be reasonably inferred that the accused appellants, as members of an unlawful assembly, had any common1077 object to commit the offence of murder of the deceased. Accused appellants were acquitted of the offences under s 302, IPC read with s 149 of the IPC .[51]

Where the evidence showing the two accused who were members of unlawful assembly and armed with deadly weapons came along with other accused and participated in murderous assault on both the victims, the finding that he had not caused any serious injuries to the two victims and no specific role was attributed to these two accused and acquitting these accused is illegal as the scope of s 149, IPC, is wide enough to hold these two accused guilty with the aid of s 149, IPC for substantive offences punishable under s 302, IPC .[52]

There was evidence mob of 18-20 persons after coming to the dalan of the deceased forced them to handover their gun by show of force. an offence under s 384 was, therefore, clearly made out and with the aid of s 149, IPC all the appellants were held guilty of that offence.[53]

Where accused persons formed an unlawful assembly and equipped with weapons came to the place of incident, they all have actively participated in the incident which has resulted in death of the accused; this clearly indicates the state of mind of the accused persons, which reflects forming of an unlawful assembly and acting in furtherance of a common object. It would, therefore, not be necessary for the prosecution to establish as to who caused the fatal injury to the accused. It stands, therefore, established that they had approached the place of incident in furtherance of their common object and to fulfil that common object, they unitedly assaulted the deceased and caused injuries to them, which ultimately resulted in his death.[54] Accused appellants had formed unlawful assembly, had committed the murder of two persons and caused injuries to the prosecution witnesses. When the police had called the accused appellants to the police station, they were carrying swords with them which demonstrated that they had prior intention in their mind to commit the murder of the two deceased. They were convicted under ss 302 and 324 read with s 149 of the IPC .[55]

All the accused persons came after the conch-shell was blown. They gave clarion calls. They exhorted others to kill the Dharas. They burnt the houses of Dharas. They killed the Dharas even

though the witnesses came and requested not to attack them. Two of the accused attacked two ladies with katari. After the murders were committed, they picked up the dead bodies and threw them on the land near the bund and then they fled away. Their conduct before the attack, at the time of the attack, after the attack and near the scene of offence clearly indicated that they were members of the unlawful assembly, the common object of which was to murder the Dharas and set fire to their houses. The conviction of the accused appellants with the aid of s 149, IPC was sustained.[56]

Accused armed with lethal weapons gave blows on the head of the deceased causing death. However, there was no evidence to show that the occurrence was a1078 pre-arranged plan. Accused persons were not convicted for offences under ss 148 and 149, IPC .[57]

Test Laid Down

In *Madat Khan v Empress* ,[58] Plowden J, held:

> The test whether an offence is committed in prosecution of common object is, whether the common object is prosecuted in fact as well as in the intention of the doer. When that is the case, every person who is engaged in prosecuting the same object may well be held guilty of an offence which fulfils or tends to fulfil the object which he is himself engaged in prosecuting. It must, however, be clearly understood that offence executes or tends to execute the common object, unless the commission of that offence is involved in the common object.

But it has been held that in a case under s 149, IPC, it is immaterial whether any member of the unlawful assembly intended to commit that offence or not. 'Intention' can be considered only in a case governed by s 34 .[59] All that can be said is that the commission of the offence must be necessarily involved in the execution of the common object. Where the common object was only to abduct a woman and murder was committed in the course of the abduction, it cannot be said that the murder was committed in prosecution of the common object as murder is not essential in order to achieve that common object.[60] But if the members of the unlawful assembly intended and made preparations to go to any length, even to the extent of causing death, in order to attain their common object, murder may be said to have been committed in prosecution of the common object within the meaning of the first part of s 149 .[61] In a case, it has been held that the commission of the offence must have been in the contemplation of the unlawful assembly directly or impliedly.[62] An extreme view is that the first part of section should be confined to cases where the common object of the assembly is to commit an offence and that offence is committed by a member of the assembly in prosecution, or execution of the common object. This is how the Supreme Court has explained this part of the section in *Shambhu Nath v State of Bihar* :[63]

> If the common object of the assembly was only to chastise a person, from the mere fact that some members of the assembly were armed with deadly weapons like spears, it cannot necessarily be inferred that their common object was to kill that person or anyone who offered resistance. If the common object was to chastise *A*, and *B* is killed, it cannot be said that *B's* death was caused in prosecution of the common object of the assembly.[64]1079

36 *Rabindra Mahto v State of Jharkhand* (2006) Cr LJ 957 (SC), AIR 2006 SC 887, 2006 (1) Scale 182, 2006 AIR SCW 298 .

37 *Shamsher Singh v State of Uttar Pradesh* 1993 Cr LJ 3544, p 3546 (SC) .

38 *Koli Jesa Arjan v State* (1988) 15 Rep 556 (Guj) .

39 *Navganbhai Somabhai v State of Gujarat* (1994) Cr LJ 1103, p 1105 (SC) .

40 *State of Andhra Pradesh v Thakidiram Reddy & Ors* (1998) Cr LJ 4035 (SC) .

41 *State of Andhra Pradesh v Thakidiram Reddy & Ors* (1998) Cr LJ 4035 (SC) .

42 *Dhan Ji Ahir & Ors v State of Uttar Pradesh* (2002) Cr LJ 1853 (All)(DB).

43 *Sheo Prasad Bhor v State of Assam* 2007 Cr LJ 1423, p 1424 (SC), AIR 2007 SC 918, 2007 (1) Scale 173, (2007) 3 SCC 120 .

44 *Rohit Yadav v State of Bihar* 2007 Cr LJ (NOC) 202 (Pat) .

45 *Empress v Ram Partab* 6 ILR All 121, p 123 ; *Mahavir Gope v State of Bihar* (1962) 2 Mad LJ 75 (Notes of Recent Cases) (SC); *Komma Neelakantha Reddy v State of Andhra Pradesh* AIR 1978 SC 1021, (1978) Cr LJ 780 .

46 *Nanak Chand v State of Punjab* AIR 1955 SC 274, p 276-77, 56 Cr LJ 721 ; *Banwari v State of Rajasthan* (1979) Cr LJ 161, p 170 (DB) ; *Salim Mohd v State of Gujarat* (1972) Cr LJ 1456 (Guj) .

47 Re *Theetumalai Gounder*AIR 1925 Mad 1 (FB) .

48 *Bharosha Mistri v State of Bihar* 2013 Cr LJ (NOC) 55 (Pat) (DB) Sections 302 / 149, IPC .

49 *Shambhu Nath Singh v State of Bihar* AIR 1960 SC 725, p 727, (1960) Cr LJ 1144 ; *Apren Joseph v State of Kerala* (1972) Cr LJ 1162, p 1170 (Ker), (1971) Ker LJ 761 .

50 *Jagannath Narayan Nikam v State of Maharashtra* (1995) Cr LJ 795 (Bom), (1995) 1 Bom CR 570 .

51 *Dukalu v State of MP* 2011 Cr LJ 1548, p 1552 (Chh) (DB) .

52 *Triloki Nath v State of UP* AIR 1965 SC 2002, (2005) JT 9 SC 370 ; *Kallu v State of Madhya Pradesh* (2006) Cr LJ 799 (SC) .

53 *Munna Chanda v State of Assam* (2006) Cr LJ 1632 (SC), AIR 2006 SC 3555, (2006) 3 SCC 752 .

54 *Munna Chanda v State of Assam* 2006 Cr LJ 1632, p 1635, AIR 2006 SC 3555, (2006) 3 SCC 752 .

55 *Charan Singh v State* AIR 1959 All 255, p 261, (1959) Cr LJ 419 ; *Ashok Kumar v State* (1995) 1 Chand Cr C 398 (HC)(Del); *Munna Chanda v State of Assam* 2006 Cr LJ 1632, AIR 2006 SC 3555, (2006) 3 SCC 752 .

56 *Mahantappa & Ors v State of Karnataka* (1999) Cr LJ 450 (SC) .

57 *Rabindra Mahto v State of Jharkhand* 2006 Cr LJ 957, p 962 (SC), AIR 2006 SC 887, 2006 (1) Scale 182, 2006 AIR SCW 298 .

58 *Sunder Lal & Ors v State of Uttar Pradesh* (1998) Cr LJ 1058 (All)(DB).

59 *Judhister Pradhan v State* (1991) 72 Cut LT 895 ; *Ramrikh v State of Rajasthan* (1976) Raj Cr C 163 ; *Virendra v State of Uttar Pradesh* (1992) 29 All Cr C 202 (All) ; *Babu Hamidkhan Mestry v State of Maharashtra* (1995) (1) Bom CR 332 .

60 *Janardhan Raghu Mhatre & Ors v State of Maharashtra* (1996) Cr LJ 4180 (Bom)(DB).

61 *Charan Singh v State* AIR 1959 All 255, p 263 .

62 *R v Sabed Ali* 20 WR (Cr) 5 .

63 *Sk Ayyub v State of Maharashtra* (1995) Cr LJ 420 (SC) .

64 Re *Dalel*AIR 1946 Lah 222, p 227, 47 Cr LJ 730 ; *Ram Sarup Rai v Emperor* 6 CWN 98 .

65 *Raghunandan v Emperor* AIR 1935 Oudh 52, p 55 ; Re *Dalel*AIR 1946 Lah 222, p 226, 47 Cr LJ 730 ; *Ram Sarup Rai v Emperor* 6 CWN 98 .

66 *State of Maharashtra v Kashirao* AIR 2003 SC 3901 .

67 *Ibid.*

68 *Emperor v Bhola Singh* 29 ILR All 28 .

69 *Jahiruddin v Queen-Empress* 22 ILR Cal 306, p 312, **approved** in *Shambhu Nath Singh v State of Bihar* AIR 1960 SC 725, p 727 .

70 *Sabed Ali* 20 WR 5, pp 8-9 (FB).

71 *Hari Singh* 8 Cal LR 49.

72 *Jahiruddin v Queen-Empress* 22 ILR Cal 306, p 312 .

73 *Md Ankoos v Public Prosecutor, High Court of AP* 2010 Cr LJ 861 (SC), 2009 AIR SCW 7132, AIR 2010 SC 566, JT 2009 (14) SC 6, 2009 (13) Scale 584, (2010) 1 SCC 94 .

74 *Bhimrao v State of Maharashtra* AIR 2003 SC 1493 .

75 *Rabindra Mahto v State of Jharkhand* 2006 Cr LJ 957, p 962 (SC), AIR 2006 SC 887, 2006 (1) Scale 182, 2006 AIR SCW 298 .

76 *Shambhu Nath Singh v State of Bihar* AIR 1960 SC 725, p 728 .

77 *Sudhir Samanta v State of West Bengal & Ors* (1998) Cr LJ 495 (SC) .

78 *Reazuddin v Emperor* 13 Cr LJ 502, p 503 .

79 *Dilawar Ali v Rex* AIR 1949 Oudh 78, p 79, **relying on***Theethumalai Gounder v King Emperor* AIR 1925 Mad 1 (FB), 25 Cr LJ 1297 .

80 *Jhapsa Kabari & Ors v State of Bihar* (2002) Cr LJ 587 (SC) .

81 *Nanak Chand v State of Punjab* AIR 1955 SC 274, p 276 ; *Chikkarange Gowda v State of Mysore* AIR 1956 SC 731, p 735, (1956) Cr LJ 1365 ; *Barendra Kumar Ghosh v State* AIR 1925 PC 1, p 7 .

82 *Jhapsa Kabari & Ors v State of Bihar* (2002) Cr LJ 587 (SC) .

83 *Sukhan Raut & Ors v State of Bihar* (2002) Cr LJ 560 (SC) .

84 *Bhagwan Singh v State of Madhya Pradesh* (2002) 3 JT 387 (SC) .

85 *Shabbir Khan v Mahommad Ismail Khan* (1971) All Cr R 528 (FB), (1972) All LJ 182, (1972) Cr LJ 666, **overruling***State of Uttar Pradesh v Chandrapal Singh* (1968) AWR 632(HC), (1968) Cr LJ 1342, (1968) All LJ 647.

86 *Barendra Kumar Ghosh v King Emperor* AIR 1925 PC 1, p 7 ; *Nanak Chand v State of Punjab* AIR 1955 SC 274 ; *Pandurang v State of Hyderabad* AIR 1955 SC 216, p 221, 56 Cr LJ 572 ; *Krishna Pillai Vasu Pillai v State of Kerala* AIR 1956 Tr & Coch 230, p 232; *Lakhan Mahto v State of Bihar* AIR 1956 SC 1742, (1966) Cr LJ 1349, p 1352 ; *Sheo Mahadeo v State of Bihar* AIR 1970 SC 1492, (1970) Cr LJ 1389 ; *Narayan v State of Kerala* (1978) Ker LT 197 ; *Shabbir Khan v Mahommad Ismail Khan* (1972) Cr LJ 666, (1972) All LJ 182 (FB), **overruling***State of Uttar Pradesh v Chandrapal Singh* (1968) Cr LJ 1342 (All), (1968) All LJ 647 .

87 *Lakhan Mahto v State of Bihar* AIR 1966 SC 1742, (1966) Cr LJ 1349 ; *Radha Kishan v State* AIR 1969 Punj 204, p 206, (1969) Cr LJ 787 ; *Bhajan Singh v State of Uttar Pradesh* AIR 1974 SC 1564, p 1567, 1974 Cr LJ 1029 .

88 *Bhajan Singh v State of Uttar Pradesh* AIR 1974 SC 1564, p 1567, (1974) Cr LJ 1029 ; see commentary under s 34, *ante*.

89 *Kiram M Kandolkar v State & Ors* (1996) Cr LJ 1429 (Bom) .

90 *Virendra Kumar v State of Madhya Pradesh* (1998) Cr LJ 2170 (MP) .

91 *Ibid*.

92 *State of Orissa v Arjun Das Agrawal* (1999) Cr LJ 4078 (SC) ; *Babu v State of Uttar Pradesh* (2000) Cr LJ 4951 (All)(DB).

93 *Tulsiram Bhanudas Kamble & Ors v State of Maharashtra* (2000) Cr LJ 1566 (Bom)(DB).

94 *State of Madhya Pradesh v Sarnam Singh* (2000) Cr LJ 3636 (DB)(MP).

95 *Jaswant Singh v State of Haryana* (2000) Cr LJ 2212 (SC) .

96 *Dani Singh v State of Bihar* AIR 2004 SC 4570 ; *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116, (1956) Cr LJ 291 .

97 *Dani Singh v State of Bihar* AIR 2004 SC 4570 ; *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116, (1956) Cr LJ 291 .

1 *Kaliya v State of MP* (2005) Cr LJ 4690 (MP)(DB).

2 *Kaliya v State of MP* (2005) Cr LJ 4690 (MP) (DB) ; *Mariadasan v State of Tamil Nadu* AIR 1980 SC 573, (1980) Cr LJ 412 ; *State of Bihar v Nathu Pandey* AIR 1970 SC 27, (1970) Cr LJ 5 ; *Vajrapu Sambayya Naidu v State of AP* AIR 2003 SC 3706, (2003) Cr LJ 4433 ; *Kanchadilal v State of MP* (1991) Jab LJ 6 .

3 *Queen v Sabid Ali* 20 WR 5, p 10 .

4 *Mizuji v State of Uttar Pradesh* AIR 1959 SC 572, p 576 .

5 *Hari Narain v State* AIR 1953 Bhopal 8, p 10, 54 Cr LJ 692 ; Re *Manakkal Kumaran*AIR 1942 Mad 446, 43 Cr LJ 81 .

6 *Behaji v King-Emperor* AIR 1924 All 670, p 671, 26 Cr LJ 154 .

7 *Faiz Baksh v Emperor* AIR 1947 Lah 188, p 191, 43 Cr J 269 .

8 *Harinarain v State* AIR 1953 Bhopal 8, p 10 .

9 *Shambhu Nath Singh v State of Bihar* AIR 1960 SC 725, p 727 ; *Sunil Kumar v State of Rajasthan* (2005) Cr LJ 1402 (SC) .

10 *Munivel v State of Tamil Nadu* (2006) Cr LJ 2133 (SC) ; *Rajendra Shantaram Todankar v State of Maharashtra* (2003) 2 SCC 257 .

11 *Ramesh v State of Haryana* 2011 Cr LJ 80 (SC), 2010 AIR SCW 6404, 2010 (11) Scale 166 .

12 *Apparao Rajaram Pund v State of Maharashtra* 2014 Cr LJ (NOC) 325 (Bom) (DB).

13 *Raju v State of Rajasthan* 2013 Cr LJ 1248 (SC), 2013 AIR SCW 812, 2013 (1) Scale 303, (2013) 2 SCC 233 .

14 *Krishnappa v State of Karnataka* 2012 Cr LJ 4347, AIR 2012 SC 2946, 2012 (7) Scale 91 .

15 *Chanda v State of UP* AIR 2004 SC 2451 ; *Charan Singh v State* of UP AIR 2004 SC 2828 .

16 *Shyam Babu v State of UP* 2012 Cr LJ 4550, AIR 2012 SC 3311, 2012 AIR SCW 4846, (2012) 8 SCC 651, 2012 (6) All LJ 10 (SC) .

17 *Ram Durlar Mitra v State* AIR 1955 Assam 226, p 228, 56 Cr LJ 1470 ; *Khudiram v State of West Bengal* AIR 1972 SC 1221, (1972) Cr LJ 756, p 758 ; **but see***Dilawar Ali v Rex* AIR 1949 Oudh 78, p 79, 50 Cr LJ 586 .

18 *Shailesh Kumar v State* (1968) Cr LJ 110, p 114 (All) .

19 *State of Uttar Pradesh v Zahoor* (1978) All Cr C 365, p 372 .

20 *Munna Chanda v State of Assam* (2006) Cr LJ 1632 (SC) ; *Bishna & Ors v State of West Bengal* (2005) 9 Scale 204 ; *Ramesh v State of Haryana* 2011 Cr LJ 80, 2010 (11) Scale 166 (SC) ; *Om Prakash v State of Haryana* 2014 Cr LJ 2567 (SC), 2014 (5) Scale 126, (2014) 5 SCC 753 ; *Vyas Ram v State of Bihar* 2014 Cr LJ 50 (SC), 2013 (11) Scale 645, (2013) 12 SCC 349 ; *Munaj v State of UP* 2009 Cr LJ (NOC) 1202 (All) (Mere presence a member of unlawful assembly enough).

21 *Anup Lal Yadav v State of Bihar* 2014 (10) SCC 275 .

22 *Kondi Bai v State of Chhattisgarh* 2010 Cr LJ 2968 (Chh) (DB) ; *Rudrappa v State of Karnataka* 2010 Cr LJ (NOC) 1049 (Kant) (DB).

23 *Saddik v State of Gujarat* 2009 Cr LJ 1087, p 1095, 1096 (Guj) .

24 *Nallamsetty Yanadaih v State of Andhra Pradesh* (1993) Cr LJ 408, p 410 (SC) .

25 *Khairuddin v State of West Bengal* 2013 Cr LJ 3271 (SC), AIR 2013 SC 2354, (2013) 5 SCC 753 .

26 *Munaf v State of UP* 2009 Cr LJ (NOC) 1202 (All) (DB).

27 *Fatta & Ors v State of Uttar Pradesh* AIR 1979 SC 1504, (1979) UJ (SC) 441, p 442, (1979) SCC (Cr) 629, (1979) All Cr C (SC) 151, (1979) Cr LR 349 (SC) ; *Dhanji Ahir & Ors v State of Uttar Pradesh* (2002) Cr LJ 1853 (All)(DB); *Chandra Bihari Gautam & Ors v State of Bihar* (2002) 4 JT 62 (SC), (2002) 4 AD 119 (SC) ; *State of MP v Habib Khan* (2007) Cr LJ 2505 (MP)(DB); *Mahmood v State of MP* 2008 Cr LJ 702, 2007 (13) Scale 155, 2007 AIR SCW 7385 .

28 *Ramesh v State of Haryana* 2011 Cr LJ 80 (SC), 2010 AIR SCW 6404, AIR 2011 SC 169, 2010 ALL MR (Cri) 3994 (SC), 2011 Cr LJ 80, JT 2010 (11) SC 488, (2010) 13 SCC 409, 2010 (11) Scale 166 .

29 *Anup Lal Yadav v State of Bihar* 2014 (8) Supreme 78, (2014) 10 SCC 275, 2014 (12) JT 456, 2014 (11) Scale 532, 2014 (4) Crimes 280 (SC) .

30 *Sikandar Singh v State of Bihar* 2010 Cr LJ 3854, p 3858 (SC), AIR 2010 SC 3580, 2010 AIR SCW 4426, 2010 (6) Scale 632, (2010) 7 SCC 477 .

31 *Daya Kishan v State of Haryna* 2010 Cr LJ 2886, p 2892 (SC), AIR 2010 SC 2147, 2010 (4) Scale 263, (2010) 5 SCC 81 .

32 *Om Prakash v State of Haryana* 2014 Cr LJ 2567, p 2572 (SC), (2014) 2 SCC (Cr) 710, (2014) 137 AIC 95 (SC) ; *Lalji v State of UP* (1989) 1 SCC 437, AIR 1989 SC 754 ; *Bhagvan v State of Kerala* (2004) 12 SCC 414, AIR 2004 SC 1058, 2003

AIR SCW 6745 ; *Debashis Daw v State of West Bengal* (2010) 9 SCC 111, AIR 2010 SC 3633, 2010 AIR SCW 5505 ; *Ramchandran v State of Kerala* (2011) 9 SCC 257, AIR 2011 SC 3581, 2011 AIR SCW 5148 .

33 *Vyas Ram v State of Bihar* 2014 Cr LJ 50, p 55 (SC), 2013 AIR SCW 5536, 2013 (11) Scale 645 ; *Masalti v State of UP* AIR 1965 SC 202, 1964 8 SCR 133 **followed**.

34 *Subal Ghorai v State of West Bengal* 2013 Cr LJ 3626, p 3641 (SC), 2013 AIR SCW 3627, (2013) 4 SCC 607, 2013 (5) Scale 675 .

35 *NagarjitAhir v State of Bihar* (2005) Cr LJ 904 (SC) .

36 *Duli Chand & Anor v State* (1998) Cr LJ 988 (Del)(DB).

37 *Rattiram v State of MP* 2013 Cr LJ 2353 (SC), 2013 AIR SCW 2456, 2013 (6) Scale 155, (2013) 12 SCC 316 .

38 *Manoj alias Bhau & Ors v State of Maharashtra* (1999) Cr LJ 2284 (SC) ; *Atar Singh v State of Rajasthan* 2015 (1) Crimes 368 (Raj) (No overt act attributed, respondent nos. 2 to 10 acquitted).

39 *Kuldip Yadav v State of Bihar* 2011 Cr LJ 2640, p 2650 (SC), AIR 2011 SC 1736, (2011) 5 SCC 324, 2011 AIR SCW 2404, 2011 (4) Scale 543 .

40 *Naurangi Mahto & Ors v State* (2001) Cr LJ 1525 (Jhar) .

41 *Bhanu v State of Madhya Pradesh* 2010 Cr LJ 3944, p 3954 (Chh) (DB) .

42 *State of MP v Habib Khan* 2007 Cr LJ 2505, p 2510 (MP) (DB) .

43 *Ramesh Baburao Devaskar v State of Maharashtra* 2008 Cr LJ 372 (SC), (2007) 13 SCC 501, 2007 (12) Scale 272 ; **see also***Bija v State of Haryana* 2008 Cr LJ 1051 (SC), [2008] 1 SCR 477, (2008) 11 SCC 242, 2008 (1) JT 297, 2008 (1) Scale 311 .

44 *Pandhari Vishnv Budhwant v State of Maharashtra* 2009 Cr LJ (NOC) 668 (Bom) (DB).

45 *Prahlad Singh v State of MP* 2011 Cr LJ 4366, p 4368 (SC), (2011) 15 SCC 136, 2011 (8) JT 591, 2011 (8) Scale 105 .

46 *Krishnappa v State of Karnataka* 2012 Cr LJ 4347, AIR 2012 SC 2946, 2012 (7) Scale 91 .

48 *Krishna Pillai Vasu Pillai v State of Kerala* AIR 1956 Tr & Coch 230, p 233; *Bhajan Singh v State of Uttar Pradesh* AIR 1974 SC 1564, p 1567, (1974) Cr LJ 1029 ; *Rewati Prasad v State of Madhya Pradesh* (1980) Jab LJ 888, p 894 (DB) .

49 *Dukalu v State of Madhya Pradesh* 2011 Cr LJ 1548, p 1552 (Chh) (DB) .

50 *Nanak Chand v State of Punjab* AIR 1955 SC 274, p 277 .

51 Re *Girada Narayana*AIR 1963 AP 146, p 148, (1963) 1 Cr LJ 415 .

52 *Dhanna v State of MP* (1996) 10 SCC 79, AIR 1996 SC 2478, 1996 AIR SCW 3066 ; *Babu v State* 2013 Cr LJ 2176, AIR 2013 SC 1769, (2013) 4 SCC 448, 2013 (4) Scale 557 .

53 *Murli v State of Rajasthan* 2010 Cr LJ 2228, p 2234 (SC), 2011 AIR SCW 412, (2009) 9 SCC 417 .

54 *State of Bihar v Nathu Pandey* AIR 1970 SC 27, (1970) Cr LJ 5 ; *Achhey Lal v State of Uttar Pradesh* 1978 SC 1233, p 1234, (1978) Cr LJ 1101 (Where the number of persons, participating in the offence, is less than five, there is no unlawful assembly); *Harwant Singh v State of Haryana* AIR 1969 NOC 79 ; *Sudarshan Ahir v State* (1966) BLJR 908 ; *Rambharose v State of Madhya Pradesh* (1970) MPLJ 41 (Notes of cases); *State of Uttar Pradesh v Zahoor* (1978) All Cr C 365, 372; *Mithu Pandey v State of Bihar* (1969) PLJR 17 (SC) ; *Sivapada v State* AIR 1969 Cal 28, p 31, (1969) Cr LJ 160 ; *Jaswant Khimabhai Bariya v State of Gujarat* (1971) 15 Guj LR 546 .

55 *Bhagwan Singh v State of Madhya Pradesh* (2002) 3 JT 387 (SC) .

56 *Maulu v Emperor* AIR 1925 Lah 532, 26 Cr LJ 531 ; *Subran alias Subranmanian v State of Kerala* (1993) Cr LJ 1387, p 1390-91(SC), (1993) SCW 1014; *Sahabrao Kisan Jadhav v State of Maharashtra* (1992) 1 Bom CR 423 ; *Bhimappa v State* (1962) 1 Cr LJ 51, p 52, (1962) Mad LJ (Cr) 36 ; *Thomas v State* AIR 1966 Mys 53, (1966) Cr LJ 150, p 151 ;*Vijay Raj v State of Rajasthan* (1978) Cr LR 217, p 222 (Raj) ; *Ramaswami v State of Tamil Nadu* AIR 1978 SC 2027 ; *Achhey Lal v State of Uttar Pradesh* AIR 1978 SC 1233, p 1234, (1978) Cr LJ 1101 ; *Bagicha Singh v State* (1964) 65 Punj LR 503 ; *Narayan Behara v State* (1968) 34 Cut LT 1378 ; *State of Uttar Pradesh v Zahoor* (1978) All Cr C 372 ; *Kareem v State* 2009 Cr LJ 1236 (Kant) ; *Nettiala Polluraju v State of AP* AIR 1991 SC 2214, 1991 AIR SCW 2476, 1991 Cr LJ 3133, JT 1991 (4) SC 135, 1991 (2) OLR 569, 1991 (2) Scale 538, (1992) 1 SCC 49 ; *Shyam Pyare v State of UP* 2009 Crlj (NOC) 1226 (All) (DB).

57 *Dhanu Napit v State of Jharkhand* 2010 Cr LJ (NOC) 1005 (Jhar) .

58 *Sikhar Jena v State of Orissa* (2000) Cr LJ 1277 (Ori)(DB).

59 *Aprem Joseph alias Current Kunju v State of Kerala* (1971) KLT 761 .

60 *Banappa Kallappa Ajawan v Emperor* AIR 1944 Bom 146 .

61 *Dalip Singh v State of Punjab* AIR 1953 SC 364, p 366 ; *Ram Tahal v State of Uttar Pradesh* AIR 1972 SC 254, (1972) SCC (Cr) 80 .

62 *Subran alias Subranmanian v State of Kerala* (1993) Cr LJ 1387 (SC) ; *Sahabrao Kisan Jadhav v State of Maharashtra* (1992) 1 Bom CR 423 .

63 *Ram Tahal v State of Uttar Pradesh* AIR 1972 SC 254, (1972) 1 SCC 136, (1972) UJ 237 (SC), (1972) Cr AR 34, (1972) SCC (Cr) 80, (1972) 2 SCJ 303, (1972) SCD 76 .

64 *Mohan Singh v State of Punjab* AIR 1963 SC 174, p 178-79, (1963) 1 Cr LJ 100 .

65 *Tahsildar Singh v State* AIR 1958 All 255, p 290, (1958) Cr LJ 424 .

66 *Musha Khan v State of Maharashtra* AIR 1976 SC 2566, (1976) Cr LR (SC) 466, (1976) Cr AR (SC) 375, (1976) Cr LJ 1987 .

67 *Sher Ali v Sk Masud* AIR 1959 Cal 457, p 460, (1959) Cr LJ 835 .

68 *Kartar Singh v State of Punjab* AIR 1961 SC 1787, p 1790, (1961) 2 Cr LJ 853 .

69 *Abhi Misser v Lachmi Narain* 27 ILR Cal 566 ; *Reazuddi v R* 13 Cr LJ 502 .

70 *Sudhir Samanta v State of West Bengal & Anor* (1998) Cr LJ 495 (SC) .

71 *Anand Mohan v State of Bihar* 2013 Cr LJ 2644 (SC), 2013 AIR SCW 2613, 2012 (7) SCC 225 .

72 *Probodh Purkait v State of West Bengal* 2007 Cr LJ 2003, p 2007 (SC), 2007 AIR ACW 1944, 2007 (3) Scale 634 .

73 *Chikkarange Gowda v State of Mysore*AIR 1956 SC 731 .

74 *Inder Sain v Emperor* AIR 1920 Lah 144, p 159 ; Re *Puvamu Athamu*AIR 1925 Mad 239, p 240, 26 Cr LJ 747 ; *Vasudeva Mudaliar v Emperor* AIR 1929 Mad 880, 30 Cr LJ 869 ; *Mahant Dukhan Das v Emperor* AIR 1941 Pat 211, p 212 ; *Hari Narain v State* AIR 1953 Bhopal 8, p 10, 54 Cr LJ 692 .

75 *Hari Narain v State* AIR 1953 Bhopal 8, p 10 .

76 *Empress v Jhabboo Mahton* 8 ILR Cal 739, p 749 .

77 *State of Karnataka v Mullu Kallappa Patil* 1994 Cr LJ 952, p 954 (SC) .

78 *Mihan Singh v Emperor* AIR 1914 Lah 557, p 558, 16 Cr LJ 60 .

79 *Undit Narain Singh v Emperor* AIR 1947 Pat 27, p 32, 48 Cr LJ 209 .

80 *Munna Chanda v State of Assam* 2006 Cr LJ 1632, p 1635, AIR 2006 SC 3555, (2006) 3 SCC 752 .

81 *Sultan v State of Rajasthan* 2011 Cr LJ 4192, p 4199 (Raj) .

82 *Roopram Laxman Satnami v State of Madhya Pradesh* 2011 Cr LJ 3472, p 3477 (Chh) (DB) ; *State of Madhya Pradesh v Devi Singh* 2011 Cr LJ 3762 (MP) (DB) .

83 *State of Rajasthan v Salman Khan* 2013 (2) KLT (SN) 123 (Raj) .

84 *Deepak Parshuram Shinde v State of Maharashtra* 2008 Cr LJ (NOC) 78 (Bom) (DB).

85 *Vyas Ram v State of Bihar* 2014 Cr LJ 50, p 55 (SC), 2013 AIR SCW 5536, 2013 (11) Scale 645 .

86 *Supdt & Remembrancer of Legal Affairs, Bengal v Golok Tikadar* AIR 1944 Cal 234, p 237, 46 Cr LJ 31 .

87 *Kapildeo Singh v King* AIR 1950 FC 80, p 81 .

88 *Ram Bilas Singh v State of Bihar* (1964) 1 Cr LJ 577, p 578 ; *Bharwad Mepa Dana v State of Bombay* AIR 1960 SC 289, (1960) Cr LJ 424 ; *Mohan Singh v State of Punjab* AIR 1963 SC 174 .

89 *Kallu v State of Madhya Pradesh* 2006 Cr LJ 799 (SC), AIR 2006 SC 831, 2006 (1) Scale 100, 2006 AIR SCW 177 .

90 *Awadheshwar Singh v State of Bihar* (1989) 37 BLJR 259 .

91 *Bhagwan Singh & Ors v State of Madhya Pradesh* (2002) 3 JT 387 (SC) .

92 *Gopa Ram & Ors v State of Rajasthan* (1996) Cr LJ 2987 (Raj)(DB).

93 *Hari Narain v State* AIR 1953 Bhopal 8, p 10 ; *Sitaram Mahton v State of Bihar* 1970 SCD 507, (1970) Pat LJR 107 .

94 *SM Singh v State of Bihar* AIR 1970 SC 1942, (1970) Cr LJ 1389, p 1391 ; *Public Prosecutor v Bollapalli Veeraiah* (1962) 1 Andh LT 181, (1962) 1 Andh WR 84 ; *Purshottam v State* (1968) MPLJ 56 (Notes of Cases); *Sukha v State of Rajasthan* AIR 1956 SC 513, (1956) Cr LJ 923 ; Re *Mala Narayana*AIR 1962 AP 166, (1962) 1 Cr LJ 394, p 398 ; *Picharu Bhati v State* (1964) 1 Cr LJ 117, (1963) 5 Ori JD 155 .

95 *Banappa Kallappa Ajawan v Emperor* AIR 1944 Bom 146, p 147 .

96 Re *Kalusingh Motisingh*AIR 1964 MP 30, p 40 ; *Rajnarain v State* AIR 1954 All 249, 55 Cr LJ 507 ; *Roshan v State of Maharashtra* AIR 1977 SC 672, p 673, (1977) Cr LJ 259 ; *Rambharose v State of Madhya Pradesh* (1970) MPLJ 41 (Notes of Cases); *Ram Rikh v State of Rajasthan* (1976) Raj Cr C 163 ; *Musakhan v State of Rajasthan* AIR 1976 SC 2566, (1976) Cr LJ 1987 ; *Salim Mohamad v State of Gujarat* (1972) Cr LJ 1454, p 1456 (Guj) ; *Mahabir Singh v State of Uttar Pradesh* (1973) All Cr R 179 ; *Judhishir Pradhan v State* (1992) 1 Crimes 103, p 105 (Ori), (1991) 72 Cut LT 895 ; *Gunnana Pentayya v State of AP* (2005) Cr LJ 4680 (AP)(DB) ; *Bhargavan v State of Kerala* AIR 2004 SC 1058 .

1 *Bhanwarlal & Ors v State of Rajasthan* (1998) Cr LJ 3489 (Raj)(DB).

2 *State of Uttar Pradesh v Ram Bharat & Ors* (2002) Cr LJ 1529 (All)(DB).

3 *Virendra v State of Uttar Pradesh* (1992) 29 All Cr C 202 (All) .

4 *Narayan v State of Rajasthan* (1989) Raj CC 130 .

5 *Kareem v State* 2009 Cr LJ 1236 (Kant) .

6 *Barsa Majhi v State* AIR 1953 Ori 1, p 3, 54 Cr LJ 123 .

7 *Anil Rai & Anor v State of Bihar* (2001) Cr LJ 3969 (SC) .

8 *Sikandar Singh v State of Bihar* 2010 Cr LJ 3854, p 3858 (SC), AIR 2010 SC 3580, 2010 AIR SW 4426, 2010 (6) Scale 632, (2010) 7 SCC 477 .

9 *Saddik v State of Gujarat* 2009 Cr LJ 1087, p 1095, 1096 (Guj) .

10 *Hori Lal v State of UP* (2007) Cr LJ 1181 (SC) .

11 *Munna Chanda v State of Assam* (2006) Cr LJ 1632 (SC) .

12 *Jahiruddin v Queen Empress* 22 ILR Cal 306 ; *Sunil Kumar v State of Rajasthan* (2005) Cr LJ 1402 (SC) .

13 *Amzad Ali v State of Assam* AIR 2003 SC 3587, (2003) AIR SCW 3461 .

14 *Munna Chanda v State of Assam* 2006 Cr LJ 1632, p 1635, AIR 2006 SC 3555, (2006) 3 SCC 752 .

15 *Musa Khan v State of Maharashtra* AIR 1976 SC 2566, (1976) Cr LR 466 (SC), (1976) Cr AR (SC) 375, (1976) Cr LJ 1987 .

16 *Krishna Pillai Vasu Pillai v State* AIR 1956 Tr & Coch 230, p 232; *Prabhakar Shankar Sawant v State of Maharashtra* AIR 1979 SC 1265, p 1266, (1979) Cr LJ 856 .

17 *Kuldip Yadav v State of Bihar* 2011 Cr LJ 2640, p 2648 (SC), AIR 2011 SC 1736, (2011) 5 SCC 324, 2011 AIR SCW 2404, 2011 (4) Scale 543 .

18 *Mirza v State of Uttar Pradesh* (1996) Cr LJ 472 (All)(DB); *Kuldip Yadav v State of Bihar* 2011 Cr LJ 2640, 2011 (5) SCC 324, AIR 2011 SC 1736 .

19 *Bhagwan Singh & Ors v State of Madhya Pradesh* (2002) 3 JT 387 (SC) .

20 *Vikram v State of Maharashtra* (2007) Cr LJ 3193 (SC) ; *Bharat Soni v State of Chhattisgarh* 2013 Cr LJ 486, (2012) 12 SCC 657 .

21 *Om Prakash v State of Haryana* 2014 Cr LJ 2567, p 2572 (SC), (2014) 2 SCC (Cri) 710, (2014) 137 AIC 95 (SC) .

22 *Hori Lal v State of UP* (2007) Cr LJ 1181 (SC) .

23 *Bhanu v State of Madhya Pradesh* 2010 Cr LJ 3944, p 3955 (Chh) (DB) .

24 *Bhanu v State of Madhya Pradesh* 2010 Cr LJ 3944, p 3955 (Chh) (DB) .

25 *Bharat Soni v State of Chhattisgarh* 2013 Cr LJ 486 (SC), (2012) 12 SCC 657, (2013) 121 AIC 99, AIR 2013 SC (Cri) 841 .

26 *Dalel Ram Sarup v Emperor* AIR 1946 Lah 222, p 225, 47 Cr LJ 730 ; *Sukha v State of Rajasthan* AIR 1956 SC 513, (1956) Cr LJ 923 ; Re *Mala Narayana*AIR 1962 AP 166, (1962) 1 Cr LJ 394, p 398,; *Shailesh Kumar v State* (1968) Cr LJ 110, p 114(All); *Muthu Naicker v State of Tamil Nadu* AIR 1978 SC 1647, p 1664, (1978) Cr LJ 713 ; *Jugal Kishore Singh v State of Rajasthan* (1978) Raj LW 123 .

27 *Bihsan Singh v State* (1969) 71 Punj LR 73 ; *Shivalingappa Kallyanappa v State of Karnataka* (1994) 3 Crimes 176 (SC), (1995) 1 East Cr C 67 ; *Mushtaq v State of Uttar Pradesh* (1994) 1 Crimes 149 (All), (1994) 31 All Cr C 14, (1994) JIC 163 (All) ; *Mirza v State of Uttar Pradesh* (1996) Cr LJ 472 (All)(DB).

28 *Surendra v State of UP* 2012 Cr LJ 2090, p 2092, AIR 2012 SC 1743, (2012) 4 SCC 776, 2012 (3) Scale 354 .

29 *Surendra v State of UP* 2012 Cr LJ 2090, p 2092 (SC), AIR 2012 SC 1743, (2012) 4 SCC 776, 2012 (3) Scale 354 .

30 *Madat Khan v Empress* 61 PR 1887 (Cr) .

31 *Faiz Baksh v Emperor* AIR 1947 Lah 188, p 191 ; *Bannappa Kallapa Ajawan v Emperor* AIR 1944 Bom 146, p 147 .

32 *Ramkishore Patel & Ors v State of Madhya Pradesh* (1997) Cr LJ 207 (SC) .

33 *Satish v State of Haryana* 2014 Cr LJ 838 (P&H) (DB) (Accused convicted under ss 302, 148 and 149 of the IPC).

34 *State of HP v Tara Chand* 2007 Cr LJ 2044 (HP) .

35 *Khuman Singh v State of Madhya Pradesh* 2014 Cr LJ (NOC) 472 (MP) .

36 *Chandubhai Malubhai Parmar & Ors v State of Gujarat* (1997) Cr LJ 1909 (SC) .

37 Re *Kalusingh Motisingh*AIR 1964 MP 30, p 41 .

38 *State of Maharashtra v Kashirao* AIR 2003 SC 3901 .

39 *Martin v State of Kerala* (1991) 3 Crimes 121, p 123 (Ker) .

40 *Charan Singh v State* AIR 1959 All 255, p 262 ; *Jit Singh v State* AIR 1957 Punj 278, p 283, (1957) Cr LJ 1307 .

41 *Musabbir Ali Tafadar v State of Assam* (1970) Assam LR 155 ; Re *Peta Venkatesu*(1967) 2 Mad LJ (Cr) 3, 8, (1967) 1 Andh WR 5.

42 *Jit Singh v State* AIR 1957 Punj 278, p 283, (1957) Cr LJ 1307 .

43 *State of Bihar v Nathu Pandey* AIR 1970 SC 27, (1970) Cr LJ 5 ; *Khudiram v State of West Bengal* AIR 1972 SC 1221, (1972) Cr LJ 756 ; *MG Bhadawans v State of Maharashtra* AIR 1977 SC 1956, (1977) Cr LJ 1148 ; *Komma Neelakantha Reddy v State of Andhra Pradesh* AIR 1978 SC 1021, (1978) Cr LJ 780 ; *Bhajan Singh v State of Punjab* AIR 1978 SC 1759, (1979) Cr LJ 7, p 12 ; *Sarwan Singh v State of Punjab* AIR 1978 SC 1925 ; *Sumant v State of Uttar Pradesh* (1971) All Cr R 277 ; *Rambharose v State of Madhya Pradesh* (1970) MPLJ 41 (Notes of Cases); *Parshottam v State* (1968) MPLJ 56 (Notes of cases).

44 *Queen v Sabed Ali* 20 WR Cr 5, p 8 ; *Raghunandan v Emperor* AIR 1935 Oudh 52, 36 Cr LJ 268 ; *Jit Singh v State* AIR 1957 Punj 278, p 283 .

45 *Queen v Sabed Ali* 20 WR Cr 5, p 8, per Phear J.

46 *Mizaji v State of Uttar Pradesh* AIR 1959 SC 572, 576, (1959) Cr LJ 777; *Ammir Chand v Crown* 48 Cr LJ 522, p 532 ; *Ahmed v Emperor* AIR 1927 Sind 108, p 111, 28 Cr LJ 61 .

47 *Radha Mohan Singh v State of UP* 2006 Cr LJ 1121, p 1131, AIR 2006 SC 951, (2006) 2 SCC 450, 2006 (1) Scale 369 .

48 *Anand Mohan v State of Bihar* 2013 Cr LJ 2644, p 2655 (SC), 2013 AIR SCW 2613, (2012) 7 SCC 225, 2012 (6) Scale 266 .

49 *Bahadur Singh v State of Madhya Pradesh* 2014 Cr LJ 3077 (SC), (2014) 6 SCC 639, (2014) 139 AIC 4 (SC) .

50 *Raju v State of Rajasthan* 2013 Cr LJ 1248 (SC), 2013 AIR SCW 812, (2013) 2 SCC 233, 2013 (1) JT 552, 2013 (1) Scale 303 .

51 *Bharat Soni v State of Chhattisgarh* 2013 Cr LJ 486 (SC), (2012) 12 SCC 657, (2013) 121 AIC 99, AIR 2013 SC (Cri) 841 .

52 *Hardev Singh v Harbhej Singh & Ors* (1997) Cr LJ 727 (SC) .

53 *Rameshwar Pandey v State of Bihar* 2005 Cr LJ 1407 (SC), 2005 (9) SCC 210 .

54 *Singha Magan Gamit v State of Gujarat* (1999) Cr LJ 2111 (Guj)(DB).

55 *Ramchander v State of Chhattisgarh* 2013 Cr LJ 4902 (Chh) (DB) .

56 *Subal Ghorai v State of West Bengal* 2013 Cr LJ 3626, p 3642 (SC), 2013 AIR SCW 3627, (2013) 4 SCC 607, 2013 (5) Scale 675 .

57 *Gunanidhi Parida v State of Orissa* 2013 Cr LJ (NOC) 87 (Ori) (DB).

58 *Madat Khan v Empress* 61 PR 1887, (Cr) **quoted with approval** in *Faiz Baksh v Emperor* AIR 1947 Lah 188, p 192 .

59 *Sohna v Emperor* AIR 1940 Lah 53, p 54, 41 Cr LJ 348 ; *Nanak Chand v State of Punjab* AIR 1955 SC 274, p 277 .

60 *Gheba v Crown* AIR 1949 Lah 44, p 46, 50 Cr LJ 290 ; *Charan Singh v State* AIR 1959 All 255, p 262 ; *State v Laiq Singh* AIR 1968 All 170, (1968) Cr LJ 584, p 587 ; *Sikhar Behera v State of Orissa* (1994) SCC (Cr) 397 .

61 *Faiz Baksh v Emperor* AIR 1947 Lah 188, p 198, per Teja Singh J; *Hukam Singh v State of Uttar Pradesh* AIR 1961 SC 1541, (1961) 2 Cr LJ 711, p 713 ; *Mizaji v State of Uttar Pradesh* AIR 1959 SC 572, p 577 .

62 *Hanif v State* AIR 1962 All 272, p 276, (1962) 1 Cr LJ 698 ; *Shambhu Nath Singh v State of Bihar* AIR 1960 SC 725, p 727 .

63 *Shambhu Nath v State of Bihar* AIR 1960 SC 725, p 727 .

64 *Charan Singh v State* AIR 1959 All 255, p 262 ; *Faiz Baksh v Emperor* AIR 1947 Lah 188, p 191 ; *Haramant Laxmappa Kukkadi v State of Karnataka* AIR 1994 SC 1546, (1994) Cr LJ 1422, (1994) SCC (Cr) 326, (1994) 1 SCC 736 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 149.

Every member of unlawful assembly guilty of offence committed in prosecution of common object.--

31. 'Or Such as the Members of that Assembly Knew to be Likely to be Committed in Prosecution of that Object'

Actually, in every case under this section it is not necessary that the common object should directly be to commit a particular offence. It is sufficient that the particular result was such that the members of the assembly knew to be likely to be committed in the prosecution of that common object.[65] It has been held that the section fixes liability on a member of an unlawful assembly for an offence which he himself did not commit in either of the two cases mentioned in the two parts of the section, namely: (a) where it was committed in prosecution of the common object, *i.e.*, in order to achieve or accomplish the common object of the unlawful assembly of which he was a member; and (b) where the members of the assembly knew it to be likely to be committed. If a case does not fall under the first alternative it may yet fall under the second.[66] The section thus applies not only to offences actually committed in pursuance of the common object, but even to offences which members of the assembly knew were likely to be committed.[67] And if there be such offence as the members of the assembly knew to be likely to be committed by a person engaged in prosecuting the common object, and acting with the purpose of executing it, it may fairly be imputed to the other members of the assembly.

32. Meaning of 'Knew' and 'Likely'

The second clause of the section indicates clearly that offences not likely to be committed in prosecuting the common object, and even, offences likely to be committed but not known to be likely, are to be excluded from imputable offences.[68] The Allahabad High Court has, however, held that the use of the word 'likely' in the second part of the section means some clear evidence that the unlawful assembly had such knowledge.[69]

The word 'knew' has been advisedly used in the section and cannot be made to bear the sense of 'might have known'.[70] It does not mean a mere possibility such as might or might not happen.[71] The use of the word 'likely' in the second part of the section implies something more than a possibility. A thing is likely to happen only when it will probably happen or may very well happen.[72] For the second part of the section to apply there must be an expectation founded upon facts known to all the members, amounting to something more than a mere speculation.[73] The word 'knew' in s 149, IPC, implies the existence of facts from which a certain inference is so irresistible as to amount to a certainty. This knowledge or state of mind must be1080 shown to exist at the time of the offence, and not the knowledge acquired in the light of subsequent events.[74] Such knowledge may be collected from the nature of the assembly, its common object, the kind of arms which its members bear, and their behaviour at or before the actual conflict.[75] It is highly significant that the legislature refrained from including in the section some such expression as 'or had reason to believe'; further the likelihood of the result must be 'in the prosecution of the common object' and not through some other reason.[76] Knowledge must be proved.[77] It is necessary for the prosecution to show that the members of the assembly did not merely know that the offence was likely to be committed but further that it was likely to be committed in prosecution of the common object of the assembly.[78] Unless such knowledge is proved, the members who did not actually take part in the commission of the offence cannot be held constructively liable for same under this section.[79] Where the accused person armed with an axe and the rest armed with sticks assaulted the deceased resulting in death of five persons and injury to others, all accused persons knowing that the main accused was armed with an axe but still continued in the said assembly and killed three other deceased by chasing them, the accused persons were guilty of sharing a common object of unlawful assembly because the facts of the case squarely fell within the purview of second part of s 149, IPC .[80] The appellant and his four companions arrived on the spot, one of them gave knife blow to the deceased on his thigh which cut his femoral artery and caused death. The appellant did not know that the assailant had knife with him; he was acquitted of the charge under s 302 read with s 149, IPC .[81]

The complainant himself stated that when PW6 intervened and tried to save him, suddenly accused B took out a knife (Churi) and assaulted him. This showed that other appellants/co-accused had no knowledge of the fact that B was having a knife in his possession. Held, the other co-accused could not be held guilty for the act of accused B, therefore, prosecution failed to prove that appellants/accused persons had made unlawful assembly and caused incised wound to the complainant in furtherance of common object of the same.[82]

The Question is One of Fact

No hard and fast rule can be laid down as to the circumstances under which one member can be deemed guilty of an offence committed by another. Every case must1081 be decided on its own merits,[83] the question, in each case, being one of fact, as to whether the offence was contemplated or was known to be likely to be committed in prosecution of the common object by members of the party other than the principal offender.[84] Where five accused persons, armed with deadly weapons, intercepted the deceased, accosted him and, after causing fatal injuries, ran away together, it was held that there was no escape from the conclusion that all the five accused came and worked with one design and object and they definitely knew of the fatal consequences that actually ensued as a result of the conjoint attack to make them all vicariously responsible under s 149, IPC .[85]

The medical evidence was that individually the injury on the right partial region was sufficient to cause death in the ordinary course of nature and cumulatively all the injuries were sufficient to cause death, in such a situation it can safely be inferred that the murder of the deceased was committed in

furtherance of the common object of the five accused who had formed an unlawful assembly for that express object, at any rate they knew that the same could be committed, as contemplated by the second part of s 149, IPC .[86]

Where, out of six assailants, four carried one *farsa* and one spear, visible to all, and all assailants came together, it was held that each of the assailants had the opportunity of seeing the spear and *farsa*; the use of those weapons was a possibility within the knowledge of every one of the members and as such each of them was responsible not merely for what he might have thought was the original common object but also for everything they had reason to know was likely to be done in prosecution of that common object.[87] If the accused, with common object to dispossess the deceased and his sons from the land and to assault them, if resistance was offered in the achievement of that object, go to the place of the occurrence armed with *lathis*, *bhalas* and *tangi*, they must know that grievous injury with deadly weapons was likely to be caused to the victim in the occurrence. Therefore, they cannot escape punishment for the offence under s 326, read with s 149, IPC .[88]

33. Cases of Free Fight

In a case of free fight, s 149 cannot be applied.[89] In a sudden and mutual fight between two groups s 149, IPC cannot be involved for imposing constructive criminal liability; each accused will have to be held liable for individual injury caused by him.[90]

1082In case of free-fight between the parties, the principle of unlawful assembly is not attracted and both sides can be convicted for their individual acts. Each accused should be fastened with the individual liability in relation to the specific role attributable to each of such individuals and since in a free fight it becomes difficult for the Court to ascertain as to who was the aggressor, the safer course of action is to pick up individual acts for punishing individual accused persons.[91]

In *Puran v State of Rajasthan* ,[92] the Supreme Court had held that in case of sudden fight the question of invoking s 149, IPC does not arise. In a recent case, applying s 149 to a case of free fight it has, however, held that the question of one party being aggressor may not arise. However, the members of each party would be members of the unlawful assembly with the common object to fight. But the nature of the participation, the weapons used and the injuries caused would also be relevant to infer the nature of the common object.[93] In another case before the Supreme Court though it was not found safe to hold that the common object of the unlawful assembly was to commit murder and that everyone knew that and that same would attract s 302, IPC, but under the circumstances, the accused armed with deadly weapons formed into an unlawful assembly with a view to fight with the other side and attacked them. One of the deceased received two fatal injuries and the other deceased received only one fatal injury. In such circumstances, the members of the unlawful assembly must be held to have knowledge that some of them are likely to cause injuries and thereby likely to cause death. In other words, they had the knowledge that at least an offence of culpable homicide was likely to be committed. It was held that under these circumstances they can safely be convicted under s 304, Pt II read with s 149, IPC .[94] Where it is apparent that none of the appellants had any intention to kill any particular person on the side of the prosecution party and both the parties were itching for a confrontation and a clash. In a sense, prosecution party and appellants came to a clash and had a free fight. In this background, it will not be safe to record a finding that the appellants had any common object to commit the murder of *B* they had only common object to cause grievous hurt to the members of the prosecution party. This is apparent from the fact that only *P* gave *gandasi* blow on the head of *B*, none of the remaining five appellants are alleged to have given any blows to him from the weapons held by them. If they had also shared common object to cause the murder of *B*, then in normal course, it was expected that they would have also attacked *B*, instead of causing incised injuries and abrasions on the other members of the prosecution party. Appellants were accordingly held guilty under s 326 read with s 149 and not under s 302 read with s 149, IPC .[95]

Where there was a free fight between two parties resulting in death of the deceased but there was no

conclusive evidence to show that the accused started the fight, injuries on accused were not satisfactorily explained by the prosecution but injuries on the side of the prosecution were more in number which was no ground to conclude that accused were aggressors, the accused were held entitled to the benefit1083 of doubt and were acquitted of the changes under ss 147, 123, 325 / 149 and 304 / 149, IPC .[1]

In a case of free fight between two parties, the question of formation of unlawful assembly and common intention does not arise. Each accused is therefore, responsible for individual acts committed by him.[2]

Where there was a free fight between two parties, both the parties were armed with deadly weapons, the prosecution suppressed injuries suffered by the accused persons in the FIR and later on failed to explain them. It also omitted to mention in the FIR that the informant side had used weapons in self-defense. Accused persons were held entitled to be acquitted for the offences under ss 149, 302 and 323, IPC .[3]

34. Proof of the Requisite Knowledge

Under the second part of this section the liability of the other members of the offence committed during the continuance of the occurrence rests upon the knowledge of the other members beforehand that the offence, actually committed, was likely to be committed in prosecution of the common object. If such knowledge may not reasonably be attributed to them, their liabilities for the offence will not arise.[4] Where no injury was inflicted pursuant to the common object to kill the deceased and injury was caused by one member only when provoked by one of the other members, all the members of unlawful assembly cannot be presumed to be aware of offence of murder and hence, not guilty under s 302 read with s 149, IPC .[5] In every case, it would be an issue to be determined whether the offence committed falls within the first part of the section or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part.[6]

35. Inference of Knowledge of Common Object from Relevant Facts

Common object, as contemplated by s 149 of the IPC, does not require prior concert or meeting of minds before the attack. Generally, no direct evidence is available regarding the existence of common object which, in each case, has to be ascertained from the attending facts and circumstances. When a concerted attack is made on the victim by a large number of persons armed with deadly weapons, it is often difficult to determine the actual part played by each offender and easy to hold that such persons who attacked the victim, had the common object for an offence which was known to be likely to be committed in prosecution of such an object. Where the persons forming the assembly are shown to be having identical interest in pursuance of which some of them come armed, others though not armed would, under the normal circumstances, be deemed to be the members of the unlawful assembly. The facts and circumstances of the case unequivocally prove the existence of the common object of such persons forming the unlawful assembly who had come on the spot and1084 attacked the complainant party.[7] Whether or not the other members of the assembly had the requisite knowledge may reasonably be collected from the nature of the assembly, arms, or behaviour at or before the occurrence.[8] The Kerala High Court has held that the manner in which the five or more accused persons came in concert and the blows, which they gave to the deceased with dangerous weapons, and then escaped from the scene with the weapons, constitute them members of an unlawful assembly and demonstrate what their common object was. In determining what offences the accused are guilty of, it is necessary to find what the common object of the assembly would have been considering all the circumstances and nature of injuries that were inflicted upon the deceased. Where a concerted attack is made on the victim by a large number of persons, it is often difficult to determine the actual part played by each of them. If the injuries, that are sufficient in the ordinary course of nature to cause death, are traced to a particular accused, he will be guilty of an offence under s 302

without the aid of s 149, IPC . When the injuries caused are cumulatively sufficient to cause death, it is necessary, before holding each of the accused guilty under s 302 read with s 149, to find that the common object of the unlawful assembly was to cause death or that the members of the unlawful assembly knew it to be likely that an offence under s 302, IPC, would be committed in prosecution of the common object. The common object of an assembly is to be ascertained from the acts and language of the members, composing it, and from a consideration of all the surrounding circumstances. On an analysis of the injuries in a given case, and taking into account all the circumstances, if the court is not satisfied that the common object of the assembly was to cause death, it cannot be said that any of the persons, who inflicted the injuries, intended to cause death or such injury as is sufficient in the ordinary course of nature to cause death. Where the injuries are incised wounds, not individually sufficient to cause death, and the only words by way of exhortation uttered by the first accused was to state the object of the unlawful assembly could have been only to cause grievous injury, the accused can, in such a case, be found guilty of the offence punishable under s 326 read with s 149, IPC .[9] In the opinion of the Madhya Pradesh High Court when *lathis* are carried, one can be certain that the common object is at least to cause hurt, and in addition that the members are aware of the possibility at least of grievous hurt. Whether they would be aware also of the possibility of killing in the prosecution of the common object would depend upon various circumstances, in particular, the number in the assembly, the nature of the weapons, and the number of injuries caused to the persons who are actually killed.[10]

Evidence of the eye-witnesses established that all the eight appellants accused persons were armed with weapons; they surrounded the deceased and prevented others from going near the deceased to rescue him. They had arrived together in the same jeep and left by jeep after the incident. Jeep was kept in starting position. Appellant accused were convicted under s 302, IPC read with s 149, IPC .[11]

1085The prosecution evidence did not show that the accused persons came to the spot together, or that after the commission of crime all of them left together, they did not carry any arm, no overt act was attributed to them; they were given benefit of doubt and acquitted of charge under s 149, IPC .[12]

Where accused (alleged to be dacoits) formed an unlawful assembly with the common object of committing murder of the police force, they allegedly fired at the police party in prosecution of the common object and had an encounter with the police party, one of the accused died on the spot and others got injured, the Allahabad High Court held that it was astonishing that there was an allegation of firing shots by the accused in the prosecution of the aforesaid common object, but the prosecution side (police and public witnesses) did not receive even a scratch on their bodies by the alleged firing in the prosecution of the common object and the accused received firearm injuries by the firing from the side of the police, the conviction of the accused by Sessions Court for offences under ss 147 and 307 / 149, IPC was, therefore, set aside.[13]

Common Object how Inferred

The Supreme Court has expressed the view that the common object has to be gathered or inferred from the various circumstances like membership, nature of the weapons, the force used and the injuries that are caused as well as other surrounding circumstances. After carefully going through the medical evidence, the Supreme Court found in a case that it is difficult to conclude that the common object was to cause the death. If their intention was to cause death, they would have used the lethal weapons in a different way and would not have merely inflicted simple injuries on the non-vital parts like legs and hands.[14] Going as a body alone cannot be a decisive factor in inferring the common object.[15] In a case of frequent movement of rival groups at the time of election the Supreme Court held that in applying s 149, IPC the court has to be satisfied about the common object and fix the membership of the accused in the alleged unlawful assembly. As on the day of occurrence an election had taken place and one can see as to how the atmosphere could have been prevailing in view of the long standing enmity between the two rival groups. Admittedly the factions of the two rival groups were moving out briskly in the village, it was, therefore, difficult to say that even if four or five members were moving that all of them could have been members of an unlawful assembly with a particular

object.[16]

36. Mere Knowledge of Likely Commission of Act

Apart from any act of commission of offence by any member of unlawful assembly, mere knowledge of likely commission of such an act also comes within purview of s 149 .[17]No overt act by each member of the assembly is necessary to attract s 149, IPC . Where a concerted attack is made on the victims by a large number of persons it is often difficult to determine the actual part played by each offender. But on that account for an offence committed by a member of the unlawful assembly in the prosecution of the common object or for an offence which was known to be likely to1086 be committed in prosecution of the common object, persons proved to be members cannot escape the consequences arising from the doing of that act which amounts to an offence.[18]

37. Inference Regarding Knowledge to Cause Death

In *Mizaji v State of Uttar Pradesh* ,[19] it was observed:

> For instance it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149 .

If a body of persons go armed to take forcible possession of the land, they will have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all.

In *Hukam Singh v State of Uttar Pradesh* ,[20] the Supreme Court held that when several persons armed with *lathis*, and one of them armed with a hatchet agreed to use these weapons in case they were thwarted in the achievement of their object, they will be believed to be prepared to use violence in prosecution of their common object and to know that in the prosecution of such common object it was likely that someone may be so injured as to die as a result of those injuries.

Where some members of the assembly accompanied the others seeing that they were armed with swords, and, so far from attempting to prevent the use of those weapons, encouraged it by shouting '*maro*', it was held that they were in the same position as those members who struck the actual blows.[21]

Where a person carries a firearm in the dead of night and uses it and then continues a fight after an excited crowd has assembled and some nine persons rush in to join in the beating after the first shot, they must know either that somebody is likely to deal a fatal blow or at least that the cumulative effect of the blows inflicted by a number of persons armed with *lathis* is likely to cause death from shock.[22]

Where a number of persons indulge in beating a man with sharp-edged weapons like *kirpans* they must know that death is likely to be caused. Where, therefore, numerous injuries were caused to a person by four members of an unlawful assembly in prosecution of their common object, and one of the injuries proved fatal, but it could not be found which of the assailants caused that particular injury, it was held that all four assailants must have known that murder was likely to be committed in prosecution of the common object and were, therefore, liable for the offence under s 302 read with s 149 .[23]

Where two members of an unlawful assembly used spears and deliberately pierced another person through the chest and abdomen, with the knowledge that death was likely to ensue, all the members of the unlawful assembly were held guilty of1087 murder.[24] Members of a party setting out heavily

armed for the purpose of committing dacoity must know that there is every likelihood of something occurring to interfere with their criminal plans and that the deliberate intention of the party is to use their arms, wherever necessary, so that if arms are used on the way, all the members of the party are collectively responsible.[25]

Where a number of persons, two of whom were armed with pistols, set out to abduct a woman and a person was shot in prosecution of the common object, the obvious inference was that the pistols were intended to be used, if necessary, to overcome any resistance, and that the members of the gang knew that murder was very likely to be committed.[26]

But where after the object of an unlawful assembly is accomplished, and the opposite party is driven away, one of the members enters into an altercation with another and wounds him with a fish-spear, the act will not be one done with a view to accomplish the common object of the assembly, or one which the rest knew would be likely to be committed in the prosecution of that object.[27]

38. Liability Attaches only to Members of an Assembly 'At the Time of Committing that Offence'

It is not all the members of an unlawful assembly but only those who are members thereof 'at the time of the commission of the offence' who are made constructively liable under this section. Under s 143, IPC, a person is punishable only for being a member of an unlawful assembly. No question of the commission of any offence arises there. Under s 144, IPC, it is only a member of the unlawful assembly who is armed with a deadly weapon that is made liable. If force or violence is used by any member of an unlawful assembly in prosecution of the common object of the assembly, every member of the assembly is liable for rioting under s 147, IPC . There is no qualification in that section, that the person should be a member of the assembly at the time when the force or violence was used. But under this section one member of an unlawful assembly is made liable for an offence committed by another, only if he and the person committing the offence are both members of the assembly 'at the time of the committing of that offence'. being a member at the time of the commission of the offence thus becomes an essential condition of liability under the section, and has to be proved by the prosecution.[28] Generally, however, it is, as pointed out by Ahmed J in the case last cited, a matter of inference from the facts and circumstances of each case. Where, in the course of a single transaction, many acts are committed by different members of the unlawful assembly in quick succession within a short time, the inference may be in favour of a person continuing to be a member of that assembly till the close of the transaction, for in such a case the probabilities are against an inference of any member of the assembly retiring in the midst of the transaction.[29]

1088If a person arraigned ceases to be a member of the unlawful assembly before commission of the offence, he cannot be held liable for the offence with the aid of s 149, IPC .[30] If a person is only a silent spectator, he would not be a member of the unlawful assembly or he ceases to be a member of the unlawful assembly before the actual commission of the offence, he would not be vicariously liable with the aid of s 149, IPC .[31]

This section cannot apply unless there is proximity of time and place both between members of an unlawful assembly and the criminal acts of individual members of that assembly, for there obviously cannot be an assembly unless five or more persons constituting it are at the same place, while the section itself speaks distinctly of 'at the time' of the committing of the offence.[32] Members of an unlawful assembly present at the time of the commission of the offence taking part in the fight are liable under this section.[33]

The prosecution must prove in each case that the person concerned was not only a member of the unlawful assembly at the some stage, but at all the crucial stages he shared the common object of the assembly at all these stages.[34] But where the persons participating in an assault upon the deceased are members of one unlawful assembly, the mere fact that some of the members of that assembly run

away after inflicting one or two injuries each upon the deceased cannot absolve them of the responsibility for the death, even though it was not the direct result of the injuries inflicted by anyone of them but was the cumulative result of the injuries inflicted by them and other members of the same unlawful assembly. It is impossible to dissociate the act done by one member of an unlawful assembly from the acts of other members of the same assembly if all those acts form part of the same transaction.[35]

39. Physical Participation if Necessary

It is well settled that if an offence is committed by some members of an unlawful assembly then the other members of the assembly are also liable for the offence under s 149, IPC .[36] Every accused is responsible vicariously for causing death. Even if any of the accused might not have caused a single injury to the deceased, because he was a member of the assembly and in prosecution of the common object of the unlawful assembly he knew that the greater probability was that death would be caused.[37] The circumstance that the other accused remained outside the house of the complainant to provide cover to the assailants/accused shows that all accused persons formed an unlawful assembly with common intention to kill deceased persons.[38]

1089Persons present at the place of occurrence may be liable even if they did not take any part in the beating which was their common object.[39] It is not correct to say when dealing with an offence under this section that all the persons must combine together or help one another at the time of the assault.[40] Where persons join an unlawful assembly for the purpose of committing an assault, and, instead of preventing those armed from using their weapons, encourage them to do so they are in the same position as those members of the unlawful assembly who struck the blows.[41]But where four out of eight accused persons were women, the only act attributed to them was that of throwing chili powder, it could be said that they were falsely implicated, and charge of unlawful assembly and rioting against them would fail in the absence of proof of their participation.[42] Where only two accused persons had participated in the occurrence, conviction for forming unlawful assembly under s 148, IPC, was set aside.[43] Non-mentioning of names of some accused, who were attributed very important role in the incident, in the FIR lodged by the eyewitnesses of the occurrence throws doubt on the participation in the crime by the said accused persons who therefore are entitled to the benefit of doubt.[44] Where the physical presence on the spot and involvement of the accused is found doubtful, he would not be convicted with the aid of s 149 .[45]

Where the testimony of the prosecution witnesses about the role played by the two appellants accused was inconsistent and doubtful, both were acquitted of the charge under s 149, IPC .[46]

The prosecution in case under s 302 read with s 149, IPC did not assign any overt act to the appellant accused N, son of the accused L, alleged to be present on the spot. Even if N was present when the occurrence took place, there was nothing to suggest that he shared the common object of the unlawful assembly, and he did not take any part in the assault. Admittedly, large number of persons had come to the ghat that day for taking a bath in river Ganges. It was considered not safe to convict appellant accused N merely on the ground that he was present. He was given benefit of doubt and was acquitted of all the charges under s 302 read with s 149 IPC .[47]

40. Mere Spectator not Liable

Where a member of the assembly is present when murder is being committed by other members, in prosecution of their common object and there is nothing to show or suggest of that assembly, he would be liable under this section.[48]

A mere spectator taking no part in the affairs is not liable.[49]1090

41. No Liability of Person Separated from Unlawful Assembly

Where a gang of persons making preparations to commit dacoity was discovered and pursued by a body of villagers who succeeded in arresting two of the members and, at or about this critical moment, one of the dacoits at large fired his gun and killed a villager, it was held that the two members arrested, having been, by force of circumstances separated from the gang before the unseized dacoit shot at and killed the villager, could not be visited with liability for the murder committed by a member of the gang to which they no longer belonged.[50]

Where a member of an unlawful assembly was, at the outset of the rioting, fell down and while he was lying unconscious, the other members of the assembly pursued the opponents and committed murder, it was held that he was not a member of the unlawful assembly at the time of the committing of the murder, and could not be held liable for it under this section.[51]

Two opposing factions meet and fight. *A* is wounded and retires. Afterwards *B* is killed. *A*, having ceased to be a member of an unlawful assembly, is not guilty of the murder.[52]

Where a group of persons took away cattle forcibly and raised shouts to assault the complainant party, however, only one accused caused death of the deceased by a single blow, there was no evidence that the other co-accused were members of an unlawful assembly or were armed with deadly weapons, the co-accused also did not make any overt act of causing hurt, the co-accused were held not liable to be convicted for offences under ss 323 and 149, IPC .[53]

42. Extent of Liability of Members--Liability under First Part--Limited Liability Under Second Part

This section is declaratory of the vicarious liability of the members of an unlawful assembly for acts done in prosecution of its common object or for such offences as the members thereof knew to be likely to be committed in prosecution of that object. As regards the extent of the vicarious or constructive liability, the section begins with the words: 'If an offence is committed by any member of an unlawful assembly' and, at the end declares that every member of the assembly 'is guilty of that offence'. Reading these two portions of the section alone, it might appear and it was so held in *Ram Prasad Singh v King-Emperor* ,[54] that if a member of an unlawful assembly is to be found constructively guilty of an offence, it must be the same offence of which the principal is guilty and not some other offence. That is so if the case falls under the first part of the section.[55] If an unlawful assembly is formed with the common object of committing an offence and if that offence is committed in prosecution of the object by any member of the unlawful assembly, all the members of the assembly will be vicariously liable for that offence even if one or more, but not all, committed the offence. But if the case falls under the second part of the section, the words1091 'guilty of that offence' at the end, must be taken to refer to 'the offence' such as the members of that assembly 'knew to be likely to be committed in prosecution of that object'. In a case falling under the second part of the section, therefore, the vicarious liability will be limited to the offence which the members knew to be likely to be committed. Once an assembly becomes unlawful, all things done in the prosecution of the common unlawful object of that assembly are chargeable against every member thereof. The liability of every member extends not only to the acts intended by all to be done, but also to those offences which were likely to be committed in achieving the common object.[56] Where some of the accused went near the place of occurrence and joined an unlawful assembly and took part in beating those who came there, from the evidence on record it cannot be said that they knew that death was likely to be caused in prosecution of the common object of the unlawful assembly of which they became a part later on, these accused persons were held liable to be convicted under s 323 read with s 149 while the accused persons who formed the unlawful assembly and assaulted the deceased and continued to beat others who came to rescue them were held liable to be convicted under s 302 read with s 149, IPC .[57]

It has to be determined, with reference to the facts of the case, what offence the members must have known to be likely to be committed. If such offence is a minor offence, then they should be convicted accordingly.[58] As long ago as 1894 it was pointed out in *Jamiruddin v Queen-Empress* :[59]

> Members of an unlawful assembly may have a community of object only up to a certain points beyond which they may differ in their objects, and that the knowledge possessed by each member of what is likely to be committed in prosecution of their common object, will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object; and, as a consequence of this, the effect of s 149 of the IPC, may be different on different members of the same unlawful assembly.

The same view still holds good. Therefore, a conviction for an offence under s 326 read with s 149, IPC may be recorded against the members of an unlawful assembly, even if it be established that an offence of murder was committed by a member of that assembly. The offence under s 326 of the Indian Penal Code is in relation to the offence of murder a minor offence and the language used in s 149 of the IPC does not prevent the court from convicting for that minor offence merely because an aggravated offence is committed.[60]

43. When Common Object of Unlawful Assembly not Murder but Murder is Committed

Each case must necessarily be decided on the facts that can be found on the evidence led in the case. If the facts established show that the common object was to commit murder, it would be a simple matter and, every member of the assembly would be1092 liable for the killing. The difficulty, however, arises when the common object of the assembly is not murder but some other unlawful object, and death is caused in the course of the achievement of that object. The question that arises, in such a case, is whether the evidence discloses that in achieving the common object, which was not the commission of murder, the members of the assembly were determined to go to any length, even to the length of committing murder. If the answer to this question is in the affirmative, the commission of murder will be deemed to have been included within the common object of the assembly. On the other hand, if the answer to the question is in the negative, and yet, on the sudden coming into existence of an unexpected situation, death is caused by the isolated act of one of the members of the assembly, that member alone will be liable for the killing, and the aid of this section cannot, in such a case, be invoked to fasten liability for the murder on the other members of the assembly.[61]

Where the members of an unlawful assembly animated with the common intention of causing grievous hurt, cause death, and it is found that one of them was immediately responsible for one of the deaths caused, that member is guilty of the offences of rioting under s 147, IPC, and of culpable homicide under s 304, and the rest are guilty of rioting and causing grievous hurt under s 325, read with s 149 of IPC .[62] Where the common object of all accused persons was proved only to the extent of giving beating to the deceased and not to commit murder, conviction of accused persons under s 300, IPC, was set aside and all accused were held liable to be convicted under s 324 read with s 149, IPC, as one of the accused was carrying a deadly weapon with the knowledge of other accused persons.[63]

Where the accused persons were alleged to have caused firearm injuries on the deceased, however, except one incised injury on the skull of the deceased all other injuries were found to be lacerated injuries on legs, no injuries were found on vital parts of the body, it was held that the common object of the unlawful assembly was to cause grievous hurt and not murder. The conviction of accused persons was altered from s 302 read with s 149 and s 326 read with s 149, IPC .[64] Where the evidence proved that motive of the accused party was to remove babul trees from the field at any cost and cause such injury as may be necessary for that purpose, some of the accused, however, started assaulting immediately after reaching the spot, the other accused persons cannot be conclusively said

to have known that murders were likely to be committed in prosecution of their common object so as to attract the second part of s 149 and so were held liable to be convicted under s 326 read with s 149 and not s 300 read with s 149, the accused who acted beyond the common object of the unlawful assembly, however, were liable to be convicted under s 300 read with s 34 IPC .[65] Most of the injuries were deep incised wounds of varying sizes. Additionally, multiple fractures on the base of the occipital bone were noticed. The intention of the assailants as established by the evidence of the witnesses was to cause death of the deceased and not to cause grievous injury. The accused were convicted under s 302 1093 read with s 149 of the IPC, and the conviction recorded by the trial court was restored.[66]

Where accused persons went to the house of the complainant armed with *lathis* to belabour them, the main accused was not a member of the assembly and picked a heavy stone and dropped it from the roof of his house on the head of the deceased who had arrived there. The act of the main accused was an isolated act unconnected with purpose or object of the unlawful assembly formed by the accused persons, the accused persons were held not guilty of offence under s 304, Pt II read with s 149, however, there was sufficient evidence with regard to formation of unlawful assembly and causing injury to the complainant and others, so, their conviction under s 323 read with ss 149 and 148, IPC, was found proper, the main accused was convicted under s 304, Pt II, IPC .[67]

Where in a case of political rivalry the group of opposite party workers including the appellants/accused alleged to be armed with deadly weapons attacked the deceased and his co-workers, they also chased them from one house to another and ultimately hacked the deceased to death, eyewitness evidence was that all the appellants/accused were members of the unlawful assembly but one of the eyewitnesses stated that appellants/accused did not continue to be members of the unlawful assembly at the time the deceased met with his death, on these facts it was held that appellants/accused cannot be convicted under s 302 read with s 149, IPC, but are liable only under s 307 read with s 149, IPC, for attempting to commit murder of the deceased.[68]

Where prior to occurrence there was no cause of friction between two parties, accused persons came to the spot duly armed not with the purpose of causing injury but to enjoy the sport of fishing, the unlawful assembly formed spontaneously and did not have the sole object of causing murder, but only to cause assault, the degree and gravity of the assault has to be considered, the death of the deceased persons was caused by the sole fatal injury inflicted by means of an arrow, the accused causing the said injuries individually were held guilty under s 302, IPC, remaining accused who did not touch the deceased at all were acquitted of the charge under s 300 read with s 149 but their conviction under s 307 read with s 149, IPC, was upheld.[69]

Where the common object of an unlawful assembly was criminal trespass and no injury was inflicted pursuant to the common object to kill the deceased, the injury was caused by one member only when provoked by one of the other members, it was held that all the members of unlawful assembly were not guilty of the offence under s 302 read with s 149, IPC, as they cannot be presumed to be aware of the offence of murder. Only the accused who caused the injury and the one who instigated him to inflict injury were held guilty under s 302 read with s 34, IPC, and all other accused were held guilty of offences punishable under ss 147, 148 and 323 read with s 149, IPC .[70]1094

44. Omission to Ask Question under Section 313,Crpc Regarding Forming of an Unlawful Assembly

Where the accused were charged with forming an unlawful assembly and attacking victims and causing death of one and inflicting grievous hurt upon another, while examining accused persons under s 313, CrPC, detailed questions were put to them and in these questions full opportunity had been accorded to accused persons to explain the circumstances appearing against them, there is no modality in s 313, CrPC that it should also be written as to what offence had been committed by the accused persons and under what sections those offences were punishable. So, there is no infraction

of s 313, CrPC, on account of not being mentioned in a question put to accused as to whether they had formed an unlawful assembly and murdered the deceased and caused grievous injuries to the witness nor can it be held that the accused persons in any manner had been prejudiced on account of omission to put the above question.[71]

45. Procedure

The procedure is the same as for the substantive offence committed. But the offence under s 149 is non-compoundable.

46. Contents of Charge--Foundation for Conviction

This section creates a specific offence[72] or at least a distinct head of criminal liability and the framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence is the foundation for a conviction and sentence thereunder.[73] An accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him. Unless he has this knowledge he must be seriously prejudiced in his defense. This is true in all cases, but it is more especially true in cases where it is sought to implicate an accused person for acts not committed by himself, but by others with whom he was in company.[74] In *Musakhan v State of Maharashtra* ,[75] the Supreme Court held that as an offence under s 395, IPC, comes into existence only when the dacoity is committed by five or more persons jointly. The question of applying s 149 is a mere surplusage. Therefore, it is not necessary to frame a charge under s 149 read with s 395, IPC .

Charge under Section 149 Includes Charge under Section 147

Commentary under same heading in s 147 may be referred to.

Mere Mention of Section in the Charge not Sufficient

A mere mention of the relevant sections in the charges to which the accused persons are called upon to plead, or when entering convictions against them, will not satisfy the conscience of an appellate court that the lower court has applied its mind to the1095 question whether the elements attracting the application of the rules relating to constructive liability for crimes are present in the case nor would such mere mention of the sections clothe the accused persons with proper notice of the crimes for which they are sought to be made constructively liable.[76] In a charge under s 149, IPC, the common object should be mentioned so as to give the accused clear notice of the charge against them, but the omission to do so is nothing more than a mere irregularity.[77]

Common Object to be Mentioned in Charge

Where the common object of the rioters was clearly to obtain possession of immovable property, but during the riot, members of the opposite party were injured, it was wrong to include 'and assaulting them' as one of the common objects, in the same trial, even more so in one charge.[78]

The fact that an offence is committed 'in prosecution of the common object', is of the essence of the case and there could be no conviction for any offence committed with a different common object. It is, therefore, obligatory to set out the common object in a charge unless it has been already specified in the main charge under s 147 .[79]

There is clear distinction between intention and common object. If some of appellants were not sharing the common object with the remaining appellants on both counts, it cannot be said that the common object of the unlawful assembly of the appellants was the same.[80]

In *Chikkarange Gowda v State of Mysore* ,[81] the common object of an unlawful assembly, as

mentioned in the charge and as found by the court, was merely to administer a chastisement to the deceased. The charge did not mention that the members of the unlawful assembly knew that the deceased was likely to be killed in prosecution of that common object. The deceased was killed by the fatal injury caused by a certain member of the unlawful assembly. The court convicted the other members, who had not caused the fatal injury, under s 302 read with ss 149 and 34 . The Supreme Court held that as the finding of the court was that none of the members of the unlawful assembly had the intention to kill the deceased nor did any of them know that the deceased was likely to be killed in prosecution of the common object of chastisement, and as the charge gave no notice to the accused that they had a separate common intention of killing the deceased different from that of the other members of the unlawful assembly, the conviction of the accused who had not caused any fatal injury, of an offence under s 302 read with ss 149 or 34, IPC could not be sustained.

Where the common object specified in the charges is 'assaulting the *pariwars*' the words cannot be understood as denoting murder, though assault may sometimes prove fatal, and if the latter part of s 149 imputing knowledge of the offence likely to1096 be committed is not referred to in the charge, there is no jurisdiction for the conviction of all the members of the unlawful assembly for murder, when it is not alleged in the charge that murder was the common object and the evidence did not establish it.[82]

Omissions in the Charge--Effect Thereof

But a mere omission to mention in the charge that the accused had the knowledge of the likelihood of the offence being committed as required by the second part of the section is a mere irregularity and not illegality if the accused is not prejudiced thereby.[83] It is not a general proposition of law that a conviction under ss 147 of the IPC cannot be supported whenever the common object as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge. Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy of their land, and, thereby to forcibly oust them, but the common object established by the facts found by the sessions judge was to maintain possession of the land by the accused, it was held that the common object in the charge had not been substantially made out, and that the conviction under s 147, IPC was, therefore, bad.[84] But in a Bombay case it was held that the omission in a charge to state the common object of an unlawful assembly is not fatal to the trial, where it is specified in the complaint and found by the court.[85]

47. Form of Charge

The following form of the charge may be adopted:

> I, (*name of office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:
>
> That on or about the.....day of.....at.....you were a member of an unlawful assembly, one of the members of which committed the offence of (specify the offence) in prosecution of the common object (merely specify the common object) of that assembly (*or the offence of.....which the members of that assembly knew to be likely to be committed in prosecution of that object*) and you, being a member of such assembly, at the time of the committing of that offence, are, therefore, guilty of that offence punishable under.....(*specify the section*) read with s 149 of the IPC, and within my cognisance (*or within the cognisance of the Court of Session*).

> And I hereby direct that you be tried by this (*or by the said*) Court on the said charge.

Framing of Additional Charge under Section 149 --Effect

Where an additional charge has been framed under s 149, IPC, and the accused sought an opportunity to recall the witness for cross-examination, on this score, s 149, IPC, is specific and the offence constitutes a substantive one, therefore, the accused persons are to be given the fullest opportunity to defend themselves. If the prosecution witnesses who have been examined are cross-examined in view of the altered charge, it would be a denial of opportunity to the accused persons to defend1097 themselves, therefore, the order of the trial judge declining such opportunity to the accused was set aside being unsustainable.[86]

Effect of Omission to Frame Charge--Effect

Sections 34, 114 and 149 of the Code, provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled up one involving the direct and the constructive liability without specifying who are directly liable and who are sought to be made liable constructively. In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant. In considering whether the omission to frame a charge under ss 34 or 149, IPC is a defect which is illegal or a mere irregularity, the court has to take into account several factors, such as the form and the language of the mandatory provisions, the scheme and the object to be achieved, the nature of the violation, etc.

The omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted. In the main, the provisions of s 535 of CrPC 1898 (now s 464 of CrPC 1973) would apply to cases of inadvertence to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specification, and where the facts proved by the prosecution constitute a separate and distinct offence but closely relevant to and springing out of the same set of facts connected with the one charged.[87]

In another case, their Lordships of the Supreme Court observed:

> Section 149, unlike section 34, creates a specific offence and deals with the punishment of that offence alone. We would accordingly require strong reasons for using section 149 when it is not charged, even if it be possible to convict under that section in the absence of a specific charge, a point we do not decide here.[88]

Subsequently in a case where a charge under s 149, IPC, was not framed but all the ingredients of s 149 were clearly indicated in the charge framed against the accused, relying upon the Constitutional Bench decision in *Willie (William) Slaney v State of Madhya Pradesh* ,[89] wherein it was held that omission to mention s 149, IPC, specifically in the charge is only an irregularity and since no prejudice is shown to have been caused to appellants/accused by that omission it cannot affect their conviction, accordingly conviction of the accused under s 304, Part II read with s 149 was held to be proper.[90] If the ingredients of s 149, IPC are mentioned in the charge1098 under s 302, IPC, mere omission of s 149, IPC would not preclude the court from convicting the accused under the provisions of s 149, IPC where no prejudice to the accused is shown or caused.[91] In framing charge under s 326, IPC, it was

mentioned that the accused persons were members of unlawful assembly and had acted in pursuance of the common object of such assembly, *i.e.,* in order to commit murder of the deceased, they committed the offence and at that time, they were armed with daggers *etc.* to bring in the application of s 148, IPC . The absence of specific charge under s 149 did not vitiate the conviction under s 302, IPC, as the charge was not only implicit, but also patent in the charges.[92] Conviction under s 149, IPC, is otherwise not sustainable when no charge under the same section was framed against the accused.[93]

Where the agitators, including the appellant, were alleged to have committed mischief by setting fire to the residential house of the District Judge during agitation of Uttrakhand Sangharsh Samiti, the evidence of the eye-witness was found not reliable, thus, the appellant could not be convicted under s 436, IPC (s*impliciter*) in the absence of charge under s 436 read with s 149, IPC against the accused appellant.[94]

Conviction without a Formal Charge in Appeal

The Goa High Court has held that where there was reliable evidence to prove that the accused formed an unlawful assembly with the common object to demolish the house of the complainant it was held that the Appellate Court can convict the accused under s 149 though no charge for that offence was framed by the trial court.[95]

Substitution of Charge under Section 34 for Charge under Section 149 of the Penal Code

It has been held that the 'common object' under s 149, IPC, being different from the 'common intention' required by s 34, in the absence of an alternative charge under s 34, it is not possible to convict the accused charged under s 149 for any supposed common intention.[96] But though there is a substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under s 149, IPC overlaps the ground covered by s 34 . If the common object which is the subject-matter of the charge under s 149 might result in prejudice to the accused, substitution of s 34 for s 149, IPC ought not to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under s 149 would be the same if the charge were under s 34, it cannot result in any prejudice, and in such cases the substitution of s 34 for s 149 must be held to be a formal matter.[97]

1099 If one reads s 149 and s 34, they will go to show that these two sections are related and overlap each other. When an offence is committed with a common object by more than five persons, it will amount to an offence under s 149, whereas if an offence is committed with a common object by persons less than five, the offence will come under s 34 . Hence an accused charged with an offence under s 448 read with s 149 can be convicted under s 447 read with s 34 .[1]

Where 29 accused persons faced trial for rioting, two murders and other related offences, the Sessions Court convicted 19 of them under ss 148, 302 read with s 149, s 307 read with s 149, and s 324 read with s 149, IPC, and acquitted the rest, the High Court dismissed the appeal of the convicts and upheld the conviction. The evidence proved that motive of the accused party was to remove babul trees from the field at any cost and cause such injury as may be necessary for that purpose. Some of the accused, however, started assaulting immediately after reaching the spot. Other accused persons cannot be conclusively said to have known that the murders were likely to be committed in prosecution of their common object so as to attract the second part of s 149 and so were held liable to be convicted under s 326 read with s 149 and not under s 300 read with s 149, the accused who acted beyond the common object of the unlawful assembly, however, were held liable to be convicted under s 300 read with s 341, IPC .[2] The accused charged under s 302 read with s 149, IPC, can be convicted under s 302 read with s 34, IPC .[3]

The accused charged under s 452 read with s 149, IPC, can be convicted under s 452 with the aid of

s 34, IPC, when charge under s 149, IPC, is not proved.[4]

The accused charged with s 302 read with s 149, IPC, can be convicted under s 326 read with s 34, IPC .[5] The accused charged under s 302 read with s 149, IPC, can be convicted under s 304, Pt I, read with s 34, IPC .[6]

In a case, the Kerala High Court has however, held that though in certain circumstances a conviction for liability under s 34, IPC, can be entered even though the charge mentions only s 149, IPC, the procedure is to put the accused person in notice of the precise ground on which liability is cast upon him.[7] It was held in Re *Thirugnanam*,[8] that failure to frame charge under s 302 read with s 34, as an alternative to that under s 302 read with s 149, because of carelessness and indifference of the trial judge will make the accused entitled to acquittal.

Commentary under same heading in s 34 may be referred to.

Substitution of Charge under Section 149 for Charge under Section 34

Commentary under same heading in s 34 may be referred to.

In the absence of prejudice, there is no legal bar to the recording of conviction under s 302, read with s 149, when the accused were charged under s 302, read with1100 s 34 . Where the charge for rioting, with deadly weapons, resulting in brutal murders, against the several accused clearly stated that the common object of the unlawful assembly was to commit murder and all the accused were also charged under s 302 read with s 34, in respect of the murders, on the footing that they were committed in furtherance of the common intention of all the accused and the evidence did not establish which of the accused had actually participated in the attack on the deceased persons, it was held that the accused, whose participation in the rioting had been proved beyond doubt, should be convicted under s 302, read with s 149, for the murders.[9] A person can be convicted of an offence read with s 34, or s 149, if the facts of the case justify it and if the accused has not been misled in his defence and if there has been no failure of justice irrespective of the fact that in the charge framed against him, s 34 or s 149 is not specifically mentioned.[10]

Charge Under Section 34 or Section 149 --Conviction for Substantive Offence, not Charged

Commentary under same heading in s 34 may be referred to.

It is settled that the offence under s 149, IPC constitutes a substantive offence and creates vicarious liability upon all the five or more, if the act has been done by any one of them. There is a legal distinction between a charge under s 302 and a charge of constructive liability under s 302 read with s 149, *i.e*. being a member of an unlawful assembly the common object of which was to kill the deceased. Section 149 creates a specific and distinct offence and it postulates an assembly of five or more persons having a common object as named in s 141, IPC . Therefore conviction of the accused under s 302 *simpliciter* without a specific charge, while acquitting the rest of the four accused persons from charges under ss 149 and 302, IPC, was liable to be quashed.[11] Where the accused are charged for rioting and murder by virtue of ss 149 and 34, IPC, it is usual to charge the accused individually also for the acts that they are said to have committed. This draws the attention of the accused in particular to the acts which they are said to have committed. If that is not done, the accused may have cause for argument that when the main charge of rioting and acting in concert in pursuance of a common intention has failed; he ought not to be convicted for the particular acts committed by him. But omission to charge an accused individually for the acts specifically done by him does not render the conviction invalid if he knew exactly what acts he was said to have done, and there has been no miscarriage of justice on account of the omission in the charge.[12] There is nothing in s 149, IPC, to indicate that unless one member of an unlawful assembly is charged with the substantive offence, the conviction with the aid of s 149, IPC, cannot be possible.[13] Where the

accused were charged for offences under s 302 read with s 149, IPC, and accused persons were found guilty of offence under s 149, IPC, no prejudice is1101 caused to accused persons for not framing an independent charge under s 302 IPC, and the irregularity is curable and trial is not vitiated.[14]

48. Legal Position Explained

When a person is charged with an offence read with s 149, IPC, he is only put on notice of two facts, that he was a member of unlawful assembly, and that an offence was committed in prosecution of the common object or he knew that an offence was likely to be committed. He is therefore called upon to meet only the points mentioned above, and is not called upon to show that he has not committed any individual act. Section 149 creates a distinct offence, at any rate, a distinct head of liability.[15] Where the accused persons were charged for offence under s 302 read with s 149, IPC, but the common object for committing murder was not established, the accused persons cannot be convicted for the substantive offence of murder under s 302 IPC, in the absence of a specific charge.[16] So a person charged with constructive liability cannot be convicted for a substantive offence.[17]The reason of the rule is that the accused is very much prejudiced when he is convicted for a substantive offence without a specific charge because his attention is not focused on any individual act. But the position is different when a person is charged with an offence under the IPC . Overt acts are attributed to the accused and they have opportunities of meeting that case. Consequently, the conviction for the substantive offence does not occasion any prejudice to the accused.[18]

Where the main accused along with other accused persons was charged with offences under ss 147, 149, 300, IPC, but the charge of unlawful assembly was not proved, the main accused can be convicted of a substantive offence under s 302, IPC, though the charge against him was framed under s 302 read with s 149, IPC, provided no prejudice is caused to the accused and accused knew from the very beginning of the trial the charge against him was one under s 302 IPC, and the evidence of the guilt of the accused beyond reasonable doubt is established.[19]

49. Joinder of Charges and Separate Trials

All the accused, charged under s 149 of the IPC, have to be tried jointly.[20] Synopsis notes under s 147, *ante* may be referred to. But where one of the members of a unlawful assembly was 13 years of age at the time of the incident, conducting of his trial along with the other accused who were not children was illegal, however, since this plea was not raised by the accused before trial court or High Court so conviction of the child accused was confirmed by the Apex Court but the sentence imposed on him was set aside.[21] When the argument that the accused was a juvenile was not1102 taken before the trial court and High Court and even in the SLP, it being a mixed question of law and fact and not a pure question of law cannot be raised for the first time in the criminal appeal before the Supreme Court.[22]

50. Proof

Prosecution should prove not only physical presence of the accused persons, but should also satisfy the court about sharing of common object notwithstanding actual participation in commission of the offence.[23]

The ingredients of the offence under s 149, IPC, have to be made out by the prosecution,[24] but it is not necessary, for it, to prove that a particular named member of the unlawful assembly committed the offence,[25] or what particular injury was caused by which one of the accused.[26] Where unlawful assembly otherwise is proved by evidence on the record, omission of the prosecution witnesses to depose exact role played by each accused would not be fatal.[27] It would be difficult for any witness to state exactly which accused inflicted how many blows on the deceased.[28] For sustaining conviction

under s 149, IPC, the prosecution need not prove as to which of the accused was responsible for the fatal blow.[29] Where the injuries were caused to the deceased in prosecution of the common object of all the accused to cause the death of the deceased, the accused cannot derive any benefit from the inability of the prosecution witnesses to state as to which particular injury was caused by which of the accused.[30] So, it is immaterial that one of the accused did not cause injuries to the deceased or the injured.[31] Whether all the accused had beaten the deceased or not, was really not of any consequence and all should be held guilty for causing death of the deceased.[32] The author of injury would not be absolved from criminal liability under ss 302 and 149, IPC, when he was member of the unlawful assembly which caused death of two persons.[33] Where the name of one accused was not mentioned in FIR, but figured in the statement under s 161, CrPC recorded on the next day of recording of FIR, four persons including the son of the informant were seriously injured, the informant may be under severe psychic trauma, the omission of the name of one accused in FIR was held of no importance.[34] Where there was no reliable evidence to show that at least five persons set on fire the hut of the complainant, the1103 PWS had not seen the three appellants on the spot at the time of the incident, held the three appellants were not members of the unlawful assembly, and were acquitted of the charge under s 436 read with s 149 IPC .[35]

51. Appreciation of Evidence

Where shots are fired in rioting, it is very difficult for the witnesses to tell the exact distance from which the shots were fired.[36]

The prosecution witnesses did not describe the appellant accused either in their statement recorded under s 161, CrPC or prior to holding of Trial Identification Parade (TIP) before the magistrate. Although, they claimed in their testimonies, that they had seen the appellant in the full moon light, but this fact was not mentioned by them in their statements recorded under s 161, CrPC . The identification of appellant accused in TIP was highly doubtful. He was acquitted of the charges under ss 399, 392 and 307 read with s 149, IPC .[37]

Once a membership of an unlawful assembly is established, it is not incumbent on the prosecution to establish any specific overt act to any of the accused for fastening of liability with the aid of s 149 of the IPC . Commission of overt act by each member of the unlawful assembly is not necessary. The common object of the unlawful assembly of the accused in the present case was evident from the fact that some of them were armed with deadly weapons. None of them were curious onlookers or spectators to the macabre drama.[38]

52. Identification by Two Witnesses Desirable when Unlawful Assembly is Large

There is no rule of evidence that no conviction can be leased unless a certain minimum number of witnesses have identified a particular accused as member of an unlawful assembly. It is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence but the quality that matters. Even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as a member of an unlawful assembly. All the same, when the size of the unlawful assembly is quite large and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as participant in the rioting.[39] Where a large number of people are involved, it would be prudent to adopt a two witness theory.[40]

The case of each individual accused has to be examined to satisfy that mere spectators, who had not joined the assembly and who were not aware of its common object, have not been treated as members of the unlawful assembly which committed1104 the crime.[41] But failure of the prosecution to establish, which of the particular persons formed an unlawful assembly, does not affect the liability of

the persons proved to be the members of the unlawful assembly for the acts done in prosecution of the common object or which they knew to be likely to be committed in prosecution of the common object thereof.[42] Doubts may arise about the veracity of the whole prosecution version and doubts about the participation of individual accused persons may contribute to the emergence of such doubts which may cover and engulf the whole case. Nevertheless, if the court, whose duty it is to separate the chaff from the grain, does hold that the convicted persons were certainly members of an unlawful assembly which must have consisted of more than five persons, one does not see any principle of law or justice which could stand in the way of the application of s 149, IPC, for convicting those undoubtedly guilty of participation in carrying out the common object of an unlawful assembly.

Where the allegations were that accused persons having formed an unlawful assembly assaulted the deceased with a sword and thereafter threw his dead body in a hut and set it on fire. Evidence of eyewitnesses was corroborated by the objective findings of investigating officer and medical evidence. The participation of the accused persons and their active roles in the incident was established by two or more eyewitnesses so conviction of participating accused was held proper. However, the conviction of other two accused persons solely on the identification by one witness only was not proper, further there was no evidence to establish that the remaining accused persons were members of an unlawful assembly and their presence at the scene of occurrence as onlookers cannot be ruled out, hence they were entitled to the benefit of doubt.[43]The statement of the informant under s 161 giving details of the incident with the specific overt acts of each accused cannot be admitted in evidence in view of s 145, Evidence Act 1872.[44]

53. Testimony of Single Witness

Where an unlawful assembly involves a very large number of persons, there is no rule of law that states that there cannot be any conviction on the testimony of a sole eye-witness, unless the court is of the view that the testimony of such sole eye-witness is not reliable. Though, generally it is a rule of prudence followed by the courts that a conviction may not be sustained if it is not supported by two or more witnesses who give a consistent account of the incident, in a fit case, the court may believe a reliable sole eye-witness if in his testimony he makes specific reference to the identity of the individual and his specific overt acts in the incident. The rule of requirement of more than one witness applies only in a case where a witness deposes in a general and vague manner, or in the case of a riot.[45]

54. Conviction

Omission to record a finding of acquittal or conviction on a charge under s 148 would not necessarily affect the conviction for another offence, read with s 149,1105IPC .[46] But where the accused are charged for different offences including offences under ss 148, 149, IPC, the acquittal of the accused persons under s 148 would make their conviction under s 149 illegal, as once there was acquittal under s 148, invoking of s 149 was not warranted.[47] Even where the charge of conspiracy is not proved, the offence of unlawful assembly can be proved and conviction can be recorded for the offence of unlawful assembly.[48]

A person cannot be convicted under s 302, IPC, for committing the offence directly and under s 302 read with s 149, IPC, at the same time, for committing the offence constructively. If a man does commit an offence directly, there is no question of his committing it constructively, and vice versa.[49] Therefore, a person charged for an offence under s 302, IPC, read with s 149 cannot be convicted of the substantive offence under s 302, IPC, without a specific charge having been framed against him as envisaged by law.[50]

When the main five accused are acquitted of the charge for the offence under s 302, IPC, *simpliciter*, the conviction of the other accused on the basis of the same prosecution evidence with the help of provision of s 149, IPC, is not proper.[51] In the total absence of evidence both in respect of offences under s 34 as well as s 149, IPC, the conviction of the accused persons with the aid of s 149 or s 34,

IPC, is not proper.[52]

Where the accused, preventing a procession from proceeding on a highway with music, were convicted under s 341, read with s 149, it was held that it would be more proper and logical not to record a separate conviction in respect of their individual acts under s 341 .[53]

Despite the possession of a pistol with two accused persons, the non-use of the pistol on the two victims proves the fact that the accused persons had not formed the unlawful assembly at the spot with the object of causing death of a victim. Thus all accused persons were held liable to be punished under s 304, Pt I read with s 149 and not under s 302 read with s 149, IPC .[54]

Deceased appellants had formed unlawful assembly, and they were armed with deadly weapons, their common object being to kill and commit murder of their rival group and inflict injuries to others; their conviction under ss 147, 148 read with ss 302 and 307, IPC read with s 149, IPC was held proper.[55]

Conviction of Less than Five Persons--When Justified

It is competent for a court to come to the conclusion that there was an unlawful assembly of five or more persons, even if less than that number are convicted by it if:1106

(i) the charge states that apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act and evidence led to prove this is accepted by the court;
(ii) the first information report and the evidence show such to be the case even though the charge does not say so; or
(iii) though the charge and the prosecution witnesses name only the acquitted and the convicted accused persons, there is other evidence which discloses the existence of named or other, persons, provided, in cases (b) and (c), no prejudice has resulted to the convicted person by reason of the omission to mention in the charge that the other unnamed persons had also participated in the offence.[56]

In charge for unlawful assembly, even if some of the accused are acquitted and the number of remaining accused falls short of five, that does not always mean that remaining two accused should be acquitted.[57]

> It is true that the acquittal of an accused person does raise, in the eye of law, a presumption that he is innocent even if he was actually guilty. But, it is only the acquitted accused person and not the convicted accused persons, who can, as a rule, get the benefit of such a presumption. The effect of findings on questions of fact depends upon the nature of those findings. If, for example, only five known persons are alleged to have participated in an attack but the courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number. On the other hand, if the court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding, based on good evidence and sound reasoning, that the participants were five or more in number. Such a case is one of doubt only as to identity of some participants and not as to the total number of participants. It may be that a definite conclusion that the number of participants was at least five may be very difficult to reach where the allegation of participation is confined to five known persons and there is doubt about the identity of even one. But, where a large number of known persons (such as eighteen, as is the case before us), are alleged to have participated and the court acts on the principle that it is better to err on the side of safety, so that no injustice is done to a possibly wrongly implicated accused, and benefit of doubt is reaped by a large number, with the result that their acquittal, out of abundant caution, reduces the number of those about whose participation there can be no doubt to less than five, it may not be really difficult at all, as it is not in the case before us, to reach the conclusion that, having regard to undeniable facts, the number of participants could not possibly be less than

five.[58]1107

Conviction under Section 302 Read with Section 34 can be altered to one under Section 326 Read with Section 149

Commentary under the same heading in s 34, *ante* may be referred to.

Conviction under Section 326 cannot be altered to one under Sections 302 / 149 in the Absence of Relevant Facts

Where the Sessions Judge did not frame charge against the accused persons for offence punishable under s 302 read with s 149, IPC, the relevant prosecution allegations so as to bring in the ingredients of the offence punishable under s 302 read with s 149, IPC also were not incorporated in the charge framed by the Sessions Judge, the accused were not told that they had to face charge of being member of the unlawful assembly and the common object of such assembly was to commit murder of the deceased and in furtherance of that common object murder was committed and thereby they had the constructive liability and thus they committed the offence punishable under s 302, IPC read with s 149, IPC on these facts it was held that mere omission to mention s 149 may be considered as an irregularity, but failure to mention the nature of the offence committed by them cannot be said to be a mere irregularity, the accused were told to face a charge punishable under s 302 *simpliciter* and there was no charge under s 302, IPC read with s 149, IPC, therefore, it was not possible to reverse the conviction of the accused under s 326, IPC and substitute the conviction for the offence punishable under s 302 read with 149, IPC as there was no charge framed against them for such offence.[59]

Basis of Conviction under the Section

Though sad, yet it is a fact that people do not hesitate in resorting to vengeance even on the unfortunate deaths of their near and dear ones. There is a tendency to rope in as many people as possible for facing the trial relating to the death or injuries to the unfortunate victims. Sometimes it is over-enthusiasm and many a times designed effort to harass the relations and friends of the real culprits. It has been found that on occasions, innocent persons including the aged and infirm, ladies and children are booked for standing at the dock and remain confined in jails till the pendency of the cases. Some are acquitted by the trial court and many by the appellate courts but only after their languishing in confinements for years. Such efforts of unscrupulous survivors of the crime or the relations of the victims invariably but unfortunately helps the real culprits as it becomes difficult for the court to sift the grain out of the chaff.

Under such circumstances and in view of the prevalent criminal jurisprudential system in the country, the doctrine of presumption of innocence in favour of the accused makes justice itself a victim which ultimately weakens the criminal justice dispensation system. Be that as it may, an onerous duty is cast upon the criminal courts in the country to ensure that no innocent is convicted and deprived of his fundamental liberties. However, in cases of group clashes and organised crimes, persons beyond the screen, executing the crime should not be allowed to get away scot free. In cases involving a number of accused persons, a balanced approach by the courts is required to be insisted upon. Neither any innocent person should be convicted nor should a guilty be acquitted under the cloak and cover of the loose and liberal interpretations of the statutory provisions and the technicalities of procedural wrangles. In cases of arson and murder where a large number of people are accused of committing the crime, the courts should be cautious to rely upon the testimony of1108 witnesses speaking generally and in an omnibus way without specific reference to the accused or the role played by them.[60]

In view of s 149, if an offence is committed by any member of that unlawful assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be

committed in prosecution of that object, every person who at the time of committing of that offence was a member of that assembly is guilty of that offence. That emphatically brings about the principle that the punishment prescribed under s 149 is in a sense vicarious, and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.[61] It is well settled that if an offence is committed by some members of an unlawful assembly then the other members of the assembly are also liable for the offence under s 149, IPC .[62]Section 149 creates a constructive or vicarious liability on the members of an unlawful assembly for unlawful acts committed pursuant to the common object by any other member of that assembly. The basis of constructive liability under s 149 is mere membership of an unlawful assembly with the requisite common object or knowledge. This section makes a member of unlawful assembly responsible as a principal offender for the acts of each and all.[63] The Allahabad High Court has held that the vicarious liability under s 149, IPC does not always proceed on the basis that the offence has been actually committed by other members of the unlawful assembly. Section 149 makes it clear that if an offence is committed by any member of the unlawful assembly in prosecution of the common object or such as the members of the unlawful assembly in prosecution knew it likely to be committed in prosecution of that object every person, who, at the time of the commission of the offence, is a member of the same assembly is guilty of that offence.[64]

55. Acquittal of three Accused Members of Unlawful Assembly by giving them Benefit Doubt

The legal position is fairly well settled by the decision of the Supreme Court in *Khem Karan v State of UP* [65] where the Supreme Court observed:

> .....the fact that a large number of accused have been acquitted and the remaining who have been convicted are less than five cannot vitiate the conviction under Section 149 read with the substantive offence if - as in this case the Court has taken care to find - there are other persons who might not have been identified or convicted but were party to the crime and together constituted the statutory number.

To the same effect is the decision of the Supreme Court in *Dharam Pal v State of UP* [66] where the court observed:

> .....If, for example, only five known persons are alleged to have participated in an attack but the Courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participations were less than five in1109 number. On the other hand, if the Court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding based on good evidence and sound reasoning that the participants were five or more in number.

Acquittal of three out of the five accused persons comprising the unlawful assembly does not make any material difference and it would not negate the theory of there being an unlawful assembly. So long as there were four other persons with the appellant who had the common object of committing an offence, the assembly would be unlawful in nature, notwithstanding the acquittal of some of those who were members of the unlawful assembly by reason of the benefit of doubt given to them.[67]

Unlawful Assembly--Membership below Five

The membership of A2 to A5 of the unlawful assembly was not proved beyond doubt, and no overt act was attributed to them, thus, their conviction under s 302 read with s 149, IPC was set aside.[68]

56. Mere Membership of Unlawful Assembly is Sufficient

The Rajasthan High Court has opined that the basis of constructive guilt under s 149 is mere membership of the unlawful assembly with the requisite common object or knowledge. If the court on the basis of the material on record is convinced that certain persons formed an unlawful assembly and the offence was committed by any member of that assembly in prosecution of the common object of that assembly, which the member of the unlawful assembly knew to be likely to be committed, that person would be constructively liable for the acts of others whether he himself actively participated in the commission of the crime or not.[69]

57. Independent part in Crime by Members of Unlawful Assembly not Necessary

When charge under s 149, IPC is there, it is not necessary that each one should be assigned independent part played in the beating. If it is found that one of them was a member of the unlawful assembly and that unlawful assembly assaulted the deceased which ultimately caused the death of the deceased, then all who were members of the unlawful assembly can be held liable.[70]

It is also well settled that if death had been caused in prosecution of the common object of an unlawful assembly, it would not be necessary to record a definite or specific finding as to which particular accused out of the members of the unlawful assembly caused the fatal injury.[71]1110

58. Other Factors

For arriving at a conclusion of constructive liability what the courts have to see is whether they had common intention or common object and the ingredients are to be considered for a conviction under s 149 or s 34, IPC . The court has to look into the proved circumstances like the formation of the unlawful assembly, the weapons with which they were armed and the active role played by them.[72]

59. No Conviction with the Aid of Section 147 or Sections 148 - 149 if the Right of Private Defence is Available or has been Exceeded

Where the right of private defence of person or property is available, the accused cannot be convicted with the aid of s 147 or s 148 of the IPC .[73] If, however, the right of private defence is exceeded, the accused can be convicted for the particular offence which he commits.[74] A group of five or more persons using criminal force in defence of their person and property is not an unlawful assembly unless they continue it after the right ceases. When a group of persons numbering five or more, at a time in exercise of their private defence of property and person, use criminal force, application of law relating to unlawful assembly on the members of the group will be improper. But as soon as the right ceases and the group continues with the criminal force with common object, they become members of an unlawful assembly.[75] Where after the deceased had fallen to earth and was assaulted indiscriminately on his back, the assembly of accused persons which was initially lawful got converted into an unlawful assembly. Their conviction for rioting was held sustainable.[76] Unless an accused is convicted of the offence of rioting under s 148, or under s 147, IPC, he cannot be convicted under s 324 read with s 149, IPC .[77]

The appellant accused fired in the air from his licensed gun only with an idea to scare away the aggressor and in pursuance of right of private defence of his property and life. Accused appellant was acquitted of the charge under s 307 read with s 149, IPC .[78]

Where the plea of private defence of accused was found to be false and concocted, the accused persons after forming an unlawful assembly and knowing the consequences of the firing had

obstructed construction by pointing firearms and1111 firing in quick succession thereby causing death of the deceased and injuries to others. In view of evidence of eyewitness which was truthful and reliable and corroborated by medical evidence, conviction of the accused persons under s 300 read with s 149, IPC, was held proper.[79]

The ripe paddy crop in the disputed land was cut and removed in the occurrence. According to prosecution it was cut and removed by the accused-appellant party while the defence version was that it was done by the prosecution side. It was held that where the possession of accused persons over disputed land was established, the right of private defence would accrue to the accused party if the prosecution party cut and removed the standing crop. It would then have been a case of theft. If however the prosecution party tried to prevent the accused party from cutting and removing the ripe paddy crop, so, even if five or more accused-appellant persons were present at the spot, it could not be said that they formed an unlawful assembly.[80] Where the allegations were that the accused party, armed with *barchas*, axes and *lathis* attacked and assaulted the complainant party and the medical evidence showed that both the accused and the complainant sustained injuries in the same incident which took place in the field of the complainant, the fact that the accused persons were aggressors and the presence of injuries on the accused would not by itself establish a plea of self-defence, also non-explanation of injuries of two accused on facts and circumstances was not fatal. However, injuries found on the complainant were simple in nature so, no intention to cause the death of the complainant can be gathered and so, the conviction of the accused under s 307 read with s 149 was altered to one under s 324 read with s 149, IPC, and their conviction under s 148, IPC, was maintained.[81]

Where the accused persons claimed to be the landlord of the land in dispute, members of the prosecution party claimed to be *bataidars* over land, executive magistrate was posted at the place of occurrence with the police force so the accused were obliged to approach magistrate and police force. The accused however arrived at the scene of occurrence and started indiscriminate firing. The plea of private defence of property or person of the accused was held not tenable and failure of the prosecution to explain some minor injuries on the person of the accused was held not fatal, in the face of cogent and positive prosecution evidence, the appeal of the accused persons against conviction under s 302 read with s 149, IPC, was dismissed.[82]

The accused were in possession of land where the incident took place, while their possession was disputed by the prosecution side. Altercation took place over embedding of hand-pump on that land by the accused. The accused were entitled to the right of private defence of self and property and where injuries inflicted by the accused caused the death of one person and severe injuries to other, the accused could not be said to have exceeded the right of private defence. However, there was no evidence to fix the identity of the individual accused who caused the fatal incised wound on the forehead of deceased. Hence, the accused could not be held liable under s 149 and their conviction under ss 147 - 149, 302, 307 IPC, was set aside.[83] Where the prosecution party appeared to be aggressors and injuries were caused to1112 the deceased in self-defence by the accused party and the prosecution had concealed the origin of the incident, the accused were held entitled to be acquitted for offence under ss 147, 148, 300 IPC .[84]

Where admittedly the complainant party had come to the disputed land for the first time on the date of occurrence, after they allegedly purchased it from the tenure holder and the documentary evidence proved beyond doubt that the accused were in peaceful possession of the land in dispute, the right of private defence of the property accrued to the accused when the complainant tried to dispossess them. The accused persons cannot be held guilty of forming an unlawful assembly and causing blunt injuries and were held entitled to be acquitted.[85]

Where the assembly of accused persons acted in exercise of the right of private defence, it cannot be termed as an unlawful assembly when there was no evidence to show that all the accused persons except one had caused any injury to anyone after the right of private defence had ceased to be available to them, the said accused persons cannot be convicted either s 148 IPC, or with the aid of s

149, IPC .[86]

Where the place where the incident took place was disputed, the occurrence as per prosecution version was doubtful. The possibility that the accused persons would have inflicted injuries on the members of complainant party in exercise of the right of private defence could not be ruled out; the acquittal of the accused persons for offences under ss 323, 148 was found proper.[87]

60. Effect of Conviction of Less than Five Persons

A combined reading of ss 141 and 149, IPC, shows that an assembly of less than five members is not an unlawful assembly within the meaning of s 141 and cannot therefore, form the basis for conviction for an offence with the aid of s 149, IPC . The effect of the acquittal of the two accused persons by the High Court and without the High Court finding that some other known or unknown persons were also invoked in the assault, would be that for all intent and purposes the two acquitted accused persons were not members of the unlawful assembly. Thus only four accused could be said to have been the members of the assembly but such an assembly which comprises of less than five members is not an unlawful assembly within the meaning of s 141, IPC . The existence of an unlawful assembly is a necessary postulate for invoking s 149, IPC . Where the existence of such an unlawful assembly is not proved, the conviction with the aid of s 149, IPC, cannot be recorded or sustained.[88] Where eight out of the accused were acquitted on concurrent finding of the Sessions Court and High Court that they were not involved in the offence and only one accused was convicted, as per evidence on record, none other than the accused persons charged formed an unlawful assembly, and death was not caused by injuries inflicted by the accused alone, on these facts the conviction of the accused under s 302 read with s 149, IPC, was set aside and the accused was convicted under s 326 1113 for causing grievous injuries.[89] Where out of 16 accused, 14 were acquitted, conviction of remaining two accused under s 147 or ss 149 and 302 IPC, would be improper since two persons cannot form an unlawful assembly with any common object, however, the two accused would be responsible for offence committed by them in their individual capacity.[90] Similarly, where the prosecution case, as set out in the charge and as supported by the evidence, is to the effect that the alleged unlawful assembly consists of five or more named persons and no others, and there is no question of any participation by other persons not identified or identifiable, it is not open to the court to hold that there was an unlawful assembly unless it comes to the definite conclusion that five or more of the named persons were members thereof.

Where a murder was committed by members of an unlawful assembly and more than five persons participated in the assault, seven persons were convicted by the trial court. The High Court acquitted four of them and one of the remaining three convicted persons died during the pendency of appeal, the High Court despite absence of appeal against acquitted accused found that acquittal of two of the accused by the trial court was wrong. On these facts the Apex Court held that the High Court can convict the remaining two accused under s 300 read with s 149 since there were more than five persons out of the named accused who had participated in the assault on the deceased.[91] Where seven accused persons were hired and five were acquitted, the remaining two accused persons were not convicted with the aid of s 149 of the IPC .[92]

It is not necessary that in every case, five persons must always be convicted before s 149, IPC can be applied because it is possible in some cases for judges to conclude that though five persons were unquestionably there, the identity of one or more is in doubt, in which case a conviction of the rest with the aid of s 149 would be good. In such a case, the court must say so with unerring certainty.[93] Where the case of the prosecution and the evidence adduced indicates that a number in excess of five persons participated in the incident and some of them could not be identified, it would be open to the court to convict less than five of the offence of being members of the unlawful assembly or convict them of the offence committed by the unlawful assembly with the aid of s 149, IPC, provided it comes to the conclusion that five or more persons participated in the incident.[94] It is competent to a court to come to the conclusion that there was an unlawful assembly of five or more persons, even if less than

that number have been convicted by it, if: (a) the charge states that apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act and evidence led to prove this is accepted by the court; or (b) that the first information report and the evidence show such to be the case even though the charge does not state so; or (c) that though the charge and the prosecution witnesses named only the acquitted and the convicted accused persons there is other evidence which discloses the existence of named or other persons provided, in cases (b) and (c), no prejudice1114 has resulted to the convicted person by reason of the omission to mention in the charge that the other unnamed persons had also participated in the offence.[95] Where the accused were large in number, some accused were acquitted. Some of the acquitted accused were given the benefit of doubt and the prosecution case was strongly supported by independent witnesses. It was held that acquittal of other accused was not justified on the ground of acquittal of some.[96]

61. Omission to Record a Finding not Material

The essence of the offence of rioting is use of force and violence by an unlawful assembly in prosecution of its common object. If it can be found on the materials on record that there was use of force and violence by the accused as members of an unlawful assembly the omission to record a formal conviction under s 148, IPC, would not affect the conviction for other offences by the application of s 149, IPC .[97]

62. Sentence

The question of sentence must in each case depend upon the facts of the case. It cannot be said that in case of a conviction under s 302 read with s 149, the appropriate sentence in all cases must be imprisonment for life. But where it is found that the accused, though they were among the rioters some of whom in pursuance of the common object of the unlawful assembly, caused the death of the deceased, had themselves taken no part in the assault, the lesser sentence of imprisonment for life may be appropriate.[98] In cases where the facts are fully known and it is possible to determine who inflicted the blows which were fatal and who took a lesser part, it is a sound exercise of judicial discretion to discriminate in the matter of punishment. It is an equally sound exercise of judicial discretion to refrain from sentencing all to death when it is evident that some would not have been if the facts had been fully known and it had been possible to determine, *e.g.* who hit on the head or who only on a thumb or an ankle; and when there are no means of determining who dealt the fatal blow, a judicial mind can legitimately decide to award the lesser penalty in all the cases.[99] It cannot be laid down as a rule of law that in every case where it is not possible to allocate the wounds inflicted to a particular accused, a lesser penalty should be given. Where a group of persons brutally murdered the deceased, they all deserve the same punishment. But there may be cases where the part taken by each of the accused may vary, one of the accused taking a main part and another taking a subsidiary part, though their common object is to commit murder. In such a case, perhaps, there may be a good ground for differentiating the accused for inflicting punishment.[99a] The Karnataka High Court has, however, held that it is not the law that when s 149 of the IPC, comes into play, the sentence passed on a member of an1115 unlawful assembly against whom an overt act is proved, should be more severe than the one passed on the other members of the unlawful assembly.[1] Where there are no reasons for distinguishing some accused from the others in the matter of sentence, all must be given the same sentence.[2] But where an accused is held to be only constructively liable for murder, he may be given the lesser punishment of imprisonment for life.[3] Once it is established that the intention of a number of persons is to make a joint assault, the culpability of those who deliver the assault and those who make the assault possible by beating off a rescue, is the same. In a case of extended liability under s 149, and in a case where it is doubtful whether death was intended it is not inappropriate to treat all alike and sentence each of the appellants, to imprisonment for life. If the evidence is such that it can be reasonably found that all who joined an attack, knew that death would be an almost certain result of the attack for instance, when guns were openly carried, perhaps death, in the case of all [subject of the provisions of s 354(3) of the CrPC 1973] would be the appropriate penalty. But where

accused persons are saddled with vicarious liability, and in addition, intention to cause the actual result achieved cannot be clearly established, the convicts should be given the benefit of the lower penalty.[4] Leniency in the matter of sentence shown to some accused is no ground for reducing the sentence of the accused who are shown to be responsible for the killing.[5]

Where it was not specified by eyewitnesses as to which of the seven accused caused grievous injury, 16 years have passed since the incident took place, there was no criminal antecedents or adverse criminal history of the accused persons, the sentences for one year rigorous imprisonment under s 148, IPC, and two years rigorous imprisonment under s 325 read with s 149, IPC, was not manifestly inadequate so enhancement of sentence was not warranted. In the facts of the case, sentences of imprisonment awarded to the accused persons were reduced to the period of imprisonment already undergone by the accused persons and the sentence of fine of Rs 10,000 each, was also imposed which was directed to be paid to the widow of the accused/victim.[6] Accused appellants were convicted for offences under ss 147, 149, 323 and 325 of the IPC . Since the occurrence had taken place 25 years ago, and the appellants had remained in custody for 23 to 109 days during trial of the case, sentence imposed on them was reduced to the period already undergone.[7]

Where the assault was made by accused persons with *lathi* and *tangi* (agricultural tools), the accused were old men with no criminal antecedent against them and the case was lying pending against them since 1984, it was observed that the accused persons had suffered much, and in view of the same the sentence of accused persons was reduced to payment of fine.[8]

But where the members of the Lodhi and Thakur community committed offences under ss 149, 300, 325, 452 and 436, IPC, against members of the scheduled caste1116 community, and such tendency of abusing members of scheduled caste community should be curbed, so the accused persons did not deserve any leniency in sentence.[9] Where the age of two of the eight accused, convicted under ss 300 and 149, IPC, at the time of recording of statement was assessed to be 22 years, however, occurrence took place some six years ago, so on calculation the said two accused were found to have been below 16 years on the date of occurrence, the order to serve remaining period of sentence by them was held liable to be set aside.[10]

Where the offences under ss 147, 149, 323, 325, and 452, IPC were committed by the accused persons 20 years back, all the accused persons were more than 60-65 years, and there was no previous conviction against them on record, their sentences were reduced to the period of imprisonment already undergone and to fine which was increased so that the victims could be properly compensated.[11]

Where accused persons were acquitted of offences under s 323 read with s 149, IPC, in view of the said offence lawfully compounded by the parties, the offences under ss 147 and 452, IPC, being non-compoundable, the conviction of the accused persons for these offences was proper, however, on facts and circumstances that incident took place 20 years ago and accused persons were in custody as convicts for at least six days, their sentence was reduced to the period of imprisonment already undergone as the amount of fine had already been deposited by them.[12]

Where the incident took place 21 years ago, the accused were now aged 55-60 years and with the passage of time their socio-economic conditions had undergone radical changes. The fact that only *lathis* were used by the accused during the crime, do not warrant imposition of severe punishment, so sentence of the accused persons for offences under s 304, Pt II read with s 149, IPC, was reduced to three years rigorous imprisonment with Rs 5,000 as fine.[13]

63. Separate Convictions and Sentences for Substantive Offences

It has been held in many cases that where a prisoner is convicted of rioting and of causing hurt, and

the conviction for hurt depends upon the application of this section, two sentences, one for rioting, and one for hurt, may be passed, provided that the total punishment does not exceed the maximum which the court might pass for any one of these offences,[14] and that the sentences should be made to run concurrently.[15] In the Full Bench case of *Sunder Singh v State* ,[16] the majority of the judges held that an offence under s 147 need have no ingredient which is common to s 323, nor for an offence under s 323 there need be any ingredient which constitutes an offence under s 147 . There can therefore be no doubt that both are separate offences for which separate convictions and separate sentences can be awarded. On the other hand, it has been held in other cases that separate sentences passed for rioting and grievous hurt1117 are not legal when the person so sentenced did not individually cause hurt, but is liable therefore under s 149 .[17]

Where the accused preventing a procession from proceeding on a highway with music were convicted under s 341 read with s 149, IPC, it was held that it would be more proper and logical not to record a separate conviction in respect of their individual acts under s 341 .[18] If the accused himself inflicted the hurt, he may be punished both for rioting and hurt, and the total punishment may legally exceed the maximum which the court might pass for any one of these offences.[19] A person cannot be convicted under s 302, IPC, for committing the offence directly, and under s 302 read with s 149, IPC, at the same time, for committing the offence constructively. If a man does commit an offence directly, there is no question of his committing it constructively, and vice versa.[20]

64. Illustrative Cases

The accused appellants committed the murder of the deceased, packed the dead body of the deceased into a gunny bag and threw it in the river. There was evidence that some accused persons actively participated in the assault, while others helped them. Conviction under s 304, Pt II, read with s 149 of the IPC was held proper.[21]

The prosecution case was that accused with armed naxallites opened fire on the police party, and the fire continued for two hours. None of the police party was hurt. No empty cartridges were recovered from the spot. The accused were arrested from the place near the incident. The prosecution witnesses gave divergent versions about the incident. Accused were entitled to benefit of doubt and acquitted of the charges under s 307 read with s 149, IPC .[22]

The prosecution case was that the accused S, driver of the car along with the occupants of the car (other accused) committed the murder of the deceased. Name of accused, S, was mentioned neither in the FIR nor in the statement under s 161, CrPC . No test identification parade was held, though the witnesses did not know him from before. The High Court had drawn an inference that because he was a driver in pre-planned manner, the role of such driver is crucial. Such an inferential conclusion was without any evidence to show participation of accused S. The conviction of the accused S under s 302, IPC read with s 149, IPC was found not sustainable, thus, it was was set aside.[23]

Five accused persons not named in FIR were given benefit of doubt and were acquitted of charge under s 302 read with s 149, IPC .[24]

1118One accused appellant was not named in the FIR; however he admitted his presence in his statement under s 313, CrPC . Injured witness also deposed about his participation in the incident. The accused appellant was convicted under s 302 read with s 149, IPC .[25]

The unlawful assembly consisted of twenty four persons. The five appellants were named in the FIR; four PWS (some of them injured) also disclosed their name at trial. The participation of the five accused appellants in the incident was proved beyond doubt. They were convicted under s 302 read with s 149, IPC .[26]

All the seven accused assailants armed with lethal weapons *viz*. country made pistols, lathi, bhala came together to the house of the complainant, participated in the assault in which one person was killed and one injured and all ran away together. Charges against the appellants that they in concert with other accused to achieve a common object entered the house of the complainant stood proved. Accused appellant were convicted under ss 149 and 302, IPC .[27]

The unlawful assembly consisted of twenty four persons. Out of them, the eight appellants though named in the FIR, the prosecution evidence did not establish that they were either present on the spot or participated in the occurrence. No overt act was attributed to them. As such these appellants were given benefit of doubt by the Supreme Court and acquitted of the charge under s 302 read with s 149, IPC .[28]

Only accused A1 was convicted. Eye-witnesses attributed overt act to accused A1 only. The injury caused by accused A1 proved fatal. Only conviction of accused A1 under s 302 read with s 149, IPC was affirmed. Other four accused A2 to A5 were acquitted.[29]

Appellant accused armed with fire arms weapons indulged in firing from close range, and caused death of the deceased. Large number of cartridges was recovered from the place of occurrence. Conviction of the accused appellants under s 302 read with s 149, IPC was held proper.[30]

Where several accused persons armed with various weapons attacked the deceased and the members of his family but only one appellant accused had inflicted the fatal injury, accused appellants were convicted under s 304, Pt II read with s 149, IPC .[31]

Since the medical report in the case did not support the allegations against the appellant Nos. 2 and 4, they were given benefit of doubt and acquitted of the charge under ss 307 and 149, IPC .[32]

Six appellants accused persons were convicted on the charge of committing culpable homicide not amounting to murder under s 304, Pt I, IPC . The remaining1119 appellants were all along present at the time of the occurrence along with the six appellants; they were convicted under s 148 IPC, and were acquitted of the charges under ss 147 and 302 read with s 149 of the IPC .[33]

Where the evidence of PWS relating to the overt acts was in conflict with medical evidence, which also rendered presence of the accused persons at the scene of offence at the relevant point of time very much doubtful, the accused persons were acquitted of the charge under s 149, IPC .[34]

Where only two accused persons armed with gun had gone to the house of the deceased, other accused persons though armed with deadly weapons had not used those weapons, did not cause injury to the deceased or his people, they were acquitted of the charges under ss 302 and 307 read with s 149, IPC .[35]

Where role of two accused A5 and A6 was not clear, the number of members of unlawful assembly came to four, thus, s 149, IPC was held not attracted in the case.[36]

Where only two accused persons had caused injuries to the deceased, all other accused persons were held entitled to benefit of doubt and were acquitted.[37]

65 Re *Kalu Singh Moti Singh*AIR 1964 MP 30, p 41 ; *Mizaji v State of Uttar Pradesh* AIR 1959 SC 572 ; *Shambhu Nath Singh v State of Bihar* AIR 1960 SC 725 ; *Fatnaya Lal Khan v Emperor* AIR 1942 Lah 89 .

66 *Behari v Emperor* AIR 1914 All 670 ; *Faiz Baksh v Emperor* AIR 1947 Lah 188 .

67 *Ghansa Singh v State* AIR 1958 Raj 226, p 235 .

68 *Madat Khan v Empress* 61 PR 1887 (Cr) .

69 *Maiyadin & Ors v State* (1973) All Cr R 167, (1973) All Cr R 167, (1973) All WR (HC) 266, (1973) Cr LJ 1203 .

70 *Dial Singh v Emperor* AIR 1926 Lah 419, p 420 .

71 *Mizaji v State of Uttar Pradesh* AIR 1959 SC 572, p 576 .

72 *Charan Singh v Emperor* AIR 1959 All 255, p 262 ; *Mayadin v State* (1973) Cr LJ 1203, p 1207 ; *Khudiram v State of West Bengal* AIR 1972 SC 1221, (1972) Cr LJ 756 ; *Lalman v State of Madhya Pradesh* (1972) MPLJ 1021, (1972) Jab LJ 606 .

73 *Dhian Singh v Emperor* AIR 1915 Lah 418, p 422 ; *Charan Singh v State* AIR 1959 All 255, p 258 ; *Dalel Ram Sarup v Emperor* AIR 1946 Lah 222, p 225 .

74 *Lalman v State of Madhya Pradesh* (1972) MPLJ 1021, (1972) MPWR 425 ; *Sidhu Gope v Emperor* AIR 1946 Pat 84, p 91, 48 Cr LJ 63 ; *Bishan Singh v State* (1969) 71 Punj LR 73 ; *Shailesh Kumar v State* (1968) Cr LJ 110, p 114 (All) ; *Chini Misam v State* (1976) Cut LR 333 (Cr) .

75 *State of Assam v Barga Dewani* (1971) Cr LJ 9(N), (1970) UJ (SC) 866, (1970) SCD 1085; *Purshottam v State* (1968) MPLJ 56 (Notes of Cases).

76 *Charan Singh v State* AIR 1959 All 255, p 258 ; *Mayadin v State* (1973) Cr LJ 1203, p 1207 ; *Khudiram v State of West Bengal* AIR 1972 SC 1221, (1972) Cr LJ 756 .

77 *Hardeo Singh v Emperor* AIR 1920 Pat 795, 22 Cr LJ 267 ; *Banwari v State of Bihar* AIR 1965 Pat 45, p 46, (1965) 1 Cr LJ 73 ; Re *G Narayana*AIR 1963 AP 146, (1963) 1 Cr LJ 415, p 416 .

78 *Mahommed v Emperor* AIR 1946 Lah 106, p 112 ; Re *G Narayana*AIR 1963 AP 146, (1963) 1 Cr LJ 415, p 416 .

79 *Faiz Baksh v Emperor* AIR 1947 Lah 188, p 193 ; *Chikkadage Gowda v State of Mysore* AIR 1956 SC 731 ; *Dalel Ram Sarup v Emperor* AIR 1946 Lah 222 ; *Komma Neealkantha Reddy v State of Andhra Pradesh* AIR 1978 SC 1021, (1978) BLJR 191, p 194-195 (SC) ; *Santosh v State of Madhya Pradesh* AIR 1975 SC 654, (1974) Cr LJ 602, p 604 ; *Anant Kumar v State of Madhya Pradesh* AIR 1994 SC 1639, (1994) Cr LJ 1585 (SC) .

80 *Rataniya Bhima Bhil & Ors v State of Gujarat* (1997) Cr LJ 891 (Guj)(DB).

81 *Roy Fernandes v State of Goa* AIR 2012 SC 1030, 2012 Cr LJ 1542, 2012 (3) SCC 221 .

82 *Brijesh Roopsingh Baghel v State of Madhya Pradesh* 2011 Cr LJ 2273, p 2275 (MP) .

83 *Jahiruddin v R* 22 ILR Cal 306 .

84 *Gade Chennappa Reddy v R* 11 Cr LJ 645, 1 Mad WN 522 ; *Masti v R* 12 Cr LJ 274 ; *Chandrika Prasad v State of Bihar* AIR 1972 SC 109, (1972) Cr LJ 22 ; *Bimal Yadav v State* (1965) 13 BLJR 61 (Summary of Cases); *State of Orissa v Rama Pradhan* (1973) Cr LJ 734, p 737(Ori).

85 *Bhajan Singh v State of Uttar Pradesh* AIR 1974 SC 1564, (1974) Cr LJ 1029, p 1032 ; *Siddu v State of Madhya Pradesh* (1973) Jab LJ 741, p 758, (1978) MPLJ 820 .

86 *Janadhan Ragho Mhatre & Ors v State of Maharashtra* (1996) Cr LJ 4180 (Bom)(DB).

87 *Sidhu v State* (1973) MPLJ 721, (1973) Jab LJ 934 ; *Gopinath v State of Madhya Pradesh* (1980) Cr LR 193, p 194 (MP High Court Notes)(DB); *Public Prosecutor v Anumula Papodu* (1980) Mad LJ (Cr) 201, p 205(DB); *Onkarnath v State of Madhya Pradesh* (1980) Cr LJ (NOC) 131 (MP)(DB); **but see***Ram Anjore v State of Uttar Pradesh* AIR 1975 SC 185, (1975) Cr LJ 249, p 253 .

88 *Bhupal Kumar v State of Bihar* (1975) Cr LJ 1405, 1409, ILR (1974) 53 Pat 644 ; **following***Shambhu Nath Singh v State of Bihar* AIR 1960 SC 725, (1960) Cr LJ 1144 .

89 *State of Haryana v Chandvir & Ors* (1996) Cr LJ 3197 (SC) .

90 *Mal Singh & Ors v State of Madhya Pradesh* (2002) Cr LJ 150(NOC)(MP).

91 *Gajendera v State of UP* AIR 1954 SC 695 ; *Abdul Hamid v State of UP* 1991 Cr LJ 431, (1991) 1 SCC 339 ; *Dwarika Prasad v State of UP* 1993 AIR SCW 1122, 1993 Supp (3) SCC 141 ; *Babla v State of Madhya Pradesh* 2010 Cr LJ 3061, p 3065 (MP) .

92 *Puran v State of Rajasthan* (1975) Cr LR (SC) 490, (1985) UJ (SC) 657, (1975) Cr AR (SC) 291, (1975) SC Cr R 426 ; *Kashi Rai v State of Bihar* (1994) SCC (Cr) 416, (1994) 1 East Cr C 113(SC).

93 *Kundavarapu Kondaiah v State of Andhra Pradesh* (1994) 3 Crimes 84 (AP)(DB).

94 *Sikhar Behera v State of Orissa* (1993) Cr LJ 3664, p 3667 (SC) .

95 *Ram Swarup v State of Haryana* (1993) Cr LJ 3540, p 3543 (SC) .

1 *Ram Adhar & Ors v State of Uttar Pradesh* (1996) Cr LJ 1775 (All) .

2 *Mangal Singh & Ors v State of Madhya Pradesh* (1996) Cr LJ 1908 (MP)(DB).

3 *Gulzari & Ors v State of Uttar Pradesh* (1999) Cr LJ 2513 (All) (DB) .

4 *Ramcharan Rai v Emperor* AIR 1946 Pat 242, p 250, **approved in***Gujanand v State of Utter Pradesh* AIR 1954 SC 659, p 699 ; *Tahsildar Singh v State* AIR 1958 All 255, p 284 ; *Jugal Kishore Singh v State of Rajasthan* (1978) Raj LW 123 .

5 *Sukhan Raut & Ors v State of Bihar* (2002) Cr LJ 560 (SC) .

6 *Mizaji v State of Uttar Pradesh* AIR 1959 SC 572, p 576, (1959) Cr LJ 777 .

7 *Bhagwan Singh & Ors v State of Madhya Pradesh* (2002) 3 JT 387 (SC) .

8 *Ram Charan Rai v Emperor* AIR 1946 Pat 242, p 250 **approved in***Gujanand v State of Uttar Pradesh* AIR 1954 SC 695, p 699 .

9 *State of Kerala v Cheetus Thomas* (1983) Cr LJ 1939 (Ker) ; *Kartar Singh & Ors v State of Punjab* (1996) Cr LJ 1722 (SC) .

10 *State v Kalu & Ors* AIR 1964 MP 182, p 192 .

11 *Sunil Kumar v State of Rajasthan* 2005 Cr LJ 1402, p 1406, 1407 (SC), AIR 2005 SC 1096, (2005) 2 JT 1, (2005) 9 SCC 283 .

12 *Rafeek Sayed Muhammed v State of Kerala* 2012 Cr LJ (NOC) 353 (Ker) (DB).

13 *Ram Bharosey v State* (1996) Cr LJ 2023 (All) .

14 *Ram Jattan v State of Uttar Pradesh* (1994) Cr LJ 58, p 60 (SC) .

15 *Haramant Laxamappa Kukhadi v State of Karnataka* (1994) Cr LJ 1422, p 1424 (SC) .

16 *Shamsher Singh v State of Uttar Pradesh* (1993) Cr LJ 3544, p 3546 (SC) .

17 *Rohit Yadav v State of Bihar* (2007) Cr LJ (NOC) 202 (Pat) (DB).

18 *State of MP v Habib Khan & Ors* (2007) Cr LJ 2505 (MP) (DB) .

19 *Mizaji v State of Uttar Pradesh* AIR 1959 SC 572, p 596 .

20 *Hukam Singh v State of Uttar Pradesh* AIR 1961 SC 1541, p 1543, (1961) 2 Cr LJ 711, **affirming**AIR 1959 All 690 .

21 *Queen v Dashrath Roy* 7 WR 58 ; Re *Kalu Singh Moti Singh*AIR 1964 MP 30, p 41 .

22 *Sukha v State* AIR 1956 SC 513, p 519 .

23 *Ghana Singh v State* AIR 1958 Raj 226, relying on *Sukha v State* AIR 1956 SC 513 ; **distinguishing***Chikkarange Gowda v State of Mysore* AIR 1956 SC 731 .

24 *Queen v Naza Fakir* 4 WR 26 (Cr) .

25 *Dhian Singh v Emperor* AIR 1915 Lah 418, 16 Cr LJ 689 .

26 *Rasul Khan v Emperor* AIR 1915 All 281, 16 Cr LJ 459 ; *Fatnaya Lal Khan v Emperor* AIR 1942 Lah 89, p 92 **relied on** by Teja Singh J, in *Faiz Baksh v Emperor* AIR 1947 Lah 188 ; *Mansha Singh v Crown* AIR 1925 Lah 371 .

27 *Queen v Binod* 24 WR 66 .

28 *Bindeshwari Singh v State* AIR 1958 Pat 12, p 16, per Sinha, J.

29 Refer the note under s 142 .

30 *Kotta Prakashan & Ors v State of Kerala* (1998) Cr LJ 1239 (SC) .

31 *Sunder Lal v State of Uttar Pradesh* (1998) Cr LJ 1058 (All) (DB) .

32 *Tahsildar Singh v State* AIR 1958 All 255, (1958) Cr LJ 424 .

33 *Golla Hanunappa v Emperor* 35 ILR Mad 243, p 245, 12 Cr LJ 269 .

34 *Musa Khan v State of Maharashtra* AIR 1976 SC 2566, (1976) Cr LJ 1987 (SC), 1976 Cr AR 375 (SC) .

35 *Babulal Tendwa v State* (1952) Cr LJ 1261, p 1263 .

36 *Banwari Ram & Ors v State of Uttar Pradesh* AIR 1998 SC 674, (1998) 9 SCC 3, (1998) Cr LJ 869 (SC) .

37 *Jalam & etc v State* (1998) Cr LJ 2103 (All) (DB) .

38 *State of Uttar Pradesh v Hori Lal & Ors* (1999) Cr LJ 1039 (All) (DB) .

39 *Ranvir v State* AIR 1953 All 778, p 779, 54 Cr LJ 1796 .

40 *Sher Ali v Sk Masud* AIR 1959 Cal 457, p 460 .

41 *Queen v Dasrath Roy* 7 WR 58 .

42 *State of Karnataka v Dodda Hanumantha & Ors* (1999) Cr LJ 658 (Kant)(DB).

43 *State of Rajasthan & etc v Moti & Ors* (2000) Cr LJ 4817 (Raj)(DB).

44 *Jugroo & Ors v State of Madhya Pradesh* (2002) Cr LJ 1050 (MP)(DB).

45 *Md Ishahaque v State of West Bengal* 2007 Cr LJ (NOC) 506 (Cal) (DB).

46 *Ran Singh v State* 2007 Cr LJ 3052 (Del) (DB) .

47 *Nagarjit Ahir v State of Bihar* 2005 Cr LJ 904, p 907 (SC), AIR 2005 SC 722, (2005) 10 SCC 369, 2005 (1) Scale 354 .

48 *Rajab Ali v State* AIR 1955 Assam 105, p 107 .

49 Re *Faiz Ali* 1 WR 20.

50 *Hari Bijal v Emperor* AIR 1915 Bom 247, 16 Cr LJ 745 .

51 *Raghunandan v Emperor* 13 Cr LJ 556, p 559 .

52 *R v Kabil* 3 BLRAC 1 ; **dissented***Raghunandan v Emperor* 13 Cr LJ 556, per Jackson J.

53 *Raj Karam & Ors v State* (1996) Cr LJ 3979 (All)(DB).

54 *Ram Prasad Singh v King-Emperor* AIR 1923 Pat 50, p 53, 24 Cr LJ 65 ; **but see***Shambhunath Singh v State of Bihar* AIR 1960 SC 725, (1960) Cr LJ 1144 .

55 *Hanif v State* AIR 1962 All 272, (1962) 1 Cr LJ 698, p 703 ; *State of Bihar v Nathu Pandey* AIR 1970 SC 27, (1970) Cr LJ 5 .

56 *Rahman Samail v Emperor* AIR 1939 Lah 245, p 251, 40 Cr LJ 712 ; *Emperor v Ramji Lal Budha* AIR 1941 Lah 117, 52 Cr LJ 475 ; *Parmeshwar Din v Emperor* AIR 1941 Oudh 517, 42 Cr LJ 758 .

57 *Gajanan Amrut Gayakwad & Ors v State of Maharashtra* (1996) Cr LJ 2887 (SC) .

58 *Bhagawat Singh v Emperor* AIR 1936 Pat 481, p 484, 37 Cr LJ 630 ; *Sidhu Gope v Emperor* AIR 1946 Pat 84, p 91 ; *Bindeshwari Singh v State* AIR 1958 Pat 12, p 18 .

59 *Jamiruddin v Queen Empress* 22 ILR Cal 306, p 312 .

60 *Shambhu Nath Singh v State of Bihar* AIR 1960 SC 725, p 727 reviewing the case-law and **overruling***Ram Prasad Singh v State of Bihar* AIR 1923 Pat 50 ; *Ramcharan Rai v Emperor* AIR 1946 Pat 242 .

61 *Hukum Singh v State* AIR 1959 All 690, p 692, (1959) Cr LJ 1258 .

62 *Barkau Singh v Emperor* AIR 1920 Oudh 152, 22 Cr LJ 279 ; *Mahommad v Emperor* AIR 1947 Lah 106 ; *Faiz Baksh v Emperor* AIR 1947 Lah 188 ; **but see***Ali Mohammed v Wali Wani* (1987) SLJ 295 .

63 *Gopa Ram v State of Rajasthan* (1996) Cr LJ 2987 (Raj) (DB) .

64 *Kartar Singh & Ors v State of Punjab* (1996) Cr LJ 1722 (SC) .

65 *Tanaji Govind Misal v State of Maharashtra* (1997) 8 SCC 340, (1998) Cr LJ 340 (SC) .

66 *State of Karnataka v Chikkahottappa* 2008 Cr LJ 3495 (SC), AIR 2008 SC 2692, [2008] 8 SCR 1167, (2008) 15 SCC 299, 2008 (7) JT 395, 2008 (9) Scale 338 .

67 *Santosh, etc v State of Madhya Pradesh* (2000) Cr LJ 1140 (MP) .

68 *Kotta Prakashan & Ors v State of Kerala* (1998) Cr LJ 1239 (SC) .

69 *Jadu Sahani & Ors v State of Bihar* (1999) Cr LJ 593 (SC) .

70 *Sukhan Raut & Ors v State of Bihar* (2002) Cr LJ 560 (SC) .

71 *Mirza v State of Uttar Pradesh* (1996) Cr LJ 472 (All)(DB).

72 See the first note under this section.

73 *Surajpal v State of Uttar Pradesh* AIR 1955 SC 419, p 422, 56 Cr LJ 1004 .

74 *Behari Mahton v Queen-Empress* 11 ILR Cal 106, p 108 ; *Dasrath Mandal v Emperor* 34 ILR Cal 525, 5 Cr LJ 424 ; *Kochayyappan v State of Kerala* (1965) KLT 1190, p 1191 .

75 *Musakhan v State of Maharashtra* (1976) Cr LJ 274, p 276, 279 .

76 *Krishna Pillai Vasu Pillai v State* AIR 1956 Tr & Coch 230, p 232.

77 *Ghaziuddin Khan v Emperor* AIR 1933 Oudh 19, 8 ILR Luck 199, 34 Cr LJ 393 ; *Bishnath v Emperor* AIR 1935 Oudh 488, 11 ILR Luck 343, 36 Cr LJ 1198 ; *State of Assam v Barga Dewan* (1971) SCC (Cr) 54, (1971) Cr LJ (N) 9 .

78 *Alkasulla v Emperor* AIR 1936 Cal 429, 38 Cr LJ 68 ; Re *Ranga*AIR 1954 Mys 75, p 77 ; Re *Manakkal Kumaran*AIR 1942 Mad 446 .

79 *Kudarutulla v Emperor* 39 ILR Cal 781 .

80 *Shyam Dhar Misra & Ors v State of Uttar Pradesh* (1987) All LJ 1196 .

81 *Chikkarange Gowda v State of Mysore* AIR 1956 SC 731, (1956) Cr LJ 1365 .

82 Re *Ranga*AIR 1954 Mys 75, p 77 ; Re *Manakkal Kumaran*AIR 1942 Mad 446 .

83 *Teeka v State of Uttar Pradesh* AIR 1961 SC 803, (1961) 1 Cr LJ 859 ; *Brundaban Swain v State* AIR 1957 Ori 117, p 120 **relyingon***W Slaney v State of Madhya Pradesh* AIR 1956 SC 116 ; *Shamba Gopi Tari v Upendra Ladu Sawant* (1971) Cr LJ 559 (Goa) ; *Bhajan Sund v State* (1974) Cut LT 325 .

84 *Silajit Mahto v Emperor* 36 ILR Cal 865, 10 Cr LJ 471 ; *Balmakund v Emperor* 16 Cr LJ 354 .

85 *Yashwant Satva Chaugule v Emperor* AIR 1926 Bom 314, 27 Cr LJ 744 .

86 *Vikas & Ors v State of Madhya Pradesh* (2001) Cr LJ 3665 (MP) .

87 *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116, p 137-138, [1955] 2 SCR 1140, (1956) Cr LJ 291 .

88 *Pandurang, Tukia and Bhillia v State of Hyderabad* AIR 1955 SC 216, p 221, [1955] 1 SCR 1083, (1955) Cr LJ 572 .

89 *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116, p 137-138, [1955] 2 SCR 1140, (1956) Cr LJ 291 .

90 *Ramkishan & Ors v State of Rajasthan* (1998) Cr LJ 54 (SC) .

91 *Jageshwari Rai v State of Jharkhand* 2011 Cr LJ (NOC) 272 (Jhar) (DB).

92 *Dumpala Chandra Reddy v Nimakayala Balireddy* 2008 Cr LJ 3936 (SC), AIR 2008 SC 3069, [2008] 10 SCR 938, (2008) 8 SCC 339, 2008 (10) Scale 178 .

93 *Mangal Singh & Ors v State of Madhya Pradesh* (1996) Cr LJ 1908 (MP) (DB) .

94 *Umesh Charan Gusain v State* 2008 Cr LJ 2837 (Utr) .

95 *Shamba Gopi Tari & Ors v Upendra Ladu Sawant & Anor* (1971) Cr LJ 559 (Goa) .

96 *Dalip Singh v State of Punjab* AIR 1953 SC 364, p 366 ; *Kashiram v State* AIR 1954 MB 143, 55 Cr LJ 1210 .

97 *Karnail Singh v State of Punjab* AIR 1954 SC 204 ; *Lachman Singh v State* AIR 1952 SC 167 ; Re *Shankarappa*AIR 1958 AP 381, (1958) Cr LJ 733 ; *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116 ; *Ram Rup v Emperor* AIR 1945 All 31 ; *State of Bihar v Rahim Nadaf* AIR 1957 Pat 52, (1957) Cr LJ 216 ; *Kartar Singh v State* AIR 1961 SC 1787 .

1 *Kiran M Kandolkar v State & Ors* (1996) Cr LJ 1429 (Bom) .

2 *Tanaji Govind Misal v State of Maharashtra* (1998) Cr LJ 340 (SC) .

3 *State of Orissa v Arjun Das Agrawal* (1999) Cr LJ 4078 (SC) ; *Sukhan Raut & Ors v State of Bihar* (2002) Cr LJ 560 (SC) .

4 *Tulsiram Bhanudas Kamble & Ors v State of Maharashtra* (2000) Cr LJ 1566 (Bom) (DB) .

5 *Aswani Vashistha & Ors v State of Uttar Pradesh* (2002) Cr LJ 619 (All) (DB) .

6 *Malhu Yadav & Ors v State of Bihar* AIR 2002 SC 2137, (2002) 5 SCC 724, (2002) Cr LJ 2819, (2002) (4) AD 549 (SC) .

7 *Krishna Balakrishnan v State* AIR 1958 Ker 94, (1958) Cr LJ 516 .

8 (1974) LW (Cr) 200.

9 *Poreddi Venkata Reddi*AIR 1961 AP 23, p 28 **relying on***Tilkeshwar Singh v State of Bihar* AIR 1956 SC 238 .

10 *Madhuwa Pyarelal Kurmi v State of Vindhya Pradesh* AIR 1954 VP 36, p 38 ; Re *Theethumalai Gounder*AIR 1925 Mad 1 (FB) ; *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116, p 137-138, (1955) 2 SCR 1140, (1956) Cr LJ 291 .

11 *Vasudeo Ram Singh v State of Madhya Pradesh* (1987) MPLJ 757 ; *Baira alias Bairagi Mohanty v State* (1971) Cut LT 451 ; *Yognedra Rawani v State of Bihar* 198 Cr LJ 386 (Pat) .

12 Re *Bhumireddi Venkata Reddy*AIR 1941 Mad 598, 42 Cr LJ 798 .

13 *State of Rajasthan v Kishan Singh & Ors* (1996) Cr LJ 4296 (Raj) ; *State of Andhra Pradesh v Thakkidiram Reddy & Ors* (1998) Cr LJ 4035 (SC) .

14 *Swamygowda & Ors v State of Karnataka* (1997) Cr LJ 423 (Kant) (DB) ; *State of Rajasthan v Moti & Ors* (2000) Cr LJ 4817 (Raj) (DB) .

15 Re *Kasireddy Chinna Subbareddy*AIR 1957 AP 14, (1957) Cr LJ 46 ; *Bishan Singh v State of Raj* (1973) Cr LJ 1079, p 1081, (1972) WLN 818 ; *Lakhan Mahto v State of Bihar* AIR 1966 SC 1742, (1966) Cr LJ 1349 ; *Baina v State* (1971) Cut LT 451 .

16 *Rame Gowda & Anor v State of Karnataka* (1999) Cr LJ 1759 (Kant) (DB) .

17 *Shyamdhar Misra v State of Uttar Pradesh* (1987) All LJ 1196 .

18 Re *Kasireddy Chinna Subbareddy*AIR 1957 AP 14, (1957) Cr LJ 46 ; *Sitaram Mahton v State of Bihar* (1970) SCD 507 .

19 *Toteshwar Chutia & Ors v State of Assam* (2002) Cr LJ 1465 (Gau) (DB) .

20 *State v Kalu* AIR 1964 MP 182, (1964) 2 Cr LJ 185 .

21 *Imesh Singh & Anor v State of Bihar* (2000) Cr LJ 3167 (SC) .

22 *Chandra Shekhar Bind & Ors v State of Bihar* (2001) Cr LJ 4693 (SC) .

23 *Md Ishahaque v State of West Bengal* (2007) Cr LJ (NOC) 506 (Cal) (DB).

24 *Bindeshwari Singh v State* AIR 1958 Pat 12, (1958) Cr LJ 72, p 77 .

25 *Himirika Loknath v State* (1964) 1 Cr LJ 114, p 117, 28 Cut LT 435 ; *Gurucharan Singh v State of Haryana* AIR 1973 SC 486, (1972) Cr LJ 1200 ; *Nawab Ali v State of Uttar Pradesh* AIR 1974 SC 1228, (1975) ALJ 143, (1974) Cr LJ 921 .

26 *Ram Prasad v State of Uttar Pradesh* AIR 1973 SC 2673, p 2675-2676, (1973) Cr LJ 1807 .

27 *Kanhaiya Lal v State of Rajasthan* 2013 Cr LJ 2921, p 2928 (SC), AIR 2013 SC 1940, (2013) 5 SCC 655 .

28 *State of Haryana v Tek Singh & Ors* AIR 1999 SC 1742, (1999) 4 SCC 682, (1999) Cr LJ 2577 (SC) .

29 *Naidu Budhia v State of Orissa* (1975) Cr LJ 564, p 567 (Ori) ; *Balwant Singh v State of Haryana* AIR 1972 SC 860, (1972) Cr LJ 645 ; *Singha Magan Gamit & Ors v State of Gujarat* (1999) Cr LJ 2111 (Guj) (DB) .

30 *Ram Prasad v State of Uttar Pradesh* AIR 1973 SC 2673, p 2675-2676, (1973) Cr LJ 1807 ; *Bhe Ram v State of Haryana* (1980) 1 SCC 201, p 202 ; *Nand Kishore Prasad & Ors v State of Bihar* (2000) Cr LJ 5070 (Pat) (DB) .

31 *Balwant Singh v State of Haryana* AIR 1972 SC 860, (1972) Cr LJ 645, p 649 .

32 *Pratapaneni Ravi Kumar alias Ravi & Anor v State of Andhra Pradesh* (1997) Cr LJ 3505 (SC) .

33 *Dhupa Chamar & Ors v the State of Bihar* (2001) Cr LJ 66 (NOC) (Pat) .

34 *Vijay Shankar v State of MP* 2010 Cr LJ 2936, p 2945 (MP) (DB) .

35 *Gautam Ghosh v State of Tripura* 2008 Cr LJ (NOC) 482 (Gauh) .

36 *Munaf v State of UP* 2009 Cr LJ (NOC) 1202 (All) (DB).

37 *Ramji v State of Rajasthan* 2011 Cr LJ 4771, p 4773 (Raj) .

38 *Mahmood v State of UP* 2008 Cr LJ 696, p 702 (SC), 2007 (13) Scale 155, 2007 AIR SCW 7385 .

39 *Binay Kumar Singh v State of Bihar* (1997) Cr LJ 362 (SC) ; *Ranjit Singh v State of Madhya Pradesh* 2011 Cr LJ 283, (2010) 11 SCC 629 .

40 *Chandra Shekhar Bind & Ors v State of Bihar* (2001) Cr LJ 4693 (SC) .

41 *Rajoo v State of Rajasthan* (1976) Raj LW 428 .

42 *Hariram v State of Rajasthan* (1971) Cr LJ 448, p 452 (Raj) .

43 *Mahantappa & Ors v State of Karnataka* (1999) Cr LJ 450 (SC) .

44 *Public Prosecutor, High Court of Andhra Pradesh v Vendela Somaiah alias Medicherla Somaiah & Ors* (2002) Cr LJ 29 (NOC) (AP) .

45 *Ranjit Singh v State of Madhya Pradesh* 2011 Cr LJ 283, p 289 (SC), 2010 AIR SCW 6676, (2010) 11 SCC 629 .

46 *Bhajan Suna v State* (1975) Cr LJ 1555, (1974) 40 Cut LT 325, p 334 ; **overruling**AIR 1961 Ori 29 .

47 *Buddapati Venkataramaiah & Ors v State of Andhra Pradesh* (1996) Cr LJ 3749 (AP) (DB) .

48 *Shankar Gowda v State of Mysore* (1968) KLT 30 (Short Notes).

49 *Ram Durlav v State* AIR 1955 Assam 226, p 228 .

50 *Subran alias Subramanian v State of Kerala* (1993) AIR SCW 1014, (1993) Cr LJ 1387, p 1391 (SC) .

51 *Santosh Kumar & Ors v State* (1997) Cr LJ 984 (All) (DB) .

52 *Jhapsa Kabari & Ors v State of Bihar* (2002) Cr LJ 587 (SC) .

53 Re *P Abdul Sattar*AIR 1961 Mys 57, (1961) 1 Cr LJ 291 .

54 *Mirza v State of Uttar Pradesh* (1996) Cr LJ 472 (All) (DB) .

55 *Phodol v State of Chhattisgarh* 2014 Cr LJ 4704, p 4716, 4717 (Chh) (DB) .

56 *Ram Bilas Singh v State of Bihar* (1964) 1 SCR 775, (1963) All LJ 609 (SC), (1964) 1 Cr LJ 573, p 578-579 ; *Ram Tahal v State of Uttar Pradesh* AIR 1972 SC 254, (1972) 1 SCC 136, (1972) SCC (Cr) 80, (1972) 2 SCJ 303, (1972) UJ 237 (SC), (1972) SCD 76, (1972) Cr AR 34 ; *Maina Singh v State of Rajasthan* AIR 1976 SC 1084, (1976) Cr LJ 835, p 840 ; *Dharam Pal v State of Uttar Pradesh* AIR 1975 SC 1917, (1975) 2 SCC 596, (1975) Cr LJ 1666, p 1669-1670 ; *Achhey v State* AIR 1978 SC 1233, (1978) Cr LJ 1101 ; *Sunder Singh v State of Punjab* AIR 1962 SC 1211, (1962) 2 Cr LJ 290 ; *Bharwad Mepa Dana v State of Bombay* AIR 1960 SC 289, (1960) Cr LJ 424 ; *Mohan Singh v State of Punjab* AIR 1963 SC 174 ; *Theethumalia Gounder v King-Emperor* AIR 1925 Mad 1, 25 Cr LJ 1297 (FB) ; *Mani Lal v State of Kerala* 2014 (2) KLT 800, ILR (2014) 2 Ker 871 .

57 *Mani Lal v State of Kerala* 2014 (2) KLT 800, ILR 2014 (2) Ker 871 (Ker) .

58 *Dharam Pal and Others v the State of Uttar Pradesh* AIR 1975 SC 1917, (1975) 2 SCC 596, (1975) Cr LJ 1666, **reiterated** in *Kallu v State of Madhya Pradesh* AIR 2006 SC 831, (2006) Cr LJ 799 (SC) .

59 *Bala Seetharamaiah v Perike S Rao* AIR 2004 SC 2172, (2004) 4 SCC 557, (2004) Cr LJ 2034 .

60 *Bijoy Singh & Anr v State of Bihar* AIR 2002 SC 1949, (2002) 9 SCC 147, (2002) (4) AD (SC) 137 .

61 *Kutubbudin Hasansab & Ors v State of Karnataka* (1976) 2 Kant LJ 421 ; *Amir Hossain alias Ali v State of Tripura* (1998) Cr LJ 4315 (Gau) .

62 *Banwari Ram & Ors v State of Uttar Pradesh* AIR 1998 SC 674, (1998) 9 SCC 3, (1998) Cr LJ 869 (SC) .

63 *Dhan Ji Ahir & Ors v State of Uttar Pradesh* (2002) Cr LJ 1853 (All) (DB) .

64 *State of Uttar Pradesh v Zahoor & Ors* (1978) All LJ 988, (1978) All Cr PC 365, p 372 .

65 *Khem Karan v State of UP* 1974 (4) SCC 603, AIR 1974 SC 1546 .

66 *Dharam Pal v State of UP* (1975) 2 SCC 596, AIR 1975 SC 1917, 1975 Cr LJ 1666 .

67 *Roy Fernandes v State of Goa* AIR 2012 SC 1030, 2012 AIR SCW 1238, 2012 (2) Scale 68, 2012 (3) SCC 221, 2012 Cr LJ 1542 (SC) ; *Dharam Pal v State of UP* AIR 1975 SC 1917, 1975 Cr LJ 1666, (1975) 2 SCC 596**reliedon**.

68 *Shahji v State of Kerala* 2011 SC 1825, 2011 AIR SCW 2903, 2011 (5) SCC 423, 2011 (5) Scale 278, 2011 Cr LJ 2935 (SC) .

69 *Aiden v State of Rajasthan* (1993) Cr LJ 2413, p 2419 (Raj) ; *Sukhdev Singh Rana v State of Haryana* (1996) Cr LJ 3060 (P&H) (DB) .

70 *Sheo Prasad Bhor alias Sri Prasad v State of Assam* AIR 2007 SC 918, (2007) 3 SCC 120, (2007) Cr LJ 1423 (SC) .

71 *Munivel v State of Tamil Nadu* AIR 2006 SC 1761, (2006) 9 SCC 394, (2006) Cr LJ 2133 (SC) .

72 *Bolineedi Venkataramaiah v State of Andhra Pradesh* (1994) Cr LJ 61, p 63 (SC) .

73 *Kunja Bhuiya v Emperor* (1912) 39 ILR Cal 896 ; *State of Bihar v Nathu* AIR 1970 SC 27, (1970) Cr LJ 5 ; *Mengal Ram v State* 65 CWN 645, (1961) All Cr R 161 ; *Sivapada v State* AIR 1969 Cal 28, p 31, (1969) Cr LJ 160 ; *Kishore Prasad v State of Bihar* (1969) Pat LJR 17 (SC) ; *Ishwar Singh v State of Orissa* AIR 1979 SC 1259, p 1260, (1979) Cr LJ 1076 ; *Pitei Bewa v State* (1971) Cut LT 1164 .

74 *State of Bihar v Nathu* AIR 1970 SC 27, (1970) Cr LJ 5 ; *Baljit Singh v State of Uttar Pradesh* AIR 1976 SC 2273, p 2282 ; *Ganda v State* 1980 All Cr Cas 27, p 28 (Summary of Cases) ; *State of Madhya Pradesh v Santan* (1980) Cr LR (MP High Court Notes) 157, p 159 (DB); *Ishwar Singh v State of Rajasthan* (1973) Cr LJ 811, (1972) WLN 269 ; *Chand Singh v State* AIR 1965 Punj 90, (1965) 1 Cr LJ 209 ; *Bindeshwari Singh v State* AIR 1958 Pat 12, (1958) Cr LJ 59, p 76-77 ; *Hanif v State* AIR 1962 All 272, (1962) 1 Cr LJ 698 ; *Mangia v State* (1963) 1 Cr LJ 712, (1962) Raj LW 657 ; *Kunja Bhuiya v Emperor* (1912) 39 ILR Cal 896, 13 Cr LJ 481 ; *Pehalwan v State of Rajasthan* (1977) Raj Cr C 173, p 177 .

75 *Amir Ali v State of Assam* (1988) Cr LJ 1512 (Gau) .

76 *Naina Ram v State* (1990) Raj Cr C 132 (Raj) (DB).

77 *Rajjan v State* (1980) All LJ 635, p 641, (1980) All Cr Cas 221 .

78 *Deomuni Sharma v State of Jharkhand* 2009 Cr LJ 3948, p 3952 (SC), AIR 2009 SC 2731, 2009 (8) Scale 303 .

79 *Pratap Singh & Ors v State of Uttar Pradesh* (1996) Cr LJ 2387 (All) (DB) .

80 *Ram Dhani & Ors v State of Uttar Pradesh* (1997) Cr LJ 2286 (All) (DB) .

81 *Dhani Ram & Ors v State of Madhya Pradesh* (1999) Cr LJ 2221 (MP) .

82 *Ayodhya Ram alias Ayodhya Prasad Singh & Ors v State of Bihar* (1999) 9 SCC 139, (1999) Cr LJ 5005 (SC) .

83 *Khar Pattu & Ors v State* (2000) Cr LJ 2827 (All) (DB) .

84 *Latoor & Ors v State of Uttar Pradesh* (2000) Cr LJ 3324 (All) (DB) .

85 *State of Uttar Pradesh v Surendra Singh Tiwari & Ors* (2001) Cr LJ 1403 (All) (DB) .

86 *Kashi Ram & Ors v State of Madhya Pradesh* AIR 2001 SC 2902, (2002) 1 SCC 71 .

87 *State v Mohd Salim & Ors* (2001) Cr LJ 80 (NOC) (Raj) .

88 *Subran alias Subramanian v State of Kerala* (1993) 3 SCC 32, (1993) Cr LJ 1387, p 1390-1391 (SC), 1993 AIR SCW 1014 ; *Vikram Lahance Dinkar v State of Maharashtra* (1994) Bom Cr C 14 (Bom) ; *Jalalu v Rajan* 2013 (2) KLJ 73 (Ker) .

89 *Atmaram Zingaraji v State of Maharashtra* (1997) Cr LJ 4406 (SC) .

90 *Sukha Sahu & Anor v State of Orissa* (2002) Cr LJ (NOC) 164 (Ori) (DB).

91 *Golla Pullanna & Anor v State of Andhra Pradesh* (1996) Cr LJ 3987 (SC) .

92 *Jalalu v Rajan* 2013 (2) KLJ 93 (Ker) ; *Vipin v State of Kerala* 2013 (3) KLJ 1 (Ker) .

93 *Ram Tahal v State of Uttar Pradesh* AIR 1972 SC 254, (1972) 1 SCC 136, (1972) SCC (Cr) 80, (1972) 2 SCJ 303, (1972) UJ (SC) 237, (1972) SCD 76, (1972) Cr AR 34 .

94 *Sahebrao Kisan Jadhav v State of Maharashtra* (1992) 1 Bom CR 423 ; *Javvadhi Sesha Rao v State of Andhra Pradesh* (1955) Cr LJ 897, p 905 (AP) ; *Ashok Kumar v State of Delhi* (1955) 1 Crimes 347 (Del) .

95 *Ram Bilas Singh v State of Bihar* (1964) Cr LJ 573, p 577-579 ; *Sahebrao Kisan Jadhav v State of Maharashtra* (1992) 1 Bom CR 423 .

96 *Hoshiar Singh v State of Punjab* AIR 1992 SC 191, (1992) Cr LJ 510, (1992) East Cr Cas 174, (1992) SCC (Cr) 283, (1992) 2 Cr LC 138 .

97 *Bhajan Sund v State* (1974) Cut LT 325 ; *Nand Kishore Mohanty v State of Orissa* AIR 1961 Ori 29, **overruled.**

98 *Rajagopalan v Emperor* AIR 1944 FC 35, p 36, 1944 Mad WN 227 ; **but see***Awadh Singh v State of Bihar* (1972) Cr LJ 446, p 450 .

99 *Dalip Singh v State of Punjab* AIR 1953 SC 364, p 367-378 .

99a a Re *Boya Burranna*AIR 1954 AP 46, 56 Cr LJ 81 ; *Moold Chand v State* AIR 1953 All 220, 54 Cr LJ 580 .

1 *Fakrusab Hussainsab & Ors v State of Karnataka* (1977) 2 Kant LJ 13, p 24 .

2 *Brindaban Swain v State* AIR 1957 Ori 117, p 121 .

3 *Bishnath v State* AIR 1935 Oudh 190, p 196 .

4 *Rahman Samail v Emperor* AIR 1939 Lah 245, p 253, 40 Cr LJ 712 .

5 *Brij Bhukhan v State of Uttar Pradesh* AIR 1952 SC 474, p 478 ; **but see***Fakrusab Hussainsab v State of Karnataka* (1977) 2 Kant LJ 13, p 24, (1975) 19 Mad LJ 399 .

6 *Walu alias Walmik Popat Khairnar & Ors v State of Maharashtra etc* (2001) Cr LJ 1322 (Bom) (DB) .

7 *Ram Singh v State of Rajasthan* 2014 Cr LJ 78, p 79, 80 (Raj) ; *Naib Singh v State of Punjab* AIR 1986 SC 2192, (1986) 4 SCC 401 **followed**.

8 *Naurangi Mahto & Ors v State* (2001) Cr LJ (Jhar) 1525, (2001) 49 BLJR 988 .

9 *Jugroo & Ors v State of Madhya Pradesh* (2002) Cr LJ 1050 (MP) (DB) .

10 *Chandrika Kumar & Ors v State of Bihar* (2002) Cr LJ 38 (NOC) (Pat) .

11 *Mangu & Ors v State of Rajasthan* (1999) Cr LJ 1541 (Raj) .

12 *Chottan Giri & Ors v State of Uttar Pradesh* (1999) Cr LJ 2986 (All) .

13 *Ganga Singh & Ors v State of Uttar Pradesh* (2000) Cr LJ 1695 (All) .

14 *R v Bana Punja* 17 ILR Bom 260 .

15 *Mahpal Singh v Emperor* 15 Cr LJ 625 ; *Seonath v Emperor* 27 Cr LJ 1172 ; *Bhup Singh v Emperor* 1 Cr LJ 139 ; *Prag v Emperor* AIR 1925 Oudh 65, 25 Cr LJ 1169 ; *Palhi Singh v Emperor* 20 Cr LJ 37 .

16 *Sunder Singh v State* AIR 1955 All 232 (FB), **overruling***Abdul Rashid Khan v State* AIR 1953 All 315 .

17 *Nilmoni Paddur v R* 16 ILR Cal 442 ; *Sahadev v R* 1 Cr LJ 1998, 8 CWN 344 ; *Harjit Singh v Emperor* 12 Cr LJ 236 ; *Kiamuddi v King-Emperor* AIR 1924 Cal 771 ; *Re Boya Hussainappa*1958 Andh LT 109; *Jit Singh v State* AIR 1957 Punj 278 .

18 Re *Adbul Sattar*AIR 1961 Mys 57, (1961) 1 Cr LJ 291 .

19 *R v Banu Punjab* 17 ILR Bom 260 ; **following***R v Ram Sarup* 7 ILR All 757 ; *R v Dharam Das* 38 ILR All 48 ; *Ram Angutha Singh v R* 40 ILR Cal 511 ; *Harbans Pandey v R* 14 Cr LJ 66 .

20 *Ram Dulav v State* AIR 2955 Assam 226, p 228 .

21 *Sheo Prasad Bhor v State of Assam* 2007 Cr LJ 1423, p 1424 (SC), AIR 2007 SC 918, 2007 (1) Scale 173, (2007) 3 SCC 120 .

22 *Punem Sonu v State of Chhattisgarh* 2014 Cr LJ (NOC) 499 (Chh) .

23 *Suresh v State of Haryana* 2008 Cr LJ 2619, p 2622 (SC), AIR 2008 SC 2042, (2008) 6 Scale 76 .

24 *Subal Ghorai v State of West Bengal* 2013 Cr LJ 3626, p 3643 (SC), 2013 AIR SCW 3627, (2013) 4 SCC 607, 2013 (5) Scale 675 .

25 *Khairuddin v State of West Bengal* 2013 Cr LJ 3271 (SC), AIR 2013 SC 2354, (2013) 5 SCC 753 .

26 *Khairuddin v State of West Bengal* 2013 Cr LJ 3271 (SC), AIR 2013 SC 2354, (2013) 5 SCC 753 .

27 *Onkar v State of UP* 2012 Cr LJ 1446, p 1451 (SC), 2012 AIR SCW 998, 2012 (1) Scale 413, 2012 (2) SCC 273 .

28 *Khairuddin v State of West Bengal* 2013 Cr LJ 3271 (SC), AIR 2013 SC 2354, (2013) 5 SCC 753 ; *State of UP v Rajeshwar* 2013 Cr LJ 3103 (SC), (2013) 15 SCC 241, 2013 (10) JT 380, 2013 (6) Scale 41 .

29 *Shahji v State of Kerala* 2011 Cr LJ 2935 (SC), AIR 2011 SC 1825, 2011 AIR SCW 2903, 2011 (5) SCC 423, 2011 (5) Scale 278 .

30 *Hori Lal v State of UP* 2007 Cr LJ 1181, p 1186 (SC), 2007 (2) SCC (Cri) 581 .

31 *Suresh Singh v State of Haryana* 2007 Cr LJ 4717, p 4721 (SC), AIR 2007 SC 3093, 2007 (7) Supreme 167 .

32 *Raju Mahto v State of Jharkhand* 2010 Cr LJ (NOC) 731 (Jhar) .

33 *Garjan Sahu v State of Orissa* 2010 Cr LJ 1880, p 1886 (Ori) (DB) .

34 *Marella Chalama Reddy v State of AP* 2010 Cr LJ 1182, p 1187 (AP) .

35 *Nagappa v State of Karnataka* 2007 Cr LJ (NOC) 37 (Kant) .

36 *State of Karnataka v Vithal Laxman Chalawadi* 2007 Cr LJ (NOC) 129 (Kant) (DB).

37 *Sudhir Kumar v State of Rajasthan* 2007 Cr LJ (NOC) 241 (Raj) (DB).

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 150.

Hiring, or conniving at hiring, of persons to join unlawful assembly.--

Whoever hires or engages or employs, or promotes, or connives at the hiring, engagement or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

Comments

1. Scope

Like s 149, IPC, this section also creates a specific offence. For a person to be liable under s 149, he must be a member of an unlawful assembly at the time of the commission of an offence by a member of that assembly. But under this section a person need not be a member of an unlawful assembly, and yet he would be guilty of being a member of an unlawful assembly and guilty of an offence which may be committed by a member of it in the circumstances mentioned in the section.[38]

Notes under s 149, *ante* may be referred to.1120

2. Liability of the Hirer, *Etc.*

As already stated, this section creates a specific offence. The section intends to embrace all those who hire, promote or connive at the employment of persons and render them punishable as principal participants. It is clear from the language of this section which refers to a particular unlawful assembly. Under the section, a person though not actually a member of that unlawful assembly himself may be held guilty of being a member of unlawful assembly and may also be held liable for the offence which may be committed by any such member of the unlawful assembly.[39] If a person hires or engages another person to join or become a member of a particular unlawful assembly, he is liable for any offence committed by a member of that unlawful assembly as if he is himself a member of such unlawful assembly or himself commits the offence. The section will not apply unless there is an unlawful assembly composed of persons hired or engaged or employed, *etc.*, by the accused, and some offence is committed by a member of such unlawful assembly in pursuance of the hiring, engagement or employment.[40]

3. Section 157 Distinguished

An offence contemplated by s 157, IPC may take place before an offence under this section is committed as well as after it. In this respect s 157 is of wider application. Section 150 , IPC makes the hiring or employing, *etc*. of persons to join an unlawful assembly an offence while harbouring persons so hired or employed or the persons about to be so hired or employed has been made punishable under s 157 . That latter section prescribes a specific sentence of imprisonment for a term of six months or fine or both but an accused under s 150 is liable to punishment in the same manner as if he had been a member of such unlawful assembly or himself had committed the offence, which may be committed by any hired or employed person as a member of such unlawful assembly. Under s 157, the law contemplates the imminence of an unlawful assembly and the proof of facts which in law would go to constitute an unlawful assembly.[41]

4. Meaning of 'Hires', 'Engages' or 'Employs'

To attract the provisions of s 150, IPC there must be the hiring, engagement or employment of a person to become a member of any unlawful assembly. The hiring, *etc.* must be complete, *i.e.* an agreement come to, and not merely an offer on the part of the accused. an attempt to hire, however, though not punishable under this section, would be so under s 511, IPC . The word 'employ' means 'to keep in service or to use'. The word is of very wide import and may include hiring and engagement. Though the word 'employ' or 'employment' is used, it does not mean recruitment. It means without any recruitment as a servant or agent to commit the offence. It would be calling of the service.[42] The word 'engage' here imports the idea of winning over as adherence or to set a person into service on a contract. It has also no reference to any compensation for the service taken from the person engaged. The word 'hire' means 'to procure for use or service for a compensation for the service to be1121 rendered'. The word 'employ' is comprehensive enough to convey any sense for which the three different words have been used in this section.

5. 'Promotes' or 'Connives'--Explained

The word 'promotes' denotes acceleration or inducement.[43] If the accused did not himself hire, engage or employ another, it should be shown that he either promoted, *i.e.* actively assisted, or connived at, i.e. passively allowed the hiring. In the case of connivance, three things should be proved:

(i) that the accused was legally bound to prevent the hiring;
(ii) that he was physically able to prevent it; and
(iii) that he did not do all that lay in his power to prevent it.

It is not necessary to prove that the person hired took any part in the unlawful assembly, unless it is desired to prove that he committed some offence in pursuance of such hiring, in which case, the hirer is punishable, under the latter clause of the section, as if he had himself been a member of the assembly, or had himself committed the offence.[44]

6. Procedure

The offence under this section is cognizable and non-compoundable. In other respects, the procedure is the same as for the offence committed by the person hired, engaged or employed.

7. Charge

The following form of the charge may be adopted:

> I, (*nameand office of Magistrate, Session Judge etc.*) hereby charge you (*name of accused*) as follows:
>
> That you.....on or about the.....day.....of.....at..... hired (*or engaged, or employed*) (*or promoted or connived at the hiring or engagement, or employment of*) one *AB* to join as (*or become*) a member of an unlawful assembly, and that the said *AB* as a member of such unlawful assembly in pursuance of such hiring (*or engagement or employment*) committed (*specify the offence and the person*), and that you thereby committed an offence punishable under.....read with s 150 of the IPC, and within my cognisance,
>
> And I hereby direct that you be tried by this court on the said charge.

38 *Nanak Chand v State of Punjab* AIR 1955 SC 274, p 277, (1955) Cr LJ 721 .

39 *Vinit alias Baba v State of Maharashtra* (1994) Cr LJ 1791, p 1804 (Bom) .

40 *Ram Lochan Sarkar v Queen-Empress* 29 ILR Cal 214, p 217 .

41 *Ram Lochan Sarkar v Queen-Empress* 29 ILR Cal 214, p 217 .

42 *Vinit alias Baba v State of Maharashtra* (1994) Cr LJ 1791, p 1804, 1805 (Bom) .

43 *Ibid*.

44 *Silajit Mahto v Emperor* 36 ILR Cal 865 ; *Bhoor Singh v State of Punjab* AIR 1974 SC 1256 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 151.

Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.--

Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Explanation.--If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145 .1122

Comments

1. Scope

This section penalises knowingly joining, or continuing in, an assembly of five or more persons, which is likely to cause a disturbance of the public peace, after it is lawfully commanded to disperse. It does not apply to cases in which the assembly was unlawful from its inception or had become unlawful before the command for dispersal was given.[45] The explanation to the section amply makes it clear that a person who is a member of an unlawful assembly will be punishable under s 145, IPC and not under this section. Section 151 , IPC, will be attracted only if there was evidence to show that the assembly had been lawfully commanded to disperse. Where the command of dispersal was not given and the policeman only warned the two factions who were pelting stones this section cannot be invoked.[46] It is very doubtful if an assembly which is not unlawful in its inception does not become unlawful merely because it continues without dispersing in defiance of the lawful order to disperse, for there is no clause under s 141, IPC to say that an assembly refusing to disperse in obedience to a lawful command becomes an unlawful assembly.[47] The section is not applicable in the absence of the likelihood of causing public disturbance.[48]

2. Analogous Law

This section is analogous to s 145 of IPC 1860 and has to be read with that section and s 129 of the CrPC . The scope of these three sections and the distinction between them has been discussed in the commentary under s 145, IPC .

3. 'Knowingly Joins or Continues'

The section applies to a person who 'knowingly' joins or continues in an assembly. The word 'knowingly' means willfully, after being aware, of the fact that the assembly has been lawfully commanded to disperse.1123

4. 'Assembly of Five or More Persons'

Where the object of only three persons was to draw a crowd and their action was such as was calculated to, and did, draw a crowd of 50-60 persons likely to cause a disturbance of the public peace, it was held that the gathering constituted an assembly of five or more persons within the meaning of this section and that a refusal to disperse after being lawfully commanded to disperse

rendered every member of the gathering liable to conviction under it.[49]

5. 'Likely to Cause a Disturbance of the Public Peace'

This section finds its place in the chapter relating to 'Offences against the public tranquillity', and the very object of the section is to prevent a disturbance of the public peace. The likelihood of the assembly to cause disturbance to the public peace is, therefore, an essential element of the offence. In *Empress v Tuker* ,[50]it was held that whether disturbance to the peace is likely to be caused, must of necessity be very much a matter of opinion, and the police officer, in whose discretion the law leaves the duty of dispersing assemblies, must of course act upon his own opinion, one way or the other; and if his opinion is relevant, the grounds on which it is based, are also relevant. But their Lordships added that, although in cases of this kind the opinions of the police who know the people of the locality, may be relevant, the magistrate himself must look to the surrounding circumstances and form his own conclusions, whether the acts committed were reasonably likely to lead to a breach of the peace.

Meaning of the Expression, 'Likely to Cause a Disturbance of the Public Peace' in Section 129Code of Criminal Procedure 1973

The expression 'likely to cause a disturbance of the public peace' appears also in s 127, CrPC 1898 (now s 129, CrPC 1973), which is the section which empowers a magistrate or police officer to command an assembly to disperse. Interpreting the section Niyogi, AJC of the Nagpur Judicial Commissioner's Court observed:

> The reasonable, and what appears to me to be a plain meaning, is that when it appears that the behaviour of an assembly of five or more persons is such as to indicate that it would be an active party to the disturbance of public peace, or that it is reasonably calculated to provoke others to a breach of the peace, such an assembly may be ordered to disperse under section 127 , CrPC 1898 (now section 129,CrPC 1973). That section speaks of an actual unlawful assembly and a potential unlawful assembly. In the case of the latter, there must be evidence to establish that in the immediate future it would develop into an unlawful assembly animated by the common object of disturbance of the peace, or that the natural consequence of the assembly itself is to provoke a disturbance. In every case it is a question of fact to be determined on the evidence relating to the conduct of the assembly.[51]

6. Satisfaction of the Court Necessary

In a case under this section it is not sufficient to establish merely that in the opinion of the magistrate, who ordered the particular assembly to disperse, such assembly1124 was likely to cause a disturbance of the public peace; it is necessary to establish by evidence to the satisfaction of the court that the assembly was in fact likely to cause such disturbance.[52]

7. 'Lawfully Commanded to Disperse'

Section 151, IPC is attracted only if there is evidence to show that the assembly was lawfully commanded to disperse.[53] In the analogous s 145, IPC, the words used are 'commanded in the manner prescribed by law'. But that makes no difference.[54] In either case, for an order of dispersal to be lawful, it must fulfil the conditions of s 129 of the CrPC, the condition for making the command is that there should be an assembly of five or more persons and a likelihood of a disturbance of public peace. The word 'lawfully' in this section cannot be construed as having reference only to the authority or competency of the person issuing the command, but as signifying authority as well as likelihood of disturbance of public peace, and if either of these is found lacking the command will not be lawful.[55]

A command, disobedience to which is made penal under this section, is only a command to disperse.

an order to an assembly proceeding in a procession to go back and not to proceed further along the route it is going, has been held to be not a 'command to disperse' within the meaning of this section.[56]

8. Procedure

The offence under this section is cognisable, bailable but non-compoundable, and is triable by any magistrate.

Since the punishment provided for an offence under this section is imprisonment not exceeding six months, it can, under s 260, CrPC 1973 be tried summarily.

9. Charge

The following form of the charge may be adopted:

> I (*name of office of Magistrate, etc.*), hereby charge you (*name of the accused*), as follows:
>
> That you.....on or about the.....day of.....at..... joined (or continued in) an assembly of five or more persons likely to cause a disturbance of the public peace, after knowing that such assembly had been lawfully commanded to disperse, thereby committed an offence punishable under s 151 of the IPC, and within my cognisance.
>
> And I hereby direct that you be tried on the said charge.

45 *M Mohd Abdullah v Emperor* AIR 1934 Lah 243, p 244, 35 Cr LJ 1094 ; *Yashwant v Emperor* AIR 1933 Nag 277, p 280, 34 Cr LJ 705 ; *Komma Neelakantha Reddy v State of Andhra Pradesh* AIR 1978 SC 1201, (1978) Cr LJ 780 .

46 *Kemma Neelakantha Reddy v State of Andhra Pradesh* AIR 1978 SC 1021, (1978) Cr LR (SC) 95, p 99, (1978) 2 SCC 473, (1978) SCC (Cr) 285, (1978) 3 SCR 75, (1978) UJ (SC) 199, (1978) SC Cr R 202, (1978) Cr AR (SC) 109, (1978) Cr LJ 780 .

47 *Girdhara Singh v Emperor* AIR 1922 Lah 135, p 136, 23 Cr LJ 275 .

48 *Farzana Bi v Board of Film Censors* (1983) Cr LJ 1259, (1984) Mad LJ (Cr) 387 (Ker), (1983) Ker LN 198, (1983) KLT 193 (Ker) .

49 *Empress v Tuker* 7 ILR Bom 42, p 49 .

50 *Empress v Tuker* 7 ILR Bom 42, p 50 .

51 *Yeswant v Emperor* AIR 1933 Nag 277, p 281, 24 Cr LJ 705 (**explaining***Empress v Tuker* 7 ILR Bom 42 ; **dissenting from***King Emperor v Raghunath Vinaik Dhulekar* AIR 1925 All 165, 26 Cr LJ 599).

52 *Murlidhar v Empress* 22 PR 1887 ; *Girdhara Singh v Emperor* AIR 1922 Lah 135, p 137, 23 Cr LJ 5 ; *Kempe Gowda v State of Mysore* AIR 1954 Mys 58, 55 Cr LJ 490 .

53 *Kemma Neelakantha Reddy v State of Andhra Pradesh* AIR 1978 SC 1021, p 1025, (1978) Cr LJ 780 .

54 *Keshav Govind v Emperor* AIR 1921 Bom 322 ((2)), p 323, 22 Cr LJ 320 .

55 *Kempe Gowda v State of Mysore* AIR 1954 Mys 58, 55 Cr LJ 490 .

56 *Sikandar Khan v Crown* 42 PLR 477 ; *Kemma Neelakantha Reddy v State of Andhra Pradesh* AIR 1978 SC 1021, p 1025, (1978) Cr LJ 780 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 152.

Assaulting or obstructing public servant when suppressing riot, etc.--

Whoever assaults or threatens to assault, or obstructs or attempts to obstruct, any public servant in the discharge of his duty as such public servant, in1125 endeavouring to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens, or attempts to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope

The last section dealt with passive resistance of a person to the lawful command of a public servant and this section deals with active opposition to a public servant endeavouring to disperse an unlawful assembly.

The section contemplates resistance to some particular public servant, and therefore general resistance to the police force does not fall under it.[57]

2. 'Assault'

Section 351,*post*, and the commentary thereunder may be referred to.

3. 'Public Servant'

Section 21,*ante,* and commentary thereunder may be referred to.

4. 'Unlawful Assembly'

Section 141,*ante*, and commentary thereunder may be referred to.

5. Riot

Section 146,*ante*, and commentary thereunder may be referred to.

6. Affray

Section 159,*post,* and commentary thereunder may be referred to.

7. Criminal Force

Section 350,*post,* and commentary thereunder may be referred to.

8. Procedure

The offence under this section is cognizable and a warrant may issue in the first instance. It is bailable, non-compoundable, and is triable by a magistrate of the first class.1126

9. Charge

The charge, under this section must specify the particular public servant assaulted or obstructed. It is not sufficient to say that the accused 'obstructed members of the police force'.[58] Where a person with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot, he may be separately charged with, and convicted of, offences under ss 147, 325 and 152 of the IPC .[59] This section has reference to the offence of affray and to an assault committed on public servants in endeavouring to disperse an unlawful assembly or to suppress an affray. Under s 254 of CrPC 1898 [now s 246 (1), CrPC 1973], therefore, a magistrate has jurisdiction when discharging the accused of an offence under s 152 to frame a charge under s 160, IPC, since the offence of an affray is not an offence triable under chapter 21,[60] which dealt with warrant cases under the old CrPC .

10. Form of Charge

The following form of charge may be adopted:

> I, (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*) as follows:
>
> That you.....on or about the.....day of.....at.....assaulted (*or threatened to assault*) or obstructed (*or attempted to obstruct*) (*or used or threatened to use criminal force to*).....a public servant, in the discharge of his duty as such public servant in endeavouring to disperse an unlawful assembly (*or to suppress a riot or affray*), and thereby committed an offence punishable under s 152 of the IPC, and within my cognisance.
>
> And I hereby direct that you be tried on the said charge.

11. Sentence

When a prisoner is convicted of rioting and for causing hurt and the conviction for hurt depends upon the application of s 149, it is not illegal to pass two sentences, one for riot, and one for hurt, provided the total punishment does not exceed the maximum which the court might pass for any one of the

offences.

When, however, the accused is guilty of rioting, and is also found to have himself caused the hurt, he may be punished both for rioting and for hurt. In such a case the total punishment can legally exceed the maximum which the court might pass for any one of the offences.[61]

Separate sentences under ss 152, 332 and 333, IPC have however, been held to be illegal as the hurt inflicted on the police officers is the violence used towards them and is the essence of the offence under s 152 .[62]

57 *Ferasat v Queen-Empress* 19 ILR Cal 105 .

58 *Ferasat v Queen Empress* 19 ILR Cal 105 .

59 Section 220(3)(g), Code of Criminal Procedure 1973.

60 *Sajan v Emperor* AIR 1933 Sind 173, p 174, 34 Cr LJ 1044 .

61 *Queen Empress v Bana Punja* 17 ILR Bom 260 (FB) .

62 *Ferasat v Queen Empress* 19 ILR Cal 105 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 153.

Wantonly giving provocation with intent to cause riot--if rioting be committed--if not committed.--

Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person, intending or knowing1127 it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Comments

1. Scope

This section penalises the doing of an illegal act with the intention of provoking a riot.[63] The object is to avoid all possibilities of disturbance of the public peace. The section is based on the maxim 'prevention is better than cure'.[64] It provides for a heavier punishment if a riot is caused in consequence of the provocation. A conviction under this section does not warrant the taking of action

under s 106 of the CrPC .[65] The presiding over of a debate on a subject of 'secularism', participated by eminent journalists and other personalities and true publication of these debates, however, will not amount to an offence under s 153, IPC . In order to come within the ambit of s 153, IPC, apart from the malignant or derogatory remarks published, that act must be an illegal act. The presiding over of a debate and publication of the speeches cannot be considered to be illegal acts.[66]

2. Validity of the section

The validity of this section was challenged before the Bombay High Court in *GV Godse v Union of India* ,[67] and it was held that the section is not *ultra vires* of the Constitution.

3. Gist of the Offence

The gist of the offence, under this section, is giving provocation wantonly to cause riot. The fact, that the offence under this section is punishable with a maximum of six months' imprisonment indicates that it was intended to apply to such provocative words, or acts, as do not directly amount to instigation or abetment.[68] A mere chance of provocation is however, not sufficient to justify a conviction under this section.[69]1128

4. Provocation to Cause Riot

The gist of the offence under this section is giving provocation wantonly to cause riot. In *Queen-Empress v Kahanji* ,[70] the language used both by Jardine and Ranade JJ, seems to show that these learned judges regarded instigation as equivalent to provocation, as the latter word is used in this section. But the point does not seem to have been argued in that case. Provocation which results in rioting may or may not amount to instigation or abetment of that offence. If it does, it is obviously more appropriate to charge abetment, which is the more serious offence. The fact that the offence under this section is punishable with a maximum of six months' imprisonment indicates that it was intended to apply to such provocative words, or acts, as do not amount directly to instigation or abetment.[71]Section 153, IPC implies instigation only in the sense of causing a riot by an illegal act which originates the feelings of anger of a so far peaceful assembly. Though the distinction may sometimes be hard to draw, the offence under this section involves some act of origination of a riot, by doing an illegal act infuriating to the feelings of those who ultimately come to riot; at least some such idea is connoted by the expression 'gives provocation' rather than the converse one of abetment.[72]

The notice board put up at a public place contained defamatory matter *qua* the accused. The accused tore out the same. Held, the act of the accused of tearing the notice would not be considered as an act done to commit disruption of public peace. Continuance of the proceedings against the accused would be abuse of the process of the court; thus, proceedings were quashed on petition under s 482, CrPC .[73]

5. Meaning of Words 'Wantonly' and 'Malignantly'

The word 'wantonly' merely means 'recklessly',[74] or 'thoughtlessly' without regard for right or consequence.[75] The word 'wantonly' occurs only in this section of the IPC, while the word 'malignantly' occurs once again in s 270, IPC, which refers to the wicked spread of infectious poison. 'Malignancy' implies a sort of general malice, and very strong evidence must be given to prove this malignancy or wantonness.[76] Good faith in the formation or expression of an opinion, can afford no protection to an imputation which does not purport to be based on that which is the legitimate subject of public comment.[77]

Where certain persons taking part in a religious procession gratuitously disobeyed the orders of the police concerning the manner in which such procession was to be conducted, with the result that a riot was only averted by bringing armed police upon the scene, it was held that the persons concerned acted, though not 'malignantly', yet 'wantonly' within the meaning of this section.[78]1129

The Provocation must be given 'Malignantly' or 'Wantonly'

The section requires that the provocation must be given malignantly or wantonly. No conviction under this section can be had unless it is proved inter alia that the act of the accused was done either malignantly or wantonly.[79] It is not necessary that the provocation should be given both malignantly and wantonly. It is enough if it is given only malignantly or wantonly.

Where it was found that the accused, a Mohammaden, killed a cow, not in the presence of any Hindu whose religious feeling might be wounded, but somewhere in a village sometime before sunrise, it was held that in the absence of evidence of malice or wantonness on the part of the accused, he could not be convicted under this section.[80] But to kill or to sacrifice a cow in the open, exposed to the view of the public, would cause needless offence to a very large body or persons who inhabit this land. A person who so kills or sacrifices a cow obviously does so recklessly, thoughtlessly and without regard for the sentiment of those who do not approve of such an act. Such conduct therefore amounts to a wanton act.[81]

Where an alleged abetment was by way of instigation by means of isolated passages contained in literary work published in the ordinary way towards the close of serious religious riots, but not distributed among the rioters, the general spirit of the work being in favour of peace and reconciliation, it was held that it would not be a proper construction of the words, though objectionable in themselves, to allow them to override the whole context of the work, and that the composition was not 'illegal', nor was its publication 'malignant' or 'wanton'.[82]

Where the accused were exercising their ordinary rights without interfering with the rights of the complainants, it cannot be said that they were provoking a riot, 'malignantly and wantonly by doing anything which is illegal' with the meaning of this section.[83]

6. 'By Doing anything which is Illegal'

The provocation must be given by doing an illegal act. If the act is not illegal, however wanton, undesirable and deplorable it may be, there can be no offence under this section.[84] Under s 43 the word 'illegal' has been defined as:

> The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

The killing of one's own cow does not furnish a ground for a civil action, and, in the absence of any law prohibiting cow slaughter, it cannot be said to be an illegal act.[85] The section does not apply unless there has been 'doing anything which is illegal'.

1130The act of taking out a bride and bridegroom in palanquins, in a marriage procession through a village does not amount to an illegal act in the absence of a custom having the force of law preventing people from going through the village in palanquins. The act which is in itself perfectly legal does not become illegal merely because it is done in defiance of an order of a police officer directing the bride and bridegroom to dismount when the police officer is not empowered under the laws, to issue such an order.[86]

The throwing of a brick at a temple is so far not declared to be an offence, nor is it prohibited by law. It may furnish a ground for a civil action if anybody was hit, but if nobody is hit, it is not an illegal act. So, even if a person deliberately threw bricks at the temple hoping that the Hindus would believe that the bricks came from the Mohammaden quarter and that thereby the Hindus would be enraged against

the Mohammadens and there would be a riot between the Hindus and Mohamadens; he cannot be held guilty under this section if nobody was hurt by the brick.[87] Such cases may fall within the ambit of s 153A, IPC .

Where the accused Mohammadens formed themselves into a procession, and proceeded along a certain route at the time when another procession of Hindus was passing in the opposite direction along the same route as settled by the authorities, ignoring the orders of policemen stationed there to control traffic that they should go by another route, and a riot with injury to many persons was the result, it was held that the act of the accused in refusing to comply with the lawful orders of the police rendered them liable under this section.[88]

7. Provocation by Publication

Presiding over a debate on a subject of 'secularism', participated by eminent journalists, and other personalities and true publication of those debates, however, will not amount to an offence under s 153, IPC . In order to come within the ambit of s 153, IPC, apart from malignant or derogatory remarks published, that act must be an illegal act. The presiding over of a debate and publication of the speeches cannot be considered to be an illegal act.[89]

The publication of a pamphlet (the subject-matter of which leaves no doubt as to the identity of the persons against whom the writing is directed) written in a very provocative style, defamatory of certain persons, furnishing to them grounds for a civil action, would be illegal according to s 43 of the IPC, and as the natural and probable result of reading such a pamphlet would be to give provocation to the readers, the person connected with the pamphlet may properly be said to have intended that such provocation would cause the offence of rioting to be committed, and the distribution of the pamphlet would render the person concerned liable to punishment under s 153 of the IPC .[90]

When mention of a sentence in a book relating to Indian History that "Oriya is a younger sister of Bengali", cannot be said to be in a derogatory or defamatory sense in the context of the entire chapter, more particularly in view of fact that said1131 sentence was promptly deleted with apology, continuance of proceedings for defamation against eminent writer who was above 75 years of age, would amount to abuse of process of the court, hence, liable to be quashed.[91]

8. 'Intending or Knowing that it was Likely to Cause Rioting'

To constitute an offence under this section the accused must have been acting illegally and also with the intention to, or knowledge that it was likely to cause the offence of rioting to be committed.[92] There is nothing 'illegal' in India in a religious procession on a highway,[93] and the procession of one sect contemporaneous with the procession of another does not necessarily involve an intention to provoke a riot.[94]

Where the general spirit of a poem, published after a riot between the Hindus and Muslims and before the excitement caused by the riot had not entirely subsided, was in favour of peace and reconciliation, and there was nothing to indicate that the author's intention was to instigate the Hindus or provoke the Mohammedans to renew the disturbance, it was held that the composition of the poem could not be regarded as an illegal act and its publication was not malignant or wanton within the meaning of this section.[95]

Motive is not to be confused with intention. If a man knows that a certain consequence will follow from his act, it must be presumed in law that he intended that consequence to take place, although he may have had some quite different ulterior motive for performing the act.[96]

There was a flag hoisting ceremony witnessed by a gathering of about 250-300 persons. After the ceremony was over and the gathering was about to disperse, the accused came, unfastened the string of the National Flag and after the flag came down, trampled over it. The court held that the

accused did an act, which was illegal, to wound the feelings of the persons present on the spot, gave provocation to them by his illegal act and was guilty under this section.[97]

9. Procedure

The procedure for an offence under this section is the same as in the case of an offence under s 152, IPC, but it is triable by any magistrate.

10. Charge

The following form of the charge may be adopted:

> I, (*name and officer of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at..... malignantly, (*or wantonly*), by doing.....which was illegal, gave provocation to.....intending (*or knowing it to be likely*) that such provocation would cause the offence of rioting to1132 be committed, and thereby committed an offence punishable under s 153 of the IPC, and within my cognisance.
>
> And I hereby direct that you be tried on the said charge.

11. Proof

To make out a case under this section, it is necessary to establish that:

(i) the accused did an act which was illegal;
(ii) he thereby gave provocation to any person; and
(iii) he did this (a) intending that the provocation will cause the offence of rioting to be committed or (b) knowing it to be likely that such provocation will cause the offence of rioting to be committed.[1]

63 *Vijayaraghavachariar v Emperor* 26 ILR Mad 554, p 582, per Davies J.

64 *Gulam Kadar Sahib v Emperor* AIR 1928 Bom 156 .

65 *Emperor v Husain Baksh* 29 ILR All 569, 6 Cr LJ 14 .

66 *Aroon Purie v HL Varma & Anor* (1999) Cr LJ 983 (Bom) .

67 *GV Godse v Union of India* AIR 1971 Bom 56 (SB), (1971) Cr LJ 324.

68 *Ahmed Hasham v Emperor* AIR 1933 Bom 162, p 164, 34 Cr LJ 559, 57 ILR Bom 129, per Broomfield J; *Queen-Empress v*

Kahanji 18 ILR Bom 758 .

69 *State of Orissa v RC Chowla* AIR 1966 Ori 192, p 194, (1966) Cr LJ 1171 .

70 *Queen-Empress v Kahanji* (1893) 18 Bom 758 .

71 *Ahmed Hasham v Emperor* AIR 1933 Bom 162, p 164, 34 Cr LJ 559, 57 ILR Bom 129, per Broomfield J.

72 *Ibid*, per Murphy J, p 163.

73 *Raju Thomas v State of Kerala* 2013 Cr LJ (NOC) 200 (Ker) .

74 *Emperor v Husain Baksh* 29 ILR All 569, 6 Cr LJ 14 .

75 *Kari v State* AIR 1952 Pat 138, 53 Cr LJ 449 .

76 *Queen-Empress v Kahanji* 18 ILR Bom 758, p 775 .

77 *Emperor v Abdool Wahood Ahmed* 31 ILR Bom 293, p 296, 5 Cr LJ 237 .

78 *Emperor v Husain Baksh* 29 ILR All 569, 6 Cr LJ 11 .

79 *Abdullah v Emperor* AIR 1919 All 307(1), 20 Cr LJ 216 .

80 *Ibid*.

81 *Kari v State* AIR 1952 Pat 138, 53 Cr LJ 449 .

82 *R v Kahanji* 18 ILR Bom 758 .

83 *Vijiaraghavachariar v Queen* 26 ILR Mad 554 (FB) .

84 *Kari v State* AIR 1952 Pat 138, p 139, 53 Cr LJ 449 ; *Jaswant v Emperor* AIR 1936 All 534, p 536, 37 Cr LJ 866 ; *Gulam Kadar Saheb v Emperor* AIR 1928 Bom 156, 29 Cr LJ 1487 .

85 *Kari v State* AIR 1952 Pat 138, 53 Cr LJ 449 .

86 *Jasmani v Emperor* AIR 1936 All 534, p 535, 37 Cr LJ 866 .

87 *Gaya Prasad v Emperor* AIR 1928 All 745, p 746, 29 Cr LJ 1487 .

88 *Gulam Kadar Saheb v Emperor* AIR 1926 Bom 156, 29 Cr LJ 1088 .

89 *Aroon Purie v HL Varma & Anor* 1999 Cr LJ 983 (Bom) .

90 *Rahimatalli Mahomedalli Mulla v Emperor* 22 Cr LJ 513, p 515 .

91 *Express Publications (Madurai) Ltd v State of Orissa* (2006) Cr LJ 2548 (Ori) .

92 *Ibid*; *Mir Chittan v Emperor* AIR 1937 All 13, p 14, 38 Cr LJ 202 .

93 See notes to s 188 .

94 *Vijaraghavachariar v Queen* 26 ILR Mad 554 .

95 *Queen Empress v Kahanji* 18 ILR Bom 758 .

96 *Mir Chittan v Emperor* AIR 1937 All 13, p 14, 38 Cr LJ 202 .

97 *State Govt v Indar Singh* AIR 1962 MP 292, p 293-295, (1962) 2 Cr LJ 483 .

1 *Ibid*; *State of Orissa v RC Chowla* AIR 1966 Ori 192, p 194, (1966) Cr LJ 1171 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

[2][S. 153A.

Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.--

(1) Whoever--

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, [3][or]

[4][(c) organises any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes, or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,]

shall be punished with imprisonment which may extend to three years, or with fine, or with both.1133

Offence committed in place of worship, etc.--(2) Whoever commits, an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.]

Comments

1. Scope

This section was enacted to supplement the law of sedition, but the offence under it is quite different from sedition. The offence under this section may be concisely described as stirring-up of class hatred. In England it is punishable as seditious libel, but in India it is inserted in chapter 8 of the IPC relating to offences against public tranquillity, because, the essence of the offence is that it predisposes people to actions which disturb the public tranquillity. It affects the state only indirectly through disturbance of the public peace.[5]

Section 153A of IPC covers a case where a person by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or

communities or acts1134 prejudicial to the maintenance of harmony or is likely to disturb the public tranquillity.[6]

2. Amendments

This section is new and with the exception of cl(c) of sub-s(1) which was substituted by s 2 of the IPC, (Amendment) Act 1961 for the old s 153A, which itself was added by s 5 of the IPC, (Amendment) Act 1898.

The old section ran as follows:

> 153A. *Promoting enmity between classes.*--Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of the citizens of India, shall be punished with imprisonment which may extend to two years, or with fine, or with both.
>
> *Explanation.*--It does not amount to an offence within the meaning of this section to point out without malicious intention and with an honest view to their removal, matters which are producing, or have a tendency to produce, feelings of enmity or hatred between different classes of the citizens of India.

3. Objects and Reasons

In order to effectively check fissiparous communal and separatist tendencies, whether based on grounds of religion, caste, language or community or any other ground, it is proposed to amend s 153A of the IPC, so as to make it a specific offence for anyone to promote or attempt to promote feelings of enmity or hatred between different religious, racial or language groups or castes or communities. The Bill also seeks to make it an offence for anyone to do any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities and which is likely to disturb public tranquillity.[7] The object of s 153A is to prevent breaches of public tranquillity which might result from excited feelings of enmity between classes of people.[8]

4. Changes Introduced by the New Section

The new section is divided into two parts marked separately as sub-ss (1) and (2). Sub-section (1) has been further sub-divided into three parts or clauses.

Clause (a) of sub-s (1) roughly corresponds to the old section and amplifies it by specifying some grounds of promoting feelings of enmity or hatred, and illustrating the different classes of citizens contemplated by the section.

Clause (b) is new and makes any act prejudical to the maintenance of harmony between the various communities an offence.

Clause (c) of sub-s (1) was inserted in 1972 to enlarge the scope of this section to bring within its ambit certain activities intended to use criminal force or violence against any religion, race, language or regional group or caste or community, which1135 may cause fear or alarm or a feeling of insecurity amongst members of the said classes or category.

Sub-section (2) provides an enhanced punishment of imprisonment extending to five years, as against three years provided by sub-s (1), for the same offence if they are committed in any place of worship or in any assembly engaged in the performance of religious worship or ceremonies.

The explanation appended to the old section has been dropped as, perhaps, being redundant.

5. Purpose

It is sometimes said that the section deals with defamation of a class as distinguished from defamation of the state (s 124A, IPC), defamation of religion (s 295A, IPC), or defamation of a person (s 499, IPC). This is probably because, according to the theory of the criminal law of England, the essence of the crime of libel lies in its tendency to provoke breaches of public peace. But, under the IPC, defamation has been made an offence without any reference to its tendency to provoke a breach of peace.[9] The section has been enacted for the purpose of preserving order and amity between various classes of citizens. It only means that no person is entitled to write or say or do anything whereby the feelings of one class of citizens should be inflamed against another.[10] That is why this section is placed in Chapter Eight and not in Chapter 21 relating to defamation.

6. Analogous Law

This section is analogous to ss 124A, 295A and 505 of IPC .

Section 95(1), CrPC 1973 provides for forfeiture of any newspaper, book or document, the publication of which is punishable under this section or s 124A, or s 153B or s 292 or s 293 or s 295A of IPC . Sub-section (2) of s 95, CrPC, provides that the 'newspaper' and 'book' for the purposes of ss 95 and 96 have the same meaning as in the Press and Registration of Books Act 1867 and the word 'document' includes any painting drawing or photograph, or other visible representation.

7. Healthy and Rational Criticism of Religion not an Offence

Rational criticism of religious tenets, couched in restrained language, however does not amount to an offence under s 153A .[11] Where the article read as a whole does not in any way tend or has the tendency to promote ill feeling or hatred against the Muslim community it cannot be said that the writer has deliberately and maliciously outraged the religious feelings of the Muslims. On the other hand, the article contains healthy and legitimate criticism of the Islamic religion and it is intended to bring about reformation in that religion in keeping with the modern world. It was held that the writing in question is not at all offensive and does not amount to an offence under1136 s 153A or s 295A of the IPC .[12] Criminality, under s 153A, does not attach to the thing said or done, but to the manner in which it is said or done. If the words, spoken or written, are couched in temperate, dignified and mild language and do not have the tendency to insult the feelings, or the deepest religious convictions, of any section of the people, penal consequences do not follow.[13] But where the articles do promote feelings of enmity, hatred and ill-will between the Hindu and Muslim communities on grounds of community, this cannot be done in the guise of a political thesis or historical truth.[14]Section 153A(1)(a), IPC is not confined to the promotion of feelings on enmity, *etc.* on grounds of religion only, but it takes in promotion of such feelings on other grounds as well such as race, place of birth, residence, language, caste or community.[15] Where the views expressed in an article, are purely political in nature, this section would not be attracted even though they give a call to the poor masses to rebel against the capitalist class.[16] But if the writing is calculated to promote the feelings of enmity or hatred, it is no defence, to a charge under s 153A, that the writing contained a truthful account of past events or is otherwise supported by good authority.[17]

The requirement of passing an order of forfeiture of a book, presupposes that the book contains any matter the publication of which is punishable under ss 124A or 153A or 153B or 292 or 293 or 295A of the IPC, for the State Government to declare that every copy of such book be forfeited to the Government. The power can only be exercised and notification can only be issued if the Government

forms an opinion that the publication contains matter which is in an offence under any of the sections of the IPC as aforestated.[18]

8. No Applicability to Historical Works

This reasoning or principle will, however, not apply to historical works. Sometimes even a truthful account may come within the mischief of s 153A, IPC . But this will be too broad a proposition. Different considerations prevail when the courts are to consider a scholarly article on history and religion based upon research with the help of a number of reference books. It is very difficult for the state to contend that a narration of history would promote violence, enmity or hatred. If such a contention is accepted, a day will come when that part of the history, which is unpalatable to a particular religion, will have to be kept in cold storage on the pretext that the publication of such history would constitute an offence punishable under s 153A, IPC . The scope of s 153A cannot be enlarged to such an extent with a view to thwart history. For obvious reasons, history, and historical events cannot be allowed to be looked as a secret on a specious plea that if the history is made known to a person who is interested to know the history, there is likelihood of someone else being hurt.1137 Similarly, an article containing a historical research, cannot be allowed to be thwarted on such a plea that the publication of such a material would be hit by s 153A .[19]

9. Moral Turpitude

An offence under this section involves moral turpitude.[20]

10. Relative Scope of Sections 124A, 153 and 153A

The offence of sedition under s 124A, IPC, is essentially an offence against the Government or the State, while, the offence of stirring up of class-hatred under this section is an offence against public tranquillity. It affects the State only indirectly by disturbing the public peace. When amending s 124A, by Act 4 of 1898, the legislature thought of putting the words 'promotes or attempts to promote feelings of enmity or ill-will between different classes of His Majesty's subjects' in the proposed s 124A . But the Select Committee omitted the clause and enacted the same as an independent section in the form of this section on the following grounds:

> It appears to us that the offence of stirring up class-hatred differs in many important respects from the offence of sedition against the State. It comes more appropriately in the chapter relating to offences against the public tranquillity. The offence only affects the Government or the State indirectly, and the essence of the offence is that it predisposes classes of the people to action which may disturb the public tranquillity. The fact that this offence is punishable in England as seditious libel is probably due to historical causes, and has nothing to do with logical arrangement.[21]

The offence under this section is distinct from, and is not a necessary ingredient of the offence defined in s 124A . These two offences, even though committed by means of the same pamphlet, are as distinct as two libels on different persons contained in one book.[22]

It has been held that this section is no more ancillary to s 153 than s 124A to s 124 .[23]Section 153A may not be 'ancillary', that is subservient or subordinate, to s 153, but certainly the two sections are analogous, both being offences against public tranquillity. The difference between the two lies in this, that s 153 is directed against provoking a riot, whereas this section is directed against the disturbance of the public tranquillity generally.

11. Validity of Notification under Section 95Code of Criminal Procedure, Regarding Objectionable Matters Pertaining to Sections 124A , 153A, 153B,

292, 293, 295A, Indian Penal Code

It is evident that for exercising power under s 95 of the CrPC, it must appear to the government that the material published contains any objectionable matter and such matter promotes or is intended to promote feelings of enmity or hatred between different classes of the citizens of India, punishable under s 124A or s 153A or s 153B or s 292 or s 293 or s 295A of the IPC and thereupon, the state government1138 may by notification, stating the grounds of its opinion, declare every copy of the book containing such matter to be forfeited.

When the person affected, challenges the notification by filing a petition under s 96 of the CrPC, he has to establish that the publication or the book complained of, does not contain any material, which will offend or outrage the religious feelings of any section of the society. Thus the burden is on the person or persons who challenge the notification.

Where the Government is satisfied after considering the material on record that, where, any newspaper, or book or any document wherever printed, appears to the State Government to contain any matter, the publication of which is punishable under s 124A or s 153A or s 153B or s 292 or s 293 or s 295A of the IPC, the State Government may issue a notification stating the grounds of its opinion, by passing an order under s 95 of CrPC and the said order cannot be said to be violative of art 19(1)(a) of the Constitution of India offending the freedom of speech. On the other hand, the order is in pursuance of the reasonable restriction imposed by the Parliament. Therefore, the same is not violative of either art 19(1)(a) or art 19(1)(g) of the Constitution of India .[24]

Mere mention of an article or a part thereof in the notification would not constitute grounds contemplated by s 95, CrPC .[25]

Where notification issued under s 95, CrPC directed forfeiture of posters displayed with deliberate and malicious intention to insult religious belief of a particular community, there was no material showing that the act was done with malicious intention and deliberateness, there was no indication regarding existence of the requisite ingredients of ss 153A and 295A of the IPC, there was also no description of any particular religion or community in the notification which was likely to be incensed, the notice was indefensible so order of forfeiture was set aside.[26]

Pre-decisional hearing is not envisaged by s 95, CrPC .[27]

12. Relative Scope of Sections 153A and 295A

The provisions of this section may overlap those of s 295A, which was inserted in the Code by the Criminal Law (Amendment) 1927. In the 'Statement of Objects and Reasons' for that Act it was stated:

> The prevalence of malicious writings intended to insult the religion or outrage the religious feelings of various classes of His Majesty's subjects has made it necessary to examine the existing provisions of the law with a view to seeing whether they require to be strengthened. Chapter 15 of the IPC, which deals with offences relating to religion, provides no penalty in respect of writings of the kind described above. Such writings can usually be dealt with under section 153A of the IPC, as it is seldom that they do not represent an attempt to promote feelings of enmity or hatred between different classes. It must be recognised, however, that this is only an indirect way of dealing with acts which may properly be made punishable themselves, apart from the question whether they have the further effect of promoting feelings of enmity or hatred between classes.1139 Accordingly, it is proposed to insert a new section in Chapter 15 of the IPC, with the object of making it a specific offence intentionally to insult or attempt to insult the religion or outrage or attempt to outrage the religious feelings of any class of His Majesty's subjects.[28]

It may be noted that s 295A, IPC is confined to outraging the religious feelings of a class of citizens by

insulting their religion or religious beliefs, but s 153A, IPC is not so restricted, but extends to promoting enmity or hatred between different racial or language groups, or castes and communities not only on grounds of religion, but also on grounds of race, language, caste, community, or any other ground.

13. Sections 153A and 505 Considered Together

Section 153A, IPC covers a case where a person 'by words, either spoken or written, or by signs or any visible representations' promotes or tends to promote such feeling. Under s 505, IPC, promotion of such feelings should have been done by making and publishing or making any statement or report containing dire or alarming news. The main distinction between the two offences is that while publication of the words or representation is not necessary under the former, such publication is *sine qua non* under s 505 . The words 'whoever makes, publishes or circulates' used in the setting of s 505(2), IPC cannot be interpreted disjunctively but only as supplementary to each other. If it is construed disjunctively, anyone who makes a statement falling within the meaning of s 505 would, without publication or circulation, be liable to conviction. But the same is the effect with s 153A, IPC also and then that section would have been bad for redundancy. The common feature in both sections being promotion of feeling of enmity, hatred or ill-will 'between different' religious or racial or language or regional groups or castes or communities it is necessary that at least two such groups or communities should be involved. Merely inciting the feeling of one community or group without any reference to any other community or group cannot attract either of the two sections.[29]

14. Validity of Section 153A

A view was taken in some cases that, after the coming into force of the Constitution of India, this section, as it was, as well as s 124A become void under art 13 of the Constitution as contravening the right of freedom of speech and expression guaranteed by art 19(1) of the Constitution . But art 19(2) after its amendment by the Constitution (First Amendment) Act 1951, which was made on 18 June 1951, with retrospective effect saved the sections from unconstitutionality.[30] The concluding words of cl (b) of the present section make it further clear that the section has been enacted in the interest of public order within the meaning of art 19(2) . The amended cl (2) of art 19 of the Constitution protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression 'in the interest of public1140 order', which is much wider than 'for maintenance of' public order. If, therefore, certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restriction 'in the interest of public order' although in some cases those activities may not actually lead to a breach of public order.[31] There can, therefore, be no question that the section is saved by art 19(2) and is perfectly valid.

15. 'By Words, Spoken or Written...or Otherwise'

These words are also found in s 124A, IPC, and for comments thereon, notes under that section may be referred to.

It is thus firmly established both in India and in England, that criminality for the offence of blasphemous libel, or criminality under s 153A of the IPC, does not attach to the things said or done but to the manner in which it is said or done. If the words spoken or written are couched in temperate, dignified, and mild language, and do not have the tendency to insult the feelings or the deepest religious convictions of any section of the people, penal consequences do not follow.[32]

16. 'Promote'

The word 'promote' according to *Webster's Dictionary* means 'to contribute to the growth, enlargement or prosperity of (any process or thing that is in course); to forward; to further; to encourage; to advance; to excite; and also to urge on or incite another as to strife'. In the context in which the word

is used in this section, it may be taken to mean 'to excite' and that is the word used in some of the analogous provisions of law. It has been held that it is not essential to the meaning of 'promotion' that the object aimed at should be achieved. That is one of the differences between 'promoting' and 'causing'. Cause implies effect. Promotion does not. The promotion may fail in its object. In this respect it may be a synonym for 'foment'. It is also not essential that promotion should be with reference to something already in existence. It would be possible to promote hatred where enmity had previously existed.[33]

17. 'Promotes or Attempts to Promote Disharmony or Feeling of Enmity, Hatred or Ill-will'

The gist of the offence under cl(a) of sub-s(1) of this section is the promotion of, or attempt to promote disharmony, feelings of enmity or hatred or ill-will between the different religious, racial, language or regional groups or castes or communities.[34] Prompting disharmony or feeling of enmity, hatred or ill-will between different communities which is likely to cause fear or alarm or induce any person to commit any offence against public tranquillity are sought to be covered by the provisions of ss 153A and 505(1)(b) and (c) of IPC . This being the common feature of both the provisions it is necessary that at least two groups or communities should be involved.1141 Merely inciting the feeling of one community or group without any reference to any other community or group cannot attract the provision of s 153A or s 505 .[35]

The intention to cause disorder or incite the people to violence is the *sine qua non* of the offence under s 153A of IPC and the prosecution has to prove *prima facie* the existence of *mens rea* on the part of the accused. The intention has to be judged primarily by the language of the book and the circumstances in which the book was written and published. The matter complained of within the ambit of s 153A must be read as a whole. One cannot rely on strongly worded and isolated passages for proving the charge, nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning.[36]

It has, however, been held that the words 'promotes or attempts to promote feelings of enmity' are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be the purpose, or part of the purpose, the mere circumstances that there may be a tendency is not sufficient.[37] Following this view, it has been held that everything done which may have a remote bearing on promoting feelings of hatred or enmity would not be an offence. There should either be the intention to promote such feelings or such feelings should be promoted as a result of such publications.[38]

Criticism of the Hindu religion for its inculcation of the doctrine of untouchability and for the sanction which it has given to reprehensible treatment meted out to the low castes has in recent years been considered perfectly legitimate.[39] Thus in such cases it cannot be said that there was any attempt to promote disharmony or feeling of enmity, hatred or ill-will.

Where there were criticisms in an article of British imperialism and the Rulers of India, accusing them of exploiting and crushing the 'workers' and the proletariat, the article could not be said to be calculated to promote feelings of enmity or hatred between the Europeans as Europeans and the Indians as Indians.[40]

But where in a speech made by the accused every calamity or evil or misfortune that fell to the country and suffering by the people was imputed to the Government, *zamindars* and *talukdars*, it was held that the intention of the accused was to promote, or attempt to promote, feelings of enmity and hatred between the *kisans* and the *zamindars* and *talukdars* of Oudh, and he was guilty of the offences under this section.[41]

If the writing is calculated to promote feelings of enmity or hatred, it is no defence to a charge under s 153A of the IPC that the writing contains a truthful account of past events or is otherwise supported by

good authority. Adherence to strict path of history is not by itself a complete defence to a charge under s 153A of the IPC .[42]

A, a Hindu, ridiculed the Mohammedan Prophet in a book, not out of any eccentricity but in the prosecution of a propaganda started by a class of persons. It1142 was held that he was punishable under this section as the book promoted feelings of enmity and hatred between Hindus and Mohammedans.[43]

The applicant wrote a book *Islam - A concept of Political World Invasion by Muslims*. The book contained an attack on the personal life of Mohammad Pigambar, which would hurt Muslim sentiments. The ban on the circulation of the book imposed by the Maharashtra Government under s 95, CrPC was held proper.[44]

Where in a newspaper article, both *Babas* and *Meahs*, are inveighed against, as robbing the poor Mohammedan *raiyats*, and Christian missionaries are referred to as illustrating their treatment of converts, it could not be said that there was an intention to create enmity between them and any other citizens, nor was it a deliberate attempt to incite one class against another, and consequently, a conviction in respect of such article under this section was held to be bad.[45]

Where in the book in question there was nothing objectionable that might be said to insult Hinduism or to promote disharmony and hatred between different castes so as to be punishable either under s 153A or s 295A, IPC and the impugned order of its forfeiture was wholly unjustified and unsustainable.[46] The author of the book *Shivaji Hindu Kling in Islamic India*, a serious and intense scholar, did not intend to hurt the sentiments of the people of India. Held, the author and the printer of the book could not be prosecuted under ss 153 and 153A .[47]

Prosecution case was that the accused petitioner published a news item in the newspaper that some explosives were received from the house of the relative of the then Chief Minister of the State to malign the Chief Minister, to create communal disharmony in the State. Merely inciting the feeling of one community or group without any reference to any other community or group cannot attract the provisions of s 153A or s 505 . In the entire news item there was no reference to two communities for the purpose of inciting the feeling of one community against the other. It only narrated about para-military forces operating in that area and recovering certain arms from the possession of persons including Ganga Charan Debbarma. Except the activity of the para military force and the role of certain persons including Ganga Charan Debbarma, there was nothing to incite any community against the other. Ingredients of offence under ss 153A and 505, IPC were not made out.[48]

In *Bilal Ahmaed Kaloo v State of AP* ,[49] it is held that the common feature in both the sections, *viz.,* ss 153A and 505(2) of the IPC, being promotion of feeling of enmity, hatred or ill-will between different religious or racial or linguistic or regional groups or castes and communities, it is necessary that at least two such groups or communities should be involved. Further, it was observed that merely inciting the1143 feeling of one community or group without any reference to any other community or group cannot attract either of the two sections.[50]

18. Attempt Implies Intention

The word 'attempt' implies intention,[51] but 'intention' falls short of 'attempt'[52]which implies, besides the mental act of intention, some direct effort towards the achievement of the desired object.

19. Gist of the Offence

The gist of the offence is the intention to promote feelings of enmity or hatred between different classes or people.[53]

20. Intention

The intention to cause disorder or incite people to violence is the *sine qua non* of the offence under s 153A, IPC, and the prosecution has to prove the existence of *mens rea* in order to succeed. Where, the prosecution has not been able to establish any *mens rea* on the part of accused persons, as envisaged by the provisions of s 153A, IPC, by their raising the three slogans casually a couple of times, the offence under s 153A, IPC, is not made out against them.[54] Absence of malicious intention is a relevant factor to judge whether the offence is committed. It can be said to be promoting enmity only where the written or spoken words have the tendency or intention of creating public disorders or disturbances of law and order or affect public tranquillity. *Mens rea* has to be proved for proving commission of the offence.[55] It has been held in a number of cases that it was intended by the framers of the Code that intention should be an element in the offence under this section.[56] In *State (Delhi Admn) v Shri Kanth Shastri* ,[57] the Delhi High Court has taken the view that the essence of this offence is malicious intention.

21. Intention can be Judged from Words Published or other Material

The intention to cause disorder or incite the people to violence is the *sine qua non* of the offence under s 153A of the IPC and the prosecution has to prove *prima facie* the existence of *mens rea* on the part of the accused. The intention has to be judged primarily by the language of the book and the circumstances in which the book was written and published. The matter complained of within the ambit of s 153A must be1144 read as a whole. One cannot rely on strongly worded and isolated passages for proving the charge nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning.[58]

In *PK Chakravarty v King-Emperor* ,[59] Rankin J, (with whom Mukerji J, agreed) observed:

> It is settled law that section 153A , IPC, does not mean that any person who
>
> publishes words that have a tendency to promote class hatred can be convicted under that section. The words 'promotes or attempts to promote feelings of enmity' are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be the purpose or part of the purpose of the accused to promote such feelings and, if it is no part of his purpose, the mere circumstance that there may be a tendency is not sufficient. It is quite true that whether or not the promoting of enmity is the intention, is to be collected in most cases from the internal evidence of the words themselves, but I know of no authority for saying that other evidence cannot be looked at; and it appears to me that the explanation shows quite conclusively that, in any matter on which other evidence could assist, it may be taken.

Again in *Satya Ranjan Bakshi v Emperor* ,[60] his Lordship as CJ (Ghose J, agreeing with him) elaborated the same view in the following words:

> In *PK Chakravarthy v Emperor* ,[61] I had occasion to point out that although the internal evidence of the words published will generally be decisive on the question of intention, they are never more than evidence of intention and it is the real intention of the accused that is the test. I pointed out also that the mere fact that ill-feeling may result or may be likely to result from the publication is not in itself sufficient and that there may be circumstances in any such case which would rightly prevent a Judge of fact from holding that the publication was an attempt to promote ill-feeling.

Further, referring to the important principle laid down by Woodroffe J, in Re *Amrita Bazar Patrika Press*:[62]

> If on the other hand, the words used naturally, clearly and indubitably have such tendency, then it must be presumed that the publisher intended that which is the natural result of the words used, and no other evidence is (to say the least) likely to rebut the existence of such intention, it was observed that each case must be presumed that the publisher intended that which is the natural result of the words used, and no other evidence is (to say the least) likely to rebut the existence of such intention.

It was observed that each case must be dealt with on its own facts. This view has been followed in the undermentioned cases.[63] In *Lajpat Rai v Emperor* ,[64] following the Calcutta cases cited above, it was distinctly held that the Crown has to establish that the writer of the work was actuated by the malicious intent which it is necessary to prove by extrinsic evidence, or to infer from the nature of the work itself.1145

22. Rule of *Mens Rea* Expressly Displaced by Statute

But, as pointed by Sulaiman CJ, in *MLC Gupta v Emperor* ,[65] it would be interpolating the words 'with intent to' in this section if one were to hold, that the intention of the writer to promote hatred, etc, must be established. The section merely says: 'Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes, or attempts to promote feelings of enmity or hatred, etc. It does not say 'intentionally promotes feelings of enmity, etc.'. There can be no justification for introducing the words 'with intent to' in the section. There are a number of offences under the IPC for which an express intention on the part of the accused is not at all necessary. Indeed, wherever it is necessary that intention should form a necessary part of the offence, the Code expressly states so. It should, therefore, follow that the legislature contemplates that the words spoken or written, which do promote hatred, etc.c., would create sufficient mischief so as to fall within the scope of the section, and that it is not necessary for the prosecution to further establish that the writer had the intention to promote such hatred. Even if a question of intention were to arise, such intention must be gathered from the words spoken or written, and they themselves would be conclusive, and it would not be necessary for the prosecution further to prove that such an intention was behind the use of such words. It may also be noted that even in the present section inserted by the amending Act, the legislature has not thought it fit to insert the word 'intention' or 'intentionally'. The offence is one of those in which the general rule of *mens rea* is expressly displaced by the statute creating it, which creates an absolute prohibition.[66]

The matter may also be looked at from another point of view. Even cl (a) of the present sub-section, like the old section, bases the liability under it on two alternative grounds: (a) promoting feeling of enmity or hatred; or (b) attempting to promote such feelings. Taking the first ground first, it is clear that it applies to a case where feelings of enmity or hatred have actually been promoted, or excited or aroused by the words spoken or written by the accused. If the feelings have not actually been excited or aroused, it cannot, without violence to the language, be said that the accused promoted such feelings. If the feelings of enmity or hatred have been promoted by the accused, he is guilty under the section and no question of intention arises; for the simple reason that promotion implies intention and the accused is presumed to have intended the natural consequences that resulted from his act of promoting.[67] That is why the section does not use the word 'intentionally' before the word 'promotes'.

As regards the second ground of liability, that is, 'attempts to promote feelings of enmity', the very word 'attempt' implies intention.[68] But intention falls short of 'attempt'[69] which implies, besides intention, some effort, through some overt act, to achieve the desired object.

This ground of liability applies only to a case where the feelings of enmity or hatred have not yet been actually promoted. All the decisions in which the question1146 of intention was considered were cases of this class. Where the attempt of the accused not having succeeded, the object of the attempt is not known and has still to be ascertained, and until it is ascertained to be to promote feelings of enmity, the accused cannot be held guilty. It is in ascertaining the effect of the attempt that the

question of intention arises. Whether or not the promoting of enmity is the intention, is to be collected in most cases from the internal evidence of the words themselves spoken or written by the accused.[70]

23. Intention--How Determined

Where the words written or spoken do attempt to promote feelings of enmity, hatred, *etc.*, and therefore fall under s 153A, action can be taken by the state where, although there has yet been no occasion for the promotion of any feelings of enmity and hatred and there may have been no attempt yet made to promote such feelings, but the words are intended to promote such feelings.[71] It has been repeatedly held that in judging the question of intent, the accused must be deemed to intend that which is the natural result of the words used, having regard, among other things to the character and description of that part of the public who are to be expected to hear or read the words used.[72] In a Bombay case, it was held that where an article can bear a meaning that it is calculated to produce hatred and enmity between two classes, the natural inference, from its publication is that the person, who published it, had the malicious intention, that it would produce such hatred and enmity. The burden of proof shifts to the accused when he asserts that the natural inference to be drawn from the publication of the article does not hold good in his case.[73] The Allahabad High Court has held that the legislature contemplates that the words spoken or written which do promote hatred, *etc.*, would create sufficient mischief so as to fall within the scope of s 153A, IPC and that it is not necessary for the state further to establish that the writer had the intention to promote such hatred. Even if a question of intention were to arise such intention must be gathered from the written words used in the case, and they themselves would be conclusive, and it would not be necessary for the state further to prove that such an intention was obtained by the use of such words.[74]

24. Determination of Guilt--Objectionable Matter

In an Oudh case, it has been held that it is not open to the speaker to say that he did not intend his language to bear the meaning which it naturally does bear.[75] But in another Allahabad case it has been held that this matter must be judged primarily by the language of the book itself though it is permissible to receive and consider1147 external evidence either to prove or to rebut the meaning ascribed to it in the charge.[76] The Calcutta High Court explained the position thus:

> It is true that from the nature of the case, the internal evidence of the words used and the meaning of the words used will very generally be decisive of the question, whether or not the court is confronted with a successful or unsuccessful attempt to promote feelings of enmity. They will be decisive in all cases where the intention is expressly declared; also if the words used naturally, clearly and indubitably have such a tendency, then it must be presumed that the publisher intended that which is the natural result of the words used.[77] But the words used and their true meaning is never more than evidence of intention and it is the real intention of the accused that is the test.[78]

It has, however, to be remembered that cl (b) of the section makes it an offence to commit an act which is even likely to disturb the public tranquillity. It does not make it necessary that the accused should know that it is likely to disturb the public tranquillity. In other words it does away with *mens rea* altogether. There is no reason why *mens rea* should be made an essential element for an offence under cl (a).[79]

When mention of a sentence in a book relating to Indian history that 'Oriya is a younger sister of Bengali', cannot be said to be in a derogatory or defamatory sense in the context of the entire chapter, more particularly in view of fact that said sentence was promptly deleted with apology, continuance of proceedings for defamation against eminent writer who was above 75 years of age, would amount to abuse of process of the court, hence, liable to be quashed.[80]

In determining the effect of a speech or writing the court has to look at the speech or writing as a

whole and not pay undue regard to any particular sentence or phrase.[81] The Supreme Court has directed that an objectionable matter must be viewed from an average, healthy and commonsense point of view and judged by the standard of an ordinary reasonable prudent man.[82]

25. 'On Grounds of Religion...or any other Ground Whatsoever'

This is a new clause in sub-s (i) of this section. It sets out the grounds of promoting feelings of enmity and hatred. The grounds so specified are only illustrative, and are not exhaustive. The words 'or any other ground whatsoever' would cover every possible ground which may or may not be similar to the grounds specified. The reference to religion, race and caste in this section echoes art 15 of the Indian Constitution which prohibits discrimination against any citizen 'on grounds only of religion, race, caste, sex, place of birth or any of them'.

'Religion' refers to the prevalent system of faith and worship, such as the Hindu, Mohammedan and Christian religions.

1148'Race' refers to different ethical stocks like the Caucasian, Mongolian, etc. Europeans and Indians were considered to belong to different races and a step towards abolition of racial discrimination was taken on the eve of the commencement of the Constitution by the passing of the Criminal Law (Removal of Racial Discriminations) Act 1949 by which the privileges enjoyed by the Europeans and Americans under the British regime, in matters of criminal law and procedure, were taken away. In *Narayan Vasudev Phadke v Emperor* ,[83] Wassoodew J, referred to racial grouping of Indians themselves at Mahan, Chambhan and Chandals in Western India.

'Language' refers to the different languages like Hindi, Tamil, Telugu, *etc.*

'Caste' refers to hereditary classes like *Brahamans*, *Kshatriyas*, *Vaishyas* and *Sudras*.

'Community' is a body of persons having something like religion or profession in common. The word roughly corresponds to the word 'classes' in the old section.

Each of the categories specified is only a different basis of classification of the citizens. These categories are not mutually exclusive and may cut across or overlap each other. Thus, different sections of the same religious group may fall under different racial or language groups. So also different sections of the same language group may fall under different religious groups. Different members of the same caste may come under different language groups.

26. 'Between Different Religious, Racial, Language or Regional Groups or Castes or Communities'

The phrase is new and corresponds to the phrase 'between different classes of the citizens of India' in the old section. This new phrase practically means the same thing as the old one, though it gives some definiteness and content to that phrase. It has been held that the word 'class' in the old section has not been defined anywhere and that the 'classes' may not be divided on racial or religious grounds only.[84] The phrase in the present section specifically refers to religious or racial groups, but it is not restricted to them. It specifically mentions other groups like language groups and castes and finally uses the general word 'communities' which practically means the same thing as 'classes'. The word 'classes' is opposed to the word 'masses' and simply means a division of the mass of citizens. The leading sense in which 'class' is used in given in the *New Oxford Dictionary* as a number of individuals (persons or things) possessing common attributes, and grouped together under a general or 'class' name; a kind, sort, division.

The Koran is a sacred book. This book is not prejudicial to the maintenance of harmony between different religions because of the Koran no public tranquillity has been disturbed up to now and there

is no reason to apprehend any likelihood of such disturbance in future. Apart from anything else, there is no question for forfeiture or banning of the said book on the ground of disharmony or feelings of enmity or hatred or ill-will between different religions or communities. Section 153A of the IPC has no application on these facts of the case.[85]

1149In *State of Andhra Pradesh v P Sugar* ,[86] their Lordships of the Supreme Court, dilating upon the expression 'class', observed thus:

> The expression 'class' means a homogenous section of the people grouped together because of certain likeness or common traits, and who are identifiable by some common tributes such a status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether, but in the determination of the class, a test, solely based upon the caste or community, cannot also be accepted.

27. Clause (b)--Prejudicial Act

This clause is entirely new and is added to 'effectively check fissiparous and separatist tendencies'. The old section was confined to promoting, or attempting to promote, feelings of enmity or hatred between different communities in India. By this clause the present section creates a new offence, which is the doing of any act which is prejudicial to the maintenance of communal harmony and which disturbs, or is likely to disturb public tranquillity, whether or not it can be said to promote or attempt to promote feelings of enmity or hatred between the various communities.

28. Clause (c)

Prior to the insertion of this clause, though action could be taken under the existing law against individuals for activities promoting enmity or prejudicial to the maintenance of harmony between different groups on grounds of religion, race, place of birth, residence, language, *etc.*, there was no provision for dealing effectively with an association which had, for its object, such objectionable activities. In order to curb the objectionable activities of such associations more particularly the militant organisations, engaged in certain activities intending to use criminal force or violence against, or to cause, or likely to cause, fear or alarm or a feeling of insecurity amongst member of any religious, racial, language or regional group or caste or community; which pose a serious challenge to the integrity of the nation and maintenance of harmony between different communities, the present cl (c) has been added in this section.

29. Sub-section (2)--Offences Committed in Place of Worship, *Etc*

This sub-section does not lay down any new provision and simply provides somewhat more stringent punishment for the offences specified in sub-s (1); if they are committed in any place of worship or in any assembly, engaged in the performance of religious worship or religious ceremonies. The temples, mosques, churches, *gurdwaras* or any platform or other place, where prayers, offerings or any other religious ceremonies made will come within the expression 'place of worship'. A marriage or adoption strictly speaking is neither a religious worship nor a religious ceremony but a *hawan* or recitation of '*sloks*' or prayers made to invoke Gods on such occasions among Hindus, may fall under the expression 'religious' ceremonies. Therefore, such part of a marriage ceremony, which has the sanction of the religion of any particular community, without which the marriage is nullity, will be a religious ceremony according to this sub-section. If it is intended that an accused should get an enhanced punishment provided by this sub-section, the formal charge framed by the magistrate should contain the particulars required thereunder.1150

30. Procedure

The offence under this section is cognizable and a warrant may be issued in the first instance. It is neither bailable nor compoundable; and is triable by a magistrate of the first class.

31. Conditions Requisite for Initiation of Proceedings

Commentary under the same heading in s 196, CrPC, may be referred to.[87]

As restriction is placed by s 196(1)(a), CrPC in relation to an offence under s 153A, IPC on cognizance of the offence by the court without prior sanctioning of the Central/State Government, as such FIR can be registered and investigation can be carried out without prior sanction.[88]

Prior sanction either of the State Government or of the Central Government is necessary before taking cognizance of the offence under ss 153A and 153B of the IPC . Where no sanction as envisaged under s 196(1)(a) and s 196(1A)(a), CrPC for prosecution of the Central or State Government was obtained, order of taking cognizance of the two offences *i.e.* under ss 153A, 153B, IPC, was quashed.[89]

32. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of....., at....., by speaking (*or writing*) the words (*or by signs, or visible representations*), *viz, ...* promoted (*or attempted to promote*) feelings of enmity (*or hatred*) between.....(*specify the groups, castes or communities*) or committed an act, which is prejudicial to the maintenance of harmony between different groups, castes or communities and which disturbs, or is likely to disturb, public tranquillity, and thereby committed an offence punishable under s 153A of the IPC, and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

In case the offence committed by an accused falls under cl (c) of sub-s (1) or under sub-s (2) the particulars or ingredients of the same are to be mentioned in the charge.

33. Joinder of Charges

A person can be charged at one trial with having committed offences under s 124A, and s 153A, IPC by means of two articles of different dates appearing in his newspaper of those dates.[90] It is not necessary for the charges to specify the distinct passages in a pamphlet which are alleged to constitute offences under ss 124A and 153A respectively. It is sufficient for the charges to allege generally that the pamphlet constitutes an attempt to excite disaffection, and also to promote feelings of hatred between different classes.[91]1151

34. Joint Trial

Charges under ss 124A and 153A, IPC, may be tried together. But even separate trials for each are not illegal.[92]

35. Proof

For charge, under s 153A, it is not necessary to prove that, as a result of the objectionable matter, enmity or hatred was, in fact, caused between the different classes.[93]Intention to promote enmity or hatred, apart from what appears from the writing itself, is not a necessary ingredient of the offence. It is enough to show, at the trial, that the language of the writing is of such a nature as to promote the feelings of enmity or hatred because a person must be presumed to intend the natural consequences of his act.[94] The matter charged, as being within the mischief of s 153A, must be read as a whole. One cannot rely on stray and isolated passages for proving the charge nor, indeed one can take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning.[95] For judging, what are the natural or probable consequences of the writing it is permissible to take, into consideration, the class of readers, for whom the writing is primarily meant, as also the state of feelings between the different classes or communities at the relevant time.[96]

Omission of Penal Provision in Notification Banning a Book--Effect of

Where the ingredients of the penal provision(s) are stated in the notification, the absence of a clear statement of the penal provisions in the notification is not fatal to the notification.[97]

36. Yardsticks for Judging an Offensive Matter

Where the question before the Supreme Court was whether the TV serial titled 'Tamas' depicted communal tensions and violence that occurred during the partition period in India and was likely to disturb public order and incite people to indulge in commission of criminal offences, the humble judges constituting the Bench viewed it from an average, healthy and commonsense point of view and observed that that is the yardstick. There cannot be any apprehension that it is likely to affect public order or it is likely to incite into the commission of any offence. It was held that the standards must be so framed that people are not reduced to a level where the protection of the least capable and the most deprived amongst us determines what the morally healthy cannot view or read. The censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and1152 society with some of its foibles along with what is good. One must not look upon such human relationship as banned in toto forever from human thought must give scope for talent to put them before society. Ideas having redeeming social or artistic value must also have importance and protection for their growth. Thus there is no violation of s 153A, IPC, or infringement of arts 21 and 25 of the Constitution when judged by the standard of an ordinary reasonable prudent man.[98]

Where there was no iota of evidence to indicate that the accused persons either committed or conspired or attempted to commit or abetted or advocated or advised or knowingly facilitated the commission of any disruptive activity, the offence under s 4(1) of TADA cannot be said to have been established beyond reasonable doubt to convict them. Similarly, no offence can be said to have been committed by them either under s 124A or s 153A, IPC, so, conviction of the accused persons was set aside.[99]

To ascertain whether an offence as defined under s 153A of IPC, has been committed or not, it is for the court to examine the words either spoken or written or by signs or by visible representations and come to a conclusion whether they have a tendency to promote or attempt to promote on grounds of religion, race, place of birth, residence, language, caste or community or any other group etc., disharmony or feeling of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities. In the absence of any material as to the actual words uttered by the accused or the acts committed by the accused, the allegations must be held to be

extremely vague.

2 Substituted by Act 35 of 1969, s 2, for the former section.

3 Inserted by Act 31 of 1972, s 2 .

4 Inserted by Act 31 of 1972, s 2 .

5 The Select Committee Report on the Bill which was passed as Act 4 of 1898.

6 *Manzar Sayeed Khan v State of Maharashtra* 2007 Cr LJ 2959, p 2963 (SC), AIR 2007 SC 2074, 2007 (5) SCC 1, 2007 (3) Scale 445, 2007 (93) Supreme 505 .

7 SOR Gaz, Ind, 1961, Extra, Pt II, s 2, p 681.

8 *Trustees of Sardar Hashmi Memorial Trust v Govt of NCT of Delhi* (2001) Cr LJ 3689 (Del) (FB) .

9 For further discussion of the point refer to notes under s 499 .

10 *Emperor v Bal Gangadhar Tilak* 8 Cr LJ 281, p 316, 10 Bom LR 843 .

11 *Lalai Singh v State of Uttar Pradesh* (1971) Cr LJ 1773, p 1775, (1973) All WR 284 (HC) (FB) (Criticism of the Hindu religion for inculcation of the doctrine of untouchability and for the sanction, which it has given to reprehensible treatment meted out to the lower classes, has been considered perfectly legitimate, having been sponsored by no less a person the Mahatma Gandhi himself).

12 *State of Maharashtra v Ganpate Vasudeo Behere* (1978) Cr LR (Mah) 178, p 184-185 .

13 *Azizul Haque Kausar Naquvi v State* AIR 1980 All 149, p 160 (FB), (1980) Cr LJ 448, (1980) 17 All Cr C 152 .

14 *Babu Rao Patel v State (Delhi Admn)* AIR 1980 SC 763, (1980) 2 SCC 402, (1980) SCC (Cr) 500, (1980) Cr LR (SC) 193, (1980) Cr AR (SC) 94, (1980) SC Cr R 173, (1980) All LR 321 (SC), (1980) 2 SCWR 63, (1980) Cr LJ 529 (SC), (1980) LW (Cr) 86 (SC) .

15 *Babu Rao Patel v State Delhi Admn* AIR 1980 SC 763, (1980) Cr LJ 529 (SC) ; *State of Maharashtra v Ganpate Vasudeo Behere* (1978) Cr LR 178, p 184-185 (Mah) .

16 *Shiv Kumar Mishra v State of Uttar Pradesh* (1978) All Cr C 154, p 156-57, (1978) Cr LJ 701, (1978) All LJ 79 .

17 *GV Godse v Union of India* AIR 1971 Bom 56 (SB), (1971) Cr LJ 324, p 340.

18 *Sangharaj Damodar Rupawate v Nitin Gadre* 2007 Cr LJ 3860, p 3863 (Bom) (FB) .

19 *Varsha Publication Pvt Ltd v State of Maharashtra* (1983) Cr LJ 1446 (Bom) (DB) .

20 Re *Tassadduq Ahmad Khan Sherwani*AIR 1922 All 140, p 141, 23 Cr LJ 128 (FB) .

21 *Gazette of India* 1898, Pt V, p 13.

22 *R v Virumal Begraj* 11 Cr LJ 583, 4 SLR 55 .

23 *Jaswant Rai v Emperor* 5 Cr LJ 439, p 447 .

24 *Barugur Ramchandrappa & Ors v State of Karnataka & Anor* (1998) Cr LJ 3639 (Kant) (FB) .

25 *Trustees of Sardar Hashmi Memorial Trust v Govt of NCT of Delhi* (2001) Cr LJ 3689 (Del) (FB) .

26 *Trustees of Sardar Hashmi Memorial Trust v Govt of NCT of Delhi* (2001) Cr LJ 3689 (Del) (FB) .

27 *RV Bhasin v State of Maharashtra* 2012 Cr LJ 1375 (Bom) (FB), 2010 (1) Bom Cr (Cri) 257 (FB), 2010 (1) All MR (Cri) 357 .

28 *Gazette of India,* 20 August 1927, Pt V, p 213.

29 *Bilal Ahmed Kaloo v State of Andhra Pradesh* (1997) Cr LJ 4091 (SC) ; *Subal Kumar Dey v State of Tripura* (2007) Cr LJ 1195 (Gau) .

30 *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955, (1962) 2 Cr LJ 103 ; *Sheikh Wajihuddin v State* AIR 1963 All 335, (1963) 2 Cr LJ 4 ; *Debi Saran v State* AIR 1954 Pat 254, (1953) Cr LJ 758 ; *Khan Gufran Zahidi v State* (1964) All LJ 545, (1964) AWR 694 (HC) ; *Indramani Singh v State* AIR 1955 Mani 9, (1955) Cr LJ 184 (190), (1955) 8 Sau LR 42 (FB) ; *Gopal*

Vinayak Godse v Union of India AIR 1971 Bom 56, p 72, (1971) Cr LJ 324 (SB) ; (1973) Raj LR 637 (Del), the rulings to the contrary are no longer good law.

31 *Ramji Lal Modi v State of Uttar Pradesh* AIR 1957 SC 620, p 623, (1957) Cr LJ 1006 .

32 *Subal Kumar Dey v State of Tripura* (2007) Cr LJ 1195 (Gau) ; *Azizul haq Kausar Naquvi v State* AIR 1980 ((All)) 149, (1980) Cr LJ 448 (All) .

33 *Jaswant Rai v Emperor* 5 Cr LJ 439, p 440, 441, 3 PWR (Cr) 27, 10 PR 1907 (Cr), per Clark CJ; *Gopal Vinayak Godse v Union of India* AIR 1971 Bom 56, (1971) Cr LJ 324, p 340 .

34 *Shiv Kumar Mishra v State of Uttar Pradesh* (1978) All Cr C 154, p 156-157, (1978) Cr LJ 701 .

35 *Subal Kumar Dey v State of Tripura* (2007) Cr LJ 1195 (Gau) .

36 *Manzar Sayeed Khan v State of Maharashtra* 2007 Cr LJ 2959, p 2963 (SC), AIR 2007 SC 2074, 2007 (5) SCC 1, 2007 (3) Scale 445, 2007 (93) Supreme 505 .

37 *PK Chakraverty v King-Emperor* AIR 1926 Cal 1133, p 1135 .

38 *ML Gautam v Emperor* AIR 1936 All 561, p 565, 37 Cr LJ 943 (SB) .

39 *Lalai Singh Yadav & Anor v State of Uttar Pradesh* (1971) Cr LJ 1773 (All) (FB) .

40 *AMA Zaman v Emperor* AIR 1933 Cal 139, 34 Cr LJ 305 .

41 *Munshi Singh v Emperor* AIR 1935 Oudh 347, p 349, 36 Cr LJ 541 .

42 *RV Bhasin v State of Maharashtra* 2012 Cr LJ 1375 (Bom) (FB) .

43 *Kali Charan Sharma v King-Emperor* AIR 1927 All 654(1), 28 Cr LJ 785 (**dissenting** from *Raj Pal v Emperor* AIR 1927 Lah 590); *Harnam Das v State of Uttar Pradesh* AIR 1957 All 538, p 541(SB), (1957) Cr LJ 912; *State of Bihar v Ghulam Sarwar* AIR 1965 Pat 393, p 395-396, (1965) 2 Cr LJ 401 ; *Kalicharan v Emperor* AIR 1927 All 649, 29 Cr LJ 968 (SB) ; *Shib Sharma v Emperor* AIR 1941 Oudh 310, 42 Cr LJ 429 ; *Vishambhar Dayal v Emperor* AIR 1941 Oudh 33, 42 Cr LJ 40 .

44 *RV Bhasin v State of Maharashtra* 2012 Cr LJ 1375 (Bom) (FB) .

45 *Joy Chandra Sarkar v Emperor* 38 ILR Cal 214, 12 Cr LJ 348 .

46 *Lalai Singh Yadav & Anor v State of Uttar Pradesh* (1971) Cr LJ 1773 (All) (FB) .

47 *Manzar Sayeed Khan v State of Maharashtra* 2007 Cr LJ 2959, p 2964 (SC), AIR 2007 SC 2074, 2007 (5) SCC 1, 2007 (3) Scale 445, 2007 (93) Supreme 505 .

48 *Subal Kumar Dey v State of Tripura* 2007 Cr LJ 1195, p 1200 (Gauh) .

49 *Bilal Ahmaed Kaloo v State of AP* (1997) 7 SCC 431 .

50 *Manzar Sayeed Khan v State of Maharashtra* 2007 Cr LJ 2959, p 2963 (SC), AIR 2007 SC 2074, 2007 (5) SCC 1, 2007 (3) Scale 445, 2007 (93) Supreme 505 .

51 *Annie Besant v Advocate-General of Madras* AIR 1919 PC 31, p 38, 20 Cr LJ 593 .

52 *MLC Gupta v Emperor* AIR 1936 All 314, p 317 (SB), 37 Cr LJ 599 .

53 *Manzar Sayeed Khan v State of Maharashtra* (2007) Cr LJ 2959 (SC), AIR 2007 SC 2074, 2007 (5) SCC 1 .

54 *Balwant Singh & Anor v State of Punjab* AIR 1995 SC 1785 ; *Manzar Sayeed Khan v State of Maharashtra* (2007) Cr LJ 2959 (SC) .

55 *Trustees of Sardar Hashmi Memorial Trust v Govt of NCT of Delhi* (2001) Cr LJ 3689 (Del)(FB); *Manzar Sayeed Khan v State of Maharashtra* (2007) Cr LJ 2959 (SC) .

56 *Jaswant Rai v Emperor* 5 Cr LJ 439, p 441 ; *Emperor v Raj Pal* AIR 1926 Lah 195, 27 Cr LJ 556 ; *Hamerdra Prasad Ghose v King-Emperor* AIR 1927 Cal 215, 28 Cr LJ 205 ; *Iswari Prasad Sharma v Emperor* AIR 1927 Cal 747, 28 Cr LJ 897 ; *Emperor v Banomali Mahendra* AIR 1943 Pat 382, 46 Cr LJ 308 .

57 *State (Delhi Admn) v Shri Kanth Shastri* (1987) 31 DLT 52 .

58 *Manzar Sayeed Khan v State of Maharashtra* (2007) Cr LJ 2959 (SC) .

59 *PK Chakravarty v King-Emperor* AIR 1926 Cal 1133, p 1135, 27 Cr LJ 1154 .

60 *Satya Ranjan Bakshi v Emperor* AIR 1929 Cal 309, p 314, 31 Cr LJ 318 .

61 *PK Chakravarthy v Emperor* AIR 1926 Cal 1133, 54 Cal 59 .

62 Re *Amrita Bazar Patrika Press*AIR 1920 Cal 478, p 488, 21 Cr LJ 98 (SB) .

63 *Lajpat Rai v Emperor* AIR 1928 Lah 245, 29 Cr LJ 899 (SB) ; *Chamapati v Emperor* AIR 1932 Lah 98, 34 Cr LJ 473 (SB) ; *Devi Shaem Sharma v Emperor* AIR 1927 Lah 594, 28 Cr LJ 794 ; *Ram P Sadaranuni v Emperor* AIR 1945 Sind 106, 46 Cr LJ 674 .

64 *Lajpat Rai v Emperor* AIR 1928 Lah 245 (SB) .

65 *MLC Gupta v Emperor* AIR 1936 All 314, 316, 37 Cr LJ 599 (SB).

66 *Raghu Pradhan v State* (1975) Cut LT 233, (1975) Cut WR 2, (1975) OJD 92 ; *GV Godse v Union of India* 1971 Cr LJ 324, p 340, AIR 1971 Bom 56, (1973) Raj LR 637 (Del) ; *PK Chakravarty v King-Emperor* AIR 1926 Cal 1133, 27 Cr LJ 1154 ; *MLC Gupta v Emperor* AIR 1936 All 314, 37 Cr LJ 599 (SB) .

67 *Lalai Singh Yadav v State of Uttar Pradesh* (1975) All Cr C 376 (SB) .

68 *Annie Besant v Advocate-General of Madras* AIR 1919 PC 31, p 38 .

69 *MLC Gupta v Emperor* AIR 1936 All 314, p 316 (SB) .

70 *PK Chakraverty v King-Emperor* AIR 1926 Cal 1133 .

71 *MLC Gupta v Emperor* AIR 1936 All 314, p 317 (SB) .

72 *Annie Besant v Advocate-General of Madras* AIR 1919 PC 31, p 38 ; *PK Chakraverty v King-Emperor* AIR 1926 Cal 1133 ; *Kali Charan v King-Emperor* AIR 1927 All 649 (SB) ; *Chamupati v Emperor* AIR 1932 Lah 98 (SB) ; *Shib Sharma v Emperor* AIR 1941 Oudh 310, 42 Cr LJ 429 ; *Emperor v Banomali Mahendra* AIR 1943 Pat 382 ; *Ram P Sadaranjani v Emperor* AIR 1945 Sind 106, 46 Cr LJ 674 .

73 *Kanchanlal Chunilal v Emperor* AIR 1930 Bom 177, 31 Cr LJ 1103 .

74 *MLC Gupta v Emperor* AIR 1936 All 314, p 316 (SB) ; *Harnam Das v State of Uttar Pradesh* AIR 1957 All 538, p 540, (1957) Cr LJ 912 .

75 *Vishambhar Dayal Tripathi v Emperor* AIR 1941 Oudh 33, p 41 ; *Shib Sharma v Emperor* AIR 1941 Oudh 310 .

76 *Kali Charan Sharma v King-Emperor* AIR 1927 All 649, p 652 .

77 Re *Amrita Bazar Patrika Press Ltd*(1920) 47 Cal 190, 54 IC 578, 23 CWN 1057 (SB).

78 *PK Chakraverty v King-Emperor* AIR 1926 Cal 1133, p 1135 ; **relyingon** Re *Amrit Bazar Patrika Press Ltd*AIR 1920 Cal 478 (SB) ; *Joy Chandra v Emperor* 38 ILR Cal 214 ; *Annie Besant v Advocate-General of Madras* AIR 1919 PC 31 .

79 *Raghu Pradhan v State* (1975) Cut LT 233, (1975) Cut WR 2, (1975) OJD 92 ; *GV Godse v Union of India* (1971) Cr LJ 324, p 340, AIR 1971 Bom 56 .

80 *Express Publications (Madurai) Ltd v State of Orissa* (2006) Cr LJ 2548 (Ori) .

81 *Iswari Prasad Sharma v King-Emperor* AIR 1927 Cal 747, 28 Cr LJ 897 ; *Maniben Liladhar Kera v Emperor* AIR 1933 Bom 65 ; *Emperor v Banomali Maharana* AIR 1943 Pat 382 .

82 *Ramesh s/o Chotalal Dalal v Union of India* AIR 1988 SC 775 .

83 *Narayan Vasudev Phadke v Emperor* AIR 1940 Bom 374, p 391 .

84 *Vishambhar Dayal Tripathi v Emperor* AIR 1941 Oudh 33, p 41, 47 Cr LJ 40 ; *Maniben Liladhar Kera v Emperor* AIR 1933 Bom 65, p 68 .

85 *Chandanmal Chopra & Anor v State of West Bengal* AIR 1986 Cal 104, (1986) Cr LJ 182 (Cal) .

86 *State of Andhra Pradesh v P Sugar* AIR 1968 SC 1379, p 1382 .

87 For detailed commentary see *Sohoni'sCodeofCriminalProcedure*, twenty-first edn, Lexisnexis.

88 *Akbaruddin Owaisi v Government of Andhra Pradesh* 2013 (6) ALT 101 (AP) .

89 *Swaraj Thackeray v State of Jharkhand* 2008 Cr LJ 3780, p 3785 (Jhar) .

90 *R v Tribhovandas* 33 ILR Bom 77 .

91 *R v Tribhovandas* 33 ILR Bom 77, p 82, 85 ; *R v Virumal Begraj* 11 Cr LJ 583, 4 SLR 55 .

92 *Emperor v Bal Gangadhar Tilak* 8 Cr LJ 281 ; *Vishambhar Dayal Tripathi v Emperor* AIR 1941 Oudh 33, 42 Cr LJ 40 .

93 *GV Godse v Union of India* (1971) Cr LJ 324, p 340, AIR 1971 Bom 56 (SB) .

94 *Ibid.*

95 *Emperor v Benomali Maharana* AIR 1943 Pat 382 ; *State of Bihar v Ghulam Sarwar* AIR 1965 Pat 393, p 397, 1965 BLR 613, (1965) 2 Cr LJ 401 (the circumstances attending the publication of the writing must also be taken into consideration); *GV Godse v Union of India* (1971) Cr LJ 324, p 340, AIR 1971 Bom 56 (SB) ; *Maniben Liladhar Kera v Emperor* AIR 1933 Bom 65 ; *Iswari Prasad Sharma v King-Emperor* AIR 1927 Cal 747, 28 Cr LJ 897 .

96 *GV Godse v Union of India* (1971) Cr LJ 324, p 340, AIR 1971 Bom 56 (SB) .

97 *RV Bhasin v State of Maharashtra* 2012 Cr LJ 1375 (Bom) (FB), 2010 (1) Bom Cr (Cri) 257 (FB), 2010 (1) All MR (Cri) 357 .

98 *Ramesh s/o Chotalal Dalal v Union of India* AIR 1988 SC 775 .

99 *Balbir Singh & Anor v State of Uttar Pradesh* (2000) Cr LJ 590 (SC) ; *Mohd Khalid Hussain v State* (2000) Cr LJ 2949 (AP) .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

[99a][S. 153 -AA.

Punishment for knowingly carrying arms in any procession or organising or holding or taking part in any mass drill or mass training with arms.--

Whoever knowingly carries arms in any procession or organizes or holds or takes part in any mass drill or mass training with arms in any public place in contravention of any public notice or order issued or made under section 144 -A of the Code of Criminal Procedure, 1973 (2 of 1974) shall be punished with imprisonment for a term which may extend to six months and with fine which may extend to two thousand rupees.

Explanation.--"Arms" means articles of any description designed or adapted as weapons for offence or defence and includes fire arms, sharp edged weapons, *lathis*, *dandas* and sticks.]

Comments

1. Scope

The purpose for inserting this section in the Code is to make the contravention of any public notice or order issued under s 144 -A of the CrPC punishable under the IPC .1153 Therefore, whoever under this section in the IPC contravenes any such public notice or order is made liable under the section.

2. 'Whoever'

Commentary under the same heading in s 144, *ante*, may be referred to.

3. 'In any Public Place'

Commentary under heading 'in a Public Place' in s 159, *post*, may be referred to.

4. 'Any Public Place in Contravention of any Public Notice or Order Issued or made under Section 144A of the Code of Criminal Procedure 1973'

Section 144A of the CrPC may be referred to.

5. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and triable by any magistrate.

99a a Inserted by the Code of Criminal Procedure (Amendment Act), 2005, s 44(a) .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

[1][S. 153B.

Imputations, assertions prejudicial to national integration.--

(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise,--

(a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India, or

(b) asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India, or

(c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes, or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Whoever commits an offence specified in sub-section (1), in any place of worship or in

any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.]1154

Comments

1. Scope

Propaganda, that members of any particular community should be deprived of their rights as citizens of India, and propaganda, regarding the obligations of any class of persons by reason of their being the members of any religion, race, language or regional group or caste or community, is prejudicial to the maintenance of communal harmony and to the integrity of the nation. This section makes special provisions, in this Code, to deal effectively with persons engaged in such activities. Thus the section which is couched in the very wide language, supplements the provisions of ss 153A and 295A of this Code.

When the mention of a sentence in a book relating to Indian history that 'Oriya is a younger sister of Bengali', cannot be said to be in a derogatory or defamatory sense in the context of the entire chapter, more particularly in view of fact that said sentence was promptly deleted with apology, continuance of proceedings for defamation against eminent writer who was above 75 years of age, would amount to abuse of process of the court, hence, liable to be quashed.[2]

The intention of the impugned publication in the newspaper was to incite hatred between the Sikkimese and non-Sikkimese people, thus, both the editors and the publishers were liable under s 153B, IPC . Conviction of the accused persons under s 153B, IPC was held proper. A sum of Rs. 3000/- was imposed as fine.[3]

The offence under s 153B(1)(c), IPC also brings within its ambit the publisher of an offending article.[4]

The requirement of passing an order of forfeiture of a book, presupposes that the book contains any matter the publication of which is punishable under ss 124A or 153A or 153B or 292 or 293 or 295A of the IPC, for the State Government to declare that every copy of such book be forfeited to the Government. The power can only be exercised and notification can only be issued if the Government forms an opinion that the publication contains matter which is in an offence under any of the sections of the IPC as aforestated.[5]

2. Procedure

Section 196, CrPC may be referred to.[6] Prior sanction, either of the State Government or of the Central Government, is necessary before taking cognizance of the offence under ss 153A and 153B of the IPC . Where no sanction as envisaged under s 196(1)(a) and s 196(1A)(a), CrPC for prosecution of the Central or State Government was obtained, order of taking cognizance of the two offences *i.e.* under ss 153A and 153B, IPC was quashed.[7]1155

3. Charge

The following form of charge may be adopted:

I..... (*name and designation of the Magistrate, etc.*) hereby charge you.....(*name of the accused*) as follows:

That you on or about.....(*date*) at.....(*Time or time in an assembly engaged in the performance of religious worship or ceremony specify as the case may be*) at.....(*name or place of worship*) by words (*spoken or written or by signs or by visible representations or otherwise*) made (*or published*) an imputation that.....(*specify the class of persons*) cannot by reason of their being members of religious (*or racial, language or regional*) group or caste or community bear true faith and allegiance to the Constitution of India (*or upheld the sovereignty of India*) or asserted (*counseled, advised, propagated or published*) that.....(*the particular class of persons*) shall by reason of their being members of any religious (*racial, language or regional*) group or caste or community be denied or deprived of their rights as citizens of India or made (*or published*) an assertion (*counsel, plea or appeal*) concerning the obligation of .....(*class of persons*) by reason of their being members of any religious (*racial, language or regional*) group or caste or community and such assertion (*counsel, plea or appeal*) caused (*or was likely to cause*) disharmony (*or feelings of enmity or hatred or ill-will*) between such members and other persons and thereby committed an offence punishable under s 153B (*or s153B (2), IPC, as the case may be*), and within my cognisance.

And I hereby direct that you be tried by this court on the said charge.

1 Inserted by Act 31 of 1972, s 2 .

2 *Express Publications (Madurai) Ltd v State of Orissa* (2006) Cr LJ 2548 (Ori) .

3 *Sikkim Social Empowerment Association v Anjan Upadhyaya* 2014 Cr LJ 2534, p 2542 (Sikk) .

4 *Sikkim Social Empowerment Association v Anjan Upadhyaya* 2014 Cr LJ 2534, p 2541 (Sikk) .

5 *Sangharaj Damodar Rupawate v Nitin Gadre* 2007 Cr LJ 3860, p 3863 (Bom) (FB) .

6 For details, see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

7 *Swaraj Thackeray v State of Jharkhand* 2008 Cr LJ 3780, p 3785 (Jhar) .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 154.

Owner or occupier of land on which an unlawful assembly is held.--

Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the

principal officer at the nearest police-station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

Comments

1. Scope

This section, which is of an exceptional nature, is intended to impose on all owners or occupiers of land, the duty of maintaining the public peace and preventing unlawful assemblies and riots on their estates, and to render the former liable for any1156 dereliction in the discharge of this duty.[8] The section declares, in the first place, that the owner of that land, on which a riot or unlawful assembly is committed or held, becomes punishable, if he or his agent or manager, knowing that such offence is being committed or has been committed or having reason to believe that it is likely to be committed, does not give the earliest notice thereof in his or their power at the nearest police station. This part of the section is extremely comprehensive in character, and embraces not only the past and present, but also the future. Secondly, it makes it punishable on the part of the owner or his agent or manager, if he or they, 'having reason to believe that a riot was about to be committed', do not use all lawful means in his or their power to prevent it. Thirdly, it imposes the same penalty, if in the event of a riot taking place he or they do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

2. Analogous Provision

The section does not authorise police officers to issue a notice in the nature of temporary injunction restraining the owners or persons who are in possession of any (agricultural) land.[9] A somewhat similar provision in part but otherwise more comprehensive has been made in s 40 of the CrPC, which requires every person residing in a village to communicate forthwith to the nearest magistrate or to the officer in charge of the nearest police station, whichever is nearer any information which he may possess respecting the commission of, or intention to commit in or near such village any non-bailable offence or any offence punishable under ss 143, 144, 145, 147 and 148 of the IPC .[10] Village in that section includes village lands. Omission to give notice or, furnish information required by s 40, CrPC, is an offence punishable under s 176, IPC .

Three Breaches of Duty

The section, therefore, contemplates three different breaches of duty:

(i) Omission to give notice;
(ii) Abstention from prevention the offence;
(iii) Negligence to suppress it.

The provisions of the section are of an exceptional nature in the sense that they cast a vicarious liability on an absentee landlord for the acts or omissions of his agents or servants.[11] Great caution is, therefore, required before proceedings are started against any person under this section.[12]

3. Ingredients of the Offence

The ingredients of an offence under this section are as under

(i) Holding of unlawful assembly or commission of a riot.1157
(ii) Accused is the owner or occupier of the land, or has, or claims to have an interest in the land, upon which the unlawful assembly is held or the riot is committed.
(iii) Either the accused or his agent or manager knew that the offence was being or had been committed, or had reason to believe that it was likely to be committed.
(iv) On having knowledge that the offence was being or had been committed, or having reason to believe that it was likely to be committed, the accused does not give earliest information to the principal officer of the nearest police station.
(v) The accused having reason to believe that the offence is about to be committed, does not use all lawful means in his power to prevent the offence, or in the event of its taking place does not use all lawful means in his power to disperse the unlawful assembly or suppress the riot.[13]

4. 'Whenever'

The holding of each unlawful assembly or riot constitutes a separate offence, for *e.g*., the use of premises on six different days for unlawful assemblies is not a continuous offence, but six offences.[14]

5. Persons Responsible under the Section

The persons made responsible under this section are the: (a) owner; (b) occupier; or (c) any person having or claiming interest in land upon which an unlawful assembly has been held or a riot committed.

The section is of exceptional nature, and is intended to impose on all landowners or occupiers, resident or non-resident, and their agents, the duty of maintaining the public peace and preventing unlawful assemblies and riots on their estates, and to render the former liable for any dereliction in the discharge of this duty.[15] It is impossible to punish in every case every person who has any interest in the land. The responsibility must depend upon the fact of the person, who caused the riot being himself the person, who has an interest in the land, or an agent or manager of such person; and one of the facts to be proved, is whose agent or manager the person who fomented the riot is. It is not everyone having an interest in land, who falls within the purview of the section, but only such persons as have control over the management of the property.[16] An absent co-sharer in land who takes no active part in its management, ought not to be convicted of an offence under this section (or s 155, IPC), where a resident co-sharer has been punished for the offence.[17]

6. Adopted Sons when not Liable

Where three Hindu women had the management of an estate and were responsible for the appointment of the manager, who had fomented a riot, and their adopted sons had1158 nothing to do with such appointment, though they took some share in the management, it was held that the ladies were alone liable under this section.[18]

7. Relevancy of *Mens Rea* or Knowledge

Knowledge of the landholder or of his agent is the first essential element of an offence under this section.[19] But knowledge on the part of the owner or occupier of the land, of the acts or intentions of the agent, is not an essential element of an offence, under this section and he may be convicted under it, though he may be in entire ignorance of the acts of his agent or manager.[20]

Seton Karr J, has observed in *Queen v Hurnath Roy* :[21]

> A Zamindar by leaving his estate and residing at the Presidency cannot avoid his duties and liabilities, and it is his business to appoint fit and proper persons to manage his local affairs, and to enable him to perform the duties imposed on him by the legislature. Moreover, it is the Zamindar's duty to be regularly acquainted with all that goes on in his zamindari.

Where, however, the agent or manager himself had no knowledge or no reason to believe that an unlawful assembly or riot would be held or committed; it has been held that the absentee-owner cannot be held liable.[22]

To Prevent the Offence or Disperse Unlawful Assembly or Suppress Riot

By the mere fact that the landholder did not reside on his estate, cannot aid him in avoiding the liability which the law imposes upon him.[23] But where the charge is of failure to prevent or suppress a riot, there must be evidence to show that the landholder or his agent had 'lawful means in his or their power' to prevent or suppress it and had neglected to use them. It cannot be expected that a person should personally attempt to suppress a riot between two parties, who suddenly and in great numbers, and armed with deadly weapons, choose to have a stand-up fight. The only means, in his power, is to invoke the aid of the police and if he does so, he cannot be convicted under this section.[24]

8. Procedure

The offence under this section is non-cognizable and summons may be issued in the first instance. It is bailable, but not compoundable, and is triable by any magistrate.1159

9. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate etc.*) hereby charge you (*name of accused*) as follows:
>
> That on or about the.....day of.....an unlawful assembly was held or a riot was committed upon land in village (*name of village*) of which you are the owner (*or occupier, or in which you claim an interest*) and you (*or your agent or manager*) knowing that such offence was being committed (*or had been committed, or having reason to believe that it was likely to be committed*) did not give the earliest notice thereof, in your power, to the principal officer at the nearest police station, and did not use all lawful means in your power to prevent it or to disperse or suppress the riot or unlawful assembly, and thereby committed the offence punishable under s 154 of the IPC, and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

The charge under this section ought to be clear and distinct.[25]

10. Proof

To prove an offence under this section, the following facts must be established:

(i) That an unlawful assembly or riot took place on the land which is owned or occupied by the accused or in which he claims an interest;
(ii) That he, knowing that such offence is being, or has been, committed, or having reason to believe that it is likely to be committed, did not give the earliest notice thereof in his power to the principal officer at the nearest police station;
(iii) In the case of his having reason to believe that it was about to be committed, he did not use all lawful means in his power to prevent it; and
(iv) In the event of its taking place, he did not use all lawful means in his power to disperse or suppress the riot or unlawful assembly.

Direct Evidence Rarely Available

Direct evidence on these points would be very difficult to obtain, but it is not even necessary. If from the surrounding circumstances of the case, the only reasonable inference that can be drawn is that the accused had the necessary information and failed to act, as directed under the section, conviction would be legal.[26]

In *Brae v Queen-Empress* ,[27] Mitter J, said:

> No doubt this fact (*i.e. The* accused had reason to believe that a riot was likely to be committed) can very seldom be established by direct evidence, but there must be circumstances from which it may be reasonably inferred.

8 *Harendra Lal v R* 1 Cr LJ 866, 8 CWN 908 ; *Kazi Zeamuddin v R* 28 ILR Cal 504, p 516 .

9 *MK Ibrahim Shariff v Sub-Inspector of Police* (1979) Cr LJ 175, p 177 (Kant), (1978) 2 Kant LJ 437 .

10 Code of Criminal Procedure 1973, s 40(1)(c) .

11 *Kazi Zeamuddin Ahmed v Queen-Empress* 28 ILR Cal 504, p 508 .

12 *Nripendra Bhushan Roy v Gobinda Bandhu Majumdar* AIR 1924 Cal 1018, p 1024, 25 Cr LJ 1258 .

13 *Nripendra Bhusan Roy v Gobindha Bandhu Majumdar* AIR 1924 Cal 1018, p 1021 .

14 *Farmer v Cluer* (1904) 68 JP 56 .

15 *Harendra Lal v R* 1 Cr LJ 866, 8 CWN 908 **following***Kazi Zeamuddin v R* 28 ILR Cal 504, p 516 .

16 Re *Radha Nath Chowdhry*(1880) 7 Cal LR 289.

17 *Harendra Lal v R* 1 Cr LJ 866, 8 CWN 908 .

18 *Siva Sundari Chowdharani v R* 39 ILR Cal 834, 13 Cr LJ 221 .

19 *Nripendra Bhusan Roy v Gobinda Bandhu Majumdar* AIR 1924 Cal 1018, 25 Cr LJ 1258 .

20 *Empress v Payag Singh* 12 ILR All 550 **followed***Kazi Zeamuddin Ahmed v Queen-Empress* 28 ILR Cal 504 . 'There seems to be no ground for holding that s 154 is intended to punish the landholder, when his agent has not rendered himself liable to the criminal law, and that when the agent has done so, then his liability is, an end. On the contrary, the provisions of s 154 appear to me to be intended to impose on non-resident landholders and their agents the duty of maintaining the public peace and preventing unlawful assembly and riots on their estate, and to render the former liable for any dereliction in the discharge of this duty'. Per Rampini J, *ibid,* p 515 on a difference of opinion between Ameer Ali J, and Pratt J.

21 *Queen v Hurnath Roy* (1865) 3 WR (Cr) 54 .

22 *Nripendra Bhusan Roy v Gobinda Bandhu Majumdar* AIR 1924 Cal 1018, p 1022 .

23 *Queen v Surroop Chunder Paul* 12 WR 75, p 77 ; *Kazi Zeamuddin Ahmed v Queen-Empress* 28 ILR Cal 504, p 515 ; *Empress v Payag Singh* 12 ILR All 550 ; *Nripendra Bhusan Roy v Gobinda Bandhu Majumdar* AIR 1924 Cal 1018, p 1022, 25 Cr LJ 1256 .

24 *Queen v Surroop Chunder Paul* 12 WR 75, 77.

25 *Re GGD Betts* 15 WR 6(1); *Pramatha Nath v R* AIR 1914 Cal 634 ((1)), 15 Cr LJ 191 .

26 *Raja Bhagwan Bakshi v Emperor* 3 Cr LJ 27, p 29 .

27 *Brae v Queen-Empress* 10 ILR Cal 338 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 155.

Liability of person for whose benefit riot is committed.--

Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land, respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot,1160 or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

Comments

1. Scope

This section is more or less an aggravated form of the offence under the previous section, and deals with the liability of a person for whose benefit a riot is committed. Facts, similar to those mentioned under s 154, IPC, must be proved in support of a charge under these sections, but the riot must be committed with reference to certain land, and for the benefit of the owner of such land. The interest in the land need not be as large as in cases under s 154 ; any interest will do.[28]

2. Liability in a Case of Sudden Riot

But a landholder ought not to be made liable under this section of a sudden and unpremeditated riot, which, there was no reason to infer, he could have anticipated that it was likely to happen.[29]

A person not claiming any interest in the land for himself cannot be convicted under this section.[30]

When there is no evidence to show that an absentee co-sharer in a *zamindari* takes an active part in the management, and a resident co-sharer has been sentenced to pay a fine under s 155, IPC, the non-resident *zamindar* ought not to be convicted under this section.[31]

3. Procedure

It is the same as in the case of an offence under s 154, IPC .

28 *Queen v Hurnath Roy* 2 WR (Cr) 50 ; *Pramatha Nath Roy Chowdhary v Emperor* 15 Cr LJ 191, AIR 1914 Cal 634 .

29 *Queen v Hurnath Roy* 2 WR (Cr) 50 .

30 *Pramatha Nath Roy Chowdhary v Emperor* AIR 1914 Cal 634(1), 15 Cr LJ 191 .

31 *Harendra Lal Roy v King-Emperor* 1 Cr LJ 866, p 867 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 156.

Liability of agent of owner or occupier for whose benefit riot is committed.--

Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom,

the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed1161 was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

Comments

1. Scope

This section extends the provisions of the previous section to the agent or manager, who is made liable along with the owner or occupier. In order to constitute an offence under this section, it must be established: (a) that a riot was committed; (b) that it was committed for the benefit, or on behalf, of the person who was the owner or occupier of the land respecting which such riot took place; (c) that the accused had reason to believe that a riot was likely to be committed or the unlawful assembly which committed the riot was likely to be held; and (d) that he had not used all lawful means to prevent it. The third fact can very seldom be established by direct evidence, but there must be circumstances from which it may be reasonably inferred. As Pigot J pointed out, applying the sections which give the magistracy powers of such startling magnitude, it is incumbent upon those entrusted with the exercise of such powers to act not upon inferences or suspicions but upon evidence.[32]

2. Procedure

It is the same as in the case of an offence under s 154, IPC .

32 *Brave v Queen-Empress* 10 ILR Cal 338, p 341 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 157.

Harbouring persons hired for an unlawful assembly.--

Whoever harbours, receives or assembles, in any house or premises in his occupation or charge, or under his control any persons, knowing that such persons have been hired, engaged or employed, or are about to be hired, engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Comments

1. Scope

This section deals with harbouring, receiving or assembling persons hired, engaged or employed to join as or become, members of an unlawful assembly. It is of wider application than s 150 which refers to a particular unlawful assembly; in other words, when it is found that any person has, hired or engaged another to join as or become, a member of a particular unlawful assembly, he is liable for any offence committed by any member of that unlawful assembly in the same way as if he had been a member of such unlawful assembly or had himself committed such offence. On the other hand, this section provides for an occurrence, that may happen and makes the harbouring, receiving or assembling of persons, who are likely to be engaged in any unlawful assembly, an offence. There again, the law contemplates the imminence of an unlawful assembly and the proof of facts which in law would go to constitute an1162 unlawful assembly.[33] The section clearly refers to some unlawful assembly in the future. It provides for an occurrence which may happen and not one which has happened.[34]

2. 'Hired, Engaged or Employed'

To support a conviction under this section it must be shown that, for the purpose of an unlawful assembly, the accused had hired or engaged or employed other persons. The mere fact that the accused's servants come from a district, where men having a well-known character as *lathials* (people who used to carry and use *lathis* or strong, stout bamboo sticks) reside, and that they had been in his

service for some time before a riot took place, is not sufficient to support a conviction under this section.[35] Volunteers engaged in preparing salt from seawater cannot be said to have been hired, engaged or employed within the meaning of this section.[36]

3. 'Harbours'

For definition of the word 'harbour', refer to s 52A, IPC . This section is exempted from that definition, so that even the wife or husband of the person harboured may be liable under this section.

4. Procedure

The offence under this section is cognizable. In other respects, the procedure is the same as in the case of an offence under s 154, IPC .

5. Charge

The following form of charge may be adopted:

> I..... (*name and designation of the Magistrate etc*), hereby charge you, (*name of the accused*) as follows:
>
> That you on or about.....the day of.....harboured (*or received or assembled*) in the house (*or premises*).....(*give details*) in your occupation (*or charge or under your control*).....(*name*) knowing that he has been hired (*or engaged or employed or was about to be hired, engaged or employed*) to join (*or become*) a members of an unlawful assembly and thereby committed an offence punishable under s 157, IPC, and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

33 *Ram Lohchan Sarcar v Queen-Empress* 29 ILR Cal 214, p 217 .

34 *Radhaaraman Saha v Emperor* AIR 1931 Cal 712, 58 ILR Cal 1401, 33 Cr LJ 62 .

35 *Radha Nath Chaudhry* 7 Cal LR 289; *C Samuel Aaron v Emperor* AIR 1931 Mad 440, 32 Cr LJ 664 .

36 *C Samuel Aaron v Emperor* AIR 1931 Mad 440, 32 Cr LJ 664 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 158.

being hired to take part in an unlawful assembly or riot.--

Whoever is engaged, or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in Section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both,1163

or to go armed.--and whoever, being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

The offence under this section differs from that under s 150, IPC, in the sense that an attempt to get hired is equally punishable with the offence of actually being hired. an offer to go armed, being hired, or going armed, renders the offence an aggravated one, more severely punishable in consequence.

2. Procedure

The procedure is the same as in the case of an offence under the previous section.

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 159.

Affray.--

When two or more persons, by fighting in a public place, disturb the public peace, they are said to "commit an affray".

Comments

1. Scope

This section defines the offence of affray, which is the last of the six species punishable under this

chapter, *i.e.,* ch 8, and the next section lays down the penalty therefor. When two or more persons (including the accused) fight in a public place, causing disturbance of the public peace, they can be said to commit an affray. The essence of the offence lies in the terror (*i.e.*, disturbance) which it causes to the public.[37] 'Affray' as defined in this section, postulates the commission of a definite assault and a breach of the public peace.[38] But when two persons fight in the public place and cause hurt to each other, they ought to be tried for causing hurt, and not for the minor offence of affray.[39] Where a person is charged with causing grievous hurt under s 325 and is acquitted of that offence, he cannot be convicted of the offence of affray in the absence of a finding as to how the public peace was disturbed.[40]1164

2. English Law

If a person uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, he is guilty of affray. A person is, however, guilty of affray only if he intends to use or threaten violence or is aware that his conduct may be violent or threaten violence. Affray may be committed in private as well as in public places.

A person guilty of affray is liable on conviction on indictment to imprisonment for a term not exceeding three years or to a fine or to both, or on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.

A person should not be charged with the offence unless he uses or threatens unlawful violence towards another person actually present at the scene and his conduct is such as would cause fear to a notional bystander of reasonable firmness.[41]

3. Singapore Law

A fight requires that there be an exchange of blows between the persons involved and a mere quarrel is not enough.[42]

4. Ingredients

To constitute an affray: (a) there must be fighting between two or more persons (including the accused);[43] (b) such fighting must be in a public place;[44] and (c) the fighting must disturb the public peace.[45]

An offence of affray in essence consists of three ingredients, the first being fighting by two or more persons, secondly, the fighting must take place in a public place and thirdly, such fighting must also result in disturbance of the public peace. Only if such ingredients are satisfied an offence of affray can be said to have occasioned for which the persons causing the same would be responsible.[46]

One does not expect, in an affray, to find specific evidence as to the acts of each fighter. Only general evidence can be given as to the accused taking part in it.[47] It is not necessary to prove that a particular individual beat a particular individual. It is1165 enough to prove that two or more persons fought together in a public place and thereby disturbed public peace.[48]

In the instant case, PW1 and PW2 categorically stated that there was a free fight between 'A' group and 'B' group, and both the groups resorted to catch hold of each other. PW1 further stated that the act of 'A' group and 'B' group resulted in disturbance to the public peace. There was no reason to disbelieve PW1 who was an independent and disinterested witness. The conviction of the accused petitioner under s 159, IPC was held proper.[49]

5. 'Affray' Distinguished from a 'Riot'

Affray differs from a riot in the sense that an 'affray' may be committed by two persons whereas a riot requires at least five persons. Secondly, an 'affray' cannot be committed in a private place while a riot may take place anywhere. Where a quarrel arose between four persons stationed, at the entrance of a temple for the purpose of collecting fees, and three others, who wished to enter the temple without previous payment of the fee demanded, it was held that the offence committed was an affray, and not a riot.[50]

6. 'Affray' Distinguished from an 'Assault'

An affray is committed by fighting in a public place while an assault may be committed anywhere. What would be an assault in a private place may become an affray in a public place. Affray is an offence against public tranquillity while an assault is an offence affecting the human body. an affray is a bilateral affair in which both parties should participate. If one side is aggressive and the other passive, there may be an assault, but not an affray.[51] The offence of affray postulates the commission of definite assault and breach of peace.[52]

7. 'Affray' Distinguished from 'Public Nuisance'

The ingredients of an offence under s 290, IPC (public nuisance) are totally different from those of the offence of an affray. It is doubtful whether a person, who is charged under s 160, IPC, can ever be convicted under s 290, IPC .[53]

8. 'Two or more Persons'

An 'affray', being a 'little war', requires two sides to fight.[54] So, for a charge under s 159, IPC, there must be two or more previous concerned, in the absence of a finding as to who the second person was, the charge cannot be sustained.[55]1166

9. 'By Fighting'

The term 'fight' is not defined in the IPC, but everyone knows what a fight is and that it takes two to make a fight.[56] The expression 'fighting', in s 159, IPC, is used in its ordinary sense and it means a combat or quarrel involving exchange of some force or violence, if not blows. Mere verbal quarrel or vulgar abuse sans violence cannot be construed as fighting which contemplated bilateral use of violence by two competing parties. Even if there is no exchange of blows, there should be exchange of some violence between the two contending parties before it can be said that the parties are fighting. If one person uses violence against another and the other person merely remains passive, it cannot be said that there is a fighting between the two persons. So also if neither person uses violence against the other but both the persons merely indulge in verbal abuses, it does not amount to fighting.[57]

10. Use of Weapons not Necessary

Where one person attacks and the other defends, they can legally be said to be fighting within the meaning of this section.[58] But it will not amount to an affray when the party, who is assaulted, submits to the assault without resistance,[59] or tries to escape, and, thus, there is no fight between the two.[60] There can be a quarrel without fighting. Mere quarreling or abusing, in a public place, without exchange of blows, is not sufficient to attract the application of s 160 .[61] It is not necessary that weapons should be used in a fight; an affray can be a fight even if only one party, in the fight, is successful in landing a blow on his opponent.[62] But it must be established that each one of the accused took an active physical part in the process of fighting.[63]

11. 'In a Public Place'

To constitute an affray, the fighting must be in a public place.[64] Whether a place is public or not, does

not necessarily depend on the right of the public, as such, to get to the place, though, of course, a place, to which the public can go as of right, must be a public place. The place, where the public are actually in the habit of going, must be deemed to be public place for the purpose of the offence of affray, for instance,1167 places, like railway platforms, theatre halls and open spaces, resorted to by the public, for purposes of recreation, amusement, *etc.*[65] The entrance to a place of worship was held to be a public place,[66] but not a *chabutara* (platform), to which public had no access, either by right or by permission or by usage or otherwise.[67] The criminal court is not charged with the task of evaluating the comparative claims of the parties as to the public user of the site in question. Its finding must be distinct and clear that the scene of occurrence is a public place.[68]

12. 'Disturb the Public Peace'

In order to constitute the offence of an affray, there must be disturbance of the public peace due to the fighting in a public place.[69] The gist of the offence is the terror which it causes to the public.[70] In a prosecution under s 159 there must be positive evidence of public peace having been disturbed which would mean that by the action of the accused the even tempo of life of the public was disturbed resulting in affecting the peace and tranquillity of the locality.[71] There must be a definite disturbance of the public peace due to the fight in the public place to make the offence affray. Merely causing inconvenience to the public is not sufficient.[72]

37 *Babu Ram v Emperor* AIR 1931 All 9, 32 Cr LJ 1269 .

38 *Kogarashetty v State of Mysore* 1971 Cr LJ 1041, (1971) Mad LJ (Cr) 246 ; *Sheoraj Singh v State* (1978) All Cr C 128, p 129 ; *Podan v State of Kerala* (1961) 1 Cr LJ 339, p 340, (1961) KLT 698 .

39 *Emperor v Nga Ywe* Cr LJ 498, p 499; *P Rami Reddy v Chinta Chinna Narasi Reddy* AIR 1938 Mad 924, 40 Cr LJ 86 .

40 *Baluchami v Emperor* AIR 1933 Mad 843 ; **but see** 35 Cr LJ 76; *Langur v Emperor* 13 Cr LJ 718 .

41 *I v Director of Public Prosecutions M v Director of Public Prosecutions H v Director of Public Prosecutions* (2002) 1 AC 285 . *[Vide Halsbury's Laws of England].*

42 *Tan Chee Wee v PP* (2004) 1 SLR 479 .

43 *P Rami Reddy v Chinta Chinna Narasi Reddy* AIR 1938 Mad 924, 40 Cr LJ 86 ; *Podan v State of Kerala* (1962) 1 Cr LJ 339, p 340, (1961) KLT 698 ; *Korgashetty v State of Mysore* (1971) Cr LJ 1041, (1971) Mad LJ (Cr) 246 ; *Raghu v State* (1975) 1 Cut WR 82, (1975) 41 Cut LT 233 ; *Sheoraj Singh v State* (1978) All Cr C 128, p 129 .

44 *Podan v State of Kerala* (1962) 1 Cr LJ 339, p 340, (1961) KLT 698 ; *Korgashetty v State of Mysore* (1971) Cr LJ 1041, (1971) Mad LJ (Cr) 246 ; Re *Thommeni Nadar*(1974) Cr LJ 1116, p 1117, (1974) Mad LW (Cr) 6.

45 *Podan v State of Kerala* (1962) 1 Cr LJ 339, p 340, (1961) KLT 698 ; *Korgashetty v State of Mysore* (1971) Cr LJ 1041, (1971) Mad LJ (Cr) 246 ; *Raghu Pradhan v State* (1975) 1 Cut WR 82, (1975) 41 Cut LT 233 ; *Sheoraj Singh v State* (1978) All Cr C 128, p 129 ; *Ranganna v State* 2010 Cr LJ 1275, p 1277 (AP) ; *C Subraqyudu v State of AP* 1996 Cr LJ 1472 (AP) ; *Gadadhar Guru v State of Orissa* 1989 Cr LJ 2080 (Ori) .

46 *Gadadhar Guru & Anor v State of Orissa* (1989) Cr LJ 2080 (Ori) .

47 *Mohan Sheikh v Queen-Empress* 21 ILR Cal 392, p 398 .

48 1 Weir 68; *Re Muthuswami Iyer*AIR 1937 Mad 286, p 287 .

49 *Ranganna v State* 2010 Cr LJ 1275, p 1277 (AP) .

50 1 Weir 68; but See *Lokenath v King* 18 WR 2, p 3 .

51 *Jodh v State* AIR 1952 All 788, p 794, 53 Cr LJ 1282 .

52 *Koraga Shetty v State of Mysore* (1971) Cr LJ 1041, (1971) Mad LJ (Cr) 246, (1971) Mys LJ 383 ; *Sheoraj Singh v State* 1978 All Cr C 128, p 129 .

53 Re *Govinde Naidu*AIR 1959 Mad 513, (1959) Cr LJ 1466 .

54 Re *Rama Kundumban*AIR 1950 Mad 408, p 409, 51 Cr LJ 979 .

55 *Baluchami v Emperor* AIR 1933 Mad 843, 35 Cr LJ 76 ; *Podan v State of Kerala* (1962) 1 Cr LJ 339, 340, (1961) KLT 698 ; *Raghu Pradhan v State* (1975) 1 Cut WR 82, (1975) 41 Cut LT 233 .

56 *Atma Singh Kahan Singh v State* AIR 1955 Punj 191, p 192, 56 Cr LJ 1283 ; *P Rami Reddy v Chinta Chinna Narasi Reddy* AIR 1938 Mad 925, 40 Cr LJ 86 .

57 *Magam Chinna Subbarayadu v State* (1975) Andh LT 332 .

58 *Baburam v Emperor* AIR 1931 All 8, p 9, Cr LJ 1269.

59 *Podan v State of Kerala* (1962) 1 Cr LJ 339, (1961) KLT 698 ; Re *Kundumban*AIR 1950 Mad 408, p 409, 51 Cr LJ 979 ; *Jodhey v State* AIR 1952 All 789, 53 Cr LJ 1282 ; *Subbaraudu v State of Andhra Pradesh* (1996) Cr LJ 1472 (AP) .

60 *Balakrishna Shetty v State of Mysore* (1966) Mys LJ 528 .

61 *Sheoraj Singh v State* (1978) Cr C 128, p 129 ; *Korgashetty v State of Mysore* (1971) 1 Mys LJ 383, (1971) Cr LJ 1941, (1971) Mad LJ (Cr) 246 ; *Puran Chand v State* 65 Punj LR 813, p 814 ; *Jagannath Sah v Emperor* AIR 1937 Oudh 425, 38 Cr LJ 169 ; *Ganesh Das v Emperor* AIR 1928 Lah 813 ((1)) ; *Atma Singh Kahan Singh v State* AIR 1955 Punj 191, 56 Cr LJ 1283 ; *Crown v Atma Singh* AIR 1926 Lah 412, 27 Cr LJ 696 .

62 *Atma Singh v State* AIR 1955 Punj 191, p 192, 56 Cr LJ 1283 .

63 *Ratnam Pillai v Emperor* 1938 Mad WN 721 .

64 *Podan v State of Kerala* (1962) 2 Cr LJ 339, (1961) KLT 698 ; Re *Thommeni*(1974) Cr LJ 1116, p 1117, (1974) Mad LW (Cr) 6 (the court must give a clear and distinct finding that the scene of offence was a public place; if there is doubt, the accused is entitled to the benefit of doubt and he must be acquitted); *Sheoraj Singh v State* (1978) All Cr C 128, p 129 ; Re *Thommeni Nadar*(1974) LW (Cr) 6, (1974) Cr LJ 1116.

65 Re *Muthuswami Iyer*AIR 1937 Mad 286, p 287, 38 Cr LJ 588 ; **but see***Queen Empress v Srilal* 17 ILR All 166 ; *Sibimiva v Emperor* AIR 1925 Nag 123, p 124, 25 Cr LJ 1073 ; *Tulsidas v King-Emperor* AIR 1924 All 768, 25 Cr LT 1368 ; *Ramjank Patwa v Emperor* AIR 1937 Pat 276 .

66 1 Weir 68.

67 *Queen Empress v Srilal* 17 ILR All 166, p 167 .

68 Re *Thommeni Nadar*(1974) LW (Cr) 6, (1974) Cr LJ 1116.

69 *Podan v State of Kerala* (1962) 1 Cr LJ 339, p 340, (1961) KLT 968 ; *Korghashetty v State of Mysore* (1971) Cr LJ 1041, (1971) Mad LJ (Cr) 246 ; *Raghu Pradhan v State* (1975) 1 Cut WR 82, (1975) 41 Cut LT 233 ; *Sheoraj Singh v State* (1978) All Cr C 128, p 129 .

70 *Baburam v Emperor* AIR 1931 All 8, p 9, 32 Cr LJ 1269 ; Re *Muthuswami Iyer*AIR 1937 Mad 286, p 287 .

71 *Gadadhar Guru & Anor v State of Orissa* (1989) Cr LJ 2080 (Cr) .

72 *C Subbarraudu v State of Andhra Pradesh* (1996) Cr LJ 1472 (AP) ; *Podan v State of Kerala* (1962) 1 Cr LJ 339 .

Indian Penal Code (Act XLV of 1860)

Chapter VIII

Of Offences Against the Public Tranquillity

S. 160.

Punishment for committing affray.--

Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

Comments

1. Scope

The fifth and the last species of offence punishable under this chapter is affray. Section 159 , IPC defines the offence and this section lays down the penalty for it.1168

2. Meaning of Affray

'Affray' has been defined in s 159 of the IPC . The various elements are that there must be fighting by two or more persons, the fighting must be a public place and that fighting must disturb the public peace.[73]

Under the English Common Law an affray is the fighting of two or more persons in a public place, to the terror of Her Majesty's subjects, and is a misdemeanor at Common Law.[74] The word 'affray' is derived from the French word *effroi* (terror). In 3 Co Instt 158, it is said that 'an affray is a public offence to the terror of the King's subjects; and is an English word, and so called because it affrighteth and maketh men afraid; and that it is inquirable in a lett as a common nuisance'.[75] Under s 159 of this Code when two or more persons, by fighting in a public place, disturb the public peace, they are said to 'commit an affray'. The essence of an affray lies on as to now public a place is, and the disturbance of the public place.[76]

'Where one person attacks and the other defends, it is legally correct to say that the two persons are fighting and the case comes under the definition of affray. The gist of the offence consists in the terror it causes to the public'.[77] In a recent case, in England, it has been held that on a charge of making an affray, it is sufficient, in the absence of direct evidence that any subject of the Queen is put in fear or terror, to show that the circumstances were such that reasonable persons might be frightened or intimidated.[78]

3. Ingredients of the Offence

To constitute an affray:

(i) there must be fighting between two or more persons;
(ii) such fighting must be in a public place; and
(iii) the fighting must disturb the public peace.[79]

Only if such ingredients are satisfied, an offence of affray can be said to have been occasioned for which the person causing the same would be responsible.[80]

Thus, to constitute an offence under s 160 of the IPC, three ingredients must be satisfied; firstly, fighting must be between two or more persons, secondly, fighting must take place in a public place, and thirdly, such fighting must also result in disturbance of public peace. In the absence of even one of these ingredients, it cannot be stated that there was either an affray or the accused facing the trial should be held responsible for the same.[81]

1169In the instant case, B along with his party men had gone to the house of A and had assaulted A and his partymen. The occurrence took place outside the house of A, which was not a public place. It was only a private fight. It had not resulted in disturbance of public peace. No offence under s 160,

IPC was committed.[82]

Affray and Riot, Distinction

Affray differs from riot in that it may be committed by two persons whereas riot requires five or more. an affray cannot be committed in a private place, while a riot may take place anywhere.

Where a quarrel arose between four persons stationed at the entrance of a temple for the purpose of collecting fees, and three others who wished to enter the temple without previous payment of the fee demanded, it was held that the offence committed was affray and not riot.[83]

An affray may fall short of a riot, though many persons are engaged in it. Thus, if a number of persons meet at a fair or market or on any other lawful or innocent occasion, and happen, on a sudden quarrel, to begin fighting, they will not be guilty of riot, but only of a sudden affray of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention.[84] But as the explanation to s 141, IPC shows, an assembly which was not unlawful when it assembled, may subsequently become unlawful. So it is not always possible to draw a distinction between an unlawful assembly as a premeditated, and an affray as a sudden one.[85]

Affray and Assault, Distinction

An affray is committed by fighting in a public place, while an assault may be committed anywhere. What would be an assault in a private place may become an affray in a public place. Affray is an offence against public tranquillity; an assault is an offence affecting the human body. an affray is a bilateral affair in which both parties should participate. If one side is aggressive and the other passive, there may be an assault and not an affray.[86]

If the fighting results in the infliction of hurt (s 324, IPC) the person causing it should be tried for that offence, and not for the minor one under this section.[87]

Where a person is charged with causing grievous hurt under s 325, IPC and is acquitted of that offence, he cannot be convicted of the offence of affray in the absence of a finding as to how the public peace was disturbed.[88]

Affray and Public Nuisance

The ingredients of an offence under s 290, IPC (public nuisance) are totally different from those of the offence of affray. It is doubtful whether a person who is charged under s 160, IPC, can ever be convicted under s 290, IPC .[89]1170

'Two or More Persons'

For a charge under s 159, IPC, there must be two or more persons concerned. In the absence of a finding as to who the second person was, the charge cannot be sustained.[1] An affray is only a 'little war', and a war and an affray both require two sides to fight.[2]

'By Fighting'

The term 'fight' is not defined in the IPC, but everyone knows what a fight is and that it takes two to make a fight.[3] Where one person attacks and the other defends, it is legally correct to say that the two persons are fighting and the case comes under the definition of affray.[4]But it is only 'when two or more persons by fighting in a public place disturb the public peace' that they are said to commit an affray. The word 'fight' connotes a bilateral act in which two parties participate. It will not amount to an affray when the party who is assaulted submits to the assault without resistance,[5] or tries to escape to avoid a fight.[6] As pointed out by Pandurang Row J, in *Rami Reddy v Chinta Chinna Narasi Reddy* :[7]

> Fighting connotes necessarily a contest or struggle for mastery between two or more persons against one another. A struggle or a contest necessarily implies that there are two sides each of which is trying to obtain the mastery, so that unless there is some violence offered or threatened against one another, there could be no fight but only a mere assault or beating.

It must be established that each one of the accused took an active physical part in the process of fighting.[8]

'Passive submission to beating by the other side will not result in affray nor will mere howling in pain do. an answering challenge or war cry or even an active non-violent resistance might have done'.[9] Mere quarrelling or exchange of abuse in a public place would not amount to an affray. Something more than a mere wordy quarrel is needed before a person can be convicted under this section. It would be enough if blows are aimed, whether or not they prove to be successful.[10]

It is not necessary that weapons should be used in a fight, and an affray can be a fight even if only party in the fight is successful in landing a blow on his opponent.[11]

'In a Public Place'

To constitute an affray, the fighting must be in a public place. The expression 'public place' or a cognate expression is used in many Acts of the legislature, but there is no1171 statutory definition of it. The word 'public' is defined in *Webster's Dictionary* as meaning the general body of mankind or of a nation, state or community. It also means people indefinitely, also a particular body or aggregation of people. This means that the public must be an unlimited or a fluctuating body of persons and not individuals merely.[12]

It will be observed that the section does not make fighting 'in public', which is not likely to disturb the public peace, an affray. The fighting disturbing the public peace, which is an affray, is fighting which takes place in a 'public place'. Some of the statues in England make acts penal which are done in public, others make acts penal which are done in a public place, so that in the criminal statute law in England, the distinction is, it will be observed, between doing an act in public and doing an act in a public place. Keeping this distinction in view, it was held that a *chabutra* (platform), to which the public had no access, either by right or by permission or by usage or otherwise, was not a public place within the meaning of s 159, IPC, although any member of the public walking along the street could walk on to it, but in doing so he would be committing trespass.[13] In Re *Muthuswami Iyer*,[14] the magistrate who tried the case having said that 'the scene of offence is an open field with no compound walls. It is a place where the public go no matter whether they have a right to go or not'. Justice Pandurang Rao, held that the magistrate's view was substantially correct, and further observed:

> Whether a place is public or not does not necessarily depend on the right of the public as such to go to the place, though of course a place to which the public can go as of right must be a public place. The place where the public are actually in the habit of going must be deemed to be public for the purpose of the offence of affray, for instance, a place like railway platforms, theatre halls, and open spaces resorted to by the public for purposes of recreation, amusement, etc. Reference was made to, among other rulings, the decision in the Allahabad case cited above.[15] It is submitted that the real point decided in that case was that a place is not a public place if the public has no access to it by right or by permission or by usage or otherwise. That means that for a place to be considered a public place, the public must not only have access to it but the access should be lawful and not by trespass. The proposition that 'the place where the public are actually in the habit of going must be deemed to be public for the purposes of the offence of affray may, however, be justified on the ground that the fact of the public being in the habit of going to the place indicates that the public has access to the place by 'permission', or by usage or otherwise.

The expression 'public place' may well have different meanings for the purpose of different Acts.

Where it is not specifically defined, its meaning must be reasonably determined by the context and the circumstances in which it has been used.[16] So the interpretations placed on the expression in cases under the various Gambling Acts cannot be relevant here. In several such cases the English decision in *Reg v Wellard* ,[17] has been relied on. But that was a case of an unlawful indecent exposure of the human body and not a case of affray. In that case, where the place in question was out of sight of the public footpath but was a place to which persons were in the habit of going without any strict legal right to do so and without being in any way1172 hindered, but the prisoner exposed his person to several little girls, it was held that he was rightly convicted, and a suggestion was thrown out that the offence might be indictable if committed before diverse subjects of the realm even if the place be not public.[18] The cases of *R v Holmes* ,[19] and *R v Harris* ,[20] are also cases of indecent exposure. These cases cannot be relevant in a case of affray. On the other hand, where two of the prisoners fought together amidst a great crowd of persons, and the others were present aiding and assisting, at a place far from any highway, and where the fight ceased on the appearance of some peace officers, it was held that this was not an affray, because the scene of action was to all intents and purposes a private place.[21]

The entrance to a place of worship was held to be a public place.[22]

'Disturb the Public Peace'

Again, in order to make the offence an affray, there must be disturbance of the public peace due to the fighting in a public place.[23] The gist of the offence consists in the terror it causes to the public.[24] The presence of large numbers of the public at the time of the disturbance which took at least a quarter of an hour, shows that the members of the public must have been alarmed by reason of the disturbance and that there was sufficient breaking of the public peace within the meaning of s 159, IPC . It is not necessary that any particular member of the public must have evidence to the effect that he was alarmed or frightened, before a conviction can be had for an offence punishable under s 160 . If it is likely that such alarm would have been caused to the public or members of the public, the necessary ingredient is established.[25] On a charge of making affray it is sufficient, in the absence of direct evidence that any member of the public was put in fear or terror, to show that the circumstances were such that reasonable persons might be frightened or intimidated.[26]

In a prosecution under s 159, IPC, there must be positive evidence of public peace having been disturbed which would mean that by the action of the accused the even tempo of life of the public was disturbed resulting in the peace and tranquillity of the locality being affected.[27]

Where admittedly no such evidence of public peace having been disturbed has been led and there is also no conclusive evidence that because of the fight any annoyance has resulted to the public, the conviction of the accused person under s 160, IPC, would not be sustainable.[28]

4. Procedure

The offence punishable under s 160 is cognizable. It is bailable but not compoundable, and is triable by any magistrate. The offence not being punishable1173 with imprisonment exceeding two years, it can be tried summarily.[29] Like other cognizable cases, an investigation is a must into an offence under this section, though both the parties are arraigned as accused.[30]

5. Charge

The charge may run as follows:

I (*name and office of Magistrate*, *etc*) hereby charge you (*name of accused*) as follows:

That you .... on or about the.....day of....at....committed an offence of affray, and thereby committed an offence, punishable under s 160 of the IPC, and within my cognisance.

And I hereby direct that you be tried on that charge.

A charge under s 160, IPC, is not maintainable when there is a charge for assault under s 323, IPC, the reason being that a charge under s 323, IPC, has a prosecutor on one side while in a charge under s 160, IPC, both sides are accused. A charge of affray brings in both the sides as accused persons since both the fighting groups have committed the offence. A charge of assault punishable under s 323, IPC, has a prosecutor on one side and the accused persons on the other.[31]

In a case of affray, merely because both the parties are accused, it is not permissible to the prosecution to submit a charge sheet against them without making an investigation. A chargesheet filed without following the procedure laid down in s 157, CrPC, is liable to be quashed.[32]

6. Proof

On a charge under this section, it has to be proved:

(i) that two or more persons including the accused were fighting;
(ii) that such fight was in a public place; and
(iii) that it disturbed the public peace.

One does not expect in an affray, to find specific evidence as to the acts of each fighter. Only general evidence can be given as to the accused taking part in it.[33] It is not necessary to prove that a particular individual beat a particular individual. It is enough to prove that two or more persons fought together in a public place and thereby disturbed public peace.[34]

7. Separate Trials

Committing the offence of affray and causing hurt are two distinct offences for which there may be separate charges and separate trials, though it is convenient, under the circumstances, to have a joint trial. A conviction of the accused under s 160, IPC, is no bar to their trial and conviction again under s 323, IPC .[35]1174

73 *Raghu Pradhan v State* (1975) Cut LT 233, (1975) Cut WR 2, (1975) OJD 92 .

74 4 B1 Com 144, 3 Co Inst 158.

75 *Russell on Crime*, eleventh edn, p 292, fn 25.

76 *Mayne's Criminal Law of India*, para 312.

77 *Babu Ram v Emperor* AIR 1931 All 8, p 9, 32 Cr LJ 1269 .

78 *R v Sharp, R v Johnson* (1957) 2 WLR 472, [1957] 1 All ER 577 .

79 *Rami Reddy v Chinta Chinna Narasi Reddy* AIR 1938 Mad 924, 40 Cr LJ 86 ; *Podan v State of Kerala* (1962) 1 Cr LJ 339, p

340, (1961) KLT 698 ; *Korgashetty v State of Mysore* (1971) Cr LJ 1041, (1971) Mad LJ (Cr) 246 ; *Raghu Pradhan v State* (1975) 1 Cut WR 82, (1975) 41 Cut LT 233 ; *Sheoraj Singh v State* 1978 All Cr C 128, p 129 .

80 *Gadadhar Guru & Anor v State of Orissa* (1989) Cr LJ 2080 (Cr) .

81 *Pushpa v Ravi* 2007 Cr LJ 4747 (Mad) .

82 *Pushpa v Ravi* 2007 Cr LJ 4747 (Mad) .

83 1 Weir 68.

84 1 Hawk c 65, s 3 (*Russell on Crime*, eleventh edn, pp 2, 3 citing 1 Hawk c 65, s 3).

85 Re *Lokenath v King* 18 WR 2, p 3 .

86 *Jodhey v State* AIR 1952 All 788, p 794, 53 Cr LJ 1282 .

87 *R v Nga Ywe* 7 Cr LJ 498, 4 LBR 837 ; *Rami Reddy v Chinta Chinna Narasi Reddy* AIR 1938 Mad 924 .

88 *Baluchami v Emperor* AIR 1933 Mad 843 ; **but see** 35 Cr LJ 76; *Langur v Emperor* 13 Cr LJ 718 .

89 Re *Govinda Naidu*AIR 1959 Mad 518, (1959) Cr LJ 1446 .

1 *Baluchami v Emperor* AIR 1933 Mad 843, 35 Cr LJ 76 ; *Podan v State of Kerala* (1962) 1 Cr LJ 339, (1961) KLT 648 ; *Raghu Pradhan v State* (1975) 1 Cut WR 82, (1975) 41 Cut LT 233 .

2 Re *Rama Kudumban*AIR 1950 Mad 408, p 409, 51 Cr LJ 979 .

3 *Atma Singh Kahan Singh v the State* AIR 1955 Punj 191, p 192, 56 Cr LJ 1283 .

4 *Babu Ram v Emperor* AIR 1931 All 8, p 9, 32 Cr LJ 1269 .

5 *Podan v State of Kerala* (1962) 1 Cr LJ 339 ; *Jodhey v State* AIR 1952 All 789, 53 Cr LJ 1282 ; *Subbarayudu v State of Andhra Pradesh* (1996) Cr LJ 1472 (CAP) .

6 *Balakrishna Shetty v State of Mysore* (1966) 1 Mys LJ 528 .

7 *Rami Reddy v Chinta Chinna Narasi Reddy* AIR 1938 Mad 925, 40 Cr LJ 86 .

8 *Ratnam Pillai v Emperor* (1938) Mad WN 721 .

9 Re *Rama Kudumben*AIR 1950 Mad 408, p 409, 51 Cr LJ 979 .

10 *Puran Chand v State* 65 Punj LR 813, p 814 ; *Jagannath Sah v Emperor* AIR 1937 Oudh 425, 38 Cr LJ 169 ; *Ganesh Das v Emperor* AIR 1928 Lah 813(1) ; *Atma Singh Kahan Singh v State* AIR 1955 Punj 191, 56 Cr LJ 1283 ; *Crown v Atma Singh* AIR 1926 Lah 412, 27 Cr LJ 696 .

11 *Atma Singh v State* AIR 1955 Punj 191, p 192, 56 Cr LJ 1283 .

12 *Sabimiya v Emperor* AIR 1925 Nag 123, p 124, 25 Cr LJ 1075 .

13 *Queen-Empress v Srilal* 17 ILR All 166, p 167 .

14 In Re *Muthuswami Iyer*AIR 1937 Mad 286, 38 Cr LJ 588 .

15 *Queen-Empress v Srilal* 17 ILR All 166 .

16 *Tulsi Das v King-Emperor* AIR 1924 All 768, 25 Cr LJ 1368, the observation of Rowland J, in *Ramjank Patwa v Emperor* AIR 1937 Pat 276 .

17 *Reg v Wellard* (1884) 14 QBD 63, 51 T 604, 33 WR 156, 15 Cox CC 559 .

18 *Russell on Crime*, eleventh edn, p 1642.

19 *R v Holmes* (1852) 22 LJ MC 122, 1 WR 416, 6 Cox CC 216 .

20 *R v Harris* (1371) LR 1 CCR 282 .

21 *R v Hunt* (1845) 1 Cox 177, Hawk C 53, s 1 .

22 1 Weir 68.

23 *Podan v State of Kerala* (1962) 1 Cr LJ 339, p 340, (1961) KLT 698 ; *Korgashetty v State of Mysore* (1971) Cr LJ 1041,

(1971) Mad LJ (Cr) 246 ; *Raghu Pradhan v State* (1975) 1 Cut WR 82, (1975) 41 Cut LT 233 ; *Sheoraj Singh v State* (1978) All Cr C 286, p 287 ; *Subbaraudu v State of Andhra Pradesh* (1996) Cr LJ 1472 (AP) .

24 *Babu Ram v Emperor* AIR 1931 All 8, 9, 32 Cr LJ 1269; Re *Muthuswami*AIR 1937 Mad 286, 287 .

25 Re *Muthuswami Iyer*AIR 1937 Mad 286, p 287 .

26 *R v Sharp R v Johnson* (1957) 2 WLR 472, [1957] 1 All ER 577 .

27 *Gadadhar Guru & Anor v State of Orissa* (1989) Cr LJ 2080 (Cr) .

28 *Ibid.*

29 Code of Criminal Procedure 1973, s 260(1)(i) .

30 *Muthulakshmi v State of Tamil Nadu* (1994) 1 LW (Cr) 261 (Mad) .

31 *Girdhari Lal Gupta v State of Orissa* (1983) 2 Crimes 157 (Ori), (1983) 55 Cut LT 180 .

32 *Muthulakshmi v State of Tamil Nadu* (1994) 1 Mad LW (Cr) 261 .

33 *Moher Sheikh v Queen-Empress* 21 ILR Cal 392, p 398 .

34 1 Weir 68.

35 *Ram Sukh v Emperor* AIR 1925 All 299, p 300, 26 Cr LJ 688 ; *Kariyappa v Somama* AIR 1955 Mys 138, (1955) Cr LJ 1611 ; *Emperor v Nga Ywe* 7 Cr LJ 448 ; Re *Dodbu Kalu Mahar*AIR 1929 Bom 451, 30 Cr LJ 965 ; **but see***Emperor v Kallasami* AIR 1927 Bom 629, 28 Cr LJ 1032 .

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 161.

Public servant taking gratification other than legal remuneration in respect of an official act.--

[*Repealed by the Prevention of Corruption Act, 1988 (49 of 1988), s 31 (wef 9-9-1988).*]

Special grounds for modification of sentence are minority of offender, condition of offender, state of health and sex of the delinquent.[2]

2 *Mohan Lal v State of Rajasthan* 2012 (114) AIC 496 (Raj) .

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 162.

Taking gratification, in order, by corrupt or illegal means, to influence public servant.--

[*Repealed by the Prevention of Corruption Act, 1988 (49 of 1988), s 31 (wef 9-9-1988).*]

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 2/Chapter IX Of Offences by or Relating to Public Servants/S. 163.

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 163.

Taking gratification for exercise of personal influence with public servant.--

[*Repealed by the Prevention of Corruption Act, 1988 (49 of 1988), s 31 (wef 9-9-1988).*]

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 2/Chapter IX Of Offences by or Relating to Public Servants/S. 164.

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 164.

Punishment for abetment by public servant of offences defined in section 162 or 163 .--

[*Repealed by the Prevention of Corruption Act, 1988 (49 of 1988), s 31 (wef 9-9-1988).*] 1176

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 2/Chapter IX Of Offences by or Relating to Public Servants/S. 165.

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 165.

Public servant obtaining valuable thing, without consideration, from person concerned in proceeding or business transacted by such public servant.--

[*Repealed by the Prevention of Corruption Act, 1988 (49 of 1988), s 31 (wef 9-9-1988).*]

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 2/Chapter IX Of Offences by or Relating to Public Servants/S. 165A .

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 165A .

Punishment for abetment of offences defined in section 161 or section 165 .--

[*Repealed by the Prevention of Corruption Act, 1988 (49 of 1988), s 31 (wef 9-9-1988).*]

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 2/Chapter IX Of Offences by or Relating to Public Servants/S. 166.

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 166.

Public servant disobeying law, with intent to cause injury to any person.--

Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in *Z's* favour by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to *Z.A* has committed the offence defined in this section.

Comments

1. Scope

Section 166 of the Code is very comprehensive and includes several offences in respect of the abuse of official authority, regarding officers omitting to arrest offenders and suffering prisoners to escape, so far as the offence is voluntary, and in general, any breach of official duty, by which it is intended, or which is known to be likely, to injure any party or to save any person from legal punishments.[3]

The ingredients of s 166 are:

(a) The accused was a public servant at the relevant time;
(b) There was a direction of law as to how such public servant should conduct himself;
(c) The accused had disobeyed such direction;
(d) By such disobedience he had intended to cause or knew it to be likely to cause injury to any person.[4]1177

To make out an offence under this provision, it has to be stated that the public servant knowingly disobeyed any particular direction of the law which he was bound to obey and further that it was to the knowledge of the public servant that such disobedience would cause injury to a person.[5] Thus, the provisions of the section are attracted only if the alleged offender disobeys a direction of the law knowingly and with the intention to cause, or knowing it to be likely that he will, by such disobedience, cause injury to the complainant.[6]

2. Analogous Law

This and the next section, deals with misconduct by a public servant in office. Under the English law, neglect of official duty is a misdemeanour. Where a public officer is guilty of misbehaviour in office, by way of neglecting a duty imposed upon him either by common law or by a statute, he commits a misdemeanour and is liable to indictment, unless, it is substituted by another remedy in a statute.[7] The liability exists whether he is a common law or a statutory officer,[8] and a person holding an office of important trust and of consequence to the public under Letters Patent, or derivatively from such authority, is liable to indictment for not faithfully discharging the office.[9]

3. Ingredients of the Section

The ingredients of the offence under s 166, IPC are: (a) that the accused should be a public servant; (b) that he should conduct himself in disobedience of a direction of law; (c) that he should disobey the direction of law knowingly; and (d) that in such deliberate disobedience, his intention or knowledge should be that he was likely thereby to cause an injury to the person complaining. Disobedience of the direction of law is not by itself punishable, unless the injury is intended to someone, or unless the injury is likely and the public servant has the intention or knowledge of it.[10]

The indispensable ingredient of the offence under this section is that the offender should have committed the act 'being a public servant'. The next ingredient close to its heels, is that such a public servant should have acted in disobedience of any legal direction concerning the way in which he should have acted as such a public servant.[11]

The prosecution case was that the replies given by the accused to the applications filed by the complainant under s 7 of the Right to Information Act 2005, were incorrect, hence the accused committed offence under ss 166 and 167, IPC . Except stating that the replies given were incorrect no attempt whatsoever was made in the complaint to show as to how or in what respect the replies given were incorrect. There was no case that the accused had disobeyed the direction of law regarding their duties by refusing to furnish the information asked for. If in carrying out the direction of law the accused gave information which according to the complainant was untrue, 1178that by itself cannot attract the offence punishable under s 166, IPC unless it is shown that the replies given by the accused were untrue.[12]

While failure to give the information applied for or giving demonstrably false replies may amount to disobedience within the meaning of s 166 but furnishing information which is not shown to be incorrect cannot be termed as disobedience of any direction of law.[13]

4. 'Direction of the Law'--Section not Concerned with Disciplinary Rules

To make out an offence under s 166, IPC it has to be stated that the public servant knowingly disobeyed any particular direction of the law which he was bound to obey and further that such disobedience would cause injury to any person, was to the knowledge of the public servant.[14] The section has nothing to do with the disciplinary rules of a department, the violation of which may call for departmental punishment. It is only concerned with the violation of an express direction of law, which alone is punishable, if it has resulted in injury to any person. The mere breach of departmental rules and regulations, not having the force of law, cannot be visited with punishment under this section. However, it may be a direction given by a written law or a mandate proceeding from a competent authority, which the public servant is bound by law to obey--like a writ or order for the liberation of a person from prison.[15]

5. Some Illustrative Cases

An interpreter or a translator of a document, who, having been directed by the court to keep its contents secret, disobeys the direction,[16] commits an offence under this section.

A Registrar issuing a marriage certificate within the times specified in s 72, Christian Marriage Act 1872 (15 of 1872), commits an offence under this section.

Where a peon in a subordinate court, who was directed to serve a notice on a person and to obtain his signature acknowledging such service, represented the notice to be a warrant and arrested the person, it was held that he was guilty of an offence under this section.[17]

The attachment and seizure of a cart for want of a licence, while the cart is being used for the conveyance of goods or passengers, is an offence under this section.[18]

Where a person had encroached upon the municipal land adjoining the land belonging to the complainant, and started construction in a manner so as to cause danger and the municipal authorities did not take any steps is a case under s 166 IPC .

On account of non-appearance of the applicant due to *shradda*, the complaint was dismissed and the accused was acquitted, despite the fact that the matter was eight 1179years old. The apex court restored the complaint and directed the magistrate concerned to dispose off the complaint case at an early date.[19]

However, where a circle inspector, merely asked the under-trial prisoners detained in police lock-up to not touch any food until the officer-in-charge, directly responsible for the feeding of the under-trial prisoners arrived there, it was held not to be within the mischief of the section.[20]

Where a perusal of the complaint against officers of the Bihar State Electricity Board did not disclose any particular act or omission thereof by any of the officers of the Board, that they knowingly disobeyed any particular directions of the law which they were bound to obey, and such disobedience could cause injury to any person to their knowledge, these officers of the Board were held not liable under this section, despite the fact that they were undisputedly public servants within the meaning of the definition of the term in the Indian Penal Code .[21]

Further where the CrPC gives a magistrate, authority to order a release on bail, it is certainly not for a sub-inspector to refuse to carry out such an order on the mere technical quibble that he thought that such an order should be communicated to him through the superintendent of police. If he thereby

refuses to carry out the order, he renders himself liable under this section.[22]

Period of limitation within which the cognizance of an offence under this section can be taken by the court is one year.[23]

6. To Cause 'Injury'--Injury is a Comprehensive Term

To make out an offence under s 166, IPC it has to be stated that the public servant knowingly disobeyed any particular direction of the law which he was bound to obey and further that such disobedience would cause injury to any person, was to the knowledge of the public servant.[24] The term 'injury' is comprehensive enough to include any harm illegally caused to any person in body, mind, reputation or property (see s 44, IPC). This section contemplates only the breach of some statutory duty with a view to cause injury to any person and not merely through inadvertence or negligence. Where, in the order of punishment, the punishing authority omitted to mention as to where and within what time an appeal could lie, it was held that it was a mere act of inadvertence for which he could not be convicted under this section.[25]It is an abuse of office, in which the law presumes that the injury was caused from some ulterior corrupt motive, which is punishable under this section. A mere dereliction of duty, unconnected with any intention to cause injury to anyone is not an offence under this section, though it may be under some other Act.

Where a postmaster, employed to expedite the conveyance and delivery of post letters and to take part in their delivery, absents himself from the station and thereby 1180causes delay in the dispatch of the mail, he is guilty of an offence under s 47 of the Post Office Act 1866, and not under this section.[26]

7. Procedure

An offence under this section is non-cognizable, and summons may be issued in the first instance. It is bailable but not compoundable, and it is triable by a magistrate of the first class.

8. Limitation for Prosecution

Refer to the Code of Criminal Procedure 1973, ss 468 - 473 .[27]

9. Sanction

Refer to the Code of Criminal Procedure 1973, s 197 .[28]

Use of filthy language by a public servant cannot be said to be an act done by him in the discharge of official duty. In such cases, protection of s 197, CrPC is not available to the accused.[29]

10. Effect of Delay in Filing Complaint

In cases such as those under ss 166 and 342, IPC, the most important, though by no means the only test is whether the allegations against the police officer or any other public servant concerned were placed before the proper authority at the very earliest opportunity. A delay in making the complaint before the magistrate or any other competent authority is almost fatal to a prosecution of this nature.[30]

11. Similarity between Section 166, and Sections 167 and 219

The indispensable ingredient of the offence under s 166, IPC is that the offender should have done the act 'being a public servant.' The next ingredient close to its heels is that such a public servant has acted in disobedience of any legal direction concerning the way in which he should have conducted as such a public servant. In the offences under ss 167 and 219 of IPC, the pivotal ingredient is the same as for the offences under s 166, IPC .[31]

12. Charge--Contents of

The charge should be stated as nearly as possible in the language of the section of the Act which is disobeyed. The particular direction of the law disobeyed should be specified.[32]

13. Form of Charge

The following form of the charge may be adopted:[33]

> I (*name and office of the magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about the.....day of..... at..... did (*or omitted to do, as the case may be*) ....., such conduct being contrary to the provisions of ..... Act ....., section....., and known by you to be prejudicial to....., and thereby committed an offence punishable under section 166 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by the said court on the said charge.

14. Proof

To establish an offence under this section the prosecution must prove that:

(a) on the date of the offence the accused was a public servant;
(b) he conducted himself in the particular manner charged;
(c) such conduct was in the exercise of his public duties as such public servant;
(d) such conduct was in disobedience of a direction of the law;
(e) when the accused disobeyed such direction of law, he did so knowingly; and
(f) when the accused committed such disobedience, he thereby intended, or knew that he was likely to cause an injury to some person.[34]

3 Second Report on the Indian Penal Code published in *Parliamentary Papers, House of Commons and Command*, vol 28, p 20, para 83.

4 *Prabhakara Panicker MB v State of Kerala* 2010 Cr LJ 4117, p 4119 (Ker) .

5 *Bihar State Electricity Board & Anor v Nand Kishore Tamakhuwala* AIR 1986 SC 1653 .

6 *RC Bahri v Prabhu Singh (*1976) Raj Cr Cas 228, p 239.

7 *R v Hall* (1891) 1 QB 747 .

8 *R v Wyat* (1703) 1 Salk 380 ; *Anonymous*(1704) 6 Mod 96.

9 *R v Bembridge* (1783) 22 St Tr 1, 77, 151, 3 Doug 327 ; *R v Wyat* (1703) 1 Salk 380 .

10 *CG Sangmnerkar v Suresh Chandra Modi* (1979) MP LJ 682, p 685, (1979) Cr LR 118 (MP) ; *Prabhakara Panicker MB v State of Kerala,* 2010 Cr LJ 4117 (Ker) .

11 *KK Patel and Anor v State of Gujarat and Anor* (2000) I CCR (SC) .

12 *Prabhakara Panicker MB v State of Kerala* 2010 Cr LJ 4117, p 4119 (Ker) .

13 *Prabhakara Panicker MB v State of Kerala* 2010 Cr LJ 4117, p 4119 (Ker) .

14 *Bihar State Electricity Board and Anor v Nand Kishore Tamakhuwala* AIR 1986 SC 1653, (1986) Cr LJ 1246 .

15 M&M 139.

16 Evidence Act 1872, s 162 .

17 Re *Rangasami Naidu*(1910) 11 Cr LJ 400, (1910) 7 Mad LT 429.

18 *Subraya Iyer v R* (1912) 13 Cr LJ 199 .

19 *Meera Shripat Admani v Chief Officer, Sangamner Municipal Council & Ors (*2001) II CCR 40 (SC).

20 *Raghunath Padhy v Ratnakar Naik* (1965) 31 Cut LT 695, p 700 .

21 *Ibid.*

22 *Mohammad Yakub v Emperor* AIR 1938 All 534, 536.

23 Code of Criminal Procedure 1973, s 468 .

24 *Bihar State Electricity Board & Anor v Nand Kishore Tamakhuwala* AIR 1986 SC 1653, (1986) Cr LJ 1246 .

25 *RC Bahri v Parbhu Singh (*1976) Raj Cr Cas 238, p 239.

26 Re *Viraswami Naick* 1 Weir 72.

27 For detailed commentary see *Sohoni's Code of Criminal Procedure*, vol 5, twenty-first edn, Lexisnexis.

28 For detailed commentary see *Sohoni's Code of Criminal Procedure*, vol 3, twenty-first edn, Lexisnexis.

29 *Prakash Chandra Bafna v Oba Ram* 2011 Cr LJ 416, 2010 (96) AIC 884 (Raj) .

30 *KK Patel & Anor v State of Gujarat & Anor* (2000) III CCR 1 (SC) .

31 (1865) 2 WR (Cr) 2.

32 Re *Karam Din*(1890) PR No 34 of 1890.

33 Refer to the Code of Criminal Procedure 1973, Sch II, Form No 32(4).

34 *Shankarro Mohite v Burjor D Engineer* AIR 1962 Bom 198, (1962) 2 Cr LJ 320 .

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

[35][S. 166A.

Public servant disobeying direction under law.--

Whoever, being a public servant,--

(a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or
(b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or
(c) fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure, 1973, (2 of 1974) in relation to cognizable offence punishable under section 326A, section 326B, section 354, section 354B, section 370, section 370A, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509,

shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.]1182

Comments

1. Legislative Changes

Section 166A of the Code is new and is inserted by the Criminal Law (Amendment) Act 2013 (13 of 2013) (wef 3-02-2013).

2. Scope and Application

Insertion of s 166A *vide* Criminal Law (Amendment) Act 2013, must be read in consonance with the provision and not contrary to it. The insertion of s 166A was in the light of recent unfortunate occurrence of offences against women. The intention of the legislature in putting forth this amendment was to tighten the already existing provisions to provide enhanced safeguards to women. The legislature, after noticing the increasing crimes against women in the country, thought it appropriate to expressly punish the police officers for their failure to register FIRS in these cases.[36]

By s 166A(c), registration of FIR is not compulsory for all offences other than those specified in the section. A lapse on the part of the public servant to register FIR is punishable with sentence of rigorous imprisonment which may extend to two years and also fine.[37]

It cannot be urged that registration of FIR is not compulsory for all offences other than what is specified in s 166A(c), IPC .[38]

3. Charge

I,.....(*name and office of Session Judge etc*.) hereby charge you..... (*name etc. of the accused*) as follows:

That you on or about the day of .....at.....Distt..... while working as Station Officer X (*Name of the Police Station*) did not record FIR lodged by one P (*name of the informant*) for offence under Section 376A of the Indian Penal Code and thereby committed an offence punishable under Section 166-A and within my cognizance.

And I hereby direct you to be tied by this Court on the said charge.

35 Inserted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 3 (wef 3-2-2013).

36 *Lalita Kumari v Government of UP* 2014 Cr LJ 470, p 486, 487 (SC), AIR 2014 SC 187, (2014) 2 SCC 1 .

37 *Lalita Kumari v Government of UP* 2014 Cr LJ 470, p 486, 487 (SC), AIR 2014 SC 187, (2014) 2 SCC 1 .

38 *Ibid.*

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

[39][S. 166B.

Punishment for non-treatment of victim.--

Whoever, being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of section 357C of the Code of Criminal Procedure, 1973, (2 of 1974) shall be punished with imprisonment for a term which may extend to one year or with fine or with both.]

Comments

1. Legislative Changes

Section 166B of the Code is new and is inserted by the Criminal Law (Amendment) Act 2013 (13 of 2013) (wef 3.2.2013).

2. Scope and Application

Section 357C, CrPC makes provision for treatment of victim of rape. Section 357C provides that all hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first aid or medical treatment, free of cost, to the victims of any offence covered under s 326A, 376, 376A, 376B, 376C, 376D or s 376E of the Indian Penal Code (45 of 1860), and shall immediately inform the police of such incident. New s 166B IPC provides for punishment on contravention of s 357, CrPC, as punishable with imprisonment which may extend to one year or with fine or with both.

3. Charge

I,.....(*name and office of the Judicial Magistrate 1st Class etc.*) charge you.....(*name etc. of the accused*) as under -

That you on or about the day of .....at.....Distt..... while posted as Medical Officer in Civil Hospital, Hazratganj, Lucknow (*give the details of the hospital*) did not provide (*first aid or medical aid*) to one A, victim of rape and did not inform the police of the incident and thereby committed offence punishable under Section 166 -B of the IPC and within my cognizance.

And I hereby direct you to be tried by the Court for the said charge.

39 Inserted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 3 (wef 3-2-2013).

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 167.

Public servant framing an incorrect document with intent to cause injury.--

Whoever, being a public servant, and being, as [40][such public servant, charged with the preparation or translation of any document or electronic record, frames, prepares or translates that document or electronic record] in a manner which he knows or believes to be incorrect, intending thereby to cause or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.1184

Comments

1. Legislative Changes

By the Amending Act 21 of 2000 vide s 91 and Sch. I, w.e.f 17-10-2000 the words 'such public servant, charged with the preparation or translation of any document or electronic record, frames, prepares or translates that document or electronic record" were substituted for the words "such public servant, charged with the preparation or translation of any document, frames or translates that document.'

2. Scope

This section, like the preceding s 166, IPC, is intended to punish acts of official perversity, and not those of mere incompetence. The public servants, who, from bias or corrupt motives, misuse their office by preparing an incorrect document, are punished under this section, while those who do a wrongful act are punished under s 166, IPC . Where a document is incorrectly framed wantonly or deliberately, the law would presume that the person who framed it must have known that it was likely to cause injury to the person affected thereby. The language of this section is vaguely general and comprehensive, but not indefinite.[41] Public records are expected to represent the proceedings of the court or the public servant concerned, correctly and accurately. There is a presumption in law as to their correctness, and hence sanctity is attached to their entries. The tampering of such records by the very persons who are charged with the duty of preparing them correctly is thus a serious offence indeed, and if the record was prepared to cause injury to any person, the offence is punishable under this section.

If there was no motive for framing the record incorrectly, even in such a case of misconduct, the matter is left for departmental action.

Prosecution under s 167, IPC cannot be launched against a private individual.[42]

The ingredients of s 167 are :--

(i) The accused at the relevant time was a public servant;
(ii) The accused was entrusted with the duty of preparation of a document;
(iii) The accused had framed, prepared or translated the document incorrectly; and
(iv) The accused did so with the intent or knowledge that it would cause or was likely to cause injury to any person.

3. Persons not Entrusted with such Work are not Liable

This section punishes a public servant for incorrectly framing or translating a document, the preparation or translation of which is within the scope of his official duty. He must have, however, done it with the intention or knowledge that it was likely to cause injury to any person. The section further requires that the public servant must be charged with the preparation or translation of the document. It would include not only those who are ordinarily employed to prepare or translate documents but also those who may have been ordered to prepare or to translate them, though such work was not within the ordinary sphere of their official duty. However, if the public servant was not entrusted with such work; he would not be penally liable.

4. Distinction between Sections 167 and 218

This section is analogous to s 218, IPC, and both are in fact indistinguishable, except that the present section specifically penalises the framer as well as the translator of a document. Under both the sections, the public servant disobeys the direction of law, knowing it to be likely to cause an injury to any person. Section 218 is, however, more comprehensive as it would apply even when the document so incorrectly framed, instead of causing injury to any person, saves him from legal punishment or

saves his property from forfeiture or other charge to which it is liable by law.

5. Distinction Between Sections 167 and 193

The distinction between s 167 and s 193, IPC, is that whereas this section relates to the incorrect preparation of a public record as such, the latter section applies when the record forms a part of the record of a judicial proceeding,[43] or when false evidence is given or fabricated in any stage of a judicial proceeding, or in any other case.

Section 167 is attracted only when a public servant prepares a document in a manner which he thinks or believes to be incorrect. In the present case, the petitioner's allegation was that the accused suppressed the real statement prepared under s 161 of the CrPC and produced along with the charge-sheet a fabricated statement, that comes only within the purview of s 193, CrPC . Section 167 was not attracted in the case.[44]

6. Distinction between Sections 167 and 466

Section 466, IPC also deals with the forgery of public records but offences under s 167 and s 466, IPC, are not of the same kind. Section 167 requires that the accused should be a public servant, but not that he should be actuated by any dishonest or fraudulent intention. While s 466 requires the latter, it does not require the former. It is however possible that the same individual may commit both the offences in the same transaction.[45]

7. Public Servant

For the definition of a 'public servant', *see* s 21, IPC and notes thereunder.

An amin, who is directed to attach the movable property in the judgment-debtor's possession by a warrant of attachment, is bound to return the warrant within a certain date, with an endorsement certifying the date and the manner in which it is executed or as to why it was not executed. He is, therefore, a public servant charged with the preparation of a document within the meaning of s 167 .[46]

Explanation 2 to s 21, IPC, provides that wherever the words 'public servant' occur, they shall be understood to include every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation. If, therefore, the public servant acted as if he had been formally 1186appointed to do the work concerned, the absence of a formal appointment is immaterial.[47]

8. 'Charged With'--The Word not to be Narrowly Construed

Section 167, IPC is attracted when a public servant is charged with the duty of the preparation of a document, and he frames an incorrect document.[48] The word 'charged' in this section is not to be narrowly construed.[49] The words 'charged with the preparation' are not restricted to the narrow meaning of 'enjoined by a special provision of law'. It is sufficient to show that the document was prepared in accordance with a practice, to which it was the duty of the accused to conform. A sub-inspector of police was held to have been charged with the preparation of a report when it appeared that he submitted such a report in pursuance only of a practice requiring such a report.[50]

Where a public servant is appointed to prepare a document, he must be taken to have been charged with the preparation of the document, even if there is any legal defect in his appointment.[51]

There must be a statutory duty on a public servant to prepare or translate the document, which he knows or believes to be incorrect, and, further, he must, in fact, have prepared it.[52]

9. Preparation, Translation and Framing

There is hardly any sensible difference between the preparation and the framing of an electoral roll. According to the dictionaries 'to prepare' is to make ready or make by a regular process, and 'to frame', is to construct by a combination of parts or an adaptation to design.[53] But both the words suggest the making of something original and not a mere copy or translation.

In *Hira Singh v Crown* ,[54] it was held that a *patwari* framing an incorrect copy of an entry in his *roznamcha* was liable to be convicted under this section.

But in *Crown v Dewa Singh* ,[55] Berkley J held that making a copy of a document is not included in the words 'preparation or translation of any document' or in the words 'frames or translates that document'.

In *People Patriotic Front v KK Birla* ,[56] it was held that the reasons recorded by the minister for giving the directions to Indian Oil Corporation can be classified as a preparation of an incorrect document. He was not even bound to record any reasons.

The preparation of a document is distinct from signing and delivering it. The signature and the delivery are operations subsequent to the preparation. They would 1187serve to indicate that the preparation was complete, but cannot be said to be essential to the framing required by this section, for it is not always impossible to show that the process of preparing was complete.

Where a clerk charged with the preparation of electoral rolls, prepared it incorrectly, but it was signed and submitted by his *locum tenens* while he was on leave, it was held that as there was a possibility that if the clerk had remained on duty he might have corrected the incorrect entries before signing and submitting the electoral rolls, therefore, he could not be convicted under this section.[57]

An amin who, being charged with the preparation of a report of attachment of some movable property, attached thereto a certificate containing falsehoods, was held liable under this section.[58] Similarly, a process-server directed to sell attached property and who made a false report of the sale, was held liable.[59]

A station house officer, in order to support an inspector, made a false entry in his diary that four cartmen stated to him, 'as they had said before the Inspector, that there was no dacoity'. He was guilty of intentionally framing an incorrect public record.[60]

10. Knowledge or Intention to Cause Injury

The words 'intending thereby to cause or knowing it to be likely that he may thereby cause injury to any person' used in the section, make it clear that before an accused can be convicted under this section, it must be shown that the accused had a clear intention to cause injury to some person by making a wrong entry. A mere wrong entry, by itself, is not sufficient to bring home the charge to the accused under this section.[61] It is for the prosecution to prove that the accused had a clear intention to harm the complainant in making the false entry.[62] Subsequent conduct of the accused may, however, be taken into consideration.[63]

11. Injury

For the definition of an 'injury', see s 44, IPC and the commentary thereunder.

12. Procedure

An offence under this section is cognizable, bailable, non-compoundable and is triable by a magistrate

of the first class. The period of limitation prescribed for the prosecution of this offence is three years.

13. Sanction

Refer to s 195, Code of Criminal Procedure 1973.[64]1188

The Supreme Court has specifically held that s 195(1)(b)(i), CrPC does not bar the jurisdiction of a magistrate to take cognizance of an offence under s 167, IPC .[65]

14. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....being a public servant in the Department,.....and being, as such public servant, charged with the preparation (*or translation*) of the document relating to.....framed (*or translated*) that document in a manner which you knew (*or believed*) to be incorrect, intending thereby to cause (*or knowing it to be likely that you might thereby cause*) injury to....., and that you thereby committed an offence punishable under section 167 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by the said court on the said charge.

15. Proof

To prove an offence under this section the prosecution must prove that:

(a) on the date of the offence the accused was a public servant;
(b) the accused was charged with the preparation (or translation) of the document;
(c) the accused in fact prepared (or translated) the said document in his capacity as such public servant; and
(d) either the accused intended to cause injury, or knew that the injury was likely to be caused by this act, to any person.[66]

16. Sentence

An official who deliberately tampers with official records and issues false copies, whatever his motives, deserves severe punishment, not merely for his own conduct, but as a deterrent to others who may be tempted to follow his example.[67]

17. Separate Convictions

The offence under this section is included in the offence under ss 467 and 471, and therefore, conviction, both under this section and ss 467 and 471, is not maintainable.[68]

40 Substituted by the Information Technology Act, 2000 (21 of 2000), s 91 and Sch 1, for 'such public servant, charged with the preparation or translaton of any document, frames or translates that document' (wef 17-10-2000).

41 Refer to the Second Report of the Law Commission, s 64 .

42 *Ravada Thavithama v State of AP* 2014 (4) Crimes 147 (AP) .

43 *G Srinivasa Ayyangar v Ramasami Ayyangar* AIR 1945 Mad 9, (1945) 46 Cr LJ 259 .

44 *AJ Joseph v State of Kerala* 2013 Cr LJ 749, p 752 (Ker) .

45 *Empress v Shreenath* (1882) 8 ILR Cal 450, p 454-55 .

46 Re *Muthalagiri Raju* 1 Weir 74.

47 *Brijbehari v Emperor* AIR 1941 Pat 539, p 542, (1941) 42 Cr LJ 508, p 511 .

48 *People Patriotic Front v KK Birla (*1983) Raj LR 554 (Del), (1983) 23 DLT 499; *Ravada Thavitamma v State of AP* 2014 (4) Crimes 147 (AP) .

49 *Ibid.*

50 *Queen-Empress v Deodhar Singh* (1900) 27 ILR Cal 149 .

51 *Brijbehari v Emperor* AIR 1941 Pat 539, p 542, (1941) 42 Cr LJ 508, p 511 .

52 *Algaraswamy Naicker v Nagalingam Pillai* (1979) LW (Cr) 6 (summary of cases) (Mad); *Kalusingh Rajput v State of Maharashtra* (1969) 71 Bom LR 669, (1969) Mah LJ 944 .

53 *Brijbehari v Emperor* AIR 1941 Pat 539, p 543 .

54 *Hira Singh v Crown* 32 PR 1872 (Cr) .

55 *Crown v Dewa Singh* 15 PR 1879 (Cr) .

56 *People Patriotic Front v KK Birla* 15 PR 1879 (Cr) .

57 *Brijbehari v Emperor* AIR 1941 Pat 539, p 544 .

58 Re *Muthalagiri Raju* 1 Weir 74.

59 *Dalip Singh v Emperor* AIR 1930 Lah 92 (a).

60 *Pasupuleti Ramdoss v Emperor* (1911) 12 Cr LJ 502, 12 IC 222 ; *State v Parasram* (1965) Raj 9, (1965) 1 Cr LJ 213 .

61 *Jaswant Singh v State* AIR 1966 J&K 96, p 97, (1966) Cr LJ 901 ; *Raghubansh Lal v State of Uttar Pradesh* AIR 1957 SC 486, (1957) Cr LJ 595 .

62 *Jaswant Singh v State* AIR 1966 J&K 96, p 97, (1966) Cr LJ 901 .

63 *Pasupuleti Ramdoss v Emperor* (1911) 12 Cr LJ 502, 12 IC 222 (Mad) ; *KG Patil v State of Maharashtra* AIR 1973 SC 1388, (1973) Cr LJ 1130 .

64 For detailed commentary see *Sohoni's Code of Criminal Procedure*, vol 3, twenty-first edn, Lexisnexis.

65 *Govind Mehta v State of Bihar* (1973) BLJR 630 (SC) .

66 *Kalusingh Dalsingh v State* (1969) 71 Bom LR 669, p 670, (1969) Mah LJ 944 .

67 *Sukhnandan Lal v King-Emperor* AIR 1926 All 719, p 720, (1927) 28 Cr LJ 31 .

68 *Gulzari Lal v King-Emperor* AIR 1926 Oudh 615 .

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 168.

Public servant unlawfully engaging in trade.--

Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.1189

Comments

1. Scope

This section is directed against public servants engaging in trade. All public servants are not debarred from engaging in trade. This section, therefore, seeks to punish only those of them, who are legally bound as such public servants, to not to engage in trade. The section requires only three elements to constitute the offence, namely:[69]

(a) that the offender is a public servant;
(b) that, as such, he is legally bound not to engage in trade; and
(c) that he has engaged in trade so forbidden.

2. Public Servant

For the definition of a 'public servant' see commentary under s 21, *ante*.

The employees of the LIC are public servants and FIR lodged by the CBI is within their competence.[70]

3. Principle

Public servants are debarred from engaging in trade so that they may not neglect their duties. They can easily obtain an unfair advantage over other traders, as they have access to official information in other respects. The courts are jealous and stringent in imposing restrictions upon the carrying on of trade by public servants, and they will go as far as possible in constructing the words 'directly or indirectly interested' to protect, in the remotest degree, the common public interest, against the fraudulent use of advantages created by the official position of a public servant.[71]

4. Section is Incomplete

The section is, in a way, incomplete without the assistance of some other enactment, or rule of law, which imposes the legal prohibition required, as the second of the above elements requires; and the

enactment containing the prohibition naturally and necessarily, should define the area which is covered by it, both as to the class of public servants to whom it applies, and the nature of the dealings in which those servants are prevented from engaging.[72]

5. 'Legally Bound as such Public Servant not to Engage in Trade'--Meaning of

As to the meaning of the expression 'legally bound', see s 43, IPC and the commentary thereunder.1190

Members, officers and servants of a municipality, who are directly or indirectly interested in any contract made with such municipality, are, under some acts, guilty of an offence under this section. This rule applies in the case of members, etc of district municipalities, local boards, committees, etc, as well.[73]

Sometimes, however, the penalty for such an offence is prescribed by the act itself.[74] Further, sometimes though no penalty attaches, but the offending official is debarred from holding the office.[75] The conduct of a police servant carrying on a shop comes within the prohibition contained in s 10 of the Police Act, and he is therefore liable to be convicted under this section.[76] Similarly, a public servant who engaged himself in trade, though prohibited from doing so by r 21, Bombay Civil Services Conduct, Discipline and Appeal Rules, framed by the government of Bombay and cl (2) of rr 48 and 54, Civil Services (Classification, Control and Appeal) Rules, was held to be liable under this section only.[77]

Also, there are departmental rules prohibiting public servants from trading, but it would appear that on their basis, such public servants are liable to departmental action only.

A public servant can be charged/convicted for offence under s 168, IPC when he is found engaged in a trade. In the instant case, the petitioner was working as a Divisional Manager of the LIC. He owned certain properties, partitioned the same amongst his two sons for the purpose of obtaining loan required by his two sons for carrying on business as builders and promoters. He had sought permission of the department also. Held, no offence under s 168, IPC was made out against him, order framing charge under s 168, IPC was set aside.[78]

6. 'Trade'--What is?

The meaning of the word 'trade' should not be narrowed down, so as to include only an extremely limited class of public servants in the operation of s 168, Indian Penal Code . In *Halsbury's Laws of England*,[79] it is said that the secondary meaning of the term 'trade' is 'any business carried on with a view to profit'. It is also pointed out that 'the word is one of a very general application, and must always be considered with the context with which it is used'. In its wider sense, the word is used 'to cover every kind of trade, business, profession or occupation'. Although 'in a great many contexts the word 'trade' indicates a process of buying and selling, that is by no means an exhaustive definition of its meaning. It may also mean a calling or industry or class of skilled labour'. In this regard, the work of preparing plans and estimates, requires a certain amount of skill, and, looking at it from that point of view, there is no reason why we should not construe it as a 'trade'.[80]

7. Isolated Transaction is not Trade

The word 'trade' in its narrow popular sense means an 'exchange of goods for goods or for money with the object of making profits'. In its widest sense, it includes any business carried on with a view to earn profit.[81] Further, the word 'trade' implies that the trade or business must be habitually, or systematically, exercised. It does not apply to an isolated transaction.

8. Carrying Trade ' *Benami*'

If a public servant carries on trade *benami* in the name of another person, he must be regarded as carrying on the trade himself.[82](Refer to Benami Transactions (Prohibition) Act, 1988.)

9. Doctor doing Private Practice Despite Ban on Private Practice

Where a doctor in Government service practices despite the ban on private practice, it may be violation of Service Rules, but he cannot be said to unlawfully engaged in trade, commits offence punishable under s 168, IPC . The said act clearly would fall within the ambit of misconduct to be dealt with under the Service Rules but would not constitute criminal offence under the Prevention of Corruption Act.[83]

10. Procedure

An offence under this section is non-cognizable, and summons should ordinarily issue in the first class. It is bailable, but not compoundable, and is triable by a magistrate of the first class. The period of limitation for prosecuting an offender under this section is one year.

The question whether a previous sanction of the state government, as provided by s 197 of the CrPC, is necessary, depends upon whether the offence was committed by the public servant while discharging his official duty.[84]

11. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:
>
> That you, on or about the.....day of.....at.....being a public servant, to wit....., and being, as such public servant, legally bound not to engage in trade, did engage in trade, namely.....and thereby committed an offence punishable under section 168 .
>
> And I hereby direct that you be tried by this court on the said charge.

1192

The property purchased by the petitioner, working as a Divisional Manager, LIC, was partitioned by him in share of his two sons and wife, and the said fact was duly declared by him to the Income Tax Department. Further in his letter he informed LIC that his sons are carrying on business as builders and promoters, and are developing the property in question; since the original title was in his name his signatures were required on loan documents. To establish the guilt of the petitioner under s 168, Indian Penal Code 1860 and under s 13(2) r/w s 13(1)(d) of the P C Act 1988 it was required to be enquired in the matter, whether after seeking permission, permission was accorded by the LIC or not? The letter which was written by the accused was on the record, but the CBI had not enquired into this aspect; the CBI was not able to establish the offence against the accused-petitioner as to how the offence was made out under s 168, Indian Penal Code 1860. No *prima facie* case for framing charge against the petitioner was made out.[85]

69 *Narayan v Emperor* (1910) 11 Cr LJ 613, p 615 .

70 *Rasik Behari Mathur v State of Rajasthan* (2007) Cr LJ 3108 (Raj) .

71 *AB v Emperor* (1911) 12 Cr LJ 281, p 283 ; *Ghanshyam Lal Chaudhary v State of Rajasthan (*1972) WLN 375.

72 *Narayan v Emperor* (1910) 11 Cr LJ 613, p 615 .

73 *Narayan v Emperor* (1910) 11 Cr LJ 613 ; *AB v Emperor* (1911) 12 Cr LJ 281 .

74 Madras City Municipal Act III of 1904, s 422 ; the Bengal Municipal Act III of 1884, s 57 ; and the Burma Municipal Act III of 1898, s 40 .

75 City of Bombay Municipal Act III of 1888, ss 60 and 87 .

76 *Emperor v Sagar Singh* AIR 1918 Cal 150 (1) .

77 *Mulshankar Maganlal Vyas v Government of Bombay* AIR 1951 Bom 233, (1950) ILR Bom 706, (1950) 52 Bom LR 648 .

78 *Rasik Behari Mathur v State of Rajasthan* 2007 Cr LJ 3108 (Raj) .

79 *Halsbury's Laws of England*, vol 4, fourth edn, reissue, para 5.

80 *Mulshankar Maganlal Vyas v Government of Bombay* AIR 1951 Bom 233, p 239 .

81 *State of Gujarat v Mahesh Kumar Dhiraj Lal Thakkar* AIR 1980 SC 1167, (1980) 2 SCC 322, (1980) UJ 579 (SC), (1980) Cr App Rep 151 (SC), (1980) SC Cr R 169, (1980) SCC (Cr) 442, [1980] 2 SCJ 317, (1980) Cr LJ 919 (SC), (1980) Mad LJ (Cr) 761 (SC), (1980) Guj LR 752 (SC) .

82 *Ghanshyam Lal Choudhary v State of Rajasthan (*1972) WLN 375; *King v Maung Saw Han* AIR 1939 Rang 69, p 70, (1939) 40 Cr LJ 268 ; *Dulloomiyan v Tularam* AIR 1932 Nag 133, p 134, (1933) 34 Cr LJ 70 ; *Rudra Dat Bhatt v Emperor* AIR 1933 All 543, p 544, (1933) 34 Cr LJ 1208 ; *AB v Emperor (1911)* 12 Cr LJ 281, p 286, 10 IC 577, 7 NLR 53 .

83 *Kanwarjit Singh Kakkar v State of Punjab* 2011 Cr LJ 3360, p 3365 (SC), 2011 AIR SCW 2757, 2011 (5) Scale 37, (2011) 13 SCC 158 .

84 *Bhairon Prasad v Emperor* AIR 1938 All 756 ; *Mahommad Ismail v Crown* AIR 1928 Lah 72 ; *Dullumiya v Tularam* AIR 1932 Nag 133 .

85 *Rasik Behari Mathur v State of Rajasthan* (2007) Cr LJ 3108 (Raj) .

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 169.

Public servant unlawfully buying or bidding for property.--

Whoever, being a public servant, and being legally bound as such public servant, not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly, or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

Comments

1. Scope

The prohibition, contained in this section, is merely the extension of the principle enunciated in s 168 . Under this section a public servant is prohibited from purchasing or bidding for property which he is legally bound not to purchase. Various laws prohibit officers from holding sales of property, and persons employed by and subordinate to them, from purchasing directly or indirectly any property at such sales. The precise terms of the law which create the obligation not to bid or purchase should be referred to, as the prohibition may not be absolute, but only against purchasing at some certain sales. The prohibition, contemplated by the section, is in respect of property with which a public servant is connected in his official capacity, and he is, thus, placed in a position of advantage. The offence of purchasing an impounded pony by a police officer falls within this section, and s 19 of the Cattle Trespass Act 1871.[86]

2. Essential Ingredients

Section 169, IPC sets out that (1) the person should be a public servant, (2) in such capacity as public servant, he is legally bound not to purchase or bid 'certain 1193property', and (3) either in his name or in the name of another or jointly, or in shares with others.[87]

3. Section Incomplete without Assistance of some other Enactment

The offence under Section 169 , IPC is incomplete without the assistance of some other enactment which imposes the legal prohibition required. 'The enactment containing the prohibition naturally and necessarily defines the area which is covered by it, both as to the class of public servants to whom it applies and the nature of the dealings in which those servants are prevented from engaging.'[88] Therefore, in order to come within the clutches of s 169, IPC, there should be a law which prohibits a public servant from purchasing certain property and if he does it, it becomes an offence under s 169, IPC . Section 481 , Criminal Procedure Code, s 189 of the Railway Act, 1989 and s 19 of the Cattle Trespass Act, 1871 and instances of that nature in several enactments are available in which persons mentioned therein shall not directly or indirectly purchase any property at a sale under those Acts. Similarly s 136 of the Transfer of Property Act provides that no Judge, legal practitioner, or officer concerned with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claims which so deals with by him as stated above. Thus, in these circumstances where a law has prohibited purchase of property or to bid at an auction, the prohibition contained therein will be attracted and will become an offence under s 169, IPC .[89]

4. Prohibition should Flow from a Law

Section 168, IPC bears the marginal heading "Public Servant unlawfully buying or bidding for property".[90] On a plain reading of the section and seeking the assurance from the marginal heading as well, it is fairly clear that prohibition should flow from a law. Such law in the context of s 169, IPC should mean that the law as ordinarily understood, that is to say, an enacted law or a rule or regulation framed under such law but not an executive order which confers no rights on anybody nor sets down legally enforceable obligations.[91]

5. Procedure

An offence under this section is non-cognizable, bailable and non-compoundable, and it is triable by a magistrate of the first class.

Section 468, CrPC is confined only to those categories of offences which are punishable with fine or with imprisonment for not exceeding three years. Obviously, the provisions of that section will not be attracted to that category of offences which are punishable with forfeiture or confiscation of property.[92]1194

6. Charge

The following form of the charge may be adopted:

> I.... (*name and office of the magistrate, etc*) hereby charge you.....(*name of the accused*) as follows:
>
> That you, on or about the.....day of.....at.....being a public servant, namely....., in the.....department and being legally bound as servant, not to purchase or bid.....property did so purchase that property in your own name (*or in the name of.....*) (*or jointly or in share*) and thereby committed an offence punishable under section 169 of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

In a case, the petitioner-accused, the Chief Minister of Tamil Nadu, can be a partner in a firm and the same cannot be questioned. The only question raised in the case was that the alleged offences were committed by her in the purchase of the property belonging to TANSI by the said firms. It was held that to answer the said charge under s 169, IPC, there must be a *prima facie* case against the petitioner-accused.[93]

It is clear that any breach in following a government order cannot be an offence punishable under IPC . This is one of the reasons which would stand against the respondent to frame charge against the petitioner for an offence under s 169, IPC . When there is no material regarding the substantial ingredients to make out the said offence, it cannot be said that there is a *prima facie* case against her or that the materials available on record are sufficient enough to convert into evidence at the time of trial to make out an offence under s 169, IPC .[94]

7. Proof

The prosecution, in order to secure conviction under this section, must prove that:

(a) the accused was a public servant;
(b) as such, he was legally bound not to purchase or bid for the property in question; and
(c) he had purchased or bid for that property either in his own name, or in the name of another, or jointly, or in partnership with others.

8. Confiscation

In addition to any sentence which may be imposed under this section, the court has to pass an order

for the confiscation of the property so purchased by the public servant. The court has no choice in the matter and in a case of conviction an order of confiscation in mandatory.

86 *R v Ramakrishna* 16 WR (Cr) 62 .

87 *R Sai Bharathi v J Jayalalitha* (2004) Cr LJ 286 (SC) .

88 *VideNarayan v Emperor* (1910) 11 Cr LJ Reports 613 ; *R Sai Bharathi v J Jayalalitha* (2004) Cr LJ 286 (SC) .

89 *R Sai Bharathi v J Jayalalitha* (2004) Cr LJ 286 (SC) .

90 *Ibid.*

91 *Ibid.*

92 *Surinder Singh v Indian Standard Institute (*1977) Cr LT 112, p 117 (P&H) (DB).

93 *Selvi J Jayalalita v State* II (2000) CCR 249 Mad.

94 *Ibid*.

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 170.

Personating a public servant.--

Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office, shall be punished 1195with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section punishes a person who pretends to hold a public office as a public servant and does any act in the assumed character of a public servant. The act of pretending to hold a particular office as a public servant alone does not make a person punishable, unless that person, in such an assumed character, does or attempts to do some act under colour of such office. The act or acts done by the person who personates a public servant gives a clear indication that he misused his position, ie, he did some overt act in the exercise of the authority of the assumed public servant. It is wholly immaterial whether such a person indulges in one act only or in a series of acts. The gist of the offence consists in the false assumption of the role of a public servant.[95]

2. Ingredients of Offence

To attract s 170, IPC two ingredients are required that such a person who pretends to hold any office as a public servant falsely impersonates any other person holding such office, and any person in such an assumed character does or attempts to do any act under the colour of such office.[96] The prosecution, therefore, needs to prove the following points:

(a) that the accused falsely pretended to be or personated to be a public servant,
(b) that he did so knowingly, and
(c) that while assuming such a character he did, or attempted to do, something under the colour of such an office.[97]

3. Distinction between Sections 170 and 419

See commentary under s 419, *post*.

The offences of cheating and personation overlap each other. Cheating by personation (s 419, IPC) is an offence of a general character under which a person 1196may pretend to be one other than what he really is. But cheating by pretending to be a public servant (s 170, IPC) is a specific offence where one pretends to be a public servant. It has all the ingredients of cheating by personation under s 419 of the IPC . When the personation is that of a public servant and the pretender does some act as such public servant, then the offence would fall under s 170 .[1]

4. 'Any Particular Office'--Meaning of

What is meant by 'any particular office' is 'any specified office' regardless of whether or not such an office exists? If a person makes a claim in some such words 'I hold an office as a public servant', it will not do to charge him under this section; he must specify the office which he claims to hold before he can be found guilty under the section. All that the law requires is that he must specify the office; it does not go further and require that the office must exist. If a person is to be convicted for making a false pretence, the false pretence must be of some existing fact in distinction from a mere promise and a mere opinion, but that does not mean that for an offence under this section the office must be existing.[2]

5. 'As a Public Servant'--Meaning of

A petition-writer is not a public servant as defined in s 21, IPC . Consequently, a person cannot be convicted under this section of personating him.[3]

See also s 21 and the commentary thereunder.

6. 'Knowing that he does not Hold such Office'--Meaning of

To sustain a conviction under this section it would be necessary to make out that the accused knew that he did not hold the office which he pretended to hold. A *bona fide* belief that he does hold such office (for example, by one officer in the absence of another) precludes such knowledge. Although an ignorance of law does not excuse a person who does an action which is an offence (without any knowledge on the part of the alleged offender), yet, to constitute the offence, it needs to be shown that there was a certain knowledge. Further, the offence was not committed by one who acts without that knowledge, and it is immaterial whether the absence of the knowledge required to constitute the offence proceeded from ignorance of law or ignorance of fact. For, though ignorance of law is no

ground of defence, it is evidence of a mental condition.[4]

7. 'Falsely Personates'--Meaning of

'Falsely' does not mean 'fraudulently'. When a person 'falsely personates' any other person he does not necessarily act fraudulently or with any dishonest intention. Whether or not he makes any gain out of his activities while he poses as a public servant is wholly immaterial.[5] This is one of the few offences in this code, in which a dishonest intention is not expressly made an essential ingredient.[6]1197

In an old case, a prisoner who, having passed himself off as a police officer, cheated several villagers out of their money, was held guilty of cheating, and falsely personating as a public servant.[7]

Where the accused, who was a lower division clerk, pretended to hold the post of a secret ASI No 775 in the education department, while knowing very well that he did not hold such office as there was no such office in the department, he was convicted under s 170, IPC .[8]

Where the accused persons posed as officers attached to the detective department on the strength of a police belt and a police monogram and robbed certain articles from the complainant, which were recovered along with one police belt and monogram from the accused, the evidence of the complainant was found to be clear and cogent. The evidence of witnesses were corroborated, the delay in the FIR was held to be of no consequence as the same had to be sent from one police station to another on the point of jurisdiction, and the conviction of the accused persons under ss 170 / 411 / 392 / 34, IPC was upheld.[9]

8. 'Does or Attempts to do any Act'--Meaning of

The fact of personation alone would not be sufficient to justify a conviction under this section. The section further requires that the offender should be shown to have attempted to do or to have done in such assumed character some act under colour of such office.[10] But it is necessary that the act done or attempted to be done should be such an act as might legally be done by the public servant personated.[11]

Where the accused, falsely representing himself to be a constable in the CID demanded people having cattle with them to produce *rahadari* papers, it was held that, even assuming that it was not the duty of a CID constable to order the production of *rahadari* papers, the accused having pretended to be a public servant and as such demanded the production of the *rahadari* papers, he was guilty of the offence under this section.[12]

To constitute offence under s 170, IPC, a person must either pretend to hold a particular office as a public servant knowing that he does not hold such office or falsely personate any other person holding such office. Over and above that, that person in such assumed character must do or attempt to do an act under the colour of such office. The only imputation against the accused was that after retirement from IAS he had used IAS with his name in his letterhead and made some correspondence. True, IAS being a service under the Central Government so long as a member thereof is in service then alone he can use with his name as a member/cadre of that service. By use of IAS with his name in the letterhead and correspondence made stating so the accused could not be imputed of having pretended of holding a particular office as a public servant, which he was not, or of doing or attempting to do any act under 1198the assumed. Petitioner who was a member of IAS had used IAS in his letterhead when he continued as Director of CAPE and also corresponded in that manner, was no ground to impute that he has committed an offence under s 170 of the IPC . The proceedings against the accused petitioner were quashed on petition filed under s 482, CrPC .[13]

9. 'Under Colour of such Office'--Significance of

The phrase 'an act under colour of such office', points to acts which could not have been done without assuming official authority or responsibility, and would not connote acts of a ministerial or mechanical character, which might be done without requiring the justification of an office in the person doing them.[14]But the act in question need not be such an act as might legally be done by the public servant personally. Thus, *A* pretending to be a head constable, demands one anna worth of fruit from a fruit-seller for one pice. He is guilty of the offence under this section.[15]The act done 'under colour' of an office is an act having some relation to the office which the accused pretends to hold.[16]The act done must be one which assumes an official authority.

The Kerala High Court has held that it is not possible to subscribe to the view that to constitute the offence provided for by s 170 of the Indian Penal Code, it is not necessary that the act done or attempted to be done should be such an act as might legally be done by the public servant personated. Such a view, if accepted would virtually make the clause 'under colour of such office' redundant, but the section not only provides that the act shall be done in such assumed character, but also under colour of such office.[17]

The view of the Calcutta High Court was the same. It observed that the clause 'under colour of such office' apparently means making use of such office and an act done or attempted to be done 'under colour' must be an act having some relation to the office which the accused pretends to hold. In the case before the division bench of the Calcutta High Court, where the accused personated as a customs officer and extracted presents, it was held that s 170, IPC was not attracted.[18]

The Punjab and Haryana High Court had the occasion to examine the above views of the Kerala and Calcutta High Courts and took a different meaning of the expression 'under colour of such office'. According to it one finds it difficult to subscribe to the view of the Kerala and Calcutta High Courts. This is for the reason that it is not necessary that the act done should be such as might legally be done by the public servant personated. The expression 'under colour of such office' need not have a direct proximity with the duties of the office of the person impersonated. It is enough that a person pretends to be someone else in front of others who infact he is not. Therefore, the accused, who identified persons in different sale-deeds as a 1199*lambardar* and attested certain sureties while he infact was not a lambardar, was held to be acting under the colour of the office of a *lambardar.*[19]

Where the accused avoided paying a one anna platform charge by pretending, upon entering the station platform, that he was a CID officer, it being a custom of the railway not to require from CID officers a platform ticket, it was held that the act of the accused did not constitute an offence as it was not a power peculiar to a CID officer to go to a platform without a ticket and the act of the accused was not therefore an official act.[20]

Where the accused falsely representing himself as a CID officer promised to appoint the complainant as a constable, it was held that the accused could not be convicted under this section as a mere promise could not be regarded as an act within the meaning of this section, and as the promise implied nothing more than that the accused would recommend the complainant for appointment as a constable, and such a recommendation might be made by one not necessarily a CID officer.[21]

Where the accused, a retired assistant civil surgeon, issued a certificate on which he made a rubber stamp which purported to show him as a civil surgeon, it was held that he was not guilty under this section as even in his capacity as a retired assistant civil surgeon, he could issue the certificate and so could not be said to have done an act under the colour of the office of a civil surgeon.[22]

Where the accused posed as a government servant and by so doing, obtained the services of the *kamdar mahar,* services which he would not otherwise have obtained and which the *Kamdar mahar*was bound to give on demand by a government officer, it was held that the accused did an act under the colour of the office which he assumed and was therefore guilty under this section.[23]

10. Mere Attending or Addressing Public Meetings without Attempts to Commit

any Official Act

A mere attending of some meetings and addressing the general public does not amount to an act under the colour of the office. If a person, who has been designated as a chairman, discusses with somebody like the sub-divisional magistrate or deputy commissioner and other people, it does not amount to dealing with the activity of the marketing board. It does not amount to acting under the colour of the office. It is possible that having been appointed as the chairman of the Punjab State Agricultural Marketing Board, the accused wanted to acquaint himself with its functioning. But it does not amount to an offence as envisaged under s 170, IPC . A mere assumption of a character without any attempt to commit any official act is not sufficient to attract s 170, IPC .[24]

11. Mens Rea

This is one of the offences in the code in which a dishonest intention is not expressly made an essential ingredient.[25] Acting as a public servant in good faith under the 1200*bona fide* belief that he holds such an office may be covered by the general exception under s 79 and is not an offence.[26]

12. Procedure

An offence under this section is cognizable and a warrant must ordinarily issue in the first instance. It is non-bailable and non-compoundable, and is triable by any magistrate. The period of limitation prescribed for this offence is three years.

13. Charge

The following form of the charge may be adopted:

> I.....(*name and office of magistrate, etc*) hereby charge you.....(*name of accused*), as follows:
>
> That you, on or about the.....day of.....at.....pretended to hold the office of....., as a public servant (*or falsely personated.....holding such office*), and in such assumed character did (*or attempted to do*) under colour of such office,.....(*specify the act done*) and thereby committed an offence punishable under section 170 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

14. Proof

To secure conviction under this section the prosecution is to prove the following points:

(a) that the accused falsely pretended to be or personated to be a public servant;
(b) that he did so knowingly; and

(c) that assuming such character he did or attempted to do something under colour of such office.[27]

In other words, for proving an offence under s 170, IPC against an accused, it is necessary for the prosecution to establish that the accused personated himself as a public servant or that he pretended to hold the office of a public servant, that he was not a public servant or that he did not hold such office, that he acted falsely in such personation and that he knew that he did not hold such office, and that he, when assuming such character, did or attempted to do something under colour of such office.[28]

95 *Satya Pal Thaper v State* AIR 1951 All 481, p 482 ; *Sukhdeo Pathak v Emperor* AIR 1918 Pat 653 ; *Queen v Sadanand Dass* 2 WR 29 .

96 *Ajitinder Singh v State of Punjab & Ors (*2000) Cr LJ 1827 (P&H), (2000) II CCR 453 (P&H).

97 *Biswanath Mukherjee v State, Opposite Party* AIR 1987 Cal 602 (DB) ; *KS Prem Chandra Kurup v State of Kerala* 2013 Cr LJ 1465 (Ker) .

1 *Sarwansingh v State* AIR 1958 MP 230, (1958) Cr LJ 1039 .

2 *Amjad Hussain v State* AIR 1953 All 549, 53 Cr LJ 1279 .

3 UBR (1897-1901), Vol I, 265.

4 1 Weir 75.

5 *Satyapal Thapar v State* AIR 1951 All 481, p 482 ; *Emperor v Tun Aung Gyaw* (1906) 4 Cr LJ 483, p 484 .

6 *Emperor v Umakant Balvant* (1907) 6 Cr LJ 70, 73, (1907) 9 Bom LR 706 (Bom) .

7 *Queen v Sadanand Doss* 2 WR 29 .

8 *Jata Shankar Jha v State of Rajasthan* (2000) Cr LJ 2108 (Raj) .

9 *KK Biswas v State of West Bengal* (1996) Cr LJ 2823 (Cal) .

10 *Emperor v Umakant Balvant* (1906) 5 Cr LJ 211, p 212, (1907) 9 Bom LR 222 ; *State v Abdul Qayum Ansari* (1956) ILR Hyd 436 ; *Sukhdeo pathak v Emperor* AIR 1918 Pat 653, p 659, (1918) 19 Cr LJ 209 ; *KS Prem Chandra Kurup v State of Kerala* 2013 Cr LJ 1465 (Ker) .

11 *Emperor v Aziz-ud-din* (1905) 27 ILR All 294, (1904) 1 Cr LJ 913, (1904) 1 All LJ 604 ; *Queen-Empress v Wazir Jan* (1888) 10 ILR All 58 ; *Biswanath v State* AIR 1967 Cal 602, (1967) Cr LJ 1626 ; *PR Gopala Pillai v State of Kerala (*1974) Ker LT 131, (1974) Mad LJ (Cr) 308.

12 *Roshan v Emperor* AIR 1935 Lah 92 .

13 *KS Premchandra Kurup v State of Kerala* 2013 Cr LJ 1465, p 1466, 1467 (Ker), 2012 (4) KLT 872 .

14 *Emperor v Umakant Balwant* (1907) 5 Cr LJ 211, p 212, (1907) 9 Bom LR 222 ; *State v Abdul Qayum Ansari* (1956) ILR Hyd 436 .

15 *Emperor v Aziz-ud-din* (1905) 27 ILR All 294, (1904) 1 Cr LJ 913, (1904) 1 All LJ 604 ; *Queen-Empress v Wazir Jan* (1888) 10 ILR All 58 .

16 *Lakshaminarayan Tripathy v Emperor* AIR 1943 Pat 378, p 379, (1944) 45 Cr LJ 211 .

17 *Gopala Pillai v State of Kerala (*1974) Ker LT 131; *KS Prem Chandra Kurup v State of Kerala* 2013 Cr LJ 1465, 2012 (4) KLT 872 (Ker) .

18 *Biswanath Mukherjee v State* AIR 1967 Ker 602 (DB), (1967) Cr LJ 1626 (DB).

19 *Pratap Singh v State of Haryana* (1998) Cr LJ 633 (P&H) .

20 *Sukhdeo Pathak v Emperor* AIR 1918 Pat 653, p 654, (1918) 19 Cr LJ 209 .

21 *Lakshaminarayan Tripathy v Emperor* AIR 1943 Pat 378, p 379, (1944) 45 Cr LJ 211 .

22 *State v Abdul Qayum Ansari* (1956) ILR Hyd 436 .

23 *Bashirulakhan Waisulla Khan v Emperor* AIR 1941 Nag 321, p 322 .

24 *Ajitinder Singh v State of Punjab & Ors* (2000) Cr LJ 1827 (P&H), (2000) II CCR 453 (P&H) .

25 *Karuna Krishna Biswas v State of West Bengal (*1996) Cr LJ 2823 (Cal).

26 *Emperor v Umakant Balvant* (1907) 6 Cr LJ 70, p 73, (1907) 9 Bom LR 706 .

27 *Biswanath Mukherjee v State* AIR 1967 Cal 602, (1967) Cr LJ 1626 .

28 *State of Madhya Pradesh v Sushil Singh* (1984) 1 Crimes 305 (MP) .

Indian Penal Code (Act XLV of 1860)

Chapter IX

Of Offences by or Relating to Public Servants

S. 171.

Wearing garb or carrying token used by public servant with fraudulent intent.--

Whoever, not belonging to a certain class of public servants, wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servants, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.1201

Comments

1. Scope

This section is analogous to s 140, IPC under which the wearing of the garb or carrying of the token of a soldier, sailor or airman is punishable. Under the present section the wearing of the garb or carrying of a token resembling any garb or token used by a public servant with the intention to pass off as such public servant is punishable. The offence is complete, although no act is either done or attempted to be done in the assumed official character. The mere circumstances of wearing the garb, or using the token, with the necessary intention or knowledge is sufficient. If any act is done, then the preceding section will apply. The English law is also to the same effect.

See also s 140, IPC and commentary thereunder.

2. 'Wears any Garb'--Meaning of

To carry a police jacket under the arm is not to 'wear' it.[29] If the person so deceived thereby acts to his own detriment, the offence will be one of cheating.[30]

Where there is no averment in the petition that the accused had worn any garb or carried any token

used by the public servant, s 171, IPC is not attracted.[31]

3. Procedure

An offence under this section is cognizable but summons may ordinarily issue in the first instance. It is bailable but not compoundable and is triable by any magistrate and may also be tried summarily. The period of limitation for the prosecution of this offence is one year.

4. Charge

The following form of the charge may be adopted:

> I..... (*name and office of magistrate, etc*) hereby charge you.....(*name of accused*) as follows:
>
> That you, on or about the.....day of.....at .....not belonging to.....class of public servant wore garb of such a class of public servant, to wit.....(*or carried token, to wit.....which is used by.....class of public servant*) with the intention that it may be believed (*or with the knowledge that it is likely to be believed*) that you belong to that class of public servants and thereby committed an offence punishable under section 171 of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

5. Proof

The points for proving an offence under this section are:

(1) that the accused wore the garb or carried a token of a public servant;
(2) that it either was the garb or token of a public servant or resembled it;
(3) that the accused was not a public servant entitled to use such garb or token; and
(4) that he wore the garb or carried the token with the intention or knowledge that it was likely to be believed that he was such a public servant.12031204

29 *R v Nga Po Kyaw* (1904) 1 Cr LJ 554 .

30 Section 415 and Illust (a) thereto; *R v Barnard* 7 C&P 784 .

31 *Ajitinder Singh v State of Punjab & Ors* (2000) Cr LJ 1827 (P&H) .

Indian Penal Code (Act XLV of 1860)

Chapter IXA

Of Offences Relating to Elections

[13][S. 171A.

"Candidate", "Electoral right" defined.--

For the purposes of this chapter--

[14][(a) "candidate" means a person who has been nominated as a candidate at any election;]

(b) "electoral right" means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at any election.]1207

Comments

1. Scope

This section only defines the expressions, 'candidate' and 'electoral right'.

2. Legislative Changes

Clause (a) of s 171A was substituted by Act 40 of 1975, s 9, wef 6 August 1975.

3. Election

The term 'election' is defined in expln 3 of s 21 of this Code as denoting 'an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election'. In its ordinary or etymological meaning it implies some act of choosing on the part of the electorate, though indeed we are accustomed to speak of an 'uncontested election', where the single candidate is unopposed. The word 'election' has by long usage, in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrower sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling, or a particular candidate being returned unopposed, when there is no poll. In the wider sense, the word is used to connote the entire process culminating in a candidate being declared elected. It bears, thus, a wide meaning whenever we talk of elections in a democratic country. Hence, the term election may be taken to embrace the whole procedure whereby an elected member is returned, whether or not it was found necessary to take a poll.[15] Election has the same meaning as the expression used in arts 327 and 328, of the Indian Constitution, *viz.,* matters relating to or in connection with election.

Election Embraces Whole Procedure

Election is not merely the ultimate decision or the ultimate result. Election is every stage from the time the notification is issued till the result is declared, and even perhaps if there is an election petition, till the decision of the Election Tribunal. It is a whole continuous integrated proceeding and every aspect of it and every stage of it and every step taken in it is a part of the election.[16]

4. Definition of Candidate

The definition of candidate in this section has been adopted from the English Municipal Corporations Act 1882, s 77 and Municipal Elections (Corrupt and Illegal Practices) Act 1884.[17]

In s 79(b) of the Representation of the People Act 1951, the term 'candidate' is defined as:

> Candidate means a person who has been or claims to have been duly nominated as a candidate at any election.

Unless, therefore a case falls within the latter half of the definition a person becomes a candidate under the first part of the definition only when he has been duly nominated as a candidate and the furtherance of the prospects of a candidate's election must, therefore, in such a case, commence from after that stage.[18] Before the 1975 amendment, the word candidate included a person who, when an election was in contemplation, held himself out as a prospective candidate thereat; provided that he was subsequently nominated as a candidate at such election. The natural effect of this definition is that a person, who holds himself out as a prospective candidate cannot be treated as a candidate in the eyes of law unless he is actually nominated as such. The expression 'holding out as a prospective candidate' has now lost its significance.

5. Candidate--Determining Factor

The question as to when a person becomes a candidate must be decided on the language of s 79(b) of the Representation of the People Act 1951. Under that section, the candidature commences when the person begins to hold himself out as a prospective candidate. The determining factor, therefore, is the decision of the candidate himself, and not the act of other persons or bodies adopting him as their candidate.[19] When, therefore, a question arises under s 79(b) of the Representation of the People Act 1951 as to whether a person had become a candidate at a given point of time, what has to be seen is whether at that time he had clearly and unambiguously declared his intention to stand as a candidate, so that it could be said of him that he had held himself out as a prospective candidate. That he has merely formed an intention to stand for election is not sufficient to make him a prospective candidate, because the essence of the matter is that he should hold himself out as a prospective candidate. That can only be possible if he communicates such intention to the outside world by a declaration or conduct from which it could be inferred that he intends to stand as a candidate.[20]

6. Withdrawal after Nomination--Effect

It is obvious that a person who has been duly nominated as a candidate is a candidate within the definition of this word in this section. He remains a candidate even though, after having been duly nominated, he withdraws. The words of the definition itself are clear and there is no manner of ambiguity in this respect.[21]

7. 'Electoral Right'--Definition of

The term 'electoral right', defined under cl (b) of s 171A, IPC clearly indicates that an electoral right is of a definite nature and it is to be exercised by an individual.[22] Electoral right has been defined in s 171A, IPC, *inter alia* as either to vote or refrain from voting at an election.[23] Under the definition given here, the expression electoral right embraces not only the right of a person to stand or not to stand as a candidate or to withdraw from being a candidate at an election,[24] but also his right to vote or refrain from voting at an election.[25] The right to nominate a candidate does not, however, constitute an electoral right.[26]

13 Inserted by the Act 39 of 1920, s 2 .

14 Substituted by Act 40 of 1975, s 9, for cl (a) (wef 6-8-1975).

15 *NP Ponnuswami v Returning Officer* AIR 1952 SC 64, p 68 ; *Shankar Rao Ramaji v State of Madhya Bharat* AIR 1952 MB 97 (FB) ; *Hari Vishnu Kamath v Ahmad Ishaque* AIR 1955 SC 233, p 238 ; *Okram v Election Commr* AIR 1968 Mani 84, p 93 (Election commences after the issue of notification) ; *AV Srinivasalu Reddy v S Kuppuswami Gounder* AIR 1928 Mad 253 (explaining, *Krishnawami Chettiar v Ghulam Muhammad* AIR 1926 Mad 951); *Srinivasachariar v Venkaterama Aiyar* AIR 1925 Mad 376 ; *Sarvothama Rao v Chairman, Municipal Council, Saidapet* AIR 1923 Mad 475 ; *Sat Narain Gurwala v Hanuman Prasad* AIR 1946 Lah 85 .

16 *Shankar Nanasahab Karpe v Returning Officer* AIR 1952 Bom 279 .

17 47 & 48 Vic c 70, s 34 .

18 *Raj Krushna Bose v Binod Kanungo* AIR 1954 SC 2002 .

19 *S Khader Sheriff v Munnuswami* AIR 1955 SC 775 .

20 *Ibid.*

21 *Moolchand v Rulia Ram Panna Lal* AIR 1963 Punj 516, p 517 ; *Rao Abhe Singh v Rao Nihal Singh* AIR 1964 Punj 209 ; *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299, p 2413 .

22 *Deepak Ganpatrao Solunke v Govt of Maharashtra (*1999) Cr LJ 1224 (Bom) (DB).

23 *Court on its own motion v Uoi* (2001) Cr LJ 225 (P&H) .

24 *Moulvi Ahmed Kabir Chowdhary v Emperor* AIR 1938 Cal 274, p 275 .

25 *Venkata Krishna Rao v G Appalaswamuy* AIR 1957 AP 845, p 846 .

26 *SK Singh v VV Giri* AIR 1970 SC 2097, p 2110 .

Indian Penal Code (Act XLV of 1860)

Chapter IXA

Of Offences Relating to Elections

[27][S. 171B.

Bribery.--

(1) Whoever--

(i) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right; or

(ii) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right,

commits the offence of bribery:

Provided that a declaration of public policy or a promise of public action shall not be an offence under this section.

(2) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward.]

Comments

1. Scope

This section defines bribery at an election.

Bribery in Election

'Bribery' is defined primarily as the giving or acceptance of a gratification, either as a motive or as a reward to any person, either to induce him to stand as, or not to stand as, or to withdraw from being a candidate, or to vote or refrain from voting at an election. It also includes offer, or agreements to give or offer, and attempts to procure, a gratification for any person. Gratification was formerly explained in s 161 of this Code, now replaced by s 7 of the Prevention of Corruption Act 49 of 1988, and it states that the word gratification is not restricted to pecuniary gratifications or to gratifications estimable in money.[28]

Bribery as Corrupt Practice

The definition of bribery given here differs materially from the definition of bribery as a corrupt practice given in s 123(1) of the Representation of the People Act 1951, which runs:

(1) "Bribery" that is to say,--

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing--

(a) a person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election, or as a reward to--

(i) a person for having so stood or not stood, or for having withdrawn or not having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting;

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward:

(a) by a person for standing or not standing as, or for withdrawing or not withdrawing from being, a candidate; or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate to withdraw or not to withdraw his candidature.

Explanation.--For the purposes of this clause the term "gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses *bona fide* incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78 .

...

That section contemplates only the making of a gift by a candidate, whereas bribery in this section embraces not only the making of a gift but also the acceptance of it.[29]

Laws of England

Bribery at a parliamentary or local election was an indictable offence at common law punishable by fine and imprisonment. The common law offence has, however, been superseded by express statutory provisions.1211

A person is guilty of a corrupt practice if he is guilty of bribery. A person is guilty of bribery:

(1) if he, directly or indirectly, by himself or by any other person on his behalf:
  (a) gives any money or procures any office to or for any voter or to or for any other person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting; or
  (b) corruptly does any such act as mentioned in head (a) above on account of any voter having voted or refrained from voting; or
  (c) makes any such gift or procurement to or for any person in order to induce that person to procure, or endeavour to procure, the return of any person at an election or the vote of any voter; or if upon or in consequence of any such gift or procurement he procures or engages, promises or endeavours to procure, the return of any person at an election or the vote of any voter;

(2) if he advances or pays or causes to be paid any money to or for the use of any other person with the intent that that money or any part of it is to be expended in bribery at an election or knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election;
(3) if, before or during an election, he directly or indirectly by himself or by any other person on his behalf receives, agrees, or contracts for any money, gift, loan or valuable consideration, office, place or employment for himself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting;
(4) if, after an election, he directly or indirectly by himself or by any other person on his behalf receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting.

Where in an election petition it is shown that corrupt practices committed in reference to the election for the purpose of promoting or procuring the election of any person at that election have so extensively prevailed that they may reasonably be supposed to have affected the result, his election, if he is elected, is void and he is incapable of being elected to fill the vacancy or any of the vacancies for which the election was held.[30]

2. Gratification

The term 'gratification' has been explained above.

3. Gratification to Individual and not to the Party

The term 'electoral right' as defined under cl (b) of s 171A of the IPC clearly indicates that the electoral right is of a definite nature and it is to be exercised by an individual. So, the gratification has to be given to an individual. When the offer is made to the Republican Party of India and not to an individual and there is nothing in the offer which indicates that any influence is being brought on any individual with respect to exercising his electoral right, that means, to stand, or not to stand as, or to withdraw from being a candidate or to vote or to refrain from voting at the election, seeking support of a political party, during the cause of election and making an offer to a political party of some share in political power for giving such support cannot be called as giving gratification as contemplated under s 171B of IPC .[31]

4. Gratification not Limited to Money

Gratification is not necessarily limited to money or money's worth, since anything done or omitted to be done may amount to a gratification and consequently a bribe. For example, the promise of a situation or employment[32] or the offer to vacate an office in favour of the briber[33] are within its mischief. Payment to the voter for loss of time is equally so.

Where a candidate for an election writes a letter to his agent asking him to dissuade a rival candidate from standing for the election by offering him money and the agent accordingly offers a big sum of money to the rival candidate for withdrawing his candidature, the conduct of the accused candidate is within the mischief of this section.[34]

5. Gratification--Tests to be Applied

For finding out whether a particular promise or act amounts to gratification, two tests have to be satisfied. First, that the gratification must be something which is calculated to satisfy a person's aim, object or desire, and secondly, such a gratification must be of some value though it need not be something estimable in terms of money.[35] The word 'gratification' should be deemed to refer only to cases where a gift is made of something which gives a material advantage to the recipient.[36] It is not, however, necessary that the gratification offered should be of value only to the person to whom it is offered, and not to anybody else.[37]

Whether the object, for which gratification has been paid, has been achieved or not is immaterial.[38]

6. Making of Gift is Corrupt Practice

An acceptance of bribe or gift made to a candidate with the intention of inducing him to drop out of the election contest is not a corrupt practice within the meaning of s 123(1)(A) of the Representation of the People Act 1951. The words 'gift, offer or promise by a candidate or his agent or by any other person' clearly show that what is contemplated is the making of the gift and these words are wholly inappropriate to describe the acceptance of the gifts. The words 'with the object, directly or indirectly of inducing' also indicate that only the making of the gift is contemplated, for the object is to punish the person making the gift, and clearly not of the person accepting it.[39]

7. Contribution to Charity

Charitable gifts, at the time of an election, may, in conceivable cases, amount to the corrupt practice of bribery, provided the motive behind the charity was corrupt.[40]1213*Bona fide* charity has always been allowed. On the other hand, what are called charitable gifts may be merely a specious and subtle form of bribery. If a gift is charitable, it will not become bribery because of the use made of it, even if political capital is made out of it; it is not possible by any *ex post facto* act to make that which

was legal at the time, illegal and criminal.[41]It is the object of the act to determine whether or not it amounts to bribery. It is, therefore, the motive which is behind the charity that should be taken into consideration in finding whether or not it is a subtle form of bribery. If the motive is corrupt and the object is to induce the voters to vote in a particular way, it is bribery.[42]

8. What is Treating?

'Treating' is a form of bribery. The explanation to s 171E says that 'treating' means that form of bribery where the gratification consists of food, drink, entertainment or provision.

Under s 100 of the (English) Representation of the People Act 1949:[43]

> A person shall be guilty to treating if he corruptly, by himself or by any other person, either before, during or after an election, directly or indirectly, gives, or provides or pays, wholly or in part, the expense of giving or providing any meal, drink, entertainment or provision to or for any person--
>
> (a) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or
> (b) on account of that person or any other person having voted or refrained from voting, or being about to vote to refrain from voting.
>
> Every elector, or proxy of an elector who corruptly accepts or takes any such meal, drink, entertainment or provision shall also be guilty of treating.

A corrupt promise of refreshment to voters to induce them to vote has been held to be bribery. Where, however, the object of a candidate in distributing sweets to school children was not to secure votes, it could not be held to be a case of bribery, even if the idea, that the donation would increase his popularity and might result in some indirect propaganda for him, might have been at the back of the candidate's mind.[44]

9. Proof--To be Proved as any other Offence

Due proof of a simple act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election.[45] The charge of bribery is indeed a serious criminal charge. It falls within the ambit of s 171B of the Indian Penal Code, and is a criminal offence. If that be so, it must follow that clear and unequivocal proof is required before a case of bribery is held to be established. It should satisfy the test applied to the proof of offences in criminal cases. The court must be satisfied beyond all reasonable doubt 1214that the said bribery has been proved.[46] Suspicion is not sufficient,[47] and the confession of the person, alleged to have been bribed, is not conclusive.[48] It is not safe to base a finding of bribery on the uncorroborated testimony of an accomplice except possibly, in very exceptional circumstances.[49]

10. Illustrative Cases

Most of the decisions relating to bribery are on election petitions under the Representation of the People Act.

Paying a voter's debts,[50] permitting a voter to shoot rabbits on the estate of the candidate,[51] paying the travelling expenses of a voter on condition that he must vote for the payer,[52] paying the rates and taxes of a voter,[53] payment made to keep away voters from voting,[54] payment to a voter for loss of time[55] offering money to a rival candidate for withdrawing his candidature,[56] are all instances of bribery, but it is not bribery to make payment to election agents,[57] or payment of election expenses to a candidate.[58]

Money paid to a club to pay off its debts and to repair its premises, with the object of inducing those of its members who are voters to record their votes in favour of the candidate is a bribe.[59]

Where the motive is corrupt and the object of giving the gratification is to induce the voters to vote in a particular way, it is bribery.[60]

A person, who gives some land to a voter for refraining from voting at an election, is guilty of an offence under this section.[61]

27 Inserted by the Act 39 of 1920, s 2 .

28 The Statement of Objects and Reasons, Gazette of India, 1920, Pt V, p 135, s 8 .

29 *S B Adilgam v VS Kandaswami* AIR 1958 SC 8570 .

30 *Vide, Halsbury Laws of England*.

31 *Deepak Ganpat Rao Salunke v Govt of Maharashtra* (1999) Cr LJ 1224 (Bom) (DB) .

32 Re *Plymouth*(1859) 2 Per & Dav 238.

33 *Waterford*(1870) O M&H 25.

34 *Ahmed Kabir Chodhary v Emperor* AIR 1938 Cal 274, (1938) 39 Cr LJ 483, 174 IC 808 .

35 *Mohan Singh v Bhanwar Lal* AIR 1964 SC 1366, p 1369, [1964] 5 SCR 12 ; *Trilochan Singh v Karnail Singh* AIR 1968 Punj 416, p 420, 421, (1968) Cr LJ 1199 (FB) .

36 *Iqbal Singh v Gurdas Singh* AIR 1976 SC 27, p 34, (1976) 3 SCC 284 .

37 *Trilochan Singh v Karnail Singh* AIR 1968 Punj 416, p 424, 425, (1968) Cr LJ 1199 (FB) .

38 *Pillai v Dangali* AIR 1942 Rang 52, p 54, 55 .

39 *SB Adityan v S Kanaswami* AIR 1958 SC 857 .

40 *Sarla Devi v Birendrasingh* AIR 1961 MP 127, p 131 .

41 *Halsbury's Laws of England*, fourth edn, reissue, vol 15, para 689.

42 *Braj Bhushan v Raja Anand Brahma Shah* AIR 1961 All 356, p 361 .

43 12, 13 and 14, Geo 6, c 68.

44 *Braj Bhushan v Raja Anand Brahma Shah* AIR 1961 All 356, p 360 ; **Seealso** the English cases cited therein.

45 Re *Plymouth*(1880) 3 OM&H 107, p 108; *Halsbury's Laws of England*, fourth edn, vol 15, reissue, (1977), p 425, para 695; *C Subba Rao v KB Reddy* AIR 1967 AP 155, (1967) Cr LJ 691 (DB) .

46 *C Subba Rao v K Brahamanda Reddy* AIR 1967 AP 155, (1967) Cr LJ 691 (DB), (1966) 2 Andh WR 401 .

47 Re *Lichfield*(1869) 1 OM&H 22, p 38.

48 Re *Ipswich*1857 Wolf & D 173, p 178.

49 *Trilochan Singh v Karnail Singh* AIR 1968 Punj 416, p 420, 421, (1968) Cr LJ 1199 (FB) ; *Halsbury's Laws of England*, vol 15, fourth edn, 1977, p 425, para 684 (bribery may be implied from the circumstances of the case and the court is not bound by the strict practice applicable to criminal case; it may act on the uncorroborated testimony of an accomplice).

50 (1869) 1 OM&H 274.

51 (1874) 2 OM&H 129.

52 *Cooper v State* (1857) 6 HL Cas 746 .

53 *Worcester*(1819) C&D 173.

54 Re *Bradford*(1869) 1 OM&H 30, p 32.

55 Re *Bolten*(1874) 2 OM&H 145.

56 *Ahmed Kabir Chowdhury v Emperor* AIR 1938 Cal 274, (1938) 39 Cr LJ 483 .

57 Re *Youghal* Sup P 295, 21 LT 316.

58 Re *Belfast*(1869) 1 OM&H 281, p 285.

59 *Pillai v Daugali* AIR 1942 Rang 52, 199 IC 110 ; *Sarla Devi v Virendra Singh* AIR 1961 MP 127, p 131, (1961) MPLJ 1361 .

60 *Brij Bhushan Singh v Raja Anand Brahma Shah* AIR 1961 All 356, p 361, (1960) All LJ 369 (DB) ; *Iqbal Singh v Gurdas Singh* AIR 1976 SC 27 ; *Trilochan Singh v Karnial Singh* AIR 1968 Punj 416, (1968) Cr LJ 1199 (FB) .

61 *Venkata Krishna Rao v Appalaswamy* AIR 1957 AP 245, (1957) Cr LJ 212 .

Indian Penal Code (Act XLV of 1860)

Chapter IXA

Of Offences Relating to Elections

[62][S. 171C.

Undue influence at elections.--

(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.1215

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever--

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1)

(3) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.]

Comments

1. Scope

This section defines the offence of 'undue influence' and s 171F provides the punishment for it.

2. Analogous Law

'Undue influence' as a corrupt practice is defined in sub-s (2) of s 123 of the Representation of the People Act 1951 as:

> ...
>
> (2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right:
>
> *Provided* that--
>
> (a) without prejudice to the generality of the provisions of this clause, any such person as is referred to therein who--
>
> (i) threatens any candidate or any elector, or any person in whom a candidate or an elector interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or
> (ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,1216
>
> shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;
>
> (b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause.

...

The law in England relating to undue influence at elections, is not the same as in India, as will appear from the following definition of 'undue influence' contained in s 2 of 46 and 47 Vic, c 51, which substantially re-enacted the former s 5 of 17 and 18 Vic, c 102:[63]

> Every person who shall directly or indirectly, by himself or by any other person on his behalf made use of or threaten to make use of any force, violence, or restrain, or inflict or threaten to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or

> compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall by abduction, duress, or any fraudulent device or contrivance, impede or prevent the free exercise of the franchise of any elector, or shall thereby compel, induce, or prevail upon any elector either to give or to refrain from giving his vote at any election, shall be guilty of undue influence.

3. Difference between English and Indian Law

The law relating to undue influence at elections in England is not the same as in India. The words of the English Statute quoted in note no 1 above, lay emphasis upon the individual aspect of the exercise of undue influence. It is with reference to the words of that statute that Brumwell, B made the following observation in the *North Durham* case:[64]

> When the language of the act is examined it will be found that intimidation to be within the statute must be intimidation practised upon an individual.

The Indian law, on the other hand, does not emphasise the individual aspect of the exercise of such influence, but pays regard to the use of such influence as has the tendency to bring about the result contemplated in the clause. What is material under the Indian law is not the actual effect produced, but the doing of such acts as are calculated to interfere with the free exercise of any electoral right. Decisions of the English courts based on the words of the English statute, which are not strictly in *parimateria* with the words of the Indian statute, cannot, therefore, be used as precedents in this country.[65]

4. Undue Influence--Meaning of

The Statement of Objects and Reasons appended to the bill states:

> Undue influence at an election is defined as the voluntary interference or attempted interference with the right of any person to stand, or not to stand as, or withdraw from being, a candidate, or to vote or refrain from voting. This covers all threats of injury to person or property and all illegal methods of persuasion and any interference with the liberty of the candidates or the electors. A sub-section is added to explain that the 1217inducing or attempting to induce a person to believe that he will become the object of divine displeasure is also interference. It is not, however, interference within the meaning of the clause to make a declaration of public policy or a promise of public action.[66] The second sub-clause is merely explanatory of the general definition in the first sub-clause and does not restrict the generality of the words used there. We have considered the criticisms of this clause based on the generality of the words employed, but we are satisfied that any attempt at specific enumeration would be open to a serious danger of loopholes in what we regard as a most salutary provision.[67]

The definition of undue influence given in s 123(2) of the Representation of the People Act 1951, is more or less in the same language as in s 171C of the IPC, except that the words 'directly or indirectly' have been added to indicate the nature of interference. It will be seen that the definition of undue influence in the Representation of the People Act may be wider.[68]

5. The term 'Under Influence' is not Susceptible to Precise Definition

The term 'undue influence' is not susceptible of any precise definition, but it suggests the overcoming of the will of one by the other who superimposes his will on the weaker party despite the latter's disinclination or effective resistance. 'Undue influence' is a species of constructive flow. Undue influence is used in contradistinction to proper influence which may be secured through affection

bestowed or from kindness indulged.

In order to establish undue influence it must be proved that the influence was such as to deprive the person affected of the free exercise of his will. It must amount to imposing a restraint on the will of another whereby he is prevented from doing what he wishes to do or is forced to do what he does not wish to do.

6. Acts which do not Amount to Undue Influence

A friendly advice or an influence arising from gratitude or esteem is not undue influence, unless thereby the functioning of a free mind is destroyed. Mere suggestions or appeals cannot have such an effect. An influence which exists from attachment or respect or which results from arguments or appeals to reason and judgment is not undue influence.[69] A threat to a member of the legislative assembly of Bengal that if a certain candidate was elected as the President of India, he would enforce President's rule in Bengal, doesn't amount to undue influence.[70]

An advice, argument, persuasion or solicitation cannot constitute undue influence. Honest intercession, even importunity, falls short of controlling a persons' free exercise of his will. A persuasion, which leaves a person free to adopt his own course, is not undue influence. On the other hand, a suggestion or an entreaty from somebody, held in esteem, could be treated as undue influence. In the absence of proof, that a person has been, in consequence of the alleged influence, deprived of free agency, the question of there being an undue influence does not arise.

7. Essence of Undue Influence

It is not objectionable to exercise an influence by acts of kindness or appeals to the free reason and understanding of a person. So long as the free agency of the other person is not prevented or impaired by obtaining a domination over his mind, it is not an exercise of undue influence. The essence of undue influence is that a person is constrained to do against his will, but for the influence he would have refused to do it, if left to exercise his own judgment. It has to be shown that a person's volition had thus been controlled by another, whereby he could not pursue his own inclination, being too weak to resist the importunity and in view of the pressure exercised on his mind he could not act intelligently and voluntarily and had become subject to the will of the other who had thus obtained dominion over his mind.

In a Madras case[71] Odgers J, doubted if merely telling people not to vote would constitute an offence under this section.

Gist of Undue Influence

The gist of undue influence at an election consists in a voluntary interference or an attempt at interference with the free exercise of any electoral right. Any voluntary action which interferes with or attempts to interfere with such free exercise of electoral right would amount to undue influence. However, even though the definition in sub-s (1) of s 171C, IPC is wide in terms it cannot take in a mere canvassing in favour of a candidate at an election. If that were so, it would be impossible to run democratic elections.[72] If the intended phonogram is not with reference to the right of a person to stand or not to stand as a candidate or to withdraw from being a candidate, it cannot be said that canvassing in favour of a candidate is to exercise undue influence and no offence under s 171C, read with s 171F, IPC can be said to have been committed.[73]

When the elector goes through the mental process of weighing the merits and demerits of candidates and makes his choice, even at that stage, undue influence may come in. The distribution of a pamphlet imputing vices and immorality to a candidate would amount to an attempt to interfere with the free exercise of the right to vote and undue influence under this section.[74]

Recitation in a public meeting of a poem containing false statements or facts, with the consent and knowledge and in the presence of a candidate, about another candidate, and its publication would make the candidate responsible under s 123(4), Representation of the People Act 1951.[75]

It is the degree of the gravity of the allegation which will be the determining factor in deciding whether the offence falls under s 171C of this Code. If the allegation, though false and relating to the candidate's personal character and conduct, made with the intent to affect the result of an election, does not amount to interference, or an attempt to interfere, the offence would be a lesser one. If, on the other hand, it 1219amounts to interference, or an attempt to interfere, it would be a graver offence under s 171F read with s 171C, IPC .[76]

8. Editorial to Vote Freely--Whether Attracts this Section

To attract s 171C of the IPC, it has to be established that the petitioners voluntarily interfered or attempted to interfere with the free exercise of any electoral right. In one case, what has been published in the editorial was only a general statement highlighting the difficulties encountered on account of a large number of candidates contesting the elections. The opinion of a newspaper or friendly advice made by it to the voters will not constitute an offence under s 171C of the IPC . As a matter of fact, the request made to the voters through the editorial, was only to exercise their votes freely and not to be influenced by the gimmicks shown by the rebel candidates and those candidates who do not put forward any definite programmes or who do not have any clear manifesto to offer to the people. In order to establish undue influence, the complainant has necessarily to prove that the influence was such as to deprive the voter of the free exercise of his will.[77]

The message by a person to a particular political party to boycott the election does not amount to interference with the free exercise of the electoral rights of the voters of that party, within the meaning of s 171C of the IPC, for the simple reason that the voters of that party would still be free to vote for the candidate, whom they desire, in spite of the message.[78]

9. Meaning of 'Without Prejudice to the Generality of the Provisions of Sub-section (1)'

Section 171C is enacted in 3 parts. The first sub-section contains the definition of undue inference, which is in wide terms and renders a person voluntarily interfering or attempting to interfere with the free exercise of any electoral right guilty of committing undue influence. That this is very wide is indicated by the opening sentence of sub-s (2), *i.e.*, 'without prejudice to the generality of the provisions of sub-s (1)'. It is well settled that, when this expression is used, anything contained in the provisions following this expression, is not intended to cut down the generality of the meaning of the preceding provision.[79]

It follows from this that we have to look at sub-s (1) as it is, without restricting its provisions by what is contained in sub-s (2). Sub-section (3) throws a great deal of light on this question.[80] In the above case, the judge observed:

> At what stage would a declaration of public policy or a promise of public action act tend to interfere? Surely only at the stage when a voter is trying to make up his mind as to which candidate he would support. If a declaration of public policy or a promise of public action appeals to him, his mind would decide in favour of the candidate who is propounding the public policy or promising a public action. Having made up his mind he would then go and vote and the declaration of public policy having had its effect it would no longer have any effect on the physical final act of casting his vote.[81]

10. Sub-section (2)--Mere Canvassing does not Amount to Undue Influence

Sub-section (2) of this section shows what the nature of undue influence is; it does not cut down the generality of the provisions contained in sub-s (1). What is contained in sub-s (2) of s 171C is merely illustrative. It is difficult to lay down in general terms where mere canvassing ends and interference or attempt at interference with the free exercise of any electoral right begins. That is a matter to be determined in each case; but there can be no doubt that if what is done is merely canvassing, it would not be undue influence. As sub-s (3) of s 171C shows, the mere exercise of a legal right without intent to interfere with an electoral right would not be undue influence.[82]

11. Sub-section (3)

Sub-section (3) proceeds on the assumption that a declaration of public policy or a promise of public action or the mere exercise of a legal right can interfere with an electoral right, and therefore, it provides that if there is no intention to interfere with the electoral right, it shall not be deemed to be interference within the meaning of this section.[83] The expression 'free exercise of any electoral right' is to be kept in mind while interpreting sub-s (3).

Sub-section (3) further proceeds on the basis that the expression 'free exercise of his electoral right' does not mean that a voter is not to be influenced. This expression has to be read in the context of an election in democratic means. Candidates may propound their programmes, policies and views on various questions which are exercising the minds of the electors. This exercise of the right by a candidate or his supporters to canvass support does not interfere or attempt to interfere with the free exercise of the electoral right. What does, however, attempt to interfere with the free exercise of an electoral right is, if we may use the expression, 'tyranny over the mind'.[84] As sub-s (3) of s 171C shows, the mere exercise of a legal right, without intent to interfere with an electoral right, would not be undue influence.[85]

It is open to ministers to canvass for the candidates to their party standing for election. Such canvassing does not amount to undue influence. It is only where a minister abuses his position as such and goes beyond merely asking for support for the candidates belonging to his party, then a question of undue influence may arise.[86]

The statements that *M* made promises to the voters about non-recovery of bank dues, removal of taxes and the repealing of some laws in no sense embody any allegation of undue influence. They are only statements which are generally made at election time by candidates boosting up their programme and achievements and running down the policies and failures of the opponents. Such declarations do not amount to exercise of undue influence on the part of the declarant.[87]1221

The Himachal Pradesh High Court, in *Dr YS Parmar v Hira Singh Pal & Anor* ,[88] approved the following observations made by the Election Tribunal Bangalore in *Linga Gounda v Shivananjappa:* [89]

> A leader of a political party is entitled to declare to the public the policy of the party, and ask the electorate to vote for his party without interfering with any electoral right and such declarations on his part would not amount to undue influence under s 123(2) . The fact that he happens to be a Minister or Chief Minister of the state would not deprive him of this right.

12. Threat of Injury

Where a day before the election, the complainant, a candidate for election, was prevented from coming out of his house and going to the voters by his rival candidate and the latter's supporters who

were picketing the former's house, it was held that the accused, the rival candidate, was not guilty of the offence under this section as he could not be said to have interfered or attempted to interfere with the free exercise of an electoral right or threatened any candidate or voter with injury of any kind.[90] Where it was averred that one of the candidates seated in an easy chair was remarking, as the voters were proceeding, that *gosha* women need not vote and that the better thing for them would be to remain at home and that his own wife remained at home, it was held that there was neither a threat to any candidate or any voter with an injury of any kind nor an attempt to induce a belief in the voter that he would be rendered the object of divine displeasure.[91]

13. Appeal to Religion and Community

If a political party is criticised on the ground that it has a communal outlook and that its policy is to suppress the members of another community, for example, the Jan Sangha or the Muslim League, and if it is stated that people should not vote for any of these communal organisations because the essential policy of these organisations is to further the ends of the Hindus or the Muslims at the cost of the members of the other community, the appeal in such cases would be to the members of the Hindu or the Muslim community, but it would not be on the ground of religion or community, but on the ground of the wrong policy of the particular organisation. This would be a criticism, of a policy of the organisation and not an appeal to vote or to refrain from voting on the ground of religion or community. If the legislature really meant to prohibit an appeal to a community, it could easily have said so, instead of saying 'on the ground of religion'.[92] A religious leader has the right to freely express his opinion on the comparative merits of the contesting candidates and to canvass for such of them as he considers worthy of the confidence of the electors. In other words, the religious leader has a right to exercise his influence in favour of any particular candidate by voting for him and by canvassing votes of others for him. Such a course of conduct on his part will only be a use of his great influence amongst a particular section of the voters in the constituency; but it will amount to an abuse of his great influence if the words he uses in a document, or utters in his speeches, leave no choice to the persons addressed by him in the exercise of their electoral rights. If the 1222religious head had said that he preferred the appellant to the other candidate because, in his opinion, he was more worthy of the confidence of the electors for certain reasons, good, bad or indifferent, and addressed words to that effect to persons who were amenable to his influence, he would be within his rights and his influence, however great, could not be said to have been misused. However, if the religious leader practically leaves no free choice to the electors, not only by issuing in writing the *hukam* or *farman*, but also by his speeches, to the effect that they must vote for the candidate, implying that disobedience of his mandate would carry divine displeasure or spiritual censure, the case is clearly brought within the purview of the second paragraph of the proviso to s 123(2) of the Representation of the People Act, and within the mischief of this section.[93]

14. Corrupt Practice under Section 123, Representation of the People Act 1951 may not be Offence Under this Section

A corrupt practice under s 123 of the Representation of the People Act 1951, may or may not be an offence under this chapter. The Rajas of Puri have been associated with the management of the Temple of Lord Jagannath and the Raja of Puri is venerated as Chalantika Bishnu (movable Bishnu as distinct from the immovable deity inside the shrine) by a large majority of Oriyas. Lord Jagannath is not only the national deity of Orissa but he also occupies a unique position throughout India. Hence as the Adya Sevak of the Lord, as his moving representative, the Raja of Puri is undoubtedly held in great veneration. In a case, a brother of the Raja being a candidate for election to the Orissa Legislative Assembly, it was alleged that he and his agents informed the voters that as he was Chalanti Vishnu and as such a representative of Lord Jagannath himself, any person who did not vote for him would be a sinner against the Lord and the Hindu religion and that he would be committing sacrilege to the deity. It was held that such a propaganda would come within the scope of the second proviso to sub-s (2) of s 123 of the Representation of the People Act 1951 and that it would also amount to an election offence under s 171F read with s 171C of the Code. It was further held that appealing to the voters to vote for him saying that he was the crown jewel amongst them, and using a

religious symbol, namely *Nila Chakra* of Lord Jagannath and asking them to vote for him as he was the moving representative of Lord Jagannath would come within the scope of s 123(3) of the Representation of the People Act 1951, but would not amount to an offence under this section.[94]

62 Inserted by the Act 39 of 1920, s 2 .

63 Section 101 of the (English) Representation of the People Act 1949 (12, 13 & 14 Geo, 6, c 68) is in the same language.

64 *North Durham* case, (1874) 2 OM&H 152, p 156.

65 *Ram Dial v Sant Lal* AIR 1959 SC 855, p 859 .

66 Statement of Objects and Reasons, *Gazette of India*, 1920, Pt V, p 135, s 9 .

67 *Ibid*, 1920, Pt V, p 178.

68 *Baburao Patel v Dr Zakir Hussain* AIR 1968 SC 904, [1968] 2 SCR 133, (1968) 1 SCA 632, (1968) 2 SCW 10, (1968) 2 SCJ 490 .

69 *Amir Chand Tota Ram v Suvhitra Kriplani* AIR 1961 Punj 383, p 386 .

70 *SK Singh v VV Giri* AIR 1970 SC 2097, [1971] 2 SCR 197 .

71 Re *Palani Kumara Chinnayya Gounder*AIR 1922 Mad 337, p 339 .

72 *Baburao Patel v Dr Zakir Hussain* AIR 1968 SC 904, [1968] 2 SCR 133, (1968) 1 SCA 632, (1968) 2 SCWR 10, (1968) 2 SCJ 490 .

73 *M Analagan v Dy Inspector of Police* (1981) Cr LJ 1179 .

74 *SK Singh v VV Giri* AIR 1970 SC 2097, p 2112-16 .

75 *Kumara Nand v Brijmohan Lal Sharma* AIR 1967 SC 808, (1967) Cr LJ 823 .

76 *SK Singh v VV Giri* AIR 1970 SC 2097, p 2113, [1971] 2 SCR 197 .

77 *KM Mathew v Damodaran Pillai* (1987) 2 Ker LT 592 .

78 *M Anbalagan v State* (1981) Cr LJ 1179, p 1180 (Mad) .

79 *SK Singh v VV Giri* AIR 1970 SC 2097, [1971] 2 SCR 197 .

80 *Ibid.*

81 *Ibid.*

82 *Baburao Patel v Dr Zakir Hussain* AIR 1968 SC 904, [1968] 2 SCR 133, (1968) 1 SCA 632, (1968) 2 SCW 10, (1968) 2 SCJ 490 .

83 *SK Singh v VV Giri* AIR 1970 SC 2097, [1971] 2 SCR 197 .

84 *Ibid.*

85 *Baburao Patel v Dr Zakir Hussain* AIR 1968 SC 904, p 911 .

86 *Ibid*; *YS Parmar v Hira Singh* AIR 1958 HP 29 ; *Jayalakshmi Devamma v Janardhan Reddi* AIR 1959 AP 272 .

87 *Mohan Singh Laxman Singh v Bhanwar Lal Rajmal Nahata* AIR 1964 MP 137 .

88 *Dr YS Parmar v Hira Singh Pal & Anor,* AIR 1958 HP 29 .

89 *Linga Gounda v Shivananjappa,* 6 Ele LR 288 .

90 *Ram Saran Das v Emperor* AIR 1926 Lah 297, p 298 .

91 *AK Bijli Sahib Bahadur v MK Mahommad Asan Marachair* AIR 1934 Mad 27, p 29 .

92 *Ghayar Ali Khan v Keshav Gupta* AIR 1959 All 264, p 270 .

93 *Ram Dial v Santlal* AIR 1959 SC 855, p 860 .

94 *Raj Rajdeb v Gangadhar Mahapatra* AIR 1964 Ori 1, p 4 .

Indian Penal Code (Act XLV of 1860)

Chapter IXA

Of Offences Relating to Elections

[95][S. 171D.

Personation at elections.--

Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name, and whoever abets, procures or attempts to procure the voting by any person in any such way, commits the offence of personation at an election]:

[96][*Provided* that nothing in this section shall apply to a person who has been authorised to vote as proxy for an elector under any law for the time being in force in so far as he votes as a proxy for such elector.]1223

Comments

1. Legislative Changes

The proviso to the section was inserted by Act 24 of 2003, *vide* its s 5 and became effective from 22 September 2003.

2. Scope

This section defines the offence of personation at election and s 171F, prescribes the punishment for the offence. The definition of 'personation' closely follows the definition in s 24 of the Ballot Act 1872 of England and covers both a person who attempts to vote in another person's name or in a fictitious name, a voter who attempts to vote twice, and any person who abets, procures or attempts to procure such voting.[1]

3. Analogous Law

'Personation' at election is defined in s 24 of the (English) Ballot Act 1872,[2] as follows:

> A person shall, for all purposes of the laws relating to parliamentary and municipal elections, be deemed to be guilty of the offence of personation who, at an election for a country or borough, or at municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or who having voted once at any such election, applies at the same election for a ballot paper in his own name.

By the (English) Representation of the People Act 1949 (12, 13 & 14 Geo 6, c 68), s 47 :

A person shall be deemed to be guilty of personation at a parliament or local government election if he:

(a) votes in person or by post as some other persons, whether as an elector or as proxy, and whether that other person is living or dead or is a fictitious person; or
(b) votes in person or by post as proxy:
  (i) for a person whom he knows or has reasonable grounds for supposing to be dead or to be a fictitious person; or
  (ii) when he knows or has reasonable grounds for supposing that his appointment as proxy is no longer in force.1224

For the purposes of this section, a person who has applied for a ballot paper for the purpose of voting in person or who has marked, whether validly or not, and returned a ballot paper issued for the purpose of voting by post, shall be deemed to have voted.

4. Essence of the Offence

The essence of the offence of false personation is that the offender pretends to be other than what he really is. The gist of the offence being false personation, the section does not come into play when the voter himself does not put the cross-mark against the name of any of the candidates, but permits the candidates or their agents to do so, and the candidate or his agent does not claim to be the voter himself when he makes a cross-mark against any name.[3]

5. 'Applies for' Interpretation--Presumption Under Section 114 Evidence Act

The indictee must have applied for a ballot paper. Only voting takes place inside the booth and a person who enters the booth against whom an allegation is raised that he had applied for the voting paper, must certainly be saddled with the responsibility at least under s 114 of the Evidence Act to explain why he entered the polling booth and for what purpose. If he hands over a slip showing the name of a voter other than himself the irresistible inference to a prudent mind can only be that he was applying for voting paper in the name of such person. Courts cannot be oblivious to life and real life situations while appreciating oral evidence. Section 114 of the Evidence Act permits and mandates courts to draw reasonable inferences based on their experience of men and matters in life.[4]

6. 'Applies for a Voting Paper'--Meaning of

The procedure for voting is as follows: the voter goes to an officer who issues what are known as 'signature slips'. He has to state, or in some other way indicate to that officer, who he is. On ascertaining that the applicant is a real voter, the officer, in whose charge the signature slips are, issues one to the applicant. The applicant then signs the signature slip, and on the strength of that signature slip, obtains a voting paper. It is the application for a voting paper by a wrong person that has been made punishable under s 171F of the Code.[5] Where the accused is charged of personation at an election, the first element to be proved by the prosecution is that he had applied for a voting paper at the election in question. So long as the voter does not approach the polling officer for the purpose of getting the ballot paper, it cannot be said that he applied for a voting paper. The mere obtaining of an identity slip, or an attempt to obtain it, is not enough.[6]

In *Reg v Parrick Fox* ,[7] a person applied for a ballot paper in a name which appeared on the register of voters' list and which was inserted therein by the overseers in the belief that it was the name of the applicant; was consequently held as not guilty of the offence of personation.1225

Where in a municipal electoral roll the name of Mahommad Din, son of Faqir Mohammad, was recorded as a person entitled to vote, and the accused, whose name also was Mahommad Din but whose father's name was Abdulla, asked for a ballot paper saying the he was Mohammad Din, son of Faqir Mahommad, it was held that he was guilty of the offence of personation under this section.[8]

The indictee had applied for a ballot paper. Only voting takes place inside the booth and a person who enters the booth against whom an allegation is raised that he had applied for the voting paper, must certainly be saddled with the responsibility at least under s 114 of the Evidence Act to explain why he entered the polling booth and fo what purpose. If he hands over a slip showing the name of a voter other than himself the irresistible inference to a prudent mind can only be that he was applying for voting paper in the name of such person. Courts cannot be oblivious to life and real life situations while appreciating oral evidence. Section 114 of the Evidence Act permits and mandates courts to draw reasonable inferences based on their experience of men and matters in life. It would be puerile for a court to look for specific evidence of the indictee entering the polling booth and making a ceremonial declaration in writing or in words that he is applying for a voting paper. That would be an unreasonable and perverse approach to the evidence tendered. Appellant accused was convicted for offence under s 171D, IPC .[9]

Dissenting from the view taken by the Orissa High Court in *State of Orissa v Gokul Barik* ,[10] the Gujarat High Court in *State of Gujarat v Chandulal Bhikalal* [11] has held that everyone who goes to the first polling officer for checking of his name and he has not already voted, does so because he applied for a ballot paper, although the ballot paper is actually issued by the third polling officer. If he has applied for a ballot paper under a false name, he comes within the mischief of the section. This view appears to be correct.

7. When Corrupt Motive is Implied

No intention or no corrupt motive is necessary to be proved when a person goes to the polling station and applies for a ballot paper under a false name. Corrupt motive is implied by the very fact that he applies for a ballot paper under a false name.[12]

8. Double Voting

An application for a second voting paper by a person who has already voted once at the same election is an offence under this section.[13]

9. *Mens Rea* or Corrupt Motive, Necessity of

It is not stated in this section, or in s 24 of the (English) Ballot Act (35 & 36 Vic Ch 33) which it closely follows, that personation must be with a corrupt or any other intention. However, in the *Stepney* case[14] a man's name had been wrongly included 1226in the register of two divisions. He voted twice and it was admitted that he was ignorant of the law and had acted conscientiously by mistake, that he had no corrupt intention and that he had not been corruptly influenced. Denman J held:

> It is thoroughly understood in election law that, unless there be corruption, and a bad mind and intention in personating, it is not an offence. If it is done under an honest belief that the man is properly there for the purpose of voting, it is held in these cases and in other cases analogous that no offence has been committed... They are enactments which can be really only applicable to an intentionally bad act, because if a man is guilty at all he is guilty of felony, and may be imprisoned as a felon for a considerable time. To suppose that the legislature even intended to enact that man, who with perfect honesty but from a mere blunder as to his rights, gives a vote, and then (believing that he has right to do so), gives a second vote, he being on the register, on the same day, is to be deemed guilty of felony, is to impute an intention to the legislature which is absurd, though if it had said so in absolutely plain words, we must have carried it out. I do not think that that is the intention of the act; I think there is still to be added to the offence of personation a corrupt intention, and where

the corrupt intention is absent, the offence of personation cannot have been committed.

The same has also been followed in *Pantan Venkayya v Emperor* ,[15] in which the facts were very similar.

10. Intention--Relevancy of

Chapter IXA of the IPC provides for the punishment of malpractices in connection with elections and attempts to safeguard the purity of the franchise. The very idea of personation connotes knowledge of or advertence to the act of pretending to be some other person. In fact, it implies false pretence. The only intention which is to be found in the section and which is the central element requisite to a conviction is the intention to personate the election for one who is a voter.

It will thus be seen that the statute does not rule out *mens rea* as a constituent part of the crime and the accused cannot be found guilty of an offence under s 171D, IPC unless he is proved to have a guilty mind.[16] The word personation itself implies corruption or fraud,[17] and a person cannot be convicted under this section unless it is proved that in doing what he did he was actuated by a corrupt motive.[18]

Holding claim of a right, honestly and *bona fide*, is a question of fact.

11. Mistake of Law and Good Faith--Effect of

It is well settled that ignorance of law will not excuse a person from the consequence of guilt if he has the capacity to understand the law. A mistake of law, however, normally relates to a mistake as to the accused's rights under the law to do a particular act or pursue a particular course of conduct. The courts are not at all concerned with the legality or otherwise of the rights under which the accused purported to act. The only question that the courts have to decide in such cases is, whether the claim of right was honestly and bona fide held by the accused. This question will essentially be one of fact. In such cases, it is the good faith of the accused and not the right itself which requires adjudication. In this sense, a mistake 1227of law can, to a certain extent, be a defence to a criminal charge.[19] It was observed in *Tolson*'s case,[20]that 'an honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy or the perversion of that faculty as in lunacy'. It was also added that this exception of common law equally applies in the case of statutory offences unless it is excluded expressly or by necessary implication. It is now well-settled as a principle of English criminal law that as a general rule, an honest and reasonable belief in a state of facts, which, if they existed, would make the accused's act innocent, affords an excuse for doing an act which would otherwise be an offence. And in this connection, the difference between a mistake of fact and a mistake of law would not be material.[21]

12. Abetment of Personation--When it Amounts to an Offence

Under s 107, IPC 'A person abets the doing of a thing who intentionally aids by any act or illegal omission the doing of that thing'. The intention should be to aid the commission of a crime. A mere giving of an aid will not make the act an abetment of an offence if the person who gave the aid did not know that an offence was being committed or contemplated. The intention should be to aid an offence or to facilitate the commission of an offence. However, if the person who lends his support does not know, or has no reason to believe, that the act which he was aiding or supporting was by itself a criminal act, it cannot be said that he intentionally aids or facilitates the doing of the offence. In one case, the accused was a candidate at a municipal election. A person named *H* was a voter on the electoral roll. He was absent but in his stead some person came forward at the time of the election and professed to be *H* and put his thumb mark on the voting slip. The voting slip was attested by the accused, after ascertaining from the voter and his men as to who the man was. This was done to the knowledge of the polling officer. It was held that the candidate did not abet, by intentionally aiding, the

commission of the offence under this section. There is an essential difference between a reckless act, for which a man may be held civilly liable, and a criminal act for which he may be punished by imprisonment or fine.[22] But in the subsequent case of *Emperor v Badan Singh* ,[23] where a candidate at an election, who was, according to the procedure to be followed, to identify the voters, recklessly attested the signature slip without taking care to ascertain whether the thumb-impression was that of the voter, Iqbal Ahmad J held that the candidate was only technically guilty of the offence under this section and deserved a lenient punishment, but Walsh J disagreed with him. The case being referred to a third judge, Mears CJ held that, it being found that the real voter, whether dead or alive, was not present at the polling station and that the accused candidate was not the victim of a plot, the inevitable inference was that he corruptly, wrongfully and intentionally abetted personation within the meaning of this section and deserved severe punishment.

13. 'Attempt to Obtain Voting Paper'--Meaning of

An act, to amount to an attempt, must be such that, if not prevented, it would complete the offence. The mere obtaining of a signature slip would not amount to an 1228application for a voting paper. If, therefore, a person is frustrated in getting the signature-slip, his attempt to obtain the signature would not amount to an attempt to commit the offence of fraudulently applying for a voting paper.[24] Mere approach to a polling officer for an identity slip or signature-slip may amount to some preparations for the commission of the offence, but preparation is not an attempt within the meaning of s 511, IPC .[25]

14. Courts Approach to Evidence

It would be puerile for a court to look for specific evidence of the indictee entering the polling booth and making a ceremonial declaration in writing or in words that he is applying for a voting paper. That would be an unreasonable and perverse approach to the evidence tendered and would not be the standards of an ordinarily prudent person which, law in s 3 of the Evidence Act mandates the courts to follow.[26]

15. Sentence

Where a person is found guilty for offence under s 171D, a deterrent sentence of fine can be imposed along with substantive sentence of imprisonment for a reasonable period. The accused petitioner was sentenced to undergo simple imprisonment for a period of 3 months and to pay an amount of Rs. 10,000/- as fine and in default to undergo simple imprisonment for a further period of 2 months.[27]

95 Inserted by the Act 39 of 1920, s 2 .

96 Inserted by Act 24 of 2003, s 5 (wef 22-9-2003).

1 Clause 10, *Gazette of India*, Pt V, 3 July 1920, p 135.

2 35 and 36 Vict, c 33.

3 *Vinjamuri Parthansarathi v P Ramachandra Rao* AIR 1956 AP 65, p 72 (FB) .

4 *E Anoop v State of Kerala* (2007) Cr LJ 2968 (Ker) .

5 *Malkhan Singh v King-Emperor* AIR 1925 All 226 .

6 *State of Orissa v Gokul Barik* AIR 1959 Ori 97, (1959) Cr LJ 752 ; *Malkhan Singh v King-Emperor* AIR 1925 All 226, (1925) 26 Cr LJ 359 .

7 *Reg v Parrick Fox,* 16 Cox CC 166 .

8 *Mahommad Din v Emperor* AIR 1929 Lah 52, p 53, (1929) 30 Cr LJ 853 .

9 *E Anoop v State of Kerala* 2007 Cr LJ 2968, p 2970 (Ker), 2006 (3) KLJ 50, 2006 (3) KLT 711 .

10 *State of Orissa v Gokul Barik,* AIR 1959 Ori 153, (1959) Cr LJ 752 .

11 *State of Gujarat v Chandulal Bhikalal* AIR 1965 Guj 83, (1965) 1 Cr LJ 440, 6 Guj LR 485 .

12 *State of Gujarat v Chandulal* AIR 1965 Guj 83, p 84, (1965) 1 Cr LJ 440 ; *State v Siddhanath Gangaram* AIR 1956 MB 241, p 243 .

13 *V Sesha Ayyar v Venkatasubba Chetty* AIR 1924 Mad 487, p 488, (1924) 25 Cr LJ 442 .

14 *Stepney* case, 4 OM&H 34.

15 *Pantan Venkayya v Emperor,* AIR 1930 Mad 216, (1930) 31 Cr LJ 329 .

16 *State v Siddhanath Gangaram* AIR 1956 MB 241, p 243 .

17 *Mulchand v Emperor* AIR 1937 Sind 21, (1937) 38 Cr LJ 306 .

18 *State of Orissa v Gokul Barik* AIR 1959 Ori 97, (1959) Cr LJ 752 .

19 *State v Siddhanath Gangaram* AIR 1956 MB 241, p 243 .

20 *Tolson*'s case, (1889) 23 QBD 168, 181(H).

21 *State v Siddhanath Gangaram* AIR 1956 MB 241, p 243 .

22 *Ram Nath v King-Emperor* AIR 1925 All 230, p 234, (1925) 26 Cr LJ 362 ; *Ram Nath v King-Emperor* AIR 1926 All 231, p 233, (1926) 27 Cr LJ 705 .

23 *Emperor v Badan Singh,* AIR 1928 All 150 .

24 *Malkhan Singh v King Emperor* AIR 1925 All 226, p 227 .

25 *State of Orissa v Gokul Barik* AIR 1959 Ori 97, p 98 .

26 *E Anoop v State of Kerala* (2007) Cr LJ 2968 (Ker) .

27 *E Anoop v State of Kerala* 2007 Cr LJ 2968, p 2971 (Ker), 2006 (3) KLJ 50, 2006 (3) KLT 711 .

Indian Penal Code (Act XLV of 1860)

Chapter IXA

Of Offences Relating to Elections

[28][S. 171E.

Punishment for bribery.--

Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both:1230

Provided that bribery by treating shall be punished with fine only.

Explanation.--'Treating' means that form of bribery where the gratification consists in food, drink, entertainment, or provision.]

Comments

1. Scope

This section merely prescribes the punishment for the offence of bribery under s 171(B) . The punishment for bribery by 'treating' is fine only, but the punishment for other forms of bribery is imprisonment of either description for one year, or fine, or both.

2. 'Treating'--Meaning of

See notes under s 171B .

3. Procedure

The offence punishable under this section is non-cognizable and summons shall ordinarily issue in the first instance. The offence is bailable but not compoundable and is triable by a first class magistrate. The period prescribed for the prosecution of this offence is one year.

4. Charge

The following form of charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:

(where the accused is the giver of the bribe)

That you, on or about the ..... day of ..... at ....., gave a gratification, to wit ..... to ....., with the object of inducing him or ..... (*name the other person, if any*) to exercise his electoral right (*or rewarding him for having exercised his electoral right*), and thereby committed an offence, punishable under section 171E of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

(*where the accused is the acceptor of the bribe*)

That you, on or about the.....day of....., at....., accepted for yourself, or for....., a gratification, to wit....., as a reward for exercising you (*or his*) electoral right (*or for inducing or attempting to induce.....to exercise his electoral right*), and thereby committed an offence punishable under section 171E of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

5. Proof

Where the accused is the giver of the bribe, it has to be proved that:

(a) he gave gratification to a particular person; and
(b) he did so with the object of (i) inducing him or any other person to exercise any electoral right, or (ii) rewarding any person for having exercised any such right.

Where the accused is the acceptor of the bribe, it has to be proved that:

(a) he accepted either for himself or for any other person a gratification; and
(b) he did so as a reward (i) for exercising any electoral right, or (ii) for inducing or attempting to induce any other person to exercise any such right.

28 Inserted by the Act 39 of 1920, s 2 .

Indian Penal Code (Act XLV of 1860)

Chapter IXA

Of Offences Relating to Elections

[29][S. 171F.

Punishment for undue influence or personation at an election.--

Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.]

Comments

1. Scope

This section prescribes the punishment for the offences of undue influence and personation at election defined in ss 171C and 171D, IPC .

In one case, a direction was given by the election commission to the chief minister, who was campaigning for himself on the date before the election, to return to the state headquarters under the threat of facing a drastic action otherwise and the chief minister was thereby prevented from exercising his franchise at a place where he was registered as a voter. No allegation of violence in the election process was reported against him. The directions, further, were passed orally without giving any reasons. It was held that the such direction violates s 171F of the IPC .[30]

2. Procedure

The procedure to be followed is the same as in the case of an offence punishable under s 171E, IPC except that the offence of personation is cognizable. The period prescribed for the prosecution of an offence under this section is one year.

Where the accused had picked up or snatched the ballot papers from the custody and possession of some public servants and they had even torn the same and in the process they used criminal force, charges under ss 171F and 353, IPC framed by a judicial magistrate against them were found in order and the petition, under s 482, CrPC, of the accused persons for quashing the FIR and the charges framed against them were dismissed.[31]

3. Charge

The following form of the charge may be adopted:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of..... at.....voluntarily interfered (*or attempted to interfere*) with the free exercise of and electoral right, to wit.....(*or.....threatened*) .....a candidate or voter or person in whom a candidate (*or voter to wit..... is interested*) with injury, (*to wit ..... or induced or attempted to induce*) ..... a candidate (*or voter*) at an election, to wit ....., to believe that he or any person in whom he is interested, to wit .....(*will become an object of divine displeasure or of spiritual censure*) and thereby committed an offence punishable under section 171F of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

The charge for the offence of personation at an election may run thus:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the ..... day of ..... at the election to wit, applied for a voting paper (*or voted*) in the name of another person, to wit ....., who is living 1231(*or dead*) (*or in a fictitious name, to wit .....*) (*or in your name after having voted once at the said election*) and thereby committed an offence

punishable under section 171F of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

4. Proof

In the case of undue influence at an election, the prosecution has to prove:

(a) that the accused voluntarily interfered or attempted to interfere with the free exercise of any electoral right; or
(b) that the accused threatened any candidate or voter or any person in whom a candidate or voter is interested, with injury of any kind; or
(c) that the accused induced or attempted to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or of spiritual censure.

In the case of personation at an election prosecution has to prove:

(a) that at an election the accused applied for a voting paper or voted in the name of any other person, whether living or dead, or in a fictitious name; or
(b) that the accused having voted once at an election applied at the same election for a voting paper in his own name; or
(c) that the accused abetted, procured or attempted to procure, the voting by any person in any one of the above ways.

5. Sentence

The pride of India is that its democratic structure has been maintained without any major dent from the date of its independence in 1947. While democracy has floundered all around in the neighbourhood, the Indian democracy has lived and survived all along though not ideally. Any attempt to undermine the democratic process must be frowned upon in unmistakable terms. There can be no place for misuse or abuse of the right to vote in a democracy. The abhorrence of the enlightened polity to the crime must be expressed by the sentence imposed by the court. The length of the period which the offender spends behind the bars need not be reckoned as vitally relevant. A deterrent sentence of fine can be imposed along with substantive sentence of imprisonment for a reasonable period.[32]

Personation in elections, that is, recording votes in elections under a false name is a serious offence and fine is not an adequate punishment.[33]

29 Inserted by the Act 39 of 1920, s 2 .

30 *Court on its own motion v Union of India* (2001) Cr LJ 225 (P&H), (2001) III CCR 212 (P&H) .

31 *Bhupinder Singh and Anor v State of Punjab* (1997) Cr LJ 3416 (P&H) .

32 *E Anoop v State of Kerala* (2007) Cr LJ 2968 (Ker) .

33 *Emperor v AK* AIR 1948 Sind 109, p 110, (1947) 48 Cr LJ 481 ; *Emperor v Badan Singh* AIR 1928 All 150, refer to notes under s 171D .

Indian Penal Code (Act XLV of 1860)

Chapter IXA

Of Offences Relating to Elections

[34][S. 171G.

False statement in connection with an election.--

Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine.]1232

Comments

1. Scope

The offence defined in this section is the making of a false statement in relation to the personal character or conduct of a candidate at an election. This offence may be committed by any person or association, whether corporate or incorporate. The section does not apply to defamatory statements about persons who are not candidates[35] at an election.

2. Analogous Law

This section, which penalises false statements of fact in relation to the personal character and conduct of a candidate for election, corresponds to s 1 of the (English) Corrupt and Illegal Practices Act 1895.[36] The acknowledgement of this fact has been made in the Statement of Objects and Reasons.[37]

This corrupt practice is defined in s 123(4) of our Representation of the People Act 1951, as follows:

> The publication by a candidate or his agent, or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election.

3. Section 171G Distinguished from Section 171C

It is the degree of gravity of the allegation which will be the determining factor in deciding whether the offence falls under s 171C, IPC or this section. If the allegation, though false and relating to a candidate's personal character and conduct, made with the intent to affect the result of an election, does not amount to interference or an attempt to interfere, the offence would be the lesser one. If, on the other hand, it amounts to interference, or an attempt to interfere, it would be the graver offence

under s 171F, IPC read with s 171C .[38]

4. Distinction between Defamation (Section 499A) and Offence under Section 171G

This section, leaving aside the clause 'with intent to affect the results of an election', does not follow the language used in s 499, IPC or refer to the offence of defamation, 1233but uses a special language of its own with the result that there may be cases under this section which do not fall under s 499 and *vice versa*. This section is not a species of the more general offence of defamation or is carved out of s 499 . It cannot, therefore, be said that a complainant should proceed against the offender under s 171G and not under s 500 .[39]

The offence under ss 171G and 500 are separate and distinct, the ingredients of an offence under s 171G being different from those of an offence under s 500 . The main distinction between the two sections is that under s 171G, the allegations must be false whereas under s 499 even if the allegations are true, the complaint for defamation will lie unless the person, who makes such defamation, comes under any one of the exceptions. Section 499 covers a wider field. In a prosecution under s 171G if the accused is able to show that the allegations made by him are true, the matter ends there. However, in a prosecution under s 500, even if the accused contends that his statement is true, it may not be a full defence for him unless he comes under any one of the exceptions.[40]

5. Statement of Fact--Meaning of

It is not apparent why the legislature should have thought fit to use the words 'any statement purporting to be a statement of fact', but what was intended doubtless was 'any statement which is made as a statement of fact' and that comes to much the same thing as is conveyed by the English statute. One thing at any rate is clear, that something must be stated as a fact and not as a general imputation or as a matter of opinion.[41] General charges of misconduct are not statements of fact within the meaning of s 171G, IPC, and though one of the statements may be construed as a statement of fact when the other statement was a general imputation of misconduct unaccompanied by any charge of particular acts, not amounting to a statement of fact, this would not fall under s 171G .[42] This section would not be contravened where the statement was a statement not of a fact, but merely of an opinion unless the expression of the opinion was supported by instances. Such reference must not be merely inferential.[43]

6. Question to be Decided on the Facts of Each Case

The question whether a particular statement with respect to a candidate at an election is a statement of fact or is a mere expression of opinion, would depend on the facts of each case and will have to be judged on the circumstances in which the statement was made and in the context of the writing in which it appears, in case it is part of a writing.[44]1234

7. 'In Relation to the Personal Character or Conduct of any Candidate'--Meaning of

The statement must relate to the personal character or conduct of a candidate. The publication by one of the contestants to an election that the other contestant is a leper, knowing it to be untrue with the mala fide intention of injuring the latter's reputation and humiliating him before the public, does not constitute an offence under this section.[45]

8. Freedom of Speech--Limits of

In the language of Parker's *Election Agent and Returning Officer*, there is no special privilege attached

to speeches made during an election. A speaker has full freedom of speech on matters of public interest and general concern. He may express his honest opinion, however adverse, of the policy or public conduct of any public man, and his comments, if uttered fairly with an honest purpose and not maliciously, are not actionable even though they may affect the reputation of some individuals. The mere fact that his opponent is also a candidate for election to the parliament does not give the speaker a right to discuss all his private life and history.

9. Privileged Comments

Unless a speaker is in a position to show that he had a good reason, such as would convince a man of an ordinary common sense to believe in the truth of the statement he proposes to make, such statement had better be left unsaid. The political address or the public career or speeches of his rival are fair subjects for bona fide discussion and unfavourable comments are privileged. He should not, however, allude to the private life or circumstances of any candidate. He should always bear in mind the distinction between criticism and an allegation of fact.

It is one thing to comment upon or criticise, even with severity, the acknowledged or proven acts of a public man and quite another to assert that he has been guilty of some particular acts of misconduct.46

10. Procedure

The procedure is the same as in the case of an offence punishable under s 171E . See notes thereunder. The limitation prescribed for the prosecution of this offence is six months only.

11. Charge

The following form of the charge may be adopted:

> I *(name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the .....day of .....at..... with intent to affect the result of the election, to wit.....made (*or published*) a statement in relation to the personal character (*or conduct*) of a candidate, to wit ..... which statement is false 1235and which you knew (*or believed*) to be false (*or which you did not believe to be true*) and thereby committed an offence punishable under section 171G of the Indian Penal Code .
>
> And I hereby direct that you be tried on the said charge.

12. Proof

For an offence under this section, the points required to be proved are:

(a) that an election was impending;
(b) that the accused made or published a statement;
(c) that it purported to be a statement of fact;
(d) that it is related to the personal conduct or character of a candidate;
(e) that he published it with an intent to prejudice his election; and
(f) that it was false or that the accused had no reasonable grounds for believing it to be true.[47]

34 Inserted by the Act 39 of 1920, s 2 .

35 *Narayanaswami v Devaraja* AIR 1936 Mad 316, (1935) Mad WN 1164 ; *VP Shanmugam v Thangavelu* AIR 1958 Mad 240, p 241, (1958) Cr LJ 647(2).

36 58 and 59 Vic c 49.

37 *Gazette of India*, Pt V, 3 July 1920, p 135.

38 *Sk Singh v VV Giri* AIR 1970 SC 2097, p 2113, [1971] 2 SCR 197 .

39 *Bhagolelal Kwalchand Darji v Emperor* AIR 1940 Nag 249, p 251, (1940) 41 Cr LJ 734 ; *VP Shanmugam v Thangavelu* AIR 1958 Mad 240, p 241 .

40 *Anthony v Nedanchezian* AIR 1970 Mad 509, (1970) Cr LJ 1593, p 1594 ; *Ramaswamy v Karunanidhi* (1970) LW (Cr) 245, p 247 ; *Bhagolelal Kwalchand Darji v Emperor* AIR 1940 Nag 249, p 251, (1940) 41 Cr LJ 734 ; *VP Shanmugam v Thangavelu* AIR 1958 Mad 240, p 241 .

41 *AS Radha Krishna Ayyar v Emperor* AIR 1932 Mad 511, (1932) 33 Cr LJ 665 .

42 *Narayanaswamy Naicker v Devaraja Mudaliar* AIR 1936 Mad 316, (1936) 37 Cr LJ 629 .

43 *VP Shanmugam v Thangavelu* AIR 1958 Mad 240, p 241, (1958) Cr LJ 647(2).

44 *Kumara Nand v Brij Mohan Lal Sharma* AIR 1967 SC 808, p 811, [1967] 2 SCR 127, (1967) 2 SCJ 889, (1967) 1 SCA 614, (1967) Cr LJ 823, (1967) Mah LJ 280, (1967) MPLJ 329 .

45 *Hajee Mahommad Kadir Sheriff v Rahimatullah Sahib* AIR 1940 Mad 230, (1940) 41 Cr LJ 577 .

46 *VP Shanmugam v Thangavelu* AIR 1958 Mad 240, p 241 **relying on***Davis v Shepstone* [1886) 11 AC 187; *Barley v Edmons* (1895) 1 TLR 537 ; *Silver v Benn* (1896) 12 TLR 199 ; Re *St Georges*(1896) 5 OM&H 171; Re *Cockermouth*(1901) 5 OM&H 155; Rogerson, *Elections,* nineteenth edn, pp 559-60; *Halsbury's Laws of England*, vol 15, fourth edn, reissue, p 705 and following.

47 *VP Shanmugam v Thangavelu* AIR 1958 Mad 240, p 241, (1958) Cr LJ 647 ; *Kumara Nand v Brij Mohan Lal Sharma* AIR 1967 SC 808, (1968) Cr LJ 823 .

Indian Penal Code (Act XLV of 1860)

Chapter IXA

Of Offences Relating to Elections

[48][S. 171H.

Illegal payments in connection with an election.--

Whoever without the general or special authority in writing of a candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate shall be punished with fine which may extend to five hundred rupees:

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.]

Comments

1. Scope

This section makes it an offence to incur unauthorised expenses in connection with an election. Under the proviso, expenses to the extent of Rs 10 may be incurred without previous authority, but subject to subsequent ratification by the candidate within 10 days.

2. Procedure

The procedure is the same as in the case of an offence punishable under s 171E, IPC . The period of limitation prescribed for this offence is six months only.

3. Charge

The following form of the charge may be adopted:

I (*name and the office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you without the general (*or special*) authority in writing of .....on or about .....incurred (*or authorised*) expenses on account of the holding of a public meeting at.....or upon an advertisement, circular or publication, exhibit v, (*or in any other way whatsoever*), for the purpose of promoting (*or procuring*) the election of.....and thereby committed an offence punishable under section 171H of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

48 Inserted by the Act 39 of 1920, s 2 .

Indian Penal Code (Act XLV of 1860)

Chapter IXA

Of Offences Relating to Elections

[49][S. 171-I.

Failure to keep election accounts.--

Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election fails to keep such accounts, shall be punished with fine which may extend to five hundred rupees.]

Comments

1. Scope

This section penalises the failure to keep accounts of election expenses as required by law.

With reference to the elections to the house of the people and to the legislative assembly of a state, this section has to be read with s 77 of the Representation of the People Act 1951, which provides that every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or his election agent from the date of nomination to the date of declaration of the result in the manner prescribed.

2. Procedure

The procedure is the same as in the case of an offence punishable under s 171E . The prescribed period of limitation for prosecution under this offence is six months only.

3. Charge

The following form of the charge may be adopted:

> I (*name and officer of magistrate, etc*) hereby charge you (*name of accused*) as follows: That you being required by law for the time being in force, to wit..... (*or by any rule having the force of law, to wit.....*) to keep accounts of expenses incurred at or in connection with the election to wit....., failed to keep such accounts and thereby committed an offence punishable under section 171I of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.12371238

49 Inserted by the Act 39 of 1920, s 2 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 172.

Absconding to avoid service of summons or other proceeding.--

Whoever absconds in order to avoid being served with a summons, notice or order proceeding from any public servant, legally competent, as such public servant, to issue such summons, notice or order, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons or notice or order is to attend in person or by agent, or to [4][produce a document or an electronic record in a Court of Justice], with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Legislative Changes

The words 'produce a document or an electronic record in a Court of Justice' were substituted by Information Technology Act 2000, s 91 and Sch I, for 'produce a document in a Court of Justice.'

2. Scope

Sections 172, 173 and 174 of this chapter all relate to a summons, notice or order lawfully issued by a public servant. Section 172 punishes absconding to avoid service, s 173 punishes preventing service, and s 174 punishes non-obedience to a summons, notice or order. The object of this section is to punish an offender for the contempt his conduct indicates of the authority whose process he disregards. In order to prove the commission of the offence, it must be shown that a summons, notice, or order has been issued. A person cannot evade a direction which has not been given. There must have been an exercise of the authority of the court or officer competent to issue the mandatory process before there can be a contempt of that authority. It is not, therefore, sufficient to show that a person apprehending that a process will be issued has absconded. He may do so in the hope that his absence will deter the court or officer from issuing the process, and he would not be guilty of the offence contemplated by this section.[5] This section can apply only if a summons, notice or order is to be served on the accused, who absconded with a view to evading its service. It is doubtful, to say the least of it, if an order that information of the date fixed for a case be given to a party is such an order as is contemplated by this section. 1240The section is not applicable, unless summons, notice or order which was to be served on the accused was, in fact, in existence and capable of being served.[6]

There is nothing in s 98, CrPC, which requires service of an order under that section, for restoration of a woman unlawfully detained to her liberty, to be served on any person. The order is one capable of execution, and the section lays down that the magistrate may compel compliance with such order using such force as may be necessary. Once an order under s 98, CrPC, has been passed, it is open to the magistrate to use all lawful means to have the woman restored to her liberty. It is conceivable that, for that end, he may legally issue an appropriate direction to some other person in whose custody the woman may be. When such a direction is not given to an accused, nor was it intended by the district magistrate that any order should be served upon him for compliance with its terms, then the accused, if he absconds, does not commit an offence under s 172, IPC .[7]

3. Analogous Law

This section is analogous to s 4 of Regulation 11 of 1796, which it substantially reproduces.

4. Essentials to Constitute an Offence under this Section

To constitute an offence under this section two things are essential:

(a) A summons, notice or order proceeding from a public servant legally competent to issue it.
(b) Absconding in order to avoid being served with the summons, notice or order.

5. Role of Police for Efficient Criminal Justice Delivery System

Police officers are duty bound and they are expected to be diligent in serving the summons on the witnesses so as to enable the criminal courts to effectively discharge their duties. It is highly essential for the proper and effective functioning of the concerned criminal courts. The important role to be played by the police wing and the investigating agency in the administration of criminal justice delivery system needs no emphasis at the hands of this court. Service of summons on witnesses and prompt attendance thereof is an essential facet of criminal justice delivery system. Criminal justice delivery system to function efficiently needs effective coordinative and cooperative gesture of the investigating agencies inclusive of the police wing. Several of the aspects like service of summons on witnesses, prompt attendance of the ordinary witnesses, official witnesses, police officers, experts, judicial magistrates and the like, the execution of warrants in all promptness are a few which may be mentioned in this context. The said list is only illustrative, but not exhaustive. Giving less priority to these duties by the concerned executive wing is to be deprecated since it will tell upon the functioning of the very system itself. The separation of judiciary from the executive is not to operate as an obstacle for the 1241effective functioning of the system. Better co-ordination is essential for better governance and better judicial administration as well.[8]

6. Second Part

The second part of the section applies only where the summons, notice or order is (a) for attendance in court or (b) for production of a document in a court of justice.

7. Non-appearance and Non-production of Property

This section makes absconding of a person, in order to evade from being served with a summons or notice, an offence and does not make non-appearance of a person served with a summons or notice an offence.[9]

Where, however, certain movable property attached in execution of a decree was placed in charge of

the accused, and he evaded service of a notice to produce the property, and the property was not produced for sale, it was held that he was guilty of the offence under this section and not under s 406 .[10]

8. 'Whoever'

The use of the word 'whoever', in this section implies that the operation of the section is not confined to parties but extends also to witnesses.[11]

9. 'Absconds'

To abscond is to retire from pubic view, to take oneself off, to decamp, to go out of the way.[12] According to the *Concise Oxford Dictionary*, 1985 'abscond' means to depart secretly or flee from the law. However, the term 'abscond' is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and its ordinary sense is to hide oneself; and it matters not whether a person departs from a place or remains in it, if he conceals himself; nor does the term apply only to the commencement of the concealment. If a person, having concealed himself before process issues, continues to do so after it has been issued, he absconds.[13]

10. 'In Order to Avoid Being Served'

The section declares a person to be liable to punishment if he has absconded 'in order to avoid' service. The absconding must be with a purpose. This implies that the absconder knows, or at least has reason to believe, that the process has issued. He may abscond to avoid the issue of process, but this would not be an offence punishable under this section. When he knows or has reason to believe that it has issued, he may be unwilling to show contempt of the authority of the court or officer who has issued it, and may comply with it, or so conduct himself that service may be effected; but he can hardly be said to be guilty of contempt of authority if he does not know, and has no reason to believe that the authority has been exercised, nor to be absconding to prevent the service of a process, if he does not know, nor has reason to 1242believe, that it has issued.[14] This implies that a summons, notice or order has been issued, for absconding in order to avoid a summons which has not been issued, is no offence under this section.[15]

The statement of a magistrate that a summons might issue has been held equivalent to its actual issue.[16]

11. 'With a Summons, Notice or Order'

Sections 61 - 68 of the CrPC lay down the rules as to issue and mode of service of summons under that Code. Orders 5 and 16 of the Code of Civil Procedure 1908, lay down the rules as to issue and service of summons under that Code.

The provisions of this section do not cover the absconding from a warrant of arrest. A warrant addressed to a police officer to apprehend an offender and to bring him before the magistrate is not a 'summons, notice, or order' within the meaning of this section, and the offence of absconding by an offender against whom a warrant has been so issued is not punishable under it.[17]

12. 'Public Servant'

Section 21,*ante*, and commentary thereunder may be referred to.

13. 'Legally Competent' to issue such Summons, *etc*

The liability of the accused under this section and ss 173 - 174, IPC depends upon the legal

competence of the public servant to issue the summons, *etc*.[18] Where a duty is imposed on a public officer to superintend and control other public servants, authority to inquire into misconduct imputed to such servants in the discharge of their official duties is implied. If a public officer has authority to hold an inquiry, he has also authority to summon witnesses.[19]

14. 'Document'

Section 29,*ante* and commentary thereunder may be referred to.

15. 'Court of Justice'

Section 20,*ante* and commentary thereunder may be referred to.

The word 'court' used in this section has, however, a wider meaning than a 'Court of Justice' and it includes a tribunal empowered to deal with a particular matter and authorised to receive evidence thereon.[20]1243

16. Procedure

The offence is non-cognizable and summons should ordinarily be issued in the first instance. The offence is bailable, but not compoundable, and is triable by any magistrate. It may also be tried summarily. An offender committing an offence under this section can be prosecuted within one year of the offence subject to the provisions of Chapter 36 of the Code of Criminal Procedure Code 1973.

17. Complaint of Public Servant Concerned, Necessary

Under s 195(1)(a), CrPC no court shall take cognizance of an offence punishable under ss 172 - 188, IPC, or of any abetment of, or attempt to commit, such offence, or of any criminal conspiracy to commit such offence except on the complaint of the public servant concerned or of some public servant to whom he is administratively subordinate. The provisions of the Criminal Procedure Code, 1973 *inter alia*, s 190 *et seq*, including s 195 must be strictly followed in such cases.[21]

A complaint directly made by a public servant mentioned therein is quite as sufficient as his sanction.[22]

18. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you (*) on or about the ..... day of ..... at....., absconded to avoid service of summons (*or notice or order*) proceeding from..... (*name of the public servant and his office or of the court of justice*) and thereby committed an offence punishable under s 172 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

19. Proof

To establish an offence under this section it has to be proved:

(i) That the process in question was a summons, notice or order.
(ii) That the same was issued by a public servant.
(iii) That such public servant was legally competent as such to issue it.
(iv) That such process was issued in order to be served on the accused.
(v) That the accused absconded in order to avoid being served with such process.

For the second clause of the section, it has to be proved further:

(i) That the process required the attendance of the accused (either personally or by his agent) or required the production of a document by him either personally or by his agent.
(ii) That such attendance or production was to be in a court of justice. 1244

4 4 Substituted by Act 21 of 2000, s 91 and Sch I, for 'produce a document in a Court of Justice' (wef 17-10-2000).

5 5 *Madapusi Srinivasa Ayyangar v Queen* 4 ILR Mad 393, p 396 .

6 6 *Abdul Jalil Khan v Emperor* AIR 1936 All 354, p 356, (1936) 37 Cr LJ 713 .

7 7 *Abdul Jalil Khan v Emperor* AIR 1936 All 354, p 356, (1936) 37 Cr LJ 713 .

8 8 *Paleti Anil Babu v State* (2006) Cr LJ 3084 (AP) .

9 9 *State v Hem Narain Singh* AIR 1953 All 200 .

10 10 *Harnam Singh v Emperor* AIR 1918 All 406(1), (1918) 19 Cr LJ 975 .

11 11 Re *Hossein Manjee* 9 WR 70.

12 12 *Century Dictionary*, 1897.

13 13 *Madapusi Srinivasa Ayyangar v Queen* 4 ILR Mad 393, p397, 1 Weir 76 .

14 14 *Ibid.*

15 15 *Ibid.*

16 16 *Potts v Cambridge* 27 LJNSMC 62 .

17 17 *Queen v Womesh Chunder Ghose* 5 WR 71 (FB), per majority; *Majhi Mamud v Emperor* (1906) 3 Cr LJ 117, 2 Cal LJ 625 ; *Queen v Zahoor Ali* (1872) 4 All HCR 97 ; *Queen v Amir Jan* (1875) 7 All HCR 302 ; Re *Alla Baksh* 28 PR 1890; *Queen v Hossen Manjee* 9 WR 70 ; *Sheo Jangal Prasad v Emperor* AIR 1928 All 232, p 233 .

18 18 *R v Purshottam Valji* 5 Bom HC 33, 1 Weir 86 .

19 19 *Madapusi Srinivasa Ayyangar v Queen* 4 ILR Mad 393, p 396 .

20 20 *Raghoobans Sahoy v Kokil Singh* 17 ILR Cal 872 ; *Atchayya v Gangayya* 15 ILR Mad 138 ; *R v Ram Lal* 15 ILR All 141 ; s 3 of the Indian Evidence Act 1872.

21 21 *Kala Khan v Crown* (1909) 9 Cr LJ 190, 191 ; For detailed commentary see *Sohoni's Code of Criminal Procedure*,

twenty-first edn, Lexisnexis.

22 22 *Poonit Singh v Madho* ILR 13 Cal 270 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 173.

Preventing service of summons or other proceeding, or preventing publication thereof.--

Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order,

or intentionally prevents the lawful affixing to any place of any such summons, notice or order,

or intentionally removes any such summons, notice or order from any place to which it is lawfully affixed,

or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both,

or, if the summons, notice, order or proclamation is to attend in person, or by agent, or [23][to produce a document or an electronic record in a Court of Justice], with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Legislative Changes

The words 'to produce a document or an electronic record in a Court of Justice' are substituted by the Information Technology Act 2000, s 91 and Sch I, for 'produce a document in a Court of Justice.'

2. Scope

The first part of this section speaks of four offences thereunder:

(a) the prevention of service of a summons, notice or order;
(b) the prevention of the lawful affixing, to any place, of such summons, *etc*.;
(c) the removing of such summons *etc.*, after it has been affixed; and

(d) the prevention of the lawful making of any proclamation.

In all of them the intention of the offender and the lawful authority of the public servant to issue the process are essential pre-requisites. The offender is liable for simple imprisonment of one month or fine upto Rs 500 or with both. The gravity of offence as per second part of the section increases if the summons, notice or proclamation order is for attending or producing documents or electronic record in a court of justice. In the latter case, the offender is liable to be punished by simple imprisonment of upto 6 months or with fine of upto as Rs 1000 or with both. 1245

3. Preventing Service

Both under the Code of Civil Procedure[24] and the Code of Criminal Procedure[25] a summons may be served by delivering or tendering a copy of the same to the person concerned.

Section 62, CrPC, provides that the summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him, one of the duplicates of the summons, and that every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Considering that tender itself amounts to service and delivery is not necessary, it has been held in several cases that a refusal to accept a summons, when tendered, does not amount to intentionally preventing service of summons. What seems to be required under this section is some act of opposition offered to the officer serving the process.[26] However, in *Budha v Emperor* ,[27] Walsh J, held that a tender, to be sufficient service must be a real tender of a document which is understood by the person to be served, and he must have voluntarily waived actual delivery and indicated in some way that a tender was sufficient, and that a man, who gets away from the serving officer with the obvious intention of not allowing him to hold any communication with him at all and shuts himself in his house, is intentionally preventing service either by tender or by delivery. The act of throwing down a summons which has actually been served on the accused, does not amount to a prevention of service within the meaning of the section.[28]

4. Refusal to Sign Receipt for Summons

It has been held in a number of cases that a refusal to sign a receipt for a summons, *i.e.*, a refusal to sign and return the duplicate as required by s 62(3) of the Code of Criminal Proceddure 1973 is not an act which prevents the service of the summons within the meaning of this section.[29]

A refusal to serve as a special constable, when ordered to do so, is no offence under this section and proceedings taken under this section for such refusal are bad in law and should be quashed.[30]1246

5. Procedure

The procedure is the same as in the case of an offence under s 172, IPC . The limitation prescribed for this offence is also one year.

6. Complaint

Complaint of the public servant concerned necessary. Synopsis notes under s 172 may be referred to.

7. Proof

To establish an offence under this section, it has to be proved that:

(i) the process in question was a summons, notice or order or a proclamation;
(ii) it was issued by a public servant;
(iii) he had authority to issue it;
(iv) if a summons, notice or order, it was issued for service on someone;
(v) the accused knew it;
(vi) he either prevented its service or removed it from any place to which it has been lawfully affixed; or that he prevented the making of the proclamation; and
(vii) he did so intentionally.

The following aggravating facts where applicable, may be added:

(i) that the process of proclamation required the attendance of the accused either in person or by an agent, or the production of a document or electronic record; and
(ii) that such process or proclamation was to attend or to produce the document or electronic record in a court of justice.

23 23 Substituted by Act 21 of 2000, s 91 and Sch I, for 'produce a document in a Court of Justice' (wef 17-10-2000).

24 24 Refer to O 5, r 10, Code of Civil Procedure 1908.

25 25 Refer to s 62, Code of Criminal Procedure 1973.

26 26 *U Thudama Wara v King-Emperor* AIR 1923 Rang 146, p 147, (1923) 24 Cr LJ 737 [relying on *Queen v Punamalai* 5 ILR Mad 199 ; *G Zapantis v Emperor* AIR 1920 UB 18, (1920) 21 Cr LJ 688]; *Chandika Prasad v Emperor* AIR 1918 Oudh 412(1), (1918) 19 Cr LJ 801 ; *Sahadeo Rai v Emperor* AIR 1918 All 409, (1918) 19 Cr LJ 746 ; *Debigir Tapdhari v Emperor* AIR 1925 All 322, (1925) 26 Cr LJ 909 ; *Emperor v Ahmed Husain Khan* (1909) 10 Cr LJ 435, 31 ILR All 608, 6 All LJ 777 .

27 27 *Budha v Emperor* AIR 1928 All 118, p 119, (1928) 29 Cr LJ 263 .

28 28 *Queen v Arumuga Nadan* 1 Weir 79 .

29 29 *Emperor v Ahmad Husain Khan* (1909) 10 Cr LJ 435, 31 ILR All 608, 6 All LJ 777 ; *Reg v Punamalai* ILR 5 Mad 199 ; *Reg v Kalya Bin Fakir* 5 BHCR (Cr) 34 ; *Queen-Empress v Bhoobuneshwar Datt* 3 ILR Cal 621 ; Re *Ananta Kunaya* 1 Weir 80; *Queen-Empress v Hira Lal* 1883 All WN 222 (where s 172 appears to have been inadvertently printed for s 173); *Queen-Empress v Krishna Gobinda Das* ILR 20 Cal 358 ; *Debigir Tapdhari v Emperor* AIR 1925 All 322, (1925) 26 Cr LJ 909 .

30 30 *Gopinath Paryah v Empress* (1906) 3 Cr LJ 169, 177 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 174.

Non-attendance in obedience to an order from public servant.--

Whoever, being legally bound to attend in person or by an agent at a certain place and time in

obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same,

intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both,

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations

(a) *A,* being legally bound to appear before the [31][High Court] at Calcutta, in obedience to a subpoena issued from that Court, intentionally omits to appear. *A* has committed the offence defined in this section. 1247

(b) *A*, being legally bound to appear before a [32][District Judge], as a witness, in obedience to a summons issued by that [33][District Judge] intentionally omits to appear. *A* has committed the offence defined in this section.

Comments

1. Legislative Changes

By Adaptation of Laws Order 1950, the words in illust (a) 'Supreme Court', and by the same enactment, in illust (b), the words 'District Judge' were substituted for the words 'Zila Judge'.

2. Scope

There are two offences under this section: (i) Non-attendance in obedience to a summons, notice, order or proclamation proceeding from a public servant legally competent to issue the same; and (ii) departure before the time when it is lawful to depart.

In either case, the section requires the following three conditions to be fulfilled:

(i) A summons, notice, order or proclamation for attendance must be issued by a public servant who was legally competent to issue the same.

(ii) The person summoned must be legally bound to attend at a certain place and time in answer to the summons, notice, order or proclamation.

(iii) The person summoned must have in the first case: (a) intentionally omitted to attend at that place and time, or in the second case, (b) departed from the place before the time at which it was lawful for him to depart.[34]

In order to sustain a conviction under s 174, IPC, it must be shown that the summons issued was issued by a public servant legally competent as such public servant to issue the same, and the accused intentionally omitted to attend in pursuance of the summons.[35]1248

3. 'Whoever'

The word 'whoever', as used in s 174, IPC, is wide enough to cover any party to a proceeding as well as a witness.[36]

4. 'Summons, Notice, Order or Proclamation'

A citation to appear, issued to a person, who is in arrears of revenue, under s 147, Land Revenue Act (UP Act 3 of 1901) is not a 'summons, notice or order' which the recipient is legally bound to obey, and a person is not guilty of the offence under this section if he fails to comply with it.[37]

Where the citation was issued on 25 February and it was not served till 10 March 1927, at 5:00 pm, and called on the accused to be present at noon on 11 March 'in case the entire arrears... are not paid very soon' no conviction under s 174, IPC could possibly stand.[38] For a proclamation requiring appearance before a court, refer to s 82, Code of Criminal Procedure 1973.

The summons, *etc.*, contemplated by the section are those which have been issued according to law. Failure to comply with summons, issued in proceedings, which are themselves illegal is not an offence under this section.[39]

A warrant is not a 'summons, notice or order' and this section does not apply to an escape from custody under a warrant in execution of the decree of a civil court.[40]

A person disobeying a coroner's summons under s 17 of the Coroners Act 1871 (Act 4 of 1871), is guilty of an offence under ss 174 or 175, IPC, as the case may be.

5. Summons, etc, must be Mandatory and not Optional

Summons may be issued to a party or to a witness or to a party who is sought to be examined in the case as a witness. The object may be to give notice to a party of some suit, application or other proceeding. In such a case, the party is not bound to appear in court although his non-appearance may entail the consequence of an *ex parte* order against him.[41] Again, the object may be to compel his appearance in court to give evidence. In such a case, he is legally bound to appear in court and he cannot be allowed to contumaciously withhold his appearance. A summons to a witness is a process of mandatory character. In a civil suit, the court has summary powers to proceed against him and pass orders under O 16, r 12, CPC. Such summary powers have now been conferred on criminal courts as well under s 350 of the Code of Criminal Procedure 1973. The cases of deliberate disobedience of summons are rare. Whether a party or a witness was bound to appear in a proceeding has to be determined by a reference to the nature of the proceeding and the provision of the particular statute under which he is served with the notice. 1249

6. Section not Applicable when Appearance is Optional

Section 201, UP Land Revenue Act 1901, provides that no *ex parte* order or order by default shall be set aside without a notice of the application to the opposite party. This section is analogous to O 9, r 14, CPC. Here the notice served to a party is not for personal appearance. It is a matter of his option to appear or not to appear, but non-appearance exposes him to certain legal consequences. It may be conceded that the party served with notice in these cases is not legally bound to appear.[42]

7. Form and Contents of Summons--Time and Place

Summons should be clear and specific in their terms as to the title of the court, the place at which the day, and the time of the day when the attendance of the party summoned is required, and they should further go on to say, that such party is not to leave the court without leave, and if the case, in which he has been summoned, is adjourned without ascertaining the date of adjournment. Where a summons did not mention the place at which, or the time of the day when, the attendance of the person summoned was required, it was held that such person could not lawfully be punished under s 174,

IPC for non-attendance in obedience to such summons.[43] Before convicting a person under this section, it is necessary to prove that he had notice to appear at a certain time and place, and that he did not do so.[44] But it would be most unreasonable to serve a notice on a person at 5:00 pm one day that he was to be present with the money on the next day by noon at a distant place.[45]

A *subpoena* issued to a person, which did not require him to attend at a certain place, but called on him to attend wherever the officer concerned might happen to be, is not a legal *subpoena,* failure to comply with which one cannot be punished under this section.[46]

A summons which, although specifies the place and the day, but omits to mention the time, is a summons which is not sufficiently specific to justify a prosecution if it be not complied with. It is not necessary that in every case the exact hour at which the attendance of the person upon whom the summons is served is required should be mentioned. A summons which required a person to attend at a particular police station on a particular date between the hours of three and five in the afternoon, or 'at such time as may be convenient between the hours of 8 and 12 in the morning' would be such a summons as would render the person to whom it is addressed liable to prosecution if he failed to obey it, but the position is different when the summons omits any reference whatever to the hour of the day at which the attendance of the person on whom that summons is served is required.[47] A case cannot be adjourned by a proclamation merely,[48] but a definite verbal order is enough.[49] A summons returnable on a sundry is legal.[50] A mere verbal direction to appear before a police officer as a witness, having regard to s 160, CrPC is not sufficient.[51] The place fixed 1250for appearance must be within India. It is no offence to disobey a summons directing a person to appear at a place outside India.[52]

8. Fact Requisite for Conviction

For a conviction under this section it must be proved that the officer in question was present[53] at the place on the date, both of which must be fixed in the summons[54] and in the case of proceedings in a court, that as a fact he took up the case in question.[55]

9. Summons or Order must be Addressed to the Person Whose Presence is Required

The order in writing contemplated by the provisions of s 160, CrPC, is an order addressed to a person whose presence is required. An order given to a subordinate police officer to produce a person before the sub-inspector is not an order contemplated by the provisions of s 160, CrPC, disobedience of which could be made punishable under this section, even though the order might be brought to the notice of the person concerned. The words 'summons, notice, order or proclamation', used in this section are different forms of directions for compliance and they would not partake of the character of directions as such if they are not addressed to the persons whose attendance is required.[56]

10. Summons or Order, must have been Properly Served

In order to sustain a charge under s 174, CrPC for disobedience to a summons issued by a court, it is necessary to prove personal service of the summons in accordance with the provisions of the Code of Civil Procedure 1908.[57] And, therefore, where a summons was not served personally on the defendant, but affixed to the door of his house and he failed to attend, it was held that he had committed no offence.[58] For service of summons, refer to Code of Criminal Procedure 1973, ss 62 - 69 . The mere production of a summons with an endorsement of service is not sufficient proof of service. The evidence of the serving officer is necessary.[59] A tender and refusal to accept a summons is a personal service.[60] The summons should be left with the person summoned.[61] If a case is postponed, fresh summons or notification of postponement must be served.[62] If a witness does not receive or hear of the summons till after the day named therein, he cannot be fined for non-attendance.[63] There must be evidence to show that the summons was brought to the knowledge of the accused.[64]1251

Section 66, CrPC, which prescribes a special mode of service on a government servant applies only to summons issued by a court of justice and not an order under s 160, CrPC, issued by a police officer. If such an order is personally served on an amin of the court and is disobeyed, he would be liable under this section.[65]

11. Party should be Legally Bound to Obey Summons, *etc*

Under this section it is necessary that the party should be legally bound to obey the summons. This obligation would, in general, follow as a necessary consequence from the competence of the officer to issue the order. But cases might arise in which there would be no such obligation. For instance, a witness, already in attendance at one court, would be under no obligation to go to a court at a distance, until he had given his evidence in the case for which he has been first cited.[66] Where the presence of the accused required before an authority issuing the summons, is optional, and not compulsory, it cannot be said that the accused is legally bound to appear.[67]

The police have not been given powers to summon witnesses during investigation in respect of proceedings under any of the chapter of Pt IV, CrPC, dealing with prevention of offences, unlike in the case of investigation of offences under ch 14, CrPC . In the absence of such powers, the petitioners can ignore the summons and the prosecution of the petitioners for the offence under s 174, IPC, cannot be sustained.[68]

12. Public Servant must be 'Legally Competent' to Issue Process

The liability of the accused under this section and ss 172 and 173, IPC depends upon the legal competence of the officer to issue the summons, *etc.* or to make the proclamation.[69] In order to sustain a conviction under this section it must be shown that the summons issued was issued by a public servant legally competent to issue the same, and the accused intentionally omitted to attend in pursuance of the summons.[70]

13. Public Servants not held Competent

A receiver appointed under s 56 of the Bengal Land Registration Act, 8 of 1876 is not a public servant legally competent to issue and pass order directing persons to attend before the collector with their collection papers and rent receipts, and 1252disobedience to such an order does not constitute an offence under this section or s 175 .[71] There is no law which makes non-attendance when called upon to serve as coolies, an offence, and a *tahsildar* acting as a magistrate is not legally competent to summon persons to appear before him and show cause why they refused to appear as coolies. They are not legally bound to obey his summons, and cannot be convicted under this section for non-attendance in obedience to the summons.[72]

A cantonment magistrate is not legally competent to require the attendance of agents of bungalows in connection with the acquisition of bungalows for military purposes, as it is not a matter connected with him as a magistrate, and disobedience of such a requisition by him is no offence under this section.[73] A *tahsildar* is not legally competent to issue summons for the attendance in court of persons who prepare and attest a list of cattle in the Mianwali district in order to make the revenue authorities able to distribute the revenue over wastelands, and the persons called *munsifs* cannot be convicted for their non-attendance under this section.[74]

Under r 44 of the rules issued by the local government in regard to the sale of ancestral land, a collector is empowered to delegate his powers only to an assistant collector of the first class. He cannot delegate his authority to an assistant collector of the second class and therefore, the latter is not legally competent to issue summons, the disobedience of which would be an offence under this section.[75]

Section 82 of the Code of Criminal Procedure 1973 prescribes the mode of giving notice by means of

a proclamation to an accused person, alleged to be absconding, to appear in court on a particular date, and the section makes it mandatory that the accused person shall be given notice of not less than thirty days' period to present himself in court, and if no such notice is given the proclamation is not a valid proclamation, and failure to appear in obedience to it is not an offence under this section.[76]

Section 160, CrPC does not provide for an order by an investigating officer to a subordinate police officer to produce a person before him. Any such order not amounting to an order of arrest under s 41, CrPC has no sanction of law behind it, and its disobedience by the person concerned to whose notice the order is brought does not become a penal offence provided under this section.[77]

Where a *tahsildar* is authorised to hold an inquiry and has discretion to depute a revenue inspector to conduct the inquiry, non-attendance in obedience to an order issued by the latter would be an offence under this section.[78]

14. Non-attendance must be Intentional

A conviction for non-attendance in obedience to an order from a public servant, under this section cannot be had unless the person summoned was legally bound to 1253attend, and refused or intentionally omitted to do so.[79] The word 'intentional' has not been defined in the IPC, but it means non-attendance which amounts to wilful disobedience.[80] The use of the word 'intentionally' limits the application of the section to cases where the omission is clearly wilful. It does not apply to a case where the omission arose from some circumstances which rendered it impracticable for the person to attend.[81]

15. Non-appearance when not Intentional

Where a person employed in an office was summoned to give evidence in a court and he failed to obey the summons as his superior officer did not let him go, it was held that there was no intentional omission on his part to attend the court in obedience to the summons, and he could not be held liable under this section.[82]

Non-appearance due to illness is not intentional. If a person is sufficiently incapacitated by illness as to have given up his ordinary vocations, there would be sufficient excuse for him not to attend a court in obedience to a summons.

The fact that he did not inform the court of his illness would not render him liable to punishment under this section.[83]

Where an advocate summoned to appear before a magistrate on a charge under the Motor Vehicles Act was unable to obey the summons as he was engaged in arguing a case in the High Court and sent another advocate to ask for an adjournment, it was held that he did not intend to disobey the summons and, therefore, committed no offence under this section.[84]

Where the accused summoned to appear before a settlement officer explained to the process-server his inability to be present, but the latter omitted to mention it to the officer issuing the summons, it was held that he could not be said to have intentionally disobeyed the summons within the meaning of this section.[85] Whether or not omission to appear was intentional is a question of fact to be decided by the trial court,[86] after giving an opportunity of hearing to explain the absence.[87]

16. Appearance by Agent

An offence is not committed by an accused person in a summons case, who on the day fixed for the trial, makes an appearance by his pleader to ask for an order dispensing with his personal attendance under s 205 of the Code of Criminal Procedure 1973 if his conduct is in other respects lawful.[88]1254

However, the accused specifically directed to appear in person had no authority to send his representative and if the accused is found to have wilfully avoided to attend in spite of sufficient notice, he is guilty of offence under s 174 .[1]

17. Intentional Departure before Time

In order to make a person, summoned as a witness, liable to punishment under this section, he must have intentionally omitted to attend at the place or time mentioned in the summons, or wilfully departed from the place where he had attended before the time at which it was lawful for him to depart.[2] In *Queen v Sutherland* ,[3] it was held that a witness who attends in obedience to a summons at a certain hour is not bound to wait all day long and if he goes away after a reasonable time, he cannot be convicted under this section. It may be doubted, however, if a witness is not bound to wait so long as there is reason to believe that the case in which he is summoned would come on, and his evidence taken.

In a Bombay case, a magistrate summoned the defendant to appear before him at 10 am. He attended punctually, but the magistrate was detained by public business. After waiting for a few minutes, the defendant went away. It was held that he was properly convicted under this section.[4]

Where the accused did not attend on the day fixed, but the magistrate was absent from the station the whole day, it was held that, as the object of the summons was a meeting on a particular day between the person summoned and a specified public functionary, the non-attendance at a time when no such meeting could have taken place was not an offence.[5]

A person who duly appears in obedience to a summons but departs without permission is not guilty under s 174, in the absence of a direction that he should not leave without permission.[6]

18. Effect of Absence of Summoning Authority

For a conviction under this section for non-attendance in obedience to a summons issued by an officer, it must be shown that the officer in question was present[7] at the place and on the date, both of which must be fixed in the summons,[8] and in the case of proceedings in a court, that as a fact he took up the case in question,[9] failing which the accused cannot be convicted.

19. Opportunity to Explain Absence must be Given to Accused

Before considering the question whether or not disobedience to a summons was intentional, the accused should be given an opportunity of explaining his absence.[10]1255

20. Procedure

The offence under this section is non-cognizable and a summons should ordinarily be issued in the first instance. It is bailable but not compoundable, and is triable by any magistrate. The period prescribed for prosecution under his section is one year.

For the offender to be prosecuted for the said offence of disobeying the summons of the court, a charge has got to be framed, he has to be tried and the procedure as is envisaged by the relevant provisions of CrPC, has to be followed.[11]

Non-attendance in obedience to a summons of a court is an offence under this section. If the magistrate thinks that such an offence had been committed by the person in question, he ought to follow the procedure prescribed in the Code of Criminal Procedure 1973 in trying him therefor. When this is not done, but a simple notice is sent to the person and he comes forward and asks to be excused, and the magistrate 'sentences' him to pay a fine of Rs 5, this procedure is not what is

contemplated by the Code.[12]

21. Complaint of Public Servant or Court Necessary

A competent court who can try the accused for the said infraction should try the case on a complaint filed by the court. But there is a limitation for that competent court to take cognizance of the offence and in the absence of the necessary complaint in writing filed by the public servant where orders have been flouted, the competent court is precluded from taking cognizance under s 195, CrPC, which engrafts a bar for the court to take cognizance of the offence alleged against the person who has violated the orders of the court in having failed to appear before that court pursuant to the summons issued which is an offence punishable under s 174, IPC . In the absence of any such written complaint filed by the public servant whose order has been infracted, no court can take cognizance of the offence and there can be no punishment.[13] In view of the provisions of s 195(1)(a), CrPC an offence punishable under this section can be taken cognizance of by a court only on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate.[14] An offence under this section is against the public servant before whom the accused fails to appear. Where, therefore, a witness fails to appear before the court, which summoned him, a complaint must be made by the court. If there is no such complaint, the accused cannot be convicted on a complaint by a sub-inspector of police.[15]

Therefore, if the court is of the opinion that there has been infraction of the order of the court by committing default in making appearance before that court pursuant to the summons issued by it, such violation on the part of the person responsible can be effectively dealt with only by ordering prosecution by filing a complaint in writing before a competent court of magistrate empowered to take cognizance.[16]1256

22. Whether Judge, Magistrate or Officer whose Order is Disobeyed, can Try such Offender

This section is one of the sections referred to in s 195, CrPC, and having regard to the provision of s 352 of that Code, therefore, an offence under this section cannot be tried by the officer whose order is disobeyed.[17]Section 352 is a prohibitory section and it excludes the jurisdiction of a court in cases in which the offence is committed before itself or in contempt of its authority.[18] The prohibition is absolute and consent or otherwise of the accused is immaterial.[19]

Section 345, CrPC, envisages a procedure, where a court can invoke its summary powers and punish the contempnor who has violated the orders of the courts by taking cognizance of the offence and by calling for the explanation from him and for that purpose by ordering detention of that person till the end of the summary trial and at the end the court is empowered to inflict the sentence of fine not exceeding Rs 200 but the summary power of the court can be exercised in respect of an offence enumerated under ss 175, 178, 179, 180 or 228, IPC . The offence enumerated under s 174, IPC, is not the offence that can be tried summarily under s 345, CrPC .[20]

Section 350 of the CrPC, however, provides a summary procedure for punishment for non-attendance by a witness in obedience to a summons. Under that section, if the court before which the witness is to appear is satisfied that it is expedient in the interest of justice that such witness should be tried summarily, the court may take cognizance of the offence and after giving the offender an opportunity of showing cause why he should not be punished under this section, sentence him to fine not exceeding Rs 100. In such cases, the procedure prescribed for summary trial has to be followed as nearly as may be practicable.

31 Substituted by the AO 1950, for 'Supreme Court'.

32 Substituted by the AO 1950, for 'Zila Judge'.

33 Substituted by the AO 1950, for 'Zila Judge'.

34 *Emperor v Himachal Singh* AIR 1930 All 265, p 269, (1930) 31 Cr LJ 546 (FB) .

35 *Shiam Lal v Emperor* AIR 1914 All 519, (1914) 15 Cr LJ 595 ; *Krishna v State* (1975) Cr LJ 620 (HP), (1974) ILR HP 452 .

36 *Nyaya Panchayat Palog v Chanu Ram* AIR 1964 HP 2 (4), (1964) 1 Cr LJ 34.

37 *Emperor v Himachal Singh* AIR 1930 All 265, p 268, (1930) 31 Cr LJ 546 (FB) ; *Banwari Lal v King-Emperor* AIR 1927 All 49, (1927) 28 Cr LJ 153 ; *Emperor v Bhirgu Singh* AIR 1927 All 122, (1927) 28 Cr LJ 20 ; the rulings to the contrary *King-Emperor v Sarju Singh* 6 All LJ 114 (Notes) ; *Ram Bali Singh v Emperor* (1909) 10 Cr LJ 250 ; *Chandrika Singh v Emperor* AIR 1928 Oudh 122, (1928) 29 Cr LJ 94) are no longer good law.

38 *Emperor v Tika Ram* AIR 1928 680 All (FB), (1929) Cr LJ 910 (FB).

39 *Behari Lal v Emperor* AIR 1920 All 304, p 305, (1921) 22 Cr LJ 79 .

40 *Reg v Sardar Pathu* 1 Bom HCR 38, 7 Mad HCR App 8; *Queen v Womesh Chunder Ghose* 5 WR 71(FB); *Sheo Jangal Prasad v Emperor* AIR 1928 All 232 .

41 Refer for instance O 9, Code of Civil Procedure 1908.

42 Per Sen J, in *Emperor v Himachal Singh* AIR 1930 All 265, p 273-74 .

43 *Empress v Ram Saran* ILR 5 All 7, (1882) 2 All WN 145, 7 Mad HC Rep App 14.

44 Re *Shib Pershad Chuckerbutty* 17 WR 38, 7 Mad HCR 14, p 43, 1 Weir 811.

45 *Emperor v Tika Ram* AIR 1928 All 680 (FB), (1929) 30 Cr LJ 910 (FB).

46 *Hukum Singh v Emperor* AIR 1926 All 474, p 475, (1926) 27 Cr LJ 697 .

47 *Latoor Mal v Emperor* AIR 1948 All 137(2), p 138, (1948) 49 Cr LJ 109 .

48 6 Mad HCR 29, 1 Weir 84.

49 *R v Guman Parthan BR* 5 Mad HCR 15, 1 Weir 87, 7 Mad HCR 3, 1 Weir 88 .

50 1 Weir 86.

51 *Ibid.*

52 *Queen-Empress v Paranga* ILR 16 Mad 463, 1 Weir 88 .

53 *R v Krishtappa* ILR 20 Mad 31, 1 Weir 83 .

54 1 Weir 81, 82.

55 *R v Lalu* (1909) 10 Cr LJR 576, 3 SLR 155 .

56 *Bhambhia Noghanji v State of Kutch* AIR 1954 Kutch 25, p 26, (1954) 55 Cr LJ 1060 .

57 *Reg v Hury Nath* 7 WR (Cr) 58 ; *Reg v Sreenath* 10 WR (Cr) 33 ; *Pal Singh Santa Singh v State* AIR 1955 Punj 18, (1955) Cr LJ 318 .

58 6 Mad HC App 24.

59 1 Weir 85.

60 *R v Punamali* 5 ILR Mad 199, 1 Weir 81 ; *R v Ahmad Husain Khan* (1909) 10 Cr LJ 435, 6 All LJ 777 .

61 Re *Kuppan* ILR 11 Mad 137, 1 Weir 10.

62 Re *Breenath Ghose* 10 WR (Cr) 33, 6 Mad HCR App 29, 1 Weir 83.

63 *R v Ungam Lall* 1873 1 NWP 303 .

64 1 Weir 83, 6 Mad HCR App 29; *Periannamalawaram* 1 Weir 84; *Ganapathi Aiyan* 1 Weir 85.

65 Re *Gumparthi Venkataramiah*(1917) 18 Cr LJ 733, p 734.

66 Mayne's Commentary of s 74 ; *Sitalal v Gram Panchayat Dhammod* (1962) MPLJ 331 (Notes) .

67 *Abdul Khader v State* (1969) LW (Cr) 266, p 267 ; Re *Sreenath Ghose* 10 WR 33; *Dandapani v State* 26 Cut LT 571, (1960) 2 Ori JD 308 .

68 Re *Manicka Reddy*AIR 1968 Mad 225, (1967) Mad LW (Cr) 173, (1968) Cr LJ 760 .

69 *R v Purshotam* 5 Bom HCCC 33, 1 Weir 86 ; Re *Vijayam & Co*(1962) 2 Mad LJ 264; *Ebrahim Sircar v Emperor* ILR 29 Cal 236, p 239 ; *Gopia v King-Emperor* (1904) 1 Cr LJ 497, 1 All LJ 263 ; *Radhakrishana Chettiar v Sales Tax Officer* (1968) KLT 731, (1968) Mad LJ (Cr) 603 ; *Ram Chand v Emperor* (1922) 23 Cr LJ 230 ; *Khota Ram v Emperor* (1907) 6 Cr LJ 107 ; *Shiam Lal v Emperor* AIR 1914 All 519, p 520, (1914) 15 Cr LJ 595 ; *Bhambhia Noghanji v State of Kutch* AIR 1954 Kutch 25, p 26, (1954) Cr LJ 1060 ; Re *Manicka Reddy*AIR 1968 Mad 225, (1967) Mad LW (Cr) 173, (1968) Cr LJ 760 ; *Krishna v State of Himachal Pradesh* (1975) Cr LJ 620, p 621 (HP), (1974) ILR HP 452 .

70 *Shiam Lal v Emperor* AIR 1914 All 519, (1914) 15 Cr LJ 595 ; *Krishna v State of Himachal Pradesh* (1975) Cr LJ 620 (HP) ; *Radhakrishan Chettiyar v Sales Tax Officer* (1968) KLT 731, (1968) Mad LJ (Cr) 603 .

71 *Ebrahim Sircar v Emperor* ILR 29 Cal 236, p 239 .

72 *Gopia v King-Emperor* (1904) 1 Cr LJ 497, (1904) 1 All LJ 263 .

73 *Ram Chand v Emperor* (1922) 23 Cr LJ 230 .

74 *Khota Ram v Emperor* (1907) 6 Cr LJ 107, 4 PR (Cr) 1907, 37 PLR 1907, 25 PWR 1907 (Cr) .

75 *Shiam Lal v Emperor* AIR 1914 All 519, p 520, (1914) 15 Cr LJ 595, (1914) 12 All LJ 680 .

76 *Pal Singh Santa Singh v State* AIR 1955 Punj 18, (1955) Cr LJ 318 .

77 *Bhambhia Noghanji v State of Kutch* AIR 1954 Kutch 25, p 26, (1954) Cr LJ 1060 .

78 Re *Kamam Venkatrao*(1910) 11 Cr LJ 566, 567; *Queen v Subbanna* 1 Weir 90 (FB) .

79 Re *Sreenath Ghose* 10 WR 33; *Dandapani v State* 26 Cut LT 571, (1960) 2 Ori JD 308 ; *Shiamlal v Emperor* AIR 1914 All 519, (1914) 15 Cr LJ 595 .

80 *Mul Singh v Emperor* AIR 1923 Lah 163, p 166 ; *Abdul Khader v State* (1969) LW (Cr) 266 ; *Dandapani v State* (1960) 2 Ori JD 308, 26 Cut LJ 571 .

81 Re *Randhir* 22 PR 1880.

82 Re *Sreenath Ghose* 10 WR (Cr) 33; *Mul Singh v Emperor* AIR 1923 Lah 163, (1923) 24 Cr LJ 433 ; *Dandapani v State* 26 Cut LJ 571, (1960) 2 Ori JD 308 ; *Abdul Khader v State* (1969) LW (Cr) 266, p 267 .

83 *Bohra Birbal v King-Emperor* AIR 1922 All 82(1), (1922) 23 Cr LJ 203, (1922) 20 All LJ 192 .

84 *JR Dass v King-Emperor* AIR 1924 Rang 35, (1924) 25 Cr LJ 229, 2 Bur LJ 146 .

85 *Randhir* 22 PR 1880 (Cr).

86 *Bhambhia Noghanji*AIR 1954 Kutch 25, p 26, (1954) Cr LJ 1060 .

87 *Ramun v Emperor* (1908) 7 Cr LJ 226, 227 ; *Ebrahim Mammojee Parekh v Emperor* AIR 1926 Rang 188 .

88 *Durga Das v Umesh Chandra* 27 ILR Cal 985 .

1 *Union of India v SP Goyal* (2002) Cr LJ 4146 (Bom) .

2 *Queen v Sutherland* 14 WR 20 .

3 *Ibid.*

4 *Reg v Kisan Bapu* 10 ILR Bom 93 .

5 *Reg v Krishtappa* ILR 20 Mad 31 .

6 Re *Narayanappa* 1 Weir 99.

7 *R v Krishtappa* ILR 20 Mad 31, 1 Weir 83 .

8 1 Weir 81, 82.

9 *R v Lalu* (1909) 10 Cr LJ 516, 3 SLR 155 .

10 *Ramun v Emperor* (1908) 7 Cr LJ 226, p 227, 2 PWRC 85 ; *Ebrahim Mammojee Parekh v Emperor* AIR 1926 Rang 188 .

11 *M Sudhakara Rao v State of Andhra Pradesh* (2001) Cr LJ 448(AP).

12 *Shahab Din v State* AIR 1961 J&K 54, (1961) 62 Cr LJ 87 .

13 *Ibid.*

14 *Ibid*.

15 *Sheomangan Singh v Emperor* AIR 1942 Oudh 425, p 426, (1942) 43 Cr LJ 641 .

16 *M Sudhakara Rao v State of Andhra Pradesh* (2001) Cr LJ 448 (AP) .

17 *Deo Saran Tewari v Emperor* AIR 1918 All 320 (1), 40 ILR All 86, 15 All LJ 877, (1918) 19 Cr LJ 688 ; *Mahommad Din v Emperor* AIR 1934 Lah 545(1), 35 PLR 454 ; *Shahab Din v State* AIR 1961 J&K 54 .

18 *Anand Reddi v State of Andhra Pradesh* AIR 1959 AP 144, p 146, (1959) Cr LJ 300 .

19 *Mahommad Din v Emperor* AIR 1934 Lah 545(1) .

20 *M Sudhakar Rao v State of Andhra Pradesh* (2001) Cr LJ 448 (AP) .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

[21][S. 174A.

Non-appearance in response to a proclamation under section 82 of Act 2 of 1974.--

Whoever fails to appear at the specified place and the specified time as required by a proclamation published under sub-section (1) of section 82 of the Code of Criminal Procedure, 1973 (2 of 1974) shall be punished with imprisonment for a term which may extend to three years or with fine or with both, and where a declaration has been made under sub-section (4) of that section pronouncing him as a proclaimed offender, he shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.]

Comments

1. Legislative Changes

This section is newly inserted by the Code of Criminal Procedure (Amendment) Act 2005 (25 of 2005), s 44(b) (wef 23-06-2006). 1257

Notes on Clauses

CrPC (Amendment) Act, 2005--Clause 44.--This clause amends the Indian Penal Code as follows, namely:--

'Clause 12 seeks to insert new sub-sections (4) and (5) in Section 82 of the Code to provide for the declaration of a person as proclaimed offender, if he fails to appear inspite of the proclamation published under sub-section (1) of that section. In order to curb the tendency on the part of criminals not to attend the Court in response to proclamation published under sub-section (1) or further proclamation issued under sub-section (4) declaring the accused as "Proclaimed Offender a new Section 174 -A is being added to the Indian Penal Code to prescribe punishment for such offender'.

2. Scope and Application

Persons against whom proclamation is issued under s 82(1), CrPC would be divided into two categories. The first category would be of the persons who are accused of an offence other than the one mentioned in s 82(4), CrPC and the second category of the persons accused of an offence mentioned in s 82(4), CrPC . For these two categories of persons, punishment is differently provided by s 174A, IPC . Where the accused is a person against whom proclamation stands published, he is liable to be proceeded against under s 83, CrPC by way of attachment of his property as also under s 174A, IPC .[22]

If the IO submits charge-sheet without arresting the accused persons (unless he is on bail), it can be submitted only if he has been declared absconder and the case under s 174A, IPC has also been registered as a result of this proclamation.[23]

21 Inserted by the Code of Criminal Procedure (Amendment) Act, 2005 (25 of 2005), s 44(b) (wef 23-6-2006).

22 *Sanjay Sarin v State (UT, Chandigarh),* 2013 Cr LJ 408, 410, 411 (P&H) (DB), 2013 (3) RCR (Criminal) 138 .

23 *Iqbal v State of U.P.,* 2013 Cr LJ 1332, 1334 (All), 2013 (1) ACR 1139 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 175.

Omission to produce [24][document or electronic record] to public servant by person legally bound to produce it.--

Whoever, being legally bound to produce or deliver up any [25][document or electronic record] to any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the [26][document or electronic record] is to be produced or delivered up to a Court of Justice, with

simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations

A, being legally bound to produce a document before a [27][District Court], intentionally omits to produce the same. A has committed the offence defined in this section. 1258

Comments

1. Legislative Changes

In the illustration, the words 'district court' were substituted for the words 'zila court' by the Adaptation of Laws Order 1950.

The words 'document or electronic record' were substituted by the Information Technology Act 2000, s 91 and Sch I for 'document' wef 17-10-2003.

2. Scope

Section 174, IPC deals with disobedience of summons, *etc.*, to attend and this section deals with disobedience of a summons, *etc.*, to produce a document. This section applies to a witness who, having a document, does not produce it in obedience of a summons to produce it.[28] In order to convict a person under this section for non-production of a document, it must be shown that the production of the document was necessary or desirable for the decision of the case in which it was summoned,[29] and that it was in the possession or control of the accused.[30] The summons or order must specify the particular documents or books required.

Where a junior member of Hindu family attended court in obedience to a summons which directed him to produce his account books in respect of a family business in which he was a partner with his father, but he did not produce the same, it was held that he could not be proceeded against under this section or s 345 of the CrPC since the summons was too vague in not directing any particular book to be produced and since he, as junior member, could not be expected to have control of the books.[31]

A party to a suit, failing to comply with an order for production or inspection of documents, does not commit an offence under this section, but is liable to be dealt with only in the manner prescribed by O 11, r 22, CPC.[32] The omission to produce the document must be intentional.

Where the omission on the part of the accused to produce and deliver up the document to the court constitutes the real gravamen of the offence of contempt of court, this section would hardly be relevant.[33] This section and other sections of this chapter relate to particular rules of contempts of lawful authority of public servants. Where the facts of a case disclose no offence under ss 172 - 90, the case, if the facts so permit may be tried as a contempt case under s 10 of the Contempt of Courts Act 1971.[34]1259

3. Analogous Law

Under s 30(b), CPC, a court may issue a summons to any person whose attendance is required either to give evidence or to produce documents and under s 32 it can compel the attendance of such person.

Order 11, r 14, CPC empowers the court during the pendency of a suit to order the production by any party thereto of such of the documents in his possession or power relating to any matter in question in

such a suit.

Under s 162 of the Indian Evidence Act 1872, a witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility, and the validity of such objection shall be decided by the court.

Under s 130 of the 1872 Act, no witness shall be compelled to produce his title deeds and under s 131 of 1872 Act, no one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.

There are also provisions in some special or local Acts under which persons are legally bound to produce documents. Thus, under s 39 of the UP Consolidation of Holdings Act 1953 (V of 1954), a consolidation officer may require any person to produce such documents as he may deem necessary for the proper exercise of his powers or discharge of his duties, and the person required to produce the document is 'legally bound' to do so within the meaning of this section.

4. Document

Section 29 and commentary thereunder may be referred to.

5. Privileged Documents

Although a witness may refuse to deliver up a document on the ground that it is privileged, he is not excused thereby, from bringing it to court for the court's inspection and decision thereon, unless the document constitutes state proceedings, in which case the word of the public officer having their custody, must be taken.[35]

6. 'Legally Bound to Produce'

A person is not legally bound to produce a deed for the purpose of verifying a copy thereof in a registration office.[36] In *Ishwar Chandra Ghoshal v Emperor* ,[37] it was held that the provisions of s 91, CrPC, cannot be taken to apply to the case of an accused person on his trial to whom a notice had been issued to produce an incriminating document. However, it has also been held in several other cases that it is competent to a magistrate under s 91, CrPC, to issue a summons to an accused 1260person to produce a document or other thing, even if the production of it might tend to incriminate him.[38]

Income-tax officers are not bound, by their oath of secrecy, when summoned, to give evidence in a court of justice.[39]

When a *karnam* is in possession of government records, he was *ex necessitae* to hand over the records to another *karnam* who is duly appointed by the collector. His action would certainly fall within the definition of 'legally bound to do' under s 43, IPC . If he is legally bound to do an act and if he fails to do so, then this section will apply.[40]

An offence under this section is committed when there is a legal obligation, on an accused, to produce or deliver the document or other thing to a public servant.[41]

7. Procedure

An offence under this section is non-cognizable and bailable but not compoundable. This is triable by the court, in which the offence is committed in a court by any magistrate.[42] The period prescribed for prosecution for this offence is one year.

8. Complaint

Under s 195(1)(a) of the CrPC, no court shall take cognizance of any offence punishable under ss 172 - 188 of the IPC, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is administratively subordinate. Subject to the provisions of s 352 of the Code of Criminal Procedure 1973, no judge of a criminal court or a magistrate can try any person for any offence committed before him. Section 352 runs as follows:

> **S. 352 . Certain Judges and Magistrates not to try certain offences when committed before themselves.--**Except as provided in sections 344, 345, 349 and 350, no judge of a Criminal Court (other than a judge of a High Court) or magistrate shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such judge or magistrate in the course of a judicial proceeding.

9. Special Procedure in Certain Cases of Contempt

Commentary on s 345(1) of the Code of Criminal Procedure 1973[43] may be referred to.

10. When Jurisdiction of High Court not Excluded

If the acts alleged are offences under ss 175, 178, 179, 180 or s 228, IPC, they constitute contempt and can be taken cognizance of by the court, in whose view or 1261presence they are committed, and, in respect of only such contempt, the High Court would not take cognizance because s 3(2) of the Contempt of Courts Act 1971 bars its jurisdiction. On the other hand, if the act, complained of, which is alleged to constitute contempt, is an offence under the Indian Penal Code, but other than an offence under ss 175, 178, 179, 180 or s 228 of the Code, then the jurisdiction of the High Court is not excluded.[44]

11. Proof

To establish an offence under this section it must be proved that:

(i) the accused was legally bound to produce or deliver up any document or electronic record to any public servant or to a court of justice;
(ii) he omitted to produce or deliver it up; and
(iii) he did so intentionally.

24 Substituted by Act 21 of 2000, s 91 and Sch I, for 'document' (wef 17-10-2000).

25 Substituted by Act 21 of 2000, s 91 and Sch I for 'document' (wef 17-10-2003).

26 Substituted by Act 21 of 2000, s 91 and Sch I for 'document' (wef 17-10-2003).

27 Substituted by the AO 1950, for 'Zila Court'.

28 Re *Premchand Dowlatram* 12 ILR Bom 63.

29 *Mithan Lal v Emperor* AIR 1918 Pat 590(2), (1918) 19 Cr LJ 217 .

30 *Damri Ram v Emperor* AIR 1918 Pat 590, p 593 ; Re *Salig Ram*(1890) 10 All WN 171.

31 Re *Salig Ram*(1890) 10 All WN 171.

32 *Ram Chand v R* (1910) 11 Cr LJ 386, 15 PR (Cr) 1910 .

33 *State v Bhagwat Singh* AIR 1968 Del 208, (1968) DLT 174 (FB) .

34 *Waryam Singh v Sadhu Ram* AIR 1972 SC 905, p 907-08, (1972) Cr LJ 635 ; *State of Madhya Pradesh v Reva Shankar* AIR 1959 SC 102, (1959) Cr LJ 251 .

35 Indian Evidence Act 1872, ss 123, 162 ; *Beatson v Skene* 29 LJ Ex 430 ; *Hennessy v Wright* LR 29 QBD 5 .

36 *Asamatullah v R* (1906) 3 Cr LJ 114, (1905) 2 Cal LJ 621 ; Re *Phool Chand Brojobassee* 16 WR 35.

37 *Ishwar Chandra Ghoshal v Emperor,* (1908) 8 Cr LJ 224 .

38 *Surey Kondareddi v Emperor* AIR 1915 Mad 17, (1912) 13 Cr LJ 493, 37 ILR Mad 112 ; Re *Ahmed Mahamed* 15 ILR Cal 109; Re *HH The Nizam of Hyderabad v AM Jacob* ILR 19 Cal 52 ; *Damri Ram v Emperor* AIR 1918 Pat 590(2) .

39 *Lee v Birrell* 3 Cam 337 ; *R v Yakatazkhan* 2 Mad Sess 1863 .

40 Re *AS Socha Gowder*AIR 1956 Mad 335, 336, (1956) Cr LJ 754.

41 Re *Venkataraman*(1968) Cr LJ 417, p 418 (Mad), (1967) Mad LJ (Cr) 437 Re *Vijayam & Co*(1962) 2 Mad LJ 264, pp 265-66, (1962) 75 Mad LW 607; Re *AS Socha Gowder*AIR 1956 Mad 335, p 336, (1956) Cr LJ 754 .

42 See the First Schedule to the Code of Criminal Procedure 1973; see also s 352 of the said Code.

43 For detailed commentary see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

44 Re *Bhola Nath Chaudhary*AIR 1961 Pat 1, p 5 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 176.

Omission to give notice or information to public servant by person legally bound to give it.--

Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both,

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both,

[45][or, if the notice or information required to be given is required by an order passed under sub-section (1) of section 565 of the Code of Criminal Procedure, 1898 (5 of 1898)[46] with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.] 1262

Comments

1. Scope

This section applies to persons upon whom an obligation is imposed by law to furnish certain information to public servants, and the penalty, which the law provides is intended to apply to parties who commit an intentional breach of such obligation. No offence is committed if there is no such legal obligation.[47] The gist of the offence is that there should be an intentional omission to give the information.[48] The section refers to information to be given in statements required to be furnished under some provision of law.[49]

The section is in three parts. All the three parts deal with an omission to give notice or information to a public servant. The omission to give information to a public servant 'or any subject' by a person legally bound to give such information is punishable under the first part of the section; and if the 'subject' in question is an 'offence', the omission is more severely punishable under the second part. The third part deals with an omission to give notice or information required under s 565(1) (now s 356) of the CrPC .

It is a well established principle that s 176, IPC is intended to apply to parties who commit an intentional breach of obligation to report, and not where the public servant had already obtained the information from other sources.[50] The provisions of this section should be used not for the purpose of vexation, but for ensuring that information be not intentionally withheld by those whose position renders them liable to give it.[51] When several parties are bound to give information and one of them furnishes it, it is not reasonable to prosecute the other or others for not giving the same.[52]

2. Legislative Changes

The third clause to the section was inserted by s 2 of the Criminal Law (Amendment) Act 1939. This clause requires amendment to substitute s 356 of the Code of Criminal Procedure 1973 for the existing words of s 565 of the same Code. 1263

3. Ingredients of Offence

The two ingredients of the offence are:

(i) intentional omission to give information to a public servant; and
(ii) that the accused was legally bound to give such information to a public servant.[53]

4. Legally Bound

A person is said to be 'legally bound to do' whatever it is illegal for him to omit.[54] And it is only illegal for him to omit what is an offence or prohibited by law or is ground for a civil action.[55] To render a person liable under this section it must be shown: (a) that there was an obligation imposed on him by law to give the notice or information, and (b) that he 'intentionally' omitted to give the same.[56] If there is no such legal obligation, there can be no offence in withholding the information in question.[57] This section refers to information to be given in statements required to be furnished under some provision of law.[58]

5. Sections 40, 43 and 176 Read Together

If ss 40, 43 and 176, IPC be read together, the result follows that one who fails to furnish information

which he is legally bound to furnish is punishable under s 176, that he is legally bound to furnish what it is illegal for him to omit, that it is illegal for him to omit what is an offence and that an offence is what is punishable under the Penal Code.[59]

6. Statutory Obligation

Such legal obligations are imposed by various Acts, both Central and local.

(a) Information in Regard to Matters other than Offence

For duty of officer employed in connection with the affairs of a village to make certain report, see commentary to s 40, Code of Criminal Procedure 1973.[60]

A village headman, *patwari* and *chowkidar* are legally bound under s 40(1)(b) of the CrPC to give the police information, which they possess respecting the resort to any place within their village of a proclaimed offender to the village, and if being aware of such a visit, they intentionally omit to do so, they are liable under this section whether the proclamation under s 87 of the CrPC was or was not made 1264strictly in accordance with the terms of that section.[61] Under certain circumstances covered by s 45(d) of the CrPC 1898 (now s 40(d) of the CrPC 1973), the concealment of suspicious death is punishable under this section, but mere servants, who are entirely dependent on their master in whose house the death takes place, do not come within the category of persons who are bound to communicate an occurrence of this sort.[62]

The bringing of a suspected robber under arrest to the village of the accused and releasing him there does not amount to the resorting to any place within, or the passage through the village of a suspected robber within the meaning of cl (b) of sub-s (1) of s 40, Code of Criminal Procedure 1973.[63]

In a case,[64] the Madras High Court held that the owner of land on which a corpse is seen, need not be the owner or occupier of land on which the occurrence took place. The finding of a dead body on any land would ordinarily raise the presumption that death had taken place on that spot, so as to impose an obligation on a person occupying one of the positions in relation to the land described in this section to communicate information regarding the matter. He must justify the omission to give information. Per Prinsep and Machperson JJ, (Mitter J, dissenting), held that the (dead) body standing by itself does not necessarily lead to the inference that death took place in the village. It is equally consistent with death having taken place in another village and the dead body having been subsequently removed to the village where it is at last found.[65]

A *Karnam* in Madras Presidency is bound to furnish true information regarding cultivation in his village.[66] But he is not liable under s 176, IPC, if he omits to submit the information in obedience to an order of a Revenue Inspector.[67]

The allegation against the wife was that she was in possession of unauthorized liquor. The husband cannot be compelled to give information to the police about the unauthorized possession of liquor by the wife. The wife and the husband cannot be prosecuted for offences under ss 176 and 420, IPC .[68]

Foreigners Act[69]

Under this provision masters of foreign vessels are liable to furnish information.

Coroners Act[70]

A person appearing on a summons before a coroner but who refuses to give the required information commits an offence under this section.1265

Dramatic Performance Act[71]

Failure to give information as to a proposed dramatic performance, when called upon to do so by the local government, or its officer, is punishable under this section.

Indian Income Tax Act (43 of 1961)

Sections 94(6) and 133 empower Income-Tax Officers to require certain information and s 271 provide penalties for failure to furnish the information.

Land Acquisition Act (1 of 1894) [72]

Section 10(2) provides that everyone required to make or deliver a statement under s 9 or s 10 of the Act is legally bound to do so within the meaning of ss 175 and 176, IPC .

Indian Succession Act 1925

If an executor or administrator, on being required by the court to exhibit an inventory or account under s 317 of the 1925 Act, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under s 176, IPC .[73]

City of Bombay Municipality Act (3 of 1888)

Section 473 provides that whoever contravenes the provisions of s 155(1) and (2), or s 187 commits an offence under s 176 or s 177, as the case may be.

Indian Works of Defence Act (7 of 1903), Section 11

Registration Act (16 of 1908), Section 84(2)

Under sub-s (1) of the Act, every registering officer appointed under this Act shall be deemed to be a public servant within the meaning of the Indian Penal Code, and every person under sub-s (2) of the Act, shall be legally bound to furnish information to such registering officer when required by him to do so.

UP Land Revenue Act (3 of 1901)

Under s 46, a *zamindar* is bound to furnish information required by a *patwari* to prepare his *jamabandi*, and failure to do so is punishable under s 176, IPC .[74] However, the *zamindar* is not bound to give the information unless he is asked to give it by the *qanungo* or *patwari*.[75]

UP Consolidation of Holdings Act (5 of 1954), Section 39

Under s 39, a person required by a Consolidation Officer to furnish certain information is bound to furnish it.

It has been held that a person who refuses to answer when examined under s 161, CrPC cannot be said to commit an offence under s 176 or s 179 or s 187, IPC .[76]1266

(b) Information in regard to Offences

Under s 39 of the Code of Criminal Procedure 1973 every person is bound to give information to the nearest magistrate or police officer of the commission of, or intention to commit, any offences specified under the Indian Penal Code .[77] Again, under s 40(1)(c) and (e), CrPC the persons mentioned in the section are bound to give information to the nearest magistrate or police officer respecting the commission or intention to commit the offences specified therein.

(c) Information required to be given under Section 356(1) of the Code of Criminal Procedure 1973

Before the insertion of the third part in this section by s 2 of the Criminal Law (Amendment) Act, 22 of

1939, and the amendment of s 567 of the Code of Criminal Procedure 1898 by Act 7 of 1924 and Act 22 of 1939, it was held that notice of residence required to be given under s 565, CrPC was not required for preventing the commission of any particular offence and that failure to give such notice fell under the first part and not under the second part of s 176 of the Penal Code.[78] The offence under the first part of this section is punishable only with simple imprisonment or with fine extending up to five hundred rupees or both. But now the third part of this section specifically provides for a breach of the order under s 565(1) of the Code of Criminal Procedure 1898 and the punishment for failure to give the notice required by that section has been altered to imprisonment of either description up to six months or fine up to Rs 1000 or both.

7. 'Offence'

By virtue of s 40, and the explanation to s 177, IPC 'offence' means a thing made punishable by the Code, or under any special or local law whether committed within or without India in the case of the offences specified in the said explanation: or under any special or local law, if punishable thereunder by imprisonment for a term of six months or upwards, whether with or without fine. The offences referred to in the explanation to s 177 are murder, culpable homicide not amounting to murder, theft after preparation made for causing death or hurt, in order to the committing of the theft, robbery, attempt to commit robbery, voluntarily causing hurt in committing robbery, dacoity, dacoity with murder, robbery or dacoity with attempt to cause death or grievous hurt, attempt to commit dacoity when armed with a deadly weapon, making preparation to commit dacoity, assembling for the purpose of committing dacoity, mischief by fire or explosive substance with intent to cause damage to the amount of Rs 100, the same with intent to destroy a house, *etc.*, house-trespass in order to the commission of an offence punishable with death, the same in order to commit an offence punishable with transportation for life, lurking house-trespass or house-breaking by night, in order to the commission of an offence punishable with imprisonment, the same after preparation made for causing hurt to any person, grievous hurt caused whilst committing lurking house-trespass or house-breaking, death or grievous hurt caused by one of several persons jointly concerned in house-breaking, *etc.*1267

8. Doctor(s) Working in Hospital

Where a patient is brought to a doctor in a hospital for treatment of poisoning, duty lies on the doctor to inform the police about the death of such patient who dies. Where the accused doctor did not do so, charges for offences under ss 176 and 201, IPC were framed against him.[79]

9. 'Commission of an Offence'

The aggravated penalty imposed by the second part of the section can be inflicted only when the information required to be given relates to the commission of some particular offence, and not of offences generally.[80]

10. 'Public Servant'

Public servant has been defined by s 21, IPC . For the application of this section it is necessary that the accused was legally bound to give notice or furnish information on any subject to any public servant. A person who is directed to investigate into the affairs of an insurance company under s 33(1) of the Insurance Act, does not *ipso facto* become an officer or there is no office which he holds. The making of a statement to the investigators under s 33(3) of the Insurance Act does not amount to furnishing information on any subject to any public servant as contemplated by this section, an omission to furnish which would be an offence under that section.[81]

11. 'Intentionally Omits'

The omission must be intentional.[82] Thus, the refusal of a person to join in a dacoity, but of which he

says nothing, does not necessarily render him liable to punishment under this section.[83] Intention, which is the gist of the offence[84] is to be presumed from the circumstances of the case.

12. Nature of Omission

Section 176, IPC, deals with omission to give notice or information to the public servant, by a person who is legally bound to do it. An omission postulates legal obligation and knowledge, for there can be no omission when there is no obligation and knowledge. The notice or information contemplated in s 176 is naturally notice or information of a definite character, having a credible origin and such as may probably be a definite character, having a credible origin and such as may probably be conductive to the apprehension of the crime or prevention of crime. The action does not refer to vague floating gossips in which every market abounds.[85]

Where the accused who as a licensee was bound under the conditions of his licence to disclose the places where he had stocked cloth meant for sale, was asked to submit a list of the mill-made cloth with him and he omitted to mention in the list submitted by him the cloth he had stocked in a place other than his shop, it was held that he 1268intentionally omitted to furnish legal information which he was legally bound to furnish and committed an offence under this section.[86]

It is not necessary in order to support a conviction under this section against a person falling within the provisions of s 40 of the Criminal Procedure Code 1973, for not giving information of an occurrence falling under cl (d) of that section, to show that the death actually occurred on his land, when the circumstances disclosed, show that a body has been found under circumstances denoting that the death was sudden, unnatural or suspicious; the finding of the body being a fact from which a court might reasonably infer, in the absence of evidence to the contrary, that the death took place there.[87]

13. Omission of Investigating Officer to Complete Investigation within the Statutory Period

Omission on the part of the Investigating Officer to complete the investigation within 60 days from the date of the arrest of the accused, is not covered under the s 176, IPC . The Investigating Officer, therefore, cannot be said to be guilty under s 176 of the IPC .[88]

14. Procedure

The offence under this section is non-cognizable and summons should ordinarily issue in the first instance. It is bailable and not compoundable. It is triable by any magistrate, and may be tried summarily.

No court can take cognizance of an offence under this section except on a complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate.[89] The prescribed period of limitation for prosecution under this section is one year.

15. Complaint of the Public Servant Concerned Necessary

The commentary under s 172 may be referred to.

16. Particulars of Charge

The charge, under this section should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which he knew to be false; and it should appear precisely what his duty was in the matter.[90]

The following form of charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the.....day of.....at....., being legally bound to give any notice (*or to furnish information*) on any subject, to wit, to..... a public servant intentionally omitted to give such notice (*or to furnish such information*), which you were legally bound to give as to in respect of commission (*or prevention*) of an 1269offence (*or apprehension of an offender*) and thereby committed an offence punishable under section 176 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

17. Proof

Before a person may be convicted under this section the prosecution is bound to prove that:[1]

(i) the accused person was legally bound to furnish a certain information to a public servant; and
(ii) he intentionally omitted to give such information.

In the case of an offence under the second or third part of the section, the aggravating circumstances have to be proved in addition.

45 Inserted by the Criminal Law (Amendment) Act 1939 (22 of 1939), s 2 .

46 Corresponds to s 356 of the Code of Criminal Procedure 1973.

47 Re *Phool Chand Brojobassee* 16 WR 35, 36; *Lt Dhara Singh v Emperor* AIR 1933 Lah 515, p 516, 34 PLR 712 .

48 Re *Luchmun Pershad Gorgo* 18 WR 22.

49 *RK Dalmia v Delhi Admn* AIR 1962 SC 1821, p 1870, (1962) 2 Cr LJ 805 ; *Geetha v Sub-Inspector of Excise, Mudigere* 2007 Cr LJ 3496, 2007 (4) Kar LJ 619 (Kant) .

50 *Lt Dhara Singh v Emperor* AIR 1933 Lah 515, p 516 ; *Empress v Sashi Bhusan Chakraburty* ILR 4 Cal 628 ; *Satyasaheal Nandlal Naik (Dr) v State of Maharashtra* (1996) 3 CCR 222, p 224 (Bom), (1996) Cr LJ 1463 (Bom) .

51 Re *Pandya Nayak* 7 ILR Mad 436.

52 *Queen-Empress v Gopal Singh* 20 C 316 ; Re *Pavallimanakkal Narayan Nambudripad* 17 Mad LT 263, (1915) 16 Cr LJ 219; *Bhagwantrao v Emperor* AIR 1927 Nag 217, p 218, (1925) 26 Cr LJ 1489 ; Re *Pandya Nayak* 7 ILR Mad 436.

53 *Satyasaheal Nandlal Naik (Dr) v State of Maharashtra* (1996) Cr LJ 1463 (Bom), (1996) 3 CCR 222, p 224(Bom).

54 Section 43 of the Indian Penal Code .

55 *Ali Mohamed Adamalli v Emperor* AIR 1945 PC 147, (1947) Cr LJ 61 .

56 Re *Phool Chand* 16 WR (Cr) 35.

57 3 Mad HCR App 30; *R v Janki Singh* (1910) 11 Cr LJ 307, 8 OC 128 ; *R v Luckhee Singh* 12 WR (Cr) 23 ; *R v Sankaralinga* 23 ILR Mad 544 ; *Gul Hassan Shah v Emperor* (1909) 9 Cr LJ 105, 27 PR (Cr) 1908 ; *Narasimayya v Achayya* (1909) 9 Cr LJ 328 ; *Hiru Satua Desla v Emperor* AIR 1929 Bom 12, (1929) 30 Cr LJ 172 .

58 *RK Dalmia v Delhi Admn* AIR 1962 SC 1821, p 1870 .

59 *Ibid.*

60 For detailed commentary see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

61 *Emperor v Ram Sarup* AIR 1938 Oudh 50 .

62 *Thakri Mst v Emperor* (1911) 12 Cr LJ 425, p 426, 17 PWR 1911 (Cr) .

63 *Queen-Empress v Malik Daud* 31 PR 1887 .

64 (1905) MHC Cr App 648.

65 *Matuki Misser v Queen-Empress* 11 Cal 619 ; *Empress v Abdul Kadir* 3 ILR All 279 ; *Queen v Hurdut Sarma* 8 WR 68 (Cr) ; *Queen-Empress v Waman Dhunad Ratanlal* 784.

66 *Public Prosecutor v Venkatanarasappa* 1 Weir 111 .

67 Re *Tolupur Bhagavannulu* 1 Weir 105.

68 *Geetha v Sub-Inspector of Excise, Mudigere* 2007 Cr LJ 3496 (Kant), 2007 (4) Kar LJ 619 .

69 *Foreigners Act*3 of 1864, s 20, now Act 31 of 1946, s 6(2) .

70 *Coroners Act* 4 of 1871.

71 *Dramatic Performance Act* 19 of 1876, s 7 .

72 Now repealed by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 (30 of 2013).

73 See the Indian Succession Act 1925, s 317 .

74 *Emperor v Suraj Baksh Singh* (1907) 6 Cr LJ 301, p 302 .

75 *Budh Singh v King-Emperor* AIR 1927 All 111, (1926) 27 Cr LJ 1367 .

76 *Queen-Empress v Sankaralinga Kone* 23 ILR Mad 544 .

77 Cf *Madras Regulation* 41 of 1816, s 8 .

78 *Emperor v Hussain Beg* 31 ILR Mad 548, (1908) 8 Cr LJ 425, 19 Mad LJ 274 ; *Emperor v Bhola* (1905) 2 Cr LJ 745, 1 Nag LR 133 both **relying on***Panatulla v Queen-Empress* 15 ILR Cal 386 .

79 *Ashok Kumar v State of Rajasthan* 2011 (107) AIC 810 (Raj) .

80 *Emperor v Hussain Beg* 31 ILR Mad 548 .

81 *RK Dalmia v Delhi Admn* AIR 1962 SC 1821, 1870 .

82 *Satyasheel Nandlal Naik (Dr) v State of Maharashtra* (1996) 3 CCR 222, p 224(Bom).

83 *R v Lahai* 7 WR 29 ; *R v Phool Chand* 16 WR (Cr) 35 ; *Luchmun Pershad* 18 WR (Cr) 22.

84 *Luchmun Pershad* 18 WR (Cr) 22.

85 *PK Saranji v State of Orissa* (1995) AIHC 5185, p 5186 .

86 *Lal Mohan Paul v State of Tripura* AIR 1952 Tri 18, p 20 .

87 *Matuki Misser v Queen-Empress* ILR 11 Cal 619, p 624 .

88 *Manoj Kumar Gautam v State of UP* 2009 Cr LJ 3176, p 3179 (All) .

89 Section 195(1)(a), CrPC ; *Arjun Mal v Emperor* AIR 1923 Lah 260 .

90 *Queen v Moosubroo* 8 WR (Cr) 37 .

1 *Shridhar v State* AIR 1954 HP 67 ; *Satyasheel Nandlal Naik (Dr) v State of Maharashtra* (1996) 3 CCR 222, p 224 (Bom) .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 177.

Furnishing false information.--

Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(a) *A,* a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the magistrate of the district that the death has occurred by accident in consequence of the bite of a snake. *A* is guilty of the offence defined in this section.

(b) *A,* a village watchman, knowing that considerable body of strangers has passed through his village in order to commit a dacoity in the house of *Z,* a wealthy merchant residing in a neighbouring place, and being bound under clause 5, section VII, [2][Regulation III, 1821], of the Bengal Code, to give early and punctual information of the above fact to the officer of the nearest police station, willfully misinforms the police officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction. Here *A* is guilty of the offence defined in the latter part of this section.

[3][*Explanation.*--In section 176 and in this section the word "offence" includes any act committed at any place out of [4][India], which, if committed in [5][India], would be punishable under any of the following sections, namely, 302, 304, 382, 1270392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and the word "offender" includes any person who is alleged to have been guilty of any such act.]

Comments

1. Legislative Changes

The explanation to this section was inserted by s 5 of the Indian Criminal Law (Amendment) Act, 3 of 1894.

The words 'British India' were successively substituted by the AO 1948, AO 1950 and the Part B States (Laws) Act 1951 to read as above.

2. Scope

This section is in two parts. The first part deals with the simple case of a person who, being bound to furnish true information to a public servant, furnishes false information to him and under this part of the section, the maximum punishment is six month's simple imprisonment with or without fine. The second part deals with a case when the information is required for the purpose of preventing the commission of an offence or in order to the apprehension of an offender, and under this part the maximum punishment is two years' imprisonment of either description with or without fine.[6]

A, a police officer, whose duty it was to enter all reports, brought to him, of offences in the station diary, refused to enter a report, brought to him, of a certain offence, but entered, instead, a false report. *A* was held to have committed an offence under this section.[7] But *A,* who seeks to be enlisted in the police, falsely says that he is not a resident of the district, commits no offence.[8]

A plain reading of s 26 of the General Clauses Act 1897, shows that there is no bar to the trial of conviction of an offender under two enactments but there is only a bar to the punishment of the offender twice for the same offence. In other words, the section provides that where an act or omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both the enactments but shall not be liable to be punished twice for the same offence.[9] The accused belonging to 'Havyak Brahmin' furnishing false information and obtaining 1271admission by producing false Scheduled Tribe Certificate can be convicted for offence under ss 120-B, 177 and 471 of the Indian Penal Code 1860.[10]

Giving false information is distinct from omission to give information. Omission to give information is not an offence under s 177, IPC, unless the same is intentional.[11]

3. Analogous Law

Regulation 3 of 1821 of the Bengal Code, referred to in illust (b) has been repealed by Act 17 of 1862. The corresponding liability is now imposed by s 40(1)(e) of the Code of Criminal Procedure 1973.

Section 52 of the Income-Tax Act 1922[12] stated as follows:

> If a person makes a statement in a verification mentioned in s 19(A) or s 22, or sub-s (2) of s 26(A), or sub-s (2) of s 33(A), which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be deemed to have committed the offence described in s 177, IPC .

Sections 277 and 278 of the Income Tax Act 1961 may be referred to.

4. Ingredients

The section lays down two ingredients: (a) that a person must be legally bound to furnish information on the particular subject to the public servant, and (b) that he must furnish, as true, information on that subject which he knows or has reason to believe to be false.[13]

5. Relative Scope of Sections 177, 182, 201 and 203

Commentary under same heading in s 182, *post* may be referred to.

6. 'Being Legally Bound'

Section 43 and commentary under ss 43 and 176 may be referred to.

The section has no application to a case in which a false statement has been made to the police by a person who was under no legal obligation or who was not legally bound to give that information. Such a person may be liable for prosecution under s 182, IPC, which, however, is a different matter. To bring a case under s 177, IPC, it is absolutely necessary to prove that the informant was 'legally bound' to give the information, which is proved to be false, to the public servant.[14] A person may be guilty of a breach of departmental orders such as sending in a false 'nil' return, but he cannot be held liable under this section unless he was legally bound to furnish the information required.[15] The illustrations to this section show that it does not apply to the case of any person, who is examined by a police officer, making a false statement, but it evidently alludes to cases, when, by law, landholders or watchmen 1272are bound to give information, and to other analogous cases of the same description.[16]

Section 43, IPC, covers a breach of contract, and not merely a tort. The breach of contract, however, must be one which furnishes ground for a civil action, that is to say, in respect of which damages could be obtained under s 73, Contract Act, or which could be enforced specifically. Where there is a contract between the government and the municipality, under which a doctor of municipality was to furnish certain information (*i.e.* to carry out post-mortem examination of bodies sent and to report result) to the government, there is no contract between the doctor and the government and as such the doctor is not legally bound to furnish information within the meaning of this section and the doctor cannot be prosecuted under it for giving a false report without opening the bodies sent to him.[17]

Under s 40(1)(d) of the Code of Criminal Code 1973, a *mukhia* of a village is legally bound to give information to the police which he may possess respecting:

(i) the occurrence in or near such village of any sudden or unnatural death;
(ii) any death under suspicious circumstances;
(iii) the discovery in or near such village or any corpse or part of a corpse, in circumstances which lead to a reasonable suspicion that such a death has occurred;
(iv) the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person.

If no death has taken place and there is no evidence that any non-bailable offence has been committed about which the Mukhia had any information, which it was his duty to report to the police, he cannot be held liable under this section.[18]

Under ss 139 and 140 of the Indian Income Tax Act 1961,[19] persons are legally bound to submit returns of their income and to sign and verify them. If a person makes a false return on a false declaration in the verification, he would be liable under this section.[20] However, he is under no such obligation if no notice has been given to him under s 139(2),[21] and he cannot be held liable under this section.[22] With reference to the corresponding ss 22 and 52 of the Income Tax Act 1922, it has been held that the essence of an offence under those sections lies in the verification of an untrue statement, and provided the statement was deliberately false or not believed to be true, subsequent rectification cannot make it any less an offence, though it may be considered as an extenuating circumstance in awarding sentence.[23]Now s 277 of the Income Tax Act 1961, itself makes a false statement in declaring an offence punishable with simple imprisonment which may extend to six months or with fine which may extend to Rs 1000, or both.1273

Section 21 of the Indian Registration Act 1908, does not lay any obligation on the executant of a

sale-deed to correctly describe the property sold. The section only requires that the property should be described in sufficient detail so as to make the identity thereof easier. If the description given by him is sufficient to identify it, the mere fact that it was not described as laid down within the meaning of s 2 of reg 3 of 1914, will not render him liable under this section.[24]

By s 44 of the Police Act 1861, every officer in charge of a police station is bound to keep a general diary in which he is to record 'all complaints and charges preferred, the names of all persons arrested, the offences charged against them', and by s 23, he is bound to communicate intelligence respecting the public peace. One object of that diary is to inform the magistrate of the district and the district superintendent of police of the offences which have been reported at the *thana*. In that sense, the diary furnishes them with 'information'. If, therefore, a police officer in charge of a police station refuses to enter a report made to him concerning the commission of an offence, and enters instead in the diary a totally different and false report as that which was made to him, he commits an offence under this section.[25] In the same case it was observed: 'If he was legally bound to give information, he would be legally bound not to omit to give such information, and such omission would make him punishable under this section.' The ground of liability under this section is not the suppression or omission of the true information but the furnishing of false information.

7. Foreigners Act 1946 (31 of 1946)

A master of any vessel, who, being required to give information under s 6 of the Act, gives false information, commits an offence under this section.

8. Bombay Municipal Corporation Act (3 of 1888) (Section 473)

A person who contravenes the provisions of ss 28(j) or 155(1) and (2) or s 187, commits an offence under this section.

9. Illustrative Cases

The following are some illustrative cases under this section:

A, not being bound to furnish information of an offence, falsely informs the police that an offence has been committed. A has committed no offence under this section.[26]

A makes an entry in his official diary to the effect that he was on duty in a particular place on a particular day, which is untrue. A has committed an offence under this section.[27]

A, a police officer, whose duty was to enter all reports brought to him of offences in the station diary, refused to enter a report brought to him of a certain offence, but 1274entered instead a different and false report. A committed an offence under this section.[28]

Appellant Sarpanch of Gram Panchayat knowingly issued a false certificate in favour of one L that he did not own any property except the land which he made fit for cultivation though L had owned 13 Kanals and 13 marlas of land and his wife owned 70 kanals of land in the village. On the basis of that certificate L contended to be landless and sought allotment of land and land was allolled to L. Conviction of the appellant under ss 177 and 420, IPC was held proper.[29]

Respondent filed nomination for election and made wrong declaration before the Election authorities. *Prima facie* respondent committed offence under s 177 . High Court directed the authorities to initiate proceedings against the respondent for making false declaration.[30]

A purchases a stamped paper and gives the vendor thereof a false name. He is not bound by law to furnish information to the vendor, and is, therefore, not punishable under this section.[31]

A, seeking to be enlisted in the police, falsely said that he was not a resident of the district. A has committed no offence.[32]

10. 'Which he Knows, or has Reason to Believe, to be False'

Even if a person is legally bound to furnish information to a public servant, before he can be convicted under this section, it has to be seen whether he knew or has reason to believe the information furnished to be false.[33] It is not necessary to prove an intention to defraud in order to justify a conviction under this section. It is enough to show that the information furnished as true was either known to be false or not believed to be true.[34]

The fact that a person, whose petition is alleged to contain false information, in bringing a suit on the basis of the allegation that the information is true does not support the view that he knew or had reason to believe it to be false, even though a magistrate on reviewing the evidence may have come to the conclusion that the information was not true.[35]

11. Information for the Purpose of Preventing the Commission of an Offence

The information which, under the second branch of this section, a person is legally bound to give 'for the purpose of preventing the commission of the offence' relates not to the commission of offences generally but to the commission of some particular offence.[36] Notes under s 176, *ante* may be referred to. 1275

12. Procedure

The procedure is the same as for an offence under s 176, IPC . The prescribed period of limitation for prosecution for this offence is one year.

Where the complaint was filed against the accused for furnishing false information to the society regarding their owning another house and having membership in other societies and getting plots allotted in their names, the chargesheet was filed against the accused persons for offences under ss 420, 471, 120(B), 177 and 182, IPC, nearly eight years after. Offences under ss 177 and 182, IPC, were held barred by limitation under s 468, CrPC and other offences were not made out; so a Division Bench of the Andhra Pradesh High Court quashed the criminal proceedings under s 482, CrPC pending against accused persons before the metropolitan magistrate, Hyderabad.[37]

13. Who can Order Withdrawal of Complaint

When a complaint of an offence under this section has been made under s 195(1)(a), CrPC by a public servant, the authority to whom such public servant is subordinate may order the withdrawal of the complaint. Interpreting the provisions of the Code of Criminal Procedure 1898, the Madras[38] and the Nagpur[39] High Courts have held that a First Class Magistrate is subordinate to the District Magistrate and not to an Additional District Magistrate. The Allahabad High Court has, however, held that since the Additional District Magistrate has got the powers of the District Magistrate, a Sub-Divisional Magistrate is subordinate to him.[40]

An Additional Deputy Commissioner exercising power under the CP and Berar Municipalities Act 1922, is not subordinate to the Board of Revenue.[41]

14. Charge

The first part of the section deals with a summons case which needs no charge. In the case of an offence under the second part, the charge should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which he knew to be false;

and it should appear precisely what his duty was in the matter.[42]

15. Form of Charge

The following form of the charge may be adopted:

> I (*name and officer of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you (*) on or about the..... day of..... at....., being legally bound furnish information on the subject, to wit..... to ....., a public servant as such, furnished as true the information, to wit..... on the subject which you knew (*or had reason to believe*) to be false (*add if necessary*) and the information which you were legally bound to give in respect of commission of an offence, (*or in order to the apprehension of an offender*) and 1276thereby committed an offence punishable under s 177 of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

16. Proof

To establish an offence under this section, the following facts must be proved that:

(i) the accused was legally bound to furnish certain information to a public servant;
(ii) he furnished information on the subject which he knew or had reason to believe, to be false; and
(iii) (in a case under the second part of the section) the information was with respect to the commission of an offence.

2 Repealed by Act 17 of 1862.

3 Added by Act 3 of 1894, s 5 .

4 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

5 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

6 *Pantulla v Queen-Empress* 15 ILR Cal 386, p 387 .

7 *R v Mahommad Ismail Khan* ILR 20 All 151 .

8 *R v Dwarka* 6 ILR All 97 .

9 *TS Baliah v TS Rangachary, Income Tax Officer, Central Circle 6, Madras* AIR 1969 SC 701, (1969) 1 ITJ 732, [1969] 72 ITR

787 .

10 *State of Karnataka Appellant v GM Sumanabai* (2004) Cr LJ 4112 (Kant) .

11 *Veeramna v State of Karnataka* 2013 Cr LJ (NOC) 335 (Del) .

12 Now repealed by the Income Tax Act 1961 (43 of 1961).

13 *Jagannath v Rex* AIR 1950 Ajmer 19, p 20, (1950) 51 Cr LJ 883 ; *Bishan Das v State of Punjab* 2014 (4) Crimes 181 (SC), 2014 (143) AIC .

14 *Lakhan v Emperor* AIR 1936 All 788, p 799, (1937) 38 Cr LJ 57 ; *Queen-Empress v Appayya* ILR 14 Mad 584, 1 Mad LJ 741, 1 Weir 109 .

15 *Queen-Empress v Appayya* ILR 14 Mad 484, 1 Mad LJ 741, 1 Weir 109 .

16 *The Queen v Luckhee Singh* 12 WR 23, 24 ; *Queen-Empress v Sankaralinga* 23 ILR Mad 544, 1 Weir 122 .

17 *Ganpat Subrao Kashyapi v Emperor* AIR 1934 Bom 202, p 204, 58 ILR Bom 491, (1934) 35 Cr LJ 1429, 36 Bom LR 373 .

18 *Lakhan v Emperor* AIR 1936 All 788, (1937) 38 Cr LJ 57 .

19 Section 22(2) of the Income Tax Act 1922.

20 *Hari Chand v Emperor* AIR 1934 Lah 626, (1933) 34 Cr LJ 176, 15 ILR Lah 832, 35 PLR 544 .

21 Sections 22 and 52 of the Income Tax Act 1922.

22 *PD Patel v Emperor* AIR 1933 Rang 292, (1934) 35 Cr LJ 131 .

23 *Ganga Sagar v Emperor* AIR 1929 All 919, p 927, (1930) 31 Cr LJ 88, (1930) All LJ 26 .

24 *Jagannath v Rex* AIR 1950 Ajmer 19, (1950) 51 Cr LJ 88 .

25 *Queen-Empress v Mahommad Ismail Khan* ILR 20 All 151, (1897) 17 All WN 227 ; Re *Syed Futteh Mahomed* 21 WR (Cr) 30.

26 *R v Saraji* BR 10 July 1873 .

27 *Viraswamy v R* ILR 4 Mad 144, as superseded by *R v Appayya* ILR 14 Mad 484 ; 1 Weir 109 ; Ib 105, 106 and notes to s 43 .

28 *R v Mahommad Ismail Khan* ILR 20 All 151 .

29 *Bishan Das v Stagte of Punjab* 2014 (4) Crimes 181 (SC), 2014 AIR SCW 6207, 2014 (143) AIC 182 (SC) .

30 *C Kuppusamy v Chief Election Commissioner* 2007 Cr LJ 3483 (Mad) (DB), (2007) 5 MLJ 67 .

31 Re *Paramaya, BR* 19 February 1885.

32 *R v Dwarka* 6 ILR All 97 .

33 *Jagannath v Rex* AIR 1950 Ajmer 19, p 20 .

34 Madras HC Proceedings of 19 November 1880, No 2342, 1 Weir 107.

35 *Mahommad Wasil v Emperor* (1910) 11 Cr LJ 11, 13 CWN 191, 5 Mad LT 93 .

36 *Panatulla v Queen-Empress* 15 ILR Cal 386, p 387 .

37 *Salauddin Owaisi v DSP, CID Hyderabad* (2000) Cr LJ 4848 (AP)(DB).

38 *B Thatayya v G Basavayya* AIR 1953 Mad 956 .

39 *Prabhulal Ramlal v Emperor* AIR 1944 Nag 85, p 87 .

40 *Jaswant v State* AIR 1951 All 828 .

41 *Gopal Prasad v Board of Revenue, MP* AIR 1953 Nag 121 .

42 *Queen v Moosubroo* 8 WR 37, p 38 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 178.

Refusing oath or affirmation when duly required by public servant to make it.--

Whoever refuses to bind himself by an oath [43][or affirmation] to state the truth, when required so to bind himself by a public servant legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

This section makes refusal to take an oath or make an affirmation an offence. The liability of a person to take the oath or affirmation depends upon the competency of the public servant to administer it. Refusal to take an oath when required by a court amounts to contempt of court for which the Code of Criminal Procedure provides a summary remedy of punishing the offender on the spot.[44]

2. Legislative Changes

The words 'or affirmation' were added by s 15 of the Indian Oaths Act 1873.

3. 'Refuses to Bind Himself by an Oath, or Affirmation'

'Refusal' signifies a positive non-compliance with the demand made. Mere omission does not amount to a refusal. If a person has opted to depose as a witness and his examination-in-chief has taken place, his refusal to take oath and come to the witness box for his cross-examination amounts to an offence under s 178, IPC .[45] The ground upon which the refusal is based is immaterial, *e.g.*, that the person refusing is the 1277father or son of the one against whom he is required to testify,[46] or the husband or wife of the same.[47] Such refusal on the ground of non-payment of expenses may, however, not amount to an offence in a civil case.[48]

4. Refusal by Police Officials before Inquiry Committee

In a case, the police officials whose actions were sought to be inquired, were covered under s 8B of the Commissions of Inquiry Act 1952. They were sought to be cross-examined at the inception of the inquiry though notices were not issued to them. On their refusal to appear and testify before the committee, the committee directed for filing of a complaint against them under s 178, IPC .

On these facts, it was held that the orders of the inquiry committee directing complaints to be filed against the police officials for an offence punishable under s 178, IPC, were the consequences of the misapprehension that they were not covered by s 8(B), because no notices under that section had been issued to them. The action of the committee in compelling them to enter the witness box on the

dates in question for being cross-examined, when even according to it and it was apparent from its order that persons similarly situated were to do so at the end of the inquiry, was in itself discriminatory. There was, therefore, valid justification for the refusal by the police official to take oath for cross-examination at the stage when they were required to do so. Therefore, the inquiry committee should not have in the instant case directed the filing of a complaint against police officials for an offence punishable under s 178, IPC .[49]

5. 'Oath'

Oath includes solemn affirmation. Section 51 , IPC, may be referred to.

6. 'When Required so to Bind Himself'

Section 4 of the Oaths Act 1969, makes it obligatory to make oaths and affirmations by all witnesses, interpreters and jurors. This section provides punishment for refusing to bind oneself by oath or affirmation or state the truth when required. Sections 9 - 12 of the Indian Oaths Act 1873, since repealed, contain provisions for special oaths. These provisions do not find a place in the Act of 1969. It is, therefore, not binding on any person even under the present law to make a statement on special oath. Even under the repealed Act a refusal to make the special oath was not binding under s 12 of the said Act.

A witness in a civil suit is entitled to be paid his expenses before giving evidence and a refusal to give evidence on the ground of non-payment is no offence.[50] As to expenses of a witness summoned by a criminal court, refer to s 312 of the Code of Criminal Procedure 1973.

7. Legally Competent

Notes under s 174 may be referred to.1278

By s 10 of the Public Gambling Act 1867 [which extends to Punjab, United Provinces (now Uttar Pradesh) and Central Provinces (now Madhya Pradesh)], a refusal to make oath or affirmation constitutes an offence under this section.

8. Procedure

The offence under this section is non-cognizable and a summons shall ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the court in which the offence is committed, subject to the provisions of ch 26, CrPC ; or, if not committed in a court, by any magistrate.

Where the offence is committed in the view or presence of any civil, criminal or revenue court, the procedure prescribed by ss 345 - 46, CrPC, has to be followed.

For 'complaint' 'jurisdiction' and 'special procedure', notes under s 175 may be referred to. Prosecution for an offence under this section can be made within a period of one year only.

43 Inserted by Act 10 of 1873, s 15 .

44 Refer to the Code of Criminal Procedure 1973, s 345 .

45 *Jibachh Shah v State* AIR 1965 Pat 331, p 332, (1965) 2 Cr LJ 235 .

46 *R v Baron Vidil CC Ct* 23 August 1861 .

47 Indian Evidence Act 1872, s 120 .

48 *Ngu Pyo v R* (1908) 7 Cr LJ 208 .

49 *Kiran Bedi & Jinder Singh v Committee of Inquiry & Ors* AIR 1989 SC 714, (1989) Cr LJ 903 .

50 *Nga Pyo v R* (1908) 7 Cr LJ 208 ; UBR (Cr) 1907.

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 179.

Refusing to answer public servant authorised to question.--

Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant, in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

While the preceding section deals with refusal to take oath or make affirmation, this section deals with refusal to answer a question put by a public servant. Before a person can be convicted under this section it must be shown that he was legally bound to state the truth and that he refused to do so. This is one of the provisions to enforce compliance when a public servant legally demands a truthful answer but is met with a blank refusal or plain mendacity.[51] A breakdown of this section would yield the following results that:

(a) the demanding authority must be a public servant; and
(b) the demand must be to state the truth on a subject in the exercise of legal powers.[52]

Section 179 has a component of *mens rea*. Where there is no wilful refusal, but only unwitting omission or innocent warding off, the offence under this section is not made out.[53]1279

This section has nothing whatever to do with the conduct of accused persons in court.[54]

2. 'Legally Bound'

Section 43 and notes thereunder and synopsis note under s 176 may be referred to.

3. 'To State the Truth'

Every person giving evidence on any subject before any court or person authorised to administer

oaths and affirmation is bound to state the truth on such subject.[55] But to this section there are certain exceptions in the form of privileges in the Indian Evidence Act 1872, and the witnesses cannot be compelled by law to answer questions on some subjects. Thus, a witness is privileged or protected from answering any questions on the following subjects:

(i) his own conduct in court as a judge or magistrate or as to anything which came to his knowledge in court as a judge or magistrate;[56]
(ii) communication made to him during marriage;[57]
(iii) evidence as to affairs of state;[58]
(iv) official communications;[59]
(v) information as to the commission of any offence;[60]
(vi) professional communications;[61]
(vii) confidential communications with legal advisers.[62]

Under s 132 of the Indian Evidence Act 1872:

A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate such witness or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind: Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Under s 165 of the Indian Evidence Act 1872, a judge may, in order to discover or to obtain proof of relevant facts, ask any question he pleases of any witness or of the parties about any fact relevant or irrelevant, but this section does not authorise him to compel any witness to answer any question, which such witness is entitled to refuse to answer under ss 121 - 131 of that Act. Although a judge has power under s 165 of the Indian Evidence Act 1872, to ask a witness questions about any irrelevant fact, in order to obtain proof of relevant facts, the witness is not bound to answer such a 1280question if it is put, not for that purpose, but with a view to criminal proceedings being taken against him.[63]

A complainant voluntarily preferring a complaint under the Code of Criminal Procedure 1973, cannot be compelled to answer questions put by the magistrate, and therefore, his refusal to answer is not an offence under this section, or s 349 of the Code Criminal Procedure 1973.[64]

Under s 161 of the CrPC 1973, a police officer making an investigation, under ch 12 of the Code may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and such person is bound to answer all questions relating to the case put by such officer. But a refusal to answer questions asked by a police officer under this section is not punishable under s 176 or s 187, IPC, as under the present Code there is no obligation to speak the truth as there was under the 1882 Code.[65]

4. Mens Rea

Section 179, IPC has a component of *mens rea* and where there is no wilful refusal but only unwitting omission or innocent warding off, the offence is not made out. When there is reasonable doubt indicated by the accused's explanation he is entitled to its benefit and cannot be forced to substantiate his ground lest, by this process, he is constrained to surrender the very privilege for which he is fighting. What may apparently be innocent information may really be innocent or not, when viewed in the wider setting.[66]

5. Accused as Witness

Section 342A, CrPC, which has been newly inserted in the Code by s 61 of the Amendment Act, (26 of 1955), enables an accused person to be a competent witness for the defence.[67]Before this amendment, he could not do so, although for the purpose of enabling him to explain the circumstances appearing in the evidence against him, the court could put such questions to him as were considered necessary. Section 118 of the Evidence Act deals with persons who are competent to testify as witnesses, but in view of s 342, CrPC, before this amendment, no accused person could appear as a witness and therefore, s 118 aforesaid was inapplicable to him. Article 20(3) of the Constitution provides that no person accused of an offence shall be compelled to be a witness against himself. Now under this section the accused person has become a competent witness for the defence, but he cannot be compelled to be a witness and cannot be called as a witness except at his own request in writing, and his failure to give evidence cannot be made the subject-matter of comment by the parties or the court.[68]1281

Under s 342 the accused cannot be called as a witness except on his own request, but once he offers himself as a witness and is put on oath, his position could not be either better or worse than that of any other witness, and s 132 of the Evidence Act would apply to him. That section itself makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer; and gives him a protection in the latter of these cases only. 'Protection is afforded only to answers which a witness has objected to give, or which he has asked to be excused from giving, and which then he has been compelled to give, and not to answers given voluntarily.'[69]

Apart from this, s 342, CrPC empowers the court to examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. However, no oath shall be administered to him and he shall not render himself liable to punishment by refusing to answer the questions put to him in his examination, or by giving false answers to such questions.[70]Section 179, IPC, has nothing whatever to do with the conduct of accused persons in court.[71]

6. Refusal to Answer

The following are cases in which the answer given by the witness was held to amount to or not to amount to refusal to answer.

A witness was asked the name of his grandfather and he replied that he did not remember it. It is not a refusal to answer within the meaning of this section.[72]

A witness was asked as to what was the result of a case in which he was a witness, and he said he did not know. He could not be considered to have refused to answer the question put to him.[73]

Where, however, a witness, though persistently asked by the court to give certain information, persisted in giving only a prevaricating and irrelevant reply, it was held that it amounted to a refusal to answer within the meaning of this section.[74]

7. Procedure

It is the same as in the case of an offence under the preceding s 178, IPC . The prescribed period of limitation for this offence is one year.

51 *Nandini Satpathy v PL Dani* AIR 1978 SC 1025, p 1031, (1978) Cr LJ 968 .

52 *Ibid.*

53 *Ibid.*

54 Re *S Tirumale Reddi*AIR 1924 Mad 540, (1924) 25 Cr LJ 374 .

55 Oaths Act 1969, s 8 .

56 Section 121, Evidence Act 1872.

57 *Ibid.*

58 Indian Evidence Act 1872, s 123 .

59 *Ibid*, s 124 .

60 *Ibid*, s 125 .

61 *Ibid*, s 126 .

62 *Ibid*, s 129 .

63 *R v Hari Lakshman* 10 ILR Bom 185 .

64 Re *Ganesh Narayan Sathe* ILR 13 Bom 600, 604.

65 *Kusana Karoo v Rajaram Paiku* AIR 1952 Nag 68, (1952) 53 Cr LJ 438 ; *Mawzamagyi v Emperor* AIR 1931 Rang 26, (1931) 32 Cr LJ 2013 ; *Queen-Empress v Sankaralinga Kone* 23 ILR Mad 544 ; *Queen v Luchee Singh* 12 WR 23 ; Re *Savani Virabayi* 1 Weir 111 and Criminal Revision Case No 221 of 1899, 2 Weir 123; *Gul Hassan Shah v Emperor* (1909) 9 Cr LJ 105 ; *Emperor v Mahomed Varis* (1913) 14 Cr LJ 302 .

66 *Nandini Satpathy v PL Dani & Anor* AIR 1978 SC 1025, (1978) Cr LJ 968 .

67 *Subedar v State* AIR 1957 All 396, p 398 .

68 *Anant Gopal Sheorey v State of Bombay* AIR 1958 SC 915, p 916-17 .

69 *R v Gopal Dass* (1881) 3 ILR Mad 271, p 280, (per Curiam J), Kernan and Ayyar JJ, dessenting; *R v Gonu* (1888) 12 Bom 440, (per Curiam J) Birdwood J, dissenting; *Emperor v Gunna* AIR 1920 Bom 270, 49 IC 324, (1921) 22 Cr LJ 68, 22 Bom LR 1247 (FB) ; *R v Samiappa* (1891) 15 Mad 63, per Curiam J; *Mohar v R* (1893) 21 Cal 392, per Curiam J; *R v Moss* (1893) 16 All 88, p 100 ; *Haider v Abru* (1905) 32 Cal 756, 2 Cal LJ 105, 9 CWN 911 ; *Kashi Ram v Emperor* 1930 All LJ 1121 ; *Sodaruddin v R* (1904) 31 Cal 715, p 720-21, 8 CWN 910 ; *Bai v Omrao* AIR 1926 Bom 141, ILR 50 Bom 162, 39 IC 91, (1926) 27 Cr LJ 423, 28 Bom LR 1 (FB) .

70 Code of Criminal Procedure, s 342 .

71 Re *S Tirumale Reddi*AIR 1924 Mad 540, (1924) 25 Cr LJ 374 .

72 *Kallu v Emperor* AIR 1926 Lah 240(2), (1926) 27 Cr LJ 252 .

73 *Bhardul Kurmi v Emperor* AIR 1934 All 136, (1934) 35 Cr LJ 1036 .

74 *Har Narayan v Emperor* AIR 1925 All 239, (1925) 26 Cr LJ 354 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 180.

Refusing to sign statement.--

Whoever refuses to sign any statement made by him, when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with

1282simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Comments

1. Scope

This section makes it an offence to refuse to sign a statement when required to do so by a public servant. But the public servant must be legally competent to require the statement to be signed and the person required to sign must be bound to do so.

A person commits an offence under this section if he refuses to sign a statement, which he has himself made and which he is required to sign by a public servant, legally competent to require him to sign the same.[75] A mere refusal to sign a receipt for a summons, as required by s 62(3) of the Code of Criminal Procedure 1973, is not an offence under s 173 or under this section.[76] It is only when a person refuses to sign a statement, which a public servant is legally empowered to require him to sign, he renders himself liable to punishment.[77]

The essential ingredients to constitute the offence under this section are:

(i) The accused made a statement before a public servant;
(ii) The accused was required by public servant to sign such statement;
(iii) Public servant was legally empowered or competent to require the accused to sign that statement, and
(iv) That the accused refused to sign statement.

In certain pension matter proceedings before the Deputy Secretary to the Government of Karnataka, the counsel for the petitioner had made certain submissions, and when the counsel was required to sign the proceedings, he was said to have refused to sign those proceedings. Held, no offence under s 180 or s 353, IPC was made out, proceedings were quashed on petition filed under s 482, CrPC .[78]

The section was enacted at a time when the Acts and Regulations, then in force, required witnesses and accused persons to sign the statements made by them. Now the law has changed considerably in this respect, and care has to be taken, in applying the section, to see whether the accused was legally bound to sign his statement.

Every refusal on the part of a counsel appearing for a party, to subscribe his signature to the proceeding sheet in which the public servant has recorded the submissions of such counsel, is not an offence under s 180 of the IPC . To attract the offence under s 180, IPC, the person accused of such offence should be under a legal 1283obligation or compulsion to sign the statement or submission, and refusal on his part to sign such statement or submission cannot be brought under s 180, IPC .[79]

2. Civil Cases

The method of recording the evidence of witnesses in civil cases is laid down in O 18, r 5 of the Code of Civil Procedure and is stated below:

In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing and when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

In this regard, there is a distinct provision that the judge shall sign the deposition, but there is nothing

about the witness signing it also. There is no legal obligation upon witnesses in civil cases to sign or thumb-mark their depositions. Courts cannot order, but can doubtlessly ask them to do so, and if they refuse, they cannot be compelled and are not liable to prosecution for an offence under this section. Section 151 , CPC, does not authorise a judge to force a witness to sign his deposition.[80]

Even assuming that, under the CPC, a judge is legally competent to require that a witness shall sign his evidence, it will only be when the evidence has been read over to the witness, and he has admitted it to be correct, and has refused to sign it, that he will be guilty of an offence under this section.[81]

3. Criminal Cases

Under five sections of the Code of Criminal Procedure 1973, it is enacted that a person who has made a statement thereunder shall sign it, when it is made in writing, or when reduced to writing. Under s 62(3) of the CrPC 1973, every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate. By s 154, CrPC, information in cognizable cases 'shall be signed by the person giving it'. Statements and confessions made to a magistrate in the course of an investigation under ch 12 must be signed by the person making them in the same manner that the record of the examination of an accused person by a magistrate is required to be signed by the accused (ss 164 and 281). So too a complaint is required to sign the substance of his complaint, when reduced to writing, made before the magistrate (s 200). No statement made to a police officer in the course of an investigation, if reduced to writing, is to be signed by the person making it, nor can such writing be used as evidence under the Code of Criminal Procedure 1973 (s 162).

It has been held in some cases that the provision in ss 122 and 346 of Act 10 of 1872 and the corresponding ss 164 and 364(2) of the Code of 1898 that the accused should sign the record of his statement, is only directory, and that an accused person who refuses to sign a statement made by him in answer to questions put to him by a magistrate (in the case of a confession recorded under s 164 of the CrPC) or by a court in the case of a statement recorded under s 364, in answer to questions put to 1284him does not commit an offence under this section.[82] The reasons for this view are said to be: (a) that since the essence of such confessions and statements is that they should be voluntarily made, and they cannot be considered complete until signed by the accused person and that this object is wholly inconsistent with the use of any compulsion, by fine or otherwise, for the purpose of obtaining such signature;[83] and (b) that the procedure indicated involves the magistrate offering the record for the accused's signature, but it does not empower the magistrate to require his signature. It is only when a person refuses to sign a statement which a public servant is legally empowered to require him to sign that he renders himself liable to punishment.[84] It may, however be pointed out that under ss 164 and 364 (now s 281) ample security is given to ensure the statement being voluntarily made, and that the accused can explain or add to his answers before he can be called upon to sign that which he has voluntarily declared to be the truth. To employ compulsion at this stage cannot deprive the statement of its voluntary character. Even if the words 'the record shall be signed by the accused' in s 364(2) (now s 281(5) can be construed only as a mere direction to the magistrate or court to take the signature of the accused, yet it is difficult to hold that in requiring the signature, the magistrate or judge is not 'legally competent' to so require it.[85] The magistrate is a public servant legally competent to require the accused to sign the statement, and if he refuses to do so, he will have committed an offence under this section. It will be noted that an accused person is not bound to make any statement whatsoever, but if he does, and if he is examined by the magistrate and replies to the magistrate's questions, the court is bound to reduce the statement to writing in the form of questions and answers and the magistrate is bound to sign it, as also the accused.[86] It has, however, been held in an old case that the signature of the accused seems to be required more for his protection than to impose on him an obligation which is to be enforced under s 180, IPC .[87]

Mere refusal to sign a receipt for a summons as required by s 62(2), CrPC is not an offence under s 173 or this section.[88]

4. Revenue Cases

A deponent in a revenue inquiry is not bound to sign his deposition.[89]

5. Procedure

The procedure is the same as in the case of an offence under s 178 . The limitation prescribed for this offence is one year. A Court wherein offence is alleged to have been committed can *suo motu* register a case and punish the offender provided the procedure laid down by s 340, CrPC has been followed.[90]1285

6. Appeal & Revision

Appeal, and not revision, lies against the order of conviction recorded under s 180, IPC .[91]

75 *Umar Khan v Emperor* AIR 1917 All 48, p 49, (1917) 18 Cr LJ 559 ; *Motilal v Emperor* AIR 1935 All 652, (1935) 36 Cr LJ 1098 ; *Regina v Bal Ratan* 10 Bom HCR 166 *Reg v Apabin Kesar* 10 Bom HCR 181 ; *Reg v Shivayya* 1 ILR Bom 219 ; *Empress v Ramannjiyya* ILR 2 Mad 5 .

76 *Queen-Empress v Gobinda Das* ILR 20 Cal 358 ; Re *Bhoobaneshawar Dutt* 3 ILR Cal 321; *Reg v Kalya Fakir* 5 Bom HCR (Cr) 34.

77 *Emperor v Ba Tin* (1906) 4 Cr LJ 205 (206) ; *Emperor v Fateh Ali* (1912) 13 Cr LJ 713 ; Re *Mabali Ram*(1881) All WN 43.

78 *Basavaraj Shivarudrappa Sirsi v State of Karnataka* 2011 Cr LJ 4809 (Kant), 2011 (5) Kar LJ 153 .

79 *Basavaraj Shivarudrappa Sirsi v State of Karnataka* 2011 Cr LJ 4809, p 4812 (Kant), 2011 (5) Kar LJ 153 .

80 *Emperor v Fateh Ali* (1912) 13 Cr LJ 713, 8 PR 1912 (Cr) .

81 *Empress v Mabali Ram* (1881) All WN 43 .

82 *Imperatrix v Sirsapa* ILR 4 Bom 15 ; *Emperor v Ba Tin* (1906) 4 Cr LJ 205, 3 LBR 199 .

83 *Imperatrix v Sirsapa* ILR 4 Bom 15, p 19 .

84 *Emperor v Ba Tin* (1906) 4 Cr LJ 205, p 206 .

85 Refer to the **dissenting** judgement of Melvill J in *R v Sirsapa* ILR 4 Bom 15, p 16 .

86 *Umar Khan v Emperor* AIR 1917 All 48, p 49, (1917) 18 Cr LJ 559 ; *Motilal v Emperor* AIR 1935 All 652, (1935) 36 Cr LJ 1098, (1935) All LJ 1058*Regina v Bai Ratan* 10 Bom HCR 166 ; *Reg v Apabin Kesar* 10 Bom HCR 181 ; *Reg v Shivayya* 1 ILR Bom 219 ; *Empress v Ramannjiyya* ILR 2 Mad 5 .

87 Mad HCR Proceedings, 3 September 1881 No 1810, 1 Weir 113; **following***Imperatrix v Sirsapa* ILR 4 Bom 15 .

88 *Queen-Empress v Gobinda Das* ILR 20 Cal 358 ; Re *Bhoobaneshwar Dutt* 3 ILR Cal 321; *Reg v Kalya Fakir* 5 Bom HCR (Cr) 34.

89 Mad HC Rule, 9 January 1870, 6 Mad HCR App 14, 1 Weir 113.

90 *Ashna Sofia v State of Kerala* 2014 (4) KLT 130, 2014 (4) Ker LJ 15 (Ker) .

91 *Ashna Sofia v State of Kerala* 2014 (4) KLT 130, 2014 (4) Ker LJ 15 (Ker) .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 181.

False statement on oath or affirmation to public servant or person authorised to administer an oath or affirmation.--

Whoever, being legally bound by an oath [92][or affirmation] to state the truth on any subject to any public servant or other person authorised by law to administer such oath [93][an affirmation], makes, to such public servant or other person as aforesaid, touching the subject, any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Comments

1. Scope

Furnishing false information to a public servant is punishable under s 177, IPC . Making a false statement on oath or affirmation to a public servant is an offence under this section. Giving false evidence is an offence under s 191 punishable under s 193, IPC . To constitute an offence under this section--

(i) the accused took the oath or made the affirmation;
(ii) the accused must be legally bound by oath or affirmation to state the truth to a public servant or any other person;
(iii) the public servant or other person must be authorised by law to administer the oath or affirmation;
(iv) the statement made by the accused touching the subject must be false; and
(v) one which he either knew or believed to be false, or did not believe to be true.

A falsehood made in good faith that it is true will not expose him to penalty.[94]

2. Relative Scope of Sections 181 and 193

The wording of this section is apparently large enough to admit of false statements of every description, *i.e.*, whether made in the course of judicial proceeding or not. However, the subject-matter of this chapter is 'contempt of the lawful authority of public servants', and provision is made in the following chapter,[95] for the offence of 1286giving false evidence and offences against public justice. This section is, therefore, properly confined to non-judicial proceedings.[1] This was perhaps clearer under the old law, for by the Schedule to the Code of Criminal Procedure 1861, an offence under s 193 was triable only by a court of session; whilst an offence under s 181 was triable by that court or by a district magistrate.[2] Under the Code of Criminal Procedure 1898, however, (as under the Codes of 1872 and 1882) offences under either section are triable by the same courts. But, as the Law Commissioners explained it, 'when false information is given upon oath, the offender is punishable under this clause, with imprisonment not exceeding three years. When the false statement amounts to false evidence as defined in s 191, the offender is punishable more severely under s 193 of the Code'.[3] Seeing that special provision is made by s 193 for false statements made in a judicial proceeding such a charge should be made under that section,[4] though a conviction under s 181 for an

offence which falls under s 193 is, apparently, good.[5]

A false return on oath of the service of a summons,[6] and a false statement made on solemn affirmation before an income tax commissioner,[7] falls under s 193 .

3. Legally Bound

Section 43 and commentary thereunder may be referred to.

4. Oath or Affirmation

Section 51 and commentary thereunder may be referred to.

5. 'Person Authorised by Law'

The officer administering the oath or affirmation must be one who is authorised by law to administer it in the circumstances in question.[8] A criminal appeal is a continuation of the criminal case, and an appellant in an appeal against conviction has the privilege of an accused. He cannot be examined as a witness, and therefore, cannot be punished for making a false statement, being protected expressly by s 313 of the Code of Criminal Procedure 1973.[9]

Section 181 of IPC provides that a person who is legally bound by oath or affirmation to state the truth on any subject to any public servant or other person authorised by law to administer such oath or affirmation, makes to such public servant or other person any statement which is false, is liable for punishment as prescribed in the said section. Complaint was filed on allegation that the accused persons made a false declaration before the Notary Ex-Officio Sub-Registrar 1287omitting to show that the applicant is one of the heirs of S. This declaration was sought to be used by the accused for applying for getting their names mutated in the properties. There was nothing to show that the Notary Ex-officio Sub-Registrar was required to administer any oath or affirmation to the persons who made the declaration excluding the applicant from the heirs of one S. The accused persons had not committed offence under s 181, IPC .[10]

However, if an accused person when not being examined under that section for the purpose of enabling him to explain any facts apparently unfavourable to him, voluntarily gives false information to the court with the view of obtaining a transfer of the case, he commits an offence under s 182, IPC .[11]

6. Making False Statement in Affidavit

The mere swearing of an affidavit does not make the statement contained therein a piece of evidence which a court would be bound to admit in a judicial proceeding. In receiving the statement, the officer before whom the affidavit is sworn is not receiving something which is intrinsically evidence and is, therefore, not acting in the exercise of any authority to receive evidence. Such an officer does not satisfy the definition in s 3, Oaths Act 1988 of a court or person authorised to administer oaths and affirmations, and the false statement is not caught up under this section.[12] For further discussion on the topic, notes under ss 191 - 193 may be referred to.

7. 'Or Does not Believe to be True'

Making a statement with no knowledge one way or other as to its truth constitutes a false statement, since the person making it does not believe it to be true.[13]

8. Procedure

The offence under this section is non-cognizable and summons shall ordinarily issue in the first

instance. It is bailable but not compoundable and is triable by a magistrate of the first class. The limitation prescribed for this offence is three years.

Where the accused was facing a charge before the trial court under s 181, IPC, he moved the High Court by a petition filed under s 482, CrPC, which was allowed and criminal proceedings were quashed. The appeal was filed before the Supreme Court where the accused appellant agreed to withdraw the petition from the High Court under s 482, CrPC, which was ordered to be dismissed as withdrawn by the Apex Court without prejudice to the right of the accused appellant and prosecution to raise whatever contentions they propose to raise in the case which shall be decided by the trial court untrammelled by any observation made by the earlier order of the trial court or the order of the High Court.[14]

9. Complaint

No court shall take cognizance of an offence under this section except on a complaint of the public servant concerned or of some other public servant to whom he is subordinate.[15] The complaint for the offence under s 181, IPC, is not covered by the provisions in cl (b) of sub-s (1) of s 195, CrPC ; on the other hand, it is covered by the provision in cl (a) of sub-s (1) of s 195, CrPC . Therefore, not serving a show cause notice and not venturing into an inquiry under s 340, CrPC, for the offence under s 181, IPC, is not violative of the procedural law.[16] Even if the complaint is false but an offence as alleged is made out, the officer competent to file the complaint is only the magistrate or his official supervisor which anyhow the sub-inspector is not. He had no business to usurp the powers.[17] Commentary under s 172, *ante* may be referred to.

10. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you(*) on or about the..... day of..... at ..... being legally bound by an oath (*or affirmation*) to state the truth, on a certain subject, to wit,..... to a public servant (*or person*) authorised by law to administer such oath (*or affirmation*), did make to such public servant (*or person*) as aforesaid, touching that subject, a statement which was false, and which you knew (*or believed to be*) false, to wit..... and thereby committed an offence punishable under s 181 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

11. Joinder of charges

The case of each person accused must be inquired into separately and if committed for trial, each accused must be separately tried.[18]

92 Inserted by Act 10 of 1873, s 15 .

93 *Ibid*.

94 *Kurien v State of Kerala* (1987) 1 KLT 619 ; *Janardhan Kashinath Pal v Harishchandra Ladu Naik* 2013 Cr LJ 4082 (Bom) .

95 Sections 191 - 209 .

1 *R v Buloram* 7 WR (Cr) 68 ; *R v Andy Chetty* 2 Mad HCR 438 ; *Khota Subba Chetty v R* 6 ILR Mad 252, 1 Weir 116 ; *R v Nga Aung Po* (1905) 2 Cr LJ 474, (1905) UBR 13 .

2 *R v Andy Chetty* 2 Mad HCR 438, 1 Weir 114 ; *R v Buloram* 7 WR (Cr) 68 ; *R v Heeramun Singh* 8 WR (Cr) 30 .

3 Second Report, s 102 .

4 *R v Khota Subba Chetty* 6 ILR Mad 252, 1 Weir 116 .

5 Madras HC Proceedings, 26 November 1867; 1 Weir 115 **followed in** 4 Mad HCR 18.

6 *R v Shama Churn* 8 WR (Cr) 27 .

7 *R v Dayalji Endraji* 8 Bom HCR 21, 1 Weir 115 .

8 *R v Niaz Ali* ILR 5 All 17 ; *Kotha Subba Chetti v R* 6 ILR Mad 252 .

9 *R v Subbayya* 12 ILR Mad 451, 1 Weir 114 .

10 *Janardhan Kashinath Pal v Harishchandra Ladu Naik* 2013 Cr LJ 4082, p 4083 (Bom), 2013 (5) ABR 978, 2013 ALL MR (Cri) 4174, II (2014) CCR 81 (Bom) .

11 *Tribhuvan v R* (1911) 10 Cr LJ 509, 12 OC 308 .

12 *Kamakshya Prasad Dalai v Emperor* AIR 1939 Cal 657, p 658, (1940) 41 Cr LJ 21, (1959) 2 ILR Cal 459, 93 CWN 2033 ; Re *Khota Subba Chetti* 6 ILR Mad 252, 1 Weir 116.

13 *R v Echan Meeah* 2 WR 47 .

14 *Santosh Kumar Bagrodia v S R Chattopadhayay & Anor* (2001) 2 CCR 308 (SC) .

15 Section 195(1)(a), CrPC .

16 *Gokula Chandra Rout v State of Orissa* (2001) 1 CCR 336 (Ori) .

17 *Kurien v State of Kerala* (1988) 1 Crime 867 (Ker) .

18 *R v Niaz Ali* ILR 5 All 17 ; *Khotha Subba Chetti v R* 6 ILR Mad 252 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

19[S. 182.

False information, with intent to cause public servant to use his lawful power to the injury of another person.--

Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant--

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him; or
(b) to use the lawful power of such public servant to the injury or annoyance of any person,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

*Illustrations*1289

(a) *A* informs a Magistrate that *Z*, a police-officer, subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss *Z. A* has committed the offence defined in this section.
(b) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.
(c) A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of this information the police will make enquiries and institute searches in the village to the annoyance of the villagers or some of them. A has committed an offence under this section.] 1290

Comments

1. Scope and Applicability

This section relates only to cases of information given to an official with the intention of causing, or with knowledge that it is likely to cause, that official to do or omit to do something, which he ought not to do or omit to do, or to use his lawful power to the injury or annoyance of any person. This is a distinct offence from the one described in s 211, which relates to an attempt to put the criminal courts in motion against another person.[20]

To make out a case under s 182, IPC the following ingredients are to be proved:

(i) An information was given by a person to a public servant.
(ii) The information was given by a person who knows or believes such statement to be false.
(iii) Such information was given with an intention to cause or knowing it to be likely to cause (a) such public servant to do, or not to do anything if the true state of facts respecting which such information is given were known by him, or (b) to use the lawful power of such public servant to the injury or annoyance of any person.[21]

The fact that the public servant did not, in fact, do or omit to do anything, or did not use his lawful power in consequence is not a deciding factor. The guilt of the accused lies in his intention or knowledge, and a man's intention or knowledge must be judged from his acts and the surrounding circumstances.[22] The criminality, contemplated by the section, does not depend upon which is done by the public servant on such false information.[23]

The offence is, therefore, complete when the false information has been knowingly given, with one or other of the intentions specified in cll (a) and (b), and, being complete, then the offender may be

prosecuted at once under the section.[24]

The section penalises only the giving of false information to a public servant and not withholding information.[25] The information need not necessarily be of the 1291commission of a cognizable offence. When a false report is made to the police, the question in deciding as to whether it amounts to an offence under this section is not whether the report is one of a cognizable crime but whether it is of such a nature as might be supposed to lead the police to make use of their lawful powers to the injury or annoyance of any person.[26]

The information given must be false to the knowledge or belief of the informant. The section does not necessarily impose upon the person giving information to the officer, criminal liability for mere want of caution before giving that information. There must be positive and conscious falsehood established.[27]

As has been mentioned earlier, the section contemplates two intentions on the part of the person giving the false information, the intention to cause or knowing it to be likely that he will thereby cause such public servant to do or omit to do some act, the intention to cause or knowing it to be likely that he will thereby cause a public servant to use his lawful power to the injury or annoyance of any person or persons. In the first case, the offence falls under cl (a) in which case the intention may not be that the public servant should act on the false information to the injury or annoyance of any person. The intention may be that the public servant should omit to do something which he ought not to omit. In the second case falling under cl (b) the intention is that the public servant should act on the false information and exercise his lawful power to the injury or annoyance of any person.[28]

2. Legislative Changes

This section was substituted for the original by s 1 of the Criminal Law (Amendment) Act, 3 of 1895. Prior to the amendment, cl (b) came first as cl (a), and cl (a) came second as cl (b). In the new section, illust (c) is newly added. Before this amendment, the Calcutta[29] and Madras[30]High Courts held that for the application of the section there must be some particular person against whom the information is levelled and that the act done must tend to do some direct and immediate prejudice of that person. These views were dissented from by the Bombay High Court in *Queen-Empress v Ganesh Khanderao* .[31] By adding illust (c), the legislature makes it clear that they did not express the intention to the legislature, and that the information need not be levelled against any particular person or persons and the informant would be liable under this section, if he knew it to be likely that in consequence of the information, the public servant would use his lawful power to the injury or annoyance of some person or persons.

3. Ingredients

The ingredients of the offence under this section are:[32]

(i) the giving of false information;
(ii) to a public servant;
(iii) which the informant knew or believed to be false; and
(iv) which he gave to influence the public servant (a) to act otherwise than he would have acted, or (b) to use his lawful power to the injury or annoyance of any person.[33]

4. Hoaxes

There may be many cases which in truth may be cases of hoaxes, which would still come within this section. For example, suppose a man, knowing the statement to be untrue, but intending the magistrate to act upon it, informed the magistrate of the district that a violent fire was raging in a city in

the district of which he had charge. Now, if the magistrate believed that statement, he would naturally send as many police as he could spare to assist in quelling the fire and keeping order. He might possibly also ask for the assistance of the military if there were any in the neighbourhood. That would be a perfect example of a hoax, and it would come within the section whether or not the magistrate acts upon the information.[34]

5. Moral Turpitude

An offence under s 182, IPC, whether falling under cll (a) or (b), is an offence involving moral turpitude.[35]

6. Imputability and Deception

The offence consists in the giving of false information with intent to mislead a public servant, and is complete whether the public servant was or was not misled. The imputability consists in the consciousness that the deception is practised upon a public servant in contempt of his authority as such and that he might thereby be induced to do what he ought not to do in the discharge of his duty as a public servant so as to prejudice the public interest.[36]

7. Relative Scope of Sections 177, 182, 201 And 203

Section 177 renders punishable the furnishing of false information to a public servant by a person 'legally bound' to furnish information. Sections 182 and 203 refer to the giving of information, which has been held to mean the volunteering of information, to a public servant.[37]Section 182 refers to the giving of any false information with 1293the particular intent specified in the section, while s 203 refers to the giving of false information respecting the commission of an offence committed. Sections 201 and 203, IPC, contemplate giving information respecting an offence which the accused person knows or believes to be false. For the offence under s 201, the false information should also be furnished with the intention of screening the offender from legal punishment. Unlike this section which deals with giving false information to any public servant, ss 201 and 203 do not refer as to whom false information should be given; it would take in private persons as well as public servants including the police.[38]

8. Distinction between Sections 182, 499 and 500

The ingredients of the offence under s 182 cannot be said to be the ingredients for the offence under s 500 . Nor can it be said that the offence relating to giving false information relates to the same group of offences as that of defamation. Offences under s 500 can be tried without sanction under s 195, CrPC .[39]Section 499 deals with defamation *per se*, and says nothing about where, why, or when the imputation is made so the law would appear to apply in exactly the same way whether the imputation is made in a court of justice or before some other public servant or anywhere else. Section 195 , CrPC, lay down that a court shall not take cognizance of certain offences under certain sections except on the complaint in writing of the public servant concerned to that court or some other court to which the first court is subordinate and so on, but s 500 is not mentioned in s 195, CrPC . To s 499 there are 10 exceptions; it would have been quite easy for the legislature to have inserted an 11th exception saying that when the defamation is made in a statement to a public servant or in court proceedings by virtue of which the offence was punishable under ss 182 or 211, IPC or some other section, then no prosecution under s 500 would lie. But there is no such extra exception.[40] Thus bar of s 195, CrPC is attracted to ss 182, 211, IPC but not to s 500, IPC .

9. Relative Scope of Sections 182 and 191

Unlike s 191, the scope of this section is restricted. Whereas s 191 also makes it an offence on the part of the accused to make a statement which he does not believe to be true, this section does not make it so.[41] To constitute an offence punishable under this section it is necessary that the

information given should be information which the accused person knows or believes to be false. It is not sufficient that he had reason to believe it to be false, or that he did not believe it to be true, there must have been positive knowledge or belief that it is false.[42]

10. Essence of Two Offences under Sections 211 and 182

Commentary under the same heading in s 211, *post* may be referred to. 1294

11. Distinction between Sections 182 and 211

Commentary under the same heading in s 211, *post* may be referred to.

Section 211 and this section have many elements in common and the question, whether an information of this nature falls under s 211 or this section, has been the subject of debate in various High Courts and their view is not unanimous. The Bombay High Court in *Apaya Tatoba v Emperor* ,[43] held that criminal law makes a clear distinction between a false charge which comes under s 211 and false information given to the police, which comes under this section. The distinction has been drawn thus:

> If the information conveyed to the police amounts to the false institution of criminal proceedings against a defined person, or amount to the falsely charging of a defined person with an offence, then the person giving such information is guilty of an offence under s 211 . In such a case this is not the appropriate section under which to frame a charge. Section 182, when read with s 211, must be understood as referring to cases where the information given to the public servant falls short of amounting to an institution of criminal proceedings against a defined person and falls short of amounting to the falsely charging of defined person with an offence.

The Allahabad, Calcutta and Madras High Courts have taken a different view. The Calcutta High Court has held that a prosecution for a false charge may lie under ss 182 or 211, but if the false charge is a serious one, the graver s 211 should be applied.[44] The Madras High Court has also held that there is no error in a conviction under s 182, when the false charge made before the police is punishable under s 211 .[45] Many of the High Courts have taken the view that an offence may fall under both sections. It is said that an offence under s 211 includes an offence under s 182, and that therefore, it is open to a magistrate to proceed under either section, although in cases of a more serious nature, it may be that the proper course is to proceed under s 211 .[46]

The view of the Allahabad High Court was expressed by Edge CJ, in *Queen-Empress v Raghu Tiwari* ,[47] in the following words:

> Although it is difficult to see what case could arise under section 211 to which section 182 could not be applied yet section 182 would apply to a case which might not fall under section 211 . The offence under section 182 is complete when false information is given to a public servant by a person who believes it to be false, but who intends thereby to cause such public servant to institute criminal proceedings against a third person. The offence is complete although the public servant takes no step towards the institution of such criminal proceedings. In our opinion it is in such a case, not at all necessary that the public servant should take any step whatever on the false information 1295before instituting and prosecuting to a conclusion a charge under section 182 against the person who had given such false information...In cases to which section 211 especially applies and in which a criminal proceeding has been instituted a court should in our opinion, as a rule proceed to determine such criminal proceeding instituted it and should give the person instituting such proceeding a reasonable opportunity of supporting his case before proceeding against him for an offence under section 211 ...It appears to us that it has been left to the discretion of the court to determine when and under what circumstances prosecutions should be proceeded with under sections 182 and 211 .

It has been held that an offence falling under this section is included in the more serious offences falling under s 211 ; and a prosecution for a false charge may be either under this section or s 211, though clearly if s 211 does apply and the false charge is serious, prosecution should be under the more serious s 211 . However, this does not mean that where an offence under s 182 is complete and the prosecution is lodged, the proceeding must subsequently be quashed because the accused; not content with the false report to the police, subsequently makes a false complaint to a magistrate in addition and thereby exposes himself to a prosecution under s 211, IPC .[48]

Where a false report has been made to the police, and a similar complaint subsequently to the magistrate, a proceeding under s 182 can be instituted by the police in reference to the false report made to them.[49] The petitioner filed a complaint against the opposite party alleging that his son was kidnapped by the opposite party. The kidnapped boy appeared before the Court and stated that he was not kidnapped by the opposite party but that he himself had gone voluntarily to marry a girl. The girl in statement under s 164, CrPC also stated that she had married the petitioner's son. The petitioner had filed a false case of kidnapping. Cognizance of the offences under ss 182 and 211, CrPC taken by the Magistrate was held proper.[50]

However, as already pointed out, the Bombay High Court has taken a different view and held that the offence under s 182 is a distinct offence from that under s 211 .

In *Raghavendra v Kashinath Bhat* ,[51] Ranade J, observed:

> The criminal law makes a clear distinction between a false charge which falls under section 211 of the Penal Code, and false information given to the police, in which latter case the offence falls under section 182 of the same Code. If plaintiff in the present case had chosen to prosecute the offender under section 182, it would not have been necessary for him to prove malice and want of probable or reasonable cause, except so far as they were implied in the act of giving information known to be false, with the knowledge or likelihood that such information would lead a public servant to use his power to the injury or annoyance of the complainant. In an inquiry under section 211, on the other hand, proof of the absence of just and lawful ground for making the charge is an important element.

In *Emperor v Ram Krishna Yeshwant Adarkar* ,[52] Batty J, delivering the judgement of the court, observed:

> Section 182 relates only to cases of information given to officials with the intention of causing or with knowledge that it is likely to cause, that official to do or omit to do something which he ought not to do or omit to do, or to use his lawful power to the 1296injury or annoyance of any person. This is a distinct offence from that described in section 211 , Indian Penal Code, which relates to an attempt to put the criminal courts in motion against another person. The action which section 211 , Indian Penal Code, renders penal is action entailing very serious consequences, and therefore the more serious consideration is required of the individual who takes it. It is sufficient, therefore, in such cases for the prosecution to prove, not merely absence of reasonable or probable cause for giving the information, but a positive knowledge or belief of the falsity of the information given.

Again in *Apaya Totoba Mande v Emperor* ,[53] Batchelor J, of the Bombay High Court observed:

> The mere words of section 182, if they stood alone, are wide enough to cover the case where the information conveyed to a Police Officer amounts to a direct charge of an offence as 'offence' is defined in the Penal Code; but section 182 is to be interpreted not in isolation but in association with section 211, and, if the wording of the two sections is contrasted, the different circumstances provided for by both seem to me to be fairly easy of ascertainment. It appears to me that where the information conveyed to the police amounts to the institution of

> criminal proceedings against a defined person, with an offence as 'offence' is defined in the Penal Code, then the person giving such information has committed an offence punishable under section 211 . In such case section 211 is, and section 182 is not, the appropriate section under which to frame the charge... section 182, when read with section 211, must be understood as referring to cases where the information given to the public servant falls short of amounting to the institution of criminal proceedings against a defined person and falls short of amounting to the false charging of a defined person with an offence as defined in the Penal Code. The distinction is substantial.

In one case,[54] Mulla J, of the Allahabad High Court held that an accused can commit both offences under ss 182 and 211 in the pursuit of the same purpose one after the other but their circles are clearly separated and they do not overlap each other.

The Punjab Chief Court also followed the Bombay High Court and held that the two offences are essentially distinct.[55]

For an offence under s 182, IPC, it is only necessary that the information given by the accused to a public servant should be false to his knowledge, whereas to constitute an offence under s 211, IPC, it is necessary that the accused should institute or cause to be instituted some criminal proceedings against another person or should falsely charge him with having committed an offence.[56] The essence of an offence under s 182 is not the falseness of the information, as it is the essence of an offence under s 211, but the contempt of the lawful authority of the public servant.[57]

It may also be noted that the offence, if any, constituted by a false complaint against unknown persons is not one under s 211, but under this section.[58]

A person who falsely informs the police that he has been robbed by a particular person is guilty of an offence under s 211 and not under s 182 .[59]1297

Section 211 applies only when a person institutes or causes to be instituted, criminal proceedings against any person, or falsely charges any person with having committed an offence. A person actually institutes criminal proceedings within the meaning of s 211 upon making a complaint as defined in s 2(d), CrPC . In order to render an allegation a complaint, it must be made with a view to a magistrate taking action under the CrPC . In the absence of a definite prayer asking the court to take such action, there must be clear proof that that was the intention of the complainant. The words 'falsely charged' in s 211 must be read with the preceding words of that section and imply a false charge to a person in authority made with a view to setting the law in motion. The question here again is one of intention. In the absence of proof that the intention of the person giving the information was to set the criminal law in motion against the person charged, the case would fall under s 182 and not s 211 .[60]

However, if the motive was to induce the public servant not merely to do what he would not otherwise have done but to take specific action of investigating the offence and prosecuting the person complained against, the only section which is appropriate and which must be applied is s 211 ; and it would be obviously anomalous and in every respect undesirable if the law were that simply because an offence under s 182 is also disclosed and because for the trial of such an offence a written complaint from a public servant is necessary, the court should be debarred from inquiring into the real nature of the offence which comes within s 211 .[61] But where a person gives false information to the police and subsequently files a complaint to a magistrate to the same effect and allows the proceedings thereon to be dropped, the mere fact that a complaint has been made does not bar the police officer to whom the false information was given from making a complaint of an offence under s 182 .[62]

It is true that the offence under s 182 is distinct from the one under s 211 though the latter is more serious and may include the offence under the former section. The magistrate can take cognizance of an offence under s 182 on a complaint in writing of the police officer by virtue of the provisions contained in s 195(1)(a), CrPC . However, it would virtually lead to the circumvention of the provisions of s 195(1)(b) if the proceedings under s 182 can continue, where the offence disclosed is covered by

s 211, IPC, and a complaint is pending which has been filed by the informant on the same facts and allegations as were contained in his first information report. On a parity of reasoning with regard to an offence under s 211, IPC, no cognizance can be taken by the magistrate for the alleged offence under s 193 of the Penal Code which is one of the sections mentioned in s 195(1)(b) .[63] Once a complaint, filed by an informant, is being proceeded with which is based on the same facts and allegations on which the first information report was registered, it is not open to a magistrate to take cognizance of any offence alleged to have been committed under s 211, IPC, unless there has been a proper complaint with the provisions of s 195(1)(b), CrPC .[64]1298

12. Distinction between Sections 211 and 182 Summarised

In a comparatively recent case the Madras High Court has held that s 182, IPC, deals with the offence of giving false information to a public servant, thereby intending such public servant to use his lawful power to the injury, or annoyance, of any person. Section 211 of the IPC deals with the offence of instituting, or causing to be instituted, any criminal proceeding against any person, or falsely charging any person for having committed an offence with intent to cause injury to any person knowing that there was no just or lawful ground for such proceeding or charge against that person. Section 182 of the IPC deals with a lesser offence while s 211 of the IPC refers to a graver offence. If the information conveyed to the police amounts to the institution of criminal proceeding against a defined person or amounts to falsely charging of a defined person with an offence, then the person giving such information is guilty of an offence under s 211 of the IPC . In such a case, s 211 is, and s 182 is not, the proper section under which a charge has to be framed. Section 182 read with s 211 of the IPC must be understood as referring to cases where the information, given to the public servant, falls short of amounting to an institution of criminal proceeding against a defined person with an offence as defined in the Penal Code. When a person specifically complains that another man committed an offence and does so falsely with the object of causing injury to that person, he is guilty of making a false charge of an offence under s 211, and not under s 182 of the IPC . Where the complainant has given a complaint of theft of cash and other articles from his house against a defined person, who was formerly employed under him, and the complaint has turned out to be false, the case falls under s 211, IPC, and not under s 182, IPC . Further, when a complaint sets forth certain facts disclosing minor offence as also a graver offence, the prosecution should ordinarily be for the graver offence.[65]

13. When Offence is Covered under Section 211, Proceedings under Section 182 cannot Continue

Commentary under same heading in s 211, *post* may be referred to.

14. 'Whoever Gives'

It is only the person who gives the false information to a public servant that can be held liable under this section.

Where a false report of a theft was made at the police station by one *S* and *U* was with him when the report was made, *U* cannot be held to have committed the offence, as he himself did not make the report.[66]

In a similar case, however, Stuart CJ, observed:

> This report was made, as is clear from the proceedings, by Ram Jiawan and Ram Naresh jointly. Ram Jiawan first stated the story and Ram Naresh corroborated him. But even if Ram Jiawan alone had told the story and Ram Naresh had said nothing, both the men were clearly guilty on the facts: Ram Jiawan under the provisions of section 182 and Ram Naresh for abetment, having engaged with Ram Jiawan in a conspiracy to make a false 1299report and the false report having been made in pursuance of the conspiracy. In respect of the

> decision of the late Mr Justice Karamat Hussain which is reported in *Umrao Singh v King-Emperor* ,[67] it is sufficient to say that I do not agree with the view which he took. He laid down that it was impossible for any person to be convicted in respect of a false report unless false report had been taken down from his dictation.68

Mere Spectator

It is difficult to understand how the other man can be made liable if he was only a spectator and there is nothing to indicate that he associated with the person who actually made the false report or investigated or conspired with or aided him.

Where an application containing false allegations is made by a person purporting to act on behalf of his father, but there is nothing to show that the father instructed the son to make the application, the father cannot be prosecuted for an offence under this section.[69]

Scribe of the Report

Where the false information is contained in an application said to have been made by the accused, it must be proved that he made the application, otherwise he cannot be convicted of the offence under this section. The mere writer of the application who had no reason to suppose that the allegations in it were false, cannot be held guilty under this section.[70]

15. Meaning of 'Information'

The word 'information' is not defined either in the IPC or the CrPC . It simply means the communication of any intelligence or knowledge of facts. A mere expression of a private person's belief or opinion[71] or suspicion,[72] is not information within the meaning of this section.

Information as contemplated by s 182 need not be in writing or be reduced to writing, it may be oral.[73]

16. 'Gives any Information'--Signature on Information not Necessary

The expression 'gives any information' occurs also in s 203, and has been interpreted to mean 'volunteers information'.[74]Section 177 uses the word 'furnishes' instead of 'gives' when the informant is bound to furnish the information. There seems to be no authority for asserting that a person cannot be said to give information under s 182 unless he actually signs the document giving the information.[75]1300

The section penalises only the giving of false information to a public servant and not the withholding of information.[76]

17. Information Given in Answer to Question

It has been held in some cases that the plain ordinary meaning of the expression 'gives information' is to volunteer information and not to make statements in answer to questions put by the public servant.[77] But in these cases, except in the *Rangoon case*, the statements were made in answer to questions put by the police during investigation under s 161, CrPC, and the questions whether or not they amount to information under this section will be presently considered in the following note. In the *Rangoon case*,[78] it was held that a statement of a witness called for the defence of a departmental inquiry cannot, in general, form the basis of a conviction under this section. Distinguishing these rulings, it has been held in a number of cases that there is nothing to justify the reading in of the word 'voluntarily' before the word 'gives' in this section,[79] that there is no reason to insert in the statutory provisions of this section words that are not there, and thus to restrict unduly the meaning of the words and to reduce the efficacy of the section in dealing with the mischief it was designed to deal

with[80] and that any false information given to a public servant with the intention mentioned in this section is punishable under that section whether the information is volunteered by the informant or given in answer to questions put to him.[81] There is no reason why the word 'information' in this section be understood to refer only to a first information recorded under s 154, CrPC . It is used in the section with reference not to a police officer in particular but to any public servant.[82] In *Queen-Empress v Ramji Sajabarao* ,[83] it was held that false information given to a forest officer, a public servant, in answers given to questions put by him in the course of an inquiry was punishable under this section.[84] When questions are put to a person, he is bound, if at all, to answer them truthfully and correctly; otherwise it is open to him not to answer the questions if he so liked. But if he gives a false reply, he gives false information and is liable under this section, whether the statement is made voluntarily or in answer to questions put to him.[85]

18. Volunteer Information

Whether answers given to questions put by a police officer in the course of an investigation are punishable under this section or not, the words 'gives information' should not be interpreted as necessarily meaning 'volunteer information' *i.e.*, that it 1301must be information on some matter which is not already under inquiry by the public servant.[86]

Reviewing the entire case-law on the subject, a division bench of the Kerala High Court has observed:

> We are not inclined to give that restricted meaning of 'volunteer' to the word 'give'. For instance, if a police officer has reason to suspect the commission of a cognizable offence, he can investigate the case under section 157 for the discovery and arrest of the offender. During such investigation he may find a person who gives him the required information in answer to questions put him. There is nothing to prevent that officer from recording that information under the provisions of section 154 and proceeding with the investigation of the case and if that information is proved to be false the person can be prosecuted. That was what happened in *Kalawati's* case[87] and their Lordships of the Supreme Court found her guilty of the offence under section 201 , IPC .[88]

19. Statements Under Section 161 , Code of Criminal Procedure 1973

It is not disputed that if any person gives the first information statement to the police which is recorded under s 154, CrPC, and if it ultimately turns out to be false, it would amount to giving false information and the offender would be punishable under s 182, 201 or 203, IPC provided the requisite intention is proved.[89]

There is conflict of judicial opinion whether information referred to in these sections if given to the police would refer only to information under s 154, CrPC, or whether they would refer to statements recorded by the police during the course of investigation also. In some cases, it has been held that the words 'public servant' in this section sufficiently cover a police officer and that a reasonable interpretation of the words of this section is to include information even if it is given to a police officer in the course of an investigation under s 161, CrPC, in reply to questions put by him.[90] These cases may be distinguished on the ground that they do not relate to statements under s 161, CrPC . On the other hand, it has been held in a number of cases that a statement made by a witness to the police under the provisions of s 161, CrPC, is not 'information given to a public servant' within the meaning of s 182, IPC .[91] Reviewing the entire case-law on the subject, a division bench of the Kerala High Court in *State of Kerala v Markose* ,[92] observed:1302

> Section 161 CrPC provides for the recording of statements of person acquainted with the facts and

> circumstances of the case by the police officer making the investigation. A statement so recorded must be distinguished from one constituting the information which starts the investigation, and it has been distinguished in section 162 by being described as a statement made by any person to a police officer in the course of an 1303investigation. Under the Criminal Procedure Code of 1882, the public were no doubt bound to answer 'truly' all questions put to them by the police while investigating a cognizable case. If, therefore, they answered falsely, they could have been then prosecuted under section 193 of the Code. But this obligation of answering 'truly' no longer exists, and if they could be punished under sections 182 , 201 or 203, IPC, it would render nugatory the policy which dictated the amendment of the Criminal Procedure Code by the removal of the word 'truly' from section 162 of the Criminal Procedure Code .

That is why Irwin CJ, in *King-Emperor v Nga Aung Po* ,[1] observed that as persons examined by the police can no longer be punished for giving false evidence, it would be mere evasion of law to hold them liable under s 182, IPC . It also seems to us unfair that a man should be liable to be convicted of giving false information on the strength of a statement given to a police officer which is not given on oath, which he has not signed, and which he has had no opportunity of verifying. As is well known, such statements are hurriedly taken down as rough notes and the police officer is not trained in taking evidence. We are aware of the force of the argument of the learned public prosecutor of not imposing a liability on persons who give false information to the police with the object of laying false trails or causing the inquiry to be burked or weaken the prosecution and thereby injuriously interfere with public justice but justice as well as expediency demand that a ban be placed on prosecutions based on statements made to the police during investigation.

20. Statements made by Accused--Such Statement is not Information

Neither can statement made by an accused person for purposes of his defence be held to be information given to a public servant within the meaning of this section,[2] nor can a false statement made by him in a petition of appeal.[3] A criminal appeal is a continuance of the criminal case, and, except so far as there is a provision to the contrary, the appellant has the privilege of the accused and cannot be punished for making a false statement under s 313, CrPC .[4]

A false statement made by an accused person when being examined under s 313, CrPC is not information given to a public servant within the meaning of this section. However, if a person is not examined in his capacity as an accused, a false statement made by him would render him liable under it.[5]

21. Statements of Accused on Oath in Support of an Application for Transfer

It has been held in some cases that no one can be prosecuted in respect of false statements made by him in an affidavit for the purpose of a revision,[6] or transfer of a case in which he was an accused person.[7] But, dissenting from this view, it has been held that an application for transfer is not a part of the defence of an accused person 1304and statements made by an accused person in an affidavit in support of such an application do not enjoy the immunity conferred by s 342, (now s 313) CrPC, upon answers to questions put to the accused by the court trying the case.[8]

22. 'To any Public Servant'

For the meaning of 'public servant' refer to s 21 and the commentary thereunder. A head constable is a public servant within the meaning of this section.[9] By the Railways Act 1989, a railway servant, *i.e.,* any person employed by a railway administration in connection with the service of a railway (s 2(34) is deemed a public servant for the purposes of ch 9 of this Code.[10]

There is no provision in the Code which constitutes it an offence to lodge a false complaint in a foreign court or to give false evidence before such court where the oath is not administered under the provisions of law in force in India, but under the law of that state in relation to proceedings before that court. No offence under this section, can be made out where it is not suggested that the false information was given to a public servant as defined by this Code, quite apart from the consideration

that it was given without and beyond India.[11]

23. Indirect Communication of Information to Public Servant--When an Offence

It constitutes an offence under this section if a false complaint with evil intention is made to a village magistrate for the purpose of being passed on to a station house officer, and which it is his bounden duty so to pass on. Information given to *A* for the purpose of being passed on to *B* (a public servant), and which it was his bounden duty so to pass on, must be considered as having been given, and intended to be given, to *B*.[12] It would, of course, be different if the false information was given to someone who was under no legal obligation to take any action upon it.[13]

24. Indirect Communication of Information to Public Servant--When Not an Offence

The accused, a liquor shop man in India, reported to his master that the excise inspector had asked him for money and had watered some liquor in the shop with a view to getting him into trouble. The master as intended by the shop man reported the matter to the collector, who after causing an inquiry to be made gave the excise inspector permission under s 195(a), CrPC, to prosecute the shopman under this section, in order to clear his own character. It was held that the accused was not 1305guilty of the offence as the false information was not given by him to a public servant, but to his own master.[14]

Where the accused swore an affidavit containing false statements in support of an application by a complainant for transfer of her case and handed it over to the complainant's pleader for filing it in court, it was held that even if the accused was the son of the complainant and made the statements to her pleader on her behalf, he could not be held to have himself made the statements in court when the affidavit was filed, inasmuch as the pleader was not his agent but represented his mother and she could have asked the pleader not to file the affidavit in court.[15]

25. 'Information which he Knows or Believes to be False'

To establish an offence under this section there must, in the first instance, be legal proof that the information given to the public servant was false. The mere opinion of the investigating officer on the point cannot be treated as legal evidence and cannot be made the basis of a finding.[16] It must further be proved that the accused knew or believed it to be false and he gave it with such knowledge or belief.[17] To establish the offence, the prosecution must show, not merely that the accused gave the information, but that it was false and that the accused knew or believed it to be false. A mere denial on oath by the person against whom the alleged false information was given is not sufficient to prove the offence.[18]

The appellant had filed a complaint against her in-laws for dowry demand and harassment under s 498A, IPC, and her brother-in-law was the Senior Superintendent of Police (respondent no. 3). No case was registered but complaint was filed against the appellant under s 182, IPC for filing false report. Held, the investigating officer failed to show that the appellant had given information which she was knowing and believing to be false. In the investigation report it was not reported that the appellant was knowing that the information given was false but still gave the information to harass the respondent. Thus, the proceedings under s 182 were quashed.[19]

26. Difficult to Prove Knowledge--Reasonable Inference--Burden not to be Laid on Accused

To constitute the offence, it is also necessary that the information given is information which the accused person knew or believed to be false. It is not sufficient that he had reason to believe it to be false, or that he did not believe it to be true; there must have been positive knowledge or belief that it

was false.[20] To bring the case within this section, it is necessary for the prosecution to prove, not merely an absence of a reasonable or probable cause for giving the information but a positive 1306knowledge or belief of the falsity of the information given.[21] In *Murad v Empress* [22] it has been held that:

> It is not enough to find that he has acted in bad faith, that is, without due care or inquiry, or that he has acted maliciously, or that he had no sufficient reason to believe or did not believe the charge to be true. The actual falsity of the charge, recklessness in acting upon information without testing it, or scrutinising its source; actual malice towards the persons charged, they are relevant evidence more or less cogent; but the ultimate conclusion must be, in order to satisfy the definition of the offence, that the accused knew that there was no just or lawful grounds for proceeding. It may be difficult to prove this knowledge, but, however difficult it may be, it must be proved and unless it is proved, the informer must be acquitted.

To constitute the offence, it must be shown that the person giving the information knew or believed it to be false or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. The fact that the information is shown to be false does not cast upon the party who is charged with an offence under this section, the burden of showing that when he made it, he believed it to be true. The prosecution must make out that the circumstances were such that the only reasonable inference was that he must have known or believed it to be false.[23] The burden of proof cannot be laid upon the accused. It is for the prosecution to show that the information given was false, and not for the accused to show that it was true.[24] The accused cannot be convicted if he fails to establish that the reported information was true. An allegation which is found not proved, is not necessarily false and false to the knowledge of the maker.[25]

27. Particular Intention or Knowledge, Essential--Act or Mission of Public Servant not Material

This section requires that information which is false or which is believed to be false is given to a public servant with a particular intention or knowledge, and if the information is known to be false and is given with the intention mentioned in the section, the offence is committed. The fact that the public servant did not, in fact, do or omit to do anything or did not use his lawful power in consequence, is not a deciding factor. The guilt of the accused lies in his intention or knowledge, and a man's intention or knowledge must be judged from his acts and the surrounding circumstances.[26] A man is presumed in law, to intend the ordinary and natural consequences of his acts, and when he falsely charges another before the police with the commission of an offence, knowing the charge to be false, there can be no doubt that he is guilty of an offence punishable under both s 182 and s 211, even though his primary object may have been to protect himself rather than to injure the person falsely charged.[27] Without the requisite intent or knowledge, there can be no offence 1307under this section.[28] The intention must be to cause the conduct specified in cl (a) or cl (b) of the section.

To put it in other words, s 182 of the IPC requires as an essential ingredient thereof, that the allegedly false information must have been given with the intention to cause, or knowing it to be likely that it will cause, a public servant in the exercise of his duties as such (a) to do or to omit anything which he ought not to do or omit, on the basis of the true facts or (b) to use his lawful power to the injury or annoyance of any person.[29]

28. Intention must not be Confused with Motive

Where the accused made a false report to the police that a burglary was committed in his house, not with the intention or knowledge specified in the section, but with the ulterior motive of suppressing certain documents by pleading that they were stolen in the burglary, it was held that he could not be held guilty of the offence under this section.[30]

29. Consequential Action not Necessary

The offence does not depend upon what is done or omitted to be done by the public servant, on such false information, the question whether the public servant was induced to do or not to do anything thereby, being absolutely immaterial so far as this section is concerned.[31] The offence is, therefore, complete when the false information has been knowingly given, with one or other of the intentions specified in cll (a) and (b), and being complete then, the offender may be prosecuted at once under this section.[32] It is thus immaterial whether or not the public servant is misled.[33] It is not necessary that action should be taken by the police on the information given. What is essential is the intention that an action be taken or the knowledge that it is likely to be taken.[34]

30. Clause (A)--Statutory Amendments

It may be noted that the marginal note to the section speaks only of 'false information with intent to cause public servant to use his lawful power to the injury of another person' which is covered by cl (b). The reason is that cl (a) did not appear in the draft of the Indian Penal Code prepared by Lord Macaulay's Commission.[35] It was subsequently added. The original clause was marked as (a) and the newly added clause as (b). But the position of the two clauses was altered when the section was amended in 1895, and what was cl (a) became cl (b), and cl (b) became cl (a).[36]1308

Under this section, the giving of false information to a public servant is made penal when either of two consequences is intended to be caused, or known to be likely to be caused, by the false information. The first is that which is described in cl (a) and the second is described in cl (b). The two consequences are quite distinct from each other. To constitute an offence under the first part, covered by cl (a), it is not necessary that the act intended, or known to be likely to be done, be to the injury or annoyance of any third person.[37] But in either case the false information must call for some action or omission on the part of the public servant to whom it is given. Thus, the making of a false report to the police alleging the disappearance of a bullock or a buffalo does not call for any action on the part of the police, as the report does not disclose any cognizable offence in which case only the police can take action. The making of such a report does not justify a conviction under this section.[38] But this does not mean that in order to constitute the offence under this section, the information should be given to a police officer and that it must relate to a cognizable offence. Illustrations (a) and (b) show that the information need not relate to an offence, cognizable or non-cognizable, punishable under the Code and that it may be given to a public servant who is not a police officer.[39]

Where the accused sold his horse but falsely reported to the police that it was stolen, it was held that in making this report, he clearly gave false information to the police which he knew to be false and he must have known that it was likely that he would thereby cause the police authorities, if they found a horse answering to his description, to take it from the possession of its rightful owner.[40]

It must be remembered that in a case under this part of the section, it is immaterial to consider the nature of the action of the public servant; the question is what action the person, who gave the false information, contemplated that the public servant would take. If the person intended and contemplated that the public servant would do some act which, had he known the true facts, he would not have done, he (the person who gave the false information) has committed an offence under this section.[41]

31. 'To do or Omit Anything'--Meaning of

The words 'to do or omit anything which such public servant ought not to do or omit' must mean, to do something which the public servant was enjoined to do in his official capacity as a public servant. If a person gives false information to a public servant, knowing it to be likely or intending that he would do something which had no connection with his office as a public servant, then the conduct of the person giving such information would not come within the purview of this section. For instance, if a person gave information to a public servant knowing it to be likely or intending that such public servant would go and beat up somebody, then it cannot be said that this offence has been committed, because it is

no part of the duty of a public 1309servant to beat up people.[42] However, it cannot be said that this section applies only to a complaint to a public servant when it is made with the intention of inducing such public servant to take action of a sort which only a public servant of the description in question could take, and which would not be open to a private individual. In illust (a), the action expected to be taken by the public servant was simply the dismissal of a subordinate and any master could do the same.

Where a postman reported to the postmaster that he was beaten and robbed of his postbag by a person, and the postmaster immediately gave information to the police who inquired into the matter and reported that the complaint was false, it was held that his conviction under this section was justified, because the accused gave to a public servant (the sub-postmaster) information which the accused knew to be false intending thereby to cause the sub-postmaster to do something (*viz*, sending information to the police) which he ought not to have done if the true state of facts were known by him.[43]

32. 'Which such Public Servant Ought not to do or Omit', etc--Use of 'Ought' Explained

The words 'such public servant ought not to do or omit' in the section appear to resemble the words 'to use the lawful power of such public servant to the injury or annoyance of any person' only insofar as both sets of words refer to an official conduct. But the latter phrase using the word 'ought', which implies duty and excludes personal choice, covers duties imposed by more particular statutes, as well as duties arising otherwise from the status or office of the public servant. The police, for example, are bound by an express statute, to vigilance, in the prevention and detection of crime and the apprehension of offenders; the customs and excise officers are in much the same position. But other public servants, in the absence of statutes, are required by the unwritten law to exercise vigilance and care, like the ministers of the government, to give good advice, or, like judges, to hearken in their courts to the suitors and their counsel, or, like the magistrate, to suppress riots, or to comment on the misconduct of the police in cases before them.[44]The office, the honour, and the duty go together and all relate to the public welfare. Now, as the officer is bound to act in the discharge of his office in the proper circumstances, it may often be an interference with his duty, and thus dangerous to the public welfare, if through false information he is prevented from acting, or induced to act wrongly.[45]

A personating *B* at an examination, passes it and obtains a certificate in *B*'s name. *B* files the certificate along with an application to the assistant collector to have his name entered in a list of candidates for service in the revenue department, and on the strength of the certificate, *B*'s name is registered. *B* is guilty of an offence under cl (a) of this section.[46]

A makes a false charge of theft to a village magistrate. This is an offence under cl (a) read with s 45(c) (now s 40(1)(c) of the Code of Criminal Procedure .[47]1310

Request to do an Illegal Act not within the Purview of this Section

It has been held that cl (a) of this section applies to a case in which it is intended that a public servant should do or omit to do something which he ought to do or omit to do if the facts were true, that is, which he would be legally justified in doing or omitting to do if the facts before him were true. Asking a magistrate to do an act which would be an illegal act even if true facts were stated to him, would not come within the purview of the section. The information must be information regarding a fact which would induce the magistrate to do something which he would be legally competent to do if he had been cognizant of the true facts. Where, therefore, the accused petitioned the district magistrate praying that as certain tenants occupying his houses had absconded, leaving the houses locked up, the houses might be unlocked to enable him to execute the necessary repairs, and the application was sent for compliance and report to the police, who reported that the allegations contained in the petition were untrue, it was held that this section was inapplicable to the circumstances of the case.[48] But dissenting from this, in a parallel case the Peshawar judicial commissioner's court had observed:

> It appears to me to be a *reductio ad obsurdum* of section 182 , Indian Penal Code, to hold that when a person gives false information to a public servant deliberately asking that public servant to take certain action, he is not punishable under this section because the public servant was not legally entitled to take the action requested. It would be more than ever *reductio ad obsurdum* in a case like the present one where the application was nothing unusual, but was one of a kind constantly made to magistrates on which magistrates were in the habit of taking the action requested. The applicant believed that the magistrate had power to take the action requested and the magistrate himself believed it. So far as the point goes, therefore, I cannot but hold that the persons making an application of this nature based upon deliberately false information are certainly liable to prosecution under section 182 , Indian Penal Code .[49]

Making Investigation does not Affect the Falsity of Report

In a later case, where a report of a burglary was made to the police and on investigation the report was found to be false, it was held that it cannot be said that making the investigation is an act which ought not to have been done if the true facts were known. There is no law or rule requiring a public servant not to make an investigation in certain circumstances. In the absence of a positive law or rule requiring him not to make an investigation if he knew that a certain report was false, lodging a false report intending to cause, or knowing it likely to cause, him to make an investigation would not constitute an offence.[50] An accused who makes a false statement in his petition of appeal, cannot be held to have committed an offence under this section, even assuming that the false statement was made with the object of inducing and that it did induce, the appellate court to send for the record of the case, as it cannot be said that the court was thereby induced to do what it ought not to have done.[51] Similarly, a person who makes a false statement in his petition cannot be held to have committed the offence simply because his claim is not substantiated, even assuming that some false statement, which was not directly the subject of complaint, was made with the object of inducing and that it did induce the court to 1311take some action, as it cannot be said that the court was thereby induced to do what it ought not to have done.[52]

Action Contemplated and not Taken is Material

It must be remembered that in a case under this part of the section, it is immaterial to consider the nature of the action of the public servant; the question is what action the person who gave the false information contemplated that the public servant would take. If the person intended and contemplated that the public servant would do some act which, had he known the true facts, he would not have done, he (the person who gave the false information) has committed an offence under this section.[53]

Giving Wrong Identity Falls within the Mischief

Where on being questioned by a superintendent of police, the accused, driving a motor car without licence, gave him a fictitious name as that of himself, it was held that the accused, by giving a false name must have intended to cause, or have known that he would be likely to cause, the superintendent of police to prosecute a fictitious person or to omit prosecuting the real offender, and even if the intention of the accused was to put obstruction or difficulty in the way of the police officer taking action against himself, the false information given by him came within the mischief of s 182(a), and that what the superintendent of police actually did was immaterial.[54]

33. Clause (B)--Test to be Applied

To bring a case within this clause, the intention or knowledge of the informant must be to procure the exercise of the lawful power of the public servant to the injury or annoyance of any person. Whether a case falls under this clause or not depends upon the answer to the question as to whether the information given to the public servant was of such a nature as might be supposed to lead the public servant to make use of his lawful powers to the injury or annoyance of any person.[55] Where the

accused in a petition of resignation made to the collector, made certain false allegations against another person in order to forestall any proceeding which that other person might take against him, but he never intended the collector to use his powers to the injury or annoyance of that person, it was held that the accused was not guilty of the offence under this section.[56]

The accused appeared before the district magistrate and made certain allegation against a police officer, but added that he did not wish to make an inquiry so as to prevent the police officer from behaving tyrannically towards him. It was held that the accused was guilty, not under s 193, but under this section.[57]

So also where the accused said to an officer 'I find there has been a theft, I suspect the persons named and I want an inquiry to be made', it was held that it was not a false charge within the meaning of s 211, but if it was false, it was a false report made to the officer under s 182 .[58]1312

In these two cases, the question as to whether the accused intended the public servant to use his lawful powers to the injury or annoyance of the third person was not considered.

34. 'To use the Lawful Power of Such Public Servant'

The expression 'such public servant' in the two clauses of the section refers to the public servant to whom the false information is given with the intention specified in the two clauses.[59] Information given to *A* (a village magistrate or headman) for the purpose of being passed on to *B* (the police station-house officer), which it was his duty so to pass on, must be considered as having been given to *B*.[60] In the case last cited, the case of *Queen v Periannan* [61] was distinguished and dissented from. In that case also information of an offence was given to a village magistrate who reported the matter at the police station, and the station house officer after an inquiry, referred the case as false to the sub-magistrate and also asked for a sanction to prosecute the informant under this section. The sub-magistrate ordered the sanction and subsequently, himself tried and convicted the accused (informant) under this section. The district magistrate, however, took the view that the proceedings were illegal on two grounds: (a) that the village magistrate to whom the information was given had no powers in the case, (b) that the sub-magistrate had no power to give sanction as he was not the public servant to whom the information was given. The High Court did not concur in the opinion of the district magistrate and refused to interfere with the conviction. With regard to the second ground on which the district magistrate considered the proceedings to be illegal, the High Court observed: 'As to the other question, we think all was done that was necessary. The public servant himself complained, which is sufficient to satisfy the requirements of the section (old s 467, now s 195, Criminal Procedure Code).' This can only mean that it is not the village magistrate to whom the false information was given but the station-house officer to whom the information was passed on and thus he was the 'public servant concerned' within the meaning of s 195, CrPC and 'such public servant' within the meaning of s 182 . And this is in accord with the decision in *Emperor v Jonnalagadda Venkatarayadu* .[62] With regard to 'the use of his lawful power' in *Periannan's* case,[63] it was remarked:

> We think the words 'to use his lawful power' in s 182 refer to some power to be exercised by the officer misinformed, which shall tend to some direct and immediate prejudice of the person against whom the information is levelled. They do not (we think) apply to such prejudice as might eventually arise in consequence of certain harmless intermediate steps to be taken by the misinformed officer such as were taken in the present case, where all that the misinformed officer did or could do was to pass on the information.

Considered along with the final decision in the case these remarks can only mean that the village magistrate (the magistrate within whose jurisdiction the concerned village lay) had no power except to pass on the information to the station-house officer, and the station-house officer being the public servant to whom the information must be considered to have been given, it is the use of his lawful power that has to be 1313considered in applying this section. It is unfortunate that the language of the

judgment is misleading, but taken with the actual decision in the case, it is submitted that there can be no doubt that the High Court meant to lay down nothing contrary to what was clearly laid down in the case of *Emperor v Jonnalagadda Venkatarayadu* .[64] In *Public Prosecutor v Thavasiandi Thevan* ,[65] it was remarked: 'The case of *The Queen v Periannan* reported in ILR 4 Mad 241 is not an authority against his view, since in that case the learned judge only held that no offence punishable under s 182(b) was committed.' It is submitted that this remark is due to a misunderstanding of the actual decision in *Periannan*'s case.

35. 'To the Injury or Annoyance of any Person'

As to the meaning of 'injury', see s 44 and the commentary thereunder.

A tells *B,* a collector, that certain *zamindars* have usurped the possession of government land. Supposing *B* believes *A* and takes action thereon, he can only bring a civil suit against the *zamindars*, and would not thereby be acting as collector or magistrate, and hence *A* has not committed any offence.[66]

'Any person' must mean some third person. A public servant cannot use his lawful power to the annoyance of himself.[67]

The other person may or may not be definitely ascertained. See illust (c). Thus, whether the 'person' in question be one, more, or many, only one offence is committed.[68]

36. Procedure

The offence under this section is non-cognizable and a summons shall ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any magistrate. In a case, registered on the report of a police officer for an offence under s 182, IPC, the provisions of s 256(1), CrPC, 1973 did not apply and the accused could not be acquitted on the complainant's failure to appear before the magistrate on the date fixed for the hearing.[69] No application can lie under s 476(1) (now under s 340), CrPC, for taking any action in regard to an offence under s 182, IPC .[70]

37. Limitation

The limitation prescribed for prosecution under this section is one year. The order taking cognizance thereafter is bad in law and cannot be sustained.[71] The offence under s 182, IPC is complete when the complaint is found to be false. Therefore, it is the date for starting limitation when the investigating agency concludes the investigation and finds the averments in the complaint are false. The acceptance of a cancellation report will not extend the time, under s 469 of CrPC, where the commission of the offence is not known to the person aggrieved by the offence or to 1314any police officer, the first day on which such offence comes to the knowledge of such person or any police officer, whichever is earlier. Therefore, when the police officer finds that the complaint was false, it is that date when the limitation starts.[72] Where the complaint was filed against the accused for furnishing false information to the society regarding their owning another house and having membership in other societies and getting plots allotted in their names, the chargesheet was filed against the accused persons for offences under ss 420, 471, 120(B), 177 and 182 of the Penal Code nearly after 8 years. Offences under ss 177 and 182, IPC were held barred by limitation under s 468, CrPC and other offences were not made out, so a Division Bench of the Andhra Pradesh High Court quashed under s 482, CrPC, the criminal proceedings pending against the accused persons before a metropolitan magistrate, Hyderabad.[73]

38. Complaint of Pubic Servant Concerned Necessary

Under s 195(1)(a) of the Code of Criminal Procedure 1973, no court shall take cognizance of an offence punishable under this section except on a complaint in writing by the public servant

concerned, or some other public servant to whom he is subordinate. Compliance with the provisions of this section is a condition precedent to the court assuming jurisdiction, and a failure to comply with those provisions would vitiate the entire trial as without jurisdiction,[74] and it is doubtful whether s 465, CrPC can be pressed into service to cure a defect of jurisdiction.[75] In view of s 195(1)(a)(iii), CrPC, in order to maintain the complaint for the offence under s 182, IPC, the complaint must be filed either by the person before whom such information was given or the superior officer of that public servant.[76] The legislature has provided a condition precedent to the exercise of jurisdiction by a court and the condition precedent must be strictly complied with.[77] The provisions of this section are mandatory, so that it has been held that no court has jurisdiction to take cognizance of any of the offences mentioned therein without the prescribed complaint,[78] non-compliance with the section being fatal to the prosecution.[79] No prosecution can be entertained without the prescribed complaint in the case of offences specified in the section.[80] In the absence of a complaint as required by s 195, the magistrate will be 1315acting without jurisdiction in summoning the accused, and any subsequent proceedings would be void,[81] and the trial without the complaint, nugatory.[82]

The Supreme Court has also held that the trial of an accused under s 182 of the Indian Penal Code, without the complaint of the public servant concerned, is without jurisdiction *ab initio* and the conviction cannot be maintained.[83] Where the complaint for giving false information was not filed by the authority to whom false information was given but by a person not competent to do, accused was acquitted of the charge under s 182, IPC .[84] Where, however, a complaint for an offence under s 182 of the Indian Penal Code has been dismissed on the ground that it has not been presented by the public servant concerned, subsequent prosecution of the accused on a valid complaint is not barred by s 300, CrPC 1973.[85]

The allegations were that the petitioner committed fraud by getting sale deed of 324 square yards registered whereas the actual ownership of the vendor was merely of 194 square yards. The complaint was filed before the Magistrate under the signatures of the SHO. As the complaint was filed by an incompetent person, order summoning the petitioner as accused under s 182, IPC was quashed[86]

39. When False Information is Given to Superintendent of Police, Complaint Cannot be Filed by SHO or Other Subordinate Police Officers

The question whether the superintendent of police is competent to file complaint or it could be filed even by a person subordinate to him has been the subject-matter of consideration in the cases of *Harbans Singh v State of Punjab* ,[87]*Davinder Singh Kapoor v State of Punjab* [88] and *Malkiat Singh v State of Haryana.* [89] It has been held in all the aforementioned judgments that the complaint is required to be filed by the public servant concerned *i.e.* by the superintendent of police to whom false grievance is alleged to have been made by the accused and not by the Station House Officer.[90]

40. Facts Disclosing Two or More Offences One of which only Requires Complaint, Trial of Others Without Complaint--Validity of

Section 195 provides *inter alia* that no court shall take cognizance of any offence punishable under ss 172 to 188, IPC, except on a complaint in writing of the public servant concerned, or some other public servant to whom he is subordinate. The statute thus requires that without a complaint in writing of the public servant concerned, no prosecution for an offence under s 182 can be taken cognizance of. It does not further provide that if in the course of the commission of that offence other distinct offences are committed, the magistrate is debarred from taking cognizance in 1316respect of those offences as well.[1] Where, in the course of the same transaction, distinct offences are committed, and only some of them require a complaint by the public servant or the court concerned, cognizance of the other offences constituted by a different set of acts is not barred.[2]

If the offence disclosed can be laid under different sections of the Indian Penal Code, some requiring sanction and others not, it is quite competent for the prosecution to bring the offence under a section

which does not require a sanction.[3]

The allegations made in a complaint may have a double aspect, that is; on the one hand they may constitute an offence against the authority of the public servant or public justice, and on the other hand, constitute the offence of defamation or some other distinct offence. Section 195 , CrPC does not *per se* bar the cognizance by the magistrate of that offence, even if no action is taken by the public servant to whom the false report has been made. The ingredients of the offence under s 182 cannot be said to be the ingredients for the offence under s 500 . Nor can it be said that the offence relating to giving false information relates to the same group of offences as that of defamation.[4] Where, upon the facts, the commission of several offences is disclosed, some of which require sanction and others do not, it is open to the complainant to proceed in respect of those only which do not require sanction; because to hold otherwise would amount to legislating and adding very materially to the provisions of ss 195 to 199, CrPC .[5]Hence, a prosecution for defamation, based on a false information given to a public officer with an intent that the latter should act on it, is not barred for a want of complaint by the public officer under s 195(1)(a), CrPC on the ground that a prosecution under s 182 and s 500, IPC, should be said to arise out of the same facts.[6] Even when an alleged defamatory statement is made before a court and that court finds that the deposition is false, it is open to the person defamed to institute proceedings under s 499, IPC, without the court filling a complaint in accordance with the provisions laid down in s 195, CrPC . All the more so is such a complaint unnecessary where a defamatory statement is made by a witness in the course of a judicial proceeding and the court was deprived of an opportunity of so adjudicating; in all such cases it is open to the party defamed to take proceedings under s 499, IPC .[7]

Though s 195 does not bar the trial of an accused person for a distinct offence disclosed by the same facts and which is not included within the ambit of that section, it has also to be borne in mind that the provisions of that section cannot be evaded by resorting to devices or camouflages. The test as to whether there has been an evasion of the section or not, is whether the facts disclose primarily and 1317essentially an offence for which a complaint of the court or of the public servant is required. In other words, the provisions of the section cannot be evaded by the device of charging a person with an offence to which that section does not apply and then convicting him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character, or by describing the offence as being one punishable under some other section of the Indian Penal Code, though in truth and substance, the offence falls in the category of sections mentioned in s 195 of the CrPC . Merely by changing the garb or label of an offence, which is essentially an offence covered by the provisions of s 195, prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it.[8]

Where the real offence committed is one under s 182, the accused cannot be tried for a minor offence without a proper complaint.[9]

41. When Complaint should be for an Offence Under Section 182 , IPC and when for Offence Under Section 211,IPC --Divergent Views--Test Suggested

On this question there is a difference of opinion between the various High Courts. The Bombay High Court holds the view that false information to the police comes under s 182, IPC, and a false charge in a court comes under s 211 .[10] The Calcutta High Court has held that prosecution for a false charge may be under s 182 or s 211, but if the charge is serious, s 211 should be applied,[11] and a false charge made to the police of a cognizable offence falls under s 211 and not under s 182 .[12] But this does not mean that where an offence under s 182 is complete, and the prosecution is lodged under s 182, the proceeding under that section must subsequently be quashed because the accused, not content with the false report to the police, subsequently makes a false complaint to a magistrate in addition and thereby exposes himself to a prosecution under s 211 .[13]

It is for the court to determine under what section the prosecution should be held.[14] When the false charge amounts to an offence under s 211 also, proceedings should be taken with respect to the more

serious offence, *i.e.,* s 211 .[15] The main test as to whether a person makes 'a charge' within the meaning of s 211 is, 'Does the person who makes the statement which is alleged to constitute the 'charge' does so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed.'[16] If a case comes under both s 211 and 182, it is open to the authority concerned to proceed under one section or the other. But if in such a case that authority has thought fit to file a complaint under s 182, the magistrate is not justified in acquitting the accused on the sole ground that he should have been 1318prosecuted under s 211 .[17] It has been held that even if the offence falls under both the sections, a conviction under s 182 will not be regarded as illegal.[18]

If the complaint sets out all the facts which constitute the offence, it does not matter whether the complainant thinks that the offence committed is punishable under s 211 or under s 182, IPC .[19]

42. Complaint by Whom to be Made

The complaint under s 195(1)(a) of the Code of Criminal Procedure 1973 must be a complaint filed by the public servant concerned or by another public servant to whom he is subordinate, but not by a public servant who is himself subordinate to the public servant concerned.[20] The public servant concerned is the public servant to whom the false information was given with the intention or knowledge that such public servant will do something which he ought not to do.[21] If a false report was made to a police officer, the complaint must be by that police officer and not the magistrate who directed the police to complain.[22] However, if the false information given to a public servant is repeated before a magistrate, that magistrate may complain, whether the false statement was made to him voluntarily or upon questions put to the accused.[23] If the information was given to a sub-inspector of railway police or to the inspector general of police, it is that officer who can complain and not a sub-inspector of police who subsequently investigated the case.[24] In the case of an offence under this section, in connection with a complaint preferred to a magistrate, the proper authority to file the complaint is the magistrate himself. A complaint filed by the sub-inspector of police under the direction of the magistrate is not a proper complaint under s 195(1)(a) .[25]

Where the accused persons were prosecuted for having committed serious offences under ss 363(A), 366 & 376, IPC, after the insuance of a *suo motu* notice for the cancellation of bail, the prosecutrix and the witnesses completely reversed the stand taken earlier and no proceeding had been initiated against the prosecutrix and her parents, the Punjab and Haryana High Court directed the concerned police station to initiate the necessary proceedings against the prosecutrix and her parents for having committed the offence under s 182, IPC, together with any other offence that may be made out.[26]

Magistrate has no *Locus Standi* to Direct Filing of Complaint under Section 182

Reading s 182, IPC with s 195(1)(a), CrPC, it is clear that no court can take cognizance of any offence punishable under s 182, IPC (giving false information to a 1319public servant in order to cause him to use his lawful power) except on a written complaint of the concerned public servant or his higher authority.[27] cognizance by a magistrate could only be taken in the given case, on a written complaint of the concerned police officer. A magistrate has no *locus standi* to order the filing of a complaint in respect of an offence under s 182, IPC .[28]

43. Inquiry before Complaint--Whether Necessary

One of the ingredients of the offence under this section is that the accused should know or believe that the information given by him was false.

The offence is one in which *mens rea* must be established by direct evidence or by circumstances of the case and the conduct of the informant. Before a public servant may make a complaint of an offence under this section, he must have before him some evidence, either direct or inferential, to establish the fact that the information given to him was false to the knowledge or belief of the informant.[29] But as pointed out by Cuming J, in the case of *Emperor v Baharali Biswas* ,[30] there is no

provision in the law that, before a magistrate can inquire into a case under s 182, on the complaint of a police officer, he must give the accused party an opportunity of proving the truth of his case, and therefore if the accused person is convicted without any preliminary opportunity being given to prove the truth of his case, the conviction is not illegal on that account.[31] The terms of s 340, CrPC do not make it obligatory in any case to direct a preliminary inquiry before the making of the complaint; such preliminary inquiry may be held only when the offence is one of those referred to in cl (b) of s 195(1), Crpc . Section 182 , IPC, is not one of the offences mentioned in the aforesaid clause, and therefore, there is no reason why there should be a preliminary inquiry before a complaint is actually made by the public servant. Section 340 , CrPC, speaks of holding a preliminary inquiry, if at all, by the court, when it is making a complaint and not where it is the public servant who is making the complaint.[32] When, as the result of a police investigation, it appears that a complaint made to the police of the commission of an offence punishable under the Indian Penal Code is false, it is not necessary that the complainant should be given any further opportunity of establishing the truth of his allegations, before his prosecution under s 182 is proceeded with.[33]

When a complaint of an offence under this section or s 211 (duly sanctioned or not requiring sanction) is presented to a magistrate, it should be disposed of according to law, and there is no provision requiring him to first give the accused person an opportunity of proving the truth of the charge he has made.[34] But where a person challenges the police report and reiterates the charges made before the police, it is 1320clearly a complaint, and the magistrate should deal with it under the provisions of s 203, CrPC . The case under this section cannot be proceeded with until that person's complaint has been dealt with in accordance with law.[35]

Where a *narazi* petition against the report of police has been actually dismissed by the magistrate under s 203, CrPC, there is nothing to prevent a trial under s 182 from proceeding.[36]

44. Quashing of Complaint by High Court Allowing Petition Under Section 482 , Code of Criminal Procedure 1973

Where the complaint was lodged by the petitioner against the accused for the house trespass and theft of his properties, after investigation, the Investigating Officer submitted final form with the report of false accusations, no notice was sent to the petitioner informing him about the submission of the final report, subsequent protest petition filed by him was not registered, instead the petitioner complainant himself was prosecuted under ss 182 and 211, IPC for setting the law in motion falsely, order taking cognizance was found not sustainable in law and was quashed.[37]

45. Jurisdiction where Information Sent by Post

Where the information given to a public servant is contained in a letter posted at one place and delivered at another, the offence is committed partly in one local area and partly in another, the court, therefore, within whose jurisdiction the letter was posted is also competent to try the offence.[38]

46. Charge

The following form of charge may be adopted:

I (*name and office of magistrate, etc.*) hereby charge you (*name of accused*) as follows:

That you on or about the ..... day of ..... at ..... gave to ....., *(name of official designation of*

public servant), a public servant, the following information, namely ..... which you knew or believed to be false, intending thereby to cause (*or knowing it to be likely that you would thereby cause*) such public servant to do (*or omit*) something to omit..., which such public servant ought not to do (*or omit*) if the true state of facts were known by him (*or to use the lawful power of such public servant, to the injury*) (*or annoyance*) of ..... and thereby committed an offence punishable under section 182 of the Indian Penal Code, and within my cognizance.

And I thereby direct that you be tried by this court on the said charge.

47. Proof

To establish an offence under this section, it must be proved that the accused gave certain information to a public servant,[39] knowing or believing it to be false and with 1321the intention, or knowledge, mentioned in either of the two clauses [(a) or (b)] of the section.[40] The prosecution has further to show that the accused intended thereby to cause or knew that it was likely that he would thereby cause such public servant to do or omit anything which such public servant ought not to do or omit, if the true state of facts were known to him or that he intended thereby to cause or knew that it was likely that he would thereby cause such public servant to use his lawful powers to the injury or annoyance of any person.[41]

To constitute an offence under this section, it must be shown that the person giving the information, knew or believed it to be false, or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. The fact that an information is shown to be false does not cast upon the party who is charged with an offence under the section, the burden of showing that, when he made it, he believed it to be true. The prosecution must make out that the only reasonable inference was that he must have known or believed it to be false.[42] It is not enough to find that he had acted in bad faith, that is, without due care or inquiry, or that he had acted maliciously, or that he had no sufficient reason to believe or did not believe the charge to be true. The actual falsity of the charge, a recklessness in acting upon the information without testing it, or scrutinising its sources; or an actual malice towards the person charged--they are relevant evidence more or less cogent, but the ultimate conclusion must be, in order to satisfy the offence, that the accused knew that there was no just or lawful ground for proceeding. It may be difficult to prove this knowledge, but however difficult it may be, it must be proved, and unless it is proved, the informer must be acquitted.[43]

Where the oral and documentary evidence on record adduced by the complainant before the trial Court did not prove beyond reasonable doubt that accused had committed the offences punishable under ss 182 and 209, IPC, the appellant accused was acquitted of the charges under ss 182 and 209, IPC .[44]

48. Sentence

Where an accused was convicted under this section and sentenced to pay a fine of Rs 200 or, in default, to undergo a rigorous imprisonment for six months, and it was found that he was a mere servant and presently out of employment, his fine was reduced to Rs 100.[45]

49. Effect of Acquittal

An acquittal on a charge under this section is no bar to a subsequent trial for an offence under s 211 .[46] But an acquittal under s 211 may be a bar to a trial under s 1322182.[47] An acquittal on the ground that the person to whom the information was given was not a public servant, is no bar to a trial for

defamation under s 500 .[48]

19 Substituted by Act 3 of 1895, s 1, for the original section.

20 *Emperor v Ram Krishna Yeshawant Adarkar* 31 ILR Bom 204, (1907) 5 Cr LJ 105, 9 Bom LR 33 .

21 *Santosh Bakshi v State of Punjab* 2014 Cr LJ 4069, p 4072 (SC), AIR 2014 SC 2966, (2014) 5 SCC (Cri) 517 .

22 *Emperor v Gopaldas Khemchand* AIR 1936 Sind 94, 97, (1936) 37 Cr LJ 870; *Queen-Empress v Budh Sen* ILR 13 All 351, (1891) 11 AWN 109 (dissenting from *Gopal Ahmed Khan* ILR 14 Cal 314); *Acting Public Prosecutor v Chinnappa Reddi* 1 Weir 118 ; *R v Raghu* 15 ILR All 336 ; *R v Jonnalagadda* ILR 28 Mad 565, p 567 .

23 *Queen-Empress v Budhsen* ILR 13 All 351, p 353 .

24 *R v Raghu* 15 ILR All 336 ; *R v Gokal Satram* (1910) 11 Cr LJ 3, 3 SLR 132 ; *Muhamad v Bhiki* (1914) 15 Cr LJ 360 .

25 *Sher Mahommad v Emperor* AIR 1940 Lah 15, (1940) 41 Cr LJ 368, (1940) ILR Lah 396, 42 PLR 171 .

26 *Kauleshar Ahir v Emperor* AIR 1943 All 96, (1943) 44 Cr LJ 342*; Emperor v Thakuri* AIR 1940 Oudh 413, (1940) 41 Cr LJ 778, (1940) OWN 655 ; *Fariduddin Khan v Emperor* AIR 1936 All 313, (1936) 37 Cr LJ 562, (1936) All LJ 253 .

27 *Emperor v Ram Krishan Yeshwant Adarkar* (1907) 5 Cr LJ 105, p 110, 31 ILR Bom 204, 9 Bom LR 33 .

28 *Queen-Empress v Ganesh Khanderao* ILR 13 Bom 506 ; *Baleshwar Singh v District Magistrate and Collector of Banaras* AIR 1959 All 71 .

29 Re *Golam Ahmed Kazi* ILR 14 Cal 314.

30 *Queen v Periannan* ILR 4 Mad 241 .

31 *Queen-Empress v Ganesh Khanderao,* ILR 13 Bom 506 .

32 *Baleshwar Singh v District Magistrate and Collector, Banaras* AIR 1959 All 71, p 74 ; *Banti Pande v Emperor* AIR 1930 Pat 550, p 555 ; *State v Roopa* AIR 1966 Raj 101, (1966) Cr LJ 576 (Raj) .

33 *Santosh Bakshi v State of Punjab* 2014 Cr LJ 4069, AIR SC 2966, (2014) 13 SCC 25, 2014 (86) AIC 58 .

34 *Queen-Empress v Budh Sen* ILR 13 All 351, p 355 .

35 *Baleshwar Singh v District Magistrate and Collector of Banaras* AIR 1959 All 71 ; *Sita Ram v District Magistrate, Pilibhit* 1957 All LJ 383, 1957 All WR (HC) 339 .

36 *Acting Public Prosecutor v Chinnappa Reddi* 1 Weir 118, p 119 .

37 *Queen-Empress v Joy Narain Patro* 20 WR (Cr) 66 ; *Emperor v Akhtiar* (1913) 14 Cr LJ 252 ; *Sarju Saran v Emperor* (1910) 11 Cr LJ 438 .

38 *State of Kerala v Markose* AIR 1962 Ker 133, p 135, (1962) 1 Cr LJ 610, (1961) 1 ILR Ker 224, (1961) KLT 1060 .

39 *Basir-Ul-Haq & Ors v State of West Bengal* AIR 1953 SC 293, (1953) Cr LJ 1232 ; *Satish Chandra v Ram Dayal* AIR 1921 Cal 1 (SB) .

40 *U Aung Ph v The King (FB)* AIR 1938 Rang 232, (1939) Cr LJ 663 (FB) .

41 *Sukhdev Singh v State* 63 Punj LR 566, (1961) All Cr R 312, (1961) All WR (Supp) 59 .

42 *Sardar Khan v Emperor* AIR 1930 Lah 54 (1), (1929) 30 Cr LJ 1008 ; *Harghan Khan v Empress* 32 PR 1884 (Cr) ; *Murad v Empress* 29 PR 1894 ; *Emperor v Ramchandra Yashwant Adarkar* (1907) 5 Cr LJ 105, 9 Bom LR 33 ; *Thakar Singh v Chhattan Pal* (1910) 11 Cr LJ 420, 20 PR 1910 (Cr) .

43 *Apaya Tatoba v Emperor* (1913) 14 Cr LJ 491(Bom); *Raghvendra v Kashinath Bhat* ILR 19 Bom 717, p 725 .

44 *Emperor v Sarada Prosad Chatterjee* ILR 32 Cal 180, (1905) 2 Cr LJ 171 .

45 *Vide* High Court Proceedings, 23 April 1872, 7 Mad HCR App 5.

46 *Bhokteram v Heera Kolita* ILR 5 Cal 184 ; *Baparam Surma v Gourinath Dutt* ILR 20 Cal 474 ; *Emperor v Sarada Prosad Chatterjee* ILR 32 Cal 180, (1905) 2 Cr LJ 171 ; *Gati Mandal v Emperor* (1906) 4 Cr LJ 68, 7 Mad HCR App 55; *D Venkata Reddi* 1 Weir 120; *Muthu Velu Kudumbaran v Samiah Kudamabaran* AIR 1937 Mad 8, 59 ILR Mad 1083, (1936) 37 Cr LJ 1134

; *Queen-Empress v Raghu Tiwari* 15 ILR All 336 ; *Jang Bahadur Singh v Emperor* AIR 1928 All 342, 26 All LJ 533 ; *Daroga Gope v Emperor* AIR 1925 Pat 717, ILR 5 Pat 33 ; *Kantir Missir v Emperor* AIR 1930 Pat 98, (1929) 30 Cr LJ 710 ; *Nota Ram v Emperor* AIR 1943 Lah 31, (1943) 44 Cr LJ 305, (1942) ILR Lah 675 ; *Mapaw v King-Emperor* AIR 1931 Rang 52, (1931) 32 Cr LJ 202 ; *State v Bala Prasad* AIR 1952 Raj 142, 2 ILR Raj 44 ; *State of Punjab v Brijlal Palta* AIR 1969 SC 355, (1969) Cr LJ 646 .

47 *Queen-Empress v Raghu Tiwari* 15 All 336, p 337 .

48 *Nota Ram v Emperor* AIR 1943 Lah 31, p 33, (1943) 44 Cr LJ 305 ; *Vadula Buchanna v State of Hyderabad* AIR 1956 Hyd 25, (1956) Cr LJ 215 .

49 *Jang Bahadur Singh v Emperor* AIR 1928 All 342 .

50 *Chintamani Paul (Kumhar) v State of Jharkhand* 2009 Cr LJ 2283 (Jhar) .

51 *Raghavendra v Kashinath Bhat* ILR 19 Bom 717, p 725 .

52 *Emperor v Ram Krishna Yeshwant Adarkar* (1907) 5 Cr LJ 105, p 109, 31 ILR Bom 204, 9 Bom LR 33 .

53 *Apaya Totoba Mande v Emperor* (1913) 14 Cr LJ 491 ; *Chandrapal v State of Madhya Pradesh* (1969) Jab LJ 114 (SN) **relying** upon *Emperor v Kashiram* (1924) 46 ILR All 906 (the distinction between report and charge should be borne in mind).

54 *Dajaj v State* (1962) 1 Cr LJ 627, p 628 .

55 *Thakar Singh v Chettar Pal* (1910) 11 Cr LJ 420, **following** 31 ILR Bom 204.

56 Re *Mallala Obiah of Owk*AIR 1918 Mad 731, (1918) 19 Cr LJ 38, (1917) Mad WN 875 .

57 *Muthu Goundan v Emperor* AIR 1925 Mad 400, (1925) 26 Cr LJ 962, (1925) Mad WN 108 .

58 *Ram Renu Chattoraj v Emperor* AIR 1941 Cal 288, (1941) 42 Cr LJ 624 .

59 *Empress v Arju* 7 ILR Bom 184 .

60 *Hidyatullah v Emperor* AIR 1936 Pesh 66, (1936) 37 Cr LJ 604 ; *Zorawar Singh v Emperor* (1911) 12 Cr LJ 432 .

61 *Muthuvelu Kundumbaran v Samiah Kundambaran* AIR 1937 Mad 8, 59 ILR Mad 1083, (1936) 37 Cr LJ 1131 .

62 *Mula v Emperor* AIR 1919 All 159, (1919) 20 Cr LJ 114, 17 All LJ 32 .

63 *State of Punjab v Brij Lal Palta* AIR 1969 SC 355, (1969) Cr LJ 645, p 649, (1969) 1 SCJ 383 .

64 *State of Punjab v Brij Lal Palta* AIR 1969 SC 355, p 358, (1969) Cr LJ 645 ; **overruling***Emperor v Prag Dutt* (1928) 29 Cr LJ 938 ; *Jaswant Singh v State* (1975) Cut LR (Cr) 325 (Punj) ; *Valaiti Ram Grover v State of Punjab* (1977) Cut LR 149, p 151 (P&H); *Nota Ram v Emperor* AIR 1943 Lah 31, p 33, (1943) 44 Cr LJ 305 ; *Vadula Buchana v State of Hyderabad* AIR 1956 Hyd 25, (1956) Cr LJ 215 .

65 *Nagalingam v State* (1984) Mad LJ (Cr) 593 (Mad) .

66 *Umrao Singh v Emperor* (1909) 9 Cr LJ 518, 6 All LJ 236 ; **dissented** from in *Ram Jiwan v King-Emperor* AIR 1926 Oudh 448, (1926) 27 Cr LJ 822 .

67 *Umrao Singh v King-Emperor* (1909) 6 All LJ 236, 2 IC 200 .

68 *Ram Jiawan v King-Emperor* AIR 1926 Oudh 448, (1912) 27 Cr LJ 822, 3 OWN Supp 96 .

69 *Sant Ram v Divan Chand* (1923) 24 Cr LJ 913 .

70 *State v Vidyanand Govind Kangali* AIR 1956 Bom 265, (1956) Cr LJ 503(1).

71 *Empress v Madho* ILR 4 All 498, (1882) 2 All WN 128 .

72 *Ananga Mohan Datta v Emperor* AIR 1919 Cal 501, (1918) 19 Cr LJ 336, 22 CWN 478 .

73 *State of Maharashtra v Limbaji Sayaji Mhasle, Sarpanch Gram Panchayat* (1976) Mah LJ 475 ; *Emperor v Gokul* (1910) 11 Cr LJ 3, p 4 .

74 *Queen-Empress v Joy Narain Patro* 20 WR (Cr) 66 ; *Emperor v Akhtiar* (1913) 14 Cr LJ 252 ; *Sarju Saran v Emperor* (1910) 11 Cr LJ 3, 4 .

75 *Emperor v Gokul* (1910) 11 Cr LJ 3, 4, 3 SLR 132 .

76 *Sher Mahommad v Emperor* AIR 1940 Lah 15, (1940) 41 Cr 368, (1940) ILR Lah 396, 42 PLR 171 .

77 *Chinan Ramana Gowd v Emperor* 31 ILR Mad 506, 18 Mad LJ 573, (1909) 9 Cr LJ 77 ; *Emperor v Nga Aung Po* (1905) 2 Cr LJ 474, 1905 UBR 13 ; *Mangu v Emperor* AIR 1914 Lah 306, (1914) 15 Cr LJ 650, 227 PLR 1914, 35 PWR (Cr) 1914, **dissented** from in *Panna Lal v Emepror* AIR 1920 Lah 349 ; *U Hlaing v RP Abigail* AIR 1937 Rang 232, (1937) 38 Cr LJ 980 .

78 *U Hlaing v RP Abigail* AIR 1937 Rang 232 .

79 *Emperor v Lachman* AIR 1929 Pat 4, 5, (1929) 30 Cr LJ 177, 7 ILR Pat 715, 10 PLT 244 .

80 *Emperor v Gopaldas Khemchand* AIR 1936 Sind 94, 97, (1936) 37 Cr LJ 870, 30 SLR 75.

81 *Queen-Empress v Ramji Sajabarao* 10 ILR Bom 124 ; *Sheo Prasad v State* AIR 1959 All 378, 380, (1959) Cr LJ 683, (1959) All LJ 44; Re *Pattammal*AIR 1940 Mad 893, (1940) 41 Cr LJ 950 ; Re *Kottayan Thevar*AIR 1960 Mad 9, (1960) Cr LJ 85 ; *Panna Lal v Emperor* AIR 1920 Lah 349, (1920) 21 Cr LJ 818, 1 ILR Lah 410, 166 PLR 1920 .

82 *Bodhan Garain v Emperor* AIR 1933 Pat 555(1), (1933) 34 Cr LJ 1216, 16 PLT 541 .

83 *Queen-Empress v Ramji Sajabarao* 10 ILR Bom 124 .

84 *U Hlaing v RP Abigail* AIR 1937 Rang 232 .

85 *Sheo Prasad v State* AIR 1959 All 378, p 379 .

86 *Bishwanath Singh v Emperor* AIR 1928 Pat 56, 57, (1928) 28 Cr LJ 872, 9 PLT 342.

87 *Kalawati's* case AIR 1953 SC 131 .

88 *State of Kerala v Markose* AIR 1962 Ker 133, 137, (1962) 1 Cr LJ 610, (1962) 1 ILR Ker 224 .

89 *Ibid*; *Fariduddin Khan v Emperor* AIR 1936 All 313, (1936) 37 Cr LJ 562 .

90 *Emperor v Gopaldas Khemchand* AIR 1936 Sind 94, p 97, (1936) 37 Cr LJ 870, 30 SLR 75 ; *Jhamatmal Alumal v Emperor* AIR 1939 Sind 274, (1940) 41 Cr LJ 8 ; *Bodhan Gerain v Emperor* AIR 1933 Pat 555(1) ; *Queen-Empress v Ramji Sajabarao* 10 ILR Bom 124 ; *Emperor v Lachman Singh* AIR 1929 Pat 4, (1929) 30 Cr LJ 177 ; Re *Pattammal*AIR 1940 Mad 898, (1940) 41 Cr LJ 950 ; Re *Kuttayan Thevar*AIR 1960 Mad 9, (1960) Cr LJ 85 .

91 *Kantilal v State* AIR 1970 Guj 218 ; *State of Kerala v Markose* AIR 1962 Ker 133, (1962) 1 Cr LJ 610, (1962) 1 ILR Ker 224, (1961) KLT 1060 ; *U Hlaing v RP Abigail* AIR 1937 Rang 232, (1937) 38 Cr LJ 980 ; *Bo Ni Maung v Emperor* AIR 1935 Rang 97, (1936) 37 Cr LJ 9 ; *Sultan v C De M Willbourne* AIR 1925 Rang 364, (1925) 26 Cr LJ 1532 ; *Subba Reddi v Emperor* AIR 1936 Mad 160, (1936) 37 Cr LJ 857 ; *Chinna Raman Gowd v Emperor* 31 ILR Mad 506, (1909) 9 Cr LJ 77 ; *Manju v Emperor* AIR 1914 Lah 360, (1914) 15 Cr LJ 650 ; *Emperor v Akhtiar* (1913) 14 Cr LJ 256 (Sind) ; *Sarju Saran v Emperor* (1910) 11 Cr LJ 438 (All) ; *King-Emperor v Nga Aung Po* (1905) 2 Cr LJ 474, 1905 UBR 13 .

92 *State of Kerala v Markose* AIR 1962 Ker 133, p 137-38, (1962) 1 Cr LJ 610, (1961) Ker LJ 1060 .

1 *King-Emperor v Nga Aung Po* (1905) 2 Cr LJ 474, (1905) UBR 13 .

2 *Queen v Daria Khan* (1870) 2 NWP (Cr) R 128 .

3 *Queen-Empress v Subbayya* 12 ILR Mad 451, 1 Weir 113 ; *Queen-Empress v Gokul* 34 PR 1879 (Cr) ; *Empress v Sant Lal* 41 PR 1881 (Cr) ; *Ameer Ali v Dukhan Momin* AIR 1928 Pat 574, (1928) 29 Cr LJ 613 .

4 *Queen-Empress v Subbayya* 12 ILR Mad 451, 453, 1 Weir 113 .

5 *Sheo Prasad v State* AIR 1959 All 378 .

6 Re *Barkat* ILR 19 All 200.

7 *Emperor v Bindeshri Singh* (1906) 3 Cr LJ 225, 28 ILR All 331, 3 All LJ 98 ; *Mattaan v Emperor* (1910) 11 Cr LJ 537, 33 ILR All 163, 7 All LJ 1143 .

8 *Mt Allah Wasai v Emperor* AIR 1926 Lah 12, 13, (1925) 26 Cr LJ 1369 ; *Ghulam Mahommad v Emperor* AIR 1922 Lah 113, 3 ILR Lah 46, (1922) 23 Cr LJ 399, 88 PLR 1922 ; *Imperator v Khan Mahommad* 1 Sind LR 124 .

9 *R v Ram Golam* 11 WR Cr 22 ; *R v Grish Chunder* 19 WR (Cr) 33 .

10 *KM Narapanaswami v Kerala State* AIR 1957 Ker 134 .

11 Re *Rambharathi Hirabharti*AIR 1924 Bom 51, 53, (1923) 24 Cr LJ 333, 47 ILR Bom 907, 25 Bom LR 772 .

12 *Emperor v Jonnalagadda Vendatrayudu* (1906) 3 Cr LJ 108, 28 ILR Mad 565, p 567, **approving** observation of Mayne in *Mayne's Criminal Law of India* in s 372 ; **dissenting** from *Queen v Piriannam* ILR 4 Mad 241, 1 Weir 117 ; *Sessions Judge, Tinnevelly v Sevan Chetty* (1908) 9 Cr LJ 170, 173(FB), ILR 32 Mad 258, 5 Mad LT 264 .

13 *Reg v Jamoona* 6 ILR Cal 620 .

14 Ratanlal's Unreported Cases 315, Cr R 1 of 1887.

15 *Public Prosecutor in Katta Prakasam*AIR 1925 Mad 123, (1924) 25 Cr LJ 1383, 47 Mad LJ 658 .

16 *Rogi v Emperor* AIR 1935 All 981, (1936) 37 Cr LJ 44, 1935 All LJ 1145 ; Re *Narayana Reddiar*AIR 1954 Mad 245 ; *Sambhoo Nath Gupta v State* AIR 1959 All 545 .

17 Re *Moulvy Abdul Lateef* 9 WR 31 (Cr).

18 *Nga Lu Po v Emperor* (1909) 10 Cr LJ 12, p 14 .

19 *Santosh Bakshi v State of Punjab* 2014 Cr LJ 4096, p 4072 (SC), AIR 2014 SC 2966, (2014) 5 SCC (Cri) 517 .

20 *Hingan Khan v Empress* 32 PR (Cr) 1884 ; *Sardar Khan v Emperor* AIR 1930 Lah 54(1), (1929) 30 Cr LJ 1008, 30 PLR 655, 11 LLJ 468 ; *Sukhdeo Singh v State* 63 PLR 566, (1961) AWR Supp 39 .

21 *Emperor v Ram Krishna Yeshwant Adarkan* (1907) 5 Cr LJ 105, 31 ILR Bom 204, 9 Bom LR 33 .

22 *Murad v Empress* 29 PR (Cr) 1894 .

23 *Rugan Kutti v Emperor* ILR 29 Mad 640, 1 Weir 190 ; *Sakhichand Kandu v Emperor* AIR 1937 Pat 6, (1937) 38 Cr LJ 289, 1937 PWN 69 .

24 *Nga Lu Po v Emperor* (1909) 10 Cr LJ 12, p 14 .

25 *Kashiram Bhagirath v State* AIR 1955 NUC 35, (1955) Cr LJ 171 .

26 *Queen-Empress v Budh Sen* 13 ILR All 351 ; *Emperor v Gopal Das Khemchand* AIR 1936 Sind 94, (1936) 37 Cr LJ 870 ; *Acting Public Prosecutor v Chinappa Reddi* 1 Weir 118 ; *Emperor v Lachman Singh* AIR 1929 Pat 4 ; *Chunni Lal v State* AIR 1952 All 18 .

27 *Public Prosecutor v D Venkata Reddi* 1 Weir 120 .

28 *Banti Pande v Emperor* AIR 1930 Pat 550 .

29 *State v Roopa* AIR 1966 Raj 101, (1966) Cr LJ 576, (1965) 15 ILR Raj 1134, (1966) Raj LW 33 .

30 *Shambhoo Nath Gupta v State* AIR 1959 All 545 .

31 *R v Budh Sen* 13 ILR All 351, **dissenting** from in Re *Golam* 14 ILR Cal 314; *R v Raghu* 15 ILR All 336 ; **followed** in *Ma Paw v Emperor* AIR 1931 Rang 12, 32 Cr LJ 202 ; *R v Jonnalagadda* 28 ILR Mad 565, 567; *Emperor v Gopaldas Khemchand* AIR 1936 Sind 94 ; *Emperor v Lachman Singh* AIR 1929 Pat 4 .

32 *R v Raghu* 15 ILR All 336 ; *R v Gokal Satram* (1910) 11 Cr LJ 3, 3 SLR 132 ; *Mahommad v Bhiki* (1914) 15 Cr LJ 360 .

33 *Acting Public Prosecutor v Chinnappa Reddi* 1 Weir 118 .

34 *Emperor v Gopaldas Khemchand* AIR 1936 Sind 94, p 95 .

35 *Queen-Empress v Ganesh Khanderao* 13 ILR Bom 506, p 512 .

36 Notes under the heading 'Legislative Changes', *supra.*

37 *Queen-Empress v Ganesh Khanderao* 13 ILR Bom 506 ; *Baleshwar Singh v District Magistrate and Collector, Banaras* AIR 1959 All 71, 74; *Emperor v Lachman Singh* AIR 1929 Pat 4 .

38 *Algoo Lal v Emperor* AIR 1920 All 196, 21 Cr LJ 576, 18 All LJ 626 ; *Mosafir Singh v Emperor* AIR 1932 Pat 170 (1), 31 Cr LJ 314, 13 PLT 83 ; *Ganga Dayal v Emperor* AIR 1933 Oudh 374, 34 Cr LJ 1149, 10 OWN 555 ;*Kauleshar Ahir v Emperor* AIR 1943 All 96, 44 Cr LJ 342 .

39 *Kauleshar Ahir v Emperor* AIR 1943 All 96, 44 Cr LJ 342 ; *Emperor v Thakuri* AIR 1940 Oudh 413, 41 Cr LJ 778 ; *Fariduddin v Emperor* AIR 1936 All 313, 37 Cr LJ 562, 1936 All LJ 253 .

40 *Incha Ram v Emperor* AIR 1922 All 272, 24 Cr LJ 88, ILR 44 All 647 .

41 *Queen-Empress v Budh Sen* 13 ILR All 351, 353; *Emperor v Lachman Singh* AIR 1929 Pat 4, 30 Cr LJ 177 .

42 *Pasupati Banerji v King* AIR 1950 Cal 97, p 99, 51 Cr LJ 469 .

43 *Imandy Appalaswami v Emperor* 15 Cr LJ 672, p 673 .

44 *Kendillon v Maltby* (2) Moody&Rob 438, 1 Car & M 402.

45 *Queen-Empress v Ganesh Khanderao* 13 ILR Bom 506, p 511 .

46 *Supra*; Re *Manikkram Pillai*(1907) 8 Cr LJ 421, 4 Mad LT 324; *R v Dwarka Prasad* 6 ILR All 97 .

47 1 Weir 122; *R v Jonnalagadda* 28 ILR Mad 565 .

48 *Manohar v Emperor* AIR (1918) All 85 (1), 19 Cr LJ 895, 16 All LJ 614 .

49 *Sant Ram v Diwan Chand* (1923) 24 Cr LJ 913, p 915 .

50 *Shambhoo Nath Gupta v State* AIR 1959 All 545, (1959) Cr LJ 103, (1959) All WR (HC) 606 ; *Queen-Empress v Raghu Tewari* 15 ILR All 336 .

51 *Empress v Sant Lal* 41 PR 1881 (Cr) ; **following***Empress v Gokal* 34 PR 1879 (Cr) .

52 *Amir Ali v Dukhan Momin* AIR 1928 Pat 574, 29 GLJ 613 .

53 *Queen-Empress v Budh Sen* 13 ILR All 351, p 353 .

54 *Emperor v Lachman Singh* AIR 1929 Pat 4, 30 Cr LJ 177, 7 ILR Pat 715, 10 PLT 244 .

55 *Fariduddin Khan v Emperor* AIR 1986 All 313, 37 Cr LJ 562, (1936) All LJ 253 .

56 *Devi v Emperor* AIR 1918 All 265, 19 Cr LJ 257, 16 All LJ 105 .

57 *Phulel v Emperor* (1913) 14 Cr LJ 56, ILR 35 All 102, 11 All LJ 15 .

58 *Mathura Prasad v Emperor* AIR 1917 All 223, 18 Cr LJ 1017, 39 ILR All 715, 15 All LJ 767 .

59 *Pasupati Banerji v King* AIR 1950 Cal 97, 51 Cr LJ 469 .

60 *Emperor v Jonnalagadda Venkatarayadu* (1906) 3 Cr LJ 108, 28 ILR Mad 565 .

61 *Queen v Periannan* ILR 4 Mad 241, 1 Weir 117 .

62 *Emperor v Jonnalagadda Venkatarayadu* 28 ILR Mad 565, 3 Cr LJ 108 .

63 *Queen v Periannan* ILR 4 Mad 241, 1 Weir 117 .

64 *Emperor v Jonnalagadda Venkatarayadu* 28 ILR Mad 565 .

65 *Public Prosecutor v Thavasiandi Thevan* 1 Weir 122 .

66 *R v Madho* ILR 4 All 498 .

67 *Shambhoo Nath Gupta v State* AIR 1959 All 545, (1959) Cr LJ 1037, (1959) All WR (HC) 606 .

68 *Poonit Singh v Madho Bhat* 13 ILR Cal 270 .

69 *State of Rajasthan v Iqbal Hussain* (1963) Raj LW 48 .

70 *Dahya Revla v Ravachhita* (1970) Cr LJ 425 (Guj) .

71 *Adhir Chandra Tiwary alias Adhiu Tiwari v State of Bihar* (1996) 2 East Cr C 613 (Pat) .

72 *Harbhajan Singh Bajwa v Seniour Supdt Police, Patiala* (2000) Cr LJ 3297 (P&H) .

73 *Salauddin Owaisi v DSP, CID Hyderabad* (2000) Cr LJ LJ 4848 (AP)(DB).

74 *State v Kanti Unad Ranning* AIR 1955 Sau 10 ; *Daulat Ram v State of Punjab* AIR 1962 SC 1206, (1962) 2 Cr LJ 286 ; *Rameshwar Singh v State* (1963) BLJR 471 ; *Brijmohan v State of Uttar Pradesh* (1969) All Cr R 377-79, (1969) All WR (HC) 600; *Dujal v State* (1961) All LJ 278 ; *Rudia Singh v State of Punjab* (1977) CLR 154 (Punj) ; *Jaswant Singh v State* (1975) CLR 325 ; *Lajja Ram v State* AIR 1952 HP 32 ; Re *Jagannathachar*AIR 1942 Mad 326 ; *State v Hem Narain* AIR 1953 All 200 ; *Sumer Goshain v State* AIR 1952 All 560 ; *Raj Roushan Yadav v State of Bihar* 2014 (143) AIC 432 (Pat) .

75 *State v Kathi Unad Ranning* AIR 1955 Sau 10 .

76 *Kanta v BS Verma* (1999) Cr LJ 1839 (Bom) .

77 *Krishna Tukaram v Secy to Chief Minister* AIR 1955 Bom 315 ; but *Barkat v Emperor* AIR 1943 All 6, 44 Cr LJ 165 ; *State v Nandlal* AIR 1951 Sau 8, 53 Cr LJ 850 .

78 *Lajja Ram v State* AIR 1952 HP 32 ; Re *Jagannathachar*AIR 1942 Mad 326 ; *State v Hem Narain* AIR 1953 All 200 ; *Sumer Goshain v State* AIR 1952 All 560 ; *Sheomangal Singh v Emperor* AIR 1942 Oudh 425 ; Re *Veerappa Moopan*AIR 1939 Mad 469 .

79 *Makaradhwaj Sahu v State* AIR 1954 Orissa 175 ; *Bansidhar v Province of Orissa* AIR 1951 Orissa 84 ; *State of Orissa v Oria Samaj Majhi* AIR 1951 Orissa 138 ; *Santi Lal v Emperor* AIR 1948 Cal 103 .

80 *Hari Lal v Abhoy Charan* AIR 1948 Cal 5 .

81 *Sudarasan v Emperor* AIR 1947 Pat 64 .

82 *Babu v Emperor* AIR 1940 Oudh 241 .

83 *Daulat Ram v State of Punjab* AIR 1962 SC 1206, (1962) 2 Cr LJ 286 ; *Sudarsan v Emperor* AIR 1947 Pat 64 ; *Babu v Emperor* AIR 1940 Oudh 241 ; *Rameshwar Singh v State* 1963 BLJR 471 ; *Public Prosecutor v Mahommad Ali* AIR 1969 AP 41, (1969) Cr LJ 145 .

84 *Vapan Kumar Khurana v Manjit Kaur* 2009 Cr LJ (NOC) 724 (P&H).

85 *State v Birda* AIR 1966 Raj 40, (1966) Cr LJ 166 .

86 *Sham Lal Thukral v State of Punjab* 2009 Cr LJ 189 (P&H), 2009 (3) RCR (Criminal) 168 .

87 *Harbans Singh v State of Punjab* (1991) 3 Rec Cr R 113, (1991) 18 Cr LT 431 (P&H).

88 *Davinder Singh Kapoor v State of Punjab* (1991) 1 CLR 194 (P&H) .

89 *Malkiat Singh v State of Haryana* (1999) 1 Cr CJ 702, (1999) 2 Rec Cr R 10 (P & H).

90 *Randhir v State of Haryana* (2004) Cr LJ 479 (P&H) .

1 *Basir-ul-Haque v State of West Bengal* AIR 1953 SC 293, p 294 .

2 *Basir-ul-Haque v State of West Bengal* AIR 1953 SC 293, p 294 ; *Dhirendra Nath Bera v Nurul Huda* AIR 1951 Cal 133 (FB) .

3 *Pramatha Nath v State* AIR 1951 Cal 581 ; *Besir-ul-Haque v State of West Bengal* AIR 1953 SC 293 .

4 *Basir-ul-Haque v State of West Bengal* AIR 1953 SC 293 .

5 *Ibid.*

6 *Dhirendra Nath Bera v Nurul Huda* AIR 1951 Cal 133 (FB) ; *Basir-ul-Haque v State of West Bengal* AIR 1953 SC 293 ; *Chaman Sing v Tarak Singh* AIR 1942 Lah 76 . Cases to the contrary are no longer good law.

7 *Narayana v Veerappa* AIR 1951 Mad 34 (FB) ; *Basir-ul-Haque v State of West Bengal* AIR 1953 SC 293, (Cases to the contrary are no longer good law); *Shantabai v Kadia Trikamji* AIR 1954 Sau 50 ; *Nallappa Govindan v Chinnammal* AIR 1942 Mad 19 ; *Mahommad Isa v Nazim Hussain* AIR 1940 All 246 .

8 *Basir-ul-Haque v State of West Bengal* AIR 1953 SC 293 .

9 Re *Chinnayya Goundan*AIR 1948 Mad 474 ; Re *PM Kamath*AIR 1954 Mad 561, 55 Cr LJ 799 .

10 *Raghavaendra v Kashinathbat* ILR 19 Bom 717 ; *Emperor v R Yeshwant Adarkar* ILR 31 Bom 20 ; *Empress v Arjun* ILR 7 Bom 184 .

11 *Emperor v Sarda Prasad Chatterji* ILR 32 Cal 180 ; *Gati Mandal v Emperor* 4 CLJ 88 ; *Balaji Appaji v Emperor* AIR 1946 Bom 7, *State v Vipra Khimji* AIR 1952 Sau 67 .

12 *Girdhari Naik v Empress* 5 CWN 727 .

13 *Nota Ram v Emperor* AIR 1943 Lah 31 ; **overruling***Shah Mahommad v Emperor* AIR 1941 Lah 216 .

14 *Queen-Empress v Raghu Tewari* 15 All LJ 336 .

15 *Mi Ngwe v Mi Chit* (1912) 13 Cr LJ 576 .

16 *Rayan Kutti v Emperor* 26 ILR Mad 640 ; *Emperor v Khubomal* (1915) 16 Cr LJ 104 .

17 *State v Bala Prasad* AIR 1952 Raj 142 .

18 *Ma Po v Emperor* AIR 1931 Rang 12, 32 Cr LJ 202 ; See also the case law discussed therein.

19 *Public Prosecutor v Linga Balija* AIR 1942 Mad 513 .

20 *Sher Mahommad v Emperor* AIR 1940 Lah 15 ; *Babu Ram v Ram Nath* (1976) All Cr Cas 319 ; *JC Chopra v State* (1971) Cr LJ 1009, p 1010 (Del) ; *Sudarsan v Emperor* AIR 1947 Pat 64 ; *State v Bala Prasad* AIR 1952 Raj 142 ; *Ram Narain v State* AIR 1952 All 436 ; *Bachalal v Emperor* AIR 1936 Pat 56, 37 Cr LJ 324 .

21 *Pasupati Banerji v King* AIR 1950 Cal 97 ; *Oyyappa Kone v Chidambaram Chettiar* AIR 1941 Mad 764 ; *Ram Rakha v Emperor* AIR 1937 Lah 624 .

22 *Nayan Chand v State* AIR 1951 Assam 54 .

23 *Sheo Prasad v State* AIR 1959 All 378 .

24 *Sudarsan v Emperor* AIR 1947 Pat 64 ; *State v Bala Prasad* AIR 1952 Raj 142, *Ram Narain v State* AIR 1952 All 436 .

25 *Bachalal v Emperor* AIR 1936 Pat 56, 37 Cr LJ 324 .

26 *Court of its own Motion v Sham Lal* (2001) (IT) RCR (Cr) 233 (P&H).

27 *Rajnath Gupta & Ors v State & Anor* (1999) IV CCR 24 (Del) .

28 *Krishna Gopal v Purushottam and State of Madhya Pradesh* (1987) C Cr J (MP) 120 .

29 *D Sundar v Emperor* AIR 1919 Pat 511, 20 Cr LJ 618 ; *Habibur Rahman v Munshi Khodabux* (1907) 5 Cr LJ 29, 11 CWN 195 ; Re *Govindan Nayar* 7 ILR Mad 224.

30 *Emperor v Baharali Biswas* AIR 1931 Cal 634, 134 IC 919, 32 Cr LJ 1241, (1931) Cr C 834, 53 ILR Cal 1056 .

31 *Nishikanta Chatterji v Behari Kahar* AIR 1933 Cal 532, 533, 34 Cr LJ 1059, 60 ILR Cal 565, 37 CWN 368; *Gopal Chandra Mandal v State* AIR 1957 Cal 382, 383, (1957) Cr LJ 716; *Queen-Empress v Raghu Tiwari* 15 ILR All 336 ; *Emperor v Ghanshayam* (1908) 8 Cr LJ 349 ; *D Revla v R Chitta* 1970 Cr LJ 425, 427 (Guj); *Hanuman Pershad v Delhi Municipality* (1974) Cr LJ 1451 (Del) .

32 *Gopal Chander Mandal v State* AIR 1957 Cal 382 -83, (1957) Cr LJ 716.

33 *Queen-Empress v Raghu Tiwari* ILR 15 All 336, 13 All WN 1893 .

34 *Emperor v Ghansaram* (1908) 8 Cr LJ 349 .

35 *Bhagabat Chandra Mandal v Emperor* AIR 1939 Cal 271, 40 Cr LJ 644 ; *Mehroo Vanko Rabri v Emperor* AIR 1937 Sind 209, 38 Cr LJ 951, 31 SLR 429 ; *Emperor v Topan Chatomal* (1910) 11 Cr LJ 199 ; *Ali Mahommad v Emperor* (1911) 12 Cr LJ 539 ; *Emperor v Rabta Raut* AIR 1915 Cal 733, 16 Cr LJ 320 ; *Sheo Balak v Emperor* AIR 1920 All 303, 22 Cr LJ 81 ; *Brindaban v Emperor* (1919) 20 Cr LJ 791 ; *Mahadeo Singh v Queen-Empress* 27 ILR Cal 921 ; *Queen-Empress v Sham Lall* 14 ILR Cal 707 (FB) .

36 *Kangali Molla v Emperor* AIR 1939 Cal 340, 40 Cr LJ 647, (1939) ILR 1 Cal 322 ; **dissenting** from *Shekandar Mia v Emperor* AIR 1933 Cal 614, 34 Cr LJ 1077, 37 CWN 399 .

37 *Rajesh Kumar Sah v State of Jharkhand* (2005) Cr LJ 1554 (Jhar) .

38 *Emperor v Narain Das* AIR 1936 All 105, p 107, 37 Cr LJ 157, (1936) All LJ 416, s 182, CrPC .

39 *Umarao Singh v Emperor* (1909) 9 Cr LJ 518, 519, 6 All LJ 236 .

40 *State v Roopa* AIR 1966 Raj 101, (1966) Cr LJ 576 Raj ; Re *Jayadevan*(1971) 1 Mad LJ 497, (1971) LW (Cr) 114, *State of Maharashtra v Limbaji Sayaji Mahaske* (1976) Mah LJ 476 ; *Sukhdeo Singh v State* (1961) 63 Punj LR 566, (1961) WR (Supp) 59 .

41 *State of Maharshtra v Limbaji Sayaji Mhaske* , *Sarpanch Gram Panchayat*(1976) Mah LJ 475.

42 *Rayan Hatti v Emperor* 26 ILR Mad 640 ; *Empress v Madho* ILR 4 All 498 ; *Fakirapa Ningappa Chikkabagewadi v State* AIR 1960 Mys 208 ; *Maung Po Ni v Emperor* AIR 1931 Rang 97, 37 Cr LJ 9 ; *Emperor v Chandra Kumar De* AIR 1927 Cal 78, 28 Cr LJ 25 ; *Gopal Kahar v Emperor* (1921) 22 Cr LJ 347 ; *Ali Ahmad v Emperor* 22 Cr LJ 503 ; *Gaya Barhai v Emperor* AIR 1923 Oudh 4, 23 Cr LJ 641 ; Re *Jayadevram*(1971) LW (Cr) 114, (1971) Mad LJ (Cr) 334; *State of Maharashtra v Limbaji Sayaji Mahaske* (1976) Mah LJ 475 .

43 *Murad v Empress* 29 PR (Cr) 1894 ; *Sardar Khan v Emperor* AIR 1930 Lah 54 (1), 30 Cr LJ 1008 .

44 *T Revanna v H Chandrappa* 2007 Cr LJ 1995, p 1997 (Kant), 2007 (1) KCCR 803 .

45 *Gopal Chandra Mandal v State* AIR 1957 Cal 82, (1957) Cr LJ 716 .

46 *Thakar Singh v Chattar Pal* (1910) 11 Cr LJ 420, 20 PR (Cr) 1910 .

47 Re *KG Ganapatti Bhatta* ILR 36 Mad 303.

48 *Ramsebak Lal v Muneshwar Singh* 37 ILR Cal 604 ; *Satish Chandra Chakrawarti v Ram Dayal* AIR 1921 Cal 1 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 183.

Resistance to the taking of property by the lawful authority of a public servant.--

Whoever offers any resistance to the taking of any property by the lawful authority of any public servant, knowing or having reason to believe that he is such public servant, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

This section makes it an offence to offer resistance to the taking of property by the lawful authority of a public servant. Under this and the following sections up to s 187, IPC, two things must concur:

(i) there must be the lawful authority of a public servant,[49] *i.e.,* the authority under which he acts must have been bestowed upon him in accordance with law;[50] and
(ii) the accused must know or have 'reason to believe' (see s 26, IPC) that the public servant in question is a public servant.

The application of this section is not limited to the parties to the donee under execution. Whoever offers resistance, whether a party to a decree or not, is liable under this section if such offers resistance, knowing, or having reason to believe, that the person, to whom resistance is offered, is a public servant.[51]

2. 'Offers any Resistance'

'Resistance' involves an active physical obstruction. Thus, a mere passive refusal, or even a threat of physical obstruction, is not resistance.1323

Where certain property is entrusted to a firm for sale and subsequently, the management of the owner's estate is handed over to the court of wards, any refusal by the firm to deliver the property entrusted to them until their general account is settled, does not amount to any resistance to the taking of any property by the lawful authority of any public servant.[52]

Where the accused refused to hand over to a bailiff, money alleged to be in his pocket, it was held that there was no 'resistance' within the meaning of this section.[53]

But where the accused not only refused to give up the property, but threatened to do harm to the constable if he should venture to carry out the warrant, it was held that the threat constituted an overt act sufficient to constitute a 'voluntary obstruction' within the meaning of s 186 .[54]

3. Oral Statement or Objection--Whether Amounts to Resistance

A mere oral statement by a person, claiming to be the owner of certain articles attached by a bailiff in the execution of a decree, to the effect that he would not allow the bailiff to take away the articles unless he entered them as his property, does not amount to an offence under this section. Where, therefore, when a bailiff proceeded to attach certain articles as the property of a judgement-debtor, the accused, a third person, said that the articles were his property and that he would not allow the bailiff to take them away, it was held that the mere statement of the accused does not amount to 'resistance' and that the accused was not guilty of an offence under this section.[55]

Where a property in possession of the accused was, in their absence, seized by a head constable investigating a case of theft and kept loaded in a cart for the purpose of being taken away, and the accused on hearing about it, came and stood before the cart and raising their hands said that the cart should not be driven and they objected to the property being taken away, it was held:

> A mere objection to the head constable's seizing the article cannot be said to amount to 'resistance'. All that was done in this case was a statement by the accused objecting to the constable taking the article accompanied by a pantomime indicating that they were so objecting. This could not be taken to amount to offering any 'resistance'.[56]

4. Lawful Authority--Meaning of

To constitute an offence under this section, the resistance must be to the taking of any property by the lawful authority of any public servant.[57]

Unless it is clearly established that the person seizing the property had lawful authority to do so, there can be no conviction under this section.[58] 'Lawful authority', means an authority given to a public servant by law, which thereby invests him with 1324legal powers. An authority, therefore, which is not authorised by law, though it may be given by a court, is not a 'lawful authority'.[59]

5. Extent of Authority Explained

Under the rules of the Calcutta High Court, where movable property is attached in execution of a warrant of attachment, the attaching officer shall give the debtor or, in his absence, any present adult member of his family, the option of having the attached property kept on his premises or in some other place in the village, on condition that a suitable place for its safe custody be provided by him. Removal of the property by the civil court peon, without leaving any option to the judgement-debtor to provide safe custody for the property, must be considered as illegal, and consequently, the subsequent taking back of the property by the accused cannot be held to constitute any offence under this section.[60]

A civil court's bailiff, in executing a process against the movable property of a judgement-debtor, has no authority to use force, and break open a door or gate,[61] unless specifically authorised.

A bailiff who, in order to execute a civil court decree against *A*, breaks open the door of *B*'s house

when neither *A* nor his goods are in the house, is a trespasser and resistance by *B* is not punishable under this section or under s 186 .[62]

6. When Resistance is not an Offence

In order to prove that an attachment made in pursuance of s 109 of the Tripura Municipal Act was effected by lawful authority, the prosecution has to prove that on the date the attachment was effected, the necessary 15 days had elapsed after the service of the notice and the bill. If the prosecution fails to prove this, the taking of the property is not by lawful authority. If the prosecution fails to prove that the taking of the property was by lawful authority, then the offence under this section has to be treated as not having been proved.[63]

Where the attaching officer had no list of the property to be attached,[64] the warrant was not signed by the court, and part of the form relating to security was left blank, and the accused, who was not the judgement-debtor, resisted the attachment, it was held that he committed no offence.[65]

A offers resistance to the execution of an order of a public servant. The order, as a matter of fact, had ceased to be in force. *A'*s resistance is not punishable.[66]

An amin attempts to attach property under a warrant, which however he has not got with him. *B* resists the attachment. This is no offence.[67]1325

7. Seizure of Property under Illegal Warrant

In order to support a conviction for resisting the execution of a warrant by a public servant, the warrant must be a lawful one and the person who executes the warrant must be clothed with lawful authority under the warrant of execution, which does not bear a date on or before which it should be executed and after which it is not a good warrant.

The *nazir* of a court has no lawful authority to execute a warrant directed to the bailiff of the court.[68]

A warrant for the attachment of property which is not signed by the judge or such officer as the court may appoint in this behalf, is not a legal warrant and the removal of property directed by such warrant for the attachment of crops for arrears of revenue, the warrant being time-expired, *A* does not commit an offence and the person resisting is guilty under this section.[69] So the execution of a writ of attachment, after the expiry of the date fixed for its return, is illegal and resistance to such execution is not an offence under s 186 .[70] The person who executes a warrant derives his authority from the court which issued it and not from the *nazir* who endorsed it in his name. If the warrant is executed within the date fixed by the court, the execution of the warrant is not illegal because the *nazir* fixed a date earlier than that in which it is executed.[71]

8. Resistance to Seizure of Property when not Strictly Justifiable

(a) When There is no Right of Private Defence

There can be no doubt that in construing this section, the language of s 99 as well as that of other sections concerning resistance to the acts of public servants, must be borne in mind. Section 99 , IPC declares that the protection afforded by the Penal Code to public servants acting in good faith, under colour of their office is not lost to them, by reason of any mistake on their part in the exercise of their proper functions. The effect of s 99, cl (1) is that although a public servant, lawfully authorised and acting under colour of his office, in good faith, does something not 'strictly justifiable', still there is no right of private defence against such acts, unless they cause an apprehension of death or grievous hurt.[72]

A public servant may do an act of a kind which he has no authority to do. In such a case, he could not

be acting in discharge of his public functions[73] and the lawful authority required by this section will be clearly wanting.[74] On the other hand, the public servant may do an act, acting in good faith under colour of his office, but the act is not strictly justifiable by law. Thus, a public servant, authorised to attach the property of the judgement-debtor, may attach the property of a third person under the *bona fide* belief that the property really belonged to the judgement-debtor. If, in such a case, the owner of the property offers resistance to the taking of the property 1326so attached, is he liable to be punished under this section? The Madras High Court has held that he is so liable.[75]

(b) Whether the Authority and its Execution both be Strictly Lawful--Madras View

In *Queen-Empress v Tiruchittambala Pathan* ,[76] a decree having been passed against the assets of a deceased debtor, execution was taken out, and the amin of the court attempted to attach and seize a brass plate in the possession of the accused as forming part of the assets of the deceased. The accused wrested it from the hands of the attaching officer stating that it belonged to him and not to the deceased. Setting aside his acquittal, the Madras High Court again observed:

> The object of the legislature as shown in the Code was to facilitate the transaction of public business by affording protection in two ways to public servants acting in the exercise of their duty. They are protected from criminal proceedings by sections 78 and 79 . They are insured against resistance by section 99 and other sections of the Code. The intention was to give protection of this latter kind in all the cases in which, but for the immunity specially provided, the act of the public servant would amount to an offence. The phrase 'lawful authority' used in section 183 does not oblige us to hold that the cases in which the person charged may have a civil action against the public officer must be excluded from the operation of the section. In the present case the amin had lawful authority to take in execution the goods of the deceased. There was no mistake about his authority, but the mistake was in the mode in which he executed his duty and the section does not require that the execution of the authority, as well as the granting of it, must be strictly lawful. To hold that a judgment-debtor might, with impunity, resist the seizure of goods found in his house, on the mere plea that they belonged to somebody else, honesty and good faith on the part of the attaching officer being presumed, would reduce section 183 to a dead letter.

(c) Bombay View

The Bombay High Court has dissented from this view and has held that resistance to the act of a public officer acting *bona fide*, though in excess of his authority, may well give rise to some charge in the nature of assault, but it cannot afford any foundation for a prosecution under s 183, IPC . According to it, s 99, IPC is designed to protect a public servant, and to limit the amount of resistance which may be offered to him.

9. Provision not for the Protection of Public Servant

Section 183, IPC is, however, not a section meant for the protection of the public servant, but enables him to take the offensive and prosecute anybody who resists the taking of property by lawful authority. It is one thing to provide that a public servant who is acting *bona fide* in the exercise of his office, though in excess of his authority in fact, is to be protected from acts of violence. It is quite another thing to say that such a public servant, being in fact in the wrong, may prosecute anybody for resisting peaceably his wrongful act. Resistance to an act of a public officer acting *bona fide*, though in excess of his authority, may well give rise to some charge in the nature of assault, but it cannot afford any foundation for a prosecution under s 183 . The language of s 183 is perfectly plain. It applies to resistance to the taking of property 1327by lawful authority of a public servant and there are no words in that section, as there are in s 99, extending the operation of the section to acts which are not strictly justifiable by law.[77]

10. 'Knowing or Having Reason to Believe that he is Such Public Servant'

There can be no offence under this section unless it is shown that the accused knew or had reason to believe[78] that the person by whose authority the property was being taken was a public servant. Where it did not *prima facie* appear from the record that the *mamlatdar* was an officer to whom, under the provisions of s 12 of the Land Revenue Code, the powers of the collector constituted by s 87 of the Code, had been delegated under any general or special order of the government, nor that the *karkoon* employed to distrain was an officer directed to perform that duty by the commissioner, under the orders of government, a person resisting such a *karkoon* by force, when the latter came to distrain some goods at his house, is not guilty of an offence under s 183 .[79] It has been held that it is the intention of the law that, when a public servant attaches property under a warrant in execution of a decree, he must have the warrant with him, otherwise the taking of the property is not lawful.[80] However, the written order need not be shown to the accused.[81]

11. Property

Property in this section includes immovable property.[82]

12. Procedure

The procedure to be followed is the same as in the case of an offence under s 182 . The limitation prescribed for prosecution for an offence under this section is one year.

13. Complaint

No court can take cognizance of an offence under this section, except on a complaint in writing of the public servant concerned, or of some other public servant to whom he is administratively subordinate.[83] Taking cognizance of offences under ss 182, 183, IPC, by the magistrate, on a complaint not filed by the concerned public servant is bad in law on account of the bar of s 195, CrPC .[84]

No complaint for an offence under this section can be filed by a court, as s 340, CrPC, applies only to cases falling under s 195(1), cl (b) of the Criminal Procedure Code . This excludes cases falling under s 195(1), cl (a). This section falls under s 195(1)(a) .[85]1328

14. Complaint of Court when Necessary

Where a complaint is filed by a private person under any section of the Indian Penal Code which does not require a complaint of the court under s 195, CrPC, but the complaint is such that it discloses other facts which constitute an offence for which a complaint of the court is necessary, the principle to be followed in cases of this kind is not whether the complaint discloses other facts which constitutes offences for which no complaint of the court is necessary, but whether there is not an evasion of the provision of s 195, and the test whether there is an evasion or not is whether the facts disclose primarily and essentially an offence for which the complaint of the court is required.[86]

15. Charge

The following form of charge may be adopted:

I (*name and office of the magistrate, etc*) hereby charge you (*name of the accused*) as follows:

That you, on or about the.....day of....., at....., offered resistance to the taking of the property by the lawful authority of public servant.....(*name or official designation of the public servant*), knowing, or having reason to believe that he was such public servant, and thereby committed an offence, punishable under section 183 , IPC, and within my cognizance.

And I hereby direct that you be tried by the court on the said charge.

16. Punishment

Where the resistance by the accused has been unaccompanied by violence and has been exaggerated by the prosecution, the case calls for no more than a nominal punishment.[87]

49 See the words 'lawful authority' in ss 183 to 185, 'public functions' in s 186, 'public duty' in s 187 .

50 *Abdul Gafur v R* ILR 23 Cal 896 ; *Lilla Singh v R* ILR 22 Cal 286 .

51 *Durodhan Das v State* 34 Cut LT 545, (1969) Cr LJ 85, 86 ; *State v Dhanraj* 1960 Nag LJ 114 .

52 *E H Parakh v King-Emperor* AIR 1926 Oudh 202, 27 Cr LJ 328, 3 OWN 160 .

53 *R v Alibhai* (1888) BUC 412, Cr R No 77 of 27th September 1888.

54 *Emperor v Pundilick Krishna Pai* 1 Cr LJ 262, p 263 .

55 *Queen-Empress v Husain Valad Tajbhai* 15 ILR Bom 564 .

56 Re *Rangaswami Goundan*AIR 1944 Mad 45, p 46, 45 Cr LJ 240, 56 Mad LW 599 ; *SS Poddar v State of Bihar* (1963) BLJR 375, p 377-78 .

57 *Jogendra Chandra Choudhary v Kshirode Ranjan Bhattacharjee (*1961) 2 Cr LJ 564, p 567 (Tripura).

58 *Dema Mahadu Amberkar v Emperor* AIR 1936 Bom 376, p 377, 33 Cr LJ 37, 38 Bom LR 790 .

59 *Arakkal v Ahmed Ali* (1909) 10 Cr LJ 496 .

60 *Emperor v Ahmad Sheikh* AIR 1928 Cal 815, p 816, 48 CLJ 288, 33 CWN 174 .

61 *John Anderson v J Mcqueen* 7 WR (Cr) 12 .

62 *R v Gogi Aba Dore* 7 Bom HCR 83 ; *Durga Charan Mali v Mohin Chandra* 25 ILR Cal 274 .

63 *Jogendra Chandra Choudhary v Kshirode Ranjan Bhattacharjee* (1961) 2 Cr LJ 564, 567 .

64 See O 21, r 12 and O 38, r 7 of the Code of Civil Procedure 1908.

65 *Prabhu Dyal v R* (1906) 3 Cr LJ 75, 6 PLR 573, 49 PR (Cr) 1905 .

66 *Anand Lall v R* 10 ILR Cal 18 .

67 *R v Ganeshi Lal* 27 ILR All 258 .

68 *Mohini Mohan Banerji v Emperor* AIR 1916 Pat 272, 18 Cr LJ 39 ; **relying on***Sheikh Naseer v Emperor* 37 ILR Cal 122, 11 Cr LJ 128 ; *Sabid Ali v Emperor* 40 ILR Cal 849, (1913) 14 Cr LJ 274 .

69 Re *Iyyemeperumal Naiken* 1 Weir 127; *Gopala Saminathan Ayyar* 1 Weir 123.

70 *Tanuk Lal Mandar v Emperor* AIR 1920 Pat 449, p 450, 22 Cr LJ 222 .

71 *Sabid Ali v Emperor* (1913) 14 Cr LJ 274, 40 ILR Cal 849, 17 CWN 911 .

72 *R v Vyankatrav Shrinivas* 7 Bom HCCC 50 .

73 Sections 186 and 353, IPC .

74 *Lilla Singh v Queen-Empress* 22 ILR Cal 286 ; *Queen-Empress v Tulsiram* 13 ILR Bom 168 .

75 *Public Prosecutor v Soosaikanna Chetti* 1 Weir 126 ; **relying on***Queen-Empress v Ramayya* 13 ILR Mad 148, 1 Weir 67 ; *Queen-Empress v Tiruchittambala Pathan* 21 ILR Mad 78, 1 Weir 123 .

76 *Queen-Empress v Tiruchittambala Pathan* 21 ILR Mad 78 .

77 *Sakharam Rawaji Pawar v Emperor* AIR 1935 Bom 233, p 234, 59 ILR Bom 545, 37 Bom LR 362 .

78 Section 26, IPC .

79 Re *Yashwant*(1837) BUC 325.

80 *Emperor v Ganeshi Lal* 27 ILR All 258, (1904) 1 Cr LJ 896, 1 All LJ 595 ; (relying on *Empress of India v Amar Nath* ILR 5 All 318, p 321) .

81 *Tribhuwan v Emperor* AIR 1918 Oudh 162, 19 Cr LJ 641 .

82 *Duryodhan Das v State of Orissa* (1969) Cr LJ 85, 34 Cut LT 545 .

83 Section 195(1)(a), CrPC .

84 *Rajnath Gupta & Ors v State & Anor* IV (1999) CCR 24 (Del) .

85 *Mundlapudi Durgaprasadarao v C Sundar Bhutt* AIR 1952 Mad 607, p 608 ; For detailed commentary on ss 195 & 340 see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

86 *Sadhuram Chimandas v Chimandas Budhuram* AIR 1937 Sind 81, (1940) ILR Kant 275, **followed in***Tikaram v Emperor* AIR 1945 Nag 210 ; *Janki Prasad v State of Bihar* (1975) Cr LJ 575 (Pat) .

87 *Kunhamba v Emperor* (1913) 14 Cr LJ 239, 19 IC 335 (Mad) .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 184.

Obstructing sale of property offered for sale by authority of public servant.--

Whoever intentionally obstructs any sale of property offered for sale by the lawful authority of any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Comments

1. Scope

This section deals with the offence of an intentional obstruction of a sale of property held by the lawful authority of a public servant. To constitute an offence under this section, the sale must be by the

lawful authority of a public servant, and the obstruction to the sale must be intentional. The obstruction dealt with here is 1329not obstruction of a public servant as under s 186 or of any person as under s 225B, IPC, but of a proceeding being conducted by the lawful authority of a public servant.

2. 'Obstructs'

The word 'obstructs' occurs in ss 186 and 225B, IPC also, and, in some cases, dealing with offences under those sections, it has been held that the obstructions must be physical.[88] But elsewhere it has been held that even under s 186, actual physical obstruction is not necessary to complete the offence if threats are accompanied either by overt acts or by a menacing attitude or show of physical force or assault, as contemplated in s 352, IPC .[89]

Commentary under same heading in s 186, *post* may be referred to.

3. 'Intentionally Obstructs'

There is an essential difference in the obstructions contemplated in ss 184 and 186, IPC . Section 186 postulates some show of physical force, whereas s 184 does not. Now, this section does not deal with the obstruction of any public servant or of any person but with the obstruction of a proceeding which is being conducted by a lawful authority, and a proceeding can be obstructed by measures other than physical measures taken against the person who is conducting the proceeding.

At a public auction, a concerted plan to prevent the auction being carried out by raising shouts or disturbance which would prevent bids from being heard and necessitating the closing of the auction would certainly amount to obstructing that auction,[90] within the meaning of this section.

4. Mere Threats do not Amount to Obstruction

In *King-Emperor v Gopal Rai* ,[91] Rennie J observed that a mere posting up of placards asserting a title to the land claimed, cannot be regarded as obstruction under s 184, IPC, and that on the contrary, a claimant is well advised in doing so as otherwise he might be told that he stood by and made no protest. Mere threats by themselves would not, in all cases, amount to an obstruction, unless they are accompanied either by an overt act or by a show of physical force.[92] Where threats uttered to the actual bidder and to the audience of potential bidders discloses an intent to prevent the sale from being held and that intention has been successfully carried out, it amounts to an offence under this section.[93]

Where two persons were charged under this section, one of them for executing and the other for accepting a deed of sale of some property which was ordered to be sold in execution of a decree of a revenue court, it was held that the execution of the sale- 1330deed would not amount to an obstruction of the sale, and was, therefore, not punishable under this section.[1]

5. 'Lawful Authority'

The commentary under s 183 may be referred to. The lawful authority of the public servant offering the property for sale must be proved by the prosecution; a conviction cannot be justified in the absence of such proof.[2]

6. Procedure

The procedure is the same as in the case of an offence under s 182 . The limitation prescribed for an offence under this section is one year.

7. Charge

The following form of charge may be adopted:

> I (*name and office of the magistrate, etc*) hereby charge you (*name of the accused*) as follows:
>
> That you, on or about the.....day of ....., at....., intentionally obstructed the sale of property, offered for sale by the lawful authority of the public servant.....(*name or official designation of public servant*) as such, and thereby committed an offence, punishable under s 184 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.'

88 *Queen-Empress v Thimmachi* 15 ILR Mad 93, 1 Weir 131 ; *Ibrahim Sircar v Emperor* ILR 29 Cal 236 ; *Darkan v Emperor* AIR 1928 Lah 827, 29 Cr LJ 645 .

89 *Emperor v Tohfa* AIR 1933 All 759, 34 Cr LJ 1211, 55 ILR All 985, (1933) All LJ 952 .

90 *Provincial Government, CP & Berar v Balram Jagannath* AIR 1938 Nag 529, 39 Cr LJ 954, (1938) NLJ 299 .

91 *King-Emperor v Gopal Rai* (1905) 2 Cr LJ 44, 7 PR (Cr) 1905, 96 PLR 1905 .

92 *Emperor v Tohfa* AIR 1933 All 759, 760, 34 Cr LJ 1211, (1933) All LJ 952.

93 *Provincial Government, CP & Berar v Balram Jagannath* AIR 1933 Nag 529, p 530 .

1 *Padam Singh v R* (1883) 3 All WN 197 .

2 *R v Tara Singh* 27 ILR All 480 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 185.

Illegal purchase or bid for property offered for sale by authority of public servant.--

Whoever, at any sale of property held by the lawful authority of a public servant, as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be

under a legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Comments

1. Scope

The last section dealt with obstructing a sale of property offered for sale by authority of a public servant. This section deals with the illegal purchases or bids at such a sale. It makes it penal to bid at a public sale for a property on account of a party who is under a legal incapacity to purchase it, or bid for it not intending to complete the 1331purchase, or as it is expressed, to perform the obligations under which the bidder lays himself by such bidding.

2. 'At any Sale of Property'

This section is not restricted to a sale of corporeal property.[3] The object of this chapter, as its heading shows, is to punish 'contempts of the lawful authority of public servants'. A party can equally show a contempt by bidding for the lease of a ferry put up to a public auction by a magistrate, as he can, by bidding for any corporeal property, not intending to perform the obligations under which he lays himself by such bidding. It is his intention at the time of bidding, and not the nature of the thing to be sold, which constitutes the offence. So a mock bidding at the sale of the lease of a ferry is an offence under this section.[4]

The right to sell drugs, *i.e.,* the monopoly granted for a certain area, comes within the definition of property.[5]

3. Purchase or Bid on Account of Person Under Legal Incapacity to Purchase

Under s 19 of the Cattle Trespass Act 1871, no officer of police shall directly or indirectly purchase any cattle for sale under that Act. A sub-inspector of police is under such legal incapacity. If he purchases a pony at a sale under that Act, he would be guilty of the offence under s 169 of this Code.[6] If, instead of himself purchasing the pony, the sub-inspector asks his friend *B* to make the purchase *benami* for himself and *B* purchases the pony at the sale under the Act, knowing of the incapacity of the sub-inspector himself to make the purchase, *B* would be guilty of the offence under this section.

4. Bidding for Property 'Not Intending to Perform the Obligations'

As observed earlier, it is the intention of the accused at the time of the bidding which constitutes the offence under this section. Where an accused made bids at a sale held by the collector and gave a false name as that of the bidder, it was held that the intention of the accused was not to perform the obligation under which he was laying himself at the time of bidding and that he was guilty of the offence under this section.[7] But where the accused made a *bona fide* bid at the time of an auction sale and had no intention of shirking his obligations, it was held that his subsequent failure, due to circumstances over which he had no control, to deposit the earnest money which he was legally bound to do on the acceptance of his bid, could not be made a penal offence under this section.[8]

5. Procedure

The procedure is the same as in the case of an offence under s 182 . The prescribed period of limitation of an offence under this section is one year. 1332

6. Charge

The following form of charge may be adopted:

I (*name and office of the magistrate, etc*) hereby charge you (*name of the accused*) as follows:

That you, on or about the..... day of ....., at a sale of property, held by the authority of a public servant....(*name or official designation of public servant*) as such, purchased (*or bade for*) the property for yourself (or any other person, namely, ... (*give the name of that person*), knowing that you (*or such other person*) were under a legal incapacity to purchase the property at sale (*or bade for such property not intending to perform the obligations under which you laid yourself by such bidding*), and thereby committed an offence punishable under section 185 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

3 *Queen v Reazooddeen* 2 WR 33 (Cr) .

4 *Ibid.*

5 *Bishan Prasad v Emperor* AIR 1915 All 93(2), 16 Cr LJ 54, 37 ILR All 128, 13 All LJ 109 .

6 Re *Raj Kristo Biswas* 16 WR 52 (Cr).

7 *Bishan Prasad v Emperor* AIR 1915 All 93, 16 Cr LJ 54 .

8 *Kali Charan v Emperor* AIR 1934 Oudh 186, p 188, 35 Cr LJ 789, 11 OWN 473 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 186.

Obstructing public servant in discharge of public functions.--

Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with

fine which may extend to five hundred rupees, or with both.

STATE AMENDMENT

Andhra Pradesh.--In Andhra Pradesh offence under section 186 is cognizable.--A.P.G.O. Ms. No. 732, dated 5-12-1991.

Comments

1. Scope

This section deals with the general offence of obstructing a public servant in the discharge of his public functions. It has to be distinguished from s 184, which deals with the obstruction of a proceeding conducted by the lawful authority of a public servant.[9]1333

A person, obstructing a public servant in the discharge of his public functions, executing a warrant of possession issued by a court, commits two offences. One offence committed is the obstruction of the public servant punishable under this section, and the other is the offence of contempt of court by undermining its authority.[10]

2. Section 186 Distinguished from Sections 332 and 353

Sections 186 and 332, IPC relate to two separate and distinct offences. Section 186 , IPC relates to a case where the accused voluntarily obstructs a public servant in the discharge of his public functions, but under s 332, IPC, the ingredient of voluntarily causing hurt as a consequence of an assault or a use of criminal force while the public servant is discharging his duty, with the intent to prevent or deter such public servant from discharging his duty as such public servant, is necessary. The gravity of the two offences is, therefore, different. It is further significant to note that while s 186 occurs in ch 10 of the IPC dealing with contempt of the lawful authority of public servants, s 332 falls in ch 16 of IPC dealing with offences affecting human body and life. The legislature in its wisdom has made the offences under s 186 IPC as 'non-cognizable' while making the offence under s 332 IPC as a 'cognizable' one.[11]

Though the offences, under ss 186 and 332, have some common elements, they are quite distinct in their nature and application.[12]

Similarly, the allegations upon which a charge under s 353, IPC, is based, may be the same as those constituting the charge under s 186, IPC, but both sections relate to two distinct offences; while the offence, under the latter section, is a cognizable offence, the one under the former section, is not so. The ingredients of the two offences are also distinct. This section is applicable to a case where the accused voluntarily obstructs a public servant in the discharge of his functions but under s 353, IPC, the ingredient of assault or use of criminal force, while the public servant is doing his duty as such, is necessary. The quality of the two offences is also different. This section occurs in ch 10, dealing with contempt of the lawful authority of public servants, while s 353 occurs in ch 16, relating to offences affecting human body.[13]

3. Ingredients of an Offence under this Section

The ingredients, which constitute an offence under this section, are as follows:

(i) there must be an obstruction;
(ii) the obstruction must be by the accused;

(iii) the obstruction must be voluntary;
(iv) the obstruction must be of a public servant; and
(v) the obstruction must be in the discharge of his (*i.e.*, the public servant's) public functions.
1334

4. 'Obstructs'

Commentary under same heading in s 184, *ante* may be referred to.

The word 'obstructs' is not defined anywhere and baffles definition. Its derivation from the Latin 'to build against, or, to block up' shows that it has a certain passive connotation.[14] But the section does not appear to contemplate constructive obstruction to a judicial officer in the discharge of his judicial functions, even when they are of a quasi-executive character or when the proceedings before him are in execution.[15]

In a Patna case, it has been held that a sufficient indication that any attempt to effect attachment by a peon having a warrant of attachment, would be resisted by force is quite enough to constitute obstruction.[16] The Allahabad High Court has observed in a case[17]that the word 'obstruction' connotes some overt act in the nature of violence or a show of violence; it connotes some positive act, which would deter the man obstructed from carrying out his intentions. It cannot be said that a man obstructed another if that man runs away from the other. The act of running away does not do any such thing. It may, however, have the effect of baulking a man or cheating him of his intentions, but that would not amount to obstruction. Some courts have held that the word 'obstruction', as used in s 186, means 'physical obstruction', *i.e.*, actual resistance or obstacle put in the way of a public servant. The word implies the use of criminal force.[18] In *Kisan Krishanji Tikle v Nagpur Conference of Society of St Vincent De Paul* case,[19] the physical obstruction required by the section was explained as follows:

> An illustration will bring out the point of this finding. If *A* endeavors to drive his motor-car down a road and *B* tears up the road and places a barricade across it so that no car can proceed until the obstruction is removed, that is a physical obstruction. It is not necessary that the car should actually crush into the barricade and attempt to break through it for the physical element to come into being. So also here, the judgement-debtor and his men were drawn up and showed every intention of resisting by force. That, in my opinion, constituted the physical obstruction required by s 186 .

On the other hand, in some cases it has been held that the word 'obstruction' in this section does not mean 'physical obstruction' and it is not necessary that there should be physical or criminal force, and that it is sufficient if there is either a show of force or a threat or any act preventing the discharge of his public function by a public servant.[20] An obstruction to a public servant can be caused even by words of mouth.[21]1335

5. 'Voluntarily Obstructs'

In this section the word 'obstructs' is used along with the word 'voluntarily', and under s 39 of the Code, a person is said to cause an effect 'voluntarily' when he causes it by mean whereby he intended to cause it, or by mean of which, at the time of employing those means, he knew or had reason to believe that he was likely to cause it. This implies the employment of certain means to cause a certain effect. It has accordingly been held that the use of the word 'voluntarily' seems to indicate that the legislature contemplated the commission of some overt act of obstruction, and did not intend to render penal a mere passive conduct.[22]

To constitute the offence under this section, the obstruction must be intentional and it must be direct.

[23] If in causing the obstruction the accused acts intentionally, the means employed by him to cause the effect intended, do not matter.[24]

Where the accused, in the honest belief that the men doing some work on a private land, under the orders of a magistrate, had committed trespass, prevented them from doing the work, it was held that he could not be said to have voluntarily obstructed the public servant and could not, therefore, be convicted under this section.[25]

Proof of bad faith on the part of a person obstructing is not necessary to a conviction under the section.[26] Refer also the commentary under the heading 'Obstructs'.

6. Gist of the Offence

The gist of the offence, thus lies in the intention of the accused to interfere with or prevent the public servant's discharge of his official function.[27] The obstruction may be in various ways.[28] The question whether an offence under this section has, or has not been, committed must depend upon the peculiar facts and circumstances of each case. The real question is whether the action or attitude of the persons alleged to have obstructed a public servant in the performance of his public functions was of such a nature so as to obstruct, that is to say, prevent him from carrying out the duties which he had to discharge.[29] To prevent, by physical means, persons willing to be vaccinated from being vaccinated, might be obstruction of the vaccinator within the meaning of the section.[30]

7. Physical Obstruction not Necessary

The expression 'obstruction' used in s 186, IPC is not consigned to physical obstruction. It need not be an act or use of criminal force. The act complained of results in preventing a public servant in the discharge of his lawful duties. Any act of causing an impediment, by unlawfully preventing a public servant from the discharge 1336of his functions, would be enough to attract s 186 of IPC . Any other interpretation would be to encourage people to take the law into their hands, frustrate the investigation of crimes and thwart public justice. Such an interpretation cannot be commended by the courts.[31] But a shutting of the door in the face of a public servant entering a house, to attach some property in the performance of his duty, is obstructing him.[32]

8. Threats and Abuses, if Constitute Obstruction--Protest when Amounts to Obstruction

In some cases it has been held that to constitute 'obstruction' within the meaning of this section there must be a use of criminal force, and a mere threat or threatening language is insufficient.[33]A different view has, however, been taken in some other cases and it has been held that mere threats by themselves would not in all cases amount to obstruction unless they were accompanied either by an overt act or by a show of physical force. If it is solely a matter of threats, they must be of such a nature as to so affect the public servant concerned as to cause him to abstain from proceeding with the execution of his duties. It seems obvious that threats of violence made in such a way as to prevent a public servant from carrying out his duty might easily amount to an obstruction of the public servant, particularly if such threats are coupled with an aggressive or menacing attitude on the part of the persons uttering the threats, and still more so if they are accompanied by the flourishing or even the exhibition of some kind of weapon capable of inflicting physical injury. Threats made by a person holding an offensive weapon in his hands must be taken to be just as much an obstruction as that caused by a person actually blocking a gateway or handling a public servant in a manner calculated to prevent him from executing his duty.[34] Threats of violence made in such a way as to prevent the public servant from carrying out his duty, might easily amount to an obstruction of the public servant.[35] A protest is not an obstruction, but a strongly worded protest, verging on a threat would be an obstruction within the meaning of this section, if there appears to be at least a likelihood of the threat being immediately carried out.[36]

Where a person not only refuses to give up the property but threatens to do harm to the police constable if he should venture to carry out the warrant, the threat is an overt act sufficient in law to constitute a 'voluntary obstruction' within the meaning of this section.[37]1337

9. Evasion of Arrest

Evasion of arrest or a mere assertion by the person sought to be arrested that he would not live to be arrested or that a fight would be the result of such arrest, does not constitute a voluntary obstruction.[38]

10. Refusal to Obey

A mere refusal to comply with the request of a public servant discharging his functions, does not amount to a voluntary obstruction within the meaning of this section.[39] But a refusal to show goods on demand to an octroi official discharging his official function has been held to be an obstruction within the meaning of this section.[40]

11. Persuasion and Dissuasion

Persuading tenants not to pay rents to a receiver does not constitute obstruction to the receiver, when such persuasion was addressed to the tenants in the absence of the receiver.[41]

Where as a protest against a member of the depressed classes being appointed a *panch*, the accused, who was a member of the *panchayat*, refused to work as a Panch and instigated others also to do the same, it was held that the accused was at perfect liberty to resign, and there was nothing in law to prevent his advising others not to serve in the *panchayat*, and he could not be held guilty under this section.[42]

To prevent, by physical means, persons willing to be vaccinated from being vaccinated, might be an obstruction to the vaccinator within the meaning of the section. But merely to dissuade people from submitting to a vaccination is not obstruction, for it is only with regard to willing patients that the vaccinator has any duty.[43]

So also spreading a false report and thereby preventing people from bringing their children for vaccination does not amount to a voluntary obstruction to the vaccinator in the performance of his duties.[44]

The lawful guardian not having consented to the vaccination of his child, has a perfect right to take the child away from the vaccinator.[45]

12. Running Away to Avoid Arrest

The act of mere running away to escape arrest may have the effect of baulking a public servant or cheating him of his intentions, but that would not amount to obstruction within the meaning of this section.[46]1338

13. Escape From Lawful Custody

Escaping from lawful custody is not obstructing a public servant in the discharge of his public functions within the meaning of this section.[47] But where *C* who was arrested, whilst being conveyed to the court, called for help and four persons rescued *C* in consequence, it was held that they were guilty under this section and *C* of abetment.[48]

14. Putting up Fence or Shutting Door to Prevent Entry

A, a district judge, sends *B*, a commissioner, to search and bring away certain property from the house of *C*, a defendant in a suit pending before him. *C* shuts the doors and did not admit *B.* A crowd collected and *B* went away. It was held that no offence under this section was committed as the object of *C* was not to obstruct, but to gain time for the compromise, which later on, in the day, was effected; and further *C* did not voluntarily obstruct, since 'voluntarily' indicates the 'commission' of some overt act of obstruction'.[49] From the definition of 'voluntarily'[50] it will be seen that the meaning of the word is not a question of doing or not doing something, but of the mental attitude of the agent. If *C* knew that by shutting his doors or by omitting to open them he was causing obstruction to *B*, by force of s 39, IPC he voluntarily obstructed *B*, and his motive in so doing (to gain time) seems to be immaterial under s 186, IPC . This case has been distinguished in the following two cases.

Shutting of the door in the face of a public servant entering a house to attach some property in the performance of his duty, is obstructing him.[51]

Where a constable entered a house and found in a room three articles alleged to have been stolen, but before the constable could remove them the accused caused the door of the room to be shut and also threatened to kill the constable if he removed the articles, it was held that the acts of the accused constituted obstruction of the public servant in the discharge of his public functions.[52]

Where the accused put up a fence across his private property to prevent a public servant from passing through it, for inspection in a suit to which the accused was not a party, it was held that the accused did not commit the offence under this section.[53]

15. Some Illustrative Cases

The following are some of the cases relating to obstruction of a public servant:

A traffic constable was trying to clear the congestion from a road. The accused became angry, showed him red eyes and asked him to give him his number. The accused persisted in asking for the number of the police constable even when the constable was engaged in clearing the congestion on the road. He placed his hand on the uniform of the police constable and pushed him, thus obstructing him in the 1339discharge of his public functions. The accused was guilty of the offence under this section.[54]

A traffic constable is prevented by the accused from regulating the traffic. He is guilty of the offence under this section whatever be the exact means employed by him.[55]

On a certain occasion, certain police constables were on duty observing and timing the speed of motor cars driving along a certain road with a view to the prosecution of the drivers of such cars as should be travelling at an illegal speed. The accused warned the drivers of cars, which were approaching the measured distance in the presence of the constables and disclosed the purpose for which they were here. As a result, the drivers slackened their speed and proceeded over the measured distance at a lawful speed. It was held that the accused had willfully obstructed the constables in the execution of the duty.[56]

The pointing of the mauser gun by the accused towards the police officers *prima facie* suggests the commission of an offence under ss 186 and 353, IPC, inasmuch as on seeing the mauser gun being aimed at him, the police officer must have got terribly shaken, thus being obstructed in the discharge of his official duties. The impugned FIR, therefore, cannot be quashed by invoking s 482, CrPC .[57] Where acts complained of *prima facie* amount to obstructing the public servant in the discharge of their public functions and offence under s 186, IPC is attracted, the proceedings before the trial court cannot be quashed by taking recourse to s 482, CrPC .[58]

The accused, in order to evade payment of toll, drove a motor bus by a sidetrack and did not stop the bus when signalled to do so. The accused prevented the toll contractor, who was a public servant,

from collecting the toll and thus obstructed him in the discharge of his duty.[59]

A public servant had to search the stock of sugar in a sugar factory, and the accused, who was the general manager of the factory, placed obstacles on the road leading to the sugar godown making any vehicular traffic towards it impossible. It amounted to 'obstruction' within the meaning of this section.[60]

A search party wanted to search the upstairs of the accused's house, but he went and stood on the stairs and blocked the way and objected to the party going up; Bagaley J of the Rangoon High Court observed:

> In view of the fact that the constable says that he merely sat on a chair by the side of the stairway and the bazaar-gang definitely says that the accused did not actually obstruct with his hand and block the way but stood by the staircase, I must hold that he did no physical act which could be regarded as obstruction while his verbal protest, not containing anything that could be interpreted as a threat which was likely to be immediately put into force, could not amount to obstruction either.[61]

1340

Where on account of electrocution of the daughter of a tenant of the accused, police officials visited to check the fresh electric wiring and leakage of current with permission, the search was undertaken in exigent circumstances. The investigating team was obstructed while taking photographs and was confined wrongfully in the house, which amounted to obstructing them in the discharge of their public duties, thus the framing of charges under ss 186 and 342, IPC against the accused persons was found proper.[62]

16. 'Public Servant'

Commentary under s 21, *ante* may be referred to.

A vaccinator is a public servant within the meaning of this section and s 21 (8),[63] so also is a Union Karnam possessing a general authority in writing,[64] and a clerk in the cess-collection department of a district municipality.[65] Under s 21(10) of this Code read with s 11 of the Tolls on Roads and Bridges Act,[66] a toll contractor as well as his servants are public servants.[67] A local board road sircar, who merely supervises roadwork or the construction of a culvert, is not a public servant[68]

By s 21, IPC, every officer of a court of justice whose duty it is to execute any judicial process, is a public officer. The resistance of a process of a civil court is punishable under this Code.[69] A commissioner appointed by a civil court to divide the properties by metes and bounds as a result of a preliminary decree for partition, is a public servant within the meaning of s 21 of this Code. Any obstruction to the work done by him is an offence under this section.[70] Obstructing an officer of a co-operative society from removing attached property is not an offence under this section, as he is not a public servant.[71]

An officer authorised by a court to arrest a person whose evidence is deemed necessary under the Bengal Pilots Act 1859, s 15, and the Indian Merchant Shipping Act 1883, s 14, is a public servant within the meaning of this section.

The section applies only to obstructing a public servant in the discharge of his public functions. Obstruction to persons called to help a public servant, is not obstruction to the public servant.[72]

17. 'In the Discharge of his Public Functions'

The public functions contemplated by this section mean legal or legitimately authorised public

functions, and are not intended to cover any act that a public functionary may choose to take upon himself to perform, and the mere fact of a 1341public servant believing that he was acting in the discharge of his duties will not be sufficient to make resistance or obstruction to him amount to an offence within the meaning of this section.[73] If a levy is legal,[74] the public servant would be performing a legal duty when attaching property, and resistance or obstruction to him would be an offence under this section.[75] But resistance to the execution of a warrant which is illegal and without any legal force does not attract the operations of this section.[76]

Where the police party forcibly took the petitioner to the government dispensary, against his will, the petitioner has a right to resist it. If in that incident any police personnel were given some beating, they invited it. No offence is, therefore, committed and the conviction has to be set aside.[77]

A warrant of attachment, which does not bear the signature[78] or the seal of the court issuing it,[79] is illegal and resistance to the execution of it is no offence. A public servant who seeks to execute a warrant of arrest which is not signed by a magistrate as required by s 70 of the CrPC, but which only bears his initials, and the substance of which is not notified to the person to be arrested, as required by s 75 of that Code, does not act in the discharge of his public functions in a manner authorised by law.[80] So also in the case of a warrant of attachment which has expired.[81]But the authorisation of a public servant to act as such in a given case need not necessarily be of a formal nature.[82] The functions, discharged by a public servant would not, however, be public-functions if they fall wholly outside the jurisdiction or authority which he, as a public officer, possesses.[83]

Where the complainant police officer entered the house of the accused in connection with the investigation of a case, without obtaining any warrant or written permission, and the accused had not used any criminal force or assaulted the 1342complainant to deter her from discharging her duty, held no offence under s 186 or s 353, IPC was committed. FIR was quashed on petition filed under s 482, CrPC .[84]

18. Some Illustrative Cases

A district magistrate has no authority to issue a warrant for the production of a witness at an investigation by a police officer, but only before his own court.[85] The warrant issued by him for the production of a witness for production before a police officer is, therefore, not lawful.

The accused, who were not parties to a suit in which a public right of way was claimed, did not allow a *munsif*, in whose court the suit was pending, to pass in a boat through a ditch, which was their private property, when the *munsif* wanted to pass through it for the purpose of making a local inspection in connection with the suit. It was held that the accused could not be held guilty of the offence under this section.[86]

An obstruction to the delivery of possession in execution of a decree by the petitioner, who was in possession of the property and not bound by the decree, cannot be treated as an unlawful obstruction to the exercise of a lawful authority by a public servant.[87]

Prosecution evidence established that train was stopped by the accused appellant who cut the hotch pipe and on being restrained from doing so, assaulted the complainant police constable. When the accused appellant and other persons were taken to the guard room, they were shouting at him and threatening to throw him on the railway track. The accused was duly identified. He had obstructed a public servant and voluntarily caused hurt to him in order deter him from discharging his duty. He was convicted under s 186, IPC .[88]

Generally, an obstruction to the execution of illegal and *ultra vires* warrants is no offence.[89]

On the other hand, the authorisation of a public servant to act as such in a given case need not necessarily be of a formal nature.[90] But the functions discharged by a public servant would not be

public functions if they fall wholly outside the jurisdiction or authority, which he as a public officer possesses.[91] This section does not apply to an officer who is acting wholly outside his jurisdiction or authority.[92]

A warrant for the realisation of a sum, which includes an installment, which is not due, is altogether without jurisdiction. When a distress warrant is issued without jurisdiction, no offence is committed under this section if the execution of the warrant is resisted.[93]1343

A person resisting a warrant is not guilty of an offence under this section, where the warrant was directed by a *munsif* to a place beyond his jurisdiction.[1]

If a public officer does no more than act upon the official instructions he has received, and if those official instructions are not of such a kind as to be obviously and patently illegal, then he acts properly in carrying out such orders and, resistance to a public officer carrying out orders which upon the face of them are not open to objection and are in proper form, is an offence against the statute.[2] There is no duty laid upon a bill collector and other persons executing warrants, to make independent inquiries regarding the validity of the warrant; nor would it be possible for him to do so.[3]

Where an officer had been entrusted with the execution of a search warrant, directing him to search in a particular place, and the officer, in fact, searched in other places, it was held that resistance to him and escape from his custody was not an offence.[4]

The prosecution case was that the accused persons forcibly entered the office of the DCP Traffic, gheraoed and manhandled DCP. However, the prosecution case of causing hurt, assault or use of criminal force to deter a public servant from discharging his duty was not proved, thus, the accused was acquitted of the charges under ss 186, 353 and 332, IPC .[5]

Where a peon was apparently carrying out official instructions to sell the attached bullocks, but the instructions were obviously and patently illegal because the certificate officer had no power to authorise the peon to sell them, it was held that the peon was not discharging his public functions and an obstruction to him was no offence.[6]

A receiver, taking possession of property in possession of a third party, in contravention of the provisions of O 40, r 1(2) of the Code of Civil Procedure, cannot be said to be discharging his public functions and resistance to him is no offence.[7]

19. Obstructing Public Servant Acting in Good Faith--Conflicting Views

There is a conflict of judicial opinion on the question whether a person who obstructs a public servant, acting in good faith though his act is not strictly justifiable in law, commits an offence under this section. In *Queen-Empress v Tulsiram* ,[8]a collector, having no legal authority to do so, ordered a surveyor to execute a decree for possession. The surveyor, in attempting to execute the decree, was obstructed by the accused. It was held by the Bombay High Court that the collector having no authority to issue the order to the surveyor, the surveyor acting under the collector's orders was not discharging a public function and that the act of the accused in obstructing him could not be an offence under this section. Repelling an argument that the surveyor 1344was protected by s 99 of the Code and that the accused had no right of private defence, it was held that was not so; for the protection given by that section to a public officer who, acting in good faith under colour of his office, does an act not causing the apprehension of death or grievous hurt which may not be strictly justifiable in law, does not extend to an officer whose act is altogether illegal. Nor was the surveyor protected by the second paragraph of s 99 ; for though he was acting by the direction of the collector, still the collector's order was so entirely *ultra vires* as to leave no room for the operation of the section. In *Emperor v Shivdas Omkar Marwadi* ,[9] the same court observed:

> Before an offence under s 186 of the Penal Code can be said to be established against any person, it is requisite, as the section itself expressly recites, to prove that the public servant concerned, was obstructed in the discharge of his public functions, and that we take it as a matter of fact and not a matter of the public servant's intentions. His intentions may have been perfectly honest, but if in fact and in law the discharge of which he was obstructed were not public functions, then no offence can be committed under this section. It is plain that the functions would not be public functions if they fell wholly outside the jurisdiction or authority which he as a public officer possessed.

Following these two rulings it has been held in another Bombay case that an obstruction offered to a range forest officer, who was acting in perfect good faith but having no jurisdiction, was not punishable under this section.[10] The Calcutta,[11] Lahore[12] and Patna[13] High Courts, took the same view.

A contrary view has been taken by the Madras High Court in a number of cases.[14] In the leading case of *Queen-Empress v Poomalai Udayan* ,[15] it is said that if the act of the public servant, however, irregular and illegal it may have been, was done in good faith under the colour of his office, an offence under this section would be committed if he was obstructed. The case of *Queen-Empress v Tulsiram* ,[16] was distinguished on the ground that the public servant was in effect not a public servant. This was followed in *Public Prosecutor v Madhava Bhonjo Santo* ,[17] where it was observed that s 99, cl 2, IPC, no doubt, in terms, applies only to the right of private defence against the act of a public servant acting in good faith under the colour of his office, but that section has been held by this court to throw light on and govern the interpretation of the expression 'lawful authority' and 'discharge of public functions' 1345found in ss 183 and 186, IPC . This case was, in its turn, followed in Re *Peer Masthan Rowther*[18] and *Simhadri Naidu v Emperor.* [19]

In *Queen-Empress v Janki Prasad* ,[20] the Allahabad High Court held that obstruction to the execution of a warrant which was sealed but which was only initiated by the officer issuing the warrant (instead of being signed), did render the obstructer punishable under this section, if the officer executing the warrant acted in good faith.

The Bombay High Court in *Reg v Vyankatrav Shrinivas* ,[21] held that if a public servant *bona fide* believed that he was discharging his public functions within the scope of his authority, even though he was mistaken as to the extent of his powers, an obstruction caused to him would be punishable under s 1876, IPC . This decision was approved of in *Bhawoo Jivaji v Mulji Dayal.* [22]

In *Dukhan Sahu v Emperor* ,[23] a peon having a proper warrant of attachment against *J* for attaching the goods from his shop, went to the shop with two men of the decree-holder, who stated that the shop belonged to *J*, and seeing *J* in the shop regarded in good faith, that the property belonged to *J* and attempted to affect attachment, but was obstructed and threatened by *J*'s son who claimed that the shop belonged to him. It was held by the Patna High Court that *J*'s son committed an offence under s 186, IPC, by obstructing the peon whose duty it was to attach the property. A similar view was taken in *Doman Mahto v Emperor* [24] and *Puna Mahto v Emperor* .[25]

The question as to the correctness of either of the above views was raised in *Santosh Kumar Jain v State* ,[26] but was left undecided. In favour of the latter view, it must be conceded that this section speaks of a public servant in the discharge of his 'public functions' and not 'lawful functions', and a public servant acting in good faith under colour of his office cannot be said to be acting in his private capacity and must be said to be discharging his public functions. But, at the same time, a public servant doing something absolutely illegal cannot be said to be discharging any of his public functions. There can be no public function to do something illegal.

20. Delegated Functions

Public functions may consist of delegated authority. Where a warrant of attachment was addressed to the *nazir* of the court, who delegated its execution to a court peon, by an endorsement of the peon's name on the warrant, an obstruction of the peon in executing the warrant was held to be an offence under this section.[27] So also a *nazir* of a court may delegate the execution of a warrant of arrest.[28]

But the name of the delegate must appear on the warrant, otherwise resistance to its execution is no offence.[29]1346

21. Procedure

The procedure is the same as in the case of an offence under s 182 . The limitation for the prosecution of an offence under this section is one year.

However, it is a well accepted proposition of law that where an accused commits some offences which are separate and distinct from those contained in s 195 ; s 195 will affect only the offences mentioned therein unless such other offences form an integral part of the same so as to amount to offences committed as a part of the same transaction. In such a case, the other offences would also fall within the ambit of s 195, CrPC .[30]

22. Complaint

Under s 195(1)(a) no court shall take cognizance of an offence under this section except on the complaint by the public servant concerned or by some other public servant to whom he is subordinate. The prerequisites for taking cognizance are: (a) that there should be a complaint; (b) that the complaint should be in writing; and (c) that it should be by the public servant concerned, or by some other public servant to whom he is subordinate. Want of such a complaint is fatal to a prosecution under this section.[31] A statement under ss 161 or 164, CrPC, would not constitute a written complaint and cannot be equated as a special complaint in writing stipulated under s 195, CrPC .[32] cognizance taken by the magistrate on a police-challan is illegal and is liable to be quashed.[33]

23. Section 195 , CrPC Does not Bar Trial of Other Distinct Offences

The allegations upon which a charge under s 353, IPC is based may be the same as those constituting the charge under s 186, IPC, but it cannot be ignored that ss 186 and 353, IPC, relate to two distinct offences and while the offence under the latter section is a cognizable offence, the one under the former section is not so. The ingredients of the two offences are also distinct. Section 186 , IPC, is applicable to a case where the accused voluntarily obstructs a public servant in the discharge of his public functions, but under s 353, IPC, the ingredients of assault or use of criminal force while the public servant is doing his duty as such, is necessary. Where, upon the facts, the commission of offences disclosed is such that they can come under either s 353 or s 186, it is open to the complainant to proceed only under s 353 which does not require a complaint from the concerned public servant or his superior authority.[34]

But the order taking cognizance of an offence under s 186, IPC would be bad in law as it would attract the mischief of s 195, CrPC .[35]1347

24. Split up not Permissible

The prosecution is, however, not entitled to split the facts of the case for the purpose of circumventing the provisions of the said s 195 of the Criminal Procedure Code .[36] Where, however, a person who has been charged under ss 186 and 504, prosecution under s 504 is not bad because no complaint has been filed under the said s 195(1)(a) .[37]

25. Charge

The following form of charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:

That you, on or about the.....day of.....at....., voluntarily obstructed a public servant.....(*name or official designation of public servant*) in the discharge of his public functions.....(*give the details*), and thereby committed an offence, punishable under section 186 , Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

26. Proof

The burden is on the prosecution to show that the court or officer who issued the warrant in the execution of which the public servant was obstructed, had jurisdiction to do so,[38] and that the public servant was discharging public duties imposed on him by law.[39]

27. Punishment

Defiance of the processes of law is a serious offence as it hampers the administration of justice. If allowed to be committed with impunity, the prestige of the court is lost. The sentence should, therefore, not be lenient.[40]

The incident had taken place in the year 1992, and the time of sentencing the accused had attained the age of 50 years, thus, the sentence of two years imposed was reduced to a period of three months, and a fine of Rs. 5000/- was imposed.[41]

9 *Provincial Government, CP & Berar v Balaram Jagannath* AIR 1938 Nag 529, 39 Cr LJ 954, (1938) NLJ 290 .

10 *State v Babulal Gaurishankar Misra* AIR 1957 Bom 10, p 12, (1957) Cr LJ 43, (1957) ILR Bom 80, 58 Bom LJ 1021 .

11 *State of Himachal Pradesh v Vidyasagar & Ors* (1997) Cr LJ 3893 (HP) .

12 *State of Orisssa v BK Rao* (1962) 4 Ori JD 278, (1962) 28 Cut LT 4, p 7 .

13 *Durgacharan Naik v State of Orissa* AIR 1966 SC 1775, p 1778, (1966) Cr LJ 1491 ; *Kuttappu v Intelligence Officer* (1962) Ker LJ 875, p 876, (1962) KLJ 493 ; *Narayanrao v State of Maharashtra* (1971) Mah LJ 512 .

14 *Ah Choung v Emperor* AIR 1932 Rang 21, p 24, 33 Cr LJ 175, ILR 9 Rang 601 .

15 *Thakur Prasad v Emperor* AIR 1936 Pat 74, 75, 37 Cr LJ 104, 16 PLT 808 .

16 *Dukhan Sahu v Emperor* AIR 1937 Pat 633 .

17 *Phudki v State* AIR 1955 All 104, p 105 .

18 *Darkan v Emperor* AIR 1928 Lah 827, p 828, 29 Cr LJ 645 ; *Emperor v Babulal Mushilal* AIR 1936 Nag 86, 37 Cr LJ 587 ; *Kisan Krishnaji Tikle v Nagpur Conference of Society of St Vincent De Paul* AIR 1943 Nag 334, 45 Cr LJ 407 ; *Ah Choung v Emperor* AIR 1932 Rang 21, 33 Cr LJ 175, ILR 9 Rang 601 ; *Janki Prasad v State of Bihar* (1975) Cr LJ 575, p 576 (Pat) .

19 *Kisan Krishanji Tikle v Nagpur Conference of Society of St Vincent De Paul* (1944) 45 Cr LJ 407, p 409 .

20 *State v Babulal Gaurishankar Misra* AIR 1957 Bom 10, p 12, (1957) Cr LJ 48, (1957) ILR Bom 80, 58 Bom LR 1621 ; *Santosh Kumar Jain v State* AIR 1950 Pat 436 ; *Ramlakhan Ram v State* AIR 1950 Pat 544 ; *Nanhua v Emperor* AIR 1938 All 118, 39 Cr LJ 363, (1937) All LJ 1344 ; *State of West Bengal v Harjit Singh Anandpuri* (1958) 1 Cal LJ 81 ; *Emperor v Suleman*

Abba AIR 1935 Bom 24, 36 Cr LJ 516, 36 Bom LR 1124 ; Re *Thimmakka*AIR 1942 Mad 552, 43 Cr LJ 757 ; *Dukhan Sahu v Emperor* AIR 1937 Pat 633, 39 Cr LJ 100 ; *Emperor v Babulal* AIR 1936 Nag 86, (1936) ILR Nag 50, 37 Cr LJ 587 ; *Sajan v Emperor* AIR 1935 Sind 245, 159 IC 665, 37 Cr LJ 148 .

21 *State of Bihar v Ramanand Singh* (1966) BLJR 300 .

22 *Empress v Somama* 15 ILR Mad 221, 1 Weir 134 ; followed in *Jaswant Singh v King-Emperor* AIR 1925 Lah 139, 25 Cr LJ 721 ; *Emperor v Gajadhar* (1910) 11 Cr LJ 721 .

23 UBR (1897-1901), Vol I, pp 266, 267.

24 *Nanhua v Emperor* AIR 1938 All 108, 39 Cr LJ 363, (1937) All LJ 1344 .

25 Re *Todd*1882 AWN 52.

26 Re *Karuman* 1 Weir 134.

27 *Emperor v Suleman Abba* AIR 1935 Bom 24, 36 Cr LJ 516 .

28 *Ramlakhan Ram v State* AIR 1950 Pat 544 .

29 *Nafur Sardar v Emperor* AIR 1932 Cal 871, p 876, 36 CWN 1038 ; *Emperor v Tohfa* AIR 1933 All 759, 34 Cr LJ 1211, (1933) All LJ 952 .

30 *Queen-Empress v Thimmachi* 1 Weir 131 .

31 *Shikha Goel and Anor v ESIC* 2001 Cr LJ (NOC) 148 (AP), (2000) IV CCR 431 (AP), (2001) 2 Andh LT (Cr) 289 .

32 Re *Thimmakka*AIR 1942 Mad 552, 43 Cr LJ 757 ; *Gottumukkula Narayana Raju v King-Emperor* AIR 1924 Mad 760, 26 Cr LJ 97 ; *State of West Bengal v Harjit Singh* (1958) 1 Cal LJ 81 ; *Nanhua v Emperor* AIR 1938 All 118, 39 Cr LJ 363 ; *Emperor v Suleman Abba* AIR 1935 Bom 24, 36 Cr LJ 516, **approved in***State v Babulal Gaurishankar Misra* AIR 1957 Bom 10 ; *Santosh Kumar Jain v State* AIR 1950 Pat 436 .

33 *Dukhan Mst v Emperor* AIR 1928 Lah 827, 29 Cr LJ 645 ; **relying on***Emperor v Gajadhar* 11 Cr LJ 721 ; *Aijaz Hussain v Emperor* AIR 1916 All 53, 17 Cr LJ 413, ILR 38 All 506, 14 All LJ 731 **dissented from***State v Baburam Gaurishankar Misra* AIR 1957 Bom 10 .

34 *Nafur Sardar v Emperor* AIR 1932 Cal 871, p 876, 36 CWN 1038 ; *Emperor v Tohfa* AIR 1933 All 759, p 760, 34 Cr LJ 1211, (1933) All LJ 952 ; *Dukhan Sahu v Emperor* AIR 1937 Pat 633, 18 PLT 783, (1937) PWN 771 ; *Abhiram Sahani v State* 26 Cut LT 596 .

35 *Nanhua v Emperor* AIR 1938 All 118, p 119, 39 Cr LJ 363, (1937) All LJ 1344 ; *Gottumukkala Narayana Raju v King-Emperor* AIR 1924 Mad 750, 26 Cr LJ 97, (1924) Mad WN 438 .

36 *Ah Choung v Emperor* AIR 1932 Rang 21, 33 Cr LJ 175, ILR 9 Rang 601 .

37 *Emperor v Pundlick Krishna Pai* 1 Cr LJ 262, 6 Bom LR 254 .

38 *Aijaz Hussain v Emperor* AIR 1916 All 53, 17 Cr LJ 413, ILR 38 All 506, 14 All LJ 731 .

39 *Queen-Empress v Somama* 15 ILR Mad 221, 1 Weir 133, 2 Mad LJ 120 ; Re *Arora Maistri* 1 Weir 132; *R v Bhaklidas* 5 Bom HCC (Cr) 51; *Lilla Singh v R* 22 ILR Cal 286 ; *Ramlakhan Ram v State* AIR 1950 Pat 544 ; *Eh Parakh v King-Emperor* AIR 1926 Oudh 202, 27 Cr LJ 328, 1 ILR Luck 133, 3 OWN 160 .

40 *Sajan v Emperor* AIR 1935 Sind 245, 37 Cr LJ 148, 29 SLR 54 .

41 *Ebrahim Sircar v Emperor* ILR 29 Cal 236 .

42 *Ram Ghulam Singh v Emperor* AIR 1925 All 401, 26 Cr LJ 978, 47 ILR All 579, 23 All LJ 352 .

43 *Ram Ghulam Singh v Emperor* AIR 1925 All 401, 26 Cr LJ 978, 47 ILR All 579, 23 All LJ 352 .

44 *Queen-Empress v Thimmachi* 15 ILR Mad 93, 1 Weir 131 .

45 Re *M Jogabathudu* 1 Weir 132; Re *Chitta Konaiya* 1 Weir 132; Re *Thulukana Chetti* 1 Weir 129; Re *Byloor Lingah* 1 Weir 130; Re *Komati Ramannah* 1 Weir 131.

46 *Phadki v State* AIR 1955 All 104, p 105, (1955) Cr LJ 278 ; *Jamna Das v Enmperor* AIR 1927 Lah 708, 28 Cr LJ 753, 9 LLJ 408 ; *Peeru Mahommad Lebhai v Swaminathan Pillai* (1917) Mad 182 (1), 17 Cr LJ 71 .

47 *Reg v Poshu* 2 Bom HCR 128 ; *Sheikh Nasa v R* 37 ILR Cal 122 .

48 *Sheo Progash v Bhoop Narain* 22 ILR Cal 759 ; *R v Thavar Issaji Boree* (1911) 12 Cr LJ 457 .

49 *R v Sommanna* 15 ILR Mad 221, 1 Weir 133 .

50 Section 39, Indian Penal Code 1860.

51 Re *Thurimakka*AIR 1942 Mad 552 (2), 43 Cr LJ 755, (1942) 1 Mad LJ 585 .

52 *Gottumukkla Narayana Raju v King-Emperor* AIR 1924 Mad 760, 26 Cr LJ 97, 1924 Mad WN 439 .

53 *Nishi Kanta Pal v Emperor* AIR 1917 Cal 180, 18 Cr LJ 62, 20 CWN 857 .

54 *State of West Bengal v Harjit Singh* (1958) 1 Cal LJ 81 .

55 *Nanhua v Emperor* AIR 1938 All 118, 39 Cr LJ 363, (1937) All LJ 1344 .

56 *Betts v Steevens* (1910) 1 KB 1, 79 LJKB 17, 73 JP 486, 101 LT 564 .

57 *Madan Gopal alias Madan Bhaiya v State* (2001) II CCR 149 (Del) .

58 *Shikha Goel & Anor v ESIC & Ors* (2000) IV CCR 431 (AP), (2001) Cr LJ (NOC) 148 (AP) .

59 *Emperor v Suleman Abba* AIR 1935 Bom 24, 36 Cr LJ 316, 36 Bom LR 1124 ; **approved** in *State v Babulal Gaurishankar Misra* AIR 1957 Bom 10 .

60 *Santosh Kumar Jain v State* AIR 1950 Pat 436 .

61 *Ah Choung v Emperor* AIR 1932 Rang 10, 24 .

62 *Veena Rangekar v State* (2000) Cr LJ 2543 (Del)

63 Re *Sooraparazu Singayya* 1 Weir 621, **relying on** 1 Weir 129.

64 Re *Gopalasaminatha Aiyar* 1 Weir 128.

65 *R v Babulal* 33 ILR Bom 213 .

66 Tolls on Roads and Bridges Act, Bombay Act 3 of 1875.

67 *Emperor v Suleman Abba* AIR 1935 Bom 24, 36 Cr LJ 516, 36 Bom 1124 .

68 *Addaita Bhuia v Kali Das De* (1905) 6 Cr LJ 393, 394, 12 CWN 96 ; **but see***Regina v Ramajirav* 12 Bom HCR 1 .

69 *Ameen v Bhagai Duffadar* 10 WR 43, p 44 .

70 Re *Ramiah*AIR 1951 Mad 773, 52 Cr LJ 847, (1951) Mad WN 200, (1951) 1 Mad LJ 191 .

71 *Udayanath Bank v State* (1989) Cr LJ 2216 (Ori) .

72 *Mata Ram v Emperor* AIR 1924 Lah 238(1), 24 Cr LJ 594 ; *Mohd Safait Hussain v State of Bihar* (1984) BLJR 132, (1984) Pat LJR 573 (Pat) .

73 *Lilla Singh v Queen-Emperor* 22 ILR Cal 286, p 290 ; *Reg v Bhagtidas Bhagwan Das* 5 Bom HCR 51 ; *Queen-Empress v Tulsiram* 13 ILR Bom 168 ; Re *Baroda Kant Pramanick* 1 CWN 74; *Queen-Empress v Jogendra Nath Mukerjee* 24 ILR Cal 320 ; *Gahar Mahommad Surkar v Pitamber Das* AIR 1918 Cal 4, 19 Cr LJ 968 ; *Jaswant Singh v King-Emperor* AIR 1925 Lah 139, (1924) 25 Cr LJ 721 .

74 *Moreshwar Janardhan Gogate v Emperor* AIR 1928 Bom 497, 30 Bom LR 1255 .

75 *Ram Singh v Emperor* AIR 1935 Pat 214 ; *Tribhuwan v Emperor* AIR 1918 Oudh 162, 19 Cr LJ 641 .

76 *Gopal Mahton v Emperor* AIR 1941 Pat 161, 41 Cr LJ 819 ; *Emperor v Tohfa* AIR 1933 All 759, 34 Cr LJ 1211 ; *King-Empror v Himayat Ali* (1905) 2 Cr LJ 64, 10 PR (Cr) 1905 ; *Abdul Gafur v Queen-Empress* 23 ILR Cal 896 ; *Gahar Mahommad Sarkar v Pitambar Das* AIR 1918 Cal 4, 19 Cr LJ 968, 22 CWN 814 ; *Marrigappa Naicker v Emperor* AIR 1925 Mad 613, 26 Cr LJ 750 ; *Badri Goope v Emperor* AIR 1926 Pat 237, 27 Cr LJ 418, ILR 5 Pat 216 .

77 *Babulal v State of Rajasthan* (1992) Cr LR (Raj) 517 .

78 *Ramdayal v Mahtab Singh* 7 ILR All 506 .

79 *Khidiri Bux v Emperor* AIR 1919 Pat 404, 20 Cr LJ 139 .

80 *Abdul Gafar v R* 23 ILR Cal 896 ; *Mohin Mohan Banerji v Emperor* AIR 1916 Pat 272, 18 Cr LJ 39 .

81 1 Weir 134; *Sheikh Nasu v R* 37 ILR Cal 122 ; *R v Jogendra Nath Mukerjee* 24 ILR Cal 320 ; *Nishikant Pal v Emperor* AIR

1917 Cal 180, 18 Cr LJ 62 ; *Kurugappa Naicker v Emperor* AIR 1925 Mad 613, 36 Cr LJ 750 ; *R v Himayat Ali* (1905) 2 Cr LJ 64 ; *Chepamahton v Emperor* AIR 1928 Pat 550, 30 Cr LJ 175 ; *Sahadat v State* 56 BLJR 439 ; *Kazi Abdul Kabir Mahommad v Emperor* AIR 1939 Sind 333, 41 Cr LJ 103 ; *Parshottam Dass v State* AIR 1965 Punj 264, p 266-67, (1965) 2 Cr LJ 116 ; *State v Bhaurao* 1977 Mah LJ (Notes) 5 .

82 *R v Abdullah* 21 ILR All 499 ; *Birdi Chand Jaipuria v Darwarin Jayaswal* AIR 1932 Pat 276, p 279 ; *Dukhan Sahu v Emperor* AIR 1937 Pat 633 .

83 *Emperor v Shivadas Onkar Marwadi* (1913) 14 Cr LJ 251, p 252 ; *Emperor v Kadarbhai Usufalli Bohsi* AIR 1927 Bom 483 ; *Dharanidharjana v Kedarnatih Das* AIR 1945 Cal 48, 46 Cr LJ 498 ; *Suribeshwarnath v Emperor* AIR 1924 Cal 501, 39 Cal LJ 33 ; Re *Peer Masthan Rowther*AIR 1938 Mad 659, p 660, 39 Cr LJ 879 .

84 *Aniruddha Ganesh Pathak v State of Maharashtra* 2010 Cr LJ (NOC) 1069 (Bom) .

85 *R v Jogedra Nath Mukerjee* 24 ILR Cal 320 .

86 *Nishi Kant Pal v Emperor* AIR 1917 Cal 180, 18 Cr LJ 62 .

87 *Murugappa Naiker v Emperor* AIR 1925 Mad 613, 26 Cr LJ 750 .

88 *Gyan Bahadur v State of Madhya Pradesh* 2013 Cr LJ 1729, p 1732 (Chh), 2013 (2) CGLJ 131 .

89 *R v Himayat Ali* (1910) 11 Cr LJ 64, 10 PR (Cr) 1905, 6 PLR 256 .

90 *R v Abdullah* 27 ILR All 499 .

91 *Emperor v Shivadas Omkar Marwadi* (1913) 14 Cr LJ 251, p 252, 15 Bom LR 315 .

92 *Emperor v Kadarbhai Usufalli Bhori* AIR 1927 Bom 483, 29 Bom LR 987 .

93 *Dharanidhar Jana v Kedar Nath Das* AIR 1945 Cal 48, 46 Cr LR 498, (1944) 1 ILR Cal 309, 47 CWN 935 .

1 *Surbeshwarnath v Emperor* AIR 1924 Cal 501, 39 Cal LJ 33 .

2 *Birdhi Chand Jaipuria v Darbari Jayaswal* AIR 1932 Pat 276, p 279, 13 PLR 480 ; *Dukhan Sahu v Emperor* AIR 1937 Pat 633, 1937 PWN 771, 18 PLT 783 .

3 Re *Peer Masthan Rowther*AIR 1938 Mad 659, p 660, 39 Cr LJ 879, (1938) Mad WN 418 .

4 *Chepa Mahton v Emperor* AIR 1928 Pat 550, 30 Cr LJ 175 .

5 *State v Ramesh* 2011 Cr LJ (NOC) 556 (Del) .

6 *Sahadat v State* 1956 BLJR 439 .

7 *Kazi Abdul Kabir Mahommad Sidik UJAN v Emperor* AIR 1939 Sind 333, 41 Cr LJ 103 .

8 *Queen-Empress v Tulsiram* 13 ILR Bom 168 ; *Thithi Suryanarayana v Thata Simhardi* AIR 1934 Mad 664 (2), 67 Mad LJ 510, (1934) Mad WN 1230 .

9 *Emperor v Shivdas Omkar Marwadi* (1913) 14 Cr LJ 251, 15 Bom LR 315 .

10 *Emperor v Kararbhai Usufalli Bohri* AIR 1927 Bom 483, 28 Cr LJ 705, ILR 51 Bom 896, 29 Bom LR 987 .

11 *Lilla Singh v Queen-Empress* 22 ILR Cal 286, 290 ; **relying on***Reg v Bhagtidas Bhagwandas* 5 Bom HC (Cr) 51; *Queen-Empress v Tulsiram* 13 ILR Bom 168 ; *Queen-Empress v Jogendra Nath Mukerjee* 24 ILR Cal 320, 1 CWN 154 **relying on** 13 Bom 168, 22 Cal 286; Re *Baroda Kant Pramanick* 1 CWN 74.

12 *Jaswant Singh v King-Emperor* AIR 1925 Lah 139, 141, 25 Cr LJ 721 ; **relying on***King-Emperor v Himayat Ali* 10 PR (Cr) 1905 ; *Queen-Empress v Tulsiram* 13 ILR Bom 168 ; *Abdul Gafur v Queen-Empress* 23 Cal 896 .

13 *Mod Narayna Rai v State of Bihar* 1963 BLJR 279 ; *Tunki Singh v State* (1969) BLJR 804, p 807, (1969) Pat LJR 230 ; *B Tiwary v State* (1964) BLJR 211 .

14 *Queen-Empress v Poomalai Udayan* 21 ILR Mad 296, 1 Weir 135 ; *Public Prosecutor v Madhava Bhonjo Santo* AIR 1917 Mad 889 (2), 17 Cr LJ 481 ; Re *Peer Masthan Rowther*AIR 1938 Mad 659, 39 Cr LJ 879, (1938) Mad WN 418 ; and the cases cited in them.

15 *Queen-Empress v Poomalai Udayan* 21 ILR Mad 296, 298 ; **relying on***Queen-Empress v Ramayya* 13 ILR Mad 148 ; *Queen-Empress v Bakot Koli* 19 ILR Mad 349 ; *Queen-Empress v Tiruchittambala Pathan* 21 ILR Mad 78 .

16 *Queen-Empress v Tulsiram* 13 ILR Bom 168 .

17 *Public Prosecutor v Madhava Bhonjo Santo* AIR 1917 Mad 889 (2) .

18 Re *Peer Masthan Rowther*AIR 1938 Mad 659 .

19 *Simhadri Naidu v Emperor* (1936) Mad WN (Cr) 35 .

20 *Queen-Empress v Janki Prasad* 8 ILR All 293, 6 All WN 106 .

21 *Reg v Vyankatrav Shrinivas* (1870) 7 Bom HCR (Cr) 50 .

22 *Bhawoo Jivaji v Mulji Dayal* (1888) 12 Bom 377 .

23 *Dukhan Sahu v Emperor* AIR 1937 Pat 633, 18 PLT 783, (1937) PWN 771 .

24 *Doman Mahto v Emperor* AIR 1920 Pat 482, 21 Cr LJ 193 .

25 *Puna Mahto v Emperor* AIR 1932 Pat 315, ILR 11 Pat 743, 13 PLT 502 .

26 *Santosh Kumar Jain v State* AIR 1951 SC 201, p 203 .

27 *Dharam v R* 22 ILR Cal 586 ; *Abdul Karim v Bullen* 6 ILR All 385 ; *Doman Mahto v Emperor* AIR 1920 Pat 482, 21 Cr LJ 193 .

28 *Sheo Progash v Bhoop Narain* 22 ILR Cal 759 .

29 *Sheikh Naseer v R* 37 ILR Cal 122 .

30 *Ramji Bhikha Koli & Ors v State of Gujarat* (1999) Cr LJ 1244 (Guj) .

31 *Lajja Ram v State* AIR 1952 HP 32, 52 Cr LJ 821 ; *Makardhwaj Sahu v State* AIR 1954 Orissa 175, 55 Cr LJ 950 ; *Basanta Kumar Gon v The State* AIR 1956 Cal 118, (1956) Cr LJ 524 ; *Inder Singh v State* AIR 1960 Punj 356, (1960) Cr LJ 987 ; *Janki Prasad v State of Bihar* (1975) Cr LJ 575, p 576 (Pat) .

32 *Gurinder Singh v State* (1996) 3 CCR 257, 259 (Del), (1966) 2 Ch Cr C 396 .

33 *Basudeva v State* (1985) CCC 97 (Del) ; *Gurinder Singh v State* (1996) 3 CCR 257 (Delhi), (1996) 2 Ch Cr C 396 ; For detailed commentary, see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

34 *Durgacharan Naik v State of Orissa* AIR 1966 SC 1775, (1966) 2 SCWR 162, (1966) Cr LJ 1491, (1966) SCD 1043, 32 Cut LT 1106 ; *Jamman Singh v State of Bihar* (1985) Cr LJ 775 (Pat), (1985) BBCJ 125, (1985) Pat LJR 401 ; *Bhagat Ram v State of Punjab* (1991) 2 CCC 213, p 215 (P&H); *Gurinder Singh v State* (1996) 3 CCR 257 (Del), (1996) 2 Ch Cr C 396 .

35 *Pankaj Aggarwal & Ors v State of Delhi & Anor* (2001) II CCR 318 (SC) .

36 *Bashirul-Huq v State of West Bengal* AIR 1953 SC 293, (1953) Cr LJ 1232 ; *State v Kathi Unad Ranning* AIR 1955 Sau 10, (1955) Cr LJ 52 ; *Radhey Shyam Gupta v State* AIR 1968 All 342, (1968) Cr LJ 1329 ; *Janki Prasad v State of Bihar* (1975) Cr LJ 575 (Pat), (1975) BBCJ 215 ; *Gurinder Singh v State* (1996) 3 CCR 257 (Del), (1996) 2 Ch Cr C 396 .

37 *Rajaram Gangaram v State of Mysore* (1969) Cr LJ 1459, (1969) Mad LJ (Cr) 22 .

38 *Sahadat v State* (1958) BLJR 439, (1956) Pat LR 92 .

39 *Jamunadas Tharoomal v Emperor* AIR 1940 Sind 42, 41 Cr LJ 401 (2); *Emperor v Bhopo* AIR 1933 Sind 174, 34 Cr LJ 1147, 27 SLR 209 ; *Queen-Empress v Dalip* 18 ILR All 246 .

40 *Sheo Ahir v Emperor* AIR 1938 Pat 548, p 550, 40 Cr LJ 71 .

41 *Gyan Bahadur v State of Madhya Pradesh* 2013 Cr LJ 1729, p 1732 (Chh), 2013 (2) CGLJ 131 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 187.

Omission to assist public servant when bound by law to give assistance.--

Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both,1348

and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a court of justice, or of preventing the commission of an offence, or of suppressing a riot or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Comments

1. Scope

Section 176, IPC dealt with an intentional omission to furnish information. This section deals with an intentional omission to render or furnish assistance to a public servant. It provides, first, in general terms, for the punishment when a person being bound by law to render assistance to a public servant in the execution of his public duty intentionally omits to assist; and secondly, it provides for the punishment when the assistance is demanded for certain specified purposes and is refused.[42]

This section and s 188, IPC apply to a direct refusal or an omission by a person, bound by law to render or furnish assistance to a public servant, to do so.

An omission by a landholder, bound under s 21, Reg 20 of 1817, to nominate some person to act as a village watchman, on the occurrence of a vacancy, to do so, was not an offence under either s 187 or s 188, IPC .[43] A similar view has been taken by the Allahabad High Court in *Joti Prasad v Emperor* .[44] In that case, an agent of a *zamindar* had refused to lend the gun of the *zamindar* to a police sub-inspector, and some villagers refused to join an expedition of the sub-inspector of police in the search of dacoits; and the learned judges held that in those circumstances, the accused were not guilty of an offence punishable under s 187, inasmuch as the refusal of the accused to the public servant so to assist did not amount to a failure of public duty required under s 37, CrPC .[45]

2. Analogous Law

Under the English Law, every person, who refuses to assist a peace officer in the execution of his duty in preventing a breach of the peace, when there is a reasonable necessity for calling upon that person, and he is called upon to assist the officer and is not prevented by any physical impossibility or lawful excuse, is guilty of a 1349common law misdemeanour. It is immaterial that the assistance would have been useless if it had been rendered. The punishment for this offence is fine and imprisonment.[46] As regards the duty of private persons to assist peace officers, it is said:

> If a peace officer sees a breach of the peace committed, or is assaulted or obstructed in the arrest of a felon, he can, if there is a reasonable necessity, call upon a private person for his assistance in arresting an offender,

> and that person commits an indictable offence if he refuses to aid the constable. So it is the duty of magistrates at the time of a riot to keep the peace and restrain rioters and pursue and take them, and to enable the magistrates to do this they may call on all the Queen's subjects to assist them, and all the Queen's subjects are bound to do so upon reasonable warning.[47]

3. 'Assistance'

This word 'assistance' referred to in the former part of the section is *ejusdem generis* with the various forms of assistance specified in the latter half. The word 'assistance' must have some direct personal relation to the execution of the duty by the public officer. The signing of the search-list required by s 100 is an independent duty imposed on the witness. The word 'assistance' as used in the section implies that the party who assists in doing something which, in ordinary circumstances, the party assisted could do for himself.[48] The assistance, that can be demanded under this section is personal assistance by the individual of whom it is demanded and not the supply of a contingent of men to assist.[49] The assistance demanded may not be actual physical assistance.[50]

4. 'Bound by Law to Render or Furnish Assistance'--Meaning of the Term

The words 'bound by law' must mean the same thing as 'legally bound' defined by s 43 . The words 'legally bound' in this section must be taken as something which it is illegal to omit, and which illegal omission is an offence, or is prohibited by law, or would furnish ground for a civil action, and that therefore it does not apply to omissions which are merely a breach of departmental rules.[51]

As to when a person is bound by law to render or furnish assistance to a public servant, see ss 37, 72, 73, 100 and 129(2), CrPC 1973.

5. Delegation of Powers not Permissible

Under s 38 of the Code of Criminal Procedure, when a warrant is directed to a person other than a police officer, any other person may aid in the execution of such warrant, but it is not obligatory for him to do so. Under s 43 a private person may himself arrest; under s 32 he must assist a police officer to arrest, but the police officer must be present before he can demand the private person's aid. This section does not 1350intend the delegation by the police of their duties.[52] Police officers who are not in the raiding party set out to search and arrest the accused, have no legal authority to give directions to private individuals to arrest the accused.[53]

6. Limitations of Police Powers

Under s 37 CrPC, every person is bound to assist a magistrate or police officer reasonably demanding his aid in taking, or preventing escape, of any other person whom such magistrate or police officer is authorised to arrest or in preventing or suppressing a breach of peace, *etc.* It would be easy to suggest cases in which a refusal to render active assistance in the arrest of an absconding criminal, or to place at the disposal of a responsible police officer material assistance, such as the use of a firearm or of a bicycle or other means of locomotion urgently required by the circumstances of the case, might involve a criminal liability. But obviously the law does not intend that police officers should have a general power of calling upon members of the public to join them in doing the work for which they are paid, such as tracing out the whereabouts of an absconding criminal or collecting evidence to warrant his conviction.[54]

In a case, two constables and two *chowkidars* arrested a man suspected of having taken part in a riot. On being arrested, the man lay down on the ground and refused to move. The constables demanded the assistance of the accused, a *patwari* and a *mukhia*, who not only refused the assistance but showed sympathy with the man arrested. It was held that the man was lying down in order to secure his eventual escape, that the demand for assistance was reasonable as the constables may have

realised that, if left by themselves, they could have, with the assistance of the chowkidars, tackled the recalcitrant and taken him to the police station, but it had become another matter because people, who had collected around, were his sympathisers. They may well therefore, have desired to have the moral, if not the actual physical assistance, of the *patwari* and the *mukhia* as they were persons of influence in the village, and so it was held that the accused were guilty of the offence under this section.[55]

There is no provision of law which requires a landholder 'to find a clue' in a case of theft and 'assist the police', and he cannot be convicted under this section or under s 188 for disobeying an order of a magistrate to do so.[56]

A refusal to serve as a *panch* when called upon to do so by a forest guard,[57] or to answer questions put by a police officer under s 161,[58] is not an offence under this section.

It is incumbent, under this section that the accused concerned must be bound by law, to render or furnish assistance and, under s 37, CrPC, such aid or assistance must have been reasonably demanded by the officer concerned. If there is no proof of demand, the charge must fail.[59]1351

7. Refusal to Assist in Making Search--Refusal to Sign Search List--Implications of Assistance

Sub-section (8) of s 100, CrPC 1973 expressly provides that any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under s 187 of the Indian Penal Code .[60] But, when there is nothing to indicate that an authorised officer had served or even attempted to serve an order in writing upon any public witness, as envisaged by sub-s (8) of s 100, CrPC,[61] or that there is a vague explanation that public witnesses were approached but they declined but neither the name of the witness has been given nor has any order in writing to that effect been preserved, nor is it asserted that a mention about the same has been made in the case diary, then obviously, there is a deliberate attempt to defeat the legislative safeguards.[62] It has to be borne in mind that where the error, irregularity or illegality, touching the procedure committed by the authorised officer is so patent and loudly obtrusive, that it leaves on his evidence an indelible stamp of infirmity or vice which cannot be oblitered or cured, then it would be hazardous to place implicit reliance on it. The aforesaid and such like circumstances make the court to be circumspect and look for corroboration of the testimony of the said police officials from an independent source.[63] Thus, assisting a search officer by attending and witnessing a search has been made *ejusdem generis* by the legislature with the kind of assistance referred to in the second part of the section. But it is the refusal to attend and witness the search that has been made penal and not the signing of the search list. The assistance which a person is required to give to a public officer must have some direct personal relation to the execution of the duty by the public officer and the signing of the search list required by s 103, is an independent duty imposed upon the witness. The word 'assistance' implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself.[64]

8. Public servant

Section 21 and the commentary thereunder may be referred to.

9. 'Legally Competent'

The commentary under s 174 may be referred to.

10. Court of Justice

Section 20 and the commentary thereunder may be referred to.

11. 'Offence'

An 'offence' denotes a thing punishable under this Code or under any special or local law.[65]1352

12. Riot

Section 146 and the commentary thereunder may be referred to.

13. Affray

Section 159 and the commentary thereunder may be referred to.

14. Procedure

The procedure is the same as in the case of an offence under s 172, *ante.* The prescribed period of limitation for an offence under this section is one year.

15. Complaint

A complaint in writing, by the public servant concerned, or of some other public servant to whom he is administratively subordinate, is required under s 195(1)(a) of the Code of Criminal Procedure for the prosecution of an accused under this section.

16. Charge

The following form of charge may be adopted:

> I (*name and officer of the magistrate, etc*) hereby charge you (*name of the accused*) as follows:
>
> That you, on or about .....day of....., at ....., being bound, by law, to render (*or furnish*) assistance to a public servant..... (*name or official designation as public servant*) in the execution of his public duty, intentionally omitted to give such assistance, and thereby committed an offence, punishable under section 187 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

17. Burden of Proof

For conviction under this section the following must be proved:

For cl (I) that:

(i) the accused was bound by law to assist the public servant;
(ii) the person to be assisted was a public servant;
(iii) he was then in the execution of his public duty;
(iv) the accused omitted to give such assistance; and
(v) he did so intentionally;

For cl (II), it must be further proved that:

(i) the assistance required was demanded:

(a) for the purpose of executing a legal process of a court of justice; or
(b) for the purpose of preventing the commission of an offence, or for suppressing a riot or affray; or
(c) for the purpose of apprehending an offender; and

(ii) the public servant demanding the assistance of the accused was competent to make the demand. 1353

42 Re *Ramaya Naika* 26 ILR Mad 419, p 420, 421, 1 Weir 136 (FB).

43 Re *Kali Prasanna Ghose*(1887) 7 CLR 575.

44 *Joti Prasad v Emperor* AIR 1920 All 265, 58 IC 673, 42 ILR All 314, 18 All LJ 169 .

45 *Ram Prasad v Emperor* AIR 1938 Pat 403, p 405 .

46 *Halsbury's Laws of England*, vol 10, third edn (Simons), p 635.

47 *Halsbury's Laws of England*, vol 10, third edn (Simons), pp 345-46.

48 Re *Ramaya Naika* 26 ILR Mad 419, 421, 1 Weir 136; *Ippilli Magatha v Emperor* 21 Cr LJ 33 (1); *Ram Prasad v Emperor* AIR 1938 Pat 403 (FB), 39 Cr LJ 796, ILR 17 Pat 632, 19 PLT 461, (1938) PWN 477 .

49 Re *Nandani Ramauya* 2 Weir 37.

50 *Ambika Prasad v Emperor* AIR 1932 All 506, 507, 33 Cr LJ 736.

51 *Reg v Appayya* 14 ILR Mad 484 .

52 *Emperor v Hafiz Murid Dood* AIR 1937 Sind 254, 38 Cr LJ 1101, 171 IC 672 .

53 *Amarendra Nath v State of Bihar* AIR 1955 Pat 106 .

54 *Joti Prasad v Emperor* AIR 1920 All 265, 42 ILR All 314, 18 All LJ 169 .

55 *Ambika Prasad v Emperor* AIR 1932 All 506, 33 Cr LJ 736 .

56 *Empress v Bakshi Ram* 3 ILR All 201 .

57 *Queen-Empress v Babaji* 22 ILR Bom 769 .

58 *Emperor v Sankaralinga Kone* 23 ILR Mad 544 ; *Empress v Jassim Khan* 7 ILR Cal 121 (FB) ; *Gul Hasan Shah v Emperor* (1908) 9 Cr LJ 105, 27 PR (Cr) 1908, 30 PWR 1908 (Cr) .

59 *Nathabhai Harijan v State of Gujarat* (1980) Guj LT (HC) 215 .

60 *Ippilli Magutha v Emperor* AIR 1920 Mad 286, 21 Cr LJ 33, 38 Mad LJ 27 ; *Rattan Lal v State* (1987) 2 Crimes 29 (Del) ;

Prithvi Pal Singh alias Munna v State (2001) 1 RCR 482 (Del) .

61 *Prithvi Pal Singh alias Munna v State* (2001) 1 RCR 482 (Del) .

62 *Rattan Lal v State* (1987) 2 Crimes 29 (Del) .

63 *Prithvi Pal Singh alias Munna v State* (2001) 1 RCR 482 (Del) .

64 *Ram Prasad v Emperor* AIR 1938 Pat 403, per majority; Re *Ramayya Naika* 26 ILR Mad 419, Weir 136 (FB).

65 Section 40, Indian Penal Code 1860.

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 188.

Disobedience to order duly promulgated by public servant.--

Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction,

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both;

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.--It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce harm.

Illustration

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. *A* knowingly disobeys the order, and thereby causes danger of riot. *A* has committed the offence defined in this section. 1354

Comments

1. Scope

This section deals with disobedience of orders promulgated by public servants, lawfully empowered to do so. It is one of the several sections dealing with various offences relating to contempt of the lawful

authority of a public servant.[66] It contemplates orders made by public functionaries in the public interest,[67] and refers to acts which are *prima facie* lawful, but which may be prohibited by a magistrate under circumstances which show a tendency in these acts to endanger the public tranquillity, by obstruction, annoyance or injury, or the risk of such, to other persons who are lawfully employed. The magistrate in such cases, does not create or decide on rights; he merely forbids the exercise of those rights on the ground of public policy, *viz.,* that their exercise endangers or tends to endanger the public peace. As the section is enacted to ensure public tranquillity, health, safety and convenience,[68] it is obvious that the order of any public servant, whether on the executive or on the judicial side, which is made for this purpose is governed by this section.[69]

2. Constitutionality of the Section

The constitutionality of this section was challenged by the national leader, late Dr Ram Manohar Lohia, before the Allahabad High Court and it was held that the section is constitutional and is not *ultra vires* of the Constitution. What is made punishable under this section, when an order, placing constitutionally permissible restrictions on certain fundamental rights, is disobeyed, is not the exercise of the fundamental rights, but the transgression of the constitutionally valid restrictions imposed upon the exercise of the rights.[70]1355

3. Views of Authors of the Code

The authors of the Code say:

> We have, to the best of our ability, framed laws against acts which ought to be repressed at all times and places, or at times and places which it is in our power to define. But there are acts which at one time and place are perfectly innocent, and which at another time or place are proper subjects of punishments; nor is it always possible for the legislator to say at what time or at what place such acts ought to be punishable.

> Thus it may happen that a religious procession which is in itself perfectly legal, and which, while it passes through many quarters of a town, is perfectly harmless, cannot, without great risk of tumult and outrage, be suffered to turn down a particular street inhabited by persons who hold the ceremony in abhorrence, and whose passions are excited by being forced to witness it. Again, there are many Hindu rites which in Hindu temples and religious assemblies the law tolerates, but which could not with propriety be exhibited in a place which English gentlemen and ladies were in the habit of frequenting for the purposes of exercise. Again, at a particular season hydrophobia may be common among the dogs at a particular place, and it may be highly advisable that all people at that place should keep their dogs strictly confined. Again, there may be a particular place in a town which the people are in the habit of using as a receptacle for filth. In general, this practice may do no harm, but an unhealthy season may arrive, when it may be dangerous to the health of the population, and under such circumstances it is evidently desirable that no person should be allowed to add to the nuisance. It is evident that it is utterly impossible for the legislature to mark out the route of all the religious processions in India, to specify all the public walks frequented by English ladies and gentlemen, to foresee in what months and in what places hydrophobia will be common among dogs, or when a particular dunghill may become dangerous to the health of a town. It is equally evident that it would be unjust to punish a person who cannot be proved to have acted with bad intentions for doing today what yesterday was a perfectly innocent act, or for doing in one street what it would be perfectly innocent to do in another street, without giving him some notice.

> What we propose, therefore, is to empower the local authorities to forbid acts which these authorities consider as dangerous to the public tranquillity, health, safety or convenience, and to make it an offence if a person does anything which that person knows to be so forbidden, and which may endanger the public tranquillity, health, safety or convenience. It will be observed that we do not give to the local authorities the power of

arbitrarily making anything an offence, for unless the court, before which the person who disobeys the order is tried, shall be of the opinion that he has done something tending to endanger the public tranquillity, health, safety or convenience, he will be liable to no punishment. The effect of the order of the local authority will be merely to deprive the person, who knowingly disobeys the order, of the plea that he had no bad intentions. He will not be permitted to allege that if he has caused harm, or risk of harm, it was without his knowledge.

Thus, if in a town where no order for the chaining up of dogs has been made, *A* suffers his dog to run about loose. *A* will be liable to no punishment for any mischief which the animal may do, unless it can be shown that *A* knew the animal to be dangerous. But, if an order for confining dogs has been issued, and if *A* knew of that order, it will be no defence for him to allege, and even to prove, that he believed his dog to be perfectly harmless. If the court thinks that *A*'s disobedience has caused harm, or risk of harm, *A* will be liable to punishment. On the other hand, if the court thinks that there was no danger, and that the local order was a foolish one, *A* will not be liable to punishment.

We see some objections to the way in which we have framed this part of the law; but we are unable to frame it better. On the one hand, it is, as we have shown, absolutely necessary to have some local rules which shall not require the sanction of the 1356legislature. On the other hand, we are sensible that there is the greatest reason to apprehend much petty tyranny and vexation from such rules, and this although the framers of those rules may be very excellent and able men. There is scarcely any disposition in a ruler more prejudicial to the happiness of the people than a meddling disposition. Yet, experience shows us that it is a disposition which is often found in company with the best intentions, with great activity and energy, and with a sincere regard for the interest of the community. A public servant of more than ordinary zeal and industry, unless he has very much more than ordinary judgment, it the very man who is likely to harass the people under his care with needless restrictions. We have, therefore, thought it necessary to provide that no person should be punished merely for disobeying a local order, unless it be made to appear that the disobedience has been attended with evil, or risk of evil. Thus, no person will be punished for disobeying an idle and vexatious order.

4. Ingredients

To constitute an offence under this section it is essential:

(i) that there must be an order promulgated by a public servant;[71]
(ii) that the public servant must have been lawfully empowered to promulgate such order;[72]
(iii) that a person, having knowledge of such order and directed by such order, (a) to abstain from a certain act, or (b) to take a certain order, with certain property in his possession or under his management, has disobeyed such direction; and
(iv) that such disobedience causes, or tends to cause, (a) an obstruction, annoyance, or injury, or risk of it, to any person lawfully employed, or (b) a danger to human life, health or safety, or (c) a riot or affray.[73]

5. Disobedience of the Order--When Punishable

The first paragraph of this section deals with the disobedience of an order promulgated by a public servant lawfully empowered to promulgate such an order, fully knowing that such an order has been promulgated. It does not lay down any penal provision. The second paragraph deals with the consequences of such disobedience in regard to any person lawfully employed. The third paragraph deals with the consequences affecting human life, health, safety, riot or affray and prescribes a more severe punishment. Thus, the mere disobedience of a duly promulgated order is not punishable

unless the consequences enumerated in the second and third paragraphs follow.[74]1357

6. Applicability of the Section--Judicial Orders

This section applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between two parties. Thus a disobedience of an injunction, issued in a civil proceeding, is not an offence under this section.[75] Offence under s 188, IPC is not attracted or committed if the order alleged to be violated has been passed by Civil or Revenue Court.[76]

In *Dalganjan Koeri v State* ,[77] it has been held:

> We are of opinion that section 188 , IPC does not contemplate orders passed by civil or revenue courts in judicial proceedings. Any breach of such orders can be adequately dealt with under the provisions of the Code of Civil Procedure, but it cannot be said that they are orders promulgated with in the meaning of s 188, IPC, the disobedience of which would result into obstruction, annoyance or injury.
>
> Our answer, therefore, to the question referred to us is that orders passed in judicial proceedings by civil, revenue or criminal courts are not governed by s 188, IPC .

But the last observation in the said case, seems to go a little too far. This section includes in its ambit both executive as well as judicial orders. As it is enacted to ensure public tranquillity, health, safety and convenience, the order of any public servant, whether on the executive or judicial side, which is made for this purpose, should be governed by this section. The test is whether the order is for the purpose of maintaining public tranquillity, health, safety or convenience, or not. If the order fulfills this requirement, its breach would be punishable under this section. Whether the order is of a civil, revenue or a criminal court, if it affects only the parties concerned and does not affect the public tranquillity, health, safety or convenience, the application of this section will not be permissible. Normally, the orders of these courts affect only the parties and not the public at large. It is therefore, right, that orders passed in judicial proceedings are normally not governed by this section. An order under s 145, CrPC, is however, amongst the exceptions.[78]

Orders under Sections 133 , 136 and 138, CrPC

The provisions of ss 136 and 141 of the Code of Criminal Procedure, themselves show that this section applies not only to the preliminary order under s 133, but also to orders made absolute under ss 136 or 138 of that Code. Where once an order has been made absolute under s 136, it is incompetent for the party against whom that order has been made to go behind it and question its validity in any way,[79] unless it was passed without an inquiry.[80]1358

Judicial Discretion has a Mandatory Import--Order under this Section can be Issued against Municipal Authorities--Prohibitory Act a Mandatory Duty

Judicial discretion, when facts for its exercise are present, has a mandatory import. Therefore, when the sub-divisional magistrate has, before him, information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act. Thus, his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. The magistrate's responsibility under s 133, CrPC is to order the removal of such nuisance within a time, to be fixed in the order. This is a public duty, implicit in the public power, to be exercised on behalf of the public and pursuant to a public proceeding. A

failure to comply with the direction will be visited with a punishment contemplated by s 188, IPC . Therefore, the municipal commissioner or other executive authority bound by the order under s 133, CrPC, shall obey the direction because disobedience, if it causes an obstruction, annoyance or injury to any persons lawfully pursuing their employment, shall be punished as prescribed in the section. The imperative tone of s 133, read with the punitive temper of s 188, IPC, makes the prohibitory act a mandatory duty.[81]

Orders under Section 144 , CrPC

It is well settled that this section applies to orders passed under s 144, CrPC, and the disobedience of an order passed under that section is punishable under this section.[82] In a case of dispute between two textile unions, when it is extremely difficult for those who are in-charge of law and order, to differentiate between the members of the public and the members of the two textile unions, the only practical way in which the particular activities referred to in the order under s 144, CrPC could be restrained or restricted, would be by making those restrictions applicable to the public generally.[83] But if there is no proof that an order under s 144 has been duly promulgated, there would be no offence under this section.[84] The penalty for infringing an order under s 144 is that which is provided in s 188, IPC . When, therefore, a prosecution is launched thereunder, the validity of the order under s 144, CrPC could be challenged.[85]

The ultimate sanction behind an order passed under s 144 is the punishment provided for its disobedience in this section; if this section did not exist, everybody would be free to disobey the order and nobody would be able to complain that his freedom was restricted by the order. The order by itself, does not infringe upon any of the rights of a person guaranteed by the Constitution; it is merely an act in writing of a magistrate which by itself, cannot affect the rights of anyone. Consequently, when a person complains that his rights under the Constitution have been infringed 1359upon by the passing of the order, the order must be considered not in isolation, but in conjunction with the provisions of this section, through which it is enforced.[86]

Orders under Section 145 , CrPC

It is fairly well settled that this section applies to orders under s 145, CrPC .[87] But before a person can be punished for disobedience of an order under s 145, CrPC, there should be evidence and a definite finding, based on that evidence, that his act of disobedience caused, or tended to cause, a riot or an affray.[88]

Orders under Section 146 , CrPC

Disobedience of an order under s 146, CrPC, is not an offence falling under this section.[89] An order under s 146, CrPC, directed not to the parties but to the receiver or custodian, makes a party disobeying it, not guilty of the offence under this section.[90]

In *Ramlubhaya v Prem Lata* ,[91] an order under s 146, CrPC was passed by the city magistrate. In a proceeding under s 145, CrPC, it was held by the Allahabad High Court that an order passed under s 146 of the Code of Criminal Procedure is an order promulgated by a public servant within the meaning of s 188 of this Code.

Orders under Section 149 , CrPC

Disobedience of a lawful order under s 149, CrPC, may constitute an offence under this section or under s 151 .[92]

Orders under the Police Act

Though disobedience of an order under s 23(3) of the City of Bombay Police Act (Bombay Act 4 of 1902) is an offence punishable under s 127 of that Act, yet it would be equally punishable under this section if all the conditions laid down by this section, are fulfilled.[93]

Orders Regulating Processions

The most frequent application of this section is to cases of contemplated public processions. *Prima facie,* every member of the public, and every sect, has a right to 1360use the public streets in a lawful manner. But the right to conduct processions in public, religious or otherwise, through the public streets is not their exclusive right, for all members of the public enjoy such right, and no exclusive right can be obtained by any usage or custom.[1] It is this limitation to the general right that a magistrate has to consider and enforce, if necessary, by an order.[2] It is not the duty of the authorities to enforce a decree in all circumstances and at all costs. Where there is a conflict between public interest and private right, the former must prevail.[3] As to the further exposition of the law relating to processions, see the undermentioned cases.[4]

Lawful Use of Public Street--Not an Offence

No person has a right to obstruct others when making a lawful use of a public street, and customs to the contrary, founded on religious intolerance cannot be recognised.[5] If the members of any sect desire to prevent the use of the street in the neighbourhood of their houses by the members of another sect, their proper course is to erect their houses on streets which are private property.[6] But the fact that a procession is a luxury, is not a sufficient ground for passing an order under s 144, CrPC .[7]

Where the petitioners were not under any prohibition or restraint on the date when the alleged offence of trespass, in breach of a prohibitory order, according to the complaint petition, was committed, the alleged offence under s 188, IPC, could not have been committed by the petitioners and the order of taking cognizance of the offence and the subsequent proceedings of the case being illegal were liable to be quashed.[8]

7. Civil and Criminal Contempt

The line between civil and criminal contempt can be broad as well as thin. Where the contempt consists in a mere failure to comply with or carry out, an order of a court made for the benefit of a private party, it is plainly a civil contempt and it has been said that when the party, in whose interest the order was made, moves the court for action to be taken in contempt against the contemner, with a view to the enforcement of his right, the proceeding is only a form of execution. In such a case, there is no criminality in the disobedience and the resultant contempt is not criminal. If, however, the contemner adds defiance of the court to the disobedience of the order, and conducts himself in a manner which amounts to obstruction to or interference with, the course of justice, the contempt committed by him is of a mixed character, partaking as between him and his opponent, being of the nature of a civil contempt 1361and, as between him and the court or the state, of the nature of a criminal contempt. In cases of this type, no clear distinction between civil and criminal contempt can be drawn and the contempt committed cannot be broadly classed as either civil or criminal contempt. There is, however, a third form of contempt which is purely criminal and which consists in a conduct tending to bring the administration of justice to scorn and to interfere with the course of justice as administered by the courts. Contempt of this class is purely criminal, because it results in an offence or a public wrong, whereas contempt consisting in the disobedience of an order made for the benefit of a private individual, results only in a private injury. To put the matter in other words, a contempt is merely a civil wrong where there has been disobedience of an order made for the benefit of a particular party, but where it consists in setting the authority of the courts at naught and has a tendency to invade the efficacy of the machinery maintained by the state for the administration of justice, it is a public wrong and consequently of criminal nature. It has been held that:

> If, on the facts of a case, it appears that a party, directed to conduct himself in a certain way by an order under s 145 of the Code of Criminal Procedure, does not comply with the direction, but conducts himself in such a way as again creates an apprehension of a breach of the peace, the wrong resulting from his misconduct may

become a public wrong and, therefore, the contempt may be regarded as a criminal contempt. Where, however, the only allegation made is that the private party, in whose favour the order was made, himself made an attempt to serve the order and was then abused and the only other complaint made is that the adverse party has not voluntarily restored possession or returned certain goods, but nothing is said as to any contumaciousness to the court itself, nor as to any apprehension of the breach of the peace, there cannot be any question of any criminal contempt.[9]

8. 'Whoever'

An order under s 145, CrPC, is binding not only on the actual parties to the proceedings but also on persons who may have notice of the proceedings. Any person who, knowing that an order under that section has been passed, disobeys it would be liable under this section, even if he was not a party to the proceedings in which the order was made.[10] In *Balbhadra Jha v State* ,[11] relying on *Parmeswar Rai v King-Emperor* ,[12] and *Umanath Prasad v Dhirendra Kumar Singh* ,[13] however, a contrary view has been taken.

9. 'Knowing That'--Knowledge, a Necessary Ingredient

Knowledge of the order is a necessary ingredient of both the offences, namely, the offence punishable under this section, and the one under s 32, Police Act.[14] There can be no conviction under this section if there is no finding that the accused knew of the 1362order which he disobeyed.[15] Before it can be said that the accused had knowledge of the order under s 144, CrPC, it must be shown that its terms were communicated to them. The mere fact that the police officer gave his own interpretation of it, is quite a different thing.[16]

10. 'By an Order'--What is an Order?

The word 'order' here means an order made by a public functionary for a public purpose, and not an order made in a civil suit between two parties, such as an injunction,[17] or on order to a public officer to take possession of a land under s 146 of the Code of Criminal Procedure .[18]Section 188, IPC does not contemplate orders passed by civil or revenue courts in judicial proceedings. Any breach of such orders can be adequately dealt with under the provisions of the Code of Civil Procedure, but it cannot be said that they are orders promulgated within the meaning of s 188, IPC, the disobedience of which would result in an obstruction, annoyance or injury.[19] The order must be on the record,[20] which should contain a clear statement of the facts giving rise to the order.[21] If no particular order has been contravened, there can be no offence.[22]

Order Need not be in Writing or Addressed to any Individual

A notice under s 98 of the Madras Local Boards Act (5 of 1884), is not an order of the kind contemplated by the section.[23] But an order does not cease to be an order simply because it is misdescribed as a notification.[24] It is not necessary that the order should be in writing.[25] It need not be addressed to the accused or to any particular individual. It may be a general order directed to the public generally.[26]

11. 'Promulgated'--Meaning and Form of

The word 'promulgated' has not been defined in the Indian Penal Code . Its ordinary meaning is 'to make known by public declaration, to publish, to disseminate or to proclaim'. Promulgation of an order connotes publication of an order publicly and openly and it does not take in its purview private information.[27] In essence, the word connotes two ideas: (a) making known of an order; and (b) the means by which the 1363order is made known must be by something done openly and publicly; private information will not be 'promulgation'. But the law does not prescribe any particular mode in which an order can be made known openly and publicly. It may be by a beat of drum; it may be by a

publication in the Gazette; it may be by reading out an order openly in public, *etc.*[28]*Prima facie*, 'promulgate' seems to indicate, if not a formal document printed or written, at any rate some form of publication. It is not necessary that the order should be in writing or printed.[29] The word 'promulgation' is not used in any narrow or technical sense in this section. The question whether the requirement of promulgation prescribed in s 188 has been complied with would depend on the particular circumstances of each case. In some cases a proclamation by a beat of drum might be considered to be a proper mode of promulgation of orders passed by magistrates, not in the open court, but framed in their office. Such, for example, would be orders under 144, CrPC . The public would be unaware of such orders unless they are announced in some form, in some open place, either by the beat of a drum or by some other form of proclamation. In other cases, the requirement might be satisfied by affixing the order on some conspicuous place or by publishing the same in the Gazette or some other paper. 'Promulgation', as used in this section, is an elastic term and is deliberately not defined in the Penal Code. So long as an order is openly declared for the purpose of notifying it to the public, or any section of the public, the requirement of law relating to promulgation would be satisfied.[30]

Essence of Word 'Promulgation'

The word 'promulgation', in essence, means that the contents of the order which is promulgated, should be known to the person against whom proceedings are taken under this section. When a judgment or order is passed in open court, it constitutes a formal declaration to the public of the decision of the court in the case in which the order is given or the judgment is passed. The delivery of a final order, in a case under s 145(6), CrPC, constitutes promulgation within the meaning of this section.[31] But when a person or party is asked to do something, it is merely a direction to the party, and not a promulgation of the order.[32]

The Word 'Promulgated' Refers to Orders Passed under CrPC

The word 'promulgated' in this section, however, refers to orders passed under the Criminal Procedure Code and not to judgments and orders of civil courts.[33] When the respondents violated the injunction order passed by the civil courts in a suit filed by the appellant, it was, held that a criminal court can sustain a complaint filed by the appellant, independent of a complaint filed by the civil court under this section.[34]1364

The operation of this section is confined to the promulgation by public servants of public orders relating to the safety, the health or the convenience of the public.[35]

Irregularity in Promulgation, Whether Renders the Order Invalid

If the order has not been promulgated, disobedience to it is no offence. Thus, if a temporary order under s 144 of the Code of Criminal Procedure has expired, and no fresh order has been issued, to do that which was forbidden by the old order is no offence.[36] Whilst an order should be promulgated in the way prescribed for the particular order in question, an irregularity in the method of promulgation will not render the order invalid, so long as it has been brought to the actual knowledge of the persons sought to be affected by it.[37] Even if there has been an irregularity in the method of promulgation of the order, that in itself would not make it *ultra vires*, so as to prevent the conviction of any person who, being proved to have had knowledge of the order, nevertheless disobeyed it.[38] If it is established that the matter was brought to the notice of the accused, then mere irregularities in the method of service would have no effect on the proceedings under this section.[39]

A mere irregularity in the promulgation of an order under s 144, CrPC, would not make the order *ultra vires,* so as to prevent a conviction of the person disobeying it, if he is proved to have had knowledge of it.[40]

It is necessary to distinguish carefully between the jurisdiction of the magistrate to make an order and a possible practical difficulty in showing that it has been disobeyed. It does not follow that because it is

difficult for the state to secure a conviction, that the order itself was made without jurisdiction.[41] An order passed by a magistrate under s 144, prohibiting the holding of a rival *hat* on certain days near an old *hat*, is not *ultra vires* and inoperative. Therefore, disobedience to such an order is an offence punishable under this section.[42] If the order itself is illegal, there cannot be a conviction under this section for disobeying it.[43]

12. 'By a Public Servant'

This section applies only when an order has been promulgated by a public servant and disobeyed.[44] A receiver appointed under s 56 of the Land Registration Act,[45] is not a public servant within the terms of ss 174, 175, 186 and 188 of this Code. An order by such a receiver, forbidding persons to pay rent to any person other than such receiver, is not an order promulgated by a public servant, lawfully empowered 1365to do so, and consequently disobedience to such order is not an offence under the section.[46] But the *sarpanch* of the *gram panchayat*, while passing a prohibitory order directing parties not to cut the paddy, under s 64(1) of the Bihar Panchayat Raj Act, acts as a public servant and as such is competent to move a complaint under s 195 of the Code of Criminal Procedure for a violation of the order under this section.[47]

For the definition of a public servant, s 21 and the commentary thereunder may be referred to.

13. 'Lawfully Empowered to Promulgate Such Order'--Person Disobeying not Guilty, If Promulgation not by Lawfully Empowered Person

The phrase 'persons lawfully employed', used in the second clause of this section, refers to authorities who are entrusted to perform their functions for maintaining public peace and tranquillity.[48] For a conviction under this section, it is necessary not only that an order should have been promulgated by a public servant, but also that the public servant should have been lawfully empowered to promulgate the order.[49]To be justified in directing a certain act to be done or not to be done is one thing and to be legally empowered to order its commission or omission, with the consequence of the disobedience being punishable under this section, is quite another. If the public servant was not legally empowered to promulgate the order, the person disobeying the same cannot be held guilty under this section.[50] If the order is both in substance and in its manner of publication illegal, as being beyond the powers conferred by law, the conviction will not stand.[51]

When a notification is issued by an executive authority in an exercise of a power conferred by a statute, that notification is as much a part of the law as if it had been incorporated with the body of the statute at the time of its enactment.[52] Under s 33 of the Police Act,[53] the district magistrate has general control over the matters referred to in ss 30, 31 and 32 of the Act, and an order restricting traffic on a public road promulgated by him is not without jurisdiction.[54] Orders under s 144, CrPC, are merely temporary orders in urgent cases of apprehended danger, and cannot remain in force for more than two months, unless in certain cases the State Government, by 1366notification in the official Gazette, otherwise directs.[55] A magistrate cannot issue a perpetual injunction under that section.[56]

On a conviction under this section, for a disobedience of the order of a magistrate directing the pruning of hedges, it was held, that as the circumstances showed that there was no necessity for a speedy remedy, the magistrate had no power to issue the order disobeyed.[57]

No Prosecution if the Order Disobeyed is Without Jurisdiction

Repeated recourse should not be made to the provisions of s 144 in the same dispute. If it is considered probable that danger to public peace may remain after the expiry of two months from the date of the order under s 144, steps should be taken in due course to obtain an order of the government under the proviso to sub-s (4); or recourse should be made to the provisions of s 145 or s 107, CrPC .[58] Where, upon a petition that there is a dispute regarding a piece of land and that there is a likelihood of a breach of peace being committed, the magistrate orders the police to attach the land

and report, and proceedings under s 145 are started about three months after the attachment. The order of attachment, having been passed without starting proceedings under s 145, is without jurisdiction and no question of prosecution under this section for its disobedience arises.[59]

Where as a result of the order passed under s 144, CrPC, conditions became peaceful, and the relations between rival parties became normal, as they were before the dispute, but all of a sudden, after a few days, relations between the parties become tense and it is again apprehended that a disturbance of public tranquility may take place, the magistrate would be acting in good faith when he issues a fresh order under s 144, CrPC . But if conditions do not become peaceful and apprehension is expected even after the expiry of the prescribed period of two months from the date of the issue of the original order under s 144, CrPC, any fresh order to be promulgated under this section, would be in continuation of the first, and in the eye of law, the magistrate shall be deemed to be promulgating an order of a period exceeding two months, which would be beyond his jurisdiction. It is a settled law that one cannot do an act indirectly which he could not do directly, or that one cannot flout the express provisions of an enactment.[60]

14. Legality of Order, When can be Questioned--On Appeal from Conviction

Although an order made under s 144, CrPC is not appealable, still, if a person is convicted for its disobedience under this section, he might appeal on the ground of its 1367illegality, and the validity of the proceedings can then be inquired into.[61] In *King v Darbarilal Shaw* ,[62] Sen J observed:

> It is not open to the court trying an accused person for disobedience of such an order under section 144 to decide whether he would have passed such an order in the circumstances of the case. He has to take the order as a good and valid order, unless it is shown that the order was a nullity by reason of the fact that the magistrate had no jurisdiction, or by reason of some other similar circumstance. He is not to superimpose his view on the propriety of the order.

It is not easy to appreciate what the learned judge meant to hold by qualifying the statement by saying that it was open to the accused to show that the order violated was bad by reason of want of jurisdiction or other similar circumstances. The learned judge appears to have held that if the order was bad for want of jurisdiction or if it was otherwise fundamentally bad, the accused person could plead that as a circumstance, in answer to a charge of disobedience to that order. Therefore, it is not right to say that Sen J limited the attack to jurisdiction only. 'Similar circumstances' must be circumstances of grave import, as for instance, where it is shown that the order could not possibly have been made by any public servant in the circumstances of a particular case.

Pleas Challenging Legality of Order, Open in Defence

A court trying a charge of a contravention or disobedience of an order of a public servant, has to proceed on the footing that *prima facie* the order is a good and valid order, but that does not necessarily mean that the persons charged can in no circumstances, show that the order, although made with jurisdiction, was otherwise fundamentally bad. It is open to a person charged with disobedience to an order promulgated by a public servant lawfully empowered to promulgate such order, to plead in defence that the order, though made with jurisdiction, was utterly wrong or improper on the merits,[63] or the order though validly made, came to an end on the date of the alleged disobedience.[64] In the case of *Brojo Nath Ghose v Empress* ,[65] it was held by a Division Bench of the Calcutta High Court that to constitute an offence under this section, it is necessary to show, first, a lawful order promulgated by a public servant, secondly, a knowledge of the order and disobedience of it, and thirdly, the result that is likely to flow from such disobedience. It is indeed one thing to say that the public servant concerned was lawfully empowered to make an order and it is a very different thing to say that the order itself was a lawful order in the sense of being a valid and a proper order. In the case of *Prem Chand Roy v Dharmadas Singh Roy* ,[66] it was held:

> The intended prosecution was for disobedience to an order, dated 22nd September last, which amongst other things directed that the petitioners should refrain from collecting rents from any tenants on certain lands. That order which purported to have been made under section 144 , CrPC, was not an order which could properly be made under the 1368section. The order, therefore, directing the prosecution of the petitioners for disobedience to that order cannot stand.

As observed by Jackson J, in *Empress v Surajanarain Dass* ,[67]

> When the Code of Criminal Procedure authorises the making of orders by executive authorities with the view of preventing a breach of the peace or for similar purpose, it has always been held, and is now enacted in the existing Code, that the propriety of such orders is not a matter of question in that state of things for the appellate judicial authorities. It is when the executive officers seek to enforce those orders by the infliction of penalties that the courts have to step in and see whether the orders made were with authority or not. This was precisely the occasion on which it was the duty of the sessions judge to consider whether that order was properly made or not.

In *Superintendent and Remembrancer of Legal Affairs, Bengal v Khodabaksh Shah* ,[68] in proceedings under s 133, CrPC no objection was raised as to a co-sharer not being made a party. It was held that the objection could not be raised in subsequent proceedings. It was in that connection that it was remarked that a question as to the validity of a final order under s 133, CrPC could not be raised in a trial for an offence under this section. Again in the case of *Rupan Singh v Emperor* ,[69] it was remarked that if the order disobeyed was made with jurisdiction, it would not matter if the public servant concerned had acted improperly in making that order. But it does not appear that the learned judge who decided the case considered the extreme point of view, namely, whether it was at all open to the person charged with the disobedience of an order of a public servant, to plead and prove that the order itself though made with jurisdiction, was fundamentally wrong on merits.

15. Orders Found *Ultra Vires*

The following are some examples of orders *ultra vires* the powers and authority of a public servant, the provisions of CrPC, this section and art 21 of the Constitution :

(i) *A,* a magistrate, issues a general order prohibiting the use of public roads between 9 pm and sunrise.[70]

(ii) *A,* a *mamlatdar*, orders *B* not to allow water from his house to fall on *C*'s premises[71] or directs *D* to keep a gateway open.[72]

(iii) *A,* a magistrate directs *B* and *C* to remove a certain embankment, whereby the adjacent lands are in danger of being flooded.[73]

(iv) *A,* a collector, forbids stake-nets to be placed in a river at certain places where it has been usual to place them.[74]

(v) An order by a revenue officer requiring certain persons to pay their assessment to a specific individual in future.[75]

(vi) A notice issued under the Madras Local Boards Act, 5 of 1884, s 98(2) .[76]1369

(vii) A permit to cut and transport timber given to certain persons.[77]

(viii) *A* fills up a water-course in his land, which supplied a neighbouring government land, with water and opened a new one which supplied less water. A sub-collector ordered him to fill in the new channel, and to re-open the old one.[78] (s 430).

(ix) An order, purporting to be under s 147 of the Code of Criminal Procedure, ordering removal of obstruction to the use of a right way.[79]

(x) An order under s 143 of the Code of Criminal Procedure, passed by a magistrate having no jurisdiction to make such an order.[80]

(xi) An order purporting to have been made under s 144 of the Code of Criminal Procedure, prohibiting a person from collecting rent from tenants.[81]

(xii) An order by a magistrate forbidding certain persons from extending cultivation in a certain land.[82]

Order Providing more than the Maximum Penalty Even Without Trial is Void and *Ultra Vires*

No one can be shot at for a mere breach of the curfew order issued under s 144 of the Code of Criminal Procedure 1973. The maximum penalty to which such person renders himself liable is provided by s 188 of the Indian Penal Code which, in its turn, is a trifling nothing as compared to the threatening penalty of being shot at. It cannot be gainsaid that the executive has no power, authority or jurisdiction to threaten to inflict punishment upon one who commits a mere breach of the curfew order greater than the maximum penalty to which he would be liable upon a judicial trial before a court of law. The executive directions contained in the 'important announcement' insofar as they hold out to the members of the public the threat that a curfew-breaker for a mere breach of the curfew order is liable to be shot at, is *ultra vires* their powers and *ultra vires* s 144 of the Code of Criminal Procedure, s 188 of the Indian Penal Code and arts 20 and 21 of the Constitution and are, therefore, void and of no effect whatsoever. The law and order forces of the state have no authority to shoot at any one for a mere breach of the curfew order and, therefore, the executive directions contained in the 'important announcement' insofar as they direct the threat of such an action are void and unlawful.[83]

16. 'He is Directed to Abstain...Under His Management'--Meaning Explained

This section speaks of an order promulgated by a public servant, which directs certain persons to abstain from a certain act or to take certain order with certain property in their possession or under their management.[84] The liability under this 1370section is for disobedience of the direction in the order and not for the disobedience of the order. The main purpose of an order of attachment under s 145, CrPC is to prohibit any breach of peace and not necessarily to restrict possession by either of the parties, unless there be a definite order to that effect. If there is no such order of prohibition passed by the court against the accused persons from entering into possession of the land, their alleged violation cannot be taken to be an offence coming within the purview of this section.[85]

An order under s 146, CrPC is directed not against parties, but to the custodian or receiver. Such an order does not direct the accused to abstain from any act or to take a certain order with respect to the property in dispute. So, even if the accused person encroached upon the attached property, such encroachment will not amount to an offence under this section.[86] The Allahabad High Court has, however, taken the view that an order passed under s 146, CrPC, by a magistrate in a proceeding under s 145, CrPC, is an order promulgated by a public servant under this section.[87]

17. 'Disobeys such Direction'

Where the crop had been raised and harvested by a party to s 145, CrPC proceedings, before the possession was restored to the opposite party, there is no disobedience of the order prohibiting the party from interfering with the possession of the opposite party and hence, the conviction of the party under this section is unsustainable.[88]

Where the accused had grounds for questioning whether the magistrate's order enforced a positive action on his part, and his neglect to take that action did not appear to have been due to a deliberate defiance, the prosecution of the accused under this section is not justified.[89]

18. 'If Such Disobedience Causes or Tends to Cause' Obstruction, *etc*--Mere Disobedience of an Order is not an Offence--Riot or Affray Need not Actually

Follow

The disobedience of an order promulgated by a public servant, is not, by itself, an offence under this section. Such disobedience, to amount to an offence under this section, should amongst others, cause or tend to cause obstruction, annoyance or injury to any person 'lawfully employed'.[90] So, to justify a conviction under this section, it is necessary to establish that the disobedience causes, or tends to cause, obstruction, annoyance, or injury to any person lawfully employed; and to make the offence graver, it must be further established that such disobedience causes, or tends to cause, a danger to human life, health or safety; or causes, or tends to cause a riot or affray.[91] Mere disobedience of an order promulgated by a public servant is thus, not in itself an offence under this section unless it entails one or the other of the 1371consequences, which the section itself mentions.[1] It is true that a riot or affray need not actually follow such disobedience so as to make a person liable, but there must be such a tendency. Doubtless this tendency has to be inferred from the proven facts and circumstances of each case and is not capable of direct proof.[2] Before a person can be punished for disobedience of an order under s 145, CrPC, there should be evidence and a definite finding on affray. Where there was no such finding by the lower court in the case, the conviction of the accused for an offence under s 188 could not be sustained by the High Court and was set aside.[3]

19. 'Annoyance to any Person Lawfully Employed'--Meaning of

The phrase 'persons lawfully employed', used in the second clause of s 188, refers to authorities who are entrusted to perform their functions for maintaining public peace and tranquillity. As the prohibitory order under s 144 is not concerned with the rights of the individual persons to that proceeding, the phrase 'persons lawfully employed' cannot refer to the first part of that proceeding.[4]

In *Wangkheimayan Kulabindhu Singh v State* ,[5] the Judicial Commissioner of the Manipur Judicial Commissioner's court, however, distinguished the Assam case cited above and observed:

> The agitation was in full swing at the time. The police party and the PWS had to go round to see that there was no disturbance to peace and that law and order were kept. They were thus engaged in their legitimate duties. If in the midst of such duties, annoyance was caused to them by such disobedience of lawful order on the part of the petitioners, it will certainly come within the purview of section 188 , IPC .

It is submitted that this decision requires reconsideration in the light of the reasons given in the Assam decision which it distinguishes.

Entering into possession in spite of an order under s 145(6), CrPC, has at least a tendency to annoy the person at whose instance the order was passed, and is, therefore, an offence under this section.[6]

Annoyance may be Physical or Mental

Annoyance may be either physical or mental. In the case of physical annoyance, no doubt, a certain degree of proximity between the object annoyed and the annoyance is necessary, but in the case of mental annoyance, no question of proximity arises. A person may be as much annoyed by a defamatory statement published thousands of miles away as by one made in his presence.[7] In order to establish that the annoyance 1372was the result of the disobedience of the order, there must be some proximity between the conduct of the accused and the disobedience. The annoyance has to be proved as a fact; a mere mental annoyance of the authorities concerned does not come within the ambit of this section. If that interpretation is to be accepted, then this section will apply in all cases of breach of order. Where an order has been passed and if any breach is committed of that order, the authorities can legitimately say that the breach itself has led to their annoyance. But that is not contemplated by s 188 . Unless the conduct of the accused is pointed out which, in the circumstances of the case, would have caused annoyance or interference with the public safety, or had the natural

tendency to create annoyance or interference with the public safety, this section is not attracted.[8]

20. 'Injury to any Person Lawfully Employed' and 'Danger to Human Life or Safety'

In the case of *Emperor v Habibullah* ,[9] Mahmood J, observed:

> ...the obstruction, annoyance, or injury on the one hand, and the danger to human life, health, or safety on the other hand, are intended by the section to be applicable to cases in which the injurious results, therein contemplated, arise in the ordinary course of lawful employment to persons who, in the exercise of their rights as ordinary citizens, may incur such evil consequences on account of any act or omission of the accused, which act or omission occurs in disobedience of a lawful order. In the next place, I am of the opinion that the section has no application to cases in which a person simply neglects his property, and by allowing a wall or a gateway to remain in a dilapidated condition, renders theft or other crime more easy of commission than would otherwise be the case. The law does not contemplate that the physical barrier of a wall or a gate is the means of restraining persons from crime, and no order of this nature can be made on the mere ground of any such apprehension.

Injury to Person, Not to Property

The 'injury' used in this section must be an injury to a person and not to property. Government is not a person and therefore, where the disobedience is alleged to cause injury to the government, it cannot be said that the ingredients of this section have been satisfied.[10]

21. Riot

Section 146 and the commentary thereunder may be referred to.

22. Affray

Section 159 and the commentary thereunder may be referred to.

23. Disobedience Tending to Cause Breach of Peace

Where there is an immediate apprehension of a breach of peace between two unlawful assemblies, the officer incharge of a police station may order either or both 1373of the two unlawful assemblies to disperse, and failure to obey his order would amount to an illegal act and may constitute an offence under this section.[11]

24. Explanation-- *Mens Rea* not Necessary

The explanation appended to the section, makes it clear that in order to constitute an offence under this section, it is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm, as contemplated by the section. *Mens rea* is, therefore, not a necessary ingredient of an offence under this section.

25. Procedure

The offence under this section is cognizable, bailable and triable by any magistrate and may also be tried summarily. The cognizance under this section can, however, be taken only on a complaint in writing by a public servant, and not on a police challan.[12]

The prescribed period of limitation for taking cognizance of an offence under this section is one year.

26. Complaint

Under s 195(1)(a) of the Code of Criminal Procedure 1973, no court can take cognizance of an offence punishable under this section, except on a complaint in writing by the public servant concerned, that is, the public servant whose order is disobeyed,[13] or some other public servant to whom he is subordinate.[14] The complaint must state that the disobedience of the order caused, or intended to cause obstruction, annoyance, or injury to any person lawfully employed. Where this fact is not stated, the complaint is defective.[15] Before an offence under this section is made cognizable by a magistrate, the preliminary step pointed out by s 195(1)(a) is necessary and a failure to do so vitiates the trial.[16] But where the order disobeyed was promulgated not by a public servant but by the government, no sanction or complaint is necessary.[17] Where final report was filed by police alleging violation of order passed by RDO and commission of offence punishable under s 188, IPC, prosecution was held barred by s 195, CrPC, as such was quashed.[18]1374

For prosecution under s 188, IPC a written complaint by a public servant is necessary. Where complaint for offence under s 188, IPC was not filed by the public servant concerned but by the S.I. of Police, the FIR and the final report in the case were quashed.[19]

The purpose of a complaint under the section is to show that the officer concerned or his superior had considered the matter and had moved the court. Where the charge-sheet is signed by the additional district magistrate who promulgated the order under s 144, CrPC, as also by the district magistrate, the purpose of a complaint is served, there is no disregard of s 195 and the trial for the offence is not without jurisdiction.[20] But where the order of the SDM, promulgated under s 144, CrPC, was violated and a complaint was filed by the ASI of police, it was held that the case was not maintainable and the prosecution was bad in law.[21] Proceedings under s 188, IPC initiated on the basis of FIR and not on the basis of any complaint in writing of the public servant concerned, as is required by s 195(1)(a), CrPC, is not maintainable.[22]

Section 195(1)(a), CrPC mandates that no Court shall take cognizance of offence punishable under s 188 of the IPC, except on the complaint in writing of the public servant concerned or some other public servant to whom he is administratively subordinate, except when the complaint in writing is made by the concerned public servant. In the instant case, the *status quo* order alleged to be disobeyed was passed by the Additional Commissioner. He or any officer to whom he was administratively subordinate did not file written complaint. The Additional Commissioner sent report to concerned police station, and the investigating officer filed a charge-sheet on which cognizance was taken. The cognizance taken by the Magistrate was illegal, thus, the criminal proceedings were quashed.[23]

Filing the Complaint is Public Duty--Not a Privilege

A change of the incumbent leaves it still the same court.[24] The complaint prescribed in s 195(1)(a) is a public duty and responsibility, and not a personal privilege and the successor-in-office of the public servant to whom information is given, can make a complaint under s 188, IPC .[25]

But where the offence under s 188, IPC is committed in respect of an order by a Mandal revenue officer, but he, being the public servant concerned, did not file the complaint and instead the complaint was filed by the sub-inspector of police, it was held that the court had no jurisdiction to take cognizance of such a complaint, not filed by the public servant to whom he was subordinate, and the proceedings before the trial court were quashed under s 482, CrPC .[26]1375

27. Form of Charge

The following form of charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, [*] on or about the ..... day of ..... at ....., knowing that, by a certain order, to wit ..... promulgated by a public servant lawfully empowered to promulgate such order, you were directed to abstain from (*specify the act*) (*or to take certain order, with certain property, to wit .... In your possession or under your management*), disobeyed such direction, such disobedience causing or tending to cause ..... (*mention the particular consequence caused or was likely to be caused*), and thereby committed an offence punishable under section 188 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on that charge.

Where disobedience of an order is an offence both under this section as well as under a Police Act, a mention only of the section of the Police Act in the charge, is a defect curable under ss 215 and 464 of the Code of Criminal Procedure 1973, if the accused has not been prejudiced thereby.[27]

28. Burden of Proof

It is the duty of the prosecution in a case under this section, to prove by positive evidence that the accused had knowledge of the order with the disobedience of which he is charged. The mere promulgation of the order is not sufficient to establish the knowledge.[28] But evidence of knowledge can rarely be direct, in most cases, knowledge can only be proved by circumstantial evidence. The question of knowledge must generally be a matter of inference.[29] It is permissible to presume knowledge of the order on the part of the accused in certain circumstances.[30] All that can reasonably be demanded of the prosecution is a proof of the circumstances from which it may be inferred that the accused had knowledge of the order. If such proof is forthcoming, the onus is on the accused to prove ignorance of the order, despite publication.[31]

In the absence of proof, it is wrong to think that selling drinks in continuation of an order promulgated by the district collector will, as a matter of course, lead to riots or disturbance.[32]

29. Convictions when can be made--Judicial Notice Cannot Fill up Gap

In order to constitute an offence under this section, it must be proved that the disobedience of the order caused or tended to cause one or other of the consequences mentioned in the second and third paragraphs of the section. It is only if the prohibited act when indulged in, brings about or tends to bring about, the above result, it becomes an offence. Any violation of the order which does not cause or tend 1376to cause the above result will not amount to an offence.[33] If no one has come forward to state that the disobedience has had this effect and it cannot be said that the irresistible conclusion from the fact of this disobedience is that it would have the effect of causing or tending to cause obstruction, annoyance or injury or risk of obstruction, annoyance or injury, to any person lawfully employed, the person disobeying cannot be punished under this section.[34] Some definite evidence on this point must be on record to support a conviction under the section.[35] If there is no evidence to show that the disobedience actually caused any obstruction, *etc.*, and there is no finding that it tended to cause such obstruction, *etc.*, a conviction under this section cannot stand.[36] There can be no conviction unless the likely consequences of the breach of the order are proved affirmatively. If there is no proof, the gap cannot be filled up by a judicial notice.[37] It is also not permissible to presume the existence of these ingredients because of the disobedience of the order.[38]

Where a person was not only aware of the proceedings under s 145, but acted in collusion with one party in order to deprive the other of the fruits of their success in the s 145 case, it was held that he was liable under this section, even though he was not a party to the proceeding in which the order was passed.[39]

30. Punishment

The confiscation of tools, weapons or other articles, used by the accused in the commission of the offence, is not wanted under this section.[40] Where the offence is merely of a technical nature, token punishment under this section would suffice.[41] Where it was clear from the record that the committing of the offence by the accused was an act of misguided, over-enthusiastic and ill-advised outburst, it was held that a lenient and liberal view should be taken in the matter of sentence.[42] Reformative justice is an accepted norm in present times.[43]

66 *Bachuram Koeri v State* AIR 1956 Cal 102, p 104, (1956) Cr LJ 515 .

67 *Dalganjan Koeri v State* AIR 1956 All 630, (1956) Cr LJ 1176 ; *Quinn v Keshab Chandra Mukherjee* AIR 1949 Cal 349, 50 Cr LJ 632 ; *Pommani Chinta Kath Mammali v Kutti Ammu* AIR 1916 Mad 640, 16 Cr LJ 592, 39 ILR Mad 543 ; *Bishan Datt v Emperor* AIR 1948 All 50, 48 Cr LJ 982, (1947) All LJ 304 .

68 *Mallappa Mallappa Tavarji v Emperor* AIR 1915 Bom 22(1), 16 Cr LJ 668, 17 Bom LR 676 ; *Dalganjan Koeri v State* AIR 1956 All 630, (1956) Cr LJ 1176 .

69 *Jagpal Singh v State* (1959) All LJ 163, (1959) All WR (HC) 178 .

70 *Ram Manohar Lohia v State* AIR 1968 All 100, p 110-11, (1968) Cr LJ 281 (DB) .

71 *State of Rajasthan v Gopal Krishna* (1977) Raj Cr C 369 .

72 *Brajanath Ghose v Emperor* 4 CWN 226 (DB) .

73 Re *Madan Kishore*AIR 1940 Pat 446 ; *Chinnamuthu Ambalam v S Jagannata Chariar* AIR 1959 Mad 89, (1959) Cr LJ 328 ; *Brojo Nath Ghose v Emperor* 4 CWN 226 ; *Srinivasiah v Government of Mysore* AIR 1951 Mys 121, 32 Cr LJ 1526 ; *Gada Kantia v State* (1981) Cr LJ 55 (Ori) ; *Khosi Mahton v State* (1965) BLJR 180 ; Re *Subramaniam*AIR 1970 Mad 333, p 334, (1970) Cr LJ 1111 ; *DN Ramaiah v DRA Setty* (1972) Cr LJ 1158, p 1159, (1972) Mad LJ (Cr) 94 ; *Raghubans Singh v State of Bihar* (1974) BLJR 561, (1974) Pat LJR 488 .

74 *DN Ramaiah v Dr Aswathanarayana Setty* (1971) 2 Mys LJ 559 ; *Habibar Rahman v Jagannath Mondal* (1982) Cr LJ 1652 (Cal) (DB), (1982) 1 Cal HN 220 ; *Sarjug Mahto v State of Bihar* (1992) 1 BLJR 347 .

75 Re *Chandrakanta De* 6 ILR Cal 445, 7 CLR 350; *Mallappa Tacargi v Emperor* AIR 1915 Bom 22(1), 16 Cr LJ 668, 17 Bom LR 676 ; *Pommam Chintakath Mammali v T Kutti Ammu* AIR 1916 Mad 640(1), 16 Cr LJ 592, 39 ILR Mad 543, 2 Mad LW 410 ; *Bishan Batt v Emperor* AIR 1948 All 50, 48 Cr LJ 982, (1947) All LJ 504, (1917) ILR All 713 ; *Hira Lal v King-Emperor* AIR 1921 Oudh 123, 22 Cr LJ 381 ; *Quinn v Keshab Chandra Mukherjee* AIR 1949 Cal 349, 50 Cr LJ 632 ; *Dalganjan Koeri v State* AIR 1956 All 630, (1956) Cr LJ 1176 ; *Govindan Kunjaraman Assari v Krishnan Nair Chellappam Naik* AIR 1953 Tr & Coch 350, (1953) Cr LJ 1421; *Madhav Chandra Chatterjee v King* AIR 1952 Pat 356, (1952) Cr LJ 1410 ; *Nandlal Mitra v State* AIR 1968 Cal 523, (1968) Cr LJ 1406 ; *Travasiyappan v Perrasamy Nadar* (1992) Cr LJ 283 ; 2010 (3) KLT SN 15 (Ker) .

76 *Sister Ludhiya v State of Kerala* 2010 (3) KLT SN 15 (Ker) .

77 *Dalganjan Koeri v State* AIR 1956 All 630, p 632, (1956) Cr LJ 1176 ; **followed in***Bhagaban Misra v State* (1959) 25 Cut LT 265 .

78 *Jagpal Singh v State* (1959) All LJ 163, p 164 . *See* also cases discussed therein.

79 *Queen-Empress v Manyan* 12 ILR Mad 475 ; *Queen-Empress v Bishambharlal* 13 ILR All 577 .

80 *HK Chindaiah v MK Gopala Iyengar* (1986) 3 Crimes 94 (Kant) .

81 *Municipal Council, Ratlam v Vardhichand* (1980) Cr LJ 1075 (SC) .

82 *Thockchom Angou Singh v Union Territory of Manipur* AIR 1961 Mani 12, (1961) 1 Cr LJ 676 ; *Chinnamuthu Ambalam v S Jagannatha* AIR 1959 Mad 89, (1959) Cr LJ 328 ; *Jagpal Singh v State* (1959) All LJ 163 ; *Raj Narain Singh v District Magistrate, Gorakhpur* AIR 1956 All 481, (1956) Cr LJ 1028 ; *Bacharam Kar v State* AIR 1956 Cal 102, (1956) Cr LJ 515 ; *State of Vindhya Pradesh v Ram Lakshan* AIR 1953 VP 25, (1953) Cr LJ 1198 ; *Rupam Singh v Emperor* AIR 1944 Pat 213, 46 Cr LJ

18 .

83 *Babulal Parate v The State of Maharashtra & Ors* AIR 1961 SC 884, (1961) 2 Cr LJ 516 .

84 *State of Rajasthan v Gopal Krishna* (1977) Raj Cr C 369, p 371 .

85 *Ibid.*

86 *Raj Narain v District Magistrate, Gorakhpur* AIR 1956 All 481, p 483 .

87 *Jagpal Singh v State* (1959) All LJ 163 ; *State v Sm Tugla* AIR 1955 All 423, (1955) Cr LJ 1111 ; *Ejaz Ahmad v Maheshwar Singh* AIR 1953 All 257, (1953) Cr LJ 622 ; *Dulal Chandra Bhar v Sukumar Banerjee* AIR 1958 Cal 474, (1958) Cr LJ 1162, 62 CWN 595 ; *Jaswant v State* AIR 1951 All 828, 52 Cr LJ 1508, (1951) All LJ 710 ; *Ambika Thakur v Emperor* AIR 1939 Pat 611, 18 ILR Pat 544, 21 PLT 45, (1939) PWN 747 ; *Emperor v Zahir-us-Sayed Alvi* AIR 1934 Nag 114, 35 Cr LJ 820, 16 NLJ 178 ; *Satya Charan De v Emperor* AIR 1930 Cal 63, 31 Cr LJ 945, 33 CWN 1002 ; *Golak Chandra v Kali Charan* 13 ILR Cal 175 ; *DN Ramaiah v DRA Setty* (1972) Cr LJ 1158, (1972) Mad LJ (Cr) 94 ; Re *V Subramaniam*AIR 1970 Mad 333, (1970) Cr LJ 1111 ; *Mata Bhikh v State* (1980) 17 All Cr Cas 72, (1980) Cr LJ 575 .

88 Re *V Subramaniam*AIR 1970 Mad 333, (1970) Cr LJ 1111 .

89 *Nagoji Ramchandra v Queen-Empress* 8 Mad LJ 253 ; 1 Weir 143 ; *Chattar Singh v State* AIR 1956 All 798 .

90 *Chattar Singh v State* (1956) All LJ 798 .

91 *Ramlubhaya v Prem Lata,* (1981) Cr LC 388 .

92 *Emperor v Raghunath Vinak Dhulekar* AIR 1925 All 165, 26 Cr LJ 599, 22 All LJ 1049, 47 ILR All 205 .

93 *Bhalachnadra Tumbak Ranadive v Emperor* AIR 1929 Bom 433, 31 Bom LR 1151 ; *Ram Chandra Narayan Shastri v Emperor* AIR 1931 Bom 520, 33 Cr LJ 64, 33 Bom LR 1169 (disobedience of an order under s 42 of the Bombay District Police Act).

1 *Sadagopachariar v Krishnamaoorthy Rao* ILR 30 Mad 185, 190 ; *Kandasami Mudali v Subroya Mudali* ILR 32 Mad 478, p 483 ; *Baslingappa v Dharmappa* 34 ILR Bom 571 ; *Manzoor Hasan v Mahommad Zaman* AIR 1925 PC 36 ; *Martin & Co v Syed Faiyaz Hasan* AIR 1944 PC 33 ; Re *P Abdul Sattar*AIR 1961 Mys 57 .

2 *Sivappachari v Mahalinga* 1 Mad HCR 50 ; *Vijiaraghava Chariar v R* 26 ILR Mad 554 .

3 *M Visvanadha Rao v Emperor* AIR 1928 Mad 1049, 30 Cr LJ 31 (FB) .

4 *Sundaram Chetty v The Queen* 6 ILR Mad 203 ; *Parthasaradi Ayyangar v Chinnakrishna Ayyangar* ILR 5 Mad 304 ; Re *Pedda Chari* 2 Weir 74; *Vijiaraghava Chariar v Emperor* 26 ILR Mad 554, p 579, 586 (FB) ; *Govinda Chetti v Perumal Chetti* ILR 38 Mad 489 ; Ratan Lal 708; *Kazi Sujaudin v Mashavdas* 18 ILR Bom 693 ; *Murugappa v Kuppuswami* AIR 1949 Mad 212 .

5 Re *Ramanuja Aiyangar* 2 Weir 89.

6 *Emperor v Govind Venkatesh Yalgi* (1908) 8 Cr LJ 431 .

7 *Arumuga Mudali v Perumalswamy* (1914) 15 Cr LJ 30 ; *Venkatasubbayya v Md Falauddin* AIR 1927 Mad 611, 28 Cr LJ 509 .

8 *Nrusingha Charan Panda v State of Orissa* (1985) 59 Cut LT 70, p 73 .

9 *Dulal Chandra Bhar v Sukumar Banerjee* AIR 1958 Cal 474, p 476, 479, (1958) Cr LJ 1162, 62 CWN 595 .

10 *Satya Charan De v Emperor* AIR 1930 Cal 63, p 64, 31 Cr LJ 945 ; Re *Nathubhai Brijlal* 11 Cr LJ 64, 11 Bom LR 377.

11 *Balbhadra Jha v State* AIR 1964 BLJR 799 .

12 *Parmeswar Rai v King-Emperor* AIR 1922 Pat 84, 23 Cr LJ 387 .

13 *Umanath Prasad v Dhirendra Kumar Singh* AIR 1960 Pat 125, (1960) Cr LJ 387 .

14 Re *Sundara Mudaliar*AIR 1937 Mad 535, 38 Cr LJ 620, (1937) 1 Mad LJ 473, (1937) Mad WN 172 ; *Devendranath Mandal v Emperor* AIR 1932 Cal 286, 32 Cr LJ 1005, 35 CWN 187 ; *Ram Das Singh v Emperor* AIR 1927 Cal 28, 28 Cr LJ 4, ILR 54 Cal 152, 44 Cr LJ 250 ; *Bhoop Singh Tyagi v State* (2002) Cr LJ 2872 (Del) (DB) .

15 *Atar Khan v State* AIR 1960 Assam 109, p 111 ; *State v Sm Tugle* AIR 1955 All 423, p 432, (1955) Cr LJ 1111 ; Re *Subramaniam*AIR 1970 Mad 333, (1970) Cr LJ 1111 ; *K Papayya v State* (1975) Cr LJ 1784, p 1785, (1975) Mad LJ (Cr) 529 ; *Purna Chandra Patro v Sri Mrutyunjaya* (1990) 1 Crimes 78 .

16 *Nirarendu Dutt Majumdar v Emperor* AIR 1939 Cal 703, 41 Cr LJ 105, (1939) ILR 2 Cal 507, 43 CWN 1061 .

17 Re *Chandrakanta* 6 ILR Cal 445; *Memon Haji Habib v Memon Haji Jusab* 3 Cr LJ 151, 15 Kar LR 302 ; *Young Hon v R* (1910) 11 Cr LJ 56, UBR 1907-09 II PC 23.

18 Re *Nagoji Ramachander* 1 Weir 143.

19 *Joseph George v State of Kerala* (2001) 2 RCR (Cr) (Ker) .

20 *R v Dwarick Misser* 18 WR (Cr) 30 ; *R v Bithal Nath* (1914) 15 Cr LJ 177 .

21 Re *Harimohun* 10 WR (Cr) 53, 1 BLR (Cr) 23.

22 *Chenveerappa v Govt of Mysore* (1908) 9 Cr LJ 550 ; *R v Bithal Nath* (1914) 15 Cr LJ 177 .

23 *Queen-Empress v Subramaniam* 20 ILR Mad 1, 1 Weir 740 .

24 *Bhal Chandra v Emperor* AIR 1929 Bom 433, 436.

25 *Emperor v Raghunath Venaik Dhulekar* AIR 1925 All 165, p 167, 169, 26 Cr LJ 599, 47 ILR All 205 ; *Emperor v Mal Raj* 2 Cr LJ 365, 6 PLR 333 .

26 Section 144 (3) Cr PC, Form No 22, Sch 5, Cr PC ; *Golock Chandra Pal v Kali Charan De* 13 ILR Cal 175 .

27 Re *Kothakota Pappayya*(1975) 2 Andh WR 187, (1975) Cr LJ 1784.

28 *State v Jogla* AIR 1955 All 423, p 431, (1955) Cr LJ 1111 ; *Mata Bhikh v State* (1980) Cr LJ 575, p 580 (All) ; *Ram Samujh v State* AIR 1967 All 579, (1967) Cr LJ 1586 ; *Nand Lal Mitra v State* AIR 1968 Cal 523, (1968) Cr LJ 1406 ; *K Papayya v State* (1975) Cr LJ 1784, p 1786, (1975) Mad LJ (Cr) 529 ; *State of Rajasthan v Gopal Krishna* (1977) Cr C 369 .

29 *Emperor v Raghunath Venaik Dhulekar* AIR 1925 All 165, 26 Cr LJ 599, 22 All LJ 1049 .

30 *Ejaz Ahmad v Maheswar Baksh Singh* AIR 1953 All 257, p 258, 259, (1953) Cr LJ 623 ; *Ram Samujh v State* AIR 1967 All 579, (1967) Cr LJ 1586 .

31 *Jagpal Singh v State* AIR 1959 All 163 ; *Ejaz Ahmad v Maheshwar Buksh Singh* AIR 1953 All 257, (1953) Cr LJ 623 ; *State v Jugla* AIR 1955 All 423, (1955) Cr LJ 1111 ; *K Pappaya v State* (1975) Cr LJ 1784, p 1786, (1975) Mad LJ (Cr) 529 .

32 *Nandlal Mitra v State* AIR 1968 Cal 523, p 534, (1968) Cr LJ 1406 .

33 *Pom Mani Chintakath Mammali v Thazhithattah Kutti Ammu* AIR 1916 Mad 640(1), 39 ILR Mad 543, 16 Cr LJ 592, 17 Mad LT 391 ; Re *Chandra Kanta De* 6 ILR Cal 445.

34 *Thavasiyappan v Periasamy Nadar* (1992) Cr LJ 283 .

35 *Mallappa Mallappa Tavarji v Emperor* AIR 1915 Bom 22(1), 16 Cr LJ 668, 17 Bom LR 676 ; *Dal Ganjan Singh v State* AIR (1956) All 630, (1956) Cr LJ 1176 .

36 *R v Sheodin* 10 ILR All 115 .

37 Re *Parbutty Charanb* UKR 16 Cal 9; *Mul Raj v Emperor* 2 Cr LJ 719, 36 PR (Cr) 1905 ; *Bhal Chandra Trimbuk Ranadire v Emperor* AIR 1929 Bom 433, 31 Bom LR 1151 .

38 Re *Madan Kishore*AIR 1940 Pat 446, 41 Cr LJ 414, 21 PLT 231, 6 BR 426 .

39 *King v Darbarilal Shaw* AIR 1949 Cal 677, p 678, 51 Cr LJ 59, 54 CWN 256 .

40 Re *Madan Kishore*AIR 1940 Pat 446, 41 Cr LJ 414 .

41 *Niharendra Dutt v Emperor* AIR 1939 Cal 703 .

42 *Nagendro Nath Biswas v Rakhal Das Sinha* AIR 1919 Cal 108(2) .

43 *Sardara v R* (1913) 14 Cr LJ 63 ; *Rama v R* ILR 35 All 136, 15 Cr LJ 122 .

44 *Emperor v Mul Raj* 2 Cr LJ 365, 36 PR 1905 (Cr), 6 PLR 333 ; *Bijo Yadav v State of Bihar* (2007) Cr LJ (NOC) 522 (Pat) .

45 VII BC of 1876.

46 *Ebrahim Sircar v Emperor* ILR 29 Cal 236, 4 Mad HCR App V; 1 Weir 137, 138; *R v Nandkumar* 3 BLR App 49 ; *R v Govind Benkatesh Yalji* (1907) 8 Cr LJ 431, 4 Mad LT 363 ; *Projapat Jha v R* (1910) 11 Cr LJ 49, 14 CWN 234 .

47 *Rama Nand Jha v Kamal Nand Jha* (1991) 2 Crimes 574 (Pat) .

48 *Bangshi Das v Ajit Kumar Das* (1988) 1 Crimes 763 (Cal) .

49 *Queen-Empress v Jamdanand* 20 ILR All 501 ; *Ram Manohar Lohia v State* AIR 1968 All 100, (1968) Cr LJ 281 ; *Matly Majhi v State* (1970) Pat LJR 402 .

50 *Emperor v Raghunath Venaik Dhulekar* AIR 1925 All 165, p 169-70, 26 Cr LJ 599, 47 ILR All 205, 22 All LJ 1049 ; *Empress of India v Bukshi Ram* 3 ILR All 201 ; *Reg v Tatya* Ratanlal 50; *Reg v Bapuju Bechar* Ratnalal, 81, (1904) All WN 233; *Matlu Manjhi v State* (1970) Pat LJR 402 .

51 *Queen-Empress v Lakhmidas Makandas* 14 ILR Bom 165 ; *Queen-Empress v Harilal* 14 ILR Bom 180 ; *Queen-Empress v Jasoda Nand* 20 ILR All 501 .

52 *Emperor v Abdul Hamid* AIR 1923 Pat 1, 3, 23 Cr LJ 625, 2 ILR Pat 134, 3 PLT 585 (FB), per Majority.

53 Police Act 5 of 1861.

54 *Emperor v Abdullah* (1921) 22 Cr LJ 705 (2) .

55 *Madho Singh v Emperor* AIR 1942 Pat 331 .

56 *Daimulla Taluqdar v Mahrulla Taluqdar* 27 ILR Cal 918 ; *Madho Singh v Emperor* AIR 1942 Pat 331, 43 Cr LJ 637 ; *Emperor v Abdullah* (1921) 22 Cr LJ 705 ; *Emperor v Abdul Hamid* AIR 1923 Pat 1, 3, 23 Cr LJ 625 (FB) .

57 *Reg v Tatya Ratanlal* , 50; *Reg v Bapuju Bechar Ratanlal* , 81.

58 *Swaminatha Mudaliar v Gopal Krishna Naidu* (1915) 16 Cr LJ 892 .

59 *Atar Khan v State* AIR 1960 Assam 109, 111, (1960) Cr LJ 891 .

60 *Ram Das Gaur v City Magistrate, Varanasi* AIR 1960 All 397, p 398, (1960) Cr LJ 865(2), (1960) All LJ 104.

61 *Queen v Pitti Singh* 8 WR 37 ; *Bhusan Das v Tulsi Ganguli* (1989) 2 Cal HN 87 (Cal) ; *Nilima Bhattacharya v State* (1984) 2 Cal HN 143 (Cal) ; *Shaikh Mahboob v State of Maharashtra* (1982) Mah LR 168, (1982) 2 Bom HCR 23 .

62 *King v Darbarilal Shaw,* AIR 1949 Cal 677, p 678, 51 Cr LJ 59, 54 CWN 256 .

63 *Bachuram Kar v State* AIR 1956 Cal 102, p 105, (1956) Cr LJ 515 ; *Jiaratdin Mahommad v Emperor* (1922) 23 Cr LJ 276, 39 Cr LJ 578 .

64 *Nrusingha Charan Panda v State of Orissa* (1985) 1 Crime 451 (Ori), (1985) 89 CLT 70 .

65 *Brojo Nath Ghose v Empress* 4 CWN 226 .

66 *Prem Chand Roy v Dharmadas Singh Roy* 9 CWN 392 (D) .

67 *Empress v Surajanarain Dass* 6 ILR Cal 88 .

68 *Superintendent and Remembrancer of Legal Affairs, Bengal v Khodabaksh Shah* AIR 1934 Cal 242(1), 35 Cr LJ 778, ILR 60 Cal 1336 .

69 *Rupan Singh v Emperor* AIR 1944 Pat 213, 46 Cr LJ 18, 11 BR 70 .

70 Re *Kohmul Kisto* 12 CLR 231; *R v Suckoo* BR 18 July 1889 .

71 *R v Bhau* 3 Bom HCR (CC) 53.

72 *R v Khandoji* 5 lb 21 .

73 5 Mad HCR App 19.

74 1 Weir 139.

75 *Ibid.*

76 *R v Subramaniam* 20 ILR Mad 1, 1 Weir 140 .

77 *R v Subramaniam* 20 ILR Mad 1, 1 Weir 140 .

78 *Ibid,* 141; *Maina Servai v R* (1910) 11 Cr LJ 621 .

79 1 Weir 143.

80 *Ibid,* 44.

81 *Prem Chand v Dharamdas Singh* (1910) 11 Cr LJ 166, 9 CWN 392 .

82 *R v Kalian Singh* (1904) 1 Cr LJ 916, 24 All WN 233 ; *Dhan Singh v R* (1904) 1 Cr LJ 987, 1 All LJ 615 .

83 *Jayantilal Mohanlal Patel v Eric Renison (*1975) Cr LJ 661, pp 665, 669 (Guj).

84 *Unnoda Pershad Dutt v Ranee Shama Soonduree* 24 WR 20, p 21 ; *Evaristo Antonio v State* AIR 1968 Goa 14, (1968) Cr LJ 313 .

85 *Dibakar Talukdar v State* AIR 1961 Assam 94, p 96 ; *Atar Khan v State* AIR 1960 Assam 109, p 111 ; *Kalu Minchi v State of Assam* AIR 1965 Assam 29 ; *Mukhdeo Singh v State of Bihar* (1962) BLJR 405 ; *Ram Surat Singh v State* (1968) All WR (HC) 448, (1968) All Cr R 287 .

86 *Chatter Singh v State* (1956) All LJ 798, p 799 .

87 *Ramlubhaya v Prem Lata* (1981) Cr LC 388 (All) .

88 Re *Tandra Narasimhappadu*AIR 1942 Mad 275(1), (1941) Mad WN 1030 .

89 *Syed Usman Ali Mahmood Ali v Emperor* AIR 1938 Nag 297, p 298, 39 Cr LJ 584, (1938) NLJ 139, (1938) ILR Nag 580 .

90 *Habibar Rahman v Jagannath Mondal* (1982) Cr LJ 1652 (Cal) (DB), (1982) 1 Cal HN 220 ; *Sarjug Mahto v State of Bihar* (1992) 1 BLJR 347 (Pat) .

91 *Emperor v Habibullah* (1886) 6 All WN 251, p 252 ; Re *V Subramanian*(1970) 1 Mad LJ 58.

1 *Bachuram Kar v State* AIR 1956 Cal 102, p 104, (1956) Cr LJ 515 ; *Fakir Charan Das v State* AIR 1957 Ori 214, (1957) Cr LJ 1151, (1957) ILR Cut 233, 23 CLT 176 ; *Pradip Chowdhary v State* AIR 1960 Assam 20, (1960) Cr LJ 215 ; *Atar Khan v State* AIR 1960 Assam 109, (1960) Cr LJ 891 ; *NG Sabde v The Crown* AIR 1950 Nag 12, 51 Cr LJ 254 ; *Umanath Prasad v Dhirendra Kumar Singh* AIR 1960 Pat 125, (1960) Cr LJ 387 ; *King v Darbari Lal Shaw* AIR 1949 Cal 677, 51 Cr LJ 59, 54 CWN 256 ; *Charan Singh v Emperor* AIR 1940 Lah 459, 42 Cr LJ 90, 212 PLR 786 ; *Lachmi Devi v Emperor* AIR 1931 Cal 122, 32 Cr LJ 511 ; *Ramgopal Daw v Emperor* ILR 32 Cal 793, 2 Cr LJ 760 ; *Parmeshwar Rai v King-Emperor* AIR 1922 Pat 84, 23 Cr LJ 381 ; *Sarjug Mahto v State of Bihar* (1992) 1 BLJR 347 (Pat) ; *Sk Mahboob v The State of Maharashtra* 1982 (2) Bom HCR 23 .

2 *Fakir Charan Das v State* AIR 1957 Ori 214, p 215 .

3 Re *V Subramaniam*(1970) 1 Mad LJ 58.

4 *Bangshi Das v Ajit Kumar Das* (1988) 1 Crimes 763 (Cal) .

5 *Wangkheimayan Kulabindhu Singh v State* (1962) 1 Cr LJ 827, 828 .

6 *Jaswant v State* AIR 1951 All 828, 829, 52 Cr LJ 1508, (1951) All LJ 710.

7 *Emperor v Ganesh Vasudeo Mavlankar* AIR 1931 Bom 135, 138, 32 Cr LJ 507, 55 ILR Bom 322, 33 Bom LR 59 .

8 *Pradip Chowdhury v State* AIR 1960 Assam 20, p 22, (1960) Cr LJ 215 ; *King v Darbari Lal Shaw* AIR 1949 Cal 677, p 679 .

9 *Emperor v Habibullah* (1886) 6 All WN 251, p 252 .

10 *King v Darbarilal Shaw* AIR 1949 Cal 677, p 679, 51 Cr LJ 59 .

11 *Jasnami v Emperor* AIR 1936 All 534, p 536, 37 Cr LJ 866, (1936) All LJ 579 ; Re *Raghunath Vinaik Dhulekar*AIR 1925 All 665, 26 Cr LJ 509, 47 ILR All 205 .

12 *Hoshiar Chand v State of Himachal Pradesh* (1979) Cr LT 79 (HP), (1979) Sim LC 308 ; *M Chacko v State of Kerala* (1984) 1 Crimes 312 (Ker) ; *State v Nur Hussain* (1981) Chand Cr C 14 (J & K); *G Pantigongpou v State of Manipur* (1994) 2 Gau LR 89 (91) .

13 *Chinna Muthu Ambalam v Haganatha Chariar* AIR 1959 Mad 89, p 94, 1959 Cr LJ 328, (1959) 1 Mad LJ 135 ; *Emperor v Abdullah* (1921) 22 Cr LJ 705(2); *Poulose v State of Kerala* 2013 (4) KLT 687 (Ker) .

14 *Bachuram Kar v State* AIR 1956 Cal 102 ; *Evaristo Antonio v State* AIR 1968 Goa, Daman & Diu 14, (1968) Cr LJ 313; *Nbatabar Samal v Bidulata Dei* (1974) Cut LT 1187, p 1191 ; *C Muniappan v State of Tamil Nadu* 2011 (99) AIC 220 (SC), 2011 (72) ACC 988 .

15 *Raghubans Singh v State of Bihar* (1974) BLJR 561, (1974) Pat LJR 488 .

16 *Lachmi Devi v Emperor* AIR 1931 Cal 122, p 127, 32 Cr LJ 511, 58 ILR Cal 971, 35 CWN 257 ; *Emperor v Ganesh Vasudeo Mavlankar* AIR 1931 Bom 135, 137, 32 Cr LJ 507, 55 ILR Bom 322, 33 Bom LR 59 .

17 *Queen-Empress v South* 24 ILR Mad 70 .

18 *Murugan v State of Kerala* 2014 (2) Ker LJ 476 (Ker) .

19 *Nizam v State of Kerala* 2014 Cr LJ 2343, p 2347 (Ker), 2014 (2) KLT 467 .

20 *NG Sabde v The Crown* AIR 1950 Nag 12, p 13, 51 Cr LJ 254 .

21 *Mahendra Sharma v State of Bihar* (1996) 2 East Cr C 684, p 685 (Pat) .

22 *Kumar v State of Punjab* 2008 Cr LJ 3576, p 3578 (P&H) (DB), 2009 (1) RCR (Criminal) 415 .

23 *Bhaiyalal Patel v State of Chhattisgarh* 2012 Cr LJ 2812, p 2815 (Chh), 2012 (2) CGLJ 384 .

24 Re *Lalit Mohan Pal*(1904) 5 CLJ 176; *Emperor v Molla Fuzla Karim* 33 ILR Cal 193 followed; *Begu Singh v Emperor* 34 ILR Cal 551 (FB) ; *Puran Chandra Dutta v Sheikh Dhalu* AIR 58 Cal 374 .

25 *Government Advocate, Bihar v Kumar Singh* AIR 1938 Pat 88, ILR 16 Pat 571 ; *Jot Narain v Emperor* AIR 1939 Sind 164 ; *Manicklal Bhagat v State* (1982) 1 Cal HN 149 ; **following**; *Ajaib Singh v Jogendra Singh* AIR 1968 SC 1422 .

26 *YVRV Anjanuililu v State & Anor* (1998) III CCR 391 (AP) .

27 *Ramendra Chandra Roy v Emperor* AIR 1931 Cal 410, 32 Cr LJ 844, 58 ILR Cal 303, 35 CWN 716 .

28 *Emperor v Abdullah* (1921) 22 Cr LJ 705, 706 ; *Ram Das Singh v Emperor* AIR 1927 Cal 28, 28 Cr LJ 4 ; *Sheikh Abdul v King-Emperor* AIR 1927 Cal 306, 28 Cr LJ 350, 31 CWN 340 .

29 Re *Madan Kishore*AIR 1940 Pat 446, p 448, 41 Cr LJ 414, 21 PLT 231 .

30 *Emperor v Turab Khan* AIR 1942 Oudh 39, 42 Cr LJ 884, ILR 17 Luck 32, (1941) OWN 1087 .

31 *Emperor v Afaq Husain Jauhar* AIR 1941 All 70, 73, 42 Cr LJ 298, ILR 1941 All 186, (1940) All LJ 885.

32 Re *Yerlagadda Venkanna*AIR 1925 Mad 856, 26 Cr LJ 1556 .

33 *Thokchom Angou Singh v Union Territory of Manipur* AIR 1961 Mani 12, p 19 ; *Thangjam Irabot Singh v State* (1961) 2 Cr LJ 584 ; *Raj Narain Singh v District Magistrate of Gorakhpur* AIR 1956 All 481, (1956) Cr LJ 1026 .

34 *King v Darbarilal Shaw* AIR 1949 Cal 677, p 679, 4 Mad HCR App V, 1 Weir 137, p 138; *R v Nundkumar* 3 BLR App 49 ; *R v Govind Benkatesh Yalgi* (1907) 8 Cr LJ 431, 4 Mad LT 363 ; *Projapat Jha v R* (1910) 11 Cr LJ 49, 14 CWN 234 .

35 *Shyamanand Das v R* 31 ILR Cal 990 ; *Ram Gopal v R* ILR 32 Cal 793 ; *Brojo Nath v R* 4 CWN 226 **followed**; *R v Madhul Chandra* (1903) 4 Cr LJ 479, 3 LBR 214 ; *Atar Khan v State* AIR 1960 Assam 109 ; *Parmeshwar Rai v King-Emperor* AIR 1922 Pat 84, 23 Cr LJ 381, 3 PLT 258 ; *D Srinivasiah v Government of Mysore* AIR 1951 Mysore 121, 57 Cr LJ 526 and cases cited therein.

36 *Bharat Raut v State* AIR 1953 Pat 376 ; *Paramasiva Mooppan v Emperor* AIR 1928 Mad 591, 29 Cr LJ 590, (1928) Mad WN 70, Re *V Subramanian*(1970) 1 Mad LJ 58; *Habibur Rahman v Jagannath Mondal* (1982) Cr LJ 1652 (Cal) ; *Sarjug Mahto v State of Bihar* (1992) 1 BLJR 347 .

37 *Lachmi Dei v Emperor* AIR 1931 Cal 122, 32 Cr LJ 511 ; *NG Savde v The Crown* AIR 1950 Nag 12, (1951) Cr LJ 254 .

38 *Raghubans Singh v State of Bihar* (1974) BLJR 561, (1974) Pat LJR 488 .

39 *Satya Charan De v Emperor* AIR 1930 Cal 63, 31 Cr LJ 945, 33 CWN 1002 .

40 1872 PR (Cr) 13, 19.

41 *J Choudhary v State* AIR 1963 Ori 216, (1963) 2 Cr LJ 659 .

42 *Jarnail Singh v State of Rajasthan* 1982 Cr LJ 319 (Raj) .

43 *State of Maharashtra v Mahommad Yusuf Noor Mahommad* 1990 Mah LJ 813 .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 189.

Threat of injury to public servant.--

Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the 1377public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

STATE AMENDMENT

Andhra Pradesh.--In Andhra Pradesh offence under section 189 is cognizable.--A.P.G.O. Ms. No. 732, dated 5-12-1991.

Comments

1. Scope

This section and s 190, IPC deal with criminal threats affecting public servants. Under this section the threat is directed against the public servant himself, while in the next section it is directed against the person who seeks his protection. This section is similar to s 503, IPC which defines criminal intimidation. Section 503 is general in character, while this section is particularly confined to criminal intimidation of a public servant.

It is the essence of an offence under this section that the threat or injury should have been held out for the purpose of inducing a public servant to do any act or to forbear or delay the doing of an act. A mere threat, uttered as an exhibition of bad temper or in the course of an altercation, is not necessarily an offence under this section.[44] What the section deals with are menaces which would have a tendency to induce the public servant to alter his actions because of some possible injury to himself or to someone in whom the accused believes he has an interest.[45]

2. 'Holds out any Threat'--Threat of Injury, a Necessary Ingredient

In order to sustain a conviction under this section, there must be a threat of injury to either the public servant or to anyone in whom the accused believes that, public servant to be interested.[46] If the threat is verbal, the exact words used should be proven to enable the court to decide whether an injury or a lawful complaint was threatened. It is most material in a prosecution under this section that the actual words, used by the accused towards the public servant, be before the court to enable it to ascertain whether, in fact, a threat of injury to the public servant was really made by the accused. Where there is a serious conflict of testimony as to the words used by the accused regarding the public servant, it is exceedingly doubtful if a conviction 1378could be had merely because the witnesses are agreed as to the general effect of those words.[47] Words amounting to an idle threat uttered in anger is no threat.[48]

Laws of Land to be Respected even by Politicians--Mere Raising Slogans not an Offence

A citizen of India is a citizen, whether he is a political worker or otherwise. A political worker cannot claim any impunity in the eye of law to commit any offence, however good the motive may be. The law of the land is to be obeyed and respected by all citizens, irrespective of their profession, vocation, status and political thinking. Before the majesty of law, no one is either exempted from its rigour, for amenable there seriously. They are all equal. So, even though the accused may have been the party

workers of a political party, and even though a case against was false, they had no business to threaten the police officers with injury and on that threat, to demand their release. The case would not have been under s 189, IPC, if the case had been limited to the raising of slogans or demanding a release.[49]

Mere Use of Impolite Language not an Offence

Where an office-bearer of the revenue officials' association, by writing a letter, requested the collector to withdraw the prosecution against one revenue officer, without holding out any threat of injury to induce him to do or forbear from doing any act in exercise of his public functions, the mere use of impolite language in the letter did not amount to an offence under this section.[50]

3. Injury--Injury Implies Illegal Harm

The word 'injury' has been defined in s 44 of this Code as denoting any harm whatever, illegally caused to any person in body, mind, reputation or property.[51] Injury implies an illegal harm, but it is unsafe to hold that a mere threat to bring a legal complaint either before a court or before the constable is an injury. Thus, it would not be criminal to threaten to report to his superiors, an official, who was about to perform an illegal act, for this would be the lawful result of the act he was committing.[52] Police constables in the execution of their duty must be protected, but when a member of the public considers that he is being harshly treated, or that a constable is exceeding the powers given to him by law, it would be absurd to hold that a protest or oral threat to report the matter either to the court or to the constable's superior officers amounts to an illegal harm. If the constable is acting within his powers, the complaint can do him no harm, if he is acting beyond his powers, he has no cause for complaint and the public has every right to protest.[53]

Section 44 and the commentary thereunder may be referred to.

4. Public Servant

Section 21 and the commentary thereunder may be referred to. 1379

5. In Whom the Public Servant is Interested

In order to sustain a conviction under this section, the threat of injury need not be to the public servant directly. It may be to anyone in whom the accused believes that public servant to be interested.[54]

6. 'For the Purpose of Inducing that Public Servant' etc--Essence of the Offence

It is the essence of an offence under this section that the threat or injury should have been held out for the purpose of inducing a public servant to do any act or to forbear or delay the doing of an act. A mere threat, uttered as an exhibition of bad temper or in the course of an altercation, is not necessarily an offence under this section.[55] What the section deals with are menaces, which would have a tendency to induce the public servant to alter his actions because of some possible injury to himself or to someone in whom the accused believes he has an interest.[56]

7. Procedure

The offence is non-cognizable. Summons should ordinarily be issued in the first instance. The offence is bailable, but not compoundable. It is triable by a magistrate and can also be tried summarily. The cognizance of an offence under this section can be taken within three years.

8. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:
>
> That you, on or about the ..... day of ..... at ..... held out a threat of injury to a public servant, to wit ....., (*or to ....., in whom you believed that a public servant, to wit ..... was interested*) for the purpose of inducing that public servant to do an act, to wit ....., (*or to forbear or delay to do.....*), connected with the exercise of the public functions of such public servant, and thereby committed an offence punishable under section 189 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

9. Proof

To establish an offence under this section it must be proved that:

(i) the accused held out a threat;[57]
(ii) the threat was directed against a public servant or a person, in whom the accused believed the public servant to be interested;
(iii) the threat was of injury; and1380
(iv) the object of the threat was to induce the public servant to do or forbear, or delay doing, an act connected with the exercise of his public functions.

10. Separate Convictions

Separate convictions under ss 186 and 189 in a case, have been held to be bad in law.[58]

11. Sentence

A court, in passing a sentence, should inflict such a sentence as the gravity or otherwise of the crime with which the accused has been convicted, warrants and merits, irrespective of whether the sentence inflicted will involve a right of appeal or not. A court should weigh the sentence with reference to the crime committed and the circumstances of the case, and not with reference to anything which may happen subsequently.[59] After considering the mitigating circumstances and the long delay in the trial, a lenient view can be taken in awarding the sentence in a case under this section.[60]

44 *Mahommad Ahmad Khan v Emperor* AIR 1936 All 171, p 172, 37 Cr LJ 212 ; Re *Kuppasami Aiyar* 16 Cr LJ 477, p 478.

45 *Queen-Empress v Amir Khan* (1886) Ratanlal UC 273 .

46 *Ibid.*

47 *Queen-Empress v Maheshri Baksh Singh* 8 ILR All 380 .

48 *Mahommad Ahmad Khan v Emperor* AIR 1936 All 171, p 172, 37 Cr LJ 212 .

49 *Jarnail Singh v State of Rajasthan* (1982) Cr LJ 319 (Raj), (1981) Raj Cr C 325 .

50 Re *Kutubuddin*(1985) Mad LJ (Cr) 105.

51 *Mulai Rai v Emperor* AIR 1926 All 277, 278 All LJ 210 .

52 Mayne, *Criminal Law of India*, p 19.

53 *Shahbad Khan v King-Emperor* AIR 1926 Lah 139, p 140, 27 Cr LJ 400 .

54 *Queen-Empress v Amir Khan* (1886) Ratanlal UC 273 .

55 *Mahommad Ahmad Khan v Emperor* AIR 1936 All 171, p 172, 37 Cr LJ 212 ; Re *Kappusami Aiyar*AIR 1916 Mad 408, 16 Cr LJ 477, p 478 .

56 *Queen-Empress v Amir Khan* (1886) Rat UC 273 .

57 *Emperor v Yar Mohd* AIR 1931 Cal 448, 58 ILR Cal 392, 32 Cr LJ 1181 .

58 *Jagannath Singh v King-Emperor* AIR 1925 Pat 183, p 184, 185, 25 Cr LJ 1227 .

59 *Emperor v Yar Mahommad* AIR 1931 Cal 448, p 450, 32 Cr LJ 890 .

60 *Jarnail Singh v State of Rajasthan* (1982) Cr LJ 319, (1981) Raj Cr C 325 (Raj) .

Indian Penal Code (Act XLV of 1860)

Chapter X

Of Contempts of the Lawful Authority of Public Servants

S. 190.

Threat of injury to induce person to refrain from applying for protection to public servant.--

Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant legally empowered as such to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

STATE AMENDMENT

Andhra Pradesh.--In Andhra Pradesh offence under section 190 is cognizable.--A.P.G.O. Ms. No. 732, dated 5-12-1991.

Comments

1. Scope and Object

The object of the section is to protect persons against being terrorised and threatened into inaction with the object of inducing that person to refrain or desist from making a legal application to a public servant for protection against any injury, which that public servant is legally empowered to give. This section punishes those holding out a threat of any injury to a person, to prevent him from seeking protection from any public servant legally empowered, as such, to give him protection, or cause such protection to be given. 1381

2. Holds Out any Threat

Synopsis note 2 under the preceding s 189 may be referred to.

3. Injury

A question may arise as to whether a threat to excommunicate, or exclude from caste, is an injury within the meaning of this section. Now, under s 44 of this Code, the word 'injury' denotes a harm illegally caused to another. Therefore, it will not be an offence to threaten another with an action, or indictment, which might lawfully be preferred against him.[61] There can be no criminality when the sentence of excommunication is legal, that is to say, where it is justified by the usages of the class or sect to which the complainant has voluntarily submitted. It has been held that:

> There can be no criminal intimidation where the injury of which complaint is made is the hardship arising from a conventional punishment, which a spiritual superior, acting in the exercise of his authority as regulated by the custom of the caste, is competent to inflict. The custom implies a common submission to his authority, and, assuming that there was an error of judgment on his part, the error cannot be accepted as sufficient for turning a case of conventional discipline into a criminal offence.[62]

A threat to institute a civil suit for a mere declaration of right against any person who objects to that right, cannot be said to be an injury within the meaning of this section, as it cannot be said to be a harm illegally caused in body, mind, reputation or property.[63]

Section 44 and the commentary thereunder and the synopsis note 3 to the preceding s 189 may be referred to.

4. Public Servant

Section 21 under and the commentary thereunder may be referred to.

5. Procedure

The procedure will be the same as in the case of an offence under s 189 . The limitation prescribed for prosecution under this section is one year.

6. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:

That you, on or about the.....day of.....at.....held out a threat of injury, to wit.....to....., for the purpose of inducing him to refrain or desist from making a legal application for protection against such injury to a public servant legally empowered to give such protection (*or to cause such protection to be given*), and thereby committed an offence punishable under section 190 of the Indian Penal Code and within my cognizance.

1382

And I hereby direct that you be tried by this court on the said charge.

7. Proof

For an offence under this section the prosecution must prove the following:

(i) that the accused held out a threat;
(ii) that such threat was of an injury;
(iii) that the purpose for which such threat was held out was to induce the person threatened to refrain or desist from making a legal application for protection against some injury;
(iv) that the person to whom such legal application was about to be made was a public servant; and
(v) that such public servant was legally empowered, as such, to give the protection or to cause the same to be given.1383

61 *Reg v Moroha* 8 Bom HCCC 101 .

62 *Queen v Sri Vidya Sankara Narasimha Bharathi Guruswamulu* 6 ILR Mad 381, p 388, 1 Weir 595 .

63 *Mulai Rai v Emperor* AIR 1926 All 277, p 278, 27 Cr LJ 351, 24 All LJ 314 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 191.

Giving false evidence.--

Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which

he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Explanation 1.--A statement is within the meaning of this section, whether it is made verbally or otherwise.

Explanation 2.--A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

Illustrations

(a) *A,* in support of a just claim which *B* has against *Z* for one thousand rupees, falsely swears on a trial that he heard *Z* admit the justice of *B*'s claim. *A* has given false evidence.

(b) *A* being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of *Z*, when he does not believe it to be handwriting of *Z*. Here *A* states that which he knows to be false, and therefore gives false evidence.

(c) *A,* knowing the general character of *Z's* handwriting, states that he believes a certain signature to be the handwriting of *Z*; *A* in good faith believing it to be so. Here *A's* statement is merely as to his belief, and is true as to his belief, and therefore, although the signature may not be the handwriting of *Z, A* has not given false evidence.

(d) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject. A gives false evidence whether Z was at that place on the day named or not.

(e) A, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation. *A* has given false evidence.13861387

Comments

1. Scope of the Section

Section 191, IPC defines 'giving false evidence' and s 192 defines 'fabricating false evidence'. Section 193 , IPC penalises giving or fabricating false evidence. That a person should always tell the truth is a moral principle. It cannot, however, be said to be a legal principle as such. Whenever the Legislature requires a person to tell the truth, it has so enacted in various enactments. It is only where it has been so enacted and a person fails to tell the truth that he comes within the mischief of the provisions of this section.[8]

No promise or undertaking, however, formal, or however important it may be as evidence, in the ordinary acceptance of the word, comes within the meaning of the term as used in this section. It must be a statement made in reference to some matter to which the person is legally bound on oath, or by some express provision of law to state the truth; or it must be a declaration which he is bound by law to make.[9]

The most appropriate stage for a trial judge to take a decision relating to an alleged perjury would be at the final stage of disposal of the main matter on its merits and not at the preliminary stage, otherwise, the decision relating to the alleged perjury or false statement at the initial stage will prejudicially affect the fair disposal of the main matter on its merits.[10]

2. English Law

'Giving false evidence', which expression is defined in this section is, in English Law, designated as 'perjury'. In England, perjury, which was a common law offence, has now been made a statutory offence. Under s 1 of the Perjury Act 1911,[11]as amended by the Criminal Justice Act 1948,[12] perjury is defined as follows:

Section 1 .--

(1) If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding willfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to penal servitude for a term not exceeding seven years, or to imprisonment . . . or a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine.

(2) The expression "judicial proceeding" includes a proceeding before any court, tribunal, or person, having by law power to hear, receive, and examine evidence on oath.

(3) Where a statement made for the purposes of a judicial proceeding is not made before the tribunal itself, but is made on oath before a person authorised by law to administer an oath to the person who makes the statement, and to record or authenticate the statement, it shall, for the purposes of this section, be treated as having been made in a judicial proceeding.

(4) A statement made by a person lawfully sworn in England for the purposes of a judicial proceeding--

(a) in another part of His Majesty's dominions; or1388
(b) in a British tribunal lawfully constituted in any place by sea or land outside His Majesty's dominions; or
(c) in a tribunal of any foreign state,

shall for the purposes of this section, be treated as a statement made in a judicial proceeding in England.

(5) Where, for the purposes of a judicial proceeding in England, a person is lawfully sworn under the authority of an Act of Parliament--

(a) in any other part of His Majesty's dominions; or
(b) before a British tribunal or a British Officer in a foreign country, or within the jurisdiction of the Admiralty of England;

a statement made by such person so sworn as aforesaid (unless the Act of Parliament under which it was made otherwise specifically provides) shall be treated for the purposes of this section as having been made in the judicial proceeding in England for the purposes whereof it was made.

(6) The question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial.

Even at common law perjury consisted in giving upon oath, in (or for the purposes of) a judicial proceeding, before a competent tribunal, whether it be a court of the common law or acting under a statute,[13] evidence which was material to some question depending in the proceeding and was false to the knowledge of the deponent, or was not believed by him to be true.[14]

Save in a most exceptional case, an immediate custodial sentence should be imposed for perjury.[15]

3. Canadian Law

It is an offence punishable on summary conviction for a person who, not being specially permitted, authorized or required by law to make a statement under oath or solemn affirmation, makes such a statement, by affidavit, solemn declaration or deposition or orally before a person who is authorized by law to permit it to be made before him, knowing that the statement is false. This does not apply to such a statement that is made in the course of a criminal investigation. A commissioner whose authority to take oaths was limited to work for his law firm, who administered the oath to an affiant in unrelated litigation, was not 'a person ... authorized by law to permit it to be made before him' and had

no authority to take the accused's oath, and the accused could not be convicted of an offence.[16]

4. Prevention of Corruption Act 1988

Section 21 of the Prevention of Corruption Act 1988 makes a similar provision with respect to the offences under that Act.

5. 'Perjury' and 'Giving False Evidence'

As regards the offence of 'giving false evidence', the framers of the Indian Penal Code, for reasons stated in note *G* to their report, dated the 14 October 1837,[17]1389 thought it proper to discard the English Law of 'perjury' and to draft the provisions of the Indian Penal Code in this respect upon the lines of the French Code Penal regarding *faux temoignage*. The Indian law commissioners were afterwards pressed to at least allow the word 'perjury' to be retained in their Code, as being one familiar to the people of India and long in use, but they refused to give way[18] on the ground that 'the authors of the Code' thought it inexpedient to use the technical terms of the English law where they did not adopt its definitions, and so materially departed from it in substance'.[19]

6. Tampering with Witnesses

The criminal justice system has been not only polluted but totally corrupted in through one practice that has become endemic and has almost reached malignant dimensions. The number of criminal cases in which one or more witnesses have been tampered with and has found that in over 90 per cent of the cases one or more witnesses have turned hostile. Nothing can be more destructive to the success of a prosecution than the obnoxious practice of bribing or pressurising witnesses and getting them to turn hostile. The Karnataka High Court had earlier directed the trial courts to ascertain in all cases where the witnesses turn hostile as to why this has happened and since the majority of witnesses are gullible they have openly disclosed that it was the accused or persons on behalf of the accused who had either used inducements or pressure and threats to get them to turn hostile. There can be little doubt about the fact that the source of this corruption or this corrupt practice can be traced to the accused because it is the accused who is the direct beneficiary of the failure of the prosecution insofar as the accused secures an acquittal in cases where this is not warranted. This practice of tampering with the witnesses has now become so widespread that the prosecutors cheerfully and openly get up and tell the trial courts that the witnesses are hostile and that there is no purpose in examining them. The source of this information is the police who are often a party to what is going on for obvious reasons. While in the rest of the world the prosecuting agency takes all necessary steps to ensure that pressures and inducements do not affect the evidence, it is unfortunate that here no such preventive steps are taken even though it is possible. The police authorities in collusion with the accused were assisting the defense by keeping back witnesses and falsely informing the court that they were not available and this court was required to take stringent steps to combat this dishonest practice with considerably improved results over the last two years. The tampering with witnesses, however, continues unabated.[20]

It would be necessary, at least in a few cases, to make a thorough example of all those responsible, irrespective of their designation or profession, for witnesses turning hostile. Whenever this happens, the trial court shall then and there make a serious attempt to ascertain the names of the culprits and in appropriate cases, if it becomes necessary, even by according pardon to the witness who is really the victim on the condition that a full and true disclosure of the facts is made. It will be necessary that the courts send out the message very clearly that nobody who tampers with witnesses will be spared and that every single guilty person, including the1390 witness who acted on their instructions, will be prosecuted for perjury and in appropriate cases under the contempt of courts Act for interfering with the course of a judicial proceeding. The trial courts should ensure that appropriate corrective steps are taken.[21] Any person found guilty of perjury has to be dealt with seriously as it is necessary for the working of the Court as well as for the benefit of the public at large.[22]

7. Difference between English and Indian Law

(a) Under the English law, in order to constitute 'perjury', the false statement must be made in (or for the purpose of) a judicial proceeding. Under this Code it is not necessary that it should be made in a judicial proceeding. The only distinction between false evidence given in a judicial proceeding and that given in any other case lies in the degree of punishment.[23]

(b) The law of England requires that a false statement, in order to support a charge, should be material to the question in dispute; but the Penal Code does not impose that qualification.[24] It is only s 192, which requires that the fabricated false evidence should affect a point material to the result of the proceeding in which it appears. This provision is omitted in this section which defines the offence of giving false evidence and does not lay down anywhere the above restrictive proviso. If the statement made is designedly false, the accused is liable irrespective of the fact whether the statement had a material bearing or not, upon the matter under inquiry before the court. The materiality or immateriality can have a bearing only upon the sentence to be passed.[25] The words in this section are very general and do not contain any limitation that the statement made shall have any bearing upon the matter in issue. It is sufficient to bring a case within that section if the false evidence is intentionally given, that is to say, if the person making the statement makes it advisedly, knowing it to be false, and with the intention of deceiving the court and of leading it to suppose that that which he states is true.[26]

(c) According to the Criminal Law of England, from which our system is so largely drawn, the assignment of perjury must be proved by two witnesses, or by one witness and the proof of other material and relevant facts confirming his testimony. The Indian Evidence Act does not provide that there must be corroboration to support a conviction, but in ordinary cases, and where the provisions peculiar to Indian law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India.[27]1391

8. Section 191 Considered with Section 199

Section 199 deals with statements and declarations made voluntarily, provided that they are capable of being used as evidence and which the court is bound to receive as evidence. Whereas, s 191 deals with statements and declaration falsely made by a person legally bound by on oath or by an express provisions of law to state the truth. For example, statements under ss 161(2) and 164 of the CrPC or those under ss 13 and 14 of the Oath Act, *etc*.[28] Under this section the declaration is made under compulsion due to some requirement of law, while under s 199 it is made voluntarily provided such declaration is admissible in evidence in a court or before a public servant or other person bound or authorised by law to receive as evidence, of any fact touching any point material to the object of declaration.[29] This section read with ss 193 and 199 of the Penal Code make the making of false declarations an offence. The distinction between the two provisions, insofar as the making of the declaration is concerned, is that under s 191 the 'declaration' is one in which a person is bound by an oath or by an express provisions of law to state the truth, or being bound by law to make a declaration upon any subject, makes a statement which is false. The declaration contemplated in s 199 is not necessarily one which the person making the declaration is bound by law to make. The essential element of the offence under s 199 is that the declaration containing the false statement must be one which any court of justice or any public servant or other person is bound or authorised by law to receive as evidence of any fact.[30] No oath is required under s 199 . No oath is required even under s 191 where the declaration is made by a person, when he makes one on being bound by law to do so.

9. Essentials

Commentary under same heading in s 193, *post* may be referred to.

The essentials of an offence under s 193, IPC, read with this section, are:

(a) The accused must have been legally bound to speak the truth or make a declaration.
(b) He must have stated or declared what is false.
(c) He must have known or believed that what he stated or declared was false, or he did not believe it to be the truth.[31]

If the false evidence is given in a judicial proceeding the offence is more severely punished under the first part of s 193 than if given in any other case, punishable under the second part of the section.

A person may not positively know a statement to be false and he may not even believe it to be false. But if, nevertheless, he does not believe the statement to be true, then he commits the offence of giving false evidence.[32]

10. 'Whoever'--Meaning of--Whether Includes Accused

Commentary under same heading 'Whoever' in s 193, *post* may be referred to.1392

On the language of this section and s 192, IPC it is not possible to hold that the accused is in any way in a more privileged position than an ordinary person. To say so would be dangerous and would put a premium on the giving or fabrication or manufacturing of false evidence in judicial proceedings by accused persons.[33] Under s 4 of the Indian Oaths Act 1969, oaths or affirmations shall be made by witnesses, interpreters and jurors. However, the sub-s (2) of that section lays down that 'nothing herein contained shall render it lawful to administer, in a criminal procedure, an oath or affirmation to the accused person, unless he is examined as a witness for the defence'. Section 342A,Criminal Procedure Code 1898 which was inserted in the Code by s 315 of the new Code of 1973 enables an accused person to be a competent witness for his defence but he cannot be compelled to be a witness and cannot be called as a witness except at his own request in writing, and his failure to give evidence cannot be made the subject of comment by the parties or by the court.[34]But once the accused offers himself as a witness and is put on oath, his position is no better or worse than that of any other witness, and s 132 of the Evidence Act 1872 would apply to him. That section itself makes a distinction between those cases in which a witness voluntarily answer a question and those in which he is compelled to answer; and gives him protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give, or which he has asked to be excused from giving, and which then, he has been compelled to give, and not to answers given voluntarily.[35]

11. Statements of Accused under Section 313 , CrPC

Under cl (a) of sub-s (1) of s 313 of the Code of Criminal Procedure 1973, a court may put such questions to the accused as it considers necessary, 'for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him'. Under sub-s (2) of that section no oath shall be administered to the accused when he is examined under sub-s (1), and under sub-s (3) of the section so that 'the accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them'. But this protection afforded to the accused is limited to statements made by the accused in answer to questions which are for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him and which are put at some stage of the inquiry or trial.[36] Statements made by an accused person under s 313 of the CrPC or contained in a written statement filed by him with the court's permission, are not absolutely privileged, as there is nothing in that section to give him an1393 absolute privilege as regards defamatory statements made in the course of examination.[37] Thus, any body who makes a false statement on oath, knowing it to be false, makes himself liable to be prosecuted for perjury.[38]

Whenever a man makes a statement in court on oath, he is bound to state the truth and if he does not, he makes himself liable under the provisions of s 193 . It is no defense to say that he was not bound to enter the witness-box.[39]

12. 'Being Legally Bound, by an oath to State the Truth'--Meaning of

For the essentiality of s 191, the person must have been legally bound to speak the truth or make a declaration and he must have stated or declared what is false.[40]A person is legally bound to state the truth when the omission to do so is illegal, by which is meant an offence, that is an act made punishable by this Code[41] or an act which is prohibited by law or which furnishes ground for a civil action.[42] Making false statement on oath before the Court is an offence under s 191, IPC and punishable under s 193, IPC .[43]

If there is no compulsion to make any declaration as required by the law, s 193 will not have any application.[44] If s 191 will not apply, s 193 immediately goes out of the picture since it deals with false evidence as stated in s 191 .[45]

'Oath'--Meaning of

The term 'oath' has not been defined in this Code or in the Oaths Act 1969. An oath is a solemn appeal to the creator of the universe that the truth only shall be witnessed. It is an adjuration to God to punish the affiant if he swears falsely. It is an outward pledge given by the person taking it that the attestation or promise is made under an immediate sense of his responsibility to God. An oath is a religious act by which the party invokes God not only to witness the truth and the sincerity of his promise, but also to avenge any imposture or violated faith. Where a person has no belief in the Supreme Being, he can do nothing which would be binding on his conscience as an oath.[46]

The practice of supporting a promise by an oath is practically as old as the existence of belief in God and it appears to have been utilised from the very earliest times to ratify and insure the fulfillment of any special contract or undertaking, by importing into the transaction the fear of divine wrath in case of a wilful failure to perform the obligation entered into.1394

Oaths are, thus, as old as the Creation. The nature of an oath is not at all altered by Christianity, or any other religion, but only made more solemn from the sanction of rewards and punishments being more openly declared. All oaths spoken of in the scriptures, both of the old and new testaments, are obviously regarded as religious ceremonies.

Object of Oath

The real object of giving an oath is the idea that there will be a super human retribution in case of a falsehood and consequently actual words or ceremonies are immaterial. The purpose of giving an oath is not to call the attention of God to the party but to call the attention of the party to God.[47]

Provisions of Oaths Act

Section 3 of the Oaths Act 1969 lays down the authority to administer oaths and affirmations, and it prescribes the courts and persons authorised to administer, by themselves or by their officers empowered in that behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed upon them and they are all courts and persons having by law the authority to receive evidence. Section 4 prescribes the persons by whom oaths or affirmations must be made and they include all witnesses, that is all persons who may lawfully be required to give evidence on or before any court. Section 8 provides that 'every person giving evidence on any subject before any court or person hereby authorized to administer oaths and affirmations, shall be bound to state the truth on such subject'.

Meaning of the Phrase--Sanctity of Oath

The opening words of this section 'whoever being legally bound by an oath or by an express provision of law to state the truth...' do not support the submission that a man, who is not bound under the law to make an affidavit, can, if he does make one, deliberately refrain from stating truthfully the facts which are within his knowledge. The meaning of these words is that whenever in a court of law a person binds himself on oath to state the truth he is bound to state the truth and he cannot be heard to say that he should not have gone into the witness-box or should not have made an affidavit, and therefore the submission that any false statements which he has made after taking the oath is not covered by the words of this section is not supportable. Whenever a man makes a statement in court on oath he is bound to state the truth and if he does not, he makes himself liable under the provisions of s 193 . It is no defense to say that he was not bound to enter the witness box. A defendant or even a plaintiff is not bound to go into the witness-box, but if either of them chooses to do so, he cannot, after he has taken the oath to make a truthful statement, state anything which is false. Indeed the very sanctity of the oath requires that a person put on oath must state the truth.[48]

Presumption of Oath Till the Statement Concluded

Where a statement is made, on solemn affirmation, on a certain date and is continued on a later date, it must be presumed that the oath, which is administered to the1395 witness on the first day of his statement, continues to bind his statement and he continues to be on oath till the evidence is concluded.[49]

Where a first informant turns hostile and does not support the prosecution version as set forth in FIR, he commits no offence under ss 191 and 193, IPC .[50]

13. Effect of Omission to Take Oath, or Irregularity in Administering Oath

Under the English law, for a person to be found guilty of perjury, he must have been 'lawfully sworn'.[51] A person is lawfully sworn if the court or person whom the oath, affirmation, or declaration is taken, has the power to administer it for the purpose of verifying the statement in question and the oath, affirmation, or declaration has been administered in a form and with ceremonies which the person has accepted without objection or has declared to be binding upon him.[52] But in India, under s 7 of the Oaths Act 1969, no omission, intentional, accidental or negligent,[53] to take an oath or make an affirmation, nor any irregularity therein shall invalidate any proceeding or render inadmissible any evidence, nor shall it affect the obligation of a witness to speak the truth, and every person giving evidence before any court or person authorized to administer oath or affirmation is bound to speak the truth.[54] But if there is no such authorisation, there is no such obligation on the witness,[55] as where a magistrate examining an accused person for the sake of gaining information on which proceedings could be taken, examined him on oath.[56] The administration of an oath or affirmation is, thus, merely a ministerial function, and is no longer an essential part of evidence. Therefore, the offence of intentionally giving false evidence may be committed, although the person has neither been sworn nor been affirmed.[57]

Where statement of a juvenile is recorded under s 164, CrPC without administering oath to him, s 191 would not be attracted. Section 193 , IPC would not apply.[58]

14. Power to Administer Oath

Section 3 of the Oaths Act 1969 authorises all courts and persons having by law or consent of the parties, authority to receive evidence, have power to administer oaths. The commanding officer of any military, naval or air force station or shop occupied by the armed forces of the Indian Union has also power to administer oath provided1396 that the oath or affirmation is administered within the limits of the station. The court, judge, magistrate or person may also administer oath and affirmation for the purpose of affidavits, if empowered in this behalf by the High Court in respect of affidavits for the

purpose of judicial proceedings, or by the State Government in respect of other affidavits.[59]Under s 3 of the Evidence Act the word 'court' includes all magistrates. A magistrate is, therefore, ordinarily empowered to administer an oath or affirmation.[60]

A sub-divisional officer called upon the complainant in a case pending before him to show cause why he should not be prosecuted for an offence under s 211, IPC, and on the complainant showing cause sent the case to an honorary magistrate for recording evidence. The latter recorded the evidence and sent the case back to the sub-divisional officer. It was held that the preliminary inquiry required to be held under s 476 of old CrPC 1898 (new s 340 of CrPC 1973), could not be held by any other magistrate except the sub-divisional officer himself who thought that the case of the complainant was a false one and gave him a chance to show cause, that the honorary magistrate had, therefore, no jurisdiction to record the evidence of the petitioner and that the petitioner therefore did not give false evidence at any stage of a judicial proceeding within the meaning of s 193, IPC and could not be prosecuted for perjury.[61]

Where the magistrate had no power to administer an oath to a witness when he was examined as a witness in an inquiry regarding a headman, the orders of the magistrate in respect of such matters were held to be executive orders and the witness could not be convicted under s 193, IPC .[62]

15. Statements under Sections 121, 133, 164 and 202,Crpc

A magistrate acting under s 164 of the Code of Criminal Procedure 1973 or when he is acting under s 202,[63] s 121,[64] or s 133 [65] thereof, has the power to administer an oath, and a charge of perjury can be framed on statements made before him on oath when he is so acting.[66]

A magistrate, setting out to record under s 164, CrPC, what any person has to say to him, may adopt one of two alternatives: he may record it as a statement or as a confession, using the appropriate procedure in each case. In either case, the record may be used, as allowed by law, for the purpose for which it was taken, but its use for a different purpose may be open to diverse objections. For example, a confession cannot be used as the basis of a prosecution for perjury. A statement cannot be used as a confession, that is, an admission of the truth of the facts set out in it in a criminal prosecution based on those facts, either against the person making it or against the person with whom he may be jointly tried. Inculpatory statements made under s 164, CrPC, by a person who was not treated as an accused, nor subsequently tried for any offence based on such statements, are admissible in a prosecution against him for1397 perjury. Such statements are not confessions and the magistrate's failure to record them in the manner laid down under s 164 does not preclude their being used in evidence.[67]

16. Relative Scope of Sections 182 and 191

Commentary under the same heading in s 182, *ante* may be referred to.

17. Contradictory Statements under Section 164 and at Trial--Effect of

A statement made on oath by a witness before a magistrate under s 164, CrPC, can be made the basis of an alternative charge together with a statement made on oath at the trial, provided there was a common relation between the two statements.[68] There is no legal objection to framing a charge in the alternative under s 193, IPC, against an accused for making contradictory statements, one under this section and the other before the court.[69] A statement made under s 164, CrPC is a judicial proceeding and can constitute the basis of prosecution for perjury[70] or of a complaint under s 340, CrPC,[71] when the deponent resiles therefrom and gives a statement contradictory thereto.

Where the eye-witness made a statement which was recorded by a magistrate under s 164, CrPC and despite all the precautions, at the trial the witness turned hostile and did not support the prosecution, even though she had squarely implicated the accused in a statement under s 164, CrPC as the

persons who had killed the deceased in her house, a direction was issued to the trial court to issue a show cause notice to the witness calling upon her to show cause as to the offence of perjury and in the course of the inquiry pursuant to the show cause notice, the trial court was directed to ascertain as to who were the persons responsible for the witness having turned hostile even after having made a statement before the magistrate on an earlier occasion.[72]

Where a person was offered a pardon under s 306 and on his acceptance of the same, was placed before a magistrate in order that his statement may be recorded, the magistrate was held to have the power to administer an oath or solemn affirmation to him while taking his statement under s 164, CrPC, and the statement so recorded could form the subject of an alternative charge under the perjury sections of this Code.[73]

Such Contradictory Statements Show *Prima Facie* Case for Perjury

When a person makes two contradictory statements, one recorded under s 164, CrPC, and another as a witness in court, a *prima facie* case is made out for launching a complaint for perjury. It is not necessary to investigate and find out whether the deposition recorded under s 164, CrPC or the deposition given in the court is false.[74]1398

18. Magistrate not Competent to Record Statement--Effect of

In *Queen-Empress v Bharma* ,[75] it was held that a statement taken by a third class magistrate under s 164 of the Code of Criminal Procedure 1898, such magistrate not having the authority to carry on the preliminary inquiry in the case, is not evidence in a stage of a judicial proceeding, within the meaning of ss 191 and 193, such that when the statement is contradicted afterwards before the magistrate having jurisdiction and exercising it in the preliminary inquiry into an accusation of murder, it will form a sufficient basis for an alternative charge of giving false evidence in a judicial proceeding. But now under sub-s (1) of s 164, CrPC 1973, it is not necessary that the magistrate receiving or recording a confession or statement should be a magistrate having jurisdiction in the case. According to this sub-section a confession or statement can only be recorded by any metropolitan magistrate or a judicial magistrate irrespective of class and not by any executive magistrate except in Andaman and Nicobar Islands and Lakshadweep for which a special provision has been made by amendment. A police officer enjoying the powers of a magistrate under any law is, however, not empowered to record a confession.

19. Power To Administer Oath Under Other Acts

Power to administer oaths is given not only by the Oaths Act, but also by other Acts. Thus, under s 131(1)(b) of the Income Tax 1961,[76] an income tax officer, appellate assistant commissioner and commissioner of income-tax have the power to enforce the attendance of any person and examine him on oath.[77] Although an income-tax officer making an assessment is not strictly acting as a court of law, it is clear from these sections that he is acting in a quasi-judicial capacity, and he ought to conform to the mere elementary rules of judicial procedure, and in particular to conduct the case himself, and not allow somebody else, even his superior officer, to take the conduct out of his hands.[78]

20. Statements under Indian Registration Act and Indian Stamp Act

Under s 63 of the Indian Registration Act 1908, every registering officer may, at his discretion, administer oath to any person examined by him under the provisions of that Act. A person making a false statement before the sub-registrar, is punishable under s 82(a) of the Registration Act and s 193, IPC .[79] So also under ss 52 and 53 of the Indian Stamp Act 1899, the collector is empowered to make certain allowances for misused or spoiled stamps, and for this purpose, he is, under the rules framed under s 75 of that Act, empowered to require a claimant to make a declaration on oath.

21. Want of Jurisdiction to Administer Oath--Effect of

For an offence of giving false evidence, the accused should be bound by an oath to state the truth. Now, under s 8 of the Oaths Act, a person is bound to state the truth1399 when he gives evidence on any subject before any court or person authorised to administer oath and affirmations. Under s 3(1) of the Oaths Act, only courts and persons having, by law, or the consent of the parties, an authority to receive evidence are authorised to administer oaths and affirmations in discharge of the duties or in exercise of the powers conferred upon them by law. It may be necessary or desirable, for the purpose of s 193 to determine whether the statement alleged to be false was made in the course of a judicial proceeding. However, if it is held that it was not so made, the accused might still be liable to conviction of the offence of giving false evidence. But still in order that a person making a statement to an officer may be legally bound to speak the truth, it is necessary that the officer should be acting in the discharge of some duty or in the exercise of some power imposed or conferred upon him by law. If, in making an inquiry, the officer is not proceeding in the discharge of some duty or in the exercise of some power imposed or conferred upon him, a charge of false evidence in respect of the statements made in such an inquiry will not lie.[80] No charge of false evidence can lie in respect of a statement made in the course of proceedings which are *ultra vires* and illegal.[81]

22. Illustrative Cases

It is no offence to make a false statement before a person purporting to act in execution of a duty under the Indian Registration Act but not legally authorised to do so.[82]

A deputy magistrate, in the absence of authorisation, has no power to administer an oath to a person making a declaration in the shape of an affidavit; and such person cannot, on the facts stated in such declaration, be prosecuted for committing an offence either under s 193 or s 199 of the IPC .[83]

It is not competent to a court conducting an inquiry into the conduct of a *vakil* under Legal Practitioners Act to take a statement from him on solemn affirmation, and the *vakil* making a false statement before the court conducting the inquiry does not render himself liable under s 181 or s 193 of this Code.[84]

Where a person applied for a refund under ch 6 of the Stamp Act 1879, and the collector made over the application for inquiry to a deputy collector, the deputy collector was not entitled to put the witnesses produced by the applicant on oath, and consequently, in reference to the statements of such witnesses, no charge under s 181 or s 193 of the IPC was sustainable.[85]

Where on a police report the district magistrate ordered an investigation by the superintendent of police and on the latter's suggestion, directed a magistrate to hold an inquiry into the case, it was held that there was no legal authority for the inquiry by the magistrate and witnesses examined by him could not be prosecuted for giving false evidence.[86]1400

Where a suit by *A* is decreed against *B* but dismissed against *C*, there is no provision in the Code of Civil Procedure to reopen the case at the instance of *C*. If the case is reopened, the court's procedure is illegal, and witnesses examined at the re-hearing cannot be prosecuted for giving false evidence.[87]

Consent given by the Attorney General of India, without due care and caution, for the prosecution of an officer of the Indian Navy cannot lead to an inference that the document conveying the consent was a false document or that giving of consent amounted to giving of false evidence or fabricating false evidence at any stage of the judicial proceeding.[88]

23. Deposition not Read out to Witness--Effect of

Section 278(1), CrPC provides that as the evidence of each witness taken under s 275 or s 276 is

completed, it shall be read over to him and shall, if necessary be corrected. Some courts have taken the view that no statement by a witness, in a deposition, can be regarded as a complete statement until the deposition is finished and corrected, if necessary, because, till then, every statement is liable to be retracted, corrected, varied or qualified. The whole deposition must be read and construed as one and if a later statement in it is contradictory to, or at variance with, a previous statement in the same deposition, the statement first made will be deemed to be modified by the subsequent statement which can be regarded as a retraction or correction of it. An intention of giving false evidence is a necessary element to constitute an offence under s 193 . The intention can only be gathered from the surrounding circumstances and the subsequent correction or retraction by the witness of his statement, in the same deposition, might negative the existence of such an intention.[89] The other view is that if a deposition is not so read over, it is merely an irregularity according to the criminal as well as the civil law, and does not render the deposition inadmissible in evidence.[90] Convictions or orders of prosecution for perjury were, however, set aside on the ground of this irregularity on some cases,[91] but maintained in others.[92]1401

24. Curable Irregularity Not Vitiating Trial Unless Prejudice Caused

Reviewing the entire case-law, then in existence, it was held by the Allahabad High Court that where a deposition made by a witness contains a false statement, the deponent is guilty of perjury. The deposition is false notwithstanding its not being read over to the witness as required under s 278, CrPC . The provisions of the Penal Code relating to punishment for perjury do not pay any regard to the question of whether the deposition was read over or not. If a deposition is not read over to the witness, it is only an irregularity and the irregularity does not vitiate the conviction.[1] The view is in conformity with the view expressed by the Supreme Court in *Bhagwan Singh v State of Punjab* ,[2] following the Privy Council view taken in *Abdul Rahman v Emperor* [3] in which it was held that if the deposition is not read over that would only amount to a curable irregularity in the absence of prejudice which must be disclosed in an affidavit. The Saurashtra High Court also has taken the same view.[4] But the essence of the offence of perjury consists in an attempt to mislead and deceive the court. A deposition must be read as a whole and a witness must always be given an opportunity of correcting any answer given by him. Where a witness makes a false statement and subsequently corrects it in the course of his examination, it is undesirable that he should be subjected to a prosecution for perjury as he withdraws the lie and leaves the court under the impression of the truth.[5]

25. Legally Bound by an Express Provision of Law to State the Truth

The obligation to state the truth may be either by an oath or 'by an express provision of law.' In order to constitute the offence of giving false evidence, the alleged false statement must have been under the sanction of the law.[6]

If a petitioner, who is legally bound by an oath to state the truth in his affidavit accompanying the writ petition, makes a false statement which constitutes an offence of giving false evidence under s 191, IPC, punishable under s 197, IPC, then to eradicate the evil of perjury the court can issue a direction to file a complaint under s 193, IPC against him before the magistrate of competent jurisdiction.[7]

Some Express Provisions--Present Code Contains an Express Provision

Besides s 8 of the Oaths Act 1969 there are several other express provisions binding a person to state the truth. Witnesses are bound to speak the truth in proceedings under ss 52 and 84 of the Bengal Land Registration Act (Bengal Act, 7 of 1876)[8] and so are applicants under s 53, read with s 88 of the same Act.[9] In view of the Christian Marriage Act 1872, s 66, as amended by s 5 of Act 2 of 1891, false oaths or declarations and false notices or certificates made for the purpose of procuring a marriage fall within this section. In view of the Government Savings Bank Act 1873, 1402 s 7, false statements by any person claiming to be entitled to deposits belonging to deceased persons, fall within this section. A sub-registrar is, for the purposes of the Indian Registration Act 1908, competent to examine any person, and any false statement by such person before an officer in any proceedings

or inquiries under the Act, renders such person liable for giving false evidence besides the liability under s 82 of that Act.[10]

26. Statements Under Section 161 , CrPC

Under the Code of Criminal Procedure 1861 and 1872, a person examined by a police officer was bound to answer all material questions, but was not liable to be prosecuted for giving false evidence in respect of his answers under s 193, IPC .[11] Under s 161 of the Code of 1882, persons being examined by the police in the course of an investigation made under ch 14 of that Code were bound to speak the truth in answering questions put by the police,[12] and not to do so was an offence under this section.[13]But the Code of 1898 restored the provision of s 118 of the CrPC of 1872, requiring the person examined simply 'to answer' instead of 'to answer truly', and this was thus not an 'express provision of law to speak the truth' within the meaning of this section.[14] The provisions of s 161 of the present CrPC 1973, however, revive the provisions of the Code of 1882 regarding the statements to be recorded by the police. Sub-section (2) of s 161 of the present Code uses the words 'person shall be bound to answer truly' and thus introduces an express provision of law to state the truth so as to attract the provisions of s 191, IPC with the exception of questions the answers to which would have a tendency to expose the maker of the statement to a criminal charge or to a penalty or forfeiture.[15]

27. Statements under Section 175 , CrPC

Section 174, CrPC empowers a police officer to inquire and report on cases of suicide. For this purpose s 175 of that Code empowers him to summon persons and examine them, and 'every person so summoned shall be bound to attend and to answer truly all questions other than those the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture'. But under the Code of 1898, he was only bound to answer questions truly if he had been summoned in writing to attend before the police officer. Investigation in the nature of an inquest consist, under s 174, of the investigation into the apparent cause of death. Such an investigation ceases when the cause of death is ascertained, that is, when it is determined whether the death was natural, suicidal, accidental, or due to homicide.1403

28. Pleadings--Verification of

Order VI, r 15 of the Code of Civil Procedure (Act 5 of 1908), requires every pleading, which means plaint or written statement (O VI, r 1), to be verified by the party or by one of the parties or by some person acquainted with the facts of the case. It also requires that the person verifying should specify what he verifies from his own knowledge and what upon information received and believed to be true. The ordinary dictionary meaning of the word 'verify' is 'to confirm the truth or truthfulness of'. So it has been held that O VI, r 15, CPC, is an 'express provision of law' requiring a party filing a plaint or written statement to confirm the truth of the statements made in the plaint or written statement to confirm the truth of the statements made in the plaint or written statement, and that if he does so knowing that the verification is false, he gives false evidence within the meaning of this section.[16]

False Pleading--Party and not the Counsel Responsible

It is not only a question of ethics, but an inflexible requirement of law that every statement made must be true to the extent that it must be verified and correct to the knowledge of the person making it. When a client instructs his learned advocate to draft the pleadings, the basic responsibility lies on the clients because the advocate, being an officer of the court acts entirely on the instructions given to him, though the lawyer will not be immune from even a prosecution. If the situation is uncertain, it is for his client to inform his learned advocate and consequently, if false statements are made in the pleadings, the responsibility will devolve wholly and completely on the party on whose behalf those statements are made.[17]

Returns--Effect of Making Wrong Verification

A false verification is not 'evidence' on which a decree can be founded in a civil suit, but it may be the basis of a prosecution for perjury.[18] A person filing a written statement in a civil suit is bound to speak the truth therein.[19] So is a person making a return to the income-tax commissioners, or in filing municipal assessment papers, or in answering questions asked by a registrar of deeds.[20] In a Nagpur case[21] it has been held that:

> The declaration contemplated in section 199 is a species of the genus of declaration contemplated in this section. We have therefore to study the character of the declarations mentioned in the section. They are declarations which a person is bound by law to make. The most familiar instances of such declarations are plaint, and pleadings in a suit. A person is under a legal obligation to verify the allegations of fact made in the plaint and pleadings. If he verifies falsely, he comes under the clutches of this 1404section and is liable to be punished under section 193 for giving false evidence. A man who voluntarily and officially verifies a statement, when the law does not want him to do so, does not render himself liable to punishment.[22]

So, a petition not requiring verification cannot, from the fact of its being verified unnecessarily, be made the subject of a prosecution for giving false evidence.[23] But a contrary view has been expressed by the Supreme Court, where a false affidavit was filed, though not required.[24]

A False Declaration in a Written Statement--Whether it can be Basis of Prosecution

In some cases, however, taking a contrary view, it has been held that 'in many cases persons in verifying pleadings, are often found to say something which is not strictly true, but by such action they do not render themselves liable for prosecution for perjury for making a false statement. This by itself does not constitute an offence under s 193, IPC '.[25]

In an Allahabad case,[26] a learned judge has gone to the length of saying that an allegation in a written statement is not evidence of any fact, which a court is bound or authorised by law to receive and, therefore, a false declaration in a written statement which is verified as required by the provisions of O VI, r 15, Civil Procedure Code, but of which the court has not ordered proof by affidavit, cannot be the basis of a conviction under s 199 .[27]Section 139 of the Income Tax Act 1961 provides for the furnishing of a return of income in the prescribed form and verified in the prescribed manner.

Section 249 of that Act requires an appeal also to be in the prescribed form and to be verified in the prescribed manner. Section 277 of the Income Tax Act prescribes a punishment for making a statement in any verification which is false, and which he either knows or believes to be false or does not believe to be true. Therefore, a person making the false statement even in verification would be liable for giving false evidence.

29. Affidavit--What is

'Affidavit' means an instrument in writing containing a declaration as to certain facts, signed by the person making it and sworn before a person having authority to administer oath. The provisions of the Indian Evidence Act 1872 are not applicable to the affidavits filed in courts or elsewhere.[28] The provisions relating to affidavits have, therefore, to be found in the Code of Civil Procedure 1908 and the Code of Criminal Procedure 1973. Order XIX, rr 1 to 3, CPC, lay down the procedure of filing affidavits in a civil court. By an amendment, rr 4 to 15 were added to O XIX, CPC for their application in the State of Uttar Pradesh only. Order XIX of the CPC1405 empowers the court to have particular facts proved by an affidavit. Under r 1 thereof, any court may, at any time, for sufficient reason, order that any particular fact or facts may be proved by an affidavit, or that the affidavit of any witness may be read at the hearing on such conditions as the court thinks reasonable. Under r 2, evidence upon any application may be given by an affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent. The combined effect of the relevant provisions is that ordinarily, a fact has to be proved by oral evidence, but the court may, subject to the conditions laid down in O XIX, ask a particular fact or facts to be proved by affidavits.[29] The oath may be

administered to the deponents of affidavits to be filed under the CPC by (a) any court or magistrate, or (b) any notary appointed under the Notaries Act 1952 or (c) any officer or other person appointed by the High Court, or (d) any officer appointed by any other court which the State Government has generally or specially empowered in this behalf.

Authorities for Criminal Cases

Under s 68 of the CrPC 1973 affidavits made before a magistrate are in certain circumstances admissible as evidence in proof of the service of summons. Under s 296 of that Code, the evidence of any person whose evidence is of a formal character, may be given by an affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceedings under the Code. Under s 295 when any application is made to any court in the course of any inquiry, trial or other proceeding under the Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by an affidavit, and the court may, if it thinks fit, order that evidence relating to such facts be so given. Such affidavits shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such fact as he has reasonable ground to believe to be true, and in the latter case, the deponent shall clearly state the grounds of such belief.[30]Section 297(1) lays down the authorities before whom affidavits to be used before any court may be sworn. They are: any judge or any judicial or executive magistrate, or any commissioner of oaths appointed by a High Court or a court of session, or any notary appointed under the Notaries Act 1952.

The above are 'express provisions of law' which authorise the use of affidavits as evidence, and under which the person making the affidavit is bound to state the truth. The filing of a false affidavit, by a witness, in proceedings before a court, constitutes an offence under ss 191 and 192, and not under s 199, IPC .[31] But where a deponent is illiterate and the affidavit has been written in one language and signed by the deponent in another language and the evidence is lacking to show that the contents of the affidavit were read over to the deponent, prosecution under s 193 is not expedient.[32] In *Asgarali Mulla Abrahimji v Emperor* ,[33] a learned judge of the Nagpur High Court classified affidavits as declarations and observed:1406

> Declarations or verified statements are of two kinds: (i) Declarations which a person is bound by law to make such as the verification of pleadings under the Civil Procedure Code. (ii) Declarations which a person makes for the purpose of their being used as evidence, such as affidavits filed under O 19, CPC. Of these, the second kind of declaration alone can be used as evidence and can therefore found a conviction of the offence under s 193, Penal Code.

It is however, stated that when a person has to make the verification of his pleadings *etc.* under a specific provision of law and if he does so knowing that that verification is false, he is said to give false evidence, thereby making himself liable for punishment under s 193, though the verification is not used as evidence.[34]

Affidavit Attested/Sworn Before Magistrate Not Competent to Do So--Effect

Where a deputy magistrate has no power to administer an oath to a person making a declaration in the shape of an affidavit, such person cannot, on the facts stated in such declarations, be prosecuted for committing an offence either under ss 193 or 199 of the IPC .[35] Where an affidavit by an accused in a criminal case is sworn before a magistrate who has no jurisdiction to take evidence in the case, the accused cannot be prosecuted under s 193 or s 199, IPC for filing a false affidavit.[36] A declaration, before it can be made the foundation of a prosecution under s 193, IPC, must be one which is admissible in evidence, and which the court, before which it is filed, is bound or authorised by law to receive in evidence.[37]

Mere Omission to State Facts in Affidavit in Examination-in-Chief, No False Evidence

Mere omission to state certain facts in affidavit in examination-in-chief about the accused's previous conviction does not amount to false evidence when in cross-examination, he admits of his conviction for the offence under s 304A, IPC .[38]

Coram Non Judice

In order to found a prosecution for perjury the affidavit must be such as may be used as evidence. Where, therefore, in support of an application for transfer of a criminal case affidavits were filed of persons who were neither parties nor witnesses in the case; it was held that the statements were *coram non judice* and could not form the subject of a charge under s 193, IPC .[39] This view, however, does not appear to be sound in *Badri Prasad v Jhamman* ,[40] disagreeing with its earlier view in *Emperor v Mattan* ,[41] the Allahabad High Court has held that if the accused person chooses to come within the scope of this section and swears an affidavit on false facts, he would be liable to punishment which can be inflicted upon persons who swear, such false affidavits. Therefore, if the affidavit filed by the accused is required by law to be sworn, the accused cannot take shelter behind the plea that the affidavit was not1407 required[42] and if he makes false allegations in an affidavit in support of an application, he can be convicted under this section.[43] It is submitted that a witness cannot otherwise be in a better position in respect of his filing a false affidavit in any case, whatsoever.

Affidavit to Conform to Truth Though Made Voluntarily When Not Required

It is not disputed that an affidavit is evidence within the meaning of s 191, IPC and a person swearing to a false affidavit is guilty of perjury punishable under s 193, IPC .[44] The opening words of this section do not support the contention that a man who is not bound under the law to make an affidavit can, if he does make one, deliberately refrain from stating truthfully the facts which are within his knowledge. The meaning of these words is that whenever in a court of law a person binds himself on oath to state the truth, he is bound to state the truth and he cannot be heard to say that he should not have gone into the witness-box or should not have made an affidavit and therefore the submission that any false statement which he had made after taking the oath is not covered by the words of this section, is not supportable.[45]

Complaint by the Magistrate Before Whom Affidavit is Sworn--Not Necessary

Adducing evidence and swearing an affidavit is entirely a different concept. The swearing of an affidavit is a form prescribed by law to be used as a piece of evidence acceptable in a court or before any other authority.[46] Thus, complaint for perjury can be made by the court or the authority before whom the false affidavit is filed or used notwithstanding the fact that the affidavit was sworn before a magistrate and not before such court or authority.

Principle Applicable to Affidavits

The filing of a false affidavit, by a witness in proceedings before a court, constitutes an offence under ss 191 and 192, and not under s 199, IPC .[47] But where a deponent is illiterate or the affidavit has been written in one language and signed by the deponent in another language and the evidence is lacking to show that the contents of the affidavit were read over to the deponent, prosecution under s 193 was held to be not expedient.[48]

False Affidavit in Support of Writ Petition

In a writ petition which was supported by an affidavit, the petitioner stated that he had not used or permitted to be used the building in any manner contrary to the terms imposed by the respondent (Delhi Development Authority). The court found that this statement which was false, was made to mislead and overreach the court and directed the registrar of the High Court to file a complaint for the offence of perjury in a competent court.[49]1408

Where an affidavit was filed in support of a writ petition, by a concealment of facts which misled the High Court to pass an *ad interim* order, the petitioner shall be deemed to have intentionally given false evidence in a stage of judicial proceeding and can be charged with having offended public justice under ch XI of the IPC 1860, particularly s 191 read with s 193 of the Code.[50] Where the respondent filed an affidavit in support of a writ petition, for the purpose of being used in judicial proceedings, and wrongly made a statement that the age of Dr Justice AS Anand had not been determined by the President of India in terms of art 217 of the Constitution, the respondent being legally bound by an oath to state the truth in the affidavit accompanying the petition was *prima facie* held to have made a false statement which constitutes an offence of giving false evidence as defined under s 191 IPC, punishable under s 193, IPC .[51]

Where a petitioner made a statement on oath in a writ petition supported by an affidavit that the timings of a law college were changed by the principal arbitrarily, the true fact being that the principal had the powers to change the timings and the change was made by him after receiving the representation of the majority of the students of the college to the said effect, the petitioner was held liable to be prosecuted for deliberately making a false statement before the court in a judicial proceeding, more so when he was one of the students signing the representation.[52]

30. 'Or Being Bound by Law to Make a Declaration on any Subject'--Scope of

This clause is concerned with that class of cases of which the declaration to be made by a person obtaining a marriage licence, is an example.[53]The declarations contemplated in this section are declarations which a person is bound by law to make. The Income Tax Act requires a person to deliver certain accounts or statements and penalises the delivery of any account or statement which is false.[54] It is submitted that such statements come under this clause and the person delivering a false account or statement would be liable for giving false evidence. In some cases, it has been held that declarations, which a person is bound by law to make, are such as the verification of pleadings under the Civil Procedure Code.[55] The Code of Civil Procedure requires an application for execution of a decree to be in writing, signed and verified by the applicant and to contain certain particulars, among which is a statement whether any and what payment or adjustment has been made between the parties subsequent to the decree sought to be executed. It has been held that an intentional omission to make such a statement or making a false statement amounts to an offence of giving false evidence.[56] A declaration, before it can be made the foundation of a prosecution must be one which is admissible in evidence, and which the court, before which it is filed, is bound or authorised by law to receive in1409 evidence.[57] But it need not be material to the case,[58] nor need it be on oath or solemn affirmation.[59]

31. A Statement Must Contain the Whole Truth

This section requires that there must be a statement made by the accused and that the statement must be false. The statement covered by this section, must be a definite statement of fact or of belief. These must be a definite assertion and not a statement qualified by expression of doubt or want of knowledge.[60] The accused must also know or believe what he has stated or declared is false.[61] To support a prosecution for giving false evidence it must be shown that the false statement charged against the accused is literally false. There must be a statement of fact which is false. It is no offence if the facts stated are true but some circumstances are suppressed, with the result that a wrong inference may be deduced.[62] But the Allahabad High Court expressed a contrary view in *Narottam Singh v State of Uttar Pradesh* ,[63] wherein it has been held that a person is guilty of perjury not only when he does not state the truth but also when he states something which is not the whole truth. This view seems to lay down the correct proposition of law. The statements made by the accused must be false. It must be proved beyond any reasonable doubt that those statements are deliberately false.[64] In *Queen v Ahmed Ally* ,[65] it was observed:

> It appears to us that the true rule is that no man can be convicted of giving false evidence except on proof of facts which, if accepted as true, show not merely that it is incredible, but that it is impossible that the statements of the party accused, made on oath can be true. If the inference from the facts proved falls short of this, it seems to us that there is nothing on which a conviction can stand; because assuming all that is proved to be true, it is still possible that no crime was committed. The evidence of a medical man or other skilled witness, however eminent, as to what he thinks may or may not have taken place under a particular combination of circumstances, however, confidently he may speak, is ordinarily a mere matter of opinion. Human judgment is fallible. Human knowledge is limited and imperfect.

32. Contradictory Statements

The question as to whether a witness who makes contradictory statements at different stages of his examination by the same court, for example one in cross-examination and the other in re-examination, can be convicted on a charge in the alternative, *i.e.*, that one or other of the two statements made by him must be false, without proving which of them is false, has led to some difference of judicial opinion, the majority of1410 judges holding that such a conviction is good.[66] If an accused has made two statements, which are so contradictory and irreconcilable that both cannot possibly be true, it means that one of them is false and if the other ingredients of the offence are made out, he can be convicted without proving which of the two statements is false. It is only when the prosecution charges him with making a particular statement falsely that it has to prove that that particular statement is false and not the other. In such a case, the mere fact that he made conflicting statement would not suffice, because it may very well be that the other statement was false and not the statement with which he was charged. When all that is proved is that one of the two statements is false, it means that it is not proved that a particular statement is false. If the accused is charged with making that statement falsely, naturally the charge must fail.[67] The essence of the offence lies in the intention to give false evidence, and that intention may, I think, just as well exist when the contradiction is in various stages of the same deposition as where it is in different stages of the same proceedings. To consider whether the false statement was made in the course of the deposition or in the course of two separate depositions seems to be irrelevant, and calculated to obscure the real question. An intention to give false evidence is a necessary element to constitute an offence under s 193 . That intention can only be gathered from the surrounding circumstances, and the subsequent correction or retraction by a witness of his statement in the same deposition might negate the existence of such an intention.[68]

33. Conviction Only When Two Statements are Irreconcilable

To convict an accused of giving false evidence, it is necessary to show not only that he has made a statement which is false, but also that he either knew or believed it to be false or did not believe it to be true. It is a well-known rule of law, applied by eminent judges to the cases of perjury arising out of contradictory statements, that the courts dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless he has on oath stated facts on which his first statement was based and then denied these facts on oath on a subsequent occasion. Where it is sought to establish the offence of perjury on contradictory statements, although the court may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time1411 be convinced that he was wrong and swear to the reverse, without meaning to swear falsely either time.[69]

Where in an application to dismiss order on compromise petition allegedly signed by impersonating the respondents instead of the real respondents in writ appeal an admission was made by the accused on oath that some persons impersonated real contesting respondents in writ appeal, subsequently, however, in *suo motu* proceedings for contempt of court the accused stated that he had given false statement in course of those proceedings when his sworn statement was being recorded,

it was held that the act of the accused amounts to commission of the offence of perjury.[70]

Court Cannot Assume Existence of Explanation to the Inconsistency of Two Statements

When two statements, given by the accused on two different occasions, are mutually inconsistent and the inconsistency is nowhere resolved in the subsequent correspondence, the accused may be able to show that the statement made by him on one of the two days was a true and correct statement and he may even have some reasonably acceptable explanation for the apparent inconsistency between the two. But the court cannot assume that such an explanation exists. Once the inconsistency in his subsequent statement made on oath is brought home to the court, the court cannot just wish away the inconsistencies and cannot hold that the accused may have some plausible explanation to the inconsistency. If the accused wants to give some explanation, he must give it.[71]

Law does not Punish a Man for Changing Opinion

The court should, however, not convict a person for perjury unless fully satisfied that the statements are from every point of view irreconcilable;[72] and if the statements opposed to each other are as to matters of inference or opinion on which a man may take one view at one time, and a contrary view at another, there can be no perjury unless he has stated facts on oath which are in conflict with the facts on oath on a subsequent occasion. The law does not punish a man because he has changed his opinion.[73] A witness should always be given an opportunity for explaining an apparently contradictory statement at the time it is made.[74]

The Whole Statement must be Read as One

As observed by Bhashyam Iyendgar J in *Re Palani Palgan*,[75] no statement by a witness in a deposition can be regarded as a complete statement until the deposition is finished, and corrected if necessary; for till then, every statement is liable to be1412 retracted, corrected, varied or qualified, the whole deposition must be read and construed as one, and if a later statement in it is contradictory to or at variance with a previous statement in the same deposition, the statement first made will be deemed to be modified by the subsequent statement which can be regarded as a retraction or correction of it.

Where a double record is maintained by the court and two versions are taken down of a statement--one in English and other in vernacular--and the latter statement of such a witness in court is in accord with the English version, then it cannot be said in law that the witness had in fact committed perjury in making a statement in court which ran counter to the version of his earlier statement.[76] The question as to whether one of the two contradictory statements must necessarily be false is a question of construction and therefore of law.[77]

Contradictory Statements--Intention is a Question of Fact

The decisions referred to above show that the existence of contradictory statements in the same deposition or different depositions makes no difference. It is the intention of the witness at the time of making the statements which is material. If the first statement was made through an error or mistake or under the stress of cross-examination, without fully understanding the implications of the question, there could be no intention on his part to deceive the court. In such a case, the subsequent correction must be accepted as the only statement of the witness. On the other hand, if the first statement is deliberate, the intention to deceive the court is apparent. The subsequent statement in such a case would be equally deliberate and intended to deceive the court. The intention is a question of fact to be decided in each case.[78]

Contradictory Statements--Completion of Offence Does Not Remain in Abeyance

It has been held that it is quite immaterial that two contradictory statements were made in the course of one deposition in one trial. If the first statement is false, the applicant committed the offence of

perjury as soon as he made it. Whether he made it deliberately and whether he knew or believed it to be false or did not believe it to be true is to be seen with reference to the time at which he made it. If the requirements of this section are fulfilled, he committed the offence of perjury as soon as he made it. The completion of the offence does not remain in abeyance for a short time in order to give him an opportunity of repenting and correcting himself. It does not remain in abeyance so long as the trial is not over or so long as he has not been cross-examined under ss 243 or 247 of the Code or so long as he has an opportunity of being recalled and making the correct statement later. What he does subsequently has absolutely no bearing on the offence already committed by him. The offence is not purged or wiped off by subsequent repentance or retraction or correction.[79]

A witness who endeavours to correct his evidence as recorded by a magistrate by means of an affidavit stating what he really said, does not make any contradictory statement.[80] Where a witness made a statement which was false and at once admitted it, and stated what was the real truth, it was held that he should not be prosecuted for1413 giving false evidence.[81] But where a witness deliberately gave false evidence and, when confronted with incontestable proof of his falsehood, admitted it to be false, it was held that he was guilty of perjury.[82]

As to a charge in the alternative, see CrPC 1973, s 221 and illust (c) thereto. For further discussion of the subject see commentary under s 193 .

34. Knowledge or Belief that the Statement is False or is not True

A man cannot be convicted of perjury for having acted rashly, or for having failed to make reasonable inquiry with regard to the facts alleged by him to be true. It must be found that he made some statement or, statements which he knew to be false or which he believed to be false or which he did not believe to be true.70 The accused must have known or believed that his statement was false at the time he made it, or not have believed it to be true.[83] The accused must have known or believed that his statement was false at the time he made it, or not have believed it to be true. [84]The mere fact of a person placing his signature on a written report, without knowing its contents, is no ground for holding that he necessarily knew or had reason to believe that the contents of the report were false; at most, the act is indiscreet and does not amount to an offence under s 193 . It may be a very foolish thing for a man to attest a document and without being made aware of the contents, however, this indiscretion does not amount to an offence under the IPC .[85] A person, going into the witness-box, must believe that all the evidence he is about to give is true, otherwise he gives false evidence. Where the evidence is proved to be false to the knowledge of the accused, his intention to give such evidence is proved.[86] The criminal intention must always be proved.[87]

Making a Statement not Believing it to be True Amounts to Perjury

The law requires that a person may not positively know a statement to be false and he may not even believe it to be true, but if, nevertheless, he does not believe the statement to be true, then he commits the offence of giving false evidence.[88]

Where in an affidavit the deponent makes certain allegations based on information conveyed to him by other persons, even if the information which was given to him was wrong, he cannot be held liable unless at the time he swore the affidavit he knew that it was wrong and in spite of the knowledge, he swore the affidavit.[89] Even belief would fall under expln 2 to this section.[90]1414

35. Whether the Proceedings Must be Sanctioned or Authorised by Law

It is only when a person is legally bound by an oath or by an express provision of law to state the truth or is bound by law to make a declaration upon any subject and he makes any statement which is false and which he knows or believes to be false or does not believe to be true, that he is said to have given false evidence.[1] Where a magistrate had no power to administer oath to a witness when he was examined as a witness in an inquiry regarding a headman, the orders of the magistrate in respect of

such matters were held to be executive orders and the witness could not be convicted under s 193, IPC .[2] Since a headman cannot examine a witness in an inquiry, the statement made to the headman can be used only under ss 145 and 157 Evidence Act 1872.[3] Where the affidavit by the accused in a criminal proceeding was sworn before a first class magistrate who had no jurisdiction to take evidence in the particular matter in respect of which the accused was prosecuted, the provisions of ss 4 and 5 of Oaths Act were contravened and the accused therefore, could not be prosecuted under ss 193 and 199 for filing a false affidavit on oath.[4]

36. Abetment in Giving False Evidence

Where an accused asks a witness to suppress the mention of certain facts while giving evidence before a magistrate in reference to a charge of defamation, it would constitute abetment of giving false evidence in a stage of a judicial proceeding.[5]

Where *C* falsely represented himself to be *U*, and the writer of a document signed by *U* and *T* knowing that *C* was not *U*, and had not written such document, adduced *C* as *U* and as the writer of that document, it was held that *T* ought to have been convicted on a charge of abetting the giving of false evidence.[6] There can be no offence of abetment of giving false evidence unless the person charged with abetment intended not only that a statement should be made, but also that the statement should be made falsely.[7]

Where a person having reason to believe that a certain man has committed an offence punishable under s 457, IPC, instigates the complainant and the witnesses in the case to make statements which he knows to be false, he commits an offence under ss 109 and 193 and not under ss 201 and 511 of the Code.[8]

Explanation 1

A false statement made punishable under this section may be oral or in writing.[9] An oral statement made on oath before a court or a person legally authorised to receive evidence, comes within the category of verbal statement. The statements and declarations made in any affidavit on oath or solemn affirmation or any other statements or verification made under the requirement of any law, though not on1415 oath, come within the category of a statement made in writing. The expln 1 to this section, however, contemplates a statement even made otherwise, which is neither verbal nor in writing. Signs or visible representations may fall in this category. It is, however, submitted that to make a sign or visible representation punishable, it should fulfill the other requirements of this section discussed above.

Explanation 2--'Attest'--Meaning of

The dictionary meaning of the word 'attesting' used in expln 2 is 'certifying the validity of' and it has been used in the sense of certifying a statement or document to be true. This may be evident from illust (e) to this section. It, therefore, follows that not only an interpreter or translator is liable to be prosecuted under this section but even any other person who knowingly certifies a false document to be a true document, while being bound by on oath or other requirement of law, will have to face the same consequences and he can be punished for committing perjury under s 193, IPC . A voluntary act of attesting or certifying a document by a private person may not fall under expln 2 and to bring it within the clutches of this section it must be proved that the attestation was made while being bound by an oath or by an express provision of law.

Effect of Statement Without Knowledge

It will appear from the foregoing discussion that it is not necessary that a statement or declaration made by the person is true to the personal knowledge of the maker, even if it is based on belief it is sufficient to bring the case under this section. In case the information received by a person is not

believed to be true but he still uses it as true, he commits an offence under this section.[10] The Supreme Court in *Ranjit Singh v State of Pepsu* ,[11] has specifically held that even belief would fall under expln 2 to this section. The law further contemplates a situation where a person does not know any fact, in controversy, but still says that he knows it. Illustration (d) to this section amply explains this. Such statements are also covered under this section.

37. Prosecution not Necessary in All Cases of Perjury

It is now well settled that the prosecution for perjury should be sanctioned by courts only in those cases where it appears to be deliberate and conscious and conviction is reasonable, probable or likely. It is also well recognised that there must be a *prima facie* case of a deliberate falsehood on a matter of substance and the courts should be satisfied that there is reasonable foundation for the charge.[12] Where evidence evenly balanced in weakness and the case is one of oath against oath, the prosecution should be withdrawn.[13] Where the offence of rape was alleged to be committed, the government doctor who examined the victim gave the certificate of a commission of rape on the victim but turned hostile during the trial and tried to protect the accused, the Karnataka High Court took a serious view of the matter, particularly since the man was a government doctor and observed that it was unfortunate that a professional, while dealing with such a serious case, has attempted to give evidence1416 which is nothing short of perjury, but this fact does not necessarily prove fatal to the prosecution. The Karnataka High Court recommended that the concerned authorities take appropriate disciplinary action against the doctor after affording him a reasonable opportunity to show cause.[14] But the direction to file a complaint under s 340 read with s 195(1)(b), CrPC for offence under s 191 read with s 193, IPC was not issued.

In a case, petitioner officer of bank was being prosecuted under s 191, IPC for giving false evidence in writ petition. Proceedings started against the complainant, defaulter in re-payment of loan under ss 13 and 14 of SARFAESI Act 2002. The petitioner acted in good faith representing the Bank, as instructed by the Bank on the basis of the documents available in the Bank in respect of the transaction. If any *bona fide* mistake has been made in the calculation by the petitioner, it will not amount to an offence under s 191 of the IPC . Petitioner held protected by s 32 of the SARFAESI Act. Complaint filed under s 340, CrPC for prosecution under s 191, IPC quashed.[15]

Court to Strike Delicate Balance Between Two Extremes

While issuing notices of perjury, the court has to exercise a delicate balance between two extremes, one being that people giving perjured evidence should not be allowed to go scot free for that would be giving a licence to people to give perjured evidence. On the other hand, the court has to equally bear in mind that being very sensitive on this issue and approaching every evidence scathingly and easily jumping to the conclusion that witnesses are liars would result in people shying away from giving evidence in courts; a tendency which is on the increase in our country.[16] Thus, where a notice under s 191, IPC for perjury was issued to eye-witnesses alleged to have committed perjury while the evidence on record did not indicate with certainty that they were liars, the issue of a notice of perjury was found not proper and therefore, quashed by the Bombay High Court invoking inherent powers, even though only one of the witnesses had challenged the notice both on his behalf and that of the others.[17]

It is not that every case of perjury, irrespective of facts and circumstances, should form the subject of an inquiry, but it is only in such cases where the courts are of an honest belief and opinion; on an objective consideration of the facts and circumstances, that the interest of justice requires the laying of a complaint. It is not mandatory, but discretionary for the court, depending upon the facts and circumstances of each case, either to conduct a preliminary inquiry or to dispense with the same, to form an opinion that it is in the interests of justice to prosecute the person or persons who committed the perjury.[18]

38. Burden of Proof to Prove Falsehood

The burden of proving the falsehood of the statement lies on the prosecution. Where, therefore, in a suit for sale on a mortgage consisted of two promissory notes, and the accused in his defense pleaded that the promissory notes were without consideration,1417 and he was accused of giving false evidence in respect of that pleading, it was held that:[19]

> For the purpose of the civil courts the Negotiable Instruments Act lays down that the presumption is that a promissory note has been passed for consideration. That rule of law would not necessarily apply to a criminal trial in which every element which goes to constitute a particular offence has to be proved by the prosecution. In the present case it was necessary for the prosecution to prove that the promissory notes were for consideration and it was not for the accused to prove the contrary.

8 *Laxman Padma Bhagat v State* AIR 1965 Bom 195, (1965) 2 Cr LJ 616, p 629 .

9 *Ram Singh v Main Chand* (1972) 74 Punj LR 521 ; *Ram Lal v State* AIR 1964 Punj 211, (1964) 1 Cr LJ 544 ; *Darshan Singh v Jayanti Prasad Joshi* (1963) All LJ 404 .

10 *Arun Kumar Agarwal v Radha Arun* (2001) Cr LJ 3561 (Kant)(DB), (2002) 1 CCR 192 (Kant).

11 1 and 2 Geo 5, c 6.

12 11 and 12 Geo 6, c 58.

13 *R v Castro* (1874) LR 9 QB 350, p 357, per Blackburn J.

14 *Russell on Crime*, eleventh edn, p 323.

15 *R v Mitchel* (2004) EWCA Crim 1516, [2005] 1 Cr App Rep (S) 193 ; *Halsbury's Laws of England*.

16 *Halsbury's Laws of Canada.*

17 *Parl papers*, 3 August 1838, Indian Law Commission, p 673.

18 Law Commission Report, 24 June 1847, para 130; *Parl Papers*, 16 May 1848, Indian Law Commission, p 330.

19 *Queen-Empress v Ghulet* 7 ILR All 41, (1884) All WN 255 .

20 *Anjinoppa & Ors v State of Karnataka* (2001) (I) CCR 94 (Kant) (DB) .

21 *Anjinoppa & Ors v State of Karnataka* (2001) (I) CCR 94 (Kant) (DB) .

22 *KG Pethani v State of Gujarat* 2013 (132) AIC 204 (SC), (2014) 13 SCC 539, 2013 (12) Scale 1 .

23 Section 193 .

24 *Emperor v Bal Gangadhar Tilak* ILR 28 Bom 479, p 486, 6 Bom LR 324, 1 Cr LJ 305 .

25 *Raja Ram v Emperor* AIR 1929 All 936, 30 Cr LJ 1154 ; *Durga Prasad v Emperor* AIR 1933 All 318, 34 Cr LJ 686 ; *Bihari Lal Sud v Emperor* AIR 1939 Lah 529, 41 Cr LJ 204 ; *Queen v Parbutty Chum Sircar* 6 WR (Cr) 84 ; *Mahommad Khudabux v King-Emperor* AIR 1949 Nag 303, 50 Cr LJ 842, (1949) ILR Nag 355 .

26 *Emperor v Babu Ram* (1926) 48 ILR 509, p 511, 1 Cr LJ 434, 1 All LJ 236 ; *Queen v Mahommad Hussain* 16 WR (Cr) 37 ; *Queen v Shib Prasad Giri* 19 WR (Cr) 69 .

27 *Emperor v Bal Gangadhar Tilak* ILR 28 Bom 479, p 493, 6 Bom LR 324, 1 Cr LJ 395 .

28 *Yellappa s/o Rangappa v Kamalourva & Ors* (1995) Cr LJ 2303 (Kant) .

29 *Baban Singh v Jagdish Singh* AIR 1967 SC 68 .

30 *Sadhu Ram v Shyam Sunder Gupta* (1975) CLR 88 .

31 *Ramlal v State* AIR 1964 Punj 211, (1964) 1 Cr LJ 544 ; *Eachara Warier v Home Secy* (1977) KLT 526, p 528, (1977) Mad

LJ (Cr) 330 ; *Ram Singh v Mainchand* (1972) 74 Punj LR 521 .

32 *Echara Warier v Home Secy* (1977) KLT 526, p 528, (1977) Mad LJ (Cr) 330 .

33 *Bhagirath Lal v Emperor* AIR 1934 All 1017, p 1018, (1934) All LJ 1064, p 1066, 4 All WR 535 ; *Rama Naria Hagavne v Emperor* AIR 1922 Bom 99, 23 Cr LJ 23, ILR 46 Bom 317, 23 Bom LR 987 ; *Superintendent and Legal Remembrancer of Legal Affairs v Tarak Nath Chatterjee* AIR 1935 Cal 304, p 305, 37 Cr LJ 698 (DB) .

34 *Anant Gopal Sheorey v State of Bombay* AIR 1958 SC 915, (1958) Cr LJ 1429, (1958) Mad LJ (Cr) 956, [1959] SCR 919, (1958) SCJ 123 ; *State of Maharashtra v RB Choudhari* AIR 1968 SC 117, (1968) Cr LJ 95, 97 .

35 *R v Gopal Das* (1881) 3 ILR Mad 271, p 280 (per curriam ; Kernan and Ayyar JJ, dissent)*; R v Gonu* (1888) 12 B440, (per curriam; Birdwood J, dissent); *Emperor v Cunna* AIR 1920 Bom 270, 59 IC 324, 22 Cr LJ 68, 22 Bom LR 1247 (FB) ; *R v Samiappa* (1891) 15 Mad 63*; Moher v R* (1893) 21 Cal 792, (per curriam); *R v Moss* (1893) 16 All 88, 100 ; *Haider v Abru* (1905) 32 Cal 356, 2 CLJ 105, 9 CWN 911 ; *Kashi Ram v Emperor* AIR 1930 All 493, 129 IC 707, (1930) All LJ 1121 ; *Sodoruddin v R* (1904) 31 ILR Cal 715, 720, 8 CWN 910 ; *Bai Shanta v Umrao Amir Malik* AIR 1926 Bom 141, ILR 50 Bom 162, 93 IC 151, 27 Cr LJ 423, 28 Bom LR 1 (FB) .

36 *Emperor v Pir Qadir Buksh Shah* AIR 1925 Lah 312 .

37 *Bai Shanta v Umrao Amir Malik* AIR 1926 Bom 141 (FB) ; **overruling***Queen-Empress v Babaji* ILR 17 Bom 12 ; *Queen Empress v Balkrishna Vithal* ILR 17 Bom 573 and **following***Satish Chandra Chakravarti v Ram Dayal* ILR 48 Cal 388 .

38 *Venkatarama Reddi v Shriniwasa Reddi* AIR 1936 Mad 350, p 361, 37 Cr LJ 557 .

39 *Ramjit Singh v State of Pepsu* AIR 1959 SC 843, p 846, (1959) Cr LJ 1121, (1959) SCJ 905, (1959) Mad LJ (Cr) 618, (1959) ILR Punj 1709 .

40 *D Jothi v KP Kandasamy & Ors* (2000) Cr LJ (Mad) 292 .

41 Section 40, Indian Penal Code and s 3(38) of the General Clauses Act.

42 Section 43, Indian Penal Code .

43 *Inderjit Singh Grewal v State of Punjab* (2011) 12 SCC 588, p 597, 2011 (9) Scale 295, 2011 (6) Supreme 181, 2011 (6) SLT 434, 2012 Cr LJ 309 .

44 *Ibid.*

45 *Ibid.*

46 *Attorney-General v Bradlaugh* 14 QBD 667 .

47 *Inder Prasad v Jagmohan Das* AIR 1924 Oudh 442, 11 OLJ 485, 84 IC 314, 1 OWN 167 ; *State of Rajasthan v Darshan Singh* AIR 2012 SC 1973, 2012 Cr LJ 2908, (2012) 5 SCC 789 .

48 *Ramjit Singh v State of Pepsu* AIR 1959 SC 843, p 846, (1959) Cr LJ 1121, (1959) SCJ 905, (1959) Mad LJ (Cr) 618, (1959) ILR Punj 1709 .

49 *Ram Lal v State* (1964) 1 Cr LJ 544 .

50 *Malayananauru Anantha Anandacharyulu v State of AP* 2014 (2) Crimes 486 (AP) (Short Note).

51 Section 1 of the Perjury Act 1911 cited in note 1 above.

52 *Halsbury's Laws of England* vol 11 (1), fourth edn, reissue, para 300; Perjury Act 1911, s 15 .

53 *R v Sewa Bhogta* 23 WR (Cr) 12 .

54 *Rameshwar v State of Rajasthan* AIR 1952 SC 54, 53 Cr LJ 547, (1952) SCJ 46, (1952) 1 Mad LJ 440, (1952) Mad WN 150 ; *Mahommad Sugal Esa Mamasan Rer Alaha v King* AIR 1946 PC 3, (1946) All LJ 100, (1945) 2 Mad LJ 493, 50 CWR 98, 48 Bom LR 138 (**overruling***Queen-Empress v Maru* ILR 10 All 207); *Chowkchand Balabux v Commr of Income Tax, Assam* AIR 1960 Assam 187 ; *Queen v Sewa Bhogta* 14 Beng LR 294, 23 WR (Cr) 12 (FB); *Ram Samujh v Emperor* 10 OC 337, 7 Cr LJ 89 ; *Queen-Empress v Govind Chandra Seal* ILR 19 Cal 355 ; *State of Rajasthan v Vijayram* (1968) Cr LJ 270, p 273, (1968) Raj LW 1 ; *State of Rajasthan v Darshan Singh* (2012) 5 SCC 789, AIR 2012 SC 1973, 2012 Cr LJ 2908, (2012) 115 AIC 14 (SC) .

55 *Khotha Subba Chetti v R* ILR 6 Mad 252, 1 Weir 116, 156 ; Re *Iswar Chunder* ILR 14 Cal 356, 1 Weir 176; *R v Pakiri* 1 Cr LJ 1004, 2 LBR 272 ; *Phulel v R* 14 Cr LJ 56 .

56 *Hari Charan Singh v R* ILR 27 Cal 455 .

57 *Gobind Chandra v R* ILR 19 Cal 355 .

58 *Ramesh Singh Bisht v State of Uttarakhand* 2013 Cr LJ 4318, p 4319 (Utr) .

59 Section 3(2) of the Oaths Act, 44 of 1969.

60 *Abdul Aziz v Emperor* AIR 1916 Lah 281, 17 Cr LJ 491 .

61 *Sakhi Rai v Emperor* AIR 1919 Pat 266, 20 Cr LJ 245 .

62 *Dayaram v Emperor* AIR 1934 All 988 .

63 *R v Palliyathodi* (1904) 1 Cr LJ 118, 3 LBR 1 .

64 *R v Ghulam Mustafa* ILR 26 All 371 .

65 *Hirananda Ojha v R* (1905) 2 Cr LJ 575, 2 CLJ 149 .

66 *R v Alagu Kone* ILR 16 Mad 421, 1 Weir 175, **followed** in *Suppa Tevan v R* ILR 29 Mad 89 ; *R v Khan* ILR 22 All 115 .

67 Re *Maddela Ramaniyamma*AIR 1917 Mad 316 ((2)), 17 Cr LJ 195, ILR 39 Mad 977 .

68 *Purshottam Ishvar Amin v Emperor* AIR 1921 Bom 3 (FB) .

69 *Emperor v Tasadduk Hussain* 7 CLJ 302 ; *Queen-Empress v Khan* ILR 22 All 115 .

70 *Pacha Devendra Rao v State of Anhdra Pradesh* (1986) 3 Crimes 38, (1986) 2 All LT 364 (AP) .

71 *Maromma v Emperor* AIR 1933 Mad 125 ; Re *Bejjili Papamma*AIR 1948 Mad 471 ; *Public Prosecutor v Nagalinga Reddi* AIR 1959 AP 250, (1959) Cr LJ 564 .

72 *Anginappa & Ors v State of Karnataka* (2001) 1 CCR 94 (Kant) (DB).

73 *Emperor v Parma Nand* AIR 1933 Lah 321, 34 Cr LJ 469, ILR 14 Lah 507, 34 PLR 421 .

74 *Public Prosecutor v Jalayya* AIR 1954 Mad 303 .

75 *Queen-Empress v Bharma* ILR 11 Bom 702 (FB) ; *Emperor v Shettepa Satapa Mundenavar* 13 Cr LJ 709 ; *Mahommad Sarfraz Khan v Crown* (1951) 52 Cr LJ 1425 .

76 Corresponding to s 37 of the Income Tax Act 1922.

77 *Chowk Chand Balabux v Commr of Income-tax, Assam* AIR 1960 Assam 187 .

78 *Dinshaw Dorabshaw Shroff v Commr of Income-tax* AIR 1943 Bom 77, p 80, (1943) ILR Bom 152, 45 Bom LR 31 .

79 Re *Narayanaswamy Iyer*(1913) 14 Cr LJ 102, (1912) MWN 1107.

80 *King-Emperor v Pakiri* 1 Cr LJ 1004, 2 LBR 272 (FB) .

81 *Sumat Prasad v Emperor* AIR 1942 All 11, 43 Cr LJ 319, (1941) All LJ 587, (1941) ILR All 768 ; *Babu Ram v Emperor* 8 All LJ 674 ; *Abdul Rahman v Emperor* ILR 32 All 30, 6 All LJ 963 ; *Emperor v Makhni* (1890) All WN 100 ; *Nallasivan Pillai v N Ramalingam Pillai* AIR 1918 Mad 398, 18 Cr LJ 783, 32 Mad LJ 402 .

82 *Radhika Mohan Kuri v Lal Mohan Sha* ILR 20 Cal 719 ; *Mata Day v Queen-Empress* 24 Cal 755 .

83 Re *Iswar Chunder Guho* ILR 14 Cal 653.

84 *Khotha Subba Chetti v Queen* ILR 6 Mad 252, 1 Weir 116 .

85 *Empress v Niaz Ali* ILR 5 All 17, (1882) 2 AWN 51 .

86 *Emperor v Abdul Rahman* ILR 32 All 30, 10 Cr LJ 424, 6 All LJ 963 .

87 *Babu Ram v Emperor* (1911) 12 Cr LJ 373 .

88 *Buddhi Kota Subbarao (Dr) v K Parasaran* (1996) 2 East Cr C 601, 606 (SC), (1996) 3 Crimes 143, (1996) 5 SCC 530.

89 Re *Palani Palagan* ILR 26 Mad 55; *Lachmi Narain v Emperor* (1913) 14 Cr LJ 280 ; *Dasondha Singh v Emperor* (1911) 12 Cr LJ 405 .

90 *Mahommad Farooq v Rex* AIR 1950 All 501, 51 Cr LJ 1346, (1950) All LJ 277 ; *Bhagwan Singh v State of Punjab* AIR 1952 SC 214 ; *Abdul Rehman v Emperor* AIR 1927 PC 44 .

91 *Kartar Singh v Emperor* AIR 1917 Lah 192, 18 Cr LJ 607 ; *Kadir Pakiri v Emperor* AIR 1918 LB 129, 18 Cr LJ 966 ; *Emperor v Maya Deb* 6 Cal 762, 8 CLR 292 ; *Nalluri Chenchiah v Emperor* AIR 1919 Mad 45, 42 Mad 561, 20 Cr LJ 379 ; *Kamatchinathan Chetty v Emperor* 28 Mad 308, 2 Cr LJ 756 ; *Barhmdeo Singh v King-Emperor* AIR 1921 Pat 149, 22 Cr LJ 568, 2 PLT 380 ; *Jyotis Chandra Mukherjee v Emperor* ILR 36 Cal 955, 14 CWN 82 ; *Hariram Jawaharlal v Emperor* AIR 1946 Nag 38, (1945) ILR Nag 788, (1945) Nag LJ 551 .

92 *Tun Ya v Emperor* 20 Cr LJ 506, AIR 1919 LB 129 ; *Feroza Jan v Mirza Amir Ali* AIR 1923 Oudh 119, 24 Cr LJ 781 (in which the perjured statement was made in civil court); Re *Bogra* 11 Cr LJ 482, 7 IC 414 (Mad); *Elahi Bux v Emperor* AIR 1918 Cal 289, ILR 45 Cal 825 (which again was a case court); *Mirza Bux v Emperor* AIR 1923 Nag 39, 23 Cr LJ 500 (which also was a case of perjury in a civil court); *Sheo Shankar v Emperor* AIR 1940 Nag 410, 41 Cr LJ 697 ; *Koli Bhima v State* AIR 1952 Sau 7, 8; *Mahommad Farooq v Rex* AIR 1950 All 501, 51 Cr LJ; *Bhagwan Singh v State of Punjab* AIR 1952 SC 214 ; *Abdul Rahman v Emperor* AIR 1927 PC 44 ; *Ram Lal v State* AIR 1964 Punj 211, (1964) 1 Cr LJ 544 ; *Jogendra Singh v State* AIR 1968 Pat 74, (1968) Cr LJ 213 .

1 *Mahommad Farooq v Rex* AIR 1950 All 501 .

2 *Bhagwan Singh v State of Punjab,* AIR 1952 SC 214, p 218 .

3 *Abdul Rahman v Emperor* AIR 1927 PC 44 .

4 *Koli Bhima v State* AIR 1952 Sau 7, 8; *Bhagwan Singh v State of Punjab* AIR 1952 SC 214 .

5 Re *Pandu Namaji Govande*(1917) 18 Cr LJ 480, 19 Bom LR 61; *Narmada Shankar v Dan Pal Singh* (1966) Cr LJ 834, p 836, (1966) All WR (HC) 474 .

6 Re *Andbeen Roy* 14 WR 24; *Raja Ram v Emperor* AIR 1929 All 936, 30 Cr LJ 1154, (1930) All LJ 251 .

7 *Suo motu proceedings against Mr Kanuppan Advocate*(2001) Cr LJ 2611 (SC).

8 *Hiranand v R* (1905) 2 Cr LJ 15, 9 CWN 127, 2 CLJ 149 .

9 *Naloo Patra v R* ILR 33 Cal 368 .

10 *Queen v Juggat Chunder Dutt* 6 WR (Cr) 81 .

11 *Empress v Kassim Khan and Empress v Dahia* ILR 7 Cal 121 ; *Nathu Sheikh v Queen-Empress* ILR 10 Cal 405 .

12 *R v Parshram* ILR 8 Bom 216 ; *Nathu Shaikh v Queen-Empress* ILR 10 Cal 405 ; *R v Baikanta Bauri* ILR 16 Cal 349 ; *R v Bhagwantia* ILR 15 All 11 .

13 *Queen-Empress v Bhagwantia* ILR 15 All 11, (1892) 12 All WN 141 ; *Nathu Shaikh v Queen-Empress* ILR 10 Cal 405 ; *Empress v Baikanta Bauri* ILR 16 Cal 349 ; *Queen-Empress v Ismail* ILR 11 Bom 659 .

14 *R v Kassim Khan* ILR 7 Cal 121, 1 Weir 166 ; *R v Sankaralinga Kone* ILR 23 Mad 544, 1 Weir 166 ; *R v Nga Aung Po* (1910) 11 Cr LJ 474, (1905) UBR 13 .

15 Sub-section (2) of s 161 of the CrPC 1973; *Vittappan v State* (1987) 2 Ker LT 174 .

16 *Emperor v Padum Singh* AIR 1930 All 490, p 492, 31 Cr LJ 954, ILR 52 All 856, (1930) All LJ 955 ; *Raja Ram v Emperor* AIR 1929 All 936, 30 Cr LJ 1154, (1930) All LJ 251 ; *Durga Prasad v Emperor* AIR 1933 All 318, 34 Cr LJ 686 ; *Queen-Empress v Mehrban Singh* ILR 6 All 626, (1884) 4 All WN 253 ; *Kali Shankar Chatterjee v Sarat Chandra Day* 81 CWN 797, 799.

17 *AN Gouda v State of Karnataka* (1998) Cr LJ 4756 .

18 *JB Ross & Co v CR Scriven* AIR 1917 Cal 269 ((2)), ILR 43 Cal 1001, 20 CWN 1192 ; *Rasbehari Roy v Emperor* AIR 1930 Cal 639, 32 Cr LJ 238 ; *Janki Rai v Emperor* AIR 1927 All 383, 23 Cr LJ 323 ; *Asgar Ali Mulla Ibrahimji v Emperor* AIR 1943 Nag 17, 18, 44 Cr LJ 313, *Mahommad Khan v Gaurishankar Misra* AIR 1954 Ori 193, p 194, 55 Cr LJ 1201 .

19 *Queen-Empress v Mehrban* ILR 6 All 626, 1 Weir 174 .

20 *R v Juggut* 6 WR (Cr) 81 ; Act II of 1877, s 82 .

21 *Asgaralli Mulla Ibrahimji v Emperor* AIR 1943 Nag 17, p 18, 44 Cr LJ 313, (1943) ILR Nag 547, (1942) Nag LJ 547 ; relying on *Queen-Empress v Bapuji Dayaram* ILR 10 Bom 288 ; *Emperor v Padam Singh* AIR 1930 All 490, 31 Cr LJ 954, (1930) All LJ 955 .

22 *JB Ross & Co v CB Scriven* AIR 1917 Cal 269 ((2)) .

23 Re *Kazi Chunder Mozumdar* ILR 6 Cal 440, 7 CLR 330; *Queen-Empress v Bapuji Dayaram* ILR 10 Bom 288 ; *Queen v Kartick Chunder Haldar* 9 WR 58 ; *Purendar Jha v Nanulal Jha* AIR 1927 Pat 197, 28 Cr LJ 518, ILR 6 Pat 184, 8 PLT 412 .

24 *Ranjit Singh v State of Pepsu* AIR 1959 SC 843, (1959) Cr LJ 1124, (1959) ILR Punj 1709 .

25 *Mahommad Khan v Gourishankar Misra* AIR 1954 Ori 193, p 194, 55 Cr LJ 1201 ; *Rashbehari Roy v Emperor* AIR 1930 Cal 639, 32 Cr LJ 238 .

26 *Janki Rai v Emperor* AIR 1927 All 383, 28 Cr LJ 323, ILR 49 All 482, 25 All LJ 327 .

27 *Emperor v Padam Singh* AIR 1930 All 490, 31 Cr LJ 954, (1930) All LJ 955 .

28 Section 1, Indian Evidence Act 1872.

29 *Khandesh Spg and Wvg Mills Co Ltd, Jalgaon v Rashtriya Girni Kamgar Sangh, Jalgaon* AIR 1960 SC 571, p 574 .

30 Sub-section (2) of s 297, CrPC 1973.

31 *Baban Singh v Jagdish Singh* AIR 1967 SC 68, (1967) Cr LJ 6 ; *Kannummal v Narayana* AIR 1970 Ker 15, p 16, (1970) Cr LJ 53 ; *MP Paul v Ali Mahommad* (1973) Cr LJ 1284, p 1287, (1973) Ker LT 850 ; *Afzal v State of Haryana* AIR 1996 SC 2326, (1996) 1 Supreme Today 397, p 415, (1996) Cr LR (SC) 434 .

32 *Ravuri Manohar Babu v State of AP* (2005) Cr LJ 3562 (AP)

33 *Asgarali Mulla Abrahimji v Emperor* AIR 1943 Nag 17, p 19 .

34 *Kali Shankar Chatterjee v Sarat Chandra Dey* (1976-77) 81 CWN 797, pp 799, 801, 803.

35 Re *Iswar Chunder Guho* ILR 14 Cal 653.

36 *Nandu Lal Ghose v Emperor* AIR 1944 Cal 283, 45 Cr LJ 748, 43 CWN 469 .

37 *Ram Parshad v Emperor* (1912) 13 Cr LJ 769, p 770, ILR 35 All 5, 10 All LJ 357 ; the cases cited therein.

38 *Ravuri Manohar Babu v State of AP* (2005) Cr LJ 3562 (AP) .

39 *Emperor v Dital Safar* (1911) 12 Cr LJ 563, 5 SLR 102 **relying on***Imperator v Baksho* 10 IC 622 ; Re *Iswer Chunder Guho* ILR 14 Cal 653.

40 *Badri Prasad v Jhamman* AIR 1933 All 47, 34 Cr LJ 457, ILR 55 All 114 .

41 *Emperor v Mattan* ILR 33 All 163 .

42 *Mehtab Singh v Emperor* AIR 1941 All 337 .

43 *Vedree CP v State* (1966) Cr LJ 825 (All) .

44 *Suo motu proceedings against Mr Karuappan Advocate*AIR 2001 SC 2611 .

45 *Ranjit Singh v State of Pepsu* AIR 1959 SC 843, p 846, (1959) Cr LJ 1121, (1959) SCJ 905, (1959) ILR Punj 1709 .

46 *Annasaheb Ramchandra Kunnuro v Parvati Parihar & Anor* (1999) Cr LJ 161 (Bom) .

47 *Baban Singh v Jagdish Singh* AIR 1967 SC 68, (1967) Cr LJ 6 ; *Kannummal v Narayana* AIR 1970 Ker 15, p 16, (1970) Cr LJ 53, **following***Baban Singh v Jagdish Singh* AIR 1967 SC 68 ; *MP Paul v Ali Mahommad* (1973) Cr LJ 1284, p 1287, (1973) Ker LT 850 .

48 *Ramchand v Munshi Ram* (1969) Punj LJ 74, (1969) 71 Punj LR 404, p 413 .

49 *Rajendra Saina Towers (P) Ltd v DDA* (1988) 14 1 DRJ 125, (1987) 33 DLT 216.

50 *Gulshan Kumar v The Collector, Ghaziabad & Ors* AIR 1994 All 243 (DB) .

51 *Suo motu proceedings against Karuppan Advocate*(2001) Cr LJ 2611 (SC).

52 *Gulshan Rai Nagpal v Principal, Government Law College* (2002) Cr LJ 171(Sik) (DB).

53 *Empress v Kassim Khan* ILR 7 Cal 121, 4 Shome LR 71, 8 CLR 300 (FB), per Field, J.

54 Section 277, Income Tax Act 1961.

55 *Asgarali Mulla Ibrahim Ji v Emperor* AIR 1943 Nag 17, p 19, 44 Cr LJ 605, (1943) ILR Nag 547, (1942) Nag LJ 547 ; *Darshan Singh v Jayanti Prasad Joshi* (1963) All LJ 404 .

56 *Queen-Empress v Bapuji Dayaram* ILR 10 Bom 288 ; *Emperor v Hakikar Singh Khushiram* (1913) 14 Cr LJ 450, 7 SLR 75 .

57 *Ram Parshad v Emperor* 13 Cr LJ 769, p 770, 16 CLJ 453, 17 CWN 379 ; the cases cited therein.

58 *Hariram Jawaharlal v Emperor* AIR 1946 Nag 38, (1945) ILR Nag 788, (1945) Nag LJ 351 ; *Beharilal Sud v Emperor* AIR 1939 Lah 529, 41 Cr LJ 204, 41 PLR 652 ; *Emperor v Baoyu Ram* (1904) 1 Cr LJ 484, ILR 26 All 509, 1 All LJ 296 ; *Durga Prasad v Emperor* AIR 1933 All 318, 34 Cr LJ 686 ; *Jugal Chandra Dalal v Emperor* 42 CWN 31 ; *Queen Empress v Aidrus Sahib* 1 Weir 146, 1 Mad HCR 38 .

59 2 WR Letters 9(1).

60 Re *Makanji Anandji*(1904) 1 Cr LJ 486, p 487, 14 KLR 157.

61 *D Jothi v KP Kandasamy & Ors* (2000) Cr LJ 292 (Mad) .

62 *Ratansi Daya v Emperor* AIR 1916 Sind 70 ((2)), 17 Cr LJ 96, 9 SLR 170 .

63 (1963) 7 Fac LR 30.

64 *Lalmoni Nonia v Emperor* AIR 1924 Pat 276, p 280, 24 Cr LJ 321 .

65 *Queen v Ahmed Ally* 11 WR Cr 25, **relied on** in *SC Gupta v Emperor* AIR 1924 Rang 17, p 20, 25 Cr LJ 185, ILR 1 Rang 290 .

66 Re *Palani Palagan* ILR 26 Mad 55; *Habibullah v R* ILR 10 Cal 937 ; *R v Bankartam* ILR 28 Bom 533 ; *R v Palani Chetti* 4 Mad HCR 510, 1 Weir 156, 165 ; Re *Rabari* 2 Cr LJ 590, 15 KLR 148; *R v Tasaduk Hussain* 7 Cr LJ 302 .

67 *Umrao Lal v State* AIR 1954 All 424, 425; *R v Mahommad* 21 WR (Cr) 72 ; *Queen-Empress v Ghulet* UKR 7 All 44, 1884 AWN 258 ; **overruling***Empress v Niaz Ali* 5 All 17 ; and **following***R v Zumeerun* 6 WR Cr 65 ; *R v Palani Chatty* 4 Mad HCR 510 ; *R v Mahommad Hometown Shaw* 13 Bom LR 324 ; *Mahommad v Emperor* AIR 1928 Lah 125, 29 Cr LJ 212 . As observed by Benson J in Re *Planai Palagan* 26 Mad 55, 65, 1 Weir 166; *Umrao Lal v State* AIR 1954 All 434 ; *Habibullah v R* ILR 10 Cal 937 .

68 *Lachhmi Narain v Emperor* 14 Cr LJ 280, 16 OC 81 ; *Dasondha Singh v Emperor* 12 Cr LJ 405, 24 PWR (Cr) 1911 .

69 *Emperor v Bankatram Lachiram* 1 Cr LJ 390, ILR 28 Bom 53, 6 Bom LR 379 ; Re *Narayanan Nair* 11 Cr LJ 353; *Jamna Das v Sabapathy Chetty* 12 Cr LJ 545 ; *R v Haji Alu* 12 Cr LJ 23 ; *Imam Bux v R* 15 Cr LJ 564 .

70 *Advocate General, Karnataka High Court v Chidambara* (2004) Cr LJ 493 (Kant) (DB) .

71 *KK Gupta v Devkumar Aggarwal* (1983) 2 Bom CR 707 (Bom) .

72 Re *Narayanan Nair* 11 Cr LJ 353; *Maung Thaw Na v R* 11 Cr LJ 734, 3 Burma LT 119 ; *R v Barkar Ram* 12 Cr LJ 216 ; *Jamna Das v Sabapathy Chetty* 12 Cr LJ 545 ; *R v Haji Alu* 12 Cr LJ 23 ; *Imam Bux v R* 15 Cr LJ 564 .

73 *R v Bankatram* ILR 28 Bom 533, 542, 1 Weir 164 ; *Fattu v Fattu* ILR 26 All 564 .

74 *Harnam Singh v R* 7 Cr LJ 460 ; Re *Narayanan Nair* 11 Cr LJ 353; *Rattan Singh v R* 12 Cr LJ 265 ; *Lachhmi Narain v R* 14 Cr LJ 280 .

75 *Re Palani Palgan* ILR 26 Mad 55.

76 *Didar Singh v State of Punjab* (1981) Cr LJ 245 (Punj) .

77 *R v Bankatram* ILR 28 Bom 533, 545.

78 *State v Dhanna Sewa* AIR 1959 MP 35, 36.

79 *Umrao Lal v State* AIR 1954 All 424, (1954) Cr LJ 860 .

80 Re *Jhala Nayabhai* 7 Cr LJ 65.

81 *Dasondha Singh v R* 12 Cr LJ 405 .

82 *Public Prosecutor v Arumugam Chetty* 13 Cr LJ 752 .

83 *Mahommad Ishaq v Emperor* AIR 1914 All 170, p 171, 15 Cr LJ 579, (1936) ILR All 362, 12 All LJ 550 ; *Ashutosh Gangoli v Brij Narain Lal* 22 Cr LJ 393 .

84 *R v Mahommad Ishaq* ILR 36 All 362 (For examples of the latter, see illusts (d) and (e)); *Ranjit Singh v State of Pepsu* AIR 1959 SC 843, p 847 ; *Eachhara Warrier v Home Secry* (1977) Ker LT 526, p 528, (1977) Mad LJ (Cr) 330 .

85 *Jai Jai Ram v Emperor* AIR 1919 All 316 .

86 *R v Ameer Ali Khan* 3 NWP 133 ; *Abdul Rashid v R* 15 Cr LJ 221 .

87 *R v Aidrus Sahib* 1 Mad HCR 38 ; *R v Mahommad Hussain* 16 WR (Cr) 37 ; *R v Mahraj* 7 Ben LR App 66; *R v Sidhoo* 13

WR (Cr) 56 ; *Azibulla v Udoy Sonthal* 9 Cr LJ 282 ; *Gopalaswami Naidu v R* 10 Cr LJ 7 ; *Rattan Singh v R* 12 Cr LJ 265 ; *Lachhmi Narain v R* 14 Cr LJ 280 .

88 *Eachhara Warrier v Home Secy* (1977) Ker LT 526, p 528, (1977) Mad LJ (Cr) 330 ; *Dwarkanath Varma v Emperor* AIR 1933 PC 124, p 129, 34 Cr LJ 322 .

89 *State v Nihar Ranjan Guha* AIR 1955 All 608, (1955) Cr LJ 1439 .

90 *Ranjit Singh v State of Pepsu* AIR 1959 SC 843, p 847 ; *Emperor v Lachmi Narain* AIR 1947 All 235, (1947) UKR All 155 held not to be good law.

1 *U Mister Wallang Nangseh v Ka Ephreban Wallang Nangseh* AIR 1954 Assam 295 (DB), (1954) Cr LJ 1838 (DB).

2 *Dayaram v Emperor* AIR 1934 All 988 (DB) .

3 *Mi Choke & Ors v Emperor* AIR 1933 Rang 119, (1934) Cr LJ 781 .

4 *Nandlal Ghose v Emperor* AIR 1944 Cal 283, (1945) Cr LJ 748 (DB) .

5 Re *Andichetti* 11 Mad HCR 438, 1 Weir 114.

6 *Queen v Chundi Churn Nauth* 8 WR 5(1).

7 *Queen v Nim Chand Mookerjee* 20 WR 41 .

8 *Queen Empress v Rawji* (1893) Unrep Cr Cases 632 .

9 *Hira Nand Ojha v Emperor* 4 Cr LJ 227, p 229, 10 CWN 1099 .

10 *Eachhara Warrier v Home Secy* (1977) Ker LT 526, p 528, (1977) Mad LJ (Cr) 330 .

11 *Ranjit Singh v State of Pepsu* AIR 1959 SC 843, p 847 .

12 *D Jothi v KP Kundaswamy* (2000) Cr LJ 292 (Mad) ; *Gortimukkala Suryanarayana Raju v State* (1987) Cr LJ 118 (AP) ; *Chajoo Ram v Radhey Shyam* AIR 1971 SC 1367, (1971) 1 SCC 774 ; *Dr SP Kohli v High Court of Punjab and Haryana* AIR 1978 SC 1753 .

13 *Choke & Ors v Emperor* AIR 1933 Rang 119 .

14 *SKrishna v State of Karnataka* (1998) Cr LJ 785 (Kant) (DB) .

15 *A Nalinkshan v Abulaise* 2014 Cr LJ 101 (Ker), 2013 (4) KHC 284 .

16 *State of Maharashatra v Manohar Yeshwant Patil & Ors* (1997) Cr LJ 3114 (Bom) (DB) .

17 *Ibid*.

18 *SS Subramaniam v Motor Accidents Claims Tribunal, Iringalakuda & Ors* (1998) Cr LJ 4738 .

19 *Sakhawat Haider v Emperor* AIR 1920 All 242(1), 22 Cr LJ 54, 18 All LJ 1151 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 192.

Fabricating false evidence.--

Whoever causes any circumstance to exist or [20][makes any false entry in any book or record, or electronic record or makes any document or electronic record containing a false statement], intending that such circumstances, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence".

Illustrations

(a) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.
(b) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.
(c) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the police are likely to search. A has fabricated false evidence.1418

Comments

1. Legislative Changes

The words 'makes any false entry in any book or record, or electronic record or makes any document or electronic record containing a false statement' were substituted by Information Technoloty Act 2000, s 91 and sch I, for 'makes any false entry in any book or record, or makes any document containing a false statement' (wef 17-10-2000).

2. Scope

This section defines 'fabricating false evidence', which is made an offence under s 193 . The offence consists in 'perverting the course of justice'. Under the English Law 'steps taken for the manufacture or fabrication of false evidence may be indicated as attempts to commit the misdemeanor of perverting the course of justice'.[21]

Unlike ss 211 and 463, this section does not require an 'intent to cause injury to any person'; nor does it require that the fabrication of evidence should be done dishonestly or fraudulently within the meaning of sub-s (2) of s 464 .[22]

If the principal motive of the action was to make a false document with the object that an erroneous opinion be formed in some judicial proceeding, whether actually pending or likely to come into existence subsequently, the provisions of this section are attracted. The proximity to a judicial proceeding, pending or likely to come into existence, is the test by which the applicability of this section is to be determined.[23]

A judicial proceeding may not be pending at the time of the fabrication.[24]

3. Essentials

To constitute this offence three things must exist:

(a) The circumstance, entry or document must be false;
(b) An intention, that the one or the other should appear in one or other of the three kinds of proceedings specified;
(c) An intention to cause the person, who is to form an opinion on the evidence, to form an erroneous one 'on any point material to the result'.[25]

Neither s 192, IPC, incorporate the principle of vicarious liability, and therefore, it is incumbent on the complainant to specifically aver the role of each of the accused in the complaint.[26]

Commentary under same heading in s 193, *post* may also be referred to.1419

4. 'Whoever'

The word 'whoever' would include an accused person. It is not possible to accept the proposition that as a matter of law an accused person can use as genuine fabricated evidence so long as he uses it for his defence.

There is no legislative provision to that effect. Section 313 of the CrPC provides that the accused shall not be liable to be prosecuted for giving false evidence in respect of any statement by him as an accused person. But there is no provision giving him such immunity as regards the use of fabricated evidence, and no such immunity can be implied in his favour simply because he uses it as an accused person in his defence.[27]

Commentary under same heading in s 193, *post* may be referred to.

Police, Public Servants and Citizens, all Fall within the Term 'Whoever'

'The police are too often tempted to introduce padding in a case in their overzealousness to establish a charge, which they believe to be true in support of which the evidence in their possession is weak. But this practice has to be condemned in no uncertain terms' observed Dixit J of the Madhya Pradesh High Court while delivering the judgement on behalf of the division bench in *State of Madhya Pradesh v Babulal Ram Ratan* .[28] His Lordship found it useful to quote the warning which Young CJ gave in *Ashiq Mahommad v Emperor* ,[29] to those who try to procure and use false and fabricated evidence of recoveries, *etc*. It runs as follows:

> It may be well that we should give a warning to anyone who may hereafter be tempted to interfere with the course of justice by the procuring of false evidence or the fabrication of evidence of recoveries, that the duty of everyone, police officers or constables, government officials and plain citizens, is to allow a case to come before the court as it is without fabrication, or 'padding'. It is for the courts to decide whether an accused person is innocent or guilty, and not for the prosecution to determine his guilt in advance and attempt to deceive the court into giving a verdict based on false evidence. Anyone procuring false evidence runs the risk of imprisonment and degradation from office, and what is still more serious, may have the burden on his shoulder of sending an innocent man to the gallows.

When the Investigating Officer deliberately manipulates the statements of witnesses under s 161(3), CrPC to be used as evidence in the Court, the investigating officer would be guilty of committing the offence punishable under s 192, IPC .[30]

5. 'Fabricates False Evidence'--Meaning of

'Fabricate' means 'to frame, to construct, to manufacture, to forge, or to devise falsely'. The fabrication contemplated by this section is (a) the causing of any circumstance to exist, or (b) making any false

entry in any book or record, or (c) making any document containing a false statement. The section contemplates the actual fabrication and not merely a preparation or an attempt to fabricate false1420 evidence. For an example of causing a circumstance to exist, see illust (a) to this section. For an example of making a false entry, see illust (b) and for making a document containing a false statement, see illust (c). In a Madras case one *A* owed *B* a certain amount of money. He sent a registered and insured packet to *B*, purporting to contain currency notes in settlement of the debt and got an acknowledgement of the receipt of the packet. The packet was found to contain waste paper. *B* sued *A* for the recovery of the money due to him. *A* applied to the court to admit the acknowledgement in evidence. It was held that the postal acknowledgement was a circumstance caused to exist with the intention of causing an erroneous opinion within the meaning of this section.[31]

Hiding stolen railway pins in a man's field intending that they may be found there and that the circumstance of their being found there might appear as evidence in a judicial proceeding and lead the magistrate to believe that the man was connected with the theft, would be fabricating false evidence.[32] So also putting stolen goods in a man's house to serve as evidence of theft against him.[33]

One *C*, whose brother was an accused person, applied to the court on behalf of the accused asking that the witnesses for the prosecution might first of all be made to identify *D*. The court assenting to this request, he produced before the court ten or twelve persons, none of whom could be identified as *D* by any of the prosecution witnesses. Upon being asked by the court where *D* was, *C* pointed out another man who, upon further investigation, was discovered to be wearing a false moustache and to be not *D* but one *M*. It was held that *C*, by placing before the magistrate a person who was not *D*, and representing that he was *D*, caused a circumstance to exist.[34] The tutoring of a man to give false evidence also amounts to the causing of a circumstance to exist within the meaning of s 192 .[35]

The accused petitioner had obtained interim order staying the election to the post of President Town Panchayat by filing forged and fabricated documents and swearing false affidavit. A *prima facie* case for proceeding under ss 192 and 193, IPC against the petitioner was held made out.[36]

False Recitals in Documents

A document containing recitals implying a false statement is a fabricated false evidence,[37] but a true copy of a mortgage-deed, though not containing a copy of endorsements subsequently made on the original, is not a false document.[38] Consent given for prosecution even if it is false cannot amount to a 'false document' or 'fabricating false evidence'.[39]

An entry would be a false entry or a statement in a record or document would be a false entry if it, either by reason of some false additions or of some material1421 omissions, misrepresents the truth. The omission may or may not be illegal. The thing to be considered is the effect of the omission on the entry as made or on the statement as occurring in a document.[40]

False Statement Need Not be in Express Terms

The false statement need not be in express terms. Where the accused made a document containing many false recitals implying that certain persons executed a sub-lease when, as a matter of fact, no such sub-lease was executed, it was held that he was guilty of fabricating false evidence.[41]

To sign a statement in an application for the execution of a decree under O XXI, r 11(2) of the CPC 1908, which contains a false statement, is punishable under this section, and it makes no difference that at the time of signature, the document was blank.[42]

Attestation of a Document

A person who attests a document knowing that it was forged and was intended to prove the discharge of a decree debt, is guilty of fabricating a false document, even if the document was not required to be

attested.[43] However, mere attestation is not sufficient to justify an inference that the person attesting knew that he was attesting a forged document.[44]

It cannot be concluded that because the accused put his signature to a written report, he necessarily knew or had reason to believe that the contents of the report were false. It is for the prosecution to prove that the written report was a false report and that the accused countersigned it with this knowledge and with the intention that the report should be used as evidence in a judicial proceeding.[45]

A, the servant of *B*, at *B*'s instigation, personated before a stamp-vendor and obtained a stamp-paper in *C*'s name for the purpose of forging a deed in *C*'s name. The endorsement on the paper in *C*'s name would be evidence that *C* had executed the deed. It was held that *A* was guilty of fabricating false evidence, and *B* of abetment thereof.[46]

Where a medical officer, while giving evidence as an expert, produced a fabricated diploma in a court with the object that the court may believe him as an expert in criminology, the Supreme Court held that an offence under this section was made out.[47] The filing of a false affidavit by a witness in a proceeding before a court also constitutes an offence under this section.[48] If a false entry is made in a book or a record and that circumstance assists the court in forming an opinion upon that evidence in favour or against somebody, that is enough to hold that false evidence1422 was fabricated. If such evidence is used in a judicial proceeding, the offence made out is under this section.[49]

Where the accused fabricated an endorsement in the promissory note so as to bring a claim within limitation, it was held that the act of the accused constituted an offence under this section.[50]

Where a police officer who took the delivery of a draft of a counter-affidavit from the standing counsel for being signed by his superior for filing in the Supreme Court, asked a police official to forge the signature of his superior on a carbon copy of the counter affidavit. On refusal, he contacted his superior and the latter directed the official asked to forge his signature. The official asked accordingly and the accused sent the carbon copy with other affidavits for filing in the Supreme Court. The said affidavit contained false documents. The accused officer was present in the Supreme Court premises along with the officer whose signature was forged on the date of filing the affidavit. The accused was held guilty of an offence under s 193, IPC as he abetted the officer to forge the signature of his superior.[51]

6. 'Intending that Such Circumstance *Etc.* May Appear as Evidence'--Meaning of

The second essential of the offence of fabricating false evidence is the intention to use what is fabricated as evidence. The gist of the offence lies in the intention to cause a failure of justice by the use of the false thing in evidence.[52] The judicial proceeding may not be pending at the time of fabrication. It is enough if the object of the fabrication is that it may appear in evidence.[53] But if there is no evidence to prove that the accused intended, at the time he made a false entry in a record, that it should appear in evidence, he cannot be held guilty of fabricating false evidence.[54] It is well-established, and indeed this section and s 193 make it perfectly clear, that the mere fabrication of a false statement is not punishable under s 193 . In order that the offence may be committed, it must be established that the person fabricating the false evidence, intended to use that false evidence in a judicial proceeding or in a proceeding taken by law before a public servant as such or before an arbitrator, *etc*.[55] It has been held that where an accused person fabricates false evidence with the sole object of diverting suspicion from himself and concealing his guilt, he cannot be convicted under s 193, IPC . Of course, the mere intention to divert suspicion and concealing his guilt need not necessarily amount to fabricating evidence which may appear in a judicial proceeding or in a proceeding taken before a public servant or before an arbitrator so that such authorised person would form a different opinion.[56]But if the act of an accused person comes within the language of this section, it is1423 difficult to see how he can take shelter behind the circumstance that he is an

accused person.[57]

An application or interlocutory application filed by either party for some relief is not evidence within the meaning of s 3, Indian Evidence Act, as same would not fall within the meaning of s 294, CrPC . No offence is committed under s 193 or s 194, IPC .[58]

Judicial Proceeding Need Not be Pending

It is not necessary for the purpose of the application of this section that the judicial proceeding in which the person intends to use the false evidence be pending at the date of the fabrication.[59]

Fabrication of Documents Not Admissible in Evidence

It has, however, been held in several cases that what is fabricated must be capable of being used as evidence and that the offence of fabricating false evidence cannot be committed in respect of a document which is not admissible in evidence, the reason being that a document which is inadmissible in evidence can never be produced for the purpose of enabling an officer to arrive at any conclusion, erroneous or otherwise, upon a relevant point.[60] Thus, it has been held that a police officer who fabricates a police special diary does not commit an offence under this section since such a document is not evidence under the provisions of the Code of Criminal Procedure, s 172,[61] but under s 218 .[62] So too a false report made by an *amin* of a civil court, deputed to deliver possession of a certain property in execution of a decree, as to his having been obstructed in so doing, and a similar report made to the police, do not constitute offences under this section.[63]

Actual Use of Fabricated Evidence Not Necessary

It has been held, however, in other cases that the words of the section show that it is the intention that creates the criminal offence and not the fact as to whether, under the terms of the law, the document is admissible in evidence, and that the mere fact that an entry or document is not admissible in evidence does not necessarily take it out of the mischief of s 193 .[64]

It is not necessary, in a charge based upon this section to show that any actual use has been made of the evidence so fabricated. Mere fabrication is punishable under s 193 . The use of the fabricated article is punishable under s 196 .1424

7. 'Judicial Proceeding'--Meaning of

The expression 'judicial proceeding' is not defined in this Code, but in s 2(i) of the Code of Criminal Procedure 1973, and it includes 'any proceeding in the course of which evidence is or may be legally taken on oath'. The definition in the CrPC is only for the purpose of that Code.[65]Section 1(2) of the English Perjury Act 1911, also lays down that the expression 'judicial proceeding' includes a proceeding before any court, tribunal, or person, having by law power to hear, receive and examine evidence on oath.

Characteristics of Judicial Proceedings

In one of the earliest cases in which the question as to the meaning of a 'judicial proceeding' arose, Scotland CJ, said: 'It is nothing more nor less than a step taken by the court in the course of the administration of justice, in connection with a case pending'.[66] In *Queen-Empress v Tulja* ,[67] West J observed that 'an inquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of persons; or between him and the community generally; but, even a judge, acting without such an object in view, is not acting judicially'. The power to take evidence on oath is the characteristic test of a judicial proceeding.[68] A judicial proceeding is not deprived of its character as such merely because it becomes abortive owing to the incompetency of one of the jurors, and the giving of false evidence in the course of such proceeding is an offence under s 193 .[69] But where the

proceeding is such under which no evidence can be legally taken, then it is not a judicial proceeding.[70] A mere irregularity in a judicial proceeding does not alter its character as such.[71] But no inquiry or trial held without jurisdiction is a judicial proceeding.[72] The criterion for deciding whether an order is a judicial or an administrative order is not whether the authority acts under a statute; it is, as pointed out by Sapru J, in *Mahommad Buksh v State of Uttar Pradesh* ,[73] whether it is required to act judicially in passing the order or not. If it is required to act judicially, the order is judicial or quasi-judicial, and if it is not, it is administrative. A sub-divisional magistrate is a judicial authority and, therefore, his order would be either judicial or executive. As an order passed by him under s 45(3) of the old CrPC, 1898 (having no corresponding provision in the CrPC of 1973) has been held to be not a judicial order, it can only be an administrative order.[74]Section 136 of the Income Tax Act 1961, provides that proceedings under that Act before an income tax authority shall be deemed to be a judicial proceeding within the meaning of ss 193 and 223 and for purposes of s 196 of the IPC but the filing of a return is not a stage of a judicial proceeding.[75]1425

Pendency of Judicial Proceeding Not Essential

Section 37(4) of the Income Tax Act 1922 makes the proceedings before the income tax officer judicial proceedings within the meaning of s 228, IPC .[76] It could not have been the intention of the legislature in making the offence committed during the cause of a proceeding before an income tax officer more serious without affording a corresponding safeguard provided by s 195(1)(b), CrPC in respect of complaints which can be made in this behalf. Where, therefore, an offence under s 193, IPC is committed in respect of the proceedings before the income tax officer, the complaint by the officer is a condition precedent, as prescribed under s 195(1)(b), CrPC to a magistrate taking cognizance of the offence.[77]

It is not essential for the purpose of s 192 of IPC that there should be any judicial proceeding pending at the time of the fabrication. It is enough that there is a reasonable prospect of such a proceeding, having regard to the circumstances of the case, and that the document in question is intended to be used in such a proceeding.[78]

Instances of Judicial Proceedings

The following have been held to be judicial proceedings:

(a) proceedings in which a magistrate comes to his determination as to the fitness of sureties under ch VIII of the CrPC ;[79]
(b) an inquiry held by a magistrate before issuing an order under s 144, CrPC ;[80]
(bc) Recording of a statement under s 161 CrPC is a judicial proceeding;[81]
(c) a proceeding in which the statement of a witness is recorded under s 164, CrPC ;[82] (some High Courts have expressed a contrary view on this point).[83]
(d) an investigation under ch 12 of the CrPC 1973 by a magistrate;[84]
(e) investigation proceedings under s 202, CrPC, conducted by a subordinate magistrate on a complaint which was taken cognizance of by another magistrate and sent to him for inquiry and report under the old Code;[85]
(f) issue of process under s 202, CrPC is a judicial determination (Order).[86]1426
(g) proceedings under s 299, CrPC 1973;[1]
(h) the proceedings of a court holding a preliminary inquiry under s 340, CrPC 1973;[2]
(i) maintenance proceedings under ch 9, CrPC 1973;[3]
(j) proceedings under s 446, CrPC 1973;[4]
(jj) Bail proceeding;[5]
(k) an inquiry conducted by a magistrate into the truth of an allegation against a subordinate official contained in a petition presented to the deputy commissioner;[6]
(l) proceedings in execution of a decree;[7]
(m) proceedings under s 8 of the Reformatory Schools Act V of 1876 (now Act 8 of 1897);[8]

(n) an inquiry under the Legal Practitioners' Act, 18 of 1879;[9]
(o) an inquiry under the Coroners Act, 4 of 1871;
(p) an inquiry under the Income Tax Act hearing objections to assessment;[10]
(q) inquiry by the registrar of the Presidency Court of Small Causes as to proper service of summons;[11]
(r) a proceeding before a magistrate for the recovery of municipal cesses under the Bombay Municipal Act;[12]
(s) an inquiry into a claim under s 83(6), CrPC 1973;[13]
(t) an inquiry by a magistrate under Police Order No 157 (Madras) in which statements of witnesses are taken on oath;[14]
(u) examination of an insolvent by the official assignee conducted under s 33(2) of the Presidency Towns Insolvency Act 1909;[15]
(v) a trial before a court-martial;[16]
(w) an investigation directed by law preliminary to a proceeding before a court of justice, though not made before a court of justice;[17]1427
(x) an investigation directed by a court of justice according to law and conducted under its authority, though may not take place before it;[18]
(y) proceedings before an income tax officer under s 37 of the Income Tax Act 1922 (Act 11 of 1922);[19]
(z) affidavit filed in support of a writ petition by concealing facts and obtaining interim order from High Court.[20] Affidavit filed by the petitioner in support of writ petition with false statement to mislead and overreach the court;[21]
(za) false counter affidavit in proceedings before the Supreme Court.[22]

Proceedings Not Considered Judicial Proceedings--Instances

The following have been held not to be judicial proceedings:

(a) examination by a police officer under s 161, CrPC ;[23]
(b) giving a sanction under s 197, CrPC, by the local government;[24]
(c) a preliminary inquiry held by a sub-divisional magistrate at the direction of a district magistrate, into the circumstances of a complaint against the police with a view to ascertain whether or not the district magistrate should grant sanction under s 197 ;[25]
(d) the proceedings of a district magistrate under s 123(9), CrPC for cancelling a bond for keeping the peace or for good behaviour,[26] in the case of an order passed under s 117 by an executive magistrate;
(e) a departmental inquiry falling within s 197 of the Bombay Land Revenue Code (Act 5 of 1879);[27]
(f) where telegraph authorities, having had a claim made against them by the heir of a deceased employee, referred it to the district judge for verification, his inquiry into such claims;[28]
(g) where the person conducting the proceedings was *coram non judice*;[29]
(h) proceedings under s 83, CrPC ;[30]
(i) an inquiry by a magistrate to find out the writer of an anonymous letter,[31] or of a petition,[32] or to discover the truth of statements made to the1428 telegraph department by a person claiming money in their hands as heir to an employee therein;[33]
(j) proceedings in which evidence is taken before a police patel;[34]
(k) an inquiry in regard to refunds for spoiled stamps conducted by a deputy collector;[35]
(l) proceedings directed by a district registrar to inquire into certain matters regarding the registration of a document;[36]
(m) proceedings before a district judge calling upon a person to show cause why he should not hand over documents relating to property over which a common manager had been appointed under the Bengal Tenancy Act, there being no provision in the act authorising

such an inquiry.[37]

8. 'Taken By Law'--Meaning of

For an offence under this section it is not necessary that the fabricated evidence should be intended to be used only in a judicial proceeding. It is enough if it is intended to be used in any proceeding taken by law before a public servant as such. All that is necessary under this clause is that the proceeding must be taken by law and that it should be before a public servant as such. The section thus contemplates even a proceeding which is non-judicial. The expression 'taken by law' in the section only means taken under the provisions of any law; similarly the word 'evidence' as used in the section is used in its ordinary sense, namely, 'information (given personally or drawn from documents, *etc.*) tending to establish a fact'.[38] Thus, the police having power to investigate the circumstances of a person's death, the accused caused a circumstance to exist intending that it should cause the investigating officer to form an erroneous opinion as to how the deceased met her death. It was held that he was guilty of fabricating false evidence.[39]

9. 'Material'--Meaning of

The word 'material' means 'of such a nature as to affect in any way, directly or indirectly, the probability of anything to be determined by the proceeding, or the credit of any witness,[40] and a fact may be material although evidence of its existence was improperly admitted'.[41]

In a case, *A* sells goods to *B*, but omits to enter the sale in his books. Subsequently, he makes the entry intending it to be used as evidence in a judicial proceeding relating to the sale. The question whether the vendor's books contained such an entry is a material point. *A* has fabricated false evidence.[42]1429

A, a *vakil*, forges a magistrate's authentication of his genuine signature to a *vakalatnamah*. The *vakalatnamah* is not an evidence in the case, and the error (if any) induced in the mind of the judge as to its genuineness could not affect his decision of the case, and therefore, *A* is not guilty under s 193 .[43]

Where the accused prepared certain receipts in respect of sales of cattle actually effected but antedated them, and the receipts were intended to be produced before a sub-inspector of police who wanted to ascertain whether the cattle were stolen property it was held that the receipts could not possibly cause the sub-inspector to entertain an erroneous opinion touching a point material to the result of the inquiry he was making, and that the accused could not be held guilty of fabricating false evidence.[44]

Fabricated False Evidence Should Help in Formation of Erroneous Opinion

It is not merely the making of a document containing a false statement which is relevant, but that the making of a document containing a false statement should be such as to lead any person, who in a judicial proceeding is to form an opinion on evidence, to entertain an erroneous opinion touching the point material to such a proceeding. Where, therefore, in a proceeding between a *raiyat* and his *bataidar* under s 144, CrPC, the *raiyat* produces a deed of exchange of title between him and another *raiyat* but which contains no recital as to past possession, the deed of exchange, even if antedated, cannot be said to have any prejudicial effect upon the interest of the *bataidar* who claims to be in possession, and therefore, the deed of exchange, even if antedated, cannot amount to fabricating false evidence.[45] Since the executive officer of a municipality has no authority to investigate whether an applicant for permission to build has a right to build on the land in question, production of a false document in such an inquiry by the applicant would not make him fall within the mischief of s 192 .[46]

Actual Failure of Justice is not the Gist of the Offence

Whether the accused could or could not succeed in carrying out his intention is immaterial. The gist of the offence does not consist in actually causing a failure of justice but in the intention to cause a failure of justice by misleading the court, and with such intent causing the existence of any circumstances which might appear in evidence.[47] Of course the materiality of the fabricated evidence must always be shown.[48]

20 Substituted by Act 21 of 2000, s 91 and Sch I, for 'makes any false entry in any book or record, or makes any document containing a false statement' (wef 17-10-2000).

21 *Russell onCrime,* eleventh edn, p 342.

22 Re *Mir Ekram Ali* ILR 6 Cal 482; *Empress v Mazhar Hussain* ILR 6 All 553 .

23 *Hukum Singh v State* (1970) All Cr Case 265 ; *Kamla Prasad Singh v Harinath Singh* AIR 1968 SC 19, (1968) Cr LJ 68 .

24 *Emperor v Mala* ILR 2 All 105 ; Re *Govind Pandurang*AIR 1921 Bom 366, 22 Cr LJ 49 ; *Rajaram Bhavanishankar v Emperor* AIR 1920 Bom 319, p 320, 22 Cr LJ 23 .

25 *R v Zakir Hussain* ILR 21 All 159, p 160 ; *R v Cheda Lal* ILR 29 All 351, p 353 ; *Kailasam Pattar v R* 4 Mad HCR 373, 1 Weir 175 ; *R v Ganeshi* 2 Cr LJ 100, p 101, 25 All WN 52 ; *R v Po Shin* 6 Cr LJ 283, 4 LBR 45 ; *Jatindra Nath Sahu v Emperor* AIR 1937 Cal 42, p 44, 38 Cr LJ 700 .

26 *Maharashtra State Electricity Distribution Co Ltd v Datar Switchgear Ltd* 2011 Cr LJ 8 (SC), 2010 AIR SCW 6151, (2010) 10 SCC 479, 2010 (10) Scale 691 .

27 *Rama Nana v Emperor* AIR 1922 Bom 99, p 101, 23 Cr LJ 23, ILR 56 Bom 317, 23 Bom LR 987 ; *Bhagirath Lal v Emperor* AIR 1934 All 1017, (1934) All LJ 1064 ; **explaining and distinguishing***Emperor v Ram Khilawan* ILR 28 All 705, 4 Cr LJ 66 .

28 *State of Madhya Pradesh v Babulal Ram Ratan* AIR 1958 Cr LJ 190, (1957) MPLJ 837 .

29 *Ashiq Mahommad v Emperor* AIR 1936 Lah 330, p 333, 37 Cr LJ 562 .

30 *Babu v State of Karnataka* 2007 Cr LJ 3802, p 3805 (Kant) (DB) .

31 *Kunju v King-Emperor* AIR 1927 Mad 199, p 201 .

32 *Empress v Rameshar Rai* ILR 1 All 379 .

33 *Queen v Soonder Patnaik* 3 WR (Cr) 59 .

34 *Emperor v Chheda Lal* ILR 29 All 351, 4 All LJ 237 .

35 *Sur Nath Bhaduri v Emperor* AIR 1927 All 721, 28 Cr LJ 950, 25 All LJ 1077 ; but see *Durga Prasad v Emperor* AIR 1915 All 388(1), 16 Cr LJ 667 .

36 *Ibrahim Sab Imam Sab Mulla v State of Karnataka* 2006 Cr LJ 2738, p 2742 (Kant) .

37 *Mahadeo Misser v Narayan Ram Sha* 3 Cr LJ 196, 10 CWN 220 .

38 *Kalyan Singh v R* 11 Cr LJ 601, 80 PLR 1910 .

39 *Dr Budhi Kata Subbarao v K Parasan* (1996) 5 SCC 530, (1996) 2 East Cr C 601, p 606 (SC), (1996) 3 Crimes 143 .

40 *Jatindra Nath Sahu v Emperor* AIR 1937 Cal 42, p 44, 38 Cr LJ 700 .

41 *Mahadeo Misser v Narayan Ram Sha* 3 Cr LJ 196, 10 CWN 220 .

42 *R v Ratanchand* 1 Cr LJ 959, 6 Bom LR 886 .

43 Re *P Rama Naidu*AIR 1942 Mad 92 ((1)), 43 Cr LJ 227, (1941) 2 MLJ 746 .

44 *Chinna Veera Reddi v Emperor* AIR 1939 Mad 730, 41 Cr LJ 11, (1939) MWN (Cr) 86 .

45 *Jai Jai Ram v Emperor* AIR 1919 All 316, 20 Cr LJ 268, 17 All LJ 574 .

46 *R v Durgacharan* ILR 25 All 75 ; **following***R v Mula* ILR 2 All 105 .

47 *Dutt v State of Uttar Pradesh* AIR 1966 SC 523, p 526, (1966) Cr LJ 459 .

48 *Baban Singh v Jagdish Singh* AIR 1967 SC 68, (1967) Cr LJ 6 ; *Kunnummal v Narayana* AIR 1970 Ker 15, p 16, (1970) Cr LJ 53 ; *MP Paul v Ali Mahommad* (1973) Cr LJ 1284, p 1287, (1973) Ker LR 214, (1973) Ker LT 850 .

49 *Nanjudaiah v Rangaiah* (1977) 2 Kant LJ 374, p 376 ; *Dutta v State of Uttar Pradesh* AIR 1966 SC 526, p 527, (1966) Cr LJ 459 .

50 *Subramania v Swamikannu* AIR 1933 Mad 413, p 415, 34 Cr LJ 800 .

51 *Afzal & Anor v State of Haryana & Ors* (1996) Cr LJ 1679 (SC) .

52 *Chheda Lal v R* ILR 29 All 351 ; *Mahommad Siddiq v R* 6 Cr LJ 162, 11 CWN 911 ; *Mahesh Chandra Chaudhary v Emperor* AIR 1918 Cal 61, 19 Cr LJ 971, 28 CLJ 213 .

53 *Emperor v Mula* ILR 2 All 105 .

54 *Jatindra Nath Sahu v Emperor* AIR 1937 Cal 42, p 44, 33 Cr LJ 700 .

55 *Abdul Mutlab v Emperor* (1947) 48 Cr LJ 632, p 633 .

56 *Emperor v Ram Khilawan* ILR 28 All 705, 4 Cr LJ 66 ; *Superintendant & Remembrance of Legal Affairs v Tarak Nath Chatterjee* AIR 1935 Cal 304, ILR 62 Cal 666 .

57 *Bhagirath Lal v Emperor* AIR 1934 All 1017, p 1018, (1934) All LJ 1064 .

58 *Anil Kumar Mishra v State of Jharkhand* 2014 Cr LJ (NOC) 44 (Jhar) .

59 Re *Govind Pandurang*AIR 1921 Bom 366, 22 Cr LJ 49, ILR 45 Bom 668 ; *Rajaram Bhavanishankar v Emperor* AIR 1920 Bom 319, p 320, 22 Cr LJ 23, 22 Bom LR 1229 .

60 *Queen-Empress v Zakir Hussain* ILR 21 All 159, 161 (**relying on***Empress v Gauri Shankar* ILR 6 All 42); *Mahommad Kajim Ali v Jarabdi Nahskar* AIR 1919 Cal 430, 20 Cr LJ 574, ILR 46 Cal 986, 29 CLJ 522 ; *Rajaram Bhavanishankar v Emperor* AIR 1920 Bom 319 ; *Fazl Ahmad v Emperor* AIR 1914 Lah 433, 15 Cr LJ 344, 139 Punj LR 1914, 1 PR 1914 (Cr) ; *Emperor v Chandra Kumar Missir* 2 Cr LJ 383, 2 CLJ 46 .

61 *R v Zakir Hussain* ILR 21 All 159 .

62 *Ibid*, at 163.

63 *R v Ajudhia Prasad* ILR 17 All 436 .

64 *Mahesh Chandra Dhupi v Emperor* AIR 1940 Cal 449, 42 Cr LJ 93, (1940) ILR 1 Cal 465 ; *Baroda Kanta Sarkar v Emperor* AIR 1916 Cal 553, 16 Cr LJ 620 ; *Amolak Ram v Emperor* AIR 1918 Lah 192, 19 Cr LJ 141, 56 Punj LR 1918, 13 PWR (Cr) 1918 ; *Reg v Gibbons* 31 LJMC 48, SCL & C 109.

65 *Queen-Empress v Tulja* ILR 12 Bom 36 .

66 *Reg v Venkatachallum Pillai* 2 Mad HC 43,p 55.

67 *Queen-Empress v Tulja* ILR 12 Bom 36, 43.

68 *Report of the Select Committee on the CrPC* 1898, para 3; *Mahommad Buksh v State of Uttar Pradesh* AIR 1953 All 739 ; *Basant Singh v Januk Singh* AIR 1954 All 447 ; *Reg v Venkatachallum Pillai* 2 Mad HC 43, p 55 .

69 *R v Virasami* ILR 19 Mad 375 .

70 *Babu Ram v R* 12 Cr LJ 373 .

71 *R v Berry* 8 Cox CC 121 ; *R v Hughes* ILR 10 Cal 604 .

72 1 Weir 151.

73 *Mahommad Buksh v State of Uttar Pradesh* AIR 1953 All 739 .

74 *Basant Singh v Janak Singh* AIR 1954 All 447 .

75 Re *Hazarilal* 29 Nag LJ 214.

76 *Lalji Haridas v State of Maharashtra & Anor* AIR 1964 SC 1154, (1964) 2 Cr LJ 249 .

77 *Ibid*.

78 *Rajaram Bhavani Shankar & Anor v Emperor* (1921) Cr LJ 23 (Bom) (DB) .

79 *Imperator v Mahro* 2 SLR 11, 10 Cr LJ 225, referring to *Queen-Empress v Sheikh Beari* ILR 10 Mad 232 ; *Queen-Empress v Matha* ILR 20 Mad 339 ; *Jhojha Singh v Queen-Empress* ILR 24 Cal 155 ; *Emperor v Ghulam Mustafa* ILR 26 All 371 .

80 *Queen-Empress v Tirunarasimha Chari* ILR 19 Mad 18 .

81 *Joseph v State of Kerala* 2014 (4) KLT 322, 2012 (4) KLJ 436 .

82 *Emperor v Andal* 5 SLR 174, 13 Cr LJ 33 ; *Emperor v Vishwanath Krishna Sethi* 8 Bom LR 589 ; *Empress v Algu Kone* ILR 16 Mad 421 ; *Suppa Tevan v Emperor* ILR 29 Mad 89 ; *Maromma v Emperor* AIR 1933 Mad 125, 126 .

83 *Emperor v Tasadduk Hussain* 7 Cr LJ 302 ; *Sheoraj v State* AIR 1964 All 290, (1964) 2 Cr LJ 1 ; *Puroshottam Ishar Amin v Emperor* AIR 1921 Bom 3, 22 Cr LJ 241 ; *Sajawal v Emperor* 33 Cr LJ 413 ; *Iboton Singh v Yaima Singh* AIR 1963 Mani 21, (1963) 2 Cr LJ 284 .

84 *Suppa Tevan v Emperor* 29 Mad 89 ; *Queen-Empress v Alagu Kone* ILR 16 Mad 421 ; *Public Prosecutor v Nagallinga Reddi* AIR 1959 AP 250 ; *Puroshottam Ishwar Amin v Emperor* AIR 1921 Bom 3 (FB) ; *Sajawal v Emperor* AIR 1932 Lah 254 .

85 *Kanchan Gorhi v Ram Kishun Mundal* ILR 36 Cal 72, 2 Cr LJ 118 ; **but see***Queen-Empress v Venkatarama* ILR 23 Mad 223 .

86 *Rajendranath v Dy Supdt of Police* AIR 1972 SC 470 .

1 *Gangawwa v State of Mysore* AIR 1969 Mys 114, (1969) Cr LJ 496 .

2 *Abdullah Khan v Emperor* ILR 37 C 52 ; *Sakhi Rai v Emperor* AIR 1919 Pat 266, 20 Cr LJ 245 .

3 *Laraiti v Ram Dial* ILR 5 All 224 .

4 *Queen-Empress v Har Chandra Chowdhury* ILR 25 Cal 440 .

5 *Abdul Rehman v Anees-Ul Hag* 2012 Cr LJ 1060, 2011 (12) Scale 609, 2011 (4) KLT SH 142 (SC) .

6 *Emperor v Kuna Sah* ILR 28 All 89, where *Hara Charan Mookerjee v King-Emperor* ILR 32 Cal 367 was **distinguished**.

7 *Bhola Nath Dey v Emperor* 10 CWN 55 ; *Dakineshwar Misra v Haris Chundra Chatterjee* 10 Cr LJ 564, 10 CLJ 450 ; *Chanan and Raghu Ram v Crown* 1 PR 1910, 11 Cr LJ 90 ; *Shioshankarpuri v Emperor* 16 Cr LJ 161 ; *Queen-Empress v Bapuji Dayaram* ILR 10 Bom 288 . The cases *Hara Charan Mookerjee v King-Emperor* ILR 32 Cal 467 and *Kanto Ram Das v Gobardhan Das* ILR 35 Cal 133, are **overruled** and *Jadu Nath Mahta v Jagadish Chandra Deb* 7 CWN 423 is no longer good law.

8 *Queen-Empress v Manaji* ILR 14 Bom 381 .

9 *Khotha Subba Chetty v Queen* ILR 6 Mad 252 ; *Gauri Shanker Lal v Emperor* 13 Cr LJ 190 .

10 *Emperor v Rup Singh* 3 Cr LJ 128 .

11 *Balchand v Tarak Nath Sadhu* 18 CWN 1323 .

12 *Municipality of Ahmedabad v Jumma Punja* ILR 17 Bom 731 .

13 *Hameed Khan v State* AIR 1957 All 121 .

14 Re *Veerappan*AIR 1944 Mad 37 .

15 *Soundarajan & Co Ltd v AK Sankarapandia Nadar* AIR 1958 Mad 69, (1958) Cr LJ 197 .

16 Explanation 1 to s 193 .

17 Explanation 2 to s 193 .

18 Explanation 3 to s 193 .

19 *Lalji Haridas v State of Maharashatra & Anor* AIR 1964 SC 1154, (1964) 2 Cr LJ 249 .

20 *Gulshan Kumar v Collector of Ghaziabad & Ors* AIR 1994 All 243 (DB) .

21 *Rajendra Jaina Towers Pvt Ltd v DDA* (1988) (14) DRJ 125, (1987) 33 DLT 216 (DB) ; *Gulshan Rai Nagpal v Principal, Government Law College* (2002) Cr LJ (Sik) 171 (DB) ; *Suo motu proceeding against R Kauppan, Advocate*(2001) Cr LJ 2611 (SC); *Ahiriyanna Gowda & Ors v State of Karnataka & Ors* (1998) Cr LJ 4756 (Kant) .

22 *Afzal & Anor v State of Haryana & Ors* (1996) Cr LJ 1679 (SC) .

23 *Queen-Empress v Ismail* ILR 11 Bom 659 .

24 Re *Kalagava Bapaiah* ILR 27 Mad 54.

25 *Queen-Empress v Venkataramanna* 23 Mad 223, but see sub-note (c) to note above.

26 *Dayanath Thakur v Emperor* 37 Cal 72 .

27 Re *Chotalal Mathuradas* 22 Bom 936.

28 *Empress v Chaitram* 6 All 103 ; *Chandrasangji Himatsangji v Mohan Sangji* ILR 30 Bom 523 (PC) ; *Chandra Sangh v Emperor* 4 Cr LJ 181 .

29 *Radhika Mohan Kuri v Lal Mohan Sha* ILR 20 Cal 719 ; *Abdul Majid v Krishna Lal Nag* ILR 20 Cal 724 ; *Phulal v Emperor* ILR 35 All 102 ; *Abdoola Haroon & Co v Calcutta Corpn* AIR 1950 Cal 36 .

30 *R v Sheodihal Rai* ILR 6 All 487 .

31 *R v Bykunt* 5 WR (Cr) 72 .

32 *R v Jibhai* 11 Bom HCR 11 .

33 *R v Chaitram* ILR 6 All 103, 1 Weir 154 .

34 *R v Irbasapa* ILR 4 Bom 479 ; *R v Venkayya* ILR 11 Mad 375 .

35 *R v Niaz Ali* ILR 5 All 17, 1 Weir 116 .

36 *Radhika Mohan Kuri v Lal Mohan Sha* ILR 20 Cal 719 ; *Abdul Majed v Krishna Lal* Nag ILR 20 Cal 724.

37 *Abdul Majed v Krishna Lal Nag* , supra.

38 *Abramayi v Joseph* (1960) Ker LJ 1307 ; cases cited therein.

39 *Emperor v Ismail Khadirshah* AIR 1929 Bom 130, 29 Cr LJ 403, ILR 52 Bom 459, 30 Bom LR 330 .

40 SD Art 148 ; *R v Gibbon L&C* 109; cf *R v Tyson* LR 1 CCR 107 ; *R v Mullany L&C* 593; *R v Baker LR* 1895 1 QB 797 .

41 *Ibid*.

42 Mayne, *Criminal Law of India*, p 366.

43 *R v Kailasam* 5 Mad HCR 373 .

44 *Badri Prasad v Emperor* AIR 1918 All 326, 19 Cr LJ 2, 15 All LJ 819, ILR 40 All 25 .

45 *Mangal Singh v State* AIR 1956 Pat 154, (1956) Cr LJ 647 .

46 *Abramayi v Joseph* (1960) Ker LJ 1307, per Raman Nayar J.

47 *Emperor v Chheda Lal* ILR 29 All 351, 5 Cr LJ 285, 4 All LJ 237 .

48 *R v Damodhar* 5 Bom HCR 68 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 193.

Punishment for false evidence.--

Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine,1430

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.--A trial before a Court-martial is a judicial proceeding.

Explanation 2.--An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration

A, in an inquiry before a magistrate for the purpose of ascertaining whether *Z* ought to be committed for trial, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, *A* has given false evidence.

Explanation 3.--An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a court of Justice.

Illustration

A, in an inquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, *A* has given false evidence.1431

Comments

1. Scope

This section prescribes the punishment for the two offences defined in the preceding two sections. Paragraph 1 of this section provides higher punishment for giving false evidence, or for fabricating false evidence for the purpose of being used in any stage of a judicial proceeding and para 2 provides lighter punishment for giving false evidence, or fabricating false evidence in any other case. It may be noted that s 191 defines the offence of giving false evidence. This section provides for the punishment. It does not say that there are two kinds of perjury, but that if perjury is committed in the stage of a judicial proceeding it may be punished more severely1432 than if committed in any other case. The offence is perjury wherever it may be committed.[49] The gravity of the offence is then measured, not by its nature and character, but by the nature and character of the tribunal before whom it is committed.[50] The argument that this section applies only to false evidence given in a judicial proceeding applies only to para (1) of the section. It does not apply to para (2).[51] The developments are of some consequence and of concern insofar as the proceedings before the court are concerned; that the parties and the persons seeking for relief do come with material which is suspect, which is fabricated, which is forged and seek for orders, interim or final, on the basis of such concocted documents and further if they further embolden themselves to swearing to an affidavit indicating that such documents are either true copies or certified copies, then matter calls for an appropriate action at least to send a right message to such errant and irresponsible persons.[52]

Where a candidate at an election does not furnish required information or knowingly furnishes false information or conceals any information, he is liable to be prosecuted for offence under s 125A of the

Representation of the People Act, but he cannot be prosecuted for offence under s 193, IPC .[53]

Making false statement on oath before the court is an offence under s 191, IPC, and punishable under s 193, IPC .[54]

Tendering of false evidence as well as threats and intimidation to any person to give false evidence have been made penal offences under ss 193 and 195(A), IPC .[55]

2. Legislative Changes

In expln I, the words 'or before a Military Court of Inquest' between 'court-martial' and 'is' were repealed by the Cantonments Act 1889, s 2 and schedule.

3. Analogous Law

Commentary under s 191, *ante* may be referred to.

4. Essentials

Section 193, IPC is a penal provision. Whoever intentionally gives false evidence in a judicial proceeding or fabricates false evidence for the purpose of being used in a judicial proceeding is made punishable under this section. The offence of giving false evidence is constituted if the following ingredients are satisfied or found to exist:

(a) A person is legally bound:

(i) by an oath or any express provision of law to state the truth, or
(ii) to make a declaration upon any subject.1433

(b) He must make a false statement;
(c) He must:

(i) know or believe it to be false, or
(ii) not believe it to be true.

The offence of fabricating false evidence is constituted if the following ingredients are satisfied:

(a) Causing any circumstance to exist or making any false entry in any book or record or making any document containing a false statement.
(b) Doing one of the above acts with the intention that it may appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant or an arbitrator.
(c) Doing such act with the intention that it may cause any person who in such proceeding is to form an opinion upon the evidence to entertain an erroneous opinion touching any point material to the result of such proceeding.[56]

Commentary under same heading in ss 191 and 192, *ante* may be referred to.

To hold a person guilty under s 193, IPC, it must be determined as to whether the earlier statement was false or true.[57]

5. Distinction Between Sections 167 And 193

Commentary under the same heading in s 167, *ante* may be referred to.

6. Section 193 Distinguished from Section 199

Section 191 read with ss 193 and 199 of this Code make the making of false declarations an offence. The distinction between the provisions of these two sections, insofar as the making of the declaration is concerned, is that under s 191, the declaration is one in which a person is bound by an oath, or by an express provision of law, to state the truth, or being bound by law to make a declaration upon any subject, makes a statement which is false. The declaration contemplated in s 199 is not necessarily one which the person, making the declaration is bound by law, to make. The essential element of the offence under s 199 is that the declaration, containing the false statement must be one which any court of justice or any public servant or other person is bound or authorised by law to receive as evidence of any fact.[58]

7. Section 193 Distinguished from Section 218

The offence under this section is a general one and does not specify the person or the kind of document. It may be any person and the fabricated evidence may be in any form. Section 218, on the other hand, deals with the intentional preparation of a false record by a public servant with the object of saving or injuring any person or property. Under this section, the evidence is intended to be used in a judicial proceeding whereas, s 218 deals with public servants and the1434 gist thereunder is the intentional preparation of a false record with a view to saving or injuring any person or property. This need not have any relation to a judicial proceeding as such.[59]

8. Sections 193 and 195 Distinguished from Section 211

A statement on oath falsely supporting the prosecution case against an accused person more appropriately amounts to an offence under ss 193 and 195, IPC and not under s 211, IPC . The offences contemplated by ss 193 and 195, IPC on the one hand and s 211, IPC on the other were not intended by the Legislature in this context to overlap so as to make it optional whether to proceed under one or the other.[60]

9. Sections 193 and 108 of Customs Act

The requirement to state the truth, enacted under sub-s (3) of s 108 of the Customs Act must be read in the light of the penalty provided for its breach, that the person summoned is liable to be prosecuted under s 193 as also under s 228, IPC . It should, however, be kept in mind that s 108 of the Customs Act does not compel a person summoned to incriminate himself. In other words, he can maintain a studied silence if the answers to the questions put to him are likely to incriminate him. In such a situation, s 193, IPC is not attracted. The right of silence is also not an offence and it cannot be said to be an obstruction to the proceedings referred to under s 108 of the Customs Act.[61]

10. Distinction between Sections 463, 465, 471 and Sections 193, 196

Commentary under same heading in s 196, *post* may be referred to.

11. Show Cause Notice to Hostile Witness

Where hostile witnesses stated before the court that the investigating officer had not recorded their statements as per their say but did not point out as to why he recorded their statements falsely, there was reason to believe that they have given false evidence before the court. It was held that such incidents need to be taken seriously and show cause notice as to why proceedings under s 193 of the

Indian Penal Code 1860 should not be initiated against them, was directed to be issued to them.[62]

12. 'Whoever'

Commentary under same heading in ss 191 and 192, *ante* may be referred to.

The word 'whoever' is quite general and includes an accused person.[63] Anybody who makes a false statement on oath knowing it to be false makes himself liable to be prosecuted for perjury.[64]1435

13. 'Intentionally'--Meaning of

In order to sustain an indictment for perjury the prosecution must establish, *inter alia*, two things: (a) that the statement was false, and (b) that it was known or believed to be false or not believed to be true. In other words, the statement must be intentionally false.[65] False evidence is intentionally given if the persons, making the statement, makes it advisedly, knowing it to be false, and with the intention of deceiving the court and leading it to be supposed that that which he states is true.[66]Even under the English Perjury Act 1911,[67] the false statements must be willfully made, that is, the false evidence must be given intentionally.[68]*Mens rea* is an essential ingredient of the offence of perjury and it is the intention that creates the offence.[69] The mere fact that a statement made by a witness turns out to be wrong or inaccurate, does not make him liable to punishment. He must make the statement deliberately and must know or believe it to be false or must not believe it to be true. It is not difficult to imagine a witness making two statements which are contradictory to each other and one of which he does not know or believe to be false.[70] Mere contradiction is not sufficient. The deponent's intention to give false evidence or fabricated false evidence is necessary.[71] To sustain a conviction under this section, among other things it must be proved beyond doubt that the statements of the accused are deliberately false.[72] The essence of the offence is the intention.[73] The primary ingredient of s 193 of the Code is intentionally giving false evidence in any stage of judicial proceedings or intentionally fabricating false evidence for the purpose of being used in any stage of the judicial proceedings.[74]

Where in petition filed under s 482, CrPC, the petitioner filed affidavit that he had not approached the Supreme Court or the High Court earlier, but the petitioner had filed application for anticipatory bail before the Court of Sessions, held, it does not amount to perjury so as to call for action for offence under s 193, IPC .[75]

Intention is a Question of Fact

Intention is a question of fact to be decided in each case.[76] The offence described in this section is the offence of intentionally giving false evidence and the intention can only, as a rule, be judged by the surrounding circumstances. If the matter deposed to1436 was irrelevant or of minor importance, the court cannot infer that there was any deliberate intention.[77] In *Queen v Aidrus Sahib* ,[78] Scotland CJ, observed:

> For the giving of false evidence, to come within section 193, must be an intentional giving; and in deciding whether or not the subject-matter of the statement were material to the result of the proceeding, inasmuch as if that subject-matter were wholly immaterial, they might well attribute the statement to indifference or carelessness on the part of the prisoner.

Corrupt intention may be inferred from the surrounding circumstances.[79] If the statement was false and known to the accused to be false, it may be presumed that in making it the accused intentionally gave false evidence.[80]

14. Giving False Particulars of his Educational Qualifications on Website

Where a person gives false particulars of his educational qualifications on website, even if he is a MLA, he cannot be prosecuted under s 193, IPC . Likewise, where biodata of members of the Legislative Assembly are published by the Legislative Secretariat, no offence under s 193, IPC is committed.[81]

15. 'Gives False Evidence'--Words Refer to Oral Evidence

The words 'whoever intentionally gives false evidence in any state of a judicial proceeding' used in this section, refer only to oral evidence given by a person in any state of judicial proceedings. Accordingly, merely because a false or fabricated document has been produced before a court it cannot be said that the person producing the document has given 'false evidence' as contemplated by s 193, IPC in the case.[82] But giving false evidence before the High Court by swearing a false affidavit in support of a writ petition has been held to be an offence under this section.[83]

A close scrutiny of ss 191 - 193 shows that they deal with false evidence.[84] An affidavit can be termed to be an evidence within the ambit of s 3 of the Evidence Act only in those cases when the same is filed at the instance and under the direction of the court.[85]

Thus, an affidavit filed *suo motu* by a party and not under the direction of any court, does not attract ss 191 - 193, IPC .

16. 'In any stage of a Judicial Proceeding'--Whether Existing or Foreseen

This section consists of two paragraphs. The first applies to intentionally giving false evidence in any stage of a judicial proceeding or fabricating false evidence1437 for the purpose of being used at any stage of a judicial proceeding. The giving of false evidence in a judicial proceeding plainly contemplates a judicial proceeding being in existence; while fabricating false evidence for the purpose of using it at any stage of a judicial proceeding contemplates some definite judicial proceeding being foreseen.[86]If an accused can be found to have intentionally given false evidence at the stage of trial, his act would obviously fall within the mischief of this section.[87]

The accused petitioner had obtained interim order staying the election to the post of President Town Panchayat by filing forged and fabricated documents and swearing false affidavit. A *prima facie* case for proceeding under ss 192 and 193, IPC against the petitioner was held made out.[88]

Meaning of any Stage

By 'any stage of a judicial proceeding' is meant 'any step taken by the court in the course of administration of justice in connection with a case pending'.[89] It is immaterial that the trial in which false evidence is given subsequently becomes abortive for any reason.[90]

An investigation under ch 12 of the CrPC, 1973 has been held to be a stage of a judicial proceeding.[91] The Kerala High Court has, however, held that every investigation conducted by the police is not a judicial proceeding unless it is an investigation directed by a law preliminary to a proceeding before a court of justice or it is an investigation directed by a court of justice.[92] Committal proceedings are a stage of the judicial proceedings before the sessions judge.[93]

Proceedings Without Jurisdiction

A preliminary inquiry under s 476 of old CrPC 1898 (new s 340 of the CrPC 1973), conducted by a magistrate having no jurisdiction to conduct it, is not a 'stage of judicial proceeding' within the meaning of this section.[94]

Proceedings before the income-tax authorities are judicial proceedings,[95] but the filing of a return is not a stage of a judicial proceeding.[96] Section 37(4) of the Income Tax Act makes the proceedings

before the income tax officer judicial proceedings under s 193, IPC .1438

Where, therefore, an offence under s 193, IPC is committed in respect of the proceedings before the income tax officer, the complaint by the officer is a condition precedent prescribed under s 195(1)(b), CrPC before a magistrate can take its cognizance.[1]

17. 'In any Other Case'--Meaning of

These words have been used in the second paragraph of this section and mean in any case, other than a judicial proceeding, in which the giving or fabricating false evidence is an offence. Such cases have been dealt with in ss 191 and 192 . A statement recorded under s 164, CrPC, in the course of an investigation has been held to be an 'evidence in any other case'.[2]

18. Explanations to the Section

The first para of this section uses the term 'judicial proceeding' twice but it has not been defined anywhere in the Code. Clause (i) of s 2 of the CrPC 1973 deals with this term but does not define it exhaustively.

It simply states that a 'judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath. Explanation 1 to s 193 states and clarifies that a trial before a court-martial is a judicial proceeding.

For a detailed discussion the commentary under s 192 may be referred to.

Investigation and Inquiry--Explanation 2

Again for the definition of the term 'investigation' used in expln 2 we have to fall back on the provisions of cl (h) of s 2, CrPC 1973 which defines 'investigation' as follows:

> Investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a magistrate) who is authorized by a magistrate in this behalf.

Like the definition of a 'judicial proceeding', even this definition of investigation is not exhaustive but one thing is clear from it that an investigation cannot be conducted by a magistrate. It is, therefore, submitted that the illustration appended to expln 2 does not appear to be very appropriate. Though this explanation also speaks of an investigation which may not take place before a court of justice, the illustration, however, speaks of an inquiry before a magistrate for the commitment of the accused for trial. According to cl (g) of s 2, CrPC, 'inquiry' means every inquiry, other than a trial, conducted under this Code by a magistrate or court. Thus, an inquiry has to be conducted by a magistrate while an investigation cannot be conducted by any magistrate. The word 'inquiry' mentioned in the illustration to expln 2, therefore, cannot be read as an 'investigation' mentioned in this explanation. An investigation directed by s 156, CrPC may be cited as an appropriate illustration to expln 2.

Explanation 3

Again expln 3 speaks of an investigation but the illustration thereto is in respect of an inquiry. This illustration, however, cannot be termed to be inappropriate as it is not1439 conducted by a magistrate. An investigation contemplated and ordered by a magistrate under sub-s (2) of s 155 in a non-cognizable case or the one directed under sub-s (3) of s 156 or sub-s (1) of s 202, CrPC in other cases may be other illustrations to expln 3. Though the police is not authorised to administer oath to persons during the course of an investigation and their statements are not recorded on oath, the

persons interrogated by the police are bound to answer truly, as required by sub-s (2) of s 161, CrPC and they are liable to be prosecuted for making a false statement as discussed above under s 191 . It seems to be the reason for treating the investigation as a judicial proceeding for a limited purpose under this explanation.

19. Procedure

The offence is non-cognizable but a warrant shall ordinarily issue in the first instance. It is bailable but not compoundable. The first part of the offence, namely, giving or fabricating false evidence in a judicial proceeding is triable by a magistrate of the first class. The second part regarding giving or fabricating false evidence in any other case is triable by any magistrate.[3] But the cognizance can be taken by the magistrate only on the complaint of the court concerned under s 195(1)(b), CrPC . The entire proceeding is violated if the complaining magistrate himself takes the cognizance.[4] If the complaint is not filed by the court, the court cannot take cognizance thereof by virtue of s 195(1)(b) of the Code of Criminal Procedure 1973.[5]

It is well settled that a complaint under s 195 of the Code must be a regular formal complaint in writing. Where the Chief Judicial Magistrate was the complainant, he should have filed complaint in some other Court to which he was subordinate. Since he filed complaint in his own Court, the conviction of the accused appellant under s 193, IPC was set aside.[6]

Where a false affidavit is filed in a judicial proceeding pending before an additional district judge, Delhi, which is a serious matter, any action to be taken in the matter is primarily a matter of the court's discretion. The offence under s 193, IPC is attracted and the appellant court cannot examine the defence of the accused or the appellant and record the finding thereon.[7]

The procedure for warrant cases has to be followed in the cases under this section. To try such case as a summons case is an illegality.[8]

In case forged affidavits are filed before the Supreme Court, it cannot try and punish the accused, and the order of the Supreme Court convicting the accused and sentencing him to 3 months' imprisonment under s 193, IPC is liable to be set aside for non-compliance with the procedure under s 195, CrPC read with s 304, CrPC and also account of want of original jurisdiction to try a criminal offence under s 193, IPC .[9]1440

Section 340, CrPC prescribes the procedure as to how a complaint may be preferred under s 195, CrPC . While under s 195, CrPC it is open to the court before which the offence was committed to prefer a complaint for the prosecution of the offender, s 340 CrPC prescribes the procedure as to how that complaint may be preferred. Provisions under s 195, CrPC are mandatory and no court can take cognizance of offences referred to therein. It is in respect of such offences that the court has jurisdiction to proceed under s 340, CrPC and a complaint outside the provisions of s 340, CrPC cannot be filed by any civil, revenue or criminal court under its inherent jurisdiction.[10]

Offences under s 193, IPC and s 344, CrPC are distinct offences, thus, conjunction of the two offences and prosecution of the accused at one trial is neither permissible nor proper.[11]

20. Limitation

There is no period of limitation for an offence following under the first para of this section as the offence of giving false evidence in a judicial proceeding or fabricating false evidence for the purpose of being used in any judicial proceeding is punishable with imprisonment extending to seven years. Before the enactment of s 468, CrPC 1973 the courts discouraged prosecution or proceedings for prosecution under this section in belated cases. The observations of the Supreme Court in *KN Mishra v Jiwaji University* [12] made in this respect are reproduced below:

> It is not expedient in the interest of justice that a complaint should be laid against the appellant after so many years. The laying of a complaint at this belated stage would make the prosecution a veritable prosecution. It is not possible to agree that since the appellant had obtained a decree against University for a large amount by making a false statement on oath the interest of justice required that a complaint should be laid against him and that unless a complaint was laid the University would not be able to get back its money from the appellant.

> It is not the function of the court hearing an application under section 476[13] to cater to the acrimonious and vengeful attitudes taken up by the parties and to advance their interest elsewhere. It is not expedient to permit the continuance of proceedings for the laying of a complaint in regard to a state matter which took place years ago.

These observations were made by the Supreme Court while dealing with a proceeding under s 476 of the CrPC 1898. It is submitted that these observations now no longer hold good and cannot be relied upon while dealing with the cases governed by the Code of 1973 and no complaint for an offence punishable with imprisonment for a term exceeding three years can now be thrown away merely on the ground of delay unless it is not otherwise expedient to proceed with it.

Exclusion and Extension of Time

The period of limitation for an offence falling under the second para of this section is three years. If after concluding the preliminary inquiry, if any, under s 340, CrPC the complaint in such cases is not made well before the expiry of three years and the1441 cognizance is not taken by the court before the expiry of such period, the cognizance cannot be taken thereafter unless any period is excluded under ss 470 and 471 or the limitation is extended by the court under s 473, CrPC .[14]

21. Merger of the order in the order of Higher Court or Authority

The merger of the judgement or order of the trial court in the judgment or order of the court of appeal or revision does not affect the powers of the trial court to file a complaint for prosecution under this section. Where the offences under ss 193 and 196 were committed, according to the complainant, at the time of the proceedings before the first income-tax officer, the fact that subsequently the order of the income tax officer has merged in the order of the tribunal does not in any manner obliterate the guilt of the offence and as such, the officer, who is the successor to the office of the forum from where the complaint had been made, retains the jurisdiction to make the complaint. Furthermore, after the disposal of the appeal by the tribunal, the income-tax officer gets seisin of the matter for the purpose of implementing the order of the tribunal. It is not possible to accept the contention that because there was an appeal before the appellant assistant commissioner and thereafter before the tribunal, the income tax officer concerned has lost jurisdiction to proceed to make the complaint. It is true that the original income tax officer had not made the complaint. But his successor to the office, who has filed the complaint, was competent to make the complaint.[15]

22. Complaint Necessary only if Offence Committed in or in Relation to Any Proceeding in Court

Commentary in s 195(1)(b) of the Code of Criminal Procedure 1973 may be referred to.[16]

Any Proceeding in Court

So far as the provisions of s 195, CrPC are concerned, it is significant that cl (b) refers to 'any proceeding in any court', and is not confined to a judicial proceeding. It is, therefore, not necessary for

its application that the court should be engaged in a judicial proceeding. It is also clear from sub-s (3) that the term 'court' in s 195, CrPC is used in a very wide sense. The word 'includes' indicates that there may also be courts other than civil, revenue or criminal courts. The recording of a confession under s 164, CrPC has been held to be a proceeding in a court within the meaning of this section.[17]

Mutation proceedings before a *mamlatdar* or *muktiarkar* are not judicial proceedings,[18] but they are proceedings before a court within the meaning of s 195, CrPC .[19]A proceeding for a composition or scheme under the Insolvency Act is in relation to the original insolvency proceedings itself which is a proceeding in court within the meaning of s 195(1)(b), CrPC . Consequently the use by the insolvent of an1442 affidavit, showing a person as his creditor in a composition, which to his knowledge was false, constitutes an offence committed in relation to a proceeding in a court within the meaning of s 195(1)(b) .[20]

The accused filed forged and fabricated documents before the Motor Accident Claims Tribunal. *Prima facie* offence under s 193, IPC was committed. No separate complaint by the public servant was held necessary, and bar of s 195, CrPC was not attracted. Inquiry under s 340, CrPC was also not required.[21]

Where a false charge was made to the police and on the report of the police after investigation, a magistrate discharged the accused and cancelled his bail bond, it was held that the offence under s 211 was committed in relation to a proceeding in court and a complaint of the magistrate was necessary.[22]

A prosecution for offence under s 193, IPC was initiated by the complainant and not by any court or a public servant, as contemplated under sub-cl (i) of sub-s 1(b) of s 195, CrPC . If the complaint had come to be filed without their being a case pending in the court, the matter would have been different. However, this being not the case, the discretion exercised by the magistrate in issuing the process was held capricious and arbitrary and such complaint suffered from a fundamental legal defect.[23] Offence punishable under s 193, IPC cannot be taken cognizance of on the basis of a private complaint.[24]

Where an offence is committed by a constable in a transaction which arose out of the execution of a warrant issued by a court, the offence is committed in relation to a proceeding in court and a complaint of the court is necessary.[25]

Offence in or in Relation to a Court Proceeding

The offence committed must be in connection with 'any proceeding' in any court.[26] Clause (b) of s 195(1), CrPC applies not only when an offence mentioned in it is committed in a proceeding in any court but also when it is committed in relation to a proceeding in a court. It has been held by the Allahabad High Court that it is not possible to hold that an offence is committed in relation to a proceeding when in fact there has been no proceeding, and to hold it to be in relation to the proceedings in a court retrospectively because subsequently some proceedings did go into court.[27] But some of the offences enumerated in the clause are capable of being committed in relation to a judicial proceeding which did not exist. False evidence, for instance, may be fabricated for a contemplated suit, or property may be fraudulently concealed in contemplation of an execution proceeding. The clause applies if a judicial proceeding is in existence at the time when it is sought to prosecute the offender for the offence in question. As held in *Re Indrachand Bacharai*[28] the crucial date for the1443 purpose of s 195, CrPC, is the date when the court takes cognizance of the offence.[29] The words 'in relation to' make it clear that s 195(1)(b) is sufficiently wide to cover cases where the offence alleged was committed in relation to proceedings subsequently instituted in court.[30] It is, however, necessary that the 'proceeding in any court' referred to in the clause should be actually instituted before the criminal court is asked to take cognizance of the offence.[31]

The clause does not apply to a prosecution for the offence of making a false charge which had not

reached any court of law.[32] No complaint of court is required under cl (b) of sub-s (1) to prosecute a person for having fabricated false evidence during a police investigation and when there was no proceeding pending in any court in relation to which the alleged false evidence was said to have been fabricated.[33]

Section 195(1)(b), CrPC also does not apply to an offence committed under s 193, IPC, in respect of proceedings in a court of law which are contemplated but which in fact are never started.[34]

If a false charge to the police is the basis of subsequent proceedings in court, a complaint of the court is necessary even if the accused is discharged in the proceedings,[35] or the proceedings are withdrawn.[36]

A returning officer deciding on the validity of a nomination paper under s 36 of the Representation of the People Act 1951, is not a court for the purpose of s 195, CrPC . An offence under s 193, IPC proceeding before him is not committed in relation to a proceeding before a court so as to require a complaint by him. But there is no legal impediment to the returning officer himself filing a complaint under ss 181 - 182, IPC, as provided in cl (a) of that section and charging the accused therein with also an offence under s 193, IPC .[37]

When Offences Falling Under Section 195 , CrPC and Other Offences are Inseparable

When offences under ss 420, 464, 466, 468 and 471 of the IPC are, on the facts and in the circumstances of the case, so intermingled with offences under ss 193 and 209 of the IPC and they are alleged to have been committed in the same transaction and it is not possible to separate the trial in respect of some of the offences which do not attract the provisions of s 195 (1)(b) of the Code, it is well settled that it is not open1444 to a court to proceed with the trial by dropping the charge for offences which attract the provisions of s 195 of the Code.[38]

23. First Information Statement under Section 154 , CrPC

First information statement is the only information on which the concerned police officer has to start the investigation, to find out the truth and collect the materials. It can be given on hearsay information also. A wrong first information statement purposely made for initiating action may be of consequence under some other provision, for example in an action for malicious prosecution, but it is not penal under s 193 on the basis of s 191 .[39]

To hold a person guilty under s 193, IPC, it must be determined as to whether the earlier statement was false or true. Merely because an informant does not support the allegations made in the FIR, he commits no offence punishable under s 193, IPC .[40]

24. Prosecution of an Approver for Perjury

Provisions of ss 195 and 340, CrPC 1973 do not apply to an offence committed by an approver under this section. In one case, a petitioner had turned approver but at the trial he resiled from the earlier statement made by him before the magistrate, by whom the pardon was tendered to him. On a certificate issued by the public prosecutor, he was tried for the main offence. The sessions judge, while acquitting him, passed an order directing that he shall be prosecuted under s 193, IPC for giving false evidence and filed a complaint to that effect in the court of the magistrate. The High Court held that the complaint could not be filed as there was no sanction of the High Court as required by the second proviso to sub-s (1) of s 308, CrPC .[41]

25. Distinguishing Features of Sections 340 and 344, CrPC[42]

There is nothing in s 344 which makes a distinction between flagrant offences and offences which are not flagrant, or between serious offences and offences which are not serious. If the court does not

form and express an opinion that the witness has intentionally given false evidence or intentionally fabricated false evidence or it is not satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating false evidence, no question of taking an action under s 344 can arise. Even under s 340, the court must, before making a complaint, be satisfied that it is expedient in the interests of justice to make an inquiry into the offence committed by the witness. The court has an option to proceed either under s 344 or s 340 and if it does not take action under s 344, it can do so under s 340 . The power of the court to this effect has been specifically saved by sub-s (3) of s 344 of the Code of Criminal Procedure 1973. But where no complaint is filed under s 340, CrPC and the requisite opinion is not expressed in the judgement, no action under s 344 is permissible. Whereas s 340 is a general provision dealing with the procedure to be followed in respect of a variety of offences affecting the administration of justice, insofar as certain offences falling1445 under ss 193 to 196 and s 471, IPC, *etc.* are concerned, every court before which that person has appeared as a witness and which disposed of the case can make a complaint.

For the purpose of s 340 a court means a civil, revenue or criminal court, and includes a tribunal (ss 340(4) and 195(3), CrPC 1973) but an action under s 344 can be taken only by a court of sessions or a magistrate of the first class. An order passed under s 340, CrPC is appealable under s 340(1), CrPC and even when no order for making a complaint or rejecting an application for making a complaint is made under s 340(1), CrPC the superior court can exercise such power under sub-s (2) of s 340 . Unlike s 340, no such powers have been given to a superior or appellate court against an order passed or omission to pass an order under s 344 for the trial of a witness for committing perjury or fabricating false evidence.[43] If on summary trial by the concerned court of session or the magistrate of first class, before whom the offence was committed by the witness, he is convicted, the general provisions of appeal or revision against such conviction shall apply. In case an appeal or revision is preferred against the judgment or order, in which the opinion for trying the witness was expressed, the trial has to be stayed until the disposal of the appeal or revision and thereupon, the further proceedings of the trial shall abide by the result of the appeal or revision.[44]

An essential prerequisite for proceedings under s 344, CrPC is that at the time of the delivery of the judgment, the court should have formed an opinion about the falsity of the evidence of the witness. It will not apply where the court cannot form such an opinion as the perjury is discovered after the delivery of the judgment.[45]

Successor Magistrate cannot act under Section 344 , CrPC Without Required Observations in Judgment

It will also not apply where the predecessor magistrate did not manifest in his judgment that he was proceeding to try the offenders for an offence under s 193, IPC . The steps taken by the successor magistrate to have the accused summoned before him under s 344, CrPC therefore, cannot be allowed to sustain.[46]

26. Whether Offence Cognizable under Section 344 , CrPC Different from the Offence under this section

The relevant part of para 1 of s 193 runs:

> Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment.... which may extend to seven years, and.....fine.

On the other hand, the relevant part of s 344(1), CrPC runs:

(1) if, at the time of delivery of any judgment or final order disposing of any judicial proceeding, a court of session or magistrate of the first class expresses an opinion to the effect that any witness appearing in any such proceeding had knowingly or fully given false evidence should be used in such proceeding it or he may, if satisfied that.... The1446 witness should be tried summarily for giving or fabricating.....false evidence, take cognizance of the offence and may, ... Try such offender summarily and sentence him to imprisonment for a term which may extend to three months, or to fine..... or with both.

Difference in Procedure--Forum and Quantum of Punishment only

A close scrutiny of the provisions of both the sections cited above reveals that the nature of the offence and its ingredients are the same in both the sections. The real difference in the two sections is regarding the procedure, forum and quantum of punishment. An offence under para one of s 193 is triable by a magistrate of the first class[47] on the complaint being filed by the concerned court under s 195(1)(b), CrPC .

On the other hand, if such offence is committed in any judicial proceeding before a court of session or magistrate of the first class and at the time of finally disposing of such proceeding, the sessions judge or the magistrate expresses an opinion in his judgment or order to the effect that a particular witness appearing in such proceeding had knowingly or willfully given false evidence or had fabricated false evidence with the intention that such evidence should be used in such proceeding and on his satisfaction that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating false evidence. He may himself take cognizance of the offence if the concerned court feels that it is expedient in the interest of justice that the person committing an offence under s 193 should be punished, or after making the necessary inquiry as provided by s 340, CrPC, it may make a complaint for his prosecution in the court of the magistrate of the first class having jurisdiction. Such court may be a civil court, criminal court, revenue court or a tribunal. Sub-section (3) of s 344 leaves no room for any controversy or doubt about the nature of the offence dealt with by these two sections (*i.e.*, ss 340 and 344, CrPC) as it clearly provides that nothing in s 344 shall affect the power of the court to make a complaint under s 340 for the offence, where it does not choose to proceed under s 344 . It means that s 344 provides the summary trial of the same offence for which a provision has been made in s 340 .

In *Ismail Khan v State* ,[48] while acquitting the accused of offences punishable under s 143 and s 506, IPC, the trial magistrate ordered to issue notice to the complainant, who had appeared as PW 1 before him to show cause as to why he should not be punished for giving false evidence in the judicial proceedings. Not satisfied with his reply, the magistrate came to the conclusion that he should be tried for having committed the offence punishable under s 193, CrPC . On a petition under s 482, CrPC by PW 1 before the Karnataka High Court, MM Mirdhe J, constituting the single bench, quashed the order of the magistrate initiating the proceeding against the petitioner. The following observations made by Mirdhe J, are relevant:

> The offence under s 193, IPC is punishable with imprisonment for seven years in maximum whereas the offence for which the person can be tried summarily by a court under s 344 CrPC is punishable in maximum with imprisonment for 3 months or fine which may extend to Rs 500 or with both. Looking to the punishment prescribed for the offence of giving false evidence contemplated under s 344, CrPC it is clear that the offence for which a person can be summarily tried under s 344, CrPC is not the offence punishable under s 193, IPC and if the magistrate is to proceed under s 344, CrPC against a person no complaint will be necessary. But, in the instant case, the magistrate1447 has proceeded against the petitioner for the offence under s 193, IPC when there is no complaint by the court itself.

Quantum of Sentence not the Yardstick to Determine the Offence

With respect it is submitted that s 344, CrPC prescribes the procedure for the summary trial of the offence punishable under s 193, IPC and merely on the basis of sentence the conclusion that the offence of giving false evidence contemplated under s 344, CrPC is not the offence punishable under s 193, IPC is not correct. These observations completely overlook the concept of summary trials meant for the speedy disposal of cases. In general, all offences not punishable with imprisonment for a term exceeding two years can be tried summarily but certain offences punishable with imprisonment, which may extend to three years or even seven years can be tried summarily.[49] The maximum sentence that can be passed in the case of conviction on summary trial is three months only.[50] If the yardstick of sentence is to be applied to determine the nature of an offence as done by the Karnataka High Court, the provisions of s 260(1), CrPC will be rendered nugatory or at least inconsistent or irreconcilable. To quote one more example, under para 4 of s 174, IPC non-attendance in a court of justice in obedience to a summons is an offence punishable with simple imprisonment extending to six months or with fine which may extend to one thousand rupees, or with both. If the summoned person had to appear before any criminal court, instead of making a complaint against the offender, the court has been empowered by s 350, CrPC to take cognizance of the offence itself and try him summarily but in that case the maximum punishment that can be awarded is a fine not exceeding one hundred rupees. The punishment that can be awarded in summary trials is thus always less than the punishment to be awarded in regular trials under other provisions of CrPC though the offence is the same.

Offence is same under Sections 193 , IPC and 344, CrPC

After the above discussion, it is evident that both s 193, IPC and s 344, CrPC make provisions for the punishment of one and the same offence under two different procedures and there seems to be no reason to say that the offence of which the cognizance can be taken under s 344, CrPC is a new or different offence, other than one punishable under s 193, IPC and the Karnataka case has not been correctly decided on this point.

27. Factors to be Considered before Making Complaint--Expediency

'Expediency in the interest of justice' does not correspond to 'interests of justice'. The court must be satisfied about expediency and must clearly record that jurisdictional finding before taking any step for prosecution. Where on notices being issued to the petitioners to show cause as to why they should not be prosecuted under s 193, IPC, they filed a joint reply and it was submitted on their behalf that whatever they stated before the committing court and at the trial was truthful. They were illiterate persons and the police gave them beating and forced them to give their statements against their will before the sub-divisional magistrate, and accordingly they gave their statements under s 164, CrPC, as directed by the police. Their statements before the committing court as well as before the session judge, according to them, were the correct statements. The sessions judge was not satisfied with the1448 reply made by these petitioners and recorded the order that separate complaints be made against them for having given false evidence. On appeal, the High Court held that in the circumstances of the case, it shall not be in the interest of justice to prosecute the petitioners under s 193, IPC . It is also not expedient in the interest of justice to prosecute a person under s 193, IPC, who in the witness-box resiles from his statement made under s 164, CrPC, and says that he was forced by the police to make that statement, specially when the person is an illiterate and it is impossible to rule out the possibility that he was forced to make the statement.[51]

Court not to Become the Handle in the Hand of any Party

The court should also see that it does not become the handle in the hands of the parties who move in the matter out of spite or grudge which they bear against their opponents.[52] Where the account books called upon by the income tax officer, which are proved to be in existence, are not produced and

where the person called upon to do so, does not give any reason for not producing them, but makes the statement that he had no account books other than those already produced by him, which was clearly false, the statement being a wrong statement, his conviction under s 193 of Indian Penal Code was held to be correct.[53]

28. Other Facts to be taken into account in Making a Complaint for Perjury--Statement must be Intentionally False

In making a complaint for perjury against a witness, the magistrate should remember that the statement must be intentionally false in order to justify a prosecution. When the question is neither material to the issue in the case nor goes to the credit of the witness, proceedings ought not to be started. Further, prosecution for perjury should be launched only in cases wherein it appears to be deliberate and conscious and conviction is reasonably probable or likely.[54] Some allowance ought to be made to a witness seeking to evade some matter relating to, for instance, his past history.[55] It has been held that it is not necessary that the statements which form the subject-matter of a charge under s 193, IPC should be material for the decision of the suit and the question can only be considered for the purpose of the sentence, in the event of a conviction.[56] But if the statement is not material in the sense that it did not hamper the course of justice, it is not in the interests of justice to prosecute the witness for perjury.[57] The materiality of the evidence to the matter in issue is not the only point1449 to be considered.[58] Where the evidence of a witness was disbelieved by the trial court but was accepted by the appellate court, it is not in the interest of justice to prosecute him for perjury.[59]

Prosecution on Merely Disbelieving the Case and the Witnesses not Justified

The mere fact that the court does not accept the complainant's version or does not rely upon the evidence of the persons produced as witnesses in the case, cannot justify prosecution under ss 211 and 193, IPC . Such prosecutions can be ordered only when the record shows unmistakably that a false complaint was filed with the knowledge that there was no just or lawful ground for such proceeding or that a witness intentionally gave false evidence.[60]

Interest of the State also to be Considered--Nature of Litigation and Motive

In dealing with an application to prosecute for perjury, courts are entitled, in doubtful cases, to consider the grounds on which the government may suggest that a prosecution is inexpedient. Although the scheme of procedure adopted in this country recognises the right of a private person to institute criminal proceedings, it also recognises the right of the state which is a party to all criminal trials as representing the public, to intervene and procure a stay of proceedings.[61] The explanation furnished by the offender has also to be given due consideration.[62] The circumstance that the false statements were made in a family dispute is not a sufficient reason for refraining from action by prosecution under s 340 against those who made those false statements. If the false statements have been made from motives not in themselves evil, that circumstance can be taken into account when awarding punishment.[63]

Where an advocate created a false evidence before the High Court by appending a false certificate to the effect that no revision was filed earlier, it was observed that it is the incumbent duty of the court to rise to the occasion in the interest of orderliness in the society and directed a complaint to be filed against him.[64]

Where the petitioner made a false statement on oath in a writ of *habeas corpus* filed in the High Court and also obtained an interim order in his favour, the High Court ultimately found that the petition amounted to an abuse of the process and the facts stated in the petition on oath were fabricated and false. The petitioner, who had made a false statement on oath, was accordingly directed to be prosecuted by the registrar of the High Court for the offence punishable under s 191 read with ss 193 and 199, IPC .[65]

Panchnama not a Record of Statement of Attesting Witnesses

It is to be noted that a *panchnama* or a *mahazar* is not a record of the statement made by the attesting witness. It is intended to contain the minutes or a record of what the1450 investigating officer sees or witnesses. It is the contemporaneous record of his actions and not that of the attesting witnesses. Just because there is a conflict between the evidence of a witness in court and the recitals in the *panchnama*, it cannot be concluded that what the witness said in the court is untrue because the real facts would be just the other way round. It is possible that the witness was tendering true evidence and the contents of the *mahazar* were wrong. Therefore, unless there are other materials before the court to determine that the witness perjured in court, proceedings are not to be taken against him for perjury.[66]

Where Proceedings are Illegal

If, during the course of proceedings which were *ultra vires* and illegal, any offence under ss 193 or 471, IPC was committed, it cannot be said that it was committed in or in relation to, or by a party to, any judicial proceedings, and no complaint can be made under this section in respect of that offence.[67]

Offending Portions of Statements to be Set Out in an Annexure

Where the notice besides being not happily worded was laconic and did not satisfy the essential requirements of law, nor did it specify the offending portions in the appellant's lengthy statement, which in the opinion of the High Court, were false, it was held that in cases of this nature, it is highly desirable and indeed very necessary that the portions of the witness's statement in regard to which he has, in the opinion of the court, perjured himself, should be specifically set out in or form an annexure to the notice issued to the accused, so that he is in a position to furnish an adequate and proper reply in regard thereto and be able to meet the charge.[68]

No Inquiry Where it is Tantamout to Abuse of the Process of Court

Where the remarks or observations made by the trial judge against the petitioners were perverse and against the record and the trial judge had exceeded in exercising his jurisdiction for holding an inquiry under s 340, CrPC for the prosecution of the petitioners for the offences under ss 193 and 195, IPC, it was held that the order directing an inquiry is tantamount to abuse of the process of court and deserves to be quashed.[69] The proceedings under s 340 of the CrPC 1973 should not be initiated as a matter of course, even when the witnesses give contradictory evidence. In a case where there is no legal evidence for its success, prosecution should be avoided. The courts should act with utmost circumspection in launching a prosecution.[70]

Most Appropriate Stage for Deciding Complaint of Perjury

If the particular judicial or legal proceeding relates to a trial of civil proceeding or the contentious issues in a legal proceeding, raised therein by the respective pleadings of the parties, to which the final adjudication of the trial court is required, on the merits of the evidence to be let in on record by the parties in support of their respective case, there it goes without saying that the most appropriate stage for the trial judge in such1451 a trial proceeding is to formulate his opinion on the filing or non-filing of complaint contemplated under s 340 of CrPC, would be at the final stage of disposal of the main matter on merits.[71] Otherwise if the presiding officer of a trial court is to take a decision relating to an alleged perjury or a false statement at the initial stage of the proceeding, then in all probability, it will prejudicially affect the fair disposal of the main matter on its merit and therefore, it would certainly deflect the course of justice.[72]

29. '*Locus Paenitentiae*'--Meaning of

The term '*locus paenitentiae'*according to Law Lexicon, means a place or chance of repentance. It also means a power of drawing back from a bargain before any act has been done to confirm it in law. No question of *locus paenitentiae* should arise when an accused is prosecuted for making two contradictory statements.[73] But where the question is whether a complaint for perjury shall or shall not be made, the safest rule is to give the witness as far as possible a *locus paenitentiae,* and if the witness avails himself thereof, a prosecution for perjury is inexpedient.[74] The fact that the person making a wrong statement applied for withdrawal of it as soon as he found that the statement was wrong is a factor in his favour. A prosecution for perjury is hardly desirable in such a case.[75] But though it is true that a witness must be allowed a *locus paenitentiae* in the interests of justice, there must be some reasonable limit as to its extent. Where a witness, several weeks after giving false evidence, fearing a prosecution, applied to the court to be recalled so that he might correct a certain answer he had given at the time of the previous examination, it was held that the previous statement was a deliberate falsehood calculated to deceive the court and it was a proper case for a complaint of court being made.[76]

30. Contradictory Statements--Outlook at Trial not the same as in Proceedings under Section 340 , CrPC

The questions which are in issue when a person is prosecuted for perjury are quite different from those which arise in proceedings under s 340 of the Code of Criminal Procedure 1973. In the latter, the court has to see whether it is expedient in the interests of justice to prosecute the witness for committing perjury, whereas in the former the court has only to see whether the ingredients of the offence of perjury are proved by the prosecution, and it is not at all concerned with the question of the expediency. A court may refuse to hold that it is expedient to prosecute a witness who has deliberately made two contradictory statements, at least one of which is false, but cannot refuse to convict him of perjury when that is proved. In a prosecution for perjury, it is quite immaterial that the two contradictory statements were made in the course of one deposition in one trial. If the first statement is false, the applicant committed the offence of perjury as soon as he made it. Whether he made it deliberately and whether he knew or believed it to be false or did not believe it to be true is to be seen with reference to the time at which he made it. Where the witnesses were examined in 1983 and 1986 and the incident had taken place in 1977,1452 it was held that it cannot be said that they gave false statements.[77] If the requirements of s 191 are fulfilled, the witness committed the offence of perjury as soon as he made it. Section 191 does not take into consideration the fact that the false statement was subsequently in the same deposition or in the same trial, admitted to be incorrect and replaced by the correct statement or that the deposition was not finished before the accused corrected himself.[78]

Contradictions in Statements in the Cases of Grave Nature

In a capital case, where irreconcilable or totally contradictory statements are made by witnesses to the crime at different stages of time and the only explanation offered is that at one stage they were threatened by the prisoners and at another stage by the police, the witnesses in such a case should be proceeded against under s 193, IPC read with s 340, CrPC and a complaint should made in order to determine whether they are liable to be convicted of the offence of perjury.[79] It has been repeatedly pointed out how the fact that a witness appears to have made contradictory statements at two different stages of a case is not by itself always sufficient to justify his prosecution for perjury. The fact that the evidence is given in a case of a grave nature should only make the court all the more careful is weighing all the circumstances before embarking on prosecutions for perjury on the basis of contradictions.[80]

Witnesses to be Encouraged to Tell the Truth

It is in the interests of the State as well as that of justice that prosecution witnesses be free to tell the truth to the court of session irrespective of whatever evidence they may have given in the court of the committing magistrate.[81] A Division Bench of the Kerala High Court has gone to the extent of saying

that a witness is expected to speak the truth and he must be encouraged to do so even if the statement before the court is against his previous statement, without the danger of exposing himself to a prosecution for perjury.[82] Where a witness made a false statement under s 164 and then told the truth at the trial, it is not expedient in the interests of justice that he should be prosecuted.[83]

Deposition as a Whole has to be Considered

The deposition should be considered as a whole and regard should be given to the circumstances in which the contradictory answers were made.[84] Usually it would not be expedient to prosecute a witness who had made contradictory statements in the course of the same deposition, because the presumption is that the witness is trying to correct a false statement by his subsequent statement, and in such cases some *locus paenitentiae* should be given to the witness, but this does not apply where different1453 depositions are recorded after an interval of time.[85] It would be most undesirable that a witness should be afraid to correct a mistake made in his deposition for fear of rendering himself liable to prosecution for perjury. Prosecution for contradiction in the same deposition is maintainable if the contradiction was made not to correct a *bona fide* error, but with a dishonest intention.[86]

Mere Contradiction not Sufficient for Inquiry

The mere fact that the statement made by a witness before the magistrate under s 164 and before the committing magistrate were undoubtedly contradictory to those made in the sessions court does not make it incumbent on the court to order prosecution. The court must exercise proper judicial discretion, giving due regard to its reaction on the administration of justice.[87] There may be cases where offences like perjury complained of against a particular person may not be of a kind in which prosecution should be resorted to, because in every case a mere contradiction by itself will not attract the operation of the provisions of s 340, CrPC, but there may be cases where contradictions made in the depositions were conscious and deliberate, made in order to thwart the administration of justice, or to obstruct the court in coming to a correct conclusion. In such cases, the court has to consider whether, in the light of the evidence before it, it is a fit case or that it is expedient in the interest of justice that an inquiry be made into the offence.[88] The court should consider how it has come about that there are contradictions and why the witness has resiled from his statements before the magistrate. The High Court refused to grant a sanction in one case though it found that the witness had made false statements before the committing magistrate, but deposed truly in the trial court.[89]

Prosecution in Doubtful Cases

It, however, cannot be laid down as a general rule that a witness is exempt from prosecution with regard to a statement made in the sessions court differing from a previous statement made by him before the committing magistrate even though the subsequent statement is considered to be true. There may be good reasons for not prosecuting the witness in many cases should the subsequent statement be held to be true; but where it is doubtful which of the two statements is true and where it may be held with some degree of certainty that the subsequent statement is the false one, a complaint for giving false evidence should, as a rule, be made. Other matters, it is true, should of course be considered, such as any compulsion brought to bear on the witness in making either of the statements, but where no compulsion has been shown, the courts should not refrain from making a complaint except for good reasons.[90]

Contradictory Statements When not to be Viewed Leniently

Where a report was made by the petitioner to the Director, ACB, Hyderabad against the sanitary inspector of Warangal municipality for demanding illegal gratification1454 and on his supporting the report in his statement recorded under s 164, CrPC, the sanitary inspector was trapped with the assistance of the petitioner. In the trial against the inspector the petitioner appeared as PW 1 and rescinding from his report and statement under s 164, CrPC, he stated that he himself had tried to put the money in the pocket of the inspector. The trial judge acquitted the accused inspector but made an observation in the judgment that the petitioner be prosecuted under this section for his giving a totally

variant version as PW 1. He was accordingly tried and convicted and sentenced to rigorous imprisonment for six months under this section by the magistrate and it was held that out of his three versions, at least one was known to him to be false. His appeal failed and thereafter the revision filed by him was also dismissed by the Andhra Pradesh High Court with the observation that no interference was called for with the findings arrived at by the two courts below.[91]

Presumption in Favour of Reconciliation of Contradictory Statements

Whether a sanction should be granted on a complaint made for giving false evidence on the mere fact that the witness made contradictory statements depends on the circumstances.[92] The practice of charging a man with making two mutually contradictory statements should be adopted only where the two statements are necessarily and irreconcilably contradictory.[93] Every possible presumption must be made in favour of the reconciliation of the two statements.[94] No sanction should be granted or complaint made when a witness has corrected his false statement in his cross-examination.[95]

In *Ismail Khan v State* [96] a Special Bench of the Karnataka High Court has held:

> The learned magistrate has perused the complaint given by the accused and his deposition and then came to the conclusion that the petitioner has committed perjury. It is necessary that in order to make a person liable for perjury he should have made a statement on oath regarding the facts on which his statement was based and then deny those facts on oath on a subsequent occasion. His earlier statement regarding the facts must be on oath and his subsequent statement also must be on oath and if both the statements are opposed to each other and they cannot be reconciled, then a person may be liable to be proceeded against for perjury under section 344 , Crpc or under section 193,IPC .

31. Contradictory Statements Made in two different Courts--Deposition which is false to be Ascertained

Where the evidence given before the committing magistrate was contradicted by the same witness before the sessions judge, it is not competent for the sessions court to order the trial of the accused for perjury without specifying which of the depositions made by the accused was false, especially when there is nothing on the record to show that the judge was satisfied that the evidence given before himself was false.[97]1455

A view has been taken that when prosecution is ordered in respect of two contradictory statements made in two different courts, an order under s 340, CrPC of one of the courts is insufficient. Both courts must make an order under this section in respect of the alternative charge,[1] or, at all events, the courts which desires to take action should obtain the sanction of the court before which the other statements were made, unless it is itself a court to which the other is subordinate.[2]

When Statement Before Committing Court Contradicts Statement Before Sessions Court

When a person makes one statement in the committing court and contradicts it in the sessions court, the sessions judge can complain in the alternative that one or other of the statements must be false. If the statement in the sessions court is true, the sessions judge can complain of the statement in the committing court. A statement made by a witness at the preliminary inquiry leading up to the trial in the sessions court is to be regarded as having been in relation to the subsequent proceedings in the sessions court.[3]

In *Tilak*'s case,[4] an offence under s 211, IPC alleged to have been committed in the court of the Poona city magistrate was brought to the notice of the district court of Poona in the course of a civil judicial proceeding. The district judge acted under this section and sent the case down to the first

class magistrate, Poona. It was held that the offence was not cognizable by the first class magistrate, as there was neither the previous sanction nor the complaint of the Poona city magistrate or of the sessions court to which he is subordinate. The fact that the district court and the sessions court are represented by one and the same individual will not in any way cure the illegality.[5]

32. Complaint in Respect of Fabricating False Evidence

cognizance of an offence in respect of documents produced in court can be taken only on a written complaint of the court concerned.[6] If a litigant is suspected of having fabricated false evidence, it is the duty of the court to direct an inquiry into the matter. Whenever it appears to the court that it is expedient in the interest of justice that the attempted fabrication should be penalised and punished, the court should not hesitate to adopt that course. But, on the other hand, a distinction must always be drawn between a document which does not appear to the court to be genuine on the evidence produced and a document which may be regarded as fabricated. This distinction is of considerable importance in deciding whether criminal proceedings should be started against a party or not.[7]

When False Entry Amounts to Fabrication

If a false entry is made in any book or record and that circumstance assists the court to form an opinion upon that evidence in favour or against somebody, that is enough1456 to hold that false evidence was fabricated. If such false evidence is used in a judicial proceeding, the offence made out is under s 193 .[8]

When during a pendency of proceeding for assessment of compensation under Bihar Land Reforms Act, the accused persons (clerks of the office of DCLR) submitted false and collusive reports and made interpolations in collectible demands and altered *touri* numbers for facilitating a false payment to a land owner, it was held to amount to fabricating false evidence within the meaning of s 192, IPC, more so when ad interim payment of compensation in excess was actually made to the land owner. In such a case, offences under ss 193 and 209, IPC were clearly made out and the provisions of s 195(1)(b), CrPC were attracted for the prosecution of the accused for those offences.[9]

33. Charge--Particulars of

Where the witnesses who had taken oath named one of the four accused causing injuries to deceased when they appeared against the other accused but changed their version with regard to participation of said accused when they appeared against him, the changed version of witnesses *prima facie* attracts the provisions of s 193 and they need to be prosecuted for the offence under s 193 .[10] A charge in a criminal trial is framed with a view to enable the accused person to understand what the prosecution alleges against him and what they are seeking to prove and what it is that he has got to meet in order that he may be acquitted. By failure to convey to the accused and inform him what he is being charged with, what he has to meet and against what he has to defend himself, whether by framing an unintelligible charge or not framing a charge at all, prejudice is assumed and the conviction is to be set aside.[11]

It was alleged that the accused *R* made some overwriting in the bed-head-tickets and the accused *M* made false entries in the call register of the employees of the hospital, but the two documents, despite Court's order, were not produced before the Court, and as the charge was without evidence, the two accused *R* and *M* were discharged.[12]

Charge--Contradictory Statements not the only Material to Prove Perjury

Charges of perjury should contain a distinct assertion with regard to each statement intended to be characterised as perjury, that it was made, that it is untrue in fact, and the accused knew it to be so when he made it,[13] when the perjury is sought to be established on the basis of contradictory statements made on oath. Even in *Emperor v Bankatram Lachiram* ,[14] on which reliance was placed

by the Karnataka High Court, the controversy before the Bombay High Court was in a case of perjury arising out of contradictory statements. It is, therefore, not correct to say that whenever perjury is sought to be established it can be done only by proving two contradictory statements of a person made on oath. It can also be established in1457 other ways as discussed above. While drawing up a charge, the following points should be kept in mind:

(i) *Date must be given*--The charge should disclose the exact date on which the offence was committed.[15]
(ii) *Court*--The court or other officer before whom the offence was committed must be specified.[16]
(iii) *Stage of the judicial proceeding*--The particular stage of the judicial proceeding should be specified.[17]
(iv) *Exact words of the statement alleged to be false* must be set out in the charge. See the undermentioned cases.[18]

Where the charge was that 'You, on or about the 7 May 1904, at *L,* gave false evidence in a judicial proceeding, namely, in a case under s 133, IPC and thereby committed an offence punishable under s 193 ', it was held that the charge was vague and the conviction was set aside.[19] Where an accused makes numerous false statements in a case, there should be a separate charge for each statement, but all such charges can be tried at one trial if they form part of one and the same transaction.[20] But compare Re *Chan Hang Kin,*[21] wherein it was stated that the whole evidence of a witness was a tissue of falsehood and it was held that the charge did not admit of being formulated in a series of specific allegations of perjury, but the gist of the accusation was sufficiently clear to the accused.

Charge in a Case of Contradictory Statements--Not Necessary to Allege which of the Contradictory Statements is False

Section 221(1), CrPC settled the law that contradictory statements by a witness which are irreconcilable constitute the offence of intentionally giving false evidence, though it cannot be proved which of the two statements is false.[22] In a charge under s 193, IPC it is not necessary to allege which of the two contradictory statements upon oath is false, but it is sufficient (unless some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time and a directly contradictory statement at another.[23] The undermentioned cases,[24] in which a contrary view was expressed, now stands superseded to this extent. Illustration (c) to s 221, CrPC adopts the full bench view in *Queen Empress v Muhomed Hymayoon Shah.* [25]1458

Applicability of illust (c) to s 221, CrPC

In *Babari Bhura* case,[26] it is laid down that this illustration must be strictly confined to the case of two contradictory statements of the same kind and cannot be applied to statements falling under the two different parts of this section. Therefore, the accused making a false statement in an investigation under s 175, CrPC and a contradictory statement before a magistrate, could not be convicted in the alternative.[27] The illustration is, however, subject to the condition that the several acts for which a charge in the alternative can be framed must form a series of acts, which means that the facts should have something in common between them. There must be a common link to connect the one fact with the other.[28]

Where a magistrate makes a complaint under s 193, IPC in respect of the statement made in his court on the definite allegation that a particular portion of that statement was false, the provisions of s 195, CrPC are fully complied with and the accused can only be charged on the definite allegation that he had intentionally given false evidence before the magistrate. The accused cannot be charged in the alternative that his previous statement in a certain suit before the civil judge was false, as such a charge requires a complaint in respect of the statement by the civil judge. In the absence of such a complaint from the civil judge, the offence in the alternative in respect of the statement before the civil judge made in the other

proceeding could not be the subject of the charge.[29]

Charge--Contradiction in the Same or Different Depositions is Immaterial

The language of s 22(1), CrPC is general enough to justify alternative charges under s 193, IPC for contradictory statements, whether they be in the same or in different depositions. The illustration is only a particular instance of the principle given in the section and does not limit it to depositions in different courts. The existence of contradictory statements in the same deposition or different depositions makes no difference.[30]

34. Alternative Charge in Case of Contradictory Statements

In *Emperor v Ningappa Banappa* ,[31] the first statement made by the witness was in the course of the police investigation under s 164, CrPC, and when the case went to the committing magistrate, he resiled from the statement. It appears that the learned additional sessions judge who ultimately tried the case was disposed to think that the statement made under s 164, CrPC was false and that the subsequent statement at the trial was true. In those circumstances, it was held that it would not be expedient in the interests of justice to compel a witness to stick to a false statement which had been made by him in the course of the investigation. This ruling does not lay down that in a proper case a charge in the alternative as contemplated by illust (c) to s 221,1459CrPC cannot be framed or prosecution for such a charge should not be sanctioned.[32] The same remark applies to the ruling in *Keramat Ali v Emperor.* [33]

Proof of Alternative Charge

Prosecution on alternative charges of persons who make contradictory statements to the police and to a court has its convenience, but it has also its drawbacks. It is not a prosecution to be encouraged and is justifiable only when the prosecution is unable to prove which of the contradictory statements was false.[34] The accused must have been under a legal obligation to speak the truth on both the occasions.[35] It must be remembered that the accused might have made two statements, in perfect good faith, and yet quite irreconcilable.[36] Where a person was convicted of giving false evidence upon an alternative charge, it was held by the majority of a Full Bench (Jackson and Phear JJ, dissenting), that the conviction was good, notwithstanding that the jury had not distinctly found which of the two statements charged was false.[37] If no alternative charge is framed, it is difficult to find which of the two statements made by a person, who is admittedly a liar, is true, in the absence of other evidence besides the statements of the accused, the liar, himself.[38]

35. Evidence in any other Case--Meaning of

Although a statement which is made in the course of a police investigation under s 164 of the IPC[39] is not evidence in a stage of judicial proceeding, it comes within the words 'evidence in any other case' in s 193, IPC . However, it can be linked with a statement which is in evidence in a stage of the judicial proceeding following on the investigation, so that the two can be said to be a series of acts on which an alternative charge can be framed for intentionally giving false evidence under s 193, IPC .[40]

36. Form of Charge

Form Nos 32 I (5) and II (4) in Sch II, CrPC 1973, which are supposed to be model charge and alternative charge under this section, run as follows:

(I) Charge:

I, (*name and office of the magistrate, etc*) hereby charge you (*name of the accused person*) as follows:

That you, on or about the.....day of.....at.....in the course of the trial of.....before.....stated in evidence that '.....' which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of this Court.1460

And I hereby direct that you be tried by this court on the said charge.

(II) Alternative charge:

I (*name and office of magistrate, etc*) hereby charge you (*name of the accused person*) as follows:

That you, on or about the day of.....at.....in the course of the inquiry[41] into.....before.....stated in evidence that '.....' and that you, on or about the.....day of....., at.....in the course of the trial of..... Before.....stated in the evidence that '.....'., one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of session/within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

(III) For fabricating false evidence following form of charge may be adopted:

I (*name and office of the magistrate, etc*) hereby charge (*name of accused person*) as follows:

That you, on or about the day of.....at....., fabricated false evidence, to wit.....for the purpose of being used in pending/prospective judicial proceeding (*or in a proceeding taken by law before a public servant or before an arbitrator*) intending that the person conducting such proceeding they entertain an erroneous opinion.

And I hereby direct that you be tried by this court on the said charge.

37. Accused should have an Opportunity of Explaining Contradictory

Statements

Where there is a trial on a charge of giving false evidence by reason of contradictory statements, it is of the first importance (a) that there should be the clearest and most precise evidence of what the statements alleged to be contradictory really are; and (b) that the accused should have every possible opportunity of explaining the statements in question and of showing that the alleged contradiction does not really exist. Where in a case the accused had no such opportunity, the High Court ordered a re-trial.[42] Extreme care has to be taken that the accused person really understands the nature of the case against him, and the circumstances which he is asked to explain.[43] Every presumption in favour of the possible reconciliation of the statements must be made.[44]

38. Proof

For a conviction under this section, the following points have to be proved:

(1) For giving false evidence:

(a) the accused was legally bound to state the truth either by an oath or by an express provision of law;1461
(b) the accused made the statement or declaration;
(c) he did so intentionally;
(d) the statement was false;
(e) the accused either knew or believed it to be false, or did not believe it to be true;

The following aggravating circumstance may be added where applicable:
(f) such statement or declaration was made in a stage of a judicial proceeding. (s 191, IPC)

(2) For fabricating false evidence:

(a) the accused caused certain circumstance to exist, or made a false entry, or made a document containing a false statement;
(b) he did so intending that such circumstance, entry or statement should appear in evidence in a judicial proceeding pending or prospective[45] or in a proceeding taken by law before a public servant[46] or before an arbitrator;[47]
(c) the person conducting the judicial or other proceeding had to form an opinion upon the evidence in which such false evidence appeared;
(d) the accused intended that person conducting the proceeding may entertain an erroneous opinion upon that evidence;
(e) such erroneous opinion touched a point material to the result of such proceedings. (s 192, IPC).

Proof--False Statement must be Literally False

The prosecution must establish all the ingredients of the offence and the decision is to be based only on the evidence and materials placed before the criminal court.[48] To support a prosecution for giving false evidence, it must be shown that the false statement charged against the accused is literally false. There must be a statement of fact which is false. It is no offence if the fact stated is true but some circumstance is suppressed, with the result that a wrong inference may be deduced.[49] In a prosecution under ss 193 and 199 it is not sufficient for the prosecution to show that the statement is

false and thus throw the burden of proof on the accused to establish good faith as a defence, but the prosecution must show affirmatively the knowledge that the evidence given or declaration made was false or else show the belief in its being false or an absence of a belief in its truth.[50] To punish one under s 193, IPC among other1462 facts, it has to be proved that one had intentionally given false evidence in any stage of judicial proceeding.[51]

In *Queen v Ahmed Ally* ,[52] Norman J, pointed out the true rule on the subject to be that:

> No man can be convicted of giving false evidence except on proof of facts which, if accepted as true, shew not merely that it is incredible, but that it is impossible that the statements of the party accused made on oath can be true. If the inference from the facts proved falls short of this, it seems to us that there is nothing on which a conviction can stand; because assuming all that is proved to be true, it is still possible that no crime was committed. The evidence of a medical man or other skilled witness, however eminent, as to what he thinks may or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a mere matter of opinion. Human judgment is fallible. Human knowledge is limited and imperfect.

The same view has been taken in the undermentioned cases.[53] But dissenting from this, it has been held in an Oudh case that:

> The definition of proof in the Evidence Act is of little positive assistance, but it is of some negative assistance. Its meaning clearly is that a fact may be held proved even though it is impossible to show that its existence is a mathematical or scientific certainty. This definition is of general application and thus applies to a case where the offence is one of perjury. I have no hesitation in saying that it is certainly sufficient if the statement of the accused party is proved to be incredible.[54]

Reasons Given in the Judgment and Opinion Expressed in the Order not to Weigh with the Trial Court

In a prosecution for perjury, the criminal court must form its own opinion, it must not arrive at its conclusions by reference to some other decision.[55] When the trial of the accused commences under s 193, IPC the reasons given in the main judgment of the High Court or those in the order passed under s 340(1), CrPC should not weigh with the criminal court in coming to its independent conclusion as to whether the offence under s 193, IPC has been fully established against the appellant beyond reasonable doubt. It will be for the prosecution to establish all the ingredients of the offence under s 193, IPC against the appellant and the decision will be based only on the evidence and the materials produced before the criminal court during the trial and the conclusion of the court will be independent of opinions formed by the High Court.[56]

In a prosecution under s 193, it is incumbent on the prosecution to show first, that the statement made by the accused was false and secondly, that he knew it or believed it to be false or did not believe it to be true at the time he made the statement.[57]1463

The intention of the accused is an essential ingredient in the constitution of the offence of perjury.[58] In order to sustain an indictment for perjury the prosecution must establish *inter alia*, two things: (a) that the statement was false; and (b) that it was known or believed to be false or not believed to be true. In other words, the statement must be intentionally false.[59]

An accused could be guilty under s 193, IPC only if he had the intention of fabricating evidence in order that it should appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant, as such, or an arbitrator as laid down in s 192 . The prosecution must, therefore,

show that there was such an intention and that the accused did not fabricate evidence merely to screen himself in the belief that his conduct would result in no proceeding being taken.[60]

Mere Fabrication of Accounts not an Offence

The mere fabrication of accounts is not in itself a criminal offence. For instance, if a man prepares false accounts for his own edification, to persuade himself that he possesses more money than he actually does, although that may be a proceeding lacking in wisdom, it is not a criminal offence; you must show that the false accounts were to be used in some proceedings pending or contemplated at the time when the offence was committed.[61]

Where the food inspector obviously made false statements in his sworn statements that the court had not fixed any further date of hearing and had taken up the case on the date in question without notice to the police prosecutor or the complainant and on the date neither of these two persons were present in court, it was held that *prima facie,* he seems to have committed an offence under s 193 of the Indian Penal Code .[62]

39. Punishment

Nowadays a peculiar trend has developed. Witnesses change their statement during different stages of the criminal proceeding at their own sweet will and thereby affecting the course of justice, though under the law, they are bound to state truth and truth only. The witnesses try to pollute the course of justice by taking a complete turn from his original version of the occurrence at later stage of the proceeding/trial. This trend should be arrested and such witnesses should not be allowed to escape consequences of their sin.[63] The perjury in judicial proceedings must be punished severely.[64] Where the accused files a false affidavit in court with the object of securing an admission of an appeal,[65] or in support of a transfer application,[66] it would be dangerous to take a lenient view. The court should not take into account the1464 effect of a conviction or prosecution on the dependants of the accused.[67] The measure of punishment depends upon the gravity of the offence. A deliberate mis-statement whether it tends to endanger the life and property of others, or to defeat and impede the progress of justice, is not an offence which should be lightly passed over. But for a simple mis-statement from which no such inferences can be drawn, a comparatively light sentence will suffice, particularly where the prisoner pleads guilty and throws himself on the mercy of the court.[68] In the instant case, the accused appellant very foolishly, under the influence of some other persons made the report and the statement in question, and at the earliest brought to the notice of the court that she had been misled and unduly influenced in making the false report and the statement. From the defence documents it did appear that the appellant was misled and unduly influenced in making a false report and the statement. In the circumstances, the conviction of the appellant was maintained under ss 193 and 211, IPC, but the sentence awarded to her was set aside and she was ordered to be released on probation.[69] A false statement by a witness as to his position or character, ought not to be punished so severely as a false charge on a false claim.[70] Where the accused, when he gives false evidence, was on bail and it appeared that he gave false answers to the questions put to him either under the influence of the police or because he was under the impression that if he gave such evidence, he would be able to obtain a discharge in the case which was then pending before him, it was held that under the circumstances no severe sentence was called for.[71] Where the trial has been pending for a long time, the court should take a lenient view of the offence.[72] In a case, the imprisonment, on an admission of having made interpolations in books of account, which was committed 8 years ago, was reduced by the Andhra Pradesh High Court to one week while the fine was retained.[73] Where no counsel was provided to the accused at state expense during the trial, his sentence of imprisonment under this section was reduced to the period already undergone.[74]

40. Illustrative Cases

Where a person representing the company was assistant secretary of the complainant company before its amalgamation and general manager in the new company, signed a *vakalatnama* without

mentioning his designation and the name of the company, he could not be said to have committed any offence under s 467, s 471 or s 193 of the Penal Code.[75]

Where in a writ petition against the housing board, the plea by the housing board was that the matter was settled and there was an agreement between the parties, however, the official of the housing board who signed the agreement on its behalf, subsequently retracted from the agreement even before the decision of the petition was taken, on the ground that he was not authorised to act, it was held that such an act of unsettling settled issues or wrongfully settling issues without sanction interferes with public justice and amounts to perjury and contempt of the court. But1465 since the record shows that the contemnor himself noticed the higher authorities, and the said defect was found to be rectified by the housing board and the contemnor sought forgiveness for the action of perjury and apologised in the contempt proceeding, the contempt action was consigned after admonishing the contemnor.[76]

In one case the police officials made interpolation in entries of the case diary to keep the sequence of the entries in order and prove the time of arrest and thereby cooked up false stories of possession of illegal arms by the accused to justify his detention after receiving an order of the magistrate directing the station house officer to give a report. On these facts, the Apex Court not only acquitted the accused but also intended an inquiry under s 340(1), CrPC into a commission of offence under ss 193, 195 and 211, IPC and directed for the issuance of a show cause notice to the police officials through the commissioner of police as to why they should not be proceeded against for the said offences.[77] Where the accused officer-in-charge of the police station prepared false statement said to be given to the deceased, he was prosecuted for offences under ss 193 and 194,[78]IPC .

Where a certified copy of a judgment appeared to be interpolated *ex facie,* the inquiry revealed that it was forged by changing its date of delivery, the court directed the petitioner to face a criminal trial for perjury. The petition pleaded innocence stating that the accused depended on her advocate who might have done it and the lawyer who represented the petitioner in the trial court had since died. On these facts, the Orissa High Court recalled its order to SDJM, Bhubaneshwar for a criminal trial and gave a benefit of doubt to the petitioner.[79]

Where the petitioner made a statement on oath in a writ petition supported by an affidavit that the timings of a law college were changed by the principal arbitrarily, but the fact was that the principal had the powers to change the timings and the change was made by him after receiving representation of a majority of the students of college to the said effect, and the petitioner was one of the students signing the said representation, it was expedient in the interest of justice to eradicate the evil of perjury and the petitioner was ordered to be prosecuted under s 193, IPC for making the said false statement in the writ petition supported by the affidavit.[80]

Where in case under ss 489B and 489, IPC, the prosecution witness on being threatened by the higher police officers did not to support the prosecution case, filed affidavits before the Court and resiled from the prosecution case, the High Court directed the Presiding Officer of the trial Court to file complaint for offences under ss 193 and 195A, IPC .[81]

A sub-inspector gave a false affidavit in support of a petition to mislead the court with a view to obtain condonation of a delay in filing the appeal, which may amount to an offence under the relevant provisions of IPC . On these facts, the Andhra Pradesh High Court directed its registrar (judicial) to file a complaint under s 195 of the CrPC against the sub-inspector of police, who gave such false affidavit, for the offences under ss 191 - 193, IPC before the concerned magistrate having the jurisdiction.[82]1466

The respondent converted to religion of Christanity and married the daughter of his maternal uncle. After conversion, the marriage did not fall under 'Sapinda relationship', thus, the married couple had not filed false declaration in Church, and had not committed offence under s 193, IPC .[83]

49 *Purshottam Ishvar Amin v Emperor* AIR 1921 Bom 10, p 11, 22 Cr LJ 241, ILR 45 Bom 334, 23 Bom LR 1 (FB), per Macleod LJ.

50 *Bhagirath Lal v Emperor* AIR 1934 All 1017, p 1018, (1934) All LJ 1064 .

51 *Sundararajan & Co v Shankarapandia Nadar* (1957) MLJ (Cr) 520, (1957) 2 MLJ 348, 70 MLW 666 .

52 *Ibrahim Sab Imam Sab Mulla v State of Karnataka* (2006) Cr LJ 2738 (Kant) .

53 *Ganesh Kumar v Raju* 2013 (2) KLT 434, p 440, 2013 (2) KLJ 605 (Ker) .

54 *Inderjit Singh Grewal v State of Punjab* (2011) 12 SCC 588, p 597 .

55 *Court on its own Motion v State of Punjab* 2012 Cr LJ 2440, p 2450 (P&H).

56 *Kirit Kumar K Jani v State of Gujarat* (1998) III CCR 115 (Guj) .

57 *Bimal Das v State of Tripura* 2012 Cr LJ 1252 (Gau) .

58 *Sadhuram v Shayam Sunder Gupta* (1975) CLR 88 .

59 *Kamla Pradad Singh v Harinath Singh* AIR 1968 SC 19, (1968) Cr LJ 86 .

60 *Santokh Singh v Izhr Hussain & Anor* AIR 1973 SC 2190 .

61 *NSR Krishna Prasad & Anor v Directorate of Enforcement & Ors* (1991) 3 Crimes 652 (AP) (DB), (1992) Cr LJ 1888 (AP).

62 *Ramesh Parasram Kawane v State of Maharashtra* (2007) Cr LJ (NOC) 442 (Bom) (DB).

63 *Bhagirath Lal v Emperor* AIR 1934 All 1017 ; refer to notes under s 191 .

64 *Venkarrama Reddi v Srinivasa Reddi* AIR 1936 Mad 350, p 351, 37 Cr LJ 557, (1936) Mad WN 291 .

65 *Taj Mahommad v Emperor* AIR 1928 Lah 125, p 127, 29 Cr LJ 212, 29 Punj LR 14 .

66 *Janki Lal v Emperor* AIR 1929 Nag 193, p 194, 30 Cr LJ 655 **relying on***Babu Ram v Emperor* ILR 26 All 509, 1 All LJ 236 .

67 Refer to s 1 of the Perjury Act, 1 and 2 Geo, 5 c 6.

68 *R v Ryan* (1914) 24 Cox 135, 10 App R 4 .

69 *Mahesh Chandra Dhupi v Emperor* AIR 1940 Cal 449, 42 Cr LJ 93, (1940) ILR 1 Cal 465 ; *Baroda Kant Sarkar v Emperor* AIR 1916 Cal 553, 16 Cr LJ 620 ; *Chandra Prakash Bhargava v GT Industries* (1980) Cr LR (MP HCN) 91, p 93 .

70 *Umrao Lal v State* AIR 1954 All 424, p 425, (1954) Cr LJ 860 .

71 *KTMS Mohd v Union of India* (1992) 3 JT (SC) 129 .

72 *Lalmoni Nonia v Emperor* AIR 1924 Pat 276, p 280, 24 Cr LJ 321, 4 PLT 683 ; *Parmeshwar Sahaiv State*1966 All WR (HC) 761; *Shanti Devi v State* (1970) All LJ 206, p 213 ; *Badri Prasad Sharma v Shanti Prasad Sharma* (1982) All Cr R 9 ; *Chandrashekhar v State of Madhya Pradesh* (1981) Jab LJ 122 .

73 *Habibullah v Queen-Empress* ILR 10 Cal 937 .

74 *Shiv Raman Gaur v Madan Mohan Kanda* (1990) Cr LJ 1033 (P&H) .

75 *Rajkumar Dhanuji Bombarde v Madhukar Wankhede* 2008 Cr LJ 661 (Bom) .

76 *State v Dhanna Sewa* AIR 1959 MP 35, 36.

77 *Nga Yon v Emperor* 19 Cr LJ 726, 727, (1918) 3 UBR 84; *Khajumal Burmal v Emperor* AIR 1920 Sind 59 .

78 1 Weir 146, 149, 1 Mad HCR 38.

79 *Queen v Rhutten Ram* 2 WR 63(3); *Mahommad Ishaq v Emperor* ILR 36 All 362, 12 All LJ 550 ; *Legal Remembrancer v Ahilal Mandal* AIR 1921 Cal 426 ; *Chaina v State of Rajasthan* (1981) Cr LR (Raj) 148 .

80 Re *Amir Ali Khan* 3 NWPHC 133; *Jankilal v Emperor* AIR 1929 Nag 193, p 194, 30 Cr LJ 655 .

81 *Ganesh Kumar v Raju* 2013 (2) KLT 434 (440), 2013 (2) KLJ 605 (Ker) .

82 *Dano v Shanker Lal* (1973) All Cr R 355, (1973) All WR (HC) 532, (1974) All LJ 46 .

83 *Manphool v Manphool* (1983) Raj LW 153, (1983) 1 Cr LC 431 (Raj) ; *Mahommad Hussain Kasau Motiwala v State of Maharashtra* (1995) Cr LJ 2364 (Bom) .

84 *Delhi Lotteries v Rajesh Aggarwal & Ors* AIR 1998 Del 332 .

85 *Ibid.*

86 *Mahommad Siddiq v Emperor* 6 Cr LJ 162, p 163, 11 CWN 911 ; *Kamla Prasad Singh v Hari Nath Singh* AIR 1968 SC 19, (1968) Cr LJ 86 ; *Har Prasad v Hans Ram* AIR 1966 All 124, (1966) Cr LJ 244 ; *Parmeshwar Sahai v State* (1966) All WR (HC) 761 ; *Gangadhar Parida and Khandla Jena v State* (1965) Cut LT 925 ; *Nanjundaiah v Rangaiah* (1977) 2 Kant LJ 374, p 376 .

87 *Gangadhar Parida and Khandla Jena v State* (1965) Cut LT 925 .

88 *Ibrahim Sab Imam Sab Mulla v State of Karnataka* 2006 Cr LJ 2738, p 2742 (Kant) .

89 *R v Aidrus Sahib* 1 Mad HCR 38, p 43 .

90 1 Weir 154.

91 *Suppa Tevan v R* ILR 29 Mad 89 ; *R v Alahbachauo* 3 Cr LJ 190, SC Rulings (1906); *Public Prosecutor v Nagalinga Reddi* AIR 1959 AP 250 ; *Purshottam Ishwar Amin v Emperor* AIR 1921 Bom 3, 22 Cr LJ 241, 23 Bom LR 1 (FB) ; *Sajawal v Emperor* AIR 1932 Lah 254(1), ILR 13 Lah 228, 33 PLR 126 .

92 *Jose John v KC Kuruvilla* (1996) 1 Ker LT 62 .

93 *Shabir Hussain Bhola v State of Maharashatra* AIR 1963 SC 816, p 821, (1963) Cr LJ 803, (1963) All LJ 844, 65 Bom LR 341, (1963) Mad LJ 574 .

94 *Sakhi Rai v Emperor* AIR 1919 Pat 266, 20 Cr LJ 245 .

95 Refer to s 136, Income Tax Act 1961.

96 Re *Hazarilal* 29 Nag LJ 214.

1 *Lalji Haridas v State of Maharashatra & Anor* AIR 1964 SC 1154, (1964) 2 Cr LJ 249 .

2 *Puroshattam Ishwar Amin v Emperor* AIR 1921 Bom 3 (FB) .

3 Code of Criminal Procedure 1973, Sch I.

4 *Harikrishna Sahu v State of Orissa* (1985) 2 Crimes 978 (Ori) ; *Rit Lal Khatway v State of Bihar* (2007) Cr LJ 593 (Pat) ; *Suresh Babu v Superintendent of Police,* 2009 (2) KLT 212, 2009 (78) AIC 652 (Ker) .

5 *Rajkumar Indarchand Agrawal v State of Maharashtra* (2005) Cr LJ 4673 (Bom) ; *Narasimhaiah v State of Karnataka* (2002) Cr LJ 4795 (Kant) .

6 *Rit Lal Khatway v State of Bihar* 2007 Cr LJ 593, p 595 (Pat) .

7 *A-one Industries v DP Garg* (1999) III CCR 716 (Del) ; **See also***Ibrahim Sab Imam Sab Mulla v State of Karnataka* 2006 Cr LJ 2738 (Kant) .

8 *R Vankat Reddy v State of Andhra Pradesh* (1991) 2 ALT 302 .

9 *Randhir Singh v State of Haryana & Anor* (2000) Cr LJ 755 (SC) .

10 *Ahlawat v State of Haryana & Anor* (2000) Cr LJ 388 (SC) ; For detailed commentary on ss 195 and 340 refer *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

11 *Jaskaran v State of Haryana* 2008 Cr LJ 4261, p 4263 (P&H).

12 *KN Mishra v Jiwaji University* (1980) Cr AR 370 (SC), (1980) Cr LR (SC) 654 .

13 Now s 340, CrPC 1973.

14 Refer to ss 468, 469, 470, 471 and 473, CrPC 1973.

15 *Mulachand Bothra v Union of India* (1975-76) 80 Cal WN 804.

16 For detailed commentary see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

17 *Har Narain v Hoshiar Singh* AIR 1935 All 341 ; *Manoramma v Emperor* AIR 1933 Mad 125 .

18 *Nirman Singh v Rudra Pratap Narain Singh* AIR 1926 PC 100 .

19 *Assudomal Ramandas v Jhamandas Hotchand* AIR 1940 Sind 100 .

20 *Kedar Nath v Amulya Ratan* AIR 1942 Cal 79 .

21 *Sushanta Sarkar v State of Nagaland* 2012 Cr LJ 4467, p 4470 (Gauh), *Iqbal Singh Marwah v Meenakshi Marwah* AIR 2005 SC 2119, (2005) 4 SCC 370, (2005) 2 SCR 708**relied on**.

22 *JD Boywalla v Sarab Rustomji* AIR 1941 Bom 294 .

23 *Manju Nath Dr v NS Nagarathna* (1998) II CCR 73 (Kant) .

24 *Shaji Thamas v State of Kerala* 2014 (1) KLT 697 (Ker) .

25 *Ganga Prasad v Emperor* AIR 1941 Cal 263 .

26 *Krishna v Goverdhanaiah* AIR 1954 Mad 822 .

27 *Kashi Ram v King-Emperor* AIR 1924 All 779 ; *Prag Dutt v Emperor* AIR 1928 All 765 .

28 *Re Indrachand Bacharai* ILR 56 Bom 213.

29 *Bajaji Appaji Kote v Emperor* AIR 1946 Bom 7 ; Re *Indrachand Bacharaj*AIR 1932 Bom 185 ; *Daroga Gope v King-Emperor* AIR 1925 Pat 717 ; *Subhag Ahir v Emperor* AIR 1932 Pat 152 ; *Sarup Singh v Emperor* AIR 1939 Nag 226 ; *Samir v Sajidar Rahman* AIR 1927 Cal 95 ; Re *K Parameswara Nambudri*AIR 1916 Mad 72 ; *Chuhermal v Emperor* AIR 1929 Sind 132 ; *Rambhrose v Emperor* AIR 1928 Rang 254 ; *Ram Chandra Rango v Emperor* AIR 1939 Bom 129 .

30 *Emperor v Nabibux* AIR 1940 Sind 209 .

31 Re *K Parameswara Nambudri*AIR 1916 Mad 72 ; *Hariram v Radha* AIR 1943 Nag 327 .

32 *King v Ma E* AIR 1939 Rang 148 .

33 *Sheo Bilas v State* AIR 1959 All 14 ; *Jagat Chandra Mazumdar v Queen-Empress* ILR 26 Cal 786 (where *Chandra Mohan Banerjee v Balfour* ILR 26 Cal 359 is **distinguished**); *Emperor v Ismail Khadirsab* AIR 1928 Bom 130, ILR 52 Bom 385,; *Government of Bengal v Gokool Chander Chowdhry* 24 WR 41 ; *Ram Runjun Bhandari v Madhub Ghose* 25 WR 33, **but see** Re *Vasudeo Ramachandra Joshi*AIR 1923 Bom 105 .

34 Re *Indrachand Bacharaj*AIR 1932 Bom 185, 56 Bom 213 .

35 *Nazir Ahmad v Emperor* AIR 1927 Cal 478 ; Re *Eswaradoss*AIR 1945 Mad 461 .

36 Re *Indrachand Bacharaj*AIR 1932 Bom 185 .

37 *Virinder Kumar v State of Punjab* AIR 1956 SC 153 .

38 *CK Sha v State of Bihar (*1975) Cr LJ 1939 (Pat) (DB).

39 *Vittappan v State* (1987) Cr LJ 1994 (Ker) .

40 *Bimal Das v State of Tripura* 2012 Cr LJ 1252, p 1263 (Gauh) .

41 *Nadigadla Ananda Rao v State* (1991) 2 Crimes 611, (1991) 1 Andh LT 18 (AP) .

42 For detailed commentary see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

43 *Subbarayan Chettiar Narayanan Chettiar v Varied Puthiya Veetial Cheeku* AIR 1964 Ker 157 ; *Manalinga Bhatta v Venkataraman Bhatta* AIR 1963 Ker 215 .

44 Sub-section (4) of s 344, CrPC 1973.

45 Re *Gnanamuthu*AIR 1964 Mad 446 .

46 *Banarsi Dass, Retired Inspector of Police v Mohan Lal* (1985) 12 Cr LT 285 .

47 The First Schedule to the Code of Criminal Procedure 1973.

48 *Ismail Khan v State* 1992 Cr LJ 3566, 1991 (4) Kar LJ 262 .

49 Section 260, CrPC 1973.

50 Section 262(2), CrPC 1973.

51 *Parmananda Mohapatra v State* (1968) 34 Cut LT 627, p 636 ; *Surendranath v Kumendracharan Mishra* AIR 1930 Cal 352 .

52 *D Revla v R Chhila* (1970) Cr LJ 425, p 427 (Guj) ; *Santokh Singh v Izhar Hussain* AIR 1973 SC 2190, (1973) Cr LJ 1176 ; *Rangaswami v Gunnammal* AIR 1966 Mad 456, p 459, (1966) Cr LJ 1457 ; *Audi Narayanamma v State* AIR 1970 AP 119, (1970) Cr LJ 443 .

53 *Chikanna Silk House, Elampilli Sotem v State of Madras* (1974) LW (Cr) 39 .

54 *Santokh Singh v Izhar Hussain* AIR 1973 SC 2190, (1973) Cr LJ 1176 ; *SP Kohli v High Court of Punjab & Haryana* (1978) Cr LR (SC) 447, p 452 ; *State v Bhubaneshwar Nayak* (1975 Cut LT 841.

55 *Sheodahin Singh v Bandhan Singh* 3 Cr LJ 45, where *Emperor v Babu* ILR 26 All 509 is **distinguished**; *Umrao Lal v State* AIR 1954 All 424 ; *Mohd Khan v Gourishankar Misra* AIR 1954 Ori 193 ; *U Anug Myin U v District and Sessions Judge of Henzada* AIR 1940 Rang 148 ; *Bandeb Misra v Laxmi Malla* AIR 1963 Ori 179, (1963) 2 Cr LJ 526, p 527 .

56 *Judgal Chandra Dalal v Emperor* 42 CWN 31 ; *Emperor v Babu Ram* ILR 26 All 509, 1 Cr LJ 434 ; *Behari Lal v Emperor* AIR 1939 Lah 529 ; *Balakrishan Pal v Emperor* AIR 1945 Pat 295, p 296 ; *Suba Singh v Emperor* AIR 1941 Pat 165 .

57 *Balakrishna Pal v Emperor* AIR 1945 Pat 295 ; *Suba Singh v Emperor* AIR 1941 Pat 165 .

58 *Queen-Empress v Subbaraya Pillai* 2 Weir 165 ; Re *Kani Papayamma* 2 Weir 652; *Raklal Chandra Shah v Damodar Shah* 12 Cr LJ 11 .

59 Re *Appaji Goundan*AIR 1939 Mad 779 .

60 *Badri Prasad Sharma v Shanti Prasad Sharma* (1982) All Cr R 9 .

61 *Emperor v Ganga Sahal* 2 Weir 193 .

62 *Jamna Prasad v State of Rajasthan* (1991) 3 Crimes 65 .

63 *Dipomal Murijmal v Emperor* AIR 1942 Sind 98, p 99 .

64 *Ranbir Singh v State* (1991) JCC 528 (Del) .

65 *Mahommod Hussain Kasau Matiwala v State of Maharashtra (*1995) Cr LJ 2364, pp 2368, 69 (Bom).

66 *Kuriakosa v State of Kerala* (1995) Cr LJ 1751, p 1753 (Ker) .

67 *Sumat Prasad v Emperor* AIR 1942 All 11 .

68 *Ibid*; *Jagdish Prasad Singhal (Dr) v State of Rajasthan* (1994) 2 Crimes 252, (1994) Cr LJ 759 (Raj) .

69 *Jalsingh (Dr) v State of Rajasthan* (1995) 1 WLC (Raj) 608 ; *Vijay Kumar v Bachna* (1992) 2 Crimes 419 (P&H) ; *Brijendra Kumar v Prakash* (1984) Cr LJ 421 (Bom) .

70 *Kuriakose v State of Kerala* (1995) Cr LJ 1751, p 1754 .

71 *Arun Kumar Agarwal v Radha Arun* (2001) 1 Cr LJ 3561 (Kant) (DB) .

72 *Ibid.*

73 *Umrao Lal v State* AIR 1954 All 424, p 426 .

74 *Emperor v Ganga Sahal* (1903) All WN 68 .

75 *Liaqat Husain v Vinay Prakash* AIR 1946 All 156, p 158 .

76 *Teoomal Gerimal v Pir Ali Mahommad Shah Rashidi* AIR 1937 Sind 116 .

77 *Hari Shankar Sharma v State of Rajasthan* (1994) 2 Crimes 265 (Raj) .

78 *Umrao Lal v State* AIR 1954 All 424, p 426, 427 .

79 Re *Bijili Papamma*AIR 1948 Mad 471, p 472 ; *Haji v State* AIR 1950 Ajmer 37(2) .

80 *Suba Singh v Emperor* AIR 1941 Pat 165 .

81 *Pragi v Emperor* AIR 1936 Oudh 373, 37 Cr LJ 885 ; *Habibullah v Queen-Empress* 10 Cal 937 ; Re *Palani Palangan* ILR 26 Mad 55; *Girdharimal v Emperor* 17 Cr LJ 240 .

82 *Kuriakose v State of Kerala* (1995) Cr LJ 1751, 1754 .

83 *Emperor v Nirigappa Ramappa* AIR 1941 Bom 408 ; *Karamat Ali v Emperor* AIR 1928 Cal 862 ; Re *Madiga Narasigadu*AIR 1949 Mad 502 ; *Chanbasayya Rachyya v Emperor* AIR 1947 Bom 161, 48 Cr LJ 474 ; *Sawa v State* (1974) Raj LW 19 .

84 *Emperor v Jitsing Umrao Singh Khatri* AIR 1935 Nag 145, 36 Cr LJ 935 ; *Karamat Ali v Emperor* AIR 1928 Cal 862 ; *Local Government v Gambhir Bhujua* AIR 1927 Nag 189, 28 Cr LJ 845 .

85 *Emperor v Jitsingh Umrao Singh Khatri,* AIR 1935 Nag 145, 36 Cr LJ 935 .

86 *Habibullah v Queen-Empress* ILR 10 Cal 937 ; Re *Palani Palagan* ILR 26 Mad 55, **referred to**; *Girdharimal v Emperor* 17 Cr LJ 240 .

87 *Bajirao Balvant v Emperor* AIR 1933 Nag 179, 34 Cr LJ 649 ; *Ghanshamdas Pumamal v Emperor* AIR 1933 Sind 412 ; *Jari v Emperor* AIR 1934 Sind 155, 36 Cr LJ 10 .

88 *Kailashpati Mishra v Nand Lala Ahir* AIR 1952 Pat 70, 72.

89 *Emperor v Tripura Shankar* ILR 37 Cal 618 .

90 *Emperor v Jitsing Umrao Singh Khatri* AIR 1935 Nag 145 .

91 *M Somaiah v State of Andhra Pradesh* (1992) 1 Andh LT 464 (AP) .

92 *Emperor v Tripura Shankar* ILR 37 Cal 618 approved; *NgaLu Pe v Emperor* 13 Cr LJ 56 ; *Queen-Empress v Ghulet* ILR 7 All 44 ; *Pananganti Parthasarthy Nayanim Garu v Pallikapu Venkataswami Reddy* 11 Cr LJ 353 .

93 Re *Parvataneni Kamayya* 16 Cr LJ 14.

94 *Queen-Empress v Ghulet* ILR 7 All 44 ; *Imambux v Emperor* 15 Cr LJ 379 ; *Queen-Empress v Ramji Sajabarao* ILR 10 Bom 124 ; *Emperor v Tikam Lakhi* 15 Cr LJ 488(1).

95 *Hukum Chand v Emperor* AIR 1928 Lah 862, 29 Cr LJ 679 .

96 *Ismail Khan v State* (1992) Cr LJ 3566, p 3568 .

97 *Dalabi v Emperor* 4 Cr LJ 469 .

1 *Rami Reddi v Public Prosecutor Kurnool* AIR 1915 Mad 508, 15 Cr LJ 612 ; *Ganesh Mull Marwari v Emperor* AIR 1931 Mad 778, 33 Cr LJ 48 .

2 *Government v Karimdeo* ILR 6 Cal 496 ; Re *Balgangadhar Tilak* 4 Bom LR 750; *Girwar Prasad v Emperor* 9 Cr LJ 219 .

3 *Ganesh Mall Marwari v Emperor* AIR 1931 Mad 778 ; *Athi Ambalagaran v Emperor* AIR 1932 Mad 494 .

4 Re *Balgangadhar Tilak* 4 Bom LR 750.

5 **But see***Girwar Prashad v Emperor* 9 Cr LJ 219 .

6 *Usha Khurana v State of Rajasthan* (1994) RCC 168 (Raj) .

7 *Parwat Vedu Patil v Sukdev Shivram Patil* AIR 1958 Bom 617, p 618 .

8 *Nanjundaiah v Rangaiah* (1977) 2 Kant LJ 374, p 376 .

9 *CK Sha v State of Bihar* (1975) Cr LJ 1939 (Pat) (DB) .

10 *Aziz v State of Rajasthan* (2005) Cr LJ 3056 (Raj) (DB) .

11 Re *Bhupalli Mulliah*AIR 1959 AP 477 .

12 *State of MP v Ramlakhan Singh* 2010 Cr LJ 1574, p 1580 (MP), 2009 (3) JLJ 173 .

13 *Queen v Kalichurun Lahooree* 9 WR 54 .

14 *Emperor v Bankatram Lachiram* (1904) 1 Cr LJ 390 (Bom) .

15 *Queen v Moharaj Misser* 16 WR 47, 7 BLR Appx 66 .

16 *Ibid*.

17 Re *Roman Audheekaree* 10 WR 37.

18 *Queen v Mungul Das* 23 WR 28 ; *Queen v Womesh Chunder Ghose* 5 WR 71 ; *Queen v Feojdar Roy* 9 WR 14 ; *Queen v Soonder Mohoree* 9 WR 25 ; *Rakhal Chandra Laha v Emperor* ILR 36 Cal 808 ; *Crown v Mi Shwe Ke* 1 LBR 268 .

19 *Hira Nand Ojha v Emperor* 4 Cr LJ 227 .

20 *State of Gujarat v Ramesh Bhai Pamanand Shah* (1966) 4 Guj LR 439 .

21 Re *Chan Hang Kin* 13 CWN 685.

22 Statement of Objects and Reasons, illust (c) to s 221, CrPC .

23 *Queen-Empress v Ghulet* ILR 7 All 44 ; *Public Prosecutor v Atchamma* AIR 1948 Mad 487 ; *Chanbassayya Rachayya v Emperor* AIR 1947 Bom 161 ; *Gangawwa v State of Mysore* AIR 1969 Mys 114, (1967) Mad LJ (Cr) 421 .

24 *Queen-Empress v Annia Ratanlal* , 518; *Queen-Empress v Kabhai Ratanlal* , 336; *Queen-Empress v Sadanand Narayan* ILR 18 Bom 377 .

25 *Queen Empress v Muhomed Hymayoon Shah* 21 WR 72 (FB) .

26 *Babari Bhura* case (1904) 2 Cr LJ 590.

27 *Queen-Empress v Mugapa Bin Ningapa* ILR 18 Bom 377 ; *Emperor v Bankatram Lachiram* ILR 28 Bom 533 **relied on**.

28 *Trijumal v State* AIR 1958 Raj 240 ; Re *Ayyalu Reddi* 5 MLT 358; *Queen-Empress v Khem* ILR 22 All 115 ; *Emperor v Tassadduk Husain* 28 All WN 73 .

29 *Taijumal v State* AIR 1958 Raj 240 .

30 *State v Dhanna Sewa* AIR 1959 MP 35, 36; *Umrao Lal v State* AIR 1954 All 424 .

31 *Emperor v Ningappa Banappa* AIR 1941 Bom 408 .

32 *Chandbasayya Rachayya v Emperor* AIR 1947 Bom 161 .

33 *Keramat Ali v Emperor* AIR 1928 Cal 862 .

34 *Hamam Singh v Empress* 27 PR 1890 ; *Maung Thaw Na v Emperor* 11 Cr LJ 734 ; *Dolabi v Emperor* 4 Cr LJ 469 .

35 *Hari Charan Singh v Queen-Empress* ILR 27 Cal 455 ; *Queen-Empress v Ramji Sajabarao* ILR 10 Bom 124 ; *Queen-Empress v Bharma Bin Ningappa* ILR 11 Bom 702 ; *Queen-Empress v Mugapa Bin Ningapa* ILR 18 Bom 377 (FB) .

36 *Emperor v Bankatram Lachiram* ILR 28 Bom 533 .

37 *Queen-Empress v Mahommad Humayoon Shah* 21 WR 72 (FB) .

38 *Repealed by the Prevention of Corruption Act, 1988 (49 of 1988), s31.*

39 *Charan Das v Emperor* AIR 1939 Sind 170 .

40 Chief Justice Pratt, Fawcett and Setalved JJ, (Shah J dissenting) in *Macleod Purshottem Ishwar Amin v Emperor* AIR 1921 Bom 3 (FB) ; **overruling***Queen-Empress v Mugapa Bin Ningapa* ILR 18 Bom 377 (FB) .

41 If both the contradictory statements are made in the same inquiry or trial the charge may be suitably modified accordingly upon the said evidence on a point material to be result of such proceeding, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within my cognizance.

42 *Queen-Empress v Puran* 1899 All WN 39, per Strachey CJ.

43 *Ibid*, per Knox J.

44 *Queen-Empress v Ramji Sajabarao* ILR 10 Bom 124 ; *Queen-Empress v Ghulet* 7 ILR All 44 ; Re *Munni Buksh* 3 CWN 81.

45 Re *Indrachand Bachraj*AIR 1932 Bom 185, p 186, 33 Cr LJ 386 ; *Mahommad Sadiq v Emperor* 6 Cr LJ 162, 1 CWN 911 .

46 *Emperor v Ismail Khadirsab* ILR 52 Bom 385, 392.

47 *Superintendent & Remembrancer of Legal Affairs v Taraknath Chatterjee* AIR 1935 Cal 304, p 306 .

48 *K Karunakaran v TV Eachara Warrier* (1977) Cr AR (SC) 411, (1977) Cr LR (SC) 521 .

49 *Ratansi Daya v Emperor* AIR 1916 Sind 70(2), p 71, 17 Cr LJ 96, 4 SLR 170 ; *Queen v Ahmad Ally* 11 WR 25, 27 ; *Padarath Singh v Ratan Singh* (1920) Pat 419, 21 Cr LJ 145 ; *SC Gupta v Emperor* AIR 1924 Rang 17, 25 Cr LJ 185 ; *Asgarall v Emperor* AIR 1942 Nag 80, 43 Cr LJ 649 .

50 *Jagdat Singh v Emperor* AIR 1934 Pat 133, p 134, 34 Cr LJ 917 ; *Shahzad Khan v Emperor* AIR 1933 Pat 513, 34 Cr LJ 912 ; *Emperor v Mahommad Ishaq* AIR 1914 All 170, 15 Cr LJ 579, 36 ILR All 362 ; *Ramdeni Pathak v Emperor* AIR 1938 Pat 145,

p 146, 39 Cr LJ 358 .

51 *Chandrasekhar v State of Madhya Pradesh* (1981) Jab LJ 122 .

52 *Queen v Ahmed Ally* 11 WR 25, p 27 .

53 *Padarath Singh v Ratan Singh* AIR 1920 Pat 419, 21 Cr LJ 145, 5 Pat LJR 23 ; *SC Gupta v Emperor* AIR 1924 Rang 17, 25 Cr LJ 185, ILR 1 Rang 290 ; *Asgarali v Emperor* AIR 142 Nag 80, 43 Cr LJ 649, (1942) ILR Nag 695, (1942) Nag LJ 257 .

54 *Mahommad Ismail Khan v Emperor* (1920) 21 Cr LJ 12, p 14 .

55 *Ram Lakhan Singh v State of Bihar* (1972) BLJR ix (Summary of case).

56 *K Karunakaran v TV Eachara Warrier* (1977) Cr AR (SC) 411, p 416, (1977) Cr LR (SC) 521 .

57 *Ramdeni Pathak v Emperor* AIR 1938 Pat 145, p 146, 39 Cr LJ 358 .

58 *Anandi Prasad v Emperor* AIR 1934 Oudh 65, 66, 35 Cr LJ 390, 1 OWN 87 ; *Takasi Satyanarayana v State of Andhra Pradesh* (1985) 1 Crimes 60 (AP) .

59 *Taj Mahommad v Emperor* AIR 1928 Lah 125, p 127, 29 Cr LJ 212, 29 PLR 14 ; *Gopinath Panda v Emperor* AIR 1917 Pat 499, 18 Cr LJ 772 .

60 *Superintendent and Remembrancer of Legal Affairs, Bengal v Taraknath Chatterjee* AIR 1935 Cal 304, p 305, ILR 62 Cal 666 ; *Chandraskhekhar v State of Madhya Pradesh* (1981) Jab LJ 122 (MP) .

61 Re *Indrachand Bachraj* 33 Cr LJ 386, ILR 56 Bom 213, 34 Bom LR 294; *Mahommad Siddiq v Emperor* 6 Cr LJ 162, 11 CWN 911 .

62 *State of Maharashtra v Jivan Govindarao Shedge* (1977) Cr LR (Mah) 11, p 13 .

63 *Ashok Kumar Rout v State of Bihar* (2006) Cr LJ 3362 (Pat) .

64 *Rangaswami v Gunnammal* AIR 1966 Mad 456,p 459, (1966) Cr LJ 1457.

65 *State v Shigara Singh* (1964) 66 Punj LR 53 .

66 *CP Vedia v State* (1966) Cr LJ 825, 826 (All).

67 *Narmada Shankar v Danpal Singh* (1966) Cr LJ 834, p 837, (1966) All WR (HC) 474 .

68 *Queen v Gurjoon Aheer* 7 WR 37 (Cr) .

69 *Chaina v State of Rajasthan* (1981) Cr LR (Raj) 148 .

70 *Queen v Rewah Goallah* 5 WR 95 (Cr) .

71 *Williams Luis v State* AIR 1956 Bom 185, p 186 .

72 *Bhawani Singh v State* (1971) Raj LW 392 .

73 *Thakasis Satyanarayana v State of Andhra Pradesh* (1985) 1 Crimes 60 (AP) .

74 *Mool Chand v State* (1990) 1 Chand Cr C 163 (Del), (1990) 40 DLT 326 .

75 *Mannath Balchandran v Forbes Compbell & Co Ltd* (1996) Cr LJ 2131 (Bom) .

76 *Baij Nath Dubey & Ors v Awas Evam Vikas Parioned Lucknow & Ors* (1997) Cr LJ 2681 (All) .

77 *Mohd Zahid v Govt of NCT of Delhi* (1998) Cr LJ 2908 .

78 *Madan Prasad Kharwar v State of Jharkhand* 2010 Cr LJ (NOC) 619 (Jhar) .

79 *Swarnalata Bhiyan v State of Orissa & Ors* (1998) Cr LJ 4520 .

80 *Gulshan Rai Nagpal v Principal, Government Law College* (2002) Cr LJ (Sik) 171 (DB) .

81 *Court on its own Motion v State of Punjab* 2012 Cr LJ 2440, p 2450 (P&H).

82 *Public Prosecutor, High Court of Andhra Pradesh v Purushotham Reddy* (1999) I CCR 406 (AP) .

83 *OP Gogne v State (NCT of Delhi)* 2012 Cr LJ 1718 (Delhi) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 194.

Giving or fabricating false evidence with intent to procure conviction of capital offence.--

Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the law for the time being in force in India, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

If innocent person be thereby convicted and executed.--and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

Comments

1. Legislative Changes

The words 'by the law of British India or England' were substituted for the words 'by this Code' by the India Railways Act 1890, s 149, which is now repealed. The words 'by the laws for the time being in force in the Provinces' were substituted for the words 'Law of British India or England' by the Adaptation of Laws Order 1948. The words 'the Provinces' were substituted by the words 'the States' by the Adaptation of Laws Order 1950. The words 'the States' were substituted by the word 'India' by Act 3 of 1951. The words 'imprisonment for life' were substituted for the words 'transportation for life' by Act 26 of 1955, s 117 and Schedule.

2. Scope and Applicability

This and the next section deal with two aggravated forms of giving or fabricating false evidence: (a) where the intention is to procure the conviction of a person for a capital offence (s 194, IPC), or (b) for an offence punishable with imprisonment for life or imprisonment for seven or more than seven years (s 195, IPC). If in the first case the capital punishment is actually awarded and carried out, and the person executed was innocent, then the giver or fabricator of the false evidence can also be punished with death under the latter part of this section.1467

To constitute an offence under this section, the accused must give or fabricate false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of a capital offence.

An application/interlocutory application filed by either party for some relief is not evidence within the meaning of s 3, Indian Evidence Act, and as such, would not fall within the meaning of s 294, CrPC . No offence is committed under s 193 or s 194, IPC .[84]

3. Tutoring of Person is Fabricating False Evidence

In one case, the Allahabad High Court held that the tutoring of a man to give false evidence is not fabricating false evidence,[85] but dissenting from this, it has been held in a subsequent case that the tutoring of a man to give false evidence amounts to the 'causing of a circumstance to exist' and therefore, amounts to fabricating false evidence within the meaning of s 192 .[86] If a police officer coerces a person to make a false statement under s 164, CrPC 1973, he fabricates false evidence and is liable to be punished under this section.[87]

4. 'Intending Thereby to Cause'--Meaning of

The words 'in any stage of a judicial proceeding' which occur in s 193 are not repeated in this section. In this respect the terms of this section are wider than those of s 193 . According to one view, this section refers only to the final stage, that is the trial of the case.[88] So, a witness, who gives false evidence in the committing proceedings against an accused person subsequently committed to the sessions on a charge of murder, would not be guilty of an offence under this section, the reason being that it is difficult to affirm the existence of an intention to cause, or of knowledge that the false evidence is likely to cause, a person to be convicted of a capital offence, when the proceeding in which the evidence is given, is one is which such a conviction is not legally possible.[89] It would follow from this *a fortiori* that the offence of a person accusing another falsely of murder to a head constable in an inquiry under s 174, CrPC, would not fall under this section.[90]

In a Calcutta case, however, it has been held that it is not necessary under this section that the false evidence which is given should be evidence given in a court of justice. Such statement, if made to a police officer, would amount to the offence of giving false evidence as defined by s 191, taking s 118 of the Code into consideration.[91]

Where the accused officer-in-charge of the police station prepared false statement said to be given to the deceased, he was prosecuted for offences under ss 193 and 194, IPC .[92]1468

An inspector of police, while making the investigation in respect of the murder of *A,* falsely implicated the accused with the connivance of two *sarpanchas* and a village witness by concocting the whole evidence and got the accused convicted by the trial court. In the appeal, the alleged deceased *A* appeared in the High Court and he was not found murdered. The High Court held that the inspector, *sarpanchas* and other witnesses were liable to be prosecuted under s 194, IPC read with s 340, CrPC .[93]

5. Fabrication in Investigation Papers by Investigating Officer

Time was not mentioned in the documents prepared during investigation. Time was inserted later by the appellant, Investigating Officer in the case. His purpose was to see that the accused persons were convicted in the case. Appellant was convicted under s 194, IPC .[94]

6. 'Likely'--Meaning of

To bring a case within the section, it must at least be possible that a conviction may be the result of giving or fabricating false evidence. *A* is being tried for murder, *B* falsely swears that *A* did not commit the murder, but that *C* (not in custody) did. His evidence being inoperative to secure the conviction of any one for the capital offence, *B* has not committed an offence under s 194, though he has committed one under s 193 .[95]

7. Capital Offence --What is?

Capital punishment means the penalty of death inflicted in pursuance of judicial sentence, it being a cardinal constitutional principle that no one is to be put to death without being brought to answer in due process of law.[96] Capital offence is that offence for which death penalty may be inflicted.

The following are capital offences under this Code:

(a) Waging, *etc*, a war against the Government of India (s 121, IPC).
(b) Abetment of mutiny in the Army, Navy, or Air Force, if mutiny is committed in consequence thereof (s 132, IPC).
(c) An offence under the second paragraph of s 194, IPC .
(d) Murder (s 302, IPC).
(e) Murder by a person sentenced to imprisonment for life (s 303, IPC).
(f) Abetment of suicide by a child, insane person, *etc* (s 305, IPC).
(g) Hurt caused in an attempt to commit murder by a life convict to murder (s 307, IPC).
(h) Murder in dacoity (s 396, IPC).1469

Offences capital by the Law of England are the following:

(i) High treason.[1]
(ii) Murder.[2]
(iii) Piracy within violence.[3]
(iv) Burning or destroying ships of war, arsenals, magazines, *etc.*[4]
(v) Numerous offences in the Navy.[5]
(vi) Numerous offences in the Army.[6]

8. Procedure

The offence under this section is non-cognizable but a warrant shall ordinarily issue in the first instance. It is non-bailable and non-compoundable and is triable only by a court of session. There is no period of limitation to prosecute a person for committing an offence under this section.

Based on a judgment of acquittal, the investigating officer was sought to be proceeded against for the offence under s 194, IPC . During the progress of preliminary inquiry under s 340, CrPC, a notice was issued to the investigating officer who sought summoning for the production of the case diaries relating to the matter. The prayer was refused. It was held that the court having summoned the proposed the accused it, ought not to shut him out when he wanted to aid the court in determining the question before it.[7]

9. Complaint

Section 195(1)(b), CrPC provides that no court shall take cognizance of an offence punishable under this section when committed in, or in relation to, any proceeding in any court except on the complaint in writing of that court, or some other court to which that court is subordinate. So a complaint by the concerned court is necessary for the prosecution of an offender under this section.

For detailed commentary *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis may be referred to.

10. Stage of Sanction under Section 197 , CrPC

Whether a sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of public duty, but facts that may come to light subsequently in the course of the prosecution evidence at the trial or

otherwise, may establish the necessity for a sanction. In that event, the court shall dismiss the1470 complaint on the ground that the accused could not be prosecuted without a sanction of the State Government under s 197, CrPC .[8]

11. Charge

The following form of charge may be adopted:

> I (*name and office of the sessions judge etc*) hereby charge you (name of the accused) as follows:
>
> That you, on or about the day of.....at.....in the course of trial of.....before.....gave false evidence (*or fabricated false evidence*), intending to cause, or knowing it to be likely that you will thereby cause..... (*give the name of the person*) to be convicted of an offence, which is capital by the law in force in India. (*Where the charge is under the second part of section194*) and an innocent person..... (*give the name of the person*) has been convicted and executed, and thereby committed an offence, punishable under section 194 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried on the said charge by this court.

12. Proof

In addition to the points mentioned under the last section, the following further points must be proved:

The accused, when giving or fabricating false evidence, intended thereby to cause or knew that it was likely that he would thereby cause the person in question to be convicted of the capital offence, by the laws for the time being in force in India.

For the second clause, prove further:

(i) that the capital punishment was awarded and carried into effect;

and

(ii) that the person executed was an innocent person.

84 *Anil Kumar Mishra v State of Jharkhand* 2014 Cr LJ (NOC) 44 (Jhar) .

85 *Durga Prasad v Emperor* 16 Cr LJ 677 .

86 *Sut Nath Bhaduri v Emperor* AIR 1927 All 721, 28 Cr LJ 950, 25 All LJ 1077 ; **relying on***Emperor v Chheda Lal* ILR 29 All 351, 4 All LJ 237).

87 *Ram Nath v Salig Ram* AIR 1967 All 519, 520, (1957) Cr LJ 1463.

88 *Reg v Gokal Das* Rat Unrep Cr Cases 80, p 81.

89 *Emperor v Mahommad* (1886) 32 PR 1886 (Cr) .

90 *Mahommad Hayat v Emperor* AIR 1922 Lah 133, 23 Cr LJ 82, 6 PWR (Cr) 1922 .

91 *Queen v Nim Chand Mookerjee* 20 WR (Cr) 41 .

92 *Madan Prasad Kharwar v State of Jharkhand* 2010 Cr LJ (NOC) 619 (Jhar) .

93 *Darshan Singh v State of Punjab* (1985) Cr LJ 71 (NOC) (P&H) ; **See also***Madan Prasad Kharwar v State of Jharkhand* 2010 Cr LJ (NOC) 619 (Jhar) ; *Suresh Chandra Sharma v State of MP* 2009 Cr LJ 4288, AIR 2009 SC 3169 .

94 *Suresh Chandra Sharma v State of MP* 2009 Cr LJ 4288 (SC), AIR 200 SC 3169, 2009 (5) Scale 699 .

95 *R v Hardayal* 3 BLR Ap (Cr) 35.

96 Mag Car c 39, 28 the Crown, I, 497 Ed III, c 3; Hale, Pleas of.

1 32 Geo, III, c 48, 54 Geo III, c 146, 33 and 34 Vic c 23, s 31 .

2 24 and 25 Vic c 100, s 1 .

3 7 Will IV and 1 Vic c 88, s 2 .

4 12 Geo III, c 24.

5 29 and 30 Vic c 109, ss 2 - 7, 10 - 13, 19, 30, 34 and 52(1) .

6 44 and 45 Vic c 53, ss 4, 6(1), 7, 8(1), 9(1) and 12(1) .

7 *Karnail Singh v Tirath Singh Sobti & Anor* (1982) Cr LJ (NOC) 155 (P&H), (1982) Chand Cr C 252 (P&H).

8 *Ram Nath v Salig Ram Sharma* (1967) All 519, (1967) Cr LJ 1463 ; *Matajoj Dobey v HC Bhari* AIR 1956 SC 44, (1956) Cr LJ 140 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 195.

Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment.--

Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which [9][by the law for the time being in force in [10][India]] is not capital, but punishable with [11][imprisonment for life], or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Illustration

A gives false evidence before a Court of Justice, intending thereby to cause *Z* to be convicted of a dacoity. The punishment of dacoity is [12][imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, with or without1471 fine. *A,* therefore, is liable to [13][imprisonment for life] or imprisonment, with or without fine.

Comments

1. Scope

The offence under this section is an aggravated form of an offence under s 193 [14] but is an attenuated form of the offence under the last section. This section applies only to cases where the intention is to procure conviction for an offence which is neither capital nor punishable with imprisonment for less than seven years. Statement on oath falsely supporting the prosecution case against an accused amounts to an offence under ss 193 and 195, IPC .[15] To sustain a conviction under this section it must be proved that the accused, when giving or fabricating the evidence, intended thereby to cause, or knew that it was likely that he would thereby cause, the person in question to be convicted of an offence punishable with imprisonment for life or imprisonment for a term of seven years or upwards under this Code.[16] If the charge is of giving false evidence, it must be proved not only that the accused spoke falsely, but also knew that he was speaking falsely.[17] Merely persuading a person to give false evidence in a case does not amount to fabrication of false evidence under this section, unless the person persuaded is produced as a witness and he gives false evidence in the case.[18]

On the basis of answer given in examination under O 2, r 2, CPC, a party cannot be prosecuted for offence under s 195, IPC as a party is not examined on oath or affidavit in examination under O 2, r 2, CPC.[19]

Where prosecution of one of the PWS under s 195, IPC was filed on allegations that in case under the Prevention of Corruption Act he had given evidence before the Court contrary to his statement under s 164, CrPC, when the statement of the PW was recorded after lapse of four years, held that the prosecution of the PWS was not proper, especially when the case under s 195, IPC was filed after a lapse of 11 years from the date of giving false evidence.[20]

2. Legislative Changes

The words 'by the law of British India or England' were substituted for the words 'by this Code' by the Indian Railways Act 1890,[21] s 149 . The same section, *i.e.* s 149 1472 was repealed by the Repealing Act 1 of 1938. The words 'by the law for the time being in force in the Province' were substituted for the words 'Law of British India or England' by the Adaptation of Laws Order 1948. The words 'the Provinces' were substituted by the words 'the States' by the Adaptation of Laws Order 1950 and the words 'the States' were substituted by the word 'India' by Act 3 of 1951. The words 'imprisonment for life' were substituted for the words 'transportation for life' by Act 26 of 1955, s 117 and Schedule. In the illustration the words 'transportation for life' were substituted by the words 'imprisonment for life' by Act 26 of 1955, s 117 and Schedule with effect from 1 January 1956.

3. Illustrative Cases

Where a man burns his own house, it is the causing of a circumstance to exist within the meaning of s 192, and he may be liable under this section if he intended thereby to procure the conviction of another person. But if the act was committed in a most public manner and not in a way calculated to lead to the conviction of that person, he cannot be held guilty under this section.[22] If he burnt the house and charged another with the offence of doing so, he should be convicted and sentenced under s 211 (making a false charge) and not under this section.[23]

Where the accused concealed certain stolen property in another's field with a view to having that innocent person punished as an offender, it was held that the accused committed the offence under this section.[24] So also, when the accused coined false rupees not for the purpose of making a gain by passing them off as good coins but for the purpose of getting the coins secretly into the house of their enemies, against whom they were making to the police a false charge of theft, accompanied by a request for a house search, it was held that the accused were guilty of the offence under this section.[25]

The accused who owed a certain amount to another, sent a registered and insured packet, purporting to contain currency notes, in settlement of the debt, but actually containing waste paper and in a suit by the creditor, applied to the court to admit the acknowledgment receipt in evidence. It was held that the accused was guilty of the offence under this section.[26]

4. Procedure

The procedure is the same as in the case of an offence under the preceding s 194, IPC . There is no period of limitation for taking cognizance under this section also.

5. Complaint by the Court

cognizance of an offence under this section can be taken only on the written complaint of the concerned court as provided by s 195(1)(b), CrPC 1973. For a detailed commentary on this point, the commentary under s 193, *ante* may be referred to.1473

The successor-in-office of a magistrate can file a complaint under this section in respect of an offence committed before his predecessor.[27]

Where forgery in a document was committed prior to it being produced in Court, a private complaint is not barred.[28]

6. Trial for other Distinct Offence not Barred

Section 195 of the Code of Criminal Procedure does not bar the trial of an accused for a distinct offence disclosed by the same set of facts but not so stated therein. Section 195 also does not provide further that if in the course of the commission of that offence, other distinct offences are committed, the magistrate is debarred from taking cognizance in respect of those offences as well.[29]

7. Charge

The following form of charge may be adopted:

> I (*name and office of the sessions judge etc*) hereby charge you (name of the accused) as follows:
>
> That you, on and about the day of.....at.....in the course of trial of.....before.....gave false evidence (*or fabricated false evidence*), intending thereby to cause (*or knowing it to be likely that you will thereby cause*) .....(*give name of the person*) to be convicted of an offence.....punishable with imprisonment for life or imprisonment for a term of seven years or upwards, and thereby committed an offence, punishable under section 195 of the India Penal Code, and within my cognizance.

And I hereby direct that you be tried, on the said charge, by this court.

8. Proof

In order to prove the guilt under this section the prosecution has to prove that the accused when giving or fabricating false evidence intended thereby to cause or knew that it was likely that he would thereby cause, the person in question to be convicted of an offence (other than capital) punishable with imprisonment for life, or imprisonment for a term of seven years or more.

9 Substituted by the AO 1948, for 'by the law of British India of England'.

10 Substituted by Act 3 of 1951, s 3 and Schedule, for 'the States'.

11 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

12 Substituted by Act 26 of 1955, s 117 and Schedule, for 'such transportation' (wef 1-1-1956).

13 Substituted by Act 26 of 1955, s 117 and Schedule, for 'such transportation' (wef 1-1-1956).

14 *RK Kapoor v Pratap Singh Kairon* AIR 1966 All 66, (1966) Cr LJ 115 .

15 *Santokh Singh v Izhar Hussain* AIR 1973 SC 2190, (1973) Cr LJ 1178, p 1180 .

16 Re *Naurang*(1906) 3 ALJR 11.

17 *Gopalaswami Naidu v Emperor* 10 Cr LJ 7 .

18 *Durga Prasad v Emperor* AIR 1915 All 388, 16 Cr LJ 667 ; **See also***Kapil Corepacks Pvt Ltd v Harbans Lal* AIR 2010 SC 2809, (2010) 8 SCC 452 .

19 *Kapil Corepacks Pvt Ltd v Harbans Lal* AIR 2010 SC 2809, (2010) 8 SCC 452, JT 2010 (8) SC 124, 2010 AIR SCW 4593, (2010) 94 AIC 72 (SC) .

20 *Vidadala Maruthi Hari Prasad Rao v Special Judge, SPE&ACB Cases* 2007 Cr LJ 710 (AP) .

21 Now repealed by the Railways Act, 1989 (24 of 1989).

22 Re *Shib Dayal* 5 NWP 128.

23 *Queen v Bhagwan Ahir* 8 WR (Cr) 65(1).

24 *Empress of India v Rameshar Rai* ILR 1 All 379 .

25 *Lal Chand v Emperor* 13 Cr LJ 252, 43 PLR 1912, 17 PWR 1912 (Cr) .

26 *Kunju v King-Emperor* AIR 1927 Mad 199, 28 Cr LJ 70, (1926) 51 Mad LJ 800 .

27 *Ajaib Singh v Joginder Singh* AIR 1968 SC 1422, p 1424, (1969) Cr LJ 4 ; *Mulchand Bohra v Union of India* (1975-76) 80 CWN 804.

28 *Shahab Uddin Mazumdar v State of Assam* 2011 (101) AIC 868 (Gauh) ; *Jagannath Singh v State of Madhya Pradesh* 2011 (103) AIC 846, 2011 Cr LJ 3008 (MP) ; *Chintamani v State of UP* 2010 (91) AIC 669 (All) .

29 *Pravinchandra Jagivandas Gandhi v Ibrahim Mahommad Merchant* (1987) Cr LJ 1795, (1987) 89 Bom LR 304, (1987) Mah LJ 855, (1987) 3 Bom HCR 29 ; *Basir-ul-Haq v State of West Bengal* AIR 1953 SC 293 ; *Gir Raj v Sulla* AIR 1965 All 597 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

[30][S. 195A.

Threatening any person to give false evidence.--

Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both;1474

and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.]

Comments

1. Legislative Changes

This section is inserted by the Criminal Law (Amendment) Act of 2005, *wef* 16-04-2006.

2. Scope

Tendering of false evidence as well as threats and intimidation to any person to give false evidence have been made penal offences under ss 193 and 195A, IPC .[31]

Where in case under ss 489B and 489, IPC, the prosecution witness, on being threatened by the higher police officers did not support the prosecution case, and filed affidavits before the Court resiling from the prosecution case, the High Court directed the Presiding Officer of the trial Court to file complaint for offences under ss 193 and 195A, IPC .[32] Where the accused gave speech that no false evidence should be given against the workers of party in murder case against the accused, held it did not amount to holding threat to any witness, and s 195A, IPC was not directed in the case.[33]

30 Inserted by the Criminal Law (Amendment) Act, 2005 (2 of 2006), s 2 (wef 16-4-2006).

31 *Court on its own Motion v State of Punjab* 2012 Cr LJ 2440, p 2450 (P&H).

32 *Court on its own Motion v State of Punjab* 2012 Cr LJ 2440, p 2450 (P&H).

33 *Abdul Wahals v State of Kerala* 2013 (4) KLT SN 29 (Ker) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 196.

Using evidence known to be false.--

Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

Comments

1. Scope

This section deals with (a) the corrupt use of false or fabricated evidence or (b) an attempt to use as true or genuine evidence, any evidence which the accused knows to1475 be false or fabricated. It must be read with ss 191 and 192, and can only apply to the use of evidence which was false evidence within the meaning of s 191 or fabricated evidence as laid down in s 192 . False evidence is not always fabricated evidence unless there was, at the time of making it, an intention that it should appear in evidence.[34] The gist of an offence under this section is the procuring of false circumstances or the making of a document containing false statement, so that the court may form a wrong opinion in a judicial proceeding, on the basis of such false evidence.[35] The section makes it punishable not only to use but also to attempt to use false or fabricated evidence corruptly. So, to constitute the offence under this section it is necessary that the false or fabricated evidence should be used or attempted to be used as true or genuine evidence.[36]

2. Evidence must be in Existence

An offence under this section can be held to have been committed only if it is shown that the evidence which the accused used or attempted to use as true or genuine was in existence at the material time.[37] A mere attempt to get a false medical certificate, which is refused, does not fall under this section.[38]

3. 'Uses or Attempts to use'--Explained

The offence under this section is the using or attempting to use corruptly as true or genuine evidence knowing it to be false or fabricated. 'Fabricated' means so fabricated as to constitute an offence. Evidence fabricated out of India, consequently, is not 'fabricated' in the sense of this section, and a person who uses such evidence, however corruptly, is not subject to punishment for it. He, in fact, commits no offence.[39]Where an assessee fabricated his account books for producing before the income tax officer and also produced the same before him, his act thereby attracts the provisions of ss 193 and 196 .[40]

4. Production of a Summoned Document does not Amount to user

The production of a copy is an attempt to use the original.[41] The production of a document, which a person is summoned by a court to produce, however, does not amount to using the document as genuine. The expression 'using a document' is apparently used in the sense of its being put forward in

some way for one of the purposes mentioned in s 463, IPC .[42] The production by a party of a document, which he is bound by law to produce, cannot by itself constitute a user of that document by him. He cannot be put to the risk of having to consider whether a document1476 answering the description contained in the summons is in fact genuine, and whether there is any reason to believe it to be not genuine. The mere production of a document in answer to a command of court can in no case be regarded as fraudulent in law.[43]

The giving of false evidence by the accused that a witness delivered the document to him with a fraudulent intention does not amount to a fraudulent user of the document with reference to which the evidence was given, though it might expose him to a prosecution for perjury.[44]

5. Knowledge and its Burden of Proof

The mere production of false evidence throws on the producer the burden of proving his innocent knowledge, and the production may be made either by himself personally, or through another.[45] If the evidence was produced through another person or persons, it must be proved that he or they knew it to be false, as well as the producer, it being necessary that the witnesses should have the same knowledge, for, otherwise, the evidence is not false.[46] Where a person produced in evidence an account book, one page of which had been extracted and another substituted in its place, it was held that he could not be guilty under this section unless he knew of the forgery, and intended to use the forged evidence for the purpose of affecting the decision on the point at issue when the book was tendered.[47] The document sought to be used may have been fabricated for a different purpose. Thus, where the accused, in a suit upon a bond, sought to support his claim by a letter fabricated for the purpose of enabling him to get the bond registered, it was held that the fact that the letter was fabricated for use before the registrar was no objection to his conviction under this section.[48]

6. Forged and Fabricated--Not the Same

It has been held that the offence imputed against an accused, who, in a civil suit, is alleged to have used as genuine a document which he knew to be a forged document, is one cognizable under s 471 of the IPC .

Such accused should, therefore, be charged under that section, and not under this section.[49]

7. 'Corruptly'--Not Confined to Bribes

The word 'corruptly' has not been defined in the Code. It must, therefore, be given its ordinary dictionary meaning. According to the *Webster's* Dictionary, 'corruptly' means 'without integrity', 'contrary to parity', 'viciously', 'wickedly'. Accordingly to *Black's Law Dictionary*[50] corruptly, when used in a statute, generally imports a wrongful design to acquire some plenniary or other advantage.[51] According to1477*Morgan and Macpherson's Indian Penal Code*, the word 'corruptly' is used in ss 196, 198, 200, 219 and 220, IPC to denote that those whose duty it is to submit evidence for the consideration of judicial and other functionaries on behalf of clients do not incur the penalties for using false evidence unless they use the evidence corruptly. In *Bhan Singh v Jalan Singh* [52] it is said that the word is not used in the sense of 'dishonestly' or 'fraudulently'.[53] It is of a wider import and is not confined to the taking of bribes.[54] Convictions have been made under this section where the word was not confined to the restricted sense indicated above.[55] 'Corruptly' is, therefore, not the same as 'dishonestly or fraudulently'. The user of false evidence, with the knowledge that it is false, must ordinarily be corrupt from its very nature, and the onus lies on the accused to show that there are circumstances in the case which prevent its being corrupt. The fact that he was defending himself against a criminal charge is not enough. Where a public servant has been induced by an accused person to produce a fabricated document in order to support his false defence, it is not difficult to support the inference as to the corrupt use by him of the fabricated evidence as being within the scope of this section.[56] The word 'corruptly' is not intended to connote a motive necessarily connected with the passing of money as an inducement to the person impugned to use or attempt to use the

fabricated evidence. An intention to procure a false conviction is also a corrupt intention.[57]

8. Illustrative Cases

A brought a suit upon a bond, and at the trial supported his claim by a letter fabricated for use before a registrar.[58]*A* is guilty of the offence under s 196 .

A, a debtor, procures *B* as a witness to swear falsely that he witnessed a payment made by *A* to his creditor. *A* is guilty.[59]

A accused *B* of having assaulted him with a *pitna*, which he produced, and which bore some red stains alleged by *A* to be bloodstains. On being chemically examined, it was found that the stains were not of blood. It was held that *A* committed an offence under this section.[60]

A, a minor, was present at the time a false swearing was committed in his favour. It did not appear that he was concerned in procuring such evidence. It was held that *A* had no guilty knowledge and was therefore not liable.[61]

9. Procedure

The offence under this section is non-cognizable. It is bailable or non-bailable depending on whether the offence of giving such evidence is bailable or non-bailable1478 and is triable by the court by which the offence of giving or fabricating false evidence is triable.[62]

In other words, if the giving or fabricating of false evidence, which is corruptly used or attempted to be used, is punishable under s 193, the offence under this section is bailable and triable by a magistrate. The period of limitation for taking cognizance of such offence is three years if the offence falls under para 2 of that section. In case such offence is punishable under s 194 or s 195, the offence under this section is non-bailable and is triable by the court of session. There is no period of limitation for taking cognizance of an offence under this section if the offence of giving or fabricating false evidence, which is used, is punishable under para 1 of s 193 or under s 194 or s 195 of this Code.

Where the income tax department instituted a prosecution against the assessee under ss 276(c) and 277 of the Income Tax Act and under ss 193 and 196 of the Penal Code, the prosecutions are maintainable and the pendency of the reassessment proceedings cannot act as a bar to the institution of such criminal prosecution.[63]

10. Complaint by Court

In view of the prohibition contained in cl (b) of s 195(1), CrPC the cognizance of an offence under this section can be taken only on the written complaint of the court if it is committed in, or in relation to, any proceeding of that court. The provisions of s 195, CrPC are mandatory. Registration of a case against a public servant under ss 196 and 208, IPC without following the proceedings of ss 195 and 240, CrPC was illegal and as such the proceedings were quashed on petition filed under s 482, CrPC .[64]

Where the offence, under this section, has been committed before an income tax officer, the magistrate can take cognizance of the offence, as the income-tax officer has been held to be a court.[65]

Where on the court's direction to hold an inquiry, a deputy superintendent of police reported that the girl produced before the court was not the girl whose production was directed, the custodian, by producing another girl, evidently gave false evidence with a view to mislead the court to make it believe that the girl produced was the petitioner's daughter. It was held that the conduct of the custodian is one which immediately attracted ss 193, 196, 199 and 201 of the IPC . These offences,

however, are covered by s 195 of the CrPC, which states that no court shall take cognizance of such an offence except on the complaint in writing by that court, or some other court to which that court is subordinate, when such offence is alleged to have been committed in or in relation to, to any proceedings in any court. Therefore, a direction was given to the registrar to lodge a complaint against the custodian.[66]1479

11. Distinction between Sections 463, 465 and 471 and Sections 193 and 196, IPC

The gist of this provision is that an offence of forgery of a document as described in s 463, IPC and of using such forged documents, if produced or given in evidence by a person other than a party to a proceeding in a court, do not require a complaint in writing by the court concerned, but prosecution in respect of offences under ss 193 - 196, 199 and 200 (among others), committed in a judicial proceeding by a person (whether a party or not), requires a complaint in writing of the court before which the offence is committed or of some other court to which such court is subordinate. It is this difference which has apparently induced the selection of ss 463 - 471 rather than ss 193 to 196, IPC . The former do not require a complaint by the court but the latter do, and this is the main point of controversy before us also.[67] The broad distinction between offences under the two groups is that s 405 deals with an offence of forgery by making of a false document and s 471 with the offence of using forged document dishonestly or fraudulently. Section 193 deals with the giving or fabricating of false evidence and s 196 with corruptly using evidence known to be false. The gist of the offences in the first group is in the making of a false document and the gist of the offences in the second group is in the procuring of a false circumstance or the making of a document containing a false statement so that a judicial officer may form a wrong opinion in a judicial proceeding on the faith of the false evidence. Another important difference is that whereas s 471 requires a user to be either fraudulent, dishonest or both, s 196 is satisfied if the user is corrupt. The IPC defines the expressions 'fraudulently' and 'dishonestly' but not the expression 'corruptly'.[68]

12. Charge

The charge should specify whether the accused used or attempted to use the false or fabricated evidence.[69]

The following form of the charge may be adopted:

> I (name and office of magistrate, *etc*) hereby charge you (name of the accused), as follows:
>
> That you, (*) on or about the .....day of.....at.....corruptly used (or attempted to use) as true or genuine evidence, the evidence, to wit.....which you knew to be false (or fabricated) and as such punishable under s 193 (or 194 or 195) of the Indian Penal Code, and thereby committed an offence under s 196 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

13. Proof

The prosecution has to prove that:

(a) the accused used or attempted to use some evidence;
(b) it was false or fabricated;
(c) he used or attempted to use such evidence as true or genuine evidence;
(d) he then knew it to be false or fabricated evidence; and
(e) he used or attempted to use it corruptly.1480

34 *Ma Ain Lon v Ma on Nu* AIR 1925 Rang 191, 26 Cr LJ 309 .

35 *Shanti Devi v State* (1970) All LJ 206, p 213 ; *SDutt v State of Uttar Pradesh* AIR 1966 SC 523, p 527, (1966) Cr LJ 459 .

36 *Ma Ain Lon v Ma On Nu* AIR 1925 Rang 191, 26 Cr LJ 309, 3 ILR Rang 26 .

37 *Kumar Chowdhury v Emperor* AIR 1937 Pat 467, 38 Cr LJ 1011, 16 ILR Pat 21, 18 PLT 271, (1937) PWN 288 ; *R v Suffrudeen Ind Jur OS* 122; Re *Katari Veeranna*AIR 1917 Mad 686 .

38 Re *Katari Veeranna*(1916) 17 Cr LJ 38.

39 *Empress v Moorga Chatty* 5 ILR Bom 338, 359 (FB), per Melville J.

40 *Union of India v M/s Gopal Engineering Works* (1988) 15 Reports (Mad) 701 .

41 *Fazl Ahmad v Emperor* AIR 1914 Lah 433, p 436, 15 Cr LJ 344 ; *Queen v Najim Ali* 6 WR (Cr) 41 ; *Malat Singh v Emperor* 3 Cr LJ 255, 3 All LJ 190 .

42 *Assistant Sessions Judge of North Arcot v Ramammal* 13 Cr LJ 35, 10 MLT 563, 36 ILR Mad 337, 22 MLJ 141 ; Re *Muthaih Chetty* 13 Cr LJ 46, 36 ILR Mad 392, 22 Mad LJ 171, (1912) Mad WN 453; *Ma Ain Lon v Ma On Nu* AIR 1925 Rang 191 .

43 Re *Muthiah Chetty* 13 Cr LJ 46.

44 *Ibid*.

45 *Government v Jumal* IM Dig 172 and 475; *Government v Muteeool* IM Dig 174 and 493.

46 *R v Gungommah* 3rd Mad Sess 1860.

47 *Queen v Muddoo Soodun Shaw* 7 WR (Cr) 3 (1).

48 *Lakshmiji v Queen-Empress* 7 ILR Mad 289, 1 Weir 177 .

49 *The Empress v Kherode Chunder Mozumdar* (1880) ILR 5 Cal 717, 6 CLR 118 .

50 *Black's Law Dictionary*, sixth edn, 1990, p 345.

51 *Yellappa s/o Rangappa v Kamalara & Ors* (1995) Cr LJ 230 (Kant) .

52 *Bhan Singh v Jalan Singh* Cr Revn no 26 of 1909.

53 *Empress v Kherode Chunder Mozumder* (1880) 5 Cal 717, 6 CLR 118 .

54 *Rama Nana Hagavne v Emperor* AIR 1922 Bom 99, (101), 3 Cr LJ 23, ILR 46 Bom 317, 23 Bom LR 987 ; *SDutt v State of Uttar Pradesh* AIR 1966 SC 523, 527, (1966) Cr LJ 459.

55 *Queen v Muddoo Soodan Shaw* (1867) 7 WR (Cr) 23 ; *Lakshmaji v Queen-Empress* (1884) 7 Mad 289, 1 Weir 177 .

56 *Rama Nana Hagavne v Emperor* AIR 1922 Bom 99, 23 Cr LJ 23 .

57 *Fazl Ahmad v Emperor* AIR 1914 Lah 433, p 436, 15 Cr LJ 344, 1 PR (Cr) 1914, 139 PLR 1914 ; *SDutt v State of Uttar Pradesh* AIR 1966 SC 523, p 527, (1966) Cr LJ 459 .

58 *R v Ramdyal* 1 M Dig 173 and s 485 .

59 *Government v Jumal* 1 M Dig 172 and s 475 ; *Government v Muteeool* 1 M Dig 174 and s 493 .

60 *Bholanath Dutt v Hari Mohan Dutt* 7 Cr LJ 196, 7 CLJ 169 ; *Fazl Ahmad v R* 15 Cr LJ 344 .

61 *R v Gungammah* 3rd Mad Sess 1860.

62 The First Schedule to the CrPC 1973.

63 *P Sayappai v SK Perumal, First Income Tax Officer, Tuticorin* AIR 1984 SC 1693, (1984) Tax LR 1197 .

64 *Balappa v State of Karnataka* 2011 Cr LJ 4804, p 4809 (Kant) .

65 *CK Nagesh v Panchapakesan* (1975) Mad LJ (Cr) 263 ; relying on *Balwant Singh v LC Bharupal* (1968) 70 ITR 89 (SC) ; *Union of India v M/s Gopal Engineering Works* (1988) 15 Reports (Mad) 701 .

66 *R Rathinam v Kamala Vaiduriam & Ors* (1993) Cr LJ 2661 (Mad)(DB); For detailed commentary on s 195 CrPC, *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis may be referred to.

67 *S Dutt v State of Uttar Pradesh* AIR 1966 SC 523 All (FB).

68 *S Dutt v State of Uttar Pradesh* AIR 1966 SC 523 All (FB).

69 Refer to 2 WR (Letters) 9.

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 197.

Issuing or signing false certificate.--

Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

Comments

1. Scope

Sections 197 and 198, IPC relate to false certificates. This section penalises issuing or signing a false certificate and the next section penalises its use as a true one. The offence is similar to the giving or fabricating of false evidence. In order to constitute the offence under this section (a) the certificate must be one required by law to be given or signed, or it must relate to any fact of which such certificate is by law admissible in evidence, and (b) it must be given or signed knowing or believing that it is false on a material point.

2. 'Issues'--Meaning of

As the words 'required by law to be given or signed' show, the word 'issues' simply means 'gives' or 'delivers'.

3. 'Any Certificate'--What is?

A 'certificate' is a testimony given in writing to declare or verify the truth of anything.[70]The word 'certify' means primarily, to assure, to vouch, to make certain. Every act of certifying does not necessarily result in a 'certificate', meaning thereby a signed document vouching a particular fact. The word 'certificate' may no doubt be used as synonymous with 'certification'[71] but that is clearly not its meaning in ss 197 and 198 .

The certificate contemplated by this section is a certificate which is required by law to be given or signed for use in the course of administration of justice.[72]

As per s 197, a certificate contemplated therein is a certificate, which is required not to be given or signed for the use in the court's administration of justice.[73]1481

In order that a statement in writing may amount to a certificate within the meaning of s 197, IPC, it would not be sufficient that the makes of the certificate should describe it as a certificate. In order to treat such a statement as a certificate it would be necessary that there should be a law requiring the issue of such certificate or providing that such written statement may be treated as a legal statement without formal proof and without formal scrutiny.[74]

4. Requisites of such Certificates--Documents which are not Certificate

The certificate issued should be as required by some law and it has some reference to some statutory requirements.[75] The certificate in respect of which a man may be punished, if it is false to his knowledge or belief, must be either (a) one which is required by law to be given or signed, or (b) one which relates to any fact of which such certificate is by law admissible in evidence. One or other of these requirements must be fulfilled before a man can be dealt with under ss 197 and 198 .[76] The certificate contemplated by this section is a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of administration of justice. The offence of issuing a false certificate is one which is intimately connected with the administration of justice.[77] Various instances are given in textbooks of the class of certificates contemplated by these sections. They are no doubt for the most part official or quasi-official certificates, to be given by officials or others, as prescribed in various statues. There is, however, no particular limitation to the character of the certificate meant, except that which we find in the section itself. It must fulfil one of the requirements there set out. If it does not, a man cannot be punished under these sections in respect of it. Thus, a signed petition filed in a court by the accused purporting to represent the decree-holder and falsely stating that the judgment-debtor had paid off the decretal amount to the decree-holder, is not a certificate within the meaning of this section, as there is no provision of law which requires a decree-holder or his agent to give or sign a certificate of payment or adjustment. Nor is there any provision of law which makes the statement of the decree-holder or his agent as to the payment or satisfactionadmissible in evidence as such a certificate, that is, without further proof.[78] A written statement, filed in a civil suit, is also not a certificate within the meaning of this section.[79]

5. Statement Amounting to or not Amounting to Certificate under Section 197 , IPC

There is substantial distinction between a mere statement in writing not amounting to a certificate contemplated by s 197, IPC and a statement in writing amounting to a certificate contemplated by s 197, IPC . The distinction between the statements in writing not amounting to certificate and the statement in writing amounting to certificate, is that the former cannot be used as legal evidence of the facts mentioned in the certificate, but the statement in writing which amounts to a certificate can be1482 used as legal evidence of the facts mentioned in the certificate. Having this distinction in view between the two statements in writing, one which can be used as evidence without any formal proof and the other which cannot be used as legal formal proof is given according to law and the statement

is subjected to scrutiny by cross-examination or otherwise, it would be proper to hold that no statement in writing can amount to a certificate within the meaning of s 197, IPC unless the law enacted by a competent legislature permits the issue of such a certificate or provides that the certificate shall be receivable as legal evidence of the fact mentioned therein. The mere fact that the document is described as a certificate does not make it a certificate in the eyes of law. This distinction must be kept in view by all those persons who have to deal with written statements of other persons. The hazard of dispensing with formal proof and the necessity of scrutinising the veracity of the statements cannot be overestimated, particularly when unscrupulous persons frequently indulge in making false certificates for the purpose of obtaining wrongful gain or causing wrongful loss to others.[80]

6. 'Required by Law to be Given or Signed'--Meaning of

The phrase 'required by law', occurring in this section, has reference to some statutory requirement.[81]Several Acts of the legislature provide for such certificates. A certificate issued by a registered medical practitioner is required by s 509 of the Calcutta Municipal Act 1951 to be given before a corpse can be interned or cremated.[82] A certificate may be given by the administrator-general,[83] entitling the claimant to the estate of a deceased person to recover any sum belonging to him up to the extent of Rs 1,000. A similar certificate may be given by a court under the Indian Succession Act,[84] which has the effect of indemnifying all persons making payments on its strength.[85] The registrar of companies is empowered to issue a certificate of incorporation.[86] Section 61 of the Indian Christian Marriage Act[87] provides for the giving of a marriage certificate. The registrar of assurances is, on completion of the registration of an assurance, empowered to indorse thereon a certificate containing the word 'registered'. 'Such certificate shall be signed, sealed and dated by the registering officer and shall then be admissible for the purpose of proving that the document has been duly registered in the manner provided by the Registration Act, and that the facts mentioned in the endorsements, referred to in s 59 (of the said Act) have occurred as therein mentioned'.[88]

In a case, the petitioner, a qualified doctor, had issued a certificate which he knew to be false in respect of the death of a person under s 509 of the Calcutta Municipal Act, to satisfy the authorities of the burning ghat that the death was not due to any unnatural causes. By virtue of the provisions of the Calcutta Municipal Act, that certificate is admissible in evidence without further proof and the petitioner can be successfully prosecuted under this section.[89]1483

A civil court may certify a payment of adjustment of a decree made out of court,[1] or grant a certificate of sale to an auction-purchaser,[2] or of a case being a fit one for appeal to the Supreme Court.[3]

A person giving a certificate which is not required by law to be given or signed, may be convicted for giving false information to a public servant but not under this section.[4]

A copyist preparing an incorrect copy of a document and thereby enabling the applicant of the copy to use it in a suit would be liable to be convicted under this section and not under s 167 .[5]

A certificate given under r 18 of the rules framed under s 14 of the Government Savings Bank Act,[6] is not a certificate required by law to be given or signed for the purpose of being used in evidence in the course of administration of justice and is not covered by this section.[7] A caste certificate issued by a member of legislative assembly for the purpose of enabling the students to obtain pre-matric scholarships without specifying the caste or tribe of the applicant cannot be held to be a certificate within the meaning of s 197 of the Indian Penal Code . The expression 'required by law' refers to some statutory requirements and there being no statutory requirement requiring the member of legislative assembly to issue the certificates in question, s 197 cannot have any application.[8]

7. Certificate Relating to any fact of which such Certificate is by law Admissible in Evidence on any Material Point

What this expression contemplates is that the certificate should, by some provision of law, be admissible in evidence as such a certificate without further proof. A certificate issued by the chairman of a municipality is not such a certificate as it cannot be used in evidence unless it is formally proved by the chairman.[9] Similarly, a medical certificate is not admissible in evidence without further proof. Consequently, the issuing and uses of a medical certificate, in a criminal proceeding stating, contrary to the fact, that the accused was ill would render neither the accused nor the issuer of the certificate liable under s 197 or s 198 .[10]

Where a false medical certificate is obtained from a doctor for the purpose of a life insurance by a false personation of the real person, who intends to apply for a policy of life insurance and the doctor issues such a medical certificate of fitness in ignorance of the false personation, the doctor is not guilty under this section.[11] The principal of a college gave a certificate in respect of the age of a student so that he may take part in sports. The principal was not required by any law to give such a1484 certificate and therefore, he cannot be said to have committed an offence under s 197 .[12]

8. 'Knowing or Believing it to be False in any Material Point'--Meaning of

For a conviction under this section, the certificate must be false on a material point, and the person issuing or signing it, must do so knowing or believing that the certificate is false on a material point. In the absence of such knowledge or belief, a person cannot be convicted of this offence or its abetment.[13] It may be noted that under s 79 of the Evidence Act, there is a presumption of the genuineness of a certificate issued by an officer of the government but that presumption does not extend to its truth or falsity.

9. Certificate Issued in Good Faith on the Basis of Earlier Certificate

Where the accused *Sarpanch* issuing a false certificate stated therein that the complainant had died, however, the said certificate was issued on the basis of earlier certificate issued by a former *Sarpanch* in which the complainant was shown as dead, it can be said that the accused issued certificate in good faith and he was not aware that it was false. On these facts the accused was held entitled to acquittal.[14]

10. Procedure

An offence under this section is non-cognizable, but a warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by the court by which the offence of giving false evidence is triable. See also commentary on the previous section. For the purposes of limitation s 468, CrPC may be referred to.

No complaint by any court is required for the prosecution of a person under this section.

11. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of .....at.....issued (*or signed*) a certificate required by law to be given (*or signed*) (*or relating to a fact of which such certificate is by law admissible in evidence*) which was false in a

material point, to wit.....and known or believed by you to be false and thereby committed an offence punishable under section 197 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

12. Proof

To obtain a conviction under this section the following points have to be proved:

(a) that the accused issued or signed a certificate;
(b) that the certificate was required by law to be given or signed, or that it related to a fact of which such certificate is by law admissible in evidence;1485
(c) that the certificate is false in any material point; and
(d) that the accused issued or signed the certificate knowing or believing it to be false in any material point.

13. Punishment

A person committing an offence under this section and s 198, IPC is punishable in the same manner as if he had given false evidence. Sections 193, 194 and 195 of this Code prescribed the punishment for giving false evidence, the severety of the punishment depending on the intention of the giver and the nature of the proceedings where it is given. A certificate, say a succession certification, may be required to be filed in a court or/and in any bank post office or any other office. After such a certificate is issued, which is false in any material point, it may not be used at all by the person in whose favour it is issued, for fear of prosecution under s 198, IPC . A marriage certificate issued by the marriage officer falsely showing the minor girl as a major to validate her marriage, may not be required to be produced anywhere by the parties to the marriage, at being obtained only by way of abundant precaution. A difficulty may arise in such cases in ascertaining the exact amount of punishment prescribed by law for issuing or signing a certificate which is not used at all for any reason. The offence committed by the presiding officer of a court or other authority under this section, or its gravity, cannot remain suspended till the certificate, so issued, is used. The commission of an offence under this section is also not subject to the fulfilment of any subsequent condition. Thus, there appears to be some ambiguity in this section in this respect.

Following the rule of harmonious interpretation of statutes, it is stated that in case it is apparent from the nature of the certificate, attending circumstances and the intrinsic evidence if any, that it has been issued or signed for being produced in any judicial proceeding, the offence may fall under para 1 of s 193 or under s 194 or s 195, IPC and may be punishable accordingly. On the other hand, if it appears to have been issued or signed for producing in any other case or it is not ascertainable as for what purpose it has been so issued or signed, the offender should be liable to be punished with imprisonment of either description for a term which may extend to three years and also with a fine under the second paragraph of s 193, IPC .

Where the amount of an alleged evasion of tax on the income of Rs 16,000 was meagre, without going into the merits of the case, the complaint filed under ss 276(c)(1) and 277 of the Income Tax Act, 1961 and s 197 read with s 120-B, IPC for the assessment year 1982-83 was quashed, as even according to the instructions of the board, the prosecution in cases where the income concealed is

less than Rs 25,000 is not warranted now.[15] But the pendency of a civil suit with respect of forged documents cannot be a ground for quashing the complaint under ss 193, 196, 197, 406, 465, 468, 471, IPC by invoking s 482, CrPC as the onus of proving the allegations beyond a reasonable doubt in criminal cases is not applicable in civil proceeding, which can be decided merely on the basis of probabilities with respect to the acts complained of.[16]1486

70 *Wharton'sLaw Lexicon*, fourteenth edn, reprint, 1978, p 171.

71 *Saadoolah Shaikh v Kalee Chum* (1869) 12 WR 358 .

72 *S Dutt v State of Uttar Pradesh* AIR 1966 SC 523, (1966) Cr LJ 459 .

73 *K Jothi v KP Kandasamy & Ors* (2000) Cr LJ 292 (Mad) .

74 *Premlata v State of Rajasthan* (1998) Cr LJ 1430 (Raj) .

75 *K Jothi v KP Kandasamy & Ors* (2000) Cr LJ 292 (Mad) .

76 *Mahabir Thakur v Emperor* AIR 1917 Cal 466, p 467, 17 Cr LJ 140, 20 CWN 520, 23 CLJ 423 .

77 *Birendra Nath Chatterjee v Umananda Mukherjee* AIR 1926 Cal 258, 259, 30 CWN 12 ; *Hasankhan Kalekhan v State of Gujarat* (1972) Guj LR 444 .

78 *Mahabir Thakur v Emperor* AIR 1917 Cal 466, p 467 ; *Birendra Nath Chatterjee v Umananda Mukherjee* AIR 1926 Cal 258, p 259, 30 CWN 12 ; *Hasan Khan Kalekhan v State of Gujarat* (1972) Guj LR 444 .

79 *Nathia v Nathu Singh* (1972) All Cr R 503 .

80 *Premlata v State of Rajasthan* (1998) Cr LJ 1430 (Raj) .

81 *Hasankhan Kalekhan v State of Gujarat* (1972) Guj LR 444 .

82 Re *Shaik Nimatullah*(1982) 2 Cal HN 170.

83 Section 36(1), Act II of 1874 and s 31(34) of Act III of 1913.

84 Sections 371 and 374, Succession Act, 1925.

85 Section 16 of 39 of 1925.

86 Section 35 of Indian Companies Act 1 of 1956.

87 Act 15 of 1872.

88 Section 60, Act 3 of 1870 (now Act 16 of 1903).

89 Re *Shaik Niamatullah*(1982) 2 Cal HN 170.

1 Order 21, r 2, Code of Civil Procedure (Act 5 of 1908).

2 Order 21, r 94, Code of Civil Procedure (Act 5 of 1908).

3 Order 45, r 3 . Code of Civil Procedure (Act 5 of 1908).

4 *Queen-Empress v Mulharji* Ratanlal Unrep Cas 182; *Birendra Chatterjee v Umananda Mukherjee* AIR 1926 Cal 258, 30 CWN 12 .

5 Re *Dwan Singh* 15 PR 1879 (Cr).

6 Government Savings Bank Act, Act 5 of 1873.

7 *Birendra Nath Chatterjee v Umananda Mukherjee* AIR 1926 Cal 258 .

8 *Haladhara Karji v Dileswar Subudhi* (1989) Cr LJ 629 (Ori) .

9 *Kumar Chowdhury v Emperor* AIR 1937 Pat 467, 38 Cr LJ 1011, 16 ILR Pat 21, 18 PLT 271 .

10 *Profulla Kumar Khare v Emperor* AIR 1943 Cal 40, p 41, 44 Cr LJ 292, (1942) ILR 2 Cal 573 .

11 *PR Sidhaya v State* (1965) 3 Law Rep 284, 323 .

12 *Radha Raman Bhargava v Keshav Dutt Panday* (1982) All LJ 1231, p 1232, (1982) All WC 382 .

13 *Queen v Hissamuddeen* 3 WR 37 .

14 *Mangtu Ram v State of Rajasthan* (2003) Cr LJ 4733 (Raj) .

15 *Madan Lal & Ors v Income Tax Officers* (1998) II CCR 669 (Raj) .

16 *M Krishna v Vijay Singh & Anor* (2001) II CCR 117 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 198.

Using as true a certificate known to be false.--

Whoever, corruptly uses or attempts to use any such certificate as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Comments

1. Scope

Section 198 must be read with the last section. The words 'such certificate', occurring in this section, refer to the certificate contemplated in s 197 .[17] The last section dealt with the issuing or signing of a false certificate and this section deals with using it corruptly. The certificate which is referred to in this section, must be one which is either required by law to be given or signed or is by law admissible in evidence.[18]

The section penalises not only corruptly using, but even the attempt to use a false certificate, knowing it to be false. In the absence of such knowledge a prosecution under this section is misconceived.[19] If the falsity of the certificate is not established, its use cannot attract this section.[20]

2. Meaning of 'Corruptly'

The commentary under s 196 may be referred to.

3. Procedure

The procedure to be followed under this section is the same as in the case of an offence under s 17 . A delay in the prosecution and trial may be fatal.[21]

4. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc.*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of .....at.....corruptly used (*or attempted to use*) as true a certificate required by law to be given and signed (*or relating to fact of which such certificate is by law admissible in evidence*), which was false in a material point, to wit.....and known or believed by you to be the same, and thereby committed an offence, punishable under s 8 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

Where a false certificate was issued by the co-accused, the head of the institution, to the accused, enabling her to obtain an appointment as '*Pracheta*', the headmaster not1487 being authorised by law to issue such a certificate, the same cannot be admissible as legal evidence of facts mentioned therein, but since the accused used the said certificate to obtain an appointment, a *prime facie* charge under s 198, IPC would be said to be made out against the accused.[22]

5. Proof

The following points have to be proved to establish a charge under this section:

(a) that the document in question purports to be a certificate;
(b) that it was either required by law to be given or signed, or that it related to some fact of which such certificate is by law admissible in evidence;
(c) that the certificate is false on a material point;
(d) that the accused used or attempted to use such certificate;
(e) that he did so corruptly; and
(f) that he so used it knowing or believing it to be false in a material point.

Where it has been proved beyond reasonable doubt that the accused used a duplicate certificate with some changes as a true certificate, knowing it to be false in material particulars and thereby got admission, a conviction of the accused under ss 198, 420 and 471, IPC was found proper but keeping in view the nature of the offence and that the accused's past and present record had been good and the fact that he had already lost his career and was now married, the Apex Court reduced the sentence to that already undergone.[23]

17 *Hasankhan Kalekhan v State of Gujarat* (1972) Guj LR 444 .

18 *Kumar Chowdhury v Emperor* AIR 1937 Pat 467, p 468, 38 Cr LJ 1011, 16 ILR Pat 21, 18 PLT 271, (1937) PWN 286 ; Refer to notes under s 197 .

19 *Emperor v Chuni Lal De* AIR 1944 Cal 448 .

20 *Mehboob v State of Rajasthan* (1987) Cr LR (Raj) 198 .

21 *Ajit Singh v State* (1988) C Cr J (MP) 7 .

22 *Premlata v State of Rajasthan* (1988) Cr LJ 1430 (Raj) .

23 *Tulsibhaii Jivabhai Changani v State of Gujarat* (2001) I CCR 32 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 199.

False statement made in declaration which is by law receivable as evidence.--

Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorised by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.1488

Comments

1 Scope

This and the next section deal with declarations as ss 197 and 198, IPC deal with certificates. This section penalises the making of a false statement in a declaration and the next section penalises the using as true of such a declaration knowing it to be false. This section subjects any person, who makes a false declaration, which declaration may be used as an evidence of the matters stated in it, to the penalties for perjury.[24] It is intended to make the penalty attached to this offence of giving of false evidence applicable to declarations which, although not compellable, have, on being made, the same effect as the compulsory declarations referred to in ss 51 and 191 .[25] In other words, the section intends to extend the penalty attached to compulsory declarations referred to in ss 51 and 191, IPC, to voluntary declarations also, provided that such declarations are capable of being used as evidence. A court of justice cannot use any declarations as evidence, unless they are of the nature of declarations contemplated in O 19 of the CPC 1908,[26]*i.e.*, in the form of affidavits. Declarations or verified statements are of two kinds: (a) declarations which a person is bound by law to make, such as the verification of pleadings under the CPC; and (b) declarations which a person makes for the purpose of their being used as evidence, such as affidavits filed under O 19 of the CPC. Of these, the second kind of declarations alone can be used as evidence and can form the basis of a conviction for an offence under s 199 .[27] This section is wider than s 192, and applies to every kind of affidavit which the court is bound or authorised to receive by the CPC or by circular orders of the High Court.[28] Under O 38 of the CPC, evidence may be given by an affidavit in support of an application for attachment before judgment and if such an affidavit is intended to be used in a judicial proceeding before a court of justice, and the declarant has made a statement for which the affidavit is to be used, the declarant will be guilty of an offence under s 199 .[29]

Where false affidavits were sworn to obtain a leave and licence to run a sales counter granted on

compassionate grounds, a direction was issued by the Apex Court to the notary to show cause why he should not be prosecuted and punished for attesting a false affidavit furnished by the respondent. No such notary, however, was found available in Tis Hazari Court, Delhi. Then direction was given to the respondent through his counsel, to name the oath commissioner who had allegedly attested the affidavits. No response was received from the respondent, and consequently, the respondent who had given a false affidavit in the court was1489 convicted under s 199, IPC for producing false certificates and false affidavits and was sentenced to undergo rigorous imprisonment for 6 months in addition to the payment of a fine of Rs 1,000 and in default to undergo a further sentence of six weeks.[30]

Where a rent control petition was dismissed in default, the plea taken by the petitioner was that he was out of station and could not appear before the court on the stipulated date. However, an affidavit sworn by him before the other court in the same town, on the same date, indicated his presence in the town. On a complaint being filed against him, the petitioner was convicted under ss 199 and 200, IPC . On these facts it was held that the oral evidence by the petitioner against the contents of the affidavit cannot be accepted, the conviction of the petitioner under ss 199 and 200, IPC was found proper.[31]

Neither s 192, IPC, incorporate the principle of vicarious liability, and therefore, it was incumbent on the complainant to specifically aver the role of each of the accused in the complaint.[32]

2. Analogous Law

This section is somewhat analogous to s 5 of the English Perjury Act 1911,[33] which runs as follows:

> **S. 5 . False statutory declarations and other false statements without oath.--**If any person knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular, and the statement is made
>
> (a) in a statutory declaration; or
> (b) in an abstract, account, balance-sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return or other document which he is authorised or required to make, attest, or verify, by any public general act of parliament for the time being in force; or
> (c) in any oral declaration or oral answer which he is required to make by, under, or in pursuance of any public general Act of Parliament for the time being in force,
>
> He shall be guilty of a misdemeanour and shall be liable on conviction thereof on indictment to imprisonment.....for any term not exceeding two years, or to a fine or to both such imprisonment and fine.

By s 15(2) of the same Act, a statutory declaration is defined as follows:

> ...
>
> (2) In this Act--

...

The expression "statutory declaration" means a declaration made by virtue of the Statutory Declarations Act 1835, or of any Act, Order-in-Council, rule or regulation applying or extending the provisions thereof.1490

3. Swearing in False Affidavit

In *Baban Singh v Jagdish Singh* ,[34] the Supreme Court has, however, ruled that the swearing of false affidavits constitutes an offence under ss 191 and 192, and not under this section. In its view the offence defined by s 191 is constituted by swearing falsely when one is bound by oath to state the truth. An affidavit is a declaration made under an oath. The definition of the offence of giving false evidence thus applies to affidavits also. The offence may also fall within the ambit s 192 . It was held that the offence of making false declarations in the affidavits tendered in a court, to be taken into consideration as evidence in a judicial proceeding, came within the words of ss 191 and 192 rather than s 199 of the IPC . All decisions to the contrary are, therefore, no longer good law.

4. Verified Applications

Apparently, there is no express provision of law which binds or authorises a court to receive a verified application as 'evidence of any fact' although for the purposes of ss 191 and 193, a false averment in such an application is regarded as a false evidence. Such applications are, therefore, not covered by this section.[35]

5. Ingredients of an Offence under Section 199

The ingredients to constitute an offence under this section are:

(a) making of a declaration which a court or a public servant or other person is bound or authorised by law to receive in evidence;
(b) making of a false statement in such declaration knowing or believing it to be false; and
(c) such false statement should be touching any point material to the object for which the declaration is used.[36]

6. Intention is an Important Ingredient

For an offence under ss 199 or 200 of this Code the punishment is in the same manner as if the accused gave false evidence under s 193 of the Code. The primary ingredients of s 193 of the Code is intentionally giving false evidence at any stage of judicial proceedings or intentionally fabricating false evidence for the purpose of being used in any stage of judicial proceedings. Thus, the intention is also a major ingredient for the offence under ss 199 or 200 of the Code.[37]

7. Reckless Statement--when it does or does not Constitute an Offence

The section requires three essentials--(a) making of a declaration which a court or a public servant is bound or authorised by law to receive in evidence, (b) making of a false statement in such declaration knowing or believing it to be false, and (c) such1491 false statement should be touching any point material to the object for which the declaration is made or used. There must be a deliberate false

statement. Statements made in a reckless and haphazard manner, though untrue in fact, may not constitute any offence when the person, making such statements, immediately admits the mistake and corrects the statement. If, however, a person makes a reckless and false allegation against a judge in his affidavit, he lays himself open to a prosecution under this section.[38]

8. Section 199 and Section 200

In order to attract s 200 the declaration has not only to be false, but also one which any court of justice or public servant is bound or authorised by law to receive as evidence. Section 199 , IPC makes punishable, the making of a false declaration whereas, s 200 punishes the use of or an attempt to use a false declaration. To attract the application of this section, the declaration must be used or attempted to be used corruptly.[39] The words 'such declaration' appearing in s 200, have reference to the declaration dealt with by s 199, with all its requirements. Section 199 deals with a declaration which a person is not bound under the law to make, but which if made, is admissible under an express provision of law in evidence and the facts declared without any further proof. It is possible, as stated already, that in some cases the declaration may be both, one which a person is bound by law to make as well as one which by law is receivable as evidence as part of the facts stated therein without any other proof.[40] In order to fall within the purview of s 200, the declaration must not only be false but also receivable by law as evidence by a court of justice or a public servant or other persons.[41]

9. Similarity with Section 193

The offence under ss 199 or 200, IPC, the punishment is in the same manner as if the accused gave false evidence under s 193 of IPC . The primary ingredient of s 193 of IPC is intentionally giving false evidence in any stage of judicial proceedings or intentionally fabricating false evidence for the purpose of being used in any stage of the judicial proceedings. Thus, the intention is also a major ingredient for the offence under s 199 or s 200 of the IPC .[42]

10. Section 199 and Sections 191, 193 Distinguished

The distinction between the two provisions insofar as the making of the declaration is concerned, is that under s 193, read with s 191, the declaration is one in which a person is bound, by oath or by an express provision of law, to state the truth, or, being bound, by law, to make a declaration upon any subject, makes a statement which is false. The declaration contemplated in s 199 is not necessarily one which the person making the declaration is bound, by law, to make. The essential element of an offence under s 199 is that the declaration, containing the false statement, must be one which any court of justice or any public servant or other person is bound or1492 authorised, by law, to receive as evidence of any fact.[43] In the words of the Supreme Court[44] the difference between ss 191 and 199 is as follows:

> Section 191 deals with statements and declarations falsely made by a person legally bound by an oath or express provision of law to state the truth. Section 199 deals with statements and declarations made voluntarily provided they are capable of being used as evidence and which court is bound to receive as evidence.

> Section 199 deals with a declaration and does not state that the declaration must be on oath. The only condition necessary is that the declaration must be capable of being used as evidence and which any court of justice, or any public servant or other person, is bound or authorised by law to receive as evidence. Section 191 deals with evidence on oath.

11. 'Declaration'--Meaning of

The declaration contemplated in this section, as explained in the Madras case of *A Vedamutu*,[45]is a statement of fact in the form simply of a declaration, which, for the purpose of proof of the fact declared, has, by itself, all the legal force of evidence given on oath or solemn affirmation. It must be a declaration which, having been made, is afterwards receivable as evidence of the fact declared. Examples of the kind of declarations contemplated in this section are affidavits in civil suits, statutory certificates under s 2 of the Banker's Book Evidence Act, and declarations and certificates under the Special Marriage Act 1872.[46] A declaration may be in an affidavit in cases in which evidence may be given by affidavit.[47] In view of the explanation to s 200, an affidavit, not fully complying with the provisions of O 11, r 3 of the CPC is more or less a declaration within the meaning of this section.[48] There is no provision of law which makes the recitals made in a sale-deed admissible as evidence of any fact by any court of justice or any public servant. It has accordingly been held that the alleged declaration in the sale deed will not be a declaration within the meaning of s 199, IPC .[49]

12. Identification of a Surety by a Lawyer is not a Declaration

A declaration by a lawyer to identify a person, for the purposes of acceptance of such person as surety, is not a declaration which a court is bound or authorised by law to receive as evidence within the meaning of s 199, IPC . It is necessary that the declaration must be admissible in evidence as proof of the fact declared under any law, in consequence of which the court is bound or authorised to receive it as such. It is not enough that there is no prohibition against the reception of such a declaration as evidence by the court. No law provides for a declaration of the identity of a surety by a lawyer; it is a matter wholly discretionary with the court, and, in appropriate cases, the court is fully competent to reject such a declaration.[50]1493

13. A Declaration need not be on Oath

A declaration contemplated in this section, need not be on oath. But it must be capable of being used as evidence and which any court of justice or any public servant or other person is bound or authorised by law to receive as evidence.[51] Where a person, in swearing an affidavit, only repeats what another person had written on a notice,[52] or what the prosecution witnesses say,[53] it will not have the same effect as of swearing a false affidavit. This section has no reference to the examination of a witness in a judicial proceeding.[54] False statements in applications for execution are not punishable under this section but they are under s 193 .[55] A person who makes false statements in the course of a voluntary declaration in the shape of an affidavit to a magistrate, cannot be charged under either s 199 or s 193, though the magistrate administers an oath to him, such a course being *ultra vires*.[56] A false report made to a revenue surveyor for a mutation of names in the revenue register is not a declaration within the meaning of this section.[57] Making, signing or attesting false declarations or certificates of marriage are punishable under s 199, read with s 21 of the Special Marriage Act. Where a person, not being the natural or legal guardian of a girl, subscribed to a declaration by her that the consent of her guardian to her marriage, as required by s 2(3) of the Special Marriage Act 3 of 1872, had been obtained, it was held that he was guilty of the offence under this section read with s 21 of the Special Marriage Act.[58]

14. 'Made or subscribed'--Meaning of

According to the *Oxford Dictionary* the word 'subscribe' means to write one's name at the foot of or sign a document, picture *etc*, express one's adhesion to an opinion or resolution. According to Aiyar's *Judicial Dictionary*,[59] 'subscribe' means 'to write under'; 'to make oneself liable for some thing'. In *Shabbir v State* ,[60] the Allahabad High Court has observed that the word 'subscribed' would show that the statement made on oath orally should be reduced to writing and be signed by the person making it in token of his adhesion to what is written. The word is not co-related with the particular form but with what is said in the oath and what is reproduced in writing.

A verbal declaration may be made, but when reduced to writing, it must be subscribed by the person making it in token of the correctness of the facts contained therein.

15. 'Bound or Authorised by law to Receive as Evidence'--Documents Fulfilling the Requirements

A declaration, before it can be made the foundation of a prosecution under this section, must be one which is admissible in evidence, and which the court before which it is1494 filed, is bound or authorised by law to receive in evidence. The mere fact that there is no prohibition against the reception of such declaration in evidence does not render it admissible or the declarant amendable to the provisions of this section.[61] Where the declaration contained in the affidavit in question is not of the type mentioned in ss 199 and 200, IPC, *i.e.*, it is not a declaration which any court or public servant or any other person is bound or authorised by law to receive as evidence of any fact, the petitioner could not be said to have committed any offence falling under s 199 or s 200 of the IPC, even if that declaration was false to the petitioner's knowledge. The charge framed against the petitioner under ss 199 and 200, IPC, in such a case, cannot be sustained.[62]Where the false declarations were made with a view to facilitate an offence under Imports and Exports (Control) Act, the false declarations were not such as would be received as evidence of facts before any court or public servant, and so it was held that no offence under s 193 or s 199, IPC is made out.[63]

An affidavit sworn to in the court of a *munsif* is a declaration which a court of justice is bound to receive as evidence of the facts stated in it.[64] Before effecting a mutation, the officer of DDA is authorised by law, to seek and receive information regarding legal heirs of the allottee, the declaration in that behalf *prima facie* falls within the ambit of s 199, IPC .[65]

The statements in a petition of insolvency are very analogous to statements made in ordinary civil pleadings--statements which are verified by law on the part of the person who places them on the record. But they certainly do not constitute evidence which is bound to be accepted by the court.[66]

Neither under Act I of 1876, nor under any other law, is a Mahommadan registrar of marriages bound or authorised to receive the statements of any person in evidence. Therefore, this section does not apply to them.[67]

There is no provision of law authorising the use of affidavits, or the administration of an oath to a person called upon by a district judge to show cause as to why he should not hand over the papers relating to some property over which a common manager has been appointed under the Bengal Tenancy Act 1885.[68]

16. Swearing False Affidavit before an Unauthorised Magistrate or Oath Commissioner--No Offence Committed

Except as specifically provided,[69] the Code of Criminal Procedure 1973 does not contain a general provision to prove a matter by affidavits. It has been held that1495 affidavits filed in support of an application for the transfer of a case cannot, therefore, form the subject of a charge under this section.[70] An affidavit sworn before a magistrate having no jurisdiction in the particular matter to which it relates, is not admissible in evidence and the person swearing it cannot be prosecuted under ss 193 or 199 .[71] Similarly, where an accused swore an affidavit before an oath commissioner, who was not authorised to administer an oath, it was held that the accused could not be convicted under s 199 because such an affidavit was not admissible in evidence.[72]

17. 'Knows or Believes to be False'--Burden of Proof

In order to convict a person under this section, the prosecution has to prove that he either knew or believed his statement to be false or that he did not believe it to be true. If there was a reasonable

possibility that the defence story was true, then these essential ingredients of the prosecution case would not be established.[73] The burden of proof is clearly on the prosecution to show that at the time of making the affidavit, the accused either knew or believed it to be false, or did not believe it to be true, and it is not upon the accused to prove the correctness of the statement and his good faith in making it.[74] The prosecution must bear the burden of proving every ingredient which is comprised in the definition. And the difficulty in proving the ingredients of an offence is no good reason for exempting the prosecution from the duty of proving them before a conviction is recorded.[75] The ingredients of the offence are, however, to be established at the trial, and not at the stage when cognizance is taken.[76]

'Or does not believe it to be true', *e.g.*, swearing to the truth of the contents of a false document, without knowing what the contents are, because of an ignorance of the language, which is not translated.[77]

18. Touching any Point Material to the Object

To hold a person liable under this section for making or subscribing to a false declaration, it is necessary to prove that the said declaration is touching a point material to the object for which the declaration has been made. Where the accused, in a petition under O 1, r 10, CPC gave a wrong date of birth of his son, but the wrong date of birth did not touch any material point involved in the suits and he stood to gain no advantage by giving a wrong date, it was held that no offence under s 199, IPC was committed.[78]1496

19. Procedure

The procedure to be followed is the same as in the case of an offence under s 197 .

Where the complaint was made under s 199, IPC on the ground that certain averments made in the affidavits filed before a rent control officer were false but no specific averment was singled out in the complaint, the complaint was held not entertainable.[79]

20. Complaint

Under s 195(1)(b)(i) of the Code of Criminal Procedure 1973, no court shall take cognizance of an offence under s 199 when such an offence is alleged to have been committed in or in relation to, any proceeding in any court, except on the complaint in writing of that court, or of some other court to which that court is subordinate.

When it is alleged that a false statement has been made in a declaration which is receivable as evidence in any court of justice or before any public servant or other person, the statement alleged to be false has to be set out and its alleged falsity with reference to the truth, found in some document, has to be referred to, pointing out that the two situations cannot co-exist, both being attributable to the same person and, therefore, one to his knowledge must be false. Rival contentions set out in affidavits, accepted or rejected by courts, with reference to *onus probandi* do not furnish foundation for a charge under s 199, IPC . Acceptance or rejection of evidence by itself is not a sufficient yardstick to dub the one rejected as false. Falsity can be alleged when truth stands out glaringly and to the knowledge of the person who is making the false statement. Day in and day out in courts, averments made by one set of witnesses are accepted and the counter averments are rejected. If in all such cases, complaints under s 199, IPC, are to be filed, not only will they open up floodgates of litigation but it would unquestionably be an abuse of the process of the court.[80]

The view that no procedings can be initiated under s 340 of the Code of Criminal Procedure 1973 if a document is forged before its production before a court would not apply in case where offence under s 199 or s 200, IPC is made out during consideration of the application under s 340 .[81]

21. Section 195 , CrPC not attracted to other Offences Clubbed with Sections 199 and 200, IPC

In one case, the offences under ss 199 and 200, IPC as mentioned in the private complaint, related to separate transactions, which were separable from the main offence alleged to have been committed by the accused in some other transaction. Then embargo under s 195, CrPC was not held to be applicable for other offences except under ss 199 and 200, IPC .[82]

Therefore, when the lower court discharged the accused of the offences under ss 166, 167, 199, 200, 213, 344, 345, 347, 379, 380, 387, 323, 448, 506(2), IPC read1497 with s 34, IPC merely on the basis that under s 195, CrPC, the court cannot take cognizance in respect of offences under ss 199 and 200, IPC the order passed by the lower court discharging the accused in respect of all the offences was held to suffer from infirmity and was set aside. The case was remitted back to the trial court to proceed with the trial against the accused in respect of the remaining offences.[83]

For further discussion on this topic, the commentary under s 193 may be referred to.

22. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*), hereby charge you (*name of accused*) as follows:
>
> That you, (*) on about the..... day of..... at..... made (*or subscribed*) a declaration, which a court of justice to wit....., (*or any public servant or other person to wit.....*) was bound (or authorised by law) to receive as evidence of a fact, and therein you made a statement, to wit..... which is false, and which you knew or believed to be false (*or did not believe to be true*), on a point material to the object, for which the declaration was made (*or used*), and thereby committed an offence under section 199 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

23. Rival Contentions do not Furnish Foundation for a charge

Rival contentions set out in affidavits, accepted or rejected by courts, with reference to *onus probandi* do not furnish a foundation for a charge under s 199, IPC . Acceptance or rejection of evidence by itself is not a sufficient yardstick to dub the one rejected as false. Falsity can be alleged when truth stands out glaringly and to the knowledge of the person who is making the false statement.[84]

Before a declaration can be made the foundation of charge under s 199, IPC it is necessary that it must be admissible in evidence as proof of the fact declared under any law in consequence of which the court is bound or authorised to receive it as such.[85]

24. Proof

The following points should be proved for establishing an offence under this section:

(a) that the accused made, or subscribed, the declaration in question;
(b) that a court of justice, *etc.*, was bound or authorised to receive such declaration as evidence;
(c) that the accused made the statement in question contained in such declaration;
(d) that such statements is false;
(e) that such false statement touched a point material to the object of such declaration; and1498
(f) that when making such false statement, the accused knew or believed that it was false, or did not believe it to be true.[86]

Mere Making of False Declaration Sufficient--Its use not Material

The mere making of a false declaration is punishable under this section. The fact whether such declaration is or is not used in the evidence is not a relevant consideration under this section.[87]

Conviction for an offence under this section may be based on purely circumstantial evidence.[88]

24 *Chandi Prasad v Abdur Rahman* ILR 22 Cal 131, p 137 .

25 Re *Vedamuthu* 4 Mad HCR 185, 1 Weir 159.

26 Now as per the amendment in the Code of Civil Procedure 1908 effective from 01-07-2002 *vide* O 18, r 4 of the Code of Civil Procedure 1908, affidavit in evidence is required to be filed in lieu of examination-in-chief.

27 *Asgarali Mulla Ibrahimji v Emperor* AIR 1943 Nag 17, p 19, 44 Cr LJ 313, (1943) ILR Nag 547, (1942) NLJ 547 .

28 *Kari Gope v Manmohan Das* AIR 1928 Pat 161, 29 Cr LJ 111, ILR 6 Pat 760 .

29 *Palaniappa Chetti v Annamalai Chetti* (1904) 1 Cr LJ 321, p 326, ILR 27 Mad 223, 2 Weir 208, (1904) 14 Mad LJ 74 .

30 *Dy General Manager (Redesignated as Dy Director) ISBT v Sudarshan Kumari & Ors* (1997) Cr LJ 1931 (SC) .

31 *Gadhi v Kaishuraja* (2000) Cr LJ 1590 (Mad) .

32 *Maharashtra State Electricity Distribution Co Ltd v Datar Switchgear Ltd* 2011 Cr LJ 8 (SC), 2010 AIR SCW 6151, 2010 (10) Scale 591, (2010) 10 SCC 479 .

33 1 & 2 Geo 5, c 6.

34 *Baban Singh v Jagdish Singh* AIR 1967 SC 68, (1967) Cr LJ 6, 8 ; *Dy General Manager (Redesignated as Dy Director), Inter State Bus Terminal v Sudarshan Kumari* (1997) 1 Crimes 24, p 25 (SC) .

35 *Queen-Empress v Bapuji Dayaram* ILR 10 Bom 288, p 298 .

36 *Kari Gope v Manmohan Das* AIR 1928 Pat 161, 29 Cr LJ 111 ; *Palaniappa Chetti v Annmalal Chetti* (1904) 1 Cr LJ 321, p 326, ILR 27 Mad 223 ; *Queen-Empress v Bapuji Dayaram* ILR 10 Bom 288, p 298 .

37 *Shiv Raman Gour v Madan Mohan Kanda* (1990) Cr LJ 1033, p 1034 (P&H).

38 *MS Jaggi v Registrar, High Court* (1983) Cr LJ 1527, (1982) 54 Cut LT 601 .

39 *Yellappa s/o Rangappa v Kanalavva & Ors* (1995) Cr LJ 20 (Kant) .

40 *Ibid.*

41 *Ibid.*

42 *Shiv Raman Gaur v Madan Mohan Kanda* (1990) Cr LJ 1033 (P&H) .

43 *Sadhu Ram v Shyam Sunder Gupta* (1975) CLR 88 .

44 *Badan Singh v Jagdish Singh* AIR 1967 SC 68, (1967) Cr LJ 6, p 8 .

45 4 Mad HCR 185, 1 Weir 159; *Darshan Singh v Jayanti Prasad Joshi* (1963) All LJ 404 ; *Shri Sadhu Ram v Shyam Sunder Gupta* (1975) CLR 88 ; *Jothi v KP Kandasamy & Ors* (2000) Cr LJ 292 (Mad) .

46 *Ismail v Emperor* 15 Cr LJ 603, 604.

47 *Palaniappa Chetti v Annamalai Chetti* ILR 27 Mad 223 .

48 *Shahzad Khan v Emperor* AIR 1933 Pat 513, 34 Cr LJ 912, 14 PLT 679 ; *Baban Singh v Jagdish Singh* AIR 1967 SC 68, (1967) Cr LJ 6 .

49 *Shri Sadhu Ram v Shyam Sunder Gupta* (1975) CLR 88 .

50 *Ram Asrey Tripathi v State of Uttar Pradesh* (1984) All Cr R 342, (1984) All LJ 1177 (All) .

51 *Public Prosecutor v PC Raju* (1968) Cr LJ 1378, (1968) Mad LJ (Cr) 197 ; *Baban Singh v Jagdish Singh* AIR 1967 SC 68, (1967) Cr LJ 6 .

52 *Qutubuddin v Emperor* AIR 1937 Pat 211, p 214, 38 Cr LJ 216, 17 PLT 835 .

53 *Parmananda Mohapatra v State* AIR 1968 Ori 144, (1968) Cr LJ 1092 .

54 *R v Vedamuttu* 4 Mad HCR 185, p 187, 1 Weir 159 .

55 *R v Bapuji* ILR 10 Bom 288 .

56 Re *Iswar Chunder* ILR 14 Cal 653.

57 *Ismail v Emperor* 15 Cr LJ 603 .

58 *State v Randya Mangubhai* AIR 1956 Bom 439, (1956) Cr LJ 861 .

59 Aiyar, *Judicial Dictionary*, eleventh edn, Law Book Co (Pvt) Ltd, Allahabad.

60 *Shabbir v State* AIR 1965 All 97 .

61 *Ram Prasad v Emperor* 13 Cr LJ 769, 770, ILR 35 All 58, 10 All LJ 462 ; Re *Iswar Chander Guha* ILR 14 Cal 653; *Abdul Majid v Krishna Lal Nag* ILR 20 Cal 724 ; *Chandi Prashad v Abdur Rahman* ILR 22 Cal 131 ; *Hariram Jawaharlal v Emperor* AIR 1946 Nag 38, (1945) ILR Nag 788 ; *Beharilal Sud v Emperor* AIR 1939 Lah 529, 41 Cr LJ 204 ; *Emperor v Bapuram* 1 Cr LJ 484, 1 All LJ 296 ; *Durga Prasad v Emperor* AIR 1933 All 318, 34 Cr LJ 686 ; *Jugal Chandra Dalal v Emperor* 42 CWN 31 ; *Queen-Empress v Aidrus Sahib* 1 Weir 146 .

62 *Anil Kapoor v Finance-cum-Health Secy, Chandigarh Administration, Chandigarh & Anor* (1973) CLR 601 .

63 *Public Prosecutor v PC Raju & Ors* (1968) Cr LJ 1378 (Mad) .

64 Re *Kottayya Pillai*AIR 1915 Mad 1069, p 1070, 16 Cr LJ 111 .

65 *Jaswant Kaur v Harnam Kaur* (1999) 77 DLT 343 (Del), (1999) 48 DRJ 543 .

66 *Chhoteram Sarup Sha v Emperor* AIR 1936 Cal 801, p 802 .

67 *Yasin Sheikh v Emperor* 2 Cr LJ 8, 11, 9 CWN 69 .

68 *Abdul Majid v Krishna Lal Nag* ILR 20 Cal 724 .

69 Sections 68, 295 and 296, CrPC 1973.

70 *Imperator v Baksho* 10 IC 622 ; Re *Iswar Chander Guha* ILR 14 Cal 653; *Emperor v Dital Safar* 12 Cr LJ 563, 5 SLR 102 ; *Ram Prasad v Emperor* 13 Cr LJ 769 .

71 *Nandlal Ghose v Emperor* AIR 1944 Cal 283, 45 Cr LJ 748, 48 CWN 469 ; *Public Prosecutor v PC Raju* (1968) Cr LJ 1378, p 1384, (1968) Mad LW (Cr) 39 ; *Ram Singh v Mam Chand* (1972) 74 Punj LR 521 (DB) .

72 *Ram Singh v Mam Chand* (1972) 74 Punj LR 521 (DB) ; *Nandlal Ghose v Emperor* AIR 1944 Cal 283, 45 Cr LJ 748 ; *Public Prosecutor v PC Raju* (1968) Cr LJ 1378, p 1384, (1968) Mad LW (Cr) 39 .

73 *Adikanda Swain v Emperor* AIR 1947 Pat 251, p 252, 47 Cr LJ 317 ; *Kali Shankar Chatterjee v Sarat Chandra Dey* (1977) Cal HCN 538, p 542, 81 CWN 797, p 799 .

74 *MS Jaggi v Registrar, High Court* (1982) 54 Cut LT 601, (1983) Cr LJ 1527 .

75 *Shahzad Khan v Emperor* AIR 1933 Pat 513, 34 Cr LJ 912, 14 PLT 679 ; *Emperor v Mahommad Ishaq* AIR 1914 All 170, 36 ILR All 362, 15 Cr LJ 579 .

76 *MS Jaggi v Registrar, High Court* (1982) 54 Cut LT 601, (1983) Cr LJ 1527 .

77 *R v Petricus* (1903) 67 JP 378 .

78 *Jotish Chandra v State of Bihar* AIR 1969 SC 7, p 8, (1969) Cr LJ 257 ; *Kamb Pani Samal v Munsif* (1919) 47 Cut LT 19 (SN) ; *R v Vedamuthu* 1 Weir 159 ; *Darshan Singh v Jayanti Prasad Joshi* (1963) All LJ 404 .

79 *Chandrapal Singh v Maharaj Singh* AIR 1982 SC 1238, (1982) Cr LR (SC) 126, (1982) Cr LJ 1731 (SC) .

80 *Chandrapal Singh v Maharaj Singh* AIR 1982 SC 1238, 1982 Cr LR (SC) 126, (1982) 1 SCC 466, (1982) UJ (SC) 517, (1982) Cr LJ 1731 (SC), (1982) All LJ 507 (SC), (1982) SCC (Cr) 249, (1982) 2 RCJ 476 (SC), (1982) All RC 348 (SC), (1982) Cr App Rep (SC) 65, (1983) SC Cr R 70 .

81 *KA Kuttiah v Federal Bank Ltd, Ernakulam* (2006) Cr LJ 3541 (Ker) .

82 *Ayyappan v Krishnapillai* (1997) Cr LJ (Mad) 3692 .

83 *Ayyappan v Krishnapillai* (1997) Cr LJ (Mad) 3692 .

84 *Chandrapal Singh v Maharaj Singh* AIR 1982 SC 1238, (1982) 1 SCC 466, (1982) Cr LJ 1731, (1982) All LJ 507, (1982) SCC (Cr) 249, (1982) Cr LR (SC) 126 .

85 *D Jothi v KP Kandasamy & Ors* (2000) Cr LJ 292 (Mad) .

86 *Shahzad Khan v Emperor* AIR 1933 Pat 513, (1933) 14 PLT 679, 34 Cr LJ 912 ; *MS Jaggi v Registrar, Orissa High Court* (1983) Cr LJ 1527 .

87 *Sadhu Ram v Shyam Sunder Gupta* (1975) CLR 88 .

88 *Ganwar v Emperor* AIR 1944 Sind 155, p 160, (1944) ILR Kant 133 ; *Arjun Singh v Emperor* AIR 1931 All 362, 32 Cr LJ 780, ILR 53 All 598 ; *Miran Baksh v Emperor* AIR 1931 Lah 529, 22 Cr LJ 1032, 32 PLR 461 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 200.

Using as true such declaration knowing it to be false.--

Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Explanation.--A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200 .

Comments

1. Scope

This section penalises the using or attempting to use corruptly, as true, any such declaration as is referred to in s 199, knowing the same to be false on any material point. This section bears the same relation to s 199 as s 198 bears to s 197, IPC .

The ingredients to constitute an offence under this section, are:

(a) that the declaration is false;
(b) that a court of justice, *etc.* was bound or authorised by law, to receive the same in evidence;
(c) that such declaration is false on a material point;
(d) that the accused made such false declaration or attempted to do so; and
(e) that he did so in the declaration corruptly.[89]

Where a rent control petition was dismissed in default, the plea taken by the petitioner was that he was out of station and could not appear before the court on the stipulated date. However, the affidavit sworn by him before another court in the same1499 town on the same date indicated his presence in the town. On a complaint being filed against him the petitioner was convicted under ss 199 and 200, IPC . On these facts it was held that the oral evidence by the petitioner against the contents of the affidavit cannot be accepted and the conviction of the petitioner under ss 199 and 200, IPC was found proper.[90]

2. 'Corruptly'--Meaning of

Commentary under s 196, *ante* may be referred to. The declaration must be used corruptly in order to attract the application of s 200, IPC .[91]

3. 'Uses or Attempts to use as true'--Meaning of

The commentary under s 196, *ante* may be referred to.

4. 'Declaration'--Meaning of

Commentary under s 199, *ante* may be referred to.

5. 'Knowing the same to be false in any Material Point'--Meaning of

Commentary under s 197, *ante* may be referred to.

6. Procedure

The procedure to be followed is the same as in the case of an offence under s 197 .

7. Complaint by the Court

As provided by s 195(1)(b)(i), CrPC, cognizance of an offence under this section can be taken only on a complaint in writing of the court concerned when an offence under this section is committed in or in relation to, any proceedings in the court.

In one case, the offences under ss 199 and 200, IPC, as mentioned in the private complaint, related to separate transactions which were separable from the main offences alleged to have been committed by the accused in some other transaction. The embargo under s 195, CrPC was not held to be applicable for other offences except under ss 199 and 200, IPC .[92] Therefore, when the lower court discharged the accused of the offences under ss 166, 167, 199, 200, 213, 344, 345, 347, 379, 380,

387, 323, 448, 506(2), IPC merely on the ground that under s 195, CrPC, the court cannot take cognizance in respect of offences under ss 199 and 200, IPC, the order passed by the lower court discharging the accused in respect of all the offences, was held to suffer from infirmity and was set aside and the case was remitted back to the trial court to proceed with the trial against the accused in respect of the remaining offences.[93] The view that no procedings can be initiated under s 340 1500 of the Code of Criminal Procedure 1973 if a document is forged before its production before a court would not apply in case where offence under s 199 or 200, IPC is made out during consideration of the application under s 340 .[1]

The commentary under s 193, *ante* may be referred to.

8. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate etc*) hereby charge you (name of the accused) as follows:
>
> That you, on or about the.....day of .....at.....corruptly used (*or attempted to use*) as true the declaration as is referred to in section 199 of the Indian Penal Code, knowing the same to be false in any material point, and thereby committed an offence, punishable under section 200 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried, on the said charge, by this court.

9. Proof

The points requiring proof for an offence under this section are:

(a) that there is a declaration such as is referred to in s 199 ;
(b) that the accused used or attempted to use it as true;
(c) that he did so corruptly; and
(d) that he did so knowing the declaration to be false on a material point.

89 *Kambhu Panisamal v Munsif* (1979) 47 Cut LT 19 (SN) ; *Dy General Manager, Redesignated as Dy Director, Inter State Bus Terminal etc v Sudershan Kumari* (1997) 1 Crimes 24, p 25 (SC) .

90 *Gadhi v Krishnaraja* (2000) Cr LJ Mad 1590 .

91 *Jotish Chandra v State of Bihar* AIR 1969 SC 7, p 8, (1969) Cr LJ 257 .

92 *Ayyappan v Krishnapillai* (1997) Cr LJ 3692 (Mad) .

93 *Ayyappan v Krishnapillai* (1997) Cr LJ 3692 (Mad) .

1 *KA Kuttiah v Federal Bank Ltd, Ernakulam* (2006) Cr LJ 3541 (Ker) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 201.

Causing disappearance of evidence of offence, or giving false information to screen offender.--

Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,

if a capital offence.--shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life.--and if the offence is punishable with [2][imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if punishable with less than ten years' imprisonment.--and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.1501

Illustration

A, knowing that *B* has murdered *Z*, assists *B* to hide the body with the intention of screening *B* from punishment. *A* is liable to imprisonment of either description for seven years, and also to fine.1502

Comments

1. Scope

Section 201,IPC presents a case of accessory after the fact. 'An accessory after the fact' said Lord Hale, 'may be, where a person knowing a felony to have been committed, receives comforts, or assists the felon'.[3] Therefore, to make an accessory *ex post facto* it is in the first place requisite that he should know of the felony committed. In the next place, he must receive, relieve, comfort, or assist him. In short, generally any assistance whatever given to a felon to hinder his being apprehended, tried or suffered punishment, makes the assister an accessory. What s 201 requires is that the accused must have had the intention of screening the offender. To put it differently, the intention to screen the offender, must be the primary and sole object of the accused. The fact that the

concealment was likely to have that effect is not sufficient, for s 201 speaks of intention as distinct from a mere likelihood.[4]

Sections 191 - 200 dealt with giving or fabricating false evidence. Sections 201 - 209 deal with offences against public justice. Of these, ss 201 - 203 themselves form a group. Section 201 deals with causing the disappearance of evidence or an offence of giving false information to screen the offender, and ss 202 and 203 deal with the giving or omitting to give information regarding the commission of an offence.

For considering the application of ss 201 and 202, the subsequent result of the trial cannot be taken as the basis ie whether the offences were proved or not. It is enough if the fact shows that the evidence was made to disappear and there was an intentional omission in giving information on the basis of the information available at that point of time, indicating that the accused knew or had reason to believe that an offence had been committed.[5] Screening the offender is a pre-requisite of this section and a person cannot be convicted of screening an offender when the offender himself has been tried and acquitted of the offence. Once it is held that the alleged offender is not guilty, any other person cannot be convicted for screening him from punishment.[6]

Provisions of s 201 would not apply to a person who has committed an offence.[7]

2. Analogous Law

Section 201 is an attempt to define the position known in England as that of an accessory after the fact.[8] According to Lord Hale, 'an accessory after the fact may be, where a person knowing a felony to have been committed, receives, relieves,1503 comforts or assists the felon'. Therefore, to make an accessory *ex post facto,* it is in the first place requisite that he should know of the felony committed. In the next place, he must receive, relieve, comfort or assist him. Besides, generally any assistance whatever given to a felon to hinder his being apprehended, tried or suffering punishment makes the assister an accessory.[9]

3. History of the Section

Aiders and abettors have been classified in English law as accessories before the fact, accessories at the fact, and accessories after the fact. The first two are reached by the Code under the law of abetment. The Indian law commissioners dealt with them as 'subsequent abettors'. But the English law commissioners found no justification for the tripartite division of accession of English law and this was agreed to by the Indian law commissioners, and s 201 with its illustration, which formed s 106 of the original bill as part of the chapter on abetment, was transposed to this place.[10]

4. Policy of the Section Underlined

The offence of an accessory after the fact was never regarded so serious as that of other accessories, as such an accessory might have been moved by feelings of love or pity to assist the felon, in which case his prosecution was seldom ordered, and it was always discouraged. That policy has led to the elimination of that class of offenders from the Code, but there still remained persons whose offence could not be similarly overlooked. There are those who know of the felony committed and that it is complete and still assist the felon not only by relieving, comforting or assisting him, but also by weakening the prosecution against him. Such a case is made punishable by s 201, the policy of which is to prevent such accessories from tampering with justice.[11]

5. Three Groups of Sections Relating to Information

There are three groups of sections in the Code relating to the giving of information. First, ss 118 - 120 deal with the concealment of a design to commit an offence; secondly, ss 176, 177, 181 and 182, IPC deal with the omission of giving information and with the giving of false information, and thirdly, ss 201

- 203 deal with the giving of false information with the intention of screening the offender. Section 201 is intended to include acts to which ss 193 - 196 does not extend and not to include acts falling under those sections.[12]

6. Section Deals with two Offences

Section 201 is designed to penalise attempts to frustrate the course of justice.[13] It deals with two offences:

(a) Causing the disappearance of an offence committed, with the intention of screening the offender from legal punishment.1504
(b) Giving false information respecting an offence committed with the intention of screening the offender from legal punishment.

In either case the intention must be to screen the offender.[14]

7. Three Important Considerations

There is no law which casts a duty on a criminal to give information which would incriminate himself. Secondly, the language used in ss 201 and 202 does not suggest that the sections would apply to a person who has committed an offence. Thirdly, the phrase 'knowing or having reason to believe that an offence has been committed' clearly indicates that the actual culprit is a person other than the one who knows or has reason to believe that an offence has been committed, as was observed by the Apex Court in the case of *Harishchandrasing Sajjansing Rathod v State of Gujarat* .[15] In other words, the language of the said section does not suggest that the section would apply to a person who has committed an offence. In this connection, the case in *Bhagwan Swarup v State of Rajasthan* [16] may well be referred to. Hence, there was no scope for framing charge under s 201, IPC against the accused in this case.[17]

8. Offence Means Real one not Imaginary

The first paragraph of s 201 lays down the essential ingredients of the offence under that section. By the second, third and fourth paragraphs, the measure of the punishment is made to depend upon the gravity of the offence. The word 'offence', wherever used in the first, second, third and fourth paragraphs, means some real offence, which, in fact, has been committed and not some offence which the accused imagines has been committed. The punishment depends upon the gravity of the offence which was committed by the offender intending to be screened and which the accused knew or had reason to believe to have been committed.[18]

9. Section 201 and Section 313,CrPC

Where some incriminating material appearing in the prosecution evidence against some accused who were charged for an offence under s 201, IPC only, was not put to them in their statements recorded under s 313, CrPC and no opportunity was afforded to them to explain these circumstances, they had been seriously prejudiced and no conviction could, therefore, be recorded against them for the offence under s 201, IPC .[19]

10. Relative Scope of Sections 177, 182, 201 and 203

Commentary under the same heading in s 182, *ante* may be referred to.1505

11. False answers by accused in Statement under Section 313 , CrPC --Effect

When the answer given by both the accused-respondents to all the questions put to them appear to be contrary to the materials on record and as such not correct, the adverse inference against both the accused-respondents is warranted in the circumstances of the case for giving false answers to the questions regarding facts which are established on the basis of evidence on record.[20] In the case of *Mani Kumar Thapa v State of Sikkim* [21] the Hon'ble Supreme Court has held that where the accused gives false answers to the questions under s 313, CrPC, the court will have to proceed on the basis that the accused has not explained the inculpating circumstances established by the prosecution against him and such failure to explain would form an additional link in the chain of circumstances. In *State of Maharashtra v Suresh* ,[22] the Hon'ble Supreme Court has held that a false answer offered by the accused when his attention was drawn to any inculpating circumstance would render such circumstance as capable of inculpating him. In such a situation, it was further held that a false answer can also be counted as providing 'a missing link' in completing the chain. To the similar effect are the observations of the Apex Court in *Mohibur Rahman v State of Assam* .[23] It has been held in that case that accused's failure to offer any reasonable explanation of any of the inculpating circumstances would be sufficient to conclusively point to the commission of the alleged offence by the accused.[24]

In this regard, a useful reference can also be made to the judgment of the Supreme Court in the case of *Joseph v State of Kerala* .[25] The Supreme Court held that if the accused flatly denies all the incriminating circumstances, then such a flat denial is an additional link in the chain of the circumstances. In the case of *Deonandan Mishra v State of Bihar* ,[26] it was held by the Supreme Court that where various links have been satisfactorily made out and the circumstances point to the accused as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation, or false explanation would itself be an additional link which completes the chain.

12. Essential Ingredients

The necessary ingredient of an offence under s 201, IPC is actually causing any evidence of the commission of an offence to disappear with the intention of screening1506 the offender from legal punishment.[27] The essential ingredients of an offence under this section are that:

(i) an offence has been committed;[28]
(ii) the accused knows or has reason to believe that the offence has been committed;
(iii) with such knowledge or belief the accused has:

  (a) caused any evidence of the commission of the offence to disappears, or
  (b) given any information respecting the offence, which he knew or believed to be false; and

(iv) the accused has done so with the intention of screening the offender from legal punishment;[29] and
(v) if the charge be of an aggravated form, as in the given case, it must be proved further that the offence in respect of which the accused did as in (c) and (d) was punishable with death, or with imprisonment for life or imprisonment extending to ten years.[30]

There was no evidence to show that after committing the murder, the accused buried the body to screen possible evidence of alleged offence, thus, the accused was acquitted of the charge under s 201, IPC .[31]

13. Two Indispensable Ingredients

Two most important ingredients out of three of the offence under s 201, IPC are that (1) the accused knew or had reason to believe that such an offence had been committed; and (2) the accused caused evidence thereof to disappear with the intent of screening the offender from legal punishment or had given any false information respecting the offence.[32]

The necessary ingredient of an offence under s 201, IPC is actually causing any evidence of the commission of an offence to disappear with the intention of screening the offender from legal punishment. Oral threat or inducement allegedly given by the two lady lawyers to approver not to give any statement against the petitioner cannot amount to commission of an offence under the s 201 .[33]

The gravest degree contemplated in s 201 is punishable with a maximum sentence of imprisonment for seven years. The minimum requirement for the offence to reach the said peak degree is that the offender should have caused the disappearance of evidence of another offence which is punishable with death, and that should be1507 established in addition to the above mentioned two basic ingredients. Even if the two basics are established, and the prosecution failed to establish the next requirement, the court cannot convict the accused for the highest tier specified in the section.[34]

14. 'Whoever'--Meaning of

In some earlier cases, it was held that this section applies merely to the person who screens the principal or actual offender and not to the principal or actual offender himself.[35] But it is now well-settled that the section is not restricted to the case of a person who screens the actual offender, it can be applied even to a person guilty of the main offence, and the offence under this section.[36]

15. 'Offence'--What is?

'Offence' means a thing punishable under the Indian Penal Code or under any special or local law, if punishable thereunder with imprisonment for a term of six months, or upwards, whether with or without fine.[37] A thing is not an offence if it falls within any of the sections in ch IV.[38]

'Offence', in this section and ss 202 and 203 of this Code, includes any act, committed at any place out of India, which, if committed in India, would have been punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 395, 396, 397, 398, 399, 402, 435, 436, 450, 457, 458, 459 and 460.[39] The word 'offence' wherever used in the first, second, third and fourth paragraphs of the section means, some real offence, which, in fact, has been committed, and not some offence which the accused imagines, has been committed.

The word 'offence' as used in this section does not contemplate that the accused should know the particular section of the Penal Code under which the offence falls, or the precise character of the offence committed. What the court has to decide is what offence, the accused knew, or had reason to believe, had been committed. When s 201 refers to an 'offence', it refers to the offence as it appeared to the accused, crediting him with the knowledge that can reasonably be expected of him. By s 309 of the Code, an attempt to commit suicide is punishable but there is no section in the Code making suicide itself an offence, obviously because in that case there would be1508 no offender who could be brought within the purview of the law. Under certain circumstances covered by s 40, CrPC the concealment of a suspicious death might be punishable under s 176, IPC but a person not bound to communicate an occurrence of that sort would not be liable. The removal or concealment of the body of a man not proved to be murdered does not amount to an offence under this section.[40] There was no evidence to prove the fact that it was the accused appellant who had concealed the dead body of the deceased in the water of '*Tumki Darha*' of river Bheden and that the shawl tied to the waist of the deceased belonged to him, hence, the accused appellant was acquitted of the charge under s 201 .[41]

The evidence showed that the accused appellant a guide took a young girl of a foreign country to his village, committed her murder and buried the dead body in his own house. The skeleton of the deceased was recovered from the house of the accused on the disclosure statement made by him.

The DNA sample got from the skeleton matched with the blood sample of the father of the deceased. The conviction of the accused appellant concurrently recorded by the Courts below under ss 302 and 201, IPC was affirmed.[42]

A killed *B* in the lawful exercise of the right of self-defence. *C* and *D* helped *A* to dispose of the body. No offence was committed by *C* and *D*[43]

16. Section Presupposes Actual Commission of an Offence

The disappearance of the evidence should be after the commission of the offence.[44]Sections 201, 203, 213 and 214 all imply that the offence screened has been committed and not the guilt of the person screened. Where no principal offence has been committed, there can be no conviction under these sections.[45]*B* was killed by *A* in the lawful exercise of his right of self-defence. *C* and *D* helped *A* in the disposal of the body. It was held that no offence was committed by *C* and *D*.[46] 'Concealing an offence and screening any person from legal punishment for any offence, therefore, presupposes the actual commission of an offence.[47] As pointed out by their Lordships of the Supreme Court in *Palvinder Kaur v State of Punjab* ,[48] in order to establish the charge under this section, it is essential to prove that an offence was committed, mere suspicion that it has been committed not being sufficient, and that the accused knew or had reason to believe that such offence had been committed. In this case a lady was charged under ss 302 and 201 on the allegations that she killed her husband by administering potassium cyanide to him and caused the disappearance of his body. The evidence proved only that the husband had died and that his body was found in a1509 trunk and was discovered in a well and that the accused took part in the disposal of the body. It was held that as there was no evidence to show the cause of the death or the manner or circumstance in which it came about, the accused could not be convicted even under this section.[49] Where both the appellant accused and the deceased had gone together on motor cycle, only the appellant returned, and the appellant sold the motorcycle within two days of the occurrence, and the dead body of the deceased was found lying near the bridge, the appellant accused was convicted under ss 300 and 201, IPC .[50]

Where the accused was charged under ss 465 and 201 for forging some bills and attempting to destroy the bills by setting fire to them, but the charge under s 465 failed, it was held that he could be convicted even under this section.[51]

17. An Offence must have been Committed

In order to justify a conviction under this section it is necessary that an offence, for which some person has been convicted or is criminally responsible within the definition of s 40, should have been committed.[52] There can be no offender liable to legal punishment, unless some offence has been committed, and the thing, which a person causes to disappear, cannot be said to be evidence of an offence unless an offence has been committed.[53] The cremation of a dead body when the death was natural, cannot amount to an offence under s 201, IPC .[54] In the absence of any positive material to show that the accused persons were aware of any offence having been committed, their act in cremating the dead body cannot amount to an offence under s 201, IPC .[55]The terms used in the section 'knowing or having reason to believe' conclusively negate and preclude the view that its provisions are applicable in cases in which an offence has not been committed. For it is impossible for anyone to know or to have reason, or sufficient cause, to believe that an offence has been committed when it has not been committed. A person may fancy that he knows or has reason to believe that an offence has been committed when it has not been committed, but he is mistaken in so fancying. He may, under the influence of such a mistake, remove something which he imagines to be an evidence of the offence which he supposes to have been committed, and he may be morally blameable for so doing. But it is beyond the province of criminal legislation to punish a man for a delusion or even for an act which has not caused any actual harm to the public or any individual member of the society.[56]1510

18. 'Knowing or Having Reason to Believe that an Offence has been

Committed'--Meaning of

Assuming that an offence was committed, and that there is an offender awaiting justice, the next thing which the prosecution has to prove, for invoking the provisions of this section, is that the accused knew, or had reason to believe, that an offence had been committed.[57] But he may not have much knowledge about the offence. He may believe a person to be guilty, but he may have no reason for his belief. In that case, he does not transgress the provision of this section by doing what is here condemned. The section only punishes him who either knew or had reason to believe that an offence had been committed. Now, no one can be said to have reason to believe a thing unless he had sufficient cause to believe that thing. It lies on the prosecution to prove that the accused had such sufficient cause for his belief. This must depend upon the facts and circumstances of each case.[58]

In the absence of reliable evidence which would show that the accused had such knowledge and they knowingly became privy to the destruction of evidence, a conviction under s 201 cannot be based.[59]

Question of Fact

Whether the circumstantial evidence in a particular case is sufficient and safe enough to warrant a finding that an offence has been committed, is a question which belongs to the realm of facts and not of law. So is the question whether the accused knew or had reason to believe that such an offence had been committed. It is true that this question further depends on the assessment of the accused's mind. Nevertheless, it is a question of fact.[60]

Mere Probability not Sufficient

'May have known or may have reason to believe that an offence has been committed' is not enough to warrant a conviction under this section. Where there is a possibility that the accused may not have known, or may not have had reason to believe, and he may have had only a suspicion that an offence had been committed, he is entitled to the benefit of doubt.[61]

Presumption as to Deemed Knowledge

There must be direct and legal evidence to prove a charge under s 201 . Merely because the accused are the brothers of the deceased's husband, it cannot be presumed, as a matter of legal proof, that they must be deemed to have knowledge of the murder of the deceased, by her husband.[62] But a person, who secretly buries the1511 headless body of a man just murdered, is *prima facie* guilty under this section unless he can establish that his act was innocent.[63]

In one other case the accused was alleged to have intentionally caused the disappearance of the evidence by helping in the burial of the dead body. It was not shown that he had knowledge of the offence alleged to have been committed by his co-accused in the murder trial. It was held that conviction under s 201 read with s 34, IPC was not sustainable.[64]

In a case, the prisoner was present at a murder without being aware that such an act was to be committed. Because of fear he not only did not interfere to prevent the commission of the crime, but also joined the murderers in concealing the body. It was held that he was guilty, not of abetment of murder, but of causing the disappearance of evidence of a crime under s 201 of the IPC .[65]

Knowledge of Offender's Identity not Necessary

The section does not say that the accused should be aware of the identity of the offender whom he intends to screen.[66]

Two Expressions Explained

Explaining the expressions 'knowing or having reason to believe' and 'knows or believes' used in this section, their Lordships of the Supreme Court observed:[67]

> Section 201 is somewhat clumsily drafted, but we think that the expression 'knowing or having reason to believe' in the first paragraph and the expression 'knows or believes' in the second paragraph are used in the same sense. Take the case of an accused who has reason to believe that an offence has been committed. If the other conditions of the first paragraph are satisfied, he is guilty of an offence under section 201 . If it be supposed that the word 'believes' was used in a sense different from the expression 'having reason to believe', it would be necessary for the purpose of inflicting punishment upon the accused to prove that he believes in addition to having reason to believe. We cannot impute to the legislature an intention that an accused who is found guilty of the offence under the first paragraph would escape punishment under the succeeding paragraphs unless some additional fact or state of mind is proved. If an accused, on seeing blood marks on the ground made as a result of an offence punishable under s 323, erases the blood marks with the intention of screening the offender whom he erroneously believes to have committed the offence of murder, he could be convicted only on the footing that an offence under s 323 was committed and that he acted with the intention of screening such an offender believing that such an offence was committed, and he may be punished accordingly under the fourth paragraph with imprisonment extending to three months; but he could not be convicted on the basis of his having screened a murderer merely because he wrongly imagined that an offence of murder had been committed.

19. Knowledge to be Distinguished from Intention and Motive

A distinction must be drawn between motive, intention and knowledge. A motive is something which prompts a man to form an intention, and knowledge is an1512 awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean more or less, the same thing and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin, but it is not difficult to perceive that they connote different things.[68]

Knowledge, as contrasted with intention, would properly signify a state of mental realisation in which the mind is a passive recipient of certain ideas and impressions arising in it or passing before it. It would refer to a bare state of conscious awareness of certain facts in which human mind might itself remain supine or inactive. On the other hand, intention connotes a conscious state in which the mental faculties are roused into activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself. Mental faculties which might be dispersed in the case of knowledge are, in the case of intention, concentrated and converged on a particular point and projected in a set direction. The difference between the shades in the meaning of the two words is fine but clear and the use of the one in place of the other by the legislature cannot be without purpose. The words used by the legislature must, therefore, be given their full effect. An accused, though he may have known that, if discovered, his act would be likely to cause annoyance to the owner of the house cannot be said to have intended either actually or constructively to cause such annoyance. It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to a certain result.[69]

20. 'Reason to Believe'--Rumour or Suspicion not Knowledge

A person is said to have 'reason to believe' a thing if he has sufficient cause to believe that thing but not otherwise.[70] It is not enough that the accused was aware of a rumour or of a suspicion relating to the commission of an offence.[71]

21. Causing Disappearance of Evidence--Active Participation Required

The dictionary meaning of the expression 'cause' clearly envisages some active step on the part of the doer of the act.[72] The word 'disappear' means 'cease to be visible', 'vanish' 'pass from sight or

existence'. A thing may cease to be visible or it may be out of sight when it is either moved from one place to another without actually concealing it or is concealed somewhere for the time being or its condition or shape is changed or it is destroyed completely. This section deals with the destruction or disappearance of material or tangible evidence. It does not relate to withholding of oral evidence or tampering with witnesses,[73] or anything that is likely to make the crime evident, such as the existence of a wounded corpse or of blood-stains, fabricated documents, or similar material objects indicating that an offence has been committed.[74] In view of this the disappearance of the evidence will be caused if the evidence ceases to be visible or traceable.[75]1513

To make out an offence under this section it is necessary to prove that the person charged, among other facts, knew that an offence had been committed and that he caused the evidence thereof to disappear. Where the accused persons had participated in taking away the victim's body, their conviction under s 201, IPC was found proper.[76] So, in the matter of causing a disappearance of the evidence relevant to a particular offence, the person charged must be proved to have actively participated in the matter of the disappearance of the evidence and a mere sufferance by him or her, of the removal of such evidence by others, is not sufficient. A mere knowledge on the part of the accused about the removal of the dead bodies does not bring the case within the ambit of s 201, IPC, as that section's essential requirement is causing any evidence of the commission of an offence to disappear. Unless the prosecution can establish that the accused had caused any evidence to disappear, the charge under s 201, IPC, would not be sustainable.[77] Where there was no evidence that the two appellants *A* and *G* made attempt to destroy the evidence, they were acquitted of the charge under s 201, IPC .[78]

Where the accused had taken the dead body of the deceased from his house to that of his parents-in-law in the presence of everyone, he was not convicted under s 201, IPC .[79] He should be instrumental in the disappearance of the evidence of the crime. As stated above, the words 'cause disappearance' imply some positive act and not a mere passive acquiescence or neglect.[80] Seven accused persons assaulted the victim by stones, caused his death, and burnt the dead body. Held, the accused persons caused the evidence of the commission of offence to disappear to screen the offenders from legal punishment. They were convicted under s 201, IPC .[81]

Where the appellant accused had committed the murder of the deceased by strangulation, burnt the dead body and had thrown it into a well, and the dead body of the deceased was recovered at the instance of the appellant accused, he was convicted under ss 302 and 201, IPC .[82]

Where the report of FSL test showed that the victim girl was murdered and thrown into water, and there was reliable evidence that on the day of occurrence, the respondent accused was seen carrying the deceased on his bicycle carrier, the respondent accused was convicted under s 201, IPC .[83]

The act of dragging the body for some distance and leaving the same in an open field cannot be termed to be causing a disappearance of the evidence.[84] In the absence of evidence showing that the dead bodies were buried or made to disappear by the accused persons, their conviction under s 201 is liable to be set aside.[85]1514

It must be, therefore, positively proved that it was the accused, who had caused the evidence of the commission of the offence to disappear.[86] The accused appellants gangraped the deceased and when she was dead, threw her into pit. The evidence of wife of co-accused was found reliable. The conviction of the appellants under ss 302 and 201 read with s 34, IPC was found proper.[87]

There was evidence that the accused husband caused the death of his wife by giving beating and burnt her dead body to destroy evidence of commission of offence. Accused husband was convicted under s 201 .[88] The evidence proved that the appellants accused persons committed the murder of the deceased by strangulation and threw the dead body in well. The dead body of the deceased was recovered from the well. There was extra judicial confession of the accused also. Appellants were convicted under ss 302 and 201, IPC .[89] It was the prosecution case that the accused appellant

committed murder of the minor son of the informant and threw the dead body in the maize filed of another person. There was evidence that the deceased minor son was last seen in the company of accused appellant, and no explanation was furnished by the accused as to what happened to the deceased thereafter. Accused appellant was convicted under ss 201 and 302, IPC .[90]

Hacked pieces of dead body of the deceased were recovered from the field of the appellant accused for which he could not give an explanation. Further, cell phone of the deceased was also recovered at the instance of the appellant accused, thus, conviction of the appellants under s 201, IPC was upheld.[91]

Evidence showed that accused husband had strangulated his wife causing death. But there was no evidence that he concealed or screened the evidence of the case. He was acquitted of the charge under s 201, IPC .[92]

Mere production of bottle containing poison allegedly consumed by the deceased could not raise any presumption that the same had been done to remove evidence of homicidal throttling.[93]

There was nothing on the record to show that appellant husband tried to make the dead body of the deceased disappear with an intention to screen himself from legal punishment and only because the appellant is husband of the deceased and the dead body of the deceased was found under the jurisdiction of the police station, it cannot be said that dead body of the deceased had been thrown by the appellant. Conviction of the accused husband on charge under s 201, IPC was set aside.[94]

Illustrative Cases

(a) Where the accused merely allowed a dead body to remain near the fields and gave no information of the crime to the police, but no positive act of1515 concealment was proved against him, it was held that he was not guilty under this section.[1]

(b) The failure of some doctors to give information about an admission of a burnt patient and that the patient may die, cannot be said to screen the evidence of the burns, unless it had been a statutory or moral duty or even a duty according to the rules for doctors to inform the police. Non-information by them will not amount to causing the disappearance of evidence.[2]

(c) Where the evidence showed and proved the incident of carrying of the dead body towards the river Gandak and thereafter throwing the same into the rivers, the conviction of the accused under ss 201 and 34, IPC must be confirmed, but since the accused was 18 years of age and staying with his brother at the time of the incident, the possibility of his having been pressurised by his brother cannot be ruled out. On the facts and circumstances of the case, the sentence of seven years imprisonment was reduced to the period already undergone.[3] In a case of gang rape and murder of a minor girl, the evidence showed that the accused concealed and took steps to destroy vital pieces of evidence of the rape and murder. They threw the body as well as the cycle in the septic tank, removed the blood stains, concealed the clothings having blood marks on them and the semen marks in the fodder room as also the knife in a cow dung heap. Thus, they caused the evidence of the commission of the offence to disappear with the intention to screen themselves from punishment and their conviction under s 201, IPC was upheld.[4]

(d) There was reliable evidence that the accused appellant was last seen in the company of the deceased. Half burnt discarded clothes of the accused were recovered by the police. The *alibi* taken by the accused appellant was not established. Appellant accused was convicted for offence under ss 201 and 302, IPC .[5]

(e) Where the evidence showed that the accused handed over a set of clothes to the witness for the main accused and the accused also resisted the police and the other

witnesses from searching her house, upon which the blood stained clothes of the main accused were recovered from her (accused) house, the conviction of the accused under s 201, IPC was held proper.[6]

The evidence proved that the appellants accused persons committed the murder of the deceased by strangulation and threw the dead body in well. The dead body of the deceased was recovered from the well. There was extra judicial confession of the accused also. Appellants were convicted under ss 302 and 201, IPC .[7] It was the case of the prosecution that the accused appellant committed the murder of the minor son of the informant and threw his dead body in the maize filed of another person. There was evidence that the deceased minor son was last seen in the company of the1516 accused appellant, and no explanation was furnished by the accused as to what happened to the deceased thereafter. Accused appellant was convicted under ss 201 and 302, IPC .[8]

(f) In one case the accused was proved to have caused the death of his wife by throttling her and caused the evidence of the commission of that offence to disappear by putting the dead body on fire. He gave a false report to the police in respect of the offence in order to screen himself from legal punishment, and so the conviction of the accused under s 201, IPC was upheld.[9]

(g) Where the appellant husband committed the murder of his wife for non fulfillment of dowry demand and threw her dead body in a well, he was convicted under s 201, IPC .[10] The accused appellant had committed rape of a minor girl aged about 10 years and thereafter, committed her murder. After the murder, he had concealed the dead body by covering it with branches and leaves. He was convicted under ss 376, 302 and 201, IPC .[11]

(h) In another case the accused, alongwith other co-accused, were charged with the offence of causing a dowry death and the disappearance of the evidence of the offence. The co-accused was acquitted, simply because the accused was the husband of the deceased and was with her on the night of the incident. That by itself will not lead to any presumption that after the murder of his wife her body was thrown in the well by the accused only. There should have been cogent and convincing evidence to prove that it was the accused and no one else who caused the disappearance of the evidence of the offence of murder by throwing the dead body in the well. The conviction of the accused, under Pt I of s 201, IPC was set aside.[12]

(i) Where in a case of kidnapping and murder, the dead body of one boy was found in a decomposed state in a flat and that of the other in a pit, the keys of the said flat were in the exclusive possession of the accused. He used a perfume to put the neighbours off track when they started becoming curious about the foul smell emitting from the said flat. The prosecution witnesses had seen the accused while he was disposing of the second dead body in a pit near a village and reliable evidence on record also showed that the accused had made purchases of certain items which were to be used by him while removing the dead bodies and he had also purchased a perfume (*aattar*) to reduce the foul smell. On these facts, the accused was held under s 201, IPC for causing the disappearance of evidence and other offences.[13]

(j) In a case of kidnapping and murder, one of the accused was detected by the informant while he was disposing of the dead body in a pond. Later, the same accused made an extra-judicial confession about the offence, before the informant. The recovery of pooja materials for the purpose of sacrificing the child he had kidnapped and murdered also strengthened the1517 prosecution case. The conviction of the accused under s 201, IPC and other offences was found proper.[14] In a cases, the assertion by the accused was that the death of his wife occurred on account of a brief illness, though he did not produce the evidence of the doctor attending on the deceased or the evidence of co-villagers in support of his defence version. He also did not inform about the death of the deceased to her parents. The dead body was cremated surreptiously, in the absence of her family members. The accused was convicted under the third part of s 201, IPC .[15] Where the accused beheaded the victims, severed their limbs and threw their bodies in

a raging fire, their conviction under ss 201 and 149, IPC was upheld.[16] Where the deceased and the husband were living in the upstairs home, the death took place in the bedroom of the spouse and an attempt was made to destroy the evidence of the murder by burning the dead body. The unnatural conduct of the husband immediately after the occurrence, the false plea of suicide and the absence from the house were material relevant circumstances which would complete the chain of circumstantial evidence, leading to only one conclusion, that the husband himself committed the ghastly offence of the murder of his wife and was liable to be convicted under ss 302 and 201, IPC .[17]

(k) The deceased, wife of the accused was inmate in his house, therefore, after the incident occurred in the house of the accused, the dead body of the deceased could be expected lying in the house of the accused but the dead body was taken by the accused to a well belonging to uncle of the deceased. Thus, the criminal intention of the accused is established to cause disappearance of the dead body and the accused was held guilty of the offence under s 201 .[18]

(l) Where the appellant husband had buried the dead body of his wife in a dry portion of the pond located in his house, he was convicted under s 201, IPC .[19]

(m) Where it was proved that the accused person abducted the deceased and disposed of his body at Singla, on the other side of the river which falls within the West Bengal side, the conviction of the accused under ss 364, 300, 201, IPC was upheld.[20]

(n) The accused persons kidnapped the victim, chopped off head, buried trunk of body and threw head in river. There was reliable evidence of the eye-witnesses that the deceased was last seen in the company of the accused. Accused were convicted under ss 201, 302 and 364, IPC .[21]

(o) In a multiple murders case the co-accused was found not involved in offences punishable under s 302, IPC . However, he had seen his father committing multiple murders and when he destroyed the evidence related1518 to those murders by throwing the articles from the Mhatre bridge on two separate occasions, it was absolutely clear that he did this with the primary object of saving his father and therefore, he was held to be liable to be convicted for the offence under s 201, IPC .[22]

(p) Where there was no material to suggest that by getting his car washed five days after the murder, the accused caused any blood or other evidence related to the murder of the deceased to disappear, the mere washing of the car could not, by any stretch of imagination, be *prima facie* evidence of the factual ingredients of the offence and he could not be convicted of an offence under s 201 .[23]

(q) Where the accused appellant had killed his son aged 5 years, had strangulated him and buried his dead body as he suspected that the deceased was not born to him, he was convicted under ss 302 and 201, IPC .[24]

(r) Accused persons committed the murder of the deceased boy aged 5 years and concealed her dead body in the cave. On search, the dead body of the boy was found in the cave. Accused persons were convicted under ss 302 and 201, IPC .[25]

(s) Charge under s 201, IPC against the accused appellant was that he threw the dead body of the deceased at a different place and tried to make the evidence against him disappear. However, the evidence established that he took the prosecutrix to the field of one *R* and he was found coming back from that field by some witnesses. It was possible that the rape was committed upon the prosecutrix at the same place where her dead body was found. Her underwear was also found near her body. Hence the prosecution could not establish the fact that the appellant killed the prosecutrix at a different place and threw her body at the spot where her body was found. There was no specific evidence produced by the prosecution to show that the appellant did something to make the evidence disappear. Under such circumstances, the prosecution failed to prove that the appellant committed an offence under s 201, IPC .[26]

(t) The accused committed the murder of a lady and her two children, and concealed their bodies. He committed offence under s 201, IPC .[27]

(u) Accused husband strangulated his wife, and set her on fire along with her infant child. Accused husband was convicted under ss 201, 302, 398A, IPC .[28]

(v) The accused after committing rape on deceased girl aged 8 years threw her dead body in a well. The dead body was recovered from the well. Eye-witness1519 deposed that he had seen something being thrown into the well the previous night. Accused was convicted under ss 376, 302 and 201, IPC .[29]

(w) Where there was no satisfactory evidence regarding recovery of the articles allegedly belonging to the deceased from the possession of the accused appellant, and there was no satisfactory evidence regarding the recovery of the bones and human skeleton from the land over which the accused appellant and his family members had exclusive possession, the accused appellant was acquitted of the charge under ss 201, 302 and 364, IPC .[30]

(x) Appellant accused was alleged to have committed the murder of the deceased as the accused suspected illicit relationship of his wife with the deceased. Dead body of the deceased was found at the distance of half a kilometer. There was no evidence of dragging of the body of the deceased by the accused. Accused was acquitted of the charge under s 201, IPC .[31]

22. Acts not Amounting to Causing Disappearance

The section contemplates concealment or destruction of evidence of a crime,[32] but it is not confined to the destruction of the evidence alone.[33] Merely delaying the discovery of the evidence of the crime is not causing its disappearance. So, where an accused, finding in her house the dead body of a girl who had been murdered by her son, locked the outer door without moving the corpse or concealing it, it was held that she was not guilty of an offence of causing a disappearance of the evidence of a crime under this section.[34] The taking of measures to keep a person, such as a witness, possessed of the knowledge of the occurrence of a crime, out of the way, does not amount to causing disappearance of evidence with the meaning of this section.[35]

Where the body of the deceased was alleged to have been burnt, but the serologist failed to give any opinion in respect of the origin, sex or age of the deceased from the bones recovered and the other evidence regarding burning of the body was not found to be reliable, the conviction of the accused under s 201, IPC was set aside.[36] Where according to the disclosure statement of the accused, the dead body was lying buried in the courtyard of younger brother of the informant, the dead body, however, was recovered from the courtyard of the informant, the accused being the members of the same family, the possibility of confusion about the courtyard of one or other was ruled out and the dead body cannot be said to be recovered pursuant to alleged disclosure statements made by the accused.[37]

Where the dead body of the deceased and a sickle, the offence weapon, were found lying in the house of the deceased in unhidden condition, conviction of the accused appellant for offence under s 201, IPC was set aside.[38]1520

In case of dowry demand, the dead body of the deceased was cremated after the members of the family of the deceased had arrived, the respondents accused had not concealed the dead body of the deceased, thus, they were acquitted of the charge under s 201, IPC .[39]

In some cases it has been held that, in a case of murder, moving the corpse of the victim from one place to another in order to divert suspicion does not amount to causing evidence of the murder to disappear.[40] Mere knowledge of the removal of the dead body to another place also does not, by itself, necessarily amount to causing the disappearance of the evidence of the offence. It is a matter of evidence in each case.[41] But in some cases it has been held that the mere removal of a body from one place to another, so as to remove the traces of the place where the murder took place, or indications which might implicate a particular individual, even though such removal does not remove undoubted evidence that a murder has taken place, is within the section.[42]

Accused A1 to 5 were alleged to have committed the murder of the deceased. A6 and A7 were driver and cleaner of the truck. It was alleged that A6 and A7 caused the disappearance of evidence to protect the accused persons by washing the truck so as to free it from bloodstains. It had come in evidence that the deceased was bleeding profusely and there was blood in the cabin and, therefore, the truck was washed. The investigating agency had collected sample of blood from the seat in the rear part of the driver's seat and from the wooden strip on the lower portion and same was found to contain human blood of group 'A', which was of the deceased. Therefore, A6 and A7 cannot be said to have caused disappearance of evidence because evidence was collected from the truck, the disappearance of which was alleged against them. They were both drivers of the truck and were not connected in any manner with the other accused. From the prosecution evidence, it transpired that when the deceased was assaulted, the driver objected to his being beaten and the reply given by the accused was that he was their man and they were beating him. A6 and A7 were acquitted of the charge under s 201, IPC .[43]

23. Disposal of Dead Body in Mysterious Circumstances

Where the accused persons secretly and clandestinely cremated the deceased to wipe out the entire evidence of murder, this clearly attracted s 201, IPC .[44] Where the accused killed a child, buried the corpse of the child and proclaimed that the child had died a natural death, the conviction of the accused under s 201, IPC and other offences was upheld.[45]

Where the death of the wife was not natural and was caused in mysterious circumstances and the dead body was disposed of by the accused and other persons hurriedly on the same night, it was held that the prosecution had been able to substantiate the charge under s 201, IPC against the accused beyond reasonable1521 doubt.[46] In a dowry death case if the appellants after committing murder of the victim of dowry demand, hurriedly cremate the dead body without informing her parents, they would be guilty of offence under s 201 .[47]

The deceased died unnatural death within seven years of her marriage at her matrimonial home as ligature marks were found on her neck, the in-laws used to quarrel with her, she wanted to go to her husband who was serving outside the village, and as the appellants father-in-law and mother-in-law cremated the dead body without informing the parents of the deceased and post mortem of the deceased, the in-laws were convicted under s 302 and s 201, IPC .[48]

Where in a dowry death case the deceased died unnatural death within nine months of marriage, and the appellant accused cremated the dead body of the deceased without informing her parents or relatives, the appellant was convicted for offence under s 201, IPC .[49]

Where the appellant husband after committing the murder of his wife, had buried the dead body in a soakpit near his house, and the dead body of the deceased was recovered in decomposed condition from the pit on the disclosure made by the appellant, and the appellant had not informed the parents of the deceased about the deceased being missing, the appellant accused was convicted for offences under ss 302 and 201, IPC .[50]

The body of the deceased may give certain clues as to cruelty and harassment and consequently, the destruction of the body without information to the police would attract the provisions of ss 201 and 202, IPC .[51]

24. Deceased Clandestinely CrematedConviction under Section 201 , IPC

In the instant case, the deceased was killed by poison being administered to her during the night. Neither the deceased was taken to any doctor nor was any doctor called to examine her, further, no medical treatment of any kind was given to the deceased. This was extremely unnatural human conduct. The dead body was secretly and clandestinely cremated causing disappearance of evidence of offence, without even intimating the parents of the deceased who were living only a few miles away

from their village. They learnt about the murder of the deceased from a barber after about three days. The appellants secretly and clandestinely cremated the deceased to wipe out the entire evidence of murder. Held, s 201, IPC was attracted in the case, and the appellants were convicted under s 201, IPC .[52]

25. Discovery of dead body on the Statement of Accused--three Possibilities--Effect of Non Explanation of Accused

When the dead body is recovered on the statement of an accused then three possibilities can be adduced: (i) that the accused would have seen someone else concealing the dead body at that place; (ii) he would have been told by some one else1522 that the dead body was concealed there; and (iii) he himself concealed the dead body.[53]The Supreme Court further held that if the accused does not tell the court about the happening of any of the two possibilities, then the court can presume that the accused had himself concealed the dead body. This is because according to the prosecution, the accused is the only person who could offer an explanation as to how he came to know of such concealment and if he chooses to refrain from telling the court as to how he came to know about it, the presumption is a well justified course to be adopted by the criminal court that the concealment was made by the accused and such an interpretation is not inconsistent with the principle embodied in s 27 of the Evidence Act .[54]

Where there was evidence that the appellant husband suspected the fidelity of his deceased wife, cut her with aruvamanai over the left side of her neck, put the dead body in a gunny bag and placed it on the railway track, recovery of blood stained bed sheet from the house of the appellant husband established that the murder was committed inside the house, and the appellant having not lodged FIR with the police about his wife being missing, he was convicted under ss 201 and 304, Pt I, IPC .[55]

The husband accused was having strained relations with his wife. There was evidence that the he was last seen with his wife and son in the village, thereafter his wife deceased was not seen. On the disclosure statements made by the accused the parts of the dead body of the deceased were recovered. Held, the accused appellant was guilty of having committed the murder of his wife and causing disappearance of the evidence of offence. He was convicted under ss 302 and 201, IPC .[56]

The three appellants accused had strangulated the deceased, chopped off her head, cut the body into pieces and disposed of the body. The deceased had gone to the accused to demand money, her share in the property sold, as her husband was inside the jail in connection with a case under the NDPS Act. The human skeleton of the deceased and her garments were recovered at the instance of the accused appellants. Accused appellants were convicted under ss 302 and 201, IPC .[57]

Where there was circumstantial evidence of last seen, but the dead body was recovered after a gap of fifteen days, the participation of the accused in the commission of offence was found doubtful, thus, conviction of the accused appellant under ss 302 and 201, IPC was set aside.[58]

Where the accused tenant after killing the victim boy had concealed the dead body in his room, and the separated head of the deceased body wrapped in polythene cover was recovered from the room of the accused, accused was convicted for offence under ss 302 and 201, IPC .[59]1523

26. Mere Discovery of Dead Body not Sufficient--Nature of Evidence Explained

The recovery of the body of a person murdered, on its being pointed out by the accused, would be very strong evidence of an offence under this section.[60] Where the accused failed to explain as to how the body of the deceased came to be exhumed from his house, despite his admission that the house from where the body of the deceased was exhumed belonged to him, the conviction of the accused under s 201 was confirmed.[61] Where the severed head of the deceased, lying concealed under shirts, was recovered on the information furnished by the accused and on being shown by him the conviction of the accused under s 201, IPC was held proper.[62] But in the absence of some other

evidence, the mere discovery of the dead body, only at the instance of the accused, cannot fasten him with the offence of a concealment of the dead body with the intention of screening himself from an offence under s 201, IPC .[63] When the dead body of the deceased put inside a truck was recovered from a room of the house of the two accused and further the part played by the accused in the placing of the dead body in that trunk was evidently not proved, the accused persons were not liable to be convicted under s 201, IPC read with s 34, IPC .[64] In some cases it has been held that concealing the bloodstained weapon, with which the murder has been committed, would amount to causing evidence of the offence to disappear within the meaning of this section.[65] But in *Jogta Kikla v State* [66] it has been held that:

> The expression 'any evidence of the commission of that offence' clearly refers, not the to evidence in the extensive sense in which that word is used in the Indian Evidence Act but to evidence in its primary sense, as meaning anything that is likely to make the crime evident, such as the existence of a wounded corpse or of bloodstains, fabricated documents, or similar material objects indicating that an offence had been committed.

In *Chunder Giani v State* [67] it was observed:

> I can well visualise to myself that in certain cases a corpse may be removed from one place to another without the intention or object of causing disappearance of evidence of the offence; and again, there can be cases in which removal to an unknown obscure, out of the way, or a distant place may be with a view to cause disappearance of evidence within the meaning of section 201 , Indian Penal Code .1524

The question thus depends upon whether what is removed or concealed is 'evidence of the commission of that offence' within the meaning of the section. This question will be separately considered presently. What is to be noted is that for the application of this section what is caused to disappear must be evidence of the commission of the offence.[68] There was no evidence that the death of the deceased wife was unnatural or the appellants husband and in-laws committed the murder of the deceased wife and to conceal the evidence of offence, consigned her dead body to flames. Appellants were acquitted of the charge under ss 201 and 304, Pt I, IPC .[69]

In case of dowry demand, the dead body of the deceased was cremated after the members of the family of the deceased had arrived, and the respondents accused not having concealed the dead body of the deceased, were acquitted of the charge under s 201, IPC .[70]

The removal or concealment of the body of a man, not proved to be murdered does not amount to an offence under this section.[71] So also where the accused helped in the burial of a dead body without any knowledge of the offence committed, it was held that the conviction under the section was not sustainable.[72]

Where the accused father-in-law had no knowledge of the commission of offence in respect of his daughter-in-law by his son accused, held the appellant accused A2 father-in-law could not be convicted for offence under s 201, IPC . Mere presence of the appellant A2 in the house was not sufficient to draw inference that he had the knowledge of the commission of offence by his son appellant A2, and his conviction for offence under s 201, IPC was set aside.[73]

Where all that the prosecution could establish was that the dead body of the deceased was recovered from the well situated in the compound of her marital home and that the cremation was hurried through after physically keeping her kith and kin away from the scene. No doubt, such a culpable haste enkindles fumes of suspicion which can be regarded as an incriminating circumstance against those who showed such a haste, but that circumstance stands isolated and unconnected with any other circumstance. The prosecution did not even attempt to show, much less to prove, that any

offence had been committed by anyone in respect of the death of the deceased, which should have been the foundation for establishing the offence under s 201, IPC . On these facts, the order convicting the accused and imposing a maximum sentence of seven years was set aside.[74]

Where the allegation was that the accused killed his mother and after cutting her body into pieces, he had packed the same into different packs and thrown some bags in a rivulet (*naala*) and buried some in a pit used for stacking or placing cow-dung, the circumstantial evidence was not convincing. The body of the deceased was recovered before a memorandum of the accused under s 27 of the Evidence Act was1525 prepared. The recovery of the head and the stump of the deceased from the pit at the instance of the accused was doubtful, so the conviction of the accused under ss 301 and 201, IPC was set aside.[75]

Mere helping the authority for discovering the dead body/skeleton cannot itself establish that a person is involved unless by way of evidence it is established that the person is aware and he had/has reason to believe that an offence has been committed, and he is causing the disappearance of the evidence of the commission of offence with an intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false. In the instant case, there was no evidence that the appellant tried to shield the offender intentionally and also had gone for helping the evidence relating to commission of offence disappear as required under s 201, IPC . Appellant accused was acquitted of the charge under s 201, IPC .[76]

27. Discovery of Incriminating Article at the Instance of Accused

Where on information given by the accused, incriminating articles were discovered by the police at the place pointed out by the accused, the investigating police officer may prove the fact of the discovery without proving the statement of the accused and without relying on s 27 of the Evidence Act . The evidence of the police officer would no doubt show that the accused knew of the existence of the fact discovered in consequence of the information given by him. But that would not necessarily show his direct connection with the offence. It would merely be a link in the chain of evidence which, taken along with other pieces of evidence, might go on to establish his connection therewith.[77]

An accused, in police custody, led the police party and witnesses to the grove, dug out the earth from near a mango tree and took out a human chopped head of the deceased which was identified by his father. Soon after the aforesaid recovery the accused led the party to another mango tree situated in the same grove, dug out earth from there and took out the beheaded body of the deceased. The accused then took the police to a tube well which was locked from the outside and then he himself opened the lock with a key which he himself took out from a concealed place and recovered some articles including one yellow coloured handkerchief (towel type) belonging to the deceased. The motive of the murder and other circumstantial evidence were also established and the conviction of the accused under ss 302, 364 and 201, IPC as recorded by the trial court was thus maintained.[78]

Where the appellant was the real brother of the main accused charged and convicted under s 302, IPC, and was seen with the main accused in the forest, and rope used in the commission of the offence was recovered on the disclosure statement made by him, he was convicted under s 201, IPC .[79]

28. Each Case Depends on Variety of Facts

The decision on the question whether when an accused person leads the police to a place not his own or in his exclusive possession and from there disinters some1526 incriminating article, the court is entitled or not to infer that the accused himself must have put that article there. Each case depends on a variety of facts. No absolute rule on the point can be laid down. Where the evidence in such a case is circumstantial, it must in order to sustain conviction, be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of his guilt. The hypotheses that are possible in such a case are: (a) that the accused saw someone bury the article

there; (b) that someone told the accused that the articles lay buried in that place; and (c) that the accused himself alone or with others buried the article there. The third hypothesis is undoubtedly the most natural and prominent in such a case and if the other two hypotheses are excluded, or are not reasonably possible, there is no reason why the court should not hold the third hypothesis proved. In determining which of these three possible hypotheses is more probable and presents such a degree of certainty that the court, like a reasonable man, ought to act upon the assumption of its existence, the court shall have to consider a variety of circumstance in each case.

29. Question as to Inference is a matter for Judge to Decide

No general rule can be laid down that in such cases the court is not justified in drawing the inference that the accused himself placed the incriminating article at the place pointed out by him. The true position is that it is for the court in each case to draw any such inference as may be legitimate or reasonable in the circumstances. The question as to what inference from a relevant fact may be drawn as to the existence or otherwise of a fact in issue and with what degree of certainty is, in each case, a matter for the judge to determine on the facts of that case and cannot be regulated by a generalisation. The outstanding fact in such cases is that the discovery of the incriminating article from a place which is hidden from public view, but is pointed out by the accused, unmistakably shows that the accused was in some way privy to the felony. This is the most natural and prominent inference which the court will draw under s 114, Evidence Act, and the fact being within the peculiar knowledge of the accused, it is for him to show that he acquired the knowledge of the place of concealment in some other way. If, therefore, the prisoner makes no attempt to explain how he acquired the knowledge of the place, leaving aside the question of proving the truth of the explanation if given, there is nothing in law to prevent the court from convicting him, if after considering all the surrounding circumstance and bearing in mind the other possible hypotheses and the principle that it is better that ten guilty men should escape than one innocent man be punished, the court comes to the conclusion that the accused himself must have put the article or articles there, and then it not only may but it is its duty to convict.[80] From the mere fact that the accused pointed out the existence of parts of the body of a murdered person, it cannot be inferred that he caused the disappearance of those portions of the body.[81] The conduct of the accused in pointing out the spot, where the dead body was, would show, at the most, that he had knowledge that a dead body was lying there. That knowledge could be acquired in various ways. Without any further evidence, it is not sufficient to hold that the dead body was thrown there by him.[82] The fact of discovery, of course, proves knowledge on the part of the person discovering the fact, that a certain thing had been discovered by him. But a mere knowledge of the1527 existence of such a fact is not sufficient to make him guilty under this section. To make him guilty under this section, it must be proved that he had caused the evidence of the commission of the offence to disappear and not merely that he knew that some other person had caused the evidence of the commission of the offence to disappear. It must be positively proved that it was he who had caused the evidence of the commission of the offence to disappear.[83] But where there is sufficient evidence to show that the accused knew as to how the dead body of the deceased was carried for disposal by other accused persons and that she refrained from informing the police about the missing of the deceased, she can be held guilty under ss 201 and 34, IPC .[84]

30. Attempt to cause Disappearance

Where the accused persons, were found carrying the dead body of a murdered man and on being confronted and questioned, the accused left the body at a place which was near the public path and disappeared and most of them were arrested only the next day, it was held that there was only an attempt to cause the disappearance of the evidence of the offence and the accused were liable to punishment only under this section read with s 511 .[85]

Mere Preparation of a Document not an Attempt

However, a different view was taken by the Allahabad High Court. Where the removal of the dead body to the cremation ground was intercepted on the way, it was held that the commission of the

offence under s 201 was prevented and the accused could not be convicted under s 201 .[86] An appellant, who was a doctor by profession, was found guilty, by the trial judge and the High Court, of an attempt to cause the disappearance of the evidence by issuing false certificates regarding the cause of death of a deceased body. The first certificate indicated his inability to express any opinion about the cause of death, the other certificate indicated same cause of death. The dead body was sent for a regular post-mortem and a case of murder was registered against the husband of the deceased. It was held by the Supreme Court that there was a marked difference between the preparation and an attempt and in this case it was highly doubtful as to whether the appellant had attempted to commit an offence under s 201, IPC or not. There was absolutely no material to show whether any body had seen the second certificate earlier and whether there was any attempt to put the same to use for facilitating the cremation. His appeal was accordingly allowed.[87]

31. 'Any Evidence of the Commission of that Offence'--Evidence Explained

Withholding of oral evidence or tampering with witnesses does not fall within the purview of this section. It relates to destroying or making to disappear material that is, tangible evidence.[88] As pointed out above, what is caused to disappear must be1528 evidence of the commission of the offence that has been committed. The expression 'any evidence of the commission of that offence', refers not to evidence in the extensive sense in which that word is used in the Evidence Act, but to evidence in its primary sense as meaning anything that is likely to make the crime evident, such as the existence of a wounded corpse or of bloodstains, fabricated documents, or similar material objects indicating that an offence had been committed. The statement of a witness and *panchanamas* do not constitute such evidence.[89]

A pushed *B* violently into a boat, *B* was killed thereby. *A* set the boat adrift. *A* committed no offence under this section.[90]

A and *B* killed *C* in the presence of *D. A* removed the *razai* on which the deceased had been sleeping, and concealed it in a stack in *D*'s presence. It was held that as the presence or existence of the *razai* would have been no evidence of the murder, *D* committed no offence under this section.[91]

Appellant accused had committed the murder of his wife by firing *katta* on her, had dropped her dead body in a culvert by the side of the road, sprinkled petrol over the dead body and set fire to it, hence, he was convicted under ss 302 and 201, IPC .[92]

Particular Evidence has to be Disclosed

Where it is not disclosed in the complaint as to what existing evidence was destroyed by the accused in respect of an offence which has been committed, with the intention of screening the offender, no case under this section is made out.[93]

32. Removing Corpse from one Place to another--whether Amounts to an Offence

When an offence is committed, there may be evidence of various types: (a) evidence to show that the offence had been committed; (b) evidence to show that the offence had been committed at a particular place; and (c) evidence to show that the offence had been committed by a particular person or persons. In a case of murder, the wounded corpse of the victim would be the evidence of the commission of the offence of murder. If the corpse is caused to disappear with the necessary knowledge and intention, it would be an offence under this section. But if the corpse is only removed from one place to another in order to divert suspicion, the corpse itself existing, it cannot be said that the evidence of the commission of 'that offence' has been caused to disappear within the meaning of this section. The removal of the corpse from one place to another however, may be evidence of the place where, or of the person by whom, the murder was committed. The question then arises whether the removal of the corpse amounts to causing disappearance of any evidence of the commission of

that offence within the meaning of this section. There is a conflict of judicial opinion on this question.1529

Allahabad View

In *Empress of India v Kishna* ,[1] the Allahabad High Court had earlier held that by removing the corpse from his own field to that of another, the accused did not cause the evidence of the murder, which that corpse afforded, to disappear. But dissenting from this, in subsequent cases the court held that the mere removal of a body from one place to another so as to remove traces of the place where the murder took place, or indications which might implicate a particular individual, even though such removal does not remove undoubted evidence that a murder has taken place, is within the section.[2]

Calcutta View

The Calcutta High Court has taken a different view and it was held that the essence of the offence under this section 'is the causing of evidence of the commission of an offence to disappear and it cannot be considered correct to say that the mere moving of a body amounts to causing disappearance of evidence of an offence'.[3] In *Nagendra Bhakta v Emperor* [4] it was observed that:

> The offence that was committed in the present case was an offence of murder and the evidence that was caused to disappear was the fact that the corpse was lying at Sarat's house. This fact, namely that the corpse was lying at Sarat's house and at no other place, was no evidence of the commission of the offence of murder. It may be some evidence of where the offence was committed or who had committed it, but it was no evidence of the fact that a murder had been committed. It is not impossible to conceive of the commission of an offence apart from where and when and by whom it was committed.

Gujarat View on Concealment of Weapon

Similarly, the Gujarat High Court has held that:

> When section 201 uses the expression 'whoever causes any evidence of the commission of that offence to disappear, it refers to a person who causes the evidence of actual commission of the offence to disappear and not to a person who causes the disappearance of evidence as to by whom the offence was committed, and that the removal or concealment of the weapon used for the commission of an offence and the bloodstained clothes of the accused, is not causing the disappearance of the evidence of the commission of the offence within the meaning of this section.[5]

Punjab View

According to the Punjab High Court

> ....there cannot be the slightest doubt that the weapon with which an offence is committed is a very valuable piece of evidence of its commission. More so when the offence is said to be of murder and that the weapon is bloodstained, and if a person1530 conceals that weapon, provided his intention in doing so is to screen the offender, he is, in my opinion, guilty of causing that evidence to disappear, *etc*.[6]

This section does not refer exclusively to causing the disappearance of the *corpus delicti*, but to

causing the disappearance of 'any evidence' of the commission of the offence.[7] The words 'any evidence of the commission of that offence' clearly include any evidence of the commission by the offender of that offence.[8]

Orissa View--Act of Removal of Dead Body or Hanging it on a Tree

The Orissa High Court has held that even if the appellant was the author of the removal of the dead body of the deceased from the place of murder to another place where the dead body was found, s 201 of the Code would be inapplicable as merely removing the dead body of the murdered person from the scene of occurrence to another place and throwing or keeping it there or hanging it on a tree to give a colour of suicidal hanging, would not amount to causing the disappearance of the evidence of the causing of the offence of murder.[9]

33. 'With the Intention of Screening the Offender from Legal Punishment'--Meaning of

The essence of the offence under this section is the intention to screen the offender from legal punishment. In the absence of such intention, the accused cannot be convicted under this section. The requirements of the section are not fulfilled if the disappearance of the evidence was merely likely to have the effect of screening the offender.[10] A person causing the disappearance of the evidence of an offence under compulsion cannot be said to have caused such disappearance with the intention of screening the offender.[11]

Awareness of the Identity of the Offender not Necessary

It is necessary, in order to justify a conviction under this section, that an offence for which some person has been convicted or is criminally responsible should have been committed.[12]But the section does not say that the accused should be aware of the identity of the offender whom he intends to screen. The expression 'with the intention of screening the offender' excludes cases where there was no active criminal intent, but merely a knowledge that a possible result of the act would be the screening of the offender. Such a case was that of *Queen v Toolshee Rai* [13] where a corpse was removed with no other intention than a desire to prevent the blame attaching to the village. But the fact that the section requires a positive criminal1531 intention does not imply that the intention must have reference to an individual known to the accused. For instance, in case of a house trespass, the facts might lead to the inference that the accused intended to annoy the inmate of the house although he was unaware of their identity.[14]

Intention a Question of Inference

The intention of a person causing the disappearance of the evidence is a matter of inference. If persons are found carrying the dead body of a murdered man from a particular house to a *piol* of a mosque and leaving it there, that by itself cannot lead to an inference that they had an intention to screen the offender or to hide the scene of the crime.[15] Where the accused stated that he had hidden the shoes of the deceased, the intention to screen the offender from punishment must be inferred.[16]

Where the witnesses consistently deposed that with regard to the death of the deceased woman, her father was never informed and the cremation had been done behind the back of the parents of the deceased, both the accused could not escape from the liability under s 201, IPC because they wanted to screen themselves from the legal punishment, fully realising that the offence under s 498A, IPC had been committed by the accused as he had been causing harassment to the deceased alongwith his father.[17]

But where the accused persons were found carrying the dead body of a murdered man and on being confronted and questioned, they left the body at a place which was near the public path and disappeared and most of them were arrested only the next day, it was held that their intention was to

commit an offence under this section, and that since the causing of disappearance of the evidence was not completed, they were guilty of an attempt to commit the offence under this section.[18]

In a multiple murder case, the co-accused was found not involved for offences punishable under s 302, IPC, however, he had seen his father commit the multiple murders and when he destroyed the evidence related to those murders by throwing the articles from Mhatre bridge on two separate occasions, it was absolutely clear that he did this with primary object of saving his father and therefore, he would be liable to be convicted for the offence under s 201, IPC .[19]

Where the accused removed the body of a murdered person from the village and left it by the side of the Grand Trunk Road in order to divert suspicion of the crime from themselves and to make it appear that the man was done to death by some passerby, it was held that they were guilty under this section.[20]

Where the circumstantial evidence established the commission of a murder of the victim by the father-in-law and brother-in-law and the third accused helped them in the removal of the dead body in order to screen the offenders, the conviction of the1532 first two accused under ss 302, 201 and 34, IPC was held proper and the third accused was convicted under ss 201 and 34, IPC .[21]

Appellant husband, present in the house, had caused the homicidal death of the wife and to conceal evidence, had burnt her dead body. He was convicted for offences under ss 302 and 201, IPC .[22]

Wife Shielding Husband--Permissibility

Under the law, a wife is completely privileged in the matter of disclosing any communication made by her husband to her during the subsistence of their marriage. It is the policy of the law as well that a wife should not be guilty of harbouring her felonious husband because the law conceives a legal unity between the spouses. No doubt it cannot be said that if a wife causes the disappearance of the evidence of a crime committed by her husband she will not be guilty under s 201, IPC . But where the wife finds the dead body of a person who has been murdered by her husband in the house, but, without removing the dead body, locks up the door and does not allow anyone to enter the house in the absence of her husband, she cannot be said to commit an offence under this section. From her refusal to disclose information, no inference can be deduced, so as to ascribe to her any criminal intention or motive.[23] Where there is not an *iota* of evidence on record, not even a whisper to the effect that it was the wife of the accused who helped him in concealing or causing the evidence of the commission of the offence to disappear, simply because she is the wife of the accused and as such is supposed to be living in the same house, it cannot be assumed that she was guilty of the offence under ss 201 and 34, IPC .[24] The accused may or may not have taken her help in concealing the dead body. Her being the wife of the accused is not sufficient to prove the charge under ss 201 and 34, IPC against her.[25]

34. 'Giving False Information with Intention to Screen Offender'--Meaning of

Sections 201 and 203 contemplates the giving of information in respect of an offence which the accused person knows or believes to be false. For the offence under this section the false information should also be furnished with the intention of screening the offender from legal punishment. Unlike s 182 which deals with giving false information to any public servant, this section and s 203 do not refer to whom the false information should be given; it would include private persons as well as public servants including the police.[26] For the application of this part of the section, the false information need not be given to the police or a magistrate.[27] It is immaterial whether the information is volunteered or given in reply to inquiries.[28] A person is guilty under this section if he gives any information in respect of an offence which he1533 knows or believes to be false.[29] If any person gives the first information statement to the police, even though not voluntarily, which is recorded under s 154, CrPC and if it ultimately turns out to be false, it would amount to giving false information and the offender would be punishable under s 201, IPC provided the requisite intention is proved.[30] Where the

accused, driver of lorry, caused the death of the cleaner, crushed the head by running the vehicle over the head of the deceased twice in order to screen evidence and gave false statement that the cleaner deceased had got down from the lorry for the purpose of taking tea, he was convicted under ss 201 and 302, IPC .[31]

Keeping silence about the commission of offence

Where a suspect dies in police station, but the police officials keep silence, and do not disclose or divulge facts about the cause of death, it indicates that the accused police official caused disappearance of the evidence to screen the real offenders, such that accused police officials commit offence under s 201, IPC .[32]

Refusal to Give Information

There is, however, a distinction between a case of refusing to give correct information and a case of giving false information. Where an accused refuses to give information, his act does not amount to giving false information and he cannot be convicted under s 201 .[33] The information given to a neighbour that someone died, cannot be taken as false. It will become false only if it is shown that the cause of the death was stated to be anything other than what actually happened. A mere omission to narrate the circumstances of the death cannot be taken as false information. It must be proved that an offence was committed. The accused must know or have reason to believe that the offence has been committed. With such knowledge or belief, he must give information respecting the offence which he knows or believes to be false. So also the accused must have acted with the intention of screening the offender. The intention must be to screen the offender, whether himself or somebody else, from legal punishment.[34] It is not necessary that the offender himself should have been found guilty of the main offence for the purpose of convicting him of an offence under s 201 . Nor is it absolutely necessary that somebody else should have been found guilty of the main offence. Nonetheless, it is imperative that the prosecution should have established two premises. First, that an offence has been committed and second, that the accused knew about it or he had reasons to believe the commission of that offence. Then and then alone the prosecution can succeed provided the remaining postulates of the offence are also established.[35] Where the offence of the murder of his wife by the accused, with the assistance of somebody else had already taken place and the co-accused, is the father of the accused, was not one of the participants, he at least knew that the lady had been murdered as he was living in the same house. The severe beating given to the lady must have caused enough noise because she had been definitely resisting, as appeared from the injuries that she had sustained on the hand. Then she was hanged and this could not be done without the1534 assistance of some other member of the family. Hence, it would be reasonable to hold that the co-accused knew or had reason to believe that the offence of murder had been committed and with that knowledge and belief he directed the *choukidar* to go and lodge a report about a suicide by the deceased, a fact which he must be held to have believed to be false. The only reason for all this could be that he wanted to screen the offender namely, his sons from legal punishment. There is no evidence to show that the accused and his mother did anything which might attract s 201 to their case. The charge under s 201, IPC was clearly established against the co-accused and it was not so established against the accused and his mother.[36] The accused persons, with a definite intention, calculatively poured kerosene oil on the person of the deceased to give a colour of suicidal death. In doing so, the accused number 1 and number 2 were deeply interested. They did this to escape from justice inasmuch as they are also guilty for the offence punishable under s 201 of the Indian Penal Code . It was held that giving false explanation in the incriminating circumstances shows the involvement of the accused in the crime.[37]

The accused had strangulated his deceased wife and threw her dead body into the well. The accused took the plea that the deceased fell into the well accidentally. After the body of the deceased was taken out from the well, no water came out from her mouth when her dead body was pressed. The defence theory of accidental fall was ruled out. The accused was convicted under ss 302 and 201, IPC .[38]

Where the husband of the accused died and at the time of his death, the accused wife and their minor child were the only inmates of the house where the incident occurred, the version of the accused wife was that deceased tried to commit suicide by putting a rope around his neck and while doing so he fell on a blunt object and died. However, on a subsequent discovery and search, a crow bar was found from the said house with human blood on it which proved to be the blood of the deceased. The circumstances under which the deceased died were within the special knowledge of the accused wife and so the falsity of information given by her cannot but warrant a punishment under s 201, IPC, since there was a deliberate attempt on her part to screen the offender from legal punishment by way of providing false information regarding the offence.[39] Appellant 1 husband and his second wife appellant 2 committed the murder of the wife of the appellant 1 and buried the dead body of the deceased in the cattle shed of the house. The prosecution witnesses deposed before the Court that the two appellants were present in the house on the day of the incident. The two appellants failed to furnish any explanation as to how the deceased was murdered and how the dead body was buried in the cattle shed. On the pointing out of the accused appellants, the dead body of the deceased was recovered. The two appellants were convicted under ss 302 and 201, IPC .[40]

There was convincing and trustworthy evidence of the witnesses that after committing the murder of the child, the appellant accused concealed the dead body. It was the appellant and the appellant alone who caused the death of the deceased, an innocent child, by strangulating him and then concealing his body inside a tin box in1535 the inner room of the quarter exclusively occupied by the appellant. Appellant accused was convicted under ss 302 and 201, IPC .[41]

In the case of *Kalawati v State of Himachal Pradesh* [42] the accused made a statement to a head constable that some unknown dacoits had invaded her house, killed her husband and robbed her of jewellery. This statement which was treated as first information statement was found on investigation to be false, and it was proved that she knowingly gave the false information to screen the real offender who was her paramour. She was, therefore, convicted under this section.

In an old case, it had been held by the Calcutta High Court that a person who gives false information to the police, accusing another of an offence of murder in order to screen the real offender, commits offences not only under ss 201 and 203, IPC but also under s 211 .[43]

But where the first information has already been laid and investigation already started, the witnesses who are questioned by the police cannot be proceeded against under ss 182, 201 or 203, for giving false information.[44]

Screening of Specified Offender not Necessary

To convict a person under s 201, IPC, it is not necessary that the accused should be aware of the identity of the offender whom he intends to screen. It is sufficient if he had the knowledge that by this act he was likely to save a person from legal punishment. There is nothing in s 201 to require the prosecution to prove that the accused intended to screen a specified offender,[45] or the offender must be named or identified or convicted of the principal offence.[46]

35. Notwithstanding Acquittal under Section 302 , IPC, Accused can be Convicted under Section 201,IPC .

Even though the accused has been acquitted under s 302, IPC, his conviction under s 201, IPC is permissible.[47]

36. Procedure

The offence under cl 1 of this section is cognizable or non-cognizable according as the offence in relation to which the disappearance of evidence is caused is cognizable or non-cognizable. It is bailable and triable by a court of session. An offence under cl 2 is non-cognizable, bailable and triable

by a magistrate of the first class. The offence under cl 3 is also non-cognizable and bailable and is triable by the court by which the principal offence is triable.

There is no period of limitation for taking cognizance of an offence under cl 1. The period of limitation for taking cognizance of an offence falling under cl 2 is three1536 years and for an offence under cl 3, the period of limitation may be one year or three years depending on the sentence provided for the offence committed.

No complaint of the court is required for taking cognizance of an offence punishable under this section.

37. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate,etc.*) hereby charge you (*name of accused*), as follows:
>
> That you (*) on or about the.....day of.....at .....knowing (*or having reason to believe*) that a certain offence, to wit.....punishable with....has been committed, did cause certain evidence of the said offence to disappear, to wit.....(*or knowingly gave false information, to wit.....*) with the intention of screening the offender from legal punishment, and thereby committed an offence punishable under s 201 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

In a complaint filed under s 201, there was not a single word as to what existing evidence was destroyed by the accused individually or conjointly, in respect of an offence which was already committed, with the intention of screening the offender. Therefore, on the averment of the complainant himself in the complaint no court could have taken cognizance of an offence under s 201, IPC . It was held that the complaint, in respect of an offence under s 201, IPC is liable to be quashed on the ground that there is not even the slightest allegation to constitute an offence.[48]

Where the deceased died out of electric shock received from the naked electric wire laid down by the respondents and the respondents threw the dead body near the road, *prima facie* case for framing charges under ss 304 and 201, IPC was made out, thus, the order of discharge was set aside.[49]

Where looking at the condition of the patient, the accused doctor had given treatment and thereafter referred the patient for further treatment to a government hospital, the accused had not committed any offence. There was no ingredient available in the charge sheet and the allegation levelled by the prosecution for establishing the second ingredient that the accused was knowing or had reason to believe that the offence was committed was also not proved. The third ingredient that the accused must either cause any evidence of commission of that offence to disappear or give any information respecting the offence which he knew or believed to be false was also not present. The applicant had not given any incorrect or false information to anybody and also did not cause the disappearance of evidence of any offence. As per the direction of the Supreme Court above it was the duty of the accused doctor to give the patient who was brought to her hospital in serious condition immediate treatment. However, no *prima facie* case worth punishable under s 201, IPC was made out against

the accused. Therefore, framing of the charge for the said offence by the trial court was quashed.[50]1537

Where the allegation against the accused was that he removed and made the weapon of the offence disappear, there was no evidence that the accused had gone to the spot of recovery and retrieved the weapon of offence, the disclosure statement of the accused was inadmissible in the absence of any recovery, and hence no charge could be proved under s 201 read with s 120, IPC against the co-accused on that count.[51]

Also the commentary under the head 'whoever' on the point of charge may be referred to.

Charge in the Alternative--Applicability of Section 354(2) , CrPC

The proper approach in such cases should be that a person be charged first with having committed a murder and in the alternative, if the evidence does not show that he has committed the murder, for causing evidence to disappear with the intention of screening the offender; in other words, of having been an accessory after the fact. If he is acquitted of murder, he can be convicted of the offence under this section.[52] It has been held that where a person is charged under ss 302 and 201, the sessions judge should not record a finding of acquittal on the charge under this section without going into that question and taking the evidence into consideration, on the mere ground that the accused has been convicted under s 302 . If the evidence discloses an offence under this section, he may be convicted under it even if acquitted under s 302 or when the appellate court sets aside the conviction under s 302 .[53] But in an appeal before them, their Lordships of the Privy Council have held that the proper avenue of approach in such a case is first and foremost, to consider whether the case under s 302 has been made out. If so, that is an end of the matter. If, on the other hand, the case under that section is not made out, then and only then, would it be proper to consider whether an offence under s 201 has been established.[54] Where the charge is framed in the alternative in respect of offences under ss 302 and 201, a position may arise as contemplated by s 72, IPC . It may be open to the court to give the judgment that a person is guilty of one of the several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty. Such a finding is in accordance with s 254(2), CrPC[55] and will have the consequence that under s 72, IPC, the offender is to be punished for the offence for which the lowest punishment is provided, the same punishment not being provided for all.[56]

38. Proof

In order to bring home an offence under this section, the prosecution has to prove:

(a) that an offence has been committed;
(b) that the accused knew or had reason to believe the commission of such offence;1538
(c) that with such knowledge or belief he--

  (i) caused any evidence of the commission of that offence to disappear, or
  (ii) gave any information respecting that offence which he then knew or believed to be false; and

(d) that he did so as aforesaid with the intention of screening the offender from legal punishment; and
(e) if the charge be of an aggravated form, it must be proved further that the offence, in respect of which the accused did, as in (iii) and (iv) was punishable with death, or with imprisonment for life or imprisonment extending to ten years.[57]

Where the charge against police officers, accused numbers 14-17, was that as a part of a criminal

conspiracy with Bhai Thakur and his men, they had caused the evidence of the commission of the offence to disappear and by that dishonest investigation had tried to screen the real offenders from legal punishment, they were held to have committed offences punishable under ss 201, 217 and 218 read with s 120B, IPC and also under TADA. However, except the confessional statement of a co-accused, there was no other independent evidence to show the involvement of the accused numbers 14-17 as alleged the confession, no doubt, created a strong suspicion that these accused numbers 14-17 were maintaining good relations with Bhai Thakur and they had possibly helped Bhai Thakur and Manik Patil in screening the real offender. However, it was not safe to convict them on the basis of the confession of a co-accused.[58]

Where the prosecution case was that the appellant accused kidnapped a 12 year old girl, raped her, committed her murder and threw her dead body in the bushes, the evidence of last seen was found not reliable, and the identify of the appellant accused not being fully established, the appellant accused was not convicted of offences under ss 363, 376, 302 and 201, IPC .[59]

Where evidence was lacking to show that the appellant accused *T* had beheaded the deceased or concealed the blood stained head part of the deceased in a cave in the forest, the appellant accused *T* was acquitted of the charge under s 201 read with s 34, IPC .[60]

Where the oral evidence of the PWS that the appellant accused after committing the murder of his brother-in-law had dumped the dead body of the deceased in the septic tank was found not reliable, appellant accused was acquitted of the charge under s 201, IPC .[61]

An offence under this section is established when the approver's deposition relating to the offence, is coupled with very reliable material in proof of the recovery of the dead body of the deceased at the instance of the accused and the recovery is1539 believed by the court for good reasons.[62] Where there was no evidence to show that any attempt was made by the appellants *A* and *G* to destroy the evidence of rape, they were acquitted of the charge under s 201 read with s 34, IPC .[63]

In one case, charges against the accused were of offences of criminal conspiracy and causing the disappearance of evidence, under ss 120B and 201, IPC respectively, and the evidence on record corroborated the evidence of the approver. The Apex Court upheld the conviction of the accused for these offences.[64]

This Offence can be Proved by Circumstantial Evidence

An offence under this section can also be established by circumstantial evidence.[65] The fact that a photographer had been sent for and his arrival was awaited before the discovery of the dead bodies tells its own story. The police were so sure about the dead bodies that they had decided to secure the presence of a photographer beforehand. The fact that they were so sure about the presence of the dead bodies is suggestive that the presence of the dead bodies was known to them already. It was held that the prosecution evidence regarding the alleged recovery of the dead bodies at the instance of the accused does not inspire confidence and their conviction under s 201, IPC, was not maintainable.[66]

Where the accused made a statement to the sub-inspector that he had buried the dead body of his wife in the forest, which statement was not admissible in evidence under s 27 Evidence Act as the police sub-inspector had already come to house on the basis of a prior first information report by prosecution witness 1 that the dead body of the wife of the accused had been buried in the forest, there could not be any conviction under s 201, IPC on the basis of evidence which was legally inadmissible.[67]

39. Conviction when Accused not Found Guilty of Main Offence

The fact that since the accused persons have been acquitted of the primary charges, recording of guilt under ss 201 and 34 of the Indian Penal Code, which were the ancillary charges, was not of much

consequence. So the accused persons are entitled to be acquitted on the charges under ss 201 and 34 Indian Penal Code 1860 as well.[68] The charge under s 201, IPC, namely the destruction of evidence relating to the commission of an offence is intrinsically interlinked with the first head of charge1540 under s 302, Indian Penal Code 1860 and it was submitted that if the first charge fails, automatically the conviction under the second head would also have to go. In the majority of cases this position would hold good. There could, however, be a category of cases in which the charge under s 201, IPC, could result in an independent conviction even if for technical reasons the charge as regards the main offence has not resulted in a conviction. Undoubtedly, this would be in a microscopically small number of cases.[69]

In *Reg v Kashinath Dinkar* ,[70] the illustration appended to this section was relied on for showing that the section was intended to apply exclusively to a person other than the offender himself. But illustrations rank only as cases decided on the section;[71] and it has often been decided that they ought never to be allowed to control the plain meaning of the section itself.[72] The true principle seems to be that there is no law preventing the main offender from being convicted under ss 201 - 203, but in practice no court will convict an accused both of the main offence and under these sections. It has been held that where in a case of murder, the disposal of the bodies is a separate transaction from the murder, the conviction of the murderers under this section in addition to a conviction under s 302 is not illegal, although a separate sentence is not called for.[73] In a particular case, notwithstanding that the accused was acquitted of offences under ss 304B and 498A, IPC he has to be convicted of the offence punishable under s 201, IPC inasmuch as the body of the deceased who had committed suicide was cremated without informing the police.[74] There is no quarrel with the legal principle that notwithstanding acquittal with reference to offence under s 302, IPC, conviction under s 201 is permissible, in a given case.[75]

If the commission of the main offence by the accused is not brought home to him, then he can be convicted under ss 201 - 203 .[76] A conviction on a charge of having been an accessory to an offence under s 201 is not illegal merely because it is suspected, but not proved or admitted, that the accused committed, or was one of the several persons, who committed the principal offence.[77] In *Nazru v Emperor* ,[78] it was remarked:

> We are not prepared to propound the extreme view that mere suspicion that an individual is the actual murderer would prevent his conviction under section 201 , Indian Penal Code, on proof that he had made away with evidence of murder, and we do not think that the rulings, all of which deal with the special circumstances of particular cases go so far as that. We think that if there is clear and independent proof that any person has caused evidence to disappear in order to screen some 'person or persons unknown', the mere fact that the had been suspected, or even tried and acquitted of the crime itself, would not, in itself, prevent his conviction under section 201 . A person1541 who has been acquitted of a crime is in the eye of the law not the principal offender, who, if no one has been convicted, would be some person unknown.

40. Conviction when Main Accused is Acquitted of Main Offence

When the main accused is acquitted of the charge under s 302, IPC, conviction of a co-accused under s 201, IPC cannot be sustained.[79]

But subsequently the same Apex Court took a contrary view when it held that it was not absolutely necessary that somebody else should have been found guilty of the main offence so as to convict the accused under s 201, IPC .[80]

Mere removal of the dead body at the instance of the main accused from one place to another would not amount to causing disappearance of evidence particularly when main accused was ultimately acquitted of not only principal offence under s 304 but also offence under s 201 .[81]

When the main accused against whom the allegations were levied under ss 302, 201,c109 and 34, Indian Penal Code 1860 were acquitted and only the allegation against the petitioner accused was that he assisted in cremating the body, in such circumstances, it was held that the order taking cognizance under s 201 cannot be sustained, so the proceedings against the absconding accused were quashed under s 482 of the Code of Criminal Procedure 1973.[82]

41. Conviction--Two Premises

It is not necessary that the offender himself should have been found guilty of the main offence for the purpose of convicting him of an offence under s 201 . Nor is it absolutely necessary that somebody else should have been found guilty of the main offence. Nonetheless, it is imperative that prosecution should have established two premises. First is that an offence has been committed and second is that the accused knew about it or he had reasons to believe the commission of that offence. Then and then alone the prosecution can succeed, provided the remaining postulates of the offence are also established.[83]

42. Conviction without Charge

Even if there is no charge under s 201, a man may be convicted of the offence under it if the evidence is such as to establish a charge that might have been made[84] and where a person is acquitted of the charge of murder and other cognate charges, with which he is charged, his conviction under s 201 without any further charge is not illegal.[85]1542

A Division Bench of the Andhra Pradesh High Court has also held that it is a well settled proposition that where a charge under s 302, IPC has been framed and the prosecution has failed to prove the same and where the screening of offence has been made out and the accused person has got knowledge about the death and purposely misled the police and public, conviction under s 201, IPC can be made even without framing a charge.[86]

43. Accused Charged under Sections 302 , 201, 324 and 34, IPC can be Convicted under Sections 302 and 201,IPC

Even if charge has been framed under ss 302, 201, 324 and 34, IPC conviction can be made under ss 302 and 201, IPC unless prejudice is shown to have been caused to the accused.[87]

44. Sentence

The offence under this section is not punishable more severely than the principal offence. The punishment varies according to the gravity of the offence and the punishment for the principal offence. The erroneous belief or delusion of the accused does not furnish the measure of punishment under this section.[88]

The first paragraph of the section contains the postulates for constituting the offence while the remaining three paragraphs prescribe three different tiers of punishments depending upon the degree of offence in each situation. The two indispensable ingredients for all the three tiers in s 201, IPC are: (a) the accused should have had the knowledge that an offence has been committed or at least that he should have had reasons to believe so; and (b) he should then have caused the disappearance of the evidence of the commission of that offence. The prosecution cannot escape from establishing the aforesaid two basic ingredients for conviction of the accused under s 201 .

The gravest degree contemplated in s 201 is punishable with the maximum sentence of imprisonment for seven years. The minimum requirement for the offences to reach the said peak degree is that the offender should have caused the disappearance of evidence of another offence which is punishable with death, and that should be established in addition to the above mentioned two basic ingredients.

Even if the two basics are established, and the prosecution failed to establish the next requirement, the court cannot convict the accused for the highest sentence specified in the section.[89]

Before a person may be convicted of an offence under this section, it must be found what the original offence committed was, evidence of which was done away with, and before he could be sentenced thereunder, the part of this section applicable to the case must be determined. Without doing this, a conviction and sentence under this section cannot be sustained.[90]1543

In a case of gangrape and murder of a minor girl where the accused caused the evidence of commission of the offence to disappear with the intention of screening themselves from punishment, their conviction under s 201, IPC was upheld and since they knew that the offence committed by them was punishable with death, they could be punished under s 201, pt II, IPC with imprisonment upto seven years, and their sentence of seven years rigorous imprisonment each under this provision was confirmed.[91]

45. Sentence Undergone

Considering the fact that all the appellants accused were above 70 years of age, and they were not connected with the first part of the occurrence, in the interest of justice, sentence was reduced to the period already undergone. One appellant had been in custody for about five months and another appellant had been in custody for three months fifteen days.[92]

A person causing the disappearance of the evidence of two offences commits two separate offences under this section. But the court should not ordinarily award two separate punishments for the same act constituting two such offences under this section.[93] The court should not also award the maximum sentence in each and every case. Unless there are very aggravating circumstances, a sentence of three to five years in cases falling under cl 1 would meet the ends of justice though there cannot be any hard and fast rule about it.[94] In *Sugni v State of Rajasthan* ,[95] the appellant, when her appeal was heard by the High Court, was aged about 64 years and remained under custody for a period of eight months and ten days. Looking at her old age, her sentence of three years simple imprisonment was reduced to the period of her custody.

The Division Bench of the same Rajasthan High Court in *Heeru Das v State of Rajasthan* , where the age of the accused lady was 83 years, reduced her sentence under s 201, IPC to the period already undergone, keeping in view the age of the accused.[96] Keeping in view the age and family background of the accused, sentence of five years imposed by the Courts below was reduced to two years RI.[97]

In case of dowry death, where the appellants accused were relatives of the husband of the deceased, and the accused had already served 10 months imprisonment during trial, the occurrence being 12 years old, sentence was reduced to the period already undergone.[98]

In the Mumbai Bomb Blast case, the co-accused *A*124 was convicted under s 25(1-B), Arms Act and s 201, IPC for destroying the arms of the co-accused. The co-accused was aged 82 years, so, considering his age and also the fact that there was no substantive evidence for convicting him for offence under s 25(1-A) of the Arms Act,1544 the Supreme Court reduced the sentence to one year and also directed that the sentences shall run concurrently.[1]

The sentence of a woman accused and convicted under s 201, IPC was reduced by the Apex Court from 7 years rigorous imprisonment to already undergone imprisonment of about four years and eight months.[2] Where the accused was 18 years of age and staying with her brothers at the time of the incident, the possibility of his having been pressurised by his brothers for causing the disappearance of evidence cannot be ruled out and on these facts and circumstance, the sentence of seven years of imprisonment awarded to the accused was reduced to the period of imprisonment already undergone by him.[3]

Where the accused persons convicted under ss 201 and 120B, IPC were government employees, their substantive sentence was reduced to the period of imprisonment which they had already undergone.[4]

46. Probation

The accused 1 had committed rape on his cousin, his wife, accused 2, when apprised by the prosecutrix, asked her not to disclose the incident to any one and cleaned the blood stained clothes of the prosecutrix, blood stained door, took her to the hospital for medical aid, and informed her parents also. Considering the conduct of the accused, she was granted probation under s 4 of the Probation of Offenders Act 1958.[5]

2 Substituted by Act 26 of 1955, s 117 and Sch., for 'transportation for life' (wef 1-1-1956).

3 See 1 Dale 618.

4 *Vijaya v State of Maharashtra* AIR 2003 SC 3787, (2003) Cr LJ 4318 (SC) .

5 *Sunkara Suri Babu v State of Andhra Pradesh* (1996) Cr LJ 1480 (AP) .

6 *State of Orissa v Chintai Reddy* 47 Cut LT 293, p 294, 1979 Cut LR (Cr) 30 ; Re *Venkatasuryanarasinha Rao*AIR 1955 AP 82 ; *SR Mulani v State of Maharashtra* AIR 1968 SC 829, (1968) All WR (SC) 651, p 652, (1968) Cr LJ 1013 ; *State of Orissa v Trinath Dash* (1982) Cr LJ 942 (Ori) (DB) .

7 *Md Siddique Ali Sardar v State of West Bengal* 2011 Cr LJ (NOC) 299 (Cal) (DB).

8 *Sumanta Dhupi v Emperor* (1916) 17 Cr LJ 4, p 5 .

9 1 Hale 618, 4 BL Com 37.

10 Seventh Report, ss 103 - 08 cited in First Report, s 220, reprint, p 242; Re *Kuttayan*AIR 1960 Mad 9, p 12, (1960) Cr LJ 65, (1959) ILR Mad 654, 72 Mad LW 522 .

11 Re *Kottayan*AIR 1960 Mad 9, p 12 .

12 Re *Kottyan*AIR 1960 Mad 9, p 12 ; Re *Shami*(1884) PR No 42.

13 *Emperor v Rino Sobedar* (1912) 13 Cr LJ 721, p 722, 6 SLR 76 .

14 Re *Kottayan*AIR 1960 Mad 9, p 12, (1960) Cr LJ 65 .

15 *Harishchandrasing Sajjansing Rathod v State of Gujarat* AIR 1979 SC 1232, (1979) Cr LJ 1025 (SC) .

16 *Bhagwan Swarup v State of Rajasthan* AIR 1991 SC 2062, (1991) Cr LJ 3123 (SC) .

17 *State of West Bengal v Hari Ramalu* (2004) Cr LJ 2659 (Cal) (DB) .

18 *Roshan Lal v State of Punjab* AIR 1965 SC 1413, p 1418, (1965) 2 Cr LJ 26 ; *Harbans Lal v State* AIR 1967 HP 10, (1967) Cr LJ 62 ; *Suleman Rahiman Mulani v State of Maharashtra* AIR 1968 SC 829, (1968) Cr LJ 1013 ; *K Puran Chandra Rao v Public Prosecutor* AIR 1975 SC 1925, (1975) Cr LJ 1671 ; Re *Sumitra Sherpani*(1975) Cr LJ 169 (Gau); *Chan v State of Rajasthan* (1977) Cr LR (Raj) 649 ; *Bharat Samantra v State* (1974) Cut LT 400 .

19 *State of Madhya Pradesh v Shyamsunder Trivedi & Ors* (1995) 4 SCC 262 .

20 *State of Sikkim v Milan Kumar Diyali* (2005) Cr LJ 4097 (Sik) (DB) .

21 *Mani Kumar Thapa v State of Sikkim* AIR 2002 SC 2920, (2002) 7 SCC 157 ; **see also***State of Sikkim v Milan Kumar Diyali* (2005) Cr LJ 4097 (Sik) (DB) ; *Tejinder Singh v State of Punjab* 2013 Cr LJ 3130, (2013) 12 SCC 503 ; *Sukhram v State of Maharashtra* AIR 2007 SC 3050, 2007 (3) Crimes 354, (2007) 3 SCC (Cri) 426 .

22 *State of Maharashtra v Suresh* (2000) 1 SCC 471 ; **see also***State of Sikkim v Milan Kumar Diyali* (2005) Cr LJ 4097 (Sik) (DB) .

23 *Mohibur Rahman v State of Assam* AIR 2002 SC 3064 ; **see also***State of Sikkim v Milan Kumar Diyali* (2005) Cr LJ 4097 (Sik) (DB) .

24 *State of Sikkim v Milan Kumar Diyali* (2005) Cr LJ 4097 (Sik) (DB) .

25 *Joseph v State of Kerala* AIR 2000 SC 1608, (2000) 2 SCC (Cr) 926, (2000) Cr LJ 2467 ; **see also***State of Jharkhand v Suresh Prasad Mehta* (2006) Cr LJ 2498 (Jhar) (DB) .

26 *Deonandan Mishra v State of Bihar* AIR 1955 SC 801, (1955) Cr LJ 1647 ; **see also***State of Jharkhand v Suresh Prasad Mehta* (2006) Cr LJ 2498 (Jhar) (DB) .

27 *Jayendra Saraswathy Swamigal v State of Tamil Nadu* (2005) Cr LJ 4626 (SC) .

28 *Palvinder Kaur v State of Punjab* AIR 1952 SC 354, [1953] SCR 94 ; *Empress v Abdul Kadir* 3 ILR All 279 (FB) ; *State of Orissa v Chintal Reddy* (1979) 47 Cut LT 293, p 294 .

29 *Chau v State of Rajasthan* (1977) Cr LR (Raj) 649 ; *Vijaya v State of Maharashtra* AIR 2003 SC 3787, (2003) Cr LJ 4318 (SC) .

30 *Koshali Puranchander Rao & Anor v The Public Prosecutor, Andhra Pradesh* AIR 1975 SC 1925, (1975) Cr LT 1671 ; *Keshave Kishore Sinha v State of Bihar* 2013 Cr LJ (NOC) 7 (Pat) .

31 *State of Rajasthan v Ramjilal* 2014 Cr LJ (NOC) 539 (Raj) .

32 *State of West Bengal v Hari Ramalu* (2004) Cr LJ 2659 (Cal) (DB) ; *State of Karnataka v Madesha* (2007) 7 SCC 35, 2007 (9) Scale 523, 2007 (5) Supreme 746, 2007 (7) SLT 320, 2007 (3) SCC (Cr) 292, 2007 (3) Crimes 298 (SC) .

33 *Jayendra Saraswathy Swamigal v State of Tamil Nadu* 2005 Cr LJ 4626, p 4632, AIR 2006 SC 6, 2005 SCC (Cri) 1 .

34 *Ram Saran Mohto v State of Bihar* (1999) Cr LJ 4311 (SC), (1999) III CCR 223 (SC) .

35 *Torab Ali v Queen-Empress* ILR 22 Cal 638 ; *Queen v Ramsoonder Shootar* 7 WR (Cr) 52 ; *Reg v Kashinath Dinkar* 8 Bom HCR (Cr) 126; *Queen-Empress v Lalli* 7 ILR All 749 ; *Queen-Empress v Dungar* ILR 8 All 252 ; *Queen-Empress v Krishna* ILR 2 All 713 ; *Empress v Behela Bibi* 12 CPLR (Cr) 17 ; *Emperor v Ghunsham Ramchandra Mantru* 4 Cr LJ 89, 8 Bom LR 538 ; *Kudaon v Emperor* AIR 1925 Nag 407 ; *Ahmed v Emperor* AIR 1926 Lah 209, 27 Cr LJ 109 ; *Rup Narain v Emperor* AIR 1931 Pat 172, 32 Cr LJ 975, ILR 10 Pat 140, 12 PLT 746 ; *State v Laikham Pradhan* AIR 1956 Ori 108, (1956) Cr LJ 638 ; the decisions in (1); *State v Mohanlal* AIR 1958 Raj 338 ((2)) ; *Dharma v State* (1966) Raj 74 and (3); *Lai Khan Khatia v State* (1966) Cut LT 1155, do not lay down the correct law in view of the decision of the Supreme Court in *Kalawati v State of Himachal Pradesh* AIR 1953 SC 131, (1953) Cr LJ 668 .

36 *Kalawati v State of Himachal Pradesh* AIR 1953 SC 131, p 135, (1953) Cr LJ 668 ; *Ranchod v State* AIR 1956 MB 262 ; Re *Kottayan*AIR 1960 Mad 9 ; Re *Madupula Jeremiah*AIR 1957 AP 611, (1957) Cr LJ 1071, (1956) ILR AP 173 ; *Nebti Mandal v Emperor* AIR 1940 Pat 289, 41 Cr LJ 910, ILR 19 Pat 369 ; *Mahadeo Nath Khetri v Emperor* AIR 1941 Pat 550, 42 Cr LJ 603, 22 PLT 1035 ; *Mata Din v Emperor* AIR 1930 Oudh 113, 31 Cr LJ 575, 5 ILR Luck 255 .

37 Section 40, IPC .

38 Section 6, IPC .

39 Explanation to s 203, IPC .

40 *Thakri v Emperor* 12 Cr LJ 425, 426, 17 PWR (Cr) 1911 .

41 *Netrananda Naik v State of Orissa* 2011 Cr LJ 813, p 817 (Ori) (DB) .

42 *Dharam Deo Yadav v State of UP* 2014 Cr LJ 2371 (SC), (2014) 5 SCC 509, (2014) 138 AIC 30 (SC) .

43 *R v Pelkoo Nushyo* 2 WR (Cr) 43 ; *Matuki v R* ILR 11 Cal 619 ; *R v Abdul Kadir* 3 ILR All 279 ; *R v Joy Narain Patro* 20 WR (Cr) 66 .

44 *Emperor v Ghanasham Ramchandra Maitri* 4 Cr LJ 89, 8 Bom LR 338 .

45 *Anverkhan Mahamadkhan v Emperor* AIR 1921 Bom 115, 117, 22 Cr LJ 609, 23 Bom LR 823 ; *Emperor v Sevalal* ILR 37 Bom 658, 15 Bom LR 694 .

46 *R v Palkoo Nushyo* 2 WR (Cr) 43 ; *Matuki v R* ILR 11 Cal 619 ; *R v Abdul Kadir* 3 ILR All 279 ; *R v Joy Narain Patro* 20 WR (Cr) 66 .

47 *Queen-Empress v Saminath* ILR 4 Mad 400, 403, 1 Weir 195, 1 Mad LJ 163 ; *SR Mulani v State of Maharashtra* AIR 1968 SC 829, (1968) All WR (SC) 651, 652 ; *Kota Subba Reddy & Ors v State of Andhra Pradesh* (1996) 2 Andh LT (Cr) 64, 66 (AP), (1996) 2 APLJ 341 (HC).

48 *Palvinder Kaur v State of Punjab* AIR 1952 SC 354, p 356 .

49 Re *Antappa*AIR 1959 Mys 250 ; *Manji Prasad v State* (1996) JIC 769 (All) where the above decision of the Supreme Court

was **followed**.

50 *Prasanta Kumar Chhotray v State of Orissa* 2008 Cr LJ 4268 (Ori) (DB) .

51 Re *Venkatasuryanarasimha Rao*AIR 1955 AP 82 .

52 *Empress of India v Abdul Kadir* 3 ILR All 279 (FB) ; *Matuki Misser v Queen-Empress* ILR 11 Cal 619 ; *Adho v Emperor* AIR 1925 Sind 257, 26 Cr LJ 897 ; *Emperor v Maduranath De* AIR 1932 Cal 850, 33 Cr LJ 657 ; *Roshanlal v State of Punjab* AIR 1965 SC 1413, (1965) 2 Cr LJ 426, p 428 ; *SR Mulani v State of Maharashtra* AIR 1968 SC 829, (1968) Cr LJ 1019 ; *B Nath v State of Orissa* AIR 1973 SC 2337, (1973) Cr LJ 1585 ; Re *Sumitra Sherpani*(1975) Cr LJ 169, 170 (Gau); *Mazahar Ali v State* (1976) Cr LJ 1629, p 1640, (1976) Kash LJ 179 ; *State of Orissa v Chinta Reddy* (1979) 47 Cut LT 293 .

53 *Dashrath Mahadeo Borate & Ors v State of Maharashtra* (1995) 2 B Cr C 22, p 33 (Bom) .

54 *Gati Behera & Ors v State of Orissa* (1997) Cr LJ 4331 (Ori) .

55 *Ibid.*

56 *Empress of India v Abdul Kadir* 3 ILR All 279 (FB), per Oldfield J; *Pratap Singh v State* (1967) 69 Punj LR 630, p 637 .

57 *Nathu v State of Uttar Pradesh* AIR 1979 SC 1245, (1979) Cr LJ 1066, (1979) 3 SCC 574, (1979) UJ (SC) 298 ; *State v Rudra* (1985) 1 Crimes 125 .

58 Re *Kuttayan*AIR 1960 Mad 9, p 13 .

59 *Arbind Singh v State of Bihar* (1994) Cr LJ 1227 (SC) .

60 *Kodali Puranchandra Rao & Anor v The Public Prosecutor, Andhra Pradesh* AIR 1975 SC 1925, (1975) Cr LJ 1671, (1975) Cr LR (SC) 544, (1975) 2 SCC 570, (1975) Cr App Rep (SC) 330 .

61 *Shamim Rahman v State of Uttar Pradesh* AIR 1975 SC 1883, p 1890, (1975) SCC (Cr) 297, (1975) Cr LR (SC) 407, (1975) Cr App Rep (SC) 233, (1975) Cr LJ 1654 ; *Ram Chandra v State* (1980) All LJ 762 (DB) ; *Nathu v State* AIR 1979 SC 1245, (1979) Cr LJ 1066 .

62 *Nathu v State of Uttar Pradesh* AIR 1979 SC 1245, (1979) Cr LJ 1066, (1979) Cr LR (SC) 167, (1979) SCC (Cr) 733, (1979) UJ (SC) 298, (1979) 3 SCC 574 .

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3 *Mahesh Mahto v State of Bihar* (1997) Cr LJ 4402 (SC) .

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6 *Sanjiv Kumar v State of Himachal Pradesh* (1999) Cr LJ 1138 (SC) .

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18 *Mallareddi Madana Mohanarao v State of Andhra Pradesh (*2006) Cr LJ 2332 (AP).

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71 *Reg v Rahimat* ILR 1 Bom 147 .

72 *Emperor v Rino Sobedar* (1912) 13 Cr LJ 721, 6 SLR 76 .

73 *Ghulam Mahommad v Emperor* AIR 1942 Lah 271, 44 Cr LJ 77 ; *Emperor v Har Piari* AIR 1926 All 737 .

74 *Sunkara Suri Babu v State of Andhra Pradesh* (1996) Cr LJ 1480 (AP) .

75 *Vijaya v State of Maharashtra* AIR 2003 SC 3787, (2003) Cr LJ 4318 (SC) .

76 *Chinna Gangappa v Emperor* AIR 1930 Mad 870, p 872, 32 Cr LJ 263, 59 Mad LJ 677, ILR 51 Mad 68 .

77 *Queen-Empress v Limbya* (1895) Ratanlal Unrep Cr Cases 799 ; *Tepreinessa v Emperor* AIR 1919 Cal 679, 19 Cr LJ 963 ; *Emperor v Hanmappa Rudrappa* AIR 1923 Bom 262 ; Re *Sumanta Dhupi*AIR 1916 Cal 919 ; *Dilta v Emperor* AIR 1928 Lah 906, 29 Cr LJ 746 .

78 *Nazru v Emperor* (1902) PR 6 (SC), 154 PLR 1901 .

79 *Perumal Asari & Ors v State* (1997) Cr LJ 3147 (Mad) (DB) .

80 *Ram Saran Mahto v State of Bihar* (1999) Cr LJ 4311 (SC), (1999) III CCR 223 (SC) .

81 *Kajju Lal v State of Rajasthan* (2006) Cr LJ 4386 (Raj) .

82 *Rajkishore Singh v State of Orissa* (2003) Cr LJ 4160 (Ori) .

83 *Ram Saran Mahto v State of Bihar* (1999) Cr LJ 4311 (SC) ; *Narayan Singh v State of Rajasthan* (2001) Cr LJ 3725 (Raj) .

84 *Begu v King-Emperor* AIR 1925 PC 130, p 131, 26 Cr LJ 1059 .

85 *Kashmira Singh v State of Madhya Pradesh* AIR 1952 SC 159 ; *Kalawati v State of Himachal Pradesh* AIR 1953 SC 131 ;

Chander Giani v State AIR 1958 Punj 183 ; Re *Kottayan*AIR 1960 Mad 9 ; Re *Kalia Perumal*AIR 1954 Mad 1088 ; Re *Madugula Jeremiah*AIR 1957 AP 611 ; *Rannu v Emperor* AIR 1926 Lah 88 ; *Bucha v King-Emperor* 1 PR 1904 (Cr), 30 PLR 1904, 1 Cr LJ 113 .

86 *Annisetti Sivaprasada Rao alias Sivayya v State of Andhra Pradesh* (1994) Cr LJ 1760, p 1764, (1994) 2 Andh LT 13 (NRC) (AP) .

87 *Babu v State of Orissa* (2005) Cr LJ 865 (Ori) (DB) .

88 *Roshan Lal v State of Punjab* AIR 1965 SC 1413, (1965) 2 Cr LJ 426, p 430 .

89 *Ram Saran Mahto v State of Bihar* (1999) Cr LJ 4311 (SC) .

90 *Government of Kutch v Rabari Shava Jiva* AIR 1950 Kutch 54, 51 Cr LJ 1178 ; *Chinna Gangappa v Emperor* AIR 1930 Mad 870, p 873, 32 Cr LJ 263, ILR 54 Mad 68, 59 Mad LJ 677 .

91 *State of Madhya Pradesh v Malai* (1999) Cr LJ 2698 (MP) (DB) .

92 *Budhan Singh v State of Bihar* 2006 Cr LJ 2451, p 2455, AIR 2006 SC 1959, (2006) 4 SCC 740, 2006 (4) Scale 570 .

93 *Roshan Lal v State of Punjab* AIR 1965 SC 1413, (1965) 2 Cr LJ 426, p 430 .

94 *Pandu Krishna Bhingada v State of Maharashtra* (1977) Cr LJ 187, p 194 (Bom) ; *Ravindra Trimbak Chouthmal v State of Maharashtra* (1996) 2 Supreme Today 272, (1996) ITC 702 .

95 *Sugni v State of Rajasthan* (1980) Raj Cr Cas 376 .

96 *Heeru Das v State of Rajasthan* (2002) Cr LJ (NOC) 41 (Raj) .

97 *Pradeep Kumar v State of Himachal Pradesh* 2015 (3) Supreme 67, p 70 (SC) .

98 *Raj Kumar alias Raju v State of Haryana* 2008 Cr LJ (NOC) 584 (P&H).

1 *Sanjay Dutt v State of Maharashtra* 2013 Cr J 3538, p 3576 (SC) Para 88.

2 *Sanjiv Kumar v State of Himachal Pradesh* (1999) Cr LJ 1138 (SC) .

3 *Mahesh Mahto v State of Bihar* (1999) Cr LJ 4402 (SC) .

4 *Ram Singh & Ors v State of Himachal Pradesh* (1997) Cr LJ 1829 (SC) .

5 *Jyoti Prasad Joshi v State of Uttaranchal* 2013 Cr LJ 4720 (Utr) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 202.

Intentional omission to give information of offence by person bound to inform.--

Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Comments

1. Scope

This section deals with an offence of not giving any information,[6] and punishes those who knowing or having reason to believe that an offence has been committed, and1545 being legally bound to give information respecting it, intentionally omit to give that information.

This section should be read with ss 39 and 40 of the Code of Criminal Procedure 1973. Under s 39 of the said Code every person is bound to give information of the commission of certain offences or of the intention of any other person to commit the same to the nearest magistrate or police officer. Under s 40 of the same Code, every officer employed in connection with the affairs of a village and every person residing in a village are also bound to give some such information. This section penalises the intentional omission to do so. Section 39 of the CrPC mentions the offences of which every person, who is aware of the commission of or of the intention of any other person to commit the same, is bound to give an information to the nearest magistrate or police officer, and his failure to do so is made punishable under s 202 of this Code. The crime of murder is one such offence of which every person is required, under the law, to give an information, either to the magistrate, or to the police at once.[7]

Unless the alleged offence(s) come within cl (i) to cl (xii) of sub-s (1) of s 39, CrPC, an offence under s 202, IPC is not attracted. As the offence under ss 363, 465, 466 and 471, IPC did not come within cl (i) to cl (xii) of sub-s (1) of s 39, CrPC, s 202, IPC would not be attracted in the case.[8]

For considering the application of ss 201 and 202, we cannot take as the basis the subsequent result of the trial as to whether the offences were proved or not. It is enough if the evidence shows that the evidence is caused to disappear and there is an intentional omission to give information on the basis of the information available at that point of time indicating that the accused knew or had reason to believe that offences had been committed.[9]

2. Analogous Law

Sections 202 and 203 are very similar to ss 118 - 20, 176, 177 and 182. These groups of sections may be thus distinguished. Sections 202 and 203 refer only to cases where offences have actually been committed, the motive of the accused being immaterial;[10] whereas under ss 118 - 120, the fact concealed is a design to commit an offence, and the motive is to facilitate the commission thereof. Sections 176 and 177 are much wider, inasmuch as they refer to 'information on any subject', and under s 182 the motive is to cause a public servant to use his lawful powers to the injury or annoyance of others. Sections 176, 177 and 182 contemplate only information given to public servants, ss 201 - 203 contemplate information given to private persons as well as to public servants.[11]

3. Essentials

This section punishes the illegal omission of those who, under law, are bound to give information in respect of an offence which he is legally bound to give particularly,1546 being the head of the family.[12] To constitute an offence under this section (a) the accused must have had knowledge or reason to believe, that an offence has been committed; (b) he must be legally bound to give information respecting that offence, and (c) he must have intentionally omitted to give such information.[13]

4. 'Whoever'--Principal Offender not Included

It has been held that the word 'whoever' in this section means any person other than the offender. It has no application to the person who is alleged to have committed the principal offence because there

is no law which casts a duty on a criminal to give information which would incriminate himself.[14]

However, the fact that the accused himself was made an accused in other offences subsequently does not absolve him of his complexity in respect of the offence punishable under s 202, IPC .[15]

5. An Offence must have been Committed

This section can apply only where, in the first instance, an offence has been committed. There can be no conviction for intentional omission to give information of an offence which has not been proved to have been committed.[16] It is necessary for the prosecution to establish the main offence before making a person liable under this offence.[17]

Where a police patel failed to report the arrival of dacoits at his village and supplied them with food and drink, it was held that he could not be convicted under this section as there was nothing to show that an offence was committed by the person who visited his village.[18]

The commentary on this point under s 201 may be referred to.

6. 'Knowing or having Reason to Believe that an Offence has been Committed'--Mere Probability Not Enough

After an offence is committed, this section can be applicable only where the accused 'knowing or having reason to believe that an offence has been committed' intentionally omits to give information of the crime.[19] It must be shown that the1547 accused knew or had reason to believe that an offence had been committed, that he might have though it very probable is not enough.[20]

When a doctor gives treatment to an injured assailant involved in a crime, but does not inform the police about the commission of the crime, he commits offence under s 202, IPC .[21]

Where no material had been placed on record to show that the accused doctors knew that in the burn injuries of the victim lady, some offence was involved, these doctors cannot be convicted under s 202, IPC for non-furnishing of information to the police about the admission of the burnt patient.[22]

The commentary under s 201 may be referred to.

7. Intention is Gist of the Offence

The main consideration under this section is whether the omission is intentional. There may be knowledge or a reason to believe that an offence has been committed; there may also be an omission to give any information, but it is clear that the gist of the offence is the intention.[23] A request by a villager to the *Ywagaung,* to whom an offence has been reported, not to report the offence, is not such an intentional omission to give information as deserves punishment under this section.[24]

Where the accused had knowledge or atleast had reason to believe that an offence has been committed even if, at that stage he thought that it was only a suicide, therefore it was his binding duty, particularly as the head of the family, to inform the authorities, he omitted to do so and on the other hand, he told others that the deceased was still alive but her condition was serious. The accused told the brother of the deceased that the body would be cremated and he intended to do so without informing the authorities. All the ingredients of s 202 were made out against the accused and he clearly committed the offence under this section at that stage.[25]

Where from the fact of the police patel ordering the *kulkarni* to write a report regarding a suspicious death in his village, his good faith was apparent, and it did not seem that he had an intention to omit the report, it was not proper to convict him under this section for an intention to evade the law about

the first report.[26]

8. Reasonable Excuse--Whether a Defence

This section deals with the negative offence of not giving any information.[27] A person is not bound to give information of a murder of which he is aware, if he has reasonable excuse for not making a report, as where the accused had no reason to believe that his informant had himself committed the offence when he came and told him of the murder as having been committed by someone else and where there was clearly no attempt at concealment of the fact of murder, and where the probability, as1548 it would present itself to the mind of the accused at the moment, was that the husband of the murdered woman, after giving the alarm to his neighbours, would go on to the police station.[28]

Certain wheat was stolen from the grain-pit of the accused who was a *lambardar.* He did not report the theft to the police. It was held that as he was bound to give such information to the police under s 90, CrPC 1872, and he was rightly convicted of an offence under s 202, IPC .[29]

9. 'Legally Bound'

Commentary under s 176, *ante* may be referred to.

10. 'Offence'

The word 'offence' in this section has to be interpreted in the light of the explanation to s 203, IPC .

11. Procedure

The offence under this section is non-cognizable. Summons shall ordinarily issue in the first instance. It is bailable but not compoundable and is triable by any magistrate. The magistrate, mentioned in s 260, CrPC may also try an offence under this section in a summary way and offence under s 202, IPC is a bailable offence.[30]

The limitation for taking cognizance of an offence under this section is one year.[31]

It is clear that an offence under s 202, IPC cannot be tried alongwith the charge of ss 306 and 498A, IPC . It doesn't fall under s 223, CrPC or with any other provision thereof. The accused could not be tried jointly in the assumed offence in the s 202, IPC alongwith those who committed an offence under s 306 or s 498A, IPC .[32]

12. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) do hereby charge you (*name of the accused*), as follows:

That you (*) knowing, or having reason to believe that on or about the.....day of ..... At..... the offence of .....was committed (*by.....*), intentionally committed to give information respecting its commission, which you were legally bound to give and thereby committed an offence punishable under section 202 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

The offence under this section cannot be treated as a minor offence included under s 201, because an essential ingredient of the offence under this section is the legal duty of the accused to give information, which is no part of the offence under s 201 . Consequently, an accused against whom only a charge under s 201 is framed cannot1549 be convicted of an offence under this section without a charge to that effect being framed against him.[33]

13. Proof

This section punishes the illegal omission of those who are bound by law to give information in respect of an offence. Under this provision it is necessary for the prosecution to prove:

(a) that the accused had knowledge or reason to believe that some offence had been committed;
(b) that the accused had intentionally omitted to give information respecting that offence; and
(c) that the accused was legally bound to give the information.[34]

For a conviction under the section, the prosecution has to prove the following facts:

(a) that the offence of which no information was given, was committed;[35]
(b) that the accused knew, or had reason to believe, that such offence had been committed;
(c) that he omitted to give information thereof;
(d) that such omission was intentional; and
(e) that the accused was legally bound to give the information which he omitted to give.[36]

Proof of intention as well as omission is essential.[37] In a prosecution under s 202 of the IPC, it is necessary for the prosecution to establish the main offence before making a person liable under this section.[38]

An offence under s 202, IPC has also to be proved beyond reasonable doubt.[39]

The body of the deceased may give certain clues as to cruelty and harassment and consequently, the destruction of the body without information to the police should attract the provisions of ss 201 and 202, IPC .[40]

6 *Prabhu v R* (1905) 6 Cr LJ 141, 2 PWR (Cr) 55 .

7 *Ram Balak Singh v State* AIR 1964 Pat 62, p 65 ; *Ramachandra Pillai v State of Kerala,* 2009 (2) KLT 949 (Ker) .

8 *Ramchandra Pillai v State of Kerala* 2009 (2) KLT 949 (Ker) .

9 *Sunakara Suri Babu v State of Andhra Pradesh* (1996) Cr LJ 148 (AP) .

10 *R v Cheetour* 1 WR 18 ; Re *Ramaswami Udayan* 1 Weir 181.

11 *State of Kerala v Markose* AIR 1962 Ker 133, p 135 .

12 *Bhagwan Swarup & Anor v State of Rajasthan* AIR 1991 SC 2062, (1991) Cr LJ 3123 ; *Ramachandra Pillai v State of Kerala,*

2009 (2) KLT 949 (Ker) .

13 Re *Woodoy Chand Mookhopadhya* 18 WR (Cr) 31; *Harischandra Singh Sajjan Singh Rathod v State of Gujarat* AIR 1979 SC 1232, (1979) Cr LJ 1025, (1979) UJ (SC) 389, (1979) Cr LR (SC) 216, (1979) 2 APLJ (SC) 26 .

14 *Ram Khilawan v R* ILR 28 All 705 ; *R v Chanasham Ramchandra* 8 Bom LR 538 ; *Harishchandra Singh Sajjan Singh Rathod v State of Gujarat* AIR 1979 SC 1232, p 1233, (1979) Cr LJ 1025, (1979) UJ (SC) 389, (1979) Cr LR (SC) 216, (1979) 2 APLJ (SC) 26 ; *Bhagwan Swarup & Anor v State of Rajasthan* AIR 1991 SC 2062, (1991) Cr LJ 3123 .

15 *Bhagwan Swarup & Anor v State of Rajasthan* AIR 1991 SC 2062, (1991) Cr LJ 3123 .

16 *Queen v Ram Ruchea Singh* 4 WR 29, p 30 .

17 *Harischchandra Singh Sajjan Singh Rathod v State of Gujarat* AIR 1979 SC 1232, p 1233, (1979) Cr LJ 1025 .

18 Re *Bala*(1881) Un Rep GC 160.

19 Re *Ramaswami Udayan* 1 Weir 81; *Harischandra Singh Sajjan Singh Rathod v State of Gujarat* AIR 1979 SC 1232, p 1233, (1979) Cr LJ 1025, (1979) UJ (SC) 389, (1979) Cr LR (SC) 216, (1979) 2 APLJ (SC) 26 ; *Bhagwan Swarup v State of Rajasthan* AIR 1991 SC 2062, (1991) Cr LJ 3123 .

20 *Nga Saw v Emperor* 2 Cr LJ 133, p 141, 11 Bom LR 8 .

21 *State of Kerala v Raneef* 2011 Cr LJ 982, p 984 (SC), AIR 2011 SC 340, (2011) 1 SCC 784, 2011 (1) Scale 8 .

22 *KK Patnayak Dr & Ors v State of Madhya Pradesh* (1999) Cr LJ 4911 (MP) .

23 Re *Woodoy Chand Mookhopadhya* 18 WR 31, p 32.

24 (1807-1901) UBR Vol 1, 276.

25 *Bhagwan Swarup & Anor v State of Rajasthan* AIR 1991 SC 2062, (1991) Cr LJ 3123 .

26 Re *Mahatu Balaji*(1895) Unrep Cr Cas 783.

27 *Prabhu v R* (1915) 6 Cr LJ 141, 2 PWR (Cr) 55 .

28 (1893-1900) LBR 382.

29 9 AWN 1883; *Lata v State of Goa* (1990) 3 Crimes 464 (Bom) .

30 *State of Kerala v Raneef* 2011 Cr LJ 982, AIR 2011 SC 340 .

31 Section 468, CrPC 1973.

32 *KK Patnayak (Dr) & Ors v State of Madhya Pradesh* (1999) Cr LJ 4911 (MP) .

33 *Imperator v Rino* 13 Cr LJ 18 .

34 *Bhagwan Swarup & Anor v State of Rajasthan* AIR 1991 SC 2062, (1991) Cr LJ 3123 .

35 Re *Ramaswami Udayan*(1894) 1 Weir 181.

36 *Harishchandra Singh Sajjan Singh Rathod v State of Gujarat* AIR 1979 SC 1232, p 1233, (1979) Cr LJ 1025, (1979) Cr LJ (SC) 216, (1979) 4 SCC 502, (1979) Guj LR (SC) 829, (1979) 2 APLJ (SC) 26 .

37 Re *Woodoy Chand Mookhopodhya* 18 WR 31.

38 *Harishchandra Singh Sajjan Singh Rathod v State of Gujarat* AIR 1979 SC 1232, p 1233, (1979) Cr LJ 1025, (1979) Cr LJ (SC) 216, (1979) 4 SCC 502, (1979) Guj LR (SC) 829, (1979) 2 APLJ (SC) 26, (1979) Guj LR (SC) 829 .

39 *State of Kerala v Raneef* 2011 Cr LJ 982, p 984 (SC), AIR 2011 SC 340, (2011) 1 SCC 784, 2011 (1) Scale 8 .

40 *Sunhara Suri Babu v State of Andhra Pradesh* (1996) Cr LJ 1480 (AP) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 203.

Giving false information respecting an offence committed.--

Whoever, knowing or having reason to believe that an offence has been committed, gives any information respecting that offence which he knows or believes to be false, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.1550

Explanation.--In sections 201 and 202 and in this section the word "offence" includes any act committed at any place out of Indian, which, if committed in India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.

Comments

1. Scope

This section penalises the giving of false information respecting an offence. It prohibits the giving of misleading information by persons who may or may not be under a legal obligation to give that information. In this respect it differs from s 202, IPC . The section also does not require that the information be given with any particular intention as under s 202 .

But as observed by Jackson J:

> In order to establish an offence under section 203, it is necessary that there should have been some offence committed; that the accused should have known or had reason to believe that such offence has been committed and that so knowing or believing or having reason to believe that it has been committed he should have given some information respecting that offence which he knew or believed to be false. The object of the legislature is not to insure general veracity or the making of correct statements in regard to supposed, offences, or to offences the commission of which might be falsely or incorrectly reported, but to discourage and punish the giving of false information to the police in regard to offences which had been actually committed, and which the person charged knew or had reason to believe had been actually committed.[41]

The commentary under ss 40 and 201 may be referred to.

2. Legislative Changes

The explanation to this section was added by s 6 of the Indian Criminal Law (Amendment) Act III of 1894. The words 'British India' in the Explanation were substituted by the words 'the Provinces' by the AO 1948. Subsequently by the AO 1950 the words 'the Provinces' were substituted by the words 'the States'. The words 'the States' were ultimately substituted by the word 'India' by Act, 3 of 1951.

3. Analogous Law

The commentary under s 202 may be referred to.1551

4. Ingredients of the Offence

The main ingredients necessary to be satisfied to constitute an offence under s 203 of the Indian Penal Code are:

(a) that an offence has been committed;
(b) that the accused knew or had reason to believe that such an offence had been committed;
(c) that he gave the information with respect to that offence;
(d) that the information so given was false; and
(e) that when he gave such information he knew or believed it to be false.[42]

5. Relative Scope of Sections 177, 182, 201 and 203

See commentary under the same heading in s 182, *ante*.

6. 'Whoever'--Meaning of

Commentary under s 202 may be referred to.

7. 'Knowing or Having Reason to believe'--Meaning of

Commentary under ss 26 and 201 may be referred to.

A belief that an offence has very probably been committed is not enough.[43]

8. 'Offence'--Meaning of

Under this section 'offence' signifies a thing punishable under the Code, or under any special or local law, and even though it is committed out of India in the cases specified in the explanation.

In one case[44] it was observed, with respect to ss 201, 202 and 203, that 'If a person has reason to believe (refer to s 26, IPC) that an offence has been committed, and acts in the manner described in either of those sections, he would be liable to punishment, even although it might subsequently transpire that he was mistaken in his belief'.

9. False information without knowledge is punishable

By the words 'gives information' is meant volunteering information or at least the making of positive statements.[45] If a person make a false statement, having in all probability, no knowledge whatever on the subject one way or the other--still the offence will equally be a giving of false evidence under the law as he could not have believed what he deposed as true.[46]1552

10. Information must be Proved to be False

A bare perusal of this section shows that the offence under s 203 relates to the giving of a false information about the commission of an offence, though no such offence has been committed. The most essential ingredient for an offence under this section is the giving of information known to be false. The information contemplated under this section must be proved to be false to the knowledge of

the accused. Where there was no material on record to show that the petitioner had given a false information, the prosecution of the petitioner under s 203 was held not justified.[47]

A person giving false information to the police, charging another person of an offence of murder in order to screen the real offender, commits offences under ss 201, 203 and 211, IPC .[48] The husband even though knowing that death of his wife was not natural but nevertheless, gives false information in the complaint filed to police, is liable to be convicted under s 203 .[49]

Appellant accused had beaten his wife brutally leading to her death, but he made false declaration before the police that his wife had fallen down from the water tank due to sickness and had died. The testimony of the child witness and the medical evidence was found reliable, thus, he was convicted for offence under s 203, IPC .[50]

11. Statement to Police During Investigation Not Information

Section 203 is not intended to apply to the case of a person who gives false evidence as a witness to the police in the course of investigation, and that too in reply to questions put to him.[51] A statement made by a witness to the police does not amount to 'information' within the meaning of the word as used in this section.

A complaint to prosecute petitioners/accused for the offence under s 203 of the IPC would lie only in a case where such accused had voluntarily given false information in respect of an offence committed knowing or believing it to be false. Statement given by the accused to the police during investigation of the crime and recorded under s 161 of the Code, even if it is false, will not constitute an offence under s 203 of the IPC . Criminal proceedings against the petitioners for offence under s 203, IPC being abuse of the process of the Court, were quashed on petition under s 482, CrPC .[52]

12. Procedure

The procedure will be same as in the case of an offence under s 202 .

The limitation for taking cognizance of an offence under this section is three years.

13. Charge

The following form of the charge may be adopted:1553

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, knowing or having reason to believe that on or about the.....day of....., at ....., the offence of .....was committed, (*gave information respecting the said offence*) committed the offences punishable under section 203 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

14. Proof

To prove an offence under this section the prosecution has to prove:

(a) that an offence was committed;[53]
(b) that the accused knew or had reason to believe that such offence had been committed; and
(c) that he gave information which he knew or believed to be false.[54]

41 *Queen v Jaynarain Patro* 20 WR 66 .

42 *Nagireddi Siva v State of Andhra Pradesh* (1992) Cr LJ 1339 (AP) .

43 *Nga Saw v R* 2 Cr LJ 133, II Bur LR 8.

44 2 WR (Letters) 1.

45 *Queen v Jaynarain Patro* supra; *Emperor v Akhtar* 14 Cr LJ 252 ; *State of Kerala v Markose* AIR 1962 Ker 133, (1962) 1 Cr LJ 610 ; *Sarju Sarun v Emperor* 11 Cr LJ 438 .

46 *Queen v Echan Meeah* 1 WR 47 .

47 *Debi Ram v State of Rajasthan* (1993) 1 WLC 346, 348 (Raj), (1993) II CCR 1398, (1993) Raj Cr C (Raj) 189 .

48 *Taprinessa v Emperor* AIR 1919 Cal 679, p 680, 19 Cr LJ 903, ILR 46 Cal 427 .

49 *Datta Kisan More v State of Maharashtra* AIR Bom R 98 (DB), (2007) Cr LJ (NOC) 433 (Bom) (DB).

50 *Bhurabhai Jinabhai Chauhan v State of Gujarat* 2009 Cr LJ (NOC) 888 (Guj) .

51 *State of Kerala v Markose* AIR 1962 Ker 133 ; *Sarju Sarun v Emperor* 11 Cr LJ 438 ; *Emperor v Nga Po Liwein* AIR 1917 UB 20, 21 Cr LJ 700 .

52 *Jiji Joseph v Tomy Ignatius* 2013 Cr LJ 828, p 831 (Ker), 2012 (4) KLT 713 .

53 *R v Ram Ruchea* 4 WR (Cr) 29 .

54 *R v Joy Narain* 20 WR 66 ; *R v Akhtiar* 14 Cr LJ 252 ; *Bhaggu Ram v State of Madhya Pradesh* (1982) Cr LJ 106 (MP) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 204.

Destruction of [55][document or electronic record] to prevent its production as evidence.--

Whoever secretes or destroys any [56][document or electronic record] which he may be lawfully

compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant, as such, or obliterates or renders illegible the whole or any part of such [57][document or electronic record] with the intention of preventing the same from being produced or used as evidence before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.1554

Comments

1. Scope

This section deals with secreting, destruction and obliteration of a document to prevent its production as evidence. Section 175 , IPC deals only with the omission to produce or deliver a document to a public servant, but this section requires the secreting, destruction or obliteration of a document to prevent the same from being produced or used as evidence.

To secrete or destroy or obliterate a document, which can be used as evidence, would be causing a disappearance of evidence. Section 201 deals with the causing of the disappearance of evidence, but it is limited to causing disappearance of evidence of the commission of an offence which has been committed. This section is not so limited. The evidence caused to disappear may be relevant in any proceeding, civil, criminal or revenue.

Section 477 also deals with secreting, destruction or defacing of a document but it is limited only to three kinds of documents. The document secreted, destroyed or obliterated must be a will or an authority to adopt or a valuable security. But there is no such limitation with this section. The document contemplated by it may be any document which may be used as evidence in any proceeding. But it must be a document which the offender may be compelled to produce in evidence.[58] If in a case under s 477 it is found that the document destroyed is not one of the three kinds of documents mentioned therein, the case may still fall under s 204 .[59] Again the secreting, destruction or obliteration must be with the intention of preventing the document from being used as evidence.

2. Legislative Changes

The word 'document' has been substituted by words 'document or electronic record' by Information Technology Act 2000, s 91 and Sch. I wef 17 October 2000.

3. Essential Ingredients

The essential ingredients of the offence under this section are: (a) that the accused secreted, destroyed or obliterated a document; (b) that he was legally compellable to produce that document as evidence in a proceeding lawfully held before a public servant;[60] and (c) that the secreting, destruction or obliteration was with the intention of preventing the document from being used as evidence.

4. Meaning of Secretion of Document

The expression 'secretes any document' means to put the document into a place of concealment or not to make it known or exposed to view. A person may secrete a document not only when the existence of the document is unknown to other persons and for the purpose of preventing the existence of the document coming to the knowledge of anybody, but also when the existence of the document is known to others. In the latter case he may secrete it for the purpose, for example, of preventing it from being produced in evidence or for the purpose of raising difficulties in the way of its being produced in evidence. But it is not necessarily enough to show that1555 upon an occasion upon

which it became his duty to produce the document, he failed to discharge that duty, though this may be a cogent piece of evidence in certain circumstances. The fact that a man perjures himself by denying the existence of a document which to his knowledge, is in his custody would be a still more cogent piece of evidence. But whether the offence of secreting the document is committed or not must depend in each case upon the facts.[61] An honest refusal to produce a document is obviously not a 'secretion' of a document within the meaning of the section. But where there is a refusal coupled with a secret dealing with the document or with a dealing intended to be kept secret, it amounts to an offence under this section.[62]

5. Mere Refusal May Amount to Secretion

The Madras High Court has, however, held that it is wrong to say that a mere refusal to produce could never amount to secreting, as that term is used in this section. The court must consider the whole case. If a search warrant had been issued, the result of the search and any evidence which may be adduced on behalf of the accused upon that material must be considered and the court must come to a conclusion whether or not there has been any secreting.[63] Before holding a person guilty for refusal to produce a document the provisions contained in ss 130 and 131 of the Indian Evidence Act 1872 should also be examined.

6. Snatching a Document May Amount to Secreting

Where the plaintiff in a suit referred to an arbitration by consent, with a view to prevent a witness from referring to an endorsement on a bond (which tended to show that the defendant had paid more than it was allegedly paid by him), snatched up the bond which was lying beside the arbitrator, ran away, and refused to produce it, it was held that the offence committed was not theft, but secreting a document under this section.[64]

7. 'Destroys' any Document--Meaning of

The offence of destroying public reports is a serious one. In the interest of the public, it is necessary that these reports should be recorded faithfully and truly by police officers. It is detrimental to the public interest, peace and tranquillity that offences be concealed by the police and the reports falsely recorded.

8. Non-Production of Original will in the Case Amounts to its Destruction

Where the evidence showed that the will in question was a forged one and was got prepared by the co-accused and relatives of the accused, and this forged will was presented before the sub-registrar for registration by the accused, further evidence showed that the original will was returned to the accused who had not produced it in the case meaning thereby, the same had been destroyed by the accused, hence, the1556 finding of the court below convicting the accused for the offence under s 204, IPC was confirmed.[65]

9. Replacing a False Report after Destroying the Original--Effect of

Where a report of the commission of a dacoity was made at a *thana* and the police officer in charge of the *thana* at first took down the report which was made to him, but subsequently destroyed that report and framed another and a false report of the commission of a totally different offence to which he obtained the signature of the complainant and which he endeavoured to pass off as the original and the correct report made to him by the complainant; it was held that on the above facts, the police officer was guilty of the offences under this section for having secreted or destroyed the first signed report.[66] In the course of a certain investigation in a case of theft, a police officer had a certain document drawn up and signed by a *panch*. When, however, he came to look at this document he found it so disfigured by interlineations and scratches that he thought it desirable to have the document fairly written out again. Therefore, employing the same writer and the same *panch*, he had

the document re-written in textually the same form as the untidy notes which had first been drawn. The rough document was thereupon destroyed and its place was taken by the fair document. It was held that, on a true view of the facts, the fair document, which was preserved and ultimately presented to the court, must be regarded as the only document which the police officer was lawfully compelled to produce as evidence, that the original writing must be regarded merely as rough notes designed for the preparation of the fair original document, and that the conviction of the police officer under this section could not be sustained.[67]

10. 'Document'--Meaning of

Section 29, and the commentary thereunder may be referred to.

11. Provisions Compelling Production in Court

Before any proceedings may be taken under this section against the accused, it has to be determined whether the document in question is one which he could be compelled to produce.[68] The legislature has endowed the courts with wide powers of ordering the production of documents necessary for the determination of matters before the court and for directing inspection of those documents. Thus, s 91 of the CrPC empowers a criminal court to issue a summons to a person to produce a document in his possession. So also rr 6 and 7 of O 16 of the Code of Civil Procedure empower a civil court to require a person to produce a document in his possession.

12. Provisions Compelling Production before Public Servants

Not only courts, but some public servants also are, by some provisions of law, empowered to require the production of documents. Thus, under s 171A of the Sea Customs Act 1878,[69] an officer of the customs, duly empowered, has the power to1557 require any person to produce documents in his possessions. So also s 13A of the Bombay Money Lenders' Act 1946, authorises the officers mentioned therein to direct the production of books which they require. An officer in charge of a police station can also require the production of documents before him, if found necessary for investigation etc, as authorised by s 91, CrPC .

Refusal to produce a document without reasonable excuse is punishable under s 175, IPC and also under s 349 of the Code of Criminal Procedure 1973.

13. Whether Accused May be Compelled to Produce a Document

The power to be exercised by a court in summoning a person to produce a document in any criminal proceeding is contained in s 91, CrPC . The word 'person' in sub-s (1) of that section does not include an accused person and no process can, therefore, be issued against him for the production of a document.[70] The accused, therefore, cannot be compelled to produce a document which may be used as an evidence against him.

14. Constitutional Protection to Accused

An accused enjoys full protection in this respect even under art 20 of the Constitution of India . Under art 20(3) of the Constitution 'no person accused of any offence shall be compelled to be a witness against himself'. Whether or not the order requiring the production of a document by an accused person is hit by the prohibition contained in art 20(3) of the Constitution would depend upon the nature of that document. If the document is not such as his statement, conveying his personal knowledge relating to the charge against him, he may be called upon by the court to produce that document. But if the order relates to a document which contains any statement of the accused based on his personal knowledge, the order for its production will attract the constitutional bar against testimonial compulsion.[71]

Article 20(3) of the Constitution will come into play only when two facts are established:

(a) the individual concerned was a person accused of an offence; and
(b) he was compelled to be a witness against himself.

If only one of these two facts and not the other is established, the requirements of art 20(3) will not be fulfilled.[72]The law prohibits a summons to be issued under this section against an accused person requiring him to produce documents in support of a prosecution case, as to produce a document in a criminal case in support of the prosecution, is a testimonial act.[73]1558

15. Protection from Civil Proceedings or Future Prosecution not available

The immunity granted by art 20(3) does not extend to civil proceedings. In order that the protection of this article be available to a person, he must be accused of an offence, which would mean that an information is laid against him before an officer or a court entitled to take cognizance of the offence and proceed upon the information to investigate into it. Merely because the evidence might disclose some crime and it might form the subject-matter of a future prosecution, would not enable the person, who is asked to furnish the evidence, to claim protection under that article in any proceedings other than where he is accused of any offence.[74]

16. 'Court of Justice'--Meaning of

Section 20 and the commentary thereunder may be referred to.

17. 'Public Servant'--Meaning of

Section 21 and the commentary thereunder may be referred to.

18. Intention under Section 204 Must be to Prevent Production of document

In order to convict a person under this section, it must be proved that he destroyed the document with the intention of preventing it from being used or produced as evidence.[75] The intention of the secretion, destruction, obliteration, *etc.* must be to prevent the document from being used as evidence,[76] and this intention is presumed conclusively if the secretion, *etc.* takes place after a lawful requisition to produce the same has been made.

A, a plaintiff in a suit referred to arbitration, snatches up a document and runs away with it, in order to prevent a witness from referring to it. *A* is guilty under this section.[77]

19. Procedure

The offence is non-cognizable. A warrant shall ordinarily issue in the first instance. The offence is bailable but not compoundable. It is triable by a magistrate of the first class. The magistrate, mentioned in s 260 of the Code of Criminal Procedure 1973 may also try an offence under this section in a summary way.

The period of limitation for taking cognizance of an offence under this section is three years.

20. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:1559

That you, on or about the.....day of.....at.....secreted (*or destroyed*) a document, to wit.....which you could be lawfully compelled to produce as evidence in a court (*or in any proceeding lawfully held before a public servant, to wit.....*), or obliterated (*or rendered illegible*) the whole (*or a part*) of such document after you were lawfully summoned (*or required*) to produce the same, and thereby committed an offence punishable under section 204 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

21. Proof

In order to bring home the guilt under this section the prosecution has to prove:

(a) that the accused secreted or destroyed a document; or that he obliterated, or rendered illegible, the whole or any part of such document;
(b) that he was lawfully compellable to produce the same as evidence (a) in a court of justice or (b) in proceedings lawfully held before a public servant; and
(c) that he did so with the intention of preventing the same from being produced or used as such evidence or he did so after he had been lawfully summoned or required to produce the same for that purpose.

Whoever secretes or destroys any document to prevent its production as evidence is made punishable under s 204, IPC . For establishing such offence, the prosecution has to show that:

(a) the accused secreted or destroyed the document or that he obliterated or rendered illegible the whole or any part of such documents;
(b) the accused did the same with the intention of preventing the same from being produced or used as such evidence or he did the same after he had been lawfully summoned or required to produce the same for that purpose;
(c) the accused was lawfully compellable to produce the same as evidence in a court of justice or in the procedure lawfully held by a public servant.[78]

Where, out of seven accused persons before the trial courts, only the accused numbers 2-4 were convicted under s 204, IPC and the remaining of the accused, including the accused appellant, were convicted under s 204, IPC, read with s 34, IPC . After the appeal and revision to High Court all the accused persons were acquitted and the accused appellant was convicted under s 204, read with s 34, IPC . Even on facts emerged from the evidence, the only part in respect of the offence under s 204, IPC which was attributed to the accused-appellant was that he was present on the scene of occurrence. The Apex Court held that when the accused numbers 2-4, who were convicted for their acts constituting an offence under s 204, IPC had been acquitted of the substantive offence, it was not possible for the Apex Court to sustain the conviction of the accused appellant under s 204 read with s

34, IPC .[79]1560

55 Substituted by Act 21 of 2000, s 91 and Sch I, for 'document' (wef 17-10-2000).

56 Substituted by Act 21 of 2000, s 91 and Sch I, for 'document' (wef 17-10-2000).

57 Substituted by Act 21 of 2000, s 91 and Sch I, for 'document' (wef 17-10-2000).

58 *Emperor v Gangaram Tukaram* 13 Cr LJ 912 .

59 *Debendra Nath Upadhaya v Bhagirath Mahto* 38 Cr LJ 158, 76 IC 391 .

60 *State v Devsi Dosa* AIR 1960 Bom 443, p 444, 61 Cr LJ 131 .

61 *Susen Behary Roy v Emperor* AIR 1931 Cal 184, p 187, 32 Cr LJ 836, 35 CWN 425 .

62 *Takhtram Tulsidas v Emperor* AIR 1938 Sind 217, p 218, 40 Cr LJ 75 .

63 *Satya Kinkar Roy v Nikhil Chander Jyotishopadhaya* AIR 1951 Cal 101, p 105, 52 Cr LJ 946 (FB) .

64 *Subramania Ghanapati v Queen* 3 ILR Mad 261 .

65 *Jagdish v State of Rajasthan* (2002) Cr LJ 2171 (Raj) .

66 *Queen Empress v Mahommad Shah Khan* ILR 20 All 307 .

67 *Emperor v Gangaram Tukara* 13 Cr LJ 912 .

68 *Bhogabat Prasad Singh v King-Emperor* 12 Cr LJ 450 .

69 Sea Customs Act 1878 has been repealed by the Customs Act 1962.

70 *State of Gujarat v Shyamlal Mohanlal* AIR 1965 SC 1251, (1965) CR LJ 256 ; *Raghunath Prasad v Bisram* (1982) Cr LR 48 (MP) (Notes) ; *Samrath v Khemji* (1983) Raj LW 77 ; *Kuttan Pillai v Ramkrishnan* AIR 1980 SC 185, (1980) Cr LJ 196, (1980) All Cr C 120, (1980) Mad LJ (Cr) 402 ; see the commentary under s 91 in *Sohoni'sCode of Criminal Procedure*, twenty-first edn, Lexisnexis.

71 *State v Prabhu Singh* AIR 1964 Punj 325 .

72 *Mahommad Dastgir v State of Madras* AIR 1960 SC 756, (1960) Cr LJ 1150 ; *State v Devsi Dosa* AIR 1960 Bom 443, (1960) Cr LJ 1317 .

73 *State of Maharashtra v Nagpur Electric Light & Power Co* AIR 1961 Bom 242, (1961) 2 Cr LJ 200 ; *Ranchhoddas Khimji Ashrare v Tempton Jahangir* AIR 1961 Guj 137, (1961) 2 Cr LJ 228 .

74 *MP Sharma v Satish Chandra* AIR 1954 SC 300, (1954) Cr LJ 865 ; *M Suryanarayana v Visya Commercial Bank Ltd* AIR 1958 AP 756 ; *State v Devsi Dosa* AIR 1960 Bom 443 .

75 Re *Amin Chand*1889 PR 24.

76 *R v Gangaram Tukaram* 13 Cr LJ 912 .

77 *Subramania Ghanapati v Queen* 3 ILR Mad 261, 1 Weir 409 .

78 *Kirit Kumar K Jani v State of Gujarat* (1998) III CCR 115 (Guj) .

79 *BS Narayanan v State of Andhra Pradesh* (1987) (Supp) SCC 172 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 205.

False personation for purpose of act or proceeding in suit or prosecution.--

Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope

This section deals with a false personation in relation to a suit or a criminal prosecution. The offence under this section consists, not merely in falsely personating another, but in doing certain acts as such assumed character.[1] The act of impersonating the prosecutrix for the purpose of giving evidence in court in sessions trial was an offence under s 205, IPC .[2]Such an act does not fall under ss 419, 420, 467 and 468 of the IPC . Section 419 , IPC relates to punishment for cheating by personation. Cheating is defined under s 415, IPC wherein there has to be a fraudulent or dishonest inducement of any person to deliver any property to any person. Section 420 of the IPC relates to cheating and dishonestly inducing delivery of property. Section 467 , IPC relates to forgery of valuable security, will, *etc.* and s 468, IPC relates to forgery for purpose of cheating.[3] The section does not require any fraudulent intent.[4] Fraudulent gain or benefit to the offender is not an essential element of the offence of false personation, and a conviction may be upheld even where the personation is with the consent of the person personated.[5] The offence under the section is essentially an offence against public justice and consists in deceiving the court and falsifying its records.

2. Analogous Law

This section deals with false personation for the purpose of doing certain acts in a suit or criminal prosecution. Other cases of false prosecution have been dealt with under ss 140, 170, 171, 171D, 229, 416 and 419, IPC . Section 140 deals with the case of a person who poses to be a soldier, sailor or airman by wearing the garb, or1561 carrying the token, resembling one used by a soldier *etc*. Section 170 deals with the case of a person pretending to be or falsely personating a public servant. Section 171 speaks of the case of a person who, with fraudulent intent, wears the garb, *etc.* resembling one used by a public servant. Section 171D deals with personation at an election. Section 229 deals with the case of a person who allows himself to be empanelled or sworn as a juryman or assessor knowing that he is not entitled to be so empanelled or sworn. Section 416 deals with the case where a person cheats by pretending to be some other person or by knowingly substituting one person for another or by representing that he or any other person is a person other than he or such other person really is, and the explanation under this section says that the offence is committed whether the individual personated is a real or imaginary person. Section 419 provides the punishment for cheating by personation.[6]

False personation and, in such assumed character, doing certain acts under the Indian Registration Act 1908, is also an offence under s 82 of the said Act.

In England, the False Personation Act 1874 (37 and 38 Vict, c 36) s 1 provides as follows:

(i) If any person shall falsely and deceitfully personate any person or the heir, executor or administrator, wife, widow, next-of-kin, or relation of any person with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property, he shall be guilty of felony, and upon conviction shall be liable...to be (imprisoned) for life...

3. 'Falsely Personates Another'--Meaning of

In the case of *Kadar Ravuttan v Ayangana Ravuttan* ,[7] it was held:

> To constitute the offence of false personation under Section 205 of the Penal Code it is not enough to show the assumption of a fictitious name. It must also, we think, appear that the assumed name was used as a means of falsely representing some other individual. It is not an uncommon thing for men to pass under names not their own for the purpose of disguise, in some instance from blameless and in other instances indifferent or bad motives: '*incog*' as the disguise is often termed in the former, and 'with or under an *alias*' in the latter instance. But whatever the motive, the use of an assumed name without more is not a criminal offence. It only becomes a crime when connected by proof with some other act or piece of conduct; and the gist of the offence of false personation under section 205, we think, is the feigning to be another known person.

Personation of Imaginary/Fictitious Person

No doubt the explanation to s 416, IPC says that 'the offence is committed whether the individual personated is a real or imaginary person', but the offence referred to therein is the offence of 'cheating by personation' which is quite different from the offence under this section. As observed in the case of *Kadar Ravuttan v Ayangana Ravuttan* [8]:

> There are sections of the Penal Code under which the false assumption of appearance or character may be an offence, though no individual is meant to be represented, or only an imaginary person. Such are the sections 140, 170, 171 and 415, but they have no1562 application to the present case, and the last section is made applicable to personation of an imaginary person by an express enactment.

A contrary view has been taken by the Allahabad High Court in *State v Inder Sen* ,[9] wherein it has been held that the decision in the case of *Kadar Ravuttan v Ayangana Ravuttan* ,[10] is not an authority in support of the proposition that there can be no personation if the personality assumed is that of a fictitious person. In that case, the accused was proved not to have been guilty of personation because nothing else was proved than mere assumption of another name. But it is submitted that the judgment in *Kadar Ravuttan's* case has not been properly read. Towards the end of that judgment it was said:

> Then as to the evidence here: it shows no more than that first prisoner used a name different from that by which he was commonly known, and had recently before been examined as a witness in another suit. He no doubt had a purpose, and most probably an improper one, in so acting, but there is nothing in the case to show that he was personating any other person.

There was, therefore, no question of the accused not acting on the assumed character, and the decision was based on the fact that the accused assumed only a fictitious name and not the name of any existing or known person.

Mere use of Assumed Name without an Act not an Offence

The mere use of an assumed name without more is not a criminal offence. It only becomes a crime when connected by proof with some other act or piece of conduct. The whole language of this section clearly imports, acting the part of another person, the actor pretending that he is that person.[11]

No False Personation without assuming the Name or Character of another

Where a person does not assume the name or character of another but merely a character which he does not possess, he cannot be said to personate falsely. Thus, where the accused, representing himself as a servant of another, accepted a notice to be served on that other person signing his own name on the receipt and saying that he received the notice addressed to his master, it was held that no offence under this section was committed as the accused, having signed his own name, did not assume the name or character of another, and the only thing that was false was the status which the accused gave to himself.[12]

Where the accused presented a petition in the name of his uncle, who was ill, but, when asked his name, he gave his own name, it was held that there was no false personation.[13]

False Personation and assuming Fictitious Name--Position under this Section and Section 82(c), Registration Act

In all the material parts, the wording of s 82(c), Registration Act 1908 is identical with that of this section and in a case under that section, the Madras High Court held that falsely assuming a fictitious name is not false personation. The wordings of both1563 this section and s 82(c) of the Registration Act are: 'Whoever falsely personates another'. This is quite different from saying 'whoever falsely assumed a fictitious name'.[14]

A person personated must be someone in existence and the mere assumption of a fictitious name is not an offence under s 82(c) .[15] Neither fraud nor dishonesty is an essential ingredient to constitute the offence of false personation under s 82(c) .[16] On a charge under s 82(c), it is not improper for the court to take fingerprints of the accused in its presence and to have them compared by an expert with the disputed fingerprints.[17]

Where an illiterate village lady impersonated as the first wife of her husband and appeared as witness before the court, but she had deposed without any fraudulent intention, she disclosed her name and also the name of the first wife, no action for alleged impersonation against her was taken.[18]

A person who has been tried and acquitted under the Indian Penal Code 1860, of offences of forgery and abetment thereof cannot be retried on the same facts for a separate offence under s 82(c) of the Registration Act.[19] However, if the trial is on two counts, for forgery and for an offence under s 82(c) and the charge of forgery fails for want of sanction, the accused may be convicted on the other count under s 82(c) of the Registration Act.[20]

***Bona fide* Mistake not an Offence**

Where, what was actually done by accused woman was to put her own signature to a counter statement that was to have been signed by her son, the son did not disown the mother, he did endorse the statement signed by his mother and the courts below were convinced by the stand of the mother and the son that the mother's act was only a *bona fide* mistake and not an offence and were also convinced that designs of the petitioner in seeking initiation of criminal proceedings against the accused sister-in-law and nephew was not to uphold the honour and purity of the justice administration system but instead to wreak vengeance on his accused sister-in-law and nephew who

had successfully launched a civil litigation against him. The order acquitting the accused of false personation was found.[21]

4. Suit and Proceedings Distinguished

By the ordinary rule of construction all the acts detailed in s 205 are acts 'in any suit or criminal prosecution'. Proceedings under the Succession Act and such other proceedings are not acts in any suit.[22]

It is beyond question that 'case' is not synonymous with 'suit'; while every suit is a case, it cannot be said that every case is a suit. The word 'case' is a more1564 comprehensive expression and includes not only a suit but other proceedings which cannot be described as a suit, for example, proceedings under the Guardians and Wards Act, Probate and Administration Act, Succession Certificate Act, Provincial Insolvency Act, Religious Endowments Act, *etc.*[23]

5. Procedure

The offence is non-cognizable. Warrant shall ordinarily issue in the first instance. The offence is bailable but not compoundable and is triable by a magistrate of the first class.

The limitation for taking cognizance of an offence under this section is three years.

6. Lok Adalat has no Jurisdiction

It is clear from s 19(5) of the Legal Services Authorities Act 1987 that if the offence in respect of which the accused were being tried was not compoundable under any law, the *lok adalat* had no jurisdiction to decide the said case. When undisputedly the offences under ss 205, 419, 468, and 471, IPC, for which the accused were being tried were not compoundable, *lok adalat* had no jurisdiction to pass any order in the case. The decision of the magistrate in such a case, being without jurisdiction, is liable to be set aside.[24]

7. Complaint

An offence under ss 205 - 211, IPC fall under s 195(1)(b)(i) of the CrPC and no court shall take cognizance of any of these offences, when such offence is alleged to have been committed in or in relation to any proceeding in any court, except on a complaint in writing of that court,[25] or of some other court to which that court is subordinate. There are many offences of which cognizance can be taken without any complaint from the court. In case any such offence is so integrated with s 205 or any other offence requiring a complaint from the court, for which the accused is jointly put up for trial and the trial for that offence cannot be separated from the trial for the rest of the offences and if the trial in respect of the offence under s 205 or under any other section requiring a complaint from the court is not competent for want of a proper complaint, then the trial for such offence, would also be incompetent.[26]

The commentary on this point under s 201 may be referred to.

8. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the .....day of.....at.....falsely personated (*name*) and, in such assumed character, did (*specify the admission or statement made, or judgment confessed, or process caused to be issued, or bail or security given or any other act done), in.....*(*specify*) *the suit or criminal prosecution*) and that you thereby committed1565 an offence punishable under section 205 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

9. Proof

For a conviction under this section it must be proved:

(a) that the accused falsely personated another; and
(b) that, in such assumed character, he made any admission or statement, or confessed judgment, or caused some process to be issued, or became bail or security, or did some other act, in a suit or criminal prosecution.

1 *Kadar Ravuttan v Ayanagana Ravuttan* 4 Mad HCR 18, 1 Weir 182 .

2 *Jawahar Yadav v State of Chhattisgarh* (2006) Cr LJ 2078 (Ch'garh).

3 *Jawahar Yadav v State of Chhattisgarh* (2006) Cr LJ 2078 (Ch'garh).

4 *Emperor v Kalya Naraputil* 5 Bom LR 138 ; *Loothi v Bewa* 2 Beng LR 25, 11 WR (Cr) 24 ; *Emperor v Tun Aung Gyan* 4 Cr LJ 483, 3 LBR 22 .

5 Re *Andi Servai* 1 Weir 182, 1 Mad HCR 450.

6 *Qutubuddin v Emperor* AIR 1937 Pat 211, p 213, 38 Cr LJ 216, 17 PLT 692 .

7 *Kadar Ravuttan v Ayangana Ravuttan* 4 Mad HCR 18, 1 Weir 182, 183 **dissenting** from *Reg v Bhillo Kuhar* 1 Ind Jur 123 .

8 *Kadar Ravuttan v Ayangana Ravuttan* 4 Mad HCR 18, 1 Weir 182 .

9 *State v Inder Sen* AIR 1961 All 62, (1961) 1 Cr LJ 30 .

10 *Kadar Ravuttan v Ayangana Ravuttan* 4 Mad HCR 18 .

11 Re *Kadar Ravuttan* 1 Weir 182, 183; *State v Inder Sen* AIR 1961 All 62, 63.

12 *Qutubuddin v Emperor* AIR 1937 Pat 211, 38 Cr LJ 216, 17 PLT 692 .

13 *Queen v Narain Achar* 8 WR 80 .

14 *Emperor v Rangammal* AIR 1935 Mad 913, p 914, 1935 Mad WN 1162, 42 Mad LW 662 .

15 *Emperor v Rangammal* AIR 1935 Mad 913, 159 IC 155 .

16 *Baburam v Emperor* (1905) 32 Cal 775, p 781 ; *Emperor v Kalya* (1903) 5 Bom LR 138 .

17 *Basgit Singh v King-Emperor* AIR 1928 Pat 129, (1926) 6 Pat 305, 104 IC 626 .

18 *Gangadhar Mandal v State of Jharkhand* 2009 Cr LJ (NOC) 786 (Jhar) .

19 *Maung Saing v King-Emperor* AIR 1924 Rang 213, (1923) 1 Rang 299, 76 IC 431 .

20 *Montajaddin v Emperor* AIR 1933 Cal 481, 143 IC 15 ; For further details refer to commentary on s 82 in Mulla, *The Registration Act*, eleventh edn, published by Lexisnexis, Butterworths.

21 *KM Chitharanjan v PM Kunhunni* (2005) Cr LJ 4434 (Ker) .

22 *Qudh Behari Lal v Emperor* AIR 1940 Lah 514, p 515, 42 PLR 683 .

23 *Lal Chand Mangal Sain v Behari Lal Meharchand* AIR 1924 Lah 425, 5 ILR Lah 288 (FB) .

24 *Sukhal v State of Uttar Pradesh* (2002) Cr LJ (All) 1523 .

25 *Jawahar Yadav v State of Chhattisgarh* (2006) Cr LJ 2078 .

26 *Sheikh Bannu v State of Maharashtra* (1973) Mah LJ 800 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 206.

Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution.--

Whoever fraudulently removes, conceals, transfers or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

Sections 206, 207 and 208, IPC, which deal with fraudulent transfers and suits, aim at rendering criminal, all contrivance by which the owner of a property withdraws it from a liability to seizure under a sentence or judgment of court. It is impossible that anyone can allow a decree to be passed, or process to be executed against him, for property which is his own, or money which is not due by him, except to cheat someone else. When he does so, it is not necessary to allege or prove any special intention. The offence consists in fraudulently employing the machinery of the court.1566 Section 206 penalises the removal or concealment of property, or any dealing with it, in order to prevent its being taken in execution of an order of forfeiture or a sentence of fine passed or likely to be passed by a criminal court, or in execution of a decree or order passed or likely to be passed by a civil court. 'Here, the accused is an owner dealing with his own property, and his acts which would otherwise be innocent, are rendered criminal if done for certain specified purposes and with that state of mind which

is described by the word 'fraudulently'.[27] Both these elements must co-exist. To bring the offence within this section there must be a fraudulent removal, sale or transfer of property, or of some interest therein, intending thereby to prevent that property from being taken as a forfeiture or in satisfaction of a fine, or from being taken in execution of a decree.[28] This section does not penalise all fraudulent transfers, but only those made with the particular intent specified in it.

2. Principle

It has been pointed out:

> (ii) As given in section 162 --it is an offence against justice in a culprit to escape from custody, in order to avoid execution of a sentence of imprisonment, and an offence to harbour, or imprison him and that such offences are fit subjects of punishment, upon the same grounds that the removal or concealment, of property or any dealing with it in order to prevent the execution of a sentence of fine, for example, instead of imprisonment, is an offence against justice and fit subject of punishment.[29]

3. Sections 206 and 406, IPC --Difference between

The criminal intention necessary for an offence punishable under this section is that of a fraudulent prevention of property or any interest therein from being forfeited or taken in execution of a decree or order. Such an intention is certainly materially different from the intention required in an offence punishable under s 406,[30] Therefore, an offence punishable under s 406, is substantially an offence different from the one punishable under this section.

4. 'Whoever'--Meaning of

The section is not restricted to the transfer, removal or concealment of one's own property. The word 'whoever', therefore, means any person and not necessarily the owner of the property.

5. 'Fraudulently'--Meaning of

The general nature of fraud has already been explained under s 25 . As the late Sir JF Stephen said:[31]1567

> There was always been a general reluctance amongst lawyers to attempt to define fraud, and this is not unnatural when we consider the number of different kinds of conduct to which the word is applied in connection with different branches of law, and especially in connection with the equitable branch of it. It shall not attempt to construe a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intent to defraud', or 'fraudulently' occur in the definition of a crime, two elements at least are essential to the commission of the crime, namely, *firstly* deceit, or an intention to deceive or in some cases mere secrecy; and, *secondly,* either actual injury or possible injury or an intent to expose some person either to actual injury or to risk of possible injury by means of that deceit or secrecy. This intent, I may add, is very seldom, the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The injurious deception is usually intended only as a means to an end, though this, as I have already explained, does not prevent it from being intentional. Where, therefore, there is an intention to deceive, and by means of the deceit to obtain an advantages, there is fraud.[32]

The word 'fraudulently' in this section is not equivalent to 'dishonestly'. Where there is no intention to deceive and there is no secrecy, a removal may be dishonest but not fraudulent.[33] There is nothing whatever in law to prevent a judgment-debtor from disposing of his interest such as it may be in an attached debt. The court has no right to presume a fraudulent intent because a person does what he is legally entitled to do.[34]

Fraud is the Gist of Offence under this Section

An intention to cause injury clearly exists in a case where the accused judgment-debtor gives an undertaking to the court not to transfer certain property and immediately transfers the same by a sale-deed in favour of his son with the knowledge that the son would be in a position to claim the property as his own. The object of the transfer is thus to injure the creditor and to prevent execution against the property. Therefore, such a case falls clearly under s 206 and it does not matter whether or not the creditor might, by taking troublesome proceedings in civil courts, circumvent the fraudulent transfer.[35] Fraud is the gist of the offence under this section and there can be no conviction in the absence of fraud.[36]

6. Fraudulent Removal or Concealment--Transfer under Mistake not an Offence

Fraudulent removal or concealment is the essence of an offence under this section. Under r 45(2) of O 21, CPC, judgment-debtors are at liberty, notwithstanding the attachment of a growing crop, to cut, gather and store the produce, in default of any conditions imposed, or orders passed, by the civil court to the contrary. This does not of course entitle them and their men to take the produce away as is apparent from sub-r (3) of r 45 . If the judgment-debtor not only cuts, gathers and stores the crops, but removes or conceals them fraudulently, they would be liable under this section. If1568 the removal of the crop is not fraudulent, he may be liable for theft.[37] Before a person can be ordered to be prosecuted under this section, there must be some evidence to show that he had fraudulently removed, concealed, transferred or delivered to any person, any property or any interest therein, intending thereby to prevent the property or interest from being taken in the execution of a decree which was passed against him. The mere harvesting of crops, which have been attached in the execution of a decree, would not bring the person doing so within the scope of this section unless it is shown that he did one of the things mentioned above with a fraudulent intent. It must further be shown that he harvested the crops with the intention of preventing them from being taken in execution of the decree and not merely with the intention of saving them.[38] Where an *amin* was sent by the court to harvest the crop which was attached and the accused, in order to forestall the action of the court, went openly to the field and harvested the same crop, it was held that as there was no deceit or intention to deceive or secrecy on the part of the accused, the action of the accused, though dishonest, could not be held to be fraudulent within the meaning of this section.[39]The cutting and carrying off of crops, which the accused knew to be under attachment in the execution of a certificate under the Public Demands Recovery Act of 1895, is an offence under the latter part of this section. The amount due under the certificate cannot be regarded as a forfeiture or fine, but is money due under a decree, the certificate having the force and effect of a decree of a civil court.[40] A person who, in order to protect his own property, not legally liable for a decree, from confusion with property which is so liable, makes it over to another person, does not commit an offence under this section.[41]

7. Fraudulent Transfer--Meaning of

There is no definition of the word 'transfer' in the IPC, but it has the same meaning as 'transfer of property' defined in s 5 of the Transfer of Property Act 1882, which reads thus:

> **S. 5 . "Transfer of property" defined.--**In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

> In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individual.

The word 'transfer' has long been recognised to be a technical term of law in all countries where English is the language of the legislature and courts of justice. It is often used as a convertible term with 'alienation', 'conveyance' and 'assignment'. Whether any distinction exists between the technical meanings of these expressions--and, if so, what that distinction is--it is not necessary to determine exactly. But it may be safely taken that the word 'transfer' is used in law in the most1569 generic signification, comprehending all the species of contract which pass real rights in property from one person to another.[42]

8. Fraudulent Preference--What is?

For a transfer to come within s 53 of the Transfer of Property Act, the intention must be to defeat or delay the creditors in general and not merely to defeat or delay one creditor.[43] The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtors. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid.[44]

The word 'preference' imports and involves freedom of choice, and no transfer which is not voluntary in the sense that it is a free act of the insolvent, is a preference which can be deemed to be fraudulent and void.[45]

Determination of Fraudulent Preference

The question whether there has been a fraudulent preference depends, not upon the mere fact that there had been a preference, but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor but that he has fraudulently done so. It is not necessary to threaten criminal proceedings, to constitute pressure. The threat of civil suits is enough. If it is established that the transaction was the result of real pressure brought to bear by a creditor on his debtor, it cannot be deemed as a spontaneous act.[46] If a debtor sells his property in order to pay some debts for which pressure was the greatest, the other creditors may be defeated or delayed, and it may be a case of fraudulent preference liable to be impugned under the insolvency law, but not a fraud on creditors for which s 53, Transfer of Property Act makes provision.[47] Until the insolvency laws are put into operation, a man is the master of his own money, and may pay any creditor, in the order he wishes, provided he really does pay him, and does not merely pretend to pay him. Apparently then, no payment by way of preference by a man in difficulties would be punishable under this section merely because the insolvency law calls it a fraudulent preference.

In order to satisfy this section, a definite intention must be found to prevent the property dealt with from being seized under an impending decree, or execution of a court of justice. When the intention is to prevent the property from being distributed according to law amongst the creditors, the offence may be one under s 421, but not under this section.[48]1570

9. A Transfer may not be in Writing

A transfer may or may not be in writing.[49] There are various forms of transfer, such as gift, sale, mortgage, pledge, will, grant, *etc*. In the case of a movable property, a transfer may be effected by a mere delivery.

10. What is Sham Transaction

This section contemplates a real transfer and not a sham transaction. A fraudulent transaction is not a sham transaction. But the fact that a transaction or a transfer of an immovable property without consideration does not make it either a sham transaction or a bogus transaction.[50] A sham transaction by which title was never intended to pass is no transfer at all. It is devoid of operation. Where such a colourable document is brought into existence for the purpose of defeating and delaying creditors, it may be simply ignored by the creditors who need not take proceedings to avoid them. If it is a colourable partition, the creditors can proceed to enforce their claims as if there was no partition.[51]

11. Fraudulent Transfer--Void, Voidable and Sham Transactions and their Consequences

Sections 23 and 24 of the Indian Contract Act 1872, render void every agreement, of which the consideration or object is fraudulent and therefore unlawful. It has been repeatedly held that, 'where there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transaction is valid even as against a creditor, though the object may have been to defeat an expected execution'.[52] And so, 'if a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference'.[53]Such transactions, though made with a view to defeat a probable execution, are not void under ss 23 and 24 of the Contract Act 1872, as being forbidden by law, or fraudulent, or involving injury to the property of another, or opposed to public policy. They involve no dealing with a man's own property which the law does not allow.[54] But if the sale of mortgage be only a colourable transaction or a mere sham, and not intended to confer upon the alleged grantee or mortgagee any beneficial interest in the property, and simply (for the purpose of screening it from execution) to substitute such grantee or mortgagee as nominal owner, in lieu of the real owner (the debtor), and to make such nominal owner nothing more than a trustee for the real owner (the debtor), and thus to endeavour to preserve the property for the latter, such a sale or mortgage would be invalid as against the creditor, and he would be entitled to attach and sell the property.[55] It would also undoubtedly be an offence punishable under this section.1571 There is nothing in ss 23 and 24 of the Indian Contract Act 1872 to support the opinion that a sale, made with the view of defeating a probable execution, is a sale with a fraudulent and unlawful object, and, therefore, void within the meaning of those sections.[56]

Section 53 of the Transfer of Property Act 1882, also deals with fraudulent transfers. The section runs thus:

S. 53 . Fraudulent transfer.--

(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for

consideration was made.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

Intention Determines the Guilt

Where a debtor effects a sale in order to convert some immovable property, which was capable of being attached and brought to sale for the realisation of the amounts due to the creditors, into cash, which could either be secreted or used for the vendor's own purposes, the transaction is not a sham but a real one, and if the purchaser purchased the property in good faith, and for consideration, his rights will not be affected by s 53 of the Transfer of Property Act . He will also be protected by s 55 of the Provincial Insolvency Act 1920. If, on the other hand, the purchaser is not a transferee in good faith and the transfer itself was a scheme by the transferor, with the knowledge and connivance of the transferee, to put the property out of the reach of the creditors, the sale would be voidable at the option of the creditor defeated or delayed.[57] In either case, however, the intention of the vendor being to prevent the property from being taken in execution of a decree against him, it would appear that he would be liable under this section.

Under s 64 of the Code of Civil Procedure a debtor is free to make any private alienation of his property, until an actual attachment of the property has been made. A creditor commits no fraud if he anticipates other creditors and obtains a discharge of his debt by the assignment of any property, which has not already been attached by another creditor.[58]1572

Fraudulent Intent cannot be Inferred in a Lawful Act

Where a judgment-debtor had sold a decree for a large amount for considerably less than half of its amount in cash, it was held that there was nothing whatever in law to prevent a judgment-debtor from disposing of his interest such as it may be in an attached debt. The court has no right to presume a fraudulent intent because a person does what he is legally entitled to do.[59] On the other hand, an intention to cause injury clearly exists in a case where the accused judgment-debtor gives an undertaking to the court not to transfer certain property and immediately after, transfers the same by a sale deed in favour of his son with the knowledge that the son would be in a position to claim the property as his own. The object of the transfer is thus to injure the creditor and to prevent the execution against the property. Therefore, the case falls clearly under this section and it does not matter whether or not the creditor might, by taking troublesome proceedings in civil courts, circumvent the fraudulent transfer.[60]

***Benami* Transactions--Nature of**

Section 53 of the Transfer of Property Act postulates that when the impugned transfer was genuine and real, but made with an intent to defeat or delay the creditors of the transferor, then the provisions of s 53 are inapplicable to a case where the transaction is impugned as *farzi or benami,* that is to say a fictitious and colourable transaction. In some *benami* transactions, the transfer effected is real though the document stands in the name of another. But in the other class of *benami* transactions, the transfer is fictitious and colourable. In the latter cases the *benami* transactions are also fraudulent, because the object of the transferor is to defeat the subsequent transferees of the property.[61] Benami transaction has now been defined by cl (a) of s 2 of the Benami Transactions (Prohibition) Act 1988. Though the said Act does not affect the provisions of s 53 of the Transfer of Property Act and any other law relating to transfers for an illegal purpose, entering into a *benami* transaction (except the purchase of property in the name of one's wife and unmarried daughter) has been made a non-cognizable offence thereunder, punishable with an imprisonment extending to three years.[62] (For further reference, the Benami Transactions (Prohibition) Act 1988 may be referred to).

12. 'To Prevent that Property or Interest Therein'--Meaning of

The expression means the transferor's interest in the property fraudulently removed, transferred or delivered or in an attached debt.[63]

13. 'Taken'--Meaning of

The word 'taken' in this section has been used in the sense of 'seized' or 'taken possession of'. This is indicated by the marginal note to the section which defines it as a 'fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution'. Where property had already been attached and handed over to the1573 decree-holder, it is difficult to see how it could again be taken in the execution of a decree or be prevented from being taken, in execution. Where the accused, who were entrusted with some articles distrained for arrears of land revenue, produced inferior articles of the same description on the date of sale, it was held that a conviction under s 206 of the Indian Penal Code was wrong: (a) since the distraint had already been made; and (b) since the distraint of the property by a collector was neither a forfeiture, the rights of the owner being only held in abeyance by such distraint, nor effected under a sentence pronounced by a court of justice or other competent authority.[64]

14. 'As a Forfeiture'--Meaning of

'Forfeiture of property' is a recognised form of punishment under s 53 (Fifthly) for certain specified offences such as those under ss 126, 127 and 169 .[65]Section 452, CrPC also makes a provision for a forfeiture (confiscation) of certain property. A certificate issued under the Public Demands Recovery Act 1895 has the force and effect of a decree of a civil court, as regards the remedies for enforcing the same. Money due under such a certificate must be regarded as money due under a decree of a civil court. It cannot be regarded as a forfeiture or a for fine. A removal of crops under attachment, in execution of such a certificate, amounts to an offence under the latter part of s 206 .[66]

15. 'In Execution of a Decree or Order'--Meaning of

The phrase 'taken in execution' in this section should be more widely interpreted as meaning something equivalent to the credit amount to be appropriated towards execution or utilised effectively in the aid of execution.[67] Where a person fraudulently removes property intending thereby to prevent that property from being taken in execution of a decree of order which has been made by a collector, who is a court of justice in a civil suit, *i.e.,* a suit for rent, he commits the offence described under this section.[68]

16. Procedure

The offence under this section is non-cognizable. A warrant should issue in the first instance. It is bailable, but not compoundable and is triable by any magistrate. A magistrate specified in s 260, CrPC can also try this offence in a summary way.

The limitation for taking cognizance of an offence under this section is three years.

17. Complaint[69]

Under s 195(1)(b)(i), CrPC a complaint in writing of the court concerned, when such an offence is alleged to have been committed in, or in relation to, any proceeding in any court or of some other court to which that court is subordinate, is necessary to1574 institute proceedings under this section.[70] If such an offence is not committed in or in relation to any proceeding in any court, then the question of that court filing the complaint does not arise and even a private person can file a complaint.[71]

18. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you fraudulently removed [or concealed or transferred or delivered to (*name the person*)] property, to wit .....(*specify it*) intending thereby to prevent the said property from being taken as a forfeiture (*or in satisfaction of fine*), under the sentence which had been pronounced (or which you knew to be likely to be pronounced) by (*specify the court of Justice etc*) in criminal case No....., or from being taken in execution of the decree which had been made (*or which you knew to be likely to be made*) by (*specify the Court*) in Civil Suit No.....and that you thereby committed an offence punishable under section 206 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

19. Proof

The prosecution must prove that the accused fraudulently removed, concealed or transferred the property, in order to prevent its being available in satisfaction of the fine or decree,[72] or for being taken as a forfeiture.

27 Mayne's *Criminal Law of India*, p 575.

28 Re *Balmokoond Borjobasi* 18 Wr 65.

29 2nd Rep s 162 .

30 *Sahebrao Baburao v Emperor* AIR 1937 Bom 46, p 48, 38 Cr LJ 272 .

31 SHCLE II, 121 referred to and adopted in *R v Ali Hasan* ILR 28 All 328, p 363 ; *R v Tha Byaw* 9 Cr LJ 15, 4 LBR 315 ; *Ramaswamy Ambalam v Nagasubramenia Iyer* (1936) Mad WN (Cr) 210 ; *Kothandarama Reddi v Balarami Reddi* AIR 1937 Mad 713, (1937) Mad WN (Cr) 194 ; *Palani Kudumban v Dinakaran* (1962) 2 Cr LJ 555 .

32 *R v Mahommad Saeed Khan* ILR 21 All 113, p 115 ; *R v Soshi Bhushan* ILR 15 All 210 ; *R v Ali Hasan* ILR 28 All 358, p 364 ; *Abudul Rashid v R* 15 Cr LJ 221 .

33 *Y Kothandarama Reddi v Kandra Balarami Reddi* AIR 1937 Mad 713, p 714 ; *Palani Kudumban v Dinakaran* (1962) 2 Cr LJ 555, p 557 .

34 *Ram Narain v Jokhai Ram* 3 Cr LJ 92, p 93, 3 All LJ 1 .

35 *Crown Prosecutor v T Sellamuthu* AIR 1940 Mad 271, p 272, 41 Cr LJ 397, (1940) 1 Mad LJ 761 ; *Ram Narain v Jokhai Ram* 3 Cr LJ 92, p 93, 3 All LJ 1 .

36 Re *Balmokoond Brojobasi* 18 WR 65.

37 *Mahabir Sah v Emperor* AIR 1941 Pat 136, p 137, 42 Cr LJ 25, 22 PLT 662 .

38 *Sheik Dawood Rowther v Abdul Kadar Rowther* AIR 1938 Mad 976, p 977 .

39 *Y Kothandarama Reddi v Kandra Balarami Reddi* AIR 1937 Mad 713 ; *Ramaswami Ambalan v Nagasubramanya* AIR 1938 Mad 471, 37 Cr LJ 627 ; *Sidhaya v Chinnamathyan* (1936) Mad WN 212 .

40 *Yond v Yond* ILR 28 Cal 217 .

41 Re *Basappa Shivappa* 18 Cr LJ 784.

42 *Gopal Pandey v Parsotam Das* 5 ILR All 121, p 137 .

43 *Bhagwani v Kedari* 25 Bom 202, 2 Bom LR 86 ; *Kedarwati v Radhey Lal* AIR 1937 Pat 609 ; *Kisami v Parasram* 1936 AMLJ 118 ; *Kashiba v Anand Rao* AIR 1937 Nag 9 ; *Parmanand v Jairamdas* AIR 1938 Sind 215 ; *Tan San Mar v U Kya Zin* AIR 1933 Rang 162, 145 IC 330 .

44 *Middleton v Pollock* (1876) 2 Ch D 104, 45 Cr LJ (Ch) 29; *Musahar Sahu v Hakim Lal* AIR 1915 PC 115, p 116, ILR 43 Cal 521, 14 All LJ 198, 18 Bom LR 378, 20 CWN 393, 30 Mad LJ 116 .

45 *Sholapur Spg and Wg Co Ltd v Pandharinath Martand Sulakhe* AIR 1928 Bom 341, p 343, 30 Bom LR 893 ; *Sharp v Jackson* (1899) AC 119, 68 LJQB 866 .

46 *Sharp v Jacksan* supra; *Nripendra Nath Sahu v Ashutose Ghose* AIR 1916 Cal 975, ILR 43 Cal 840 ; *Sholapur Spg and Wg Co Ltd v Prandharinath Martand Sulakhe* AIR 1928 Bom 341, p 343 .

47 *C Abdul Shukoor Saheb v Arji Papa Rao* AIR 1963 SC 1150, p 1156 .

48 *Mayne's Criminal Law of India*, p 584.

49 Section 9, Transfer of Property Act.

50 *Rainibai v Khemraj* AIR 1944 Nag 133, (1944) NLJ 85 .

51 *Firm Schwebo v Subbiah* AIR 1944 Mad 381, 1 Mad LJ 384 .

52 *Sankarappa v Ramayya* 3 Mad HCR 231 ; *Pullen Chetty v Ramalinga* 5 Mad HCR 368 ; *Ishar Chunder v Bishan Sirdar* 24 Cal 825 .

53 *Suba Bibi v Balgobind Das* ILR 8 All 178 ; *Narayana v Viraraghavan* ILR 23 Mad 184 .

54 *Rajan Harji v Ardeshir* ILR 4 Bom 70 .

55 *Tilakchand v Jitamal* 10 Bom HC 206 ; *Joshua v Alliance Bank of Simla* 22 Cal 185 ; *Nana Mansaram v Rautmal* 22 Bom 255 ; s 53, Transfer of Property Act, 4 of 1882, as to the evidence of fraud.

56 *Rajan Harji v Ardeshir Hormusji Wadia* ILR 4 Bom 70 .

57 *C Abdul Shakoor Saheb v Arji Papa Rao* AIR 1963 SC 1150 .

58 *Reg v Appa Mallya* (1876) Unrep Cr Ca 110 .

59 *Ram Narain v Jokhai Ram* 3 Cr LJ 92, p 93, 3 All LJ 1 .

60 *Crown Prosecutor v T Sellamuthu* AIR 1940 Mad 271, p 272 .

61 *Mahendra Mahto v Suraj Prasad Ojha* AIR 1958 Pat 568, p 571 ; **relying on***Pathaperumal Chetty v Muniandy Chetty* ILR 35 Cal 557 (PC) .

62 Sections 3 and 6 of the Benami Transactions (Prohibition) Act, 45 of 1988.

63 *Ram Narain v Jokhai Ram* 3 Cr LJ 92, p 93 .

64 *Emperor v Murli* (1888) All WN 237 .

65 *RS Joshi v Ajit Mills Ltd* AIR 1977 SC 2279 .

66 *Sundar Dusadh v Setal Mahto* ILR 28 Cal 217 .

67 *Sidhaya v Chinnamatty* (1936) Mad WN 212 ; *Y Kothandarama Reddi v Kandra Balarami Reddy* AIR 1937 Mad 713 ; *Palani Kuddumban v Dinakaran* (1962) 2 Cr LJ 555 .

68 *Gaurchunder Chuckarbutty v Kishan Mohan Singh* 10 WR 46 .

69 For detailed commentary on s 195, see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

70 *Bhagat Jethsur Jiva v Shah Amrat Lal Sanchand* 4 Cr LJ 375 ; *Queen-Emperor v Dala Jiva* ILR 10 Bom 190 ; *AR Palanisami Gounder v Bagavati Gounder* AIR 1942 Mad 675(1), (1942) Mad WN 492 .

71 *Nadeem Mian v State* (1977) Cr LJ 1329, p 1330 (AP) .

72 Re *Balmokoond* 18 WR (Cr) 65.

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 207.

Fraudulent claim to property to prevent its seizure as forfeited or in execution.--

Whoever fraudulently accepts, receives or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practices any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced or which he knows to be likely to be pronounced, by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

The last section dealt with persons fraudulently removing, concealing or transferring property to prevent its being taken as a forfeiture or in satisfaction of a fine or in1575 execution of a decree or order of a court of justice. This section deals with their accomplices who fraudulently accept or receive the property so removed, concealed or transferred or who falsely claim the property or practise any deception touching such property or interest therein with the same intent. For further details, the commentary under the last section may be referred to.

2. 'Fraudulently'--Meaning of

The commentary under ss 25 and 206, IPC may be referred to.

3. 'Court Of Justice'--Meaning of

Section 20, IPC and the commentary thereunder may be referred to.

4. Procedure

The procedure will be the same as in the case of an offence under s 206, IPC .

5. Complaint

Complaint of the court is necessary for taking cognizance of an offence even under this section. For

details, commentary under s 206, IPC may be referred to.

6. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate etc*) hereby charge you (*name of accused*) as follows:
>
> That you fraudulently accepted (or received or claimed) property to wit.....(*or any interest therein, to wit.....*), knowing that you had no right or rightful claim to it [or you practised deception, to wit.....touching the rights to property to wit.....(*or any interest therein*) intending thereby to prevent (*or interest therein*) from being taken as a forfeiture (or in satisfaction of a fine) under a sentence which had been pronounced (*or which you knew to be likely to be pronounced*) by the court of .....or by a competent authority, to wit.....(*or from being taken in execution of a decree or order which had been made on.....*(*or wit..... in Civil Suit No.....of.....*) and thereby committed an offence under section 207 of the Indian Penal Code and within my cognizance.
>
> (i) And I hereby direct that you be tried on the said charge.

7. Proof

For a conviction under this section, it must be proved that:

(a) the accused fraudulently accepted, received or claimed any property or any interest therein, or practised any deception touching any right to any property or an interest therein;
(b) the accused knew that he had no right or rightful claim to it;
(c) he intended thereby to prevent that property or interest therein, from being taken as a forfeiture, or in satisfaction of a fine or in an execution of a decree or order of a court of justice;
(d) he then knew that such forfeiture, fine or execution was pending or was likely to be made; and
(e) the forfeiture fine or execution was under the orders of a court of justice or a competent authority.1576

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Chapter XI

Of False Evidence and Offences against Public Justice

S. 208.

Fraudulently suffering decree for sum not due.--

Whoever fraudulently causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due or for a larger sum than is due to such person or for any property or interest in property to which such person is not entitled or fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied, or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustration

A institutes a suit against *Z. Z,* knowing that *A* is likely to obtain a decree against him, fraudulently suffers a judgment to pass against him for a larger amount at the suit of *B,* who has no just claim against him, in order that *B,* either on his own account or for the benefit of *Z,* may share in the proceeds of any sale of *Z's* property which may be made under *A's* decree. *Z* has committed an offence under this section.

Comments

1. Scope

This section is intended to prevent the abuse of the machinery of the court for causing or suffering collusive decrees to be passed or executed in order to secure property from being available for the satisfaction of first debts. The Law Commissioners remarked that the section was drafted to prevent an abuse, then said to be prevalent, by getting someone to file a collusive suit for the recovery of the whole of one's property and suffering a decree to be passed. As mentioned in s 159 :

> No one at the time, is either injured or annoyed. It is only in the course of years, when unsuccessful in his speculations, and at the time his creditors press their claims against him that the original plaintiff, the man of straw, appears, not with a naked claim, but with a decree in his favour, adjudging him with the whole of the defendant's property. This property, he will acknowledge, he has nevertheless left the whole time in the defendant's possession; but he pleads his rights under a decree of court.[73]

2. 'Fraudulently'--Meaning of

Section 25, and the commentary thereunder may be referred to.

3. 'To be Executed'--Meaning of

An application for an execution of a decree, which is refused, is not an offence under this section.[74]

4. 'Satisfied'--Meaning of

The word 'satisfied' bears its ordinary meaning and does not only refer to decrees, the satisfaction of

which has been certified to the court.[75]1577

5. Procedure

The procedure to be followed will be the same as in the case of an offence under s 206, IPC, with the difference that the offence under this section is triable by a magistrate of the first class.

6. Complaint

No court shall take cognizance of an offence under this section when such an offence is alleged to have been committed in, or in relation to, any proceeding in any court except on a complaint in writing of the court before which the offence is committed, or of some other court to which it is subordinate.[76]

The provisions of s 195, CrPC are mandatory. Registration of a case against a public servant under ss 196 and 208, IPC without following the proceedings of ss 195 and 240, CrPC was illegal and as such the proceedings were quashed on petition filed under s 482, CrPC .[77]

7. Charge

The following form may be adopted in framing a charge:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the .....day of.....at.....fraudulently caused (*or suffered*) a decree (*or order*) to wit..... in suit No.....of the Court of.....to be passed against you and which has for a sum of not due (*or for a larger sum than was due*) to such person [*or (for any property or interest in property to which the decree-holder was not entitled*) (*or fraudulently caused (or suffered) a decree (or order, to wit.....*), passed in Suit No....passed by the Court .....on .....to be executed against you, after it had already been satisfied in full (*or in part*)] and thereby committed an offence under section 208 of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

73 2nd Report, s 159 .

74 *Shama Charan v Kasi Naik* ILR 23 Cal 971 .

75 *R v Bapuji Dayaram* ILR 10 Bom 288 ; *Madhub v Novodeep* 16 ILR Cal 121 .

76 Section 195(1)(b) .

77 *Balappa v State of Karnataka* 2011 Cr LJ 4804, p 4809 (Kant) .

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Chapter XI

Of False Evidence and Offences against Public Justice

S. 209.

Dishonestly making false claim in court.--

Whoever fraudulently or dishonestly, or with intent to injure or annoy any person, makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Comments

1. Scope

This section punishes persons who fraudulently or dishonestly or with an intent to injure or annoy any person, make any claim, having full knowledge of its falsity, in a1578 court of justice. This section is wider than the preceding section as it applies to persons who are acting fraudulently or dishonestly. The offence is complete the moment a false claim is filed. The section is not limited to cases where the whole claim made by the accused is false. It applies even where a part of the claim is false.[78]

The offence under this section relates to false and fraudulent claims in a court of justice and is confined to the civil court in which an original suit was brought.[79]

Where affidavits alleged to have been filed by accused in suit in which complainant was defendant, issue in said suit was about seniority to officiate as headmaster which vacancy occurred due to retirement of the headmaster, no contention to the effect was taken by the complainant in suit that School Committee was not properly represented and that affidavits filed by the accused declaring himself as Secretary of Committee are false and there was no decision on merits on this question in the suit, it was held that the complainant failed to prove offences alleged against the accused and the accused was entitled to acquittal.[80]

2. Essential Ingredients

Falsely attesting the plaint in a false case is an essential ingredient of fraudulently and dishonestly making a false claim in a court of justice and a person cannot be convicted of both.[81]

3. 'Fraudulently'--Meaning of

For details, s 25, and the commentary thereunder may be referred to.

4. 'Dishonestly'--Meaning of

Section 24, and the commentary thereunder may be referred to.

5. 'With Intent to Injure or Annoy'--Meaning of

The question of fraud or dishonesty or intent to injure or annoy must be decided like any other question of fact on the basis of evidence.[82] The mere dismissal of a suit in the absence of a clear finding as to whether the suit was false and was brought with an intent to injure the defendant, is not a justification for directing the prosecution of the plaintiff under this section.[83]

6. 'Makes any Claim'--Meaning of

The expression 'claim' in this section does not include a claim made in an execution. An attempt to execute a decree cannot correctly be described as making a false claim.[84] The word 'claim' cannot refer to a document produced in evidence to1579 substantiate the relief asked for in the suit.[85] An attempt to execute a decree which has been satisfied also cannot be correctly described as a false claim.[86]

7. Remedy of the Aggrieved Defendant

The ordinary remedy of a person who has had a false suit brought against him is to apply to the court to prosecute the plaintiff under this section. And in that case one has the benefit of the court's opinion as to whether the plaintiff was acting with any sinister and improper intention. As a general rule, it is undesirable that people should be hampered in their access to the courts and in getting justice by the fear that if they are unsuccessful, they may be prosecuted for defamation, and therefore, all courts should be careful when a complaint of defamation is filed in respect of proceedings in a civil court to see whether the provisions of this section and those of the Code of Criminal Procedure generally have not been evaded.[87]

8. Mere Belief not Sufficient per Offence under Section 207

In order to establish an offence under this section, it is essential to prove that the claim made is one which the person making it knew to be false, and it is not sufficient to show that the claim is one which he believed or had reason to believe to be false, or did not believe to be a true claim.[88]

A person, who brings a claim in the civil court, which he knows to be false, commits an offence punishable under this section but he does not, by so doing, commit an offence either of extortion, if he succeeds or, of attempting to commit extortion if he fails.[89]

9. 'In a Court of Justice'--Meaning of

The court of justice intended here is a civil court,[90] and not a *persona designata*.[91] The essential characteristic of a court is that it is authorised by law to decide, in accordance with law, disputes between parties before it.

In dealing with claims against an estate under the Chhota Nagpur Encumbered Estates Act, the manager was not deciding a dispute between two parties who appeared before him for the determination of their dispute. The manager, in dealing with a claim under the Chhota Nagpur Encumbered Estates Act, was therefore, not a court of justice.[92]

For further details, s 20 and the commentary thereunder may be referred to.

10. Procedure

The offence under this section is non-cognizable. A warrant shall ordinarily issue in the first instance. It is bailable, not compoundable and triable by a magistrate of the first class. It can also be tried summarily as provided by s 260, CrPC .1580

The period of limitation for taking cognizance of an offence under this section is three years.

11. Complaint

A complaint in writing by the court in which the false claim was made or of some other Court to which it is subordinate, is necessary[1] for taking cognizance of an offence under this section. In the absence of a complaint in writing of the court concerned or other court to which that court is subordinate, cognizance cannot be taken.[2] Cognizance cannot be taken as the basis of private complaint.[3] The proceeding in relation to a prosecution under s 209, IPC is covered by cl (b)(ii) of s 195(1) . When the offence is committed in proceedings in any court, normally no cognizance of any of these offences coming under ss 209, 471 or 466, IPC could be taken without a complaint of the concerned court.[4]

12. Charge

The following form may be adopted in framing the charge:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you on or about the.....day of.....at.....fraudulently (*or dishonestly or with an intent to injure or annoy any person*) made a claim, to wit.....(*specify the claim*) in Suit No.....of .....in the court of .....which you knew to be false, and thereby committed an offence under section 209 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

A person cannot be convicted both of fraudulently and dishonestly making a false claim in a court of justice and of falsely attesting the plaint in the false case, the latter being an essential ingredient of the former offence.[5]

13. Proof

For a conviction under this section, it must be proved that:

(a) a false claim was made by the accused in a court of justice; and
(b) the accused had made such claim: (i) knowing that it was a false claim, and (ii) intending thereby to defraud or to cause a wrongful gain or loss, or to injure or annoy, any person.

It is essential to prove that the claim made is one which the person making it knew to be false.[6] The burden of proof lies on the prosecution. It will not be enough in a criminal proceeding to show that the plaintiff in the civil suit failed to discharge the burden of proof. It will also not be enough to show that in the evidence adduced for the plaintiff, there were discrepancies or improbabilities which made it impossible for the court to rely with confidence on their evidence or even which made it improbable that the fact alleged was true. The onus is on the prosecution to prove1581 affirmatively that the claim was false to the knowledge of the accused, who was the plaintiff in the civil suit.[7] The question of fraud or dishonesty or intent to injure or annoy must be decided like any other question of fact, on the evidence.[8]

Where the oral and documentary evidence on record adduced by the complainant before the trial court did not prove beyond reasonable doubt that accused had committed the offences punishable under ss 182 and 209, IPC, the appellant accused was acquitted of the charges under ss 182 and 209, IPC .[9]

78 *Queen-Emperor v Bulaki Ram* (1890) All WN 1 .

79 *Queen v Begum Mahtoon* 12 WR 37 .

80 *T Revanna v H Chandrappa* (2007) Cr LJ 1995 (Kant) .

81 *King Emperor v Zer Mahommad Khan* (1901) All WN 187 .

82 *Motilal v Emperor* AIR 1936 All 154, p 165, 37 Cr LJ 420 .

83 *Chakauri Rai v Emperor* AIR 1920 Pat 548, 21 Cr LJ 58, 54 IC 686 .

84 *Bismilla Khan Pathan Khan v Rambhau Maroti* AIR 1948 Nag 350, 47 Cr LJ 1031, (1946) Nag LJ 402 ; *Queen v Begum Mahtoon* 12 WR 37 .

85 *Boddu Ramayya v Chituri Surayya* 16 Cr LJ 439, p 440 .

86 *Queen v Begum Mahtoon* 12 WR 37 ; *Bismilla Khan Pathan Khan v Rambhau Maroti* AIR 1946 Nag 350 ; *Bashir Dagadu Maner v State of Bihar* (1978) Cr LR (Mah) 69 .

87 *Ganumal v King-Emperor* AIR 1925 Sind 263, 26 Cr LJ 941, 18 SLR 83 .

88 *Baisakhi v Empress* (1830) 7 PR 38 ; *CK Jha v State of Bihar* (1975) Cr LJ 1939 (Pat) .

89 *Ganesh v Empress* (1884) 25 PR 1884 (Cr) ; *Khushal v Emperor* AIR 1947 Oudh 117, p 118, 18 Cr LJ 651 ; *Hikmatullah Khan v Sakena Begum* AIR 1931 All 305, 32 Cr LJ 367, (1931) All LJ 117 .

90 *Queen v Begum Mahtoon* 12 WR 37 .

91 *Kewal Ram v Emperor* AIR 1935 Pat 515, p 520 .

92 *Ibid*.

1 Section 195, CrPC ; *Rajkumar Singh v Emperor* AIR 1916 Pat 97, 18 Cr LJ 135, 1 PLJ 298 .

2 *Muzaffar Hasan v Surajmal* (1984) Raj Cr case 364 (Raj) ; *Sardul Singh v State of Haryana* (1992) Cr LJ 354 (P&H) ; *Ratan Singh v Kanta Devi* (1992) Cr LT 411 (P&H) .

3 *Shaji Thomas v State of Kerala* 2014 (1) KLT 697, 2014 (2) KLJ 21 (Ker) .

4 *Babu Lal v State of Rajasthan* (1998) Cr LJ 3595 (Raj) .

5 *King-Emperor v Zer Mahommad Khan* (1901) All WN 187 .

6 *Baisakhi v Empress* (1888) 7 PR 38 .

7 *Hiralal Sarda v Emperor* AIR 1932 Pat 243, p 244, 33 Cr LJ 860, 13 PLT 370 .

8 *Moti Lal v Emperor* AIR 1936 All 164, p 165, 37 Cr LJ 420, (1936) All LJ 71 .

9 *T Revanna v H Chandrappa* 2007 Cr LJ 1995, p 1997 (Kant) .

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Chapter XI

Of False Evidence and Offences against Public Justice

S. 210.

Fraudulently obtaining decree for sum not due.--

Whoever fraudulently obtains a decree or order against any person for a sum not due, or for a larger sum than is due, or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section really comprises of three offences, *viz* (a) fraudulently obtaining a decree for a sum not due, or for a larger sum than is due, or for any property or interest in property to which the accused is not entitled; (b) fraudulently causing a decree or order to be executed after it has been satisfied, or for anything in respect of which it has been satisfied; and (c) fraudulently suffering or permitting any such act to be done in his name.

This section is a counterpart of s 208, the two sections together deal with the plaintiff and the defendant in a fraudulent or collusive suit or execution proceeding. Both are treated alike as principal offenders. While s 208, IPC punishes the fraudulent defendant, this section punishes the fraudulent plaintiff.

2. 'Fraudulently Obtains a Decree or Order'--Implication of

The meaning of 'fraudulently' has been discussed under ss 25 and 206, IPC . An offence under this section is committed when a decree is fraudulently obtained. It, therefore, makes no difference whether the decree alleged to be fraudulent has, or has not, been subsequently set aside at the instance of the parties against whom it was made. The fact that the decree has not been set aside might be evidence to prove that1582 there was no fraud, but that fact cannot be, in any way, a bar to the prosecution under this section. At the same time, even if the decree has been set aside by a civil court on the ground of fraud, that fact would not be evidence in the criminal court of the existence of fraud.[10] The question of jurisdiction, whether the court had power to pass a decree or not, is immaterial.[11] A *bona fide* mistake negatives the conduct being fraudulent.[12]

3. Section Applies to both Decree and Order

The section applies not only to fraudulently obtaining a decree but also to fraudulently obtaining an order. Where therefore, the accused obtained an order of attachment for a sum not due to him from his judgment-debtor, it was held that this section applied.[13]

4. 'Fraudulently Causing a Decree or Order to be Executed'--Meaning of

In order that an offence under this section may be completed, a decree-holder must cause a decree to be executed fraudulently. The mere filing of an application for execution is not enough. If after making the application by mistake, the decree-holder gets the application for execution dismissed, he cannot

be said to have caused the decree to be executed within the meaning of this section.[14] So also, if the application for execution is dismissed on the ground that the decree had been satisfied out of court, it cannot be said that the decree was caused to be executed against the opposite party.[15]

5. Consequences of Unfructuous Execution Application

In *Queen v Begum Mahtoon* ,[16] after a decree had been fully satisfied, the decree-holder applied for an execution of the decree against the judgment-debtor who produced a receipt signed by the decree-holder showing full satisfaction of the decree. The decree-holder at first denied, but eventually admitted the receipt and the decree was not executed. The decree-holder was then prosecuted and convicted under s 209 . His conviction under that section was set aside on the ground that the section was not applicable to such a case, and the conviction was altered to one under this section read with s 511, for attempting to execute the decree fraudulently, after it was executed.

6. Execution Against Third Party

Where in the execution of a partition decree the tenant, who was not a party to the decree, was physically dispossessed by the court commissioner, contrary to the provisions of the CPC, with the collusion of the landlord decree-holder, the question arose whether the decree-holder had committed an offence under s 210, IPC and the1583 cognizance was barred without a complaint from the court. It was held by the Allahabad High Court that 'neither the complainant, who lodged the report, was a party to the civil suit in question, nor a decree was obtained against him. Section 210 , IPC would not be attracted by any stretch of imagination'.[17] Apart from these considerations this section could not be attracted in the said case as it has not been shown that the decree in the execution of which the tenant was dispossessed, had already been satisfied earlier in any manner as discussed below.

7. 'After it has been Satisfied'--Meaning of

For the application of this section not only must a decree have been executed, but it must have been done so 'after it has been satisfied'.

The words 'after it has been satisfied' indicate only the fact of the satisfaction of the decree. The fact that the satisfaction of the decree is of such a nature, that the court executing it could not recognise it, would not take the case out of the purview of this section.[18] In construing this section, it is necessary to attach to the word 'satisfied' its ordinary meaning and not to understand it as referring only to decrees, the satisfaction of which has been certified.[19] Order 21, r 2 of the Code of Civil Procedure, which provides that no payment or adjustment of a decree not certified to the court shall be recognised by any court, does not debar a criminal court from recognising such payment where the decree-holder is charged with fraudulently executing a satisfied decree.[20] Where the provisions of s 258 of the old Code of Civil Procedure corresponding to O 21, r 2 of the Code of 1908 had not been complied with, it was held that a civil court is not debarred from admitting evidence that the decree has been satisfied out of court, for the purpose of an investigation with a view to sending the judgment-creditor to a magistrate.[21] The words 'any court' in that clause have no application to a criminal court investigating a charge of fraudulently executing a decree under this section. Those words do not bar any criminal remedy which an injured judgment-debtor may have against a fraudulent decree-holder, whether by a prosecution under ss 193, 210, 406 or any other section of the Indian Penal Code .[22] The Rajasthan High Court, however, quashed the prosecution under this section for an earlier payment which was never got verified in the execution court, terming it as wholly unjustified.[23]

8. Procedure

The offence is non-cognizable, bailable and not compoundable. It can be tried by a magistrate of the first class, and can also be tried summarily under s 260, CrPC . The period of limitation for taking cognizance of an offence under this section is three years.1584

9. Complaint

A complaint in writing by the court where such offence is committed in, or in relation to any proceeding in that court or by some other court to which it is subordinate, is required under s 195(1)(b) of the CrPC for taking cognizance of the offence under this section.

Where the facts primarily and essentially disclose an offence under s 210, IPC, the other offences alleged being merely subsidiary to the main offence, the complainant could not be permitted to evade the provisions of s 195, CrPC, by omitting this section from the complaint.[24] It is essential in the public interest that persons who have decrees in their favour be warned that they must not attempt to deceive the courts and thereby get money from their judgment-debtors to which they are not entitled. So, the sanction (court complaint) to prosecute a decree-holder under this section for failing to give credit in execution for a sum paid to him should not be withheld, merely on the ground that the judgment-debtor making the payment has not been prejudiced or that there is no satisfactory proof of the payment on the file.[25]

10. Competence to Make Complaint

Where a plaintiff first instituted a suit in one court and obtained a decree for a part of his claim and then proceeded to present a fresh plaint in another court in respect of the items disallowed by the first court and obtained an *ex parte* decree, the action for making a complaint under this section for obtaining the second decree by fraudulent means, if proved, can only be taken by the court to which both the trial courts are subordinate, as the filing of the second suit cannot be held to be an offence committed in relation to any proceeding in the first court.[26]

11. Charge

The following form may be adopted in framing a charge:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....fraudulently obtained a decree (*or order*) in suit no.....of.....against.....for Rs.....which was not due (*orwhich was a larger sum than was due*) (*or for property or interest in propertyviz*.....(*specify*) to which you were not entitled) (or fraudulently caused a decree (or order) to be executed against.....after it has been satisfied, or fraudulently suffered or permitted.....(*specify any such act*) to be done in your name), and thereby committed an offence punishable under section 210 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

12. Proof

For a conviction under this section, the following points must be proved:

(a) the accused obtained a decree or order, or suffered or permitted the same to be done in his name;1585
(b) the decree or order was for a sum not due, or for a larger sum than was due, or for any property or interest in property to which the accused was not entitled;
(c) or the accused fraudulently caused a decree or order to be executed against any person after it had been satisfied, or for anything in respect of which it had been satisfied; and
(d) the accused did so fraudulently.[27]

10 *Emperor v Mulla Fuzla Karim* ILR 33 Cal 193, 3 Cr LJ 365 .

11 *Badri v Emperor* AIR 1919 All 323, 20 Cr LJ 898 .

12 *Mangat Rai v R* (1910) 11 Cr LJ 202, 7 All LJ 93 ; *Dayaram v R* AIR 1914 Lah 254(2), 15 Cr LJ 263, 11 PWR 1914 .

13 *Hikmatullah Khan v Sakina Begum* AIR 1931 All 305, p 306, 32 Cr LJ 367, (1931) All LJ 117, ILR 53 All 416 .

14 *Bismillah Khan Pathan Khan v Rambhau Maroti* AIR 1946 Nag 350, p 352, 47 Cr LJ 1013 .

15 *Shama Charan Das v Kasi Naik* ILR 23 Cal 971 ; *Naurang Mal v Emperor* 13 PC (Cr) 1902 .

16 *Queen v Begum Mahtoon* 12 WR (Cr) 37 .7

17 *Bal Krishan Gaur v State of Uttar Pradesh* (1985) All Cr R 528, (1985) All WC 1012, (1985) All LJ 495, (1985) All Cr Cas 455 .

18 *Modhub Chunder Mazumdar v Novodeep Chunder Pandit* 16 ILR Cal 126 .

19 *Queen-Empress v Bapuji Dayaram* ILR 10 Bom 288 .

20 *Queen-Empress v Pillala* ILR 9 Mad 101 ; *Queen-Empress v Bapuji Dayaram* ILR 10 Bom 288 ; *Mulla Mal v Rahman* (1884) PR 8 (FB) ; Re *Balu*(1885) PR 7; Re *Naurangonal*(1902) PR 13; *Ram v Deramal* (1899) 1 UBR (1897-1901) 278.

21 *Queen v Mutturaman Chetti* ILR 4 Mad 325 .

22 *Queen-Empress v Bapuji Dayaram* ILR 10 Bom 288 .

23 *Bhawani Singh v Ram Swaroop* (1987) Cr LR (Raj) 236 .

24 *Sadhuram Chimandas v Chimandas Budhuram* AIR 1937 Sind 81, 38 Cr LJ 742 ; *Bhimamal v Emperor* AIR 1936 Sind 123, 37 Cr LJ 107 ; *Tarachand Madhumal v Emperor* AIR 1936 Sind 130, p 132 ; *Bashirul Huq v State of West Bengal* AIR 1953 SC 293, (1953) Cr LJ 1232 ; *SDutt v State of Uttar Pradesh* AIR 1966 SC 523, (1966) Cr LJ 459 ; *CK Jha v State of Bihar* (1975) Cr LJ 1939, p 1945 (Pat) .

25 *Bur Singh v Ishar Singh* AIR 1917 Lah 209(2), 18 Cr LJ 619 ; *Chiman Lal v Ghulam Mohi-ud-din* (1911) 12 Cr LJ 189 .

26 *Vishnu Ram v Crown* AIR 1925 Lah 524, 26 Cr LJ 1588 .

27 *Hari Ram v Emperor* AIR 1929 Lah 676, p 677, 30 Cr LJ 666 .

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Chapter XI

Of False Evidence and Offences against Public Justice

S. 211.

False charge of offence made with intent to injure.--

Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

and if such criminal proceeding be instituted on a false charge of an offence punishable with death, [28][imprisonment for life], or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.1586

Comments

1. Scope

This section is divided into two distinct parts. The first part contemplates two offences *viz,* (a) the institution of criminal proceedings wrongly, and (b) making a false charge, with intent to cause injury to any person. All cases of false criminal proceedings and of false charges fall under the first part of the section, except those specified in the second part of the section. The purview of the second part of the section is, however, limited to the institution of criminal proceedings on a false charge, and does not include the making of a false charge, which falls short of the institution of criminal proceedings.[29] Under the latter part, if criminal proceedings are instituted on a false charge of an offence punishable with death, imprisonment for life or imprisonment for seven years or upwards, the offence is more severely punishable. The former of the two offences, contemplated by the first part, necessarily assumes the latter, but the latter may be committed even where no criminal proceedings follow. To constitute the offence of preferring a false charge contemplated in this section, it is not necessary that the charge should be before a magistrate. It is enough if it appears that the charge was deliberately made before a police officer with a view to its being brought before a magistrate. Of course, a mere random conversation or remark would not amount to a charge.[30] A false charge laid before the police, and never intended to be prosecuted in court, may obviously subject the accused party to very substantial injury, as defined in s 44 .[31] It has been held that a person may be charged under two heads, for making a false charge and for instituting criminal proceedings, the two offences being different.[32] It would appear that the legislature must have meant different things when it spoke of 'instituting proceedings' and 'making a charge'. In a full bench case of the Calcutta High Court,[33] Wilson J, delivering the judgment of the court, observed:[34]1587

> I agree in this reasoning in one sense and not in another. I agree that we must take it that the legislature did not regard the two phrases as co-extensive in meaning, but considered that there were, or might be, cases to which the one would apply and not the other. But I do not think we are to suppose that the legislature meant the phrase to be mutually exclusive in meaning, so that the instituting of criminal proceedings must be by something which is not a charge, and a charge must be something which is not the institution of criminal proceedings. This cannot, I think, be for two reasons. First, because there is no mode by which a private accuser can institute criminal proceedings except by making a charge; and if he does not do it by the charge, he never does it at all, to whatever length the proceedings may go. And secondly, because the last part of the section speaks of 'proceedings instituted on a false charge.

2. Essential Ingredients

To constitute an offence under this section the following ingredients must exist, namely:

(a) the accused intended to cause injury to any person;
(b) with that intention, he instituted or caused to be instituted, a criminal proceeding against that person or, in the alternative, falsely charged him with having committed an offence; and
(c) when he did as above, he knew that there was no just or lawful ground for such criminal proceeding or false charge against that person.[35]

There are thus three elements in each of the offences under this section.

The intention and knowledge in (a) and (c) respectively constitute the mental elements in each offence.

The ingredients of this section go a good deal further than the mere absence of proof of the guilt of the person said to have been falsely charged with an offence. The complainant must have falsely charged such person with having committed an offence, that is to say, the person must be innocent.

The complainant must have known that there is no just or lawful ground for the proceeding or charge, that is to say, there is no penalty in this section for incautious or negligible acceptance of information which the complainant might have learnt by inquiry to be unreliable.

Thirdly, there must have been an intention to cause an injury to the person. This can in some cases be inferred from the relation of the parties when the other two elements are established. As regards the other two ingredients, it is important to remember that there is a difference between suspicion and evidence. The prosecution will have to establish facts irreconcilable with the innocence of the accused.[36] The criminal proceedings and false charges contemplated by this section must mean proceedings instituted and charges made according to the provisions of the criminal law in force in India. The section occurs in a chapter relating to offences against1588 public justice, which under the Code must mean public justice in India, unless it is expressly otherwise provided.[37]

3. Distinction between Sections 182 and 211

The commentary under the same heading in s 182, *ante* may be referred to.

It is true that an offence under s 182 is distinct from one under s 211, though the latter is more serious and may include the offence under the former section.[38]The criminal law makes a clear distinction between a false charge which falls under this section, and false information given to the police, falling under s 182 . A person prosecuting another for an offence under the latter section need not prove malice and a want of reasonable and probable cause except so far as they are implied in the act of giving information known to the police, with the knowledge or likelihood that such information would lead a public servant to use his power to the injury or annoyance of the complainant. In an inquiry under this section, on the other hand, the absence of just and lawful grounds for making the charge is an important element.[39]Section 182 relates only to cases of information given to officials with the intention of causing, or with the knowledge that it is likely to cause, that official to do or omit to do something, which he ought not to do or omit to do, or to use his lawful power to the injury or annoyance of any person. This is a distinct offence from that described in this section, which relates to an attempt to put the criminal courts in motion against another person. The action which this section renders penal, is an action entailing very serious consequences, and, therefore, more serious consideration is required by the individual who takes it. It is sufficient therefore, in such cases, for the prosecution to establish that there was no just or lawful ground for the action taken and that the accused knew this. But something more is required in the case of action referred to in s 182 . To bring a case within that section, it is necessary for the prosecution to prove, not merely the absence of a reasonable or probable cause for giving the information, but a positive knowledge or belief of the

falsity of the information given.[40] An accused can commit offences both under ss 182 and 211 in the pursuit of the same purpose, one after the other, but their circles are clearly separated and they do not overlap each other.[41]

Where the information conveyed to the police amounts to a false institution of criminal proceedings against a defined person, or amounts to falsely charging a defined person, with an offence as defined in the Indian Penal Code, then the person giving such information has committed an offence under this section. In such a case, this section is, and s 182 is not, the appropriate section under which to frame the charge. Section 182, when read with this section, must be understood as referring to cases where the information given to the public servant falls short of amounting to the institution of criminal proceedings against a defined person or to the false charging of a defined person with an offence as defined in the Indian Penal Code .[42]

The petitioner filed a complaint against the opposite party alleging that his son was kidnapped by the opposite party. The kidnapped boy appeared before the court and1589 stated that he was not kidnapped by the opposite party but he himself had gone voluntarily to marry a girl. The girl in statement under s 164, CrPC also stated that, she had married the petitioner's son. The petitioner had filed a false case of kidnapping. Cognizance of the offences under ss 182 and 211, CrPC taken by the Magistrate was held proper.[43]

4. Essence of the Two Offences under Sections 211 and 182

The essence of the offence under s 182 is a contempt of the lawful authority of a public servant, whereas the offence under this section is an offence against public justice.[44]

5. When Offence is covered under Section 211, Proceeding under Section 182 cannot continue

The magistrate can take cognizance of an offence under s 182 on a complaint in writing by the police officer by virtue of the provisions contained in s 195(1)(a) of the CrPC . But it would virtually lead to the circumvention of the provisions of s 195(1)(b) if the proceedings under s 182 can continue where the offence disclosed is covered by s 211, IPC and a complaint is pending, which has been filed by the informant on the same facts and allegations as were contained in his first information report (FIR).[45]

For more details, commentary under s 182 may be referred to.

6. 'Whoever'--Person Liable

The word 'whoever' is wide enough to cover not only private individuals but also public servants. If the accused, in bad faith, and knowing that he had no just or lawful grounds for instituting the proceedings, led his superior officer to believe that he had just and lawful grounds and so induced the latter to direct the institution of criminal proceedings against a person, he would be liable under this section, notwithstanding that he was a police officer and in a sense instituted the proceedings by order of his superior officer.[46] If the mere fact of being in a subordinate position is to shield a man from the consequences of official acts originated by himself, no one will be safe from false and malicious charges.[47]

7. Intention to Cause Injury Necessary

It is essential for a conviction for either of the offences under this section, that the accused intended to cause injury to the person he charged or proceeded against.[48] By 'injury' is meant any harm illegally caused to any person, in body, mind, reputation or property.[49]1590

Malice is the Foundation

'The foundation of the action is malice, and malice may be shown at any time in the course of inquiry'.[50] As Cockburn CJ, said in *Fitz Jogn v Mackinder* [51]

> A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a judge or magistrate, or, if spontaneously undertaken, from having been commenced under a *bona fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused.

8. 'Criminal Proceeding'--What is?

When the proceeding is before a magistrate, and it is one which may end in conviction, it must be considered to be a criminal proceeding. If there be a provision in a statute that that which is merely a civil liability may be enforced by a proceeding in its nature criminal, that proceeding is nonetheless criminal because it is applied to a civil liability.[52]

Code of Criminal Procedure is not Exhaustive of Criminal Proceedings--Contempt Proceedings are Criminal Proceedings

A contempt of court can be punished by imprisonment and fine, and that brings an accusation charging a man with contempt of court within the wide words 'criminal proceedings'. Such proceedings were described as quasi-criminal proceedings by the privy council because such proceedings are not tried under the CrPC . That does not render it any the less a criminal proceeding because the CrPC is not exhaustive of criminal proceedings and punishments for contempts by summary procedure, before the superior courts are special criminal proceedings which the CrPC does not even seek to regulate. An application to take proceedings under the Contempt of Courts Act, undoubtedly can be regarded as causing a criminal proceeding to be instituted.[53]

Offence--Not Confined to Criminal Proceedings

When the section says that an offence under it may be committed by falsely charging a person with the commission of an offence, it does not intend that the offence must be one which gives rise to a criminal proceeding. There is no authority for a contrary view. Indeed, the definition of the word 'offence' in s 40 of the IPC shows that such a contrary view would be wrong. Under that definition, the word 'offence' in this section, means an offence punishable under this Code or under any special or local law as defined in it. Section 41 defines a special law as a law applicable to a particular subject. Now, the Contempt of Courts Act is an Act dealing with the subject of contempt of courts and is, therefore, a special law. It also provides for punishment for a contempt of court with simple imprisonment up to six months, subject to certain conditions mentioned.[54]1591

Two Ways to put the Criminal Law into Motion

According to the CrPC now in force, there are two modes in which the aggrieved person may seek to put the criminal law in motion. He may make a charge or, in the language of the Code, give information to the police as provided by s 154 . If the information discloses a cognizable offence, the proper police officer may proceed to make an investigation; and if the result of that investigation is adverse to the accused, he is, in due course, brought before a magistrate. All this forms the subject of ch XII of the CrPC . If the information does not disclose a cognizable offence, the police cannot take any step of their own authority. Secondly, the aggrieved person may lay a charge by way of filing a complaint[55]under s 200 before a magistrate or before a judge under the provisions of some special Act.

Whichever of these methods is adopted, the thing done by the accuser is the same, that which is called in the one case giving information, and in the other, making a complaint. In each case, the steps that follow are governed by the CrPC . In each the first step taken by the accused is ordinarily also the last, for from that time the control of the investigation or inquiry passes out of his hands into those of the constituted authorities; subject to this, that if, after an information before the police, the result of their investigation is adverse to the complainant, he may renew his complaint to the magistrate. The procedure by information to the police is by far the more common course of proceeding, especially where any grave offence is alleged.[56]

9. 'Institutes or Causes to be Instituted any Criminal Proceeding'--Scope of Statement

This section refers to three matters: falsely charging a person, instituting criminal proceedings against that person, and causing criminal proceedings to be instituted against that person.

To 'institute' is to originate or found, to begin or commence. It does not require any further steps to be taken. To 'institute criminal proceedings' means to set the criminal law in motion. 'Criminal proceedings' are not defined in this Code, nor in the Crpc . Section 2 (i), CrPC, defines judicial proceedings as including any proceeding in the course of which evidence is or may be legally taken on oath. So, no investigation by the police can be a judicial proceeding, although it is a criminal matter. Chapter XIV of the CrPC 1973 is headed as 'Conditions Requisite for Initiation of Proceedings'. These proceedings, of course, are inquiry proceedings or trials, but they are certainly criminal proceedings as well.[57] Proceedings to compel any one to give security, by reason of an anticipated breach of peace under s 107, or because he is concealing himself, or has no ostensible means of subsistence under s 109 of the CrPC, are apparently criminal proceedings, but they do not necessarily involve a charge of any offence. On the other hand, a charge to the police of a non-cognizable offence may, very possibly, be a charge within the meaning of the section, but could hardly be called the institution of criminal proceedings. So a charge made to the judge of a civil court, or to public officers of other kinds, in order to obtain a sanction to prosecute may well be a charge, but it is not the institution of criminal proceedings.[58]1592

Mere Investigation does not amount to institution of Criminal Proceedings

In the case of *Re Thakur Tewary*,[59] where a police officer made a coloured or false report that a certain offence investigated by him was proved, sanction to prosecute him under this section was refused, not because he was a police officer and acted under orders of his superior, but because it could not be said that the accused instituted any criminal proceedings against any person.

Report and Complaint as Criminal Proceedings

A person actually institutes criminal proceedings not only upon making a complaint as defined in s 2(d) of the CrPC 1973 but also upon reporting the commission of a cognizable offence to the police under s 154 of the same Code. Under s 2(d) a 'complaint' means an allegation made orally or in writing, to a magistrate, with a view to his taking action under the CrPC, that some person, whether known or unknown, has committed an offence, but does not include a police report. There must be an express or implied request to the magistrate to take action. It is of the essence of a complaint that the accusation should have been made with a view to action being taken under the Code. An express request to that effect is not, however, necessary. Whether the statement was made with a view to action being taken upon it as upon a complaint or not, must be determined in the light of the circumstances.[60]

A Departmental Complaint not Contemplated under this Section

A petition addressed to a collector was directed against an official of the court of wards and asked for a redressal of the petitioner's grievances. It was held that the complaint was purely departmental and

that the collector was not justified in treating it as a criminal complaint and ordering a prosecution of the petitioner under this section.[61]

Where a person sent a telegram to the deputy superintendent of police alleging that a certain sub-inspector of police had committed certain offences against him, it was held that in the absence of proof, that the person sent the telegram with the intention of making a report for investigation with a view to prosecution, he could not be held guilty under this section.[62]

Report of Non-Cognisable Offence to the Police is not Criminal Proceeding

Turning to a report made to the police, it is settled law that as the police have no power to take any proceedings in non-cognizable cases, without the order of a magistrate, a false charge of such an offence made to the police is not an institution of criminal proceedings.[63] It may, however, amount to making a false charge.[64]

Option in Case of Cognisable Offence

If a person feels aggrieved by the commission of a cognizable offence, he may either (a) lodge the first information report before the police under s 154, or (b) approach1593 the competent judicial magistrate or court directly and file a complaint under s 200 of the CrPC . The choice is left entirely to his discretion at that stage. The police, after due investigation, may submit a report under s 173, which is usually known as charge-sheet if a *prima facie* case is made out against the accused, or a final report if no such case is made out. If a charge-sheet is submitted, the magistrate takes cognizance of the same under s 190(1)(b) . If the police submits a charge-sheet and sends the accused for trial, then criminal proceedings have been instituted against a person, and the person who has set the police in motion has caused those criminal proceedings to be instituted.[65]

Submission of Final Report--Whether amounts to Institution of Criminal Proceedings

If, however, the police finds that no case is made out against the accused and accordingly submits a final report and the magistrate accepts the same, the accused, that is, the person against whom the report to the police was made, is not sent up for the trial and is discharged, it can be said that criminal proceedings were instituted on a false charge. On this question, there is a conflict of opinion. The answer to the question depends upon the meaning of the two phrases, 'institution of criminal proceedings' and 'making a false charge.' So far as the first part of the section is concerned, the question whether the two phrases are different and mutually exclusive has no material bearing, for whether a given act amounts to a false charge or the institution of criminal proceedings, the penalty is the same. The difference between the two phrases becomes material when the applicability of the second paragraph of the section has to be considered.

One view is that although criminal law may be set in motion by giving information to the police of a cognizable offence, yet unless proceedings are instituted in a court of law, it is not correct to say that criminal proceedings were instituted.[66] According to this view, where on a false charge of a cognizable offence made to the police, there has only been an investigation by the police and no proceedings have been taken in any court, there has been no institution of criminal proceedings on a false charge within the meaning of the second part of this section, and the person making the false charge is liable only under the first part of the section, even if the offence charged is punishable with death, imprisonment for life, or imprisonment for seven years or upwards.

The other view is that to prefer a complaint (report) to the police in respect of an offence with which they are competent to deal, is to institute a criminal proceeding within the meaning of this section.[67] Hence, a person who sets the criminal law in motion by making a false charge to the police of a cognizable offence, institutes criminal proceedings within the meaning of this section, even though the person charged may not be arrested or the matter may not go further than the police inquiry,1594 and if the offence falls within the description in the latter part of the section, he is liable to the punishment

provided for.[68]

The weight of authorities is in favour of this latter view which also finds support from the Supreme Court.[69]

10. Statements which do not Amount to Institution of Criminal Proceedings

Mere Statement of Suspicion is not enough

A mere statement of facts or a communication of a suspicion cannot amount to an institution of criminal proceedings within the meaning of this section.[70]

Statement made to Police during Investigation

Where a complaint of a cognizable offence was made by a person other than the accused, any statement made to the police officer by the accused, after that complaint had been received, however false it might have been, is a statement made in police investigation and cannot be made the foundation of a prosecution under this section, as it is not this statement which set the law in motion, nor can the prosecution be said to have been instituted by it.[71]

Statement of Witness

The mere fact of giving evidence by a witness in a court alone cannot, by any stretch of reasoning, be tantamount to the institution of proceedings within the meaning of this section.[72]

Statement of Counsel

An advocate filing a complaint on behalf of a client, cannot be said to have instituted criminal proceedings. An advocate cannot be expected to constitute himself a judge,1595 either of the law or facts, of his client's case. He is his client's adviser and must act according to his instructions, provided always that those instructions do not require that he should be guilty of an offence or of misconduct or that he should institute in a court, criminal proceedings which to his own certain knowledge are false. Moreover, it is his bounden duty to put into the complaint all the material facts upon which the complaint is based and not wilfully, by acts of omission, to deceive the court.[73]

11. 'Or Falsely Charges any Person with having Committed an Offence'--Meaning of

The Code of Criminal Procedure does not define what constitutes 'making of a charge' and what amounts to the 'institution of criminal proceedings'. It must, therefore, follow that these expressions have been used in their ordinary or popularly understood meaning and not in any restricted or technical sense. Thus, whereas 'making a charge' may mean and imply a false accusation with regard to the commission of an offence, made with a view to take action against the person complained of, to an authority bound by law to move in the matter, the causation and institution of criminal proceeding may also include the setting of criminal law thus in motion.[74]

Bombay View

In *Raya Kutti v Emperor* ,[75] it was observed:

> Now it is obvious that the word 'charges', as used in the section, means something different from 'give information'. We think, the words 'falsely charges' must be construed with reference to the words which speaks of the institution of proceedings. The true test seems to be: does the person, who makes the statement which is alleged to constitute the 'charge', do so with the intention and object of setting the criminal law in motion

> against the person against whom the statement is directed. Such object and intention may be inferred from the language of the statement and the circumstances in which it is made.

Madras View

So also, in *Queen-Empress v Karigowda* ,[76] Ranade J observed that:

> The words 'falsely charging' used in that section must be construed along with the words which speak of the institution of proceedings. These latter words are obviously used in a technical and exclusive sense, and by parity of reasoning, the same restricted sense must be given to the words which relate to a false charge.

But this narrow construction has not been accepted in other cases. In *Sessions Judge, Tinnevelly v Sivan Chetti* ,[77] a full bench of the Madras High Court held:

> A false 'charge' in this section must not be understood in any restricted or technical sense, but in its ordinary meaning, of a false accusation made to any authority bound by law to investigate it or to take any steps in regard to it, such as giving information of it to superior authorities with a view to investigation or other proceedings, and the institution of criminal proceedings includes the setting of the criminal law in motion.1596

Calcutta View

Expressly dissenting from the above Bombay decision, in *Dasrathi Mondal v Hari Das* ,[78] it was observed:

> With due deference to their Lordships, we are unable to accept this narrow construction of section 211 , IPC . If the legislature had intended that the words 'falsely charging' should be read *ejusdem generis* with the words that precede, *viz,* 'institutes or causes to be instituted any criminal proceeding' there was hardly any necessity for using the expression 'or falsely charges' because that would have been covered by the words the precede them, namely, 'institutes or causes to be instituted any criminal proceedings.

Supreme Court's View

This view has been upheld by the Supreme Court in *Hari Das v State of West Bengal* ,[79] where Mudholkar J observed at p 1779:

> In my judgment it would not be right to read the words 'or falsely charges' as being in any way restricted by the words 'institutes or causes to be instituted any criminal proceeding'. The legislature has clearly provided for two kinds of acts: one, the institution of proceedings and the other of making a false charge, and I see no compelling reason for reading the section as if it is limited to the institution of a complaint upon a false charge. Such an interpretation would completely shut out criminal proceedings in which no charge of offence has been made.

Words Refer to Initial Accusation--Intention should be to set Criminal Law in Motion

In the latter case the Supreme Court has observed that the expression 'falsely charges' in this section cannot mean giving false evidence as a prosecution witness against an accused person during the course of a criminal trial. To 'falsely charge' must refer to the original or initial accusation, putting or seeking to put in motion the machinery of criminal investigation in motion and not when seeking to prove the false charge by making a deposition in support of the charge framed at the trial. The words 'falsely charges' have to be read along with the expression 'institution of criminal proceeding'. Both these expressions, being susceptible to analogous meaning, should be understood to have been used in their cognate sense. They seem to have been used in a technical sense as commonly understood in our criminal law. The false charge must be embodied either in a complaint or in a report of a cognizable offence to the police officer or an officer having authority over the person against whom the allegations are made. The statement in order to constitute a 'charge' should be made with the intention and object of setting criminal law in motion. A statement on oath, falsely supporting the prosecution case against an accused person, more appropriately amounts to an offence under ss 193 and 195, IPC and not under s 211, IPC .[80]

Offence Complete when Charge has been Made

So then the meaning of the expression 'falsely charges' is simply 'falsely accuses', and as the section stands, there is no necessity of this false accusation being made in1597 connection with a criminal proceeding.[81] The offence is complete when the false charge has been made, and even though no criminal proceedings follow, for example, owing to the police, on investigation, referring the charge as false.[82]

Definite Accusation Necessary

To constitute a charge, there must be a definite accusation. The section requires a good deal more than a mere suggestion of an inference. There must be a charge of some specific offence made with the intention and object of setting the criminal law in motion, against the man who is said to have committed the offence.[83] The accusation must be that a certain defined person has committed an offence, otherwise, it would only amount to giving information of an offence within the meaning of s 182 .[84]

Test Identification does not Constitute a Charge--Report and Charge Distinguished

A mere suggestion to the police that certain houses should be searched because there is reason to suspect the conduct of the owners of those houses does not amount to a 'charge' within the meaning of this section.[85] The mere expression of a suspicion is, therefore, not enough.[86] Identification of an accused at test identification parades also does not amount to a false charge.[87] In one case it was held:

> If the complainant confines himself to reporting that he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the police, or leaving the police to take such course as they think right in the performance of their duty, he may be making a report, but he is not making a charge. But if he takes the further step, without waiting for any official investigation, of definitely alleging his belief in the guilt of a specified person, and his desire that the specified person be proceeded against in court, that act of his, whether verbal or written, if made to an officer of the law authorised to initiate proceedings based upon the complainant's statement, whether amounting to an expression of the complainant's belief in the guilt of the specified person or his desire that court proceedings be taken against him, amounts to making a charge.[88]1598

Report not Reduced to Writing--Effect of

The fact that the statement made by the accused to the police officer was not reduced to writing in

accordance with the requirements of s 154 of the CrPC, does not prevent the statement made from being a false charge within the meaning of this section.[89]

Charge--Where to be Made

As held by the Supreme Court in *Santokh Singh v Izhar Hussain* ,[90] a false charge has to be made initially to a person in authority or to someone who is in a position to get the offender punished by appropriate proceedings. It must be embodied either in a complaint or in a report of a cognizable offence to the police officer or an officer having authority over the person against whom the allegations are made.

A false charge may be made in a court or outside it.[91] For this section to apply, the false charge must be made to a court or an officer who has power to investigate and send it up for trial,[92] or to take any step in regard to it.

Some Illustrative Cases

Information of an offence given by a person to a village *munsif* (village headman), who communicated it to the police, which in turn when investigated found it to be false, may be made the basis of a charge against the informant under this section.[93]

It must be made to a competent magistrate or other person with a statutory standing in the matter and must further be made with the object of setting the criminal law in motion.[94] A resolution condemning the police action in not taking effective steps to apprehend the culprits of a criminal case was passed in a public meeting. The copies of the resolution were sent to various higher authorities. It was held that no offence under s 211 was committed thereby.[95]

A charge which is untrue, but which is made to a person who has no official duty in the matter, cannot amount to a 'false charge'[96] though it may be defamation. 'It is not necessary, however, that the charge should be before a magistrate. It is enough if it appears that the charge was deliberately made before an officer of police with a view to its being brought before a magistrate'.[97] The criminal intention involved in this offence, is to cause injury to the person accused, not merely by a loss of reputation, as in defamation, but by subjecting him to a criminal prosecution and the1599 consequences thereof, and this object can be brought about only by making the false charge to those whose office it is to investigate, and proceed upon an information of the crime--the police and the magistracy. If then *A,* intending to injure *B*, by subjecting him to a criminal prosecution, falsely charges him before a policeman or magistrate with having committed an offence, he has falsely charged *B,* and nothing further is necessary to render him liable to punishment under the first part of this section.[1] As pointed out in *Rayan Kutti v Emperor* ,[2] the true test is; does the person who makes the statement which is alleged to constitute the charge, do so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed? Such an object and intention may be inferred from the language of the statement and the circumstances in which it is made.[3]

Where an accusation of murder is made, in the first instance to a village magistrate, who has authority to arrest any person whom he suspects of having committed the murder of a person, and whose body is found within his jurisdiction, the accusation is a 'charge', within the meaning of this section, even though it does not amount to the institution of criminal proceedings and even though no criminal proceedings follow it owing to the police, on investigation, referring the charge as false.[4]

When the accused, in order to protect themselves from the oppression of a sub-inspector of police, sent a petition to the superintendent of police, alleging that the sub-inspector committed bribery and extortion, it was held that the object of the accused could only be that the superintendent might punish the sub-inspector departmentally, by transferring him to some other station or by some other act of a like nature, and that as it could not be said with certainty that their intention was to set the criminal law in motion, the accusation did not amount to a false charge.[5]

A petition was presented with the object of bringing to the knowledge of the authorities certain matters

regarding which the petitioner had received information, in order that there might not be a repetition of an alleged tutoring of witnesses, and not with the object that the authorities should institute criminal proceedings. It was held that the petition did not amount to a charge within the meaning of this section.[6]

It has been held that a false accusation against a subordinate judge, that he committed an offence under s 196, made to a district judge, in order to obtain a sanction for a prosecution, amounts to making a charge within the meaning of this section, as the object in making the accusation is to set the criminal law in motion and the district judge has the statutory power to further that object by means of a complaint, though the sanction of the local government is also necessary before any criminal court can take cognizance of the offence.[7]1600

To bring Vexatious Charge not an Offence

For a conviction under this section the charge made must be false. To bring a vexatious charge is not an offence under this section.[8] Compounding of a false charge made to the police is not a conclusive answer to a charge under this section.[9]

12. Charge Partly True and Partly False--Test to be Applied in Such Cases

This section contemplates a charge which is indivisible in its nature. To judge whether a complaint, part of which is true and part false, falls under the section or not, the nature of the complaint or charge made by the accused has to be considered; in other words, no precise rule or principle, to decide whether the complaint is substantially true or substantially false, can be laid down, and each case must depend upon its own circumstances.[10] It has to be considered whether the complaint is substantially true and what is false is a mere fringe to the complaint or whether the substantial complaint is false and what is true is a mere fringe, or a mere accessory circumstance.[11]

13. Charge must be of an offence

Under s 40 of the IPC the word 'offence' denotes a thing punishable under the Code or under any special or local law, and there is no reason why a thing made punishable by the Workmen's Compensation Act should not be taken to be an offence within the meaning of this section. The Contempt of Courts Act, being a special law, a charge of having committed a contempt of court has been held to be an offence within the meaning of this section.[12]

14. Charge should be Wilfully False

Another essential ingredient of an offence under this section is that the accused must have known that there was no just or lawful ground for the criminal proceeding or charge. A mere finding that he made a false report or charge is not sufficient.[13] The prosecution is bound to prove that the charge was wilfully false to the knowledge of the maker of the charge. A mere proof of the falsity of the complaint or the failure to prove its truth is not enough. To adduce evidence of such knowledge may be very difficult, but it is still the unavoidable duty of the prosecution to prove it, if the accused is to be convicted under this section.[14] In a case under this section, two principles must be kept in view, first, that a failure on the part of a complainant to establish the truth of his allegation does not by any means justify the inference that the complaint was false, and second, that to secure a conviction in this class of cases, it must be established beyond reasonable doubt, that the circumstances are not merely1601 consistent with the guilt of the accused but also entirely inconsistent with his innocence.[15]

Where an FIR is lodged containing false and baseless allegations, *prima facie* to injure and harm the reputation of the complainant and the falsity of the said allegations is proved from the statement of the accused recorded under s 313, CrPC and corroborated from the evidence of independent witnesses on record, the order acquitting the accused of the offences under ss 500 and 211 was set aside.[16]

Presumption in Some Cases--Defence in Such Cases

Where the accused knows that there is no just or lawful ground for his instituting proceedings or making a charge, a conclusive presumption of an intent to injure at once arises. Such a knowledge can only be proved on the facts of each individual case, as they existed, or were supposed to exist, or were known by the accused, at the time the charge was made, and the accused in his defence should be allowed to show the nature of the information he had, and the rumours that he heard, *etc.*[17] Proof that the accused, upon reasonable grounds sufficient to satisfy a cautious man, honestly believed that the person he accused was probably guilty is a good defence[18] as wholly negativing a presumption of an intent to injure on his part. Rashness in making a charge honestly believed, is not itself indictable.[19] But want of any inquiry (and hence rashness) is important in determining whether there was a reasonable and probable ground for the alleged belief.[20] The prosecution must prove such knowledge on the part of the accused, and, if this is not established, he must be acquitted.[21]

Making Charge when Justified--Purpose behind the Exception

A false charge may be made in two circumstances:

(a) the person making the charge may come forward and say that he had himself seen the offence being committed; or
(b) he may say that he was making the charge on the basis of information received by him.

If the charge is made on the basis of personal knowledge, it would not be difficult for the prosecution to show that there was no just or lawful ground for such charge, if it is able to prove that no such offence was ever committed. That fact alone would be sufficient to show that the person concerned had no just or lawful ground for the charge. But where the charge is made on information supplied to the informant, different considerations arise, and the mere fact that the offence was never committed is not enough to establish that the person making the charge had no just or lawful ground for such charge. If the mere fact that no offence was committed were enough for the purpose, it would block a large source of information to the police where crimes may be suspected in such cases, sometimes the suspicion may prove to be incorrect. But that thing by itself should not be sufficient to make the person informing the Police on suspicion liable to1602 prosecution under this section. It was for the purpose of safeguarding this channel of information to the police that the words 'knowing that there is no just or lawful ground for such proceeding or charge' were put in this section. If the charge is therefore, made on the basis of information supplied to the person making the charge, two further considerations arise which might go to prove that the person concerned knew that there was no just or lawful ground for such charge. In the first place, the person making the charge may have been supplied with a certain information, but in his complaint or report to the police he says falsely that he was supplied with certain other information which on the face of it, justifies his making the charge. In such a case, it is the duty of the police, if they know who the informant of the person making the charge was, to produce that information so that it may be known what information was given to the person making the charge. The other way, in which the prosecution can show that the person making the charge knew that there was no just or lawful ground for it would be to show that, on the basis of the facts put down in the report or complaint making the charge, no person of ordinary prudence would make such a charge. A person may in good faith make a charge, which is subsequently found to be false, believing that there are good grounds for making the charge. In such a case, he does not commit an offence under this section as it is for the prosecution to show that the person making the charge knew that there was no just or lawful ground for such a charge.[22] In *Murdad v Queen-Empress* ,[23] Plowden SJ observed:

Unless the person making a charge actually knows that there is no just or lawful ground for it, he is not guilty of

> the offence, and cannot properly be convicted of it. It is not enough to find that he has acted in bad faith, that is, without due care or inquiry or that he has acted maliciously, or that he had no sufficient reason to believe or did not believe the charge to be true. The actual falsity of the charge, recklessness in acting upon information without testing it, or scrutinising its sources, actual malice towards the persons charged, these are all relevant evidence, more or less cogent, but the ultimate conclusion must be, in order to satisfy the definition of the offence, that the accused knew that there was no just or lawful ground for proceedings. It may be difficult to prove this knowledge, but however difficult it may be, it must be proved, and unless it is proved the informer must be acquitted.

In a Patna case, Rowland J observed that there is no penalty in this section for incautious or negligible acceptance of information which the complainant might have learnt by inquiry to be unreliable.[24]

15. Procedure

The offence under this section is non-cognizable but a warrant shall ordinarily issue in the first instance. The offence is bailable but not compoundable. If the false charge is of an offence punishable with death or imprisonment for life, it is triable only by a court of sessions. In other cases it is triable by a magistrate of the first class.

The limitation for taking cognizance of the offence described in the first para of this section is three years. There is no limitation for taking cognizance of the offence described in the second para of the section.1603

16. Complaint of Court--When Necessary

Section 195(1)(b)(i) of the Code of Criminal Procedure 1973 prohibits taking of cognizance of certain offences, including an offence under this section, 'when such offences is alleged to have been committed in, or in relation to, any proceeding in any court, except on the complaint in writing of that court or of some other court of which that court is subordinate.' The prohibition is, therefore, not an absolute prohibition, and does not preclude the magistrate concerned from taking cognizance of the offences mentioned in the clause without the complaint of the court or a superior court if the offences are not alleged to have been committed 'in, or in relation, to any proceeding in any court'.[25] When an offence under the sections referred to in cl (b) is not committed in or in relation to any court, a complaint of such an offence can be made by a private individual.[26] It is significant that cl (b)(i) refers to 'any proceeding' and is not confined to a judicial proceeding. It is, therefore, not necessary for its application that the court should be engaged in a judicial proceeding. Again the clause applies not only when an offence mentioned in it is committed in a proceeding in any court but also when it is committed in relation to a proceeding in a court.

Therefore, when a complaint against some accused persons for making false charges in a petition under s 144, CrPC before the executive magistrate was filed, not by the concerned executive magistrate, who is a court for the purpose and meaning of s 195(1)(b)(i), CrPC, but by the aggrieved person, for prosecution under s 211, IPC in relation to a proceeding before the executive magistrate, the cognizance of the said complaint, taken by the chief judicial magistrate was held illegal and without jurisdiction, being hit by the mischief of s 195(1)(b)(i), CrPC .[27] Cognizance in relation to an offence punishable under s 211, IPC when such offence is alleged to have been committed in or in relation to any proceeding in any court, cannot be taken except on the complaint in writing of such court in view of the bar created by s 195(b)(i), CrPC .[28] An accused acquitted by a judicial magistrate in a complaint case under s 407 read with s 34, IPC, cannot file a private complaint against the complainant of the case in which he was acquitted, due to a bar of s 195(1)(b)(i) of the CrPC and it is only the court of judicial magistrate, which passed the acquittal who is empowered to file such a complaint under s 211, IPC . The cognizance of the private complaint of such acquitted accused by the court was erroneous, and so the order of the issuance of process by the said court of the judicial magistrate, who took cognizance of the complaint under s 211, IPC, was quashed in a criminal writ petition.[29] When a private complaint under s 407, IPC was found to be false by the magistrate, the aggrieved party filed a private complaint under s 211, IPC against the complainant. It was held that

such a complaint was not maintainable in view of the bar of s 195(1)(b)(i) of the CrPC and the complaint can be filed only by the1604 magistrate who gave the finding that the complaint was false.[30] A Station House Office (SHO) cannot *suo motu* register a crime under s 211, IPC without the order of the Magistrate.[31]

Section 195, CrPC is a bar for taking cognizance of an offence punishable under s 211, IPC at the behest of the victim or the aggrieved person.[32]

Where an offence under this section is alleged to have been committed in relation to making of a statement under s 164 of the Code of Criminal Procedure 1973, cl (b) of s 195 of that Code would come into play, which clearly bars cognizance of the offence except on a complaint in writing of that court or a court to which that court is subordinate.[33]

Conflict of Opinion as to the Interpretation of the Phrase--Point of Controversy

There is a conflict of opinion as to the interpretation of the words 'in, or in relation to, any proceeding in any court'. The question on which the controversy centres may be stated as follows:

> When a report is made to the police charging any person with the commission of an offence and the police, after investigation, finds that the report is false and gets the case cancelled under the provisions of s 173, CrPC is the order of the magistrate accepting the police report (commonly known as final report) sufficient to bring the offence in respect of the false charge or false information to the police under ss 211 and 182, IPC, within the categories of offences committed in relation to proceedings in court.

Affirmative View

One view is that any proceeding that comes into existence or is taken before a court even before the cognizance of the offence has been taken, is a proceeding contemplated by s 195(1)(b), CrPC . A proceeding held by a magistrate on receipt of an investigating officer's report made under s 167(1), CrPC is a proceeding contemplated by the Code. When a person accused of any non-bailable offence is arrested without a warrant or is brought before a magistrate, he may be released on bail.[34]When he applies to the magistrate for bail, the magistrate has to consider various matters and then decide whether or not he should release him on bail. When an accused applies for bail, a proceeding does come into existence, terminating in the order granting or refusing the bail. Therefore, even though it may be true that no proceeding comes into existence when the magistrate considers a final report submitted to him by an investigating officer under s 173, it comes into existence when he passes a remand order or passes orders on an application for bail. Section 195(1)(b) does not require that the proceeding must be one from which it can be found out whether an offence was committed or not, or that it must be such as to give material to the court for deciding whether to make a complaint or not. It is not essential that the proceeding must be one for an inquiry into the very act which is alleged to be an offence. Section 195(1)(b) simply requires that there should be some relationship between the offence alleged to have been committed and the proceeding;1605 no particular kind of relationship is required. The words 'in relation to' do not mean that the offence must have been committed after the proceeding had started. Even if the offence was committed prior to the proceeding, it can be said to be in relation to the proceeding if the proceeding was undertaken in consequence of it. If a proceeding is related to an offence, the offence itself is related to the proceeding because, if *A* is related to *B,* it means that *B* is related to *A.* Where, therefore, a person makes a false report to the police against certain persons, resulting in their being arrested and being remanded to custody and leading to an application for bail being made by them, the remand proceedings and the bail proceedings are connected with the false report made by the person and the offence committed by him by making it must be held to be an offence committed in relation to those proceedings. As the proceedings are related to the offence in the manner mentioned above, the offence must be said to have been

committed in relation to them. Section 195(1)(b) is therefore, applicable and no cognizance of the offence can be taken without a complaint by the magistrate and on a complaint by a private person.[35]

In *Bajaji Appaji v Emperor* ,[36] which was a case under the Code of 1898, it was observed at p 11:

> Where information relating to the commission of a cognizable offence is given to an officer in charge of a Police Station under section 154,Criminal Procedure Code, and is followed by an investigation by him, he is bound under section 173(1) to complete it without any unnecessary delay, and as soon as it is completed, to forward his final report to a magistrate empowered to take cognizance of the offence on a police report, in the form prescribed by the local government. That report may be in Form A when the complaint is true, or in Form B when the information is found to be false, or in Form C when the information is neither true nor false and no case is sought to be sent up. An order passed by the said magistrate on such report would dispose of the complaint made to the police. That order, as pointed out by Beaumont CJ is not merely an administrative order but a judicial order of the court. Hence, if the complaint be held to be false and a *B* summary is issued, the offence under section 211, Penal Code, will have to be alleged to have been committed by the complainant in relation to the proceedings in the magistrate's court which ended in an issue of the *B* summary.

It has been held in a series of decisions that once a complaint goes to court and the accused is discharged, thereafter, for any complaint by the discharged person in respect of the complaint made against him to the court, the complaint of the court is necessary for an offence under this section.[37]

A similar view was taken in *MP Sirajudeen v M Ganesan* ,[38] where one *A* had filed a complaint under ss 147, 448 and 379, IPC against *B,* before the magistrate, which was referred by him to the police for investigation. On investigation, the dispute was found to be of a civil nature and the report of the police to this effect having been accepted by the magistrate, no process was issued against the accused *B. B* then made a complaint against *A* under s 211, IPC assailing the falsity of the allegations made by him in the aforesaid complaint under ss 147, 448 and 379, IPC . On trial, *A* was acquitted as the charge was not found established. On appeal, the Madras High Court, upholding the finding of acquittal further held that the complaint of *B* was not1606 maintainable and the complaint of the court for the prosecution of *A* under s 211, IPC was necessary.

As police cannot investigate a non-cognizable case without the permission of a magistrate under s 155(2), CrPC 1973 and after investigation if it is reported by the police that the FIR is false and the informant has committed an offence under s 211, IPC, the magistrate is not competent to take cognizance of this offence without a proper complaint.[39]

Where a complaint filed under ss 211 and 500, IPC before him, was referred by the magistrate under s 156(3), CrPC to the police for investigation, the police submitted a challan for offences under ss 211 and 500 . The High Court quashed the proceedings in respect of the offence under s 211 and held that the same were not maintainable without the complaint of the court.[40]

Where the application under s 156(3), CrPC of the accused, filed before the additional chief judicial magistrate (ACJM), for sending his complaint for an investigation by the police, was dismissed by the ACJM on the basis of an inquiry report submitted by the police, as directed by him, the complaint filed against the accused under s 211, IPC was held barred by the provision of s 195(1)(b), CrPC . The filing of a complaint for an offence under s 211, IPC was within the competency of the court *suo motu*, and the complainant himself could also have applied to the magistrate for an initiation of such an action.[41]

Where the applicant, after filing a complaint of dacoity before a magistrate, repeated the charges before the police, and the police found the complaint to be false and at the instance of the police, the applicant was put on his trial under this section, it was held that the offence, if any, was committed in relation to proceedings in court and a complaint in writing of such court was necessary.[42]

The same view has been taken in the undermentioned cases.[43]

Contrary View

The other view is that when a report is made to the police, charging any person with the commission of an offence and the police, after investigation, finds that the report is false and gets the report cancelled under the provisions of s 173, CrPC, the magistrate receiving the information and accepting it does not act as a court and the act of the magistrate in accepting the police report does not give rise to judicial proceedings. The offence of a false charge preferred against the information in respect of such report cannot be in relation to proceedings of a court and a complaint of the court is not necessary for his prosecution under this section.[44]1607

Supreme Court's View

Magistrates are specially labelled as courts by s 6 of the Code of Criminal Procedure 1973. When a magistrate acts judicially, he cannot but be regarded as a court. On a complaint lodged with the police, the magistrate bailed out the accused and ultimately discharged him on the basis of the final report submitted by the police. The Supreme Court held that the magistrate acted as a court and the proceeding before the magistrate was covered by the expression 'any proceeding before the court', and therefore, a subsequent complaint under s 211, IPC by the accused, against the complainant, was not maintainable in the absence of a written complaint by the magistrate concerned.[45]

Before a court can grant sanction or make the complaint, the record must show that it has exercised its own judgment on the facts proved before it.[46]

Consideration for making Complaint

Where the case is taken on file after investigation by the police under s 202, CrPC the subsequent discharge of the accused would not justify the making of a complaint under this section.[47] It is settled law that no person should be proceeded against for making a false charge against another unless he has been given an opportunity of substantiating his allegations by the tribunal before which the charge is made and which proposes to take action against him. It is the duty of the tribunal which makes a complaint under s 340, CrPC to come to a judicial finding that the allegations made before it are *prima facie* false, and it is obvious that a tribunal cannot come to such a decision without giving an opportunity to the person concerned to prove his allegations before it.[48]

Thus, where some false entries in the case diary were made by the police officials, by making interpolation in the entries of the case diary, thereby cooking up a false story against the accused, the Apex Court opined that it is expedient in the interest of justice that an inquiry be made in accordance with sub-s (1) of s 340, CrPC, into the commission of offences under ss 193, 195 and 211, IPC by the police officials. So, in the exercise of powers conferred under s 340(2), CrPC, a show cause notice was issued by the Apex Court to the police officials as to why a complaint should not be made against them for the aforesaid offences.[49]

Before granting sanction for a prosecution under this section, the court should be satisfied that: (a) the charge was really a false one, (b) there is reasonable probability that this can be established;[50] and (c) a prosecution is desirable in the interests of justice.[51]1608

The dismissal of a complaint under s 203 of the CrPC, is no bar to granting a sanction to prosecute under s 195 .[52] If the facts proved do not amount to an offence under this section, but disclose an offence under s 182(a), IPC, it is the duty of the magistrate to frame a charge against the accused under the latter section and try him accordingly.

The person accused of an offence under this section ought to be given an opportunity of substantiating the charge which he has brought, before sanction is given.[53]

Criminal Proceedings when not to be Stayed

Where the court is of the opinion that it is in the highest degree desirable, that the inquiry be

conducted both, in the interests of justice as well as of the accused and of all the parties concerned, as speedily as possible, the High Court would not be justified in staying the proceedings merely because a civil appeal from the judgment, out of which the criminal proceedings were initiated, is pending in the High Court.[54]

Criminal Proceedings when to be Stayed

On the other hand, if the charge in the criminal proceedings is in respect to a question which is a principal issue in the civil suit (*eg* the genuineness or otherwise of a document) the criminal proceedings ought to be stayed pending the decision in the suit.[55]

17. Charge

Where there is positive knowledge of the falseness of a charge, a prosecution for a false charge may be made under s 182, or this section,[56] but if the false charge is a serious one, the graver s 211 should be applied, and the trial should be full and fair.[57] Where the case is not a serious one, it is quite legal to prosecute under s 182 .[58]

The communication of a false accusation is, in fact, the laying of a false charge and unless the matter is actually communicated to a superior officer, it cannot be said that a false charge has been made out.

Where therefore, a complaint that a certain village *munsif* had received illegal gratification, was written and posted at Kumbakonam and addressed to the inspector-general of police, Madras, and the complaint was, on investigation, found to be false and groundless, it was held that it could not be said that by posting the letter at Kumbakonam the complainant even attempted to commit the offence under this1609 section, and the magistrate at Kumbakonam had no jurisdiction to try him for the offence under this section.[59]

Where a false complaint is lodged and dismissed, the magistrate dismissing the complaint is not competent to proceed against the complainant under this section. He should make a complaint under s 195 of the CrPC .[60]

An acquittal under this section will bar a second prosecution for an offence under s 182 .[61]

18. Form of Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, (*) on or about the.....day of.....at.....with intent to cause injury to one .....instituted criminal proceedings before.....charging the said .....with having committed the offence of .....(*or falsely charged the said..... before.....with having committed the offence of.....*) knowing at the time that there was no just or lawful ground for such proceeding (*or charge*) against the said.....and that you thereby committed an offence punishable under section 211 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

19. Proof

This section requires the proof of (a) an intention of the accused to cause injury to any person and (b) an initiation of any criminal proceeding, or the making of a false charge with having committed an offence, against a person, knowing that there was no just or lawful ground for such proceeding or charge.[62] The duty of the prosecution in a case under this section is to prove by satisfactory evidence that the charge was wilfully false to the knowledge of the maker of the charge. It is for the prosecution to establish their case, and if they fail to supply that proof which is required to secure the conviction of the accused, the failure on the part of the latter to examine only a particular person as a defence witness will not imply the guilt as having been proved.[63] Where a person is charged with instituting a criminal proceeding with an intent to cause injury, knowing that there was no just or lawful ground for such proceeding, it is for the prosecution to make out a distinct case against him, not for the accused, in the first instance, to show that he had just or lawful grounds. Where the facts are as consistent with an accused's innocence as with his guilt, innocence must be presumed; and criminal intent for knowledge is not necessarily imputable to every man who acts contrary to the provisions of the law.[64] It is not for the person charged to make out that his report was true, until it has been clearly traversed by evidence produced by the prosecution showing that it was false.[65]1610

The offences under s 182, IPC and this section are distinct. The offence under this section is much more serious. This being so, the positive knowledge or belief of the falsity of the information given, which must be established on a charge under s 182, is not essential under this section, it being enough to establish the negative *viz* that there was no just or lawful ground for the action taken, and that the accused knew this. Knowledge of the falseness of the information is essential under s 182 ; an insufficient foundation for the professed knowledge or belief is enough under this section.[66]

20. Punishment

If a false charge only has been made, it matters not what kind of offence has been charged; it may be the most grievous or the least serious, but the false charge in every case is punishable alike.[67] This is, however, not the case with a criminal proceeding, for under the second part of this section, if a false charge of an offence punishable with death *etc*, has been made, and criminal proceedings are instituted upon such a charge, the false accuser is liable to a considerably enhanced punishment. So, if *A* falsely charges *B* to the police with having committed a cognizable offence punishable with death or imprisonment for life, *etc,* he is liable to the enhanced punishment under the second part of the section.[68]

The offence under this section is one which should ordinarily be punished with a substantive sentence of imprisonment. The age of the accused is a factor to be taken into consideration in deciding the nature of the sentence. But if, for that reason, the magistrate deems fit only to impose a fine instead of an imprisonment, the amount of the fine should be determined so as to inflict on the accused a punishment comparable with what he would suffer had he been a younger man.[69]

Where a grave charge was made deliberately by persons who said that they were eye-witnesses of what they knew perfectly well that they had not seen, the case calls for a severe punishment.[70]

28 Substituted by Act 26 of 1955, s 117 and schedule, for 'transportation for life' (wef 1-1-1956).

29 *Empress v Pitam Rai* 5 ILR All 215 .

30 *Queen v Subhama Goundan* 1 Mad HCR 30 ; *Emperor v Abdul Hasan* ILR 1 All 497 .

31 *Ashrof Ali v Empress* 5 ILR Cal 281 .

32 *Queen v Nobokisto Ghose* 8 WR (Cr) 87 .

33 *Karim Buksh v Queen-Empress* ILR 17 Cal 574, 578 (FB).

34 Re *Kankanampati Nagayya*(1962) 2 Cr LJ 719; *Albert v State of Kerala* (1965) Ker LT 865, p 869 .

35 *Management of Bombay Co (P) Ltd v Its Workmen* AIR 1964 SC 1770, p 1778 ; *Santokh Singh v Izhar Hussain* AIR 1973 SC 2190, (1973) Cr LJ 1176, (1973) SCC (Cr) 828, (1973) 2 SCC 406, (1973) SCD 611, (1973) Cr AR 316 ; *PA Nallapemmal v PR Muthiah* (1973) Cr LJ 541, p 542, (1972) LW (Cr) 201 .

36 *Pachu Singh v Tribeni Sah* AIR 1939 Pat 178, p 179, 40 Cr LJ 157, (1938) PWN 904 ; *Sew Ratn Lal Binani v Emperor* AIR 1939 Cal 288, 40 Cr LJ 605 ; *U Po Thein v Buta Khan* AIR 1936 Rang 473 .

37 Re *Rambharthi Hirabharthi*AIR 1924 Bom 51, p 53 .

38 *State of Punjab v Brij Lal Palta* AIR 1969 SC 355 .

39 *Raghvendra v Kashinathbhat* ILR 19 Bom 717, p 725 .

40 *Emperor v Ramkrishna Yesawant Adarkar* 5 Cr LJ 105, p 109, 110, ILR 31 Bom 204, 9 Bom LR 33 .

41 *Dujai v State* (1962) 1 Cr LJ 627, p 628 .

42 *Apaya Tatoba Munde v Emperor* 14 Cr LJ 491, p 492 ; *Ram Raneu Chhattoraj v Emperor* AIR 1941 Cal 288, 12 Cr LJ 624 .

43 *Chintamani Paul (Kumhar) v State of Jharkhand* 2009 Cr LJ 2283 (Jhar) .

44 *Muthu Goundan v Emperor* AIR 1925 Mad 400, 26 Cr LJ 962, (1925) UWN 108 .

45 *State of Punjab v Brij Lal Palta* AIR 1969 SC 355 .

46 *Queen v Nobokisto Ghose* 8 WR (Cr) 87 .

47 *Queen v Hredoy Nath Biswas* 2 WR (Cr) 44, 45.

48 *Handeo Singh v Hanumandat Narain* 1 Cr LJ 7, 24 All WN 10 ; *R v Gopal Dhanuk* 7 ILR Cal 96 ; *Niaz Ali v R* 5 Cr LJ 396, 4 All LJ 361 ; *Bholanath Dutt v Hari Mohan Dutt* 7 Cr LJ 196, 7 CLJ 169 ; *Ahmed Kutty v State of Kerala* AIR 1963 Ker 152 .

49 Section 44, IPC .

50 *Gaya Prasad v Bhagar Singh* ILR 30 All 525 (PC), 5 All LJ 665, 10 Bom LR 1080, 12 CWN 1017, 8 CLJ 337, 18 Mad LJ 394, 11 OC 371 ; *Kapoor v Kairon* AIR 1966 All 66, (1966) Cr LJ 115 .

51 *Fitz Jogn v Mackinder* (1961) 9 CBNS 505, p 531 .

52 *Samun v Burby* (1896) 2 QBD 344 ; relied on in *Karupanna v Mada Nandan* 1 Cr LJ 1018, p 1020, 2 LBR 300 .

53 *Hari Das v State of West Bengal* AIR 1964 SC 1773, p 1776, (1964) 2 Cr LJ 737, per Hidayatulla J.

54 Sections 3 and 4 .

55 Section 199(2), Code of Criminal Procedure 1973.

56 *Karim Buksh v Queen-Empress* ILR 17 Cal 574, p 577 (FB) .

57 *King v Ma Ban Gyi* AIR 1938 Rang 397, p 399 .

58 *Karim Buksh v Queen-Empress* ILR 17 Cal 573, p 579 (FB) .

59 *Thakur Tewary* 4 CWN 347.

60 *Banti Pande v Emperor* AIR 1930 Pat 550, 129 IC 87 .

61 *Jogubandhu v Emperor* ILR 30 Cal 415 ; *Ahmed Khan v Emperor* 1 Cr LJ 1957, 109 PLR 1904 .

62 *Hidayat Ullah v Emperor* AIR 1936 Pesh 66, 37 Cr LJ 604 .

63 *Abdul Hakim Khan Chaudhauri v Emperor* AIR 1932 Cal 511, 33 Cr LJ 631, ILR 59 Cal 334 ; *Karim Buksh v Queen-Empress* ILR 17 Cal 574 (FB) ; *Faiz Alam v Emperor* AIR 1934 Pesh 112, 36 Cr LJ 1410 .

64 *Rayan Kutty v Emperor* ILR 26 Mad 640 .

65 *King v Ma Ban Gyi* AIR 1938 Rang 397, p 399 .

66 *Emperor v Karsan Jasang* AIR 1941 Bom 414, p 415, 43 Bom LR 858 ; *Sultan Ahmed v Emperor* AIR 1931 Nag 134, 32 Cr LJ 1009, 27 NLR 275 (FB) (overruling *Emperor v Chhoti Bi* 4 Cr LJ 240, 2 NLR 119); *Emperor v Hayat Fateh Din* AIR 1948 Lah 184, 49 Cr LJ 531 (FB) ; *Mahommad Hayat v Emperor* AIR 1922 Lah 133, 23 Cr LJ 82, 6 PWR (Cr) 1922 ; *Sultan v Empress* 3 PR 1888 (Cr) ; *King v Ma Ban Gyi* AIR 1938 Rang 397 ; *Satish Chandra Sadhukhan v Balaram Banerjee* (1968) Cr LJ 1534 (Cal) ; Re *TM Sivaprakasam Pillai*AIR 1948 Mad 292, p 293, 49 Cr LJ 385 .

67 *Queen v Bonomally Sobai* 5 WR (Cr) 32 .

68 *Karim Baksh v Queen-Empress* ILR 17 Cal 574 (FB) ; *Sessions Judge of Tinnevelly Division v Sivan Chetti* ILR 32 Mad 258, 9 Cr LJ 170 (FB) ; Re *Kankanumpati Nagayya*(1962) 2 Cr LJ 719; *Parameshwar Lal v Emperor* AIR 1925 Pat 678, 27 Cr LJ 373, ILR 4 Pat 472 ; *Nanhkoo Mahton v Emperor* AIR 1936 Pat 358, 37 Cr LJ 862 ; *Balak Ram v Emperor* AIR 1942 Oudh 100, 42 Cr LJ 833 ; *Faiz Alam v Emperor* AIR 1934 Pesh 112, 35 Cr LJ 1410 ; *Dharam Das Hiranand v Emperor* AIR 1938 Sind 213, 40 Cr LJ 12, ILR (1939) Kar 241 ; *Jhammatmal Ahamad v Emperor* AIR 1939 Sind 274, 41 Cr LJ 8 ; *Albert v State of Kerala* AIR 1966 Ker 11, (1956) Ker LT 865, (1966) Cr LJ 26 (FB) .

69 *Kamlapat v State of West Bengal* AIR 1979 SC 777, (1979) Cr LJ 679, (1979) All Cr Cas 49, (1979) Mad LJ (Cr) 56, (1979) BBCJ (SC) 25, (1979) Cr LR (SC) 128, this decision of the Supreme Court finally settles the above controversy and the case-law upholding the contrary view is now no more good law.

70 *Ahmed Kutty v State of Kerala* AIR 1963 Ker 152, p 154, (1963) 1 Cr LJ 597, (1963) Mad LJ (Cr) 396 ; *Shankar Lal Tewari v Abdul Rahman* AIR 1953 Assam 204, (1953) Cr LJ 1598 ; *Saminatha Thevan v Emperor* 13 Cr LJ 303, (1912) Mad WN 1125 ; Re *Mallala Obiah*AIR 1918 Mad 731, 19 Cr LJ 38 ; *Kashi Ram v Emperor* AIR 1924 All 779, 25 Cr LJ 1239 .

71 *Patil Subba Reddi v Emperor* AIR 1936 Mad 160, 37 Cr LJ 357, (1935) Mad WN 1197 ; (relying on Re *Krishna Baipadithaya* 11 Cr LJ 286, 20 Mad LJ 132; and distinguishing *Public Prosecutor v Chidambaran* AIR 1928 Mad 791, 29 Cr LJ 717, 55 Mad LJ 231); *Guruswami Naidu v Villis Guruswami Naidu* AIR 1951 Mad 812, (1951) 52 Cr LJ 857, (1951) 1 Mad LJ 426, (1951) Mad WN 255, (1951) Mad WN (Cr) 83 .

72 *Master Zodpa v Emperor* AIR 1936 Lah 828, p 829, 37 Cr LJ 1043, 38 PLR 16 ; *Santokh Singh v Izhar Hussain* AIR 1973 SC 2190, p 2194, (1973) Cr LJ 1176, (1973) SCC (Cr) 828 .

73 *Emperor v Ivar Henry Bridgnell* AIR 1937 Sind 193, p 196, 38 Cr LJ 1002, 31 SLR 150 .

74 Re *Kankanampati Nagayya*(1962) 2 Cr LJ 719, p 720; *Sessions Judge v Sivan Chetti* ILR 32 Mad 258 (FB) .

75 *Raya Kutti v Emperor* ILR 26 Mad 640, 1 Weir 190 .

76 *Queen-Empress v Karigowda* ILR 19 Bom 51 .

77 *Sessions Judge, Tinnevelly v Sivan Chetti* ILR 32 Mad 258, 9 Cr LJ 170 (FB) .

78 *Dasrathi Mondal v Hari Das* AIR 1959 Cal 293, (1959) Cr LJ 837 .

79 *Hari Das v State of West Bengal* AIR 1964 SC 1773, (1964) 2 Cr LJ 737 .

80 *Santokh Singh v Izhar Hussain* AIR 1973 SC 2190, (1973) SCC (Cr) 828, (1973) 2 SCC 406, (1973) SCD 611, (1973) Cr AR 316, (1973) Cr LR 473, (1973) Cr LJ 1176 .

81 *Dasarathi Mondal v Hari Das* AIR 1959 Cal 293, (1959) Cr LJ 837 .

82 *Chenna Malli v R* ILR 27 Mad 129, 1 Weir 193 ; *Hardes Singh v Hanuman Das* 1 Cr LJ 7, 24 All WN 10, ILR 6 All 244 ; *Nga Ba Shein v Emperor* AIR 1934 Rang 21, 35 Cr LJ 1259 ; *Kashi Ram v King-Emperor* AIR 1924 All 779 ; *Emperor v Hayat Fateh Din* AIR 1948 Lah 184 (FB), 49 Cr LJ 531; *Empress v Abdul Hasan* ILR 1 All 497 ; *Prag Datt v Emperor* AIR 1928 All 765, 29 Cr LJ 938, ILR 51 All 382 ; *Subhag Ahir v Emperor* AIR 1932 Pat 152, 33 Cr LJ 153, ILR 11 Pat 155 ; *Brown v Ananda Lal Mullick* ILR 44 Cal 650 .

83 *Nga Bon She v Emperor* AIR 1917 LB 108, p 109, 18 Cr LJ 362 ; *Rayan Kutti v Emperor* ILR 26 Mad 640 ; *Government Advocate v Kumar Singh* AIR 1938 Pat 83, p 87, 39 Cr LJ 314 ; *Santokh Singh v Izhar Hussain* AIR 1973 SC 2190, (1973) SCC (Cr) 828, (1973) Cr LJ 1176, (1973) SCD 611 .

84 *Apaya Tatoba Munde v Emperor* 14 Cr LJ 491, p 492 .

85 *Solaimuthu Pillai v Murugaih Moopan* 16 Cr LJ 423, (1915) Mad WN 272 .

86 *Ganpatram Dinanath Agrawal v Ramabai* AIR 1950 Nag 20, (1950) 51 Cr LJ 267, (1950) ILR Nag 208, (1949) Nag LJ 604 ; *Abdul Ghafur v Crown* AIR 1925 Lah 325, 26 Cr LJ 1165 ; *Mathura Prasad v Emperor* AIR 1917 All 223, 18 Cr LJ 1017, ILR 39 All 715, 15 All LJ 767 .

87 *Santokh Singh v Izhar Hussain* AIR 1973 SC 2190, p 2194, (1973) Cr LJ 1176, (1973) Cr AR 316, (1973) SCD 611 .

88 *Kashi Ram v King-Emperor* AIR 1924 All 779, p 780, 25 Cr LJ 1239, ILR 46 All 906, 22 All LJ 829 ; *Nag Ba Shein v Emperor* AIR 1934 Rang 21, 35 Cr LJ 1259 .

89 *Malappa Reddi v Emperor* ILR 27 Mad 127, 1 Weir 192, 2 Weir 117 .

90 *Santokh Singh v Izhar Hussain* AIR 1973 SC 2190, (1973) SCC (Cr) 828, (1973) 2 SCC 406, (1973) SCD 611, (1973) Cr AR 316, (1973) Cr LJ 1176 .

91 *Emperor v Hayat Fateh Din* AIR 1948 Lah 184, p 187, 49 Cr LJ 531 (FB) .

92 Re *Jamoona* ILR 6 Cal 620; *Munipan Chetti v Balayan Chetti* ILR 31 Mad 505, 19 Mad LJ 222 ; *Chenna Mal Gowda v Emperor* ILR 27 Mad 129, 1 Weir 193 ; Re *Subban Samben*AIR 1944 Mad 391 ((1)), (1944) 1 Mad LJ 379 ; *Mathura Prasad v Emperor* AIR 1917 All 223, 18 Cr LJ 1017, ILR 39 All 715, 15 All LJ 767 ; *Bhawani Sahal v Emperor* AIR 1932 Lah 246, 33 Cr LJ 409, ILR 13 Lah 568, 33 All LR 174 ; *Amanat Ali v Emperor* AIR 1929 Cal 724, 31 Cr LJ 420 .

93 *Session Judge of Tinnevelly v Sivan Chetty* ILR 32 Mad 258, 9 Cr LJ 170 (FB) ; *Chintamani Paul (Kumhar) v State of Jharkhand* 2009 Cr LJ 2283 (Jhar) .

94 *Banti Pande v Emperor* AIR 1930 Pat 550, p 554 ; *Hidayatullah v Emperor* AIR 1936 Pesh 66, 37 Cr LJ 604 ; *Govt Advocate, Bihar v Kumar Singh* AIR 1938 Pat 83, 39 Cr LJ 314, 16 ILR Pat 571, 19 PLT 51 ; *Queen-Empress v Karigowda* ILR 19 Bom 51 .

95 *Shiv Kumar Prasad Singh v State of Bihar* (1984) Cr LJ 1417 .

96 *R v Jamoona* ILR 6 Cal 620 .

97 *R v Subbanna* 1 Mad HCR 30, 1 Weir 184, per Scotland CJ; *R v Abdul Hassan* ILR 1 All 497 ; *R v Salik* ILR 1 All 527 ; *R v Jijibhai Govind* ILR 22 Bom 596, p 599 .

1 *R v Abdul Hassan* ILR 1 All 497 .

2 *Rayan Kutti v Emperor* ILR 26 Mad 640, 1 Weir 122 .

3 *Zorawar Singh v Emperor* 12 Cr LJ 433, 8 All LJ 1106 ; *Mathura Prasad v Emperor* AIR 1917 All 223 ; *Bhawani Sahai v Emperor* AIR 1932 Lah 246 ; *Queen-Empress v Kangowon* ILR 19 Bom 51 ; *Banti Pandey v Emperor* AIR 1930 Pat 550 .

4 *Chenna Malli Gowda v Emperor* ILR 27 Mad 129, 1 Cr LJ 426, 1 Weir 193 .

5 *Abdul Hakim Khan Chaudhuri v Emperor* AIR 1932 Cal 511 .

6 *Rayan Kutty v Emperor* ILR 26 Mad 640 .

7 *Government Advocate, Bihar v Kumar Singh* AIR 1938 Pat 83, p 87, 39 Cr LJ 314 .

8 Re *Tatia Hari* 1 Bom LR 11.

9 *Queen Empress v Atar Ali* ILR 11 Cal 79 .

10 *Girdhari Naik v Empress* (1901) 5 CWN 727 .

11 *Sahadeo Karan Singh v Emperor* AIR 1937 Pat 84, p 85, 38 Cr LJ 462, (1937) PWN 243 ; *Ahmed Kutty v State of Kerala* AIR 1963 Ker 152, (1963) 1 Cr LJ 597 .

12 *Hari Das v State of West Bengal* AIR 1964 SC 1773, p 1776 .

13 *Sew Ratan Lal Binani v Emperor* AIR 1939 Cal 288, 40 Cr LJ 605 .

14 *Ahmed Kutty v State of Kerala* AIR 1963 Ker 152, 154, (1963) 1 Cr LJ 597, (1962) Ker LT 564, (1963) Mad LJ (Cr) 396 ; *Hassan Mirza v Emperor* 15 Cr LJ 355, 18 CWN 391 .

15 *Ram Prasad v Emperor* 13 Cr LJ 897, 904, 17 CWN 379, 16 CLJ 453 .

16 *AN Gupta v State* (1999) Cr LJ 4933 (Raj) .

17 *R v Navalmal* 3 Bom HCR 16 .

18 *Hicks v Faulkner* LR 8 QBD 167 ; *Abrath v NE Rly Co* 11 App Cases 247 (HL) .

19 Re *Vridda Chetti Pillai* 1 Weir 185.

20 *Perryman v Lister* LR 3 Ex 197 ; *Lister v Perryman* LR 4 HL 521 ; *R v Pran Kissen* 6 WR (Cr) 15 ; *Ram Prasad v R* 15 Cr LJ 897 .

21 *Karrim Buksh v R* 2 Cr LJ 67, 12 PR (Cr) 1905, 6 PLR 278 ; *Mirza Hassan v R* 15 Cr LJ 355 .

22 *Abdul Shakoor v State* AIR 1953 Raj 115, p 116, 54 Cr LJ 829 .

23 *Murdad v Queen-Empress* 29 PR 95 (Cr) .

24 *Bachu Singh v Triveni Sah* AIR 1939 Pat 178, 40 Cr LJ 157, (1938) PWN 904 .

25 *Sheo Bilas v State* AIR 1959 All 14 ; *Emperor v Raja Kushal Pal Singh* AIR 1931 All 443 (FB) ; *Virindar Kumar v State of Punjab* AIR 1956 SC 153 ; *Karunakaran Nambiar v State of Kerala,* 2012 (3) KLJ 685, ILR 2012 (4) Ker 361 .

26 *Raji v Allaudin M Samo Mukhtiarkar* AIR 1939 Sind 65 ; *Nyan Chand v State* AIR 1951 Assam 54, (1951) Cr LJ 394 ; *ML Sethi v RP Kapur* (1965) All LJ 506, (1965) All WR 132 .

27 *Robin Ray Choudhary v State* (1998) Cr LJ 1699 (Cal) .

28 *Harish Chandra Pathak v Anil Vats* 2008 Cr LJ 2965, p 2966 (All) .

29 *Amitabh Adhar & Anor v NCT of Delhi* (2000) Cr LJ 4772 (Del) .

30 *Subhash Ramchandra Durga v Deepak Annasaheb Gat* (2001) I RCR 368 (Bom) ; *Dongari Venkatram v M Tirpathanna* (2006) Cr LJ 2697 (AP) ; *Rajkumar Indarchand Agrawal v State of Maharashtra* (2005) Cr LJ 4673 (Bom) .

31 *Karunakaran Nambiar v State of Kerala* 2012 (3) KLJ 685, ILR 2012 (4) Ker 361 (Ker) .

32 *Rajkumar Malpani v Akella Sreenivasa Rao* 2011 Cr LJ 2997, p 2998 (AP) .

33 Re *Adhir Chandra Tiwary alias Adhru Tiwari*(1996) 2 East Cr C 613, p 615 (Pat).

34 Section 437, Code of Criminal Procedure .

35 *Badri v State* (1963) 2 Cr LJ 64, (1963) ILR All 359 (Cr), (1963) All LJ 334 ; **approved** in *PC Gupta v State* (1974) Cr LJ 945 (All)(FB); *Daulat Ram v Rajinder Motwani* (1992) JCC 544, p 548 (Del) .

36 *Bajaji Appaji v Emperor* AIR 1946 Bom 7 .

37 Re *PM Kamath*AIR 1954 Mad 561 ; *Dholiah v Sub-Inspector of Police* AIR 1931 Mad 702, 32 Cr LJ 1215 .

38 *MP Sirajudeen v M Ganesan* (1987) 1 Crimes 561 .

39 *Prayag Sao and Uday Shankar Ojha v State of Bihar* (1996) 1 East Cr C 10, p 14, 19 (Pat)(DB) .

40 *Sis Ram v State of Haryana* (1993) 1 CCC 349 (P&H) .

41 *Imtiaz Ahmad v State of Uttar Pradesh* (2001) III CCR 98 (All) .

42 *Ghaslawan Sing v Emperor* AIR 1926 All 613, 27 Cr LJ 1014 ; *Sheikh Samir v Sajidar Rehman* AIR 1927 Cal 95, 25 Cr LJ 86, ILR 53 Cal 824 .

43 *JD Boywalla v Sorab-Rustomji Engineer* AIR 1941 Bom 294, 42 Cr LJ 814 ; *State v Vipra Khunji* AIR 1952 Sau 67, (1952) Cr LJ 1084 ; *Chuhermal Nihalmal v Emperor* AIR 1929 Sind 132, 30 Cr LJ 732 ; *Ghulam Rasul v Emperor* AIR 1936 Lah 238, 37 Cr LJ 426 ; *EP Subba Reddy v State* AIR 1969 AP 281 ; *Narayan v State* (1972) Cr LJ 1446 (FB)(Del).

44 *Pukhraj v Sheshmal* AIR 1961 Raj 231, (1961) 2 Cr LJ 691 ; *Emperor v Hayat Fateh Din* AIR 1948 Lah 784 (FB), 49 Cr LJ 531; *Emperor v Birdichand Chunilal* AIR 1948 Nag 244, 49 Cr LJ 326 ; *Registrar, High Court v Kodangi* AIR 1932 Mad 363 (FB), 33 Cr LJ 479; *Raji v Allauddin M Samo* AIR 1939 Sind 65, 40 Cr LJ 461 ; *Mochamvelli Kunhammad v State of Kerala* AIR 1966 Ker 242, (1966) Cr LJ 1136 ; *Satish Chandra Sadhukhan v Balaram Banerjee* (1968) Cr LJ 1534 .

45 *Kamlapat v State of West Bengal* AIR 1979 SC 777, (1979) Cr LJ 679, (1979) All Cr Cas 49, (1979) Mad LJ (Cr) 56, (1979) BBCJ (SC) 25, (1979) Cr LR (SC) 128, this decision of the Supreme Court finally settles the above controversy and the case-law upholding the contrary view is now no more good law.

46 *Tayab Ullah v King-Emperor* 24 CLJ 134, 20 CWN 1265 ; *FA Brown v Ananda Lal Mullick* 18 Cr LJ 25, 20 CWN 1347 .

47 Re *CR Seshadri Ayyangar* 43 Cr LJ 32.

48 *Bhawani Sahai v Emperor* AIR 1932 Lah 246, p 248, 33 Cr LJ 409, ILR 13 Lah 568, 33 PLR 174 .

49 *Mohd Zahid v Govt of NCT of Delhi* (1998) Cr LJ 290 (SC) .

50 *Jadunandan v R* 11 Cr LJ 37, 10 CLJ 564 .

51 *Budh Ram v R* 3 Cr LJ 121, 6 PLR 627 ; *Shiv Ram v State of Himachal Pradesh* (1992) 1 Sim LJ 1054 (HP) .

52 *Surya Harlani v R* 6 CWN 295 ; *Chiragh Din v Zahur Din* 6 Cr LJ 258, 2 PWR 63 (Cr) .

53 *Jogendra Lal v Babu Ballabh* 2 Cr LJ 615, 2 CLR 228 ; *R v Tula* ILR 29 All 587 ; *Zain-ul-abdin v Nawab Din* 9 Cr LJ 152, 4 PWR 2 (Cr) ; *R v Tabarak Zaman* ILR 30 All 521 .

54 *Hem Chandra Ray v Atal Behari Ray* ILR 35 Cal 909 ; **followed** in *Brojobashi Panda v R* 13 CWN 398 .

55 *Shashi Bhushan v R* ILR 38 Cal 106 .

56 1 Weir 120; *Barkatulla v Sadho Kalwar* 13 Cr LJ 855 .

57 *Apaya Tatoba Mundse v R* 14 Cr LJ 491 .

58 *Bhokteram v Heera Kolita* 5 ILR Cal 184 ; Re *Russick Lal Mullick* 7 CLR 282; *R v Sarada Prasad* ILR 32 Cal 180, p 185, 186, where all the cases are noticed; *Gati Mandal v R* 4 Cr LJ 68, 4 CLJ 88 ; *Thakar Singh v Chattar Pal* 20 PR 1910 (Cr) .

59 Re *TM Sivaprakasam Pillai*AIR 1948 Mad 292, p 293, 49 Cr LJ 385, (1948) ILR Mad 893, (1948) 1 Mad LJ 21 .

60 *Ambika Singh v King-Emperor* AIR 1926 Pat 368, 27 Cr LJ 987, 5 ILR Pat 450, 7 PLJ 716 .

61 Re *K Ganapathi Bhattu* ILR 46 Mad 308, 14 Cr LJ 214, 24 Mad LJ 463.

62 *PA Nallaperumal v PR Muthiah* (1973) Cr LJ 541, p 542, (1972) Mad LW (Cr) 201 .

63 *Hassan Mirza v Emperor* 15 Cr LJ 355, 18 CWN 391 .

64 *Queen v Nobokisto Ghose* 8 WR (Cr) 87 .

65 Re *Sankaram Serval*AIR 1929 Mad 496, 30 Cr LJ 167, 30 Mad LW 795 .

66 *R v Ramachandra* ILR 31 Bom 204 ; *Thakar Singh v Chattar Pal* 11 Cr LJ 420, 20 PR 1910 (Cr) ; *R v Ramakrishna* 5 Cr LJ 105, 9 Bom LJ 33 ; *Raghavendra v Kashinath Bhat* ILR 19 Bom 717 ; *Walaiti Ram v State of Punjab* 1977 Ch LR 149, 151 (Punj) .

67 *R v Pitam Jai* 5 ILR All 215 .

68 *Karim Buksh v R* ILR 17 Cal 574 (FB) .

69 *Emperor v PRS Muthia Chetti* AIR 1917 Mad 667 ((2)), 17 Cr LJ 158, (1916) 1 Mad WN 1, per Ayling J.

70 *Mahommad Hayat v Emperor* AIR 1922 Lah 133, p 134, 23 Cr LJ 82, 6 PWR (Cr) 1922 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 212.

Harbouring offender.--

Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment;

if a capital offence.--shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment.--and if the offence is punishable

with [71][imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either1611 description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment which may extend to one year, and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

[72]["Offence" in this section includes any act committed at any place out of [73][India], which, if committed in [74][India], would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in [75][India]].

Exception.--This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.

Illustration

A, knowing that *B* has committed dacoity, knowingly conceals *B* in order to screen him from legal punishment. Here, as *B* is liable to [76][imprisonment for life], *A* is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

Comments

1. Scope and Applicability

From the definition it is manifest that it is only harbouring and concealing a person who the person harbouring thinks or has reason to believe to be the offender that the provision is attracted subject to the condition that such harbouring and concealment should be with the intention of screening him from legal punishment given in s 212 .[77]1612 The object of s 212, IPC as it appears from the language of the provision is to prevent intentional harbouring or concealing of an offender with the criminal intention of screening him from legal punishment.[78]

This section applies to the harbouring of persons who have actually committed an offence and it does not apply to the harbouring of persons not being criminals, who merely abscond to avoid or delay a judicial investigation. The section says nothing about the harbouring of an absconder or an accused person. It renders punishable only the harbouring of a person when it is known, or there is reason to believe that he is the offender.[79] Until the offender has been convicted of the offence he is alleged to have committed, no prosecution can be launched under this section for harbouring him.[80]

To attract the provisions of s 212, IPC it is necessary to establish the commission of an offence, the harbouring or concealing of the person known or believed to be the offender, and such concealment must be with the intention of screening him from legal punishment.[81]

For convicting a person under s 212, the following essential ingredients must be established:

(i) the offence must have been committed, *ie*, completed and there must be an offender;
(ii) there must be harbouring or concealment of a person by the accused;
(iii) the accused knows or has reason to believe that such harboured or concealed person is the offender;
(iv) there must be an intention on the part of the accused to screen the offender from legal punishment.[82]

A mere help given to a person for absconding without any knowledge that he has committed a crime is not enough. The person accused of s 212 must harbour or conceal the person by providing him shelter or otherwise. He must have given shelter to him with knowledge that he is an offender or has reason to believe to be a offender. The word used is 'offender' and not 'accused' or a person convicted for that offence. The person who is sheltering or harbouring or concealing that person must have knowledge or has reason to believe that he is the 'offender'.[83]

For attracting s 212 also, it is essential to prove that an offence has been committed and mere suspicion that it has been committed is not enough and accused knew or has reason to believe that such offence had been committed and with requisite knowledge and with the intention to screen the offender from legal punishment, he must have harboured or concealed the offender, but, the intention cannot be presumed. If the accused did not know that an offence has been committed or is not1613 aware or has no reason to know the identity of the offender, s 212 is not attracted and burden of proof is on the prosecution.[84]

2. Legislative Changes

The clause defining 'offence' under this section was introduced by s 7 of the Indian Criminal Law Amendment Act 1894. In para 5, the words 'the Provinces' were substituted for the words 'British India' by the Adaptation of Laws Order 1948. The words 'the States' were substituted for the words 'the Provinces' by the Adaptation of Laws Order 1950. The word 'India' was substituted for the word 'The States' by Act 3 of 1951. The words 'imprisonment for life' were substituted for the words 'transportation for life' by s 177 and the Schedule of Act 1955.

3. Analogous Law

The offence of 'harbouring', which is dealt with in this section, is that which under English Law, renders a person an 'accessory after the fact' to the crime committed by the person harboured. An accessory after the fact is a person who, knowing a felony to have been committed by another receives, relieves, comforts or assists the felon, *eg* in the case of a murder, by assisting the murderer to conceal the death or to evade the pursuit of justice.[85] Similar offences under special circumstances are dealt with under ss 130, 136, 157 and 216 . The only exception is in the favour of the husband or wife as the case may be.

4. Section 212 , IPC Considered with Section 3(4) of the TADA Act

A careful analysis of the ingredients of s 212, IPC and s 3(4) of the TADA Act would make it clear that there is a clear distinction between them. Under s 212, IPC an offence must be alleged to have been committed and the offender must be alleged to have committed that offence; whereas under s 3(4) of TADA Act what is made an offence is the harbouring or concealing or the attempt to harbour or conceal any terrorist and no more. If a person is alleged to be a terrorist and ultimately he is proved to be so, it is enough. It is not necessary to have established that even at the time of filing of the charge sheet the offence must have been proved to have been committed. The further ingredient, that the persons who are harboured are known to the harbourer, or he has reason to believe to be the offenders, with the intention of screening them from legal punishment, is also absent. Therefore, the two sections, s 212, IPC, and s 3(4), TADA Act, are different and not identical.[86](The Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) has now been repealed.)

5. Essential Ingredients of the Offence

There are three essentials of an offence under this section:

(a) The offence must have been committed, *i.e.*, completed, and hence there must be an

offender;

(b) Harbouring or concealment of the person known or reasonably believed to be the offender; and1614

(c) Intention to screen the offender from legal punishment *i.e.* the mere giving of food and shelter as a matter of humanity to a person in distress is not punishable.[87]

A reading of s 212, IPC will disclose that three things have to be proved by the prosecution *viz*: (a) there must be an offender, (b) the offender should have already committed an offence and (c) the person accused under the section should have harboured the offender knowing that he is an offender.[88]

Where the prosecution witness had given shelter to the accused, but he had no knowledge that murder had been committed, held the prosecution witness could not be prosecuted for the offence of harbouring an offender under s 212, IPC .[89]

6. Offence

The word 'offence' denotes a thing made punishable under this Code.[90] For the purposes of this section the word 'offence' also includes an act committed out of India, if it is punishable under any of the sections of the Indian Penal Code specified in the second paragraph of this section, or under any special or local law, if punishable thereunder with imprisonment for a term of six months or upwards whether with or without fine.

7. 'Harbours'--Meaning of

'Harbours' means to shelter, afford lodging or protection to, to give refuge to. It also includes 'to conceal'. Harbour or conceal involve an element of secrecy.[91] According to s 52A the word 'harbour' includes supplying a person with shelter, food, drink, money, clothes, arms, ammunitions or means of conveyance, or assisting a person by any means, whether of the same kind as those enumerated in the section or not, to evade apprehension.[92]

In *Emperor v Husain Baksh* ,[93] the Allahabad High Court took a restricted view of the definition of 'harbouring' and held that it did not include assisting an accused person to escape by merely telling lies and misleading the police as to his whereabouts. So also in *Damri v King-Emperor* ,[94] where a pony was lent to some dacoits to facilitate them in removing the loot, another judge of the same court held that as the pony was not lent to the dacoits with any of the objects comprised in the definition of 'harbour' in s 216B [95] of the Code, the act of lending the pony did not amount to harbouring. But this view has not been accepted by the Calcutta and1615 Lahore High Courts. In *Muchi Mian v Emperor* ,[1] the accused, while answering an inquiry of an inspector of police, replied that his brother, who was wanted on a charge under s 411, IPC was in the house and promised to produce him. He then went inside the house and after a delay of 15 minutes returned with his brother's son, and said that he had made a mistake and that it was the son who had come to the house the preceding evening. The inspector, however, subsequently reached the house and found the wanted brother hiding in the thatch of the roof of the house. On these facts it was held that as the accused, by the methods he employed, gave time and opportunity for the offender to conceal himself or effect his escape and thereby gave him material assistance in evading apprehension, he was guilty of harbouring. Following this, in *Tara Singh v King-Emperor* ,[2] the Lahore High Court has held that when a person gives false information to the Police with respect to a proclaimed offender, or warns him of the approach of the Police, in order that the said offender may make good his escape, he is guilty of the offence of harbouring him.

Where in a murder case the co-accused knew the involvement of the accused in the commission of the offence of murder, the co-accused being one of the directors in the company where the main accused was also a director, the act of the co-accused of sending his car to pick up the accused from the city of occurrence to facilitate the escape of the accused, renders him liable to be charged under s

212, IPC .[3] In the assassination case of the former Prime Minister of India, Sh. Rajiv Gandhi, the accused (namely Irumbori) assisted the main accused persons by concealing them in a house to evade their apprehension, so his conviction under s 212, IPC was confirmed by the Apex Court.[4]

In framing the new definition in s 52A, IPC, the legislature in effect, overruled the Allahabad view and approved the view taken by the Calcutta and Lahore High Courts.

8. Mere Knowledge of Whereabouts is not Harbouring

A mere knowledge of the whereabouts of an offender does not amount to harbouring. Where, therefore, a father who was asked to produce his son, who was charged with an offence and was absconding, produced him when the police demanded him, it was held that the father was not guilty of harbouring his son.[5]

A man who employs another person to harbour or assist the principal, may be convicted as an accessory after the fact, although he himself did no act of relieving or assisting the principal.[6] And a man may make himself an accessory after the fact to a larceny of his own goods or to a robbery on himself by harbouring or concealing the thief or assisting in his escape.[7]

Section 52A and the commentary thereunder may also be referred to.

9. 'Conceals a Person'--Meaning of

In a Patna case, certain offenders were found concealing themselves in the courtyard (*dalan*) of the accused and were arrested by the villagers. When asked by the1616 villagers how the offenders came to be there, the accused gave no answer. In his defence the accused pleaded that it was he himself who arrested the offenders, but his story was not believed. It was held that these facts were not sufficient to warrant his conviction on the footing that he had concealed the offenders.[8]

10. 'Whom he Knows'--Meaning of

A person can be supposed to 'know' where there is a direct appeal to his senses.[9] It is necessary for a receiver to have had notice, either express or implied, of the felony having been committed.[10]

Where the name of the accused was not mentioned as an accused in an FIR, that she harboured her son, there was also no evidence on record collected by the prosecution that it was in the knowledge of the accused that her son had committed the offence. Even if the son, after committing an offence, came to the house of the accused, and it is not in the knowledge of the accused, even then no offence is made out against the accused (mother). Therefore, criminal proceedings under ss 212 and 216 *etc* against the accused were quashed.[11]

11. 'Reason to Believe'--What is

A person has 'reason to believe' if he has sufficient cause to believe the thing but not otherwise.[12]

Section 26 and the commentary thereunder may be referred to.

12. 'To be the Offender'--Meaning of

This section is attracted only when it is established that the person had harboured or concealed a person, whom he knew or reasonably believed, to be an offender.[13] The word 'offender' used in this section means a person who has contravened the provision of any criminal law, which is punishable either with death, imprisonment for life, imprisonment or fine. Where there is neither any affirmative nor any circumstantial evidence to bring home the fact that the accused knew or had reason to believe

that the person he was harbouring was an offender within the meaning of this section, his conviction under it cannot be sustained.[14]

'Offender' in s 212 does not mean 'convicted offender'. Even when the main offender is not punished by the court, the persons who harboured or concealed the offender would be tried and convicted if the other ingredients of s 212, IPC are satisfied in the case.[15]

This section says nothing about the harbouring of an absconder or an accused person. It renders punishable only the harbouring of a person when it is known, or there is reason to believe, that he is the offender. The first thing to be proved in a1617 case under this section is that an offence has been committed by the person harboured. Until actually convicted, a person is entitled to the presumption that he is innocent. He becomes an offender only when he has been convicted of an offence. Until he has been actually convicted and pronounced to be an offender, a prosecution for harbouring him is premature.[16]

As seen above, one of the ingredients of the offence under this section is that the person who harbours an 'offender' should know or should have reason to believe that he is an offender and such harbouring should be with the intention of screening such person from legal punishment but all the same, the requirement is that the person whom he harbors, should be believed to be an offender and this character of the person can be proved only when he has been judicially found to be a person guilty of an offence. If he is ultimately acquitted or found innocent or falsely roped in, it cannot be said that the person who was harbouring the said 'offender' was actually harbouring an 'offender' within the meaning of s 212 .[17]

In a Patna case, it was in evidence, that after a dacoity in the neighbourhood, three persons, known as *domes*, were found concealed in the *dalan* of the accused and were arrested by the villagers. It was also in evidence that in connection with this dacoity, not only were processes under ss 87 and 88, (now ss 82 and 83) CrPC taken out and served against the three *domes*, but proclamations by the beat of a drum were made. But the proclamations did not name these particular *domes* as the offenders, nor specified the particular dacoity of which evidence had been given in the case as the dacoity of which they were suspected. On a charge under this section, the accused pleaded that it was he himself who had arrested the *domes* but his story was not believed. It was held that suspicion would be aroused by seeing armed *domes* so as to lead to their arrest; but this is not enough for the section to apply and that the facts established were insufficient to warrant the conclusion that the accused had concealed persons, whom he knew or had reason to believe as the offenders, in relation to the particular dacoity in question.[18]

13. Intention to Screen Offenders

Another essential ingredient to the application of the section is that the harbouring or concealing must be with the intention of screening the offender from legal punishment. There can be no conviction under this section until such an intention is established.

14. Special Provision for Husband or Wife

Commentary under s 201, *ante* may be referred to.

The exception to the section makes a special provision for husband and wife. This exception in favour of the husband or wife of the offender is wider than that of the English law, under which only the wife is exempted from liability. Under the English1618 law, except under special statutory provisions,[19] a married woman does not become an accessory after the fact to a felony committed by her husband by receiving him, nor does she become a principal in receiving her husband when his offence is treason, the law considering that she is bound to receive him and not to discover him.[20] Nor is she liable criminally, for receiving jointly with her husband, any offender. This, however, applies to no other relation except a wife to her husband; therefore, a husband can be guilty as an accessory after the

fact to his wife,[21] or a daughter to her father, and so on. But if the wife, acting alone, receives a felon, her husband being ignorant, she is the accessory and not the husband.[22]

The position in India is different. The 'exception' appended to s 212, IPC, clearly provides that the provision of harbouring or concealing the offender does not apply to any case in which the harbour or concealment is by the husband or wife of the offender.

15. Procedure

The offence under this section is cognizable and a warrant may ordinarily issue in the first instance. It is bailable but not compoundable. It is triable by a magistrate of the first class.[23]

The allegation under s 212, IPC is not a separate offence and it can be tried along with main sessions case.[24]

Where the accused against whom offences under ss 212 and 216, IPC were alleged, was produced before the judicial magistrate, the judicial magistrate remanded him to police custody under s 167(3), CrPC without recording the reasons, despite the fact that the offences alleged were bailable offences, the order of remand for police custody was held illegal and against the provisions of s 436, CrPC and so the same was quashed.[25]

The limitation for taking cognizance of the offence falling under paragraph three of this section is three years and that of an offence falling under paragraph four may be six months or one year, depending on the punishment prescribed for the offence actually committed as provided by s 468 of the Code of Criminal Procedure 1973. There is however, no limitation prescribed for the offences mentioned in paragraph two of the section.

16. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (name of accused) as follows:
>
> That on or about the..... day of... the offence of..... (*specify it*) was committed at..... (*specify the place*) by *AB,* and that you on or about the....day of.....at....harboured (*or concealed*) the said *AB,* knowing (*or having reason to believe)* at the time of the said1619 harbouring (*or concealing*), that the said *AB* had committed the said offence of....; and that you thereby committed an offence punishable under section 212 of the India Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

Where in a murder case, the co-accused knew the involvement of the accused in the commission of an offence of murder, the co-accused being one of the directors in the company where the main accused was also a director, the act of the co-accused of sending his car to pick up the accused form the city of occurrence to facilitate the escape of the accused, renders him liable to be charged under s 212, IPC .[26]

Where the material on record didn't even *prima facie* indicate that the accused *A* harboured or concealed *B* and *C*, and it was only the opinion expressed by the witnesses that *A* had the motive to harbour or conceal the offender and he might have done so, the evidence is not sufficient to frame a charge under s 212 of IPC against *A*.[27]

17. Proof

To establish a charge under this section the following points have to be proved:

(a) That an offence has been committed by the person harboured;
(b) that such offence is punishable with: (a) death, or (b) imprisonment for life or imprisonment not exceeding ten years, or (c) imprisonment from one to ten years.
(c) that the accused had harboured or concealed the offender;
(d) that the accused did so knowing or having reason to believe him to be so; and
(e) that the accused thereby intended to screen such offender from legal punishment.

In order to support a charge of receiving, harbouring, comforting, assisting or maintaining a felon, there must be some active steps proved to have been taken to assist the felon personally; it is not enough to prove possession of various sums of money derived from the disposal of the property stolen.[28] For an offence under s 212, IPC, for harbouring an offender, it has to be proved that an offender was harboured or concealed by a person with the knowledge or having reason to believe that such person was the offender and such harbouring or concealment has to be with the intention of screening him from legal punishment.[29] To support a conviction under this section, there must be evidence of an offence committed in which the accused could have intended to screen the offender as well as harbouring or concealing the offender.[30]

A reading of s 212, IPC will disclose that three things that have to be proved by the prosecution, *viz*: (a) there must be an offender, (b) the offender should have already1620 committed an offence and (c) the person accused under this section should have harboured the offender knowing that he is an offender.[31]

18. Punishment

Three degrees of punishment are provided in the section, the harbourer's punishment varying with that which can be inflicted on the principal offender.

The law makes harbouring of an offender punishable, but the punishment provided for against the harbourer is made to conform with the gravity of the offence committed by the person who is being harboured, for in the case of the harbourer, the offence does not in its essence vary in gravity. The fact that the law makes a difference in the punishment of the harbourer, according to the to the nature of the offence committed by the absconder, or if we may say, the harbouree, indicates that the more serious the offence committed by the absconder, the greater is the disfavour shown by law to an accused who harbours or screens him from legal punishment.[32]

71 Substituted by Act 26 of 1955, s 117 and Schedule for 'transportation for life' (wef 1-1-1956).

72 Inserted by Act 3 of 1894, s 7 .

73 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

74 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

75 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

76 Substituted by Act 26 of 1955, s 117 and Schedule for 'transportation for life' (wef 1-1-1956).

77 *Parichan Singh v Emperor* (1944) PWN 521 ; *Kuriakose Chacko v State* AIR 1951 Tr & Coch 90, 52 Cr LJ 470; *Ghulam Waris v State of Uttar Pradesh* (1983) All WC 250, (1983) All Cr Cas 175, (1983) All Cr R 134 .

78 *Sujit v State of Kerala* 2008 Cr LJ 824, p 831 (Ker) (DB) .

79 *Ibid*.

80 *Sanjiv Kumar etc v State of Himachal Pradesh* (1999) Cr LJ 1138 (SC) .

81 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1 January 1956).

82 *Sujit v State of Kerala* 2008 Cr LJ 824, p 831 (Ker) (DB), ILR 2007 (4) Kerala 773 .

83 *Sujit v State of Kerala* 2008 Cr LJ 824, p 831 (Ker) (DB), ILR 2007 (4) Kerala 773 .

84 *Sujit v State of Kerala* 2008 Cr LJ 824, p 831 (Ker) (DB), ILR 2007 (4) Kerala 773 .

85 *Russell on Crime*, eleventh edn, p 173.

86 *Prem Kumar v State of Karnataka* (1994) 2 Crimes 429, p 433 (Kant)

87 *R v Fateh Singh* ILR 12 All 432 ; **cf***R v Abdul Kadir* 3 ILR All 279 ; *Niranjan Ojha v State of Orissa* (1991) 3 Crimes 796 (Ori), (1992) Cr LJ 1863, p 1864, (1991) 72 Cut LT 711 (DB) ; *Sumati Vijay v State of Madhya Pradesh* (1992) Cr LR (MP) 368 (Notes) ; *Sujit v State of Kerala* 2008 Cr LJ 824, p 831 (Ker) (DB)

88 *Aleem v State of Andhra Pradesh* (1995) Cr LJ 866 (AP) ; *Surjit v State of Kerala* 2007 (4) KLT 987 ; *State v Sushil Sharma* 2007 Cr LJ 4008 (DB) .

89 *State v Sushil Sharma* 2007 Cr LJ 4008, p 4042 (Delhi) (DB) .

90 Section 40 of the Code.

91 *Niranjan Ojha v State of Orissa* (1991) 3 Crimes 796, (1992) Cr LJ 1863, p 1864 (Ori), (1991) 72 Cut LT 711 (DB) .

92 Section 52(A), IPC .

93 *Emperor v Husain Baksh* ILR 25 All 261 .

94 *Damri v King-Emperor* AIR 1924 All 676(1), 26 Cr LJ 151, 22 All LJ 496 .

95 Section 216(B) is no more on the statute book as it was repealed by s 3 of the IPC (Amendment) Act 8 of 1942. The new s 52A was inserted by the same amendment act to define 'harbour'.

1 *Muchi Mian v Emperor* AIR 1918 Cal 826, 18 Cr LJ 731, 26 CLJ 141, 21 CWN 1062 .

2 *Tara Singh v King-Emperor* AIR 1926 Lah 206, 27 Cr LJ 563, 7 ILR Lah 30 .

3 *State v Sidaharth Vashisth alias Manu Sharma* (2001) Cr LJ 2404 (Del) .

4 *State of Tamil Nadu v Nalini* (1999) Cr LJ 3124 (SC) .

5 *Jagadish Chandra Maity v Emperor* AIR 1935 Cal 550, 39 CWN 317 .

6 *R v Jarvis* (1837) 2 M&Rob 40 .

7 Fost 123, Cromp Just 41b, PI 4 and 5.

8 *Shivarekha Panda v Emperor* AIR 1938 Pat 358, 39 Cr LJ 768, (1938) PWN 468 .

9 *Emperor v Latoor* AIR 1930 All 33, p 34, 31 Cr LJ 40 .

10 *Russell on Crime*, eleventh edn, p 177.

11 *Rajbobo v State of Haryana* (2001) IV CCR 39 (P&H) .

12 *Emperor v Latoo* AIR 1930 All 33, p 34, 31 Cr LJ 40 .

13 *Niranjan Ojha v State of Orissa* (1991) 3 Crimes 796 (Ori), (1992) Cr LJ 1863, (1991) 72 Cut LT 711 ; *Sujit v State of Kerala*

2008 Cr LJ 824 (Ker) (DB) .

14 *Emperor v Latoo* AIR 1930 All 33, p 34, 31 Cr LJ 40 .

15 *Sujith v State of Kerala* 2008 Cr LJ 824, p 835 .

16 *Ram Raj Choudhury v Emperor* AIR 1946 Pat 74, 47 Cr LJ 573, ILR 24 Pat 604 ; *Parichan Singh v Emperor* 1944 PWN 521 ; *Kuriakose Chacko v State* AIR 1951 Tr & Coch 90, (1952) Cr LJ 801.

17 *Gulam Waris v State of Uttar Pradesh* (1983) All WC 250, (1983) All Cr Cas 175, (1983) All Cr R 134 .

18 *Shivarekha Pande v Emperor* AIR 1938 Pat 358 .

19 For example if he is a deserter from the armed forces (Army Act 1881) (44 and 45 Vict, C, 58, s 153 (3); *R v Davis* (1945) Jour Crim Law IX, 81).

20 1 Hawk, Cr 1 s 10, 2 Hawk, Cr 29 s 34, 1 Hale 47, 621; *R v Good* (1842) 1 C&K 185 .

21 1 Hale 621; *R v Jones* (1949) 1 KB 194 .

22 1 Hale 621.

23 First Schedule to the Code of Criminal Procedure 1973.

24 *Sujith v State of Kerala* 2008 Cr LJ 824, p 835 .

25 *Harvinder Pal Singh v State of Punjab* (1982) CCC 443 (P&H) .

26 *State v Sidaharth Vasisth alias Manu Sharma* (2001) Cr LJ 2404 (Del) .

27 *Sunativijay v State of Madhya Pradesh* (1992) 1 Crimes 467 MP, (1992) Cr LJ 97, p 100 (MP) .

28 *R v Chapple* (1840) 9 Cr&P 365, contra, in Roman-Dutch Law where merely passive conduct is enough, provided the intention of the inactivity is to aid the principal to escape; *Majara v R* (1954) AC 235 .

29 *Sumativijay v State of Madhya Pradesh* (1992) 1 Crimes 467 (MP), (1992) Cr LJ 97, p 100 (MP) .

30 *Queen-Emperor v Fateh Singh* ILR 12 All 432 ; *Empress v Abdul Kadir* 3 ILR All 279 .

31 *Aleem v State of Andhra Pradesh* (1995) Cr LJ 866 (AP) .

32 *Tahsildar Singh v State* AIR 1958 All 214, p 222, (1958) Cr LJ 324, (1957) All LJ 857 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 213.

Taking gift, *etc.*, to screen an offender from punishment.--

Whoever accepts or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

if a capital offence.--shall, if the offence is punishable with death, be punished with imprisonment of

either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment.--and if the offence is punishable with [33][imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.1621

Comments

1. Scope and Object

The offence constituted by this section or s 214, IPC consists in the corrupt motive which is brought into play as much as in the delay to criminal justice. It consists in the compounding of an offence by some agreement not to bring the criminal to justice, and these sections intend to punish those who make a profit out of a public wrong. If the facts found in the case prove that there has been an actual compounding of an offence and there is superadded to it an acceptance of, an attempt to obtain, or an agreement to accept, a gratification or restitution as a consideration for the compounding, the offence is made out.

Once a person accepts a gratification and the consideration for accepting that gratification is his concealing the offence or screening the person from legal punishment, the offence is complete.[34]

2. Analogous Law

Section 213 is similar to the old ss 161 and 162 (since omitted and replaced by ss 7 and 8 of the Prevention of Corruption Act 49 of 1988). Section 213 is the section applicable when the person accepting the gratification is not a public servant. If he is a public servant, there would appear to be no advantage in referring to this section and the offence might more properly be dealt with as one under s 161 or s 162 (now s 7 or s 8 of the Prevention of Corruption Act 1988) as may be appropriate.[35]

Section 320, Code of Criminal Procedure 1973, after laying down in its sub-ss (1), (2) and (3) which offences may be compounded, enacts in sub-s (9) that 'no offence shall be compounded except as provided by this section'. Compounding an offence other than those made compoundable by s 320, CrPC will be illegal as such compounding is a thing prohibited by s 320(9), CrPC .[36] The exception to s 214 provides that 'the provisions of ss 213 and 214 do not extend to any case in which the offence may be lawfully compounded' that is, as provided in s 320 of the CrPC .

Under the English law, agreements not to prosecute or to stifle a prosecution for a criminal offence are in certain cases criminal.

It is well recognised that agreements not to prosecute a felony or misdemeanour are illegal and unenforceable.[37] This offence is distinct from that of misprision of felony. It was stated by Lord Westbury in *Williams v Bayley* ,[38] when speaking of misprision of felony: 'If you are aware that a crime has been committed you shall not convert that crime into a source of profit or benefit to yourself'.

By s 34 of the Larceny Act 1916,[39] it is felony to take any reward for helping a person to recover any property stolen or obtained by false pretences, and by s 102 of1622 the Larceny Act 1861,[40] to advertise a reward for the return of things stolen, the penalty of which involves a forfeiture of fifty pounds.[41]

3. Section not Applicable to Compoundable Offences

This section occurs in ch XI which is headed 'Of False Evidence and Offences against Public Justice'. An examination of the different sections to be found in this chapter shows that the intention of the legislature was to punish acts--including of course omissions--which do or have a tendency to, or are likely to, affect public justice.[42] Both the ss 213 and 214, are intended to prevent the suppression of prosecutions in cases in which the public is thought to be deeply interested in the punishment of the offender. Penalties are imposed on transactions entered into with this view in mind. But after the rules have been laid down in terms extending to all compromises of offences, an exception is made that the provisions of these two sections do not extend to any case in which the offence may lawfully be compounded.[43]

4. 'Whoever'--Includes a Third Party

This term is wide enough to include not only the victim of an offence who accepts gratification for abstaining from prosecuting the offender, but also any other person who receives gratification for concealing the offence or screening the offender. He may be the person who committed the offence in question or a third party.[44] The offence of compounding a felony applies to all felonies, and is not limited to larceny. It may be committed by a person other than the owner of the stolen goods or a material witness for the prosecution.[45]

5. 'Agree'--Meaning of

Under s 23 of the Indian Contract Act 1872 every agreement of which the object or consideration is unlawful is void. It is, however, not necessarily punishable as an offence. According to s 40 of this Code only a thing made punishable by this Code, is an offence. It therefore follows, that only such agreements are punishable, which have been so declared by this Code. When two or more persons agree to do, or cause to be done, an illegal act or a legal act by illegal means, such agreement is punishable under s 120B as a criminal conspiracy. This section and s 214 further furnish the species of such agreements, which are punishable as an offence. An agreement to accept any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, is void and is not enforceable under the law, nevertheless, it is an offence punishable under this section.1623

6. 'Gratification'--Meaning of

'Gratification' has not been defined by this Code. The expln 2 to the omitted s 161 and expln (b) to s 7 of the Prevention of Corruption Act 1988 simply explain this term as follows:

...

(b) "Gratification" the word "gratification" is not restricted to pecuniary gratifications or to gratifications estimable in money

...

Gratification need not be in Money

It is apparent from this explanation that a gratification need not be in money or in the form of a thing estimable in money. The literal dictionary meaning of gratification is the satisfaction of appetite or desire.[46] Accepting the same, it has been held that the expression has been used in the sense of anything which gives satisfaction to the recipient.[47] But a gift is not a gratification, though it also gives pleasure or satisfaction to its recipient.[48]

Section 161, IPC (since omitted) and s 7, Prevention of Corruption Act 1988, both use the expression 'any gratification whatever other than legal remuneration', which has been interpreted to mean 'any gratification whatever and apart from legal remuneration', and thus there is no scope for the interpretation that the gratification received should be an illegal one, and not a legal one, and must be prohibited by law.[49] This expression has, however, not been used in ss 213 and 214 .

7. 'In Consideration of'--A Discussion of the Phrase

Calcutta View

In enacting this section, the evil sought to be eradicated by the legislature is accepting, or agreeing or attempting to accept, illegal gratification in consideration of doing any of the three things mentioned in the section, namely, (a) concealing any offence, (b) screening the offender from legal punishment, or (c) not proceeding against him. In *Hem Chandra Mukherjee v Emperor* ,[50] a Division Bench of the Calcutta High Court held that there must be an actual concealment of an offence or screening of a person from legal punishment, or an abstention from proceeding criminally against a person, in order to attract the application of this section, and that there would be no offence if a gratification was accepted merely on a promise to conceal, screen or abstain and nothing more. Such was also the contention of the defence in *Queen v Bargess* ,[51] but was rejected, Lord Coleridge CJ pointing out the extraordinary position which would arise if that construction was accepted, namely, that if the maker of an agreement kept the agreement, he was guilty of an offence; but1624 if, in addition to making such an illegal agreement he is guilty of the further fraud towards the other party by breaking it, he was guilty of no offence at all.

Bombay View

The Calcutta decision has also been dissented from by the Bombay High Court in *Behari Lal Kalacharan v Emperor.* [52] As pointed out by Chagla CJ in that case, in law a consideration may be as much a promise as something actually done or achieved. The neutral word 'consideration' used by the legislature is wide enough to cover both cases, the case of something having been done or achieved in the past and also the case of something to be done in future. So the consideration contemplated by this section may be either a promise to conceal an offence or screen the person from legal punishment or it may be a past consideration, the person having already concealed the offence or screened the person from legal punishment and receiving gratification for having rendered that service. The section, however, does not require the actual concealment of an offence or the screening of any person from legal punishment or the actual forbearing of taking any proceeding. It is sufficient if an illegal gratification is received in consideration of a promise to conceal an offence or screen any person from legal punishment or desist from taking any proceeding. The offence is then complete and cannot be undone by subsequently doing that which ought to have been done before, for example, by a subsequent prosecution of the principal offender.[53] It may be added that concealing or screening an offender is already an offence under the preceding section, and the offence under this section consists in accepting or agreeing to accept illegal gratification for such concealing or screening.

8. 'Screening'--Meaning of

According to the *Oxford Dictionary,* the meaning of the word 'screen' is 'to shield or protect from hostility or impending danger; especially to save (an offender) from punishment or exposure; to conceal (a person's offence)'. In this sense, a mere abstention from giving evidence or merely keeping away from the court, would be sufficient to constitute screening. It is not necessary that the accused should physically keep away the offender from the arm of the law or that he should, again, physically destroy some evidence on which the prosecution relies. However, if the accused in the original case is discharged or acquitted of the charge, there can be no screening.[54] In ss 217 and 218, the legislature has used the word 'saving' instead of 'screening' but that does not mean that the two words must have different meanings. There are occasions when the legislature does use two different expressions without meaning to make any distinction between them.[55]

9. 'Offence'--Meaning of

The term 'offence' has been judicially interpreted to mean an actual offence and not an imaginary one. If there is no offence, there is no application of this section.[56] The words 'concealing an offence' and 'screening any person from legal punishment for any offence' presuppose the actual commission of an offence, or the guilt of the1625 person screened from punishment. The intention of the legislature was, in framing these sections, 'to discourage malpractices, when offences have really been committed, or when persons really guilty are screened, and not to ensure general veracity on the part of the public in regard to imaginary offences or offenders'.[57] In the case of *Girish Myte v Queen-Empress* ,[58] it was observed that this section would seem to be applicable only when it is proved that the person screened or attempted to be screened from legal punishment has been guilty of an offence.

Section 40 and the commentary thereunder may be referred to.

10. Procedure

The offence under this section is cognizable, but a warrant shall ordinarily issue in the first instance. The offence is bailable but not compoundable. It is triable by a magistrate of the first class. Limitation for taking cognizance of the offence under this section, if the principal offence is punishable with imprisonment for life, or with imprisonment extending to ten years is three years; if the principal offence is punishable with imprisonment not extending to ten years, it may be six months or one year depending on the limitation for taking the cognizance, if the principal offence is a capital offence.

11. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That on or about the.....day of.....at.....one *AB* committed the offence of .....punishable with.....and that you on or about the.....day of.....at .....accepted (*or attempted to accept or agreed to accept*) any gratification for yourself or *X*, or any restitution of property, to wit.....to yourself (*orX*) in consideration of your concealing the said offence of.....(*or screening the said AB from legal punishment for the said offence or not proceeding against the said AB*), for the purpose of bringing him to legal punishment and that you thereby committed an offence punishable under section 213 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

12. Proof

The points requiring proof are:

(a) that an offence had been committed;
(b) that the accused either: (a) concealed such offence; or (b) screened the offender from legal punishment; or (c) omitted to proceed against such offender so as to bring him to punishment;
(c) that the accused accepted, or attempted to obtain, or agreed to accept, some gratification or restitution of property; and
(d) that the accused accepted, attempted to obtain or agreed to accept, the same in consideration of such concealment, screening or omission.1626

Where there was no offence as the complaint was cleared of the original charge, there could be no screening of the offender or preventing him from being exposed to the consequence of the offence. Unless every ingredient of the charge is established, the conviction is not possible.[59]

33 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

34 *Biharilal Kalacharan v Emperor* AIR 1949 Bom 405, p 406, 51 Cr LJ 84, 51 Bom LR 564 .

35 *SB Hossain v Emperor* AIR 1947 Cal 29, p 30, 47 Cr LJ 623 .

36 *London and Lanchasire Insurance Co, Ltd v Binoy Krishna Mitra* AIR 1945 Cal 218, p 234, 78 CLJ 129 .

37 Re *Fivaz v Nicholls* (1846) 2 CB 501 ; *Rawlings v Coal Consumers' Assn* (1874) 43 LJMC 111 ; *Windhill Local Board v Vint* (1890) 45 Ch D 351 .

38 *Williams v Bayley* (1866) LR 1 HL 200, 220 .

39 6 & 7 Geo, 5, Ch 50.

40 24 and 25 Vict C 96.

41 Common Informers Act 1951, s 1 .

42 *Hem Chandra Mukhejree v King-Emperor* AIR 1925 Cal 85, 26 Cr LJ 345, ILR 52 Cal 151, 40 CLJ 278 ; *R v Burgess* (1880) 16 QBD 141 .

43 *Rev v Rahimat* ILR 1 Bom 147 (FB) ; exception to s 214, IPC .

44 Re *Karuppanna* 1 Weir 194.

45 *Russell on Crime*, eleventh Edn p 381 citing *R v Burgess* (1886) 16 QBD 141 .

46 *Sallendra Nath Bose v State of Bihar* AIR 1968 SC 1292, p 1296, (1968) Cr LJ 1484, (1968) Pat LJR 17, (1968) LIC 1412 ; *State v Pundlk Bhikaji Ahire* AIR 1959 Bom 543 *Pramod Chandra Shekhar v Rex* AIR 1951 All 546 **followed**.

47 *State v Pundlik Bhikaji Ahire* AIR 1959 Bom 543, p 547 ; *Trilochan Singh v Karnail Singh* AIR 1968 Punj 416 (FB), (1968) Cr LJ 1199, p 1204; *Rameshwar v State* (1981) Cr LR (MP HCN) 13 .

48 Re *Varadadesikachariar*AIR 1950 Mad 93, p 94, 51 Cr LJ 386 ; Re *MS Mohiddin*AIR 1952 Mad 561, p 563, (1952) Cr LJ 1245 .

49 *Subramanya v State* (1975) 1 Ker LJ 178, (1976) Mad LJ (Cr) 31 .

50 *Hem Chandra Mukherjee v Emperor* AIR 1925 Cal 85, 26 Cr LJ 345 .

51 *Queen v Bargess* (1885) 16 QBD 141 .

52 *Behari Lal Kalacharan v Emperor* AIR 1949 Bom 405 .

53 *R v Burgess* (1885) 16 QBD 141, p 146 .

54 *Mir Faizali Shaheen v State of Maharastra* (1992) Cr LJ 1034, p 1039 (Bom), (1992) Mah LJ 598 .

55 *Bihari Lal Kalacharan v Emperor* AIR 1949 Bom 405, p 408 .

56 *Mir Faizali-Shaheen v State of Maharashtra* (1992) Mah LJ 98, (1992) Cr LJ (Bom) 1034, (1992) 1 Bom HCR 226 .

57 *R v Saminatha* ILR 14 Mad 400 ; *Girish Myte v Queen-Empress* ILR 23 Cal 420 ; *Queen v Joynarain Patro* 20 WR 66 ; *Emperor v Sana Lal Lallubhai* ILR 37 Bom 658 ; *Hem Chndra Mukherjee v King-Emperor* AIR 1925 Cal 85 .

58 *Girish Myte v Queen-Empress* (1896) ILR 23 Cal 420 .

59 *Mir Falzali-Shaheen v State of Maharashtra* (1992) Cr LJ 1034 (Bom), (1992) Mah LJ 598, (1992) 1 Bom CR 226 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 214.

Offering gift or restoration of property in consideration of screening offender.--

Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or [60][restores or causes the restoration of] any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment;

if a capital offence.--shall, if the offence is punishable with death, be punished with imprisonment of either description for a tern which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment.--and if the offence is punishable with [61][imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be, punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

[62][*Exception.*--The provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded.]

[63][*****].

Comments

1. Scope and Object

The preceding section dealt with the receiver and this section deals with the offerer of illegal gratification in consideration of concealing an offence, or screening the offender from legal punishment or abstaining from prosecuting the offender.1627 Otherwise the scope and object of this section is the same as that of the preceding section. Synopsis note 2 under s 213, IPC may be referred to.

There cannot be even a slightest doubt that a lawyer appearing for an accused who is facing a murder charge, cannot perform his professional duty as is required of him when he himself is faced with criminal prosecution, for a serious charge like under ss 201 and 214, IPC, which are punishable with imprisonment for a term which may extend to seven years and also fine.[64]

2. Legislative changes

As originally enacted, the section contained the following exception and illustrations:

> *Exception.*--The provisions of sections 213 and 214 do not extend to any case in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action.
>
> *Illustrations*
>
> (a) *A* assaults *B* with intent to commit murder. Here, as the offence does not consist of the assault only, irrespective of the intention to commit murder, it does not fall within the exception, and cannot, therefore, be compounded.
> (b) *A* assaults *B.* Here, as the offence consists simply of the act, irrespective of the intention of the offender, and as *B* may have a civil action for the assault, it is within the exception, and may be compounded.
> (c) *A* commits the offence of bigamy. Here as the offence is not the subject of civil action, it cannot be compounded.
> (d) *B* commits the offences of adultery with a married woman. The offence may be compounded.

The courts found various difficulties in construing the exception, and the illustrations to the exception which, far from throwing light on its meaning, created the chief difficulties in its constructions.[65] Both the exception and the illustrations were therefore repealed in 1882, the former by s 6 of the Indian Penal Code (Amendment) Act 8 of 1882 and the latter by Sch I to the Code of Criminal Procedure, 10 of 1882, and the present exception was inserted in place of the old one by Act 8 of 1882.

The words 'restores or causes the restoration of' were substituted for the words 'to restore or cause the restoration of' by the Repealing and Amending Act 12 of 1953, s 4 and the third Schedule. The words 'imprisonment for life' were substituted for the words 'transportation for life', by Act 26 of 1955, s

117 and the Schedule.

3. 'Whoever'--Meaning of

This term is wide enough to include the person who committed the offence, sought to be concealed or screened, as well as a third party. The section, therefore, includes the offer of a bribe by the person who has committed the offence that he desired to screen.[66]1628

4. 'Agrees to give'--Meaning of

The word 'agree' involves the idea of something of the nature of a demand. But even if the bribe is solicited, the giving or agreeing to give it, is no less an offence under this section.[67]

5. 'Gratification'--Meaning of

Synopsis note 6 under s 213 may be referred to.

6. 'In consideration of'--What is?

Synopsis note 7 under s 213 may be referred to.

7. 'Offence'--What is

Synopsis note 9 under s 213 and the commentary under s 40 may be referred to.

8. Concealing an Offence

In an old case it was held that the words 'in consideration of that person's concealing any offence or his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purposes of bringing him to legal punishment' are applicable not only to the case of a completed offence, but also to the case of an offence in progress, and an offence proposed but not yet commenced.[68] But in subsequent cases it has been held that the words 'concealing an offence' and 'screening any person from legal punishment for any offence' presuppose the actual commission of an offence, or the guilt of the person screened from the punishment.[69] The intention of the legislature in framing these sections was 'to discourage malpractices, when offences have really been committed, or when persons really guilty are screened, and not to ensure the general veracity on the part of the public in regard to imaginary offences or offenders.'[70]

9. Exception

The exception to this section also applies to the preceding s 213 and it provides that the provisions of ss 213 and 214 are not applicable to compoundable offences. Section 320 , CrPC enumerates the offences which may be compounded with or without the permission of the court.

10. 'Compounded'--What is

Compounding an offence is more than a mere promise to withdraw a prosecution. It supposes an arrangement by which the parties have settled their differences, and in the more usual acceptance of the term, implies that the prosecutor has received some consideration or gratification dropping the prosecution. Although the provisions of the Contract Act 1872 may not apply, the proof of the arrangement must be similar to1629 that which the court requires for the proof of any agreement which is in issue. Unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition. It signifies that the person against whom the offence has been committed has

received some gratification, not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from a prosecution, and the law[71] provides that if the offence be compoundable, a composition shall have the effect of an acquittal.[72]

Sub-sections (1) and (2) of s 320 of the CrPC specify the offences which may be compounded. Those specified in sub-s (1) may be compounded only by certain persons. Those specified in sub-s (2) can also be compounded only by certain persons, but with the permission of the court trying the offence. Sub-section (9) of that section lays down that 'no offence shall be compounded except as provided by this section'.

11. Offence under Special or Local Laws not Compoundable

Offences created by special or local laws, not being specified in s 320, CrPC, are not compoundable.[73] Compounding an offence, other than those made compoundable by s 320 will be illegal, as such compounding is a thing prohibited by s 320(9), CrPC .[74]

12. Procedure

The offence under this section is not cognizable, but a warrant shall ordinarily issue in the first instance. It is bailable but not compoundable. It is triable by a magistrate of the first class. Provisions as to the limitation applicable to an offence under the previous section also apply to an offence under this section.

13. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That on or about the....day of.....at.....you have (*or caused or offered or agreed to give*) a gratification to wit..... to *AB* (*or restored or caused the restoration of a property, to wit.....toAB*) in consideration of the said *AB*'s concealing the offence of .....under section.....of.....and which offence is punishable with.....(*or of his screening you or any person to wit.....from legal punishment for the offence of.....or of his not proceeding against you or any person, to wit.....for the purpose of bringing you* (*or him to legal punishment, for the offence punishable under s .....*), and you thereby committed an offence under section 214 of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

14. Proof

To establish an offence under this section, the following points must be proved:1630

(a) that an offence was committed;
(b) that the accused offered or gave, or caused or agreed to give or cause, any gratification, or restored, or caused restitution of, any property; and
(c) that he did so in consideration of the other's concealing an offence, or of his screening the offender from legal punishment for an offence, or of his not proceeding against the offender for the purpose of screening him from legal punishment.

A conviction under this section cannot be upheld in the absence of a proof of the theft for the hushing of which the bribe is alleged to have been offered.[75]

15. Earlier Decision not to be questioned

A court dealing with a charge under this section is not entitled to question or review the correctness of the decision of another court acquitting a person charged with having committed the offence which the person before it is charged with having attempted to conceal.[76]

60 Substituted by Act 42 of 1953.

61 Substituted by Act 26 of 1955, s 117 and Sch., for 'transportation for life' (wef 1-1-1956).

62 Substituted by Act 8 of 1882, s 6 for the Original Exception.

63 Illustrations repealed by the CrPC 1882 (10 of 1882), s 2 and Sch 1.

64 *Jayendra Saraswathy Swamigal v State of Tamil Nadu* (2005) Cr LJ 4626 (SC) .

65 *Reg v Rahimat* ILR 1 Bom 147, 11 Mad Jur 427, 1 Mad LR 116 (FB) ; Refer to the case cited therein, *Reg v Madan* 6 NWPNCR 302 .

66 Re *Karuppanna* 1 Weir 194.

67 Re *Ma Ka* (1892-96) 1 UBR 158.

68 Re *Soyapo*(1894) 1 UBR 196.

69 *R v Saminatha* ILR 14 Mad 400, 1 Weir 195, p 196 ; *Girish Myte v R* ILR 23 Cal 420 ; *Queen v Joynarain Patro* 20 WR 66 ; *Emperor v Sanalal Laulubhai* ILR 37 Bom 858 ; *Mohd Aslam v State of Madhya Pradesh* AIR 1981 SC 1735, (1981) Cr LJ 1285 .

70 *Ibid*.

71 Section 320, CrPC 1973.

72 *Murray v Queen-Empress* ILR 21 Cal 103 .

73 *Trikam Das Udeshi v Bombay Municipal Corpn* AIR 1954 Bom 427 ; *Hari Chandran Pagadar v Thangaswami Nadar* AIR 1949 Mad 501 ; **but see***Emperor v Kyasone* 13 Cr LJ 48, **contra**.

74 *London Lancashire Insurance Co Ltd v Binoy Krishna Mitra* AIR 1945 Cal 218, p 234 .

75 Re *Peddu Reddi* 1 Weir 196; *Mir Faizali Shaheen v State of Maharashtra* (1992) Cr LJ 1034 (Bom), (1992) 1 Bom HCR 226, (1992) Mah LJ 598 .

76 *Baleshwar Bhagat v Emperor* AIR 1946 Pat 101, 47 Cr LJ 801 ; *R v Saminatha* ILR 14 Mad 400 ; *Emperor v Sanalal Lallubhai* ILR 37 Bom 658 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 215.

Taking gift to help to recover stolen property, *etc.*--

Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.1631

Comments

1. Scope and Object

The primary aim of the section is to punish all trafficking in crime, by which a person knowing that property has been obtained by crime, and knowing the criminal, makes a profit out of the crime, while screening the offender from justice. It is not an offence to take money from another in order to help him to find the property and to convict the thief. It is an offence for one who knew of the commission of the crime, and who could at once have informed the offender, to wait till a reward is offered, and then to take money from the owner of the property under colour of getting the property back for him. It is an offence for one who is mixed up with the original crime to receive or to bargain for money as reward for the restitution of the property.[77] The offence under this section consists in any person taking, or agreeing or consenting, to take any gratification under pretence, or on account of helping any person to recover any movable property of which he shall have been deprived, by any offence punishable under this Code, unless such person uses all means in his power to cause the offender to be apprehended and convicted of the offence.[78] The section aims primarily at professional trackers and other persons who, being usually in league with thieves or well aware of their proceedings, obtain money for recovery of stolen property without making any effort to bring the offenders to justice.[79] The section is not intended to punish a person who receives consideration *bona fide* for helping the owner to recover property which he lost by theft, criminal misappropriation, *etc*. It is intended to deal with cases which are similar to collections, in the nature of '*Thuppukooli'* made by the person, who, from the circumstances of their offer to help the owner, are expected to contact the thief and pay him a portion of the money on the understanding that he won't be exposed if he would release the concerned property to the owner. There is thus, besides the promise by the accused to recover the stolen property, an implied association between him and the thief or the means on his part of discovering the thief and recovering the property, but without at the same time any undertaking on his part to do what the law expects every honest citizen to do in his situation, namely, to help in the prosecution of the person who has committed a cognizable and non-bailable offence like theft or an offence in regard to a movable property.[80]

2. Analogous Law

This section is borrowed from a series of English Statutes, the first of which, 4 Geo, 1, cr 11, s 4, was passed to put a stop to the trade of the notorious Jonathan Wild who was ultimately convicted under it and executed.[81]In England, s 102 of the Larceny Act 1861 (24 & 25 Vict, cr 96) provided that:

> Whoever shall publicly advertise a reward for the return of any property whatsoever,[82] which shall have been taken or lost, and shall in such advertisement use any words purporting that no questions will be asked or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which1632 shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawn broker or other person who may have bought or advanced money by way of loan upon any property stolen or lost the money so paid or advanced or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence (to any person who will sue for the same by action of debt, to be recovered with full costs of suit).[83]

The Larceny Act 1916,[84] s 34,[85]which substantially re-enacts s 101 of the Larceny Act 1861 provides that:

> **S. 34 Corruptly taking a reward.--**Every person who corruptly takes any money or reward, directly or indirectly, under pretence or upon account of helping any person to recover any property which has, under circumstances which amount to felony or misdemeanour, been stolen or obtained in any way whatsoever, or received, shall (unless he has used all due diligence to cause the offender to be brought to trial for the same) be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding seven years....

3. Ingredients of the Offence

The section has three essential ingredients: (a) taking, or agreeing or consenting to take, any gratification under pretence, or on account of helping any person to recover any movable property; (b) that the owner of such property must have been deprived of it by an offence punishable under the Indian Penal Code ; and (c) that the person in question, having taken or agreed to take the gratification, must not have used all means in his power to cause the offender to be apprehended and convicted of the offence.

Mere Omission may Complete the Offence

It is a peculiar section inasmuch as once it is shown that the person charged has taken or agreed to take money, which in itself is no way wrong or illegal if the intention is honest, then the completion of the offence follows not necessarily from any further overt act but merely from an omission, namely as the section puts it, the failure to use all means in his power to cause the offender to be apprehended and convicted.[86]

Knowledge of Offender not Necessary

The knowledge of the offender is not a necessary ingredient of an offence under this section. There is not one word in the section that suggests that such knowledge is necessary. It may well be that a person who receives money for discovering a stolen property may, in the course of his investigation, obtain information which if followed up, would lead to the apprehension of the offender. If he withholds that information from the proper authorities, it is obvious that it cannot be said that he used his best endeavour to cause the offender to be apprehended.[87]1633

Screening the Offender also not Necessary

To bring a case within the purview of this section it is enough to prove that money was demanded and paid for helping the person to recover the property of which he had been deprived of by means of a punishable offence. Screening or attempting to screen an offender is not a further necessary ingredient.[1]

4. 'Whoever'--If Includes thief or Suspected Thief

There is a conflict of judicial opinion on this question. In an early Madras case, it was held that this section is not applicable to the case of the offender himself taking a gratification. This is seen from the part of the section which speaks of his using all the means in his power to cause the offender to be apprehended and convicted of the offence.[2] So also, in one of its earlier decisions the Allahabad High Court held that this section was not intended to apply to the actual thief, but to someone who, being in league with the thief, receives some gratification on account of helping the owner to recover the stolen property without at the same time using all the means in his power to cause the thief to be apprehended and convicted.[3] And this decision was followed by the Madras[4] and the Rangoon[5] High Courts. A similar view was taken by a Division Bench of the Allahabad High Court in *Mangu v Emperor* ,[6] without reference to any previous decision, but only relying on an observation of Mayne[7] to the effect that the section is not intended to apply to the actual thief, but to someone who, being in league with the thief, receives some gratification on account of helping the owner to recover stolen property without at the same time using all the means in his power to cause the thief to be apprehended and convicted of his offence.

Old View Overruled

The Allahabad ruling in *Queen-Empress v Mahommad Ali* ,[8] which was followed by the Madras and Lahore High Courts, was dissented from in *Emperor v Mukhtara* ,[9] and was finally overruled by a Full Bench of that court in *DeoSuchit Rai v Emperor.* [10] So also in Burma, the correctness of the decision in *Twet Pe v King-Emperor* ,[11] was doubted in *Emperor v Nga Nyan U* ,[12] and in *King v Nga V Nyein* ,[13] this question was thoroughly considered by a judge who followed *Emperor v Mukhtara* ,[14] which had dissented from *Queen-Empress v Mahommad Ali.* [15] In the course of the judgment, the learned judge observed:1634

> It does not appear to me to be correct to say as Fox, CJ said in 4 LBR 1998 that the section does not apply to the actual thief because he is under no legal obligation to bring himself to justice. All that the section says is that the person who takes the gratification shall be punished unless he uses all means in his power to bring the actual thief to justice. No doubt the wording of the section makes it apply in the majority of cases to offenders other than the actual thief. But cases may well occur, as was pointed out by Aston JC in (1893-1900) PJLBR 226 where a thief having stolen cattle without a view to obtain money by restoring them to the owner, may offer to restore them for a gratification merely because he knows that detection is becoming imminent.

In *Ramanand Telt v Emperor* ,[16] a Division Bench of the Patna High Court also followed the decision in *Emperor v Mukhtara* [17] and held that a person suspected of theft may, if the prosecution fails to prove the fact of theft by him, be convicted under s 215 .

Thief is Covered--Settled Law

It can, therefore, be taken as settled law now, that the accused can be convicted under this section even if he was the thief or a suspected thief. There is nothing in this section which should exclude an actual thief from a liability under it if, in addition to committing the theft, he also tried to realise money by a promise to return the stolen article. Such an act, which is independent of the act of stealing, constitutes a different offence. There is no reason why a thief should not be punishable for an additional offence. The only reason for the view that a thief cannot be held guilty under this section is the fact that it is unnatural for a thief himself to use all means in his power to cause himself to be apprehended and convicted for theft. But the language of the section does not contemplate any exception. The earlier part of the section which really describes the ingredients of the offence, does not lend support to the view that the thief cannot be prosecuted under this section. The latter part of the section is really in the nature of a provision by way of a concession in favour of one who helps, though for personal gain, both in recovering the stolen property, and in bringing the thief to book. An actual thief or a person suspected to be the thief can be convicted under this section.[18]

5. 'Takes, or Agrees or Consents to take any Gratification'--Meaning of

In order to constitute the offence punishable under this section, it is necessary that the person who is willing to take and the person who is willing to give, the illegal gratification, must agree not only as to the object for which the gratification is to be given, but also as to the shape or form the gratification is to take. If a person has actually taken a gratification from another, it must be assumed that he agreed to take, and the other to give it, in that particular form or shape; but where the gratification has not actually passed and there is a disagreement as to the form or shape that the gratification is to take, the idea of agreement or consent is negatived.[19]1635

6. 'Attempt'--When Complete ?

In *Queen-Emperor v Chittar* ,[20]Dillon J held that an attempt to take a gratification within the meaning of this section, necessarily includes the idea of concurrence of wills between the giver and taker; with this much superadded thereto, that some act has been done preliminary to the act of taking. In other words, an attempt is a stage in the commission of the offence which is intermediate between the agreement or consent and the actual taking. But this has been dissented from in the undermentioned cases.[21] Under s 2 of the Indian Contract Act 1872, when one person signifies to another his willingness to do, or to abstain from doing, anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.[22] The assent to a proposal amounts to a promise.[23] The proposals as above defined which are inseparable from the establishment of contractual arrangements are attempts to complete an agreement, or in other words, to arrive at the mutually expressed view of two wills whereby the legal bond called a 'contract' is constituted. When once a proposal has been made for the payment of an illegal gratification, whether or not it fructifies into an agreement, the offence of an attempt to commit an offence under this section is complete.[24] If an attempt to take a gratification within the meaning of this section necessarily includes the idea of a giver and taker, it is no more an attempt to commit an offence, but a substantive offence on the language of the section.[25] In the substantive offence there is a giver and a taker; in an attempt to commit the offence there is merely a proposal or an attempt to enter into an agreement to take from a person who is being induced to give.[26]

7. Gratification

Synopsis note 6 under s 213 may be referred to.

8. Movable Property

Section 22 and the commentary thereunder may be referred to.

9. Deprived--Meaning of

There is no reason to give the word 'deprived' a restricted interpretation so as to mean 'taken out of the possession of'. To deprive a person of any article may be either to take it away from him or to prevent him from getting possession of it if he would have done so in the normal course of events.[27] Thus, if an animal belonging to a person strays away and he does not know its whereabouts, he may be said to have lost the actual possession or control of the animal, but he cannot be said to have been deprived of it. The judicial possession of the animal remains with him. Temporary1636 loss of property, as by straying of cattle, cannot amount to a deprivation as contemplated by this section. It is only when somebody also takes possession of the animal and misappropriates it, that the owner can be said to have been deprived of it.[28]The deprivation of the property must be by an offence punishable under the Code, but it is not confined to one resulting from an act of theft. A person who commits a criminal misappropriation of a property, also deprives the owner of the possession of the property.[29]

Deprived by any Offence Punishable under this Code

One of the important ingredients of an offence under this section is that the owner of some movable

property must have been deprived of it by any offence punishable under this Code. The property for the recovery of which gratification has been taken or promised must be one of which the owner has been deprived of by any offence punishable under the Penal Code.[30] There can be no conviction for an offence under this section until it is proved that a person has been deprived of movable property by an offence punishable under the Code. The mere fact that property has disappeared does not necessarily raise a presumption that the disappearance is due to an offence, *eg* when a buffalo has disappeared.[31] Where the accused merely undertakes to endeavour to trace out and restore the lost property on payment of some remuneration, then upon this circumstances alone the accused cannot be said to be guilty of an offence under this section, unless over and above that, the prosecution proves that the property has been lost by the commission of an offence and that the accused is endeavouring to screen the offender from justice and is not using all means in his power to cause the offender to be apprehended and convicted of the offence which he has committed.[32]

Offence may be Committed even after the Possession is Lost

It is not necessary that the offence should have been committed at the time the property had gone out of the possession of the owner. If an animal belonging to a person goes astray and is subsequently misappropriated by another person, the owner is deprived of the property when it became the subject of criminal misappropriation, but still, he may be said to have been deprived of his property by an offence punishable under the Code.

No Inference to be made in Case of Direct Evidence

Where an offence is committed at the time the owner lost the property or was deprived of it, no further evidence is necessary and the courts can straight away hold that the owner was deprived of the property by an offence, say of theft, punishable under the IPC ; but where no offence was committed at the time of the loss of the property, as in the case of criminal misappropriation, there must be material on1637 record, direct or circumstantial, to show that the offence of criminal misappropriation was committed and that as a result thereof, the owner was deprived of the property. Where the person finding the lost property has the intention to return it to the rightful owner, he shall not be guilty of the offence of criminal misappropriation, even though he is not prompt and wants to make money by making a demand from the owner. Wherever a direct evidence is adduced by the prosecution, it shall have to be assessed to find out if the offence of criminal misappropriation had been committed. If no direct evidence is adduced, the circumstances of the case must be looked into to find out if they lead to only one inference, namely, that the offence of criminal misappropriation had been committed.[33]

Inference is a Question of Fact and not of Law

In such cases there can be no question of any presumption. It is a question of inference from the facts, and what inference may properly be made is not a question of law but a question for the conscience of the person who is supposed to make the inference.[34] In some cases,[35] it was remarked that it must be proved that the deprivation of possession was the result of an offence under the Indian Penal Code and that there can be no inference merely from the disappearance of cattle that any such offence was committed. They were all cases in which the stolen cattle were never recovered; and, very likely, it was not a fair inference in any of these cases that the cattle had ever been stolen or misappropriated. They had strayed and were never found and there was, therefore, nothing whatsoever to suggest that any person had ever taken possession of them. But if a bullock strays at night, the person who ties it up to a tree is depriving the owner of its possession, as normally such a bullock would return to its owner in the ordinary course and by being tied up, it is prevented from so doing. The court is entitled quite fairly to make the inference that the bullock had either been stolen or misappropriated dishonestly by some person. In either case some offence is committed, which prevented the owner from retaining or obtaining possession of his property so that he was deprived of the possession of it. Hence, a person taking money for pointing out such a bullock is guilty under this section.[36]

No Offence when there is no Theft or Misappropriation

A charge to the effect that the accused had taken a sum of money from the complainant as a gift in consideration of returning him his donkey which had gone astray, does not disclose an offence under this section, when there is no evidence that the donkey was a stolen donkey, and a conviction under this section cannot be sustained, although the accused pleads guilty to the charge.[37]

Where an accused represents to the owner of a missing animal that it was stolen, and promises, for consideration, to help him in recovering it, but it is found that the animal was only missing and there was no evidence showing that it was stolen, the accused cannot be convicted under this section. His representation that the animal was stolen and that he was helping him to recover it does not itself show that the1638 animal was really stolen.[38] But in an Allahabad case, where the accused demanded a price for the return of some missing bullocks, it was held that the act of the accused was punishable under this section.[39]

10. 'Abetment'--Advertisement when may Amount to Abetment

To advertise a reward for the return of any property stolen or lost, and to use therein words purporting that no questions will be asked from the person claiming the reward, would constitute an abetment of the offence by instigation.[40]

11. Exception--to be Proved by the Accused

This section does indeed contain a saving clause to the effect that a person, taking a gratification of the nature mentioned in it, shall not be punished if he uses all means in his power to cause the offender to be apprehended and convicted of the offence; but this is clearly an exception to the generality. Once the elements of an offence under this section are established by evidence, the onus of proving that the person charged is entitled to the benefit of the exception referred to above is on the defence.[41] The object of the legislature in the clause 'unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence' was to exempt from the liability to punishment, a person who is acting honestly, and not to exempt the thief.[42]The clear meaning of the section is that it is an offence to receive money for helping any person to recover property stolen or misappropriated and that there is an exception only in favour of a man who can show that he used all means in his power to cause the apprehension of the offender. Under the provision of s 105, Evidence Act where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any special exception or proviso contained in the Code or in any law defining the offence, is upon him, and the courts shall presume the absence of such circumstances.[43]

Merely demanding a gratification to help the complainant to recover his buffaloes, without making any attempt to get the person, who had stolen the buffaloes or the person who was retaining them, to be prosecuted and convicted, clearly amounts to an offence under this section.[44]

12. Procedure

An offence under this section is cognizable and a warrant shall ordinarily issue in the first instance. It is bailable but not compoundable. It is triable by a magistrate of the first class.1639

13. Charge

The following form of charge may be adopted:

I (*name and office of the magistrate, etc*), hereby charge you (*name of the accused*) as follows:

That *A*, the owner of....., a movable property, was deprived of it by an offence, namely....., punishable under the Indian Penal Code, that you, on or about the..... day of..... at ..... took (*or agreed or consented to take*)..... as gratification, under the pretence of (*or on account of*) helping to recover the property, deprived of but you failed to use all means in your power to cause the offender apprehended and convicted, and that you thereby committed an offence, punishable under section 215 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

14. Proof

To establish an offence under this section the following points must be proved:

(i) that the owner of some movable property was deprived of it by an offence punishable under this Code;
(ii) that the accused took, or agreed or consented to take, some gratification;
(iii) that the taking of such gratification was under the pretence of, or on account of, helping to recover such property; and
(iv) that the accused failed to use all means in his power to cause the offender to be apprehended and convicted.

No Conviction when Loss not Due to any Offence

To sustain a conviction under this section there must be evidence to show that the loss of the article complained of, was by means of the commission of an offence punishable under the Indian Penal Code . If there is no such evidence on record, there can be no conviction under this section.[45]

To bring a case within the purview of this section it is enough to prove that money was demanded and paid for helping the person to recover the property of which he had been deprived of by means of a punishable offence.[46]

Exception--Initial Facts have to be Proved by the Prosecution

The first part of the section has to be read in conjunction with the last part, containing the words 'unless he uses all means in his power to cause the offender to be apprehended'. Therefore, the first part of the section itself is really intended to deal with persons who impliedly have means of contacting the offender and recovering the property, and who then undertake to recover the property from the thief on payment of a sum which will serve to remunerate them and also square up the thief. It is only when this state of affairs has been established by the prosecution, the onus of proof can be thrown on the accused person to prove the terms of the exception, namely, that he had used all means in his power to cause the offender to be apprehended and convicted of the offence. These being the facts within his knowledge, the statute has placed the onus on him to establish them. Therefore,1640 though it is clear that the clause 'unless he uses all means in his power to cause the offender to be

apprehended and convicted of the offence' is in the nature of a special exception or proviso within the meaning of s 105 of the Evidence Act for which the onus of proof is on the accused, the juxtaposition of this clause with the other ingredients of the offence specified in the first portion of the section, shows that the prosecution has initially to establish that the circumstances of the taking of the money were such that the accused received it without any intention of tracing the offender and bringing him to book, assuming that he had the means of getting at the offender.[47]

Negative not to be Proved by Prosecution

In a prosecution under this section, it is not for the prosecution to prove the negative, that the accused did not use all in his power to cause the offender to be apprehended. It is for the defence to establish the positive fact that they did all in their power to cause the offender to be apprehended. Hence, a conviction under this section can be maintained even if there is no evidence to prove that the accused did not use all means in his power to cause the offender to be apprehended and convicted of the offence.[48] Once the elements of an offence under this section are established by evidence, the onus of proving that the person charged is entitled to the benefit of the exception, is on the defence, particularly so where there has been a spontaneous demand by the accused of money, indicating an intention not to bring the offender to justice. Thus, where the accused themselves accosted the complainant, who had lost his cycle, and told him that if he spent Rs 10, his cycle could be recovered, and the very terms in which the complainant was approached implied that no questions would be asked as to the actual offender and no attempt made at his apprehension or conviction, and on the complainant's paying Rs 2, the accused told him that the cycle would be restored to him on a particular day, but it was not done, it was held that the accused were guilty under this section.[49] Once it is established by the prosecution that the accused accepted the gratification for restoring the stolen property, he must be found guilty under the section, unless and until he successfully proves that he did everything within his means for the apprehension and conviction of the real culprits.[50]

15. Conviction in the Alternative

A person charged with theft under s 379, can be charged in the alternative with demanding illegal gratification for the return of the same. The court can convict the accused of either offence even if the accused has not been charged with it.[51]

Where a person, who was charged alternatively with offences under ss 379 and 215, was convicted of the offence under s 215 alone and the appellate court, finding that there was no evidence for the offence under s 215 but that there was satisfactory1641 evidence for the offence under s 379, acquitted the accused altogether, it was held that the appellate court ought to have altered the conviction to one under s 379 and maintained the sentence.[52]

On the other hand, where there was no evidence on record to show that either of the applicants was in possession of the buffaloes, the mere fact that the applicants offered to get the buffaloes restored to the complainant, cannot necessarily lead to the inference that the applicants or either of them was in possession of the buffaloes. The mere circumstance that the applicants offered to get the buffaloes restored, is not conclusive to show that the applicants were in possession, for this circumstance is also consistent with the hypothesis that the applicant might have known who was in possession of the buffaloes, and he may have offered to help the complainant. In these circumstances, it cannot be said that the charge under s 411, IPC is made out against the applicants. Their demanding gratification to help the complainant to recover his buffaloes without making any attempt to get the person who had stolen the buffaloes or the person who was retaining them, to be prosecuted and convicted, clearly amounted to an offence under s 215, IPC . So the conviction of the applicants under s 215, IPC was upheld.[53]

A person in possession of stolen property, entering into an agreement with the owner for the restoration of such property, without actually helping to bring the thief to justice, cannot be convicted of an offence under this section, but only of an offence under s 211 .[54]

Where the question is likely to arise whether a person who has accepted a gratification for the return of stolen property is the actual thief or not, alternative charges should be framed under s 221(1) of the Code of Criminal Procedure .[55]

16. Double Conviction

As stated above, it cannot be said that this section does not apply to the actual thief because he is under no legal obligation to bring himself to justice. All that the section says is that the person who takes the gratification shall be punished unless he uses all means in his power to bring the actual thief to justice. No doubt the wording of the section makes it apply, in the majority of cases, to offenders other than the actual thief. But cases may well occur where a thief, having stolen cattle with a view to obtain money by restoring them to the owner, may offer to restore them for a gratification merely because he knows that detection is becoming imminent. There is, therefore, nothing illegal in the double conviction of the actual thief who also takes a gratification.[56]

17. Sentence

It is only in such exceptional cases that a severe sentence should be passed for both offences than could have been inflicted for the theft alone.[57] Where the accused was1642 an old man and had already served a sentence of two months, a sentence of six months was reduced to that already undergone.[58]

77 *Mayne on Criminal Law*, pp 493, 494, citing *Reg v King* 1 Cox CC 36 ; *Mangu v Emperor* AIR 1928 All 22, 29 Cr LJ 21 .

78 *Babu v Emperor* AIR 1936 Sind 145, 37 Cr LJ 1038 ; Re *Seeni Thewar Thanga Thewar*(1972) LW (Cr) 73.

79 *Biswanath Dubey v Gharbigan Chamar* AIR 1940 Pat 548, 41 Cr LJ 902 .

80 *Pachakutty Thondumpirim v State* 78 Mad LW 110 .

81 2 East, PC 770; *Mayne on Criminal Law*, p 493.

82 Dogs are included in the words 'any property whatsoever.' *Mirams v Our Dog* 's *Publishing Co Ltd*[1901] 2 KB 564, 70 LJKB 879.

83 Common Informers Act 1951 (14 & 15 Geo 6, Cr 39).

84 6 & 7 Geo 5, Ch 50.

85 As amended by the Criminal Justice Act 1948, 11 & 12 Geo, 6, Cr 58.

86 *Biswanath Dubey v Gharbigan Chamar* AIR 1940 Pat 548, 41 Cr LJ 902 ; *Mohan v State* (1965) 2 Cr LJ 273 ; *Nazar Ali v State* (1977) All Cr R 63, p 64 .

87 *Yusuf Mian v Emperor* AIR 1938 All 440, p 442, 39 Cr LJ 808 .

1 *Arman Ulla v Jainulla* AIR 1933 Cal 599, p 600, 34 Cr LJ 1015, 37 CWN 360 .

2 Re *Kudumbam* 1 Weir 196.

3 *Queen-Empress v Mahommad Ali* ILR 23 All 81, (1900) AWN 205 .

4 Re *Nalli Veerathevan*AIR 1914 Mad 121(1), 15 Cr LJ 471, 26 Mad LJ 598 ; *Kehr Singh v Emperor* AIR 1925 Lah 563, 26 Cr LJ 1121, 26 PLR 303, 7 LLJ 477 ; *Godha v Emperor* AIR 1927 Lah 500, 28 Cr LJ 670, ILR 8 Lah 263, 28 PLR 433 .

5 *Twet Pe v Emperor* 7 Cr LJ 464 (FB), 14 Bur LR 67, 4 LBR 19 ; *Nga Ok Gyi v Queen-Empress* 5 JLB 449 .

6 *Mangu v Emperor* AIR 1928 All 22, 29 Cr LJ 21, ILR 50 All 186, 25 All LJ 866 .

7 *Mayne's Criminal Law in India*, p 271.

8 *Queen-Empress v Mahommad Ali* ILR 23 All 81 .

9 *Emperor v Mukhtara* AIR 1924 All 783, ILR 46 All 915, 26 Cr LJ 481, 22 All LJ 838 .

10 *DeoSuchit Rai v Emperor* AIR 1947 All 225, 48 Cr LJ 640, (1947) All LJ 48 (FB) .

11 *Twet Pe v King-Emperor* 4 LBR 199, 14 Bur LR 67 (FB) .

12 *Emperor v Nga Nyan U* AIR 1914 UB 43, 16 Cr LJ 421 .

13 *King v Nga V Nyein* AIR 1941 Rang 340, (1941) PLR 582 .

14 *Emperor v Mukhtara* AIR 1924 All 783, ILR 46 All 915, 26 Cr LJ 481, 22 All LJ 838 .

15 *Queen-Empress v Mahommad Ali* ILR 23 All 81 .

16 *Ramanand Telt v Emperor* AIR 1938 Pat 590, ILR 17 Pat 677, 39 Cr LJ 887, 19 PLT 776 .

17 *Emperor v Mukhtara* AIR 1924 All 783, ILR 46 All 916 .

18 *Deo Suchit Rai v Emperor* AIR 1947 All 225 (FB) .

19 *Queen-Empress v Chittar* ILR 20 All 389, (1898) All WN 84 ; *Emperor v Nga Nyo* 1 Cr LJ 1116, 2 LBR 310 ; *Hargayan v King-Emperor* AIR 1923 All 83, 25 Cr LJ 127, ILR 45 All 159, 20 All LJ 925 .

20 *Queen-Emperor v Chittar* ILR 20 All 389 .

21 *Emperor v Nga Nyo* 1 Cr LJ 1116 ; *Hargayan v King-Emperor* AIR 1923 All 83 ; *King v Naung Hla Pe* AIR 1941 Rang 295, 43 Cr LJ 67 .

22 Act 9 of 1872, s 2(a) .

23 *Ibid*, s 2(b) .

24 *Emperor v Nga Nyo* 1 Cr LJ 1116, p 1117 .

25 *Hargayan v Emperor* AIR 1923 All 83, p 84 .

26 *King v Maung Hla Pe* AIR 1941 Rang 295, p 296 .

27 *Yusuf Mian v Emperor* AIR 1938 All 440, p 441, 39 Cr LJ 808, (1938) ILR All 81, (1938) All LJ 531 .

28 *Mohan v State* (1965) 2 Cr LJ 273 .

29 *State v Karan Singh Gujar* AIR 1953 MB 191, (1953) Cr LJ 1189 .

30 *State v Karan Singh Gujar* AIR 1953 MB 191, (1953) Cr LJ 1189 .

31 *Hemraj v Emperor* 11 Cr LJ 295 ; *Sharfa v Emperor* AIR 1914 Lah 551(1), 16 Cr LJ 541 ; *Akhan v Emperor* AIR 1931 Lah 157, 32 Cr LJ 729 ; *Bageshwari Ahir v Emperor* AIR 1932 Pat 241, 33 Cr LJ 709 ; *Mangu v Emperor* AIR 1928 All 22, 29 Cr LJ 21 ; *Balu v Emperor* AIR 1936 Sind 145 ; *Biswanath Dubey v Gharbigan Chamar* AIR 1940 Pat 548, 41 Cr LJ 902 .

32 *Ram Naresh Rai v Emperor* AIR 1931 All 710, p 711, 32 Cr LJ 1072 ; *Bageshwari Ahir v Emperor* AIR 1932 Pat 241, 33 Cr LJ 709, ILR 11 Pat 392 ; *Biswanath Dubey v Gharbigan Chamar* AIR 1940 Pat 548 .

33 *Mohan v State* (1965) 2 Cr LJ 273 .

34 *Yusuf Mian v Emperor* AIR 1938 All 440, p 442 .

35 *Sarla v Emperor* AIR 1914 Lah 551, 29 IC 669, 9 PR 1915 (Cr), 28 PLR 1916 ; *Bageshwari Ahir v Emperor* AIR 1932 Pat 241, (1932) Cr C 638, 139 IC 76, 33 Cr LJ 709, 11 Pat 39, 13 PLT 732 ; *Mangu v Emperor* AIR 1928 All 22, 106 IC 437, 29 Cr LJ 21, ILR 50 All 186, 25 All LJ 866 .

36 *Yusuf Mian v Emperor* AIR 1938 All 440 .

37 *Balu v Emperor* AIR 1936 Sind 145, 37 Cr LJ 1038 .

38 *Radha Mohan Ahir v Emperor* AIR 1941 Pat 138, 41 Cr LJ 922 ; *Bageshwari Ahir v Emperor* AIR 1932 Pat 241, 33 Cr LJ 709 .

39 *Yasin v State of Uttar Pradesh* (1970) All Cr Cas 240, (1970) All WR (HC) 368 .

40 *Mirams v Our Dogs Publishing Co* 2 KB 564 .

41 *Arman Ulla v Jainulla* AIR 1933 Cal 599, p 600, 34 Cr LJ 1015, 37 CWN 360 ; *Dewa Kalu Balai v State of Madhya Pradesh*

AIR 1959 MP 418, (1959) Cr LJ 1438 ; *Deo Suchit Rai v Emperor* AIR 1947 All 225, 48 Cr LJ 640, (1947) All LJ 48 (FB) **overruling***Emperor v Ram Naresh Rai* AIR 1931 All 710, ILR 54 All 55 ; *Yusuf Mian v Emperor* AIR 1938 All 440, 39 Cr LJ 880, (1938) ILR All 681, (1938) All LJ 531 ; *Ramanand Teli v Emperor* AIR 1938 Pat 590, 39 Cr LJ 887, ILR 17 Pat 677, (1938) PWN 679 .

42 *Queen-Empress v Nga Tun Bya* (1893-1900) LBR 226; *Emperor v Nga Pa Nyein* AIR 1941 Rang 340 .

43 *Yusuf Mian v Emperor* AIR 1938 All 440, p 442 .

44 *Nazar Ali v State* (1977) All Cr R 63, p 64 .

45 *Bageshwari Ahir v Emperor* AIR 1932 Pat 241, 33 Cr LJ 709 .

46 *Arman Ulla v Jainulla* AIR 1933 Cal 599, p 600, 34 Cr LJ 1075 .

47 *Pachakutty Thondampiriar v State* 78 Mad LW 110 .

48 *Deo Suchit Rai v Emperor* AIR 1947 All 225, p 228, 48 Cr LJ 640 (FB) ; **overruling***Emperor v Ram Naresh Rai* AIR 1931 All 710, 32 Cr LJ 1072 .

49 *Ramanand Teli v Emperor* AIR 1938 Pat 590, p 591, 39 Cr LJ 887 .

50 *Dewa Kalu Balai v State of Madhya Pradesh* AIR 1959 MP 418, (1959) Cr LJ 1438 ; *State v Karan Singh Gujar* AIR 1953 MP 191, p 192, (1953) Cr LJ 1189 ; *Arman Ulla v Jainulla* AIR 1933 Cal 599, 34 Cr LJ 1015 ; *Yusuf Mian v Emperor* AIR 1938 All 440, 39 Cr LJ 808 .

51 *King v Maung Hla Pe* AIR 1941 Rang 295, p 296, 43 CR LJ 57 ; *Ramanand Teli v Emperor* AIR 1938 Pat 590, p 591, 39 Cr LJ 887 ; *Emperor v Mukhtara* AIR 1924 All 738, 26 Cr LJ 481 .

52 *King v Nga Po Nyein* AIR 1941 Rang 340 .

53 *Nazar Ali v State* (1977) All Cr R 63, p 64 .

54 Re *Nalli Veerathevan*AIR 1914 Mad 121(1), 15 Cr LJ 471 .

55 *Twet Pe v Emperor* 7 Cr LJ 464 (FB) .

56 *King v Nga Po Nyein* AIR 1941 Rang 340 ; *Twet Pe v Emperor* 7 Cr LJ 464 (FB) .

57 *Ibid.*

58 *Doongia v State* 1954 PLW 329 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 216.

Harbouring offender who has escaped from custody or whose apprehension has been ordered.--

Whenever any person convicted of or charged with an offence, being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say,

if a capital offence.--if the offence for which the person was in custody or is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment.--if the offence is punishable with [59][imprisonment for life], or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine;

and if the offence is punishable with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both.

[60]["Offence" in this section includes also any act or omission of which a person is alleged to have been guilty out of [61][India], which, if he had been guilty of it in [62][India], would have been punishable as an offence, and for which he is, under any law relating to extradition, [63][* *] or otherwise, liable to be apprehended or detained in custody in [64][India]; and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in [65][India].

Exception.--This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.1643

Comments

1. Scope and Object

This section deals with harbouring an offender who escaped from custody and whose apprehension has been ordered. It is analogous to s 212, IPC . That section applies only to harbouring an offender who, after the commission of an offence, absconds before his conviction, while this section deals with harbouring an offender, who has escaped from custody, after being actually convicted of, or charged with an offence or where his apprehension has been ordered. It is thus an aggravated form of the offence under s 212 . In the case of an offence under s 212, the offender escapes to avoid his possible arrest. Here he escapes from an arrest, or at any rate, after his arrest has been ordered.

This section provides for the punishment of harbourers where the person harboured is wanted for an offence for which certain punishments are provided. No provision whatever is made in the section for the punishment of a harbourer where the man harboured is wanted for an offence punishable with imprisonment of less than one year.[66]

The purpose of the section is to penalise acts designed to obstruct or defeat the course of justice, which requires that suspected persons should be arrested whether they may eventually prove to be guilty or innocent, and that it is not necessary to show that the offence in respect of which orders of apprehension were issued, was actually committed.[67]

2. Legislative Changes

The paragraph relating to the definition of 'offence' was inserted by s 23 of Act 10 of 1886. The words 'British India' were replaced by the words 'the Provinces' by the Adaptation of Laws Order 1948. Subsequently, by the Adaptation of Laws Order 1950, the words 'the Provinces' were replaced by the words 'the States'. Finally, the words 'the States' were replaced by the word 'India'. The words 'or under the Fugitive Offenders Act 1881' were deleted by Act 3 of 1951. The words 'imprisonment for life' were substituted for the words 'transportation for life' by act 26 of 1955, s 117 and the schedule.1644

3. Section 216 and Section 224,IPC

In *Ajab v State of Maharashtra* ,[68] 12 persons apprehended for gaming, had escaped from police custody and there was no evidence of harbouring. The Apex Court held that s 216, IPC is not attracted and the conviction of the accused ought to be under s 224, IPC . The following observation were made by highest court of the land:

> Taking the last point first, we see merit in the contention that the conviction under section 216 , IPC is wrong. Under that section a person who harbours or conceal an offender who has escaped from custody or whose apprehension is ordered, is liable for punishment, if he has done so to prevent the offender's apprehension. In the present case, although the 12 persons who were apprehended for gaming had escaped, there was no evidence to show that any of the appellants was guilty of harbouring any of them. We are, therefore, of the opinion that their conviction under section 216 , IPC is not proper. The correct section to apply would be section 224,IPC which *inter alia* provides for punishment if a person escapes or attempts to escape from any custody in which he is lawfully detained. We are, therefore, of the opinion that the conviction under section 216 , IPC is not proper and it ought to be under section 224 , IPC .[69]

4. Ingredients of the Offence under this Section

The essential ingredients of the offence under this section are: (a) that a person, convicted of or charged with an offence, being in lawful custody for that offence, escapes from such custody, or that there has been an order for the apprehension of a certain person for an offence, (b) knowledge by the accused of such escape or the order for apprehension; and (c) the harbouring or concealing by the accused of the said person with the intention of preventing him from being apprehended.[70]

It is not an essential ingredient of the offence under this section that the person harboured should be found guilty. It is enough to show that against the person harboured an order of apprehension was issued for an offence, that is to say, for an offence alleged against him.[71] The harbourer is liable for punishment under this section, only if he has done so to prevent the offender's apprehension.[72]

5. 'Convicted or Charged with'

This expression makes it clear that, for the application of the section, it is not necessary that the person harboured should have been convicted of an offence. It is enough if he is charged with an offence and an order for his apprehension has been issued.[73]

6. 'Offence'--Meaning of

Under the general definition of the word 'offence' in s 40, IPC, it denotes a thing made punishable by this Code, but this is subject to certain qualifications. The first is that in certain chapters and in certain sections the word also denotes a thing1645 punishable under the Code, or under any special or local law as defined by ss 41 and 42, IPC . Secondly, in certain other specified sections the word has the same meaning, that is, a thing punishable under the Code, or under any special or local law, only when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards. This section is included among the latter sections, and from this it would appear that it would apply to a case in which the person harboured is wanted for an offence under a special or local law for which he is punishable under that law with imprisonment for a term of six months or upwards. But the section very clearly provides for the punishment of harbourers only where the person harboured is wanted for an offence for which certain punishments are provided. No provision whatever is made in this section for the punishment of a harbourer where the man harboured is wanted for an offence punishable with imprisonment of less than one year. The definition of the word 'offence' in s 40 cannot, therefore, affect the clear provision made in this section

for the punishment of a person who harbours an offender and the section does not apply to a case where the person harboured is wanted for an offence under a special or local law for which he is punishable only with imprisonment for six months. To this extent this section has overriding effect over s 40 .[74]

The definition of the word 'offence' as given in this section, further shows that if an act or omission is committed by a person out of India, with a view to harbour or conceal a person who is punishable in India as contemplated by this section, subject to the law relating to extradition, he is liable to be apprehended and punished for such act or omission in India. In this connection, ss 3, 4 and 40 may be referred to.

7. Public Servant

Section 21 and the commentary thereunder may be referred to.

8. 'Orders a Certain Person to be Apprehended for an Offence'--Explained

The order of apprehension may be for enforcing a punishment inflicted on conviction, or it may be for an offence only alleged and not yet proved with a view to facilitate a trial or to procure his presence for any purpose when avoiding the appearance is an offence. Harbouring or concealing a person for whose apprehension an order has been passed by a public servant for the purpose of enforcing a punishment already inflicted on him for having committed an offence, is an offence under this section.[75] But the purpose of this section is to penalise acts designed to obstruct or defeat the course of justice, which requires that suspected persons should be arrested whether they may prove eventually to be guilty or innocent, and for the application of this section, it is not necessary to show that the offence in respect of which orders of apprehension were issued was actually committed. It is enough to show that against the person harboured an order of apprehension had been issued for an offence, that is to say, for an offence alleged against him, and acquittal of the person harboured cannot affect the legality of the conviction.[76]1646

9. 'Knowing of such Escape or Order for Apprehension'--Presumption as to Knowledge

In order to establish an offence under this section it must be proved that a public servant, in the exercise of his lawful authority, ordered a certain person to be apprehended for an offence, and that the person charged with harbouring him did so knowing of such order, with the intention of preventing his apprehension.[77] Such knowledge cannot be presumed from the mere publication of the name of the offender in the *Criminal Intelligence Gazette*, nor can it be inferred from the offender adopting a false name and the harbourer misdescribing him as his relation.[78]

'Knowing' and 'Having Reason to believe' are Different Things

The word 'knowing' in this section means something more than and different from the words 'had reason (or sufficient cause) to believe'. The latter words might be satisfied even though no warrant has in fact been issued. 'Knowing', however, implies a fact which can be known. It does not necessarily import actual evidence of the senses, but it does import knowledge of something actual by means of authentic or authoritative information. Where warrants of arrest could not be executed and proclamations under s 82, CrPC, are issued, the proclamations cannot be deemed to establish that the accused 'knew' of the issue of the warrants. The distinction between 'knowing' and 'having reason to believe' cannot be disregarded. To read this section as if it contained the latter words would vitiate the judgment, conviction and sentence.[79] The mere fact that an absconder is found in the house of another person is not sufficient to involve the owner of the house in an offence under this section, unless the knowledge of the accused person as required by the section is proved, and here too the fact that a proclamation had been made sometime before the arrest, is not conclusive evidence of the knowledge of the offender.[80]

Mere Knowledge is Sufficient

This section may be compared with s 212 . If the harbourer knows[81] of the escape or order, it is immaterial whether he knows that the offence has been committed or not, and he will be liable even though no offence has, as a fact, been committed, or no fresh offence, as where the order is to surrender and serve out the remaining portion of a sentence, has been committed.[82]

Where the name of the accused was not mentioned as an accused in the FIR that she harboured her son, there was also no evidence on record, collected by the prosecution, that it was in the knowledge of the accused that her son had committed the offence, even if the son, after committing the offence, came to the house of the accused without the knowledge of the accused, even then no offence is made out against the accused (mother). Therefore, criminal proceedings under ss 212 and 216 *etc*, against the accused, were quashed.[83]1647

10. 'Harbours or Conceals'--what is?

As to the general definition of the term 'harbour', see notes to s 52A . The word 'harbour' includes supplying a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or assisting him in any way to evade apprehension. The last words are general and will include every kind of assistance.[84]

When a person gives false information to the police, in order that an offender may make good his escape, he is guilty of the offence of harbouring him.[85]

It has been held that the word 'harbour' in this section must be construed liberally. The person, at whose instance harbouring is effected, commits the offence, although the house in which the harboured person stays may belong to a different person.[86]

11. Intention to Prevent Apprehension Necessary

The mere fact of harbouring a person, who has committed a dacoity, is not an offence under this section. In order to constitute an offence, it must be done with the intention of preventing the apprehension of such person.[87]

12. Punishable

The word 'punishable' is used in the latter part of the section in reference to the offence, merely for the purpose of describing particular classes of offences in relation to which the punishment indicated in the section is to be inflicted, and, it does not indicate that in a particular case the offence must have been punished.[88]

13. Exception

This special provision appears to have been made in this section and s 212, IPC to maintain the harmonious relationship between the husband and wife and to safeguard the interest of their children. This section does not apply to any other member of the family and according to this exception, if the wife harbours or conceals her husband or she is harboured or concealed by her husband, the provisions of this section will not apply to them and they cannot be held guilty of any offence under this section.

14. Procedure

The offence under this section is cognizable, and a warrant should ordinarily issue in the first instance. It is bailable but not compoundable. It is triable by a magistrate of the first class.

Limitation for taking cognizance of the offence under this section is the same as for the offence under s 213, IPC .

Where the accused against whom offences under ss 212 and 216, IPC were alleged, was produced before the judicial magistrate, the judicial magistrate remanded him to1648 police custody under s 167(3), CrPC without recording the reasons, despite the fact that the offences alleged were bailable offences. The order of remand for police custody was held illegal and against the provisions of s 436, CrPC so the same was quashed.[89]

15. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (name of accused) as follows:
>
> That on or about the..... day of....., at ....., one *AB* was charged with or convicted of an offence under s ..... by the court of,..... (*or one AB was ordered to be apprehended for an offence punishable unders ..... by.....a public servant*) and that you knowing of the escape of *AB* (*or knowing of the said order for apprehension*) on or about the..... day of..... at....., harboured (*or concealed the said*) *AB* with the intention of preventing him from being apprehended, and that you thereby committed an offence, punishable under s 216 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

16. Proof

For a conviction under this section, the following points must be proved:

(a) Where the Offender Escapes:

(i) that a certain person had been convicted of, or charged with, an offence;
(ii) that the said person was in lawful custody for the same;
(iii) that he escaped from such custody;
(iv) that the accused knew of such escape;
(v) that he, with such knowledge, harboured or concealed such offender;
(vi) that he did so, with intent to prevent him from being apprehended;
(vii) that the offence in question was punishable with (a) death, or (b) imprisonment for life or imprisonment for ten years, or (c) with imprisonment from one to ten years.

(b) Where the Offender is Ordered to be Apprehended-

(i) that a person had been ordered to be apprehended;
(ii) that such order was passed by a public servant;
(iii) that it was passed in the exercise of the lawful power of such public servant;
(iv) that the accused knew of such order for apprehension;
(v) that with such knowledge he harboured or concealed such offender;
(vi) that he did so with the intention of preventing him from being apprehended.

17. Evidence

With regard to an order for the apprehension of a person as being guilty of an offence, there must be admissible evidence to show that lawful warrants or orders for1649 arrest were issued by the proper authorities. Sections 62, 64 and 65 of the Evidence Act prescribe the only evidence which the law permits in order to prove a warrant of arrest under s 62 of the Act, the production of the original order, or, under the conditions specified in s 65, of a certified copy. A warrant of arrest is a public document which affects the personal liberty of the subject. The statute prescribes its form. It has to bear the appropriate signature and seal. Any laxity of proof might have serious consequences. It might, for instance, lead to error as to the identity of the person to be apprehended. Secondary evidence, other than a certified copy, would not necessarily or even obviously show that the statutory form had been complied with.

In the case of proclamation under s 82, CrPC, sub-s (3) of that section provides that a statement in writing by the court issuing the proclamation, to the effect that the proclamation was duly published on a specified day, shall be conclusive evidence that the requirements of that section were complied with, and that the proclamation was published on such day. But this cannot be read as overriding the requirements of the Evidence Act or as making the proclamation evidence that the warrants had been issued. The method of proving the warrants is not a requirement of the section, which is merely dealing with the proclamation itself and the mode of publishing it and the like. Nor does s 82 expressly, or by implication, make the proclamation equivalent to a notice of its contents to the public or even to the inhabitants of the town or village where it is published.[90]

18. Punishment

The section provides that if the person harboured is wanted for an offence punishable with death, the person harbouring him shall be punishable with sentence extending up to seven years; if the man is wanted for an offence punishable with imprisonment for life or imprisonment up to ten years, the person shall be liable to be punished with imprisonment for a term of three years; if the man is wanted for an offence punishable with imprisonment which may extend to one year and not to ten years, the man harbouring him shall be punishable with imprisonment up to one-fourth part of the longest term of the imprisonment provided for the offence. It seems quite clear from this that the section only takes into consideration cases where the man who is harboured is wanted for an offence for which a maximum sentence of at least one year's imprisonment is provided. No provision is made in the section for cases where he is wanted for offences for which the maximum sentence is less than one year.[91]

The acquittal of the person harboured cannot affect the legality of the conviction; but it may well be taken into consideration in awarding the sentence.[92]

59 Substituted by Act 26 of 1955, s 117 and schedule, for 'transportation for life' (wef 1-1-1956).

60 Inserted by Act 10 of 1886, s 23 .

61 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and

schedule to read as above.

62 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and schedule to read as above.

63 The words 'or under the Fugitive Offenders Act, 1881' were repealed by Act 3 of 1951, s 3 and schedule.

64 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and schedule to read as above.

65 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and schedule to read as above.

66 *Deo Bakhash Singh v Emperor* AIR 1943 Oudh 51, 52, 44 Cr LJ 90.

67 *Rangaswami Goundan v Emperor* AIR 1928 Mad 1147, ILR 52 Mad 73, 55 Mad LJ 503 .

68 *Ajab v State of Maharashtra* AIR 1989 SC 827, (1989) Cr LJ 954 .

69 *Ibid*.

70 *KR Easwaramurthi Goundan v Emperor* AIR 1944 PC 54, p 55, 45 Cr LJ 721 ; Re *A Subramanya Ayyar*AIR 1947 Mad 303, p 304, 48 Cr LJ 287 .

71 *Rangaswami Goundan v Emperor* AIR 1928 Mad 1147, ILR 52 Mad 73 .

72 *Ajab v State of Maharashtra* AIR 1989 SC 827, (1989) Cr LJ 954, (1989) 1 SCJ 568, (1989) SCC (Cr) 602, (1989) 1 Crimes 725 .

73 *Rangaswami Goundan v Emperor* AIR 1928 Mad 1147 .

74 *Deo Baksh Singh v Emperor* AIR 1943 Oudh 51, p 52, 44 Cr LJ 90 .

75 *Satanji Koer v Emperor* 11 Cr LJ 95 .

76 *Rangasami Goundan v Emperor* AIR 1928 Mad 1147 ; Re *Subramanya Ayyar*AIR 1947 Mad 303, 48 Cr LJ 287, (1946) 2 Mad LJ 482, (1947) ILR Mad 793 .

77 *Ajab v State of Maharashtra* AIR 1989 SC 827, (1989) Cr LJ 954, (1989) 1 Crimes 725, (1989) SCC (Cr) 602 .

78 *Balwant Singh v Emperor* AIR 1914 Oudh 204, 15 Cr LJ 349 .

79 *KR Easwaramuthi Goundan v Emperor* AIR 1944 PC 54, p 57, 45 Cr LJ 721 .

80 *Moola v Emperor* AIR 1939 Lah 19, p 20, 40 Cr LJ 243, 40 PLR 934 .

81 *Balwant Sing v R* 15 Cr LJ 249 .

82 *Satanji Koer v R* 11 Cr LJ 95, 11 CLJ 109 .

83 *Rajbala v State of Haryana* (2001) IV CCR 389 (P&H) .

84 *Balakaran Singh v Emperor* AIR 1925 Oudh 423, 26 Cr LJ 1288 ; *Emperor v Sarwan Singh* AIR 1923 Lah 223, 24 Cr LJ 659 .

85 *Tara Singh v Emperor* AIR 1926 Lah 206, 27 Cr LJ 563 ; *Muchi Mian v Emperor* AIR 1918 Cal 826, 18 Cr LJ 731 ; *Akbar Ali v Emperor* 24 Cr LJ 485 ; *Vir Singh v Emperor* AIR 1930 Lah 99 ((2)), 31 Cr LJ 772 ; contra *Emperor v Hussain Baksh* ILR 25 All 561 .

86 *R v Bhujabali Akappa Goundi* 13 Cr LJ 701 .

87 *Nga Myat Gyi*(1872-1892) LBR 174.

88 *Satanji Koer v Emperor* 11 Cr LJ 95 .

89 *Harminder Pal Singh v State of Punjab* (1982) CCC 443 (P&H) .

90 *KR Easwaramurthi Goundan v Emperor* AIR 1944 PC 54, p 57, 45 Cr LJ 721, (1944) All LJ 388, 46 Bom LR 844, 48 CWN 477, (1944) 1 Mad LJ 515 ; Re *Shripad G Chandavankar*AIR 1928 Bom 184, 39 Cr LJ 317 .

91 *Deo Baksh Singh v Emperor* AIR 1943 Oudh 51, p 52 .

92 *Rangaswami Goundan v Emperor* AIR 1928 Mad 1147, p 1148 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

[93][S. 216A

Penalty for harbouring robbers or dacoits.--

Whoever, knowing or having reason to believe that any person are about to commit or have recently committed robbery or dacoity, harbours them or any of them, with the intention of facilitating the commission of such robbery or dacoity or of1650 screening them or any of them from punishment, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation.--For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without [1][India].

Exception.--This provision does not extend to the case in which the harbour is by the husband or wife of the offender.]

Comments

1. Scope

This section was inserted by the Indian Criminal Law (Amendment) Act 1894.[2] This was enacted with a view to empower the court to inflict an enhanced punishment where the persons harboured are dacoits or robbers or where they intend to commit dacoity or robbery. The section is analogous to s 212, which is not appropriate in dealing with the case of robbers and dacoits.

The section requires that no one should harbour any persons who are about to commit a dacoity, with the intention of facilitating the commission of such dacoity. It would appear, therefore, that to attract the penalty of the section it is not enough that a person should be harbouring dacoits in general, but the section renders it penal to harbour persons who intend to commit a particular dacoity,[3] or robbery.

2. Legislative Changes

In the explanation, the words 'British India' were substituted by the words 'the provinces' by the Adaptation of Laws Order 1948. The words 'the provinces' were substituted by the words 'the states' by the Adaptation of Laws Order 1950. The words 'the states' were substituted by the word 'India' by Act, 3 of 1951.

3. 'Reason to Believe'--Meaning of

Section 26, and the commentary thereunder may be referred to.

4. Robbery

Section 390, and the commentary thereunder may be referred to.1651

5. Dacoity

Section 391, and the commentary thereunder may be referred to.

6. Harbours

Section 52A, and the commentary thereunder may be referred to.

The mere fact that a dacoit or robber was seen talking to the accused is not an evidence of harbouring him.[4]

7. With the Intention of Facilitating the Commission of such Robbery or Dacoity

When a person charged with the substantive offence of dacoity or robbery, has been acquitted of that offence, another person who is said to have intended to screen him from legal punishment in respect of that offence, cannot be held guilty of harbouring the alleged offender under this section.[5] The reason is that no person can be screened from legal punishment if he has not rendered himself liable to it by his conduct. [6]

8. Procedure

An offence under this section is cognizable and bailable.[7] It is not compoundable and is triable by a magistrate of the first class.

There is no limitation for taking cognizance of an offence under this section.

9. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the ..... day of..... at..... knowing (*or having reason to believe*) that *AB* was about to commit robbery (*or dacoity*) [or that he had on or about the..... day of..... committed robbery (*or dacoity*) at.....] harboured him, with the intention of facilitating the commission of robbery (*or dacoity*) by the said *AB* (*or with the intention of screening him from punishment*) and that you thereby committed an offence punishable under s 216A of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

10. Proof

In a prosecution under this section, the prosecution has to establish the following facts:

(i) that certain persons were about to commit or had recently committed a robbery or a dacoity;
(ii) that the accused knew that fact;
(iii) that the accused harboured them or some of them; and1652
(iv) that the accused did so with the intention of--

(a) facilitating the commission of robbery or dacoity, or
(b) screening them or any of them from punishment.[8]

The accused was prosecuted on allegations that upon receiving intimation about the movement of the dacoits in the ravines (with live cartridges, rifle and large cash amount), an ambush was set up for apprehending them by the Station House Officer of Police Station. A known dacoit *R*, against whom prize money was also declared, was moving in the territories of Kwaari River Ravines, where respondent was found to be in possession of arms and ammunition, for supplying the same to the declared dacoit *R*. The entries of the *Roznama* which is one of the most important documentary evidence were not filed by the prosecution to establish the timings of receiving information as also the details of the information, for connecting the present respondent with the offence. The licence of the gun alleged to be recovered from the possession of the respondent was in the name of the respondent and was subsisting. Respondent was acquitted of the charge under s 216A .[9]

93 Inserted by Act 3 of 1894, s 8 .

1 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

2 Section 8 of the said Act.

3 *Emperor v Sunderdas* AIR 1925 Sind 295, p 296, 26 Cr LJ 28 .

4 *Man Singh v State of Haryana* (1993) 2 Chand Cr C 41, p 42, (1993) 3 CR 335 (P&H).

5 Re *A Subramanya Ayyar*AIR 1947 Mad 303, 48 Cr LJ 287 .

6 *Rangaswami Goundan v Emperor* AIR 1928 Mad 1147 .

7 *Shriya v State* (1989) Raj CC 189 .

8 *Brindaban v State* (1958) MPLJ (Notes) 94 .

9 *State of Madhya Pradesh v Veeru Singh* 2010 Cr LJ 2896, p 2899 (MP) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

[10][S. 216B.

Definition of "harbour" in sections 212, 216 and 216A .--

[Repealed by the Indian Penal Code (Amendment) Act 1942 (8 of 1942), section 3].

10 Inserted by Act 3 of 1894, s 8 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 217.

Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.--

Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

The four sections, ss 217 - 220, IPC, deal with the disobedience of the direction of law and disregard of their duties by public servants. They relate to offences by public servants, and could have, as such, formed a part of ch IX. But they have been included in this chapter as they deal with acts or omissions on the part of public servants which affect public justice.[11]1653

This section deals with disobedience on the part of a public servant, in respect of his official duties. The dereliction of any duty must be committed in the discharge of the functions of the public servant concerned.[12]Section 218 punishes public servants framing incorrect records or writing. Section 219 punishes public servants corruptly making, in a judicial proceeding, any report, order, verdict or decision, knowing it to be contrary to law. Section 220 punishes public servants making illegal commitments for trial or confinement.

The section makes punishable, a certain dereliction of duty, quite apart form the question as to

whether any bribe was paid to induce such dereliction. The dereliction must clearly, from the nature of the definition of the offence, be committed in the discharge of the functions of the person charged.[13]

2. Direction of Law--Direction Means Positive Direction of Law

The direction of law mentioned in this section means a positive direction of law, such as those contained in ss 39 and 40 of the Code of Criminal Procedure, and cannot be made to extend to the more general obligation by which every subject is bound not to stifle a criminal charge.[14]

Before a person can be convicted under this section, it must be shown that there is a direction of law as to the way in which a public servant is to conduct himself, as such public servant, and this direction must be a direction to be found in some positive statute or some rules or regulations which are declared by a statute to have the force of law.[15] Thus, under s 457, CrPC, it is the duty of a police officer seizing property, suspected to be a stolen property, to report the seizure forthwith to a magistrate. So, where a police constable, who retained for himself a piece of gold found in a search for stolen property, but not proved to be a part of the stolen property, and failed to report his possession to his superior officers under s 457 of the Code of Criminal Procedure, it was held that he was guilty of the offence under this section.[16] But where despite the report lodged with the police with regard to the commission of an offence, an FIR was not registered, no offence under ss 217 and 218, IPC is made out against the SHO for not registering the case.[17]

In the instant case, the corporation allowed the telephone authorities to do some digging work for laying down new cables and pipe-lines, and the telephone authorities did not restore the road for a long time. On complaint by a citizen, the process was issued under s 217, IPC against municipal officers. It was held that the municipal authorities had failed in their duty to prosecute the telephone authorities under s 417 of the Bombay Municipal Corporation Act (3 of 1888). The complaint not only makes out a *prima facie* case under s 217, IPC, for which the process had been issued, but also under s 166, IPC . The process issued, it was held could not be quashed.[18]

Where the court directed the prosecuting inspector to produce the police diary in the court and, on his failure, filed a complaint, under this section, against the1654 prosecuting inspector, it was held that the police diary being not in the possession of the prosecuting inspector, he did not disobey the direction given to him by the court and, as such, the complaint did not disclose any offence under this section or under any other law, against the accused.[19]

3. 'Intending Thereby to Save' *etc*--Intention is Material

For a conviction under this section, it is not only necessary that a public servant should have 'knowingly' disobeyed a direction of law, but also that he should have done so with a particular intention, namely, to save a person from legal punishment or minimise his punishment, or with a knowledge that his disobedience is likely to save a person from legal punishment or to minimise his punishment. The intention contemplated under the section is to screen persons believed to be guilty, and thereby to obstruct the course of justice.[20] It is not necessary as in the case of a charge under s 201, IPC, to establish that an offence has actually been committed.[21]It would be sufficient if the circumstances are such that a reasonable inference can be drawn therefrom that the accused had a certain knowledge at the time he did the act, namely, a knowledge that he was likely by his act to save a person from legal punishment.[22]

A police officer, who apprehends several persons at night, on a suspicion that they committed a culpable homicide, and keeps them in the village where they were arrested, after tying them together by the hands, is not guilty of an offence under this section if the prisoners escape in the course of the night.[23]

4. Disobedience of Direction of Law should be Knowingly

In a Bombay case, an old and illiterate police patel, on receiving a complaint of an offence of rape, made some investigation and prepared a *panchnama* of the scene and arrested the two persons against whom the accusation was laid. He sent them with a report to the police station, but on the way, the parties, presumably to save the girl's reputation, came to a settlement and all of them returned to the village. The relatives of the girl, who were responsible for lodging the proceedings, informed the patel that they had no desire to continue them, and the patel thereupon tore up the *panchnama* which he had made. It was held that under the circumstances, the patel could not be convicted under this section, inasmuch as it could not be fairly said, in these circumstances, that the patel knowingly disobeyed any direction of the law as to the way in which he should conduct himself or that he intended or knew it to be likely that by tearing up the *panchnama* he would save any person from legal punishment.[24]

5. 'Any person'

'Any person' means some person other than the public servant or the public servant himself.[25]1655

6. Legal Punishment

'Legal punishment' does not involve departmental punishment. It also does not apply to a fine inflicted on a *chaukidar* by his superior officer.[26] It means the prescribed punishment for the offence committed by the person sought to be helped.

7. Procedure

The offence under this section is non-cognizable and a summons should ordinarily issue in the first instance. It is bailable, but not compoundable, and is triable by any magistrate. It can also be tried in a summary way by the magistrate stated in s 260 of the Code of Criminal Procedure 1973.

The limitation within which the cognizance of the offence under this section can be taken is three years.

8. Sanction

The very nature of the offence defined in this section makes it clear, having regard to the *ratio decidendi* in the undermentioned cases,[27] that a sanction as required by s 197, CrPC for a prosecution for this offence, is a pre-requisite.[28] Proceedings commenced in respect of the offence under this section, without first obtaining such sanction are null and void, and a subsequent sanction is not sufficient to validate them.[29]

9. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate etc*) hereby charge you (*name of accused*) as follows:
>
> That on or about the..... day of..... at....., you being a public servant knowingly disobeyed the direction of law as to the way, in which you were to conduct yourself as such public servant, to wit....., (*specify the direction of law*) intending thereby to save..... (*or knowing it to be likely that you would thereby save.....*) from legal punishment (*or subject him to a less punishment than that to which he was liable or with intent to save or knowing that you were likely thereby to save some property, to wit..... from forfeiture*

(*or any charge to which it is liable by law*)), and that you thereby committed an offence punishable under section 217 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

When a charge has been expressed in vague terms, the prosecution should be limited to the particular sense in which these terms have been understood in the actual trial. The mere circumstance that some evidence was given about an omission to send a report in order to afford a collateral corroboration to the testimony going to prove a criminal breach of duty of another kind, does not make the accused liable to1656 punishment for the offence thus incidentally deposed to, but with which he was not clearly and directly charged.[30]

Before a person can be proceeded against under this section, there must be some material to show that there was a direction of law as to the way in which the person was supposed to conduct himself as such public servant and that he deliberately disobeyed any such direction of law, intending thereby to save, or knowing it to be likely that he would thereby save, any person from legal punishment or subject him to a lesser punishment, to which he was liable, or that he would save some property from forfeiture or a charge to which it was liable by law. It must also be shown that the direction, which the public servant knowingly disobeyed, was a direction to be found in some positive statute or some rules or regulations which have the force of law.[31]

10. Proof

To make out an offence under this section, the following points require proof:

(a) that the accused is a public servant;
(b) that there was a direction of law as to the way in which he was to conduct himself;
(c) that he disobeyed that direction of law;
(d) that he disobeyed it knowingly;
(e) that such disobedience was in conducting himself as such public servant; and
(f) that he did so intending thereby to save, or knowing it to be likely that he would thereby:

(i) save any person from a legal punishment or;
(ii) subject him to a lesser punishment than what he is legally liable to; or
(iii) save any property form forfeiture, or any charge to which it is liable by law.

Where the charge against the police officers, accused numbers 14-17, was that as a part of a criminal conspiracy with Bhai Thakur and his men, they had caused the evidence of the commission of an offence to disappear, and by that dishonest investigation had tried to screen the real offenders from legal punishment, they were held to have committed offences punishable under ss 201, 217 and 218, IPC read with s 120B, IPC as well as an offence under TADA. However, except the confessional statement of the co-accused, there was no other independent evidence to show the involvement of accused numbers 14-17 as alleged. The confessions, no doubt, create a strong suspicion that the accused numbers 14-17 were maintaining good relations with Bhai Thakur and accused number 8 (Prashant) and they had possibly helped Bhai Thakur and Manik Patil in screening the real offenders, however, it was not safe to convict them on the basis of the confessions of the co-accused.[32]1657

11. Sentence

When the offence comes under s 161, IPC as well as s 217, IPC the accused can be sentenced either by imprisonment or fine or both. An offence was committed 12 ½ years ago where the accused had taken small amounts for pushing up cases. The accused had since retired from service. The Bombay High Court opined that an imposition of a sentence of fine would meet the ends of justice.[33]

11 *Hem Chandra Mukherjee v King-Emperor* AIR 1925 Cal 85, 26 Cr LJ 345, ILR 52 Cal 151, 28 CWN 755 .

12 *Kesar Dev v State of Rajasthan* (1976) Raj Cr C 122 .

13 *SB Hussain v Emperor* AIR 1947 Cal 29, p 30, 47 Cr LJ 623 .

14 Re *Raminihi Nayar* ILR 1 Mad 266, 1 Weir 196.

15 Re *Ram Prasad*(1902) 22 AWN 16; *Kesar Dev v State of Rajasthan* (1976) Raj Cr Cas 122 .

16 Re *B Dasappa*AIR 1916 Mad 1109, 16 Cr LJ 453 .

17 *Vijay Kumar v Ramesh Kumar* (2002) II RCR (Cr) 677 (P&H).

18 *RN Kulkarni v VV Kanabar* (1998) AIHC 1192 (Bom) .

19 *Kesar Dev v State of Rajasthan* (1976) Raj Cr C 122, 123 ; Re *B Dasappa*AIR 1916 Mad 1109, 16 Cr LJ 453 .

20 *R v Hurdut Sarma* 8 WR (Cr) 68 ; *Empress v Amiruddeen* 3 ILR Cal 412 .

21 *Empress v Amiruddeen* 3 ILR Cal 412, 1 CLR 483 .

22 *Emperor v Mathuranath De* AIR 1932 Cal 850, p 854, 33 Cr LJ 657 .

23 Re *Ottam Chand*(1871) PR 18.

24 *Naranbhai Bhulabhai v Emperor* 14 Cr LJ 441 .

25 *R v Nand Kishore* ILR 19 All 305, *quoad hoc***overruling***R v Gauri Shankar* ILR 6 All 42 .

26 *R v Jungle Lall* 19 WR (Cr) 40 .

27 *Hori Ram Singh v Emperor* AIR 1939 FC 43, p 55, 43 CWN (FR) 50, (1940) ILR Lah 400, (1939) FCR 159, 181 IC 317, 43 CWN (FR) 50 (FC); *Vijay Kumar v Ramesh Kumar* (2002) II RCR (Cr) 677 (P&H).

28 *SB Hossain v Emperor* AIR 1947 Cal 29, p 30, 47 Cr LJ 623 .

29 *Ibid*; *Basdeo Agarwalla v Emperor* AIR 1945 FC 16, 46 Cr LJ 510 .

30 *Imperatrix v Baban Khan* ILR 2 Bom 142, p 144 .

31 *SB Hossain v Emperor* AIR 1947 Cal 29, p 30, 47 Cr LJ 623 in the absence of such material the accused is entitled to a discharge and no charge is to be framed.

32 *SN Dube etc v NB Bhoir* (2000) I CCR 1999 (SC) .

33 *Rajnikant Jaiwant Londhe v State of Maharashtra* (2000) III CCR 129 (Bom) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 218.

Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.--

Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope

This section deals with the wilful falsification of public records with the intention of (a) injuring any person, (b) saving any person from legal punishment or (c) saving any property from forfeiture or other charge.

The offence under this section is quite distinct from the one under s 193, IPC . All the necessary ingredients of the one are not included in the other. This section is1658 concerned with bringing erring public servants to book for falsifying public records in their charge; while s 193 makes no reference to public servants or their records but punishes falsification of evidence (whether in public records or otherwise) by any person (whether or not a public servant) for the purpose of being used in a judicial proceeding. These offences may at times overlap, but that would not make them any the less distinct.[34]

Gist of the Section is Stifling of Truth

Section 217 and this section are wider than s 201 . This section embraces cases other than those in which a principal offender is screened. But even as to such cases, the criminal intent is expressed in the following words: 'With intent thereby to save, or knowing it to be likely that he will thereby save any person from legal punishment'. These words also imply that an offence has been committed. The gist of the section is the stifling in cases where an offence has been committed. It is not necessary even to prove the intention to screen any particular person. It is sufficient that he knows it to be likely that justice will not be executed and that someone will escape punishment for the offence. It would be sufficient if the circumstances are such that a reasonable inference can be drawn therefrom that the accused had a certain knowledge at the time he did the act, namely, a knowledge that he was likely by his act to save a person from legal punishment. Further, it is not necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment.[35]

Essence of the Offence

In fact, the essence of the offence under s 218 is the intent to cause a loss or injury to any public or person or thereby save any person from legal punishment or save any property from forfeiture or any other charge.[36]

2. Ingredients of the offence

To constitute an offence under this section, the following ingredients must exist:

(i) the offender must be a public servant, charged with the preparation of a record or writing;
(ii) he must have framed that record or writing incorrectly as such public servant;
(iii) he must have done so with an intent to, or knowing it to be likely that he will thereby:

(a) cause loss or injury to the public or any person; or
(b) save any person from legal punishment; or
(c) save any property from forfeiture or other charge to which it is legally liable.[37]1659

3. Distinction between Sections 167 And 218

Commentary under the same heading in s 167, *ante* may be referred to.

4. Distinct Features of Sections 218 and 193

The first question is what the distinct features of ss 193 and 218 of the Indian Penal Code are. Section 198 states the punishment for giving false evidence in any stage of a judicial proceeding or fabricating false evidence for the purpose of being used in any stage of judicial proceeding. Section 191 defines the offence of giving false evidence and s 192, the offence of fabricating false evidence. We may ignore s 191 because here admittedly, there is no giving of false evidence as defined in the Indian Penal Code . The offence of fabricating false evidence comes into existence when a person causes any circumstances to exist, makes any false entry in any book or record or makes any document containing a false statement, intending that such circumstances, false entry or false statement may appear in evidence in a judicial proceeding etc, and such appearance causes an erroneous opinion to be formed, touching a point material to the result of such proceeding. The offence is a general one and does not specify the person or the kind of document. It may be any person and the fabricated evidence may be in any form. Section 218 on the other hand, deals with the intentional preparation of a false record by a public servant with the object of saving or injuring any person or property. The differences between the two sections is clearly noticeable. Section 192 deals with a judicial proceeding and the false evidence is intended to be used in the judicial proceeding. Section 218 deals with public servants and there the gist is the intentional preparation of a false record with a view to saving or injuring any person or property. This need not have a relation to a judicial proceeding as such.[38]

Offences under s 218, IPC, is quite distinct from that under s 193 . Section 218 is concerned with bringing erring public servants to book for falsifying the public records in their charge; while s 193, on the other hand, makes no reference to public servants or their records but punishes the falsification of evidence (whether in public records or not) by any person (whether a public servant or not) for the purpose of being used in a judicial proceeding. These offences may at times overlap, but that does not make them any the less distinct. There is, therefore, no justification for refusing to allow the accused to be prosecuted under s 218, IPC, for his misdeeds (false entry in the birth and death register) as a public servant merely because the falsification of the records in his charge happens also to constitute an offence punishable under s 193, IPC .[39]

5. 'Charged with the preparation of any record or writing'--Meaning of

The words 'charged with the preparation' are not restricted to the narrow meaning of 'enjoined by a special provision of law'. It is sufficient if the document was prepared in accordance with a practice to which it was the official duty of the public servant to conform.[40] To render a public servant liable under

this section, he must have been charged with the preparation of a record or writing. A public servant who frames a1660 false document of a character which it was not his duty to prepare, is not punishable under this section.[41]

So also a *patwari*, who is directed by a revenue court to prepare a *fard*, prepares a false *fard*, is not guilty as he is not a public servant charged with the preparation of such a *fard*.[42]

A pay-sheet drawn up in a railway office and setting out certain sums as due by the railway to certain coolies described as working in a special gang, is a record within the meaning of this section and the railway clerk who prepares a false pay-sheet is liable under the section.[43]

A *patwari* is responsible for the accuracy of all entries in the *khasra* and must satisfy himself of the facts by inquiries from the persons concerned as well as by the field inspections. So a *patwari* who, knowing that a particular person was in possession, fails to enter his name in the *khasra*, knowingly makes a wrong entry, and if he makes the wrong entry with the intention of causing a loss to the person, he is liable under this section.[44]

6. 'Frames that Record or Writing in a Manner which he knows to be Incorrect'--Not the use, mere Preparation Sufficient to Constitute Offence

To constitute an offence under this section, it is not necessary that the incorrect document should be submitted to another person or be otherwise used by the writer. The requirements of the section are satisfied, if it is shown that the document has been prepared by a public servant, charged with its preparation, in a manner which he knows to be incorrect and with the knowledge that he is thereby likely to cause loss to the public.[45]

Mere making of incorrect entries when not Punishable

If a *lekhpal* makes entries in revenue records in an exercise of the powers reserved to him by law, and these entries are incorrect, it would be an erroneous exercise of his power which can be corrected by the higher revenue authorities. Such entries cannot, however, be made a ground for the prosecution of the *lekhpal* under this section.[46] The *lekhpal*, not being required to make a very detailed inquiry on the point of possession, it could not be inferred from his act in making those entries that he had acted dishonestly in order to cause a wrongful gain to any party and wrongful loss to others. Since there was already a dispute between the parties regarding the possession of a plot, a very heavy burden lay on the prosecution to establish that the *lekhpal* had acted dishonestly when he had made the entries.[47]

Where the accused, a deputy commissioner of a district, was alleged to have got some land registered in the name of his daughter, by under valuing the price, causing1661 a loss in the stamp duty to the government, the allegations were also that mutation was sanctioned in violation of revenue rules. As per the annual five years average statement, it could not be said that the land was sold for inadequate consideration. For five years since the registration of the case, there was no progress in the investigation. The offence under s 218, IPC and other offences alleged were not made out, so FIRS were quashed by the High Court *qua* the accused in the petition under s 482, CrPC .[48]

The accused Chairman and member of a Subordinate Staff Selection Board in conspiracy with the accused candidate increased the numbers awarded in *viva voce*test and included him in the list of selected candidates for pecuniary benefits. The act of the three accused persons did not amount to offence of forgery. The accused persons prepared false record of the final result also and therefore were guilty of offences under ss 218, 420, 477A and 120B, IPC .[49]

Mere making of Incorrect Entries when Punishable

But where a *patwari* who was present when the possession of certain plots was delivered by the court *amin* to the mortgagees and actually signed the *dakhalnama,* entered in the *khasra* the names of the

mortgagors as being still in possession of the plots, he must be deemed to have made the entry knowing it to be false.[50]

Mode of Preparation not Material

It is not material what mode is adopted for incorrect preparation of the record. Substitution of one leaf in a record, by another, so as to omit a given entry from the page, is penal within the meaning of the section.[51]

Mere Motive is not Incriminating

A conviction under this section can be maintained for framing the record of an investigation incorrectly only where it is established that during the investigation, the accused recorded statements, which were not made before him, or destroyed the statements that were actually made or made a record of circumstances which, as a matter of fact, did not transpire before him. Where a sub-inspector recorded what was stated before him and he recorded what he actually witnessed, he cannot be held guilty under this section merely because he may have a motive for recording the statement made before him knowing them to be false.[52]

Issue Estoppel

But where the sub-inspector, in his capacity as a public servant, wrongly prepared certain notes in order to concoct a false defence, he was to be convicted under s 218 simpliciter and not with the aid of s 149 . [53]

Where the accused was charged under ss 201 and 218, IPC and it was alleged that he fabricated false evidence records and initiated false cases to screen certain1662 offenders in a murder trial, the prosecution against the said offenders in the murder trial was quashed in view of the rule of issue estoppel and the proceedings against the accused under ss 201 and 218, IPC were held not maintainable, there being no chance of ultimate conviction of the accused.[54]

7. 'With Intent to Cause Loss to the Public or to any Person'--Intention is Dominant

In order to sustain conviction under this section, it is not sufficient that the entries are incorrect, but it is essential that the entry should have been made with the intention mentioned in that section. Where direct evidence proving the necessary criminal intention is lacking in the case, and the circumstantial evidence is too meagre to support any safe conclusion as to the intention with which the accused made the entry complained of, it must be held that the prosecution had failed to prove the necessary criminal intention.[55]

Where the accused made a certain false abstraction and read it over to another, a public servant charged with the preparation of a certain record, and thereby an incorrect record was prepared, it was held that the accused could not be guilty of abetment of such offence and not the less so, because the person charged with the preparation of the record had no guilty knowledge or intention in the matter.[56]

***Bona fide* Mistake Rule out Intention**

Where the wrong entry has been made due to a *bona fide* mistake, an intention to cause harm cannot be inferred.[57]

Substitution of Fresh Matter when amounts to framing Incorrect Record

When a police-inspector was charged with framing an incorrect record in that he entered in his diary that certain cartmen told him that they were not beaten by dacoits, while in fact, they had told him that

they were beaten by dacoits, it was held that this of itself would not be sufficient to sustain a conviction under this section but, where, without endeavouring to inquire into the truth of the said entry in his diary, he had destroyed certain records which falsified it and substituted fresh note-books, his *bona fides* were open to question and he must be deemed to have framed an incorrect public record intentionally.[58]

Where a *patwari* knows that a particular person was in possession and he fails to enter his name in the *khasra,* he is making an entry which he knows to be false, and if such false entry is made with a criminal intention of causing a loss to the person, an offence under this section is committed.[59]1663

Destruction of Correct Report and Preparation of Incorrect Report

A report of the commission of dacoity was made at a *thana*. The police officer in charge of the *thana* at first took down the report which was made to him, but subsequently destroyed that report and prepared another and a false report of the commission of a totally different offence, to which he obtained the signature of the complainant, and which he endeavoured to pass off as the original and correct report made to him by the complainant. It was held that the police officer was guilty of offences punishable under s 204 and this section.[60] But where a report was lodged with the police with regard to the commission of an offence, but FIR was not registered, no offence under ss 217 and 218 is made out against the SHO, for not registering the case.[61]

Where the two accused, whose joint duty was to prepare *panchanamas* and valuation of fees, knowingly prepared false *panchanamas* in common concert, with the dishonest intention of benefitting themselves and some other persons and causing loss to the government, it was held that they were guilty under this section.[62]

Intention and not the chance of Success Material

The question under this section is not whether the accused was or will be able to accomplish the object he had in view, but whether he made the entries in question with the intention to cause, or knowing it to be likely that he will thereby cause, loss and injury. The fact, therefore, that the accused conceived a foolish plan of injury is no ground for exculpating him from the offence which he has committed.[63]

8. Injury or loss must not be remote

This section contemplates the wilful falsification of a public document with the intent thereby to cause loss or injury, and this means by the document itself or by some transaction with which it is essentially connected. An accused must not be convicted on a remote and speculative chain of possibilities; otherwise the most innocent acts might, by the exercise of a little ingenuity, be perverted into the initial steps of great crimes.[64]

Remote Intention not Material

Where a *chowkidar* was charged under this section with having made a false entry in his attendance book, with a view to support a charge which was made against a sub-inspector of having made a false report regarding the length of absence from duty of another *chowkidar,* and thereby to cause loss or injury to the sub-inspector, it was held that the intention was too remote to fall within this section.[65]

9. 'Or with Intent Thereby to save any Person from Legal Punishment--Meaning of

It was been held that a public servant is not punishable under this section, if his object in preparing the false document was to screen himself from punishment, by1664 concealing the fact that he had committed a breach of duty,[66] unless the mode in which he framed the false document had, and must

have been known by him to have, the effect of causing injury to the public or to others.[67] In a later case, however, the same court held that if the act charged would tend to save any person from legal punishment, it was equally an offence where the accused intended to save himself. If the legislature had intended that this section should only apply when the intention was to save some person other than the public servant, it would have been easy to insert the word 'other' between the words 'any ' and 'person'. A public servant who does that which, if done to save another from legal punishment, would bring the public servant within this section has equally committed the offence punishable under the section if the person whom he intends to save from legal punishment is himself.[68] To support a conviction under this section it is necessary to prove that the accused believed, or had reason to believe, that the person concerned had committed an offence, though it was not necessary to prove that such an offence had, as a matter of fact, been committed.[69]

A, a *kulkarni,* falsely reports on an offence committed in his village, intending to save *B* from punishment. *A* is guilty under this section.[70]

A, a *patwari,* alters an entry in his official diary, falsely in order to save himself from punishment. He commits an offence under this section.[71]

A, whose duty it was to make certain reports, made false ones with an intent to prevent the discovery of a fraud previously perpetrated by him. He committed an offence under this section.[72]

A, a sub-inspector in his capacity as a public servant, wrongly prepares certain notes in order to concoct a false defence, he was to be convicted under s 218 simpliciter.[73]

Where a person is charged under this section with framing a report incorrectly, or under s 201, for giving false information, with an intent to save offenders from punishment, the issue to be tried is not whether or not such alleged offenders were in fact guilty, but merely the belief and intention of the accused in respect to their guilt.[74]

For the purpose of obtaining a previous sanction of the Governor under s 197, CrPC, an offence under this section cannot be distinguished from an offence under s 447A, IPC .[75] No complaint of the court is, however, necessary for a prosecution under this section.[76]1665

10. Legal Punishment

The expression 'legal punishment' means the punishment prescribed by law for the offence committed and does not include departmental punishment. It does not apply to a fine inflicted on a *chowkidar* by his superior officer.[77]

11. Procedure

The offence under this section is cognizable and a warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by a magistrate of the first class. The limitation for taking cognizance of the offence under this section is three years. The cognizance cannot be taken beyond the period of limitation unless the court holds that it was necessary to do so in the interest of justice or the delay in taking cognizance is held to have been properly explained.[78]

12. Sanction

No court can take cognizance of an offence alleged to have been committed by a government servant, not removable from his office, save by or with the sanction of the government, while acting or purporting to act in the discharge of his official duty.[79] A medical officer is supposed to issue a medical certificate based on an act done by him while discharging his duty as a medical officer and not without performing his duty as a medical officer. Issuance of a medical certificate without performing his duty as a medical officer, that is with false allegations, does not amount to an act done

while discharging his official duty. Such act does not fall within the ambit of s 197(1), CrPC and no sanction for the prosecution for an offence under this section is required under the law.[80] Where an FIR was not registered, no offence under ss 217 and 218, IPC was made out against the SHO for not registering the case, moreover the SHO cannot be prosecuted without a sanction from the authority.[81]

Where a public servant posted in the traffic police was alleged to have framed an incorrect record or writing to save a person from punishment or from forfeiture of a property, the prosecution against the police official is barred under s 140, Delhi Police Act, if initiated after more than three months or within a year with the previous sanction of the Administrator. The alleged acts were committed by the said public servant in 1977 and the case was instituted in the court against him on 16 April 1979, thus the institution of the prosecution was obviously time barred.[82]

Where the accused, a *patwari* being a public servant, was charged for committing forgery and using the forged documents as, a genuine one by erasing and manipulating the *khasra girdawari* register and *jamabandhi*, the offences being committed by him while discharging his official duties and when this was the1666 petition, the benefit of s 197, CrPC was available to him and his conviction was set aside.[83]

13. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That on or about the.....day of.....you being a public servant charged with the preparation of a record (or writing), to wit.....framed the said record (*or writing*) in a manner which you knew to be incorrect (*specifythe incorrectness of the statement*) and which you made with intent to cause (*or knowing it to be likely that you will thereby cause*) loss (*or injury*) to the public (*or to.....specify the person*) [or with intent thereby to save, or knowing it to be likely that you will thereby save any person from legal punishment] [or with intent to save or knowing that you are thereby likely to save any property, to wit.....from forfeiture (*or other charge*) to which it was liable by order of the court in case No....of.....] and that you thereby committed an offence punishable under s 218 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

The charge must set out the manner in which the offence was committed.[84] The material point for establishing the charge is the intention of the accused which should be specifically stated in the charge.[85]

14. Proof

Where the charges against police officers, accused numbers 14-17, was that as a part of criminal conspiracy with Bhai Thakur and his men, they had caused the evidence of the commission of the offence to disappear, and by that dishonest investigation they had tried to screen the real offenders from legal punishment and thereby they had committed offences punishable under ss 201, 217 and 218 read with s 120B, IPC as well as an offence under TADA. However, except a confessional statement of a co-accused, there was no other independent evidence to show the involvement of the

accused numbers 14-17 as alleged. The confessions, no doubt, cast a strong suspicion that the accused numbers 14-17 were maintaining good relations with Bhai Thakur and that the accused number 8 (Prashant) and they had possibly helped Bhai Thakur and Manik Patil in screening the real offenders, however, it was not safe to convict them on the basis of the confessions of a co-accused.[86]

15. Sentence

In *Harish Chandra Krishna Gadkar v State of Maharashtra* ,[87] upholding the conviction of the accused for an offence under this section and some other offence, the Supreme Court held that an admonition was sufficient punishment, considering the fact that he cannot be taken back in service, nor is he entitled to any backwages from the date of suspension to the date of retirement. Earlier these grounds were not1667 found sufficient by the Maharashtra High Court in a case, for taking a lenient view in the matter of sentence.[88]

Where the police took a person from the place where he was alleged to have been causing nuisance to the public, under the influence of liquor, to the civil hospital, and the doctor of the civil hospital gave a certificate stating that the accused had consumed liquor but was not under intoxication, since he was conscious and well-oriented to time and space and his speech was normal there was nothing to show the result of the blood test of the accused. The police even failed to record statements of members of the public who had felt annoyance on account of the conduct of the accused, and the only witnesses cited were the police officials who had arrested him and the doctor who had examined him. On these facts, the Himachal Pradesh High Court, taking a lenient view, did not direct a registration of a criminal case against the police authorities for the abuse of their power on account of illegal arrest and unlawful confinement under ss 465 and 218, IPC after following due procedure and instead, directed the competent disciplinary authority to hold a departmental inquiry against them.[89]

34 *Ganga Singh v State* AIR 1962 All 150, p 151, (1962) 1 Cr LJ 240 .

35 *Queen-Empress v Krishnaja* Ratanlal Unrep Cr Cas 405; *Empress v Amiruddeen* 3 ILR Cal 412, 1 CLR 483 ; *Anverkhan Mahommad Khan v Emperor* AIR 1921 Bom 115, p 118, 22 Cr LJ 609 ; *Emperor v Mathuranath De* AIR 1932 Cal 850, p 854-55, 33 Cr LJ 657 ; *Moti Ram v Emperor* AIR 1925 Lah 461, 26 Cr LJ 857, 26 PLR 594 .

36 *Biraja Prasad Roy v Ngendra Nath Dash* (1985) 1 Crimes 446, p 448 (Ori), (1985) 59 Cut LT 144 .

37 *Biraja Prasad Roy v Ngendra Nath Dash* (1985) 1 Crimes 446, p 448 (Ori), (1985) 59 Cut LT 144 .

38 *Kamla Prasad Singh v Hari Nath Singh & Anor* AIR 1968 SC 19 .

39 *Ganga Singh v State* AIR 1962 All 150, (1962) 1 Cr LJ 240 .

40 *Queen-Empress v Deodhar Singh* ILR 27 Cal 144, 151 ; *Nathu Mal v Abdul Haq* AIR 1930 Lah 159, 31 Cr LJ 584 .

41 *Empress v Mazhar Hussain* 5 ILR All 553 ; *R v Nand Kishore* ILR 19 All 305 .

42 *Meherban Ali Khan v Sita Ram* AIR 1929 All 374, 30 Cr LJ 874, (1929) All LJ 512 ; *Sitaram v State* AIR 1968 All 207, (1968) Cr LJ 721, 726 ; Re *Chinnakannu Udayan* 1 Weir 197.

43 *Kesari Mal v Emperor* AIR 1914 Oudh 361, 15 Cr LJ 502 .

44 *Chandra Bhan Lal v Emperor* AIR 1935 All 968, 37 Cr LJ 131, (1935) All LJ 1088 ; *Ishaq v State* (1981) All LJ 871 .

45 Re *Megraj*(1881) PR 13.

46 *Ram Gopal v State* (1970) Cr LJ 384 (All), (1968) All WR (HC) 192, (1968) All Cr R 127 .

47 *Sitaram v State* AIR 1968 All 207 (DB), (1968) Cr LJ 721 (DB).

48 *Rajmani Tripati v State of Himachal Pradesh* (1998) 1 Crimes 422 (HP), (1997) 3 Sim LC 226 (HP) .

49 *Rakesh Kumar Chhabra v State of HP* 2012 Cr LJ 354, p 357 (HP) .

50 *Chandra Bhan Lal v Emperor* AIR 1935 All 968, p 969 .

51 *Madan Lal Lamba v Inderjit Mehta* AIR 1970 Punj 200, (1970) Cr LJ 726, p 729 .

52 *Moti Ram v Emperor* AIR 1925 Lah 461, 26 Cr LJ 837, 26 PLR 594 .

53 *Sarju Singh v State* (1978) Cr LT (NOC) 286 All .

54 *Ramesh Chandra Biswas v State* (1994) Cr LJ 1134 (Cal) .

55 *Raghubansh Lal v State of Uttar Pradesh* AIR 1957 SC 486, (1957) Cr LJ 595 ; *Raghunath Lal v State* (1964) All Cr R 244 ; *Attar Singh v State* (1967) 69 Punj LR 89 (SN) ; *Jaswant Singh v State* AIR 1966 J&K 96, (1966) Cr LJ 901 .

56 *Queen v Brij Mohan Lal* 7 NWP 134 ; *Maulad Ahmed v State of Uttar Pradesh* (1964) 2 Cr LJ 71, 72, (1964) 1 SCJ 164 .

57 *Jaswant Singh v State* AIR 1966 J&K 96, (1966) Cr LJ 901 ; *SC Ramaswami Iyengar v Emperor* 12 Cr LJ 455 .

58 *SC Ramaswami Iyengar v Emperor* 12 Cr LJ 455 .

59 *Chandrabhan Lal v Emperor* AIR 1935 All 968 .

60 *Queen-Empress v Mahommad Shah Khan* ILR 20 All 307 .

61 *Vijay Kumar v Ramesh Kumar* (2002) III RCR (Cr) 677 (P&H).

62 *Dattajirao Bhausaheb Patel v State of Maharashtra* (1971) UJ (SC) 476, 478-79.

63 Re *Naraparaddi Seshareddi*AIR 1938 Mad 595, 39 Cr LJ 825 .

64 *Queen-Empress v Ramchandra* Ratanlal Unrep Cr Cases 201-02.

65 *Queen v Jungle Lall* 19 WR 40 .

66 *Empress v Gauri Shankar* ILR 8 All 42 .

67 *Reg v Girdhari Lal* ILR 8 All 653 .

68 *Queen-Empress v Nand Kishore* ILR 19 All 305 .

69 *Queen-Empress v Krishnaji* Ratanlal Unrep Cr Cases, 405; See also notes above under the heading 'Scope'.

70 *R v Mathar Ramchandra* 7 Bom HCCC 64 .

71 *R v Nand Kishore* ILR 19 All 305 .

72 *R v Girdhari Lal* ILR 8 All 653 .

73 *Sarju Singh v State* (1978) Cr LJ (NOC) 286 (All) .

74 *Queen v Hurdut Surma* 8 WR 68 .

75 *Sita Ram v State* AIR 1968 All 207, (1968) Cr LJ 721 .

76 *Karan Singh v State of Rajasthan* (1985) Raj LW 682 .

77 Re *Jungle Lall* 19 WR 40.

78 *Dalpat Singh (Dr) v State of Rajasthan* (1989) Cr LR (Raj) 238 ; *State of Punjab v Sarwan Singhai* AIR 1981 SC 1054 .

79 See s 197 and the commentary thereunder in *Sohoni*'s *Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

80 *DV Venkateswara Rao v State of Andhra Pradesh rep by Public Prosecutor* (1997) Cr LJ 919 (AP), (1996) 2 Andh LT (Cr) 613, p 617 (AP) ; *Ashfaq Ahmed v State* (1981) All LJ 871, p 875 (Luc) .

81 *Vijay Kumar v Ramesh Kumar* (2002) II RCR (Cr) 677 (P&H).

82 *State v Shiv Charan* (1999) I CCR 86 (Del) .

83 *Ram Prakash v State of Haryana* (2000) Cr LJ 3395 (P&H) .

84 Code of Criminal Procedure 1973, s 213, illust (f).

85 *Ram Sawrup v State of Punjab* (1987) 1 Punj LR 95, (1987) CCC 448 .

86 *SN Dube etc v NB Bhair* (2000) 1 CCR 1999 (SC) .

87 *Harish Chandra Krishna Gadkar v State of Maharashtra* (1994) SCC (Cr) 1709 .

88 *State of Maharashtra v Harikishan* (1989) 3 Crimes 364, p 378-79 .

89 *Padam Dev v State of Himachal Pradesh* (1989) Cr LJ 383 (HP)(DB).

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 219.

Public servant in judicial proceeding corruptly making report, etc., contrary to law.--

Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding, any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Comments

1. Scope

Sections 219 and 220, IPC relate to corrupt or malicious exercise of the power of a public servant, in judicial proceedings.

Where a village court judge, charged with the preparation of the register of suits filed in his court, frames that register in a manner which he knew to be incorrect, namely, by making an entry therein that a certain suit had been filed when in fact it was not so filed, and also by making an entry of a judgment purported to have been pronounced, when it was in fact not pronounced, he cannot be convicted under this section but can be convicted only under s 218 .[90]

Where the judicial officers acting in official capacity and not in individual capacity have passed judicial orders, such orders can be challenged by filing appeal or revision, but they cannot be prosecuted for offences under ss 219 and 220, IPC .[91]1668

No cognizance of an offence under this section can be taken if the proceeding concerned is not a judicial proceeding, but only an arbitration proceeding, conducted as per the provisions of the Karnataka Co-operative Societies Act.[1] As the submission of a report by the police under s 112, or 145(1), CrPC is not a judicial proceeding s 219 is not attracted even if the report is corruptly or maliciously furnished.[2]

2. Essence of the Offence

The essence of the offence under this section is (a) that there must be a judicial proceeding, that is, a

proceeding actually commenced and pending, wherein a party claims relief against another and invites the decisions of the court in regard thereto, and not a fictitious one where there is no party litigating, and (b) that there must be the making of a real report or a real pronouncement of an order, verdict or decision.[3]

3. Public servant

Section 21 and the commentary thereunder may be referred to.

4. Corruptly

The commentary under s 196 may be referred to.

5. 'Maliciously'--Meaning of

The meaning of the term 'malice' has been the subject of much controversy and 'maliciously' has been characterised as an unhappy expression by a high judicial authority.[4] The word 'malice' seldom has any meaning except a misleading one. It refers not to an intention but to a motive; and in almost all legal inquiries, intentions as distinguished from motive, is the important matter.[5] The sense of the word as employed in law seems to vary according to the subject-matter and the context, and the only sense in which it is never used, is the popular sense of spite, whilst it also includes the elements of negligence or mischance.[6]The word 'maliciously', though not defined in this Code, has been interpreted to mean where a person wilfully does an act which is injurious to another without a lawful excuse, he does it maliciously. In other words, the term 'maliciously' implies an intention to do an act which is wrongful to the detriment of another.[7] "Maliciously', said Bowen LJ in *Mogal Steamship Co v Mc Gregor Cow & Co* [8]'means and implies an intention to do an act which is wrongful to the detriment of another', and by 'wrongful' is 'meant an act done without lawful excuse'.[9]

In the interpretation of the statutory provisions, the courts have attributed so many different meanings to 'malice' that it is impossible at the present time to find in1669 judicial authority any precise and universal definition of the word. In this confused situation the late Professor Kenny,[10] in 1902, enunciated a principle which, although it lacked any definite judicial authority, has been repeated ever since without adverse criticism, and has now been approved by the Court of Criminal Appeal,[11] in the following terms:

> In any statutory definition of a crime, 'malice' must be taken not in the old vague sense of wickedness in general but as requiring either: (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not, *ie*, the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it. It is neither limited to, nor does it indeed require, any ill-will towards the person injured.

Presumption and Inference

The word 'maliciously' is used in s 219, IPC . In order to establish malice as contemplated by this section, it is not necessary for the prosecution to prove that the accused bore ill-will or enmity against a specific person, but if the injurious act was done voluntarily without a lawful excuse, malice may be presumed. Malice is often not capable of direct and tangible proof and in almost all cases has to be inferred from surrounding circumstances having regard to the setting, background and connected facts.[12]

'Malice' is contrasted with 'Corruptly'

In this section the word is contrasted with 'corruptly' and thus, read together, the effect would seem to be that a report, order, *etc*, deliberately given contrary to law is punishable, whether the public servant's conduct in so doing has been induced by corruption, or prompted by any other feeling.

6. Judicial Proceedings

The commentary under s 192 may be referred to.

7. Procedure

The offence under this section is non-cognizable, but a warrant may issue in the first instance. It is bailable but not compoundable, and is triable by a magistrate of the first class.

There is no period of limitation for taking cognizance of an offence under this section.

8. Sanction for Prosecution is Required in Cases Falling under Section 197 , CrPC

Where there were no *mala fides* on the applicant's part and the whole action of the applicant [the trial magistrate] against the non-applicant, being purely and solely in discharge of his official duties, previous sanction of the State Government was necessary for taking cognizance of the particular offence against him, as enjoined by1670 s 197 of the Code of Criminal Procedure ; and as such, in the absence of such compliance, the proceedings initiated under the private complaint, deserve to be quashed. Further, there being nothing on record to show any corruption or malice on the part of the applicant, the offence under s 219 of the IPC could not even be *prima facie* made out against him.[13]

9. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:
>
> That, on or about the.....day of .....you being a public servant, corruptly (*or maliciously*) made (*or pronounced*), in any stage of the judicial proceeding, to wit.....a report (*or order, or verdict, or decision, to wit.....*), which you knew to be contrary to law, and thereby committed an offence, punishable under section 219 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

10. Proof

The essential ingredients of the section, which require proof for establishing an offence under this section are:

(a) that the accused was a public servant;
(b) that he made, or pronounced in a stage of a judicial proceeding, a report, order, verdict or decision;
(c) that he did so corruptly or maliciously;
(d) that the report, order, verdict or decision was contrary to law; and
(e) that the accused was then aware of it.[14]

90 Re *Narapareddi Seshareddi*AIR 1938 Mad 595, p 597-98, 39 Cr LJ 875 .

91 *Pravin Sawant v JB Anandgaonkar Saheb, Ex JMFC, Ichalkaranji* 2008 Cr LJ 984, p 986 (Bom), 2007 (5) Mhlj 838 .

1 *Dilip Kumar Velji Kanji v Kristagonda Hanmantagonda Patil* (1979) Cr LJ (NOC) 64 (Kant) .

2 *Ram Narain v State* (1980) Cr LJ (NOC) 55, (1979) All WC 361, (1979) All Cr R 233 (All) .

3 Re *Narapareddi Seshareddi*AIR 1938 Mad 595, p 597-98, 39 Cr LJ 875 .

4 *Allen v Flood* LR (1898) ACI 144, per Lord Macnaughten J.

5 *Stroud*'s *Judicial Dictionary*, p 454.

6 4 Black Com 222.

7 *Birja Prasad Roy v Nagendra Nath Dash* (1985) 59 CLT 144, (1985) 1 Crimes 446, p 448 (Ori) .

8 *Mogal Steamship Co v Mc Gregor Cow & Co* LR 23 QB 598, p 612 .

9 Per Blackburn J, *R v Pembliton* LR II CCR 119, p 122; **cited in***Peary Lal v Emperor* AIR 1917 All 317(1), 18 Cr LJ 527, 15 All LJ 106 ; Notes to s 153 .

10 *Outlines of Criminal Law*, first edn, 1902, pp 47, 168.

11 *R v Cunninghanm* [1957) 2 QB 396.

12 *The Trustees of Safdar Hashmi Memorial Trust, Petitioner v Govt of NCT, Delhi* (2001) Cr LJ (Del) 3689 .

13 *Devendra Singh Rai v Khokan Rohit* (1983) 2 Crimes 97 (MP) .

14 *Brija Prasad Roy v Nagendra Nath Dash* (1985) 1 Crimes 446, p 448, (1985) 59 CLT 114 (Ori) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 220.

Commitment for trial or confinement by person having authority who knows that he is acting contrary to law.--

Whoever, being in any office which gives him legal authority to commit persons for trial or to

commitment, or to keep persons in confinement, corruptly or maliciously commits any person for trial or to confinement, or keeps any person in confinement, in the exercise of that authority knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.1671

Comments

1. Scope

This section is enacted to prevent abuse of their powers by persons holding any office which gives them authority to commit persons for trial or to confinement. To constitute an offence under this section there must be an illegal commitment for trial or to confinement, plus a guilty knowledge. If the act is legal, there can be no guilty knowledge, and hence no offence.[15] The provisions of this section will apply only when there has been excess by an officer of his legal power.[16]

Where the judicial officers acting in official capacity and not in individual capacity have passed judicial orders, such orders can be challenged by filing appeal or revision, but they cannot be prosecuted for offences under ss 219 and 220, IPC .[17]

2. 'Being in any office'--Meaning of

This section applies to those persons who hold certain, public offices. It does not apply to private persons who have the right to confine persons accused of certain offences under certain circumstances, as provided in ss 43 and 60 of the Code of Criminal Procedure 1973.

3. 'Legal Authority to Commit Persons for Trials'--Meaning of

Section 209 of the Code of Criminal Procedure 1973 prescribes the procedure to commit cases to the court of sessions by the magistrate having jurisdiction to do so. The competence or jurisdiction of the magistrates to try or commit cases is determined by the various provisions contained in the Code of Criminal Procedure 1973.[18]

4. Authority to Commit Persons to Confinement--Relevant Provision Analysed

Section 41 of the Code of Criminal Procedure 1973 authorises a police officer to arrest persons without a warrant in certain cases. A police officer making an arrest under that section may either release the arrested person on bail or, without unnecessary delay, produce him before a magistrate who alone can authorise his further detention (ss 167 and 309, CrPC). A person arrested can in no case be detained by a police officer for more than 24 hours (s 57, CrPC).1672

A police officer may also arrest a person in execution of a warrant of arrest. When he does so, he must produce the arrested person before the court before which he is required by law to produce such person (subject to the provisions of ss 80 and 81, CrPC) without unnecessary delay (s 76, CrPC). The magistrate or the court issuing the warrant of arrest, may then order the further detention of the person (ss 167 and 309, CrPC), if necessary.

Where an offence is committed in the presence of a magistrate, he may himself arrest or order any person to arrest the offender and may thereupon, either release him on bail or commit him to custody (s 44, CrPC).

When a person is convicted and sentenced to imprisonment, a warrant for the execution of the sentence is directed to the officer in charge of a jail and that officer is authorised to keep the person in confinement in the jail.[19]

Order 21, r 39(3) of the Code of Civil Procedure also authorises the detention of a judgment-debtor in a civil prison in execution of a decree for payment of money.

Some local Acts also authorise certain officers to arrest and detain persons under certain circumstances. Thus s 70(i) of the Bihar and Orissa Excise 1915, empowers an excise officer to arrest without warrant, any person found committing an offence punishable under certain sections of the Act, and cl (iii) of that section empowers him to detain any person upon whom he may have reasonable cause to suspect any article liable to confiscation under the Act, or any other law relating to the excise revenue, to be. Section 75(2) of that Act requires every police officer to give reasonable aid to any excise officer in carrying out the provisions of the Act when called upon to do so.[20]

5. Malice not to be Inferred from every Wrongful Confinement

Under s 220, IPC, it is necessary to establish that the officer, who committed any person for trial or to confinement, must have acted corruptly or maliciously and knowing that he was doing that act contrary to law. In absence of these conditions and circumstances, a person cannot be held guilty under s 220 of IPC, merely because he has confined or committed any person to confinement in exercise of the authority given to him under the law.[21]

For the meaning of the words 'corruptly and maliciously' refer to notes to s 219, IPC . The words 'corruptly and maliciously' in this section are wide enough to cover confinement for the purpose of extortion under s 347, IPC . Where a police sub-inspector wrongfully confines certain persons on charges of gambling and extorts money from them by putting them in fear of being challaned and called in court upon offences which he knew to be fictitious, the offence falls under this section.[22] Where the unlawful commitment to confinement is wilful, without any excuse and with a view to put pressure on the person confined to come to terms with a certain person in whom the accused is interested, the accused can safely be said to have acted 'maliciously'.[23] But every unlawful commitment to confinement will not, by itself,1673 warrant the legal inference of malice. In order to bring a case under this section, it should be alleged and proved that the person in office corruptly and maliciously confined the person wrongfully.[24]

Excess by Police Officer attracts the application of the Section

It is only when there has been an excess by a police officer of his legal powers of arrest, that it becomes necessary to consider whether he has acted corruptly or maliciously and with the knowledge that he was 'acting contrary to law'.[25]

6. 'Or Keeps any Person in Confinement'--Meaning of

This phrase makes it clear that, apart from the legality of the arrest of a person, the keeping of him in confinement even by a person, who had legal authority to do so, would be an offence under this section, if in the exercise of that authority, a person kept another in confinement, knowing that in so doing he was acting contrary to law.[26]

7. No Guilty Knowledge when the Arrest Made is Legal

If the arrest was legal, there could be no guilty knowledge 'superadded to an illegal act', such as it would be necessary to establish against the accused to justify a conviction under this section.[27] It is only when there has been an excess by a police officer of his legal powers of arrest that it becomes necessary to consider whether he has acted corruptly or maliciously and with the knowledge that he was 'acting contrary to law'.[28]

Arrest only on Credible Information[29]

It must be remembered that before any arrest can be made by the police without a warrant, either

under s 41 or under s 157, CrPC it must be shown that there was credible information given to the police, or that the officer in charge of a police station had reason to suspect the commission of a cognizable offence. The arrest has also to be made in accordance with the procedure laid down by law. Sections 46 and 49, CrPC are material in this respect.

Application of Handcuffs and Fetters not allowed for making Arrest

In a landmark case[30] after a thorough consideration of the fundamental rights of a detenu in the light of well recognised human rights, the Supreme Court has held that:

> when there is no compulsive need to fetter a person's limbs it is sadistic, capricious, despotic and demoralizing to humble a man by manacling him. Such arbitrary conduct1674 surely slaps Article 14 on the face. The minimal freedom of movement which even a detainee is entitled to under Article 19 cannot be cut down cruelly by application of handcuffs or other hoops. It will be unreasonable so to do unless the state is able to make out that no other practical way of forbidding escape is available, the prisoner being so dangerous and desperate and the circumstances so hostile to safe keeping.

In another judgment in *Citizens for Democracy v State of Assam* ,[31] the Supreme Court taking a more strict view in the matter, totally prohibited the handcuffing or fettering of prisoners--convicted or undertrial--while lodged in a jail or transporting or in transit from one jail to another or from the jail to the court and back, without the permission of the magistrate concerned. Laying down the norms for granting such permission by the magistrates, the Supreme Court has observed as follows:

> Where the police or the jail authorities have well-grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody, then the said prisoner be produced before the magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said magistrate. Save in rare cases of concrete proof regarding proneness of the prisoner to violence, his tendency to escape, he being so dangerous and desperate and the finding no other practical way of forbidding escape is available, the magistrate may grant permission to handcuff the prisoner.

In another case, the judge observed:

> What is a reasonable complaint or suspicion must depend on the circumstance of each particular case; but it must be at least founded on some definite fact tending to throw suspicion on the person arrested, and not on mere vague surmise or information. Still less have the police any power to arrest persons as they appear sometimes to do, merely on the chance of something being proved hereafter against them. Any wilful excess by a police officer of his legal powers of arrest is, by section 220 of the Penal Code, an offence punishable by imprisonment for seven years.[32]

A police officer is not empowered to detain, without question, any accused person for a period not exceeding 24 hours, but rather he is in no case justified in detaining a person for one single hour except on some reasonable ground warranted by the circumstances of the case.[33]

Knowledge is a Question of Fact not of Law

Proof of an unlawful confinement will not, of itself, warrant the legal inference of malice; knowledge that such confinement is contrary to law is a question of fact and not of law and must be proved to satisfy the requirements of this section.[34] In the case of *Budroo Hossain,*[35] where there was no malice, no intention of doing any act of the nature spoken of in s 339 or s 340, IPC and no voluntary

obstruction or restraint, though there was probably excessive and mistaken exercise of powers not civilly excusable in a police officer, the arrest was held not to amount to criminal offence of wrongful restraint.[36] It has, however, been held that where the release of a person arrested and detained by an excise sub-inspector, was obtained by a payment of illegal gratification, the court was entitled to infer that the explanation of the excise sub-inspector, that he was all the time considering whether the statement of1675 the arrested person as to his innocence should be accepted or not, was not true and that he must have known from the beginning that there was no justification in law or fact for arresting or detaining him.[37]

Acting under the Instructions of Superiors--Consequence of

The circumstances that the accused were acting under the instructions of their superior officers and that they were not known before to the complainant and had no particular personal grudge of their own against him, may be taken into consideration on the question of sentence, but cannot justify the illegal arrest and detention of the complainant.[38]

An honest mistake precludes the knowledge contemplated by the section, because the official then acts in good faith.[39]

8. Procedure

The offence under this section is non-cognizable, but a warrant should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by a magistrate of the first class.

There is no period of limitation fixed for taking cognizance of the offence under this section.

9. Sanction

Where the accused is a judge, magistrate or a public servant not removable from his office save by or with the sanction of the Union or State Government, no court can take cognizance of the offence under this section except with the previous sanction of such government (s 197, CrPC).

Where the accused were members of the Bombay police force, the acts constituting the offences under ss 220, 342, IPC*etc* were committed by them in their capacity, but the requisite sanction was not obtained, the Apex Court held that the accused persons were entitled to protection under s 197(2) of the CrPC .[40]

10. Charge

The following form of charge may be adopted:

I (*name and officer of magistrate, etc*) hereby charge you (*name of the accused*) as follows:

That, on or about the....day of...you, being in office, to wit.....which gave you legal authority to commit persons for trial (*or to confinement*) (*or to keep persons in confinement*), corruptly (*or maliciously*) committed....for trial [(*or to confinement*) (*or kept in confinement*)] in the exercise of that authority, knowing that, in so doing, you were acting contrary to law, and thereby committed an offence, punishable under section 220 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.1676

11. Proof

In order to bring home the charge under the said provision, it must be shown that accused held an office which empowered him to convict any person for trial or to confinement or to keep such person in confinement.

It must next be shown that the accused corruptly or maliciously committed such person for trial or to confinement or kept him in confinement in exercise of that authority, knowing that in so doing he was acting contrary to law.[41]

To establish an offence under this section the following points require proof:

(a) that the accused held an office which empowered him to: (i) commit persons for trial; (ii) commit persons to confinement; or (iii) keep persons in confinement;
(b) that he corruptly or maliciously committed a person for trial or to confinement or kept a person in confinement in exercise of such powers;
(c) that he, in doing so, was acting contrary to law;
(d) that he, at the time, knew that he was acting contrary to law.

It is necessary for the prosecution to prove a case that certain officers have acted corruptly, maliciously and with the knowledge that they were acting contrary to law, then only there would be a justification for a conviction under this offence. Where the arrest or confinement is illegal but there is no knowledge, then in such cases, the conviction cannot be made. Therefore, it is necessary that the onus is on the prosecution to prove that the respondent has kept the accused in confinement in excess of his power and he was acting contrary to law and at the time of acting contrary to law, he was acting corruptly or maliciously.[42]

15 *Queen-Empress v Amarsang* ILR 10 Bom 506 ; *Priya Dubey v State of Jharkhand* 2014 (3) Crimes 101 (Jhar) .

16 *State of Bihar v Deonath Singh* (1988) Pat LJR 524, p 528 .

17 *Pravin Sawant v JB Anandgaonkar Saheb, Ex JMFC, Ichalkaranji* 2008 Cr LJ 984, p 986 (Bom), 2007 (5) Mhlj 838 .

18 Sections 2(j), 11 - 19, 26, 27, 32, 35, 190-192, 201, 323 etc CrPC .

19 Section 419, CrPC .

20 *Afzalur Rahman v Emperor* AIR 1943 Pat 229, p 235 .

21 *Pravin Sawant v JB Anandgaonkar Saheb, Ex JMFC, Ichalkaranji* 2008 Cr LJ 984, p 986 (Bom), 2007 (5) Mhlj 838 .

22 *Mansharam Gianchand v Emperor* AIR 1941 Sind 36, 42 Cr LJ 460 .

23 *Sita Ram Chand Lall v Malkiat Singh* AIR 1956 Pepsu 30, p 31, (1956) Cr LJ 412 .

24 *TM Appu Nair v Earnest* AIR 1967 Mad 262, (1967) Cr LJ 903 .

25 *Queen-Empress v Amarsang Jetha* ILR 10 Bom 506, p 511 ; *State of Bihar v Deonath Singh* (1988) Pat LJR 524, p 528 .

26 *Afzalur Rahman v Emperor* AIR 1943 FC 18, p 24, 44 Cr LJ 466, ILR 22 Pat 349, 24 PLT 139 .

27 *Reg v Narayan Babaji* 9 BHCR 346 .

28 *Queen-Empress v Amarsang Jetha* ILR 10 Bom 506, p 511 ; *State of Bihar v Deonath Singh* (1988) Pat LJR 524, p 528 .

29 For detailed commentary refer to ss 41, 157, 46, 49 in *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

30 *Prem Shankar Shukla v Delhi Administration* (1980) SCC (Cr) 815, p 826-27, (1980) 3 SCC 526, (1980) Cr LJ 930 .

31 *Citizens for Democracy v State of Assam* (1995) 4 JT (SC) 475, p 482-83 .

32 *Queen v Behary Singh* 7 WR (Cr) 3, p 5 .

33 *Queen v Suprosunno Ghosaul* 6 WR (Cr) 88 .

34 *Reg v Narayan Babaji* 3 BHCR 346 .

35 *Budroo Hossain* 24 WR 51.

36 *Bhawoo Jivaji v Mulji Dayal* 12 Bom 377 .

37 *Afzalur Rahman v Emperor* AIR 1943 CF 18, p 24, 44 Cr LJ 66, ILR 22 Pat 349, 24 PLT 193 .

38 *Pandhikhan Nandokhan v Emperor* AIR 1948 Sind 67, 49 Cr LJ 178 .

39 Notes to s 52 ; *R v Daya Shankar* 1 Cr LJ 146, 13 Ker LR 332 ; *Bhawoo Jivaji v Mulji Dayal* ILR 12 Bom 377 .

40 *Rizwan Ahmed Javed Sheikh v Jammal Patel* (2001) II CCR 281 (SC) .

41 *Suryamoorthi v Govindswamy* AIR 1989 SC 1410 .

42 *State of Bihar v Deonath Singh* (1988) Pat LJR 524, p 528 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 221.

Intentional omission to apprehend on the part of public servant bound to apprehend. --

Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person charged with or liable to apprehended for an offence, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say,--

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with death; or

with imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with [43][imprisonment for life] or imprisonment for a term which may extend to ten years; or

with imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have1677 been apprehended, was charged with, or liable to be apprehended for, an offence punishable with imprisonment for a term less than ten years.

Comments

1. Scope

Sections 221 - 223, IPC deal with omissions to apprehend offenders and acts of suffering or aiding escape of offenders from confinement, on the part of public servants, which affect public justice. This section and s 222, IPC deal with intentional omissions to apprehend offenders and intentional suffering or aiding the escape of offenders from confinement. The difference between these two sections is that this section deals with persons charged with or liable to be apprehended for an offence, whereas s 222 deals with persons under sentences of court of justice for an offence or lawfully committed to custody. Section 223 deals not with an intentional omission to apprehend, but to negligently suffer the escape of an offender from confinement.

Section 224, IPC punishes not the public servant but the offender himself for escaping from custody. The common object of all the four sections is to prevent the escape of offenders from justice.

2. Applicability

For the application of this section, the accused must be a public servant legally bound as such public servant, to apprehend or keep in confinement a person who is charged with or is liable to be apprehended, for an offence. And then the accused must do one of the three things, namely: (a) omit to apprehend such person if he has not yet been arrested and kept in confinement, (b) if he has already been arrested and kept in confinement, suffer him to escape, or (c) aid him in escaping. Lastly, such omission to apprehend or suffering or aiding the escape must be intentional. Where a court *moharrir*, whose duty it was to prepare remand papers in respect of a suspect, produced in a court, and also to issue the release order and direct the police escort to release the suspect, after the grant of bail to the suspect by the magistrate, directed the release of the suspect even prior to the grant of bail to him in clear violation of his legal duties, he was held liable to be punished under s 221, IPC .[44]

A convict was entrusted in the custody of the accused appellant a Police Officer for escorting him to hospital. On way the convict escaped from custody. The escaped convict was closely related to the accused. Conduct of the accused showed that the accused intentionally allowed the convict to escape, did not take any steps to arrest1678 him, nor immediately informed the higher authorities. Accused appellant was convicted under ss 221, 222 and 223, IPC .[45]

3. Public Servant

Section 21 and the commentary thereunder may be referred to.

4. 'Legally Bound to Apprehend or Keep in Confinement'--Meaning of

In order to render a public servant liable under this section, he must, in the first instance, be legally bound to apprehend a person or to keep him in confinement. A mere power to arrest or keep a person in confinement, as under s 4(1) of the Code of Criminal Procedure is not enough. He must be under an obligation to do so, as when he is directed to execute a warrant of arrest issued by a court or when a police officer sees a person committing a cognizable offence[46] or suspects that he has committed such an offence.[47]

A *chaukidar,* or a village-watchman, is not legally bound as a public servant, to apprehend a person accused of committing murder outside the village of which he is *chaukidar,*such person not being a proclaimed offender, and not having been found by him in the act of committing such murder, and consequently such *chaukidar,* if he refuses to apprehend such person on such charge at the instance of a private person, is not punishable under this section.[48] A *dafadar* (head chowkidar), bound to

arrest a person found in possession of stolen property, took him in custody under the provisions of Bihar and Orissa Village Administration Act 1922 but instead of taking him to the police station, the *dafadar* allowed the accused to escape. It was held that he was guilty under this section.[49] A convict was entrusted in the custody of the accused appellant a police custody for escorting him to hospital. On way the convict escaped from custody. The escaped convict was closely related to the accused. Conduct of the accused showed that the accused intentionally allowed the convict to escape, did not take any steps to arrest him, nor immediately informed the higher authorities. Accused appellant was convicted under s 221, IPC .[50]

Escape from Unlawful Custody is no Offence

Where neither the original arrest nor the subsequent custody by the *chaukidar* was lawful, the *chaukidar* could not properly be convicted under s 223 of the India Penal Code.[51]

***Chaukidar's* Duties as a Private Citizen and as a Public Servant not to be Confounded**

The duties of a *chaudkidar,* as a private citizen, ought not to be confounded with his duties as a public servant. Where the legal obligation of the *chaukidar* to arrest or1679 detain has not been established, there is no dereliction from his statutory duty within the purview of this section and the *chaukidar* cannot be penalised for intentionally suffering a pilferer to escape from his detention.[52]

5. 'Intentionally Omits'--Meaning of

When the accused, who were public servants, were legally bound to arrest a man, who had committed murder in their presence, omitted to apprehend him, it was held that:

> There can be no doubt that they did it intentionally. There was nothing involuntary about it. Their motive may not have been that they wanted the man to escape, but that they were afraid of getting hurt, but motive must always be distinguished from intention. They certainly intended not to apprehend the man, and legally they were guilty of the offence under this section.[53]

6. 'Intentionally Aids'--Meaning of

Notes under s 107 may be referred to.

7. Offence

Section 40, and the commentary thereunder may be referred to.

8. Offence under this Section as well as under the Police Act

An offence falling under the Police Act and also under the Penal Code should be punished under the latter enactment.[54]

9. Procedure

The offence under the first part of this section is cognizable or non-cognizable according as the offence in relation to which such omission has been made is cognizable or non-cognizable, but a warrant should ordinarily issue in the first instance. It is bailable but not compoundable and is triable by a magistrate of the first class.[55]

There is no period of limitation for taking cognizance of the offence falling under punishment cl 1 of this section. For the offence falling under cll 2 and 3, the cognizance can be taken within three years.

10. Sanction

In a case falling under s 197 of the Criminal Procedure Code, a previous sanction for a prosecution under this section is necessary.

For detailed commentary on s 197, see *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.1680

11. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you being a public servant, to wit.....and being as such public servant, legally bound to apprehend (*or keep in confinement*) one *AB,* who was on or about the.....day of.....at.....charged with (*or liable to be apprehended for*) the offence of.....punishable with.....did intentionally omit to apprehend such person [(*or intentionally suffer the said AB to escape*) (*or intentionally aid the said AB in escaping*) (*or attempting to escape*)] from such confinement, and that you thereby committed an offence punishable under section 221 of the India Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

12. Vicarious Liability

A person must be told as to what offence he is being directly charged with and to what others, if any, he is being sought to be vicariously made liable. There is no rhyme or reason to seek to make a person who had committed a criminal act with his own hand, liable constructively for that act under any of the sections of the Penal Code relating to vicarious responsibility. As the principal offender, the charge and the conviction against him must be for the substantive offence he committed and not for that offence, by virtue of any vicarious responsibility.[56]

13. Proof

To establish an offence under this section, it must be proved:

(a) that a certain person was charged with, or liable to be apprehended for, some offence, *ie*, a breach of the Code, or of a special or local law (s 40);
(b) that the accused was a public servant (s 21), whose legal duty it was as such to apprehend or keep in confinement such offender;

(c) that the accused actually had the offender in custody (if the charge is one of escape); and
(d) that there was an intentional omission to apprehend, or intentional suffering to escape, or intentional aiding to escape or attempt to escape.

14. Conviction

Where the suspect was not granted bail and was remanded to custody, the duty of the accused court *moharrir* was to have the suspect sent to jail custody. When the accused, instead of sending the suspect to jail custody, directed the police escort to release the suspect, the accused was held guilty of the offence under this section.[57]

43 Substituted by Act 26 of 1955, s 117 and schedule, for 'transportation for life' (wef 1-1-1956).

44 *Ram Pal v State of Uttar Pradesh* AIR 1979 SC 1184, p 1188, (1979) Cr LJ 711, (1979) SCC (Cr) 735, (1979) 3 SCC 601 .

45 *Yonus Khan v State of Karnataka* 2013 Cr LJ 1040 (Kar), 2013 (1) AKR 515, ILR 2012 Karnataka 6556, 2012 (6) Karlj 643 .

46 *Ram Lal v Emperor* AIR 1936 All 651, 37 Cr LJ 1019, (1936) All LJ 1006 .

47 Section 157, CrPC .

48 *Empress of India v Kallu* 3 ILR All 60 .

49 *Durga Singh v Mohd Isa* (1963) 1 Cr LJ 827, (1962) BLJR 438 .

50 *Younus Khan v State of Karnataka* 2013 Cr LJ 1040 (Kant), 2013 (1) AKR 515, ILR 2012 Karnataka 6556, 2012 (6) Karlj 643 .

51 *Emperor v Debi* ILR 29 All 377, 4 Cr LJ 277 ; *King-Emperor v Johri* ILR 23 All 266 ; *Kalia v Kallu Chawkidar* ILR 27 Cal 366 .

52 *Bhagwandin v Emperor* AIR 1929 All 935, p 936, 31 Cr LJ 12, (1930) All LJ 242 .

53 *Ram Lal v Emperor* AIR 1936 All 651, p 652, 37 Cr LJ 1019, (1936) All LJ 1006 .

54 Re *Fatteh Khan*(1874) PR 12; *Dooloo Mul v Dewa Singh* (1868) PR 2 .

55 Code of Criminal Procedure 1973, Sch 1.

56 *Krishna Pillai Vasu v State* AIR 1956 Tr & Coch 230, p 233, (1956) Cr LJ 1358.

57 *Rampal v State of Uttar Pradesh* AIR 1979 SC 1184, (1979) Cr LJ 711, (1979) SCC (Cr) 735, (1979) 3 SCC 601 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 222.

Intentional omission to apprehend on the part of public servant bound to apprehend person

under sentence or lawfully committed.--

Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in1681 confinement any person under sentence of a Court of Justice for any offence [58][or lawfully committed to custody], intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say:

with [59][imprisonment for life] or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death; or

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, or by virtue of a commutation of such sentence, to [60][imprisonment for life] [61][* * *] [62][* * *] [63][* * *] [64][* * *] or imprisonment for a term of ten years or upwards; or

with imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, to imprisonment for a term not extending to ten years [65][or if the person was lawfully committed to custody].

Comments

1. Scope

This section is identical with the last section, except that the person to be apprehended has already been convicted or committed for an offence. It is an aggravated form of the offence made punishable under the last section. Commentary under s 221 may be referred to.

2. Legislative Changes

The words 'or lawfully committed to custody' in the first paragraph, and 'or if the person was lawfully committed to custody' at the end, were inserted by s 8 of the Indian Penal Code Amendment Act (27 of 1870). The words 'or penal servitude for life' and the words 'or penal servitude' which occurred in paragraph three, were1682 omitted by s 2 of Act, 17 of 1949. The words 'imprisonment for life' were substituted for the words 'transportation for life' by Act, 26 of 1955, s 117 and schedule.

3. Public Servant

Section 21, and commentary thereunder may be referred to.

4. 'Legally Bound'--Meaning of

Section 43, and synopsis note 4 to s 221 may be referred to.

A convict was entrusted in the custody of the accused appellant a police custody for escorting him to hospital. On way the convict escaped from custody. The escaped convict was closely related to the accused. Conduct of the accused showed that the accused intentionally allowed the convict to escape, did not take any steps to arrest him, nor immediately informed the higher authorities. Accused appellant was convicted under ss 221, 222 and 223, IPC .[66]

Where the accused, a police constable, was proved to have intentionally allowed a prisoner to escape from his custody, but there was no evidence to prove that the prisoner had been lawfully committed to

the custody of the Central Jail, the accused was not legally bound to keep the prisoner in custody.[67]

5. 'Court of Justice'--Meaning of

Section 20, and commentary thereunder may be referred to.

6. Offence

Section 40, and commentary thereunder may be referred to.

7. Lawfully Committed to Custody

The prosecution must prove that the offender had lawfully been committed to the custody of the jail, before an accused can be convicted for offence under this section. From the mere fact that the offender had been given in the custody of the accused, the court should not presume that the offender had lawfully been committed to the custody of the jail.[68]

8. 'Intentionally Aids'--Success of the Attempt is not Material

The meaning of this phrase may be seen from s 107, expln 2 of the IPC, wherein it is explained that 'whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof is said to aid the doing of that act'. If the accused did acts which were done in order to facilitate the attempt of certain prisoners to escape, it cannot be gainsaid that he did thereby facilitate an attempt to escape, and he can be1683 properly convicted under this section. It makes no difference that the attempt was in fact frustrated by other circumstances.[69]

9. Procedure

The offence under this section is cognizable, and a warrant should ordinarily issue in the first instance. An offence under the first and second punishment clauses is not bailable; but one under the third is. The offence is not compoundable. An offence falling under the first punishment clause is triable by a court of session. That under the second and third clause it is triable by a magistrate of the first class.[70] The limitation for taking cognizance of an offence falling under the third punishment clause of this section is three years. There is no limitation for the offence falling under the other clauses.

10. Sanction

Only in cases falling under s 197 of the Code of Criminal Procedure 1973, a sanction is required to prosecute a person under this section.

11. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*), as follows:
>
> That you on or about the..... day of..... were a public servant (*state the office*) and as such public servant, you were legally bound to apprehend (*or keep in confinement*) one *AB*, a person under

sentence of..... of the court of..... for the offence of..... under section..... of the (*state IPC or the local or special law, whichever may be the case*) (*or who had been lawfully committed to custody by.....*), you intentionally omitted to apprehend the said *AB* (*or intentionally suffered the said AB to escape*) (*or intentionally aided him in escaping or attempting to escape*) from such confinement] and that you thereby committed an offence punishable under section 222 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

12. Proof

The following points require proof for a conviction under this section:

(a) that the accused was a public servant;
(b) that, as such, he was legally bound:

  (i) to apprehend or
  (ii) to keep in confinement any person who was under sentence of a court of justice for some offence; or had been lawfully committed to custody;

(c) that the accused omitted to apprehend him, or intentionally suffered him to escape, or intentionally aided him in escaping or attempting to escape; and
(d) that the person who ought to have been apprehended was:1684

  (i) under sentence of death, or
  (ii) under any sentence of imprisonment.

58 Inserted by Act 27 of 1870, s 8 .

59 Substituted by Act 26 of 1955, s 117 and schedule, for 'transportation for life' (wef 1-1-1956).

60 Substituted by Act 26 of 1955, s 117 and schedule, for 'transportation for life' (wef 1-1-1956).

61 The words 'or penal servitude for life' were repealed by s 2 of the Criminal Law (Removal of Racial Discriminations) Act 1949 (17 of 1949) (wef 6-4-1949).

62 The words 'or to' omitted by Act 36 of 1957, s 3, Sch II.

63 The word 'transportation' omitted by Act 26 of 1955, s 117 and Schedule (wef 1-1-1956).

64 The words 'or penal servitude' omitted by Act 17 of 1949, s 2 (wef 6-4-1949).

65 Inserted by Act 27 of 1870, s 8 .

66 *Yonus Khan v State of Karnataka* 2013 Cr LJ 1040 (Kar), 2013 (1) AKR 515, ILR 2012 Karnataka 6556, 2012 (6) Karlj 643 .

67 *Sant Lal v State of Delhi* (1975) 3 CLR (Del) 429 .

68 *Sant Lal v State of Delhi* (1975) Cut LR 429 .

69 *Maula Baksh v Emperor* AIR 1929 Lah 631, p 634, 30 Cr LJ 1103 .

70 Code of Criminal Procedure 1973, Sch I.

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 223.

Escape from confinement or custody negligently suffered by public servant.--

Whoever, being a public servant legally bound as such public servant to keep in confinement any person charged with or convicted of any offence [71][or lawfully committed to custody], negligently suffers such person to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section is supplementary to and further extends the principles laid down in the two preceding sections. It punishes a public servant who negligently suffers any person charged with an offence to escape from confinement. The last two sections dealt with cases of an intentional omission to apprehend such person or suffering them to escape.

2. Legislative Changes

The words 'or lawfully committed to custody' were added by s 8 of the Indian Criminal Law Amendment Act (27 of 1870).

3. Essential Ingredients of the Section

In order to constitute an offence under this section:

(a) the accused must be a public servant;
(b) he must be legally bound to keep in confinement a person charged with or convicted of an offence, or lawfully committed to custody; and
(c) he must negligently suffer such person to escape.1685

4. Public Servant

Section 21 and commentary thereunder may be referred to.

Convict-warders are 'public servants' within the meaning of this section.[72] A watchman in the *Kaira* collectorate, who does the work of *rakha*, though not entered on the village records as a village servant, and receives a portion of the emoluments assigned as remuneration for the services of a *rakha*, is a person in actual possession of the situation of a public servant within the meaning of expln 2 of s 21 of the Indian Penal Code .[73] A village revenue servant, as distinguished from a village police servant, is not a 'public servant' within the meaning of the section.[74]

The offence, envisaged in terms of this section, is one of which a public servant is guilty only while acting as a public servant, and not otherwise. He cannot be guilty of an offence under this section unless he was acting as a public servant.[75]

5. 'Legally Bound to Keep in Confinement'--Meaning of

For the meaning of the expression 'legally bound', notes to s 43 may be referred to.

When Public Servant not Entitled to Custody

An offence under this section is committed when the custody is lawful. If a public servant is not authorised to keep a person in custody, he is not guilty of an offence under this section for suffering that person to escape.[76]

The Patna High Court has held that it is only when the letting off is from a lawful confinement, that an offence under this section can be said to have been committed. Therefore, when an authority, not authorised to confine a person, but only to detain, lets off such person from his custody, no offence under this section is committed.[77]

A village *chaukidar* is not a police officer entitled to arrest and keep in custody a person without warrant.[78]

Escape from Unlawful Custody is no Offence

In *Kalai v Kalu Chowkidar* ,[79] it was held that where a person had committed a theft and had been made over to the custody of a village *chaukidar*, the accused could not be convicted under s 225, for rescuing the alleged thief from lawful custody. The court held that the *chaukidar* was not 'lawfully detaining' the alleged thief. The same view was taken in the case of *King-Emperor v Johri* .[80]

Where the police of a former native state arrested in an adjoining territory, a person suspected of having committed an offence in the native state, and made him over to one Debi, a *chaukidar*, from whose custody he escaped, it was held that neither the1686 original arrest, nor the subsequent custody by the *chaukidar* was lawful, and, therefore, the *chaukidar* could not properly be convicted under this section.[81]

In a Bombay case, a complaint by a private person was presented to a magistrate that a certain person was concerned in a murder, and the magistrate arrested him, and, after hearing the complainant and such person, sent him to the superintendent of the police. He, in turn, sent him to a sub-inspector. It was held, that the magistrate's order might be held to have been passed under s 167, CrPC, and the sub-inspector was bound to detain him in custody, until released by due course of law, and that he was guilty of an offence under s 222, IPC, by negligently suffering him to escape from the custody.[82]

Commentary under the same heading in s 221, *ante* may be referred to.

6. 'Charged with'--Meaning of

The words 'charged with an offence' in this section are used only in the sense of inculpation or

accusation of an offence and do not mean 'against whom a charge has been framed'.[83] Where the person who escapes, is neither charged nor convicted of any offence, no offence under this section is made out.[84]

7. Offence

Section 40, and commentary thereunder may be referred to.

8. 'Lawfully Committed to Custody'--Whether Custody and Confinement Co-Extensive

This phrase and the phrase 'legally bound to keep in confinement' though distinct, are somewhat overlapping. No public servant can be legally bound to keep any one in confinement unless he is lawfully committed to custody. It has been held that in ss 220 and 225, IPC the words 'custody' and 'confinement' have been used as co-extensive.[85] The custody must be lawful; for, if a man is arrested for a supposed crime, when no such crime was committed, and the party is neither indicted nor charged, or for such a slight suspicion of an actual crime and by such an irregular process as will not justify an arrest or detention, the officer is not guilty of an escape by suffering the prisoner to go at large. But if the warrant of commitment plainly and expressly charges a man with treason or felony, though it be not strictly formal, the custodian suffering an escape is punishable, and where commitments are good in substance, the custodian is as much bound to observe them as if they were made ever so exactly. Whenever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape. It is generally considered that the imprisonment must be for some criminal matter.[86] But a person may be 'lawfully committed to custody' even though he is not charged with or convicted of an offence. Thus, a person lawfully arrested on suspicion, *eg*, under s 41, CrPC, is lawfully committed to custody, though not1687 actually charged with any offence.[87] So also a person failing to give security under ss 106, 116 or s 117, CrPC, and detained in prison under s 122, CrPC, is lawfully committed to custody, although he has not been charged with or convicted of an offence.

9. 'Negligence'--What is?

In criminal law, negligence is a subjective state of mind. It connotes inadvertence. It consists not merely in omitting to do what ought to have been done, but in not thinking of the result which one's conduct might produce.[88]

Escape should be Natural and Probable cause of Negligence

In *Durga Prasad v Emperor* ,[89] it was held by the Allahabad High Court that before a person can be convicted under s 223, IPC, it must be shown not only that he was guilty of negligence, but that the escape was at least the natural and probable consequence of his negligence. In a case, a police officer *A*, incharge of a police station had been ordered to send certain prisoners to a certain place. He went out on some other work leaving orders with the head constable to send the prisoners off. The head constable complied, but the prisoners escaped from the custody of those sent in charge of them. It was held that the escape of the prisoners was not the natural and probable consequence of *A*'s negligence and he could not be convicted under this section.[90] Where the accused happened to be in overall charge of the case but was not a co-conspirator in the escape of the person in custody, the very conduct of the accused in making a hectic search for the escaped accused shows that the accused was not a co-conspirator in the escape of the said accused from lawful custody, and therefore, charges framed under s 223, IPC and ss 132 - 137, Customs Act 1962, framed against the accused, were quashed.[91]

Escape should not be a Remote Consequence

The escape of the prisoner must not be too remote a consequence of the negligence of the accused.

Where all that was shown was that the accused marched the prisoner by night and he was rescued, it was held that as there was no evidence that the accused had any reason to expect that any attempt would be made at a rescue, no offence under this section was made out.[92]

Negligence to be Determined with Reference to Duties

It must be shown that there was negligence on the part of the accused and that the escape of the prisoners was the consequence of this negligence. Before the court can decide the question of negligence, it must know what the duties of the accused were, and unless they are known exactly, it is impossible to find whether he was negligent in the performance of his duties and whether the escape of the prisoners was due to that negligence.[93]1688

Special Duties Require Special Care--Places Burden on Accused

In the case of a prison-guard, the escape of a prisoner is a *prima facie* evidence of negligence on the part of the guard on duty. Where a person undertakes a special duty which requires extra vigilance, he must satisfactorily establish that he took all reasonable care in performing his duty, which is expected of a person performing similar duties. If he fails to establish it, he would render himself liable under this section.[1]

Where a *daffadar* in charge of one of the gates of a jail, suffered certain convict prisoners to pass out of the gate and they escaped, it was held that the *daffadar* was guilty under this section, even if he did not intend that the prisoners should escape and allowed them to pass out of the gate to have an interview with their friends.[2]

In a Lahore case, a jail warder was placed in charge of a gang of prisoners who were sent off to do agricultural works. Contrary to his orders, he permitted a convict-warder to take two of the convicts to a cemetery to water the trees there. The cemetery was at some distance and was not within sight, and the accused made no attempt to patrol in that direction. Owing to the negligence of the convict-warder, one of the convicts escaped. It was held that the accused was guilty of an offence under this section.[3]

Two policemen were conveying a prisoner from one place to another in a camel-cart. The prisoner was secured by two pairs of handcuffs and a rope round the waist. He wanted to be let down from the cart to answer the call of nature and thereupon, one set of handcuffs was removed and he was let down. He suddenly raised an alarm of a snake and in the confusion, jerked at the waist rope and ran away. It was held that the policemen were not guilty of negligently suffering the prisoner to escape within the meaning of this section.[4]

A convict was entrusted in the custody of the accused appellant a police custody for escorting him to hospital. On way the convict escaped from custody. The escaped convict was closely related to the accused. Conduct of the accused showed that the accused intentionally allowed the convict to escape, did not take any steps to arrest him, nor immediately informed the higher authorities. Accused appellant was convicted under ss 221, 222 and 223, IPC .[5]

10. Confinement--Meaning of

The word 'confinement' in this section, should not be restricted to confinement within circumscribing limits. In ss 220 and 225, the legislature appears to have used the words 'custody' and 'confinement' as co-extensive.[6]

11. 'To Escape from Confinement'--Meaning of the Expression

The expression 'escape from confinement' in this section is not limited to escape from the particular sort of place of confinement to which a prisoner is subjected to or1689 in which he is restrained at the

time of the occurrence. A prisoner cannot be said to have escaped from confinement until he has regained his liberty. In one case, the accused public servants were posted to keep guard on certain cells in a jail where certain prisoners were confined. When the accused were relieved, the prisoners were not in their cells but were found crouching on the roofs of their cells and were immediately recaptured. It was held that, under the circumstances, the accused were not guilty of the offence under this section, for the prisoners were still in confinement and crouching upon the roofs of their cells, inasmuch as they were still within the prison walls and were not at liberty. An attempt to escape from confinement had no doubt been made, but negligently suffering such an attempt is not an offence within the provision of this section.[7]

12. Procedure

The offence under the section is non-cognizable, and a summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any magistrate.

The limitation for taking cognizance of an offence under this section is three years.

13. Sanction

Sanction is only necessary in cases falling under s 197, CrPC, for a prosecution under this section.

14. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc*), hereby charge you (name of accused), as follows:
>
> That you, on or about..... day of..... were posted as..... (*state the office*) and as such a public servant, were legally bound to keep in confinement one *AB*, who was charged with (*or convicted of*) an offence of..... under section..... of the Indian Penal Code [(*or of a special or local law (specify)*] (*or lawfully committed to custody*) but negligently suffered the said AB to escape from confinement and that you thereby committed an offence punishable under section 253 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

15. Proof

In order to establish the charge under this section the following facts have to be established:

(a) that the accused was a public servant;
(b) as such public servant he was bound to keep in confinement any persons;
(c) such person was: (i) charged with; (ii) convicted of an offence; or (iii) lawfully committed to custody;

(d) the accused suffered such person to escape; and
(e) the escape was due to the negligence of such public servant.[8]1690

16. Sentence

The sentence of imposing only fine in a case of an inexcusable dereliction of duty, leading to the escape of prisoners from a well-guarded prison, is out of all proportion to the gravity of the offence. Officers guarding a prison must know that if they are negligent in the performance of their duty, and this negligence leads to the escape of any prisoner under their charge, the consequences will be very serious for them. A sentence of fine will tend to create a belief that their negligence is not likely to be visited with anything more serious than the loss of service and a few visits to the court. The sentence of the court is as important as the trial itself. It should be commensurate with the gravity of the crime, though it may not be harsh and should not amount to useless cruelty. It must, however, serve as a deterrent to other members of the public services, who are charged with looking after the security of the community.[9]

71 Inserted by Act 27 of 1870, s 8 .

72 *Queen v Kallachand Moitree* 7 WR 63 .

73 *Queen-Empress v Fula Bhana* Ratanlal's Unrep Cr Cases 388.

74 Re *Bodapati Pentadu* 1 Weir 197.

75 *Girja Shankar v State of Bihar* (1972) Cr LJ 988, p 989, (1972) PLR 64 .

76 *Empress v Kallu* 3 ILR All 60 .

77 *Girja Shankar v State of Bihar* (1972) Cr LJ 988, p 990-91, (1972) PLR 64 .

78 *Empress v Kallu* 3 ILR All 60 .

79 *Kalai v Kalu Chowkidar* ILR 27 Cal 366 .

80 *King-Emperor v Johri* ILR 23 All 266 .

81 *Emperor v Debi* ILR 29 All 377, 5 Cr LJ 277 .

82 *Queen-Empress v Jaglia* 1 Bom LR 349 .

83 *Nural Har v Obayadulla* 46 CWN 163 .

84 *Girja Shankar v State of Bihar* (1972) Cr LJ 988, p 999, (1972) Pat LJR 64 .

85 Re *Imamuddin*(1891) PR 2 (FB).

86 *Russell on Crime*, eleventh edn, p 360.

87 5 WR Lett 9; *Empress v Ashraf Ali* ILR 6 All 129 .

88 *Russell on Crime*, vol I, twelveth edn, p 43.

89 *Durga Prasad v Emperor* (1910) 11 Cr LJ 478, 7 IC 411 .

90 *Durga Prasad v Emperor* 11 Cr LJ 478, 7 All LJ 907 .

91 *Vimal Narain v State of Rajasthan* (1999) I CCR 672 (Raj) .

92 Re *District Magistrate of Nellore* 10 Cr LJ 293.

93 *R Singh v Emperor* 37 Cr LJ 918, 40 CWN 61 .

1 *Kutch State v Bachu Sama* AIR 1951 Kutch 89, p 90, (1952) Cr LJ 22 .

2 *Ghulamali v Empress* 19 PR (1883) (Cr).

3 *Ashan Ali v Emperor* AIR 1919 Lah 229, 20 Cr LJ 350 .

4 *Girdhari v Emperor* AIR 1918 All 282, 19 Cr LJ 78, 15 All LJ 883 .

5 *Yonus Khan v State of Karnataka* 2013 Cr LJ 1040 (Kar), 2013 (1) AKR 515, ILR 2012 Karnataka 6556, 2012 (6) Karlj 643 .

6 Re *Imamudin*(1891) PR 2 (FB).

7 *Albal Singh* 32 PR (Cr) 1890, per Rivaz J.

8 *Bansidhar Swain v State of Orissa* (1987) Cr LJ 1819, (1987) 63 Cut LT 99 .

9 *Kutch State v Bhachu Sama* AIR 1951 Kutch 89, p 90, (1952) Cr LJ 22 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 224.

Resistance or obstruction by a person to his lawful apprehension.--

Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.--The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.1691

Comments

1. Scope

Sections 221 - 223, IPC dealt with public servants, intentionally or negligently, omitting to apprehend or keep in confinement offenders, or suffering them to escape or aiding them in their escape. This section deals with the offender himself, who offers resistance or illegal obstruction to his lawful apprehension, or escapes or attempts to escape from lawful custody. Section 225 , IPC deals with other persons who offer resistance or illegal obstruction to the lawful apprehension of an offender or rescue or attempt to rescue him from lawful custody.

Where the accused ran away while in the custody of the police authorities, the plea by the accused that he never escaped from the custody but left the place to answer call of nature and on his return, finding no police at office left that place, was dispelled by the fact that on the following day he was caught by the police personnel while trying to escape on seeing them, he had thus escaped intentionally, and hence, his acquittal in the case in which he has been arrested will not negate charge

of his intentional escape from custody so he is guilty under s 224 .[10]

The accused, a wanted criminal, attacked police squad when they surrounded the hut in which he was hiding and apprehended him. The accused pelted bottles and glasses and also tried to give blow on head of PSI with a heavy chopper but he warded off the blow. Attempt on his part to commit murder amply proved, police officers had no reason to tell falsehood in their deposition, as medical evidence proved that the accused sustained injuries in the scuffle with the police, conviction of the accused for offences punishable under ss 224, 332, 307 was found proper.[11]

Two Parts of the Section

First Part

This section itself is in two parts and deals with two offences. The first deals with the offence of intentionally offering resistance or illegal obstruction to the lawful apprehension of himself for an offence with which he is charged or of which he has been convicted. For the application of this part of the section:

(a) the accused must have been charged with or convicted for an offence;
(b) there should have been an attempt to lawfully apprehend him for that offence;
(c) he must have offered resistance or illegal obstruction to such apprehension; and
(d) he must have done so intentionally.[12]1692

Second Part

The second part of the section deals with the offence of intentional escape or attempt to escape from lawful custody. For the application of this part of the section:

(a) the accused must have been charged with or convicted of an offence;
(b) he must have been lawfully detained in custody for such offence; and
(c) he must have intentionally escaped or attempted to escape from such custody.[13]

So, the essential ingredients for the second part of s 224, IPC are that the accused must have been detained in custody lawfully and that he escaped from such custody intentionally.[14]

Common Features

Both the parts have two common features *viz*: (a) the accused must have been charged with or convicted of an offence; and (b) the resistance, obstruction or escape must be intentional.

2. Sections 224 and 216, IPC

Commentary under s 216, *ante* may be referred to.

3. 'For any Offence with which he is Charged or of which he has been Convicted'--Meaning of

The words 'for any offence' in this section mean for any offence with which a person is charged, or of which he has been convicted. It would be an offence to escape from lawful custody before the trial, just as it would be an offence to escape from lawful custody after conviction. The word 'charged' is used in the popular sense as implying inculpation of an alleged offence as distinguished from a charge formulated after trial. It would, therefore, be an offence for a man to escape from custody after

he has been lawfully arrested on a charge of having committed an offence, although he may not have been subsequently convicted of such latter offence.[15] So, even if the person in custody is declared afterwards to be innocent, the offence of escape from custody will be complete, provided only the custody be lawful.[16]

The mere fact that a sub-inspector of police put his hand on the applicant's shoulder or caught hold of his wrist without the least intimation to the applicant for what offence he was being arrested, can hardly amount to the applicant being 'charged' with any offence.[17]1693

Arrest or Detention must be in Connection with Some Offence

The section has no application if the apprehension or detention is not for any offence. An escape from custody, when being taken before a magistrate for the purpose of being bound over to be of good behaviour, is not punishable under either this section or s 225, as the person is not charged with or convicted of any offence.[18] So also an escape from custody in execution of a civil process.[19]

4. 'Offence'--Meaning of

The word 'offence' as used in this Code is defined in s 40, IPC . In cl 2 of that section it is said that in s 224, IPC the word 'offence' denotes a thing punishable under this Code or under any special or local law as hereinafter defined.

Under s 41, IPC, a 'special law' is a law applicable to a particular subject and under s 42, IPC a 'local law' is a law applicable only to a particular part of India. Reading this section with these sections, the only conclusion which can be arrived at is that for its application the apprehension or detention should necessarily be for any of the offences mentioned in the Indian Penal Code or under any local or special law applicable to any part of India.

5. Proper Attempt to Arrest

There must be a proper attempt to arrest a person before he can be said to offer resistance or obstruction to it.[20]Sections 41, 46, 49, 157 of the Code of Criminal Procedure 1973[21] may be referred to.

Resistance and Obstruction Explained

'Resistance' and 'obstruction' imply some active opposition to the arrest by the use or show of force. A mere evasion of arrest[22] by running away[23] or by shutting oneself in the house,[24] does not amount to resistance or illegal obstruction to the arrest.

Obstruction Must be Illegal

Where the accused, a lady, on seeing the peon entrusted with a warrant of arrest, goes inside her house and shuts the door, it amounts to obstruction. But this section requires that the obstruction should be illegal, and in construing the term 'illegal', regard must be given to the definition of 'illegal' in s 43 of the Code. The legality or illegality of the obstruction would also depend upon the legality of the arrest, having regard to the provisions of the Civil and Criminal Procedure Code s relating to arrest and imprisonment.[25]

In a Lahore case, the accused was arrested by the police under s 17(2) of the Criminal Law Amendment Act 1908, and it was found that at the time of arrest, he1694 resisted being apprehended by not allowing the police to remove him and by kicking out. No case under s 17(1) or s 17(2) of the Criminal Law Amendment Act was made out, and it was contended by the accused that, under the circumstances, his arrest was illegal and therefore, he could resist it. The contention was not seriously considered, the court remarking that the argument was only half-heartedly advanced and that there

was no force in it. The conviction of the accused under s 224 was maintained but the sentence was reduced.[26]

Resistance or Obstruction must be Intentional

The resistance or illegal obstruction, in order to constitute an offence under this section, must be intentional. A resistance or illegal obstruction when, one who resists or illegally obstructs, does so with the intention that there should be no apprehension notwithstanding that such apprehension, to his knowledge, is lawful.[27]

Magistrate's Duty to check abuse of Powers by Police

When the offence against an accused is a bailable one, the police have no authority to attempt to put handcuffs on him in the first instance, and would only be justified in using them, if, for some special reason, there is reasonable ground for believing that he, after a proper arrest, would attempt to escape and is likely to do so, or he cannot be made to go to the police station except by such, amongst other, means. Trivial resistance to unlawful force on the part of an arresting officer does not constitute an offence under this section. It is highly important that magistrates should check any abuse by police officers of their powers and should insist on the plain provisions of the law being carried out.[28]

6. 'To the Lawful Apprehension'--What is Lawful Apprehension

For this section to apply, it is necessary that the accused, who is charged under it, must have been lawfully apprehended or detained in custody, which in its turn depends on whether the magistrate ordering the arrest of the accused had power to do so.[29]Sections 224 and 225 deal with a resistance to, or an escape from, lawful apprehension, and s 353 deals with an assault to deter a public servant from discharging his duty. It thus becomes essential for convictions under these sections that the prosecution should show that the apprehension or arrest made or attempted was lawful in every way.[30]

No offence is committed by resisting or obstructing an arrest which is not lawful.[31] An arrest in court for a contempt of court is a lawful arrest.[32] In1695*Jagpat Koeri v Emperor* ,[33] a warrant of arrest signed, not by the magistrate who had taken cognizance of the case, but by an honorary magistrate who lived in the same town, was held invalid under s 70, CrPC . If the apprehension is under a warrant of arrest, the person executing it must notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.[34] But s 75 of the Code of Criminal Procedure does not require the fact of the notification to be mentioned in the report.[35] The provision in s 75, CrPC does not extend to arrests without a warrant under s 55 of that Code.[36] Under that section, an arrest by a *chaukidar* in pursuance of a written order from an officer in charge of a police station is legal, and its resistance is an offence under this section.[37] Where a police officer who is not present on the spot asks the constables to bring a certain person to the thana with some papers, the order does not amount to a direction for arrest as contemplated by s 55, unless the order is given in writing. The use of force by the constables, therefore, is illegal, and if the person against whom force is used resents it and a scuffle ensues in the course of which brickbats are thrown, the person cannot be convicted under this section, nor can the persons assisting him be convicted under ss 225 and 353 .[38]Section 41, CrPC authorises any police officer, without an order from a magistrate and without a warrant, to arrest any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. In *Appaswami Mudaly v Emperor* ,[39] it was observed that if a constable, in effecting an arrest, specifies a certain power which proves to be wanting, resistance to him or escape from his custody constitutes no offence. To hold that s 41, CrPC applies in such cases without any intimation to the accused, and without any allegation by the constable in his deposition that he proceeded under the section, would be to nullify several salutary provisions contained in Pt B, ch VI of the Code of Criminal Procedure, relating to the execution of

warrants of arrest. Where the constable purports to act under a warrant which is found to be invalid, and where there is no allegation by the constable in his deposition that he proceeded under ss 41(1), 41(1) does not apply.[40]

Arrest without Endorsement on Warrant of Arrest

Under the terms of s 74 of the Code of Criminal Procedure, the endorsement on the warrant of arrest should be regularly made by name to a certain person in order to authorise him to make an arrest. Where there is no such endorsement, the arrest is not a legal arrest so as to make the accused liable for an offence under this section or s 225 .[41] If a warrant allows bail, that fact must be stated at the time it is executed, otherwise the arrest may become illegal.[42]1696

Lack of Good Faith, whether affects Legality of Arrest

If the apprehension is lawful, it does not matter whether that apprehension was not made, or attempted to be made, in good faith.[43]

7. Of himself--Meaning of

This section requires that the accused person must offer resistance or illegal obstruction to the lawful apprehension of himself, for any offence with which he has either been charged or of which he has been convicted. If the resistance or illegal obstruction is to the lawful apprehension of himself, when not charged with or convicted of any offence, the offence would fall under s 225B, IPC and not under this section. The distinction between the two sections is not merely academic. This section empowers a magistrate to inflict an imprisonment for two years whereas under s 225B, the maximum term of imprisonment is six months.[44]

8. Escape

An escape is where one who is arrested, gains his liberty before he is delivered by due course of law.[45] It is distinct from flight from justice before arrest, for which a provision is made separately.

Escaping from legal custody is an offence under s 224 of the IPC .[46]

Escape how Effected

The term 'escape' is usually applied where the liberation of the prisoner is effected either by himself or others, without force. Where it is effected by the prisoner himself with force, it is called prison-breaking; and where it is effected by others, with force, it is commonly called a rescue. A person legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law, he commits the offence of escaping from lawful custody under this section.[47]

Escapes Fall into Three Classes

Escapes fall into three classes-escapes by the prisoner, escape suffered by an officer of the law, and escape suffered by a private person who has the prisoner in custody.[48]

9. Section is Confined to Escape by Accused Himself

In this section we are concerned with escapes by the prisoner. It is his voluntary act.[49] A person forcibly snatched away from custody cannot be said to have intentionally escaped from custody, and, therefore, cannot be convicted under this section.[50] As all1697 persons are bound to submit themselves to the judgment of the law, those who, when lawfully arrested on criminal process, free themselves from custody before they are put in a prison or other legal place of detention, are guilty of

a misdemeanour, punishable by fine and imprisonment.[51] When the accused was arrested, the grounds of his arrest were communicated to him and his arrest was legal but the accused police official resisted the arrest by the raiding party, he was guilty under s 224 IPC .[52]

Cogent evidence on the record proved that the accused facing trial in as many as 22 cases escaped from the jail custody, which was also proved by the entry of missing in the roll call, the accused was convicted under s 224, IPC and sentenced to rigorous imprisonment of one year.[53]

10. Escape by Consent or Neglect, or with Knowledge of Keeper

It has been long established that even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody, the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law.[54]

When the escape is effected by the consent or with the knowledge of the person escorting the prisoner in custody, the accused is no less guilty.[55] But, where a person arrested in execution of a civil process was allowed to go by the decree-holder and the process-server who had arrested him; it was held that there was no offence of escape from lawful custody committed by the person who was arrested.[56]

11. Resistance or Escape must be Intentional

The word 'intentionally' governs both the parts of the section. In order, therefore, to warrant a conviction under this section, it is essential to prove that the accused intentionally escaped or attempted to escape from lawful custody.[57]

Escape not Intentional when Forcibly Rescued

A person forcibly snatched away from custody cannot be said to have intentionally escaped from custody, and cannot therefore be convicted under the section.[58] Where two constables, when on patrol duty, wanted to apprehend a person, some persons surrounded the two constables, assaulted and obstructed them in taking the accused to the police station, the facts of offences under s 224, IPC and other offences were1698 not proved beyond reasonable doubt, the accused persons were held entitled to be acquitted under ss 307, 149, 332 and 224, IPC .[59]

12. Acquittal of Accused in the Case in which he was Arrested--No Effect on his Intentional Escape

Law nowhere provides that acquittal in a case in which an accused is arrested will by itself be sufficient to hold that the arrest was unlawful or to negate a charge under s 224, IPC . If it is established by the prosecution that the accused, who had been taken to custody on the allegation of commission of an offence, escaped from such custody intentionally, he would be guilty of offence under s 224, IPC despite the fact that he gets an order of acquittal in the case in which he had been arrested.[60]

13. Disappearance after being Rescued--Consequences of

Where an accused was rescued by a number of his friends from the lawful custody of the process-server, and he took advantage of this and disappeared, and thus got out of the way of the process-server, it was held that the accused escaped within the meaning of s 225B, although it was due to no fault of his that the accused was released by his friends and that he surrendered himself the next morning.[61]

14. Escape must be 'from any Custody in which he is Lawfully Detained'

In order to warrant a conviction under this section, it is necessary to prove that the accused intentionally escaped or attempted to escape from a lawful custody.[62] He cannot be convicted if his detention in custody was illegal.[63] An escape from custody under a civil process must be distinguished from an escape by a person arrested on a criminal charge. The mere fact that a constable in charge of the accused, who was detained in a jail, became insensible, could not determine the lawful custody of the accused, and escape from such custody is an offence under this section.[64]

15. Lawful Custody how Determined

In construing the terms, 'lawfully detained in custody' in the section, regard must be given to the nature of the custody itself, as well as to the circumstances under which the authority to arrest and keep in custody arises. The 'stocks' were intended by the Regulation (11 of 1816) to be employed for a specific purpose, namely, the infliction of conviction for petty offences as a form of punishment, on the people of lower castes. It was held that detention in stocks, otherwise than as a punishment, was not legal custody, and escape from it was not punishable under this section.[65]

16. Custody in Non-Cognizable Cases

Where a person, apprehended on a charge of a cognizable offence, escapes from lawful custody, his liability to punishment is not affected by the circumstances that a1699 competent court determines his offence to be other than that with which he had been charged. However, if charged with a non-cognizable offence, the police officer, who apprehends him without warrant, does not have him in lawful custody, and his escape is not punishable under this section.[66]

17. Arrest and Custody in a case of Mistaken Identity

A, a police officer, arrested *B* (bearing the same name as *C*) thinking that he was *C*, against whom there was a warrant of arrest. *B* escaped, but was re-arrested. On being tried for the offence for which he was arrested on suspicion, he was acquitted on the ground that he was not *C*, the person charged. It was held that he was not lawfully detained in custody, since he (*B*) had not been charged with the offence and the arrest was therefore unlawful, and therefore he committed no offence under this section.[67]

A, having arrested *B* in the act of stealing, takes him to the village magistrate, who sends him in the custody of two village servants to the nearest police station. *B* escapes from the servants' custody. He is guilty of escaping from legal custody.[68]

18. Custody when Arrest by Private Person

In order to convict the accused under this section, the prosecution must prove that there was a lawful arrest within the meaning of s 41 or s 55, CrPC . Under s 43 of the CrPC a private person can arrest any person, but only if that person is a proclaimed offender or is found actually committing a non-bailable cognizable offence in his presence. Arrest by a private person in any other circumstances is illegal and escape from his custody is not an offence under this section.[69]

19. Failure to show Authority before Arrest

It may be desirable or even obligatory that, if called upon, the police officer making the arrest should show the person arrested, the authority under which he is acting, but to hold that he is bound to do so before he can properly arrest and detain in custody such a person, so as to make the arrest and the detention lawful, would be to extend the law beyond what the legislature has thought proper to declare it.[70]

20. Custody when Arrest made without Proper Endorsement in Warrant

An endorsement in a warrant of arrest should be made in accordance with the law. In *Abdul Sikdar v Mathu Singh* , the court, while it pointed out that initials ought not to be used to authenticate an endorsement upon a warrant, held that a warrant was not invalid when the endorsement was made by initials only, such initials being shown to be those of the proper person to make the endorsement. The endorsement referred to, should be regularly made by name to a certain person in order to authorise him to make the arrest and when there is no endorsement by a person having authority to do1700 so, the arrest is not legal, so as to make any attempt at obstruction or escape, an offence punishable with the terms of this section.[71]

21. 'For any such Offence'--Meaning of

The word 'for any such offence' must mean for any offence with which he is charged or of which he has been convicted. The expression 'charged with' means not that a charge had been framed against the accused by a court of law under the CrPC, but that he was accused of having been involved in an offence.[72] Thus, it would be an offence for a man to escape from custody after he had been lawfully arrested on a charge of having committed an offence, although he may not have been convicted of such latter offence. An accused person is no less guilty than a convicted person, if he escapes from lawful custody.[73] An escape from custody when such detention is not for an offence, is not punishable under this section.[74] The detention contemplated should necessarily be for any of the offences mentioned in the Code or under any local or special law applicable to India. Hence, where an accused arrested for an offence committed in an erstwhile native state, escaped in India while in custody of the state police, he could not be convicted under s 224 even if that state had adopted the Indian Penal Code as its own Code.[75]

22. Explanation--Sentence need not be Consecutive

As the act of offering resistance or illegal obstruction to lawful apprehension or an escape or the attempt to escape is an additional offence punishable under this section, the punishment to be imposed for this offence is also in addition to the punishment for which such person was liable for the offence with which he was charged or of which he was convicted. There is, however, nothing in the explanation to require that a sentence of imprisonment under this section must be made to run consecutively to a sentence imposed for the main offence of which the accused was convicted. A concurrent sentence is nonetheless an additional sentence.[76]

23. Procedure

The offence under this section is cognizable. A warrant should ordinarily issue in the first instance. The offence is bailable but not compoundable. It can be tried by any magistrate.

The limitation for taking cognizance of an offence under this section is three years.

24. 'Place of Trial'

The offence of escaping from custody may be inquired into or tried by a court within whose local jurisdiction the offence is committed or the accused person is found.[77]1701

Sections 177 to 189 of the Code of Criminal Procedure[78] may be referred to.

25. Charge

The following form of charge may be adopted:

I (*name of office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the .....day of.....at.....intentionally offered resistance (*or illegal obstruction*) to your lawful apprehension for the offence of .....with which you were charged [(*or of which you had been convicted*) (*or escaped, or attempted to escape from the custody of.....in which you were lawfully detained for the offence of* .....)], and thereby committed an offence punishable under section 224 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

26. Proof

Section 224, IPC has two distinct parts. The first relates to resistance to apprehension and the second part relates to escape from custody. In order to bring home the guilt of the accused under the first part, the prosecution is to prove the following ingredients:

(a) that the accused was charged or convicted;
(b) that he offered resistance or obstruction to his apprehension;
(c) that such resistance or obstruction was illegal; and
(d) that the accused offered such resistance or obstruction illegally.

When the offence charged is that of escape or attempt to escape from custody, the prosecution is to prove the following:

(a) that the accused was taken into custody for commission of an offence;
(b) that such detention in custody was lawful;
(c) that the accused escaped from such custody or made an attempt to do so; and
(d) that the accused did so intentionally.[79]

In a prosecution under this section, what would be proved is that the person who escaped from lawful custody, had been charged with an offence, not in the sense that a charge had been framed against him, but in the ordinary sense of that expression, namely that he was accused of having been involved in an offence. It is not necessary that proof should be produced of any formal announcement having been made by the person who apprehended the accused, that he had committed an offence. The question whether a person was or was not charged with an offence should depend upon the facts and circumstances of each case and the inference to be drawn from such facts and circumstances.[80]

It is incumbent on the prosecution to prove that the accused was in lawful custody and he escaped from that custody. When there is no evidence even to indicate that the1702 accused was lawfully arrested and that he escaped from the lawful custody, his conviction under this section cannot be sustained.[81]

27. Punishment

The punishment under this section being in addition to the original sentence, the courts when passing the sentence must comply with the provisions of sub-s (2) of s 426 of the Code of Criminal Procedure 1973.[82] A person, who offers resistance to his lawful apprehension, and persons, who manhandle a public servant in discharging his duty and secure the release of a person from lawful custody, can plead no circumstance in extenuation.[83]

10 *State of Orissa v Purna Chandra Jena* (2006) Cr LJ 505 (Ori) .

11 *Jamil Ahmed v State of Maharashtra* (2003) Cr LJ 3663 (Bom) .

12 Re *Kulandaivalu*AIR 1969 Mad 408, (1969) Mad LW (Cr) 214 .

13 Re *Kulandaivalu*AIR 1969 Mad 408, (1969) Mad LW (Cr) 214 .

14 *State of Orissa v Purna Chandra Jena* (2006) Cr LJ 505 (Ori) .

15 *Kalia Amra v Emperor* AIR 1927 Bom 96, 28 Cr LJ 380, 29 Bom LR 168 ; *Queen-Empress v Kutia Ala* Ratanlal Unrep Cr Cases 298; *Nurul Haq v Obeyadulla* 46 CWN 1630 ; *Deo Sahay Lal v R* ILR 28 Cal 253, p 255 ; Re *Sidda Basavaiya* 7 Cr LJ 179, 12 MCCR 50; *Mahommad Qazi v Emperor* AIR 1916 Cal 421(1) ; *Emperor v Po Hle* 4 Cr LJ 381 ; *GK Kumar v State of Mysore* (1963) 2 Cr LJ 466 .

16 *Queen-Empress v Chokhu Yesu* 24 WR 45 ; *Queen-Empress v Tafaullan* ILR 12 Cal 190 ; *Queen v Bajigan* 5 ILR Mad 22 .

17 *Muneshwar Bux Singh v Emperor* AIR 1939 Oudh 81, p 83, 40 Cr LJ 221 .

18 1 Weir 198, 7 Mad HCR App 41; *Empress v Shasti Churan Napit* ILR 8 Cal 331, 106 LR 290 ; *Queen-Empress v Kandhaia* 7 ILR All 87, (1884) 4 AWN 267 .

19 Re *Public Prosecutor* 11 Cr LJ 477, (1910) Mad WN 592.

20 Re *Nooruboobu* 1 Weir 204, 205.

21 For detailed commentary see *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

22 Re *Nanjan* 1 Weir 205.

23 *Bati Daim v Crown* 52 Cr LJ 1031, p 1032 .

24 *Emperor v Gun Pal Me Ya* 4 Cr LJ 287, UBR Cr 1906, 12 Burt LR 340.

25 1 Weir 211; Mad HC Proceedings, 14 May 1979, No 848.

26 *Pratap Singh v Emperor* AIR 1932 Lah 615 ((2)), 34 Cr LJ 25, 33 PLR 1071 .

27 *Hamjisab v State of Mysore* AIR 1966 Mys 20, 21, (1966) Cr LJ 36 ; *GK Kumar v State of Mysore* (1963) 2 Cr LJ 466, 467 (Mys).

28 Re *Tan Sein*(1901) 1 LBR 173; *Sunil Batra v Delhi Administration* (1978) 4 SCC 494, (1979) SCC (Cr) 155 ; *Prem Shankar Shukla v Delhi Administration* (1980) SCC (Cr) 815, (1980) 3 SCC 526 ; *Dhananjay Sharma v State of Haryana* (1995) 4 JT (SC) 483 .

29 *Muneshwar Bux Singh v Emperor* AIR 1939 Oudh 81, 40 Cr LJ 221 .

30 *Queen-Empress v Dalip* (1896) 19 ILR All 246, (1896) All WN 48 ; *Sampat v Emperor* (1917) 18 Cr LJ 803, 41 IC 323 ; *Durga Charan v Queen-Empress* (1900) 27 ILR Cal 457 ; *Raman Singh v Queen-Empress* (1901) 28 ILR Cal 411, 5 CWN 134 .

31 *R v Taik Pya* 10 Cr LJ 188, 5 LBR 2 ; *Bolai De v R* ILR 35 Cal 361 ; *Safdar v State* (1974) All Cr R 10, (1974) All WR (HC) 26 ; *State v Indra Pradhan* AIR 1960 Ori 23, (1960) Cr LJ 267 ; *Kesar v Emperor* AIR 1932 Lah 263 ; *Gokul Tatwa v Emperor* AIR 1926 Pat 23, 26 Cr LJ 1462 .

32 Re *Mahommad Kassim* I Weir 204.

33 *Jagpat Koeri v Emperor* 2 Pat LJR 487 .

34 Code of Criminal Procedure 1973, s 75 ; *Mann Lal v Emperor* AIR 1918 Pat 52 ; notes to s 225B .

35 *Bankey Behary Singh v Emperor* 8 PLR 493 .

36 *R v Basant Lall* ILR 27 Cal 320 .

37 *Bahubal v R* 3 Cr LJ 201, 10 CWN 287 .

38 *Gulabi Mahto v Emperor* AIR 1940 Pat 361, 41 Cr LJ 742 .

39 *Appaswami Mudaly v Emperor* AIR 1924 Mad 555, 81 IC 51, 25 Cr LJ 563, ILR 47 Mad 442 .

40 *Kartik Chandra v Emperor* AIR 1932 Pat 171, 174, 33 Cr LJ 706, 13 PLT 135 ; Re *Appasway Mudaly*AIR 1924 Mad 555, 25 Cr LJ 563 ; *Mousi Lal v Emperor* AIR 1918 Pat 252, 19 Cr LJ 1000 .

41 *Kochu Kunju v State of Kerala* (1962) 2 Cr LJ 437 ; *Durga Tewari v Rahman Buksh* 4 CWN 85 .

42 *Shyama Charan Majumdar v R* 13 Cr LJ 590 ; See notes to s 225 .

43 *Hamjisaan v State of Mysore* (1966) Cr LJ 36 .

44 *King-Emperor v Khanu Kori* AIR 1925 Sind 193 ((1)), 25 Cr LJ 462, 18 SLR 501 .

45 Termes de la Ley.

46 *Shalik Maruti Kowe v State of Maharashtra* 2014 Cr LJ 3922, p 3927 (Bom) (DB), 2014 ALL MR (Cri) 2116, 2014 (3) Bom CR (Cri) 230 .

47 *Kalia Amra v Emperor* AIR 1927 Bom 96, 28 Cr LJ 380 ; *Empress v Muppan* ILR 18 Mad 401 ; *Public Prosecutor v Ramaswami Konan* ILR 31 Mad 271 ; *Shalik Mareeti Kowe v State of Maharashtra* 2014 Cr LJ 3922 (Bom) (DB), 2014 ALL MR (Cri) 2116, 2014 (3) Bom CR (Cri) 230 .

48 *Russel onCrime*, eleventh edn, p 359.

49 Re *Kulandaivelu*AIR 1969 Mad 408, pp 409-10, 1969 Cr LJ 1406 .

50 Re *Retta Koravan*AIR 1957 Mad 714 ; *King-Emperor v Lachhu Kamara* AIR 1950 Ori 62 .

51 Russel on *Crime*, vol I, eleventh edn, p 359.

52 *Ami Lal & Ors v State of Rajasthan* (1996) Cr LJ 1585 (Raj) .

53 *State of Madhya Pradesh v Suresh Singh* 2013 Cr LJ 848, p 851 (Chh), 2013 (1) CGBCLJ 122 .

54 *Queen-Empress v Muppan* ILR 18 Mad 401, 1 Weir 203 (citing 1 *Russel on Crime* fifth edn, p 567 corresponding to *Russel on Crime*, eleventh edn, p 35; Roscoe, eleventh edn, p 453 and Bishop's *Criminal Law*, seventh edn, s 1104); *Public Prosecutor v Ramaswami Konan* ILR 31 Mad 271, 8 Cr LJ 200, 18 Mad LJ 540 ; *Public Prosecutor v Sennimalai Goundan* 20 Cr LJ 208, (1919) Mad WN 695, 9 Mad LW 216, 25 Mad LT 290 .

55 *State of Hyderabad v Kan Kadu* AIR 1954 Hyd 89, p 90, (1954) Cr LJ 651 .

56 Re *Public Prosecutor* 11 Cr LJ 477, (1910) Mad WN 592, 8 Mad LT 286.

57 *State v Indra Padhan* AIR 1960 Ori 23, 25, (1960) Cr LJ 267, (1959) ILR Cut 504, 25 CLT 244 ; Re *Kulandaivelu*AIR 1969 Mad 408, p 410, (1969) Cr LJ 1406 .

58 Re *Retta Koravan*AIR 1957 Mad 714, (1957) Cr LJ 1234 (1), (1957) 1 Mad LJ (Cr) 405 ; *King-Emperor v Lachhu Kamara* AIR 1950 Ori 62, 51 Cr LJ 679 .

59 *Kundan Singh & Anor v State* (1990) Cr LJ 1660 (All) .

60 *State of Orissa v Purna Chandra Jena* (2006) Cr LJ 505 (Ori) .

61 *Attiya v King-Emperor* AIR 1923 Rang 133, 24 Cr LJ 307 .

62 *State v Indra Padhan* AIR 1960 Ori 23, p 25, (1960) Cr LJ 267 ; Re *Kulandaivelu*AIR 1969 Mad 408, (1969) Cr LJ 1406 .

63 Re *Uppala Kotayya Nagaram*AIR 1916 Mad 686(1), 16 Cr LJ 672, 18 Mad LT 310 .

64 Re *Sandeya* 1 Weir 203, **distinguishing** Re *Sarahaiya* 1 Weir 202.

65 Mad HC Proceedings, 23 September 1878; no 1533; 1 Weir 199; Re *Uppala Kotayya Nagaram*AIR 1916 Mad 686(1), 16 Cr LJ 672 .

66 *Queen v Ram Saran Tewary* 24 WR 45 .

67 *Ganga Charan v R* ILR 21 Cal 337 ; *Deo Sahay Lal v R* ILR 28 Cal 253, p 255 .

68 *R v Potadu* ILR 11 Mad 480, 1 Weir 200 ; *Parsidhan v R* ILR 29 All 575 ; *King-Emperor v Johri* ILR 23 All 266 .

69 *State v Indra Padhan* AIR 1960 Ori 23, (1960) Cr LJ 267 ; *Kesar v Emperor* AIR 1932 Lah 263 ; *Gokul Tatwa v Emperor* AIR 1926 Pat 53, 26 Cr LJ 1462, 7 PLT 65 .

70 *Queen-Empress v Basant Lal* ILR 27 Cal 320 .

71 *Durga Tewari v Rahaman Buksh* 4 CWN 85 .

72 *GK Kumar v State of Mysore* (1963) 2 Cr LJ 466 .

73 *Deo Sahay Lal v R* ILR 28 Cal 253, p 255 ; Re *Sidda Basavaiya* 7 Cr LJ 179, 12 MCCR 50; *Mahommad Qazi v Emperor* AIR 1916 Cal 436(1) ; *Emperor v Po Hle* 4 Cr LJ 341 ; *Halim Amin v Emperor* AIR 1927 Bom 76 .

74 *Ganga Charan Singh v Queen-Empress* ILR 21 Cal 337 .

75 *Billu v Emperor* AIR 1940 Lah 44, p 45, 41 Cr LJ 378 .

76 *Emperor v Chokhu Yesu* AIR 1934 Bom 462(1) .

77 Section 181(1), Code of Criminal Procedure 1973.

78 For detailed commentary see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

79 *State of Orissa v Purna Chandra Jena* (2006) Cr LJ 505 (Ori) .

80 *GK Kumaran v State of Mysore* (1963) 2 Cr LJ 466 ; *State v Indra Pradhan* AIR 1960 Ori 23, p 25, (1960) Cr LJ 267 .

81 *State of Madhya Pradesh v Dayaram* (1980) Cr LR (MP) 14 (SN), (1980) MPLJ (SN) 9 .

82 Re *Chinna Madakudumban* 1 Weir 203, 204; *Queen v Dhoonda Bhooya* 8 WR 85 .

83 *Hamjisab v State* AIR 1966 Mys 20, p 21, (1966) Cr LJ 36 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 225.

Resistance or obstruction to lawful apprehension of another person. --

Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

or, if the person to be apprehended, or the person rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with [84][imprisonment for life] or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is liable under the sentence of a Court of Justice, or by virtue of a commutation of such a sentence, to [85][imprisonment for life] [86][***] [87][***] [88][***] or imprisonment, for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with [89][imprisonment for life] or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.1703

Comments

1. Scope

From bare perusal of the provision it appears that the person from whose custody the rescue is effected must have authority to detain lawfully the person rescued. Otherwise, no offence is committed for effecting the rescue. It is not necessary that the custody from which offender is rescued should be that of a police man, it is enough that the custody is one which is authorised by law and it must be proved that the person rescued was in lawful custody at the time. It would be very apt to mention that under s 43 of the Code of Criminal Procedure 1973 even a private individual can have authority to take the culprit in custody. But that power is not unlimited, rather it is a limited one which would be evident from the provision as enshrined in s 43 of the Code of Criminal Procedure 1973.[90]

The last section dealt with offenders offering resistance to their lawful apprehension or escaping from custody. This section deals with others who do the same thing to rescue the offenders. Like the last section, this section also is in two parts and deals with two offences: (a) intentionally offering resistance or illegal obstruction to the lawful apprehension of an offender, and (b) rescuing or attempting to rescue an offender from any custody in which he is lawfully detained.[91] Offering resistance or illegal obstruction to the lawful apprehension of a person should not be confused with an attempt to rescue him. The former comes in before the actual apprehension or arrest, and the latter only after the apprehension or arrest. An offence, under this section, can be said to have been committed if a person tries to rescue an arrested person.[92] It is not necessary that the person who effects the rescue of another from lawful detention, should be aware of the facts leading to that detention.[93]

The person from whose custody the rescue is effected must have authority to detain lawfully the person rescued. Otherwise, no offence is committed for effecting the rescue. It is not necessary that the custody from which offender is rescued should be that of a police man, it is enough that the custody is one which is authorised by law and it must be proved that the person rescued was in lawful custody at the time. The petitioners were alleged to have rescued the accused while the witnesses were taking him to the police station after the commission of the offence. Where there was no1704 eye-witness to the occurrence, as such the witnesses had no authority to arrest the petitioners. No overt act was attributed to the petitioners. Their conviction under s 225, IPC was set aside.[1]

2. Legislative Changes

The words 'imprisonment for life' were substituted by Act, 26 of 1955. Section 117 and schedule for 'transportation for life' (wef 1 January 1956). The words 'or to' in para 4 were omitted by Act 36 of 1957, s 3 and Schedule II. The word 'transportation' in the same para was omitted by Act, 26 of 1955, s 117 and schedule (wef 1 January 1956). The words 'penal servitude' in para 4 were omitted by s 2,

Act 17 of 1949, (wef 6 April 1949).

3. Section 225 Distinguished from Sections 130 and 225B

Section 130, IPC also deals with rescue, but that relates to the rescue of a state prisoner or a prisoner of war, whereas this section relates to the rescue of an offender. Another section in the Code dealing with rescue is s 225B, IPC, which deals with rescue in cases not provided for in this section. This section deals with the rescue of a person who is charged with or convicted of an offence within the meaning of s 40 of this Code, and is lawfully detained in custody for such an offence. On the other hand, s 225B deals with the rescue of a person who is not charged with or convicted of an offence, but is detained in custody for being bound over to be of good behaviour,[2] or in execution of a civil process.[3] In *Abdul Rahiman Sahib v Emperor* ,[4] it was held that a person rescuing a person arrested in execution of a civil warrant was guilty under s 225 . It is, however, submitted that in fact, s 225B should have been applied to the case and not s 225 .

4. Demand for Release of Accused

Where though the accused was found uprooting the crops in the land of the victim's family and caught in the action, the intention and resolve of those who detained him and the victim was not to release him till subjected to a village *panchayat* and it was not as though they were bent upon handing the accused over to police for further lawful custody or action, in the light of such evidence coming to light even from the prosecution case, a conviction under s 225, merely because there was a demand to release him, is rendered impossible, all the more so when except a demand so made, nothing further was done in this direction to get him released.[5]

5. Intention is an Important Ingredient

Intention is an important ingredient in an offence under this section, as under almost every criminal offence, and it is for the prosecution to establish with what intention the accused acted. Unless it is proved by the evidence on record that the intention of the accused was to prevent the arrest, or that the pursuers were lawfully empowered to arrest him, persons stopping them from doing so are not liable under this section.[6]1705 Resistance or illegal obstruction is intentional when those who resist or obstruct, do so with the intention that there should be no apprehension, notwithstanding that such apprehension is, to their knowledge, lawful.[7]

6. Power of Arrest and Resistance are Co-related

Any police officer may, without an order or warrant from a magistrate, arrest a person against whom suspicion exists of his having been concerned in theft, under s 41(1)(a), CrPC, but he cannot send persons who are not police officers to make an arrest which he himself can lawfully make. So, when private persons are sent by a person having the powers of a police officer, to arrest a person suspected of theft, they have no lawful authority to arrest him, and any resistance to such persons does not constitute an offence under this section.[8]Section 43, CrPC gives to a private person the power to arrest any person who, in his view, commits a non-bailable and cognizable offence. But where the man escaping was a thief running away after the theft, an arrest of the offender by a private person in whose presence the theft was not committed, is not justified.[9]

If the offence is not committed in one's presence, a private person can arrest an offender only if he is a proclaimed offender.[10]

A, a private person, arrests *B* in the act of stealing. *C* rescues *B. C* is guilty of an offence under this section.[11]

During an unlawful assembly, *A,* a police officer, arrests *B,* a member of the assembly. *C* and *D* rescue *B*; they are guilty of an offence under this section.[12]

7. Mere Threat may Amount to Resistance

Threatening a sub-inspector of excise, in order to prevent him from making an arrest, amounts to offering resistance and an illegal obstruction to the lawful apprehension of an offender.[13] But resistance to an unlawful arrest does not constitute an offence under this section.[14] Notes under s 224 may be referred to.

8. Illegal Obstruction

Notes under s 224 may be referred to.

9. 'Rescue'--Meaning of

The word 'rescue' though not defined in the Code will always mean an act of getting a person free forcibly from custody against the will of person in whose lawful custody he was. Therefore, some overt act needs to be there if one is said to have rescued a person from the lawful custody.[15]1706

The word 'rescue' is not defined in the Code. Rescue is the act of forcibly freeing a person from custody, against the will of those who have him in custody.[16] 'Rescue, or an attempt to rescue is the offence of a person who forcibly frees another from a lawful arrest, whether the arrest is by a constable or a private person, or whether the person rescued is in prison or not'.[17] In other words, rescue is the offence of forcibly and knowingly freeing another from arrest or imprisonment.[18] The term 'rescue' in this section implies intention and the use of violence or criminal force to achieve the object desired. Rescuing would certainly indicate some positive overt act on the part of the accused by which the liberation of the person arrested is effected. Whether there is any such act done by the accused in a particular case would depend on the facts of each case.[19]

Where, except for a demand to release the accused, nothing further was done in the direction of getting him released, the conviction and sentence under s 225, IPC was set aside by the Apex Court.[20]

Intention not Necessary for Rescue

Rescue from lawful custody, which is made punishable under the section, however, need not be an intentional rescue. It is only the resistance or illegal obstruction to apprehension that has to be intentional before it can amount to an offence.[21]

Intention may Sometimes be Material

Where a *daffadar,* in charge of one of the gates of a jail, allowed certain convicts to pass out of the gate to have an interview with their friends, but the convicts, taking advantage of the *daffadar*'s over-confidence, effected their escape, it was held that the *daffadar* was not liable to be convicted under this section as it was not his intention to rescue the convict prisoners.[22]

The use of force is a part of the offence of causing rescue. The accused cannot therefore, be convicted of both, for the illegal act of rescuing the prisoner, as well as for using force.[23] Notes under s 225B may be referred to.

10. Detention must be Lawful

One can be held guilty for an offence under s 225 if he rescues a person who was detained lawfully.[24]

For the application of this section, the rescue must be from custody in which the person rescued is in lawful detention. The person from whose custody the rescue is1707 effected must have authority to lawfully detain the person rescued. It must be shown that the person rescued was in lawful custody at

the time. If the warrant of arrest is to arrest a particular person, it must be shown that the person arrested and rescued is that particular person.[25]

Where the arrest is unauthorised by law, the person effecting the rescue, cannot be held guilty under this section.[26] When the accused can never be said to have been lawfully detained by the witnesses and once detention of the accused was not lawful, question of committing offence by other accused for rescuing under s 225 of the Indian Penal Code 1860 never arises.[27]

Consequences of Unlawful Arrest and Detention--Some Illustrative Cases

A warrant of arrest not signed by the magistrate issuing it, is defective, and an arrest made under the warrant is illegal, so that the rescue of the person arrested is not a rescue from lawful custody, and the persons effecting the rescue cannot be held guilty under this section.[28] But where the lower half of the warrant, which provides for the release of the arrest person on bail, has not been filled in, this omission would not make the apprehension unlawful.[29] A warrant addressed to the process server of the court is not invalid merely because it is not addressed to a particular person by name. The accused rescuing the person arrested under the warrant would be guilty of the offence under this section.[30]Where the record shows that the magistrate directed the issuance of a warrant of arrest on 8 July 1874 for the appearance of the petitioner, in fact, no such warrant was ever issued. On the next date fixed in the case, the bench clerk of the magistrate, finding the petitioner moving in the court compound under the impression that a warrant of his arrest has already been issued, asked the court constable to arrest him. Upon such asking, the petitioner was arrested but he managed to escape from the custody of the court constable. On his complaint, the magistrate took cognizance under ss 225 and 353, against the petitioner. Such cognizance being challenged before the Patna High Court, it was held that the conduct of the constable in putting the petitioner under arrest or taking him into custody cannot be a lawful act, rather the arrest in such a circumstance must be deemed to be illegal and unjustified. The petitioner as such did not commit any offence in running from such unauthorised custody or detention and no offence as such under s 225 of the Code is made out. There appears to be a grave error on the part of the learned magistrate in ignoring the provisions of law with respect to the issuance of a warrant of arrest and he has committed an error in the present case in taking cognizance of the offence and issuing processes against the petitioner on the allegations made out in the petition of complaint.[31]

A complaint under ss 323 and 329, IPC was lodged by the complainant against some persons. The head constable investigating the case demanded a bribe from the1708 complainant for arresting those persons. A trap was laid to apprehend the head constable red handed. The complainant gave the agreed amount to the head constable, who in turn gave it to a constable, who was present there. On a signal by the complainant, the raiding party appeared on the scene. However, the head constable and constable resisted the raiding party from taking further steps; they shouted for help; one of them ran away and returned along with some villagers and at the instance of the head constable, attacked the raiding party, snatched their belongings and looted the currency notes which were used for giving the bribe. They rescued the head constable, intentionally assaulted the members of the raiding party, used criminal force and prevented the members of the raiding party, who were public servants, from discharging their lawful duties. The head constable was convicted under s 395 read with s 109, ss 353, 109 and 224, the constable under s 395 and the villagers under ss 353, 149, 225 and 147, on the basis of cogent and reliable evidence.[32]

Section 41, CrPC does not give an unqualified power in all cases to any police officer, to arrest without an authorisation in writing, a person concerned in a cognizable offence. The provisions of s 41 are limited by those of s 55, CrPC . Hence, a police constable who is merely deputed by his superior officer to arrest someone concerned in a cognizable offence and not acting independently, cannot arrest without complying with the formalities mentioned in s 55 . An arrest made without complying with the provisions of s 55, CrPC is illegal and the custody of the person's arrest is not lawful.[33] But it is otherwise if the police officer making the arrest has independent information of the offence and has power to arrest under s 41, CrPC .[34]

Custody need not be of Police

A village *chaukidar* is not a police officer within the meaning of s 41, CrPC and is not entitled to arrest as a police officer under that section.[35] To support a conviction under this section, it is not necessary that the custody from which the offender is rescued should be that of a policeman, it is enough that the custody is one which is authorised by law.[36] Rescue from the custody of a private person who had arrested a thief in the act of stealing is an offence under this section.[37] But under s 43, CrPC, a private person can arrest only a person who, in his view, that is, in the sight or presence, commits a non-bailable cognizable offence, or is a proclaimed offender. If the person arrested is not a proclaimed offender and has committed no offence in the presence of the private person arresting him, the arrest is illegal and a charge of rescuing him from lawful custody cannot be sustained.[38]1709

Under s 43, CrPC where a private person arrested an offender, he must, without delay, make over the person so arrested to a police officer or take him to the nearest police station.

A, a private person arrested *B,* who was alleged to have committed theft, but not in *A's* presence, and handed him over to *C,* a village *chaukidar* for custody. *D* rescued him therefrom. It was held that *D* did not commit an offence since the village *chaukidar* was not a 'police officer within the meaning of s 59 of the CrPC 1898,[39] then in force.

Under s 129(2), CrPC a police officer dispersing an unlawful assembly, is fully competent to arrest any member of the unlawful assembly, and a person rescuing the person so apprehended is liable under this section.[40]

11. Offence

An offence denotes a thing punishable under the IPC or any special or local law.[41] An escapee from a custody, when being taken before a magistrate for the purpose of being bound over to be of good behaviour, is not punishable under either s 224 or s 225 .[42]

12. Procedure

The offence under this section is cognizable. A warrant shall ordinarily issue in the first instance. It is bailable if it falls under the first paragraph of the section. The offence falling under the other paragraphs is non-bailable. It is not compoundable.[43] The cognizance of the offence falling under paragraphs one and two of this section can be taken within three years from the date of the offence while there is no period of limitation for taking cognizance of the offence falling under the other paragraphs of this section.[44]

13. Jurisdiction

The offence is triable as follows:

(a) If it is under the first clause--by any magistrate;
(b) if it falls under cll (2), (3) or (4)--by a magistrate of the first class;
(c) if it falls under the last clause--by the court of session.

14. Charge

The following form of charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the.....day of.....at.....intentionally offered resistance (*or illegal obstruction*) to the lawful apprehension of *AB* for the offence of.....under section.....of1710 .....[or rescued (*or attempted to rescue*) the said *AB* from the custody in which the said *AB* was lawfully detained for the offence of.....], and that you thereby committed an offence under section 225 , clause....of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

The person who escapes from a lawful apprehension commits an offence punishable under s 224, IPC and not under this section. Where such a person was charged and convicted under this section and was not charged under s 224, his conviction was set aside and he was acquitted of the offence.[45]

15. Punishment

To convict a person of rioting, with a view to attacking the police and obstructing them in the discharge of their duties, and also to convict him of the substantive offence of so attacking and obstructing, is illegal.[46]Similarly, a person, who rescues another from lawful custody, must not be sentenced both for the illegal act of rescuing as well as of using force.[47] Where an accused is convicted under ss 225 and 353 for offences committed in the course of the same transaction and the magistrate feels that a sentence of imprisonment is necessary, the proper course for him is to inflict a sentence of imprisonment for each offence and to direct that the two sentences run concurrently.[48] But where the obstruction has not been such as to constitute a serious offence, the case does not call for heavy punishment.[49] Where the accused persons, convicted under this section, were young boys of 18 years, a sentence of one and a half years was held severe and it was reduced to a rigorous imprisonment of six months only.[50] But the persons who manhandle a public servant in discharging his duty, and secure the release of a person from lawful apprehension, can plead no circumstance in extenuation.[51] In a case falling under this section, it is wrong in principle to take recourse to the provisions of the Probation of Offenders Act in a territory where the law and order situation is alarming.[52] After the decision of this case the Code of Criminal Procedure 1898, which was then in force, was repealed with effect from 1 April 1973 and the provisions of ss 360 and 361 of the Code of Criminal Procedure 1973 have to be kept in view in disallowing the benefit of being a first offender in appropriate cases thereafter.

84 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation for life' (wef 1-1-1956).

85 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation for life' (wef 1-1-1956).

86 The words 'or to' omitted by Act 36 of 1957, s 3 and Sch II.

87 The word 'transportation' omitted by Act 26 of 1955, s 117 and schedule (wef 1-1-1956).

88 The words 'penal servitude' were repealed by s 2 of the Criminal Law (Removal of Racial Discriminations) Act 1949 (17 of 1949) (wef 6-4-1949).

89 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation for life' (wef 1-1-1956).

90 *Radha Sah v State of Jharkhand* (2007) Cr LJ 2805 (Jhar) .

91 *Bhima Gowda v State of Mysore* (1962) Mys LJ 381 .

92 *Salim Mahommad v State of Gujarat* (1972) Cr LJ 1454, p 1456 (Guj) .

93 *Golak Chandra Dutta v State* (1971) Cr LJ 1454, p 1456 (Guj) .

1 *Radha Sah v State of Jharkhand* 2007 Cr LJ 2805, 2007 (2) BLJR 922, 2007 (4) JCR 615 (Jhar) .

2 *Satish Chandra Rai v Jadunandan Singh* ILR 26 Cal 748, 3 CWN 741 .

3 *Rajani Kanta Pal v Emperor* 5 CWN 843 .

4 *Abdul Rahiman Sahib v Emperor* AIR 1914 Mad 55, 15 Cr LJ 439 .

5 *Malhu Yadav v State of Bihar* (2002) Cr LJ 2819 (SC) .

6 *Alawal v Emperor* AIR 1922 Lah 73, p 74, 23 Cr LJ 3 .

7 *Hamjisab v State* AIR 1966 Mys 20, p 21, (1966) Cr LJ 36 .

8 *Taik Pyn v Emperor* 10 Cr LJ 115 (Low Bur), 5 LBR 21.

9 *Alawal v Emperor* AIR 1922 Lah 73, p 74, 23 Cr LJ 3 ; *Balai Dey v Emperor* ILR 35 Cal 361 ; *Kalai v Kallu Chawkidar* ILR 27 Cal 366 .

10 *Emperor v Taik Pyn* 1 Weir 210 .

11 *R v Kutti* ILR 11 Mad 441 ; *Queen v Degambar Aheer* 21 WR 22 .

12 *R v Assam Shureff* 13 WR (Cr) 75 .

13 *Bechu Mian v Emperor* AIR 1930 Pat 344, p 345, 31 Cr LJ 465 .

14 *Emperor v Taik Pyn* 10 Cr LJ 118 ; *Alawal v Emperor* AIR 1922 Lah 73, p 74, 23 Cr LJ 32 ; *Balai Dey v Emperor* ILR 35 Cal 361 ; *Kalai v Kallu Chowkidar* ILR 27 Cal 366 .

15 *Radha Sah v State of Jharkhand* (2007) Cr LJ 2805 (Jhar) .

16 Stephen's Digest, art 162 .

17 *Halsbury's Laws of England*, vol 11(1), fourth edn, reissue, para 326.

18 *Russell on Crime,* vol 1, twelveth edn, p 335.

19 *Thangal v State of Kerala* AIR 1961 Ker 331, p 334, (1961) 2 Cr LJ 774 ; *Hamjisab v State* AIR 1966 Mys 20, p 21, (1966) Cr LJ 36 ; *Golak Chandra Dutta v State* (1971) Cr LJ 910, p 911 (Tripura) .

20 *Malhu Yadav & Ors v State of Bihar* (2002) II CCR 236 (SC) .

21 *Bhima Gowda v State of Mysore* (1962) Mys LJ 380, p 381 ; *Awadhesh Mahto v State of Bihar* (1979) Cr LJ 1275, p 1278 (Pat), (1979) BLJ 443, (1979) BLJR 449 ; Re *Kulundalvelu*AIR 1969 Mad 408, (1969) Cr LJ 1406 ; *Radha Shah v State of Jharkhand* 2007 Cr LJ 2805,, 2007 (2) BLJR 922, 2007 (4) JCR 615 (Jhar .).

22 Re *Ghulam Ali*(1883) PR 19.

23 *The Queen v Chunder Kant Lahore* 12 WR 29 ; *Kallu v Emperor* AIR 1922 Lah 3, p 32, 23 Cr LJ 449 ; *Golak Chandra Dutta v State* (1971) Cr LJ 910 (Tripura) .

24 *Radha Sah v State of Jharkhand* (2007) Cr LJ 2805 (Jhar) .

25 *Queen v Degambar Aheer* 21 WR 22 .

26 *Mumtaz Khan v State* (1971) All Cr R 213, p 214, (1970) All WR (HC) 345 ; *Mousi Lal v Emperor* AIR 1918 Pat 252, 19 Cr LJ 1000 ; *Shayama Charan Majumdar v Emperor* 13 Cr LJ 590, 16 CWN 549 ; *Mahommad Ismail v Emperor* AIR 1936 Rang 119, 37 Cr LJ 462 ; *King v Sridhar* AIR 1941 Rang 180, 42 Cr LJ 629 ; *Gulabi Mahto v Emperor* AIR 1940 Pat 361, 41 Cr LJ 742 .

27 *Radha Sah v State of Jharkhand* (2007) Cr LJ 2805 (Jhar) .

28 *Mousi Lal v Emperor* AIR 1918 Pat 252, 19 Cr LJ 1000, 5 PLW 226 ; *Mumtaz Khan v State* (1971) All Cr R 213, p 214, (1970) All WR (HC) 345 .

29 *Magna v State* AIR 1954 HP 68, p 69 .

30 *Abdul Rahiman Sahib v Emperor* AIR 1914 Mad 55, 15 Cr LJ 439, 1 Mad LW 500 .

31 *Saryug Prasad v State of Bihar* (1984) BLJ 264, (1984) Pat LJR 779 .

32 *Ami Lal v State of Rajasthan* (1996) Cr LJ 158 (Raj) .

33 *Mahommad Ismail v Emperor* AIR 1936 Rang 119, 37 Cr LJ 462, ILR 13 Rang 154 ; *King v Sridhar* AIR 1941 Rang 180, 42 Cr LJ 629 ; *Gulabi Mahto v Emperor* AIR 1940 Pat 361, 41 Cr LJ 742, 27 PLT 144 .

34 *Keshavlal Harilal v Emperor* AIR 1937 Bom 56, 39 Cr LJ 267, (1937) ILR Bom 127, 38 Bom LR 971 ; *Krishun Mandar v Emperor* AIR 1926 Pat 424, 27 Cr LJ 1310, 5 ILR Pat 533, 8 PLT 287 .

35 *Kalai v Kallu Chawkidar* ILR 27 Cal 366, 4 CWN 252 ; *Purna Chandra v Emperor* AIR 1914 Cal 272, 14 Cr LJ 494, ILR 41 Cal 17, 17 CWN 978 ; *Empress of India v Kallu* 3 ILR All 60 ; *Emperor v Bhagwan Din* AIR 1929 All 435, 31 Cr LJ 12, ILR 52 All 203, (1930) All LJ 242 ; *Jograj Mahto v Emperor* AIR 1940 Pat 693, 42 Cr LJ 199 .

36 *Queen-Empress v Kutti* ILR 11 Mad 441 .

37 *Ibid*.

38 *Gokul Tatwa v Emperor* AIR 1926 Pat 53, 26 Cr LJ 1462, 7 PLT 65 ; *Kesar v Emperor* AIR 1932 Lah 263 ; *State v Indra Pradhan* AIR 1960 Ori 23, (1960) Cr LJ 267 ; *Bolai De v Emperor* ILR 35 Cal 361 .

39 *Kalai v Kallu Chawkidar* ILR 27 Cal 366 ; *Purna Chandra Kundu v Emperor* AIR 1914 Cal 272, 14 Cr LJ 494, *Taik Pyn v Emperor* 10 Cr LJ 118 (Low Bur), 5 LBR 21.

40 *Queen v Assam Shurreff* 13 WR 75 .

41 Section 40, IPC .

42 *Empress v Shasti Chum Napit* ILR 28 Cal 331 ; *Satish Chandra Rai v Jadunandan Singh* ILR 26 Cal 748, 3 CWN 741 .

43 Re *Venkatrasubbier* 1 Weir 210.

44 Sections 468 and 469, CrPC 1973.

45 *Khalaksingh v State of Madhya Pradesh* (1996) III CCR 465, p 470 (MP) .

46 *Kallu v Emperor* AIR 1922 Lah 31, p 32, 23 Cr LJ 449 .

47 *Golak Chandra Dutta v State* (1971) Cr LJ 910, p 911-12.

48 *Magna v State* AIR 1954 HP 68, p 70-72, (1954) Cr LJ 1472.

49 *Bechu Mian v Emperor* AIR 1930 Pat 344, p 345, 31 Cr LJ 465 .

50 *Bindeshwari Mehta v State* (1973) Pat LJR 432 .

51 *Hamjisab v State* AIR 1966 Mys 20, 21, (1966) Cr LJ 36 .

52 *Golak Chandra Dutta v State* (1971) Cr LJ 910, p 911 (Tri) .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

[53][S. 225A.

Omission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise provided for.--

Whoever, being a public servant legally bound as such public servant to apprehend, or to keep in confinement, any person in any case not provided for in section 221, section 222 or section 223, or in any other law for the time being in force, omits to apprehend that person or suffers him to escape from confinement, shall be punished--1711

(a) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and
(b) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both.]

Comments

1. Scope

This section is analogous to and supplements ss 221, 222 and 223 and punishes public servants who intentionally or negligently omit to apprehend, or suffer the escape, of persons liable to be apprehended or detained in custody, in cases not provided for in those sections or in any other law for the time being in force. This being a general provision for cases not provided for elsewhere, it is necessary before it is applied, to see that there is no other specific provision, in this Code or elsewhere, applicable to the case.

Chapter IV (General Exception), ch V (of Abetment) and ch XXIII (of Attempts to Commit Offences) apply to ss 225A and 225B [54] also.

2. Legislative Changes

Section 225A which was first inserted in the IPC by s 9 of the Indian Penal Code (Amendment) Act 27 of 1870, ran as follows:

> Whoever escapes or attempts to escape, from any custody in which he is lawfully detained for failing, under the Code of Criminal Procedure, to furnish security for good behaviour, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

It was intended to supplement the provisions of s 224, which extend only to resistance to, or escape from custody for an offence under the IPC, and not to custody under s 123, CrPC for failing to furnish security for good behaviour.

By s 24 of the Criminal Law (Amendment) Act, 10 of 1886, it was substituted by the present s 225A and the old section was absorbed in the newly inserted s 225B .

3. 'Public Servant'--Meaning of

Section 21 and commentary thereunder may be referred to.

4. 'Legally Bound'--Meaning of

Notes to ss 43 and 223 may be referred to.

5. 'Confinement'--Meaning of

Section 41 of the Code of Criminal Procedure 1973 is independent of ch VIII of the IPC, although proceedings under that chapter may follow an arrest under s 41 as a1712 natural sequence. An officer in charge of a police station can, therefore, arrest or cause to be arrested, without a warrant or order of a magistrate, any person who is by repute a habitual robber, house-breaker or thief, or otherwise comes within the scope of s 110 .[55] And where such a person is arrested, without a warrant or order of a magistrate, the confinement of that person is legal custody within the meaning of s 225A .[56]

6. 'Negligently'--Meaning of

Where a person properly arrested is confined in a room, an omission to secure the door of the room, thereby allowing the prisoner to escape from custody, amounts to negligence.[57]

7. Procedure

The offence under this section is not cognizable. If the offence is under cl (a) a warrant shall ordinarily issue in the first instance and if it is under cl (b), a summons will issue. The offence is bailable but not compoundable. An offence under cl (a) is triable by a magistrate of the first class and the one under cl (b) is triable by any magistrate.[58] The period of limitation for taking cognizance of an offence under this section is three years.

8. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....being a public servant legally bound as such public servant to apprehend (*or to keep in confinement*) one *AB* intentionally (*or negligently*) omitted to apprehend the said *AB* (*or suffered the said AB to escape from confinement*) and that you thereby committed an offence punishable under section 225A of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried (*by this court*) on the said charge.

9. Proof

In order to establish an offence under this section the prosecution has to prove:

(a) that the accused was a public servant;
(b) that he was legally bound to apprehend, or keep in confinement, the person in question;
(c) that he omitted to apprehend that person, or suffered him to escape from confinements;
(d) that he did so intentionally [or negligently for cl (b)];
(e) that the offence does not fall under ss 221, 222 or 223 or any other law for the time being in force.1713

53 Sections 225A and 225B substituted by Act 10 of 1886, s 24(1), for s 225A, which had been inserted by Act 27 of 1870, s 9 .

54 Section 13 of Act 27 of 1870 as amended by Act 2 of 1891.

55 *Emperor v Nepal* ILR 35 All 407 .

56 *Ramnandan Singh v Emperor* AIR 1930 Pat 103, p 104, 31 Cr LJ 717 .

57 *Ibid*.

58 Code of Criminal Procedure 1973, Sch 1.

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

[59][S. 225B.

Resistance or obstruction to lawful apprehension, or escape or rescue, in cases not otherwise provided for.--

Whoever, in any case not provided for in section 224 or section 225 or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself or of any other person, or escapes or attempts to escape from any custody in which he is lawfully detained, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.]

Comments

1. Scope

This section is analogous to, and supplements ss 224 and 225 . It applies to cases not provided for in ss 224 and 225 . It was added in order to fill up the lacuna referred to in *Empress v Shasti Churn Napit* [60] and *Queen-Empress v Kandhaia* ,[61] in which it was held that an escape from custody, when being taken before a magistrate for the purpose of being bound over to be of good behaviour, is not punishable under either s 224, or s 225 of the IPC . Now a person, who escapes from police custody while proceedings under s 109, CrPC are pending against him, commits an offence under this section and not under s 224 .[62] This section penalises not only the resistance or illegal obstruction to the lawful apprehension of oneself, but also that of another. So also it penalises not only the escape from lawful custody but also the rescue of another from such custody.

The gist of the offence under this section is a resistance or obstruction to a lawful apprehension or an escape or rescue from a lawful custody or an attempt to secure1714 such an escape or rescue. For a

forcible escape from the custody of a process-server to amount to an offences under this section, two prerequisites must be satisfied and they are: (a) that the process-server had the legal authority to arrest the accused and (b) that the warrant on the authority of which he was making the arrest had been legally issued by a competent authority.[63]

2. Legislative Changes

This section was inserted in the IPC by s 24 of the Criminal Law Amendment Act 10 of 1886, and absorbs the old s 225A which was originally inserted in the Code by s 9 of the Indian Penal Code Amendment, Act 27 of 1870, and s 65 of the old Civil Procedure Code, which provided for a resistance to apprehension and an escape from custody in the execution of a process issued by a civil court.

3. Section 225 Distinguished From Sections 130 and 225B

Commentary under same heading in s 225, *ante* may be referred to.

4. Meaning of Intentional Resistance

The meaning of the word 'illegal' has been discussed in s 43 . An offence under this section is committed only when the resistance to arrest is intentional, and that can only be when the person who makes the resistance knows that he is being, or is about to be arrested.[64]

Mere Evasion of Arrest not enough--Some Overt Act Necessary

To constitute the offence of intentionally offering resistance or illegal obstruction to the lawful apprehension of himself, something more than mere absconding is required; there must be an overt act of resistance or obstruction, some active opposition by the use or show of force.[65]

Merely running away into the house to avoid his arrest in execution of a civil court's warrant could not be regarded as a resistance or obstruction.[66] Something more than an evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such an arrest, is required to constitute an offence under this section.[67] A person who intentionally resists or illegally obstructs a police officer in the apprehension of a deserter from the Army or rescues or attempts to rescue him from the custody of such officer, is guilty of an offence punishable under this section.[68]

Resistance to Arrest by *Choukidar*

It may seem anomalous that while the law punishes a person who absconds in order to avoid being served with a summons, notice or order, there should be no provision for punishing one who absconds to avoid arrest under a warrant. But in the latter1715 case, the law provides certain coercive procedures which may be followed in the alternative and hence, the recalcitrant does not enjoy impunity. In the case of a warrant issued by a criminal court, there is the coercive procedure by proclamation and attachment, under ss 82 and 83, CrPC .[69] An arrest by a *choukidar* under s 55, CrPC, in pursuance of a written order from an officer in charge of a police station, is legal; and its resistance is an offence under this section.[70]

5. 'Lawful Apprehension'--Meaning of

In order to constitute an offence under this section, the apprehension and detention must be lawful, that is to say, the warrant on which the arrest was made and detention was ordered must satisfy all the due formalities of law. It does not matter whether that apprehension was not made out, or attempted to be, in good faith.[71] The statutory rules which involve penal consequences for infringement must be strictly interpreted, and it is the duty of the prosecution to prove all the essential

ingredients that constitute the offence.[72] It must be shown that the process-server had legal authority to make the arrest, and the warrant of arrest on the authority of which he was making the arrest was legally issued by a competent authority.[73]

Failure of Charge does not effect Validity of Apprehension

The person from whose custody the rescue is effected or escape made, must have authority to lawfully detain the person rescued. If the apprehension or detention is not lawful, then his own escaping as well as the rescuing of such a person by others, is no offence.[74] But where a person, authorised to make an apprehension makes one, such an apprehension, if it is otherwise within the power and authority of the person making it, does not become unlawful by reason of the failure of the charge for which the apprehension was made or attempted.[75]

Arrest--Requirements of

An arrest is a restraint of the liberty of the person and unless there is a submission, an actual contact is necessary to effect it. There must be a touch or confinement or else an acquiescence. Mere words cannot constitute an arrest.[76] An arrest under a civil process is not effected unless either the person to be arrested submits to the arrest or the officer making the arrest actually touches or confines the body of the person to be1716 arrested. A request to the judgment-debtor by the *amin* to accompany him to the court is not an arrest as required by law, where the judgment-debtor is not informed that he is being put under an arrest.[77]

6. Resistance to Improper Warrant

Resistance or obstruction to the apprehension of a person is made punishable only if the apprehension was 'lawful', but where the imposition of a tax, for the non-payment of which warrants are issued, is itself illegal and *ultra vires,* the resistance to their execution cannot be punishable.[78]

Similarly, a warrant of arrest issued by a magistrate who neglects to record his reasons for issuing the same, as required by s 87 of the Code of Criminal Procedure 1973, is illegal and a person rescuing a witness arrested on such a warrant is not guilty of an offence under the section.[79]

A warrant of arrest which contains a wrong description of the accused, or is not addressed to the person attempting to execute it, is not a valid warrant, and a conviction under ss 225B and 358, of the accused, who resisted or used criminal force upon his being arrested under such warrant, is illegal.[80]

Where a warrant does not contain the name of the person to be apprehended, the apprehension is not lawful within the meaning of this section.[81] Under s 70, CrPC every warrant must bear the seal of the court. Omission of the seal on a warrant renders it void, and a person offering resistance to apprehension under such a warrant does not commit an offence under this section.[82]

Where the warrant of arrest is signed by the deputy *nazir*, who had not been empowered legally or given any lawful authority to sign warrants, the fact that it had been the practice for a considerable time for such warrants to be signed by the deputy *nazir* cannot make the signing of them by that officer legal, in the absence of due authorisation, and resistance to such a warrant is not an offence under this section.[83]

Where a warrant of arrest was signed by the *sheristadar* of a civil court, duly authorised to sign them, the judgment-debtor resisting its execution would be guilty of an offence under this section. But it cannot be presumed from the mere fact of the *sheristadar* signing such warrant that he had been duly appointed to sign warrants. Evidence of the fact of appointment should be given.[84] Even if a notice as well as a1717 warrant for the arrest of the judgment--debtor were issued simultaneously by the executing court, the apprehension of the judgment-debtor by the peon executing the warrant of arrest is a lawful apprehension, however mistaken the executing court may have been in exercising its

discretion to direct that apprehension, and escape from and obstruction to that apprehension are unlawful acts under this section.[85]

The powers given by s 1 of the CrPC, to the police officer to arrest without a warrant, are only in respect of cognizable offences. If the person arrested is a child under seven years of age, who under s 82 of the IPC cannot commit an offence, it is difficult to see how such an arrest can be a lawful apprehension within the meaning of this section.[86]

7. Resistance to Arrest without Notifying Substance of Warrant

An arrest by a police officer, acting under a warrant, who does not notify the substance of the warrant to the person to be arrested, is not a lawful arrest, and resistance to such arrest is not an offence under this section.[87] An officer armed with a warrant of arrest should produce the warrant before the person sought to be arrested and make an attempt to arrest him, and if the officer is in fact resisted, then the person sought to be arrested would be guilty of an offence under this section.[88]

8. Bailiff to Show Warrant to Person Arrested

It is not necessary that a bailiff, executing a civil court warrant, should in the first instance show the warrant. It is sufficient that he should apprise the person to be arrested of the contents of the warrant and show it, if desired. If the warrant is not shown to the person to be arrested, nor the contents thereof appraised to him before or at the time of arrest, there is no lawful arrest and as such a resistance does not amount to an offence under this section.[89]

9. 'Escape'--Meaning of

A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by the course of law, he commits the offence of escape. It has been long established that even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody, the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law.[90]

What amounts to an attempt to Escape

Where the offence is under the first part of the section, there must be an overt act of resistance or obstruction.[91] But for an offence under the second part, once a man has1718 been apprehended and he effects an escape, it is immaterial whether at the time of apprehension, he used any force or not and whether the bailiff was actually present or temporarily absent. What has to be considered is whether he escaped or attempted to escape. What amounts to an attempt to escape is a matter of inference. Where the action of the accused person is passive and consists of either standing still or sitting down, it is impossible to hold that an attempt to escape has begun.[92]

Escape when not Charged with or Convicted of any Offence etc

When the person who escapes or attempts to escape has not been charged with or convicted of an offence and has not been detained for any offence, his conviction should be under this section and not under s 224 . Where a person escapes from a jail in which he was confined under a warrant, by reason of his having failed to find security to be of good behaviour, he commits an offence under this section.[93]

Where a *tahsildar* issued a warrant under s 146 of the Uttar Pradesh Land Revenue Act, against certain defaulting co-sharers, and they were arrested but subsequently they escaped from detention, it was held that this was an escape from lawful custody within the meaning of this section.[94]

A person escaping from police custody while proceeding under s 109, CrPC are being taken against

him, commits an offence under this section and not under s 224 of the Indian Penal Code .[95]

Commentary under s 224 may be referred to.

10. There can be no custody without arrest

What the section penalises is an escape or an attempt to escape from custody, and there can be no custody if there was no arrest. An arrest under a civil process is not effected unless either the person to be arrested submits to the arrest or the officer making the arrest actually touches or confines the body of the person to be arrested. A mere request by the *amin* or process-server to the accused, who is to be arrested, to accompany him to the court, does not amount to an arrest in the absence of any evidence to show that the *amin* had informed the accused that he was being arrested and that he submitted to the arrest or that the *amin* in fact touched the body of that accused to evidence the fact of arrest.[96]

Custody to be Lawful

This section requires that the custody from which a man tries to escape must be a lawful custody, he must have been lawfully arrested and detained; then only he is liable to conviction under this section.[97]1719

If a person, who is not under lawful custody or lawful detention, escapes from such detention, he commits no offence.[1]

The person from whose custody the rescue is effected or escape made, must have an authority to lawfully detain the person rescued, otherwise no offence is committed in effecting the rescue.[2]

Right of the Person Sought to be Arrested

A person about to be arrested is entitled to know under what power the constable is arresting him, and if he specifies a certain power, which he knows that the constable has not got, he is entitled to object to such arrest and escape from custody, such custody not being a lawful one.[3]

Where an inspector of police catches hold of the wrist of the accused without informing him for what offence he was being arrested, the accused wrenching himself free is not guilty of any offence under the Indian Penal Code .[4]

Sections 41 , 42, 43, 49, 50A, 56, 57 of the Code of Criminal Procedure 1973[5] may be referred to.

Delegation of Power to Sign Warrant

When a district *munsif* passes a general order that all warrants of arrest ordered by the court should thereafter be signed by the head clerk of his office, the delegation of the power to sign the warrants is made by the court, and not by the district *munsif* personally, and the delegation is made to the head clerk and to any particular or one time head clerk. A warrant of arrest ordered by the successor of the district *munsif* and signed by the person holding the office of the head clerk at the time, is a valid warrant and a person arrested under the warrant, and escaping from custody is liable under this section.[6] A civil court is not empowered to have a judgment-debtor in custody of a peon after giving him time to pay up a decretal amount, and if he does so, detention in the custody of the peon is not lawful within the meaning of this section, so that escape from such custody is no offence.[7]

Opportunity for Furnishing Fresh Security Necessary

Where a surety giving security under O 38, r 1, CPC applies to be discharged, the court shall, under O 38, r 3, 'direct the surety to be discharged from his obligation, and shall call upon the defendant to find

fresh security'. If without directing him to1720 find fresh security, the defendant is arrested and detained, the detention is illegal, and he cannot be convicted under this section for escaping from the custody.[8]

A warrant must be issued to some person for execution; and where no name or description of that person is given in the warrant, the person arrested can have no knowledge that the persons who present the warrant, are legally authorised to do so. It may be that the person who is arrested is unable to read the warrant and has no knowledge as to whether the warrant is or is not properly filled up, but it is the duty of the court to issue a warrant in proper form, and where a warrant is incomplete, it has been held by more than one High Court, that the subsequent release (escape or rescue) of a person arrested under such a warrant is not an offence under this section.[9]

Endorsement on Warrant when Necessary

A warrant had been issued to the *nazir*, and the *nazir,* without any endorsement, made it over to a subordinate official. It was held that the warrant was defective and did not authorise the person who directed the peon to make the arrest, and that accordingly, an escape from custody in such a case was no offence.[10]

11. Rescue

For the definition of 'rescue', the commentary under s 225 may be referred to.

Rescue indicates Some Overt Act

'Rescuing' indicates some positive overt act on the part of the accused by which the liberation of the person arrested is effected. Whether there is any such act done by the accused in a particular case would depend on the facts of each case. When the accused escaped on the instigation of another, it amounts to an abetment of escape punishable under this section, read with s 109 .[11] The person from whose custody the rescue is effected or escape made must have authority to lawfully detain the person rescued.[12]

Lawful Custody Necessary

It is not illegal for a magistrate to issue a warrant under s 97, CrPC without confining it to any particular place. But an officer to whom a warrant for searching a person at a particular place is directed, has no power to make a search outside that place and take the person into custody from a different place. If he does so, the custody is illegal and rescue from such custody is not an offence under this section.[13] A search warrant was issued to a police officer to search a house of a particular person to find out a woman who was alleged to be unlawfully detained. She was not found in that house, but was found in a field and was taken custody of. The accused rescued her1721 from police custody. It was held that the search not being in accordance with the warrant, the accused could not be convicted under this section as they did not rescue the woman from lawful custody within the meaning of this section.[14]

Under s 74 of the CrPC, a warrant directed to a police may be executed only by him or by another police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed, and not by any other person. When a warrant of arrest is directed to a court sub-inspector for execution, a court head constable cannot, in his absence, by an order in writing signed by himself, endorse such warrant over to any process-serving peon for execution. If such peon is obstructed in its execution, a conviction under s 225B, IPC will not stand.[15] A person in lawful custody cannot rescue himself and hence, he cannot be convicted for rescuing himself from lawful custody.[16]

12. Procedure

The offence under this section is cognizable. A warrant may ordinarily issue in the first instance. It is bailable but not compoundable. It can be tried by any magistrate. The period of limitation prescribed for taking cognizance of an offence under this section is one year.

13. Complaint

Sections 195 and 340, CrPC have no application to an offence under this section. In a case under this section, the proper person to make the complaint is the officer from whom the escape or rescue has been effected, but a complaint by another person aware of the facts is not a nullity.[17] Every person including the presiding officer of a court has power to make a complaint as a rule.[18] The High Court did not interfere, in revision, with an order of acquittal passed by a magistrate of competent jurisdiction, on a prosecution for an alleged offence under this section, irregularly instituted on a report sent in by the *munsif,* which was treated as a complaint.[19]

14. Charge

The following form of charge may be adopted:

> I (*name and office of the magistrate, etc*) hereby charge you (*name of the accused*) as follows:
>
> That on or about the.....day of.....you.....intentionally offered resistance (*or illegal obstruction*) to the lawful apprehension by.....of yourself (*or ofAB*), [*or escaped from the custody of.....in which you were lawfully detained* (*or rescued* (*or attempted to rescue*) *one AB from the custody of.....in which the said AB was then lawfully detained*)], and that you thereby committed an offence punishable under section 225B of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.1722

15. Proof

In the case of resistance or illegal obstruction, the prosecution must prove:

(a) that there was an attempt to lawfully apprehend the accused or another person;
(b) that the accused offered resistance or illegal obstruction to such apprehension;
(c) that he did so intentionally; and
(d) that the case is not provided for in s 224 or s 225, IPC or in any other law for the time being in force.

In the case of escape or attempt to escape, the prosecution has to prove

(a) that the accused was lawfully detained in custody;

(b) that he intentionally escaped, or attempted to escape, from such custody; and
(c) that the case is not provided for in s 224 or s 225, IPC or in any other law for the time being in force.

In the case of rescue or attempt to rescue, the prosecution should prove:

(a) that a certain person was lawfully detained in custody;
(b) that the accused intentionally rescued or attempted to rescue that person from such custody; and
(c) that the case is not provided for in s 224 or s 225, IPC or in any other law for the time being in force.

16. Onus

The onus to show that the accused is the person against whom the warrant was issued is on the prosecution. It is not for the accused to show that he is not the person against whom the warrant was issued.[20]

59 Sections 225A and 225B substituted by Act 10 of 1886, s 24(1), for s 225A, which had been inserted by Act 27 of 1870, s 9 .

60 *Empress v Shasti Churn Napit* ILR 8 Cal 331 .

61 *Queen-Empress v Kandhaia* 7 ILR All 67 .

62 *King Emperor v Khanu Kori* AIR 1925 Sind 193 ((1)) .

63 *Kunhambu Nambiar v State of Kerala* AIR 1957 Ker 174, (1957) Cr LJ 1264 .

64 *GPC Holmes v Emperor* AIR 1928 Lah 324, 29 Cr LJ 286 .

65 *King-Emperor v Annawadin* AIR 1923 Rang 231, p 232, 24 Cr LJ 848 .

66 *Emperor v Gajadhar* 11 Cr LJ 721, 7 All LJ 1174 ; *Emperor v Gun Pal Me Ya* 4 Cr LJ 287 .

67 *Aijaz Hussein v Emperor* AIR 1916 All 53, p 54, 17 Cr LJ 419 ; *Dewa Singh v Emperor* AIR 1919 Lah 475(1), 20 Cr LJ 64 ; *Emperor v Gajadhar* 11 Cr LJ 721 .

68 *Emperor v Rahman Ali* 13 Cr LJ 234, 20 PR 1911 Cr, 47 PWR 912 (Cr) .

69 *King-Emperor v Annawadin* AIR 1923 Rang 231, p 232, 24 Cr LJ 848 .

70 *Bahubal Sircar v Emperor* 3 Cr LJ 201 .

71 *Hamjisab v State of Mysore* AIR 1966 Mys 20, p 21, (1966) Cr LJ 36 .

72 *State of Kerala v Devassy* AIR 1962 Ker 258, p 261, (1962) 2 Cr LJ 372 ; *King v Maung Po Shein* AIR 1939 Rang 320, 40 Cr LJ 845 ; *Dasandhi v Emperor* AIR 1928 Lah 332(2), 29 Cr LJ 265 ; *Venkayya v State* (1973) Cr LJ 245, p 246 (AP) .

73 *Kunhambu Nambiar v State of Kerala* AIR 1957 Ker 174, (1957) ILR Ker 1586, (1957) Cr LJ 1264 ; *Kunwar Sen v State* (1968) All WN (HC) 629 ; *Durga Charan Jemadar v Queen-Empress* ILR 27 Cal 457 ; Re *Yedama Subbaramiah*AIR 1934 Mad 206, p 207, 35 Cr LJ 782 ; *Venkayya v State* (1973) Cr LJ 245 (AP) ; *Dy Legal Remembrancer v Mir Sarwar Jan* 6 CWN 845 .

74 *Public Prosecutor v Annadhan Annamalai* AIR 1954 Mad 321 ; *Bolai De v Emperor* ILR 35 Cal 361 ; *Kesar v Emperor* AIR 1932 Lah 263 ; *King v Shridhar* AIR 1945 Rang 141 ; *Vijoy Narain Singh v Emperor* 22 Pat LT 29 ; *King-Emperor v Lacchu Kamara* AIR 1950 Ori 62 .

75 *Hamjisab v State* AIR 1966 Mys 20, p 21, (1966) Cr LJ 36 ; for **contrary** view, see *Ram Chandra Turah v State of Bihar* AIR 1966 Pat 286, (1966) Cr LJ 938*; State of Orissa v Purna Chandra Jena* (2006) Cr LJ 505 (Ori) .

76 *Aludomal v Emperor* AIR 1916 Sind 19, p 20, 17 Cr LJ 87 ; *Russan v Lucas* (1827) 1 C&P 153 ; *Granger v Hill* (1838) 4 Bing

(NC) 21 ; *Sandon v Jervis* (1859) 28 LJ Ex 156 .

77 *State v Heer Singh* AIR 1961 Raj 156, p 157, (1961) 21 Cr LJ 161 ; *Rajni Kanto Pal v Emperor* 5 CWN 843 .

78 *Dasondhi v Emperor* AIR 1928 Lah 382 ((1)), 29 Cr LJ 265 .

79 *Sukheswar Phukan v R* ILR 38 Cal 789 .

80 *Debi Singh v R* ILR 28 Cal 399 ; *Mahommad Bakhshy v R* 1 Cr LJ 1091 ; *R v Gaman* 14 Cr LJ 142 ; *Ghasita Mal v Emperor* 22 Cr LJ 145 ; *Ulahaman v State of Kerala* (1961) Mad LJ (Cr) 795, (1961) Ker LJ 695 .

81 *Jogendra Nath Laskar v Hiralal Chandra Paddar* AIR 1924 Cal 959, 26 Cr LJ 2 .

82 *Dasondhi v Emperor* AIR 1928 Lah 332, p 333(2), 29 Cr LJ 265 ; *Mahajan Sheikh v Emperor* ILR 42 Cal 708 ; *Alter Caufman v Govt of Bombay* ILR 18 Bom 636 ; Re *Phipps* 11 WR 730; *Badre Gope v Emperor* AIR 1926 Pat 237 ; *Maung Po Shain v Emperor* AIR 1939 Rang 320 ; Re *James Hastings* 9 Bom HCR 184; Re *Abdul Rahim Beg*AIR 1920 Mad 352 ; *Pangin Bajgir Gossin v State* (1962) 1 Cr LJ 91, (1960) Raj LW 637 .

83 *Yadama Subbaramaih v Emperor* AIR 1934 Mad 206, p 207, 35 Cr LJ 782 ; *Venkayya v State* (1973) Cr LJ 245, p 246 (AP) .

84 *Dy Legal Remembrancer v Mir Sarwan Jan* 6 CWN 845 ; *Venkayya v State* (1973) Cr LJ 245, p 246 (AP) .

85 *Puna Mahton v Emperor* AIR 1932 Pat 315, ILR 11 Pat 743, 13 PLT 502 .

86 Re *Santa Cruz Morais* 16 Cr LJ 602, p 603.

87 *Satish Chandra v Jodu Nandan* ILR 26 Cal 748 ; *Abdul Gafur v R* ILR 23 Cal 896 .

88 *Aijaz Husain v Emperor* AIR 1916 All 53, p 54, 17 Cr LJ 17 .

89 *Rajani Kanta Lal v Emperor* 5 CLJ 439, 5 CWN 843 ; *Superintendent and Remembrancer of Legal Affairs v Barada Kanta Majumdar* AIR 1921 Cal 79, 23 Cr LJ 247 .

90 *Queen-Empress v Mappan* ILR 18 Mad 401 (relying on *Russel*, fifth edn, p 567; Rosco, eleventh edn, p 453 and Bishop's *Criminal Law*, seventh edn, s 1104); *Public Prosecutor v Ramasami Konan* ILR 31 Mad 271, 8 Cr LJ 200 ; *Jamna Das v Emperor* AIR 1927 Lah 708, 28 Cr LJ 753 ; Re *Mammad Beary*(1955) Cr LJ 569; *Attiya v Gounden* AIR 1919 Mad 864(2), 20 Cr LJ 208 .

91 *Deva Sing v Emperor* 20 Cr LJ 64, 33 PR 1918 (Cr) .

92 *Santa Singh v Emperor* AIR 1933 Lah 128(1), 34 Cr LJ 632, 34 PLR 668 ; **but see** Re *Mahommad Beary*AIR 1955 Mad 157, (1955) Cr LJ 569 where it has been held to amount to an attempt to escape.

93 *Muli v Emperor* AIR 1921 All 281, ILR 43 All 185 .

94 *Emperor v Gulab Singh* ILR 32 All 116, 11 Cr LJ 137 .

95 *Emperor v Khanu Kori* AIR 1925 Sind 193, 25 Cr LJ 462 .

96 *State v Heer Singh* AIR 1961 Raj 156, 157, (1961) 2 Cr LJ 151, (1961) ILR 11 Raj 243, (1961) Raj LW 227 .

97 Re *Appaswamy Mudali*AIR 1924 Mad 555, p 556, 25 Cr LJ 563, ILR 47 Mad 442, 46 Mad LJ 447 ; *Emperor v Ramara* 7 Cr LJ 74, 4 LBR 103 ; *Emperor v Kham Kori* AIR 1925 Sind 193(1), 25 Cr LJ 462 ; *Gograj Mahto v Emperor* AIR 1940 Pat 696, 42 Cr LJ 199 ; *Public Prosecutor v Annadham Annamalai* AIR 1954 Mad 321, (1956) Cr LJ 396 .

1 *Showkat-un-nissa Begum v State of Hyderabad* AIR 1950 Hyd 20 (FB) .

2 *Bolai De v Emperor* ILR 35 Cal 361 ; *Kesar v Emperor* AIR 1932 Lah 263 ; *King v Shridhar* AIR 1941 Rang 180 ; *Vijoy Narain Singh v Emperor* 22 Pat LT 29 ; *King-Emperor v Lachhu Kamara* AIR 1950 Ori 62 ; Re *Somalah*AIR 1945 Mad 409 ; *Public Prosecutor v Annadham Annamalai* AIR 1954 Mad 321 ; *Emperor v Jaman* 14 Cr LJ 142, 153 PLR 1913 Cr, 20 PWR 1913 Cr, 16 PR 1913 (Cr) .

3 *Public Prosecutor v Annadham Annamali* AIR 1954 Mad 321, p 324 ; relying on *Charistie v Leachins Ky* (1947) AG 573 ; Re *Appaswamy*AIR 1924 Mad 555, 25 Cr LJ 563 ; *Ramji v Emperor* AIR 1936 All 120, 39 Cr LJ 360 .

4 *Moneshwar Bux v Emperor* AIR 1939 Oudh 81, 40 Cr LJ 221 .

5 For detailed commentary see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

6 *Public Prosecutor v Abdul Rajak* AIR 1938 Mad 536, 39 Cr LJ 685, (1938) 1 Mad LJ 667 .

7 *Emperor v Madho Singh* AIR 1925 All 328 ((2)), 26 Cr LJ 86, ILR 47 All 409, 23 All LJ 189 .

8 *Gopal Singh v Crown* AIR 1929 Lah 163, 30 Cr LJ 653, 30 PLR 147 .

9 *Fattu v Emperor* AIR 1932 All 692, (1932) All LJ 1073 ; *Bansropan Singh v Emperor* AIR 1937 Pat 603, 18 PLT 760 .

10 *Jagannath v Emperor* AIR 1932 All 227, 3 Cr LJ 387, (1932) All LJ 179 .

11 *Thangal v State of Kerala* AIR 1961 Ker 331, p 334, (1961) 2 Cr LJ 774 .

12 *Public Prosecutor v Annadham Annamalai* AIR 1954 Mad 321, 324; *Bolai De v Emperor* ILR 35 Cal 361 ; *Kesar v Emperor* AIR 1932 Lah 263 ; *King v Shridhar* AIR 1941 Rang 180 ; *Vijoy Narain Singh v Emperor* 22 Pat LT 29 ; *King-Emperor v Lachhu Kamara* AIR 1950 Ori 62 ; Re *Somaiah*AIR 1945 Mad 409 .

13 *Chepa Mahton v Emperor* AIR 1928 Pat 550, 30 Cr LJ 175 .

14 *Chepa Mahton v Emperor* AIR 1928 Pat 550, 30 Cr LJ 175 .

15 *Durga Charan Jemadar v Queen-Empress* 27 Cal 457 .

16 *Moti Dusadh v Emperor* AIR 1940 Pat 479, p 480, 41 Cr LJ 381 .

17 *Mehr Singh v Emperor* AIR 1933 Lah 884, p 885, 35 Cr LJ 86, 34 PLR 1020 .

18 *Emperor v Balmukund* AIR 1928 Lah 510, 29 Cr LJ 652, ILR 9 Lah 678 .

19 *Emperor v Madho Singh* AIR 1925 All 318(2), 26 Cr LJ 86, ILR 47 All 409, 23 All LJ 189 .

20 *Debi Singh v R* ILR 28 Cal 399 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

[21][S. 226.

Unlawful return from transportation.--

This section dealt with unlawful return from transportation, and was omitted by Act 26 of 1955, by which transportation as a form of punishment itself was abolished, and imprisonment for life substituted in its place. See Notes to Section 55 .]

21 Repealed by the Code of Criminal Procedure (Amendment) Act 1995 (26 of 1995), s 117 and Schedule (wef 1-1-1956).

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 227.

Violation of condition of remission of punishment.--

Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.1723

Comments

1. Scope

As Breadt observed, this section deals with the violation of any condition of a remission of punishment. Sub-section (3) of s 432, CrPC also provides for such a violation. Under that sub-section, the effect of the violation is that the appropriate government may cancel the remission, and thereupon the person in whose favour the sentence was remitted may, if at large, be arrested without warrant and remanded to undergo the unexpired portion of the sentence. This is all that this section also provides for. It does not provide any punishment for the violation in addition to the punishment to which the person violating was originally sentenced. The effect of the section is only to cancel the remission, so that the original sentence which was remitted may be carried out.[22]

To this extent this section and s 432, CrPC may appear to overlap each other. But the latter only lays down the procedure to be followed on a violation of any condition of remission. It provides only for the cancellation of the remission, but a mere cancellation of the remission cannot revive the sentence remitted, and there is no sentence to undergo, which the person violating may be remanded to under the latter part of sub-s (3) of s 432, CrPC . This is why this section is enacted as a piece of substantive law, enabling the court to re-impose the unexpired portion of the original sentence as a punishment for the violation. No such difficulty arises with regard to a suspension of sentence. And that is why this section deals only with the remission of sentence, whereas s 432, CrPC deals with both suspension and remission of sentence.

Articles 72 and 161 of the Constitution also provide for a remission of punishment, and such remission may be on condition. There seems to be no reason why this section should not apply to the violation of the conditions of such remission.

Section 360 of the CrPC provides for the release of certain offenders on probation of good conduct, instead of sentencing them to punishment, and sub-ss (8) and (9) of that section provide that if the offender so released violates any condition of his re cognizance, the court which convicted him, may order his arrest, and after hearing the case, pass a sentence on him. But the release on probation is not a remission of sentence and so this section can have no application to it.

2. Analogous Law

This section deals with the violation of the conditions of a remission of punishment. There is a similar provision in s 432(1) -(6) of the Code of Criminal Procedure 1973, which runs as follows:1724

S. 432 . Power to suspend or remit sentences.--

(1) When any person has been sentenced to punishment for an offence, the appropriate government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and--

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

...

Section 432, CrPC gives the power of remission to the central and state governments, arts 72 and 161 of the Indian Constitution also give the power of remission to the President of the Union and the governors of states respectively. There is no mention of any conditional remission in these articles, but it has been held that the power to suspend a sentence would include the power to attach lawful conditions to it,[23] and so the power to remit a sentence must be taken to include the power to attach conditions to it.

3. Section 227 , IPC Distinguished from Section 432(3) , CrPC

While s 432(3) of the Code of Criminal Procedure envisages the arrest of a person who violates the conditions of a remission and remand him straightway to jail, s 227 of the Indian Penal Code also envisages the same act of violation of conditions,1725 prosecution and punishment. If the prosecution succeeds the result is the same as the consequence contemplated under s 432(3), CrPC, namely remanding of the person concerned to jail for the rest of his term. In one case, the person is subjected to an executive handling resulting in his being sent to jail, and in the other he has a trial in a criminal

court and he is sent to the jail for an identical period, but only if he is found guilty. On the other hand, there is a fair trial in a court, and in the other, there is not even an executive trial. Whether the provisions of s 432(3), CrPC can operate in such circumstances, is a question for serious deliberation. It cannot be that a person is subjected to a prosecution under s 227 of the IPC and simultaneously action is taken against him under s 432(3), CrPC . That would make no sense, however, if it is not cumulative but alternative. To choose between an action under this Code and an executive action under the CrPC would lead to an arbitrary choice which may result in a violation of art 14 of the Constitution . It is difficult to reconcile these provisions. That process is none too easy.[24]

4. Remission of Punishment

A remission is a reduction in the amount of a sentence, without changing its character. In the case of a remission, the guilt of the offender is not affected, nor is the sentence of the court affected, except in the sense that the person concerned does not suffer incarceration for the entire period of the sentence, but is relieved from serving out a part of it.[25]

5. Remission and Suspension are not the Same

Remission should not be confused with suspension. Suspension clearly means that the sentence has not been remitted and it is only kept in abeyance at the pleasure of the person who is authorised to suspend the sentence, and if no conditions are imposed, then the state government has the right to have the accused person re-arrested and direct that he should undergo the rest of the sentence without assigning any reason.

Even a suspension of sentence without any condition, does not amount to a remission of sentence.[26]

6. 'Knowingly Violates any Condition'

In order to make out an offence under this section, it must be proved not only that the accused was granted a conditional remission of punishment, that he accepted the conditions of the remission, and that he violated one or more of those conditions, but also that he did so 'knowingly'. If the conditions are clear and unambiguous, and he violates any of them, he may be considered to have done so knowingly. But if the conditions are vague or ambiguous, the question whether the accused violated them 'knowingly' would be a matter of inference from the nature of the conditions, the status of the accused and the circumstance of the violation.

7. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and triable by the court by which the original offence was triable.[27] In case an accused,1726 convicted of theft and sentenced to a rigorous imprisonment for six months by the judicial magistrate *sadar* at Allahabad, after undergoing imprisonment for a month only, was granted remission on certain conditions and was released but commits the breach of those conditions at Kanpur then, he is to be tried for committing the offence under this section by the judicial magistrate *sadar*, Allahabad or at any other place, where breach of the condition of remission is committed, and the breach being proved he can be sentenced to rigorous imprisonment for five months.

The provisions of limitation for taking cognizance of an offence under this section will be the same as were applicable to the original offence and have to be determined with the aid of s 468, CrPC .

8. Charge

The following form of charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the.....day of.....were convicted in case No.....of.....by the court of.....and sentenced to.....(*mention the punishment*) and which punishment was remitted on.....by the order of.....on the condition, to wit.....and which you accepted and which you knowingly violated in that on or about the.....day of.....you.....(*state the nature of the violation*), and that you thereby committed an offence punishable under section 227 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

9. Proof

In a case under this section, it is necessary to prove the following:

(a) the accused person had been convicted and sentenced; (the conviction and its date and the sentence passed should, under ch V, Evidence Act, be proved by documentary evidence, ie, by judgment in the case, the judgment being a public document, it may, under s 65(e), Evidence Act, be proved by a certified copy; but oral evidence to prove it is not admissible);
(b) the accused person was granted a remission of punishment, on his accepting certain conditions; (again this must be proved by documentary evidence, that is, by the order granting the remission. Here also a certified copy of the order is admissible, but no other form of secondary evidence);
(c) the conditions on which the remission was granted; (this again is provable only as above, ie by a certified copy of the order of remission. The bond executed by the accused should also be put in, or a certified copy of it.)
(d) the fact that the accused is the person convicted, sentenced and granted remission must be proved (for this oral evidence is admissible); and
(e) the fact that the accused has knowingly committed a breach of a condition of the remission. (This may also be proved by oral evidence, but obviously no breach can be proved until the condition itself has been proved as set out in head (c) above).[28]1727

It is for the court to decide whether a conditionally released prisoner has violated the conditions on which remission was granted to him or not. Until he has been found guilty under this section, it is not for the jail authorities to say that he has committed an offence.[29]

22 Section 2 of Burma Act, 3 of 1928 which provides that 'whoever is convicted of absconding in violation of a condition of a remission of punishment under s 227, Penal Code, shall in addition to the punishment prescribed by that section, be punished by the convicting magistrate with rigorous imprisonment for a term which may extend to one year'.

23 *State v Kawas Manichkshaw Nanawati* AIR 1960 Bom 502, p 508 (FB), (1960) Cr LJ 1558, 62 Bom LR 383, (1960) Nag LJ 371 .

24 *Krishnan Nair v State of Kerala* (1984) Cr LJ 84, p 91-92 .

25 *Khagendranath Nath v Umesh Chandra Nath* AIR 1958 Assam 183, p 187 .

26 *Jagdish Prasad v Rex* AIR 1949 All 626, p 627, 50 Cr LJ 999, (1950) All LJ 219 .

27 First Schedule to the Code of Criminal Procedure 1973; Re *RV Ahone Akong*(1872) 9 Bom HCR 356.

28 *Nga Po Ngwe v Emperor* AIR 1929 Rang 278, 31 Cr LJ 1724, 7 ILR Rang 355 .

29 *Emperor v Nga Po Min* AIR 1933 Rang 28, p 29, 34 Cr LJ 447 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 228.

Intentional insult or interruption to public servant sitting in judicial proceeding.--

Whoever, intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.1728

Comments

1. Scope

Chapter X of IPC deals with contempt of the lawful authority of public servants in general, whether judicial officers or not. This section, which is contained in ch XI, dealing with offences against public justice, contemplates cases of contempt of court occurring in the presence of the court by insulting the officer or interrupting the business of the court.[30] This is the only section of the Indian Penal Code which specifically deals with contempts committed against a judicial officer, that is to say, a court.[31] But as pointed out by the Supreme Court in *Bathina Rama Krishna Reddy v State of Madras* ,[32] offences under ss 175, 178, 179 and 180 may also, IPC, as s 480 of old CrPC 1898 (new s 345 of the CrPC 1973), shows, amount to contempt of court if the 'public servant' referred to in these sections happens to be a judicial officer in a particular case. The expression 'contempt of court' has not been used as a description of any offence in the Indian Penal Code, though certain acts which would be punishable as contempt of court in England, are made offences under it. It is well known that the aim of the contempt proceedings is 'to deter men from offering any indignities to a court of justice'. And an essential feature of the proceeding is the exercise of a summary power by the court itself in regard to the delinquent. Thus, s 345 of the CrPC 1973 empowers any civil, criminal or revenue court to punish summarily, a person who is found guilty of committing any offence under ss 175, 178, 179, 180 or 228 of the IPC, in the view or presence of the court.

2. Analogous Law

Somewhat similar provisions, with some wider scope, appear in s 345 of the CrPC 1973, which provides that when such offence (as described in s 228, IPC) is committed in the view and presence of any civil, criminal or revenue court, the offender may be punished by that very court the same day. In such a case, the maximum sentence that can be inflicted is a fine of Rs 200, and in default of the payment of the fine, the offender can be sentenced to a simple imprisonment extending to one month. The court itself acts as a prosecutor under s 345, CrPC .

3. Object

The gravity of the offence under this section is clear from the fact that the court, in such cases, has been given the extraordinary power of being the complainant, the prosecutor and the judge. The legislature has thus manifested its anxiety to maintain and uphold the dignity and prestige of the courts of justice.[33] Such a summary jurisdiction for contempt is essential to the proper administration of justice, and it is exercised not from any exaggerated notion of personal dignity, but to prevent instances of indecorum occurring in courts.[34]1729

4. Averments Scandalising the Court are Beyond the Scope of this Section

If the averments go beyond and scandalise the court itself, and further impair the administration of justice, they amount to a contempt of court, and not merely to an offence under this section.[35] What is punishable under s 228, IPC, is an intentional insult or interruption to any public servant, and not a contempt of court. If the act complained of, in addition to insulting a judge, also scandalises the court or lowers the authority of the court, it can be punished as a criminal contempt. Section 228 gives remedy to an aggrieved judge as an individual. The contempt of court is not personal to the judge. It is a wrong done to the public.[36]

5. Criminal Contempt--Object of

The object of a contempt proceeding is therefore, not to afford protection to judges personally, from imputations to which they may be exposed to as individuals; it is intended to be a protection to the public, whose interests would be very much affected, if by the act or conduct of any party, the authority of the court is lowered and the sense of confidence which people have in the administration of justice by it, is weakened.[37]

6. Scandalising the Court--What is?

There are indeed innumerable ways by which attempts can be made to hinder or obstruct the due administration of justice in courts. One type of such interference is found in cases where there is an act or publication which amounts to scandalising the court itself. This scandalising might manifest itself in various ways, but, in substance, it is an attack on the individual judges, or the court as a whole, with or without reference to particular cases, casting unwarranted and defamatory aspersions upon the character or ability of the judges. Such conduct is punished as contempt for the reason that it tends to create a distrust in the popular mind and impair the confidence of people in the courts, which are of prime importance to litigants, for the protection of their rights and liberties. When attacks or comments are made on a judge or judges, which are disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to a contempt of court. The fact that a statement is defamatory so far as the judge is concerned, it does not necessarily make it a contempt. A defamatory attack on a judge may be a libel, so far as the judge is concerned and it would be open to him to proceed against the libellor in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or the proper administration of law by such court, it can be punished summarily as contempt. One is a wrong done to the judge personally, while the other is a wrong done to the public. It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge, or to deter actual and prospective litigants from placing complete reliance1730 upon the court's administration of justice, or if it is likely to cause

embarrassment in the mind of the judge himself in the discharge of his judicial duties.[38]

7. Section 228 and Contempt of Court--Distinction

What is made punishable under s 228, IPC is the offence of intentional insult to a judge or interruption of court proceedings but not as a contempt of court. The definition of criminal contempt is wide enough to include any act by a person which would either scandalise the court or which would tend to interfere with the administration of justice. It would also include any act which lowers the authority of the court or prejudices or interferes with the due course of any judicial proceeding. It is not limited to the offering of intentional insult to the judge or interruption of the judicial proceedings.[39]

8. Powers to be Used in Exceptional Cases

The power conferred under this section, would be used only in exceptional cases. The courts, taking action under this section, ought not to give room for the impression that they are unduly sensitive about their dignity. Proceedings under this section on trivial matters will have a tendency to interfere with the proper administration of justice, as they would put the party in fear of possible summary punishment for acts which may be innocently committed.[40]

Section 2(a) of the Contempt of Courts Act 1971 defines 'contempt of court'. Clauses (b) and (c) of s 2 define 'civil contempt' and 'criminal contempt' respectively. Section 10 of the 1971 Act, which corresponds to s 3 of the Contempt of Courts Act 1952, states that every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to it, as it has and exercises in respect of contempts of itself. The proviso to s 10 of the 1971 Act provides that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it, where such contempt is an offence punishable under the Indian Penal Code .

The words 'where such contempt is an offence' as used in the proviso to s 10 of the Contempt of Court Act 1971, came for interpretation before the Supreme Court in some cases and it has been held that the proviso excludes the jurisdiction of the High Court only in cases where the acts alleged to constitute a contempt of a subordinate court, are punishable as contempt under the specific provisions of the Indian Penal Code, but not where these acts merely amount to offences of other description for which punishment has been provided for in the Indian Penal Code .[41] In another case the Supreme Court observed:

> The true test is: Is the act complained of an offence under section 228 , Indian Penal Code, or is it something more than that? If in its true nature and effect, the act1731 complained of is really 'scandalising the court' rather than a mere insult then....the jurisdiction of the High Court is not ousted.[42]

Where an act is not punishable as a contempt of court under the provisions of this Code, or for any technical reason (eg for want of intention), the act does not fall under this section and the proviso to s 10 of the Contempt of Courts Act has no application.[43] In such cases, the jurisdiction of a High Court to take an action under s 10 of the Contempt of Courts Act, is not ousted.

Where the offence of contempt was committed when the matter was before the session court and the same was covered by the provisions of s 228, IPC, the session court made a reference of contempt of court to the High Court under sub-s (2) of s 15 of the Contempt of Courts Act 1971. The High Court sent back the reference to the session court concerned, for taking action under s 228, IPC against the contemnor, as the session court had full jurisdiction and the subsequent closure of the case would not take away the jurisdiction of the court.

9. Courts Cannot be Compelled to give 'Command Orders'

A judicial officer of the rank of district judge was attacked in a pre-planned and calculated manner in his court room and when he tried to protect himself from physical harm by retiring to his chambers, was chased till there causing injuries to him. The raising of slogans and demanding unconditional bail for accused further compounded the offence. On three facts, it was held by the Supreme Court that the courts cannot be compelled to give 'command orders'. The act committed amounts to deliberate interference with the discharge of duty of a judicial officer by intimidation apart from scandalising and lowering the dignity of the court and interference with the administration of justice. The effect of such an act is not confined to a particular court or a district, or the State, it has the tendency to effect the entire judiciary in the country. It is a dangerous trend. Such a trend has to be curbed. If for passing judicial orders to the annoyance of the police the presiding officers of the courts are to be assaulted and humiliated the judicial system in the country would collapse.[44]

10. Essential Ingredients of Offence

The essential ingredients of the office under this section are (a) intention, (b) insult or interruption to a public servant, and (c) the public servant insulted or interrupted must be sitting in any stage of a judicial proceeding.[45]

Essence of the Offence

Thus, the essence of the offence is that the offender must do something physical, namely, insult or interrupt a public servant in any stage of a judicial proceeding, but that is not enough. There is a mental part of the offence, which should also be taken into consideration, and that mental part is that the offender had the intention to cause1732 the said insult or interruption. Both these elements must co-exist in order to constitute an offence under s 228, IPC . The fact that the court feels insulted, is no reason for inferring contempt when no insult is intended. To put it in a short compass, the elements of an offence under this section are both objective and subjective. Objective in the sense that the factum or interruption must be there and subjective, because the same, has to be accompanied by an intention on the part of the offender to commit the same, and the entire thing must take place against the back-drop of a judicial proceeding.[46]

11. Section 228 , IPC and Section 345 , CrPC Distinguished

The difference between the two sections is that while s 345 of the Code of Criminal Procedure empowers a civil, criminal or revenue court to take action when an offence as described in ss 175, 178, 179, 190 or 228 of the IPC is committed in its presence, s 228 of the Indian Penal Code empowers any public servant to take action when a person intentionally offers insult or causes interruption to him, while he is sitting in any stage of a judicial proceeding. Section 345 , CrPC empowers the courts referred to therein to take action not only when offence is committed under s 228 of the IPC but also under the other sections referred to therein whereas the power conferred under s 228 on a public servant is limited only to the extent that if any person offers insult or causes any interruption to him while he is sitting in any stage of a judicial proceeding, he can punish such person.[47]

12. 'Intentionally Offers any Insult or Causes any Interruption'-- Meaning of

To constitute an offence under this section, the act must be done intentionally and with intent to insult the court.[48] It has been repeatedly held that the chief ingredient of the offence contemplated by this section is the intention of the offender, and that the question is not whether a judicial officer felt insulted, but whether an insult was actually offered and intended. A judicial officer is no doubt fully entitled to maintain the dignity of the court, but, as often pointed out, he should not be too sensitive and too ready to take offence where none is intended.[49] The mere fact that a judicial officer feels insulted is of no consequence. The intention of the alleged offender must be looked into. The

Allahabad High Court has held that in order to render an accused liable under s 228 of the IPC, it is not merely necessary that the judicial officer felt insulted, but it has to be seen whether any insult was intended. This section makes it quite clear that the insult or interruption must be intentional. It is not enough that the work of the court was in fact interrupted.[50] If the facts and circumstances show that he intended to cause an insult or interruption, his act may amount to an offence under this section. If they show that he had no such intention, his act cannot be held to1733 amount to that offence.[51] It is, therefore, essential that a judicial officer, while exercising the extraordinary powers of convicting a person for contempt of court, must never allow his personal feelings to have any weight or importance, because those powers have been conferred on him exclusively for the purpose of supporting the dignity of his important office, and not for upholding his own vanity. A judicial office, being in sacred trust of the presiding officer, is expected never to be influenced or swayed in making its decisions in this connection, by feelings of personal retaliation. It is only by sustaining and keeping in view this high standard, that public confidence in the integrity of the courts, which is so vital to our form of government, can be maintained.[52]

Intention not to be Confused with Knowledge

Intention should not be confused with knowledge. There must be clear proof of intention to insult. The mere fact that the accused knew that such would be the consequences of his act, is not sufficient to hold him guilty of an offence under this section.[53]

Merely Uttering Words without Intending to Insult or Interrupt not an Offence

Merely uttering words, or not keeping silence, can hardly be construed as an intentional insult or interruption.[54] Where a magistrate said that the proceedings in his court were interrupted by an audible remark made by the accused, and there are no materials on which the magistrate could have come to the conclusion that the accused intended to insult him or interrupt his proceedings, it cannot be said that an offence under this section has been committed.[55]

Intention is to be Inferred from Conduct

An intention is a state of mind which has to be inferred from the conduct of a person. No extraneous evidence can possibly be led to read the state of the mind of a person. Inferences are to be drawn keeping in view the ordinary human conduct, the feelings and the working of the mind. Hurling of an abuse on an adversary, in the view and within the hearing of the presiding officer of the court, suggests an intention to insult the court. The intention, therefore, in such a case, has to be imputed to the contemner and it cannot be said that it was an innocent conduct of him, without realising the sanctity and the authority of the court.[56] A contrary view has been expressed by some High Courts and it has been held that where, however, the remark is not addressed to a court, even if it is rude or vulgar, it cannot be made the subject-matter of an offence under s 228, IPC, though the court overhears it.[57]1734

Sometimes a Direction may not Amount to an Order of Court

Where a magistrate dismissed a complaint without hearing the complainant's witnesses or his vakil and then asked the complainant to call his vakil so that he may go through the order passed, the complainant expressed surprise at this, and inquired how his complaint could be dismissed without any examination of his witnesses, and he repeated this several times; it was held that:

> whatever, that be, it is clear that after having pronounced the order of dismissal, the Magistrate lost seisin of the matter and his direction to the complainant to bring his *vakil* cannot be regarded as an order of the court trying the matter. It was not unnatural for the petitioner whose case had been summarily dismissed by the magistrate, without hearing his witnesses or his vakil, to have remarked that the presence of a vakil at that stage was unnecessary. Any disappointed litigant is likely to make such a statement in such circumstances

> and there appears to be no justification to import any intention to insult the magistrate. After all, courts cannot be over-touchy in such matters.[58]

Where a lady litigant, who had a prolonged litigation with her husband, seemed to be very much mentally upset and made derogatory remarks to the learned magistrate, though there was no justification for such remarks against the learned magistrate the Allahabad High Court opined that it would have been better if the learned magistrate had ignored them, considering the mental state of the litigant. It was also held that often, the court should overlook even unfair, malicious and totally unjustified remarks, as the person making such remarks often wants publicity for himself and by ignoring them, the court denies him the publicity which he wants.[59] Where a witness for prosecution in a case being heard by a magistrate, had a scuffle with another person on the verandah of the court-room, it was held that the witness could have no idea whatever of intentionally insulting the magistrate and could not be held liable under this section.[60]

Aspersions in Transfer Application--Effect of

Where an accused person made an application for the transfer of a case pending against him and inserted in such application aspersions of a defamatory nature concerning the magistrate who was trying the case, it was held that there was no intention on the part of the applicant to insult the court, but the intention was merely to procure a transfer.[61]

Where the appellant prayed that he should be given a week's time for bringing a stay order from the High Court because he had no hope of getting justice from the court of the district judge, the district judge stopped dictating the judgment in the miscellaneous civil appeal, and started proceedings under s 345, CrPC, on his coming to the conclusion that this application had been moved by the appellant for blackmailing the court and with an intention of impeding the court of justice, and convicted the appellant. On an appeal before the High Court, it was held that there was absolutely no question of blackmailing the court and under the circumstances of the case, it was most natural for the appellant to infer that he would not get justice from that court. In that application he therefore, expressed his genuine feelings and,1735 therefore, there could be no intention of blackmailing the court. Such a conclusion can be said to have been drawn by the learned district judge only because he developed some prejudice against him. The conviction of the appellant was, therefore, held to be wholly unjustified.[62]

Intention to Offer Insult to be Decided on the Facts *etc* of each Case

In the similar case of *Narotam Das v Emperor* ,[63] however, York J held that there was an intention to insult the court and observed that it must be a matter for consideration in each individual case how insulting the expressions that are used are and whether there was any necessity for the applicant to make use of those expressions in the application which he was actually making to the court. But in *State of Madhya Pradesh v Ravishankar* ,[64] their Lordships of the Supreme Court have not accepted these tests and observed: 'Whether there is an intention to offer insult to the magistrate trying the case or not must depend on the facts and circumstances of each case and we do not consider it necessary, nor advisable to lay down any inflexible rule thereto'. Intention is an inference attaching to the words themselves, and this inference is not rebutted by any excuse as to the motive with which the accused used the words, or the object that he thought would be attained by so doing. Intention should not be confused with motive.[65]

Coming to Court Badly Drunk--Effect of

Where all that was shown against the accused was that he appeared in the court badly drunk and talked irrelevantly, and there was nothing to show that he had taken liquor of his own free will before coming to the court, it was held that it could not be presumed that he had deliberately taken liquor before coming to the court, and consequently, it could not be held that he intentionally offered insult to, or caused interruption in the court.[66]

Merely appearing in a drunken state in a court is neither offering an insult, nor causing an interruption to the presiding officer of the court. Sometimes it is seen that such like persons show more respect to the court than others who may not have taken liquor. The *sine qua non* of the offence is the causing of intentional insult to the court and obstruction to its proceedings. Where these essential factors of this offence are totally missing, this section is not attracted.[67]

If a counsel appears in the court drunk, without any idea of insulting the court, even if the court feels insulted by his appearing before it in that state, it cannot be said that the he has intentionally insulted it. It cannot be said that the court's feeling insulted by his appearing drunk is a natural and probable consequence of the act which must be presumed to have been intended by him. He cannot be said to have intentionally caused an interruption; there is nothing to suggest that he ever knew or thought that interruption would be caused by his appearing drunk before the court.[68]1736

Intentional Disobedience amounts to Offering Insult

An intentional disobedience of an order of the presiding officer of a court, in his presence, must lead to the conclusion that the person responsible intended, at least, to offer insult to that officer.[69]

Refusal to Vacate Seat on being Directed

In this case the petitioner, a party in a civil suit, in the court of a *munsif,* occupying the front seat in the court hall, declined to obey the verbal direction of the learned *munsif* to move out of the seat for accommodating senior lawyers then standing for want of seats. The petitioner, who was conducting his case without the aid of a counsel, persisted in claiming the right to sit at the same place. This conduct of the petitioner was treated as an intentional insult or interruption during the judicial proceedings by the *munsif* and, exercising his powers under s 345, CrPC, the petitioner was sentenced to a fine of Rs 150 under s 482, CrPC . The High Court observed that in a court room, members of the bar have certain privileges, being officers of the court, and even among the members of the bar, certain special privileges have been conferred on such among them as holding special position and ranking. Thus, when members of the bar are to stand inside a court room due to lack of seating facilities, members of the public, even if they are litigants in the same court, cannot claim any right to occupy the seating facilities available inside the court. It is open to the presiding officer to direct such persons to vacate, for accommodating members of the bar, if there is no other seating facility available. The above must be regarded as a rule of practice to be followed in the court hall for the upkeep of discipline and decorum of the court proceedings. It is held that the learned *munsif* was right in asking the petitioner to move out of the seat in the front row as senior advocates were standing in the court, without seating accommodation. As the petitioner openly defied obeying the said direction given by the court, his conduct amounted to an offence as specified in s 228 of the IPC . It was further held that the learned *munsif* was not oversensitive in reacting to the contumacious conduct of the petitioner. The cussedness, unabashedly and persistently displayed by the petitioner in open court, warranted the steps adopted by the learned *munsif*.[70]

Whether Delay amounts to Interruption

Where the presiding officer of the court sent for the accused, working as a stenographer in his court, and the accused told the *daffadar*, who called him, that he would come after typing the issues dictated by the presiding officer and the accused went to the presiding officer after typing the issues, it was held that though there was some delay in this process, there was no intentional interruption to the court by the accused and the accused could not be convicted under s 228, IPC .[71]

Threatening a Witness in the Witness Box--Effect of

In an Allahabad case,[72] an accused person made a threat to a prosecution witness in the box and the magistrate convicted him under this section. The magistrate himself found that though there was no intention to insult him, this conduct of the accused1737 had the effect of the magistrate starting at once the proceedings under s 228 and was taken to amount to an interruption to him while sitting as a

court. The sessions judge in revision, was of the opinion that if the magistrate thought it his duty to take notice of the threat and start proceedings under this section, it could not be said that an interruption was caused by the accused himself, and referred the case to the High Court with a recommendation that the conviction might be quashed. Stuart J rejected the reference, observing that 'the learned sessions judge has misapprehended the scope of the section. An accused person, who, during the hearing of the case, makes an impertinent threat to a witness in the box, has clearly committed an offence under s 228, IPC .

Only Wilful Error and not Error of Judgment is Material

In all offences in the Indian Penal Code, where the intention is an essential ingredient of the offence, that intention must be strictly made out by the prosecution and this rule applies to the offence under this section also.[73] Where a magistrate, misconceiving his powers and exercising a jurisdiction not vested in him by law, passed an unjustifiable order under s 144, CrPC, restraining a civil court peon from executing a warrant of arrest, it was held that:

> it is not sufficient in such cases for the purpose of visiting a judicial officer with the penal consequences of proceeding in contempt, simply because he committed an error of judgment, or the order passed by him is in excess of the authority vested in him. The error must be a wilful error proceeding from improper or corrupt motives in order that the may be punished for contempt of court.[74]

Improperly Dressed

Where a sessions judge fined an assessor for being 'improperly dressed', it was held that there being no rule as to the dress of assessors, and there being no suggestion that his dress offends public decency, or was intended to be insulting to the court, the learned sessions judge had no jurisdiction to fine the assessor.[75]

Disobedience of Court Order by Marrying a Minor

A mere disobedience of an order of the court, by marrying a minor girl while she is in the custody of a guardian appointed by the court, is not intentionally offering insult or causing interruption within the meaning of this section.[76]

13. What Amounts to Insult or Interruption

It has been held that if a remark is not addressed to a court, however rude or vulgar it may be, it cannot be made the subject of an offence under this section, even if the court happens to overhear it.[77] Vulgar abuse addressed to the court is certainly an offence under this section.[78] Where on hearing the judgment, one of the accused1738 addressed the court uttering filthy abuses, making contemptuous statements, which amounted to an insult to the court, the court had jurisdiction to sentence the accused under s 228, IPC .[79] The use of vulgar language by a villager to emphasise a denial does constitute an offence under this section.[80] Contempt may be shown either by language or by manner; and language which may otherwise be unobjectionable if uttered in a temperate manner, may become highly improper, constituting a punishable contempt, if uttered in a different and disrespectful manner.[81] Even if the words used are innocuous, the tone employed may change their innocent character.[82]

Prevarication, Retraction or Refusal to give answer to Questions while giving Evidence

Though a mere prevarication, a retraction in giving evidence or a persistent refusal to give direct answers to questions, do not necessarily constitute an offence under this section, it may, in particular

circumstances, constitute such an interruption to a public servant sitting in a stage of a judicial proceeding as to constitute an offence under this section.[83]

Bidding in Auction Sale without Money

A person who bids at a sale in execution of a decree, knowing that he cannot deposit the ernest money, commits an offence under this section.[84]

Acts not Falling under this Section

Leaving the court when ordered to remain or making signs from outside to a prisoner on his trial[85] or an absence from the court in disobedience to a summons,[86] or listening to the evidence having been directed to go away until required as witness,[87] or the walking out of court by a party when asked if he is going to call witnesses[88] are not offences under this section. In *re Bhavani Mudalia*[89] a person was fined under this section for chewing betel while under examination as a witness at a trial. In one case it was observed that:

> To wilfully impede, hinder, embarrass, interrupt or obstruct the judicial proceedings, or to insult the court, in its presence, in the course of adjudication of some cause, amounts to undue interference with the administration of justice and therefore to contempt, and, as such, it can never be tolerated or countenanced by this court. The status or the official position of the person who chooses to so interrupt is wholly irrelevant. Indeed, the higher the status of a person, the more responsible conduct and behaviour is expected from him.[90]1739

The mere act of addressing the presiding officer of a court during the pendency of a proceeding does not amount to culpable interruption. Where the court peon maltreated a gentleman entering the court-room, a pleader appealed to the presiding officer against the rude behaviour of the peon. It was held that interruption' as used in this section, contemplates something far more serious and far more obstructive than what was done by the pleader.[91] Every protest made, in fact, does interrupt the court, but it is its duty to listen to protests how much so ever they may delay its proceedings. So long as they are made *bona fide* they do not constitute the interruption which the section punishes as contempt.[92]

Where the letter allegedly written and addressed to the court which interfered with the course of justice but mostly likely was opened only in chambers by the magistrate when he retired after judicial work, it cannot be said that letter was received by the magistrate when he was in any stage of the proceedings, hence offence under s 228 was held not made out.[93]

Every Act of Disrespect is not Contempt

If a counsel appears before a court while under the influence of liquor, it may be an act of disrespect to the court, but as observed in *Joseph Orakwrie Izoura v R* ,[94] not every act of disrespect is contempt. A counsel appearing in court after consuming liquor, but without being under its influence, does not affect its dignity or amount to contempt. Even if he argued irrelevantly or incoherently, he does not commit direct contempt. It is a far-fetched argument that interruption is caused because the counsel cannot work normally, or he argues irrelevantly, or incoherently, and has to be pulled up by the presiding officer at the expense of some time if the pending officer's attention is diverted from the proceeding that he is conducting, either to the appearance or behaviour of the counsel or to the behaviour of those standing close to him.[95]

14. Insult or Interruption by Counsel

In a Bombay case[96] it was observed:

> The section requires that the insult or interruption of the court should be intentional. In this case there is no evidence of any intention on the part of the pleader to insult or interrupt the court. The whole affair has been given undue importance and might have been more quietly settled. Some latitude should be allowed to a member of the bar, insisting in the conduct of his case upon his question being taken down or his objections noted, where the court thinks the question inadmissible or the objections untenable. There ought to be a spirit of give and take between the bench and the bar in such matters and every little persistence on the part of a pleader should not be turned into an occasion for a criminal trial unless the pleader's conduct is so clearly vexatious as to lead to the inference that his intention is to insult or interrupt the court.

Relying upon the said case, Bombay High Court reaffirmed this position and held that there is no doubt that a judicial officer is entitled to maintain the dignity of the1740 court, but he should not be too sensitive and too ready to take offence where none is intended. The law allows some latitude to a member of the bar acting *bona fide* in the discharge of his professional duty, so long as his conduct is not so gross as to lead to an inference that his intention is to insult or interrupt the court.[1]

Procedure for Recording Evidence when an Objection is Raised

If a witness, in response to a question put by the court, gives an answer appearing to be different from the one previously given in response to a question put by the counsel, it is quite natural for the counsel to request the court to record the previous one also, and the appropriate course for the court would be to record both the answers. While it is true that the court has the power, and indeed it is its duty, to see that undue advantage is not taken of the ignorance of witnesses or parties, it is no less the duty of the court to see that there is a faithful record of the proceedings in court. If, for any reason, the court does not see its way to accept the position contended for by a counsel, there is nothing unnatural or wrong in the counsel requesting the court to place on record its ruling. While it cannot be said that the court is bound to record all contentions, objections or representations, even if they are of a trivial or a frivolous character, it is undoubtedly the court's duty to record its decision on any matter of substance that arises in a case. If some time was taken by the counsel in looking up authorities to satisfy the court about the correctness of the position contended for by him, and if the discussion took some time and if all this occupied about 20 minutes, it can hardly be said that the petitioner interrupted the court's proceedings. If the court refuses to record the question put by the counsel and the answer to it, and it also refuses to note his objection to the non-recording of that answer, and the counsel expresses his desire to retire from the case and applies for time to move for a transfer of the case, his conduct cannot be said to constitute a threat or insult. When under some exceptional provisions the court itself is constituted both the prosecutor and the judge, it is all the more incumbent upon the presiding officer not to lose a sense of perspective. While there can be no doubt that it is the duty of all those appearing in court, and more particularly of the counsel, to conduct themselves with becoming decorum and restraint and to do nothing which is likely to bring down the prestige or dignity of the court, it is equally essential that no occasion should be given for any party to feel that he has not been given the fullest opportunity to present his case or that there is not a fair, substantial and faithful record of the proceedings in court.[2]

Mere Persistence in Putting Question not an Insult or Interruption

The mere persistence of an advocate in putting a question again and again to the witness, during cross-examination could not, by any stretch of imagination, be said to be done with an intention of offering any insult or to cause any interruption to the court within the meaning of s 228 of the Indian Penal Code, where it is not suggested that the tone employed by the advocate in persisting the question was such as to create an impression in the court hall that the decorum of the court was not maintained and insult was being offered to the court. When no remark was made by the appellant-advocate to derogate the status of the presiding officer of the court; no1741 gesture was done which would even indirectly suggest that the advocate concerned wanted to run down the presiding officer of the court or in any manner show any disrespect to the court, it could hardly be said that such interruption would be an interruption within the meaning of s 228, IPC, so that the offence under that section could be said to have been established.[3]

Hypersensitiveness on One Side and Rudeness on the Other and Ideas of Domination or

Servility to be Avoided

It is true that a lawyer should always conduct himself properly in a court of law, and exert his best at all times to maintain the dignity of the court, but the court has also a reciprocal duty to perform, and should be not only not discourteous to a lawyer, but should also try to maintain his respect in the eyes of his clients and the general public with whom he has to deal in his professional capacity. Hypersensitiveness on the one side or rudeness on the other must be avoided at all costs. Both the bench and the bar are two arms of the same machinery and unless they work harmoniously, justice cannot be properly administered. Mutual adjustment, and not mutual antagonism, should be the end in view on both sides, eliminating all ideas either of domination or of servility.[4]

Action under this Section and Section 345 , CrPC can be taken against Counsel in Appropriate Cases

The complaint made against the respondent advocate in the order for taking proceedings for committing contempt of a subordinate court was that the respondent, time and again, appeared in court and that a loud and thundering voice was used by him. When asked not to speak in such a loud voice, he responded that he could not put a silencer in his throat. It was observed by the Delhi High Court that it is desirable that in future, if anything transpires in a court, which in the view of the presiding officer of the court, amounts to a contempt of court within the meaning of the Contempt of Courts Act 1971, the conduct of the contemnor should be reflected in the order sheet of the court so as to make it possible for the High Court to peruse the order-sheet and come to a proper conclusion. The High Court further observed: 'In any case we would like to remind the court below that provisions of s 228 of Indian Penal Code, read with s 345, CrPC, can in appropriate cases, be utilised to the court with due discretion and care, and when their application becomes necessary'. No action for contempt was taken.[5]

15. 'To any Public Servant'--Meaning of

An offence under this section can arise only in the case of a public servant, while he is sitting in a judicial proceeding. As to the meaning of 'public servant', see s 21 and notes thereunder. Although an advocate is a part of the machinery of the administration of justice, he is not a public servant within the meaning of that expression in this section. So, where a threat was addressed, not to the judge, but to an advocate in his presence, it was held that the contempt was not punishable under this section.[6]1742

16. 'Judicial Proceeding'--Meaning of

The expression 'judicial proceeding' occurs in s 192, IPC and is explained therein. See notes under s 192 . The expression 'in any stage of a judicial proceeding' occurs in s 193, IPC and is explained therein. Notes under s 193 may be referred to.

Sitting in a Judicial Proceeding--Meaning of

This section relates merely to an insult or interruption to a public servant while sitting in a stage of judicial proceedings. It does not provide against a contempt of court committed by the publication of a libel out of court, when the court is not sitting.[7] It contemplates only cases of contempt of court occurring in the presence of the court, by insulting the officer or interrupting the business of the court.[8] What the section requires is that the public servant must be actually dealing with the matter pertaining to the judicial proceeding at the moment when insult is offered. When a judicial proceeding is pending on the file of a public servant, he cannot be said to be sitting over that judicial proceeding all the time, if he is not actually dealing with it.[9] A private interview with a district magistrate cannot be regarded as a 'stage of a judicial proceeding', even if in consequence of the interview, he expressed his intention to examine the complainant in whose behalf the interview was sought.[10] It cannot be said that the judicial proceedings of a court, in a particular case, are at an end the moment the sentence has been passed, and that a prisoner may then insult the judge with impunity. The judicial proceedings continue

until the prisoner is discharged or removed in custody.[11]

Where an order, binding an accused under s 107, CrPC, was pronounced by a magistrate and thereupon, the person bound down, remarked that the court had acted with *zulm*, it was held that he was guilty of contempt of court, and the magistrate was sitting at a stage of a judicial proceeding when the utterance was made by the accused.[12]

Where *panches* assemble on a particular day to pronounce the judgment in a case, they should be deemed to be sitting in a stage of a judicial proceeding till their dispersal, unless, of course, the dispersal was delayed. Where, therefore, the pronouncement of the judgment and the utterance of the threat and abuses to the *panches* were almost simultaneous events, it could not be said that the threat and abuses were hurled at a stage which was not a stage of a judicial proceeding.[13]

An insult to a judge or magistrate may be contained in an application or affidavit presented to him. The practice as to the filing of applications and affidavits varies from court to court, and in some courts, application and affidavits are filed within stated hours before the reader or the bench clerk; they are so filed even when the judge or magistrate is in the chamber or pre-occupied with some administrative duties. So, in order to establish the offence under this section, it must be shown that1743 the judge or magistrate was doing some judicial work when the application or affidavit was presented.[14]

All Proceedings of a Judge are not Judicial

All proceedings of a judge are not necessarily judicial proceedings. In order to be judicial, a proceeding must relate in some way to the administration of justice or to the ascertainment of any right or liability.

Demarcation proceedings under the Himachal Pradesh Panchayat Raj Act do not relate, in any way, to the administration of justice, nor are they directed towards an ascertainment of any right or liability, and are not therefore, judicial proceedings within the meaning of this section.[15]

Functions of Registrar not Judicial

The functions assigned to a registrar and a sub-registrar, in the matter of registering documents, are purely administrative, and not judicial. A sub-registrar is not, for general purposes, a court and he does not become one by making an inquiry for the purposes of ascertaining whether he is justified in registering a document presented for registration. Much less is he a judge.[16]Section 347 of the Code of Criminal Procedure 1973, however, empowers the state governments to direct that any registrar or sub-registrar appointed under the Registration Act 1908 shall be deemed to be a civil court within the meaning of ss 345 and 346 of that Code.

Public Servant not held to be Court

A settlement officer, appointed under the provisions of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act 1948[17] or an assistant settlement officer, appointed under the Bihar Tenancy Act,[18] is not a civil, criminal or revenue court, and as such, a conviction recorded by him under s 228, IPC, is without jurisdiction. But an assistant registrar, functioning as a registrar under s 48 of the Bihar and Orissa Co-operative Societies Act, has been held to be a court, subordinate to the High Court, for the purpose of s 3 of the Contempt of Court Act.[19]

17. Procedure

An offence under this section is non-cognizable and a summons shall ordinarily issue in the first instance. It is bailable but not compoundable. It is triable by the court in which the offence is committed, subject to the provisions of ch XXVI of the CrPC 1973. This offence can also be tried summarily under s 260, CrPC .[20]

The period of limitation prescribed by s 468, CrPC for taking cognizance of an offence under this section is one year.1744

18. Special Procedure under Sections 345 - 351, CrPC

Abovementioned sections in CrPC 1973[21] may be referred to.

19. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:
>
> That you on or about the.....day of.....at.....intentionally offered insult (*or caused interruption*), to wit.....(*specify the insult, or interruption*) to.....a public servant while he was sitting in a stage of a judicial proceeding, namely.....(*specify the proceeding*), and thereby committed an offence punishable under section 228 of the Indian Penal Code, and within any cognizance.
>
> And I hereby direct that you be tried on the said charge.

20. Punishment

A presiding officer of a court of justice in this country, representing, as he does, the Indian Republic, is entitled to respect, and any disrespectful or undue hindrance or interruption in the course of judicial proceeding constituting, as it does, a challenge to the court's authority deserves to be severely dealt with.[22]

30 *Jogendra Narayan Majumdar Chowdhary v Syama Charan Ukil* 6 Cr LJ 405, p 406, 6 CLJ 713 .

31 *Jnanendra Prasad Bose v Gopal Prasad Bose* AIR 1933 Pat 204, p 206, ILR 12 Pat 172, 14 PLT 77 .

32 *Bathina Rama Krishna Reddy v State of Madras* AIR 1952 SC 149, p 151, (1952) Cr LJ 832, 90 CLJ 14, (1952) 1 Mad LJ 73, (1952) Mad WN 393 .

33 *Capt Gurbakhsh Singh v State* AIR 1960 Punj 211, p 213, (1960) Cr LJ 511 ; Re *Ramaswamy Gounden*AIR 1916 Mad 648, 16 Cr LJ 610 .

34 *King v Darson* (1821) 4 B&Ald 329, 106 ER 958; cited with **approval in***Emperor v Venkatarao* AIR 1922 Bom 261, 23 Cr LJ 325, 24 Bom LR 386 .

35 *Advocate General v Amanullakhan* AIR 1967 Mad 162, (1967) Cr LJ 551 .

36 *Court on its own motion v RK Garg* (1981) Cr LJ 239, p 241-42 (HP) (DB), (1980) Cr LT 304; *Bathina Ramakrishna Reddy v State of Madras* AIR 1952 SC 149, (1952) Cr LJ 832 .

37 *Brahma Prakash Sharma v State of Uttar Pradesh* AIR 1954 SC 10, p 13, 14, (1954) Cr LJ 238 ; **reversing***State v Brahma Prakash Sharma* AIR 1950 All 556 (FB).

38 *Brahma Prakash Sharma v State of Uttar Pradesh* AIR 1954 SC 10, p 13, 14, (1954) Cr LJ 238 ; **reversing***State v Brahma Prakash* AIR 1950 All 556 (FB) ; *State of Madhya Pradesh v Revashankar* AIR 1959 SC 102 ; *Malabar Hill Co-operative Housing Society Ltd v KL Jaubar* AIR 1964 Bom 147, (1964) 1 Cr LJ 652, 65 Bom LR 533 .

39 *Daroga Singh v B KPANDEY* (2004) Cr LJ 2084 (SC) .

40 *SN Murthy v State of Mysore* (1974) Cr LJ 211, (1973) 2 Mys LJ 266, (1973) Mad LJ (Cr) 598 .

41 *Bathina Ramkrihna Reddy v State of Madras* AIR 1952 SC 149, (1952) Cr LJ 832 .

42 *State of Madhya Pradesh v Ravashankar* AIR 1959 SC 102, (1959) Cr LJ 251 ; Re *DBVohra*(1974) 2 Cr LJ 899, 901, (1974) ILR 1 Del 466(FB).

43 *State of Punjab v Mast Ram Advocate* (1974) Cr LR 174 ; *State v Shankara Charan Sahu* AIR 1952 Ori 215, p 218, (1952) Cr LJ 1106 ; *State of Uttar Pradesh v Deg Raj Singh* (1983) All Cr R 65, (1983) Cr LJ 866 (All)(DB); *State v Ratan Shukla* AIR 1956 All 258 (DB), (1956) Cr LJ 679.

44 *Daroga Singh v BK Pandey* (2004) Cr LJ 2084 (SC) .

45 *State of Madhya Pradesh v Ravashankar* AIR 1959 SC 102, p 105, (1959) Cr LJ 251, (1959) 1 Mad LJ 84, 61 Punj LR 343, (1959) SCJ 86 ; *KC Nanda v Certificate Officer* (1971) Cr LJ 742, p 743, (1970) 36 Cut LT 1282 ; *Court on its own motion v RK Garg* (1980) 7 Cr LT 3304 (HP) .

46 *Sahrangshu Kanti v State* AIR 1968 Cal 249, (1968) Cr LJ 621 ; *Court on its own motion v RK Garg* (1980) 7 Cr LT 304, (1981) Cr LJ 239 (HP) ; *KC Nanda v Certificate Officer* (1971) Cr LJ 742, p 743, (1970) 36 Cut LT 1282 ; *State of Uttar Pradesh v Deg Raj Singh* (1983) Cr LJ 866, p 870 .

47 *Chinubhai Keshavlal Nanavatt v KJ Mehta* (1978) Cr LJ 1040 .

48 *Kiran N Makasare v State of Maharashtra* (1998) ULJ 1939 (DB), (1999) I CCR 769 (DB) .

49 *Purshotam Lal v The Crown* AIR 1925 Lah 210, p 216 ; Re *Dattatraya Venkatesh Belvi* 1 Cr LJ 612, 6 Bom LR 541; *State of Uttar Pradesh v Ratan Sukla* AIR 1956 All 258 ; *Chhagum Lal Ishwar Das Shah v Emperor* AIR 1933 Bom 478, 35 Cr LJ 107, 25 Bom LR 1025 ; *State v Bhabesh Chandra* AIR 1963 Tri 50, p 52, (1963) 2 Cr LJ 668 ; *State of Madhya Pradesh v Panna Lal* 1966 Cr LJ 1087, p 1088, (1966) MPLJ 373 .

50 *State of Uttar Pradesh v Deg Raj Singh* (1983) Cr LJ 866, p 870 .

51 *Rameshwar Mandal v State* AIR 1960 Pat 309, p 310, (1960) Cr LJ 976 ; *State of Madhya Pradesh v Panna Lal* (1966) Cr LJ 1087, p 1088, (1966) MPLJ 3373 ; *SahasrangshuKanti v State* AIR 1968 Cal 249, (1968) Cr LJ 621 ; *Queen Empress v Abdullah Khan* (1898) All WN 145 ; *Murlidhar v Emperor* AIR 1916 All 330, 17 Cr LJ 163 ; *Salig Ram v Emperor* AIR 1937 All 17, 38 Cr LJ 416 ; *Ram Nath v State* AIR 1953 All 59, 61; *Sant Ram Bhatia v State* (1967) All WR (HC) 833 ; *State of Uttar Pradesh v Ratan Shukla* AIR 1956 All 258, p 262, (1956) Cr LJ 679 .

52 *Capt Gurbaksh Singh v State* AIR 1960 Punj 211, p 213 .

53 (1972) I Cut LR (Cr) 422, (1972) ILR Cut 692.

54 Re *Surendra Nath Banerjee* 4 Cr LJ 210, 212, 10 CWN 1062.

55 Re *Ramasamy Gounden*AIR 1916 Mad 648, 16 Cr LJ 610, 29 Mad LJ 274 .

56 *Dhiraj Singh v State* (1974) Kash LJ 245 .

57 *Bamadev Misra v DC Das* (1973) Cr LJ 1064, p 1065 (Ori), (1972) 38 Cut LT 1286 ; *Jit Singh v Emperor* 13 Cr LJ 567, 23 PWR 1912 (Cr) ; Re *Ramasamy Gounden*(1915) 29 Mad LJ 274, 16 Cr LJ 610; *Manghai Ram v Emperor* AIR 1919 All 330, 20 Cr LJ 777 ; *Hukumat Rai v Emperor* AIR 1943 Lah 14, p 18, 44 Cr LJ 181 .

58 *Puma Chandra Majhi v State* AIR 1956 Ori 28, p 29, (1954) ILR Cut 706 .

59 *Usha Pandey v ACJM II, Basti* (2001) Cr LJ 2836 (All) (DB) .

60 *Mangai Ram v Emperor* AIR 1919 All 330, 20 Cr LJ 777 .

61 *Queen-Empress v Abdullah Bhan* (1898) All WN 145 ; *Emperor v Murli Dhar* AIR 1916 All 330, ILR 38 All 284, 17 Cr LJ 165, 14 All LJ 247 ; *Salag Ram v Emperor* AIR 1937 All 171, 38 Cr LJ 416 .

62 *Choudhary Beniram v Ghanshyam Das* (1977) UP Cr C 261 .

63 *Narotam Das v Emperor* AIR 1943 All 97, 99, (1943) ILR All 186, 44 Cr LJ 360, (1942) All LJ 677.

64 *State of Madhya Pradesh v Ravishankar* AIR 1959 SC 102, p 107 .

65 *Emperor v Venkatarao Bajirao Mudvedkar* AIR 1922 Bom 261, p 266, 23 Cr LJ 325, ILR 46 Bom 973, 24 Bom LR 386 .

66 *Ramnath v State* AIR 1953 All 59, p 61 .

67 *Ramesh Chand v State of Himachal Pradesh* (1990) 1 Sim LJ 458, p 460 (HC), (1989) 2 SCJ 1 (HP) ; *State of Uttar Pradesh v Ratan Shukla* AIR 1956 All 258 **relied on**.

68 *State of Uttar Pradesh v Ratan Shukla* AIR 1956 All 258, p 261, (1956) Cr LJ 679 .

69 *Rameshwar Mandal v State* AIR 1960 Pat 309, p 310, (1960) Cr LJ 976, **explaining anddistinguishing** High Court Proceedings, 30 November 1878, 1 Weir 215; Re *Papa Naiken* 1 Weir 217.

70 *PC Jose v Nanda Kumar* (1994) Cr LJ 682, p 683, 686 (Ker) .

71 *SN Murthy v State of Mysore* (1974) Cr LJ 211, (1972) Mad LJ (Cr) 598 .

72 *Allas v Emperor* AIR 1923 All 193(2), ILR 43 All 272, 24 Cr LJ 756, 21 All LJ 72 .

73 *Emperor v Venkatarao Baji Rao Mudvedkar* AIR 1922 Bom 261, p 266 .

74 *SS Roy v State of Orissa* AIR 1960 SC 190, (1960) Cr LJ 282, (1959) ILR Cut 385 (**reversing***State v Sankarcharah Sahu* AIR 1952 Ori 215), **relying on***Barton v Field* 4 Moo PCC 273, 13 ER 307 .

75 *Chhaganlal Ishwardas Shah v Emperor* AIR 1933 Bom 478, p 479, 35 Cr LJ 107, 35 Bom LR 1025 .

76 *Kaulashia v Emperor* AIR 1933 Pat 142, p 143, 24 Cr LJ 770, ILR 12 Pat 1, 14 PLT 605 .

77 *Ajit Singh v Emperor* 13 Cr LJ 567, 23 PWR 1912 (Cr) ; *Mahant Hukumat Rai v Emperor* AIR 1943 Lah 14, p 18, 44 Cr LJ 181, (1943) ILR Lah 791, 44 PLR 511 .

78 Re *Kunhutti*(1934) Mad WN 398.

79 Re *Ram Vishal*(1997) Cr LJ 3736 (MP)(DB).

80 1 Weir 216.

81 *Capt Gurbakhsh Singh v State* AIR 1960 Punj 211, p 214 .

82 *Mahant Hukumat Rai v Emperor* AIR 1943 Lah 14, p 18 .

83 *Gopi Chand v Emperor* AIR 1918 Lah 65, 19 Cr LJ 676, 90 All LR 1918, 14 PR 1918 Cr, 24 PWR (Cr) 1918 ; *Queen-Empress v Devji Asa* Unrep Cr C 473; *Reg v Jaimal, Shravan* 10 Bom HCR (Cr) 69; **explaining***Reg v Amba Bin Bhivrao* 4 Bom HCR (Cr) 6; *Reg v Pandu Bin v Thaji* 4 Bom HCR 7 .

84 Re *Mohesh Chunder* WR 1864, Misc 3.

85 1 Weir 215.

86 *Ibid*.

87 *Ibid.*

88 *Ibid*.

89 Re, *Bhavani Mudalia,* 1 Weir 217.

90 *Capt Gurbaksh Singh v State* AIR 1960 Punj 211, p 214, (1960) Cr LJ 511 .

91 *Mahant Hukumat Rai v Emperor* AIR 1943 Lah 14, p 18 .

92 *Vijay Rao v State* AIR 1953 Hyd 285, p 286, (1953) Cr LJ 1856, p 1857 .

93 *CR Rajasekaran v Judicial Magistrate, Nagapattinam* (2003) Cr LJ 4024 (Mad) .

94 *Joseph Orakwrie Izoura v R,* [1953] AC 327, p 336 .

95 *State of Uttar Pradesh v Ratan Shukla* AIR 1956 All 258, p 262-263 .

96 Re *Dattatraya Benkatesh Belvi* 1 Cr LJ 612, p 613, 6 Bom LR 541; *SNarayanabhatta v Special First Class Magistrate, Sreerangapatna* AIR 1956 Mys 602 .

1 *Kiran N Makasare v State of Maharashtra* (1998) Cr LJ 1939 ; *Mustafa Khan v State* (1954) Cr LJ 1008 (Raj) .

2 *SNarayanabhatta v Special First Class Magistrate, Sreerangaptna* AIR 1956 Mys 602, p 612, (1956) Cr LJ 1415, (1956) ILR Mys 371 .

3 *HB Joshi v State of Gujarat* (1972) Guj LR 548, p 552 .

4 *Mahant Hukumatrai v Emperor* AIR 1943 Lah 14, p 17 .

5 *Court on its own motion v Virinder* (1977) Chandi LR 105 .

6 *Damayanti G Chandiramani v S Vaney* AIR 1966 Bom 19, p 29, (1965) ILR Bom 619, 67 Bom LR 380 .

7 *Surendra Nath Benerjee v Chief Justice of Bengal* ILR 10 Cal 109, p 130 (PC) ; *Nand Singh v Gram Panchayat* (1962) 64 Punj LR 868 .

8 *Jogendra Narayan Majumdar Chowdhury v Shyama Charan Ukil* 6 Cr LJ 405, 6 CLJ 713 .

9 *KC Nanda v Certificate Officer* (1971) Cr LJ 742, p 744, (1970) 36 Cut LT 1282 .

10 *Newandram Vishnudas v Emperor* AIR 1948 Sind 97 .

11 1 Weir 214.

12 *Queen-Empress v Salig Ram* 16 PR 1897 .

13 *Asharfi Lal v State* AIR 1952 All 306 .

14 Section 481(2), CrPC ; *State of Madhya Pradesh v Revashankar* AIR 1959 SC 102 .

15 *Dhani Ram v Sub-Divisional Judge, Theog* AIR 1965 HP 25 .

16 *Queen-Empress v Tulja* ILR 12 Bom 36 .

17 *Ram Sarup v State* AIR 1965 Punj 454, p 455, (1965) 2 Cr LJ 669 .

18 *Nand Singh v Sita Ram Prasad* (1976) BLJR 1, (1976) Pat LR 149 .

19 *Jugal Kishore Sinha v Sitamahi Central Co-operative Bank Ltd* AIR 1967 SC 1494, (1967) Cr LJ 1380 .

20 *Asharfi Lal v State* AIR 1952 All 306, p 307 .

21 For detailed commentary see *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

22 *Capt Gurbakhsh Singh v State* AIR 1960 Punj 211, p 214, (1960) Cr LJ 571 .

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

[23][S. 228A.

Disclosure of identity of the victim of certain offences, etc.--

(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an [24][offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E] is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall

also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is--

(a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) by, or with the authorisation in writing of, the victim; or

(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim:

Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.1745

Explanation.--For the purposes of this sub-section, "recognised welfare institution or organisation" means a social welfare institution or organisation recognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the previous permission of such court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Explanation.--The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.]

Comments

1. Scope and Object

An alarmingly large increase in crime against women in the recent past in India, necessitated some drastic changes in this Code and by Criminal Law (Amendment) Act 1983 and the Criminal Law (Amendment) Act 2013, s 376, IPC, the only section dealing with rape, was substituted by a more effective, rigorous and exhaustive new section and other new ss 376A, 376B, 376C, 376D and 376E, IPC, were introduced to deal with sexual intercourse with women not amounting to rape, by persons occupying dominating position in certain peculiar circumstances. As many sexual offences used to go unpunished for want of information to the police and other authorities, for fear of humiliation in the public eye, this section was enacted to save the victims of sexual assaults, punishable under ss 376, 376A, 376B, 376C, 376D or 376E, IPC, from undue publicity and defamation.

The section imposes a ban on the publication of the names or other particulars disclosing the identity of the victims of the aforesaid offences, without the permission of the police, the victims themselves, or recognised welfare institutions or organisations. Even the proceedings of cases relating to such offences, before the courts, and their judgments, except the judgments of High Courts and Supreme Court, cannot be printed or published without the previous permission of such courts. The breach of these provisions has been made a cognizable offences by this new section.

2. Rape and Sexual Intercourse--Definition of

The section applies when either there is an allegation or it is found that rape or sexual intercourse as stated above has been committed with a female. The word1746 'rape' has been defined by s 375, IPC and means a sexual intercourse with a woman under the circumstances falling under any of the six clauses of that section. The term 'sexual intercourse' has however, not been defined by this Code. Explanation to s 375 simply states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. This explanation should also apply to sexual intercourse mentioned

in ss 376A, 376B, 376C and 376D, though the same does not amount to rape. An attempt to commit rape or sexual intercourse or any other sexual activity, short of penetration, though it may be an offence falling under ss 354, 509 or any of the ss 376, 376A, 376B, 376C or 376D with the aid of s 511, cannot amount to sexual intercourse and the restrictions imposed by this section will not apply to printing and publishing the name *etc.* of the victim of that offence.

By the Criminal Law (Amendment) Act, 2013, the definition of rape has been expanded, but the eseential ingredients of the offence of rape remain the same, while the sentence has been enhanced. See commentary under ss 375, 376, 376A-E .

3. 'Prints or Publishes'--Meaning of

The terms 'prints' and 'publishes' have not been defined by this Code. The word 'print' commonly means to produce a book, picture or other matter by applying inked types, blocks or plates to paper, vellum etc, and includes cyclo-styling.[25]

The word 'publish' according to its dictionary meaning, denotes 'to make generally known, make known to a third party, announce formally, issue copies of books, *etc* for sale to the public'. According to the Supreme Court, 'publication' is the act of publishing anything; offering it to public or rendering accessable to public scrutiny; making known of something to the public for a purpose.[26]Publication necessarily implies some act and the mere knowledge of a person cannot be regarded as publication.[27]

Section 499, IPC contemplates that one can publish an imputation by words spoken or intended to be read, or by signs or by visible representation. Here what is to be published is the name or the particulars sufficient to disclose the identity of the victim of rape or sexual intercourse contemplated by sub-s (1) and s 499 may not be of any help in the interpretation or appreciation of the provisions of s 228A, and the printing and publication made punishable under this section should be understood to be made by any common mode of printing and publication.

When s 228A, IPC has been enacted keeping in view the social object of preventing social victimisation or ostracism of the victim of a sexual offence, publishing the photographs of such victims in newspapers, journals and magazines would certainly fall under the category of making disclosure of the identity of the victim and thereby such act would fall under s 228A, IPC .[28]1747

Name of Rape Victim should be Avoided in Judgment

The name of a rape victim should not be disclosed.[29] Of course, if it is absolutely unavoidable as, for example, when framing the charge, the identity of the victim may be disclosed, but not otherwise. Sessions judges would be well advised to ensure that when they are dealing with cases of sexual offences, the name of the victim should not be disclosed unless it is unavoidable.[30]

Section 228-A of the IPC makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under ss 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. The restriction, no doubt, does not relate to printing or publication of judgment by High Court or the Supreme Court. But keeping in view the social object of preventing social victimisation or ostracism of the victim of a sexual offence for which s 228-A has been enacted, it would be appropriate that in the judgments, be it of the Supreme Court, High Court or lower court, the name of the victim should not be indicated. The Supreme Court had chosen to describe her as 'victim' in the judgment.[31]

4. Sub-section (2)--Exceptions to the Section

This sub-section serves as an exception to sub-s (1) and permits the printing and publication of the

name or other particulars, making known the identity of the victim of a sexual assault by the following:

(a) the officer-in-charge of the concerned police station or the investigating officer of the case, provided he does so in good faith and for the purposes of investigation; or
(b) the victim herself; or
(c) the next-of-kin of the victim if she is dead or minor or of unsound mind; or
(d) the chairman or secretary of a recognised welfare institution or organisation, in case he has been authorised in writing by her next of kin; if the victim is dead or a minor or of unsound mind.

Authorisation to be in Writing

Where the victim is dead or a minor or of unsound mind, if her next of kin, does not himself resort to printing or publishing her name and identity, he may disclose the same to the chairman or secretary of a recognised welfare institution or organisation, authorising him in writing to get the same printed or published. The proviso to sub-s (2) makes it clear that the next of kin of the deceased or a legally disabled victim cannot authorise any person or institution other than the chairman or secretary of a1748 recognised welfare institution or organisation, which according to the explanation to sub-s (2) means a social welfare institution or organisation recognised in this behalf by the central or state government. Clauses (a) and (b) above also speak of the authorisation in writing. Such further authorisation in writing by the chairman or secretary of the recognised welfare institution or organisation is not inferrable from this sub-section, if he decides to act on the authority of the next-of-kin of the deceased or legally disabled victim. It appears that this sub-section is not happily worded in some respects.

5. An Offence Referred to in Sub-section (1)

This expression used in sub-s (3) means an offence under s 376, or s 376A, or s 376B, or s 376C or s 376D of the IPC, mentioned in sub-s (1) and not the offence of printing and publishing, defined by that sub-section.

6. Sub-section (3)--Court Proceedings not to be Printed or Published

The yellow press, with a profit earning motive, is always interested in covering the day-do-day proceedings of sensational cases pending in courts and giving wide publicity to such cases and the judgments ultimately delivered therein. This many a times causes a lot of embarrassment to the victims and also adversely affects their marriage prospects, if unmarried. To save them from such embarrassment *etc*, the printing and publishing of proceedings before a court with respect to offences under ss 376, 376A, 376B, 376C or s 376D, without the previous permission of such court, has been made a cognizable offence.

Sub-Section (3) Applies to Certain Judgments also

One commits an offence under this sub-section even while printing or publishing, any matter in relation to any proceeding before a court, the accused may neither name the victim, nor otherwise disclose her identity. The explanation to sub-s (3) makes it clear that this sub-section is not confined to the proceedings before a court upto their termination, but also applies to judgments of trial courts or other subordinate courts. The only exception permitted by the explanation is that the judgments of the High Courts and the Supreme Court can be printed or published with immunity, without any prior permission.

Consideration for Permission

While granting permission, the courts are expected to act with restraint and circumspection, and the permission to print and publish any matter in relation to such proceeding is not to be granted on a mere asking, otherwise the very purpose of enacting this sub-section is likely to be defeated. The interest of the victim and the likely prejudice and embarrassment to her and her family members should be given due consideration when a permission to print or publish such matters is sought.

7. Procedure

An offence under this section is cognizable and bailable, but is not compoundable. It is triable by any magistrate.

The limitation for taking cognizance of an offence under this section is three years.1749

8. Complaint

The general principle is that anybody can set the law in motion, in order to bring to the notice of the court, the offence committed by the person concerned. According to s 2(d), CrPC, a 'complaint' means any allegation made orally or in writing to a magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence. Any person, as a public interest litigant, can approach the court to file the complaint against the accused requesting it to take action against the offence committed by him under the Code of Criminal Procedure . So, this definition section also makes it clear that unless there is a specific prohibition, the *locus standi* of the complainant cannot be questioned.[32]*Locus standi* of the complainant is a concept foreign to criminal jurisprudence, save and except cases where the statute creating an offence, provides for the eligibility of the complainant, by necessary implication and the general principle gets excluded by such statutory provision.[33]

The question arises whether the complaint under s 228A, IPC can be made by any person or by only either of the three persons mentioned in the sub-section of s 228A, who alone are competent to give authorisation to publish the name of the victim.

The whole reading of s 228A would only disclose the eligibility of the person who can give an authorisation or permission to make a publication. It does not provide for the eligibility of the persons who could file the complaint. In fact, there are so many other sections found available in the CrPC which provide for the eligibility of the persons who alone can launch a prosecution against the accused. Some of the sections are ss 195 and 198, CrPC, *etc*. This provision, namely, s 228A(2) cannot be construed to be analogous of the same. So, in the absence of any specific prohibition for the filing of a complaint by persons other than those eligible, it cannot be held that the complaint is not filed by a competent person.[34]

9. Charge

The following form of charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name and the accused*) as follows:
>
> That you, on or about the.....day of.....at.....printed (*or published*) the name.....(*or the particulars sufficient to ascertain the identity of*.....) .....(*mention the mode or medium*) against whom an offence under section..... IPC was alleged (*or found to have been committed*) without the authority of the person competent to give such permission, [or printed (*or published*) a matter.....(*specify*) in relation to case

no.....before.....in respect of an offence under section..... IPC (*or the judgment delivered by that court in that case*).....(*mention the mode or medium of printing or publishing*) without the previous permission of that court] and that you thereby committed an offence punishable under section 228A(1) (*or section 228A(3) as the case may be*) of the Indian Penal Code, and within the cognizance of this Court.

And I hereby direct that you be tried by this court on the said charge.1750

10. Proof

To establish an offence under this section the prosecution has to prove:

(a) that the accused printed or published (a) the name, or (b) some matter sufficient to establish the identity of the woman;
(b) that against such woman an offence under s 376, or s 376A, or s 376B, or s 376C, or s 376D, IPC was alleged or found to have been committed; and
(c) that the name or the particulars establishing the identity of such woman were printed or published, without a written order or authorisation by (a) the concerned officer-in-charge of the police station; (b) the police officer investigating into the case; (c) the victim; (d) the next-of-kin of the victim if she is dead, or minor or of unsound mind (nor otherwise by any of them); or (e) the chairman or secretary of a social welfare institution or organisation recognised by the central or state government, duly authorised in writing by the next-of-kin of the victim, in case she is dead or minor or of unsound mind.

In case the offence falls under sub-s (3) of this section, the prosecution has to prove:

(a) that the accused printed or published any matter in relation to any proceeding before a court, with respect to an offence under s 376, or s 376A, or s 376B, or s 376C, or s 376D, IPC or the judgment delivered in such case by any court other than a High Court or Supreme Court; and
(b) that such printing or publication was made without the previous permission of the concerned court.

In either case the burden to prove the order or authorisation or the permission required by sub-s (2) or (3), shall be on the accused. A mere allegation that rape or sexual intercourse, as contemplated by sub-s (1), was committed against a particular woman, is sufficient for a prosecution under this section and it is not necessary to prove that such act, in fact, was committed with her.

23 Inserted by Act 43 of 1983, s 2 (wef 25-12-1983).

24 Substituted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 4 (wef 3-2-2013) for the words, figures and letters 'offence under section 376, section 376A, section 376B, section 376C or section 376D '.

25 *Habibunnissa Begum v LI Corpn* AIR 1980 All 147 (DB) .

26 *State of Madhya Pradesh v Shri Ram Raghubir Prasad Agarwal* (1979) 4 SCC 686, p 695 .

27 *Sporsomanik Siem v Rokendro* AIR 1955 Assam 83 .

28 *National Federation of Indian Women v Government of Tamil Nadu* 2007 Cr LJ 3385, p 3387 (Mad) (DB) .

29 *State of Punjab v Gurmit Singh* AIR 1996 SC 1393, (1996) Cr LJ 1728 ; *Dinesh v State of Rajasthan* AIR 2006 SC 1267, (2006) 3 SCC 771, (2006) Cr LJ 1679 (SC) ; *State of Orissa v Sukru Gouda* 2009 Cr LJ 831 (833) (SC), AIR 2009 SC 1019, 2008 (16) Scale 189, (2009) 2 SCC 118 ; *Satya PalAnand v State of MP* 2013 (10) Scale 88, II (2015) CCR 7 (SC), (2014) 4 SCC 800 (Addl . Superintendent of Police disclosed the identify of the victim of gang rape. Supreme Court issued show cause notice to the Addl. Superintendent of Police as to why case under s 228A, IPC be not registered against him).

30 *Mohd Alam v State (NCT of Delhi)* (2007) Cr LJ 803 (Del)(DB).

31 *Dinesh v State of Rajasthan* AIR 2006 SC 1267, (2006) 3 SCC 771, (2006) Cr LJ 1679 (SC) ; *Hayat Singh v State* (2005) Cr LJ 2473 (Uttaranchal) ; *Bhupinder Sharma v State of HP* (2004) Cr LJ 1 (SC) ; *State of Karnataka v Puttaraja* (2004) Cr LJ 579 (SC) .

32 *R Lakshmipathi v S Ramalingam*(1998) Cr LJ 3683 (Mad).

33 *AR Antulay v Ramdas Srinivas Nayak* AIR 1984 SC 718, (1984) Cr LJ 647, (1984) SCC (Cr) 277 .

34 *R Lakashmipathi v S Ramalongam*(1998) Cr LJ 3683 (Mad).

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

S. 229.

Personation of a juror or assessor.--

Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned, empanelled or sworn as a juryman or assessor in any case in which he knows that he is not entitled by law to be so returned, empanelled or sworn, or knowing himself to have been so returned, empanelled or sworn contrary to law, shall voluntarily serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section deals with the false personation as a juror or assessor. For other offences dealing with false personation, see s 140, IPC (personation of soldier, or airman), ss 170 and 171, IPC (personating a public servant); s 171F, IPC (personation in an1751 election) and s 205, IPC (false personation for the purpose of the act or proceeding in a suit or prosecution).

The system of trial with the aid of assessors was abolished by Act 26 of 1955 and that of trial with the aid of jury, went with the CrPC 1898 and no similar provision in this respect was made in the CrPC 1973, replacing it with effect from 1 April 1974. As a matter of fact, the provision regarding juryman and assessor in clause 'fifth' of s 21, IPC and this section should be deleted as they are of mere academic interest now.

The section is in two parts. The first part makes it an offence to intentionally cause, or knowingly suffer oneself to be returned empanelled or sworn as a juryman, knowing that he is not entitled by law to be so returned, empanelled or sworn. The second part makes it an offence to voluntarily serve as a juror or assessor, knowing himself to be returned, empanelled or sworn contrary to law. In the former, he has guilty knowledge before being returned, empanelled or sworn, whereas in the latter, he has the guilty knowledge after he was returned, empanelled or sworn.

2. 'By Personation or Otherwise'--Meaning of

To constitute an offence under this section, it is not necessary that the accused should personate another. It is enough if he is not entitled to serve as a juror or assessor, and acts in that capacity.

3. 'Empanelled'--Meaning of

A person was 'empanelled' when he was chosen to serve as a juror as provided in ss 276 - 279, CrPC 1898.

4. 'Sworn'--Meaning of

Section 281, Crpc 1898 provided for the jurors chosen, to be sworn under the Indian Oaths Act 1873, and the word 'sworn' occurring in this section refers to that requirement.

5. 'Not Entitled by Law to be Returned' *etc*--Meaning of

Under s 319, CrPC 1898, all persons between the ages of 21 and 60 years were, unless exempted under s 320 of that Code, liable to serve as jurors. Under s 321, CrPC 1898, the sessions judge and the collector or any other officer appointed by the State Government, had to prepare and make out a list of persons liable to serve as jurors and qualified in the judgment of the sessions judge and collector or the other officer so appointed, to serve as such, and not likely to be successfully objected to under s 278, cll (b)-(h), both inclusive of the old CrPC . Only the persons included in this list were entitled to serve as jurors. Others were not so entitled. The section does not apply to persons exempted under s 320, CrPC 1898.

6. Procedure

The offence under this section is not cognizable and a summons shall ordinarily issue in the first instance. It is bailable but not compoundable and is triable by a magistrate of the first class.

The period of limitation for taking cognizance of an offence under this section is three years as prescribed by s 468, CrPC 1973.1752

7. Charge

The following form of charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:

That on or about.....day of.....you (*) intentionally caused (*or knowingly suffered yourself*) to be returned (*or empanelled or sworn*) as a juryman (*or assessor*) in case No .....of .....tried by.....when you knew that you

were not entitled to be so returned (*or empanelled or sworn*) (*or you, knowing yourself to have been so returned* (*or empanelled or sworn*) contrary to law, voluntary served on such jury (*or as such assessors*)], and that you thereby committed an offence punishable under section 229 of the Indian Penal Code, within my cognizance.

And I hereby direct that you be tried on the said charge.]

8. Proof

In order to establish a charge under this section, the prosecution has to prove:

(a) that the accused was returned, empanelled or sworn as a juror or assessor;
(b) that he was not entitled by law to be so returned or empanelled, or sworn;
(c) that he caused or suffered himself intentionally or knowingly to be so returned, empanelled, or sworn by personation, or otherwise; and
(d) that he, at the time when he was so returned or empanelled or sworn, knew that he was not entitled to be so returned or empanelled, or sworn.

Or prove points (i) and (ii) as above, and further:

(a) that the accused knew that he had been returned or empanelled, or sworn contrary to law; and
(b) that he nevertheless voluntarily served in that capacity.

Indian Penal Code (Act XLV of 1860)

Chapter XI

Of False Evidence and Offences against Public Justice

[35][229A.

Failure by person released on bail or bond to appear in Court.--

Whoever, having been charged with an offence and released on bail or on bond without sureties, fails without sufficient cause (the burden of proving which shall lie upon him), to appear in Court in accordance with the terms of the bail or bond, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Explanation.--The punishment under this section is--

(a) in addition to the punishment to which the offender would be liable on a conviction for

the offence with which he has been charged; and

(b) without prejudice to the power of the Court to order forfeiture of the bond.]1753

COMMENTS

Where the trial of the case is not due to the absence of the accused, the accused cannot be prosecuted for offence under s 229A, IPC .[36]

In the instant case the PW1 was examined five years and PW2 was examined seven years after the framing of the charge, the case was adjourned as the Presiding Officer was on leave, the witnesses had not turned, the trial of the case could not be said to be delayed due to the absence of the accused, charge under s 229A, IPC was not framed against the accused.[37]1754

35 Inserted by the Code of Criminal Procedure (Amendment) Act, 2005 (25 of 2005), s 44(c) (wef 23 June 2006).

36 *Uddhavrao Nivrutti Sarkale v State of Maharashtra* 2011 Cr LJ 1058 (Bom) .

37 *Uddhavrao Nivrutti Sarkale v State of Maharashtra* 2011 Cr LJ 1058 (Bom) .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 230.

"Coin" defined.--

[3][Coin is metal used for the time being as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used.]

Indian coin.--[4][Indian coin is metal stamped and issued by the authority of the Government of India in order to be used as money; and metal which has been so stamped and issued shall continue to be Indian coin for the purposes of this chapter, notwithstanding that it may have ceased to be used as money.]

Illustrations

(a) Cowries are not coin

(b) Lumps of unstamped copper, though used as money, are not coin.

(c) Medals are not coin, in as much as they are not intended to be used as money.

(d) The coin denominated as the Company's rupee is [5][Indian coin].

[6][(e) The "Farrukhabad rupee", which was formerly used as money under the authority of the Government of India, is [7][Indian coin] although it is no longer so used.]1758

Comments

1. Scope

The IPC draws a distinction between 'coins' and 'Indian coins'. A 'coin' is defined as a metal used for the time being as money, and stamped and issued by the authority of some State or sovereign power in order to be so used.[8] An 'Indian coin' is defined as metal, stamped and issued by the authority of the Government of India in order to be used as money; and metal which has been so stamped and issued shall continue to be an Indian coin for the purposes of the IPC,[9] notwithstanding that it may have ceased to be used as money.

This section only defines 'coin' and 'Indian coin'. If an offence is committed in relation to the 'Indian coin' (s 231, IPC), it is almost invariably more heavily punished than if it was committed in relation to money stamped and issued by a foreign sovereign power.

2. Legislative Changes

Before the amendment of this section by the Indian Penal Code (Amendment) Act 1872, coin was defined as 'metal stamped by the authority of some government'. At that time s 17 of the IPC defined 'government' as denoting 'the person or persons authorised by law to administer the executive government of any part of British India'. It thus happened that the coin of the native states of India was not 'coin' within the meaning of the IPC . The definition of 'coin' was amended by the Amendment Act of 1872, in order to check the practice of counterfeiting the copper coin of the Indian states. The words 'for the time being' were introduced as it was suggested that the definition might possibly be held to include old coins, such as those that Graeco-Bactrian states formerly used as money, but which were now regarded only as a curiosity.

The section was again amended by Act 6 of 1896. The reasons for the amendment were stated as follows:

> At present 'coin' is defined as metal used for the time being as money, and the consequence is that, if any offence under these sections has to be proved, it has to be shown that the coin was in use at the time of the offence as money. There is a process in coinage which is provided for by law, namely, in the Indian Coinage Act, which is termed the calling in of coin. This gives government an authority which it exercises under certain circumstances to call in coin and to cause it after a certain time to cease to be used as money. It is extremely doubtful whether if the coin so called in has been counterfeited, a court would hold that it was in use as money after the date of the proclamation which had called it in. After a certain time it would certainly cease to be in use as money. This power to call in money has been exercised in one case--and I think in only one,--namely, that of the Farrukhabad rupee which immediately preceded the existing government rupee, or, as it was at first called, the Company's rupee. It was called in 1877. We have ascertained that this coin has been recently largely1759 manufactured in Bombay. The manufacture has been carried on perfectly openly, and it has been brought to our notice by some of our Political officers who showed that it was being imported into Central India and Rajputana in considerable quantities. This manufacture, we are unable, under the present law, to stop, because that particular coin is not in use at present as money. The immediate practical object of the change which I propose to the Council to make in the Indian Penal Code is to put a stop to this particular coinage. But it is obvious that the same necessity may arise in any future case. We may, at any time, find reason to call in any particular issues of the rupee, and it would be an extremely peculiar state of the law if an act which is today reckoned so harmful as to be punishable with ten years' imprisonment should tomorrow become a perfectly innocent one. It is to protect our action against a consequence of this kind that the measure is proposed
>
> But there is a special necessity peculiar to India which arises in this connection. In a great part of the Native states of India coin is not current in the same legal sense in which it is current in British India; that is to say,

> there is no law of legal tender; and the consequence is that many kinds of coins pass in those Native states from hand to hand, not by reason of being legal tender, but by reason of each person who receives them knowing that they are customarily current in his own or other Native states, and that any other person will receive them in the same way as he receives them. From the fact that these Farrukhabad rupees were imported in such large quantities into Rajputana and Central India...it seems to me, therefore, that we are under some obligation to the Native states in this matter not to permit a coin which passes, or which certainly might pass, there from hand to hand as an ordinary circulating coin, to be fabricated by private individuals in British India.[10]

Illustration (e) also was added by the same Act.

The word 'Central' was added before 'Government' and the words 'of India' were omitted after the word 'Government' by the Government of India (Adaptation of Indian Laws) Order 1937. The original second paragraph was substituted by the present paragraph by the Adaptation of Laws Order 1950. The word 'had' was substituted for the word 'as' by the Adaptation of Laws Order (Third Amendment) 1951. In illusts (d) and (e), the words 'Indian coin' were substituted for the words 'the Queen's coin' by the Adaptation of Laws Order 1950.

3. Essentials of a Coin

The essentials of a 'coin' are: (a) metal used as money; and (b) stamped, and issued under state authority. Section 3 of the Indian Coinage Act 1906, empowers the Central Government to establish or abolish a mint, and under s 6 of that Act, coins may be coined at the mint for issue, under the authority of the Central Government, of such denominations, of such dimensions and designs, and of such metals or of mixed metals, of such composition as the Central Government may, by notification in the Official Gazette, determine.

4.No Metal to be used as Money without the Authority of the Central Government

Section 3 of the Metal Tokens Act 1889, prohibits the making of copper or bronze or of any other metal or mixed metal, whether stamped or unstamped, intended to be used as money except by the authority of the Central Government. Section 6 of the1760 said Act prohibits receipt by local authorities and railways as money or metal which is not coin.

No piece of copper or bronze or of any other metal or mixed metal, which, whether stamped or unstamped, is intended to be used as money, shall be made except by the authority of the Central Government.

Section 7 of the Coinage Act 1906 authorises the Central Government to prescribe the standard weight and remedy (*i.e.*, variation from standard weight and fineness).

5. 'Used for the Time being as Money'

The word 'coin' in this section means a coin which is used for the time being as money, *i.e.*, which is current. A coin which is not current will not be deemed a coin.[11]

To counterfeit a coin of Emperor Akbar's time is not an offence under s 231, as the test of 'money' is the possibility of it being used as a current medium of exchange in the market.[12] Ancient coins which are out of circulation are not coins.[13]

A coin of the time of Emperor Akbar or a gold mohur of the reign of Shah Jahan cannot be deemed to

be a coin, inasmuch as it is not used for the time being as money.[14] But in the case of an Indian coin the section expressly states that the metal which has been stamped and issued by the Government of India shall continue to be the Indian coin for the purposes of this chapter notwithstanding that it may have ceased to be used as money. Now a coin may have ceased to be used as money in various ways. It may, for instance, be a coin which has been superceded, or it may pass into territories of some independent chief where it is not accepted as legal tender, or it may be that it has been defaced so badly that no one would accept it as a current coin. But it may still, within the meaning of this section, be deemed to be Indian coin, even though it has ceased to be used as money. Furthermore, the mere fact that a coin is being used as in an ornament by soldering a ring to it does not transform it absolutely into a new article. By removal of that ring the coin in a defaced form will re-appear and may be capable of being accepted by ignorant villagers.[15]

Illustration (c)--This illustration makes it clear that a medal is not a coin. If a person fraudulently represents it to be money to an ignorant villager and the latter is deceived thereby, he would be guilty of cheating.

Illustration (e)--The Murshidabad rupee stood on the same footing as the Farrukhabad rupee and are, therefore, 'Indian coins'.[16]

6. Legal Tender not Necessary

It is not necessary, to satisfy the ordinary definition of money, that a coin should be a legal tender receivable at a value in rupees fixed by the law. Gold mohurs having absolutely no fixed value, but having a current value, which is not ascertained merely1761 by weighing them as lumps of gold, but attaching to them as coins, are 'coin' for the time being used as money.[17]

7. Extradition

All offences in this chapter[18] are 'extradition offences'.[19] Extradition means delivery of a fugitive criminal or accused person to another state. Fugitive criminal means an individual who is accused or convicted of an extradition offence committed within the jurisdiction of a foreign state or a commonwealth country and is, or is suspected to be, in some part of India.[20] Extradition offence has been defined by s 2(c) of the Extradition Act 1962 and means an offence provided for in the extradition treaty, in relation to a foreign state having such treaty and in relation to any other foreign state or a commonwealth country an offence specified in the second schedule or in the notification issued thereunder.

3 Substituted by Act 19 of 1872, s 1, for the original first paragraph.

4 Substituted by the AO 1950, for the former paragraph.

5 Substituted by the AO 1950, for 'the Queen's coin'.

6 Inserted by Act 6 of 1896, s 1 .

7 Substituted by the AO 1950, for 'the Queen's coin'.

8 Indian Penal Code 1860, s 230, para 1.

9 *Ibid*, ss 230-263A .

10 Gazette of India, 1895, Pt 6, p 320.

11 *R v Bapu Yadav and Rama Tulshiram* 11 Bom HCR 172 ; *Emperor v Khushali* ILR 29 All 141, (1906) 4 Cr LJ 453 .

12 *Ibid.*

13 *Ibid.*

14 *Emperor v Khushali* (1907) ILR 29 All 141, (1906) 29 All 141, 4 All LJ 453 .

15 *Mehtab Rai v Emperor* AIR 1926 All 321, p 323 .

16 *R v Deni* ILR 28 All 62 ; *Baman v Emperor* 1 PR 1903 (Cr) .

17 *Reg v Kunj Beharee* 5 NWPHC 18 .

18 Indian Penal Code 1860, ss 231 - 263A .

19 See the Extradition Act 1962.

20 *Ibid*, 2(f).

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 231.

Counterfeiting coin.--

Whoever counterfeits or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.**--**A person commits this offence, who intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin.

Comments

1. Scope

This section penalises counterfeiting 'coin', and the next section penalises counterfeiting 'Indian coin'. In either case the counterfeiting must be of 'coin' and 'Indian coin' respectively as defined in s 230, IPC .

The offence of counterfeiting consists in the mere fact of counterfeiting.[21] It is not necessary that the counterfeit coin should be made with the primary intention of it being passed as genuine; it is sufficient if the resemblance to the genuine coin is so close that it is capable of being passed as such.[22] For the detection of counterfeit coins, one need not be an expert. Experience shows that many have a knack and1762 capacity to mark it out readily even though the same is mixed up with the good ones.[23]

The accused appellant was convicted for circulating fake currency notes as guilt of accused had been proved beyond reasonable doubt.[24]

2. 'Counterfeits'

For the meaning of the term 'counterfeit', s 28, IPC and notes thereunder may be referred to.

3. Counterfeiting Involves an Intention to Deceive

To be counterfeit within the meaning of the statute, the coin must resemble or be apparently intended to resemble or pass for a genuine coin,[25] but this resemblance is a matter of fact which the court has to judge upon the world.[26] Thus, counterfeiting with some small variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is counterfeiting in a different metal, if in appearance it be made to resemble the true coin.[27] The word 'counterfeiting' involves an intention to practise deceit by causing one thing to resemble another thing[28] and when a counterfeit coin is such an imitation of a genuine one as might deceive people, the presumption of an intention to deceive arises.[29] The limitation need not be exact[30] but must be sufficient to deceive persons using customary caution in receiving money. Thus, a trifling variation in effigies or arms[31] or the absence of all marks of this kind, in order to imitate worn coin,[32] will not prevent the coin being counterfeit. But the absence of any apparent resemblance[33] is a good defence, unless it is due to the fact that the process of manufacture has been imperfectly carried out or interrupted at an early state.[34]

Thus, where a person was apprehended whilst dipping round blanks of brass silver to *aqua fortis* which gave them the appearance of lead, but, when rubbed, they gave the appearance of silver, it was held that he was guilty of counterfeiting coin.[35]

4. Worn out Impression--Effect

A blank that is smooth and made like a piece of legal coin, the impression of which is worn out and yet sufficient to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of the realm to bring the coiners of such blanks within the statute; these blanks having some reasonable likeness to that coin which has been defeated by time, and yet passed in circulation.[36]1763

A files a genuine sovereign round the edge so as to reduce it by 1/24, and adds a new milling. *A* is guilty of counterfeiting coin.[37]

5. Consequences of Restoring a Coin to its Original State

To restore a coin to its original state does not amount to counterfeiting, unless the coin had been materially altered at any time, *e.g.*, to remove a ring from a coin which has formed part of the necklace or other ornament and to work up the face of the coin where the ring had been attached.[38]

It is not necessary that the counterfeit coin should be counterfeit of a current coin.[39] To counterfeit a coin of Emperor Akbar's time is, however, not an offence under ss 230-231 of the IPC, since the test of 'money' is the possibility of its being used as a current medium of exchange in the market.[40]

6. 'Performs any Part of the Process of Counterfeiting'

The offence of uttering or putting in circulation is deemed complete even if the counterfeiting is not finished or perfected, nor is the coin in a fit state to be uttered.[41]

7. Procedure

An offence under this section is cognizable, non-bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

8. Charge

The following form of the charge may be adopted:

I, (*name and officer of magistrate, etc*), hereby charge you (*name of accused*) as follows:

That you, on or about the..... day of..... at....., counterfeited (*or knowingly performed any part of the process of counterfeiting, to wit*.....) a coin to wit..... and that you thereby committed an offence punishable under section 231 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

9. Proof

To establish an offence under this section the prosecution must prove:

(i) that the accused knowingly counterfeited or performed any part of the process of counterfeiting; and
(ii) that the article counterfeited, or intended to be counterfeited, was a coin.1764

10. Extradition

Offences under this section and all succeeding sections of the chapter are extradition offences.[42] Synopsis note 7 under s 230 may be referred to.

21 1 Hale PC 228-29.

22 *Emperor v Qadir Bakhsh* ILR 30 All 93, (1907) 4 All LJ 776, (1907) 6 Cr LJ 395 ; *Amrit Soner v Emperor* AIR 1919 Pat 330, (1919) 20 Cr LJ 439 .

23 *Nava v State of Mysore* AIR 1957 Mys 24, p 25, (1957) Cr LJ 381 .

24 *C Ronald v UT of Andaman Nicobar Islands* 2012 Cr LJ 672, (2011) 12 SCC 428, 2011 (9) Scale 59 .

25 1 Hawk, c 17, s 81 .

26 1 Hale 178, pp 184, 211, 215.

27 *Russel on Crime*, eleventh edn, p 1733.

28 *Lal Chand v R* (1912) 13 Cr LJ 252 .

29 Indian Penal Code 1860, s 28, expln 2; *Emperor v Quadir Baksh* ILR 30 All 93 .

30 *Public Prosecutor v Konazirumala Reddi* 1 Weir 219 .

31 *R v Robinson* 34 LJMC 176 .

32 *Walsh*'s case, East PC 164.

33 *R v Varley* (1914) 10 Cr App Rep 125 (CCA) .

34 Madras HC Rules, 17 November 1863, 1 Weir 71.

35 *R v Case* 1 Leach 145 ; *R v Lavey* 1 Leach 153 (CCR) .

36 *R v Wilson* (1783) 1 Leach 285 .

37 *R v Hermann* LR 4 QBD 284 .

38 *R v Mahommad Hussain* ILR 23 All 420 .

39 Re *Kandanury Annappa* 1 Weir 221.

40 Re *Premsookh Dass*1870 PR 38.

41 *R v Harris* (1776) 1 Leach 135 ; *R v Varley* (1771) 1 Leach 76 .

42 Indian Extradition Act 15 of 1903, Sch I. Now, repealed.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 232.

Counterfeiting Indian coin.--

Whoever counterfeits, or knowingly performs any part of the process of counterfeiting [43][Indian coin], shall be punished with [44][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

This section penalises counterfeiting the Indian coin. The only difference between this and the preceding section is that this section imposes a heavier penalty than the previous section. The protection of the coin of the country is greater, hence the offence under this section is visited with heavier penalties.

Commentary under the same heading in s 235 may be referred to.

2. Legislative Changes

The words 'Queen's coin' were replaced by the words 'Indian coin' both in the margin and in the body of the section by the Adaptation of Laws Order 1950. The words 'imprisonment for life' were substituted for the words 'transportation for life' by Act 26 of 1955, s 117 and Schedule.

3. 'Counterfeits'

Commentary under ss 28 and 231 may be referred to.

If coins are made to resemble genuine coins and the intention of the makers is merely to use them in order to foist a false case upon their enemies, those coins do not come within the definition of 'counterfeit coins' given in the IPC .[45]

4. Coining of False Rupee not for Gain--Effect

Where coining of false rupees was not done for the purpose of making gain by passing the false coins off on the public as good ones, but for the purpose of getting them secretly into the houses of the enemies of the accused against whom they were1765 making false charge to the police of theft accompanied by a request for a house search; it was held that there was no counterfeiting of Indian coin and that the accused could not be convicted under this section, though they might be convicted under s 235 for possessing instruments or material for counterfeiting.[46]

5. Intention to Deceive Sufficient

In order to constitute offences under ss 232 and 235, it is not necessary to prove that the specious coins should go into circulation and be used as money. It is sufficient that there was an intention to practise deception by means of the imitation.[47]

It is not an offence under this section to remove the ring from a coin which has been used to form part of a necklace or other ornaments and to work up the face of the coin wherefrom the ring has been removed.[48]

6. 'Knowingly'

Where a person was charged with having parted with a double piece coin, whitened with quick-silver, for the purpose of changing it for copper-coins as rupees; it was held that he was not liable to be convicted under s 241, unless, at the time of whitening the coin, he intended thereby to practise deception, or knew it to be likely that deception would thereby be caused. Otherwise, the accused could be convicted of abetting the person, to whom the coin was given, to cheat the person to whom he was sent with the counterfeit rupee.[49] The fact that the accused has previously uttered counterfeit money, may be proved to show guilty knowledge under this section.[50]

7. 'Performs any Part of the process'

Notes to s 231 may be referred to.

8. 'Indian Coin'

Section 230 and discussion thereunder may be referred to.

9. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a court of session. A warrant shall ordinarily issue in the first instance. There is no time-limit for taking cognizance of an offence under this section.

10. Charge

The following form of the charge may be adopted:

I, (*name and office of sessions judge, etc*), hereby charge you (*name of accused*) as follows:

That you, on or about the ..... day of..... at....., did counterfeit (*or knowingly performed any part of the process of counterfeiting*) an Indian coin, to1766 wit....., and that you thereby committed an offence punishable under section 232 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

11. Proof

To establish an offence under this section, the prosecution has to prove:

(i) that the accused counterfeited or knowingly performed any part of the process of counterfeiting;
(ii) that the article counterfeited or intended to be counterfeited was an Indian coin.

Asking the accused to give a demonstration of preparing the counterfeit coin was held amounting to be witness against himself,[51] and as such is not punishable in law.

The minimum that would be required for prosecution to establish a charge under ss 232 and 235, IPC is that it establishes that the coins seized resembled the original and that the resemblance is such that it would deceive a person or that the accused knew that if the coin is used it would be likely to deceive a person. Merely by seizing the equipment and the coins found in the flat, the prosecution cannot establish its case against the accused. There cannot be a presumption that the equipment was being used for counterfeiting coins or that the coins found in the flat resemble genuine coins. Unless there is intrinsic evidence on record to show that the coins indeed resemble genuine coins, it is difficult to accept the case of the prosecution.[52]

In order to sustain a conviction under this section, the prosecution must show that the accused himself counterfeited, or knowingly performed any part of the process of counterfeiting the Indian coin. Direct evidence on such point is difficult and sometimes it is a matter of inference in the circumstances.[53]

12. Sentence

Separate sentences cannot be passed on an accused person for offences under this section and s 235 for counterfeiting an Indian coin and having in his possession instruments used for counterfeiting such coin.[54] It is not incumbent that when substantive terms of imprisonment are awarded any fine should be super added to those sentences. The fine imposed by the lower court in respect of all the three offences was accordingly cancelled.[55]

43 Substituted by the AO 1950, for 'the Queen's coin'.

44 Substituted by the Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

45 *Velayudham Pillai v Emperor* AIR 1937 Mad 711, p 712, (1938) 39 Cr LJ 51 ; *Sahebrao Awadhut Maratha v Emperor* AIR 1938 Nag 444, (1938) 39 Cr LJ 838 .

46 *Lal Chand v Emperor* (1912) 13 Cr LJ 252, 43 PLR 1912, 17 PWR 1912 (Cr) .

47 1899 PR 4.

48 *King-Emperor v Mahommad Husain* ILR 23 All 420 .

49 Re *Mahabiran*1883 PR 84, **contra**; *Emperor v Qadir Bakhsh* ILR 30 All 93, (1907) 6 Cr LJ 395 .

50 *R v Weeks* (1861) Le & Ca 18.

51 *State of Rajasthan v Ram Kumar* (1986) Cr LR 273 (Raj) .

52 *Shahid Sultan Khan v State of Maharashtra* (2007) Cr LJ 568 (Bom) (DB) .

53 *Ranchhod Mulu v State* (1961) 2 Cr LJ 472, p 474 (Guj) .

54 *Hayat v King-Emperor* (1904) 1 Cr LJ 946 ; *Queen v Nazur Ali* 6 NWPHCR 39 ; *Bishan Das v King-Emperor* AIR 1924 Lah 78 ; *King-Emperor v Johri* ILR 23 All 267, (1925) 24 Cr LJ 236, (1901) AWN 77 ; *Zamir Hussain v Crown* AIR 1950 Lah 97 .

55 *Krishnan Asari Gangadharan Asari v State of Kerala* (1957) KLT 215, p 219 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 233.

Making or selling instrument for counterfeiting coin.--

Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting coin, shall be punished with imprisonment of either1767 description for a term which may extend to three years, and shall also be liable to fine.

Comments

1. Scope

Making or selling any die or instrument for the purpose of being used for counterfeiting coin or Indian coin is punishable under ss 233 and 234, IPC respectively. Such conduct might, however, be justified under s 76 or s 79, *e.g.*, a die-sinker acting in concert with the police[56] or mint authorities.[57] A prisoner went to a die-sinker and ordered four dies of the size of a shilling to be made, stating them to be for two whist clubs. Before making them, the die-sinker communicated with the officers of the mint, who directed him to execute the prisoner's order, which he did by making the first and third dies, and from these counterfeit shillings could be coined. It was held that the prisoner was the principal as the

die-sinker was an innocent agent.[58] It is not necessary to show that a coin has actually been made with the instrument.[59]

2. Analogous Law

This section is analogous to s 9 of the English Coinage Act 1946[60] under which:

> Every person who, without lawful authority or excuse (the proof whereof shall lie on the person accused), knowingly makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his possession, any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould in or upon which there is made or impressed, or which will make or impress, or which is adopted and intended to make or impress, the figure, stamp or apparent resemblance of both or either of the sides of any current gold or silver (Cupro-nickel) coin or any part of both or either sides, shall be guilty of felony and on conviction thereof liable to imprisonment for life.

3. 'Performs any Part of the Process'

It is enough if the puncheon, *etc.*, impress a resemblance, whether exact or not, to the genuine coin such as would impose upon the world.[61]

If one is found to be associated with the performance of any part of the process of making or mending of any die or instrument, which is used, or which he knows, or has reason to believe, is intended to be used, for the purpose of counterfeiting coin, he is punishable under this part of the section. The offence of uttering or putting in1768 circulation is deemed complete even if the counterfeiting is not finished or perfected, nor the coin is in a fit state to be uttered.[62]

4. 'Reason to Believe'

Commentary under s 26 may be referred to.

5. 'Counterfeiting'

Commentary under ss 28, 231 and 232 may be referred to.

6. 'Instruments of Counterfeiting'

The following are common instruments used for counterfeiting:

(i) a galvanic battery;[63]
(ii) a press for coinage;[64]
(iii) a puncheon for coining, though without a counter-puncheon;[65]
(iv) a collar for gaining edges of coin;[66]
(v) a lead mould bearing a stamp of a coin.[67]

7. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. cognizance of an offence under this section can be taken within three years.[68]

8. Charge

The following form of the charge may be adopted:

I, (*name and office of magistrate, etc*), hereby charge you (*name of accused*), as follows:

That on or about the.....day of..... at ..... you made (*or mended or performed any part of the process of making or mending or bought or sold or disposed of*) a certain die (*or instrument*) to wit..... for the purpose of being used (*or knowing or having reason to believe that it was intended to be used*) for counterfeiting a coin, to wit ..... (*or a piece of Indian coin, to wit.....*), and that you thereby committed an offence punishable under section 233, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

9. Proof

In a prosecution under this section, the following facts have to be proved that:1769

(i) the accused made, or mended, or performed some part of the process of making or mending any die or instrument or that he bought, sold or disposed of it; and

(ii)

(a) the accused did so intending or knowing that such die or instrument would be used for the purpose of counterfeit coin; or

(b) he knew, or had reason, to believe that the same was intended to be used for such purpose.

56 Arch 655.

57 *R v Bannon* Mood CC 309.

58 *Ibid; R v Valler* (1944) 1 Cox 84 .

59 *R v Ridgely* 1 East PC 172 .

60 9 & 10 Geo 6, c 74, as amended by the Criminal Justice Act 1948, s 1 .

61 *R v Ridgeley* (1778) 1 Leach 189 .

62 *R v Harris* (1776) 1 Leach 135 ; *R v Varley* (1771) 1 Leach 76 .

63 *R v Gover* 9 Cox CC 282 .

64 *R v Bell* 1 East PC 169 .

65 *R v Ridgely* 1 East PC 172 .

66 *R v Moore* 2 C&P 235 .

67 *R v Lennard* 1 Leach CC 90 .

68 Section 468 - 469, Code of Criminal Proedure 1973.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 234.

Making or selling instrument for counterfeiting Indian coin.--

Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting [69][Indian coin], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section deals with the same offence which is covered by the preceding section, the only difference being that this section relates to Indian coin and provides for an enhanced punishment.

2. Legislative Changes

The words 'Indian coin' were substituted for the words 'Queen's coin' both in the margin and the body by the Adaptation of Laws Order 1950.

3. Analogous Law

This section is analogous to s 3 of the English Coinage Act 1946[70] which runs as follows:

> Every person who, without lawful authority or excuse (the proof whereof shall lie on the person accused), knowingly makes or mends, or begins or proceeds to make or mend, or buys or sells, or has, in his possession, any instrument, tool or engine adapted and intended for the counterfeiting of any current copper coin, shall be guilty of felony and on conviction thereof liable to imprisonment for a term not exceeding seven years.

4. 'Performs any Part of the Process'

If one is found to be associated with the performance of any part of the process of making or ending of any die or instrument, which is used, or which, he knows, or has reason to believe, is intended to be used, for the purpose of counterfeiting coin, he is1770 punishable under this part of the section. It is enough if the puncheon, *etc.*, impress a resemblance whether exact or not, to the genuine coin such as would impose upon the world.[71]

5. 'Reason to Believe'

Commentary under s 26 may be referred to.

6. 'Indian Coin'

Notes under s 230 may be referred to.

7. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a court of session. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

8. Charge

The following form of the charge may be adopted:

> I, (*name and office sessions judge, etc*), hereby charge you (*name of accused*) as follows:
>
> That you, on or about the ..... day of..... at....., did make (*or mend or perform any part of the process of making or mending, to wit....., or buy, sell or dispose of*) a certain die (*or instrument for the purpose of being used or knowing, or having reason to believe that it was intended to be used*) for counterfeiting an Indian coin, to wit....., and that you thereby committed an offence punishable under section 234 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

9. Proof

In a prosecution under this section, the following facts have to be established:

(i) that the accused made, or mended, or performed some part of the process of making or mending any die or instrument or that he bought, sold or disposed it of; and

(ii)

(a) that the accused did so intending or knowing that such die or instrument might be used for the purpose of counterfeiting Indian coin; or
(b) that he knew or had reason to believe that the same was intended to be used for such purpose.

It is not necessary to allege or prove any intent. The felony consists of knowingly being in possession of a die or instrument and the guilty knowledge required is merely that of being in possession of the die or instrument contrary to the provisions of the Act of Parliament, ie, without lawful authority or excuse. A guilty intention to use the die is not necessary.[72]1771

69 Substituted by the AO 1950, for 'the Queen's coin.'

70 9 and 10 Geo 6, c 74 as amended by the Criminal Justice Act 1948, s 1

71 *R v Ridgeley* (1778) 1 Leach 189 .

72 *R v Harbey* (1871) LR 1 CCR 284 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 235.

Possession of instrument, or material for the purpose of using the same for counterfeiting coin.--

Whoever is in possession of any instrument or material, for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe that the same is intended to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if Indian coin.--and if the coin to be counterfeited is [73][Indian coin], shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope--Legislative Changes

Before an offence could be made out under s 235, IPC it is obligatory on the prosecution to prove not only the possession of the instrument or the material mentioned therein, but also to prove that the possession was with the intention of using the same for the purpose of counterfeiting coins or with full knowledge and belief that it was intended to be used for that purpose. If the necessary intention,

knowledge or belief is not proved, a person could not be convicted under this section by a mere proof of physical possession of an instrument or material.[74]

The words 'Indian coin' were substituted for the words 'Queen's coin' both in the margin and the body by the Adaptation of Laws Orders 1950.

2. Analogous Law

This section is analogous to s 9(2) of the English Coinage Act 1946[75] which runs as follows:

> Every person who, without lawful authority or excuse (the proof whereof shall lie on the person accused), makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his possession--
>
> (a) any edger, edging or other tool, collar, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings or other makes or figures apparently resembling those on the edges of any current gold or silver coin, knowing it to be so adapted and intended as aforesaid; or
> (b) any press for coinage, or any cutting engine for cutting by force of a screw or of any other contrivance round blanks out of gold, silver or other metal or mixture1772 of metals, or any other machine, knowing the press to be a press for coinage or knowing the engine or machine to have been used or to be intended to be used for the false making or counterfeiting of any current gold or silver coin.

3. Possession under English Law

Under s 17(c) of the English Coinage Act 1946,[76]

> A thing shall be deemed to be in the possession of any person, if he himself has it in his personal custody or possession, and also if he knowingly and wilfully has it in the actual custody or possession of some other person, or in some building or place (whether belonging to or occupied by himself or not), and whether he has it for his own use or benefit or for that of any other persons.

4. What Is Possession?

The following are instances of 'custody or possession':[77]

(i) a person acting in association with another who has pleaded guilty to having the 'matter' in his possession;
(ii) a person who being the tenant or occupier of a house knowingly sublets a room to another who has the 'matter' in his possession; or who
(iii) knows that a lodger in his house has in his possession, and makes use of the 'matter' in the room which he (the lodger) occupies.

Connotation of Possession

The word 'possession' connotes the intention to exercise power or control over the object possessed (*animus sibi habendi*) and, therefore, necessarily implies that the possessor has been conscious of the possibility of exercising that power or control. The mere physical relation arising from the possession of the object is insufficient.

It is clear from the wording of s 235, IPC, that it is the possession of an instrument or material for the purpose counterfeiting that is made punishable, not the knowledge that someone else is in such possession.[78] The mere possession of such instrument or material is not enough, such possession should be coupled with intention of using the same for the purpose of counterfeiting coins or with full knowledge and belief that it was intended to be used for that purpose.[79]

Possession to be Voluntary and Conscious

The possession contemplated in this section is not possession, which has never been voluntary, and for the purpose of bringing home to any person the voluntary possession of any object, the mere proof of a fact, of which he knows nothing, would be valueless. The section no doubt also requires, in the accused person, intention or knowledge as to the use to be made of the objects in possession, and these might be implied from the nature of the objects themselves. But before that stage is reached, there must be some circumstance indicating such intention or knowledge as is inseparable from the notion of conscious retention implied in the word 'possession'.1773 Such indication may arise from the position of the object in a place which is constantly used by the person accused and which could not be overlooked by him or from the bulk of the object itself or from any circumstance, such as the locking up of the object, which would point to voluntary and conscious possessions.[80]

Possessor of Material need not be Owner of Building

All that is required to convict a person under this section is that he should be in possession of material for counterfeiting. It is not necessary that he should be the owner of the building in which the material was found stored.[81]

Where a person, who was passing counterfeit Indian coins, was, on being chased, found in possession of instruments or metals used for counterfeiting coin, it was held that he should be convicted under s 235 and not under s 240, as the latter did not apply to the actual coins.[82]

Possession must be Exclusive

'Possession' in this section means an exclusive possession. A man is not in possession of instruments which are found in a box to which others also have access.[83]

Possession of Wife or Servant

Under s 27 of the IPC, the possession of a wife, clerk or servant on account of a husband or master is deemed by law to be the possession of the latter.[84] But it is not so if a servant, *e.g.*, has physical possession for his own purposes as distinguished from the interest of his employers.[85]

The police searched *A*'s house in his absence and found his wife and three other persons in a room, on the table of which was a coining mould. *A* was arrested on his return. He had passed a bad half-crown thirteen days earlier. *A* was held guilty of possession.[86]

Mere Knowledge of Someone's Possession not Punishable

It is clear from the wordings of this section, that it is the possession of any instrument or material for the purpose of counterfeiting that is made punishable, not the knowledge that someone else is in such possession. The mere fact that a wife knows that certain implements and materials are in the possession of her husband and the place where those implements and materials are kept, does not necessarily indicate that she herself is in possession of those articles and she cannot be convicted under this section.[87]1774

Possession of Member of Joint Family

The observation of their Lordships of the Allahabad High Court in the case of *Queen-Empress v Sangam Lal* ,[88] may possibly lend support to the view that presumption as to possession and control of articles found in a house may be made against the housemaster. The presumption that a managing member of a joint family is in possession of the family house is not irrebuttable. It depends upon the circumstances of each case. Where the articles found are large properties and placed in a conspicuous place to which the managing member may have access and over which he could exercise control and which could not be overlooked by him, the presumption against him may fairly be made.[89] But in a case where the articles are small, the presumption cannot be properly raised. Although the managing member as the head of the family is supposed to have control over the house, it is impossible for him to know of tiny things placed by a junior member in a place which is not shown to have been in direct control of the managing member.[90]

When instruments and materials for counterfeiting coins are found in a house and it is sought to fix responsibility upon any member of the family, except the head of the family, it is necessary to prove that the possession and control were not only with the head of the family but with the subordinate members also. The mere fact that a wife knows that certain implements and materials are in the possession of her husband and the place where those implements and material are kept, does not necessarily indicate that she herself is in possession of those articles and cannot be convicted under s 235 of the IPC .[91] This view of the Patna High Court was approved and followed by the Lahore High Court.[92] It has been observed in *Queen-Empress v Sangam Lal* [93] as follows:

> We are not disposed in the present case to depart from the well known rule of law that where articles are found in a house in such place or place as several persons living in the house may have access to there is no presumption as to possession and control that those articles are in the possession and control of any other person than the housemaster.

But their Lordships further observed:

> We do not lay it down as an invariable rule that where weapons are found in a house occupied by a Hindu family living jointly, possession is necessarily that of the managing member, and the managing member only; but we do lay down that in all such cases where it is sought to establish that possession and control are with some member of the family other than the managing member, there must be good and clear evidence of the fact before we can in an act of this kind, arrive at such a conclusion.

5. 'Instruments of Counterfeiting'

Synopsis note 6 under s 233 may be referred to.

The court has to be convinced of the fact, which may of course be by a necessary inference (but the inference must be the only possible inference) that the1775 dies are capable of striking a complete coin which the accused intended to manufacture.[94]

6. 'Knowing'

Before an offence can be made out under this section, it is incumbent upon the prosecution to prove not only the possession of the instrument or material, but also to prove that the possession was with the intention of using the same for the purpose of counterfeiting coin or with full knowledge and belief

that it was intended to be used for that. If the prosecution fails to prove the necessary intention, knowledge or belief, a person cannot be convicted under the section by a mere proof of physical possession of an instrument or material.[95] The fact within the knowledge of one that someone else is in possession of such instrument or material does not make the former liable under this section.[96] Mere possession of instruments and materials capable of counterfeiting coins is no offence. To constitute an offence under this section possession of such instrument should be with the intention of counterfeiting coins and the intention must be proved to establish the charge. Where false coins are made only for the purpose of passing them secretly into the house of the coiner's enemy in order to get him into trouble, the persons making those coins and in possession of the instruments and materials used therefore are neither guilty under s 232 nor under this section.[97]

Merely by seizing the equipment and the coins found in the flat, the prosecution cannot establish its case against the accused. There cannot be presumption that the equipment was being used for counterfeiting coins or that the coins found in the flat resemble genuine coins. The conviction of the appellants under s 237, IPC was set aside.[97a]

7. 'Having Reason to Believe'

Section 26, and the notes thereunder may be referred to.

8. 'For that Purpose'

The offence under this section consists in the possession of moulds *etc.*, capable of being used to manufacture a counterfeit coin. The prosecution is bound to adduce evidence to show that the moulds were capable of producing a counterfeit coin. Broken moulds are of no use for such purpose, though there may be evidence of coining having been previously carried on.[98] In *R v Macmillan* ,[99] Maule J, seems to have ruled that a mould must be something with which a coin can be made and to have directed an acquittal where a mould, having a perfect impression of one side of a shilling, had no channel through which the metal could run.1776

The court has to be convinced of the fact, which may of course be by a necessary inference (but the inference must be the only possible inference) that the dies are capable of striking a complete coin which the accused intended to manufacture. The fitness of the material for the purpose of counterfeiting a coin has also to be proved by the prosecution.[1]

9. 'Indian Coin'

Section 230 may be referred to.

10. Procedure

The offence under this section is cognizable, non- bailable, non-compoundable and is triable by a court of session, if the coin is an Indian coin, otherwise by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. The limitation for taking cognizance of an offence under para 1 of this section is three years. There is no time limit for taking cognizance of the offence under the second para.

11. Charge

The following form of the charge may be adopted:

I, (*name and office of sessions judge, etc*) hereby charge you (*name of the accused*) as follows:

That on or about the.....day of.....at .....you were in possession of a certain instrument (*or material*) to wit.....(*mention it*) for the purpose of using the said instrument for counterfeiting a coin, (*or Indian coin*) to wit.....or knowing (*or having reason to believe*) that the said instrument was intended to be used for the purpose of counterfeiting, *etc,* and thereby committed an offence punishable under section 235 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

12. Proof

For a conviction under this section, the following facts have to be established that:

(i) the accused was in possession of an instrument or material; and
(ii) the instrument or material was for the purpose of using for counterfeiting coin, or Indian coin, or, the accused knew or had reason to believe that the same was intended to be used for that purpose.

The minimum that would be required for prosecution to establish a charge under ss 232 and 235 is that it establishes that the coins seized resembled the original and that the resemblance is such that it would deceive a person or that the accused knew that if the coin is used it would be likely to deceive a person. Merely by seizing the equipment and the coins found in the flat, the prosecution cannot establish its case against the accused. There cannot be a presumption that the equipment was being used for counterfeiting coins or that the coins found in the flat resemble genuine1777 coins. Unless there is intrinsic evidence on record to show that the coins indeed resemble genuine coins, it is difficult to accept the case of the prosecution.[2]

It is obligatory on the prosecution to prove not only the possession of the instrument or the material mentioned in s 235, IPC, but also to prove that the possession was with the intention of using the same for the purpose of counterfeiting coins or with full knowledge and belief that it was intended to be used for that purpose. If the necessary intention, knowledge or belief is not proved, a person cannot be convicted under this section by mere proof of physical possession of an instrument or material.[3]

The court has to be convinced of the fact, which may of course be by a necessary inference (but the inference must be the only possible inference) that the dies are capable of striking a complete coin which the accused intended to manufacture. The fitness of the material for the purpose of counterfeiting coin has also to be proved by the prosecution.[4]

To deprive the court of the benefit of looking at dies and moulds (on account of non-production) is a serious infirmity which must be held to be fatal to the prosecution case.[5]

13. Sentence

Having regard to s 71, separate sentences cannot be passed under s 232 and under this section for possession of instruments used for counterfeiting the coins in question.[6] The offence of counterfeiting a coin is no doubt very serious and an exemplary sentence should be given. At the same time when a man is being convicted for being in possession of instruments or materials for counterfeiting coin, it is

hardly right to convict and sentence him separately for being in possession of various parts of such instruments or materials.[7]

In the case of *NV Rao v State of Andhra Pradesh* ,[8] the appellant was convicted for the offence under s 235, IPC and was sentenced to 10 years RI. In appeal, the Supreme Court, keeping in view the guilt, need for rehabilitation and deterrence, opined that the prisoner/appellant may serve a sentence of five years which may be long enough for correctional treatment at the same time not unduly long to be regarded as repugnantly harsh sentence. The sentence was accordingly reduced to five years RI.

73 Substituted by the AO 1950, for 'the Queen's coin'.

74 *Mohd Ibrahim v State* AIR 1969 Del 315 .

75 9 and 10 Geo 6, c 74 as amended by the Criminal Justice Act 1948, s 1 .

76 9 and 10 Geo 6, c 74.

77 *R v Queen* 53 JP 822 .

78 *Zamir Hussain v Crown* AIR 1950 Lah 97 .

79 *Mohd Ibrahim v State* AIR 1969 Del 315 .

80 *Emperor v Hari Maniram Sonar* (1904) 1 Cr LJ 960, p 963 ; *Queen-Empress v Sangam Lal* ILR 15 All 129 ; *Amrit Sonar v Emperor* AIR 1919 Pat 330, p 333 ; *Lachminiya v Emperor* AIR 1933 Pat 272, (1934) 35 Cr LJ 9 .

81 *Kashi Prasad v State* AIR 1950 All 732, p 733, (1950) All LJ 516 .

82 Re *Ahmad Shah*(1892) PR 10; *Ranchod Phula v State* (1961) 2 Cr LJ 472, p 473 (Guj) .

83 *Abdul Majid v R* (1904) 1 Cr LJ 40, 5 PLR 14 ; *Queen-Empress v Sangam Lal* ILR 15 All 129 ; *Emperor v Hari Maniram Sonar* (1904) 1 Cr LJ 690, 6 Bom LR 887 .

84 *Fateh Chand Agarwalla v Emperor* AIR 1917 Cal 123, p 136, (1917) 18 Cr LJ 385 (FB) .

85 *Anglo-American Oil Co v Manning* (1908) LR 1 KB 536 .

86 *R v Weeks* 30 LJMC 141 .

87 *Lachminiya v Emperor* AIR 1933 Pat 272, (1934) 35 Cr LJ 9 ; *Zamir Husain v Crown* AIR 1950 Lah 97, p 100, (1950) 51 Cr LJ 717 .

88 *Queen-Empress v Sangam Lal* (1893) 15 ILR All 129 .

89 *Emperor v Hari Maniram Sonar* (1904) 1 Cr LJ 690, 6 Bom LR 887 .

90 *Amrit Sonar v Emperor* AIR 1919 Pat 220, p 333 .

91 *Lachhmimiya Thakurain v Emperor* AIR 1933 Pat 272 .

92 *Zamir Hussain v Crown* AIR 1950 Lah 97, (1951) 52 Cr LJ 717 .

93 *Queen-Empress v Sangam Lal* (1893) 15 ILR All 129 .

94 *Mohd Ibrahim v State* AIR 1969 Del 315 .

95 Re *Morrsan*AIR 1938 Mad 393, (1938) 39 Cr LJ 344 ; *Nga San Nyein v Emperor* AIR 1915 LB 64, (1915) 16 Cr LJ 264 ; *Shahid Sultan Khan v State of Maharashtra* 2007 Cr LJ 568 (Bom) (DB) .

96 *Zamir Hussain v Crown* AIR 1950 Lah 97 .

97 *Khadim Hussain v King-Emperor* AIR 1925 Lah 22, (1925) 26 Cr LJ 247 ; *Lal Chand v Crown* (1912) 13 Cr LJ 252 .

97a *Shahid Sultant Khan v State of Maharashtra* 2007 Cr LJ 568, p 570 (Bom) (DB) .

98 *Public Prosecutor v Kona Terusula Reddi* 1 Weir 219 .

99 *R v Macmillan* (1843) 1 Cox 41 .

1 *Mohd Ibrahim v State* AIR 1969 Del 315 .

2 *Shahid Sultan Khan v State of Maharashtra* (2007) Cr LJ 568 (Bom) (DB) .

3 *Mohd Ibrahim v State* AIR 1969 Del 315 .

4 *Ibid.*

5 *Ibid.*

6 *Hayat v R* (1904) 1 Cr LJ 946, 5 PLR 404, 14 PR Cr (1904); *Bishan Das v King-Emperor* AIR 1924 Lah 78 ; *King-Emperor v Johri* ILR (1923) All 267, (1924) Cr LJ 236 ; *Zamir Hussain v Crown* AIR 1950 Lah 97 .

7 *Allah Wadhya v Emperor* AIR 1930 Lah 51, 52, (1930) 31 Cr LJ 529.

8 *NV Rao v State of Andhra Pradesh* AIR 1978 SC 480, (1978) SCC (Cr) 99, (1978) Cr LJ 641 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 236.

Abetting in India the counterfeiting out of India of coin.--

Whoever, being within [9][India], abets the counterfeiting of coin out of [10][India], shall be1778 punished in the same manner as if he abetted the counterfeiting of such coin within [11][India].

Comments

1. Scope

This section provides for punishment for abetment in India of an offence of counterfeiting coin committed outside India. The person abetting the offence may be an Indian citizen or a foreigner, but he must be in India and the abetment in India must be complete.

2. Legislative Changes

The words 'British India' were substituted by the words 'the Provinces' by the Adaptation of Laws Order 1948, which were later substituted by the words 'the States' by the Adaptation of Laws Order 1950. The word 'India' was subsequently substituted for the words 'the States' by Act 3 of 1951.

3. 'Abets'

Section 107 and commentary thereunder may be referred to.

4. 'Counterfeiting'

Sections 28 and 231 and commentary thereunder may be referred to.

5. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a court of session. A warrant shall ordinarily issue in the first instance.

6. Charge

The following form of the charge may be adopted:

> I, (*name and office of sessions judge, etc*) here charge you (*name of accused*) as follows:
>
> That on or about the.....day of.....at.....you being in India abetted.....the counterfeiting of coin out of India at.....and you thereby committed an offence under section 236 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this Court on the said charge.

7. Proof

For a conviction under this section, the following facts have to be established that:

(i) the accused abetted the commission of the offence of counterfeiting coin;1779
(ii) the counterfeiting of coin was out of India; and
(iii) at the time of such abetment, the accused was in India.

9 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

10 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

11 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 237.

Import or export of counterfeit coin.--

Whoever imports into [12][India], or exports therefrom, any counterfeit coin, knowing or having reason to believe that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Comments

1. Legislative Changes

The words 'British India' were replaced by the words 'the Provinces' by the Adaptation of Laws Order 1948. Subsequently, by the Adaptation of Laws Order 1950, the words 'the Provinces' were replaced by the words 'the States'. Finally, the words 'the States' were substituted by the word 'India' by Act 3 of 1951.

2. Analogous law

The offence under this section consists of importing or exporting any counterfeit coin, knowing, or having reason to believe, that the same is counterfeit.

3. 'Counterfeit'

Synopsis notes to ss 28 and 232 may be referred to.

4. 'Reason To Believe'

Synopsis notes to s 26 may be referred to.

5. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance.

6. Charge

The following form of the charge maybe adopted:

I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That on or about the.....day of.....at.....you imported into (*or exported from*) .....a place in India, certain pieces of coins (*or Indian coins*) to wit.....(*mention the coins*) then knowing (*or having reason to believe*) that the same were counterfeit,1780 and that you thereby committed an offence punishable under section 237 of the Indian Penal Code, and within my cognizance or the cognizance of this Court.

And I hereby direct that you be tried by the said Court on the said charge.

7. Proof

For a conviction under this section the following points have to be proved:

(i) that the accused imported into, or exported from, India some coins;
(ii) that such coins were counterfeit; and
(iii) that the accused knew or had reason to believe that they were counterfeit.

12 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 2/Chapter XII Of Offences Relating to Coin and Government Stamps/S. 238.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 238.

Import or export of counterfeits of the India coin.--

Whoever imports into [13][India], or exports therefrom, any counterfeit coin, which he knows or has reason to believe to be a counterfeit of [14][Indian coin], shall be punished with [15][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

This section deals with the import and export of Indian coins just as the last section dealt with import

and export of other coins. The punishment prescribed by this section is heavier than that prescribed by the previous section as the import or export is of Indian coins.

2. Legislative Changes

The words 'British India' were substituted by the words 'the Provinces' by the Adaptation of Laws Order 1948. The words 'the Provinces' were substituted by the words 'the States' by the Adaptation of Laws Order 1950. The words 'the Queen's coin' both in the margin and the body were substituted by the words 'Indian coin' by the Adaptation of Laws Order 1950. The word 'India' was substituted for the words 'the States' by Act 3 of 1951. The words 'imprisonment for life' were substituted for the words 'transportation for life' by Act 26 of 1955, s 117 and Schedule.

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a court of session. A warrant shall ordinarily issue at the first instance. There is no time limit prescribed for taking cognizance of an offence under this section.1781

4. Charge

The following form of the charge may be adopted:

> I, (*name and office of sessions judge, etc*) hereby charge you (*name of accused*) as follows:
>
> That on or about the.....day of.....at.....you imported into (*or export from*) India, counterfeit Indian coins (*specify the amount and name of the coins*) knowing (*or having reason to believe*) that the said coins were counterfeit, and that you thereby committed an offence punishable under section 238 of the Indian Penal Code, and within the cognizance of the Court of Sessions (*or High Court*).
>
> And I hereby direct that you be tried by the said Court on the said charge.

5. Proof

In a prosecution under this section, the following points have to be proved:

(i) that the accused imported into, or exported from India, Indian coins;
(ii) that such coins were counterfeit; and
(iii) that the accused knew, or had reason to believe, that they were counterfeit.

13 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and

Schedule to read as above.

14 Substituted by the AO 1950, for 'the Queen's coin'.

15 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 239.

Delivery of coin, possessed with knowledge that it is counterfeit.--

Whoever, having any counterfeit coin, which at the time when he became possessed of it he knew to be counterfeit, fraudulently or with intent that fraud may be committed delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Comments

1. Scope and Object

Three classes of offences are created by ss 239 - 243, IPC, which deal with possession and delivery of coins:

(i) passing off coin known to be counterfeit from the time of obtaining it (ss 239 - 240, IPC).
(ii) passing off such coin which was for the first time discovered to be counterfeit after its receipt (s 241, IPC); and
(iii) being in wrongful possession of coin known all along to have been counterfeit (ss 242 - 243, IPC).

Further sub-divisions of classes first and third arise, according to the fact that the counterfeit coin is Indian or otherwise.[16]1782

The offence for which punishment is provided by this section is not the offence committed by the coiner. It is directed against a person other than the coiner, who procures or obtains or receives counterfeit coin and not to the offences committed by the coiner.[17]

The object of ss 239 - 241, IPC is to penalise all fraudulent circulation of false coin. A distinction, is however, made between a professional and a casual utterer of false coins, in the matter of punishment, as the former is subject to the penalties in this and the next section, whereas, the casual offender is made subject to the more lenient penalties of s 241, IPC . The distinction between these two classes of offenders was explained by the authors to be very material:

> A professional utterer is a helpmate of the professional coiner and is, therefore, an offender in equal degree. A causal receiver of false coins may, however, be himself imposed upon; but, if he tries to retrieve his loss by passing it on to another, he would naturally be guilty of dishonesty, but the authors regarded it as comparatively venial, and hence the difference in punishment.[18]

The authors of the Code say:

> An utterer by profession, an utterer who is the agent employed by the coiner to bring counterfeit coin into circulation, is guilty of a very high offence. Such an utterer stands to the coiner in a relation not very different from that in which a habitual receiver of stolen goods stands to a thief. He makes coining a far less perilous and a far more lucrative pursuit than it would otherwise be. He passes his life in a systematic violation of the law, and in the systematic practice of fraud in one of its most pernicious forms. He is one of the most mischievous, and is likely to be one of the most depraved of criminals. But a causal utterer, an utterer who is not an agent for bringing counterfeit coin into circulation, but who having heedlessly received a bad rupee in the course of his business takes advantage of the heedlessness of the next person with whom he deals, to pay that bad rupee away is an offender of a very different class. He is undoubtedly guilty of a dishonest act, but of one of the most venial of dishonest acts. It is an act which proceeds not from greediness for unlawful gain, but from a wish to avoid, by unlawful means it is true, that what to a poor man may be a severe loss. It is an act which has no tendency to facilitate or encourage the operations of the coiner. It is an occasional act, an act which does not imply that the person who commits it is a person of lawless habits. We think, therefore, that the offence of a causal utterer is perhaps the least heinous of all the offences into which fraud enters.

> We considered whether it would be advisable to make it an offence in a person to have in his possession at one time a certain number of counterfeit coins, without being able to explain satisfactorily how he came by them. It did not, after much discussion, appear to us advisable to recommend this or any similar provision. We entertained strong objections to the practice of making circumstances which are in truth only evidence of an offence part of the definition of an offence; nor do we see any reason for departing in this case from our general rule.

> Whether a person who is possessed of bad money knows the money to be bad, and whether, knowing it to be bad, he intends to put it in circulation, are questions to be decided by the tribunals according to the circumstances of the case, circumstances of which the mere number of the pieces is only one and may be one of the least important. A few bad rupees which should evidently be fresh from the stamp would be stronger evidence than a greater number of bad rupees which appeared to have been in circulation for years. A few bad rupees all obviously coined with the same die, would be stronger evidence than a greater number obviously coined with different dies. A few1783 bad rupees placed by themselves, and unmixed with good ones, would be far stronger evidence than a much larger number which might be detected in a large mass of treasure.[19]

2. Counterfeit

Commentary under s 28 may be referred to. It is not necessary that the counterfeit coin should be the counterfeit of a current coin.

3. 'Which, at the Time when he became Possessed of it, knew to be Counterfeit'

The words 'which at the time when he became possessed of it he knew to be counterfeit' point to a person other than the coiner, that is to say, the person who procures or obtains or receives a

counterfeit coin. It is against such a person that the section is directed.[20]

4. Direct Proof of Fabrication not Necessary

Where the charge is one of counterfeiting Indian coin, direct proof of fabrication is not necessary to render the person punishable under the sections of the IPC with reference to the uttering of false coin. All that is required is a guilty knowledge of the spuriousness of the coin at the time of receiving possession of it or the absence of such guilty knowledge at first.[21]

Where the accused persons were goldsmiths, it was presumed that when they became possessed of the pagodas in question, they knew them to be counterfeit.[22]

5. 'Fraudulently'

Commentary under ss 25 and 263 may be referred to.

6. Procedure

The offence under this section is cognizable, non- bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

7. Charge

The charge under this section may be worded as follows:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That on or about the.....day of.....at.....you had a piece or.....(*specify the number*) of counterfeit coins to wit.....which at the time you became possessed of it (*or them*), you knew to be counterfeit, and which you fraudulently (*or with intent that fraud may be committed*) delivered to *AB* (*or attempted to induce AB to receive it or them*) and you thereby committed an offence punishable under section 239 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this Court on the said charge.1784

8. Proof

Evidence of the possession and attempted disposal of coins of the unusual kind is relevant to a charge of uttering such coins soon afterwards when the factum of uttering is denied.[23] In 2 and 3 Will 4 Cr 34 s 7 (Rep), where the prisoner had entered a shop and asked for tea and sugar, and had in payment placed on the counter a counterfeit shilling but on being told that it was bad, had left the shop and left the coin behind, it was held that a charge of uttering and putting off was proved by evidence.[24]

Offences made punishable under this section and s 240 are separate and distinct offences and s 220, CrPC, permits of double conviction and consecutive sentences as s 71, IPC, is obviously not applicable.[25]

16 *Mayne's Criminal Law of India,* para 595.

17 *R v Sheobux* 3 NWP 150 .

18 Note 1, Reprint, pp 135-136.

19 Note 1, Reprint, pp 135-136.

20 *R v Sheobux* 3 NWP 150 .

21 *Parushullah Mundul v Heroo Mundul* 23 WR 4 .

22 Re *Kandamutu Annappa* 1 Weir 221.

23 *Queen-Empress v Nur Mahomed* ILR 8 Bom 223 .

24 *R v Welch* (1851) 2 Den 78 ; **cf***R v Jon* (1851) 3 Den 475 .

25 *Gopichand v Emperor* AIR 1933 Pesh 99, p 100 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 240.

Delivery of Indian coin, possessed with knowledge that it is counterfeit.--

Whoever, having any counterfeit coin which is a counterfeit of [26][Indian coin], and which, at the time when he became possessed of it, he knew to be a counterfeit of [27][Indian coin], fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

The offence under this section is an aggravated form of the offence under the preceding section. The only difference between s 239, IPC and this section is that while s 239 is in relation to any counterfeit coin other than the Indian coin, this section is in relation to counterfeit Indian coin. It is obviously impossible for a person who commits an offence under s 239 to commit a further act in respect of the same coin which will make him liable under this section. In other words, there is no part of s 240, IPC which if absent, would leave an offence under s 239 .[28]

2. Legislative Changes

The words 'the Queen's coin' were substituted by the words 'Indian coin' both in the margin and the body of the section by the Adaptation of Laws Orders 1950.1785

3. 'Counterfeit'

Sections 28 and 231*ante,* may be referred to.

4. 'Knew to be a Counterfeit of Indian Coin'

Knowledge on the part of the accused that the coin was counterfeit, when they first came to possess it, is an element of the offence defined in ss 240 and 243 .[29] The fact that the accused delivered certain counterfeits of the Indian coin knowing them to be counterfeit is not enough for a conviction under this section. The knowledge that the coins were counterfeit at the time the accused became possessed of them has also to be established.[30] For a conviction under this section the point of time to be considered in connection with the offence is the time when the accused became possessed of the false coins and it has to be shown that at that particular time the accused knew that the coins were not genuine.[31] The prosecution may bring out circumstances which might indicate or from which a reasonable presumption could be raised that the accused ought to have known at the time that he became possessed of the coins that they were counterfeit.[32]

5. 'Fraudulently'

Section 25 and commentary thereunder may be referred to.

6. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and triable by a court of session. A warrant shall ordinarily issue in the first instance. There is no limitation for taking cognizance of an offence under this section.

7. Charge

The following form of the charge may be adopted:

I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the.....day of.....at.....having in your possession pieces of counterfeit Indian coins, known as.....knowing at the time when you became possessed of the said coins that they were counterfeit, fraudulently (*or with intent that fraud might be committed*) delivered the same to one *AB* (*or attempted to induce AB to receive the same*), and thereby committed an offence punishable under section 240 of the Indian Penal Code, and within the cognizance of this Court.

And I hereby direct that you be tried by this Court, on this said charge.

8. Proof

The following facts have to be proved in order to prove an offence under this section:

(i) the accused became possessed of counterfeit coin;
(ii) the coin in question is a counterfeit of an Indian coin;1786
(iii) at the time he became possessed of it, the accused had knowledge that it was a counterfeit Indian coin;
(iv) the accused delivered to some person or attempted to induce someone to receive it; and
(v) the accused delivered the same with intention to defraud or intended that a fraud might be committed.

Proof of Guilty Knowledge

It is not always possible or necessary that the particular knowledge be proved by positive evidence. The prosecution may bring out circumstances which might indicate or from which a reasonable presumption could be raised that he knew at the time he became possessed of the coins that they were counterfeit.[33] In a case of this nature it is not always possible or necessary that the particular knowledge should be proved by positive evidence. The prosecution may bring out circumstances which might indicate or from which a reasonable presumption could be raised that the accused ought to have known at the time that she became possessed of the coins that they were counterfeit.[34] Guilty knowledge may be proved either directly or indirectly from surrounding circumstances.[35]

9. Separate Conviction under Sections 240 and 243, Indian Penal Code 1860--Whether and when Permissible

A conviction for an offence under s 243 is no bar to a subsequent trial under s 240, the offence under the two sections being distinct offences.[36] A person having four counterfeit coins in his possession, but uttering only one of them, cannot be separately convicted under this section with respect to one coin and under s 243 regarding the possession of the other three, as an offence, under this section implies prior guilty possession. If such separation were allowable, there might be a conviction for the possession of each coin. The physical acts, though capable of separate existence and perception, coalesce when coincident in time, space and purpose.[37]

10. Sentence

Tampering with an Indian coin is a very serious offence; and to punish it with two months rigorous imprisonment is not calculated to deter coiners from committing it.[38]

26 Substituted by the AO 1950 for 'the Queen's coin'.

27 Substituted by the AO 1950 for 'the Queen's coin'.

28 *Gopichand v Emperor* AIR 1933 Pesh 99, p 100 .

29 1 Weir 222.

30 *Dost Mohammad v Emperor* AIR 1936 Nag 242, p 243 ; *Bhan Singh v Emperor* (1930) 31 Cr LJ 736(1).

31 *Kishan Lal v State* AIR 1953 Pepsu 43, (1953) Cr LJ 452, p 453.

32 *Ganga v State* (1957) All LJ 283 (All) .

33 *Kishan Lal v State* AIR 1953 Pepsu 43, (1953) Cr LJ 452, p 453 .

34 *Ibid*.

35 *Parushullah Mundul v Kheroo Mundul* 23 WR 4 ; *Ranchhod Mula v State* (1961) 2 Cr LJ 472, p 474 (Guj) .

36 *R v Prasanna Kumar* ILR 31 Cal 1007 .

37 *Queen-Empress v Lakshin* Ratanlal's Un Cr Cas 202.

38 *Parushullah Mundul v Kheroo Mundul* 23 WR 4, p 5 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 241.

Delivery of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit.--

Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment of either description for a term which may extend1787 to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

Illustration

A, a coiner, delivers counterfeit Company's rupees to his accomplice B, for the purpose of uttering them. B sells the rupees to C, another utterer, who buys them knowing them to be counterfeit. C pays away the rupees for goods to D, who receives them, not knowing them to be counterfeit. D, after receiving the rupees, discovers that they are counterfeit and pays them away as if they were good. Here D is punishable only under this section, but B and C are punishable under section 239 or 240, as the case may be.

Comments

1. Scope

While s 239, IPC dealt with professional utterers, this section deals with a casual utterer of base coin. The offence under this section consists in trying to pass off as genuine a coin which the accused has honestly received, but has subsequently found out to be counterfeit.[39]

2. Essence

The essence of the offence in s 241, IPC, is the delivery of counterfeit coin to any person and three deliveries of counterfeit coin to three different persons are clearly offences of the same kind within the meaning of that term as set out in s 234 of the CrPC .[40]

3. 'As Genuine'--Illustrative Cases

The coin must be delivered as genuine otherwise there will be no offence under this section. If *A,* in possession of a counterfeit coin, hands it over to a friend in order to prevent its discovery by the police, he commits no offence under the section.[41]

A vagrant entered a shop for drink. The shopkeeper supposing that he had come to commit theft, shut the door and called for a watchman. The vagrant ran away and meeting one Munglee put some coins into his hand and told him to keep them for him. The coins turned out to be counterfeit. A conviction under this section was set aside, as it did not appear that he had passed the coins as genuine or induced Munglee to receive them as genuine.[42]

4. 'Counterfeit'

Notes under ss 28, 231, 232 may be referred to.1788

5. Meaning of 'Which he knows'

The ignorance of the accused as to the nature of the coin when he took it into his possession should be alleged in the charge, though it need not be proved, for if alleged the ignorance will be presumed. A false statement as to how a coin was obtained is *prima facie* evidence that the accused knew that it was counterfeit,[43] so is the fact that the coin was first tendered for change and was refused on the ground that it was counterfiet.[44] If a person is found in possession of counterfeit coins separated from the genuine ones and he tries to deliver the genuine ones first and the counterfeit ones afterwards and he is unable adequately to explain the purpose behind the separation, it can be inferred that he had knowledge of the counterfeit character of the coins.[45]

6. Possession

Notes under s 235 may be referred to.

7. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by any magistrate. A warrant shall ordinarily issue in the first instance. The cognizance of an offence under this section can be taken within three years.

Where two persons were jointly charged with and convicted under s 241 of the IPC, of passing counterfeit coins on three different occasions on the same day to three different persons it was held that the trial was not illegal within the meaning of ss 234 and 239, CrPC .[46]

8. Charge

The charge under this section should run thus:

I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That on or about the.....day of.....at .....you delivered to *AB* as genuine (*or attempted to induce AB to receive as genuine*) a coin. Ex.....which was counterfeit, and which you then knew to be counterfeit though you did not know it to be counterfeit at the time when you took it into your possession, and you thereby committed an offence punishable under section 241 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

9. Proof

To establish an offence under this section, it will have to be established that:[47]

(i) the accused delivered or attempted to induce another person to receive a coin;
(ii) the said coin was counterfeit;1789
(iii) the accused delivered or attempted to deliver it as genuine; and
(iv) at the time of delivery he knew it to be counterfeit though he did not know that it was counterfeit when he took it into his possession.

10. Sentence

When a person of position passes off counterfeit coins to others who are not as well off as he is, the matter cannot be dealt with leniently, especially as it is a kind of offence which is difficult to detect.[48]

39 *Mayne on Criminal Law,* p 804.

40 *Kovaganti alias Nalldgonda Appiah & Anor v Crown* AIR 1923 Mad 181 .

41 *R v Soorut* 4 NWP 62 .

42 *Ibid*.

43 *Ram Ruttun Saha v Bawool Mundul* 23 WR (Cr) 4 .

44 *Ebrahim v R* (1911) 12 Cr LJ 79 .

45 *State of Uttar Pradesh v Lal Chand* (1965) All WR (HC) 837 .

46 *Kovaganti alias Nalldgonda Appiah & Anor v Crown* AIR 1923 Mad 181 .

47 Re *Bhan Singh* 124 IC 688.

48 *Dost Mohammad v Emperor* AIR 1936 Nag 242 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 242.

Possession of counterfeit coin by person who knew it to be counterfeit when he became possessed thereof.--

Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Comments

1. Scope

The mere possession of counterfeit coin is an offence under this section and s 243, IPC, even though no attempt is made to pass it off, provided it can be shown that it was kept for a fraudulent purpose, and was originally obtained with a guilty knowledge. The mere fact of a single base coin being found in a party's possession would not, without further evidence, be sufficient to create a presumption that he knew it to be counterfeit when he obtained it, and intended to make a fraudulent use of it. But where a considerable number of base coins are found in a man's possession, the presumption of guilt would be sufficient to make a conviction lawful, unless the possession could in some manner be explained or accounted for.[49]

2. Fraudulent

Sections 25 and 463 and commentary thereunder may be referred to.

3. 'Possession'

Notes under s 235 may be referred to. For a conviction under this section it must be proved that the accused was in possession of a counterfeit coin with intent to defraud. It must also be shown that at the time he became possessed of the coin he knew it was counterfeit.[50]

4. 'Counterfeit'

Section 28 and notes thereunder may be referred to.1790

5. Procedure

The offence under this section is cognizable, non- bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. The limitation for taking cognizance of an offence under this section is three years.

6. Charge

The following form of charge under this section may be adopted:

I, (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:

That on or about the .....day of .....at.....you fraudulently (*or with intent that fraud might be committed*) were in possession of Ex.....being counterfeit coins, knowing at the time when you became possessed of the same that they were counterfeit, and thereby committed an offence punishable under section 242 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

7. Proof

To establish an offence under this section the prosecution must prove that:

(i) accused was in possession of a coin;
(ii) the coin was counterfeit;
(iii) he was in possession of it with intent to defraud, or with intent that fraud might be committed; and
(iv) at the time he became possessed of it, he knew it to be counterfeit.

Illustration (e) to s 21 of the Indian Evidence Act 1872 reads thus:

A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that the person did examine it and told him it was genuine.

A may prove these facts in his defence as they are explanatory of conduct influenced by facts in issue.

49 *Mayne on Criminal Law,* pp 804-805.

50 *Fateh Chand v R* 21 CWN 33 ; *Ebrahim v R* 4 Bur LT 9 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 243.

Possession of Indian coin by person who knew it to be counterfeit when he became possessed thereof.--

Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, which is a counterfeit of [51][Indian coin], having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.1791

Comments

1. Scope

This section provides that whoever, fraudulently or with intent that fraud may be committed, is in possession of a counterfeit coin, which is a counterfeit of an Indian coin, having known at the time when he became possessed of it that it was counterfeit, shall be punished as stated in the section.[52]

2. Legislative Changes

The words 'the Queen's coin' both in the margin and the body of the section were replaced by the words 'Indian coin' by the Adaptation of Laws Order 1950.

3. Ingredients of the Offence

To constitute an offence under this section it must be proved that: (a) the accused was in possession of coin; (b) the coin was a counterfeit of the Indian coin; (c) the accused was in such possession fraudulently or with intent to defraud; and (d) at the time he became possessed of such coin he knew it to be counterfeit.

'Fraudulently'

Where in the course of a search of the house of the accused in connection with an offence, counterfeit coins were recovered from a bundle of cloth kept inside a box under lock and key, and it was found that the coins were part of an estate and were sold as such and were purchased by the accused openly in an auction sale and there was no attempt at concealment, and no attempt was made to pass on the coins to other persons as genuine, it was held that it could not be held that the accused was in possession of the coins fraudulently or with intent that fraud may be committed and therefore, the

charge under this section was not proved.[53]

Sections 25 and 463 and commentary thereunder may be referred to.

Possession of Coin must be with Knowledge of its Being Counterfeit

In order to find an accused guilty of an offence under this section, it must be proved, *inter alia,* that at the time of coming into possession of the counterfeit coins, he knew1792 that the coins were counterfeit. If a person who innocently comes into possession of counterfeit coins, discovers later that the coins are counterfeit, he does not thereby become liable to punishment under this section if he retains possession of the coins with him.[54]

Possession--Personal and Constructive

An accused charged under this section may be proved to be in possession if he is in possession in either of two modes, namely: (a) he may be in possession of the coin himself, or (b) he may be in possession of the coin on his account. It is plain that whichever mode of possession is established, it is essential to prove that at the time the accused became possessed of the coin, he knew it to be counterfeit. Section 27 , IPC defines constructive possession and the court is bound to interpret the expression 'in possession' according to that definition.

Possession through Servant

The master becomes possessed, when he personally takes possession on his own account, or when, he authorises the servant to take a thing for him, for his benefit or on his account, or when he consents to, or sanctions, the retention of the thing received by the servant, or knowingly allows the servant to retain in custody for him. If there be prior authority to the servant or arrangement with him to receive, the time when the servant receives is the time when the master becomes possessed. In other cases, the time when the master comes to know or consent or allows the thing to remain with the servant, is the time when he becomes possessed. The master, for purposes of this section, may be in possession in two ways: (a) time when he becomes possessed, and (b) when it can be held that he was 'conscious' of his possession.[55] It is certainly not intended that no person in possession of a house shall be convicted of being in possession of stolen property or counterfeit coin or anything of that kind, if there happen to be other people living in the house and if it cannot be positively established that the person convicted had put the incriminating articles in the place where they were found. It must be shown in the first place that the incriminating articles were found in a place in the possession of the person to be convicted. In the next place it must be shown, either by direct or circumstantial evidence, from which a reasonable inference can be drawn, that the person to be convicted knew that these particular things were in the place where they were found.[56]

Commentary for s 27 may be referred to.

Possession of Large Number of Coins

Merely because the number of counterfeit coins was 85, it would not be conclusive for proving beyond a reasonable doubt that the accused had come into possession of these coins knowing that they were counterfeit and that he was in possession of these coins fraudulently or with an intent that fraud may be committed.[57]1793

Innocent Possession

Where the accused was a tea-vendor and if customers had been coming to him to tender the counterfeit coins for buying tea, and the coins were not so clearly counterfeit as to make him suspicions of these coins, he may well be considered to have come into possession of these coins innocently.[58]

4. 'Counterfeit Coin'

This section requires that the person must be in possession of counterfeit coin and that the person who was possessed of it must have known at the time when he became possessed of it that it was counterfeit. Section 28 , IPC, defines the expression 'counterfeit', and the essential ingredient of that section is that there must be a resemblance such as to practice deception, although according to expln (1) of that section the imitation need not be exact. But, although the resemblance need not be exact, it is essential that the counterfeit must be of such a character that it would be possible to pass it off as a genuine coin, and unless that is so, it would not be possible to practice deception; and to practice deception is one of the ingredients of the definition of counterfeit in s 28 .[59]

5. 'Indian Coin'

Section 230 and commentary thereunder may be referred to.

6. Procedure

The offence under this section is cognizable, non- bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

7. Charge

The following form of the charge under this section may be adopted:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....fraudulently (*orwith intent that fraud might be committed*) were in possession of.....pieces of counterfeit Indian coin; knowing at the time when you became possessed of the said coins that they were counterfeit, and thereby committed an offence punishable under section 243 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

8. Proof

To sustain a conviction under this section the prosecution must prove that:

(i) the accused was in possession of coins;
(ii) the said coins were counterfeit coins;
(iii) the accused was in possession of them with intent to defraud; and1794
(iv) the accused at the time he became possessed of the coins knew that they were counterfeit.

It has to be established by the prosecution that the accused fraudulently or with intent that fraud may

be committed, came into possession of counterfeit coins which were counterfeit of Indian coins, having known at the time he became possessed of them, that they were counterfeit.[60]

9. Knowledge at the time of Obtaining Possession--Presumption and Proof

It is difficult to establish, by positive evidence that a man in whose possession a counterfeit coin is found knew when it came into his possession that it was counterfeit. This difficulty is enhanced when the accused who is in a position to give an explanation refuses to give one. In such a case the guilty knowledge of the accused has to be inferred from the circumstances of the case and the conduct of the accused.[61] The fact that at the time when the accused came into possession of the counterfeit coin for the first time, the accused knew that it was counterfeit need not necessarily be proved by any positive evidence, specially when the accused refuses to give any explanation of his possession and can be inferred from the conduct of the accused and the circumstances of the case. Thus onus in such cases lies on the prosecution to prove that the accused became possessed of the counterfeit coin knowing it to be counterfeit.[62]Section 106 of the Evidence Act 1872 does not entitle the prosecution to throw the onus as regards the time of knowledge on the accused without any qualification, but if the prosecution has succeeded in establishing circumstances suggesting that the petitioner knew at the time he became possessed of the coins that they were counterfeit, then and in that case alone, it would be necessary for the accused to lead evidence to show that it was not at that time he became aware of their counterfeit character.[63]

10. Separate Conviction under Sections 240 and 243, Indian Penal Code 1860--Whether and when Permissible

Commentary under same heading in s 240 may be referred to.

51 Substituted by the AO 1950, for 'the Queen's coin'.

52 *Gulam Rabbani Gulam Uman v State* AIR 1956 Bom 511, (1956) Cr LJ 881 .

53 *Gudar Sao v Emperor* AIR 1936 Pat 533, (1936) 37 Cr LJ 114 ; **distinguishing***Emperor v Sangaram* AIR 1933 Oudh 85, (1933) 34 Cr LJ 545 where some of the coins were found in a box which was concealed, inside a heap of *bhusha* evidently with the object of concealment; *Mohd Ibrahim v State* AIR 1969 Del 315, (1969) Cr LJ 1377 .

54 *Kashi Prasad v State* AIR 1950 All 732, p 733, (1950) All LJ 516 ; *Kesho Bania v Emperor* AIR 1941 Pat 26, (1941) 42 Cr LJ 301 ; *JK Devaiya v State of Coorg* AIR 1956 Mys 51, (1956) Cr LJ 904 ; *Fateh Chand Agarwalla v Emperor* AIR 1917 Cal 123, (1917) 18 Cr LJ 385 (FB) .

55 *Fateh Chand Agarwalla v Emperor* AIR 1917 Cal 123, p 136, (1917) 18 Cr LJ 385 (FB) .

56 *Tulsi Ram v Emperor* AIR 1936 All 650, p 651, (1936) 37 Cr LJ 1019 .

57 *Mohd Ibrahim v State* AIR 1969 Del 315 .

58 *Mohd Ibrahim v State* AIR 1969 Del 315 .

59 *Gulam Rabbani Gulam Uman v State* AIR 1956 Bom 511, (1956) Cr LJ 881 .

60 *Mohd Ibrahim v State* AIR 1969 Del 315 .

61 *Emperor v Dhanna Singh* AIR 1943 Oudh 335, p 337, (1943) 44 Cr LJ 542 ; *Emperor v Sangram* AIR 1933 Oudh 85, (1933) 34 Cr LJ 545 ; *Kashi Prasad v State* AIR 1950 All 732, p 733 .

62 *Emperor v Dhanna Singh* AIR 1943 Oudh 335, p 337 .

63 *Kesho Bania v Emperor* AIR 1941 Pat 26, p 27, (1941) 42 Cr LJ 301 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 244.

Person employed in mint causing coin to be of different weight or composition from that fixed by law.--

Whoever, being employed in any mint lawfully established in [64][India], does any act, or omits what he is legally bound to do, with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.1795

Comments

1. Scope and Applicability

This section provides drastic penalties for pilfering of bullion used at the mint for the coinage of money. The provisions of the section apply to those who are employees at the mint, whatever may have been their duties and responsibilities. Section 6 of the Coinage Act[65] 1906, as amended by the Amending Acts, 4 of 1942 and 28 of 1947, provides for coining the coins of such denominations, dimensions, designs and composition as may be prescribed and s 7 provides for prescribing the standard weight and remedy (*i.e.* variation from the standard weight and fineness) of the coins, which alone can, under s 13 of that Act, be legal tender.

2. Legislative Changes

The words 'the Provinces' were substituted for the words 'British India' by the Adaptation of Laws Order 1948. The words 'the Provinces' were substituted by the words 'the State' by the Adaptation of Laws Order 1950. The word 'India' was substituted for the words 'the states' by Act 3 of 1951.

3. Object is to Ensure Purity of Coining

The object of this section is to ensure the purity of the coinage and secure its conformity to the legal standard against the acts or omissions of persons employed in the mint. A similar provision is to be found in England also. Not only those who counterfeit coin without authority but even persons employed in the mint or its branches are within the Coinage Offences Act,[66] if for their own lucre they make the money of baser alloy, or lighter than they are authorised and bound by law to do; for they can only justify coining at all under the Coinage Acts and proclamations, and the terms of their appointment; and if they have not pursued that authority it is the same as if they had none. But mere mistake in weight or alloy will not make them guilty; the act must be wilful, corrupt and fraudulent.[67]

4. 'Legally Bound'

Section 43, and commentary thereunder may be referred to.

5. Procedure

The offence under this section is cognizable, non- bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no limitation for taking cognizance of an offence under this section.1796

6. Charge

The following form of the charge may be adopted in a prosecution under this section:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:
>
> That, on or about the.....day of.....at.....you being employed as.....in the.....mint lawfully established in India did an act to wit.....(*specify the act*) or omitted what you were legally bound to do (*specify the omission*) with the intention of causing the coin issued from the said mint to be of a different weight or composition from the weight or composition fixed by law, and thereby committed an offence punishable under section 244 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

7. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused was employed in any mint lawfully established in India;
(ii) as such, he did some act or omitted what he was legally bound to do; and
(iii) the act or omission was with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law.

64 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

65 The word 'Indian' of the Indian Coinage Act 1906, was omitted by Act 47 of 1975, s 2 (wef 12-8-1975). Now repealed.

66 Coinage Offences Act (1936) 26 Geo, 5 & 1 Edw 8, cr 16.

67 *Russell on Crime*, Vol 2, eleventh edn, p 1939.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 245.

Unlawfully taking coining instrument from mint.--

Whoever, without lawful authority, takes out of any mint, lawfully established in [68][India], any coining tool or instrument, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

The section penalises 'unlawfully taking' coining instruments out of the mint lawfully established in India. Intention is no part of the offence. All that is required is that coining instruments should be taken out of the mint without lawful authority.

2. Legislative Changes

The word 'the Provinces' were substituted for the words 'British India' by the Adaptation of Laws Order 1948. The words 'the Provinces' were substituted by the words 'the States' by the Adaptation of Laws Order 1950. The word 'India' was substituted for the words 'the States' by Act 3 of 1951.1797

3. 'Without Lawful Authority'

If the authorities, knowing of a person's intention to remove any coining instrument, allow him to do so, in order to ensure his detention, such authority does not justify the act of the accused.[69]

4. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit to take cognizance of an offence under this section.

5. Charge

The following form of the charge may be adopted in a prosecution under this section:

I, (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:

That you, on or about the.....day of .....at.....without lawful authority, did take out of a mint lawfully established in India to wit, the mint.....a certain coining tool (*or instrument*), to wit.....and thereby committed an offence punishable under section 245 of the Indian Penal Code, and within the cognizance of my Court.

And I hereby direct that you be tried by this court, on the said charge.

6. Proof

To establish an offence under this section, it will have to be proved that:

(i) the tool or instrument in question is a coining tool or instrument;
(ii) it belonged to a mint lawfully established in India; and
(iii) the accused took it out of the mint without lawful authority.

68 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule to read as above.

69 *R v Hervay* LR 1 CC 284 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 246.

Fraudulently or dishonestly diminishing weight or altering composition of coin.--

Whoever fraudulently or dishonestly performs on any coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation.--A person who scoops out part of the coin and puts anything else into the cavity alters the composition of that coin.

Comments

1. Scope

This section and s 247 of the IPC deal with the tampering of coin either by sweating or other means which diminishes its weight or alters its composition.1798

2. Analogous Law

Sections 246 and 247 correspond with s 3 of the English Coinage Act 1946 (as amended by the Criminal Justice Act 1948)[70] which runs as follows:

> (1) Every person who impairs, diminishes or lightens any current gold or silver (cupro-nickel) coin with intent that the coin so impaired, diminished or lightened, may pass, for a current gold or silver (cupro-nickel) coin, shall be guilty of felony, and on conviction thereof liable to imprisonment for a term not exceeding fourteen years...

Section 2(a) of the Coinage Act 1906[71]as amended by the Indian Coinage (Amendment) Act 1947 defines the word 'deface' as follows:

> ...
>
> (a) "deface", with its grammatical variations and cognate expressions, includes clipping, filing, stamping, or such other alteration of the surface or shape of a coin as is readily distinguishable from the effects of reasonable wear.
>
> ...

Section 16 of the Coinage Act 1906 provides that any person authorised by the Central Government shall by himself or another, cut or break the silver coin; if it has been diminished in weight or has been defaced.

Sections 17 and 18 of the said Act provide for the return or payment of the coins so cut to their owners, unless he believes that the coin has been fraudulently defaced. It is provided in the Explanation to s 18 to the said Act that defacing a coin by sweating is deemed to amount to fraudulent defacement.

3. 'Fraudulently'

Section 25 and commentary thereunder may be referred to.

4. 'Dishonestly'

Section 24 and commentary thereunder may be referred to.

5. Procedure

The offence is cognizable, non- bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. The limitation for taking cognizance of an offence under this section is three years.

6. Charge

The following form of the charge may be adopted for a prosecution under this section:

I, (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:

That you, on or about the.....day of.....at.....fraudulently (*or dishonestly*) performed on the coin, to wit .....an operation which diminished its weight (*or altered1799 its composition*), and you thereby committed an offence punishable under section 246 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

7. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused performed an operation;
(ii) the thing on which the operation was performed was a coin;
(iii) the operation was performed fraudulently or dishonestly; and
(iv) it diminished its weight or altered its composition.

70 11 & 12 Geo 6, c 58, s 1 .

71 The word 'Indian' of the Indian Coinage Act 1906 was omitted by Act 47 of 1975, s 2 (wef 12-8-1975). Now, repealed

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 247.

Fraudulently or dishonestly diminishing weight or altering composition of Indian coin.--

Whoever fraudulently or dishonestly performs on [72][any Indian coin] any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

The only difference between s 246, IPC and this section is that the former deals with the tampering with a coin while this, section deals with the tampering with the Indian coin, either by sweating or other means so as to diminish its weight or alter its composition.

2. Legislative Changes

The words 'any of the Queen's coin' were replaced by the words 'any Indian coin' in the body of the section by the Adaptation of Laws Order 1950. By the same order the words 'Queen's coin' were replaced by the words 'Indian coin' in the margin of the section also.

3. Coin with respect to which Offence Defined in Sections 247 or 249 has been Committed

Commentary under s 251 may be referred to.

4. 'Fraudulently'

Section 25 and commentary thereunder may be referred to.1800

5. 'Dishonestly'

The word 'dishonestly' which occurs in this section has been defined in s 24, IPC thus:

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that "thing dishonestly".

Dishonesty With Banks

The banks are not authorised to accept coins which have been fraudulently defaced. If, therefore, a person intentionally defaces a coin and conceals this fact from the bank in order to persuade the bank to accept the coin, he has the intention of causing wrongful gain to himself, even though the bank may not be put to a wrongful loss inasmuch as it has to pay price according to the present weight of the coin. But there would be a wrongful loss to the bank if some silver has been taken away by cutting

clipping or filing and the weight is brought up to the required minimum by soldering. The person would therefore be liable under this section.[73]

6. Procedure

The offence is cognizable, non-bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

7. Charge

The following form of the charge may be adopted in a prosecution under this section:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....fraudulently (*or dishonestly*) performed on an Indian coin, to wit.....an operation which diminished its weight (*or altered its composition*), and you thereby committed an offence punishable under section 247 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

8. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused performed an operation;
(ii) the thing on which the operation was performed was an Indian coin;
(iii) the operation was performed fraudulently or dishonestly; and
(iv) it diminished its weight or altered its composition.

72 Substituted by the AO 1950, for 'any of the Queen's coin'.

73 *Mehtab Rai v Emperor* AIR 1926 All 321, p 323, (1926) 27 Cr LJ 426 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 248.

Altering appearance of coin with intent that it shall pass as coin of different description.--

Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.1801

Comments

1. Scope

Any performance or operation which alters the appearance of a coin with the intention that the said coin shall pass as a coin of a different description is an offence under this section. The alteration must not diminish the weight of the coin. If so, then ss 246 or 247 will apply.

2. Analogous Law

This section is analogous to s 2 of the English Coinage Act 1946 (as amended by Criminal Justice Act 1948, s 1), which reads thus:

> Every person who:
>
> (a) Gilds or silvers, or, with any wash or materials capable of producing the colour or appearance of gold or silver by any means whatsoever, washes, cases over or colours:
>
> (i) any coin whatsoever resembling any current gold or silver (cupro-nickel) coin; or
> (ii) any current copper coin, with intent to make it resemble or pass for any current gold or silver (cupro-nickel) coin; or
> (iii) any piece of silver or copper or of coarse gold or coarse silver or of any metal or mixture of metals; being of a fit size and figure to be coined, with intent that it shall be coined into false and counterfeit coin resembling any current gold or silver (cupro-nickel) coin; or
>
> (b) Gilds, or with any wash or materials capable of producing the colour or appearance of gold or by any means whatsoever, washes, cases over or colours, any current silver (cupro-nickel) coin with intent to make it resemble or pass for any current gold coin;
> (c) Files or in any manner alters
>
> (i) any current silver (cupro-nickel) coin with intent to make it resemble or pass for any current gold coin; or
> (ii) any current copper coin with intent to make it resemble or pass for any gold or silver (cupro-nickel) coin;
>
> shall be guilty of felony and on conviction thereof be liable to imprisonment for life.

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. The limitation for taking cognizance of an offence under this section is three years.

4. Charge

For a charge under this section, the following form may be adopted:

I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

1802

That you, on or about the.....day of.....at ..... performed an operation on the coin, Exhibit.....which altered the appearance of the said coin, with the intention that the said coin shall pass as a coin of a different description and you thereby committed an offence punishable under section 248 of the Indian Penal Code, and within my cognizance.

And I there direct that you be tried by this court on the said charge.

5. Proof

To establish an offence under this section the prosecution has to prove that:

(i) the accused performed an operation on any coin;
(ii) it altered its appearance; and
(iii) he did so with the intention that the altered coin should pass as a coin of a different description.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 249.

Altering appearance of Indian coin with intent that it shall pass as coin of different description.--

Whoever performs on [74][any Indian coin] any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

The only difference between the previous section and this section is that in this section the coin altered is an Indian coin and it provides a higher penalty, in other respects, the ingredients of this section are the same as those of the last section.

2. Legislative Changes

The words 'any Indian coin' were substituted for the words 'any of the Queen's coin' by the Adaptation of Laws Order 1950.

3. 'Indian Coin'

Section 230 may be referred to.

4. Coin with respect to which the Offence Defined in Sections 247 or 249 has been Committed

Commentary under s 251 may be referred to.1803

5. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

6. Charge

For a charge under this section, the following form may be adopted:

I, (*name and Office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That on or about the.....day of.....at .....you performed an operation on the Indian coin, Exhibit.....which altered the appearance of the said coin, with the intention that the said coin shall pass as a coin of a different description and you thereby committed an offence punishable under section 249 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

7. Proof

In order to establish an offence under this section, the prosecution has to prove that:

(i) the accused performed any operation on an Indian coin;
(ii) it altered its appearance; and
(iii) he did so with the intention that the altered coin should pass as a coin of a different description.

74 Substituted by the AO 1950, for 'any of the Queen's coin'.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 250.

Delivery of coin, possessed with knowledge that it is altered.--

Whoever, having coin in his possession with respect to which the offence defined in section 246 or 248 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Comments

1. Scope

Sections 250 and 251, IPC are meant to punish persons who trade in spurious or altered coins, and correspond to ss 239 and 240, IPC . In both sections possession with knowledge and fraudulent delivery is essential.

2. 'Fraudulently'

Section 25 and commentary thereunder may be referred to.1804

3. Coin

Coin refers to a coin in respect of which an offence under ss 246 or 248, IPC has been committed. Section 246 , IPC deals with an offence of fraudulently or dishonestly diminishing the weight or altering the composition of a coin. Section 248 , IPC deals with an offence of altering the appearance of a coin with the intention that it shall pass as a coin of different description. This section deals with offences relating to trading in such spurious or altered coins.

4. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

5. Charge

The following form of the charge may be adopted in a prosecution under this section:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of the accused*), as follows:
>
> That on or about the.....day of.....at.....you had in your possession a coin, to wit.....with respect to which the offence defined in section 246 (or section 248) of the Indian Penal Code had been committed, and having known at the time when you became possessed of the said coin, that such offence had been committed with respect to it, you fraudulently or with intent that fraud might be committed, delivered such coin to *AB* (*or attempted to induce the said AB to receive the same*), and thereby committed an offence punishable under section 250 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this Court on the said charge.

6. Proof

To establish an offence under this section the prosecution has to prove that:

(i) the coin in the case was one in respect of which an offence under ss 246 or 248 had been committed;
(ii) the accused was in possession of it;
(iii) at the time when he became possessed of it, he knew that any of the said offences had been committed with respect to it;
(iv) he delivered it to some other person, or attempted to induce him to receive the same;

and

(v) he did so fraudulently, or with intent that fraud might be committed.

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Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 251.

Delivery of Indian coin, possessed with knowledge that it is altered.--

Whoever, having coin in his possession with respect to which the offence defined in section 247 or 249 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment1805 of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

This section deals with Indian coins. The difference between the last and the present section is that the coin possessed in this section is 'Indian coin' for which a higher penalty is prescribed. In all other respects the two are the same.

2. Legislative Changes

The word 'Queen's' in the margin of the section was replaced by the word 'Indian' by the Adaptation of Laws Order 1950.

3. 'Delivers such Coins'

The mere fact that a coin is used as an ornament by soldering a ring to it does not transform it absolutely into a new article. By removal of the ring, the coin in a defaced form will re-appear and may be capable of being accepted as a coin by ignorant villagers. If these coins are tendered to a bank, they are not tendered as ornaments or other articles into which coins have been transformed, but they are tendered as coins which have been defaced. If, therefore, any person clips and cuts away such coins, makes up their deficient weight by solder and delivers them to a bank, he would be guilty of the offence under this section.[75]

4. Coin with respect to which the Offence Defined in Sections 247 or 249 has been Committed

Sections 247 and 248, IPC both deal with Indian coins. That is the reason for not repeating the word

'Indian' in the body of this section. Section 247 , IPC deals with fraudulently or dishonestly diminishing weight or altering composition of Indian coins, while s 249, IPC deals with the altering of appearance of an Indian coin with the intention that it shall pass as coin of different description. This section deals with offences relating to trade in such spurious or altered Indian coins.

5. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a court of session. A warrant shall ordinarily issue in the first instance. There is no limitation for taking cognizance of an offence under this section.1806

6. Charge

The following form of the charge may be adopted in a case under this section:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....had in your possession an Indian coin, to wit.....and in respect of which the offence defined in section 247 (*or section 249*) of the Indian Penal Code, had been committed, and knowing at the time when you became possessed of the said coin that such offence had been committed, you fraudulently (*or with intent that fraud may be committed*) delivered such coin to *AB* (*or attempted to induce the said AB to receive the same*) and thereby committed an offence punishable under section 251 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

7. Proof

To establish an offence under this section it will have to be proved that:

(i) the coin in question was one with respect to which the offence defined in ss 247 or 249, IPC was committed;
(ii) the accused was in possession of it;
(iii) at the time when he became possessed of it, he knew that any of the said offences had been committed;
(iv) he delivered it to someone, or attempted to induce someone to receive it; and
(v) he did so with intent to defraud or with intent that fraud might be committed.

8. Sentence--'And Shall also be Liable to Fine'

The law did not require a sentence of fine as well as imprisonment to be inflicted. The sentence of fine was optional.[76]

The maximum sentence prescribed under this section, is ten years' rigorous imprisonment coupled with a fine. Therefore, a sentence of one years' rigorous imprisonment and a fine of Rs 1000 on one accused and six months rigorous imprisonment with a fine of Rs 500 on another cannot be said to be severe.[77]

75 *Mehtab Rai v Emperor* AIR 1926 All 321, p 323, ILR 48 All 603, (1926) 27 Cr LJ 426 .

76 Re *Joseph alias Thavasi* 1 Weir 223.

77 *Mehtab Rai v Emperor* AIR 1926 All 321, p 324, (1926) 27 Cr LJ 426, ILR 48 All 603, (1926) 24 All LJ 842 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 252.

Possession of coin by person who knew it to be altered when he became possessed thereof.--

Whoever, fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 246 or 248 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect of such coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.1807

Comments

1. Scope

This section punishes persons who possess debased or altered coins with fraudulent intention. This section and s 253, IPC correspond to ss 242 and 243, IPC . Under this section possession of a debased coin in respect of which an offence defined in either ss 246 or 248, IPC has been committed is made an offence.

2. 'Fraudulently'

Commentary under s 25 may be referred to.

3. Possession

Commentary under ss 27 and 235 may be referred to.

4. Procedure

The offence under this section is cognizable, non- bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. The limitation for taking cognizance of an offence under this section is three years.

5. Charge

The following form of the charge may be adopted in a prosecution under this section:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....fraudulently (*or with intent that fraud might be committed*) had in your possession a coin, to wit.....in respect of which the offence defined in section 246 (or 248) IPC had been committed having known at the time of becoming possessed thereof, that such offence had been committed with respect to the said coin, and thereby committed an offence punishable under section 252 of the Indian Penal Code and within any cognizance.
>
> And I hereby direct that you be tried on the said charge.

6. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused was in possession of a coin;
(ii) it was a coin with respect to which the offence defined in ss 246 or 248 had been committed;
(iii) the accused knew of it when he became possessed of the coin; and
(iv) he was in possession of the coin with intent to defraud, or with intent that fraud might be committed.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 253.

Possession of Indian coin by person who knew it to be altered when he became possessed thereof.--

Whoever, fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence1808 defined in either of the section 247 or 249 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Comments

1. Scope

The only difference between this and the last section is that in this section the same offence is in respect of an Indian coin and the penalty prescribed is higher than the preceding section. In other respects, there is no difference.

2. Legislative Changes

The words 'Queen's coin' in the margin were replaced by the words 'Indian coin' by the Adaptation of Laws Order 1950.

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. No period of limitation is fixed for taking cognizance of an offence under this section.

4. Charge

The following form of the charge may be adopted in a prosecution under this section:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you on, or about the.....day of.....at.....fraudulently (*or with intent that fraud might be committed*) had in your possession an Indian coin, to wit.....in respect of which the offence defined in section 247 (or 249) IPC had been committed having known at the time of becoming possessed thereof, that such offence had been committed with respect to the said coin, and thereby committed an offence punishable under section 253 of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

5. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused was in possession of an Indian coin;
(ii) it was a coin with respect to which the offence defined in s 247 or 249, IPC has been committed;
(iii) the accused knew of it when he became possessed of the coin; and
(iv) he was in possession of the coin with intent to defraud, or with intent that fraud might be committed.1809

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 254.

Delivery of coin as genuine, which, when first possessed, the deliverer did not know to be altered.--

Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in sections 246, 247, 248 or 249 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed.

Comments

1. Scope

The section makes it an offence to deliver as genuine what is spurious or a coin of one description as a coin of another description, but which has been subjected to an operation described in any of the ss 246 - 249, IPC, which he did not know when he took the coin into his possession. It corresponds to s 241, IPC .

The offender under either section comes into possession of the coin innocently, *i.e.*, without knowing that it has been altered. He then comes to know of it and then delivers or attempts to deliver it to another as genuine. In a great majority of coin offences, the false coin is substantially worthless. It would, however, be a very profitable transaction to make and circulate silver or copper coins of exactly the same intrinsic value as those issued by Government. Such an act would undoubtedly come within the meaning of 'counterfeit coin' under the previous section of this chapter. It is specifically provided for by the Metal Tokens Act 1889, which forbids the making or issuing of metal intended to be used as

money, but not authorised by the Indian Government.

Section 3 of the Metal[78]Tokens Act 1889 provides:

> **S. 3 Prohibition of making by private persons of pieces of metal to be used as money.--**No piece of copper or bronze or of any other metal or mixed metal, which, whether stamped or unstamped, is intended to be used as money, shall be made except by the authority of the Central Government.

2. Procedure

The offence under this section is cognizable, non-bailable, non- compoundable and is triable by any magistrate. A warrant shall ordinarily issue in the first instance. The limitation for taking cognizance of an offence under this section is three years.

3. Charge

The following form of the charge may be adopted in a prosecution under this section:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

1810

> That on or about the.....day of.....at.....you delivered to AB (*or attempted to induce the said AB to receive*) as genuine a coin to wit.....(*or as a coin of a different description to what it is*), in respect of which you then knew (*though not at the time when you took the same in possession*) that an operation such as is mentioned in section 246 (or sections 246 , 247, 248 or 249) of the Indian Penal Code, to wit.....had been performed, and you thereby committed an offence punishable under section 254 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried on the said charge.

4. Proof

To establish an offence under this section, it will have to be proved that:

(i) the coin in question is one with respect to which any such operation as that mentioned in ss 246 - 249, IPC has been performed;
(ii) at the time the accused took possession of it, he did not know that the coin was so operated upon;
(iii) the accused delivered it to someone; or he attempted to induce someone to receive it,

as a genuine coin, or as a coin of a different description; and

(iv) at the time he did so, he knew that it had been so operated upon.

78 *Mayne on Criminal Law,* second edn, p 129.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 255.

Counterfeiting Government stamp.--

Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any stamp issued by Government for the purpose of revenue, shall be punished with [79][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.--A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

Comments

1. Scope

Sections 255 - 263A, IPC, of this chapter deal with offences relating to government stamps. These sections correspond to s 13 of the English Stamp Duties Management Act 1891,[80] under which every person who does or causes to be done, or knowingly aids, abets or assists in doing certain acts in relation to stamps or dies used for the purpose of the collection of stamp duties under the care and management of the Commissioner of Inland Revenue, or for the collection of postage (income-tax, national insurance and industrial injuries insurance contributions and entertainments duty) is guilty of felony.[81]1811

This section deals with counterfeiting government stamps. It corresponds to s 241, IPC, which deals with counterfeiting coins.

2. Legislative Changes

The words 'imprisonment for life' were substituted for the words 'transportation for life' by Act 26 of 1955, s 117 and Schedule, with effect from 1 January 1956.

3. 'Counterfeits'

Sections 28, 231 and 232, and commentary thereunder may be referred to.

An exact resemblance or facsimile is not required to constitute the crime of forgery; it is adequate if there be a sufficient resemblance to show that a false making was intended and that the false stamp is so made as to have an aptitude to deceive.[82]

4 'Any Stamp'

'Stamp' means a stamp impressed by means of a die as well as an adhesive stamp for denoting any duty or fee.[83] Impressed stamp includes: (a) labels affixed and impressed by the proper officer, and (b) stamps embossed or engraved on stamped paper.[84] The word 'stamp' signifies some impression or mark set upon paper or parchment as a token of the payment of some charges, *e.g.*, tax revenue. It includes postage stamps.[85]

5. 'Government'

In ss 255 and 263A, IPC the word 'Government', when used in connection with or in reference to, any stamp issued for the purpose of denoting a rate of postage shall, notwithstanding anything in s 17, be deemed to include the person or persons authorised by law to administer executive government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country.[86]

Section 17 and commentary thereunder may be referred to.

6. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a court of session. A warrant shall ordinarily issue in the first instance. There is no limitation for taking cognizance of an offence under this section.

7. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....counterfeited (*or knowingly performed a certain part of the process of counterfeiting, to wit....*) a certain stamp1812 issued by Government for the purpose of revenue, to wit.....and thereby committed an offence punishable under section 255 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

8. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused counterfeited, or knowingly performed any part of the process of counterfeiting; and
(ii) the counterfeiting was that of a stamp issued by the government for the purpose of revenue.

In the instant case the accused appellants were caught red-handed when they were processing counterfeit stamps. The printing machinery was also seized from the possession of the accused appellants. Their conviction under ss 255 and 256, IPC was held proper.[87]

79 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

80 54 and 55 Vic of English c 38 as amended by the Forgery Act 1913 and by the Criminal Justice Act 1948.

81 *Halsbury's Laws of England*, third edn (Simonds), p 860.

82 *R v Callicutt* (1812) 2 Leach 1048, 4 Taunt 300 .

83 Section 27, Stamp Duties Management Act 1891 (54 and 55 Vict, c 38).

84 Section 2(13) of the Indian Stamp Act 1899.

85 Sections 16 and 17 of the Indian Post Office Act 1898.

86 Section 263A(4) of the Indian Penal Code 1860.

87 *Manmit Saggu v State of Maharashtra* 2009 (2) Mah LJ (Cri) 95 (Bom) .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 256.

Having possession of instrument or material for counterfeiting Government stamp.--

Whoever has in his possession any instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section deals with possession of instruments or material for counterfeiting stamps, and corresponds to s 235, IPC, with the difference that while the present section deals with stamps, s 235, IPC deals with coins. The object of both sections is the same.

In the instant case the accused appellants were caught red-handed when they were processing counterfeit stamps. The printing machinery was also seized from the possession of the accused appellants. Their conviction under ss 255 and 256, IPC was held proper.[88]

2. Possession

Sections 27 and 235 and commentary thereunder may be referred to.

3. 'For the Purpose of Counterfeiting'

The expression 'for the purpose of counterfeiting' means 'for the purpose of causing one thing to resemble another, intending by means of that resemblance to practise deception.1813

4. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

5. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

> I, (*name and office of the magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....had in your possession, an instrument (*or material*) to wit.....for the purpose of being used, (*or knowing or having reason to believe that it was intended to be used*), or the purpose of counterfeiting stamp to wit.....issued by Government for the purpose of revenue, and thereby committed an offence punishable under section 256 of the Indian Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

6. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused had in his possession an instrument or material;
(ii) the said instrument or material was for the purpose of being used, or knowing or having reason to believe that it was intended to be used, for the purpose of counterfeiting a

government stamp;
(iii) the stamp to be counterfeited was one, issued by the government for revenue; and
(iv) the instrument or material was so usable.

88 *Manmit Saggu v State of Maharashtra* 2009 (2) Mah LJ (Cri) 95 (Bom) .

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 2/Chapter XII Of Offences Relating to Coin and Government Stamps/S. 257.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 257.

Making or selling instrument for counterfeiting Government stamp.--

Whoever makes or performs any part of the process of making, or buys, or sells, or disposes of, any instrument for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section deals with making, buying, selling, or disposing of instruments for counterfeiting government stamp. It is similar to s 234, IPC .1814

2. 'Reason To Believe'

Section 26 and commentary thereunder may be referred to.

3. Stamp

Synopsis notes under s 255 may be referred to.

4. Government

Synopsis notes under ss 17 and 263A(4) may be referred to.

5. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a

magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

6. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

I, (*name and office of the magistrate, etc*) hereby charge you (*name of accused*) as follows:

That on or about the.....day of.....at.....you made (*or performed any part of the process of making or bought or sold or disposed of*) an instrument, to wit.....for the purpose of being used (*or knowing or having reason to believe that it was intended to be used*) for counterfeiting a stamp, to wit.....issued by Government for the purpose of revenue, and thereby committed an offence punishable under section 257 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

7. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused made or performed any part of the process of making; or bought, or sold, or disposed of, an instrument;
(ii) the said instrument was intended to be used for the purpose of counterfeiting any stamp issued by government for the purpose of revenue; and
(iii) the accused did so in order that such instrument might be used for the purpose of counterfeiting such stamp, or he knew or had reason to believe that the same was intended to be used for such purpose.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 258.

Sale of counterfeit Government stamp.--

Whoever sells, or offers for sale, any stamp which he knows or has reason to believe to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.1815

Comments

1. Scope

This section deals with the sale of a counterfeit government stamp and is similar to s 239, IPC .

2. 'Knowledge' or 'Reason to Believe'--Distinction

'Knowledge' is an awareness on the part of the person concerned indicating his state of mind. 'Reason to believe' is another facet of the state of mind. 'Reason to believe' is not the same thing as 'suspicion' or 'doubt' and mere seeing also cannot be equated to believing. 'Reason to believe' is a higher level of a state of mind. Likewise 'knowledge' will be slightly on higher plane than 'reason to believe'. A person can be supposed to know where there is a direct appeal to his sense and a person is presumed to have a reason to believe if he has sufficient cause to believe the same.[89]

Reason to Believe--What is?

What s 26, IPC means is that a person must have reason to believe if the circumstances are such that a reasonable man would by probable reasoning conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such as creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing. These two requirements, *i.e.*, 'knowledge' and 'reason to believe' have to be deduced from various circumstances of the case.[90]

Inference of Knowledge or Reason to Believe

Where the appellant was a licensed vendor and admittedly used to purchase stamps from the treasury, but there was absolutely no material, whatsoever, to show that the counterfeit stamps were in fact purchased by the accused from the treasury. A bare allegation by way of an explanation by the accused-appellant that he purchased all the stamps including the counterfeit ones from the treasury, appeared on the face of it to be false, as he had neither produced registers maintained by him nor had he made even an effort to summon the treasury records. There is no material, whatsoever, even to probablise such a plea. In these circumstances, the only inference, that can be drawn is that he had 'knowledge' and 'reason to believe' that the stamp which he had in his possession and which he was selling or offering to sell, were counterfeit ones. These two ingredients of provisions of law are fully established.[91]1816

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

4. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

I, (*name and office of magistrate, etc*) hereby charge you (*name of the accused*) as follows:

That you, on or about the.....day of.....at.....sold (*or offered for sale*) a stamp, to wit.....which you knew (*or had reason to believe*) to be counterfeit of the stamp issued by government for the purpose of revenue and thereby committed an offence punishable under section 258 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

5. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused sold or offered for sale, a stamp;
(ii) the stamp sold or offered for sale was a counterfeit government stamp; and
(iii) the accused then knew, or had reason to believe, that the stamp was counterfeit.

89 *Joti Prashad v State of Haryana* AIR 1993 SC 1167, (1993) All Cr 101 (SC), (1993) Cr LJ 413, p 415 .

90 *Joti Prashad v State of Haryana* AIR 1993 SC 1167, (1993) All Cr 101 (SC), (1993) Cr LJ 413, p 415 .

91 *Ibid*.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 259.

Having possession of counterfeit Government stamp.--

Whoever has in his possession any stamp which he knows to be a counterfeit of any stamp issued by Government for the purpose of revenue, intending to use, or dispose of the same as a genuine stamp,

or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section deals with possession of a counterfeit government stamp with the intention of using it as genuine. It is similar to s 243, IPC .

2. 'Knowledge' or 'Reason to Believe'

Synopsis note 2 under s 258 may be referred to.

3. 'Possession'

Synopsis notes under ss 27 and 235 may be referred to.1817

4. 'Stamp'

Notes under s 255 may be referred to.

5. 'Counterfeit'

Notes under ss 28 and 231 may be referred to.

6. 'Government'

Notes under ss 17 and 263A may be referred to.

7. Procedure

An offence under this section is cognizable, bailable, non-compoundable and is triable by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

8. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....were in possession of a stamp to wit.....which you knew to be counterfeit of a stamp, to wit.....issued by government, for the purpose of revenue, intending to use (*or dispose of*) the same as a genuine stamp, (*or in order that the same might be used as a genuine stamp*), and thereby committed an offence punishable under section 259 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

9. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused had in his possession a counterfeit of a government revenue stamp;
(ii) the accused knew that the stamp was a counterfeit of the revenue stamp; and
(iii) he had it in his possession intending to use or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp.

The possession of government stamps by the accused stamp vendor was established and the accused barely alleged by way of explanation that he purchased all the stamps including the counterfeit ones from the treasury, appeared on the face of it to be false, as he had neither produced registers maintained by him nor had he made even an effort to summon the treasury records. In these circumstances the only inference that can be drawn is that he had the 'knowledge' and 'reason to believe' that the stamps which he had in his possession and which he was selling or offering to sell, were counterfeit ones. The conviction of the accused under ss 258, 259, IPC was upheld.[92]1818

92 *Joti Prashad v State of Haryana* AIR 1993 SC 1167, (1993) All Cr C 101 (SC), (1993) Cr LJ 413 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 260.

Using as genuine a Government stamp known to be counterfeit.--

Whoever uses as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Comments

1. Scope

This section deals with using as genuine a government stamp known to be a counterfeit. It corresponds to s 254, IPC . Under this section the stamp used as genuine must be a counterfeit. A person passing off a one-*anna* stamp as a one-rupee stamp was held to be not counterfeiting a one-rupee stamp.[93]

2. Counterfeit

Where a stamp-vendor of certain forest stamps caused some used stamps to resemble genuine ones and attached them to the licenses issued for grazing cattle. It was held that this act amounted to counterfeiting within the meaning of s 28 and the stamp-vendor was guilty under s 260, IPC .[94] Under s 260 the stamp used as genuine must be a counterfeit. A person passing off a one-*anna* stamp as a one-rupee stamp was held to be not counterfeiting a one-rupee stamp.[95]

3. Procedure

The offence under this section cognizable, bailable but not compoundable and can be tried by a magistrate of the first class. A warrant shall ordinarily issue in the first instance. There is no time limit for taking cognizance of an offence under this section.

4. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the.....day of.....at.....used as genuine a stamp, to wit.....knowing it to be a counterfeit of a stamp issued by government for the purpose of revenue, to wit.....and thereby committed an offence punishable under section 260 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

5. Proof

In order to establish an offence under this section, it will have to be proved that:1819

(i) the accused used as genuine a counterfeit stamp;
(ii) the said stamp was counterfeit of a government revenue stamp; and
(iii) the accused used the said stamp knowing that the stamp used was counterfeit.

93 *Queen v Shuroop Chunder Doss* 2 WR 65 .

94 *Ramlal v Emperor* AIR 1921 Nag 86(2) .

95 *Queen v Shuroop Chunder Doss* 2 WR 65 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 261.

Effacing, writing from substance bearing Government stamp, or removing from document a stamp used for it, with intent to cause loss to Government.--

Whoever, fraudulently or with intent to cause loss to the Government, removes or effaces from any substance, bearing any stamp issued by Government for the purpose of revenue, any writing or document for which such stamp has been used, or removes from any writing or document, a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope

This section deals with alteration and defacement of government revenue stamps and is similar to ss 246 and 248, IPC .

The intention with which the acts named in this section are done, may be either fraudulent generally or done with a view to cause loss to the government. Therefore, a conviction would be good where the intention was merely to efface a document with a view to injuriously affect the rights of another person. No intention to cause loss to government can be assumed unless it is shown or inferred that the intention of the party was to use the stamp as a stamp, a second time. Therefore, no conviction will be supported, if the object of removing the writing from a stamped paper was merely to write upon the blank space something which required no stamp.[96]

2. Essential Ingredients Of The Offence

The essential ingredients on an offence under this section are:

(i) fraudulent removal or effacement of any writing or substance, from a document bearing a government stamp, or
(ii) causing such removal or effacement with intent to cause loss to the government; or

(iii) with a view to defraud or cause loss to the government by removing from, any writing or document, a stamp used thereon to use it again.

3. Re-use of Removed Stamp not Necessary

Under the above cl (3) the mere removal of the stamps with a view to use it again is sufficient to constitute an offence under this section. The actual re-use is a separate1820 offence falling under s 262, IPC . Acts contemplated under this section should be committed either to cause loss to the government or to defraud some one not necessarily the government.

4. 'Fraudulent'

Notes under ss 25 and 463 may be referred to.

5. 'Document'

Section 29 and notes thereunder may be referred to.

6. Procedure

The offence under this section is cognizable, bailable, non-compoundable and is triable by a magistrate of the first class.. A warrant shall ordinarily issue in the first instance. The limitation for taking cognizance of an offence under this section is three years.

7. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the.....day of.....at.....fraudulently (*or with intent to cause loss to the Government*) removed (*or effaced*) from any substance bearing any stamp issued by government for the purpose of revenue, any writing or document for which such stamp had been used [or removed from any writing (*or document*) a stamp which had been used for such writing (*or document*)] in order that such stamp may be used for a different writing (*or document*), and thereby committed the offence punishable under section 261 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

8. Proof

To establish an offence under this section, it will have to be proved that:

(i) a government revenue stamp was used on a writing or document;
(ii) the accused removed or effaced any writing or document on which such stamp had been used; or the accused removed from any writing or document a stamp which had been used for such writing or document, in order that such stamp may be used for a different writing or document; and
(iii) the accused did so fraudulently, or with intent to cause loss to the government or in order that such stamp may be used for a different writing or document.

96 *Mayne's Criminal Law*, second edn, p 132.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 262.

Using Government stamp known to have been before used.--

Whoever, fraudulently or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of1821 either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section penalises fraudulent use of a government stamp which has already been used. The gist of the offence lies in the use of a stamp which has already been used, not only with the knowledge that it has been used before, but also fraudulently or with intention to cause loss to government. The intent to defraud or cause such loss cannot be assumed.[97]

2. Use of Postage Stamp

Under s 37 of Act 14 of 1866, postage stamps shall be considered to be stamps issued by the government for the purpose of revenue. Hence, fraudulent use of a postage stamp would also be an offence under this section.[98]

The mere affixing to a letter a postal stamp, which has been previously used does not itself prove a fraudulent intent to cause loss to the government within the meaning of this section.[99] It has to be proved by the prosecution.

3. Procedure

The offence under this section is cognizable, bailable, non-compoundable and is triable by any magistrate and can also be tried summarily. A warrant shall ordinarily issue in the first instance. The limitation for taking cognizance of an offence under this section is three years.

4. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

> I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you, on or about the .....day of.....at.....fraudulently (*or with intent to cause loss to Government*) used for the purpose of.....a stamp issued by the Government for the purpose of revenue, which you knew to have been before used, and thereby committed the offence punishable under section 262 of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried by this Court on the said charge.

5. Proof

To establish an offence under this section, it will have to be proved that:1822

(i) the stamp in question was issued by the government for the purpose of revenue;
(ii) it had already been used;
(iii) the accused used it again knowing that it had been used already; and
(iv) he did so fraudulently or with intent to cause loss to the government.

97 Re *Niaz Ahamad*1881 All WN 56.

98 Re *Sita Ram* 5 CPLR (Cr) 43.

99 *Queen-Empress v Murlidhar* Ratanlal, Un Cr Cas 145.

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

S. 263.

Erasure of mark denoting that stamp has been used.--

Whoever, fraudulently or with intent to cause loss to Government, erases or removes from a stamp issued by Government for purpose of revenue, any mark, put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession or sells or disposes of any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope

This section is in three parts and deals with three offences, namely:

(i) erasing or removing marks of cancellation of a stamp to defraud or cause loss to the government;
(ii) knowingly possessing or selling or disposing of a stamp from which such mark has been erased or removed; and
(iii) selling or disposing of such stamp knowing it to have been used.

The endorsements of the names of the vendor and vendee and of the date of the sale of a stamp, which are made upon a stamp by the stamp-vendor, are not put upon the stamp for the purpose of showing that it has been used, and therefore do not come under the purview of this section.[99a]

2. 'Fraudulently'

Section 25 and notes thereunder may be referred to.

'Fraudulently or With Intent to Cause Loss to Government'

The first part of the section makes it an offence to erase or remove, from a stamp issued by the government for the purpose of revenue, any mark put upon it for the purpose of denoting that it has been used, if that erasing or removing is done1823 fraudulently or with intent to cause loss to the government. Therefore, for an offence under the first part of the section, it is necessary to prove fraud or intent to cause loss to the government.[1]

3. 'Mark Put or Impressed for the Purpose of Denoting that the Stamp has been Used'--Purpose of Cancellation

The ordinary purpose for which the stamps are used is collection of revenue. For the application of the first part of the section there must be some mark put on the stamps for the purpose of denoting that they had been so used and the mark must have been erased or removed. It must be proved that the stamp in question had some mark denoting that it had been used and that the same has been erased or removed. The mark erased or removed must be such as to denote that the stamp has been used.

Erasure or removal of any other mark does not come under this part of the section. If the stamps had in fact been used for the purpose of revenue, the fact that they bore no marks would go to show that the marks had been erased. If there are slight marks, but they do not necessarily indicate that the stamp had been used for the purpose of revenue, the section does not apply.[2]

4. Mere Possession of Cancelled Stamp with Knowledge Sufficient

Under the second part of the section it is an offence to have in possession any stamp, from which the mark put upon it for the purpose of denoting that it has been used, has been erased or removed, if those facts are known to the person having such a stamp in his possession. That is to say, it is sufficient to prove that the person in whose possession the stamp was found knew that such a mark had been erased or removed from it; it is not necessary under this part of the section to prove that his possession was fraudulent or with intent to cause loss to the government.[3]

5. Accused Need not Remove the Marks Himself

There is no necessity under this part of the section for the prosecution to prove that the erasure of the marks or impressions had been done by the accused person or that he had any connection with them. It is sufficient to show that he had in his possession such stamps knowing that such marks had been so erased.[4]

6. Effect of Stamps not Punched

Section 30 of the Court Fees Act 1870 requires, that the officer of the court or the head of the office, on receiving any document requiring to be stamped under the Act, shall forthwith effect a cancellation of the stamp by punching out the figurehead so as to leave the amount designated on the stamp untouched and the part removed by punching shall be burnt or otherwise destroyed. But the fact that the stamps were not punched does not, of course, necessarily show that an offence could not be committed in respect of them, as there have been a number of cases in which stamps which have been used have been left unpunched and, subsequently removed probably1824 for nefarious purposes. Of course, if the procedure laid down in the Stamp Act is properly carried out, every stamp ought to be punched, but experience has shown that punching is often omitted.[5]

7. Procedure

The offence under this section is cognizable, bailable, non-compoundable and is triable by a magistrate of the first class. The cognizance of an offence under this section can be taken within three years of the date of the commission of the offence. In *Shankarlal Bhargava v State of Uttar Pradesh* ,[6] it was held under this section that the power to condone delay under s 473, CrPC is an overriding power and is not limited to the time-factor of condonation and can be exercised at any time (even after cognizance is taken) when full facts are brought on record.

8. Charge

The following form of the charge may be adopted in case of an offence under this section:

I, (*name and office of the magistrate, etc*) do hereby charge you (*name of accused*) as follows:

That you, on or about the.....day of.....at..... fraudulently (*or with intent to cause loss to government*)

erased or removed from a stamp issued by the Government for the purpose of revenue, a mark put (*or impressed*) on such stamp for the purpose of denoting that the same has been used, [*or knowingly had in your possession* (*or sold*) (*or disposed of*) *such stamp from which such mark had been erased or removed*] [*or sold* (*or disposed of*) *a stamp which you knew to have been used*], and thereby committed the offence punishable under section 263 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

9. Proof

To establish an offence under this section, it will have to be proved:

(i) In the case of erasing or removing marks of cancellation:

(a) that the stamp in question was issued by the government for the purpose of revenue;
(b) that it had been so used;
(c) that it bore a mark or impression denoting that it had been so used;
(d) that the accused removed or erased such mark or impression; and
(e) that he did so with intent to defraud or cause loss to government.

(ii) In the case of possessing, selling or disposing of such stamp:

(a) to (c) as in case of (i):
(d) that the mark or impression, denoting that the stamps had been used, was erased or removed;
(e) that the accused had possession of such stamp in such cancelled condition; or that the stamp, in such cancelled condition, was sold or disposed of by the accused; and1825
(f) that the accused at that time knew that such mark or impression had been so removed or erased

(iii) In the case of selling or disposing of used stamp:

(a) to (c) as in case of (i) above:
(d) that the accused sold or disposed of such stamp; and
(e) that he, when selling or disposing of the same, knew that it had been so used.

99a *Supdt and Remembrancer of Legal Affairs, Bengal v Bazlar Rahman* (1936) 37 Cr LJ 923, 39 CWN 542 .

1 *Supdt and Remembrancer of Legal Affairs, Bengal v Bazlar Rahman* (1936) 37 Cr LJ 923, 39 CWN 542 .

2 *Ibid*.

3 *Supdt and Remembrancer of Legal Affairs, Bengal v Bazlar Rahman* (1936) 37 Cr LJ 923, 39 CWN 542 .

4 *Ibid*.

5 *Supdt and Remembrancer of Legal Affairs, Bengal v Bazlar Rahman* (1936) 37 Cr LJ 923, 39 CWN 542 .

6 *Shankarlal Bhargava v State of Uttar Pradesh* (1985) (1) Crimes 265 (All), (1986) All Cr C 15 .

Indian Penal Code (Act XLV of 1860)

Chapter XII

Of Offences Relating to Coin and Government Stamps

[7][S. 263A.

Prohibition of fictitious stamps.--

(1) Whoever--
  (a) makes, knowingly utters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or
  (b) has in his possession, without lawful excuse, any fictitious stamp, or
  (c) makes or, without lawful excuse, has in his possession any die, plate, instrument or materials for making any fictitious stamp,

  shall be punished with fine which may extend to two hundred rupees.

(2) Any such stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp [8][may be seized and, if seized] shall be forfeited.

(3) In this section "fictitious stamp" means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage, or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in sections 255 to 263, both inclusive, the word "Government" when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in section 17, be deemed to include the person or persons authorized by law to administer executive Government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country.]

Comments

1. Scope and Object

The section deals with making, uttering, selling, using or dealing in fictitious postal stamps. The object is to curb the growing traffic in fictitious postage stamps. The proprietor of a newspaper, which circulated amongst stamp collectors, had in his possession a die, which he had ordered to be made for him abroad. From this die representations of a current Cape of Good Hope postage stamp could

be produced. The only purpose for which he had ordered, or had in his possession, the die, was for making upon the pages of an illustrated stamp catalogue, or newspaper, illustrations1826 in black and white, and not in colours, of the stamp in question, such catalogues being intended for sale only to stamp collectors and others as a part of the newspaper. Upon a special case, the court held that the possession of the die for making a false stamp, known to be such to its possessor, was, however innocent the use that he intended to make of it, a possession without lawful excuse, within s 7(c) of the Post Office (Protection) Act 1884.[9]

2. Legislative Changes

This section was added by s 2 of the Indian Criminal Law (Amendment Act) 1895 in consequence of the resolution of the International Postal Congress held at Vienna on 20 May 1891, by which it was agreed to make an organised attempt to prohibit the growing traffic in fictitious stamps, the use of which on postal articles posted abroad resulted in much loss and inconvenience to the post office.[10]

The words 'may be used and, if seized' in sub-s (2) were substituted for the words 'may be seized, and' by the Repealing and Amending Act 1953, Sch III.

3. Analogous Law

This section corresponds to s 7 of the English Post Office (Protection) Act 1894[11] re-enacted as s 6(5), the Post Office Act 1908.[12]

4. 'Fictitious Stamp'

Fictitious stamps as defined by sub-s (3) of this section means:

(i) any stamp falsely purporting to be issued by the government for the purpose of denoting a rate of postage, or
(ii) any fascimile, or imitation or representation whether on paper or otherwise, of any stamp, issued by the government for that purpose.

Any imitation of a government stamp which does not fulfil the requirements of this sub-section, cannot be a fictitious stamp dealt with by this section.

5. 'Government'

Section 17, IPC, defines government and states that the word 'government' denotes the Central Government or the government of a state. Overriding this definition, sub-s (4) of this section gives a special definition for the limited purposes of ss 255 - 263A, IPC and states that the word 'government', when used in connection with or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall be deemed to include the person or persons authorised by law to administer executive government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country. This definition is not of general application to govern all the provisions of the said sections and only when the question arises or is raised about the authority of issuing a stamp for the purpose of denoting a rate of postage, the1827 word 'government' shall be deemed to include the person or persons authorised to administer executive government in any part of India or foreign country.

6. Procedure

The offence under this section is cognizable, bailable, non-compoundable and is triable by any magistrate. The cognizance of an offence under this section can be taken within six months.

7. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

I, (*name and office of magistrate, etc*) do hereby charge you (*name of accused*) as follows:

That, on or about the.....day of.....you made, knowingly uttered, dealt in, or sold fictitious stamps (*or knowingly used for any postal purpose any fictitious stamp or had in your possession without lawful excuse any fictitious stamp or made or without lawful excuse, had in your possession any die, plate, instrument or materials for making any fictitious stamp*) and thereby committed an offence under section 263A of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

8. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused made, knowingly uttered, dealt in or sold the fictitious stamp in question or knowingly used it for any postal purposes; or
(ii) he had in his possession, without lawful excuse, such stamps; or
(iii) he made, or, without lawful excuse, had in his possession any die, plate, instrument, or materials for making such stamp.1828

7 Inserted by Act 3 of 1895, s 2 .

8 Substituted by Act 42 of 1953, s 4 and Sch III, for 'may be seized and' (wef 23-12-1953).

9 *Dickins v Gill* (1896) 2 QB 310 ; see now Post Office Act 1953 (1 & 2 Eliz 2, c 36) s 63 .

10 Report of Select Committee on the Amending Bill of 1895, dated 1 Jan 1895, *Gazette of India,* Pt V, dated 2 February 1895, pp 19-20.

11 47 & 48 Vict, c 76.

12 8 Edw 7, c 48.

Indian Penal Code (Act XLV of 1860)

Chapter XIII

Of Offences Relating to Weights and Measures

S. 264.

Fraudulent use of false instrument for weighing.--

Whoever fraudulently uses any instrument for weighing which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Comments

1. Scope

This section deals with fraudulent use of any instrument of weighing. The instrument used must not only be known to be false, but must also be fraudulently so used, that is, it must be used for the purpose of passing off short weight upon persons who are entitled to full weight. In general, the mere possession of false balance, which is used as a true one, will be sufficient evidence of a fraudulent intention. The scales used in markets in the mofussil are of the very crudest construction and are seldom equally balanced. Such defects are generally visible to a purchaser, and the scales are made to balance by putting some substance, generally a piece of earth or a stone, into the lighter scale. In the absence of any intention to use the scales fraudulently, the offence under this section cannot be said to have been committed.[3]

2. 'Fraudulently uses any Instrument for Weighing'

Intention is an essential part of the offence of fraudulently using false instruments of weighing.[4] The intention, however, must be alleged in laying the charge, though it may be a matter of inference only, from the fact of the possession, and the attending circumstances as manifesting the purpose, and the inference may, of course, be rebutted. But where the incorrectness of the scale is visible, and there is no attempt to cover or conceal it, there can be no ground for imputing fraud from the defect alone; the circumstances negative the intention of fraud, and no charge would lie against the party using such a balance.[5]1830

Where the weight was a *seer* weight (now out of use) and was one *tolah*,[6] or one rupee short, it was held that the weight in question could not be regarded as a false weight in the sense of the IPC .[7]

'Fraudulently' has been defined by s 25, IPC . Commentary under that section may be referred to.

3. Meaning of 'False Instrument of Weighing'

According to the ordinary use of language, if a measure is described as false, that means that it is something other than what it purports to be. The word false in this and the next section means different from the instrument, weight or measure, which the offender and the person defrauded have fixed upon, expressly or by implication, with reference to their mutual dealings.[8] The offence, under this section, is not committed unless there is proof that the accused knew that his weighing balance was false.[9]

4. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable and is triable by any Magistrate. It can also be tried summarily,[10] by a Magistrate competent to try cases summarily. A summons shall ordinarily issue in the first instance.

5. Inspection and Seizure of Weights and Measures

Under s 153 of the Code of Criminal Procedure 1973:

> ...
>
> (1) Any officer in charge of a police station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false.
>
> (2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

6. Charge

The following form of the charge may be adopted in a case of prosecution under this section:

> That you, on or about the**....**.....day of....., at....., fraudulently used a certain instrument for weighing, to wit..... knowing it to be false at the time of using it, and thereby committed an offence, punishable under section 264 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this Court on the said charge.1831

7. Proof

To establish an offence under this section the following facts have to be proved:

(i) that the accused used an instrument of weighing;
(ii) that the instrument was false;
(iii) that the accused knew it to be false; and
(iv) that he used it fraudulently.

3 *Govt v Kangalee Muduk* 18 WR 7(Cr).

4 *Ibid*.

5 Second Report 1847, ss 220, 221 .

6 One *seer* was equal to 80 *tolahs* or 80 one rupee coins.

7 *Empress v Bikka Mal* (1883) All WN 224 .

8 *Kanaya Lal Mohanlal Guljar v Emperor* AIR 1939 Bom 455, 41 Bom LR 977, (1940) 41 Cr LJ 172 ; citing *Stokes Anglo Indian Code*, Vol 1, p 404.

9 *Raj Kumar v State of Madhya Pradesh* (1967) Jab LJ 86 (SN) .

10 Refer to s 260(1), Code of Criminal Procedure 1973.

Indian Penal Code (Act XLV of 1860)

Chapter XIII

Of Offences Relating to Weights and Measures

S. 265.

Fraudulent use of false weight or measure.--

Whoever fraudulently uses any false weight or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Comments

1. Scope

The offence under this section is similar to that under the last one. The only difference between the two sections is that whereas the last section dealt with fraudulent use of false instruments of weighing, this section deals with fraudulent use of false weights and measures.

2. Principal Ingredient

The principal ingredient of this offence is the use of a false weight, measure of capacity with intent to defraud.[11]

3. 'Fraudulently'

'Fraudulently' has been defined by s 25, IPC, notes thereunder may be referred to. If a person proposes to use weights of a certain standard, it is incumbent upon him to see that the weights he uses come up to the proper standard. A magistrate is at liberty to infer fraud from the existence of a deficiency in weights used, unless the accused can account for it.[12]

4. Test of 'False Weight or Measure'

The section has no application in cases in which the accused did not profess to sell by any standard weight or measure, *e.g.,* a sale by the measure of a coconut shell.[13] The1832 weight of grain that a measure is found to hold is no evidence of its capacity, as compared with that of another measure, unless the very same grain is used. Grains of rice may be large or small, light or heavy. One sample of rice may contain more large and light grains than another and would therefore measure more, though weigh less than the latter. To ascertain whether a measure is false or not, the only proper test to apply is that of measure, and the same article must be measured in each case, and proof should be adduced that this had been done.[14]

5. Effect of False Misrepresentation of Capacity

The accused who sold liquor, measuring it with a glass which was not a prescribed measure and of which they fraudulently misrepresented the capacity, were convicted of the offence of fraudulent use of a false measure under this section. It was held that they would more appropriately have been tried for the offence of cheating.[15]

Where a tradesman supplied milk, which he sent in his own churns by train, the churns being fitted with a gauge to show how many gallons they held, and the gauge indicated a greater amount than was actually contained, the churns were held to be measures within the meaning of an English Act, similar to ss 265 - 266 of the IPC .[16]

6. Small Deficiency not to be Counted

In considering whether a weight used is false or not, a small deficiency, for instance, a deficiency of one *tola*[17] in a five-*seer* weight, should not count.[18]

7. Procedure

Same as under s 264, IPC . A magistrate detecting the offence cannot himself take cognizance of this offence.[19]

8. Complaint

The CrPC does not require any complaint by any particular persons for taking cognizance of an offence under this section, but it has been held that a conviction under this section cannot be maintained where there is no complaint by a purchaser.[20]

9. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the.....day of.....at.....frequently used a false weight (*or false measure of length or capacity*) [*or fraudulently used a weight(or measure of length or capacity) as a different weight (or measure) from what is/was*], and thereby committed1833 an offence punishable under section 265 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

10. Proof

To establish an offence under this section the prosecution has to prove that:

(i) the weight or the measure or length, or capacity used by the accused was false; or
(ii) the weight or the measure of length or capacity used by the accused was a different weight or measure from what it is; and
(iii) that the accused did so fraudulently.[21]

11. Fraud, is not Presumed has to be Strictly Proved

It is the duty of the prosecution to lead some evidence to show that the accused knew the weight or measure in question to be incorrect or that before he used them, he tampered with them. In the absence of any evidence to that effect, the fraudulent intent required by the section cannot be presumed.[22] Where standard weights are prescribed, a bazaar seller would no doubt be bound to take reasonable care that the weights used by him are not defective according to the standard, and if any of his weights varied from the standard so as to give the seller a substantial advantage, the court would probably infer fraud. But where no standard is prescribed, it is clear that no presumption of fraud can arise, and a conviction under ss 265 - 266, IPC cannot be obtained unless the element of fraud is strictly proved.[23]

11 *Bakhat Lal v Emperor* AIR 1929 Nag 239, p 240, (1929) 30 Cr LJ 692 ; *Suwalal v State* (1962) 2 Cr LJ 693 ; *State of Maharashtra v Sahijram Hiranand Sindhi* (1980) 2 Mah LJ 67, p 68 .

12 Re *Meetalagath* Poker 1 Weir 223.

13 Re *Achi* 1 Weir 223.

14 *Queen-Empress v Lakshman Martind* Ratanlal Un Cr Cas 989, p 990.

15 *Queen-Empress v Nurodin* Ratanlal Un Cr Cas 386.

16 *Harris v London County Council* (1895) 1 QB 240 .

17 *Tola* and *seer* weights are now out of use. There used to be 80 *tolas* in a *seer*.

18 *Empress v Bikka Mal* (1883) All WN 224 .

19 *Din Dahal Poddar v State of Tripura* (1994) (1) East Cr C 263, p 264, (1994) 1 Crimes 654 (Gau) .

20 *Sobha v Emperor* (1909) 9 Cr LJ 4, p 5 .

21 *Suwalal v State* (1962) 2 Cr LJ 693 ; *State of Maharashtra v Sahijram Hiranand Sindhi* (1980) 2 Mah LR 67, p 68 .

22 *Bakhat Lal v Emperor* AIR 1929 Nag 239, p 240, (1929) 30 Cr LJ 692 .

23 *Emperor v Mi Ya Pyan* (1909) 9 Cr LJ 415 .

Indian Penal Code (Act XLV of 1860)

Chapter XIII

Of Offences Relating to Weights and Measures

S. 266.

Being in possession of false weight or measure.--

Whoever is in possession of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, [24][***] intending that the same may be fraudulently used, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Comments

1. Scope

This section is similar to ss 235, 239, 240 and 259, IPC, and penalises the possession of any instrument for weighing, or any false weight or measure, knowing it to be false and intending that it may be used fraudulently. For an offence under this1834 section, mere possession of false scales, weight or measures is not enough. The prosecution must prove that the accused knew them to be false and intended to use them fraudulently.[25]

2. Legislative Changes

The word 'and' before the word 'intending' was omitted by the Repealing and Amending Act, 42 of 1953, s 4 and Third Schedule.

3. False Instrument, Weight or Measure

According to the ordinary use of language, if a measure is described as false, it means that it is something other than what it purports to be.[26] An actual shortage of weight, *etc.*, cannot be determined until a comparison is made with standard weights or measures and some reasonable allowance should, in any case, be made for wear and tear and for the rough and ready methods of bazaar shopkeepers.[27]

4. 'Which he knows to be False'

For a conviction under this section it is not enough to prove that the accused was in possession of a false instrument for weighing or a false weight or measure. It must further be proved that the accused knew them to be false and intended to use them fraudulently.[28] From the mere fact that a measure in possession of the accused is found to be false, it cannot be presumed that he knew it to be false.[29] The knowledge is an awareness on the part of the person concerned indicating his state of mind. A person can be supposed to know where there is direct appeal to his senses.[30]

5. Intending that the same may be Fraudulently used

Fraudulent intent is a necessary ingredient of the offence under this section. Where everybody, both purchaser and seller, are well aware of the actual measure being used, there can be no question of fraudulent intent. It is only when the seller purports to sell according to a certain standard and sells below that standard, that he can be said to be guilty of fraud.[31] A person in possession of false weights cannot be convicted under this section unless fraudulent intention is charged and proved.[32]

6. Inference or Presumption Against Accused when may arise

A person who represents himself as using weights or a measure of a particular standard, *e.g.,* weights of a certain English standard[33] is bound to see that the weights1835 or measures are correct according to the standard, and if they vary so as to give the seller a considerable advantage, the court is justified in inferring fraud.[34] Where standard weights are prescribed, a bazaar seller would no doubt be bound to take reasonable care that the weights used by him are not defective according to the standard, and if any of his weights varies from the standard so as to give the seller a substantial advantage, the court would probably infer fraud. But where no standard is prescribed, no presumption of fraud can arise, and a conviction under ss 265 and 266 cannot be obtained unless the element of fraud is strictly proved.[35] It has been held that from the mere fact that certain measures in the possession of the accused are found to be false no presumption arises that he knew them to be false and that he intended them to be fraudulently used.[36] But, doubting this, it has been held that the only way in which knowledge and fraudulent intention can be proved in such a case is by the possession and the use of the false weights concerned, and that where it is not the case that the weights were very old ones which the accused had neglected to verify, or that they were new ones which he had accepted as correct, and the weights in his possession were weights which he had kept in his shop for the purposes of his trade and was regularly using, the only reasonable inference is that he knew they were deficient and was using them fraudulently.[37]

Where the accused who carried on the business of selling opium, was found sitting on a gunny bag near which was a box of opium and the scales for weighing it, and false weights were found beneath the gunny bag, it was held that the only inference that could be drawn from these circumstances was that the accused possessed false weights knowing them to be false and intending that they may be falsely used.[38]

7. Procedure

Same as in the case of an offence under s 264, IPC .

8. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the .....day of.....at.....were in possession of a certain instrument for weighing (*or a certain weight, or a certain measure of length or capacity*), to wit.....which you knew to be false, intending that the same might be fraudulently used, and thereby committed an offence punishable under section 266 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

9. Proof

To establish an offence under this section, it will have to be proved that:

(i) the instrument for weighing, weight or measure of length or capacity in question is false;1836
(ii) the accused was in possession of the same;
(iii) he knew the same to be false; and
(iv) he intended that such false weight, *etc.*, should be used to defraud someone.

10. Sentence

The offence under this section is an offence against society, and in such cases, any leniency in the matter of sentence will be misplaced.[39]

24 The word 'and' omitted by Act 42 of 1953, s 4 and Sch III (wef 23-12-1953).

25 *Queen-Empress v Hamirmal* Ratanlal Un Cr Cas 514; *Reg v Kangulee Muduk* 18 CWR 7 ; *Reg v Damodhar* 1 BHCR 181 ; *Re Elukuri Seshapani Chettiar*AIR 1937 Mad 209, ILR (1937) Mad 258, (1937) 38 Cr LJ 323 .

26 *Kanayalal Mohanlal Gujar v Emperor* AIR 1939 Bom 455, p 456 .

27 *Emperor v Nanak Chand* AIR 1914 Lah 42(2), p 44, (1914) 15 Cr LJ 11, 20 PR (1913) (Cr).

28 *Queen-Empress v Hamirmal* Ratanlal Un Cr Cas 514, p 515; *Re Elukuri Seshapani Chetti*AIR 1937 Mad 209 .

29 Re *M Abdul Latiff*AIR 1943 Mad 589, (1943) 1 Mad LJ 352 .

30 *Joti Parshad v State of Haryana* (1993) All Cr C 101, (1993) Cr LJ 413, p 415 (SC) .

31 *Emperor v Harak Chand Marwar* AIR 1918 All 174, p 175, ILR 40 All 84, (1918) 19 Cr LJ 145 ; *Kanayalal Mohanlal Gujar v Emperor* AIR 1939 Bom 455 .

32 Re *Elukuri Seshapani Chetti*AIR 1937 Mad 209 ; *Reg v Damodhar* 1 Bom HCR 181 .

33 Re *Kandamuru Annappa*(1883) 1 Weir 221.

34 Re *Venkata Chetti* 1 Weir 225; *Re Appasami* 1 Weir 225; *Emperor v Mi Ya Pyan* (1909) 9 Cr LJ 415 .

35 *Emperor v Mi Ya Pyan* (1909) 9 Cr LJ 415 .

36 Re *M Abdul Latiff*AIR 1943 Mad 589 .

37 Re *Challur Seshayya*AIR 1945 Mad 8, p 9, (1944) 2 Mad LJ 249 .

38 *Bansidhar v State* AIR 1959 Raj 191, (1959) ILR Raj 36, (1959) Cr LJ 1112 .

39 *Bansidhar v State* AIR 1959 Raj 191, (1959) ILR Raj 36, (1959) Cr LJ 1112 .

Indian Penal Code (Act XLV of 1860)

Chapter XIII

Of Offences Relating to Weights and Measures

S. 267.

Making or selling false weight or measure.--

Whoever makes, sells or disposes of any instrument for weighing, or any weight, or any measure of length or capacity which he knows to be false, in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Comments

1. Scope

This section penalises making or selling of false instruments for weighing weights or measures. The offence lies in putting false scales, weights or measures in circulation with the knowledge that they may be used as true.

2. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by any magistrate. The magistrate, mentioned in s 260(1) of the CrPC 1973, may also try this offence in a summary manner. The cognizance of an offence under this section can be taken within one year.

3. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

I, (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the.....day of.....at.....made (*or sold, or disposed of*) certain instrument for weighing (*or a certain weight, or a certain measure of length or capacity*), to wit.....knowing it at the time of making (*or selling or disposing of*) it, to be false, in order that the same might be used as true (*or knowing that the same was likely to be used as true*) and thereby committed an offence punishable under section 267 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.1837

4. Proof

To establish an offence under this section, it will have to be proved that:

(i) the instrument for weighing, weight or measure of length or capacity in question is false;
(ii) the accused either made, sold, or disposed of the same;
(iii) he then knew it to be false; and
(iv) he so made, sold, or disposed of it in order that it might be used as true; or that he knew that it was likely to be used as true.1838

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 268.

Public nuisance.--

A person is guilty of a public nuisance, who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.1840

Comments

1. Scope

This section only defines the offence of 'public nuisance'. Particular kinds of public nuisances are made punishable by other sections of this chapter, and s 290 provides the punishment for public nuisances not falling and hence, not punishable under those sections.

A plain reading of s 268, IPC, would indicate that in order to amount to a public nuisance, a person must have acted in a manner which may cause any common injury, danger or annoyance to the public or to the people in general who might dwell in a certain area or in occupation of any property in the vicinity necessarily causing injury or obstruction or danger or annoyance to persons who may have occasion to exercise any public right in respect of that locality or property.[7]1841

The offence involves any act or illegal omission causing common injury, danger or annoyance to the public. Such ingredient against the people in general who reside or occupy property in the vicinity is

also sufficient to make out an offence. It is also sufficient if the acts must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.[8]

The definition of 'public nuisance' as given in s 268, IPC applies to the Code of Civil Procedure by virtue of s 3(44) of the General Clauses Act.[9]

2. English Law

Public Nuisance

Nuisances may be divided into those which are public and those which are private. A public nuisance is one which inflicts damage, injury or inconvenience on all the Queen's subjects or on all members of a class who come within the sphere or neighbourhood of its operation. It may, however, affect some to a greater extent than others. The question whether the number of persons affected are sufficient to constitute a class is one of the fact. The character of the neighbourhood is relevant for determination of the question whether a particular activity constitutes a public nuisance, and it has been held that the grant of planning permission for a change of use may therefore have the effect of rendering lawful an activity which would have been actionable if carried out in an earlier period before the character of the neighbourhood had changed. There is no requirement that an activity must in itself be unlawful to constitute a public nuisance, and disturbance caused by lawful use of the highway may constitute such a nuisance in an appropriate case.

Nuisance, Negligence and Trespass Distinguished

Some varieties of nuisance closely resemble acts classed under the head of trespass. The distinction between the two is that in trespass the immediate act which constitutes the wrong causes an injury to the sufferer's person or damage to his property or amounts to dispossession, whereas in nuisance the act itself often does not directly affect the person or property of another, but has consequences which become or are prejudicial to his person or property. Nuisance must also be distinguished from negligence although many acts which constitute a nuisance involve an element of negligence and may also be actionable as such.

In addition to the Road Traffic Regulation Act 1984 and other modern legislation regulating behaviour in highways, there are several other enactments, mainly contained in the Town Police Clauses Act 1847 and equivalent London legislation of 1839, which regulate behaviour and occupations in streets and other public places by creating offences.

Under s 54(17) of the English Metropolitan Police Act 1839, it is an offence to play a game in any thoroughfare or public place in the metropolitan police district or the City of London to the annoyance of the inhabitants or passengers.[10]

Section 54 of the English Metropolitan Police Act, 1839 provides as follows:

Prohibition of nuisances by persons in the thoroughfares.--Every person shall be liable to a penalty not more than level 2 on the standard scale, who, within the limits of1842 the metropolitan police district, shall in any thoroughfare or public place, commit any of the following offences; (that is to say,)

1 Every person who shall, to the annoyance of the inhabitants or passengers expose for show or sale (except in a market lawfully appointed for that purpose) or feed or fodder any horse or other animal, or show any caravan containing any animal or any other show or public entertainment, or shoe, bleed, or farry any horse or animal (except in cases of accident), or clean, dress, exercise, train, or break any horse or animal, or clean, make, or repair any part

of any cart or carriage, except in cases of accident where repair on the spot is necessary:

2 Every person who shall turn loose any horse or cattle, or suffer to be at large any unmuzzled ferocious dog, or set on or urge any dog or other animal to attack, worry, or put in fear any person, horse, or other animal:

3 Every person who by negligence or ill-usage in driving cattle shall cause any mischief to be done by such cattle, or who shall in anywise misbehave himself in the driving, care, or management of such cattle, and also every person not being hired or employed to drive such cattle who shall wantonly and unlawfully pelt, drive, or hunt any such cattle:

4 Every person having the care of any cart or carriage who shall ride on any part thereof, on the shafts, or on any horse or other animal drawing the same, without having and holding the reins, or who shall be at such a distance from such cart or carriage as not to have the complete control over every horse or other animal drawing the same:

5 Every person who shall ride or drive furiously, or so as to endanger the life or limb of any person, or to the common danger of the passengers in any thoroughfare:

6 Every person who shall cause any cart, public carriage, sledge, truck, or barrow, with or without horses, to stand longer than may be necessary for loading or unloading or for taking up or setting down passengers, except hackney carriages standing for hire in any place not forbidden by law, or who, by means of any cart, carriage, sledge, truck, or barrow, or any horse or other animal, shall wilfully interrupt any public crossing, or wilfully cause any obstruction in any thoroughfare:

7 Every person who shall lead or ride any horse or other animal, or draw or drive any cart or carriage, sledge, truck, or barrow, upon any footway or curbstone, or fasten any horse or other animal so that it can stand across or upon any footway:

8 Every person who shall roll or carry any cask, tub, hoop, or wheel, or any ladder, plank, pole, showboard, or placard, upon any footway, except for the purpose of loading or unloading any cart or carriage, or of crossing the footway:

9 Every person who, after being made acquainted with the regulations or directions which the commissioners of police shall have made for regulating the route of horses, carts, carriages, and persons . . . for preventing obstructions during public processions and on other occasions herein-before specified, shall wilfully disregard or not conform himself thereunto:

10 Every person who, without the consent of the owner or occupier, shall affix any posting bill or other paper against or upon any building, wall, fence, or pale, or write upon, soil, deface, or mark any such building, wall, fence, or pale with chalk or paint, or in any other way whatsoever,...:

11 ...

12 Every person who shall sell or distribute or offer for sale or distribution, or exhibit to public view, any profane, . . . book, paper, print, drawing, painting or representation, or sing any profane, indecent, or obscene song or ballad, ... or1843 use any profane, indecent or obscene language to the annoyance of the inhabitants or passengers:

13 ...

14 Every person ... who shall blow any horn or use any other noisy instrument, for the purpose of calling persons together, or of announcing any show or entertainment, or for the purpose of hawking, selling, distributing, or collecting any article whatsoever, or of obtaining money or alms:

15 Every person who shall wantonly discharge any fire-arm or throw or discharge any stone or other missile, to the damage or danger of any person, or make any bonfire, or throw or set fire to any firework:

16 Every person who shall wilfully and wantonly disturb any inhabitant by pulling or ringing any door-bell or knocking at any door without lawful excuse, or who shall wilfully and unlawfully extinguish the light of any lamp:

17 Every person who shall fly any kite or play at any game to the annoyance of the inhabitants or passengers, or who shall make or use any slide upon ice or snow in any street or other thoroughfare, to the common danger of the passengers.

In *R v Williams* [11] the court observed that where public health endeavours fail to provide adequate protection to individuals like the complainants, the criminal law can be effective. It provides a needed measure of protection in the form of deterrence and reflects society's abhorrence of the self-centered recklessness and the callous insensitivity of the actions of the respondent and those who have acted in a similar manner.

3. Definition of Public Nuisance in the Section

Various definitions of nuisance are given elsewhere,[12] but here we are concerned only with the offence of public nuisance as defined in this section. This definition has been made applicable to all

Central Acts and Regulations made on or after 14 January 1887, when the General Clauses Act was passed.[13]

'Public nuisance' includes an act which causes or which must necessarily cause injury, obstruction or annoyance to persons who may have occasion to use any public right, *e.g.*, an individual has a public right to pass along a public highway practicing his religious observance peacefully and if anyone interferes with his right, he commits public nuisance. A body of persons have the same right as an individual.[14] The definition of 'public nuisance' in this section is wide enough to cover cases of obstruction to village pathway.[15] It is, however, a matter of common experience that, for temporary purposes, the villagers stack logs and fuels on a public road; such an act though causes obstruction on a public road, is not an offence under this section.[16]

4. Analysis

The offence defined in this section may be analysed thus:

(i) it may be caused either by an act or illegal omission;1844
(ii) the effect thereof must be either injury,[17] danger or annoyance;
(iii) it may actually caused either to the public in general, or to that portion of the public who 'dwell or occupy property in the vicinity'; or
(iv) threatened of necessity to 'person who may have occasion to use any public right.'[18]

5. Spreading Infectious Disease is a Public Nuisance

Commentary under the same heading in s 269, *post* may be referred to.

6. Nuisance--Public and Private

The Supreme Court says:[19]

> Nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. It is not capable of precise definition. It may be public or private nuisance. As defined in s 268 IPC, public-nuisance is an offence against public either by doing a thing which tends to the annoyance of the whole community in general or by neglect to do anything which the common good requires. It is an act or omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy the property in the vicinity on the alternative it causes injury, obstruction, danger or annoyance to persons who may have occasion to use public right. It is the quantum of annoyance or discomfort in contradistinction to private nuisance which affects an individual is the decisive factor.

According to Pollock, 'Nuisance is the wrong done to a man by unlawfully disturbing him: (a) in the enjoyment of his property, or, in some cases, (b) in the exercise of a common right.'

In *Winfield and Jolowicz on Tort,*[20] public nuisance has been defined as follows:

> A public or common nuisance is one which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subject who come within the sphere or neigbourhood of its operation. But this definition is vague and it has been rightly said that nuisance covers a multitude of sins, great and small. Public nuisance of common law include diverse activities as carrying on an offensive trade, keeping a disorderly house, selling food unfit for human consumption, obstructing public highways, throwing fireworks about in the

> streets and holding an ill advised pop-festival.[21]

Sir Arthur Underhill in his *Law of Torts*,[22] describes public nuisance as under:

> A public nuisance is some unlawful act, or omission to discharge some legal duty, which act or omission endangers the lives, safety, health or comfort of the public or by which the public are obstructed in the exercise of some common right.

No action can be brought by a private person of public nuisance unless he has suffered substantial particular damage beyond that suffered by the public generally.1845

A private nuisance has been described as under:

> A private nuisance is some unauthorised user or a man's own property causing damage to the property of another or some unauthorised interference with another's enjoyment of his property, causing damage.

Any private nuisance whereby sensible injury is caused to the property of another, or whereby the ordinary physical comfort of human existence in such property is materially interfered with, is actionable.

Harry Street, in his *Law of Tort*[23] observes as follows:

> The essence of the tort of nuisance is the interference with enjoyment of land...the generic conception of nuisance can readily be illustrated. It covers interference with use and enjoyment of land by water, foul smoke, smell, fumes, gas, noise, heat, electricity, disease or any other like thing which may cause such an inconvenience. Nevertheless, the term 'nuisance' is used in different senses by the Judges and this has caused confusion both in the development and in the exposition of this branch of the law of torts.

Salmond in *Law of Torts*,[24] states as follows:

> Nuisance is commonly a continuing wrong that is to say, it consists in the establishment or maintenance of some state of affairs which continuously or repeatedly causes the escape of noxious things into the plaintiff's land (*eg* a streak of foul water or the constant noise of small factory). An escape of something on a single occasion would not ordinarily be termed a nuisance. Nuisance are of two kinds, public and private. A private nuisance is a civil wrong and a public or common nuisance is a criminal offence.[25]

Same Act may Constitute Public as well as Private Nuisance

Private nuisance affects only private individuals in contradistinction to the public at large. In other words it is an act or omission intended to hurt or create annoyances, injury or discomfort to private individual or to the property possessed by a private individual. In brief, in some cases the same act may constitute a public nuisance as well as a private nuisance. Very often it is evident, that the private nuisance and public nuisance may in few instances, be overlapping. It is the quantum of annoyance or discomfort or injury which distinguishes private nuisance from public nuisance.[26]

When Injury *etc.* to be actually caused and when mere Threat is enough

Where the nuisance affects the public or the people who dwell or occupy property in the vicinity, the injury, danger or annoyance must be actually caused, and must affect a number of persons. Where, however, the nuisance affects only the person who may have occasion to use any public right, the injury, danger or annoyance need not be actually caused; it is enough if it is threatened. Again it need not affect the public or the people dwelling or occupying property in the vicinity, generally. It is enough if any individual, who may have occasion to use a public right, is threatened to be affected.1846

Where can Nuisance be Committed

The wording of the section, which is not aimed at mere private nuisances implies that an offence of causing a public nuisance can only be committed in a neighbourhood which is dwelt in or occupied by people in general, that is, by a body of a considerable number of persons.[27]

Whether Nuisance may be Committed by One on his Own Land

The acts, done by a person on his own land, may amount to a public nuisance, when they cause any common injury, danger or annoyance to the public or to the people in general, who dwell or occupy property in the vicinity. It is not necessary that the nuisance must have been committed on the land belonging to the public.[28]

Lawfulness of an Act upon One's own Land is no Defence

Where an act is a nuisance to the public, it is no defence that it is in itself a perfectly lawful act, and that it is done upon a man's own ground, in a convenient place, and in a proper manner, for the illegality consists in using one's own property so as to harm the public.[29]

7. Nuisance Distinct from Trespass and Negligence

Nuisance is distinct from trespass and negligence, and, as a general rule, in cases of public nuisance the grievance lies in the inconvenience, in fact, caused,[30] and not in the intent or knowledge of the person responsible as occupier of the premises on which the nuisance is created, or of the owner, if the premises are, in fact, unoccupied.[31]

8. 'Act'

By s 33, the word 'act' in this Code, includes an 'illegal omission', except where a contrary intention appears from the context. The contrary intention does appear in this section, *viz*, by expressly contrasting the words 'illegal omission' with the word 'act'. Thus, the word 'act' in this section bears its natural sense of positive conduct, doing something, as contrasted with 'omission' or negative conduct, not doing something.[32] 'Act', however, includes a series of acts and 'omission' includes a series of omissions.[33]

9. 'Illegal Omission'

By s 43, IPC the word 'illegal' has a three-fold meaning: (a) anything which is an offence under the Code;[34] (b) anything prohibited by law; and (c) anything which furnishes ground for a civil action. Thus, an omission which is either in itself an1847 offence under the Code, or which is prohibited by law, or which furnishes a ground for a civil action, is an 'illegal omission'.

A public nuisance may be caused by acts or omissions causing terror or danger to the public in general. It is said that a *mastiff* going in the street unmuzzled, from the ferocity of his nature being dangerous and a cause of terror to the general public, seems to be a common nuisance; and that, consequently the owner may be

> indicted for suffering him to go at large, and it is said to be a public nuisance to keep 'a ferocious dog' and noisy dog so near a highway as to be likely to frighten horses owing to its barking. Negligently blasting stone in a quarry and thereby projecting large pieces of stone, so as to endanger the safety of persons in houses and on highways adjoining the quarry, is a misdemeanour indictable at common law. So is allowing a house near a highway to become a dangerous building; and while a man who burns down his own house is not guilty of arson at common law, he commits public nuisance if the house is so situate that its burning causes danger to others.[35]

A, whose duty it is by law to see to the burial of a corpse, omits to do so. This is an illegal omission, and the injury, danger or annoyance caused or threatened thereby is a public nuisance.[36]

A, the occupier of a house in ruins, dangerous to the public, is bound to repair it, and his omission to do so is illegal and causes a public nuisance.[37]

A, the occupier of a house, is bound to prevent the soil in the privy from trespassing. His omission to do so is illegal and causes a public nuisance.[38]

A has a well in his private ground within eight yards of the highway and open thereto. *A* is not bound to fence the well in, and his omission to do so is not illegal.[39] But, the filling up of the private well from where inhabitants of the village were drawing water for a long time would clearly result in common injury to the public or to the people of the village who dwell or occupy the property in the vicinity of the well, constitute public nuisance.[40]

Where the *lambardars*, who used to make sanitary arrangement on the occasion of the holding of a fair at a certain village, were found to have omitted to make the arrangement in a certain year, it was held that they could not be convicted of an offence under this section.[41]

Allowing a prickly-pear to spread from his own property on to the public road was held to be a public nuisance within the meaning of this section on the principle that no man shall so use his property as to injure his neighbour and it makes no difference that the neighbour is the public and not an individual.[42] Omission on the part of the owners of pigs to prevent them from straying and committing nuisance in a public place is not an illegal omission and does not, therefore, constitute a public nuisance punishable under s 290 .[43] The omission of a person to keep his ponies from straying is not a public nuisance punishable under s 290 of the Indian Penal Code .[44]1848

Letting loose one's cattle on the public road has been held to be doing an act which must necessarily cause obstruction, danger or annoyance to persons who have occasion to use the public road at night.[45]

10. Offences Affecting the Public and not an Individual

The persons affected by the nuisance, by the terms of the section, must comprise either the public generally, or a section of the public resident near the locality of the nuisance or persons in the exercise of a public right.[46] Thus, the essence of the offence is that it affects the public, and is not merely injurious or annoying to an individual. A nuisance which merely affects an individual or a few individuals is a ground for a civil action for damages, but is not indictable. The inhabitants of three sets of chambers in Clifford's Inn, London, were annoyed by the noise made by a tinman carrying on his trade in the immediate neighbourhood. When the windows were shut the noise was greatly lessened. It was held that this was not an indictable nuisance, but if anything, a private one.[47]

11. Public

The first part of the section refers to injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity. The word 'public' has been defined in the Code in s 12 as including any class of the public, or any community. The Muslim community or the Muslims of the neighbourhood would, therefore, be included in the word 'public' which is used in the expression

'public nuisance' in this section.[48] The public is a body different from the *panchayat*.[49] In s 133, CrPC, which deals with abatement of a public nuisance, the word used is 'community', and it has been held to mean the public at large or the residents of an entire locality and not merely the residents of a particular house.[50]

12. 'Common Injury, Danger or Annoyance'

The words 'public', 'in general' and 'vicinity' clearly indicate that there can be no public nuisance unless the general public of the locality is affected by the nuisance. Injury, danger or annoyance caused to residents of a particular house is not enough.[51] What the section in this chapter aims at is general annoyance or danger to persons in the vicinity. When no injury or annoyance is caused to persons in the vicinity, there can be no public nuisance, even if it tends to cause some injury to some owners of property.

There is no manner of doubt that filling up of the well from which the public at large was drawing water would clearly result in common injury to the public or the people of the village to dwell or occupy the property in the vicinity of the well.[52]1849

Where riparian owners of land on one bank of a river throw up an embankment on their own land to protect their fields from flood, and this results to accumulation of water on the fields of the owners of land on the other side of the river, it cannot be said that the embankment causes a common injury to the public in the vicinity. Hence, an embankment of this kind, even if it tends to cause injury to some owners of property, cannot be described as a public nuisance.[53]

Every Member of Public need not be Affected by Injury *etc*

Because the residents of a single house are annoyed by the noise of a theatre, the householder is not entitled to prosecute, unless he can show that the noise annoys other people living in the vicinity.[54] But the annoyance or injury need not affect every member of the public. It is sufficient if it should affect people in general who dwell in the vicinity.[55]

Individual *Versus* General Public

It is sufficient even if one person is annoyed, and as the act complained of can hardly be proved except by some person who comes forward to complain, the annoyance is almost necessarily involved in the complaint. It therefore, comes to this, that all that is required is that the act was done in such a way as to annoy a person who complained of it.[56] But when the trade of the non-applicant is causing nuisance only to the applicant and there is no evidence that other neighbours also are troubled, s 133, CrPC, has no application.[57] Similarly, where the noise of the ice-cream making machinery constitutes a nuisance to the residents of the building whose flats are adjacent to the place where the machine is running and not to all the residents of the building, finding to this effect, is not a finding that a public nuisance exists, therefore, s 133, CrPC, has no application is such cases.[58] The public which one must have in view is the general public of a locality, *i.e.*, the villagers in the case of a village, and not an individual of particularly refined susceptibilities.[59]

Whether an annoyance or injury is sufficiently widespread to amount to public nuisance is a question of fact.[60]

Injury or Annoyance to some Persons Drawn from a Higher Class or Society not Sufficient

What is likely to be an annoyance to persons in a town may not be an annoyance to people living in a village. Thus, passing urine in a public place in a village is not likely to cause annoyance, to the villagers. Similarly, quarrelling in a public place, though it might be a source of annoyance in a town, is not likely to cause annoyance to villagers or inhabitants of a village.[61] Regard must be had to the character of the locality, and the class of persons of whom the public is composed. To make an1850

nuisance indictable, it must be a nuisance to the public or to the people in general, not merely to a few persons drawn from a higher class and accustomed to a higher standard of comfort than their neighbours.

Other Persons Committing Other Nuisance is no Defence

Where any act or occupation causes an undoubted public nuisance, a person who is charged with such a nuisance cannot plead that a number of other persons are committing other nuisances as bad as, or worse than his own, and that his contribution to the general annoyance is merely an imperceptible addition.[62]

Smell Injurious to Senses and not to Health--Effect

In order to constitute an offence under this section, it is not necessary that the alleged nuisance should produce smells injurious to health, it is sufficient if they are offensive to the senses.[63] In order to constitute a nuisance, there must be 'not merely nominal, but such a sensible and real damage as a sensible person...would find injurious.'[64]

Smell Rendering Living Uncomfortable, Though not Unwholesome

As regards personal discomfort arising from noxious fumes, smells and the like, it was long ago laid down by Lord Mansfield CJ: 'It is not necessary that the smell should be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable'.[65] The vitiation of the atmosphere so as to make it noxious to health is specially punishable by s 278, IPC .

Degree of Discomfort Required to Constitute Nuisance

As to the degree of personal discomfort which constitutes a nuisance, Knight Bruce VC said:

> The important point for decision may properly be thus put: Ought this inconvenience to be considered as more than fanciful, or as one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according elegant or dainty modes and habits of living, but according to plain, sober, and simple notions amongst English people.[66]

Where the annoyance neither did, nor could, cause any sensible or real damage, it cannot amount to an offence under this section merely by reason of its hurting the feelings of the members of a particular community. Thus, where the accused cut up, on his *verandah*, meat that was to be cooked for a dinner party, exposing it to the sight of persons passing along the road, among whom were some Jains, whose temple was close by, it was held that the act of the accused was an annoyance merely by reason of its hurting the feelings of Jains, who have a repugnance to killing of animals, and did not constitute an offence under s 290 .[67] Similarly where certain Mohammedans killed and cut up two cows before sunrise in a private compound, partly visible from the road, and one Hindu saw them doing so, it was1851 held that there was no public nuisance.[68] So also where certain Mohammedan villagers erected a temporary shed near a Hindu temple during Mohurrum, and placed a religious symbol therein, it was held that this did not constitute a public nuisance.[69]

Sentimental Injury or Annoyance not Sufficient

The effect of the act or illegal omission must be any common injury,[70] danger, obstruction or annoyance, but these do not include a sentimental injury or annoyance arising from the susceptibilities of others.[71] Playing the radio loudly at a particular time did not constitute public nuisance.

It was too trivial for being pursued in a court of law. The conviction under s 290, IPC, was, therefore,

set aside.[72]*A* places cakes of cow-dung on the roadside to dry in the sun. This is not a public nuisance, unless a material annoyance is caused to the public.[73] Gambling of itself is not a public nuisance, especially gambling in a private house.[74] But where a lessee of a house permits disorderly people to use it for gambling and thereby causes annoyance to the public, he is guilty of the offence under s 290 .[75]

Some Examples of Public Nuisance

The following are some examples of public nuisance:

(i) Keeping filth upon premises.[76]
(ii) Using a shop as a slaughter house.[77]
(iii) Offensive smells, though not injurious to health,[78]*eg* a hartshorn manufactory,[79] and brick burning.[80]
(iv) Trades dangerous to human life, *eg* keeping gunpowder, *etc.*[81]
(v) Bringing horses with glanders into a public place.[82]
(vi) Taking a plague patient to a house where several persons are living.[83]
(vii) Erecting a privy[84] or placing putrid carrion[85] near the highway.1852
(viii) Keeping swine near a street[86] and boiling the entrails and offal of beasts.[87]
(ix) Violently blowing a speaking trumpet at night,[88] and keeping dogs which make noises at night.[89]
(x) Brothels[90] and common gambling houses.[91]
(xi) Indecent exposure of the person in a public place, with intent to cause annoyance to persons dwelling or being near, or passing by.[92]
(xii) Gambling in a public place.[93]

13. 'Which must Necessarily Cause Injury...Public Right'

Under the second part of the section actual injury or annoyance need not have been caused. It is enough if the act or illegal omission of the accused is such as must necessarily cause injury, obstruction, danger or annoyance to any person who may have occasion to use any public right.[94] If any portion, however small, of a public street is encroached upon, the inevitable result must be to cause obstruction to persons who may have occasion to use the highway, for the public is entitled to use every inch of a road that has been dedicated to the public.[95] The obstruction must be the direct and necessary consequence of the act or the illegal omission of the accused. Where the accused was selling '*satta*' tickets at his ship with the result that 10 or 15 customers collected outside and obstructed the traffic in the public street adjoining the shop, it was held that the assembling of 10 or 15 customers and the obstruction of traffic cannot be considered to be the direct or necessary consequence of the offer of '*satta*' tickets for sale, that the mere offer of '*satta*' tickets for sale by the accused could not itself be the source of any nuisance to the public. Obviously, it should be possible for the customers to purchase tickets in an orderly manner without crowding in front of the shop or blocking the traffic; and therefore, the accused could not be convicted under s 290 .[96]

Levy of registration fees of Rs. 5/- for indoor patients and Rs. 2/- for outdoor patients in Government Hospital imposed by a society providing diagnosis facilities was held as not 'public nuisance'.[97]1853

Private Right to yield to Public Right

In one other case the accused, the master and servant of a toy shop exhibited in the windows of the shop, overlooking the public road, certain clock-work toys during the diwali festival. The result of the exhibition was that thousands of people collected on the road to witness the toys. There were dangerous crowds in consequence; people were knocked down and great obstruction and danger were caused to those using the road. The accused were asked by the police to stop the exhibition, but

they would not obey. It was held that the cause of this nuisance was the act of the accused. It consisted of the manner in which they worked the toys in their shop; their object was to attract a crowd; they knew that a crowd would be, and as a matter of fact was, attracted by what they did, and they must be regarded as having intended that consequence. It follows that the nuisance was caused by them.[1] Ordinarily every shopkeeper has a right to exhibit his wares in any way he likes in his shop, but he must exercise the right so as not to cause annoyance or nuisance to the public.[2] As was said by Romer LJ, in *Attorney-General v Brighton and Hove Co-op Supply Assn* ,[3] 'It does not follow that, because the user is necessary or useful for the purpose of carrying on the business, it must of necessity be held to be a reasonable user'. And the law, as explained by Lindley MR, in the same case, is that, 'In a case of doubt or difficulty, the private reasonable right of a householder to carry on his business must yield to the public right of user of the street'. No man shall so use his property as to injure his neighbour, and it makes no difference that the neighbour is the public and not an individual.[4]

In yet another case, the accused placed a board in the front of his house over the water channel and on to a considerable portion of the road leaving only a small space by which persons could pass by his house. On this board he sat writing and delivering to a large crowd of persons vouchers for bets which they made with him about the government opium sales. It was held that the placing of the board in the way by the accused did necessarily caused obstruction to persons who might have occasion to use the public right of passage past the shop of the accused.[5] It has been held that merely placing a *charpoy* on the road in a bazaar temporarily does not amount to an offence of causing public nuisance.[6] When the accused raised the level of the public way in front of his house and also constructed a cross-bund across it and the result was stagnation of water leading to breeding of mosquitoes and giving rise to offensive smell, causing to persons living in the vicinity danger to their health and annoyance to persons using that part of the way, it was held that it was a clear case of public nuisance.[7]

Allegation was that the respondent factory had created public nuisance by creating a wall by which the flow of the water by *nala* has been obstructed and thereby the water is accumulated in the residential houses constructed by petitioner Housing Board for public. The Assistant Engineer of the Housing Board produced in the court admitted that the blockage was due to non-making of proper sewage line by the1854 Housing Board upto the *nala*. The plea of creating public nuisance was rejected. Order rejecting petition under s 133, CrPC was upheld.[8]

Frequently Causing not the same as Necessarily Causing

Although soliciting by prostitutes in a public place frequently causes annoyance to persons using such place, annoyance is not necessarily caused thereby, and therefore, such soliciting does not fall within this section.[9]

14. Legalised/Recognised Nuisances

There is a limited class of nuisances recognised by law, which are so recognised because they are compromises belonging to social life, by which some apparent natural right is invaded or some enjoyment abridged to provide for the more general convenience or necessities of the whole community; *eg*, the cremation of the dead. But it does not follow that the cremation of the dead under any circumstances whatsoever is innocent, for if, on the one hand, the use of a ground for the purpose of cremation, in a manner neither unusual nor calculated to aggravate the inconveniences naturally incident to such an act as it is generally performed in India, is perfectly lawful; on the other hand, a ground kept and used in such a manner as to be offensive or a source of injury or annoyance to people in general who dwell in the vicinity will constitute a nuisance under this section.[10] It is, of course, an answer to an indictment for a public nuisance that the acts or omissions on which the indictment is based are authority by statute.[11] This defence has been much discussed in many cases of public and private proceedings for nuisance. The decisions frequently turn on the particular wording of the statute involved, *i.e.*, on the question whether what is complained of was specifically authorised or whether the terms of the statute preserve the common law liability in the case of negligence or

nuisance.[12]

Smoking--Use of Cigarette Trademark by another Company, Section 91 , CPC

Injury, damage or annoyance contemplated in s 268, IPC does not comprehend the injury, damage or annoyance which may result from smoking, smoking being regarded as injurious to health. Even though smoking is injurious, neither is manufacture, nor sale, nor advertisement, nor consumption of cigarettes prohibited. Therefore, the use of the cigarette trademark of one company by another company which results in an increase in the sale of cigarettes does not give a cause of action for an action of public nuisance. Nor does that act amount to any other wrongful act. Section 91 does not create any new legal right. It only provides for the procedure in cases of public nuisances and other wrongful acts affecting the public, where no special damage has been caused to such persons by reason of such public nuisance or other wrongful act. There are many forms of harm of which the law takes no account. Damage so done and suffered is called *damnum sine injuria*. Undoubtedly, such a harm is not comprehended within the expression, 'other wrongful act' affecting the public, occurring in s 91 .[13]1855

Non-Payment of Tax not an Offence under this Section

Non-payment of tax does not necessarily cause injury, danger or annoyance to the public, and does not, therefore, constitute an offence under this section.[14]

15. 'Licensed Trade Causing Nuisance'--No Right to Continue when its user Becomes Nuisance

A previous sanction of the public authorities to the establishment of a trade, *eg*, the running of a slaughter-house, does not entitle the trader to continue the business after it has become a public nuisance to the neighbourhood.[15]

16. No Prescriptive Right to Maintain Nuisance

No length of enjoyment can legalise a public nuisance involving actual danger to the health of the community.[16] A public nuisance is indictable however long it has existed.[17] In *R v Cross* ,[18] Ellenborough CJ said:

> It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance. A shell fishery across a river had been established for a vast number of years, but Buller, J held that it continued unlawful, and gave judgement that it should be abated.

Although no length of enjoyment can legalise a public nuisance,[19] yet the long possession or enjoyment of what is said to be a nuisance may give to the objection of the person so possessing or enjoying it the character of a *bona fide* dispute as to title such as might have the effect of ousting the jurisdiction of the magistrate under ss 133 and 138 of the CrPC, and making the question a proper one for the civil court.[20]

17. Some Convenience or Advantage, no Defence

The section itself says that a common nuisance is not excused on the ground that it causes some convenience or advantage. To a charge of public nuisance, it is no answer that the injury to the public is more than counter-balanced by the benefits resulting from the act or occupation complained of to the general community, or to the locality itself.[21]

18. Master's Liability for Acts of Servant

Under the English law it is no defence to an indictment for nuisance against a master or employer that the nuisance was caused by acts of his servants, if they were done in the course of their employment.[22] But in India the general rule is that a principal is not criminally answerable for the acts of his agent.[23] Where the accused, the manager1856 of a school, had a building put up at a cost of Rs 35,000 employing masons therefor, and the masons constructed the same with excess of sand in the mortar thereby resulting in collapse of the building and killing several inmates. On these facts, the Madras High Court held that it was not the case of the prosecution that the accused himself constructed the building and, it was not disputed that he sought the assistance of the masons and the masons constructed the building. If the masons had not done the work properly and if they had been negligent in not mixing the lime mortar in proper proportions, the accused could not be made liable for the negligence of those persons who actually constructed the building who were supposed to be skilled. The accused was a layman, he, therefore, could not be held liable for the negligence of the persons who actually constructed the building, which is the cause for the collapse of the building. The acquittal of the accused by the sessions court in appeal for offences under s 304A, 337, 338 and 290, IPC, was found proper.[24]

19. Lessor's Liability for Nuisance Caused by the Lessee

So long as a tenancy continues, the lessor may have no control over the premises leased. But it is always open to the landlord to terminate the tenancy, if the lessee commits public nuisance. If he fails to do so, he may be held liable for the nuisance committed by the lessee.[25]

20. Lessee's Liability for Acts of Lessor

If platforms built by owners of houses or shops cause injury, danger or annoyance to the public or to the people in the vicinity, it is the owners who built the platforms that are guilty of causing public nuisance and not the shopkeepers who merely sit on the platforms.[26]

21. Liability of Joint Owner

A joint owner is responsible in law for nuisances caused by his joint property.[27]

22. Abatement of Nuisance

There is a broad distinction between removing an obstruction wrongfully placed in a highway and abating a nuisance created by the non-feasance of persons charged with the duty of repairing a highway or public bridge.[28] In a case in which the defendant had gone on the land of another to re-erect a bridge alleged to be public which had fallen into decay, it was held that this proceeding could not properly be described as abatement.[29] There seems to be no instance in which an individual has been held entitled to abate a public nuisance caused by omission except perhaps in cutting trees allowed to obstruct a highway.[30] In the latter case are discussed the rights of individuals to abate private nuisances caused by the growth of trees. At the present1857 time, save in exceptional circumstances, the only lawful mode of abating a public nuisance is by obtaining an order of a competent court.[31] In the case of easements, s 24 of the Indian Easements Act 1882, gives a dominant owner an accessory right to do all acts necessary to secure the full enjoyment of an easement. But s 36 of the same Act lays down that 'notwithstanding the provisions of s 24, the dominant owner cannot himself abate a wrongful obstruction of an easement'. A summary procedure for abatement of a public nuisance is laid down in ss 133 - 144 of the CrPC .

23. Remedies Available against Public and Private Nuisance

Sections 133 and 144 of the CrPC 1973, deal with public nuisance. It is inconceivable that the

provisions of ss 133 - 144 can be made applicable to private nuisance. The remedies available are both in civil and criminal nature. Against a private nuisance a civil remedy is available under s 91 of the CPC 1908, by filing a civil suit for declaration and injunction or for such other relief as may be appropriate in the circumstances of the case and in that suit the plaintiff need not prove, that he has sustained any special damage. The other remedy available is under criminal law by prosecution of the person responsible under different sections provided under ch XV of the IPC . The next remedy is in the form of summary proceedings in urgent matters pertaining to public nuisance *etc*, and the same has been provided under ss 133 - 144 of the Code. One more remedy is also available against public nuisance that is as provided under special or local laws, including s 405 of UP Nagar Mahapalika Adhiniyam 1959, s 126 of the Cantonments Act 1952 *etc*. In the instant case, as the nuisance complained of was affecting the public at large inasmuch as while manufacturing wheel-panas, some unusual noise or disturbance was created which certainly affected the public at large and as alleged if cracks were formed in the buildings of the locality that affected the public in general and not only any private individual. Therefore, in the present case nuisance was certainly public nuisance and the remedy available in the summary proceedings was by way of an application under s 133 of the Code. It may be clarified that the remedy against public nuisance under s 133 was essentially a civil remedy but as the matter pertains to an urgent situation the power to pass an appropriate order was given to the magistrate concerned. Otherwise, if for similar purposes some urgent remedy was provided in summary proceedings in a civil court that would have prolonged the proceedings.[32]

Chapter X of the Code of Criminal Procedure deals with 'public nuisance' and not with 'private nuisance' the remedy for the latter is a civil suit, although that constitutes nuisance may be common to both classes. Section 133 , CrPC provides a speedy and summary remedy in case of urgency where danger to public interest or public health is concerned. In all others cases, the party should be referred to the remedy under the ordinary law.[33] As a rule, a public nuisance is only punishable on indictment, and is no ground for a civil action for damages as well.[34] But if an individual member of the public suffers some special damage thereby, but not otherwise, he may bring a civil action.[35] It is competent to a person to bring an action in the civil court for obtaining an order for the removal of a building erected on a1858 portion of waste land belonging in common to all the houses in a street or upon a road, provided he is injured by it, without in the first instance applying to the magistrate for its removal.[36]

An individual has a public right to pass along a public highway practising his religious observances peacefully and if anyone interferes with this right, he commits public nuisance. A body of persons has the same right as an individual. A suit for declaration of such a right and formation restraining those who interfere with it, is a suit for removal of such public nuisance.[37]

A digs a hole in high road. This is a public nuisance, and *A* may be punished for causing it. But if *B* falls into the hole and injures himself he may bring an action for damages as well.[38]

7 *S Venktaramaiah v State* (1989) Cr LJ 789 (Kant) .

8 *Santosh v State of Kerala* (1985) Cr LJ 756, (1985) 2 Crimes 58 (Ker) .

9 *Firm Pyarlal Satpal v Santlal* AIR 1972 Raj 103 (DB) .

10 *Halsbury's laws of England*.

11 *R v Williams* (2001) NJ No 274 (*VideHalsbury's Laws of England*).

12 'Topical Introduction' to the Chapter may be referred to.

13 General Clauses Act 10 of 1897, s 3(48) and s 4(2) .

14 *Firm Pyarelal Satpal v Santlal* AIR 1972 Raj 103 (DB) .

15 *Chandrawati v Ramaeshwar* AIR 1968 Pat 422, p 432, 47 ILR Patna 326 .

16 *Moochia Naik v State* AIR 1967 Ori 36, (1967) Cr LJ 393, p 394 ; *Kamla Prasad v Emperor* (1912) 13 Cr LJ 380, (1912) 10 All LJ 362 .

17 Section 44, IPC .

18 This analysis has been adopted, though not acknowledged in *Achammagan Venkata Reddi v State* (1953) Cr LJ 500 ; *SVenkataramaiah v State* (1989) Cr LJ 789 .

19 *Vasant Manga Nikumba v Baburao Bhikanna Naidua* (1996) SCC (Cr) 27 .

20 *Winfield and Jolowicz on Tort*, twelfth edn, 1984, pp 378-79.

21 *South Port Corpn v Esso Petroleum Co Ltd* (1954) 2 QB 182 per Denning LJ; *Attorney General for Ontario v Orange Production Ltd* (1971) 21 DLR 257 .

22 Sir Arthur Underhill, *Law of Torts*, sixteenth edn, p 118.

23 Harry Street, *Law of Tort*, seventh edn, 1983, p 229.

24 Salmond, *Law of Torts*, sixteenth edn, p 52.

25 *Wali Uddin v State of Uttar Pradesh* (1988) All LJ 134 .

26 *Ibid*.

27 Re *Nga Tan Ze* 1 LBR 219.

28 *Debi Sahai Tewari v Gram Sabha* (1955) All WR 269, p 270(HC), (1955) NUC (All) 1725.

29 *Bomford v Turnley* 3 B&S 62(1) (SC), 31 LJ QB 286; *Cavey v Ledbitter* 13 CBNS 470, 32 LJCP 107 ; *Rajmohun Bose v El Rly Co* 10 BLR 253 .

30 *Barber v Penley* (1893) Ch 447 ; *R v Moore* (1832) 3 B & AP 184; *R v Carlile* (1834) 6 C & P 636.

31 *Attorney-General v Tod Heatley* (1897) 1 Ch 560 ; *Russell on Crime*, eleventh edn, p 1593, citing the above footnote.

32 Notes under s 32, IPC .

33 Section 33, IPC .

34 Section 40, IPC .

35 *Russell on Crime*, eleventh edn, p 1616.

36 *R v Vann* 2 Den C 331 .

37 *R v Watts* 1 Salk 357 .

38 *Tenant v Goldwin* (1704) 1 Salk 21, 360 .

39 *R v Anthony* ILR 6 Mad 280, 1 Weir 245 .

40 *Bhagwan v Sub-Divisional Magistrate* (1986) All LJ 1388 (All) .

41 *Re Gaj Singh* 11 PR 1875 (Cr).

42 *Molaiappa Goundan v Emperor* AIR 1928 Mad 1235, ILR 52 Mad 79, 55 Mad LJ 715 .

43 *Re Vallapoo Kotadu* 1Weir 244.

44 *Joynath Mundul v Jamul Seikh* 6 WR 71 .

45 *Re Kasayi Ahmed* 1 Weir 239.

46 *Onooram v Lamessor* 9 WR (Cr) 70 .

47 *R v Lloyd* 4 Esp 200, 1 Russ 318 ; *R v Byers* (1907) 71 JP 205 .

48 *Raghubar v Madari* AIR 1936 Oudh 154, p 155, (1935) OWN 899 ; Re *Vedagiri Perumal*AIR 1937 Mad 130, (1937) 38 Cr LJ 120 .

49 *Sheo Narain Lal v AN Rastogi* AIR 1964 All 16, p 17 ; (1964) 1 Cr LJ 24(1).

50 *Shaukat Hussain v Sheo Dayal Saksaria* AIR 1958 MP 350, p 351, 58 Cr LJ 1319 ; *Dwarika Prasad v Dr BK Roy Chowdhary* AIR 1950 Cal 349, (1950) 51 Cr LJ 1315 .

51 *Dwarika Prasad v Dr BK Roy Chowdhary* AIR 1950 Cal 349, (1950) 51 Cr LJ 1315 ; *Awadh Kishore Sinha v State* (1980) BLJR 50 .

52 *Bhagwant v Sub-Divisional Magistrate, Mata* (1986) All LJ 1388 (All) .

53 *Joy Krushna Mohanty v Emperor* AIR 1940 Pat 577, (1941) 42 Cr LJ 72 ; *RT Hing v JN Silas* AIR 1930 Cal 713, p 714, 32 Cr LJ 185 .

54 *RT Hing v JN Silas* AIR 1930 Cal 713, p 714, (1931) 32 Cr LJ 185, ILR 57 Cal 849 .

55 *Phiraya Mal v Emperor* (1904) 1 Cr LJ 513 .

56 *Lallu Ram v Crown* AIR 1924 All 194, p 195, (1924) 25 Cr LJ 332, 21 All LJ 772 .

57 *Shaukat Hussain v Sheodayal Saksaina* AIR 1958 MP 350, (1958) Cr LJ 1319 (MP) .

58 *Dwarika Prasad v Dr BK Roy Chowdhary* AIR 1950 Cal 349, (1950) 51 Cr LJ 1315 (DB) .

59 *Re Vedagiri Perumal Naidu*AIR 1937 Mad 130, (1937) 38 Cr LJ 120 .

60 *Smith and Hogan on Criminal Law*, fourth edn, 1978, p 766.

61 *Perumal Naidu v Emperor* AIR 1937 Mad 130, (1937) 38 Cr LJ 120 ; *Re Govinda Naidu*AIR 1959 Mad 513, p 514, (1959) Cr LJ 1440 .

62 *Mayne's Criminal Law of India*, p 605.

63 *Berkefeld v Eemperor* (1907) 5 Cr LJ 45, 34 ILR Cal 73, 5 Cal LJ 40 .

64 *Scott v Firth* 4 F&F 349 .

65 *R v White* I Burr 337, per Abhott CJ; *R v Neil* 2 C&P 485 ; *Malton Board of Health v Malton Manure Co* 4 Ex D 302 .

66 *Walter v Selfe* 4 De G&Sm 315, 322, (1919) 20 Cr LJ 433.

67 *Queen-Empress v Byramji Edalji* 12 ILR Bom 437 .

68 *R v Zakuiddin* 10 ILR All 44 ; cf *R v Byramji Edalji* 12 ILR Bom 437 .

69 *Muttumira v R* 7 ILR Mad 590, 1 Weir 246 .

70 See s 44 .

71 *Shahbaz Khan v Umrao Puri* 3 ILR All 1181 .

72 *Iivour Heyden v State of Andhra Pradesh* (1984) Cr LJ (NOC) 16(AP).

73 *R v Bapu Jaga* (1886) Cr R No 42 of 1886, Unrep Cr C 297.

74 Mad HC Proceedings, 25 February 1879 and 17 July 1880; 1 Weir 240; *Managal Karuvan* 1 Weir 2440.

75 *Queen-Empress v Thandarayadu* 14 ILR Mad 364, 1 Weir 241 ; *Venkataramaiah v State* (1989) Cr LJ 789 .

76 *Attorney-General v Bradford Canal* LR 2 Ex 71 ; *Benjamin v Storr* LR 9 CP 400 .

77 1 Russ Cr 733.

78 *R v White* 1 Burr 333 ; *R v Neil* 2 C&P 485 ; *Berkefeld v Emperor* 34 ILR Cal 73 .

79 1 Russ Cr 733

80 *Bomford v Turnleey* 31 LJQB 286 ; *Wanstead v Hill* 32 LJMC 135 .

81 *Hepburn v Lordon* 34 LJ Ch 293 ; *R v Lister* 26 LJMC 196 ; Act 11 (Arms) of 1878.

82 *R v Henson* Dears CC 24

83 *Re Chabumian Saheb*(1913) 14 Cr LJR 45.

84 3 West 225.

85 4 West 213

86 1 Russ Cr 732

87 *R v White & Ward* (1757) 1 Burr 333

88 *R v Smith* 1 Str 704 .

89 1 Russ 452.

90 *R v Stannard* 34 LJMC 61 ; *R v Rice & Wilson* LR 1 CCR.

91 *Jenks v Turpin* LR 13 QBD 505*; R v Hau Nagji* 7 Bom HCC 74 ; *R v Thandavarayadu* 14 ILR Mad 364 ; 1 Weir 2241 .

92 *R v Webb* 1 Den CC 338 ; *R v Watson* 2 Cox CC 376 ; *R v Farrel* 9 Cox CC 446 ; *R v Holmes* Dears CC 207; *R v Tallman* 33 LJNSMC 58 ; *R v Orchard* 3 Cox CC 248 ; *R v Harris* LR 1 CCR 282 ; *R v Elliot* 1 L and C 103; *R v Crudden* 2 Camp 89 .

93 *Santhosh v State of Kerala* 1985 Cr LT 756 (Ker) .

94 Re *Umesh Chandra Kar* 14 ILR Cal 656.

95 *Emperor v Nisar Mahommed Khan* AIR 1925 Lah 454, p 455, (1925) 26 Cr LJ 942, 6 ILR Lah 203, 226 PLR 127 ; **dissenting** from *Jugal Das v Queen-Empress* 20 ILR Cal 665 and relying on *Empress v Verappa Chetti* 20 ILR Mad 433, 1 Weir 233 ; Re *Umesh Chandra Kar* 14 ILR Cal 656.

96 *Nanak Chand v Emperor* AIR 1929 Lah 801(1) .

97 *Rajasthan Medicare Releif Society v Rajesh Gulati* 2013 AIR CC 258 (Raj) .

1 *Emperor v Noor Mohamed Suleman* (1911) 12 Cr LJ 2258, 13 Bom LR 2209 .

2 *Ibid*.

3 *Attorney-General v Brighton and Hove Co-op Supply Assn* (1900) 1 Ch 276, 69 LJ 204, 48 WR 314, 81 LT 762, 16 TLR 304 .

4 *Moliappa Goundan v Emperor* AIR 1928 Mad 1235 .

5 *Emperor v Maddho Ram* (1906) 4 Cr LJ 492, 26 All WN 317 .

6 *Kamla Prasad v Emperor* (1912) 13 Cr LJ 830, 10 All LJ 362 .

7 *Achammagari Venkata Reddy v State* (1953) Cr LJ 500 .

8 *MP Housing Board v Chhagan Lal Kishanlal Factory* 2011 Cr LJ 4697, p 4698 (MP) .

9 *R v Nann* 22 ILR All 113 .

10 *R v Saminadha Pillai* 19 ILR Mad 464 ; *Mahommed Mohidin v Madras Municipal Commrs* 25 ILR Mad 118, p 130, 1 Weir 247 ; *Indra Nath Banerji v R* 25 ILR Cal 425 .

11 *LB & SCRY v Truman* (1885) 11 AC 45 .

12 The decisions collected in *Hardcastle on Statutes*, fourth edn, (ed Craies) pp 245, 247.

13 *ITC v Krishna Moktan* AIR 1992 Sikkim 1 .

14 *Sheo Narain Lal v AN Rastogi* AIR 1964 All 16, p 17, (1964) 1 Cr LJ 24(1).

15 *Municipal Commrs of Suburbs of Calcutta v Mahomed Ali* 16 WR 6, p 10 .

16 *Ibid*; **but see***Joy Krishna Mohanty v Emperor* AIR 1940 Pat 577 .

17 *Weld v Hornley* (1806) 7 East 195 ; *Forter v Warblington Urban Council* (1906) 1 KB 648 .

18 *R v Cross* (1812) 3 Camp 227 .

19 *Municipal Commrs of Calcutta v Mahomed Ali* 7 BLR 499 .

20 *Preonath Dey v Goborddhone Malo* 25 ILR Cal 278 .

21 *R v Ward* 4A & E 384 (404); *Reg v Train 2* B & Ss 640, SC 31 LJMC 169.

22 *R v Stephens* (1866) LR 1 QB 702, 35 LJQB 251, a case of obstruction of a navigable river by acts and defaults of the

defendant's servants.

23 *Bhuban Ram v Bibhuti Bhushan Biswas* AIR 1919 Cal 539, p 540, 14 Cr LJ 915, 46 ILR Cal 515 ; *Prem Pandhi v Mahesh Garg* (1980) Jab LJ 45, 51, (1980) MPLJ 453 .

24 *Public Prosecutor v Pitchaiah Moopanar alias Pitchaiah Pillai* AIR 1970 Mad 198, (1970) Cr LJ 705 (Mad) .

25 *Diwarka Das Jivraj v State* AIR 1956 Bom 163, (1956) Cr LJ 380 .

26 *Puranmashi v Waliullah* AIR 1936 All 156, (1936) 37 Cr LJ 269, ILR 58 All 694, (1936) All LJ 200 .

27 *Molaippa Goundan v Emperor* AIR 1928 Mad 1235 .

28 *Campbell Davys v Lloyd* (1901) 2 Ch 518, p 523, 525 .

29 *Ibid*.

30 *Earl of Lonsdale v Nelson* (1823) 2 B&C 302 ; *Lemmon v Webb* (1895) AC 1 .

31 *Russell on Crime*, eleventh edn, p 1594.

32 *Wali Uddi v State of Uttar Pradesh* (1988) All LJ 134 .

33 *Shaukat Hussain v Sheodayal Saksaina* AIR 1958 MP 350, (1958) Cr LJ 1319 (MP) .

34 *Winterbottom v Derby* LR 2 Ex 316 .

35 *Baroda Prosad v Gora Chand Mustaff* 3 BLRAC 295, 12 WR 160 ; *Raj Narain Mitter v Ekadasi Bag* 27 ILR Cal 793 ; *Bhawan Singh v Narottam Singh* 31 ILR All 444 .

36 *Jain Panchod v Jadho Shah* 1 BHC 1 .

37 *Firm Pyarelal Satpal v Santlal* AIR 1972 Raj 103 (DB) .

38 *Ramphal Rai v Raghunandan* 10 ILR All 498 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 269.

Negligent act likely to spread infection of disease dangerous to life.--

Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Comments

1. Scope and Object

This and the next two sections deal with the subject of infectious diseases. This section and s 270, IPC make it an offence to do any act which is, and which the accused knows, or has reason to believe to be likely to spread the infection of any disease dangerous to life. It is further necessary under the former section that the act should have been done 'unlawfully or negligently', and under the latter section 'malignantly'. The object of these sections is the prevention of the spreading of infectious diseases.

It has been illustrated in *Ratanlal and Dhirajlal's Law of Crime*,[39] that if a man is attacked by a contagious and deadly disease and needlessly goes abroad with it1859 in a public way or if a person carries about a child so infected, he does what he may be supposed to know to be likely to spread the infection. And unless some lawful occasion or reason for this conduct can be shown, as that the sick person had been directed to be removed to a hospital and that the removal was performed with due caution, the act will be an offence punishable under this section. It must be shown that the accused had knowledge that the disease was infectious. Where the disease is generally known to be infectious there will be no difficulty. The infection which is likely to be spread must be of a disease dangerous to life.[40]

2. Legal Obligation of the Sick and his Attendants

Legal rule with respect to infectious diseases has been laid down by Lord Blackburn thus:[41]

> Where the disease is infectious, there is a legal obligation on the sick person, and on those who have the custody of him, not to do anything that can be avoided, which shall tend to spread the infection; and if either do so, as by bringing the infected person into public thoroughfare, it is an indictable offence, though it will be a defence to an indictment if it can be shown that there was a sufficient cause to excuse what is *prima facie* wrong, causing them to be carried along the public street.[42]

3. Spreading Infectious Disease is a Public-nuisance

In *R v Vantandillo* ,[43] in which a woman was indicted for carrying her child, infected with small-pox, along a public highway, Le Blane J, in passing sentence, observed that although the court did not find upon its records any prosecutions for this specific offence, yet there could be no doubt, in point of law, that if anyone unlawfully, injuriously and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all the subjects and indictable as such.

4. Sections 269 and 270, IPC

These two sections spell out two separate and distinct offences by providing that if a person, negligently or unlawfully, does an act which he knew was likely to spread the infection of a disease, dangerous to life, to another person then, the former would be guilty of an offence punishable with imprisonment for the term indicated therein. Therefore, if a person suffering from the dreadful disease 'AIDS' knowingly marries a woman and thereby transmits infection to that woman, he would be guilty of the offences indicated in ss 269 and 270 of the IPC .

The above statutory provisions thus impose a duty upon the appellant not to marry as the marriage would have the effect of spreading the infection of his own disease, which obviously is dangerous to life, to the woman whom he marries apart from being an offence.[44]1860

5. Essentials

Section 269, IPC makes the negligent act likely to spread infection of disease dangerous to life an offence. The essential ingredients are that the accused does any act unlawfully or negligently; that such act is likely to spread infection of any disease dangerous to life; and that he knows or has reasons to believe that the act is likely to cause such infection.[45]

6. 'Unlawfully or Negligently'

If a person, in doing anything which he knows, is in itself likely to spread an infectious disease, dangerous to life, adopts means, which he has no right to adopt, or does not use due care and caution in doing what he is engaged upon, he acts unlawfully in the first case, and 'negligently' in the second. These words qualify the word 'does', and refer to the manner in which the *prima facie* dangerous act is performed, and do not refer to the act itself, which may be 'any' act. Thus, the gist of the unlawful act is that there must be danger of the infection spreading. If care is taken to avoid such an infection, the act cannot be said to be unlawful or negligent.[46]

Illustrations

(i) *A,* suffering from a dangerous infectious disease, exhibits himself in the public streets for the purpose of eliciting pity and gaining alms thereby.[47]

(ii) *A* exhibits in the public streets a child suffering from small-pox.[48]

(iii) *A* injuriously inoculates children with small-pox, and while they are sick, causes them to be carried through the public streets.[49]

(iv) *A* knowing that he is suffering from cholera, enters a railway carriage as a passenger without informing the railway officials.[50]

In each of the above cases, *A* has committed an offence under s 269 .

(v) In a Bombay case, *A,* a prostitute suffering from syphilis, encouraged and allowed *B* to have sexual intercourse with her, after assuring him that she was healthy, thereby communicating the disease to *B; A* was held to be not guilty of the offence under this section. Justifying the decision, West J observed:

Assuming that there was dangerous disease, and culpable negligence still accused's act of sexual intercourse would not spread infection without the intervention of the complaining party, himself, a responsible person and himself generally an accomplice.[51]

7. 'Does any Act'

'Act' here means one or more acts, or one or more illegal omissions.[52]1861

8. Doctor's Negligence during Operation

Where during the course of operation the accused doctor left a cotton bundle in the patient's stomach which caused pain and the patient had to undergo subsequent operation, held a *prima facie* case for offence under s 269, IPC was made out.[53]

9. Gist of Unlawful Act

The gist of the unlawful act is that there must be danger of the infection spreading. If care is taken to avoid such an infection, the act cannot be said to be unlawful or negligent. To bring the offender within it, he should have unlawfully or negligently done an act which he knew or had reason to believe to be likely to spread the infection of any disease dangerous to life.[54]

10. 'Knows or has Reason to Believe'

It is not enough that the act in question is done in an unlawful or negligent manner; the act must be one which the accused knew or had reason to believe,[55] to be likely to spread infection, *eg*, s 116, but it does not come within this section unless the accused knew or had reason to believe that his act was likely to spread infection.[56] Where *A,* living in a house together with her only daughter *B* and a friend, refused, on *B* being attacked by small-pox, to allow her to be removed to the small-pox hospital, as ordered by the district magistrate, it was held that in so doing, *A* had reason to believe that the infection was likely to be spread thereby and that *A* committed no offence under this section.[57]

11. Infectious Diseases

Infectious diseases have been defined in the Public Health (London) Act 1891 to include small-pox, cholera, diphtheria, membranous croup, erysipelas, the disease known as scarlatina, or scarlet fever and the fevers known by any of the following names, typhus, typhoid, enteric, relapsing continued or puerperal. The section is confessedly inexhaustive but the diseases named may be taken to be those which are regarded as undoubtedly infectious.

Defence in Cases of Infectious Disease

The duty not to spread infectious illness and the limitations upon that duty, were fully examined by Lord Blackburn in the case of the *Metropolitan Asylum District v Hill* ,[58] where it had to be decided whether a small-pox hospital was a public nuisance. He pointed out that *prima facie* it was an indictable offence to take an infected person into any place where he would come into contact with other persons, but that it would be a defence to an indictment if it could be shown that there was sufficient reason to excuse what is *prima facie* wrong. As, for instance, where those who have charge of a person suffering from an infectious disorder, have no means of1862 isolating him from others; or where they can in no other way discharge their legal obligation of doing their best to procure advice and assistance for him, or where some overwhelming necessity, such as a fire in the house, compels them to carry the patient through a crowd.

Where the allegation in the complaint was that the wife of the complainant was examined by the doctors in a nursing home at regular intervals but she was never informed that the position of the child in her womb was not normal. This fact was told by the doctors only when she was admitted for the purpose of delivery. The complainant gave his consent and thereafter a caesarian operation was performed and the child was born. Further allegation in the complaint was that on account of giving of enema the wife had loose motions about six times due to which her condition deteriorated and the doctor suspected some heart problem and advised the complainant to bring a heart specialist. It was held that these facts by themselves do not at all constitute an offence under s 269, IPC . There is neither any allegation nor there is any material to show that the act of the applicants was likely to spread any infections disease. Thus, necessary ingredient for commission of an offence under s 269, IPC, is not at all made out.[59]

A person who keeps a member of the family who is attacked with small-pox in the house, and refuses to allow his removal to hospital, does not commit an offence under this section.[60]

A doctor who caused death of complainant's wife due to negligent acts, by use of wrong medicines and injections and overdose of anaesthesia could be said to have committed offence as described under s 269 .[61]

Liability of Shipping Company in Some Cases

A similar question arose in Bombay, where an action was brought against a steamship company for breach of contract in not shipping five hundred pilgrims from Bombay to Jeddah. The plea was that the persons had arrived at Bombay from Singapore in a ship in which small-pox had broken out on the voyage, and that on the day on which they should have been shipped, fresh cases were occurring not amongst the five hundred pilgrims tendered for shipment, but amongst the others, and that the

shipment of five hundred pilgrims would have been an act punishable under this section. This plea was held to be insufficient, apparently on the ground that the company might, by taking sufficient precautions, have shipped the five hundred pilgrims so as not to endanger anyone else, and that their contract bound them to do so, if it was in any way possible.[62]

Small-pox

It is an offence to carry a child suffering from small-pox through the public streets, or into any place of public resort, without necessity.[63]

Where the health officer of the city of Madras directed the removal of a small-pox patient to an isolation hospital, but the patient's father, under advice of his own medical advisor, removed the patient to an isolated house; it was held that as proper1863 precautions were taken to prevent infection and to provide a suitable lodging for the person infected, the mere failure to carry out an order which could otherwise have been *bona fide* obeyed by the avoidance of the danger of infection, could not be regarded as an offence under this section.[64]

It is not an offence to inoculate with small-pox, when done *bona fide* as a remedial measure.[65] Inoculation is not in itself an illegal or negligent act, unless it is proved that any act has been done negligently in respect of the persons when inoculated, with the knowledge or belief that it is likely to spread the infection of a disease dangerous to life. It is, however, possible for the operator or a third person to be punishable under the section, on proof of a negligent dealing with the patient or patients after inoculation, with the knowledge or belief required by the section. Whether there has been such negligence accompanied by such knowledge or belief is always a question of fact.[66]

Plague

Hale discusses the question, whether if a person infected with the plague should go abroad with intent to infect another, and another be thereby infected and die, it would not be murder by the common law,[67] and seems to consider it as clear, that though where no such intent appears it cannot be murder, yet if another should be affected by an action of such a person it would be a misdemeanour.[68] Where a person, who was removed to a plague shed against orders, and travelled by rail to another place, it was held that he was rightly convicted under this section as he had sufficient reason to believe that his act was dangerous and likely to spread the infection of a dangerous disease.[69]

Cholera

K, knowing that he was suffering from cholera entered a train as a passenger without informing the erstwhile railway company's servants of his condition. *M* knowing of *K*'s condition bought *K*'s ticket and travelled with him. It was held that *K* was properly convicted under this section for negligently doing an act which was, and which he had reason to believe was likely to spread infection of a disease dangerous to life, and *M* of abetment of *K*'s offence.[70]

Glanders

It is an indictable misdemeanour at common law to bring a horse infected with glanders into a public place to the danger of infecting the people there; and an indictment, which alleges that the defendant knew that a horse was infected with a contagious and infectious disease called the glanders, and that he brought it into a public place among diverse subjects of the King to the great danger of infecting1864 the said subjects with the said disease,[71] has been held sufficient after verdict, though it did not allege that the defendant knew that the disease was communicable to man.[72]

AIDS

If a person suffering from the dreadful disease 'AIDS' knowingly marries a woman and thereby

transmits the infection to that woman he would be guilty of offences indicated in ss 269 and 270 of IPC . The above statutory provision thus impose a duty upon the appellant not to marry as the marriage would have the effect of spreading the infection of his own disease, which obviously is dangerous to life, to the woman whom he marries apart from being an offence.[73]

Venereal Disease

Under s 4 of the Venereal Diseases Act 1917,[74] the expression 'venereal diseases' means syphilis, gonorrhoea, or soft chancre.

Syphilis and Gonorrhoea

Syphilis and gonorrhoea are contagious diseases.

A prostitute who, while suffering from syphilis communicates the disease to a person who has sexual intercourse with her, has been held to be not liable to punishment under this section for a negligent act and one likely to spread infection of any disease dangerous to life.[75]

12. 'Dangerous to Life'--Life Means Human Life

Under s 45, IPC, 'life' denotes the life of a human being unless the contrary appears from the context. There is nothing in this section to indicate the contrary. So 'life' in this section must mean human life.

13. Procedure

The offence under this section is cognisable but a summons shall ordinarily issue in the first instance. It is a bailable but non-compoundable offence. It is triable by a magistrate.

The cognizance of an offence under this section can be taken within one year.

14. Charge

The following form of the charge may be adopted in the case of a prosecution under this section:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:
>
> That you on or about the.....day of.....at.....unlawfully or negligently did an act which you knew (*or had reason to believe*) to be likely to spread the infection1865 of.....a disease dangerous to life, and thereby committed an offence punishable under s 269 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this Court on the said charge.

Where the allegations were that accused was negligent and careless while injecting needles twice for performing amniocentesis test as a result of which the patient had to undergo forced abortion as septic had developed while performing test, no consent of patient and her spouse had been taken by the accused as required as per practice before conducting the said test, in the circumstances, even if

the patient had consented, she could not be assumed to have consented for insertion of needle which can cause infection, the *prima facie* case against the accused was held made out and order framing the charge under ss 313 read with 269, IPC against the accused was held proper.[76]

15. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused did an act unlawfully or negligently; and
(ii) the accused knew or had reason to believe that the said act was likely to spread the infection of a disease dangerous, to life.

39 *Ratanlal and Dhirajlal's Law of Crime*, vol 2, twenty-fifth edn.

40 *Raman Kumar v State of Jharkhand* (2006) Cr LJ 4496 (Jhar) .

41 *R v Instan* (1893) 1 QB 450 ; *R v Senior* (1899) 1 QB 283 .

42 *R v Bumett* (1815) 4 M&S 272 .

43 *R v Vantandillo* (1815) 4 M&N S 73 .

44 *Mr X v Hospital Z* AIR 1999 SC 495 .

45 *Meeru Bhatia Prasad (Dr) v State* (2002) Cr LJ 1674 (Del) .

46 *Re P Kandaswami Mudaliar*AIR 1920 Mad 420, p 421, (1919) 20 Cr LJ 785, 43 ILR Mad 344 .

47 *Mayne PC*, fourteenth edn, p 241.

48 *R v Vatandillo* 4 M&S 73 .

49 *R v Burnett* (1815) M&S 272 .

50 *R v Krishnappa* 7 ILR Mad 276, 1 Weir 276, p 277 .

51 *R v Rukma* 11 ILR Bom 59 .

52 Sections 32 and 33 and notes thereto.

53 *Mohd Javed Khan v State of UP* 2012 Cr LJ 732, 2012 (110) AIC 409 (All) (DB).

54 Re *P Kandaswami Mudaliar*AIR 1920 Mad 420, p 421, (1919) 20 Cr LJ 785 .

55 Section 26, IPC .

56 Re *Polina Padmanabhswami* 1 Weir 226.

57 *Cahoon v Mathews* 24 ILR Cal 494 ; *Joti Parshad v State of Haryana* AIR 1993 SC 1167, (1993) Cr LJ 413, p 415 (SC), (1993) 1 Ori LR 81, (1993) Cr App R 85(SC), (1993) SCC (Cr) 691, AIR 1993 SCW 224, (1992) 3 Crimes 256 .

58 *Metropolitan Asylum District v Hill* 3 AC 193, p 204, 205 .

59 *Prabha Malhotra (Dr) v State* (2000) Cr LJ 549 .

60 *Cahoon v Mathews* 24 ILR Cal 494 .

61 *Raman Kumar v State of Jharkhand* (2006) Cr LJ 4496 (Jhar) .

62 *Bombay and Persia Steam Navigation Co v Rubbattino Co* 14 ILR Bom 147 .

63 *Rex v Vantanadillo* 4 M&S 73 ; *Rex v Burnett* (1815) 4 M&S 272 .

64 Re *P Kandaswami Mudaliar*AIR 1920 Mad 420, p 422, (1919) 20 Cr LJ 785 .

65 *Rex v Burneff* 4 M&S 272 ; Sections 81 , 87 - 99, Indian Penal Code ; Madras HC Rulings, 10 July 1867 (SC); 1 Weir 71, p 96.

66 Re *Sau Hla* (1900) 1 UBR (1897-1901) 290.

67 1 Hale 432.

68 *Metropolitan Aslyum District Managers v Hill* (1881) 6 AC 199, p 204 .

69 Re *Niadar Mal*(1902) PR 22; following *SCahoon v A Mathews* 24 ILR Cal 492 ; *Queen-Empress v Krishnappa Murugappa* 7 ILR Mad 276 ; *Bombay and Persia Steam Navigation Co Ltd v Rubattino Co Ltd* 14 ILR Bom 147 ; Re *Kandaswami Mudaliar*AIR 1920 Mad 420, (1919) 20 Cr LJ 785 .

70 *Queen-Empress v Krishnappa & Murugappa* 7 ILR Mad 276 .

71 Which is dangerous to human life, *Baird v Graham* (1852) 14 Dunlop (SC) 615 .

72 *Russell on Crime*, eleventh edn, p 1605.

73 *Mr X v Hospital Z* AIR 1999 SC 495 .

74 7 & 8 Geo 5 Ch 21 as amended by the Criminal Justice Act 1948.

75 *Queen-Empress v Rakma Kom Sadhu* 11 ILR Bom 59 .

76 *Meeru Bhatia Prasad (Dr) v State* (2002) Cr LJ 1674 (Del) .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 270.

Malignant act likely to spread infection of disease dangerous to life.--

Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

The offence under this section is an aggravation of the offence which is punishable under s 269, IPC . Under that section the act is done either 'unlawfully' or 'negligently' while under this section it is done 'malignantly'. The Law Commissioners observed:

> If any person died of the plague and his death could be traced to infection so caused maliciously, the person who caused it, we apprehend, would be chargeable with homicide...It is contrary to the principle of the Code to punish acts which the doer when he committed them knew to be likely to cause certain evil results, if in the same manner as if such evil consequences had actually flown from them.[77]

2. Sections 270 and 269, IPC

Synopsis note 4 of s 269, *ante* may be referred to.1866

3. No Effect of Repealing Provision of Section 25, Prevention of Food Adulteration Act (37 of 1954)[78]

It is necessary to see the provisions of the Prevention of Food Adulteration Act. The object of the Act as it is stated in the preamble is to make provisions for the prevention of adulteration of food. The Act defines what is meant by adulteration and also lays down specific procedure for purchasing a sample of suspect adulterated foods, for getting them examined from public analysts, for getting sanction from the prosecution and for prosecuting the accused thereafter. The Act gives certain rights to the accused and from the scores of judgments that have been delivered under this Act those rights of the accused have been scrupulously protected. However, the crucial question is whether this Act repeals the provisions of the Indian Penal Code or has the effect of repealing this provision *viz*, ss 270 - 273, and 337 read with s 34 of the IPC, s 25 of the Act provides for repealing and saving and it says that if, immediately before the commencement of this Act, there is in force in any state to which this Act extends any law corresponding to this Act, that corresponding law shall upon such commencement stand repealed.[79] The Indian Penal Code is not a state law but it is a Central legislation. What is repealed by s 25 is the state law relating or controlling adulteration. Provisions of the Indian Penal Code are applicable to all the states including the State of Maharashtra, but it is not state law and these repealing provisions, therefore, do not affect ss 270 - 273, and s 337 of the IPC .[80]

4. 'Malignantly'

Notes to s 153 may also be referred to. The word 'malignantly' involves a deliberate intention to do harm, and in performing the act in question the offender adopts means calculated and intended to produce the *prima facie* dangerous consequences, known, or believed to be likely in any case. 'Malignantly' means 'maliciously'.[81]

5. 'Does any Act'

Notes under ss 32, 33 and 269 may be referred to.

6. 'Reason to Believe'

Notes under s 26 [82] may be referred to.

7. Procedure

The offence under this section is cognisable. A summon shall ordinarily issue in the first instance. It is a bailable offence, but not compoundable. It can be tried by any magistrate.

The cognizance of an offence under this section can be taken within three years.1867

8. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

I (*name and office of magistrate etc*) hereby charge you (*name of accused*) as follows:

That on or about the.....day of.....at.....you malignantly did an act which you knew or had reason to believe to be likely to spread the infection of disease (*name of the disease*) dangerous to life and thereby committed an offence punishable under section 270 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

9. Proof

To establish an offence under this section it will have to be proved that:

(i) the accused did some act malignantly;
(ii) his act was likely to spread a disease, dangerous to life; and
(iii) the accused then knew, or had reason to believe, that his act was likely to spread the infection of a disease, dangerous to life.

The most important ingredient of this offence is that the act attributed to the accused which constitutes the offence, must be shown as likely to spread disease which is both infectious and dangerous to life. The bottle of Bluseal whisky found in possession of the petitioner had traces of methyl alcohol, a poisonous substance. As there was no suggestion, whatever, if this substance was likely to spread the infection of any disease dangerous to life, the conviction and sentence recorded against petitioner for his offence were held not sustainable.[83]

77 Second Report, s 226, p 465.

78 Now repealed by the Food Safety and Standards Act 2006 (34 of 2006).

79 *Mahesh Ramchandra Yadav v State of Maharashtra* (1999) Cr LJ 231(Bom).

80 *Ibid*.

81 *Queen-Empress v Kahanji* ILR 18 Bom 758 .

82 *Joti Prashad v State of Haryana* AIR 1993 SC 1167, (1993) Cr LJ 413, p 415 (SC), (1993) 1 Ori LR 81, (1993) Cr App R 85 (SC), (1993) (Cr) 691, AIR 1993 SCW 224, (1992) 2 Crimes 256 .

83 *Wallaiti Ram v State of Himachal Pradesh* (1985) 1 Crimes 598, p 599 (HP) .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 271.

Disobedience to quarantine rule.--

Whoever knowingly disobeys any rule made and promulgated [84][by the [85][***] Government [86][***] for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Comments

1. Scope

This section provides punishment for breach of a quarantine rule. The motive for disobedience is immaterial. The person who, knowing the rule, disobeys it, does so1868 intentionally, and such disobedience is *per se* punishable irrespective of any injurious test.

2. Legislative Changes

The words 'by the Central or any Provincial Government or the Crown Representative' was replaced by the words 'by the Government of India or by any Government' by virtue of the Government of India (Adaptation of Indian Laws) Order 1937. Subsequently, the words 'or the Crown Representative', were deleted by the Adaptation of Laws Order 1948. Finally, the words 'Central or any Provincial' were dropped by the Adaptation of Laws Order 1950.

3. No Effect of Repealing Provision of Section 25, Prevention of Food Adulteration Act (37 of 1954)[87]

Commentary under the same heading in s 270, *ante* may be referred to.

4. 'Any Rule made and Promulgated'

The Indian Ports Act 1901 which repeals the Indian Quarantine Act 1870 provides for the promulgation by the Government of India and the local government of quarantine rules, which are to be published, and taken as rules made and promulgated under this section. A similar provision is to be found in s 2(1) of Epidemic Diseases Act 1897 which runs as follows:

(1) When at any time the State Government is satisfied that the State or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease, the State Government, if it thinks that the ordinary provisions of the law for the time being in force are insufficient for the purpose, may take, or require or empower any person to take, such

measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as it shall deem necessary to prevent the outbreak of such disease or the spread thereof, and may determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed.

...

5. 'Government'

Section 16, and notes thereunder may be referred to.

6. Procedure

The offence under this section is not cognisable. A summons shall ordinarily issue in the first instance. It is a bailable offence but not compoundable. It can be tried by any magistrate.

The cognizance of an offence under this section can be taken within one year.

7. Charge

The following form of the charge may be adopted in case of a prosecution under this section:1869

I (*name and office of the magistrate*) hereby charge you (*name of the accused*) as follows:

That on or about the.....day of.....at.....you knowingly disobeyed the quarantine rule (*mention the rule*) made and promulgated by the Government for putting any vessel into a state of quarantine with the shore (*or other vessels*), (*or for regulating the intercourse between placed, where an infectious disease prevailed, and other places*) and thereby committed an offence punishable under s 271 of the Indian Penal Code or within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

8. Proof

To establish an offence under this section, it will have to be proved that:

(i) the rule of quarantine in question, exists;
(ii) the rule was made and promulgated by the government;

(iii) the rule was for one of the purposes mentioned in the section;
(iv) the accused knew of the rule;
(v) he disobeyed it; and
(vi) he did so knowingly.

84 Substituted by the AO 1937, for 'by the Government of India or by any Government'.

85 The words 'Central or any Provincial' omitted by the AO 1950.

86 The words 'or Crown Representative' omitted by the AO 1948.

87 Now repealed by The Food Safety and Standards Act, 2006 (34 of 2006).

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 272.

Adulteration of food or drink intended for sale.--

Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

STATE AMENDMENTS

Orissa--In its application to the State of Orissa, in s 272, for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both", the following shall be substituted namely:--

"shall be punished with imprisonment for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."[88]

Uttar Pradesh--In s 272, for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both," the following shall be substituted, namely:

"shall be punished with imprisonment for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."[89]

West Bengal--In its application to the State of West Bengal in sections 272 for the words "of either description for a term which may extend to six months, or with fine1870 which may extend to one thousand rupees, or with both" the following shall be substituted, namely:

"For life with or without fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment which is less than imprisonment for life."[90]

Comments

1. Scope

This section deals with adulteration of food or drink, and the next section deals with the sale of noxious food or drink. To make out an offence under this section, it is necessary to show that an article of food or drink was adulterated so as to make such article noxious as food or drink, and that it was intended to sell such article, or that it was known that it would be likely to be sold, as food or drink.[91]

2. Analogous Law

This section is not the only provision which penalises the sale and exposure for sale of adulterated articles of food or drink, but there were several State enactments providing for the punishment of the said or similar offence, which have not been repealed by the Central enactment, the Prevention of Food Adulteration Act, 37 of 1954.

Under the English Law also it is an indictable misdemeanour knowingly to sell food unfit for human consumption, or to mix unwholesome ingredients in anything made and supplied for the food of man. The offence may be classified either as a public nuisance or as a common law cheat. The common law remedy by indictment is not affected by the provision of the Sale of Food and Drugs Act or the Public Health Acts.[92]

3. No Effect of Repealing Provision of Section 25, Prevention of Food Adulteration Act (37 of 1954)[93]

Commentary under the same heading in s 270, *ante* may be referred to.

4. 'Adulterate'

According to the *Concise Oxford Dictionary*, 'adulterate' means 'debase (especially foods) by admixure of other substances'. According to the *Chamber's Twentieth1871 Century Dictionary*, 'adulterate' means 'to debase, falsify, by mixing with something inferior or spurious'. Thus, 'adulteration' refers to infusion of some foreign substance or mixing up, with food, drink or drugs, other articles of inferior quality or of deleterious character, the object of such mixing being to increase the bulk, weight or apparent size of the article or to give it a deceptive appearance.[94] In this way adulteration involves an alteration in the nature of a substance by the addition of some foreign substance. Hence, mere inferiority in the quality never amounts to adulteration under this section. Under this section the adulteration must be such as to render it injurious to health. Section 2(ia) of the Prevention of Food Adulteration Act, 37 of 1954,[95] however, defines adulteration as follows:

...

(ia) "adultered", an article of food shall be deemed to be adulterated--

(a) if the article sold by a vendor is not of the nature, substance or quality demanded by the purchaser and is to his prejudice, or is not of the nature, substance or quality which it purports or is represented to be;
(b) if the article contains any other substance which affects, or if the article is so processed as to affect, injuriously the nature, substance or quality thereof;
(c) if any inferior or cheaper substance has been substituted wholly or in part of the article so as to affect injuriously the nature, substance or quality thereof;
(d) if any constituent of the article has been wholly or in part abstracted so as to affect injuriously the nature, substance or quality thereof;
(e) if the article had been prepared packed or kept under insanitary conditions whereby it has become contaminated or injurious to health;
(f) if the article consists wholly or in part of any filthy, putrid, rotten, decomposed or diseased animal or vegetable substance or is insect-infested or is otherwise unfit for human consumption;
(g) if the article is obtained from a diseased animal;
(h) if the article contains any poisonous or other ingredient which renders it injurious to health;
(i) if the container of the article is composed, whether wholly or in part, of any poisonous or deleterious substance which renders its contents injurious to health;
(j) if any colouring matter other than that prescribed thereof is present in the article or if the amounts of the prescribed colouring matter which is present in the article are not within the prescribed limits of variability;
(k) if the article contains any prohibited preservative or permitted preservative in excess of the prescribed limits;
(l) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability, which renders it injurious to health;
(m) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injurious to health;

1872Provided that where the quality or purity of the article being primary food, has fallen below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability, in either case, solely due to natural causes and beyond the control of human agency then, such article shall not be deemed to be adulterated within the meaning of this sub-clause.

Explanation.--Where two or more articles of primary food are mixed together and the resultant article of food--

(a) is stored, sold or distributed under a name which denotes the ingredients thereof; and
(b) is not injurious to health,

then such resultant article shall not be deemed to be adulterated within the meaning of this clause.

...

The Prevention of Food Adulteration Act, 37 of 1954 is a special law enacted with more stringent and exhaustive provisions after about a century of the enactment and enforcement of this Code with a specific object in view and they are to be interpreted and applied independently. Mixing water with milk, also leaves with tea, or chicory with coffee, would not be punishable under s 272, while it clearly amounts to an offence under the Prevention of Food Adulteration Act.

5. Noxious as Food or Drink--Expression Explained

A bare glance through s 272, IPC leaves no doubt that a person who adulterates any article of food or drink so as to make it noxious as food or drink, shall be punished with certain terms of imprisonment mentioned therein. The term 'noxious' has not been defined in the Code or the CrPC . Thus, the ordinary dictionary meaning of this term has to be taken into consideration. According to *Oxford English Dictionary*,[1] the word 'noxious' means injurious, hurtful, harmful and unwholesome.[2] The word 'noxious' means harmful or injurious to health. In s 2(xv) of the Prevention of Food Adulteration Act, it is said that the words 'unwholesome' and 'noxious' when used in relation to an article of food, mean respectively that the article is harmful to health or repugnant to human use. But this section does not use the word 'unwholesome' and the expression 'noxious as food', in it obviously means unwholesome as food or injurious to health and not repugnant to one's feeling. The mixing of pig's fat with ghee and selling the mixture would be noxious to the religious and social feeling of both Hindus and Mohammedans, but such an act was held not to come within the meaning of the expression 'noxious as food' which occurs in this section.[3] The article of food or drink must be rendered noxious as food or drink, *i.e.*, injurious to health, *e.g.* paddy soaked in dirty water,[4] or toddy in which worms have germinated,[5] or vegetable oil to ghee.[6]

But mere presence of non-permitted red oil solvable coal tardy, the percentage of which has not been given in the report of the public analyst, would not make the1873 spices as noxious because it will neither amount to injurious or hurtful nor can be said that it has made the spices as unwholesome.[7]

6. Vicarious Liability of Directors

Where 'Rajnigandha Pan Masala' was found to be containing Magnesium Carbonate, a banned substance, incorrect assertion was made by company in newspaper advertisement and in application made for grant of licence that 'Rajnigandha Pan Masala' does not contain Magnesium Carbonate, it cannot be without knowledge and permission of company's directors, therefore, proper investigation of matter would be in the interest of public and proceeding against directors cannot be quashed.[8]

7. Procedure

The offence under this section is not cognisable. A summons shall ordinarily issue in the first instance. It is a bailable offence but not compoundable. It is triable by any magistrate. In Uttar Pradesh and West Bengal there is no period of limitation fixed for taking cognizance of this offence.

8. Charge

The following form of the charge may be adopted for an offence under this section:

I, (*name of the magistrate with his designation etc*) do hereby charge you (*name of the accused*) as follows:

That on or about the.....day of.....in the year.....at.....you adulterated an article, namely..... (*specify the article*), which is an article of food (*or drink*), so as to make the same noxious as food (*or drink*) intending to sell such article as food (*or drink*), and thereby committed an offence punishable under s 272, of the Indian Penal Code and within my cognizance.

And I, hereby direct that you be tried on the said charge by this court.

In Uttar Pradesh and West Bengal the charge may be suitably amended. Where there is no allegation either in the FIR or in the charge sheet of adulterating food or drink intended for sale so as to make the same noxious, there can be no charge or prosecution under this section.[9]

When there is no evidence on the file that the accused had in fact mixed the adulterating material in the packets sold to the complainant, it cannot be said that a *prima facie* case would be made out against the accused for an offence under s 272, IPC, even if the entire allegation of the prosecution is taken to be true.[10]

9. Proof

To establish an offence under this section it will have to be proved that:

(i) the article of food or drink in question was adulterated;
(ii) it was thereby rendered noxious; and1874
(iii) the person who adulterated the article intended to sell it as food or drink, or knew that it was likely to be sold as such.

The Supreme Court has held that to establish that an offence under s 273, IPC, has been committed, the prosecution has to prove that the article involved was food or drink meant to be consumed by live persons, that the accused adulterated it, that he intended to sell such article as food or drink, or knew it to be likely that such article would be sold as food or drink. The offence is complete on introduction of the adulterant in the food or drink, provided it is meant for the purpose of sale, actual or likely.[11]

The knowledge of the adulteration will seldom be capable of direct proof. Where the article is, in fact, adulterated, and when it is shown that the vendor purchased it at a price below that for which the genuine article could be procured, such knowledge may safely be inferred. The presumption would be strengthened if it could be shown that the vendor had several articles of the same species on hand, at different prices, some adulterated and some not, or adulterated to different degrees.[12]

10. Evidentiary Value of Report of Scientific Expert

Section 293(1), CrPC 1973, provides that any document purporting to be a report under the hand of a government scientific expert (which includes a chemical examiner or assistant chemical examiner to the government), upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under the Code, may be used as evidence in any inquiry, trial or other proceeding under this Code. But a report of a municipal analyst cannot be used as evidence without formal proof; he should be called as a witness to prove his report.[13]

Where one of the allegations was that the petitioners were manufacturing spurious sodawater, this charge was quashed keeping in view the fact that the contents of the alleged sodawater were never

chemically tested.[14]

11. Destruction of Noxious Food or Drink

Section 455(2) of the CrPC 1973, provides:

> The Court may, in like manner, on a conviction under s 272, s 273, s 274 or s 275 of the Indian Penal Code (45 of 1860) order the food, drink, drug or medical preparation in respect of which the conviction was had, to be destroyed.

88 *Vide* Orissa Act, 3 of 1999, s 2 (wef 27-1-1999).

89 *Vide* UP Act, 47 of 1975, s 3 (wef 15-9-1975).

90 *Vide* WB Act No 42 of 1973, s 3 (wef 29-4-1973).

91 *Suleman Shamji v Emperor* AIR 1943 Bom 445, 45 Bom LR 895 ; *EK Chandrasenan v State of Kerala* (1995) 1 All LT (Cr) 460 (SC) .

92 *Russell on Crime*, eleventh edn, pp 1605-06.

93 Now repealed by The Food Safety and Standards Act, 2006 (34 of 2006).

94 42 LJMC 32.

95 Now repealed by The Food Safety and Standards Act, 2006 (34 of 2006).

1 *Oxford English Dictionary*, vol 2, third edn.

2 *Raj Kumar v State (UT Chandigarh)* 1991 (2) Crimes 217(P&H).

3 *Ram Dayal v King-Emperor* AIR 1925 All 214(1), (1925) 26 Cr LJ 220 .

4 Re *Cunnyappa* 1 Weir 227.

5 Re *Ediga Narasappa* 1 Weir 228.

6 *Chokraj Marwari v R* Cr LJ 405, 12 CWN 609.

7 *Raj Kumar v State (UT Chandigarh)* (1991) 2 Crimes 217 (P&H) .

8 *Rajiv Kumar Gupta v State of Maharashtra* (2006) Cr LJ 581 (Bom) (DB) .

9 *Satya Narayan Kejriwal v State of Bihar* (1989) East Cr C 604 (Pat) .

10 *Raj Kumar v State (UT Chandigarh)* (1991) 2 Crimes 217 (P&H) .

11 *Joseph Kurian & Phillip Jose v State of Kerala* (1995) 1 Ch Cr Cas 137, p 140 (SC), (1995) 1 East Cr C 487 (SC), (1995) Mad LJ (Cr) 203 .

12 *Mayne's Criminal Law of India*, p 137.

13 *Suleman Shamji v Emperor* AIR 1943 Bom 445, p 446 .

14 *Purshotam Das v State of Haryana* (1987) 2 Crimes 278, (1987) Ch Cr Cas 122 (P&H) .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 273.

Sale of noxious food or drink.--

Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.1875

STATE AMENDMENTS

Orissa--In its application to the State of Orissa, in s 273, for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both", the following shall be substituted namely:--

"shall be punished with imprisonment for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."[15]

Uttar Pradesh--In s 273, for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both", the following shall be substituted, namely:

"shall be punished with imprisonment for life and shall also be liable to fine:

Provided that the Court may, for the adequate reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."[16]

West Bengal--In its application to the State of West Bengal in s 273 for the words "of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both" the following shall be substituted namely:

"for life with or without fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."[17]

Comments

1. Scope

This section deals with the sale, or exposure for sale as food or drink of an article which is noxious or unfit for human consumption. It is more comprehensive than the previous one and includes not only

articles adulterated, but also those which have become noxious or unfit for human consumption by lapse of time, such as tinned provisions kept for a long time or those articles which have become unfit for human consumption due to long exposure, neglect or contamination.1876

2. No Effect of Repealing Provision of Section 25, Prevention of Food Adulteration Act of 1954

Commentary under same heading in s 270, *ante* may be referred to.

3. Essential Ingredients of the Offence

For an offence under this section:

(i) there must be a sale, or offer or exposure for sale, of some article as food or drink;
(ii) the article must have been rendered, or become noxious, or it must be in a state unfit for use as food or drink by a human being; and
(iii) the sale or exposure of such article must have been made with a knowledge or reasonable belief that the article is noxious as food or drink.

The ingredients for constituting offence under s 273 are: (1) accused commits act of sales, or offers or exposes for sale, as food or drink, (2) such article has been rendered or has become noxious or has become unfit for food or drink, and (3) during the sale or offer for sale or exposing for sale, accused knew or has reason to believe that the article is noxious as food or drink.[18]

Noxious Article

The word 'noxious' as stated in *Advance Law Lexicon* by P Ramanatha Aiyar,[19] when used in relation to article of food is to mean that the article is poisonous, harmful to health or repugnant to human use. In the instant case the report of the State Public Health Laboratory did not indicate that the 'gutka' seized was obnoxious article within the meaning of s 273, IPC . The accused was therefore discharged of offence under s 273, IPC, alleged to be committed by him.[20]

Mere Sale *etc* of Noxious Article not Punishable

What is punishable under this section is the sale or offer or exposure for sale of noxious articles 'as food or drink', and not the mere sale or offer or exposure for sale of noxious articles. A sale for the purpose of trade other than as food or drink does not fall within the section.[21]

4. 'Sells or Offers or Exposes for Sale, as Food or Drink'

Section 47 of the English Public Health Act (London, 1891) (now s 8 of the Food and Drugs Act 1955)[22] provided for punishment of persons in whose possession were found articles intended for the food of man, but unsound, unwholesome, or unfit for the food of man. But this section provides only for the sale or offer or exposure for sale of noxious food or drink. Where a butcher had killed a sheep and hung it up, and on inspection the flesh was found unfit for food, but the flesh was neither removed to1877 the shop nor was exposed or offered for sale, it was held that the accused could not be convicted under this section, because the offence was incomplete.[23] But where from the evidence on record, it is clearly established that both the accused who were running the shop have knowingly sold a noxious liquor, they were held guilty for an offence punishable under s 273 .[24]

Where evidence proved that the accused appellant sold spurious liquor which resulted in the death of the deceased, he was convicted under ss 273 and 304, Pt II, IPC .[25]

5. Offer as Food or Drink in its Existing Condition

What is punishable under this section is the sale or offer or exposure for sale of noxious articles as food or drink, and not the mere sale or offer or exposure for sale of noxious articles. A sale for purposes of trade other than as food or drink does not fall within the section.[26] The article must be material offered for sale as food or drink in its existing condition, and not material which in the ordinary course of things would be cleaned, ground and cooked before being consumed. It has been held that the food or drink may be for the use of animals, and not necessarily for human beings,[27] but seeing that ch XIV deals with offences relating to public health *etc*, and having regard to s 12 which explains the word 'public' the sale of noxious food for the use of animals clearly does not fall within the section.[28]

A person is not indictable at common law for sending meat unfit for human food to a salesman in a market, unless he intends it to be sold for human food.[29]

6. Law in England

Under the English statute, somewhat similar to this section, it has been held that the offence is only committed by the sale of an article which, at the time of sale, professes to be either food or drink. An article such as baking powder, which is not itself food, though used in the preparation of food is not within the Act.[30] But a person is not indictable at common law for sending meat unfit for human food to a salesman in a market, unless he intends it to be sold for human food.[31] Where it was proved that the prisoner was a wholesale fruit dealer, and received for sale a large consignment of foreign nuts, a large proportion of which proved to be bad and he, without examining their condition, sold a quantity of them to retail dealers, who were, however, warned by him to examine the nuts, and destroy such (if any) as were bad, before offering them for sale to the public, it was held that he could not be convicted, since it was not shown that he intended to sell the bad nuts for human food.[32]1878

7. 'Which has been Rendered or has become Noxious or is in a State Unfit for Food or Drink'

The noxiousness of the article in cases falling under s 272, IPC must be caused by adulteration, whereas under this section, it may be caused either by adulteration, or by natural decay, 'or has become noxious'. Thus, a butcher attempting to sell meat which from natural decay or disease is unfit for human consumption could be prosecuted under this section. The word 'noxious' in this section means harmful to health and unwholesome.[33]

8. Mere Adulteration not an Offence

In the absence of evidence to show that the adulteration of *ghee* with vegetable oil was such as to render it noxious in the above sense, such adulteration cannot be held to constitute an offence under this section.[34]

Milk is not rendered noxious or unfit for drinking within the meaning of this section by being mixed with water.[35]

9. Sale after due Notice of Defect

Where the accused sold *atta* at the rate of 18 *seers* per rupee, whereas its ordinary price was 15 *seers* per rupee, informing the purchaser that it was sold cheap because it was bad or of inferior quality, it was held that the accused was not liable to be convicted under this section.[36]

A person cannot be convicted of an offence under this section for selling wheat containing a large admixture of extraneous matter, *eg*, dirt, wood matches, charcoal, black-seeds and other matters,[37]

as the foreign matter is separable and wheat is not consumed in its existing condition.

10. 'Knowing or Having Reason to Believe'

The necessary ingredient of s 273, IPC is that the offender should know or should have reason to believe the commodity to be noxious.[38] This section is somewhat peculiarly worded. But it appears that before a person can be convicted thereunder it must be shown that the article which he has sold or exposed for sale was, to his knowledge or belief, noxious as food or drink.[39] For the meaning of the expression 'reason to believe' notes under s 26 may be referred to.

As Mayne points out:

> Little difficulty can ever be felt where the bad quality of the article arises, not from any adulteration which might possibly escape notice, but from its own intrinsic defects, for instance, where unsound meat is sold. And, even though the defect has escaped the notice of the purchaser, it must be remembered that the seller has generally such an accurate knowledge of the qualities of his ware, and of the previous history of each1879 particular article, as renders it very unlikely that he could be ignorant of any fault of a glaring character.[40]

According to Russell:

> Victuallers, butchers and other common dealers in victuals, are not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances that they are, so that if an order be sent to them to be executed, they are presumed to undertake to supply a good and merchantable article, but they are also liable to punishment for selling corrupt victuals by virtue of an ancient statute, certainly if they do so knowingly, and probably if they do not.[41]

When the accused is summoned by the magistrate under s 273, IPC for selling noxious oil, in the summon trial it is absolutely necessary to explain the particulars of the offence under s 273, IPC to the accused in order that he may have an opportunity of showing to the court that whatever the condition of the oil may have been in his shop, the circumstances disclosed by him would establish that he neither knew nor had reasons to believe the same to be noxious as food.[42]

11. Vicarious Liability

Synopsis note 6 of s 272, *ante* may be referred to.

12. Master's Liability under the Section

If a servant adulterates an article of food so as to make it unwholesome, within the knowledge of the master, the master would be answerable criminally. It is for the master to see that more than the required quantity of a foreign matter is not mixed with an article of food so as to make it unwholesome.[43] In the case of public nuisance or breach of status relating to the sale of goods, there is a disposition to treat the master as liable for the acts of his agents.[44]

The Madhya Pradesh and Calcutta High Courts have, however, held that the concept of constructive liability cannot be attracted to the provisions of this section.[45]

As to liability of a husband for the acts of his wife, refer to *Lyons v Martin.* [46]

13. Procedure

The procedure is the same as under s 272 .

The offence under this section being one for which the police may not arrest without a warrant, an order of a magistrate to a constable to 'bring' before him persons selling unwholesome fruits is plainly illegal.[47]

A case under this section being a summons case, it is absolutely necessary, where a formal charge is not framed, to explain the particulars of the offence to the accused1880 so that he may have an opportunity to show that he neither knew nor had reason to believe that the article he kept for sale in his shop was noxious as food; otherwise his conviction would be illegal.[48]

14. Charge

The following form of charge may be adopted:

> I (*name and office of the magistrate etc*) do hereby charge you (*name of accused*) as follows:
>
> That you on or about the date of.....in the month of.....in the year..... at..... sold [(*or offered for sale*) (*or exposed for sale*)] as food (*or drink*), an article namely, ... (*specify the article*), which had been rendered noxious [(*or which had become noxious*) (*or which was in a state, unfit*)] for food (*or drink*) knowing (*or having reason to believe*) that the same was noxious as food (*or drink*), and thereby committed an offence punishable under s 273 of the Indian Penal Code and within my cognizance, (*or the cognizance of this Court*) where triable by a Court of Session.
>
> And I, hereby direct that you be tried on the said charge by this court.

15. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused sold or offered for sale or exposed for sale;
(ii) the things so sold, offered or exposed was an article of food or drink;
(iii) the said article had been rendered noxious or had become noxious, or was in a state, unfit, for food or drink; and
(iv) the accused then knew or had reason to believe that the same was noxious or unfit for food or drink.[49]

16. Destruction of Noxious Food or Drink

By virtue of s 455(2), CrPC, the court may, on a conviction under this section, order the food or drink, in respect of which the conviction was had, to be destroyed.

15 *Vide* Orissa Act, 3 of 1999, s 2 (wef 27-1-1999).

16 *Vide* UP Act 47 of 1975, s 3 (wef 15-9-1975).

17 *Vide* WB Act 42 of 1973, s 3 (wef 29-4-1973).

18 *Dilipsingh Ramsingh Bhatia v State of Maharashtra* 2010 Cr LJ 2014, p 2016, 2010 (2) Mah LJ (Cri) 386 (Bom) .

19 P Ramanatha Aiyar, *Advance Law Lexicon*, third edn, reprint 2009.

20 *Dilipsingh Ramsingh Bhatia v State of Maharashtra* 2010 Cr LJ 2014, p 2017, 2010 (3) Bom CR (Cri) 507 (Bom) .

21 *R v Salig Ram* 28 ILR All 312 ; *Prem Pandhi v Mahesh Garg* (1980) Jab LJ 45, p 50, (1980) MPLJ 453 .

22 4 and 5 Eliz 2 c 16.

23 *Madar Sahib* 1 Weir 227.

24 *Radhakrishna v State* (2007) Cr LJ 1282 (Uttaranchal) .

25 *Radhakrishna v State* 2007 Cr LJ 1282 (Utr), 2007 (3) UC 1470 .

26 *R v Salig Ram* 28 ILR All 312 ; *Prem Pandhi v Mahesh Garg* (1980) Jab LJ 45, p 50, (1980) MP LJ 453 .

27 *R v Narumal* (1904) 1 Cr LJ 618, 6 Bom LR 520 .

28 *Sita Ram v R* (1908) 7 Cr LJ 278, 3 PWR (Cr) 10, 3 PR (Cr) 1908 .

29 *R v Crawley* (1862) 3 F&F 109.

30 *James v Jones* (1894) 1 QB 304 .

31 *R v Crawley* (1862) 3 F&F 109 .

32 *R v Dennis* (1894) 2 QB 458 (per Hawkins, Cave, Grahtham, Charles, Vaughan Villams, Lawrence, Wright, Collins, Bruce and Kennedy JJ), Mathew J, dissenting. This decision was criticised in *Grivell v Malpas* (1906) 2 KB 32 ; *R v Dennis* (1894) 2 QB 458 .

33 *KN Sarkar v State* (1967) Cut LT 1158 .

34 *Chokraj Marwari v Emperor* (1908) 7 Cr LJ 405 .

35 *Chinniah* 1 Weir 228; *Bhawa v Emperor* AIR 1926 Lah 49, 50, (1925) 26 Cr LJ 1393.

36 *Ganesha*(1873) PR 15.

37 *Emperor v Barumal Jawarmal* (1904) 1 Cr LJ 618 .

38 *Kailash Chand Gupta v State* (2005) Cr LJ 2846 (Del) .

39 *Emperor v Sheo Lal* (1904) 1 Cr LJ 210, ILR 26 All 287 ; *Awadh Prasad v State* AIR 1952 Pat 77 ; *Prem Pandhi v Mahesh Garg* (1980) Jab LJ 45, p 50 .

40 *Mayne's Criminal Law of India*, p 137.

41 *Russell on Crime*, eleventh edn, pp 1606, 1607.

42 *Awadh Prasad v State* AIR 1952 Pat 77 .

43 *Russell on Crime*, eleventh edn, p 1606.

44 *R v Stephens* (1866) LR 1 QB 702, *ante,* p 1593; *Police Commr v Cartman* (1896) 1 QB 655 ; *Coppen v Moore* (1898) 2 QB 306 .

45 *Prem Pandhi v Mahesh Garg* (1980) Jab LJ 45, p 51, (1980) MPLJ 453 ; *Bhuban Ram v Bibhuti Bhushan Biswas* AIR 1919 Cal 539, p 540, (1918) 19 Cr LJ 915 .

46 *Lyons v Martin* (1838) 8 A&E 512 .

47 Re *Perumalu* 1 Weir 344.

48 *Awadh Prasad v State* AIR 1952 Pat 77 .

49 *KN Sarkar v State* (1967) Cut LT 1158 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 274.

Adulteration of drugs.--

Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

STATE AMENDMENTS

Orissa--In its application to the State of Orissa, in s 274, for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both", the following shall be substituted namely:--

"shall be punished with imprisonment for life and shall also be liable to fine:1881

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."[50]

Uttar Pradesh--In s 274, for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both," the following shall be substituted, namely:

"shall be punished with imprisonment for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons, to be mentioned in the judgement, impose a sentence of imprisonment which is less than imprisonment for life."[51]

West Bengal--In its application to the State of West Bengal in s 274 for the words "of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both", the following shall be substituted, namely:

"for life with or without fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment which is less than imprisonment for life".[52]

Comments

1. Scope

This and the next section deal with adulteration of drugs and the sale of adulterated drugs. The efficacy of a drug as a medicine must have been lessened, or its operation changed, or the drug rendered noxious, as the result of adulteration and therefore, adulteration of drugs with ingredients, which although harmless, have the effect of weakening the effect of the genuine drug, is punishable.

Under this and the next section, it is not necessary to show that the drug was so adulterated as to render it noxious to life. It is sufficient if its efficacy is lessened. The necessity for this enactment is obvious enough. All drugs are of a recognised average strength, and prescriptions are made upon the understanding that they possess such strength. If, however, the drug which a physician prescribes proves to be only half the strength on which he calculated, it may prove wholly useless, and death may ensue before the error is remedied. The section only speaks of the efficacy of the drug being lessened, or its operation charged. It would, however, be necessary to show that the difference in the drug was of so considerable a character as to make an appreciable and important change in its character and effect.[53]1882

2. Analogous Law

In England, the Food and Drugs Act 1955,[54] which consolidated previous Acts of 1938, 1950 and 1954 and certain other enactments, covers offences committed in the preparation and sale of injurious foods and adulterated drugs, falsity in labelling and advertising foods and drugs, and the sale of food unfit for human consumption.

3. Adulteration

The use of the word 'adulteration' implies the mixture of some foreign element. A merely inferior quality of the same medicine, therefore, will not amount to adulteration. For instance, there are different varieties of cod liver oil, and the same oil prepared in different ways may produce different degrees of effect. But, if a chemist having been asked to supply a bottle of the same produces a bottle of the most inferior oil of that description, it would not be an act indictable either under this or the next section, provided the oil, however inferior in quality, is genuine oil.

Notes under s 272 may be referred to.

4. Drug or Medical Preparation

Drug means any substance primarily used for medical purposes. Sometimes kerosene oil is used as an embrocation for muscular rheumatism. But it is not its primary use and it is submitted that it cannot, therefore, be a drug or medical preparation within the meaning of this section.

5. Intention and Knowledge

The essence of the offence under this section lies not so much in the adulteration, as in the passing off the adulterated article as unadulterated. The accused must not only have adulterated a drug or medical preparation, but should also have intended that it should be sold or used for, or should also have known it to be likely that it would be sold or used for, any medical purpose, as if it had not been so adulterated. As Mayne points out:[55]

If a druggist were to sell compounded medicine to an apothecary, communicating exactly its real nature to him, he could not be rendered criminally answerable, because the apothecary sold it again as genuine, even though his knowledge of the apothecary's morals made it very probable that such might be the result. But it would be very different if it could be shown that he supplied the spurious commodity, by mutually understanding for the purpose of being issued to the world as something different.

6. Procedure

The procedure is the same as in the case of an offence under s 272, IPC .

7. Charge

The following form of charge may be adopted:

I *(name and office of the magistrate etc)* do hereby charge you (*name of the accused)* as follows:

1883

That you on or about the.....Day in the month of.....in the year.....at..... adulterated the drug (*or medical preparation*), namely.....(*specify the drug or medical preparation)* in such a manner as to lessen the efficacy (*or to change the operation*) of such drug (*or medical preparation*) (*or to make it noxious*), intending that it shall be sold (*or used for*) [(*or knowing it to be likely that it will be sold (or used) for*] any medical purpose as if it had not undergone such adulteration, and thereby committed an offence punishable under section 274 of the Indian Penal Code and within my cognizance (*or within the cognizance of this court*) where offence is triable by the Court of Session.

And I hereby direct that you be tried on the said charge by this court.

8. Proof

To establish an offence under this section, it has to be proved that:

(i) the article in question is a drug or a medical preparation;
(ii) the accused adulterated it;
(iii) the adulteration:

- (a) lessened the efficacy; or
- (b) changed the operation of the drug or medicine; or
- (c) made it noxious; and

(iv) the accused intended or knew it likely:

(a) that it would be sold or used for any medicinal purpose; or
(b) that it would be so used as if it were unadulterated.

9. Destruction of Drug

Commentary under ss 272 and 455(2) of the Code of Criminal Procedure 1973 may be referred to.

50 *Vide* Orissa Act, 3 of 1999, s 2 (wef 27-1-1999).

51 *Vide* UP Act 47 of 1975, s 3 (wef 15-9-1975).

52 *Vide* West Bengal Act 42 of 1973, s 3 (wef 29-4-1973).

53 *Mayne's Criminal Law*, p 133.

54 4 and 5 Eliz 2 c 16.

55 *Mayne's Criminal Law of India*, p 138.

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 275.

Sale of adulterated drugs.--

Whoever, knowing any drug or medical preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

STATE AMENDMENTS

State of Orissa--In its application to the State of Orissa, in section 275, for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both", the following shall be substituted namely:--

"shall be punished with imprisonment for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment,

impose a sentence of imprisonment which is less than imprisonment for life."[56]1884

Uttar Pradesh--In s 275, for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both", the following shall be substituted, namely:

"shall be punished with imprisonment for life and shall also be liable to fine:

Provided that the Court may, for adequate reasons to be mentioned in the judgement, impose a sentence of imprisonment which is less than imprisonment for life".[57]

West Bengal--In its application to the State of West Bengal in section 275 for the words "of either description for term which may extend to six months, or with fine which may extend to one thousand rupees or with both" the following shall be substituted namely:

"for life with or without fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment which is less than imprisonment for life".[58]

Comments

1. Scope

This section deals with the sale, *etc* of adulterated drugs. It bears the same analogy to s 274 as s 273 does to s 272, IPC . But there is a noteworthy difference between this section and s 273 . The latter punishes only the sale, or offer or exposure to sale, of noxious food or drink, but this section punishes not only the sale, or offer or exposure for sale, but also issue from any dispensary for medical purposes, of adulterated drugs.

2. Object

The object of the section is to prevent the issue and sale of adulterated or noxious drugs, and thus to protect public health by penalising persons who trade in the sale and issue of adulterated, inefficacious and noxious drugs. The section applies to persons who deal in dispensing and selling adulterated preparations not complying with the standards of the recognised pharmacopoeia.[59]

3. 'Whoever Sells'

The expression 'whoever sells' has been held to include one who sells, be he a master or servant, principal or a person to whom the conduct and management of sale is delegated.[60] But a canvasser getting only commission for receiving orders is not a seller, and he is not liable as he is a mere intermediary who brought the seller and the1885 buyer together, who merely communicated the seller's offer to intending purchasers. He cannot be regarded as offering anything for sale.[61]

4. Knowing any Drug or Medical Preparation to have been Adulterated-Noxious

Knowledge that a drug or medical preparation has been adulterated in order to lessen its effect or to change its operation or render it noxious is essential for the offence under this section.[62] Where a purchaser ordered to be supplied with an ointment containing a lesser proportion of mercury than that prescribed by the pharmacopoeia, it was held that the person supplying the ointment was guilty of the offence punishable under this section.[63]

5. 'Exposes for Sale'

The words 'exposes it for sale' have been held to mean 'exposed to view in the shop in the sight of the purchaser'.[64] It does not mean that the article should be exposed to view. The exposure is sufficient if the article is exhibited in the shop for sale in packets.[65]

If the drug is stored in a room or a cellar, there is no exposure of the article for sale.[66]

6. Procedure

The procedure is the same as in the case of an offence under s 272, IPC .

7. Charge

The following form of the charge may be adopted:

> I, *(name and office of the magistrate etc)* do hereby charge you (*name of the accused*) as follows:
>
> That you on or about the.....Day in the month of.....in the year.....at..... knowing the drug (*or medical preparation*), namely..... (*specify drug or medical preparation)* to have been adulterated in such a manner as to lessen its efficacy [(*or to change its operation*) (*or to render it noxious*)] sold the same [(*or offered*) (*or exposed*) for sale] [(*or issued it from the dispensary, to wit....., for medical purposes, by any person, not knowing of the adulteration*)] and thereby committed an offence punishable under section 275 of the Indian Penal Code and within my cognizance (*or within the cognizance of this court*). Where the offence is triable by the Court of Session.
>
> And I hereby direct that you be tried by this court on the said charge.

8. Proof

To establish an offence under this section, it has to be proved that:

(i) the article in question was a drug or medical preparation;
(ii) it had been adulterated in such a manner as to:1886

- (a) lessen its efficacy, or
- (b) change its operation; or
- (c) render it noxious;

(iii) the accused:

- (a) sold it, or
- (b) offered it for sale, or
- (c) exposed it for sale, or

(d) issued it, from any dispensary for medicinal purposes, or
(e) caused it to be used for medicinal purposes, by any person not knowing of the adulteration, as unadulteration; and

(iv) the accused then knew that it had been adulterated in the manner mentioned in (ii) above.

9. Destruction of Adulterated Drug

Commentary in ss 272 and 455(2) of the Code of Criminal Procedure 1973 may be referred to.

56 *Vide* Orissa Act, 3 of 1999, s 2 (wef 27-1-1999).

57 *Vide* UP Act, 47 of 1975, s 3 (wef 15-9-1975).

58 *Vide* WB Act, 42 of 1973, s 3 (wef 29-4-1973).

59 *White v Bywater* (1887) 19 QBD 582 .

60 *Pharmaceutical Society v London and Provincial Supply Assn* 5 AC 857 ; *Hotchin v Hindmarsh* (1891) 2 QBD 187 .

61 *Pharmaceutical Society v White* (1901) 1 UB 601 .

62 *White v Bywater* (1887) 19 QBD 582 .

63 *Dickins v Ramesan* (1901) 1 KB 437 .

64 *Crane v Lawrence* 25 QBD 152, p 155 .

65 *Wheat v Brown* (1892) 1 QBD 418 .

66 *Crane v Lawrence* (1890) 25 QBD 152 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 276.

Sale of drug as a different drug or preparation.--

Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation, as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

STATE AMENDMENTS

Orissa--In its application to the State of Orissa, in s 276, for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both", the following shall be substituted namely:--

"shall be punished with imprisonment for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."[67]

Uttar Pradesh--In s 276 for the words "shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both" the following shall be substituted, namely:

"shall be punished with imprisonment for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."[68]

West Bengal--In s 276 for the words "of either description for a term which may extend to six months or with fine which may extend to one thousand rupees or with the both" substitute the following:

"for life with or without fine:1887

Provided that the court may for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."[69]

Comments

1. Scope

The offence under this section is not the sale or attempt to sell an adulterated or inferior article, but the sale or attempt to sell something which is not what it purports to be, and the essence of the offence is the false pretence involved. Thus, if a chemist were to discover a drug which he considered to be just as effective as quinine, and which could be procured for half the price, he would not be justified in selling it as quinine, even though it answered precisely the same purpose. The fraud consists, not in the injury done, but in the false pretence by which persons, who suppose that they are using one medicine, are forced to use another against their will.

The section deals with medical preparations only; the case of food and drink is not within the purview of the section.

2. Procedure

The procedure is the same as in the case of an offence under s 272, IPC .

3. Charge

The following form of the charge may be adopted:

I (*name and office of the magistrate etc*) do hereby charge you (*name of the accused*) as follows:

That you on or about the.....day.....in the month of.....in the year...at....., knowingly sold or offered (or exposed) for sale (*or issued from dispensary to wit.....*) for medicinal purposes, the drug (*or medical preparation*), namely.....(*specify the drug or medical preparation*) as a different drug (or medical preparation), and thereby committed an offence punishable under section 276 of the Indian Penal Code and within my cognizance. Where his offence is triable by the court of session (*or within the cognizance of this court*).

And I hereby direct that you be tried by this court on the said charge.

4. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused sold an article or offered or exposed it for sale, or issued it from a dispensary for medicinal purposes;
(ii) the article so sold, *etc*, was a drug or medical preparation;
(iii) the accused sold, *etc*, the said drug or medical preparation as a different drug or medical preparation; and
(iv) he knew of such difference at the time it was so sold, *etc*.1888

67 *Vide* Orissa Act, 3 of 1999, s 2 (wef 27-1-1999).

68 *Vide* UP Act 47 of 1975, s 3 (wef 15-9-1975).

69 *Vide* West Bengal Act 42 of 1973, s 3 (wef 29-4-1973).

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 277.

Fouling water of public spring or reservoir.--

Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less

fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Comments

1. Scope

Under this section, the offence consists in voluntarily fouling the water of a public spring or reservoir, making it less fit for the purpose for which it is ordinarily used. The water of a public reservoir or spring belongs to the public, and they have a right to use it as it is, and no one is entitled to disturb its enjoyment by an act inconsistent with its beneficial use.

The corrupting or fouling of the water contemplated by this section may not affect the public health or safety, but it affects the 'convenience' of the public and is, therefore, a public nuisance.

2. Water (Prevention and Control of Pollution) Act 1974

The Water (Prevention and Control of Pollution) Act 1974 has not repealed the provisions of s 277, IPC . The accused can be prevented both under the provisions of the Water Act and s 277, IPC .[70]

3. Two Relevant Considerations

With reference to a charge under this section, the two questions to be considered are: (a) whether the water of the tank has been ordinarily used for drinking purposes; and (b) whether the accused voluntarily corrupted or fouled the water so as to render it less fit for drinking.[71]

This section does not apply to a public river,[72] or to a continuous stream of water running along the bed of a river.[73] It does not apply to mere bathing in a tank, not set apart by any lawful order for bathing purposes.[74]1889

4. 'Essentials of the Offence'

To constitute an offence under this section, the following three ingredients are necessary, *viz*:

(i) there must be voluntary corruption or fouling of water;
(ii) the water must be of a public spring or reservoir; and
(iii) the water must be rendered less fit for the purpose for which it is ordinarily used.

To attract s 277, IPC it is sufficient if a person voluntarily corrupts or fouls water to render it unfit for which it is ordinarily used. It need not be for drinking water alone.[75]

5. 'Voluntarily'

To constitute an offence under this section, the act of corrupting or fouling the water must be done 'voluntarily'. Under s 39, IPC a person is said to cause an effect 'voluntarily' when he causes it by means, whereby he intended to cause it, or by means which, at the time of employing those means, he knew, or had reason to believe to be likely to cause it. Intention or knowledge that the act done will corrupt or foul the water is thus essential. If the accused did not intend to foul the water, he must at least have known that his act would foul the water.

6. 'Corrupts or Fouls'

The expression 'corrupts or fouls' as used in this section must be taken in its literal and not its artificial sense. It could not be said that a *mahar* (a low caste man) by drawing water from a public well, rendered the water less fit for drinking purposes and thus 'corrupts or fouls' it within the meaning of the above section. The quality of the water is not affected by the fact that certain persons, owing to caste prejudices, may refrain from using the well.[76] The defiling or causing to be defiled the water, *etc*, referred to in s 61(m) of the Bombay Act, 4 of 1890, and voluntarily corrupting or fouling water, *etc*, referred to in this section, both mean some act which defiles or fouls the water.

Some Offending Acts

Where a woman of the lower caste takes water from a public cistern of water, she cannot be convicted of defiling or fouling the water either under the Bombay District Police Act or under the Indian Penal Code .[77] The mere bathing in a tank, not set apart by any lawful order for bathing purposes, without anything further, is not an offence under this section.[78] But bathing as it is ordinarily practised, fouls drinking water.[79]

Spitting into a public well fouls the water of the well though the degree to which the act of the accused rendered the water less fit for drinking might be small.[80]1890

Where the accused fished with basket nets in a tank used for drinking purposes, thereby causing a light disturbance of the mud and so making the water rather less fit for drinking, it was held that the accused had committed an offence under this section.[81]

Cultivating paddy in the bed of a tank used by the public for drinking purposes is a nuisance and is punishable under this section and s 291 .[82]

Mere angling in a tank is not an offence under this section, without proof that the accused used bait of a foul kind.[83]

The accused loaded toilet waste in a lorry and dumped the latrine waste into the *thodu* underneath the bridge and polluted the water. Held, the prosecution of the accused for offence under s 277, IPC was maintainable, and same was not quashed on petition under s 482, CrPC .[84]

7. 'Water of any Public Spring or Reservoir'

For an offence under this section, the corrupting or fouling must be of the water of a spring or reservoir, and that spring or reservoir must be public.

Both a spring and a reservoir are sources from which water may be taken. In the case of a spring, the water springs or shoots up from the ground spontaneously. A well may be taken to be a spring as its water comes out from the ground spontaneously. A reservoir is where water is stored. A tank would come under this heading.

The section requires that the spring or reservoir, the water of which is fouled, should be a public spring or reservoir. Relying on an observation in *Reg v Wellard* ,[85] it has been held in a Nagpur case,[86] that a place is a public place if people are allowed access to it, though there may be no legal right to it. A well is thus a public well, if people are allowed to use its water. But in the case of *Ramkewal Singh v State* ,[87] a learned judge of the Patna High Court discussed the case of *Reg v Wellard* ,[88] and quoting the various views of the judges in that case, held that that case cannot be taken as an authority for the proposition that, as a general rule, a place is a public place if people are allowed access to it, though they may have no legal right to it. His Lordship, therefore, held that where the well the water of which was fouled was claimed by the complainant herself to be her private well, this section had no application, even though some of the neighbours were allowed to draw water from

it.

Public River, *Nullah*, Private Well *etc* not Covered under the Section

The water in question must be that of a public spring or reservoir. A public river is not a public spring,[89] nor is a stream of water running along the bed of river,[90] nor is1891 the water of a rivulet, even though standing in pools and used as drinking water.[91] The water of a *nullah* does not constitute a public spring. The fouling of the water of a *nullah*, is, therefore, no offence under this section.[92] Notes under s 290 may also be referred to.

Section 277, IPC does not apply to a case of pollution of a well which the complainant claims to be her private well, particularly in the absence of any evidence to show that the public were using its water by right. The mere fact that the neighbours were using its water does not make it a public well, as they may be doing so by licence.[93] Where a dog-killer buried the carcass of a dog in the bed of a public river near town, it was held that conviction under this section could not be sustained, although there was evidence that the people of the vicinity bathed in, and drank water from the river and also used, for domestic purposes, water taken from there.[94]

8. 'So as to Render it Less Fit for the Purpose for which it is Ordinarily used'

This qualification renders it necessary to prove the purpose for which the water is ordinarily used, and then it has to be proved that the fouling has rendered the water less fit for that purpose.

It is not necessary that the spring or reservoir should be reserved for the purpose. It is enough if its water is ordinarily used for that purpose.[95] It is not even necessary to prove the degree of fouling. All that is necessary is that the fouling rendered the water less fit for the purpose for which it is ordinarily used. Thus, spitting into a public well fouls its water so as to render it less fit for drinking, though the degree to which it has rendered the water less fit may be very small.[96]

9. Procedure

The offence under this section is cognisable. A summons shall ordinarily issue in the first instance. It is bailable but not compoundable. The offence is triable by any magistrate.

The cognizance of an offence under this section can be taken within one year.

10. Sanction Required under Local Acts, Whether Necessary for Offences under this Section

Where, a private complaint was filed alleging offences under ss 277, 278 and 290, IPC against the accused, the accused raised the question of want of jurisdiction even before issue of the process, after interpreting ss 49, 60, 47, 24 and 43 of the Water (Prevention and Control of Pollution) Act 1974 and ss 43, 52, 40, 22 and 37 of the Air (Prevention and Control of Pollution) Act 1981 and ss 190, 197 of the CrPC 1973 and s 26 of the General Clauses Act 1897. The Madhya Pradesh High Court, held that:1892

> The resultant effect of the provision in the Water Act, and Air Act is that irrespective of the question whether or not an Act, complained of also constitutes an offence under the Indian Penal Code, the prosecution has to be in compliance with the provision of these special Acts and it is not open to a magistrate to take cognizance under section 190 of the Code without the written sanction of the State Boards the express legislative mandate cannot be permitted to be whittled down by labelling the Act complained of as an offence not under the special Acts but under the Indian Penal Code .

Then any prosecution for an act which is an offence under the special Act, by any agency other that the competent Board on the ground that it is also an offence under the Indian Penal Code can also be characterised as colourable because the offences under the special Acts are graver ones and labelling the Acts as an IPC offence will be just to evade the requirement of previous sanction under the special Acts.[1]

11. Charge

In case the framing of a charge is deemed expedient or necessary. The following form may be adopted:

I (*name and office of magistrate etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the.....day of.....at....., voluntarily corrupted, (*or fouled*), the water of the public spring (*or reservoir*), to wit..... so as to render it less fit for the purpose for which it is ordinarily used, and thereby committed the offence punishable under s 277 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

12. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused corrupted or fouled the water;
(ii) the water was of any public spring or reservoir;
(iii) he did so voluntarily;
(iv) the act of corrupting or fouling rendered the water less fit for the purpose for which it was ordinarily used.

70 *Prasad v State of Kerala* 2012 (1) KLT 861, 2012 (1) KLJ 658 (Ker) .

71 Re *Mathian* 1 Weir 229.

72 *Empress v Halodhur* ILR 2 Cal 383 .

73 *Reg v Vetti Chokkan* 4 Mad 229 ; Re *Anthony* 1 Weir 230.

74 Madras HC Proceedings, 13 December 1878, (SC) 1 Weir 72, p 96.

75 *Prasad v State of Kerala* 2012 (1) KLT 861, 2012 (1) KLJ 658 (Ker) .

76 *Empress v Pandia Mahar* (1900) 13 CPLR 92, **relying on***Muttumira v Queen-Empress* ILR 7 Mad 590 ; *Queen-Empress v Byramji Edalji* 12 ILR Bom 437 .

77 Re *Bhagi*(1900) 2 Bom LR 1078.

78 1 Weir 228.

79 Re *Mathian* 1 Weir 229.

80 *Ramkaranlal v Emperor* AIR 1916 Nag 15(1), (1917) 18 Cr LJ 650 ; *Empress v Pandia Mahar* 13 CPLR 92 ; Re *Punni Besoyi* 1 Weir 231.

81 Re *Punni Besoyi* 1 Weir 231.

82 Re *Ramatripati* 1 Weir 229.

83 Re *Srinivsa Naik* 1 Weir 231.

84 *Prasad v State of Kerala* 2012 (1) KLT 861, 2012 (1) KLJ 658 (Ker) .

85 *Reg v Wellard* (1885) 14 QBD 63, 51 LT 64, 33 WR 136, 15 Cox CC 559 .

86 *Ramkaran Lal v Emperor* AIR 1916 Nag 15(1), (1917) 18 Cr LJ 650 .

87 *Ramkewal Singh v State* AIR 1954 Pat 309, p 310 .

88 *Reg v Wellard* (1885) 14 QBD 63, 51 LT 64, 33 WR 136, 15 Cox CC 559 .

89 *R v Halodhur* ILR 2 Cal 383, 1 Weir 230 .

90 *R v Patha* BR 2 July 1869 ; *R v Vetti Chokkan* ILR 4 Mad 229, 1 Weir 230 ; *R v Nama Rama* (1904) 1 Cr LJ 6, 6 Bom LR 52 .

91 *R v Hari Bapu* BR 29 September 1885 .

92 *Queen-Empress v Nilappa Dayappa* Ratanlal Un Cr Cas 963.

93 *Ramekwal Singh v State* AIR 1954 Pat 309 .

94 Re *Anthony* 1 Weir 230.

95 Re *Muthan* 1 Weir 229.

96 *Ramkaran Lal v Emperor* AIR 1916 Nag 15(1) ; **See also***Prasad v State of Kerala* 2012 (1) KLT 861, 2012 (1) KLJ 658 (Ker) .

1 *Babulal v Shri Aditya Birla* (1986) 1 Crimes 249 (MP) ; *Prasad v State of Kerala* 2012 (1) KLT 861, 2012 (1) KLJ 658 (Ker) .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 278.

Making atmosphere noxious to health.--

Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.1893

Comments

1. Scope

This section is directed against public, and not a private nuisance. It is clearly provided in it that the atmosphere must be so vitiated as to make it noxious to the health of the persons in general dwelling or carrying on business in the neighbourhood, or passing along a public way.[2]

Where the accused threw a human skull into the house of the complainant and the skull was in a highly offensive condition, but there was no finding to show that the effect of it was to make the atmosphere noxious to the other persons dwelling in the locality, it was held that, although the conduct of the accused was most reprehensible and offensive, he was not guilty under this section.[3]

The act of performing the offences of nature in a public street is not an offence under this section.[4]

2. 'Voluntarily Vitiates the Atmosphere'

A public nuisance may be caused by smoke, stench, or effluvia, if, either singly or in combination, the accused creates serious public injury to health. An indictment for a nuisance, by steeping stinking skins in water, laying it to be committed near the highway, and also near several dwelling houses, has been held sufficient; for if a man causes a nuisance near the highway by which the air thereabout is corrupted, it must, in its nature, be a nuisance to those who are in the highway.[5]

3. 'Noxious to the Health'

The word 'noxious' does not merely mean hurtful and offensive to the smell, but includes also the complex idea of insalubrity and offensiveness.[6] If a trade is alleged to be noxious by producing unwholesome smells, it may be proved that the smells are frequently perceived, and are not only offensive to the senses but have an injurious effect on those who smell them.[7] It has been held that if an open compound is used as an open latrine without any shed, obnoxious smell is bound to emanate from it and it would amount to an offence under this section. It has also been held that the fact that the neighbouring houses were constructed after the nuisance had been commenced in immaterial.[8] Synopsis in s 272, IPC may be referred to.

4. Procedure

The offence under this section is non-cognisable. Summons may ordinarily issue in the first instance. It is bailable but not compoundable. It can be tried by any magistrate.

The cognizance of an offence under this section can be taken within six months.1894

5. Sanction Required under Local Acts, Whether Necessary for Offences under this Section

Synopsis note 10 of s 277 may be referred to.

6. Charge

For a charge under this section, if deemed necessary, the following form may be adopted:

I (*name and office of magistrate etc*), hereby charge you (*name of accused*) as follows:

That you on or about the.....day of....., at.....by.....(*state the act*) voluntarily vitiated the atmosphere of..... (*name the place*) so as to make it noxious to the health of persons in general, dwelling or carrying on business in the neighbourhood or passing along a public way, and thereby committed the offence punishable under section 278 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

7. Proof

To establish an offence under this section, it must be proved that:

(i) the accused voluntarily vitiated the atmosphere in a particular place; and
(ii) such vitiation made it noxious to the health of persons in general dwelling, or carrying on business, in the neighbourhood, or passing along a public way.

2 *Rahim Mian v Emperor* AIR 1929 Pat 113, p 114, (1929) 30 Cr LJ 556 .

3 *Ibid.*

4 *Queen-Empress v Mahadshet* Ratanlal Un Cr Cas 200.

5 *R v White* (1757) 1 Burr 333 .

6 *R v White* (1757) 1 Burr ; cf *Bishop Aukland LB v Bishop Auckland Iron, etc Co* (1882) 10 QBD 138 .

7 *Russell on Crime*, eleventh edn, p 1614.

8 *Suwa Lal v State* AIR 1953 Ajmer 4 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and

Morals

S. 279.

Rash driving or riding on a public way.--

Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.18951896

Comments

1. Scope and Applicability

Sections 279, 280 and 284 - 289, IPC all deal with public nuisances affecting public safety.[9] In all of these sections the offences are due to criminal rashness or negligence. In all of them mere negligence or rashness is made punishable, apart from any injury actually done.[10] It is plain that the essence of the offence consists in the possibility of injury, and not in its actual occurrence, as all the clauses contain the words 'likely to cause hurt or injury', or words of a similar nature. The occurrence of actual injury meets with punishment under ss 337 and 338, IPC, though, strangely enough, the actual inflicting of hurt is liable to less punishment under s 337, IPC than the commission of the same act would be, if no hurt has resulted. Nor is it necessary that there should be any intention to injure, or reason to anticipate the particular injury that ensued, if it was in fact caused by the accused's negligence.[11] It is sufficient if the carelessness is such as does cause, or is likely to cause, injury. Mere rashness or negligence (except in the case of negligence under s 281, IPC and of rashness and negligence under s 283, IPC) under the various circumstances given is rendered punishable by ss 279 - 289, IPC, quite irrespective of any injurious consequences, the essence of the offence being the possibility or likelihood of injury. If hurt is caused by reason of one of these offences, the offence falls under s 337, IPC . If grievous hurt is the result of one of these offences, the offence falls under s 338, IPC . If death is the result, the offence is punishable under s 304A, IPC .[12]

The section takes into account, the potential danger or possibility of danger to life or injury to persons on account of the rash or negligent driving or riding by an accused.[13]

2. Analogous Law

In England, by s 35 of the Offences Against the Person Act 1861:[14]

> Whosoever, having the charge of any carriage or vehicle, shall, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

The section extends to bicycles and to all carriages whether drawn by animals or propelled by steam, petrol, electricity or other mechanical means.

The Road Traffic Act 1930,[15] s 11,[16] states:

(1) If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances1897 of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable:
(a) on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding in the case of a second or subsequent conviction six months, or to both, such fine and imprisonment;
(b) on conviction on indictment to imprisonment for a term not exceeding two years or to a fine, or to both such imprisonment and fine.[17]

Section 222(a) of the Tanganyika Penal Code also is similar to this section.

In India, a similar provision with respect to rash or negligent driving of a motor vehicle is contained in s 184 of the Motor Vehicles Act, 59 of 1988. Sections 304A, 336, 337 and 338 of this Code are also analogous to this section, but they are not confined to rash or negligent driving or riding, but extend to all rash or negligent acts.

3. Ingredients of the Offence

This section deals with rash or negligent driving or riding on a public way. To constitute an offence under this section:

(i) there must be rash or negligent driving or riding;
(ii) it must be on a public way; and
(iii) the driving or riding must be in a manner so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any person other than the driver.[18]

In order to constitute an offence punishable under s 279, IPC it must be established that:

(a) the accused was driving the vehicle on public way,
(b) such driving was done in a rash and negligent manner to endanger human life or likely to cause hurt or injury to any other person.

For the purpose of s 279, rashness and negligence must be described as criminal rashness or criminal negligence. It must be more than mere carelessness or error of judgment.[19]

Section 279, IPC requires two essentials: *viz*, (a) driving or riding of a vehicle on any public way; and (b) such driving must be so rash or negligent as to endanger human life or is likely to cause hurt or injury to any person. Both the said ingredients must exist to attract the offence. To invite the wrath of law under s 279, IPC, the act complained of need not be a rash and negligent one. For attracting the offence under s 279, IPC, the rashness or negligence attributable to the accused must be criminal rashness or negligence. It is true that the section does not require an element of *mens rea* for getting involved therein. What is essentially required is1898 the utter callousness or recklessness or an

indifferent/unmindful attitude towards the consequences.[20]

Probability, Possibility and Likelihood

For an offence under this section, the effect of the manner, in which the act is performed, must be either: (a) that human life was, as a fact, endangered thereby; or (b) that hurt or injury was likely to be caused thereby. Therefore, it must be shown that some person was either in a position of danger to his life or there was a likelihood of persons being hurt or injured. Likelihood is something stronger than a possibility, and may or may not amount to a probability, which is merely a strong degree of likelihood.[21]

4. Essence of the Offences

Mere rashness or negligence (except in the case of negligence under s 281, and of rashness and negligence under s 283) under the various circumstances given is rendered punishable by ss 279 to 289, quite irrespective of any injurious consequences, the essence of the offence being the possibility or likelihood of injury.

Actual Accident or an Injury not Necessary

In order to constitute an offence under this section there need not be any accident or injury or death to individuals. Driving a vehicle on any public way in the manner specified in the section alone is sufficient. The provision is intended to protect the interest of society by avoiding danger to pedestrians and vehicular traffic mainly. Even without waiting for such danger happening, the offender could be brought to justice.[22]

An Aggravated Degree of Rash and Negligent Driving is Contemplated

To be guilty of an offence under s 279 the accused must drive a vehicle in such a rash or negligent manner as to endanger human life or to be likely to cause hurt or injury to any other person. Both ingredients must be satisfied. The accused must drive the vehicle in a rash or negligent manner, and the driving in a rash or negligent manner must be such as to endanger human life or be likely to cause hurt or injury to any other person. A certain aggravated degree of rash or negligent driving is contemplated here.[23]

5. Difference between Section 279 and Section 184 of the Motor Vehicles Act 1988

Culpable driving of a motor vehicle giving rise to penalties on the criminal side and damages on the civil side may be classified as negligent driving, rash driving and guilty errors of judgment. Of these three classes, the first two constitute the component elements of reckless or dangerous driving punishable under s 184 of the Motor Vehicles Act.1899

Section 184 of the Motor Vehicles Act (59 of 1988) runs as follows:

> **184. Driving dangerously.--**Whoever drives a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the place where the vehicle is driven and the amount of traffic which actually is at the time or which might reasonably be expected to be in the place, shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, and for any second or subsequent offence if committed within three years of the commission of a previous similar offence, with imprisonment for a term which may extend to two years, or with fine which may extend to two thousand rupees, or with both.

Comparing the above with this section, the two sections might appear to cover the same offence. But there are differences between the two. Thus:

(i) Section 184 of the Motor Vehicles Act refers only to driving, while this section refers to not only driving, but also riding;
(ii) Section 184 of the Motor Vehicles Act refers to the driving only of a motor vehicle, while this section refers to the driving of any vehicle and is not confined to a motor vehicle.
(iii) Section 184, Motor Vehicles Act, refers to dangerous driving in any place, while this section refers to driving on any public way.
(iv) Section 184, Motor Vehicles Act, refers to driving 'at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case'. But this section refers to driving 'in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person.

The offence under the two sections may, however, overlap each other.[24] An accused, tried and acquitted for an offence under s 116 of the Motor Vehicles Act 1939, (since repealed and replaced by s 184 of the Motor Vehicles Act 1988) cannot be tried for an offence under this section.[25]

6. Section 279 and Section 177 of Motor Vehicles Act 1988

Section 177 of the Motor Vehicles Act 1988 would apply not only to offenders under the Motor Vehicles Act, but also for breach of any rule, regulation or notification made thereunder the punishment for which is not provided for, under those provisions. On the other hand, this section is a self-contained section like any other section of the Code, prescribing the extent of punishment. This being independent by itself, there is no meaning in connecting it or reading it with s 177 of the Motor Vehicles Act. It would be wrong to charge a person under both the sections for the same act.[26]1900

7. Sections 279, 337 and 336 --Distinction

The offences under ss 279 and 337 are offences of a different nature and the conduct referred to therein is penalised with different objects.[27]

This section penalises rash driving or riding on a public way. A person who drives any vehicle or rides on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, is liable to be punished under this section. This offence falls within ch XIV of the Code which is a chapter dealing with offences affecting public health, safety, convenience, decency and morals. An offence under s 279 is essentially an offence against public safety. By s 337, causing hurt by an act endangering life or personal safety of others is penalised. By that section, whoever causes hurt to any person by doing an act so rashly or negligently as to endanger human life or the personal safety of others is liable to be punished in the manner provided thereby. This section occurs in ch XVI, which deals with offences affecting the human body. Under this section the maximum sentence which may be imposed is rigorous imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both. Under s 337, the maximum sentence is rigorous imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, or with both. The offence punishable under s 337 is the offence of hurt committed in certain defined circumstances. By s 336, an act endangering life or personal safety of others which is done rashly or negligently is an aggravated form of the offence defined by s 336 .[28]

8. Sections 279 and 338 --Distinction

Under s 338, IPC, whoever causes grievous hurt to any person by doing an act so rashly or negligently as to endanger human life or the personal safety of others, is liable to be punished in the

manner provided thereby. This section is covered by ch XVI, which deals with offences affecting the human body.

None of the parts of the offence defined in s 338, IPC, is sufficient to constitute an offence under s 279 of the said Code because under s 279, the ingredient of driving any vehicle or riding in a public way is essential, which is not necessary under s 338 . The offence under s 338 of the IPC need not be committed by driving a vehicle or riding on a public way.[29]

Sections 279 and 338 are co-related with s 304A, IPC ; and s 279, IPC applies to the driving of any vehicle or riding on any public way in a manner so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any person where no hurt has actually been caused. Section 338 , IPC applies to a case where grievous hurt has been caused to any person by an act being done so rashly or negligently as to endanger human life or the personal safety of others. It is more general than this section and embraces not only the act of driving or riding but all acts which endanger human life or personal safety.1901

9. Sections 279 and 304A --Distinction

Commentary under the same heading in s 304A, vol III may be referred to.

To establish an offence under either s 279 or s 304A, rashness and negligence has to be established, but the only distinction is that in s 279 the rash and negligent act relates to the manner of driving or riding on a public way, while an offence under s 304A extends to any rash and negligent act falling short of culpable homicide.[30] A rash and negligent act is the gist of both the offences. However, offences punishable under ss 279 and 304A, IPC, being distinct, the accused can be convicted for both the offences.[31]

10. Overlapping of Offences under Sections 279, 337 and 338 does not make these Offences of Same Character

Undoubtedly s 279, IPC penalises rash or negligent driving but on that account an offence under either s 337 or s 338, IPC, cannot be said to be of the same nature or character. Offences under s 279, and s 337 or s 338, IPC are offences of different nature and the conduct referred to therein is penalised with different objects. There is no doubt that the above three sections overlap, but that does not make those offences of the same character. Offence under s 279, IPC is not compoundable, while ss 337 and 338 are compoundable with the permission of the court. Thus, the offence under ss 279 and 337 or s 338 of the Indian Penal Code, being distinct, an accused can be convicted both under ss 279 and 337 or s 338, IPC .

A person can be convicted of an offence under s 279 as well of an offence under s 337, IPC at the same time.[32]

11. 'Drives any Vehicle or Rides'

This section covers not only rash or negligent driving, but also such riding. If a man rides so fast that he would be unable to stop the horse if a foot-passenger got in the way, he would be liable, provided that the foot-passenger acts in a reasonable manner.[33]

So far as driving is concerned, it may be of any vehicle, including a tram-car,[34] or a bullock-cart,[35]or even a bicycle, for a man to ride pillion on an ordinary bicycle in a crowded street is a negligent act which is likely to cause injury to the other persons and vehicles there.[36]

12. 'On any Public Way'

What the section penalises is not rash driving anywhere, but only rash driving on any public way.[37] The expression 'public way' is not defined in the IPC . Sub-s (34) of s 2 of the Motor Vehicles Act 1988, defines a public place thus:1902

> (34) "Public place" means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access, and includes any place or stand at which passengers are picked up or set down by a stage carriage.

The words 'are granted access or over which they have a right to pass' which occurred in the definition in the Motor Vehicles Act of 1914 have been substituted by the words 'have a right of access' and so no question of grant arises now. The way may be a road or street, and all that is necessary to make it 'public' is that the public should have a right of access to it.

Under s 121(1) of the English Road Traffic Act 1930:[38]

> (1) Road' means any highway and any other road to which the public have access, and includes bridges over which a road passes.
>
> ...

The 'public way' in this and some of the following sections may be a 'highway', which is defined as 'a way leading from the marked town, or inhabited place to another inhabited place, and which is common to all'.[39] In *Pran Nath Kundu v Emperor* ,[40] which was a case under s 283, it was observed:

> Where the privilege to use a road is enjoyed only by one particular section of the community or by inhabitants of two or three villages and not by others, the road is not a public road.[41] Where there is the intention to allow not the public generally but merely visitors to or traders with the people of the village, or way allowed to be used by villagers to go to a church or a market or the common fields of a village, such ways are not regarded as public ways but private ways, and they generally have their origin in custom.[42] Such a customary way can be converted into an ordinary highway after use by the general public sufficient to raise the presumption of dedication.[43] But the evidence in support of the public claim must be cogent.[44]

13. 'Rash or Negligent'

For the purposes of this section the manner in which the driving, riding or navigation is performed must be rash or negligent.[45] A certain aggravated degree of rash or negligent driving is contemplated here.[46]

In the case of negligence, 'the party does not do an act which he was bound to do, because he adverts not to do it'. In the case of rashness 'the party does an act and breaks a positive duty. He thinks of the probable mischief, but, in consequence of a mis-supposition begotten by insufficient

advertence, he assumes that the mischief will not ensure in the given instance or case. The radical idea denoted is always this. The party runs a risk of which he is conscious'.[47] Even in ordinary parlance1903 negligence connotes want of proper care and rashness conveys the idea of recklessness or the doing of an act without due consideration.[48]

Negligence' was defined in the well-known case of *Blyth v Birmingham Waterworks Co* ,[49] thus:

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulated the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

The Law Revision Committee in 1939, adopted the definition, 'Negligence may be said to consist in a failure to exercise due care in a case in which a duty to take care exists'. The general concept of reasonable foresight is the criterion of negligence and is fluid in its application; it has to be fitted to the facts of the particular case.[50]

'Negligence is not established by proving that the loss might possibly and with extraordinary foresight and prudence have been avoided.'[51]

Negligence--Failure to take Precaution may Amount to Negligence

A rash act is primarily an over-hasty act and is thus opposed to a deliberate act. It may also include a deliberate act done without due deliberation and caution.[52] Negligence is a breach of duty caused by the omission to do something which a reasonable man, guided by the consideration, which ordinarily regulates the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do.[53] The negligence connotes want of proper care.[54] If the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.[55] For the definition of 'negligence' in civil cases refer to *Ramesh Kumar Nayak v Union of India.* [56]

14. 'Culpable Rashness or Negligence'

Negligence is an omission to do something, which a reasonable man, guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. Culpable negligence is acting without the consciousness that the dangerous consequences will follow but in the circumstances which show that the actor has not exercised the caution that was incumbent on him. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which,1904 having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.[57]It is the duty of every motorist while driving on a public road to keep a lookout for other motorists coming from the front to avoid collision with the oncoming vehicle. Where a driver has not exercised this much care and caution incumbent upon him and if his conduct occasions an accident, he is guilty of culpable negligence as imputability of criminality arises from the neglect of civic duty of circumspection and running the risk or doing such an act with recklessness and indifference to the consequences. A person driving a motor vehicle is also under a duty to be in a position to control it on seeing the peril in front which could normally be expected on the road.[58] Rashness consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences.[59] Culpable rashness is acting with the consciousness that the dangerous consequences may follow, but with the hope that they will not follow, and often with the belief that the actor had taken sufficient precautions to prevent the

happening of such consequences.[60] Driving at an excessive speed on a public road would be *prima facie* evidence of rash driving in determining whether the person is rash and negligent. The standard of reasonable care is that which is reasonable to be demanded in the circumstances, if still mishap occurs, the person cannot be held guilty of rashness.[61] But if a vehicle with defective brakes, is driven at a speed of 15 or 20 kms in a crowded bazaar, it is nothing but driving the vehicle rashly at high speed.[62]

Where the appellant driver of police jeep under the influence of alcohol was driving jeep at high speed, caused death of five persons, injured seven, and went 93 feet ahead of the incident, could only be stopped by the Police Officer who was travelling in vehicle. It was held a case of culpable negligence and the driver was convicted under ss 304A, 337, 338 and 279, IPC .[63]

Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, often with the belief that the actor has taken sufficient precaution to prevent their happening. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, in the circumstances which show that the accused has not exercised the caution incumbent upon him and if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.[64]1905

Where the accused appellant driver of a jeep was driving negligently and rashly, dashed against a girl going on the road, caused injuries to her, the accused was convicted under s 279 .[65]

Mere Error of Judgment or Carelessness not Sufficient

Under this section, the rashness or negligence shown must be what may fairly be described as criminal rashness or criminal negligence. Before an accused can be convicted of an offence under this section, there must be something more than a mere error of judgement or mere carelessness.[66] For the purpose of s 279 rashness and negligence may be described as criminal rashness or criminal negligence. It must be more than mere carelessness or error of judgment. Negligence connotes an idea of reckless doing of an act without consideration of any consequences.[67]

Reckless

In order to render a person liable for criminal negligence there must be something more than mere negligence; for law distinguishes between negligence which originates a civil liability and one the consequence of which is a criminal prosecution. But negligence does not mean, even for criminal negligence, absolute carelessness or indifference, but want of such a degree of care as is required in particular circumstances. Simple lack of care as will constitute civil liability is not enough. A very high degree of negligence is required to be proved before the felony is established and this may aptly be described by the epithet 'reckless'.[68]

Driver Running away from the Spot

Where the accused driver of a jeep was driving jeep rashly and negligently, after hitting the deceased boy standing on the side of the road, ran away, held it indicated that he was guilty otherwise, there was no necessity for him to run away from the place of occurrence. He took false defence in his statement under s 313, CrPC when it was pointed to him that he ran away from the place of accident. Accused was convicted under ss 279 and 304A, IPC .[69]

No Universal Rule of Negligence

'Negligence' is the breach of a duty caused by omission to do something which a reasonable man, guided by these considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.[70]

No universal rule as to what amount of carelessness is necessary in order to render negligence culpable can be laid down, and the question must be determined on the facts of the particular case.[71]1906

The culpability in culpable negligence arises from the neglect of the civic duty of circumspection;[72] such circumspection as a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would use.[73] No universal rule as to what amount of carelessness is necessary in order to render negligence culpable can be laid down, and the question must be determined on the facts of the particular case.[74] Negligence cannot be inferred from the mere fact of a person having been run over.[75] Where the trial court and the appellate court convicted the driver of a bus with the finding that he was guilty of rashness and negligence both in driving the bus under ss 279 and 337, IPC, but in revision the Bombay High Court found that there was only negligence on his part and maintained the conviction.[76] Therefore, either of the two is sufficient to bring home the guilt to the accused.

15. Distinction between 'Negligence' and 'Rashness'

Rashness consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury and running the risk of doing such an act with recklessness or indifference as to the consequences. And criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injuring others which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.[77]

Distinction between rashness and negligence is that negligence connotes want of proper care, while rashness conveys of idea of reckless doing of an act without consideration of any consequences. A rash act is primarily an over hasty act and is thus opposed to a deliberate act, but it also includes an act which, though it may be said to be deliberate, is yet done without due deliberation and caution. Austin[78]has drawn distinction between negligence and rashness which, though closely allied 'are broadly distinguished by differences.' In cases of negligence, the party performs not an act to which he is obliged. He breaks a positive duty. Negligence is basically a breach of a duty because of omission to do something which a reasonable man guided by these considerations which ordinarily regulate conduct of human affairs to mould, or doing something which a prudent and reasonable man would not do. 'Negligence' is not an affirmative word. It is a negative word. It is absence of such care, skill and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed. There is a distinction between a rash act and a negligent act. Criminal negligence is the great and culpable neglect or failure to exercise that reasonable or proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all circumstances out of which charge has arisen was the imperative duty of the accused person to have adopted. Negligence is an omission to do something which a reasonable man guided upon these considerations which ordinarily1907 regulate conduct of human affairs would do or doing something which a prudent and reasonable man would not do. A culpable rashness is acting with consciousness that mischievous effect will follow, but in circumstances which show that the actor has not exercised caution incumbent upon him and if he had he would have had consciousness. Imputability arises from the neglect of civic duty of circumstances. As between rashness and negligence, the former is a graver offence.[79]

There is a clear distinction between negligence and rashness and that distinction is contemplated even by this section. In the case of negligence, the party does not do an act which he was bound to do, because he adverts not to do it. In the case of rashness, the party does an act and breaks a positive duty. He thinks of the probable mischief. But in consequences of a mis-supposition begotten by insufficient advertence, he assumes that the mischief will not ensue in the given instance or case. The radical idea denoted is always this. The party runs a risk of which he is conscious. Even in ordinary parlance, negligence connotes want of proper care and rashness conveys the idea of recklessness or the doing of an act without due consideration.[80]

No Presumption of Negligence in Certain Cases

Negligence, however, cannot be inferred from the mere fact of a person having been run over,[81] or from the mere fact that the passengers were dragged into the bus in a hurry before the two buses collided,[82] or from a mere fact that an accident has taken place and some persons have been injured,[83] or from the mere fact that the vehicle was at a fast speed.[84] Failure of the driver to sound the horn has also been held to be negligent driving.[85]

16. Consciousness about Consequences in Rashness and Negligence in Practice

Culpable rashness is acting with the consciousness that mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the accused has taken sufficient precautions to prevent their happenings.[86] The imputability arises from acting despite the consciousness (*luxuria)*. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the accused has not exercised the caution incumbent upon him, and that if he had, he would have had the consciousness. The imputability arises from the neglect of the civil duty of1908 circumspection. It is manifest that personal injury consciously and intentionally caused cannot fall within either of these categories which are wholly inapplicable to the case of an act or a series of acts, themselves intended, which are the direct producers of death.[87]

Rashness consists in doing something which ought not to have been done by a person who 'adverts to the consequences of his act, but by reason of some assumption which he examines insufficiently (he) concludes that those consequences will not follow the act in the instance before him'. 'The party runs a risk of which he is conscious; but he thinks that the mischief will probably be averted in the given instance'.[88] Negligence consists in not doing something which ought to have been done, by a person who does not think about that which he ought to have done.[89] A rash act is primarily an over-hasty act and is thus opposed to a deliberate act.[90]The rashness conveys an idea of recklessness in doing of an act without consideration of any consequences.[91] Rashness implies doing an act and thereby breaking a negative duty, and negligence implies not doing an act, and thereby breaking a positive duty. The one is doing something which ought not to have been done; the other is not doing something which ought to have been done. Such is the precise meaning of these terms in the language of jurisprudence, but, the word 'rashness' as used in the Code includes 'heedlessness' and thus signifies an insufficient advertence or complete inadvertence to the consequence of his conduct on the part of the agent. Thus, a man on horseback who furiously gallops down a crowded street commits a rash act, whether he thinks that people will get out of his way, or gives no thought at all to the probable consequences of what he is doing. So the driving of a vehicle at a high speed without caring for the persons going on the road, amounts to culpable rashness.[92] Absence of any person inside the vehicle is not, by itself, a circumstance to absolve the accused from liability.[93]

Again, 'negligence' in practice is more often combined with a positive act, *i.e.*, it does not exist in reference to the very act, but with regard to the neglect of certain necessary precautions in doing the act. Thus, in the language of these sections, it is the 'manner' of doing the act which is rash or negligent. To take the above example, riding down the crowded street is the act in question. Galloping under these circumstances is a manner of riding which is rash, whilst omitting to give warning to the foot-passengers is a negligent manner of riding. The culpability (in culpable negligence) 'arises from the neglect of the civil duty of circumspection'.[94] Such circumspection as 'a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs' would use.[95]1909

17. Determination of Rashness and Negligence

In determining whether a person is negligent or rash, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. The relevant circumstances to take into account may be the importance of the end to be served by acting in this way or the other. If all the vehicles

running on the roads in this country were restricted to a speed of 5 or 10 miles per hour, there would be fewer accidents. But our national life would be intolerably slowed down. Therefore, the purpose to be served, if sufficiently important, justifies the assumption of abnormal risk. But that does not mean that the driver of a vehicle who uses the highway should take abnormal risk and drive in a manner so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other human life or to be likely to cause hurt or injury to any other person. The driver must be able to pull up within limits of vision, but each case must depend upon its own circumstances.[1] The condition of the road and the nature of traffic are also circumstances to be considered in order to arrive at a conclusion as to whether the accident was the result of rash and negligent driving of the vehicle by the driver.[2] When the road is free and the road condition is perfect, the accused is justified in driving his vehicle (mini bus) at normal speed. But even when the road is blocked by the truck and the road condition is bad as fresh earth was spread on the roadside, if the accused-driver still drives his vehicle at normal speed without slowing it down, it is evident that such driving is a rash and negligent act on his part.[3]

Speed is not a criteria even to infer the rash or negligent act of driving, but it is corroborative factor.[4]Accused driver of a roadways bus was driving bus at a high speed which dashed against a tempo coming from opposite direction and caused injuries to three persons occupants of the tempo. Accused driver was convicted under ss 279 and 337, IPC .[5]

Boy crossing the Road

The accused driver was driving the bus, the bus took deviation at the spot of the accident and hit the house. The injured passenger PW did not depose that the accused was driving the bus rashly and negligently. The defence version was that a boy was crossing the road and to avoid accident, the accused driver look to the other side of the road and hit the house. The defence version being probable was believed, the accused appellant was acquitted of the charge under ss 279, 337, 338 and 427, IPC .[6]

Principle of *Res Ipsa Loquitur*--If Applicable

Commentary under same heading in s 304A, vol III may be referred to.1910

It is true that in motor accident cases the principle that the facts speak for themselves is applicable.[7] The principle of *res ipsa loquitur* will apply to the facts of the case where the incident speaks for itself. Where, the vehicle was driven on the highway by the accused on the wrong[8] side and the accident resulted in death of two persons, it was held that it is a fit case where the principle of *res ipsa loquitur* is applied. Normally, this principle is applicable only in the realm of tortious liability. An accident as mentioned above will speak for itself for the rash and negligent act on the part of the accused.[9] The courts can invoke the doctrine of *res ipsa loquitur* which is found applicable by the apex court as long back in the case of *Syed Akbar v State of Karnataka* .[10] But where some prosecution witnesses have corroborated the explanation given by the accused that he was compelled to take the vehicle to the right side leaving the road, in order to avoid a head-on collision with the lorry, it was clear that even assuming that the principle of *res ipsa loquitur* can be pressed into service in a case like this, there was sufficient explanation offered by the accused to explain why he had to take the vehicle to the wrong side. That being so, ignoring this aspect, the principle of *res ipsa loquitur* could not be applied stating that the facts spoke for themselves inasmuch as such facts were capable of being explained by the accused.[11] In the absence of any material on the record, no presumption of 'rashness' or 'negligence' could be drawn by invoking the maxim '*res ipsa loquitur*'.[12]

The principle of *res ipsa loquitur* has limited application in the domain of criminal law.[13]Where accused driver has reasonable explanation for the accident *viz*, in order to avoid head on collusion he had to take vehicle to the wrong side resulting in accident, the accused cannot be convicted under s 279, IPC by applying the principle of *res ipsa loquitur.*[14]

Mere Non-Observance of Rules not Necessarily Constitutes Wilful Rashness or Negligence

Mere non-observance of the requirements of the rules framed under the Motor Vehicles Act or driving a vehicle, which is not in its ideal condition, would not necessarily amount to wilful rashness or negligence required to constitute an offence under the Motor Vehicles Act or driving a vehicle, which is not in its ideal condition, would not necessarily amount to wilful rashness or negligence required to constitute an offence under the aforesaid sections.[15]

Accidents on Highway

The situation that prevails on the open highway is slightly different to one that the court would take into account had the incident taken place within the city limits. One needs to take into account the factors that on the highway, vehicles would1911 legitimately be moving at a relatively high speed. The more important aspect is that on the highway the vehicles have a right of way and if a person desires to cross the highway, the rules of the road require that the person would have to wait until the traffic has passed and only then embark on crossing the highway. It is a very familiar error committed by pedestrians even on the national highway that they saunter on to the road regardless of the movement of the traffic and if a person does a suicidal act of this type, then it would be impermissible for a court in a situation of this type to hold the driver of the vehicle responsible for the consequences of the act.[16] High or low speed is a relative term depending upon other factors.[17] Where the vehicle being driven on a national highway, caused an accident in front of a school, it is expected for a driver to be cautious and slow down the vehicle.[18]

Slow and Fast Speed--Depends upon Individual Notions

The fact that a vehicle is driven at high speed or the fact that a vehicle is not driven at high speed cannot, by itself, without judging the situation in which the driver has been placed, be a factor to determine rashness or negligence. High speed may not in each case be sufficient to hold that the driver is rash or negligent. If, however, a person is driving along a street in a town or in a crowded locality where persons are on the move, he has a duty not to drive carelessly and at an unusually rapid pace.[19] Mere proof of high speed is not sufficient to prove rashness and negligence to drive home the accusation under ss 279 and 304A, IPC .[20]Merely because the truck was being driven at a 'high-speed' does not bespeak of either 'negligence' or 'rashness' by itself. When none of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by 'high-speed'. 'High-speed' is a relative term, it is for the prosecution to bring on record material to establish as to what is meant by 'high-speed' in the facts and circumstances of the case.[21] It is always dangerous to rely upon such evidence of the passengers because what is slow speed and fast speed depends upon the idea or notions about the speed and which varies from person to person. Unless a passenger is conversant with driving, it is difficult to rely upon the evidence of such a passenger to determine whether the bus was driven at fast speed or otherwise. The accident had taken place on a zig-zag road and it is unlikely that the driver could have driven the bus at such place at a high speed. If the bus was not driven at a high speed, then the mere fact that the accident has taken place would not lead to the conclusion that the accused was driving rashly and negligently.[22] Where the bus driver drove the bus at a very high speed, lost control over the vehicle and came to the eastern side of the road causing an accident with a jeep resulting in death of all passengers travelling in the jeep, besides finding no mechanical defect in the offending vehicle, the conviction of the accused driver under ss 279, 304A, IPC, was maintained.[23] Where the accused while driving the truck with high speed climbed onto a footpath and hit the deceased from behind1912 causing his death, testimony of five witnesses was found truthful, conviction of the accused under ss 279, 304A, IPC, was upheld.[24]

The expression 'high speed' is an unambiguous/unclear expression. There must be prosecution evidence that the accused was driving the vehicle in rash and negligent manner.[25]

Where the accused driver of the bus even though was driving the vehicle at a slow speed, but hit a scooterist from behind causing death, was held guilty under ss 279 and 304A, IPC .[26]

Speed alone not the Test of Rashness and Negligence--Real Test Indicted

The relationship between speed, rashness or negligence depends upon the place, time, condition of the road, nature of the traffic and such other like circumstances. A motor vehicle is meant to be driven in speed. It is not always the one who drives his vehicle at a slow speed who is a safe driver. So, the speed with which a vehicle is driven is not always the deciding factor for coming to a finding whether accused was driving rashly or negligently.[27] Speed is not the sole contention for determining the negligent driving of the vehicle unless and until it is proved by the cogent evidence that the vehicle was being driven rashly or negligently.[28] It is not the speed alone that makes the driving rash or negligent. An automobile is meant to be driven in speed. Depending upon the place, speed by itself may not be rashness or negligence sometimes. But even without speed, driving can be rash or negligent as to endanger human life or health. The real test for negligent driving is whether the accident could have been avoided by the accused if he had exercised due care and diligence which ordinarily cautious persons using the road in similar circumstances would have done.[29]

It may not be always possible to determine with reference to the speed of a vehicle whether a person was driving rashly and negligently. Even when one is driving a vehicle at a slow speed but recklessly and negligently, it would amount to 'rash and negligent driving' within the meaning of s 279, IPC .[30]

Speed is not a criteria even to infer the rash or negligent act of driving, but it is corroborative factor.[31]Accused driver of a roadways bus, driving bus at a high speed which dashed against a tempo coming from opposite direction, caused injuries to three persons occupants of the tempo, accused driver was convicted under ss 279 and 337, IPC .[32]

To bring home a charge under s 279, IPC prosecution has to prove not only the fact that the accused was driving the vehicle on a public way, but has also to prove that1913 such driving was so rash or negligent as to endanger human life or likely to cause hurt or injury to any other person. Criminal negligence or criminal rashness is an important element.

The speed is not the sole contention for determining the negligent driving of the vehicle, unless and until it is proved by cogent evidence that the vehicle was being driven rashly or negligently.[33] Mere fact that the accused was driving the vehicle at high speed may not attract the provision of this section and prosecution has to prove something more.[34]

Situation and Location are also Material

High speed is a relative term. A vehicle which is driven in a congested road even at a speed of 30 km may constitute high speed, but driving a vehicle at a speed higher than 30 kms in an open road may not be considered driving at high speed. It would depend upon the nature and situation of the road, concentration of pedestrians and vehicular traffic on it and many such other relevant factors.[35]

The road on which the truck was plying was only 11 feet wide and, therefore, a very narrow road. Even if the truck was going at a speed of 10-12 miles per hour, it cannot be said as a rule that it was not rash driving. It depends upon the situation or the location where the vehicle was being driven.[36] High or low speed is a relative term depending upon other factors. If a vehicle with defective brakes is driven at a speed of 15-20 kms in a crowded bazaar, it is nothing but driving the vehicle rashly at high speed.[37] The lengthy skid marks found on the spot indicate that the bus while on descend and having negotiated the curve was being driven at a very high speed.[38] The fact that the accident took place on the right side of the road on a blind turn and brake-marks of 6.5 meters were found on the right side of the road, by itself proves that the accused was rash and negligent in driving the vehicle.[39] Where, the evidence of a witness whose jeep was also involved in the accident clearly discloses that the truck was being driven by the accused at a very high speed, the truck had no lights, it was being driven without the driver sounding the horn, the visibility was very poor at that time due to heavy fog and the witness was driving the jeep on the left side of the road very cautiously at a speed less than 15-20 miles per hour and he had put on both the head lights and he was also sounding the horn at intervals, so as to give warning to the vehicles approaching from the opposite sides. The finding of the courts below that the accident happened due to rash and negligent driving of the accused was perfectly

justified.[40]

But where the evidence of the motor vehicle inspector, who visited the spot of accident, showed that after the accident the motor-cycle moved to a distance of 17.6 meters, it is a strong factor to draw the inference that the driving of the motor-cycle1914 was rash and negligent. There can be no escape from the conclusion that the accused-respondent is guilty of offences under s 279, IPC .[41]

Dragging Marks\skid Marks on Road--Absence of

Absence of dragging marks/skid marks on the road are not always or invariably necessary to prove rashness/negligence of the driver of the offending vehicle.[42]

Other Factors

Where the truck was not being driven at a fast speed in a rash and negligent manner but it was the deceased himself who fully contributed to the cause of the accident and came in front of the truck all of a sudden when it was only at a distance of 6-7 feet. In these circumstances it was held, it cannot be said that the petitioner caused the accident due to his rash and negligent driving and the conviction of the petitioner cannot be sustained.[43]

Similarly, where the pedestrian crossed the road without attempting to take care to see the approaching vehicle with the consequences that he was knocked down by that vehicle, it was held that the finding as to rashness or negligence on the part of the driver was wrong and no offence under s 279, IPC was made out.[44]

While the truck was going on the main thoroughfare from south to north, the ill-fated young girl was crossing the road from east to west and she had already covered 35 ft. of the road. There was sufficient time and margin for the driver to see that the young child was crossing the road and he could have applied brakes instead of knocking down the girl only 17 ft. away from the kerb. Appellant accused was convicted of charge under ss 279 and 304A, IPC .[45]

Accused car driver was prosecuted on allegations that the accused was driving the car in rash and negligent manner and caused grievous injuries to a child 7 years old. Evidence proved that the child was playing on the road, while playing the child was running on the road to reach the house, due to this act, he came in contact with the car and the driver of the car had applied its brakes to save him and there were skid marks upto 30 feet. The site plan prepared by IO corroborated the defence version as there were skid marks on the spot. Accused was acquitted of the charges under ss 279, 337 and 338, IPC .[46]

Accidents on Account of Mechanical defect in the Vehicle

Commentary under the same heading in s 304A, vol III may be referred to.

Evidence of witnesses established that the accused appellant driving a jeep loaded with passengers, dashed with roadside trees, collapsed by the side of the road, and as a result 12/13 passengers on board sustained injuries, one injured died later in the hospital. Vehicle was seized from the spot in damaged condition. The motor vehicle inspector reported that the vehicle was having no mechanical defect at the time of the1915 accident. Accused appellant had suffered injuries in the accident. The appellant driver was convicted under ss 279, 338 and 304A, IPC .[47]

Where the accident took place not due to rash and negligent driving of the car by the accused-petitioner but due to some mechanical defect, which developed when the car was being driven on the road immediately before the accident had taken place, and the brake-oil leaked out, it cannot be said that the accused petitioner was negligent in not checking up the brake-oil, rather it appears that it was due to sheer ill-luck that the brake-oil leaked out due to some mechanical defect

which the car had developed all of a sudden, it was held that the accident during which the cyclist sustained his injuries was due to negligence on his own part and not due to rash and negligent driving of the car by the accused-petitioner.[48]

Mechanical Defect in Vehicle

Where the evidence established that the accident by a Road Transport Corporation bus occurred due to mechanical defect in the bus, the accused driver of the bus was acquitted of the charges under ss 279 and 304A, IPC .[49]

The evidence led by the prosecution as well as by the defence clearly shows that the accident had taken place because of a mechanical defect mainly that the steering of the bus had got locked at the time when it met with the accident with the motorcyclist. No doubt, as could be inferred from the sketch, the bus had gone to the right, beyond the road along with the said motorcyclist. However, on this count alone one certainly cannot come to the conclusion that the accused/driver of the said bus was driving it rashly and negligently, more so because the motorcyclist was coming from his opposite direction. Therefore, the accused was entitled to acquittal.[50]

When steering wheel being not in order and hence, not workable, is a part of prosecution story itself shows that it was not necessary for the accused to state these facts in so many words even in his examination under s 313 of the Code of Criminal Procedure . It can safely be inferred that incident was merely an accident and there is nothing to infer that the accused was driving the vehicle either rashly or negligently.[51]

Poor Maintenance of Vehicle

The accused appellant by rash and negligent driving of scooter had caused serious injuries to a four years old boy. The appellant had taken plea that the accident had occurred as tyre of the scooter had bursted. Poor maintenance of the vehicle is itself a negligent act as it speaks of 'absence of care' so far as the vehicle is concerned. Accused appellant was convicted under ss 279 and 304A .[52]

Boy Crossing the Road

The accused driver was driving the bus, the bus took deviation at the spot of the accident and hit the house. The injured passenger PW did not depose that the accused was driving the bus rashly and negligently. The defence version was that a boy was1916 crossing the road and to avoid accident, the accused driver took to the other side of the road and hit the house. The defence version being probable was believed, the accused appellant was acquitted of the charge under ss 279, 337, 338 and 427, IPC .[53]

Benefit of Doubt when to be Given

The onus is on the prosecution to establish, beyond reasonable doubt, that the vehicle was being driven in a rash or negligent manner. What is rash or negligent driving would depend upon the facts and circumstances of each case. No hard and fast rule can be laid down. Where the court is not able to get a clear picture as to how the accident happened, the accused is entitled to the benefit of doubt.[54]

18. Duties of the Driver and user of the Road

To Prevent Injury

As shown above, the offence consists in rash or negligent driving or riding. It is the duty of everyone who drives a vehicle on a public highway to drive it with such care and caution as to prevent, as far as is in his or her power, any injury to any person.[55] There is a duty on the driver of a motor car to

observe ordinary care or skill towards persons using the highway, whom he could reasonably foresee as likely to be affected.[56]

Special Care in Case of Mechanical Defect

Where a vehicle with defective brakes had to be driven in the crowded *bazaar* the driver was required to exercise reasonable care by driving the bus at snail's speed to enable him to bring it to a halt whenever required without applying the brakes.[57]

Foot Passenger's Right to use Carriageway

A foot passenger, though he may be infirm from disease, has a right to walk on the carriageway, although there be a footpath, and he is entitled to the exercise of reasonable care on the part of the persons driving carriages along the carriageway.[58] It is obviously the duty of a driver to see that he does not approach so near a car in front of him that he cannot avoid a collision if that car slackens speed or stops.[59]

Overloading of Vehicle

Overloading of 60-65 people in the truck like fodder contributes to the negligence of the accused driver. In the present case the truck had turned turtle, causing injuries to several persons of death of the three persons on the spot and six persons1917 in the hospital. The appellant accused driver was convicted under ss 279, 304A and 338, IPC .[60]

Blowing Horn when Necessary

Mere speed is not the criterion to judge the rashness or negligence. Even high speed on a highway, which is not surrounded by *abadi*, cannot be said to be a rash act. But driving the bus in a locality without giving any horn is a breach of a duty imposed upon a driver.[61] Failure of a driver to sound the horn also amounts to negligent driving.[62]

Condition of Road and Nature of Traffic to be kept in view

A person who is driving a motor vehicle should always keep it in a state of control sufficient to enable him to avoid dashing against any other vehicle or running over any pedestrian who may be on the road. It is the duty of every one who drives a vehicle on a public highway to drive it with care and caution and to avoid as far as possible any injury to any person. The condition of the road and the nature of the traffic are also circumstances to be considered in order to arrive at a conclusion as to whether the accident was the result of rash and negligent driving of the vehicle by the driver.[63]

Bigger the vehicle, bigger is the responsibility. In the instant case the offending bus was a big passenger vehicle and while driving such a big vehicle along the public road and that too in an area where there are educational institutions, the accused driver should have been very careful. The very act of the accused in driving the bus and dashing from behind the cyclist, would speak volumes about the rashness and negligence in driving the vehicle.[64]

Certain Precaution to be Observed--Own Safety also Material

On a clear road with no traffic in front or behind except at a distance, a driver is entitled to take any part of the road he likes. He must, however, keep a sharp lookout in front and behind and when he sees a vehicle approaching, he must go to the left or near side of the highway to permit the passage of the other vehicle.[65]

No rider or driver can tell when a pedestrian may happen to arrive on a road; consequently, he cannot drive or ride rashly or negligently even at a time when the road happens to be temporarily unoccupied by any pedestrian or by any vehicle. And this is so not only because any person or any vehicle may happen to arrive on the road at any time, but also because the driver or the rider is to look to his own

safety as well, and cannot at all indulge in a riding or driving which may endanger his own life.[66]1918

Vehicle Parked on Wrong side of Road

The accused was alleged to have caused injuries to the driver and the passengers of the auto rickshaw, evidence showed that the auto rickshaw at the time of the incident was parked on the wrong side of the road, there was no evidence that the accused at the time of the accident was driving the jeep at speed beyond prescribed limit for the area where the accident occurred, accused was acquitted of the charge under s 279, IPC .[67]

Care when using Wrong Side of Road

A person driving a carriage is bound to keep on the ordinary side of the road; but if he does not do so, it is his duty to use more care and diligence, and keep a better lookout, that he may avoid collision, that would not be a requisite if he were to keep to his proper side of the road.[68] Where it was established that the accident took place on the right side of the road taking the direction of the vehicle (truck) into consideration and the accident took place where the driver could not see beyond the said turn, the truck crashed into the scooter coming from the opposite direction on its own side, the fact that the accident took place on the right side of the road on a blind turn and brake-marks of 6.5 metres were found on the right side of the road, by itself proves that accused was rash and negligent in driving the said truck.[69] Where the accused driving mini bus rashly and negligently dashed against the bus, causing injuries to the passengers of both the buses, the mini bus driven by the accused was on the wrong side of the road, the passengers of the mini bus deposed that the accused driver was driving the bus at a high speed, accused respondent was convicted under ss 279 and 337, IPC .[70]

Where accused driver of a bus driving collided with a truck coming from opposite direction, caused injuries to the complainant and other persons, photographs showed that the bus was coming on wrong side, he was convicted under ss 279 and 337, IPC .[71]

Where the photographs of the spot showed that the offending truck was on the wrong side of the road, *i.e.* on extreme right side of road on the curve, whereas the victim Maruti car was at its left side, the appellant accused was convicted under s 279, IPC .[72]

Even if there is no oral evidence of rash and negligent driving of the bus by the accused, but the fact that the accused was driving the bus on the wrong side of the road at a high speed proves rash and negligent driving by the accused. Accused appellant was convicted under ss 279 and 304A, IPC .[73]

Constant Anticipation by Driver is subject to Normal Conditions

As already stated, the rashness and negligence in driving cannot be inferred from the mere fact that the crossing pedestrian was knocked down by the bus. In the hustle and bustle of present day life, the most essential element of carefulness and diligence in the activity such as driving is constant anticipation, but its postulate is a normal1919 condition. Where the victim had crossed over to the western side on seeing the bus coming and still decided to cross back to the eastern side immediately unmindful of the approach of the bus, it was observed that the driver could not be blamed for not anticipating her last trip towards the east and as he was pardoned for not anticipating such a suicidal return journey on the part of the deceased, the case of rashness and negligence on his part was ruled out.[74]

Non-observance of the Rule of the Road

It is the duty of every user of the road to make reasonable use of it for the purposes of passing along it and to allow others to do so also. One way of doing it is to conform to the ordinary usages of the road. When the accused was coming along the wrong side and at a terrific speed, it is impossible to hold that he was not driving the car in a rash or negligent manner as to endanger human life or to be likely to cause hurt or injury to any other person.[75]

Motorists are not the only persons who owe a duty of care; others also have a responsibility and must conform to the ordinary usages of the road. There is a duty on every user of the road to make a reasonable use of it for the purposes of passing along it, and to allow others to do so also.

A person driving a motor car has a right to expect that the persons negligently loitering on the road would make way for him, especially when he sees that they are aware of his approach. Even when they signal him to stop, he is not bound to do so, whatever the rules of courtesy may be. He has the right to assume that they would get out of the way when they see him ignore their signals. It is the experience of motorists along the Indian roads, and elsewhere also, that they are often signaled to stop by persons who are begging a ride. Obviously, they need not pull up for this. As a rule, it is not until they are right upon them that it is possible to determine whether the signals are really of distress or not, and then of course with a courteous driver the car is usually brought to a standstill a short distance away. But even then one does not expect a man to stand obstinately in the way while he is in the process of pulling up. A car cannot be stopped in a few feet, especially when it is a heavy one like a motor lorry.[76] The rule of the road is not an invariable or inflexible rule, and a deviation from it may, upon occasion, be not only justifiable but actually necessary.[77] It is the duty of any person driving another vehicle on the same road as that on which a tram-car is running, not to bring his vehicle on the tram lines in front of the car, so as to obstruct its ordinary progress. It follows then that a driver of a tram-car, while he must not drive negligently or rashly, is entitled to expect that other traffic along the road will keep clear off, or remove itself from, the tramway line so far as is reasonably possible. This does not mean of course that a driver of a tram-car is entitled to travel with excessive speed, that he is entitled, for instance, to ignore a blind man who is trying to cross the road or when he sees another vehicle is on the line and cannot get clear in time, that he is entitled to hold on his way regardless of all other considerations. His position is privileged to this extent that he has acquired the right by law to the use of the line and he is entitled to expect that if other vehicles are in the way that they will give passage to him.1920

In a case where a tram-car collided with a camel cart, it appeared that the tram-car was being driven by the applicant at a fast, but not at an excessive speed, upon the tram lime, and there was nothing upon the tram line directly in front of the tram-car, but on the other line parallel to it, the camel cart was proceeding in the same direction. It also appeared that if the camel had not suddenly swerved to the left side instead of to the right side there would have been no collision. In the circumstances, it was held that it would not be said that the driver of the tram-car was rash or negligent within the meaning of this section merely because he did not anticipate that the camel would suddenly swerve to the left side instead of to the right side. He was entitled to expect that the camel cart would continue on its way or that, if it made any effort to move, the effort would be directed towards moving away from the line upon which his car was proceeding and not moving across it.[78]

Accident at Green Signal

Where the accused driving a bus at a fast speed struck against the deceased at green signal, held it was sufficient proof that the accused was driving the bus rashly and negligently.[79]

Driving on Right Side on *Kacha* or Zigzag Road

Where the road was admittedly zig-zag near the place of accident, the accused driver ought to have slowed down the bus so as to be able to stop it at a moment's notice, and should not have driven the bus on the right side of the road. When a heavy loaded bus is driven across a zig-zag road or up a hill prudence requires that he should reduce the speed considerably so as to be able to stop the vehicle at a moment's notice.[80] The very act of driving of the vehicle on the right side of the *kutcha* road itself is a dangerous act.[81]

19. Precaution in 'Trial Run'

A 'trial run' is after all a 'test run' to satisfy the repairers that the repair work has been completed to their satisfaction. Putting a vehicle to trial run, therefore, is not certifying to its road-worthiness. The

board should be hung on the vehicle to that effect to warn all concerned that such a vehicle on the road is not absolutely roadworthy but was being tested for the purpose, and the possibility of its failing could not be ruled out.[82]

20. Dashing against a Stationary Vehicle

The act of the accused in dashing against a stationary lorry may amount to rash and negligent driving. With the head lights on, the driver of the offending vehicle should have been able to see the stationary lorry and with diligent driving could have avoided the accident.[83]1921

21. Passenger Jumping Out of Bus in Motion

The deceased, on his own, opened the gate and alighted from the bus, while it was still in motion. On being asked by the conductor and the passengers the accused immediately stopped the bus. On these facts if the deceased had no patience and without waiting for the bus to come to complete halt, alighted, no negligence can be attributed to the driver of the bus. Thus, even if the prosecution case goes un-rebutted there are no chances of the accused being guilty for offence under s 279 or 304A, IPC .[84] Where the accused appellant driver of the truck was negotiating steep height and the truck due to some mechanical defect or otherwise started rolling back, one of the four labourers out of panic jumped from the truck and died, the act of jumping from the truck was the rash and negligent act of the deceased, for which the accused could not be convicted under ss 279 and 304, IPC .[85]

22. Passenger going on Roof of Bus

Section 279 deals with rash driving or riding on a pubic way. For bringing in application of either ss 279 or 304A it must be established that there was an element of rashness or negligence. Appellant accused was a driver in Himachal Pradesh Transport Corporation. On the day of the incident while he was driving the vehicle, the bus had stopped at a bus stop. One passenger after alighting from the bus went to its roof top for the purpose of unloading his luggage. The accused without waiting for a signal from the conductor and without verifying if all the passengers who were to board, had boarded and who were to alight had alighted, all of a sudden started the bus as a result of which the said passenger fell down and sustained injuries. He was carried to the hospital where he succumbed to the injuries. Even if the prosecution version is accepted in toto, there was no evidence led to show that any negligence was involved. The conviction of the accused appellant under ss 279 and 304A, IPC was set aside.[86]

23. Driving on the Wrong Side of Road--Whether Offence

The mere non-observance of the requirements of the rules, framed under the Motor Vehicles Act 1988, or driving a vehicle, which is not in an ideal condition, would not necessarily amount to wilful rashness or negligence, required to constitute an offence under ss 279 and 304A, IPC .[87] It is true that the usage of the road is not the sole criterion for determining negligence and there may be instances where even though the vehicle was found on the wrong side of the road, the driver had taken appropriate precautions and exercised due care and diligence.[88]

It cannot be said that a person driving his motor car even slowly on the wrong side of the road at a blind corner between two roads of considerable traffic is not driving the car rashly or negligently.[89] But it is not always necessarily rash and negligent to drive on the wrong side of the road. Much would depend upon other conditions.[90]1922

Where the accused was driving on the wrong side of the road, but he took all possible precautions by driving his car slowly and by putting his hand up to give his signal to the complainant when he saw the complainant's car coming on from the opposite direction at an excessive speed, but in spite of all this an unfortunate accident occurred, which would not have occurred if the complainant had not been driving his car at an excessive speed, it was held that the guilt of the accused under this section was

not proved.[91] But where the accused while driving the truck hit the scooter from behind while overtaking the scooterist from the left side, and hit the scooterist from the right side of the truck and could not stop immediately after colliding with the scooter, it is obvious that the accused did not exercise reasonable and proper care which was imperative duty to have exercised. He was obviously unmindful of the safety of the scooterist and was driving the truck at an uncontrollable speed, as a result he could not control his vehicle after hitting the scooter. He had not even blown the horn before overtaking the scooter from the left side. These circumstances clearly proved that the accused was guilty of rashness and criminal negligence and that was the direct cause of this fatal accidental death.[92]

There was prosecution evidence that the accused respondent was driving motorcycle at a high speed on the wrong side of the road after it had become dark and without lights. In mechanical examination the motorcycle was found in order. Held, the act of the accused was such a wanton that it must be presumed that he had the knowledge that his act would cause injury to any person on the road. He was convicted under ss 279 and 338, IPC .[93]

24. Racing Competition

Where two buses were racing and competing with each other, the drivers of both the buses were held guilty under this section because racing or competition involves rash driving on both sides.[94] Permitting or taking part in a race or trial of speed of any kind between motor vehicles in any public place without the written consent of the state government is an offence even under s 189 of the Motor Vehicles Act 1988.

25. Overtaking another Vehicle

Where the accused driving a vehicle overtakes another vehicle at fast speed having total disregard to the passengers who might have been crossing the road after alighting form the vehicle, he is guilty of rash and negligent driving. Accused appellant was convicted under s 304A .[95]

Accused appellant, driver of a van, attempted to overtake the car, had hit the scooter andcaused the death of the rider and injuries to the pillion rider of the scooter. The name of the accused was not mentioned in the FIR. He was arrested after one month of the accident. Identifying witness had only a glimpse of the driver of the vehicle. There was no interaction between identifying witness and the driver of the vehicle at the spot for a sufficient longer period. In these circumstances, the identification of the accused for the first time, after six years, in the court, in the1923 absence of any test identification parade, during the course of investigation was held not to be sufficient to connect him with the present case. Accused was acquitted of the charges under ss 279 and 304A, IPC .[1]

26. 'Driving Cart without Reins'

Simply driving a cart the bullocks of which have no nose-string, does not constitute the offence under this section.[2]

Upon a trial for manslaughter it appeared that the accused was standing up in a spring cart; the reins were not in his hands, but lying on the horse's back; while the horse was trotting down a hill with the cart, the deceased, a child of about three years old, ran across the road before the horse, and the wheel of the cart knocked it down and killed it. It did not appear that the accused saw the child before the accident. Erle J, told the jury that if the accused had had the reins, and by using them, could have saved the child, he was guilty of manslaughter; but if they thought he could not have saved the child by pulling the reins or otherwise by their assistance, they must acquit him.[3]

On an indictment for manslaughter, the evidence was that the accused, being employed to drive a cart, sat inside instead of attending at the horse's head, and while he was sitting there, the cart ran over a child who was gathering up flowers on the road. Bayley B, held that the accused, by being in

the cart, instead of at the horse's head, or by its side, was guilty of negligence, and death having been caused thereby, he was guilty of manslaughter.[4]

Where a person allowed his cart to proceed unattended along a road and ran over a boy who was sleeping on the road, it was held he could be not convicted under this section but either under s 337 or s 338, IPC .[5]

27. 'Rash Riding'

If a person rides a horse so fast that he would be unable to stop it if a foot-passenger got in the way, he would be liable under this section provided that the foot-passenger acted in a reasonable manner.[6]

28. 'Riding Pillion on Bicycle'

For a man to ride a pillion on an ordinary bicycle in a crowded street is a negligent act which is likely to cause injury to the other persons and vehicles there.[7]

29. 'Contributory Negligence'--Doctrine not Applicable in Criminal Law

In case of an accident on account of rash and negligent driving under this section, contributory negligence cannot be put up as a defence.[8] It is well established that the doctrine of contributory negligence, so well known in the law of tort, has, as such,1924 fortunately no place in criminal law. The question is purely one of causation and the facts of each case should be examined in the light of the principles suggested above. It may, in some cases, appear that it was the sufferer's own conduct which can alone be regarded as the cause of his misfortune. But where this is not so, the victim's carelessness or folly does not *per se* limit the liability of one who has, in fact, caused him harm.[9] In cases of road accidents the court has to keep in mind the likelihood of an error of judgment on the part of the person who is driving a motor vehicle as well as a pedestrian who attempts to cross the road little realising the great difference in his speed and that of the approaching motor vehicle.[10] The doctrine of contributory negligence has no application in criminal law.[11]

Contributory Negligence--No Defence in such Cases

Whether a vehicle is being driven fast or not depends upon the notion of a person. The petitioner was carrying his sister on the pillion seat and in the normal course he would not be driving the motor cycle recklessly for his and for the safety of his sister. The plea of contributory negligence is no defence on a case of this nature but then while deciding the criminality one has to bear in mind the peculiar facts and circumstances of the case and the eyewitnesses' testimony cannot be accepted mechanically unless it fits in with the facts and circumstances of the case leading to the conclusion that the act of the accused was really a vicarious act of recklessness which alone resulted in the accident.[12]

Contributory Negligence--Ground for Lesser Punishment

Where the accused overtook three buses at a time by driving his bus in a rash and negligent manner and not only collided with the bus coming from the opposite side but also lost control of his vehicle and clashed against a tree causing simple and grievous injuries to the passengers and his conviction under ss 279, 337, 338, IPC, and s 184, Motor Vehicle Act (59 of 1988) was found proper. But, since the driver coming from the opposite side was also guilty of contributory negligence, the accused was not found entitled to leniencies and was sentenced to pay fine quantified at Rs 1000 on each of the heads of charge aggregating to Rs 4000 and no default in sentence was prescribed.[13]

Due to rash and negligent driving of cart, the deceased child came under the wheel of the cart, was crushed. Three carts were involved in the accident. As the case was of contributory negligence, sentence was reduced to the period already undergone.[14]

30. 'So as to Endanger Human Life or to be Likely to Cause Hurt or Injury'

To be guilty of an offence under this section the accused must drive the vehicle in a rash or negligent manner and driving must be such as to endanger human life or be likely to cause hurt or injury to any other person. A certain aggravated degree of rash1925 or negligent driving is contemplated here.[15]For an offence under this section the effect of the manner in which the act is performed must be either: (a) that human life was, as a fact endangered thereby, or (b) that hurt or injury was likely to be caused thereby. Therefore, it must be shown that some person was either in a position of danger to his life, or that there was a likelihood of persons being hurt or injured. Likelihood is something stronger that a possibility, and may or may not amount to a probability, which is merely a stronger degree of likelihood.[16] A magistrate may, therefore, take into consideration the probability of persons using the road being placed in danger, and the fact that no one happened to be on the road at the time is no defence.[17] For a conviction under this section, it is, however, not necessary that the rash or negligent act should result in injury to life or limb. Bare negligence involving the risk of injury is punishable under the section.[18]

31. Rash or Negligent Driving or Riding not Permissible even when Roads are Unoccupied

The more the public way is crowded, the greater is the diligence and care expected from a driver or rider. Again, no rider or driver can tell when a pedestrian may happen to arrive on a road, consequently, he cannot drive or ride rashly or negligently even at a time when the road happens to be temporarily unoccupied by any pedestrian or by any vehicle. And this is not only because any person or any vehicle may happen to arrive on the road at any time, but also because the driver or the rider is to look to his own safety as well and cannot at all indulge in a riding or driving which may endanger his own life.[19]

32. 'Hurt'

Section 319 and notes thereunder may be referred to.

33. 'Injury'

The word 'injury' in the section, would denote any harm whatever illegally caused, to any person, in body, mind, reputation or property (refer to s 44 *ante*). Therefore, negligent or rash driving, which may cause harm to the property of a person, is covered in this section.[20]

Notes under s 44 may be referred to.

34. 'To any other Person'

The words 'any other person' are very wide, and are not distinctly limited to persons on a road as distinct from the occupants of the particular vehicle which is being1926 rashly or negligently driven. They are wide enough to include the occupants of the vehicle itself, and it may be reasonably held, especially at the present time, that the occupants of a motor bus have as much right to be protected against rash or negligent driving on the part of the driver of the bus as have other people on the road.[21]

35. 'Abetment'--Meaning

To establish the abetment of an offence under this section, it is not sufficient to show that the accused had instigated the driver to drive fast; it must be shown at least that he instigated him to drive at a pace which was in itself, in all the circumstances, so rashly fast as to endanger human life. In fact, looking at the common sense view, it seems unlikely that any passenger in a car would explicitly tell

any person to drive in a manner which is dangerous. The fact that the owner or an occupant did not insist on the driver driving at a moderate pace, does not show that he instigated his driving at a reckless pace.[22]

Supervisor of Learner Driver when Liable

The appellant had been acting (under the appropriate statutory regulation) as supervisor of a learner-driver of a motorcar. The driver pulled out on a pronounced bend of the road in order to overtake and pass a horse and cart, being unable to see a motor-lorry which was approaching in the opposite direction on its proper side of the road. He stalled his engine when well over the center of the road so that a collision occurred. The appellant sitting in the passenger's seat on the left of the driver saw the horse and cart, the white line in the center of the road, and the driver's manoeuvre in pulling out to pass, but he took no steps to prevent this, and so far as the evidence showed, remained passive. The driver was convicted of driving the motor vehicle without due care and attention, and the appellant was convicted of aiding and abetting the driver.

In dismissing his appeal, the divisional court held that the appellant was under a legal duty imposed by the regulations to take such action as could be reasonably expected to be done by a person supervising the acts of another to prevent that other from acting unskillfully or carelessly in a manner likely to cause danger to others; and to this extent to participate in the driving.[23]

Owner or Occupant when also Liable

If, however, the circumstances justify an inference that a common purpose to drive the car in a dangerously rash or negligent manner existed between the owner or occupant and the driver, the former also would be liable.[24]

36. Liability of Owner of Vehicle--When Exists

The rashness or negligence must be personal. Thus, the actual driver, and not the owner of the carriage, is liable under this section.[25] But this rule does not apply in1927 cases where a master employs a servant to do anything which is *prima facie* dangerous to the public.[26]

37. Liability under this Section and Special Laws

It cannot be laid down as a general rule of law that where there is a special law making a particular act an offence and providing penalties for such an offence, the general law must be held to be inapplicable. It is possible that the same act may be an offence under two different Acts and both may be applicable simultaneously, and the offender may be prosecuted and convicted under either Act. It may, however, be conceded that where the offence falls strictly within the provision of a section of a special Act, rather than fall back upon a more general law which prescribes a heavier penalty, in such a case it may be assumed that the legislature in prescribing the smaller penalty has considered recourse to the special law as the proper course.[27]Where a special kind of rash or negligent act is penalised under a special law, recourse should not be had to this section.[28]

38. Procedure

The offence under this section is cognisable, but a summons shall ordinarily issue in the first instance. It is a bailable offence but not compoundable. It can be tried by any magistrate and even summarily.

The cognizance of an offence under this section can be taken within one year.[29] Trial should be speedy. In case of enormous delay it is liable to be quashed.[30] Delay of nine and a half years for a trial of rash and negligence driving was held to be too long a time to be condoned.[31]

Court's Discretion to Exempt Personal Appearance of Accused

Under s 317, CrPC, the judge or magistrate can, at any stage of inquiry or trial, dispense with the personal attendance of the accused before the court if he satisfies that his presence is not necessary in the interest of justice. The discretion to exempt personal attendance of the accused should be exercised judicially with care and caution depending upon circumstances of each case or each occasion. Accordingly, when a question of identification of an offender arises in a case under ss 279 and 304A, IPC, the judge or magistrate should see that on the date of examination of eye-witnesses, the accused appears in court so that they can get a chance to identify him.[32]

39. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC 1973 may be adopted:1928

I (*name of the office of the magistrate etc*) hereby give notice to you (*name of accused*) as follows:

That you on or about the..... day of ..... at....., drove a vehicle (*name the vehicle*), or rode on a public way (*name the way*) in a manner so rash or negligent as to endanger human life or to be likely to cause hurt (*or injury*) to any other person and thereby committed an offence punishable under section 279 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

40. Joinder of Charges and Persons at one Trial

Rash or negligent driving by the driver of one vehicle is independent of rash or negligent driving by the

driver of another vehicle. When, therefore, two vehicles collide due to the rash or negligent driving of the drivers of the two vehicles, the two acts of the two drivers cannot be said to constitute the same transaction within the meaning of s 223, CrPC, and the trial of the two drivers together at one trial for the offence under s 279 is illegal.[33] It has been held that where two motor vehicles coming from opposite directions collide due to rash and negligent driving by the drivers of the two vehicles, and the collision results in the death of one passenger and grievous hurt to another passenger, a joint trial of the two drivers for the Motor Vehicles Act, is illegal, as they cannot be said to have been committed in the course of the same transaction.[34] But a contrary view has been taken by the Rajasthan High Court.[35]

41. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused was driving a vehicle or was riding;
(ii) the driving or riding was on a public way;
(iii) he was driving or riding rashly or negligently; and
(iv) such manner of driving or riding endangered human life, or was likely to cause hurt or injury to any other person.[36]

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Burden lies on the prosecution to establish that the accused driver was driving the vehicle at high speed. The prosecution must also establish the place of occurrence.[37] Where the accused has pleaded guilty, he cannot be allowed to urge later on that he was not made aware of the consequences.[38]

Prosecution case was that the accused was driving a truck at a very fast speed, dashed against the deceased from behind, causing his death. There was evidence of one witness who was also not cross-examined, there was no other evidence showing the speed of the truck at the time of the accident. Accused was acquitted of the charges under ss 279 and 304A, IPC .[39]

The petitioner accused was found guilty of driving auto rickshaw rashly and negligently. The petitioner had dashed the said vehicle against the deceased and as a result, the deceased sustained grievous injury and was admitted to the hospital. During treatment the deceased died after 38 days of the accident. The injury sustained by the deceased in the accident caused by the accused, was the direct and proximate cause, which led to the death of the deceased. The accused was convicted for offences under ss 279 and 304A .[40]

Eye-witnesses deposed that the accident was due to rash and negligent driving of the truck, the truck dashed against the scooter causing the death of two brothers. The conviction of the accused under ss 279 and 304A, IPC was held proper.[41]

Once the accident stands proved and the circumstances which appear on the record conclude the rash or negligent driving by the offending vehicle, immediately the onus shifts upon such driver to prove due care and caution.[42]

The respondent accused was prosecuted under ss 279 and 337, IPC on allegations that he was driving the motorcycle at high speed, hit the victim from wrong side, causing injuries on his legs, chest, head *etc*. There were material omissions and contradictions in the statement of the prosecution witness. Respondent was acquitted of the charges under ss 279 and 337, IPC .[43]

Where the accused driver of the bus in the process of overtaking the bullock cart dashed against the motorcycle coming from the opposite side, the pillion rider of the motorcycle injured in the accident was the best witness about the incident. The accused driver of the bus dragged the motorcycle for

about 20 feet and stopped the vehicle on the footpath on the western side of the road. Held, the accused driver of the bus was guilty of rash and negligent driving of the bus. He was convicted under ss 279, 338 and 304A, IPC .[44]

Where the accused has been already acquitted under s 187, Motor Vehicles Act 1988, for want of evidence, accused cannot be convicted for offences under ss 279 and 304A, IPC .[45]1930

Where Pedestrian Crossing the Road is Negligent

Where a person suddenly crossed the road without taking note of the approaching vehicle, there was every possibility of his crashing against the vehicle without the driver becoming aware of it. The driver of the vehicle in such circumstances cannot save accidents and so cannot be held to be negligent in such cases.[46] Where the boy who met with the accident was only aged five years, although he was accompanied by his father, yet he was going ahead of him independently and when the truck came close, he, all of a sudden started crossing the road, in these circumstances it cannot be said that accused driver caused the accident due to his rash and negligent driving.[47]

If an accident occurs on a public road in a village and is witnessed by one or more witnesses, the eye witnesses are more likely to be the residents of the locality or the persons visiting that locality on business or some other purpose. Merely because the persons are residents of the village or the locality where the accident occurred, they cannot be called as interested witnesses.[48]

Where a pedestrian crosses the road and does not take care to see whether any vehicle or truck is coming along the road, so that he dashes against the bus or truck, the driver may not be held guilty of negligence.[49] Where the old pedestrian crossed the road without attempting to take care to see the approaching bus with the consequence that he was knocked down by that bus, no case of criminal negligence could be inferred against the driver.[50]

Non-examination of the Driver of Victim Vehicle

Where it is proved by the evidence on the record that the accused was driving bus rashly and negligently and dashed against the tempo causing the death of two persons and injuries to several persons, accused would not be acquitted on the mere ground that the driver of the tempo was not examined in the case.[51]

Non-Examination of Investigating Officer

Where the very date of alleged occurrence became doubtful and the case of prosecution in this regard is contradicted by the evidence of the doctors, the injured has stated that his statement was not recorded and only his thumb impression was taken, the non-examination of investigating officer in these circumstances would certainly prejudice the accused and so the accused was acquitted for the offences under ss 279 and 338, IPC .[52]1931

Identification of Driver-Test Identification Parade

Prosecution witnesses identified the accused driver driving the vehicle at the time of accident, in the court. He was also named in FIR. Test identification parade was found not necessary. Conviction of accused under s 279, IPC was held proper.[53]

Identification of the Accused

Accused driving van in abnormal speed on a public way had caused the death of a lady. Owner of the offending vehicle deposed that the accused appellant was driving the vehicle at the time of the accident. Eye-witnesses identified the accused in the dock. Mere fact that the witnesses could not give out the name of the accused in the witness box was held not fatal to the prosecution case.[54]

Prosecution's case was that the accused driving goods truck in rash and negligent manner dashed

against Tata Sumo which was coming from the opposite direction. All the PWS were sitting in the rear seats of the Tata Sumo as such they had no opportunity to see the driver of the offending vehicle. The witnesses did not depose before the court that they saw the face of the driver of the offending vehicle. The identity/identification of the accused was not proved beyond reasonable doubt. The accused were acquitted of the charge under ss 279, 337 and 304A, IPC .[55]

About 10-15 persons had gathered on the spot at the time of the accident, two of them were examined by the prosecution. One witness deposed that he came to know from the mob assembled on the spot that the accused was driving the offending vehicle, another witness deposed that on the next day of the accident he came to know that the accused was driving the vehicle. The identity of the accused driver was not proved beyond reasonable doubt. He was given benefit of doubt and acquitted of the charge under ss 279 and 304A, IPC .[56]

In prosecution of the accused for rash and negligent driving under ss 279, 337, 338, IPC, witness supporting the prosecution case, who was minor at the time of the incident testified before the court that the driver was not on the wheels at the time of the accident. Another hostile witness deposed that he could not see the driver of the offending vehicle. Accused was not convicted for offences under ss 279, 337 and 338, IPC .[57]

Prosecution's case was that the accused was driving the jeep rashly and negligently, which collided with the auto rickshaw, causing serious injuries to auto rickshaw passengers and death of one of them. The testimony of the witnesses varied about the direction from which offending jeep came. Witnesses disclosed the name of the accused driver for the first time in the court. The evidence of the eye-witnesses that they identified the accused in the light of another lorry was found not reliable. Investigating Officer of the case was not examined and the place of occurrence was not proved. The accused was entitled to the benefit of doubt and was acquitted.[58]1932

Accused driver of a canter was prosecuted on allegations that while driving rashly and negligent he dashed against the two girls, causing death of one and injuries to another. If the accused is not known to the witness previously and he is identified in the court for the first time then it becomes a question of fact whether reliance is to be placed upon that evidence or not. In the instant case there was evidence of PW1 that the accused alighted from the canter and came to them and disclosed his name, parentage and address and it was only thereafter that he had escaped from the spot leaving behind the canter. Thus, the complainant interacted with the accused and had sufficient opportunity to note his distinctive features which made the basis of identification of the accused by him in the court. There was nothing on the record to disbelieve that part of the testimony of the complainant. The accident had occurred in the day at 10.15 AM. The identification of the accused was found reliable. He was convicted under ss 279 and 304, IPC .[59]

Two Versions--Discretion of Court in such Cases

The principle is that when two versions emerge from the prosecution evidence, the one which is favourable to the accused, should be adopted and its benefits should be given to the accused.[60] Where in the given case the circumstances clearly showed rashness and negligence on the part of the driver and from the perusal of the site plan, it was evident that it is a straight road and the driver knew that there is a level crossing and when one side of the gate was locked by the gateman, he ought to have slowed down the bus and should have driven at a speed so that it could have completely stopped much before the level crossing, the ingredients of the offences under ss 279, 336 and 337, IPC and under s 129 of Indian Railways Act were held fully proved against the accused beyond all reasonable doubt and his acquittal recorded by the magistrate was set aside.[61]

Rashness and Negligence when not Averred in Complaint--Matter of Inference

Merely because there is no averment in the complaint that the crash by the respondent was a rash and negligent act of his driving, it does not follow that the ingredients of the offence alleged were not proved. It is a matter of inference. The impugned order of discharge was accordingly quashed and set

aside and the magistrate was directed to dispose of the case in accordance with law.[62]

Circumstantial Evidence

In cases where negligence is the primary cause, it may not always be that direct evidence to prove it exists. In such cases, the circumstantial evidence may be adduced to prove negligence.[63]

42. Conviction both under Sections 279 and 337 or Section 338 --Legality of

None of the parts of the offence defined in s 338, IPC, is sufficient to constitute an offence under s 279, IPC, because under s 279, the ingredient of driving any vehicle or riding on a public way is essential, which is not necessary under s 338 .1933 The offence under s 338, IPC, need not be committed by driving a vehicle or riding on a public way and therefore s 71, IPC, cannot be applied to ss 338 and 279, IPC .[64]

A Full Bench of the Madhya Bharat High Court held that an offence under this section is distinct from an offence either under s 337 or s 338, and therefore, a person convicted of an offence either under s 337 or s 338 can also be convicted for an offence under this section. If, however, the two offences are committed in the same transaction, s 71 of this Code will govern the assessment of punishment.[65] The Rajasthan High Court has also held that the offence under ss 279, 337 or s 338, IPC being distinct an accused can be convicted both under ss 279 and 337 or s 338, IPC .[66] The imposition of separate sentences, however, cannot be justified where the acts constituting two different offences form part of the same transaction against the same accused.[67] Separate sentences under ss 279 and 338, IPC, obviously cannot be passed because an act of rash and negligent driving would automatically merge under the act covered under s 338, IPC .[68]

43. Conviction under Section 190Motor Vehicles Act--No Bar to Conviction under Penal Code

A conviction under s 190 of the Motor Vehicles Act is no bar to a conviction of the accused under this section or ss 304A and 338 of the Indian Penal Code .[69]

44. Acquittal under Section 337 or Section 338 --No Bar to Prosecution under Section 279

If by rash or negligent driving the accused has caused injury to some person, offences punishable under ss 279 and 337 will be committed, and acquittal of the offence under s 337 or s 338, IPC, as a result of compounding will still leave the charge under this section outstanding and prosecuting under this section is not barred by the acquittal.[70]

The offence punishable under s 279, IPC is a grave offence, the sentence prescribed is higher, the accused can be punished under s 279, IPC only, and not under both ss 279 and 337, IPC .[71]1934

45. Whether Conviction/Sentence both under Section 279 and Section 304A is Permissible

If a person is guilty of an offence under s 279, IPC, and death is also caused as a result of the negligent act, he will be guilty of the offence under s 304A, IPC,[72] because an offence under this section is a minor offence which is included in s 304A, IPC . An accused, convicted under s 304A, IPC, therefore, cannot be convicted under this section as the latter is a minor offence.[73] A somewhat contrary view has been expressed in *MH Mohammadali v State of Gujarat* [74] and *Kantilal Shivabhai Thakur v State of Gujarat* ,[75] wherein it has been held that offences under s 279, IPC, are distinct offences and an accused can be convicted for offences under the said two sections though the punishment given for the minor offence such as under s 279, IPC, cannot be passed in view of the

provision of s 71, IPC . The Delhi High Court has also taken a similar view and it was held that there was no need to impose any separate sentence for minor sentence under s 279 because the offence under ss 304A and 338, IPC, are similar offence in aggravated forms. Thus, the sentence imposed under s 279 was set aside.[76] The same view is taken by the Madhya Pradesh High Court holding that some of the facts found as ingredients of the offences under s 304A, IPC covered the ingredients of the offence under s 279, IPC and hence, the sentence of fine imposed by the lower court under s 279, IPC, was therefore set aside.[77] A definite finding must be recorded by the court as to whether the version of the witnesses, regarding the high speed and negligent driving at the time of the accident, was acceptable to him or not. In the absence of a definite finding as to whether the driving was negligent or not, no conviction under this section or s 304A can be recorded.[78]

46. Punishment

Sentence, it is said is the most public face of the criminal justice system. A sentence imposed by the courts should have a deterrent effect more so when accident cases are on the rise. Courts are required to ensure that whenever an accused is found guilty, he does not escape the clutches of law very lightly. Sentencing discretion has to be exercised considering the facts of each case.[79] It is well known that there is no formula for determining sentence in each individual case. The lower appellate court might have decided to impose a little lesser or bigger sentence than the one imposed by it. There is no method of knowing as to what sentence would be appropriate in a given case. Sentence is a matter of discretion with the court and sentence is to be awarded on a conspectus of the entirety of facts and circumstances of each individual case.[80]

There cannot be a blanket sentence for all the offences and it is obligatory for the trial court to say specifically what is the sentence imposed and for which of the1935 offence, failing which the only course left of the High Court is to set aside the very conviction and remit the case to the trial court for disposal according to law.[81]

If the accused are found guilty of rash and negligent driving courts have to be on guard to ensure that they do not escape the clutches of law very lightly. The sentence imposed by the courts should have a deterrent effect on potential wrongdoers and it should be commensurate with the seriousness of the offence. Of course, the courts are given discretion in the matter of sentence to take stock of the wide and varying range of facts that might be relevant for fixing the quantum of sentence. But the discretion shall be exercised with due regard to the larger interest of the society and it is needless, that passing of sentence on the offender is probably the most public face of the criminal justice system.[82]

Where the evidence on record clearly revealed that the petitioner was driving the bus rashly and negligently, it was held that to avoid speeding menace and the alarming rate of increase in accidents to see that public roads do not become death traps and/or to see that heavy vehicles are not used as lethal weapons, some deterrent punishment is required to be provided for such type of cases. In any set of circumstances it would be totally misplaced sympathy if the accused is released on probation. This may lead to lawlessness. Further, the sentence also should not be a flea-bite sentence. It should not be forgotten that it was a defence of the petitioner that he was not the driver of the vehicle and that as the prosecution has proved beyond reasonable doubt that he was the driver of the vehicle, he seeks sympathy from the court and prays that he may be released on probation. It would not be just and proper to release the petitioner on probation or to reduce the sentence.[83]

Appellant accused while driving tanker in rash and negligent manner caused the death of the scooterist. There was no allegation that the appellant at the time of accident, was under the influence of liquor or any other substance impairing his driving skills. The sentence awarded to him was reduced to the period already undergone. In addition he was directed to pay Rs. 1 lac as compensation to the mother of the deceased.[84]

Lenient View, when Called for--Release on Probation, if Permissible

Where a truck was being driven by the appellant and another truck tried to overtake his truck with the result that when he found that bullock cart was in front of him he tried to apply his brakes but there was insufficient time to apply them before he hit the bullock cart. The pipe got burst and on account of this, the brakes failed. Thereafter the truck was not under his control. The accident occurred because the truck behind him overtook him at a place which was a bridge and at a time when there was a bullock cart already in front of his truck. The driver of the truck behind the appellant was also rash and negligent in overtaking the truck at such a place and time. It was held that the petitioner could not be absolved of his guilt on this ground because if he had been driving carefully he could avoid the accident. His rash and negligent driving has been proved but considering the circumstance that his brakes1936 suddenly failed and that another truck also came and he lost control, the accused can be given benefit of probation[85] or the punishment awarded in such cases can be lenient.[86] Where there was some breakage in the hydraulic system of the brakes of the vehicle it would be proper to deal with the accused under s 360, CrPC or under the Probation of Offender's Act.[87] Age of the accused, his antecedents, the manner in which the accident took place, the conduct of the accused in removing the injured to the hospital immediately after the accident, his family liability *etc*, are other considerations on which the benefit of release on probation may be extended to the accused.[88]

A person found guilty and convicted for offence under s 279 and s 304A, IPC cannot be released on probation.[89]

Where death of two persons was caused by rash and negligent driving of the accused the case was not found fit for the exercise of power under s 4 of Probation of Offenders Act or s 360, CrPC though the accused was the only earning member of his family.[90] Where the accused driving the matador suddenly overtook a lorry and went to the extreme right and hit the deceased standing at that spot resulting in his death the request for benefit of Probation of Offenders Act to the accused was declined.[91]

Where due to rash and negligent driving of the truck by the accused a person died the accused was a first offender and belonged to a poor family and had a number of persons dependent on him. There was no complaint of the conduct during the trial, the parties had also settled their dispute, the accused had already undergone part of the sentence the Punjab and Haryana High Court, on these facts directed that the accused be released on probation for a period of three years under s 360, CrPC read with s 4 of the Probation of Offenders Act on his furnishing a personal bond of the sum of Rs 10,000 with one surety of the like sum.[92] Where the accused who was convicted under ss 279, 338, IPC, has suffered the agony of trial for six years, he had also undergone a period of 10 days in custody and was not a previous convict, the accused was found entitled to the benefit of s 4 of the Probation of Offenders Act .[93] But where the accused caused the death of five persons by rash and negligent driving his case was not fit for grant of probation under s 4 of the Probation of Offenders Act . However, since the degree of the rashness and negligence was not that culpable and great the sentence imposed upon the accused was reduced to nine months RI and sentence of fine was confirmed.[94]1937

Implications of Day's Imprisonment

The punishment of one day's simple imprisonment is a sentence that is well known. Its purpose is to exercise clemency towards an accused, and so it is ordinarily passed where imprisonment is the only punishment allowed by law, and the court sees, in the circumstances of the case, grounds for passing the lightest possible sentence. In practice the person on whom it is passed is not placed in prison, but is to all intents and purposes as free as though the sentence had not been passed.[1]

9 *State v Kamalakar Prabhakar Juvekar* AIR 1960 Bom 269, (1960) Cr LJ 814 .

10 *Mohan Lal v State* (1991) JCC 128 (Del) ; *Mukeem v State of Uttar Pradesh* (1997) JIC 122(All).

11 *Smith v London and South-Western Rly Co* LR 6 CP 14 .

12 *State v Kamalakar Prabhakar Juvekar* AIR 1960 Bom 269, (1960) Cr LJ 814 ; *Nanalal Harishanker v State of Gujarat* AIR 1969 Guj 62, (1969) Cr LJ 389 ; *Vishwanath Vishnu Dabholkar v King* AIR 1948 PC 183, (1948) 49 Cr LJ 665 ; *Anadasingh Niggi v State* AIR 1969 Ori 49, p 51, (1969) Cr LJ 428 ; *Mohan Lal v State* (1991) JCC 128 (Del) .

13 *Vasudevari v State* (1975) KLT 750, (1975) Mad LJ (Cr) 659, (1975) ACJ 523 .

14 24 and 25 Vict, c 100.

15 20 and 21 Geo, 5 c 43.

16 As amended by the Road and Rail Traffic Act 1934 (23 and 24 Geo 5, c 53), s 4 of the Road Traffic Act 1956 (4 and 5 Eliz 2, c 67), 8th Sch 12(1). Now ss 1 - 44 repealed by Road Traffic Act 1960 (c. 16), Sch 18 Pt I.

17 *Russell on Crime*, eleventh edn, p 700.

18 *Emperor v Abdul Latif* AIR 1944 Lah 163, (1944) 45 Cr LJ 699 ; *Raghunath Behera v State* (1968) 34 Cut LT 500, p 504, (1968) Cr LJ 851 ; *Ajit Singh v State of Himachal Pradesh* (1975) Cr LJ 77, (1975) ACJ 339 ; *Badri Prasad Tiwari v State* (1994) Cr LJ 389 (Ori) ; *Bada Kanta Phukan v State of Assam* (1992) Cr LJ 1197 (Gau) ; *Padmacharan Naik v State* (1982) Cr LJ (NOC) 192 (Ori) ; *Braham Dass v State of HP* 2009 Cr LJ 4297, AIR 2009 SC 3181, (2009) 7 SCC 353 .

19 *Prafulla Kumar Rout v State of Orissa* (1995) Cr LJ 1277 (Ori) ; *Rajesh R v State of Kerala* 2014 Cr LJ 4580 (Ker), 2014 (3) KLT 890, 2014 (4) KLJ 119 .

20 *Rajesh R v State of Kerala* 2014 Cr LJ 4580, p 4582 (Ker), 2015 (1) RCR (Criminal) 255 .

21 *PM Raju v State of Karnataka* (1977) Cr LJ 1545, (1977) Mad LJ (Cr) 211 ; *Ajit Singh v State of Himachal Pradesh* (1975) Cr LJ 77 .

22 *Mohan Pai v State of Kerala* (1987) 1 KLT 625, (1987) Ker LJ 513, (1988) 1 Crimes 852, p 853(Ker); *Mohan Lal v State of Delhi* (1991) JCC 128, p 131 .

23 *Ajit Singh v State of Himachal Pradesh* (1975) Cr LJ 77 .

24 *King v Maung Thoung Shwe* AIR 1938 Rang 161, (1938) 39 Cr LJ 642, a case under s 5 of the Motor Vehicles Act of 1914, which corresponds to s 116 of the Act of 1939 and s 184 of the Motor Vehicles Act 1988.

25 *Waeezul Khan v State of Bihar* AIR 1967 Pat 368, (1967) Cr LJ 1564 .

26 Re *Govilan*AIR 1958 Mad 286, (1958) Cr LJ 775 ; *Cheriyan v Sirkar Prosecutor* AIR 1950 Tr & Coch 14; *R v Finney* (1874) 12 Cox CC 625 ; *Jumman v Emperor* AIR 1944 Nag 285 ; *Emperor v Abdul Auayyum* AIR 1941 Lah 113 ; *Robson v Emperor* AIR 1934 Rang 194 ; *Andrew v Director of Public Prosecutions* (1937) 2 All ER 552 ; Re *Ganesan*AIR 1950 Mad 71, (1949) 2 Mad LJ 255 ; Re *Appayya*AIR 1957 AP 100, (1956) Andh WR 784 ; *Gulam Saeed Gulam Amir v State* AIR 1954 MB 41 ; *Chammanla v State* AIR 1953 Hyd 123 ; Re *JC May*AIR 1960 Mad 50, p 51-52, (1960) Cr LJ 239 .

27 *Nandlal Haishanker v State of Gujarat* AIR 1969 Guj 62 .

28 *State v Kamalakar Prabhakar Juvekar* AIR 1960 Bom 269, p 270, (1960) Cr LJ 814, (1960) ILR Bom 75, 61 Bom LR 1674 .

29 *Babulal Chotalal v State of Gujarat* AIR 1968 Guj 240 .

30 *Badri Prasad Tiwari v State* (1994) Cr LJ 389 (Cr) ; *Prafulla Kumar Rai v State of Orissa* (1995) Cr LJ 1277 (Ori) .

31 *Kantilal Shrivabhai Thakkar v State of Gujarat* (1990) Cr LJ 2500 (Guj) .

32 *Nandlal Harishanker v State* AIR 1969 Guj 62 .

33 Re *Balunki* 1 CPLR (Cr) 112.

34 *Abdul Ghani Nasurullah v Emperor* AIR 1938 Rang 86 .

35 *Reg v Ganpatee* Ratanlal Un Cr Cas 19.

36 *King v Basdeo* AIR 1940 Rang 176, (1940) 41 Cr LJ 693 .

37 *Raghunath Behera v State* (1968) 34 Cut LT 500, 504, (1968) Cr LJ 851 .

38 20 and 21 Geo, 5 Cr 43.

39 *KK Wadhwani v State of Rajasthan* AIR 1958 Raj 138, p 139, (1957) 7 ILR Raj 353 .

40 *Pran Nath Kundu v Emperor,* AIR 1930 Cal 286, (1930) 31 Cr LJ 859, p 860-61, ILR 57 Cal 326, 33 CWN 915 .

41 *Sham Soonder Bhattacharjee v Monee Ram Dass* 25 WR 233 ; *Fatehyab Khan v Mahommed Yusuf* (A9) 434 All WN (1887) 82.

42 *Brocklebank v Thompson* (1903) 2 Ch 344, 72 LJ Ch 626, 89 LT 209, 19 TLR 285 .

43 *Farquhar v Newbury Rural Council* (1903) 1 Ch 12, 78 LJ Ch 170, 100 LT 17, 73 JP 1, 7 LGR 364, 25 TLR 39 .

44 *Bemondsey Vestry v Brown* (1866) 1 Ex 204 .

45 *PM Raju v State of Karnataka* (1977) Cr LJ 1545, (1977) Mad LJ (Cr) 211 ; *Ajit Singh v State of Himachal Pradesh* (1975) Cr LJ 77 .

46 *Ajit Singh v State of Himachal Pradesh* (1975) Cr LJ 77 .

47 *Austin's Jurisprudence*, vol 1, 1911, p 127.

48 *Emperor v Abdul Latif* AIR 1944 Lah 163, p 164, (1944) 45 Cr LJ 699 ; *State of Bihar v Mangal Singh* AIR 1953 Pat 56, 54 Cr LJ 518 ; Re *JC May*AIR 1960 Mad 50, (1960) Cr LJ 234 .

49 *Blyth v Birmingham Waterworks Co* (1858) 11 Ex 781, 25 LJ Ex 212, 4 WR 294, 86 Dig 6 ; *Ravi Kapur v State of Rajasthan* AIR 2012 SC 2986, (2012) 9 SCC 284, 2012 (118) AIC 167 (SC) .

50 Per Lord Wright in *Bourhill v Young* (1943) AC 92, p 107 .

51 *Rothschild v Royal Mail Steam Packet Co* (1851) 18 LT (OS) 334 ; *Hart v Lancashire and Yorkshire Railway Co* (1869) 21 LT 261 .

52 *Nga Myat Thin*(1893-1900) LBR 426.

53 *Padmacharan Naik v State* (1982) Cr LJ (NOC) 192 (Cr) ; *State of Himachal Pradesh v Amar Nath* (2002) Cr LJ 495(HP).

54 *Badri Prasad Tiwari v State* (1994) Cr LJ 389(Ori).

55 Per Lord Dunedin in *Fardon v Harcourt Rivington* (1932) 146 LT 391**cited** in Re *JC May*AIR 1960 Mad 50, p 52-53, (1960) Cr LJ 234 ; *Emperor v HC Bayne* (1906) 3 Cr LJ 494 .

56 *Ramesh Kumar Nayak v Union of India* (1995) 2 TAC 312, p 316-17 (Ori) .

57 *SN Hussain v State of Andhra Pradesh* AIR 1972 SC 685 ; Re *JC May*(1960) Mad 50, (1960) Cr LJ 239; *PM Raju v State of Karnataka* (1977) Cr LJ 1545, p 1546, (1977) Mad LJ (Cr) 211 ;Re *JC May*AIR 1960 Mad 50, p 53, (1960) Cr LJ 234 ; *State of Rajasthan v Niranjan Singh* (1971) WLN (1) 235 ; *Tiramareddi Satyanarayan v State* (1970) 36 Cut LT 301, p 304 ; *PM Raju v State of Karnataka* (1977) Cr LJ 1545, p 1547, (1977) Mad LJ (Cr) 211 ; *Zahoor Mohammed v State* (1972) All Cr R 401 ; *State of Himachal Pradesh v Amar Nath* (2002) Cr LT 495 (HP) .

58 *Jai Bhagwan v State* 76 (1998) DLT 934 (Del), (1999) 1 CCR 112 .

59 Supra; *P Yareian v State of Mysore* (1972) Cr LJ 404 (Mys) .

60 *State of Rajasthan v Niranjan Singh* (1971) 1 WLN 235, p 239 ; *Tiramareddi Satyanarayan v State* (1970) 36 Cut LT 301, p 304 ; *PM Raju v State of Karnataka* (1977) Cr LJ 1545, p 1547, (1977) Mad LJ (Cr) 211 ; *State of Bihar v Mangal Singh* AIR 1953 Pat 56 .

61 *State of Himachal Pradesh v Amar Nath* (2002) Cr LJ 495 (HP) .

62 *Devraj & Anor v State of Himachal Pradesh* (1991) 3 Crimes 383 (HP) .

63 *Shaikh Maheboob v State of Maharashtra* 2008 Cr LJ 4729 (Bom) .

64 *Surendra Mahapatra v State* (1984) 2 Crimes 581 (Ori) ; *State v Ramakant Yaswant* AIR 1968 Goa 77, (1968) Cr LJ 933 ; *Raghunath Bihere v State* (1968) Cut LT 500, p 504, (1968) Cr LJ 851 ; *State of Kerala v Arunachalam Reddiar* (1961) Mad LJ (Cr) 328 (Ker) ; *Zahoor Mohd v State* (1972) All Cr R 401 ; *Shiva Ram v State* AIR 1965 All 196, (1965) 1 Cr LJ 524 .

65 *Md. Hiran Mia v State of Tripura* 2010 Cr LJ 189 (Gauh), (2010) 3 GLR 468 .

66 *Penu alias Pannu Sethi v State* (1983) 1 Crimes 876 (Ori) .

67 *Badri Prasad Tiwari v State* (1994) Cr LJ 389, p 390 .

68 *R v Bateman* (1925-90) 16 Cox CC 710, (1874) 12 Cox CC 625; *Hilton*'s case (1838) 2 Lewin 214; *Rex v Dalloway* (1846-48) 2 Cox CC 273, (1960) Cr LJ 239; *Badri Prasad Tewari v State* (1994) Cr LJ 389, p 390 .

69 *Thukan Sharing v State of Himachal Pradesh* 2009 Cr LJ 4093, p 4095 (HP) .

70 *Padmacharan Naik v State* (1982) Cr LJ (NOC) 192 (Ori) ; *State of Rajasthan v Niranjan Singh* (1971) WLN (Pt I) 235 .

71 SHCLE, vol 3, p 2 and notes to ss 32 and 33 .

72 Re *Nidamarti Nagabhushanam* 7 Mad HCR 119; *Emperor v Katabdi Mundul* ILR 4 Cal 764 ; *R v Ganapati Saluke* BR 12 August 1869 .

73 Stirling; *Blyth v Birmingham Waterworks* 11 Ex 784 ; *Smith v LSW Rly Co* LR 5 CP 102 .

74 SHCLE, vol 3, p 2.

75 Re *Pillasan*, Weir 1, 232; *Kamdarali Serang v R* (1911) 12 Cr LJ 362 .

76 *Annasahed Bandhu Patil v State of Maharashtra* (1991) Cr LJ 814 (Bom) .

77 *Balachandra v State of Maharashtra* AIR 1968 SC 1319 .

78 *Austin's Jurisprudence,* fourth edn, p 444.

79 *Badri Prasad Tiwari v State* (1994) Cr LJ 389 ; *Prafulla Kumar Rout v State of Orissa* (1995) Cr LJ 1277 (Ori) .

80 Re *JC May*AIR 1960 Mad 50, (1960) Cr LJ 234 .

81 Re *Pillagan* 1 Weir 232; *Bijuli Swain v State of Orissa* (1980) 50 Cut 358, p 362(Ori), (1981) Cr LJ 583; *Kamdar Ali Sarang v R* (1911) 12 Cr LJ 362 .

82 *Kunju Pillai Parameswaran Pillai v State (*1967) ACC LJ 377 (Ker).

83 *State of Bihar v Sarful Haque* (1973) BLJR 304 ; *Ajit Singh v State of Himachal Pradesh* (1975) Cr LJ 77, (1975) ACJ 339 (HP) .

84 *State of Maharashtra v Bramhadatta Ramdas Sharma* (1978) Cr LJ 106, p 109 (Mah) ; *Jogeshwar Koeri v State of Bihar* (1978) BLJR 24 (Summary of Cases).

85 *State of Rajasthan v Niranjan Singh* (1971) 1 WLN 235 .

86 *Ibid*; *Tiramareddi Satyanarayan v State* (1970) 36 Cut LT 301, p 304 ; *PM Raju v State of Karnataka* (1977) Cr LJ 1545, p 1547, (1977) Mad LJ (Cr) 211 ; *State of Bihar v Mangal Singh* AIR 1953 Pat 56 .

87 Re *Nidamarti Nagabhushanam* 1 Weir 324, 7 Mad HC Rep 119; *State of Bihar v Mangal Singh* AIR 1953 Pat 56 .

88 *Austin's Jurisprudence*, Lect 20, p 441.

89 *Ibid*; *Annasahab Bandu Patil v State of Maharashtra* (1991) Cr LJ 814 (Bom) .

90 *Padmacharan Naik v State (*1992) Cr LJ (NOC) 192 (Ori).

91 *Badri Prasad Tiwari v State* (1994) Cr LJ 389 (Ori) .

92 *State of Rajasthan v Niranjan Singh* (1971) 1 WLN 235, 240 ; *ASRTCorpn v Mahamaya* AIR 1977 Gau 55, p 58, (1977) ACC CJ 454 ; *State of Kerala v Ramaswami Iyer* (1961) KLT 769 .

93 *Vasudevan v State* (1975) KLT 750, (1975) Mad LJ (Cr) 659 .

94 Re *Nidamarti Nagabhushanam* 7 Mad HCR 119; *R v Katabdi Mandul* ILR 4 Cal 764 ; *R v Ganapati Saluke* BR 12 August 1869 ; *Pyarejan v Mysore* (1972) Cr LJ 404, p 405, (1971) Mad LJ (Cr) 225 .

95 Starling, *Ibid*; *Blyth v Birmingham Water Works* 2 Ex 784 ; *Smith v LSW Rly Co* LR 5 CP 102 .

1 *Pyarejan v State of Mysore* (1971) 1 Mys LJ 314, (1971) Mad LJ (Cr) 225 ; *Chitoolal Ram Swaroop Rathore v State of Madhya Pradesh* (1992) MPLJ 793 ; *Bhagwat Rai v State of Bihar* (1972) BLJR 353, p 354-55 .

2 *Mohanlal v State* (1991) JCC 128, p 131 ; *Shakila Khader v V Naushar Gama* (1975) Cr LJ 1105 (SC) **relied on**.

3 *Bhaskar Patre v State of Orissa* (1989) Cr LJ 516 (Ori) .

4 *State of HP v Baljit Singh* 2012 Cr LJ 237, p 239 (P&H).

5 *State of HP v Baljit Singh* 2012 Cr LJ 237, p 239 (P&H).

6 *Durgappa v State of Karnataka* 2009 Cr LJ 226, p 228 (Kant), ILR 2008 Karnataka 3759, 2008 (5) Kar LJ 668, 2008 (4) KCCR 2177 ; *State of Himachal Pradesh v Jawaharlal Jindal* 2011 Cr LJ 3827 (HP) .

7 *Swayambu v State* (2001) Cr LJ 1577 (Mad) .

8 *State v Mohammed Yusuf* (2001) Cr LJ (Kant) .

9 *Francis Xavier Rodrigues v State* (1997) Cr LJ 1374 (Bom) .

10 *Syed Akbar v State of Karnataka* AIR 1979 SC 1848, (1979) Cr LJ 1374 ; In *Ishwar Sadeppa v State of Karnataka* (2004) Cr LJ 4912 .

11 *BC Ramachandra v State of Karnataka* (2007) Cr LJ 475 (Kant) .

12 *Abdul Subhan v State* (2007) Cr LJ 1089 (Del) ; *State of Karnataka v Satish* (1998) SCC (Cr) 1508 .

13 *BC Ramchandra v State of Karnataka* 2007 Cr LJ 475, p 478 (Kant) ; *Jacob Mathew v State of Punjab* AIR 2005 SC 3180, 2005 AIR SCW 3685, 2005 Cr LJ 3710, (2005) 6 SCC 1 ; *Syad Akbar v State of Karnataka* AIR 1979 SC 1848, 1979 Cr LJ 1374, (1980) 1 SCC 30, [1980] 1 SCR 95 .

14 *BC Ramchandra v State of Karnataka* 2007 Cr LJ 475, p 478 (Kant) .

15 *Penu alias Pannu Sethi v State* (1983) 1 Crimes 876 (Ori) .

16 *State v Mahommed Yusuf* (2001) Cr LJ 5 (Kant) .

17 *Devraj & Anor v State of Himachal Pradesh* (1991) 3 Crimes 383 (HP) .

18 *Prafulla Kumar Rout v State of Orissa* (1995) Cr LJ 1277 (Ori) .

19 *Padmacharan Naik v State* (1982) Cr LJ (NOC) 192 (Ori) ; *Madhu Sudan Debnath v State of Tripura* 2012 (116) AIC 699 (Gauh) .

20 *Madhu Sudhan Debnath v State of Tripura* 2012 (116) AIC 699 (Gauh) .

21 *State of Karnataka v Satish* (1998) SCC (Cr) 1508 ; *Abdul Subhan v State* (2007) Cr LJ 1089 .

22 *Madhukar Venkatesh Kulkarni v State of Maharashtra* (1983) 1 Bom CR 307, p 309 .

23 *Suyambu v State* (2001) Cr LJ 1577 (Mad) .

24 *Mann Prakash v State of Haryana* (1996) Cr LJ 663 (P&H) .

25 *Abdul Subhan v State* 2007 Cr LJ 1089 (Del), 133 (2006) DLT 562, (2006) ILR 2 Delhi 882 .

26 *Mehnga Singh v State* 2012 Cr LJ 4930 (Del) .

27 *Bhaskar Patra v State of Orissa* (1989) Cr LJ 516 (Ori) .

28 *State of Rajasthan v Nauratan Mal* (2002) Cr LJ 348 (Raj) ; *State of HP v Parmodh Singh* 2009 Cr LJ (NOC) 277 (HP) ; *State of HP v Amar Nath* 2009 Cr LJ (NOC) 654 (HP) ; *Kushal Singh v State of Himachal Pradesh* 2009 Cr LJ (NOC) 839 (HP) (Accused Acquitted).

29 *State of Kerala v Gopalan Nair* (1988 (2) Ker LJ 662, 664; *Harprasad Jena v State* (1967) 33 Cut LT 882, 885 ; *Vasudevan v State* 1975 KLT 750, (1975) Mad LJ (Cr) 659 .

30 *Ravi Kapur v State of Rajasthan* 2012 Cr LJ 4403, p 4408, AIR 2012 SC 2986, 2012 AIR SCW 4659, 2012 (7) Scale 354, (2012) 9 SCC 284 .

31 *State of HP v Baljit Singh* 2012 Cr LJ 237, p 239 (P&H).

32 *State of HP v Baljit Singh* 2012 Cr LJ 237, p 239 (P&H).

33 *State of Rajasthan v Nauratan Mal* (2002) Cr LJ 348 (Raj) .

34 *Beda Kant Phukan v State of Assam* (1992) Cr LJ 1197 (Gau), (1991) 2 Gau LR 52, p 54 .

35 *Prafulla Kumar Rout v State of Orissa* 1995 Cr LJ 1277 (Ori) .

36 *Bhagwat Rai v State of Bihar* 1972 BLJR 353-55.

37 *Devraj v State of Himachal Pradesh* 1991 (3) Crimes 383(HP).

38 *Karam Singh v State of Himachal Pradesh* (2001) III CCR 22 (HP) .

39 *State v Suhas Satardekar* (1999) III CCR 642 (Bom) .

40 *Amar Singh v State of Bihar* 1971 UJ 518 (SC) .

41 *State of Orissa v Abhiram Sethi* (1985) 60 Cut LT 212, p 213 .

42 *Mehnga Singh v State* 2012 Cr LJ 4930, p 4933 (Del) .

43 *Vijender Singh v State of Haryana* (1994) 2 Crimes 294, p 295, (1994) 1 Rec Cr R 20, (1994) 2 Chand Cr Cas 502 (P&H).

44 *Raju PM v State of Karnataka* (1977) 1 Kant LJ 260, p 263 .

45 *Bansilal Babuji Vanjara v State of Gujarat* 2007 Cr LJ 2879, p 2880 (Guj) .

46 *State of Himachal Pradesh v Jawaharlal Jindal* 2011 Cr LJ 3827, p 3829 (HP) .

47 *Hardhan Gope v State of Tripura* 2012 Cr LJ 3232 (Gauh) .

48 *Puran Chand v State of Punjab* (1978) Chand LR 136, p 140, (1978) Cr LT 5 .

49 *State of Himachal Padesh v Manohar Singh* 2011 Cr LJ 3402 (HP) .

50 *Gajanan Majik v State* (2006) Cr LJ 1146 (Bom) .

51 *Mahadev v State of Madhya Pradesh* (2006) Cr LJ 4246 (MP) .

52 *Binoda Bihari Sharma v State of Orissa* 2011 Cr LJ 1989, p 1991 (Ori), 2010 (II) ILR-CUT 1167.

53 *Durgappa v State of Karnataka* 2009 Cr LJ 226, p 228 (Kant), ILR 2008 Karnataka 3759 ; *State of Himachal Pradesh v Jawaharlal Jindal* 2011 Cr LJ 3827 (HP) .

54 *Trinath Panigrahi v State* (1975) 41 Cut LT 245, (1975) 1 Cut WR 84 ; *Bijuli Swain v State of Orissa* (1980) 50 Cut LT 358, 362 (Ori) ; *Sant Lal v State of Rajasthan* (1976) Raj Cr Cas 46 ; *State v Ramakant Yashwant* AIR 1968 Goa 77, (1968) Cr LJ 933 ; *Chotelal Ramswaroop Rathore v State of Madhya Pradesh* (1992) MPLJ 793, p 796 ; *Niranjan Singh v State (Delhi Admn)* (1997) 1 Crimes 181, p 184 (Del) .

55 *Russell on Crime*, eleventh edn, p 477.

56 Re *JC May*AIR 1960 Mad 50, p 53, (1960) Cr LJ 234 .

57 *Gurdas Singh v State of Himachal Pradesh* (1992) Cr LJ 3538, p 3540.

58 *Russell on Crime*, eleventh edn, p 478; citing *R v Walker* (1824) 1 CP 320 .

59 *Babu Santu Jadhav v Emperor* AIR 1921 Bom 456, p 457, (1921) 22 Cr LJ 324 .

60 *Zora Singh v State of Punjab* 2008 Cr LJ 1572 (Pat) .

61 *Lal Singh v State of Haryana* (1993) 3 R Cr R (P&H) 231, p 233, (1994) 1 Chand Cr Cas 41.

62 *State of Rajasthan v Niranjan Singh* (1971) 1 WLN 235 .

63 *Mohanlal v State* (1991) JCC 128, p 131 ; *Shakila Khadar v Naushar Gama* (1975) Cr LJ 1105 (SC) .

64 *KK Mani v State* 2009 Cr LJ 4595, p 4601 (Mad) .

65 *Raghavan Pillai v State* AIR 1954 Tr & Coch 25, p 26; *Swadling v Cooper* (1930) WN 204, 46 TLR 597, 143 LT 732 ; *Deota Misir v Emperor* AIR 1931 All 708, (1931) 32 Cr LJ 1061 ; *Charan Singh v Emperor* AIR 1925 All 798, (1925) 26 Cr LJ 1254 .

66 *Emperor v Abdul Latif* AIR 1944 Lah 163, p 164, (1944) 45 Cr LJ 699 .

67 *Manna Ghosh v State of Tripura* 2009 Cr LJ (NOC) 866 (Gauh) .

68 *Russell on Crime*, eleventh edn, p 478; citing *Pluckwell v Wilson* (1832) 1 C&P 320 .

69 *State v Suhas Satardekar* (1999) III CCR 642 (Bom) .

70 *State of Mohandas S Gawade*2007 Cr LJ 850 (Bom).

71 *State of Himachal Pradesh v Varinder Kumar* 2008 Cr LJ 4175, p 4178 (HP), 2008 (2) Shimlc 13 .

72 *State of Himachal Pradesh v Amrik Singh* 2007 Cr LJ 4177 (HP) .

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74 *Bhausaheb Sakharam Mhasruk v State of Maharashtra* (1983) 2 Bom CR 729(Bom), (1984) 1 Cr LC 11 (Bom).

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76 *Emperor v Homnarain Sukhailal Cachhi* AIR 1934 Nag 65, p 66, (1934) 35 Cr LJ 696 .

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81 *State of Karnataka v M F Kodliwad* (2004) Cr LJ 3712 (Kant) .

82 *V Sujatha v State of Kerala* (1995) 2 Chand Cr Cas 18, p 23-24 (SC).

83 *State v Mohammadsab Urf Baba* (2006) Cr LJ 3410 (Kant) .

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86 *Braham Dass v State of HP* 2009 Cr LJ 4297, p 4298 (SC), AIR 2009 SC 3181, (2009) 7 SCC 353 .

87 *Penu v State* (1980) 49 Cut LT 337, p 340, (1980) Cr LJ (NOC) 132 (Ori), (1981) Cr LC 231 .

88 *Phagu Moharana v State* AIR 1961 Ori 71, (1961) 1 Cr LJ 541 .

89 *Yar Mahommed v Emperor* (1925) 26 Cr LJ 253 .

90 *Ram Sewak v Emperor* AIR 1933 Oudh 391, p 392 .

91 *FG Robson v Emperor* AIR 1934 Rang 194, (1935) 36 Cr LJ 178 .

92 *Mohkam Singh v State of NCT of Delhi* 1 (1999) CCR 692 (Del) .

93 *State of HP v Niti Raj* 2009 Cr LJ 1922, p 1926 (HP), 2010 (2) Crimes 553 .

94 *Parameswaram Pillai v State of Kerala* (1967) KLT 11 (SN) .

95 *State of Goa v Devendra Kashinath Chopedekar* 2010 Cr LJ 1011, p 1019 (Bom) ; *Bikram Pradhan v State of Sikkim* 2014 (141) AIC 825 (Sikk) .

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5 *Govt of Bombay v Malkaji* Ratanlal Un Cas 198.

6 Re *Balunki* 1 CPLR (Cr) 112.

7 *King v Bas Deo* AIR 1940 Rang 176, (1940) 41 Cr LJ 693 .

8 *Padmacharan Naik v State* (1982) Cr LJ (NOC) 192(Ori).

9 *Russell on Crime*, eleventh edn, p 33; citing *R v Dallway* (1847) 3 Cox 273 ; *R v Walker* (1824) 1 C&P 320 ; *R v Swindal and Osborne* (1846) 2 CK 230 .

10 *Zahoor Mahommed v State* (1972) All Cr R 401 ; *State of Maharashtra v Ravji Khandu Landhe* (1993) 1 Crimes 293 (Bom) .

11 *Fagu Moharana v State* AIR 1961 Ori 71, p 72, (1961) 1 Cr LJ 541 ; *R v Jones* (1870) 11 Cox CC 393 .

12 *Rajesh Srivastava v State* (1991) JCC 547 (Del) .

13 *State of Karnataka v Peter Prank* (2000) Cr LJ 3516 (Kant) .

14 *Vijai Rai v State of Bihar* 2014 Cr LJ (NOC) 176 (Pat) .

15 *Ajit Singh v State of Himachal Pradesh* (1975) Cr LJ 77 (HP) .

16 Notes to s 39 .

17 *R v Harmusji Nowroji Lord* 19 ILR Bom 715 .

18 *Sivarama Pillai Ayyappan Pillai v State* AIR 1953 TC 173, p 174 .

19 *Emperor v Abdul Latif* AIR 1944 Lah 163, p 164 ; *Queen-Empress v Hormusji Nowroji Lord* 19 ILR Bom 715 .

20 *Vasudevan v State* (1975) KLT 750, (1975) Mad LJ (Cr) 659, (1975) ACJ 523 ; *Kamal Kusha v S Kirpal Singh*(1987) Kash LJ 211; *Abdul Kadar Ebrahim Sura v Kashinath Moreshwar Chandani* AIR 1968 Bom 267 ; *Municipal Committee, Seoni v State of Madhya Pradesh* AIR 1962 MP 40, (1961) MPLJ 667, (1961) Jab LJ 771 ; *Devaram v State of Rajasthan* (1980) Cr LR 679, 681 ; *Surendra Singh v Lal Sheoraj* AIR 1975 MP 85, p 88, (1975) MPLJ 57, (1975) Jab LJ 140 .

21 *Ejaz Ahmad v Emperor* AIR 1936 Oudh 148, p 150 ; **doubting** the view in *Mahommed Jamal v Emperor* AIR 1930 Sind 64, (1929) 30 Cr LJ 1077 .

22 *Maung Tun Khin v King* AIR 1938 Rang 97, p 98, (1938) 39 Cr LJ 535 .

23 *Rubre v Faulkner* (1940) 1 KB 571 .

24 *R v Baldessare* (1930) 144 LT 185, 22 Cr App R 70.

25 *Mayne's Criminal Law in India*, fourteenth edn, p 247; *Larrymore v Pernendoo* 14 WR (Cr) 32 ; *R v Bennett* 28 LJMC 27 .

26 *R v Dixon* 3 M& S 11 - 14 ; *R v Lister* D&B, 209; *Attorney-General v Siddon* 1 Cr & Jer 202; *Sanglli Nand v R* (1911) 12 Cr LJ 495 .

27 *Jiwa Ram v Emperor* AIR 1932 All 69, (1932) 33 Cr LJ 309 ; *Joti Prasad Gupta v Emperor* AIR 1932 All 18, (1932) 33 Cr LJ 236 ; *Emperor v Ganesh Vaman Joshi* AIR 1931 Bom 140, (1931) 32 Cr LJ 471, distinguishing *Mohan Lal Saxena v Emperor* AIR 1930 Oudh 497, (1931) 32 Cr LJ 104 .

28 *R v Bayne* (1906) 3 Cr LJ 494, 8 Bom LR 414 .

29 *Altab Khan v State of Uttar Pradesh* (1987) 23 ACC 103, p 104 .

30 *Sriniwas Pal v Union Territory of Arunachal Pradesh* AIR 1988 SC 1729, (1988) 2 Crimes 950, p 954 (SC), (1988) Cr LJ 183 .

31 *Ibid*.

32 *State v Yudhisthra Nanda* (2001) III CCR 184 (Ori) .

33 Re *Venkayala Pati Gopala Rao*AIR 1956 AP 21, (1956) Cr LJ 27 ; *Umar Bin v State* AIR 1954 Sau 15, (1954) Cr LJ 143 ; *Edward Tom v State* AIR 1954 Tr & Coch 4, (1954) Cr LJ 25; *State v Mangla Ram* AIR 1962 Raj 155, (1962) 1 Cr LJ 763 .

34 *Umar Bin v State* AIR 1954 Sau 15, (1954) Cr LJ 143 ; *Edward Tom v State* AIR 1954 Tr & Coch 4, (1954) Cr LJ 25; *Gayan Singh Prabhat Singh v State* AIR 1963 Guj 275, (1963) 2 Cr LJ 519(1); Re *Venkayala Pati Gopala Rao*AIR 1956 AP 21 ; *State v Ramakant* AIR 1968 Goa 77, (1968) Cr LJ 933 .

35 *State v Mangloo Ram* AIR 1962 Raj 155, (1962) 1 Cr LJ 763 .

36 *Shiv Singh v State* (1983) 24 DLT 158, p 161 ; *State v Ramkant Yeshwant* AIR 1968 Goa 77, (1968) Cr LJ 933 ; *Raghunath Behera v State* (1968) 34 Cut LT 500, p 504, (1968) Cr LJ 851 ; *State of Kerala v Arunahalam Reddiar* (1961) Mad LJ (Cr) 328 (Ker) ; *Prabadas v PK Datta* (1986) Cr LJ 398(Guj), (1985) Guj LJ 78.

37 *Sidique v State of Kerala* 2013 (2) KLJ 470, ILR (2013) (3) Ker 540 (Ker) .

38 *Thomas v State of Kerala* 2013 (1) KLJ 344 (Ker), 2013 Cr LJ 825 .

39 *Bal Kishan v State* 2009 Cr LJ (NOC) 1175 (Del) .

40 *Aleem Pasha v State of Karnataka* 2013 Cr LJ 174 (Kant), 2012 (6) Karlj 463 .

41 *Satnam Singh v State of HP* 2014 Cr LJ (NOC) 55 (HP) .

42 *State of HP v Baljit Singh* 2012 Cr LJ 237, p 239 (P&H).

43 *State of Rajasthan v Mohan Ram* 2009 Cr J (NOC) 43 (Raj) .

44 *State of Karnataka v Kumayian* 2010 Cr LJ 3376 (Kant), 2010 (3) KCCR 2402 .

45 *Basappa v State of Karnataka* (2014) 5 SCC 154, (2014) 136 AIC 253 (SC), 2014 (3) Scale 87 .

46 *Mahadeo Hari Lokre v State of Maharashtra* AIR 1972 SC 221, (1972) Cr LJ 49 ; *Om Prakash v State of Rajasthan* (1990) 2 WLN 599 ; *Bhagirath Singh v State of Rajasthan* (1999) Cr LJ 4237 (Raj) ; **See also***Durgappa v State of Karnataka* 2009 Cr LJ 226 (Kant), ILR 2008 Karnataka 3759 .

47 *Vijender Singh v State of Haryana* (1994) 2 Crimes 294 (P&H) .

48 *Digamber Baburao Ingavale v State of Maharashtra* 2008 Cr LJ 2418, p 2419 (Bom) (Accused bus driver driving rashly and negligently, colliding against an autorickshaw, convicted under ss 279 and 337, IPC).

49 *Mohanta Lal v State of West Bengal* (1968) ACJ 124 (SC) .

50 *PM Raju v State of Karnataka* (1977) Cr LJ 1545 (Kant) .

51 *State of Karnataka v Akram Pasha* 2008 Cr LJ 155 (Kant) .

52 *Ashok Kumar v State of Haryana* (2001) 3 RCR (Cr) 17 (P&H).

53 *Ravi Kapur v State of Rajasthan* 2012 Cr LJ 4403 (SC), AIR 2012 SC 2986, 2012 AIR SCW 4659, 2012 (7) Scale 354, (2012) 9 SCC 284 .

54 *Md Abdul Kayum v State of Tripura* 2014 Cr LJ 4792, p 4794 (Tripura) .

55 *State v S Manoharan* 2014 Cr LJ 3307, p 3310 (Kant) (DB), 2014 (3) AKR 55 ; **see also***Fazoof Pasha v State of Karnataka* 2012 (117) AIC 870 (Benefit of doubt given to accused).

56 *S Sakir v State of Tamil Nadu* 2013 Cr LJ (NOC) 165 (Mad) .

57 *Sunil Kumar v State of HP* 2014 Cr LJ (NOC) 278 (HP) .

58 *Palliyalil Sidique v State of Kerala* 2014 Cr LJ (NOC) 62 (Ker) .

59 *Kewal Singh v State of Punjab* 2011 Cr LJ 3004, p 3008 (P&H), 2011 (4) RCR (Criminal) 636 .

60 *State of Himachal Pradesh v Sudarsan Singh* (1992) 2 Crimes 870, p 872 (HP) .

61 *State of Rajasthan v Singara Singh* (1983) Cr LR 278, p 279 (Raj) .

62 *Mulchand Motilal Raka v State of Maharashtra* (1995) 1 Crimes 177, p 179 (Bom) .

63 *Ravi Kapur v State of Rajasthan* 2012 Cr LJ 4403, p 4411, AIR 2012 SC 2986, 2012 AIR SCW 4659, 2012 (7) Scale 354, (2012) 9 SCC 284 .

64 *Babulal Chotalal v State of Gujarat* AIR 1969 Guj 240 .

65 *State v Gulam Meer* AIR 1956 MB 141, p 144 (FB) ; **overruling** the decision in *State v Jagdish* (1952) MBLR (Cr) 302, (1952) MBLJ HCR 459 ; **but see***Collett v Emperor* (1929) Mad WN 395 ; *Emperor v Aghan* AIR 1927 Oudh 441 ; *Govt of Bombay v Malkaji* Ratanlal Un Cr Cas 198; **contra***Queen-Empress v Bali* Ratanlal Un Cr Cas 396, decision in which no reasons were given; *State of Bihar v Mangal Singh* AIR 1953 Pat 56, 54 Cr LJ 518 ; *Raghava Pillai v State* AIR 1954 Tr & Coch 25, (1954) Cr LJ 7.

66 *State of Rajasthan v Niranjan Singh* (1971) WLN (Pt 1) 235 .

67 *Ragho Prasad v Emperor* AIR 1939 Pat 388, (1939) 40 Cr LJ 759 ; **dissented** in *N Harishanker v State of Gujarat* (1969) Cr LJ 759 ; *Champa Pasin v Emperor* AIR 1928 Pat 326, (1928) 29 Cr LJ 325 ; *BD Vittal Shetty v State of Karnataka* (1979) Cr LJ (NOC) (Kant) .

68 *Roop Chand v State of Chhattisgarh* (2001) 1 CCR 538 (Chh) ; *Nanalal Harishanker v State of Gujarat* AIR 1969 Guj 62 .

69 *State of Bihar v Mangal Singh* AIR 1953 Pat 56 .

70 *State v Karmalakar Prabhakar Gavekar* AIR 1960 Bom 269 .

71 *Md. Hiran Mia v State of Tripura* 2010 Cr LJ 189, p 191 (Gauh), (2010) 3 GLR 468 .

72 *Esco Mathew v State of Kerala* (1967) Ker LJ 227 .

73 *Shiva Ram v State* (1965) All 196, (1965) 1 Cr LJ 524 ; *Ranjit Singh v State of Haryana* (1988) Chand Cr Cases 516 (P&H) .

74 *MH Mohammadali v State of Gujarat* (1971) Gujarat 72, 171 Cr LJ 469 **relying** upon *State v Gulam Meer* (1956) MP 141, (1956) Cr LJ 624 (FB) .

75 *Kantilal Shivabhai Thakur v State of Gujarat* (1990) Cr LJ 2500 (Guj) .

76 *Abdul Hameed v State* (1990) 41 DLT 306, p 307 ; *Hamid Khan v State* (1996) 1 Crimes 465 (Del) .

77 *Nanhe Khan v State of Madhya Pradesh* (1907) Cr LJ 1403 (MP) .

78 *Ram Shankar Rai v State of Bihar* (1975) Cr LJ 1402, p 1404, (1974) BLJR 913 (Pat) .

79 *State v Mohandas S Gawade* (2007) Cr LJ 850 (Bom) .

80 *Rampal v State of Haryana* (1989) 16 Cr LT 193, p 195 .

81 *State of Karnataka by Pandavapura Police v CK Devraj* (1993) 1 Crimes 590, p 596 (Kant) .

82 *State of Karnataka v Sharanappa Basna Gouda Aregoudar* (2002) 2 CCR 33 (SC) .

83 *Fateh Mohmod Aloyasbhai Samanti v State of Gujarat* (1988) Cr LR (Guj) 375, p 376, 378, **relying** on *Ravjibhai Maganbhai v State of Gujarat* (1984) Guj LH 306 ; *State of Karnataka v Krishna* AIR 1987 SC 861 ; *Amarlal v State of Rajasthan* (1988) Cr LJ 1 .

84 *Manish Jalan v State of Karnataka* 2008 Cr LJ 3941, p 3944 (SC), AIR 2008 SC 3074, (2008) 8 SCC 225, 2008 (9) Scale 814 .

85 *Prabhu Dayal v State of Rajasthan* (1993) 3 Crimes (Raj) 369, p 370 ; *Kuldip Singh v State of Haryana* (1996) 1 SLJ 449 ; *Mann Prakash v State of Haryana* (1996) Cr LJ 663, p 665 ; *Sunderlal alias Shankarlal v State of Punjab* (1993) 1 Crimes 98 ; *Gurmeet Singh v State of Punjab* (1992) 3 Crimes 475, p 476 ; *Bishamber Dass v State* (*Union Territory of Chandigarh*) (1987) 1 91 PLR 664, p 665.

86 *Durga Singh v State* (1991) RCC 127, p 128 ; *Sher Khan v State of Rajasthan* (1982) Cr LR 48 (Raj) .

87 *Adam Khan Adam Ali v State of Rajasthan* (1985) Raj Cr Cases 276, p 277 .

88 *Nirmal Singh v Union Territory of Chandigarh* (1991) 1 CC Cases 65 (HC) ; *Bishamber Dass v State (Union Territory of Chandigarh)* (1987) 1 91 PLR 664, p 665.

89 *State of HP v Girdhari Lal* 2007 Cr LJ 4347 (HP) .

90 *Pal alias Nand Lal v State (Delhi Admn)* (1983) 23 DLT 484 (Del) .

91 *State v SB Marigouda* (1999) Cr LJ 2171 .

92 *Mann Prakash v State of Haryana* (1996) Cr LJ 663 (P&H) .

93 *Mahabir Singh v State* (2001) 1 RCR (Cri) 808 (Del) .

94 *Swarna Singh v State of Punjab* (1998) 1 RCR (Cri) 682 (P&H).

1 Per Jenkins CJ, in *Emperor v HC Bayne* 3 Cr LJ 494, p 498 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 280.

Rash navigation of vessel.--

Whoever navigates any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

This section, which deals with rash or negligent navigation, is analogous to the preceding section. It only extends its provisions to waterways. That section applies to public ways on land whereas this section applies to all waterways, whether public or private, and whether a sea, river, lake or canal. The section is, however, confined to inland navigation, and not to navigation on high seas.

Rash and negligent navigation on the high seas is not within the scope of this section. The Indian Merchant Shipping Act,[2] the Pilgrim Ships Act,[3] and the Native Passenger Ships Act,[4] provide for the safety of passengers on the high seas.

2. 'Vessel'

This word denotes anything made of the conveyance by water of human beings or of property.[5]

3. 'Rash or Negligent Navigation'

The manner in which the navigation is performed must be rash or negligent. The fact that a steam launch ran into a cargo boat at anchor is in itself *prima facie* evidence of negligent navigation.[6]1938

To support a conviction under this section there must be proof of rashness or negligence which endangers human life or is likely to cause hurt or injury to any other person. The immediate cause of the accident should be rashness or negligence on the part of the navigator. In considering the question of degree, the question of contributory negligence has also to be taken into account, not as a defence to the indictment, but for the purpose of determining causation and fixing a measure of the liability of the accused.[7]To make the captain of a steam vessel guilty of manslaughter, in causing a person to be drowned, by running down a boat, the prosecutor must show some act done by the captain; and mere omission on his part, in not doing the whole of his duty, is not sufficient. But, if there be sufficient light, and the captain is either at the helm, or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter.[8] It is a primary duty of steam vessels to keep out of the way of vessels lying at anchor. Where the water at the place of the collision is admittedly apt to be disturbed and uncertain owing to eddies, it is all the more incumbent on the Serang to give a wide berth to cargo boats at anchor, and the fact that he can into the stern of one of them would be, in itself, *prima facie* evidence of negligent navigation.[9]

4. 'In a Manner...So as to Endanger Human Life or to be Likely to Cause Hurt or Injury'

In a prosecution under this section, it is not enough to prove that the accused navigated the vessel in an extremely slovenly manner. It is necessary to prove that he navigated it in such a manner as to endanger human life or in a manner which was likely to cause hurt or injury to other persons.[10] Where a ferryboat was upset because it was sent without sufficient ballast and the ferry contractor was charged of having abetted the navigation of a vessel in a manner so rash as to endanger human life and was convicted under this section and s 109, it was held that, in the absence of evidence to show that the contractor intentionally omitted to provide the ferryboat with what he knew to be necessary for safe navigation, the conviction for abetment could not be supported.[11] As pointed out above, the

immediate cause of the accident should be rashness or negligence on the part of the navigator. But where a boat, carrying passengers more than its carrying capacity, capsized, it was held that the accused were guilty under this section and s 304A of this Code.'[12]

5. Quashing of FIR

Where except the master of the vessel, the responsibility of the crew for navigation of the vessel that they courted the disaster by design is not spelled out from the allegations in the FIR under ss 280 and 336 of the Indian Penal Code 1860 and s 14 of Foreigners Act 1946, and the documents produced in the case and the circumstances also do not *prima facie* indicate that the accused persons entered the territorial waters, willfully and even if so, they are entitled for innocent passage, being the members of the crew of a fishing vessel as per the existing laws and the1939 International Conventions, a conclusion which is unexceptionable. Except the accused, the master of the vessel, the other accused persons were not responsible for rash and negligent navigation. Evidently, the rest of the crew members who belong to different nationalities, were working in the fishing vessel to earn their livelihood. In the circumstances and for the reasons mentioned above, the case registered against the rest of the crew members except the master of the vessel was quashed.[13]

6. 'Endanger Human Life'

Notes under s 279 may be referred to.

7. 'Hurt'

Notes under s 319 may be referred to.

8. 'Injury'

Notes under s 44 may be referred to.

9. Procedure

The offence under this section is cognisable, but a summons shall ordinarily issue in the first instance. It is a bailable offence but not compoundable. It can be tried by any magistrate and can also be tried summarily.

The cognizance of this offence can be taken within one year.

Non-compoundable

Offences punishable under ss 279 and 304 A, IPC are not mentioned in the two tables of s 320, CrPC, the offences are not compoundable.[14]

10. Notice under Section 251 , CrPC

The following form of notice under s 251, CrPC 1973 may be adopted:

I (*name and office of magistrate etc*) hereby give notice to you (*name of accused*) as follows:

That you, on or about the.....day of.....20.....at..... navigated a vessel (*name the vessel*) in a manner so rash (*or negligent*) as to endanger human life [*or to be likely to cause hurt (or injury) to any other person*], and thereby committed an offence punishable under section 280 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

1940

11. Proof

To establish an offence under this section, it will be necessary to prove that:

(i) the accused navigated a vessel;
(ii) he did so, in a rash or negligent manner; and
(iii) the manner of navigation was such as to endanger human life, or such as to be likely to cause hurt or injury to any other person.

2 Act 7 of 1880.

3 Act 14 of 1895.

4 Act 10 of 1887 (now Act 21 of 1923).

5 Section 48, IPC .

6 *Lal Meah v R* (1911) 12 Cr LJ 582 .

7 *Kamadar Ali Serang v Emperor* (1911) 12 Cr LJ 362 ; *State of Kerala v Krishnan Thampi* (1965) KLT (short notes) 6 .

8 *Rex v Gean* (1835) 7 C&P 156 .

9 *Lal Meah v Emperor* (1911) 12 Cr LJ 582, p 583 .

10 *Rahimtullah Ibrahim v Emperor* AIR 1925 Sind 284, p 285, 26 Cr LJ 1026 .

11 *Reg v Sakaram Govind* Ratanlal Un Cas 35, p 36.

12 *State of Kerala v Krishna Thampi* (1965) KLT 6 (short notes); notes under s 279 .

13 *Hisa A Sheng v Administrator, Union Territory of Lakshadweep* (2007) Cr LJ 821 (Ker) .

14 *Manish Jalan v State of Karnataka* 2008 Cr LJ 3941, p 3942 (SC), AIR 2008 SC 3074, (2008) 8 SCC 225, 2008 (9) Scale 814 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 281.

Exhibition of false light, mark or buoy.--

Whoever exhibits any false light, mark or buoy, intending or knowing it to be likely that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Comments

1. Scope

This section deals with exhibition of false signals to a vessel. It punishes exhibiting a false light, mark or buoy (*ie* an anchored floating seamark for showing navigable course) with the intention and knowledge that such an action would mislead a navigator. *Mens rea*is an essential ingredient of the offence under this section. Where the act is not intentional but due to negligence, it will not be within the purview of this section.

2. Analogous Law

The provision of this section are analogous to the provisions of s 47 of the English Malicious Damage Act 1861[15]as amended by the Criminal Justice Act 1948, s 1 which reads:

> Whosoever shall, unlawfully mark, alter, or remove any light or signal, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, or boat into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction any ship, vessel, or boat, and for which no punishment is hereinbefore provided, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of

the Court to be imprisoned for life...

3. Voluntary Exhibition of False Lights, *Etc*

A person who intends a certain effect of his actions, or knows that such an effect is likely, causes that effect 'voluntarily' under s 39, negligence is excluded by the terms in the section, only conduct accompanied by consciousness in regard to its likely consequence being punishable therein. A negligent act of the kind would fall under s 283, post.1941

4. Procedure

The offence under this section is cognisable and a warrant shall ordinarily issue in the first instance. The offence is bailable but not compoundable. It is triable by a magistrate of the first class.

There is no time limit for taking cognizance of this offence.

5. Charge

The following form of the charge may be adopted in case of a prosecution under this section:

I (*name and office of magistrate etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the.....day of.....at.....did exhibit a false light (*or mark or buoy*) knowing (*or intending*) it to be likely that the exhibition of the said false light (*or mark or buoy*) would mislead the officer in charge of the navigation of any vessel; and thereby committed an offence punishable under section 281 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

6. Proof

To establish an offence under this section, it will be necessary to prove that:

(i) the accused exhibited a false light, mark or buoy; and
(ii) he did so with the intention or knowledge of misleading any navigator.

15 24 and 25 Vict c 97. Section 1 of the Malicious Damage Act 1861, now repealed by the Criminal Damage Act 1971.

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 282.

Conveying person by water for hire in unsafe or overloaded vessel.--

Whoever knowingly or negligently conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state or so loaded as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

This section which is confined to common carrier by water, deals with conveying persons by water, for hire in unsafe or overloaded vessels. The offence consists in conveying a passenger for hire in vessel which is so unseaworthy, either from its own condition or from the way in which it is loaded, as to endanger his life. The offence is not confined only to overloading, but includes carrying a passenger in an unsafe vessel. But a person is liable under this section only if he conveys a passenger in an unsafe vessel 'knowingly or negligently'. If an overloaded launch does not capsize1942 on account of the negligence of the owners but because of the stampede that followed the sudden rush of persons, waiting at the jetty, which resulted in a displacement of the balance of the launch and breaking away of the ropes, the owner and master of the launch cannot be held guilty under this section.[16]

2. 'Whoever'

This word is wide enough to include a boatman, a lessee of a ferry,[17] or the owner of a vessel.[18]

3. 'Knowingly or Negligently'

Apparently the word 'knowingly' takes the same meaning as 'rashly', *ie*, the party runs a risk of which he is conscious, but he thinks that the mischief will probably be averted in the given instance.[19] If, on the other hand, he 'negligently' conveys *ie,* conveys in a negligent manner, and gives no thought to the possible consequences of his conduct, or thinks about them insufficiently then the offence will come within the mischief of this section. Criminal negligence is gross and culpable neglect or failure to exercise that reasonable and proper care to guard against injury either to the public in general or to the individual in particular which, having regard to the circumstances, it was the imperative duty of the accused person to have adopted.

4. Mere Unseaworthiness of Vessel not Sufficient

To constitute an offence under this section, it is not sufficient that the vessel was not in a seaworthy state, it must have been known by the accused to be in such a state, or he must have occupied such

a position that his ignorance of it amounts to negligence. The owner of a ship would be bound to take all proper precautions to ascertain whether or not his ship was seaworthy. The manager of a booking-office, at which passengers are supplied with tickets for any vessel they wish to select, would be under no such obligation. It is also to be remembered that seaworthiness is a relative term, and merely means fitness to perform the service which the vessel is about to undertake. A ship may be fit to undertake a small coasting voyage, with an ordinary cargo, when it may not be fit to go to a distant country in the typhoon season, or to carry a load of machinery.[20]

5. Owner of Boat when Liable for Overloading by Boatman--Liability of the Lessee of a Ferry

Where the owner of a boat who knowingly or negligently permits overloading of his boat so as to endanger the safety of the passengers travelling therein, he is guilty under this section. He cannot shift his liability to the *tindal* (boatman) who was in actual charge of the boat at the time of overloading. Even when there is no proof that he actually knew about the overloading, his negligence will make him liable if he did not take due care and attention.[21] Criminal negligence is gross and culpable neglect or failure to exercise that reasonable and proper care to guard against injury either to1943 the public in general or to the individual in particular, which having regard to the circumstances it was the imperative duty of the accused person to have adopted. The lessee of a ferry ought to know that overloading, particularly in the middle of the monsoon, would be dangerous and it is his duty to take proper precautions to ensure that his *majhis* (boatman) do not overload boats. He should not only give definite instructions to them not to overload the boats but also see that the *majhis* carry out the instruction. It would be culpable negligence on his part if he leaves the whole matter in the hands of boatman and thus leave the passengers to their fate.[22]

6. 'To Endanger'

It must be proved that the life of the person was, as a fact, endangered by the state of the vessel.

7. 'Conveyed for Hire'

The person whose life is endangered must be a person 'conveyed for hire' *ie*, a passenger.[23] Endangering the lives of officers and crews of a ship by sending it to sea in an unseaworthy condition is punishable under s 336, IPC, and not under this section.

8. Procedure

An offence under this section is cognisable but a summons shall ordinarily issue in the first instance. It is bailable but not compoundable. It is triable by any magistrate.

The cognizance of this offence can be taken within a year.

9. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC 1973 may be adopted:

I (*name and office of the magistrate etc*) hereby notice to you (*name of accused*) as follows:

That you on or about the.....day of.....at.....knowingly or negligently conveyed, (*or caused to be*

conveyed) for hire..... (*name the person*) by water in the vessel (*name the vessel*) when that vessel was in such a state (*or so loaded*) as to endanger the life of the said..... (*name the person*), and thereby committed the offence punishable under section 282 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

10. Proof

To establish an offence under this section, it will be necessary to prove that:

(i) the accused conveyed a person for hire, or caused the same to be done;1944
(ii) the conveyance was by water in a vessel;
(iii) such vessel was at that time in such a state, or so loaded, as to be dangerous to the life of that passenger; and
(iv) when he conveyed such person in the vessel, the accused knew of the state of such vessel, or he acted negligently.

16 *VR Bhate v State of Maharashtra* (1970) SC 1362, p 1364, 1365, (1970) Cr LJ 1261 .

17 *Tofail Ahmad Mia v Emperor* AIR 1934 Cal 490, (1934) 35 Cr LJ 1373 .

18 Re *KSM Mahommedabdul Kadar Marakayar*AIR 1950 Mad 300, (1950) 51 Cr LJ 729 .

19 *Austin's Jurisprudence*, ch 20, 441, notes to s 280 .

20 *Kopitoff v Silson* 1 QBD 377 .

21 Re *KSM Mahommedabdul Kadar Marakayar*AIR 1950 Mad 300, p 301, (1950) 51 Cr LJ 729 .

22 *Tofail Ahmad Mea v Emperor* AIR 1934 Cal 490, (1934) 35 Cr LJ 1373 .

23 *R v Khoda Jagta* 1 Bom HCR 13 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 283.

Danger or obstruction in public way or line of navigation.--

Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction or injury to any person in any public way or public line of navigation, shall be punished with fine which may extend to two hundred rupees.

Comments

1. Scope

This section penalises causing danger or obstruction to any person in a public way or public line or navigation. This section refers to parties who do acts so as to cause danger, obstruction, or injury to any person in any public way.[24] It applies not only to persons who do some positive act, but also to those who omit to take order with any property in his possession or under his charge, and is based on the maxim *Sic utere tuo ut alienum non laedas* (so use your own as not to cause injury to another). The section is enacted to protect persons in the exercise of their public right. A public nuisance may undoubtedly be caused without any deliberate intention of causing it, and this section and indeed s 290, do not refer to the intention of the accused person. The obstruction may be caused by negligence, and in nine cases out of ten it is so caused.[25] The section cannot, however, be extended to a case where a party prohibits strangers from passing through its field even though they may have been allowed access on earlier occasions.[26]

2. Essential Ingredients of the Offence

The section has the following two ingredients:

(i) A person must do an act or omit to take order with any property in his possession or under his charge.1945
(ii) Such act or omission must cause danger, obstruction, or injury to any person in any public way or in the public line of navigation.

3. 'Whoever'

It is the author of the act, which caused the obstruction, *etc*, who is liable under this section, and not the person who may use the obstruction. Thus, where a hut encroached upon a public way and caused obstruction, it is the person who constructed the hut, who is liable and not the person who takes it on rent and opens a shop.[27]

Owner and Contractor

Where the accused employed a contractor to supply materials for the repair of a temple, and the contractor placed some girders on a public way and thereby caused an obstruction, but there was nothing to show that the accused directed or sanctioned the contractor to place the girders on the road, it was held that the accused could not be convicted under this section.[28]

Occupier and the Owner

With regard to an omission to take order with any property, the person liable under this section is the person who is in possession or charge of the property. *Prima facie* this person is the actual occupant, whether he is the owner or tenant, and it makes no difference in the latter case that, as between himself and his landlord, the latter is liable to make repairs.

As the danger is the matter that concerns the public, the public are to look to the occupier and not to the estate, which is not material in such cases to the public.'[29]

Liability in a Case of Nuisance

According to the civil law, and *a fortiori* according to criminal law, a landlord is not liable merely because premises in the occupation of a tenant are in such a state as to amount to a nuisance.[30] Nor does he become liable for a nuisance created by a tenant merely because, when the tenancy came to an end, he renewed it, the property with the nuisance on it never having got back again into his hands.[31] If, however, he has himself created the nuisance, he is of course, the person liable,[32] and if the nuisance is one of a continuing character, he does not free himself from liability by letting the premises to a tenant.[33] The occupation of servants or agents will be the occupation of their employers, though of course they would be personally liable for any nuisance created by themselves.[34]

4. Meaning of Act

'Act' is here contrasted with 'omitting' and thus bears its strict sense of something positive (refer to s 32, IPC). The word 'act' used in this section cannot be read in1946 such a wide sense that mere standing on the road without anything more is such an act as punishable under this section. If that were so, then anybody out of a crowd witnessing a fair or procession standing on the road might be hauled up under this section.[35]

5. 'By Doing any Act'

What is punishable under this section is not any act, but only an act which causes danger, obstruction or injury to any one. 'Anyone' does not mean 'everyone'. The liability results from the consequences to the individual harmed and not from any impropriety in the act itself. If there is a legal right to do the act, of course it is not punishable, unless it is improperly performed. Thus, an act done under statutory authority is not punishable even if it causes injury to somebody.[36] It would, of course, be otherwise, if the statutory authority was negligently or improperly carried out.[37] Similarly, there are some acts which are so necessary to the ordinary enjoyment of property, that they are lawful, even though they cause a temporary obstruction to the highway, such as the stoppage of carts to unload goods into a warehouse, or the erection of a hoarding to protect the public while buildings are being repaired.[38]

The occasional inconvenience arising from crowds of persons or a carriage blocking up the road when private entertainment is being given is not punishable if reasonable precautions are taken to mitigate the evil but it is a nuisance that the streets should be blocked up night after night by crowds waiting to enter a theatre, and it would be punishable even though only a single person complained that access to his house was obstructed.[39]

6. 'Or by Omitting to take Order'

The word 'omitting' seems to be used in the popular sense of the word 'omission',[40]*ie*, intentional or unintentional non-doing, and therefore, includes a mere neglect to take order. The offence by omission is an omission 'to take order', *ie*, to dispose of the property in such a way as to prevent the danger, obstruction or injury, but the omission must be the cause of the injury, and not some unavoidable event, such as a flood.

The danger or injury must be such as would naturally flow from the act. Therefore, where the defendant, being in possession of land abutting on a public footway, excavated an area in the course of building a house immediately adjoining the footway, and left it unprotected, and a person walking in the night fell in, the defendant was held to be liable though in point of law, the party who fell in was off the road, and was in law a trespasser.[41] But the contrary was held where a man made a well in the middle of his field, through which there was a right of way, and a person straying off the path at night, fell into it. Martin B, after citing the last case with approval said:1947

> But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to be different. We do not see where the liability is to stop. A man going off a road in a dark night, and losing his way, may wander to any extent. We think the proper and true test of legal liability is, whether the excavation be substantially adjoining the way.[42]

7. 'Any property'

The property may be movable or immovable. Notes under s 22 may be referred to.

8. 'Possession'

Notes under s 27 may be referred to.

9. 'In his Possession or under his Charge'

This expression means 'in his possession or custody',[43] and the essence of both is effective control. Hence, neither is the owner of a wrecked and abandoned ship is liable for the danger, obstruction or injury caused by it,[44] nor is the late owner of a bull which has been set at large according to the religious practice of the Hindus.[45]

But every shopkeeper in a public street, although he has a right to exhibit his wares in any way he likes in his shop, must exercise his right so as not to cause annoyance or nuisance to the public, as by attracting large crowds in the public street.[46]

10. 'With any Property in his Possession or under his Charge'

The words 'with any property in his possession or under his charge' are not to be read with the word 'act'. They are to be read only with the phrase 'by omitting to take order'. As observed by Sharma J in

Badrinarain v State :[47]

> So far as the Acts of the Indian Legislature and the Constitution of India are concerned, it has been held that in India, the punctuations in the statutes should not be ignored. We cannot, therefore, ignore the comma after the words 'by doing any act' and giving it significance, we hold that the words 'or by omitting to take order with any property in his possession or under his charge' are disjunctive and not conjunctive to 'by doing any act'. If the words 'with any property in his possession or under his charge', were intended by the Legislature to qualify the word 'act' also, it would not have been necessary to add the words 'or by omitting to take order' as under s 32 of the Indian Penal Code, the words which refer to acts done also extend to illegal omission. The words 'by doing any act with any property in his possession or under his charge' would therefore have included illegal omission to take order with any property in his possession or under his charge.

As it was the intention of the legislature to restrict the omission only to any property in the possession or under the charge of the accused, the expression 'or by omitting1948 to take order with any property in his possession or under his charge' had to be added.

11. 'Causes'

The danger, obstruction, or injury must be caused, *ie*, the mere act or omission is not *per se* punishable, as in the case of rashness or negligence (except in the case of negligence, which is excluded in s 281, in ss 279 - 282 and ss 284 - 289, IPC).

Where there was no evidence of any kind to the effect that the accused by driving their carts on the road caused danger, obstruction or injury to any person on the road, their conviction under s 283, IPC, cannot be sustained.[48]

12. Obstruction

Every obstruction must endanger and inconvenience, but the converse is not true. Every inconvenience need not necessarily arise out of obstruction. Where the accused placed logs at a space of seven feet in width on a road, which was 24 feet in width, but there was no finding or evidence that the stacking, caused injury, danger or annoyance, it was held that there was no obstruction within the meaning of this section and the accused could not be convicted under this section or under s 200, IPC .[49]

Where the accused driver was alleged to have negligently parked a tractor trolley duly loaded with fertilizers in the middle of the road without there being any signal of its being stationary and as such three persons who were proceeding on a motorcycle collided with the stationary trolley and sustained severe injuries. Initially a challan was filed against the accused only for offence under s 283, IPC, and subsequently a supplementary challan was filed under s 304A, IPC, and the court of the additional chief judicial magistrate took cognizance of both the offences. The petition filed by the accused under s 482, CrPC for quashing criminal proceeding against him before the additional chief judicial magistrate was dismissed by the Rajasthan High Court as there was ample material on record of the learned trial court to take cognizance of the offence under ss 283 and 304A, IPC against the accused petitioners.[50]Section 283 does not refer to the intention of the accused. The obstruction may be caused by negligence and in nine cases out of ten it is so caused.[51] Where the sub-inspector was exercising his public right to ride along the side of the road and it was admitted that the side of the road was occupied by the charpoy of the accused, and the circumstance were such that the sub-inspector was undoubtedly obstructed, the conviction of the accused under s 283, IPC, was found proper.[52] Notes and s 280 may be referred to.

13. Injury to any Person

The injury to any person means any harm illegally caused to his body or to his property.[53] The harm in these cases can clearly be only physical.1949

14. 'To any Person'

Obstruction to the public does not bring an act under this section, but under s 290 . For an offence under this section there must be obstruction to some particular person or class of persons in a public way, *etc*.[54]

An appropriation of part of a street by building over it does not constitute an offence under this section, in the absence of evidence that danger, obstruction, or injury was caused thereby. It would fall under ss 278 and 290 .[55]

15. 'In any Public Way'

A public way is a place over which members of the public have the right to pass, either individually or in a number collectively. But a highway cannot be so used as to exclude other persons, equally entitled, from the use of it.[56]

Private and Customary Way

As pointed out in *Pran Nath Kundu v Emperor* ,[57] where the privilege to use a road is enjoyed only by one particular section of the community or by inhabitants of two or three villages and not by others the road is not a public road.[58] Where there is the intention to allow, not the public generally but merely visitors to or traders with the people of the village, or ways allowed to be used by villagers to go to a church or marked to the common fields of a village, such ways are not regarded as public ways but private ways and they generally have their origin in custom.[59] Such a customary way can be converted into an ordinary highway after use by the general public sufficient to raise the presumption of dedication.[60] But the evidence in support of the public claim must be cogent.[61]

Where a municipality had constructed a barrel drain in the highway, and then allowed it to fall out of repair, so that it became a hole into which a man and horse fell, Sir Barnes Peacock J, said:

> Their Lordships are therefore of opinion that the applicants by reason of the construction of the drain, and their neglect to repair it, whereby the dangerous hole was formed, which was left open and unfenced, caused a nuisance on the highway, for which they were liable to an indictment. This being so, their Lordships are of opinion that the corporation are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty.[62]

Where the accused obstructed by building a stone wall across a cart track which he claimed to be in his private *patta* land, and he claimed a right to close it by putting a1950 wall, it was held that he could be convicted under this section, but could be proceeded under s 133, CrPC .[63]

16. Procedure

The offence under this section is cognisable, but a summons shall ordinarily issue in the first instance. It is a bailable offence but not compoundable. It can be tried by any magistrate and summarily.

The cognizance of this offence can be taken within six months only.

17. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC, 1973 may be adopted:

I (*name and office of the magistrate etc*) hereby notice to you (*name of the accused*) as follows:

That you on or about the.....day of.....at.....did.....(*name the act*) (*or omitted to take order*) with...(*name the property*) in your possession (*or under your charge*), and thereby caused danger, obstruction or injury to (*name the person*) in the public way (*name the way*) [*or in the public line of navigation* (*name the life of navigation*)] and thereby committed an offence under section 283 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

18. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused did some act or omitted to take order with a property in his possession or charge; and
(ii) the said act or omission caused danger, obstruction or injury to some person in any public way or public line of navigation.

For a conviction under this section, there must be proof of obstruction to the road so as to cause danger or injury to any person passing the road without which there can be no conviction.[64]

24 *Queen v Bholanath Banerjee* 7 WR 31, p 32 .

25 *Ram Krishna v Emperor* AIR 1935 All 746 (i), (1935) 36 Cr LJ 893, (1935) All LJ 1057.

26 *Nand Ram v Sub-Divisional Judge* 70 PLR 225(Del), (1969) Cr LJ 77, p 79 (Del).

27 *Narain Adhikari v Emperor* (1904) 1 Cr LJ 244, 8 CWN 369 .

28 *Lalta Prasad v Emperor* AIR 1921 All 192(1), (1921) 22 Cr LJ 331(1).

29 *R v Watts* 1 Salk 357 ; per Littledale J 5 B&Cr, 560 affirmed in 6 M&WP 510.

30 *Russel v Shenton* 3 QB 449 ; *Nelson v Liverpool Brewery Co* 2 CPD 311 .

31 *Bowen v Anderson* (1894) 1 QB 164 .

32 *Draper v Sherring* 30 LJMC 225 .

33 *R v Pedly* 1 A&E 822 ; *Thomson v Gibson* 7 M&W 456 ; *Todd v Flight* 9 CBNS 377, 30 LJCP 21 .

34 *Rich v Basterfield* 4 CB 783, 16 LJCP 273, 5 B&CP 560 ; *Mayne's Criminal Law*, p 623.

35 *Badrinarain v State* AIR 1957 Raj 64, p 65, (1957) Cr LJ 391 .

36 *Huams v Webster* LR 4 QB 138 ; *Moore v Lambeth Waterworks* 17 QBD 462 .

37 *Williams v Great Western Rly Co* LR 9 Ex 157 ; as to injury resulting from a rotten fence refer to *Horrold v Watney* (1898) 2 QB 320 .

38 *Herring v Metropolitan Board of Works* 34 LJMC 224, SC 19 CBNC 510 .

39 *Barber v Pentey* (1893) 2 Ch 447, where the whole law as to nuisance to highways is discussed.

40 Refer to notes to ss 32, 33 .

41 *Bames v Ward* 9 CB 392 ; *Hadley v Taylor* LR 1 CP 53 ; *Brown v E&M Rly Co* 22 QBD 391 .

42 *Hardcastle v South Yorkshire Rly Co* 28 LJ Ex 139 SC, 4 H&N 67; *Houndell v Smith* 29 LJCP 203 SC, 7 CBNS 731 ; *Binks v South Yorkshire Rly Co* 32 LJ QB 26, SC 3 B&Cr 214; *Reg v Anthony Udayan* 6 Mad 280 .

43 Refer to notes under s 27 .

44 *Brown v Mallet* 5 CB 599 .

45 *R v Shambu Dial* (1904) 1 Cr LJ 501, 5 PR Cr (1904), 5 PLR 308.

46 *R v Noor Mahommed Soleman* ILR 36 Bom 368, 12 Cr LJ 258 .

47 *Badrinarain v State* AIR 1957 Raj 64, p 65, (1957) Cr LJ 391 .

48 *Emperor v Ghulam Raza* AIR 1925 Lah 153, (1925) Cr LJ 707 .

49 *Moochia Naik v State* AIR 1967 Ori 36, p 37, (1967) Cr LJ 393 .

50 *Jai Ram v State of Rajasthan* (2001) Cr LJ 3915 (Raj) .

51 *Ram Krishna v Emperor* AIR 1935 All 746(1), (1935) 36 Cr LJ 893, (1935) All LJ 1057 .

52 *Ibid*.

53 *R v Natha Lalla* 6 Bom HCC 67 ; Refer s 44 .

54 *R v Khadar Moidin* ILR 4 Mad 235 ; Re *Umesh Chandra Kar* 14 ILR Cal 656.

55 *R v Virappa Chetti* 20 ILR Mad 433 .

56 Re *Mruthyuzar Khan Sab*(1910) 11 Cr LJ 321.

57 *Pran Nath Kundu v Emperor* AIR 1930 Cal 285, p 288, 31 Cr LJ 859 ; *Fatehyab Khan v Mahommed Yusuf* (1887) 9 All 434, (1887) All WN 82 .

58 *Sham v Monee* 25 WR 233 ; *Fatehyab Khan v Mahommed Yusuf* (1887) 9 All 434, (1887) All WN 82 .

59 *Brocklebank v Thompson* (1903) 2 Ch 344, 72 LJ Ch 626, 19 TLR 285, 89 LT 209 .

60 *Farquhar v Newbury Rural District* (1909) 1 Ch 12, 78 LJ Ch 170, 25 TLR 39, 7 LGR 364, 73 JP 1, 100 LT 17 .

61 *Vestry or Bermondsey v Brown* (1865) 1 Ef 204 .

62 *Burough of Bathurst v Macpherson* 4 AC 256 ; **explained** in *Picton Municipality v Geldert* (1893) AC 525, p 531 ; *Municipal Council of Sydney v Bourke* (1895) AC 433**followed** in *Corpn of Calcutta v Anderson* 10 ILR Cal 445 .

63 Re *Muthu Goundan*AIR 1940 Mad 216, (1940) 41 Cr LJ 391 .

64 *Emperor v Ghulam Raza* AIR 1925 Lah 153, 155, (1924) 25 Cr LJ 707 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 284.

Negligent conduct with respect to poisonous substance.--

Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person,

or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance,1951

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

This section deals with negligent conduct with respect to poisonous substance. To sustain a conviction under this section, it is sufficient that a person in possession of a poisonous substance should have negligently omitted to take such order with it as is sufficient to guard against any probable danger to human life from the poisonous substance. The gist of the offence is culpable negligence, and the fact that a person has the custody of any dangerous substance suffices by itself to impose upon him the duty of being careful. It is not necessary to constitute an offence under this section, that the negligent omission punishable under the section should be followed by any disastrous consequences.[65]

2. Meaning of Act

Commentary under the same heading in s 283, *ante* may be referred to.

The word 'act' in ss 284 - 287, IPC is contrasted with the word 'omission' and thus, having regard to the context, it signifies a thing or things done, *i.e.*, positive, as contrasted with negative conduct.[66]

3. 'Rash or Negligent'

Notes under s 279 may be referred to.

4. 'Endanger Human Life'

Notes under s 279 referred to.

5. 'Hurt'

Notes under s 319 may be referred to.

If hurt is actually caused by the rash or negligent act, the case falls within the ambit of s 337,[67] and not under this section.

6. 'Injury'

Notes under s 44 may be referred to.1952

7. 'Knowingly or Negligently Omits'

Both these mental states relate to non-doing and negative conduct, *ie*, something is not done by the agent, knowingly or negligently.

8. 'To take such Order'

Where the accused, who was a police sergeant, took over a desk containing poisonous powders and also some other powders, which might easily be mistaken one for the other, without taking any precaution whatever to guard against misuse of the poison, and the only order he took with the poison subsequently was to hand over the key of the receptacle, in which the powders were kept, to a subordinate official, who by mistake issued some of the poisonous powders to a person suffering from fever who took one of the powders and died, it was held, that on the above facts, a conviction under this section was sustainable, but not under s 304A .[68]

Notes under s 283 may be referred to.

9. 'Possession'

Notes under s 27 may be referred to.

10. Procedure

The offence under this section is cognisable but a summons shall ordinarily issue in the first instance. It is a bailable offence but not compoundable. It is triable by any magistrate and may also be tried summarily. Offences punishable under ss 279 and 304, IPC are not compoundable.[69]

The limitation for taking cognizance of this offence is one year.

11. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC, 1973 may be adopted:

I (*name and office of the magistrate etc*) hereby notice to you (*name of accused*) as follows:

That you on or about the.....day of.....did (*name the act*) with..... (*name the poisonous substance*) in a manner so rash (*or negligent*) as to endanger human life, [*or to be likely to cause hurt or injury to* (*name the person*)], [*or knowingly (or negligently) omitted to take such order with*.....(*name the poisonous substances) in your possession as is sufficient to guard against probable danger to human life from such poisonous substance*], and thereby committed an offence punishable under section 284 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

1953

12. Proof

The following points require proof for a conviction under this section:

(i) Where the first para of the section is applicable:

(a) that the substance in question was poisonous;
(b) that it was capable of endangering human life or of causing hurt or injury to any person;

(c) that the accused did some act with it; and
(d) that the act was rash or negligent, so as to endanger human life or to be likely to cause hurt or injury to any person.

(ii) Where the second para of the section is applicable:

(a) that the accused was in possession of a poisonous substance;
(b) that there was probable danger to human life from it; and
(c) that the accused knowingly or negligently omitted to take such order with it as to guard against such danger.

65 Re *Hosein Beg*(1882) PR 16.

66 Refer to s 32, IPC .

67 *R v Abbus Sattar* 28 ILR All 464 .

68 Re *Hosein Beg*(1882) PR 16.

69 *Manish Jalan v State of Karnataka* AIR 2008 SC 3074, 2008 Cr LJ 3941, (2008) 3 SCC (Cri) 456 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 285.

Negligent conduct with respect to fire or combustible matter.--

Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

This section deals with negligent conduct with respect to fire or combustible matter. It extends the provisions of the preceding section, to fire or any combustible matter. For an offence under this section it is not necessary to show any danger to human life; it is sufficient to prove likelihood of hurt or injury to any person.[70] Where the management had not taken safety measures, as such the occurrence took place, prosecution of the accused under s 92 of the Factories Act was proper, was not permissible under the general law.[71]1954

2. Part I of Section 285 Distinguished from Section 435,IPC

The *actus reus* for an offence under the first part of s 285, IPC would be established in every case where the *actus reus* for an offence under s 435, IPC is made out. But the *mens rea* for the two offences is different. The *mens rea* for an offence under s 435, IPC is doing of a wrongful act with the requisite intention or knowledge of the likelihood to cause wrongful loss or damage to any person by the wrongful act. The *mens rea* for an offence under the first part of s 285, IPC is, however, rashness or negligence in doing the wrongful act.[72]

3. 'Combustible Matter'

Matter is said to be combustible if it is inflammable or capable of catching fire. The expression 'combustible matter' includes *bidis*,[73] fireworks,[74] and gunpowder or combustible fluids like naphtha.[75] Erecting gunpowder mills or keeping gunpowder magazines near a town is a public nuisance at common law. In *R v Lister* ,[76] it was held to be an indictable offence to deposit and keep large quantities of naphtha in such local circumstances as to create real danger to life and property, and further that although in the opinion of scientific men the manufacture and keeping of the material was carried on so carefully as to produce no danger, yet there was no doubt that its liability to danger *ab extra* might make it a public nuisance.

4. 'Rashly or Negligently'

Where the accused had a quarrel with his wife, got angry, broke the crockery and then went out and set fire to the eaves of his house, thereby causing risk of injury to the house owners in the neighbourhood but doing no actual mischief, it was held that this section was not applicable as his act was wilful and not rash and negligent.[77]

The owner of a house, in which a fire breaks out, cannot be convicted under this section, without proving actual carelessness or an illegal omission in the owner, from which rashness or negligence can be inferred. There may be conduct either by act or omission from which rashness or negligence may be inferred, which would require the accused to rebut it by evidence; but such an inference cannot be made merely because a fire breaks out and destroys property or occasions risk to life or property. Evidence of actual carelessness or of an illegal omission to take order with fire must generally be shown, before the party, by or through whom a fire is aid to be occasioned, can be convicted.[78] The mere fact that a man's house is burnt owing to causes which cannot be discovered, furnishes no ground for the assumption that he has been guilty of negligence under this section. The negligence must be clearly proved.[79] The mere letting off of a fire balloon cannot, therefore, in the absence of proof of rashness or negligence, be a ground of conviction.[80]The act of accused in setting fire to the tobacco stock inside the house after pouring petrol and further act of throwing petrol on the deceased when he tried to pacify, cannot be held either as1955 rash or negligent act so as to attract the offence under s 285 of IPC .[81]So also the accused could not be prosecuted for a rash and negligent act, which is the basic requirement of offences alleged, merely because he was incharge of a section.[82]

Commentary under s 279 may be referred to.

5. 'Endanger Human Life'

Notes under s 279 may be referred to.

6. 'Hurt'

Section 319 and commentary thereunder may be referred to.

7. 'Injury'

The term 'injury' as used in this section, includes any harm illegally caused to the property of any other person, and is not confined to injury to the person only. While a marriage procession was going on, the accused, who was one of the members of the procession, used fireworks on the road, which burnt two bundles of straw with which a *mandap* (a temporary structure) belonging to the complainant was thatched, thereby causing him an injury. It was held that the accused was guilty under this section.[83] Where the accused was found smoking *bidi* close to half-pressed cotton bales lying close to the press house in the compound of a company, he was rightly convicted of negligent conduct with respect to fire or combustible matter causing thereby likelihood of injury to property.[84]

Section 44 and commentary thereunder may be referred to.

8. 'Knowingly or Negligently'

Notes under s 284 may be referred to.

9. 'Take such Order'

Notes under s 283 and 284 may be referred to.

10. 'Possession'

Notes under s 27 may be referred to.

11. Procedure

Same as in the case of an offence under s 284 .

12. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC, 1973 may be adopted:1956

I (*name and office of the magistrate etc*) hereby notice to you (*name of the accused*) as follows:

That you on or about the.....Day of.....at.....did..... (*name the act)* with fire (*or the combustible matter*) so rashly (*or negligently*) as to endanger human life (*or to be likely to cause hurt*) (*or injury*) to (*name the other person)* [*or knowingly (or negligently*)] omitted to take such order with fire (*or the combustible matter*) in your possession as was sufficient to guard against any probably danger to human life from such fire(*or the combustible matter*), and thereby committed an offence punishable under section 285 of the Indian Penal Code, within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

13. Proof

In order to support a conviction under this section, the following matters must be proved:

(i) rash or negligent dealing with fire;
(ii) the rashness or negligence must be such as:

(a) endangers human life; or
(b) is likely to cause hurt or injury to any other person; or

(iii) there must be found intentional or negligent omission in dealing with fire to guard against probably danger to human life.[85]

In order to sustain a conviction under the above section, there must be evidence of rashness or of negligence of the accused.[86] It ought to be proved that on the part of the accused there was criminal negligence, as taking no proper precautions after discovering the fire.[87]

14. Conviction

In view of the provisions of s 221(2), CrPC 1973, an accused can be convicted under the first part of this section even if he has been charged only under s 435, IPC .[88]

15. Sentence

Where, due to the negligent act of the accused, fire breaks out in a factory, resulting in the death of

seven persons, maximum punishment of six months' rigorous imprisonment to the accused cannot be said to be severe.[89]1957

70 *Queen-Empress v Krishna* Ratanlal Un Cas 134.

71 *Rabindra Agarwal v State of Jharkhand* (2010) 126 FLR 580 (Jhar) .

72 *Komaraswami v State* (1966) 1 Mad LJ 385, p 386, (1966) Mad LW (Cr) 176 .

73 *Queen-Empress v Krishna* Ratanlal Un Cas 134.

74 Re *Natha Lalla* 5 BHCR 67.

75 *R v Lister* 26 LJMC 196 .

76 *R v Lister* (1857) D&B 20 LJMG 196.

77 *Queen-Empress v Hari* Ratanlal Un Cas 126.

78 Re *Mi On*(1872-92) LBR 134.

79 Re *Nga Sein*(1872-92) LBR 569.

80 Re *Nga Bo Gale*(1899) LB 628.

81 *Madhusudan v State of Karnataka* 2011 Cr LJ 215, p 220 (Kar) (DB), 2010 (4) KCCR 2841 .

82 *Mehrajuddin v State of Madhya Pradesh* (1990) Cr LR (MP) 245 .

83 Re *Natha Lalla* 5 BHCR 67 (Cr).

84 *Queen-Empress v Krishna* Ratanlal Un Cas 134.

85 Re *Nga Cho*(1872-92) LBR 411.

86 Re *Nga Ya Po*(1872-92) LBR 337.

87 Re *Ngaka* (1902-03) 1 UBR, Penal Code 7.

88 *Komaraswami v State* AIR 1966 Mad (Cr) 176, (1966) 1 Mad LJ 385 .

89 *Kurban Hussain Mohamedalli Rangawalla v State of Maharashtra* AIR 1965 Bom 1616, p 1618, (1965) 2 Cr LJ 550 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 286.

Negligent conduct with respect to explosive substance.--

Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

This section provides for the punishment of a person who does any act with an explosive substance so rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any person, or who knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against probable danger to human life from that substance.[90]

The preceding section dealt with 'negligent conduct with respect to fire or combustible matter' and this section deals with negligent conduct with respect to explosive substance. Otherwise in other respects, the provisions of both the sections are identical.

Whilst this section deals with rash or negligent conduct in respect of an 'explosive substance' (quite irrespective of any consequence of such conduct), mischief caused by an explosive substance is punishable under ss 435, 436 or 438, IPC, as the case may be, and the manufacture, possession, use, sale, transport and importation into India of such substances, is regulated by the Explosives Act 1884 (Act 4 of 1884), which is a penal Act, and the intentional causing, by an explosive substance, of 'an explosion of a nature likely to endanger life or to cause serious injury to property, whether any injury to person or property has been actually caused or not', or an attempt or abatement of such is punishable under the Explosive Substances Act (Act 6 of 1908).

2. Analogous Law

The provisions of this section are analogous to the English rule of common law, under which erecting gunpowder mills, or keeping gunpowder magazines near a town is a public nuisance at common law.[91]1958

3. Offence may be Committed in Two Ways

The rash or negligent conduct in regard to an explosive substance which is punishable under this section may take either of the two forms:

(i) an act done with such substance, which either endangers human life, or is likely to cause hurt or injury to any other person;
(ii) an omission (intentional or otherwise) to guard against a probably danger to human life, arising from such substance in the possession of the accused.

4. Extent of Liability under First Part of the Section

Like the last two sections, this section also has two parts. The first part deals with dangerous acts and the second with illegal omissions. The first part of the section is not confined to cases where the explosive substance is in possession of the accused at the time of the injury. It applies also to a case where the injury takes place after it left his possession and while it is being conveyed to its destination

where it was sent by the accused without packing it properly.[92]

5. 'Explosive Substance'

This term is not defined in this Code, but according to s 4(d) of the Indian Explosives Act 1884, as substituted by the Indian Explosive (Amendment) Act 1978 (32 of 1978), 'explosive' means gunpowder, nitroglycerine, nitroglycol, gun-cotton, di-nitro-toluene, tri-nitro-toluene, picric acid, di-nitro-phenol, tri-nitro-resorcinol (styphnic acid), cyclo-trimethylene-tri-nitramine, penta-erythritol-tetranitrate, tetryl, nitro-guanidine, lead azide, lead styphynate,fulminate of mercury or any other metal, diazo-di-nitro-phenol, coloured fires or any other substance whether a single chemical compound or a mixture of substances, whether solid or liquid or gaseous used or manufactured with a view to produce a practical effect by explosion or pyrotechnic effect; and includes fog-signals, fireworks, fuses, rockets, percussion-caps, detonators, cartridges, ammunition of all descriptions and every adaptation or preparation of an explosive as defined in this clause.[93]

According to s 2(a) of the Explosive Substances Act 1908, 'explosive substance' shall be deemed to include any material for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement. The term 'explosive substance' as used in s 4(b) of the said Act includes any part of any apparatus, machine, or implement intended to be used or adapted for causing or aiding in causing any explosive in or with any explosive substance; also any part of any such apparatus, machine or implement.[94]

A Part of Vessel may be Explosive Substance

The definition is of wide generality, and in the case of *Rex v Charles* ,[95] it was ruled that any part of a vessel which, when filled with an explosive substance, or adapted1959 for causing an explosion, is itself an explosive substance within the statute. The articles found with the accused in that case were a lead bolt, a fuse, a brass bolt, a screw, a brass casting, and evidence was given to show that these were various parts of a vessel, which when filled with chlorate of potash or other explosive substance, formed a bomb of a highly dangerous character.[1]

6. Revolver or Gun, if an Explosive Substance

It has been held by the Madras High Court in *Kasia Pillai*'s case that a loaded revolver is not an 'explosive substance',[2] but the fireworks are.[3]

A contrary view has also been expressed and it has been held that a revolver, loaded or unloaded, is clearly an 'explosive substance' within the definition cited above in the undermentioned cases.[4] The view of the Madras High Court in *Kasia Pillai* also did not find favour with the Bombay High Court.[5] However, firing a loaded gun may come under s 286, IPC .[6]

7. 'Rashly or Negligently'

In a Madras case,[7] it was held that causing of hurt by negligence in the use of a gun would fall within the purview of s 337, and this section is not intended to apply to such a case. But whether the offence falls under this section or s 337, to sustain a conviction, it is necessary for the prosecution to prove affirmatively that the accused had been guilty of culpable rashness or negligence. Where the accused was out shooting with some friends and a pellet from his gun lodged in the thigh of the complainant, who was at work in the corner of his field, there was no evidence of the rashness or negligence on the part of the accused, but the magistrate inferred negligence from the fact that the accused fired the gun and the complainant was injured thereby, coupled with the fact that in the month of July people are out working in their fields, it was held that there being nothing on the record to show at what distance the accused was from the complainant, when he fired or even that the complainant was in the direct line of fire, and it was quite possible that the complainant was injured by a stray pellet accidentally

deflected from its course, rashness or negligence was not proved, and the conviction was quashed.[8]

It is difficult to see how it is possible to contend, if the accused did fire the gun, and he fired the gun in that particular spot, it could be anything but a rash and negligent act.[9] Notes under s 279 may also be referred to.

8. 'So as to Endanger Human Life'

Under the first part of the action which deals with dangerous acts the substance need not necessarily be in the possession of the accused at the time of the injury (if any),1960*e.g.*, to dispatch fireworks, carelessly packed in a country cart, would be an offence under the section.[10]

Under the second part of the section, the explosive substance must be in the possession of the accused at the time of his omission to safeguard it.

Notes under s 279 may be referred to.

9. Bomb Explosion in Bus

There was explosion of a bomb kept inside a passenger bus which caused the death of one passenger and injuries to several passengers. The prosecution witnesses identified the accused appellant. There was enough material to connect the accused appellant with the heinous crime of planting a live bomb in a passenger bus and getting down from the same before the bomb exploded, thereby causing death of one person and grievous injuries on several other passengers. The accused appellant was convicted for offences under ss 285, 337, 338, 427 and 302, IPC and s 3 of the Explosive Substances Act .[11]

10. 'Hurt'

Notes under s 319 may be referred to.

11. Injury'

Injury means any harm illegally caused to the body or to the property of another. Notes under s 44 may be referred to.

12. 'Knowingly or Negligently'

The word 'knowingly' is evidently used here advisedly and the word 'intentionally' advisedly avoided. Whatever distinction there may be between 'knowingly or negligently' and 'rashly or negligently' it must be assumed that the former is purposely used in this part of the section while 'rashly' is used in the first clause, consciousness is involved in both, while intention is not. If a person omits to take precautions in respect of explosives in his possession sufficient to guard against any probable danger to human life, being conscious of the probability of danger resulting from such omission, he 'knowingly' does that which under this section renders him liable to punishment. If a person omits to take such precautions without such consciousness, he is liable, by reason of his negligence, if he has not exercised the caution incumbent on him, and which, if he had exercised it, would have created in him the consciousness that his omission was likely to cause danger.[12]

13. 'Take such Order'

A, having returned from watching his crops, placed a loaded gun with its hammer down on the cap, on a cot outside his house, and went away for a short time. *B*, a neighbour's child, played with the gun, which went off and killed *B*. *A* was held not1961 guilty under this section, he having taken order

sufficient to guard against any probable danger.[13]

Notes under s 283 may be referred to.

14. 'Possession'

Notes under s 27 may be referred to.

15. 'To Guard against any Probable Danger to Human Life'

Unless it is established that danger to human life was a probable consequence of the omission, the offence under this section is not established.[14]

16. Procedure

The same as in the case of an offence under s 284 .

Where the crakers were burst and they damaged the eyes of victim in the year 1995, the challan was filed in the year 2006, prosecution was filed beyond the period of limitation prescribed by s 468(2)(c), CrPC, the criminal proceedings were quashed.[15]

17. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC, 1973 may be adopted:

I (*name and office of the magistrate etc)* hereby notice to you (*name of the accused)* as follows:

That you on or about the.....day of....., at....., acted with.....(*name the explosive substance)* so rashly (*or negligent*ly) as to endanger human life, (*or to be likely to cause hurt or injury to*) (*name of the person)* [*or knowingly (or negligently*) *omitted to take such order with (name the explosive substance) in your possession as was sufficient to guard against any probable danger to human life from*.....(*name the explosive substance*)], and thereby committed an offence punishable under section 286 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

18. Proof

To establish an offence under this section, prove the points, as mentioned in the last section, substituting 'explosive substance' for 'fire or combustible substance'.1962

A conviction under this section can be based solely on the basis of a dying declaration if the court believes the same to have been truthfully recorded by a reliable person.[16]

90 *Emperor v Abdus Sattar* 28 ILR All 264 .

91 *Russel on Crime*, p 1617.

92 Re *Anantanarayana Patter* 1 Weir 236.

93 Section 4(d), Indian Explosives Act 1884, as substituted by the Indian Explosive (Amendment) Act 1978 (32 of 1978).

94 Section 2, Explosive Substances Act 1908.

95 *Rex v Charles* (1992) 17 Cox CC 494 .

1 *Amritala Hazra v Emperor* AIR 1916 Cal 188, p 203, 16 All LJ 497 .

2 Re *Kasiya Pillai* 1 Weir 235.

3 Re *Anantanarrayana Patter* 1 Weir 236.

4 *Queen-Empress v Gorla Chenchugadu* 8 ILR Mad 42, 1 Weir 233 ; *Emperor v Abdus Sattar* 28 ILR All 464, (1906) 3 Cr LJ 363 .

5 *Krishnaji Vitthal v Emperor* AIR 1949 Bom 29 .

6 *Ibid*.

7 Re *Kasiya Pillai* 1 Weir 235.

8 *Emperor v Abdus Sattar* 28 ILR All 464, (1906) 3 Cr LJ 363 .

9 *Ibid*.

10 Re *Anantanarayana Patter* 1 Weir 236.

11 *D Dandasi Reddy v State of Orissa* 2009 Cr LJ 4400, p 4404 (Ori) (DB), CLT (2009) Supp Crl 1246 .

12 *Queen-Empress v Golla Chenchugadu* 8 ILR Mad 421 .

13 *Queen-Empress v Golla Chenchugadu* 8 ILR Mad 421 .

14 *Queen-Empress v Golla Chenchugadu* 8 ILR Mad 421 .

15 *T Amudha Sidhanathan v Union Territory, Chandigarh* 2008 Cr LJ 942 (P&H), 2008 (1) RCR (Criminal) 628 .

16 *Asruf Ali v State of Orissa* (1989) 67 CLT 464, 468, P 469 **following***Dalip Singh v State of Punjab* AIR 1979 SC 1173,

relying on*Ramawati Devi v State of Bihar* AIR 1983 SC 164 ; *Balak Ram v State of Uttar Pradesh* AIR 1974 SC 2165 ; *Munnu Raja v State of Madhya Pradesh* AIR 1976 SC 2199 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 287.

Negligent conduct with respect to machinery.--

Whoever does, with any machinery, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

The preceding section dealt with negligent conduct with respect to explosive substances while this section deals with negligent conduct with respect to machinery. In other respects both the sections are alike.

In *Benu Krishna Mandal v State of Bihar* ,[17] when the cooling tower was being lifted on the roof of the main building by a pulley, chains, *ballis* and ropes *etc*, the rope suddenly broke away and one labourer fell down and sustained injuries and later succumbed to the injuries. The factory inspector on inquiry was satisfied that the pulleys, chains *etc*, used for the purpose were sufficient and capable of lifting weight many times more than the registered weight of the tower and there was nothing specific to show that the accused had any hand in the alleged incident, the proceedings, against the accused persons for offences under ss 287, 288, 337, 120B, IPC, were quashed by the High Court in exercise of its powers under s 482, CrPC .

Where the impugned act is covered by the provisions of the Factories Act, prosecution would not be launched under s 287, IPC .[18]1963

2. Sections 287 and 304A --Distinction

Where negligent conduct with respect to machinery results in the death of a human being, the question arises whether the offence falls under s 304A, IPC or under this section. Section 304A , applies only to such acts of the accused as are rash or negligent and are directly the cause of the

death of another person. Where the victim has no right to go near the machinery and it is never contemplated by the accused that any injury would be caused to him, nor is it his intention to cause any injury, the offence would fall under this section and not under s 304A .[19]

3. 'Whoever'

An employer who employs a competent engineer and does not fetter his discretion by instructions, is not criminally responsible for accidents.[20]

4. 'Act'

Notes under s 32 may be referred to.

5. 'Rashly or Negligently'

Notes under s 279 may be referred to.

6. 'Endanger Human Life'

Notes under s 279 may be referred to.

7. 'Hurt'

Notes under s 319 may be referred to.

8. 'Injury'

Notes under s 44 may be referred to.

9. 'Knowingly or Negligently'

Notes under s 286 may be referred to.

10. 'Take such Order'

In relation to machinery the order usually taken is to fence it.[21] A person may be guilty of an offence under this section although the person injured might not, by reason of his contributory negligence, be able to recover damages. It is to the interest of the State that machinery should be safe for negligent as well as careful people.[22]The hand of the victim was crushed while he was repairing conveyor belt. No negligence or overt act was attributed to the petitioner. It was also not the case that1964 the petitioner had not taken care/steps against the probable danger. No case under s 287 or s 304A, IPC against the petitioner was made out.[23]

Notes under s 286 may be referred to.

11. 'Possession'

Section 27 and the notes thereunder may be referred to.

12. 'Or under his Care'

In s 283 the expression used is 'under his charge'. The engineers[24] and mechanics,[25] employed in a mill may be said to have the machinery under their care.

Sleeping Partner not Liable

Where two partners took a lease of a mill, but one of them took no active part in the management of the mill which was left to the other partner, it was held that he could not be held liable under this section, for an accident due to the negligent conduct of the other partner with respect to the machinery in the mill.[26]

13. To Guard against any Probable Danger

What the section punishes is omission to take such order with the machinery as is sufficient to guard against any probable danger. The section does not say any possible danger; the owner is not required to provide perfect security against every possibility of danger. However remote, he ought to take reasonable precautions and so much care as insufficient to guard against such danger as can be expected within the bounds of probability.[27]

14. Procedure

The offence under this section is not cognisable. A summons shall ordinarily issue in the first instance. It is bailable but not compoundable. It can be tried by any magistrate and can also be tried summarily.

The limitation prescribed for taking cognizance of this offence is one year.

15. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC 1973 may be adopted:

I (*name and office of the magistrate etc*) hereby notice to you (*name of the accused*) as follows:

That you on or about the.....day of.....at.....acted with.....(*name of the machinery*) so rashly (*or negligently*) as to danger human life, (*or to be likely to cause hurt*) (*or injury*) (*name the person*) (*or knowingly or negligently)* omitted to take such order with (*name the machinery*) in your possession as was sufficient to guard against any probable danger to human life from the said machinery; and thereby committed an1965 offence punishable under section 287 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

16. Proof

In the case of an offence, under the first part of the section, the prosecution has to prove that:

(i) the accused committed some act with a machinery;
(ii) he did it rashly or negligently; and
(iii) his rashness or negligence was such as to endanger human life or to be likely to cause hurt or injury to any other person.

In the case of an offence under the second part of the section, the prosecution must prove that:

(i) the accused was in possession of some machinery, or the same was under his care;
(ii) he omitted to take such order with it as was sufficient to guard against any probable danger to human life therefore; and
(iii) the accused so omitted to do so knowingly or negligently.

17 *Benu Krishna Mandal v State of Bihar* (2001) III CCR 447(Pat).

18 *Binod Kumar Mittal v State of Jharkhand* 2013 (4) Crimes 134 (Jhar) .

19 *Mohri Ram v Emperor* AIR 1930 Lah 453, p 454, 31 Cr LJ 533 ; *Jiwan Lal v Devi Luhar* (1970) 19 Jab LJ 161 .

20 *R v Kanhaya Lal* (1906) 4 Cr LJ 279, 8 PR (Cr) 1906 .

21 *Indemaur v Dames* LR 2 CP 311 ; *Britton v GW Cotton Co* LR 7 Ex 130 .

22 *Balenkinsop v Ogden* (1893) LR 1 QB 783 .

23 *Raj Kumar Bansal v State of Jharkhand* 2012 Cr LJ (NOC) 554 (Jhar) .

24 *R v Kanhaya Lal* (1906) 4 Cr LJ 279 .

25 *Mohd Ram v Emperor* AIR 1930 Lah 453, (1930) 31 Cr LJ 553 .

26 *Mohd Ram v Emperor* AIR 1930 Lah 453, (1930) 31 Cr LJ 553 .

27 *Mulraj Dhir v Emperor* AIR 1930 Pat 507 -08, (1930) 31 Cr LJ 1232.

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 288.

Negligent conduct with respect to pulling down or repairing buildings.--

Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

This section deals with negligent conduct with respect to pulling down or repairing a building. It contemplates only an omission and not a positive act, to safeguard against probable danger to human life. If the building is situated on public way and the omission to take order with it causes danger to any person, s 283, IPC, and not this section, will apply.1966

What the section requires is that the accused must knowingly or negligently omit to take such orders with the building as is sufficient to guard against a probable danger to human life 'from the fall of that building or of any part thereof'. Hence, the injury, complained of must be the consequence of the fall of the building or any part thereof. A worker, throwing a brick negligently, may be responsible for his rash or negligent act, but a contractor who has engaged a worker in a work of construction, cannot be held guilty of omitting to take such order as is sufficient to guard against a probable danger to human life from the fall of a building or any part thereof if the injury is caused not because the building, or any part thereof, fell, but because the worker threw a brick carelessly or negligently.[28]

2. 'In Pulling Down or Repairing'

The collapse of a house not undergoing such operations, as mentioned in this section cannot come under this section.[29]

A close reading of the s 288, IPC would show that the starting point of the offence is the pulling down of a building or part thereof or repairing the same. It is while pulling down or repairing is in process that offence contemplated by the section can take place. The offence lies in the one who pulls down or the repairer who, knowingly or negligently omitted to do certain things. What the section requires the one who pulls down or the repairer to do is 'to take such order with that building'. These words imply no more than the taking of such steps with reference to the building. The purpose of taking the said steps is, to guard against any probable danger to human life. The need to guard against the probable danger of human life is from the fall of the building or any part thereof. The offence can be committed only while the building is being pulled down or repaired. Once the pulling down or repairing is completed, the offence cannot be committed regardless of the deficiencies in the carrying out of repairs.[30]

For Scaffolding put by Contractor/Labourers Owner of Building is not Liable

Section 288, IPC concerns itself with a situation where a person, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or any part thereof. The scaffolding put up by the contractor and/or the labourers themselves cannot fall within the sweep of this section when the owner of the building had assigned the job of plastering to the contractor and/or the labourers and there was nothing else left for him to do. Therefore, it cannot be construed that he knowingly or negligently omitted to take such order as is required under s 288, IPC . Accordingly, the ingredients of s 288 are not made out against such owner.[31]1967

3. 'Knowingly or Negligently'

Notes to s 286 may be referred to.

4. 'Such Order with that Building as is Sufficient'

The degree of precaution required by this section varies with the actual necessity of the situation of the case. If a dilapidated building is situated in a populous place more care will be needed than where the building under the same circumstances stands in a desired place.

5. Procedure

The same as in the case of an offence under s 287 .

6. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC 1973 may be adopted:

> I (*name and office of the magistrate etc*), hereby notice to you (*name of the accused*) as follows:
>
> That you on or about the.....day of....., at....., by pulling down (*or repairing*) (*name the building*) knowingly (*or negligently*) omitted to take such order with (*name the building*) as was sufficient to guard against any probable danger to human life for the fall of (*name the building*) (*or of any part thereof*), and thereby committed an offence punishable under section 288 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried for the said offence.
>
> Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

7. Proof

To establish an offence under this section it will have to be proved that:

(i) the accused was pulling down or repairing a building;
(ii) in doing so he omitted to take such order therewith as to guard against any probable danger from the fall of the building or any part thereof; and
(iii) the accused omitted to do so knowingly or negligently.

28 *Manohar Shrinlwas Montri v Avtar Singh Ganga Singh* (1970) 72 Bom LR 629, (1970) Mah LJ 890 .

29 *Jeuchand v Thakar Bawa* (1904) 1 Cr LJ 488, 14 KLR 19 .

30 *Vijayak Laxman Vartak v Laxmidas Ganatra* (1991) Mah LJ 1201, p 1203 .

31 *Abdul Kalam v State (Govt of NCT of Delhi)* (2006) Cr LJ 3071 (Del) .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 289.

Negligent conduct with respect to animal.--

Whoever knowingly or negligently omits to take such order with any animal in his possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal, shall be punished with imprisonment of either description for a term which may

extend to six months, or with fine which may extend to on one thousand rupees, or with both.1968

Comments

1. Scope

The section deals with improper or careless management of animals. The section refers to animals in possession and of probable danger to human life or of causing grievous hurt.[32] It applies to all animals whether wild and ferocious or domestic.

Like the previous one, this section also deals with criminal omissions and not with positive acts.

2. Essential Ingredient

The essential ingredient of the offence under this section is that there should be probable danger to human life or limb from the negligence of the accused in not managing his animal.[33]

3. Section 289 and Section 323

If in a case falling under this section simple hurt is caused by the animal, the conviction of the accused should be under this section and not under s 323 .[34]

4. 'Whoever'

It is not only a servant, who is actually in charge of an animal, but the master also may be held liable under this section. When an old woman was gored to death by a buffalo, not only the herdsman who was in charge of the animal, but also the master was held liable under this section as the buffalo was known to be a dangerous animal which had attacked several persons, and no special precautions were taken regarding it.[35]

5. 'Knowingly or Negligently'

The offence under this section consists principally in a 'knowing or negligent omission' and not merely in an omission, which is no offence under the Indian Penal Code .[36] The principal point to be considered under this section will be the knowledge that the accused had of the dangerous propensities of the animal. Where the very nature of the animal gives him warning, his knowledge will be assumed; as, for instance, if a person were to make a pet of a tiger, or a bear. Otherwise, express1969 knowledge will have to be shown, in order to involve the necessity of unusual caution. Where injury is done by a horse, a pony, a bull, or a dog, and it is not shown that the animal was peculiarly vicious, or that his vice was known to his master, no indictment could be maintained, unless he had neglected the ordinary precautions employed by everyone who uses such animals. But if the animal had shown a savage disposition to the knowledge of the owner, it would not be necessary to show that he had actually injured anyone. In considering the knowledge of the master, it is material to inquire what knowledge as to the dangerous propensities of the animal was possessed by his servants. Their knowledge will not necessarily be imputed to him, but it will be a question for determination whether the persons who received actual notice of such facts stood in such a relation to the accused that it was their duty to communicate the notice to him, and whether in fact they did communicate it.

Negligence to be Inferred under the Rule of Civil Law in Certain Cases

Where the animal is known to be mischievous, or is of the class of undomesticated animals, which from their very nature are dangerous, though capable of being brought under a certain degree of

subjection, the rule of civil law seems to be to infer negligence absolutely, from the mere fact that an injury has followed. Where the injury arose from a savage, the conclusion to be drawn from an examination of all the authorities appears to be this, that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril; and that if it does mischief, negligence is presumed, without express averment. The negligence is in 'keeping such an animal after notice'.[37] This case was followed, and the general principle approved, where the injury was caused by an elephant which was being exhibited by the defendants.[38]

Presumption of Negligence in certain Cases

In the case of a ferocious animal it is quite clear that to allow it liberty is in itself likely to cause danger to human beings. But in the case of a dog, it must be shown that it is likely to bite human beings. There is no presumption in the case of an ordinary domestic dog that it is likely to bite human beings. There are many dogs that are likely and there are some dogs that are actually trained to do so. But it must be proved against the owner of the dog that this particular dog had a tendency or character of biting human beings.[39]

Case Laws on the Point Discussed

Before the owner or keeper of an animal can be convicted under this section, for negligence with respect to his animal, it must be made out that the animal was known to be ferocious, and that it was negligently kept. It is, however, not necessary to show that the animal had actually bitten or injured another person before it bit or injured the complainant; it would be enough to show that, to the knowledge of the owner, it had evidenced a savage disposition, *eg* by attempting to bite.[40] It must be shown that the accused knew that the animal was of a savage disposition as against human beings. A person cannot be convicted under this section merely because his buffalo1970 attacked and injured the complainant's buffalo.[41] The mere fact that a rope tied to a bullock when violently strained, broke, affords no proof of negligence.[42] Where the accused's bullock escaped from the herd, and straying into a hospital chewed some clothes, it was held that the omission of the accused to search for it in the hospital, which was close to his house and where he ought naturally to have suspected it would go, was not such negligence as to bring him within the provisions of this section.[43] The tethering of a horse in a narrow street where people cannot pass without going near the animal's hind legs is a negligent omission to take order with the animal sufficient to satisfy the requirements of this section.[44]

6. 'Omits to take such Order'

In order to convict a person of an offence under this section, it must be established in the affirmative that the accused knowingly or negligently omitted to take such order with the animal in question as was sufficient to guard against probable danger to human life or probable danger of grievous hurt from such animal. It should, therefore, be established in the affirmative that there was a probability that the animal would cause grievous hurt or danger to human life.[45] The degree of care or order, omission to take which is punishable under this section, differs in the case of different animals. There are some animals naturally so fierce that all persons acquainted with their habits are aware that danger to human life or risk of grievous hurt is the probable consequence of allowing them to be at large. There are other animals or which at least when domesticated, there is no probability of such danger or risk in allowing them to be at large even without a herdsman. As to animals of the latter class, there should be some evidence that the animal, of which the person in possession is charged with a conscious or negligent omission to take due order for its custody, is of an abnormally vicious disposition.

7. 'Any Animal'

This section does not refer to savage animals alone but to any animal.[46] For definition of 'animal' s 47 may be referred to.

8. 'In his Possession'

Section 27, IPC and the notes thereunder deal with the meaning and law of 'possession'. The only person liable under this section is the person who was in possession of the animal in question. The possession may be actual or constructive. An animal is not less in the actual possession of a servant because it is for some purposes in the constructive possession of his master.[47] Where a bull was set at large by the accused in accordance with a general practice of the Hindus and the accused had given up possession of the animal, the bull is no more in possession of the accused within the meaning of this section.[48] Where a bull let loose by the accused's father was ordered to be shot on its becoming vicious, it was held that merely1971 because the accused claimed the bull, he could not be convicted under this section, as it could not be said that the animal was in his possession.[49]

9. 'Probable Danger to Human Life or any Probable Danger of Grievous Hurt from such Animal'

To sustain a charge under this section there should be evidence not only of negligence but of such negligence as would probably lead to danger to human life or of grievous hurt.[50] It must be established in the affirmative that the accused knowingly or negligently omitted to take such order with the animal in question as was sufficient to guard against probable danger to human life or probable danger of grievous hurt from such animal.[51] The likelihood of the consequence must be determined by a deduction from facts, antecedent to the actual event and a man cannot be held criminally liable for a consequence of which so far as appears by the evidence, nothing had occurred to show the probability. Where a pony kicked a child on the road and the owner of the pony was convicted under this section, it was held that even assuming the negligence in keeping of the pony, there was no evidence in the case to show that such unsecure keeping would probably lead to danger to human life or of grievous hurt. If the pony had been proved to be vicious and the accused to be cognizant of the fact, there would have been evidence of the commission of the offence defined in the section.[52] But where the owner of the pony negligently omitted to fasten the animal securely, and it galloped through a crowded *bazaar*, it was held that the accused was liable under this section as the pony was galloping about loose. The *bazaar* was crowded with people and it is quite possible that a pony running away through a crowded *bazaar*, albeit a perfectly good-tempered beast on all ordinary occasions, would create a most probable danger to the lives or limbs of the men, women and children walking on the road.[53]

Where a bullock escaped by pure accident and it was not proved that the disposition of the bullock rendered any precautions necessary, it was held that the mere fact that the rope tied to the bullock, when violently strained, broke, would afford no proof of negligence, nor was there anything to show that the probable consequence of the negligence, even if it was assumed that there was negligence, would be danger to human life or danger of grievous hurt.[54] If a person allows his bull to be at large in spite of its vicious character, the presumption is that he did so with knowledge that there was probable danger to human life or limb.[55] The mere presence of stray cattle on a road at night cannot be said to involve probable danger to human life or grievous hurt within the meaning of this section.[56]

10. Procedure

It is the same as in the case of an offence under s 284 .1972

11. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC 1973 may be adopted:

I (*name and office of the magistrate etc*) hereby notice to you (*name of the accused*) as follows:

That you on or about the.....day of.....at..... knowingly (*or negligently*) omitted to take such order with a (*name the animal*) in your possession as was sufficient to guard against any probable danger to human life (*or any probable danger of grievous hurt*) from such (*name the animal*) and thereby committed an offence punishable under section 289 of the Indian Penal Code within the cognizance of this court.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

12. Proof

To establish an offence under this section, it will have to be proved that:

(i) the accused was in possession of an animal; and
(ii) he knowingly or negligently omitted to take such order with it as was necessary to guard against any probable danger to human life or of grievous hurt.

If the animal is not by nature, fierce or vicious, the onus of proving negligence is on the prosecution.[57]

32 *Queen-Empress v Lingappa* Ratanlal Un Cr Cas 606.

33 *Shivbharan Ayodhya Prasad v Emperor* AIR 1916 Bom 196(2), (1916) 17 Cr LJ 383 .

34 *Magistrate Shave Zin v Ma Po Nawe* AIR 1923 Rang 147, (1924) 25 Cr LJ 565 .

35 *Shamlay v Emperor* (1907) 6 Cr LJ 100, p 101 .

36 5 WR Cr (Letter) 8.

37 *May v Burdett* 9 QBD 112 .

38 *Mayne Criminal Law*, pp 626-27.

39 *Lachmi Narain v Emperor* AIR 1918 All 369(1), (1918) 19 Cr LJ 1 .

40 Re *Thankura Aung*1885 LBR 353.

41 *Queen-Empress v Sandu* Ratanlal Un Cas 197.

42 *Subbaraya Padayachi* 1 Weir 237; *Cox v Bandidge* 13 CBNS 430 .

43 *Queen-Empress v Lingappa* Ratanlal Un Cas 606.

44 *Mahommad Sadiq v King-Emperor* (1904) 1 Cr LJ 1059 .

45 *Ibid.*

46 Re *Chand Manal* 19 WR (Cr) 1.

47 *Queen-Empress v Natha Reva* Ratanlal Un Cas 163.

48 *King-Emperor v Shambu Dial* (1904) 1 Cr LJ 501 ; *Queen-Empress v Bandu* 8 ILR All 51 .

49 Re *Fatta*(1889) PR 32.

50 Re *Subbaraya Padayachi* 1Weir 237, 3 MHCR App 33.

51 *Mahommed Sadiq v King-Emperor* (1904) 1 Cr LJ 1059 .

52 Re *Subbaraya Padaychi* 1Weir 237.

53 Re *Chand Manal* 19 WR (Cr) 1.

54 Re *Subbaraya Padayachi* 1 Weir 237.

55 *Shivabarann Ayodhya Prasad v Emperor* AIR 1916 Bom 196(2), p 197, (1916) 17 Cr LJ 38 .

56 Re *Kasayi Ahmed* 1 Weir 238.

57 Re *Brojonarain Pubraj* 2 WR 51.

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

S. 290.

Punishment for public nuisance in cases not otherwise provided for.--

Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees.1973

Comments

1. Scope

This section only provides for punishment of the offence defined in s 268, IPC . The commission of a public nuisance as defined by s 268, and not made punishable by any other section in this chapter, is punishable hereunder. The section would not come into operation if the commission of a public nuisance falls within the scope of any particular section of this Code.[58] An action under this section does not lie for a private nuisance.[59]

2. 'Whoever'

A prosecution cannot be instituted against the chairman of a municipality under this section for keeping a rubbish depot in the neighbourhood of houses, but it should be against the municipal corporation.[60]

In some cases, undoubtedly, the agents themselves may be personally responsible for the crime. It is, however, a question of fact in each particular case whether the criminal act of the agent is the act of the corporation. In such a case, it depends upon the nature of charge and other relevant facts and circumstances.[61]

3. Public Nuisance

Section 268, IPC may be referred to.

4. 'Not otherwise Punishable by this Code'

Section 290, IPC, deals with punishment for public nuisance in cases not otherwise provided for. It deals with public nuisance causing under the four corners of the definition in s 268 of IPC but not punishable under any other section. These specific sections are ss 269 - 289 and ss 291 - 294, IPC .[62]

5. Intention not Necessary

A public nuisance may undoubtedly be caused without any deliberate intention of causing it and s 283 and indeed s 290 do not refer to the intention of the accused person. The obstruction may be caused by negligence and in nine cases out of ten it is so caused.[63]

6. Examples of Nuisance Dealt with and Illustrating Cases Falling under this Section

Fouling the water of a river, as contrasted with that of a public spring or reservoir under s 277 ;[64] causing an offensive (though not necessarily noxious) smell in a high1974 road from rotten bones or vegetable matter kept on private premises;[65] throwing dust and rubbish in the neighbourhood of houses, *ie*, a municipal rubbish heap,[66] though not if kept on the person's own premises, unless otherwise offensive to passer-by in a public place;[67] gambling in, and taking dangerous animals, such as fighting rams, about a market place;[68] gambling in the public streets,[69] but not in private houses;[70] encroaching upon or obstructing any part of the public highway, though it does not fall within s 283 ;[71] letting cattle loose at night so that they stray on the public roads, although this may not fall within s 283 ;[72] using vulgar language in public,[73] are all instances of nuisance punishable under this section.

The mere act of enclosing village and government land is not an offence under this section,[74] nor mere gambling.[75] Similarly, mere interruption at a public meeting,[76] or quarrelling in a public street in a village,[77] or stacking of logs on a space of seven feet on a 24 feet wide road in the absence of evidence of finding that the stacking caused injury, danger or annoyance,[78] non-payment of taxes,[79] would not constitute an offence under this section.[80]

Filing up the well from which the public at large were drawing water would clearly result in common injury to the public or to the people of the village who dwell or occupy the property in the vicinity of the well. The action of the petitioner complained of would clearly amount to an injury to the public in that it has deprived the inhabitants of the facility of drawing water from the well.[81]

In a case of public nuisance under this section, it must be proved that injury, danger or annoyance was caused either in regard to the enjoyment of property or the exercise of a public right on the part of a portion of the community or of any particular class of people. The fact that there is a special law to meet a particular offence, such as, cattle trespass, does not prevent the punishment of the offenders under this Code of an offence which could be rightly punished under it.[82]

Where on account of accumulation of dirty water causing health hazards, a complaint was filed against officers and employees of UPSIDC Ltd, main persons responsible for the flow of coloured and dirty water were owners of the saree printing units and not the accused officers and employees of UPSIDC Ltd. Allegations in the complaint did not show any specific act done by the accused persons to make them liable under ss 268, 278, 290, IPC . It was held that an administrative lapse on the part of the accused persons cannot amount to a criminal offence. Further, the accused1975 persons were not impleaded by name and were impleaded by posts held, it was not clear when the industrial area was established and who was responsible for the construction of roads and drainage system at the relevant time. During the intervening long period the concerned officers must have been transferred, it was held that the complaint suffered from technical defect and no criminal offence was made out against the accused persons, and hence, proceedings against accused persons under ss 268, 278 and 290, IPC, were quashed.[83]

7. When a Trade becomes Nuisance

The question whether a particular trade or business is or is not a nuisance can be determined only after taking into consideration a number of circumstances such as the place where it is located or carried on, the number of the people whose rights are prejudicially affected thereby and the extent of the injury, discomfort and annoyance caused to human beings.[84] Noise alone may constitute a nuisance.[85] A noisy trade can be dealt with as a public nuisance; but most of the decisions as to nuisance by noise or vibration are in actions for nuisance caused to individuals suffering particularly therefrom or under byelaws made by local authorities. It was held a public nuisance to make great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood.[86]

Nuisance includes Danger or Annoyance

Where a factory creates distressing noises and vibrations which render the occupation of the property in the neighbourhood unsafe and uncomfortable, the existence of the factory is a nuisance, for the expressions 'nuisance' includes every act or illegal omission which causes danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity. Although a person is at liberty to carry on any trade or business on property belonging to him, he has no right to do so if such trade or business deprives another of the reasonable and comfortable use of his property. Even a lawful trade would become a nuisance if it interferes with the comfort and enjoyment of the neighbours, and gives offence to their senses or obstructs the reasonable use of property.

A Lawful Trade may become Nuisance Afterwards

A particular trade or business may be lawful to start with but may become a nuisance, as by reason of changed circumstances such as the growth of population.

No Prescriptive Right to Maintain Nuisance

The mere fact that a factory was allowed to operate for several years without any objection having been raised by the neighbours would not render its owner immune from punishment if it is found that

its existence constitutes a nuisance to the people of the neighbourhood. It has been held repeatedly that no prescriptive right can be acquired to maintain, and no length of time can legalise a public nuisance.[87]1976

Determination of Nuisance

The question whether a particular trade or business is or is not a nuisance can be determined only after taking into consideration a number of circumstances such as the place where it is located or carried on, the number of people whose rights are prejudicially affected thereby, and the extent of the injury, discomfort and annoyance caused to normal human beings.

8. Principal and Agent--Owner's Liability for Nuisance Caused by Occupier of Premises

The general rule is that a principal is not criminally answerable for the acts of his agent. Speaking generally the person liable, where the user of premises gives rise to a nuisance, is the occupier for the time being whoever he may be.[88]

Where the accused, the manager of a school, had a building put up at a cost of Rs 35,000 employing masons therefor and the masons constructed the same with excess of sand in the mortar, the building collapsed killing several inmates, on these facts, the Madras High Court held that it was not the case of the prosecution that the accused himself constructed the building, it was not disputed that he sought the assistance of the masons and the masons constructed the building, if the masons had not done the work properly and if they had been negligent in mixing the lime mortar in proper proportions, the accused could not be made liable for the negligence of those persons who actually constructed the building who were supposed to be skilled. The accused was a layman, he, therefore, could not be held liable for the negligence of the persons who actually constructed the building, which is the *causa causans* for the collapse of the building. The acquittal of the accused by the sessions court in appeal for offences under ss 304A, 337, 338 and 290, IPC, was found proper.[89]

9. Procedure

The offence under this section is non-cognizable. A summons shall ordinarily issue in the first instance. It is a bailable offence but not compoundable and is triable by any judicial magistrate and also summarily.

The limitation prescribed for taking cognizance of this offence is six months.

10. Sanction--Whether Necessary

Sanction under s 197, CrPC, is necessary for prosecuting public servants for omitting to perform certain functions which they are expected to perform as such public servants.[90]

Even against others, where the right of filing a private complaint for an offence under this section is clearly there but by the special Acts. The right has been subjected to the restriction on the lines of s 197, CrPC and previous written sanction of the state board *etc*, has been made a condition precedent to the cognizance of the offences being taken by courts; the prosecution will not be without such previous sanction in writing. This safeguard has a rational basis. Without it industrialists could1977 be vexed day in and day out by being dragged to criminal courts for a variety of reasons even unconnected with the indication of law.[91]

11. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC 1973 may be adopted:

I (*name and office of the magistrate etc*) hereby notice to you (*name of the accused*) as follows:

That you on or about the.....day of...at.....committed.....which is a public nuisance and thereby committed an offence punishable under section 290 of the Indian Penal Code, and within the cognizance of this Court.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

12. Alteration of Charge

Section 216 of the Code of Criminal Procedure 1973 deals with alteration of a charge, but it requires that the alteration shall be read and explained to the accused. The accused must know what he is charged with and to what offence he has to answer. Section 221(2) of the CrPC, must be read with s 216 of that Code. A court cannot convict an accused person of an offence of which he has not been told anything. When the accused has no opportunity to meet the charge and he did not even know of it till his conviction, it is not only an irregularity but an illegality which cannot be cured.[92]

13. Proof

To establish any offence under this section, the prosecution must prove that:

(i) the accused did an act or was guilty of an illegal omission;
(ii) such act or omission caused injury, danger, or annoyance;

(iii) such injury, danger, or annoyance was common to the public or the people in general who dwell or occupy in the vicinity;

or

(i) the accused did an act or was guilty of an illegal omission;
(ii) the act or omission in question was likely to cause injury, obstruction, danger, or annoyance, to persons who may have occasion to use any public right.[93]

Utterance of certain words by the accused to his brother during cross-examination before the Land Tribunal but there was no quarrel between them, such utterance even if true, does not constitute the offence of public nuisance as defined under s 268, IPC, and made punishable under s 270, IPC .[94]1978

14. Conviction

The essential elements, constituting offences under ss 290 and 323, IPC, are different. Hence, where an accused has been charged under s 290, IPC, he cannot be convicted under s 323, IPC .[1] The ingredients of an offence under s 160, IPC, are also totally different from the ingredients of an offence under s 290, IPC and it is doubtful whether a person charged under s 160, IPC, could ever be convicted under s 290, IPC .[2]

Playing of the radio loud at a particular time did not constitute public nuisance. It was also too trivial for being pursued in a court of law. The conviction under s 290, IPC was, therefore, set aside.[3]

15. Sentence

Imprisonment in default of payment of a fine under this section must be simple only[4] but the Madras High Court has held that it is not restricted to simple imprisonment.[5]

58 *R v Madho Ram* (1906) 4 Cr LJ 492, 26 All WN 317 ; Re *Kasayi Ahmed* 1 Weir 238; *Santhosh & Ors v State of Kerala & Anor* (1985) Cr LJ 756(Ker).

59 *Berhampur Municipality through the Executive Officer v Orugunti Kondaya* (1977) Cut LR (Cr) 267, p 271 .

60 Re *Chairman of the Municipal Council, Ellore* 1 Weir 243.

61 *Kurnool Municipality v Civic Association* (1973) Cr LJ 1227 ; *Bhuban Ram v Bibhuti Bhushan Biswas* AIR 1919 Cal 539, p 540, (1918) 19 Cr LJ 915 .

62 *Santhosh v State of Kerala* (1985) Cr LJ 756(Ker).

63 *Ram Krishan v Emperor* AIR 1935 All 746 .

64 *R v Nama Rama* (1904) 1 Cr LJ 6, 6 Bom LR 52 .

65 *Guj Berckesfeldt v R* 34 ILR Cal 73, 1 Weir 243, (1906) 5 Cr LJ 45 .

66 Re *Vasudeva Chetti* 1 Weir 240.

67 Re *Kuppa Pillai* 1 Weir 241.

68 Re *Bethan Chette* 1 Weir 242; Re *Rajah Sahib* 1 Weir 243.

69 Re *Mala Obigadu* 1 Weir 239.

70 Re *Managil Kuruvan* 1 Weir 240; *Queen-Empress v Thandavarayadu* 1 Weir 241 .

71 *R v Madho Ram* (1906) 4 Cr LJ 492, 26 All WN 317 .

72 Re *Kasayi Ahmed* 1 Weir 238.

73 *Saramma Zacharia v State* AIR 1953 Tr & Coch 43, p 44, (1953) Cr LJ 288.

74 Re *Anthony Udayan* 1 Weir 245; Re *Nevor Parivatappa* 1 Weir 245, p 246.

75 Re *Mangil Kamran* 1 Weir 241.

76 *KGS Nair v State of Kerala* (1961) KLT 110, (1962) Mad LJ (Cr) 185 .

77 Re *Govinda*AIR 1959 Mad 513, (1959) Cr LJ 1440 .

78 *Moochla Naik v State* AIR 1967 Ori 36, 37, (1967) Cr LJ 393 .

79 *Sheo Narain Lal v AN Rastogi* AIR 1964 All 16, p 17, (1964) 1 Cr LJ 24(1).

80 *Jatindra Nath v Manindra Nath* AIR 1950 Cal 330, p 331, (1950) 51 Cr LJ 1241 .

81 *Bhagwant v Sub-Divisional Magistrate, Hata* (1986) All LJ 1388 .

82 *Onooram v Lamessor* (1868) 9 WR (Cr) 70 .

83 *UPSIDC Ltd v Krishna Murari* (1999) III CCR 105(All).

84 *Kirori Mal Bishamber Dayal v State* AIR 1958 Raj 11, (1958) Cr LJ 91 .

85 *Crown v Lambert* (1867) LR 3 Eg 409 .

86 Russell on *Crime*, eleventh edn, p 1609.

87 *Kirori Mal Bishambar Dayal v State* AIR 1958 Punj 11, (1958) Cr LJ 91 .

88 *Bhuban Ram v Bibhute Bhushan Biswas* AIR 1919 Cal 539, p 540, (1918) 19 Cr LJ 915 .

89 *Public Prosecutor v Pitchaiah Moopanar alias Pitchaiah Pillai* AIR 1970 Mad 198, (1970) Cr LT 705 (Mad) .

90 *Captain Shankarrao Mohite v Burjoi D Engineer* AIR 1962 Bom 198, (1962) 2 Cr LJ 320 .

91 *Babulal v Shree Aditya Birla* (1986) 1 Crimes 249, 254 (MP) .

92 *Raghunath Kandu v Emperor* AIR 1926 All 227, 228, (1926) 27 Cr LJ 152 .

93 *Onooram v Lamessor* (1868) 9 WR (Cr) 70 .

94 *S Venkataramaih v State* (1989) Cr LJ 789(Kant).

1 Re *Gangasingam*(1969) LW (Cr) 201, (1970) 1 Mad LJ 242; Re *Govinda*AIR 1959 Mad 513, p 514, (1959) Cr LJ 1440 .

2 Re *Govinda*AIR 1959 Mad 513, p 514, (1959) Cr LJ 1440, (1959) Mad LJ (Cr) 346 .

3 *Ivour Heyden & Ors v State of Andhra Pradesh* (1984) Cr LJ (NOC) 16 (AP) .

4 *R v Santubin Lakhappa* 5 Bom HCRCC 45 ; Re *Mala Obigadu* 1 Weir 259.

5 *Queen v Yellamandu* ILR 5 Mad 157 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and

Morals

S. 291.

Continuance of nuisance after injunction to discontinue.--

Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

Comments

1. Scope

This section punishes repetition or continuance of a nuisance after an injunction to discontinue. Section 143 of the CrPC provides for the issue of such injunctions.

2. Enjoined

To support a conviction under this section, there must be proof of an injunction issued to the accused individually, against repeating or continuing the same particular public nuisance. It must be shown that the person convicted had, on some previous occasion, committed the particular nuisance, had been enjoined not to repeat or continue it, and had repeated or continued it.

The authority under which a magistrate can order or enjoin a person against repeating or continuing a public nuisance is provided in s 143 of the CrPC . It is the1979 infringement of this order that is punishable under this section. What is contemplated is an order addressed to a particular person.

A magistrate's powers to deal with public nuisances are contained in ch X of the CrPC 1973. Part C of this chapter is properly applicable only to temporary orders in urgent cases. It is only in such cases that an order may be made *ex parte*, and an exception is allowed to the general rule that it shall be directed to a particular individual in such emergent cases an order may, under s 144 of that Code, be directed to the public generally when frequenting or visiting a particular place to abstain from a certain act; but this provision does not apply to a proclamation directed not to the public generally frequenting or visiting a particular place, but to a portion of the community.[6]

3. Public Servant

For the interpretation of the term 'public servant' this section has to be read with s 143, CrPC which runs as follows:

> **S. 143 . Magistrate may prohibit repetition or continuance of public nuisance.**-- A District Magistrate or Sub-divisional Magistrate, or any other Executive Magistrate empowered by the State Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code (45 of 1860), or any special or local law.

4. Injunction

A personal injunction may be given by a district magistrate, or sub-divisional magistrate, or any other

executive magistrate specially empowered by the State Government, or the district magistrate in this behalf, not to repeat or continue a public nuisance.[7] Under O 39, r 2 of the CPC, a civil court can also issue an injunction in pending cases.

5. Procedure

The offence under this section is cognizable, but a summons shall ordinarily issue in the first instance. It is a bailable offence but not compoundable and is triable by any magistrate. It can be tried summarily.

The limitation for taking cognizance of this offence is one year.

6. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC 1973 may be adopted:

> I (*name and office of the magistrate etc*) hereby notice to you (*name of the accused*) as follows:
>
> That you on or about the.....day of.....at.....repeated (*or continued*), ... (*name the public nuisance*), having been enjoined by..... (*name the public servant*) who had lawful authority to issue such injunction not to repeat (*or continue*) ..... (*name the nuisance*), and thereby committed an offence punishable under section 291 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried for the said offence.

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> Q. Have you heard and understood the notice ?
>
> Ans. Yes
>
> Q. Do you plead guilty or have any defence to make ?
>
> Ans. Name of the office of the Magistrate

7. Proof

To establish an offence under this section, the prosecution must prove that:

(i) the accused committed a particular public nuisance;
(ii) he was personally enjoined not to repeat or continue it; (a general proclamation to that effect is not sufficient.)[8]
(iii) he was so enjoined by a public servant having lawful authority to do so; and
(iv) after having been so enjoined he repeated or continued the offence.

In order to sustain a conviction under this section, it is necessary that the order of the magistrate forbidding the continuance of the nuisance or evidence of notice of such a character as to make plain the precise terms of the order and the notice, be recorded in the case. Strict proof of all the circumstances constituting an offence, especially when the offence is one, which is not *malum in se*, is required on the basis of a conviction.[9]

Where the magistrate tried 14 persons together and convicted Nos 1, 4, 7, 9 and 13 under s 291, IPC, and the remainder under s 290, IPC it was held that in trying 14 persons accused of distinct offences at the same time, the magistrate committed an irregularity calculated to the prejudiced by the several charges having been disposed of in one trial. The conviction was quashed.[10]

6 *Queen-Empress v Jokhu* ILR 8 All 99 ; Re *Mahesh Chand* 20 WR 55.

7 Code of Criminal Procedure 1973, s 143 .

8 *R v Gunga Sonha* BR 24 June 1886 .

9 *Queen-Empress v Gunya* Ratanlal Un Cr Cas 295.

10 *Pulisanki Reddy v Queen* (1882) ILR 5 Mad 20, p 21 (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

[11][S. 292.

Sale, *etc.*, of obscene books, *etc.*--

[12][(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is

lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it].

[13][(2)] Whoever--

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or1981

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section.

shall be punished [14][on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees].

[15][*Exception.*--This section does not extend to--

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure--

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or

(ii) which is kept or used *bona fide* for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in--

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.]]

STATE AMENDMENTS

Orissa.--

(1) In its application to the whole State of Orissa, in Section 292, for the words, "which may extend to three months", substitute the words "which may extend to two years" and insert the following proviso before the Exception, namely:--

"*Provided* that for a second or any subsequent offence under this section, he shall be punished with imprisonment of either description for a term which shall not be less than six months and not more than two years and with fine".[16]1982

(2) Section *292A*. Same as that of Tamil Nadu.[17]

Tamil Nadu.--

(1) In section 292, for the words "shall be punished with imprisonment of either description for a term which may extend to three months or with fine or with both", substitute the following, namely:--

"shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that for a second or any subsequent offence under this section, he shall be punished with imprisonment of either description for a term which shall not be less than six months and not more than two years and with fine."[18]

(2) In its application to the State of Tamil Nadu, after section 292, insert the following section, namely:--

" **S. 292A . Printing,*etc.*, of grossly indecent or scurrilous matter or matter intended for blackmail.--**Whoever,--

(a) prints or causes to be printed in any newspaper, periodical or circular, or exhibits or causes to be exhibited, to public view or distributes or causes to be distributed, or in any manner puts into circulation any picture or any printed or written document which is grossly indecent, or in scurrilous or intended for blackmail; or

(b) sells or lets for hire, or for purposes of sale or hire makes, produces or has in his possession, any picture or any printed or written document which is grossly indecent or is scurrilous or intended for blackmail; or

(c) conveys any picture or any printed or written document which is grossly indecent or is scurrilous or intended for blackmail knowing or having reason to believe that such picture or document will be printed, sold, let for hire distributed or publicly exhibited or in any manner put into circulation; or

(d) takes part in, or receives profits, from, any business in the course of which he knows or has reason to believe that any such newspaper, periodical, circular, picture or other printed or written document is printed, exhibited, distributed, circulated, sold; let for hire, made, produced, kept, conveyed or purchased; or

(e) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such newspaper, periodical, circular, picture or other printed or written document which is grossly indecent or is scurrilous or intended for blackmail, can be procured from or through any person; or

(f) offers or attempts to do any act which is an offence under this section, [19][shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both]:

Provided that for a second or any subsequent offence under this section, he shall be punished with imprisonment of either description for a term which shall not be less than six months [20][and not more than two years].

Explanation I.--For the purposes of this section, the word "scurrilous" shall be deemed to include any matter which is likely to be injurious to morality or is calculated to injure any person:

Provided that it is not scurrilous to express in good faith anything whatever respecting the conduct of--

(i) a public servant in the discharge of his public functions or respecting his character so far

as his character appears in that conduct and no further; or1983

(ii) any person touching any public question, and respecting his character, so far as his character appears in that conduct and no further.

Explanation II.--In deciding whether any person has committed an offence under this section, the court shall have regard, *inter alia*, to the following considerations--

(a) the general character of the person charged, and where relevant, the nature of his business;
(b) the general character and dominant effect of the matter alleged to be grossly indecent or scurrilous or intended for blackmail;
(c) any evidence offered or called by or on behalf of the accused person as to his intention in committing any of the acts specified in this section."[21]1984

Comments

1. Scope

To attract the offence under s 292, IPC, there must be public circulation, sale or distribution of the alleged obscene writing.[22]Sections 292 - 294 deal with obscene publications, obscene objects and obscene acts which affect public decency and morals. This section makes it an offence to publish or put into circulation any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object.

The section has two sub-sections. Sub-section (1) defines 'obscene matter' which itself consists of two parts, the first part is in regard to a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, which is lascivious or appeals to the prurient interest, and the other part is related to its effect which (or where it comprises two or more distinct items, the effect of any one of its items), if taken as a whole is such as tends to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter, contained or embodied in it. Where the material produced satisfies the first part of what is described in s 292(1), the second part of it would not apply.[23]Sub-section (2) has five clauses and an act covered by any one of them constitutes the offence under it but all the clauses are related to publication or circulation of 'obscene matter'.

The publication or circulation may be either by sale, hire, distribution, public exhibition or in any other manner.

An advertisement is a manner of publication. But where an advertisement only says that the book advertised contains 84 postures of men and women, but it does not itself give any posture, offensive to the senses, and the words used do not suggest any indecent, obscene or immoral ideas, the advertisement will not come under this section.[24]

The exception to the section expressly exempts books, *etc*, kept or used *bona fide* for religious purposes or are justified as being for the public good in the interest of science, literature, art or learning or other objects of general concern. Engravings, painting, sculptures *etc*, on or in ancient monuments, temples *etc*, have also been specifically exempted.

No such exemption was earlier made in respect of works of art, science or literature. This defect has now been removed by inserting sub-cl (i) in cl (a) of the Exception by Amendment Act, 36 of 1969.

2. Legislative Changes

This section, as it originally stood in 1861, made it an offence to sell, distribute, import or print for sale or hire, or wilfully to exhibit any obscene book, pamphlet, paper, *etc*. A representation in a temple or on a car used for conveying of an idol was, however, exempted from the operation of the section.[25]

The section, as it stood before the amendment of 1969, was introduced into the Code by the Obscene Publications Act (8 of 1925) with a view to give effect to art I of the International Convention for the Suppression of the Circulation of Traffic in1985 Obscene Publications, signed at Geneva on behalf of the Government of India in 1923.[26] The scope of the section was widened and the exception was also slightly enlarged by inserting the words 'any book, pamphlet, writing, drawing or painting kept or used *bona fide* for religious purposes or'. The exception then applied to any such matter connected with religion. But with regard to the exception the select committee said:

> We have considered at length the desirability of extending the scope of the exception to new section 292 of the Indian Penal Code, so as to cover religious, artistic and scientific writings, *etc*, but we have come to the conclusion that it would be difficult to do so without including writings, *etc.*, which are not *bona fide* of the nature stated. Further, there is a substantial body of case-law, which makes it clear that *bona fide* religious, artistic and scientific writings, *etc*, are not obscene within the meaning of the Indian Penal Code .

It is thus, clear that the scope of the exception has not been widened so as to make it applicable to objects of art and literature,[27] but it is also clear that the select committee left the exception to be supplemented by the 'substantial body of case-law' which made it clear 'that *bona fide* religious, artistic and scientific writings, *etc*, are not obscene within the meaning of the Indian Penal Code '.

There was again a drastic amendment in the section by Act 36 of 1969. Thereby the old s 292 was renumbered as sub-s (2) and the present sub-s (1) explaining the import and meaning of the word 'obscene' was introduced. The sentence (of imprisonment of either description, for a term which may extend to three months, or with fine or with both) earlier provided for this section was also enhanced by Act 36 of 1969 to make the repetition of the offence deterrent as will appear from the existing sub-s (2). The exception clause was also amended by Act 36 of 1969 by introducing certain new provisions. The old clause ran as follows:

> *Exception.*--This section does not extend to any book, pamphlet, writing, drawing or painting kept or used *bona fide* for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

3. Analogous Law--Law of England

In England, the common law offence of obscenity was established three hundred years ago, when Sir Charles Sedley exposed his person to the public gaze on the balcony of a tavern. Obscenity in books, however, was punishable only before the spiritual courts because it was so held down to 1708 in which year *Queen v Read* ,[28] was decided. In 1727, in the case against one Curl it was ruled for the first time that it was a common law offence.[29] In 1857, Lord Campbell enacted the first legislative measure against obscene books, *etc*, and his successor in the office of Chief Justice interpreted this statute[30] in *Hicklin*'s case.[31] The section of the English Act is long (they were so in those days), but it used the word 'obscene' and provided for search, seizure and destruction of obscene books, *etc*, and made their sale, possession for sale, distribution, *etc*, a misdemeanour. The section may thus be regarded as1986 substantially in *pari materia* with the section as it stood before the 1969 amendment in this Code, in spite of some differences in language.[32]

In 1959, the Obscene Publications Act[33] was passed. Section 1 of this statute prescribed the test for obscenity and by s 4 a defence that the publication of the article was justified as being for the public good on the ground that it is in the interest of science, literature, art or learning or of other objects of general concern was made available to the offender. With reference to this a Division Bench of the Bombay High Court had observed, 'We must, however, be guided by the law as laid down in this country without reference to a recent statute law in England'.[34]

Every person is liable to a fine who, in any thoroughfare or public place in the metropolitan police district or the City of London or in any street elsewhere in England and Wales, offers for sale or distribution, or exhibits to public view, any profane book, paper, print, drawing, painting or representation, or sings any profane or obscene song or ballad, or uses any profane or obscene language, to the annoyance of the inhabitants or passengers.[35]

Test of Obscenity

An article is deemed to be obscene for the purpose of the Obscene Publications Acts 1959 and 1964 if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

In proceedings against a person for publishing an obscene article, the question whether the article is obscene must be determined without regard to any publication by another person unless it could reasonably have been expected that the publication by that other person would follow from publication by the person charged. In proceedings against a person for having an obscene article for publication for gain, the question whether the article is obscene must be determined by reference to such publication for gain of the article as in the circumstances it may reasonably be inferred he had in contemplation and to any further publication that could reasonably be expected to follow from it, but not to any other publication.

The issue of obscenity is one for the jury and expert evidence on the issue is not ordinarily admissible although in exceptional cases a jury may require the assistance of such evidence.

Section 1(1) of the Obscene Publications Act is quite plain to understand. The question to be answered, bearing in mind all the circumstances of the case, is whether there are people who could be depraved and corrupted on the basis of the likely distribution of the material in question.[36]

Where obscene video cassettes were distributed to a limited circle of viewers but where there was no further control over them, where the official channels of certification of videos were not used, and where no artistic merit was claimed for the1987 works, the applicant's conviction for publishing obscene works was proportionate to the legitimate aim pursued.[37]

Publication of obscene material established even though material only sent to one person.[38]

4. Laws of Canada

In a case, Mr. Gill's wilful conduct in masturbating in the driver's seat of his car while stopped at a traffic light on a busy Surrey street, and while he was deliberately making eye contact with D.M.K., was an indecent act in the presence of D.M.K. The only reasonable inference to be drawn from the proven facts was that Mr. Gill would be seen by D.M.K. and he knew it. The exhibitionist nature of this conduct was a clear evidence of the intention of Mr. Gill.

A 'public place' is defined in s 150 as 'any place to which the public have access as of right or by invitation, express or implied'. 'Access' means 'the right or opportunity to reach or use or visit' and not the ability of those who are neither entitled nor invited to enter a place to see or hear from the outside, through uncovered windows or open doors, what is transpiring within.[39]

5. Object

The object of this section, which was enacted in pursuance of the international convention regarding suppression of the circulation and traffic in obscene publication is to prevent circulation or, and traffic in, obscene publications. There is bound to be an erosion of moral standards if one is constantly exposed to literary and visual materials which over-emphasise sexuality and brutality. All civilised societies need legal ban on obscenity for protecting and preserving the moral values on which there is consensus.[40] The basic object of s 292 is to prevent any circulation or sale of any obscene literature and the purposes behind the Act is to preserve such moral values of which there is universal consensus.[41]

6. Constitutional Validity of the Section

No doubt art 19(1)(a) of the Constitution guarantees complete freedom of speech and expression, but cl (2) of the article also makes an exception in favour of existing laws which impose restriction on the exercise of the right in the interest of public decency or morality. This section does not go beyond decency which falls directly within the words, 'public decency or morality' in the second clause of the article. The section manifestly embodies such a restriction as is contemplated by the second clause of the article because the law against obscenity, of course correctly understood and applied, seeks no more than to promote public decency and morality. The section cannot, therefore, be said to be invalid in view of the second clause of art 19 of the Constitution .[42]The validity of this section was thus examined by the Supreme Court before its amendment by Act 36 of 1969. There appears nothing objectionable in the said amendment so as to infringe the provisions of art 19 as considered by the Apex Court.1988

Let us also not forget that freedom of expression also requires adequate 'breathing space'.[43]

7. Section 292 , IPC and Rights under Article 21 of the Constitution

Where the petitioner bought the book 'The Women and Men in My Life', by Khushwant Singh and felt aghast and shocked at the cheap, vulgar and obscene writings about dead persons and filed writ petitions under art 21 of the Constitution of India for direction to the commissioner of police for registration of a case under ss 272, 509 read with s 24 of IPC . However Jaspal Singh J, of the Delhi High Court after referring to the alleged vulgar and obscene language used in the box regarding some men and women observed as follows:

> Khushwant Singh has dared to state. His book does not read like Anne Bradsheet's poem 'To My Dear Children' or like the life story of Elizabeth Ashbridge, a Quaker woman missionary. His are life stories of new styles of life challenging traditional social norms and values. What he has stated has to be tested by the current standards of ordinary decent people. I say so because the book being in English and with a high price tag is likely to be read only by well educated persons in high income bracket like the petitioner herself. Some of them may find some stray words or passages shocking or disgusting but not obscene. Even the petitioner only felt aghast and shocked. This does not prove obscenity. Let us also not forget that freedom of expression requires adequate 'breathings space'. I do not think Khushwant Singh has crossed the permissible limits. The question of violation of right to privacy, dignity, fair treatment or reputation as enshrined under article 21 of the Constitution thus also does not arise. In any case right of privacy under article 21 is enforceable only *qua* the State.[44]

8. Whether the Provisions of Press (Objectionable Matter) Act 1951 Repeal the Provisions of this Section

The Press (Objectionable Matter) Act 1951, does not provide for punishment for printing and

publishing obscene matter, but provides only against the repetition of such publications. It is preventive in nature regarding objectionable matters and not penal. On the other hand, under this section once a person is found to have been concerned with the publication of obscene matter, the court must convict and punish him. Moreover, a person found guilty under this section is considered as an offender and is guilty of having committed an offence. The provisions of this section are not inconsistent with the provisions of the 1951 Act and therefore, it cannot be said that this section is repealed by implication by the subsequent Act.[45] There is nothing in the Act of 1951 to indicate that this section is either abrogated or superseded. A prosecution of the accused for an offence under this section, therefore, does not in any way amount to evading the provisions of Act 56 of 1951.[46]

9. Abetment

In order to constitute abetment, the abetter must be shown to have 'intentionally' sided to the commission of the crime and that mere proof that the crime charged could not have been committed without the interposition of the alleged abetter is not1989 enough compliance with the requirements of s 107, IPC .[47] Where it was not the case of the prosecution that the accused has intentionally exhibited or arranged exhibition of a blue film, and on the other hand, the allegation was that the accused was a spectator of the blue film and therefore, an abetter of the offences under ss 292, 293 and 294, IPC, this interposition as a mere spectator to the exhibition of a blue film without any further complicity, cannot be taken to be amounting to abetment of the main offence.[48]

10. 'Obscene'--Ingredients of

Sub-section (1), which defines the word 'obscene' was inserted, in this section by the Indian Penal Code (Amendment) Act 1969. Before it this Code did not contain any definition of this word. The said sub-s (1) now lays down that for the purposes of sub-s (2) of this section, a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object shall be deemed to be obscene if:

(i) it is lascivious of,
(ii) it appeals to the prurient interest, or
(iii) its effect, or (where it comprises two or more distinct items) the effect of any of its items, if taken as a whole, such as to tend to deprave and corrupt persons, who are likely having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

11. Obscene--Meaning of

The word 'obscenity' as the dictionaries tell us, denotes the quality of being obscene which means 'offensive, to modesty or decency, lewd, filthy, repulsive',[49] 'loathsome, indecent and lewd. But it does not mean that every indecent or repulsive or filthy article will come under the definition of obscenity though all obscene articles will be either indecent or repulsive'.[50] The language of a writing may have a tendency of shock or disgust but revulsion is not corruption. Tendency to corrupt is a much stronger concept than a tendency to shock or disgust. One may find some stray words or passages shocking or disgusting but not obscene. So merely feeling aghast or shocked does not prove obscenity.[51] 'Obscenity' means something opposed to public decency and morality.[52]

The obscenity does not lie in the letters of the words. The writing for the purpose of branding it as 'obscene' must have tendency to deprive and corrupt person who are likely to read the same. The letters written by the petitioner accused did not tend to deprive the reader like the chief matron to get influenced and get her corrupted as regards moral, his conviction, therefore, under s 292, IPC was set aside.[53]

It may be taken as meaning offensive to chastity or modesty; expressing or presenting to the mind or view something that delicacy, purity and decency forbid to1990 be expressed; impure as obscene language, obscene pictures, anything expressing or suggesting unchaste and lustful ideas, impure, indecent, lewd.[54] Obscenity is treating sex in a manner appealing to the carnal side of human nature, or having that tendency. Such treating of sex is offensive to modesty and decency, but the extent of such appeal in a particular book, *etc*, are matters for consideration in each individual case.[55] Anything distinctly calculated to incite a reader to indulge in acts of indecency or immorality is obscene, for example a book containing a description of defective sexual enjoyment with advice for heightening and prolonging such enjoyment in the case of normal persons.[56]

The concept of 'obscenity' would differ from country to country, state to state and even from region to region depending on the standards of morals and contemporary society. The words treated as obscene in Malabar area may not be obscene in other parts of Kerala; similarly the words used in other parts of Kerala may not be obscene in Malabar area.[57]

Whether the words uttered were obscene, whether those words are/were likely to deprave and corrupt those whose minds are open to such immoral influences is a question of fact to be decided based on the evidence that may have to be adduced by reference to the meaning attributed to those words in that particular region/locality. The tone and tenor of those words and the meaning of those words, whether hearers are likely to suffer mental shock on hearing such words, whether those words are actually intended and used in that locality as obscene are questions of fact to be decided based on the evidence that may have to be adduced.[58]

Hicklin's test postulated that a publication has to be judged for obscenity based on isolated passage of work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. Held, *Hicklin's test* is not the correct test to be applied to determine 'what is obscenity'. Section 292 of the IPC, of course, uses the expression 'lascivious and prurient interests' or its effect. The courts should apply the 'community' standard test rather than '*Hicklin's test*' to determine what is 'obscenity'.[59]

12. Obscenity to be Judged in the Light of its Influence

Obscenity may be adjudged in the light of the influence, which the impugned matter may have, not only on the minds of the persons, already depraved or abnormal, but also on the minds of persons, who may be completely unintroduced to sex and may be innocent. The human mind has an inherent attraction for sex. If any material incites extreme immoral perversities in respect of sexual indulgence, then it incites the impulses to depravity and degeneration and would be obscene.[60]1991

13. Sub-section (1)--'To Deprave and Corrupt'

Sub-section (1) of this section has used the words 'deprave' and 'corrupt' as synonymous. 'To deprave and corrupt' does not merely mean to lead astray morality.[61] 'Deprave' and 'corrupt' refer to the effect of a pornographic publication on the mind, including the emotions; it is not necessary that the physical (*ie* 'overt') sexual activity should result.[62] 'Depravity' and 'corruption' is not, however, confined to sexual depravity and corruption.[63]

The word 'obscene' means what is offensive to modesty or decency and which gives rise to emotions, nudeness, filthiness, and repulsiveness. The real test of obscenity is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands the object of the sort may fall.[64]

The accused was running a shop and found in possession for sale/hire/distribution, an obscene blue film video cassette depicting a man and a woman in a completely nude posture indulging in carnal intercourse appealing to the prurient interests of the viewers and arousing corrupt and lascivious feelings of persons who chanced to view the video cassette. Appellant accused was convicted for

offence under s 292, IPC .[65]

Even the certificate issued by the Censor Board does not give immunity to a celluloid film from obscenity.[66]

14. Duty of Judge or Court in Deciding Question of Obscenity of any Book, Story or Article

In deciding the question of obscenity of any book, story or article the court whose responsibility it is to adjudge the question may, if the court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available, for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the judge hearing the matter is likely to influence even though unconsciously, his mind and his1992 decision on the question. A judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In judging the question of obscenity, the judge in the first place should try to place himself in the position of the author and from the view point of the author the judge conveys if the work has any literary and artistic value. The judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of s 292, IPC, by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the court, for eliminating any subjective element or personal preference which may remain hidden in the sub-conscious mind and may unconsciously affect a proper objective assessment may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and, satisfaction to enable the court to discharge the duty of making a proper assessment.[67]

It appears useful to quote here certain guidelines laid down by the Supreme Court in *Samresh Bose v Amal Mitra* ,[68] in this respect as follows:

> In deciding the question of obscenity of any book, story or article the court whose responsibility it is to adjudge the question may, if the court considers it necessary, rely to an extent on evidence and view of literary personage, if available for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the court must necessarily be on an objective assessment of the book, story or article as a whole and with particular reference to the passage complained of in the book, story or article. The court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall.

> ...The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author the Judge should try to understand what is that the author seeks to convey and what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A Judge, should thereafter apply his judicial mind dispassionately to decide whether the book can be said to be obscene within the meaning of s 292, IPC by an1993 objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the court, for eliminating any subjective element or personal preference which may remain hidden in the sub-conscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed and recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the court to discharge the duty of making a proper assessment.

The petitioner accused had authored a book '*Breathless in Bombay*'. Certain words used in the book to describe the character of a person in story were not held to be obscene. Prosecution of the petitioner was quashed on petition filed under s 482, CrPC .[69]

15. Obscenity Distinguished from Pornography

There is some difference between obscenity and pornography in the sense that the latter denotes writings, pictures, *etc*, intended to arouse sexual desire while the former may include writings *etc*, not intended to do so but which have that tendency. Both, of course, offend against public decency and morals, but pornography is obscenity in a more aggravated form.[70] It has now received the appellation of hardcore pornography by which term is meant libidinous writings of high erotic effect unredeemed by anything literary or artistic and intended to arouse sexual feeling.[71] Pornographic pictures and writings are always obscene within the meaning of s 292 .[72]

16. Obscenity Distinguished from Vulgarity

In *Sameresh Bose v Amal Mitra* ,[73] the question for determination before the Supreme Court was whether a novel written by the appellants was obscene. After carefully examining the contents of the novel, opinion of literary personage about it and other evidence produced in the case, the Supreme Court was of the view that, 'reference to kissing, description of the body and the figures of the female characters in the book and suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness and the novel on these counts, may not be considered to be obscene'. Distinguishing obscenity from vulgarity the Apex Court observed as follows:

> A vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and repulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences.

This distinction may be further clear from the following observations made by the Apex Court in the same case:

> ...the novel is not obscene merely because slang and unconventional words have been used in the book in

> which there have been emphasis on sex and description of female bodies and there are the narrations of feeling thoughts and actions in vulgar language. Some portions of the book may appear to be vulgar and readers of cultured and refined taste may feel shocked and disgusted. Equally in some portions, the words used and1994 descriptions given may not appear to be in proper taste. In some places there may have been an exhibition of bad taste leaving it to the readers of experience and maturity to draw the necessary inference but certainly not sufficient to bring home to the adolescent any suggestions which is depraving or lascivious. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and 'will have to read books which are purely religious'.

Thus, every vulgar matter is not obscene as these words do not have similar connotations and each term has its separate characteristics to affect the minds of the readers as laid down above.

17. Filthy Abuses, Whether Obscene

Filthy abuses are not, *per se*, obscene within the meaning of this section. Whether certain filthy abuses are obscene or not, regard must be had to the class of society to which the parties belong.[74] Every abusive or humiliating word would not by itself be obscene. The words uttered by the accused were abusive and humiliating but were not obscene, his conviction under s 294(b), IPC was set aside.[75]However, where the accused had abused the complainant in caste name and in open field, order framing charge under s 294, IPC was held proper.[76]

Word 'scandal' does not have the tendency of depraving or corrupting those minds which are open to prurient of lascivious influences.[77]

18. Nude Pictures--Whether Obscene

Nudity in itself cannot under all circumstances be classified as obscene.[78] A picture of a woman in the nude is not *per se* obscene[79] unless there is something in it which would shock or offend the taste of any ordinary or decent-minded person. Unless nude pictures are an incentive to sensuality and excite impure thoughts in the minds of ordinary persons of normal temperament who may happen to look at them, they cannot be regarded as obscene within the meaning of this section.[80]

Nude Pictures--Considerations for Decision

For the purpose of deciding whether a nude picture is obscene or not, one has to consider to a great extent, the surrounding circumstances, the pose, the posture, the suggestive element in the picture, *etc.*, the person in whose hands it is likely to fall *etc*. So no hard and fast rule can be laid down for the determination of the matter.[81]

In the present day society in India, a book, picture, or a publication which deals with such matters cannot *per se* be said to be obscene. Great emphasis is being laid1995 on family planning and in that connection it has become absolutely necessary to import education about sex to the masses. It is a matter of common knowledge that there is even a thinking to introduce sex education as one of the subjects to be taught to the younger generation.[82]

When nude pictures are included in a book which deals with intimate side of sex life, without any reference to the subject-matter, but as a cheap medium for obtaining, greater circulation of the book, the only inference, that can be drawn, is that they have been included therein with an idea to arouse sexual desire in the readers. Such nude pictures are pornographic and as such obscene.[83]

'Obscenity' should be gauged with respect to contemporary community standards that reflect the sensibilities as well as the tolerance levels of an average reasonable person. In the present case, the appellant merely referred to the increasing incidence of pre-marital sex and called for its societal acceptance. At no point of time appellant described the sexual act or said anything that could arouse sexual desires in the mind of a reasonable and prudent reader. Furthermore, the statement has been made in the context of a survey which has touched on numerous aspects relating to the sexual habits

of people in big cities. Even though this survey was not part of a literary or artistic work, it was published in a news magazine thereby serving the purpose of communicating certain ideas and opinions on the above mentioned subject. In the long run, such communication prompts a dialogue within society wherein people can chose to either defend or question the existing social mores. It is difficult to appreciate the claim that the statements published as part of the survey were in the nature of obscene communications.[84]

The same view was taken by the Allahabad[85] High Court and it was held that the mere showing of the nude female form in itself, is not necessarily obscene unless the manner, in which the nude pictures appear (in the film) is such that it is likely to arouse unhealthy lustful thoughts in the minds of viewers.

There was evidence that the accused showed pornographic films on handycam containing nude photographs of the prosecutrix. The handycam and the cassettes were recovered from the house of the accused appellant. When the prosecutrix demanded the cassette from the accused, he refused to return and threatened with dire consequences. Accused appellant was convicted for offences under ss 292 and 506, IPC .[86]

Obscenity of a Picture

For the purpose of testing whether a picture is obscene or not, one has hardly to depend upon any oral testimony. What has to be considered is to a great extent the surrounding circumstances such as the pose, the posture, the suggestive element in the picture and last of all the person or persons in whose hand it is likely to fall.[87] Under s 292 (1), IPC, a picture or article shall be deemed to be obscene if: (i) it is lascivious; (ii) it appeals to the prurient interest; and (iii) it tends to deprave and1996 corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in the section. A picture of a nude/semi-nude woman, as such, cannot *per se* be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of 'exciting lustful thoughts' can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.[88]

A picture alleged to be obscene has to be viewed in the background in which it was shown, and the message it has to convey to the public and the world at large.[89]

Where the smudged and indecipherable publication of the face of a woman either by itself or read with the name of the film 'Together with love' printed alongside did not tend to invade or deprave and corrupt public morals through over-sex and the film itself was not stated as being offensive, the offence under s 292, IPC, was held not made out.[90]

19. Exhibition of Blue Films

The appellant were found showing blue film in video hall to young men where about 15 viewers were present. They were convicted under s 292, IPC and s 7, Cinematograph Act. Held, exhibiting blue film does not deserve leniency in sentencing. Sentence of one month simple imprisonment and fine imposed was not interfered. Probation was refused.[91]

20. Obscene Film--Certificate by Board of Film Censors--Effect

The grant of a certificate by the Board of Film Censors does not bar the court from examining the question of obscenity, it raises rebuttable presumption that the picture does not offensively invade or deprave public morals through over-sex.[92]

21. Obscene Film--Protection under Section 79 , IPC when Available

The court has also to keep in view not only the exceptions provided by this section but also the general exceptions provided by this Code in ss 76 - 95, IPC . Section 79 , IPC makes an offence a non-offence when the offending act is actually justified by law or is *bona fide* believed by mistake of fact to be so justified. If the Board of Censors, acting within their jurisdiction and on an application made and pursued in good faith, sanctions the public exhibition, the producer and connected agencies do enter the statutory harbour and are protected, because s 79 exonerates them at least in view of their *bona fide* belief that the certificate is justificatory. The prosecution is1997 unsustainable because s 79 is exculpatory when read with s 5A of the Cinematograph Act and the certificate issued thereunder.[1]

22. Accused Privately seeing Obscene Film--No Offence

The accused were not in possession of the obscene films for the purpose of sale, distribution, circulation *etc* as mentioned in clause (a) of sub-s (2) of s 292 of IPC . Therefore, the act of the accused privately viewing obscene film did not constitute an offence under s 292, IPC .[2]

23. A Vulgar Picture not Necessarily Obscene

A vulgar picture is not necessarily obscene unless there is something in it which would shock or offend the taste of any ordinary or decent minded person.[3]

24. Indecent Exposure--Whether Falls under this Section

Any unlawful indecent exposure of the human body in a public place, and in the view of several persons (or either sex) the offence is in substance only a form of public nuisance by indecent exhibition. Exposing to public view the naked body of a newly born infant has been held indictable.[4] But most of the decisions relate to the exposure of the private parts of an individual in a public place.[5] Bathing so near a public footway frequented by females that public exposure must occur, is a nuisance, and it is no defence that there has been a usage to bathe at that place.[6]

Matrimonial dispute was pending between the complainant wife and the accused husband. The accused husband hanged painting of women on wall of the bedroom in nude/semi-nude. *Prima facie* case for offence under s 292, IPC was made out, order issuing process against the accused husband was not quashed.[7]

25. Test of Obscenity

The test of obscenity is whether it excites or not the average person enjoying a normal state of mind to have recourse to depravity as a matter of degenerate pleasure. Public depiction of sexual perversities crosses the norm of morality and containing an incentive to similar performance, such depiction in certain circumstance may surely be obscene.[8]

In *R v Hicklin* ,[9] the test of obscenity was laid down by Cockburn CJ, in these words:1998

> ...I think the test of obscenity is this: Whether the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of the sort may fall...It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thought of a most impure and libidinous character.

The test has been approved by Lord Goddard in *R v Reiter* ,[10] and it has been uniformly applied in

India,[11] even before the insertion of sub-s (1).

In *R v Martin Secker and Warburg Ltd* ,[12] Stable J in directing the jury, cited Cockburn CJ's test of obscenity in *R v Hicklin* [13]and stated:

> Because this test was laid down in 1868, that does not mean that you have to consider whether this book is an obscene book by the standards of nearly a century ago. Your task is to decide whether you think that the tendency of the book is to deprave those whose minds today are open to such immoral influences and into whose hands the book may fall in this year, or last year, when it was published in the country.
>
> Remember that the charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or disgust.
>
> It is undoubtedly, true that a case is not to be judged by the Victorian standards but by the moral standards of today, since moral values and standards vary from age to age. The tests to be applied for determining whether a particular object is obscene or not would depend on various circumstances. The idea as to what is to be deemed to be obscene has varied from age to age, from region to region, dependent upon particular social conditions. There cannot be an immutable standard of moral values.[14]

The idea as to what is to be deemed to be obscene not only varies from age to age and from region to region but even from person to person dependent upon particular social conditions. The court must take into account the change brought about in the society.[15] Still the test laid down in *Hicklin*'s case should not be discarded. It makes the court, the judge of obscenity in relation to an impugned book *etc*, and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to decide in each case and it does not compel an adverse decision in all cases.[16]

Hicklin's test postulated that a publication has to be judged for obscenity based on isolated passage of work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. Held,1999*Hicklin's* test is not the correct test to be applied to determine 'what is obscenity'. Section 292 of the IPC, of course, uses the expression 'lascivious and prurient interests' or its effect. The courts should apply the 'community' standard test rather than '*Hicklin's* test' to determine what is 'obscenity'.[17]

Effect on Average Person not on one of Depraved Mentality

Further, it appears that the courts have, more often, restricted the use of the term 'obscenity' to sexual immorality only. Such matters as would tend to stir in persons, into whose hands such matter is ordinarily expected to reach. Sex impulse which leads to sexually impure and lustful thoughts, are declared as obscene, attracting the jurisdiction of the court to ban out such publications. The true test is not to find out what depraves the morals in any way whatsoever, but what leads to deprave only in one way *viz*, by exciting sexual desire and lascivious thoughts.

The effect produced on an ordinary member of the society or a particular class of readers for which a particular publication may be meant has to be ascertained. It is neither a man of wide culture or rare character, nor a person of a depraved mentality, who should be thought of as being the reader of such literature. The standard of readers is neither one of exceptional sensibility nor one without any sensibility whatsoever.[18] In considering whether a publication is obscene, the class of persons who

are likely to read such a publication must be taken into consideration. In applying the test, one has also to consider the effect which the book would produce on an ordinary average person,[19] and not on a person with depraved mentality. In considering the question, the persons to whom, and the time and the circumstances under which, the obscene thing is put forth must be taken into account.[20]

Obscene Poem

The respondent composed and published an obscene poem '*Gandhi Mala Bhetla*' on Mahatma Gandhi which would cause damage to the image and reputation of the father of the nation, which is nurtured by every citizen of India. Proceedings were not quashed on petition under s 482, CrPC .[21]

Whether one Obscene Passage is Sufficient to Render the Whole Work Obscene

One obscene passage is sufficient to render the work obscene.[22] There lurks a danger in the doctrine of the book as a whole. The application of this doctrine would mean that if in a book some portion, say, a few pages are clearly obscene and the rest innocuous, the book can pass muster, the good overshadowing the bad. The fact will, however, remain that the large portion of the book being innocuous, the obscene portion thereof would have the effect to deprave the mind of the reader. The result would be that the obscenity could then parade under the protective cloak of a2000 quantity of innocuous pages.[23] The words 'if taken as a whole' in s 292(1), are however, of significance and show a departure from the earlier approach.[24]

Again the test is whether the object or article is such as would rouse prurient thoughts in an average person and whether it is obscene by contemporary standards of decency and morality. What may not rouse prurient thoughts in an enlightened person or scholar or a moralist, may arouse, or provoke such thoughts in an average person into whose hands the object may fall. Determination must be with reference to the kind of person, likely to come by it. Test is not whether it will corrupt the morals of an archbishop, but whether it will tend to corrupt the thoughts of a person understood as the average person.[25]

Comparison of One Book with another not necessary

A publication cannot be said to be obscene merely because it deals frankly with sex matters, provided, of course, that the language used is not such as to excite sensual feelings or give rise to thoughts of lust.[26] A book which is intended to give advice to married people on how to regulate the sexual side of their lives, that is to say, with a view to promoting their health and mutual happiness, and which is written in a fairly plain language in order to be understood, cannot be said to be obscene, merely because such a book might fall into wrong hands.[27] When there is nothing in the books to offend an ordinary decent person, it is impossible to say that they are obscene. It is not necessary to compare one book with another to find the extend of permissible action. [28] It is useful to bear in mind the words of Lord Goddard CJ, in *R v Reiter* :

> The character of other books is a collateral issue, the exploration of which would be endless and futile. If the books produced by the prosecution are indecent or obscene, their quality in that respect cannot be made any better by examining other books...

> The court must, therefore, apply itself to consider each work at a time. An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book *etc*...on it, must not be overlooked.[29]

Elements which make a Book Obscene

A book shall be deemed obscene if: (a) it is lascivious or appeals to the prurient interest, or (b) if its effect or where it comprises of two or more distinct items, the effect of any one of its items is taken as a whole such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read the matter contained in it. The words 'if taken as a whole' are of significance and show a departure from the earlier approach.[30]2001

The magazine published by the petitioner contained nude photographs of women. In the impugned pictures of the magazine there was hardly anything aesthetic or artistic about them. Rather the pictures were taken and published with the sole purpose of attracting readers who have a prurient mind. Held, there was *prima facie* case to frame charge under s 292, IPC against the petitioner.[31]

Offending Matter to be judged by the Court

The question, whether a book contains obscene matter or not, does not altogether depend on oral evidence because the offending matter of the book, which is the subject of charge, must be judged by the court in the light of s 292, IPC and the provisions of the Constitution. The publication in question should not be judged on a different standard than the strictly legal one because there is a good deal of gulf between legalism and literature on the question of decency.[32] If it may be necessary or is at all required the court may rely to a certain extent, on the evidence and views of leading literature on that aspect particularly when the book is in a language with which the court is not conversant.[33]

Certain Aspects to be Kept in View

The books as a whole and so also the passages under attack have to be judged keeping in view not only the present day literary trends and standards but the present day popular permissiveness as well. At places some words or passages may appear to be shocking or disgusting but not obscene. This does not prove obscenity. Freedom of expression requires adequate 'breathing space'.[34]

Whether a picture is obscene or not, one has to consider to a great extent the surrounding circumstances, the suggestive element in the picture and the person or persons in whose hands it is likely to fall. It is the duty of the court to find out whether there is any obscenity or any thing in the book which will undermine or take away or influence the public in general, and the reader in particular.[35]

Indecent Matter when Justified

Publication of indecent matter may be justified if it is genuinely in the interest, or for the purposes of art, science or any other form of learning. The justification must, however, depend on the facts of each particular case, on the form of the matter, the circumstances of its publication and the nature of the accused's business. In other words, if the necessary or natural effect of a publication is prejudicial to the public morality or decency, the motive of the accused in publishing the obscene matter is immaterial.

Where the accused, a company owned by the Government of India, engaged mainly in manufacturing and marketing of various types of condoms published the advertisement in question to promote the sale of one of their products 'Moods' for which the complainant Kerala Women's Commission and another responsible body sought explanation of the accused. On coming to know of the fact that advertisement2002 published drew objection from certain members of the society, the accused immediately withdrew the advertisement and expressed their regret, still the complaint was filed against the accused but much thereafter, alleging an offence punishable under s 292, IPC . It was held that even if the complaint was maintainable, the interest of the complainant who is alleged to be a social worker should give way to the larger interest of the society in not prosecuting the accused persons when the two very important public bodies have accepted the regrets expressed by the

accused persons who immediately withdrew the advertisement and also in view of the explanation offered by the accused persons regarding publication of the advertisement, the proceeding against the accused persons was quashed by Kerala High Court by exercising powers under s 482, CrPC .[36]

26. Necessity of Publication or Circulation

Publication or putting into circulation, or attempting to do so is an essential element in the offence under this section. There are several ways of putting obscene matter into circulation. The section mentions some of them, such as sale, letting to hire, distribution, public exhibition, advertising *etc*. But this list is not exhaustive. For the purposes of the section, the indecent matter may be put into circulation in any manner.

Mode of Publication

It is immaterial whether the publication is in writing or in print or by sign, picture or effigy. The principles laid down in the cases upon this subject seem to cover oral communications, made before a large assembly, and having a clear tendency to produce immorality, as in the case of the performance of an obscene play. Publication is an essential element in the offence.[37] Showing an obscene print in private to another at his request who seeks to see and buy it for the purpose of prosecution has been held a publication.[38] It seems to be no defence in law to prove that the obscene libel is in a foreign language,[39] although the language may, in fact, limit the mischief of the publication.

Obscene books were seized from the shop of the accused, which the accused had kept in exposed state. The court considered the contents of the book and found that the necessary ingredients of the offence were made out. Appellant accused was convicted under s 292, IPC .[40]

Advertisement is Publication

An advertisement is a manner of publication. But where an advertisement only says that the book advertised contains 84 postures of men and women, but it does not itself give any posture offensive to the senses and the words used do not suggest any indecent, obscene or immoral ideas, the advertisement will not come under this section.[41]In Punjab a special Act [The Punjab Suppression of Indecent Advertisement Act (Punjab Act 7 of 1941)] has been passed for the purpose of suppressing indecent advertisement.2003

Where it appeared that the accused kept in Epsom Downs, a booth for the purpose of showing an indecent exhibition and they invited all persons who came within the reach of their solicitations to come in and see it, and that those who paid, went in and did see what was grossly indecent, it was held that the facts were sufficient to prove the common law offence of indecent exhibition.[42]

27. Mens Rea

It is beyond question that unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of the crime, no one should be found guilty of an offence under the criminal law unless he has got a guilty mind.[43] Offences which can be held to be committed without a guilty mind are usually of comparatively minor character. The offence under this section is not of a minor character. So *mens rea*, is a necessary ingredient of an offence under this section.[44] 'Possession' in cl (a) of sub-s (2) of this section connotes conscious possession and in that sense it cannot be argued that *mens rea* or guilty mind has been dispensed with.[45]

28. Guilty Knowledge

Sub-section (2) of this section (unlike some others which open with the words 'whoever knowingly or negligently *etc*') does not make the knowledge of obscenity an ingredient of the offence. The prosecution need not prove something which the law does not burden it with. If knowledge were made

a part of the guilty act (*actus reus*) and required the prosecution to prove it, it would place an almost impenetrable defence in the hands of offenders. Something much less than actual knowledge must therefore suffice. Absence of definite knowledge may be taken in mitigation, but it does not take the case out of the section. As regards the selling or keeping for sale of an object which is found to be obscene the ordinary guilty intention (*mens rea*) will be required before the offence can be said to be complete. The offender must have actually sold or kept for sale, the offending article. The circumstance of the case will then determine the criminal intent and it will be a matter of a proper inference from them. In criminal prosecution *mens rea* must necessarily be proved by circumstantial evidence alone unless the accused confesses. Sub-section (2) makes sale and possession for sale one of the elements of the offence. Where a sale has taken place, and the accused is a bookseller, the necessary inference is readily drawn. Difficulties may, however, arise in cases close to the border. To escape liability the accused can prove his lack of knowledge unless the circumstances are such that he must be held guilty for the acts of another. The court will presume that he is guilty if the book is sold on his behalf and is later found to be obscene, unless he can establish that the sale was without his knowledge or consent.[46]

29. Innocent Intention no Defence

If a publication is in fact obscene, it is no defence that the intention of the party charged was innocent,[47] or that there are other passages in the book which contain2004 moral precepts of an unexceptionable character.[48] If the probable effect of a publication is to prejudice public morals and decency, and is intended for those who have ardent sex appeal in them and it is for the delectation of the married and the unmarried for the gratification of their normal and abnormal sex appetites and it described varieties of sexual intercourse in a manner which, to say the least, is obscene, it must be taken that the book was written, printed and published and brought into circulation for prurient tastes. If the probable effect of the publication is to prejudice public morals and decency, the accused must be taken to have intended the natural consequences of his acts.[49]

30. Motive

The motive that the publisher had in publishing a book does not prevent it from being obscene if the descriptions are in themselves obscene. The motive may be taken into account as regards the question of sentence; but whether or not it is obscene depends on the material itself and not upon the reasons for the publication. Where a man publishes a work manifestly obscene, he must be taken to have intended the inevitable consequences.[50]

31. Master and Servant--Vicarious Liability--Extent of

The mere fact of a person being the proprietor and publisher of a newspaper is not sufficient to render him liable for a matter inserted by his servant. It must be shown that the matter was inserted by his orders, or with his knowledge,[51] which knowledge may be assumed if the thing is done in the ordinary course of trade management.[52]

32. Sub-section (2)(a)--'Makes, Produces'

The section covers not only the publication or circulation of an objectionable object, but also making, producing and having in possession such an object for the purpose of publication or circulation, and also an attempt to do so. The expression 'makes' and 'produces' occurring in cl (a) of sub-s (2) of this section do not exclude printing from its ambit. They are wide enough in their ambit[53] to embrace it. Possession of obscene matter is punishable only if such possession is for the purpose of publication or circulation. Possession by a person for his own use is not punishable under this section. But private circulation of obscene literature is not exempted under s 292, IPC . A person who puts obscene literature in private circulation is equally guilty under this section.[54]

33. Sub-section (2)(A)--'Or other Objects or General Concern'

The words 'or other objects of general concern' also occurring in sub-cl (i) of cl (a) of the exception to this section fall within the same field or dimension as 'science,2005 literature, art or learning' and do not fall in a totally different area of effect or sexual behaviour.[55]

34. Sub-Section (2)(A)--Sale etc of Obscene Object

In order to constitute an offence under s 292(2)(a), IPC, it must be a case where the obscene object was sold, let on hire, distributed or publicly exhibited or put into circulation. Production or possession of the object for any of the abovesaid purposes will also constitute an offence.[56] Where the allegations were that the first accused was seen exhibiting a blue film and accused nos 2 and 3 were viewing it from the drawing room of the first accused's residence, there was no allegation that the blue film was sold, let on hire or distributed or publicity exhibited, there was no allegation that the film was produced by any of the accused persons for purposes of distribution or circulation, the facts of the case were held not to constitute an offence under sub-s (2)(a) of s 292, IPC, the charge framed against the accused persons was therefore quashed.[57]

In the present day society in India, a book, picture or a publication which deals with such matters cannot *per se* be said to be obscene. Great emphasis is being laid on family planning and in that connection it has become absolutely necessary to import education about sex to the masses. It is a matter of common knowledge that there is even a thinking to introduce sex education as one of the subjects to be taught to the younger generation.[58]

35. Exceptions

The original exception to the section expressly exempted books, pamphlets, writings, drawing and paintings from the operation of the section if they were kept or used *bona fide* for religious purposes. It also exempted sculptures, engravings and paintings represented on or in any temple or on any car used for any religious purpose.

In England, s 4 of the Obscene Publications Act of 1959[59] makes an exception in the case of publications in the interest of science, literature, art or learning or of objects of general concern. This section did not make such exception earlier. But the courts had generally held that publication of indecent matters may be justified if it is genuinely in the interests or for the purposes of arts, science or any other form of learning. The books on medical science with intimate illustrations and photographs, though in a sense immodest, have not been considered to be obscene, but the same illustrations and photographs collected in a book form without the medical text would certainly be considered to be obscene.[60] This defect has now been removed by substituting a new exception in place of the old one by s 2 of Act 36 of 1969. Sub-clause (i) of cl (a) of the present exception now clearly states that this section will not extend to the publication of such book, pamphlet *etc*, which is proved to be justified as being for the public good on the ground that the same is in the interest of science, literature, art or learning or other objects of general concern. Sub-clause (i) of cl (b)2006 of the present exception has further widened the scope of the exception clause by exempting the representation sculptured, engraved, painted or otherwise represented on or any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains (Act 24 of 1958). Such provision was necessary with a view to protect some ancient monuments of historical and artistic importance having some vulgar or objectionable engravings *etc.*

Social Purpose

The book--'*Indian Call Girls*' has obviously been written by the petitioner, who is a sociologist with an object of general good inasmuch as she had carried out research in the lives of call-girls and the men helping in the lives of the call-girls in order to serve the social purpose of eradicating or minimising the evil of call-girls pervading the society. The mere fact that some sort of vulgar language has been used in some portions of book in describing sexual intercourse would not make it obscene. So this book falls under the exception to s 292, IPC .[61]

36. 'Justified as Being for the Public Good'

This expression occurs in cl (a)(i) of the exception to this section. It is open to an accused to plead that the book, pamphlet, writing, drawing, painting, representation or figure, alleged to be obscene, is justified as being for the public good in the interest of science, literature, art or learning, *etc*. Where the court is considering the question of obscenity and of public good as a defence, the court has, first of all, to determine the question of obscenity and the evidence on the question of public good is not relevant to the question of obscenity; once evidence has been given that satisfies the court that the articles are obscene, then and then only the court can proceed to consider the evidence on the other aspect, namely, public good.[62]

If the propagation of an idea, opinion or information be for public interest or profit, it would not be considered to be obscene though such propagation, in a different context, may be considered to be so. It is in this view of the matter that intimate illustrations in photographs, though in a sense immodest, are not considered obscene if included in books of medical science.[63] The justification must, however, depend on the facts of each particular case, on the form of the matter, the circumstances of its publication and the nature of the accused's business. In other words, if the necessary or natural effect of a publication is prejudicial to the public morality or decency, the motive of the accused in publishing the obscene matter is immaterial.[64]

A German magazine by name 'STERN' having worldwide circulation published an article with a picture of Boris Becker, a world renowned tennis player, posing nude with his dark-skinned fiancée by name Barbara Feltus, a film actress, which was photographed by none other than her father. The articles stated that in an interview, both Boris Becker and Barbara Feltus spoke freely about their engagement, their lives and future plans and the message they wanted to convey to the people at large, for posing to such a photograph. Article pictures Boris Becker as a strident protester of the pernicious practice of '*apartheid*'. Further, it was stated that the purpose of the photograph was also to signify that love champions over hatred. 'Sports World', a2007 widely circulated magazine published in India reproduced the article and the photograph as cover story in its Issue-15 dated 5 May 1993 with the caption '*Posing nude dropping out of tournaments, battling racism in Germany. Boris Becker explains his recent approach to life*' - Boris Becker Unmasked. *Anandbazar Patrika*, a newspaper having wide circulation in Kolkata, also published in the second page of the newspaper the above mentioned photograph as well as the article on 6 May 1993, as appeared in the Sports World. Held, the article and the photograph convey message to eradicate the evil of racism and *apartheid* in the society. Boris Becker is protestor against racism in Germany. The photograph and the article are intended to promote love and marriage between white skinned man and black skinned woman. The provisions of s 292, IPC were held not attracted in the case.[65]

The onus is on the accused to make out his defence on the probabilities.[66]

37. Procedure

An offence under this section is cognizable and a warrant shall ordinarily issue in the first instance. It is bailable but not compoundable and is triable by a magistrate. Cognizance of the first offence under this section can be taken within three years of the commission of the offence. There is no limitation for taking cognizance of the subsequent offences.

38. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC 1973 may be adopted:

I (*name the office of the magistrate etc*) hereby notice to you.....(*name of the accused*) as follows:

That on or about the.....day of.....at..... you sold (*or let to hire, or distributed, or publicly exhibited, or put into circulation*) or, for that purpose made, produced or had in your possession an obscene book, pamphlet, paper, drawing, painting, representation or figure, or other object, namely.....(*name the book, etc*) or imported, exported or conveyed an obscene object for such purpose, or knowing or having reason to believe that it will be sold, etc, or took part in or received profits from a business in the course of which you knew or had reason to believe that such object was, for the purposes aforesaid, made, produced, purchased, kept, imported, exported, publicly exhibited or put into circulation, *or, advertised or made known to the public that*.....(*name the person*) *was engaged or was ready to do any act which is an offence under section292 of the Indian Penal Code, or that any such obscene object would be procured from such person*,] (*or offered or attempted to do any such act which is an offence under section292 of the Indian Penal Code*), and thereby committed the offence punishable under section 292 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice?

Ans. Yes

Q. Do you plead guilty or have any defence to make?

Ans. Name of the office of the Magistrate

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39. Contents of the Charge

When a charge is brought against an accused under s 292 or s 294, IPC, it should always specify the words or representations alleged to be obscene, and the magistrate should state in his judgment what he finds to have been exhibited or uttered.[67] A somewhat different view was expressed by the Kerala High Court and it was held that when a person is prosecuted under s 292, no doubt it is better to indicate, in the charge, in what respect exactly the book is obscene. But if the accused is not prejudiced in his defence and the prosecution maintains that the whole book is obscene mere failure to mention particular passages is not a sufficient reason to interfere in revision.[68]

However, in view of the provisions of s 211(2) of the CrPC if the law which creates the offence gives it any specific name, the offence may be described by that name only. If the charge under s 292(1), IPC mentions only 'obscene (photos) books in English, Tamil and Telugu language', the charge is not illegal because s 292, IPC uses a specific name to the offence and that name is obscene. The charge need not narrate the words 'such as to tend to deprave and corrupt persons who are likely, having

regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it' mentioned in the section.[69]

In the instant case, the accused were not found selling or doing anything to bring the case in cl (a) of sub-s (2) of s 292, IPC . For the second part of cl (a) the prosecution has to show that the obscene material was made produced or kept in possession for the purpose of the sale, hire, distribution, public exhibition or circulation, in other words, the possession of obscene object is punishable under s 292, IPC if the possession is for the purpose of sale, hire, distribution, public exhibition or circulation, if the obscene object is kept in the house and is not for sale, hire, public exhibition or circulation, the accused cannot be charged under s 292, IPC .[70]

40. Proof

To establish an offence under this section, it will have to be proved that:

(i) the book *etc*, is of an obscene nature;
(ii) the accused:

(a) sold, let to hire, distributed, publicly exhibited or in any manner put into circulation, or for purpose of sale, hire, distribution, public exhibition or circulation made, produced or had in his possession, any obscene book, pamphlet, paper, drawing painting, representation or figure or any other obscene object whatsoever; or
(b) imported, exported or conveyed any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object would be sold, let to hire, distributed or publicly exhibited or, in any manner put it into circulation; or
(c) took part in, or received profits from, any business in the course of which he knew, or had reason to believe, that any such obscene2009 objects were, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation; or
(d) advertised or made known by any means whatsoever, that any person was engaged or was ready to engage in any act which was an offence under this section, or that any such obscene object could be procured from or through any person; or
(e) offered or attempted to do any act which was an offence under this section.

It is not necessary for the prosecution to prove that the person, who sells, or keeps for sale, any obscene object, knows that it is obscene before he can be adjudged guilty.[71]

The requirement of passing an order of forfeiture of a book, presupposes that the book contains any matter the publication of which is punishable under ss 124A or 153A or 153B or 292 or 293 or 295A of the IPC, for the State Government to declare that every copy of such book be forfeited to the Government. The power can only be exercised and notification can only be issued if the Government forms an opinion that the publication contains matter which is in an offence under any of the sections of the IPC as aforestated.[72]

Proof of Mere Indecency not Sufficient

It is true that in order to sustain a conviction under s 292, IPC the prosecution has to prove that the book is obscene and that it is not sufficient to prove that it is indecent, the gravamen of the charge is that the tendency of the book is to corrupt and deprave and not merely to shock or to disgust.[73]

41. Certain Defences not Open to the Accused

It is not open to an accused to contend that the book is not in circulation,[74] or that one subject of that book was to hold up, to the reader, contemporary life in the west,[75] though he can contend that the book, or pamphlet, *etc* in question, falls within the purview of the exception contemplated in this section. An accused cannot also put to defence that his other publications were also obscene, but he had never been prosecuted earlier.[76] If a publication is, in fact, obscene, it is no defence that the intention of the accused was innocent,[77] or that there are other passages in the book which contain moral precepts of an unexceptionable character.[78]

42. Sentence

The offences of corrupting the internal fabric of the mind, like the one under s 292, IPC, have got to be treated on the same footing as in the cases of food adultrators,2010 and deserve no leniency.[79] Where the accused sold a packet of playing cards portraying on the reverse, luridly obscene naked pictures of a man and woman in pornographic sexual postures, a sentence of six months, rigorous imprisonment and line of Rs 500 was not held to be servere.[80] Where, however, the accused, who had not been prosecuted earlier for similar publications, was put to great loss by the destruction of the obscene books and the book gave useful instructions in sexual matters, a sentence of fine of Rs 250 for the offence under this section was held sufficient.[81] Where the accused guilty of an offence under this section, was aged 31 years and it was hoped that he would refrain from such activities in future, he was sentenced to a fine of Rs 300 and rigorous imprisonment of two months.[82] Where the accused, found guilty under this section, was a petty bookseller and his entire stock of obscene books was seized and he gave an undertaking that he would not repeat such an offence in future, a fine of Rs 50 was held sufficient.[83]But the discretion, which the court had in passing a sentence, has been taken away by the amendment, introduced by the Central Act, 36 of 1969, in this section. Therefore, it is now obligatory on a court to pass a sentence of imprisonment while convicting a person under s 292(2) of this Code. Hence, a mere sentence of fine is, now illegal.[84] While considering the quantum of sentence, the fact, that the accused has pleaded guilty to the charge, must be taken notice of by the court.[85] Where the accused, a young refugee and first offender, expressed desire to rehabilitate himself, sentence of three months was held sufficient.[86]

43. Probation

Where an accused is found guilty under s 292, IPC for showing blue films to young men, has undertaken it as a commercial activity, he is not entitled to be released on probation under s 4 of the Probation of Offenders Act 1958.[87]

44. Destruction of Obscene Matter

On conviction under section the court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the court or remain in the possession or power of the person convicted.[88] The provision is an enabling one and is not mandatory.

11 Substituted by Act 8 of 1925, s 2 for the original section.

12 Inserted by Act 36 of 1969, s 2 (wef 7-9-1969).

13 Section 292 was renumbered as sub-s (2) thereof by Act 36 of 1969, s 2 (wef 7-9-1969).

14 Substituted by Act 36 of 1969, s 2, by certain words (wef 7-9-1969).

15 Substituted by Act 36 of 1969, s 2, for *Exception* (wef 7-9-1969).

16 *Vide* Orissa Act 13 of 1962, s 2 (wef 16-5-1962).

17 *Vide* Orissa Act 13 of 1962, s 3 (wef 16-5-1962).

18 *Vide*Tamil Nadu Act 25 of 1960, s 2 (wef 9-11-1960).

19 Substituted by Tamil Nadu Act No 30 of 1984.

20 Inserted by Tamil Nadu Act No 30 of 1984, s 2 (wef 28-6-1984).

21 *Vide*Tamil Nadu Act 25 of 1960, s 3 (wef 9-11-1960).

22 *MM Haries v State of Kerala* (2005) Cr LJ 3314 (Ker) .

23 *State of Karnataka v Basheer* (1979) Cr LJ 1183 (Kant)(DB).

24 *Jagat Narain Lall v Emperor* AIR 1928 Pat 649, p 651, (1928) 29 Cr LJ 773 .

25 *Ranjit D Udeshi v State* AIR 1962 Bom 268, p 269 .

26 *Sukanta Haldar v State* AIR 1952 Cal 214, p 215, 53 Cr LJ 575 .

27 *Ranjit D Udeshi v State* AIR 1962 Bom 268 .

28 *Queen v Read* (1708) 11 Mod Rep 142 Case No 205(QB).

29 *R v Curl* (1727) 2 Stra 788(KB).

30 20 and 21 Vict, c 83.

31 *Hicklin*'s case [1868] 3 QB 360.

32 *Ranjit D Udeshi v State* AIR 1965 SC 881, (1965) 2 Cr LJ 8 .

33 Statutes 7 and 8 Eliz 2, c 66.

34 *Ranjit D Udeshi v State* AIR 1962 Bom 268, p 271 .

35 *Halsbury's Laws of England.*

36 *R v Levy* (2004) EWCA Crim 1141 .

37 *R v Perrin* (2002) All ER (D) 359 (Mar) .

38 *R v GS* (2012) Times, 16 February.

39 *R v Clark* (2005) S.C.J. No. 4 (*Vide Halsbury's Laws of Canada*).

40 *Narayanan v State of Kerala* (1970) KLT 605, p 607, (1970) Mad LJ (Cr) 775 .

41 *Damodar Sarma v State of Assam* 2007 Cr LJ 1526, p 1527 (Gauh) .

42 *Ranjit D Udeshi v State* AIR 1965 SC 881, (1965) 2 Cr LJ 8, p 12, 13 .

43 *Neelam Mahajan Singh v Commr of Police & Ors* (1996) Cr LJ 2725 (Del) .

44 *Neelam Mahajan Singh v Commr of Police* (1996) Cr LJ 2725 (Del) .

45 *State v Dina Nath* AIR 1956 Punj 85, p 87, (1956) Cr LJ 415 .

46 Re *D Pandurangan*AIR 1953 Mad 418, (1953) Cr LJ 763 .

47 *Shri Ram v State of Uttar Pradesh* AIR 1975 SC 175, (1975) Cr LJ 240(SC).

48 *B Rosaiah (Dr) v State of Andhra Pradesh* (1991) Cr LJ 189(AP).

49 *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881 ; *Public Prosecutor v AD Sabapathy* AIR 1958 Mad 210 ; Re *D Pandurangan*1953 Cr LJ 763.

50 *Public Prosecutor v AD Sabapathy* AIR 1958 Mad 210 ; Re *D Pandurangan*(1953) Cr LJ 763 (Mad).

51 *Neelam Mahajan Singh v Commr of Police* (1996) Cr LJ 2725, p 2732 (Del) .

52 *Javeer Prasad v State of UP* 2011 (128) FLR 1105 (All) .

53 *Sopan v State of Maharashtra* 2008 (2) Mah LJ (Cri) 491 (Bom) .

54 *State of Thakur Prasad*AIR 1959 All 49, 52, (1959) Cr LJ 9.

55 *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881, (1965) 2 Cr LJ 8, p 16, [1965] 1 SCR 65 ; *CK Kakodar v State of Maharashtra* (1970) 2 SCR 80 ; *Sameresh Bose v Amal Mitra* (1985) 2 Crimes 782 (SC), (1986) Cr LJ 24 .

56 *State v Thakur Prasad* AIR 1959 All 49, p 52 .

57 *Dhanisha Karthika v Rakhi N Raj* 2012 Cr LJ 3225, p 3231 (Ker) (DB), 2012 (2) KLT 55 .

58 *Dhanisha Karthika v Rakhi. N Raj* 2012 Cr LJ 3225, p 3232 (Ker) (DB), 2012 (2) KLT 55, 2012 (114) AIC 595 .

59 *Aveek Sarkar v State of West Bengal* 2014 Cr LJ 1560, AIR 2014 SC 1495, 2014 (2) Scale 16, (2014) 4 SCC 257 .

60 *Durlab Singh v State* (1971) 73 Punj LR (D) 113 .

61 *Kutter(Publishing Printing & Promotions) Ltd v Director of Prosecutions* (1972) 2 All ER 898, 904, [1913] AC 435.

62 *Director of Public Prosecutions v Whyte* (1972) AC 849, (1972) 3 All ER 12(HL); *Abdul Rasheed v State of Kerala* 2008 Cr LJ 3480 (Ker), 2008 (3) KLT 150 .

63 *John Calder (Publications) Ltd v Powall* (1965) 1 QB 509, [1965] 1 All ER 159 ; *Director of Public Prosecutions v A and BC Chewing Gum Ltd* (1968) 1 QB 159, [1967] 2 All ER 504 ; *R v Calder and Boyars Ltd* (1968) 3 All ER 644, [1969] 1 QB 151 ; *Halsbury's Laws of England,* vol 11, fourth edn, Butterworths, London, 1976, p 581, para 1017.

64 *Abdul Rasheed v State of Kerala* 2008 Cr LJ 3480, p 3483 (Ker), 2008 (68) AIC 617 (Ker), 2008 (3) KLT 150, 2008 (2) KLJ 367 ; *Murzban F Shroff v Gopala Krishna* 2011 (108) AIC 542 (Mad) .

65 *Abdul Rasheed v State of Kerala* 2008 Cr LJ 3480 (Ker), 2008 (68) AIC 617 (Ker), 2008 (3) KLT 150, 2008 (2) KLJ 367 .

66 *Abdul Rasheed v State of Kerala* 2008 Cr LJ 3480 (Ker), 2008 (3) KLT 150 .

67 *Sameresh Bose v Amal Mitra* 1986 Cr LJ 24 (SC), (1985) 2 Crimes 762 (SC) .

68 *Samresh Bose v Amal Mitra* (1985) 2 Crimes 782, p 795 (SC) .

69 *Murzban F Shroff M v TC Gopalakrishnan* 2011 (108) AIC 542 (Mad) .

70 *PK Somnath v State of Kerala* (1990) Cr LJ 542 (Ker) .

71 *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 831, (1965) 2 Cr LJ 8, p 12 .

72 *State of Uttar Pradesh v Kunjilal* AIR 1970 All 614, (1970) Cr LJ 1638, p 1642 .

73 *Sameresh Bose v Amal Mitra* (1985) 2 Crimes 782, p 798-99 .

74 *Ganpat v State of Madhya Pradesh* (1966) MPLJ 29 (Notes) .

75 *Latheef v State of Kerala* 2015 (1) Crimes 281 (Ker) .

76 *Santosh Singh v State of MP* 2014 (1) Crimes 456 (MP) ; *Himmat Singh v State of MP* 2010, p 89 AIC 683 (MP).

77 *Sangeetha Lakshmana v State of Kerala* 2008 (2) KLT 745, 2008 (65) AIC 330 (Ker) .

78 *Durlabh Singh v State* (1971) DLT 152 .

79 *Gandhi Smaraka Samiti v Kanuri Jagdish Prasad* (1994) 1 Andh LT (Cr) 84 ; *Aveek Sarkar v State of WB* AIR 2014 SC 1495, 2014 Cr LJ 1560, (2014) 4 SCC 257, (2014) 137 AIC 211 (SC) .

80 *Sreeram Saksena v Emperor* AIR 1940 Cal 290, p 291, (1940) 41 Cr LJ 617 ; Re *M Krishnaswami*(1974) LW (Cr) 48; *Durlabh Singh v State* (1971) DLT 152, (1971) 73 Punj LR (D) 113 .

81 Re *M Krishnaswami*1974 LW (Cr) 48; *Gandhi Smaraka Samiti v Kanuri Jagdish Prasad* (1994) 1 Andh LT (Cr) 84 .

82 *OP Lamba v Tarun Mehta* (1988) Cr LJ 610 (P&H) .

83 *State of Uttar Pradesh v Kunji Lal* AIR 1970 All 614, (1970) Cr LJ 1638 .

84 *S Khushboo v Kanniammal* 2010 Cr LJ 2828, p 2835 (SC), AIR 2010 SC 3196, 2010 (4) Scale 462, (2010) 5 SCC 600 .

85 *Farzana Bi v Board of Film Censors* (1983) 2 Cr LC 417 (All), (1983) All WC 424, (1983) All LJ 1133 .

86 *Vijay Sood v State of Himachal Pradesh* 2009 Cr LJ 1530 (HP) .

87 *OP Lamba v Tarun Mehta* (1988) Cr LJ 610 (P&H) .

88 *Aveek Sarkar v State of West Bengal* 2014 Cr LJ 1560, p 1566, 1567, AIR 2014 SC 1495, 2014 (2) Scale 16, (2014) 4 SCC 257 .

89 *Aveek Sarkar v State of West Bengal* 2014 Cr LJ 1560, p 1566, 1567, AIR 2014 SC 1495, 2014 (2) Scale 16, (2014) 4 SCC 257 .

90 *Ibid.*

91 *Gita Ram v State of HP* 2013 (1) Crimes 247 (SC), AIR 2013 SC 641, (2013) 2 SCC 694 .

92 *Ibid.*

1 *Rajkapoor v Laxman* AIR 1980 SC 605, (1980) 2 SCC 175, (1980) UJ 180(SC), (1980) Cr LR (SC) 96, (1980) Cr AR 53(SC), (1980) SCC (Cr) 383, (1980) Cr LJ 436(SC), (1980) All Cr C 8 (SC), (1980) LW (Cr) 109 (SC).

2 *Deepankar Chowdari v State of Karnataka* 2008 Cr LJ 3408, p 3410 (Kant), 2008 (4) KCCR 2720 . (Proceedings were quashed).

3 *Sadanand v Delhi Admn* (1986) 2 Crimes 424 (Del) ; *Aveek Sarkar v State of West Bengal* 2014 Cr LJ 1560, AIR 2014 SC 1495, 2014 (2) Scale 16, (2014) 4 SCC 257 .

4 *R v Clerk* (1883) 15 Cox 171 .

5 *R v Sedley* (1863) 1 Sid 168, 1 Keb 620, 17 St Tr 155n.

6 *R v Reed* (1871) 12 Cox 1 .

7 *Chintan Upadhyay v Hema Upadhyay* 2013 Cr LJ (NOC) 481 (Bom), 2014 (2) Crimes 499 .

8 *Durlab Singh v State* (1971) DLT 152 .

9 *R v Hicklin* (1808) 3 QBD 360, p 371 quoted with **approval** in *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881, (1965) 2 Cr LJ 8 .

10 *R v Reiter* (1954) 2 QB 16 .

11 *Ranjit D Udeshi v State of Maharahstra* AIR 1965 SC 881 ; *CK Kakodar v State of Maharashtra* (1970) 2 SCR 80 ; *Sameresh Bose v Amal Mitra* (1985) 2 Crimes 782 (SC) ; *R v Parashram* 20 ILR Bom 193 ; *R v Hari Singh* 28 ILR All 100, p 102 ; Re *Kheroda Puranik*(1913) 14 Cr LJ 248; *Ranjit D Udeshi v State of Maharashtra* AIR 1962 Bom 268, (1962) 2 Cr LJ 741 ; *CT Prim v State* AIR 1961 Cal 177, (1961) 1 Cr LJ 371 ; *State v Dina Nath* AIR 1956 Punj 85, (1956) Cr LJ 415 ; *M Ramamurthy v State of Mysore* AIR 1954 Mys 229, (1954) Cr LJ 1622 ; *Sukanta Haldar v State* AIR 1952 Cal 314, 53 Cr LJ 575 ; *Emperor v Harnam Das* AIR 1947 Lah 383, (1947) 48 Cr LJ 910 ; *R v Martin Secker and Warburg Ltd* (1954) 1 All ER 683 ; *R v Reiter* (1954) 1 All ER 741 ; *State of Maharashtra v Christine Kelley* (1978) UCR 277 (280) (Bom) ; *Dhanisha Karthika v Rakhi* 2012 Cr LJ 3225, p 3232 (Ker) (DB), 2012 (2) Karlj 265 .

12 *R v Martin Secker and Warburg Ltd* (1954) 2 All ER 683 .

13 *R v Hicklin* (1868) 3 QB 360, 37 LJMC 89 .

14 *Ranjit D Udeshi v State of Maharashtra* (1962) Bom 268, (1962) 2 Cr LJ 741 ; *Sukanta Haldar v State* AIR 1952 Cal 214, p 215, 53 Cr LJ 757 .

15 *State v Dina Nath* AIR 1956 Punj 85, p 88, (1959) 1 ILR Cal 678 ; *Chandrakant v State of Maharashtra* AIR 1970 SC 1390, (1970) Cr LJ 1273 .

16 *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881, (1965) 2 Cr LJ 8, p 15 ; *Chandrakant v State of Maharashtra* AIR 1970 SC 1390, (1970) Cr LJ 1273 .

17 *Aveek Sarkar v State of West Bengal* 2014 Cr LJ 1560, AIR 2014 SC 1495, 2014 (2) Scale 16, (2014) 4 SCC257.

18 *Sukanta Halder v State* AIR 1952 Cal 214, p 215, 53 Cr LJ 575 ; *CT Prim v State* AIR 1961 Cal 177, (1961) 1 Cr LJ 371 ; *Sreeram Saksena v Emperor* AIR 1940 Cal 290, (1940) 41 Cr LJ 617 ; *Steele v Brannan* 7 CP 261 ; *State v Thakur Prasad* AIR 1959 All 49, (1959) Cr LJ 9 .

19 *Krishna Chandreshwar v State of Orissa* (1987) 64 Cut LT 632, p 637 .

20 *R v Thomson* (1900) 64 UP 456 ; *State v Thakur Prasad* AIR 1959 All 49, (1959) Cr LJ 9 .

21 *Devidas Ramchandra Tuljapurkar v State of Maharashtra* 2010 Cr LJ 1967, p 1971 (Bom), 2010 (112) BOMLR 535 .

22 *CT Prim v State* AIR 1961 Cal 177, (1961) 1 Cr LJ 371 ; *Ranjit D Udeshi v State of Maharashtra* AIR 1962 Bom 268, (1962) 2 Cr LJ 741 .

23 *Ranjit D Udeshi v State of Maharashtra* AIR 1962 Bom 268, (1962) 2 Cr LJ 741 .

24 *Neelam Mahajan Singh v Commr of Police* (1996) JCC 337, p 346 (Del) .

25 *Antony v State of Kerala* (1988) 2 Crimes 173 (Ker) .

26 Re *M Krishnaswami*(1974) LW (Cr) 48; *Durlabh Singh v State* (1971) 73 Punj LR (D) 113 .

27 *Girdharlal Popatlal Shah v State* AIR 1956 Bom 32, (1956) Cr LJ 206 .

28 *Sreeram Saksena v Emperor* AIR 1940 Cal 290, p 291, (1940) 41 Cr LJ 617 ; *State v Thakur Prasad* AIR 1959 All 49, (1959) Cr LJ 9 .

29 *R v Reiter* (1954) 2 QB 16 .

30 *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881, (1965) 2 Cr LJ 8, 15 ; *Durlabh Singh v State* (1971) 73 Punj LR (D) 113 .

31 *Vinay Mohan Sharma v Delhi Administration* 2008 Cr LJ 1672 (Del), (2007) ILR 10 Delhi 1 .

32 *Neelam Mahajan Singh v Commr of Police* (1996) JCC 337, 346 (Del) .

33 *Dau Dayal v State* (1955) NUC (All) 3567 ; *Samresh Bose v Amal Mitra* (1985) 2 Crimes 782, p 799 (SC) .

34 *Samresh Bose v Amal Mitra* (1985) 2 Crimes 782, p 799(SC); *Ranjit D Udeshi v State of Maharashtra* (1965) 1 SCR 65 ; *CK Kakodar v State of Maharashtra* (1970) 2 SCR 80 .

35 *Gandhi Smaraka Samithi v Kanuri Jagdish Prasad* (1994) 1 Andh LT (Cr) 84, p 89 .

36 *CMD Hindustan Latex Ltd v State of Kerala* (1999) IV CCR 558 (Ker) .

37 *Russel on Crime*, eleventh edn, p 1633.

38 *R v Altred Cartle* (1845) 1 Cox 229 .

39 *R v Hirsch* (1899) 34 LJ News 132 .

40 *Damodar Sarma v State of Assam* 2007 Cr LJ 1526, p 1530 (Gauh), (2007) 1 GLR 655 .

41 *Jagat Narain Lall v Emperor* AIR 1928 Pat 649, p 651, (1928) 29 Cr LJ 773 .

42 *R v Saundus* (1875) 1 QBD 15 .

43 *OP Lamba v Tarun Mehta* (1988 Cr LJ 610 (P&H).

44 *CT Prim v State* AIR 1961 Cal 177, p 178, (1961) 1 Cr LJ 371 ; *Srinivas Mare v Emperor* AIR 1947 PC 135 .

45 *Ibid*; *R v Hicklin* 3 QBD 369 .

46 *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881, (1965) 2 Cr LJ 8, p 13 .

47 *R v Hari Singh* 28 ILR All 100 ; *R v Gathercole* 2 Lewin GC 237 ; *R v Dixon* 3 M&S 11 .

48 *R v Vishnu Krishna Puranik* (1913) 14 Cr LJ 248 .

49 *State v Thakur Prasad* AIR 1959 All 49, p 52 .

50 *Kailash Chandra v Emperor* AIR 1932 Cal 651, p 652, (1932) 33 Cr LJ 771 .

51 *R v Mahommad* (1890) All WN 175 ; *Mumtaz Ali v R* (1905) 2 Cr LJ 717, 35 PR (Cr) 1905 ; *R v Uma Shankar* 18 PR 1889, Cr; *R v Marney* LR [1907] 1 KB 388, 76 LJKB 210.

52 *R v Key* 52 Sol Jo (1907), 748 CCA; *Jagat Narain Lall v Emperor* AIR 1928 Pat 649, (1928) 29 Cr LJ 773 .

53 *Ravi v Sub-Inspector of Police* (1989) 1 Crimes 259, p 261 (Ker) .

54 *Dau Dayal v State* (1955) NWC 3567 (All) .

55 *Director of Public Prosecutions v Jordon* (1978) 3 All ER 775, p 780(HL).

56 *Ramesh Krishnan v State of Kerala* (2000) III CCR 95(Ker).

57 *Ibid.*

58 *OP Lamba v Tarun Mehta* (1988) Cr LJ 610 (P&H) .

59 Statutes 7 & 8 Fliz 2, Ch 68.

60 *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881, (1965) 2 Cr LJ 8, 12, p 14, 16 .

61 *Promilla Kapur (Dr) v Yashpal Bhasin* (1989) Cr LJ 1241 (Del) .

62 *Olympia Press Ltd v Holis* (1974) 1 All ER 108, p 111 ; *R v Colder and Boyars Ltd* (1968) 3 All ER 644, [1969] 1 QB 151 (CA) ; *Halsbury*'s *Laws of England,* vol 11, fourth edn, p 582, para 1018.

63 *State v Kunji Lal* AIR 1970 All 614, (1970) Cr LJ 1638, p 1642 .

64 *State v Thakur Prasad* AIR 1959 All 49, p 52, 53, (1959) Cr LJ 9 .

65 *Aveek Sarkar v State of West Bengal* 2014 Cr LJ 1560, p 1568, AIR 2014 SC 1495, 2014 (2) Scale 16, (2014) 4 SCC 25 .

66 *R v Calder and Boyars Ltd* (1968) 3 All ER 644, (1969) 1 QB 151(CA); *Halsbury*'s *Laws of England*, vol 11, fourth edn, p 582.

67 Re *Mi Min Si* (1872-92) LBR, 262; *Queen v Upendranath Doss* ILR 1 Cal 356 .

68 *Dwarkadas v State of Kerala* (1961) Ker LJ 771, (1961) KLT 701 .

69 *State of Karnataka v Basheer* (1979) Cr LJ 1183 (Kant)(DB).

70 *Jagdish Chawla v State of Rajasthan* (1999) Cr LJ 256 (Raj) .

71 *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881, p 886, (1965) 2 Cr LJ 8 .

72 *Sangharaj Damodar Rupawate v Nitin Gadre* 2007 Cr LJ 3860, p 3863 (Bom) (FB) .

73 *E Adikesavalu v State of Madras (*1963) Mad WN 629 (Mad).

74 *Sukanta Haldar v State* (1959) 1 ILR Cal 678 .

75 *CT Prim v State* AIR 1961 Cal 177, p 180, (1961) 1 Cr LJ 371 .

76 *Dau Dayal v State* (1955) NUC (All) 3567 .

77 *R v Hari Singh* 28 ILR All 100 .

78 *R v Vishnu Krishna Puranik* (1913) 14 Cr LJ 248 .

79 *Uttam Singh v State* AIR 1974 SC 1230, p 1231-32, (1974) Cr LJ 923, (1974) SCWR 688, (1974) 4 SCC 590 ; *Gopal Saha v State* (1975) 41 Cut LT 171, (1974) Cut LR (Cr) 421 .

80 *Uttam Singh v State* AIR 1974 SC 1230, p 1231-32, (1974) Cr LJ 923 (probation under s 4 of the Probation of Offenders Act 1958 not granted).

81 *Dau Dayal v State* (1955) NUC (All) 3567 .

82 *Chandrasekher Pradhan v State* (1976) Cut LT 121(Cr).

83 *Dwarakadas v State of Kerala* (1961) KLT 701, (1961) Ker LJ 771 .

84 *State of Karnataka v Basheer* (1979) Cr LJ 1183, p 1185, (1980) Mad LJ (Cr) 259 (Kant) (DB).

85 *Ibid.*

86 *Gopal Saha v State* (1975) 41 Cut LT 171 .

87 *Gita Ram v State of HP* AIR 2013 SC 641, (2013) 2 SCC 694, (2013) 124 AIC 154 .

88 Section 455(1), CrPC 1973.

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

[89][S. 293.

Sale, *etc.*, of obscene objects to young person.--

Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or2011 offers or attempts so to do, shall be punished [90][on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees].

STATE AMENDMENTS

Tamil Nadu--In section 293 --

(a) For the words "any such obscene object as is referred to in the last preceding section", the words, figures and letters "any such obscene object as is referred to in s 292 or any such newspaper, periodical, circular, picture or other printed or written document as is referred to in s 292A ", shall be substituted;
(b) for the words "which may extend to six months" the words "which may extend to three years" shall be substituted;
(c) in the marginal note, after the words "obscene objects" the words "and grossly indecent or scurrilous matter or matter intended for blackmail", shall be inserted.[91]

Orissa--

Same as in Tamil Nadu.[92]

Comments

1. Scope

This section punishes a person who sells, lets to hire, distributes, exhibits or circulates obscene objects as referred to in the preceding section to young persons. It enhances the punishment where the obscene objects are sold, *etc*, to persons under the age of 20 years.

In the final draft of the International Conference which drafted, the convention in accordance with which this section was substituted for the original, it was stated that the conference generally was of opinion that the offence of offering, delivering, selling or distributing obscene objects must be held to have been aggravated when committed in respect of minors. The Council (of the League) considered that it would be preferable to leave each state free to fix the age under which a person should be considered to be a minor for the purposes of this provision.[93]

2. Legislative Changes

This section was substituted for the original by s 2 of the Obscene Publication Act, 8 of 1925. The section was again amended in 1969 by Act 36 of 1969 with a view to provide a more stringent punishment. Before the 1969 amendment the offence was2012 punishable only with imprisonment of either description for a term which could extend to six months, or with fine, or with both.

3. Analogous Law

This section is analogous to s 2 of the English Children and Young Persons (Harmful Publications) Act 1955.

4. Abetment

Synopsis note 8 of s 292 may be referred to.

5. Procedure

This offence is cognizable and a warrant shall ordinarily issue in the first instance. It is bailable but not compoundable and is triable by any magistrate.

The limitation for taking cognizance of this offence is three years. This bar of limitation will, however, not apply to subsequent offences committed by the accused after his conviction in a case under this section.

6. Charge

The following form of the charge may be adopted:

I (*name and office of the magistrate etc*) hereby charge you (*name of the accused*) as follows:

That you on or about the.....day of.....19....., at....., sold (*or let to hire, or distributed or exhibited or circulated*) to.....(*name the person*) under the age of twenty years.....(*name the obscene object*) (*or offered or attempted to do so*), and thereby committed an offence punishable under section 293 of the Indian Penal Code and within the cognizance of this court.

[94][*And that you, the said.....(name the accused) stand further charged that you had been earlier convicted on the.....day of.....by.....(name the court) of an offence under this section, which conviction is still in force and effect, and that you are thereby liable to enhanced punishment in the event of your conviction in this case.*]

And I hereby direct that you be tried by this court for the said offence.

7. Proof

To establish an offence under this section, it will be necessary to prove that:

(i) a book or object of obscene nature, as is referred to in s 292, IPC, was sold, *etc.*;
(ii) the person, to whom it was sold, *etc.*, or offered or attempted to do so, was under the age of 20 years.

8. Assessment of Evidence--Relevancy of Certificate of Board of Censors

In a trial for the offence under ss 292 and 293, IPC, a certificate granted under s 5A of the Cinematograph Act 1952, by the Board of Censors, does not provide an irrebuttable defence to the accused, who have been granted such as certificate, but2013 it is certainly a relevant fact of some weight to be taken into consideration by the criminal court in deciding whether the offence charged is established. Regard must be had, by the court, to the fact that the certificate represents the judgment of a body of persons, particularly selected under the statute for the specific purpose of adjusting the suitability of films for public exhibition, and the judgment extends to a consideration of the principal ingredients which go to constitute the offences under ss 292 and 293 of the Indian Penal Code . At the same time, the court must remind itself that the function of deciding whether the ingredients are established is primarily and essentially its own function and it cannot abdicate that function in favour of another, no matter how august and qualified be the statutory authority.[95]

9. Destruction of Obscene Matter

On a conviction under this section or under s 292, IPC, the court may under s 455(1) of the CrPC 1973 order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the court or remain in possession or power of the person convicted.

89 Substituted by Act 8 of 1925, s 2 for the original section.

90 Substituted by Act 36 of 1969, s 2, for certain words (wef 7-9-1969).

91 *Vide* TN Act 25 of 1960, s 4 (wef 9-11-1960).

92 *Vide* Orissa Act 13 of 1962, s 4 (wef 16-5-1962).

93 Statement of Objects of Reasons, *Gazette of India*, 1924, Pt 5, p 126.

94 Sections 211(7), 236 and 248(3) of the CrPC 1973.

95 *Raj Kapoor v State (Delhi Admn)* AIR 1980 SC 258, (1980) Cr LJ 202 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

[96][S. 294.

Obscene acts and songs.--

Whoever, to the annoyance of others,

(a) does any obscene act in any public place, or
(b) sings, recites or utters any obscene song, ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.]2014

Comments

1. Object

The section is intended to prevent an obscene act being performed in public, to the annoyance of the public at large.[1]

It must be read subject, *inter alia*, to the general exception in ss 87 and 88 of this Code.[2] A customer, who goes to a hotel, where a cabaret show is run, impliedly gives his consent to take the risk of the mental harm, if any, of being annoyed by the obscene sound and dances which the cabaret performer may give. The maxim *volenti non fit injuria* must apply to annoyance, if any.[3] 'Writing letter' to the woman police officer at her residential address using vulgar and obscene language does not come under the mischief of s 292 or s 294 .[4]

To make out an offence under s 294(b) of IPC, the alleged obscene act must have been committed by the accused in or near a public place.[5] Offence under s 294(b) cannot be made out uttering words in a private garden which is not a public place.[6]

2. Legislative Changes

This section was substituted for the original s 294 by s 3 of the Criminal Law Amendment Act (3 of 1895). The original section ran thus:

> Whoever sings, recites or utters in or near any public place any obscene song, ballad, or words to the annoyance of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

The old section was replaced to meet a case of indecency which was common in the Madras Presidency and was pointed out in an unreported case of the High Court.

3. Essential Ingredients of the Offence under this Section

The essential ingredients of the section are:

(i) an act must have been done in a public place, or a song, ballad or words must have been sung, recited or uttered in, or near any such place;
(ii) the act, song, ballad or words must be obscene; and
(iii) the same must cause annoyance to others.

The main ingredient for the offence under s 294(b), IPC is uttering words in a public place to the annoyance of others.[7]

4. Abetment

Commentary under the same heading in s 292, *ante* may be referred to.2015

5. 'Annoyance to others'

An act*per se* indecent and obscene would not warrant prosecution under s 294 of the IPC in absence of express evidence of annoyance to any other persons.[8]

To prove the offence under s 294, IPC mere utterance of obscene words are not sufficient, but there must be a further proof to establish that it was to the annoyance to others.[9] Annoyance to others is essential to constitute an offence under this section. Where there is no evidence recorded that the language used caused annoyance to anybody, a conviction under this section cannot be sustained.[10] From the wording of the section it is plain that annoyance by the obscene act of the accused should be caused to others. The word 'others' includes singular member as well.[11]The section does not limit the scope of the word 'others' to mean the person who is the intended victim of the obscene act. It is enough if the obscene act is committed in public and causes annoyance to anybody, be he the contemplated victim of the offender or not.[12]There can be a large number of acts which, by their very nature, are so offensive to morality and repugnant to a sense of propriety and decency that, if done in public, they would cause annoyance to any every respectable member of the society regardless that the doer of the act has or has not any particular individual or individuals in his mind whom he wants to injuriously affect when doing the act. The doing of such an act would cause annoyance to the public at large and the offender cannot escape liability on the plea that there was no particular victim intended by him. Similarly, there is another class of cases in which the offender, by his act, intends to injuriously affect his victim only, but nonetheless, since the act is done in public and it is obscene, it is bound to cause annoyance to others also who happen to see and hear it besides the victim intended.[13] Kissing by two young people without any intention of annoying anyone has, however, not been held to be an obscene act.[14]

Where a couple was taking photograph of each other sitting together and using their mobile phones outside the court premises, held no annoyance was caused to the public, as such no offence under s 294, IPC was committed and therefore FIR was quashed.[15]

Annoyance--How to be Determined

In determining whether a particular utterance caused annoyance to others, regard should be had to the circumstances of the case and to the class of society to which the parties belong.[16]

6. 'Obscene Act'

No precise or arithmetical definition of the word 'obscene' to cover all possible cases could be given earlier. It had to be judged on the facts of each case, whether in the context of its surroundings the questioned act was obscene or not. The position has2016 considerably been changed now. Sub-section (1) of s 292 inserted by the Amendment Act 36 of 1969 now specifically defines the word 'obscene' and the said definition can be used for the purposes of this section as well.

The word 'obscenity' used in s 294, IPC does not have different meaning than what is explained in ss

292 and 293, IPC .[17]

Test of obscenity laid down in *Hicklin's* case[18] followed in *PT Chacko v Nainan Chacko* [19] and *George v State of Kerala* ,[20] while interpreting 'obscenity' used in s 294(b) of IPC, having been followed for nearly four decades has to be accepted and followed as the correct law laid down on the point.[21]

Commentary under s 292, *ante* may be referred to.

Test of Obscenity

Commentary under the same heading in s 292, *ante* may be referred to. For test of obscenity, see also *Devidas Ramachandra Tuljapurkar v State of Maharashtra.* [22]

The test of obscenity is the substantial tendency to corrupt by rousing lustful desires.[23]In a case, the accused addressed two respectable young girls not known to him, openly in the hearing of others, in a public place, inviting them to accompany him on his rickshaw in amorous words suggestive of illicit sex relations with them. The words addressed by the applicant were clearly offensive to the chastity and modesty of the girls, something which delicacy, purity and decency forbade to be expressed. The girls, as also others who were present, must have suffered a moral shock to hear such sensuous words addressed to them by an utter stranger. They were suggestive of unchaste and lustful ideas and were impure, indecent and lewd. It was held that by addressing such words to the girls the accused committed an obscene act within the meaning of this section.[24]

Cabaret Dances and Obscenity

It is hard to hold the contention that cabaret dances are harmful to public order and morals and are likely to deprave and corrupt the minds of the viewers, especially those who are young and besides being obscene, cause annoyance to the other customers of the restaurant. A customer above the age of 18, who goes to a hotel, where a cabaret show is run, looks forward to be entertained by obscenity and cannot complain of annoyance to which, if any, he shall be deemed to have given his consent. Even assuming that such a hotel where any person can buy tickets or seats is considered to be a public place, it cannot be held that the obscenity and annoyance which are punishable under s 294, IPC are caused without the consent express or implied of such person. An offence under s 294, IPC can be said to have been committed to the annoyance of the public, if the public or a section thereof object.[25] The cabaret dances where indecent and obscene act per se is involved would not2017 attract provision of s 294 in absence of express evidence of annoyance by any of the persons who attended such show.[26]

The performance of a cabaret dance devoid of nudity and obscenity judged with Indian standards, is permissible, and is not, in any way, liable to be banned or prevented.[27]

Nude Female Form--Whether Obscene

Mere showing of nude female form in itself, is not necessarily obscene, unless the manner in which the nude picture appeared in the film is such that it is likely to arouse unhealthy lustful thoughts in the minds of viewers.[28]

Obscenity and Moral Turpitude

In *Pawan Kumar v State of Haryana* ,[29] the question before the Supreme Court was whether a conviction under this section involves moral turpitude. The Apex Court defined 'moral turpitude' as follows:

> Moral turpitude, is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity.

It was held that conviction under s 294, IPC, *per se* does not establish moral turpitude. The courts should be sensitive to the changing perspectives and concepts of morality to appreciate the effect of s 294, IPC on today's society and its standards, and its changing views of obscenity.

Commentary under s 292 may be referred to.

7. 'Public Place'

To constitute an offence under this section, it is necessary that the acts, enumerated in the section, must have been done in, or near, any 'public place'.[30] 'A public place is a place where the public go, no matter whether they have a right to go or not. The right is not the question'.[31]Where annoyance to the public was not caused by the act of the accused persons, namely a couple taking photograph of each other and, sitting together and using their mobile phones outside the court premises, held no offence under s 294, IPC was made out, FIR was quashed.[32]

In considering whether a particular locality is a public place or not, the courts look at it in respect to the manner in which it was used at the time of the alleged offence. Thus, if a village storehouse in which medicines are sold, is locked up at night, it then ceases to be a public place, though it was such during the day. And the general principle seems to be, that the place must be one to which people are at the time privileged to resort without an invitation. On the other hand, any place may be made2018 public by a temporary assemblage; and the exclusion of a few persons is not alone sufficient to prevent its being such.[33]

A necessary ingredient of the offence under s 294 of the IPC is that it must occur in a 'public place'. A public place must be held to be a place which is open to the members of the public though in some cases access to it by members of the public may be on fulfilling certain conditions. But the right of access to such place must not be limited to any determinate section of public and the person in charge of the place should have no right or discretion to deny access to any member of the public as long as such member is ready to fulfill the conditions attached for access. Where the incident was alleged to have occurred in the room of the petitioner, Managing Director, when the complainant had gone after prior appointment, the petitioner had threatened and abused the complainant, the Managing Director's room is not a public place, offence under s 294, IPC was not committed, cognizance taken against the petitioner was quashed on petition under s 482, CrPC .[34]

A railway carriage is a public place.[35] So also is an omnibus, train, or public urinal.[36]

Exposure of a man's person in a public place is indictable.[37]

In the instant case the incident had taken place inside the house of the accused appellant which is not a public place. The words and sentences alleged to be obscene were not mentioned in the FIR. FIR was quashed on petition filed under s 482, CrPC .[38]

Public Place--Hotel with Restriction of Entry by Ticket Like Cinema Hall

An enclosed area in a posh hotel where cabaret dance is performed cannot be said to be a private place merely by reason that entry is restricted to persons purchasing the highly priced tickets and costly food and drinks are served. A posh hotel is as much a public place as a cinema house. Entry to a hotel just like a cinema house cannot be and is not being restricted to anybody. A hotel must definitely be placed accessible to all except perhaps subject to reasonable restrictions allowed by law. It continues to be a public place. If any portion of the hotel is earmarked for persons who opt to pay a particular amount, it does not cease to be a public place for that reason, because without discrimination anybody will have access on such payment. Therefore, there is no point in contending

that a portion of a hotel where the only restrictions for entry on some payments is not a public place. Otherwise the result will be that any public place could be made a private place by enclosing the same and restricting entry to persons who can afford payment of huge amounts. If 'public place' is determined on the amount of money, one may have to shell out for securing admission the position will be pitiable and it will only tend to judicial recognition of corruption. If what is prohibited in a cinema house where people are admitted for charges within their reach is not taboo for the rich who could afford to witness such shows for higher tickets with additional amounts for drinks and food, the position is really ridiculous. The position will be that those who could afford enormous amounts could conduct or witness obscene acts with impunity. That is not the legal intent. If that principle is2019 accepted the criterion for deciding a public place will be the amount that is expended for getting entry. If so a cinema house also will cease to be a public place if the ticket charges are enormously increased and it is provided that consumption of costly food and drinks on payment is also a must. That is not what the law intended as the criterion for deciding whether a place is public or not. If that is the criterion every public place could be converted into a private place by restricting entry to rich persons who alone could afford the luxury. The result will be that any obscenity which is prohibited to the poor will not be a prohibited obscenity for the rich. That will lead to a very unhappy position. So also previous advertisement of what is going to be performed cannot have the effect of converting a public place into a private place or obscenity into something which is not obscene.[39] Thus, (i) cabaret dances where indecent and obscene act *per se* is involved, would not attract the provision of s 294 of the IPC without fulfilment of its essential ingredients *ie* evidence pertaining to 'annoyance to others' and (ii) the hotels like the one where cabaret dances are performed and entry is restricted by purchase of the tickets, would still be the public places within the meaning of s 294 of the IPC .[40]

Where the allegation was that the accused owner of the bar and restaurant was organizing obscene dances in guise of orchestra in bar and restaurant it was held that s 294, IPC was not attracted in the case.[41]

8. Occurrences not taking Place in Public Place

Where the accused went to the complainant's house and abused him, it was held that the act was not done in, or near, any public place and, therefore, it did not constitute an offence under this section.[42] Similarly, where the accused was abusing the complainant, his next door neighbour standing on his own *chabutra*, the *chabutra* was held not to be a public place so as to constitute an offence under s 294(b), IPC .[43] Where the occurrence did not take place in a public place but it took place in the garden belonging to one person, who stated to have purchased the said property from another person without the knowledge of the accused person, who are the wife and son of the person who has sold the said property, under these circumstances the proceeding for the offence under s 294(b), IPC, is not maintainable.[44] The offence under the section cannot be made out for uttering words in a private garden which was not a public place.[45]

Where the place in question was out of sight of the public footpath but was a place to which persons were in the habit of going without any strict legal right to do so and without being in any way hindered, and the prisoner exposed his person to several little girls, it was held that he was rightly convicted, and a suggestion was thrown out that the offence might be indictable if committed before diverse subjects of the realm even if the place be not public.[46]2020

The prosecution case was that the accused by uttering obscene words and words relating to caste dispossessed the complainant from land. Evidence however showed that the accused was in possession of the disputed land. The case set up by the complainant was false. Accused was acquitted of the charge under s 294, IPC .[47]

9. Sealing and Seizing Theatre and Articles

Insofar as arrest of the persons, who are alleged to have been committed the offence under s 294 of IPC, which is a cognizable offence, and seizing five reels of the offending film is concerned, there

cannot be any objection for they directly relate to commission of the offence. Sealing and seizing the theatre is, however, not authorised in law. But when on allegation that the licensee of the theatre is screening obscene or pornographic films, B-form licence is cancelled or suspended thereby the theatre cannot be used for screening any films. However, at the stage of investigation in relation to a criminal case, the police do not have any powers to seize the cinema theatre or projector.[48]

10. Clause (B)--'Obscene Songs'--Ballad and Words

It must be proved that the act or words in question were obscene.[49] They are to be stated in the FIR or complaint. The mere allegation of the use of obscene words without mentioning the words uttered cannot attract charges under s 294, cl (b).[50]

In order to constitute an offence under s 294(b), the accused must sing, recite or utter any obscene song, ballad or words, in or near any public place.[51]

A conviction under this section for singing obscene songs in a public place was set aside in the absence of proof that the particular songs sung were obscene, though they belonged to a class of songs many of which were obscene.[52]

11. Vulgar Abuses--Whether Obscene

No literal significance can, however, be attached to vulgar abuses,[53] abuse cannot be equated with utterance of obscene words, there must be proof of annoyance to others in the public place.[54] So mere vulgar abuses do not constitute an offence under s 294, IPC, though of course in certain circumstances intentional insult with intent to provoke breach of peace may enable court to frame a charge under s 504, IPC . Mere platitudinous utterances signifying the enraged state of a person's mind would not be sufficient to attract the application of the provision of s 294, IPC . The test is whether the tendency of the matter charged on obscenity is to deprave and corrupt those whose minds are open to such immoral influences.[55] Where the accused called a mistress, serving in a school, '*Randi*', *'Chhinar'* and '*Vaishya'* in the public place, it2021 was held that the words were obscene and annoying within the meaning of this section.[56]

Where the petitioners were alleged to have uttered words to two girls in public places, 'oh, good looking, how are you, from where have you come and how is your life, let us laugh and play'. These words allegedly created bad influence on the public. But it was held that none of the saying attributed to petitioners could in any way be construed as amounting to an offence under s 294, IPC .[57]

12. Obscene Words

So if the words uttered by the accused are not such as would tend to arouse sexually impure thoughts or deprave or corrupt the mind of complainant, who is himself a doctor they do not answer the test of obscenity.[58] But where the accused, in a public lane, repeatedly uttered words '*Haae jani maar daal idhar bhi darshan karti ja*' when girls and ladies were passing, it was held that the words were obscene and annoying.[59]

13. Dramatic Performance Act, 19 of 1876, Section 9

A conviction under s 9 of the Dramatic Performance Act, 19 of 1876, is no bar to conviction under this section.

14. Procedure

An offence under this section is cognizable. A warrant shall ordinarily issue in the first instance. It is bailable but not compoundable. It can be tried by any judicial magistrate and can be tried summarily.

But where the charge under this section is against a government servant, which if established, would entail the dismissal of the government, the accused should not be tried summarily.[60]

The cognizance of this offence can be taken within one year.

15. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC 1973 may be adopted:

> I (*name and the office of the magistrate etc*) hereby notice to you (*name of the accused*) as follows:
>
> That you on or about.....day of....., at....., to the annoyance of (*name the persons*) did the obscene act.....(*name the obscene act*) in.....(*name the public place*) (*or sung or recited or uttered*).....(*name the song, ballad or words*) which was an obscene song, (*ballad or words*), in [*or near*.....(*name the public place*)], and thereby committed an offence punishable under section 294 of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried for the said offence.
>
> Q. Have you heard and understood the notice ?
>
> Ans. Yes2022
>
> Q. Do you plead guilty or have any defence to make ?
>
> Ans. Name of the office of the Magistrate

16. Proof

To establish an offence under this section, it will be necessary to prove that:

(i) the accused:

(a) either did some act in any public place; or
(b) sang, recited, or uttered any song, ballad or words, in or near any public place,

(ii) the said act, song, ballad or words were obscene; and
(iii) it caused annoyance to others.[61]

Where the obscene words used by the accused were not set out in the evidence, it was held, that the omission was not a sufficient ground for setting aside the conviction.[62]

A vague or general statement in the FIR that the accused showered obscene words is not enough to constitute an offence under s 294(b) . It is necessary to state the words uttered by the accused. The prosecution would not be justified in bringing in the evidence for the first time the words are allegedly spoken to by the accused, when the same is not recorded in the First Information Statement in a case instituted upon police report.[63] Where the words alleged to be obscene were not reproduced in FIR, charge for offence under s 294(b), IPC framed against the accused was quashed.[64]

Mere unparliamentary words used by the accused would not amount to offence punishable under s 294 when the words are not obscene.[65]

To prove the offence under s 294, IPC, mere utterance of obscene words are not sufficient, but there must be a further proof to established that it was to the annoyance to others.[66]

Film Reel found containing Blue Film Attached to the Regular Film

Where the materials collected during the course of investigation *prima facie*point out that the obscene scene is totally unconnected with the English Film 'Girl' and the obscene scene had been connected to the film 'Girl' and shown as part of the film, just prior to intermission, in such a state of affairs, it cannot at all be stated that the offending act of exhibition of the blue film containing the obscene scene, which is totally unconnected with the censored film, is actually justified by law or is *bona fide* believed by mistake of fact to be justified, therefore, accused who were prosecuted of the offence under ss 294, 279, IPC, read with s 7(1)(b) of Cinematograph Act 1952 cannot get benefit of s 79, IPC, to get the proceedings quashed.[67]2023

Annoyance is to be Inferred from Proved Facts and Circumstances

Annoyance is generally associated with the mental condition and for that reason it is difficult to prove it as a fact by positive evidence. In almost all the cases, it is to be inferred from the proved facts. In the given case, the words attributed to the accused are clearly abusive and obscene especially when directed against a doctor and a public servant. The fact that the doctor and some other members of the public were impelled to complain about it is a sufficient indication of the fact that they were all annoyed by the use of such words in a public place. These circumstances are sufficient to establish the ingredient relative to annoyance contained in s 294, IPC .[68]Though, unless annoyance is caused, an act will not be punishable under s 294, IPC yet it is not necessary that the witness should specifically say that annoyance was caused, it can be inferred from the facts and circumstances in which the incident occurred.[69] In the absence of any evidence that an annoyance was caused to any member of the public, it was held that the charge was not proved.[70]

Photographs best Evidence

Where the charge related to dancing by a professional dancer in an obscene manner, it is not safe to act upon the oral evidence of the prosecution witness who has been set up by the police. The best thing in such cases should be to take a photograph at the time of dancing to find out whether such dancing is nude and obscene.[71] Similarly, where neither the informant nor the girl, who had been teased by the accused, was examined and the court recorded conviction on the hearsay evidence of a

witness who had reached the spot after the occurrence was over, it was held that the conviction of the accused was not maintainable.[72]

17. Punishment

The old trend was in favour of a lenient punishment under this section. In a case of 1923 the Rangoon High Court had held that a sentence of three months' rigorous imprisonment under this section for using obscene language in a public place is unduly severe.[73] In yet another old case, it was observed that in ordinary cases under this section where the bad language is not specially pointed at an individual and arises from a mere outbreak of temper, a small fine is sufficient to meet the requirements of justice.[74] A woman, who abused her husband in language and under circumstances amounting to an offence under this section, was ordered to pay a fine of Rs 20, and, in default of payment, to undergo one month's simple imprisonment. The fine was paid. It was held that the sentence was unduly severe and that it must be reduced to Rs 2 and that the balance ought to be refunded.[75] This view was probably taken as it was the husband, who was abused by his own wife and was the result of some domestic quarrel otherwise even a fine of Rs 20 should be regarded as too lenient a punishment. Apart from this, the decision is of the period 1872-92, when2024 even a rupee had some value. In any case, it should be no authority at the end of the present century.

In a later, Allahabad case,[76] Misra J, observed:

> Teasing by road-side Romeos is fast on the increase in cities. Unfortunately, no offence is so easy to commit, yet so difficult to be booked. The victims of the offence are mostly modest and shy girls or young women of respectable families. While on the road or passing in the by-lanes, prowling desperadoes cut filthy jokes with them and pass indecent, sensuous and sarcastic remarks against them. The poor victims dare not protest in order to avoid creating scene and attracting a crowd at the spot. Publicity of such incidents sometimes leads to injurious effect against the victims themselves inasmuch as it subsequently provides material for groundless scandal and unjustified gossip against their character from interested quarters. The victims therefore, are compelled as of necessity to silently suffer the disgrace and instinctively leave the spot as quickly as they can without disclosing their identity. The offenders being riffraffs and desperate character, prudence dictates that even respectable passersby, who happen to hear and see the ugly incident must to their mental anguish, pretend not to have heard or noticed it and to pass off the place quickly in their own safety. The result is that the offenders indulge in the crime freely and with impunity without any fear of consequence to themselves. The offence hardly ever is brought to the notice of the authorities. In my opinion, such an offence, when proved, must be looked upon with utmost severity and should be punished deterrently. The maximum sentence of imprisonment provided under this section is three months' rigorous imprisonment only, plus fine also in the discretion of the court. In fact, I think it is time that, considering its large incidence, the legislature thought fit to amend the law and provide severe punishment for this offence.

Eve-Teasing Deserves Deterrent Punishment

The Patna High Court has also taken a similar view and it has been held that as the teasing of school girls has become very common, an offence, under this section when proved, must be looked upon with utmost severity and should be punished deterrently. It should not be dealt with lightly.[77]

18. Security for Keeping the Peace

Although an offence under this section, does not necessarily amount to a breach of the peace, if it in fact did so, or was intended or known to be likely to cause a breach of the peace the offender may be bound over to keep the peace at the time of conviction.[78]

96 Substituted by Act 3, of 1895, s 3 for the original section.

1 *Zafar Ahmed Khan v State* AIR 1963 All 105, p 107, (1963) 1 Cr LJ 273 .

2 *State of Maharashtra v Joyce Zee alias Temico* (1975) Bom LR 218, (1976) ILR Bom 1299 .

3 *State of Maharashtra v Joyce Zee alias Temico* (1975) Bom LR 218, (1976) ILR Bom 1299 ; *Sadhna v State (Delhi Admn)* (1981) 83 Punj LR (Del) 70, p 71 ; *Chandrakant Kalyandas Kakodkar v State of Maharashtra* (1970) Cr LJ 1273 .

4 *MM Haries v State of Kerala* (2005) Cr LJ 3314 (Ker) .

5 *Ibid.*

6 *Saraswathi v State* 2002 Cr LJ 1420 (Mad) .

7 *Preethimon v State of Kerala* 2008 Cr LJ 1233, p 1234 (Ker), 2008 (2) KLT 666 .

8 *Narendra H Khurana v The Commissioner of Police* (2004) Cr LJ 3393 (Bom) (DB) .

9 *K Jayaramanuju v Jankaraj* (1997) Cr LJ 1623 (Mad) .

10 *Nyo Ke*(1872-92) LBR 332; *Ma Kye W*(1872-92) LBR 537; *Ganpat v State of Madhya Pradesh* (1966) MPLJ (Notes) 29 ; *Khitish Kumar Purohit v State of Orissa* (1991) 72 Cut LT 79 .

11 Section 9, IPC .

12 *Zafar Ahmed Khan v State* AIR 1963 All 105, p 107, (1963) 1 Cr LJ 273 .

13 *Ibid.*

14 *Atul Jain v State of Haryana* (1989) SLJ 28 (P&H) .

15 *A&B v State , through NCT of Delhi*2010 Cr LJ 669 (Delhi).

16 *Ganpat v State of Himachal Pradesh* (1966) MPLJ (Notes) 29 .

17 *Dhanisha Karthika v Rakshi N Raj* 2012 Cr LJ 3225, p 3231 (Ker) (DB), 2012 (2) Karlj 265 .

18 *Hicklin's* case (1868) 3 QB 360.

19 *PT Chacko v Nainan Chacko* (1967) KLT 799 .

20 *George v State of Kerala* (1968) KLT 219 .

21 *Dhanisha Karthika v Rakhi N Raj* 2012 Cr LJ 3225, p 3232 (Ker) (DB), 2012 (2) Karlj 265 .

22 *Devidas Ramachandra Tuljapurkar v State of Maharashtra* AIR 2015 SC 2612, (2015) 6 SCC 1 .

23 *PT Chacko v Nainan Chacko* (1967) KLT 799, (1967) Mad LJ (Cr) 815 .

24 *Zafar Ahmed Khan v State* AIR 1963 All 105, p 107 .

25 *Sadhana v State (Delhi Admn)* (1981) Chand Cr Cas 17 (Del), 81 Punj LR (DS) 70; *State of Maharashtra v Joycee Zee alias Temico* (1975) Bom LR 218 .

26 *Narendra H Khurana v The Commissioner of Police* (2004) Cr LJ 3393 (Bom) (DB) .

27 *KP Mahommed v State of Kerala* (1984) Cr LJ 745 (Ker), (1984) KLT 276, (1984) 2 ILR Ker 66 .

28 *Farzance Bi v Board of Film Censors* (1983) All WC 424, (1983) 2 Cr LC 417 (All), (1983) All LJ 1133 **relied** on *Rajkapoor v Laxman* (1980) 2 SCC 175 .

29 *Pawan Kumar v State of Haryana* (1996) SCC (Cr) 583, p 587 .

30 *State v Gangaram* (1960) Nag LJ (Notes) 111 ; *Shivwati Devi Saket v Muliya* (1991) Cr LR (MP) 333, p 334 (Notes) .

31 *R v Wellard* LR 14 QBD 63, p 66, per Grove JL.

32 *A&B v State Thr NCT of Delhi* 2010 Cr LJ 669 (Delhi) .

33 *Mayne*'s *Criminal Law*, eleventh edn, p 145, citing 1 Bishop, s 315 .

34 *Ashok Kumar Mishra v State of Orissa* 2013 Cr LJ 1431, p 1432 (Ori), 2013 (I) OLR 287 .

35 *Lanrish v Archer* (1882) 10 QBD 44 .

36 Arch 792; *R v Thallman* 33 LJMC 58 ; *R v Harris* LR ICC 282.

37 *R v Sidney* (1663) 1 Sid 168, 3 Keb 620 ; *R v Holmes* (1852) Derrs 207 .

38 *Aniruddha Ganesh Pathak v State of Maharashtra* 2010 Cr LJ (NOC) 1069 (Bom) .

39 *Narendra H Khurana v The Commissioner of Police* (2004) Cr LJ 3393 (Bom) (DB) .

40 *Ibid*; *Seema Dass (Smt) v State of AP* 2010 Cr LJ (NOC) 753 (AP) .

41 *Seema Dass (Smt) v State of AP* 2010 Cr LJ (NOC) 753 (AP) .

42 *State v Gangaram* 1960 Nag LJ 111 (Notes) .

43 *Rakesh Kumar Madotia v State of Madhya Pradesh* (1996) 3 CCR 180(MP).

44 *Saraswathi v State* (2002) Cr LJ 1420 (Mad) .

45 *Saraswathi v State* (2002) Cr LJ 1420 (Mad) .

46 *R v Wellard* (1884) QBD 63 ; cf *R v Madercine* (1899) 20 New S Wales Rep Law 36, where a conviction was upheld for indecent exposure on the *verandah* of a private house in the presence of several children.

47 *Ansar Ali v State of Madhya Pradesh* 2014 Cr LJ (NOC) 471 (MP) .

48 *P Kullaiah Swamy v Sub-Inspector of Police, Jammalamadugu* (2003) Cr LJ 2488 (AP) .

49 *R v Ganubin Krishna* 4 Bom HCCC 25 ; *R v Upendronath Doss* ILR 1 Cal 356 .

50 *V Dhasiah v State* (1994) 2 Crimes 67, (1994) 1 LW (Cr) 285 (Mad) ; *Santhilal v Parmeshwaran* (1988) KLT (SW) 74 ; *Savarimuthu Nadar v State* (1994) Mad LJ (Cr) 154 .

51 *Preethimon v State of Kerala* 2008 Cr LJ 1233, p 1234) (Ker), 2008 (2) KLT 666 .

52 *Ganu K Gunrav* 4 BHC 25.

53 *Hargovind v Balkrishna Prasad* (1988) Cr LR 384 (MP) .

54 *State of Madhya Pradesh v Arvind Kumar* (1967) Jab LJ 10 (SN) .

55 *Om Prakash s/o Janta Prasad Dumar v State of Madhya Pradesh* (1989) MPLJ 657 .

56 *Chhotelal v State of Madhya Pradesh* (1966) MPLJ (Notes) 144 .

57 *Sanjeev Sehgal v State of Punjab* (1987) Chand Cr Cas 218(P&H).

58 *Chacko George v State of Kerala* (1968) KLT 219, p 222, (1968) Mad LJ (Cr) 269 .

59 *State of Uttar Pradesh v Kailash* (1967) All Cr R 416, (1967) All WR 648 (HC) .

60 *Lalta Prasad v State* (1968) All Cr R 18 .

61 *Bidyandhar Giri v State of Orissa* (1992) 73 Cut LT 520 .

62 *Narasamma* 1 Weir 251; *Pawan Kumar v State of Haryana* (1996) SCC (Cr) 583, p 586 .

63 *Preethimon v State of Kerala* 2008 Cr LJ 1233, p 1235 (Ker), 2008 (2) KLT 666 .

64 *Preethimon v State of Kerala* 2008 Cr LJ 1233, p 1235 (Ker), 2008 (2) KLT 666 .

65 *Venkatachalam v State* (2010) 2 Madlj (Cri) 12 (Mad) .

66 *K Jayaramanuju v Jankaraj* (1997) Cr LJ 1623 (Mad) .

67 *Mahommad Raffi v State* (1992) 3 Crimes 157 (Mad) .

68 *Patel HM Malle Gowda v State of Mysore* (1973) 1 Mys LJ 42, (1973) Mad LJ (Cr) 114, (1973) Cr LJ 1047, p 1048 .

69 *Babulal v State of Madhya Pradesh* (1980) MPWN 236 .

70 *Khitish Kumar Purohit v State of Orissa* (1991) 72 Cut LT 79 .

71 Re *Cucla alias Coral Banker*(1974) LW (Cr) 196.

72 *Kashmira Singh v State* AIR 1965 J&K 37, (1965) 1 Cr LJ 554 .

73 *Parliam v King-Emperor* AIR 1923 Rang 253 .

74 Re *Ma Kye W*(1872-92) LBR 537.

75 (1872-92) LBR 309.

76 *Zafar Ahmad Khan v State* AIR 1963 All 105, p 107, (1963) 1 Cr LJ 273 .

77 *Sadan Prasad v State of Bihar* (1970) Cr LJ 1323, (1969) Pat LR 257 .

78 Section 106, CrPC 1973; *R v Mi Kun Ya* (1904) 1 Cr LJ 555 ; UBR 1904, 1 Qr PC 4; *Fab Lal Gir v Fogmohun Gir* ILR 26 Cal 576 ; *Sheo Bhajan v SA Mosawi* 27 ILR Cal 983 .

Indian Penal Code (Act XLV of 1860)

Chapter XIV

Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

[79][S. 294A.

Keeping lottery office.--

Whoever keeps any office or place for the purpose of drawing any lottery [80][not being [81][a State lottery] or lottery authorised by the [82][State] government], shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.2025

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees.]

Comments

1. Scope

This section makes it an offence to keep a place for drawing a lottery, and to publish a lottery. A lottery by itself is not, in India, unlawful in the sense that it is prohibited by law. It is only in relation to this section that a lottery becomes unlawful:[83]

Every lottery is either authorised or not authorised by government. The section does not touch authorised lotteries, but intends to save people from the effects of those not authorised, firstly, by prohibiting the keeping of offices or places for drawing them, and secondly, by prohibiting the publication of any advertisements relating to them.[84]2026

2. Analogous Law

In *Sesha Ayyar v Krishna Ayyar* ,[85] Venkataramana Rao J, summed up the development of the law

regarding lotteries as follows:

> It is necessary to advert briefly to the development of the law, both in England in India, regarding lotteries and the underlying principle on which they have been rendered illegal, or, in certain circumstance made punishable.

Law in England

In England lotteries were perfectly valid at common law, but between the years 1698 and 1846 a series of statutes were enacted in order to suppress lotteries. The original purpose of these acts was twofold; to authorise only state lotteries which infact thrived from 1709-1803, and also to prevent any opposition to those state lotteries either at home or from abroad. Later statutes were also intended to prevent innocent persons from being ruined. It is necessary to refer to these various statutes except two of them insofar as they have a bearing on the Indian Statute Law. Two of the said statutes are the Gambling Act of 1802,[86] and the Lotteries Act of 1823.[87] The relevant provisions of the said two Acts are as follows:

The Gambling Act

> An act to suppress certain games and lotteries and authorised by law.[88]

> Whereas evil-disposed persons do frequently resort to public houses and other places to set up certain mischievous games or lotteries called little games, and to induce, servants, children, and unwary person to play at the said games; and thereby most fraudulently obtain great sums of money from servants, children, and unwary persons to the great impoverishment and utter ruin of many families.

> For remedy whereof, be it enacted, that all such games or lotteries called little goes, shall, from the after the passing of this Act, be deemed, and are hereby declared common and public nuisances and against law. From and after 1 day of July 1802, no person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show or expose to be played, drawn, or thrown at or in, either by dice, lotteries, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little go or any other lottery whatsoever not authorised by Parliament, or shall knowingly suffer to be exercised, kept open, shown, or exposed to be played, drawn or thrown at or in, either by dice, lots, cards, balls or by number or figures, or by any other way, contrivance, or device whatsoever, any such game or lottery in his or her house, room, or place upon pain of forfeiting for every such offence the sum of five hundred pounds, to be recovered in the court of exchequer at the suit of His Majesty's Attorney-General, and to be put to the use of His Majesty, his heirs and successors.

Lotteries Act 1823 QQ 2548

The Lotteries Act 1823, provided that if any person or persons were to sell tickets or chances in any lottery not authorised by an Act of Parliament or publish any scheme or proposal for the sale of any ticket or chance in such a lottery, for every such offence he had to forfeit and pay a sum of fifty pounds.2027

It will be seen from the preamble of 42 Geo 3, the underlying public policy which declared the lotteries common public nuisance was that they promote gambling and speculations so that great sums are obtained fraudulently from servants, children and unwary persons, to the great impoverishment and utter ruin of many families.

Act 5 of 1844

In India, Act 5 of 1844 was enacted on these lines. The relevant provisions are as follows:

> Whereas great mischief has been found to result from the existence of lotteries:
>
> (1) it is hereby enacted, that, in the territories subject to the government of the East India Company, all lotteries not authorised by government shall, from and after 31st day of March 1844, be deemed, and are hereby declared, common and public nuisances and against law;
>
> (2) and it is hereby enacted, that from and after the day aforesaid, no person shall, in the said territories, publicly or privately, keep any office or place for the purpose of drawing any lottery not authorised by the government, or shall have any such lottery drawn, or shall knowingly suffer any such lottery to be drawn, in his or her house; and any person so offending shall for every such offence, upon conviction, before a justice of the peace, or magistrate, be punished by fine not exceeding Rs 5,000.

The interpretation of 'lottery' in Act 5 of 1844, was accepted by the legislature and with the knowledge of that interpretation, the Penal Code was amended by s 10 of Act 27 of 1870, by enacting this section, which it may be observed is more restricted in scope than that of Act 5 of 1844.

Though the Private Lotteries Act 1844 was repealed, the same spirit permitting its various provisions has reincarnated in the shape of s 294A, IPC .[89]

3. Legislative Changes

This section was inserted by s 10 of the Indian Penal Code (Amendment) Act, 27 of 1870.

The words 'a lottery organized by the Central Government or the government of a Pt A State or a Pt B State' were substituted for the words 'a state lottery' and the word 'state' was substituted for the word 'Provincial' by the adaptation of Laws Order 1950. The words 'a state lottery' were substituted for the words 'a lottery organized by the Central Government or the government of a Pt A or a Pt B State' by Pt B State (Laws) Act 1951 (3 of 1951).

4. Section repealed in Certain States

The provision of s 294A, IPC have been repealed in Andhra Pradesh by s 27 of Andhra Pradesh Act, 26 of 1968 (with effect from 1 February 1969), in Maharashtra by s 33 of the Bombay Act, 82 of 1958 (with effect from 1 May 1959) in Gujarat by s 33 of the Bombay Act, 82 of 1958 read with s 87 of the Bombay Act, 11 of 1960 and in Mysore, except Bellary district, by s 33 of Mysore Act, 27 of 1951.2028

5. Object

Neither under the English Acts on the subject, nor under this Code, is it made an offence to buy a ticket in a lottery. There can be no doubt that these enactments are aimed at the class of persons who promote lotteries and that they are intended to protect the class of persons who are tempted to take tickets in lotteries.[90] This was the view of the policy of the Lottery Acts taken by Striling J, in *Barclay v Pearson* .[91]The fact that the lotteries have a pernicious tendency is evident from the fact that private lotteries were prohibited as far back as in the 19th century by means of the Private Lotteries Act 1844,

though the said Act was repealed, the same spirit permitting its various provisions has reincarnated in the shape of s 294A, IPC .[92] Under s 294A, if any person sums a private lottery, he is liable to imprisonment or fine or both. It appears that when the government itself sums a lottery or permits a lottery to sum, the lottery is not legitimised but it only exempts that lottery from the operation of s 294A, IPC .[93]

6. Two Parts of the Section

The section is in two parts. The first part makes it an offence to keep any office or place for the purpose of drawing any lottery not authorised by government. The second part makes it an offence to publish any sum on an event or contingency relative to the drawing of any ticket in such lottery.[94] What has been rendered indictable under the first part, is the running of public lotteries and the precise offence envisaged by the section is that of keeping any place for the purpose of drawing any unauthorised lottery.[95] The officer or place, the keeping of which is punishable under this part of the section, must be intended to be the scene of actual drawing of the lottery, the keeping of an office for the transaction of preliminary business and correspondence, and not intended or used for the purpose of drawing, is no offence under the first part of the section.[96]

The offence under the second part of the section consists in the publication of proposals and does not depend on whether the proposals were to be actually carried out or not. The intention of the legislature appears to have been that the public should not be informed of such proposals.[97] If the proposals are such as come within the mischief of the second clause of this section, the offence is completed by publishing them and it does not matter whether the scheme is to actually conduct the lottery or to merely defraud the public.[98]

7. Essential Ingredients of this Offence

The first part of the section which deals with keeping a lottery office has two essential ingredients, namely:2029

(i) there must be keeping of an office or place for drawing lottery; and
(ii) the lottery must not be a state lottery or a lottery authorised by the state government.

The ingredients of the offence under the second part of the section, which deals with the publication of any proposal regarding a lottery, are:

(i) there must be a lottery,
(ii) there must be a drawing of any ticket, lot, number or figure in such lottery, and
(iii) there must be a publication of a proposal to pay any money, or to deliver any goods, or to do or forbear doing anything for the benefit of any person on any event or contingency relative or applicable to such drawing.[1]

8. 'Lottery'

Meaning

There is no formal definition of 'lottery' in the Penal Code or in any other statute. Its common meaning, as disclosed by the dictionary is, 'a scheme for the distribution of prizes by lot or chance'. It is in this sense that the word is used in this section.[2] What constitutes a lottery is that some gain is to come to the subscriber dependent upon pure chance, any element of skill being absent.[3] Lucky draw schemes

are covered under the provisions of s 294A, IPC .[4]

A Game of Chance

The term 'lottery' denotes a game of chance. Ordinarily, it is a sort of device to induce the party to buy worthless things against their better judgment and with no return. The only person, who always wins, is the lottery-keeper. Where the purpose of the scheme is only to attract deposits, and distribution of prizes from periodical lots is only an inducement; and where no subscriber stands to lose, as even the interest money is paid to the persons who do not get any prize, it is difficult to describe the transaction as a lottery to attract s 294A, Pt I, IPC .[5]

Chance to Win is the Essence of Lottery

In the *Oxford New English Dictionary*, a lottery is defined as 'an arrangement for the distribution of prizes by chance among persons purchasing tickets'.[6] Tickets of course are only the tokens of the chance purchased, and it is the purchase of this chance which is the essence of a lottery. A lottery involves the collective contribution of the prize money by the competitors, though some of them may have paid nothing.[7] The purchase of a chance of winning a prize makes the thing a lottery,[8] but an absolutely free and gratuitous distribution of chances, none of which had been paid2030 for by the competitors, would not be so.[9] Where the result does not depend entirely on chance, the transaction is not a lottery.[10]

Lottery Distinguished from a Game or Sports

A lottery is a distribution of prizes by lot or chance.[11] The distribution must be determined by mere chance and not by judgment or skill,[12] and this distinguishes a lottery from a game or sports. But where the result does not depend entirely on chance the transaction is not a lottery.[13]

Actual Distribution of Prize not Essential

The question of lottery or no lottery is not to be determined by the quality of the promoters' motive, and it is not an element of a lottery that some of the competitors must stand to lose.[14] The principle underlying a lottery is that there should be a distribution of prizes determined solely by chance; but if the results of the lottery are such that no prize at all is distributed and the organizer of the lottery pockets the whole of the stakes adventured, the transaction does not cease to be lottery. The actual distribution of a prize the essential factor in the case in that there should be a scheme for distribution of a prize or prizes to be determined solely by chance, and if chance so decrees that no prize is to be distributed to the adventures and the stakes are to be appropriated by the organizer of the lottery, the scheme is nonetheless a lottery.[15]

Substantial Object of the Whole Scheme is to be seen

It has been held that the substantial object of the whole scheme will be looked at in order to ascertain whether it is a lottery. Where the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lot will not vitiate the scheme.[16] But where one of the conditions of the scheme, floated by the accused, showed that the company would hold a draw every month and would give ten prizes of a total sum of Rs 1500 as detailed in the conditions, it was held that the scheme came within the ambit of the term 'lottery'.[17]

Circuitous Payment of Prize does not Change the Nature of Scheme

In *Shanmugha Mudali v Kuman Swami Mudali* ,[18] it was held that a scheme would not be a lottery if the prize money came out of the interest earned from the subscribers' contributions. But dissenting from this view it has been held by a Full Bench of the Madras High Court that if the subscribers have purchased a chance of winning a prize, it can make no difference whether the prizes are paid circuitously2031 from the interest earned on the subscribers' contributions or are paid directly from those contributions.[19]

Whether *kuri* is lottery?

It has been held that a transaction is not necessarily a lottery simply because a matter of whatever kind is agreed to be decided by lot, and a *kuri* where the fund is distributed by lot is not lottery.[20] Referring to the first of these cases the Punjab Chief Court remarked in *Madan Gopal v R* :[21]

> The proceedings were entirely private and extremely limited in extent, and we are by no means prepared to admit that if in similar circumstances subscribers had been invited by public advertisement, and in thousands instead of units, so that the profit resulting from a lucky draw would have been substantial, the result of the case would have been same.

In a subsequent Full Bench case, however, it has been definitely held that a *kuri* is a lottery.[22]

Prize Scheme under which Free Coupons Issued to Customers on Sale of Goods

As no amount is collected from the consumers to whom coupons are supplied, the conduct of the scheme cannot amount to conduct of a prize chit scheme prohibited by the Prize Chits and Money Circulation (Banning) Act 1978. From the scheme, it is seen that the proposal is to draw lots with all the participating merchants and it is not based on the coupons taken by them so that it is not possible to say that the merchants have made a contribution or subscription for taking part in the lots to be drawn so the scheme does not offend the provisions of the said Act.[23]

In order to constitute a lottery within the meaning of the Lotteries Regulation Act 1998, the scheme must be for distribution of prizes by lot or chance to those persons who participate in the chances of a prize by purchasing tickets. Since no tickets are sold or purchased, the scheme does not constitute a 'lottery'. Thus, neither the provision in the Lotteries Regulation Act 1998 nor the provision in s 294A, IPC are attracted.[24]

9. 'Whoever'

Includes User of a Place though Neither the Owner nor Occupier

This section makes it an offence for any person to keep an office or place for the purpose of drawing a lottery there. It would include the case of a person who, without being the owner or occupier, is permitted to keep the place for the particular object.[25]2032

Members of the Committee of a Club

The members of the committee of a club, who have control of the premises of the club, keep the premises for the purposes of this section and they cannot be allowed to shift their responsibility on to the general body of members or to the club which is an abstract entity.[26]

Persons having Common Object

Where the common object is the keeping of a place for the purposes of drawing a lottery not authorised by government, all who engage in such an object, are each individually guilty and they can be prosecuted successfully in whole or in part, jointly or severally.[27]

10. 'Keeps any Office or Place'

This section makes it an offence to keep a place for drawing a lottery or to publish a lottery. 'Keeping' implies not occasional user, but something habitual or regular. A certain degree of habitualness or continuity of operation is intended as also a fixed or ascertained locality for the drawing.[28] The notion of keeping also implies some dominion over the place kept. There would not be keeping of a place

unless there is an occupation, so effective as to enable the persons drawing the lottery to be regularly found in that place at stated times. But an exclusive dedication of the place for the purpose of drawing the lottery is not necessary. The essential thing is the habitual or regular use of a place for the purpose of drawing lots, such user being sufficiently effective as to enable anyone interested in the lottery to know where the promoters can be found at the time of the draw. It is not necessary that the members of the public should be excluded from the place or that the place should not be used for any purpose other than drawing of the lottery.[29]

11. Meaning of 'Drawing'

The word 'drawing' is used in the section in its physical sense and when the section was enacted in 1870, it seems probable that the only form of lottery envisaged by the legislature was a lottery run on the usual lines in which the winning numbers are actually drawn out of an urn, box or other receptacle and the actual drawing of logs was an essential ingredient.[30]

Webster's *Dictionary*defines the word 'drawing' as 'the act of pulling, attracting, extracting, taking lots, a card or cards, from the pack, *etc*'. Its meaning relative to a lottery is clearly, therefore, that the lots should be drawn by some mechanical or human agency involving their chance extraction. Where there is no physical or mechanical 'drawing' to determine the lucky lots which depends on a sort of arithmetical progression based on an original number to be determined merely by the chance of a bond-holder there is no drawing as contemplated in the section.[31]2033

Drawing does not mean Conducting

The word 'drawing' must be given its natural meaning. It does not mean conducting.[32] Where the accused was running a lottery which was a gigantic swindle, in that the only substantial prize fell necessarily to the agent who sold the largest number of tickets, the ticket bearing the highest number among those sold by the agent was a number upon which all the other lucky numbers received a small prize of one rupee. It was held that although it was true that the accused was conducting a lottery and had cheated the public on a large scale, he was not guilty under either part of this section, because he had not been keeping an office or place for the purpose of drawing a lottery, and had not been publishing any proposal to pay any sum on any contingency relative to the drawing of any ticket, lots, number or figure in any such lottery.[33]

12. 'For the Purpose of Drawing any Lottery'

The first clause of the section speaks of keeping an office for 'purpose of drawing any lottery'. The conditions for the application of that part of the section are complied with, when it is shown that the accused did keep an office where they carried on the necessary preliminary work for running a lottery and received the lottery moneys, and which they held out to the public as the place where the lottery would finally be drawn.[34] The office or place, the keeping of which is punishable under this section, must be intended to be the scene of the actual drawing of the lottery. The keeping of an office for the transaction of preliminary business and correspondence and not intended or used for the purpose of drawing is not an offence under the first part of the section.[35]

13. Difference between Lottery and Wagering Contract

In *Thacker v. Hardy* ,[36] Cotton LJ, said:

> The essence of gaming and wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature, that is to say, if the event turns out one way *A* will lose; but if it turns out the other way he will win.

In *Carlill v Carbolic Smoke Ball Co* ,[37] Hawkins J, defined a 'wager' thus:

> A wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties...if either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.

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Even if none Loses, the Scheme may be Lottery

A lottery and a wagering contract are two distinct things. A scheme may amount to a lottery though none of the competitions is a loser.[38]

14. 'Not being a Lottery Authorised by the State Government'

The section applies to unauthorised lotteries whether conducted in or out of India.[39] The fact that the business of an association of persons is registered as a company does not make it authorised by government.[40] It would not be within the collector's authority to sanction a lottery, he being a revenue officer; and the mere fact of taking income from the club on the profits of the lotteries would not authorise them.[41] The withholding of a prosecution does not amount to authorisation.[42]

The words in the section 'not authorised by government' are equivalent to meaning unless it (the lottery) has been authorised by government or except in the case where it (the lottery) has been authorised by government. It is a reasonable view to take that they are in the nature of an exception, and as they appear in the section defining the offence, it is reasonable to hold that s 105 of the Evidence Act, applies and that the burden of proof lies on the accused person, to show that the lottery was authorised by the government.[43]

Lottery Authorised by the State Government

The language of s 294A, IPC is very clear. It excludes only a State lottery and a lottery authorised by the State Government. In the latter portion, the words 'state government' should necessarily mean the State within which the lottery is conducted. In this case it is the State Government of Tamil Nadu. Unless the lottery is authorised by the State of Tamil Nadu, it will not be exempted under s 294A, IPC . Section 294A , IPC, does not prescribe the procedure by which the State Government should authorise to run a lottery. Hence, it is open to the State Government to pass executive orders for regulating the conduct of lotteries or to prevent the conducting of lotteries within the State.[44]

Discretion Vested in the Government

Section 294A of the Indian Penal Code 1860, contemplates authorisation being given by the State Government to any person to draw a lottery. It does not specifically give any guidelines to indicate in what manner the discretion vested in the government is to be exercised. But this does not mean that the discretion to be exercised is an unguided discretion. The provision itself, read in the light of the other provisions in the chapter, would certainly provide necessary guidelines and limitations. The authorisation granted by the State Government for punishment with imprisonment, or with fine, or with both indicates the seriousness with which the legislature looked at the particular act which is rendered punishable. Evidently, the offence involved is an offence which falls under the general category of offences which have been brought2035 under ch XIV, namely offences affecting public health, safety, convenience, decency and morals. One or more of these aspects would certainly be relevant in deciding whether in a given case, authorisation is to be granted or rejected. Drawing a lottery may

affect public health, public safety or public convenience *etc*. A businessman may try to dupe the public by drawing a lottery. Another may try to flood the market with cheap goods and stifle healthy competition. A scheme may be loaded heavily against the public. A manufacturer may try to popularise substandard goods by attracting the customers in the guise of a lucky draw prize scheme. Certainly, this will be injurious to public health, public safety and public convenience, as the case may be depending on the nature of the manufacturing product, and terms and conditions of the scheme, state of the market and a host of other considerations.

Too many Prize Schemes--When not Conducive to Public Interest

Allowing too many prize schemes to be conducted at the same time in the same locality or area may also not be conducive to public interest as it may lead to unhealthy competition. Co-operative sector or small scale industry and the like may require to be assisted by such promotion schemes. At times, even a large scale manufactures may genuinely desire to run a lottery to help sales promotion. Individual requirements in the light of public interest must guide the government in authorising or declining to authorise, a scheme. In the case of multiplicity of applications, the government has certainly the power of regulation which includes the power of making a choice between applicants unless it be that all the applications, can be granted. Granting of preference in any reasonable manner short of conferring monopoly to a co-operative society would be permissible and will not amount to discrimination. If two manufacturers have not been allowed to conduct a scheme during an identical period, it cannot be said to be an attempt to create monopoly. It is only an attempt to regulate the conduct of schemes, keeping in mind the interest of manufacturers as well as public interest. If the State Government is of the opinion that it will not be conducive in public interest to allow two manufacturers to conduct the same scheme during the identical period, the decision cannot be said to be either discriminatory or creative of monopoly. This is a case where the state government is bound to select one or two or more of the applicants who seek authorisation of the state government, and the State Government will have to choose one or the other on relevant grounds.[45]

Lottery Business whether Protected by Article 19(1)(G) and Article 21 of the Constitution

It also needs to be noticed that the rights protected by art 19(1) are not absolute. The limitations are stated in cll 2-6 of art 19 . The rights guaranteed in arts 19(1)(a) -(g) are to be read alongwith the qualifications contained in cll 2-6 of art 19 . The right to practice any profession or carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious. It does not entitle a citizen to carry on trade or business activities which are immoral and criminal. They are *res extra commerciumie* they are outside commerce. May be the interest of a citizen lies in carrying on trade or business which is pernicious but demands of public interest have to be give primacy and they over ride individual interest.2036

Since the business of the sale of lottery tickets is of a pernicious nature no person has a legal or a fundamental right in it. There is good authority for the proposition that trade or business which is noxious or pernicious in nature, is not covered under art 19(1)(g) and art 21 of the Constitution .[46]

15. Meaning of Publisher

The word 'publisher' includes both the person who sends a proposal as well as the proprietor of a newspaper who prints the proposal as an advertisement. The proprietor of a Bombay newspaper who published an advertisement in his paper relating to a Melbourne lottery was accordingly held punishable under this section.[47] Where the publication is that a particular lottery ticket can be had at a particular place, it does not appear to be sufficient to constitute a publication of a proposal to pay any sum on any event or contingency relative or applicable to the drawing of any ticket in any lottery not authorised by the government as provided in the second paragraph of this section. If there had been an advertisement about the lottery itself, the position might have been different. It is difficult to say that the publication of a reference to the tickets about an unauthorised lottery is prohibited by this section.

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Publication of Proposal

The publication, contemplated by this section, is not some public advertisement in the sense of a written publication in newspapers or handbills. As far as publication in the second part of s 294A, IPC is concerned, it envisages making a thing available to the public. Where a pamphlet is given only to persons who are depositing money in the bank, there is no advertisement of the same at all.[49] If a number of persons go about canvassing for subscribers on the basis of scheme, settled beforehand by the promoter, it amounts to a publication of the proposal.[50] Once it is established that the accused appellant was responsible for sending a circular to the printing company to be printed, and that it was printed, there is an end to his appeal, for it is inconceivable that none of the printers read the circular.[51] Under the Press and Registration of Books Act, 25 of 1867, a publication in a newspaper makes the proprietor liable. Section 7 of the said Act makes the printer or publisher responsible for everything appearing in the newspaper.[52] The provisions of that section lay down that a declaration made by a person that he is the printer of a newspaper shall be sufficient evidence (unless the contrary is proved) as against that person that he was the printer of every portion of every issue of the newspaper named in the declaration. The effect of this section is to throw upon the declared printer the onus of proving that in fact he was not the printer of any issues of the newspaper which may form the subject-matter of legal proceedings.[53] A mere causal and gratuitous delivery of a lottery ticket is not necessarily a publication within the meaning of this section.[54] But where the ticket2037 books were delivered with a view to the tickets therein being sold, this cannot be considered to be, in any sense, a mere casual or gratuitous delivery, and amounts to a publication.[55]

Publication of Proposal--Non-Payment of Prize is of no Consequence

Where the accused was charged for publishing a circular of a proposal for a lottery for the sale of tickets for prizes on horses winning at the Derby races on starters and for other special prizes in these terms, and saying that the sweep would close on a certain date, that the draw under the supervision of the patrons stated in the tickets would take place a few days later (date specified) and that the prize winners would be notified by telegrams, it was held that the accused was guilty of the charge as he had published a proposal to pay a sum for the benefit of a person on an event, or contingency relative or applicable to the drawing of the ticket in a lottery and it did not matter that the payment proposed to be made was not made by the person advertising.[56]

16. 'Goods'

The word 'goods' includes movable and immovable property.[57]

17. Procedure

The offence under this section is non- cognizable. A summons shall ordinarily issue in the first instance. It is a bailable offence but not compoundable. It can be tried by any judicial magistrate and summarily.

The limitation for taking cognizance of an offence under Pt I of this section is one year and for Pt II is six months.

18. Notice under Section 251 , CrPC

The following form of the notice under s 251, CrPC 1973 may be adopted:

I (*name and office of the magistrate etc*) hereby notice to you (*name of the accused*) as follows:

That you on or about the.....day of.....at..... kept an office (*or place*) for the purpose of drawing a lottery not being a State Lottery or a lottery authorised by the State Government.

or

published a proposal to pay a sum (or to deliver goods) (*or to do*) (*or forbear doing anything*) *for the benefit of any person on an event or contingency relative or applicable to the drawing of ticket, lot, number or figure in a lottery not being a state lottery or a lottery authorised by the state government*,] and thereby committed an offence punishable under section 294A of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

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19. Proof

For establishing an offence under the first part of this section, the prosecution will have to prove that:

(i) the accused kept an offence or place for the purpose of drawing a lottery; and
(ii) such lottery was not a State lottery or a lottery authorised by the State Government.

And to establish an offence under the second part of the section, it will be necessary to prove that:

(i) the accused published a proposal; and
(ii) the said proposal was to pay a sum, or to deliver any goods, or to do or forbear doing something for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery.[58]20392040

79 Inserted by Act 27 of 1870, s 10 .

80 Substituted by the AO 1937, for 'not authorised by government'.

81 Substituted by Act 3 of 1951, s 3 and schedule, for 'a lottery organised by the Central Government or the government of a Part A State or a Part B State'.

82 Substituted by the AO 1950, for 'Provincial'.

83 *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225 (FB), 59 ILR Mad 562, 70 Mad LJ 36.

84 *Queen-Empress v Vellancherji Kavasji Shapurji* 10 ILR Bom 97, 101 ; *Kamal Agency v State of Maharashtra* AIR 1971 Bom 332, p 340, 72 Bom LR 928 .

85 *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 239(FB).

86 42 Geo III, c 119.

87 4 Geo IV, c 60.

88 42 Geo III, c 119.

89 *ABSLVM v Commr of Police* (1999) 3 CCR 476 (Del)(DB).

90 *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 229(FB).

91 *Barclay v Pearson* (1893) 2 Ch D 154, 62 LJ Ch 636, 42 WR 74, 68 LT 709 .

92 *ABSLVM v Commr of Police* (1999) 3 CCR 476 (Del)(DB).

93 *Ibid.*

94 *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 228 (FB) .

95 *Emperor v Mukandi Lal* AIR 1917 Lah 93, p 95, (1917) 18 Cr LJ 65 .

96 *Madan Gopal v Emperor* (1910) 11 Cr LJ 382, 14 PWR (Cr) 1910 .

97 *Queen-Empress v Mancherji Kavasji Shapurji* 10 ILR Bom 97 ; *Public Prosecutor v M Jwala Subrahmanyam* AIR 1957 AP 987, p 990, (1957) Cr LJ 1389 .

98 *Public Prosecutor v M Jwala Subrahmanyam* AIR 1957 AP 987, p 990, (1957) Cr LJ 1389 .

1 *Vazirally v Emperor* AIR 1928 Bom 550, p 551, 30 Bom LR 1426 ; *State v VN Narayanasami Mudaliar* (1983) Mad LW (Cr) 105, (1984) Mad LJ (Cr) 40 .

2 *Emperor v Gurbaksh Singh* AIR 1934 Lah 840, p 841 ; *Tayler v Smettan* (1883) 11 QBD 207 ; *Suresh Kumar Bali v State* (1978) All Cr C 307, (1978) All LJ 976 .

3 *Universal Mutual Aid & Poor Houses Assn Ltd, Madras v AD Thoppa Naidu* AIR 1933 Mad 16, p 20, (1932) 33 Cr LJ 792 .

4 *Tata Oil Mills Co Ltd v State of Kerala* (1982) KLT 324 .

5 *State v VM Narayanasami Mudaliar* (1983) Mad LW (Cr) 105, (1984) Mad LJ (Cr) 40 .

6 *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 227 .

7 *Wills v Young* (1907) 1 KB 448 ; *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 227 .

8 *Bartlett v Parker* (1912) 2 KB 497 .

9 *Wills v Young* (1907) 1 KB 448 .

10 *Hall v Cox* LR [1899] 1 QB 198.

11 *Barclay v Pearson* (1893) LR 2 Ch 154 .

12 Re *Dormisony Mundaly* 1 Weir 251.

13 *Hall v Cox* LR [1899] 1 QB 198.

14 *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 228(FB).

15 *Barkett v Parker* (1912) 2 KB 497 ; *Emperor v Mukandi Lal* AIR 1917 Lah 93, p 94, (1917) 18 Cr LJ 768 .

16 *Halsbury's Laws of England*, vol 15, fourth edn, Butterworths, London, 1976, s 229, per Venkataramana Rao J, in *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 240-41 .

17 *Suresh Kumar Bahri v State* (1978) All Cr C 307, (1978) All LJ 976 .

18 *Shanmugha Mudali v Kuman Swami Mudali* AIR 1925 Mad 870, ILR 48 Mad 661 .

19 *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 228 (FB) .

20 *Kamakshi Achari v Appava Pillai* 1 Mad HCR 448, 1 Weir 251 ; **followed in***Vasudevan v Mammed* ILR 26 Mad 212 .

21 *Madan Gopal v R* (1910) 11 Cr LJ 382, p 384, 17 PR (Cr) 1910 .

22 *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225 (FB) .

23 *T Hamza Haji v State of Kerala* (1999) 3 CCR 646 (Ker) .

24 *Ibid.*

25 Per Cormish J, in *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 228 (FB) .

26 *R v AJ Cooke* (1914) 15 Cr LJ 243 .

27 *Emperor v AJ Cooke* 23 IC 195, (1914) 15 Cr LJ 243 .

28 *Martin v Benjamin* (1907) 1 KB 64 ; *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 226 (FB) .

29 Per Wadsworth J, in *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 237 (FB) .

30 *Emperor v Mukandi Lal* AIR 1917 Lah 93, p 96, (1917) 18 Cr LJ 768 ; *Vazirally v Emperor* AIR 1928 Bom 550 ; *OD Hardar v Emperor* AIR 1934 Sind 149 ; *Public Prosecutor v KB Kalkura* AIR 1942 Mad 404, (1942) 43 Cr LJ 751 .

31 *Emperor v Gurbaksh Singh* AIR 1934 Lah 840, p 841 .

32 *Public Prosecutor v KB Kalkura* AIR 1942 Mad 404, (1942) 43 Cr LJ 751 .

33 *Ibid*.

34 *AS Ramaswami Mudaliar v Crown* AIR 1923 Mad 187(1), (1922) 23 Cr LJ 688 .

35 *Madan Gopal v Emperor* (1910) 11 Cr LJ 382, 14 PWR (Cr) 1910, 17 PR (Cr) 1910 .

36 *Thacker v. Hardy* (1878) 4 QBD 685, 39 LT 595, 27 WR 158, 48 LJQB 289 .

37 *Carlill v Carbolic Smoke Ball Co* (1892) 2 QBD 484, 56 JP 662, 61 LJQB 696 .

38 *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 228(FB).

39 *R v Mancherji* 10 ILR Bom 97 .

40 *Ramanejam Chetti* 1 Weir 252.

41 *Emperor v AJ Cooke* AIR 1914 LB 23, p 26, (1914) 15 Cr LJ 243 .

42 *Public Prosecutor v Soosal Pillai* AIR 1938 Mad 315, p 316 .

43 *Emperor v AJ Cooke* AIR 1914 LB 23, p 27, (1914) 15 Cr LJ 243 .

44 *Rama Nava Nirman Samithi v State of Tamil Nadu* (1990) Cr LT 2620 (Mad) .

45 *Tata Oil Mills Co Ltd v State of Kerala* (1982) KLT 324 .

46 *ABSLVM v Commr of Police* (1999) 3 CCR 476 (Del)(DB).

47 *Queen-Empress v Mancherji Kavasji Shapurji* 10 ILR Bom 97 .

48 *King-Emperor v Rachappa Murigappa Shabedi* AIR 1925 Bom 26, (1925) 26 Cr LJ 222 .

49 *State v VM Narayanasami Mudaliar* (1983) LW (Cr) 105, (1984) Mad LJ (Cr) 40 .

50 Per Varadachari J, in *Sesha Ayyar v Krishna Ayyar* AIR 1936 Mad 225, p 233(FB).

51 *Dew v Director of Public Prosecutions* (1920) 89 LJKB 1166 ; *Lilomal Manumal v Emperor* AIR 1941 Sind 91, p 92, (1941) 42 Cr LJ 613 .

52 *Emperor v Phanendra Nath Mitter* ILR 35 Cal 945 .

53 *Emperor v Phanendra Nath Mitter* ILR 35 Cal 945 ; *Emperor v Mahommad Siraj* AIR 1928 All 400, p 401 .

54 *FA D'Sauza v Emperor* AIR 1926 Sind 213, p 215 .

55 *Emperor v Diwan Chand Joely* AIR 1930 Lah 81, p 82, (1930) 31 Cr LJ 692 .

56 *Chimanlal Pranjivandas Gheewalla v Emperor* AIR 1925 Bom 243, p 244, (1925) 26 Cr LJ 780 .

57 Re *CM Pedda Malla Reddi*AIR 1927 Mad 66, (1927) 28 Cr LJ 4 .

58 *State v VN Narayanasami Mudaliar* (1983) LW (Cr) 105, (1984) Mad LJ (Cr) 40 .

Indian Penal Code (Act XLV of 1860)

Chapter XV

Of Offences Relating to Religion

S. 295.

Injuring or defiling place of worship with intent to insult the religion of any class.--

Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section makes punishable acts of destruction, damage or defilement by whomsoever committed and quite irrespective of the person of the offender, provided that such acts are done with the intention of insulting the religion of any class of persons, or with the knowledge that such destruction, damage or defilement will be considered by any class as2042 an insult to their religion. The *mens rea*is,

therefore, of the essence of the offence, and, in addition, the act must itself be one of destruction, damage or defilement; otherwise it is not criminally punishable.[5]A doctrinal disagreement will not constitute an act of outraging or insulting any religion or religious beliefs.[6]

2. Analogous Law

This section follows the English law under which 'affrays in a church or churchyard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated; and upon this consideration all irrelevant behaviour in these places has been passed for the criminal by the makers of our laws. Several statutes have been passed for the purpose of preventing disturbances in places of worship belonging to the established church, and also in those belonging to congregation of Protestant Dissenters and Roman Catholics.'[7]

Law of England

'Religious hatred' is hatred against a group of persons defined by reference to religious belief or lack of religious belief; however, nothing in the statutory provisions governing the offences of incitement to religious hatred is to be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytizing or urging adherents of a different religion or belief system to cease practicing their religion or belief system.[8]

When considering the seriousness of such offences in the context of terrorism, it was material to have regard to the period of time covered by the offending, the sophistication, skill and industry devoted to it and the likelihood that the offending would lead others to commit acts of terrorism, or might even have done so.[9]

Law of Canada

It is an offence punishable on summary conviction to willfully:

- disturb or interrupt an assemblage of persons met for religious worship or for a moral, social or benevolent purpose, or
- do anything that disturbs the order or solemnity of such a meeting.

Two people are "an assemblage of persons"; a "meeting" occurs when people meet for religious worship; and the period prior to the formal ceremony is included in the "order or solemnity of the meeting". Where the accused deliberately obstructed or partially obstructed parishioners, or caused parishioners to avoid their regular entrance to their place of worship, this was sufficient to constitute the offence. The offence of disturbing or interrupting an assemblage does not violate the Charter.[10]

3. Object

The object with which the legislature framed this section was, as indicated by the section itself, to prevent wanton insult to the religious notions of a class of persons.[11]2043 The section has been intended to respect the religious susceptibilities of persons of different religious persuasions or creeds. Courts have to be very circumspect in such matters and pay due regard to the feelings and religious emotions of different classes of persons with different beliefs, irrespective of the consideration whether or not they share those beliefs, or whether they are rational or otherwise, in the opinion of the court.[12]

In Note J being the note on the chapter of offences relating to religion and caste, the Law Commissioners stated of s 275 of the Code (which corresponds with s 295 of the present Code):

> We have prescribed a punishment of great severity (the proposed punishment is rigorous imprisonment for a term which might extend to seven years) for the intentional destroying or defiling of places of worship, or of objects held sacred by any class of persons. No offence in the whole Code is so likely to lead to tumult, to sanguinary outrage, and even to armed insurrection. The slaughter of a cow in a scared place at Benares in 1809 caused violent tumult, attended with considerable loss of life. The pollution of a mosque at Bangalore was attended with consequences still more lamentable and alarming. We have therefore empowered the courts in cases of this description to pass very severe sentence on the offender.

4. Ingredients of the Offence

The ingredients of the offence under this section are:

(1) a person must first destroy, damage or defile any place of worship or any object held sacred by any class of persons;
(2) he must thereby have the intention of insulting the religion of any class of persons, or he must have the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion.

If any one of these ingredients is not present, the offence is not made out.[13]

5. 'Whoever'

It makes no difference that the guilty party is a worshipper in the temple which he has defiled.[14]

6. 'Distroys, Damages or Defiles'

Defiles--Meaning of

The word 'defiles' as used in this section, cannot be restricted to acts which would render the place of worship or object held sacred, unclean or dirty as piece of stone or metal. The words used in the section are 'whoever defiles a place of worship or an object held sacred' by a certain class of persons. The object with which the legislature framed this section, as indicated by the section itself, was to prevent wanton insult to the religious notions of that class of persons. The word 'defile' ought to be taken in the sense in which such class of worshippers usually understands it when it is applied to a place or an object of worship. In this sense it would include any act done in relation to the *Lingam* which would render it impure to the accused's2044 knowledge according to the recognised usage of the institution as an object of worship. 'If the accused knew that the temple in the case before us is one of those temples, and if he did the act imputed to him to ridicule openly the established rule in regard to the unity of the *Lingam* as an object of worship, it may then be reasonably inferred that he did the act wantonly and with the intention of insulting the religious notions of the general body of worshippers'.

Words 'Destroys' and 'Damage' Explained

The words 'destroys' and 'damages' which precede the word 'defiles' in this section indicate classes of acts which are designed to cause a particular result and not to limit the word 'defile' to making an object held sacred dirty as a material object.[15] Therefore, 'to defile' means, in this connection, not only

to make a place unclean, foul, or dirty, but to render it ceremonially or ritually impure. For a conviction under this section, such pollution must be proved. The mere entry of a person of nonpolluting caste into a temple is not defilement within the meaning of this section.[16]

Bull not a Sacred Object

In *Romesh Chunder Sannyal v Hira Mondal* ,[17] it was held that the killing of a bull was not 'destroying' within the meaning of this section, because it was held that the bull was not an 'object' within the meaning of the section, and not because killing is not destruction.

7. Place of Worship

In the absence of proof that the place in question was a place of worship, a conviction under the section would be bad, *eg*., an enclosure to the tomb of a Mahommadan *fakir* not used as a place of worship.[18]

A mosque is a place of worship and so also a Hindu temple. A mosque becomes consecrated on the declaration of the *waqf* that he has constituted it into a *Musjid*, or on the performance of prayers therein.[19] But the subject-matter of a dedication under the Mahommadan law must be the lawful property of the *waqf* or the *waqf* will not be valid.

Where an attempt was made to bring into existence a public mosque in a plot in the possession of an agricultural tenant without the permission of the landlord, it was held that the use of a hut situated in that plot as a public mosque without the landlord's permission could not make it a place of worship as contemplated by this section.[20]

A lessee by his unilateral act cannot prejudice the lessor's proprietary right in a leasehold property. Where a piece of garden land together with a shed thereon is let out on lease, but the lessor has not dedicated the shed or the side to the Hindu public of the locality to be used as a temple or a place of worship, the lessor who has no proprietary right over the property cannot make any such dedication. The mere fact2045 that the lessees used the building as a place of worship and permitted such use by other Hindus of the locality could not in any way prejudice the proprietary right of the lessor over the property. The privilege enjoyed by the lessees and others in making use of this shed as a prayer hall could continue only as long as the lease arrangements continued. Such a user of the shed cannot make it a place of worship within the meaning of this section.[21]

8. 'Any Object held Sacred'

In *S Veerabhadran Chettiar v EV Ramaswami Naicker* ,[22] a learned judge referring to the decisions reported in the undermentioned cases[23] held that:

> In the above case they were dealing with a dedicated bull. It is clear from the observations in the above two cases that the word 'object' has to be interpreted *ejusdem generis* with a place of worship. Interpreted like that, it would mean that the section would apply to cases where an idol in a temple is sought to be destroyed, damaged or defiled. The words 'any object held sacred by any class of persons' even otherwise will apply only to idols in a temple or when they are carried out in procession on festival occasions.

Object--Whether includes Cow or Bull

The word 'object' means a material body or substance perceived or cognizable by the senses. It is a general word not limited to inanimate object, but is wide enough to include an animate object like a cow or a bull.[24] But a Full Bench of Allahabad High Court,[25] as well as a Full Bench of the Punjab

Chief Court[26] have held that the word 'object' in this section does not include animate objects like a cow or a bull.

An Object may be Sacred without Worship

However, on appeal their Lordships of the Supreme Court overruled the earlier decision in *Veerabhadran Chettiar*'s case, and observed:

> The learned judge in the court below has given much too restricted a meaning to the words 'any object held sacred by any class of persons' by holding that only idols in temples or idols carried in processions on festival occasions are meant to be included within those words. There are no such express words of limitation in section 295 of the Indian Penal Code, and in our opinion the learned judge has clearly misdirected himself in importing those words of limitation. Idols are only illustrative of those words. A sacred book, like the Bible, or the Koran, or the Granth Saheb, is clearly within the ambit of those general words. If the courts below were right in their interpretation of the crucial words in section 295, the burning or otherwise destroying or defiling such sacred books, will not come within the purview of the penal statute. In our opinion, placing such a restricted interpretation on the words of such general import, is against all established canons of construction. Any object, however trivial or destitute of real value in itself, if regarded as sacred by any class of persons would come within the meaning of the penal section. Nor is it absolutely necessary that the object, in order to be held sacred, should have been actually worshipped. An object may be held sacred by a class of persons without being worshipped by them. It is clear, therefore, that the court2046 below were rather cynical in so lightly brushing aside the religious susceptibilities of that class of persons to which the complainant claims to belong.[27]

Object of Respect and Sacred Object--Not the same thing

There is a distinction, not arbitrary, between objects which are objects of respect and even veneration and objects which are held sacred; as an example of the former, a place of sepulchre (not actually consecrated, as in the case of ground specially consecrated for that purpose according to the rites of Christian Churches), as distinguished from a place for worship to the deity or where an idol or altar is kept; and such distinction appears to have been kept in view by the legislature, for while s 295, IPC deals with the latter class of objects and places,[28] s 297, IPC deals more especially with trespasses on places of sepulchre and places set apart for the performance of funeral rites and as depositories for the remains of the dead.[29]

Dilating further on the same point, their Lordships of the Supreme Court observed in *Veerabhadran Chettiar*:[30]

> The section has been intended to respect the religious susceptibilities of persons of different religious persuasions or creeds; courts have got to be very circumspect in such matters, and to pay due regard to the feelings and religious emotions of different classes of persons with different beliefs, irrespective of the consideration whether or not they share those beliefs, or whether they are rational or otherwise, in the opinion of the court.

9. Any Class of Persons

It cannot be held that ss 295 - 298, IPC are only applicable to between those who follow different religions and not as between different sects or classes of Hindus, who are lean towards sectarian beliefs. The expression 'any class of persons' includes any religious sect, however small in number.[31] Even two persons can form a class,[32] but the complainant and his family cannot form a class of persons within the meaning of this section.[33]

10. 'With the Intention of thereby Insulting the Religion'

The authors of the Code, while framing this section, noted:[34]

> The question whether insults offered to a religion ought to be visited with punishment does not appear to us at all to depend on the question whether that religion be true or false. The religion may be false, but the pain which such insults give to the professor of that religion is real. It is often, as the most superficial observation may convince us, as real a pain and as acute a pain as is caused by almost any offence against the person, against property or against character. Nor is there any compensating good whatsoever to be set off against the pain. Discussion, indeed, tends to elicit truth; but insults have no such tendency, they can be employed just as easily against the purest faith as against the most monstrous superstition. It is easier to argue against falsehood than against truth; but it is as easy to pull down or defile the temples of truth as those of falsehood; it is as2047 easy to molest with ribaldry and clamour men assembled for purposes of pious and rational worship, as men engaged in the most absurd ceremonies. Such insults, when directed against erroneous opinions, seldom have any other effect than to fix those opinions deeper and to give a character of peculiar ferocity to theological dissension; instead of eliciting truth, they only inflame fanaticism.

> These considerations apply with peculiar force to India. There is perhaps no country in which the government has so much to apprehend from religious excitement among the people. The Christians are numerically a very small minority of the population, and in possession of all the highest posts in the government in the tribunals and in the army. Under their rule are placed millions of Mahommadans, of differing sects, but all strongly attached to the fundamental articles of the Mahommadan creed, and tens of millions of Hindus, strongly attached to doctrine and rites which Christians and Mahommadans join in reprobating. Such a state of things is pregnant with dangers which can only be averted by a firm adherence to the true principles of toleration. On those principles the British Government has hitherto acted with eminent judgment, and with no less eminent success; and on those principles we propose to frame this part of the Penal Code.

Mere Doctrinal Disagreement will not Amount to Insulting the Religious Feelings

Where on publication of a book by the accused, a Christian group filed a complaint alleging the outraging of religious feelings and infringement of copy of translations of songs and mutilations of sacred writings in books published by the accused, there was no evidence showing that disagreement expressed by the accused with the doctrine of the complainant was with deliberate and malicious intention of outraging religious feelings of the complainant group, it was held that mere doctrinal disagreement will not constitute an act of outraging or insulting any religion or religious belief.[35]

11. 'Mens Rea'

Mens rea is of the essence of the offence under this section.[36] The mere defilement of a place of worship is no offence under it. In order to sustain a conviction, there must be an intention of thereby insulting the religion of a class of persons, or the knowledge that a class of persons is likely to consider the defilement as an insult to their religion.[37]

Some Illustrative Cases

Where a person, as a result of a quarrel with a relation, throws a basket containing cooked food (fowl, fish, rice, *etc*.), into a well without any intention to wound the religious susceptibilities of anyone, he cannot be convicted of an offence under this section.[38]

The defendants were charged under this section, in that they (Hindus) removed some old building materials belonging to a mosque, and thereby insulted the religious feelings of Mahommadans. They

were acquitted on the finding that the mosque was, or at any rate its roof was, in a rotten condition, and that no one had any particular claim to it. Dismissing a revision petition against it, it was held that there was no reason to believe that one of the defendants, in acting as he did, had any2048 intention of insulting the religion of the Mahommadan residents of the village, or that he did so even with the knowledge that any class of persons was likely to consider the removal of the materials as an insult to their religion.[39]

Where a Hindu had sexual intercourse with a woman at night, within an enclosure surrounding a tomb of a Mahommadan *fakir*, venerated by some of his co-religionists, it was held that the accused had no intention to insult the religious feelings of the Mahommadan, and he could not be convicted under this section inasmuch as there was no evidence to show that the tomb in question was used as a place of worship, or that any particular object held sacred was defiled.[40]

Where the accused, a goldsmith by caste, performed *abishekam, ie.,* poured coconut-water over a *Lingam* (an idol) it was held by Muthuswami Iyer J:

> The word 'defiled' in section 295 must not be restricted to acts which would render the *Lingam* unclean or dirty as a piece of stone or metal. It is to be taken in the sense in which such class of worshippers usually understood it when it is applied to a place or an object of worship. In this sense, it would include any act done in relation to the *Lingam,*which would render it impure to the accused's knowledge, according to the recognised usage of the institution as an object of worship. If the act leads to this result, it is of no consequence whether it makes the *Lingam* materially or ritually impure. In many temples it is not usual for worshippers generally to touch the idol or pour coconut-water upon it, except through persons, who are specially appointed to do so and enjoined to observe special rules of cleanliness. If the accused knew that the temple, in the present case, was one of those temples, and if he did the act imputed to him to ridicule openly the established rule in regard to the purity of the *Lingam* as an object or worship, it might then be reasonably inferred that he did the act wantonly, and with the intention of insulting the religious notions of the general body of worshippers.[41]

Where the lessee of a shed, without any authority, uses it as a prayer hall and the lessor, getting delivery of the property in execution of a decree, pulls down the shed, he cannot be said to have intended or known that such an act will be an insult to the religion of others who had no manner of right over the property or the shed.[42]

Where according to the customary religious practices prevalent in a temple certain *puja pendas* had the exclusive right to offer the daily *bhog* to the deity but on a certain occasion, they having refused to offer the *bhog*, the superintendent of the temple got it offered by others, it was held that in the absence of evidence to show that the superintendent intended to ridicule the established practices of the temple or to wantonly insult the feelings of the worshippers of the temple, he could not be held liable under this section.[43]

Where the accused, a Mahommadan, threw a burning cigarette on a *Viman*, an object held sacred by the Hindus, while it was being taken out in a procession, but the cigarette did not fall on the *Viman* and only struck it on the side and fell down, it was held that it could not be said that the act of the accused was unintentional or that the accused did not have the knowledge contemplated by this section, and that he was guilty of an attempt to commit the offence under this section.[44]2049

In *DP Titus v LW Lyall* ,[45] it was observed that unless it is alleged that the pastor of the church has done anything with the intention of insulting the religion of any class of persons, the mere running of a nursery school and a dispensary in a portion of the church premises, by him, would not amount to an offence under s 295, IPC .

When an elephant accompanying the Moharram procession got enraged and went berserk, the magistrate passed an order under s 133, CrPC authorising the accused to liquidate the elephant to protect the property and life of people. The situation's exigency had left no alternative but to direct the elephant's liquidation. The prosecution of the accused under this section was held unjustified.[46]

12. 'Religion'

The word 'religion' has not been defined in this Code or in the Constitution, and it is a term which is hardly susceptible of any rigid definition. In an American case,[47] it has been held "that the term 'religion' has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and Character and of obedience to His will. It is often confounded with '*cultus*' of form or worship of a particular sect, but is distinguishable from the latter".

However, this definition of 'religion' has not been accepted by the Supreme Court of India. With reference to the word 'religion' in art 25 of the Indian Constitution, their Lordships of the Supreme Court observed:

> Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well-known religions in India like Buddhism and Jainism which do not believe in God or in any intelligent first cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conductive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a Code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observance might extend even to matters of food and dress. What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion.

> ... Freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well, subject to the restrictions which the Constitution itself has laid down under article 26(b) . Therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.[48]2050

13. Procedure

The offence under this section is cognizable. A summons shall ordinarily issue in the first instance. It is non-bailable and not compoundable. It can be tried by any magistrate.

The cognizance of an offence under this section can be taken within three years.

14. Notice under the Code of Criminal Procedure 1973, Section 251

In a prosecution under this section, the following form of the notice under s 251, CrPC, may be adopted:

> I (*name of office of the magistrate etc*) hereby notice to you (*name of the accused*) as follows:

That on or about the..... day of..... at..... You destroyed (or damaged or defiled) ..... (a place of worship) [(or..... an object held sacred by a class of persons namely (*mention the class*)] with the intention of thereby insulting the religion of that class of persons (or with the knowledge that any class of persons were likely to consider the said destruction, (damage or defilement) as an insult to their religion, and you thereby committed an offence, punishable under section 295 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

15. Proof

To establish an offence under this section, it will have to be proved that the accused:

(1)
- (a) destroyed, damaged or defiled any place of worship; or
- (b) destroyed, damaged or defiled any object held sacred by any class of persons; and

(2)
- (a) he did so with the intention of insulting the religion of any class of persons; or
- (b) had done so with the knowledge that any class of persons was likely to consider such destruction, damage or defilement as an insult to their religion.

16. Sentence

The Indian Law Commissioners were of opinion that an offence under this section deserves a very severe punishment and proposed rigorous imprisonment for a term which might extend to seven years. The section, however, prescribes only imprisonment of either description for a term which may extend to two years or with fine or both.2051

5 Re *Sivakoti Swami* 1 Weir 253, p 255.

6 *Zac Poonen v Hidden Treasure Literature Incorporated in Canada* (2002) Cr LJ 481 (Kant) .

7 *Russell on Crime*, vol II, eleventh edn, p 1766.

8 (*Vide Hulsbury's Laws of England*).

9 *R v Saleem, R v Muhid, R v Javed* (2007) All ER (D) 462 (Oct) .

10 (*VideHalsbury's Laws of Canada*).

11 Re *Sivakoti Swami* 1 Weir 253, p 255; *Gopinath Puja Panda Samanta v Ramchandra Deb* AIR 1958 Ori 220, p 223, (1958) Cr LJ 1207 .

12 *S Veerabhadran Chettiar v EV Ramaswami Naicker* AIR 1958 SC 1032, p 1035, (1958) Cr LJ 1565 ; *State of Mysore v Henry Rodrigues* (1962) Mys LJ 271, (1962) 2 Cr LJ 594 .

13 *A Verrabhandran Chettiar v EV Ramaswami Naicker* AIR 1955 Mad 550, p 551, 56 Cr LJ 1268 ; *Southern Eastern Railway v State of Jharkhand* 2012 (113) AIC 512 (Jhar) .

14 Re *Bheema Goundan* 1 Weir 256.

15 Per Muthuswami Aiyar J, in Re *Sivakoti Swami* 1 Weir 253; Re *Bheemagounda* 1 Weir 256; *Gopinath Puja Panda Samanta v Ram Chandra Deb* AIR 1958 Ori 220, (1958) Cr LJ 1207 .

16 *Kutti Chami Moothan v Rama Pattar* 47 IC 812, 19 Cr LJ 960 .

17 *Romesh Chunder Sannyal v Hira Mondal* 17 ILR Cal 852 .

18 Re *Ratna Mudali* 1 Weir 253.

19 *Adam Sheikh v Isha Sheikh* 1 CWN 76 .

20 *Bechan Jha v Emperor* AIR 1941 Pat 492, 42 Cr LJ 579 .

21 *Joseph v State of Kerala* AIR 1961 Ker 28, p 31, (1961) 1 Cr LJ 82 .

22 *S Veerabhadran Chettiar v EV Ramaswami Naicker* AIR 1955 Mad 550, p 551, 56 Cr LJ 1268 (**overruled**).

23 *Queen-Empress v Imam Ali* 10 ILR All 150 and *Romesh Chunder Sanyal v Hira Mondal* 17 ILR Cal 852 .

24 *Hakim v Empress* (1884) PR 27 .

25 *Romesh Chunder Sanyal v Hira Mondal* 17 ILR Cal 852 .

26 *Ali Mohammad v Emperor* 7 Cr LJ 314 .

27 *S Veerabhandran Chettiar v EV Ramaswami Naicker* AIR 1958 SC 1032, p 1035, (1958) Cr LJ 1565 .

28 Per Brandt J in Re *Ratna Mudali* 10 ILR Mad 126, 1 Weir 256.

29 *Ibid*.

30 *Veerabhadran Chettiar*AIR 1958 SC 1032, p 1035, (1958) Cr LJ 1565 .

31 Re *Sivakoti Swami* 1 Weir 253.

32 *Banarsidas Chamaria v State* 98 Cal 139 .

33 *Amir Hasan v Emperor* AIR 1940 Pat 414, p 415, 41 Cr LJ 810 .

34 Note JP, p 136.

35 *Zac Pooven v Hidden Treasure Literature Incorporated in Canada* (2002) Cr LJ 481 (Kant) .

36 Re *Sivakoti Swami* 1 Weir 253, pp 255-56.

37 Re *Zingoo* 7 CPLR 45.

38 *Queen-Empress v Waman Lakshman* Ratanlal Un Cr C 979.

39 *Jan Mahommad v Narain Das* 1883 AWN 39 .

40 Re *Ratna Mudali* ILR 10 Mad 126.

41 Re *Sivakoti Swami* 1 Weir 253.

42 *Joseph v State of Kerala* AIR 1961 Ker 28, p 32, (1961) 1 Cr LJ 82 .

43 *Gopinath Puja Panda Samanta v Ramchandra Deb* AIR 1958 Ori 220, (1958) Cr LJ 1207 .

44 *Saidullah Khan v State of Bhopal* AIR 1955 Bhopal 23, p 24 .

45 *DP Titus v LW Lyall* (1981) Cr LJ 68, p 69 (All) .

46 *Aziz Ahmad (Dr) v State of Uttar Pradesh* (1993) 2 Crimes 22 (All), (1993) JIC 178 (DB) .

47 *Davis v Beason* (1883) 133 US 333, p 342 .

48 *Commr Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar* AIR 1954 SC 282, p 290-91, (1954) 1 MLJ 596, (1954) MWN 363, 67 LW 1220 .

Indian Penal Code (Act XLV of 1860)

Chapter XV

Of Offences Relating to Religion

[49][S. 295A.

Deliberate and malicious acts intended to outrage religious feelings of any class, by insulting its religion or religious beliefs.--

Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [50][citizens in India], [51][by words, either spoken or written, or by signs or by visible representations or otherwise], insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to [52][three years], or with fine, or with both.]

Comments

1. Scope

This section makes it an offence to speak or write any words with a deliberate and malicious intention of outraging the religious feelings of any class of citizens of India or insulting or attempting to insult the religious beliefs of that class.[53]It does not penalise any and every act of insult to, or attempt to insult, the religion or the religious beliefs of a class of citizens, but only those acts of insult to or those varieties of attempt to insult, the religion or the religious beliefs of a class of citizens which are

perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. Insult to religion offered unwittingly or carelessly or2052 without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section. It only punishes the aggravated form of such insult when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. The calculated tendency of this aggravated form of insult is clearly to disrupt the public order, and the section is valid only in so far as it is in the interests of public order. Having regard to the ingredients of the offence created by this section, there cannot be any possibility of the section being employed for purposes not sanctioned by arts 19(2), 25 and 26 of the Constitution . In other words, the section can be applied only when it is necessary 'in the interest of public order'.[54] In order to bring the case within the scope of this section it is not so much the matter of discourse as the manner of it. In other words, the words used should be such as are bound to be regarded by any reasonable man as grossly offensive and provocative, and maliciously and deliberately intended to outrage the feelings of any class of citizens of India.[55]

2. Legislative Changes

The section was inserted as stated above by s 2 of the Criminal Law (Amendment) Act 25 of 1927. The words 'citizen of India' were substituted for the words 'His Majesty's subjects' by the Adaptation of Laws Order 1950.

The section was further amended by s 3 of the Indian Penal Code (Amendment) Act, 41 of 1961[56] by which:

(a) for the words 'by words, either spoken or written, or by visible representation', the words 'by words, either spoken or written, or by signs or by visible representations or otherwise', and
(b) for the words 'two years', the words 'three years', were substituted.

3. History of the Law

This section was inserted in the Code by s 2 of the Criminal Law (Amendment) Act, 25 of 1927. The immediate cause for this was an agitation following a decision of a judge of the Lahore Court in *Raj Paul v Emperor* ,[57] holding that s 153A of this Code was intended to prevent persons from making attacks on a particular community as it exists at the present time and was not meant to stop polemics against deceased religious leaders, however scurrilous and in bad taste such attacks might be. In a subsequent case a division bench of the same court held that a scurrilous, vituperative and foul attack on a religion or its founder would come within the purview of s 153A .[58] The Allahabad High Court also held that a certain book entitled '*Vichitra Jiwan*' depicting the life of the Prophet Mohammad promoted feelings of enmity between Hindus and Mahommadans and came within the purview of s 153A, IPC . Thus, before the insertion of this section, such malicious writings could, if at all, be dealt with only under s 153A as attempts to promote feelings of enmity or hatred between different classes of citizens. They could not be dealt with as offences against2053 religion under this chapter. This section was enacted to make malicious acts insulting the religion, or outraging the religious feelings, of any class of citizens, punishable as offences relating to religion, whether or not they amount to attempts to promote feelings of enmity or hatred between classes.

4. Statement of Object

In the statement of objects and reasons, it was stated:[59]

> The prevalence of malicious writings intended to insult the religion, or outrage the religious feelings of various classes of His Majesty's subjects had made it necessary to examine the existing provisions of the law with a view to seeing whether they require to be strengthened. Chapter 15 of the Indian Penal Code, which deals with offences relating to religion, provides no penalty in respect of writings of the kind described above, such writings can usually be dealt with under section 153A of the Indian Penal Code, as it is seldom that they do not represent an attempt to promote feelings of enmity or hatred between different classes. It must be recognized, however, that this is only an indirect way of dealing with acts which may properly be made punishable themselves, apart from the question whether they have the further effect of promoting feelings of enmity or hatred between classes. Accordingly it is proposed to insert a new section in chapter 15 of the Indian Penal Code, with the object of making it a specific offence intentionally to insult or attempt to insult the religion, or outrage or attempt to outrage the religious feelings, of any class of His Majesty's subjects.

Provisions of Article 26 are not Affected

The section also does not prohibit or make punishable anything which is mere profession, practice or propagation of a religion or any of the things specified in art 26 of the Constitution of India . What is made punishable is 'deliberate and malicious intention of outraging the religious feelings of any class of citizens of India'. If there is any such deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, then whether that intention is expressed by words, either spoken or written, or by signs or by visible representation or otherwise it is made punishable under this section. But 'deliberate and malicious intention of outraging the religious feelings' of others is not the same thing as professing, practising or propagating one's own religion. One may, with complete liberty, profess, practise or propagate his religion without any obstacle or hindrance and nothing what he may do, can possibly be treated or considered as an intention to outrage the religious feelings of any class of people, much less would it amount to a 'deliberate and malicious' intention to do so. There would be deliberate and malicious intention of outraging the religious feelings of others only if a person does something which has a tinge of intention to outrage the feelings of others and even that intention is not merely deliberate, but also malicious.[60]

5. Validity of this Section

This section cannot be said to be ultra vires and void on the ground of its interfering with the fundamental right to freedom of speech and expression guaranteed under art 19(1)(a) of the Constitution . The section is enacted in the interests of public order, and only penalises the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of a2054 class of citizens. The calculated tendency of this aggravated form of insult is clearly to disrupt the public order, and the section which penalises such activities is well within the protection of cl (2) of art 19 of the Constitution, as being a law imposing a reasonable restriction on the exercise of the right to freedom of speech and expression guaranteed by art 19(1)(a) of the Constitution . Having regard to the ingredients of the offence, there cannot be any possibility of the section being applied for purposes not sanctioned by the Constitution.

Articles 25 and 26 of the Constitution guarantee the right to freedom of religion, but the right to freedom of religion so assured is expressly made subject to public order, morality and health. These two articles, in terms, contemplated that restrictions may be imposed on the rights guaranteed by them in the interest of public order.[61] If it does impose any restriction, it is within the four corners of the expression 'subject to public order, morality and health'.[62] Passing of an order banning or forfeiture of *Koran* would go against the preamble of the Constitution and would violate provisions of art 25 thereof. The preamble proclaims India to be a secular state. It states that each and every religion is to be treated equally. No preference is to be given to any particular religion. Liberty of thought, expression, belief, and worship are assured. The *Koran*, which is the basic textbook of Mahommadans, occupies a unique position to the believers of that faith. *Bible* is to the Christians and *Gita, Ramayan* and *Mahabharata* are to the Hindus. If such an order is passed, it would take away the secularity of India and deprive a section of people of their right of thought, expression, belief, faith and worship. It would also amount to infringement of art 25 which provides that all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate any religion.

Banning or forfeiture of *Koran* would infringe that right. Such action would amount to the abolition of the Muslim religion itself. The Muslim religion cannot exist without *Koran*. The proposed action would take away the freedom of conscience of the people of that religion and their right to profess, practise and propagate the said religion. Such action is unthinkable. The court cannot sit in judgment on holy books like the *Koran, Bible, Gita* and *Granth Sahib*.[63]

Free thinking does not involve freedom to make scurrilous attacks on the religion and religious beliefs of other sects with impunity. It is not free thinking to abuse and insult other religions. Further, the method and the manner of discourse on a particular topic also matter very much. All the citizens of India are guaranteed freedom of religion and freedom of conscience by our Constitution and each one has a right to pursue his own way of attaining salvation, unhampered and without interference from others. It is the duty of the state to create such a climate as would enable every one of its citizens to exercise freedom of religion and conscience. Section 99A of the Old CrPC 1898 (now s 95 of the CrPC 1973) and s 295A of the IPC are only legislative recognition of the power of the state to take action for the purpose of affording such protection to all its citizens.[64] Freedom of speech is one of the basic rights guaranteed by the Constitution. But the limits of the freedom end where the religion and religious beliefs are insulted or outraged. Section 295A is obviously a reasonable restriction which is in public interest.[65]2055

6. Retrospective Effect of the Section

This section has no retrospective effect, but if a new edition of a book, which was published before the enactment of the section, is published after its enactment, the author of the book can be convicted under this section if his connection with the publisher is proved.[66]

7. Essential Ingredients of the Offence under this Section

To constitute an offence under this section, the following ingredients must exist:

(1) the accused must insult or make an attempt to insult, the religion or religious beliefs of any class of citizens of India;
(2) the said insult *etc.*, must be with the deliberate and malicious intention to outrage the religious feelings of the said class of citizens; and
(3) the said insult, *etc.*, must be by words, either spoken or written, or by signs, or by visible representations or otherwise.[67]

Relative Scope of Sections 153A and 295A

Notes under s 153A may be referred to.

Relative Scope of Sections 295A and 298

Commentary under the same heading in s 298, *post*, may be referred to.

This section first became law in 1927. Up to that time acts constituting the offence under it fell within s 298, which still forms part of the IPC . The Select Committee, in its report stated that the essence of the offence is 'that the insult to religion or the outrage to religious feelings must be the sole, or primary, or at least the deliberate and conscious intention. We have accordingly decided to adopt the phraseology of s 298 which requires deliberate intention in order to constitute the offence with which it deals'.

While s 298, IPC uses the word 'wounding', s 295A uses the word 'outraging'. Outraging is a much stronger word than wounding. In *Murray*'s *Dictionary*, 'outrage' is explained as to wrong grossly, treat

with gross violence or indignity.[68] The two sections still stand together in the IPC, but the offence under this section is more serious. 'Outraging' in this section is a stronger word than 'wounding', and the intention to outrage must be malicious as well as deliberate, and must be directed to a class of persons, and not merely to an individual. But under s 298 they must not only be directed to an individual, but must also be uttered in the hearing of that individual, but intention need not be malicious. It is enough if it is deliberate. Under this section, the prosecution must prove something more than under s 298 ; they must show insult for the sake of insulting and with an intention which springs from malice and malice alone. To a charge under this section, therefore, it would be a defence to say, 'I had no malicious intention towards a class, but I did intend to wound or shock the2056 feelings of an individual so that attention might, however rudely, be called to the reform which I had in view'.[69]

8. 'With Deliberate and Malicious Intention'

One of the basic requirements of s 295A, IPC, is a deliberate and malicious act. Malice in one sense is negation of *bona fides*.[70] To come within the ambit of s 295A, the intent must be both malicious and deliberate. It is well settled that the offending publication is to be viewed as a whole and the intent of the author has to be gathered from a broader perspective and not merely from a few solitary lines or quotations.[71]The main ingredient of the offence under this section is insult to the religion or religious beliefs of any class of citizens. But the section further requires that the act of insulting must be with 'deliberate and malicious intention' of outraging the religious feelings of that class of citizens. Now an act may be deliberate without being malicious, or malicious without being deliberate. What the section requires is not an intention which is either deliberate only or malicious only but an intention which is both deliberate and malicious.[72]

There should be a deliberate and malicious intention of outraging the religious feelings of any class of citizens of India or of wounding the religious feelings of any person.[73] Complaint allegation was that as per the belief of Muslim community, holy 'Quaran' was neither written nor created by any body but it came into existence/revealed by Allah (God) himself, therefore, disclosing the holy 'Quran' as 'Racha Gaya' in the answer given by Sir Amitabh Bachchan in the TV Programme 'Kaun Banega Krorepati' was contrary to the belief of the Muslim community and, therefore, the religious feelings of Muslim community were hurt and as this statement was deliberately made, the accused was liable to be prosecuted for the offences punishable under ss 295A and 298, IPC . Held, allegation made in the complaint that the statement was deliberately made was without any supporting material to show that there was a deliberate and malicious intention of outraging the feeling of any class of citizens of India or of any person, it would not be sufficient to draw the proceedings under ss 295A / 298, IPC . No such intention was shown or was apparent in the reply given in the programme. The accused was not summoned.[74]

The section requires that there should be deliberate and malicious intention of outraging the religious feelings of any class of citizens. The mere fact that the learned author used such words as 'Kulta', or 'Duracharini', with reference to Sita not as his comment, but as the accusations of the conspirators and the rumour-mongers, this cannot, by itself, establish his intention as contemplated by s 295A, IPC, though there may be other synonyms for such words or that they may be expressible in milder terms.[75]2057

Section 295A of the IPC does not penalize every act of insult but penalizes only deliberate acts of insult, so that even if by any expression insult is in fact caused, that expression is not an offence if the insult offered is unwilling or unintended.[76] It was alleged that pursuant to a criminal conspiracy hatched with the 2nd and 3rd accused, the 1st accused made certain disclosures as part of deciphering the Devaprasnam that a woman had entered into the sanctum sanctorum (Garbha griha) of the temple and touched the idol of Lord Ayyappa. He made such a false statement knowing fully well that no female above the age of 10 and below 50 years can ever enter into even the peripheries of the temple. He made a further declaration while Devaprasnam continued on 17-6-2006 that the woman who had committed such sacrilege is an artist and an accomplished dancer. The three

accused, by their false declarations and acts done, caused hurt and also insulted the religious belief, tenents and faith of the followers of Hindu religion and the devotees of Lord Ayyappa, punishable under ss 295A and 120B of the IPC . The police report did not show that the accused had made such declarations with deliberate and malicious intention to outrage the religious feelings of a class of persons, that too, to insult the religion and religious feelings, to invite the penal consequences under s 295A of the IPC .[77]

The question arose in this case was whether the book "*Dwikhandita*" written by Taslima Narseen of Bangladesh could be proscribed in India. As the book was written in the context of author's country of origin, it does not deliberately and maliciously intend to outrage the religious feelings of any community of India, and since the theme of the book was the hapless condition of women in that country, it was held, that it does not come within the ambit of s 295A of the IPC and, therefore, the order of forfeiture under s 95, CrPC 1973 was unwarranted, and was accordingly set aside.[78]

Intention unless Conceived suddenly, may be Inferred to be Deliberate

In the first instance, the intention to outrage the religious feelings must be deliberate, *i.e.*, not conceived all of a sudden in the course of a discussion, but premeditated. A mere knowledge that the religious feelings of others may be outraged would not suffice, nor a mere intention to outrage such feelings, unless the intention is deliberate. Where the intention to outrage the feelings is not conceived suddenly in the course of a discussion, but, premeditated, deliberate intention may be inferred.[79] It must also be shown that the intention to outrage the religious feelings was also malicious.

The fact that the statement is contrary to material available on record and has been made without inquiry or investigation, would be sufficient to hold that it was deliberately and maliciously made to outrage the religious feeling of followers of Pranami Dharma. Nothing else is required to establish the guilt of the respondent.[80]2058

Malice--Meaning of

One of the basic requirements of s 295A is deliberate and malicious act. Malice in one sense is negation of *bona fides*.[81] The word 'malicious' used in this section presents some difficulty. According to *Stroud's Judicial Dictionary*, malice in common acceptation means ill-will against a person. But in its legal sense, it means wrongful act done intentionally without just cause or excuse. In *Peary Lal v Emperor* ,[82]it was held that, if a person willfully does an act injurious to another without lawful excuse, he does it maliciously. Malice in its legal import does not mean spite or ill-will, but the willful doing of an illegal act.[83] The court of criminal appeal has observed in a later case:[84]

> In any statutory definition of a crime, 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either: (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (ie, the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured'.

Object behind inserting the term 'Malice'

> Further, we were impressed by an argument to the effect that an insult to a religion or to the religious beliefs of the followers of a religion might be inflicted in good faith by a writer with the object of facilitating some measure of social reform by administering such a shock to the followers of the religion as would ensure notice being taken of any criticism so made. We have, therefore amplified the words 'with deliberate intention' by inserting

> reference to malice, and we think that the section which we have now evolved will be both comprehensive and at the same time of not too wide an application.[85]

What is punishable under this section is not so much the matter of the discourse, written or spoken, as the manner of it. One must, therefore, look with great care at the words used. If the words used caused persons to feel insulted but were only such as might possibly wound and in fact did so, then there would be no offence under the section; if the words used were bound to be regarded by any reasonable man as grossly offensive and provocative, and were maliciously intended to be regarded as such then an offence would have been committed.[86]

Malice is not Capable of Direct or Tangible Proof

Malice, no doubt, is one of the important ingredients of the offence under the section and it is certainly for the prosecution to establish that element by proper evidence. But it has to be realised that malice is a state of the mind and often is not capable of direct and tangible proof. In almost all cases where it is required to be proved, it has to be inferred from the surrounding circumstances, having due regard to the setting, background and connected facts in relation to the writings in question. Malice in one sense is a negation of *bona fides*. If a person knowing that his words, either uttered or written, are likely to offend or injure the religious faiths2059 of others, indulges in them, it would be difficult to hold that his act was done *bona fide* and without malice.[87]

Malice and Intention are to be Inferred

Malice being an important ingredient of the offence under this section, it is for the prosecution to establish it by proper evidence. But it being a state of mind and often not capable of direct and tangible proof, it has to be inferred from the circumstances, having due regard to the setting, background and connected facts in relation to editing and publishing articles of the nature in question.[88] If the language used transgresses the limits of decency and is designed to vex, annoy and outrage the religious feelings of others, the malicious intention of the writer can be inferred from the language employed by him.[89]

Malice when to be Presumed

It, therefore, appears that, in this section the word 'malicious' has not been used in the popular sense. In order to establish malice as contemplated by this section, it is not necessary for the prosecution to prove that the accused bore ill-will or enmity against specific persons. If the injurious act was done voluntarily without a lawful excuse, malice may be presumed.[90] Provocation received from supporters of the opposite view cannot be treated as a lawful excuse for writing offensive books.[91]

9. 'Outraging Religious Feelings'

In s 298, the expression used is 'wounding religious feelings', while in this section 'outraging religious feelings' is used. The word 'outrage' is somewhat stronger than the word 'wound'.[92] The Select Committee in their report stated:[93]

> We think that to penalise even an intentional outrage or attempted outrage upon the religious feelings of any class would be casting the net too wide for the cases with particular reference to which the Bill has been introduced. At the same time, we realise that the reference to the outraging of religious feelings was inserted to provide for the case of an insult to the founder of a religion or a person held sacred by the followers of a particular religion where such an outrage does not amount to an insult of the religion. It has in one instance been held that an insult to the founder of a religion is not necessarily an insult to the religion although it may outrage the religious feelings of the followers of that religion. We have therefore provided that the new section shall only apply in cases where a religion is insulted with the deliberate intention of outraging the religious feelings of its followers.2060

Even a True Statement may outrage Religious Feelings

This section requires that the offending writing must be with deliberate and malicious intention of outraging the religious feelings of a class of citizens of India. Therefore, the enquiry under this section has to be confined to the question whether there was malicious intention of outraging the religious feelings of a class of citizens of India. Even a true statement may outrage religious feelings.[1] In the case of books alleged to fall within the scope of this section, the truth of the language can neither be pleaded nor proved. The inquiry has to be confined to the question whether there was malicious intention of outraging the religious feelings of a class of citizens of India. Even a true statement may outrage religious feelings.[2]

The applicant wrote a book "*Islam -- A concept of Political World Invasion by Muslims*". The book contained attack on the personal life of Mohammad Paigambar, which would hurt Muslim sentiments. The ban on the circulation of the book imposed by the Maharashtra Government under s 95, CrPC was held proper.[3]

Book of a Writer--When does not Outrage Religions Feelings

The book was an autobiographical work, detailing the events occurring in the life of the author and the status of the women in Bangladesh in the socio-religious and political situation by reason of adoption of state religion in Bangladesh. It was held that it, in no way, divulged the requisite *mens rea* to outrage religious feelings to insult the religion or religious belief of that class of citizens in India. The theme of the book and its context was essentially secular and not in the nature of an insult to religion or religious feelings of that class of the citizens in India. The contents of the offending passages are the opinion of the author based on historical data and the same cannot constitute an 'insult' or 'attempt to insult' upon the religion or religious belief of Muslims in India.[4]

Having regard to the established principles of law governing the field, the book read as a whole: (1) does not reflect that the book was concerned with the Indian scenario and by no stretch of imagination could any passage be construed to have even been intended to mean and apply to the citizens of that class in India; (2) does not reflect any intention of outraging the religious feelings to insult the religion or religious belief of that class of citizens in India; (3) the intention that could be gathered from the context and the theme of the book, by no stretch of imagination can be called deliberate and malicious for achieving any object of religious hatred; (4) it appears to be vibrant with the thoughts and philosophy of life conceived by the author having regard to the context and situation and the plight of women in the society in Bangladesh; (5) it appears to be directed against the malaise and ills of the society sought to be supported and sanctioned in the name of religion in general; (6) particularly, in the context of adoption of State religion in Bangladesh by the then ruler purporting to support such sanction through State machinery at the cost of democracy and secularism, the salient features of the Constitution of Bangladesh; (7) in the context of the socio-religio-politico situation in Bangladesh, the author had2061 intended to administer a shock in order to revolutionise the feelings and sensitize the attitude of the people of Bangladesh towards women clamouring for equality; (8) read in the perspective of the whole book, one would be left with the impression of the author's philosophy of equality between men and women, between women and women, between men and men and above all the humanity with a perfectly secular outlook which the State has to follow and the law is to be enacted applicable to the humanity irrespective of the caste, creed and religion affording equality to all, a principle enshrined and vibrant as the soul of the Constitution of India.[5]

Book has to be Read as a Whole

In order to see whether a particular passage in the book is offensive, the book has to be read as a whole and cannot be read in piecemeal. The offending passage cannot be read out of context of the central theme of the book.[6]

Feelings of a Class and not of the Individuals should have been Outraged

The idea of making a separate offence under s 295A is to punish those who attempt to insult the religion or religious belief of any class of citizens in India. It does not probably relate to any act done with the intention of outraging the religious feelings of any individual. Section 295A has application where the whole of particular class of citizens is affected and it is for this reason that a complaint by the state government or an officer empowered in this behalf by the state government has been made a pre-requisite for the initiation of such proceedings.[7]

Historical Part of any Narrative

Historical perspective and a discussion based thereon without the requisite *mes rea* does not and cannot fall within the ambit of s 295A of the IPC . Distortion of history may lead to an inference of necessary *mens rea* but such inference cannot be drawn due to existence of ample historical support.[8]

Where the origin of a community is sought to be traced, so long as there is adherence to the historical part of the narrative, however unpalatable it may be to the members of that community, there may be no offence. But, on the other hand, where the author uses language which shows malice and is bound to annoy the members of the community so as to degrade them in the eyes of the other classes, he would be promoting feelings of enmity and hatred.[9]

Mere Doctrinal Disagreement will not Amount to Outraging the Religious Feelings

Where on publication of a book by the accused, a Christian group filed a complaint alleging the outraging of religious feeling and infringement of copy of translations of songs and mutilations of sacred writings in books published by the accused, there was no evidence showing that disagreement expressed by the accused with the doctrine of the complainant was with deliberate and malicious intention of outraging the religious feelings of the complainant group, it was held that mere doctrinal2062 disagreement will not constitute an act of outraging or insulting any religion or religious belief.[10]

Where a person, who in public said that the *Ramayana* is a fiction and that no Rama was ever born and then kicked the book of *Ramayana*thereby tearing its cover and pages, it was held that the act of the accused was to outrage the feelings of Hindus and Sikhs who hold the *Ramayana* in reverence, and, therefore, the accused was liable under this section.[11]

Photographs of Gods and Goddesses of Hindus on Fire Crackers, Newspapers, *etc*.

It is a fact that photographs of Hindu Gods and Goddesses are pasted on fire crackers. This practice has been going on for many years and up till now nobody has raised any objection regarding this practice. This has happened only because nobody has thought it objectionable, nobody's feelings have been hurt on seeing the fire crackers bursting and the photographs being destroyed because the photographs on the fire crackers have not been viewed as photographs of Gods and Goddesses but just as some prints to attract the attention of customers. There was no intention that anybody's feelings should be hurt by selling such fire crackers or by bursting such fire crackers. However, in *Bhau v State of Maharashtra* ,[12] a new dimension has been given to the matter. The court observed in this case:

> Nobody from Hindu community up-till-now has thought over on this issue in this way. It is just whim of the petitioners and for that they have come before the court. This is nothing but wasting time, money and energy.

> Photographs of Gods and Goddesses, and for that matter, other respectable National Leaders, are being printed everyday in different newspapers and everybody knows that the life of the newspaper is hardly for 24 hours and thereafter it becomes waste paper and those photographs on the newspapers go to the dustbin in majority of the cases without anybody considering that there are photographs of Gods and Goddesses of Hindu religion or photographs of National Leaders because the matter is never looked at from that point of view.

> Whenever invitation cards of marriages or other ceremonies being performed by Hindu persons, photographs of Gods and Goddesses are printed on these invitation cards and once the purpose of the cards is finished, those cards also go to the dustbins, with them the photographs printed on them. Here also nobody's feelings are hurt by saying that the photographs of Gods and Goddesses are being thrown in dustbins along with other rubbish matters.

Criticism of Hindu Religion for Untouchability, *etc*.

The criticism of Hindu religion for its inculcation of the doctrine of untouchability and for the sanction which it has given to reprehensible treatment meted out to the lower castes has of recent years been considered perfectly legitimate.[13]

10. 'Class'

Notes under ss 153 and 295 may be referred to.2063

11. 'Written'

Notes under s 124A may be referred.

12. 'Visible Representation'

Notes under s 124A may be referred to.

13. Attempts

Notes under s 124A may be referred to.

14. 'Religious Beliefs'

The Select Committee, in its report stated:[14]

> 'To make it clear that an attack on a founder is not omitted from the scope of the section, we have specifically made punishable an insult to the religious beliefs of the followers or any religion'.

Whether Provocation may be Justified to Outrage Religious Beliefs

So an attack on a founder and the religious beliefs of his followers is not excluded from the scope of this section. Where the accused, finding that certain pamphlets had been issued in support of the opposite view, wrote six books by way of reply, it was held that it might be that the applicant wrote the six books by way of a reply to the pamphlets issued from the opposite camp, but, if on examining the

language used by the applicant in the six books, it is found that the writing is likely to outrage religious beliefs or feelings of a certain class of citizens, he would be liable under this section.[15]

Appellant accused was carrying beef and the blood was falling on the road. The informant and others objected to it as it might cause hurt to the sentiments of Hindu. In the scuffle ensued in which the informants and others received injuries which were not grievous in nature. The FIR and the statement of the witnesses did not show that the accused did the act with the intention to create religious rift and communal disharmony between the two groups. Appellant accused was acquitted of the charge under s 295A, IPC .[16]

15. Procedure

The offence under this section is cognizable. A warrant shall issue in the first instance. It is neither bailable nor compoundable and is triable by a magistrate of the first class.

The cognizance of an offence under this section can be taken within three years.

16. Sanction for Prosecution

No court shall take cognizance of any offence punishable under this section except with the previous sanction of the Central Government or of the state government.[17]2064

The Central Government or the state government (as the case may be) may, before according its sanction, order a preliminary investigation by a police officer not below the rank of inspector, in which case such police officer shall have the power, referred to in s 155(3), CrPC .

The obtaining of a sanction is a *sine qua non* and no magistrate can take cognizance of the complaint under s 295A, IPC unless the order, granting sanction, is produced.

An order of cognizance of offence punishable under ss 153A and 295A, IPC without being supported by the order of sanction of the state government is liable to be quashed.[18] On a complaint filed under ss 153A, 295A and for other offences before the magistrate, the magistrate cannot take cognizance of offences under ss 295A and 153A without there being any sanction under s 196(1), CrPC .[19]

If the complainant feels that the applicants, with malicious and deliberate intention of outraging the religious feelings of Hindus, have published the article, proper course would be to move the government for their prosecution under s 295A, IPC .[20]

Where no sanction is given in accordance with s 196(1), CrPC to prosecute the accused for the offence under s 295A, IPC, the Apex Court quashed the proceedings.[21]

Complaint filed for offence under s 295A, IPC without obtaining the sanction of the Government was quashed.[22]

17. Charge

In a prosecution under this section the following form of the charge may be adopted:

I (*name and office of the magistrate etc*) hereby charge you (*name of the accused*) as follows:

That on or about the .....day of.....at.....you (*) insulted (or attempted to insult) the religion (or the religious beliefs) of.....by the following words spoken (or written) [or by signs or by visible representations (or otherwise) to wit....] with the deliberate and malicious intention of outraging the religious feelings of the said class of citizens of India, and you thereby committed an offence, punishable under section 295A of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

18. Proof

To establish an offence under this section, it will have to be proved that:

(a) the accused insulted or attempted to insult the religion or the religious beliefs of a class of citizens of India by words either spoken or written or by visible representations, or otherwise; and
(b) he did so with the deliberate and malicious intention of outraging the religious feelings of that class of citizens.2065

Under this section the prosecution must show that the accused insulted for the sake of insulting and with an intention which sprung from malice and malice alone.[23]

19. Defence

To a charge under this section it would be a defence to say: 'I had no malicious intention towards a class, but I did intend to wound or shock the feelings of an individual so that attention might, however rudely, be called to the reform which I had in view'.[24] But it is no defence for anyone to plead that he was writing a book in reply to the one written by one professing another religion who had attacked his own religion.[25]

Truthfulness of a Statement is no Defence

The truth of language can neither be pleaded nor proved. Even a true statement may outrage religious feelings. It was held that the intention of the writer of a book must be judged primarily by the language of book itself, though it is permissible to receive and consider external evidence either to prove or to rebut the meaning ascribed to it. If the language is of a nature calculated to produce or to promote feelings of enmity or hatred, the writer must be presumed to intend that which his act was likely to produce.[26] A statement, which would otherwise fall within the mischief of this section, cannot be taken out of it merely because it happens to be the true statement.[27]

20. Forfeiture

Section 95(1) of the CrPC authorises the state government to forfeit a newspaper, book or document, the publication of which is an offence under this section. A person aggrieved by an order of forfeiture passed by the state government may apply to the High Court under s 96, CrPC to set aside such order.

Where there was nothing objectionable in the book that might be said to insult Hinduism or to promote disharmony and hatred between different castes so as to be punishable under s 153A or under s 295A, IPC, the impugned order of its forfeiture was held wholly unjustified and unsustainable.[28] The

statement of the ground of the opinion by the state government is mandatory and a total absence thereof would vitiate the declaration of forfeiture.[29] The satisfaction of the High Court alone that the offending material does not contain any matter which is punishable under one or other of the relevant sections specified in s 95(1)(b), CrPC, is the conclusive factor in either upholding or quashing the declaration of forfeiture.[30]2066

49 Inserted by Act 25 of 1927, s 2 .

50 Substituted by the AO 1950, for 'His Majesty's subject'.

51 Substituted by Act 41 of 1961, s 3, for certain words (wef 27-9-1961).

52 Substituted by Act 41 of 1961, s 3, for 'two years' (wef 27-9-1961).

53 Re *P Ramaswamy*(1962) 2 Cr LJ 146.

54 *Ramji Lal Modi v State of Uttar Pradesh* AIR 1957 SC 620, p 623, (1957) Cr LJ 1006 ; *Public Prosecutor v Ramaswami* AIR 1964 Mad 258, (1964) 1 Cr LJ 672 .

55 *Shiv Ram Dass v Punjab State* AIR 1955 Punj 28, p 30, (1955) Cr LJ 337 ; *King v Nga Shwe Hpi* AIR 1939 Rang 99, 40 Cr LJ 640 .

56 *Gazette of India* dated 10 August 1961, Pt 2, s 2, p 681.

57 *Raj Paul v Emperor* AIR 1927 Lah 590, 28 Cr LJ 721 .

58 *Devi Saran Sharma v Emperor* AIR 1927 Lah 504, 28 Cr LJ 594 .

59 *Gazette of India* dated 20 August 1927, Pt 5, p 213.

60 *Sant Das Maheshwari v Baburam* AIR 1969 All 436, (1969) Cr LJ 1097 .

61 *Ramji Lal Modi v State of Uttar Pradesh* AIR 1957 SC 620, (1957) Cr LJ 1001 .

62 *Sant Das Maheshwari v Baburam* AIR 1969 All 436, (1969) Cr LJ 1097 .

63 *Chandanmal Chopra v State of West Bengal* (1986) Cr LJ 182 (Cal) .

64 *Veerabrahmam v State of Andhra Pradesh* AIR 1959 Andh Pra 572, p 578, (1959) Cr LJ 1280 .

65 Re *Ramaswamy*(1962) 2 Cr LJ 146, p 147.

66 *Shib Shram v Emperor* AIR 1941 Oudh 310, p 315, 42 Cr LJ 429 .

67 Re *Ramaswamy*(1962) 2 Cr LJ 146; *Sant Das Maheshwari v Babu Ram* AIR 1969 All 436, (1969) Cr LJ 1097 ; *Jayamala v State of Kerala* 2013 Cr LJ 622 (Ker), 2012 (3) KHC 291, 2012 (3) KLJ 454 .

68 *The Trustees of Safdar Hashmi Memorial Trust v Govt of NCT of Delhi* (2001) Cr LJ Del 3689 (FB) .

69 *King v Nga Shwe Hpi* AIR 1939 Rang 199, 40 Cr LJ 640 ; *Baba Khalil Ahmad v State* AIR 1960 All 715, p 718, (1960) Cr LJ 1528 .

70 *Ibid*.

71 *Nand Kishore Singh v State of Bihar* (1985) Cr LJ 797 (Pat) (SB) .

72 *King v Nga Shwe Hpi* AIR 1939 Rang 199, 40 Cr LJ 640 ; *Public Prosecutor v Ramaswami* AIR 1964 Mad 258, (1964) 1 Cr LJ 672 ; *Sant Das Maheshwari v Baburam* AIR 1969 All 436, (1969) Cr LJ 1097 .

73 *Mudassir Ullah Khan v State of UP* 2013 Cr LJ 3741, p 3742 (All) .

74 *Mudassir Ullah Khan v State of UP* 2013 Cr LJ 3741, p 3742 (All), 2013 (5) All LJ 37 .

75 *Ramlalpuri v State of Madhya Pradesh* AIR 1971 MP 152, p 158 .

76 *Jayamala v State of Kerala,* 2013 Cr LJ 622, p 625 (Ker) .

77 *Jayamala v State of Kerala* 2013 Cr LJ 622, p 627 (Ker), 2012 (3) KLT 461, ICK 2012 (3) Ker 690 .

78 *Sujato Bhadra v State of West Bengal* 2006 Cr LJ 368, p 402 (Cal) (SB), (2005) 4 Cal HN 601 .

79 *Narayan Dev v State* AIR 1952 Ori 149 and notes under s 298 .

80 *State of Madhya Pradesh v Swami Rishi Kumar* (1993) Cr LJ 23 (MP) .

81 *The Trustees of Safdar Hashmi Memorial Trust v Govt of NCT of Delhi* (2001) Cr LJ Del 3689 (FB) .

82 *Peary Lal v Emperor* AIR 1917 All 317 ((1)), 15 All LJ 106, Knox J referred to *R v Pembleton* (1874) 43 LJMC 91 .

83 *Gott v Measures* (1948) 1 KB 234, p 239, [1947] 2 All ER 609, p 610, per Lord Goddard CJ.

84 *R v Cunningham* (1957) 2 QB 396 .

85 *Gazette of India* dated 17 September 1927, Pt 5, p 251.

86 *King v Nga Shwe Hpi* AIR 1939 Rang 199, p 200 . Refer to synopsis under s 219, *ante*.

87 Re *P Ramaswamy*(1962) 2 Cr LJ 147; **see also,dissenting** judgment of Bheema Sankaram J in *N Veerabrahman v State* AIR 1959 Andh Pra 572, p 583, (1959) Cr LJ 1280 .

88 Re *P Ramaswami*(1962) Cr LJ 146, (1962) Mad LJ (Cr) 465; **dissenting** judgment of Bheema Shankaram J in *N Veerabrahman v State of Andhra Pradesh* AIR 1959 Andh Pra 572, (1959) Cr LJ 1280 .

89 *State of Mysore v Henry Rodrigues* (1962) 2 Cr LJ 564, 40 Mys LJ 271 .

90 *Baba Khalil Ahmed v State* AIR 1960 All 715, p 719, (1960) Cr LJ 1528 .

91 *Ibid.*

92 *Baba Khalil Ahmad v State* AIR 1960 All 715, p 718, (1960) Cr LJ 1628 ; *King v Nga Shwe Hpi* AIR 1939 Rang 199, 40 Cr LJ 640 .

93 *Gazette of India* dated 17 September, 1927, Pt 5, p 252.

1 *Baba Khalil Ahmed v State* AIR 1960 All 715, p 718, (1960) Cr LJ 1528 ; *Kali Charan Sharma v Emperor* AIR 1927 All 649, 27 Cr LJ 968 .

2 *Baba Khalil Ahmad v State* AIR 1960 All 715, p 718, (1960) Cr LJ 1528 .

3 *R V Bhasin v State of Maharashtra* 2012 Cr LJ 1375, 2010 (112) Bom LR 154, 2012 (2) KLT (SN) 69 (Bom) (FB) .

4 *Sujato Bhadra v State of West Bengal* (2006) Cr LJ 368 (Cal) (FB) .

5 *Sujato Bhadra v State of West Bengal* (2006) Cr LJ 368 (Cal) (FB) .

6 *Sujato Bhadra v State of West Bengal* 2006 Cr LJ 368, p 381 (Cal) (SB), (2005) 4 Cal HN 601 .

7 *State v Nand Singh* (1979) CLR (P&H) 6, p 8-9 .

8 *Sujato Bhadra v State of West Bengal* (2006) Cr LJ 368 (Cal) (FB) .

9 *Harnam Das v State of Uttar Pradesh* AIR 1957 All 538, p 541, (1957) Cr LJ 912 (SB) .

10 *Zac Poonen v Hidden Treasure Literature Incorporated in Canada* (2002) Cr LJ 481 (Kant) .

11 *Chand Singh v State* (1967) 69 PLR 126, p 128, (1967) Cur LJ 72 .

12 *Bhau v State of Maharashtra* (1999) Cr LJ (Bom) 1230 (DB) .

13 *Lalai Singh Yadav v State of Uttar Pradesh* (1971) Cr LJ 1773 (All) (FB) .

14 *Gazette of India* dated 17 September 1927, Pt 5 pp 251-52.

15 *Baba Khalil Ahmad v State* AIR 1960 All 715, p 718, (1960) Cr LJ 1528 .

16 *Pesh Imam Qureshi v State of Jharkhand* 2008 Cr LJ (NOC) 297, 2008 (1) Jhar R 56 (Jhar) .

17 Code of Criminal Procedure 1973, ss 196(1) and (3) .

18 *Swami Laxmanananda Saraswat v State of Orissa* (1988) 2 Crimes 960 (Ori) .

19 *Srivishwanath v Sriyogendranath Tripathi* (1986) 2 Crimes 413 (All) .

20 *Laxminarayan Singh v Shreeram Sharma* (1983) 1 Crimes 615, p 621 (MP) .

21 *Manoj Rai v State of Madhya Pradesh* (1999) Cr LT 470 (SC) .

22 *Rameshbhai M Gagadia v State of Gujarat* 2010 Cr LJ (NOC) 508 (Guj) .

23 *King v Nga Shwa Hpi* AIR 1939 Rang 199, p 200, 40 Cr LJ 640 .

24 *Ibid*.

25 *Shiv Ram Dass Udasin v Punjab State* AIR 1955 Punj 28, p 29, (1955) Cr LJ 337 .

26 *Baba Khalil Ahmad v State* AIR 1960 All 715, (1960) Cr LJ 1528 .

27 *State of Mysore v Henry Rodrigues* (1962) 2 Cr LJ 564, 567, 40 Mys LJ 271 ; *Kali Charan Sharma v Emperor* AIR 1927 All 649, 28 Cr LJ 968 .

28 *Lalai Singh Yadav v State of Uttar Pradesh* (1971) Cr LJ 1773 (All) (FB).

29 *Nand Kishore Singh v State of Bihar* (1995) Cr LJ 797 (Pat) (SB) .

30 *Ibid*.

Indian Penal Code (Act XLV of 1860)

Chapter XV

Of Offences Relating to Religion

S. 296.

Disturbing religious assembly.--

Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Comments

1. Scope

This section deals with disturbance of a religious assembly, which may or may not be in a place of worship.

The penal law of India extends a special protection against voluntary disturbance to all assemblies lawfully engaged in religious worship or ceremonies.[31]

2. Analogous Law

This section in the Code may fairly by supposed to have been framed upon the kindred English law to be found in 52 Geo III, ch 155, s 12, also 23 and 24 Victoria, ch 39.[32]

3. Object

The object of the section is to secure freedom from molestation when people meet for the performance of acts which ordinarily take place in some quiet spot vested for the time, in the assembly exclusively.2067

4. Ingredients of the Offence

To constitute an offence under this section:[33]

(1) there must be an assembly;
(2) the assembly must be lawfully engaged in religious worship or religious ceremonies; and
(3) the accused must have voluntarily caused disturbance to such an assembly.

5. 'Voluntarily'

A person is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it, or by means which at the time of employing those means, he knew, or had reason to believe to be likely to cause it.[34]

6. Intention to Cause Disturbance is the Essence--Not an Active Intention but mere Knowledge is Sufficient

The essence of the offence under this section is the intention express or implied,[35]to cause disturbance to a religious assembly, and it is immaterial whether this intention is due to religious animosity, or any other cause, intention to cause a certain result is not an element necessary to constitute a voluntary causing of that result but knowledge of or belief in, the likelihood of the result following, though not intended, may supply the place of intention. If, therefore, the accused knew, or had reason to believe that their act in removing an image was likely to cause disturbance to any religious worship, then, though they might not have intended to cause such disturbance, yet the causing of the disturbance, would be voluntary within the meaning of the Code.[36] It is not, therefore, necessary for the purpose of this section, that the accused should have had an active intention to disturb religious worship. It is sufficient, if knowing they are likely to disturb it by their music, they take the risk and do actually cause disturbance.[37]

Refer to notes under s 39 .

7. 'Causes Disturbance'

If disturbance is not proved as a fact there can be no conviction under the section, but to constitute a 'disturbance', it is not necessary that there should be an actual stay or interruption of the service. It cannot be said that a congregation assembled for public worship cannot be disturbed unless there is an actual stay or interruption of the service. Where the worshippers are reciting one *Mantram,*it amounts to a disturbance to recite another, in their presence and hearing, so as to distract their minds from the act in which they are engaged.[38] But where one sect of a religion could not hear what the other sect recited, it was held that no disturbance was caused within the meaning of this section.[39]2068

Substantial and not Merely Fanciful Disturbance Matters

Spreading false rumours, although they might have had the most serious consequences, cannot be

described as 'causing a disturbance'.[40] The playing of music near a mosque would not by itself, without anything further, amount to an offence within the meaning of this section. Any deliberate intention to disturb the worship may not be necessary; but surely it must be found as a fact before the section could apply, that there was a substantial and not merely fanciful disturbance of the worship.[41]

Persons Engaged in Religious Worship can cause disturbance to Different Community

There is nothing in s 296, IPC, to justify the interpretation that the persons who were themselves engaged in the performance of religious worship or religious ceremonies, cannot be convicted of causing disturbance to another community.[42]

DSP can Regulate extent of Music in Streets on Future Occasions

Where the order was issued that no procession with music would be allowed to pass within 40 kms from the mosque, it is clearly a regulation that falls within the ambit of s 30 of Police Act 1861. Sub-section 4 of s 30 of the said Act clearly gives the District Superintendent of Police a right to regulate the extent to which music may be used in the streets on future occasions, and it is not necessary for him to pass a separate order on every occasion.[43]

Consequences of Pronouncing *Amin* Loudly

A mosque to be a mosque must be a building dedicated to God, and not a building dedicated to God with a reservation that it could be used only by a particular person holding particular views of the ritual. No sect or creed or portion of the community can restrain others claiming the right. There is no authority in the Mahommadan ecclesiastical law to limit the tone of the voice in which the word *amin* is to be pronounced. So long as persons are Mahommadans, they are entitled to enter a mosque and perform the worship and say the word *amin* without anything to restrain their tone or note of the octave. But if the pronouncing of the word *amin* results in the disturbance of the peace, it will have to be dealt with under the criminal law. But where the word *amin* is pronounced aloud in the honest exercise of the conscience that it should be so pronounced, there can be neither any offence under the criminal law, nor any wrong in the civil law (per Mahmood J). If a Mahommedan goes to a mosque not with the object of honestly performing his own religious duties, but with the deliberate purpose and intention of disturbing the quiet devotion of others engaged in prayers, and acts in such a way that the necessary consequences is that the congregation is disturbed, he has brought himself within the meaning of this section (per Straight J). A Mahommedan would bring himself within the grasp of criminal law, who, not in the *bona fide* performance of his devotions, but *mala fide* for the purpose of disturbing others engaged in their devotions, makes any demonstrations, oral or otherwise, in a mosque, and disturbance is the result.[44] Where, however, there was no voluntary disturbance to any assembly, engaged in *namaz* or prayer, but the2069 word *amin* was loudly uttered by the accused at the close of the prayer, it was held that no offence under this section was made out.[45]

Interference with Devotion Amounts to Disturbance

Where a mosque is a public mosque open to the use of all Mahommadans without distinction of sect, a Mahommadan who, in the *bona fide* exercise of his religious duties in such mosque, pronounces the word *amin* in a loud tone of voice, according to the tenets of his sect, does nothing which is contrary to the Mahommadan ecclesiastical law or which is either an offence or civil wrong, though he may by such conduct cause annoyance to his fellow-worshippers in the mosque. But any person, Mahommadan or otherwise, who goes into a mosque not *bona fide* for religious purpose, but *mala fide* to create a disturbance there and interfere with the devotion of the ordinary frequenters of the mosque, will render himself criminally liable.[46]

8. 'Assembly'

For the purpose of this section, even three persons gathered together for the purpose of worship are

sufficient to constitute an assembly.[47] A religious procession is but an assembly in motion.[48]

9. 'Lawfully Engaged in the Performance of Religious Worship'

To come within the protection afforded by the section, the assembly of persons must be essentially a religious assembly, and it must be lawfully engaged as such. An assembly, therefore, which is not really a religious assembly, though carrying on its proceeding in such guise, would not be protected by the section, *eg.*, an assembly whose real common object is one of those set out in s 141, and is therefore, an unlawful assembly. 'Whatever' is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance.[49]

Worship to be Real and not a Cloak

The worship referred to in this section must be a real worship and not a cloak for doing something else, and the assembly must be lawfully engaged in such worship. If the ceremony is commenced by an act which is not lawful, it cannot be said that the persons engaged in them are lawfully engaged, from the mere circumstances of their falling into a posture of worship, though such worship may be real. As to whether a worship is real or not, much must depend upon the circumstances under which it is performed.[50]

10. Assembly Prohibited by Law is not Lawfully Engaged

A religious assembly which is prohibited by law is not lawfully engaged in the performance of worship or ceremonies *eg.*, such an assembly on private property under conditions which constitute it a trespass or one which has been lawfully2070 commanded to disperse under s 151,[51] or which has been prohibited by order of a magistrate under s 144 of the CrPC .[52]

No Assembly can be Lawfully Engaged on a Highway

Where certain boys were beating drums on a public road to summon people for a procession during Moharram, and the accused seized the drums which he returned to them the next day, it was held that the accused's acts did not constitute an offence as no assembly can be lawfully engaged within the meaning of this section on a highway.[53]

Inherent Right to use Public Road for Religious Procession

The use of the public highways for religious processions is, despite dicta to the contrary,[54] a well-established right. Such use is but incidental to the right of the general public, all members of which have equal rights in them.[55] There is a right in every community to take out a religious procession, with its appropriate observances, along a highway. This is an inherent right and does not depend on the proof of any custom or a long, established practice. Even if such a procession be an innovation, it would be in the exercise of legal rights. The right is independent of any long standing tradition and is not lost by mere abstention or non-exercise of it for a number of years.

An enquiry as to the existence or non-existence of an old custom is, therefore, unnecessary and irrelevant.[56]

No Exclusive Right to any Religious Sect

However, no religious sect can lay claim to an exclusive right to the use of a public way, or portion of it for religious processions or worship.[57]

Condition of uses of Public Highways

A public highway is primarily for purposes of traffic, and every individual is entitled to use it in a

reasonable way. But he cannot claim it exclusively for purposes of worship. Persons of every sect are entitled to take out religious processions through public streets provided they do not interfere with the ordinary use of such streets by the other members of the public.[58] The taking out of a procession accompanied with music, whether as a part of religious worship or not, is within the civil rights of the community, but not an exclusive use of the highway for worship, and worshippers in a mosque or temple which abuts on a highway have no right to compel processionists to stop their music completely while passing a mosque or temple on the ground that there was continuous worship inside it.2071

Religious Ceremony Starts when Procession Starts

Where the *mahars* of a certain locality took out their yearly *samaptt* processions and were proceeding by the customary route in front of a mosque when they were stopped by the accused and prevented from going by that route and threatened with attack if they did so, and they accordingly diverted their procession and went by a route behind the mosque, it was held that a religious ceremony was in progress from the time when the procession started and the accused were convicted accordingly.[59]

Exclusive use of Public way may Render the Religious Rites Unlawful

The right being thus limited, it follows that if any religious sect uses a public way in such a manner as to obstruct its use by other members of the public, it is not 'lawfully engaged' in the performance of religious rites and to cause disturbance of such an assembly in vindication of the right of passage would be no offence under this section.

This Section not Attracted in a Case of Procession through Private Land

A *tazia* procession was taken out by some Mahommadans on the tenth day of Moharram through a private grove, although they had no right to take *tazias* through the grove. The Hindus objected to the *tazias* being taken through the grove and directed the *tazias* to be taken back. A riot took place and they were convicted under ss 147, 323 and 296, IPC . In revision however, it was held that no offence under this section was committed.[60]

Where certain *lodhas*, who, with the sanction of the public authorities, had been carrying flags to a temple in procession through a public street, were attacked by persons who objected to the procession, it was held that such attack constituted a disturbance of the performance of a religious ceremony punishable under this section.[61]

Presumption in Case of Continued Use

Continued use by the public of a way raises a presumption that it belongs to the public, and was dedicated by the owner for public use.[62]

11. Procedure

The offence under this section is cognizable, but a summons shall ordinarily issue in the first instance. It is a bailable offence but not compoundable. It is triable by any magistrate and can also be tried summarily.

The cognizance of this offence can be taken within one year.

Notice under Section 251 , Code of Criminal Procedure 1973

The following form of the notice under s 251, CrPC, may be adopted in a prosecution under this section:

I (*name and office of the magistrate etc*) hereby notice to you (*name of the accused*), as follows:

That on or about the....day of....at.....you (*) voluntarily caused disturbance by (*specify the act*) to an assembly, to wit....which was lawfully engaged in the2072 performance of religious worship (or religious ceremonies) and you thereby committed an offence under section 298 of the India Penal Code, and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

12. Proof

To establish an offence under this section it will have to be proved that:

(a) the accused voluntarily caused disturbance to an assembly; and
(b) such assembly was then lawfully engaged in the performance of religious worship or religious ceremonies.

Where several persons are charged, the case of each accused should be considered and proved individually.[63]

31 *Vijiaraghava Chariar v Emperor* 26 ILR Mad 554, 1 Weir 260 (FB) .

32 *Emperor v Masit* 34 ILR All 78 .

33 *Jaipal Gir v Dharmapala* 23 ILR Cal 60 .

34 *Public Prosecutor v Sunku Seethiah* 34 ILR Mad 92 .

35 *R v Sunku Seethaiah* 34 ILR Mad 92 .

36 *Jaipal Gir v Dharmapala* ILR 23 Cal 60 .

37 *Public Prosecutor v Sunku Seethiah* 34 ILR Mad 92 .

38 *Re Krishnatatachari* 1 Weir 259.

39 *Vijiraghava Chariar v Emperor* 26 ILR Mad 554, 1 Weir 260 (FB) .

40 *Mohammad Hussain v Emperor* AIR 1919 All 188(2), 20 Cr LJ 421 .

41 *Kolimi Mahabub Sahiv v Sri Sidheswaraswami Temple at Devalampeta* AIR 1945 Mad 496, p 497 .

42 *Laxmikant Balwantrao Deshmukh v Emperor* AIR 1943 Nag 199 .

43 *Ibid*.

44 Per Edge CJ in *Ataullah v Azimullah* ILR 12 All 494 (FB) ; *Queen v Empress v Ramzan* 7 ILR All 461 .

45 *Imam Firasat Hussain v State* 1972 All Cr R 168 ; *Jangu v Ahmadullah* ILR 13 All 419 (FB) .

46 *Jangu v Ahmad Ullah* ILR 13 All 419 (FB) .

47 *Emperor v Aftab Mohd Khan* AIR 1940 All 291, 41 Cr LJ 647 .

48 *Vijairaghava Chariar v Emperor* 26 ILR Mad 554 .

49 *Booth v Bank of England* 7 Cal and F 509, 6 Bing NC 416.

50 *Jaipal Gir v H Dharmapala* ILR 23 Cal 60 .

51 *R v Tucker* 7 ILR Bom 42 .

52 Refer to s 188 .

53 *Emperor v Dhalu Ram* 10 Cr LJ 445 ; *Vijiaraghava Chariar v Emperor* 26 ILR Mad 554 .

54 Refer to the judgments of Bhashyam Aiyangar and Subramaniya Aiyar JJ in *Vijiaraghava Chariar v Emperor* 26 ILR Mad 554 ; *R v Dhalu Ram* 10 Cr LJ 445, 119 PLR 1909 ; *R v Masit* 34 ILR All 78, 12 Cr LJ 573 .

55 *Sadagopa Chariar v Krishnamoorthy Rao* 30 ILR Mad 185, p 190 (PC) ; *Mannada Mudali v Naliaya Gounden* 32 ILR Mad 527, p 529 ; *Sengodan v Emperor* 13 Cr LJ 534 .

56 *Mahommad Jalil Khan v Ram Nath Katua* AIR 1931 All 341, p 344 ; *Manzur Hussain v Mahommad Zaman* AIR 1925 PC 36 ; *Mahommad Khan v Emperor* AIR 1949 Nag 132, 50 Cr LJ 329 ; *Chanda Sajan Patil v Nyahalchand Panamchand* AIR 1950 Bom 192 .

57 *Kandasami Mudali v Subraya Mudali* 32 ILR Mad 478, p 483 .

58 *Mahommad Jalil Khan v Ram Nath Katua* AIR 1931 All 341, p 344 .

59 *Mahommad Khan v Emperor* AIR 1949 Nag 132, 50 Cr LJ 329 .

60 *Bulgar Singh v Emperor* AIR 1933 Oudh 196, p 197, 34 Cr LJ 778 .

61 *Emperor v Masit* 34 ILR All 78, 12 Cr LJ 573 .

62 *Mannada Mudall v Nallaya Gounden* 32 ILR Mad 527 .

63 1961 BLJR 347.

Indian Penal Code (Act XLV of 1860)

Chapter XV

Of Offences Relating to Religion

S. 297.

Trespassing on burial places, etc.--

Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby,

commits any trespass in any place of worship or on any place of sepulture, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies,

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.2073

Comments

1. Scope

This section punishes persons who injure the feelings of living persons by insults offered to the dead. It extends the principle laid down in s 295 to places which are treated as sacred. This section is comprehensively worded, and the offence at which it strikes is intimately bound with the commission of a trespass or, subject to that of deliberately offering an indignity to a corpse or causing disturbance to a body of persons assembled for the performance of funeral ceremonies.[64]

The criminal intention or knowledge in this offence is to wound the feelings, or insult the religion of any person, and the conduct in pursuance of such intention or knowledge is either: (i) a trespass on one or other of four places of religious rites; or (ii) the offering of an indignity to any human corpse; or (iii) the causing of a disturbance to a funeral ceremony. This section does not refer to 'religious feelings', though the kind of feelings which comes within the section, is clearly limited, in its nature, by the second paragraph to the section by reference to a place of worship, to a place of sepulchre, to feelings of a spiritual nature than a material kind and to feelings associated with such sacred places. It does not punish acts which are merely of earthly vanity or pride.[65]

This section, as originally drafted, applied only to 'a place of sepulchre' but its scope has been extended on the recommendation of the Law Commissioners, who said:[66]

> It seems to us that the word 'sepulchre', the proper meaning of which is burial or interment, is not sufficiently comprehensive to express what is intended in this place; for it is clear that what is contemplated is any place in which are performed the last rites of the dead, of whatsoever nature they may be, or in which the remains of the dead are deposited. Instead of 'a place of sepulchre' we would propose 'any place set apart for the performance of funeral rites, or a depository for the remains of the dead.

Gist of the Offence

The provisions of this section are applicable where there is a trespass in a place of religious worship with the knowledge that the feelings of persons would be wounded thereby.[67] The gist of the offence is the committing of trespass on a place of sepulchre with the intention or with the knowledge specified in the section, and if these essentials are not established, no offence under the section is made out.[68]

2. With the Intention or with the Knowledge'--*Mens Rea*

In a particular situation an act may not cause disgrace or may not humiliate, but in other situations that very act may cause disgrace or humiliation. So the intention of the person concerned as well as surrounding circumstances, are important factors.[69]

Intention or knowledge of either of the things specified is essential to the offence.[70] Mere reason to believe[71] which is so often classed with intention or knowledge in the IPC, is insufficient.2074

Ploughing Ground--Consequences

This section does not make an act committed in defiance of it an offence only when that act is committed with the intention of wounding the feelings of any person; it is equally an offence if committed with the knowledge that the feelings of any person are likely to be wounded or the religion of any person is likely to be insulted thereby. Persons who enter a burial ground and plough up land used as a graveyard are guilty of the offence under this section, although they enter the ground with the knowledge of the owner, and apparently, with his consent.[72]

Doing an Act Secretly with Knowledge of Consequences

A, a Hindu, had sexual connection with a woman at 9 o'clock at night in an enclosure surrounding a tomb of a Mahommadan *fakir*, which was not used as a place of worship. It was held that *A* committed an offence under s 297, IPC, as he committed a trespass on a place of sepulchre and knew that his act, if detected, was likely to wound the feelings of Mahommadans, and that his belief that the act would probably not be detected would not make any difference though it might well be taken into consideration in awarding punishment.[73]

Using a Mahommadan tomb as a place of privacy for adulterous intercourse is an offence under this section, as it is trespassing on a place of sepulchre with the knowledge that the religious feelings of certain Mahommadans were likely to be insulted thereby.[74]

Where, owing to a *bona fide* dispute as to use of a burial place, arising out of a question between the parties as to the complainants' delay or neglect in making a certain payment, a delay occurred in digging a grave, but nothing else, the corpse not having been brought to the ground, when the dispute commenced, it was held that this section was not applicable to the case.[75]

Mere Delay without an Intention to Offer Indignity

Where the accused, forming part of a committee, whose duty it was to collect subscriptions to defray the cost of a wall around a cemetery, but having no right to compel payment of burial fees, demanded a fee from the complainant's party before admitting the corpse into the cemetery, and after some discussion, during which the corpse was placed on the ground, the corpse was admitted without payment, it was held, that there was no intention to offer any 'indignity' within the meaning of this section.[76]

3. 'Commits any Trespass'

The word 'trespass' in this section has not the same meaning as criminal trespass in s 441, IPC, but implies any violent or injurious act committed in the place with the intention and knowledge specified in this section.[77] The word 'trespass' as2075 used in this section has not any peculiar meaning.[78] Every invasion of private property *i.e.*, of possession or of a right to possession, be it ever so minute, is a trespass.[79]

Entry with Permission--Intention of Entry Material

However, leave or licence of the possessor to the entry, of course, prevents such entry being a trespass. In one case where *A* went on to certain land used as a burial ground, with the consent and wish of *B*, the owner of the land, and ploughed it up (thereby disturbing the graves) for the purpose of turning it into an agricultural land, it was held that *A* was guilty of an offence under this section.[80] But this decision cannot be supported. Apart from the fact that there was obviously no trespass (which is essential to the offence) *A*'s intention in entering on the ground was clearly to cultivate it and nothing else. He intended no 'offence relating to religion', the subject-matter of this chapter. He may have had reason to believe that his operations would be likely to wound the feelings of the community who used the ground as a place of sepulchre but that would not bring his conduct within the section. The offence may be mischief under ss 425 and 426 .[81]

Trespass and Criminal Trespass

This section speaks of 'any trespass' and not of criminal trespass. Therefore, whether the trespass is of a civil or a criminal nature, the offence becomes complete, for the completion of the offence it is not necessary to record a finding that the trespass committed was necessarily a criminal trespass.[82]

Owner of Land not Exempt

The ownership of the land does not exempt its owner from the rigours of this section. In *Abdul Kadar v Abdul Kasim* ,[83] it was observed:

> Although the petitioners have been found by the Civil Court to be the owners of the land in question and although they have been given *khas* possession thereof by the Civil Court, that does not entitle them to disturb any graves that may be found existing in that land or to damage any structure that may have been raised over such graves, if by such act or acts the feelings of any person interested in the graves are likely to be wounded. The fact that the petitioners are the sole owners of the land in question does not render their action in damaging the structures that had been erected over the graves of the complainant's father and aunt, any the less a trespass within the meaning of section 297 of the Code, even though the petitioners have been placed in *khas* possession of the land by the Civil Court.

Where the accused removed bricks from the graves of the ancestors of the complainant, it was held that the bricks had been disturbed and that the intention was to wound the feelings of the complainant and the accused committed trespass within the meaning of this section.[84]2076

Consequences of Hurling Abuses in a Mosque

In a Nagpur case, the evidence established that the accused had gone to a mosque for mid-day prayer as usual; when the service was over, he was asked by some others why he had, on former occasions, abused the *Moulvi* and the congregation. On his attempting a denial, witnesses were sent for, and an altercation followed; the petitioner then began to abuse all and sundry, employing obscene epithets and uttering threats. It was held that in order to convict the accused, the court would have to come to the conclusion that he, with the intention of wounding the feelings of the *Moulvi* and the congregation, remained unlawfully within the mosque with intent thereby to insult or annoy the said

Moulvi and congregation, and that on the facts of the case a conviction under this section could not be sustained.[85]

Co-sharer's Liability under this Section

Acts done by a co-owner of property in the exercise of his rights of property cannot amount to a trespass. *A, B, C* and *D* were co-owners of a ground in which they were accustomed to bury their dead. *A* and *B* opened a saw-pit close to the grave of *D's* relations, but without disturbing their graves. It was held that *A* and *B* committed no offence under this section.[86] But a joint owner, who in the course of demarking his share in the land dug up certain graves and exposed the bones of the person buried there, in spite of the remonstrance of their relations, was convicted under this section.[87]

4. Place of Worship

For a conviction under this section, there should be a trespass on a place of religious worship with the knowledge that the feelings of persons would be wounded thereby.[88] Where a *Mahar*, a low caste man, entered into a temple, he was found guilty of an offence under this section.[89] Under the changed social conditions and the fundamental rights and right of equality guaranteed, by the Constitution, this decision may not hold good now. Persons found inside a mosque having sexual connection were held guilty under this section.[90] Four accused persons entered the house of the complainant and one of them demolished the wall which he was constructing and took the *pindi* of the *Naika Cossain* which was worshipped by the complainant and his family from the niche and threw it into a drain running by the side of the lane. It was held that the accused were guilty under this section.[91]

5. 'Place of Sepulchre'

Sepulchre means burial or interment.[92] A few isolated and secret cases of burial in the course of many years on a piece of land do not constitute the place one of sepulchre within the meaning of this section.[93] But it is not necessary that the burial2077 ground should be in use. If it has been a burial ground and if there are visible graves in it, it becomes a depository for the remains of the dead.[1] For an offence under this section it is essential that the place must have been set apart as a depository of the remains of the dead.[2]

The act of a person who destroys or disturbs a place of sepulchre with the intention of wounding the feelings of any person or with the knowledge that the feelings of any person are to be wounded, is wrongful and amounts to a trespass within the meaning of the said section, no matter whether the land in which the place of sepulchre is included does or does not belong to the persons who are guilty of the act complained of.[3]

6. 'Any Place Set Apart for the Performance of Funeral Rites'

Persons interfering in the performance of funeral ceremonies become trespassers at the funeral pyre and when they interfere with the obsequies, they are guilty under this section.[4] But the stopping of a *tazia* during a Moharram procession does not amount to an offence as, it is not a funeral ceremony within the meaning of this section.[5]

7. 'Offers any Indignity to any Human Corpse'

What is indignity to a corpse is not defined anywhere. Indignity is generally synonymous to humiliation or disgrace. A conduct to be criminal in the sense of s 297, IPC, should be spiteful to become humiliating or disgraceful. In a particular situation, an act may not cause disgrace or may not humiliate, but in other situations that very act may cause disgrace or humiliation. So, the intention of the person concerned as well as surrounding circumstances, are important factors.[6]

Where certain persons deliberately put obstacles in the way of the complainant in burying his son

because he had not joined the *khilafat* movement, it was held that the accused were not guilty, as it would not be said that by their act they offered any indignity to the corpse. In the course of his judgment, Stuart J observed:

> I do not propose to expatiate upon the mentality of persons who, to support their view as to what they conceive desirable in politics, use their influence to prevent a man from burying his little child. But as the law stands, they have not committed any criminal offence in this particular case. The act was an act of boycotting and was not a criminal act either under the Penal Code or any other laws.

Where a dangerous criminal was shot dead in a police encounter and after the postmortem, the police took his body to his father, who refused to accept it for cremation, and a large crowd gathered in the meantime to see the dead body, and in order to maintain law and order and assure the public at large about the death of the dangerous criminal, his body was roped and tried to the tower for a few minutes, it was held that no insult or indignity was shown by the police/accused person to the dead body. Since the intention of police officers to show indignity to the body was not proved, so offence under ss 297 / 34, IPC was not made out against them.[7]2078

8. 'Causes Disturbance to any Person Assembled for the Performance of Funeral Ceremonies'

The word 'disturbance' in this section has not been defined, but it implies some active interference in, or hindrance to, the performance of the funeral ceremonies.

The grand-daughter-in-law of the complainant died, and the complainant and his relations took the body out to the cremation ground and were preparing to cremate it; the accused came there and told them not to cremate the body, and on being asked why, said that they would state the reason to the police. It was held that the mere utterance of the words 'do not cremate the body', unaccompanied by any attempt to prevent the cremation, or by any manifestation on the part of the accused of their intention to interfere if the complainant and his relations should persist in having the body cremated, cannot be regarded as a disturbance to the persons assembled for the performance of the funeral ceremonies, within the meaning of this section.[8]

9. Procedure

It is the same as in the case of an offence under s 296, IPC .

Notice under Section 251 , Code of Criminal Procedure 1973

In a prosecution for an offence under this section, the following form of the notice under s 251, CrPC, may be adopted:

> I (*name and office of the magistrate etc*) hereby notice to you (*name of the accused*), as follows :
>
> That on or about the....day of.....at.....you (*) committed trespass in..... a place of worship [(*or a place of sepulchre*) (*or a place set apart for the performance of funeral rites*) (*or a place which is used as a depository for the remains of the dead*)], offered an indignity by....(*specify the act*) to the corpse of.....[(*or caused disturbance to persons, to wit.....assembled for the performance of funeral ceremonies with the intention of*

wounding the feelings of (name the persons whose feelings are wounded) or insulted the religion of...) (*or with the knowledge that the feelings of.....are likely to be wounded*) (*or that the religion of....is likely to be insulted*)] and you thereby committed an offence under section 297 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

10. Proof

To establish an offence under this section, it will have to be proved that:

(1) the accused had the intention to:

(a) wound the feelings of any person; or2079
(b) to insult the religion of any person; or, had the knowledge:

(i) that the feelings of any person are likely to be thereby wounded; or
(ii) that the religion of any person is likely to be thereby insulted;

(2) the accused

(a) committed trespass; or
(b) offered any indignity to a human corpse; or
(c) disturbed persons assembled for funeral ceremonies;

(3) the place trespassed upon was either:

(a) a place of worship; or
(b) a place of burial or cremation; or
(c) a place set apart for the performance of funeral rites, or
(d) a place set apart as a depository for the remains of the dead.

11. Conviction

Where the charges framed against an accused was under cl (1) of s 297, IPC, but the evidence established charge under cl (2) of s 297, IPC, against him, it was held that the accused could not be convicted under cl (1) of s 297, IPC .[9]

64 *Mustaffa Rahim v Motilal Chunilal* 10 Cr LJ 160, p 165 .

65 *Sanoo Manji v Emperor* AIR 1941 Sind 33, p 34, 42 Cr LJ 454 .

66 Second Report, s 261 .

67 *Queen-Empress v Bhagya* Ratanlal Unrep Cr Cas 148.

68 *Umar Din v Emperor* AIR 1915 Lah 409, 16 Cr LJ 683 .

69 *Sudarshan Kumar v Gangacharan Dubey* (2000) Cr LJ 1618 (MP) .

70 *Re Hajee Mohammed Ghouse* 1 Weir 287; *Jhulan Sain v R* 40 ILR Cal 548, p 154 Cr LJ 117.

71 Refer to the Indian Penal Code 1860, s 28 .

72 *Queen-Empress v Subhan* 18 ILR All 395 .

73 Re *Ratna Mudali* 10 ILR Mad 126, 1 Weir 256.

74 Re *Gaja* 5 CPLR Cr 32.

75 Re *Barhan Shah*(1887) PR 26.

76 Re *Hajee Mahommad Ghouse Sahab* 1 Weir 287.

77 *Jhulan Sain v R* 40 ILR Cal 548, 14 Cr LJ 117 ; *Sanoo Manaji v Emperor* AIR 1941 Sind 33, 42 Cr LJ 454 ; *Mustan v Emperor* AIR 1924 Rang 105, 25 Cr LJ 253 ; *Queen-Empress v Subhan* 18 ILR All 395 ; *Ram Prasad v Emperor* 33 ILR All 773 ; *Maqsud Hussain v Emperor* AIR 1924 All 9, 24 Cr LJ 711 ; *Umer Din v Crown* AIR 1915 Lah 409, 16 Cr LJ 683 ; *Mullukohand Sheikh v King* AIR 1949 Cal 104, 50 Cr LJ 135 ; *Abdul Kadar v Abdul Kasim* AIR 1932 Cal 459, 33 Cr LJ 517 .

78 *Per* Le Rossignol J in *Umar Din v Emperor* AIR 1915 Lah 409, p 414, 16 Cr LJ 883 .

79 *Entick v Carrington* 19 St Tri 1066, Pollock's *Law of Torts*, fourth edn, p 307.

80 *R v Subhan* 18 ILR All 395 .

81 *Re Rumla Nagayan* 1 Weir 496.

82 *Ram Prasad v State* AIR 1952 All 878, p 879, (1952) Cr LJ 1551 .

83 *Abdul Kadar v Abdul Kasim* AIR 1932 Cal 459, p 460, 33 Cr LJ 517 .

84 *Mulluckchand Sheikh v King* AIR 1949 Cal 104, 50 Cr LJ 135 .

85 *Mustan v King-Emperor* AIR 1924 Rang 106, p 107, 25 Cr LJ 553 .

86 Re *Kheja Mahommad* 3 ILR Mad 179, 1 Weir 286.

87 *R v Ram Prasad* 33 ILR All 773, 13 Cr LJ 532 .

88 *Queen-Empress v Bhogya* Ratanlal Unrep Cr Cas 148.

89 *Ibid*.

90 *Maqsud Hussain v Emperor* AIR 1924 All 9, 24 Cr LJ 711 .

91 *Amir Hassan v Emperor* AIR 1940 Pat 4141, 41 Cr LJ 810 .

92 Refer to s 261 of the Second Report of the Law Commission.

93 *Mustaffa Rahim v Motilal Chunilal* 10 Cr LJ 160 .

1 *Jhulan Sain v R* 40 ILR Cal 548, 14 Cr LJ 117 .

2 *Katwaru v State* (1976) Cr LJ 943, (1976) All Cr C 26 .

3 *Umar Din v Emperor* AIR 1915 Lah 409, p 412, 16 Cr LJ 683 .

4 *Subramania Ayyar v Venkata Ayyar* 6 ILR Mad 254 .

5 *Ghasita v Kalka* 5 AWN 49 .

6 *Sudarshan Kumar v Gangacharan Dubey* (2000) Cr LJ 1618 (MP) .

7 *Sudarshan Kumar v Gangacharan Dubey* (2000) Cr LJ 1618 (MP) .

8 *Amanat v Emperor* AIR 1922 All 184 ((2)), 25 Cr LJ 72 .

9 *Gopal Chandra Choudhary v State* (1971) Cr LJ 1008 (Cal) .

Indian Penal Code (Act XLV of 1860)

Chapter XV

Of Offences Relating to Religion

S. 298.

Uttering words, etc., with deliberate intent to wound the religious feelings of any person.--

Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

STATE AMENDMENT

Andhra Pradesh.--In Andhra Pradesh, offence under section 298 is cognizable.--A.P.G.O. Ms. No. 732, dated 5-12-1991.2080

Comments

1. Scope

This section punishes the doing of certain acts with the deliberate intention of wounding the religious feelings of any person. It is much wider in scope than s 295 and includes any action which is known to wound the religious feelings of others.[10]

The offence relates to oral words, uttered, in the presence of a person, with the intention of wounding his religious feelings. This section can, therefore, have no application where the grievance relates to a written article, published in a weekly.[11]

2. Analogous Law

In England, at Common Law, it is an indictable misdemeanour 'to speak or otherwise publish any matter blaspheming god, *e.g.*, by denying his existence or providence to contumeliously reproaching Jesus Christ, or vilifying or bringing into disbelief or contempt or ridicule, Christianity in general, or any doctrine of the Christian religion or the Bible'.[12] There have also been some statutes on the subject.[13] But the opinions of the judges have of late changed with respect to the essential elements of the offence, and the gist of the offence is not now considered to be in holding an opinion contrary to the general tenets of Christianity, or the particular doctrines of the Church of England, which may be heretical, but in the mode of expressing it. Now it is not blasphemy with due gravity and propriety to contend that the Christian religion, or any part of its doctrine, or the whole or any part of the Holy scriptures, is untrue.[14] With regard to this section the Indian Law Commissioners observed:[15]

> In England, an attempt to convert any one from the religion of the country by the most gentle and dispassionate address, is by law an offence; to attempt the same thing by contemptuous or vituperative language is an offence which would be severely punished in practice. But the reason is that conversion is not recognised as a legitimate object. The law assumes the truth of Christianity. But it is manifest that the law and the legislature of this country cannot assume the truth of any religion. And, as free discussion, or, in other words, attempts to conversion, is the best criterion of the truth of anything, the truth or falsehood of which is not already assumed by law to be beyond controversy, it seems to follow that a *bona fide* attempt to convert ought not in this country to be treated as a crime, even though the intention to convert be an intention to do so by wounding the religious feelings of the persons addressed. We apprehend it is almost impossible to convert a sincere or ardent votary of any faith without wounding his religious feelings in the early stages of the process.

3. Object

With reference to the object of this section, the authors of the Code said:

> In framing this clause we had two objects in view: we wish to allow all fair latitude to religious discussion, and at the same time to prevent the professors of any religion from offering, under the pretext of such discussion, intentional insults to what is held sacred2081 by others. We do not conceive that any person can be justified in wounding with deliberate intention, the religious feelings of his neighbours by words, gesture or exhibitions. A warm expression dropped in the heat of controversy or an argument urged by a person not for the purpose of insulting and annoying the professors of a different creed, but in good faith for the purpose of vindicating his own, will not fall under the definition contained in this clause.

Gist of the Offence

The gist of the offence is the intention to wound the religious feelings of another, which may be by uttering a word or making a sound in his hearing, or making a gesture or placing any object, in his sight.

4. Relative Scope of Sections 295 and 298, Indian Penal Code 1860

See also synopsis 8 under s 295A . This section is one of the five sections (295-98) in ch XV dealing with offences relating to religion. It will be useful to compare the provisions in the other sections as regards the criminal intention or knowledge requisite for the commission of the offence. Section 295 , IPC deals with destruction, damage or defilement of a place of worship either with the intention of insulting the religion of any class of persons or with knowledge that such insult is likely to result. Section 295A , IPC which was inserted by the Amending Act of 1927, speaks of 'deliberate and malicious intention' of outraging the religious feelings of any class of person. Section 296 , IPC refers to voluntary disturbance of any religious assembly and the expression 'voluntarily' as defined in s 39 would include either intention or knowledge. Similarly, s 297, IPC refers both to the intention and knowledge. It will thus be seen that while ss 295, 296 and 297 require either guilty intention or guilty knowledge as specified in those sections, ss 295A and 298, IPC require 'deliberate intention'. Section 295A goes further and requires even proof of malice before a conviction can be sustained under that section. As to what the legislature meant by the words 'deliberate intention' occurring in this section, an indication may be found in the report of the Select Committee, on whose recommendation s 295A was inserted in the IPC . It is stated there that the essence of the offence is:

> That the insult to religion or the outrage to religious feelings must be the sole, or primary, or at least the deliberate and conscious intention. We have accordingly decided to adopt the phraseology of section 298 which requires deliberate intention in order to constitute the offence with which it deals.[16]

5. 'With the Deliberate Intention'

Section 298, IPC makes it an offence if anyone with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person.[17] The essence of the offence consists in the deliberate intention of wounding the religious feelings of other persons. A mere knowledge of the likelihood that the religious feelings of other persons may be wounded would not suffice, nor a mere intention to wound such feelings, unless that intention was deliberate.[18]2082

Mere allegation in the complaint that the statement was deliberately made without any supporting material to show that there was a deliberate and malicious intention to outrage the religious feelings of any class of citizens of India or of any person would not be sufficient to draw the proceedings under ss 295A / 298 IPC . The malicious intention should either be shown to exist or should be apparent from the nature of the act alleged to constitute an offence.[19]

The intention to wound the religious feelings of another must, in order to convict a person under this section, be a deliberate one.[20] Referring to certain objections to this action, the Law Commissioners said:[21]

> We understand these instances to be mentioned as indicative of the strictness with which the definition is to be construed, so as not to make a person criminally liable for words, etc, wounding the religious feelings of another, unless a deliberate intention so to wound his feelings be unequivocally manifested, as it would be by mere railing and abuse, and by offensive attacks upon his religion, under the pretext of discussion, without any argument which an impartial arbiter could possibly believe to have been addressed to him in good faith merely for the purpose of convincing him of the truth. It is here to be observed, that it is not the impression of the offended party that it is to be admitted to decide whether the words uttered deserve to be considered as insulting, and whether they were uttered with the deliberate intention of insulting; these are points to be determined upon cool and calm consideration of the circumstances by the judge. The intention to wound must

> be deliberate, that is, not conceived on the sudden in the course of discussion, but premeditated. It must appear, not only that the party, being engaged in a discussion with another on the subject of the religion professed by that other, in the course of the argument, consciously used words likely to wound his religious feelings, but that he entered into the discussion with the deliberate purpose of so offending him. In other places in the Code, a party is held guilty if he causes a certain effect, the causing of which is an offence, intending to cause that effect, or knowing that his act was likely to cause it. Here, there is a marked difference; although the party uttering offensive words might be conscious at the moment of uttering them that they were likely to wound the feelings of his audience, yet if it were apparent that he uttered them on the spur of the occasion, in good faith, simply to further his argument--that he did not take advantage of the occasion to utter them in pursuance of deliberate purpose to offend--he would not, we think, be liable to conviction under section 298 . If, however, a party were to force himself upon the attention of another addressing to him, an involuntary hearer, an insulting invective against his religion, he would, we conceive, fall under the definition, for the reasonable inference from his conduct would be, that he had a deliberate intention of wounding the religious feelings of his hearer.

With reference to the offence of blasphemy which is analogous to this offence, Russell observes that:

> The wilful intention to insult and mislead others, by means of licentious and contumelious abuse offered to sacred subjects or by wilful sophistry calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention in law as well as morals--a state of apathy and indifference to the interests of society--is the broad boundary between right and wrong.[22]

2083

Section 298 IPC is a penal provision which requires strict interpretation. Complaint was filed with allegations that the accused Managalore Ganesh Beedi Works is depicting picture of Lord Ganesh on its Bidi product as a result of which the religious susceptibility of Hindus were being hurt. It was also alleged that the accused was utilizing the name of the said pious deity for his commercial benefit. It was further alleged that after smoking of Bidi the residue is thrown on the roads and on the other filthy places and the said residues are trampled under the shoes, which hurt the religious sentiments of Hindus and brings disrepute to the deity. Held, the allegations made in the complaint were general allegations, the act is not using the trade mark with deliberate intention to hurt the religious feeling and sentiments of Hindus. The accused was not summoned.[23]

Intention has to be Inferred

The deliberate intention has undoubtedly to be inferred from the words spoken, the place where they were spoken and the persons to whom they were addressed and other surrounding circumstances.[24] In *R v Boulter* ,[25] on an indictment for blasphemous speeches, Phillimore J, directed the jury as follows:

> A man is free to speak and teach what he pleases as to religious matter, though not as to morals. He is free to teach what he likes as to religious matters even if it is unbelief. But when we come to consider whether he has exceeded the limits, we must not neglect to consider the place where he speaks, and the persons to whom he speaks. A man is not free in a public place where passersby who might not willingly go to listen to him knowing that what he was going to say might accidentally hear his words, or where young people might be present. A man is not free in such places to use coarse ridicule on subjects which are sacred to most people in the country. He is free to use arguments.

Insult in the Course of Argument--Inference Regarding Intention

It is true that the offence of blasphemous libel in English law is not the same as the offence described in this section but wilful intention which is the essential ingredient of the former offence is almost

synonymous with deliberate intention required for the offence under this section and in considering whether certain words were said with the deliberate intention of wounding the religious feelings of persons, the observations of Phillimore J, quoted above, are very helpful.[26] When a man, in the course of an argument, uses insulting words to another, it is impossible to suppose that he does so without the intention of insulting him. It is not to be believed that he uses them in good faith simply for the purpose of convincing or persuading the person with whom he is arguing. In such a case the intention is to be inferred from the character of the words. Again, when words, not positively insulting in themselves, are used in a manner clearly evidencing a deliberate intention to insult the religious feelings of another, the case will fall within the clause. But it will not be an offence when any person arguing with another on the subject of his religion says, what is likely to wound his religious feelings in good faith, simply for the purpose of convincing the person with whom he is arguing, of what he believes to be the truth.[27]2084

Premeditated Intention

Where the intention to wound was not conceived suddenly in the course of discussion but premeditated, deliberate intention may be inferred. Similarly, if the offending words were spoken without good faith by a person who entered into a discussion with the primary purpose of insulting religious feelings of his listeners, deliberate intention may be inferred.[28]

Requirement in Case of more Intentions than One

In doing a particular act, a person may have more intentions than one and to hold him guilty of the intention required for a particular offence, it must be further shown that the intention specified in that offence was the real or dominant intention.[29]

Intention and Motive

Motive is not to be confused with intention. If a man knows that a certain consequence will follow from his act, it must be presumed in law that he intended that consequence to take place, although he may have had some quite different ulterior motive for performing the act. Killing of a cow in the presence of Hindus would lead to a wounding of their religious feelings, and the accused must be supposed to have intended the necessary consequences of his acts and is guilty under this section.[30]

In a case the accused were charged under s 295, IPC, in that they, Hindus, removed some old building materials belonging to a mosque, and thereby insulted the religious feelings of Mahommedans. They were acquitted on the finding that the mosque was, or at any rate its roof was, in a rotten condition, and that no one had any particular claim to it. The complainant having applied to the High Court for revision, it was held that there was no reason to believe that one of the defendants in acting as he did, had any intention of insulting the religion of the Mahommedan residents of the village, or that he did so even with the knowledge that any class of persons was likely to consider the removal of the materials as an insult to their religion.[31]

To throw a shoe on the ground adjacent to food prepared for a feast by caste Hindus, for the purpose of depriving them of expected meal, has been held not to constitute an offence within the section, or s 504 .[32]

Killing a goat and exposing its flesh for sale in the presence of Mahommedans does not amount to an offence under this section, as the Mahommedans do not revere goats.[33]

Where the accused called out to a gathering of members of a certain caste at a dinner, that they would be eating cow's flesh if they did not admit a certain woman to the caste, and in consequence the guests left their food untouched, it was held that no offence under this section had been committed.[34]2085

Where a woman, having given birth to an illegitimate child, went to the house of the person whom she alleged to be its father and threw upon him the clothes which she had been wearing at the time of her

confinement, it was held that this was no offence under this section as it treats offences relating to religion and not those relating to caste.[35]

6. Religious Feelings

The IPC does not define religious feeling but it is evident that religious feeling can mean nothing more or less than that associated with a person's religious ideas.[36]

Religion

In *Commissioner, Hindu Religious Endowments, Madras v Lakshmindra Thirtha Swamiar* ,[37] their Lordships of the Supreme Court have held that religion is a matter of faith with individuals or communities and that a religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. It has been further pointed out in that decision that a religion may not only lay down a Code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

Cow Slaughter--Considerations arising therefrom

In view of the observations in *Commissioner, Hindu Religious Endowments, Madras v Lakshmindra Thirtha Swamiar* , the idea of slaughter of cows which is repugnant to the Hindus universally cannot be held to be a mere superstition. Such repugnance is nothing but a part of the religious idea of all who profess the Hindus religion. In *Mahommad Hanif Quareshi v State of Bihar* ,[38] the Supreme Court has held that sacrifice of a cow even on the Bakrid day is not an obligatory overt act of a Mussalman to exhibit his religious belief and idea. Even if it be conceded that the accused persons as Muslims were under a religious compulsion to sacrifice a cow on the occasion of *Bakr-id* Day, it must be noted that their rights to do such acts are subject to some important limitations under art 25(1) of the Constitution . If follows that Mahommedans can pursue their religious practices so as not to wound the feelings of others which might cause a breach of public order, *i.e.*, the public tranquility.

Cow Slaughter in Privacy

Where a cow is slaughtered by Muslims in a place which cannot be said to be a public place at a time when it might be anticipated that there would be no one to overlook, and without uttering any insulting gestures, it would not be possible to say that the Muslims slaughtered the cow with the deliberate intention of wounding the religious feelings of the Hindus.[39] But if a Mahommedan slaughters a cow or a bull in broad day-light in an open place in full view of the Hindus, he must be deemed to2086 have done the act with a deliberate intention to wound the religious feelings of the Hindus and would be liable under this section.[40]

7. Procedure

The offence under this section is non-cognizable. A summons shall ordinarily issue in the first instance. It is a bailable and compoundable offence. It can be tried by any magistrate or summarily.

The cognizance of an offence under this section can be taken within one year.

Notice under Section 251 , Code of Criminal Procedure 1973

In a prosecution of an offence under this section, the following form of the notice under s 251, CrPC may be adopted:

I (*name and office of the magistrate etc*) hereby notice to you (*name of accused*) as follows:

That on or about the..... day of..... at..... you uttered the words..... (*mention them*) in the hearing of..... (*name the person*) [(or made a sound, to wit..... in the hearing of.....) (or made a gesture in the sight of.....) (or placed an object, to wit..... in the sight of.....)] with the deliberate intention of wounding the religious feelings of the said person and thereby committed an offence under section 298 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried for the said offence.

Q. Have you heard and understood the notice ?

Ans. Yes

Q. Do you plead guilty or have any defence to make ?

Ans. Name of the office of the Magistrate

8. Proof

To establish an offence under this section it will have to be proved that:

(1) the accused uttered some words or made some sound in the hearing of the complainant or made a gesture or placed any object in the sight of the complainant; and
(2) he did so with the deliberate intention of wounding the religious feelings of the complainant.

To hold a person guilty of an offence under s 298, IPC, the prosecution must establish affirmatively that the act was done with the deliberate intention of wounding the religious feelings of some person. It is true that intention has to be gathered from the conduct of the parties and the surrounding circumstances. But a mere knowledge of the likelihood that the feelings of other persons might be

hurt, would not suffice to bring their act within the mischief of s 298, IPC .[41]20872088

10 *Mir Chittan v Emperor* AIR 1937 All 13, p 14, 38 Cr LJ 202 ; *Chakra Behera v Bata Krushna Mohapatra* AIR 1963 Ori 23, (1963) 1 Cr LJ 712 .

11 *Shalibhadra Shah v Swami Krishna Bharati* (1981) Cr LJ 113 (Guj), (1980) Guj LT 116 (Guj) (DB) .

12 *Russell on Crime*, eleventh edn, p 1757.

13 *Ibid*, pp 1758-59.

14 *R v Ramsay and Foote* (1883) 48 LT 733 ; *R v Bontta* (1909) JP 12 ; *Bowman v Secular Society Ltd* (1917) AC 436 (HL) .

15 Second Report, s 252 .

16 *Narayan Das v State* AIR 1952 Ori 147, p 151, 53 Cr LJ 772 .

17 *Shailbhadra Shah v Swami Krishna Bharti* (1981) Cr LJ 113, (1980) Guj LT 116 ; *Mangalore Ganesh Bedi Works v Gokalesh Pathak* 2008 Cr LJ 4673 (All), 2010 (1) Crimes 476, (2008) ILR 2 All 581 .

18 *Narayan Das v State* AIR 1952 Ori 147, p 151, 53 Cr LJ 772 .

19 *Mudassir Ullah Khan v State of UP* 2013 Cr LJ 3741, p 3742 (All), 2013 (2) ACR 2020, 2013 (3) ADJ 108, 2013 (5) ALJ 73 .

20 *Habibulla*1899 PR 4.

21 Second Report 1847, s 252 .

22 Russell on *Crime*, eleventh edn, p 1761.

23 *Managlore Ganesh Beedi Works v Gokalesh Pathak* 2008 Cr LJ 4673, p 4675 (All) .

24 *Narayan Das v State* AIR 1952 Ori 149 ; *Gulab v State* (1955) Cr LJ 168 .

25 *R v Boulter* (1908) 72 JP 188 .

26 *Narayan Das v State* AIR 1952 Ori 149, p 151, 53 Cr LJ 772 .

27 Second Report, s 253 .

28 *Narayan Das v State* AIR 1952 Ori 149 .

29 *Sinaswamy Selvanayagam v King* (1951) AC 83 .

30 *Mir Chittan v Emperor* AIR 1937 All 13, p 14, 28 Cr LJ 193 .

31 *Queen-Empress v Rahman* 13 AWN 144 .

32 *R v Moti Lal* 24 ILR All 155 .

33 *Kirpa Singh v R* 12 Cr LJ 601 .

34 *Queen-Empress v Dagadi* Ratanlal Unrep Cr Cas 592.

35 *Tukaram v Zeli* 6 CPLR 7 .

36 *Kitab Ali Munshi v Shanti Ranjan Deb* AIR 1965 Tri 22, (1967) 2 Cr LJ 134 .

37 *Commissioner, Hindu Religious Endowments, Madras v Lakshmindra Thirtha Swamiar* AIR 1954 SC 282 .

38 *Mahommad Hanif Quareshi v State of Bihar* AIR 1958 SC 731 .

39 *Shiekh Amjad v Emperor* AIR 1942 Pat 471, 21 ILR 21 Pat 315, 44 Cr LJ 30 .

40 *Mir Chittan v Emperor* AIR 1937 All 13, 38 Cr LJ 202 ; *Kitab Ali Munshi v Shanti Ranjan Deb* AIR 1965 Tri 22, (1965) 2 Cr LJ 134 ; *Mahommad Hanif Quareshi v State of Bihar* AIR 1958 SC 731, (1958) SCJ 975 .

41 *Chakra Behra v Balakrushna Mohapatra* AIR 1963 Ori 23, p 24 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 299.

Culpable homicide.--

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Illustrations

(a) *A* lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. *Z*, believing the ground to be firm, treads on it, falls in and is killed. *A* has committed the offence of culpable homicide.2091

(b) *A* knows *Z* to be behind a bush. *B* does not know it. *A*, intending to cause, or knowing it to be likely to cause *Z's* death, induces *B* to fire at the bush. *B* fires and kills *Z*. Here *B* may be guilty of no offence; but *A* has committed the offence of culpable homicide.

(c) *A*, by shooting at a fowl with intent to kill and steal it, kills *B*, who is behind a bush; *A* not knowing that he was there. Here, although *A* was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill *B*, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.--A person, who causes bodily injury to another, who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.--Where death is caused by bodily injury, the person, who causes such bodily injury, shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment, the death might have been prevented.

Explanation 3.--The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.2092

Comments

1. Scope

This section defines culpable homicide broadly,[4] *i.e.*, culpable homicide *simpliciter*, and not culpable homicide not amounting to murder;[5] it lays down that acts, which fall within the definition given, constitute the offence of culpable homicide. At this stage, the law is not concerned whether the acts described amount, or do not amount, to murder. All that is said is that they amount to culpable homicide, which is a

wider offence than that of murder, as all acts of culpable homicide do not amount to murder though, of course, all acts of murder are acts of culpable homicide[6] because culpable homicide is the genus, while murder is a species of culpable homicide. What is left out of culpable homicide, after the special characteristics of murder have been taken away from it, is culpable homicide not amounting to murder.[7] 'Culpable homicide' is the *genus* and 'murder' is its *species* and all 'murders' are 'culpable homicides' but all 'culpable homicides' are not 'murders'.[8]

In the scheme of the IPC 'culpable homicide' is *genus* and 'murder' its *specie*. All 'murder' is 'culpable homicide' but not *vice-versa*. Speaking generally, 'culpable homicide' sans 'special characteristics of murder is culpable homicide not amounting to murder'.[9]2093

The offence of culpable homicide defined by this section, involves the doing of an act (a) with the intention of causing death; or (b) with the intention of causing such bodily injury as is likely to cause death; or (c) with the knowledge that the act is likely to cause death. If death is caused in any of these three circumstances, the offence of culpable homicide is said to be committed. The existence of the three circumstances (a), (b) and (c) distinguishes homicide, which is culpable, from homicides which are lesser offences or which are excusable altogether. The killing comes within the second part of s 299, which relates to intention of causing bodily injury likely to cause death, it comes under s 304, Pt I, and if there is no intention but only knowledge, that is to say, if there is no intention to cause death or a bodily injury likely to cause death, but only knowledge that the death is likely to be caused, the offence is under s 304, Pt II.[10]

'Culpable homicide' may or may not amount to 'murder', in terms of s 300 of IPC . When a 'culpable homicide is murder', the punitive consequences shall follow in terms of s 302 of IPC while in other cases, that is, where an offence is 'culpable homicide not amounting to murder', punishment would be dealt with under s 304 of the IPC .[11]

Intent and knowledge in the ingredients of the section postulate the existence of a positive mental attitude and this mental condition is the special *mens rea* necessary for the offence. The guilty intention in the first two conditions contemplates the intended death of the person harmed or the intentional causing of an injury likely to cause his death. The knowledge in the third condition contemplates knowledge of the likelihood of the death of the person.[12]

2. Law of Australia

Homicide is 'unlawful' or 'culpable' unless it is authorised, justified or excused at law. Examples of lawful homicide include accidental killings, killings in legitimate self-defence or defence of others, and, in certain circumstances, killings done during the exercise of a lawful power of arrest, the prevention of the commission of a crime, or in the defence of property. In Queensland, lawful homicide may also include the provision of palliative care. Suicide is no longer a crime in Australian jurisdictions, and therefore neither is attempted suicide. However, assisting another person's suicide may result in criminal liability for homicide. Homicide offences may also include crimes such as dangerous or culpable driving causing death.[13]

In case, the deceased, John Reid, occupied a flat above the flat occupied by the appellants Boreman and Michael Byrne in Plumstead. On the evening of 4 April 1996 there was a fight between Boreman and the deceased which resulted in both sustaining some injury. The appellants Michael Byrne and Malcolm Byrne (no relation) were both in the house later that night. At approximately 4 am the three appellants were in the deceased's flat when an ugly incident took place during which the deceased received substantial injuries from being kicked and hit by pieces of2094 wood. At 5 am the Fire Brigade were alerted and arrived to find the deceased at his flat badly burnt.

The prosecution case was that the appellants had intended to kill or seriously injure the deceased before the fire and that the injuries he then received were an operative and substantial cause of death. They also sought to show that the appellants had set the fire deliberately in any event. The defence case, in general terms, was that the injuries sustained before the fire were not life threatening and the fire itself, which the

defence submitted was the sole cause of death, was accidental. Michael and Malcolm Byrne argued that if there was a joint enterprise in the deceased's flat, they withdrew before the serious injuries were inflicted and lacked any intent to cause serious harm.

Held, the attack was a joint enterprise, that each was a party to the common purpose to inflict grievous bodily harm, that grievous bodily harm was in fact inflicted in furtherance of the joint enterprise and that these injuries were a substantial and operating cause of death, even though the immediate and precipitating cause of death was the inhalation. Moreover they must have considered and rejected the defences of self-defence and provocation. Conviction on the charge of murder was held proper.[14]

3. Three forms of Culpable Homicide

For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in s 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of s 304 . Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of s 304 .[15]

The IPC recognizes two kinds of homicide : (1) Culpable homicide, dealt with between ss 299 and 304, IPC ; and (2) Not culpable homicide, dealt with by s 304A, IPC .

When an act or omission of an accused caused the death of any person, he or she is either guilty of culpable homicide or guilty of not culpable homicide. It is for the court to determine on the evidence whether, if it is culpable homicide, it amounts to murder as explained in s 300 of the IPC (along with all its clauses) or not as explained in s 304 IPC . If culpable homicide cannot be proved, then it would fall in the category of 'not-culpable homicide'.2095

When there is a death of a human being, it may either be culpable homicide (amounting to murder or not amounting to murder) or not culpable homicide, but it is a homicide nevertheless.[16]

4. Crucial Question

Commentary under the same heading in s 300, *post*, may be referrred to.

5. Essentials of Culpable Homicide

Culpable homicide consists of three elements: (a) death of a human being; (b) which is caused by the physical conduct of a person; and (c) the mental attitude of that person towards the consequences of such conduct. In other words, where one is charged with the offence of culpable homicide, three facts have to be established. First of all, it must be proved that the person, alleged to be victim of the offence, is dead; secondly, that he died by the means alleged on the part of the prosecution; and thirdly, that the accused intentionally took that part in causing his death which is attributed to him by the prosecution.[17] So, the mental element in culpable homicide, ie, the mental attitude of the agent towards the consequences of his conduct, is one of intention or knowledge. Motive is immaterial, so far as the offence of culpable homicide is concerned, and therefore, it need not be established.[18] The intention refers to either the death itself or a bodily injury which is likely to cause death, *i.e.*, an injury dangerous to life, whilst the knowledge refers to the death itself. There are, thus, three species of *mens rea* in culpable homicide: (a) an intention to cause death; (b) an intention to cause a dangerous injury; and (c) knowledge that death is likely to happen. Illustrations (a) and (b) to s 299, IPC, give examples of culpable homicide accompanied by the first or third species and illust (c) shows that unless one or other of the three species is present, there can be no culpable homicide.[19] The first class of culpable homicide is causing death by doing an act with the intention of causing death; such an offence is also *prima facie*murder within the express words of s 300 .

The second class of culpable homicide is causing death with the intention of causing such bodily injury as is likely to cause death; this section, in defining this class of culpable homicide, does not dealt with knowledge at all, and knowledge and intention must not be confused. The third class of culpable homicide is causing death by an act with knowledge (on the part of the offender) that he is likely, by such act, to cause death.[20]

6. Section 299, Section 300 and Section 304A

Commentary under the same heading in s 300 *post*, may be referred to.2096

7. 'Murder' Distinguished from 'Culpable Homicide'

Commentary under the same heading in s 300, *post*, may be referred to.

8. Clause 'Secondly' of Section 300 Distinguished from the Second Clause of Section 299

Commentary under the same heading in s 300, *post*, may be referred to.

9. Clause 'Thirdly' of Section 300 Distinguished from the Second Clause of Section 299

Commentary under the same heading in s 300, *post*, may be referred to.

10. Clause (c) of Section 299 and Fourth Clause of Section 300

Commentary under the same heading in s 300, *post*, may be referred to.

11. 'Whoever'

All accused may not be liable for culpable homicide. If it cannot be proved that it was the accused who caused the death of the deceased person, there can be no conviction.[21] Thus, even when it is clear that one of the two persons must have caused the death, but it is not clear as to which of them did so, both must be acquitted.[22]

The expressions 'whoever causes death', read along with s 9, IPC, means one, where death is caused by one person, and more where death is caused by more than one person.

Where death is caused by the act of one person, but with the assistance of others, he alone is guilty of culpable homicide under s 299, IPC, but the others would be punishable, as if they had caused the death, under the provisions of ss 34-38 .[23] Where three persons attack another with *lathis*, not upon a sudden quarrel, but in concert and after previous consultation, they must be deemed to be acting with a common intention and each one's act must be presumed to have been done in furtherance of the common intention.[24] However, for this to be the case, the death must have been caused 'in furtherance of the common intention of all'.[25]

If death is caused by one person but it was not the common intention of all the persons to cause death, the others are not liable therefore, ie, where the common intention is to give a beating, and no more, and one of the parties kills the victim.[26] In a case, four accused persons joined in beating another. Only the two older accused struck him on the head and those blows caused his death. The two younger men struck him on the body, but not with exceptional violence. There was no original2097 design to kill the man. It was held that the two younger accused, who did not themselves strike fatal blows, did not realise that they were joining in a murder, or how grave the injuries inflicted by their older comrades were, and they were not, therefore, liable for murder.[27]

Some other instances are given below:

(a) Where the two accused persons assaulted the deceased not with motive to murder but to commit the robbery successfully, an offence under s 394, IPC, was made out against them, the first accused having caused death of the deceased was also liable for offence under s 304, Pt II, IPC .[28]

(b) Where the accused were chasing the son of the deceased with intention to kill, the deceased interfered and got killed instead, since the accused had no intention to kill the deceased, the accused who inflicted the fatal injury on head of the deceased was convicted under s 304, Pt II, IPC instead of s 304, Pt I, the other accused who inflicted sword injury which was simple injury was committed under s 324, IPC .[29] Where the accused persons had right of private defence but exceeded it, accused attacked the prosecution witness with *bhala* and thrust the *bhala* in his abdomen causing grievious injuries and the co-accused gave fatal blow with a deadly weapon and caused death, the former accused was held liable under s 326 read with s 322, IPC while the co-accused was held guilty under s 304, Pt I, IPC .[30]

(c) Where the two accused persons attacked the deceased with a hunting sickle and dagger, the evidence showed that the co-accused first attacked and after he stopped beating the deceased the accused stabbed him. The injuries caused by the accused were fatal and led to the death of the deceased, conviction of the accused for murder under s 302 was found proper, however, considering the nature of attack, weapon used and injuries caused, the conviction of co-accused was altered to one under s 304, Pt I, IPC .[31]

(d) Where the accused caught hold of the deceased while the co-accused inflicted a knife blow on him, the accused was convicted under s 326 read with s 34 while conviction of co-accused was altered from s 302, IPC to s 304, Pt I, IPC .[32]

(e) Where the accused persons went to the house of the complainant armed with *lathis* to belabour them, the main accused not a member of the assembly picked up a heavy stone weighing about 15 kgs and dropped it from the roof of his house on the head of the deceased who arrived there, he alone was found guilty of an offence under s 304, Pt II and the other accused persons were not held guilty of offence under s 304, Pt II, read with s 149, IPC, however, there was no sufficient evidence with regard to the formation of assembly and causing injury to the complainant and the2098 others, so, the conviction of the other accused persons under ss 323 / 149, IPC, was found proper.[33]

(f) Where accused no 1 hurled the bomb at the deceased and killed him, the conviction of accused no 1 under s 302 and ss 3 and 5 of the Explosive Substances Act was found proper. Similarly, accused no 2 who hurled a bomb on a prosecution witness but his wife came in the middle to save her husband, the bomb hit the wife and she succumbed to her injuries, conviction of accused no 2 under s 304, Pt II and ss 3 and 5 of the Explosive Substances Act was found proper. Accused no 3 hurled a country-made bomb towards the victim but missed him by chance, the act of accused no 3 was an attempt to kill and so accused no 3 was held liable to be convicted under s 307 and ss 3 and 5 of the Explosive Substances Act .[34]

Where co-accused caused simple injury with an axe and the main accused caused stab-injury, on a vital part of the body of the deceased, the co-accused was convicted under s 324, IPC and the main accused under s 304, Pt II, IPC, as each accused was found to have acted individually and not in concert.[35] Where the accused persons assaulted the deceased causing his death, the prosecution could not establish common intention of accused persons, accused no 1 who had used an iron pipe and had a given blow which proved to be a simple injury and accused no 3 who had given stick blows and inflicted injuries were convicted under s 324, IPC, accused no 2 who pelted stones and caused voluntary hurt was convicted under s 323, IPC, and accused no 4 who inflicted pipe-blow which landed on head of the deceased was convicted under s 304, Pt II, IPC .[36]

Cases frequently arise where the death could not have occurred but for an act on the part of the accused, but in which he had been excused on the ground that some other person intervened and appeared to

have been the more immediate and direct cause of the death and that the death was not the consequence of what the accused did, but was the consequence of what the intervener did. But if one person is engaged in murderously beating another to death and a stranger, without sharing the common intention, rushes in and adds some more blows so that the victim's death is more speedily brought about, then it is a case where both would be guilty of murder and the first man cannot be allowed a defence that it was the second assailant's stroke that finally ended the victim's life.[37] The mere fact of presence at a murder, committed by another, is, therefore, insufficient,[38] but if coupled with some conduct, which renders aid, it is enough.[39] The aid rendered must be to the killing. Thus, assistance in the disposal of the dead body, or by not giving information of the murder, is not enough though such conduct constitutes offences under ss 201 and 202 irrespectively.[40]2099

12. 'Causes Death'

Death must be the result or consequences of the physical conduct, or, inversely, the conduct in question must be the cause of death. As observed by Mayne:[41]

> ...any act is said to cause death within the meaning of s 299 when the death results either from the act itself or from some consequences, necessarily or naturally flowing from that act, and reasonably contemplated as its result.

Where, without the intervention of any considerable change of circumstances, the death is connected with the act of violence by a chain of causes and effects, the death must be regarded as proximate, and not too remote, a consequence of the act of violence.[42]In order that a person should be guilty of culpable homicide, it is indispensable that the death of the deceased should be connected with the act of violence or other primary cause; not merely by a chain of causes and effect, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances.[43]

13. Explanation 1: Accelerating Death or Killing Person Labouring under Disease

A person, causing bodily injury to another, who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerating the death of that other, is deemed to have 'caused his death'.[44] This is what explanation 1 to this section states. As explained by Morgan and Macpherson:[45]

> An offence, affecting the life of a person, who must soon die either from a mortal disease or in course of nature from old age and decay, is not a less offence than one which affects the life of a person in strong health. The offender causes death, in one case, by accelerating that event by a few months, or days, or hours; in the other case, possibly, he hastens the event by many years. The real difference between the two cases is not in point of law, but in respect of the degree of proof, requisite to show the cause of death. From where the death of a person, who receives some bodily injury, while labouring under a disease, is the subject of enquiry, the court, in estimating the evidence, must consider whether it is sufficiently proved which of the two causes, the disease or the bodily injury to the deceased person, is the cause of his death on the day when his death occurs.

It is not necessary (if it were possible) that the evidence should enable the court to apportion the two causes and the degree in which each of them contributes to the result. But the court must be satisfied: (1) that the death, at the time when it occurs, is not caused solely by the disease; and (2) that it is caused by the bodily injury to this extent that it is accelerated by such injury. Suppose *A* is ill of small-pox and *Z* gives him pills in such doses that the disease is aggravated and death is accelerated. *Z* has caused death, notwithstanding that it may be proved that *A* must have eventually died of the small-pox.2100

Likewise, if *A* is very ill with fever and *B*, intending his death, administers large doses of opium, thereby accelerating *A*'s death. *B* kills *A*.[46]

The explanation assumes that the bodily injury was inflicted with the intention of causing death or the knowledge that it would be likely to cause death. It was only intended to repeat the English rule that an injury, which accelerates the death of a dying man, is deemed to be the cause of it and where death has been caused, it is no defence that the deceased was suffering from a complaint which would have caused his death in any event. Section 300(2) , IPC, makes it clear that the offender is not responsible for death in such a case, unless he knows that the condition of the deceased was such that his act was likely to cause death.[47] Thus, where the injury, inflicted by the accused, was not such as is likely to cause death, but death ensued because the heart of the deceased was weak and dilated, and the accused had no intention to cause death and did not know that the deceased was suffering from heart disease, it was held that the offence did not amount to culpable homicide under this section.[48] But when the right lung of the deceased was TB affected, the combined effect of alcohol consumed by him and the injuries inflicted by the accused shortened the period of death and resulted in quicker death. The conviction of the accused under s 304, Pt II was found proper.[49]

14. 'Death'

The word 'death', in this section, means the death of a human being (s 46, IPC) But a person can be said to cause the death of a human being only if that human being was alive before his death was caused. In other words, death can be caused only of a living human being. This is made clear by expl 3 to this section. This explanation declares that the causing of the death of a child in the mother's womb is not homicide, but it may amount to culpable homicide to cause the death of a living child if any part of that child has been brought forth, though the child may not have breathed or been completely born.[50] The child may have breathed while in the mother's womb, but it does not itself prove that such breathing necessarily took place after it had wholly or partially emerged from its mother's womb.[51]

15. Death must be caused

Proof of the death of a person, alleged to have been murdered, is the first essential to a conviction of murder. This is established by the finding of the body. Sir Mathew Hale once observed:

> 'I will never convict any person of murder unless there is any trace of the body or unless the body is found.'[52]

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The first part of s 304, IPC applies where there is guilty intention, whereas the second part applies where there is guilty knowledge. But before an accused is held guilty and punished under the first part or second part of s 304, IPC, a death must have been caused by him under any of the circumstances mentioned in the five exceptions to s 300, IPC, which include death caused while deprived of power of self-control under grave and sudden provocation, while exercising in good faith the right of private defence of person or property, and in a sudden fight in the heat of passion without premeditation. When death itself had not been caused there is no occasion for convicting the accused under s 304 of the IPC .[53]

16. Death Caused may be of any Human Being

The section does not say that the intention must be to cause the death of a specific human being. It is sufficient if the death of any human being is in contemplation or known to be likely. Consequently, there may be: (a) complete indifference as to who, in particular, is killed; or (b) the death of a specific individual may be in contemplation, but it is another who is actually killed.[54]

17. Death may not be of any Particular Person

That, there may be complete indifference as to who, in particular, is to be killed, is clear from illust (a) to the section. If a person buries a bomb in a frequented path, where it is almost certain that it will be tread

on and explode and cause the death of any one treading on it, and if it does, infact explode and cause death, that person is guilty of murder unless he can explain his action in such a way as to negative the inference as to his intention which the nature and circumstances of the act suggest. It is not at all necessary that he should intend to cause the death of any particular person.[55]

18. Death of Person not Intended to be Killed

The section does not require that the offender should intend to kill (or know himself to be likely to kill) any particular person. It is enough if he 'causes the death' of any one by doing an act with the intention of 'causing death' to anyone, whether the person intended to be killed or anyone else. The language is perfectly general and all that it requires, is that there should be an intention to cause death, or a knowledge that death is likely to be the result, and there is nothing which would require that the homicidal intention or knowledge must/be with reference to the life of the person whose death is actually caused. The law affords protection equally to the lives of all persons, and once the criminal intention, ie, an intention to destroy human life, is found, there is no reason why it should make any difference, whether the act, done with such intention, causes the death of the person aimed at or of someone else. Section 301 also supported this construction as it assumes that the accused, in such cases, would be guilty of culpable homicide.[56]2102

Where the accused hurled a bomb on the prosecution witness, the wife of the witness came in the middle to save her husband as a result of which the bomb hit the wife and she succumbed to her injuries, conviction of the accused under s 304, Pt II, was found proper.[57]

19. Death due to Supervening Causes

Certain kinds of injuries are not immediately followed by serious consequences; an injured person may die after a long or short period and his death may be as much a consequence of the injury as if it had taken place on the spot. Similarly, an aggressor is as responsible as if the deceased has been directly killed by his violence, provided the fatal result can be traced to the probable consequence of the injury. No doubt, when death is so caused by remote or indirect causes, it might be difficult to establish the *mens rea*, which is necessary for the offence of murder, the more remote the cause, the less possible it would be to show that the accused intended or realised the result. However, where the intention to cause death is clearly made out, it does not matter that death was caused directly, but by a chain of consequences, each following upon the other in the processes of nature, and not being an unexpected complication causing a new mischief. Thus, where the accused stabbed his wife in the back and injured her spinal cord, and the injury resulted in paralysis of the lower limbs and the bladder, followed by cystitis and bed sore, and the woman died after several months, it was held that death was caused by the injury, inflicted by the accused, and he was guilty of murder.[58] In *Re Dorasamy Servai*,[59] it was held that when an injury to the head sets up septic pneumonia, which results in death, the person, who inflicts the blow on the head, cannot be absolved from the consequences of his crime by saying that his victim died of pneumonia, and not of the blow on the head, and that, by calling the consequences of an injury a disease, one cannot alter the nature of the consequential results of the injury. The court, after referring to a number of English and Indian cases, observed that the test is whether the cause of death is to be directly associated with the act. It further remarked that it would be a strange position if a man, who inflicts a wound, causing almost immediate death, should be held guilty of murder while a man, who inflicts a similar wound, from which pneumonia supervenes, should not.[60] In two Lahore cases,[61] it was held that if a person receives grievous injuries and dies from pneumonia, which supervenes as a result of them, the perpetrators of the attack on him are guilty of murder. In a Sind case, where the accused attacked a person with murderous weapons and inflicted dangerous wounds and, although the wounds had somewhat healed up, blood poisoning intervened and the person died of brain fever, it was held that the wounds were the cause of death within the meaning of this section.[62]

20. Proximate Cause of Death--Death due to Complication or Development

An act is said to cause death when death results from the act itself or from some consequences

necessarily or naturally flowing from the act, and reasonably2103 contemplated as its result. Where, without the intervention of any considerable change of circumstances, death is connected with the act of violence of a chain of causes and effects, death must be regarded as the proximate, and not a remote, consequences of the act. The cause must not only be the cause *sine qua non*, but it must also be a cause reasonably proximate; but the doctrine of criminal causation has reasonable limits. An injury may lead to death. Death may be instantaneous; it may be delayed. The injury may lead to shock, excessive bleeding, coma, syncopation, etc, and cause death. In such a case, injury and death have a clearly perceptible and direct nexus and there will be no difficulty in finding that death is the direct result of injury. The decision may not be so easy in a case where death is caused not directly by the injury itself but due to a complication or development or in a case where death is not instantaneous but is delayed. Where death is delayed or due to a later complication or development, court has to consider the nature of the injury, complication or development and attendant circumstances. If the complication or development is the natural or probable or necessary consequence of the injury and if it is reasonably contemplated as its result, the injury can be said to have caused death. If, on the other hand, the chain of consequences is broken or if there is an unexpected complication, causing new mischief, the relation of cause and effect is not established, or the causal connection is too remote, and the injury cannot be said to have caused death. If the original injury itself is of a fatal nature, it makes no difference that death is actually caused by a complication, naturally flowing from the injury, and not the injury itself, since causal connection is proximate.[63]

21. 'By doing an Act'

For the application of s 299, IPC, death must be the result or consequence of an act, done by the accused, or, inversely the act of the accused must be the cause of the death. The act, or physical action, is the means of causing death.

An act, which is the cause of the death, must not be confused with a prior act which is merely one of preparation. Thus, if *A*, *B*, and *C* go armed to certain land, on which cultivators are at work, in order to enforce their supposed rights, and a quarrel ensures in which *A* kills one of the cultivators with a blow of a *dao* intending to kill him, they are guilty of murder. But the cause of death is the blow, and not the previous action of *A*, *B* and *C* in arming themselves and going to the land. In *Reaz-ud-din Shaikh v Emperor* ,[64]going armed to the land was held to be an act done with the knowledge that death was likely and, therefore, within the ambit of ss 299 and 300 . But the act likely to cause death must, by the terms of s 299, be 'such act', ie, the act which caused the death. The blow of the *dao* was the cause of death, and not the arming and assembling on the land.

22. 'An act' includes a Series of Acts

The word 'act', as used in ss 299 and 300, read with s 33 of the IPC, denotes not only a single act, but also a series of acts taken as a single act. When a number of persons participate in the commission of a criminal act, the responsibility may be individual, that is to say, each person may be guilty of a different offence, or all of them may be2104 liable for the total result produced. This would, however, depend on the intention and knowledge of the participants. The subject is then covered by ss 34, 35 and 38 of the IPC . Thus, if two persons beat a third person and one intends to cause his death and the other to cause only grievous injury and there is no common intention, their offences will be different. But this would not be the case if the offence is committed with a common intention.[65]

Under s 33, IPC, the word 'act' denotes a series of acts as well as a single act. But, for an act to amount to culpable homicide, it must have caused the death of a living human being and it must have been done with the intention or knowledge specified in this section. In a series of acts, the first act may not have caused death and the subsequent act, which caused the death, may have been done only to cause disappearance of the body of the victim, believed to be already dead, or to show that he committed suicide. In such cases, the law may be stated thus:

> where the first act is done without any intention to kill, or knowledge that it is likely to cause death, and the second act, which causes the death, is done in the belief that the victim is already dead, the accused is not guilty of culpable homicide or murder, but of hurt or grievous hurt.[66]

But if the first act is done with the intention of killing, or with the knowledge that it is likely to cause death, and the second act, which causes the death, is so closely connected, in time and purpose, with the first that the two acts form parts of the same transaction, the accused is guilty of culpable homicide whether, when doing the second act, he believed that the victim was already dead or was completely indifferent as to whether the victim was alive or dead.[67]

23. Accused Hitting and Making Victim Unconscious, Believing him Dead doing act Leading to Death of Victim--Effect and Instances

In *Empress v Khandu Valad Bhawani* ,[68] the accused struck the deceased three blows on the head with a stick. The deceased fell down senseless on the ground. The accused, believing that he was dead, set fire to the hut, in which he was lying, with a view to remove all evidence of the crime. The medical evidence showed that the blows, struck by the accused, were not likely to cause death, and did not cause death, and that death was really caused by injuries from burning when the accused set fire to the hut. The majority of the judges (Parsons J, dissenting) held that as the accused undoubtedly believed that he had killed his victim, 'there would be a difficulty in regarding what occurred from first to last as one continuous act, done with the intention of killing the deceased, and that the accused should be held to have committed only the attempt to murder, punishable under s 307 . In *Emperor v Dalu Sardar* ,[69] it was held that the accused was not guilty of murder on a finding that he had first assaulted the deceased, without any intention of causing death, and2105 subsequently, believing her dead, had suspended her body by the neck by a piece of string tied to the roof of the house. It was found that, in fact, death was not caused by the previous assault, but by the hanging. A conviction was inflicted under s 325, IPC . But in an earlier case, where one person struck the deceased a blow, which knocked him down, and then he and the other accused, without inquiring as to whether he was dead, in haste, hung him up to a tree so as to make it appear that he committed suicide, all the accused were convicted of hurt. But the High Court quashed the proceedings and directed the accused to be re-tried on charges of murder, culpable homicide not amounting to murder and hurt.[70] In *Re Shreenarayan*,[71] the accused struck the deceased a single blow on the head and she fell down bleeding from the nose and became senseless. The accused thought that she was dead and burnt the body. It was held that the accused were not guilty under s 302, but were liable to be convicted under s 304, Pt 2, for acting with gross negligence and thereby causing death. In *Re Thavamoni*,[72] the accused assaulted a woman, with the intention of causing her death, and believing her to be dead, though, in fact, she was not, threw her body into a well where she was found dead. The High Court, following the decision in *Re Kaliappa Goundan*,[73] held the accused guilty of murder since the intention of the accused was, from the beginning to cause the death of the deceased. In *Nehal Mahto v Emperor* ,[74] in which the facts were strikingly similar to those in the case of *Kaliappa Goundan v Emperor* ,[75] the Patna High Court, agreeing with that decision, held that the accused were guilty of murder, and the same view was taken in *Lingaraj Das v Emperor* ,[76] and it was held that if the intention is to kill, the offence is one of murder even if the killing takes place by a series of acts in two stages.[77] In *Emperor v Gujjan Singh* ,[78] the accused struck the deceased two or three times on the head and, when the latter fell down unconscious, threw him face down into a pool, containing a few inches of water, removed the contents of his pockets and covered the body with the branches of a tree. Later on, the accused carried the body of the deceased in a *dhoti* and threw it into a canal. On these facts, it was held, by a Division Bench of the Lahore High Court:

> The action being continuous and it being impossible to resolve the two incidents into two wholly separate actions, inspired by different motives and committed for different reasons, we are of opinion that the accused must be treated as having done one act with the intention of causing death and as having succeeding in carrying out his object.

24. 'With the Intention of Causing Death'

The word 'intention' means the mental attitude of the man who decides to bring about a certain result. Every act is followed by consequences. The consequence, necessary to constitute the offence of culpable homicide, is death. By 'intention' is2106 meant the expectation of the consequence in question[79] and intention does not, therefore, necessarily involve premeditation or thinking out the killing before hand.[80] An accused may 'intend' certain injuries albeit he may not know or intend the serious consequences of those injuries. But the injuries in order to be 'intentional' should not be such which the appellant in the heat of passion and without any previous enmity happened to just cause, but should at least be such, for causing which the appellant infact strove. 'Intention' is purposeful doing of a thing to achieve a particular end. It is the mental attitude of a man who has resolved to bring about a certain result, if he can possibly do so. It is shaping of one's conduct to achieve a particular end at which he aims.[81] A man expects the natural consequences of his acts and, in law, is presumed to intend them.[82] If, therefore, a person, in performing some act, either: (a) expects death to be the consequence thereof; or (b) expects a dangerous injury (*i.e.*, a bodily injury likely to cause death) to be the consequence thereof; or (c) knows that death is a likely consequence thereof,[83] and, in each case, death ensues, his intention in the first two cases, and his knowledge in the third case, renders the homicide culpable. A guilty intention or knowledge is, thus, essential to this offence, and if this does not exist, the killing cannot amount to culpable homicide.[84] The law does not regard every case of homicide as *prima facie* murder; it throws on the prosecution the burden of proving an intent or knowledge.[85] Where, therefore, there is nothing more than a fatal result to indicate an intention to cause death, etc, and no weapon has been used, it is unsafe to convict a person of murder.[86] In certain classes of injuries, resulting in death, eg, injuries of which death is not a natural or ordinary consequence, there must be, in order to support conviction for murder, a specific finding of the intention to cause death.[87] However, under the IPC, no constructive, but actual intention is required.[88]

Assault from Blunt Side of Axe

Accused belonging to scheduled tribes and inhabitant of tribal area committed the murder of his wife. There were frequent quarrels between the accused and the victim. On the date of incident the accused under provocation assaulted his wife from the blunt side of the axe. Since he did not assault from the sharp cutting side of the axe, he could not be imputed with intention to cause the death of the deceased. His conviction under s 302, IPC was altered to one under s 304, IPC, a sentence of ten years rigorous imprisonment already undergone by him was found sufficient.[89]2107

25. Motive not Required to be Proved

Motive for doing a criminal act is generally a difficult area of prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murders have been committed without any known or prominent motive. It is quite possible that the aforesaid impelling factor would remain undiscoverable. Lord Chief Justice Champbell struck a note of caution in *Reg v Palmer* [90] thus:

> But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know, from experience of criminal courts that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties.

In some cases, it may not be difficult to establish motive but in other cases, inferences from circumstances may help in discerning the mental propensity of the person concerned. There may also be cases in which it is not possible to disinter the mental transaction of the accused which would have impelled him to act. No proof can be expected in all cases as to how the mind of the accused worked in a particular situation.

Sometimes, it may appear that the motive established is a weak one. That by itself, is insufficient to lead to any inference adverse to the prosecution.[91] Motive for the crime rarely affects the worth of evidence of the eyewitnesses.[92] When facts are clear, it is not necessary to prove motive. The motive, which induces a man to do any particular act, is known to him, and to him alone, or possibly to the deceased and it is impossible to establish it. At the most, the prosecution can only suggest as to what may have been the motive for any particular act.[93] Failure of the prosecution to establish the motive for the crime does not mean that the entire prosecution case has to be thrown overboard. It only casts a duty on the court to scrutinise the other evidence, particularly the evidence of eyewitnesses.[94] The fact, that the prosecution has failed to lead such evidence, has this effect only that the other evidence, bearing on the guilt of the accused, has to be very closely examined.[95]

Motive, the absence of which cannot absolve the accused from the commission of crime,[96] nor does it call for any leniency in sentence,[97] is relevant and important on the question of intention;[98] it does not, however, acquire much significance where the offence can be proved by other evidence,[99] or when the case is based on ocular testimony of witnesses.[99a] The fact, that the apparent motive was too flimsy, is,2108 therefore, no reply to the unshaken testimony of credible and natural eyewitnesses[1] because the question of motive becomes more or less academic where the direct testimony, regarding assault, it worthy of credence.[2] Sometimes, it may appear that the motive established is a weak one. That by itself is insufficient to lead to any inference adverse to the prosecution.[3] It must, however, be remembered that if motive, as a circumstance is put forward, it must, like any other circumstance, be fully established.[4] If motive is proved by the prosecution, the court has to consider it and see whether it is adequate.[5]

Inequitable distribution of property undoubtedly provides an adequate motive for murder,[6] but no inference of motive can be drawn merely from the existence of claims put up by kins to family property.[7] Where the accused killed the entire family of his uncle, the motive alleged by the prosecution was elimination of successors of half share of property. The plea of the defence that the motive alleged was not plausible as person to whom deceased had bequeathed property by Will was not killed. This was rejected because no material was brought forth to show that the accused knew of the Will.[8]

26. Motive--Sound Proposition and Unsound Suggestion

Though it is a sound proposition that every criminal act is done with a motive, it is unsound to suggest that no such criminal act can be presumed unless motive is proved. After all, motive is a psychological phenomenon. Mere fact that prosecution failed to translate the mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailant. In *Atley v State of Uttar Pradesh* [9] it was held:

> ...that is true, and where there is clear proof of motive for the crime, that lends additional support to the finding of the court that the accused was guilty but absence of clear proof of motive does not necessarily lead to the contrary conclusion.

27. Motive not Essential Ingredient of Offence

It must be remembered that motive is not an essential ingredient of an offence[10] and the question of motive need not be considered when the evidence is clear that the particular accused was the assailant[11] and, therefore, there is no burden of proof on the prosecution to establish the existence of any motive.[12] It is true that motive is not2109 an essential ingredient of the offence of murder and when there is direct evidence about the commission of the offence, motive loses its significance and recedes in the background.[13]

28. In the Face of Direct Evidence Motive Loses Significance

Simply because it is not possible to find out the exact motive, the direct evidence cannot be disbelieved if it is reliable.[14] When there is direct evidence of a reliable character, no question of motive can arise.[15] It is now well settled that in cases in which there is direct testimony, motive loses much of its importance and the court has to decide the case on the basis of the evidence of direct witnesses.[16] Once it is established by other evidence that the offence was committed, the absence of motive becomes entirely immaterial and cannot be used as a mitigating circumstance in connection with the measure of sentence to be imposed.[17]

29. Existence of Motive is Important in Cases of Circumstantial Evidence

Existence of motive, even if not an essential component in proof of the offence,[18] assumes importance only where direct and credible evidence is not available and the case rests upon circumstantial evidence.[19] Where the prosecution evidence disclosed that there was a long-standing dispute over property between the accused and the deceased, the accused had strong motive to kill the deceased.[20] Where only circumstantial evidence is available at the outset, one normally starts looking for the motive of crime[21] as it is relevant in making the prosecution story probable[22] and helps in determining the conduct of the accused at the time of committing the offence.[23] Undoubtedly, in cases of circumstantial evidence, motive bears important significance. It is sometimes difficult to unlock the motive from the mind of the accused. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never indispensable for conviction. When2110 facts are clear, it is immaterial that no motive has been proved, therefore, absence of proof of motive does not break the link in the chain of circumstance connecting the accused with the crime nor militates against the prosecution case.[24]

30. When Motive to Implicate Accused and Motive to Kill by Accused are Equally Balanced

Discovery of motive for the crime is not imperative in every case.[25] When the motive to implicate accused on prosecution side as well as the motive to kill on the part of the accused are equally balanced, the court should look to the surrounding circumstances.[26]

31. Knowledge of Motive Different from Suspicion of Motive

If motive is known and established, it is a strong piece of evidence against an accused. However, knowledge of motive is different from suspicion of motive. When there has been a dispute between an accused and the deceased, the implication of the accused on the basis of suspicion of there being a motive for the crime cannot be ruled out.[27]

32. Motive alone is Insufficient to Fasten Guilt

There can be no conviction on mere vague evidence of motive.[28] In the absence of any reliable evidence, motive alone is insufficient to fasten guilt.[29] It is wholly insufficient, even if coupled with other circumstances, when the evidence of eyewitnesses is wholly unacceptable,[30] or when evidence on other important, issues is unreliable.[31]

33. Motive Distinguished from Intention

Motive should be distinguished from intention. Intention refers to consequences produced by the act or omission of the offender, while motive refers to inducement for producing such consequences.[32]

34. 'With the Intention of Causing such Bodily Injury as is Likely to Cause Death'

Both the first and second clauses of this section require intention. But the intention, required by the two clauses, is not the same. The intention, required by the first clause, is to cause death, whereas the intention required by the second clause, is only to cause such bodily injury as is likely to cause death.

Where the intention is to cause2111 death, the offence is murder unless the case falls under one of the exceptions, mentioned in s 300 .[33] If an exception does apply, the first part of s 304 will regulate the punishment.[34] Where the intention is to cause only bodily injury, it may, or it may not, amount to murder. If the offence is culpable homicide not amounting to murder, the punishment is still regulated by the first part of s 304, being covered by the words 'if the act, by which the death is caused, is done with the intention of causing such bodily injury as is likely to cause death'.[35] When the accused were armed with *lathis*, the injuries caused by hard, blunt object were found only on the hands and feet of the deceased, the accused could not be convicted for murder, so their conviction was altered to one under ss 325 and 326 .[36]The bodily injury, intended to be caused, must be such 'as is likely to cause death'. To justify a conviction of culpable homicide of any sort against an offender, who has committed an intentional act, causing bodily injury to another, and which act was intended for some particular individual, there must, at least be a finding that the offender intended, by his act, to cause bodily injury likely to cause death.[37] Where the appellant on the spur of moment, all of a sudden inflicted one "Hansua" blow causing death, it canot be held that the appellant committed the offence of murder within the meaning of s 300, IPC rather it can be construed that the appellant committed the offence with the intention of causing such bodily injury as was likely to cause death, within the meaning of s 299, IPC . Conviction of the appellant under s 302, IPC was modified to one under s 304, Pt II, IPC .[38]

Accused police officers being annoyed with the stabbing of their constable, in police custody gave beating to the deceased causing death. Held, the accused appellant did not intend to cause death, but the act was done with the knowledge that it was likely to cause the death of the deceased. The case falls within the 3rd Pt of s 299 and will be punishable under the 2nd Pt of s 304, accordingly the accused appellant was convicted under s 304, Pt II.[39]

The difference between an intention to cause death and an intention to cause such bodily injury as is likely to cause death is a difference of degrees only. The latter is a degree lower in the scale of criminality than the former.[40]In either case, the act of the accused must have caused death. The nature of weapon used, the manner in which blows are dealt, the parts of the body on which they are dealt and the manner in which the weapons are used are important to gather intention of the accused.

The accused after consuming alcohol had gone to the house of the deceased. There was exchange of hot words, the accused caught-hold of the deceased by neck and dashed against the mud wall. Asphyxia and cardiac arrest were the cause of death. There was no preparation or pre-meditation on the part of the accused. The accused had no intention but he could be imputed with knowledge that his act was likely to cause the death of the deceased. The accused was convicted under s 304, Pt II and not under s 302, IPC .[41]2112

Where the accused gave only one injury by iron rod on the head of the deceased, it was not clear from the medical evidence as to whether deceased died on account of head injuries. The death of deceased could well be on account of septicaemia, the doctor however did not clarify whether septicemia was the direct result of the injuries, the accused surely cannot be pinned down for an offence under s 302, IPC, though he can be held guilty under s 304, Pt II as septicemia could have been developed because of operation also.[42] Where the accused caused a knife injury on the buttock of the deceased, the accused cannot be imputed with the intention of causing death as the buttock is not a vital part of the body, more so when two injuries caused by the accused on the person of the deceased were also not on a vital part of the body and were not of grievous nature and were opined to be caused by a blunt object, the conviction of the accused was altered from s 302 to that under s 304, Pt II, IPC .[43] Where death of the deceased was caused by a single blow by *kassi* (spade), medical evidence showed that *kassi* blow caused damage to skull of the deceased, it can, therefore, be said that accused caused the death by doing an act with the knowledge that he was thereby likely to cause death, his act, therefore, would amount to culpable homicide not amounting to murder and would fall under s 304, Pt I, IPC .[44] Appellant accused inflicted single gun shot injury on the left side of chest resulting in death. The act was done with the knowledge that by such act the accused was likely to cause the death of the deceased, the case fell under IIIRD Pt of s 299, as culpable homicide not amounting to murder. The conviction of the appellant accused under s 302, IPC was converted into one under s 304, Pt II, a sentence of five years rigorous imprisonment was

imposed.[45] Where the manner in which a stab injury on the chest of deceased was given by the accused showed that the accused had not only the intention but also the knowledge that injury given was likely to cause death, the conviction of the accused was altered from one under s 302 to one under s 307, Pt I, IPC .[46] Accused appellant assaulted the deceased with iron rod causing death. The accused did not intend to cause death but he can be attributed with knowledge that his act was likely to cause death of the victim. The conviction of the accused appellant under s 302, IPC was altered to one under s 304, Pt II and accused was sentenced to ten years rigorous imprisonment.[47]

Over the cable connection, a sudden quarrel took place between the appellant accused and the son of the deceased. On account of heat of passion, the appellant went home; took out his father's revolver and started firing indiscriminately, and one of the bullets hit the deceased on her chin. The appellant had the knowledge that the use of revolver was likely to cause death and, as such, the present case would fall within the third clause of s 299, IPC . The offence committed by the appellant was only "culpable homicide not amounting to murder". The accused appellant was convicted under s 304, Pt II and not under s 302, IPC .[48]2113

35. 'Likely'--Interpretation

The word 'likely' means probably. It is distinguished from possibly. When the chances of a thing happening are even with, or greater than, its not happening, we say that the thing will probably happen. When the chances of its happening are very high, we say that it will most probably happen. An injury sufficient in the ordinary course of nature to cause death merely means that death will be the most probable result of the injury, having regard to ordinary course of nature.

The expression does not mean that death must result in the case in which such an injury is caused. Therefore, the expression 'sufficient in the ordinary course of nature' is a species of the genus likely. In ss 299 and 304, the word 'likely' is used in a comprehensive sense as including both the higher and the lower degrees of likelihood. In s 300, the word 'likely' is used in the sense of a higher degree of likelihood. In s 300, the word 'likely' is used in the sense of a lower degree of likelihood only. In common parlance, however, the word 'likely' is used only as denoting a lower degree of likelihood. It is in this sense that the word is used in deciding cases to distinguish between an offence falling under s 302 from that falling under s 304 .[49] An effect is 'likely' to take place when there is a likelihood distinguishable from mere possibility. A thing is possible when it may happen; likely when chances are in favour of its happening, and probable when the chances are strongly in its favour. Thus, probability is the stronger degree of likelyhood. A thing may, therefore, be likely without being probable though a thing probable must be likely.[50] 'The offence is culpable homicide if the bodily injury, intended to be inflicted, is likely to cause death; it is murder if such injury is sufficient, in the ordinary course of nature, to cause death.' The distinction is fine, but appreciable. It is a question of degree of probability.[51]

36. Explanation 2

This explanation provides that where death is caused by injury, the person, who causes it, would be deemed to have caused the death although, by resorting to proper remedies and skilful treatment, the death might have been prevented.[52]

In view of the expln 2 of s 299, IPC, no accused can raise the contention that he did not cause the death as it might have been prevented by resorting to proper remedies and skilful treatment. If an accused causes an injury on a vital portion of the body and as a result of it the victim dies, it is no defence to a charge of murder for the accused to say that rendering of proper and expert medical assistance would have prevented the death and so he cannot be held liable for murder.[53] The principle, underlying the explanation, seems to be that a man is responsible for the natural2114 consequences of his conduct and the fact, that those natural consequences might have been negatived by artificial means, does not affect the question of liability. Thus, if *A* deliberately inflicts an injury on *B*, which is likely to result in his death by lockjaw, and if *B* refuses to allow a surgeon to perform an operation to prevent this and dies, *A* is guilty of killing *B*.[54] Similarly, where an injury is intentionally inflicted, the defence, that no proper medical treatment

was given to the victim, does not exonerate the person, who caused the injury, from the guilt of murder if he intended that the injury should be sufficient, in the ordinary course of nature, to cause death or knew that it was likely to cause death of that person. It does not exonerate him from the guilt of culpable homicide if death ensues as a natural or likely consequence. Such a person is deemed to have caused the death and his degree of criminal responsibility must depend, on the knowledge or intention to be gathered from the proved facts.[55]

The appellant accused had beat the deceased on his head twice, the deceased died in the hospital where he was treated by various doctors. The plea of the accused that the deceased could have survived if proper treatment had been given to her was rejected in view of the provisions of expln 2 to s 299 which provides that where the death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.[56]

37. 'Intention' does not Imply Knowledge of Likelihood of Causing Death

Intention is locked up in the heart of the assailant and the inference is to be drawn from acts and attending circumstances.[57] All that the second clause of this section requires, is an intention to cause such bodily injury as is likely to cause death. Here intention neither implies existence of previous design, nor assumes any forethought. Nor is it necessary that the accused should have knowledge that the injury, which he intends to cause, will be sufficient, in the ordinary course of nature, to cause death.[58] The plain words of the second clause of s 299, IPC, require no proof of knowledge that the bodily injury intended was likely to cause death. The question is one of fact and may be sub-divided into two parts: (a) was bodily injury intended? (b) was such bodily injury likely to cause death? If the answers to both these questions are in the affirmative, then the offender is guilty of culpable homicide. However, when one asks whether a bodily injury is likely to cause death, that means as a natural and probably consequence of the injury, and not as a special and abnormal consequence of some disability, on the part of the victim, which was unknown to the offender. Thus, a blow, with the fist upon the thyroid cartilage is not ordinarily likely to cause death; if fatal result ensues from it by reason of some abnormal condition of the cartilage, unknown to the offender, his offence does not amount to culpable homicide because the intention to be ascribed to him is no more than the natural and probable2115 consequence of his act. Similarly, in the absence of such knowledge, if a person causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, his offence comes under s 299, IPC and it is only if the intention was to cause bodily injury, which injury was sufficient, in the ordinary course of nature, to cause death, that the offence would come under s 300, cl (3).[59]

38. Knowledge

Knowledge, as used in this section, is a word which imports a certainty and not merely a probability,[60] though intention also includes foresight of certainty.[61] Knowledge, as contrasted with intention, would more properly signify a state of conscious awareness of certain facts in which the human mind might itself remain supine or inactive.[62]

39. 'Knows', 'Thinks' and Likely Consequences

'Knows' is a stronger word than 'thinks'. In many cases, which unhappily arise, a person does not pause to think, much less does he know, what degree of harm he will effect by striking a blow or blows which may ultimately prove fatal. Some of these cases rightly result in convictions for murder because of the savagery of the attack, or because a lethal weapon was used on a vital part of the body, as a result of which death was the natural and probable consequence, and the injuries, intended to be inflicted, were sufficient, in the ordinary course of nature, to cause death. However, there are other cases which end fatally and in which death was not the natural and probable consequence because the injuries were not very severe, but were merely a likely consequence. These causes are expressly governed by the second part of s 299 ; they do not amount to murder, but are nonetheless culpable homicide.[63]

40. 'Intention' Distinguished from 'Knowledge'

The framers of the IPC designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue. Firstly, when an act is done by a person, it is presumed that he must have been aware that certain specified harmful consequences would or could follow. However, that knowledge is bare awareness and not the same thing as intention that such, consequences should ensue. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, namely the purposeful doing of a thing to achieve a particular end.

Kenny in *Outlines of Criminal Law*[64] has observed:

> Intention: To intend is to have in mind a fixed purpose to reach a desired objective, the noun 'intention' in the present connection is used to denote the state of mind of a man who not only foresees but also desires the possible consequences of his conduct. Thus if2116 one man throws another from a high tower or cuts off his head it would seem plain that he both foresees the victim's death and also desires it: the desire and the foresight will also be the same if a person knowingly leaves a helpless invalid of infant without nourishment or other necessary support until death supervenes. It will be noted that there cannot be intention unless there is also foresight, since a man must decide to his own satisfaction, and accordingly must foresee, that to which his express purpose is directed.

> Again, a man cannot intend to do a thing unless he desires to do it. It may well be a thing that he dislikes doing, but he dislikes still more the consequences of his not doing it. That is to say he desires the lesser of two evils, and therefore has made up his mind to bring about that one.

Russell on Crime[65] has observed:

> In the present analysis of the mental element in crime the word 'intention' is used to denote the mental attitude of a man who has resolved to bring about a certain result if he can possibly do so. He shapes his line of conduct so as to achieve a particular end at which he aims.

It can thus be seen that the 'knowledge' as contrasted with 'intention' signifies a state of mental realisation with the bare state of conscious awareness of certain facts in which human mind remains supine or inactive. On the other hand, 'intention' is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one's conduct so as to bring about a certain event. Therefore, in the case of 'intention' mental faculties are projected in a set direction. Intention need not necessarily involve premeditation. Whether there is such an intention is a question of fact.[66]

Knowledge, as contrasted with intention, would more properly signify a state of conscious awareness of certain facts in which the human mind might itself remain supine or inactive. On the other hand, intention connotes a conscious state in which mental faculties are roused into activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself. Mental facilities, which might be dispersed in the case of knowledge, are, in the case of intention, concentrated and converged on a particular point and projected in a set direction.[67]

41. Intention and Knowledge may Sometime Mean Same Thing

Motive is something which prompts a man to form an intention and knowledge is awareness of the consequences of the act. In many cases, intention and knowledge merge into each other and mean the same thing, more or less, and intention can be presumed from knowledge. The demarcating line between knowledge and intention is, no doubt, thin, but it is not difficult to perceive that they connote different things.[68] Intention requires something more than a mere foresight of the consequences, a purposeful doing of a thing to achieve a particular end, whereas knowledge implies awareness that certain consequences would or could not follow.[69]2117

42. Intention, Knowledge and three Clauses of Section 299

'Intent' and 'knowledge' in the ingredients of s 299, IPC postulate the existence of positive mental attitude and this mental condition as the special *mens rea* condition of s 299 contemplates the intended death of the person harmed or the intentional causing of an injury likely to cause death. The knowledge in the third condition contemplates knowledge of the likelihood of the death of a person.[70]

43. Foresight of Consequences

Foresight of consequences is the common factor in both intention and knowledge as used in the two clauses of this section. Where consequences are substantially certain or inevitable, the doer may be credited with knowledge of the foresight of those consequences and the act may be called intentional; but where consequences are not so certain, criminality may be attached to those acts only where the accused could be credited with the knowledge of foresight of such consequences only which are likely, ie, which he could reasonably have foreseen, though he may not have desired them. The third clause is, thus, only a species of the second clause where the degree of probability of the result being death is only foreseen as likely by the accused. The latter requires a particular intent, while the former is satisfied with knowledge only.[71]

44. 'With the Knowledge that he is Likely, by such Act, to Cause Death'

Section 299, IPC enacts that the doing of an act, which causes death, is culpable homicide if it is done either: (i) with one of the two intentions, that is to say, with the intention of causing either: (a) death, or (b) such bodily injury as is likely to caused death: or (ii) with the knowledge that death is likely to be caused by such act. Headings (i) and (ii) are, it will be noticed, alternative, one to the other, so that it follows that culpable homicide may be committed without any intention on the part of the accused if he has the knowledge indicated in the said heading (ii). Section 304 lays down as to what shall be the punishment for culpable homicide not amounting to murder; if the act is merely done with the knowledge that death is likely to be caused thereby and without either of the intentions, mentioned in the above heading (i), that is to say, if the case falls under the above heading (ii), a lesser punishment is provided under the latter part of s 304 .[72] The word 'likely' implies both higher and lower degrees of probability. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If the risk is of a lower degree and death is merely a likely result, it is culpable homicide; if the risk is higher and death is the most probable result, it is murder.[73]

The third clause of the section, relating to knowledge, is intended to apply to cases in which there is no intention to cause death or bodily injury, eg, furious driving at a mark near a public road.[74] A person, causing death, even without homicidal intention, is liable if he acted with the knowledge that he is likely to cause death.[75] Even though2118 the accused might not have the intention to cause death, his act is done with the knowledge that it is likely to cause death, he has, therefore, committed an offence punishable under s 304, Pt II and is required to be punished for the same.[76] The accused picking up a heavy stone weighing about 15 kgs and dropping it from the roof of his house on the head of the deceased could be said to have knowledge that he vide his act was likely to cause death of the deceased and so is liable under s 304 Pt II, IPC .[77] Where it was found that death had been caused by a single blow with a *lathi* and the other injuries, found on the body of the deceased, did not indicate a determination to beat the deceased to death, it was held that it was not possible to hold that death was caused by doing an act with the intention of causing death or with the intention of causing such bodily injury as was likely to cause

death, but it might be held that death was caused by the doing of an act with the knowledge that by such act the person, who did it, was likely to cause death.[78] Where the accused stuffed a cloth into deceased's mouth in order to silence him, and not with any idea of killing him, it was held that the most, that can be said, is that the accused must be presumed to have known that they were likely, in so doing, to cause his death.[79]

Where the accused had no intention to cause the death but knowledge could be imputed to him that his act was likely to cause the death of the deceased, *viz* the accused dashes the head of the deceased against the wall, the accused would be convicted under s 304, Pt II and not under s 302, IPC .[80]

On proof of commission of the offence of gang-rape found to have been committed in a violent manner, the accused are assumed to be having knowledge that by their action it was likely that the deceased would have died.[81] Where looking into anti-mortem injuries suffered by the deceased and the fact that as the deceased appeared to have died as a result of the right artery being punctured at the ilium, the accused could not be fastened with the intention of puncturing right artery at the ilium as per the first three clauses of s 300, or the knowledge as contemplated by the fourth clause of s 300, he could only be saddled with the knowledge of causing death of the deceased, as contemplated by s 299, IPC .[82]

Where the medical evidence showed that there was only one injury on the head that proved to be fatal, the other injuries were found to be simple, the weapons used also were not deadly, it was held that under these circumstances, it was reasonable to hold that the accused persons only had knowledge that the injuries inflicted by them were likely to cause death, the conviction of accused persons from s 304, Pt I was altered to s 304, Pt II, IPC .[83]

45. Presumption Regarding Intention or Knowledge

The requisite intention or knowledge, in order to render killing culpable homicide, must be clearly proved by the prosecution,[84] which can usually be done by proof of2119 the circumstances which prove the act or omission in question,[85] because there is an accepted doctrine that a man of mature understanding is presumed to intend the natural and probable consequences of his acts.[86] This doctrine itself is based upon the presumption that a person of mature understanding knows the natural and probable consequences of his acts. Therefore, if a person does an act, knowing what its natural and probable consequences will be, then he is presumed to have intended, by that act, to give rise to those consequences.[87] The degree of guilt depends upon intention, and the intention to be inferred, must be gathered from the facts proved. Sometimes, an act is committed which would not, in an ordinary case, inflict injury sufficient, in the ordinary course of nature, to cause death, but which, the offender knows, is likely to cause death. Proof of such knowledge throws light upon his intention.[88]

46. Presumption Regarding Intention

The intention is to be judged by his acts in relation to the surrounding circumstances.[89] The presumption of intention must, therefore, depend upon the facts of each particular case,[90]*e.g.*, when the accused inflicts an injury with a blunt weapon, he would be liable for an offence no more serious than one under s 325,[91] but, in drawing the presumption, the court must have regard to the common course of events.[92] In deciding the question of intention, therefore, the nature of the weapon used, the part of the body on which the blow is given, the force of the blow and its number are some of the factors which assume importance. Death from a blow or blows on the head with a heavy sharp-edged weapon is probably, as rule, associated by the villagers with breaking of the skull, but the ignorance of the actual cause, which will bring about the victim's death as a result of the blow or blows, cannot affect the question of the striker's intention. The fact, that the accused went on striking shows unmistakably that he intended to cause bodily injury and that the bodily injury, intended to be caused, was sufficient to end fatally.[93] Where there was nothing more than a fatal result to indicate an intention to cause death, *etc.*, and where no weapons had been used, it was held unsafe to convict the accused of murder.[94]

47. Presumption Regarding Knowledge

The fact that knowledge of wrongful act is accompanied by indifference, whether death or serious injury is caused, or even by a wish that it may not be caused, makes no difference.[95] In a case of snake-bite, two snake-charmers were giving a performance before a crowd and put a snake on a boy's head. The boy tried to push2120 away the snake and was bitten on the hand with the result that he died. It was held that the snake-charmers did not think that the snake would bite the boy, but nevertheless their act was done with the knowledge that it was likely to cause death, thought not with the knowledge that it was so imminently dangerous that it must, in all probability, cause death. The accused were, therefore, convicted of culpable homicide not amounting to murder.[1]Where the accused armed with a bow and arrow chased his deceased wife and while running shot an arrow at a distance of 80 feet causing injury to her resulting in her death. It is not possible to say that he inflicted injury with the intention of causing such bodily injury as is likely to cause death, however, the accused who is familiar with the weapon must necessary have known that by shooting an arrow from a bow at such a distance there is every likelihood of the arrow piercing a vital part of the body and likelihood of causing death, it was held that accused's act attracted the last clause of s 299, punishable under Pt II of s 304, IPC .[2] Where altercation and fight took place between the accused and deceased and during the same the accused took out a knife from his trousers and inflicted a blow with it on the chest of the deceased, the death of the deceased was not instantaneous, the knife used resembled only a pen-knife, no second injury with a knife was caused, it was held that accused had not intended to kill the deceased and the offence will fall within the ambit of Pt I of s 304 and not under s 300, IPC .[3]

48. Death Caused by a Person under Voluntary Intoxication

Voluntary intoxication, while it affords no ground of exemption from liability for causing, whilst under its influence, the death of another (s 85), may render the offence culpable homicide, and not murder.[4]

49. Death as an Accidental Consequence

To cause death by an act, which is not likely to cause death, does not amount to culpable homicide, ie, death as an accidental consequence of a man's conduct does not render that conduct culpable homicide.[5]

Illustrations

(i) *A* is working with a hatchet, the head of which flies off and kills *B* on the spot. *A* is not liable.
(ii) *A*, an officer of a ship, whilst superintending its unloading by coolies, strikes at *B*, a cooly, with a light stick. To avoid the blow, *B* springs to one side, slips, falls overboard, and is drowned. *A*, though guilty of an assault, is not guilty of culpable homicide.

Section 299 and illust (c), IPC, do away with the distinction between accidental death caused by an unlawful act. Under the IPC, a person, who, whilst doing a lawful act, kills another accidentally, is exempted under s 80, and if the act is an unlawful one,2121 still he has not committed culpable homicide because intention or knowledge, in reference to the death, is, by force of s 299, essential to this offence.[6]

50. Numerous Injuries

Although, in a given case, the number of injuries on the person of the deceased may not be the determinative factor, the same, however, is relevant.[7] The number of injuries is always not determinative of the offence. It would depend on the weapon used, place where the injuries were inflicted and the nature of the injuries.[8]

Where the injuries inflicted were numerous, but no bones were broken and none of the injuries individually amounted to more than a simple hurt and they were mostly on the legs and arms, it was held that no intention to cause death could be inferred and the assailants could only be deemed to have known that, by the beating, which they gave, they were likely to cause the victim's death.[9] Where seven accused inflicted

24 injuries on the deceased, about 20 of which being inflicted after the deceased had fallen down and was unconscious, it was observed that it showed that they certainly beat him with the intention of causing such bodily injuries as were likely to cause his or with the knowledge that, by such acts, they were likely to cause his death. In these circumstances, all the accused were held guilty of an offence of culpable homicide punishable under s 304, IPC .[10] However, when three persons set to work to beat a fourth with sticks, the blows being directed at the head of that fourth, they must be fixed with the knowledge that they were likely to cause death.[11]

Where the number of injuries found on the dead persons were many and the accused persons were not justified in causing so many injuries so to have exceeded the right of private defence, their conviction under s 304 Pt I, was found proper.[12] Where the accused party entered the house of the complainant party and assaulted them with *lathis* resulting into death of the deceased, the number and nature of injuries received by each party pointed out that accused were aggressors.[13]

51. Single Blow Causing Death

In *Zahid Khan v Emperor* , a Division Bench of the Oudh Chief Court observed:

> Where death has been caused by a single blow with a lathi and the other injuries, found on the body of the deceased, do not indicate a determination to beat the deceased to death, such as is indicated in many cases, it is not possible to hold that death was caused by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, but it may be held that death was caused by the2122 doing of an act with the knowledge that, by such act, the person, who did it, was likely to cause death.

A similar view was taken by the Bombay High Court in *Sardarkhan Zahidkhan v Emperor* ,[14] in which Beaman J observed:

> 'Where death is caused by a single blow, it is always much more difficult to be absolutely certain what degree of bodily injury the offender intended.'

Referring to this observation in *Virsa Singh v State of Punjab* ,[15] the Supreme Court observed:

> With due respect to the learned Judge, he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct though the evidence about them may sometimes overlap. The question is not whether the prisoner intended to inflict a serious injury or a trivial one, but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent, that the section requires, is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question, and once the existence of the injury is proved, the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact, and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

In cases of single injury, the facts and circumstances of each case has to be taken into consideration before arriving at the conclusion whether the accused should be appropriately convicted under s 302, IPC

or under s 304, Pt II, IPC . It cannot be laid down as a general principle that in no case of single blow or injury, accused cannot be convicted under s 302, IPC .[16]

Where accused caught hold of deceased while co-accused inflicted a knife-blow on him, accused was convicted under s 326 read with s 34 while the conviction of co-accused was altered from s 302 to s 304, Pt I, IPC .[17] Accused appellant gave a single lathi blow on the head of the accused, deceased was hospitalized and died after six days. Other co-accused had not given any blow, as such were acquitted by the courts below. There was no intention or pre-meditation in the mind of the accused appellant to inflict such injuries to the deceased as were likely to cause his death in the ordinary course of nature. Accused appellant was convicted under s 304, Pt II and not under s 302, IPC .[18]2123

Accused appellant gave knife blow on the vital part of the body of the deceased which proved fatal, he had concealed the knife. He was convicted under s 302, IPC .[19]

It cannot be laid down as a rule of universal application that whenever a single blow is given application of s 302 IPC is ruled out. It would depend upon several factors. In the present case the accused appellant A1 had stabbed the deceased with a dagger on his left chest causing death on the spot. Looking to the facts and circumstances of the case, the appellant A1 was convicted under s 304, Pt I and not under s 302 .[20]

Where the accused gave one single *katari* blow in a sudden quarrel on the head of the deceased[21] and where the accused stabbed the deceased with a knife on the spur of the moment[22] the conviction of the accused was altered from one under s 302, IPC, to one under s 304, Pt II, IPC . Where the accused, after an altercation, hit the deceased on the leg, above the ankle, with his *dah* with such force that he cut through the bones and the arteries and in consequence the man died four days later in hospital, the Rangoon High Court altered his conviction under s 302 to one under s 304 Pt I, observing:

> The intention, so far as I can see, of the appellant was to cut the deceased on the leg and the cut inflicted was quite low down near the ankle. A man, who directs a blow in this direction as a general result, would be a man who does not intend to cause injury sufficient in the ordinary course of nature, to cause death because most cuts on the leg are not injuries sufficient, in the ordinary course of nature, to cause death. The blow was delivered with great force, perhaps we could say, and even residents in the jungle must be held to know that a violent blow of this nature with a formidable weapon is likely to cause death wherever the blow may fall, but I do not think that any intention, higher than this, can be imputed against the appellant.[23]

Where the accused inflicted only one pipe blow on the head of the deceased, the deceased was operated and died 10 days later due to septicemia and other complications that set in, the accused cannot be said to have intended to cause death for that particular injury, the conviction of accused therefore was altered from s 302 2124 to s 304, Pt II, IPC . When the injury caused by the *musal* on head of the deceased[24] revealed there was no previous enmity but trivial incidents caused hot exchange of words, s 304, Pt II and not s 302 is attracted.[25] Where the evidence on record disclosed that it was blunt side of the axe which was used for dealing blow on the deceased and there was only one blow on the head of the deceased which proved to be fatal, the offence of culpable homicide not amounting to murder was made out. The conviction of the accused under s 302 was altered to one under s 304, Pt I.[26]

It cannot be said as a rule of universal application that whenever one blow is given s 302, IPC is ruled out. It would depend upon the facts of each case. The weapon used, size of the weapon, place where the assault took place, background facts leading to the assault, part of the body where the blow was given are some of the factors to be considered. In the present case only one blow with a small stick was inflicted and the place where the assault took place was dimly lit. Held case was covered by s 304, Pt I, and not s 302, IPC . Ten years rigorous imprisonment was imposed.[27]

Where a single blow by the accused caused death of the deceased after several days, the accused is liable under s 304, Pt II.[28] Where the accused inflicted only one injury on the abdomen of the deceased, the doctor opined that the complications may set in, in some cases and further opined that the

complications may be after the injured is admitted in the hospital, in these circumstances it is difficult to hold that the accused intended to cause that particular injury, so cl (3) of s 300, is not attracted and the accused was convicted under s 304, Pt II, IPC .[29] Where the death was caused by single blow with *kassi* (spade), there was no previous enmity between the accused and the deceased. The medical evidence showed that the *kassi* blow caused damage to the skull, it was held that the accused caused the death by doing an act with the knowledge that he was thereby likely to cause the death, his act therefore, would amount culpable homicide and not murder and would fall under s 304, Pt I, the conviction was altered from s 302 to s 304, Pt I, IPC .[30] Where a quarrel took place between the accused and the victim and the accused incensed by the situation, gave a blow with a stick, which fell on a vulnerable part of the victims body resulting in his death the conviction of the accused was altered from s 302 to s 304, Pt II, IPC .[31] Where, accused shot only arrow at the deceased in the night hitting him in the stomach, the deceased died 5 days after the occurrence, the accused was held guilty under s 304, Pt II and not under s 302 .[32]

Where the manner in which a stab injury on the chest of deceased was given by the accused showed that the accused had not only the intention but also the knowledge that injury given was likely to cause death, the conviction of the accused was altered from that under s 302 to one under s 304, Pt I, IPC .[33] Accused inflicted knife blow on2125 the chest, vital part of body causing death of the deceased. He was convicted under s 302, IPC and not under s 325, IPC .[34]

Where death of the deceased was caused by a single blow by *kassi* (spade), medical evidence showed that the *kassi* blow caused damage to skull of the deceased, it can, therefore, be said that the accused caused the death by doing an act with the knowledge that he was thereby likely to cause death, his act, therefore, would amount to culpable homicide not amounting to murder and would fall under s 304, Pt I, IPC .[35]

However, no legal proposition can be laid down that wherever one blow by means of a lethal weapon or by a stabbing instrument is dealt on the person of the deceased, the case would not come within the purview of any of the clauses of s 300 defining murder and that the case would come invariably within the purview of s 304, Pt I or Pt II, IPC . Each case would depend upon facts and circumstances.[36] Accused assaulted with darat, an agricultural implement, on the back side of head of deceased, causing cut of skull, and death. Single injury was caused, but injury caused was imminently dangerous. Accused was convicted on the charge of murder.[37]

The appellants accused persons who had assembled outside the house of the deceased were taking drinks and causing nuisance. On objection raised by the landlords, appellant accused had inflicted single injury on head of the deceased who had intervened with blunt-side of the axe, also assaulted another person on head. Held, it was not a case of single injury, the appellant accused had participated in the entire incident. Accused was convicted under s 302, IPC .[38]

52. Single Blow Causing Death in a Sudden Quarrel

When the incident took place at the spur of the moment without any intention, the accused had given only one blow in a sudden quarrel with the deceased, the order of the High Court acquitting him under s 302 and convicting him only under s 304, Pt I was held proper.[39] Where there was a sudden quarrel and the accused inflicted single *lathi* injury on the deceased, the occurrence happened unexpectedly in a spur of moment and in heat of passion of sudden quarrel and there was no pre-meditation, the conviction of the accused under s 302 was set aside and accused was convicted for the offence under s 304, Pt II, IPC .[40]

53. Single Blow Causing Death in Right of Private Defence

Where the dispute arose between the accused persons on one side and the deceased on the other over partition of the house in which they were living, the evidence showing that the deceased was angry enough, armed with *gandala* and opened attack2126 on two out of the three accused persons, there was every possibility for the accused to have apprehended sufficient danger to himself justifying his taking recourse to protecting himself, single blow inflicted in abdomen of the deceased by the accused snatching weapon from assailant was not excessive use of force in his right to self-defence. So, the conviction of the

accused under s 304, Pt I was set aside.[41]

54. Single Sickle Blow on Back of Deceased

On the date of the incident, all of a sudden altercation ensued between the appellant and deceased on the issue of payment of Rs.150/- as interest amount. There was no previous enmity between the appellant and the deceased. A single blow of sickle was inflicted by the appellant on the back of the deceased. In the opinion of doctor, injury Nos. 1 to 9 were in the nature of 'Ulcers' and indirect outcome of injury No. 10. The deceased died two years after the incident. The doctor opined that the deceased had not died due to direct result of injury No. 10 sustained by him. The conviction of the appellant under s 324, IPC was affirmed. In view of the mental agony and financial sufferings, the sentence of three years imposed by the High Court was reduced to the period already undergone.[42]

55. Single Gun Shot Injury on Waist

Appellant accused caused a single shot injury to the deceased on waist. The accused was convicted under s 304, Pt II and not under s 302, IPC .[43]

56. Single *Lathi* Blow Causing Death

A blow on the head with a *lathi* is certainly likely to cause death and the person, who inflicts a *lathi* blow on the head of another person, must be presumed to have the intention of causing such bodily injury as is likely to cause death. But it does not necessarily follow that a *lathi* blow on the head is always sufficient, in the ordinary course of nature, to cause death.[44] Similarly, it cannot be accepted that whenever death is on account of a single blow, offence is one under s 304, and not s 302 .[45] It would depend upon weapon used, size of it in some cases, force with which blow was given, part of body it was given and several such relevant factors.[46] The nature of offence where there is a single injury could not be decided merely on the basis of a single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being: (i) whether the act was pre-meditated; (ii) the nature of weapon used; (iii) the nature of assault on the accused. In the instant case the accused plunged the screw driver. When the screw driver was plunged into the vital part of the body of the deceased, it cut his liver and spleen, injury was 12 cm deep. This was a case where the act was done with intention of causing bodily injury2127 and the body injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, covered by "Thirdly" of s 300 of " Indian Penal Code ". The conviction of the accused under s 302 and not under s 304, Pt II, IPC was held proper.[47]

57. Single Blow by Bamboo

Where the appellant accused inflicted single blow with broken bamboo stick on the deceased caused death on the place of occurrence, he was convicted under s 304, Pt II, IPC and sentenced to five years rigorous imprisonment.[48]

58. Single Blow by Yoke

The accused and the deceased were on inimical terms. The accused gave single blow of yoke to the deceased in night, caused single injury which proved fatal. The accused appellant was convicted under s 304, Pt I.[49]

59. To Beat a Person after he has Fallen Down

To beat a person after he has fallen down does not necessarily prove the intention of causing his death. Certain factors will have to be considered, for instance, the number of blows, the nature of those blows, and the parts of the body on which those blows have been inflicted.[50] Where the assailants took undue advantage of the fact that the victim was not armed and gave several blows on his head with *lathis* and

the beating continued even after the victim had fallen down, it was held that the accused were guilty of murder, and not of culpable homicide not amounting to murder.[51] Where, even after the deceased fell down after receiving injuries, he was not spared but the accused, further assaulted him, such conduct of the accused is consistent with an intention to kill the deceased.[52] In such cases, the possibility of the accused causing injuries in exercise of private defence is ruled out.[53]

60. Strangulation

When a man kneels on the body of another and presses his throat with great violence, he knows that he is likely to cause death and if death results from strangulation, the knowledge merges into intention and he is guilty of murder under s 300, firstly, unless he can obtain the benefit of any of the exceptions to s 300 . However, where death was not due to strangulation, but no internal bleeding due to rupture of an enlarged spleen, it was held that the knowledge stopped short of intention and the offence committed was culpable homicide not amounting to murder.[54] Where, in a sudden unpremeditated attack, the accused seized hold of the deceased and strangled him to death, it was held that it could not be said that the injury, intended to be2128 inflicted, was sufficient, in the ordinary course of nature, to cause death, but the act of the accused was done with the knowledge that it was likely to cause death, and that he was guilty of culpable homicide not amounting to murder.[55]

Under explanation (3) to s 299, IPC, it is necessary to prove not only that the child breathed and was, therefore, a living child, but also that it breathed after it had, wholly or partially emerged from its mother's womb. In the absence of definite proof of the child being alive and having breathed after it was born, the mother cannot be convicted of culpable homicide.[56] Immediately on delivery of a child, the mother suffers from a mental depression, verging on temporary insanity, and she may not be in a position to observe the condition of the child minutely at birth. So, unless it is otherwise proved beyond reasonable doubt that the child was born alive, it is unsafe to convict the accused (mother) of murder. The standard of proof should be commensurate with the gravity of the crime. In India, infanticide is included in murder.[57]

61. Dangerous Injuries

A person plunging a dangerous weapon, like a knife, into a vital part of the body, will be deemed to intend to cause such injury as, he knew, was likely to cause death.[58] A person, who voluntarily inflicts injury such as to endanger one's life, must always, except in the most extraordinary and exceptional circumstances, be taken to know that he is likely to cause death. If the victim is actually killed, the conviction, in such cases, should ordinarily be of the offence of culpable homicide.[59]

What is the injury intended to be inflicted by the accused can be ascertained, unless the accused admits that he intended to inflict a particular injury, only by the nature of the weapon or weapons used, by the seriousness of the injury caused, and by the parts of the body on which the wounds are inflicted. Whether such injuries are likely to cause death or are sufficient, in the ordinary course of nature, to cause death, would depend again on the different degrees of probability. If death is the most probable result, it would be murder.[60]When a grown-up person, in full possession of his senses, stabs another person on the stomach in the region of the umbilicus, inflicting a wound three inches long and causing the intestines to protrude through it, and that injury is found by medical officers to be a very serious injury with very little chance of survival, and when death also has occurred as a result of that injury, it would amount almost to judicial misconduct to hold that there was no intent on to cause such bodily injury as the assailant knew to be likely to cause the death of the victim of that he had no knowledge that his act was so imminently dangerous that it must in all probability, cause death or such bodily injury as is likely to cause death.[61]

62. Burn Injuries

By no stretch of imagination one can reasonably argue that an act of pouring kerosene on the body of a person and setting him on fire thus resulting into injuries to2129 the person would amount to an offence of simple injuries punishable under s 323, IPC .[62]Such an act of the accused even if done under the influence of liquor or in the state of complete drunkenness would rule out the possibility of the said

accused while committing the offence being totally unoblivious of the fact that the act by itself was so imminently dangerous that it might, in all probability cause death of the deceased or such bodily injury as is likely to cause death.[63]

Where the accused poured kerosene and set the victim ablaze by lighting a match stick, after having set the victim on fire, the accused poured water on her and also covered her with a *chadar* to put out the fire. The victim died 19-20 days after the incident. In these circumstances the accused may not have had the intention to commit murder but he certainly had the knowledge that by pouring kerosene oil on the victim and setting her ablaze could result in her death, so the accused was found liable under s 304 Pt II, IPC, and sentence and conviction under s 302, IPC was set aside.[64]

63. Fracture of Bones

One who inflicts injuries, which cause fracture of the skull, must be held guilty of the offence of murder because he must have intended the natural consequences of the act. A fracture of the skull, in the ordinary course of nature, would result in death. A person is also presumed to know that a fracture of the skull is likely to result in death.[65] When, however, the surrounding circumstances of a case do not warrant the suggestion of an intention to kill or to cause a fatal injury, the accused must, at least, be deemed to know that a blow on the head with a weapon like *kulhari* (axe) is likely to cause death.[66] Presumably, everybody knows that the abdomen is the most delicate and vulnerable part of the human body, and if a man, with that knowledge, kicks the abdomen with such violence as to cause fracture of two ribs and rupture of the spleen, which is normal, he should be presumed to have done so with the knowledge that he, by so kicking, is likely to cause death.[67]

64. Use of Firearms

Where it appeared that the accused fired a gunshot in a free fight suddenly under grave provocation where there was a free fight between the parties for quite sometime, the accused was held guilty under s 304, Pt II instead of s 302, IPC .[68] Where the death of the deceased wife was caused by a pistol-shot fired by her husband accused, the possibility of husband using firearm in a fit of rage owing to quarrel with the deceased could not be ruled out, the accused was convicted under s 304, Pt I and was acquitted of the charge under s 302, IPC .[69]2130

65. Use of Knife/*Katari*

It must be assumed that a person, who goes armed with a stabbing weapon to assault another person, against whom he has a previous grudge, and actually strikes that person at a vital part of his body and causes his death, intends to cause such bodily injury, as is imminently dangerous to life, and must be held guilty of murder.[70] An injury, caused, by stabbing, with a knife, which is a lethal weapon, in the abdominal region with the result that the intestines emerge, is sufficient, in the ordinary course of nature, to cause death, and whoever intentionally causes such an injury is guilty of murder.[71]

Where the accused gave one single *katari* blow in a sudden quarrel on the head of the deceased[72] and where the accused stabbed the deceased with knife in a spur of the moment[73] the conviction of the accused was altered from one under s 302, IPC to one under s 304, Pt II, IPC .

66. Squeezing Testicles

In a case, the prisoner, by gripping and squeezing the testicles of the deceased, caused them to be much bruised and reduced them to a pulpy condition, thereby causing an injury to them which resulted in his death. It was held that death was a probable consequence of the prisoner's act and that she was guilty under s 304, IPC, of culpable homicide not amounting to murder.[74] Where the accused seized the deceased by his testicles and squeezed them with considerable force and for a long time and the deceased, who was in a very unsound bodily condition, died from the shock of the pain, and the medical evidence showed that the injury, inflicted by the accused, would not, in normal conditions, have

endangered the life of the deceased, it was held that the accused was guilty of causing only simple hurt.[75]

67. Use of Deadly or Dangerous Weapons

There is no such thing as a regular or ear-marked weapon for committing murder.[76] The implements used in carpentry are not readily such deadly weapons so as to cause, per se, any serious or a grievous hurt or injury to the victim.[77] Where a number of persons go armed with deadly weapons to attack a person or a party, it may be assumed, as a matter of common sense, that their common intention is at least to cause grievous hurt. If, in the course of the commission of that offence, death is caused, the persons, so attacking, will be guilty of an offence under s 302, IPC .[78] Thus, where a number of persons attacked another with sharp-edged weapons like *kripans*, with object of causing him serious injuries, it was held that they must have2131 known that one or other of those injuries might cause death and, therefore, they were liable for murder under s 302, by virtue of s 149 .[79]

Tyre lever has been held to be a dangerous weapon in *State of Madhya Pradesh v Manzoor Hason* ,[80] and it was observed that the question, whether to convict the accused under s 302 or under s 326, must be answered with regard to the nature of the weapon used.

68. Use of Heavy Weapons

In *Karam v Empress* ,[81] the prisoner, who had caused the death of his wife by striking her on the head with a wooden *kharwanji* in the course of a sudden quarrel, was held not to be guilty of murder, but only of culpable homicide not amounting to murder. It was observed that a single blow on the head with a *kharwanji* is not likely to cause the death of the person struck, nor can it be said that a person, who strikes another on the head with such a weapon, intends to cause death or such bodily injury as is sufficient, in the ordinary course of nature, to cause death. If, in such a case, death does occur as a result of the injury caused, the offence committed is not murder because none of the clauses to s 300, IPC, is applicable. If, however, a man, even in the course of a sudden quarrel, gives a terrific blow on the head of another with a weapon, like a heavy hammer or a heavy hatchet, and the result is that head bones are smashed to pieces, it must, on the principle that a man intends the natural consequences of his act, be held that he intended to cause such bodily injury as he knew was likely to cause death or that the injury intended to be inflicted was sufficient, in the ordinary course of nature, to cause death. The offence, thus committed is, therefore, murder both under clauses secondly and thirdly to s 300, IPC, unless some exception to that section reduces it from murder to culpable homicide not amounting to murder.[82]

69. Use of an Axe

Even the most illiterate and ignorant person would realise that a savage blow with an axe in the region of the abdomen and spine is bound to cause death, or injury, which would result in death, and the person, who strikes such blows, must have either intended to cause death or cause such bodily injury as would, in the ordinary course of nature, result in death and, is therefore, guilty of murder.[83]

However, where the quarrel took place on the spur of the moment over a very trifling matter, there was no previous motive to cause murderous attack, the accused lost control over his temper and assaulted deceased with an axe, it could not be said that the accused had an intention to cause bodily injury and was likely to cause death or to cause death, the conviction of the accused was altered from s 302 to s 304, Pt I,2132IPC .[84] Where the evidence on record disclosed that it was blunt side of the axe which was used for dealing blow on the deceased and there was only one blow on the head of the deceased which proved to be fatal, the offence of culpable homicide not amounting to murder was made out. The conviction of the accused under s 302 was altered to one under s 304, Pt I.[85]

70. Use of *Gandasa*

The stomach is as vital a part of the human anatomy as the head, and to strike three or four blows with a heavy chopper or *gandasa*on the stomach of any human being, thereby injuring the intestines and the

peritoneum and disembowelling that person, is an act which clearly shows that the assailant necessarily had the intention of causing such bodily injury as he knew was likely to cause the death of the person to whom the harm is caused. There is no question of the amount of force used in striking the blow on the abdomen. The very fact, that such blows are inflicted on the abdomen with a heavy sharp cutting weapon like a *gandasa* or chopper, is sufficient to make manifest the intention of the assailant that he intended to cause such bodily injury as he knew was likely to cause the death of the victim.[86]

71. Use of Dagger

Appellant accused inflicted dagger blows on face, neck and hand of the deceased causing death. FIR was prompt, oral evidence and medical evidence, fully corroborated the prosecution case. Plea of the defence that there were several other persons of the name of the accused appellant as such the identity of the accused was not established was not supported by the evidence of other witnesses. Appellant accused was convicted under s 302, IPC .[87]

72. Use of *Kulhari*

Any sane person must be presumed to know that a blow on the head with a weapon, like a *kulhari* is likely to cause death.[88]

73. Use of Spear

Prima facie, a man, who drives a spear into the stomach of another and causes that man's death, commits murder.[89] Injuries inflicted with a spear, are sufficient, in the ordinary course of nature, to cause death, or, at any rate, likely to cause death.[90]2133

74. Use of Scissors

The medical officer had found three incised wounds on the body of the deceased, which could be caused with a pair of scissors. There was evidence of the eye-witness that the accused appellant caused injuries by scissors on the deceased. Accused was convicted under ss 302, 307 / 34, IPC .[91]

Where the accused had given only one blow with a pair of scissors on the chest of the deceased causing death, it could be inferred that the accused had knowledge that an injury caused by such a weapon on the vital part of the body of the deceased would cause death. Conviction of the accused under s 302, IPC was altered to one under s 304, Pt II and ten years' rigorous imprisonment was imposed.[92]

75. Use of Stone

Eye-witnesses (PWs) deposed that the accused hit the deceased on the left side of the head with the stone and he rolled down. There was no material before the High Court to come to a conclusion that the death occurred due to fall. The High Court came to a peculiar finding that it might be possible that before the stone had hit the head of the deceased, he had slipped and had rolled down. Conviction under s 302, IPC recorded by trial court was restored.[93]

76. Use of Bow and Arrows

Where the accused shot only one arrow of the deceased in the night hitting him in the stomach, the deceased died 5 days after the occurrence, the accused was held guilty under s 304, Pt II and not under s 302 .[94]Where accused shot an arrow at a distance of 80 feet from the deceased wife who was being chased by the accused and both were running, it was held that accused's act attracted the last clause of s 299, punishable under s 304, Pt II of IPC .[95]

In a case of free fight the accused/appellant alongwith companions armed with bow and arrows encircled

the deceased, the arrow shot by the accused hit the deceased on the chest who fell down, the accused took up a piece of stone and struck it on the head of the deceased as a result of which brain injury was caused. The High Court holding that there was a free fight convicted the accused for their individual acts and convicted accused/appellant under s 304, Pt II, IPC . The conviction was maintained by the Apex Court under s 304, Pt II, in an appeal filed by accused/appellant against the judgment of the High Court.[96] Where the fact situation showed that arrows were being shot from a distance, not with any accuracy and one of such arrows hit the deceased, as established by the evidence of eye-witnesses the accused had shot that arrow and there was no sudden quarrel, the conviction of the accused was altered from s 302 to s 304, Pt I.[97]2134

77. Use of Cycle Chain

Where only one injury was caused by a cycle chain on the head of the deceased which was serious and other injuries were only bruises and abrasions though there was bitter enmity between two groups, only cycle chain and gloves were used, the conviction under ss 302 / 34, was altered to one under s 304, Pt II/ s 34, IPC .[1]

78. Use of *Lathis*/Sticks/Wooden Logs

A *lathi* cannot necessarily be considered an imminently dangerous weapon.[2] It (bamboo stick) is a lethal weapon. A person, who uses a *lathi* in assaulting another, must know that he is very likely to cause death.[3] Where the accused gave the deceased a terrific blow with a *lathi* on the head in consequence of which the skull got fractured like a coconut shell, and the unfortunate man died, it was held that ordinarily the only inference, that can be made, is that the person, who gave such a blow on the head, either intended to cause death or else intended to cause such bodily injury as would be sufficient, in the ordinary course of nature, to cause death.[4] Where the accused gave two blows on the chest of the deceased with the stick resulting into his death having regard to the nature of the weapon used and on the parts of the body on which blows were dealt the conviction was altered from s 302 to s 304, Pt II, IPC .[5] Appellant accused had nurtured grievance against the deceased, gave two or three stick blows on the head of the deceased. The deceased fell down, was admitted in the hospital where he was treated by several doctors and died after about forty days. Appellant accused was convicted under s 304, Pt II and not under s 302, IPC .[6]

The accused appellant picked up one gobbaly tree wood piece lying on the spot and hit on the head of the deceased, the post-mortem report stated that blow itself might have caused the death of the deceased, the accused appellant was convicted under s 302, IPC .[7]

Where the deceased having illicit relationship with the mother of the accused, he was also forcing the sister of the accused to have a relationship with him, the deceased picking up quarrel with the accused on the date of incident and attempting to cause injury to him, unable to bear the agony and ill-treatment meted out to his mother and sister and losing temper due to sudden provocation, the accused was beating the deceased to death with a stick, the accused acted on account of sustained provocation and was found liable to be convicted under s 304, Pt I.[8] Where the altercation took place between two parties, the accused gave a single *lathi* blow on the head of the deceased, an old man of 70 years who died 7 days after the incident, the doctor examining the deceased had admitted that at the old age of deceased a2135 fracture could be caused even by slight force used in inflicting a blow, on these facts intention to cause death or such bodily injury which was likely to cause death cannot be inferred, it cannot also be said that the accused knew that the blow he was giving could be so imminently dangerous that it must in all probabilities cause death, knowledge that the act was likely to cause death can only be inferred, therefore, the conviction of the accused under s 302 was altered to one under s 304, Pt II, IPC .[9] Where the appellant husband in a sudden quarrel after exchange of hot words picked up a wooden log in fit of anger and hit a single blow, on the head of the deceased wife causing death, the appellant accused was convicted under s 304, Pt I, and not under s 302, IPC .[10]

The injury attributed to the accused appellant on the person of the deceased was a very small abrasion.

The injury caused was a very small dimension and it was doubtful whether the injury could be caused with a lathi which the accused was said to be carrying, another accused placed in similar situation had been acquitted by the trial court, the accused was acquitted of the charge under ss 302 / 34, IPC .[11]

Appellant accused R was alleged to be armed with lathi. PWS did not state that the accused R had caused any lathi injury, no overt act was attributed to him. The appellant accused R was held entitled to benefit of doubt, was acquitted.[12]

79. Kicks and Blows

In a case, the accused kicked his wife on the side with such tremendous force that it caused practically her instant death. There was nothing to show that she was suffering from any disease. It was held that a man, who so kicks a prostrate woman on the side, must be credited with the knowledge that he is likely thereby to cause her death.[13] Where the accused went to the house of the deceased, caught hold of the deceased, hit him on cheek and neck, on sight that neighbours have come the accused stated that he would not leave the deceased alive and kicked him on the private parts, the deceased died due to neurogenic shock resulting from the injury to the private parts, the injury opined by the doctor to be sufficient to cause immediate death, the statement of the accused followed by the kick shows that he had knowledge that it was likely to cause death. On these facts, it was held that the conviction of the accused could only be for murder. The trial court convicted him under s 304, Pt II. The High Court in appeal should not have interfered with the conviction and altered it to s 323, IPC . Hence, the Supreme Court altered the conviction of the accused from s 323 to s 304 .[14] Where the statement in FIR by the interested eye-witnesses that the deceased was beaten by kicks and fists by the co-accused, however, in the statement on oath in the court, it was stated that the co-accused had caught hold of victim when the accused inflicted knife blows and also inflicted injuries by *lathi*, the contradictory2136 statements of the witnesses cannot be relied on. So, the co-accused was found entitled to be acquitted.[15]

Where the accused assaulted the deceased by means of fists and legs by throwing him on ground and injuries received on head caused his death, conviction of the accused under s 304 is was found proper.[16]

80. Throttling

The accused caused death of his mother by throttling, the incident happened on mother trying to advice his son (accused) that he should not treat his wife cruelly. The conviction of the accused was altered from s 302 to conviction under s 304, Pt I.[17]

81. Woman Jumping into well with her Child

Where a girl of 17 years of age being tired of her husband's ill-treatment attempted to commit suicide by jumping in a well with child on her neck and she jumped with the child and the child died of the jump though survived, the conviction under s 302, IPC was altered to one under s 334A, IPC . The court was further pleased reduce the sentence to six months simple imprisonment to run concurrently with the instance under s 309, IPC .[18]

In a case of *Emperor v Dhirajia* [19] where a young woman with her baby in her arms had jumped or fallen down in a well, it was observed that in order to possess and to form an intention, there must be a capacity for reason. And when by some extraneous force the capacity for reason has been listed, the capacity to form an intention must have been unseated too. But knowledge stands upon a different footing. Some degree of knowledge must be attributed to every sane person. Obviously the degree of knowledge which any particular person can be assumed to possess must vary. The act done with knowledge of consequences is not *prima facie*a murder, it becomes murder only in the absence of excuse. Ill-treated wife leaving home without knowledge of her husband where husband following her, wife getting into panic and throwing herself with body in her arms into an open well, the evidence was held to be culpable homicide not amounting to murder. It was further observed that the offence did not amount to an attempt to commit suicide. Where an act of the accused in jumping into the well with her children was clearly one

made by her knowing that it must in all probability cause the death of her children. She had no excuse for incurring the risk of causing the death of her children. The face that there were quarrels between her and her sister-in-law and that her life had become unbearable on account of this family discord could not be regarded as a valid justification.[20]

Where the accused appellant, wife of a rickshaw-puller who used to ill-treat her, jumped into the well with her two sons. It was observed that under the cl 4 of2137 s 300, culpable homicide is murder if the person committing the act knows that it is so imminently dangerous that it must in all probability, cause death, or such bodily injury as is likely to cause death, and commit such act without any excuse for incurring the risk of causing death or such bodily injury as is likely to cause death. In the circumstances the constant ill-treatment to which the accused appellant was subjected at the hands of her husband could not furnish such an excuse.[21]

Where there was no evidence as to how exactly the accused who was suffering from chronic and incurable illness fell into the well at midnight along with her child aged one and a half years. The child was also suffering from rickets prior to his death. It was observed that it may be possible to hold that the accused attempted to commit suicide by jumping along with her child. However, in absence of any evidence clearly indicating as to exactly how they fell into the well, it would be wrong to play on the termination and hold the accused guilty under s 309 or s 302 and exclude the operation of s 84, IPC .[22] Where the accused attempted to end her life by jumping into a well alongwith her female child in her lap, the life of the female child was lost in the incident, the mental condition of accused at the time of the incident was not normal as she was suffering from illness of tuberculosis coupled with severe stomach pain, the accused was in full senses when she was brought out of the well and had narrated to the witnesses the reason justifying her act, the case was not found fit to be covered for the purposes of plea of insanity available under s 84, IPC, the act was done by the accused with the knowledge of consequences so offence of culpable homicide not amounting to murder was made out, hence, conviction of the accused under s 302 was altered to one under s 304, Pt II, IPC .[23]

4 Per Mosely J, in his referring order in *King v Aung Nyun* AIR 1940 Rang 259, p 263 (FB), 42 Cr LJ 124 .

5 *Behari v State* AIR 1953 All 203, p 205, 54 Cr LJ 565 ; *Sukhdeo v State* 1968 Cr LJ 438, AIR 1968 All 151 .

6 Per Mosely J, in his referring order in *King v Aung Nyun* AIR 1940 Rang 259, p 263 (FB), 42 Cr LJ 124 .

7 *Behari v State* AIR 1953 All 203, p 205, 54 Cr LJ 565 ; *Sukhdeo v State* 1968 Cr LJ 438, AIR 1968 All 151 .

8 *Rampal Singh v State of UP* 2012 Cr LJ 3765 (SC), 2012 AIR SCW 4211, 2012 (6) Scale 574, 2012 (5) All LJ 248, (2012) 8 SCC 289 ; *Veeram v State of UP* 2011 (11) SCC 367, AIR 2011 SC 1655, 2011 Cr LJ 2688 .

9 *Budhi Lal v State of Uttarakhand* 2009 Cr LJ 360, p 362, 363 (SC), 2008 AIR SCW 6968, AIR 2009 SC 87, JT 2008 (10) SC 572, 2008 (12) Scale 848, (2008) 14 SCC 647 .

10 *Gita Rani Ghosh v State of West Bengal* 2012 Cr LJ 794, p 800 (Cal) (DB) .

11 *Rampal Singh v State of UP* 2012 Cr LJ 3765, p 3769 (SC), 2012 AIR SCW 4211, 2012 (6) Scale 574, 2012 (5) All LJ 248, (2012) 8 SCC 289 .

12 *Ando v State of Rajasthan* AIR 1966 SC 148, p 150 ; *Shri Ram v State* 1973 WLN 401, 1973 Cr LJ 1443 ; *Nga Chi Tia v King* AIR 1939 Rang 225, 40 Cr LJ 725 .

13 *Halsbury's Laws of Australia*.

14 *R v Boreman* (2000) 1 All ER 307 .

15 *Sellappan v State of Tamil Nadu* 2007 Cr LJ 1442 (SC), 2007 (2) Scale 373, (2007) 15 SCC 327 ; *Sunder Lal v State of Rajasthan* 2007 Cr LJ 3281 (SC), 2007 (6) Scale 649, (2007) 10 SCC 371, [2007] 7 SCR 76 ; *Shakti Dan v State of Rajasthan* 2007 Cr LJ 3426 (SC), 2007 (6) Scale 151, (2007) 15 SCC 68, [2007] 5 SCR 673 ; *Budhi Lal v State of Uttarkhand* 2009 Cr LJ 360, 2008 AIR SCW 6968, AIR 2009 SC 87, JT 2008 (10) SC 572, 2008 (12) Scale 848, (2008) 14 SCC 647 ; *Jagriti Devi v State of HP* AIR 2009 SC 2869, (2009) 14 SCC 771, AIR 2009 SC 2869, [2009] 10 SCR 167, 2009 (8) JT 648, 2009 (9) Scale 48, 2009 (3) Crimes 289 (SC) ; *Kesar Singh v State of Haryana* (2008) 15 SCC 753, 2008 (5) JT 407, 2008 (6) Scale 433 .

16 *Richhpal Singh Meena v Ghasi* (2014) 8 SCC 918, AIR 2014 SC 3595, 2014 Cr LJ 4339 .

17 *Emperor v Ananda Bhau* 3 Cr LJ 85, 7 Bom LR 985 .

18 *Public Prosecutor v Somasundaram* AIR 1959 Mad 323, p 325, 1959 Cr LJ 993 ; *Emperor v Manubha* 1 Cr LJ 1027 ; *Emperor v Bai Pani* 1 Cr LJ 193 ; **See also***Kesar Singh v State of Haryana* (2008) 15 SCC 753, 2008 (5) JT 407, 2008 (6) Scale 433 ; *Raj Kumar v State of Maharashtra* (2009) 15 SCC 292, [2009] 11 SCR 49, 2009 (9) JT 413, 2009 (9) Scale 495 ; *Harendra Nath Borah v State of Assam* (2007) 15 SCC 249, [2007] 1 SCR 1211, 2007 (2) JT 404, 2007 (2) Scale 319 .

19 *Public Prosecutor v Somasundaram* AIR 1959 Mad 323, p 325, 1959 Cr LJ 993 .

20 *King v Aung Nyun* AIR 1940 Rang 259, p 271 (FB), 42 Cr LJ 124 .

21 *Ahmad v Emperor* 14 Cr LJ 275 .

22 *Muzammal v Emperor* 10 Cr LJ 321 ; *Torap Ali v Empress* ILR 22 Cal 638 ; *Langar v Emperor* 13 Cr LJ 718 ; *Dhani Ram v Emperor* 14 Cr LJ 104 ; *Fateh Sher v Emperor* 14 Cr LJ 593 .

23 *State v Hira Duhey* AIR 1952 Pat 135 .

24 *Behari v State* AIR 1953 All 203, 54 Cr LJ 565 ; *Bashir v State* AIR 1953 All 668, 54 Cr LJ 1505 .

25 *Emperor v Mahmadkhan* 5 Cr LJ 168, 9 Bom LR 153 ; *Subbappa Channappa v Emperor* 14 Cr LJ 235 ; *Emperor v Mahabir* 14 Cr LJ 241 ; *R v Kanhai* ILR 35 All 329 .

26 *Emperor v Duma Baidya* ILR 19 Mad 483, 1 Weir 298 ; *Nga Tun Baw v Emperor* 7 Cr LJ 205 ; *Emperor v Bhola Singh* ILR 29 Mad 282 ; 12 Cr LJ 124 .

27 *Gul Shah v Emperor* AIR 1914 Lah 552, 16 Cr LJ 93 .

28 *Rajjo alias Gingin v State* 1999 Cr LJ 2996 (All) (DB) .

29 *Asu v State of Rajasthan* 2000 Cr LJ 207 (Raj) .

30 *State of Haryana v Sher Singh* (2002) JT 7 SC 98 .

31 *Ramanna v State of Andhra Pradesh* 1998 Cr LJ 2716 (AP) (DB) .

32 *Tirthi Lal v State of Punjab* 1999 Cr LJ 2356 (P&H) (DB).

33 *Santosh v State of Madhya Pradesh* 2000 Cr LJ 1140 (MP) .

34 *Padigapati Sanjeevaraidu alias Kethanna v State of Andhra Pradesh* 2000 Cr LJ 3396 (AP) (DB) .

35 *State of Karnataka v Akbarsab Ameensab Umachagi* 2000 Cr LJ 5036 (Kant) (DB) .

36 *Anil Amrutrao Jalte v State of Gujarat* (1999) 2 CCR 411 (Guj) (DB).

37 *Nakafodi v State* AIR 1958 Ori 113, p 116, 1958 Cr LJ 785 ; *Golla Chenchuramayya v Emperor* AIR 1946 Mad 83, 47 Cr LJ 514 ; *Ganga Singh v State* 1980 Cr LJ 235, p 239 (All) (DB) .

38 *Wansarapu Baladu* 1 Weir 296; *Chiman Lal v Gulam Mohluddin* 12 Cr LJ 189 .

39 *Golla Sanyasi* 1 Weir 296; *Emperor v Shivsingji* 1 Cr LJ 891, 14 Ker LR 209 ; *Emperor v Kala Nanji* 1 Cr LJ 920, 14 Ker LR 184 ; *Wadhawa Singh v Emperor* 13 Cr LJ 742 ; *Emperor v Ram Newaz* 14 Cr LJ 615 .

40 *Kammari Kamappa* 1 Weir 297, p 298; *Muzammal v Emperor* 10 Cr LJ 321 .

41 Mayne, *Criminal Law of India*, fourth edn.

42 *Davasia Yohannan v State* AIR 1958 Ker 207, p 210, 1958 Cr LJ 1021 .

43 *Nga Ba Min v Emperor* AIR 1935 Rang 418, p 419 ; *Public Prosecutor v Mushunooru Suryanarayanamoorty* 13 Cr LJ 145, 22 Mad LJ 333 .

44 *Empress of India v Fox* ILR 2 All 522, p 526 .

45 *Penal Code*, p 257.

46 *Emperor v Anando Bhau* 3 Cr LJ 85, p 87, 7 Bom LR 985 .

47 *Emperor v Ismail* AIR 1918 Sind 60, 19 Cr LJ 319 .

48 *Ibid*; *Bharat Singh v Emperor* AIR 1932 Oudh 279, 34 Cr LJ 99, *Empress v Fox* ILR 2 All 522 ; *Empress v O'Brien* ILR 2 All 766 ; *Empress v Randhir Singh* ILR 3 All 597 ; *Queen v Punchanan Tantes* 5 WR (Cr) 97 ; *Queen v Bysagoo Noshyo* 8 WR (Cr) 29 .

49 *Munshi Singh Gautam v State of Madhya Pradesh* 2005 Cr LJ 320 (SC) .

50 Law laid down in this explanation, is wider than the English law under which complete emergence from the mother's womb is necessary to constitute a human being.

51 *Budho v Emperor* AIR 1916 Lah 184, 17 Cr LJ 20 ; *Boya Latchmakka*AIR 1940 Mad 294, 41 Cr LJ 597 .

52 Quoted in *Emperor v Ananda Bhau* 3 Cr LJ 85, 86, 7 Bom LR 985; *R v Kersey* (1908) 21 Cox CC 690 .

53 *Harendra Nath Mandal v State of Bihar* (1993) 1 CCR 117 (SC) .

54 *Public Prosecutor v Mushunooru Suryanarayanamoorty* 13 Cr LJ 145 .

55 Per Benson J, in Re *Chukkapalli Ramayya* 11 Cr LJ 222, p 225.

56 *Public Prosecutor v Mushunooru Suryanrayanamoorty* 13 Cr LJ 145, p 154 ; *Ganga Singh v State* 1980 Cr LJ 235, p 238 (All) (DB) ; *Ballan v State* AIR 1955 All 626, 56 Cr LJ 1448, 13 WR (Cr) (Letters) 2 ; *Ba U v Emperor* 9 Cr LJ 364 .

57 *Padigiapati Sanjeevaraidu alias Kethanna v State of Andhra Pradesh* 2000 Cr LJ 3396 (AP) (DB) .

58 *Davasia Yohanna v State* AIR 1958 Ker 207, p 210, 1958 Cr LJ 1021 .

59 *Dorasamy Servai*AIR 1944 Mad 157, 45 Cr LJ 513, (1943) 2 MLJ 660, 1943 MWN 797 .

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65 *Anda v State of Rajasthan* AIR 1966 SC 148, p 151 .

66 Re *Palani Goundan*AIR 1920 Mad 862, 20 Cr LJ 404 (FB) ; Re *Chinnathambi*AIR 1953 Mad 239, 54 Cr LJ 449 ; *Empress v Khandu Valad Shawani* ILR 15 Bom 194 (FB), (distinguished in *Kaliappa Goundan v Emperor* AIR 1933 Mad 798, 34 Cr LJ 1109 ; Re *Shreenarayan* ILR 27 Pat 67; *Emperor v Dalu Sardar* AIR 1915 Cal 221, 15 Cr LJ 709 ; Re *Gour Gobindo Thakoor*(1866) 6 WR 55 (Cr).

67 Re *Thavamani*AIR 1943 Mad 571, (1943) 2 Mad LJ 13 ; *Kaliappa Goundan v Emperor* AIR 1933 Mad 798, 34 Cr LJ 1109 ; *Nehal Mahto v Emperor* AIR 1939 Pat 625, ILR 18 Pat 485 ; *Lingaraj Das v Emperor* AIR 1945 Pat 470, ILR 24 Pat 131 ; *Emperor v Khubi* AIR 1923 All 545, 25 Cr LJ 703 ; *Emperor v Gujjan Singh* AIR 1931 Lah 27, 32 Cr LJ 483 . See commentary under s 33, *ante*.

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83 *Gujjar v Emperor* 12 Cr LJ 591 .

84 *Empress v Fox* ILR 2 All 522, p 526-27 ; *Empress v Randhir Singh* ILR 3 All 597-98.

85 1 Weir 288.

86 *Daude Gangadu* 1 Weir 299.

87 *Muvvala Kondaiyya* 1 Weir 300.

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99 *Datar Singh v State of Punjab* AIR 1974 SC 1193, 1974 Cr LJ 908 .

99a *Haji Lal Din v State* 1977 Cr LJ 538, p 541, 1976 J&K LR 549 ; *Surendran v State* 1977 Cr LJ 1197, 1977 Mad LJ (Cr) 101 .

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4 *Lal Singh v State* 1980 Cr LJ (NOC) 51 (Raj), 1979 WLN 30 .

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*Kodur Thimma Reddi*AIR 1957 AP 758, 762.

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12 *State v Durga Charan Bank* AIR 1963 Ori 33, p 37 ; *Kishan v State of Rajasthan* AIR 1980 Raj LW 510, p 513 (DB) .

13 *Gordhan v State of Rajasthan* 1987 Cr LJ 541, p 547 (Raj) (DB) ; *Dasan v State of Kerala* 1987 Cr LJ 180, p 184 (Ker) (DB) ; *Suhash v State of Uttar Pradesh* 1987 Cr LJ 991, p 995, AIR 1987 SC 1222 .

14 *Ghansa Singh v State* AIR 1958 Raj 226, 1958 Cr LJ 1232 ; *State of Uttar Pradesh v Hari Prasad* AIR 1974 SC 1740-41, 1974 Cr LJ 1274 ; *Bhulakirama Koiri v State* 1970 Cr LJ 403 (Cal) .

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18 *Arundhati Kentuni v State* 34 Cut LT 60, p 68 ; *Bhulakiram Koiri v State* 1970 Cr LJ 403 (Cal) .

19 *Bhagoji v Hyderabad Government* AIR 1954 Hyd 196 .

20 *Sukhdev Singh v State of Punjab* (1987) JT 1 SC 628 .

21 *Udai Pal Singh v State of Uttar Pradesh* 1972 UJ 38 (SC), AIR 1972 SC 54, p 57 .

22 *Mukhtiar Singh v State of Punjab* 1975 Cr LJ 132, 1974 Punj LJ (Cr) 338 ; *Keshav Dev v State of Uttar Pradesh* AIR 1973 SC 482, 1972 Cr LJ 1196 .

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24 *Mulakh Raj etc v Satish Kumar* AIR 1992 SC 1175 .

25 *Yeshwant v State of Maharashtra* AIR 1973 SC 337, p 343, 1972 Cr LJ 1254 .

26 *State of Punjab v Pritam Singh* AIR 1977 SC 2005, p 2006, 1977 Cr LJ 1575 .

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29 *State of Rajasthan v Balbir Singh* 1980 Cr LJ (NOC) 112 (Raj) ; *State v Shankar Sakharam Jadhav* AIR 1957 Bom 226 ; Re *Zahirabi*AIR 1966 Mys 199 ; *Rannun v Emperor* AIR 1926 Lah 88, 27 Cr LJ 709 ; *Onkar v State of Madhya Pradesh* 1974 Cr LJ 1200, p 1204 .

30 *Narsinbhai v Chhatra Singh* AIR 1977 SC 1753, 1977 Cr LJ 1144 .

31 *Shrilal Jadho v State of Madhya Pradesh* 1976 Cr LJ 1325, p 1330 .

32 *State Prosecutor v VN Achutha Kurup* 1967 KLT 18 (SN) ; *Russell on Crimes*, eleventh edn, p 18 and following pages; Re *Kuttayan*AIR 1960 Mad 9, 1960 Cr LJ 85 .

33 *Reg v Govinda* ILR 1 Bom 342 .

34 *Shwe Ein v Emperor* 3 Cr LJ 355, p 357-58 .

35 *Ibid*.

36 *Rathan Singh and Ran Singh v State of Punjab* AIR 1988 SC 2147 .

37 *Rathan Singh and Ran Singh v State of Punjab* AIR 1988 SC 2147, p 358 .

38 *Radha Kanta Sheet v State of West Bengal* 2015 Cr LJ 2006, p 2007 (Cal) (DB) .

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SCC 445 .

40 *Nga Min Po* (1897-1901) 1 UBR 288; *Nga Shwe Baw*(1897-1901) UBR 285.

41 *Umesh Suresh Vale v State of Maharashtra* 2014 Cr LJ (NOC) 50 (Bom) (DB).

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46 *Suresh v State* (1988) 35 DLT 411 (Del) (DB).

47 *Surajit Sarkar v State of West Bengal* AIR 2013 SC 807, (2013) 2 SCC 146, 2013 Cr LJ 1137, p 1147 (SC) .

48 *Vineet Kumar Chauhan v State of UP* 2008 Cr LJ 1367, p 1371 (SC), AIR 2008 SC 780, 2008 AIR SCW 1, 2008 (1) All LJ 735, (2007) 14 Scale 386, 2007 (8) Supreme 502, (2007) 14 SCC 660 .

49 *Behari v State* AIR 1953 All 203, p 205, 54 Cr LJ 565 .

50 *Public Prosecutor v Somasundaram* AIR 1959 Mad 323, 1959 Cr LJ 993 ; per Melvill J, in *Reg v Govinda* ILR 1 Bom 342, p 345 ; *Shwe Ein v Emperor* 3 Cr LJ 355 ; *Dadi Ahdul Gaffoor*AIR 1955 AP 24, 56 Cr LJ 329 .

51 *Reg v Govinda* ILR 1 Bom 342, 345.

52 *Narayanan Satheesan v State of Kerala* AIR 1977 SC 2308, p 2313, 1977 Cr LJ 1946 ; *Satrughana Lahar v State* 1998 Cr LJ 1508 (Ori)*; Sellappan v State of Tamil Nadu* 2007 Cr LJ 1442, 2007 (2) Scale 373, (2007) 15 SCC 327 .

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54 **See also***R v Holland* 2 Moo & R 351; Re *Krishnaswami Naicker*AIR 1965 Mad 261, p 263, (1965) 2 Cr LJ 42 .

55 *Kins v Abor Ahmed* AIR 1937 Rang 396, p 397 (FB), 38 Cr LJ 1097 (**explaining***Emperor v Nga San Pal* AIR 1936 Rang 442, 37 Cr LJ 1119 ; *Bichhu v State of Uttar Pradesh* AIR 1958 All 791, 1958 Cr LJ 1367 ; *Kela Ayyappan v State* AIR 1959 Ker 230, 1959 Cr LJ 981 ; Re *Krishnaswami Naicker*AIR 1965 Mad 261, p 263, (1965) 2 Cr LJ 42 ; *Salebhai Kadarali v Emperor* AIR 1949 Nag 19, 49 Cr LJ 647 .

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57 *State of Haryana v Pale and Ors* 1996 Cr LJ 1872 (SC) .

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60 *Gahbar Pande v Emperor* AIR 1928 Pat 169, 29 Cr LJ 17 .

61 *Rama v State* AIR 1969 Goa 116, 1969 Cr LJ 1393 .

62 *Faqira v State* AIR 1955 All 321, p 325, 56 Cr LJ 884 .

63 *King v Aung Nyun* AIR 1940 Rang 259, p 273 (FB), 42 Cr LJ 124 ; *Kudumulla Mahanana Reddi*AIR 1960 AP 141, 1960 Cr LJ 303 .

64 Kenny, *Outlines of Criminal Law,* seventeenth edn, p 31.

65 *Russell on Crime,* twelfth edn, p 41.

66 *Jai Prakash v State (Delhi Admn)* (1991) 2 SCC 32 .

67 *Faqira v State* AIR 1955 All 321, p 325, 56 Cr LJ 884 .

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72 *Nga Chit Tin v King* AIR 1939 Rang 225, 40 Cr LJ 725 ; *Laxman Kalu Nikalje v State of Maharashtra* 1968 Cr LJ 1647, AIR 1968 SC 1390 .

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74 *Ibid*.

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77 *Santosh and etc v State of Madhya Pradesh* 2000 Cr LJ 1140 (MP) .

78 *Zahid Khan v Emperor* AIR 1939 Oudh 49, 40 Cr LJ 187 ; *Inder Singh Bagga Singh v State of Pepsu* AIR 1955 SC 439, p 444, 56 Cr LJ 1014 ; *Ajmer Singh v State* AIR 1955 Punj 13, 1955 Cr LJ 305 .

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80 *Umesh Suresh Vale v State of Maharashtra* 2014 Cr LJ (NOC) 50 (Bom) (DB).

81 *State of Orissa v Dibakar Naik* (2002) 2 CCR 205 (SC) .

82 *Shankar Kondiba Gore v State of Maharashtra* 1995 Cr LJ 93 (Bom) (DB) .

83 *Madhusudan Satpathi v State of Orissa* AIR 1994 SC 474 .

84 *Sheikh Choollye* 4 WR (Cr) 35, 1 Weir 288; *R v Steam* (1947) 1 All ER 813, p 816 ; *Virsa Singh v State of Punjab* AIR 1958 SC 465, 1958 Cr LJ 818 .

85 Re *Pooshoo* 4 WR (Cr) 33; Re *Muvvala Kondaiya* 1 Weir 300.

86 *King v Aung Nyun* AIR 1940 Rang 259, p 276 (FB) per Mya Bu J, 42 Cr LJ 124 ; *Swami v State* AIR 1954 Pepsu 10, p 14, 54 Cr LJ 1878 ; Re *Pooshoo* 4 WR (Cr) 33; *Muvvala Kondaiya* 1 Weir 300.

87 *King v Aung Nyun* AIR 1940 Rang 259, p 276 (FB), per Mya Bu J, 42 Cr LJ 124.

88 *Kudumula Mahanandi Reddi*AIR 1960 AP 141, p 143, 1960 Cr LJ 303 ; *King v Aung Nyun* AIR 1940 Rang 259, p 272 (FB), 42 (Cr) LJ 124 .

89 *Sawami v State* AIR 1954 Pepsu 10, p 14, 54 Cr LJ 1878 ; *Ramprasad v State of Madhya Pradesh* (1963) 1 Cr LJ 363, 1962 Jab LJ 629 .

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5 *Virsa Singh v State of Punjab* AIR 1958 SC 465, 1958 Cr LJ 818 .

6 *Empress v Punchanun Tantee* 5 WR (Cr) 97 ; *Empress v Fox* ILR 2 All 522 ; *Empress v Ganesh Doobey* ILR 5 Cal 351 ; *Empress v Randhir Singh* ILR 3 All 597 .

7 *Sheikh Rafi v State of Andhra Pradesh* 2007 Cr LJ 2746 (SC) .

8 *Adu Ram v Mukna* 2004 Cr LJ 4674 (SC) .

9 *Beli v Emperor* AIR 1925 Lah 621, 27 Cr LJ 29 ; *Inder Singh v Emperor* AIR 1929 Lah 157, 30 Cr LJ 141 ; *Nur Mohammad Roshen Ein v Emperor* AIR 1933 Lah 883, 35 Cr LJ 65 ; **but see***Allah Ditto v Emperor* AIR 1922 Lah 260, 25 Cr LJ 547 ; *Samand Singh v Emperor* 20 Cr LJ 157 (where the injuries were severe and included several fractures of bones).

10 *Emperor v Sat Narain* AIR 1935 Oudh 381, p 383, 36 Cr LJ 573 ; *Emperor v Rataj* AIR 1932 Oudh 186, 33 Cr LJ 561 .

11 *Harnama v Emperor* 22 Cr LJ 276, p 278 ; *Sukha v State of Rajasthan* AIR 1956 SC 513, p 519, 1956 Cr LJ 923 .

12 *State of Karnataka v Shivappa Gurusiddappa* 1998 Cr LJ 1253 (SC) .

13 *Vijay Bahadur Singh v State of Uttar Pradesh* 1998 Cr LJ 2358 (All) (DB) .

14 *Sardarkhan Zahidkhan v Emperor,* AIR 1916 Bom 191, 192, 17 Cr LJ 530 .

15 *Virsa Singh v State of Punjab,* AIR 1958 SC 465, 468, 1958 Cr LJ 818 ; *Ramprasad v State of Madhya Pradesh* (1963) 1 Cr LJ 363, 1962 Jab LJ 629 ; *Gudar Dusadh v State of Bihar* AIR 1972 SC 952, p 955, 1972 Cr LJ 587 .

16 *Gurmukh Singh v State of Haryana* 2010 Cr LJ 450 (SC), 2009 (11) Scale 688, (2009) 15 SCC 635 .

17 *Tirthi Lal v State of Punjab* 1999 Cr LJ 2356 (P&H) (DB).

18 *Gurmukh Singh v State of Haryana* 2010 Cr LJ 450, p 454 (SC), 2009 (11) Scale 688, (2009) 15 SCC 635 ; *Abani K Debnath v State of Tripura* AIR 2006 SC 518, 2006 Cr LJ 314, (2005) 13 SCC 422, 2005 (9) Scale 531 (Accused gave single dah blow on spur of moment which proved fatal); *Pappu v State of MP* 2006 AIR SCW 3623, (2006) 7 SCC 391, AIR 2006 SC 2659, 2006 (Supp-3) SCR 394, 2006 (7) Scale 24, 2006 Cr LJ 3640 ; *Jagrup Singh v State of Haryana* (1981) 3 SCC 616, AIR 1981 SC 1552 (Single blow from blunt side of Gandhala, accused convicted under s 304, Pt II, IPC); *Gurmail Singh v State of Punjab* (1982) 3 SCC 185, AIR 1982 SC 1466 (Single blow of spear on the chest of the deceased causing death); *Kulwant Rai v State of Punjab* AIR 1982 SC 126 (On a short quarrel, accused give single dagger blow which proved fatal); *Jagtar Singh v State of Punjab* (1983) 2 SCC 342, AIR 1983 SC 463 (Single fatal knife blow on chest of the deceased); *Hem Raj v State (Delhi Administration)* (1990) Supp SCC 291, AIR 1990 SC 2252 (Single fatal stab injury on chest of the accused).

19 *Settu v State of Tamil Nadu* 2006 Cr LJ 3889, AIR 2006 SC 2986, 2006 (8) Scale 382, (2006) 10 SCC 549 ; *Pulcherla Nagaraju v State of Andhra Pradesh* 2006 Cr LJ 3899 (SC), AIR 2006 SC 3010, 2006 (8) Scale 133, (2006) 11 SCC 444 (Single forceful blow by barisa (a long dagger) on vital part of the body of the deceased, conviction under s 302, IPC, upheld.

20 *Katta Surendra v State of UP* 2008 Cr LJ 3196, p 3198 (SC), (2008) 9 Scale 359, 2008 AIR SCW 4271, (2008) 11 SCC 360 ; *Raj Pal v State of Haryana* (2006) 9 SCC 678 ; *Jai Dev v State of Punjab* 1963 (3) SCR 489, AIR 1963 SC 612 ; *Shaikh Majid v State of Maharashtra* 2008 Cr LJ 1062, p 1065 (SC), AIR 2008 SC 1091, 2008 (1) Scale 561, (2008) 11 SCC 131 .

21 *Andhari Naik v State of Orissa* 1999 Cr LJ 1346 (Ori) (DB) .

22 *Tamil Mani v State* 1997 Cr LJ 144 (Mad) (DB) .

23 *Abor Ahmed v King* AIR 1938 Rang 17, 39 Cr LJ 244, **dissenting** from *Kra Chan U v Emperor* AIR 1923 Rang 247, 25 Cr LJ 207 ; *Behari v State* AIR 1953 All 203, p 207, 54 Cr LJ 565 ; *Mohammad v Emperor* AIR 1932 Lah 254 (2) ; *Gupta v Rex* AIR 1949 All 109, 50 Cr LJ 127 .

24 *Ram Kumar Pal v State of West Bengal* 1999 Cr LJ 3868 (Cal) (DB) .

25 *Baij Nath v State of Uttar Pradesh* 1994 Cr LJ 398 (All) (DB) .

26 *Baghia Urang v State of Assam* 2004 Cr LJ 2249 (Gau) (DB) .

27 *Thangaiya v State of Tamil Nadu* 2005 Cr LJ 684, p 689, 2005 (1) Crimes 319 (SC), 2005 SCC (Cri) 1284, 2004 (10) JT 421, AIR 2005 SC 1142, 2004 (10) Scale 319, (2005) 9 SCC 650 .

28 *Abani K Debnath v State of Tripura* 2006 Cr LJ 314(SC); *Ram Gopal v State of Rajasthan* 2006 Cr LJ 362 (Raj) (DB) .

29 *Ramaswamy v State of Tamil Nadu* 1993 Cr LJ 3253 (SC) .

30 *Vedpal v State of Haryana* 1995 Cr LJ 3556 (P&H) (DB).

31 *Om Prakash v State of Haryana* AIR 1981 SC 642, 1981 Cr LJ 30 .

32 *Karhna Tudu v State of Assam* 1994 Cr LJ 432 (Gau) (DB) .

33 *Suresh v State* (1988) 35 DLT 411 (Del) (DB).

34 *Balraje v State of Maharashtra* 2010 Cr LJ 3443, 2010 AIR SCW 3707, (2010) 6 SCC 673, 2010 (5) Scale 576 .

35 *Vedpal v State of Haryana* 1995 Cr LJ 3556 (P&H) (DB).

36 *Pradip Choudhary v State* 1985 Cr LJ 1770 (Ori) (DB) ; *Kana Majhi and Anor v State* 1985 Cr LJ 1876 (Ori) (DB) ; *Sandhya Jadhav v State of Maharashtra* 2006 Cr LJ 2111, p 2113, 2006 SCC (Cri) 394, 2006 (3) Scale 665, (2006) 4 SCC 653 .

37 *Som Raj v State of HP* 2013 Cr LJ 2237 (SC), AIR 2013 SC 1649, 2013 (2) Scale 774, (2013) 14 SCC 246 .

38 *Ambaram v State of MP* 2007 Cr LJ 2743, p 2746 (SC), 2007 (6) Scale 632, 2007 AIR SCW 2745, 2007 (4) Supreme 252, (2007) 12 SCC 105 .

39 *State of Punjab v Gurcharan Singh* 1998 Cr LJ 4560 (SC) .

40 *Bhika v State of Rajasthan* 1997 Cr LJ 193 (Raj) (DB) .

41 *Dharam Pal v State* 2007 Cr LJ (NOC) 383 (Del) (DB).

42 *Ramdas v State of MP* 2009 Cr LJ 1136, p 1137 (SC), 2009 AIR SCW 604, 2009 (1) 364, (2009) 4 SCC 57 .

43 *Daya Nand v State of Haryana* 2008 Cr LJ 2975 (SC), AIR 2008 SC 1823, 2008 (6) Scale 62, 2008 AIR SCW 2515, (2008) 15 SCC 717 .

44 Per Kulwant Sahay J, in *Gahbar Pande v Emperor* AIR 1928 Pat 169, p 171, 29 Cr LJ 17 ; *Public Prosecutor v Madathi* AIR 1942 Mad 415, 43 Cr LJ 671 .

45 *Pulicherla Nagaraju v State of Andhra Pradesh* 2006 Cr LJ 3899 (SC) .

46 *Pappu v State of Madhya Pradesh* 2006 Cr LJ 3640 (SC) .

47 *Bavisetting Kameshwra Rao v State of AP* 2008 Cr LJ 2987 (SC), AIR 2008 SC 1854, 2008 (4) Scale 452, (2008) 15 SCC 725 .

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51 *Bashir v State* AIR 1953 All 668, 54 Cr LJ 1505 .

52 *Labhu Ram v State of Punjab* 1996 Cr LJ 399 (SC) .

53 *Harabailu Kariappa v State of Karnataka* 1996 Cr LJ 321 (Kant) (DB) .

54 *Munnilal v Emperor* AIR 1943 All 344, p 345 .

55 *Nanak v Emperor* AIR 1931 Lah 189, p 191, 32 Cr LJ 1205 .

56 *Lunano Lotha v State of Nagaland* 1981 Cr LJ 522, p 526 (Gau) (DB) .

57 *Lunano Lotha v State of Nagaland* 1981 Cr LJ 522, p 527 (Gau) (DB) .

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59 *Mana Gendal v Emperor* AIR 1930 Bom 483, 32 Cr LJ 289 .

60 Re *Dadi Abdul Gaffoor*AIR 1955 AP 24, 56 Cr LJ 329 .

61 *Kelu Ayyappan v State* AIR 1959 Ker 230, p 233, 1959 Cr LJ 981 .

62 *Caetano Fernandes v State* (1992) 1 CCR 860 (Bom) (DB).

63 *Ibid*.

64 *Prakash v State of Madhya Pradesh* (1944) 1 CCR 445 (MP)(DB); *Pallapolu Narasimha Rao v State of Andhra Pradesh* 1997 Cr LJ 4448 (AP) (DB) ; *Hari Shankar v State of Rajasthan* 1999 Cr LJ 2902 (SC) ; *Sham Madhavrao Rupvate v State of Maharashtra* 2000 Cr LJ 2389 (Bom) (DB) ; *Mohan Das v State of Rajasthan* (2002) 1 CCR 495 (Raj) (DB).

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82 *Ghulam v Crown* AIR 1950 Lah 149, 51 Cr LJ 962, **dissenting** from *Rahmat v Emperor* 30 PR (Cr) 1902, 6 PLR 1903 .

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87 *Munney v State of UP* 2006 Cr LJ 4064 (SC), AIR 2006 SC 2902, 2006 (7) Scale 510, 2006 (5) All LJ 690 (SC), (2006) 12 SCC 697 .

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Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 300.

Murder.--

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is

caused is done with the intention of causing death, or--

Secondly.--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly.--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

Fourthly.--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

(a) *A* shoots *Z* with the intention of killing him. *Z* dies in consequence. *A* commits murder.2138

(b) *A*, knowing that *Z* is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. *Z* dies in consequence of the blow. *A* is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if *A*, not knowing that *Z* is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) *A* intentionally gives *Z* a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. *Z* dies in consequence. Here, *A* is guilty of murder, although he may not have intended to cause *Z's* death.

(d) *A* without any excuse fires a loaded canon into a crowd of persons and kills one of them. *A* is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1.--**When culpable homicide is not murder**.--Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:--

First.--That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.--That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.--That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.--Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) *A*, under the influence of passion excited by a provocation given by *Z*, intentionally kills *Y, Z's* child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) *Y* gives grave and sudden provocation to *A. A*, on this provocation, fires a pistol at *Y*, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. *A* kills *Z*. Here *A* has not committed murder, but merely culpable homicide.

(c) *A* is lawfully arrested by *Z*, a bailiff. *A* is excited to sudden and violent passion by the arrest, and kills *Z*. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) *A* appears as a witness before *Z*, a Magistrate. *Z* says that he does not believe a word of *A's* deposition, and that *A* has perjured himself. *A* is moved to sudden passion by these words, and kills *Z*. This is murder.2139

(e) *A* attempts to pull *Z's* nose. *Z*, in the exercise of the right of private defence, lays hold of *A* to prevent him from doing so. *A* is moved to sudden and violent passion in consequence and kills *Z*. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) *Z* strikes *B. B* is by this provocation excited to violent rage. *A*, a bystander, intending to take advantage of B's rage, and to cause him to kill *Z*, puts a knife into *B's* hand for that purpose. *B* kills *Z* with the knife. Here *B* may have committed only culpable homicide, but *A* is guilty of murder.

Exception 2.--Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration

Z attempts to horsewhip *A*, not in such a manner as to cause grievous hurt to *A. A* draws out a pistol. *Z* persists in the assault. *A*, believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots *Z* dead. *A* has not committed murder, but only culpable homicide.

Exception 3.--Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers, given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner.

Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.--Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration

A, by instigation, voluntarily causes *Z*, a person under eighteen years of age, to commit suicide. Here, on account of *Z's* youth, he was incapable of giving consent to his own death; *A* has therefore, abetted murder.21402141

Comments

1. Scope

The nature of culpable homicide having been explained in s 299, IPC, this section sets out the circumstances when culpable homicide turns into 'murder' which is only an aggravated form of culpable homicide.[24]Section 300, IPC, is not attracted in the absence of any intention, on the part of the accused, to cause death of the deceased, particularly when he (*i.e*. accused) first gives *lathi* blows on non-vital parts of body of the deceased.[25] Therefore, unless the cause is brought within any of the five exceptions

to this section, culpable homicide will be murder; but despite the fact that none of the exceptions has been pleaded, the prosecution is bound to bring the cause under any of the four clauses of this section.[26] The prosecution has to prove in every case of culpable homicide to attract the provisions of s 300, IPC, that, the act by which the death was caused was done (i) with the intention of causing death, or (ii) with the intention of causing such bodily injury which the offender knows to be likely to cause the death of the person to whom the harm is caused, or (iii) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or (iv) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and without any excuse for incurring the risk of causing death.[27]

The section, defines as to what must be proved to establish a *prima facie* murder unless any of the mitigating circumstances, set out in the five exceptions, applies. If any of them applies, the *prima facie* presumption, that the offence is murder, is removed and the offence becomes 'culpable homicide not amounting to murder'.[28] It must, however, be noted that the exceptions, carved out under this section for mitigating the crime, would be inapplicable to a murder, committed in the course of the offence of dacoity, because the word 'murder', as used in s 396, is not the same thing as 'murder' defined in this section.[29]

2. English Law

To establish a case of murder the prosecution must prove: (1) that the unlawful death of the victim was caused by an act or omission of the defendant; and (2) that the defendant did that act or omitted to act with 'malice aforethought', express or implied. The burden of proof remains, throughout, on the prosecution and, apart from the special defences of insanity and diminished responsibility and the anomalous2142 case of suicide pacts, it is at no time incumbent upon the defendant to establish any other defence, or partial defence, to the charge. The mental element of murder, traditionally called 'malice aforethought', may take the form of 'an intention unlawfully to kill (express malice)' or 'an intention unlawfully to cause grievous bodily harm (implied malice)'. Therefore, 'intent' is the essential element in both forms of 'malice aforethought'.

Further, it has been held by the Supreme Court of United Kingdom that: 'Both parties in gunfight guilty of murder of bystander killed by stray bullet; guilt was result of either combination of common law principles relating to aiding and abetting and doctrine of transferred malice operated, or conclusion that both parties were principals to joint enterprise to engage in unlawful violence with intent to cause death or serious injury.'[30] It has also been held that, 'The public interest in the administration of justice is best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning but irrespective of the wishes of trial counsel, any obvious alternative offence which there was evidence to support: thus on a charge of murder it is in the interests of justice that a judge direct a jury as to manslaughter, as an alternative to murder.'[31]

3. Canadian Law

Under the Canadian law, 'Murder' is one of the three forms of culpable homicide: murder, manslaughter or infanticide. Further, it is an indictable offence to commit first degree murder or second degree murder..

Actus Reus

A person commits homicide when, directly or indirectly, by any means, he or she causes the death of a human being. There are two kinds of homicide: 'culpable' and 'non-culpable' homicide. 'Non-culpable' homicide is not an offence. Culpable homicide means to cause another person's death by:

- an unlawful act,
- criminal negligence,
- causing, by threats or fear of violence or by deception, the deceased to do anything that

causes death, or
- wilfully frightening a child or sick person so as to cause death.

The test for 'death' is not 'brain death' but organ death *i.e.* to see whether or not the deceased's vital organs, including the heart, continue to operate. Where a person, by an act or omission, does anything that results in the death of another person, he is deemed to cause the death, notwithstanding that death from such cause might have been prevented by resorting to proper means. Where a person causes a bodily injury to another person, which itself is of a dangerous nature and from which death results, he is deemed to have caused the death, notwithstanding whether the immediate cause of death is proper or improper treatment that is applied in good faith. Where a person causes a bodily injury to another person resulting in death, he is deemed to have caused the death notwithstanding that the effect of the bodily injury is only to accelerate the death from a disease or disorder arising from some other cause.2143

These situations are fact-specific, and the trial judge is obliged to give the jury a clear and specific instruction with respect to intervening events. Where an intervening faulty CPR procedure appeared on the evidence to be the cause of death, it was critical that the jury understood their obligation to consider whether or not any independent, intervening and therefore, exculpatory factors occurred after the accused's acts, thereby severing the link in the chain that tied them to the death. The decision of treating physicians to pursue a conservative, non-interventionist treatment of the 77 year old man who had been shot, in view of his age and health, could not exculpate the accused, when the man died three weeks later. Organs such as kidneys may be removed for transplantation purposes before a mortally injured person is pronounced dead.

Causation

The applicable standard for causation in relation to all homicide cases (with one exception for first-degree murder) is a 'significant contributing cause'. This is constitutionally valid. No person commits culpable homicide where he causes the death of a human being by any influence on the mind alone or by any disorder or disease resulting from influence on the mind alone. However, causing the death of a child or sick person by wilfully frightening him or her may constitute culpable homicide. No conviction lay where the deceased died from acute heart failure caused by stress resulting from the accused's break-in and subsequent struggle.

Mens Rea

Culpable homicide is murder in the following circumstances:

- Intent to kill.

  The accused causes death with one of the specified intentions required for murder *i.e.*, the accused means to cause the deceased's death.
- Intent to cause bodily harm, likely to cause death, and is reckless as to whether death ensues or not.

  In the absence of the intent to kill, murder requires the death of a human being by bodily harm of a sufficient gravity such that it is likely to cause death. Since death has in fact resulted, this requirement will generally, however illogically, operate except in cases where the bodily harm actually inflicted only caused death because of some unusual or unexpected chain of circumstances. Then the argument will remain plausible that the bodily harm intended by the accused was not in fact likely to cause death. The required accompanying mental elements are threefold: the intention to cause that bodily harm which is likely to cause death, the knowledge that the intended bodily harm is likely to cause death and recklessness as to whether death ensues or not. In the first element, the accused must foresee a likelihood of death flowing from the bodily harm she or he is intentionally causing the victim, therefore foresight of a mere danger of death is not sufficient. The element 'likely'

in the *mens rea* of murder in s 229(a)(ii) means 'a substantial degree of probability'. Recklessness requires advertence to the prohibited consequence and the conscious running of that risk. It is now clear that recklessness requires advertence to the probability (likelihood) of the prohibited consequence and not merely the possibility thereof.2144

- o Unintended deceased.

  The accused would otherwise be guilty of murder in respect of an intended target, but happens to kill the wrong person. This is 'the doctrine of transferred intent' where the mental element is simply 'transferred' from the intended target to the actual deceased. Even in a case of transferred intent, the accused at the time of the act that kills the deceased must have the specific requisite intent in relation to the intended target. The 'transferred intent doctrine' has no application where the accused intends to commit suicide but inadvertently kills another.
- o No intent to kill, but death likely.

  The accused is engaged in an unlawful object and foresight of death becomes sufficient *mens rea*. The objective liability phrase 'ought to know' in the Code as written is constitutionally invalid under s 7 of the Canadian Charter of Rights and Freedoms and should be read out of the section. Thus, murder is made out upon simple foresight of the likelihood of death where the accused acts for 'an unlawful object'. In other words, the mental elements 'intent to cause bodily harm' and 'recklessness as to whether death ensues or not' are replaced by 'unlawful purpose'. The fact that the accused acts for an unlawful purpose is viewed as sufficiently equivalent in regard to culpability to justify discarding the other mental requirements since the accused is still required to have a foresight of likelihood of death. Thus, the section as read down is constitutional. There are three components under s 229(c) : an unlawful object ('for an unlawful object'); a dangerous act ('does anything that he knows is likely to cause death and thereby causes death to a human being'); and knowledge or foresight of; likelihood of death ('that he knows is likely to cause death'). A gang member who is prepared to engage in a shootout on a public street with an opposing gang can be liable for murder when an innocent bystander is shot to death.
- o Murder in commission of specified offences.

  This applies where the accused is engaged in one of the specified offences and the intentional use of bodily harm in aid thereof or in aid of his escape causes death. The specified offences are: committing or attempting to commit high treason or treason, or sabotage, piratical acts, hijacking an aircraft, escape or rescue from prison or lawful custody, assaulting a peace officer, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, kidnapping and forcible confinement, hostage taking, robbery, breaking and entering, and arson. As the offence is written in the Code, the accused may be convicted whether or not he or she means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if the accused either meant to cause bodily harm, administer a stupefying or overpowering thing or wilfully stops the breath of a human being, for the purpose of facilitating either the commission of the offence or his flight after committing or attempting to commit the offence, and the death ensues from the bodily harm, the accused for the purposes of flight, and the death ensues therefrom. This offence is unconstitutional, as the minimum constitutionally acceptable *mens rea* for murder is at least foresight of death and the provisions of this section fail to comply with that consideration.2145

While there must be concurrence of the *mens rea* and *actus reus*, the two elements need not be completely co-extensive. If death results after a series of wrongful acts that are part of a single transaction, so long as the requisite mental state coincides at some point with the wrongful acts, it will be sufficient to constitute the offence.

If A assaults B, leaving him unconscious on the floor of a building in which the assault occurred and before B regains consciousness he is killed when the building collapses in a sudden earthquake, A cannot be

held criminally responsible for the homicide. The law would attribute B's death to another intervening cause and not to A's assault even though B would not have been in the building but for the force of A's blow that rendered him unconscious. The assault was the reason that B was there but the blow was not the cause of the man's death.[32]

The transfer of intent applies equally to the elements of planned and deliberate action. If the accused intends to kill one person or himself or intends to cause serious bodily harm to one person or to himself knowing that he is likely to cause death, and he deliberately formulates a plan to carry out that act, but in so doing accidentally or mistakenly kills someone else, then he is still guilty of first degree murder regarding that killing.[33]

4. Essentials of Murder

Except in cases covered by the five exceptions mentioned in s 300 of the IPC, culpable homicide is murder if the act by which the death is caused is done with the intention of causing death, or if the act falls within any of the 3 clauses of s 300, namely, secondly, thirdly and fourthly.[34] In order that culpable homicide may amount to a murder, as enunciated in this section, the following two things are essential:

(1) The killing must be accompanied by the intention or knowledge, specified in this section. Culpable homicide is not *prime facie* murder. It lies on the prosecution to prove the requisite intention or knowledge.[35] If the prosecution fails to do this, but the intention or knowledge, requisite under s 299, is established, then the accused is guilty only of culpable homicide not amounting to murder.[36]

Further, 'intent' and 'knowledge' postulate the existence of positive mental attitude and this mental condition is the special *mens rea* which is necessary for the offence.[37]

(2) The killing must not fall within one or other of the five exceptions, specified in this section. If it does, the accused is again guilty only of culpable homicide not amounting to murder.[38]2146

5. Crucial Question

The crucial question is as to which was the appropriate provision to be applied. In the scheme of the IPC, 'culpable homicide' is 'genus' and 'murder' its 'specie'. All 'murder' is 'culpable homicide', but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder' is culpable homicide not amounting to murder.[39]

6. Court's Approach in Four Stages

The proper way, in which a court should approach the facts and apply the law in cases where one person has, by doing an act, caused the death of another person, may be expressed in stages as follows:

First Stage

It should first be established, to the satisfaction of the court, that the accused person has done an act by doing which he has caused the death of another person, *i.e.*, there must be a relation between the act, done by the accused, and the death of the victim of the offence.

Second Stage

The court must next consider whether that act on the part of the accused amounts to culpable homicide, *i.e*., whether the act of the accused comes within the purview of s 299, IPC .

Third Stage

If it is established that the act, which caused the death, was done, whether with one of the two intentions, or with the knowledge necessary to cause that act to amount to culpable homicide, then, and then only, s 300, IPC comes into operation and, therefore, the next thing to do is to ascertain whether such act was done either (1) with one of the three intentions, that is to say, with the intention of causing either (i) death, or (ii) such bodily injury as the offender knew to be likely to cause the death of the person to whom the harm was caused, or (iii) such bodily injury as was sufficient, in the ordinary course of nature, to cause death; or (2) (i) with the knowledge that the act was so imminently dangerous that it must, in all probability, cause either (a) death or (b) such bodily injury as was likely to cause death, and (ii) without any excuse for incurring the risk of causing either (a) death or (b) such bodily injury as was likely to cause death.

Fourth Stage

If it has been proved that the act either (a) was done by the accused with the intention of causing death, or (b) it fulfilled one of the other requirements of s 299, IPC and also fulfilled one of the requirements of s 300, IPC, then, it must further be considered whether, on the facts of the particular case, the culpable homicide is brought down from the higher plane of murder, to the lower plane of culpable2147 homicide not amounting to murder, by reason of the act having been done, either (a) in an excessive, but *bona fide*, exercise of the right of private defence, or (b) whilst the accused was deprived of the power of self-control, by grave and sudden provocation, or (c) in sudden fight in the heat of passion, or (d) in such circumstances as are mentioned in either exception 3 or exception 4 in s 300 . If culpable homicide is not amounting to murder, the only matter to be considered at the fourth stage is whether the accused has established (if such is his case) the right of private defence as a complete defence under s 96 .[40]

7. 'Murder' Distinguished from 'Culpable Homicide'

The distinction between murder and culpable homicide not amounting to murder is often lost sight of, resulting in undue liberality in favour of undeserving culprits like police officers.[41] Two offences involve the killing of a person, *viz*, the offence of 'culpable homicide' and the more heinous offence of 'murder'. What distinguishes these two offences is the presence of a special *mens rea*, which consists of four mental attitudes, in the presence of any of which the lesser offence becomes the greater. These four mental attitudes are stated in s 300 and they distinguish murder from culpable homicide. Unless the offence can be said to involve, at least, one such mental attitude, it cannot be murder.[42] The distinction between the offences of culpable homicide and murder is the presence of special *mens rea* which consists of four mental attitudes in the presence of any of which the lesser offence becomes greater. These attitudes are stated in s 300, IPC, as distinguishing murder from culpable homicide not amounting to murder.[43] In considering whether the offence is murder or culpable homicide not amounting to murder, the manner of causing injuries to the victim by accused persons as deposed by the prosecution witness, nature of injuries caused to the victim, part of the body where accused person/persons caused injuries to the victim, the weapon/weapons used in the commission of crime and conduct of the offender/offenders are to be taken into account.[44]

An injury 'likely to cause death', within the meaning of s 299(2) may, or may not, fall within the descriptions, mentioned in cll (2) and (3) of s 300, which both clauses together do not equal culpable homicide in s 299(2) .[45] The offence will amount to murder if the conditions, laid down in any one, or more, of the four clauses of s 300, are satisfied. If the offence comes under s 299, or under one, or other, of the exceptions to s 300, it will be culpable homicide not amounting to murder.[46]If an act is done with the knowledge that the doer is likely by such act to cause death, the offence is culpable homicide unless the act done is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death2148 and is committed without any excuse, in which case the offence is murder. If the act is done with the intention of causing such bodily injury as is likely to cause death, the offence is culpable homicide unless the offender knows that the act done is likely to cause the death of the person to whom the harm is caused or if the bodily injury is sufficient, in the ordinary course of nature, to cause death.[47] The degree of knowledge is a question of fact.[48] Putting it shortly, culpable homicide, as defined

under s 299, does not amount to murder (a) where, though the evidence is sufficient to constitute murder, one or more of the exceptions to s 300 apply, or (b) where the degree of *mens rea*, specified under s 299, is present, but not the special degrees referred to by s 300 .[49] To render culpable homicide murder, the case must come within the provisions of cl (1), or (2), or (3), or (4), of s 300 .[50]

8. Culpable Homicide is *Genus* and Murder its *Specie*--Three Degrees of Culpable Homicide

In the scheme of the IPC, 'culpable homicide' is *genus* and 'murder' its *specie*. All 'murder' is culpable homicide, but not *vice-versa*. Speaking generally, 'culpable homicide' sans 'special characteristics of murder' is culpable homicide not amounting to murder. For purposes of fixing punishment, proportionate to the gravity of this offence, IPC practically recognises three degrees of culpable homicide.[51] The first is what may be called 'culpable homicide of the first degree'. This is the gravest form of culpable homicide which is defined in s 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of s 304 . And then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment, provided for it, is also the lowest among punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of s 304 .[52]

9. Tabular Comparison of Culpable Homicide and Murder

The terms of ss 299 and 300 are almost identical as readily appears from the following tabular comparison:[53]2149

Section 299	**Section 300**
A person commits culpable homicide if the act, by which the death is caused, is done--	Subject to certain exceptions, culpable homicide is murder if the act by which the death is caused, is done--
Intention	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
	(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death; or
Knowledge	
(c) with the knowledge that the act is likely to cause death	(4) with the knowledge that the act is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

On a glance of the above table, it will be noticed that not only the *actus reus*, but also the mental elements of intention or knowledge, required by the two sections, are the same and the only distinction between the offences lies in the degree of risk to human life which the offender intends or knows. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder.[54]

10. Court to Focus on Keywords used in Sections 299 and 300

The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the courts. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to2150 the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of ss 299 and 300 .[55]

11. Section 299,Section 300 and Section 304A

Commentary under the same heading in s 299, *ante* and commentary under s 304A, *post*, may be referred to.

The cases in which death of the victim is caused by the accused with the intention or knowledge to kill are either covered under culpable homicide as defined under s 299, IPC, and made punishable under s 304, IPC, or murder as defined in s 300, IPC and made punishable under s 302, IPC . The essentials of s 299, IPC, are given in synopsis note 5 of s 299, IPC, and that of s 300, IPC, are given in synopsis note 4 of that section and their distinctions in the last synopsis. There is another category of cases in which the death of the victim is caused by the accused on account of his rash or negligent act. There cases are covered under s 304A, IPC .

The provisions of s 304A, IPC apply to cases where there is no intention to cause death and no knowledge that the act done in all probabilities will cause death. Therefore, this provision is directed at offences outside the range of ss 299 and 300, IPC and obviously contemplates those cases into which neither intention, nor knowledge enters. The words 'not amounting to culpable homicide' in the section are very significant and it must therefore be understood that intentionally or knowingly inflicted injury or violence directly and wilfully caused is excluded. The section applies only to such acts which are rash or negligent and are directly the cause of death of another person. In other words, a rash act is primarily an over hasty act as opposed to a deliberate act, but done without due care and caution. Then the question of whether the conduct of the accused amounted to culpable rashness or negligence depends on the amount of care and circumspection which a prudent and reasonable man would consider fit to be sufficient and this depends on the circumstances in each case.[56]

In *Sadhu Singh Harnam Singh v State of Pepsu* ,[57] a *mahant* went to the house of the accused who was having a drink party and the accused was respectful to him and was very anxious to show all hospitality to him. The accused wanted the *mahant* to take meals and spend the night with him. However, on seeing that the *mahant* was going away, the accused fired his gun without aiming at the *mahant* just to prevent him from leaving his place by terrifying him to some extent, but unfortunately the shot hit the *mahant* and he died. The Apex Court held that on the materials placed, it was not proved that the accused had an intention of firing at the *mahant*, but it was a wholly rash and negligent act on the part of the accused and accordingly convicted him under s 304A, IPC .

In *Meera Puri v State of Nagaland* ,[58] the accused fired a rifle with the knowledge that the children and others were near about, and the same resulted in the death of a child. The court noted that the accused did not aim at the child or fire at the party. Gowsami CJ, as he then was, who spoke for the Bench, held as under:2151

> By her act in firing the rifle in the way she did with the full knowledge of the children and others near about, she has done a rash and negligent act, which, although does not amount to culpable homicide, brings her within the mischief of s 304-A, Penal Code. We consider her rash and negligent act in firing in that way as culpable rashness and negligence and act merely an error of judgment or defect of (sic) intelligence.

In *Nga San Win*,[59] the accused, a sub-inspector of police while pursuing a party of gamblers fired four shots in the air, but one of the persons got injured and died. Noting that the sub-inspector fired from a short distance from the crowd, the court observed that if he had only taken sufficient care and caution, he would not have fired the four shots, while running, even into the air from such a short distance and that he acted with over-hastiness and held him to be guilty under s 304A, IPC . In *Emperor v Morgan and Anr* ,[60] two accused persons belonging to the light infantry were practising target shooting at a place by the side of a public road, due to which a man was fatally wounded. The Division Bench of the Calcutta High Court found them guilty under s 304A, IPC holding that they fired the rifles without having taken any precaution or the use of the slightest circumspection with regard to the safety of others. In *Balwant Singh v State of Punjab and Anr* ,[61] the accused, a police constable, with a view to maintain law and order killed two bystanders with his service rifle. The accused did not aim at the two deceased persons who were away. It was night time and it could not definitely be said that the accused would have seen them. In fact the prosecution witness and his brother who started assaulting the head-constable and the accused were not hit by the shots fired by the accused. That itself showed that the accused fired his rifle without any aim and only to scare away the people; including the prosecution witness and his brother and he did so as directed by the head-constable who was in command of the police party. However, even in such a situation he had to act in a prudent manner but when he acted in such haste, rashly, and without circumspection and due care and caution with regard to the safety of other innocent people then the only inference is that his rash act amounted to culpable rashness attracting the provisions of s 304A, IPC . The conviction of the accused was, therefore, altered from s 302, IPC, by the open court.

12. 'Except in the Cases Hereinafter Excepted'

Except in cases covered by the five exceptions mentioned in s 300 of the IPC, culpable homicide is murder if the act by which the death caused is done with the intention of causing death, or if the act falls within any of the three clauses of s 300, namely, secondly, thirdly and fourthly. An offence cannot amount to murder unless it falls within the definition of 'culpable homicide' because s 300 merely points out the cases in which culpable homicide is murder. But an offence may amount to culpable homicide without amounting to murder. Thus, culpable homicide may not amount to murder (a) where, though the evidence is sufficient to constitute murder, one, or more, of the five exceptions to s 300 apply, or (b) where the degree of *mens rea*, specified under s 299, IPC, is present, but not the special degrees referred to by s 300 . So, the question, as to whether a particular case is within one of the said exceptions, does not arise for consideration unless the prosecution has established a case of murder. If the prosecution has proved that culpable homicide (under s 299, IPC) has been committed by the accused, but has failed to prove that such culpable2152 homicide amounts to murder (under s 300), it is improper, and indeed useless, to consider whether any of the mitigating factors are present.

13. Clause Firstly--"With the Intention of Causing Death"

By virtue of this clause, which corresponds with, and is equivalent to, the first clause of s 299, an offence is murder if there is an intention to kill. The intention to kill a person has to be gathered from certain factors such as, the nature of the weapon used and the vital part on which the injury was inflicted, and the force with which the weapon was used and other attendant circumstances. Once the intention to kill is proved, the offence is murder unless one of the exceptions applies, in which case the offence is reduced to culpable homicide not amounting to murder.[62] If the court comes to the conclusion that the accused had common intention to kill the deceased and this conclusion is further fortified by the medical evidence, the accused are guilty of murder under ss 302 / 34, IPC .[63]Further, it has been held that the intention of the accused to cause death can be ascertained from the resultant injuries.[64] Where injuries are inflicted with the intention of killing a person and death ensues as a result of the injuries, it is a clear case of murder falling under this clause.[65] Where the accused was held responsible not only for the fatal injury but other injuries too which were amongst 16 injuries found on the deceased, the magnitude of the damage apparent on the dead body besides the incised wound inflicted on deceased by accused with the aid of a dagger clearly indicated his intention to cause murder of the deceased.[66] Where the accused abused the deceased by holding his collar and brandishing the knife, however the deceased overpowered the accused and sat on his chest, the co-accused at the call of the accused delivered a knife-blow on victim's

thigh by which the accused got released from the victim's grip and without any provocation dealt a very severe knife-blow on the stomach of the deceased causing severe injuries to the vital parts of the body resulting in his death, it cannot be held that the accused had no intention to cause the murderous assault on the deceased.[67] Where a knife injury was caused directly and deep into the stomach of the deceased, a vital part which led to his death in a short time, it cannot be said that there was no intention to cause that very injury which had led ultimately to the death of the deceased. Therefore, the accused were convicted under s 302, IPC .[68] Where, the accused A2 and A3 caught hold of the deceased and the accused A1 swiftly took out knife from his waist and stabbed the deceased causing death, it was held that, the acts on the part of A2 and A3 stood on a different footing than the act committed by A1. However, the common intention to attack the deceased was there in the minds of A2 and A3 along with A1 and it was proved that the 3 accused persons came together2153 and they wanted to attack the deceased. Further, A2 and A3 were having knowledge that their acts along with the acts of A1 were likely to cause the death of the deceased, but at the same time, an intention to commit murder could not be attributed to A2 and A3 as apart from catching hold of the deceased and stopping him, A2 and A3 had not attacked the deceased.[69] Where the assailants accused gave two lathi blows to the deceased S, which had caused facture of the ribs and pierced his lungs and the injuries caused were neither unintentional nor accidental, the doctor had opined that the injuries caused were sufficient to cause death in the normal course; it was held that the guilt of the accused fell under s 300, cl thirdly, punishable under s 302, IPC .[70]

Where there was a dispute between the accused and the deceased over the removal of the boundary stone, the accused assaulted the deceased with axe over his head and back of the neck of the deceased resulting in fracture and ultimate death, it was held that the guilt of the accused fell under s 302 and not s 304, IPC .[71]

Where the accused assaulted the deceased in such a manner that the deceased suffered grievous injuries which were sufficient to cause death, but the injuries were not inflicted by the accused to kill the deceased, the use of the words *Maro Maro* by the accused did not indicate that they intended to cause the death of the deceased. The conviction of the accused under s 302, IPC was altered to one under s 304, Pt II, IPC .[72]

The single-injury theory cannot be made applicable to a case where a deadly weapon like firearm is used. Even a single-injury caused by a firearm would only lead to an inference that the death was caused intentionally.[73] Firing two shots successively at a person clearly shows a murderous intent.[74] Where the accused set fire to the single room hut, in which the deceased was sleeping, after locking the door of the room from outside and also prevented the villagers from going to the rescue of the helpless inmate of the room, it was held that the intention of the accused to kill the deceased was clear and they were liable for murder.[75] When the assault was given by a sword on the head of a victim with such a force that grievous cut and bleeding injuries occurred on the head of the deceased such that his brain matter was exposed, there can be no manner of doubt that the intention of the accused was to cause the death of the deceased.[76] In a case, the intention to cause the death was inferred from the nature of the injuries caused.[77] Where as many as 34 injuries by an axe had been2154 caused, it was held that intention to cause death may be inferred from the nature and number of injuries.[78] Where a person causes an injury on a vital part, the intention to kill can be attributed to him.[79] Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant.[80] Where the accused had inflicted injury by axe on the head of the deceased and the medical officer who conducted autopsy examination deposed that such injury was sufficient in the ordinary course of nature to cause death, the case fell under s 302 and not under s 304, Pt II, IPC .[81] Where an assault with a *lathi* is made on the head, the intention may not be to kill; if, however, the injury is inflicted on the chest with a long knife, the intention to kill is clear.[82] Illustration (a) to s 300, and (a), (c), (d), (e), and (f) to exception 1, s 300, IPC, illustrate cases falling under the first clause of this section.

As stated earlier, this clause contemplates the intention to cause death. Intention, which is a question of fact, when proved, is an almost necessary inference from the established facts. As a basic rule, one may say that when the doer of an act knows that his act will result in death, he should be deemed to have intended to cause death. Every man is, in law, deemed to know and to intend the natural and probable

consequences of his act. This clause would, therefore, apply only when the culprit or culprits either knew, or must have known, that death would be the result of his or their act.[83] Where the deceased after consuming liquor entered the house of the accused, and did not leave the house despite the request of the accused, the appellant inflicted a blow with a spade on the head of the deceased; the deceased died after five days, it was held that the accused had no intention to cause the death of the deceased, and he was convicted under s 304, Pt II, IPC .[84]

There was evidence that the accused was unhappy with the quality of the food prepared by the deceased cook, and the accused assaulted him with kicks and fists causing his death. The deceased had sustained multiple contusions; however, the nature of injuries of the deceased did not suggest that the accused intended to cause death of the deceased. Therefore, the conviction of the accused under s 302, IPC was altered to one under s 304, Pt II, IPC .[85]

Intention

Where the accused had no intention to cause the death of the deceased but knowledge could be imputed to him as his act was one that was likely to cause death *viz*. the accused dashed the head of the deceased against the wall, the accused was convicted under s 304, Pt II and not under s 302, IPC .[86]

Where the accused being armed with axe and kati could have assaulted on the vital parts of the body of the deceased if they had any intention to cause death; the very2155 fact that the accused were alleged to have assaulted on arm and wrist and corresponding injuries were also found in course of post-mortem examination, it was held proper to convict the accused for commission of offence under s 304, Pt II read with s 34, IPC since they had no intention to cause death but had knowledge that such injuries may cause death.[87]

Where the act of the accused appeared to have been committed out of deep frustration as the accused was a vagabond, it was held that there was no *mens rea* on the part of the accused to commit the murder of the deceased The conviction of the accused under s 302, IPC was altered to one under s 304, Pt I, IPC .[88]

In a case where the accused armed with knives laid down the deceased on the ground and caused injuries on the vital parts of the body of the deceased, it was held that the intention of all the accused to commit the murder of the deceased was discernible and the accused were convicted under s 302 . The plea of the accused that the offence fell under s 304, Pt II and not under s 302, IPC was rejected.[89]

14. Clause Secondly

An intention to kill is not required in every case. Knowledge on the part of the accused, that the natural or probable consequences of the act would be death,[90] or that his act was so imminently dangerous that it must, in all probability, cause death or such bodily injury which was likely to cause death,[91] would suffice. In common parlance, the word 'likely' is used only to denote a lower degree of 'likelihood', meaning thereby to distinguish an offence, falling under s 302, IPC, from that falling under s 304, IPC .[92]An act of setting any person aflame after pouring kerosene is definitely likely to cause death of that person and this fact is obviously known to the accused persons when they caught hold of the deceased, poured kerosene over her and set her ablaze. Both clauses secondly and fourthly of s 300 clearly apply to these facts.[93] Where both the accused had caused one blow each with a *gandasa* on the head, a vital part of the body, of the deceased and the extent of damage as disclosed by the doctor that the death was caused by shock and haemorrhage due to injury to the brain which was sufficient to cause death in the ordinary course of nature, the conviction of the accused person under ss 302 / 34, IPC, was upheld.[94] Where the accused by use of bare hand suffocated the deceased in stagnant water leading to death, the accused was convicted under s 304, Pt I and not under s 302, IPC .[95] . Where there was family dispute with regard to property, the accused appellant gave one blow with iron rod on the head of the deceased causing death, the accused had no intention to kill and his conviction under s 302, IPC was altered to one under s 304, Pt II.[96] Where on a sudden quarrel on the spur of the moment, the accused inflicted2156 cuts by kathi on the

neck which caused the death of his younger brother, he was convicted under s 304, Pt II, and his conviction under s 302, IPC was set aside.[1]

Where the accused was quarrelling with prosecution witness and the deceased was trying to pacify, the accused being unhappy with the deceased's intervention assaulted the deceased with a pestle with such force that the head of the deceased was broken into pieces, the injury caused not only showed the intention of the accused to cause death but also knowledge that the injury was likely to cause death, thus, the accused was convicted under s 302, IPC .[2]

This clause, *i.e.*, the second clause of s 300, IPC, mentions one special circumstance which converts culpable homicide into murder. Putting aside the exceptions in the section, which reduce the offence of murder to culpable homicide not amounting to murder, culpable homicide is again considered murder if the offender does the act with the intention of causing such bodily injury which he knows to be likely to cause the death of the person to whom harm is caused.[3] This knowledge must be in relation to the 'peculiar physical condition' of the deceased and the accused, having full knowledge that the injury, intended to be caused, would most likely result in his death on account of his 'peculiar physical condition', causes the injury to him and death ensues.[4] Pushing a person into the sea, with a bleeding head injury may not have been with the intention to kill, but it would certainly show the 'intention of causing a bodily injury as was likely to cause death', within the meaning of s 300 & Secondly s 304, Pt I of the IPC .[5] Where the accused/victim who was brought to the police station on a false charge of dacoity, was mercilessly beaten by the constables with the intention to cause such bodily injury as the constables knew would cause his death, the injuries would fall under clause secondly of s 300 .[6] If the element of knowledge is wanting, the offence would not be murder, but only culpable homicide not amounting to murder or even a lesser offence. Illustration (b), appended to this clause, very clearly brings out the point.[7] When cl (3) of this section speaks of an injury sufficient in the ordinary course of nature to cause death, it contemplates an injury caused to a normal grown-up human being and does not take account of the special physical condition of the person harmed accelerating his death. When an injury, which would not be sufficient to cause the death of an ordinary grown-up human being, is sufficient to cause the death of a person in a sub-normal state of health, *e.g*. by reason of age, disease, or weakness of previous injuries, it is spoken of as an injury likely to cause the death of the person, to whom the harm is caused, bearing in mind that person's special physical condition. This is what is provided for in cl (2) of the section.[8] Where,, neither it has been shown that any constitutional or other peculiarity existed in the case of the deceased, which would have made it likely that injuries, which ordinarily would not cause death, would be2157 fatal in his case, nor the fact that his assailants were aware of it, cl (2) would be inapplicable.[9]

Where the deceased aged 90 years was dragged from his cot, beaten by wall clock on head by the accused, causing death, it was held that the accused was attributed by the consequences of his act and the accused was convicted under s 302, IPC .[10]

15. Clause 'Secondly' of Section 300 Distinguished from the Second Clause of Section 299

Commentary under the same heading in s 299, *ante*, may be referred to.

The distinguishing feature of the *mens rea* requisite under cl (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of cl (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury. Clause (b) of s 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under cl (2) of s 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim,

nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death was intentionally given.[11]

Clause (2) of s 300 differs from the second clause of s 299 in the sense that stress is laid on the knowledge of the offender that he is likely to cause death by the act done. It has, therefore, ordinarily been applied to those cases where the offender has specific knowledge of the facts or circumstances which makes the act done particularly dangerous to the life of the person to whom that harm is done. Thus, if *A* knows that *B* is suffering from an enlarged spleen and, with that fact in his mind, proceeds to give *B* a violent blow in the region of the spleen and *B* dies, the offence would fall under cl (2) of s 300, and not under the second clause of s 299, because of the special knowledge of *A*. This is not the only class of cases which is covered by cl (2) aforesaid, but it is the commonest type of cases falling under it.[12] If, on the other hand, a person does an act knowing what its natural and probable consequences will be, then he is presumed to have intended, by that act, to give rise to such consequences. The intention, spoken of in the second clause of s 299, is such intention. But the knowledge, mentioned in the second clause of s 300, is not knowledge of the nature and probable consequences to an ordinary human being, but2158 the knowledge of the nature and probable consequences to the particular person to whom the harm is caused. In proving this knowledge, it may be, and in most cases it is, necessary to have recourse to the natural presumption that a man is presumed to know the natural and probable consequences of his acts and, in such cases, the practical question, that arises, is whether, on account of a certain peculiarity, known to the accused, as a fact, in the person to whom the harm is caused, the presumption as to knowledge can property be drawn, having regard to the common course of natural events. If the answer be in the affirmative, the offence is murder; if the answer be in the negative, or there is any reasonable doubt that the presumption can be drawn, the offence may be culpable homicide if the injury intended was likely to cause the death of an ordinary human being without being especially likely to cause the death of the person, to whom the harm is caused, or it may not amount to culpable homicide if the accused cannot be presumed to have intended to cause an injury likely to cause death. In the last mentioned class of cases, the offence may be one of the lesser offences, affecting the human body, determined according to whether the accused intended to cause hurt or grievous hurt or knew his act to be likely to cause hurt or grievous hurt.[13]Thus, the distinction between knowledge of the natural and probable consequences of an act to an ordinary human being and the knowledge of the natural and probable consequences to the particular person, to whom the harm is caused, distinguishes cl (2) of s 299 from cl (2) of s 300 .[14] Again, when an injury, which would not be sufficient to cause the death of an ordinary grown-up human being, is sufficient to cause the death of a person in a sub-normal state of health, *e.g.*, by reason of age, disease or weakness or previous injuries, it is spoken of as an injury 'likely to cause the death of the person, to whom the harm is caused', bearing in mind the person's special physical condition. This is provided for in cl (2) of s 300 . Clause (2) of s 299, on the other hand, refers to the causing of an injury likely to cause death without any reference to the special physical condition of the person to whom the harm is caused.[15]

16. Clause Thirdly

For cases to fall within this clause, it is not necessary that the offender intended to cause death if death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature.[16] It must be proved that there was an intention to inflict that particular bodily injury, which in the ordinary course of nature, was sufficient to cause death, *viz*, the injury found to be present was the injury that was intended to be inflicted.[17] The sufficiency of an intentional injury to cause death in the ordinary course of nature is the gist of the clause, irrespective of an intention to cause death.[18] The emphasis is on the sufficiency of the injury, in the ordinary course of nature, to cause death. The sufficiency is the high probability of death in the ordinary course of nature.[19] Thus, for cases that fall within cl (3), it is not2159 necessary that the culprits should have the knowledge of death so long as the intended injuries are sufficient to cause death. Whether an injury is sufficient in the ordinary course of nature is a question of fact and it does not cease to be sufficient merely because the person, who inflicts the injury, does not know that it is sufficient. The correct principle seems to be that a case falls within cl (3) when the degree of probability of death is very great and certainly so where death is the inevitable result of the intended injuries, whether the culprits intended death or even did not know that death would result.[20]

If the probability of death is very high, then the requirements of clause 'thirdly' of s 300, IPC are satisfied and the fact that a particular individual may, by the fact of his having secured especially skilled treatment or being in possession of a particularly strong constitution, have survived an injury, which would otherwise prove fatal to majority of persons, subjected to it, is not enough to prove that such an injury is not sufficient, in the ordinary course of nature, to cause death.[21] The chopping off of the leg would necessarily involve the cutting of all bone structures, blood vessels and nerves. A case of this kind would fall under clause 'thirdly' of the section.[22] If the injury, that the offender intends to cause, and does cause, is sufficient to cause death in the ordinary course of nature, the offence is murder, irrespective of whether the offender intended to cause death and whether the offender had a subjective knowledge of the consequences.[23] The intention of the offender in relation to sufficiency, or otherwise, of the injury is not a matter for consideration at all,[24] and the notation, that the injuries should normally be on, what the layman considers to be, vital parts of the body in order to constitute murder in law is not correct.[25] This part of the inquiry is purely objective and inferential, and has nothing to do with the intention of the offender.[26] Similarly, what is necessary to establish is that the bodily injury, intended to be inflicted, is sufficient, in the ordinary course of nature, to cause death.[27]

The Supreme Court, in *Virsa Singh v State of Punjab* ,[28] observed that, for the application of this clause, it must first be established that an injury is caused; next, it2160 must be established objectively what the nature of that injury in the ordinary 'course of nature' is. If the injury is found, in the opinion of the court, to be sufficient to cause death, one test is satisfied. Then, it must be proved that there was an intention to inflict that very injury, and not some other injury, and that it was not accidental or unintentional. If this is also held against the offender, the offence of murder is established.[29] The question, in such a case, which falls for determination, is whether the causing of the fatal injury was accidental or unintentional or whether some other kind of injury was intended to be inflicted by the assailant.[30] There should be explicit medical opinion on the question whether the injuries caused were sufficient in the ordinary course to cause death. Where the two injuries caused by a stone were in the ordinary course of nature not sufficient to cause death, acquittal of accused proper.[31] If the injury, in the opinion of the doctor, is sufficient, in the ordinary course of nature, to cause death of the deceased,[32] and it is not unintentional or accidental,[33] or it cannot be said that it was caused negligently,[34] the case would fall under this clause. But, if the injury caused is not sufficient, in the ordinary course of nature, to cause death, it is out of the purview of this clause.[35] So, the fact, that the deceased met his death after one month of the date of occurrence, would exclude the application of the ingredients of this clause, particularly when the medical opinion with regard to the cause of death is hesitating.[36] Where the accused had inflicted as many as 26 injuries, the obvious intention of the accused was to cause the death of the deceased; merely because most of the injuries were on the extremities (non-vital parts), it was no ground to alter the conviction of the accused under s 302, IPC into one under s 304, Pt II, IPC, when the doctor had opined that the injuries were sufficient to cause death in the ordinary course of nature.[37] Where the accused had poured acid on the deceased while the latter was sleeping which caused 60% burn injuries and septicemia causing death, it was held that since the cause of death was burn injuries and not septicemia, the accused was convicted under s 302, IPC and not s 304, Pt I, IPC .[38]

Whether the injury inflicted was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury, and has nothing to do with the question of intention.[39] It has to be decided2161 by the court as a question of fact.[40] In some cases, where death resulted from a single *lathi* blow on vital part of the body, *e.g.*, the head, it was held that the case fell under s 304 because the injury, intended to be caused, was such as was 'likely to cause death'.[41] However, in none of these cases, cl (3) of this section was discussed.

The two accused armed with weapons entered the house of the deceased to commit robbery, when overpowered by the deceased, the accused inflicted knife blow in the abdomen of the deceased causing death. It was held that the case was not covered by cl 'Thirdly' of s 300, IPC ; the accused who had come to commit robbery had the intention to cause the death of the deceased, and therefore, the offence of the accused fell under s 302, IPC and not under s 304, Pt I, IPC .[42]

The accused was alleged to have caused injuries by knife on the deceased. However, the medical

evidence in the case disclosed that the injuries found on the deceased were simple injuries and none of them was described as grievous. There was no evidence to prove that the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death. This injury was not attributed to the respondent accused, and there was nothing to establish that the injury which ultimately resulted in the death of the deceased was intended by any one. Both the High Court and Supreme Court held that the offence under s 302, IPC was not made out and that the offence made out was one punishable under s 304, Pt II, IPC .[43]

17. Two Parts of Clause 'Thirdly'

This clause has two parts. The first part is a subjective one which indicates that the injury must be an intentional one, and not an accidental one and the second part is objective in the sense that, looking at the injury intended to be caused, the court must be satisfied that it was sufficient, in the ordinary course of nature, to cause death.[44] These two parts are disjunctive and separate. In using the objective test, the court can take note of the fact that the accused used no weapon in attacking the deceased.[45] Where there is an intention to cause bodily injury and death has ensued, the question will ordinarily be whether the injury, which the accused intended to inflict, was sufficient, in the ordinary course of nature, to cause death or was merely likely to cause death and that will depend mainly on the weapon used, the force with which it was used, the number of blows struck, and the part of the body injured.[46] Where the accused gave cuts with an axe in the middle of the thigh with such severity as to sever the lower part from the upper thigh, it was held that he was guilty under this clause.[47]2162

18. Test Laid Down in *Virsa Singh*'s Case Ingrained in our Legal Systems

In *Virsa Singh v State of Punjab* ,[48] Vivian Bose, J, speaking for the court, explained the meaning and scope of cl (3). It was observed that the prosecution must prove the following acts before it can bring a case under s 300, 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the inquiry proceeded further, and fourthly it must be proved that the injury of the type just described made up the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the inquiry is purely objective and inferential, and has nothing to do with the intention of the offender.

The ingredient of clause 'thirdly' of s 300, IPC were brought out by the illustrious judge in his terse language as follows:

> To put it shortly, the prosecution must prove the following facts before it can bring a case under s 300, "thirdly".
>
> First, it must establish, quite objectively, that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved; these are purely objective investigations.

> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and,
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

The leaned judge explained the third ingredient in the following words:

> The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion.

These observations of Vivian Bose, J are *locus classicus*. The test laid down by *Virsa Singh*'s case[49] for the applicability of clause 'Thirdly' is now ingrained in our legal system and has become part of the rule of law. Under cl thirdly of s 300, IPC, culpable homicide is murder, if both the following conditions are satisfied, *i.e.*, (a) that the act which causes death is done with the intention of causing death or is done2163 with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury, which in the ordinary course of nature, was sufficient to cause death, *viz*, that the injury found to be present was the injury that was intended to be inflicted.

Thus, according to the rule laid down in *Virsa Singh*'s case, even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to s 300 clearly brings out this point.[50]

19. So Many Injuries Caused in Quick Succession Attract Clause 'Thirdly'

Nineteen injuries caused in quick succession cannot be said to have been caused as a result of grave and sudden provocation. The very fact that so many injuries were caused in quick succession and particularly where the deceased being unarmed and in a helpless situation, is sufficient to indicate that s 300, cl 'Thirdly' is attracted to the case.[51]

20. Nature and Extent of Intention Required in Clause 'Thirdly'

In order to bring a case within the third clause of this section, it is not only necessary that the injury be sufficient, in the ordinary course of nature, to cause death, but also that the accused intended to cause that injury.[52]What clause 'thirdly' of s 300 requires is (a) that the act, by which death is caused, is done with the intention of causing bodily injury to any person, and (b) that the bodily injury, intended to be

inflicted, is sufficient, in the ordinary course of nature, to cause death. Once the intention to cause the bodily injury, actually found to be present, is proved, the rest of the inquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient, in the ordinary course of nature to cause death. The intention in relation to sufficiency, or otherwise, of the injury is not a matter for consideration at all.[53] Proof of injury on any particular part of body may be determinative of the intention of causing death. If it has not been proved that it was the intention of the accused to inflict the particular injury on the particular place, it is not possible to apply cl (3) of s 300 .[54] Where the accused gave cuts with an axe in the middle of the thigh with such severity as to sever the lower part from the upper thigh, he was held guilty under cl (3) of s 300, IPC .[55]2164

For cases to fall within cl (3) of s 300, IPC, it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature.[56]

21. Inference Regarding Intention to Cause Injury

Whether the offender intended to inflict the injury in question is one of fact, and not of law. Although the court 'attributes' a particular intention or a desire to the individual concerned having regard to the act, committed by him, and the circumstances, surrounding the commission of the act,[57] so that, on proof of existence of injuries in question, the intention to cause injuries would be presumed unless the evidence or the circumstances warrant an opposite conclusion,[58] yet the test of intention is always subjective to the accused,[59] and can be inferred from the act, conduct or other relevant circumstances in each case,[60] or it may become clear from the fact that the injury was inflicted 'on a very vital part of the body with a deadly weapon'[61] though there can be circumstances to show that the intention of the offender was not to inflict a bodily injury sufficient, in the ordinary course of nature, to cause death and it was only accidentally, in the circumstances, which the offender could not himself foresee, that a fatal injury was caused and death took place.[62]Where the accused thrust a spear into the abdomen of the deceased with such force that it penetrated the bowels and three coils of the intestines came out of the wound and digested food oozed out from cuts in three places, as a result of which the deceased died, it was held that, in the absence of evidence, or reasonable explanation, that the accused did not intend to stab in the stomach with a degree of force sufficient to penetrate that far into the body, or to indicate that his act was a regrettable accident, and that he intended otherwise, it would be perverse to conclude that he did not intend to inflict the injury that he did.[63]

Where the accused hit the deceased with a rice pounder, which is a deadly weapon, with such force as to cause an extensive fracture and death, it was held that it could not be said that he did not intend to cause the injury which led to her death. Even if it be considered that he had no intention to kill, there can be no doubt that he intended to inflict the injury, which he actually inflicted, and he must have known that such an injury is sufficient, in the ordinary course of nature, to cause death.[64] A person, who causes such serious injuries as are expected, in the ordinary course of nature, to cause death, must, in the absence of anything to show that it was caused accidentally or2165 negligently, be held to have inflicted them intentionally.[65] In *BN Srikantiah v State of Mysore* ,[66] the Supreme Court observed:

> There were 24 injuries on the person of the deceased, out of which 21 were incised, and they were either on his head or the neck or the shoulders or on the forearms. All these, except perhaps the last, are vital parts of the body and anybody, who causes injuries with weapons of the kind, that the appellants used, must be fixed with the intention of causing such bodily injury or injuries as would fall within clause (3) of section 300 , IPC .[67]

Where the accused, armed with a long knife, went to the deceased and, taking him unaware, gave him a blow in the neck, with that knife, causing a deep injury, which was sufficient, in the ordinary course of nature, to cause his death, it was held that a deep stab wound, caused, with a long knife, in the neck of the victim, taking the defenceless victim, by surprise, could lead to only one conclusion that the accused had the intention to kill the deceased and was, therefore, guilty of murder.[68] Where the accused inflicted

knife injuries on two minor children and inflicted injuries causing death of his wife, the injuries being sufficient in the ordinary course of nature to cause death, he was convicted under s 302, IPC, though he had no intention to commit the murder of his two children.[69]

22. 'The Bodily Injury Intended to be Inflicted'

The expression 'the bodily injury intended to be inflicted' is descriptive of the earlier part of the clause, namely, the infliction of bodily injury with the intention to inflict it, that is to say, if the circumstances justify an inference that a man's intention was only to inflict a blow on the lower part of the leg, or some lesser blow, and it can be shown that the blow landed in the region of the heart by accident, then, though an injury to the heart is shown to be present, the intention to inflict an injury in that region, or of that nature, is not proved.[70] So, the expression 'and the bodily injury intended to be inflicted' does not import the idea that the intention, required by the first part of the clause, should be to inflict an injury sufficient to cause death as was interpreted in *Faqira v State* .[71]

23. 'Ordinary Course of Nature'

The emphasis, in clause 'thirdly' of this section, is on the sufficiency of the injury in the ordinary course of nature to cause death. 'Ordinary course of nature' means 'in the usual course if left alone'.[72] The expression 'ordinary course of nature' means normal course or due course. At the best it may envisage a high probability of death. On the converse the word always means inevitably or invariably.[73]2166

Where the injury caused by knife by the accused was clearly intended by him and it was not an accidental or unintentional injury, the medical evidence established that the injury was sufficient in the ordinary course of nature to cause death. It was held that, the offence committed by the appellant is clearly covered by clause 'Thirdly' of s 300, IPC .[74]

24. 'Sufficient, in the Ordinary Course of Nature, to Cause Death'

The expression 'sufficient in the ordinary course of nature to cause death' only means in normal or due course or at the best may envisage a high probability of death, but certainly does not mean that the injury should invariably or inevitably lead to death. The distinction between the expression high probability of death and death invariably or inevitably taking place though fine is substantial and if overlooked may result in gross miscarriage of justice.[75] It is an error to suppose that the words 'sufficient in the ordinary course' can be applied only when death is an almost certain result. If a person knowingly causes injuries which are more likely to cause death than not in the ordinary course, his offence falls under cl (2), or cl (3), of s 300 .[76] So, an injury 'sufficient, in the ordinary course of nature, to cause death' merely means that death will be the most probable result of the injury having regard to ordinary course of nature, and not that death must be the necessary consequence.[77] One single blow, with spear, in the abdomen,[78] or one blow on head,[79] is not a circumstance which will mitigate the offence in view of the medical opinion that the injury was, in the ordinary course of nature, sufficient to cause death.[80] A stab wound in the abdomen, viscera deep, has been held to be sufficient, in the ordinary cause of nature, to cause death.[81] An injury, inflicted by the assailant, may be said to be sufficient, in the ordinary course of nature, to cause death if the bodily injury is proved to be fatal in the ordinary course.[82] Where an injury was inflicted with great force on the most vital part of the body, *viz*, chest, on account of which the left lung was pierced through and through and both the ventricles were punctured, it was held that the injury was sufficient, in the ordinary course of nature, to cause death.[83] But2167 stuffing the mouth with a handkerchief cannot be said to be sufficient, in the ordinary course of nature, to cause death.[84] Where, in a sudden unpremeditated attack, the accused caught hold the deceased and strangled him to death with his turban, it was held that it could not be said that the injury, which the accused intended to inflict, was sufficient, in the ordinary course of nature, to cause death.[85] Where the accused was carrying only a torch and was given a dagger by the co-accused during the quarrel, only one overt act was attributed to the accused and injury inflicted by him on the neck of the deceased when there was a scuffle between accused and the deceased, the injury caused by the accused was likely to cause death cumulatively with other injuries, but was not sufficient in the ordinary cause of nature to cause death so cl 3 of s 300, IPC, was not attracted.[86] Where the accused

had given severe beatings by sticks, the injuries and fractures received by the deceased were dangerously sufficient to cause death; omission of the doctor to give opinion that the injuries were sufficient in the ordinary course of nature to cause death was held to be of no consequence.[87]

Where the evidence showed that prior to the incident there was fight between the parties and the accused had extended death threat and the accused by his motor vehicle hit and dragged the deceased causing his death, it was held that the accused had the intention to cause bodily injury sufficient for conviction under s 300, IPC and not under s 304, Pt I, IPC .[88]

Where the deceased died due to septicemia after 35 days of the incident, but as the deceased had sustained seven gun shot injuries which in the ordinary course of nature were sufficient to cause death, it was held that the case fell within the ambit of s 302, IPC .[89]

25. Proof of Sufficiency of the Injury to Cause Death in Clause 'Thirdly'

Once the intention to cause the bodily injury, found to be present, is proved, the rest of the inquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient, in the ordinary course of nature to cause death.[90] This question being one of fact in each case,[91] presumably, a medical witness, is in the best position to give evidence on the point.[92]The sufficiency of the injury may be established by the nature and quality of the act, taken with the consequence, which was intimately related to the act.[93] The prosecution may elicit, from the medical officer, who held that autopsy, the evidence to the effect whether2168 the injury, found on the body of the deceased, was merely likely to cause death or sufficient in the ordinary course of nature to cause death.[1] However, even if the doctor has not said that any one of the injuries was not sufficient to cause death in the ordinary course, the court can infer that from the nature of the injuries found on the body of the deceased.[2] No doubt it would have been of advantage to the court if public prosecutor had put the question to the doctor if the injuries were sufficient in the ordinary cause of nature to cause death. But mere omission to put that question is not enough for the court to reach a wrong conclusion that the injury noticed by the autopsy surgeon was not responsible for causing death of the deceased. Though not an expert as the autopsy surgeon, the sessions judge himself being an experienced judicial officer can look at the injuries himself and deduced whether the injuries were sufficient in the ordinary course of nature to cause death. When no sensible man with some idea regarding the fracture of homicidal cases would come to a different conclusion from the 45 injuries on the dead body which included fracture of 5 ribs (2 to 6) on the left side toward sternal end, fracture of some of the fingers and extravasation of blood on the right side of occipital region and above on the citus of rib-fractures etc, except that the injuries were sufficient in the ordinary course of nature to cause death.[3] In a case, it was observed that nineteen injuries caused in quick succession cannot be said to have been caused as a result of grave and sudden provocation. The very fact that so many injuries were caused in quick succession and particularly where the deceased being unarmed and in a helpless situation, it was sufficient to indicate that s 300, clause 'Thirdly' was attracted.[4]

Where the victim is either helpless or rendered helpless and the offender does some act which leads to death in the ordinary course and death takes place from the act of the offender and nothing else, it is hardly necessary to prove more than the acts themselves and the causal connection between the acts and the end result.[5] A blow on the head with a *lathi* is certainly likely to cause death and the person, who inflicts a *lathi* blow on the head of another person, must be presumed to have the intention of causing such bodily injury as is likely to cause death. But it does not necessarily follow that a *lathi* blow on the head is always sufficient, in the ordinary course of nature, to cause death.[6] When, in view of the medical evidence, it is not certain that the deceased died a homicidal death, the conviction of the accused under s 302, IPC, cannot be sustained.[7]

With a view to bring home the charge under s 302, IPC, it is essential for the doctor to state that the injury/injuries were sufficient in the ordinary course of nature to cause death. In the absence of such opinion, the courts do not generally make a guess about the nature of the injury, especially when there is evidence to show that the injured could have been saved. To clothe an accused with the liability under

s2169 302, IPC, the prosecution has to establish the requisite intention or the requisite knowledge.[8]

26. Numerous Injuries and Clause 'Thirdly'

Commentary under the heading 'Numerous Injuries' in s 299, *ante*, may be referred to.

Although, in a given case, the number of injuries on the person of the deceased may not be the determinative factor, the same, however, is relevant.[9]

If, from the nature and number of injuries, caused on various parts of the body of the deceased, and the weapon used, it would be reasonable to hold that the accused really intended to cause injuries which were sufficient, in the ordinary course of nature, to cause death,[10] then it is not necessary that each injury,[11] or even any one injury, should, by itself, be sufficient, in the ordinary course of nature, to cause death. Even if none of the injuries, by itself, is sufficient, in the ordinary course of nature, to cause death, but if they cumulatively,[12] or even two of them,[13] are sufficient, in the ordinary course of nature, to cause death, the offence would be murder under clause 'thirdly' of this section. Where, even though there was no punctured or incised wound on a vital part of the body, death was caused very soon after the incident on account of shock and haemorrhage produced by the multiple injuries caused with a spear, it was held that the injuries were sufficient, in the ordinary course of nature, to cause death.[14] The point, whether the injuries were cumulatively sufficient, or individually sufficient, in the ordinary course of nature, to cause death, would, however, bring about a substantial difference in cases where the assailants are themselves numerous. When no specific injury can be attributed distinctly to any of the accused, the correct rule, as propounded by the Supreme Court in *Sorban Singh v State of Uttar Pradesh* ,[15] is to convict the several accused under s 302, read with s 34, IPC, and not to convict any one of them under s 302 *simpliciter*.[16]

27. Injuries on Vital or Non-vital Parts of Body of the Deceased and Clause 'Thirdly'

Ordinarily, an injury on a vital part of the body is sufficient, in the ordinary course of nature, to cause death.[17] A stab in a vital part of the body, resulting in the victim's2170 death, is an injury sufficient, in the ordinary course of nature, to cause death.[18] Where a man inflicts a wound on a vital spot and death ensues, it is no defence to say that the accused did not intend the injury to be fatal.[19] There are a plethora of cases on an injury in the ordinary course of nature.[20] Where the stomach and the omentum had hemiated together and the omentum protruded through the hole, which the injury had made, the pleura and the diaphragm were both cut and the injury had extended right up to the abdominal cavity, the injury was held sufficient to cause death in the ordinary course of nature.[21] Where a concerted attack is direct against the head of a victim, which is smashed, the attack is made with the knowledge that the injury inflicted is sufficient, in the ordinary course of nature, to cause death and the offence is murder.[22] But all blows on the head do not necessarily cause death or inflict injuries sufficient, in the ordinary course of nature to cause death.[23] A remark by Melville J, in *Reg v Govinda* :[24]

> Practically, I think, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick on a vital part may be likely to cause death; a wound from a sword in a vital part is sufficient, in the ordinary course of nature, to cause death.

To this, it may be added that the decision may depend on the size and weight of the stick, where a stick is used, and in the way in which it is used.[25]

An injury on the neck, cutting through the spinal cord, is sufficient, in the ordinary course of nature, to cause death.[26] Where, in the course of an altercation between the two, the accused stabbed the deceased on the left forearm with a knife, it was held that as the forearm was not a vital part, the accused was guilty only of causing grievous hurt.[27] The case is, however, quite different when a weapon, like a

sword, is used in order to chop off, or to hack at, a limb. The person, who uses a sword or aruval, chopping off an arm or a leg, and, by so doing, severs the arteries of the arm or leg, must know that he is inflicting an injury which, in the ordinary course of nature, is sufficient to cause death. The offence, in such a case, is clearly one of2171 murder.[28] So, even if the intended injury is on a non-vital part of the body and the victim dies as a result of it, it would be murder if the injury inflicted is sufficient, in the ordinary course of nature, to cause death. An injury to a vital part of the body is not necessarily an ingredient to determine whether the case falls under s 300 . If the bodily injury intended to be, and also actually inflicted, is sufficient, in the ordinary course of nature, to cause death, the offence falls under s 300 .[29] Where merciless blows, with a fairly heavy stick, were struck so that two ribs were fractured, the pleura was injured and the right lung was lacerated, and the almost inevitable result of the injury was death, it was held that though an ordinary man might survive such a beating, death would be the most probable, and not merely the likely, result and it must, therefore, be held that the accused intended to inflict injuries sufficient, in the ordinary course of nature, to cause death.[30] The fact, that to a reasonable man the case, resulting in the assault, may appear to be quite petty, is not decisive as to the offence committed when there is evidence that blows, more than one, were inflicted on the skull, which is a vital part of the body of a person, causing multiple depressed comminuted fractures. As the assault was preceded by a hot discussion, the blows must have been inflicted in anger as great force is bound to be used to cause the above fractures. Such a case would fall under clause 'thirdly' of s 300, IPC so that the offence would be one punishable under s 302 .[31]

Where the ordinary course of nature is neither interrupted, nor interfered, with, by any intervening act of another and whatever happens is the result of the acts of the assailants alone, they would be sufficient, in the ordinary course of nature, to cause death.[32]

28. Clause 'Thirdly' of Section 300 Distinguished from the Second Clause of Section 299

In clause 'thirdly' of s 300, instead of the words 'likely to cause death', occurring in the corresponding second clause of s 299, the words 'sufficient in the ordinary course of nature' have been used. Obviously, the distinction is between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. This distinction is fine and real, but, if overlooked, may result in miscarriage of justice. The difference between the second clause of s 299 and clause 'thirdly' of s 300 is one of degree of probability of death, resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium, or lowest, degree. The word 'likely' in the second clause of s 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words 'bodily injury...sufficient in the ordinary course of nature to cause death', in clause 'thirdly' of s 300, mean that death will be the most probable result of the injury having regard to the ordinary course of2172 nature.[33] If the act done will, in all reasonable probability, result in death, the offence is murder, whereas if it is only likely to cause death, the offence is within the second clause of s 299 .[34] Though a large number of blows, inflicted by a light stick, might indicate an intention to cause bodily injuries sufficient, in the ordinary course of nature, to cause death, yet there should be clear medical evidence to support such an inference; and, in the absence of such evidence, the benefit of doubt, as to whether the case falls under clause 'thirdly' of s 300, should be given to the accused and he should be convicted only of culpable homicide not amounting to murder under s 304, Pt I, read with s 299(2) of the IPC .[35]

24 *Ande v State of Rajasthan* AIR 1966 SC 148, p 150 ; *Hayati Usta v State* AIR 1967 Goa 11, p 16 (FB) .

25 *Udit v State* 1980 All LJ 534, p 536 (DB) .

26 *Kishore Singh v State of Madhya Pradesh* AIR 1977 SC 2267, 1977 Cr LJ 1937 .

27 *State of AP v Punnayya* AIR 1977 SC 45, 1977 Cr LJ 1, 1976 SCC (Cri) 659 .

28 *King v Aung Nyun* AIR 1940 Rang 259, p 271 (FB), 42 Cr LJ 124 ; *Mahomed Hasan v Emperor* AIR 1934 Sind 145, p 148,

36 Cr LJ 22 ; *Thakur Mahto v State of Bihar* 1972 BLJR 265, 1972 Cr LJ 835 .

29 *Ram Singh v State* 1971 All LJ 833, 1971 RD 545 .

30 *R v Gnango* (2011) UKSC 59, [2012] 1 AC 827, [2012] 2 All ER 129

31 *R v Coutts* (2006) UKHL 39, [2006] 4 All ER 353, [2006] 1 WLR 2154

32 *R v Reid* (2003) NSJ No 360 .

33 *R v Fontaine* (2002) MJ No 363 (Also see *Halsbury's Laws of Canada*).

34 *State of Uttar Pradesh v Ram Sagar Yadav and* Ors AIR 1985 SC 416, 1986 Cr LJ 836 .

35 *Rakhia v Emperor* 12 Cr LJ 214 ; *Charku Sattiah v State of Andhra Pradesh* AIR 1960 AP 153, 1960 Cr LJ 309 .

36 Re *Midde Venkappa* 1 Weir 299.

37 *Anda v State of Rajasthan* AIR 1966 SC 148, **followed** in *Jayaraj v State of Tamil Nadu* AIR 1976 SC 1519, p 1524, 1976 Cr LJ 1186 .

38 *Emperor v Mahmadkhan Sultankhan* 5 Cr LJ 168, 9 Bom LR 153 .

39 *Sellappan v State of Tamil Nadu* 2007 Cr LJ 1442 (SC) ; *Shakti Dan v State of Rajasthan* 2007 Cr LJ 3426 (SC) ; *Sunder Lal v State of Rajasthan* 2007 Cr LJ 3281 (SC) (FB)*; Budhi Lal v State of Uttarkhand* 2009 Cr LJ 360, 2008 AIR SCW 6968, AIR 2009 SC 87, 2008 (57) BLJR 223, JT 2008 (10) SC 572, 2008 (12) Scale 848, (2008) 14 SCC 647 ; *Rampal Singh v State of UP* 2012 Cr LJ 3765, 2012 AIR SCW 4211, 2012 (6) Scale 574, (2012) 8 SCC 289 .

40 *Nga Chit Tu v King* AIR 1939 Rang 225, p 227-229, 40 Cr LJ 725 .

41 *State of Uttar Pradesh v Ram Sugar Yadav and Ors* AIR 1985 SC 416, 1986 Cr LJ 436 (SC) .

42 *Rajwant Singh v State of Kerala* AIR 1966 SC 1874, p 1877 ; *Shankar Majhi v State* (1971) 1 CWR 770, 1971 Cut LT 565 ; *Amjot Ali Munshi v State of Assam* (1988) 1 Crimes 65, p 66 (Gau) .

43 *Subhash Shamrao Pachunde v State of Maharashtra* 2006 Cr LJ 546 (SC) .

44 *Saleem and Ors v State of Rajasthan* 1999 Cr LJ 1419 (Raj) (DB) .

45 *Reg v Govinda* ILR 1 Bom 342 ; *King v Aung Nyun* AIR 1940 Rang 259 (FB), 42 Cr LJ 124; 54 Cr LJ 565; *Inder Singh v Emperor* AIR 1929 Lah 157, 30 Cr LJ 141 ; *Babulal v Emperor* AIR 1946 Nag 120, 47 Cr LJ 441 ; *Khiman v Emperor* 1936 All LJ 73 ; *Mahomed Hasan v Emperor* AIR 1934 Sind 145, 36 Cr LJ 22 ; **contrary view** in *Empress of India v Idu Beg* ILR 3 All 776(1), p 778; *Public Prosecutor v Somasundaram* AIR 1959 Mad 323, p 326, 1959 Cr LJ 993, seems to be wrong.

46 Re *Dadi Abdul Gaffoor*AIR 1955 AP 24, p 25, 56 Cr LJ 329 .

47 Per Dalip Singh J, in *Inder Singh v Emperor* AIR 1929 Lah 157, p 158, 30 Cr LJ 141 ; *Empress v Gora Chand Gope* 5 WR (Cr) 45 (FB); *Behari v State* AIR 1953 All 203, p 206, 1953 Cr LJ 565 .

48 *Ugrasen Mukhi v State* (1966) 32 Cut LT 589, p 594 ; *State of Uttar Pradesh v Ram Sagar Yadav and Ors* AIR 1985 SC 426, 1986 Cr LJ 836 (SC) .

49 *Mohomed Hasan v Emperor* AIR 1934 Sind 145, p 149, 36 Cr LJ 22 ; *Queen v Sheik Bazu* 8 WR (Cr) 47, p 51 .

50 *Queen v Sheik Bazu* 8 WR (Cr) 47, p 51 .

51 *Sampuran Singh v State of Haryana* 1980 Cr LJ 951, p 955 (Punj) (DB) .

52 *State of Andhra Pradesh v Rayavarapu Punnayya* AIR 1977 SC 45, p 50, 1977 Cr LJ 1 ; *Reg v Govinda* ILR 1 Bom 342, p 344 ; *Mahabir Harso v State of Orissa* 1996 Cr LJ 158 (Ori) (DB) ; *Narasingh Challan v State* 1997 Cr LJ 2204 (Ori) (DB) ; *Dharni alias Dhaneswar Naik v State* 1999 Cr LJ 2712 (Ori) (DB) ; *Ruli Ram and Anor v State of Haryana* (2002) 7 AD 492 (SC) ; *Abdul Waheed Khan alias Waheed and Ors v State of Andhra Pradesh* (2002) JT 6 SC 274 ; *Bishek Mohananda v State* 1998 Cr LJ 1489 (Ori) (DB) ; *Ramakrishnan Nair alias Raju v State of Kerala* 2000 Cr LJ 416 (Ker) (DB) .

53 *Shakti Dan v State of Rajasthan* 2007 Cr LJ 3426 (SC) ; *Sunder Lal v State of Rajasthan* 2007 Cr LJ 3281 (SC) (FB) ; *Rajinder v State of Haryana* 2006 Cr LJ 2926 (SC), AIR 2006 SC 2257 ; *Gita Rani Ghosh v State of West Bengal* 2012 Cr LJ 794, p 799 (Cal) (DB) .

54 *Reg v Govinda* ILR 1 Bom 342 ; Re *Dadi Abdul Gaffoor*AIR 1955 AP 24, 1955 Cr LJ 239 ; *Sajjan Singh v State* (1965) 67 Punj LR 1204 .

55 *Rajinder v State of Haryana* 2006 Cr LJ 2926 (SC) ; *Shakti Dan v State of Rajasthan* 2007 Cr LJ 3426 (SC) ; *Sunder Lal v*

State of Rajasthan 2007 Cr LJ 3281 (SC) (FB) .

56 *Balwant Singh v State of Punjab and Anor* (1994) JT 2 SC 30 .

57 *Sadhu Singh Harnam Singh v State of Pepsu* AIR 1954 SC 727 .

58 *Meera Puri v State of Nagaland* 1971 Cr LJ 539 .

59 *Nga San Win*AIR 1933 Rang 326 .

60 *Emperor v Morgan and Anr* (1909) 9 Cr LJ 393 .

61 *Balwant Singh v State of Punjab and Anr* (1994) JT 2 SC 30 .

62 *Rajwant Singh v State of Kerala* AIR 1966 SC 1874 ; *Anda v State of Rajasthan* AIR 1966 SC 148, p 150 ; *Inder Singh v Emperor* AIR 1929 Lah 157, p 158, 30 Cr LJ 141 ; *State of Rajasthan v Arjun Singh* (2011) 9 SCC 115, AIR 2011 SC 3380, [2011] 10 SCR 823, 2011 (9) Scale 661, 2011 C rLJ 494 ; *John Pandian v State* (2011) 3 SCC (Cri) 550, (2010) 14 SCC 129, 2011 (1) Crimes 1 (SC) .

63 *Jagdish v State of Madhya Pradesh* 1980 Cr LR 212, p 215(MP)(DB); *State of Maharashtra v Kalu Shivram Jagtap* AIR 1980 SC (UJ) 632, p 633 ; *Brij Mohan v State* 1984 Cr LJ 34 .

64 *John Pandian v State* (2010) 14 SCC 129, (2011) 3 SCC (Cri) 550, 2011 (1) Crimes 1 (SC) .

65 *Badri v State* AIR 1953 All 189, p 191, 54 Cr LJ 450 .

66 *Devaramani Bheemanna v State of Karnataka* 1995 Cr LJ 1534 (SC) .

67 *Nashik v State of Maharashtra* AIR 1993 SC 1485 ; *Moses Arulanantham v State of TN* (2010) 17 SCC 702 (Internal injuries caused with knife showed that accused had intention to cause death).

68 *Gurmail Singh v State of Punjab* 2012 Cr LJ 665, 2011 (6) Scale 322, (2011) 15 SCC 412 ; **See also***Arun Nivalaji More v State of Maharashtra* AIR 2006 SC 2886, 2006 AIR SCW 3999, (2007) 2 SCC 613 .

69 *Ajithkumar v State of Kerala* 2014 Cr LJ 2313, p 2320, 2321 (Ker) (DB) (*Bhaba Nanda Barma and Ors v State of Assam* AIR 1977 SC 2252, 1977 Cr LJ 1930, (1977) 4 SCC 396 & *Afrahim Sheikh and Ors v State of West Bengal* AIR 1964 SC 1263, 1964 Cr LJ 350, [1964] 6 SCR 172, **relied on).**

70 *Richhpal Singh Meena v Ghasi* (2014) 8 SCC 918, AIR 2014 SC 3595, 2014 Cr LJ 4339 .

71 *Pundappa Yankappa Pujari v State of Karnataka* 2014 Cr LJ 3781, p 3788, AIR 2014 SC 2733, (2014) 12 SCC 372 .

72 *Litta Singh v State of Rajasthan* 2013 Cr LJ 3321 (SC), 2013 AIR SCW 3583, AIR 2013 SC 2554, 2013 (6) Scale 399 .

73 *AN Chandra v State of Uttar Pradesh* (1990) JT 3 SC 832 .

74 *Ahmad Yar Khan v Emperor* 11 Cr LJ 171 ; *Rajendra Prasad Singh v Emperor* AIR 1933 Pat 147, 34 Cr LJ 1071 .

75 *Rawalpenta Venkalu v State of Hyderabad* AIR 1956 SC 171, 1956 Cr LJ 338 .

76 *Mahabir Harro v State of Orissa* 1996 Cr LJ 158 (Ori) (DB) .

77 *Brij Bhukhan v State of Uttar Pradesh* AIR 1957 SC 474, 1957 Cr LJ 591 ; *Oswal Danji Tejsi v State* AIR 1961 Guj 16, (1961) 1 Cr LJ 251 ; *Kutali Ali v Emperor* 42 PWR 1911 (Cr) ; Per Cuming J, in *Hazrat Gul Khan v Emperor* AIR 1928 Cal 430, p 432, 29 Cr LJ 546 ; *Bhola Bind v Emperor* AIR 1944 Pat 92, p 95, 45 Cr LJ 409 ; Re *Kandasami Solagar*AIR 1942 Mad 213, 43 Cr LJ 516 ; *Inder Singh Bagga Singh v State of Pepsu* AIR 1955 SC 439, 56 Cr LJ 1014 ; *Rahman Samail v Emperor* AIR 1939 Lah 245, p 253, 40 Cr LJ 712 .

78 *Laxman v State of Maharashtra* AIR 1974 SC 1803, 1974 Cr LJ 1271 .

79 *Chahat Khan v State of Haryana* 1973 Cr LJ 36, p 38, AIR 1972 SC 2574 ; *Bhaskar Pandit Kadrim v State of Maharashtra* 1984 Cr LJ 493 (Mah) ; *State of Haryana v Pala and Ors* 1996 Cr LJ 1872 (SC) .

80 *Ram Jatan v State* 1979 All Cr R 105 .

81 *Namdeo v State of Maharashtra* 2007 Cr LJ 1819, p 1827 (SC), 2007 (4) Scale 337 .

82 *Ranjit Singh v State* (1965) 67 PLR 1175 .

83 *Rahman Samail v Emperor* AIR 1939 Lah 245, p 251, 40 Cr LJ 712 .

84 *Laxmichand v State of Maharashtra* (2011) 2 SCC 128, (2011) 1 SCC (Cri) 621 .

85 *Swarn Kaur v Gurmukh Singh* 2013 Cr LJ 3991, p 3999 (SC), AIR 2013 SC 3356, 2013 (8) Scale 159, (2013) 12 SCC 732 .

86 *Umesh Suresh Vale v State of Maharashtra* 2014 Cr LJ (NOC) 50 (Bom) (DB).

87 *Kanhu Gouda v State of Orissa* 2008 Cr LJ 2716, p 2718 (Ori) (DB) .

88 *Makhmalsinh v State of Gujarat* 2014 Cr LJ 519, p 522 (Guj) (DB) .

89 *Satvir v State of Uttar Pradesh* 2009 Cr LJ 1586 (SC), AIR 2009 SC 2163, 2009 (3) Scale 439 .

90 *Santosh v State of Madhya Pradesh* 1975 Cr LJ 602, p 603, AIR 1975 SC 654 .

91 *Kelu Ayyappan v State* AIR 1959 Ker 230, p 233, 1959 Cr LJ 981 .

92 *Sukhdeo v State* 1968 Cr LJ 438, AIR 1968 All 151 .

93 *Ramesh and Ors v State (Delhi Admn)* 1996 Cr LJ 309 (Del) (DB) .

94 *Balbir Singh and Anor v State of Punjab* (1994) 3 Crimes 900 (SC) ; *Ashok Kumar Magabhai Vankar v State of Gujarat* (2011) 10 SCC 604, 2012 Cr LJ 685, 2012 (1) SCC (Cr) 397 (Assault by pestle with force, head of the deceased was broken).

95 *Kumraval v State* (2009) 17 SCC 524

96 *Dhan Singh v State of Haryana* (2010) 12 SCC 277 .

1 *Felix Abrose D'Souza v State of Karnataka* (2009) 16 SCC 361, 2002 (8) JT 249, 2003 (1) Supreme 679, 2010 (3) SCC (Cr) 294, 2003 (2) Crimes 78 (SC) .

2 *Ashok Kumar Magabhai Vankar v State of Gujarat* (2011) 10 SCC 604, 2012 Cr LJ 685, 2012 (1) SCC (Cr) 397 .

3 *Anda v State of Rajasthan* AIR 1966 SC 148, p 150 ; *Reg v Govinda* ILR 1 Bom 342 .

4 *State of Orissa v Goti Lachhumu Dora* (1979) 47 Cut LT 312 ; *Behari v State* AIR 1953 All 203, 54 Cr LJ 565 ; *Anda v State of Rajasthan* AIR 1966 SC 148, p 150 ; *Reg v Govinda* ILR 1 Bom 342 .

5 *Abdul Nawaz v State of West Bengal* 2012 Cr LJ 2901, p 2906 (SC), AIR 2012 SC 1951, 2012 (5) Scale 357, (2012) 6 SCC 581 .

6 *State of Uttar Pradesh v Ram Sagar Yadav and Ors* AIR 1985 SC 416 .

7 *Anda v State of Rajasthan* AIR 1966 SC 148, p 150 ; *Reg v Govinda* ILR 1 Bom 342 .

8 *Behari v State* AIR 1953 All 203, 54 Cr LJ 565 ; *Ram Asre v Emperor* AIR 1923 Oudh 97, 24 Cr LJ 513 .

9 *Waryam Sher Mohammad v Emperor* AIR 1938 Lah 834 ; *Inder Singh v Emperor* AIR 1929 Lah 157, 30 Cr LJ 141 ; *Rahman Samail v Emperor* AIR 1939 Lah 245, p 252, 40 Cr LJ 712 ; *Emperor v Ratan* AIR 1932 Oudh 186, 33 Cr LJ 561 .

10 *Kunjomohan v State of Kerala* (2012) 13 SCC 750, 2012 (11) JT 381, 2012 (11) Scale 212 .

11 *Abdul Waheed Khanalias Waheed and Ors v State of Andhra Pradesh* (2002) JT 6 SC 274 ; *Ruli Ram and anor v State of Haryana* (2002) 7 AD 492 (SC) .

12 *Inder Singh v Emperor* AIR 1929 Lah 157, p 158, 30 Cr LJ 141 ; *Ishwar Behera v State* 1975 Cut LT 904 .

13 *Emperor v Aung Nyun* AIR 1940 Rang 259, p 272-75 (FB), 42 Cr LJ 124 .

14 *Empress v Pooshoo* 4 WR (Cr) 33 ; *Queen v Sheik Choollye* 4 WR (Cr) 35 .

15 *Behari v State* AIR 1953 All 203, 54 Cr LJ 565 ; *Ram Kumar v State of Rajasthan* 1970 Cr LJ 486, AIR 1970 Raj 60 .

16 *Rajwant v State of Kerala* AIR 1966 SC 1874, 1966 Cr LJ 1509 ; *Kishan v State of Madhya Pradesh* AIR 1974 SC 244, 1974 Cr LJ 324 .

17 *Settu v State of Tamil Nadu* 2006 Cr LJ 3889, p 3893 (SC), AIR 2006 SC 2986, 2006 (8) Scale 382, (2006) 10 SCC 549, (2006) Supp(6) SCR 185.

18 *Anda v State of Rajasthan* AIR 1966 SC 148, p 151 .

19 *Dhansai Sahu v State* AIR 1960 Ori 105, 35 Cut LT 18 .

20 *Rahman Samail v Emperor* AIR 1939 Lah 245, p 253, 40 Cr LJ 712, **dissenting from***King v Abor Ahmad* AIR 1937 Rang 396, 38 Cr LJ 1097 ; Re *Thangavelu*1972 Cr LJ 390, p 394, 1971 Mad LJ 663 (Cr); *Virsa Singh v State of Punjab* AIR 1958 SC 465 ; *Rajwant Singh v State of Kerala* AIR 1966 SC 1874 ; *Harjinder Singh v Delhi Admn* AIR 1968 SC 867, 1968 Cr LJ 1023 ;

Suresh Chandra v State 1972 Cr LJ 1416, p 1420 ; AIR 1976 SC 1519, p 1524, 1976 Cr LJ 1186 ; *Laxman Kalu Nikalje v State of Maharashtra* AIR 1968 SC 1390 ; *Parmar Bhikhabhai v State of Gujarat* 11 Bom LR 82 ; *Kirtan v State of Madhya Pradesh* 1984 Cr LJ 1069 (MP) ; *Rameshraya and Anor v State of Madhya Pradesh* 2001 Cr LJ 1252 (SC) .

21 Re *Singaram Padayachi*AIR 1944 Mad 223, p 225, 45 Cr LJ 729 ; *Amar Singh v State* 71 PLR 358, p 366 .

22 *Public Prosecutor v Ayyanar* (1969) 2 Mad LJ 453, p 455-56 .

23 *Rajwant Singh v State of Kerala* AIR 1966 SC 1874, p 1878 ; *Dhansai Sahu v State* AIR 1969 Ori 105 ; *Dore v State of Karnataka* (1980) 24 Mad LJ 281, p 286 (Kant) (DB) ; *State of Rajasthan v Mangilal* AIR 1980 Raj LW 159, p 161-62 (DB) ; *Rahman Samail v Emperor* AIR 1939 Lah 245, p 253, 40 Cr LJ 712 ; *Kadarbhai v State of Gujarat* AIR 1980 Guj LT 341 (DB); *Nand Singh v State* (1968) 70 PLR 58 (SN) ; *King v Aung Nyun* AIR 1940 Rang 259, p 264 (FB), 42 Cr LJ 124, per Mosely J, in the order of reference.

24 *Public Prosecutor v Ahdul Rahim* 1968 Cr LJ 1030, AIR 1968 AP 231 .

25 Re *Thangaraj*1972 LW (Cr) 170.

26 Re *Varadu Gounder*1970 LW (Cr) 282.

27 *Gulab Singh v State of Rajasthan* 1974 WLN 168, 1974 Raj LW 130 ; *Anda v State of Rajasthan* AIR 1966 SC 148, p 151 ; *Mohan Singh v State of Rajasthan* 1973 WLN 749, 1973 Raj LW 657 .

28 *Virsa Singh v State of Punjab* AIR 1958 SC 465 ; *Settu v State of TN* 2006 Cr LJ 3889, AIR 2006 SC 2986, (2006) 10 SCC 549, (2006) Supp(6) SCR 185.

29 *Jagroop Singh v State of Haryana* AIR 1981 SC 1552 ; *State of Madhya Pradesh v Mangu Kishan* 1966 Jab LJ 1047, AIR 1967 MP 167 (wherein a single injury with back metal side of an axe upon the head of the victim had resulted in his death); *State of Rajasthan v Mangilal* 1980 Raj LW 159, p 161-162 .

30 *Hardev Singh v State of Punjab* AIR 1975 SC 179, p 181, 1975 Cr LJ 243 .

31 *State of Rajasthan v Shera Ram* AIR 2012 SC 1, (2012) 1 SCC 602 .

32 *Morecha v State of Rajasthan* 1978 Cr LJ 1710, p 1713 (SC) ; *Vijay v State of Madhya Pradesh* 1980 Cr LR 175, p 179 (MP) (Notes) (DB) .

33 *Mahadeo Ganpat Badawans v State of Maharashtra* 1977 SCC 1756, 1977 Cr LJ 1148 ; *Aditya Mohaptra v State of Orissa* AIR 1980 SC 2110, p 2111, 1980 Cr LJ 1475, p 1476 ; *Ambika Yadav v State of Bihar* 1972 BLJR 107 ; *State of Andhra Pradesh v Rayavarapu Punnayya* AIR 1977 SC 45, p 51, 1977 Cr LJ 1 ; *Kishan v State of Rajasthan* AIR 1980 Raj LW 510, p 517 (DB) .

34 *Behari v State* AIR 1953 All 203, p 207, 54 Cr LJ 565 ; *Jagan v State* (1962) 2 Cr LJ 641 .

35 *State v Raja Panda* (1971) 37 CLT 667 ; *Fakira v State of Maharashtra* (1997) 2 Crimes 517 (Bom) (DB).

36 *Kishore Singh v State of Madhya Pradesh* AIR 1977 SC 2267, 1977 Cr LJ 1937 ; *Sudershan Kumar v State of Delhi* 1975 Cr LJ 16, p 18, AIR 1974 SC 2328 ; *Dhansai Sahu v State* AIR 1969 Ori 105 ; *State of Rajasthan v Arjun Singh* (2011) 9 SCC 115, AIR 2011 SC 3380, 2011 Cr LJ 4943 .

37 *Sher Singh v State of Haryana* (2010) 14 SCC 24, (2011) 98 AIC 218 (SC), AIR 2011 SC 373 .

38 *Veerala Satyanarayana v State of AP* (2010) 3 SCC (Cri) 274, (2009) 16 SCC 316 .

39 *Virsa Singh v State of Punjab* AIR 1958 SC 465, pp 466-67, 1958 Cr LJ 818 ; *Domisetti Subhanna v State of Andhra Pradesh* (1975) 2 Andh WR 155 .

40 *Domisetti Subhanna v State of Audhra Pradesh* (1975) 2 Andh WR 155 .

41 *Khimar v Emperor* 1936 All LJ 73 ; *Perana v Emperor* 1936 All LJ 333 .

42 *State of AP v M Sobhan Babu* 2011 Cr LJ 2175, 2011 AIR SCW 1914, (2010) 3 Scale 451, (2010) 15 SCC 69 .

43 *State of Rajasthan v Jora Ram* 2005 Cr LJ 2578, p 2579, AIR 2005 SC 2440, (2005) 10 SCC 591, 2005 (2) Crimes 157 .

44 *Nanku v State* AIR 1972 All Cr R 293, 1972 All Cr C 263 ; *Ram v State* 1973 Cr LJ 1443, p 1447, 1973 WLN 401 ; Re *Thangavelu*(1971) 2 Mad LJ 403, 1971 Mad LJ (Cr) 663.

45 Re *Podi*(1967) 2 Mad LJ 74, p 78.

46 *Babulal v Emperor* AIR 1946 Nag 120, p 121, 47 Cr LJ 441 ; *Mohammad Wahid v State of Madhya Pradesh* 1980 Cr LR 105 (Notes) (MP) (DB).

47 *Sultan v State of Rajasthan* 1966 Raj LW 517 ; *Nana Gangaram Dhore v State* 1970 Cr LJ 621 (Bom) ; *State of Madhya Pradesh v Badri Prasad* 1980 Cr LR 94, p 98 (Notes) (MP) (DB) .

48 *Virsa Singh v State of Punjab* AIR 1958 SC 465 .

49 *Virsa Singh v State of Punjab* AIR 1958 SC 465, 1958 Cr LJ 818 .

50 *Settu v State of Tamil Nadu* 2006 Cr LJ 3889 (SC) .

51 *Sheikh Rafi v State of Andhra Pradesh* 2007 Cr LJ 2746 (SC) .

52 *State of Madhya Pradesh v Shanker Gangaram* AIR 1956 Nag 208, 1956 Cr LJ 908 ; *Virsa Singh v State of Punjab* AIR 1958 SC 465, 1958 Cr LJ 818, **followed in***State of Mysore v Hanamant Nagappa* AIR 1965 Mys 150, (1965) 1 Cr LJ 737 ; *Thannoo v State* AIR 1959 All 131, 1959 Cr LJ 158 ; Re *Krishnaswami Naicker*AIR 1965 Mad 261, (1965) 2 Cr LJ 42 ; *Jagan v State* (1962) 2 Cr LJ 641 ; *Basappa Bhimappa Doddamani v State* AIR 1961 Mys 21, (1961) 1 Cr LJ 120 .

53 *Public Prosecutor v Abdul Rahim* 1968 Cr LJ 1030, AIR 1968 AP 231 .

54 *Harjinder Singh v Delhi Admn* 1968 Cr LJ 1023, AIR 1968 SC 867 .

55 *Sultan v State of Rajasthan* 1966 Raj LW 517 ; *Virsa Singh v State of Punjab* AIR 1958 SC 465, p 467, 1958 Cr LJ 818 ; *R v Steane* (1947) 1 All ER 813, p 816 ; *Badri v State* AIR 1953 All 189, 54 Cr LJ 450 .

56 *Balkar Singh v State of Uttarakhand* 2009 Cr LJ 2980, p 2983 (SC), 2009 AIR SCW 3499, 2009 (4) Scale 507, (2009) 15 SCC 366, [2009] 5 SCR 242 ; *Rajwant v State of Kerala* 1966 Cr LJ 1509, AIR 1966 SC 1874 .

57 *Barku Krishna v State of Gujarat* AIR 1972 Guj LR 457 .

58 *State of Orissa v Raidhar Gouda* 1973 Cut LT 1225 ; *Hardev v State of Punjab* AIR 1975 SC 179, p 181, 1975 Cr LJ 243 .

59 *Laxman v State of Rajasthan* 1975 WLN 243 .

60 *Mukha Singh v State of Rajasthan* 1975 WLN 555 .

61 *Sajan v State of Rajasthan* 1975 WLN 536 .

62 *Khachera Mal v State of Uttar Pradesh* 1973 All Cr C 391 .

63 *Virsa Singh v State of Punjab* AIR 1958 SC 465, p 468, 1958 Cr LJ 818 ; *Gani Mohammad v State of Rajasthan* 1970 Raj LW 5 .

64 Re *Muniandi Servai*AIR 1944 Mad 251, p 253, 45 Cr LJ 733 ; *State of Madhya Pradesh v Gangabai* 1971 MPLJ 829 ; *Joginder Singh v State of Punjab* AIR 1979 SC 1876, p 1879 ; *Elem Molla v Emperor* 11 Cr LJ 417, ILR 37 Cal 315 .

65 *Badri v State* AIR 1953 All 189, p 191, 54 Cr LJ 450 ; *Behari v State* AIR 1953 All 203, p 207, 54 Cr LJ 565 .

66 *BN Srikantiah v State of Mysore* AIR 1958 SC 672, 1958 Cr LJ 1251 .

67 *Daljit Singh v Emperor* AIR 1937 Nag 274, p 280, 39 Cr LJ 92 ; *Sohan Majhi v State* AIR 1970 Pat 303, p 304, 1970 Cr LJ 1245 ; *Nga Khwet v King* AIR 1941 Rang 319, p 321, 43 Cr LJ 266 .

68 *State of Madhya Pradesh v Matroomal* 1980 Cr LJ 310, p 312-313 (MP) (DB) .

69 *State of Maharashtra v Sushil Vishnu Ombasa* 2015 Cr LJ 1894 (Bom) (DB) .

70 *Virsa Singh v State of Punjab* AIR 1958 SC 465, pp 466-467, 1958 Cr LJ 818 ; *Harjinder Singh v Delhi Admn* 1968 Cr LJ 1023, AIR 1968 SC 867 .

71 *Faqira v State* AIR 1955 All 321, p 325 .

72 *State of Orissa v Ghana Padhan* (1979) 47 Cut LT 575 .

73 *Vishnu Daga Pagar and Ors v State of Maharashtra* 1997 Cr LJ 2430 (Bom) (DB) .

74 *Arun Nivalaji More v State of Maharashtra* 2006 Cr LJ 4057, p 4064, AIR 2006 SC 2886, (2006) 7 Scale 532, (2006) 12 SCC 613 .

75 *Vishnu Daga Pagar and Ors v State of Maharashtra* 1997 Cr LJ 2430 (Bom) (DB) .

76 *Arjun Singh v Emperor* AIR 1942 Lah 255, p 256, 43 Cr LJ 812 ; *Babu Lal v Emperor* AIR 1946 Nag 120, p 127, 47 Cr LJ 441 ; *Ram Murti v State of Haryana* (1977) 79 PLR 12 .

77 *Behari v State* AIR 1953 All 203, 54 Cr LJ 565 .

78 *Dharam Pal v State of Uttar Pradesh* 1970 SCC (Cr) 132, (1970) 1 SCC 429 ; *Abdul Main v State of Rajasthan* 1984 Cr LR 310 (Raj) .

79 Re *Govindarasu*1970 LW 199 (Cr).

80 *Dharam Pal v State of Uttar Pradesh* 1970 SCC 132 (Cr), (1970) 1 SCC 429 ; *Domisetti Subbanna v State of Andhra Pradesh* (1975) 2 Andh WR 155 ; *Ghulam v Crown* AIR 1950 Lah 149, p 150, 51 Cr LJ 962 ; *Bharu v State of Madhya Pradesh* 1974 Jab LJ 240 ; *Mongolia v State of Rajasthan* 1975 WLN 688 ; *Sitori v State of Rajasthan* 1975 WLN 483 ; *Bheema v State of Rajasthan* 1984 Cr LR 86 (Raj) .

81 *Salebhai Kadarali v Emperor* AIR 1949 Nag 1949 Cr LJ 647 (2); *Delmohammad v Emperor* AIR 1942 Pat 420, 43 Cr LJ 883 .

82 *Rajwant Singh v State of Kerala* AIR 1966 SC 1874, p 1878 .

83 *Rajinder Singh v State of Punjab* AIR 1978 SC 1420, p 1421, (1978) 3 SCC 422 ; *Public Prosecutor v Ayyar* (1969) 2 Mad LJ 453, p 455-456 ; *Maridasan v State of Tamil Nadu* AIR 1980 SC 573, p 574 ; *Gaffar v State of Uttar Pradesh* 1980 Cr LR 600, p 605 (All) (DB), (wherein it was held that an accused, who inflicts a stab injury in the chest (a vital part of the body) of the deceased, as a result of which he dies only half an hour after and which injury is sufficient, in the ordinary course of nature, to cause death of the victim, is guilty of murder); *Kaliya v State of Rajasthan* 1984 Cr LR 321 (Raj) .

84 *Narain Rao v State* AIR 1952 MB 25 .

85 *Nanak v Emperor* AIR 1931 Lah 189, 32 Cr LJ 1205 .

86 *Abdul Mazid v State of Assam* AIR 1994 SC 1487 .

87 *Ram Kumar v State of MP* 2014 Cr LJ 3694, (2014) 5 SCC (Cri) 607, (2014) 140 AIC 61 (SC), 2014 (4) Crimes 90 (SC) .

88 *Khachar Dipu v State of Gujarat* 2013 Cr LJ 3177, 2013 AIR SCW 3223 (SC), 2013 (5) Scale 37, (2013) 4 SCC 322 .

89 *State of Rajasthan v Arjun Singh* 2011 Cr LJ 4943, p 4949 (SC), AIR 2011 SC 3380, 2011 (9) Scale 661, 2011 AIR SCW 5295 .

90 *Virsa Singh v State of Punjab* AIR 1958 SC 465, p 467, 1958 Cr LJ 818 ; *Rajwant Singh v State of Kerala* AIR 1966 SC 1874 ; *Bhaktawar v State of Haryana* 1980 SCC (Cr) 150, p 152, (1979) 4 SCC 698 ; *Ramasharya and Anor v State of Madhya Pradesh* 2001 Cr LJ 1452 (SC) .

91 *Narayanan Nair Raghwan Nair v State of Travancore and Cochin* AIR 1956 SC 99, 1956 Cr LJ 278 .

92 *Rahman Samail v Emperor* AIR 1939 Lah 245, p 252, 40 Cr LJ 712 ; *Behari v State* AIR 1953 All 203, 54 Cr LJ 565 .

93 *Rajwant Singh v State of Kerala* AIR 1966 SC 1874, p 1879 .

1 Re *Thangaswami*AIR 1963 Mad 476 .

2 *Ibid*; *Brij Bhukhan v State of Uttar Pradesh* AIR 1957 SC 474, p 477, 1957 Cr LJ 591 ; *Rajwant Singh v State of Kerala* AIR 1966 SC 1874, p 1878 .

3 *State of West Bengal v Mir Muhammad Omar* 2000 Cr LJ 4047 (SC) .

4 *Sheikh Rafi v State of AP* 2007 Cr LJ 2746, 2007 AIR SCW 2749, 2007 (3) Supreme 675, 2007 (6) Scale 74 .

5 *Rajwant Singh v State of Kerala* AIR 1966 SC 1874, p 1878-79 .

6 *Gahbar Pande v Emperor* AIR 1928 Pat 169, p 171, 29 Cr LJ 17 ; *Behari v State* AIR 1953 All 203, 54 Cr LJ 565 ; *Perana v Emperor* 1936 All LJ 333 ; *Queen v Khedun Misser* 7 WR (Cr) 54, p 55 ; *Emperor v Hashim* 14 Cr LJ 459 ; *Saidino v Emperor* 16 Cr LJ 710 ; *Nga Na Ban v Emperor* 5 Cr LJ 306 .

7 *Balu Singh v State of Madhya Pradesh* 1981 Cr LR 10, p 11 (MP High Court Notes) (DB) .

8 *State v Akbar Dar* 1980 Srinagar LJ 661, p 670 (J&K) (DB).

9 *Sheikh Rafi v State of Andhra Pradesh* 2007 Cr LJ 2746 (SC) .

10 *Rajendera v State* 1968 Cr LJ 811 (All), **following***Anda v State of Rajasthan* AIR 1966 SC 148 ; *Kirtem v State of Madhya Pradesh* 1984 Cr LJ 1069 .

11 Re *China Naicker*1937 Mad WN 1129.

12 *Brij Bhukan v State of Uttar Pradesh* AIR 1957 SC 474, p 477, 1957 Cr LJ 591 ; *Anda v State of Rajasthan* AIR 1966 SC 148, p 152 ; *Jhaduram v State of Madhya Pradesh* 1980 Cr LR 99, p 100 (Notes)(MP)(DB); *Rewaram v State of Madhya Pradesh* 1978 Cr LJ 858 ; *Lal Singh v Emperor* AIR 1938 Lah 31, 39 Cr LJ 265 ; *Lati v Emperor* AIR 1937 Nag 335 ; *Thakur*

Das v State AIR 1967 All 495, 1967 Cr LJ 1455 .

13 *Mochi Ram Mahton v State* 1972 BLJR 596 .

14 *Ghurey v Rex* AIR 1949 All 342, 50 Cr LJ 535 .

15 *Sorban Singh v State of Uttar Pradesh* 1970 UJ 328 (SC) .

16 Re *Oswal Danji Tesji v State* AIR 1961 Guj 16, (1961) 1 Cr LJ 251 .

17 Re *Dadi Abdul Gafoor*AIR 1955 AP 24, 56 Cr LJ 329 ; *State of Madhya Pradesh v Badriprasad* 1980 Cr LR 94, p 98 (Notes) (MP)(DB); *Noor Mohammed v State of Madhya Pradesh* 1980 Cr LR 102, p 104 (Notes) (MP)(DB).

18 Re *Mahanti Sreeramulu*AIR 1940 Mad 293, 41 Cr LJ 491 ; *Aditya Mohapatra v State of Orissa* AIR 1980 SC 2110, p 2111, 1980 Cr LJ 1475, p 1476 ; *State of Karnataka v Vedanayagam* AIR 1995 SCC (Cr) 231 ; *Sannappa Rayappa Jadge v State of Karnataka* AIR 1994 SC (Cr) 1167 ; *Babubhai Ranchodbhai Patel v State of Gujarat* AIR 1994 SC (Cr) 265, 1994 Cr LJ 2099 ; *Vide Vasanta v State of Maharashtra* AIR 1983 SC 361, 1983 Cr LJ 693 (SC) ; *Appadurai v State* 1997 Cr LJ 2349 (Mad) (DB) ; *Bahan Ramji Chaudhary v State of Maharashtra* 1999 Cr LJ 4338 (Bom) (DB) .

19 *Nga Khwet v King* AIR 1941 Rang 319, p 321 ; *Thannoo v State* AIR 1959 All 131, 1959 Cr LJ 158 ; *Sadhu Kumbhar v King* AIR 1951 Ori 354, p 355, 52 Cr LJ 1136 ; *Nga Ba U v Emperor* AIR 1937 Rang 429, p 430 ; *Nga Ohn Pe v Emperor* AIR 1936 Rang 477, p 478 ; *Bikrama v State* AIR 1958 All 348, 1958 Cr LJ 588 ; *Ghulam v Crown* AIR 1950 Lah 149, 51 Cr LJ 962 ; *Nazar Singh v State* AIR 1951 Pepsu 66 .

20 *Bicchu v State of Uttar Pradesh* AIR 1958 All 791, 1958 Cr LJ 1367 ; *Ramprasad v State of Madhya Pradesh* (1963) 1 Cr LJ 363, p 368 ; *Reg v Govinda* ILR 1 Bom 342 ; *Basappa Bhimappa Doddamani v State* AIR 1961 Mys 21, (1961) 1 Cr LJ 120 ; *Dilmohammad v Emperor* AIR 1942 Pat 420, 43 Cr LJ 883 .

21 *Narayanan Nair Raghavan Nair v State of Travancore & Cochin* AIR 1956 SC 99, 1956 Cr LJ 278 .

22 *Emperor v Ram Newaz* 14 Cr LJ 615, ILR 35 All 506 ; *Sipahi Singh v Emperor* AIR 1923 All 88 (2), 24 Cr LJ 106 ; *Lati v Emperor* AIR 1937 Nag 335 .

23 *Willaim Slaney v State of Madhya Pradesh* AIR 1956 SC 116, p 133, 1956 Cr LJ 291 .

24 *Reg v Govinda* ILR 1 Bom 342 .

25 *Nga Na Ban v Emperor* 5 Cr LJ 306 .

26 *Nga Po Swa v Emperor* AIR 1936 Rang 113, 37 Cr LJ 435 ; Re *Krishnaswami Naicker*AIR 1965 Mad 261, p 263, (1965) 2 Cr LJ 42 .

27 Re *Kottegodan Alaxi*AIR 1939 Mad 269, 40 Cr LJ 308 (1).

28 *Public Prosecutor v Ramaswami Nadar* AIR 1940 Mad 745, p 746 ; *Public Prosecutor v Ayyanar* (1969) 2 MLJ 453, p 455-456 ; *Amar Singh v State* 71 Punj LR 358, p 366 ; Re *Singaram Padayachi*AIR 1944 Mad 223, p 225, 45 Cr LJ 729 .

29 *Virsa Singh v State of Punjab* AIR 1958 SC 465 ; *Public Prosecutor v Ayyanar* (1969) 2 MLJ 453, p 455-456 .

30 *Babulal v Emperor* AIR 1946 Nag 120, p 121, 47 Cr LJ 441 ; *Bhikham v State* AIR 1980 All LJ 927 (DB); *Anda v State of Rajasthan* AIR 1966 SC 148 .

31 *Gathi v State of Madhya Pradesh* 1980 Cr LR 346, p 348 (MP) (DB) .

32 *Rajwant Singh v State of Kerala* AIR 1966 SC 1874, p 1878 .

33 *State of Andhra Pradesh v Rayavarupu Punnayya* AIR 1977 SC 45, pp 50-51, 1977 Cr LJ 1 ; *Abdul Waheed Khan alias Waheed and Ors v State of Andhra Pradesh* (2002) JT 6 SC 274 ; *Ruli Ram and Anor v State of Haryana* (2002) 7 AD (AS) 492 .

34 *Inder Singh v Emperor* AIR 1929 Lah 157, p 158 ; Re *Dadi Abdul Gaffoor*AIR 1955 AP 24, p 26 ; *King v Aung Nyun* AIR 1940 Rang 259 (FB) ; *Reg v Govinda* ILR 1 Bom 342, p 345 .

35 *Darhoon Khuda Bux v Emperor* AIR 1914 Sind 35, 16 Cr LJ 472 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 300.

Murder.--

29. Clause Fourthly--Scope and Applicability of

The fourth clause of this section contemplates the doing of an imminently dangerous act, in general, and not the doing of any bodily harm to any particular individual. In case of intentionally causing bodily injury to a particular person, the question, whether such an act is murder, has to be decided with reference to the first three clauses of the section. This clause, *i.e.*, the fourth clause, is designed to provide for rare class of cases like putting lives of many persons in jeopardy, by the act done, as envisaged in illust (d) of the section and the like.[36] When a man deliberately strikes or shoots another, the case can never fall under this clause.[37]This clause comes into play only if no other clause of this section applies. In cases, where the intention of the assailants, as inferred from the result of their act, can, at least, be that of causing such bodily injuries as the assailants would have known to be likely to cause the death of their victim, the invocation of this clause would be altogether erroneous.[38] The emphasis in the preceding part of this fourth clause is on the imminently dangerous nature of the act itself. Further, the clause is usually applied to cases where the act of the offender is not directed against any particular person. There may even be no intention to cause harm or injury to any particular individual. The act proceeds not from any malicious intention towards any particular individual, but is the result of a general disregard for human life and safety. There may, however, be rare cases in which the target of attack, even under this clause, may be a single individual. The act of a person, practising feats of archery by aiming his arrow at the cap of a human being walking at some distance away or at a mother leaving a new born baby in the open, or the act of pouring kerosene oil over the body of victim and setting fire to it,[39] may provide an instance of it.[40] Therefore, furious driving and2173 firing at a mark near a public road would be cases of this description.[41] The Supreme Court, in *State of Madhya Pradesh v Ram Prasad* ,[42]observed that clause fourthly, though usually invoked in those cases where there is no intention to cause the death of any particular person (as the illustration shows), may on its terms, be used in those cases also where there is extreme callousness towards the result and the risk taken is such that it may be stated that the person knows that the act is likely to cause death or such bodily injury as is likely to cause death. In *Pradeep Kumar Pathak v State* ,[43] the court observed that the clause 'fourthly' of s 300, IPC, envisages knowledge, and not intention. An assailant, causing deep injury in the chest with a deadly weapon like knife, spear, gun, *etc.*, must know that he is doing an imminently dangerous act which, in all probability, would cause death or such bodily injury as is likely to cause death. As it is common knowledge that the vital organs are found in the chest, therefore if, the deceased dies within half-an-hour of the causing of a deep injury in his chest by the accused with a deadly weapon like a knife, the accused is liable under the said clause even if the doctor, who conducts the post-mortem examination, is not examined in evidence.

30. Essential Requirements of the Fourth Clause

Following are the essential requirements of fourth clause of s 300 :

(i) the person, committing the offence, knows that the dangerous character of the act is so

imminent that it must, in all probability, cause death or such bodily injury as is likely to cause death;[44] and

(ii) he should have committed the act without any excuse for incurring the risk of causing death or such bodily injury as is likely to cause death.[45]

For applicability of this clause following are the necessary requirements:

(1) the act must be imminently dangerous;
(2) the act must be of extra-ordinary recklessness;
(3) the danger to human life must be imminent; and
(4) the imminence should be such that it will in all probability cause death or cause such bodily injury as is likely to cause death.[46]

Where the deceased had refused to take wine with the accused and the later first fired in the air and thereafter fired indiscriminately, the offence was committed under s 304, Pt I and not under s 302, IPC .[47]

31. Clause (c) of Section 299 and Fourth Clause of Section 300

Clause (c) of s 299 and cl (4) of s 300 both require knowledge of the probability of the act causing death. It will be sufficient to say that cl (4) of s 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons,2174 being caused from his imminently dangerous act approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.[48]

32. 'Imminently' and 'Imminently Dangerous'

The word 'imminently' implies a risk which is both threatening and near. The question of whether an act is imminently dangerous depends upon nature of the act and its evident risk to human life. The danger threatened must be to human life. It must be an act in which death of human is certain or almost so, and it would be surprising if the result was otherwise. Moreover, the danger must not only be of certain or almost certain death, but of a death which is near and may be counted by number of hours or days.[49] The man, who strikes another with a knife in the throat, must know that the blow is so imminently dangerous that it must, in all probability, cause death and the injury intended to be inflicted is sufficient, in the ordinary course of nature to cause death.[50] When the accused had used a dangerous weapon like a rifle, (being a police constable he must have known that it was a dangerous weapon) and having regard to the fact that he had fired as many as five shots, at the deceased, one of which was fired after the victim was hit by a bullet and collapsed on the ground, in any view of the matter the case would fall under clause 'fourthly' of s 300, IPC .[51]The act of the accused in abandoning the two-year old child is imminently so dangerous that it would have in all probability caused death or such bodily injury as is likely to cause his death attracting clause, fourthly, of s 300, IPC .[52]

33. 'If the Person, Committing the Act, Knows that it is so Imminently Dangerous that it must, in all Probability, Cause Death or such Bodily Injury as is Likely to Cause Death'

The earlier part of this fourth clause of s 300 refers to cases where the act of the accused is itself so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death. The degree of the probability or likelihood of the act, resulting in fatal harm being of the highest level.[53]The knowledge must relate to the time when the act was done, and not to any time anterior to it.[54]

An act of setting any person aflame after pouring kerosene is definitely likely to cause the death of that person and this fact is obviously known to the accused persons when they caught hold of the deceased, poured kerosene over her and set her ablaze.[55] One accused sprinkled petrol in a bus and another accused lit the matchstick thereafter. These facts are sufficient to bring the case under s 302, IPC, because these very acts were such that accused would be deemed to know that pouring of petrol in the bus and lighting fire are so imminently dangerous that in all2175 probabilities it would cause death or such bodily injury as is likely to cause death of the passengers.[56]

Where the accused persons had thrown bricks on the vital parts of the body of the deceased who was a 78 year old man, thereby causing his death, in such event, knowledge to commit murder can definitely be attributed to the accused as the deceased died instantaneously after receiving the brick injuries. The conviction of the accused under s 302, IPC was altered to one under s 304, Pt II.[57]

The knowledge, that this clause requires, is not merely that the act in question is 'imminently dangerous', but also that 'it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death'. A danger is imminent when it is immediately threatened or is impending. Bodily injury, which is likely to cause death, may be 'sufficient, in the ordinary course of nature, to cause death', but the words 'imminently dangerous' and 'in all probability', in this clause, show that death must be an almost certain consequence of the act--so certain that only a miracle can prevent it.[58] At one time, it was considered that the wielding of a *lathi* was an imminently dangerous act and if a severe injury is caused resulting in death, the case should fall within the purview of clause 'fourthly' of this section.[59] However, this view has not been followed in other cases.

In *Perana v Emperor* ,[60] it was observed that the use of *lathi* is certainly dangerous, but is not so dangerous that anybody would, in the ordinary course, think that death is a probable cause of the use of the *lathi*. *Lathis* are frequently used and result in nothing more than injuries which are simple hurt or, at the most, grievous hurt. In another case, it was observed that it cannot be said of every *lathi* blow that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death. Even brutal assaults with *lathis*, resulting in death, do not fall under clause 'fourthly' of this section and do not ordinarily amount to murder, unless the accused intends to cause death or to cause such bodily injury as is sufficient, in the ordinary course of nature, to cause death.[61]

34. Proof of Intention or Knowledge

It is the duty of the prosecution to prove the accused's guilt subject to his (accused's) defence of insanity and subject also to any statutory exception.[62] If, however, the prosecution has failed to prove the requisite intention or knowledge, the court can2176 rely on the proved circumstances in judging the offence even if the accused might have failed to raise the plea in his defence.[63]

In the context of intention, the question is not whether the accused intended to kill or to inflict injuries of any particular degree of seriousness, but the question rather is whether he intended to inflict the injuries in question, and once the existence of such injuries is established, the intention to cause the same will be presumed unless an opposite conclusion is warranted by the proved circumstances.[64] The following cases, for illustrations' sake, may explain the above proposition:

(i) The accused had intended only to incapacitate the deceased by hitting at his leg which act was not as imminently dangerous as would, in all probability, cause death; the stroke however hit the vital part of the body and resulted in the victim's death. It was held that the accused had no intention to cause death or such bodily injury as is likely to cause death.[65]

(ii) The accused had set fire to the clothes of his wife. It was held that accused must have known that he was running the risk of causing death of the victim because no special knowledge is required to know that one might cause death by such act.[66]

The circumstance, that there may be difficulty in establishing the requisite knowledge or intention, by no means, discharges the prosecution from the burden of so doing.[67] Thus, when the court is called upon to arrive at a finding as to the real intention of the accused in committing a particular offence, it is expected to consider every available circumstance and it should accept only that conclusion which can be arrived at, beyond reasonable doubt.[68] Section 100 of the Indian Evidence Act 1872, does not absolve the prosecution from proving all the essential ingredients of an offence, nor does it cast upon an accused the burden of proving that no offence has been committed.[69] Therefore, in order to establish the guilt, specific intention to cause death or bodily injury should be proved by the prosecution.[70]

35. 'And Commits such act without any Excuse for Incurring the Risk of Causing Death or such Injury as Aforesaid'

Merely causing death, by doing an act with the knowledge that it is so imminently dangerous that it must, in all probability, cause death, is not murder. In order that an act, done with such knowledge, should constitute murder, it is necessary that it should be committed without any excuse for incurring the risk of causing the death or bodily injury. An act, done with the knowledge of its consequences, is not *prima facie* murder; it becomes murder only if it can be positively affirmed that there was no excuse. The requirements of the section are not satisfied by the act of homicide being one of extreme recklessness. It must, in addition, be wholly inexcusable. When a risk is incurred, even a risk of the gravest possible character which must normally2177 result in death, the taking of that risk is not murder unless it was inexcusable to take it.[71]It is culpable homicide because the act, causing death, is done with the knowledge that the actor is thereby likely to cause death; it is not murder because it does not satisfy both parts of the definition of murder in clause 'fourthly' of this section. Being culpable homicide and not murder, the act is necessarily culpable homicide not amounting to murder.[72]

The words 'without any excuse for incurring the risk' mean without any excuse which a criminal court, administering the criminal law, as embodied in IPC, can reasonably regard as an excuse. The term 'excuse', also occurs in the explanation to s 81, IPC . It is used there as synonymous with the expression 'to justify' which seems to indicate that the grammatical meaning of exculpating or absolving is intended to be retained. In this sense, the words would mean in the absence of any exculpatory circumstances other than any of those circumstances mentioned in the five exceptions to this section.[73]In view of the above, an imminently dangerous act is not murder if it is done to prevent a greater evil. If the evil can be avoided without doing the act, then there can be no valid justification for doing the act which is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death.[74] In *Emperor v Dhirajia* ,[75] a village woman left her home with her six months' old baby in her arms on account of her husband's ill-treatment. After she had gone some distance from home, she turned around and saw her husband pursuing her. She became panicky and jumped into a well nearby with the baby in her arms. The baby died, but the woman survived. On these facts, a Division Bench of the Allahabad High Court assumed that the woman had knowledge of the consequences of her act, but thought that she had an excuse and that excuse was panic or fright, it held her guilty, not of murder, but of culpable homicide not amounting to murder. Similarly, in *Supadi v Emperor* ,[76] a girl of 17 years of age, who too was ill-treated by her husband, jumped with her baby into a well when she found that her husband prevented her from returning to her parents. In this case, she was carrying the baby on her back but the judges came to the conclusion that she was not aware at all that she had a baby with her and, therefore, the girl was convicted under s 304A, and not under clause 'fourthly' of s 300 . But in Re *Karuppal*,[77]a woman had been very harshly treated by her husband and was living a life of utmost misery and, therefore, jumped into a well with her two children with the result that the children died. It was held that, as there was no evidence of insanity which would take away the criminality of the act, the woman was guilty of murder; but in view of the extenuating circumstances, even a sentence of transportation for life was considered excessive and a sentence of three years' imprisonment was recommended. From the above decisions, it appears that it is a matter of fact, and not of law, whether a particular act of homicide, committed with the knowledge, described in clause 'fourthly' of this section, is committed without any excuse. As the fourth clause is framed, it need never be determined as a matter of2178 law what circumstances, other than, or falling short of, the five exceptions, constitute an excuse, it being, in each case, a question of fact whether, from

the circumstances, which are proved, the just inference is that the act was done without any excuse.[78]

36. If one of the Four Conditions of Section 300 is Satisfied, the Offence is Murder

It is to be noticed that cll (1)-(4) of s 300, IPC define culpable homicide amounting to murder. An offence will amount to murder if any one of the four clauses enumerated under s 300, IPC is satisfied. All the four conditions precedent, enumerated under s 300, IPC are not necessary to co-exist for an offence of murder. It would be sufficient for the prosecution to establish any one of the conditions enumerated under s 300, IPC, against an offender or offenders, as the case maybe, for punishing him or them for an offence of murder.[79] To render culpable homicide to murder, the case must come within the provisions of cll (1), or (2), or (3), or (4), of s 300 .[80] In a case where the prosecution case is supported by direct eyewitness evidence, the rules applicable to a case where death is caused by administering poison and where the fate of the case rests entirely on circumstantial evidence are not applicable when the prosecution has otherwise proved its case against the accused. Its failure to prove the source from which the accused procured the poison would not by itself be of any consequence.[81]

37. Exceptions--Scope of

After setting out the four mental conditions, the section lays down five exceptions which reduce the offence of murder again to 'culpable homicide' which may be said to be culpable homicide not amounting to murder,[82] which mitigates the offence of murder. When a case does not fall under any of the exceptions of this section, the accused can rightly be convicted under s 302, IPC, as when he deliberately caused a fatal injury on the most vital part of body of the deceased.[83] If, however, any one of them is attracted, the *prima facie* presumption, that the offence is murder, is removed and the offence becomes 'culpable homicide not amounting to murder'.[84] An offence may also amount to culpable homicide, but not murder, even though none of the exceptions in s 300 is applicable to the case.[85]It must be noted that unless the act done constitutes, at least *prima facie*, a murder by reason of the intention, with which it is found to be done, the court need not consider the exceptions.[86]

The exceptions, specified in this section, are special exceptions which must be distinguished from the general exceptions specified in ch 4 of IPC . The general exceptions rebut the *prima facie* liability of the offender and he is completely exonerated from blame. But the special exceptions, specified in this section, do not2179 completely exonerate him, but only mitigate the offence, committed by him, and reduce his liability.[87] The five exceptions, specified in the section, may briefly be stated to arise out of:

(i) provocation;
(ii) right of private defence of person or property;
(iii) exercise of legal powers;
(iv) absence of pre-meditation and heat of passion;
(v) consent.

38. Operation of Exceptions

As pointed out by Plowden J, in a case, namely, Re *Barkatulla*,[88] the operation of the five exceptions to s 300 is practically somewhat different in respect to an act, which falls within one of the first three clauses of s 300, and in respect to an act which falls within the fourth clause. The exceptions operate in this way. The existence of all the circumstances, described in an exception, excuse an act, which would otherwise be murder within one of the first three clauses, to the extent that the act constitutes only culpable homicide not amounting to murder, and not murder. Here the act is *prima facie*murder unless and until an exception

is established. There is no inconsistency involved in finding that an act falls within one of these clauses and also falls within an exception, for all the circumstances of any exception may co-exist with the murderous intention. When, however, an act falls within the fourth clause of s 300 as regards the knowledge, with which it is done, and the circumstances, constituting an exception, exist, there is this difference, *i.e.*, it cannot consistently be affirmed (at the end of a trial and upon all the evidence) as an act, causing death, done with the knowledge described, in one breath that it was done without any excuse for running the risk of causing death and in the next breath that it was done under circumstances which the law declares to be an excuse for the act of causing death to the extent of preventing the culpable homicide not amounting to murder. It has been decided, that it is a matter of fact, and not, of law, whether a particular act of homicide, committed with the knowledge described in cl (4) of s 300 is committed without any excuse. As the fourth clause is expressed, like the three preceding clauses, to be subject to the five exceptions, which are legal excuses for murder (as contra-distinguished from culpable homicide), it is evident that the words 'without any excuse' in cl (4) do not mean merely in the absence of the circumstances described in the exceptions. A court, as a judge of fact, is left at liberty to affirm, upon proof of circumstances other than, or falling short of, an exception, not that these circumstances form an excuse for murder, but that, in view of them, the court is unable to affirm that the particular act of homicide was committed without any excuse and is, therefore, unable to pronounce the act to be culpable homicide amounting to murder as defined in cl (4) of s 300 .

Where one of the two accused raises a plea that his case falls under one of the exceptions, the case of the other may also be entitled to the benefit of such defence although the other denies his presence altogether.[89] Where the death caused by the accused was not premeditated and the injuries were not sufficient in the ordinary course of nature to have caused his death, furthermore the accused had no common2180 intention to cause death of deceased, as only accused no. 1 had caused a vital injury on the head of the deceased, it was held that, the case was covered by exceptions 1 and 4 of s 300, IPC . Therefore, the accused no. 1 was convicted under ss 304, Pt I/149 of the IPC .[90]

39. Burden of Proving Exceptions

The law of homicide is contained in ss 299 and 300 of the IPC . If a case falls under s 300 it is murder, unless one of the exceptions to the section is attracted. The other defences to a charge of murder are contained in ch IV of the IPC which *prima facie* rebuts the liability of the offender and he is completely exonerated from blame. In any case, unless one of the various sections of the IPC applies, the onus under s 105 of the Indian Evidence Act 1872 is not discharged.[91] If an accused pleads an exception, then, because of s 105 of the Indian Evidence Act 1872, the burden of proving the existence of circumstances, bringing the case within any of the exceptions, lies upon him and the court is enjoined to presume the absence of such circumstances. Consequently, the accused must establish, from the evidence, the existence of such circumstances. The court is precluded to presume them in the absence of their proof; it is precluded from speculating and giving the accused any benefit of doubt on the basis of such speculation.[92] Of course, the accused has merely to satisfy the standard of a prudent man. If the material placed before the court, such as oral and documentary evidence, presumptions, admissions or even prosecution evidence, satisfies the test of a prudent man, the accused will be deemed to have discharged his burden. It may merely raise a reasonable doubt in the mind of the court as regards one, or other, of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the court whether the accused had the requisite intention, laid down in s 299 of the IPC . If the court has such a reasonable doubt, it has to acquit the accused because, in that event, the prosecution must be deemed to have failed to prove conclusively the guilt of the accused.[93] In the case of

In Re *Murugian*,[94] the bare word of the accused was accepted. However, it cannot be accepted as a principle that, in every case, the bare word of an accused person is sufficient to discharge the burden of proof of an exception. There must be some corroboration, direct or indirect, of the statement of the accused person.[95]

40. Benefit of Exceptions to Accused though not Claimed or Claimed

Belatedly

If, upon the evidence, it appears that the accused is entitled to the benefit of any one of the exceptions, neither the ignorance of the accused, nor the falsity of his defence,2181 nor any mistake or omission of the lower courts or advocates, should deprive him of the benefit of it.[1] The fact, that the accused has not specifically pleaded the right of self-defence or any other exception, should not influence the court in concluding that the plea of self-defence was not available to the accused to any degree.[2] The fact, that the accused has disclosed the circumstances, constituting grave and sudden provocation for the first time only in his statement before the sessions court, is not, by itself, sufficient to dismiss the same out of consideration as being an afterthought counsel for the accused is entitled to rely upon any circumstance which, if accepted, would convert the offence into a lesser one even if such circumstance had not been placed before the court at an earlier stage. The question is whether such circumstances did exist, though it was not disclosed at an earlier stage.[3]

41. Exception 1--Scope of

The defence of provocation rests upon the fact that provocation was grave and sudden by reason of which the accused was deprived of his power of self-control.[4] One of the conditions for the operation of this exception is that the accused must have used force in consequence of grave and sudden provocation. One slap cannot constitute grave provocation even though it may be held to be sudden.[5] Nineteen injuries caused in quick succession cannot be said to have been caused as a result of grave and sudden provocation.[6] It is true that if the modesty of a girl is being outraged or any person tries to molest one's sister then that may give a right to a brother to thrash the person who has done so, but it does not give any sufficient cause to kill that person.[7] Mere objectionable or filthy abuses cannot be said to have deprived one of one's power of self-control[8] though a very foul abuse, hurled by the deceased, may be grave and sudden enough to entitle an accused to the benefit of exception I.[9] It is no defence if the fatal blow is traced not to the influence of passion, arising from the provocation, but after the passion had cooled down by lapse of time for premeditation and calculation.[10] Where the accused went home, came armed with a spear and brought his brothers, who were armed with *lathis*, it was held that this interval was enough to cool him down.[11] Similarly, where the accused went to his house, which was about a furlong away from the scene of occurrence, and fetched a gun to shoot the victim, it was held that there was sufficient time for him to cool down.[12] But running a distance of 45 yards by the accused was held not to furnish him sufficient time to cool down his indignant passion.[13]

It is the temporary loss, and not the permanent or utter absence of reason of self-control, which is contemplated by this exception and, what is more, such loss of self-2182control must be shown to have been caused by a grave and sudden provocative act or conduct of the victim.[14] An accused, who found his wife, lying with her paramour, almost naked, killed them by an axe, was held entitled to this exception.[15] But the rule, that when wife, mother or married sister, living under care of husband, son or brother, is apprehended having sexual intercourse with a stranger, the killing of that stranger would attract the benefit of grave and sudden provocation, was held not to extend to cases of first cousin, second cousin or others.[16]

Where the wife of the accused threw a vegetable cutter at him causing an injury on his right little finger, it was held that it constituted a grave and sudden provocation, which deprived him of his power of self-control within the meaning of exception 1, keeping in view, the fact that the wife was also refusing conjugal relations to her husband (*i.e.*, the accused) while she was carrying them with her sister's husband. Viewed in this background, the conviction of the accused under s 302, IPC, was altered into one under s 304, Pt I, IPC .[17]

In a case, the niece of the accused had eloped with her school teacher and the accused suspected the hand of the deceased. On the date of the incident the accused was working in his field and the deceased came there and after a long verbal duel, the accused picked up a sickle lying on the ground and delivered a blow on the neck of the deceased. There was no pre-meditation or pre-plan of the accused to cause the

death of the deceased. As the accused acted under grave and sudden provocation, and he did not repeat the blow, he was convicted under s 304, Pt II and not s 302, IPC .[18]

42. Law Relating to Exception I

The law, laid down in the undernoted case,[19] relating to exception 1 of s 300, may be stated as under:

(i) the test of grave and sudden provocation is whether a reasonable man, belonging to the same class of society, to which the accused belongs, and placed in the situation, in which the accused was placed, would be so provoked as to lose his self-control;[20]
(ii) words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within exception 1 to s 300 ;
(iii) the mental background created by the previous act of the victim, may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence;[21] and2183
(iv) the fatal blow should be clearly traced to the influence of passion, arising from that provocation, and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.

43. Conditions Necessary for the Application of Exception 1

Under exception 1, culpable homicide is not murder if the following conditions are satisfied:

(i) there must be provocation to the accused;
(ii) the provocation must be grave;
(iii) the provocation must also be sudden;
(iv) the provocation must have deprived the accused of his power of self-control;
(v) the offence must have been committed during loss of self-control; and
(vi) the person killed must have been the person giving provocation, or another by mistake or accident.[22]

In applying the test, it is of particular importance:

(a) to consider whether sufficient interval had elapsed, since the provocation, to allow a reasonable man to cool; and
(b) to take, into account, the instrument, with which the homicide was effected, because a retort in the heat of passion, induced by provocation by a simple blow, is a very different thing from one by making use of a deadly weapon like a concealed dagger.[23]

44. Provocation

Provocation is an external stimulus which can be objectively measured. However, loss of self-control is a subjective phenomenon. To look into the mind of the accused is seldom possible. The state of mind can be inferred from the surrounding circumstances.[24]

The provocation must be such as will upset not merely a hasty, hot-tempered and hypersensitive person,

but also a person of ordinary sense and calmness. The law does not take into consideration abnormal creatures reacting abnormally in given situations. It contemplates the acting of normal beings in a given situation and the protection, that is offered by the exception, is the protection for normal beings reacting normally in a given set of circumstances.[25] It all depends on how a particular2184 situation acts on the mind of the person keeping in view his social status and mental background to which a man of his nature could be prone to.[26]

45. Test of 'Grave and Sudden Provocation'

The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society, to which the accused belonged, and placed in the situation, in which the accused was placed, would be so provoked as to lose his self-control. What a reasonable man will do in certain circumstance depends upon the customs, manners, way of life, traditional values, *etc*., that is to say, the cultural, social and emotional background of the society to which an accused belongs.[27] So, a reasonable man is a normal man of the same class or community as that to which the accused belongs.[28] In *Mahmood v State* ,[29] Dhavan J, suggested that whenever the courts refer to a 'reasonable' person, they really mean a normal person. The proper criterion is the likely reaction of a normal person against a similar provocation. Whenever an accused pleads grave provocation in defence, he means that the provocation, under which he killed his victim, was too strong for him to resist, and the simple question before the court is, would a normal person have been able to control himself, if similarly provoked, and did the accused, in killing the deceased, react like any normal person? Thus, the test is not the conduct of the reasonable man, but the impulses and frailties of a normal man and his likely reaction to a similar provocation. In *Mahmood v State* ,[30] the court pointed out that the question of fact, under the explanation, attached to exception 1, is not whether the accused lost self-control, but whether the provocation was grave enough to prevent the offence from being murder even if the accused did lose self-control. In deciding this question, ordinarily, the general nature of the provocation, rather than its effect on a particular individual, has to be considered. The court has to consider the general nature of the provocation and to decide whether it is provocative enough to make a normal person, in similar circumstances, react so violently as to release his homicidal impulses.

The word 'grave' indicates that provocation be of such a nature so as to give cause for alarm to the accused and 'sudden' means an action which must be quick and unexpected so as to provoke the accused. The question whether the provocation was grave and sudden is a question of fact and not one of law. Each case is to be considered according to its own facts.[31]

46. There must be Provocation to the Accused

The first condition to invoke the operation of exception 1 to s 300 is that there must be provocation to the accused. When fatal injuries have been caused without provocation the offence is punishable under s 302, and not under s 304, Pt I of the2185IPC .[32] Where the provocation came from the side of the accused, the accused was not entitled to the benefit of exception 1.[33]

The accused did not adduce evidence to show that the complainant or his brothers abused or used provocative words/language; exception 1 to s 300 was not attracted in the case. Conviction under s 302, IPC was held proper.[34]

47. Provocation Caused by Act

There may be circumstances which may merely predispose a man to a violent act, but these are not enough to bring the offender within the purview of exception 1. The provocation must be an act, or series of acts, which, by their very nature, would induce sudden and temporary loss of self-control in a reasonable man to such an extent that it can be said that he is no longer the master of his mind.[35]

Where there was admittedly a quarrel between the parties, following an assault on the accused's father, and both sides were injured and the prosecution failed to explain the injuries on accused person, it was held that the defence of grave and sudden provocation might be true.[36] If a person beats another with a shoe, that would be considered to be the height of shame, particularly in the midst of a number of villagers. An attempt to beat a man with a shoe would, therefore, give sufficient provocation to the man intended to be beaten.[37] But, it is impossible to say that a man was deprived of the power of self-control merely by being slapped two or three times on the back. Being slapped cannot be a sufficient provocation.[38] When there is material showing that the deceased prior to incident attempted to outrage the modesty of the niece of the accused provoking the accused, inflicting knife blows on the vital part of the body of the deceased causing death, the case falls under exception 1 to s 300, IPC .[39]

Where the deceased husband was perverted in sexual habits and used to satisfy his lust in an unnatural way and the accused wife killed him, the circumstances showed that she killed her husband under grave and sudden provocation, the case was found covered by exception 1 of s 300, IPC .[40] In *Akhtar v State* ,[41] the accused had been under the stress of previous provocations. He, however, controlled himself and acted quite reasonably and properly until the very last act of provocation by the use of foul and filthy language, hurled, at the accused's father and the accused himself, by the accused's own brother, who also aggressively advanced towards the accused and grappled with him. It was held that there was sufficient provocation within the meaning of this exception. Where a poor man catches a thief in the act of stealing rice and, on the impulse of the moment, rushes at the thief and belabours him with a2186 stick in a fatal way, it is a clear case of grave and sudden provocation.[42] A threat of a wife to leave her husband forever without any prior reason is indeed provocation and if she goes further and removes the *thali* (an ornament which, in Southern India, a Hindu woman is made to wear on her marriage and which she is supposed not to part with until the death of the husband) from her neck, which is attributable to the separation of the marital tie with the husband, and throws it, on his face, there is sufficient provocation for the husband to make him lose his self-control and give him the benefit of this exception.[43]

Where a wife not only refuses to give *pan* to her husband, when he asks for it, but also throws dirty water on his face, it would be an act which would cause the husband to lose, control of himself and would be grave and sudden provocation.[44]Where the accused on seeing the deceased committing the act of sodomy on the son of the accused, lost his power of self-control and it was undoubtedly a grave and sudden provocation for him which led him to commit the murderous assault on the deceased.[45] Where the accused were carrying on their agricultural operation, the deceased came to the field and tried to demarcate the boundary line and caused provocation, on such grave and sudden provocation caused by prosecution party, accused attacked the deceased. The evidence also disclosed that the accused on being suddenly and gravely provoked by the deceased was deprived of her self-control, exception 1 to s 300, IPC attracted to the facts of the case.[46]

Where the accused persons being provoked by the murder of their brother by the son of the deceased, within 15 minutes of the first incident set on fire the house of the deceased causing death of the deceased, his wife and children, it was observed that a time gap of 15 minutes was not sufficient for the members of the family of the accused persons to gain their self control, when they saw the dead body of their brother. It was held that, the accused persons committed murder in question under grave and sudden provocation and their case was fully covered by exception I to s 300, IPC and the accused were convicted under ss 304, Pt I, and 147, IPC .[47]

48. Provocation Caused by Words and Gestures

A notable difference between the English and the Indian law on the subject is that, while there is practically a rule of law in England that mere words and gestures cannot, except in circumstances of most extreme and exceptional character, be sufficient to constitute a grave and sudden provocation, there is no such firmly entrenched rule of any sort in this country about the use of words.[48] Everything depends on the peculiarities of facts and circumstances and the context in which certain words may have been used.[49] Where it was difficult to reach any definite conclusion, on the test of preponderance of probabilities, as to

in what circumstances the fight between the deceased and accused originated, there was no previous enmity between the accused and the deceased, nor had the accused come to the scene of2187 occurrence with any predetermined mind or pre-planning and it was in evidence that the incident occurred on the spur of the moment during the course of altercation which ensued between the deceased and the accused, the evidence also did not make it clear, as to what exact altercation did occur between them, its nature and precise words spoken have not been brought on record, the weapon of offence, the spade was not used from its sharp-edged side, but was used only from its blunt end during the entire incident, all these factors, if taken together, would lead to a reasonable inference that the accused may have been deprived of his self-control on account of grave and sudden provocation given by the deceased.[50] In *Ullu Mahapatra v King* ,[51] it was observed that harsh words never break bones and the law expects a reasonable person to endure abuse without resorting to fatal violence. But in *KM Nanavati v State of Maharashtra* [52] the Supreme Court held that words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his case within the first exception to s 300 of the IPC . Where the deceased was a member of a high caste, and the accused belonging to low caste, was subjected to repeated insults by the deceased, the accused requested the deceased, a headmaster in a school for a job which was available in the school, the deceased asked the accused to make available his wife to him for immoral purpose, on these facts it was held that accused lost his self-control and due to grave and sudden provocation, inflicted injuries on the deceased, successively within seconds with knife.[53] In *Ghulam Mustafa Gahno v Emperor* ,[54] it was held that showing *booja*, gesture of contempt, by a wife to her husband cannot be said to cause such grave and sudden provocation as to deprive him of his power of self-control.

Information received from a reliable person and believed to be credible as to the existence of a provoking act, which is being done in the immediate neighbourhood and the existence of which is instantaneously verified, can, within the meaning of this exception, be said to be provocation given by the person, committing that act, just as much as if the person provoked had seen it in the first place with his own eyes.[55] However, the mere fact, that deceased described himself as *chacha* of accused, without mentioning any blood relation between the two, cannot be taken to be such grave and sudden provocation as to attract this exception.[56] Similarly, the act of a child of five years in coming out of her house to spit on the accused and show her legs would not constitute a provocation to sustain the plea of grave and sudden provocation.[57]

There was a verbal argument and heated exchange of words amongst the accused and complainant and his family members over a trivial issue of parking of autorickshaw. The accused no. 3 being driven by grave and sudden provocation gave knife blows to the deceased causing his death. Since there was no pre-meditation and intention to kill the deceased, the case of the accused appellant fell under s 300,2188 exception I, and his conviction under s 302, IPC was altered to one under s 304, Pt I, IPC .[58]

Where in a Panchayat convened by the parties for settling some matter, the accused being provoked by certain remarks passed by the deceased, suddenly inflicted a single blow by a knife on the chest of the deceased causing death, the accused was convicted under s 304, Pt I and not under s 302, IPC .[59]

49. Provocation Caused by use of Abusive Language

The use of abusive language 'of the foulest kind', addressed to a man, already engaged, would be provocation sufficient to deprive him of self-control.[60] However, a mere vulgar abuse is not such a grave and sudden provocation as is contemplated by this exception.[61] In this last cited case, the deceased, a *sardar*, was a foul mouthed old man and was in the habit of abusing and bullying his servants and dependants. He abused the accused, a servant, in the morning and further struck him on the forehead causing it to bleed. These insults were offered in the presence of several persons who were the associates and fellow-workmen of the accused. The accused remonstrated and the deceased went away. But he returned at about noon and once again abused the accused in the manner which apparently was habitual with him. This repeated insult infuriated the accused who picked up a hatchet, which happened to be lying nearby, and without any premeditation, made a murderous attack on the deceased. It was held

that there was grave provocation. In *Amarjit Singh v State* [62] the deceased, an unemployed addict father, demanded money from accused, his son, making his demand imperative even if money had to be raised by prostituting his (accused's) mother. The son assaulted the deceased with a knife. It was held that the language as used was sufficient to entitle the accused to the benefit of this exception. Where, in the course of a quarrel between them, the deceased hurled filthy abuses at the accused and even insinuated that he once committed unnatural offence with a pigeon, it was held that there was grave and sufficient provocation within the meaning of this exception.[63]

50. Provocation must be Grave

It is not all provocation that will reduce the crime of murder into mere culpable homicide. Provocation, to have that result, must be such that it temporarily deprives the person provoked of the power of self-control as a result of which he commits the unlawful act which causes death.[64] For the application of the section, the provocation2189 pleaded must be grave. 'Grave' means that it must be serious enough to influence the mind of the person provoked. An accused person, in order to invoke the benefit of the first exception, must distinctly show not only that the act was done under the influence of some feeling, which took away, from the person doing, it, all control over his actions, but also that, that feeling had an adequate cause.[65] Each little provocation cannot be called grave simply because the consequences ensuing from that provocation at the hands of the accused had been grave. The provocation must be such as will upset not merely a hastily, hot-tempered and hypersensitive person, but even a person of ordinary sense and calmness.[66] If provocation does not result in immediate retaliation and motive to take revenge emerges, the accused cannot claim benefit of exception I to s 300, IPC .[67] A bare statement by the accused, that he regarded the provocation as grave, will not be accepted by the court. The court has to apply an objective test for deciding whether the provocation was grave. An ordinary exchange of abuses is a matter of common occurrence. A reasonable man does not lose self-control merely on account of an ordinary exchange of abuses. An ordinary exchange of abuses is not, therefore, treated as the basis for a grave provocation.[68] Where the accused killed his wife not only because he was angry with her as she had gone away to her father's house to inquire about his health without the accused's permission, but also because he was annoyed that she refused to depart with him at once, it was held that it could not be said to amount to provocation, far less grave and sudden provocation.[69] Similarly, the mere sight of an enemy, travelling in another lorry, cannot be said to be a grave and sudden provocation.[70] Passions of a person in a drunken condition are probably easily aroused when he sees his aunt being beaten by her husband, but that is not the kind of provocation, contemplated by this exception; if he kills his uncle his offence is murder, and not culpable homicide, though sentence may be reduced.[71] The mere refusal of a wife to have conjugal connection with her husband cannot be said to cause grave provocation to him.[72] But a person, who finds his wife and her paramour in *flagrante delicto*, undoubtedly receives the highest provocation and the indulgence, which the law shows in such cases, is condescension to the frailty of human nature.[73]*Ram Kumar v State of Haryana* ,[74] was a case wherein the accused and the deceased were real brothers, the former exhorting the latter to discontinue illicit connection with the widow of their brother. The deceased protested in hot words whereupon the accused picked up knife, lying on a hand-cart, and caused a thrust on the back of neck resulting in death of the deceased. It was held that the case fell under the first exception because the accused2190 acted, while deprived of power of self-control, under grave and sudden provocation. Where a concubine, for whom the accused grievously injured his wife and sacrificed his caste, left him for another connection, it was held that it was a grave provocation to the accused.[75] Where the wife of the accused, a Hindu, hurled one of the most intolerable imprecations upon him that 'he would be eating cow's flesh if he cooked and ate in the house', it was held that the provocation was grave.[76] Where deceased caught hold of hand of wife of accused and asked her to come with him, somehow she got herself released and ran away to her house and informed the accused about the incident, accused went to deceased and gave an axe blow which proved fatal behaviour of the deceased in normal course was bound to cause great provocation to the accused a tribal because of which the offence was committed.[77]

A person claiming the benefit of provocation has to show that the provocation was so grave and sudden that he was deprived of power of self-control and that he caused the death of a person while he was still in that state of mind.[78]

Where the deceased was unarmed and was only trying to wake up the accused so as to do patrolling duty, the action of deceased to slap and push the accused, could not be characterized as grave and sudden, so as to provoke the accused to fire at the deceased killing him on the spot. In such a case, the plea of grave and sudden provocation was rejected and the conviction of the accused under s 302, IPC was not converted into one under s 304, Pt I, IPC .[79]

Where the accused who was humiliated by his superior, after six hours while still on the guard duty shot the deceased dead, it was held that the provocation was not sudden and grave and he was not entitled to protection of exception I and was convicted under s 302, IPC .[80]

51. 'Sudden' Involves two Elements

The word 'sudden' involves two elements. First, the provocation must be unexpected. If an accused plans, in advance, to receive a provocation in order to justify the subsequent homicide, the provocation cannot be said to be sudden. Secondly, the interval between the provocation and the homicide should be brief. If the man, giving the provocation, is killed within a minute after the provocation, it is a case of sudden provocation. If the man is killed after six hours of the provocation, it is not a case of sudden provocation.[81]

52. Provocation must also be Sudden

The provocation must be grave as well as sudden to entitle the accused to the indulgence of the exception I.[82] Grave provocations, suffered by the accused over a2191 long series of years, are insufficient, in the absence of evidence of recent and sudden provocation, to reduce the offence of killing to culpable homicide.[83] If the provocation is not immediate and grave, but is the culmination of a long period of swaggering and insult, which finally makes an accused lose his temper, the benefit of exception 1 cannot be given to him.[84] A provocation, however grave, which is not sudden, but is a chronic one, will not satisfy the requirements of this exception.[85]In a case of intentional killing, the fact, that the intention was sudden and the impulse momentary and even uncontrollable, is no mitigation unless it can be shown that the act was the result of grave and sudden provocation.[86] Where the true reason for assault was that, a month or so before the incident, the deceased had attempted to outrage, the modesty of the accused's wife, it was held that the interval between the incident and the assault was too long to afford to him the benefit of exception I.[87] If a husband, finding his wife actually committing adultery, kills her or her lover at once, that, of course, would be grave and sudden provocation; but where the injured husband has time for deliberation, this exception will not apply. The reason for excusing a person, who acts under grave and sudden provocation, is that he has lost his reason. If, however, the accused shows that he has deliberated in any way, or there has been a lapse of time, which would enable him to cool down, he cannot be said to be acting under sudden provocation. Therefore, this exception would not apply though the sentence may be reduced.[88] In *KM Nanavati v State of Maharashtra* ,[89] the Supreme Court has pointed out that the mental background, created by the previous act of the victim, may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence, but that is, in itself, insufficient to invoke the provisions of exception 1. The accused, hearing that his sister was having illicit connection with the deceased, picked up an axe, went to the sister's home, broke open the door and, finding the deceased with his sister, killed both of them with the axe. It was held that provocation, though grave, was not sudden.[90] In another case, in which the accused, seeing his sister and her paramour having illicit connection, killed both of them, the Allahabad High Court gave him the benefit of this exception and observed:

> "Of course, there is a difference between the provocation, which a man receives when he finds another man committing adultery with his wife, and the provocation, which he receives when he finds his sister dishonouring his family by having illicit intercourse with a man; still, the latter provocation, cannot, in commonsense and in one's experience of the world, be looked upon as a light one.[91]"

But in a Madras case, it has been held that when a wife or mother or married sister, living under the projection of the husband or son or brother, is caught in the act of2192 having sexual intercourse with a stranger, the killing of that stranger by the husband, son or brother, before there is time to get over the sudden anger, would be only an offence under s 304, IPC . However, a person, who is not the guardian or custodian of a woman, would have no similar right to kill her and claim to be convicted only under s 304, IPC .[92]

But, for the provocation to be sudden, it is not necessary that it should have immediately preceded the killing in point of time. There have been cases in which the accused had the provocation of adultery, being committed by the deceased with his wife, and the killing was after an interval of time during which the accused had to wait for the deceased to come out of the room or the deceased was taken to some distance.[93] In *Boya Munigadu v Queen* ,[94] in the evening, preceding the commission of the murder, the accused saw the deceased having connection with his (accused's) wife and was intensely moved by what he saw, but he did not interfere then. The next morning, he saw his wife eating with the deceased and giving him food while she left her husband without it. Enraged at this, the accused immediately killed the deceased. Giving the accused the benefit of this exception, it was observed that, that amounted to provocation, grave enough and sudden enough to deprive him of his self-control, and reduced the offence from murder to culpable homicide not amounting to murder. In a Madras case, it was first reported to the accused that his wife gave betel-nut to another man, it being a sign of intimacy between the two. Then, on the day of occurrence, he saw his wife and that man weeding in a field side by side and their bodies frequently coming in contact. This greatly exasperated the accused. He subsequently upbraided his wife first, but she told him that she could do just as she liked and that there were thousands of men as good as he. Upon this, he killed her in a passion. It was held that the provocation, thus received by the accused, was sufficiently grave and sudden to bring the killing of his wife under this exception.[95]

Where the deceased had abused the accused and called him "gandu", thereafter the accused on the next day stabbed the deceased with knife, it was held that the accused had time to deliberate, and had planned to kill the deceased, and therefore, he was not entitled to benefit of exception I to s 300, IPC .[96]

In a case, the wife of the accused left the house and started living with another person and she did not return to the house of the accused on the message sent to her. It was observed that the accused had reasonable time to go to the carpenter's shop for picking up a Baditha and dealt the deceased with the Baditha; further it was held that this was not a grave and sudden provocation for the accused to give such fatal injuries to his wife. Therefore, the case was not covered under the clause of grave and sudden provocation.[97]

In the instant case, the wife of the accused had eloped with the deceased one week before the incident and she returned on 12 April 2000, and the incident took place in the evening of 14 April 2000. It was held that, the case was not covered by exception I to s 300, IPC, the provocation even if was grave, was not sudden.[98]2193

Where on account of an old enmity, the accused persons went to theatre, called out the deceased watching movie, quarreled with him, threatened and stabbed him causing death, it was held that exception I to s 300 was not attracted in the case.[1] Also, in the case of *Imtiaz v State of UP* [2], based on the facts and circumstances of the case, the plea of grave and sudden provocation was rejected. Where the accused husband asked his wife to withdraw the maintenance proceedings and after she refused, the accused inflicted polpat blow on her head resulting in death, it was held that the case was not covered by exceptions I and III to s 300 . Where the wife refuses to withdraw the maintenance proceedings, the mere denial of the wife would not amount to grave and sudden provocation within the meaning of exception I to s 300, IPC . Further the alleged provocation was sought by the accused himself.[3]

53. Lapse of Time Converts Provocation into Resentment

Provocation must be distinguished from resentment.[4] Lapse of time changes the former into the latter, which is founded on revenge, and not upon the absence of self-control caused by passion. *A*, believing

that he had been the victim of witchcraft at the hands of his brother during the past three or four months, suddenly attacked and killed him. This was held to be murder.[5] A man's feeling, that the deceased was misbehaving with his wife, must cause a provocation to him to retaliate; but when such feeling of provocation is a long standing one, gaining intensity from day to day until finally the person, harbouring such feeling, yields to the provocation by attacking his enemy, it cannot be said that he is acting under grave and sudden provocation. On the other hand, the provocative feeling which he was entertaining for some time can only be termed the motive for the act committed by him.[6]

54. Whether the Provocation, in a Given Case, was Grave and Sudden is a Question of Fact

The explanation, at the end of exception 1, is very important because it enjoins that the question, whether the provocation was grave and sudden enough to prevent the offence from being murder, should be treated as a question of fact, and not as a question of law. It follows, therefore, that each case must be considered according to its own facts and the court must decide, on the particular circumstances of that case, whether the provocation was grave and sudden enough to permit an indulgent view of the crime committed by the accused.[7] The court must consider the reaction of a normal man, whose impulses are conditioned by the same environment as that of the accused, and not of a normal man in the abstract. What is grave and sudden provocation to a Baluchi may not be grave and sudden provocation to an Englishman2194 or *vice versa*.[8] Precisely, for this reason, the legislature has made the gravity of a provocation a question of fact and left it to the court to decide each case according to its own peculiar circumstances.[9] There can be no direct evidence as to what was the psychological effect of the provocation upon the mind of a person in certain circumstances. The state of mind of a person has to be gathered from proved facts.[10] Similarly, if it is proved that the accused did receive grave and sudden provocation, it will generally be assumed that the homicide was committed while the accused was deprived of the power of self-control.[11]

In the case of Re *Murugian*[12] the Madras High Court observed:

> "We should view it as a psychological problem, and not one where reasoning, as to the legality or otherwise, of the rights of parties is to be considered before the emotion of the man is roused to action. Each case has to be considered in the circumstances that prevail at the given situation, and there can be no generalization on such issues."

55. Grave and Sudden Provocation in Instances

Following are instances of grave and sudden provocation to accused:

(a) Deceased catching hold of wife of accused and asking her to go with him.[13]
(b) Rape of wife of the accused.[14]
(c) Deceased boasting that he is paramour of wife of the accused and openly expressing his intention to take her to live with him.[15]
(d) Accused carrying agricultural operation and deceased came to the field and tried to demarcate boundary lines to the field.[16]
(e) Insult to low caste accused by high caste deceased.[17]
(f) Deceased wife insisted on going to native town alone where she had extra-marital affair and such insistence leading to quarrel between her and accused.[18]
(g) Explanatory part of dying declaration of deceased clearly indicated that on the day of

incident, the deceased did something so objectionable while cutting jokes with sister of the accused that blood quickly rushed to accused's head and the accused picked up loaded revolver of deceased and fired repeated shots at the deceased. Accused was deprived of power of self control by such grave and sudden provocation occasioned by obscene and objectionable behavior of deceased with his blood sister.[19]2195

(h) The deceased who used to collect waste papers from the roadside, collected the waste papers and cardboard boxes and threw them inside the shop of the accused. On seeing this, the accused got angry and shouted at deceased and pulled his hair. The deceased thereupon pushed the accused and the accused took a knife from the top of a table in the shop and stabbed the deceased in the chest. The deceased fell down due to this injury and died. It was held that the accused was deprived of the power of self control by grave and sudden provocation which led him to commit the offence. It is evident that the accused had no motive or intention to cause the death of the deceased since the accused was not carrying the knife from before, and only picked it up during the scuffle with the deceased. The incident resulted in a sudden fight and in the heat of passion, without the accused having taken undue advantage or having acted in a cruel or unusual manner. Hence, the accused was entitled to the benefit of exceptions 1 and 4 to s 300 and the case was under s 304, Pt II, IPC .[20]

(i) Where there was evidence that the deceased came drunk and started abusing and beating his father, on the call of the father, the accused (brother of the accused) came armed with a small axe and inflicted injuries on his head causing death, the act of the accused was out of grave and sudden provocation and was covered by exception to s 300, IPC and the accused was convicted under s 304, Pt I, IPC .[21],

56. Insolent Answer of Wife, Whether Grave and Sudden Provocation

Where the accused asked his wife to cook his food and, on her declining to do so saying that she would rather die in a sweeper's house than cook meals for him, dealt several blows on her, with an axe, with a fatal result, it was held that the answer, given by the wife, could not be treated as sufficient provocation within the meaning of this exception.[22] Similarly, where the accused suspected his wife to be in criminal intimacy with one *N* and, one day, on seeing her going towards the house of *N*, asked her not to go there and, on her giving a defiant answer, brutally attacked her and brought about her death, it was held that the defiant tone of the answer could, to some extent, amount to provocation, but it was not sufficiently grave, nor was it surprisingly sudden.[23]

In *Inayat v Emperor* ,[24] the accused's younger sister, the deceased, who had left her husband and was living under the care of accused, was suspected to be of an immoral character. On the night of murder, at about 3 am, she had gone to meet a stranger in the cattle shed at the back of the house for a clandestine purpose. When the accused asked the deceased why she did not give up her evil ways, she refused to listen to him and gave an insolent reply. Thereupon, the accused gave her a blow with a hatchet which caused her death. It was held that the provocation, received by the2196 accused was, in the circumstances, almost as grave and sudden as it would have been if he had seen the deceased in the act of sexual intercourse with a stranger and it was further aggravated by insolvent reply given by the deceased and that the case properly fell within the purview of s 304, Pt I.

57. Confession of Adultery by Wife--Whether Grave and Sudden Provocation

In England, when the wife suddenly confesses to her husband that she has committed adultery with someone, it is treated as equivalent to a discovery of the act itself.[25] Same is the situation in India.[26] In *Nga Saw Maung v Emperor* ,[27] the accused found his wife pregnant and, suspecting that there was something wrong before and that he was not the father of the child, inquired of her if she had been cohabiting with a particular person. She said 'yes' in a taunting manner. The accused immediately stabbed

her to death. It was held that it was hardly possible to imagine graver provocation being received and that the accused was guilty of culpable homicide, and not of murder. In an Allahabad case, the accused's wife was grossly immoral and he upbraided her with her misconduct. Instead of being repentant, she said that she would again do such acts upon his head. Thereupon, he became enraged and struck her with a stick. She struggled with him and caught hold of his fingers and bit them. He then lost control of himself and took out a knife and stabbed her to death. It was held that there was sufficient provocation to come within this exception.[28] Where accused found his wife in a compromising position with another man so assaulted her with a stick in the heat of passion and she died after receiving injuries, accused was found guilty under s 304, Pt I, and not under s 302 IPC .[29]

In *Imbichi Koya v Emperor* ,[30] it was held that the principle, that if a wife suddenly confesses to her husband that she had committed adultery, it may be treated as equivalent to the discovery of the act itself and if the husband forthwith kills her, the offence is only one of culpable homicide not amounting to murder and cannot be extended to a case of murder, by the husband, of the paramour with whom his wife had confessed to have committed adultery. If the wife tells her husband that she has committed adultery with a man that would not be grave and sudden provocation for the murder of the paramour. In Re *Muthappa Goundan*,[31] another Division Bench of the Madras High Court agreed with this view. It, however, makes no difference, whether the deceased is the wife or mistress of the deceased.[32] But where the altercation between accused and wife began the previous night when he had refused to have intercourse with her, his wife compared the manner of intercourse of her paramour with her and she even told him that if he was not willing to come she2197 would get her paramour and under the very nose of her husband (accused) would indulge in such intercourse, the altercation between accused and his wife over the affair took place the whole night even when, he came back following afternoon again the deceased wife quarreled with him and he lost control, he took a chisel (an instrument used in carpentry) and killed his wife, accused was held entitled to benefit of exception 1 of s 300, IPC .[33] Where the evidence clearly showed that the accused was piqued due to his recently acquired knowledge that the deceased had betrayed him and he wanted to finish the deceased for that reason, he had clear intention to kill the deceased and there was no evidence of the deceased lady providing him any provocation what to talk of sudden and grave provocation to the accused for commission of the offence, it was true that prosecution witness (PW1) was not aware of the language in which the accused and the deceased must have been conversing but that did not mean that there must have been some grave and sudden provocation at the hands of the lady which resulted in assault on her body by the appellant in view of the fact that the accused himself had uttered the crucial words in Hindi which could be understood by the two prosecution witnesses (PW1 and PW2) that he wanted to teach a lesson of life to the lady as she had betrayed him in love, on these facts the accused was found not entitled to the benefit of exception 1 to s 300, IPC and his conviction under s 302, IPC, by the sessions court was upheld.[34]

58. Provocation must have Deprived the Accused of his Power of Self-control

Under exception 1, the provocation must not only be grave and sudden but it must also have, by its gravity and suddenness, deprived the accused of the power of self-control.[35]In other words, it ought to be distinctly shown not only that the act was done under the influence of some feeling, which took away, from the person, doing it, all control of his action, but also that feeling had an adequate cause.[36] The adequate cause should be strong enough to make a normal man lose his self-control.[37] It is an essential condition for the operation of exception 1 that the offender, by reason of the provocation, shall have been deprived of the power of self-control.[38] So, provocation is an excuse only when the accused is thereby deprived of the power of self-control and unless it is found that the provocation had destroyed the power of self-control, the proof of provocation is no defence.[39] Where the accused were carrying on their agricultural operation, the deceased came to the field and tried to demarcate a boundary line and caused provocation, on such grave and sudden provocation caused by prosecution party, the accused attacked the deceased, the evidence also discharged that the accused on being suddenly and gravely provoked by the deceased, was deprived of her self-control, and hence exception 1 to s 300, IPC, was attracted to the facts of the case.[40]

Where the deceased was a member of high caste and accused belonged to a low caste and the former subjected the latter to repeated insults, and the accused2198 requested the deceased, a headmaster in school for a job which was available in school, the deceased asked the accused to make available his wife to him for immoral purpose, it was held that the accused lost his self-control and due to grave and sudden provocation, inflicted injuries on the deceased, successively within seconds with a knife.[41] In a case, it was held that the action of a wife, assaulting her husband with a sword and chasing him particularly when he has actually received some injuries, must be taken to be sufficient to provoke the husband to the extent of losing self-control when he snatches the sword from wife and inflicts on her fatal injury.[42] However, in another case, the deceased, the unarmed elder brother of the drunken accused, advised the accused to stop drinking and each abused the other. The accused then brought a naked *kirpan* and gave a blow with it across the throat of the deceased causing fatal injuries. It was observed that it could not be said from the evidence that there was any provocation which could be regarded as grave or that, in the situation, in which the two brothers were placed at the relevant time; the accused must have been deprived of the power of self-control.[43] In one case, it was remarked that mere unfounded suspicion, that the wife of the accused was carrying on an intrigue with someone is not enough to allow the accused to take the life of his wife.[44] There are, however, cases where suspicion of infidelity coupled with conduct of the wife, has been held to be sufficient to bring the case within this exception.[45]

An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.[46]

59. Offence must have been Committed during Loss of Self-control

Another essential condition for the application of exception 1 is that the accused should have killed the deceased during the continuance of loss of the power of self-control of which he was deprived by the grave and sudden provocation. The fatal blow should be traced to the influence of the passion, arising from that provocation, and not when the passion has cooled down by lapse of time or has otherwise given room and scope for premeditation and calculation.[47] Thus, the exception applies only if death is caused during the time when the offender is deprived of the power of self-control as a result of grave and sudden provocation. If the degree and duration of the loss of the power of self-control are not commensurate with the degree of gravity of provocation, the benefit of this exception cannot be availed of by the offender.[48]It has to be shown that the act, causing death, was committed after loss of self-control, but before self-possession had an opportunity to return. This can often be presumed2199 from the existence of a grave provocation and the sudden and drastic character of the violent and hasty act, immediately following the provocation; but facts and circumstances may sometimes exist which destroy the presumption and show that self-possession was not actually lost.[49] A husband, finding a man in his room at night, who has come there for the purpose of intriguing with his wife, would receive the gravest provocation; and if he kills the seducer then and there, his offence would not amount to murder. But when a man has time to cool down, *i.e*., if he, after seizing the intruder, under the circumstances stated above, takes him away to another room and, after being joined by another man there and so being in a position to render all resistance hopeless, deliberately first knocks his enemy down and then suffocates him with a bamboo-pole, placed and pressed upon his neck, the pole having been fetched from outside, he can hardly plead the extenuating circumstances provided for in this exception.[50] If, therefore, the accused shows that he has deliberated in any way, or there has been a lapse of time, which would enable him to cool down, then he cannot be said to be acting under sudden provocation.[51]However, the rule, contained in exception 1, does not contemplate that, in order to entitle the accused to earn the mitigation provided for, the act must immediately follow the provocation. In *Abalu Das v Emperor* ,[52] the court thought that the provocation was of a nature that would continue to influence the feelings of the accused for a considerable period after the culprit was found in the company of his wife. Where, therefore, the accused saw his wife and her lover, actually committing adultery, or, at least, together in a room, and he first grappled with the lover and killed him and then turned to his wife and killed her, it was held that it would not be a justification to say that any considerable period intervened between the two murders.[53] The question to be determined in such a case is how long the provocation continued to weigh on the mind of the accused. There must be

some material on the record to enable the court to determine that question. Where there is nothing which leads the court to suppose that the accused acted on anything but grave provocation, the fatal stroke must be referred to the immediate impulse of such provocation.[54]

Nineteen injuries caused in quick succession cannot be said to have been caused as a result of grave and sudden provocation. Appellant accused was convicted under s 302, IPC .[55]

It is impossible to lay down a hard and fast rule as to when a person can be said to have had time to cool down and thus to be deprived of the benefit of this exception. Much depends on the individual characteristics of the accused and that element cannot be ignored in the determination of this matter. In a Lahore case, the accused saw the deceased, who had contacted a liaison with his daughter-in-law, entering his house. He informed his son, who was at a short distance, of what he saw. Then they both came to the house and, seeing the daughter-in-law and the deceased together in2200 a compromising position, killed the deceased. It was held that even if the father had seen the deceased, entering his house in his absence, when he was at a short distance from his house, he must have been provoked to such a degree as to lose his sense then and there, and if he further informed his son, of what he had seen, and came to his house, accompanied by his son, he had no time to cool down, so to say, and thus return to his normal condition. The whole thing formed a series of one transaction and the provocation continued until such time when the deed was done.[56] But there should be some circumstance to indicate that the act of the accused was done in the same transaction in which he received the grave and sudden provocation.[57] In *Bansi v State* ,[58] the benefit of exception 1 was not given to the accused because, by the time the attack was launched, an appreciable amount of time had passed, thereby disentitling him to plead that he had been deprived of the power of self-control.

60. Person Killed must be the Person Giving Provocation to Another by Mistake or Accident

Another condition for the application of this exception is that the offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.[59] The fact, that the provocation did not proceed directly from the victim, renders exception 1 to s 300 inapplicable to a particular case. If some other factors, emanating from other sources, intervene, which lead to the provocation, and the fatal blow cannot be traced directly to the influence of passion, arising from the conduct of the victim, the accused is deprived of the benefit of exception I.[60]Where, without any sudden and grave provocation from the deceased, who was an innocent intervener between the accused and his (accused's) father in a quarrel, the accused caused fatal injuries to the deceased with a knife, it was held that the act of the accused was a cruel act and his conviction under s 302, IPC, was proper.[61]

61. Provisos

The first exception to this section is subject to three provisos which are really exceptions to the exception.

62. First Proviso

The first proviso to exception 1 of this section says that the provocation will not be deemed to be grave and sudden when that provocation is sought, or voluntarily caused, by the offender as an excuse for killing or doing harm to any person.[62]When the accused himself was responsible for inviting provocation, the subsequent act of deceased by opening fire from their respective weapons upon the deceased and another and in this factual situation, the accused was responsible in inviting provocation from the complainant party who returned fire, the subsequent fact of2201 accused person of firing upon them cannot be brought within the four corners of exception I.[63] The effect of the proviso is that provocation does not reduce murder to culpable homicide under the first exception if the provocation is sought, or courted, by the offender, or if it is voluntarily caused by him, as an excuse for killing or doing harm to any person. A person cannot 'pick a quarrel' with another in order to fight and then plead the fight as being a

provocation. Nor can a man 'go out of his way' in order to be provoked. Seeking provocation is best illustrated in adultery cases. In *Queen v Lachan* ,[64] the accused was convicted of culpable homicide not amounting to murder in respect of his cousin's widow who lived with him. The evidence showed that the accused was seen to follow the deceased for a considerable distance with a *gandasa* under circumstances which indicated that he wanted to detect whether she was going to keep an assignation. He found her in the act of connection with her paramour and killed her. The court held that the conviction should be altered to one of murder as the accused went deliberately in search of the provocation, sought to be made the mitigation of his offence, and under circumstances disclosed, it could not be said that he was deprived of self-control by grave and sudden provocation. Where the accused, who knew that his sister had gone to meet the deceased, with whom she had illicit connection, deliberately went to the spot with the intention of killing the culprit if he found him with his sister and killed him on finding him with her, it was held that he sought the provocation by deliberately going to the scene of the meeting.[65] Similarly, where the accused themselves started the trouble and offered earlier provocation by calling the opponents by beat of drum and calling them for a fight, it was held that the fact that the challenge by the deceased was couched in strong indecent language, cannot be considered to be grave and sudden provocation, as is contemplated by the first exception, especially when it is read along with the first proviso to the said exception.[66] Where the husband attacked his unarmed wife with pestle without any threat or danger to his life, the deceased wife caught hold of private parts of the husband in order to save herself but could not save herself and the result was that husband accused ultimately killed her by hitting her on her head, here the husband cannot be said to have acted in exercise of right of private defence.[67]

63. Second Proviso

This proviso is illustrated by illusts (c) and (d). It is not limited to what is done by public servants only; it also includes acts done by any person in obedience to law. Grave provocation, given by anything done under cover of obedience to the law, or under cover of its authority, or by a public servant, or in defence in excess of what is strictly warranted by the law, in point of violence, or as regards the means used, or the manner of using them and the like, would be admissible in extenuation of homicide under this proviso.2202

64. Third Proviso

The right of private defence is available against an offence and, therefore, where an act is done in exercise of the right of private defence, such act cannot give rise to any right of private defence in favour of the aggressor in return. This would seem to be so even if the person exercising the right of private defence, has the better of his aggressor, provided, of course, he does not exceed his right because the moment he exceeds it, he commits an offence. There is also no right of private defence in cases where there is time to have recourse to the protection of public authorities. The right of private defence is essentially a defensive right, circumscribed by the statute, available only when the circumstances clearly justify it. It would not be allowed to be pleaded, or availed of as a pretext for a vindictive aggressive or retributive purpose. According to s 97, IPC, this right vests even in strangers for the defence of the body or property of other persons against offences mentioned therein. The courts have, therefore, to be careful in seeing that no one, on the mere pretext of the exercise of the right of private defence, takes sides in a quarrel between two or more persons and inflicts injuries on the one or the other. In case, where two parties are having a free fight without disclosing as to who is the initial aggressor, it may be dangerous as a rule, to clothe, either of them or his sympathiser, with a right of private defence. If, however, one of them is shown to be committing an offence affecting the human body, then that would, of course, seem to give rise to such a right.[68]

65. Exception 2--Scope of

The IPC recognises the right of private defence of a person and property against certain offences (s 97, IPC) and declares that nothing is an offence which is done in the exercise of such right of private defence (s 96, IPC). The right of private defence, however, is made subject to certain restrictions. In the first

instance, the right, in no case, extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence (s 99, IPC). If, therefore, a person, exercising the right of private defence, causes death where it is not necessary to do so for the purpose of such defence, he exceeds the power so given to him by law within the meaning of this exception.[69] Then again, the right extends to the causing of death only in defence against certain offences enumerated in ss 100 and 103, IPC .[70]

Against other offences, the right of private defence extends only to causing any harm other than death, (ss 101 and 104, IPC). Even if death is caused in the exercise of the right of private defence of body or property against the offence, mentioned in ss 100 and 103, subject of course, to the restrictions as mentioned in s 99 it is no offence at all (s 96), nor even culpable homicide not amounting to murder, and no question arises as to the application of exception 2 to s 300 .[71] The accused need not affirmatively establish that he had a right of private defence and he exercised the same in that manner. This general exception which deals with the right of private defence lays an emphasis on the reasonable apprehension in the mind of accused while exercising the right of private defence. Where an injury is found on the accused, and if the accused comes forward with a specific plea of private defence, the2203 same has to be considered in the facts and the surrounding circumstances obtained in the case. Every kind of explanation put forward particularly at the belated stage by the prosecution will not be sufficient and cannot be held to be an appropriate explanation to reject the version put forward by the accused, particularly when it does not appear to be false but, on the other hand, appears to be plausible.[72]

The question of the operation of this exception arises only if the alleged offender exceeds the right of private defence[73] subject to the limitations, that (a) the accused caused the death of a person without premeditation; and (b) he caused the death of the victim, without any intention of doing more harm than what was necessary for the purpose of defence even if the harm caused was more than what was necessary for the purpose of defence.[74]In order to attract the benefit of this exception, it is necessary to show that the act of the accused was without any intention of doing more harm than what was necessary for the purpose of private defence where the deceased was made disabled and defenseless and the number of attacks on him were definitely with the intention of doing more harm than what was necessary for ousting him from taking forcible possession of the disputed land, it was held that this exception was not attracted.[75] Thus, what this exception means is explained below:

If a person, who possesses the right of private defence, infact, does no more than what is necessary for him to do, he commits no offence; but if he exceeds the right, it is still a lesser offence than murder if his intention was to do no more harm than what he believed necessary in the exercise of his right. The exception deals, in the concluding words, not with fact, but with intention, and refers to circumstances, in which a person does not take advantage of the right of private defence to kill with a vengeful motive, but exceeds that right by inflicting fatal injuries where their infliction was, in fact, unnecessary and where there was reckless criminality, though the right of private defence was the only impulse operating in the mind.[76]

This exception is a necessary corollary of s 99 IPC .[77]

In a case, the accused after inflicting injuries on R, ran towards P, who was standing 10 steps away from the place of incident, who after seeing the incident relating to the death of R started running away and he was chased by the accused persons who then inflicted lathi blows on P, thereby causing his death. It was held that in such situation the accused had no right to invoke right of self defence by chasing P and causing fatal injuries to him. The reasonable apprehension disappeared when P was running away to escape from the scene, therefore, the conviction of the accused under ss 302 / 34 was held proper.[78]

66. Requirements of Exception 2

The benefit of this exception can be invoked where an accused person has exercised the right of private defence of person or property in good faith and, then, had2204 exceeded that power, which the law had given to him, and has caused the death of his antagonist without premeditation and without any intention of doing more harm than what was necessary for the purpose of such defence.[79] In considering the

question whether the accused exceeded the right of private defence, the court has to consider the part played by the accused persons, gravity of the offence committed and nature of attack made by them.[80] Normally, if there is non-explanation of the injuries on the person of accused, it may at the most give scope to argue that the accused had the right of private defence.[81] If the person has exercised his right (a) in good faith, (b) without premeditation of death, and (c) without any intention of doing more harm than what was necessary, then his offence will be culpable homicide not amounting to murder.[82] But the said three conditions must occur; otherwise the offence will be murder. It will have to be borne in mind that if, after commission of an assault of simple or grievous nature, there is, in any case, no further apprehension of assault, occasion for the exercise of right of private defence of body should not arise. At the same time, the possibility of infliction of further assault, likely to cause grievous bodily injury, cannot, as a rule, be ruled out on the mere ground that the injury or the injuries, already inflicted, are simple. The law, in this respect, honours the human instinct of self-preservation. In considering whether one is entitled to exercise the right of private defence of his body, one has to place himself in the position of the accused in the midst of circumstances, in which he stood, and to form his opinion, whether, for him in those circumstances, it was not fairly wise to apprehend such an injury to the body as would entitle him to exercise the right that he claims to have done. Where an accused, charged with murder, asserts that he killed in self-defence, his state of mind at the time of the killing becomes material and important in determining his justification or his belief in an impending attack by the deceased.[83] However, an accused cannot escape the liability for his assault merely by asserting that he exercised the right of private defence. There should be some evidence, direct or indirect, indicating either positively or showing at least the reasonable possibility of right of private defence having been exercised by the accused. A bald assertion of the exercise of right of private defence, without anything more, cannot deflect the scale against the prosecution if the evidence adduced by the prosecution, satisfactorily establishes that the accused had deliberately and wilfully caused injuries without any excuse[84] though it is not for the accused to prove beyond reasonable doubt that he acted in self-defence; he has only to raise a probability in his favour of the same being true.[85]

Where the injuries of the accused were self-inflicted, and the accused refused to undergo radiological examination of the injuries and failed to tell the doctor as to how and why he got the injuries, the plea of the accused that he attacked the deceased to save the life of his father was rejected.[86] Once it is established that there was the2205 existence of the right of private defence, the burden shifts to the prosecution to prove that such right had been exceeded.[87]

The accused armed with a *kulhari* in his hand went to the house of the deceased and hacked both the deceased to death one after another. The accused had not received any injury and the very fact that the accused committed the murder of two persons one after the other ruled out the plea of private defence. Further, a woman by virtue of its feminine nature and with a feeble body, ordinarily would not pose a threat or danger to the life of a well bodied man with a lathi. Therefore, the plea of private defence was rejected; and accused was convicted under s 302, IPC[88].

Where it was found that the death of two persons occurred due to the firing resorted to by the accused as part of his self-defence, the accused was convicted under s 304, Pt II and not under s 302, IPC[89].

67. There must be a Right of Private Defence

The first requirement of exception 2 is that the accused must have had a right of private defence of body or of property and he must have exercised it.[90] It is not attracted when no right of private defence accrued to the accused who inflicts fatal injuries to the deceased.[91] If there is no initial right of private defence, then there can hardly be any question exceeding that right.[92] Normally if there is non-explanation by the prosecution about the injuries on the accused persons, it may at the most give scope to argue that the accused had the right of private defence or in general that the prosecution evidence should be rejected as they have not come out with the whole truth, particularly regarding the genesis of the occurrence.[93] Where the accused persons received injuries during the same occurrence in which the complainants were injured and when they had taken the plea that they acted in self-defence, which cannot be lightly ignored particularly in the absence of any explanation of their injuries by the prosecution.[94] In such an event a

doubt arises whether the accused acted in exercise of his right of self-defence and that benefit has to go to him and submission on behalf of the accused that he might have acted in exercise of his right of self-defence has some force.[95] The determination of the question whether there exists the alleged right of private defence is always a question of fact.[96]

The accused need not affirmatively, establish that he had a right of private defence and he exercised the same in that manner. Where an injury is found on the person of the accused and if the accused comes forward with a specific plea of the right of private defence, the same has to be considered in the facts and surrounding2206 circumstances obtained in the case.[1] For example, the action of the entrant in the *khandar* of the accused being merely of easing himself, because, for want of time, he could not go outside the village, could not be sufficient to make out a case of criminal trespass and, in such a case, the accused, causing death of the entrant, cannot be held to have exceeded his right of private defence of property.[2] The right of private defence does not arise upon the use of mere words, threatening future injury, and the killing of the person, who uses such threats, would be murder.[3] A person, who began a quarrel by acting, in an improper manner, towards the wife of the deceased and declined to leave the place peacefully, when asked by them to do so, being himself responsible for the subsequent consequences, cannot plead the right of private defence.[4] The right commences as soon as a reasonable apprehension of danger arises and ceases when such apprehension ceases or on completion of the offence.[5]

In a Lahore case, the deceased was a man of desperate character who had recently come out of jail after undergoing a long sentence of imprisonment which had been awarded to him for causing somebody's death. The accused found him molesting his maternal uncle's wife and reprimanded him. The deceased abused him and threatened to give him a blow with a club which he was carrying. The accused snatched the club from him and gave him a blow with it. The deceased persisted in abusing him and so he gave him another blow which killed him by rupturing his spleen which was enlarged. The accused had no knowledge of it. It was held that the first blow, given by the accused, was in the exercise of the right of private defence, but since he gave the second blow, not because he apprehended any more danger from the victim, but because he went on abusing him, his act in giving the second blow was not protected by the right of private defence.[6]

In a case the evidence showed that heated arguments took place between the accused and the deceased for more than an hour and the deceased under the influence of liquor, had trespassed into the house of the accused with an intention of molesting the accused, who in fact was his real sister-in-law. The accused persons attacked the deceased; however, it was held that the accused might have retaliated to ward off the blows given by the deceased in exercise of their right of private defence; therefore the accused persons were acquitted of the charge under s 302, IPC .[7]

Where the accused fired with gun on the deceased causing his death, whereas the deceased was not armed and nor had he made any attempt on the life of the accused, it was held that the plea of the right of private defence by the accused was not sustainable and the accused was convicted under s 302, IPC .[8]

Where the deceased had gone to the house of the accused and inflicted injuries by *Kapa* on the accused and his wife, the accused no. 3 in order to defend himself and2207 his wife inflicted a single injury on the chest of the deceased with a cobbler's instrument, the plea of the accused that they acted in exercise of right of private defence was accepted and the accused were acquitted of the charge under s 302, IPC .[9]

68. The Right must have been Exercised in 'Good Faith'

The right of private defence is a right of defence,[10] being purely preventive, and not punitive or retributive.[11] Culpable homicide cannot be held to be murder when the accused exercised in good faith his right of private defence.[12] The requirement of exception 2, therefore, is that the accused must have been exercising the right of private defence in good faith. Where two accused, armed with a *lorh* and a deadly axe, proceeded upon a house-breaking expedition and, in order to escape, the man with the axe used that

axe, aiming his blow at the face and head of a pursuer, armed only with a *lathi* or a *lorh*, it was held that it cannot be said that he was *bona fide* exercising the right of private defence.[13] Where there is no evidence that the accused exercised in good faith, the right of private defence of person. Exception 2 will not apply.[14] When even after the deceased fell down after receiving injuries he was not spared, but the accused further assaulted him, such conduct of the accused is consistent with an intention to kill the deceased.[15] In such cases, possibility of accused causing injuries in exercise of private defence is ruled out.[16]

36 *Dharam Raut u State of Bihar*AIR 1964 Pat 334, p 337 ; *Nga Na Ban v Emperor* 5 Cr LJ 306 ; *Rahman Ismail v Emperor* AIR 1939 Lah 245, p 253 ; *Anda v State of Rajasthan* AIR 1966 SC 148, p 151 ; *Rajwant Singh v State of Kerala* AIR 1966 SC 1874, p 1879 ; *Nawab v Emperor* AIR 1914 Lah 98, p 100, 15 Cr LJ 610 ; Re *Dadi Abdul Gaffoor*AIR 1955 AP 24, 1955 Cr LJ 329 ; *Thangani Bai v State of Madhya Pradesh* 1972 MPLJ 607, 1972 Jab LJ 604 .

37 *Nga Na Ban v Emperor* 5 Cr LJ 306 ; *Manindra Lal Das v Emperor* AIR 1937 Cal 432 ; *Ram Asre v Emperor* AIR 1923 Oudh 97, p 100 .

38 *Hasta Ismail v Emperor* AIR 1937 Lah 593, 38 Cr LJ 1073 .

39 *State of Madhya Pradesh v Ram Prasad* (1968) 17 Jab LJ 774, p 779 (SC), AIR 1968 SC 881 .

40 *Faqira v State* AIR 1955 All 321, p 327, 1955 Cr LJ 884 ; *Bhagat Singh v Emperor* AIR 1930 Lah 266, p 268 .

41 *Reg v Govinda* ILR 1 Bom 342, p 345 .

42 *State of Madhya Pradesh v Ram Prasad* AIR 1968 SC 881, (1968) 2 SCJ 355 .

43 *Pradeep Kumar Pathak v State* AIR 1980 All LJ 834 .

44 *Ugrasen Mukhi v State* (1966) 32 Cut LT 589, p 593 .

45 *Abdul Karim v Empress* (1872) 92 LBR 650 .

46 *Dilipbhai Madhubhai Patel v State of Gujrat* 2003 CR LJ 565 .

47 *Balkar Singh v State of Uttarakhand* 2009 Cr LJ 2980,p 2984 (SC), 2009 AIR SCW 3499, 2009 (4) Scale 507, (2009) 15 SCC3 66, [2009] 5 SCR 242.

48 *Settu v State of Tamil Nadu* 2006 Cr LJ 3889 (SC) .

49 *Dilipbhai Madhubhai Patel v State of Gujrat* 2003 Cr LJ 565 (Guj) .

50 *Judagi Mullah v Emperor* AIR 1930 Pat 168, p 171, 31 Cr LJ 243 .

51 *Sehej Ram v State of Haryana* AIR 1983 SC 614 .

52 *Pawan Kumar v State of Madhya Pradesh* 1999 Cr LJ 329 (MP) (DB) .

53 *Faqira v State* AIR 1955 All 321, p 327, 1955 Cr LJ 884 .

54 *Sewa Ram v State* (1976) 78 PLR 99 ; *Prabhunath v State* AIR 1957 All 667, p 670, 1957 Cr LJ 1056 .

55 *Ramesh and Ors v State (Delhi Admn)* 1996 Cr LT 309 (Del) (DB) ; *State of Rajasthan v Santosh Savita* (2013) 12 SCC 663, 2013 Cr LJ 4611, AIR 2013 SC 3731 I, (2014) CCR 17 (SC), 2013 (3) JCC 2123, 2013 (10) Scale 182 (Accused convicted under s 304, Pt II, IPC).

56 *Third Addl Sessions Judge, Guntur v Gantele Vijayavardhan Rao and Anor* 1996 Cr LJ 703 (AP) (DB) .

57 *Naimuddin v State of West Bengal* 2010 Cr LJ 392, p 395 (SC), 2009 AIR SCW 7062, 2009 (13) Scale 605, AIR 2010 SC 505, JT 2009 (14) SC 419, (2010) 1 SCC 123 .

58 *Nanbu v State* AIR 1956 MB 207, p 208, 1956 Cr LJ 1078 ; *Pran Krishna Chakravarty v Emperor* AIR 1935 Cal 580, p 590 .

59 *Kanhal v Emperor* 14 Cr LJ 609, 11 All LJ 752 ; *Emperor v Subhappa Chunnappa* 15 Bom LR 303 ; *Emperor v Ram Newaz* 14 Cr LJ 615, 11 All LJ 804 ; *Hanuman v Emperor* 14 Cr LJ 685, 11 All LJ 926 (**dissenting from***Dhian Singh v Emperor* 9 All LJ 180); *Garib v Emperor* AIR 1919 All 445, 20 Cr LJ 767 ; *Emperor v Umrao* AIR 1923 All 355 (2), 24 Cr LJ 753 ; *Parshadi v Emperor* AIR 1929 All 160, 30 Cr LJ 559 .

60 *Perana v Emperor* 1936 All LJ 333 .

61 *Emperor v Hashim* 14 Cr LJ 459 ; *Saidino v Emperor* 16 Cr LJ 710 ; *Naganaban v Emperor* 5 Cr LJ 306 ; *Behari v Emperor* AIR 1953 All 203, p 207 ; *Queen v Khedun Misser* 7 WR (Cr) 54(2), p 55.

62 *Woolmington v Director of Public Prosecutions* (1935) AC 462, p 481 ; *Charker Sattiah v State of Andhra Pradesh* AIR 1960 AP 153, p 155, 1960 Cr LJ 309 .

63 *Ram Kumar v State of Rajasthan* 1969 Raj LW 610, AIR 1970 Raj 60 .

64 *Gopal Chandra Ghosh v State* (1976) 42 CLT 21 .

65 *State v Dhanidhar Mohanty* (1976) 42 CLT 29, AIR 1976 Ori 79 .

66 *Bandu v State of Maharashtra* 1978 Mah LJ 324 ; *Bandarupalli Venkateshwarlu v State of Andhra Pradesh* 1975 Cr LJ 21, p 23, AIR 1974 SC 2363 .

67 Re *Sultana* 35 PR (Cr) 1884.

68 *State of Gujarat v Mohanlal Kuberds* 1975 Guj LR 260 .

69 *Stephen Seneviratne v King* AIR 1936 PC 289, 37 Cr LJ 963 ; *Attygalle v King* 37 Cr LJ 628, AIR 1936 PC 169 .

70 *Ram Kumar v State of Rajasthan* 1969 Raj LW 610, AIR 1970 Raj 60 .

71 *Emperor v Dhirajia* AIR 1940 All 486, p 489, 42 Cr LJ 146 ; Per Plowden J, in Re *Barkatulla*1887 PR 32; *Gyarsibai v State* AIR 1953 MB 61, p 62, 54 Cr LJ 588 .

72 Per Plowden J, in Re *Barkatulla*1887 PR 32; *Gyasibai v State* AIR 1953 MB 61, p 62, 54 Cr LJ 588 .

73 Re *Suba*1888 PR 40.

74 *Syarsibai v State* AIR 1953 MB 61, p 62, 54 Cr LJ 588 .

75 *Emperor v Dhirajia* AIR 1940 All 486, 42 Cr LJ 146 .

76 *Supadi v Emperor* AIR 1925 Bom 310, 26 Cr LJ 1016 (2).

77 Re *Karuppal*AIR 1940 Mad 50, 42 Cr LJ 270 .

78 Per Plowden J, Re *Barkatulla*1887 32 PR 65, p 66.

79 *Salim and Ors v State of Rajasthan* 1999 Cr LJ 1419 (Raj) (DB) .

80 *Queen v Sheik Bazu* 8 WR (Cr) 47, p 51 .

81 *Devaki v State of Kerala* 2000 Cr LJ 477 .

82 *Anda v State of Rajasthan* AIR 1996 SC 148 .

83 *Pappu v State of Uttar Pradesh* AIR 1978 SC 1455, 1978 SCC 571 (Cr) .

84 *King v Aung Nyun* AIR 1940 Rang 259, p 271 (FB), 42 Cr LJ 124 ; *Thakur Mahton v State of Bihar* 1972 BLJR 265, 1972 Cr LJ 835 .

85 *Raja Ram v Emperor* AIR 1935 Oudh 239 ; *King v Aung Nyun* AIR 1940 Rang 259, p 271-73 (FB), 42 Cr LJ 124 ; *Mahomed Hasan v Emperor* AIR 1934 Sind 145, p 149, 36 Cr LJ 22 .

86 *Shyama Charan Sri Ram Saran v State* AIR 1969 All 61 .

87 *Akhtar v State* AIR 1964 All 262, (1964) 1 Cr LJ 617 .

88 Re *Barkatulla* 32 PR 1887 (Cr).

89 *Mukha Singh v State of Rajasthan* AIR 1975 Raj LW 510, 1976 Cr LJ 457, p 460 .

90 *Veeran v State of MP* 2011 Cr LJ 2688 (SC), AIR 2011 SC 1655, 2011 (4) Scale 618, (2011) 11 SCC 367, (2011) 3 SCC(Cri) 195, [2011] 5 SCR 300.

91 *Arur Singh Fateh Singh v State* AIR 1957 Punj 81, p 83, 1957 Cr LJ 532 .

92 *Abdul Mojid v State of Madhya Pradesh* AIR 1963 MP 364, p 367, (1963) 2 Cr LJ 631 ; *State of Maharashtra v Krishnamwti Laxmipati Naidu* 1981 Cr LJ 9, p 16 (SC), AIR 1981 SC 617 ; *Ram Kumar v State of Rajasthan* 1970 Cr LJ 486, AIR 1970 Raj

60 .

93 *Dayabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, p 1566-67, (1964) 2 Cr LJ 472 ; *KM Nanavati v State of Maharashtra* AIR 1967 SC 605, p 617, (1962) 1 Cr LJ 521 ; *Mohd Ramzani v State of Delhi* 1980 UJ 541 (SC) .

94 Re *Murugian*AIR 1957 Mad 541, 1957 Cr LJ 970 .

95 *Jairam Chandrabhan v State of Bombay* AIR 1959 Bom 463, p 464, 1959 Cr LJ 1299 .

1 *Motiram Chandiram v Emperor* AIR 1941 Sind 117, 42 Cr LJ 786 .

2 Re *Thommen Thomas v State of Kerala* AIR 1957 Ker 53, 1957 Cr LJ 635 .

3 Re *Mwugian*AIR 1957 Mad 541, p 544, 1957 Cr LJ 970 .

4 *Neeraj v State* AIR 1978 All LJ 1293 ; *Mancini v DPP* AIR 1942 Cal 1, p 9 ; *Kannakunnummal Ahmed Koya v State of Kerala* AIR 1967 Ker 92, p 95 .

5 *Lachmi Kirsani v State* 1974 Cut LR 348 (Cr) .

6 *Sheikh Rafi v State of Andhra Pradesh* 2007 Cr LJ 2746 (SC)*; Sukhlal Sarkar v Union of India* 2012 Cr LJ 3032, (2012) 5 SCC 703 .

7 *Amarjeet Singh v State of Rajasthan* 1996 Cr LJ 185 (Raj) (DB) .

8 *State of Orissa v Burdara Majhi* (1978) 46 Cut LT 328 .

9 *Amarjit Singh Sohan Singh v State* 1970 Cr LJ 835, AIR 1970 Punj 279 .

10 *Guru Prasad v State* 1978 All Cr R 440 .

11 *Dwarika Yadav v State* 1976 Cr LJ 239, p 242 .

12 *Gyanendra Kumar v State of Uttar Pradesh* AIR 1972 SC 502, p 505, 1972 Cr LJ 308 .

13 Re *Govinda*1974 LW (Cr) 157.

14 *Akhtar v State* AIR 1964 All 262, (1964) 1 Cr LJ 617 .

15 *Shyama Charan Sri Ram Saran v State* AIR 1969 All 61 ; *Mukhi v State* 35 Cut LT 94, p 97, 1969 Cr LJ 1172 ; *Ralia v Emperor* 14 Cr LJ 208 ; *Emperor v Jate Uraon* AIR 1940 Pat 541 ; *Mohammad Yar v Emperor* AIR 1924 Lah 62 .

16 *Fakirappa Yellappa Tukkapanawar*1971 Mad LJ 394 (Cr). For a case of sister, **see***State of Mysore v Ramaji Ramappa Malagi* (1972) 2 Mys LJ 6 .

17 *Ibid*.

18 *Chinnathaman v State Rep by Inspector of Police* 2008 Cr LJ 1372, p 1375 (SC), AIR 2008 SC 784, 2008 AIR SCW 7, 2007 (14) Scale 357, 2007 (8) Supreme 417 .

19 *KM Nanavati v State of Maharashtra* AIR 1962 SC 605, (1962) 1 Cr LJ 521, p 546 ; Re *Ganesan*1974 Cr LJ 381, p 384, 1973 Mad LW 42 (Cr); *Atma Ram v State* 1967 Cr LJ 1697, AIR 1967 Punj 508 .

20 *Shyama Charan Sri Ram Saran v State* AIR 1969 All 61 ; *Madhavan v State of Kerala* AIR 1966 Ker 258, p 259 .

21 Re *Ganesan*1973 LW 42 (Cr); *Gurubasavaiah v State of Karnataka* 1979 Cr LJ 603 .

22 *KM Nanavati v State of Maharashtra* AIR 1962 SC 605, p 626, (1962) 1 Cr LJ 521 ; *Swamy Prasad v State* 1980 Cr LR 361, p 365 (UP) ; *Mahmood v State* AIR 1961 All 538, (1961) 2 Cr LJ 591*; Sukhlal Sarkar v Union of India* 2012 Cr LJ 3032, (2012) 5 SCC 703, 2012 AIR SCW 3398, 2012 (4) Scale 599 ; *BD Khunte v Union of India* 2015 Cr LJ 243, p 247 (SC), 2014 (12) Scale 481, (2015) 1 SCC 286 .

23 *State v Mohanasundaram* 1973 LW 181 (Cr) ; *State v Laikhan Pradhan* AIR 1956 Ori 108, p 110, 1956 Cr LJ 638 .

24 Re *Vadivel Padayachi*1972 Cr LJ 1641, p 1642, 1972 Mad LW 34 (Cr).

25 *Shyama Charan Sri Ram Saran v State* AIR 1969 All 61 ; *Madhavan v State of Kerala* AIR 1966 Ker 258, p 259 ; *Akhtar v State* AIR 1964 All 262, (1964) 1 Cr LJ 617 ; *Arun Raj v Union of India* (2010) 6 SCC 457, p 463, (2010) 3 SCC (Cri) 155, 2010 (5) Scale 608 .

26 *State of Karnataka v R Varadaraju* 1995 Cr LJ 1429 (Kant) (DB) .

27 *KM Nanavati v State of Maharashtra* AIR 1962 SC 605, p 629-630, (1962) 1 Cr LJ 521 ; *Sankappa Rai v State of Kerala*

1968 Ker LJ 643 ; *Madhavan v State of Kerala* AIR 1966 Ker 258 .

28 *Ghulam Mustafa Ghno v Emperor* AIR 1939 Sind 182 -183, 40 Cr LJ 778; *Akhtar v State* AIR 1964 All 262, p 269 ; *Krishnan Nair v State of Kerala* 1965 KLT 150, p 158-159 .

29 *Mahmood v State* AIR 1961 All 538, p 541-542 .

30 *Mahmood v State* AIR 1961 All 538, (1961) 2 Cr LJ 591 ; *Ghulam Mustafa Gahno v Emperor* AIR 1939 Sind 182, 40 Cr LJ 778 ; *Akhtar v State* AIR 1964 All 262, p 268-269, (1964) 1 Cr LJ 617 .

31 *Sukhlal Sarkar v Union of India* 2012 Cr LJ 3032, 2012 AIR SCW 3398, (2012) 5 SCC 703, 2012 (4) Scale 599 .

32 *Mannam Balaswamy v State of Andhra Pradesh* AIR 1980 SC 448, p 449 .

33 *Guru Dev Singh v State of MP* 2011 Cr LJ 3101, p 3106 (SC), AIR 2011 SC 2088, 2011 (6) Scale 20, (2011) 5 SCC 721 .

34 *Imtiaz v State of Uttar Pradesh* 2007 Cr LJ 1663, p 1666 (SC), 2007 (3) Scale 204, (2007) 15 SCC 299 .

35 *Ulla Mahapatra v King* AIR 1950 Ori 261, p 264 .

36 *Petei Beja v State of Orissa* 31 Cut LT 67, p 70 .

37 Re *Kannan*AIR 1953 Mad 579, p 580, 54 Cr LJ 1109 ; *Ghulam Mohammad v Rex* AIR 1950 All 91, 51 Cr LJ 385 .

38 *Nga Chit Tin v King* AIR 1939 Rang 225, p 226, 40 Cr LJ 725 .

39 *Tarachand and Ors v State of Maharashtra* 2000 Cr LJ 2667 (Bom) (DB) .

40 *Girja Devi alias Gita Devi v State of Himachal Pradesh* 2000 Cr LJ 1528 (HP) (DB) .

41 *Akhtar v State* AIR 1964 All 262, p 270, (1964) 1 Cr LJ 617 .

42 *Queen v Gokool Bowree* 5 WR 33, p 40 (Cr) .

43 *Madhavan v State of Kerala* AIR 1966 Ker 258 .

44 *Krishna Chandra Pati v Emperor* AIR 1929 Pat 201 .

45 *Hansa Singh v State of Punjab* AIR 1977 SC 1801 .

46 *Madni v State of Rajasthan* AIR 1994 SC 1713 .

47 *State of UP v Shyam Veer* 2005 Cr LJ 2606, p 2607, AIR 2005 SC 4108, (2005) 10 SCC 611 .

48 *Krishnan Udayan v State of Kerala* AIR 1971 KLT 604, 1971 Ker LR 550 ; *Dini v Emperor* AIR 1926 Lah 485 ; *Sukhai v Emperor* AIR 1925 All 676 .

49 *Akhtar v State* AIR 1964 All 262, p 267, (1964) 1 Cr LJ 617 .

50 *Makhan Lal v State of Uttar Pradesh* 2000 Cr LJ 3896 (All)(DB).

51 *Ullu Mahapatra v King* AIR 1950 Ori 261, p 263 ; *Urlikia Medina v State* AIR 1964 Ori 149 ; *Madi Adma v State* 35 Cut LT 336 .

52 *KM Nanavati v State of Maharashtra* AIR 1962 SC 605, p 630, (1962) 1 Cr LJ 521 ; *Madi Adma v State* 35 Cut LT 336 .

53 *Devku Bhikha v State of Gujarat* AIR 1995 SC 2171 .

54 *Ghulam Mustafa Gahno v Emperor* AIR 1939 Sind 182, p 184, 40 Cr LJ 778 .

55 *Chanan Khan v Emperor* AIR 1943 Lah 123, p 126, 44 Cr LJ 595 .

56 *Santokh Singh v State* (1970) 72 PLR 262 .

57 Re *Chinnapaiyan*(1969) 1 Mad LJ 511, p 513.

58 *Dudabhai Dalabhai Gohil v State of Gujarat* 2014 Cr LJ 125, p 130 (Guj) (DB) .

59 *State of AP v Thummala Anjanayulu* (2010) 14 SCC 621, AIR 2011 SC 564, (2011) 98 AIC 190 (SC) .

60 *Empress v Khogayi* ILR 2 Mad 122-23.

61 *Abdullah v Emperor* AIR 1932 Lah 369, p 370, 33 Cr LJ 338 ; *Partaba v Crown* AIR 1923 Lah 408 ; *Lala v State* AIR 1953

Bilaspur 27 .

62 *Amarjit Singh v State* AIR 1970 Punj 279, 1970 Cr LJ 835 .

63 *Abdul Majid v State of Madhya Pradesh* AIR 1963 MP 364, (1963) 2 Cr LJ 631 ; *Akhtar v State* AIR 1964 All 262, (1964) 1 Cr LJ 617 ; *Chet Ram v Union of India* (1963) 1 Cr LJ 120 ; *Pancham v Emperor* AIR 1947 Oudh 148, 48 Cr LJ 229 ; *Nga Paw Yin v Emperor* AIR 1936 Rang 40, p 41, 37 Cr LJ 410 ; *Atma Ram v State* AIR 1967 Punj 508, 69 Punj LR 794, p 799 ; *Rahman v Emperor* AIR 1930 Lah 344 ; *Maung Ni v Emperor* AIR 1936 Rang 49 ; *Hira Singh v Emperor* AIR 1933 Lah 126, 34 Cr LJ 1159 (1); *Abdul Khanan Watamir v Emperor* AIR 1939 Lah 436, 40 Cr LJ 868 .

64 *Mohan v State* 1997 Cr LJ 22 (Mad) (DB)*; Dudabhai Dudabhai Gohil v State of Gujarat* 2014 Cr LJ 125 (Guj) (DB) .

65 *Queen v Hari Giree* 10 WR 26 (Cr) ; *Hafizullah v State* AIR 1957 All 377 ; *Queen v Ganesh Luskur* 9 WR 72 (Cr) .

66 *Dhanno Khan v State* AIR 1957 All 317, p 319, 1957 Cr LJ 498 .

67 *BD Khunte v Union of India* 2014 (8) Supreme 87 (SC), (2015) 1 SCC 286, 2014 (12) Scale 481, 2014 (9) SLT 462, 2015 Cr LJ 243, 2014 (4) Crimes 286 (SC) .

68 *Mahmood v State* AIR 1961 All 538, p 542, (1961) 2 Cr LJ 591 .

69 *Rahman v Emperor* AIR 1932 Lah 14, 32 Cr LJ 1118 .

70 *Emperor v Prem Singh* AIR 1942 Lah 301, 34 Cr LJ 117 .

71 *Nga Po Nyun v Emperor* AIR 1936 Rang 325 .

72 Re *Nattekallappa* 1 Weir 308.

73 *Mansingh Parma Teli*AIR 1959 MP 267, 1959 Cr LJ 850 ; *Kadir Baksh v Emperor* AIR 1920 Lah 501 ; *Muhammad Zaman v Emperor* AIR 1933 Lah 165 ; *Jagar Beg Jai v Emperor* AIR 1937 Lah 692 ; *Hussain v Emperor* AIR 1939 Lah 471, 41 Cr LJ 15 ; *Hemsingh v State of Madhya Pradesh* 1980 Cr LR 209, p 211-212 (MP) ; *Mongol Ganda v Emperor* AIR 1925 Nag 37 ; *Queen v Maithya Gazee* 6 WR 42 (Cr) ; *Queen v Gour Chunder Poli* 1 WR 17 (Cr) ; *Queen v Bhekye* 1 WR 46 (Cr) ; *Emperor v Mehdi Ali* AIR 1941 All 310 ; *Raj Kishore v State* AIR 1953 All 464 ; *Noukar Mouledina v Emperor* AIR 1937 Sind 212, 38 Cr LJ 968 ; *Empress v Asha Gopal* Ratanlal Cr C 932.

74 *Ram Kumar v State of Haryana* (1978) 80 PLR 408 .

75 Re *Ghuntappa* 1 Weir 306.

76 *Pancham v Emperor* AIR 1947 Oudh 148, 48 Cr LJ 229 .

77 *Bonda Devesus v State of Andhra Pradesh* 1996 SCC 115 .

78 *Sukhlal Sarkar v Union of India* 2012 Cr LJ 3032, 2012 AIR SCW 3398, (2012) 5 SCC 703, 2012 (4) Scale 599 .

79 *Sukhlal Sarkar v Union of India* 2012 Cr LJ 3032, 2012 AIR SCW 3398, (2012) 5 SCC 703, 2012 (4) Scale 599 .

80 *BD Khunte v Union of India* 2015 Cr LJ 243, p 247 (SC), 2014 (12) Scale 481, (2015) 1 SCC 286 .

81 *Mahmood v State* AIR 1961 All 538, (1961) Cr LJ 591, Oak J.

82 *Mahmood v State* AIR 1961 All 538, p 540, (1961) 2 Cr LJ 591 ; *Akhtar v State* AIR 1964 All 262 ; Re *Andi Thevan*AIR 1941 Mad 251 ; *Queen v Subrain* 13 WR 33 (Cr) ; *Dhanno Khan v State* AIR 1957 All 317 .

83 *Moni Prodhano* 1 Weir 306.

84 *Nga Sae Myini v Emperor* AIR 1937 Rang 4, p 6 .

85 *Jumma Fateh Mohammad v Emperor* AIR 1932 Lah 438, 34 Cr LJ 94 .

86 *Daljit Singh v Emperor* AIR 1937 Nag 274, p 280 .

87 *Dattu Genu Gaikwad v State of Maharashtra* AIR 1974 SC 387, p 388, 1974 Cr LJ 446 .

88 *Jagar Beg Jat v Emperor* AIR 1937 Lah 692 ; *Imam Bakhsh v Emperor* AIR 1937 Lah 562, 38 Cr LJ 637 ; *Gangaram Raghunath v State of Madhya Pradesh* (1965) 14 Jab LJ 280, p 283, AIR 1965 MP 122 ; *Jugraj Budhan v State of Madhya Pradesh* 1966 Jab LJ 115 (SN) ; *Maiga v State* (1972) 1 Mys LJ 306, 1972 Mad LJ 191 (Cr) ; *Lal Khan v Emperor* AIR 1948 Lah 43 ; Re *Ghuntappa* 1 Weir 306.

89 *KM Nanavati v State of Maharashtra* AIR 1962 SC 605, p 626, (1962) (1) Cr LJ 521 ; *Abdul Majid v State of Madhya Pradesh* AIR 1963 MP 364, p 366 .

90 *Imam Baksh v Emperor* AIR 1937 Lah 562, 38 Cr LJ 637 ; *Mehra Mistak v Emperor* AIR 1934 Lah 103, 35 Cr LJ 1378 ; *Empress v Mohan* ILR 8 All 622 ; *Empress v Lochan* ILR 8 All 635 ; **see also***Namala Subba Rao v State of Andhra Pradesh* 2007 Cr LJ 47 (SC) .

91 *Empress v Chunni* ILR 18 All 497 ; *Dini v Emperor* AIR 1926 Lah 485 -486.

92 Re *Jamaluddin*1955 NUC 1834.

93 *Abalu Das v Emperor* ILR 28 Cal 571, 5 CWN 708 ; *Raham Shah v Emperor* AIR 1925 Lah 114, 26 Cr LJ 534 .

94 *Boya Munigadu v Queen* ILR 3 Mad 33 .

95 Re *Venkatesan* 1 Weir 307.

96 *Arun Raj v Union of India* (2010) 6 SCC 457,p 463, (2010) 3 SCC (Cri) 155.

97 *Namala Subba Rao v State of Andhra Pradesh* 2007 Cr LJ 47, p 49 (SC), AIR 2007 SC 9, 2006 (10) Scale 253, (2006) 10 SCC 557 .

98 *Ansari Krishna Murthy v State of AP* (2009) 17 SCC 462, 2009 (13) Scale 26, 2011 (1) SCC (Cr) 901 .

1 *Mohd Asif v State of Uttranchal* (2009) 11 SCC 497, 2009 Cr LJ 2789, [2009] 4 SCR 12, 2009 (3) Scale 695, 2009 (3) SLT 77 .

2 *Imtiaz v State of UP* (2007) 15 SCC 269 .

3 *Raj Kumar v State of Maharashtra* (2009) 15 SCC 292, [2009] 11 SCR 49, 2009 (9) JT 413, 2009 (9) Scale 495 .

4 Re *Natte Kallappa* 1 Weir 308.

5 Re *Gandava Nayako* 1 Weir 305; Re *Mom Prodhana* 1 Weir 306; *Emperor v Rahim Khan* 15 Cr LJ 501 ; *Gangaram Raghunath v State* (1965) 14 Jab LJ 280, p 283, 1965 MP 122 .

6 *Chindan Nair v State of Kerala* AIR 1957 Ker 166, p 169, 1957 Cr LJ 1261 ; *Jumma Fateh Mohammad v Emperor* AIR 1932 Lah 438 ; *Abdul Majid v State of Madhya Pradesh* AIR 1963 MP 364, p 366, (1963) 2 Cr LJ 631 .

7 *Mansa Ram v State* 1975 Cr LJ 1772, p 1775 ; *Swami Prosad v State* 1980 (UP) Cr LR 361, p 365 .

8 *Ghulam Mustfa Gahno v Emperor* AIR 1939 Sind 182 -83, 40 Cr LJ 778; *Mansa Ram v State* 1975 Cr LJ 1772 ; *Akhtar v State* AIR 1964 All 262, p 268 .

9 *Abdul Majid v State of Madhya Pradesh* AIR 1963 MP 364, p 366, (1963) 2 Cr LJ 631 .

10 *Panchan v Emperor* AIR 1947 Oudh 148, p 149 ; *Des Raj v Emperor* 29 Cr LJ 454 .

11 *Mahmood v State* AIR 1961 All 538 -539, (1961) 2 Cr LJ 591; *Mohan Singh v State* (1980) 49 Cut LT 275, p 284 .

12 Re *Murugian*AIR 1957 Mad 541, p 546, 1957 Cr LJ 970 .

13 *Bonda Deves v State of Andhra Pradesh* 1996 SCC 115 .

14 *Jagjit Singh v State of Punjab* (1978) 80 Punj LR 331 .

15 *Nga May Maung v Emperor* AIR 1936 Rang 472 .

16 *Madani v State of Rajasthan* AIR 1994 SC 1713 .

17 *Devku Bhikha v State of Gujarat* AIR 1995 SC 2171 .

18 *Ashok Soma Misal v State of Maharashtra* 2006 Cr LJ 1528 (Bom) (DB) .

19 *Pushpendra Singh v State of Uttar Pradesh* 2005 Cr LJ 2022 (All) (DB) .

20 *Muthu v State,* 2008 Cr LJ 442 (SC), AIR 2008 SC 1, 2007 AIR SCW 6982 ; **See also***D Sailu v State of Andhra Pradesh* 2008 Cr LJ 686 (SC) ; *Gali Venkataiah v State of Andhra Pradesh* 2008 Cr LJ 690 (SC), 2007 AIR SCW 7282 .

21 *Budhi Singh v State of HP* 2013 Cr LJ 962 (SC), 2012 (12) Scale 393 .

22 Re *Dhula v State of Madhya Bharat* AIR 1956 MB 94, 1956 Cr LJ 241 .

23 Re *Mathappa Goundan*AIR 1954 Mad 538, p 540, 55 Cr LJ 733 .

24 *Inayat v Emperor* AIR 1933 Lah 869, 35 Cr LJ 74 ; *Gouranga Dora v State* (1971) 37 Cut LT 170 ; Re *Thandavan*1973 Cr LJ

1041, p 1043, 1972 Mad LW 244 (Cr); *Queen v Kasseemoddeen* 4 WR 38 (Cr) ; *Jafar v Emperor* 1 Cr LJ 705, 6 Punj LR 492 ; *Mohammad Yar v Emperor* AIR 1924 Lah 62 ; *Imam Bakhsh v Emperor* AIR 1937 Lah 562 .

25 *King v Palmer* (1913) 2 KB 29 .

26 Re *Murugian*AIR 1957 Mad 541, p 546, 1957 Cr LJ 970 ; Re *Chervirala Narayan*AIR 1958 AP 235, 1958 Cr LJ 476 ; *Jairam Chandrabhan v State of Bombay* AIR 1959 Bom 463, p 465 .

27 *Nga Saw Maung v Emperor* AIR 1937 Rang 466, 39 Cr LJ 137 .

28 *Sukhal v Emperor* AIR 1925 All 676 ; Re *Ghuntappa* 1 Weir 306; Re *Venkatesan* 1 Weir 307; Re *Nallekallappa* 1 Weir 308.

29 *Ramchandra Pangi and Ors v State* 1984 Cr LJ (NOC) 12 (Ori) (DB).

30 *Imbichi Koya v Emperor* AIR 1934 Mad 176, 35 Cr LJ 694 .

31 Re *Muthappa Goundan*AIR 1954 Mad 538, 55 Cr LJ 733 ; *Paieshwari Prasad v Emperor* AIR 1928 Oudh 241 .

32 *Kota Potharaja*AIR 1932 Mad 25, 33 Cr LJ 273 ; *Emperor v Dinabandhu Ooria* AIR 1930 Cal 199, p 203, 31 Cr LJ 737 ; Re *Ghuntappa* 1 Weir 306, *Murgi Munda v Emperor* AIR 1939 Pat 443 ; *Sheo Ram v Emperor* AIR 1937 Oudh 457 ; *Mir Zaman v Emperor* AIR 1937 Pesh 101 .

33 *State of Karnataka v R Varadaraju* 1995 Cr LJ 1429 (Kant) (DB) .

34 *JP Lall v State* (1995) 57 DLT 394 (Del) (DB).

35 *Public Prosecutor v Kundarapu Danam* 1961 Mad LJ 580 (Cr), 1961 Andh WR 182 .

36 *Hafizullah v State* AIR 1957 All 377, p 380 .

37 *Abdul Majid v State of Madhya Pradesh* AIR 1963 MP 364, p 366, (1963) 2 Cr LJ 631 ; *Murugaiya Nadan v Emperor* 12 Cr LJ 235 .

38 *KM Nanavati v State of Maharashtra* AIR 1962 SC 605, (1962) 1 Cr LJ 521 .

39 *R v Devji Govindji* ILR 20 Bom 215 .

40 *Madni v State of Rajasthan* AIR 1994 SC 1713 .

41 *Devku Bhikha v State of Gujarat* AIR 1995 SC 2171 .

42 *Chand Singh v State of Rajasthan* 1971 Cr LJ 1501, p 1506-1507 .

43 *Sadhu Singh v State* 1969 Cr LJ 1183 (Punj) .

44 *State v Gurbachan Singh* AIR 1953 Pepsu 32, p 33, 54 Cr LJ 445 ; Re *Pakirappa Yellappa Tukkappanawar*1971 Cr LJ 1511, 1971 Mad LJ 394 (Cr).

45 *Abdul Khanan Watamir v Emperor* AIR 1939 Lah 436 ; *Muhammad v Emperor* AIR 1929 Lah 861, 30 Cr LJ 1044 ; *Ralia v Emperor* 14 Cr LJ 208 ; *Boya Munigadu v Queen* ILR 3 Mad 33 ; *Latu Mukhi v State* 1969 Cr LJ 1172, 35 Cut LT 94 ; *Babu Lal v State* AIR 1960 All 223, p 226, 1960 Cr LJ 437 .

46 *Budhi Singh v State of HP* 2013 Cr LJ 962, p 968 (SC), 2012 (12) Scale 393 .

47 *KM Nanavati v State of Maharashtra* AIR 1962 SC 605, (1962) 1 Cr LJ 521 ; *Hafizullah v State* AIR 1957 All 377, p 380, 1957 Cr LJ 617 ; *State v Laikhan Pradhan* AIR 1956 Ori 108 ; *Queen v Yasin Sheikh* 12 WR 68 (Cr) .

48 *Guriya Bucha v State of Gujarat* AIR 1962 Guj 39, p 43, (1962) 1 Cr LJ 324 .

49 *Akhtar v State* AIR 1964 All 262, p 270, (1964) 1 Cr LJ 617 .

50 *Queen v Bechoo Saout* 19 WR 35, p 36 (Cr) ; *Jairam Chandrabhan v State of Bombay* AIR 1959 Bom 463, 1959 Cr LJ 1299 ; *Adil Mohamed v R* 9 Cr LJ 32, 8 Cal LJ 561 ; *Nannhu Gobrya v State of Madhya Pradesh* AIR 1960 MP 132, p 134, 1960 Cr LJ 605 ; Re *Ramaswamy Konar*1954 Cr LJ 1545.

51 *Jagar Beg Jat v Emperor* AIR 1937 Lah 692, 38 Cr LJ 1057 .

52 *Abalu Das v Emperor* ILR 28 Cal 571 .

53 *Kadir Baksh v Emperor* AIR 1920 Lah 501, p 504 ; *Raham Shah v Crown* AIR 1925 Lah 114 .

54 *Queen v Nakul Nushyo* 7 WR 27 (Cr) .

55 *Sheikh Rafi v State of AP* 2007 Cr LJ 2746 (SC), 2007 AIR SCW 2749, 2007 (3) Supreme 675, 2007 (6) Scale 74, (2007) 13 SCC 76 .

56 *Chanan Khan v Emperor* AIR 1943 Lah 123, p 125, 44 Cr LJ 595 .

57 *State v Jane Bahadur* 1960 All LJ 721, 1960 All WR 556 ; *Bahadur v Emperor* AIR 1935 Pesh 78 ; *Jan Muhammad v Emperor* AIR 1929 Lah 861 ; *Empress v Khogayi* ILR 2 Mad 122 .

58 *Bansi v State* AIR 1956 All 668, 1956 Cr LJ 1272 .

59 *KM Nanavati v State of Maharashtra* AIR 1962 SC 605, p 626, illusts (a) and (b).

60 *Yusuf v State of Uttar Pradesh* 1973 Cr LJ 1220, p 1225, 1973 All LJ 111 ; *Nga Po Aung Gyaw v Emperor* AIR 1936 Rang 115 .

61 *Mannam Balaswamy v State of Andhra Pradesh* 1980 Cr LR 75, p 76 (SC), 1980 SCC 313 (Cr) .

62 *Mahamdu v Emperor* AIR 1945 Sind 42, p 46, 46 Cr LJ 614 ; *Raj Kumar v State of Maharashtra* (2009) 15 SCC 292, [2009] 11 SCR 49, 2009 (9) Scale 495 .

63 *Sartaj Mahammad and Ors v State* 2001 Cr LJ 2823 (All) (DB) .

64 *Queen v Lachan* ILR 8 All 635, ILR 6 All 822 ; *Chainu v Emperor* AIR 1926 Oudh 272, 27 Cr LJ 65 .

65 *Mehra Mistak v Emperor* AIR 1934 Lah 103, 151 IC 751 ; *Imam Baksh v Emperor* AIR 1937 Lah 562, ILR 1937 Lah 206 ; *Gosain v Emperor* AIR 1920 All 199, 18 All LJ 851 ; *Mahamdu v Emperor* AIR 1945 Sind 42, 46 Cr LJ 614 .

66 Re *Mala Narayana*AIR 1962 AP 166, (1962) 1 Cr LJ 394 .

67 *Pattani v State* 1993 Cr LJ 1709 (Mad) (DB) .

68 *Munne Khan v State of Madhya Pradesh* AIR 1971 SC 1491, p 1494, 1971 BLJR 1080 ; *Kalu v State* AIR 1965 Raj 74, (1965) 1 Cr LJ 478 .

69 *State v Satish Sangma* AIR 1954 Assam 56 .

70 *Ibid.*

71 *State v Satish Sangma* AIR 1954 Assam 56 ; *Padmeshwar Phukan v State* 1971 Cr LJ 1595, p 1596 .

72 *Scoria alias Thankan v State of Kerala* AIR 1995 SC 2342 .

73 *State v Satish Sangma* AIR 1954 Assam 56 ; *Padmeshwar Phukan v State* 1971 Cr LJ 1595, p 1596 .

74 *Dholia Ravji v State* (1961) 1 Cr LJ 813, p 814-815 .

75 *Jharia Naik v State* 35 Cut LT 322, p 326 .

76 *Po Mye v King* AIR 1940 Rang 129, p 132, 41 Cr LJ 634 ; *Ram Lal v Empress* AIR 1928 Oudh 15, 28 Cr LJ 1029 .

77 *Akal Sahu v Emperor* AIR 1948 Pat 62, 48 Cr LJ 565 .

78 *Gopal v State of Rajasthan* 2013 Cr LJ 1297 (SC), 2013 AIR SCW 889, (2013) 2 SCC 188, 2013 (1) Scale 445 ; *Krishna Kant Chaturvedi v State of UP* 2013 Cr LJ 1491 (All) (DB) .

79 *Balbir Singh Balwant Singh v State* AIR 1959 Punj 332, p 338, 1959 Cr LJ 901 ; *Ram Dahin Singh v State of Bihar* (1970) 19 Jab LJ 76 (SC) (SN) .

80 *State of Karnataka v Jinappa Payappa Kudachi and Ors* 1993 Cr LJ 3915 (SC) .

81 *Ibid*.

82 *Siryan v Emperor* 17 Cr LJ 270 .

83 *Kheiri Bewa v State* AIR 1952 Ori 37, p 39 .

84 *Damisetti Subbanna v State of Andhra Pradesh* 1976 Cr LJ 1242, p 1245 .

85 *Manik Malakar v State of Assam* 1976 Cr LJ 1921, p 1923 .

86 *Gurjit Singh v State of Haryana* 2015 Cr LJ 1955 (SC), 2015 (3) Scale 337, (2015) 4 SCC 380 .

87 *Mazidar Rahman v State of Assam* 1977 Cr LJ 1293, p 1297 (Gau) .

88 *State of UP v Chatur Singh* 2006 Cr LJ 545, p 546 (SC), AIR 2006 SC 745, 2005 (9) Scale 444, 2006 (1) All LJ 649 .

89 *Rajinder Singh v State of Haryana* 2015 Cr LJ 1330 (SC), III (2015) CCR 91 (SC), 2015 (1) Scale 95 .

90 *Balbir Singh Balwar Singh v State* AIR 1959 Punj 332, p 338, 1959 Cr LJ 901 ; *Roopsingh v State of Rajasthan* 1980 Cr LJ 138 (Raj) (NOC) ; *Victor alias Kaloo v State* 1966 Jab LJ 587 .

91 *Mohammed Mytheen Shahul Hameed v State of Kerala* AIR 1980 SC 108, p 111 .

92 *Munney Khan v State of Madhya Pradesh* (1971) 1 SCR 943, AIR 1971 SC 1491, p 1494 ; *Jhaduram v State of Madhya Pradesh* 1980 Cr LJ 99 (Notes) (MP) (DB).

93 *State of Karnataka v Jinappa Payappa Kudachi and Ors* 1993 Cr LJ 3915 (SC) .

94 *Dev Raj and Anor v State of Himachal Pradesh* AIR 1994 SC 523 .

95 *Kanwarjeet Singh v State of Punjab* AIR 1992 SC 2199 .

96 *Gundicha Bhoi v State* (1963) 1 Cr LJ 700, p 702 .

1 *Scoria alias Thankan v State of Kerala* AIR 1995 SC 3242 .

2 *Ghanshyam v State* 1978 A Cr R 415 .

3 *Empress v Gabardhan Bhuyan* 4 Beng LR (App) 101.

4 *King v Nga Pu Gyi* AIR 1938 Rang 441, 40 Cr LJ 59 .

5 *Queen v Bulakee Jalahed* 10 WR 9 (Cr) .

6 *Emperor v Lal Bakhsh* AIR 1945 Lah 43, 46 Cr LJ 736 ; *Khetri Bewa v State* AIR 1952 Ori 37 ; *Lalman Shivnath v State of Madhya Pradesh* (1971) 1 Cr LJ 176, p 180 ; *Ram Ration v State of Uttar Pradesh* AIR 1977 SC 619, p 622, (1971) 1 SCC 188 .

7 *State of Himachal Pradesh v Bhikham Ram* 2011 Cr LJ 910, p 915 (HP), 2010 (3) Shim LC 329 .

8 *Narinder Kumar v State of Jammu & Kashmir* 2010 Cr LJ 3905, p 3910 (SC), AIR 2010 SC 3015, 2010 ALL MR (Cri) 3337 (SC), JT 2010 (7) SC 454, (2010) 9 SCC 259 .

9 *Babu Ram v State of Punjab* 2008 Cr LJ 1651, p 1654 (SC), AIR 2008 SC 260, (2008) 3 SCC 709, 2008 (2) Scale 499 .

10 *State of Uttar Pradesh v Ram Swarup* AIR 1974 SC 1570, p 1574, 1974 Cr LJ 1035 .

11 *Ram Dahin Singh v State of Bihar* 1970 SCC 376 (Cr), 1970 UJ 592 (SC) .

12 *Rajesh Kumar v State* (1988) 35 DLT 262 (Del) (DB).

13 *Fakiro v Emperor* AIR 1947 Sind 107, 48 Cr LJ 823 ; *Victor alias Kaloo v State* 1966 Jab LJ 587 ; *Motiram Chandiram v Emperor* AIR 1941 Sind 117, 42 Cr LJ 789 .

14 *Sada Ram v State* 71 PLR 428, p 435 ; *State of Assam v Inush Ali* 1982 Cr LJ 1044 (Gau) (DB) .

15 *Labhu Ram and Ors v State of Punjab* 1996 Cr LJ 399 (SC) .

16 *Harabailu Kariappa and Ors v State of Karnataka* 1996 Cr LJ 321 (Kant) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 300.

Murder.--

69. Accused must have Exceeded the Right of Private Defence

In considering the question whether the accused exceeded the right of private defence, court has to consider the part played by the accused person, gravity of the offence committed and nature of attack made by them.[17] Exception 2 applies only if the accused has, in exercising the right of private defence, exceeded the powers, given to him by law, and causes death.[18] The accused would be said to have exceeded the power, given to him by law, if he causes more harm than what is necessary for the purpose of his defence,[19]such as the act in spearing to death the unarmed deceased as soon as he (*i.e*., the deceased) advances to seize the trespassing cattle of the accused.[20] Where the deceased father, aged 74 years, had chastised his daughter,2208 the accused son, aged 32, on being enraged, inflicted a large number of injuries by blows/fists, knife and a wooden piece causing death; it was held that the accused son exceeded his right of private defence and the case was not covered by exception 2 to s 300 and the conviction of the accused under s 302, IPC was held proper.[21] Where occurrence of the event took place in the field of the deceased on his objection to removal of crops by accused persons, and the deceased's act of biting finger of the hand of the accused caused provocation to his accused sons, the medical evidence proved that the death was caused by back portion of the axe so the two accused armed with axe were convicted under s 304, Pt I, IPC for exceeding right of private defence of body of their father/accused; the other accused persons were acquitted.[22]

Where the complainant party attacked the accused party with sticks causing injuries to them, in retaliation of attack by complainant the accused party exceeded the right of private defence so the charge of murder fails, thus, the accused were held liable to be convicted under s 304, Pt I, IPC .[23]

Where the deceased came to the house of the accused in a drunken condition with a danda in his hands and started abusing the accused and his family members (other co-accused persons) and also assaulted the family members of the accused, the accused in retaliation, inflicted multiple tangier blows to the head of the deceased, it was held that the right of private defence accrued to the accused as he reasonably apprehended the death and grievous injuries to him and members of his family. However, the accused exceeded the right by inflicting more injuries to the deceased, therefore, the case fell within the ambit of exception 2 to s 300 and the accused was liable to be convicted under s 304, Pt I, IPC .[24]

Where stones from the side of the house of the deceased had fallen on to the house of the accused, the accused had every right to protect his properties, but he exceeded the right by inflicting repeated blows leading to the death of the deceased. It was held that the case was covered by exception 2 to s 300, and the accused was convicted under s 304, Pt I, IPC .[25] Where in a sudden quarrel the accused persons exceeded their right of private defence in causing death of two persons, they were held entitled to benefit of exception 2 of s 300, IPC .[26] Where, even after the deceased (who intruded into the accused's plot with a tractor) had fallen down, the accused continued to injure him in a vindictive and revengeful spirit, it was held that they exceeded their right of private defence and were, therefore, liable to conviction under Pt I of s 304 instead of under s 302 .[27] But where in a case of triple murder the accused fired at victims from a close range and one in the back while he was running away, the victims were not armed, the accused was not under any danger or threat from the victims, the accused was held not entitled to any right of private defence and deserved conviction under s 300, and not under s 304, Pt I, IPC .[28]2209

Where the deceased husband suspecting the fidelity of his wife, the accused, had threatened his wife that he will kill her with a vegetable cutter, and only thereafter the accused wife cut him with an axe, it was held that the act of the accused amounted to exercise of private defence, but she exceeded the right, hence the guilt of the accused fell under exception 2 to s 300, and was convicted under s 304, Pt I, IPC .[29]

The defence of the accused was that he had gone to the deceased's house for repairing his TV, and the deceased had just come home and he expressed a desire to have unnatural sex with the accused, which the accused refused and thereupon the deceased removed all his clothes and for the purpose of gratifying his unnatural lust, he attacked the accused. The accused apprehended that the deceased would force him to have unnatural sex with him and on being certain that he would be a victim of unnatural lust, he picked up a weapon and to protect himself from unnatural sex and assault he attacked the deceased with a weapon. As a result, the deceased fell down and it was held that the 'defence version' was probable as theaccused caused death in exercise of right of private defence, but exceeded this right and was held guilty under s 304, Pt II.[30]

In a case, there was reliable prosecution evidence that R had dealt a blow on the head of the deceased by the sabba, due to which the deceased fell. Once the deceased fell to the ground, the apprehension of any threat of death or injury being caused by the deceased to the accused R, ended. The fact that the accused had brutally beheaded the deceased and assaulted him repeatedly on the thoracic cavity of the deceased with such force that during each assault the penetration of the sabba in the thoracic cavity was full, it can be safely inferred that the accused R had exceeded the right of private defence. Therefore, the offence committed by the accused R fell under exception 2 to s 300 of the IPC and did not travel beyond s 304, Pt I of the IPC .[31]

70. Accused not Exceeding Right of Private Defence is Entitled to Acquittal

Section 100, IPC, may be referred to. Where there was no prior enmity between the two groups and the whole incident developed suddenly, the accused persons received a fair number of injuries, some of them were on vital parts, the prosecution had no plausible explanation for these injuries, the plea of the accused that they inflicted injuries on deceased in self-defence was quite probable, the accused inflicted only one injury on the head of the deceased, in such a situation it cannot be said that the act of the accused was not in conformity with the limitation laid down s 100, IPC and all the accused persons were found entitled to benefit of doubt.[32]

71. 'Without Premeditation and without any Intention of doing more harm than is Necessary for the Purpose of such defence'

For the application of exception 2, it is further necessary that the accused must have caused the death without premeditation and without any intention of doing more2210 harm than what was necessary for the purpose of private defence. Where an accused, exceeding his right of private defence, intentionally,[33] or deliberately,[34] causes more harm than what is necessary or indiscriminately assaults the deceased after he becomes disabled,[35] he is not entitled to the benefit of the exception. In a case, the deceased, none of whom was in possession of any dangerous weapon, were harvesting the crops on a plot of land peacefully under the protection of police. The accused, who claimed the crop in the field, went to the field armed with guns, with the common intention of killing the deceased, and shot them dead at point blank range. It was held that, under the circumstances, it could not be said that the accused had shot at the deceased without premeditation and without the intention of doing more harm than what was necessary for the purpose of private defence.[36] It is an accepted proposition of law that a person cannot avail himself of the plea of self-defence in a case of homicide when he was himself the aggressor and had wilfully brought, on himself, without legal excuse, the necessity for the killing. It would be strange indeed if a person, who provides an attack, brings on a combat and then slays his assailant, were to take shelter behind the plea of self-defence in justification of the blow which he struck during the encounter.[37] If, however, the deceased becomes aggressive and attacks the accused first, it would be a case where the accused must be said to have acted without premeditation. Where all, but one, of the injuries, inflicted by the accused on the deceased, are such as are not likely to cause death, it cannot be said that the accused intended to cause more harm than what was necessary.[38] But where *A* and *B*, who are unarmed, assault *C* with their hands and *C* stabs *B* with a large knife through the lungs and stomach and *B* dies, *C* is guilty of murder,

and not of culpable homicide not amounting to murder.[39] Exception 2 or any other exception in s 300, IPC would not apply when the deceased is unarmed, and the assault cannot be said to be sudden and unpremeditated.[40] If the accused causes injuries to the unarmed deceased before he receives stick blows by the deceased's son, it cannot be said that the deceased was the aggressor and that the accused caused those injuries to the deceased to ward off any imminent apprehension of death or grievous hurt to himself.[41] The accused has to establish, with a balance of probability, circumstances which would bring his case within any exception.[42]

Where the accused had not gone to the spot with any weapon, but there was a lengthy quarrel and scuffle between the deceased and the deceased and his son hit the accused with sticks on his head and the blows landed on his elbows when he raised his hands to protect his head, and that at that stage, the accused picked up one of the thorny sticks lying at the spot and hit the deceased, to protect himself and not with2211 the intention of killing him, the plea of private defence was accepted and the accused was acquitted of the charge under ss 302 and 323, IPC .[43]

72. Exception 2 of Section 300 and Section 34

Commentary under s 34, *ante*, vol I, may be referred to.

Where two persons are charged with murder and one of them brings his case within exception 2 and is convicted of culpable homicide not amounting to murder under Pt I of s 304, the other cannot be convicted under Pt II of s 304, read with s 34, as s 34 requires common intention, while Pt II of s 304 deals only with knowledge, and not common intention.[44]

73. Exception 3--Scope and Applicability of

This exception provides that culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers, given to him by law, and causes death by doing an act which he, in good faith, thinks to be lawful and necessary for the due discharge of his duty as a public servant without ill-will towards the person whose death he has caused.[45] For the application of this exception, the following facts must be established, namely:

(i) the person, accused of murder, must be a public servant (s 21, IPC) or one who is aiding such servant when the latter is acting for the advancement of public justice;
(ii) he must, in good faith as under s 52, IPC, believe that the act, which results in death, was 'lawful and necessary' for the due discharge of his duty; and
(iii) he must act without ill-will towards the person who is killed.

Where the accused, a police constable and so a public servant, with a view to re-arrest a suspected thief, who has escaped from the running train, pursued him and, on his failure to catch him, fired at him, but, in that process, hit a fireman, it was held that the accused, being a public servant, whose object was the advancement of public justice, though he undoubtedly exceeded the powers given to him by law, caused the death of the fireman by doing an act which, he in good faith, believed to be lawful and necessary for the due discharge of his duty, and that he was entitled to the benefit of this exception.[46] A police officer, who causes death by firing on an unlawful assembly for the purpose of dispersing it, is protected only if he believes in good faith, that it is necessary for the public security to disperse the assembly by firing on it.[47]

Exception 3, thus, pre-supposes that a public servant who causes death, must do so in good faith and in due discharge of his duty as a public servant and without ill-will towards the person whose death is caused.

The accused had fired without provocation at a car killing two innocent persons and injuring one; in this

case, the court observed that the accused had not acted in2212 good faith. Further, the obligation to prove an exception is on the preponderance of probabilities but it nevertheless lies on the defence and even on this touchstone, the defence did not succeed. Therefore, it was held that the accused police party was not entitled to the benefit of exception 3.[48]

This exception has no application to acts done by a public servant outside his duty.[49]

74. Exception 4--Scope and Applicability of

To invoke this exception four requirements must be satisfied, namely:

(a) it was a sudden fight;
(b) there was no premeditation,
(c) the act was done in a heat of passion; and
(d) assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant, nor is it relevant, who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy, and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception, provided he has not acted cruelly.[50]

Further, in order to bring a case under exception 4 to s 300, IPC, the evidence must show that the accused acted without any premeditation and in a heat of passion and without having taken undue advantage and that he had not acted in a cruel or unusual manner. Every one of these circumstances is required to be proved to attract this exception to s 300, IPC and it is not sufficient to prove only some of them.[51]

This exception is meant to apply to cases where, in whatever way, the quarrel may have originated; the subsequent conduct of both the parties puts them on an equal footing.[52] Where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor, the situation does not permit of the plea of private defence on either side. It would be a case of sudden fight and has to be dealt with under this exception.[53]2213

The exception is just for the benefit of the person who cannot invoke the right of private defence. An occasion to consider the applicability of this exception will arise where the accused, who had no right of private defence of person, has caused the death of another in circumstances which, according to him, would bring his case within the exception. This means that this exception may be of help to an accused who was the first to strike or to create an apprehension of danger in the mind of the other and as such could not rely on any right of private defence of person or, in the circumstances, was not entitled to any right of private defence. It is to mitigate the gravity of his offence that he may take advantage of this exception by pleading that he had caused the death of the other without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without his taking undue advantage or acting in a cruel or unusual manner. The fact, that the accused committed the assault first, will not, in such circumstances, deprive him of the benefit of the exception. In other words, his act, being responsible for the first assault in the fight and thus, for the entire incident, will not aggravate the offence against him because of the want of premeditation, the suddenness of the incident, heated passion and his not taking unfair advantage do not put him at par with one who deliberately commits the murder of another with the intention or knowledge as contemplated in s 300 .[54] So, the aid of this exception can be invoked if, and only if, death is caused (a) without premeditation, (b) in a sudden fight, (c) in the heat of passion upon a sudden quarrel, and (d) without the offender's having taken undue advantage or acted in a cruel or unusual manner. To bring a

case within this exception, all the ingredients, mentioned in it, must be found.[55] So long as the fight is unpremeditated and sudden, the accused, irrespective of his conduct before the fight, earns the mitigation, provided for in this exception, subject to the condition that he did not, in the course of the fight, take undue advantage or act in a cruel or unusual manner.[56]

If, from the evidence and attendant circumstances, it is reasonable to hold that the accused intentionally caused a bodily injury, to the deceased and this injury was found sufficient, in the ordinary course of nature, to cause death, but the said injury was caused without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the accused having taken undue advantage or acted in a cruel or unusual manner, the case is covered by exception 4 to s 300 and the culpable homicide is not murder. The offence, therefore, is punishable under the first part of s 304 .[57]

Where, at a marriage function, there was exchange of hot words as to who had invited the deceased, which led to a sudden quarrel without premeditation and the accused inflicted one lathi blow on the deceased who was otherwise not armed, the accused was convicted under s 304, Pt II, IPC .[58]2214

75. Test of Applicability of Exception 4

The proper test for the applicability of this exception is whether the accused shows, since the onus is on him, under s 105 of the Indian Evidence Act 1872, that he acted solely out of the provocation generated by the heat of a sudden quarrel followed by a sudden fight.[59] In fact, exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing.[60] Where one person picks up a knife and stabs another in the stomach merely following an exchange of heated words, the ordinary inference is that the attacker has acted out of some other motive as well as the provocation that may have been generated by the verbal altercation.[61] Where accused on being slapped by the deceased ran to his house situated at a considerable distance and brought several deadly weapons, inflicted various injuries on deceased two of which were fatal, the accused can be said to have acted in a 'cruel' and 'unusual' manner and so was not entitled to benefit of exception 4 of s 300, IPC .[62]

Where there was evidence that the accused persons armed with deadly weapons like swords, balam, lathis, pharsa came to the house of the deceased to teach a lesson for getting the accused persons convicted, and after coming to the house of deceased, the accused opened the attack with the sword, with which he hit the deceased on the head and ultimately deceased succumbed to his injuries, it was held that exception 4 to s 300 was not attracted in the case.[63]

76. Ingredients of Exception 4

The ingredients of the said exception 4 are (i) there must be a sudden fight; (ii) there was no pre-meditation; (iii) the act was committed in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. In the event the said ingredients are present, the cause of quarrel would not be material as to who offered the provocation or started assault. Indisputably, however, the occurrence must be sudden and not pre-meditated and the offender must have acted in a fit of anger.[64]

The help of exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been2215 with the person killed. To bring a case within exception 4, all the ingredients mentioned in it must be found.[65]

77. 'Without Premeditation'

As stated earlier, exception 4 comes into play only if death is caused without premeditation. To constitute

a pre-meditated killing, it is necessary that the accused should have reflected with a view to determine whether he could kill and that he should have determined to kill as a result of that reflection, that is to say, killing should be a predetermined killing upon consideration, and not sudden under the momentary excitement and impulse of passion upon provocation given at the time, or so recently before, as not to allow time for reflection.[66] Pre-meditation is the guiding factor to draw a line in between murder and culpable homicide. Therefore, if the court will get benefit of acquittal or lesser punishment whichever is applicable in the facts and circumstances of the case and that is the basic principle of criminal law.[67] Premeditation may be established by direct or positive evidence or by circumstantial evidence. Evidence of premeditation can be furnished by former grudges or previous threats and expressions of ill-feelings by acts of preparation to kill, such as procuring a deadly weapon or selecting a dangerous weapon in preference to one less dangerous, and by the manner in which the killing was committed. For example, repeated shots, blows or other acts of violence are sufficient evidence of premeditation. Premeditation is not proved from the mere fact of killing by the use of a deadly weapon; it must be shown by the manner of the killing and the circumstances, under which it was done, or from other facts in evidence.[68] But whether the killing was premeditated is not the first test to be applied while considering whether the exception of 'a sudden fight in the heat of passion' is applicable to any given set of facts. The first test is whether the act of the accused, which caused the deceased's death, was done without premeditation. The distinction is not to be ignored.[69]

The exception clearly indicates that culpable homicide in a fight is murder unless the fight is unpremeditated and is such as is, therein described, sudden in the heat of passion and on a sudden quarrel. A fight is not per se a palliating circumstance; only an unpremeditated fight can be such. Where persons engage in a fight under circumstances which warrant the inference that culpable homicide is premeditated, they are responsible for the consequences to their full extent.[70] If, after exchange of blows on equal terms, one of the parties, without any such intention at the commencement of the affray, snatches a deadly weapon and kills the other party with it, such a killing will be only culpable homicide not amounting to murder. But if a party, under colour of fighting, upon equal terms, uses, from the beginning of the contest, a deadly weapon without the knowledge of the other party and kills the other party with such weapon, or if, at the beginning of the contest, he prepares a deadly weapon so as to have the power of using it at some part of the contest and uses it accordingly in the course of the combat, and kills the other party with the weapon,2216 the killing, in both these cases, will be murder.[71] If the fight is deliberate and contemplated, it cannot be said that there was a sudden and unpremeditated fight.[72] But when the incident takes place in two parts and the latter part of the incident follows upon the earlier as its sequel and there is no time for reason to interpose and passions to cool down, the fatal injury must be thought to have been caused without premeditation.[73]

In a case, the evidence showed that as soon as the accused entered the house, there appeared to be some quarrel with his wife and in that fight first, he threw a water pot and thereafter a kerosene lamp, and since the deceased wife was wearing a nylon sari, she caught fire and sustained 70% burn injuries and died. The accused had also received burn injuries to the extent of 18%. It was held that there was a sudden fight and there was no pre-meditation and therefore, the case squarely fell under exception 4, s 300, IPC .[74]

78. Fight

Though the term 'fight' has not been defined in IPC, yet everyone knows as to what a 'fight' is.[75] It takes two or more to start a fight; it implies mutual assault;[76] it implies a combat or contest, in which both parties participate, irrespective of how they fare in it.[77] One-sided attack cannot constitute a fight.[78]An incident will be a fight if the parties are pitched and arrayed against each other and an act of violence of one party is met and countered by similar act of the other.[79] In order to constitute a fight, it is necessary that blows should have been exchanged,[80] but it is not necessary that weapons should be used,[81] though there has to be an offer of violence on both sides.[82] Fight must be with the person who is killed.[83] Exception 4 would not be2217 attracted where there was no exchange of blows between the deceased, who was unarmed, and the accused and the assault on the deceased by the accused was deliberate and pressed with

determination when the deceased was fleeing for his life.[84] If blows are exchanged, the fact, that the person assaulted hits back in self-defence, would not make any difference. It may be added that if, in the course of a sudden quarrel, one of the parties gives a blow to his adversary and that blow results in death, he cannot take advantage of exception 4, notwithstanding the fact that, after he has given the blow, he is belaboured by the deceased, before he dies, or by his companions, for the simple reason that, at the time, when he gave the fatal blow, there was no fight.[85] It is always more than a mere verbal quarrel.[86] If there is no quarrel between the accused and the deceased, it is unnecessary to look further and inquire whether any of the other facts which are essential for the purpose of bringing a case within exception 4 have been established.[87] Moreover, for attraction of this exception, which is listed as exception 'Fourthly' in s 302, IPC, there has to be not only a sudden quarrel, but also a fight, which means use of criminal force by both the sides.[88] Verbal abuses are not a fight.[89]

In a case, the accused was not armed with any deadly weapon and the accused and the deceased were grappling and fighting and in that sequence, when the deceased jumped down in another field, the accused threw a stone which hit the deceased on his head leading to death. It was held that s 304, Pt II, IPC was attracted in the case.[90]

79. Sudden Fight/Quarrel

There is no previous deliberation or determination to fight. A fight suddenly takes place for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct, it would not have taken the serious turn it did. There is then mutual provocation and aggravation and it is difficult to apportion the share of blame which attaches to each fighter.[91] It is not possible to emaciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden must necessarily depend upon the proven facts of each case.[92] A 'fight' connotes something more than a verbal duel.[93]

Where the accused armed with spears had arrived on the spot, the act of the accused in assaulting the deceased was premeditated and not sudden, thus, it was2218 held that exception 4 to s 300, IPC was not attracted in the case and conviction under s 302, IPC was held proper.[1]

The word 'sudden' only means that the fight should not have been prearranged.[2] If two persons gather together at a place and some dispute suddenly arises, as a result of which the parties attack each other or one person attacks another, that would be a case of sudden fight. But if some persons deliberately go to another with the intention of attacking him, that can never be a case of free fight or sudden fight. That would be a case where the latter would be entitled to the right of private defence in order to ward off the attack on him by the former.[3] A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation nor in such cases the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be exception 1.[4] If two parties clash in a sudden fight in which nobody is killed, it is the duty of the court to determine which party was the aggressor and if this cannot be determined on the evidence produced in the case, the accused party must be given the benefit of doubt with regard to having acted in the right of self-defence.[5]

When there was a wordy quarrel between the two sides leading to the use of weapons by both the parties against each other, it is not a case where the accused had deliberately attacked the deceased and the injured witness with an intention to kill them. On the other hand, it is a case which would fall under exception 4 to s 304, IPC .[6] When admittedly there could not have been any premeditation, the accused (banana seller) and the deceased, (customer of the accused) quarreled after the deceased had refused to pay five paisa, the picking of knife by accused which had been kept by him for peeling bananas and giving of the blow by him can be said to be in the spur of the moment.[7] In a restaurant when the deceased and his friends were having food, the accused while passing by, made an abrasive comment on the complainant party at which the deceased laughed. The accused stabbed the deceased with a broken bottle causing death. It was held that the incident was out of sudden quarrel and the accused was

convicted under s 304, Pt II, IPC .[8] In a case, initially the accused did not have any weapon with him, however, during the course of the incident, he went inside and came back with a knife with the help of which he stabbed the deceased. It was held that the case cannot be said to be one under s 302, IPC but it is a case falling under s 304, Pt II, IPC .[9] Where, something happened at the spur of the moment, which led the accused to strike the deceased with the blunt side of *gandhala* in the heat of the moment, without pre-meditation and in a sudden fight;2219 the case was covered by exception 4 to s 300 .[10] Where in a sudden quarrel regarding going to village to the accused's ailing father, the husband stabbed his wife with knife, poured kerosene oil and set her on fire, it was held that the case was covered by exception 4 to s 300, IPC .[11]

Where in a sudden quarrel between the accused and the deceased, blows are exchanged, but they are separated by people, and thereafter, the accused runs to his house, fetches a deadly weapon and gives a blow on a vital part of the body of the deceased, who is standing unguardedly, the first part of the affair may be said to be a sudden fight, but the subsequent part of the affair, after the disengagement of the two parties, cannot be said to be a sudden fight without premeditation.[12] When the accused suddenly came out of the house and stabbed deceased first on the back and when the deceased who was repairing the puncture actually in his bicycle turned, the accused stabbed him again in the chest, it could not be said that the fight was on when the injuries were caused because at that time the deceased was actually repairing the puncture in his bicycle, so exception 4 to s 300, IPC, would not apply.[13]

Where the accused, in a sudden fight over beating of a dog, hit the deceased with an iron rod carried by him, however he did not repeat the blow which showed that the intention to kill was absent, the case fell under exception 4 to s 300, IPC . Therefore, the conviction of the accused under s 302, IPC was converted into one under s 304, Pt II, IPC .[14]

In the instant case, there was a fight at the spur of the moment between the two male groups on the issue of taking possession of cattle shed with no intention to kill any one. The accused set fire to the cattle shed, the deceased was inside the cattle shed, who caught fire and died. No overt act was attributed to any one and the conviction of the accused under s 302, IPC was altered into one under s 304, Pt I, IPC .[15]

In the instant case, the accused and his father, armed with a knife, had followed the deceased who had gone to the pond for the purpose of digging the earth and ultimately murdered him. There was no evidence that there was sudden fight or that the accused attacked the deceased in heat of passion. It was held that the act was not covered by exception 4 to s 300, IPC .[16]

Where on a sudden quarrel at the spur of the moment, the accused inflicted cuts by kathi on the neck and caused the death of his younger brother, he was convicted under s 304, Pt II, IPC and his conviction under s 302, IPC was set aside.[17]2220

A fight cannot be said to be sudden if it was in the contemplation of the accused party from the very start and they must have been expecting it all along.[18] Thus, the fact that assault took place after about two hours after the exchange of hot words between accused and deceased and deceased was hit for quite number of times on head, a vital part, takes case out of the purview exception 4 of s 300, IPC .[19] Where the accused no. 1 did not strike the deceased at the first instance, but he struck him after an interval of time; since he left the place of occurrence, went home and then came back armed with a Farsa, it was held that exception 4 to s 300, IPC was not attracted in the case. The conviction of the accused no. 1 recorded by the Sessions Judge under s 302, IPC was proper.[20]

In a case where the accused persons, who were drunk, suddenly quarreled with the deceased for not voting in election in favour of the winning party and assaulted the deceased, it was held that the case fell under exception 4 of s 300, IPC and the conviction of the accused appellant under s 304, Pt I, instead of s 302, IPC was held proper.[21]

In a case, the son of the deceased threw a stone on a cat which, while jumping, landed on the terrace of the first accused, where some grain was lying for drying. The boy was scolded and beaten by the accused and the mother of the boy, on hearing this altercation, called her husband, the deceased. There was scuffle between the accused and the deceased, the accused struck the head of the deceased with tekani (piece of wood) used for supporting the bullock carts. The deceased fell down, and he died nearly four hours after the incident. The available evidence showed that there was no premeditation on the part of the accused and that it was a sudden fight. There was only one hit and there was nothing to show that there was any cruelty involved by inflicting any other injury or by any other conduct on the part of the accused so as to hold the accused as intending to cause the death of the deceased. The case was fully covered by exception 4 to s 300, IPC, and fell under s 304, Pt II, IPC .[22]

The accused was going to his house and carrying a bundle of cotton/grass, and on his way the cotton bundle hit the roof of the complainant's house. On sudden quarrel and exchange of hot words, the accused went to their nearby house, brought weapons *viz* axe, knife and gupti and caused injuries to the deceased which proved fatal. It was held that the case fell under exception 4 of s 300 and the accused were convicted under s 304, Pt I, IPC .[23]

In another case, at the time of the incident the deceased was cutting karuvela trees and he had a spade and aruval in his hand, the accused came there and questioned him as to how he could cut the trees, and following the same, there was a verbal duel; immediately, the accused snatched the aruval and cut him on the neck and shoulder indiscriminately, causing instantaneous death. It was held that the occurrence took2221 place in course of sudden quarrel, thus, exception 4 to s 300, IPC applied and conviction was under s 304, Pt I, IPC .[24]

Where the facts of the case showed that there was no premeditation, the fight resulted on drinking of water from the hand pipe after an exchange of abuses, there appeared no intention on the part of the accused to cause the death of the deceased, nor were the injuries caused with the intention of causing such bodily injuries as the accused knew were likely to cause death. The case was covered by exception 4 to s 300, IPC, and the offence committed by the accused was culpable homicide not amounting to murder. The accused were convicted of the offence under s 304, Pt II of the IPC and not under s 302 of the IPC .[25]

Where a dispute arose between the parties because of conflicting claims as to ownership of land, after an exchange of hot words, in course of sudden quarrel, the accused assaulted the deceased. It was held that the case was covered by exception 4 of s 300 ; and accused was convicted under s 304 Pt I, IPC .[26]

Where in a sudden quarrel/fight, the accused had given two blows by a wooden log on the head of the deceased resulting in his death, it was held that the accused was entitled to the benefit of exception 4 to s 300, IPC, and he was convicted under s 304, Pt I and not under s 302, IPC .[27]

In a sudden fight between two religious groups over the issue of prayer, a single blow from a small knife was given to the deceased. It was held that the accused could not be convicted on the charge of murder and his conviction under s 302, IPC was altered to one under s 304, Pt I, IPC .[28]

When the accused assaulted their landlord when the latter asked for payment of rent and the nephew (deceased) of the landlord intervened, the accused S delivered a knife blow to the deceased; it was a case of sudden fight. It was held that exception 4 to s 300 was fully attracted in the case and the conviction of the accused under s 302, IPC recorded by the trial court was converted into one under s 304, Pt II, IPC .[29]

In a case, after an exchange of hot words between the accused and the deceased over the damage of the crops of the complainant by the accused, the accused fired one shot causing death of the deceased; it was held that the accused had no intention to cause the death of the deceased and exception 4 to s 300,

IPC was attracted.[30]2222

Where evidence showed that the accused on a sudden quarrel with regards to peels of eggs, inflicted injuries on the deceased by knife, blows, kicks and fists, it was held that the case fell under exception 4 to s 300, IPC, and the accused was convicted under s 304, Pt I, instead of s 302 .[31]

A father, in a drunken state, abused his step son and mother, and also beat the latter and thereafter, in a sudden quarrel, the accused son hacked his father thereby causing death; it was held that the accused was entitled to the benefit of exception 4 to s 300, IPC, and his conviction under s 302, IPC was converted to one under s 304, Pt I, IPC .[32]

Where the accused in a sudden altercation with his wife and mother-in-law assaulted his mother-in-law causing three injuries which proved fatal, the accused was convicted under s 304, Pt I and not under s 302, IPC .[33]

On sudden quarrel between the accused and the deceased over a trivial issue, the accused picked up the Dhangu and gave two Dhangu blows on the head of the deceased which proved fatal; the accused was convicted under s 304, Pt II and not under s 302, IPC .[34]

80. 'Heat of Passion'

'Heat of passion' requires that there must be no time for the passion to cool down. In such a case, the court is not concerned with the origin of the fight, and the guilt or innocence of the accused is not dependent upon the result of an inquiry as to his conduct. The temper may rise with each exchange of blows and it is not unlikely that the less blameworthy individual may conduct himself in a more blameworthy manner. So long as the fight is unpremeditated and sudden, the accused, irrespective of his conduct before the fight, earns mitigation, provided for in the exception, subject to the condition that he has not taken, in the course of the fight, undue advantage or has not acted in a cruel or unusual manner.[35] Heat of passion requires that there must be no time for the passions to cool down.[36] There was dispute between the parties *qua* possession of land, the accused, in heat of passion, inflicted barchi blow on the head of the deceased which caused death; it was held that the case was covered by exception 4 to s 300, IPC .[37]

Where the two accused brought weapons from their houses, and inflicted blows on the deceased causing his death, it was held that the two accused had sufficient time to2223 cool down and the crime was not committed in a heat of passion; exception 4 was not attracted in the case.[38]

In another case where the accused had no pre-meditation to assault the deceased, rather the accused in the heat of passion inflicted such bodily injury, which was likely to cause death; his conviction under s 302, IPC was altered to one under s 304, Pt I, IPC .[39] Where the accused tried to commit rape on the deceased, which when resisted by the deceased, the accused poured kerosene oil and set her on fire and later, when she cried the accused also poured water on her to save her life, as the act of the accused was not premeditated, the accused only wanted to frighten the deceased, the conviction of the accused under s 302, IPC was altered to one under s 304, Pt II, IPC .[40]

In a sudden fight going on, the deceased, out of curiosity, came to enquire about the fighting going on, the accused dragged him and his brother and inflicted solitary Hasua blow on the neck causing instantaneous death. It was held that the act done was in the heat of passion; upon sudden quarrel and that the accused had neither taken undue advantage, nor acted in cruel manner. The case was covered by s 300, exception 4, and fell under s 304, Pt I and not s 302, IPC .[41]

It was established on record that the accused and the deceased were taking liquor and an altercation had taken place amongst the three. After the altercation, the accused N had slapped the deceased resulting

into some grappling. It was at this moment that accused *B* had picked up an iron rod which was lying nearby and in the heat of passion, had given the fatal blow on the head of the deceased. Only one injury was given which clearly shows that accused *B* had not taken any undue advantage nor had he acted in a cruel manner. It was held that the case fell under exception 4 to s 300, IPC .[42]

Where there was neither any preparation, nor any premeditation after altercation, and in the heat of passion, the accused inflicted knife blow in the abdomen of the deceased, which hit in latter's kidney and proved fatal, the accused was convicted under s 304, Pt II instead of s 302, IPC .[43]

81. Further Requirement of Exception 4

Though there may be absence of premeditation and it may be a case of sudden fight, that is not sufficient to bring the offence committed by the accused within the purview of exception 4. The further requirement of exception 4 that the offender should not have taken undue advantage or acted in a cruel or unusual manner, should be satisfied.[44]2224

82. Taking Undue Advantage

For the application of exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.[45] Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide, whether undue advantage has been taken.[46]

The expression 'undue advantage', as used in this exception, means 'unfair advantage' and cannot be limited to a case where the victim is made physically incapable to defend himself. An assailant cannot but be said to have taken undue advantage when the victim is taken completely unaware, and struck when he does not even suspect of being struck,[47] or when the deceased has no weapon while the assailant has picked up a *kripan* and stabs the deceased in his most vital part.[48] Similarly, an assailant cannot but be said to have taken undue advantage of his victim if he is armed with an axe while the deceased is not.[49] When a man stabs an unarmed person, who makes no threatening gestures and merely asks the accused's opponent to stop fighting, it cannot be said that the accused has not taken undue advantage of the victim.[50] If two men are fighting and one of them is unarmed, while the other uses a deadly weapon, the one, who uses a weapon, must be held to have taken an undue advantage.[51] Where, however, a deceased is armed with a knife, formidably of nine inches in length, which he freely and unhesitatingly uses and carries it when he runs away for shelter, it cannot be said that, in chasing the deceased and inflicting the fatal injury on him, when he is armed with such a knife, the accused has taken undue advantage or has acted in a cruel or unusual manner.[52] In the instant case, the facts2225 showed that there was no premeditation in the incident, no sudden quarrel and it was a unilateral act on the part of the accused that he lost his temper as he suspected the deceased of having misappropriated the fare that he had been collecting. The accused had taken undue advantage of his position inasmuchas he had run to the scooter, opened the boot, taken out a knife and caused one injury on the person of the deceased who was a young, unarmed boy. It was held that the case was not covered by exception 4 and his conviction under s 302, IPC was held proper.[53]

Where despite protest/objection made by the accused persons, the complainant party tried to pass their bullock cart through the fields of the accused persons, a free fight ensued in which accused persons inflicted two injuries by palsi and dau (agriculture instruments), causing death; the accused persons had not taken undue advantage nor acted in cruel manner and it was held the case fell under exception 4 to s 300, IPC .[54]

In a case blows on vital parts of unarmed persons were given with brutality and the abdomens of two deceased persons were ripped open and internal organs came out. In view of the aforesaid factual position, exception 4 to s 300, IPC was held inapplicable in the case.[55]

The accused fired shot from his gun at the deceased, while the deceased was unarmed and there was also no provocation from him. However, the accused had intention to kill the deceased, and had taken undue advantage of his position. Therefore, exception 4 did not apply in the case, and his conviction under s 302, IPC was held proper.[56]

83. Acting in a Cruel or Unusual Manner

As has been stated elsewhere, to bring a case within exception 4 all the ingredients, mentioned in it, must be found.[57]And even then, the exception will apply only if it is established by the accused that he did not take undue advantage and did not act in a cruel or unusual manner.[58] Conversely, if the accused acts in a cruel manner, the case does not fall under this exception and the offence would be one of murder.[59]2226 Intention to cause more harm, if capable of being inferred from the facts and circumstances of the case, would mean that the act was done in a cruel and unusual manner.[60]

If the weapon or manner of attack by the assailant is out of all proportion to the offence given, that circumstance must be taken into consideration for deciding whether undue advantage has been taken. In such a case, the assailant must also be said to have acted in an unusual manner.[61] Wife's refusal to have sex with accused husband led to a quarrel and the accused husband inflicted as many as 14 injuries on the neck of deceased and strangulated her with enormous force causing death. He had taken undue advantage of the fact that he was a male and was much stronger physically and the murder had also been committed in a revolting and cruel manner. It was held that exception 4 to s 300, IPC was not attracted in the case and conviction of the accused under s 302, IPC was upheld.[62] The absence or presence of injuries on the body of accused may quite often serve as a pointer whether the accused had acted in any cruel or unusual manner. An injury on person of accused may afford ground to assume that the members of the party of the deceased had also been armed with dangerous weapons, since otherwise the injuries, found on the body of the accused, cannot be explained.[63] Merely because three injuries were caused to the deceased during the scuffle, it could not be said that accused had acted in a cruel and unusual manner.[64] When two contending parties, each armed with sharp-edged weapons, clashed and, in the course of a free fight, some injuries were inflicted on one party or the other, it was held that it cannot be said that either of them acted in a cruel or unusual manner. It would have been otherwise if the deceased and his party were unarmed, or armed with weapons which were not lethal or dangerous, and the accused's party had used sharp weapons. In that case the accused could be deemed to have acted in a cruel or unusual manner.[65] In the instant case, blows on vital parts of unarmed persons were given with brutality such that the abdomens of two deceased persons were ripped open and internal organs come out. In view of the aforesaid factual position, exception 4 to s 300, IPC was held inapplicable in the case.[66]

The very fact that the accused appellants used the fire arms in the course of a frivolous quarrel triggered off by the sarcastic remarks of the deceased, demonstrated beyond doubt that the accused acted in a cruel manner. Exception 4 to s 300 was not attracted in the case and conviction of the accused under s 302, IPC was held proper.[67]

Likewise, where the accused gave a beating to the buffaloes of the deceased with eucalyptus stick, as the buffaloes were tethering in his enclosure and when the2227 deceased quarreled with him not to do so, he gave two injuries with the same stick causing death of the deceased, it was a sudden quarrel without premeditation; the accused was held not to have taken undue advantage or acted in a cruel or unusual manner.[68] Where the accused without any pre-meditation inflicted a single knife blow causing death, the conviction of the accused under s 302, IPC was altered to one under s 304, Pt I, IPC .[69]

The accused inflicted a single blow with pen knife which caused the death of the deceased. It was held that intention to cause death could not be imputed to the accused. However, the accused knew that his

act was likely to cause the death of the deceased; therefore, the case was covered by exception 4 to s 300, IPC .[70]

See also the undermentioned cases where on the facts of the case, exception 4 to s 300 was held inapplicable in the case.[71]

See also the following cases where on the facts of the case, the case was held covered by exception 4 to s 300, IPC . [72]

84. Distinction between Exception 1 and Exception 4

Exception 4 to s 300 covers acts done in a sudden fight. It deals with a case of provocation not covered by the first exception, the exception is founded upon the same principle of absence of premeditation the distinction is that while in exception 1, there is total deprivation of self-control, in exception 4 there is only that heat of passion which clouds a person's sober reason and leads to acts which would not have been otherwise committed. A sudden fight implies mutual provocation and postulates bilateral transaction in which both victim and assailant assault each other.[73] There is provocation in exception 4 as in exception 1, but the injury done is not the direct consequence of that provocation.[74] A sudden fight implies mutual provocation and2228 blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases can the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be exception 1.[75] In fact exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing.[76]

85. Exception 5--Scope and Applicability of

The infliction of harm without the consent of the sufferer falls under the general exception, contained in ss 87 to 93 of IPC . But under those sections, death cannot be consented to, either expressly or by implication. Refer to ss 87, 88, 89 and 92 . Under s 87, even a person above the age of eighteen years is precluded from giving a valid consent to an act, intended to cause, or which is known to the doer to be likely to cause death or grievous hurt. Such a consent will not, therefore, prevent the act from being a crime, but this exception provides that, in such a case, the person, who kills the consenting party, shall be guilty of culpable homicide not amounting to murder, and not of murder. Where a man of full age (*i.e.* above 18 years) submits himself to emasculation, performed neither by a skilful hand, nor in the least dangerous way and dies from the injury, the persons concerned in the act are guilty of culpable homicide not amounting to murder by virtue of this exception.[77]

It may be noted that exception 5 to s 300, IPC, must receive a very strict and not a liberal interpretation and in applying the said exception the act alleged to be consented to or authorised by the victim must be considered by very close scrutiny.[78] Thus, where the sessions court and the High Court had correctly appreciated evidence adduced in a case and had come to the finding that the husband had planned to murder the wife and in execution of the said plan had murdered the wife and thereafter tried to commit suicide, the conviction of the husband under ss 302 and 309, IPC, was upheld by the Apex Court.[79]

This exception applies to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be likely to be the result; but it does not refer to the running of a risk of death from something, which a man intends to avert, if he can possibly do so, even by causing the death of the person from whom the danger is to be anticipated.[80] In a Lahore case, the accused killed his step-father, who was an infirm old man, with his consent in order to involve some of their enemies in trouble by charging them with murder. It was held that the case was covered by this exception.[81] The exception cannot be applied unless the person killed had the full knowledge of the facts and was determined to suffer or to take the risk of death and unless this determination existed at the

moment of his death. The question of whether there was such consent2229 is a question of fact, to be decided on the circumstances of each case.[82] In the Full Bench case of *Empress v Nayamuddin* ,[83] Pigot J, delivering the majority judgment, observed:

> ...the exception should be considered in applying it first, with reference to the act, consented to or authorised, and next with reference to the person or persons authorised. And, I think that, as to each of these, some degree of particularity at least should appear upon the facts proved before the exception can be said to apply...the consent may be inferred from circumstances and does not absolutely need to be established by actual proof of express consent.

A man, who, by concert with his adversary, goes out armed with a deadly weapon to fight that adversary, who is also armed with a deadly weapon, must be taken to be aware that he runs the risk of losing his life and, as he voluntarily puts himself in that position, he must be taken to consent to incur the risk.[84]In such a case, the circumstances do show a distant act of the mind of each combatant with respect to the other and in concert with him of willingness to encounter and suffer such known and anticipated acts of violence from that other as he cannot defend himself from. But to include such a case within this exception is rather to strain the terms of it. At any rate, there is a distinction between such a case and one in which the members of two riotous assemblies, who agree to fight together and some of whom, on each side, are, to the knowledge of all the members, armed with deadly weapons. From a mere agreement to fight, such a consent, as is contemplated by this exception, cannot be imputed, to each member of the two mobs, to suffer death or take the risk of death at the hands of any one of the armed members of the other mob, by means of whichever of such deadly weapons, used in whatever way that person may please and be able, to inflict.[85] The same reasoning would apply to cases of duelling.[86]

86. 'Consent'

Consent, under IPC, is not valid if it is obtained by either misrepresentation or concealment as it implies not only a knowledge of the risk, but a judgment in regard to it, a deliberate free act of the mind. In other words, before exception 5 can be applied, it must be found that the person killed, with full knowledge of the facts, determined to suffer death, or take the risk of death and this determination continued, and existed till the moment of his death.[87] An accused who wants to bring his case within the domain of exception 5 of s 300, IPC must not only show that the deceased took the risk voluntarily, he must further prove that the deceased had the requisite knowledge that he would die while doing so.[88] An accused, pleading consent as a defence, must show that the person consenting did know what risk he was undertaking. A patient can hardly be said to accept a risk of which he is not aware. A doctor, pleading consent to an operation, that might prove fatal, must show that the patient did accept the risk and that consequently, he was aware of it.[89] A husband,2230 being in sore distress, desired to commit suicide. His wife asked him to first kill her and then kill himself and he accordingly killed her, but was caught before he killed himself. It was held that the consent of the wife was a consent within the meaning of exception 5 to s 300, IPC .[90]

To attract exception 5 to s 300, IPC, there must have been free and voluntary consent of the deceased. Where both accused and the deceased fell in love and then entered in the pact to commit suicide, the accused inflicted injuries on the deceased causing death and also inflicted injuries on himself but survived, it was held that exception 5 was attracted in the case.[91]

In *Queen v Anunto Rurnagat* ,[92] the accused and his wife, being overwhelmed with grief for the loss of their child, determined to kill themselves. His wife made repeated requests to him that he should kill her and after a time, he did so by striking her three blows with an axe. It was held that the case did come within exception 5 and that the accused was guilty of culpable homicide not amounting to murder. In a case, a man tried to persuade his concubine to leave on the ground that a scandal was being created by his association with her. But she refused, took the knife out of his waist, put it into his hand and asked him

to kill her. He, accordingly, cut her neck with the knife. It was held that the accused was entitled to the benefit of this exception.[93] In a similar case the accused tried to persuade the deceased to leave him and go away, but she said that she would never leave him and suggested that both of them might commit suicide. The next morning, he killed her. The accused was given the benefit of this exception.[94] In *Masum Ali v Emperor* ,[95] the accused strangled his beloved, aged 16 years, to death upon their decision to die together in despair of future separation and with the feeling that they could not live apart. It was held that this was essentially the case where the spirit, if not the letter, of exception 5 could be applied. Because, the girl was below 18 years of age, not capable of giving her valid consent, the accused was convicted of murder though sentenced to transportation for life. Had the murdered girl been of 18 years or above, the offence would have been culpable homicide not amounting to murder. However, where in *Queen v Poonai Fattehmal* [96] the accused, a snake-charmer, persuaded the deceased to allow themselves to be bitten by a poisonous snake, inducing them to believe that he had power to protect them from harm, it was held that the consent having been founded on a misconception of fact and the accused knowing that the consent was given in consequence of such misconception, the accused was not protected by this exception.

17 *State of Karnataka v Jinappa Payappa Kudachi and Ors* 1993 Cr LJ 3915 (SC) .

18 *Siryan v Emperor* 17 Cr LJ 270 ; *Yogendra Moraji v State of Gujarat* AIR 1980 SC 660, p 674 ; *State of Madhya Pradesh v Sultan* 1980 Cr LR 66 (MP) (Notes) (DB).

19 *Sada Ram v State* 71 Punj LR 428, p 435*; Maniram Dewar v State of Chhattisgarh* 2009 Cr LJ 4232 (Chh) (DB), 2009 (3) CGLJ 117 .

20 Re *Venkataswami Naicker*(1966) 1 Mad LJ 95; *Mirza Hidayatullah Baig v State of Maharashtra* AIR 1979 SC 1525 ; *Ghanshyam Dass v State* AIR 1979 SC 44, p 49 ; *Purnia v State of Orissa* AIR 1979 SC 1454 ; *Rafiq v State of Maharashtra* AIR 1979 SC 1179, p 1181, 1979 Cr LJ 706 ; *Mohinder Pal Jolly v State of Punjab* AIR 1979 SC 577 ; *Munney Khan v State of Madhya Pradesh* (1970) 2 SCC 491 (Cr), 1970 Mah LJ 883 ; *Nakafodi v State* 1958 Cr LJ 834, 1958 Cr LJ 785 ; *Public Prosecutor v Semalai Pannadi* AIR 1960 Mad 240, 1960 Cr LJ 834 ; *Farid v Emperor* 12 Cr LJ 81 ; *Dohariya v State* AIR 1956 MB 23, 1956 Cr LJ 70 .

21 *Mohanan Pillai v State of Kerala* (2009) 16 SCC 287, (2010) 3 SCC (Cri) 264 .

22 *Hanumantappa Krishnappa Mantor v State of Karnataka* AIR 1992 SC 399 .

23 *State of Punjab v Jagjit Singh and ors* AIR 1994 SC 1598 ; *Pathubha Govindji Rathod v State of Gujarat,* AIR 2015 SC 1118, 2015 Cr LJ 1413 (SC), 2015 (1) Scale 250, (2015) 3 SCC 724 (In group fighting accused sustained deep knife blow on back, resorted firing by revolver causing death. Right of private defence exceeded, accused convicted under s 304, Pt I).

24 *Maniram Dewar v State of Chhattisgarh* 2009 Cr LJ 4232, p 4235 (Chh) (DB), 2009 (3) CGLJ 117 .

25 *Puran Singh v State of Uttaranchal* 2009 Cr LJ (NOC) 850 (Utr) (DB).

26 *Dev Raj and Anor v State of Himachal Pradesh* AIR 1994 SC 523 .

27 *Tara Chand v State of Haryana* AIR 1971 SC 1891, p 1897, 1971 Cr LJ 1411 .

28 *State of Punjab v Karnail Singh* AIR 1995 SC 1970 ; **See also***Ranbir Singh v State of Haryana,* 2009 Cr LJ 3051, 2009 AIR SCW 3683, 2009 (7) Scale 310, (2009) 16 SCC 193 .

29 *Jayalakshmi v State of Tamil Nadu* 2009 Crlj 2502, p 2508 (Mad) .

30 *Samir Nijam Landge v State of Maharashtra* 2006 Cr LJ 3429, p 3433 (Bom) (DB), 2006 (2) Bom CR (Cri) 42 .

31 *Rati Ram Khadiya v State of Chhattisgarh* 2009 Cr LJ 2563, p 2567 (Chh) (DB) .

32 *Ram Phal and Ors v State of Haryana* AIR 1993 SC 1979 .

33 *Lachmi Koeri v State of Bihar* AIR 1960 Pat 62, 1960 Cr LJ 274 .

34 *Noor Muhammed Abdul Samad v State* AIR 1959 Ker 46, 1959 Cr LJ 187 .

35 *State of Orissa v Sabu Dalbehera* 31 Cut LT 265, p 268-269 .

36 *Gurdutta Mal v State of Uttar Pradesh* AIR 1965 SC 257, (1965) 1 Cr LJ 242 ; *State of Mysore v Hansamaant Nagappa Gavada* AIR 1965 Mys 150, (1965) 1 Cr LJ 737 .

37 *Kirpal Singh v State* AIR 1951 Punj 137, p 140, 52 Cr LJ 1517 .

38 *Dholia Ravji v State* (1961) 1 Cr LJ 813 ; *Shankar v State of Madhya Pradesh* AIR 1979 SC 1532 ; *Thommen Thomas v State of Kerala* AIR 1957 Ker 53, 1957 Cr LJ 635 .

39 *Emperor v Bhimji Jeram* 1 Cr LJ 491, 14 Ker LR 24 ; *Garugu Ramayya* 12 Cr LJ 18, 8 MLT 462; *Thekkumthatathil Kelukutti v Emperor* 13 Cr LJ 782 .

40 *State of Maharashtra v Krishnamurti Laxmipati Naidu* 1981 Cr LJ 9, p 16-17 (SC), AIR 1981 SC 617 .

41 *Ibid.*

42 *Ibid*.

43 *Krishnan v State of Tamil Nadu* 2006 Cr LJ 3907, p3914 (SC), AIR 2006 SC 3037, 2006 (8) Scale 27, (2006) 11 SCC 304 .

44 *Asmat Sheik v Emperor* AIR 1940 Cal 147 .

45 *Dakhi Singh v State* AIR 1955 All 379, p 382, 56 Cr LJ 905 .

46 *Ibid*.

47 *Empress v Subha Naik* ILR 21 Mad 249, 1 Weir 310 .

48 *Satyavir Singh Rathi v State through CBI* 2011 Cr LJ 2908, p 2922 (SC), AIR 2011 SC 1748, (2011) 6 SCC 1, 2011 (5) Scale 339 .

49 *R v Ahdul Hakim* ILR 3 All 253 .

50 *Surinder Kumar v Union Territory, Chandigarh* AIR 1989 SC 1094 *; Ravindra Shalik Naik v State of Maharashtra* 2009 Cr LJ 1549, AIR 2009 SC 1709, 2009 (2) Scale 354 ; *Babulal Sahu v State of Chhattisgarh* 2011 Cr LJ 3131, AIR 2011 SC 2530 ; *Vijendra Kumar v State of Delhi* 2010 Cr LJ 3851, 2010 AIR SCW 4414, 2010 (5) Scale 707 ; *State of MP v Shiv Shankar* (2014) 10 SCC 366, 2014 (10) Scale 608, 2014 (7) Supreme 1, 2014 (8) SLT 569, 2015 Cr LJ 155, 2014 (4) Crimes 114 (SC) ; *Dilip Kumar Mondal v State of West Bengal* 2015 Cr LJ 1321 (SC), 2015 (1) Scale 441, (2015) 3 SCC 433 ; *Sanjeev v State of Haryana* 2015 Cr LJ 1669 (SC), 2015 (2) Scale 591, (2015) 4 SCC 387 .

51 *State of Rajasthan v Islam* 2011 Cr LJ 3110 (SC), AIR 2011 SC 2317, 2011 AIR SCW 3553, (2011) 6 SCC 343, 2011 (6) Scale 389 .

52 *Karam Singh v Emperor* AIR 1926 Lah 219, 27 Cr LJ 459 .

53 *Jumman v State of Punjab* AIR 1957 SC 469, p 474 .

54 *Abdul Razaq v State* AIR 1960 All 567, p 568, 1960 Cr LJ 1179 ; *Queen v Zalim Rai* 1 WR 33, p 34 (Cr) ; *Nga Chit Tin v King* AIR 1939 Rang 225, p 230, 40 Cr LJ 725 .

55 *Bati Kunjami v State* 1996 Cr LJ 1431 (Ori) (DB) ; *Ramesh Narayan alias Andi v State* 1999 Cr LJ 3056 (Cal) (DB) ; *Rajendra Singh and Ors v State of Bihar* 2000 Cr LJ 2199 (SC) ; *Ramchandran v State of Kerala* 2000 Cr LJ 973 (Ker) (DB) ; *Naveen Chandra v State of Uttaranchal* 2007 Cr LJ 874 (SC) ; *Suchand Bouri v State of WB* (2009) 17 SCC 63, 2009 Cr LJ 2840, AIR 2009 SC 2319 .

56 *Public Prosecutor v Somasundaram* AIR 1959 Mad 323, p 327, 1959 Cr LJ 993 .

57 *State of Bihar v Mohammad Khursheed* 1968 Cr LJ 574 ; *Phukan v State* 1980 All LJ 588, p 590 (DB) ; *Jangri Pathak v State* (1965) 1 Cr LJ 373 (All) .

58 *Pappu v State of Madhya Pradesh* 2006 Cr LJ 3640 (SC), AIR 2006 SC 2659, (2006) 7 SCC 391, 2006 (7) Scale 24 .

59 *Bati Kunjami v State* 1996 Cr LJ 1431 (Ori) (DB) .

60 *Sandhya Jadhav v State of Maharashtra* 2006 Cr LJ 2111 (SC) ; *Byvarapu Raju v State of Andhra Pradesh* 2007 Cr LJ 3204 (SC) ; *Pappu v State of Madhya Pradesh* 2006 Cr LJ 3640 (SC) ; *Byvarapu Raju v State of Andhra Pradesh* 2007 Cr LJ 3204 (SC) ; *Naveen Chandra v State of Uttaranchal* 2007 Cr LJ 874 (SC) .

61 *Sunnu Muduli v Emperor* AIR 1947 Pat 168, p 171, 48 Cr LJ 838 .

62 *Bati Kunjami v State* 1996 Cr LJ 1431 (Ori) (DB) .

63 *Hawa Singh v State of Haryana* 2009 Cr LJ 1146, p 1148 (SC), 2009 AIR SCW 665, 2009 (1) Scale 581, (2009) 3 SCC 411 .

64 *Subhash Shamrao Pachunde v State of Maharashtra* 2006 Cr LJ 546 (SC)*; Shaukat v State of Uttaranchal* 2010 Cr LJ 4310, p 4317, (2010) 5 SCC 68 ; *Vijendra Kumar v State of Delhi* 2010 Cr LJ 3851, 2010 AIR SCW 4414, 2010 (5) Scale 707, (2010)

12 SCC 381 ; *Bhola v State of HP* 2009 Cr LJ 1885, AIR 2009 SC 1338, 2009 AIR SCW 1942, (2009) 11 SCC 460 .

65 *Sandhya Jadhav v State of Maharashtra* 2006 Cr LJ 2111 (SC) .

66 *Kripal Singh v State* AIR 1951 Punj 137, p 140 ; *Public Prosecutor v Bonder Siddaiah* (1978) 2 Andh WR 461, 1978 Mad LJ 698 (Cr) .

67 *Ramesh Narayan alias Andi v State* 1999 Cr LJ 3056 (Cal) (DB) .

68 *Kripal Singh v State* AIR 1951 Punj 137, p 140 .

69 *Nga Chit Tin v King* AIR 1939 Rang 225, p 233 .

70 *Empress v Rohimuddin* ILR 5 Cal 31, p 34 ; Re *Kither Khan* 11 Cr LJ 191; *Nga Thawe v Emperor* 13 Cr LJ 272 .

71 *Public Prosecutor v Somasundaram* AIR 1959 Mad 323, p 327 ; *Nga Ba Shin v Emperor* AIR 1933 Rang 142 .

72 *Lal Singh v Crown* 48 Cr LJ 786 .

73 *Amrithalinga Nadan v State of Tamil Nadu* AIR 1976 SC 1133, p 1138, 1976 Cr LJ 848 ; *Queen v Rajoo Ghose* 7 WR 70 (Cr) .

74 *Sayaji Hanmat Bankar v State of Maharashtra* 2011 Cr LJ 4338, p 4339 (SC), AIR 2011 SC 3172, 2011 AIR SCW 4502, (2011) 7 Scale 710 .

75 *Atma Singh Kahan Singh v State* AIR 1955 Punj 191 -92, 56 Cr LJ 1283; *Public Prosecutor v Somasundaram* AIR 1959 Mad 323, p 327, 1959 Cr LJ 993 .

76 *Nafe Singh v State of Haryana* 1973 Cr LJ 965, p 967, 74 Punj LR 990 ; *Bhagwan Munjali Pawade v State of Maharashtra* AIR 1979 SC 133, p 134 ; *Public Prosecutor v Somasundaram* AIR 1959 Mad 323, p 327, 1959 Cr LJ 993 ; *Thannoo v State* AIR 1959 All 131, p 132, 1959 Cr LJ 158 ; *Narayanan Nair Raghwan Nair v State of Travancore* AIR 1956 SC 99 ; *Sikander alias Mohd Sofia v State (Delhi Admn)* 1999 Cr LJ 2098 (SC) ; *Ramchandran v State of Kerala* 2000 Cr LJ 973 (Ker) (DB) ; *Sandhya Jadhav v State of Maharashtra* 2006 Cr LJ 2111 (SC) ; *Pappu v State of Madhya Pradesh* 2006 Cr LJ 3640 (SC)*; Dilip Kumar Mondal v State of West Bengal* 2015 Cr LJ 1321 (SC), 2015 (1) Scale 441, (2015) 3 SCC 433 .

77 *Thonnoo v State* AIR 1959 All 131-132, 1959 Cr LJ 158 ; *Bati Kunjami v State* 1996 Cr LJ 1431 (Ori) (DB) .

78 *Nafe Singh v State of Haryana* 1973 Cr LJ 965, p 967, 74 PLR 990 ; *Atma Singh Kahan Singh v State* AIR 1955 Punj 191, p 192, 56 Cr LJ 1283 .

79 *Nafe Singh v State of Haryana* 1973 Cr LJ 965, p 967, 74 PLR 990 .

80 *Public Prosecutor v Somasundaram* AIR 1959 Mad 323, p 327 ; *Bhagwan Munjali Pawade v State of Maharashtra* AIR 1979 SC 133 -134; *Balani Kani v State of Kerala* 1980 Ker LJ 740, p 743 ; *Hansraj Singh v Emperor* AIR 1946 Lah 41, p 43, 47 Cr LJ 234 .

81 *Public Prosecutor v Somasundaram* AIR 1959 Mad 323, p 327 ; *Atma Singh Kahan Singh v State* AIR 1955 Punj 191, p 192 ; *Bati Kunjami v State* 1996 Cr LJ 1451 (Ori) (DB) .

82 *Pakhar Singh v Emperor* AIR 1948 Lah 75, p 76, 49 Cr LJ 110 .

83 *Balani Kani v State of Kerala* 1980 KLT 740, p 743 .

84 *Mohammad Mytheen Shahul Hameed v State of Kerala* AIR 1980 SC 108, p 111*; State of MP v Shivshankar* (2014) 10 SCC 366, 2014 (10) Scale 608, 2014 (7) Supreme 1, 2014 (8) SLT 569, 2015 Cr LJ 155, 2014 (4) Crimes 114 (SC) .

85 *Emperor v Babu Ram* AIR 1931 All 8, 32 Cr LJ 1269 ; *Rawail Chand v State of Uttar Pradesh* 1967 All WR 394 (SC) .

86 Meredith J, in *Sunnu Muduli v Emperor* AIR 1947 Pat 168, p 172, 48 Cr LJ 838 .

87 *Nga Chit Tin v King* AIR 1939 Rang 325, p 328, 40 Cr LJ 725 .

88 *Ram Lal v State of Himachal Pradesh* 2006 Cr LJ 939 (HP) (DB) .

89 *State of Orissa v Khaga* (2013) 14 SCC 649 .

90 *Baraf Singh v State of Uttaranchal* 2005 Cr LJ 3212, p 3215 (Utr) (DB), 2005 (3) UC 1539 .

91 *Situ Kandi v State* 1999 Cr LJ 1642 (Ori) (DB) ; *Pappu v State of Madhya Pradesh* 2006 Cr LJ 3640 (SC) ; *Sandhya Jadhav v State of Maharashtra* 2006 Cr LJ 2111 (SC) ; *Byvarapu Raju v State of Andhra Pradesh* 2007 Cr LJ 3204 (SC)*; Muthu v State* 2008 Cr LJ 442, AIR 2008 SC 1, (2009) 17 SCC 433 ; *Gali Venkataiah v State of Andhra Pradesh* 2008 Cr LJ 690 (SC) AIR 2008 SC 462, 2007 (13) Scale 37, (2007) 14 SCC 475 ; *Dilip Kumar Mondal v State of West Bengal* 2015 Cr LJ 1321 (SC) .

2015 (1) Scale 441, (2015) 3 SCC 433

92 *Bati Kunjami v State* 1996 Cr LJ 1431 (Ori) (DB) .

93 *Kesar Singh v State of Haryana* (2008) 15 SCC 753 .

1 *Imtiaz v State of Uttar Pradesh* 2007 Cr LJ 1663, p 1666 (SC), 2007 (3) Scale 204, (2007) 15 SCC 299 .

2 *Hansraj Singh v Emperor* AIR 1946 Lah 41, p 43 .

3 *State v Kolis Hira Bhaga* AIR 1961 Guj 8, p 11, (1961) 1 Cr LJ 54 (2) .

4 *Sita Kandi v State* 1999 Cr LJ 1642 (Ori) (DB) ; *Sandhya Jadhav v State of Maharashtra* 2006 Cr LJ 2111 (SC) ; *Pappu v State of Madhya Pradesh* 2006 Cr LJ 3640 (SC) .

5 *Gian Singh v State of Punjab* (1972) 74 PLR 974 ; *Dilip Kumar Mondal v State of West Bengal* 2015 Cr LJ 1321 (SC)), 2015 (1) Scale 441, (2015) 3 SCC 433 .

6 *State of Uttar Pradesh v Jodha Singh and Ors* AIR 1989 SC 1822 ; *Rajinder Singh v State of Haryana* 2015 Cr LJ 1330 (SC) (Conviction of the appellant under s 302, IPC modified to one under s 304, Pt II, IPC).

7 *Brij Pal v State* (1988) 36 DLT 335 (Del) ; *Chenda v State of Chhattisgarh* (2013) 12 SCC 110, 2014 Cr LJ 172, 2013 (4) Crimes 59 (SC) (Held, case covered by exception 4).

8 [Footnote not found]

9 *Satish Narayan Sawant v State of Goa* 2009 Cr LJ 4655, p 4666 (SC), 2009 AIR SCW 6077, 2009 (12) Scale 494 .

10 *Jagrup Singh v State of Haryana* AIR 1981 SC 1552 ; *Sangharaj Bhogappa Kamble v State of Maharashtra* (2010) 13 SCC 651, (2011) 2 SCC (Cri) 370 (Deceased intervener--Accused inflicted one injury by knife in chest of the deceased--Conviction under s 304, Pt I and not under s 302, IPC --Five years' RI imposed); *Bhagyadhan Pal v State of Orissa* 2015 Cr LJ 1531 (Ori) (DB) (Conviction of accused under s 302, IPC altered to one under s 304, Pt I, IPC).

11 *K Ravi Kumar v State of Karnataka* 2015 Cr LJ 553 (SC), (2015) 2 SCC 638 .

12 *Lal Singh v Crown* 48 Cr LJ 786, p 788 ; *Sarjug Prasad v State* AIR 1959 Pat 66, p 69 ; *State of Madhya Pradesh v Mangu Kisan* AIR 1967 MP 167, 1966 Jab LT 1047, p 1051 .

13 *Ashok Babu Mali v State of Maharashtra* AIR 1995 SC 944 .

14 *Ankush Shivaji Gaikwad v State of Maharashtra* AIR 2013 SC 2454, (2013) 6 SCC 770, 2013 Cr LJ 3044, 2013 AIR SCW 3153 .

15 *Balu Onkar Pund v State of Maharashtra* AIR 2015 SC 949, p 953, (2015) 3 SCC 409, 2015 (2) JT 36, 2015 (2) Scale 147, 2015 (2) SLT 116, 2015 (1) Crimes 181 (SC) .

16 *Shaukat v State of Uttaranchal* 2010 Cr LJ 4310, 2010 AIR SCW 5017, (2010) 5 SCC 68, (2010) 4 Scale 299 .

17 *Felix Abrose D'Souza v State of Karnatkaa* (2009) 16 SCC 361, 2010 (3) SCC (Cr) 294, 2003 (2) Crimes 78 (SC) .

18 *Gaman v Crown* 48 Cr LJ 590, p 597 .

19 *Jai Pal Singh v State* 1996 Cr LJ 4097 (Del) .

20 *State of Rajasthan v Islam* 2011 Cr LJ 3110 (SC), AIR 2011 SC 2317, 2011 AIR SCW 3553, (2011) 6 SCC 343, 2011 (6) Scale 389 .

21 *Bhola v State of HP* 2009 Cr LJ 1885 (SC), AIR 2009 SC 1338, 2009 AIR SCW 1942 .

22 *Chenda v State of Chhattisgarh* 2014 Cr LJ 172, p 173 (SC), 2013 AIR SCW 6260, (2013) 12 SCC 110 .

23 *Ravindra Shalik Naik v State of Maharashtra* 2009 Cr LJ 1549, p 1550 (SC), AIR 2009 SC 1709, 2009 (2) Scale 354 .

24 *Kulesh Mondal v State of West Bengal* 2008 Cr LJ 325 (SC), AIR 2007 SC 3228, 2007 AIR SCW 5880 ; *Ramesh Krishna Madhusudan Nayar v State of Maharashtra* 2008 Cr LJ 1023 (SC), AIR 2008 SC 927, 2008 (1) Scale 118 ; *A Maharaj v State of Tamil Nadu* 2009 Cr LJ 315 (SC), AIR 2009 SC 480, CLT (2009) Sup. Crl 307, JT 2008 (12) SC 111, 2008 (14) Scale 467, (2008) 17 SCC 173.

25 *Dharam Pal v State of UP* 2008 Cr LJ 1016, p 1023 (SC), AIR 2008 SC 920, 2008 (1) Scale 9, 2008 (1) All LJ 721 .

26 *Iqbal Singh v State of Punjab* 2008 Cr LJ 4679, p 4682 (SC), 2008 AIR SCW 6368, 2008 (11) Scale 599, (2008) 11 SCC 698 .

27 *Ramesh Krishna Madhusudan Nayar v State of Maharashtra* 2008 Cr LJ 1023, p 1025 (SC), AIR 2008 SC 927, 2008 (1) Scale 118, 2008 AIR SCW 370 .

28 *Shaikh Majid v State of Maharashtra* 2008 Cr LJ 1062, p 1065 (SC), AIR 2008 SC 1091, 2008 (1) Scale 561 .

29 *Sandhya Jadhav v State of Maharashtra* 2006 Cr LJ 2111 (SC), 2006 SCC (Cri) 394, 2006 (3) Scale 665, (2006) 4 SCC653.

30 *Surendra Singh v State of Uttaranchal* 2006 Cr LJ 2461, AIR 2006 SC 1920, 2006 (4) Scale 647, (2006) 9 SCC 531 .

31 *Rakesh v State of MP* 2008 Cr LJ 1646 (SC), AIR 2008 SC 1229, 2008 AIR SCW 1229, 2008 (2) Scale 375 .

32 *Byvarapu Raju v State of Andhra Pradesh* 2007 Cr LJ 3204 (SC), AIR 2007 SC 1904, 2007 (8) Scale 95, 2007 (4) Supreme 581 ; *A Maharaja v State of Maharashtra* 2009 Cr LJ 315 (SC), AIR 2009 SC 480, CLT (2009) Supp Crl 307, JT 2008 (12) SC 111, 2008 (14) Scale 467, (2008) 17 SCC 173 .

33 *Gurdev Raj v State of Punjab* 2008 Cr LJ 382, p 386 (SC), 2007 (7) Supreme 417, 2011 (11) Scale 729 .

34 *Ravi Kumar v State of Punjab* 2005 Cr LJ 1742, (2005) 9 SCC 315, 2005 (2) Supreme 402 .

35 *Public Prosecutor v Somasundaram* AIR 1959 Mad 323, p 327 ; *Sita Kandi v State* 1999 Cr LJ 1642 (Ori) (DB) ; *Ram Chandran v State of Kerala* 2000 Cr LJ 973 (Ker) (DB) .

36 *Naveen Chandra v State of Uttaranchal* 2007 Cr LJ 874 (SC), AIR 2007 SC 363 .

37 *Nanka Ram v State of Rajasthan* (2014) 5 SCC (Cri) 82, (2014) 136 AIC 59 (SC), 2014 Cr LJ 1843 .

38 *State of Orissa v Khaga* (2013) 14 SCC 649, 2013 (10) Scale 413, 2013 (6) Supreme 209, 2013 (7) SLT 616, 2013 (4) Crimes 67 (SC) .

39 *Gobinda Soren v State of Odisha* 2014 Cr LJ 197, p 199, 200 (Ori) (DB) (*Sania Dora v State of Odisha* (1984) 1 OLR 665 (Ori) and *Mandangi Samburu v State of Odisha* 1985 (1) OCR 271 (Ori) **followed**; *Sukra Munda v State of Odisha* 2014 Cr LJ 275 (Ori) (DB) .

40 *Sanjeev Girraj Kirar v State of Madhya Pradesh* 2014 Cr LJ 512 (MP) (DB) .

41 *Kulesh Mondal v State of West Bengal* 2008 Cr LJ 325 (SC), AIR 2007 SC 3228, 2007 AIR SCW 5880 ; *Ramesh Krishna Madhusudan Nayar v State of Maharashtra* 2008 Cr LJ 1023 (SC), AIR 2008 SC 927, 2008 (1) Scale 118 ; *A Maharaj v State of Tamil Nadu* 2009 Cr LJ 315 (SC) .

42 *Nirmal Singh v State* 2011 Cr LJ 2258, p 2267 (Del) .

43 *Mohammad Iqbal v State of Madhya Pradesh* 2012 Cr LJ 337, p 342 (Chh) (DB) .

44 *Suresh Chandra v State of Uttar Pradesh* 2005 Cr LJ 3449 (SC) .

45 *Naveen Chandra v State of Uttaranchal* 2007 Cr LJ 874 (SC)*; Kulesh Mondal v State of West Bengal* 2008 Cr LJ 325 (SC), AIR 2007 SC 3228, 2007 (10) Scale 637, (2007) 8 SCC 578 ; *Ramesh Krishna Madhusudan Nayar v State of Maharashtra* 2008 Cr LJ 1023 (SC), AIR 2008 SC 927, 2008 (1) Scale 118, (2008) 14 SCC 491 .

46 *Ibid*; *Kulesh Mondal v State of West Bengal* 2008 Cr LJ 325 (SC), AIR 2007 SC 3228, 2007 AIR SCW 5880 ; *Ramesh Krishna Madhusudan Nayar v State of Maharashtra* 2008 Cr LJ 1023 (SC), AIR 2008 SC 927, 2008 (1) Scale 118 .

47 *Mayadhar Paramanik v State* (1971) 1 Cut WR 779, 1971 Cut LT 582 ; *Sandhya Jadhav v State of Maharashtra* 2006 Cr LJ 2111 (SC) ; *Byvarapu Raju v State of Andhra Pradesh* 2007 Cr LJ 3204 (SC) ; *Pappu v State of Madhya Pradesh* 2006 Cr LJ 3640 (SC)*; Bangaru Venkata Rao v State of Andhra Pradesh* 2008 Cr LJ 4353 (SC) ; *Rakesh v State of MP* 2008 Cr LJ 1646 (SC), AIR 2008 SC 1229, 2008 AIR SCW 1229, 2008 (2) Scale 375 ; *Thankachan v State of Kerala* AIR 2008 SC 406, 2007 AIR SCW 7153, 2007 (11) SCR 1128 ; *Suresh Kumar v State of Himachal Pradesh* 2008 Cr LJ 2247, AIR 2008 SC 1973, 2008 (4) Scale 173 .

48 *Bahal Singh v State* 1971 Cr LJ 532, p 535 (All)*; Babu v State* (2013) 4 SCC 448, AIR 2013 SC 1769, 2013 Cr LJ 2176 .

49 *State of Madhya Pradesh v Mangu Kisan* 1966 Jab LJ 1047, p 1051-1052, AIR 1967 MP 167 ; Re *Thippanna*1971 Mad LJ 200 (Cr).

50 *Narayanan Nair Raghavan Nair v State of Travancore and Cochin* AIR 1956 SC 99, p 101 ; *Thannoo v State* AIR 1959 All 131 ; *Ali Mohammad v Emperor* AIR 1936 Sind 31 ; *Mir Zaman v Emperor* AIR 1937 Pesh 101 .

51 *Po Kin v Emperor* 1 Cr LJ 1128, p 1130 ; *Basappa Bhimappa Doddamani v State* AIR 1961 Mys 21 ; *Syed Ahmed v King* AIR 1938 Rang 15,p 16; *Umar Khushal v Emperor* AIR 1940 Pesh 1, p 2 ; Re *Thippanna*1971 Cr LJ 1640, p 1649, 1971 Mad LJ 200 (Cr).

52 *Amrithalinga Nadar v State of Tamil Nadu* 1975 Cr LR 632 (SC), 1975 UJ 883 (SC) ; *Nga Ba Shin v Emperor* AIR 1933 Rang

142, p 144 ; *Kaplesh Kumar v State of Gujarat* (2009) 16 SCC 343, (2010) 3 SCC (Cri) 286 (Accused inflicted knife injury on left side of chest of the deceased causing death, the deceased was going to class-room. Accused was convicted under s 302, IPC); **See also***Vijendra Kumar v State of Delhi* (2010) 12 SCC 381, 2010 (5) Scale 707, 2010 (4) SLT 385, 2010 Cr LJ 3851 ; *Shaukat v State of Uttranchal* (2010) 5 SCC 68, (2010) 2 SCC (Cri) 1238, 2010 (4) Scale 299, 2010 (4) SLT 15, 2010 Cr LJ 4310 .

53 *Vijender Kumar v State of Delhi* 2010 Cr LJ 3851 (SC), 2010 AIR SCW 4414, 2010 (5) Scale 707 .

54 *Dilip Kumar Mondal v State of West Bengal* 2015 Cr LJ 1321 (SC), 2015 (1) Scale 441, (2015) 3 SCC 433 . **See also***Ahmed Shah v State of Rajasthan* 2015 Cr LJ 1398 (SC), 2015 (1) Scale 222, (2015) 3 SCC 93 and *Sanjeev v State of Haryana* 2015 Cr LJ 1669 (SC), 2015 (2) Scale 591, (2015) 4 SCC 387 .

55 *Bangaru Venkata Rao v State of Andhra Pradesh* 2008 Cr LJ 4353, p 4355 (SC) .

56 *Anil v State of Haryana* 2007 Cr LJ 4294, p 4298 (SC), 2007 (7) Scale 56, 2007 (5) Supreme 15 .

57 *Kripal Singh v State* AIR 1951 Punj 137, p 140 ; *Thannoo v State* AIR 1959 All 131 .

58 Re *Rahiman Khan Sahib*AIR 1938 Mad 403, p 405 ; *Basappa Bhimappa Doddamani v State* AIR 1961 Mys 21, p 24 ; *Lohana Govind Jamnadas v State of Gujarat* 1980 Guj LT (SN) 161 ; *Lal Singh v Crown* 48 Cr LJ 786 ; *Jagat Narain v Emperor* AIR 1945 Oudh 31 ; *Shyam Lal v State* 1971 Cr LJ 978, p 982, 1971 All LJ 439 ; *Suresh Chandra v State of UP* 2005 Cr LJ 3449, AIR 2005 SC 3120, 2005 SCC (Cri) 1364 .

59 *Ratan Singh v State of Uttar Pradesh* 1973 Cr LJ 1101, p 1103, 1973 All LJ 303 ; *Abdul Aziz v Emperor* AIR 1933 Pat 508, (1934) 35 Cr LJ 725 ; *Basic v State* AIR 1953 All 668, 1953 Cr LJ 1505 .

60 *Dhani v State of Rajasthan* 1973 Cr LJ 1336, p 1340, 1973 Raj LW 274 .

61 *Sarjug Prasad v State* AIR 1959 Pat 66, p 69 .

62 *Babulal Sahu v State of of Chhattisgarh* 2011 Cr LJ 3131, p 3132 (SC), AIR 2011 SC 2530, 2011 AIR SCW 3617, 2011 (6) Scale 206 .

63 *Mohomed Ghouse v State* (1965) 2 Cr LJ 288 (Mys) (DB), **following***Dharman v State of Punjab* AIR 1957 SC 324, 1957 Cr LJ 420 ; *Jumman v State of Punjab* AIR 1957 SC 469, 1957 Cr LJ 586 .

64 *Surinder Kumar v Union Territory, Chandigarh* AIR 1989 SC 1094 .

65 *Dharman v State of Punjab* AIR 1957 SC 324, p 326*; Babu v State* (2013) 4 SCC 448, AIR 2013 SC 1769 ; *Raj Paul Singh v State* (2012) 10 SCC 144, [2012] 8 SCR 1203, 2012 (10) Scale 137 (Deceased unarmed, Accused gave knife blow--exception 4 not attracted)*; Dilip Kumar Mondal v State of West Bengal* 2015 Cr LJ 1321 (SC), 2015 (1) Scale 441, (2015) 3 SCC 433 .

66 *Naveen Chandra v State of Uttaranchal* 2007 Cr LJ 874, p 877 (SC), AIR 2007 SC 363, 2006 (12) Scale 456, (2009) 16 SCC 449 .

67 *Suresh Chandra v State of UP* 2005 Cr LJ 3449, p 3451, AIR 2005 SC 3120, 2005 SCC (Cr) 1364 .

68 *Jagir Singh v State of Haryana* 1996 Cr LJ 2693 (P&H) (DB).

69 *Sharad v State of Maharashtra* (2010) 15 SCC 560, 2009 (14) Scale 179, 2009 (9) SLT 720 ; *Mukesh v State of MP* (2010) 15 SCC 585, 2002 (6) JT 310 ; *Rampal Singh v State of UP* (2012) 8 SCC 289, 2012 Cr LJ 3765 (Case of single shot); *Buddhu Singh v State of Bihar* (2011) 14 SCC 471, [2011] 5 SCR 962, 2011 (6) JT 617 (Single axe blow); *Bhimanna v State of Karnataka* (2012) 9 SCC 650, AIR 2012 SC 3026, [2012] 7 SCR 909, 2012 (8) JT 298, 2012 (8) Scale 457 ; *Johny v State of Kerala* (2011) 14 SCC 158, 2012 (3) SCC (Cr) 1284 ; **see also***Ranjitham v Basavaraj* (2012) 1 SCC 414, AIR 2012 SC 1856, 2011 (13) JT 480, 2011 (13) Scale 221, 2011 (8) Supreme 260, 2012 Cr LJ 2135 .

70 *Ranjitham v Basavaraj* 2012 Cr LJ 2135 (SC), AIR 2012 SC 1856, (2012) 1 SCC 414, 2012 AIR SCW 2205, 2011 (3) Scale 221 .

71 *Mohd Asif v State of Uttranchal* 2009 Cr LJ 2789, (2009) 11 SCC 497 ; *Sukhda v State of Punjab* (2007) 15 SCC 364, 2007 (9) JT 257, 2007 (8) Scale 649 :; *Maniben v State of Gujarat* (2009) 8 SCC 796, AIR 2010 SC 1261, [2009] 12 SCR 753, 2009 (3) Crimes 298 (SC) .

72 *Ramesh Krishna Madhusudan*AIR 2008 SC 927, 2008 Cr LJ 1023, (2008) 14 SCC 491 ; *Arumugam v State* AIR 2009 SC 331, (2008) 15 SCC 590 ; *Raghubir Singh v State of Haryana* AIR 2009 SC 1223, (2008) 16 SCC 33 .

73 *Bati Kunjami v State* 1996 Cr LJ 1431 (Ori) (DB) ; *Situ Kandi v State* 1999 Cr LJ 1642 (Ori) (DB) ; *Sandhya Jadhav v State of Maharashtra* 2006 Cr LJ 2111 (SC) ; *Byvarapu Raju v State of Andhra Pradesh* 2007 Cr LJ 3204 (SC) ; *Pappu v State of Madhya Pradesh* 2006 Cr LJ 3640 (SC) ; *Byvarapu Raju v State of Andhra Pradesh* 2007 Cr LJ 3204 (SC) ; *Naveen Chandra v State of Uttaranchal* 2007 Cr LJ 874 (SC) ; **See also***Golla Yelugu Govindu v State of AP* AIR 2008 SC 1842, 2008 Cr LJ 2607, (2008) 16 SCC 769 ; *Trimbak v State of Maharashtra* (2008) 17 SCC 213, 2008 (3) Scale 405 ; *Hawa Singh v State of Haryana* (2009) 3 SCC 411, 2009 Cr LJ 1146 .

74 *Sita Kandi v State* 1999 Cr LJ 1642 (Ori) (DB) ; *Byvarapu Raju v State of Andhra Pradesh* 2007 Cr LJ 3204 (SC) ; *Pappu v State of Madhya Pradesh* 2006 Cr LJ 3640 (SC) ; *Byvarapu Raju v State of Andhra Pradesh* 2007 Cr LJ 3204 (SC) ; *Naveen Chandra v State of Uttaranchal* 2007 Cr LJ 874 (SC) .

75 *Sita Kandi v State* 1999 Cr LJ 1642 (Ori) (DB) .

76 *Sandhya Jadhav v State of Maharashtra* 2006 Cr LJ 2111 (SC) ; *Byvarapu Raju v State of Andhra Pradesh* 2007 Cr LJ 3204 (SC) ; *Pappu v State of Madhya Pradesh* 2006 Cr LJ 3640 (SC) ; *Byvarapu Raju v State of Andhra Pradesh* 2007 Cr LJ 3204 (SC) ; *Naveen Chandra v State of Uttaranchal* 2007 Cr LJ 874 (SC) .

77 *Queen v Baboolan Hijrah* 5 WR 7 (Cr) .

78 *Vijay alias Gyanchand Jain v State of Madhya Pradesh* (1994) JT 5 SC 528 .

79 *Ibid.*

80 *Empress v Rohimuddin* ILR 5 Cal 31, p 34 .

81 *Ujagar Singh v Emperor* AIR 1918 Lah 145, p 146, 19 Cr LJ 125 .

82 *Empress v Nayamuddin* ILR 18 Cal 484 (FB) ; *Po Set v Emperor* 11 Cr LJ 345 .

83 *Empress v Nayamuddin* ILR 18 Cal 484, p 490 .

84 *Shamshere Khan v Empress* ILR 6 Cal 154, p 158 .

85 *Empress v Nayamuddin* ILR 18 Cal 484 (FB), dissenting from *Shamshere Khan v Empress* ILR 6 Cal 154 .

86 *Po Set v Emperor* 11 Cr LJ 345 .

87 O'Kinealy J, in *Empress v Nayamuddin* ILR 18 Cal 484, p 492 (FB) .

88 *Po Set v Emperor* (1910) 11 Cr LJ 345 ; *Rajinder Kumar Sharma v State* 1996 Cr LJ 2510 (Del) (DB) .

89 *Sukaroo Kabiraj v Empress* ILR 14 Cal 566, p 568 .

90 *Dasrath Paswan v State of Bihar* AIR 1958 Pat 190 ; *Queen v Anunto Rurnagat* 6 WR 57 (Cr) .

91 *Narendra v State of Rajasthan* 2014 (10) SCC 248, 2014 Cr LJ 4396, 2014 (10) JT 96, 2014 (10) Scale 62 .

92 *Queen v Anunto Rurnagat* 6 WR 57 (Cr) .

93 *Kanaga Kasvan v Emperor* AIR 1931 Mad 436 ; Re *Nainmuthu Kannappan*AIR 1940 Mad 138 ; Re *Ambalathi Assainar*AIR 1956 Mad 97, wherein a contrary view was taken.

94 Re *Nainamuthu Kannappan*AIR 1940 Mad 138 ; *Kanaga Kosvan v Emperor* AIR 1931 Mad 436 ; Re *Ambalathi Assainar*AIR 1956 Mad 97, but see wherein a contrary view was taken.

95 *Masum Ali v Emperor* AIR 1929 Lah 50 .

96 *Queen v Poonai Fattehmal* 12 WR 7 (Cr) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 301.

Culpable homicide by causing death of person other than person whose death was intended.--

If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the2231 description of which it would have been if he had caused the death of the person, whose death he intended or knew himself to be likely to cause.

Comments

1. Scope

Section 301, IPC does not enact any rule not deducible from ss 299 and 300, IPC ; it merely declares, in plain language, an important rule deducible from the said sections just as an explanation to a section does. The rule cannot well be stated as an explanation to either s 299 or s 300 as it relates to both. It was, therefore, found most convenient to state the rule by means of a fresh section. The rule makes it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended, nor knew himself to be likely to kill, a rule which, though it does not lie on the surface of s 299 yet, is deducible from the generality of the words 'causes death' and from the illustration to the section; and the rule then goes on to state that the quality of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely, to be killed or injured, and not with reference to his intention or knowledge with regard to the person actually killed, a rule deducible from the language of ss 299 and 300 though not, perhaps, lying on their very surface.[97]

2. Object

The law affords protection equally to the lives of all persons, and once the criminal intention, *i.e*., an intention to destroy human life, is found, it does not make any difference whether the act, done with such intention, causes the death of the person aimed at, or of someone else. Illustration (a) to s 299, IPC makes it quite clear that the legislature deliberately employed general and unqualified language in order to cover cases where the person, whose death is caused by the act of the accused, was not the person intended to be killed by him, but some other person. This section, *i.e*., s 301, IPC, also supports this construction as it assumes that the accused, in such cases, would be guilty of culpable homicide. The object of this section is to lay down that the nature of culpable homicide of which the accused in these cases would be guilty, namely whether murder or not, would be the same as he would have been guilty of if the person, whose death was intended to be brought about, had been killed.[98]2232

3. Applicability

The section applies to cases where the accused causes the death of another whose death he neither intends, nor knows himself likely, to cause.[1]In other words, the section applies where the death of the person, whose death is intended, or known to be likely to occur, by the person doing the act does not, as a fact, occur, but the death of someone else occurs as a result of the act done by him. It does not apply where the death--both of the persons whose death was in contemplation and of another person or persons--has occurred.[2]The accused's intention or knowledge of the effect of his act in relation to the unintended or accidental victim is presumed not to exist at all in a case to which s 301 can apply[3] because this section clearly makes culpable homicide murder notwithstanding the fact that there was no intention actually to commit the murder of the particular person killed.[4]

4. Section 301 and Section 304A

Where the accused persons were alleged to have fired freely towards the fleeing complainant party, the

first shot injured one person and the second shot resulted in the death of the 10-year old son of the complainant, the gun was not fired in the air just to frighten the complainant and his companion, the firing was resorted to in a locality where there were a number of shops, these circumstances attract s 300 read with s 301, IPC, and not s 304-A, as the death of a person other than whose death intended was caused.[5]

5. Doctrine of Transfer of Malice

The provision is founded on a doctrine called a transfer of malice by Halo and Foster. Others describe it as a transmigration of motive. Coke calls it coupling the event with the intention and the end with the cause. If the killing takes place in the course of doing an act which a person intends or knows to be likely to cause death, it ought to be treated as if the real intention of the killer had been actually carried out.[6] Where, though initially, the malice was focused on prosecution witness, the fact that all the accused chased and assaulted the deceased is a case of transfer of malice.[7]

The section embodies a well-established principle of criminal jurisprudence based on the doctrine of transferred malice. It is settled law that where a blow, aimed at one person, falls upon another and kills him, the offence committed by the assailant is the same as it would have been if the blow had struck the intended victim.[8] It is clear that even though the accused intended to cause the death of prosecution witness and the stab, which was aimed at prosecution witness, fell on the chest of the deceased, which resulted in the death of the deceased, as per the principle of 'transfer of malice', it must be presumed that the accused had the intention to cause the death of2233 the deceased alone. Hence, the act committed by the accused to commit the murder of prosecution witness, which, unfortunately, caused the death of the deceased would attract the offence under s 301, read with s 302, IPC, and consequently, the conviction imposed on the accused by the trial court, for the offence under s 301 read with s 302, IPC .[9]

Conviction under Section 326 Based on Doctrine of Transfer of Malice

Where the stab was aimed at the mother, but it hit the child in her arms causing his death, it was held that the accused was liable neither for the offence of murder nor for that of culpable homicide, even by operation of s 301, there being no material to show that the identical stab, if it had fallen on the mother, against whom it was aimed, would have caused her death. The offence made out was held to be one under s 326, since the conviction of the accused could be sustained on the basis of the doctrine of transfer of malice embodied in s 301 .[10]

6. Applicability of Section 34 to cases under Section 301

In *Wazir Singh v State of Punjab* ,[11] an interesting point as to the applicability of s 34 to cases falling under s 301, IPC, was raised, but it was left undecided. There, the accused and one *X,* who were both armed with rifles and had the common intention of killing *B,* fired their rifles at him. It so happened that at the time of firing, there was also one *S* with *B.* Both of them began to run and *B* succeeded in hiding himself behind a tree, but *S* was fatally injured by the shots. It could not be found as to whose shots caused the fatal injuries. The question arose whether the common intention to kill *B* could, by virtue of s 301, be transferred so as to operate on the matter of murder of *S,* there being, at no time, any common intention entertained between the accused and *X* to commit the murder of *S.* The point was left undecided as the appeal was limited to the question of sentence and the decision of the said point, one way or the other, was not to affect the sentence passed. In *Ganga Singh v State* ,[12] the court observed the expression 'in furtherance of the common intention of all', in s 34, IPC, need not necessarily relate to the person actually killed. It is sufficient for the application of s 34, IPC, that the 'common intention of several persons', contemplated therein, is to commit culpable homicide, irrespective of any specified person. In such a case, each member shall be liable for the act resulting in murder or culpable homicide not amounting to murder, as the case may be. In *Shankarlal Kacharabhai v State* ,[13] the Supreme Court pointed out that, under s 301, IPC, if *A* intends to kill *B* but kills *C* whose death he neither intends nor knows himself to be likely to cause, the intention to kill *C* is, by law, attributed to him. If *A* aims his shots at *B,* but it misses *B,* either because *B* moves out of the range of the shot or because the shot misses the mark, and hits some other person *C,* whether within sight or out of sight, *A* will be deemed, under s 301, to

have hit *C* with the intention to kill him. What is to be noticed is that to invoke s 301, *A* shall not have any intention to cause the death, or the knowledge that he is likely to cause the death of *C.* If this condition is not complied with and the accused shoots at a particular person with the intention2234 of killing him, though under a misapprehension of his identity, all the ingredients of ss 299 and 300, IPC are complied with. The aid of s 301, IPC is not called for.

7. Applicability of Section 149 to Cases under Section 301

Though s 149, IPC, may not in a given case apply to a case covered by s 301, it would depend upon the factual background involved. No hard and fast rule of universal application can be invoked.[14]

8. Illustrative Cases

Where the accused aimed a blow with a sharp *dao* at *B,* but instead of killing *B,* it struck a child in his arms and killed it, it was held that the offence was of murder punishable under s 301 .[15] Similarly, where a blow was aimed at a woman, but, she having ducked, it struck another woman and killed her, it was held that the assailant was guilty of murder by virtue of this section.[16] If an accused intends to kill a particular person but he kills another, he is guilty of an offence under s 301 .[17] The accused, with the intention of killing *A* gave him poisoned sweet *halwa* to eat. *A* ate a little and threw away the rest. It was picked up by *B* who ate it and died. It was held that the accused was guilty of murder.[18] So also, where the accused mixed poison in *halwa* with the intention of killing her husband, but another man also partook of the *halwa* and died, it was held that the accused was guilty of murder.[19]Where the intention of the accused was to cause the death of a particular person but his act of taking a lorry at a high speed with the intention of hitting against that 'particular person' and killing him really resulted in causing the death of deceased and the fact that the deceased sustained the fatal injuries not as a result of the direct hitting of the lorry but due to the fall of pillar and its debris on the body of the deceased would not also change the position. Since the accused's intention in taking the lorry was to kill 'another person' and the overt act committed by the accused in furtherance of his intention was so imminently dangerous that it must in all probability, cause death or such bodily injury as was likely to cause death, and hence, the offence committed by the accused would squarely fall under s 301 and would amount to murder and the accused would be liable to be convicted for an offence punishable under s 302 .[20] Where the accused persons fired freely at the fleeing complainant party, the first shot injured one person and the second shot resulted in the death of a 10 year old boy of the complainant, which was not intended by the accused, the offence committed by accused was murder under s 300 read with 301, IPC and not under s 304A, IPC .[21]

Where the deceased received a single blow, by knife in the abdomen by the accused while intervening to save her brother from being attacked by the accused, the accused can be clothed with knowledge and not intention that the injury was likely to cause death and so the offence would fall under s 304, Pt II, IPC and not under s 300, IPC .[22]2235

97 *Ganga Singh v State* (1980) Cr LJ 235, p 239 (All) (DB) ; *Public Prosecutor v Mushunooru Suryanarayanamoorty* 13 Cr LJ 145, p 147 (Mad) ; *Jeani v Emperor* 15 All LJ 13, 17 Cr LJ 505 ; *Ballon v State* AIR 1955 All 626, (1955) Cr LJ 1448 (All) .

98 *Re Public Prosecutor v Mushunooru Suryanarayanamoorty* 13 Cr LJ 145 .

1 Re *Girada Narayana*AIR 1963 AP 146, p 148, (1963) 1 Cr LJ 415 .

2 Re *Public Prosecutor v Mushunooru Suryanarayanamoorty* 13 Cr LJ 145 .

3 *Koran Singh v State* (1965) All LJ 52, (1965) AWR 132 .

4 *Ballon v State* AIR 1955 All 626 .

5 *Abdul Ise Suleman v State of Gujarat* AIR 1994 SC 1910 .

6 *State of Maharashtra v Kashirao* (2003) Cr LJ 4464 (SC), AIR 2003 SC 3901 .

7 *Ibid*.

8 *Suba v Emperor* AIR 1928 Lah 344, p 346, 29 Cr LJ 280 ; *Shankarlu Kacharabhai v State of Gujarat* AIR 1965 SC 1260, p 1263 ; *Public Prosecutor v Mushunoorn Suryanarayanamoorty* 13 Cr LJ 145 ; *Viswanatha Pillai v State of Kerala* (1994) Cr LJ 1037 (Ker) (DB) ; *Jagpal Singh v State of Punjab* AIR 1991 SC 982, (1991) Cr LJ 597 (SC) .

9 *Nagaraj v State* (2006) Cr LJ 3724 (Mad) (DB) .

10 *Kurien v State of Kerala* (1975) KLT 748 .

11 *Wazir Singh v State of Punjab* AIR 1956 SC 754 .

12 *Ganga Singh v State* (1980) Cr LJ 235, p 239 (All) (DB) .

13 *Shankarlal Kacharabhai v State* AIR 1965 SC 1260, p 1263, (1965) 1 SCWR 750 .

14 *State of Maharashtra v Kashirao* (2003) Cr LJ 4464 (SC), AIR 2003 SC 3901 .

15 *Queen v Phomonee Ahun* 8 WR 78 (Cr) ; *Gyanendra Kumar v State* AIR 1972 SC 502, (1972) Cr LJ 308 ; *Dan Behari v State of UP* (2003) Cr LJ 4959 (SC) .

16 *Suba v Emperor* AIR 1928 Lah 344 ; *Ballon v State* AIR 1955 All 626, (1955) Cr LJ 1448 (All) ; Re *Subramaniam*(1980) Mad LJ 633, p 637.

17 *Hari Shankar v State of Mysore* (1980) SCC 107, p 108 .

18 *Public Prosecutor v Mashanooru Suryanarayanamoorty* 13 Cr LJ 145 .

19 *Jeoni v Emperor* 15 All LJ 13, 17 Cr LJ 505 ; *Boreddi Kondamma*AIR 1945 Mad 293 .

20 *Padmonabhan Ganga v State of Kerala* (1988) Cr LJ 591 (Ker) (DB) .

21 *Abdul ha Suleman v State of Gujarat* AIR 1994 SC 1910, (1995) Cr LJ 464 (SC) .

22 *Ramesh Vithalrao Thakre v State of Maharashtra* AIR 1995 SC 1453, (1995) Cr LJ 2907 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 302.

Punishment for murder.--

Whoever commits murder shall be punished with death, or [1][imprisonment for life], and shall also be liable to fine.22362237223822392240224122 42

Comments

1. Introduction

Unlike civil cases where documentary evidence matters far more than ocular evidence, the reverse is the

position in a criminal trial of the offences under the IPC except for a few offences like ss 467 / 471, etc. Murder is the most heinous offence in the IPC, which makes it the most important too. Beside ocular evidence, medical evidence, dying declaration, confessions, identification of an accused are important pieces of evidence in a criminal case. A murder case cannot be properly understood without dealing with these important aspects. Keeping in view the importance of murder cases, a fair idea of the legal position as clarified by High Courts and the Supreme Court regarding different types of witnesses, different aspects of dying declaration, confessions, circumstantial evidence are dealt with separately under different heads in this part.

The idea is not to encroach upon the territory of commentaries on the Evidence Act or the CrPC, but to avoid wastage of time and diversion of attention of the reader in switching from this book to another in search of the latest basic law on these aspects. However, where in depth analysis is required, reference should be made to commentaries on CrPC or the Evidence Act with regard to relevant provisions enshrined therein.

2. Scope

Under the old CrPC, ample discretion was given to courts to pass death sentence. An alternative sentence of life term could be awarded in exceptional circumstances, that too, after advancing special reasons for making this departure from the general rule. The current CrPC entirely reversed the rule. A sentence for imprisonment for life is now the rule and capital sentence is an exception. It has also been made obligatory on the courts to record special reasons if ultimately death sentence is to be awarded. A Constitutional Bench of the Supreme Court in the case of *Bachan Singh v State of Punjab* ,[2] while upholding the constitutional validity of death sentence voiced that as a legal principle death sentence is still awardable but only in rarest of rare cases when the alternative option of lesser sentence is unquestionably foreclosed.[3] While it is the duty of the court to see that no innocent person is punished, it is equally important to see where it is clear evidence of commission of crime by a person such person should not be given the benefit of some distortion or exaggeration, made for the prosecution by the witnesses.[4] The plea by the accused that he remained in jail for more than seven years is not a good ground to reduce the sentence.[5] Every incidence of murder involves brutality, which is one of the factors for imposing the extreme penalty on the accused while considering the case for imposition of sentence on the accused, but it cannot be a sole ground for imposing extreme penalty. Other factors have also to2243 be taken into consideration, *i.e*., aggravating and mitigating circumstances along with the brutality, *i.e*., the act of the accused. The legislature has incorporated the provision of death penalty in order to impose appropriate punishment for a criminal act to respond to the need of society for justice against criminals. Punishment is always imposed not only to punish the criminal but also to ensure that criminal is punished in a befitting manner, commensurate with the crime committed by him. Of course, at the time of consideration for punishment the court is required to consider the act as well as right of victim of crime and the society at large. Manifestly, inadequate punishment having regard to the nature of crime of offence would not subserve the cause of justice to the society. The court has to examine as to whether the murder has been committed for a motive, which evinces total depravity, for *e.g.*, murder by hired assassins for money or reward or cold-blooded murder for gains of a person *vis-à-vis* whom the murderer is in a dominating position or in a position of trust or when the court reaches to conclusion looking to the facts of the case that the accused is a menace to the society looking to his past criminal track record and nefarious activities.[6]

3. 'Whoever'

This section makes no distinction between men. It will apply even to a case where a police officer, in the zeal of his duty to trace out an offence, commits torture on the suspect and thereby causes his death.[7] Even the choice between the two penalties, provided in the section, does not depend upon any classification of murders on the basis of youth, sex, etc. The IPC has not created any special categories, or classes of persons, who can claim exemption from death sentence as a matter of right. Neither youth, nor sex, nor any other peculiarity is mentioned in the section entitling any person to claim exemption from capital punishment after his conviction for murder. It merely says 'Whoever commits murder shall be

sentenced to death or imprisonment for life and shall also be liable to fine.'[8] In *Gangu Singh v State* , it was stated that the murder trial of the accused less than 16 years on date of occurrence should not be tried by a sessions judge, but, shall be dealt with in accordance with provisions of Uttar Pradesh Children Act 1952.[9]

This section applies, whether the murder is committed by one, or by more than one person (see s 9, IPC).

4. 'Commits Murder'

If it cannot be proved that it was the accused who caused the death of the deceased person, there can be no conviction.[10] Thus, even if it is clear that one of the two persons must have caused the death, but not as to which of them did so, both will be acquitted.[11] When assault is made by many accused but without common intention the doctor's opinion that the death was due to head injury and the accused who alone is the author of the head injury is guilty of murder and the other accused persons who2244 assaulted the dead body cannot be made liable for the offence of murder.[12] However, if one person is engaged in murderously beating another to death and a stranger, without sharing the common intention, rushes in and adds some more blows so that the victim's death is more speedily brought about, then it is a case where both would be guilty of murder and the first man cannot be allowed a defense that it was the second assailant's stroke that finally ended the victim's life.[13]

For the commission of the offence of murder, it is not necessary that the accused should have the intention to cause death. If it is proved that the accused had the intention to inflict the injuries actually suffered by the victim, and such injuries are found to be sufficient in the ordinary course of nature to cause death, the ingredients of clause 'thirdly' of s 300 are fulfilled and the accused must be held guilty of 'murder' punishable under s 302 .[14]

If the whole combination of facts, necessary to prove murder, is not proved, the accused may be punished for any complete minor offence, disclosed by the facts, which have been proved.[15] Where an accused person is convicted in the alternative, either of murder, or, *e.g.*, of an offence under s 201, IPC (causing disappearance of evidence), he must be punished with a punishment applicable to the minor offence, *e.g.,* imprisonment for seven years.[16]

In order to convict the accused for an offence under s 302, IPC, the first and foremost aspect to be proved by the prosecution is the homicidal death. Where the evidence proves that the death was accidental death and not homicidal death, the accused cannot be convicted under s 302, IPC .[17]

5. Relevant Factors to Ascertain Murder

Merely because there were some minor injuries, it cannot be said that s 302, IPC, is not attracted. Though the number of injuries does not determine the question whether s 302, IPC, is to be attracted, yet the nature of injuries, the weapon used, and the places where injuries exist are relevant factors.[18] In considering whether the offence is murder or culpable homicide not amounting to murder, the manner of causing injuries to the victim by the accused person as deposed by the prosecution witnesses, nature of injuries caused to the victim, part of the body where accused person(s) caused injuries to the victim, the weapon(s) used in the commission of crime and conduct of the offender(s) charged with the offence of murder, are to be taken into account.[19]

6. Motive

Commentary under s 299, *ante*, may be referred to.2245

Motive is a relevant factor in all criminal cases whether based on the testimony of an eyewitness or circumstantial evidence.[20] Motive is not an ingredient for an offence under s 302, IPC .[21] When the participation of the accused is established by the evidence of an eyewitness, absence of motive pales into insignificance and cannot be a ground to justify his acquittal.[22] Where the testimony of the wife that the

accused fired shot from gun at the deceased was corroborated by medical evidence and contents of the FIR, in the presence of direct evidence, uncertainty of motive was held of no consequence and conviction of the accused under s 302, IPC was affirmed.[23]

In a case where the accused himself had taken the deceased to the hospital which showed that he had no motive or intention to commit a crime, much less to give a gun shot, which would inevitably result in the death of deceased, the accused was acquitted of the charge of murder under s 302, IPC .[24]

In a case the accused committed the murder of three teenaged children of the complainant while they were returning from school, the accused had the motive as his wife had eloped with the brother of the complainant and had threatened the complainant. Therefore, the conviction of the accused under ss 302 and 364, IPC was held proper.[25]

Conviction of main Accused under Section 302 and of another under Section 341

Commentary under s 341, *ante*, may be referred to.

(I) CONSTRUCTIVE LIABILITY

7. Applicability of Section 34 to Section 302

Commentary under s 34, *ante*, Vol. 1 may be referred to.

It is only the person, who actually commits murder, who is directly made liable under this section, others may be held liable for murder vicariously under ss 34-38 or under s 149, IPC .[26] A mention of the section in the judgment is not the requirement of law to convict a person. If the ingredients of the offence are present, conviction can be made. It is not material to bring the case under s 34, IPC, as to who in fact, inflicted the fatal blow.[27] Accused persons charged with offences under s 302 read with s 149, IPC, can be convicted under s 302 read with s 34, IPC .[28] Even in the2246 absence of a charge under s 34 IPC, the conviction and sentence under s 302, IPC, can be maintained adding s 34 thereto.[29] When two, out of the three accused, have been convicted of a charge under ss 302 / 34, the third can be convicted under s 302, only when his 'individual, and not the conjoint, liability' has been established.[30] But where the other two accused, who have been tried along with the appellant on a charge under ss 302 / 34, have been acquitted, there being no evidence that any other unknown person took part in the murder, the appellant, too, cannot be convicted under ss 302 / 34 even though the appellant's confession, implicating conjointly himself and the two others, is taken as true and voluntary.[31] There was evidence that the four accused armed with weapons reached the place of occurrence, two of the accused dragged the deceased, and on the exhortation of one, he fired a shot at the deceased causing death. It was held that it could be said that not only the two accused were present at the scene of the offence but they actively participated in the commission of the offence by doing acts in furtherance of the common intention of killing the deceased, and so their conviction under s 302 was held proper.[32]

Out of seven accused persons put on trial, five accused persons were acquitted by the trial Court. Two accused H and M armed with lathi and sharp edged weapon had come together on the spot, gave abuses, had inflicted injuries with sharp edged weapon and lathi, and had left together from the spot. Held, common intention was proved, thus, the Supreme Court upheld the conviction of the two accused appellants not with the aid of s 149, IPC, but with the aid of s 34 .[33]

In a case of human sacrifice, it was held that just by mere presence of the accused it cannot be said to attribute a common intention and as such, the accused cannot be convicted with the aid of s 34, IPC . Therefore, the accused were acquitted of the charge under s 302 read with s 34, IPC .[34]

The evidence of public witnesses about the role of exhortation attributed to appellant *N* was full of

contradictions, however there was no evidence of pre-consent or prior meeting of minds between the two appellants *N* and *B*, therefore, appellant *N* was held entitled to benefit of doubt and acquitted of the charge under s 302, IPC .[35]

The co-accused *S,* who was a pillion rider, along with main accused *R* had gone to commit the murder of the deceased. But the eye-witnesses did not depose that the co-accused *S* was armed with any weapon or had any role in the murder, therefore the co-accused *S* was acquitted of the charge under ss 302 / 34, IPC .[36]

Where the testimony of the public witnesses about the presence/involvement of the two accused in the commission of the murder was contradictory, and there was no material to show that the accused had committed the alleged offence in the2247 furtherance of their common intention, the accused were acquitted of the charge under s 302, IPC .[37]

There was a land dispute between the two brothers and the accused assaulted the victim with chura and his minor son, the co-accused caught hold of the victim, however the evidence was lacking to show that there was any prior meeting of minds between the accused and his minor son co-accused, the conviction of the co-accused under s 300 read with s 34, IPC was held to be not proper and was set aside.[38]

The complainant and his father (deceased) were returning home from the police station at night and the accused persons came in the way armed with lathi, sword and iron rod, and assaulted the deceased, giving continuous beating and caused serious injuries resulting in death. It was held by the court that the injuries sustained by the deceased were caused by the accused persons in pursuance of their common intention to cause the death of the deceased and the accused were convicted under ss 302 and 34, IPC .[39]

In a case it was alleged that the father and son had gone to the house of the deceased, and father caught hold of the deceased and the son attacked the deceased with Gupti, however father was not named in FIR, hence he was acquitted of charge under ss 302 and 34, IPC .[40]

Where three persons separately armed with weapons storm into the house of the victim in the dead of the night, just because only one of them uses the weapon and gives a fatal blow, it would not absolve the others. The others may not be required to use their weapons, but that by itself does not change the role of such other accused to that of a mere bystander. It was held that the two accused were assigned the role of exhortation and all the three accused were convicted under s 302, IPC read with s 34, IPC .[41]

Applicability of Section 34 to Murder Case when all but one Accused Acquitted

In the case of *Krishna Govind Patil v State of Maharashtra* ,[42] a four-judge Bench of the Supreme Court was considering a case in which there were a total four accused persons and all of them were acquitted by the trial court of the charge under s 302 read with s 34, IPC . The High Court upheld acquittal of the three accused persons, but convicted the fourth accused under s 302 read with s 34, IPC . When the matter was brought to the Supreme Court, the conviction was set aside as apart from these four accused persons, there was no other fifth accused and in view of the acquittal of three accused persons, the conviction of the accused before the Supreme Court under s 302 read with s 34, IPC, could not be maintained as there was none else with whom he could have shared the common intention to cause death of the deceased. While acquitting, the Supreme Court observed that neither it was the prosecution case that there was any fifth accused person nor was there any evidence to that effect, meaning thereby that if there could have been any other accused person, known or unknown, other than the four persons tried, the conviction of the accused before the Supreme2248 Court could have been upheld as it could have been said that he shared the common intention with the fifth unknown accused person to commit the offence. To illustrate the point, if in a case an FIR is lodged against four persons, known as well as unknown, and tried, out of whom three acquitted, one person can be convicted under s 302, IPC*simpliciter*, in case it is found that injury inflicted by him was fatal one, but he cannot be convicted under s 302 with the aid of s 34, IPC as in view of acquittal of the other accused persons, he cannot be

said to have shared the common intention with anybody. On the other hand, if there are three persons, two named and one unknown, whose identity could not be ascertained even during the course of investigation, and upon being put on trial, out of the two named one gets acquitted, the other can be convicted under s 302 with the aid of s 34, IPC, as it can be said that the convicted accused shared the common intention with the unknown person if there is evidence to that effect.[43]

The evidence of the eye-witnesses that the co-accused were holding the deceased by hand, exhorted the accused to bring gun and to shoot at the deceased was found reliable, thus, the co-accused were convicted under s 302 read with s 34, IPC .[44]

Where the public witness deposed that the accused *S* had gone to work after switching off the line from the transformer and after completing the work, he returned and switched on the electricity line; it was clear that the transformer was at a distance from the electric pole where the deceased got electrocuted and since the accused rushed there to ensure that the line is switched off, it was considered not safe to convict the accused under s 302 read with s 34, IPC, and as such he was acquitted.[45]

8. Applicability of Section 149 to Section 302

Section 149 of the IPC makes the members of an unlawful assembly vicariously liable where it is proved that the offence is committed in pursuance of the common object of the unlawful assembly, where the members of the unlawful assembly knew that such offence was likely to be committed in prosecution of the object of the unlawful assembly. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act for the purposes of incurring the vicarious liability for the offence committed by a member of such unlawful assembly. Under this section the liability of the other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Common object has to be distinguished from the common intention. There is no question of common intention in s 149 of the IPC . Where no injury is inflicted pursuant to the common object to kill the deceased, but caused only when provoked by one of the witnesses, the members of the unlawful assembly cannot be held guilty for the commission of the offence of murder.[46] Where death has been caused in prosecution of the common2249 object of an unlawful assembly, it is not necessary to record a definite and specific finding as to which particular accused out of the members of the unlawful assembly caused the fatal injury. Once an unlawful assembly has come into existence, each member of the assembly becomes vicariously liable for the criminal act of any other member of the assembly committed in prosecution of the common object of the assembly.[47]

The presence of the accused KN on the spot was deposed to by the eye-witness who was niece of the accused, therefore, his conviction under s 302, IPC on the charge of murder was upheld.[48]

Where the prosecution evidence showed that out of eight accused persons, four accused were not present on the spot, no overt act could also be attributed to them, and they were acquitted of the charge under s 302 read with s 149, IPC .[49]

All the seven accused assailants armed with lethal weapons *viz.* country made pistols, lathi, bhala came together to the house of the complainant and participated in the assault in which one person was killed and one injured. The charges against the accused that they in concert with other accused persons to achieve a common object entered the house of the complainant stood proved and they all were convicted under ss 149 and 302, IPC .[50]

There was no enmity between the deceased and the accused and he had not caused any injury to the deceased and no overt act was attributed to the accused so far as the deceased was concerned. Therefore, the mere fact that the accused was armed with a lathi, by itself would not prove that he shared common object with which the main accused was inspired. The prosecution had not adduced evidence to establish the nexus between the common object and the offence committed. Hence it was held that, the

accused could not be convicted with the help of s 149, IPC .[51]

Where the eye-witness in his statement mentioned the name of one accused and did not attribute any overt act to other accused persons, it was held that other accused did not share common object with the named accused, and the conviction of the co-accused under ss 302 and 149, IPC was set aside.[52]

Where the two accused were not named in FIR and they were not identified, none of the public witnesses had taken their names as the persons who committed any overt act, or the persons who chased the deceased, it was not established that they were members of unlawful assembly, and therefore, it was held that they could not be convicted under ss 302 and 149, IPC and they were acquitted of the charge.[53]

The evidence of the eye-witnesses established that all the eight accused persons were armed with weapons, and they surrounded the deceased and prevented others from going near the deceased to rescue him. They had arrived together in the same2250 jeep and left by the jeep after the incident and the jeep was kept in starting position. The accused were convicted under ss 302 and 149, IPC .[54] Where the son of the accused, though present on the spot, did not take part in assault and no evidence was adduced that he shared a common object of an unlawful assembly, he was given the benefit of doubt, and his conviction under ss 302 and 149, IPC was set aside.[55]

(II) PROCEDURE

9. Procedure

The offence of murder is a cognizable, non-bailable and non-compoundable offence, and is exclusively triable by a court of session. Except as otherwise provided by the CrPC, or by any other law for the time being in force, no court of session shall take cognizance of any offence unless the case has been committed to by a magistrate under the said Code.[56]Section 209 of the new CrPC dispenses with the inquiry, preliminary to commitment, in cases triable exclusively by a court of session, irrespective of whether such a case is instituted on a criminal complaint or on a police report.[57]

When an offence under s 302, IPC, is alleged against a public servant and the cognizance of offence is not taken owing to the absence of sanction to prosecute him, there is no scope to take cognizance of the offence of murder punishable under s 302, IPC .[58]

The Apex Court has impressed upon the trial courts of the need to indicate the rank of the accused besides using the name while recording evidence in cases involving multiplicity of accused. It also opined that it would be profitable for the High Courts to issue circulars to trial courts to implement this practical suggestion to avoid possible miscarriage of justice resulting solely on account of defective and truncated recording of evidence in criminal cases.[59]

10. Judicial Restraint while Dealing with Judgments of Lower Courts

Commentary under s 366, *post*, may be referred to.

Time and again the Apex Court has emphasised the need to exercise judicial restraint, particularly while dealing with judgments and orders of the lowers courts. The High Court should avoid unsavory remarks against a judicial personage of the lower hierarchy,[60] when the situation does not warrant such castigation.[61]

11. Judicial Restraint while Making Remarks against Police/Investigating Officers

Castigation of investigation unfortunately seems to be a regular practice when the trial courts acquit accused in criminal cases. It is almost impossible to come across a2251 single case wherein the

investigation was conducted completely flawlessly or was absolutely foolproof. The function of criminal courts should not be wasted in picking out the lapses in investigation and by expressing unsavory criticism against investigating officers.[62] The Courts should bear in mind the time constraints of the police officers in the present system, the ill-equipped machinery they have to cope with, and the traditional apathy of respectable persons to come forward for giving evidence in criminal cases which are realities the police force have to confront with while conducting investigation. In almost every case, an Investigating Officer (IO) is impugned with castigating remarks. The courts should not overlook the fact that usually such an officer is not heard in respect of such remarks made against him. The court need make such depreciatory remarks only when it is absolutely necessary in a particular case, and that too by keeping in mind the broad realities indicated above.[63] Thus when the division bench of the High Court did not make any reference to any particular omission or lacuna in the investigation but used unkind remarks against the investigating officer saying 'Investigation of the case was perfunctory and suffered from serious lacuna and irregularity', it did not find favour with the Supreme Court.[64]

12. Precedent--Broad Resemblance to another Case is not Decisive

Unless and until the facts and circumstances in a cited case are in pari materia in all respects with the facts and circumstances of the case at hand, it will not be proper to treat an earlier case as a precedent to arrive at a definite conclusion. This is clear from some judgments of the Supreme Court where the Supreme Court has taken a different view from the earlier cases, though basic facts look similar in the latter case.[65] How a person reacts in a given case may be the determinative factor so far as that case is concerned. That cannot be applied as a rule of universal application to all cases irrespective of the fact situation in that particular case. There can be no empirical formula as to how one reacts in a given situation and its effect and impact. It would be almost like trying to put a square peg on a round hole. To imprint the fact situation of one decided case upon another or observations made in the peculiar facts of a given case to any or every other case notwithstanding dissimilarity in effect and the distinctive features is legally impermissible. Each case, more particularly a criminal case, depends on its own facts and a close similarity between one case and another is not enough to warrant like treatment because a significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore on which side of the line a case falls, the broad resemblance to another case is not at all decisive.[66]

13. Accused Pleading he was a Child--Duty of the Court

When a plea is raised on behalf of an accused that he was a 'child' within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause2252 an inquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. Keeping in view the beneficial nature of the socially oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions to an accused. The court must hold an inquiry and return a finding regarding the age, one way or the other.[67] The High Courts and subordinate courts were to deal with such cases with more sensitivity, as otherwise the object of the Acts[68] would be frustrated and the effort of the legislature to reform the delinquent child and reclaim him as a useful member of the society would be frustrated.[69] The Supreme Court also emphasised that High Courts may issue administrative directions to the subordinate courts that whenever such a plea is raised before them and they entertain any reasonable doubt about the correctness of the plea, they must as a rule, conduct an inquiry by giving opportunity to the parties to establish their respective claims and return a finding regarding the age of the concerned accused and then deal with the case in the manner provided by law.[70]

Relevant Date for Determining Age of Accused

The relevant date for determining age of the accused is date when the accused was brought for first time

before the court. The accused below 16 years when brought before the court would be termed as 'Child' under s 2(f) of the Rajasthan Children Act of 1970.[71]

Can the Plea that Accused was a Child be Entertained for the First Time at the Appellate Stage?

The view of a Full Bench of the Patna High Court[72]was that though the normal rule is that a plea unless it goes to the very root of the jurisdiction should not be allowed to be taken at the appellate stage especially when it requires investigation into a question of fact but a plea that accused in question was a 'child' within the meaning of the Act can be entertained at the appellate stage also and should not be overlooked on technical grounds. After noticing the provisions of the Bihar Children Act 1982 and the Juvenile Justice Act 1986, a Full Bench of the Patna High Court opined, taking into consideration the aim and intention of the two Acts, that the application of the provisions of the Acts should not be denied to an offender where, by the time the trial commenced or concluded the accused had ceased to be a juvenile, although when the offence was committed he was a juvenile within the meaning of the Act. The court then laid down the procedure which should be followed when a plea is raised to the effect that the accused on the date of the offence was a child and held that inquiry into that aspect should be conducted and on the basis of the evidence led at the inquiry, the court should record a finding whether or not on the date of commission of the offence, the accused was a 'child' within the meaning of the Act.[73] A Division Bench of the Allahabad High Court also took the view that the plea2253 by the accused that he was a child at time of commission of the offence can be allowed to be raised for the first time in appeal.[74] But the Apex Court took a somewhat contrary view in another case.[75] Wherein, neither before the committal court nor before the trial court any plea was raised on behalf of the accused that he was a child and so should not have been committed by the magistrate and therefore tried by the sessions court and that he ought to have been dealt with only by the Court of Juveniles, the Apex Court did not approve that the High Court merely on the basis of the entry made in s 313, CrPC, a statement mentioning the age of the accused as 17 years, has concluded that the accused was a 'child' within the definition of the Act on the date of the occurrence.[76] Later in another case where the plea that the accused on the date of the incident was hardly 13 years old was not taken before the trial court and High Court so the Apex Court where this plea was raised for the first time upheld the conviction of the accused but set aside the sentences awarded.[77]When the accused has not taken the plea before the sessions court that he was a child at the time of the incident, such plea cannot be taken before High Court in appeal for the first time to get benefit of the Children's Act.[78] When such plea of applicability of Juvenile Justice (Care and Protection of Children) Act 2000 is neither taken before the trial court nor before the High Court nor before the Supreme Court, it being a mixed question of law and fact which cannot be taken for the first time in criminal appeal before the Supreme Court as this is not a pure question of law.[79]

A Child Tried by Sessions Court cannot be Sentenced

When a person accused is a child at the time of commission of offence under the Children's Act applicable and he is tried by the Sessions Court with or without an adult accused and is held guilty of the offence charged, he cannot be sentenced for the offence committed even though he becomes an adult at the time of his conviction and cannot be sent to an approved school under the respective Children's Acts for being retained there, as he had already attained majority. The sentence if awarded by the trial court is liable to be quashed on the sole ground that the accused was a child on the date of commission of the occurrence though his conviction can be maintained.[80] But when accused is found to be above 16 years of age at the time of incident, he is not entitled to the benefit of the UP Children's Act 1952.[81]2254

14. Form of Charge

The following form of the charge may be adopted:

I (*name and office of Sessions Judge*, *etc*) hereby charge you (*name of accused person*) as follows:

That you, on or about the...day of..., at...have committed murder by causing the death of...and thereby committed an offence, punishable under s 302 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

Particulars of Charge

Under s 211 of the CrPC,[82] every charge shall state the offence with which the accused is charged. If the law, which creates the offence, gives it any specific name, the offence may be described, in the charge, by that name only. The fact, that the charge is made, is equivalent to a statement that every legal condition, required by law to constitute the offence charged, is fulfilled in the particular case. It is only when the law, which creates the offence, does not give it any specific name that so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged. A charge, which expressly mentions the specific name, given to it by law, would be a sufficient charge under sub-s (2) of s 221, CrPC 1898, corresponding to s 211 of the CrPC, even if the ingredients of the offence are not given. But if the specific name of the offence is not mentioned, the ingredients cannot be implied.[83] Thus, *A* is charged with the murder of *B.* This is equivalent to a statement that *A's* act falls within the definition of murder given in ss 299 and 300, IPC, that it did not fall within any of the general exceptions of the said Code or within any of the five exceptions to s 300 or that, if it did fall within exception 1, one or other of the three provisos to that exception applied to it.[84] A charge under s 302 / 34, IPC showing that either the appellant 'or' some other person' committed the murder, has been held to be defective because it does not show, nor does it mention, how the appellant acted in concert with anyone else.[85] It should be remembered that nothing, which is not essential to the offence, should be included in the charge, except such details of time and place as are sufficient to give, to the accused, notice of the matter with which he is charged.

Separate Charges for Distinct Offences

Under s 218 of the CrPC, for every distinct offence of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately except in the cases mentioned in ss 219, 220, 221 and 223 . Where, therefore, the accused killed a man and subsequently his wife, it was held that the two murders were distinct offences and the inclusion of both in one charge offended against the first part of s 233, CrPC 1898, corresponding to s 218 (1), CrPC 1973.[86]2255

Alternative Charge

The joinder of a charge of murder (s 502, IPC) and of causing disappearance of the evidence of the murder (s 201, IPC) in the alternative is legal.[87] It was held, by the Privy Council, in *Begu v Emperor* [88] that in a charge of murder under s 302, a conviction under s 201, without a further charge being made, is not illegal. Where a person is acquitted of the charge of murder and other cognate charges, with which he is charged, his conviction under s 201, without any further charge, is perfectly legal.[89] Where alternative charges under ss 302 and 201 are framed, the Sessions Court should take the evidence into consideration and record its findings on both the charges. It should not record a finding of acquittal on the charge of s 201, without going into the question and taking the evidence into consideration, on the mere ground that the accused is convicted of the offence under s 202 . The dangers of such a course are pointed out in *Adi Bhumiani v State* .[90]

Alteration of Charge

Under the CrPC 1898, the magistrate, while committing a case to the court of session, was required to frame a charge. Under the CrPC 1973, he simply commits the case to the court of sessions and the latter proceeds to frame a charge as if it were the court of original jurisdiction. Under s 228, CrPC,[91] on the material placed before it, if there are grounds for presuming that the accused committed the offence, it has to frame a charge or the charges. Section 216(1) , CrPC,[92] empowers the court to alter, or to add to any charge at any time before the judgment is pronounced. It invests the court with a comprehensive power to remedy the defect in the framing or non-framing, of a charge, whether discovered at the initial stage of the trial or at any subsequent stage prior to judgment.[93] The law, however, warrants that the alteration of the charge and the trial on the altered charge must not occasion a failure of justice.

Where the circumstance are almost identical, the absence of a charge, under s 302, against only the accused, when others are acquitted, is not fatal and the defect is only a mere irregularity which is curable and no prejudice can be said to have been caused to the accused convict.[94]

Accused charged with Section 302 can be convicted under Section 314

Commentary under the s 314, *ante*, may be referred to.2256

Defect, Irregularity, Omission or Error in Charge

According to s 464, CrPC, no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid, merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges unless, in the opinion of the court, a failure of justice has in fact been occasioned thereby. Thus, if in framing charges against the accused, there was some technical defect or error, no benefit arises to the accused unless due to that defect/error in framing the charge, any substantial injustice has been caused to the accused or accused has been prejudiced in getting justice.[1] When all particulars required to be given in the charge under s 212, CrPC, were mentioned in the charge and if, in a technical manner, the charges were not framed in the prescribed form as enjoined by the CrPC, then on the technical footing there is no justification for holding the charge to be defective.[2] Mere omission in charge of words 'along with three others' is not fatal when particularly no failure of justice is occasioned.[3]

(III) ADMISSION, CONFESSION AND PLEA OF GUILT

15. Introduction

Criminal law gives several opportunities to the accused to admit during investigation and trial the facts relating to the crime alleged to be committed by him. Such statements of the accused if proved are confessions and conviction can be based on the statements. But where, besides such statements of the accused, some evidence is required to be proved to establish the case of the prosecution then such statements are an admission and not confession. An accused who wants to confess his guilt during the investigation of his case can do so before a magistrate under s 164, CrPC, or give an extra-judicial confession before any member of the public. Besides admission and confession the accused may take a plea of guilt when after ascertaining a *prima facie* case against him, the court frames charge of the offence alleged against him and reads it over and explains it to him. The charge if admitted is known as plea of guilt and obviates the need for the trial. After the evidence, the prosecution is concluded and all the incriminating circumstances appearing against the accused are put to the accused under s 313(1)(b), CrPC 1973. The court may also in the inquiry or trial, at any stage without previously warning the accused put such questions to him as the court considers necessary under s 313(1)(a), CrPC 1973. In answer to the question or examination by the court under s 313(1)(a) and (b), CrPC 1973, the accused may admit to the incriminating circumstances against him but since the examination of the accused under s 313(1)(b), CrPC 1973, is always after the conclusion of the prosecution evidence which commences subsequent to pleading not guilty to the charge, by the accused, it is most unlikely that the accused would admit the prosecution case as a whole during his such examination. However, he may admit some of the

circumstances appearing against him in evidence which may fall short of confession. The admission and confession may be judicial or extra-judicial.2257

From the above, it is obvious that there is essentially a difference between admission, confession and plea of guilt. Admission is defined and dealt with in ss 17-23 of the Evidence Act 1872, and is not in itself sufficient for the conviction of the accused. However, confession, and plea of guilt which are in themselves sufficient for the purpose of conviction of the accused owing to their being more important, are being further dealt with separately.

Plea of Guilt should be in the Words used by Accused

Unlike s 252 CrPC does not cast any obligation on the sessions judge to record the plea of the accused as nearly as possible in the words used by the accused, yet prudence demands that the court records the plea in the words used by the accused so that the court confirming conviction and sentence may know what exactly the plea of the accused was.[4]

16. Relevancy and Admissibility of Confession

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.[5] No confession made by any person whilst he is in the custody of the police officer, unless it be made in the immediate presence of a magistrate shall be proved against such person,[6] except the part of such statement of the accused which leads to the discovery of the fact.[7] Otherwise no confession made to a police officer shall be used against a person accused of any offence.[8] The position of a village administrative officer is not different from the police.[9] But a senior reserve police officer appointed under the State Reserve Police Force Act though a police officer under the Bombay Police Act, but since he is not empowered with the power of investigation envisaged in ch 12 of CrPC is not a police officer within the meaning of s 25 of the Evidence Act, so a confession before him by the accused is valid.[10]

17. What is a Confession

'Confession' which is known as a species of 'admission' is to be found contained in ss 24-30 of the Evidence Act 1872.

'Confession' has not been defined in the Evidence Act. Justice Stephen, in his *Digest of the Law of Evidence*, defined it thus: 'A confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed the crime'.2258

This definition was adopted by various High Courts in India.[11] Justice Straight, however, in *Queens Empress v Jagrup* ,[12] did not adopt this definition and held that only those statements which are the direct acknowledgements of guilt could be regarded as 'confessions' and not mere inculpatory admission which may fall short of an admission of guilt. A similar view was taken in *Emperor v Santya Bandit.* [13] The judicial opinion was thus not unanimous as to the exact meaning of 'confession'. The Privy Council, however, by its authoritative pronouncement in *Pakala Narayana Swami v The King-Emperor* ,[14] clarified the position and laid down that a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence.

This was followed by this court in many cases, including *Palvinder Kaur v State of Punjab* ,[15]*Om Prakash v State of Uttar Pradesh* ,[16]*State of Uttar Pradesh v Deoman Upadhyaya.* [17]

In view of these decisions, it is certain that a 'confession' must either be an express acknowledgement of

guilt of the offence charged, certain and complete in itself or it must admit substantially all the facts which constitute the offence.[18] Compelling the accused to be searched does not amount to confession.[19]

18. Confessions before a Magistrate

During the course of an investigation or at any time afterwards before the commencement of the inquiry of trial, the confession may be recorded by any metropolitan magistrate or judicial magistrate under s 164, CrPC . However, a police officer on whom any power of a magistrate has been conferred under any law for the time being in force, is not entitled to record confessional statements.[20] The magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.[21] If at any time before the confession is recorded, the person appearing before the magistrate states that he is not willing to make the confession, and the magistrate shall not authorise the detention of such person in police custody.[22] The magistrate is also required to make a prescribed memorandum at the foot of the record of confessional statement verifying that he has explained to the accused that2259 he was not bound to make a confession and if he does so, then his confessional statement may be used against him and that the confession was made voluntarily by the accused.[23] Certificate/memorandum at foot of confession as one required under s 164(4) is mandatory and non-compliance with requirements of s 164(4) makes confession inadmissible.[24]The act of recording confession under s 164, CrPC being a very solemn act, the magistrate recording the confession must take care that the requirements of s 164(2), CrPC, are fully complied with.[25] The magistrate recording a confession should question the person making it to find out if the confession is being made voluntarily.[26] The questioning of the accused before recording confession as to whether it was voluntary as a matter of substance and not of mere form. A magistrate should ascertain at the beginning of the statement and not at the end whether the confession made is voluntarily.[27] If the questions to judge the voluntary nature of a confessional statement are not put to the accused before recording the confession, the confessional statements so recorded cannot be relied upon despite the fact that the magistrate has given a certificate as required under s 164(4), CrPC .[28]

Confession before Magistrate does not offend Article 21

The rendering of legal assistance, according to the principle of art 21 of the Constitution of India, on the very first day of production of the accused before the magistrate is meant for giving and for offering an opportunity to the accused as to the course he will take in the case as his defence. Section 164 , CrPC, contains a warning to the accused to be given by the magistrate, before making any confessional statement offering time to him for his reflection and to insure that before making such statement whether he was under coercion or duress by the police and or there was any police person within his sight. These are the protective measures. The accused has to be warned by the magistrate that even if he refuses to give any confessional statement he will not be sent to police custody and it will not be taken against him. The special provision under s 164, CrPC, is made by the legislature in its wisdom and the same does not come within the purview of art 21 of the Constitution of India and as such there is no militancy of art 21 and s 164, CrPC .[29]

19. Confession of Co-accused

Section 30, Evidence Act, states that when more persons than one are being tried jointly for the same offence, and a confession made by one of such person is proved, the court may take into consideration such confession as against such other persons as well as against the person who makes such confession.

Section 30 of the Evidence Act appears to be based on the view that an accused who admits his own guilt affords same sort of credibility in support of the truth of his2260 confession against offers as well as himself.[30] The statement of the co-accused must amount to confession and if it is short of that, it cannot be admissible in evidence against the other accused.[31]It is essential that the accused making the confessional statement and the co-accused be tried jointly. Where a joint trial started but could not

continue for long as the son of the accused absconded and the case of the accused was separated, s 30 of the Evidence Act would not be attracted and the statement of the other accused would not be usable against the absconding accused.[32] But, where such accused absconded at the absolute end of the joint trial resulting in separating his trial, his confession can be taken into consideration against the other accused to lend assurance to the conclusion of guilt reached on the basis of other evidence.[33] In case, the accused making the confession dies before pronouncement of judgment in a joint trial, his confession under s 30 of the Evidence Act read with s 32(3) of the same act is relevant.[34] The confession of a co-accused against himself and against other accused in a joint trial is relevant only if they are being tried for the same or identical offence. If the accused persons in the same trial are being tried for different offences, then the confession of the accused is not relevant under s 30 of the Evidence Act . Such a confession can only be taken into consideration by the court but is not in itself a substantive piece of evidence.[35]

A confession made by an accused is not relevant against the co-accused under s 10 of the Evidence Act .[36]

Evidentiary Value of Confession of Co-Accused

The confession of a co-accused is a very weak type of evidence.[37] It does not even come within the definition of 'evidence' contained in s 3 of the Evidence Act .[38]The confession of a co-accused stands on an even lower footing than that of the evidence of an accomplice. It can only be considered against his co-accused. The Evidence Act itself gives it a position inferior to the evidence of an approver.[39] The conviction cannot be based solely on a confession made by a co-accused in the absence of corroboration from independent evidence.[40] Although without corroborative evidence a confession made by an accused cannot be used to convict his co-accused but the accused making a confession can be convicted solely upon his own confession despite the fact that he retracted his confession, provided that the court believes it to2261 be true.[41] The extrajudicial confession has to be proved like any other fact. The value of evidence as to the confession depends upon the veracity of the others to whom it is made and the circumstances in which it came to be made and the actual words used by the accused.[42]

20. Retracted Confession of Accused

After the confession is retracted by the accused, it is not free from suspicion and so cannot be acted upon without corroboration of credible independent evidence.[43] What amount of corroboration[44] is necessary and what is sufficient corroboration has to be decided in each case on its own facts and circumstances.[45] But the rule that a retracted confession cannot be acted upon unless corroborated, is more of prudence than of law.[46] The rule of prudence does not require that each and every circumstance mentioned in the confession with regard to the participation of the person in the crime must be separately and independently corroborated.[47] If the court believes that the retracted confession is voluntary and true, a conviction based upon even uncorroborated retracted confession is not illegal.[48] Where the confession was retracted after lapse of several months and after the closure of prosecution evidence during examination of accused under s 313, CrPC and not at the earliest opportunity, it can be concluded that the confession was voluntary as it militates to some extent against the contention of the accused that the confession was recorded under pressure of the police.[49] But when accused made confessional statement stating that he hit the deceased on head and other parts of the body and this version of the accused was inconsistent with the medical evidence and subsequently, the accused retracted the confession, it was not found safe to rely upon such retracted extra-judicial confession.[50] The legal position with regard to retracted confession can be summed up in the observations made by the Supreme Court in *Shankar v State of Tamil Nadu* ,[51] given below.

Judidal confessions are those which are made before a magistrate or in court in due course of legal proceedings and when such a confession is retracted, the courts have held that apart from the statement being voluntary, it should be true and should receive sufficient corroboration in material particulars by independent evidence. The rule of prudence namely requiring corroboration does not mean that each and every circumstance mentioned in the confession with regard to the participation of the accused in the

crime must be separately and independently corroborated. It is sufficient if there is general corroboration of the important incidents, just like in the case of an approver's evidence and it is not necessary that the corroborative evidence2262 itself should be sufficient for conviction. It may not be necessary to refer to remaining aspects governing the use of retracted confession for the purposes of this case. Suffice it to say that it is also laid down that it is not illegal to base a conviction or an uncorroborated confession of an accused person but as a rule of prudence which has sanctified itself to the rule of law, the courts do look for corroboration before acting upon and accepting the retracted confession and what amount of corroboration would be necessary in a case would be a question of fact to be determined in the light of the circumstances of the case. In *State of Tamil Nadu v Kutty alias Laxmi Narsimhan* ,[52] it was said:

> It is not the law that once a confession was retracted the court should presume that the confession is tainted. As a matter of practical knowledge we can say that non-retracted confession is a rarity in criminal cases. To retract from confession is the right of the confessor and all the accused against whom confessions were produced by the prosecution have invariably adopted that right. It would be injudicious to jettison a judicial confession on the mere premise that its maker has retracted from it. The court has a duty to evaluate the evidence concerning the confession by looking at all aspects. The twin test of a confession is to ascertain whether it was voluntary and true. Once those tests are found to be positive the next endeavour is to see whether there is any other reason which stands in the way of acting on it. Even for that, retraction of the confession it not the ground to throw the confession overboard.

21. Retracted Confession of Co-accused

Retracted confession does not come within the definition of evidence contained in s 3 of the Evidence Act . But, when there is sufficient evidence against co-accused then the confession described under s 30 of the Evidence Act may be thrown into the scale as an additional reason for believing that evidence to support the conviction.[53] A retracted confession is a weak link against the maker and more so against a co-accused.[54] A retracted confession of a co-accused cannot be made the foundation of a conviction though it can be considered against the other accused to be used only in support of other evidence.[55] Although a confession made by an accused cannot be used to convict the co-accused in the same trial in the absence of corroborative evidence, but the accused making it can be convicted solely upon his own confession despite it being retracted provided the court believes it to be true.[56]

Credibility of Retracted Confession

The weight to be attached to a retracted confession must depend upon whether the court thinks that it was induced by the consideration that the confession was untrue, or by realisation on that it had failed to secure the benefits of the hope which inspired it.[57] The amount of credibility to be attached to a retracted confession would depend upon the facts and circumstances of each case. As a matter of prudence and practice, a court would not ordinarily act upon it to convict a co-accused without the strongest and fullest corroboration on material particulars. Corroboration in full sense implies2263 corroboration not only as to the factum of the offence but also as to the connection of the co-accused with that offence.[58]

22. Extra-Judicial Confession

A confession made before a magistrate or in court is a judicial confession. The confessions made before anyone except magistrate or court are extra-judicial confessions. *Sarkar on Evidence*[59] states: 'An extra-judicial confession may properly be made to any person or collection or body of persons. It is not even necessary that the statement should have been addressed to any definite individual...'. Further, an extra judicial confession is a weak form of evidence.[60] Extra judicial confession made by the accused before the Village Administrative Officer is not admissible and thus, cannot be relied upon.[61]

Extra-judicial confessions are not usually considered with favour but that does not mean that such a

confession coming from a person who has no reason to state falsely and circumstances tend to support his statement, should not be disbelieved. An extra-judicial confession made to one who is not a person of authority and which is free from any suspicion as to its voluntary character and has also a ring of truth in it is admissible in evidence against the accused and deserves to be acted upon.[62]

When the contents of extra-judicial confession are disclosed long before to the witnesses but the extra-judicial confession was subsequently recorded inside the police station, the mere fact that the confessions read to the witnesses were later put in black and white in the police station is no reason to cover it with the cloak of inadmissibility.[63] But extra judicial confession made in the presence of the police is not admissible.[64] Though it is admissible if made before a village administrative officer[65] or to a constable or an official of the Rajasthan armed constabulary not vested with power of investigation, before but not in the course of investigation, as s 162, CrPC, would not be attracted.[66]

Extra judicial confession made to the witnesses found not reliable as the accused had no occasion to make extra judicial confession to the witnesses.[67] The three accused respondents were acquitted of the charge under s 302, IPC .

Where the accused was alleged to have made confession to one of his relatives who lodged a complaint with police after a delay of three days, though being a social worker she was with police for two days in connection with some other case, the2264 extra-judicial confession was held surrounded by suspicious circumstances.[68] In charge for rape and murder, extra judicial confession made by the accused to Sarpanch was found not reliable, as the Sarpanch had disclosed the extra-judicial confession to police after 16 days; the conviction of the accused under ss 302 and 376, IPC was set aside.[69]

In a murder case, the extra judicial confession made by the accused to Police Patil was believed and the accused were convicted under s 302 read with s 34, IPC .[70] In a case, the extra judicial confession was made by the accused to a convenient witness to the police as the witness admitted that he had stood bail in a large number of excise cases and that he was running a toddy shop. There was no other evidence to connect the accused with the commission of the offence charged. It was case of no evidence. The accused appellant was acquitted of the charge under s 302, IPC .[71]

Extra-Judicial Confession may be Strong Evidence

Extra-judicial confession can be relied upon and it is not always essential that there should be corroboration, if found:

(i) voluntary;
(ii) reliable;
(iii) without any allegation of inimical terms;
(iv) trustworthy;
(v) unbiased;
(vi) in a natural incidental way;
(vii) showing the accused only as a perpetrator;
(viii) nothing which may militate against him;
(ix) clear and unambiguous inspiring confidence of the court; and
(x) appearing and natural.

In such factual scenario, no research of corroboration is warranted.[72]

The evidence in the form of extra-judicial confession if undergoes successful scrutiny of the aforesaid aspects, can be relied on for the purpose of holding the accused guilty even without other independent corroboration or circumstantial evidence. Corroboration to the extra-judicial confession in all cases is sine qua non is neither just nor reasonable proposition. If extra-judicial confession is found to be unbiased,

untainted coming from the evidence of trustworthy and reliable witness who have stood the test of cross-examination against whom there is no remote suggestion or allegation of inimical terms can be based for holding the accused guilty.[73]

In fact, extra-judicial confession is like any other evidence if proved under s 3 of the Evidence Act . If it is successfully proved by the prosecution that version stated2265 by the witnesses was truthful and voluntary version of the accused referable to incriminating circumstances and his complicity, the same would form basis for conviction. It is not the quantity but quality which matters in evaluating the evidence of prosecution even in case of extra-judicial confession either under s 24 or 30 of the Evidence Act .[74]

There is neither any rule of law nor of prudence that evidence furnished by extra-judicial confession cannot be relied upon unless corroborated by some other credible evidence. The courts have considered the evidence of extra-judicial confession a weak piece of evidence. If the evidence about extra-judicial confession comes from the mouth of witness/witnesses who appear to be unbiased not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous tests on the touchstone of credibility, if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction. It has further been observed that in such a situation to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extra-judicial confession is reliable, trustworthy and beyond reproach, the same can be relied upon a conviction can be founded thereon.[75]

It is required that the evidence of an extra-judicial confession should in all cases be corroborated and where such confession was proved by an independent witness who was a responsible officer and who bore no animus against the accused, there was hardly any justification to disbelieve the same.[76]

23. Plea of Guilty in Capital Cases

A plea of guilty under s 229 of the CrPC,[77] is not a confession. It is a statement which, if accepted by the court, amounts to a waiver of trial on the part of the accused in which case alone it might be utilised in evidence.[78] It is an admission of all the facts, on which the charge is found, as well as an admission of guilt in respect of them. A plea of guilt in a criminal court can only be made in response to a charge and an informal admission as to guilt does not amount to a formal plea of guilty and such admission has not, in fact or in law, the same binding effect as a plea of guilty.[79] It is also not an admission, by an accused, of the guilt under a particular section of the IPC . He does not plead to a section of a criminal statute; he pleads guilty, or not guilty, to the facts alleged to disclose an offence under that section.[80] Similarly, where the facts, mentioned in the police reports, do not, by themselves, constitute an offence, the mere admission of the accused, that the facts2266 mentioned are correct, is not tantamount to a guilty plea.[81] It must be remembered that the plea of guilty does not avail when the offence in question has not been committed in the eyes of law.[82]

Almost all the High Courts of the country have taken the view that the court should not act upon the plea of guilty in a serious offense but should proceed to take the evidence as if the plea had been one of not guilty and should decide the case upon the what evidence including the accused's plea.[83]

It is a settled practice not to accept the plea of guilty in a murder case unless the court is satisfied that the accused knew exactly what was implied by his plea of guilty and its effect.[84] Where, on a trial for murder, the accused was put to some questions, in answer to which he said that he hit the deceased, and the sessions judge, treating the statement as a plea of guilty, convicted the accused of murder, it was held: (a) that it was not in accordance with the usual practice to accept a plea of guilty in a case where the natural consequence would be a sentence of death; and (b) that a man may plead that he hit some one, who thereby died, without necessarily admitting that he committed murder because murder, under the IPC, requires a certain intention or a certain knowledge.[85] But though it is not the usual practice to accept plea

of guilty on a capital charge, it cannot be said that it can never be accepted. There, is no reason why, if proper safeguards are taken, such a plea should not be accepted. Such safeguards must include the accused's representation by counsel, who must be in a position to answer the questions of the court, with respect to the fact as to whether the accused knows what he is doing and the consequences of his plea and also a medical report or medical evidence upon him.[86] Where, in a capital case, there is any doubt as to whether the accused fully understands the meaning and effect of a plea of guilty, it is advisable for the court to take evidence, and not to convict solely on the plea of the accused.[87] Under s 229, CrPC,[88] the court is not bound to convict the accused on his plea of guilty. The court has a discretion to accept, or not to accept, the plea.[89] If an accused pleads guilty, the court ought to satisfy itself that he confesses the full offence charged in the indictment.[90] So, before an accused can be convicted on a plea of guilty, it must be established that he has admitted all the facts, on which his charge is founded, as well as guilt in respect of them. Unless the accused distinctly admits each and every fact necessary to constitute the offence, and unless the judge himself finds, on the admissions made, that the2267 offence charged is legally established, he should record evidence and come to a decision thereon.[91]

Where an accused has pleaded guilty to a charge of murder, conviction of culpable homicide not amounting to murder is illegal.[92]

(IV) ARTICLES RECOVERED AS CASE PROPERTY

24. Discovery of the Deceased's Articles from the Possession of the Accused or at his Instance

Where an accused is found in possession of the ornaments, worn by the deceased at the time of the murder, the question arises as to the inference to be drawn from this circumstance. In this respect, some theories in favour of the accused need be considered and eliminated before drawing an inference of murder against the accused. The first is that it may be that someone merely committed the murder and went away leaving the ornaments. The second is that someone murdered the deceased and stole the property and then entrusted it to the accused. And the third is that the murderer, who robbed the deceased of the ornaments, was himself robbed by someone. After eliminating the possible theories suggested above, the court is entitled, if it appears reasonable in all the circumstances of the case, to infer that the accused committed the murder, or took part in its commission, from the fact that he is found in possession of property proved to have been in possession of the murdered person at the time of murder, or is able to point out the place where such property is concealed and admits having concealed it there and fails to give any reasonable explanation of his possession.[93]

In what circumstances, the presumption under s 114, illust (a), of the Evidence Act, may be drawn depends upon the circumstances, under which the discovery of the fruits of crime is made from a particular accused, the time-gap or the interval and the nature of the property involved, especially in quantity and character, in the context of early or delayed dispensability.[94] So, although the recovery of the articles belonging to the deceased from the possession of the accused raises a suspicion about his complicity in the murder, yet in the absence of any other evidence, it would be unsafe to draw an inference of guilt on a charge of murder and base a conviction thereon. What may be held in such a case is that the accused is guilty of an offence under s 411,[95] or under s 380 .[96] Where, therefore, the only evidence against an accused person is the recovery of stolen property, then even though the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person, in possession of the stolen property was the murderer.2268

Suspicion cannot take the place of proof.[1] In *Bhikha Gober v Emperor* ,[2] it was held that the mere fact, that an accused produced, shortly after the murder, ornaments which were on the murdered person, is not enough to justify the inference that the accused must have committed the murder. There must be some further material to connect the accused with the murder in order to hold him guilty of that offence.

The recovery of articles, which are ordinary articles found in many houses and which have no identifying marks, is held to be hardly of any probative value.[3]

25. In Robbery-cum-Murder Cases Recent and Unexplained Possession of Stolen Property Raises Presumption of Murder as well

When robbery and murder are part of the same transaction and the accused from whom the recovery of stolen properties was made, consequent upon their disclosure statements and they did not offer any explanation regarding their possession of the stolen properties, drawing a presumption under s 114 of Evidence Act, it can solely be held that the accused persons were at least guilty of the offence of robbery punishable under s 392, IPC, on the assumption that they were not armed with any deadly weapon.[4] The recent and unexplained possession of stolen properties will be taken to be presumptive evidence of the charge of murder as well.[5] The presumption permitted to be drawn under illust 114(a) of the Evidence Act has to be read along with 'important time factor'. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of killing may be permitted. The close proximity of the recovery with the murder as 'important time factor' should not be lost sight of.[6]

But in a case of robbery and murder, when the recovery of all the three articles of the victim are found in possession of the accused on the very next day leading to the presumption that the accused committed robbery but death of the victim was found to be caused by drowning, no internal or external injury was found on the person of the deceased though some superficial marks of injuries could not be noticed due to decomposition of the dead body, it was difficult to link the death of the deceased by drowning with the offence of robbery. Thus, the accused persons were found entitled to acquittal under s 302, IPC, but were liable for conviction under s 392, IPC .[7]While drawing presumption under s 114 of the Evidence Act in robbery-cum-murder cases on the basis of recent possession of belongings, of the victim with the accused, the2269 court must adopt a cautions approach and have assurances from all angles that the accused not merely committed theft or robbery but also killed the victim.[8] Thus, where the accused persons removed earrings causing injuries to the deceased and there was every possibility that one of the accused, picked up the stone at that moment and decided to hit the deceased in order to silence or immobilise the victim, if the idea was to murder him and take away the ornaments, there was really no need to forcibly snatch the earrings before putting an end to the victim. When there was no pre-meditated plan to kill the deceased, then two possibilities arose, one common intention of accused persons sprang up and they decided to kill the victim instantaneously for whatever reason, two, one of the accused suddenly got the idea of killing the deceased and in furtherance thereof picking up the stone lying at the spot and hitting the deceased, when there is a reasonable scope for two possibilities and the court is not in a position to know the actual details of the occurrence, it is not safe to extend the presumption under s 114 so as to find the accused persons guilty of the offence of murder with the aid of s 34, IPC .[9]

26. Recovered Articles not immediately Sealed--Effect

Where the recovered articles were not immediately sealed no value can be attached to the said recovery.[10] When the investigating officer did not affix lac seals after effecting recoveries from the accused persons, no evidentiary value can be attached to the said recovery.[11]

27. Discovery of Fact under Section 27, Indian Evidence Act 1872[12]

The essence of s 27, Evidence Act, is that it was enacted as a proviso to the two preceding sections (ss 25 and 26) which imposed a complete ban on the admissibility of any confession made by an accused either to the police or to any one while the accused is in police custody. The object of making a provision in s 27 was to permit a certain portion of the statement made by an accused to a police officer admissible in evidence whether or not such statement is or is not a confessional. Nonetheless, the ban against admissibility would stand lifted if the statement distinctly related to a discovery of fact. A fact can be discovered by the police (investigating officer) pursuant to information elicited from the accused if such disclosure was followed by one or more of a variety of causes. Recovery of an object is only one such cause. Recovery, or even production of object by itself need not necessarily result in discovery of a fact.[13]

That is why Sir John Beaumont said in *Pulikuri Kottaya*[14] that 'it is fallacious to treat the fact discovered in the section as equivalent to the object produced'. The following sentence of the learned law lord in the said decision, though terse, is eloquent in conveying the message highlighting the pith of the ratio.

> Information supplied by the person in custody that 'I will produce a knife concealed in the roof of my house', does not lead to the discovery of a knife; knives were discovered2270 many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant.

The legal proposition adumbrated in *Pulikuri Kottaya* has been considered and tested by the Court, time and again, and on all such occasions, the Court has only reiterated the said principle with approval.[15] The ratio therein *(Kottaya's)* has become *locus classicus* and even the lapse of half-a-century after its pronouncement has not eroded its forensic worth.[16] No doubt in a given case an object could also be a fact, but discovery of a fact cannot be equated with recovery of the object though the latter may help in the final shape of what exactly was the fact discovered pursuant to the information elicited from the accused.[17] Thus, during interrogation by the police when the accused made a statement 'I have kept firearm concealed behind the old house in a heap of wood', the fact discovered by police officer before whom statement is made is certainly not the gun, the fact discovered is that the accused had concealed the gun behind the old house under a heap of wood.[18]

Accused pointing out Place of Concealment of Dead Body or Incriminating Material--Three Possibilities

There are three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself concealed it. Second is that he saw somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities, the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the Court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the Court. Such an interpretation is not inconsistent with the principle embodied in s 27 of the Evidence Act .[19]

28. Blood-stained Articles

The fact that there was human blood on the accused's clothes when he was arrested, may be taken into consideration in determining his guilt in a murder case,[20] but it cannot be regarded as a conclusive piece of evidence.[21] Of course, it is a piece of evidence which goes to support other evidence,[22] but it is impossible to say that mere2271 discovery of a blood-stained article is enough to justify a conviction for murder.[23] The recovery of a blood-stained axe at the instance of the accused is one of the incriminating circumstances against the accused.[24] The plea that as the knife was found from a nearby water pit after about 24 hours, no blood would have remained on it cannot be accepted as the evidence showed that the knife was closed before it was thrown in that water pit.[25] Recovery of a piece of cloth and two shirt buttons found near the body of the deceased on the basis of disclosure statement made by accused 14 days after the incident was not attached importance in case under s 302, IPC . The accused was given benefit of doubt and acquitted.[26] The recovery of the dead body along with a blood-stained *khurpi* from the field of the accused may render his conduct rather suspicious, but suspicion, however strong, cannot take the place of legal proof,[27] and more so when falsehood has been mixed by witnesses in such a manner that it is difficult to separate it from truth[28] though it is another matter when the evidence of identifying witnesses shows that they had sufficient opportunity to mark the features of the accused and their identifications are also corroborated by the recovery of a blood-stained knife and a blood-stained bush shirt at the pointing out of the accused and there is not a shadow of doubt that the accused had committed the dastardly

attack on the deceased.[29] Where a person could not explain as to how his wife was killed or who killed her and not only denied the ownership of clothes but also betrayed ignorance about the stains on his clothes, his conduct was held to be inconsistent with his innocence.[30] In *Kashinath Krishna Jadhav v State of Maharashtra* ,[31] where the clothes of the accused when arrested soon after the occurrence, were found to be stained with blood and the accused was also, soon after the occurrence, seen sitting with a blood-stained knife in his hand in front of the room, in which the dead body of the deceased was lying, conviction of the accused, in the absence of any acceptable explanation, was held proper. Mere presence of blood stains on the shirt of the accused without evidence of blood group is not of any consequence.[32] Where the accused produced a blood-stained sword and said that he had killed the deceased with it, but the prosecution failed to prove that the blood on the sword was human blood, it was presumed that the blood was not human blood and consequently the sword could not be said to have any connection with the crime.[33] It was held, in another case, that, from the mere finding of blood in accused's house, it could not be concluded that the accused either himself committed, or was responsible for the commission of, murder.[34] The fact that no blood was found2272 on the spot is immaterial.[35] There was clear and consistent evidence of the eye-witnesses that the occurrence took place inside the house of the deceased, hence, evidence was not discarded merely because no blood stains were found at the place of occurrence.[36]

The discovery is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter like charge of murder cannot be based upon the discovery. In the instant case, recovery of articles *viz.* blood stained clothes of the deceased and blood stained kuduval offence weapon, was made from open space ten days after the incident. The prosecution did not establish that the house where murder was committed belonged to the accused. The alleged discovery was absolutely farcical. There was also no motive for the murder. The accused was given benefit of doubt and conviction of the accused under s 302, IPC was set aside.[37]

(V) MEDICAL EVIDENCE

29. Medical Evidence--Importance

Medical evidence plays an important role in a murder case. In a criminal case, medical evidence is a very safe yardstick for measuring the veracity of ocular accounts. It corroborates the same, unless it suffers from some inherent improbabilities or intrinsic infirmities, it would ordinarily be accepted by the Court. On the converse, if it is belied by the medical evidence in the absence of some in-built guarantees which demonstrate the truthfulness of the prosecution case, like spot arrest of accused persons, the Court normally would be loath to accept it. Such an approach is founded on the trite law that whereas witnesses may lie, circumstances do not.[38] In cases of ghastly murders where the accused has taken the plea of insanity the medical experts, particularly the professors, should not venture to come and give evidence in a light hearted manner with unconvincing opinions.[39] The value of a medical witness is not merely a check upon the testimony of eyewitnesses; it is also independent testimony because it may establish certain facts, quite apart from the other oral evidence. If a person is shot at close range, the marks of tattooing, found by the medical witness, would show that the range was small, quite apart from any other opinion. Similarly, fractures of bones and depth and size of the wounds would show the nature of the weapon used. It is, therefore, wrong to say that it is only opinion evidence; it is often direct evidence of the facts found upon the victim's person.[40] In firearm injuries, usually the entrance wound is smaller and the exit wound is bigger. Where the exit wound was not only smaller in dimension than the entry wound but was also smaller in dimension than the size of the cartridge, taken out of the revolver, allegedly used for causing injuries, it was held that the injuries were not gunshot injuries. In such cases, it cannot be expected from medical evidence to give any categorical opinion about the character of injuries merely on the basis of their margins or edges.[41] Where the medical officer has not given depth of all the2273 injuries on the person of the deceased, and except injury no. 5 in the post-mortem certificate, none of the injuries seemed to have been deep cut injuries, the inference arose that other injuries, *i.e.*, injuries nos. 1-4 and 6-11 were not serious in nature.[42]

Where the doctor conducting post-mortem categorically stated in his certificate that the exact cause of death cannot be ascribed and preserved his opinion pending result of chemical analysis and in his subsequent report was not able to give definite opinion as to injuries found on the dead body could be ante-mortem or post-mortem, it could not be concluded that death of the deceased can only be homicidal.[43] The mere fact, that the eyewitness had seen the victim being struck with a knife, cannot be held to be inconsistent with the medical evidence showing strangulation as the cause of death when the medical report shows that there were a number of incised wounds in addition to marks of strangulation.[44] It is the duty of the prosecution, and no less of the Court, to see that the weapon of offence, if available, is shown to the medical witness and his opinion invited as to whether all, or any of the injuries on the victim could be caused with that weapon. Failure to do so may, sometimes, cause miscarriage of justice.[45]

Time of Death

Medical science has not achieved such perfection so as to enable a medical practitioner to categorically state in regard to the exact time of death.[46]

30. Doctor's statement only Opinion

A doctor usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post-mortem features which he noticed in the medical report may express his views one way or the other depending upon the manner the question was asked. But the answers given by the witness to such questions need not become the last word on such possibilities. After all, he gives only his opinion regarding such questions. But to discard the testimony of an eyewitness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice.[47]

31. Corpus Delicti

It is a well-settled principle in law that in a trial for murder, it is neither an absolute necessity nor an essential ingredient to establish *corpus delicti*. The fact of the death of the deceased must be established like any other fact. The corpse in some cases may not be possible to be traced or recovered. There are a number of possibilities where a dead body could be disposed of without a trace, therefore, if the recovery of the dead body is to be held to be mandatory to convict an accused, in many a case the accused would manage to see that the dead body is destroyed which would afford the accused complete immunity from being held guilty or from being punished. What is2274 therefore required in law to base a conviction for an offence of murder is that there should be reliable and plausible evidence that the offence of murder like any other factum of death was committed and it must be proved by direct or circumstantial evidence, albeit the dead body may not be traced.[48] In law, a conviction for an offence does not necessarily depend upon the corpse being found. There may be reliable evidence, direct or circumstantial, of the commission of the murder though the corpse is not traceable.[49] Where the prosecution is successful in providing cogent and satisfactory proof of the victim having met a homicidal death, absence of *corpus delicti* will not, by itself, be fatal to a charge of murder.[50] Post-mortem examination on the dead body is not absolutely necessary to prove murder. Even in the absence of the dead body, murder may otherwise be proved by credible evidence.[51] The failure on the part of the prosecution to recover the dead body will not indicate that there was no murder if the other evidence is convincing enough to establish the crime of murder.[52] In a murder case, it is the murder which is the thing to be regarded, and not the finding of the body. Once the Court is satisfied that the murder has been committed and the accused person has committed it, the question of sentence must be determined upon the gravity of the offence irrespective of the circumstances whether the body has, or has not, been discovered.[53] Where the body of the deceased is not found and the factum of death is established by nothing but a retracted confession, the accused should be given the lesser sentence.[54]

The question, whether a man is dead or not, is always a question of fact to be decided on the facts of each case.[55] In the absence of evidence, direct or circumstantial, of the death of the person, who is said to have been killed by the accused, there is no onus upon the accused to account for the disappearance, or non-production, of the person alleged to be dead. Again, the prosecution must further prove that the

accused are the persons who committed the murder charged.[56] Therefore, it is impossible for a court, in a matter of life and death, to leave a gap in2275 the prosecution evidence and to arrive, by a process of speculation, at a conclusion which cannot be justified by evidence.[57]

When it is established that the accused persons after killing the deceased took away the body of the deceased it is for the accused persons to explain, what they did with the dead body of the deceased as s 106 of the Evidence Act[58] would apply as prosecution has succeeded in proving the death of the deceased by the accused person.[59]

Would a person play hoax with the police stating that he had murdered another and had caused disappearance of evidence, when the person allegedly murdered was, in fact, alive? Would accepting these allegations of masochism as true not be credulous? Are not the allegations made against the petitioners of their having given false information to the police that they had committed murder and had caused disappearance of the evidence, so absurd and improbable, on the basis of which no prudent man could ever reach a just conclusion that there was sufficient ground for proceeding against them? The answers thereto can only be in the affirmative. It defies reason that two persons would confess to having murdered their sister/niece, when in fact, she was very much alive. Given alteration in the charge-sheet by the police was only to cover up their earlier lapse in having charged the petitioners of murder and destruction of evidence under ss 302 and 211, IPC . The accused persons are however required to be paid suitable costs, for the harrowing experience they have undergone and the uncalled for misery they had to suffer for no fault of theirs.[60] The *corpus delicti* or the fact of homicidal death can be proved by telling and inculpating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned.[61]

Identity of the Corpse

In one case, overwhelming evidence showed that the dead body on which autopsy was conducted was that of the victim, the sister and nephew of the deceased were sure of the identity of the deceased, the fact that the deceased aged 29 years was shown by novice medical practitioner to be aged 40 years without conducting any medical tests in this regard or the observation of the same doctor that the penis of the dead body had undergone religious circumcision contrary to the report of the senior doctor, a specialist in forensic medicine who conducted the post-mortem but did not find any evidence of such circumcision on the dead boy, are not enough to create doubt as to the identity of the victim.[62] The identification of dead body on the basis of clothes and ornaments cannot be altogether rejected on the ground that the garments such as a saree and blouse are common items which any women would be wearing and there was nothing very special on the basis of which it could be said that the clothes could form a reliable basis. Often there is familiarity particularly within the family with regard to some of the garments which a person wears. When the parents of the deceased on seeing the clothes identified them as belonging to their daughter, there is strong possibility that they are right, but the same could not be said with regard to jewellery worn by the deceased which is a common item in the2276 absence of special distinguishing features.[63] Where the daughter of the deceased identified her mother's body after its recovery from the river on the basis of tattoo marks, and the post-mortem report regarding post-mortem held on the next day of recovery of body showed that there were no tattoo marks or the body, since the report did not suggest that the body when recovered was in a badly decomposed state, identification made by daughter could not be disbelieved.[64]

Corpse found Floating in Water

Medical jurists have warned that in the case of a dead body found floating in water, the medical men, from a mere observance of the external condition of the body, should not jump to the conclusion that the death was from drowning. Only internal examination of the body can reveal symptoms which may indicate with certainty as to whether death was from drowning or from unlawful violence before the body was immersed in water. The fact that the stomach was not filled with water and bloated and no froth was coming out of the mouth of deceased, are important symptoms which go a long way to exclude the possibility of death being as a result of suicide by drowning.[65]

Case of Burning Case--Smell of Kerosene from Deceased even after Three Days--Effect

The doctor who conducted the post-mortem examination, found smell of kerosene emanating from the body of the deceased. If, as put forth by the accused, accidental fire that erupted from the stove, had set the deceased on fire, it is not possible that the body would smell of kerosene even after three days. The incident took place on 27 October 1996, whereas the death occurred on 30 October 1996, and the post-mortem was conducted then. If it was an accidental fire, it is highly impossible that the body would smell of kerosene. The learned counsel for the accused made a feeble attempt to explain it saying that in his attempt to extinguish the fire, the accused might have rolled the deceased on the ground as the result that the kerosene which had fallen on the ground due to toppling of the kerosene can could have percolated the deceased's body. This theory is also not possible since if kerosene had fallen on the ground, that would have caught fire and it is not likely that the appellant, in his attempt to extinguish fire on the body of the deceased would roll her on such fire. Besides, in his written statement submitted under s 313 of the CrPC, nowhere did the appellant mention any such attempt. The smell of kerosene emanating from the body of the deceased is a clear indication that the fire was set only after kerosene was poured on her body.[66]

Burning Case--Doctor's Report Suggesting Suicide

Doctor's opinion that colour or burns was suggestive of suicidal death was a stray observation and could not help accused since it was not the defence of accused that deceased committed suicide.[67] Prosecution case was that the accused husband on account of non-fulfilment of dowry demand poured kerosene oil on the deceased and2277 set her on fire. The dying declaration of the deceased was not free from doubt. The record of the case maintained in the hospital noted that when the doctor examined the deceased she was conscious. The doctor noted that the deceased had stated to have sustained burns around 9 p.m. at her residence. She was given some treatment and referred to the resident medical officer. Here again the doctor noted that the deceased alleged to have sustained burns accidentally at her residence. The acquittal of the accused for offences under ss 302, IPC and 498A, IPC was held proper.[68]

Three types of Contradictions between Medical and Oral Evidence and their Inferences

The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be cases where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witness. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category, no such inference can straightaway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of occular testimony.[69]

1 Substituted by Act 26 of 1955, s 117 and Sch for 'transportation for life' (wef 1-1-1956).

2 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1980) Cr LJ 636 .

3 *Bhashendra v State of Uttar Pradesh* 2005 Cr LJ 2757 (All) .

4 *Anup Singh v State of Uttaranchal* (2005) Cr LJ 3373 (Uttaranchal) (DB) .

5 *Yakub Ismailbhai Patel v State of Gujarat* (2004) Cr LJ 4205 (SC) .

6 *Shyamlal v State of Chhattisgarh* (2006) Cr LJ 4743 (Chattishgarh) (DB) .

7 *Madan Gopal v State* AIR 1955 Pepsu 153, p 155, 56 Cr LJ 1385 .

8 *Ram Singh v State* AIR 1960 All 748, p 751, (1960) Cr LJ 1536 .

9 *Gangu Singh v State* (2005) Cr LJ 1864 (Uttaranchal) (DB) .

10 *Ahmad v Emperor* 14 Cr LJ 275 .

11 *Muzammal v Emperor* 10 Cr LJ 321 ; *Jarap Ali v R* ILR 22 Cal 638 ; *Langar v Emperor* 13 Cr LJ 718 ; *Dhani Ram v Emperor* 14 Cr LJ 104 ; *Fateh Sher v Emperor* 14 Cr LJ 593 .

12 *Bhakua Kampa & ors v State of Orissa* (1996) Cr LJ 350 (Ori) (DB) .

13 *Nakafodi v State* AIR 1958 Ori 113, p 116, (1958) Cr LJ 785 ; *Golla Chenchuramayya v Emperor* AIR 1946 Mad 83, 47 Cr LJ 514 .

14 *Bakhtawar v State of Haryana* AIR 1979 SC 1006, p 1007-1008 ; *Virsa Singh v State of Punjab* AIR 1958 SC 465 ; *State of Andhra Pradesh v Rayavarapu Punnayya* (1977) 1 SCR 601, AIR 1977 SC 45 .

15 Refer to Code of Criminal Procedure 1973, s 222 .

16 Indian Penal Code 1860, s 72 ; *Emperor v Sahel Singh* 3 Cr LJ 364, 26 All WN 93 .

17 *Madho Singh v State of Rajasthan* (2010) 15 SCC 588, p 590 (SC), 2002 (8) JT 305, 2003 (1) Supreme 473, 2003 (2) Crimes 111 (SC) .

18 *Ganga alias Gangadhar Behera v State* (1999) Cr LJ 488 (Ori) (DB) .

19 *Saleem & ors v State of Rajasthan* (1999) Cr LJ 1419 (Raj) (DB) .

20 *State of Uttar Pradesh v Babu Ram* (2000) Cr LJ 2457 (SC)*; R Shaji v State of Kerala* (2013) 14 SCC 266, AIR 2013 SC 651 .

21 *State of Sikkim v Rakesh Rai* 2012 Cr LJ 2737, p 2768 (Sikk) (DB) .

22 *R Shaji v State of Kerala* (2013) 14 SCC 266, AIR 2013 SC 651, [2013] 3 SCR 1172, 2013 (2) Scale 186, 2013 (1) Crimes 217 (SC) ; *Manjeet Singh v State of Rajasthan* (2012) 12 SCC 223 ; *State of Uttar Pradesh v Nahar Singh (dead) & Ors* (1998) Cr LJ 2006 (SC)*; Sarup Singh v State of Punjab* 2005 Cr LJ 4518, AIR 2005 SC 4345, 2005 AIR SCW 5057 ; *Nikhil Soni v State of HP* 2015 Cr LJ 1299 (HP) (DB), III (2015) CCR 387 (HP) .

23 *Kailash Nath v State of UP* 2010 Cr LJ 2822, p 2825 (SC), 2010 AIR SCW 2763, 2010 (3) Scale 612, 2010 (4) All LJ 157 .

24 *State of Rajasthan v Hakam Singh* 2012 Cr LJ 1159, 2011 (6) Scale 568 (SC) .

25 *State of Chhattisgarh v Manoj Suryavanshi* 2014 Cr LJ 345 (Chh) (DB) .

26 Refer to commentary under those sections. **Refer** to *Mahabir Gope v State of Bihar* AIR 1963 SC 118, (1963) 1 Cr LJ 86 .

27 *Narinder Singh & anor v State of Punjab* (2000) Cr LJ 3462 (SC) .

28 *Gajjan Singh & Anor v State of Punjab* (1998) Cr LJ 3609 (SC) ; *Babu v State of Uttar Pradesh* (2000) Cr LJ 4951 (All) (DB) .

29 *Lallan Rai & Ors v State of Bihar* (2002) JT 9 SC 334 .

30 *Sawal Das v State of Bihar* AIR 1974 SC 778, p 782, (1974) Cr LJ 664 ; *Piara Singh v State of Punjab* (1980) SCC 499, p 500 (Cr), (1980) 2 SCC 401 ; *Sudhir Chandra Das v State* AIR 1971 Tri 8, (1971) Cr LJ 86 ; *Ummini Kani Balan Kani v State of Kerala* (1980) Cr LJ (NOC) 166 (Ker) (DB).

31 *Jaladhar Metey v State* (1974) Cr LJ 416, p 417 (Cal) ; *Piara Singh v State of Punjab* (1980) Cr AR 323, p 324 (SC) .

32 *Patai v State of UP* 2010 Cr LJ 2815, p 2818 (SC), AIR 2010 SC 2254, (2010) 4 SCC 429, 2010 (3) Scale 496 .

33 *Murli v State of Rajasthan* 2010 Cr LJ 2228, p 2234 (SC), 2011 AIR SCW 412, (2009) 9 SCC 417 .

34 *State of UP v Sahrunnisa* AIR 2009 SC 3182, 2009 (9) Scale 170, 2009 Cr LJ 4151 (SC) .

35 *Nirmal Singh v State* 2011 Cr LJ 2258, p 2267 (Del) (DB) .

36 *State of Haryana v Satendra* 2014 Cr LJ 4052, p 4058 (SC), (2014) 7 SCC 291 .

37 *Md Abdul Ali v State of Tripura* 2012 Cr LJ 1944, p 1954 (Gauh) (DB) .

38 *Baijnath Mahto v State of Bihar* 2014 Cr LJ (NOC) 180 (Pat) (DB).

39 *Ram Kumar v State of MP* 2014 Cr LJ 3694, p 3697 (SC), (2014) 13 SCC 128, (2014) 140 AIC 61 (SC) .

40 *Baijnath Chullu Kanwar v State of Madhya Pradesh* 2012 Cr LJ (NOC) 514 (Chh) (DB).

41 *Niam v State of Uttrakhand* (2015) 1 SCC 397 (400), 2014 (13) Scale 42, 2014 (10) SLT 204 : 2015 (2) Crimes 173 (SC) .

42 *Krishna Govind Patil v State of Maharashtra* (1964) 1 SCR 678 .

43 *Rajan Rai v State of Bihar* (2006) Cr LJ 163 (SC) .

44 *Mahesh v State of Madhya Pradesh* 2012 Cr LJ 2713 (SC), AIR 2012 SC 2172, 2011 (9) SCC 626 ; **see also***State of Haryana v Shakuntala* 2012 Cr LJ 2850 (SC), AIR 2012 SC 2123, 2012 (4) Scale 526, (2012) 5 SCC 171 .

45 *Rajalingam v State Rep by Inspector of Police* 2012 Cr LJ 3353 (SC), 2012 AIR SCW 3557, (2012) 12 SCC 745 .

46 *Sukhan Raut v State of Bihar* (2002) Cr LJ 560 (SC) .

47 *Rajendra Shantaram Todankar v State of Maharashtra* (2003) 1 AD 612 (SC) .

48 *Probodh Purkait v State of West Bengal* 2007 Cr LJ 2003, p 2007 (SC), 2007 AIR SCW 1944, 2007 (2) 706, 2007 (3) Scale 634 .

49 *Rattiram v State of MP* 2013 Cr LJ 2353 (SC), 2013 AIR SCW 2456, 2013 (6) Scale 155 .

50 *Onkar v State of UP* 2012 Cr LJ 1446, p 1451 (SC), 2012 AIR SCW 998, 2012 (1) Scale 413, 2012 (2) SCC 273 .

51 *Daya Kishan v State of Haryna* 2010 Cr LJ 2886, p 2892 (SC), AIR 2010 SC 2147 .

52 *Ramesh Baburao Devaskar v State of Maharashtra* 2008 Cr LJ 372 (SC), 2007 (12) Scale 272, (2007) 13 SCC 501, **see also***Bija v State of Haryana* 2008 Cr LJ 1051 (SC), I (2008) DMC 223 SC, JT 2008 (1) SC 297, 2008 (1) Scale 311, (2008) 11 SCC 242 .

53 *Munna Chanda v State of Assam* 2006 Cr LJ 1632, p 1635, AIR 2006 SC 3555, (2006) 3 SCC 752 .

54 *Sunil Kumar v State of Rajasthan* 2005 Cr LJ 1402, pp 1406, 1407 (SC), AIR 2005 SC 1096, (2005) 2 JT 1, (2005) 9 SCC 283 .

55 *Nagarjit Ahir v State of Bihar* 2005 Cr LJ 904 (SC), (2005) SCC (Cri) 1530, 2005 (1) Crimes 191 (SC) .

56 Code of Criminal Procedure 1973, s 193 .

57 *Kewal Krishan v Suraj Bhan* AIR 1980 SC 1780, (1980) Cr LJ 1271 ; *Tuneswar Prasad Singh v State of Bihar* (1978) Cr LJ 1020, AIR 1978 Pat 225 (Code of Criminal Procedure 1973, s 209, not limited only to cased instituted on a police report).

58 *Chintamani Par Ida v Jadumani* (1980) 49 Cut LT 519, p 522 .

59 *Mohamed Rafiz Husenmiya Thakar & ors v State of Gujarat* (1997) Cr LJ 759 (SC) .

60 *Pammi alias Brijendra Singh v Govt of Madhya Pradesh* (1998) Cr LJ 1617 (SC) .

61 *Mahabir Singh v State of Haryana* (2001) Cr LJ 3945 (SC) .

62 *State of West Bengal v Mir Mohammad Omar & ors* (2000) Cr LJ 4047 (SC) .

63 *State of West Bengal v Mir Mohammad Omar & ors* (2000) Cr LJ 4047 (SC) ; *Mahabir Singh v State of Haryana* (2001) Cr LJ 3945 (SC) .

64 *Ibid.*

65 *Ramesh Singh v State of AP* (2004) Cr LJ 3354 (AP) (SC) .

66 *Parasa Raja Manikyala Rao v State of AP* (2004) Cr LJ 390 (SC) .

67 *Bhola Bhagat v State of Bihar* (1998) Cr LJ 390 (SC) .

68 Bihar Childrens Act 1982; Juvenile Justice Act 1986.

69 *Ibid.*

70 *Ibid.*

71 *Suresh Dutt v State of Rajasthan* (2003) Cr LJ 3342 (Raj) .

72 *Krishna Bhagwan v State of Bihar* AIR 1989 Pat 217 (FB) .

73 *Krishna Bhagwan v State of Bihar* AIR 1989 Pat 217 (FB) .

74 *Meher Ban & ors v State of Uttar Pradesh* (2000) Cr LJ 4702 (All) (DB) .

75 *State of Haryana v Balwant Singh* (1993) Supp 1 SCC 409 .

76 *Ibid.*

77 *Umesh Singh & anor v State of Bihar* (2000) Cr LJ 3167 (SC) .

78 *Narain and ors v State* (1998) Cr LJ 4158 (All) (DB) .

79 *Chandrashekhar Bind v State of Bihar* (2001) Cr LJ 4693 (SC) .

80 *Chandrika Kumar & ors v State of Bihar* (2002) Cr LJ (NOC) 38 (Pat), (2001) 1 Bihar LJ 614 (DB) ; *Meher Ban & ors v State of Uttar Pradesh* (2000) Cr LJ 4702 (All) (DB) ; *Shama & etc v State of Uttar Pradesh* (2001) Cr LJ 1419 (All) (DB) ; *Umesh Singh & anor v State of Bihar* (2000) Cr LJ 3167 (SC) ; *Jayendra v State of Uttar Pradesh* AIR 1982 SC 685 ; *Bhoopram v State of Uttar Pradesh* AIR 1989 SC 1329, (1989) 3 SCC 1 ; *Gopinath Ghosh v State of West Bengal* AIR 1984 SC 237, 1984 (Supp) SCC 228, 1984 Cr LJ 168 ; *Pradeep Kumar v State of Uttar Pradesh* AIR 1994 SC 104, (1994) Cr LJ 148 ; *Lalit Mohan Ghose & ors v State of Tripura* (1999) Cr LJ 609 (Gau) (DB) ; *Bhola Bhagat v State of Bihar* (1998) Cr LJ 390 (SC), AIR 1998 SC 236 ; *Pran Singh v State of Uttar Pradesh* (2003) Cr LJ 2721 (All) (DB) .

81 *Hari Lal v State* (2001) Cr LJ 695 (All) (DB) ; *Somaru v State of Uttar Pradesh* (2004) Cr LJ 4809 (All) (DB) .

82 For details refer to *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

83 *State v Raghavan Pillai* AIR 1959 Ker 248, (1959) Cr LJ 1074 .

84 Code of Criminal Procedure 1973, s 211, illust (a).

85 *Ram Kumar v State of Madhya Pradesh* AIR 1975 SC 1026, p 1030, (1975) Cr LJ 870 .

86 *State of Bihar v Ramautar Singh* AIR 1956 Pat 10 ; *Kanai Lal Paladi v Emperor* AIR 1948 Cal 274, 49 Cr LJ 449 .

87 *Emperor v Bawa Manghnidas* 11 Cr LJ 731 ; **but see***Sumanta v Emperor* 20 CWN 166 .

88 *Begu v Emperor* AIR 1925 PC 130, 26 Cr LJ 1059 .

89 *Kashmira Singh v State of Madhya Pradesh* AIR 1952 SC 159, (1952) Cr LJ 839 ; *Onkar v State of Madhya Pradesh* (1974) Cr LJ 1200, p 1206 ; *Babu v State* (1972) Cr LJ 815, p 818, (1972) All WR (HC) 105 ; *KK Jadav v State of Gujarat* AIR 1966 SC 821, (1960) Cr LJ 605 ; *Chander Giani v State* AIR 1955 Punj 183, (1958) Cr LJ 689 ; Re *Madugula Jermiah*AIR 1957 AP 611, p 619, (1957) Cr LJ 1071 ; Re *Kaliaperumal*AIR 1954 Mad 1088, (1954) Cr LJ 1768 ; Re *Upputholla Sreenivasulu*AIR 1958 AP 37, (1958) Cr LJ 18 .

90 *Adi Bhumiani v State* AIR 1957 Ori 216, (1957) Cr LJ 1152 .

91 For details refer to s 299, *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

92 *Ibid*.

93 *Enumuh Subbarao v State* (1978) 2 Andh LT 251, p 255-256 .

94 *Kuldip Sham v State of Punjab* (1980) Cr LJ 71, p 78 (Punj) (DB) ; *Daryaosingh v State of Madhya Pradesh* 1981 Cr LR 117, p 119, (MP High Court Notes); *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116 .

1 *Mirza & Ors v State of Uttar Pradesh* 1996 Cr LJ 472 (All) (DB) .

2 *Ibid*.

3 *Siddiaue & ors v State of Uttar Pradesh* (1998) Cr LJ 3829 (All) (DB) ; *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) Cr LJ 472 (SC) .

4 *State of Mizoram v Ramengmawia* (2006) Cr LJ 1188 (Gau) (DB) .

5 Indian Evidence Act 1872, s 24 .

6 *Ibid*, s 26 .

7 *Ibid*, s 27 .

8 Indian Evidence Act 1872, s 25 .

9 *Annamalai v State* (1996) Cr LJ 535 (Mad) (DB) .

10 *State of Gujarat v Anirudha Singh* (1997) Cr LJ 3397 (SC) .

11 *Queen Empress v Babu Lal* (1884) ILR 509, p 539 (FB) ; *Queen Empress v Nana* (1890) ILR 14 Bom 260, p 263 ; *Queen Empress v Meher Ali Mullick* (1888) ILR 15 Cal 589 ; *Emperor v Cunna* (1920) 22 Bom LR 1247, AIR 1920 Bom 270 ; *Imperatrix v Pandharinath* (1881-1882) ILR 6 Bom 34; *Muthukumaraswami Pillai v King Emperor* (1912) ILR 35 397 (Mad) .

12 *Queens Empress v Jagrup* (1885) ILR 7 All 646 .

13 *Emperor v Santya Bandit* (1909) Bom LR 633 .

14 *Pakala Narayana Swami v The King-Emperor* AIR 1952 SC 354, [1953] SCR 94 .

15 *Palvinder Kaur v State of Punjab* (1939) IA 66, AIR 1939 PC 47 .

16 *Om Prakash v State of Uttar Pradesh* AIR 1960 SC 409, p 412 .

17 *State of Uttar Pradesh v Deoman Upadhyaya* AIR 1960 SC 1125, [1961] 1 SCR 14, (1961) 2 SCJ 334, (1960) Cr LJ 1504 .

18 *Sahib Singh v State of Haryana* (1997) Cr LJ 3956 (SC) .

19 *State of Rajasthan v Daulat Ram* 2005 Cr LJ 4117 (SC), AIR 2005 SC 3816, 2006 (1) ALD (Cri) 45, 2005 (102) ECC 139, 2005 (126) ECR 258 (SC), JT 2005 (8) SC 82, RLW 2005 (4) SC 2527, (2005) 7 SCC 36 .

20 Code of Criminal Procedure 1973, s 164(1), proviso.

21 Code of Criminal Procedure 1973, s 164(1), proviso, 164 (2).

22 *Ibid*, 164 (3).

23 *Ibid*, 164 (4).

24 *Murugan v State* (2006) Cr LJ 1085 (Mad) (DB) .

25 *Bobu Singh etc v State of Punjab* (1964) 1 Cr LJ 566, p 571 (SC) ; *Sarwan Singh Rattan Singh v State of Punjab* AIR 1957 SC 637, p 643, (1957) Cr LJ 1014 .

26 *Ibid.*

27 *Maharaj Deen & Anor v State* (1996) Cr LJ 506 (All) (DB) .

28 *Devendra Prasad Tewari v State of Uttar Pradesh* AIR 1978 SC 1544, (1978) Cr LJ 1614 ; *Kohar Singh v State* AIR 1988 SC 1883, (1989) Cr LJ 1 ; *Shanti v State* (1977) Cr LJ 2053 (Ori) (FB) ; *Maharaj Deen & Anor v State* (1996) Cr LJ 506 (All) (DB) ; *Badri Prasad v State of Uttar Pradesh* (1973) Cr LJ 1478 (All) ; *Preetam v State of Madhya Pradesh* (1996) Cr LJ 4458 (SC) .

29 *Dev Dass alias Dawred v State* (1996) Cr LJ 1441 (Cal) (DB) .

30 *Haricharan Kurmi v State of Bihar* AIR 1964 SC 1184, p 1190, (1964) 2 Cr LJ 344 .

31 *Bhuboni Sahu v The King* AIR 1949 PC 257, p 260, (1950) Cr LJ 872 .

32 *Sudhir Chandra Das & ors v State* AIR 1971 Tri 8, p 12, (1971) Cr LJ 86 ; *Asst Collector of Customs v Harbans Lal Sharaf* (1980) Cr LJ 618, p 630 (Del) (DB) .

33 *Ramashish Rai & ors v State of Bihar* (1989) Cr LJ 336, p 356 (Pat) .

34 *Haroom Haji Abdulla v State of Maharashtra* AIR 1968 SC 832, p 835 .

35 *Ram Chandra & anor v State of Uttar Pradesh* AIR 1957 SC 381, p 388, (1957) Cr LJ 559 ; *Haricharan Kurmi v State of Bihar* AIR 1964 SC 1184, (1964) 2 Cr LJ 344 .

36 *State (NCT of Delhi) v Navjot Sandh* 2005 Cr LJ 3950 (SC) .

37 *Chandraiahgari Anantharedd i & ors v State of Andhra Pradesh* (1996) Cr LJ 2108 (DB) ; *State of Punjab v Bhajan Singh* (1975) Cr LJ 282, AIR 1975 SC 258 *; Prakash Kumar v State of Gujarat* 2007 Cr LJ 2731 (SC), (2007) 4 SCC 266 ; *Harcharan Kurmi v State of Bihar* 1964 (6) SCR 623, AIR 1964 SC 1184, 1964 Cr LJ 344 .

38 *Bubani Sahu v The King* AIR 1949 PC 257, (1950) Cr LJ 872 ; *Haroon Hazi Abdulla v State of Maharashtra* AIR 1968 SC 832, p 837 .

39 *Kashmira Singh v State of Madhya Pradesh* AIR 1952 SC 159, (1952) Cr LJ 839 ; *Nathu v State of Madhya Pradesh* AIR 1956 SC 56, (1956) Cr LJ 152 .

40 *Haricharan Kurmi v State of Bihar* AIR 1964 SC 1184, (1964) 2 Cr LJ 344 ; *Bhuboni Sahu v King* AIR 1949 PC 257, p 260, (1950) Cr LJ 872 .

41 *Kehar Singh & ors v State (Delhi Admn)* AIR 1988 SC 1883, (1989) Cr LJ 1441 .

42 *Kishor Chand v State of Himachal Pradesh* AIR 1990 SC 2140, (1990) Cr LJ 2289 .

43 (1963) 2 Cr LJ 702, p 704 (SC).

44 *Darbari Kumar v State* AIR 1970 Ori 54, p 55, (1970) Cr LJ 580 (DB) .

45 *PK Singh v State of Manipur* AIR 1956 SC 9, p 11, 1956 Cr LJ 126 ; *Sarwan Singh Rattan Singh v State of Punjab* AIR 1957 SC 637, p 643, (1957) Cr LJ 1014 .

46 *Sarwan Singh Rattan Singh v State of Punjab* AIR 1957 SC 637, p 643, (1957) Cr LJ 1014 ; *Ramchandra & ors v State of Uttar Pradesh* AIR 1957 SC 381, p 387, (1957) Cr LJ 559 .

47 *Balbir Singh v State of Punjab* AIR 1957 SC 216, p 225, (1957) Cr LJ 481 .

48 *RCP Sharma & ors v State of Bihar* AIR 1967 SC 349, p 352, (1967) CR LJ 409 ; *Ram Chandra & anor v State of Uttar Pradesh* AIR 1957 SC 381, p 387, (1957) Cr LJ 559 .

49 *Shankaria v State of Rajasthan* AIR 1978 SC 1248, p 1258, (1978) Cr LJ 1251 ; *Dev Dass alias Daweed v State* (1996) Cr LJ 1441 (Cal) (DB) .

50 *Chhittar v State of Rajasthan* AIR 1994 SC 214, (1994) Cr LJ 245 .

51 *Shankar v State of Tamil Nadu* (1994) Cr LJ 3071, (1994) JT 3 SC 54 .

52 *State of Tamil Nadu v Kutty alias Laxmi Narsimhan* (2001) Cr LJ 4168 (SC) .

53 *Rattan Lal & ors v State* AIR 1955 Punj 11, (1955) Cr LJ 373 (DB), (1979) ILR (2) Del 571, p 643 (DB) .

54 *Haroom Haji Abdulla v State of Maharashtra* AIR 1968 SC 832, p 837 .

55 *Mohd Hussain Umar Kochra etc v KS Dalipsinghji & anor* AIR 1970 SC 45, p 56, (1970) Cr LJ 9 ; *Mohan Wahi v State* (1982) Cr LJ 2040, p 2043, (1982) 22 DLT 139 .

56 *Kehar Singh & ors v State (Delhi Admn)* AIR 1958 SC 1883, (1989) Cr LJ 1, p 44 .

57 *Bubani Sahu v The King* AIR 1949 PC 257, (1950) Cr LJ 872 .

58 *Ram Prakash v State of Punjab* AIR 1959 SC 1, p 3, (1959) Cr LJ 890 ; *Thakur Ram & anor v State of Nagaland* (1978) Cr LJ (NOC) 91 (DB) ; *State of Assam v Upadra Nath Rajkhowa* (1975) Cr LJ 354, p 408 (Gau) (DB) .

59 *Sarkar on Evidence*, fourteenth edn, 1993, p 309 as quoted in *Luku Paike v State of Orissa* (1895) Cr LJ 1207 (Ori) (DB) .

60 *Tejinder Singh (Kaka) v State of Punjab* 2013 (2) Crimes 159, p 161 (SC), (2013) 12 SCC 503, 2013 (6) JT 585, 2013 (5) Scale 553, 2013 Cr LJ 3130 .

61 *Sivakumar v State by Inspector of Police* 2006 Cr LJ 536, p 542 (SC) .

62 *Pulin Haldhar v State* (1996) Cr LJ 513 (Cal) (DB) .

63 *State of Andhra Pradesh v Gangula Satya Murthy* (1997) Cr LJ 774 (SC) .

64 *Dharani Pradhan v State* (1997) Cr LJ 2973 (Ori) (DB)*; Balappa v State of Karnataka* 2005 Cr LJ 2346 (Kant) .

65 *Pakkirisamy v State of Tamil Nadu* (1998) Cr LJ 89 (SC) .

66 *Ramesh Kumar v State of Rajasthan* (1998) Cr LJ 871 (Raj) (DB) .

67 *State of Rajasthan v Chhote Lal* 2012 Cr LJ 1214, p 1216 (SC), 2011 (6) Scale 526, 2013 (1) ALD (Cri) 835, (2011) 14 SCC 303 .

68 *Balwinder Singh v State of Punjab* (1996) Cr LJ 883 (SC) .

69 *Tejinder Singh v State of Punjab* 2013 Cr LJ 3130 (SC), 2013 AIR SCW 3289, 2013 (5) Scale 553, (2013) 12 SCC 503 .

70 *State of Maharashtra v Arjun Dattaram Bhekare* 2005 Cr LJ 472, p 481 (Bom) (DB) .

71 *Manthur Laxmi Narasaiah v State of AP* 2012 Cr LJ 2172 (SC), 2010 AIR SCW 2234, (2011) 14 SCC A117.

72 *Jayeshkumar Parshottamdas Valand v State of Gujarat* (1998) Cr LJ 4260 (Guj) (DB) .

73 *Jayeshkumar Parshottamdas Valand v State of Gujarat* (1998) Cr LJ 4260 (Guj) (DB) .

74 *Ibid.*

75 *State of Uttar Pradesh v MK Anthony* AIR 1985 SC 48, (1985) Cr LJ 493 (SC) .

76 *Vinayak Shivajirao Pol v State of Maharashtra* (1998) 2 SCC 233, (1998) Cr LJ 1558 ; *State of Maharashtra v Vilas Pandurang Patil* (1999) Cr LJ 1062 (Bom) (DB) .

77 For details refer to s 299 in *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

78 *Shyama Charan v Emperor* (1934) Pat 330, 35 Cr LJ 1323 .

79 *Haobijam Chaoyaina Singh v Heisnam Mangi Singh* (1967) Cr LJ 144 ; *New Raginaya Goods Mart v State* AIR 1960 J&K 108, (1960) Cr LJ 1085 .

80 *AJ Anand v State* AIR 1960 J&K 139, p 141, (1960) Cr LJ 1453 .

81 *Ghulam Mohd Dar v State* AIR 1960 J&K 106, (1960) Cr LJ 1083 ; *State of Mysore v Bantra Kunjanna* AIR 1960 Mys 177, (1960) Cr LJ 165 .

82 *Budha Mal v Emperor* AIR 1928 Lah 825 .

83 *Ram Kumar v State of Uttar Pradesh* (1998) Cr LJ 1267 (All) (DB) .

84 *Vishwanath Ganpat Marathe v Emperor* 46 Cr LJ 357 ; *Nga Kyaw Zan Hla v Emperor* 17 Cr LJ 402 ; *Achar Sanghar v Emperor* AIR 1934 Sind 204 ; Re *Sundararuju*(1964) 1 Cr LJ 457 (Mad).

85 *Emperor v Chinia Bika Koli* 5 Bom LR 240 .

86 *Emperor v Abdul Kadeer Allarakhia* AIR 1947 Bom 345, p 348 (SB), 48 Cr LJ 329 ; Re *Gavisiddappa*AIR 1968 Mys 145, (1968) Cr LJ 762 .

87 *Empress v Bhadu* ILR 19 All 119 ; *Pala Singh v Emperor* 59 PR 1905 ; *Emperor v Laxmaya* 19 Bom LR 356 .

88 For details, refer to *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

89 *Basaruddin Mohammad v Emperor* AIR 1928 Cal 775 ; *Achar Sanghar v Emperor* AIR 1934 Sind 204 ; Re *Nallayee*(1961) 1 Mad LJ 333, (1961) 2 Cr LJ 581.

90 *R v Golathan GCA* 11 Cr Ap R 79.

91 *Haobijam Chaoyaina Singh v Heisnam Mangi Singh* (1957) Cr LJ 144 ; *New Raginaya Goods Mart v State* AIR 1960 J&K 108, (1960) Cr LJ 1085 .

92 *Emperor v Watu* 10 Cr LJ 5 ; *Gurrapua Marigadu* 1 Weir 336.

93 *Chavadappa Pujari v Emperor* AIR 1945 Bom 292 ; *Kanbi Babu v State* AIR 1955 Sau 93, 50 Cr LJ 1522 .

94 *State of Mysore v Narasingadu* (1973) 2 Mys LJ 348, (1973) Mad LJ 623 (Cr) .

95 *Onkar v State of Madhya Pradesh* (1974) Cr LJ 1200, p 1208 ; *Nagappa Kalal v State of Karnataka* AIR 1980 SC 1753, p 1754 .

96 *Hari Ram v State* (1972) Cr LJ 961 (J&K), AIR 1972 J&K LJ 64.

1 *Sunwat Khan v State of Rajasthan* AIR 1956 SC 54, p 56 ; *Mirsa v Emperor* 27 Cr LJ 993 ; *Moyila Kurmiah v Emperor* 14 Cr LJ 49 ; *Bhikha Gober v Emperor* AIR 1943 Bom 458 ; Re *Singaram*AIR 1954 Mad 152, 55 Cr LJ 115 ; *State v Shankar Prasad* AIR 1952 All 776, 53 Cr LJ 1585 ; *Fakirchand v State* AIR 1955 MB 119 (FB), 56 Cr LJ 1073; Re *Basappa*AIR 1951 Mys 1, 51 Cr LJ 1603 ; Re *Shivanna*AIR 1955 Mys 17, 56 Cr LJ 360 .

2 *Bhikha Gober v Emperor* AIR 1943 Bom 458 ; *State v Shankar Prasad* AIR 1952 All 776 ; *State v Moti* AIR 1955 Raj 82 ; Re *Singaram*AIR 1954 Mad 152 ; *Palam v State* (1973) KLT 886, (1973) Mad LJ 602 .

3 *Caetano Piedade Fernandes v Union Territory of Goa* (1977) Cr LJ 167, AIR 1977 SC 135 ; *Pratapsingh v State of Madhya Pradesh* (1971) Cr LJ 172, (1970) Jab LJ 797, wherein there was no evidence that the blood-stained clothes belonged to the accused.

4 *Sanjay alias Kaka v State (NCT of Delhi)* (2001) Cr LJ 1231 (SC) .

5 *Sanjay alias Kaka v State (NCT of Delhi)* (2001) Cr LJ 1231 (SC) ; *Baijur v State of Madhya Pradesh* AIR 1978 SC 522, (1978) Cr LJ 646 (SC) ; *Eara Bhadarappa v State of Karnataka* AIR 1983 SC 446, (1983) Cr LJ 846 (SC) .

6 *Tulsiram v State* AIR 1954 SC 1, (1954) Cr LJ 225 ; *Gulab Chand v State of Madhya Pradesh* AIR 1995 SC 1598, (1995) 3 SCC 574, AIR 1995 SCW 2504 .

7 *George v State of Kerala* (2002) Cr LJ 2031 (SC) .

8 *Lambaji & ors v State of Maharashtra* (2002) Cr LJ 590 (SC) .

9 *Lambaji & Ors v State of Maharashtra* (2002) Cr LJ 590 (SC) .

10 *State of Maharashtra v Prabhu Barku Cade* (1995) Cr LJ 1432 (Bom) ; *Amarjit Singh v State of Punjab* (1992) Cr LJ 3858 (SC), (1993) 4 CCR 486 (SC) ; *State v Motia* AIR 1955 Raj 82, (1955) Cr LJ 835 .

11 *Tulshiram Bhanudas Kumble & ors v State of Maharashtra* (2000) Cr LJ 1566 (Bom) (DB) .

12 For details refer to *Woodroffe and Ali, The Law of Evidence*, Lexisnexis Butterworths, New Delhi.

13 *Pandurang Kalu Patil v State of Maharashtra* (2002) Cr LJ 1007 (SC) .

14 *Pulikuri Kottaya v Emperor* AIR 1947 PC 67, 48 Cr LJ 533 (PC) .

15 *Jallar Hussain Dastagir v State of Maharashtra* (1969) 2 SCC 872, AIR 1970 SC 1788, (1983) 2 SCC 330, (1995) 4 SCC 392 ; *Shamshul Kanwar v State of Uttar Pradesh* (1995) 4 SCC 430 ; *State of Rajasthan v Bhup Singh* (1997) 10 SCC 675 .

16 *State of Rajasthan v Bhup Singh* (1997) 10 SCC 675 .

17 *Pandurang Kalu Patil v State of Maharashtra* (2002) Cr LJ 1007 (SC) .

18 *Ayan Ali v Emperor* AIR 1929 All 710, p 717 .

19 *Sonti Venkataiah v State of AP* (2005) Cr LJ 3507 (AP) (DB) .

20 *Mangal Singh v Emperor* AIR 1937 PC 179 ; *Shaligram v Emperor* AIR 1938 Nag 52, p 53 ; *Terugu v Emperor* AIR 1936 Rang 468 ; *Azad Singh v State of Madhya Pradesh* (1999) Cr LJ 4816 (MP) (DB) ; *Baharan Bibi & anor v State of Assam* (2002) Cr LJ 2323 (Gau) (DB) .

21 *Namdeo Daulata Dhavagude v State of Maharashtra* (1977) Cr LJ 238, p 242, AIR 1977 SC 381 ; *Masang Kisku v State of Orissa* (2001) Cr LJ 1633 (Ori) (DB) .

22 *Namdeo Daulata Dhavagude v State of Maharashtra* AIR 1977 SC 381, (1977) Cr LJ 238, p 242 ; *Phoolsie v State of Madhya Pradesh* (1998) Cr LJ 3931 (MP) (DB) ; *Sandeep v State of Haryana* (2001) Cr LJ 1456 (SC) .

23 *State v Sardara Singh* (1970) Cr LJ 558 ; *Sohan Lal v State of Uttar Pradesh* AIR 1971 SC 2064, p 2067, (1971) Cr LJ 1458 ; *State v Motia* AIR 1955 Raj 82, p 84 .

24 *Nanav State of Maharashtra*(1999) Cr LJ 4632 (Bom) (DB).

25 *Mahipal alias Mahaveer Singh v State of Rajasthan* (1998) Cr LJ 1257 (SC) .

26 *State of Andhra Pradesh v Patnam Anandam* 2005 Cr LJ 894 (SC), AIR 2005 SC 764, JT 2005 (11) SC 461, 2005 (1) Scale 4, (2005) 9 SCC 237 .

27 *Gopal v State* (1977) Cr LJ 358, (1977) All Cr C 63 ; Re *Periyaswami Thevan*AIR 1950 Mad 714 ; *State v Yusuf Dar* (1973) Cr LJ 955, p 960 (J&K); *Mutteppa Dhareppa Chigadolli State of Karnataka*(1980) Cr LJ 1065 (Kant) (DB); *Narasimbhai Naribhal Prajapati v Chhatrasinh & ors* AIR 1977 SC 1753, (1977) Cr LJ 1144 .

28 *Kaliya v State of Rajasthan* (1977) Cr LJ 74, p 78, (1976) Raj LW 154 .

29 *Ramesh Ramdas Teli v State of Maharashtra* AIR 1976 SC 345, p 347, (1976) Cr LJ 310 ; *Govindasami v State of Tamil Nadu* (1998) Cr LJ 2913 (SC) .

30 *Paras Ram v State of Himachal Pradesh* (1973) Cr LJ 428, p 433, (1972) 74 PLR (D) 157 .

31 *Kashinath Krishna Jadhav v State of Maharashtra* AIR 1973 SC 1219, p 1222, (1973) Cr LJ 989 .

32 *Kausa Behera v State of Orissa* AIR 1987 SC 1507, (1981) Cr LJ 1857 ; *Shyamlal v State of Madhya Pradesh* 2002) Cr LJ 344 (MP) (DR).

33 *Nojali v Sarkar* AIR 1950 Raj 5 .

34 *Sarjug Mahton v State* (1970) BLJR 385 .

35 *State of Rajasthan v Salyanarayan* (1998) Cr LJ 2911 (SC) .

36 *Nirmal Singh v State of Bihar* 2005 Cr LJ 672 (SC), (2005) 9 SCC 725, 2005 (1) Crimes 68 (SC) .

37 *Mani v State of Tamil Nadu* 2008 Cr LJ 1046, p 1050 (SC), AIR 2008 SC 1021, 2008 (1) Scale 126 .

38 *Shankar Shridhar Kavale & ors v State of Maharashtra* (1998) Cr LJ 4491 (Bom) (DB) .

39 *Shaik Ahmed v State of Madhya Pradesh* (1996) Cr LJ 2582 (AP) (DB) .

40 *Nagindra Bala v Sunil Chandra Roy* AIR 1960 SC 706, p 721, (1960) Cr LJ 1020 ; *Sunil Chandra Roy v State* AIR 1954 Cal 305, (1954) 55 Cr LJ 805 ; *Vishwanath & ors v State of Uttar Pradesh* (1991) Cr LJ 3076 .

41 *Salim Zia v State of Uttar Pradesh* AIR 1979 SC 391, p 395 .

42 *State of Karnataka v Siddappa Basanagauda Patil & anor* (1990) Cr LJ 1116 (SC), AIR 1990 SC 1047 .

43 *CK Ravoendran v State of Kerala* (2000) Cr LJ 497 (SC) .

44 *Jahamman v State of Uttar Pradesh* AIR 1975 SC 1083, p 1085, (1975) Cr LJ 926 .

45 *Kartarey v State of Uttar Pradesh* AIR 1976 SC 76, p 80, 81, (1976) Cr LJ 13 ; *Ishwar Singh v State of Uttar Pradesh* AIR 1976 SC 2423, p 2428, (1976) Cr LJ 1883 .

46 *Ramjee Rai v State of Bihar* 2006 Cr LJ 4630, p 4636, 4637, 2006 (4) Crimes 225, 2006 (8) Scale 440 .

47 *Ram Swaroop v State of Rajasthan* 2008 Cr LJ 2259 (SC), AIR 2008 SC 1747 .

48 *Mani Kumar Thapa v State of Sikkim* (2002) Cr LJ 4069 (SC)*; Rishipal v State of Uttrakhand* 2013 Cr LJ 1534, (2013) 1 Scale 609, (2012) 1 SCC 10 .

49 *State v Sardara* (1974) Cr LJ 43, p 46-47, (1973) Raj LW 290 ; *Ram Chandra v State of Uttar Pradesh* AIR 1957 SC 381 ; *Queen v Poorusoollan Sikhdar* 7 Suth WR 14 (Cr) ; Re *Puttawwa*AIR 1959 Mys 116, (1959) Cr LJ 617 ; *State of Orissa v Kaushalya Dei* 73 CWN 467 ; *Anant Chintuman Lagu v State of Bombay* AIR 1960 SC 500, (1960) Cr LJ 682 ; *Raj Bahadur alias Demy & anor v State* (1996) Cr LJ 2364 (Del) (DB) ; *Prithi v State of Haryana* (2010) 8 SCC 536, (2010) 3 SCC (Cri) 960 .

50 *Rishi Pal v State of Uttarakhand* 2013 Cr LJ 1534, p 1537 (SC), 2013 AIR SCW 1167, (2013) 1 Scale 609 ; *Ram Chandra & Ram Bharosey v State Uttar Pradesh* AIR 1957 SC 381, 1957 Cr LJ 599 ; *State of Karnataka v MV Mahesh* (2003) 3 SCC 353, 2003 (2) Scale 553, 2003 (2) Supreme 450, 2003 SCC (Cr) 795, 2003 (1) Crimes 459 (SC) .

51 *Majee Taha v State* (1973) Cr LJ 526, p 532 ; *Ramanand v State of Himachal Pradesh* (1981) Cr LJ 298, p 305-06 (SC), (1981) 1 SCC 511 (if dead body is not traceable, murder may be proved by other satisfactory evidence, whether direct or indirect. If murder is sought to be proved by circumstantial evidence, circumstances must be of a clinching and definite character unerringly leading to the inference that the victim has met a homicidal death).

52 *Brijesh Kumar v State* AIR 1958 All 514, p 520 ; *State v Amrit Lal* (1968) AWR (HC) 805 ; *Empress of India v Bhagirath* ILR 3 All 383, p 384 ; *Sevaka Perumal v State of Tamil Nadu* AIR 1991 SC 1463, (1991) Cr LJ 1845 (SC) .

53 *Raggha v Emperor* AIR 1925 All 627, 26 Cr LJ 1431 (FB) ; *Ram Nath v Emperor* AIR 1926 Oudh 234, 27 Cr LJ 460 ; *Munda v Emperor* AIR 1931 Lah 25, 32 Cr LJ 493 ; *Rajkumar Singh v Emperor* AIR 1928 Pat 473, 29 Cr LJ 913 ; *Empress of India v Bhogirath* ILR 3 All 383 .

54 *Queen v Budduruddeen* 11 WR 20 (Cr) .

55 *Bhairon Lal v State* (1953) Cr LJ 1038, p 1040 .

56 *Jagdish Singh v State of Madhya Pradesh* (1980) Cr LR 410, p 424-25 (MP) (DB) .

57 *Azam Ali v Emperor* AIR 1929 All 710, p 717 .

58 For details see *Woodroffe and Ali on Law of Evidence,* Lexis Nexis Butterworths, New Delhi.

59 *Ram Gulam Chandhury & ors v State of Bihar* (2001) Cr LJ 4632 (SC) .

60 *Peruboyina Sathyanarayana v State of AP* 2006 Cr LJ 3027 (AP) .

61 *Shakti Singh v State of Rajasthan* 2006 Cr LJ 3017 (Raj) (DB) .

62 *State of West Bengal v Mir Mohammad Omer & ors* 2000 Cr LJ 4047 (SC) .

63 *Suresh v State of Karnataka* 2002 Cr LJ 3273 (Kant) (DB) .

64 *Shankar Mahato v State of Bihar* (2002) Cr LJ 3775 (SC) .

65 *Kodali Puranchandra Rao v Public Prosecutor* AIR 1975 SC 1925, pp 1931, 1933, (1975) Cr LJ 1671 .

66 *Prakasha v State of Karnataka* (2005) Cr LJ 1106 (Kant) (DB) .

67 *S Shakunthala v State of AP* (2004) Cr LJ 2906 (AP) (DB) .

68 *State of AP v Guvva Satyanarayana* 2009 Cr LJ 376, p 378 (SC), 2008 AIR SCW 6990, AIR 2009 SC 101, II (2008) DMC 755 SC, JT 2008 (10) SC 515, 2008 (12) Scale 808, (2008) 12 SCC 692 .

69 *Thaman Kumar v State of Union Territory of Chandigarh* AIR 2003 SC 3975, 2003 Cr LJ 3070, JT 2003 (4) SC 478, 2003 (4) Scale 531, (2003) 6 SCC 380 ; *Amar Lal v State of Madhya Pradesh* (2007) Cr LJ 230 (MP) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 302.

Punishment for murder.--

32. Contradiction between Medical Evidence and Oral Evidence--Accused may be Entitled to Acquittal

Whenever there is a conflict between medical evidence and ocular testimony, normally ocular testimony should be preferred unless it belies fundamental facts.[70] If, in the light of the medical evidence, it is difficult to accept the prosecution case as alleged, and the defence version is not false altogether, it is unsafe to maintain the conviction.[71] It is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case, the Court has to draw adverse inference.[72] It is very important for the prosecution that the medical evidence with regard to type of weapon used by the accused and the nature of injuries sustained by the victim is corroborated with the2278 statement of the eyewitnesses in this regard. The contradictory occular and medical evidence may be fatal to the prosecution case, leading to acquittal of the accused.[73] Following are the instances of types of contradictions between the ocular and medical evidence which were one of the major factors in the acquittal of the accused.

(i) An eyewitness stated that the accused assaulted the deceased with a pronged weapon *(jalia)* but the medical witness categorically opened that injuries 1, 2 and 9 on the body of the deceased could have been caused by *gandasi*.[74]

(ii) The prosecution case is that the accused inflicted the injury only once and that too for from behind by way of a single blow with *jalia* but the medical evidence clearly indicates that three incised wounds were inflicted upon the deceased, one on the nape of neck, another on the left side of mandible and third on the left side of the elbow joint.[75]

(iii) The ocular evidence is that the deceased was attacked not by *kassi* but by spade but the doctor who held the autopsy clearly stated that the injuries could be caused only by a *kassi*

(pickaxe).[76]

(iv) In the opinion of the doctor, the person who caused injuries to the deceased was at a higher level than the deceased, which was wholly inconsistent with the testimony of eyewitnesses.[77]

(v) The prosecution case was that accused gave *lathi* blow over forehead of the deceased but the doctor did not find any head injury on the body of the deceased during post-mortem examination, further the doctor did not find any undigested food material in the abdominal cavity of the deceased making statement of eyewitnesses regarding time of death, contradictory.[78]

(vi) According to prosecution witnesses the deceased was allegedly beaten by all the accused with *lathi*, medical evidence supported the possibility that the fatal head injury could be caused when the head of the accused could have struck a stone on account of fall on the ground.[79]

(vii) Eyewitnesses stated that the accused persons grappled with the deceased who fell down but the doctor who conducted postmortem on body of the deceased did not find any mark or ligature around the neck or any mark of injury on the body and opined clearly that cause of death was asphyxia due to drowning,[80] where the eyewitnesses state that the only injury on the person of the deceased was the result of three separate blows but medical evidence showed that it was extremely improbable that the injury was caused even by two simultaneous blows.[81]2279

(viii) Medical evidence showed injuries to be caused by knife whereas eyewitnesses stated that the main accused had a *pharsa* battle axe in his hand and the other accused did not cause any injuries.[82]

(ix) The medical evidence shows that death of victim was due to the effect of endrin poisoning but prosecution evidence did not show that victim was forced to take endrin by the accused.[83]

(x) Eyewitnesses stated that the deceased and injured were assaulted with sharp cutting weapons but evidence of doctor who conducted post-mortem examination showed that the deceased had no injury which could not have been caused by a sharp-cutting weapon and he had sustained only one injury which could have been caused, according to the doctor, by a blunt weapon only.[84]

(xi) The eyewitness stated that the deceased was given 10/15 *tamba* blows and also was strangulated, but the medical expert did not find any injury on the neck or on other parts of the body except two injuries on the head and also did not find any evidence of strangulation and there were other infirmities also in prosecution case.[85]

(xii) The medical evidence clearly indicates that three incised wounds were inflicted on the body of the deceased but evidence of eyewitness, shows that the accused had inflicted injury only once by a single blow.[86]

(xiii) The doctor who held the post-mortem examination states in his evidence that during autopsy partly digested food material was found in the stomach of the deceased but the evidence of the eyewitnesses state that the deceased took his food alongwith them, just before he was killed.[87]

(xiv) From the evidence of doctor it appears that except one injury all the injuries were caused by sharp cutting weapon, but from the evidence of eyewitness, even a whisper could not be found that the accused had any sharp cutting weapon capable of inflicting incised wounds or that they had any weapon except a dagger/knife which normally can cause puncture wounds.[88]

(xv) The medical evidence depicts three injuries on the person of deceased while according to ocular evidence only one blow was struck on the person of the deceased.[89]

(xvi) The only eyewitness states infliction of many injuries by accused but doctor states that the deceased sustained only one anti-mortem injury.[90]

(xvii) According to the medical evidence, the victim died within moments of receiving the injuries whereas according to the ocular version of the2280 prosecution witnesses, there was gap of about nine hours between the receipt of injuries and death.[91]

(xviii) The evidence of eyewitnesses was that the accused assaulted the deceased on face,

thighs and stomach but post-mortem report belied the said evidence.[92]

(xix) The specific evidence of eyewitnesses is that the accused gave a single hit on the head of the deceased but the medical evidence showed that there were several injuries but no injury on the back of the head though the injuries were on the left side occipital region, right-parietal region and right temporal region.[93]

(xx) The eyewitnesses deposed that two shots were fired by the accused and both had caused injury to the deceased but the evidence of the doctor was that the injuries were possibly caused by only one shot. All the eyewitnesses stated that the accused had fired two shots from his revolver from a distance of six to nine feet, but medical evidence showed that there was blackening around the wounds. Further, the eyewitness stated that the injured witness suffered injuries of *pharsas* and *lathi* at the hands of the accused, but medical evidence disclosed that he had not received a single injury which could have been caused by a *pharsa*.[94]

(xxi) The doctor did not find any head injury on the body of the deceased during post-mortem examination, while the eyewitness account shows that a lathi blow was given on the head of the deceased and it was not a mild blow and the Investigating Officer also observed the said injury on the forehead of the deceased.[95]

(xxii) The prosecution case was that the accused armed with sharp weapons like a *gandhasa* and *ghop* attacked the deceased. The post-mortem report showed that the assault was made with the blunt side of the weapon, there was no mention in the FIR about the use of the sharp edged weapons from their blunt side, the eyewitness account that accused had used blunt side of weapon showed that they made statements to fit in with post-mortem report.[96]

(xxiii) The eyewitnesses stated that accused persons gave *barchha* and *lathi* blows but the medical evidence showed that all the injuries on the person of the deceased were caused by sharp edged weapons.[97]

(xxiv) The evidence of extra-judicial confession that deceased was poisoned was belied by medical evidence stating that death occurred due to multiple injuries.[98]

(xxv) The eyewitness alleged that the accused fired a revolver shot at the deceased in a scuffle, but medical evidence showed stab wounds on the person of the deceased apart from firearm injury.[99]2281

(xxvi) The consistent prosecution version that victim was assaulted with *lathis* and knife was belied by absence of any *lathi* injury in the post-mortem examination of the victim, which runs contrary to the prosecution case.[1]

(xxvii) Medical evidence showing presence of two shots from the gun and was contrary to occular testimony and the manner of assault as stated by witnesses was rendered doubtful by the conflicting medical evidence.[2]

(xxviii) The deceased suffered *kassi* injury by the sharp side, the witness stated in categorical terms that *kassi* had penetrated four *angul* (approximately three inches) in the head. At the same time witness said that the accused had inflicted *kassi* blow from the reverse side making contradictory statement. The doctor who conducted autopsy of the deceased found that the injury on the head of the deceased did not correspond to the measurement of the reverse side of *kassi* shown to him.[3]

(xxix) The evidence of eyewitness mentioned in an omnibus way that the accused were armed with lathis but no overtact was attributed to them, the medical evidence ruled out any lathis having been used and doctor found only incised injuries on the dead bodies and on the injured prosecution witnesses.[4]

(xxx) The number of injuries and nature of injuries on the person of the deceased were totally and completely impossible to reconcile with the oral evidence and medical evidence.[5]

(xxxi) The ocular evidence showed that deceased was thrashed by four persons on a cot by *lathi* blows for one hour but there was no blood of the victim on the cot or on the floor.[6]

(xxxii) Eyewitnesses stated that they had seen the accused persons grappling with the deceased and when there was a noise, the accused persons fled away from the spot and as a result of grappling, the deceased fell down but no injury was found on the body of the deceased and the evidence of the doctor who conducted the post-mortem on the body of the

deceased showed that there was no mark of ligature seen around the neck and there was no mark of injury on the body and cause of death was asphyxia due to drowning which was sufficient to cause death in the ordinary course of nature.[7]

(xxxiii) Evidence of eyewitnesses showed that the deceased was first assaulted with lathis and when he had fallen down, he was shot at, but the face of the deceased was virtually turned into pulp, though there was no evidence that indiscriminate *lathi* blows were given on his face nor did the doctor say that the face was turned almost to a pulp by *lathi* blows. There was also no possibility of single gunshot injury causing such damage to face and so occular evidence was neither reliable nor compatible with medical evidence.[8]2282

(xxxiv) The eyewitness stated that the accused stuck the deceased with a *hansia* blow while the doctor explained that injury caused on chest of the deceased was a punctured wound and a *hansia* which is curved or half-rounded with a sharp edge on only one side could not cause such an injury.[9]

(xxxv) According to prosecution witnesses, accused come down by staircase to the ground floor, fell down, got up and after going 5-6 steps fell down, but according to the evidence of the doctor, due to the injuries caused to the accused he might have suffered paralysis and he could not have moved 5-6 steps after falling down.[10]

(xxxvi) All three eyewitnesses in a parrot-like manner stated that when accused fired at the deceased he was removed by five-six paces (12-15 ft) from him but the doctor has been very specific in the opinion that the shot must have been fired from a distance of less than four feet. The doctor further opined that the shot must have been fired from right side of the deceased as direction of that shot was inward and from right to left, however, according to one of the eyewitnesses the accused was in front of the deceased and not on his right or last side.[11]

(xxxvii) The ocular evidence was that deceased was assaulted with *bhusa*. But the doctor's statement was that death was due to the injury on the head which might have been caused by a sharp cutting weapon.[12]

(xxxviii) The eyewitnesses stated that the accused fired the shot with his hand bent downwards. But the doctor opined that the hand which fired the shot must have been at a slightly lower level than the part of the body hit by the shot, which means that the barrel of the gun must have been pointing upwards.[13]

(xxxix) The three eyewitnesses stated that the accused rasped the neck of the deceased by using *gandasa* while two co-accused caught hold of the deceased but medical evidence regarding nature of injuries on neck of deceased did not suggest that the neck of the deceased having been rasped, *i.e.*, using a weapon like *gandasa* or like a saw. On the contrary, the medical evidence showed that probably that heavy blow or blows, one or two, were dealt with by sharp cutting heavy weapon, may be a *gandasa*, resulting into instantaneous death of the deceased. The medical evidence also showed that the deceased also sustained an injury on the hand by the same or similar weapon but no explanation was given by eyewitnesses as to how the deceased sustained injury on hand.[14]

(xl) The consistent stand of the prosecution witness has been that the bullet hit the deceased on the chest, but the medical evidence clearly points out that the deceased was hit on the back and the exit wound is on the chest.[15]

(xli) The prosecution case was that two positive injuries were sustained by the deceased by firearms of the accused but medical evidence showed that only one gun injury shot was found on the person of the victim.[16]2283

(xlii) The testimony of the two eyewitnesses showed that the accused inflicted two injuries by the axe and 10 to 12 injuries by the 'jayee', while as per doctor and his post-mortem report the deceased received five incised injuries and seven injuries by a blunt weapon on her person.[17]

(xliii) The prosecution witness stated that deceased received pellet injuries on his chest and jaw, investigating officer also stated in injury statement that deceased received pellet injuries on tongue, chest, chin *etc.*, but the bullet was recovered from the chest cavity of the deceased by the doctor and there was no explanation by the prosecution about it.[18]

(xliv) According to medical evidence, there were no *lathi* injuries, whereas the occular version

was that deceased was assaulted with *lathis* after his fall on the ground due to firearm injury.[19]

(xlv) The post-mortem report of the two deceased showed that besides firearm injury the deceased also sustained non-superficial, injuries by blunt object while ocular evidence did not disclose that any of the accused was armed with any blunt object or that the firearm was also used by any of the accused from the blunt side.[20]

(xlvi) The post-mortem report of the deceased persons showed no firearm injury while the prosecution witnesses stated before the police that the accused caused gunshot injuries on the person of the deceased and subsequently tried to improve their statements after knowing about post-mortem report, the panchnamas prepared immediately after the occurrence also showed gunshot injuries on the person of the deceased.[21]

(xlvii) Incised and penetrating wounds were found on the body of the deceased. Where no *lathi* or pistol injury was found on the body of the deceased in medical examination, the presence of accused armed with pistol or *lathi* was ruled out. Accused persons alleged to be armed with pistol and *lathi* were acquitted of the charge of murder.[22]

(xlviii) Eye-witnesses, relatives of the deceased, deposed that accused persons caused fire-arm injuries to the deceased but in post-mortem examination no fire arm injury on the person of the deceased was found. The accused were given benefit of doubt and acquitted of the charge of murder.[23]

(xlix) It was the prosecution case disclosed in the FIR, and the eye-witnesses also deposed before the Court that the accused inflicted pharsi (axe) blow and a stick blow on the head of the deceased. But in post-mortem examination no incised wound was found on the head of the deceased. Only one lacerated wound was found on the head of the deceased in post-mortem examination.2284 Appellant accused was given benefit of doubt and acquitted of charge under s 302, IPC .[24]

(xlvii) It was the consistent testimony of both eyewitnesses that accused at the time of incident had a *pharsa* while his unknown companions had spears and they all caused injuries to the deceased with their respective weapons, but a perusal of the post-mortem report showed that the bone deep injury was a lacerated wound and the doctor admitted in his cross-examination that this injury was the result of a *lathi* blow.[25]

(xlviii) As per medical evidence, two injuries caused by a sharp-edged weapon were found on the body of the deceased and the eyewitness account was that three accused assaulted the deceased with a sharp-edged weapon. The seized weapons were also not shown to the doctor for soliciting his opinion as to whether injuries on the body of deceased could be caused by those weapons.[26]

(xlix) The testimony of the two eyewitnesses did not show that the deceased was also attacked on the chest and the hand and so was contradictory with the medical evidence. Further, the ocular evidence was also contradictory with medical evidence regarding time of incident.[27]

(l) The two eyewitnesses stated that all the eight accused were armed with *gandasas* and they caused a series of injuries on the deceased but their statements were belied by medical evidence which showed that injury no 1 was caused by a sharp weapon, injuries no 2, 3, 4 and 5 were caused by firearms and injuries no 6 and 7 by a blunt weapon.[28]

(li) Eyewitness stated that one accused fired a shot on the deceased, while the other gave a *gandasa*/chopper blow, but as per medical report, no injury of sharp-edged weapon was found on the body of the deceased.[29]

(lii) As per evidence of witness the accused fired at the deceased from behind, but the medical evidence showed that the entry wound was found on the stomach of the deceased.[30]

(liia) Where the eye witnesses deposed that the deceased was shot on his back by the accused, but in the post-mortem report, a singular bullet wound which had entry from the front of the chest and had exit point at the back of the deceased was found, there was major contradiction between ocular and medical evidence, hence, the accused appellant was acquitted of the charge of murder.[31]

(liii) The eyewitness stated that one of the accused, fired two rounds on the back of the deceased but no gunshot injury was found in the post-mortem report of the doctor.[32]2285

The evidence of the two eye-witnesses about the assault made by the accused persons was not

corroborated by medical evidence, and evidence about the assault was so intermingled that it was not possible to separate the grain from the chaff, thus, the accused were acquitted of the charge under s 302, IPC .[33]

Prosecution case was that the accused fired with pistol and rifle at the deceased from behind and caused death. No rifle injury was found on the body of the deceased though PWS deposed that the accused fired with rifle at the deceased. Accused was acquitted of the offence under s 302, IPC .[34]

It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which are to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant'. Where the eye-witnesses' account is found credible and trustworthy, a medical opinion pointing to the alternative possibilities cannot be accepted as conclusive.[35]

The eyewitness account did not obtain any support from the medical evidence regarding the nature of injuries rather it ran counter to medical evidence and though for ascertainment of weapon used, the body of the deceased was referred for X-ray examination by the doctor conducting post-mortem, however, the X-ray report was not shown to the doctor till the date of examination or even produced before the Court.[36]

The eye-witness stated that the accused, on being exhorted by the co-accused, had picked up a big stone and thrown it at head of the deceased resulting in his death. However, the injuries suffered by the deceased and medical evidence neither indicated any depressed injury nor showed any bleeding from nose and ears of the deceased.[37]

When the eye-witnesses stated that deceased was assaulted by a *hasua*, a semi-circular weapon and the medical witness deposed that toddy tapper, *i.e.*, a *hasua* is curved in shape, but none of the injuries appearing on the dead body of the deceased was semi-circular or a curved injury and as such there was a question mark regarding the injuries appearing on the dead body of the deceased having been caused by a *hasua*.[38]

The medical witness had deposed that the injuries of the deceased were caused by heavy sharp cutting weapon, might have been inflicted by a *farsa*, but the eye-witness stated that main accused gave single *farsa* (axe) blow on neck of the deceased and other accused assaulted deceased with *farsa* and *lathi*, however, injuries caused by hard and blunt substance were not found on body of the deceased.[39]

Evidence of the prosecution witnesses was that the deceased was killed immediately after he had his evening meals, however, medical evidence showed that2286 stomach and small intestine of the deceased was empty, falsifying prosecution case as regards time of death.[40]

According to medical evidence, injury no 1 was caused by a shot fired from a distance of within three feet and injury no 3 from a distance of 3" to 12" and PW 2 stated that the shots were fired at his deceased father from a distance of some 5-6 paces (one pace is equivalent to two and a half feet) while PW 3 stated that the shots were fired at the deceased from a distance of some ten paces.[41]

Evidence of the witness was that the accused assaulted the deceased with blunt side of *bankri* on left ear of the deceased but as per medical evidence there was no injury on left ear which could be attributed to blunt weapon.[42]

There was discrepancy between the oral evidence and the medical evidence inasmuch as the injury on the deceased indicated that the bullets were discharged from very close range from his body, while the prosecution evidence in this regard showed that the assailants were standing at a considerable distance away from the deceased.[43]

Absence of burn injuries on the person of injured not supporting evidence of the witnesses regarding alleged infliction of assault by means of hot iron rod.[44]

Where the FIR and the eye-witnesses alleged that the deceased was given a *pharsa* (axe) blow and a stick blow on his head but no incised wound on the head was found in the post-mortem report, the

post-mortem report also showed only one injury on the head of the deceased.[45]

The testimony of the witnesses was that they heard firing of 2-3 gun shots was contrary to evidence of doctor who held post-mortem examination over body of the deceased and found only one bullet injury.[46]

The testimony of eye-witnesses was that the accused persons assaulted the deceased with *ballam, bichhua* and axe, was totally inconsistent with medical evidence showing that all injuries found on the body of the deceased were caused only by hard and blunt object.[47]

Both the eye-witnesses stated that from the *chaunh* (pointed end of the plough) injury was caused to the deceased, but the doctor in very specific words had said that injury no 5, by which the deceased had died, could not have been caused by a *chaunh*.[48]

The postmortem report showed only one incised injury on the head of the deceased whereas the witness, specifically stated that the accused dealt two axe blows on the head of the deceased.[49]2287

The accused appellant ULC had carried a knife, but no injury from the same knife was found on the person of the deceased. The participation of the accused appellant ULC was doubtful, thus, his conviction under ss 302 / 34, IPC recorded by the courts below was set aside.[50]

PW 2 while describing the incident deposed that A1 appellant had inflicted injury on the neck of the deceased by patta knife and, thereafter caused cut on the right side of his head and further inflicted cut on the neck and that he had also inflicted injuries on the back. It was submitted by the learned counsel that no injury was found on the back of the deceased and, therefore, the medical evidence did not corroborate the statement of PW. In the instant case, the duration of the occurrence was short. The injuries on the deceased were inflicted in quick succession and it was too much to expect from a witness in such circumstances to narrate the exact injuries caused on the person of the deceased. The generalized statement as regards the injuries would be more credible than the particularized statement of location of injuries on the body when the injuries were caused in quick succession and in a short time. Moreover, there was every possibility of the first injury being caused from the back side of the deceased. The medical evidence corroborated the statement of the eye-witness PW. There was no conflict between medical and ocular evidence.[51]

Reliable Evidence of an Eyewitness does not become Untrustworthy due to Inconsistency with Medical Evidence

It is well-settled that positive evidence in a case is that of eyewitnesses who had seen and narrated the entire occurrence. The evidence of a medical man or an expert is merely an opinion which lends corroboration to the direct evidence in a case where there is a glaring inconsistency between direct evidence and medical evidence in respect of entire prosecution story, that is undoubtedly a manifest defect in the prosecution case.[52] Where the eyewitness travelling alongwith the deceased deposed that the deceased received injury in his back but medical evidence showed that the deceased received a gunshot in his chest and thoracic region, it was held that witness having seen exit wound on back of deceased, bleeding, though he had been hit in back so his evidence could not be rejected.[53] It is not always the inconsistency in the evidence of eyewitnesses and medical evidence in a murder case which makes eyewitnesses unreliable, the evidence of eyewitnesses is to be fully and correctly evaluated and cannot be discredited on the basis of somewhat unsatisfactory testimony of the doctor which on proper judicial appraisal does not contradict the version of prosecution witnesses as to the manner in which offence was committed.[54] Merely because an illiterate witnesses stated that deceased took his meal immediately2288 before the occurrence cannot by itself be a circumstance to discredit their evidence on basis of medical evidence regarding presence of semi-digested food in stomach of the deceased giving contradictory version regarding time of the incident.[55] If direct evidence is satisfactory and reliable, the same cannot be rejected on hypothetical medical evidence.[56] When post-mortem report showed that there were a number of incised wounds on the person of the deceased in addition to marks of strangulation and the death was due to strangulation, evidence of eyewitness that she saw the accused striking the deceased with a knife cannot be contradictory to post-mortem report as the witness also stated that she

woke up from sleep on hearing a gurgling sound which evidently came from her husband when he was being strangulated.[57] Where eyewitnesses stated that the deceased was hit on his back by a shot fired by the accused but the doctor who had performed the post-mortem examination deposed that the entry wound was on the chest and exit wound on the back, the inconsistency could not help accused he being compounder in the same government hospital, the doctor who had performed the post-mortem examination had evidently tried to help him, evidence of eyewitnesses therefore could be rejected.[58]

Should Eye-witness Account be preferred to Medical Evidence in Cases of Contradiction between them

Where ocular evidence is cogent, reliable and credible, medical evidence to the contrary cannot corrode the evidentiary value of former.[59] In the case of *State of Madhya Pradesh v Dharkole alias Govind Singh* ,[60] it was held by the Supreme Court that where the medical evidence was at variance with the ocular evidence, the testimony of the eye-witness should be decided independently and if found trustworthy, the same could not be discarded merely because it is at variance with medical opinion. While there can be no difference of opinion with the principle explained in the aforesaid decision, the application thereof will depend on whether the story as made out by the prosecution is trustworthy and can be related to the injuries suffered by the victim in the manner as sought to be projected. If the ocular testimony is such that it is not possible to relate the injuries with the circumstances in which they were said to have been inflicted, the Court has the discretion not to accept the ocular evidence. The principle enunciated in *Dharkole's* case (supra) may be applied in an appropriate case, but each case has to be determined having regard to its own set of facts.[61]

Slight Variation between Medical and Ocular Evidence

It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eye-witnesses the testimony of eye-witness cannot be thrown out [62] In *State of Uttar Pradesh v Krishna Gopal and another* ,[63] this position has been illuminatingly and exhaustively reiterated.[64]2289

Inconsistency between Opinion of two Medical Witnesses

Where the opinion of a medical witness is contradicted by another medical witness, both of whom are equally competent to form an opinion, the opinion of that expert should be accepted which supports the direct evidence in the case.[65] The contradictions in the nature of injuries on the person of the deceased depicted in the post-mortem report and in the injury report prepared by the doctor who examined the deceased when he was injured, coupled with other infirmities in the prosecution case entitle the accused to the benefit of doubt.[66] Similarly, the contradiction in the evidence of the two doctors regarding nature of injuries found on the accused and also that they could not be caused by knife as alleged by accused disentitles the accused to the right of private defence.[67] When the doctor who actually examined the accused and had noted the injuries himself stated that one of the injuries cannot be a self-inflicted injury, another doctor gave his opinion only on the basis of injury report and the X-ray report, without even looking at the X-ray plate, the Court relied upon the opinion of the former.[68] Where medical evidence showed that the victim died of jaundice and liver failure but post-mortem report listed cause of death as shock and hemorrhage due to anti-mortem injuries, in a custodial death case, the Supreme Court directed that the cause of the victim's death should be investigated by the CBI.[69] The opinion of the doctor, who was new to the profession and had just completed his internship after his graduation, that the penis of dead body had undergone religious circumcision is not material when the doctor, who conducted post-mortem examination and was a specialist in forensic medicine and a senior person, did not find any evidence of such circumcision on the dead body.[70] Whatever be the reason, no court could afford to ignore the report of the doctor who so conducted the autopsy with meticulous precision about all the features noticed, merely on the strength of what another doctor had scribbled in the medico legal case at the initial stage.[71]

Where, on the question that the victim was murdered, there is conflicting medical evidence, circumstantial evidence satisfactorily establishing that death was homicidal, the medical evidence supporting homicide ought to be accepted.[72] Where three doctors who conducted a joint post-mortem examination without seeing the report of the chemical examiner who conducted the autopsy exhausted their opinion that the deceased had died of asphyxia due to suffocation caused by smothering and/or internal airway obstruction, the doctor examined by defence after going through chemical examiner's report opined that poison was responsible for death rather than smothering, the Court could not ignore the large number of external injuries particularly there on the legs of the victim and in association with the finding of joint post-mortem report of internal organs cumulatively lead to one conclusion in favour of the theory of forcible smothering leading to discarding of evidence of the doctor examined by the defence.2290

Contradiction between Ocular and Medical Evidence regarding Fatal Injury--Medical Evidence to be preferred

Where the medical officer who had performed the post-mortem examination gave clear, irrefutable reasons founded on physical facts noted by him at the autopsy in support of his firm opinion that the only external injury found on the body of the deceased could not be the result of two simultaneous blows, and, in the ordinary course of human events and experience also it was extremely improbable, that the three blows simultaneously given by three different persons from different directions with sharp-edged weapons would land with such precision and exactitude so as to cause a single wound of such clean cut margins and such dimensions and other characteristics as those of the external wound round by the medical officer, the version of the eyewitnesses that the injury of deceased was the result of three separate blows was inherently improbable and intrinsically incredible and so could not be accepted in preference to evidence of the medical expert.[73] In the chapter on 'Deaths from Asphyxia' in *Modi's Medical Jurisprudence,*[74] the learned author has pointed out that in cases of death due to hanging, in addition to the cord-mark, there would be dribbling of saliva from the mouth at an angle. A study of this book shows that in case of strangulation, death could be slow.[75] But where in case of murder there was medical evidence on record that blood was oozing from nose and mouth and that there was a pool of blood underneath the body of the deceased, the death would be due to asphyxia by strangulation. In other words, asphyxia was not due to hanging though dead body was ultimately recovered from a tree. Therefore, the defence version that death of the victim was due to strangulation in the absence of cord-mark around the neck of the deceased could not be believed in preference to medical evidence.[76]

Post-mortem--Non-recovery of Pellets

Where death of the deceased was caused by air-gun, and proved by medical opinion, non-recovery of pellets from the body of the deceased in post-mortem examination, despite best efforts, was held not fatal to the prosecution case.[77]

33. Medical Testimony as to the Nature of the Injury

The testimony and report of medical witness as to nature of the injury on the person of victim is not final. Where the doctor had stated that the injuries were sufficient in ordinary course of nature to cause death, the Court after analysing the injuries can come to the conclusion that the injuries, cumulatively were not sufficient in the ordinary course of nature to cause death.[78] 'It is well known that doctor can never be certain on the point of the time so far as duration of injuries are concerned'.[79] In the face of hesitant medical opinion about the causes of death given by three doctors and the further fact that the deceased died after a month of occurrence, the Court may come to the conclusion that cl (3) of s 300, IPC, has not been established beyond2291 reasonable doubt, leading to conversion of conviction under s 302 to one under s 304, IPC .[80] If numerous injuries are found on the body of the deceased and the doctor's medical evidence does not say that any one of the injuries was sufficient to cause death in the ordinary course of nature, even if none of the injuries by themselves was sufficient in the ordinary course of nature to cause death, cumulatively they were certainly sufficient in the ordinary course of nature to cause his death, which infact took place soon after the assault.[81] The inquiry in regard to the question whether the injury is

sufficient in the ordinary course of nature to cause death, is purely objective and inferential and the matter has to be decided by the Court as a question of fact, even where the medical witness does not say anything about the sufficiency or otherwise of an injury to cause death in ordinary course of nature or where a medical witness makes a positive assertion one way or the other, the Court cannot be relieved of its duty in deciding for itself the nature of injury. A medical witness who conducts a post-mortem is one of the witnesses in a case and assessing evidence of witnesses including the evidence of a medical witness, is the duty of the Court.[82]

If the doctor expresses his opinion that the injury is sufficient to cause death but does not use the words of the code in the ordinary course of nature. By no stretch of imagination can it be construed that when the doctor stated that the injury is 'sufficient to cause death', he meant that injury is 'sufficient' to cause death under peculiar or extraordinary circumstances and insufficient to cause death in the ordinary course of nature.[83] No doubt it would have been of advantage to the Court if the public prosecutor had put the question to the doctor if the injuries were sufficient in the ordinary course of nature to cause death. But mere omission to put that question is not enough for the Court to reach a wrong conclusion that the injury noticed by autopsy surgeon was not responsible for causing death of the deceased. Though not an expert as an autopsy surgeon, the sessions judge himself would have been an experienced judicial officer. Looking at the injuries he himself could have deduced whether the injuries were sufficient in the ordinary course of nature to cause death. No sensible man with some idea regarding the features of homicidal cases would come to a different conclusion from the 45 injuries on the dead body which included fracture of five ribs (2-6) on the left side towards sternal end, fracture of some of the fingers and extravasation of blood on the right side of occipital region and also on the citus of rib-fractures *etc.*, except that these injuries were sufficient in the ordinary course of nature to cause death.[84]

Medical evidence can be used to repel the testimony of eyewitnesses only if it is so conclusive as to rule out even the possibility of the eyewitness's version being true. A doctor usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post-mortem features which he noticed in the medical report may express his views one way or the other depending upon the manner the question was asked. But the answers given by the witness to such questions need not become the last word on such possibilities. After all, he gives only his opinion regarding such questions. But to discard the testimony of an eyewitness2292 simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice.[85]

34. Duration of Injuries in Post-mortem Report and Medical Certificate

In the instant case, in the medical certificate, the age of the injuries was mentioned as 24 hours, which meant that the injuries could have been caused within 24 hours of examination of the injured. In the post-mortem report, the determination of precise duration of the injuries can be possible due to the internal examination of the injuries, whereas no such advantage is available to the doctor when he examines the injuries in the nature of contusions. Therefore, normally the approximate duration is indicated in such certificates.[86]

35. Failure of Prosecution to show Weapon of Offence to Medical Witness

It is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may, sometimes, cause aberration in the course of justice.[87] Where the weapons of offence were not shown to the doctor and it was impossible to say with certainty whether the injury was caused by the *ballam* or the *bhala* that were seized and therefore, whether it was one or the other of the accused persons who was responsible for it, even if one believed that on the day of occurrence one of them carried a *ballam* and the other a *bhala*, the conviction under s 302, IPC, simpliciter cannot therefore be sustained.[88] But when the accused persons in

furtherance of their common intention stabbed the victims, the failure of the prosecution to seek the opinion of the doctor with regard to particular weapons used in stabbing the two victims could not result into rejecting the prosecution case.[89] Where the seized weapons were not shown to the doctor for soliciting his opinion as to whether injuries on the body of deceased could because by those weapons, the number of injuries found on the person of deceased was two, while prosecution case was that, three accused assaulted deceased with sharp-edged weapon, the conviction of the accused person under ss 302 / 34, IPC, was set aside.[90]

36. Post-mortem Report

It is not always necessary to have a complete post-mortem in every case. Section 174 of the CrPC confers discretion to the police officer not to send the body for post-mortem examination if there is no doubt as to the cause of the death. If the cause of2293 death is absolutely certain and beyond the shadow of doubt or controversy, it is unnecessary to have the postmortem done by the medical officer.[91] The post-mortem report is not substantive evidence but it is the doctor's statement in court which has the credibility of substantive evidence, which in normal circumstance ought to be used only for refreshing the memory of the doctor witness or to contradict what he might say from the witness box.[92] When both post-mortem report and inquest report are not substantive evidence, the discrepancy occurring therein cannot be fatal to the prosecution case.[93] Where the post-mortem was conducted jointly by two doctor but the doctor who did the major work was examined and the other doctor was not examined the omission to examine the latter conducting post-mortem was of no relevance.[94] Failure of the doctor conducting post-mortem to state that the cause of death was firearm injuries is not of much importance if occular version is cogent.[95] Where the doctor who conducted the post-mortem examination was not examined but another qualified and experienced doctor who could identify his signature and handwriting was examined who deposed about the nature of injuries and consequence thereof, the post-mortem report was treated as proved and it was also observed by a Division Bench of the Karnataka High Court that s 294, CrPC would have no application to the facts of the case nor was it obligatory on the part of the prosecution to have tendered the post-mortem report after having obtained the consent of the defense under s 294, CrPC .[96] Where the doctor conducting post-mortem in his certificate categorically stated that exact cause of death cannot be ascertained and preserved his opinion pending result of chemical analysis, in his subsequent report he was not able to give a definite opinion as to injuries found on the dead body which could be ante-mortem or post-mortem, it could not be concluded that death of the deceased could be homicidal.[97] Whatever be the reason, no court could can afford to ignore the report of a doctor who has conducted an autopsy with meticulous precision about all the features noticed, merely on the strength of what another doctor has scribbled in the medico legal case at the initial stage.[98]

The Two Aspects of Expert Evidence

Expert evidence has two aspects, the data evidence and the opinion evidence while it is undoubtedly true that data evidence cannot be rejected if it is inconsistent with oral evidence, yet so far as opinion evidence is concerned, it is only an inference drawn from the data and that evidence would not have precedence over the direct eyewitness testimony unless of course the inconsistency between the two is so great as to obviously falsify the oral evidence.[99] There is distinction between the objective finding of the doctor and his opinion based on such objective finding. Where the doctor finds a lacerated wound on the dead body and opines that the same had been caused by a hard blunt substance, it is open to the court to take a different view on the basis of reliable ocular evidence and hold that the wound in question was caused2294 by a firearm and not a hard, blunt substance. But it is not possible to read lacerated wound as incised wound. In other words, so far 'opinion' is concerned, it may be possible in an appropriate case to take a different view, but it is not possible to say that the objective finding is not correct, unless it is challenged on the basis of some reliable evidence.[1]

37. Importance of *Rigor Mortis* in ascertaining Time of Death

The time within which *rigor mortis* develops all over the body has no factual basis. It depends on various

factors such as constitution of the deceased, season of the year, the temperature in the region and the conditions under which the body has been preserved.[2]

In estimating the time of death from the presence or absence of rigor mortis, is of slight use. In the warm climate of India, *rigor mortis* may commence in an hour or two after death, even these assumptions are only guidelines and are not a sure test to fix the time of death.[3] It is true that normally *rigor mortis* commences after one to two hours after the death and the entire body gets stiffened within five to six hours but the definite time since death cannot be estimated with the aid of the time of commencement of *rigor morits*. The speed of onset of *rigor mortis* depends on many factors and this speed is delayed indefinitely in cold conditions.[4] The murder allegedly took place on a boat. The dead body was thrown in the water. It remained under water for more than five days. *Rigor mortis* was absent and the body was fully decomposed. The soft tissues of some of the parts of the body had been eaten away by fish. Medical science has not achieved such perfection so as to enable a medical practitioner to categorically state in regard to the exact time of death. In a case of this nature, it was difficult to pinpoint the exact time of death.[5] When, it is quiet apparent, that in the absence, of various factors which had not been noted by any doctor considering which the probable time for the outset of *rigor mortis* and estimation of probable time of death with references to the state of *rigor mortis* and coolness of the body can be fairly estimated, any opinion as to the time of death therefore cannot be held to be wholly reliable.[6]*Modi's Medical Jurisprudence*[7] states:

> Rigor mortis first appears in the involuntary muscles, and then in the voluntary... In the voluntary muscles rigor mortis follows a definite course. It first occurs in the muscles of the eyelids, next in the muscles of the back of the neck and lower jaw, then in those of the front of the neck face, chest and upper extremities, and lastly extends downwards to the muscles of the abdomen and lower extremities. Last to be affected are the small muscles of the fingers and toes. It passes off in the same sequence.[8] Taylor, in his book,[9] under the caption 'The order in which rigor appears' states:

> As a rule, cadaveric rigidity first appears in the muscles of the face, neck and trunk; it then takes place in the muscles of the upper extremities, and lastly in the legs... In regard to its disappearance the muscles of the lower extremities will often be found2295 rigid, while those of the trunk and upper extremities are again in a state of relaxation. It appears later and lasts longer in the lower extremities than in other parts of the body.[10]

In *Jhala and Raju's Medical Jurisprudence*[11] it has been stated:

> Rigor mortis is due to rigidity of the muscles. It appears both in the voluntary as well as involuntary muscles, its appearance and disappearance in various muscles follows a pattern. It is apparent first in the region of head, face, neck, eyelids and lower jaw. It last shows its appearance in the lower extremities. Hence, if rigor mortis is present in the lower extremities, it can safely be opined that it is present all over... After the rigor mortis has set in the whole body (as confirmed from its presence in lower extremities), no specific opinion is possible till the time it starts disappearing *i.e.*, after about 18 hours.[12]

It would thus appear that all the authorities on the subject are unanimous in their opinion that *rigor mortis* sets in and reaches the 'extremities' at the end and that it follows the same pattern both in the matter of appearance and disappearance. The presence of *rigor mortis* by itself, cannot be decisive of the time of death, but it is difficult to believe that *rigor mortis* would be found only in the extremities of the body within seven hours of the death. It is true that on the basis of presence of *rigor mortis*, no opinion can be given with mathematical precision regarding the time of death. At the same time, in view of the undisputed position regarding the 'course' of appearance and disappearance of rigor, its presence only in the

extremities does provide a sound basis to find out the probability or otherwise of the prosecution case regarding time of death. The process of appearance and disappearance of rigor mortis may take relatively shorter and longer time but it cannot be that within seven hours time it would disappear from the other portions of the body like head, face, neck, and abdomen and remain only in the extremities.[13] In *Modi's Medical Jurisprudence and Toxicology,*[14] in the heading 'Putrefaction of Decomposition and Autolysis' it is stated:

> Putrefaction follows the disappearance of the rigor mortis but this is not always the case; since, in Northern India especially during the hot months from April to October it commences before rigor mortis has completely passed off from the lower extremities.[15]

Time of Death

Medical science has not achieved such perfection so as to enable a medical practitioner to categorically state in regard to the exact time of death. In the instant case, the murder took place on a boat, and the dead body was thrown in the water. Dead body remained under water for more than five days. *Rigor mortis* was absent and the body was fully decomposed. The soft tissues of some of the parts of the body had been eaten away by fish. It was not possible for the doctor to pinpoint the exact time of death.[16]2296

38. Contents of Stomach cannot give exact Time of Death

The stomachic contents cannot determine with precision the time of death inasmuch as the power of digestibility may remain in abeyance for a long time in states of profound shock and coma and it must also be remembered that the process of digestion in normal healthy person may continue for a time after death. Be it noted, all the imponderables pointed out by Dr. Modi in his book on Medical Jurisprudence which makes the digestive testimony inconclusive, and, therefore insufficient, to contradict positive evidence, if any, about the time of death. To impute exactitude to a medical statement, oblivious to the variables noticed by experts and changes in the dietary and eating habits is to be unfair to the Science. We are not prepared to run the judicial risk of taking the whole verdict on such nebulous medical observations made by the Doctor.[17]

As the occurrence was a daylight occurrence, the inconsistency as to the fact that the stomach of the deceased was found empty, whereas, the wife of the deceased deposed that the deceased had taken breakfast before incident took place, was held not fatal to the prosecution case.[18]

When Contents of Stomach Assume Importance

It may be possible to contend that contents of the stomach may not always be an indicator of the time of death. But in a case where stomach is empty and the prosecution evidence is that the murder had taken place shortly after the deceased has his last meal, to say that the contents of the stomach have no material bearing on the determination of the time, is not acceptable. When the time of death being a material factor to verify the presence of the eye-witnesses it was obligatory for the prosecution to have clarified the discrepancy between the medical evidence and the oral evidence. If the prosecution has failed to do so, a serious doubt as to the time of incident and the presence of the eye-witnesses at the time of incident and their narration of the incident also becomes doubtful.[19] Where the PW I stated that he and the deceased had gone to take tea after dinner when the incident took place, but no food was found in the post-mortem, and even small intestines were found empty, the evidence of eye-witnesses was not believed, and appellant accused was acquitted of the charge of murder.[20]

Semi-digested Food in Stomach of the Deceased

As per oral evidence of PW12 sister in law of the deceased, the deceased had taken food at about 10 pm, while the occurrence was alleged to have taken place at 8.30 pm and in the post-mortem examination, semi-digested food was found. The accused contended that there was a conflict between oral and medical evidence. Held, as per doctor's evidence, the death occurred within 24 hours of the post-mortem, and the variation between the medical evidence and the testimony of the eye-witnesses was not such which would lead to a conclusion that the prosecution case was not correct.[21]2297

Undigested Food in the Stomach of the Deceased--Time of Death can be Ascertained

The Supreme Court in a quite number of cases determined time of death of deceased relying on nature of the contents of the stomach or intestine.

In *Ram Narain Singh v State of Punjab* ,[22] In para 9 of this decision the Supreme Court held:

> Medical evidence of Dr Walia shows that undigested food was found in the stomach of the deceased and according to him deceased must have taken his food only five minutes before his death or at the most within half an hour of his death. Doctor's evidence, therefore, clearly shows that he must have taken his food at 8 pm which is also the usual time when the villagers take their food. Relying on this circumstance. The Supreme Court came to the conclusion that the incident must have taken place at about 8 pm, and it belied version of the two eyewitnesses that the occurrence took place in their house at about 6.30 pm. From the aforesaid decision of the Supreme Court, it appears clear that if in the stomach of dead man undigested food material is found, it must be presumed that he died at the most within about half an hour since he took his food last. Therefore, the contents of stomach/intestine of a dead man must contain undigested food material if he dies within half an hour after he took food.[23]

Likewise the Supreme Court in *Raghunandan v State of Uttar Pradesh* ,[24] determined the time of death/occurrence on the basis of nature of the contents of the stomach/intestine.

In *Charan Singh v State of Punjab* ,[25] it was held by the Supreme Court in para 18 as follows:

> The first information report about the present occurrence was lodged promptly and this is apparent from the fact that a copy of the first information report was received by the Judicial Magistrate concerned at Ludhiana at 8.12 pm the same evening. We are not impressed by the suggestion that the occurrence took place not at 5 pm but much earlier. According to the post mortem examination reports, the stomach of each one of the two deceased persons was empty at the time of the post mortem examination. Normally a vegetable diet containing mostly farinaceous food as usually taken by an Indian does not leave the stomach completely within six to seven hours after its ingestion (see page 151 of *Modi's Medical Jurisprudence and Toxicology.* Sixteenth Edition). If the occurrence had taken place at 2 or 3 pm as suggested on behalf of the accused persons the mid day meals usually taken by the villagers at about 11 am would still be in their stomachs and the same would have been empty at the time of the post mortem examination. The fact that the stomach of each of the deceased persons was empty lends assurance to the prosecution version that the occurrence took place at about 5 pm.

From the above discussion it is evident that stage of digestion of the food material or the nature of the contents of the stomach or intestine can be the basis to estimate time of death or the time of occurrence depending upon the circumstances of the case.[26] Where the prosecution case was that the deceased was murdered at about 7.30 am on 13 March 1990 and FIR and lodged at 10 am on the same day but defence has thrown a suggestion that the deceased died in the previous evening, suggestion was denied by prosecution witness, the doctor's evidence showed that age of injury was 38-40 hours from the time of post-mortem examination which takes the time of death to2298 previous evening, besides the doctor also found undigested rice in the stomach, the normal practice in the month of March in the area was to take rice in the evening, so evidence of record established that deceased took food in the evening and immediately thereafter he died, accused was held entitled to the benefit of doubt.[27] Where the prosecution

had fixed up the time of murder as 11 pm on surmise, perhaps, the actual time of murder would have been later in the night or the last earlier, by any stretch of imagination on the fact of the case, absence of any food materials in the stomach cannot be counted as a circumstance in favour of the accused.[28]

The Time Period for Emptying the Stomach--Factors affecting it

In *Modi's Medical Jurisprudence & Toxicology,*[29] the learned author has opined: 'The rate of emptying of stomach varies in healthy persons. It varies in man from 2.5, 6 hours...'.[30]

In *Medico-legal Postmortems in India*,[31] the learned author Dr CK Parikh has opined:

> The length of time required to empty the stomach after a meal is very variable, and depends not only on the type of meal ingested but also on stomach tone and pyloric function and on the psychological state of the individual. Fear slows but anger hastens gastic emptying. The power of digestion may remain suspended for a long time in conditions of shock and coma. Food has been sent in the stomach remaining undigested in persons who received severe head injuries soon after their meal and died within 12-24 hours.

In general, milk leaves the stomach rapidly but the large vegetable and fatty meals consumed in India do not usually leave the stomach under four hours. *Chapattis* digest to a pulp fairly quickly, within about two hours, but do not leave the stomach quickly when other foods are present with them. Most kinds of *dals* retain their form for about two to three hours and rice grains retain their from up to three to four hours. If meat has been eaten along with the vegetable foods, it is seldom distinguishable as such after three hours, and after four hours, both green vegetables and roots are also indistinguishable. In general, if at autopsy one finds that the stomach is full it would suggest that the victim died within two hours of taking the last meal if food was distinguishable and four hours if the food was indistinguishable. The volume and condition of stomach contents can thus provide important data.[32]

In *HMV Cox's Medical Jurisprudence and Toxicology*,[33] the learned author opined:

> In a sudden and unexpected death, if a full stomach containing undigested food is found, it is reasonable, if other evidence is not incompatible to deduce that death occurred within two to four hours of the eating of the last meal. It is dangerous to make any more accurate interpretation than this.[34]

The opinion of Dr CK Parikh contained in the book *Medico-legal Postmortems in India,* is that not only ingestion of the meal will depend upon the type of meal2299 consumed but it will also depend upon stomach tone and pyloric functions and on the psychological state of the individual. According to the author large vegetable and fatty meals do not leave the stomach under four hours but *chapattis* digest to pulp fairly quickly within about two hours. In case *chapattis* are taken along with other items of food, it will take a longer time to leave the stomach. *Dals* retain their form for 2-3 hours and rice retains its form for 3-4 hours. So therefore, the ingestion will depend upon the type and quality of food consumed by a person and upon his digestive power. This power varies from person to person. It would depend upon the kind and quantity of food consumed. Period of digestion is different for different types of foods.[35]

The time taken normally for digesting of food would depend upon the quality and quantity of food as well, besides others. It is required to be factually proved as to the quantum of food that was taken, atmospheric conditions and such other relevant factors to throw doubt about the correctness of time of occurrence as stated by the witnesses. Only when the ocular evidence is wholly inconsistent with the medical evidence the has the Court to consider the effect thereof. The Supreme Court in *Pattipati Venkaiah v State of Andhra Pradesh* ,[36] observed that medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerised or mathematical fashion so as to be accurate to

the last second. The state of the contents of the stomach found at the time of medical examination is not a safeguide for determining the time of occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when exactly the deceased had his last meal and what that meal consisted of. In *Nihal Singh v State of Punjab* ,[37] it was indicated that the time required for digestion may depend upon the nature of the food. The time also varies according to the digestive capacity. The process of digestion is not uniform and varies from individual to individual and the health of a person at a particular time and so many other varying factors.[38]

Empty Stomach of the Deceased and Time of Death

The time of death cannot be viewed with any mathematical accuracy.[39] The stomach contents cannot determine with precision the time of death and there are imponderables which make the digestive testimony inconclusive and therefore, insufficient to contradict positive evidence, if any, about the time of death. To impute exactitude to a medical statement oblivious to variables noticed by experts and changes in dietary habits is to be unfair to science.[40] In the absence of any convincing evidence that the doctor holding post-mortem examination had deliberately given a wrong report, his evidence is not liable to be discarded. Where there is positive direct evidence about the time of occurrence, it would be wrong to make conjecture about such time on the basis of the presence of faecal matter in the intestines and come to the conclusion that the deceased would normally have evacuated it early in the morning.[41] Even the presence of faecal matter in the intestines would not be conclusive. In the present case, the fact that the stomach of the deceased was empty, lends assurance to the prosecution version that the occurrence took place at around2300 4.45 pm, because it has come in evidence that he had taken his meal at noon time on that day.[42] The contents of the stomach found at the time of postmortem are not a safe guide to determine the time of the incident. It was also observed that it was not proper and fair to a medical witness to discard his evidence by referring to passages of experts on medical jurisprudence without bringing the reference to the notice of the witnesses.[43] Where the stomach of the deceased was found empty as revealed by post-mortem report, it was held that inference that incident took place early in the morning would be a pure speculation.[44] The stomach being empty or the large intestine not having any faecal matter would not falsify the positive evidence on the question of time of death. Therefore, the evidence of eyewitnesses as regards the time of occurrence of the incident and of the doctor as regards the time of death cannot be discarded merely on a theoretical consideration of the process of digestion of food.[45] Where as per the prosecution's case the incident took place at 12 noon and the postmortem reports of both the deceased boys showed that the stomach of both the deceased was empty and faecal matter was present in the intestines and on the strength of that medical evidence the plea of the defence was that it was unnatural that the boys had not taken their breakfast or food by the time, *i.e.,* 12 noon, the unfortunate incident had occurred so eyewitness account given by the witnesses was in conflict with medical evidence, was rejected by the Allahabad High Court on the ground that because it was not the case of the prosecution that the deceased had left the house after taking food or breakfast. Unless there is evidence to that effect, it can safely be said that the incident had not taken place at 12 noon as alleged by the prosecution or the oral evidence is not in line with medical evidence.[46] The presence of faecal matter in the large intestine of the deceased is not suggestive of the fact that the incident took place late in the night or in the early hours of the next day, more so, when there was convincing evidence of the son of the deceased that his father was shot dead when he had gone to ease himself in the night.[47]

Contradiction between Statement of Witness and Post-Mortem Report as to Content of Stomach

The contradiction in post mortem report relating to empty stomach of deceased and statement of his wife that he had taken breakfast before going to the fields would not be fatal.[48]

39. Non-mentioning of Name of Accused in Medico-legal Report--When Fatal

When from the medico-legal report that the doctor sent to the police after examining the deceased, apart

from the name of deceased, his father's name, his address, his occupation and an account as to how the injuries were caused, the place where he was found, these particulars obviously were furnished by the deceased himself before his death or eyewitness, who accompanied him. In that context it was expected if really the accused was the assailant that his name would be disclosed by all or any of them while furnishing the cause of the injuries. It can, therefore, be legitimately2301 inferred that at the earliest available opportunity the same of the accused was not disclosed. This fact coupled with the fact that no special report in the respect of registration of the case on the day FIR was recorded and the evidence on record unmistakable shows that it was forwarded to the magistrate only after the case was converted to s 302, IPC, consequent upon the death of the deceased. This glaring circumstance prompts the inference that the FIR did not see that light of the day till the death of the deceased, in the light of these facts the conviction and sentence of the accused under s 302, IPC, and other offences were set aside.[49]

Non-mentioning of the Statement made to the Doctor in the Memo forwarded to the Police

The memo which is sent by doctor to the police is in a prescribed form found in a book obviously kept by the hospital. One of the forms is filled up and sent by the doctor to the sub-inspector of the police. It is not necessary at all to mention all the statements made to the doctor by the persons who brought the patient to him in that memo. It is not part of the duty of the doctor.[50] Thus, omission of doctor to mention the statements made to him by the persons who accompanied the injured in the memo sent to the police had no effect on the prosecution case.

40. Strangulation and Hanging Cases

In *Modi's Medical Jurisprudence and Toxicology* in the chapter on 'Deaths from Asphyxia', the deaths due to asphyxia by strangulation are explained. The learned author points out that death due to hanging, in addition to the cord-mark their would be dribbling of saliva from the angle of mouth. The learned author also says that in cases of strangulation, pure blood issues from the mouth, nose and ears specially when great violence had been used and the tongue is also protruding.[51] A study of *Modi's Medical Jurisprudence* shows that in a case of strangulation death could be slow.[52] The strangulation is established due to the availability of contusion of sternomestoid of muscle on both sides, which is common in strangulation and will not occur in hanging.[53] Where in a case of murder the suggestion by defence was that the death of the victim was by hanging as dead body was recovered from a tree but the medical evidence on record showed that blood was oozing from the nose and the mouth and that there was a pool of blood under the body of deceased, the death could be due to asphyxia by strangulation. In other words, asphyxia was not due to hanging though the dead body was ultimately recovered from a tree.[54]

In the act of strangulation by the hands much greater degree of violene is commonly employed than is necessary to cause death, fingernail impressions are common and if much force is used locally in producing construction, the larynx, wind pipe, the muscles, even vessels in the front sides of the neck may be found to be bruised or lacerated. The hyoid is sometimes fractured.2302

Evidence of violent compression or constriction of the neck during life is obtained from the presence of ecchymosis and swelling and lividity of haemorrage above the level of the constriction and swelling and lividity of face.

In *Llyods Medical Jurisprudence of India,* the author has noticed that: 'If both hands are employed as is very often the case, several marks will be seen on each side of the throat'.

It will appear from the aforesaid text books on medical jurisprudence that in strangulation with hands (throttling), the face is cyanosed, livid and swollen, the eyes are open and suffused, the pupils dilated, the tongue swollen, dark coloured and protruded, bleeding occurs from the mouth, nostrils and ears, ecchymosis may result and fingernail marks may be found. If both the hands are used several marks may be seen on each side of throat. Hyoid bone may be fractured. Hyoid bone is not fractured by any means

other than strangulation.

The opinion contained in *Modi's Medical Jurisprudence and Toxicology* is always regarded as of high authoritative value.[55] Both in *Modi's Medical Jurisprudence and Toxicology* and in *Taylor's Principle and Practice of Medical Jurisprudence*, it has been clearly indicated that suicide by self strangulation is very rare. For committing suicide by self-strangulation the person committing suicide must take aid of contrivance so as to ensure application of sufficient force until death by strangulation. Without such contrivance sufficient force cannot be applied because initially with the pulling the ends of the string must get loosened.[56] Therefore, on account of absence of contrivance which rules out any possibility of suicide by the deceased by self-strangulation, the defence plea of self-strangulation was discarded and in the face of circumstantial evidence being absolutely clinching in establishing the complicity of the accused in committing the murder of the deceased, the Apex Court reversed the order of acquittal of the accused passed by the High Court.[57]

On the night of occurrence, the deceased wife was with the accused husband. The accused did not furnish any explanation as to how the deceased died. In post-mortem examination, external and internal injuries and, hematoma were found on the neck of the deceased wife. The medical officer opined that the death of the deceased was due to strangulation. Conviction of the accused on charge under ss 302 / 34, 201, IPC was held proper.[58]

The accused had strangulated his deceased wife and threw her dead body into a well. The accused took the plea that the deceased fell into the well accidentally. After the body of the deceased was taken out from the well, no water came out of her mouth when her dead body was pressed. The defence theory of accidental fall was ruled out. The accused was convicted under ss 302 / 201, IPC .[59]

In the instant case of alleged strangulation, the second post-mortem reiterated that cause of death was 'asphyxia as a result of strangulation'. According to the medical2303 opinion, a hard blunt substance appeared to have been used to cause strangulation leading to death on account of asphyxia. However, no such hard or blunt substance was found or seized from the room. Doctors had not found any physical signs of internal injuries *viz.* any extravasations of blood in the tissue or any laceration in the underlying muscles. Considering post-mortem reports and the evidence of PWS, the Court held that reasonable doubts arose as to the cause of death due to asphyxia as a result of strangulation.[60]

See also the undermentioned case.[61]

Presence or Absence of Ligature Marks on Neck of Deceased--Effect

If there was no ligature mark on and around the neck of the deceased it is a very signifiant feature ruling out the possibility of suicide by strangulation with the help of rope, *etc*. Abraded contusions in front of the neck and on right side of the neck with ecchymosis present under the contusions speak of throttling because the abraded contusions would be caused when the neck is pressed by the hand and pressure is exerted upon the throat. The doctor clearly stated that the contusions on the neck and the fracture of both the cornua of hyoid bone was the result of forceful pressing of the neck.[62] Where post-mortem report showed that there was ligature mark on the neck of the deceased wife which was ante-mortem, the opinion of the doctor was clear and definite that such ligature mark of 5 cm width in horizontal position could not be caused by hanging but would have been caused by strangulation, the medical evidence, therefore, completely pacified the case of the accused husband that on his return from the field to his house he had found his wife hanging, and thus she had committed suicide.[63] In case of ligature mark caused by suicidal hanging, normally, the mark could be situated above the thyroid cartilage. If it was across the thyroid cartilage, the possibility of ligature mark is homicidal cannot be ruled out. The possibility of death due to suicide also cannot be brushed aside. In case of homicidal death there would be further injuries inside the neck muscles. In case of homicidal strangulation in addition to ligature mark or finger mark there is probability of struggle mark of violence on the other part of the body. Although in the case of suicide saliva must have dribbled, but due to partial suspension of the body asphyxia process might be

slow and gradual as a result dribbling of saliva might be absent.[64]

Where it has come in evidence that the chadar was about one and a half meter long and one meter wide, this shows that in fact it was not a full chaddar or a bed sheet but was a piece of cloth, which is sometimes used by ordinary people like rickshaw pullers to cover their face during winters especially in night, if the said piece of cloth is converted into a rope by rolling it over, its diameter will very much depend upon the fact as to how strongly and tightly it is rolled over. If a piece of cloth which is only one meter in width is tightly rolled over in the shape of a rope, its diameter will be much less than 6/7 cm and the ligature mark on the neck of the deceased would be2304 of still lesser dimension. The width of the ligature mark would very much depend upon the type of the cloth, how tightly and strongly it was rolled over and was converted into a rope and how soon it was removed.[65]

Distinction between Ligature Marks in Cases of Hanging and Strangulation

In the case of hanging, the position of ligature mark would be different from that of the strangulation. In the case of hanging, mark goes up towards the jaw and it also passes above the thyroid cartilage. The ligature mark pass obliquely from the front side of the neck. In the case of hanging, the mark of knot of the rope would be visible on front of the neck. In the case of hanging, there must be a little stretch on the neck due to the weight of the body. In the case of hanging, there would be no horizontal ante-mortem injuries around the neck. In the case of strangulation, it may be caused by any rope or by any cloth or it may be caused by pressing the throat by hand, small bruises and contusion on the sides of the neck would be visible. If the strangulation may have been caused by pressing the neck by rope or anything alike, the ligature mark would be present on the neck in a circle all around the neck.[66]

Strangulation and Throttling

The Court should not lay uncalled for emphasis on the difference between strangulation and throttling. Strangulation is a generic term and throttling is one of its species as observed in *Modi's Medical Jurisprudence and Toxicology,*[67]*Taylor's Principle and Practice of Medical Jurisprudence*[68] and *Lyods Medical Jurisprudence for India*.[69] Strangulation means a violent form of death when results in constricting the neck by means of ligature or by any other means and strangulation on is called throttling when the constriction is produced by the presence of the fingers or palm upon the throat.[70] The strangulation is established due to the availability of contusion of sternomestoid of muscle on both sides, which is common in strangulation and will not occur in hanging.[71] Where there is absolutely nothing in the evidence on record to indicate that the multiple bruises on the body of the deceased were self-inflicted; rather, these bruises were indicative of severe beating and the fracture of the hyoid bones with superficial bruises on the neck cements the possibility of strangulation. In such circumstances, there can be really no escape from the conclusion that it was the accused who had killed the said deceased by throttling her to death.[72]

Accused persons committed the murder of the deceased boy aged 5 years by strangulation as proved by the post-mortem report, thus, they were convicted under s 302, IPC .[73]2305

The three appellants accused had strangulated the deceased, chopped off her head, cut the body into pieces and disposed of the body. The deceased had gone to the accused to demand money, her share in the property sold, as her husband was inside the jail in connection with a case under the NDPS Act. The human skeleton of the deceased and her garments were recovered at the instance of the accused appellants. Accused appellants were convicted under ss 302 and 201, IPC .[74]

The doctor who conducted post-mortem in the case deposed that the death of the deceased was on account of asphyxia caused by throttling. This conclusion was supported by the fact that there was a fracture of the cornua of the hyoid bone. It is well accepted in medical jurisprudence that hyoid bone can be fractured only if it is pressed with great force or hit by hard substance with great force. Otherwise the hyoid bone is not a bone which can be easily fractured. Moreover, the absence of carbon particles and fumes in the trachea and bronchus led to the irresistible conclusion that the deceased must have died before she was set on fire. Some amount of carbon particles and fumes would have certainly been found

in the trachea and bronchus if she were alive when set on fire. Accused husband was convicted for offences under ss 302, 498A and 201, IPC .[75]

Duty of Medical Officer in Throttling Cases

According to the medical jurisprudence, in a case of throttling, the medical officer is expected to remove a piece of skin around the neck for preservation as an exhibit in a later criminal proceedings for the purpose of ascertaining the opinion of the expert. The failure in this regard, is a lacuna in the case.[76]

Some Hanging Cases

(a) When the medical evidence of the doctor shows that in the case of suicide by hanging there is normally trickling of the saliva from an angle of the mouth of the deceased, when stains the clothes of the deceased which, were not found on examination of the clothes worn by the deceased, the plea of defence that the deceased committed suicide by hanging stood falsified.[77]

(b) Where the allegations against the accused were that accused assaulted deceased wife till she became unconscious and thereafter left the house, he came back and hanged her, the evidence on record indicated that after assaulting the deceased as result of which she became unconscious the accused left the house alongwith his daughter and came back home sometime later. The version of the accused was that he untied the knot of the saree which she used as the ligature and brought her down. In the absence of any evidence to prove that deceased was alive when the accused came back, his version cannot be rejected altogether entitling him to acquittal.[78]

(c) Where the accused husband was alleged to have throttled his wife to death at his father-in-law's house, no external injuries of fracture of hyoid bone was found in post-mortem examination of the deceased, though in the2306 cross-examination, the doctor stated that generally in all cases of throttling, marks of violence and injuries cannot be found but this stray statement of the doctor in the cross-examination was not a conclusive opinion but it was only a possibility in the absence of material to show that the death had occurred by throttling and some other infirmities in the prosecution case, accused was found entitled to be acquitted.[79]

41. Death by Drowning--Signs

In the autopsy examination 200 mls of watery fluid was found in the stomach of the deceased. Modi in his celebrated work *Medical Jurisprudence and Toxicology*, has opined that the presence of a certain quantity of water in the stomach is an important sign of death by drowning. It is not possible for water to get into the stomach, if a body is submerged after death.[80]

Mere absence of diatom in the deceased's body would not exclude the possibility of death by drowning. The post-mortem report also indicated presence of mud in the trachea of the children, which also pointed to the possibility of death by drowning.[81]

Accused appellant, a girl aged 15 years, was alleged to have drowned the child (deceased) in pond. As there was a short distance between the pond and the house of the deceased, the possibility of accidental death could not be ruled out. Conviction of the accused appellant under s 302, IPC was set aside.[82]

42. Depth of Injury more than Length of Blade of Weapon

Normally the depth of injury may not be more than the length of the blade of the weapon of offence

because the blade of the weapon has an important role in causing the injury. But when a 14 cm deep injury was found on the person of the deceased which was undoubtedly more than the length of the blade of the weapon but since it was a forceful blow, the Apex Court did not see any improbability of such a deep injury having being caused by the said weapon.[83]

Character of an Incised or Slash Wound

The edges of a wound made by a heavy cutting weapon, such as an axe, hatchet or shovel may not be as smooth at thoswithmuche of a wound caused by a light cutting weapon, such as a knife, razor, *etc.*, and may show signs of contusion.[84]

Keeping in view the above view of the learned author and taking into consideration the axe used and the injuries found on the person of the two deceased persons, it can certainly be said with all experience in life that when a weapon like an axe is used even on its blunt side, then, the very weight of the axe added with the force exerted behind it will generate forceful momentum and accordingly, the resultant blow was found to give an appearance of the injury of a contused lacerated wound and not that of an incised wound depending upon force exerted. Apart from the above quoted2307 recitals. *Modi's Medical Jurisprudence* supports occular evidence even the common sense approach and experience of life commands that the injury caused by muddamal heavy axe with all force and the momentum at its back was bound to cause and bring about an appearance of the contused lacerated wound. In fact, when the axe blow lands on the head and when it first contacts the skin with the sharp side and there is not much force, then it may cause and also leave behind the appearance of incised wound but as against this if with the heavy weight axe and the force behind it, the blow is delivered then even if with the first contact, it causes an incised wound but instantaneously in an inseparable moment the weight and the force makes a further impact, it is bound to ultimately give the look of a contused lacerated wound.[85]

43. Value of Expert Opinions expressed in Medical Text Books

It cannot be said that the opinions of the authors of medical textbooks were given in regard to circumstances exactly similar to those which arose in the case before the Court nor is this a satisfactory way of dealing with or disposing of the evidence of an expert examined in the case unless the passages which are sought to be relied to discredit his opinion are put to him. The Supreme Court in *Sunderlal v State of Madhya Pradesh* ,[86] disapproved of judges drawing conclusions adverse to the accused by relying upon such passages in the absence of their being put to medical witnesses. Similar view was expressed in *Bhagwan Das v State of Rajasthan.* [87] Though opinions expressed in textbooks by specialist authors may be of considerable assistance and importance for the Court in arriving at the truth, these cannot always be treated or viewed to be either conclusive or final as to what such author says to deprive even a court of law to come to an appropriate conclusion of its own on the peculiar facts proved in a given case. In substance, though such views may have persuasive value cannot always be considered to be authoritatively binding, even to dispense with the actual proof otherwise reasonably required of the guilt of the accused in a given case. Such opinions cannot be elevated to or placed on higher pedestal than the opinion of an expert examined in court and the weight ordinarily to which it may be entitled to or deserves to be given.[88] The purported opinion expressed by an author, hypothetical answers given to hypothetical questions, and mere hypothetical and abstract opinions by textbook writers, on assumed facts, cannot dilute evidentiary value of ocular evidence if it is credible and cogent.[89]

Should the Books on Medical Jurisprudence be Relied upon by Courts with or without putting the same to the Medical Witness?

In *Piara Singh v State of Punjab* ,[90] the reliance on a number of books on medical jurisprudence to support the evidence of one doctor did not find favour with the Apex Court. It was observed that unless the books were put to an expert the High Court should not have done so. Recitals in the books do not provide a sufficient guide to determine the truth or falsity of the testimony of an expert.2308

The ratio of the decision of the Apex Court was analysed by a division bench of the Gujarat High Court in *Rataniya Bhima Bhil v State of Gujarat* ,[1] and it was explained that in the aforesaid the Supreme Court case that the prosecution had examined two medical officers who had given two conflicting opinions and at the time of writing the judgment, the Court had relied upon some recitals in medical jurisprudence without giving an opportunity to the other concerned medical officer whose evidence did not conquer with the said recitals. Therefore, in the case before a division bench of the Gujarat High Court where the facts were very simple *viz.*, which side of axe whether sharp or blunt side was used which was simply an aspect of appreciation of evidence and did not call for expert knowledge, so it was held that the decision of the Supreme Court in *Piara Singh*'s case did not apply.

Where the doctor who conducted the post-mortem was confronted by the defence in the cross-examination by observations made in *Lyon's Medical Jurisprudence,*[2]*Parikh's Text Book on Medical Jurisprudence* and also with the book *The Essentials of Forensic Medicine* by Dr KS Narayana Reddy[3] and the opinion of the doctor as to the cause of death was contrary to the opinion expressed by the learned authors in these books on medical jurisprudence, the Supreme Court held that though sufficient weightage should be given to the evidence of the doctor who has conducted the post-mortem, as compared to the statements found in the textbooks, but giving weightage does not ipso facto mean that each and every statement made by a medical witness should be accepted on its face value even when it is self-contradictory. When there is a reasonable doubt in regard to cause of death of the victim, it is not safe to rely upon the evidence of the doctor solely for the purpose of coming to the conclusion that the victim's death is proved by the prosecution to be homicidal.[4] The opinions in the eminent books on medical jurisprudence cannot be ignored when the doctor in a case has given his report without reason and without support of authority.[5]

44. Fractures caused to Ribs without corresponding Internal Injuries--Not an Accident Case

Where the doctor being a prosecution witness stated in the cross-examination that the injuries on the person of the deceased could as well have been caused even in a motor accident, the Apex Court observed that a closer scrutiny of the injuries impels it to rule out the possibility of a motor accident as a cause for all the injuries eg, fractures on the ribs 5-10 have no corresponding external injury. If these fractures were caused in a motor accident there should necessarily have been corresponding external injuries but if the deceased was manhandled by the assailants with bare hands and legs (either by stamping or by hitting on the chest when the victim was lying) those fractures could have been caused without causing any corresponding internal injury. That apart, the minor damage noticed on the scooter is incompatible with the theory of motor accident resulting in such number of injuries.[6]2309

Depressed Fracture

Cox, in his *Medical Jurisprudence and Toxicology,* while dealing with head injuries, has described various types of fractures. He has described 'depressed fracture' in the following words:

> Depressed Fracture: This is also known as signature fracture or fractures a la signature as their pattern at times resembles the weapon which caused it. Heavy weapons with a small striking surface, *e.g.* axe, hammer, stone *etc*, cause localized depressed fracture.[7]

45. Injury caused by Accused but Death due to Improper Medical Treatment

It will be useful to refer to the law in the UK and the USA on this point as many principles of our justice system have been borrowed from these two countries:

Position of Law in the United Kingdom

In *Halsbury's Laws of England,*[8] the law on the point has been stated as follows:

> For the purposes of offences of homicide, a person causes the death of another where by any act or omission he accelerates the death of that other. The act or omission need not be the sole or the substantial cause but it must be one of the causes, and one that is more than minimal. It is, therefore, possible to have two or more independent operative causes of death, and any person whose conduct constitutes a cause may be convicted of an offence in respect of the death.

It is not necessary that the death should have been caused in the way intended or foreseen by the defendant. It is enough that the death was a foreseeable or natural consequence of the defendant's conduct, so if the defendant threatened the victim who accidentally killed himself in trying to make his escape, the defendant is liable for murder or manslaughter, according to his mens rea.

If a wound is inflicted and death results, the person who inflicted the wound will be held to have caused the death although the victim may have neglected to use proper remedies, or have refused to undergo a necessary operation.

Similarly, where a wound or hurt has necessitated medical treatment and such treatment is improper or negligent so that death ensues, the wound will be regarded as causing the death if it continues to be an operative cause at the time of death, but if the original wound is merely the setting in which another cause operates, or has become merely part of the history of the case, an ensuing death cannot be said to result from the wound and the person who inflicted it cannot be said to have caused the death.[9]

Position of Law in the USA

(a) ***Contribution of act to death***--liability for homicide does not depend upon the fact that death is the immediate consequence of the injury inflicted by the accused. One who inflicts an injury on another is deemed by law to be guilty of homicide if the injury contributes mediately or immediately to the death of such other. He is legally accountable if the direct cause of death is the natural result of his criminal act. The fact that other causes contribute to2310 the death does not relieve the actor of responsibility, provided such other causes are not the proximate cause of the death. Criminal responsibility for inflicting an injury which is the immediate cause of death is not lessened merely because of the predisposed physical condition of the deceased without which the blow or wound would not have been fatal.

(b) ***Acceleration of death--***Criminal responsibility for homicide is not relieved because the person killed has previously been mortally wounded by another, if the act of the accused actually causes or accelerates death. The law declares that one who inflicts an injury on another and thereby accelerates his death shall be held criminally responsible thereof. It is said in this connection that if any life at all is left in a human body, even the least spark, the extinguishment of it is as much homicide as the killing of the most vital being. In accordance with this rule, one who inflicts injury on the deceased after the latter is mortally wounded by another may be guilty of homicide if the effect of the former's act hastens death. In such case, the person who inflicts the first injury may also be convicted, according to some authorities, if it appears that the injury or wound inflicted by him would have resulted in death without the intervening act.

(c) ***Disease or physical condition resulting from or co-operating with injury--***One who

> inflicts a blow or wound upon another, which devolves into or initiates an affliction or disease, is criminally responsible for the death of such person ultimately resulting from the affliction or disease. It is not indispensable to a conviction that the wounds be necessarily fatal and the direct cause of death. It is sufficient that they cause death indirectly through a chain of natural effects and causes, unchanged by human action. This rule is applied not merely where the consequential development is in the form of an immediate infection of the wounds itself, such as erysipelas, septicemia or blood poisoning, but also when the condition developing it is anatomically dissociated from the mere external wounds, as in the case of miscarriage, or pneumonia, or where blows cause congestion of the brain resulting in death, or in exposure which causes death.[10]

Position of Law in India

It may be pointed out that expln 2 to s 299, IPC, lays down that when death is caused by bodily injury the person who causes such bodily injury shall be deemed to have caused death although by resorting to proper remedies and skillful treatment, death might have been prevented. In *Moreha v State of Rajasthan* ,[11] it was held that the mere fact that if immediate expert treatment had been available and the emergency operation had been performed there were chances of survival of the deceased can be of no avail to the accused in view of expln 2 to s 299, IPC . The nature of the offence committed by an accused has to be judged with reference to ss 299 and 300 of the IPC .[12] In *Zorawal v State* ,[13] where the deceased had sustained gunshot injuries but died after 12 days on account of peritonitis, it was held that the offence committed by the accused was under s 302, IPC . In *Naresh v State* ,[14] knife injuries were caused to the deceased on 2 March 1974. After initial treatment at Ghaziabad he was shifted to2311 Safdarjang Hospital, Delhi where he died on 20 April 1974. The post-mortem examination showed that the death took place due to septicaemia and there was pus in the operational injury. It was held that septicaemia caused by the abdominal operational injury accelerated the death of the victim and injury sustained by him was the real cause of his death. In *Jageshwar Singh v State of Bihar* ,[15] it was held as follows:

> Even if the injuries caused the death combined with the complication of tetanus, it must be held that those injuries wer]e the cause of death or that, in any case the circumstances in which those injuries were received would be circumstances of transactions which resulted in his death.[16]

The legal position which emerges is that if injury is caused which makes it imperative for the victim to have medical treatment and such treatment is improper or negligent or is not up to the mark and the victim dies, the injury will be regarded as causing the death of the victim and the fact that other causes contribute to the death does not mitigate or reduce the liability of the accused unless the other causes are wholly independent and do not owe their origin to anything connected with the injury or their treatment and are the sole cause of death.[17]

Victim got Discharged against Medical Advice, Dying on Re-Admission

Where the victim wife was set on fire by the husband, sustained 807 burn injuries and she got discharged from hospital against medical advice and on her re-admission in the hospital she succumbed to her injuries, the doctor who besides conducting post-mortem examination had also treated the deceased at first instance and after re-admission, opined that deceased died on account of burn injuries sustained by her, the accused was found guilty under s 302, IPC, and not under s 304, IPC .[18]

Stone

In normal circumstances, incised wounds cannot be caused by a stone unless the stone is sharp-edged or is given the shape of a sharp-edged weapon.[19]

(VI) GUN, BULLET INJURY AND EVIDENCE AND REPORT OF BALLISTIC EXPERT

46. Importance of Report of Ballistic Expert

In murder cases where firearms are used, the report of a ballistic expert is important, particularly to know whether the bullet found in the body of the deceased or when it has pierced the body and was recovered from the spot and was fired from the same firearm which was recovered from the accused or at his instance.

It cannot be laid down as a general proposition that in every case where a firearm is allegedly used by an accused person, the prosecution must lead the evidence of a Ballistic Expert to prove the charge, irrespective of the quality of the direct evidence available on record. Where direct evidence is of such an unimpeachable character, and, the nature of injuries disclosed by post-mortem notes is consistent with the2312 direct evidence, the examination of the Ballistic Expert may not be regarded as essential. However, where direct evidence is not available or there is some doubt as to whether the injuries could or could not have been caused by a particular weapon, examination of an expert would be desirable to cure an apparent inconsistency, or for the purpose of corroboration of oral evidence.[20]

Comparison Microscope--Importance in Comparing the Crime Cartridge with Test Cartridge

Usually more can be seen through a microscope than can be photographed through it. There are several reasons for this superiority of visual perception, in the first place, the eye looking through a microscope can scan the field and change focus at different points of the field in addition the eye can see any movement present, and with the aid of mental 'filling in' is able to perceive form and detail that may not be recorded photographically. Moreover, as the lens system of the microscope produces a curved field, this works out nicely for the eye since the retina is curved, but does not work so well photographically since the film plane is flat. Due to this latter defect, not all of the field will be photographed to the same degree of sharp focus, and some distortion may be produced in the photograph.[21] It cannot therefore be doubted that a comparison microscope is the most important and most widely used scientific instrument in comparing the crime cartridge with the test cartridge. Such microscopes are of various types but they have been described as follows in *Mathew's Firearms Identification.*[22]

> A comparison microscope consists essentially of two compound microscopes, having identical optical systems, so that they give the same magnification, connected by an optical 'bridge' containing a combination of prisms such that by viewing two separate objects (one under each miscroscope) through a single eyepiece the two objects may be compared by bringing the images of parts of each into juxtaposition.

It has further been stated that when the desired condition is attained for purposes of comparison the bullets are said to be 'matched' and correct opinion can be given thereon.

Modi, in his book,[23] states:

> Close range wounds of entry without washing should be excised with the surrounding skin and deeper tissues and immersed in a fixative solution, eg, formaline. The microscopic examination of close range wounds of entry may show the scorching effects of the gases and traces of carbon monoxide and metals etc.[24]

Expert not taking Microscopic Photograph or its Non-Production in Court--Effect

It is true that there has been considerable difference of opinion amongst investigators regarding the use of photographs in a court for the purpose of illustrating the matching of the markings, and while it may be that

microscope photographs, when2313 taken with the due care and in the best of conditions, may enable the evidence to be placed on the record in a visible form, it cannot be denied that a court would not be justified in rejecting the opinion of an expert who has examined the markings under the comparison microscope simply for the reason that he has not thought it necessary to take the photographs. It is therefore not possible to reject the evidence of ballistic expert who has categorically stated that he had compared the land and groove markings on the bullets under a comparison microscope, simply because he did not think it necessary to take the photographs.[25]

Bullet Injury Entry Wound Smaller Than Exit Wound

A wound of entry is smaller in size than the wound of emergence. The wound of entry has inverted margins and wound of re-emergence has everted margins. In *Modi's Medical Jurisprudence and Toxicology,*[26] this opinion is mentioned:

> The wound of entrance in distance shot is usually smaller than the projectile due to the elasticity of the skin, and round when the projectile strikes the body at a right angle and oval when it strikes the body obliquely. The edges of wound are inverted...The wound of exit is often larger than the wound of entrance and its edges are irregular and everted...The edges of both the wounds of entrance and exit may be exerted in fatty persons due to protrusion of fat in the wounds, and in decomposed bodies from the expansive action of the gases of putrefaction...

In a book on the subject, namely, *Forensic Science in Criminal Investigation and Trials*[27] by Dr BR Sharma, Ph D, Director, Himachal State Forensic Science Laboratory, Shimla, it is observed regarding wounds caused by a gun, that when velocity of a fired shot exceeds 600 meter per second and up to 1100 meter per second it also causes wound of the nature of blast effect. Thus, the wound in the loose skin around the testicles of the deceased could be because of such effect also. At the same page it is also mentioned that if a projectile comes out of the body the exit wound is larger than the entrance wound. So the laceration in that area after testicles of the size 3½´´ × 3´´ with irregular margin is explainable on this theory of blast effect of a fired shot. Even in Gaur's book, namely *Firearms, Forensic, Ballastic, Forensic Chemistry and Criminal Jurisprudence,*[28] it is observed at that wound of exit is usually larger than the wound of entrance, unless on the way through the body the projectile is intercepted by some bones and, there is some deformity or disintegration in the projectile, Shri K Kumar in his book *Forensic Ballistics in Criminal Justice* based on his experience as Director of Ballistics Laboratory of various states, making a scientific exposition of gunshot wounds, compares wound of entrance and wound of exit as under:

	Wound of Entrance	**Wound of Exit**
1.	Size	
	Appears smaller than the wound of exit due to inversion. Greater the distance, smaller the appearance. Contact shots are exception to this phenomena due to stretching of surface skin.	Appears larger than the wound of entrance due to eversion. May appear smaller than the entrance if the entrance wound is a contact shot.2314
2.	Shape	
	Regular, *i.e.*, circular when the bullet hits at right angles and oval when it hits and penetrates in an angular direction.	The shape is of irregular size.
3.	Nature	
	Punctured and lacerated.	May at times appear as incised particularly with high velocity, tapered and pencil point bullet.

4.	Margins	
	Usually inverted, but in case of wound on fatty part of the body, the entrance wound may appear as everted due to protrusion of fat. May be surrounded with abraded collar and contused. Quantity of grease may be deposited. There may be blackening, scorching, tattooing, singing of hair in case of close range shot. Microscopical examination of skin and subcutaneous tissues around the wound of entrance will disclose evidence of carbonisation, swelling and homogenisation of dermal collagen apart from the deposit of dark particles.	Usually everted, broaded collar, contusion, tattoo in, blackening, burning, carbonization, *etc*., are absent. Usually everted, abraded A collar, contusion, tattooing, blackening, burning carbonisation, *etc.* are absent.

In firearm injuries, usually the entrance wound is smaller and the exit wound is bigger. Where the exit wound was not only smaller in dimension than the entry wound but was also smaller in dimension than the size of the cartridge, taken out of the revolver, allegedly used for causing injuries, it was held that the injuries were not gunshot injuries. In such cases, it cannot be expected from medical evidence to give any categorical opinion about the character of injuries merely on the basis of their margins or edges.[29] From a country made pistol it cannot be expected that after penetrating the abdomen and intestine and back muscles of a person it would cause multiple exit wounds when pellets were not big in size so that exit wounds would be found in large numbers. There may not be any exit wound at all.[30] In cases of a bullet injury except where the bullet gets fragmented after entering the body and only a portion thereof passes out of the exit wound or the bullet remains embedded in the body and does not pass out in the normal course and is subsequently taken out or2315 except in case of a point blank wound, it is practically and usually not possible that the size of the wound of exit may be smaller than the diameter of the bullet.[31]

47. Person Shot at from Close Range

If a person is shot at from close range, the marks of tatooing found by the medical witness would show that the range was small, quite apart from any other opinion.

In case of gun the range of blackening would normally extend to three feet as beyond that shot charge begins to disperse. In *Modi's Medical Jurisprudence and Toxicology*[32] the opinion of Dr Modi goes that the shot charge of a gun at a distance of one to three feet makes a single aperture with irregular and lacerated edges corresponding in size to the bore of the muzzle of the gun as the shot charge enters as one mass but is scattered after entering the wound and causes great damage to the internal tissues. The skin surrounding the wounds is blackened, scorched and tattooed with unburnt grains of powder. On the other hand, at a distance of six feet the central aperture is surrounded by separate openings in an area of about two inches in diameter made by a few pellets of the shot which spread out before reaching the mark, the skin surrounding the aperture may not be blackened or scorched but is tattooed to some extent. At a distance of about 12 feet the charge of shot spreads widely and enters the body as individual pellets producing separate openings in an area of five to eight inches in diameter depending on the extent of choke but without causing blackening, scorching or tattooing of the surrounding skin. According to Taylor,[33] no general rule can be laid down about the distance from which a firearm was discharged. If blackening is found around the wound of entry on the dead body by the medical man it confirms that the deceased was within six feet of the assailant.[34] No charring or burning of the skin was found in medical examination as shot was fired from a distance of more than six feet.[35]

Fire from a Shot Gun by Close Range

The prosecution case was that the appellant had fired shot from about 2 meters causing death of the deceased. Several wounds of entry spread across the chest and left upper arm with blackening and burning around some of them were found. The dispersal of pellets and the uneven blackening and burning over the bullet holes suggested that a primitive weapon, (a 'topidar' shot gun, a muzzle loading weapon, which is often a primitive weapon and when used with gun powder and shot of uncertain quality and quantity, is likely to give uneven and uncertain pellet patterns) could have been used. The doctor gave opinion that the shot had been fired from about 2 metres from a shot gun, which fully corresponded with the injuries found on the dead body. Accused was convicted under s 302, IPC .[36]

Where prosecution witnesses deposed that the accused appellant fired from a close range causing death of the deceased, but no blackening or charring was found at the2316 wound of entry in the body of the deceased, the use of the gun by the accused appellant was not established. Accused was acquitted of the charge under s 302, IPC .[37]

Accused Assaulted Deceased with Fire-arm--No Fire arm Injury found--Accused Acquitted

Evidence of eye-witnesses was that the accused assaulted the deceased with fire arms, knife and rod. But in post-mortem examination, no gun shot injury was found on the person of the deceased. Empty cartridges were also not recovered from the spot. Enmity between the parties was admitted. Eye-witnesses were related to the deceased. Accused persons were acquitted of the charge under ss 302 / 34, IPC .[38]

Prosecution case that the accused persons took away the deceased from his house and about 20 minutes thereafter 3-4 shots were heard, was not supported by medical evidence as in post-mortem examination, no gun shot injury was found on the person of the deceased, and only lacerated wounds were found. All the accused appellants were held entitled to benefit of doubt, thus, their conviction under ss 302 / 34, IPC was set aside.[39]

48. Wounds and Gunshots

The argument that the two gunshot injuries had spread, which suggested that these were fired from some distance is negatived by presence of blackening, charring and tattooing mark. The blackening was present in an area of 14 cm by 10 cm but the entry would was 2 cm by 2.06 cm only.[40] But where the deceased died of gunshot injuries fired from single barrel gun, the pelletes were recovered from the dead body of the deceased and their was possibility of pelletes from single shot being disbursed and causing more than one injury, the injuries found on the body of the deceased being more will not belie prosecution version of single shot fired from gun of the accused when the pelletes were fired from the distance of 40 feet or even 15-20 feet. The possibility of blackening around injuries also could not be ruled out as due to gap of about a month from the date of incident to the date of recovery, the possibility of the gunpowder residues being washed off by water cannot be ruled out.[41]

49. Double Barrel Gun

In case of a double barrel gun, it is impossible to make out which pellet has been fired from which gun.[42] Where the evidence of ballistic expert showed that the injuries suffered by the deceased and the pellets removed from his body, could be fired from the double barrel guns recovered as per the disclosure statement made by the accused, the conviction of the accused under s 302 read with s 34, IPC, was upheld.[43]2317

50. Evidentiary Value of Opinion of Ballistic Expert

The evidence of ballistic expert has corroborative value when it finds support from statement of eyewitnesses. It helps the prosecution in proving guilt of the accused, when the case of prosecution that the accused persons had fired their guns is amply corroborated by the report of the ballistic expert that all the cartridges of point 12 bore recovered from the house of the deceased had been fired from the guns of the accused persons, the conviction of the accused persons under ss 302 / 307 / 34, IPC, and under s 27 Arms Act was upheld.[44] Where the ballistic expert showed that bullets recovered from the body of the

deceased had been fired from revolvers used by the accused, the injuries of the deceased were compatible with the manner of their being caused as deposed to by eyewitnesses, the conviction of the accused persons under ss 302 / 34, IPC, was upheld.[45] When the reliable ballistic experts opinion that gunshot injuries found on the body of the deceased and on the person of the injured person were caused by two different weapons, *i.e.*, one by country made pistol and other by factory made gun, while prosecution case was that both deceased and injured witness received gunshot injury, the conviction of the accused under ss 302 and 307, IPC, was set aside.[46] Where defence of accused was that in a free fight between accused party and deceased party, the butt of the gun of the accused was broken by an axe-blow because of which it went off killing deceased, evidence of ballistic expert showed that axe-blow could not move forward safety lock of gun so that gun could go off, gun injuries on deceased also indicated that the gun was not fired from close range. Plea of accidental firing of accused persons was not accepted.[47] The Court can refuse to place any reliance on the opinion of an expert which is unsupported by any reasons.[48] When the opinion of ballistic expert is based on the notes prepared by him and the same is prepared in the exercise of his official duty, no reliance can be placed upon such opinion/report when the copies of the notes are not supplied to the defence.[49] In the face of definite evidence of ballistic expert on record that point 32 deformed lead bullet, which was found from the body of deceased was fired from an English revolver which was seized from accused, the defence plea that bullet recovered from the body of the deceased was not compared by ballistic expert to find out that it was fired or not from the revolvers of police officers is of no use to the accused.[50]

Where ocular evidence of the injured witnesses was that the first shot as well as the second one were fired by the accused and the report of the ballistic expert showed that two shots were fired from two different guns, the explanation of the witness that it was dark and when the torchlight was flashed, the accused was seen pointing his gun towards them and therefore they had believed that the previous shot was also fired by him, deserves to be accepted when the identity of accused was not challenged.[51] When the witnesses have not stated that shots were fired from the two guns in question, non-production of the report of the ballistic expert is of no consequence.[52] It cannot be laid down as a general proposition that in every case2318 where a firearm is allegedly used by an accused person, the prosecution must lead the evidence of a Ballistic Expert to prove the charge, irrespective of the quality of the direct evidence available on record. In the present case, the death of the deceased was caused by bullet fired from a revolver. The medical evidence was consistent with the oral evidence. It was clear that the bullet recovered by the doctor at the time of post-mortem of the victim had traversed to thoracic spine through the neck from the face near the angle of the jaw, hitting the fifth thoracic vertebra, badly damaging the underlying spinal cord, thus, the absence of Ballistic Expert's evidence was held not fatal to the case of the prosecution, notwithstanding the fact that the Forensic Science Laboratory, in its report, had not expressed a definite opinion about the bullet recovered from the place of occurrence.[53]

There was cogent and reliable evidence to establish the prosecution case. Seizure of the fire arms and recovering the empties and sending them for examination by the Ballistic Expert would have only corroborated the prosecution case but by not sending them to the Ballistic Expert in the case was not fatal in view of the categorical testimony of PW about the whole incident.[54]

Appellant accused fired with gun at the deceased causing his death. The evidence of two eye-witnesses was found reliable, and the plea of the accused that it was accidental firing from rifle was found improbable. As admittedly it was a case of firing from gun, the non-sending of rifle to the Ballistic Expert for opinion was inconsequential.[55]

Inconsistency between Evidence of Ballistic Expert and that of Eyewitnesses

When evidence of qualified ballistic expert proved beyond doubt that injuries attributed to the accused were caused by a double barrel gun and not a rifle, the contradictory statements of eyewitnesses who was neither expert nor had used gun or rifle before, about use of gun at one time and rifle at other is not material.[56] But when accused as per prosecution case has fired with a gun causing death of the deceased and injuring the eyewitnesses but ballistic experts opinion that the gunshot injuries found on the body of the deceased and the injured witness were caused by two different weapons *i.e.*, one by factory made gun and other by country made pistol, the conviction of accused under ss 302 and 307, IPC, was set aside.[57]

When direct evidence of witness is available inconsistency related to distances from which gunsshots were fired between evidence of medical expert and eyewitness is of no significant whatsoever. So what is required is that the eyewitness account must substantially tally with the medical evidence on record.[58] Where it is proved beyond doubt that the evidence of the eyewitnesses is trustworthy in a case where the accused person committed murder by gunshots, the inconsistency between the opinion of expert and the eyewitnesses relating to the distance from which gunshots were fired carried no weight. If the eyewitnesses stand the test of their credibility2319 they have to be believed.[59] From the mere admission in his evidence by witness that 'MO 1 is the gun which the accused was having at the time of shooting', it cannot be held that based on the contents of ballistic expert (that fired cartridge could not have been fired from rifle examined by him), the whole prosecution case must fall to the ground.[60] Where prosecution witness stated that the deceased received pellet injuries on his chest and jaw, and the investigating officer also stated in the injury statement that deceased received pellet injuries on tongue, chest, chin *etc.*, but the bullet was recovered from the chest cavity of the deceased by the doctor and there was no explanation by prosecution about it, the fact that the loaded gun seized by investigating officer and bullet removed from chest cavity of the deceased by the doctor were not sent to ballistic expert for examination the acquittal of accused was upheld.[61]

51. Time when Weapon/Cartridge was fired

In *Modi's Medical Jurisprudence and Toxicology*,[62] while dealing with the topic as to 'the time when the weapon was fired' it has been observed that 'it is never possible to ascertain with any scientific accuracy the time when a weapon or cartridge was fired'.[63]

52. Non-recovery of Pistol or Spent Cartridge

The non-recovery of the pistol or cartridge does not detract from the case of the prosecution, where the direct evidence is acceptable.[64]

53. Mere Recovery of Offence Weapon not sufficient to Record Conviction

The recovery of offence weapon *viz.* gun, was effected after more than two years. The prosecution did not prove that during this intervening period of more than two years, the gun had not changed hands and the same was consistently possessed by the accused appellant. Possibility of use of another gun of the same caliber could not be ruled out. There was also no direct evidence to connect the accused with the commission of offence by the accused appellant. The accused appellant was given benefit of doubt and acquitted of the charges under ss 302, 460 / 34, IPC .[65]

54. Recovery of Empties from the Place of Occurrence--Weapon used is Pistol and not Recovered

If shots had been fired from a revolver then the empties would have remained inside the chamber of the revolver and would not have fallen out on the platform. Presence of five empties on the platform clearly indicated that the weapon used for firing shots was a pistol.[66] Identity of weapon and manner of use by the accused has to be2320 established by the prosecution the weapon and the empties have to be connected with the crime otherwise the use of weapon is not established and the same is not connected with the accused.[67]

In every case of gun firing, it is not required that each and every bullet should hit the target. There may be attempts by the deceased or the victim to save himself from the raining bullets, in which case, the bullets may not hit the target. Merely because all the bullets fired from the gun did not hit the target and were not recovered from the scene of offence, is no ground to conclude that the incident did not take place.[68]

55. Seized Firearm not sent for Examination by Ballistic Expert--Effect

Where the guns seized from two accused persons had not been sent for forensic examination by ballistic experts, both accused persons having licenced guns surrendered in the court after a lapse of 11 days from the date of incident. Examination of guns by the ballistic expert after a lapse of 11 days would not have made any material difference. It would have been different if any bullet or pellet would have been

found and recovered either from the body or from the scene of occurrence in which case the ballistic expert would have been expected to conduct test-fires and determine whether the bullet or pellet was fired from the seized guns or any one of them.[69] Seizure of the fire arms and recovering the empties and sending them for examination by the ballistic expert would have only corroborated the prosecution case but by not sending them to the ballistic expert in the particular case may not be fatal in view of the categorical testimony of prosecution witness about the whole incident.[70]

56. False Encounter

In autopsy examination, blackening and tatooing were found around bullet injuries on the chest and back of the deceased. This showed that shots were fired from a short distance, which was not consistent with the theory of genuine encounter. No fire-arm was recovered from the body of the deceased. The police party had not received any injury. Held, it was a case of false encounter.[71]

57. Death in Police Lock-up

Where the entries in police station diary showed that the appellant accused had kept the deceased in police lock-up, and injuries including fracture of rib, which was the cause of death, were found in the medical examination of the deceased, and the deceased was in the custody of the appellant accused and none-else, however as the evidence did not show that the accused intended to cause the death of the deceased, his conviction under s 302, IPC was altered to one under s 304, IPC .[72]2321

Where the deceased, suspect in a theft and lurking house trespass case, was detained in police custody for 2/3 days, subjected to electric shock to his scrotum by accused police officials in police custody, causing death, accused appellants police officials were convicted under s 304, Pt II, IPC .[73]

(VII) POISONING CASES

58. Routes of Administration of Poison

In *Modi's Medical Jurisprudence and Toxicology,*[74] in s II dealing with toxicology, routes of administration of poison have been given. It is stated: 'Poisons may gain entry into the body by various other routes. These can be considered as enteral routes. The poison may come in contact with the skin, mucous membrane of the respiratory tract, gastro-intestinal tract, eye, ear and the vagina'.[75]

59. Poisons

Mercury

In *Modi's Medical jurisprudence and Toxicology,*[76] in s II dealing with toxicology, Modi has dealt with mercury and its compounds as poisons. About mercury, it is stated at p 135 that:

(i) Persons concerned with mercury mining are also liable to get poisoned. It is easily converted into a dull grey powder when shaken up with oil or triturated with sugar, chalk or lard. The process is known as deadening and is used in preparing mercurial ointment and emplastrum. The metal is not acted upon by hydrochloric acid. It is slightly dissolved by dilute cold sulphuric add but completely dissolved by strong sulphuric and nitric acids.

About compounds of mercury, against mercuric chloride the book states: 'It is a violent poison, and is obtained in the bazaar, often mixed with impure sub-chloride'.[77]

Further:

> After mercury is absorbed into the system, it is eliminated in the saliva, urine and faeces, and in the milk and perspiration. If the quantity is large. It also passes rapidly to the foetus in uterus through the placental circulation particularly methyl mercury compounds. Elimination commences within a few hours of the administration of a single dose and is completed within four to five days after which the metal cannot be detected in the urine, but its excretion is very slow, if mercury, is given in repeated small doses it may be detected in the solid organs after long periods. The diagnosis of clinical and industrial mercury poisoning can be proved by measuring the amount of mercury in the urine.
>
> Mercury is often used as a medicine, hence the detection of small quantity in the viscera does not contra indicate death from some other cause.2322

According to Modi this type of poison can cause renal failure.[78]

According to Dr Bernard Knight, in *Medical Jurisprudence and Toxicology*,[79] 'a characteristic feature of poisoning by mercury is suppression of urine at early stage of poisoning and presence of blood and albumin in urine. This is because mercurials are specific poisons to kidneys and cause necrosis of glomeruli'. Shock and collapse supervenes and the cause of death is mostly kidney failure. Where the accused, a scientist who had done his Phd in bio-chemistry was alleged to have inserted mercuric chloride crystals mixed with tamarind into vagina of his wife who developed severe burning in her genitals after insertion and was treated by the doctor for chemical burns, the wife died 44 days after administration of the poison due to renal failure. The post-mortem and forensic science laboratory report showed that there was no trace of mercuric chloride in her body. In view of *Modi's Medical Jurisprudence and Toxicology,* since the deceased died 44 days after administration of poison and so there was no possibility of mercury at the time of conducting post-mortem, and since the accused had access to the mercuric chloride crystals in the laboratory at the place of his work and crystals were available in open market and accused being a scientist knew the use and misuse of the chemical, the death of deceased was held to be caused by mercury poisoning by the accused and not by renal failure.[80]

Dhatura

In *Lyon's Medical Jurisprudence for India*,[81] it is said:

> In the East, *dhatura* is not used with homicidal or suicidal intent; it is almost invariably employed with the object of producing stupefaction to facilitate theft.[82]

In *Emperor v Bhagwan Din* ,[83] it was observed that *dhatura* is not exactly a deadly poison and may often be given for the purpose of merely stupefying a victim. But, although death does not always follow from dhatura poisoning, yet it does follow in a considerable proportion of cases.[84] A division bench of the Nagpur High Court observed that *dhatura* is a common poison frequently used to cause death, and the effects of *dhatura*, plants of which are often to be found in villages, are well known to the villagers.[85]

The question, as to what offence is constituted by the administration of *dhatura*depends upon the consequences of the act of its administration and the intention or knowledge of the person administering it. In *Empress v Tulsha* ,[86] a woman who had administered *dhatura* to three members of her family, who all recovered, was found guilty of an attempt to murder. In Re *Venkatachalam Chetty,*[87] it was held that since it was not shown that pneumonia was a likely consequence of the administration of2323*dhatura,* nor was it established that the pneumonia was caused by the exposure or was a probable consequences of sleeping out, it could not be said that the death was caused by the administration of *dhatura* and the accused was guilty of the offence under s 238, IPC . On the other hand, in *Emperor v Bhagwan Din* ,[88] where *dhatura* had been administered to travelers, one of whom died and the trial court had convicted the accused under s 304, the High Court had altered the conviction to one under s 325 though the judges remarked that the

case might possibly have come under s 326 .[89]

The best indication of the intention of the offenders can be gathered from the quantity of *dhatura* which he administered. Where, therefore, in order, to facilitate robbery, the accused administered a large quantity of *dhatura* to his victims in the hope that the successful culmination of his crime would be facilitated by the death of his victims and the subsequent difficulty of tracing him with the help only of persons, little acquainted with him, it was held that he was guilty of murder.[90] So once it is established that the accused, with a motive to get rid of the victim administered a fatal dose of dhatura in his food, the conclusion to be drawn is that he or she committed murder unless the explanation is such as to create some doubt in the mind of the Court. Thus, if one deliberately administers a common poison, the effects of which are well known, it is no defence to say that one failed to grade the exact dose correctly so as to cause some injury short of death. The question, whether a person knows what he is administering and knows what its effects will be, is, of course, a question of fact in the particular case. If the necessary knowledge can be attributed to the accused, he would be guilty of murder.[91]

Arsenic

A person who administers a well-known poison, like arsenic, to another, must be taken to know that his act is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and if death ensues, he is guilty of murder notwithstanding that his intention may not have been to cause death.[92] If, however, the person, to whom the arsenic is administered, survives, the accused would be guilty of an offence under s 307, IPC .[93] In *Emperor v Sikandar* ,[94] it was held that it is of the utmost importance, in a case of arsenic poisoning, that the prosecution should prove that a lethal dose of arsenic, *i.e.*, two grains or upwards, had been administered.[95]

Accidental case of poisoning by arsenic sometimes occurs from its admixture with drinks or articles of food. There have been instances where white arsenic has been mistaken for baking powder, soda, sugar, salt or flour and has caused mass accidental2324 poisoning.[1] Thus where the testimony of eyewitnesses as regards manner of pouring arsenic poison by the accused in the cooking-pot was not reliable, there was absence of motive on the part of the accused of administering poison, there was possibility that the arsenic poison was mixed in dal (pulse) accidentally at the hands of someone else, the conviction of the accused was set aside.[2]

Aconite

It is stated in books on medical jurisprudence and toxicology that a root of aconite is often used both externally and internally by *vaids* and *hakims* in this country and that it is also sometimes added to country made liquors to increase their intoxicating power. But there is no doubt that a variety of aconite is a deadly poison and, in the absence of anything to show any other intention, a person, who administers aconite to another, producing fatal results within three hours, cannot but have the intention of killing him. In any case, a person, who administers aconite of such quality and in such quantity to another, as results in his death within three hours, must be taken to have known that his act is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and if death ensues, he is guilty of murder, notwithstanding that his intention may not have been to cause death.[3] Where, however, a woman administered aconite powder to her husband, not with an intention to kill him, but with an intention to obtain some kind of domination over him, it was held that she was guilty of an offence under s 328, IPC .[4]

Love Potions

Sometimes poisonous drugs are used as love potions with fatal results and the question arises as to which of the offences has been committed in such cases. There have been several cases, all very much of the same nature, in which it has been held that where the intention to cause death cannot be clearly found without any other possible explanation of the act of the person of giving poison, a conviction for murder cannot stand and even if the person, administering the drug, had neither the intention to cause death, nor the knowledge that she was likely to cause death, she must be held to have administered the

poison without due care and caution and the offence would fall under s 304A, IPC .[5] In *Pika Bewa v Emperor* ,[6] it was held that unless it is shown clearly and without possible doubt that the intention was to cause death, where a substance is administered as a love potion, the accused cannot be convicted of murder. The mere administering of a love potion or drug, which, a person thinks, might be beneficial, is not, in itself, an offence, but when it is supposed to have effect upon persons, with whom the paramour of the accused had enmity, and when she administers it without due care and caution or any inquiry as to what it really is, her act certainly falls within s 304A, IPC . If, however, the administration of the love potion does not cause death of the victim, but results merely in his falling into delirium or coma, the person administering it would be2325 guilty of the offence under s 328, IPC .[7] A person, who supplies love potion to another for being administered as such, would be liable as an abettor.[8]

60. Proof Needed in Poisoning Cases

In a case of poisoning, the prosecution must establish that:

(a) death took place by poisoning;
(b) the accused had poison in his possession; and
(c) the accused had an occasion to administer poison to the deceased;
(d) there is a clear motive for an accused to administer poison to the deceased.[9]

If however, the accused gives the victim something to eat and the victim dies immediately on the ingestion of that food with symptoms of poisoning and poison, in fact, found in viscera, the requirement of proving, that the accused was possessed of the poison, would follow the circumstance that the accused gave the victim something to eat and it need not be separately proved.[10] In *Mohan v State of Uttar Pradesh* ,[11] the Supreme Court considered the proof of the fact of possession of poison unnecessary as the victim had died soon after eating *pedas* given by the accused and had not taken any other food likely to contain poison.

Beyond the above four elements, which are essential to be proved in poisoning cases, the prosecution has also to establish that the deceased died of a particular poison said to have been administered.[12] It has also been said that it is of the utmost importance in a case of arsenic poisoning that the prosecution should prove that a lethal dose of arsenic, that is, two grains or upwards, had been administered.[13] In *Happu v Emperor* ,[14] it was observed that if the prosecution wishes to establish that the deceased died of arsenic poisoning by means of the chemical examiner and weight is to be attached to his evidence, it must be proved that at least two grains of arsenic were administered to the deceased before death. It can be done by proving the discovery of this quantity in the body of the deceased or by accounting for its absence in part which absence in part may be attributed to vomiting, purging or the natural elimination of poison from the body of the deceased.[15]

Where in alleged case of poisoning, no poison was detected in the viscera of the deceased, and evidence failed to show that the death of the deceased was caused by2326 administering poison by the accused, the acquittal of the accused for offence under s 302, IPC was recorded.[16]

Where evidence proved that there was matrimonial discord between the parties and death of the deceased was caused by forced administration of poison and smothering, accused husband was convicted under s 302, IPC .[17]

Where the appellant husband was alleged to have mixed cyanide in cold drink and given the same to his wife causing death, the oral evidence about the purchase of cyanide was not reliable, and the recovery of limca bottle from the house of the accused did not inspire confidence as the sample to the FSL was sent 22 days after the seizure, the conviction of the appellant was found not sustainable, and was set aside.[18]

Proof needed in poisoning cases is circumstantial evidence. If circumstantial evidence, in the absence of direct proof of the above mentioned elements,[19] is so decisive that the Court can unhesitatingly hold that death was the result of administration of poison (though not detected) and that the poison must have been

administered by the accused, then the conviction can be rested on it.[20] Even in *Anant Chintaman Lagu v State of Bombay* ,[21] where poison could not be traced in the viscera by chemical and post-mortem examination, the majority of the judges had concluded that the circumstantial evidence established the administration of poison by the accused.[22] It was, however, warned, in *Ramgopal v State of Maharashtra* ,[23] that where the evidence is circumstantial, the fact, that the accused had motive to cause death of the deceased, though, relevant, is not enough to dispense with the proof of certain facts. The evidence of motive, which is frequently given in poisoning cases, is of subsidiary importance and the mere fact, that the accused had a motive to cause the death of the deceased, is not a fact which will dispense with the proof of points that the accused had the poison in his or her possession and that the accused had an opportunity to administer the same to the deceased.[24] On the fateful night, admittedly nobody was present in the bedroom where the accused appellant and the deceased were sleeping as husband and wife. The victim screamed at about 2 am, which attracted the inmates of the house to rush to the bedroom where they found the victim dead. The accused husband did not explain how the deceased died. The conviction of the accused husband under s 302, IPC was held proper.[25]

The evidence of a prosecution witness, a goldsmith, cannot be rejected on the ground that he had no license to possess potassium cyanide and he had not disclosed2327 the fact of giving potassium cyanide to accused to any other person. Being a goldsmith, it was quite likely that he was able to obtain potassium cyanide even though he did not have a license to possess it as cyanide is commonly used by goldsmiths for electroplating gold ornaments.[26]

Appellants were prosecuted for offences under ss 302, 120B and 201, IPC on allegations that the accused persons made the deceased and his wife drink coffee in which they had mixed sleeping pills, and also administered five injections of poison. The doctor in post-mortem report had opined that the cause of death could not be ascertained as the body was decomposed. According to FSL report, medicine called Diazepam 'Tranquilizer' was found in the stomach, intestine, liver, heart, kidney and lungs *etc*. The mere recovery of injections from a lane near the house of the accused was held not sufficient to record the conviction of the accused appellants. Conviction of the accused appellants for offences under ss 302, 120B and 201, IPC was held not proper and was set aside.[27]

There was no evidence to show that any of the accused persons administered poison. PW3 deposed that the poison was mixed with the Halua and she found the taste to be pungent and did not have the whole of halua served to her; but the deceased took the whole quantity which was offered to him. She did not know from where the halua came. There was no forensic examination of the halua which is supposed to have contained the poison by PW3 and shared by the deceased. The acquittal of the accused persons, as recorded by the High Court under s 302, IPC, was held justified.[28]

Appellant accused doctor son-in-law with intention to grab property made his father-in-law and mother-in-law believe that they were suffering from AIDS, and on the pretext of treatment, gave poisonous injection, caused their death and that of their three minor children. Held, case was proved beyond reasonable doubt, thus, accused was convicted under s 302, IPC .[29]

70 *State of Punjab v Hakam Singh* 2005 Cr LJ 4111, p 4115 (SC), AIR 2005 SC 3759, (2005) 7 SCC 408 .

71 *Milkiyat Singh v State of Rajasthan* (1980) Cr LR 645, p 648 .

72 *Ram Swaroop v State of Rajasthan* 2008 Cr LJ 2259, p 2260, AIR 2008 SC 1747, 2008 (4) Scale 566, (2008) 13 SCC 515 .

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Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 302.

Punishment for murder.--

61. Chemical Examiner's Report

Before using the chemical examiner's report, the Court must satisfy itself that the substances examined were, in fact, what they are said to be[30] because such a report can be of no use unless there is proof of the identity of the articles found during investigation and sent to the chemical examiner with the articles examined by him.[31] It is always open to the Court to call the chemical examiner when this course is deemed to be necessary in the interests of justice. He does not, as a rule, give any opinion as to the cause of death; he merely reports the result of the chemical examination of the substances sent to him. It is for the Court to determine the cause of death after a consideration of such report together with the post-mortem appearances, as deposed to by the officer, who conducts the autopsy, and the other evidence in the case.[32] In ordinary circumstances there would be nothing wrong in2328 taking reports of the chemical examiner and the imperial serologist on record without examining these persons as witnesses as permitted by the CrPC . When however there is a difference of opinion in the reports so much so that the effect of one report is to nullify the effect of the other, the duty to explain the difference is on the prosecution and mere production of reports does not, under the circumstances, prove anything which can weigh against the accused.

Failure of the serologist to detect the origin of the blood due to disintegration of the serum in the meanwhile does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to haematological changes and plasmatic coagulation that a serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin? Such guess work that blood on the other axe would have been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity no benefit can be claimed by the accused.[33] In the absence of report regarding origin of blood it cannot be said that the Court could not have convicted the accused when the serologist and chemical examiner have found that the chadar (sheet) seized in consequence of the disclosure statement made by the accused was stained with human blood, as with the lapse of time the classification of the blood could not be determined. No bonus or benefit can be conferred upon the accused by the Court.[34] Even if the serologist did not enter the witness box, his report is admissible in evidence under s 293(4)(f), CrPC .[35]

62. Contradiction between Report of Chemical Examiner and Statement of Doctor

Where in a murder by burning, the doctor who examined the deceased stated that the body of the deceased smelled of kerosene but the report of forensic science laboratory showed that traces of petroleum were detected on partially burnt clothes of the deceased, in the face of report of the forensic science laboratory which was based upon scientific analysis, the statement of the doctor which was only an opinion was discarded particularly when it militated against the version of eyewitness.[36]

63. Failure of Police to send the Blood for Chemical Examination--Effect

The failure of the police to send the blood for chemical examination in a serious case of murder is to be

deprecated. In such cases, place of occurrence is often disputed. However, such an omission need not jeopardise the success of the prosecution case where there is other reliable evidence to fix the scene of occurrence.[37] Where in a case based on circumstancial evidence, the crucial questions were as to whether the gloves of the accused were stained with blood, whether that blood was human matched the blood group of the deceased, to link the accused with murder, non-production of the chemical analysts report by the prosecution was fatal to its case because without it the Court was unable to hold that either the clothes or the axe was2329 blood-stained.[38] Lapse on the part of investigating officer in not sending the sample of blood-stained earth to the chemical examiner is fatal to the prosecution case when eyewitnesses account given by interested and inimical witnesses is not reliable.[39]

64. Burn Cases

The prosecution case disclosed in the complaint filed by the father of the complainant was that the appellant husband subjected the deceased to mental and physical torture and on the date of incident poured kerosene oil on the deceased and set her ablaze. Contrary to it, in the dying declaration recorded in the hospital, the deceased had stated that she had sustained burn injuries due to explosion of stove. She did not name the accused. The accused had also sustained injuries on his hand and face which showed that he tried to save the deceased. The possibility of committing suicide could not be ruled out. Held, the prosecution case was not proved beyond reasonable doubt. The conviction of the accused under s 302, IPC recorded by the trial Court was found not sustainable, hence, it was set aside.[40]

The accused husband had poured kerosene oil on the body of his deceased wife as the latter had refused to transfer her property to the husband. At the time of the admission of the victim in the hospital the doctor examined in the case, had recorded the statement of the deceased in the admission register in which she had told him that the accused appellant had poured kerosene on her and set her on fire. She also stated the same in the dying declaration made by her to the Head Constable, showing the involvement of the accused appellant. The conviction of the accused appellant recorded by the High Court under s 304, Pt II, IPC, after setting aside the acquittal recorded by the trial Court was confirmed.[41]

Prosecution case and evidence was that the appellants mother-in-law and sister-in-law ill-treated the deceased for non-fulfilment of dowry demand, and burnt her alive. Dying declaration of the deceased implicated the accused appellants. Doctor had given certificate that the victim at the time of making dying declaration was in fit mental state to make dying declaration. Conviction of the appellant was held proper.[42]

The incident admittedly took place inside a small room. It had two doors. The prosecution witnesses knocked both the doors. Their call to the deceased to open the door remained unanswered and only then they took recourse to breaking open the door. According to them, not only the appellant was with them at that point of time, but also he took part in dousing the flames. Indisputably, he took the deceased to the hospital. In such a situation, the dying declaration which implicated the appellant accused was eschewed from consideration. The appellant husband was acquitted of the charge under s 302, IPC .[43]2330

65. Honour Killing

The deceased, a Kshatriya, was married to the accused appellant, a member of the Schedule Caste. The accused paternal uncle of the deceased was annoyed with the marriage. The prosecution case was that the accused appellant had taken the deceased on the pretext that her grandmother was seriously ill and wanted to see her. The dead body of the deceased was recovered two days later. Marriage had taken place six years before, even a child was born to the couple. The honour killing, which was the alleged motive of murder, was weak. Last seen evidence was found unreliable as the statement of witnesses recorded under s 161 CrPC was recorded four months after the incident. Evidence of recovery was also found not reliable. Circumstantial evidence adduced in the case was found insufficient to record the conviction of the accused appellant. Accused appellant was acquitted of the charge under s 302, IPC .[44]

(VIII) IDENTIFICATION OF THE ACCUSED AND CASE PROPERTY

66. Night Incident--Foggy Night--Accused given Benefit of Doubt

A mob of about 20 persons at about 10 pm in the night had entered the house and committed the murder of three inmates of the house. Eye witness from his field had seen the incident, he identified only 4 persons out of mob. The injury said to be received by the eye-witness was not mentioned in the FIR, nor was he examined by the doctor. The night of incident was a foggy night. FIR was delayed. The accused appellants were entitled to benefit of doubt and acquitted.[45]

Where the incident took place in the month of March at 5 pm, and the victims and the accused persons were known to each other, identification of the accused persons could not be doubted, thus, conviction of the accused persons for offence under ss 300, 307, 436, 506 and 149, IPC was held proper.[46]

67. Identity of Accused proved--Night Occurrence--Accused Acquitted

The identity of the assailants was not established by the prosecution evidence. The incident had taken place at night and though the oral evidence did indicate the presence of lantern in the premises but the said lantern was neither shown in the site plan nor seized by the police. The incident was seen by a large number of persons and that too from a distance of 20 paces. There was enmity between the parties. The medical evidence did not support the ocular version. The Supreme Court affirmed the view expressed by the High Court that the accused was entitled to benefit of doubt and to acquittal.[47]

There was explosion of a bomb which was kept inside a passenger bus which caused the death of one passenger and injuries to several passengers. The prosecution witnesses identified the accused appellant. There was enough material to connect the accused appellant with the heinous crime of planting a live bomb in a passenger bus and getting down from the same before the bomb exploded, thereby causing death of2331 one person and grievous injuries to several other passengers. The accused appellant was convicted for offences under ss 285, 337, 338, 427, 302, IPC and s 3 of the Explosive Substances Act .[48]

The very identification of the accused appellant was doubtful. The accused appellant was convicted solely on the evidence that the murder weapon which had been recovered at his instance had been matched with the bullet recovered from the dead body. Recovery of offence weapon was itself doubtful. The case of the acquitted co-accused was similar. The accused appellant was also acquitted of the charges under ss 393, 398 and 302, IPC .[49]

68. Identification Parade

The main purpose of holding test identification parade during investigation is to enable the eyewitnesses to identify the accused who were not previously known to them. This way the investigating officer can satisfy himself of the *bona fides* of the witnesses and produce further evidence to corroborate their testimony.[50] The holding of test identification parade is all the more necessary when the eyewitnesses are unable to name the offender but claim that they could identify him on seeing him.[51] But the State is not bound to hold test identification parade when the accused are arrested on the spot though such an identification parade can be held on the request from the accused.[52] When the accused persons are named in the FIR lodged within one hour of the incident, non-holding of identification parade does not matter.[53] Where identity of the accused is not disputed, holding of test identification parade is not necessary.[54] Where conviction of the accused was not based on identification parade but on the evidence of eyewitness which was found reliable as the conviction cannot be set aside on the ground that identification was not reliable as witness had seen the accused in the police lock-up, more so when the witness admitted before the identification parade that he was acquainted with the accused.[55] When the accused was known to the witnesses before the occurrence, and though the witness did not know his name but could identify him, holding of test identification parade was not essential.[56] When the police asked the witness whether he could identify the persons who were on the scooter to which he replied in affirmative and then the two accused persons were shown for the purpose of identification and the witness

identified them, such an identification will not assist the prosecution in any way nor could it be held to be test identification parade.[57] The legal position is the same when the accused is shown to the witnesses before holding test identification parade.[58]2332

Where identity of the accused is not disputed, holding of test identification parade is not necessary.[59]

PW who identified the accused in jail knew the accused, as he was also in jail along with the accused in that very cell for about 20 days. The police had detained illegally and un-authorizedly PW along with the accused in the same cell for about 20 days. Thus, the test identification parade was not conducted in a lawful manner, and such test identification parade was not relied upon. Acquittal of the accused A2 to A6 on charges under ss 302, 395, 201 / 34, IPC was held proper.[60]

Delay in holding Test Identification Parade

The test identification parade must be held without any delay. In the absence of proper explanation given by the prosecution for the delay in holding the test identification parade, the evidence of identification is not reliable.[61] The unexplained delay of four months in conducting such parade itself mars the credibility of test identification parade.[62] But when accused is put to test identification within 24 hours of his arrest, identification cannot be rejected on the ground that it was not possible for the witnesses to identify the accused after a lapse of three months.[63] An identification parade held 44 hours after occurrence cannot be said to be delayed.[64] Where parade was held after about two months and delay was properly explained, it cannot be discarded.[65]

Evidentiary Value of Test Identification Parade

The test identification parade has corroborative value only. The identification of the accused by the witness in the Court is substantive evidence. But when the accused is not known to the witnesses, the safe rule is that the testimony on oath of the witnesses regarding identity of the accused requires corroboration by way of an earlier test identification parade during investigation,[66] without which the evidence of identification during trial in the Court is of little value.[67] When photograph of the accused was published in all local newspapers and it was also shown to the witness2333 before test identification parade, neither the test identification parade nor subsequent identification of the accused in the Court during trial by the witness after many years is reliable.[68] The legal position is the same, when the accused is shown to the witnesses before holding test identification parade.[69]

Identification of the accused not known from before, for the first time by a witness in Court during trial, is considered a weak type of evidence.[70]

Failure to hold Test Identification Parade though demanded or not by Accused

The failure to hold that test identification parade even after a demand by the accused is not always fatal and it is only one of the relevant factors to be taken into consideration alongwith the other evidence on record. If the claim of the occular witnesses that they already knew the accused is found to be true, the failure to hold a test identification parade is inconsequential.[71] The evidence of eyewitnesses is not to be jettisoned merely due to the failure of the investigating officer to conduct test identification parade when the witnesses already knew the accused and name of some of the accused is given in the FIR.[72] In some cases the Supreme Court has held that failure to hold test identification parade with respect to the witnesses who did not know the accused before the occurrence is not necessarily fatal.[73] In other words, identification of an accused in Court is the substantive evidence of the person identifying him and earlier identification in test identification parade does not affect the admissibility of the evidence of identification in Court.[74] But it cannot be denied however that though not fatal, absence of the corroborative evidence of prior identification in a test identification parade makes the substantive evidence of identification in Court after a long lapse of time a weak piece of evidence and no reliance can be placed upon it unless sufficiently and satisfactorily corroborated by other evidence.[75]

Accused/Known People can be identified by their Voice *etc*, in the Absence of Light

Known people could be recognised by their gait, timbre of voice *etc*.[76] Thus, although in some instances there was no light, but where the witnesses were known to the accused persons being their very close relations, they could have recognised them by the timbre of their voice, gait, *etc*.[77]

Identification of Accused by Witness in Scooter Headlight

The four appellants accused armed with sickles and knives attacked the deceased who was driving a scooter, fell down and died. Incident was of the month of April at about 7 pm. Eye-witness identified the appellants in the scooter headlight.2334 Identification was found reliable and believed. Absence of source of light in the FIR was held not fatal to the prosecution case. Accused appellants were convicted under s 302, IPC .[78]

Legal Position of Test Identification Parade

The legal position regarding test identification parade of accused is concluded by the Supreme Court as follows:

(a) If an accused is well known to the prosecution witnesses, no test identification parade is called for and it would be meaningless and a sheer waste of public time to hold the same.

(b) In cases where according to the prosecution the accused is known to the prosecution witnesses, but the said fact is denied by him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court while dealing with such a prayer, should consider without holding a mini inquiry as to whether the denial is *bona fide* or a mere pretence and/or made with an ulterior motive to delay the investigation, question for grant of such a prayer would not arise. Unjustified grant or refusal of such a prayer would not necessarily insure to the benefit of either party nor the same would be detrimental to their interest. In case prayer is granted and test identification parade is held in which a witness fails to identity the accused, his so-called claim that the accused was known to him and the evidence of identification in court should not be accepted. But in case either prayer is not granted or granted but no test identification parade held, the same *ipso facto* cannot be a ground for throwing out evidence of identification of an accused in Court when evidence of the witness, on the question of identity of the accused, is found to be credible. The main thrust should be on answer to the question as to whether evidence of a witness in Court to the identity of the accused is trustworthy or not. In case the answer is in the affirmative, the fact that prayer for holding test identification parade was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if, however, such an evidence is not free from doubt, the same may be a relevant material while appreciating the evidence of identification adduced in Court.

(c) Evidence of identification of an accused in Court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in Court.

(d) Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable dispatch for the purpose of enabling the witnesses to identity either the properties which are the subject matter of the alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on the right lines and the2335 persons whom it suspects to have committed the offence were the real culprits.

(e) Failure to hold test identification parade does not make the evidence of identification in Court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in Court should not form the basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The

previous identification in the test identification parade is a check value to the evidence of identification in Court, of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in Court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in Court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.[79]

69. Fingerprints

Under s 4 of Identification of Prisoner's Act 1920, police is competent to take fingerprints of the accused but to dispel any suspicion as to its *bona fides* or to eliminate the possibility of fabrication of evidence. It is eminently desirable that they are taken before or under the order of the magistrate in accordance with s 5 of the said Act.[80] When specimen fingerprints of the accused were not taken before or under the order of a magistrate and the prosecution failed to prove that the seized article with the fingerprints of the accused was not tampered with before sending to the bureau and the seized articles were not produced and exhibited during the trial, the conviction of the accused on the basis of the fingerprints report was found not proper.[81] When majority of fingerprints found at the crime scenes or crime articles are partially smudged, it is for the experienced and skilled fingerprint expert to say whether a mark is usable as fingerprint evidence. Similarly, it is for a competent technician to examine and give opinion whether the identity of fingerprints can be established, and if so, whether that can be done on eight or even less identical characteristics in an appropriate case.[82] Since the Supreme Court says that the fingerprint test is an exact science, the availability of fingerprints of the accused in the house of the deceased is a clinching and vital circumstance.[83] The report of the fingerprint expert does not fall within any of the categories contemplated under s 293(4) CrPC . Hence this report cannot be used in evidence without examination of the fingerprint expert.[84] Failure of the prosecution to produce the result of examination of fingerprints lifted from the scene of occurrence leads to the inference that it is possible that the result of this examination may have been contrary to the2336 story set-up by the prosecution.[85] But, non-examination of the fingerprint expert has no effect on the prosecution case when it has come on record that before seizure of the weapon of offence many persons had handled it.[86] When the fingerprints were lifted from the spot but the fingerprints of the accused were not taken and sent for comparison by an expert, there is no possibility of any report of the expert being in existence, non-production of which may lead to any adverse inference against the prosecution.[87]

Presence/Absence of Fingerprints of Accused--Effect

Presence of a fingerprint at the scene of occurrence is a positive evidence. But the absence of a fingerprint is not enough to foreclose the presence of the persons concerned at the scene. If during perpetration of the crime the fingerprint of the culprit could possibly be remitted at the scene it is equally a possibility that such a remnant would not be remitted at all. Hence absence of finger impressions is not guarantee of absence of the person concerned at the scene.[88]

70. Footprints

The science of identification of footprints is not a fully developed science and, therefore, if in a given case evidence relating to the same is found satisfactory, it may be used only to reinforce the conclusions as to the identity of a culprit already arrived at on the basis of other evidence.[89]It is not safe to act upon the footprint evidence when sample footprints of the accused were not taken before a magistrate.[90] In a murder case, it is not proper for a judge to take the opinion of a footprint expert regarding footprints found near the corpse of the victim, as conclusive evidence against the accused. The expert's opinion is valuable but it must be supported by statements of fact, the accuracy or otherwise of which can be verified by the Judge.[91] The circumstance of matching of shoeprints found at the spot with that of the accused is

considered insufficient to establish the offence.[92]

71. Accused Making Phone Calls from Mobile of the Deceased Immediately after Murder

The use of Mobile handset bearing IEMI No. 35136304044030 on which the accused appellant made calls from his own registered mobile phone (SIM) No. 9818480558, immediately after the occurrence of the murder of deceased, was a legitimate basis for the identification of the accused appellant. The accused appellant was arrested. The nexus of the accused appellant with the deceased at the time of occurrence stood fully sustained from the aforesaid SIM/IEMI details. The conviction of the accused appellant under ss 302, 380 and 452, IPC was upheld.[93]2337

72. Identification of Accused by Police Dogs--Evidentiary Value

The uncanny smelling power of canine species has been profitably tapped by investigating agencies to track the culprits. Trained dogs can pick up scent from the scene of any object and trace out the routes through which the culprits would have gone to reach their hideouts. Developing countries have utilised such sniffer dogs in a large measure. In India also the utilisation of such tracker dogs is on the increase. Though such dogs may be useful to the investigating officers, can their movements be of any help to the Court in evaluating the evidence in criminal cases?[94] Where FIR was lodged about the murder of the deceased, but accused was not named, and the sniffer dog identified the accused and the accused was formally arrested, the identification of the accused by sniffer evidence was relied upon.[95]

A four-fold criticism is advanced against the reception of such evidence. First is, that it is not possible to test the correctness of the canine movements through the normal method available in criminal cases, *ie* in cross-examination. Second is that the life and liberty of human beings should not be made to depend on animal sensibilities. Third is that the possibility of a dog misjudging the smell or mistaking the track cannot be ruled out, or many a times such mistakes have happened. Fourth is that even today science has not given a final pronouncement about the accuracy of canine tracking.[96]

There are basically three kinds of police dogs: tracker dogs, patrol dogs and sniffer dogs. Recent trends show that hounds belonging to certain special breeds sheltered in specialised kennels and imparted with special training are capable of leading an investigating agency to a very useful clause in crime detection and thereby help detectives to make a breakthrough in investigation. English courts have already started treating such evidence as admissible. In Canada and in Scotland such evidence has become admissible of late though in the United States the position is not uniform in different states.

The weakness of the evidence based on tracker dogs has been much discussed. The possibility of error on the part of the dog or its master is the first aspect. The possibility of misunderstanding between the dog and its master is also a factor. The possibility of a misrepresentation or a wrong inference from the behaviour of the dog cannot be ruled out. The last, but not the least, is the fact that from a scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable police dogs to track and identify criminals. Police dogs engage in these actions by virtue of instincts and also by the training imparted to them.[97]

In *Abdul Razak Murtaza Dafadar v State of Maharashtra* ,[98] a three judge Bench of the Supreme Court declined to express any concluded opinion or to lay down any general rule with regard to tracker dog's evidence or its admissibility against the accused as it was not necessary to do so on the fact situation. However, their Lordships made the following observations on the usefulness or otherwise of such evidence:2338

> 'It was argued that the tracker dog's evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But dogs are intelligent animals with many thought process similar to the though processes of human beings and wherever you have though processes there is always the risk of error,

> deception and even self-deception. For these, reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking even if admissible, is not ordinarily of much weight. In *Surinder Pal Jain v Delhi Admn* ,[1] a two judge Bench expressed the opinion that the pointing out by the dogs could as well lead to a misguided suspicion that the accused had committed the crime, so their Lordships sidelined that item of evidence from consideration.'

Criminal courts need not bother much about the evidence based on sniffer dogs due to the inherent frailties adumbrated above although the investigating agency may employ such sniffer dogs for helping the investigation to track down criminals.

Investigating exercise can afford to make attempts or forays with the help of canine faculties but judicial exercise can ill afford them.[2] In the undermentioned case, the prosecution case was that the accused killed the deceased by sharp edged weapon. The dog tracking evidence adduced by the prosecution was not relied on for the following reasons:-

(i) It was not established that the pair of tyre chappals which was found near the dead body of deceased either belonged to the accused or it was used by the accused.
(ii) After taking smell of the pair of chappals, the dog pointed out the blood stained shirt, pyjama and sickle. However, no evidence was collected by the investigating officer to establish that clothes or the sickle either belonged to the accused or they were used by the accused.
(iii) After taking smell of the shirt, pyjama and sickle, the dog pointed out the house of the accused. It came in the evidence of PW5 (Dog Handler) that whenever the trained dog recognizes the culprit, it would raise its front legs and place the same on the chest of the culprit and/or start barking. However, nothing of this sort happened in the present case though there was evidence suggesting that the accused was present near the house.
(iv) The house pointed out by the dog was not in exclusive occupation of the accused.[3]

73. Voice Identification

Indubitably, requiring the accused to lend his voice sample for the limited purpose of identification of his voice so as to compare the same with the tape-recorded telephonic conversation, is not requiring him to impart knowledge in respect of relevant facts, by means of oral statements or statements in writing of his personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation, thus, it is not violative of art 20(3) of the Constitution .[4]2339

74. Identification of Stolen Property

The identification of stolen articles by owners or the persons who have the opportunity to see them very often, cannot be discarded merely on the ground that no special identification marks were present on the said ornaments. It is so because such person can identify the articles by feel, touch or various points of difference distinguishing one thing from the other of the same kind, though they may not be able to formulate the reasons, as such identification is based on untranslatable impressions of their minds.[5]

The two accused appellants and one more accused (convicted), were alleged to have committed the murder of the deceased couple. The articles *viz.* mangalsutra, ring and chain recovered from the possession of the accused were of common use and are easily available. No TI parade in respect of the recovered articles was held. Material witnesses examined by the prosecution had not supported the prosecution case against the two appellants. Their acquittal recorded by the High Court was not disturbed.[6]

(IX) POLICE INVESTIGATION

75. Duty of Investigating Officer

The Investigating Officer (IO) has to workup a theory on the clues available but if he finds that there is material which shakes that theory, he must not be adamant to present a pre-conceived theory before the Court. The IO must keep his mind open to collect and verify the facts in a straight forward manner.[7] Non-action on the part of IO reflects upon the nature and manner of the investigation. When the IO deliberately made no efforts to know the genesis and origin of the occurrence, the investigation is far from fair and honest.[8] But the more fact that the Investigating Officer committed irregularity or illegality during the course of the investigation would not and does not cast doubt on the prosecution case nor trustworthy and reliable evidence can be cast aside to record acquittal on that account.[9] Failure of IO to note crime number in some documents during investigation cannot be a ground to disbelieve his evidence.[10]

76. Defective Investigation--Effect

It is true that in case the Court, on perusal, finds that statements of eyewitnesses are truthful and are reliable and trustworthy, then, ignoring the lapses of investigating officer in not complying with such safeguards, as are provided in th CrPC with regard to recording of substance of FIR in daily diary, sending of the special report promptly to the Metropolitan Magistrate and recording of brief facts containing the names of the accused and eyewitnesses in the inquest proceedings, could be2340 ignored.[11] In the case of a defective investigation, the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the IO if the investigation is designedly defective.[12] The defective investigation would not, therefore, deter the Court from convicting the accused if the courts finds that dehors the defects the accused can still be convicted on the basis of the evidence on record.[13] As was observed in *Ram Bihari Yadav v State of Bihar and others* ,[14] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcing agency but also in the administration of justice. The view was again reiterated in *Amar Singh v Balwinder Singh and others.* [15] As noted in this case,[16] it would have been certainly better if the firearms were sent to the forensic test laboratory for comparison. But the report of the ballistic expert would merely be in the nature of an expert opinion without any conclusiveness attached to it. When the direct testimony of the eye-witnesses corroborated by the medical evidence fully establishes the prosecution version, failure or omission or negligence on the part of the IO cannot affect credibility of the prosecution version.[17] Experience shows that for reasons unknown, the police invariably commit lapses in not complying with the relevant provisions of law meticulously in every case. When such lapses occur in a particular case, the Court is to be on guard to examine the occular evidence, with more care in order to determine whether such ocular evidence is fully reliable and can be given credence despite such lapses on the part of the investigating agency. Where, the ocular evidence is of a shaky nature and a lingering doubt comes to mind about such eyewitness, where, eyewitness having not actually witnessed the occurrence, these lapses committed by the investigating officer assume significance and the benefit of doubt has to be given in such a case to the accused.[18]

77. Delay in Recording Statement of Witness under Section 161 , Code of Criminal Procedure 1973[19]

It depends on the facts and circumstances of each case to find if testimony of a witness is credible inspite of delay in case diary statement under s 161, CrPC .[20] In2341*Sunil Kumar v State of Madhya Pradesh* ,[21] there was delay of one and a half months in recording the case diary statement of a witness who was the mother of the victim and who had reached there at once. The Supreme Court found that there was ample evidence that the mother had reached the spot, and regarding delay in the case diary statement the Court observed that such delay in every case does not lead to disbelieving such witness. If the witness's presence is natural, the dereliction of duty by the police in not recording the case diary statement in time will not adversely affect the reliability of such witness.

Another case worth citing is *State of Uttar Pradesh v Sikander Ali.* [22] In this case, one witness who was the father of the victim was examined by the police 24 days after the incident. The investigating officer explained that delay was due to a law and order problem. The Supreme Court held that the statement of such witness cannot be discarded on account of such delay. The non-explanation by the prosecution as to why the eyewitness had not been examined shortly after the incident and for inordinate delay in examining

them, is no ground to discard the convincing and reliable evidence adduced in the case.[23] However, whether the investigating officer met the witness for the first time about 3-4 months after the incident and the statement of the witness was recorded after extreme delay, for which no explanation was available on record, the statement of the witness becomes incredible.[24]

78. Statement made to Police before the Start of Investigation is Admissible and not Hit by Section 162 , Code of Criminal Procedure 1973

It is settled position in law that the prohibition contained in s 162, CrPC, extends to

(1) all statements:

(a) the statement need not be a confession, it applies equally to all statements, confessional or otherwise;
(b) the statement need not be reduced into writing; it applies equally to all statements whether reduced into writing or not;

(2) by whomsoever made:

(a) the prohibition applies equally to statements made by any person, whether accused or not;
(b) the person making the statement need not be in police custody while making the statement; but:

(i) the statement must be made to a police officer; and
(ii) must be made in the course of an investigation under ch 12, CrPC .

It will thus be seen that for being excluded from using the statement made to a police official it must be made in the course of investigation under ch 12, CrPC . A constable or an official of the Rajasthan Armed Constabulary is not invested with any powers of investigation as contemplated by ch 12, CrPC and, therefore, there is no question of the statement being made to any of them being excluded from use by2342 recourse to the provisions of s 162, CrPC . Assuming that an official of the Rajasthan Armed Constabulary is police as contended by learned counsel relying on several rules contained in the Rajasthan Police Subordinate Service Rules 1989, in order that it could be so excluded it must be in the course of investigation under ch 12 of the CrPC .[25] The statement of the deceased, *i.e.*, dying declaration recorded by the investigating officer before the start of investigation of the case can be treated as a dying declaration and the plea of the accused that it should be treated as an FIR cannot be accepted.[26]

All statements made to the police before commencement of investigation are admissible in evidence, and investigation does not necessarily commence immediately after the FIR is recorded.[27] When the IO had only received the FIR at the shop of the witness and had not even visited the site before he recorded the statements 'C' to 'D', and therefore the portion 'C' to 'D' is the part of the FIR not hit by s 162, CrPC .[28]

79. Delay in forwarding Report to Magistrate--Effect

On receiving first information of a cognizable offence an officer incharge of a police station is required under s 157(1), CrPC, to forthwith send a report of the same to a magistrate empowered to take cognizance of such offence upon a police report. The report is to be submitted in the manner provided under s 158, CrPC . But delay in dispatch of FIR to the Magistrate in itself is not sufficient to throw out the prosecution case in its entirety.[29] It is not that as if every delay in sending the delayed special report to the

District Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante-timed or ante-dated or that the investigation is not fair and forthright.[30] But when such delay is coupled with the suspicion or other infirmities attaching to the recording of FIR, or the conduct of the investigation thereafter, it affects adversely the case of the prosecution.[31] So, when there is inordinate delay of about three days in lodging FIR and also delay of about four days in sending FIR to the Magistrate in a murder case coupled with other circumstances, the accused cannot be convicted.[32]

In several cases the Supreme Court has emphasised the importance of prompt dispatch of FIR from police-station to the Judicial Magistrate and also to the superintendent of police of the district.[33] But, such a delay in dispatch of FIR to the Magistrate cannot be so detrimental as to dislodge the case of the prosecution on2343 this ground alone if otherwise it is worth placing reliance.[34] Mere fact that the copy of FIR was received by the concerned magistrate three days after the incidence does not lead to the conclusion that FIR was not lodged on the same date or it was ante-dated.[35] But, non-proving of FIR and record to show that the copy of FIR was dispatched to the jurisdiction magistrate in compliance with s 167, CrPC, points out a few likely holes left unplugged by the prosecution.[36] The explanation by the prosecution that delay in sending FIR to magistrate occurred as those two days were holidays is not acceptable, as FIR should reach the concerned Magistrate without any undue delay.[37] If the delay is reasonably explained no adverse inference can be drawn but failure to explain the delay would require the court to minutely examine the prosecution version for assuring itself that no innocent person has been implicated in the crime. Investing upon the accused to seek an explanation of the delay in sending copy of FIR to the Magistrate is not the requirement of law. It is always for the prosecution to explain such a delay and if reasonable, plausible and sufficient explanation is tendered, no adverse inference can be drawn against it.[38] The expression 'forthwith' used in s 157(1), CrPC, obviously cannot mean that the prosecution is required to explain every hours delay in sending the FIR to the Magistrate, of course, the same has to be sent with reasonable dispatch, which would obviously mean within a reasonable, possible time in the circumstances prevailing.[39]

Copy of the FIR mandated under s 157, CrPC was not forwarded to the concerned Magistrate. There were material contradictions in the statement of the prosecution witness. Recovery of offence weapon was found doubtful. Conviction of the accused appellants under ss 148 and 302, IPC recorded by courts below was set aside.[40]

80. Shortcomings in Site-Plan prepared by the Investigating Officer

The Investigating Officer, who generally himself is not an eyewitness of the occurrence, prepares the site-plan. He has no personal knowledge regarding the place from where the witness has seen the occurrence or from where the accused has assaulted the deceased. He can make the entries in the site plan what he himself had seen and observed and that will be the direct and substantive piece of evidence being based on his personal knowledge; but as he has not himself seen the incident, therefore, he could have mentioned the place from where the witnesses had seen the occurrence only after ascertaining the same from the eyewitnesses, which is not admissible in evidence being hit by s 162, CrPC .[41]

In *Jagdish Narain v State of Uttar Pradesh* ,[42] site plan was prepared by the investigating officer who failed to indicate in the site plan the spot wherefrom the shots were allegedly fired by the appellants. While considering the effect of failure of the Investigating Officer to indicate the spot, the Supreme Court held:[43]2344

> While preparing a site plan an investigating police officer can certainly record what he sees and observes, for that will be direct and substantive evidence being based on his personal knowledge; but as he was not obviously present when the incident took place, he has to derive knowledge as to when, where and how it happened from persons who had seen the incident. When a witness testifies about what he heard from somebody else it is ordinarily not admissible in evidence being hearsay, but if the person from whom he heard is examined to give direct evidence within the meaning of s 60 of the Evidence Act, the former's evidence would be admissible to corroborate the latter in accordance with s 157, CrPC . However, such a statement made to a police officer, when he is investigating into an offence in accordance, with Chapter 12 of the Code of Criminal Procedure cannot be

> used to even corroborate the maker thereof in view of the embargo in section 162(1) , CrPC, appearing in that chapter and can be used only to contradict him (the maker) in accordance with the proviso thereof, except in those cases where sub-section (2) of the section applies. That necessarily means that if in the site plan PW 6 had even shown the place from which the shots were allegedly fired after ascertaining the same from the eyewitnesses it could not have been admitted in evidence being hit by section 162 , CrPC .

In this view of the matter, the failure on the part of the investigating officer to point-out the place in the site plan from where the eyewitnesses had seen the occurrence, is not and it cannot be read in evidence being hit by s 162, CrPC .[44]

Omission of Crime Number in Site Plan

Where the crime number is not mentioned in the site plan, that by itself, does not create any doubt as to the truthfulness of the prosecution story for the reason that it is only one site plan in respect of crime in question which has been prepared.[45]

Omission of Crime Number in Inquest Report

Mere non-mentioning of crime number in the inquest report does not create any doubt as to the preparation of inquest report where the doctor who conducted autopsy on the dead body of the deceased stated that he received the dead body in sealed condition.[46]

Site Plan--Existence/Absence of Blood

It is often argued by the Counsel for the accused that in the site plan or in the observation panchnama no place where blood was found has been shown. The Supreme Court opined that the existence of blood or absence thereof would not, by itself, be such a fact as would completely wipe out the evidence of eye-witnesses.[47]

81. If Court can examine Case Diaries and Statement under Section 161 , Code of Criminal Procedure 1973, in favour of Accused

The Courts can certainly look at the case diary as contemplated under s 172(2) of the CrPC, to determine the veracity of the investigation and to aid the Court in such inquiry. However, such diaries cannot be used as evidence.[48]2345

The provisions embodied in sub-s (3) of s 172 of the CrPC cannot be characterised as unreasonable or arbitrary. Under sub-s (2) of s 172, CrPC, the Court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The Legislature has reposed complete trust in the Court which is conducting the inquiry or the trial. It has empowered the Court to call for any such relevant case diary if there is any inconsistency or contradiction arising in the context of the case diary the court can use the entries for the purpose of contradicting the police officer as provided in sub-s (3) of s 172 of the CrPC . Ultimately, there can be no better custodian or guardian of the interest of justice than the Court trying the case. No court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries.[49]

The public interest requirement from the stand point of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the Court, which is the ultimate custodian of the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded.[50]

This proposition of law will equally apply to the statements made to the police officer in the course of investigation under s 161 of the CrPC under s 162(1) of the CrPC there is a bar to the statement made by any person to a police officer to be used for any purpose and the same is provided under s 145 of the Indian Evidence Act .[51]

However, the bar under s 162 shall not apply to the statements falling under s 32(1) of the Evidence Act or

for a discovery of fact as required under s 27 of the Evidence Act . If certain admissions were made to the police officer by a witness in the course of investigation and if such admissions or contradiction were not elicited in evidence, it is always open to the Court to look at the case diary to find out contradictions not elicited in evidence. If such contradictions are in favour of the accused, it can be looked into, to aid the Court in favour of the accused. If the Court can look at a confession of the accused there does not seem to be any inhibition for looking at the statement of the witnesses recorded under s 161, CrPC, in favour of the accused. There is nothing wrong in this procedure, otherwise the power under s 172(2) of CrPC, could become as empty formality.[52] But a somewhat contrary view is taken by the Apex Court which was confronted with the question that if the public prosecution failed to get the contradiction explained as permitted by the 1st limb of the proviso to s 162(1), CrPC, is it permissible for the Court to invoke the powers under s 172, CrPC, for explaining such contradiction After referring to sub-s 172, CrPC, the Supreme Court explained as follows:

> A reading of the said sub-sections makes the position clear that the discretion given to the court to use such diaries is only for aiding the court to decide on a point. It is made abundantly clear in sub-section (2) itself that the court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the court uses the entries in a case diary for contradicting a police officer it should be done only in the manner provided in section 145 of the Evidence Act ie, by giving the author of the statement an opportunity2346 to explain the contradiction after his attention is called to that part of the statement which is intended to be so used for contradiction. In other words, the power conferred on the court for perusal of the diary under section 172 of the Code is not intended for explaining a contradiction which the defence has winched to the fore through the channel permitted by law. The interdict contained in section 162 of the Code, debars the court from using the power under section 172 of the Code for the purpose of explaining the contradiction.[53]

82. Conclusion of Investigation and Proceedings in Court thereafter

The result of investigation under ch 12 of the CrPC is a conclusion that an investigating officer draws on the basis of materials collected during investigation and such conclusion can only form the basis of a competent court to take cognizance during investigation are to be translated into legal evidence, the trial court is then required to base its conclusion solely on the evidence adduced during the trial, and it cannot rely on the investigation or the result thereof.[54] If the result of investigation was to be made the basis of a court's verdict regarding guilt or innocence of an accused, there would be no need of a trial in a police case for relying on the report submitted under s 173(2), CrPC . A court would be entitled to decide the fate of the person arrainged, such a course is not legally permissible.[55]

83. Inquest Report

The proceedings under s 174, CrPC, have a limited scope. The object of the proceedings thereunder is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so, what is the apparent cause of death[56] and nature of injuries and the possible weapon used in causing those injuries.[57] The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted, is foreign to the ambit of the scope of proceedings under s 174, CrPC . Neither in practice nor in law is it necessary for the police to mention these details in the inquest report.[58] It is neither incumbent upon the police officer who prepared the inquest report to mention the names of the assailant, nor it is necessary for the eyewitnesses,[59] who are witnesses to the said inquest to insist upon the mention of the names of the assailants in the inquest report nor it is possible to draw any inference against the prosecution that the names of the assailants were not known merely because they are not mentioned in the inquest report.[60] The non-mentioning of the names of the assailants in the inquest report or in the requisition memo, cannot be said to be fatal to the2347 prosecution case.[61] When there was no column in inquest-report about the names of the assailants, there was no occasion for anyone to mention the names of assailants in it.[62]

The evidence of eyewitnesses cannot be discussed on erroneous interpretation of s 174, CrPC, to

disbelieve the prosecution story.[63] The Court is not justified in treating the statement allegedly made by the witness during inquest proceeding as substantive evidence in view of embargo of s 162, CrPC . It is equally unjustified when it placed reliance upon the FIR informer who could not be examined during trials as the FIR could only be used for the purpose of corroborating and contradicting the person who lodges it and under no circumstances can it be used as substantive evidence, and the accused is entitled to the benefit of doubt in such cases.[64] The Supreme Court has consistently held that inquest report cannot be treated as substantive evidence but may be utilised for contradicting the witness of inquest.[65] Statements contained in an inquest report, to the extent they relate to what the Investigating Officer saw and found are admissible but any statement made thereon on the basis of what he heard from others, would be hit by s 162, CrPC .[66] If on reading of inquest report it is clear that the names of the assailants are not mentioned and nevertheless, the FIR gives all the names of the assailants, then it would lead to an indication that FIR might have been registered after the inquest report.[67] In some cases,[68] it has been held that even not giving the names of the accused or of the eyewitnesses in the brief facts which are sent alongwith the inquest papers also would sometime result in doubting the prosecution version.[69] Where the entire inquest report was in one ink while the name of the informant in the inquest report was by a different ink, which created a suspicion that when the inquest report was prepared, the FIR had not come into existence, and it had not been decided as to who would be made the first informant. It was later that the name of the informant was inserted in the inquest report. This gives rise to a great deal of doubt as to whether the FIR was lodged by the person named therein, and at that time, because in that event the name of the informant would have been written at the time when the remaining contents of the inquest report were written.[70]2348

(X) DYING DECLARATION OF VICTIM

84. Dying Declaration--Scope

The statement made by the deceased before his death as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is known as dying declaration. Such statement is relevant under s 32 of the Indian Evidence Act in a case in which the cause of that person's death is relevant. Section 32 is an exception to the rule of hearsay.[71] A magistrate should preferably record the dying declaration in question and answer form.[72] But when the dying person is in severe bodily pain owing to stab injuries in abdomen and words were scarce, his natural impulse would be to tell the Magistrate without wasting his breath on details as to who had stabbed him. The recording of such brief dying declaration is natural and reliable.[73] The dying declaration must not necessarily be made before the Magistrate[74] but when it is not recorded by a magistrate, it has to be scrutinised closely.[75] The dying declaration recorded by a police officer in the light of facts and circumstances of the case may lead to conviction of the accused.[76] But recording of dying declaration by the investigating officer during the course of investigation should not be encouraged.[77] Recording of dying declaration by an executive magistrate though not in question-answer form[78] or by the doctor or[79]in the injury report by the doctor[80] is admissible in evidence. Although it is preferable to have the dying declaration in question-answer form, such requirement is not absolute. A dying declaration if otherwise reliable and trustworthy need not be discarded merely on the ground that it is not recorded in question-answer form.[81]

Eyewitness Accounts Stand on Higher Footing to Dying Declaration

The dying declarations can not be put at the same pedestal as direct account or eye witness account of the incident. If the two are to be compared, the eye witness account must stand on a higher footing.[82]

Fit Mental State of Declarant--Necessity of

Acceptability of a dying declaration is greater because the declaration is made in extremity. When the party is on the verge of death, one rarely finds any motive to tell falsehood and it is for this reason that the requirements of oath and cross-examination are dispensed with in case of a dying declaration. Since the accused has2349 no power of cross-examination, the Court would insist that the dying declaration should be of such a nature as to inspire full confidence of the Court in its truthfulness and correctness. The Court

should ensure that the statement was not as a result of tutoring or prompting or a product of imagination. It is for the Court to ascertain from the evidence placed on record that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit.[83]

85. Evidentiary Value of Dying Declaration

The earlier view was that it is not safe to convict an accused person on the evidence furnished by a dying declaration without further corroboration because such a statement is not on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion.[84] However, subsequently, in a landmark judgment *Khushal Rao v State of Bombay* ,[85] the earlier view was reversed and the following propositions of law have been made:

> On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in india and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sifficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Death after Few Days--Dying Declaration not Discarded

Dying declaration which is recorded in expectation of death, need not be discarded only because death took place after a few days. In the instant case, death of the deceased old woman took place 25 days after the incident. Dying declaration was not discarded. Conviction under s 302, IPC was affirmed.[86]2350

86. Dying Declaration of Burnt Person--Conduct of Accused in Extinguishing Fire

In case the burnt wife gives dying declaration implicating her husband, the fact that the accused tried to extinguish the fire on the person of the deceased may be on the account of two reasons, one reasons may be that the accused is really innocent and he is trying to save the life of that person by extinguishing the fire. Another reason may be that the accused had become immediately repentant and to control the damage that had been caused by his act in setting fire to that person. To put it plainly, such conduct could be the conduct of an innocent person or a repentant person. If a person after having set fire to another person, realises immediately the magnitude of the damage caused by him to the life of that person and out of repentance immediately tries to control that damage, it could not be the conduct of an innocent person but it could be the conduct of a repentant person.[87]When there were strained relations between the deceased burnt wife and the accused husband and she made a voluntary reliable dying declaration to neighbours implicating her husband in the act of setting her on fire, the subsequent conduct of the accused in extinguishing the fire was not the conduct of an innocent man, rather it was the conduct of a person who was trying to control the damage caused by him, so the conviction of the accused was upheld.[88] But in *State of Assam v Mafizuddin Ahmed* ,[89] the Apex Court disbelieved the dying declaration on the ground of certain circumstances which also included that the accused in that case covered the burning body of the deceased with a quilt and tried to extinguish the fire. In *State of Gujarat v Mohanbhai*

Ragubhai Patel ,[90] the Supreme Court held that burning of the woman by accused is doubtful because of conduct of accused in throwing mattress over the deceased and also because of absence of motive in that case, the attempt of accused to extinguish fire on body of deceased was considered one of the grounds to disbelieve the dying declaration. But later in *Kumbhar Dhirajlal Mohanlal v State of Gujarat* ,[91] the Supreme Court took a somewhat contrary view and assumed that the accused sustained the injuries while extinguishing the fire still it would not lead to the inference that the fire was accidental for the dying declaration itself indicated that the accused received those injuries after he had set her on fire. The observations of the High Court that a shrewd person may adopt these tactics; first setting his wife on fire then make an effort to extinguish the fire and thereafter remain by her side were approved. The fact that the accused recorded injuries in the hand and other portions of the body which were also indicated by the doctor that it was likely that the injuries on the person of the accused were caused while gripping the deceased when she was trying to escape from the flames on her person. The conduct of the accused after the incident that he has not been either in the hospital or even cared to see the deceased showed that he was trying to keep himself away. The dying declaration of the deceased was also found truthful so the conviction of the accused was upheld.[92] The accused husband made no attempt to put out the fire and save the deceased wife, the dying declaration by the wife showed that he killed her by setting her on fire. The accused was found guilty of2351 murdering his wife.[93] Where, in four dying declarations to different persons, the allegation was that the death of the wife was due to setting her on fire by the husband, the plea of the husband/accused that he is innocent and attempted to save her and got injured in the process was found without merit as the doctor opined that location and nature of injuries found on the body of the accused were not consistent with the claim that he had tried to extinguish the fire but on the other hand had tried to hold her to prevent her from going out of the room.[94] Similarly, in a death by burns case, the deceased wife gave dying declaration which was trustworthy and reliable, the accused sustained injuries not while extinguishing fire but in the process of setting the deceased on fire, the conviction of the accused husband was found proper.[95]

87. More than One Dying Declaration

When two or more dying declarations are recorded and they corroborate with each other they on being proved can be acted upon but when two or more dying declarations are contradictory to each other, it is not safe to act upon them. In a bride burning case, there were few dying declarations made by the deceased revealing glaring inconsistencies *vis-à-vis* naming the culprit, one of the dying declarations indicated the incident as an accident, the conviction of the accused under s 302, IPC, based upon one of the dying declarations implicating the accused was set aside by the Supreme Court.[96] When there is more than one dying declaration genuinely recorded, they must be tested on the touchstone of consistency and probabilities.[97] In another bride burning case, the two dying declarations gave contrary versions. One dying declaration duly recorded by a doctor showed that the victim was burnt by her mother-in-law and husband while the second dying declaration recorded by a person attested by *sarpanch* indicated that the deceased committed suicide which was introduced by the police inspector in his cross-examination and was not proved by a competent witness was discarded and placing reliance on the first dying declaration recorded by the doctor, the conviction of the accused under ss 302, 34, IPC, was sustained.[98] In a bride burning case, as the two dying declarations were inconsistent, the accused mother-in-law was given the benefit of doubt and was acquitted of charge under s 302, IPC .[99] In another case, a dying declaration was recorded by the doctor that the deceased was set on fire by her husband, the second dying declaration was recorded by a police constable and was also attested by a doctor. The third dying declaration was duly recorded by an executive magistrate with endorsement by doctor that the patient was fit to give statement, observing that it was immaterial that the third dying declaration was not recorded in question-answer form and there was2352 no infirmity in any of the dying declarations, the conviction of the accused under s 302, IPC, was upheld by the Apex Court.[1]

The prosecution evidence was that the accused appellant hit the deceased and the eye-witness by a wooden bat and pushed them into bushes. It could not be stated that the accused appellant intended to cause the death of the deceased. However, knowledge could be imputed to him that his action was likely to cause the death of the deceased. The conviction of the appellant under s 302, IPC was altered into one under s 304, Pt II, IPC .[2]

Where the first dying declaration was recorded by the doctor and another by a police officer and thereafter the deceased succumbed to burn injuries, the evidence of witness attesting first dying declaration showed that the deceased was in a fit condition to give a statement, both dying declarations stated that the accused himself caused burn injuries to his accused wife and so corroborated with each other, no relatives of the deceased were present at the time of recording of the dying declaration, no one could think of tutoring her to give false statement so as to implicate the accused; no domestic lady having children and living with her husband will falsely implicate her husband unless there is a strong motive which was not proved, the dying declaration was therefore admissible.[3] First dying declaration recorded by police immediately after incident was found not reliable as it was recorded in the presence of mother-in-law under pressure. Second dying declaration recorded by Magistrate which showed the complicity of her husband, in-laws was found more probable. Conviction of the accused appellants under ss 302 / 34, IPC was affirmed.[4] When there is no contradiction between the two dying declarations of one deceased[5] or three dying declarations[6] of another deceased implicating the accused, the conviction of the accused was found proper. Same is the legal position when two out of three dying declarations are not contradictory.[7] But when all three dying declarations did not inspire confidence and the other evidence was also not creditworthy the accused is entitled to acquittal.[8] When two dying declarations are inconsistent, much importance need not be given to them.[9] But when two of the four dying declarations are reliable, they can be acted upon.[10] The Court cannot sideline2353 noticeable discrepancy looming large as between the two different dying declarations made by the same person. When the sphere of scrutiny of dying declaration is a restricted area, the Court cannot afford to sideline such a material divergence relating to the very occasion of the crime in either context, spoken to one was wrong, or that, in the other was wrong. Both could be reconciled with each other only with much strain as it relates to the opportunity for the culprit to commit the offence. Adopting such a strain to the detriment of the accused in a criminal case is not a feasible course.[11]

The deceased was said to have made two dying declarations. The second dying declaration made by the deceased introduced a new case and involved new accused persons and new witnesses. The first dying declaration was recorded by ASI at the police station. Both the dying declarations were discarded. Conviction of the appellant under s 302, IPC was found improper, and as such, was set aside.[12]

88. Principles Governing Dying Declaration

In *Paniben v State of Gujarat* ,[13] the Supreme Court laid down the principles governing dying declaration which could be summed up as under:[14]

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.[15]

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base the conviction on it, without corroboration.[16]

(iii) This court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailant and was in a fit state to make the declaration.[17]

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.[18]

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.[19]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.[20]

(vii) Merely because a dying declaration does not contain the details as to the occurrence it is not to be rejected.[21]2354

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.[22]

(ix) Normally, the Court in order to satisfy itself whether deceased was in a fit mental condition to make the dying declaration, seeks medical opinion. But where the eyewitness has said

that the deceased was in a fit and conscious state to make his dying declaration, the medical opinion cannot prevail.[23]

(x) Where the prosecution version differs from the version as given in the dying declaration the said declaration cannot be acted upon.[24]

(xi) The deceased told the doctors attending her in the hospital that she did not know as to who set her on fire. Accused appellants were acquitted of the charge under s 302, IPC .[25]

Long Delay between the Time of Dying Declaration and the Death of the Deceased

There is no merit in the contention that the deceased died long after making the dying declaration and therefore, the dying declaration has no value. Such a dying declaration does not lose its value if the person lives for a longer time than expected. However, the question has to be considered in each case on the facts and circumstances established therein.[26]

Lengthy Dying Declaration Discarded

The dying declaration showed that the deceased was not in a position to speak and see and in such state of mind, it was highly doubtful and unbelievable that the deceased had written a lengthy statement running into more than 3 pages containing various details by sign and gestures. The contents of the dying declaration were shrouded by doubts and suspicion and the entire evidence suggested that the dying declaration did not reveal the entire truth. The appellants were held entitled to benefit of doubt and their conviction under s 302, IPC was set aside.[27]

Circumstances of Transaction which resulted in His Death

The collocation of the words in s 32(1) of the Evidence Act, 'circumstances of the transaction which resulted in his death' is apparently of wider amplitude than saying 'circumstance which caused his death'. There need not necessarily be a direct nexus between 'circumstances' and death. It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of s 32(1) of the Evidence Act . In other words, it is not necessary that such circumstance should be proximate, for, even distant circumstance can also become admissible under the sub-section, provided it has nexus with the transaction which resulted in the death.[28] The test of proximity cannot be too literally2355 construed and practically reduced to a cut and dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death.[29]

Bride Burning--Dying Declaration of Deceased

Where in a bride burning case, the dying declaration made by the deceased before the Executive Magistrate and police was found voluntary, conviction of the appellant accused under s 302, IPC was held proper.[30]

89. Tests to know the Truthfulness of Dying Declaration

The truthfulness of a dying declaration has to be tested with reference to the circumstances and other relevant facts of each case.[31] By and large, *inter alia*, the following tests can be devised in order to answer the question whether dying declaration is true:

(i) whether the declarant had sufficient opportunity to observe and identify his assailant;

(ii) whether the capacity of the declarant to remember the facts stated, had not been impaired at the time he was making the statement by circumstances beyond his control either due to nature of the injuries or for any other cause;
(iii) whether the statement has been consistent throughout if the declarant had several opportunity of making a dying declaration apart from the official record of it;
(iv) whether the statement had been made at the earliest opportunity and was not the result of the tutoring by interested parties;
(v) whether the statement made by the declarant is intrinsically sound and in accord with probabilities;
(vi) whether any material part of the statement is proved to be false by other reliable evidence.[32]

90. Person Making Dying Declaration Surviving

Where a witness survives after making dying declaration, his statement cannot be admitted as dying declaration but as it is a statement made shortly after the2356 occurence, at the earliest opportunity and is so connected with the fact in issue as to form part of the same transaction, it is relevant and admissible as *res gestae*under s 6 of the Evidence Act .[33] A magistrate is legally competent to record a dying declaration 'in the course of investigation' as provided in ch 12 of the CrPC . The contours provided in s 164(1), CrPC, would cover such a statement.[34] However, such a statement, so long as its maker remains alive, cannot be used as substantive evidence. Its use is limited to corroboration or contradiction of testimony of its maker.[35]

91. Dying Declaration is useless when Accused has right of Private Defence

Although dying declaration is a very strong piece of evidence and conviction of accused on its basis even on its corroboration is not illegal but in the face of right of private defence of the accused this piece of evidence looses its significance. Thus in a case before the Supreme Court, though the dying declaration held the accused to be the sole author of the fatal injury but it was held that this by itself was not a corroborative factor to establish the murder charge in view of the plea of private defence taken by the accused and so the accused was acquitted.[36]

92. Importance of Certificate showing Deceased Medically Fit to make Statement

It is an essential requirement and one on which there could be no matter of compromise that the condition of the patient at the time when the dying declaration was made has to be assessed by the doctor concerned and certified on the document at that very point of time. The courts can never accept a situation whereby this very vital requirement is bypassed and the prosecution attempts to get over the infirmity by examining the doctor at a much later point of time in order to try and cover up the lacuna. It is a well accepted position in law that where the condition of a patient is so serious, the doctor must certify the consciousness levels. There can be no dispute about the fact that the patient in such cases is undergoing a lot of physical pain that the mental condition of the patient is also not very certain having regard to the nature of the injuries and the consequences thereof, but what is most important is that the courts have always taken note of the fact that as soon as a seriously injured person is brought to the hospital, the formal treatment is commenced, the most important of which is the administration of tranquilisers and pain-killers for the purposes of controlling the trauma and reducing the pain. It is a medically accepted fact that these drugs have attendant side effects, the most important of which is drowsinsess and it is for this reason that the courts insist that the doctor has to certify that the patient was not only conscious but is also in a position to speak and was in a mentally fit condition to make a statement.[37] When deceased died within 15 minutes of recording the statement, the doctor had not certified that she was in her full senses and was medically fit to make a statement although, he had certified that she was conscious,2357 having regard to the fact that the deceased had sustained extensive burn injuries and died within 15 minutes of recording her statement her dying declaration recorded by the doctor cannot be relied upon and conviction of the accused based upon it is not proper.[38] In the absence of certificate of the doctor that the victim was in a fit state of mind to make the statement, *i.e.*, dying declaration, the dying declaration recorded cannot

be relied upon to convict the accused.[39]

Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement without there being the doctor's opinion to that effect, it can be acted upon provided the Court ultimately holds the same to be voluntary and truthful. A certificate by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of a statement can be established otherwise.[40]

93. Suspicion and Proof

It must be recalled that the well established rule of criminal justice is that 'fouler the crime higher the proof'. Though a case when superficially may bear all grotesqueness so as to *prima facie* shock the conscience of any court yet suspicion, however great it may be, cannot take the place of legal proof. A moral conviction, however, strong or genuine cannot amount to a legal conviction supportable in law.[41]

It may be that in a situation the Court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well-settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only conclusion that the prosecution has not been able to prove its case beyond all reasonable doubt.[42]

(XI) BURDEN OF PROOF

94. Proof

What degree of probability amounts to 'proof' is an exercise particular to each case. Referring to of probability amounts to 'proof' is an exercise the interdependence of evidence and the confirmation of one piece of evidence by another a learned author says:[43]

> The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibit act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two2358 doubts are not to be multiplied together. The one piece of evidence may confirm the other.[44]

95. Burden of Proof

The burden to prove a criminal case beyond reasonable doubt always lies on the prosecution. However, when accused set up his defence the burden to prove it is not as stringent as that on prosecution and the accused can successfully discharge the burden to prove his defence on preponderance and probabilities.

Right of Silence of Accused

The accused is entitled to exercise the right of silence. That he did not offer any explanation itself may not be sufficient to conclusively hold that he was guilty of commission of the offence, but the legal position that the same would be considered to be a circumstance against him is not in dispute.[45]

96. Burden on Prosecution

In a criminal case, it is for the prosecution to affirmatively and satisfactorily establish the guilt of an accused and it is not for him to prove his innocence[46]because the presumption is that he is innocent until the contrary is clearly established. The burden of proof, that the accused is guilty, is always on the prosecution. If there is an element of reasonable doubt as to the guilt of an accused, the benefit of that

doubt must go to him. It does not, however, mean that even an imaginary or unreal and improbable doubt is enough for holding the accused not guilty if the evidence, on the whole, points to the only conclusion, on which a prudent man can act, that the accused is guilty.[47] The contention on behalf of the prosecution, that inference should be drawn against the accused for murdering the deceased due to an absence of explanation, cannot be sustained.[48] Similarly, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can, at best, be considered as an additional circumstance if other circumstances point unerringly to the guilt of the accused.[49]

97. Burden of Proof on the Accused

Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, eg, where burden of proof may be imposed upon the accused by reason of a statute.[50]

When the accused has admitted the fact that the house from where the body of the deceased was exhumed, belonged to him and he was residing in the said house,2359 though not at the relevant time, failure to give any explanation by the accused as to how the body of the deceased came to be exhumed from his house is an important incriminating circumstance against the accused.[51]

98. Plea of Alibi

The word 'alibi' is derived from a Latin expression which means and implies in common acceptation 'elsewhere'. It is a defence based on the physical impossibility of participation in a crime by an accused by placing the accused in a location other than the scene of the crime at the relevant time, or shortly put by the presence of the accused elsewhere when the offence was committed.[52] The distance, in such a case thus, would be a material factor in the matter of acceptability of the plea of alibi.[53] A distance which was only 15/20 minutes' walk from the place of occurrence cannot possibly be said to be 'presence elsewhere'. It was not an impossibility anyway to be at the place of occurrence and also at the place where the accused had allegedly gone just to buy some food. Such plea of alibi must miserably fail. And once it does, as a false plea as it looks, it boomerangs on the accused - only to further fortify the prosecution case.[54] When there is a possibility that the accused had travelled from the place of work to the place of the incident in the village and had come back during the intervening period between 7:15 pm and 6:00 am next day, the plea of alibi cannot be accepted.[55]

The prosecution story was that at the time of incident the deceased and his two associates were going on scooter, the accused persons stopped them, fired with 12 bore gun which hit the deceased causing death. Evidence showed that at that time accused A2 was admitted in hospital at Bombay and the accused A1 was attending him. The said evidence was not challenged by the State. The plea of alibi was accepted. Accused persons were acquitted of the charge under s 302, IPC .[56]

99. Burden of Proof of Plea of Alibi

The burden of proving an alibi is entirely on the accused and strict proof is required for establishing an alibi. The word alibi means 'elsewhere', and that word is used for convenience when an accused takes recourse to a defence that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. Under s 11 of the Indian Evidence Act, dealing with facts not otherwise relevant, becoming relevant in certain context, it is *inter alia* provided that facts not otherwise relevant are relevant if they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. Therefore, once the prosecution succeeds in discharging the burden, it is incumbent on the accused who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the2360 Court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. If the

evidence adduced by the accused is of such a quality and of such a standard that the Court entertains some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would no doubt be entitled to the benefit of that reasonable doubt.[57] It would be a sound proposition to be laid down in this context that the burden on the accused is rather heavy, and that strict proof is required for establishing the plea of alibi.[58]

If an accused takes the plea of alibi, he must establish it.[59] Alibi, not being an exception under the IPC, is governed by s 11 of the Indian Evidence Act 1872, and the burden to prove it is always on the accused who must prove it to the satisfaction of the Court.[60] This burden cannot be discharged by showing merely a preponderance of probabilities in his favour. As envisaged by s 11, he has to show a high degree of probability in his favour. In *Satya Vir v State* ,[61]it was remarked that the omission on the part of the accused to produce all important evidence in support of his plea, which could have been easily produced, would raise a presumption under illust (g) to s 114 of the Evidence Act 1872, that it would, if produced, have been unfavourable to him.[62] Plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can, therefore, suceed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed.[63] The plea of alibi may be established from prosecution case, itself.[64]

No finding on a plea of alibi can be recorded by the High Court for the first time in a petition under s 482, CrPC .[65]

It is true that a plea of alibi must be proved with absolute certainty so as to completely encode the presence of the person concerned, at the time when, and the place where the incident took place.[66] Where the accused claimed that he had gone to see a certain advocate for consultation with regard to some matter at the time when the murder took place, and lent no contemporaneous document produced by such advocate to the accused to prove the plea of alibi, the plea was not accepted.[67] The burden of proof for a plea of alibi lies on the person who raises it.[68] If the burden is not discharged, the appellate court will not interfere with the finding of conviction.[69]2361 The prosecution case cannot be said to have not been proved against the accused, merely because he comes out with a plea of alibi without establishing the same.[70] The plea of alibi has to be proved to the satisfaction of the Court where there is ample time and opportunity for the accused to reach the place of occurrence, and it is for the accused to prove that he did not reach the place.[71]

Plea of Alibi--Best and Worst Defence at the Same Time

Once a plea of alibi is taken by an accused, then it is for him to establish the said fact, the defence of alibi is the best and worst of defence at the same time, they are best because if the accused was not here, when the deceased was murdered, he could not have murdered her, it is the worst because once he raises a plea of alibi, no other defence is usually open to him.[72]

100. Plea of Insanity in Murder Cases

Commentary in s 84, vol I, may be referred to.

When the abnormal behaviour of the accused was apparent from the evidence on record, and the opinion of the doctors also supported the ground of insanity, the accused is entitled to be acquitted.[73] Where there was clear indication in the evidence of the witness that the accused was not a normal person who also killed his son aged three years for no apparent reason, with no evidence led by the prosecution with regard to the state of mind of the accused during custody, the accused was found entitled to be acquitted.[74] The conduct of the accused at the time of assaulting the deceased in broad daylight within sight of his relatives leaving blood stains on the spot, demonstrate abnormality, so the circumstances showed that the accused at the time of doing the act of assault, by reason of unsoundness of mind was incapable of knowing the nature of the act and so was entitled to the benefit of doubt.[75]

Where, on account of medical evidence, the accused was found to be of unsound mind, preceding and

following the occurrence, the nature and burden of proof on the accused is no higher than that which rests upon a party to a civil proceeding. The state of mind of the accused at the time of commission of the offence was an aspect to be inferred from the circumstances, if the circumstances justify the inference that the accused was under a delusion and under attack of an ailment of paranoid schizophrenia. He was held entitled to the benefit of s 84 and acquitted of the charge under s 302, IPC .[76]

101. The Case not put to the Witness in Cross-examination--Effect

It is a essential rule of justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted.[77]2362

102. Reasonable Doubt

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt: but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.[78]

Benefit of Doubt and its Relation with the Accused

In a criminal case, the burden of proof is always on the prosecution, and the benefit of doubt, if any, is given to the accused.[79] When the benefit of doubt is given to the co-accused because his name does not figure in the FIR, but same yardstick cannot be applied to accused who was named in the FIR as one of the assailants and he was also identified by the prosecution witnesses.[80] The benefit of doubt, to which the accused is entitled, is a reasonable doubt, *i.e.*, doubt which rational thinking men will reasonably, honestly and conscientiously entertain, and not the doubt of a timid mind which fights shyness or is afraid of the logical consequences.[81] The doubt must be reasonable, cogent and coherent, and fanciful.[82] If the doubt amounts to reasonable doubt, the accused must be acquitted. If, however, there is no doubt concerning the guilt of the accused, he should be convicted.[83] However, he cannot be convicted on the basis of mere suspicion.[84] If there is a gap or lacuna in the prosecution evidence, the accused, and not the prosecution, should get its benefit.[85]

There is a long distance between 'may be true' and 'must be true', and the whole of this distance must be traveled by the prosecution by legal, reliable and unimpeachable evidence before it can ask for a conviction. If there has been any failure or omission in covering this distance, even if the prosecution case 'may be true', the benefit of the doubt must go to the accused and he must be acquitted even though, as a result, a foul and cruel murder goes unpunished.[86] The allegation that the accused entered the house of the victim by making a hole in the wall was not believed as it was not possible to make a hole without making noise as the walls were built of bricks and were strong. The incident of assaulting five victims by a known accused attacker going unheard by anybody was also doubtful, and the weapon of offence recovered from the accused also did not prove to be connected with the crime, the accused in such a case is entitled to the benefit of doubt.[87] When there is2363 no legal evidence, connecting the accused with the crime, and the circumstances relied upon by the prosecution, are not sufficient to bring home the offence to the accused beyond reasonable doubt, the conviction of the accused under s 302, IPC, could not be sustained.[88]

If the prosecution witnesses have come out with two inconsistent versions of the occurrence, conviction of the accused cannot be sustained.[89] The discrepancy in the evidence of eyewitnesses as to the alleged role played by the accused, is sufficient to give him the benefit of doubt.[90] When the case of the convict-accused cannot be distinguished from the case of those acquitted by reading the evidence correctly in all material particulars, the conviction will have to be set aside.[91] When two parties clash in a sudden fight, and it cannot be decided on evidence, produced in the case, as to which party was the aggressor, then both parties are entitled to the benefit of doubt having acted in exercise of the right of

private defence.[92] When it is not proved which of the accused persons attempted or committed murder by attacking with knife, all the accused are entitled to benefit of doubt.[93]

Appellant accused persons were prosecuted on allegations that they caught hold of the deceased, young lad of 20 years, and set him on fire with match stick. Statement of the complainant and prosecution witnesses were replete with glaring discrepancies. Written report lodged by the complainant was not produced before the Court. Dying declaration of the deceased did not inspire confidence. Appellants accused persons were given benefit of doubt and acquitted of the charge under ss 302 / 34, IPC .[94]

Conviction cannot be based merely on the bald conclusion that the deceased died as a result of injury, deliberately given by the accused, when the prosecution has failed to establish the case beyond reasonable doubt,[95] and such reasonable doubt holds to the benefit of the accused not only in the matter of conviction but also in the matter of sentence.[96] When names of the miscreants were not mentioned by the eyewitness in the FIR but their names were subsequently included in the investigation report by the investigating officer, the false implication of the accused cannot be ruled out making him entitled to the benefit of doubt.[97] Where wife of the deceased, a natural witness, deposed about the presence of named accused 1 and accused 2, but in cross-examination she omitted the name of accused 1 and accused 2, on the same evidence, accused A4, A5 and A6 were acquitted, hence, accused A1 and A2 were also held entitled to benefit of doubt, and acquitted of the charges under2364 ss 302 / 34, IPC .[1] Where neither of the circumstances singly nor cumulatively lead to the conclusion that the accused alone was the perpetrator of the crime or that he had participated in the crime, the accused will be entitled to both the benefit of doubt in respect of the conviction and sentence.[2] Prosecution case was that the accused appellant and others fired shot at the deceased and caused death. Other accused persons on the same evidence were acquitted. There was discrepancy in the name of the father of the accused appellant. The weapon of offence and the pellet were not recovered. The accused appellant after the commission of the offence did not abscond. The Supreme Court held that the accused appellant was also entitled to benefit of doubt, and his conviction under ss 302 / 34, IPC was set aside.[3]

Appellant accused R was alleged to be armed with lathi. PWS did not state that the accused R had caused any lathi injury, and no overt act was attributed to him. The appellant accused R was held entitled to benefit of doubt, and was acquitted.[4]

Out of eight accused persons arraigned on trial for offence under s 302, IPC, six accused persons were acquitted while two were convicted. The two accused persons against whom overt acts were attributed were not named in FIR, the evidence of the informant examined in the case was found not reliable. The two convicted accused were held entitled to benefit of doubt and were also acquitted.[5]

The three accused appellants were armed with lathi which had not been used by them in any manner and the only allegation against them was that they had exhorted their co-accused to fire at the opposite party. Held, the possibility that the three accused persons were roped in on account of animosity could not be ruled out. The three accused appellants were given benefit of doubt and acquitted of the charge under ss 149, 302 and 307, IPC .[6]

Three appellants (real brothers) were alleged to have assaulted the deceased, causing death. Deceased died as a result of knife blow given by the appellant no. 1. The evidence adduced to establish the guilt of appellant nos. 2 and 3 was that appellant no. 1 had come to place of occurrence along with a knife in his hand and other two accused came from another place. They allegedly came out of the field, caught hold of the deceased and embraced him. If the appellant nos. 2 and 3 had embraced the deceased, a knife blow could not have been given in that manner by the appellant no. 1 on the chest of the deceased. It is not stated by the prosecution that the said two accused nos. 2 and 3 were embracing him from behind. Nature of the evidence adduced and role ascribed to them entitled them to benefit of doubt. The conviction of the appellant no. 1 was confirmed, the appellant nos. 2 and 3 were held entitled to benefit of doubt, they were therefore acquitted of the charge under ss 302 / 34, IPC .[7]2365

If one of the accused is given the benefit of the doubt, it cannot be said that the rest of the accused should also be acquitted.[8] The benefit of doubt, resulting in the acquittal of the other accused, would not,

therefore, vitiate the conviction of only one of them.[9] The fact that the dimension of blood-stains on cloths in the seizure memo were not given, or that with lapse of time the classification of blood group on the *chadar* (sheet) could not be determined, is not sufficient to claim the benefit of doubt by the accused.[10]

Reasonable doubt as regards some ingredients of the offence ought to be distinguished from reasonable doubt as regards some general exception claimed.

In the former case, the accused is entitled to an acquittal while, in the latter case, he is not.[11]

Accused Convicted under Sections 302 / 34 cannot be Convicted under Sections 506 / 34 or under Section 303,IPC

Where the sessions court convicted the accused under s 302 read with s 34, IPC, and also under s 506 read with s 34, IPC, the conviction under ss 506 / 34, IPC, was not found proper particularly because the charge under ss 506 / 34, IPC, was with respect to the accused threatening the deceased and the accused was acquitted of the charge under s 506 and s 34, IPC .[12] The conviction of accused persons under s 303, IPC, is not proper when they are convicted for a major offence under s 302, IPC .[13]

103. Improbable Version

Appellant accused and the deceased were going on the same scooter, the deceased was a pillion rider. The prosecution case was that the accused set the deceased on fire after pouring petrol from the petrol can kept in the scooter. The counter version of the accused was that the deceased set herself on fire without his knowledge while the scooter was in motion. As both the versions were found improbable, and incredible, the accused was given benefit of doubt and acquitted of the charge for offence under s 302, IPC .[14]

(XII) APPRECIATION OF EVIDENCE IN MURDER CASES

104. Appreciation of Evidence

It is trite law that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive.

Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for their credibility which should2366 not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance in the witness-box; their power of observation, *etc*. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.[15] The Court's approach to the evidence in a case must be dispassionate and free from prejudice, and the examination of the evidence must be fair and just in fixing the guilt upon an accused.[16]

The proper way to approach a case is first to marshal the evidence against the accused, excluding the confession altogether from consideration, and see whether, if it is believed, a conviction can safely be based on it. If it is capable of belief independently of the confession, then, of course, it is not necessary to call the confession in aid. However, cases may arise where the Judge is not prepared to act on the other evidence, as it stands, even though, if believed, it would be deficient to sustain a conviction. In such an event, the Judge may call in aid the confession, and use it to lend assurance to the other evidence and, thus, fortify himself in believing that without the aid of the confession, he would not be prepared to accept.[17] The Supreme Court observed in *Birpal Singh v State of Uttar Pradesh* ,[18] that in appreciation of evidence, the Court should see whether the prosecution case and its evidence suffer from such infirmities that the accused cannot be justifiably convicted. In the undernoted cases,[19] the accused had to be

acquitted because of a number of infirmities in the prosecution evidence. When there is enough material to support the inference that it might have happened in the manner alleged by the defence, the prosecution evidence has to be scanned and sifted in the light of the defence contention.[20] The Court should therefore, make an attempt to separate the grain from the chaff, if possible.[21] Where however, the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up, that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution, completely from the context and the background against which they are made, then2367 this principle will not apply.[22] Where deposition of the wife of the deceased has been discarded and some accused persons are acquitted, that cannot be a ground for acquitting the prime accused of the case.[23]

Where there is failure to appreciate the oral evidence in the light of the general probabilities and the salient circumstances that have come out, the judgment is not in conformity with the law.[24] The Court should not miss that failure on the part of the prosecution to produce an important eyewitness which would give the accused the 'benefit' of optional presumption under s 114, illustration (g) of the Evidence Act 1872, and to infer that if such witness had been produced, it would have defeated the prosecution case.[25] When a lady is confronted with a number of intruders in her house armed with deadly weapons and showering bullets, she cannot give a very accurate and photogenic version as whole thing happened in a few minutes. Therefore, while appreciating such testimony, the Court should give due regard to their rural background and the whole scenario in which the incident happened.[26]

When a murder takes place, and when there are more than one accused, it is not necessary for the prosecution to lead evidence as to which accused has dealt which blow on what part of the body of the deceased. Any inquiry into the question as to who among the accused has dealt the fatal blow is clearly not warranted.[27]

The prosecution case was that the accused appellants in furtherance of their common object fired gun shots at the deceased causing death. There was long enmity between the family of the complainant and the accused persons. The eye-witnesses, brother and friend of the deceased had seen the incident from their flour mill. The place of occurrence *viz.* shop of the deceased was not visible from the flour mill. The witnesses deposed contrary to the averments of the FIR and their statement in examination-in-chief. There was no direct evidence that the accused appellant fired shots from the rifle causing the death of the deceased. The conviction of the accused under s 302 read with ss 148 and 149, IPC recorded by the trial Court was set aside.[28]

Two views Emerging from Evidence

The golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.[29] It is now well settled that if two views are possible, the appellate court should not interfere with the judgment of acquittal passed by the2368 Court below.[30] If two views are possible the view in favour of the accused should be accepted and the accused should be acquitted.[31] On the basis of evidence, two views being possible, as such accused A1 was entitled to benefit of doubt and acquitted of the charge under s 302, IPC .[32]

30 *Ofei Molla v Emperor* 15 Cr LJ 147 ; *Queen v Autal Muchi* ILR 10 Cal 1026 ; *Empress v Nga Pya* 1 Bur SR 634 .

31 Re *Chukkapall Ramayya* 11 Cr LJ 222(2), p 229.

32 *Aishan Bibi v Emperor* AIR 1934 Lah 150 (2), 36 Cr LJ 14 .

33 *State of Rajasthan v Teja Rama* AIR 1999 SC 1776, (1999) Cr LJ 2588 (SC), (1999) JT 2 SC 279 .

34 *Cure Singh v State of Rajasthan* AIR 2001 SC 330, (2001) Cr LJ 487 (SC) .

35 *Rajesh Rai v State of Sikkim* (2002) Cr LJ 1385 (Sikkim) (DB) ; for more details see *Sohoni's Code of Criminal Procedure*, Lexisnexis Butterworths, New Delhi.

36 *Hassan Murtaza alias Johny v State of Haryana* (1999) Cr LJ 3446 (P&H) (DB).

37 *Raghunandan v State of Uttar Pradesh* AIR 1974 SC 463 .

38 *State of Karnataka v Ramappa Apparai Ghasti* (2000) Cr LJ 599 (Ker) (DB) .

39 *Mahesh & ors v State of Uttar Pradesh* (2002) Cr LJ 2683 (All) (DB) .

40 *Khant Dhanjibhai Ghusabhai Sarvaiya v State of Gujarat* 2014 Cr LJ 278, p 282 (Guj) (DB), 2014 (1) GLH 424 .

41 *Anjanappa v State of Karnataka* 2014 Cr LJ 368, p 375 (SC), 2013 AIR SCW 6681, 2013 (13) Scale 608, (2014) 2 SCC 776 .

42 *Kamalavva v State of Karnataka* 2009 Cr LJ 4408, p 4413 (SC), 2009 AIR SCW 5378, 2009 (10) Scale 468 .

43 *P Mani v State of Tamil Nadu* 2006 Cr LJ 1629, p 1631, AIR 2006 SC 1319 .

44 *Dandu Jaggaraju v State of AP* 2011 Cr LJ 4956 (SC), AIR 2011 SC 3387 .

45 *Kailash Gour v State of Assam* AIR 2012 SC 786, 2012 Cr LJ 1050, p 1060 .

46 *State of UP v Om Prakash* 2015 Cr LJ 1706 (SC), 2015 (1) Scale 380, (2015) 4 SCC 467 .

47 *State of UP v Garibuddi* 2012 Cr LJ 772 (SC), 2013 (1) ALD (Cri) 50, 2012 Cr LJ 772, (2011) 14 SCC 145 .

48 *D Dandasi Reddy v State of Orissa* 2009 Cr LJ 4400, p 4404 (Ori) (DB) .

49 *Surender v State (NCT) of Delhi* 2012 Cr LJ 2177 (SC), AIR 2012 SC 1725, 2012 AIR SCW 2247 .

50 *Kananan & ors v State of Kerala* AIR 1979 SC 1127, (1979) Cr LJ 919 ; *Budhsen & anor v State of Uttar Pradesh* AIR 1970 SC 1321, (1970) Cr LJ 1149 ; *Rameshwar Singh v State of Jammu & Kashmir* AIR 1972 SC 102, (1972) Cr LJ 15 .

51 *Ramanathan v State of Tamil Nadu* AIR 1978 SC 1204, (1978) Cr LJ 1137 .

52 *State of Uttar Pradesh v Rajju & ors* AIR 1971 SC 708, (1971) Cr LJ 642 .

53 *Asha alias Ashanand & ors v State of Rajasthan* (1997) Cr LJ 3508 .

54 *Ram Bharosey v State of UP* 2010 Cr LJ 871, 2009 AIR SCW 7220, AIR 2010 SC 917, 2009 (57) BLJR 2865, JT 2009 (14) SC 260, 2009 (14) Scale 54, (2010) 1 SCC 722, [2009] 15 SCR 947 .

55 *Poolin Haldar v State* (1996) Cr LJ 513 (Cal) (DB) .

56 *Ambika Prasad v State* (1997) Cr LJ 2853 (Del) (DB) .

57 *Ahmed Bin Salam v State of Andhra Pradesh* (1999) Cr LJ 2281 (SC) .

58 *Sheikh Omar Ahmed Sheikh v State of Maharashtra* (1998) Cr LJ 2534 (SC) .

59 *Ram Bharosey v State of UP* 2010 Cr LJ 871, 2009 AIR SCW 7220, AIR 2010 SC 917, 2009 (57) BLJR 2865, JT 2009 (14) SC 260, 2009 (14) Scale 54, (2010) 1 SCC 722, [2009] 15 SCR 947 .

60 *State of Karnataka v Rajanaika* 2012 Cr LJ 2611 (Kant)(DB).

61 *Chotey Lal v State of Uttar Pradesh* (1994) SCC (Cr) 144 ; *Shatrudhan Panda v State of Orissa* (1994) SCC (Cr) 1424 ; *State of Andhra Pradesh v Dr MV Ramana Reddy* AIR 1991 SC 1938, (1991) Cr LJ 2703 ; *Puttan alias Kamal Prasad v State of Uttar Pradesh* AIR 1992 SC 1032, (1992) Cr LJ 1122 .

62 *Hari Nath v State of Uttar Pradesh* AIR 1988 SC 345, (1988) Cr LJ 422 ; *Subhas & Shiv Shanker v State of Uttar Pradesh* AIR 1987 SC 1222, (1987) Cr LJ 991 .

63 *Brij Mohan & ors v State of Rajasthan* AIR 1994 SC 739, (1994) Cr LJ 922 .

64 *Bollavaram Pedda Narsi Reddy v State of Andhra Pradesh* AIR 1991 SC 1531, (1991) Cr LJ 1833 ; *Subash & Shiv Shanker v State of Uttar Pradesh* AIR 1987 SC 1222, (1987) Cr LJ 991 .

65 *Brij Mohan v State of Rajasthan* AIR 1994 SC 739 ; *Mahabir Singh v State of Uttar Pradesh* (1997) Cr LJ 1703 (All) (DB) ; *Murari Lal Jeevaram Sharma v State of Maharashtra* (1997) Cr LJ 782 (SC), AIR 1997 SC 1593 .

66 *Surendra Narain alias Munna Pande v State of Uttar Pradesh* (1998) Cr LJ 359 (SC) ; *Vekuntam Chandrappa v State of*

Uttar Pradesh AIR 1960 SC 1340, (1960) Cr LJ 1681 ; *Matru alias Girish v State of Uttar Pradesh* AIR 1971 SC 1050, (1971) Cr LJ 913 ; *Anil Kumar v State* (2009) 17 SCC 537, 2009 (13) Scale 23, 2011 (1) SCC (Cr) 1084 ; *C Muniappan v State of TN* (2010) 9 SCC 567 (SC), AIR 2010 SC 3718 : (2010) 10 SCR 262 (Identification of accused in TI parade found reliable).

67 *V.C. Shukla v State (Delhi Administration)* AIR 1980 SC 1382, (1980) Cr LJ 965 ; *State of Maharashtra v Sukhdev Singh alias Sukha Singh* AIR 1992 SC 2100, (1992) Cr LJ 3454 ; *Jaspal Singh v State of Punjab* (1997) Cr LJ 370 (SC) .

68 *KS Sadanandan v State of Kerala* (1999) Cr LJ 1638 (SC) .

69 *Sheikh Omar Ahmed Sheikh v State of Maharashtra* (1998) Cr LJ 2534 (SC) .

70 *Anil Kumar v State* (2009) 17 SCC 537, 2009 (13) Scale 23, 2011 (1) SCC (Cr) 1084 .

71 *Surendra Narain alias Munna Pande v State* (1998) Cr LJ 359 (SC) .

72 *Pammi alias Brijendra Singh v Govt of Madhya Pradesh* (1998) Cr LJ 1617 (SC) .

73 *Kanta Prasad v Delhi Admn* AIR 1958 SC 350, [1958] SCR 1218 ; *Jadunath Singh v State* AIR 1971 SC 363, (1971) Cr LJ 350 ; *Harbhajan Singh v State of Jammu & Kashmir* AIR 1975 SC 1814, (1975) 4 SCC 480 .

74 *George v State of Kerala & anor* (1998) Cr LJ 2034 (SC) .

75 *Ibid*.

76 *Kripal Singh v State of Uttar Pradesh* AIR 1965 SC 712 .

77 *Shankar Shridhar Kavale & ors v State of Maharashtra* (1998) Cr LJ 4491 (Bom) (DB) .

78 *S Sudershan Reddy v State of Andhra Pradesh* 2006 Cr LJ 4033, p 4038 (SC), AIR 2006 SC 2716 .

79 *Dana Yadav alias Dahu & ors v State of Bihar* (2002) 7 AD 501 (SC) .

80 *Mohd Aman & anor v State of Rajasthan* AIR 1997 SC 2960, (1997) Cr LJ 3567 .

81 *Ibid*.

82 *Mohan Lal & ors v Ajit Singh* AIR 1978 SC 1183, (1978) Cr LJ 1107 (SC) .

83 *Pandi & anor v State* (1997) Cr LJ 2964 (Mad) (DB) .

84 *Shanmugayya & ors v State* (1992) 3 Crimes 505 (Mad) (DB).

85 *State v Chotey Lal & ors* (1999) Cr LJ 3411 (Del) (DB) .

86 *Keshawlal v State of Madhya Pradesh* (2002) Cr LJ 1776 (SC) .

87 *Rajesh alias Raju Chandulal Gandhi & anor v State of Gujarat* (2002) Cr LJ 1821 (SC) .

88 *Gade Laxmi Mangraju alias Ramesh v State of Andhra Pradesh* (2001) Cr LJ 3317 (SC) .

89 *Mohd Aman & anor v State of Rajasthan* AIR 1997 SC 2960, (1997) Cr LJ 3567 .

90 *Ibid*.

91 Re *Balija Pullayya*AIR 1941 Mad 88, (1942) Cr LJ 316 (DB) (Mad) ; Re *Oomayan*AIR 1940 Mad 452, (1943) Cr LJ 702 ; *Fakirchand Nandran & anor v State* AIR 1950 MB 76 (FB) .

92 *State of Haryana v Ved Prakash* AIR 1994 SC 468 ; *Ramesh Chandra v State of Rajasthan* (1998) Cr LJ 1994 (Raj) (DB) .

93 *Gajraj v State (NCT) of Delhi* 2012 Cr LJ 413, p 416 (SC), 2011 AIR SCW 5933 .

94 *Gade Laxmi Mangraju alias Ramesh v State of Andhra Pradesh* (2001) Cr LJ 3317 (SC) .

95 *Lalit Kumar Yadav v State of Uttar Pradesh,* 2014 Cr LJ 2712, p 2721 (SC), 2014 (5) Scale 616 .

96 *Ibid*; *Eknath Vitthal Wakle v State of Maharashtra* 2008 Cr LJ 662, 2007 (109) Bom LR 1947 (Bom) (DB) .

97 *Gade Laxmi Mangraju alias Ramesh v State of Andhra Pradesh* (2001) Cr LJ 3317 (SC) .

98 *Abdul Razak Murtaza Dafadar v State of Maharashtra* AIR 1970 SC 283, (1970) Cr LJ 373 (SC) .

1 *Surinder Pal Jain v Delhi Admn,* (1993) Supp 3 SCC 68, AIR 1993 SCW 1561, AIR 1993 SC 1723, (1993) Cr LJ 1871 (SC) .

2 *Gade Laxmi Mangraju alias Ramesh v State of Andhra Pradesh* (2001) Cr LJ 3317 (SC) .

3 *Eknath Vitthal Wakle v State of Maharashtra* 2008 Cr LJ 662, 2007 (109) Bom LR 1947 (Bom) (DB) .

4 *CBI v Abdul Karim Ladsab Telgi* 2005 Cr LJ 2868 (Bom) .

5 *State of Madhya Pradesh v Mukund alias Kundu* (1997) Cr LJ 534 (MP) (DB) 120.

6 *Bharama Prasaram Kudhachkar v State of Karnataka* 2012 Cr LJ 792, p 794 (SC), AIR 2012 SC 570, 2012 (4) Kar LJ 388, (2014) 14 SCC 431 .

7 *State of Maharashtra v Bahaurao & ors* (1996) Cr LJ 673 (Bom) (DB) .

8 *Ibid*.

9 *State of Rajasthan v Kishore* (1996) Cr LJ 2003 (SC) .

10 *Mongol & onor v State* (1996) Cr LJ 4279 (All) (DB) .

11 *Vijay Kumar & anor v State* (1996) Cr LJ 2439 (Del) (DB), (1995) 1 Apex Decisions 569 (Del), (1993) Cr LJ 1537 (Del) ; *Naresh Kumar v State* (1995) 1 Apex Decisions 625 (Del), (1995) Cr LJ 1256 (Del) .

12 *Dhanaj Singh v State of Punjab* (2004) Cr LJ 1807 (SC) ; *Karnel Singh v State of Madhya Pradesh* (1995) 5 SCC 518, (1995) Cr LJ 4173, AIR 1995 SC 2472 .

13 *Kishore Shinde v State of Maharastra* (2006) Cr LJ 2618 (Bom) (DB) ; *Amar Singh v Balwinder Singh and Ors* (2003) 2 SCC 518, AIR 2003 SC 1164 ; *Ram Bihari Yadav v State of Bihar and Ors* (1998) 4 SCC 517, AIR 1998 SC 1850 .

14 *Ram Bihari Yadav v State of Bihar* (1998) 4 SCC 517 .

15 *Amar Singh v Balwinder Singh* (2003) 2 SCC 518 .

16 *Ibid*.

17 *Ram Bali v State of UP* (2004) Cr LJ 2490 (SC) .

18 *Rajesh Kumar alias Kala v State* (1996) Cr LJ 607 (Del) (DB) ; *State of Punjab v Trilok Singh* AIR 1971 SC 1221, (1971) Cr LJ 1063 ; *Balaka Singh v State of Punjab* AIR 1975 SC 1962, (1975) Cr LJ 1734 ; *Ishwar Singh v State of Uttar Pradesh* (1976) Cr LJ 1883 (SC) ; *Vijinder Singh v State* (1985) 1 Crimes 237, (1984) Cr LJ (NOC) 26 (Del) ; *Arjun Marik v State of Bihar* (1994) JT 2 SC 627 .

19 For details on s 161, refer to *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

20 *State of Madhya Pradesh v Bhagwan Singh* (2000) Cr LJ 123 (MP)(DB).

21 *Sunil Kumar v State of Madhya Pradesh* (1997) 1 Jab LJ 192, (1997) Cr LJ 1183 (SC) .

22 *State of Uttar Pradesh v Sikander Ali* (1998) JT 3 SC 18, (1998) Cr LJ 2520 .

23 *Dr Krishna Pal v State of Uttar Pradesh* AIR 1996 SC 733, (1996) Cr LJ 1134 (SC), (1996) 7 SCC 194 ; *Ram Swaroop & ors v State of Uttar Pradesh* (2000) Cr LJ 808 (SC) .

24 *Ramesh Jogi (Yogi) v State of Uttar Pradesh* (1998) Cr LJ 3861 (All) (DB) .

25 *Ramesh Kumar v State of Rajasthan* (1999) Cr LJ 871 (Raj) (DB) .

26 *Gulam Hussain & anor v State of Delhi* (2000) Cr LJ 3949 (SC) .

27 *Sawwaliya v State of Rajasthan* AIR 1955 NUC (Raj) 497, (1953) 3 ILR Raj (380) ; *Abdul Wahid v State of Rajasthan* (1998) Cr LJ 3423 (Raj) (DB) .

28 *Abdul Wahid v State of Rajasthan* (1998) Cr LJ 3423 (Raj) (DB) .

29 *Sarwan Singh & ors v State of Punjab* AIR 1976 SC 2304, (1976) Cr LJ 1757 (SC) ; *Pattad Armrappa & ors v State of Karnataka* AIR 1989 SC 2004, (1989) Cr LJ 2167 (SC) ; *SG Gundegowda alias Moganna v State* (1996) Cr LJ 852 (Ker) (DB) .

30 *State of Uttar Pradesh v Gokaran* AIR 1985 SC 131, p (1985) Cr LJ 511.

31 *Baldev Singh & ors v State* (1982) Cr LJ 1087 (J&K) (FB).

32 *Man Singh Praja v State of Assam* (1996) Cr LJ 1379 (Gau) (DB) ; *Arun Kumar Sharma v State of Bihar* 2010 Cr LJ 428, 2009 (13) Scale 124 (Unexplained delay of six days in sending copy of FIR to concerned Magistrate, accused acquitted of the charge of murder); *Moti Lal v State of* Cr LJ 3971 (SC) (Accused acquitted).

33 *Bir Singh v State of Uttar Pradesh* (1977) 4 SCC 420, (1978) Cr LJ 177 ; *Dattar Singh v State of Punjab* 1975 SCC (Cr) 530, (1974) Cr LJ 908 ; *State of Punjab v Tarlok Singh* (1973) SCC (Cr) 9, (1971) Cr LJ 1063 .

34 *Amar Singh v State* (1996) Cr LJ 3848 (Del) (DB) .

35 *Madru Singh & ors v State of Madhya Pradesh* (1997) Cr LJ 4390 (SC) .

36 *Surendra Pratap Chauhan v Ram Naik & ors* (2001) Cr LJ 98 (SC) .

37 *State of Rajnsthan v Teja Singh & ors* (2001) Cr LJ 1176 (SC) .

38 *Bijoy Singh & anor v State of Bihar* 2002 Cr LJ 2623 (SC) .

39 *Alia China Apparao & ors v State of Andhra Pradesh* 2003 Cr LJ 17 (SC) .

40 *Shivlal v State of Chhattisgarh* 2011 AIR SCW 6480, 2012 Cr LJ 616, AIR 2012 SC 280 .

41 *Sabia v State* 1985 Cr LR 18 (Raj) ; *Pyare v State of Rajasthan* 1997 Cr LJ 1065 (DB) .

42 *Jagdish Narain v State of Uttar Pradesh* JT 1996 (3) 89 (SC), AIR 1996 SCW 1666 .

43 *Ibid,* p 1669.

44 *Pyare v State of Rajasthan* (1997) Cr LJ 1065 (DB) .

45 *Baraf Singh v State of Uttaranchal* 2005 Cr LJ 3212, p 3215 (Utr) (DB), 2005 (3) UC 1539 .

46 *Baraf Singh v State of Uttaranchal* 2005 Cr LJ 3212, p 3215 (Utr) (DB), 2005 (3) UC 1539 .

47 *Bhagwati Prasad v State of MP* 2010 Cr LJ 528, p 532 (SC), 2009 AIR SCW 7503, AIR 2010 SC 349, 2009 (14) Scale 314, (2010) 1 SCC 697 .

48 *Manohar v State of Karnataka* (1997) Cr LJ 398 (Kant) (DB) .

49 *Mukund Lal v Union of India* AIR 1989 SC 144, (1989) Cr LJ 872 (SC) .

50 *Ibid*.

51 *Manohar v State of Karnataka* (1997) Cr LJ 398 (Kant) (DB) .

52 *Ibid*.

53 *Mahabir Singh v State of Haryana* (2001) Cr LJ 3945 (SC) .

54 *Vijender v State of Delhi* (1997) JT 3 131 (SC) .

55 *Dalip Singh v State of Punjab* (1997) Cr LJ 3647 (SC) .

56 *Mer Malde Veja v State of Gujarat* (1998) Cr LJ 4412 (Guj) (DB) ; *Guiram Mandal v State of West Bengal* 2013 (2) Crimes 324 ; *Amar Singh v Balwinder Singh* (2003) 2 SCC 518, AIR 2003 SC 1164, 2003 Cr LJ 1282 ; *Radha Mhan Singh v State of UP* (2006) 2 SCC 450, AIR 2006 SC 951, 2006 Cr LJ 1121 .

57 *Suresh Rai & ors v State of Bihar* (2000) Cr LJ 3457 (SC) ; *George & ors v State of Kerala* (1998) Cr LJ 2034 (SC) .

58 As at *Podda Naraina v State of Andhra Pradesh* AIR 1975 SC 1252, (1975) Cr LJ 1062 (SC) ; *Khujji v State of Madhya Pradesh* AIR 1991 SC 1853, (1991) Cr LJ 2653 .

59 *Amar Singh v State* (1996) Cr LJ 3848 (Del) (DB) ; *Nripen Das v State of West Bengal* 2015 Cr LJ 497, p 500 (Cal) (DB) .

60 *Mahendra Rai v Mithilesh Rai* (1997) 10 SCC 605 .

61 *Shashidhar Singh & anor v State of Madhya Pradesh* (1998) Cr LJ 2676 (MP) (DB) ; *Shaikh Ayub v State of Maharashtra* (1998) Cr LJ 1656 (SC) .

62 *Ram Sanjjwan Singh & ors v State of Bihar* (1996) Cr LJ 2528 (SC) ; *Baleshioar Mandal & ors v State of Bihar* (1997) Cr LJ 4084 (SC) .

63 *State of Uttar Pradesh v Abdul & ors* (1997) Cr LJ 2997 (SC) .

64 *Harkirat Singh v State of Punjab* (1997) Cr LJ 3954 (SC) .

65 *Rameshwar Dayal v State of Uttar Pradesh* AIR 1978 SC 1558, (1978) 2 SCC 518 ; *Khujji alias Surendra Tiwari v State of Madhya Pradesh* AIR 1991 SC 1853, (1991) 3 SCC 627 ; *Kuldeep Singh v State of Punjab* AIR 1992 SC 1944, (1992) Supp 3

SCC 1 ; *Suresh Rai & ors v State of Bihar* 2000 Cr LJ 345 (SC) .

66 *George & ors v State of Kerala* (1998) Cr LJ 2034 (SC) .

67 *Maharaj Singh v State of Uttar Pradesh* (1994) 5 SCC 199, (1995) Cr LJ 457 (SC) .

68 *State of Punjab v Tarlok Singh* AIR 1971 SC 1221, (1971) Cr LJ 1063 (SC) ; *Ishwar Singh v State of Uttar Pradesh* AIR 1976 SC 2423, (1976) Cr LJ 1883 (SC) ; *Marudanal Auquesti v State of Kerala* (1980) 4 SCC 425, (1980) Cr LJ 446 (SC) ; *Vijinder Singh v State* (1984) 1 Crimes 237, (1984) Cr LJ (NOC) 26 (Del) ; *Lala Ram v Thakur Singh* (1988) 36 DLT 8, (1989) Cr LJ 572 ; *Jagjit Singh v State* (1990) 2 Delhi Lawyer 135, (1990) Cr LJ (NOC) 103 (Del) ; *Arjun Marik v State of Bihar* (1994) JT 2 627 SC ; *State of Gujarat v Patel Mohan Mulji* AIR 1994 SC 250, (1994) Cr LJ 280 (SC) ; *Pandi Mallaiah v State of Andhra Pradesh* AIR 1980 SC 1160, (1980) Cr LJ 914 (SC) .

69 *Vijay Kumar & anor v State* (1996) Cr LJ 2439 (Del) (DB) .

70 *State of UP v Shri Krishan* (2005) Cr LJ 892 (SC), 2005 SCC (Cri) 1551, 2005 (1) Crimes 220, 2005 (27) AIC 714 (SC) .

71 *Sharad v State of Maharashtra* AIR 1984 SC 1622, (1984) Cr LJ 1738 .

72 *Rabi Chandra v State of Orissa* AIR 1980 SC 1738, (1980) Cr LJ 1257 .

73 *Jayaraj v State of Tamil Nadu* AIR 1976 SC 1519, (1976) Cr LJ 1186 .

74 *Ramawati Devi v State of Bihar* AIR 1983 SC 164, (1983) Cr LJ 221 .

75 *Jaswant Singh v State (Delhi Admn)* AIR 1979 SC 190, (1978) Cr LJ 1869 .

76 *Ramawati v State of Bihar* AIR 1983 SC 164, (1983) Cr LJ 221 .

77 *Dalip Singh v State of Punjab* AIR 1979 SC 1173, (1979) Cr LJ 700 .

78 *Ganpat Mahadeo Mane v State of Maharashtra* AIR 1993 SC 1180, (1993) Cr LJ 298 ; *State of Uttar Pradesh v Nawab Singh* (1996) Cr LJ 934 (All) (DB) ; *Rajendra Singh v State of Rajasthan* (1996) Cr LJ 1560 (Raj) (DB) .

79 *Suresh v State of Madhya Pradesh* AIR 1987 SC 860, (1989) Cr LJ 775 ; *Chandrawati & etc v State* (1996) Cr LJ 975 (Del) (DB) .

80 *Ashok Kumar v State of Rajasthan* AIR 1990 SC 2134, (1990) Cr LJ 2276 .

81 *Ganpat Mahadeo Mane v State of Maharashtra* (1992) 6 JT 177 (SC), (1993) Cr LJ 298 (SC) ; *Padmahen Shamalbhai Patel v State of Gujarat* (1991) 1 JT 205 (SC), AIR 1991 SCW 464 ; *Ram Dhar v State* (1997) Cr LJ 292 (Del) (DB) .

82 *Sunil Kashinath Raimale v State of Maharashtra* (2006) Cr LJ 589 (Bom) (DB) .

83 *Sher Singh v State of Punjab* 2008 Cr LJ 2062 (SC), AIR 2008 SC 1426 .

84 *Ramnath v State of Madhya Pradesh* AIR 1953 SC 420, (1953) Cr LJ 1772 .

85 *Khushal Rao v State of Bombay* AIR 1958 SC 22, (1958) Cr LJ 106 .

86 *Maniben v State of Gujarat* 2007 Cr LJ 3187 (SC), AIR 2007 SC 1932 .

87 *Sajid v State of Karnataka* (1996) Cr LJ 1465 (Kant) (DB) .

88 *Ibid*.

89 *State of Assam v Mafizuddin Ahmed* (1983) SCC (Cr) 325, (1983) Cr LJ 426 (SC) .

90 *State of Gujarat v Mohanbhai Ragubhai Patel* AIR 1990 SC 1374, (1990) Cr LJ 1462 (SC) .

91 *Kumbhar Dhirajlal Mohanlal v State of Gujarat* (1997) Cr LJ 769 (SC) ; *Chaman Lal v State of Punjab* (1997) Cr LJ 3045 (P&H) (DB).

92 *Rajendra Kumar v State of Uttar Pradesh* (1997) Cr LJ 1120 (All) (DB) .

93 *Najjaim Faraghi alias Najjaim Faruaui v State of West Bengal* (1998) Cr LJ 866 (SC) ; *CV Govindappa & ors v State of Karnataka* (1998) Cr LJ 1107 (SC) .

94 *Rajendra Kumar v State of Uttar Pradesh* (1998) Cr LJ 3293 (SC) .

95 *Pradeep Kumar & ors v State of Himachal Pradesh* (2001) Cr LJ 1517 (HP) (DB) ; *Ram Viswas v State of MP* (2013) 11 SCC 677, 2012 (12) JT 429, 2012 (12) Scale 674 (Dying declaration found beyond suspicion, conviction under s 302, IPC recorded).

96 *Kamla v State of Punjab* AIR 1993 SC 374, (1993) Cr LJ 68 ; *Sharda v State of Rajasthan* (2010) 2 SCC 85, AIR 2010 SC 480, (2010) 85 AIC 80 (SC) (First two dying declarations stated that it was a case of accidental fire while the deceased was preparing food, in third she implicated her mother-in-law, conviction of the appellant was set aside).

97 *State of Maharashtra v Sanjay D Rajhans* 2005 Cr LJ 120 (SC), AIR 2005 SC 97, JT 2004 (10) SC 253, 2004 (9) Scale 50, (2004) 13 SCC 314 .

98 *Harbans Lal v State of Haryana* AIR 1993 SC 819, (1993) Cr LJ 75 .

99 *Balbir Singh v State of Punjab* 2006 Cr LJ 4646 (SC), AIR 2006 SC 3221, 2006 (9) Scale 537 .

1 *Ganpai Mahadeo Mane v State of Maharashtra* AIR 1993 SC 1180, (1193) Cr LJ 298*; Tanua Rabidas v State of Assam* (2014) 12 SCC 587, 2014 Cr LJ 4514 (Case of two dying declarations, husband accused convicted).

2 *Gudu Ram v State of Himachal Pradesh* 2013 Cr LJ 481, p 486 (SC), AIR 2013 SC (Cri) 852), 2012 (11) Scale 637, (2013) 11 SCC 546 .

3 *Mavari Surya Satyanarayana v State of Andhra Pradesh* (1995) Cr LJ 689 (AP) (DB) .

4 *Sher Singh v State of Punjab* 2008 Cr LJ 2062 (SC), AIR 2008 SC 1426, (2008) 4 SCC 265 .

5 *J Bolum Bhaskara Rao v State of Andhra Pradesh* (1985) Cr LJ 32 (AP) (DB) ; *Lavakishor & anor v State of Andhra Pradesh* (1997) Cr LJ 285 (AP) (DB) .

6 *Ramdhar v State* (1997) Cr LJ 292 (Del) (DB) ; *Prakash alias Om Prakash v State of Rajasthan* (1997) Cr LJ 668 (Raj) (DB) ; *Prakash Shobharam v State of Gujarat* (2000) Cr LJ 2559 (Guj) (DB)*; Bhagwan Tukaram Dange v State of Maharashtra* 2014 Cr LJ 1875, (2014) 4 SCC 270 (Minor discrepancies held immaterial); **see also***Amar Singh Yadav v State of UP* (2014) 13 SCC 443, AIR 2014 SC 2486 .

7 *Rawel Singh v State* (1997) Cr LJ 1195 (Del) (DB) ; *Pratapaneni Ravi Kumar alias Ravi & anor v State of Andhra Pradesh* (1997) Cr LJ 3503 (SC) .

8 *State of Maharashtra v Ahmed Gulam Nabi Shaikh* (1997) Cr LJ 2373 (Bom) (DB) ; Re *Basith & ors*(1997) Cr LJ 3232 (Mad) (DB).

9 *Ramesh Prasad v State of Bihar* (2000) Cr LJ 503 (SC) ; *Kalai Samay Nadar v State of Tamil Nadu* (1997) Cr LJ 2381 (Mad) (DB) .

10 *Babu Ram v State of Punjab* (1998) Cr LJ 2060 (50) ; *Janabai Rau Patoli v State of Maharashtra* (1997) Cr LJ 3062 (Bom) (DB) ; *Mangeram & ors v State (Delhi Admn)* (1998) Cr LJ 2269 (SC) ; *Sankara Nagamalleswara Rao v State of Andhra Pradesh* (1998) Cr LJ 2270 (SC) .

11 *Dandu Lakshmi Reddy v State of Andhra Pradesh* (1999) Cr LJ 4287 (SC) .

12 *Vallabhaneni Venkatswara Rao v State of AP* 2009 Cr LJ 3447, p 3450 (SC), 2009 AIR SCW 3990, 2009 (7) Scale 678 ; *State of Rajasthan v Yusuf* 2009 Cr LJ 3470 (SC), AIR 2009 SC 2674, 2009 (6) Scale 449, (2009) 12 SCC 139 (In dying declaration attempt by the deceased to falsely implicate the accused. Accused acquitted).

13 *Paniben v State of Gujarat* (1992) JT 4 SC 397, AIR 1992 SC 1817 .

14 *Rajendra Kumar v State of Uttar Pradesh* (1997) Cr LJ 1120 (All) (DB) .

15 *Mannu Raja v State of Madhya Pradesh* (1976) 2 SCR 764, AIR 1976 SC 2199 .

16 *State of Uttar Pradesh v Ram Sagar Yadav* AIR 1985 SC 416 ; *Ramvati Devi v State of Bihar* AIR 1983 SC 164 .

17 *Ram Chandra Reddy v Public Prosecutor* AIR 1976 SC 1994 .

18 *Rasheed Beg v State of Madhya Pradesh* (1974) 4 SCC 264, AIR 1974 SC 332 .

19 *Kala Singh v State of Madhya Pradesh* AIR 1982 SC 1021 .

20 *Ram Manorath v State of Uttar Pradesh* (1984) SCC (Cr) 581 .

21 *State of Maharashtra v Krishnamurthi Laxmipati Naidu* AIR 1981 SC 617 .

22 *Saraj Deo Oza v State of Bihar* AIR 1979 SC 1505 .

23 *Nanahau Ram v State* AIR 1988 SC 912 .

24 *State of Uttar Pradesh v Madan Mohan* AIR 1989 SC 1519 .

25 *S Panneerselvam v State of Tamil Nadu* 2008 Cr LJ 3531 (SC), 2008 (8) Scale 151, (2008) 17 SCC 190 .

26 *Najjam Faraghi alias Najjam Faruqui v State of West Bengal* (1998) Cr LJ 866 (SC) .

27 *J Ramulu v State of AP* 2008 Cr LJ 1918 (SC), AIR 2008 SC 1505), 2008 (3) Scale 113, (2009) 16 SCC 432 .

28 *Rattan Singh v State of Himachal Pradesh* (1997) Cr LJ 833 (SC) .

29 *Shurad Virdhi Chand Sarda v State of Maharashtra* AIR 1984 SC 1622, (1984) Cr LJ 1738 (SC) .

30 *Bapu v State of Maharashtra* 2007 Cr LJ 310 (SC), 2006 AIR SCW 5911, 2006 (11) Scale 561, (2006) 12 SCC 73, (2006) Supp (9) SCR 52 ; **see also***Gangaram Shantaram Salunkhe v State of Maharashtra* 2007 Cr LJ 315 (SC), 2006 (12) Scale 259, (2006) 12 SCC 491, (2006) Supp (9) SCR 291 ; *Vithal v State of Maharashtra* 2007 Cr LJ 317 (SC), 2006 (10) Scale 585, (2006) 13 SCC 54 (Multiple dying declarations implicated the appellant accused, conviction upheld).

31 *Chanetrawati & etc v State* (1996) Cr LJ 975 (Delhi) (DB) .

32 *Ibid*.

33 *Third Addl Sessions Judge, Guntur v Gantela Vijayavardhan Rao & anor* (1996) Cr LJ 703 (AP) (DB) .

34 *Maqsoodan v State of Uttar Pradesh* AIR 1983 SC 126 .

35 *Gantela Vijaya Vardhan Rao v State of Andhra Pradesh* (1996) Cr LJ 4151 (SC) ; *Sunil Kumar & ors v State of Madhya Pradesh* (1997) Cr LJ 1183 (SC) .

36 *Harish Kumar & anor v State of Uttar Pradesh* (1996) Cr LJ 3511 (SC) .

37 *Irappa v State of Karnataka* (1998) Cr LJ 1806 (Kant) (DB) .

38 *State of Orissa v Parsuram Naik* (1997) Cr LJ 4404 (SC) .

39 *Paparambaka Rosanma v State of Andhra Pradesh* AIR 1999 SC 3455, (1999) Cr LJ 4321 (SC) ; *State of Uttar Pradesh v Dambar & anor* (2000) Cr LJ 4690 (All) (DB) .

40 *Sher Singh v State of Punjab* 2008 Cr LJ 2062 (SC), AIR 2008 SC 1426, (2008) 4 SCC 26 .

41 *Bobade v State of Maharashtra* (1994) SCMR 1614, SCC (Cr) P 1047.

42 *Vikramjit Singh alias Vicky v State of Punjab* (2007) Cr LJ 1000 (SC) .

43 See Glanville Williams, '*The Mathematics of Proof II*', Criminal Law Review, 1979, Sweet and Maxwell, p 340, at p 342.

44 *Ramakant Rai v Madan Rai* (2004) Cr LJ 36 (SC) .

45 *Raj Kumar Prasad Tamarkar v State of Bihar* (2007) Cr LJ 1174 (SC) .

46 *Public Prosecutor v A Thomas* AIR 1959 Mad 166, p 170 ; *Sudhdeo Jha Uptal v State of Bihar* AIR 1957 SC 466 ; *CSD Swami v State* AIR 1960 SC 7, p 9, (1960) Cr LJ 131 ; *Chacko Mathai v State of Kerala* AIR 1964 Ker 222, (1964) 2 Cr LJ 294 .

47 *Pershadi v State* AIR 1955 All 443, p 461 .

48 *Nagappa Dondiba Kalal v State of Karnataka* (1981) Cr LR 160, p 161 (SC) .

49 *Shankarlal Gyarsilal Dixit v State of Maharashtra* (1981) 2 SCC 35, p 43 .

50 *Vikramjit Singh alias Vicky v State of Punjab* (2007) Cr LJ 1000 (SC) .

51 *Damodar v State of Karnataka* (2000) Cr LJ 175 (SC) ; *Shankar Shridhar Kavale & ors v State of Maharashtra* (1998) Cr LJ 4491 (Bom) (DB) .

52 *Munshi Prasad & ors v State of Bihar* (2001) Cr LJ 4708 (SC) .

53 *Ibid*; *Dudhi Nath Pandy v State of Uttar Pradesh* AIR 1981 SC 911, (1981) Cr LJ 618 .

54 *Arun Das v State of WB* (2003) Cr LJ 1337 (Cal) (DB) .

55 *Jasbir & ors v State of Haryana* (2003) 1 AD 366 (SC) .

56 *Arshad Hussain v State of Rajasthan* AIR 2013 SC 3001, 2013 Cr LJ 3955, p 3958 (SC), (2013) 14 SCC 104 .

57 *State of Gujarat v Chavda Manaji Cheleji & ors* (2000) Cr LJ 1091 (Guj) (DB) .

58 *Binay Kumar Singh v State of Bihar* (1997) 1 SCC 283, (1997) Cr LJ 362 .

59 *State of Haryana v Sher Singh* (1981) Cr LR 230, p 232 (SC) ; *Chandrika Prasad Singh v State of Vihar* AIR 1972 SC 109, p 110 .

60 *Dalel Singh v Jag Mohan Singh* (1981) Cr LJ 667 (Del) ; *Gurcharan Singh v State of Punjab* AIR 1956 SC 460, (1956) Cr LJ 827 ; *Chandrika Prasad Singh v State of Bihar* AIR 1972 SC 109, (1972) Cr LJ 22 ; *Soma Bhai v State of Gujarat* AIR 1975 SC 1453, (1975) Cr LJ 1201 ; *Vijayee Singh v State of Uttar Pradesh* (1990) 3 SCC 190, (1990) Cr LJ 1510 (SC) .

61 *Satya Vir v State* (1968) Cr LJ 1266 .

62 *Dalel Singh v Jag Mohan Singh* (1981) Cr LJ 667, p 669 (Del) .

63 *Dudh Nath Pandey v State of Uttar Pradesh* AIR 1981 SC 911, p 916, (1981) ALJ 228 ; *Vijay Pal v State (NCT) of Delhi* AIR 2015 SC 1495 (SC), 2015 Cr LJ 2041 (Bald statement of the sister of the accused that the accused was not present on the spot at the time of the occurrence was not believed).

64 *Kewal Singh v State* (2007) Cr LJ 2083 (Del) (DB) .

65 *Rajindra Singh v State of UP* 2007 Cr LJ 4281 (SC), AIR 2007 SC 2786, (2007) 7 SCC 378 .

66 *Rajesh Kumar v Dharamveer & ors* (1997) Cr LJ 2242 (SC) .

67 *Rajesh Kumar v Dharamveer & ors* (1997) Cr LJ 2242 (SC) ; *Dhananjaya Chatterjee v State of West Bengal* (1994) 2 SCC 220 .

68 *Ambika Prasad & anor v State* (1997) Cr LJ 2853 (Del) (DB) ; *State of Haryana v Sher Singh* AIR 1981 SC 1021, (1981) Cr LJ 714 (SC) .

69 *Chandrika Prasad v State of Bihar* AIR 1972 SC 109, (1972) Cr LJ 22 .

70 *State of Havana v Prabhu MR* (1979) SC 1019, (1979) Cr LJ 892 (SC) .

71 *Soma Bai v Stair of Gujarat* AIR 1975 SC 1453, (1975) Cr LJ 1201 (SC) .

72 *Deva v State by Inspector of Police* (2007) Cr LJ (NOC) 210 (Mad) (DB).

73 *State of Punjab v Mohinder Singh* (1983) 2 SCC 274 .

74 *Ram Swarup Thakur v State of Bihar* (2000) Cr LJ 426 (Pat) .

75 *Gulab Manik Surwase v State of Maharashtra* (2001) Cr LJ 4302 (Bom) (DB) .

76 *Shrikant Anandrao Bhosale v State of Maharashtra* (2002) 8 AD (SC) 500, (2002) Cr LJ 4356 (SC) .

77 *Sarvan Singh v State of Punjab* (2003) Cr LJ 21 (SC) ; *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 .

78 *Ramakant Rai v Madan Rai* (2004) Cr LJ 36 (SC) ; *State of Madhya Pradesh v Dhankole* 2005 Cr LJ 108 (SC), AIR 2005 SC 44, 2004 (9) Scale 149, (2004) 13 SCC 308 .

79 *Joginder Pal Pandey v Hazura Singh* (1980) Chand LR 100, 104 .

80 *State of MP v Badri Yadav* (2006) Cr LJ 2128 (SC) .

81 *Himachal Pradesh Admn v Om Prakash* AIR 1972 SC 975, p 981, (1972) Cr LJ 606 .

82 *Public Prosecutor v Ash Mohammad* (1981) Cr LJ 646, p 651 (DB) ; *K Gopal Reddy v State of Andhra Pradesh* AIR 1979 SC 387, (1979) ALJ 137 .

83 *Jaddu Ahir v Emperor* AIR 1935 All 919, p 920 .

84 *Public Prosecutor v Ash Mohammad* (1981) Cr LJ 646, 651 (DB); *K Gopal Reddy v State of Andhra Pradesh* AIR 1979 SC 387, (1979) ALJ 137 ; *Omprakash v State of Uttar Pradesh* (1981) Cr LJ 636, p 638, 639 .

85 *State of Punjab v Bhajan Singh* AIR 1975 SC 258, p 260, (1975) Cr LJ 282 .

86 *Sarwan Singh v State of Punjab* AIR 1957 SC 637 ; *State of Orissa v Govinda Mallik* (1980) Cut LR 145, p 150 (Cr) (DB) .

87 *KV Chacko alias Kunju v State of Kerala* (2001) Cr LJ 713 (SC) .

88 *Jawan Singh v State of Madhya Pradesh* (1980) Cr LR 12 (MP) (notes) ; *Annamalai v State* (1996) Cr LJ 535 (Mad) (DB) .

89 *State of Haryana v Gurdial Singh* AIR 1974 SC 1871, p 1876, (1974) Cr LJ 1286 .

90 *Ramesh Laxman Gavli v State of Madhya Pradesh & ors* (1999) Cr LJ 4603 (SC) .

91 *Kasturi Lal v State of Haryana* AIR 1976 SC 2042, p 2045, (1976) Cr LJ 1574 .

92 *Maghar Singh v State of Punjab* (1974) CLR 128 .

93 *Nand Lal & Ors v State* (2007) Cr LJ 3300 (Del) (DB) .

94 *Sheikh Meheboob v State of Maharashtra* 2005 Cr LJ 2136, p 2140 (SC), AIR 2005 SC 1805, JT 2005 (3) SC 137, (2005) 10 SCC 387, [2005] 2 SCR 628 .

95 *Parmananda Mahakud v State* (1970) Cr LJ 931, p 936 ; *State of Punjab v Pritam Singh* AIR 1977 SC 2005, p 2007, (1977) Cr LJ 1575 ; *Rau Bhagwanta Hargude v State of Maharashtra* AIR 1979 SC 1224, p 1225 ; *State of Bihar v Mohammad Khurseed* AIR 1971 SC 2268, p 2270, (1971) Cr LJ 1555 .

96 *State v Tomeiren Maringni* (1970) Cr LJ 549, p 552 (Manipur) .

97 *K Ashokan & ors v State of Kerala* (1998) Cr LJ 2834 (SC) .

1 *Anil Sharma Sute v State of Maharashtra* 2013 Cr LJ 2223 (SC), AIR 2013 SC (Cri) 1058, 2013 (2) Scale 135 .

2 *Vijaisingh v State of Rajasthan* (1975) WLN 674 .

3 *Sadananda Mondal v State of West Bengal* 2013 Cr LJ 4716, p 4720, 2013 AIR SCW 5064, 2013 (10) Scale 125 .

4 *Narain v State* 2005 Cr LJ 2001 (All) (DB), 2005 All LJ 979, 2005 (2) Crimes 2 .

5 *Kalyan Chandra Sarkar v Rajesh Ranjan* 2005 Cr LJ 1450, 2005 SCC (Cri) 1252 ; **see also***State of UP v Sunder Singh* 2005 Cr LJ 2186 (SC), AIR 2005 SC 2238, (2005) 3 SCC 735 . (Acquittal on charge under ss 324, 302 and 148, IPC . View taken by the High Court reasonable view, acquittal not interfered with).

6 *Prahlad Singh v State of MP* 2011 Cr LJ 4366, p 4368 (SC) .

7 *Ramvir v State of UP* 2009 Cr LJ 4155, p 4161 (SC), AIR 2009 SC 3185, (2009) 9 Scale 65 .

8 *Dalbir Kaur v State of Panjab* AIR 1977 SC 472, p 488, (1977) Cr LJ 273 ; *Hazari Parida v State of Orissa* AIR 1979 SC 1344 ; *Kartar Singh v State of Haryana* AIR 1978 SC 1158, (1978) Cr LJ 1097 .

9 *Amir Hussain v State of Uttar Pradesh* AIR 1975 SC 2211, p 2213, (1975) Cr LJ 1874 .

10 *Gura Singh v State of Rajasthan* (2001) Cr LJ 487 (SC) .

11 *Rishikesh Singh v State* AIR 1970 All 51, p 99 (FB), (1970) Cr LJ 132 .

12 *Raja Shranappa Zinge & ors v State of Maharashtra* (1997) Cr LJ 450 (Bom) (DB) .

13 *Shyam Lal and ors v State of Himachal Pradesh* (2002) Cr LJ 3178 (HP) (DB) .

14 *State of Maharashtra v Sanjay D Rajhans* 2005 Cr LJ 120 (SC), 2005 SCC (Cri) 231, 2004 (4) Crimes 338 .

15 *Ramakant Rai v Madan Rai* (2004) Cr LJ 36 (SC) .

16 *State v Shankar Sakharam Jadhav* AIR 1957 Bom 226, p 227 ; *Kashmira Singh v State of Madhya Pradesh* AIR 1952 SC 159 .

17 *Kashmira Singh v State of Madhya Pradesh* AIR 1952 SC 159, (1959) Cr LJ 839 .

18 *Birpal Singh v State of Uttar Pradesh* AIR 1977 SC 2083, p 2084 .

19 *State of Assam v Upendra Nath Rajkhowa* (1975) Cr LJ 354, p 397 ; *Annuppa v State of Karnataka* (1980) Cr LJ 462 ; *Ramasray Pandey v State of Bihar* AIR 1976 SC 2147, (1976) Cr LJ 1704 ; *Ponnuswami v State* (1975) Cr LJ 509, p 513, (1974) Mad LW (Cr) 168 ; *Salveraj v State of Tamil Nadu* AIR 1976 SC 1970, (1976) Cr LJ 1541 ; *Imam Samsher Hakim v State of Maharashtra* (1978) Cr LJ 712, 715 ; *Annamalai v State* (1996) Cr LJ 535 (Mad)(DB); *State of Uttar Pradesh v Kapildev Singh & ors* (1999) Cr LJ 2594 (SC) ; *State of Karnataka v KS Manjunathacheri & ors* (1999) Cr LJ 3949 (Kant) (DB) ; *Ramjan alias Sawanru v State of Uttar Pradesh* (2001) Cr LJ 940 (All) (DB) ; *State of Rajasthan v Teja Singh & ors* (2001) Cr LJ 1176 (SC) ; *Kanhai Mishra alias Kanhaiya Mishra v State of Bihar* (2001) Cr LJ 1259 (SC) ; *KV Chacko alias Kunju v State of Kerala* (2001) Cr LJ 713 (SC) ; *Thanedar Singh v State of Madhya Pradesh* (2002) Cr LJ 254 (SC) .

20 *Antony v State of Kerala* (1960) Ker LJ 73 .

21 *Balaka Singh v State of Punjab* AIR 1975 SC 1962, p 1966, (1975) Cr LJ 1734 ; *Keshoram Bora v State of Assam* AIR 1978 SC 1096, p 1098, (1978) Cr LJ 1089 ; *Jagdip Singh v State of Haryana* AIR 1974 SC 1978, (1974) Cr LJ 1378 ; *Chandu v State* (1960) Jab LJ 18 ; *BD Jadhav v State of Maharashtra* 64 Bom LR 784 (SC) ; *Anant B Kamble v State of Maharashtra* (1995) Cr LJ 2583 (Bom) ; *Poolin Haldar v State* (1996) Cr LJ 513 (Cal) (DB) .

22 *Balaka Singh v State of Punjab* AIR 1975 SC 1962, p 1966, (1975) Cr LJ 1734 ; *Biri Singh v State of Uttar Pradesh & ors* (1992) JT 2 SC 229 ; *Anant B Kamble v State of Maharashtra* (1995) Cr LJ 2583 (Bom) ; *Poolin Haldar v State* (1996) Cr LJ 513 (Cal) (DB) .

23 *Paulmeli v State of TN* (2014) 13 SCC 90, 2014 Cr LJ 3240, (2014) 139 AIC 8 (SC) .

24 *Sreedhara Marar Roman Pillay v State of Kerala* AIR 1965 Ker 196 .

25 *Sawal Das v State of Bihar* AIR 1974 SC 778, p 783, (1974) Cr LJ 664 .

26 *State of Punjab v Hakam Singh* 2005 Cr LJ 4111, p 4115 (SC), AIR 2005 SC 37589, 2005 AIR SCW 4339 .

27 *State of Sikkim v Rakesh Rai* 2012 Cr LJ 2737, p 2768 (Sikk) (DB) (Four accused persons convicted under ss 302 / 34, IPC) (*Alakunta Narsimloo v State of Andhra Pradesh* 1994 Cr LJ 1721, 1994 (1) ALT (Cri) 248, **followed**, *Pandurang v State of Hyderabad* AIR 1955 SC 216, 1955 Cr LJ 572, [1955] 1 SCR 1083, **referred**).

28 *Kishan Singh v State of MP* 2014 Cr LJ 261, p 271 (MP) (DB) .

29 *Kali Ram v State of Himachal Pradesh* AIR 1973 SC 2773, (1974) Cr LJ 1 ; *Kalu v State of Madhya Pradesh* (2006) Cr LJ 1506 (MP) (DB) .

30 *Umrao v State of Haryana* (2006) Cr LJ 2798 (SC)*; Krishnan v State* 2008 Cr LJ 3590, 2008 (7) Scale 96, (2008) 15 SCC 430 .

31 *Ayodhya Singh v State of Bihar* (2005) Cr LJ 1450 (SC) .

32 *Krishnan v State* 2008 Cr LJ 3590, p 3596 (SC), 2008 (7) Scale 96 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 302.

Punishment for murder.--

Two Important Considerations for Evaluating Evidence of Eye-witness

In assessing and evaluating evidence of eyewitnesses, the two important considerations are as under:

(i) Whether, in the circumstances of the case, it was possible for the eyewitness to be present at the scene or their explanation for their presence at the scene can be accepted; and
(ii) Whether there is anything inherently improbable or unreliable in their evidence.

Shot fired All of Sudden

When a shot is fired all of a sudden, it is difficult for anybody to give a vivid description of the entire

incident.[33]

105. Conduct of Witness--Considerations by the Court

As regards conduct of different witnesses it is sufficient to refer to an observation made by the Supreme Court in *Rana Pratap v State of Haryana* ,[34]wherein, the Apex Court clearly stated that there is no legal principle of universal application as to how a witness will react in seeing an occurrence. A person may be dumb-founded and may not disclose the incident to others immediately. Some are stunned. Some become speechless and some stand rooted to the spot. The Court while considering the conduct of the witness has to bear in mind that even in a given situation different persons act differently which may not be considered to be natural and probable by others while judging the matter after a number of years. In a case where the witnesses depose after a number of years, slight contradictions in their evidence and slight discrepancies in their statements must be viewed in the context of capacity of retention of the respective witnesses, the chance of their forgetting a minor part of the incident, *etc*.[35] The Court can convict some accused, and acquit others on the basis of testimony of some eyewitnesses depending upon the facts and circumstances of the case.[36] The plea by some of the convicted accused persons that when eyewitness evidence is disbelieved as regards some accused persons they are also entitled to the benefit of doubt is not tenable.[37]

Where the witnesses continued sitting on their respective cots inspite of repeated fires made by the appellant R from his pistol, and did not try to run or take shelter in order save their lives, held there was false implication of the appellant R, and he was acquitted of the charge under ss 302, 307, 458 read with s 34, IPC .[38]2369

If the conduct of the witness is inconsistent with the conduct of an ordinary human being then his testimony has no credence for acceptance.[39]

Daughter of the deceased, an eye-witnesses, deposed before the Court that she had informed her grandmother that the accused forcibly had taken her mother, but the grandmother did not disclose this fact to any one in the village or to the police, and kept mum for two days. The evidence of the daughter of the deceased was rejected. Accused persons were acquitted for offences under ss 302 / 149 / 201, IPC .[40]

The prosecution case was that the accused appellant committed the ghastly murder of the deceased on the way leading to temple. There was no reason to disbelieve the evidence of PWS and the medical evidence adduced in the case. The eye-witness after seeing the ghastly murder fled away from the scene of occurrence and did not inform the police, the conduct of the witness was found not unnatural. Conviction of the accused appellants concurrently recorded by the Courts below was confirmed.[41]

The eye witnesses closely related of the deceased had left the injured in lurch, did not take the deceased to the hospital, did not inform anybody about the incident, disappeared from the scene of the occurrence till they were asked by the police. The conduct of the witnesses was unnatural, their presence on the spot was doubtful. The dying declaration of the deceased recorded by the Judicial Magistrate did not implicate the accused nos. 1 to 4. The accused respondents were acquitted of the charge under s 302, IPC .[42]

On the night of occurrence at about 11.00 pm the deceased was coming back home, accused appellant appeared there with a country made pistol in his hand and fired a single shot on the back of the deceased, who on being hit, fell down on the ground. Four PWS alleged that eye-witness had seen the occurrence. The witnesses did not accompany the deceased to hospital, nor went to the Police Station which showed their unnatural conduct. The evidence of eye-witnesses was not believed, and acquittal of the appellant recorded by High Court was held proper.[43]

Eye-witnesses not Shouting on the Spot

Accused persons armed with weapons formed unlawful assembly, assaulted the deceased, threatened members of his family and the eye-witnesses. In such atmosphere, it did not matter if the witnesses did

not shout.[44]

Free Fight between Parties--Omission of Name(s) of the Witnesses in FIR

In the case of a free fight where large number of persons are involved, the omission of the name(s) of the witnesses, especially eye-witnesses, does not affect the prosecution case.[45]2370

High Daily Temperative--Absence of Witnesses from Spot

The occurrence had taken place on 28 June 1993 at 3.00 p.m. The daily temperature in the month of June in the relevant part of Haryana where the occurrence had taken place, was approximately 50 degree Celsius. People do not venture out in this heat and prefer to stay at home and come out only when the temperature cools down in the evening. This is the reason that no person was present at the bus stand at the time of incident.[46]

106. Evidence to be Weighed and not Counted

The evidence has to be weighed and not counted.[47] This well known maxim that 'Evidence has to be weighted and not counted' has been given statutory placement in s 134 of the Evidence Act,[48] which provides as under.[49]

No particular number of witness shall in any case be required for the proof of any fact.

It should be remembered that plurality of evidence is only a rule of prudence and not an inflexible requirement of law. The necessity of plurality crops up in those cases where evidence of a solitary witness is not wholly reliable.[50]

107. Ordinary Presumption as to Witness

Though the ordinary presumption is that a witness speaking under oath is truthful unless and until he is shown to be untruthful or unreliable in any particular respect,[51] yet witnesses are very often tutored. In *Haria v State of Himachal Pradesh* ,[52] a young boy of 13 or 14 years was kept for 10 or 15 days at the police station, and it was observed that he could be easily tutored. In *Ram Singh v State* ,[53] it was held that a conviction, based on the testimony of a child witness, found untrustworthy, is unsustainable. When a child eyewitness admits to have been tutored and has given different versions and there is otherwise no other corroborating evidence, the Court should not place reliance on such evidence.[54]

There appears to be conflict of decisions, pronounced by the Supreme Court, on the point whether direct evidence can be believed with regard to some of the several accused while rejected in relation to the others. The Supreme Court held in *Ram Janam v State of Uttar Pradesh* [55] that direct evidence may be believed in relation to one accused though it may be disbelieved in relation to the other, while, earlier in *Prem Singh v State of Punjab* ,[56] it was ruled that if the evidence of two eyewitnesses is disbelieved in regard to participation by the four other accused in the incident, it is difficult to accept it so far as the role assigned to the one is concerned. It is submitted that in such a case of conflict, the juristic notion favours the latter view to prevail.2371 Similarly, the mere defect, that one prosecution witness did not state in the FIR that he was an eyewitness to the occurrence of murder, whereas, in his evidence in the Court, he claimed to have seen the murder, may be a justification for rejecting this particular part of his testimony, but that would not mean that his entire deposition should be rejected.[57] It is, however, not safe to convict an accused under s 302, IPC when eyewitnesses have identified him as the assailant of the victim.[58]

108. Place of Occurrence not Established--Accused Acquitted

Eye-witness deposed four places of occurrence, as such place of occurrence in the case was not established. When the place of occurrence itself has not been established, it would not be proper to accept the prosecution version. Appellant accused was acquitted of the charge under s 302, IPC .[59]

109. Change of Place of Occurence

When there was a free fight between the parties and a large number of persons were involved, in such a fight it is usual for the parties to change their position. Ultimately the case rests on the testimony of the eye witnesses. Therefore, in case of a free fight between parties, change of place of occurrence would not affect prosecution case.[60]

110. Maxim--*Falsus in Uno Falsus in Omnibus*

The maxim *falsus in uno falsus in omnibus* (false in one thing, false in everything) has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called a 'mandatory rule of evidence'.[61]

Even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding the acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the Court to separate the grain from the chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused, notwithstanding the fact, that evidence has been found to be deficient to prove the guilt of the other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to the end. The maxim *falsus in unofalsus in omnibus* has no application in India and the witness cannot be branded as a liar.[62]

It is well settled by a catena of decisions of the Apex Court that the maxim *falsus in uno falsus in omnibus* has not been accepted by the courts in India. While assessing evidence, courts try to separate the grain from the chaff, and it is only where truth and falsehood are so inextricably mixed that it is impossible to separate2372 them that the entire statement of a witness is rejected.[63] The evidence of a witness cannot be rejected only because a part of his testimony may not inspire confidence.[64] If the Court disbelieves a portion of evidence of a witness, the testimony of that witness should not be rejected if the rest of the evidence is found to be acceptable and true.[65]

111. Corroboration--A Rule of Prudence

Corroboration is a rule of prudence. Evidentiary value of a deposition which is otherwise admissible is not just wiped out in the absence of corroboration. Even in the absence of corroboration, a deposition for its quality may be safely accepted to be correct. It will be unfortunate, if on account of over emphasis for corroboration, a crime goes unpunished by not giving due weight to uncorroborated evidence when such evidence is otherwise reliable.[66] However, corroboration is required to be appreciated by the court at the time of deciding the case after conclusion of evidence. The court, therefore, cannot seek independent corroboration at the stage of framing of charge to quash the charge and discharge the accused.[67] If the High Court thought it unsafe to convict any of the accused on uncorroborated evidence of a single eyewitness, it does not mean that the evidence of the witness stands castigated. It is no stigma against the evidence of any eyewitness if the court only wanted reassurance from other sources. Corroboration is what the court requires as a matter of prudence and as step of caution.[68] Corroboration is not a rule of practice, and hence, no corroboration is required if the testimony of the child inspires confidence, and there is no likelyhood of tutoring, and its demeanour was found to be straightforward by the trial judge.[69]

Where the sole eye-witness did not disclose the incident to any one for almost two years simply because he had been threatened by the co-accused, and his statement was recorded belatedly, the conviction of the accused on un-corroborated testimony of the witness on the charge of rape was found unsustainable, and was set aside.[70]

112. Discrepancy as to Age of Deceased--Effect

Where the age of the deceased in the post-mortem report was given 26 years, while witnesses stated the

age of the deceased as 40 years. But, the discrepancy with regard to the age of the deceased *vis-à-vis* the postmortem report was neither drawn to the attention of the doctor, investigating officer or the other witneses, the said discrepancy in the age, is not pertinent so as to throw away the entire prosecution case, particularly when the identity of the deceased was not suspected.2373

113. Withholding Evidence by Prosecution--Inference

An adverse influence against the prosecution can only be drawn if it withholds some evidence, and not merely on its failure to obtain certain evidence. No adverse inference can be drawn against the prosecution from non-examination of the accused's younger sister who was aged only about 17 years, when the evidence on record is sufficient to prove beyond doubt the case of the prosecution and the failure to examine another person does not affect the credibility of the prosecution.[71] It is not necessary for prosecution to examine somebody as a witness even though the witness was not likely to support the prosecution version. Non-examination of some persons *per se* does not corrode vitiality of prosecution version, particularly when the witnesses examined have withstood incisive cross-examination and pointed to the accused as the perpetrators of the crime.[72] Non-examination of material witness would be immaterial where other prosecution evidence proves the case of the prosecution.[73]

114. Minor Inconsistencies

Where the evidence of two eye-witnesses proved the accusations against the accused persons, the minor variations did not in any way corrode the credibility of the prosecution version.[74] Minor discrepancies or some improvements would not justify rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time-gap between the date of occurrence and the date on which they give their depositions in court. Conviction of the appellants under s 302, IPC was upheld.[75]

115. Contradictions in the Testimony of Eyewitnesses--Riot Cases

When people are killed during a riot, there may be a possibility of the incident being exaggerated or some innocent persons being named as being part of the assailants party. This may happen wittingly or unwittingly. However, just because there may be some inconsequential contradictions or exaggeration in the testimony of the eyewitness, that should not be a ground to reject their entire evidence. In cases of rioting; where there are a large number of assailants and a number of witnesses, it is but natural that the testimony of the witness may not be identical. What has to be seen is whether the basic feature of the occurrence has been similarly viewed or sustained by the victims and the people who are attacked and killed.[76]

Same Evidence may justify Conviction of some Accused and Acquittal of Others

The Court can convict some of the accused and acquit others on the basis of testimonies, of the same eyewitness depending upon the facts and circumstances of2374 the case.[77] The plea by some of the convicted accused persons that when eyewitness evidence is disbelieved as regards some of the accused persons they are also entitled to the benefit of doubt is untenable.[78] The mere fact that the evidence of the prosecution witness is not safe enough to be relied upon with regard to the part assigned to one accused in the occurrence, is no ground to reject it mechanically against the other accused also.[79] Where the witness had stated that the accused dealt *gupti* blows on the person of the deceased, which fact was corroborated with medical evidence but the witness did not state the specific overt act committed by co-accused persons, the conviction of the accused was maintained but that of the co-accused persons was set aside.[80] Where accused no 1 inflicted razor blows on the deceased, and accused nos 2 and 3 were alleged to have caught hold of the victim, an evidence of the eyewitness corroborated with the medical evidence. Similarly accused no 1 was convicted under s 302, IPC, but since the prosecution had failed to prove the identity of accused nos 2 and 3, so they were given the benefit of doubt.[81] Where accused persons fired at the victims after being exhorted by the co-accused person to assault the victim, it did not necessarily amount to asking the accused persons to kill the deceased, so the accused persons

exhorting the main accused were acquitted, while the main accused who killed the victim were held guilty under ss 302 / 34, IPC .[82] Where, during the scuffle on the date of incident, the co-accused tried to hold the deceased or separate the main accused and the deceased, the presence of the co-accused at the scene of offence could not be said to be for causing any injury to the deceased; the medical evidence disclosed only one knife blow to the deceased, in these circumstances no inference could be drawn that the said co-accused shared common intention with the main accused, so his conviction under ss 302 / 34, IPC, was set aside.[83]

116. Parity of Reasoning to be Adopted by the Courts

Where in a murder case the sessions court acquitted some of the accused and convicted the others on the basis of the same prosecution evidence, and the High Court confirmed the judgment of the sessions court, the Apex Court held that every reasoning mentioned by the sessions court if applied on the same yardstick to the prosecution evidence regarding the convicted accused persons, does not lead to any2375 symptomatic differences in regard to applying the said evidence to convicting the accused and rejecting the same with reference to the acquitted accused on the parity of reasoning adopted by the session court, the case of the convicted accused could not have been distinguished from those of the acquitted persons; the convicted accused were also entitled to be acquitted.[84] When the courts below have chosen to discard the evidence of dying declaration regarding acquitted accused persons, it is rather difficult to accept this dying declaration as the sole basis to come to the conclusion that it has implicated the convicted accused of having caused the injuries leading to the death of the victim.[85]

117. Evidence of Tape-recorded Conversation

Tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed to by any of the parties to the conversation, and in the absence of evidence of any such conversation, the tape-recorded conversation is not proper evidence and cannot be relied upon.[86] It is settled law that rendering a tape-recorded conversation can be legal evidence by way of corroborating the statement of a person who deposes that the other speaker and he carried on with the conversation, even of the statement of a person who deposes that he overheard a conversation between two persons and what they actually stated had been tape-recorded. The tape-recorded conversation can only be used as corroborative evidence of such conversation deposed to by any of the parties to the conversation.[87]

118. Both Prosecution and Defence coming with False Facts--Who Gains

Where neither the prosecution nor the defence come out with the whole and unvarnished truth so as to enable the Court to judge where the rights and wrongs of the whole incident or set of incidents lay or how one or more incidents took place in which so many persons were injured, courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits to determine whether any reasonable doubts emerge on any point under consideration from proved facts and circumstances of the case.[88]

If both the parties come to court with untrue facts and conceal the real truth, they have only themselves to blame, and they cannot expect the Court to arrive at any definite conclusion on unreliable evidence produced either for or against either of the parties. In such a case, the Court will certainly attempt to separate the grain from the chaff but only if it is possible to do so. In certain circumstances, it may be found to be an impossible task. That is particularly so when the evidence of both parties is thoroughly unreliable and cannot be accepted even in part with safety. In such a case, it is not open to the Court to make out a third case which is different from the case set out by both parties; the Court can only say that the matter is doubtful in the extreme, and it is not possible to arrive at any conclusion one way or the other. The result-of such a finding may be that all the persons who stand as accused in the case, may have to be given the benefit of doubt. However, that cannot be helped. The defective investigation and the conduct of the parties themselves are really2376 responsible for such regrettable results in which case there can be no question of recording any conviction.[89] The position which crystallises is that when in a murder trial, both the prosecution and the defence are coming with untrue versions, the gainer is not the

prosecution but the defence in which case there can be no question of recording a conviction.[90]

119. Single Accused Single Deceased Case--Negligible Chance of False Implication

When more than one person is implicated in a case, chances of false implication of some of them may be there because the complainant or the witness may avail of that opportunity to wreak vengeance against some of their enemies by falsely implicating them. However, in a case of a single accused and a single deceased, such chances of false implication are negligible. It is wholly unnatural that the complainant would let go of the real culprit, and would implicate someone else falsely without any reason.[91]

120. Documentary Evidence in Criminal Proceedings

Certain amount of caution is required to be observed, particularly in criminal proceedings with regard to admission in evidence of documents, when the prosecution relies on the contents for purposes of securing a conviction. Documents are required to be proved by either the maker of the document or some other persons who are in a position to depose to the satisfaction of the Court with regard to their contents. Effectively, it is necessary to adopt this procedure for two reasons: first, in order to introduce that material in evidence through a process, that is, in consonance with that prescribed by the provisions of the Evidence Act, but more importantly in order to make available to the accused the witness who vouches for the contents so that the veracity can be tested by cross-examination of that witness.[92] The incriminating documents relied upon by the prosecution should also be put to the accused in his statement under s 313, CrPC, without which the documents cannot be used against the accused in the criminal trial.[93]

The expression, 'books of accounts' used in s 34 of the Evidence Act means books in which merchants, traders or businessman generally keep their accounts, *i.e.*, statements of debits or credits or receipts and payments. A register kept at the counter of a hotel need not contain any statement of account. So, until it is shown that such register also pertained to the pecuniary transactions involving the customers of the hotel, the same cannot be treated as a book of account. In the second place, even if it is assumed that a register kept in a hotel can be treated as a book of accounts, the entry therein cannot became the sole premise to charge a person with liability.[94] However, if an accused conceals his identity to the hotel people, and hence, writes a pseudonym name in the hotel register, he is the only one who knows why he wrote a different name, so in the absence of any explanation from him it is2377 open to the Court to draw an inference that the accused had some reasons to conceal his identity from the hotel people.[1] In a case where death of the deceased was alleged to have been caused by her in-laws, a letter written by the deceased to her father stating that she should be immediately taken from the house of her in-laws otherwise her in-laws and her husband would kill her, the handwriting of the deceased stood proved on the testimony of her brother. No effort was made by the accused to get it compared with the admitted handwriting of the deceased. The mere fact that the prosecution witness did not produce other letters allegedly written by the deceased, cannot be a ground to say that the prosecution suppressed evidence which the accused could have utilised for the purpose of comparing handwriting of the deceased. Further the alleged discrepancy or overwriting on the top of the letter regarding its date would not be helpful to the accused.[2]

Section 294, CrPC,[3] is amended with a view to avoid delay in trial. When any document is produced by the prosecution, it is for the defence to admit or not to admit it. Once the defence admits the documents, then no formal proof of execution of the documents is required. The said document can be read in evidence for all purposes though the author is not examined before the Court. Such document is not only admissible in evidence to the execution of the document but also admissible to the contents of the document.[4]

121. Acts or Conduct of Accused

The fact that the accused accompanied the co-accused to the house of the deceased or that the accused knew that the co-accused was himself armed with a pistol and also had knowledge about previous enmity

between the co-accused and the deceased, does not lead to the inference that the accused had common intention with the co-accused to kill the deceased.[5] The fact that the accused was seen by the witness going with two other accused persons towards the house of the deceased, by itself, is not sufficient to establish the guilt of the accused in the absence of other circumstantial linking of the accused with the commission of the offence.[6]Conduct of the accused regarding his leading the police and other persons present at the spot to his house wherefrom the weapon of assault and other articles were found, would be admissible under s 8 of the Evidence Act, and such circumstances lend support to the confession made by the accused before one of the prosecution witnesses.[7]

No Role Assigned to Accused Appellant--Acquitted

Where no role was assigned to the appellant accused, he was acquitted of the charge under s 302, IPC .[8]2378

Mere Fact of Recovery of Sword at the Instance of Accused--Conviction not Proper

When almost all other evidence produced by the prosecution is disbelieved, the conviction in a murder case cannot be based on the mere fact of recovery of the sword at the instance of the accused.[9]

122. Evidence to be Considered as a Whole

It is on the totality of the evidence that the guilt of an accused has to be determined to that high degree of moral certainty which is required for proof of a criminal charge.[10] The evidence has not to be considered merely as a number of bits of evidence, but the whole of it together and the cumulative effect of it has to be weighed.[11] No distinction has, therefore, to be made between circumstantial and direct evidence.[12] The Court must satisfy itself that the cumulative effect of the evidence, led by the prosecution, establishes the guilt of the accused beyond reasonable doubt.[13] When the evidence recorded in a case is quite sufficient for coming to the conclusion of guilt beyond reasonable doubt, the order of acquittal will be unsustainable.[14] Likewise, no hard and fast rule can be laid down as to what inference can be drawn from certain circumstances. The cumulative effect of all the circumstances established by evidence, and the nature of those circumstances have to be taken into consideration, and then it has to be judged whether having regard to the ordinary course of human conduct, it is safe to presume that the offence was committed by the accused.[15] Where the prosecution evidence is found to be false and riddled with defects and the prosecution has not, discharged the burden, the Court can look to the plea of the accused and his evidence to see whether there are materials available to bolster up the case for the prosecution or add weight and reliability to the prosecution witness where none exists.[16] It may be mentioned that: (a) the criminal trespasses into the land under actual possession of the accused; (b) the physical prevention of the accused's legitimate right of ploughing the land; and (c) the aggressive wrongful attack on the vital parts of the body of the accused 1 and 4 with dangerous weapons coupled with the non-mentioning of the injuries found on the persons of accused 1 and 4 leave apart the explanation for that are all important points which go in favour of the accused persons.[17] It is, therefore, the paramount duty of every court to separate the grain from the chaff on a careful and scrupulous analysis and, if that is not possible, to give the benefit of it to the accused so that no innocent person may be2379 convicted.[18] However, this principle does not compel a court to give the benefit of the doubt to an accused person even after considering the totality of evidence, the Court is convinced beyond all reasonable doubt that the prosecution case is acceptable and the defence version is completely wrong.[19] Individual circumstances, considered in isolation and divorced from the context of the overall picture, emerging from a consideration of the diverse circumstances and their conjoint effect, may, by themselves, appear innocuous. It is only when the various circumstances are considered conjointly that it becomes possible to understand and appreciate their true effect.[20]

123. Assault by Many Persons

In the a case where a large number of persons had attacked one person, the witnesses cannot be expected to explain the role in the inflicting of injuries by each one of them individually and the weapons

used.[21]

When there are many accused persons involved in commission of the occurrence, then in that event it is highly improbable for all the witnesses to identify the individual accused with the weapon in his hand as well as respective part played by each of them.[22]

In case(s) where several accused persons assault and give numerous blows to the deceased, and evidence is quite unclear as to whose blow resulted in the death of the deceased, and accused have no intention to kill, the accused would be convicted under ss 325 / 34, IPC and not under ss 302 / 34, IPC .[23]

124. Competency of a Witness

Under s 118 of Indian Evidence Act,[24] all persons are competent to testify unless the court considers that because of tender years, extreme old age, disease whether of body or of mind, or any other cause of the same kind, they are prevented from understanding questions put to them or from giving rational answers. All grounds of incompetency have been swept away by s 118 under which competency of witness is the rule and their incompetency is the highlights their premature or defective intellect.[25]

Depositions of Witness should be Scrutinised with same Yardsticks

Deposition of witness, whether examined on the prosecution side or the defence side or as a court witness, are oral evidence in the case, and hence, the scrutiny shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a court witness. It is judicial scrutiny which is warranted in respect of depositions of all witnesses for2380 which different yardsticks cannot be prescribed.[26] Defence witnesses are entitled to equal treatment with those of the prosecution, and the Court ought to overcome this treatment of instinctive disbelief in defence witnesses who quite often may tell lies, but so do the prosecution witnesses.[27]

Plight of a Witness--Frequent Adjournments--Diet Money to Witness

A criminal case is built on the edifice of evidence that is admissible in law. For that witnesses are required whether it be direct evidence or circumstantial evidence. In these cases witnesses are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to himself and his family, is not difficult to fathom. It has become a fashion to have a criminal case adjourned again and again till the witness tires and gives up. It is the game of unscrupulous lawyers to get adjournments on one excuse or the other till a witness is won over or tired. It is not only that, a witness is threatened, abducted, maimed, done away with, or bribed. There is no protection for him. In adjourning the matter without any valid cause, a court unwittingly becomes party, to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowed courtroom by the peon. He waits the whole day and then finds the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in court, he is subjected to unchecked and prolonged examination and cross-examination, and finds himself in a hapless situation. For all these reasons and others, a person abhors becoming a witness. It is the administration of justice that suffers. Appropriate diet money for a witness is a far cry. Here again, the process of harassment starts and he decides not to get the diet money at all. High courts have to be vigilant in these matters. Proper diet money must be paid immediately to the witness (not only when he is examined but for every adjourned hearing) and even sent to him, and he should not be left to be harassed by the subordinate staff. If the criminal justice system is to be put on a proper pedestal, the system cannot be left in the hands of unscrupulous lawyers and the sluggish state machinery. Each trial should be properly monitored. The time has come for all courts, district courts, subordinate courts to be linked to the High Court with computers and a proper checks to be kept on adjournments and recording of evidence. The Bar Council of India and the State Bar Councils must play their part and lend their support to put the criminal system back on its trail.[28]

No Expectation of Minute Details from Scared Eye-Witness

It is not reasonable to expect that the scared eye-witnesses would be able to give a meticulous and precise account of the details of shots that landed on the victim. The charring at the entry wounds 1, 3 and 5, found on the dead body of the deceased indicated that the firing was done from close range. The Court cannot expect the panic-stricken eye-witnesses to come forward with a vivid account of the distance from which each one of the shots was fired at. The possibility of firing from close range cannot be ruled out.[29]2381

125. Evidence of Relations

It is not a rule of evidence that a relation is not a competent witness. In other words, in a criminal trial a relation of a natural witness of a particular sequence of events, such relation's evidence cannot be discarded on the ground of his relationship if such evidence is found to be true, trustworthy and reliable. The evidence of a prosecution witness having no enmity with the accused cannot be brushed aside merely on the ground of relationship with the deceased.[30] There is no probation in law that a person who is related to the deceased has to be termed as an unreliable witness. More often than not, a relation is supposed to be a truthful witness. That is because a relation would not normally implicate an innocent person and shield the real culprit. Interest should be to get a person convicted. When allegation of interestedness is made, the accused is required to establish and to show that the witness had a partisan approach. In such case, the Court is required to make a careful analysis of the evidence to find out whether the allegation of partisan approach is borne out from the materials on record. Facts showing that the witness is biased or partial in relation to the parties or the cause has to be elicited in cross-examination or if denied, independently proved. It has always been permissible to call evidence to contradict a witness's denial of bias or partiality towards one of the parties and to show that he is prejudiced so far as the case being tried is concerned.[31]

The testimony of the father and wife of the deceased who had seen the incident from the courtyard of the deceased was believed, hence, the conviction of the accused persons under ss 326 / 34, IPC was held proper.[32]

The accused fired at the deceased when he was returning to his village. Father of the accused and other eye-witness deposed about the incident, their evidence could not be rejected merely because no outsider or pedestrian or resident of the vicinity was examined though incident took place on metalled road.[33]

The evidence of brother of the deceased, eye-witness, was believed, thus, the conviction of the accused appellant under s 302, IPC concurrently recorded by the Courts below was upheld.[34]

The testimony of the wife, eye-witness who claimed to be with the deceased since morning was found doubtful, as she could not depose when the deceased took food, hence, same was rejected. Acquittal of the accused under s 302, IPC was held proper.[35]

The fact, that one of the witnesses happens to be the grandson[36] or uncle[37] or son[38] of the deceased, is, by itself, no ground to view his evidence with distrust. An2382 eyewitness cannot be disbelieved on the ground that he is the son or relation[39] of the deceased.[40] The fact of being a relation, far from undermining, rather guarantees the truth of his testimony because, as observed by the Supreme Court in *Gopal Singh v State of Uttar Pradesh* ,[41] being a relation, he would be the least disposed to falsely implicate the accused or substitute him in place of the real culprit[42] unless there is cogent evidence on record to show that the said witness had some animus against the accused.[43] Mere fact that an FIR lodged by the brother of the deceased on the next morning would hardly be sufficient to reject his evidence or otherwise reliable testimony of the wife of the deceased.[44] Though, in one case, one of the four eyewitnesses was the brother of the deceased and he had admitted his enmity with the accused, yet the Supreme Court observed that if his evidence can stand the test of a more close 'scrutiny', it can be acted upon despite such enmity. It all means that suggestion of *animus* need not be accepted on purely speculative grounds.[45] Similarly, not only should the witness not be discredited because of their

relationship[46] but also their testimony should not be disbelieved merely on the ground that neighbours residing near the place of occurrence have not been examined.[47] In *Vishvas Aha Kurane v State of Maharashtra* ,[48] the deposition of the solitary eyewitness, who was the full brother of the deceased, was not brushed aside as it had received ample corroboration not only from the medical evidence but also from circumstantial evidence. The matter of appreciation of such witness, who are relations, only casts a duty upon the Court to scrutinise their evidence with more than ordinary care.[49] Likewise, the evidence of relations and partisan witness has to be scrutinised with caution, but the evidence of such witness does not deserve to be rejected outright simply because they are relations or inimical witnesses.[50] In *Prem2383 Singh v State of Punjab,*[51] the prosecution had chosen to rest its entire case on the evidence of *S* who was the brother of the two witnesses, examined in the case, and because his evidence had failed to inspire confidence, the conviction was ultimately set aside.

Merely because the inhabitants of the village were not examined by the prosecution, no adverse inference should be drawn against it because it is not necessary to examine each and every witness and particularly when occurrence of the incident is proved from the statement of the injured witnesses. Now-a-days, nobody would like to place his life in danger by giving evidence against the accused persons.[52]

Related is not Equivalent to 'Interested'

It is worth mentioning here that 'related' is not equivalent to 'interest'. A witness may be called interested only when he or she derives some benefit from the result of a litigation, *i.e.*, in a decree in a civil case, or in seeing an accused person punished. A witness, who is a natural witness and is the only possible eyewitness in the circumstances of a case, cannot be said to be an interested witness.[53] A close relative, who is a very natural witness in the circumstances of a case, cannot be regarded as an 'interested witness'. The term 'interested' postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted, either because he had some animus with the accused or for some other reason.[54]

126. Evidence of Co-villager

In *Satyanarain v State of Madhya Pradesh* ,[55] murder had been committed in a village where there were two parties--both tried under s 107, CrPC 1898, and naturally all witnesses were partisan or interested. It was observed that it was not safe to base conviction of the accused on their evidence unless some corroboration was found in the evidence or material on record. However, in assessing the value to be attached to the evidence of co-villagers, who have natural inclination of sympathy for their fellow villagers against a stranger, the courts should rely more on human probabilities than on the assertion of the witness.[56] When eyewitnesses are persons of the same village from which the accused hailed, there is no question of any mistaken identity of the accused,[57] though, non-examination of the villagers who tried to intervene in the attack would not affect the veracity of the prosecution case.[58]

127. Evidence of--Eye-witnesses

The testimony of the two eye-witnesses established the accusations against the accused, minor contradictions, variations were not attached importance. The conviction of the accused appellant under s 302, IPC was upheld.[59]2384

Eye-witness(es)

Where the testimony of the eye-witnesses is reliable to record the conviction of the accused under s 302, IPC, the fact that co-accused has been acquitted, cannot be a ground for holding that appellant's conviction is infirm.[60]

Where there is no bitterness between the eye-witnesses and the accused, and the evidence of eye-witnesses is clear and reliable, it can form the basis of conviction of accused.[61]

The evidence of closely related eye witnesses that they had seen the accused persons involved in the case with weapons in their hands from a distance of 30 feet was not believed, and FIR being delayed, conviction of the accused persons under s 302, IPC was set aside.[62]

Evidence of a Single Eyewitness

The well-known maxim that 'Evidence has to be weighed and not counted' has been given statutory placement in s 134 of the Evidence Act which provides as under:[63] '134. No particular number of witnesses shall in any case be required for the proof any fact'. Where the prosecution relies on the sole testimony of an eye-witnesses, it should be wholly reliable.[64]

Where the testimony of an eye-witness is otherwise found reliable, his testimony would not be rejected merely because he has not sustained any injury.[65]

Conviction can be based on the testimony of a single witness if he is wholly reliable. Corroboration may be necessary when he is only partially reliable.[66]

This section marks a departure from English law where a number of statutes still prohibit conviction for certain categories of offences on the testimony of a single witness. This difference was noticed by the Privy Council in *Mohamed Sunal Esa Mamasn Rer Alalah v King* [67] wherein it was laid down as under:

> It was also submitted on behalf of the appellant that assuming the unsworned evidence was admissible the court could not act upon it unless it was corroborated. In England, where provision has been made for the reception of unsworned evidence from a child, it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a court can act upon its corroboration unless required by statute goes only to the weight and value of the evidence. It is sound rule in practice not to act on the2385 uncorroborated evidence of a child, whether sworn or unsworned but, this is a rule of prudence and not of law.

The Privy Council decision was considered by the Supreme Court in *Vadivelu Theuar v State of Madras* ,[68] in which it was observed as under:

On a consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions may be safely stated as firmly established:

(1) As a general rule, a court can/may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.
(2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon for example, in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.
(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes.

In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the Court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that 'no particular number of witness shall, in any case, be

required for the proof of any fact. The Legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witness.

This Court further observed as under:

> It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence where determination of guilty depends entirely on circumstances evidence. If the legislature were to insist upon plurality of witnesses cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused may be proved by the testimony of a single witness, the innocence of the accused person may be established on the testimony of the single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories.
>
> Namely:
>
> (1) wholly reliable;
> (2) wholly unreliable;
> (3) neither wholly reliable nor wholly unreliable.2386
>
> In the first category of proof, the court should have no difficulty in coming to its conclusion either way--it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or subordination. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witness. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subordination of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to the suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution.

The above decision in *Vadivelu Thevar* has been followed in several subsequent cases[69]by the Hon'ble the Supreme Court and by different High Courts. In some other cases,[70] the Supreme Court has considered the question of the sole witness constituting the basis of conviction or otherwise.[71] On a conspectus of these decisions, it clearly comes out that there has been no departure from the principles laid down in Vadivelu Thevar's case,[72] and, therefore, conviction can be recorded on the basis of a statement of a single eyewitness, provided his credibility is not shaken by any adverse circumstance appearing on record against him and the Court at the same time is convinced that he is a truthful witness. The Court will not then insist on corroboration by any other eyewitness particularly as the incident might have occurred at a time or place when there was no possibility of any other eyewitness being present. Indeed, the courts insist on the quality and not the quantity of evidence.[73] Where the evidence of the sole eye-witness is of sterling quality, reliable and trustworthy, it can form the basis of conviction in charge for murder.[74]

If the High Court thought it unsafe to convict any of the accused on the uncorroborated evidence of a single eyewitness, it does not mean that the evidence of the witness stands castigated. It is no stigma against the evidence of any eyewitness, if the Court only wanted an assurance from yet other sources. Corroboration is what2387 the Court requires as a matter of prudence and step of caution.[75] Although, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eyewitness, but at

the same time such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities, and inspires implicit confidence. By this standard, when the prosecution case rests mainly on the sole testimony of an eyewitness, it should be wholly reliable. Even though such witness is an injured witness and his presence at the place of incident may not be seriously doubted, when his evidence is in conflict with other evidence, it would be unsafe to convict the accused on his sole testimony.[76] Where there are improvements and inconsistencies in the statement of complainant/sole eye-witness made before the Court, the accused would be entitled to benefit of doubt.[77]

Appellant accused and two others had attacked the deceased with patta knife causing a large number of injuries leading to death. Evidence of sole eye-witness was corroborated by medical evidence, and as such was believed. The mere fact that brother of the eye-witness named in FIR was not examined did not affect the prosecution case. Appellant accused was convicted under s 302, IPC .[78]

The evidence of the eye witness that he saw the appellant accused attacking the deceased, was corroborated by finger prints, recovery of offence weapon, locket and clothes at the instance of the appellant. The mere fact that one person cannot inflict large number of injuries was held not sufficient ground to rule out involvement of the appellant. The appellant accused was convicted under s 302, IPC .[79]

Where the sole eye-witness did not disclose the incident to anyone for almost two years as he was being threatened by the co-accused, and his statement was recorded belatedly, simply because the conviction of the accused was on un-corroborated testimony of the witness on the charge of rape, same was found unsustainable, and was set aside.[80]

Where the eye-witnesses who had seen the occurrence were related to the deceased, and did not inform the police immediately after the occurrence, nor took the victim to the doctor for medical aid, the conduct of the witnesses was found unnatural, thus, the conviction of the accused on the charge of murder was held not proper.[81]

128. Evidence of Independent Witnesses

The examination of independent witnesses in a case is a rule of prudence, though not a rule of law, which depends on whether the independent witnesses were present and saw the occurrence, but are not supporting the prosecution story or that they are withheld by the prosecution. If there are many independent witnesses who are said to have witnessed the occurrence and are not brought to the Court to support the prosecution story then inference can necessarily be drawn, but if the possibility of an2388 independent witness being present and witnessing the occurrence is ruled out, non-examination of the independent witness as such cannot be a ground to disbelieve the prosecution story.[82] A witness is normally to be considered independent unless he or she springs from sources likely to be tainted, and that usually means that the witness has caused such enmity against the accused as to wish to implicate him falsely.[83] It cannot be said that, the evidence of independent witnesses should automatically be believed. The evidence of an independent witness has also to pass the test of being in tune with probabilities, and being trustworthy, and in consequence with attending circumstances. In the instant case, it was found that the testimony of independent witnesses did not pass such test.[84] Where the incident took place in broad daylight but there was nothing on record to show that independent witnesses from the locality had witnessed the same, it was not proper to reject the prosecution evidence on the ground that independent witnesses from the locality were not examined as eyewitnesses.[85] Where the deceased and prosecution witnesses boarded the bus the next morning, the prosecution witness again boarded the said bus, during talks with the prosecution witness, the bus conductor was informed about the murder of the deceased, the bus conductor being an independent person not connected with the accused or the witnesses, there was no reason to doubt his evidence.[86] When the witness examined by the prosecution cannot be held to be interested in the prosecution and inimical to the accused, he must be held to be a wholly disinterested witness.[87] When the occurrence took place in the late hours of the night inside the house, the prosecution cannot be expected to examine independent witness occurrence.[88]

129. Evidence of Tutored Witness

Use of the word 'Pitaji' by a Muslim accused to call his father as per statements of witnesses showed that they were wrongly tutored because it is not language of a Muslim to address his father.[89]

130. Evidence of Hostile Witnesses

It is now a well-settled principle of law that though a witness has been declared hostile, his statement cannot be discarded in toto merely because on a certain point he has chosen not to support the prosecution.[90] It is for the Judge, infact to consider in each case whether as a result of cross-examination and contradiction, the hostile witness stands thoroughly discredited or can still be believed in regard to a part of his testimony.[91] The fact that the public prosecutor after obtaining permission of the Court, asked a question with regard to the role played by the two accused on the basis of the police statement, does not show that the witness was not supporting the prosecution case, on the contrary, this would mean that the witness was truthful and2389 he had not supported his police version with regard to identification of the two accused.[92]

The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof.[93]

Necessity to Prove Previous Statement of Hostile Witnesses

Section 145 of the Evidence Act mandates that if any contradiction in evidence of any witness from his previous statement reduced to writing is intended to be used in the case, the attention of the witness must be called to that particular part of his previous statement. If he admits the previous statement, it is unnecessary to prove it. If he denies the previous statement, such statement has to be proved in an appropriate manner. If this is not done the evidence of the witness cannot be assailed in respect of those statements.[94] In this view of the matter, when contradictory portion has not been proved in accordance with law, the mere fact that the witness has been declared hostile by the prosecution and allowed to be cross-examined does not make him an unreliable witness, so as to exclude his evidence from consideration altogether.[95]

131. Tendering a Witness for Cross-Examination--Not Permissible

The procedure of tendering a witness for cross-examination without his being examined-in-chief is not warranted by law.[96] Permitting the prosecution to tender a witness for cross-examination only would be wrong and the effect of their being tendered only for cross-examination, amounts to the failure of the prosecution to examine them at the trial.[97] The effect of witnesses being tendered only for cross-examination amounts to the failure of the prosecution to examine them at the trial. Their examination, therefore, seriously affects the credibility of the prosecution case and detracts materially from its reliability.[98] Even if a witness was tendered for cross-examination, such tender will not cure the inherent defect of non-examination-in-chief of such witness by the prosecution.[99]

132. Evidence of Child Witness

It is well-settled that the testimony of a child witness should only be accepted with great caution and circumspection. The rationale for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and aducement, he can be made to depose about things which he has not seen,2390 and once having been tutored, he goes on repeating in a parrot like manner what he has been tutored to state. It is commonly felt and rightly so that such witnesses are the most dangerous witnesses.[1] It would also be relevant to quote Dr Kenny Downing (Professor of the Laws of England Cambridge University) at page 386, in his book, *Outlines of Criminal Law:*

> Children are a most untrustworthy class of witnesses for when of a tender age as our common experience teaches us, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and desire of notoriety.[2]

The testimony of a child witness should be evaluated with the greatest caution and circumspection. It is common knowledge that there can more dangerous witnesses than children for they live in a world of make-believe, are prone to imagine things, even if they have not seen them; on account of fear or reward they can be made to depose false facts.[3]

The law regarding a child witness is that evidence of a child witness should be accepted with great caution.[4] The legal position is that when a child is a witness, the first step for the judge is to satisfy himself that the child is a competent witness within the meaning of s 118 of the Evidence Act, and competency of the child witness should be ascertained by putting a few questions in order to find out whether the witness is intelligent enough to understand what he has seen, and afterwards to inform the court thereof, and understands the duty of speaking the truth or not. The holding of preliminary inquiry is merely a rule of prudence and not a legal obligation upon the Judge.[5] The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the Trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a word of make beliefs.[6] Under s 5 of the Oaths Act, an oath shall be administered to such witness only, who understands the sanctity of the oath. A witness may be a competent witness, though he may not understand the sanctity of the oath, and in such a case s 13 of the Oaths Act becomes applicable, in which the Court refrains from administering the oath to such witness.[7] Nowithstanding s 5 of the Oaths Act, evidence of a child witness is not inadmissible merely on the ground that no oath was administered. However, it is desirable that the Judge Magistrate should record their opinion so that the child witness understands the importance of speaking only the truth and states why he thinks so.

Prosecution case was that the accused came in the field and committed the murder of three accused persons. Only eye-witness was a girl aged 7 years. She was the2391 resident of another village, and had no opportunity of seeing or knowing the accused persons. Mere recovery of motorcycle and wrist watch did not connect the accused with the commission of crime. Accused was given benefit of doubt, and acquitted of the charge under s 302, IPC .[8]

One of the tests to judge the credibility of such solitary witness is the intrinsic quality of of his evidence, independent of other evidence, and if such evidence measures up to the Court's satisfaction it can itself form the basis of conviction. It is only when such evidence does not pass muster that the Court seeks corroboration to draw its conclusion therefrom.[9] When the statement of the child witness was highly reliable and it could not be rejected merely because he was a child, the conviction on the basis thereof was found not illegal.[10] The allegation was that the accused assaulted his wife and the father of the child with stone slab at midnight as he suspected illicit relations between his wife and father of the child. The child witness was the most natural witness, and his evidence was found reliable. There was no reason for false implication. Confessional statement recorded by the Special Executive Magistrate also implicated the accused. Conviction of the accused for offence under s 302, IPC was upheld.[11]

Clear evidence of girl aged 7 years that the accused, her uncle, killed her grandfather was found reliable, thus, conviction under s 302, IPC was upheld.[12]

Testimony of Child Witness--Children of the deceased

The testimony of PW2 and 3, children of the deceased (their mother) was believed, and the accused appellant (their father) was convicted under s 304, Pt I, IPC .[13]

The testimony of a eight old years old son against his father accused for the murder of the mother of the

child was found reliable and accused was convicted on the charge of murder.[14]

A child witness is prone to tutoring so the Court should look for corroboration particularly when the evidence betrays traces of tutoring. In the absence of corroboration from independent and reliable evidence, reliance cannot be placed on the testimony of a child witness.[15] When there is no delay in lodging the FIR, and the evidence of the child witness is reliable and truthful and corroborated by evidence of another witness, conviction of the accused can be upheld.[16] A boy of 13 years who2392 has attained the measure of mature understanding, cannot be treated as a child witness.[17] A child aged four years may be found a reliable witness.[18]

When the child witness cogently narrated the incident immediately after the occurrence to his relations, who in turn narrated the incident in court as was narrated to them by the child witness, the evidence of the child witness was found credible.[19] Testimony of child witness is reliable more so when it was corroborated with evidence to recovery and report of the forensic science laboratory.[20] Appellant accused no. 1 had developed illicit relationship with accused no. 2, the wife of the deceased, both strangulated and throttled the deceased with nylon rope causing his death. The testimony of the child witness, daughter of the accused no. 2 (her mother), in the murder of her father was found reliable, and her testimony was corroborated by the recovery of the dead body at the instance of accused no. 2. Conviction of the appellant under s 302, IPC recorded by the Courts below was affirmed.[21]

All grounds of incompetency have been swept away by s 118 under which competency of witnesses is the rule, and their incompetency is the exception. Only incompetency that the section highlights is incompetency from premature or defective intellect. As to infancy, it is not so much the age as the capacity to understand which is the determining factor. No precise age limit can be given, as persons of the same age differ in mental growth and their ability to understand questions and give rational answers. The sole test is whether the witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking the truth. The general rule is that the capacity of the person offered as a witness is presumed, *i.e.*, to exclude a witness on the ground of mental or moral incapacity, the existence of incapacity must be made to appear under s 118, a child is competent to testify if it can understand the questions put to him, and give rational answers.[22] Corroboration is not a rule of practise and hence no corroboration is required if the testimony of the child inspires confidence and there unlikelihood of tutoring and demeanour was found to be straightforward by the Trial Judge.[23] However, when the child witness admitted that he was not only brought to the Court by another person but was also told what to depose, the conviction cannot be based on such evidence of the child witness alone even if it is corroborated by medical evidence.[24]

133. Tutored Witness

The child witness deposed before the Court that she had seen voltage of bulb lighted at a distance of 200 yards, hence, she was a tutored witness, and her evidence was discarded.[25]2393

134. Weapon of Offence not Gotten Identified from Witnesses in Trial--Effect

The three eye-witnesses were not shown the weapons of offence allegedly recovered by two of the accused persons but that fact does not cause any dent in the prosecution case since from the evidence of the eye-witnesses, it can be found that the injuries to the deceased were caused with sharp edged weapons, which according to the eye-witnesses were *churis*, and also with *dandas*. The autopsy surgeon had opined that the fatal injury on the back of the chest of the deceased was caused by a sharp cutting penetrating weapon and injury on the chest also was caused by a hand blunt weapon and fist blows. During the investigation the autopsy surgeon had been shown the weapons of offence recovered by accused persons and after seeing those recovered weapons the autopsy surgeon had opined that the injuries sustained by the deceased were possible with those weapons. In these circumstances, the absence of identification of the recovered weapons by the three eye-witnesses in court during their evidence is of no consequence.[26] In the judgment of the Hon'ble Supreme Court in *State of Rajasthan v Dhool Singh* ,[27] also, a similar objection was raised but was rejected.[28]

135. Evidence of Chance Witness

In a murder trial, by describing the independent witnesses as 'chance witnesses', it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passers by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witnesses' is borrowed from countries where every man's home is considered his castle, and everyone must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more causal. To discard the evidence of street hawkers and vendors on the ground that they are 'chance witnesses', even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence.[29]

In a murder trial, by describing an independent witness as 'chance witness' it cannot be implied thereby that his evidence is suspicious and his presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence.[30] On the sole2394 ground that the witness in question belonged to a different area and had no business to be near the place of occurrence, his evidence should not be disbelieved.[31]

136. Evidence of Approver

An accomplice is a competent witness and his evidence can be accepted, and a conviction may be based on it, if there is nothing significant to reject it as false. However, the rule of prudence, ingrained in the consideration of accomplice evidence, requires independent corroborative evidence first of the offence and next in connecting the accused against whom accomplice evidence is used with the crime. [32]Section 138 of the Evidence Act only says that a conviction is not illegal merely because it proceeds on uncorroborated testimony of an accomplice. However, the law is settled, and it is established as a rule of prudence that the testimony of an accomplice if it is thought reliable as a whole, then conviction could be based if it is corroborated by independent evidence, either direct or circumstantial connecting the accused with the crime.[33] When the evidence of an approver relating to the role of the accused has remained uncorroborated in material particulars, it is difficult to accept the evidence of the approver.[34] However, when it is trustworthy and corroborated on material particulars by other witnesses, the, conviction of the accused would be justified.[35] Pardon granted to approvers by a magistrate or a chief-judicial magistrate, after the case is committed to the Court of Sessions is not a curable irregularity, and only a court of sessions is empowered to grant pardon after committing the case to it.[36] For making use of the accomplice, the law provides a specific procedure under ss 306 and 307, CrPC,[37] but when the investigating officer (IO), instead of adopting and adhering to the prescribed procedure, himself decided the matter, and granted pardon to the co-accused, though he was not authorised to do so and also got his statement recorded under s 164, CrPC,[38] the IO did not act in accordance with law.[39] Considering the object and purpose of examining the person accepting tender of pardon as a witness, which is limited, the proceeding which takes place before the Magistrate at that stage is neither an inquiry nor a trial. Therefore, it cannot be said that the approver should have been examined as a witness in open court and not in the chamber, and while being examined by the Magistrate, the accused should also be present and afforded the opportunity to cross-examine the approver. The phrase 'examination of witness' does not necessarily mean examination and cross-examination of that witness.[40]

Evidence of Approver has more Sanctity than a Confession under Section 164 , Code of Criminal

Procedure 1973

The evidence of an approver has more sanctity than a mere confession under s 164, CrPC, because an approver deposes in open court and he is subject to cross-2395examination by the other accused.[41] Adopting the principle of harmonious construction and having regard to the words 'at any stage of investigation or enquiry into or trial of offence' in sub-s (1) of s 306,[42] and the words 'and in the subsequent trial, if any' in sub-s (4) of s 306, CrPC, taken alongwith the directory nature of s 307, CrPC,[43] by use of the word 'may', the Chief Judicial Magistrate and the Sessions Judge have concurrent jurisdiction to grant pardon after commitment of the case to the Court of Sessions.[44]

137. Non-mentioning of Name of Accused by Eyewitness in his Statements under Section 164 , Code of Criminal Procedure 1973, and at Inquest

Where the eyewitness did not make a mention of the name of one of the accused in his statement record under s 164, CrPC, and also in his statement recorded at the inquest, the accused is entitled to the benefit of the doubt and an acquittal.[45]

138. Discrepancy as to Age of Deceased--Effect

Where the age of the deceased in the post mortem report was given as 26 years, while witnesses stated the age of the deceased as 40 years, the discrepancy with regard to the age of the deceased *vis-à-vis* the post mortem report was neither drawn to the attention of the doctor, 10 or other witnesses, the said discrepancy in the age was held as not very pertinent as to throw away the entire prosecution case, particularly when the identity of the deceased was not suspected.[46]

139. Signed Statement of Accused before Police

The bar of inadmissibility of a signed statement created by s 162, CrPC, operates not only on statement of witnesses but also on the statement of the accused made to the police officer.[47] Such statement of the accused is inadmissible in evidence.[48]Whenever, handwriting or signature of the accused are required, the investigating officer has to approach the Magistrate having jurisdiction under s 73 of the Evidence Act, and file a requisition for obtaining specimen signatures and handwriting of the accused. There is no law authorising him to directly obtain the signature and handwriting of an accused.[49]

140. Accused as his Own Witness

As per s 315, CrPC,[50] any person accused of an offence before a criminal court shall be a competent witness for the defence, and may give evidence on oath in disproof of the charges made against him or any co-accused at the same trial; provided that the accused shall not be called as a witness except on his own request in writing, and his failure to give evidence shall not be made the subject of any comment by any of the2396 parties or the Court or give rise to any presumption against himself or his co-accused at the same trial.

Accused Admitting Incriminating Circumstance under Section 313 , Code of Criminal Procedure 1973

In very rare instances, the accused may even admit or own upto incriminating circumstances adduced against him, for the purpose perhaps of adopting legally recognised defences. In all such cases the Court gets the advantage of knowing his version about those aspects, and it helps the Court to effectively appreciate and evaluate the evidence in the case. If an accused admits any incriminating circumstances appearing in evidence against him, there is no warrant that those admissions should altogether be ignored merely on the ground that such admissions were advanced as defence strategy.[51] However, only a part of such statement under s 313, CrPC, cannot be made the sole basis of conviction of the accused.[52]

Sub-section (4) of s 313, CrPC,[53] contains necessary support to the legal position that answers given by

the accused during such examination are intended to be considered by the court. The words, 'may be taken into consideration in such inquiry or trial' in sub-s (4), would amount to a legislative guideline for the court to give due weight to such answers, though it does not mean that such answers could be made the sole basis of any finding.[54] Several times has the Supreme Court pointed out that such answers of the accused can be taken into consideration in deciding whether the prosecution evidence can be relied on, and whether the accused is liable to be convicted of the offence he is charged with.[55]

Thus, it is made clear by the Apex Court that the answers of the accused when they contain admission of circumstances against him are not by themselves, delinked from the evidence, to be used for arriving at a finding that the accused had committed the offence.[56]

Non-examination of Accused Under Section 333 , Code of Criminal Procedure 1973[57]

Non-examination of the accused under s 313, CrPC, is an irregularity but it would not vitiate the trial unless prejudice is shown to be caused to the accused.[58] The challenge to the conviction based on non-compliance of s 313, CrPC, for first time in the appeal cannot be entertained unless the appellants/accused persons demonstrate that prejudice has been caused to them.[59]2397

141. Non-questioning the Accused under Section 313 , CrPC[60]Regarding any Incriminating Circumstance--Effect

In the case based on circumstantial evidence, the circumstances which were not put to the accused under s 313, CrPC, cannot be used for holding him guilty.[61] In the event of any inadvertent omission on the part of the Court to question the accused on any incriminating circumstance appearing against him, the same cannot *ipso facto* vitiate the trial unless it is shown that some prejudice was caused to him.[62] The challenge to the conviction based on non-compliance of s 313, for the first time in appeal, cannot be entertained unless the appellants/accused demonstrate that prejudice has been caused to them.[63] It is obligatory on the part of the trial court to examine the accused for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him. If such opportunity is not afforded, the incriminating pieces of evidence available in the prosecution evidence cannot be relied upon for the purpose of recording conviction of the accused persons.[64]

142. Evidence of Injured Witness

Injured witnesses are those who are injured in the crime committed by the accused. These witnesses are stamped witnesses, whose presence admits no doubt as being themselves victims they would not leave out the real assailant and substitute them with innocent persons.[65] The medical evidence showed that the sole injured eye-witness had received injuries on the previous day of the occurrence. The conviction of accused appellant rested solely on the testimony of the injured witness. Inference drawn that the eye-witness was not present at the time of occurrence. Appellants accused were acquitted of the charges under ss 302 and 324, IPC .[66] It should always be remembered that injuries only insure the presence of witnesses and do not guarantee his/her credibility, even in cases resting on the testimony of injured witnesses; the Court does not convict if it does not find their evidence to be truthful in respect of the substratum of the prosecution case.[67]

The evidence of injured witnesses carries much weight and cannot be thrown away, merely because it is not corroborated by independent witnesses.[68] The evidence of the injured witness stands on a higher footing.[69] When eyewitnesses being inmates of the house in which incident took place were present at the time2398 of incident, their presence being natural, and they also, received injuries at the time of the incident, their evidence is reliable;[70] the credible evidence of the injured, eyewitnesses cannot be discarded on the ground of non-examination of the investigating officer or non-examination of independent witnesses despite the fact that 20 to 25 persons were collected at the spot at the time of the incident.[71]

When the prosecution failed to examine the injured witness and the explanation offered was that the said witness was gained over, no adverse presumption against the prosecution can be drawn under s 114 illust

(g) of the Evidence Act.[72]

It would be practically impossible for any injured witness to exactly notice and memorise which accused was assaulting with the blunt side of the weapon and which accused was causing injuries with the sharp-edged weapon. Even if such statement is made, it may amount to an exaggeration because when a number of assailants are there, injuries are not inflicted in a manner which could exactly be noted by the witness. If one or two injuries are caused and if it is broad daylight, it is quite possible that the same witnesses maybe in a position to note it. However, at 8:30 pm, when the witness herself was receiving injuries, it would not be possible to note and narrate whether the accused were causing injuries to her parents by the blunt or sharp side of the weapon.[73] When the testimony of an injured witness is found reliable regarding involvement of some accused in the murder, even though the witness sought to make an improvement in the course of his disposition by also naming falsely other persons as the accused, his entire evidence for this reason cannot be rejected.[74] The absence of injury reports in respect of injuries on the witnesses can at best be a ground for raising doubt on the point of their receiving injuries. It will not be a ground to discard their entire evidence.[75] Where the evidence of sole injured and related eye-witness was found cogent and reliable, and corroborated by medical evidence, conviction of five appellants accused on the charge of murder was held proper.[76] The evidence of injured person who is examined as a witness lends more credence, because normally he would not falsely implicate a person thereby protecting the actual assailant.[77]

It is not necessary to invariably accept the version of the injured witnesses but it is well settled that greater weight has to be given to the testimony of the injured witnesses.[78]

Where a number of persons are injured witnesses, their evidence cannot be discarded in the absence of strong reasons.[79]2399

One of the Witnesses not Injured--Effect

In a murder case the fact that two of the witnesses were also injured does not make the presence of another witness at the spot doubtful, merely because no injury was caused to her.[80]

143. Rustic witnesses

For every minor discrepancy or slight embellishment in the prosecution version, which does not touch the core of the prosecution case, the entire prosecution version cannot be discarded, if the testimonies of the witnesses are found to be worthy of reliance and have a ring of truth in them. The presence of some discrepancies and minor contradictions in the testimonies of rustic witnesses as a result of prolonged cross-examination is completely natural and only to be expected.[81]

144. Unreliable Witness(es)

As the name would suggest an unreliable witness is the one on whose testimony no reliance can be placed. Such a witness is of no use to the prosecution or defence producing him. A witness(es), is/are unreliable, when:

(i) Being an eyewitness he admits during cross-examination that he did not tell anyone about the occurrance of murder of his employer even to his co-employees, though on the next day of murder he went to his work place.[82]

(ii) His deposition that two of the accused had guns and he identified them by flashing a torch towards them at a distance of 8-10 paces, and the witness was spared by the accused without any harm despite flashing the torch towards them.[83]

(iii) His statement as an eyewitness was recorded belatedly, and despite seeing the gruesome murder he did not inform the mother and father of the deceased or the police, immediately

and his presence at the place of occurrance is found doubtful.[84] The eye-witness after seeing the murder, had disappeared and did not inform anyone about the incident. The conviction of the appellant under s 302, IPC was set aside.[85]

(iv) The accused had reached the '*Kothi*' and shot dead the victim after taking him out and gunned down another victim who was inside, it was highly improbable that the accused did not care to look at the places where prosecution witnesses were hiding in the small room, and so the presence of witnesses in that room and their version was improbable.[86]

(v) Despite having good relations with the deceased, he, after the accused had given a knife blow to the deceased, did not take the deceased to his aunts2400 place which was nearby, or to a hospital for treatment, or to the police station for lodging a complaint, but disappeared from the spot and appeared only the next evening.[87]

(vi) He did not disclose any information about the incident to anybody till the next day,[88] or for about one and a half days.[89]

(vii) Being a complainant, he stated before the Court that he identified the accused persons except for one but suppressed this fact in the FIR leading to the presumption that he could not identify anybody and had incorrectly named the assailants in the FIR.[90]

(viii) They falsely implicate two of the accused persons who were in jail at the relevant time rendering their evidence wholly unbelievable against other accused persons also.[91]

(ix) They implicated a dead person as one of the accused persons rendering their evidence false against all the accused persons.[92]

(x) There is inconsistency in the version of the eyewitness as towords spoken by the accused before his son fired the shot.[93]

(xi) There are number of infirmities in the evidence of eyewitnesses.[94]

(xii) Being a complainant he had mentioned in his complaint that only 'dongi' was used by the accused, and only in his oral evidence before the Court, after having noticed the nature of the injury, he spoke about the use of a stick by the accused. Secondly, the presence of the witness at the place of incidence was disputed, and even though there were two independent eyewitnesses they were not examined by the prosecution though their statements had been recorded.[95]

(xiii) The act of alleged eye-witness in not reporting matter to police though an assault on his friends took place in his presence is his most unnatural conduct so also the police approaching him only after the accused was arrested.[96]

(xiv) In examination-in-chief, the witness stated that he saw only one assault on the deceased while in cross-examination, he stated that he saw the accused attacked on the deceased twice and both injuries were caused in his presence.[97]

(xv) The evidence of wife of the deceased as witness was that she tried to intervene and protect her husband by covering him but no injury was found on her person and mother of the deceased who was injured in the incident neither speaking about presence of wife of the deceased at the place of the incident nor naming any of the accused as persons who assaulted her and2401 the deceased and evidence of wife was not corroborated by any injured witness.[1]

(xv) The deceased profusely bleeding after receiving the gun shot, eye-witnesses who were accompanying the deceased stated to have carried victim on shoulder but no blood-stains were found on clothes of witnesses.[2]

(xvi) The witnesses, brothers of the deceased stated that on hearing the sound of firing they came out from inside their house and saw the accused running away with a pistol and the deceased lying injured having sustained a gunshot injury, unnatural conduct on part of said witnesses in not taking the deceased who was precariously injured first to hospital makes evidence of witnesses doubtful in view of some other several infirmities also. So, conviction of the accused on the basis of their evidence, not proper.[3]

(xvi) The witness having paralysed legs for past 20 years, not stating in his evidence as to how he went to place of incident which was about more than one furlong away.[4]

145. Evidence of Interested Witnesses

The term 'interested' postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted, either because he had some animus with the accused or for some other reason.[5] The fact that the eyewitnesses were known to the younger brother of the deceased is no ground to discard their evidence.[6] As dexterously emphasised by the Supreme Court on many occasions[7] that interested witnesses are not necessarily false witnesses, though the fact that those witnesses have a personal interest or stake in the matter must put the court on its guard, that the evidence of such witnesses must be subjected to close scrutiny and the court must assess the testimony of each important witness and indicate reasons for accepting or rejecting it, and that no evidence should at once be disregarded simply because it came from interested persons.[8] There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reasons have to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused.[9] A witness may be called interested only when he or she derives some benefit from the result of a litigation in decree in a civil case or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the2402 circumstances of a case cannot be said to be an interested witness.[10] The evidence of the brother of the deceased who was present along with the deceased at the time of the occurrence, who was also an injured witness was believed, and accused was convicted on the charge of murder.[11] The evidence of eye-witness cannot be rejected merely because he is the brother of the deceased.[12] Where the murder takes place during the night inside the house, the wife is the most natural witness, thus, the accused appellant was convicted under s 302, IPC .[13]

The evidence of an eye-witness cannot be rejected merely because he/she is a relation of the deceased. In the case of murder of the father, the testimony of the son was believed, especially when he had sustained injuries.[14]

Where the village is faction-ridden and where there is serious enmity between the parties, as appears in the present case on account of repeated incidents of murders taking place on regular intervals, it is highly unsafe to place reliance upon such interested witnesses whose presence at the scene of occurrence is doubtful.[15]

Conviction of an accused on the sole uncorroborated testimony of an eyewitness, who was not only interested being a cousin of the deceased but also enimical to the accused is liable to be set aside when the material witness though available is not examined and other eyewitness, whose name was mentioned in the FIR was also not examined.[16] In cases of long enmity, it is not unusual to lug in innocent persons.[17]

Evidence of mother about assault by the accused on his son was believed, as the mother would not be interested in allowing the real culprits to go unpunished. The conviction of the accused appellants under ss 302, 147, 148, 302, IPC was upheld.[18]

146. Wife's Role as Eye-Witness

Appellant accused assaulted the deceased by Tangia (axe) in front of the latter's shop in the presence of wife (PW1) of the deceased. The presence of wife (PW1) was natural, and could not be doubted as occurrence took place in the early morning. The appellant accused was named in FIR, which was promptly lodged within 1½ hours of the incident. The conviction of the accused on the evidence of wife (PW1) sole eye witness under s 302, IPC was sustained.[19]

147. Deaf Eye-Witness

Eye-witness was deaf, she was able to read and write, but her statement was recorded in signs and gestures with the help of the interpreter. Her father being an2403 interested witness in the case, the accused respondent was acquitted for offence under s 302, IPC .[20]

148. Non-Examination of Independent Witness(s)

In a faction ridden village, daylight murder of deceased was committed by accused persons armed with

spears and axes at Bus stop. The investigating officer deposed before the Court that on that day he went to the place of the incident but none came forward to reveal anything about the case. Due to double murder in the town in a single day, there was tension in the public, and he imposed s 144 CrPC . In such a situation surcharged with tension and fear psychosis, it is not expected of any witness to come and depose about the incident even though they may have seen something. Non-examination of independent witnesses, in such a situation, would be no ground to discard the otherwise creditworthy testimony of PWS found reliable. Conviction under ss 148, 149, 302, IPC was held proper.[21]

Where FIR was ante-timed, there were about 100 persons present on the place of occurrence, but police did not make any effort to join/examine independent witnesses, appellants accused were held entitled to benefit of doubt and acquitted of charge under ss 302 / 34, IPC .[22]

Where independent witnesses, though available, were not examined in the case, and there was no explanation for the omission by the prosecution, the evidence of the related eye witnesses was found not reliable, thus, conviction of the accused persons on the charge of murder was set aside.[23]

149. Inimical Witness

The evidence of inimical witness cannot be rejected on the ground that he is inimical to the accused, though of course it has to be considered with caution. Murder by gun shot. Accused convicted under s 302, IPC .[24]

150. Evidence of Investigating Officer

The evidence of the IO should not be brushed aside simply because he is a police officer, if his evidence can be characterised as that of a trustworthy witness.[25] In a murder case when the involvement of the accused has been clearly established by the evidence of the eyewitnesses in confirmity with medical evidence and fact stated in the FIR, non-examination by the IO would not fail the prosecution case.[26] Non-seizure of torchlight used by the witness to see the occurrence of murder, by the IO cannot be considered a lapse on the part of the IO, or a ground for impairment of2404 testimony of the eyewitness.[27] Same is the position regarding non-seizure of hurricane lamp from the place of occurrence.[28] When the IO neither entered the time of the statement of witnesses in his diary, nor sent the blood-stained clothes and earth seized from the place of occurrence for examination serologist, these lapses and non-compliance of s 172, CrPC, read with r 164 of the Bihar Police Manual have no adverse effect on prosecution case if no prejudice is caused to be shown to the accused.[29] If the IO did not instruct the person who drew up the site plan to note down certain details, that would not render the testimony of material witnesses unreliable.[30] The credible evidence of injured eyewitnesses cannot be discarded merely on the ground of non-examination by the investigating officer.[31]Even if the investigation is illegal or even suspicious, the rest of the evidence must be scrutinised independently of the impact of it. Otherwise, the criminal trial will plummet to the level of investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made the casuality for wrongs committed by investigating officers. In other words, if the court is convinced that the testimony of a witness to the occurrence is true, the court is free to act on it albeit the investigating officer's role in the case.[32]

Non-examination of Investigating Officer

The non-examination of the IO does not affect the prosecution case adversely when the defence has not been prejudiced by it and when no contradiction has been taken by the defence from the eye witnesses *vis-à-vis* their statements in court and the statements made by them before the 10 during investigation of the case.[33] In a murder case, when the involvement of the accused has been clearly established by the evidence of eyewitnesses, in conformity with the medical evidence and facts in the FIR, the non-examination by the 10 would not fail the prosecution case.[34] However, when there are discrepancies in the statement of eyewitnesses and the doctor conducting the post-mortem is also not examined, the non-examination of investigating officer would cause prejudice to the case of the defence.[35]

33 *Anil v State of Haryana* 2007 Cr LJ 4294, p 4296 (SC), 2007 (7) Scale 56, 2007 (5) Supreme 15 .

34 *Rana Pratap v State of Haryana* AIR 1983 SC 680 .

35 *Poolin Haldar v State* (1996) Cr LJ 513 (Cal) (DB) .

36 *Balo Yadav & ors v State of Bihar* (1997) Cr LJ 3395 (SC) .

37 *Jagnarayan Dusadh & anor v State of Bihar* (1998) Cr LJ 1110 (SC) .

38 *Faqira v State of UP* 2013 (2) Crimes 480, p 486 (All) (DB) .

39 *Tejinder Singh @ Kaka v State of Punjab* 2013 (2) Crimes 159, p 161 (SC), 2013 (12) SCC 503, 2013 (6) JT 585, 2013 (5) Scale 553, 2013 (2) Supreme 689, 2013 Cr LJ 3130 .

40 *Shivasharanappa v State of Karnataka* 2013 Cr LJ 2658, p 2664, 2013 AIR SCW 2719 (SC) .

41 *Abu Thakir v State* 2010 Cr LJ 2840, p 2849 (SC), AIR 2010 SC 1119, 2010 AIR SCW 2799, (2010) 5 SCC 91 .

42 *State of Tamil Nadu v Subair* 2009 Cr LJ 1777, p 1782 (SC), 2009 AIR SCW 1906 .

43 *Arvind Kumar v State of MP* 2007 Cr LJ 3740, p 3741 (SC), AIR 2007 SC 2674, 2007 (9) Scale 325 .

44 *Shivappa v State of Karnataka* 2008 Cr LJ 2992 (SC), AIR 2008 SC 1860 .

45 *Nagalla Mukha Lingam v State of AP* 2005 Cr LJ 2583, p 2584, AIR 2005 SC 2466, 2005 (5) JT 109, 2005 (4) Scale 471 .

46 *Man Singh v State of Haryana* (2005) Cr LJ 3369 (P&H) (DB).

47 *Balraj Singh v State of Punjab* (1976) Cr LJ 1471, p 1478 .

48 For details refer to *Woodroffe and Ali on Evidence,* Lexisnexis Butterworths, New Delhi.

49 *Kartik Malhar v State of Bihar* (1996) Cr LJ 889 (SC) .

50 *State of Maharashtra v Raju Dadaba Borge* (2001) Cr LJ 3638 (Bom) (DB) .

51 *State of Punjab v Hari Singh* AIR 1974 SC 1168, p 1172, (1974) Cr LJ 822 .

52 *Haria v State of Himachal Pradesh* (1975) Cr LJ 78, 81 (HP).

53 *Ram Singh v State* (1972) CLR 482 .

54 *Jogi Sahu v State* (1970) Cr LJ 637-38.

55 *Ram Janam v State of Uttar Pradesh* AIR 1979 SC 1507 .

56 *Prem Singh v State of Punjab* AIR 1977 SC 673, p 674, (1977) Cr LJ 261 .

57 *State of Uttar Pradesh v Lalla* (1978) Cr LJ 359, p 362, AIR 1978 SC 368 .

58 *Vesta v State of Madhya Pradesh* (1981) Cr LR 4 (MP High Court Notes) (DB).

59 *Syed Ibrahim v State of Andhra Pradesh* 2006 Cr LJ 4087, p 4090, AIR 2006 SC 2908 .

60 *Nagalla Mukha Lingam v State of AP* (2005) Cr LJ 2583 (SC), AIR 2005 SC 2466, 2005 (5) JT 109, 2005 (4) Scale 471 .

61 *Nisar Ali v State* AIR 1957 SC 366 ; *Krishna Mochi v State of Bihar* (2002) Cr LJ 2645 (SC) ; *Rajendra Singh v State of Uttranchal* 2013 (2) Crimes 194 (SC), (2013) 4 SCC 713, 2013 (7) JT 438, 2013 (5) Scale 568, 2013 Cr LJ 3172, 2013 (2) SCC (Cr) 877 .

62 *Nisar Ali v State* AIR 1957 SC 366 ; *Krishna Mochi v State of Bihar* (2002) Cr LJ 2645 (SC) .

63 *Balaka Singh v State of Punjab* AIR 1975 SC 1962, (1975) Cr LJ 1734 ; *Keshoram v State of Assam* AIR 1978 SC 1096 .

64 *Poulin Haldar v State* (1996) Cr LJ 513 (Cal) (DB) .

65 *Sal Kumar v State of Haryana* (1974) Cr LJ 345, AIR 1974 SC 294 ; *Raghavan Pillai v State of Kerala* (1989) Cr LJ 188 (NCC) (Ker) .

66 *Pattu Lal v State of Punjab* (1996) Cr LJ 2446 (SC) .

67 *State of Maharashtra v Priya Sharan Maharaj & ors* (1997) Cr LJ 2248 (SC) .

68 *Bolo Yadav v State of Bihar* (1997) Cr LJ 3395 (SC) .

69 *Roopa & anor v State of Rajasthan* (1998) Cr LJ 1848 (Raj) (DB) .

70 *Deny Bora v State of Assam* 2015 Cr LJ 68 (SC), 2014 (4) Crimes 503 (SC), 2015 (2) Crimes 40 (SC), 2014 (10) Scale 208 .

71 *Rajendra Kumar v State* (1998) Cr LJ 3293 (SC) .

72 *State of Madhya Pradesh v Dharkole* 2005 Cr LJ 108, p 114 (SC) .

73 *Harivadan Babuibhai Patel v State of Gujarat* 2013 AIR SCW 4575, (2013) 7 SCC 45, 2013 (8) Scale 17, 2013 Cr LJ 3944, p 3950 (SC) ; *Dhari v State of Uttar Pradesh* AIR 2013 SC 308, (2012) 10 SCC 256 ; *State of HP v Gian Chand* AIR 2001 SC 2328, (2001) 6 SCC 145 .

74 *Ram Swaroop v State of Rajasthan* 2008 Cr LJ 2259 (SC), AIR 2008 SC 1747 .

75 *Shivappa v State of Karnataka* 2008 Cr LJ 2992 (SC), AIR 2008 SC 1860 .

76 *State of Uttar Pradesh v Dan Singh & ors* (1997) Cr LJ 1150 (SC) .

77 *Balo Yadav & ors v State of Bihar* (1997) Cr LJ 3395 (SC) ; *Madugula Nageswara Rao v State of Andhra Pradesh* (2000) Cr LJ 1033 (AP) (DB) ; *Maghar Singh v State of Punjab* (2000) Cr LJ 3767 (P&H) (DB); *Malkhan Singh & ors v State of Uttar Pradesh* (2001) Cr LJ 933 (All) (DB) ; *Balachandran & ors v State of Kerala* (2001) Cr LJ 2372 (Ker) (DB) ; *Pamy & ors v State of Uttar Pradesh* (2001) Cr LJ 2500 (All) (DB) ; *Subash Chander v Krishan Lal & ors* (2001) Cr LJ 1825 (SC) ; *Dilip Kumar Singh alias Chedi Singh v State of Bihar* (2001) Cr LJ 3820 (Pat) (DB) ; *Chandrashekhar Bind v State of Bihar* (2001) Cr LJ 4693 (SC) ; *Vithal Tukaram More & ors v State of Maharashtra* (2002) Cr LJ 3546 (SC) ; *Saju v State of Kerala* (2001) Cr LJ 102 (SC) ; *Pipal Singh v State of Punjab* (2001) Cr LJ 740 (SC) ; *Hardeep v State of Haryana & anor* (2002) Cr LJ 3939 (SC) ; *Babu Singh v State of Punjab* AIR 1996 SC 3250, (1996) Cr LJ 2503 (SC) ; *Rami Reddy Venkatasubha Reddy v State of Andhra Pradesh* (2002) Cr LJ 770 (AP) (DB) .

78 *Jagnarayan Dusadh & anor v State of Bihar* (1998) Cr LJ 1110 (SC) ; *Singha Magan Gamit v State of Gujarat* (1999) Cr LJ 2111 (Guj) (DB) .

79 *Bhagwan Tana Patil v State of Maharashtra* AIR 1974 SC 21, (1974) Cr LJ 145 (SC), (1974) SCC 1 (Cr) 1; *Haji Hamsa v State of Kerala* AIR 1974 SC 902, (1974) Cr LJ 755, (1974) SCC (Cr) 515 ; *Abdul Haqi & ors v State of Uttar Pradesh* (2000) Cr LJ 885 (All) (DB) .

80 *Manoj alias Bhau v State of Maharashtra* (1999) Cr LJ 2284 (SC) .

81 *Asifkhan Haiderkhan Pathan & ors v State of Gujarat* (1998) Cr LJ 4458 (Guj) (DB) .

82 *Sartaj Muhammad & ors v State* (2001) Cr LJ 2823 (All) (DB) .

83 *Manubhai Chimanlal Senma (Senwa) & ors v State of Gujarat* (2001) Cr LJ 3275 (SC) .

84 *Chander Pal v State of Haryana* (2002) Cr LJ 1481 (SC) .

85 *Bhupan v State of Madhya Pradesh* (2002) Cr LJ 1474 (SC) .

86 *Muhaveer Prasad Verma v Surinder Kaur* AIR 1982 SC 1043 .

87 *State v Ravi alias Munna* (2000) Cr LJ 1125 .

88 *Jamuna v State of Bihar* AIR 1974 SC 1822, (1974) Cr LJ 890 (SC) .

89 *Subrati v State* (1959) All LJ 423 .

90 *State of Maharashtra v Tanaji Dagadu Chavan & ors* (1998) Cr LJ 4515 (Bom) (DB) .

91 *Hari Prasad v State* (2000) Cr LJ 1344 (All) (DB) .

92 *Ansar Pasha & ors v State of Karnataka* (2000) Cr LJ 5066 (Kant) (DB) ; *Thimma v State of Mysore* AIR 1971 SC 1871, (1971) Cr LJ 1314 (SC) ; *M/s Sanjay Cotton Co v Om Prakash Sheoprakash* AIR 1973 Bom 40 ; *Mst Kan Kanwari v State of Rajasthan* (1957) Cr LJ 688 (Raj) ; *Haste Ismail v Emperor* AIR 1937 Lah 593, (1937) 38 Cr LJ 1073 .

93 *Ansar Pasha & anor v State of Karnataka* (2000) Cr LJ 5066 (Kant) (DB) .

94 *Manish Dixit & ors v State of Rajasthan* (2001) Cr LJ 133 (SC) .

1 *Ibid*.

2 *State of Uttar Pradesh v Mohan & ors* (2001) Cr LJ 170 (SC) .

3 For details refer to s 294, *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

4 *Kodadi Srinivas Lingam & ors v State of Andhra Pradesh* (2001) Cr LJ 602 (AP) (DB) .

5 *Mithu Singh v State of Punjab* (2001) Cr LJ 1820 (SC) .

6 *Kuldeep Singh & ors v State of Rajasthan* (2001) Cr LJ 479 (SC) .

7 *Sonatan Mahato v State of West Bengal* (2001) Cr LJ 3470 (Cal) (DB) .

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82 *Alil Mollah & anor v State of West Bengal* (1996) Cr LJ 3842 (SC) .

83 *Lal Man & anor v State of Uttar Pradesh* (2000) Cr LJ 3336 (All) (DB) .

84 *Mahendra Singh & ors v State of Rajasthan* (1998) Cr LJ 1314 (Raj) (DB)*; Lahu Kamalkar Patil v State of Maharashtra* 2013 Cr LJ 603, 2013 (6) SCC 417 .

85 *Lahu Kamlakar Patil v State of Maharashtra* 2013 Cr LJ 603 (SC), 2012 (12) Scale 710, 2013 (6) SCC 417 .

86 *State of Rajasthan v Mahaveer & ors* (1998) Cr LJ 2275 (SC) .

87 *Kocher Maitheen Kannu Salim v State of Kerala* (1998) Cr LJ 2277 (SC) .

88 *Jaysingh alias Gangawa Mesraj Khararija & anor v State of Maharashtra* (1999) Cr LJ 1687 (Bom) (DB) .

89 *State of Orissa v Brahmananda Nanda* AIR 1976 SC 2488, (1976) Cr LJ 1985 (SC) .

90 *Bachchu & ors v State of Uttar Pradesh* (1999) Cr LJ 1967 (All) (DB) .

91 *State of Uttar Pradesh v Babu Singh & ors* (1999) Cr LJ 2396 (All) (DB) .

92 *Sahib Singh v State of Haryana* AIR 1997 SC 3247, (1997) Cr LJ 3956 (SC) .

93 *Jag Narain Prasad v State of Bihar* (1998) Cr LJ 2553 (SC) .

94 *State of Punjab v Rakesh Kumar alias Painta* (1998) Cr LJ 3604 (SC) .

95 *Mathura Yadav alias Mathura Mahato & ors v State of Bihar* (2002) Cr LJ 3538 (SC) .

96 *Satyanarayan Vithal Ambat v State of Maharashtra* (2006) Cr LJ 3662 (Bom) (DB) .

97 *Shankarlal v State of Rajasthan* (2004) Cr LJ 2874 (SC) (FB) .

1 *Ramlal Devappa Rathod v State of Maharashtra* (2006) Cr LJ 3689 (Bom) (DB) .

2 *State of Rajasthan v Taran Singh* (2004) Cr LJ 654 (SC) .

3 *Munshi Singh v State* (2004) Cr LJ 2975 (All) (DB) .

4 *Devatha Venkataswamy v Public Prosecutor, AP, High Court* (2003) Cr LJ 4332 (SC), AIR 2003 SC 3217 .

5 *Dalbeer Kaur v State of Punjab* AIR 1977 SC 472, (1977) Cr LJ 273 .

6 *Girish Yadav v State of Madhya Pradesh* (1996) Cr LJ 2159 (SC) .

7 *Chandra Mohan Tiwari v State of Madhya Pradesh* AIR 1992 SC 891, (1992) Cr LJ 109 (SC) ; *Anwaruddin v Shakoor* AIR 1990 SC 1242, (1990) Cr LJ 1269 (SC) .

8 *Mahuri Kishan & ors v State* (1996) Cr LJ 4017 (Ori) (DB) ; *Baithullah & anor v State of Uttar Pradesh* (1997) Cr LJ 4644 (SC) ; *Gurjit Singh v State of Haryana* 2015 Cr LJ 1955 (SC) (Testimony of widow and brother of the deceased not discarded); **See also***Golam Sarwar v State of West Bengal,* 2015 Cr LJ 1789 (Cal) (DB) .

9 *Rajesh Kumar v State of HP* 2009 Cr LJ 335, p 338 (SC), 2008 AIR SCW 6833 .

10 *State of Rajasthan v Kalbi* AIR 1981 SC 1390, (1981) Cr LJ 1012 ; *Roopa & anor v State of Rajasthan* (1998) Cr LJ 1848 (Raj) (DB) ; *Nikhil Soni v State of HP* 2015 Cr LJ 1299 (HP) (DB) (Evidence of sister and mother of the deceased believed).

11 *Mahendra Singh v State of UP,* 2015 (1) All LJ 182 (All) (DB) .

12 *Satish v State of Haryana* 2014 Cr LJ 838 (P&H) (DB).

13 *Gaindan Singh v State of UP* 2012 Cr LJ 2893, p 2897 (All) (DB) ; *Raj Prasad v State* 2008 Cr LJ (NOC) 1041 (All) (DB).

14 *Gita Rani Ghosh v State of West Bengal* 2012 Cr LJ 794, p 798 (Cal) (DB) .

15 *Gore Singh v State of UP* 2014 (4) All LJ 88, p 93 (All) .

16 *Sohan & anor v State of Haryana* (2001) Cr LJ 1707 (SC) .

17 *Jasbir & ors v State of Haryana* (2003) 1 AD 366 (SC) ; *SG Gundegowda alias Moganna v State* (1996) Cr LJ 852 (Kant) (DB) .

18 *Bheeru Lal v State of Rajasthan* 2009 Cr LJ 4118 (SC), AIR 2009 SC 3208, (2009) 9 SCC 119, 2009 (11) Scale 40 .

19 *Horilal Beersingh Yadav v State of Chhattisgarh* 2014 Cr LJ 271, p 274 (Chh) .

20 *State of Rajasthan v Darshan Singh* AIR 2012 SC 1973, 2012 AIR SCW 3036, 2012 (5) Scale 570, 2012 Cr LJ 2908 (SC) .

21 *State of AP v S Rayappa* 2006 Cr LJ 1616, p 1618, AIR 2006 SC 3709 .

22 *Sudarshan v State of Maharashtra* (2014) 12 SCC 312, 2014 Cr LJ 3232, (2014) 139 AIC 14 (SC) .

23 *Hem Raj v State of Haryana* 2005 Cr LJ 2152 (SC), AIR 2005 SC 2110, 2005 (7) Scale 457, (2005) 10 SCC 614 .

24 *Rama Shish Rai v Jagdish Singh* 2005 Cr LJ 669 (SC), AIR 2005 SC 335, JT 2004 (10) SC 594, 2004 (9) Scale 73, (2005) 10 SCC 498 .

25 *State of Kerala v MM Mathew* AIR 1978 SC 1571, (1978) Cr LJ 1690 ; *State of Gujarat v Raghunath & ors* AIR 1985 SC 1092, (1985) Cr LJ 1357 ; *Mahadeo v State of Uttar Pradesh* (1989) All LJ 475 ; *Aher Raja Khima v State of Sawashtra* AIR 1956 SC 217, (1956) Cr LJ 421 ; *Mongol v State* (1996) Cr LJ 4279 (All) (DB) .

26 *Behari Prasad etc v State of Bihar* (1996) Cr LJ 1653 (SC) .

27 *Balo Yadav v State of Bihar* (1997) Cr LJ 3395 (SC) .

28 *B Subba Rao & ors v Public Prosecutor High Court of Andhra Pradesh* (1997) Cr LJ 4072 (SC) .

29 *Balishwar Mandal & anor v State of Bihar* (1997) Cr LJ 4084 (SC) .

30 *State of Uttar Pradesh v Babu Ram* (2000) Cr LJ 2457 (SC) .

31 *Ambika Prasad & anor v State (Delhi Admn), Delhi* (2000) Cr LJ 810 (SC) .

32 *State of Karnataka v K Yarappa Reddy* AIR 2000 SC 185, (1999) JT 8 SC 10 ; *Jai Narain & ors v State of Uttar Pradesh* (2000) Cr LJ 3808 (All) (DB) .

33 *Hari Singh & ors v State of Bihar* (1999) Cr LJ 3921 (Pat) (DB) ; *Bahadur Nayak v State of Bihar* (2000) Cr LJ 2466 (SC) .

34 *Behari Prasad etc v State of Bihar* (1996) Cr LJ 1653 (SC) .

35 *Sita Ram Yadav & ors v State of Bihar* (2000) Cr LJ 1534 (Pat) (DB) ; *Punit Mandal & ors v State of Bihar* (2000) Cr LJ 1537 (Pat) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 302.

Punishment for murder.--

151. Evidence of Police officials

The statement of a police officer can be relied upon and even form the basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record.[36] Merely because the eyewitnesses happened to be police officers, it is not a ground to reject their testimony. The acquittal of the accused2405 persons for offences under ss 333 and 452, IPC recorded by the Trial Court was held not proper, and was set aside.[37]

152. Public Witness(es)--Non-Examination of

Once cannot lose sight of the ground realities that the members of the public are generally insensitive and reluctant to come forward to report and depose about the crime even though it is committed in their presence. Even otherwise, it will be erroneous to lay down as a rule of universal application that non-examination of a public witness by itself gives rise to an adverse inference against the prosecution or that the testimony of a relative of the victim, which is otherwise credit-worthy, cannot be relied upon unless corroborated by public witnesses. The conviction of the accused appellants under ss 324 and 329, IPC, was affirmed.[38]

153. Public Prosecutor may give up Witnesses during Trial[39]

Section 134 of the Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact. This provision of law makes it unnecessary to produce any particular number of witnesses to prove a fact in consonance with the maxim 'evidence has to be made and not counted'.

A public prosecutor may give up witnesses during trial to avert proliferation of evidence which could save much time of the court unless examination of such witness would achieve some material views. The witness, if examined, would only have helped in duplication of the same category of evidence as the other two eyewitnesses, the public prosecutor cannot be blamed for adopting the course of not examining him. If the accused thinks that the witness not examined by the prosecution would help the defence, it is open to the accused to examine him as a defends witness.[40] In murder cases, it is primarily for the prosecutor to decide which witness he should call to unfold the prosecution story. If a large number of persons have witnessed the incident it would be open to the prosecutor to make a selection of those witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenience from the witness box.[41] Similar sentiments were echoed by the Apex Court in some other cases.[42]

When the prosecution failed to examine the injured witness and the explanation offered was that the said witness was gained over, no adverse presumption against the prosecution can be drawn under s 114, illust (g) of the Evidence Act.[43] It is clear from s 231, CrPC, that the public prosecutor is expected to produce evidence 'in support of the prosecution' and not in derogation of the prosecution case. If there are2406 too many witnesses on the same point, the public prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects. Similarly, when there are too many injured witnesses, applying the same principle, the public prosecutor is not obliged to examine all of them if he is satisfied by examining any two or three of them, it is open to him to inform the Court that he does not propose to examine the remaining persons in that category to avoid repetition of evidence on the same point and to lessen the work load of the Court.[44]

154. Two Categories of Witnesses--Duty of Prosecutor

The situation in a case where the prosecution cited two categories of witnesses to the occurrence, one consisting of persons closely related to the victim and the other consisting of witnesses who have no such relation, the public prosecutor's duty to the Court may require him to produce witnesses from the latter category, also subject to his discretion to limit to one or two among them. But if the public prosecutor received reliable information that any one among that category would not support the prosecution version he is free to state such fact in court excuse the witness from being examined as a prosecution witness. It is open to the defence to cite him and examine him as a defence witness. The decision in this regard has to be taken by the public prosecutor in a fair manner. He can interview the witness beforehand to eanble him to know well in advance the stand which that particular person would be adopting when examined as a witness in court.[45]

Evidence of Senior Police Officers as Defence Witnesses on Basis of Case Diary

etc. should not be Allowed by the Court

Where in a murder case the deputy superintendent of police and the additional district superintendent of police were examined as defence witnesses, to testify that they had perused the case-diary prepared by the IO, and interrogated some of the accused and other persons and on such exercise found that three of the accused were innocent, the Apex Court held that the Court ought not to have permitted the defence to adduce this evidence as it is not legally admissible. It was also observed that if the result of investigation was to be made the basis of the Court's verdict regarding the guilt or innocence of an accused, there would be no need for a trial in a police case, for relying on the report submitted under s 173(2), CrPC, a court would be entitled to decide the fate of the person arraigned.[46]

155. Evidence of Stock Witness

In *Prem Chand v UOI* ,[47] the Apex Court while inviting attention to the perils likely to be caused to the judicial process if professional perjurers are kept captive by the police, to be pressed into service for proving 'cases', condemned in the strongest terms, the systematic pollution of the judicial process and the consequent threat to human rights of innocent persons. The Supreme Court further emphasised the need for the state to issue clear orders to the police department to free the process of2407 investigation and prosecution from the contamination of concoction through the expediency of stock filing of stock witnesses.

A person who has given evidence on behalf of the police more than 23 times in the court of law, would clearly expose the fact that he was a stock witness readily available in the hands of the police. The evidence of such a witness is highly doubtful as he seems to be a false witness utilised by the police to give evidence in support of the prosecution case.[48] The evidence of persons appearing as prosecution witnesses, four or five times in police cases, hardly carries any value in court.[49]

156. Evidence of Reliable Witnesses Establishing the Presence of other Witnesses

When the Trial Court accepted evidence of two witnesses establishing the presence of other eyewitnesses at the place of incident, the presence of such other witnesses cannot be doubted by it merely on the ground that they were not residents of the same locality or on the ground of failure of police to seize their blood stained clothes or to promptly examine them under s 161, CrPC .[50]

157. Delayed Examination of Eye-Witness under Section 161CrPC

In the presence of the wife PW1 (First informant) when she along with her deceased husband was waiting at the bus stand, the accused appeared, assaulted the deceased with knives causing death. FIR was filed by wife (PW1) instantly, but her statement under s 161, CrPC was recorded after 13 days, and the delay was not explained. In the inquest report name of the informant was entered in different ink which showed that when the inquest report was prepared, FIR had not been filed. Accused was held entitled to benefit of doubt, and acquitted of charge under ss 302 / 34, IPC .[51]

158. Evidence of Witness cannot be Discarded on the Plea that Police Statement was given under Threat

The plea that the witness had given her police statement under threat that if she did not give such statement she would be involved in the incident, so no reliance whatsoever should be placed on her evidence, and such evidence cannot be accepted. It is difficult to appreciate how for this reason the evidence given by the witness in the Court could be discarded. The witness being the wife of the younger brother of the accused, it was quite likely that she did not want to state in the Court all that she had stated

before the police and therefore, deposed about those facts which she could not have denied.[52]

Eyewitnesses not Stating under Section 161 , Code of Criminal Procedure 1973, which blow was given by which Accused

When eyewitnesses had received injuries during the very incident; and therefore, their presence at the time of incident has to be believed, merely because they have2408 not stated in their statements under s 161, CrPC which blow was given by which accused, their evidence cannot be discarded if it is found to be otherwise reliable.[53]

Witness not Confronted with Statement under Section 161 , Code of Criminal Procedure 1973--Court cannot Draw Adverse Inference Regarding Statement of Witness--Correct Procedure to be Followed

Section 162, CrPC[54] interdicts the views of any statement recorded under s 161, CrPC except for the limited purpose of contradicting the witness examined in the trial to whom such statement is attributed.[55] However, s 162, CrPC does not impair the special powers of the Court under s 165 Indian Evidence Act[56] which authorises the Court to question a witness in order to secure the ends of justice,[57] but it must be remembered that the said procedure can be followed only when the witness is in the box. Bearing the above two modes and statement recorded under s 161, CrPC, can only remain fastened up at all stages of the trial in respect of that offence. In other words, if the Court has not put any question to the witness with reference to his statement recorded under s 161, CrPC, it is impermissible for the Court to use that statement later even for drawing any adverse impression regarding the evidence of that witness. What is interdicted by the Parliament in direct terms cannot be obviated in any indirect manner.[58] The correct procedure to be followed would assume to be to first ask the witness whether he/she made the previous statement. If the witness returns the answer in the affirmative, the previous statement in writing need not be proved and the cross-examiner may, if he so chooses leave it to the party who called the witness to have the discrepancy, if any, explained in the course of re-examination. If on the other hand, the witness denies having made the previous statement attributed to him or states that he does not remember having made any such statement, and it is desired to contradict him by the record of the previous statement, the cross-examiner must read out to the witness the relevant portion or portions of the record which are alleged to be contradictory to his statement in court and give him an opportunity to reconcile the same if he could.[59] Merely allowing the public prosecutor to cross-examine the witness without inviting the attention of the witness to his earlier contrary statement under s 161, CrPC is of no use.[60]

159. Statements under Section 161 , Code of Criminal Procedure 1973 of the Witness in two Different Incidents

Where the statement of a witness is recorded under s 161, CrPC, in two incidents though one incident has followed the other, they did not overlap each other and both incidents were distinct and separate, the statements made before the 10. Cannot be used for the purpose of cross-examining a witness within the meaning of the first part of s 145 of the Evidence Act to establish a contradiction between one statement and another.[61]2409

160. Two Sets of Contradictory Witnesses

Where there is evidence of two sets of witnesses and each set contradicts the other, both sets of witnesses stand discredited and therefore cannot be relied upon.[62]

Where there is major discrepancy and contradiction between statements of one witness and the other, it not only creates a grave suspicion regarding an accused person being part of the offence but also make his presence doubtful at the place of occurrence.[63]

161. Evidence of Defence Witnesses

Defence witnesses are entitled to equal treatment with those of the prosecution, and courts ought to overcome their traditional instinctive disbelief in defence witnesses. 'Quite often they tell lies but so do the prosecution witnesses'.[64]

162. Reliability and Credibility of a Witness

It is not that every discrepancy or contradiction that matters much, in the matter of assessing the reliability and credibility of a witness or the truthfulness of his version. Unless the discrepancies and contradictions are so material and substantial, and are in respect of vitally relevant aspects of the facts deposed, the witnesses cannot straightaway be condemned and their evidence discarded in its entirety.[65]

Evidence of Statement of Person in another Criminal Case

The copy of statement of a person in another criminal case, who is not examined in the later case cannot be relied upon by the Court to disbelieve the presence of eyewitness at the time of occurrence.[66]

Reaction of Witnesses on Seeing the Incident

Criminal courts should not expect a set reaction from any eyewitness on seeing an incident like murder. If five persons witness one incident, there could be five different types of reactions from each of them. It is neither a tutored impact nor a structured reaction which the eyewitness can make. It is fallacious to suggest that witnesses would have done this or that on seeing the incident. Unless the reaction demonstrated by an eyewitness is so improbable or so inconceivable from any human being pitted in such a situation it is unfair to dub his reactions as unnatural.[67] Thus, the disbelief by the High Court of the statement of an eyewitness on the ground that during the incident she did not shout or cry but remained calm, was found not proper.[68] No fixed pattern of natural conduct can be laid down as different as a2410 witness would react in a different manner in the same situation.[69] Conduct of the mother who did not raise a hue and cry when she found that her son was shot at or atleast when she apprehended that the assailant was about to shoot her son cannot be said to be unnatural.[70]

Even Corroborated Evidence of three Eyewitnesses not Enough to Prove Guilt when Large Number of Accused are Involved

Where a large number of people are accused of committing a crime and are said to be charged with the aid of s 149, IPC, the Court should be extremely careful in scrutinising the evidence, and prudence demands in such cases that the prosecution case should be supported by two, three or more witnesses who give a consistent account of the incident.[71] Where it is seen that a large number of people exceeding 500 in number were alleged to have taken part in this incident and nearly 22 prosecution witnesses have supported this part of the prosecution case in which the courts below believed the case of the prosecution in regard to only 36 of them, who have been convicted for their part in the second incident. Taking into consideration the nature of the attack and the possibility or otherwise of identification of these accused persons by the prosecution witnesses, and bearing in mind the principles laid down by this court in the above-cited judgments, it is not safe to rely on the evidence of witnesses who speak generally and in an omnibus way without specific reference to the identity of the individuals and their specific overt acts in regard to the incident that took place in the *Harijan Basti.* In view of the large number of accused implicated in this incident and the simultaneous nature of attack as stated by the prosecution witnesses, as a rule of prudence it is necessary to fix a minimum number of witnesses needed to accept the prosecution case to base a conviction.[72] When the three prosecution witnesses have implicated all the accused persons and though the presence of the witnesses at the place of the incident cannot be doubted, it is difficult to accept that the three witnesses could have noticed and identified all the accused numbering 64, out of nearly 500 participants in the incident. Likewise, conviction cannot be based on the testimony of the three witnesses. However, if evidence of these three witnesses is supported/corroborated

by one or more reliable witnesses, then the conviction of the accused can be safely based.[73]

Contradiction between Statements of Witnesses

The insignificant contradiction in the testimony of the witnesses as to whether the victim received knife blows in standing or lying posture should be ignored.[74]

Witness Narrating Incident to Other Witness--Corroboration of Their Testimony

In *Smt Chander Kala v Ram Kishan* ,[75]an incident which took place on 10 March was narrated by the victim to some of her colleagues on 11 March and it was held that the testimony of her colleagues was admissible under s 157 of the Evidence Act and2411 could be used for the purpose of seeking corroboration to the testimony of the victim. Thus, the testimony of the prosecution witness who had reached immediately after the incident had happened and to whom the other prosecution witness had narrated the incident and the role played by the three accused persons in causing the death of his brother by firing upon him can be used for corroboration to the testimony of the said other witness.[76]

Evidence of two Eyewitnesses who did not see each Other

Where the two eyewitnesses produced by the prosecution stated that they saw the accused giving a death blow to the deceased while they were ploughing their field, and yet saw that other witnesses were not present, a reasonable doubt about the presence of either of the two witnesses at the scene of occurrence would create a serious doubt in the mind of a reasonable man regarding presence of these witnesses as to whether there was any eyewitness to the incident.[77]

Evidence of Witness with Weak Eyesight

It is unsafe to convict the accused on the sole testimony of an eyewitness who admits his eyesight to be weak and does not depose to any of injury inflicted, nor what has been done by other accused persons.[78]

Evidence of Advocate Conducting Defence Case

Where learned counsel was conducting the defence case, right from the beginning till defence witnesses were examined, and at the stage of final arguments an application was filed on the behalf of the defence where this advocate entered as a defence witness, the trial court simply observed that this advocate was an interested witness and if he had personal knowledge in the matter, he should not have conducted the defence in the case; but the Division Bench of the High Court of Allahabad took a serious view, observing that it was not befitting his noble profession to have conducted the defence in the case, when he knew fully well that he was a witness to suggest innocence of the accused and when he had sworn an affidavit at the initial stage of the proceedings, the High Court directed that a report in this regard must be made to the Bar Council by the sessions judge for appropriate action against the concerned advocate who had failed to maintain the high standard of professional ethics.[79]

Evidence of Witness cannot be Contradicted by Citing another Witness

The general rule of evidence is that no witness shall be cited to contradict another witness if the evidence is intended only to shake the credit of another witness.

The said rule incorporated in s 153 of the Evidence Act has only two exceptions. One is that if the witness denies having been previously convicted, then evidence can be adduced to prove that he was convicted. The other exception is the following:

"...

Exception 2.--If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.2412

Illustration (d) cited in s 153 amplifies the aforesaid exception no 2. That illustration is extracted below:

...

(d) *A* is asked whether his family has not had a blood feud with the family of *B* against whom he gives evidence. He denies it.

He may be contradicted on the ground that the question tends to impeach his impartiality."

The basic requirement for adducing such contradictory evidence is that the witness whose impartiality is sought to be contradicted with the help of such evidence, should have been asked about it and he should have denied it. Without adopting such preliminary recourse it would be meaningless, if not unfair, to bring in a new witness to speak something fresh about a witness already examined.[80] The rule limiting the right to call evidence to contradict a witness on collateral issues excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute.[81] As the general rule of evidence is one of prohibiting evidence on collateral issues and since it is only by way of exception that such evidence can be permitted, the Court must guard that the defence evidence falls strictly within the exception.[82]

Evidence of Eyewitnesses Attracted to the Spot by Dogs Barking

Where one of the witnesses stated that she was awakened only by the barking of dogs who used to be unchained during night hours, and further stated that the dogs stopped barking immediately after the firing, which was most unusual, all the eyewitness were attracted to the spot by the barking of dogs and it appeared that the barking of dogs was introduced in evidence purposely, and it would have been proved, then a mention of this ought to have been there in the FIR; this serious omission in the FIR created a grave doubt in the witnesses having been awakened before the victim was fired upon, making the witness unreliable.[83]

Conduct of Eyewitness in Not Saving the Deceased

The conduct of the eyewitness in not making any attempt to save the deceased who was his grandmother and with whom he was living is not natural. The explanation of the witness that he was frightened due to the sudden attack is also not normal or natural as he was healthier than the accused. His natural instinct

and normal conduct would have been to take all steps to save his grandmother, particularly when he had been called to live with her in her hut and cultivate her land.[84]

Unnatural Conduct of Witness

Merely because the evidence of father of the deceased shows that he acted in an unnatural manner, *i.e.*, he left the spot seeing his son being attacked and did not return for a long period, per se, is not a determinative factor to throw out otherwise cogent prosecution evidence. Every person cannot act or react in a particular or very same way and it would depend upon the mental set up of the person concerned and the extent and nature of fear generated and consequently on the spot his reaction in a2413 particular way has to be viewed on the totality of all such circumstances.[85] The conduct of husband of the deceased in not taking her to hospital and not lodging report was not unnatural as their marriage took place only 21/2-3 months prior to incident and Gauna had not taken place, more so, he was threatened by the accused.[86] The witnesses, brothers of the deceased stated that on hearing the sound of firing they came out from inside their house and saw the accused running away with a pistol and the deceased lying injured having sustained a gunshot injury, unnatural conduct on part of said witnesses in not taking the deceased who was precariously injured first to hospital makes evidence of witnesses doubtful in view of some other several infirmities also. So, conviction of the accused on the basis of their evidence, not proper.[87] The prosecution case for establishing motive was that the accused was harassing mother of the deceased and had been rebuked for that. It was also stated that on several occasions the accused wanted to sexually assault the mother of deceased and to ensure that she is not left alone, the deceased was asked to accompany her. In this background it is improbable and unnatural that mother of the deceased would permit the deceased to go with the accused and would not take any precaution when she claimed to have seen the deceased in the company of the accused.[88]

163. Recalling of Witness for Cross-examination

In a serious case of murder when the accused persons were given sufficient opportunity to cross-examine the witness, and if during cross-examination the criminal was not put questions which ought to have been put, cannot give the accused persons the right under s 311, CrPC,[89] to recall the witnesses for cross-examination.[90] When an application is filed by the defence for recalling a witness under s 311, CrPC, the Court has to satisfy itself with the reasons assigned for recalling the witness. The practice of recalling witnesses should be deprecated.[91]

Prosecution Witness Stating Accused (With 60 Percent Disability) Ran Away

Where one of the accused was afflicted by polio on his lower limbs with nearly 60 percent disability in his legs due to which he was hardly able to stand or walk, the statement of the witness that he ran away from the place of incidence cannot be treated as false, solely on the ground that the word used by him was that the accused also ran away; what the witness actually meant was that the accused alongwith other assailants left the place of the incident before the sarpanch could come to the place of the incident. Further, the prosecution story that the accused with the disability caught hold of the hands of an adult lady right through the assault, is also reliable as disability was confined only to the legs of the accused and was only in regard to his walking.[92]2414

164. Affidavits of Prosecution Witnesses in Advance

Where the defence side examined a notary public who gave evidence that PW1 to PW10 had visited his office, and sworn affidavits, the contents of which were read out by him to these witnesses and these affidavits were filed before the sessions court in a murder case. The defence also examined a municipal councellor who claimed to have identified these witnesses, and another defence witness, a fingerprint expert, was examined to prove thumb impressions of witnesses PW1 to PW10 on the affidavits. In these affidavits PW1 to PW10 stated that they did not see the occurrence. However, when confronted with the affidavits, these witnesses denied them. The practise adopted by the defence side in getting the affidavits

of these witnesses in advance is to be deprecated. That, in a way, amounts to an attempt aimed at dissuading the witnesses from speaking the truth before the Court. The witnesses also appeared to be illiterate. Their so called affidavits must have been either concocted or obtained by playing fraud on them. This type of interference in criminal justice is not be encouraged and is to be viewed seriously.[93]

165. Evidence of Criminal Witness

The admitted position of law is that enmity is a double edged weapon which can be a motive for the crime as also a ground for false implication of accused persons. In case of inimical witnesses, the courts are required to scrutinise their testimony with anxious care to find out whether their testimony inspires confidence, to be acceptable notwithstanding the existence of enmity. Where enmity is proved to be the motive for the commission of the crime, the accused cannot be urge that despite proof of motive of the crime, the witnesses proved to be inimical should not be relied upon. Bitter animosity is a double edged weapon instrumental for false involvement or for witnesses inferring and strongly believing that the crime must have been committed by the accused. Such possibility has to be kept in mind while evaluating the prosecution witnesses regarding the involvement of the accused in the commission of the crime. Testimony of eyewitnesses, which is otherwise convincing and consistent, cannot be discarded simply on the ground that the deceased were related to the eyewitnesses or previously there were some disputes between the accused and the deceased or the witnesses. The existence of animosity between the accused and the witnesses may, in some cases, give rise to the possibility of the witnesses exaggerating the role of some of the accused or trying to rope in more persons as accused persons for the commission of the crime. Such possibility is required to be ascertained on the facts of each case. However, the mere existence of enmity in the case, particularly when it is alleged as a motive for the commission of the crime cannot be made a basis to discard or reject the testimony of the eyewitnesses, the deposition of whom is otherwise consistent and convincing.[94]

Evidence of Eyewitnesses giving Different Versions of Colour of the Cow--Its Effect

Where in a murder case, one witness stated the colour of the cow to be white, another witness stated that the colour was '*dhawar'*, and still another witness stated its colour as '*sokan*' the different versions of colour of the cow assigned by prosecution witnesses cannot be a ground to throw away the presence of witnesses, the factum of2415 the witnesses milching cow at the place and time of occurrence has been clearly established and in such a melee, the witnesses may not be mindful of the colour of the cow.[1]

(XIII) CIRCUMSTANTIAL EVIDENCE

166. Bride Burning Cases

The fact that after deceased suffered burn injuries appellant himself carried her to hospital for treatment and remained present there throughout, until she expired, militates against the idea of his culpability. Appellant accused was acquitted of the charge under s 302, IPC .[2]

167. Accused not named in FIR--Acquitted

Accused appellant was not named in FIR by informant who was an eye-witness. His name was disclosed by him in Court. Other witnesses who named him were examined under s 161, CrPC with delay. No specific role was attributed to the accused appellant. He was acquitted of the charge under s 302, IPC .[3]

168. Circumstantial Evidence

Circumstantial evidence is that which relates to a series of other facts than the fact in issue; but which by experience have been found so associated with the fact in issue in relation of cause and effect that it leads to a satisfactory conclusion. It is one of the established principles of law that a witness may lie but not the

circumstances.[4]

Death by violence may be proved by circumstantial evidence,[5] but it is well settled that when evidence against an accused person consists only of circumstantial evidence, and not of direct oral evidence, it must be qualitatively such that on every reasonable hypothesis the conclusion must be that the accused is guilty.[6] In other words, in every case dependent wholly on circumstantial evidence, the court before recording a conviction on the basis of such evidence, must be firmly satisfied,[7] that:2416

(a) the circumstances, from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt;[8]
(b) the circumstances are of determinative tendency, unerringly pointing towards the guilt of the accused; and
(c) the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis except that of the guilt sought to be proved against him.

Child was left in the custody of the accused persons, and the dead body was found buried in the premises of the accused persons. No explanation by way of suggestion in cross examination or in the examination under s 313, CrPC was offered as to how the dead body was found buried in the hut of the accused which was in his exclusive use. It is now settled law that if the deceased was in the custody or in the company of the accused, then the accused must supply some explanation regarding the disappearance of the deceased. The conviction of the accused appellants under s 302, IPC was affirmed.[9]

No presumption against an accused can be drawn unless the circumstances proved are completely incompatible with the innocence of the accused.[10]

Rules to be Observed in Cases of Circumstantial Evidence

Sir Alfred Wills in his admirable book *Wills Circumstantial Evidence* lays down (in ch VI) the following rules specially to be observed in cases of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the *factum probandum;* (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.[11]

Test to be Satisfied by Circumstantial Evidence

In *Padala Veera Reddy v State of AP* ,[12] it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:2417

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.[13]

Two Inferences Emerging from Circumstantial Evidence

In *State of UP v Ashok Kumar Srivastava* ,[14] it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.[15]

169. Essential Ingredients

The essential ingredients to prove guilt of an accused person by-circumstantial evidence are:

(i) the circumstances from which the conclusion is drawn should be fully proved;
(ii) the circumstances should be conclusive in nature;
(iii) all facts so established should be consistent only with the hypothesis of guilt inconsistent with innocence;
(iv) the circumstances should be to a moral certainty and exclude the possibility of guilt of any person other than the accused.[16]

In the case of *Tarsem Kumar v Delhi Admn* ,[17] the Hon'ble the Supreme Court has held as under:

> When the case of prosecution solely rests on circumstantial evidence, the court has to be satisfied that (i) the circumstances from which conclusion of guilt is to be drawn has been fully established; (ii) all the facts so established are consistent only with the hypothesis of guilt of the appellant and they do not exclude any other hypothesis except the one sought to be proved; (iii) the circumstances on which reliance has been placed are conclusive in nature; and (iv) the chain of the evidence in the present case is such that there is no scope for any reasonable ground for a conclusion consistent with the innocence of the accused.2418

Panchsheel of Circumstantial Evidence

The *Panchsheel* of proof of a case based on circumstantial evidence, which are usually called the five golden principles, has been stated by the Apex Court and reiterated by the High Courts.[18] They read as follows:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established;
(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
(3) The circumstances should be of a conclusive nature and tendency;
(4) They should, exclude every possible hypothesis except the one to be proved; and
(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

170. Distinction Between Circumstantial and Direct Evidence

As evidence, there is no difference between direct and circumstantial evidence. The only difference is in that as proof, the former directly establishes the commission of the offence whereas the latter does so by placing circumstances which lead to irresistible inference of guilt.[19]

171. Circumstantial Evidence--Cumulative Effect of all Proved Facts Decisive

While appreciating circumstantial evidence, the Court has to adopt a very cautious approach, and should record a conviction only if all the links in the chain are complete, pointing to the guilt of the accused, and every hypothesis of innocence is capable of being negatived on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonable, capable of two inferences, the one in favour of the accused must be accepted. The circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent with the hypothesis of guilt. However, this is not to say that the prosecution must meet any and every hypothesis put forward by the accused howsoever far fetched and fanciful, nor does it mean that prosecution evidence must be rejected on the slightest doubt.[20]

It is a settled principle of law that circumstances relied upon by the prosecution must be fully established, and the chain of evidence furnished by these circumstances should be fully complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. In a case of circumstantial evidence, not only various links of evidence should clearly establish guilt of the accused, but it must also be such as to rule out reasonable likelihood of innocence of the accused. Where the various links satisfactorily make out a case and the circumstances point to2419 the accused as the probable assailant with reasonable definiteness and while pointing to the accused as regards the time and situation, and the accused offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence then such absence of explanation or false explanation would itself be an additional link which completes the chain. However, at the same time it has to be kept in mind that it does not mean by implication, that before the prosecution can succeed in a case resting upon circumstantial evidence alone it must meet any and every hypothesis suggested by the accused, however extravagant and fanciful it might be. In other words, when deciding the question of and sufficiency, what the Court has consider is the cumulative effect of all proved facts, each one which reinforces the conclusion of guilt and the combined effect of all those facts taken together if conclusive, and establishes the guilt of the accused, conviction would be justified even though it may be that any one or more of these facts by itself is not decisive.[21] In order to justify an inference of guilt, the circumstances from which such an inference is sought to be drawn, must be incompatible with the innocence of the accused. The cumulative effect of the circumstances must be such as to negate innocence of the accused and to bring home the offence beyond any reasonable doubt. Where the accused on being asked, offers no explanation or the explanation offered is found to be false, then that itself forms an additional link in the chain of circumstances to point the guilt.[22]

In a case based on circumstantial evidence, it is now well settled that circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond reasonable doubt and the established circumstances should be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence. In a case based on circumstantial evidence the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof. It is in the context of the above settled principles, that an analysis of the evidence led by the prosecution is made.[23]

Appellant accused mother killed her own 4 years old son with axe. She was seen near the dead body holding axe in her hand. Evidence of close relatives of the accused who deposed against her was found reliable, and as such believed. Prosecution case was corroborated by report of post-mortem. The plea of the Counsel for the accused that a mother would not commit the murder of her own son was discarded. She was convicted under s 302, IPC .[24]

Where the accused and the deceased (niece of the accused) alone were present inside the house when

the incident took place, the prosecution story that it was the appellant who had first shot the deceased and then attempted to commit suicide, stood proved. Accused was convicted on the charge of murder.[25] Both the appellant accused and the deceased spent a night together prior to the date of the incident.2420 There was also evidence that an altercation took place between the two. Injuries were found on the body of the deceased, and a rope was seized. Dead body was cremated hurriedly without giving any information to police. Appellant accused was convicted under s 302, IPC .[26]

The initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per s 106 of the Indian Evidence Act . Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused *etc*., non-explanation of death of the deceased may lead to a presumption of guilt.[27]

On basis of two circumstances *i.e.* motive of the appellants and that the death of the deceased was homicidal in nature, a suspicion may arise against the appellants that they were the persons who killed the deceased. However, suspicion cannot take the place of a valid evidence. The appellants could not be convicted on the basis of suspicion. Appellants were acquitted of the charge under ss 302 / 34, IPC .[28]

172. Circumstantial Evidence--Evidence of 'Last seen together'

The theory of being last seen together is one where two persons are seen together alive and after an interval of time, one of them is found alive and the other dead.[29] The circumstance that the accused and the deceased were last seen together alone is not sufficient to bring home the offence to the accused, particularly when there has been no motive proved which could have goaded the accused to kill the deceased.[30] The last seen evidence would not necessarily mean that the accused had killed his wife.[31] In prosecution for offence of murder the mere fact the accused and the deceased (the real brother of the accused) were together in the field prior to the occurence does not by itself lead to the irresistable inference that the accused must have murdered the deceased. Though it is ordinarily believed that when a person is accused of committing murder, the fact that the accused and the deceased were last seen together in the company of each other, and the failure of the accused to satisfactorily account for the disappearance of the deceased is considered a circumstance of incriminating character. However, that itself is not sufficient unless the same is established beyond reasonable doubt that the accused must have caused the death of the deceased.[32] The deceased was seen in the company of the accused by the mother of the deceased, one witness and shopkeeper. There was property dispute between the accused and the deceased. The blood found on the clothes of the accused2421 was of the blood group of the deceased. Conviction of the accused for offence under s 300, IPC was held proper.[33] The initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per s 106 of the Indian Evidence Act . Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recover of weapon from the accused *etc*., non-explanation of death of the deceased, may lead to a presumption of guilt.[34] In the absence of any suggestion as to how and where the deceased was done to death, it is not possible to record conviction of the accused on the basis of last seen evidence.[35] The only circumstance that the deceased was last seen alive in the company of the accused and that the dead body of the deceased was recovered at the instance of the accused from a part of the building which was near the residential position of the accused, is not inconsistent with the innocence of the accused, and on the basis of these two circumstances alone, it cannot be held that the accused was a party to the murder of the deceased.[36] When the presence of the accused and the deceased as being last seen together is doubtful, this evidence cannot be considered as a piece of circumstantial evidence against the accused.[37] The evidence of last seen of the accused with the deceased was found not reliable as the witness had not disclosed this fact to the son of the deceased or at the police station. The evidence of recovery at the instance of the accused was also found not acceptable. Accused appellants were acquitted of the charge under ss 302 / 34, IPC .[38] Prosecution case

was that the accused and the deceased had gone together to another village, but the deceased did not return. Two days later, the dead body of the deceased was found in the field. The witnesses could not depose the date on which they had seen the accused and the deceased going together, could not also give the identification mark(s) on the basis of which they identified the two. The conviction of the accused appellant under s 302, IPC was found not sustainable, and was set aside.[39] Evidence of last seen together was not found sufficient to record conviction of the accused under s 302, IPC). Where both the appellant husband, his deceased wife were living together in the same house, and the two did not have good relations as the deceased was short tempered, both were last seen together, conviction of the appellant husband under s 302, IPC was held proper.[40]

Charge against the appellant police officers was of abduction and murder. From the evidence of PW3 it was clear that terrorism was prevailing in the State of Punjab at the time when the seven persons were abducted and action was being taken by the police against the terrorists. When the seven persons abducted by the appellants did not go missing immediately after their abduction and were found in different police2422 stations in the State of Punjab and one of them was also found going in a gypsy at Amritsar, the Court cannot hold that the seven abducted persons were last in the custody of the appellants and hence they must discharge the burden under s 106 of the Evidence Act and must explain what they did to the seven abducted persons. The prosecution should have examined witnesses from amongst the police personnel or the Police Station to establish that the seven abducted persons were last seen in the custody of the appellants. The conviction of the two appellants under ss 302 / 120, IPC was found not sustainable, and was set aside.[41]

Last seen Evidencetime Lag of two Daysaccused Acquitted

There was evidence of prosecution witness that all the five accused and the deceased were seen together two days earlier to the incident. The High Court was justified in holding that the time lag made it difficult to connect A2 to A5 with the incident. There was no other evidence showing the involvement of the accused. Accused A2 to A5 were acquitted of the charge under s 300, IPC .[42]

The accused and the deceased were last seen going together in the evening, next day body of the deceased was found lying in the water course. Incriminating articles *viz.* iron plate, wooden leg of bed recovered from the house of the accused. Accused did not explain as to what happened to the deceased after they were last seen in the previous evening. Motive also proved as the accused had taken money from the deceased for securing job for him in the police department which the accused was not returning to the deceased. Conviction of the accused for offence under s 302, IPC was held proper and justified.[43]

The accused and the deceased had gone together for buying toddy, the deceased did not return, his dead body was recovered from the river the next evening. The body was recovered after more than 24 hours. Evidence was lacking to show that the accused and the deceased were seen together before the dead body was recovered. The prosecution witnesses examined in the case did not support the theory of last seen together. There was delay in filing FIR. The conviction of the accused under ss 302 and 201, IPC was found not sustainable and was set aside.[44]

The accused appellant was alleged to have committed rape and murder of minor girl. The testimony of the mother and the brother of the deceased that the accused was last seen in the company of the deceased was found reliable and as such believed. On the disclosure statements made by the accused, the clothes of the deceased and the accused, stained with human blood, were recovered. Accused appellant was convicted under ss 302, 376, IPC .[45]

Accused appellant was prosecuted on allegation that the accused committed the murder of his father-in-law and mother-in-law (two deceased). The prosecution evidence showed that the relations between the accused appellant and the two deceased were on visiting terms. The evidence did not prove that the blood on the clothes of the accused was that of the deceased. It was also not proved that at the time of the2423 occurrence, the accused appellant alone was in the house. Once that was clear and once it is found that the circumstances could not point out towards the guilt of the accused, without any other inference being probable, the accused must get the benefit of doubt. The conviction of the accused

appellant under s 302, IPC was set aside.[46]

Prosecution story was that the accused respondent committed murder of the deceased, amputated her legs and took away her silver anklets. Case was of circumstantial evidence. Evidence of last seen was found not reliable and was as such rejected. Prosecution evidence as to the time of the occurrence was scanty. The recovery of *khurpi* as offence weapon was also found doubtful. Acquittal of the accused respondent for offences under ss 394 and 302, IPC was upheld.[47]

There was no evidence that both the appellant and the deceased were last seen together. The deceased was found lying in a pool of blood. FIR was filed again by unknown person. Finger print of the appellant accused was not found on the articles seized. Merely because the identity card of the appellant accused was found near the body of the deceased was not sufficient to record the conviction of the appellant. Accused appellant was acquitted for offence under s 302, IPC .[48]

After the complaint about a boy being missing was filed, telephone call was received demanding ransom amount. From the nearby place where the ransom amount was to be paid accused persons were arrested and on their pointing out, the dead body of the kidnapped boy was recovered. The accused persons could not explain their presence. Held, the circumstances proved beyond doubt that the accused persons committed the offence. Conviction of the accused persons under ss 363, 302 and 201, IPC was held proper.[49]

Prosecution story was that accused committed rape on a minor girl aged 6 years and committed her murder. There was reliable evidence of the eye-witnesses that the accused was carrying the deceased girl on cycle. The dead body of the deceased was recovered the next day from the sugar cane field. Evidence of last seen together was found reliable. Omission of the name of the accused in FIR was explained. Accused was convicted under ss 376 and 302, IPC .[50]

The two appellants accused brothers, committed the murder of the wife and children of their brother, having thrown acid on them. There was strong motive for the accused to liquidate the deceased to grab the property. On killing them, the accused became the immediate beneficiary to the estate left by the husband of deceased. No enmity with the accused could be proved by the evidence against the witnesses. Four eye-witnesses had seen one of the appellants accused coming out of the house of the deceased with acid in hand. There was also dying declaration of the elder daughter of the deceased. Conviction of the two accused appellants and acquittal of two other accused appellants was affirmed.[51]2424

The deceased, a deserted wife, had intimacy with the appellant accused and used to live in a hut and the accused frequently visited the house of the deceased and they lived there as husband and wife. During the lifetime of the deceased, the appellant used to harass and beat the deceased suspecting her fidelity. During night time on the previous day of the occurrence while the deceased was watching TV in the house of PW3, the appellant came to the house of PW3 and started beating the deceased and dragged her to the hut. On the next day morning, she was found dead. The police found one towel of the accused which was tied around the waist of the deceased and the rope was lying near the cot. The appellant accused was convicted under s 302, IPC .[52]

There was evidence of a teacher, an independent and responsible witness who deposed that he had seen the respondent accused and the deceased girl aged about 10 years going towards the orchard field. Dead body of the deceased victim was recovered from the orchard field. Evidence of last seen was found reliable. The accused could not explain the injuries/scratches found on his face. Appellant accused was convicted for offence under ss 302 and 376, IPC .[53]

There was evidence that the accused husband used to ill treat his deceased wife. Offence weapon recovered from the side of the body of the deceased belonged to the accused appellant. The evidence of 'last seen' was found reliable. Abscondence of accused for a period of 12 years was a great circumstantial evidence against the accused. Conviction under s 302, IPC was held proper.[54]

There was reliable evidence that the accused appellant was last seen in the company of the deceased. Half burnt discarded clothes of the accused were recovered by the police. The plea of alibi taken by the accused appellant was not established. Appellant accused was convicted for offence under ss 201 and 302, IPC .[55]

In the instant case there was evidence that the accused persons had stayed at the house of the deceased in the night, next day they left in the company of the deceased, and soon thereafter, the dead body of the deceased was recovered. At the instance of the appellant accused, articles belonging to the deceased were also recovered from the possession of the accused appellant and his uncle. The conviction of the appellant under s 302, IPC read with s 34, IPC was held proper.[56]

173. Circumstantial Evidence--Additional Link

Once the fact of 'last seen together' is proved, a duty is cast on the accused to explain the circumstances in which they parted company. The failure of the accused to explain the circumstances in which he parted company with the deceased may well serve as additional link in the chain of circumstances thereby fortifying the prosecution case.[57] Silence of inmates of the house about cause of the death of the2425 victim, would become additional link in chain of circumstances.[58] The accused absconding after incident is an additional circumstance which reinforces prosecution case, no explanation given by the accused as to where they were, indicates their guilty mind.[59]

It is a well settled principle that in a case of circumstantial evidence when the accused offers an explanation and that explanation is found to be untrue then the same offers an additional link in the chain of circumstances to complete the chain.[60] A false answer offered by the accused when his attention was drawn to a circumstance renders that circumstance capable of inculpating him. In such a situation a false answer can also be counted as providing 'a missing link' for completing the chain.[61] Where the accused on being asked, offers no explanation or explanation offered is found to be false, then that itself forms an additional link in the chain of circumstances to point out to the guilt.[62]

Recovery of dead body of the deceased from the house of the accused

The prosecution case that the appellant accused called the deceased at his house and committed his murder. The dead body of the deceased was recovered at the house of the appellant accused, no explanation was given by the appellant accused thereof. Conviction of the appellant accused under s 302, IPC was held proper.[63]

174. Circumstantial Evidence--Considerable Gap Between Last Seen Together and Death of the Victim or Recovery of Corpse--Effect

The theory of being last seen together can be considered a link in the chain when the case rests on circumstantial evidence. It is a well settled principle that merely because two persons are found together at a particular time and sometimes thereafter one of them was found unnaturally dead, the inevitable conclusion is not that the other is the author of the crime. Even if the prosecution version is accepted in the case that in the evening the deceased and the accused were seen going out together and the former was found dead in the morning, in the absence of any motive or material about the probable death of time, it would be difficult to positively establish theory that the deceased was last seen in the company of the accused as there is a possibility during the long gap of time that some other person might have come in between. In the absence of any further positive material to show that the accused and the deceased were together immediately before the death of the deceased, it cannot be conclusively held that the accused is the author of the crime. It is true that when two persons are seen together and immediately thereafter one of them is found dead, it would be a material link in the process of finding out as to who is the guilty person. When there is an explained time gap of considerable length, the evidence that at2426 some point of time prior to the discovery of the dead body the accused was found together with the deceased is not a conclusive link to fasten guilt on the accused.[64] Where the evidence shows that the accused was last seen with the deceased in the court at Pune on 1 August 1992 and the corpse of the deceased was recovered on 12 October 1993, since between the circumstance of being last seen and the recovery of the

corpse there was a very long gap of more than 14 months, it cannot be inferred from this circumstance that it was the accused who had murdered the deceased.[65]

The circumstance of last seen in order to constitute an incriminating circumstance in a murder case must be in a close proximity with the recovery of corpse of deceased. The rationale for this is that only in such a contingency would it probablise the inference that the person with whom the deceased was last seen in all probability murdered him, and unless such an inference is probabalised it would not be an incriminating circumstance.[66] Evidence establishing the 'last seen together' theory and the fact that after altercation and strangulation of the deceased, which was witnessed by PWS, the body of the deceased was recovered in pieces in presence of the witnesses, were fully established. The gap between the time when the accused persons were last seen with the deceased and the discovery of his mutilated body was quite small and the possible inference would be that the accused were responsible for commission of the murder of the deceased. Once the last seen theory comes into play, the onus was on the accused to explain as to what happened to the deceased after they were together seen alive. The accused persons failed to render any reasonable/plausible explanation in this regard. The conviction of the accused persons under ss 302 / 34 was held proper.[67]

The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt.[68]

175. Circumstantial Evidence--Short Gap Between 'Last Seen Together' and Death of Victim--Effect

The theory of being last seen together is one where two persons are seen together alive and after an interval of time, one of them is found alive and the other dead. If the period between the two is short, presumption as to the person alive being the author of death of the other can be drawn. Time gap should be such as to rule out possibility of somebody else committing the crime. The theory can be pressed into service effectively when the two persons last seen together were close friends or2427 persons who are likely to been seen together giving due margin to the time gap.[69] In the absence of any positive material to show that the accused and the deceased were together immediately before the death of the deceased, it cannot be conclusively held that the accused is the author of the crime. True, it is when the two persons are seen together and immediately thereafter one of them is found dead, it would be a material link in the process of finding out as to who is the guilty person.[70] Where the deceased and the accused were living together as husband and wife, they were seen together leaving with articles to shift residence, and after about two hours, the accused was seen alone and the deceased was not in his company when they had gone out together with a definite purpose, and the deceased was found missing, that is certainly a circumstance against the accused.[71]

The deceased was last seen going with the accused in the car of the accused. The injuries found in post-mortem examination on the person of the deceased were four days old. The gap of four days between the date when the accused was last seen with the deceased and the date of death of the deceased was held not long. Accused was convicted under s 302, IPC .[72]

176. Importance of Motive in Cases of Circumstantial Evidence

In *Tarsem Kumar v Delhi Admn* ,[73] the Supreme Court has laid down that where the case of the prosecution has been proved beyond all reasonable doubt on the basis of material produced before the Court, the motive loses its importance, but in a case based on circumstantial evidence, motive for committing the crime on the part of the accused assumes great importance. It was further emphasised that if each of the circumstances proved on behalf of the prosecution is accepted by the Court for the purpose of recording a finding that it was the accused who committed the crime in question, then even in the absence of any proof of a motive for commission of such crime the accused can be convicted. In

Budha Satya Venkata Rao v State of Andhra Pradesh ,[74] the Supreme Court again emphasised that in a case of circumstantial evidence, the aspect of motive assumes considerable importance. A similar view is taken in several other cases.[75] In the case of *Prem Kumar v State of Bihar* ,[76] the Apex Court held that if motive is proved or established, it affords a key or a pointer to scan evidence in the case, and as a satisfactory circumstance corroboration. It is a very relevant and important aspect:

(i) to highlight intention of the accused; and,2428
(ii) the approach to be made in appreciating the totality of circumstances including evidence discussed in the case.

Absence of motive cannot be said to be fatal to the prosecution case but motive assumes pertinent significance in a case solely based on circumstances, as existence of motive is an enlightening factor in the process of presumptive reasoning in such a case; the absence of motive, however, puts the Court on its guard to scrutinise the circumstance more carefully to insure that suspicion and conjecture do not take the place of legal proof.[77]

In a case of circumstantial evidence, motive helps in the process of presumptive reasoning. However, by itself it is not sufficient to convict a person.[78] Motive is a relevant factor in all criminal cases whether based on the testimony of eyewitnesses or circumstantial evidence.[79] It is well settled that merely because motive is neither alleged nor proved, the same would *ipso facto* not affect the prosecution case, but in case there are other circumstances to create doubt regarding veracity of the prosecution case, this may also become material.[80]

177. Missing Link in Chain of Circumstances--Effect

The prosecution case was that the accused stole gold ornaments of the deceased and murdered her. But the prosecution had failed to establish: (a) that the accused was seen by the neighbour in the house of the deceased on fateful day; (b) that the accused had got certain gold ornaments melted with the help of gold-smith; and (c) that the accused had sold two ingots of 60 grams and 35 grams each to a jeweller for a consideration of Rs 35,000. In view of the fact that the prosecution failed to prove these links in the chain of circumstances, it was held that the rest of the circumstances did not form a complete chain as to draw an irresistible inference that it is the accused and the accused alone who could have committed the murder of deceased. The accused was therefore held entitled to be acquitted.[81]

178. On Failure to Secure Eyewitnesses or their Support Prosecution can Rely upon Circumstantial Evidence

The question arises whether the prosecution can rely on circumstantial evidence on its failure to secure the presence of eyewitnesses. The question arose directly before the Apex Court in *Jagjit Singh v State of Himachal Pradesh* ,[82] and it was observed that when the presence of eyewitnesses could not be secured at all, it does not prevent the prosecution from relying on evidence though circumstantial in nature and if such evidence is sufficient to bring home the guilt, the conviction should follow. When the witnesses to the actual murder did not support the prosecution case during trial, the question for consideration was whether the circumstantial evidence would be sufficient to bring home the charge.[83]2429

179. Circumstantial Evidence--Accused Alongwith Other Accused Seen going Towards House of the Deceased

The fact that the accused was seen by the witness going with the other two accused persons towards the house of the deceased, by itself is not sufficient to establish the guilt of the accused in the absence of other circumstantial linking of the accused with the commission of the offence.[84]

180. Absconding

The accused cannot be said to be absconding merely because he was absent when the police reached at

his house.[85]Normally, courts are reluctant to attach too much importance to the act of absconding. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of guilt of the accused.[86] It, by itself, is not a strong piece of evidence against an accused.[87] The act of absconding, even if proved, is considered a somewhat weak link in the chain of circumstances utilised for establishing the guilt of an accused.[88] The Supreme Court in *Rahman v State of Uttar Pradesh* ,[89] stated that absconding, by itself, is not conclusive proof of guilt of an accused because one might abscond for fear or for any other allied reason. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime. Of course, it is a relevant piece of evidence to be considered along with other evidence, but its value depends upon the circumstances of each case. In *Mohinder Singh v State of Punjab* ,[90] the accused's absence from duty without any proper leave, his overstaying the period of leave, his setting up a false plea of alibi, and evading arrest for a period of more than two months were, in the light of the dying declaration of the deceased, held to be circumstances which could have, independently of any direct evidence, brought home the guilt of the accused. Similarly, the disappearance of the accused after the commission of the alleged crime is a circumstance, which in the absence of any plausible explanation, may be taken against him.[91]

Where the accused, who was on casual leave on the day of the occurrence, gave a false denial when he was questioned about his whereabouts during the relevant period, it was held that his false reply strengthens the prosecution case.[92] The accused absconding after incident is an additional circumstance which reinforces2430 prosecution case, no explanation given by the accused as to where they were, indicates their guilty mind.[1]

181. Circumstantial Evidence--Benefit of Doubt

The prosecution case was that the accused caused the death of the deceased brother of the informant by lathi blows. The dead body of the deceased was found in the courtyard of the house of the accused, the accused and members of his family were not present at that time in the house. Son-in-law of the informant did not disclose to anyone nor was it disclosed in the FIR that he had last seen the deceased and the accused together before the discovery of dead body. The blood stained earth and the *lathi* seized were not sent for forensic examination. All the chains of circumstantial evidence were not proved. Accused was held entitled to benefit of doubt, hence, his conviction under s 302, IPC recorded by the trial Court was set aside.[2]

182. Effect of Non-explanation by Prosecution of Injuries on the Accused

The Apex Court, in *Lakshmi Singh v State of Bihar* ,[3] on the aspect of non-explanation of injury on the person of the accused has laid down:

> In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the Court altercation is a very important circumstance from can draw the following inferences:
>
> (a) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version:
> (b) that the witnesses, who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable:
> (c) that in case there is defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case:
>
> The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses where the defence gives a version which competes in probability with that of the prosecution one.

It was further observed in the same case that:

> There may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit worthy, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries.

In *Hare Krishna Singh v State of Bihar* ,[4] the law laid down by *Mohan Rai v State of Bihar* ,[5] was considered and discussed in some detail and it has been laid down that:2431

> The obligation of prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. The burden of proving the guilt of the accused is undoubtedly on the prosecution. The accused is not bound to say anything in defence. The prosecution has to prove the guilt of the accused beyond all reasonable doubts. If the witnesses examined on behalf of the prosecution and believed by the court in proof of the guilt of the accused beyond reasonable doubt, the question of the obligation of the prosecution to explain the injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and in what circumstances injuries have been inflicted on the person of the accused.

Thus, non-explanation of the injury is a factor which is to be taken into consideration in judging the veracity of the prosecution witnesses and the Court should scrutinise their evidence with care. In some cases, the failure of the prosecution to count for the injuries of the accused may undermine its evidence to the core, while in others, it may have little or no adverse effect on the prosecution case. The entire prosecution case cannot be thrown over board simply because the prosecution witnesses do not explain the injuries, on the person of the accused.[6]

The omission on the part of the prosecution to explain the injuries on the person of the accused assumed much greater important where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case the two accused were admitted to the hospital after the occurrence. Their injuries were not explained by the two interested witnesses examined in the case. Accused persons were acquitted of the charge of murder under ss 302 / 34, IPC .[7]

Where the injuries sustained by the accused persons alleged to be received during the course of the incident are not on vital parts of the body and are as such insignificant, the non-explanation of those injuries cannot be advantageous to the defence nor can it be said that the prosecution, in not explaining those injuries, had suppressed the genesis of the incident.[8]

When the accused was examined by a doctor four days after the incident, where in the statement, the doctor stated that the injuries were simple in nature and could be self-inflicted, and no defence witness stated anything about the alleged attack with a hockey stick on the accused or about his private defence, the injuries on the person of the accused had no effect on the prosecution case.[9]

When the injuries on the person of the accused are in fact minor and small injuries, the prosecution is not obliged to explain the same and this non-explanation by the prosecution cannot be held to be fatal to the prosecution case, particularly when the2432 injured has been examined only five days after the occurrence and it is difficult to hold that these injuries have been inflicted in the course of the incident.[10] Same is the result if the injuries received by the accused are found to be minor and could be received as suggested by the prosecution,[11] In *Mohar Rai and Bharath Rai v State of Bihar* ,[12] it was observed:

> ...In our judgment, the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilities the plea taken by the appellants.

In *Mohar Rai and Bharath Rai v State of Bihar* ,[13] it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true. Likewise in *Lakshmi Singh and others v State of Bihar* ,[14] it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case. These aspects were highlighted by Supreme Court in *Vijayee Singh and others v State of UP.* [15]

Mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases and the said principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested and so probable, consistent and creditworthy that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.[16]

Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and congent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries. As observed by this court in *Ramlagan Singh v State of Bihar* ,[17] prosecution is not called upon in all cases to explain the injuries2433 received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In *Hare Krishna Singh and others v State of Bihar* ,[18] it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of prosecution to explain injuries by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, trifle and superficial injuries on accused are of little assistance to them to throw doubt on veracity of prosecution case[19] or injuries found on the person of the accused are superficial and not caused by the deceased.[20] However, when there is non-explanation of grievous injuries on the head of the accused and all eyewitnesses were related to the deceased victim, the accused is entitled to an acquittal.[21]

Before non-explanation of injuries on the person of the accused by the prosecution witnesses, may affect the prosecution case, the Court has to be satisfied of the existence of two conditions: (a) that the injury on the person of the accused was of a serious nature; and (b) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in all probability with that of the prosecution. Where the evidence is dear, cogent and creditworthy, and where the Court can distinguish truth from falsehood, the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses, and consequently the whole of the prosecution case.[22] The non-explanation of injuries on the person of the accused by the prosecution together with three days delay in sending the FIR, to the Magistrate thus creating doubt about the genuineness of time and date of recording of the FIR; the non-examination of the doctor performing the post-mortem examination; the CFSL report not suggesting involvement of the accused beyond all reasonable doubt, entitles the accused to the benefit of the doubt.[23]When the prosecution has failed to produce the injury report of the accused, an adverse inference can be drawn against it under s 114, expln (g) of the Evidence Act that the injury suffered by the accused was serious and therefore prosecution deliberately suppressed his injury report. The inference that injuries of the accused were manufactured cannot be reached and his2434 failure to

get his injuries examined for three days pales into insignificance for failure of the prosecution to prove injury report of the accused.[24] It is not an absolute rule of law that non-explanation by the prosecution of the injuries on the accused is bound to result in his acquittal, because if positive evidence of guilt of the accused is otherwise cogent and reasonable, failure of the prosecution to explain the injuries on him cannot compel an acquittal.[25]

In *Abdul Waheed v State of Maharashtra* ,[26] it was held that the mere presence of a number of injuries on the person of the accused is no ground to accept the defence version. The injury on the person of an accused may afford a ground to assume that the members of the party of the deceased were also armed with dangerous weapons, since otherwise, the injuries found on the body of the accused cannot be explained.[27] As regards the injuries on the person of an accused, the rule is that the prosecution is not, in all cases, obliged to explain them, and before an adverse inference is drawn against the prosecution for its alleged failure to explain their presence, it must reasonably be shown that in all probability, they were caused to him in die same occurrence in which the victim of the prosecution case was injured. It all depends upon the circumstances of each case as to whether the prosecution case has become doubtful.[28] When the injuries sustained on the person of the accused pertain to a different case, no question of explanation to such injuries by the prosecution arises.[29]

Where the injuries of the accused persons were not explained by the prosecution, and the main accused had died during the pendency of the appeal, surviving accused were entitled to benefit of doubt and acquitted of the charge of murder.[30]

Free fight between partiesnon-explanation of injuries of accused

In the case of a free fight in which large number of persons participated, there is a reasonable explanation for the injuries suffered by some of the members of the defence party.[31]

(XIV) SENTENCE IN MURDER CASES

183. Sentence--General

Even a casual glance at the provisions of the IPC will show that punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs, the punishments prescribed are strict, whereas, for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of punishment is left to the discretion of the judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed.[32]2435

Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a three-fold purpose: (i) punitive; (ii) deterrent; and (iii) protective.[33]

It is no doubt true that the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal *etc*., imposition of appropriate punishment is the manner in which the courts respond to the cry of the society for justice against criminals. Justice demands that the Court should impose punishment befitting the crime, so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of criminals, but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. While it is true that punishment disproportionately severe ought not to be passed but that does not even sloth the law courts, however, with an option to award the sentence which would be manifestly inadequate having due regard to the nature of the offence since an inadequate sentence would not subserve the cause of justice to the society.[34]

Different Schools Profess Different Punishments

Justice is supreme and justice ought to be beneficial to society so that society is placed in a better situation. Law courts exist for society and ought to rise to the occasion and subserve the basic requirement of society. It is a requirement of society and the law must respond to its need. The greatest virtue of law is its flexibility and its adaptability, it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day. In present day society, crime is considered a social problem and a tremendous change, even conceptually, is being seen in the legal horizon so far as the concept of punishment is concerned.

One school of thought on this score propagates that the function of the law court is that of a social reformer, and as such in its endeavour to act as such, the question of deterring punishment would not arise since society would otherwise be further prone to such violent acts or activities by reason of the fact that with the advancement of age the mental frame of boys of tender age also goes on changing and in the event of any arrogance being developed or a sense of revenge creeping into society, the society would perish to the detriment of its people. The other school, however, expressly recorded and expressed emphatically that unless the severest of severe punishments is inflicted on an offender (obviously depending upon the nature of the crime) society would perish.

The other school professes that since one has taken the life of another it does not mean that his life shall have to be taken but during the trial if it transpires that the method and manner or the nature of the activities has resulted in the elimination of a human being from this world, there should not be any laxity on the part of the law courts, otherwise, people will, and in turn the society, will be engulfed in a false sense of security of life in the event of a heinous crime.[35]2436

Sentence--Position Under Code of Criminal Procedure 1898

The legal position regarding award of sentence in murder cases under CrPC 1898 can be divided into two parts--*i.e.*, upto 31 December 1955 and wef 1 January 1956 to 31 December 1973.

(a) Sentence upto 31 December 1955--Before the Criminal Amendment Act 26 of 1955, for the offence of murder, death sentence was the rule, and transportation for life an exception and if the lesser penalty was to be awarded then sub-s (5) of s 367, CrPC 1898 required reasons to be given.[36] Sub-section (5) of s 367, which, as it then stood, was as follows:

> '...
>
> (5) If the accused is convicted of an offence punishable with death and the court sentences him to any punishment other than death, the court shall, in its judgment, state the reason why sentence of death was not passed
>
> ...'

(b) Position wef 1 January 1956 to 31 December 1973--By the Amendment Act 26 of 1955, sub-s (5) of s 367, CrPC was recast and the requirement of giving reasons for the lesser punishment was done away with. The former rule was thus no longer operative. The court has after 31 December 1955, discretion, to award either of the two penalties prescribed under s 302, IPC . The death sentence was exacted only where murder was perpetrated with marked brutality.[37] The determination of sentence in a given case depended on a variety of considerations, the more important being the nature of the crime, the manner of its

commission, the motive which impelled it and the character and antecedents of the accused.[38] After amendment of s 367 (5), CrPC 1898 by Act 26 of 1955, the discretion of the Court in deciding whether to impose the sentence of death or imprisonment of life has become wider.[39]

The Law Commission in its 35th report (vol 1), made the following comments on this provision:

> ...a considerable body of opinion is in favour of a provision requiring the court to state its reasons for imposing the punishment either of death or of imprisonment for life. Further, this would be good safeguard to ensure that the lower courts examine the case as elaborately from the point of view of sentence as from the point of view of guilt... It would increase the confidence of the people in the courts, by showing that the discretion is judicially exercised. It would also facilitate the task of the High Court in appeal or in proceedings for confirmation in respect of the sentence (where the sentence awarded is that of death) or in proceedings in revision for enhancement of the sentence (where the sentence awarded is one of imprisonment for life). In deference to this recommendation, see 60 of the Code of Criminal Procedure (Amendment) Act 1955 (XXVI of 1955) deleted old sub-s (5) of s 367 with effect from January 1, 1956, and thereafter, for such capital offences, it was left to the courts on the facts of each case, to pass, in its2437 discretion, for reasons to be recorded, the sentence of death or the lesser sentenced. Their led to some difference of opinion, whether even after the Amendment of 1955, in case of murder the normal punishment was death or imprisonment for life; (See AI a. Commentaries on the Code of Criminal Procedure, Vol 3, page 565, by DV Children and S Appu Rao).[40]

Sentence--Position Under Code of Criminal Procedure 1973

After coming into force of CrPC wef 1 January 1974, the position with regard to award of punishment is reverse of what it was before the Criminal Amendment Act 26 of 1955.[41] Thus, while before 1 January 1956, death sentence was the rule; but after 1 January 1974, imprisonment of life has become the rule and death sentence can be awarded by giving special reasons as provided under s 354(3), CrPC, death sentence has now become an exception unlike the position before 1 January 1956. On the question of awarding sentence for offences for which life imprisonment as well as death sentence is prescribed, sub-s (3) of s 354, CrPC enjoins that in case of sentence of death, special reasons for such sentence shall be stated. The provisions of the said section fell for consideration of the Supreme Court in *Bachan Singh v State of Punjab.* [42] The Supreme Court pointed out the change in the policy of sentencing thus: Section 354(3) of the CrPC, marks a significant shift in the legislative policy underlying the CrPC 1898 as in force immediately before 1 April 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the IPC were normal sentences. Now, according to the changed legislative policy which is patent on the face of s 354(3) the normal punishment for murder and six other capital offences under the IPC is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception.

And elucidated the principle for awarding proper sentence. It will be advantageous to note the following observations:

> ...for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. In many cases the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in no separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that special reasons can legitimately be said to exist. It may be noted that 'special reasons' necessary for imposition of death penalty must relate, not to crime as such, but to criminal. Criminal may not deserve death penalty though crime may be shocking.[43]

The principles laid down in *Bachan Singh v State of Punjab* [44] were applied in various cases by the Supreme Court. [45]Section 354, CrPC, makes it obligatory in cases of conviction for an offence punishable with death or with imprisonment for life or for a2438 term of years, to assign reasons in support of the sentence awarded to the convict, and further, ordains that in case the judge awards the death penalty, 'special reasons' for such sentence shall be stated in the judgment. When the law casts a duty on the judge to state reasons it follows that he is under a legal obligation to explain his choice of sentence. It may seem trite to say so, but the existence of the special reasons clause in the above provision implies that the Court can in fit cases impose the extreme penalty of death which negatives the contention that there never can be a valid reasons to visit an offender with the death penalty, no matter how cruel, gruesome or shocking the crime may be.[46]

Sentence--Whether Crime or Criminal or both should be Considered

All three views which form part of the present synopsis found favour separately with the Apex Court in different cases, though it may be interpreted as somewhat variant in approach by the Supreme Court in these cases. In *Bishnu Deo Shaw v State of West Bengal* ,[47] and also in *Shiv Mohan Singh v State (Delhi Administration)* ,[48] the Supreme Court took the view that the criminal, not the crime, must figure prominently in shaping the sentence where reform of the individual and rehabilitation into society, and other measures to prevent recurrence are weighty factors. However, in *Ravji alias Ramchandra v State of Rajasthan* ,[49] the Supreme Court held that it is the nature and gravity of the crime but not the criminal which are germane for consideration for appropriate punishment in a criminal trial.

However, the correct approach seems to be that there should be consideration of both circumstances for awarding sentence in a murder case. In *Bachan Singh v State of Punjab* ,[50] the Constitutional Bench of the Supreme Court has held that for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' within the meaning of s 354(3), CrPC, the Court must pay due regard to both the crime and the criminal. It was also observed that it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In *Ashok Kumar v State (Delhi Administration)* ,[51] the Supreme Court took the view that the Court has to consider the totality of factors bearing on the offence and the offender, and fix a punishment which will promote effectively the punitive objective of the law--deterrence and habilitation.

In *Apren Joseph v State of Kerala* ,[52] also the Apex Court has emphasised the need to consider the nature of the crime, the manner of its commission, motive which impelled it and the character and antecedents of the accused for determination of sentence. In *Shankar alias Gauri Shankar v State of Tamil Nadu* ,[53] the Supreme Court has held that the nature of the crime and circumstances of the offender should be so revealing that the criminal is a menace to society and the sentence of imprisonment for life would be inadequate and which is why death sentence is desirable. In *Dhananjay Chatterjee alias Dhana v State of West Bengal* ,[54] the Apex Court opined that the measure of punishment in a given case must depend upon the2439 atrocity of the crime, the conduct of the criminal and the defenseless and unprotected state of the victim. In *Bachan Singh v State of Punjab* ,[55] it was held that when the question of choice of sentence is under consideration, the Court must not only look to the crime and the victim, but also the circumstances of the criminal and the impact of the crime on the community.

184. Deterrent Punishment

The society survives on social values and commitment by social beings to conform to such values. This strengthens the social bonds which at times are stronger than the laws of the land, when the accused has, belligerently defied the social order, any leniency shown towards the accused, therefore, is likely to send wrong signals to the society apart from an adverse psychological fear in women folk. The crime against women is rising with extraordinary abnormality. The time is ripe when the courts will have to alarm themselves with the fact that too liberal attitude leading to disproportionately lesser punishments *viz.* the nature of crime, has encouraged the incorrigible anti-social elements. The bonanza of paroles, remissions, furloughs and/or en-block release of convicts on the eve of certain historical days by the Executive, has failed to serve any good rather has led the hard core criminals to believe as if 'life imprisonment' is just a temporary stay for a few years. The abnormal increase in crime against women is one of the root causes

in creating chaotic and fearful social conditions, especially for the downtrodden and middle class families who find themselves totally exposed to the lecherous eyes of the criminals. It is high time that deterrent punitive measures are taken, failing which we will land ourselves in a situation of no return. It is in this context and backdrop that we find the accused not only guilty of committing ruthless crime against the two victims but equally guilty of committing a crime against the society.[56]

Just and Appropriate Sentence Based on Aggravating and Mitigating Factors

With regard to the quantum of punishment, the IPC gives very wide discretion to the court in the matter of awarding punishment. The maximum and minimum punishments are prescribed under the Code and it is left to the discretion of the court to award appropriate punishment having regard to the aggravating and mitigating circumstances in each case. Though there are no general guidelines for purposes of awarding punishment, yet it is judicial discretion that guides the Court in the matter of sentencing.[57]

No formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime of murder. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime of murder, the discretionary judgment in the facts of each case, is the only way in which such judgment may equitably be distinguished.[58] The choice as to which one of the two punishments provided for murder is a proper one in a given case will depend upon the particular circumstances of that case and the Court has to exercise its discretion judicially and on well-recognised principles after balancing2440 all mitigating or aggravating circumstances of the case.[59] Shockingly, a large number of criminals go unpunished, thereby increasing and encouraging criminals and ultimately making justice suffer by weakening the system's credibility. Justice suffer by weakening the system's credibility. The imposition of appropriate punishment is the manner in which the court responds to society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that the courts reflects the public abhorrence of the crime. The Court must not only keep in view the right of the criminal but also the rights of the victim of the crime, and the society at least while considering the imposition of an appropriate punishment.[60] It is the nature and gravity of the crime but not the criminal which are a germane consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society in which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant, but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abbhorence and it should respond to society's cry for justice against the criminal. If for an extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, adequate deterrent punishment is not given, the case of deterrent punishment will lose its relevance.[61] In the matter of death sentence, the courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect society and to deter the criminal in achieving the avowed object of law by imposing an appropriate sentence. It is expected that the courts would operate the sentencing system to impose such sentence which reflects the conscience of society, and the sentencing process has to be stern where it should be.[62] For deciding a just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced in a dispassionate manner is indeed a difficult test.[63]

The law courts as a matter of fact have been rather consistent in the approach that reasonable proportion has to be maintained between the seriousness of the crime and the punishment. While it is true that a sentence disproportionately severe ought not to be passed, but that also does not clothe the law courts with the option to award the sentence which would be manifestly inadequate having due regard to the nature of the offence since an inadequate sentence would fail to produce a deterrent effect on society at large. Punishments are awarded not because of the fact that it is an eye for an eye or a tooth for tooth rather than having its due impact on the society, while undue harshness is not required yet inadequate punishment may lead to sufferance of the community at large.[64] It is true that in a civilised society a tooth for tooth or death for death is not the rule but it is equally true that when a man becomes a beast and a menace to society, he can be deprived of his life according to the procedure established by law, as the

Constitution itself has recognised the death sentence as a2441 permissible punishment for which sufficient constitutional provision for an appeal, reprieve and the like have been provided under the law.[65]

Principle of Proportion between Crime and Punishment

The principle of proportion between crime and punishment is a principle of just desserts that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed the requirement that punishment not be disproportionately great, which is a corollary of just desserts, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.[66]

Criminal law adheres, in general, to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case.

Judges in essence affirm that punishment ought always to fit the crime; yet in practice, sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence, sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.[67]

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact quite apart fom those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.[68]

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, eg, where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter-productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.[69]2442

No Foolproof Formula for Proportion Between Crime and Sentence

Proportion between crime and punishment is a goal respected in principle, and despite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times on account of misplaced sympathies to the perpetrator of crime, thus leaving the victim or his family into oblivion. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the gravity of the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Councle MCGDAUTHA v State of California* ,[70] that no

formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.[71]

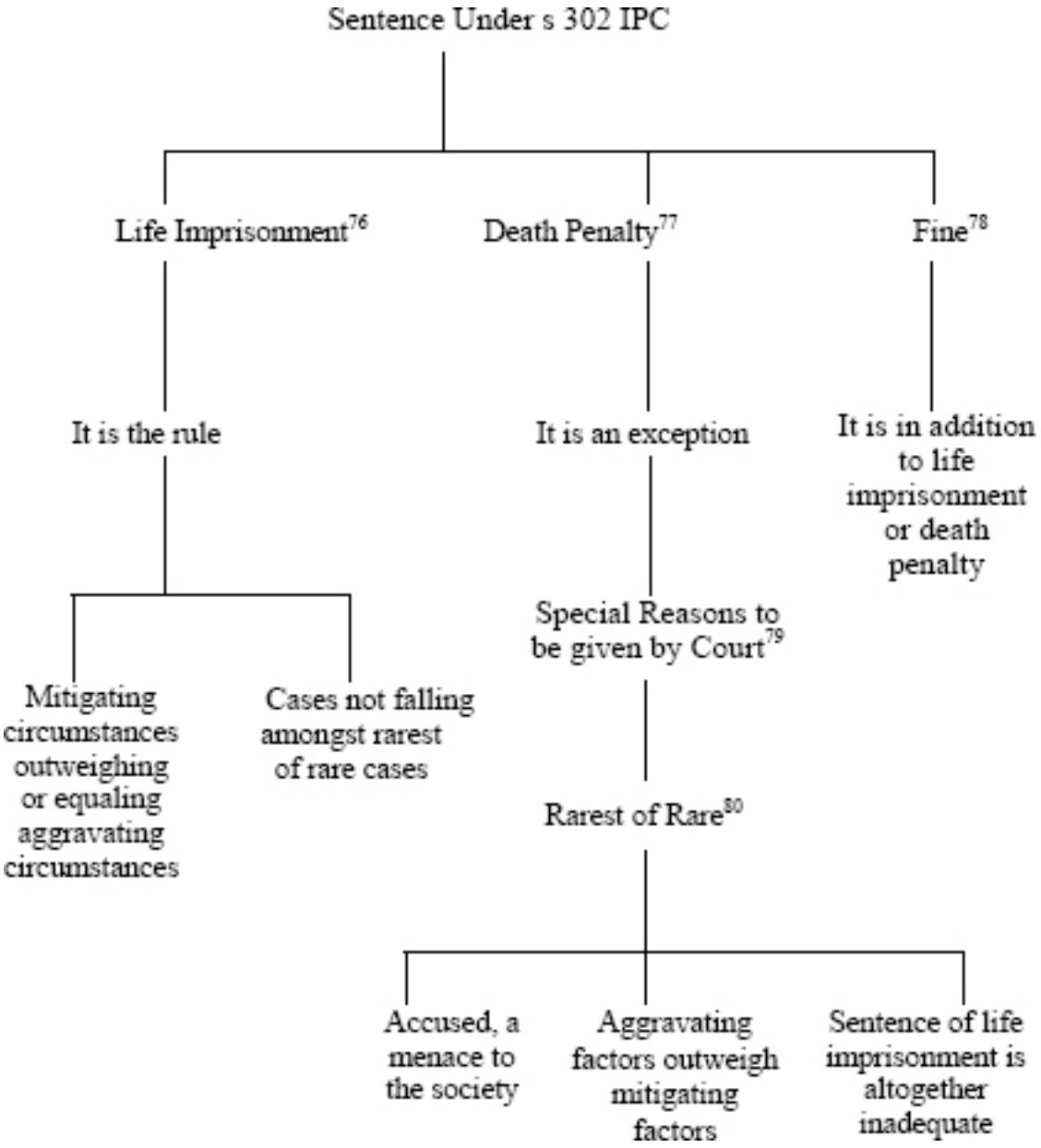
185. 'Shall be Punished With Death or Imprisonment for Life'

In a sessions trial case, if the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of s 360, CrPC, hear the accused on the question of sentence, and then pass sentence on him according to law.[72] However, since the punishment prescribed under s 302, IPC is either death penalty or imprisonment for life, there is no question of proceeding in accordance with the provisions of s 360, CrPC .

No discretion is given to the trial judge who convicts a person of an offence under this section to award or not to award the punishment provided. The only discretion allowed is to determine which of the two punishments prescribed should be awarded, regard being had to the circumstances of the particular case.[73] Similarly, the sentence for murder prescribed by this section is death 'or imprisonment for life' in the alternative. The sentence of life imprisonment is the minimum, provided under this section, and that cannot be reduced even if the Court so desires.[74] Where an accused has been awarded the minimum sentence prescribed in this section, it is not necessary2443 to remit his case to the sessions judge for giving a hearing on the question of sentence under s 235(2), CrPC 1973.[75]

186. Table Showing Sentence to be Awarded in Section 302

The following table shows that appropriate sentence to be awarded in s 302, IPC .



76 See Indian Penal code 1860, s 302 .
77 *Ibid.* See also synopsis notes of this section.
78 See synopsis notes of this section
79 See synopsis notes of this section.
80 See below.2444

187. Sentence Less Than Life Imprisonment--Not Permissible

Under s 302, IPC, the accused can be punished with death or imprisonment for life and is also liable to fine. Thus, the minimum sentence provided for the offence under s 302 is imprisonment for life.[81]

An accused found guilty of an offence punishable under s 302, IPC, which only prescribes for two sentences, death and life imprisonment, cannot be given a lesser punishment than the two prescribed, as passing such sentence would be contrary to the provisions contained in s 302, IPC .[82] The sentence of life imprisonment is the minimum provided under s 302, IPC and that cannot be reduced even if the Court so desires.[83] Thus, awarding of rigorous imprisonment for seven years only when the accused is found guilty under ss 302 / 34, IPC, by a sessions court is a seriously grievous error.[84]

188. Imprisonment for Life

See commentary under the same heading in s 53, *ante,* Vol I.

In *Shri Bhagwan v State of Rajasthan* ,[85] while reducing the death sentence to imprisonment for life, the Supreme Court considered s 57, IPC and referred to the following observation in *Dalbir Singh v State of Punjab:* [86]

> The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad v State of Uttar Pradesh.* [87] Taking the clue from the English Legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the man's life, but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the conditions that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder.

The Court also observed that though under the relevant rules a sentence for imprisonment for life is equated with a definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with a definite period and not for any other purpose. The Court, thereafter directed that the accused shall be released from prison unless he had served out at least 20 years of imprisonment including the period already undergone by the accused.[88]2445

Life Convict

A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under s 432 of the CrPC, which in turn is subject to the procedural checks in that section and the substantive check in s 433-A of the CrPC .[89]

189. 'And shall also be Liable to fine'

This section provides that whoever commits murder shall be punished with death or imprisonment for life 'and shall also be liable to fine'. Whether there should be a sentence of fine also is for the Court to determine.[90] The words 'and shall also be liable to fine' in s 302, IPC, are not to be understood as a legislative mandate that the Court must invisibly award a sentence of fine also in addition to imprisonment for life.[91] If, however, the Court imposes a sentence of fine also under s 302, IPC, it must, give reasons as to why a sentence of fine is also being imposed, the reason being that a sentence of fine, over and above the substantive sentence of death or life-imprisonment, is deemed to be in excess and it is always desirable to give reasons for imposing the excess penalty.[92] To sustain an order imposing fine, there must be evidence to show that the convicts can pay the fine. If the fine is for the purpose of compensating the heirs of the deceased, it must be specified who those heirs are. It is not the practice of the courts to impose fine when death sentences are given.[93] Of course, there is power to combine a sentence of death with a sentence of fine, but that power is sparingly exercised because the sentence of death is an extreme penalty to impose, and adding to that grave penalty, a sentence of fine is hardly calculated to serve any social purpose. In fact, the common trend of sentencing is that even a sentence of life-imprisonment is seldom combined with a heavy sentence of fine, but the Supreme Court, in *Palaniappa Gounder v State of*

Tamil Nadu ,[94] was not inclined to go so far as to express approval of the unqualified view, taken in some cases, that a sentence of fine for an offence of murder is wholly 'inapposite'.[95] A sentence of fine, in a murder case, looks appropriate only where the murder has been motivated by monetary gain.[96]

190. Forms of Death Sentence

Commentary under s 53, *ante*, Vol. 1, may be referred to.

When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.[97] Therefore, the order of the Court directing that 'the accused be hanged or'[98] 'to review the supreme penalty'[99] are not in proper form.2446 However, the omission to specify the direction in the manner indicated under s 354(5), CrPC 1898) is only an irregularity which is only technical in nature and does not vitiate the judgment.[1] The form of death sentence prescribed by s 354(5), CrPC 1973, does not violate the provisions contained in art 21 of the Constitution .[2] The method of execution of capital punishment by hanging by neck is a scientific and one of the least painful methods of execution of the death sentence.[3]

Hanging in Public View Violates Article 21 [4]

Execution of death sentence under s 354(5), CrPC (2 of 1974) by public hanging would be a barbaric practice clearly violative of art 21 of the Constitution . The jail manual of no state in the country makes a provision for execution of death sentence by public hanging. The direction for execution of death sentence by public hanging is unconstitutional and if any jail manual were to provide public hanging the Supreme Court would declare it to be violative of art 21 of the Constitution .[5]

191. Should Capital Punishment be Abolished?

Courts are constantly faced with the situation where they are required to answer to new challenges and mould the sentencing system to meet those challenges. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The change in the legislative intendment relating to award of capital punishment, notwithstanding the opposition by the protagonist of abolition of capital sentence, shows that it is expected of the courts to so operate the sentencing system and impose such sentence which reflects the social conscience of society. The sentencing process has to be stern where it should be.[6]

To be or 'not to be' is a highly vexed question. Throughout the globe, brilliant brains including legal luminaries and philosophers have debated whether the death sentence should be retained as punishment for some of the most heinous crimes. Lord Denning once said that punishment of death should reflect adequately the revulsion felt for the gravest of crimes by the great majority of citizens. In our country, for the offence of murder, death sentence has been retained for rarest of rare cases.[7]

Human rights activists, reformists and sociologists sometimes argue that life once past cannot be brought back, that capital punishment does not serve any social purpose and in the absence of any study, the barbaric penalty of death should not be awarded to any person as it has no deterent effect. It is argued that penalty of death sentence has a dehumanising effect, and execution of capital punishment by hanging is barbaric and dehumanising. The 35th Report of the Law Commission submitted in 1967 summarises the recommendations in the following words:

Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the2447 paramount need for maintaining law and order in the country at the present juncture India cannot risk the experiment of abolition of capital punishment. The majority opinion in *Bachan Singh's* case[8] held that having regard to the social conditions in our country the stage was not ripe for taking a risk of abolishing it. Further, a judicial notice can be taken of the fact that the law and order situation in the country has not only not improved since 1967 but has deteriorated over the years and is fast worsening today. The present is, therefore, the most inopportune time to reconsider the law on the subject. While, rejecting the demand of the protagonist of the reformatory theory and

humanitarian ideology or rehabilitarian philosophy for abolition of the death penalty the Legislature in its wisdom though that the 'special reasons clause' under s 354(3), CrPC, should be a sufficient safeguard against arbitrary imposition of the extreme penalty.[9] The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence in no case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member the society may not feel itself bound by the shackles of this doctrines. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'killing' a member of the community which protects the murderer himself from being killed. Or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the antisocial or abhorrent nature of the crime.[10]

It is only the Legislature which can abolish the death penalty and not the Courts. As long as the death penalty exists in the statute book it has to be imposed in some cases, otherwise it will tantamount to repeal of the death penalty by the judiciary. It is not for the judiciary to repeal or amend the law, as that is in the domain of the legislature.[11]

Death Sentence Not Unconstitutional

It cannot be said that since it may not be possible to eradicate crime itself, criminals cannot be awarded the death sentence prescribed by law.[12] The death penalty, provided for in an offence of murder under s 302, IPC, is not unconstitutional. It2448 neither violates 19 nor art 21of the Constitution of India .[13] In the face of the statutory provision in cl (3) of s 354, CrPC which requires the giving of special reasons while imposing the death penalty. This is consistent with art 21 which enjoins that the personal liberty or life of an individual shall not be taken except according to the procedure established by law, extreme plea of death in no case cannot be countenanced and the death penalty cannot be said to be violative of art 21 .[14] A provision conferring power on courts to exercise discretion cannot be said to be violative of art 14 and capital punishment should not be regarded as *per se* unreasonable or as not being in public interest.[15] It is a most inopportune time to consider the question of imposition of capital punishment as the law and order situation in the country has deteriorated over the years and is fast worsening today.[16] The death sentence is not unconstitutional.[17]

36 *Govindaraju v State by Srirampuram PS* 2012 Cr LJ 1991, p 2001 (SC), AIR 2012 SC 1292, (2012) 4 SCC 722 .

37 *State of Karnataka v Richard* 2008 Cr LJ 2200 (Kant), 2008 (5) Kant LJ 707 .

38 *Ashok Kumar Chaudhary v State of Bihar* 2008 Cr LJ 3030 (SC), AIR 2008 SC 2436 .

39 For more details refer to *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

40 *Harpar Singh v Devinder Singh* (1997) Cr LJ 3561 (SC) .

41 *Darya Singh v State of Punjab* AIR 1954 SC 328 .

42 *Masalti v State* AIR 1965 SC 202 ; *Gurmej Singh v State of Punjab* AIR 1992 SC 215 ; *Rajbir v State of Haryana* (1996) SCC (Cr) 178 ; *Girish Yadav v State of Madhya Pradesh* (1996) SCC (Cr) 552 ; *Ram Sanjiwan Singh v State of Bihar* (1996) SCC (Cr) 701, (1996) AIR SCW 2300 ; *Malkan Singh v State of Uttar Pradesh* (1995) SCC (Cr) 839, 1994 AIR SCW 880 ; *Bava Hajke v State of Kerala* AIR 1974 SC 902 ; *Shivaji Sahebrao Bobade v State of Maharashtra* AIR 1973 SC 2622, (1973) 2 SCC 793 ; *Dalbir Kaur v State of Punjab* AIR 1977 SC 472, (1976) 4 SCC 158 .

43 *Saudagar Singh & ors v State of Haryana* (1998) Cr LJ 62 (SC) .

44 *Hukam Singh & ors v State of Rajasthan* (2001) Cr LJ 511 (SC) .

45 *Banti v State of MP* (2004) Cr LJ 372 (SC) .

46 *Dalip Singh v State of Punjab* (1997) Cr LJ 3647 (SC) .

47 *Prem Chand v UOI* AIR 1981 SC 613, (1981) Cr LJ 9 (SC) .

48 *Madan v State* (1997) Cr LJ 3921 (Mad) (DB) .

49 *Hira Lal v State of Haryana* AIR 1971 SC 356, (1971) Cr LJ 290 (SC) .

50 *Chhotu & ors v State of Maharashtra* (1997) Cr LJ 4394 (SC) .

51 *State of UP v Shri Krishan* 2005 Cr LJ 892, p 893, 2005 All LJ 385, 2005 SCC (Cri) 1551, 2005 (1) Crimes 200, 2005 (27) All Ind Cas 714 (SC) .

52 *Lekhraj alias Harisingh v State of Gujarat* (1998) Cr LJ 396 (SC) .

53 *Amrik Singh v State of Punjab* (1999) Cr LJ 463 (SC) .

54 See ss 161, 162 *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

55 *Dandu Lakshmi Reddy v State of Andhra Pradesh* (1999) Cr LJ (SC) .

56 For details refer to *Woodroffe and Ali on Evidence,* Lexisnexis Butterworths, New Delhi.

57 *Raghunandan v State of Uttar Pradesh* AIR 1974 SC 463, (1974) Cr LJ 453 .

58 *Dandu Lakshmi Reddy v State of Andhra Pradesh* 1995 Cr LJ 4287 (SC) .

59 *Chira Sen Goala & anor v State of Assam* (1998) Cr LJ 2118 (Gau) (DB) .

60 *Ibid*.

61 *Kempareju & ors v State* Cr LJ 4734 (Kant) (DB).

62 *Harchand Singh v State of Haryana* AIR 1974 SC 344, (1974) Cr LJ 366 (SC) .

63 *Tejinder Singh @ Kaka v State of Punjab* 2013 (2) Crimes 159 (SC), (2013) 12 SCC 503, 2013 (6) JT 585, 2013 Cr LJ 3130 .

64 *State of Uttar Pradesh v Babu Ram* (2000) Cr LJ 2457 (SC) ; *Dudh Nath Pandey v State of Uttar Pradesh* AIR 1981 SC 911, (1981) Cr LJ 618, (1981) 2 SCC 166 .

65 *Joseph v State of Kerala* (2000) Cr LJ 2467 (SC) .

66 *Pammi alias Rrijendra Singh v Govt of Madhya Pradesh* (1998) Cr LJ 1617 (SC) .

67 *Rana Pratap v State of Haryana* AIR 1983 SC 680, (1983) Cr LJ 1272 ; *Appabhai v State of Gujarat* AIR 1988 SC 696, (1988) Cr LJ 848 ; *State of Karnataka v K Yarappa Reddy* (2000) Cr LJ 400 (SC) .

68 *State of Karnataka v K Yarappa Reddy* (2000) Cr LJ 400 (SC) .

69 *Vijay Pal Singh v State, NCT of Delhi* (2001) Cr LJ 3294 (SC) .

70 *Vijay Pal Singh v State, NCT of Delhi* (2001) Cr LJ 3294 (SC) .

71 *Masalti v State* AIR 1965 SC 202, (1965) 1 Cr LJ 226 (SC) ; *Binay Kumar Singh v State of Bihar* AIR 1997 SC 322, (1997) Cr LJ 362 (SC) .

72 *Kumuksha Rai & ors v State of Uttar Pradesh* (2000) Cr LJ 178 (SC) .

73 *Ibid*.

74 *Kishore Kumar v State of Uttar Pradesh* (2000) Cr LJ 552 (All) (DB) .

75 *Smt Chander Kala v Ram Kishan* AIR 1985 SC 1268 .

76 *Ramashray Yadav v State of Bihar* (2006) Cr LJ 133 (SC) .

77 *Nathia v State of Rajasthan* (1999) Cr LJ 1371 (Raj) (DB) .

78 *Shankar v State of Rajasthan* 1999 Cr LJ 1783 (Raj) (DB) .

79 *Ram Darash Rai v State of Uttar Pradesh* (1998) Cr LJ 4205 (All) (DB) .

80 *State of Karnataka v K Yarappa Reddy* (2000) Cr LJ 400 (SC) .

81 *Vijayan v State* (1999) 4 SCC 36, (1999) AIR SCW 1003, AIR 1999 SC 1311, (1999) Cr LJ 2037 .

82 *State of Karnataka v K Yarapa Reddy* (2000) Cr LJ 400 (SC) .

83 *Gulzar Singh v State of Uttar Pradesh* (2000) Cr LJ 3900 (All) (DB) .

84 *State of Rajasthan v Mani Ram* (2001) Cr LJ 3283 (SC) .

85 *Main Pal v State of Haryana* (2004) Cr LJ 2036 (SC) .

86 *Suresh Singh v State* (2004) Cr LJ 2113 (All) (DB) .

87 *Munshi Singh v State* (2004) Cr LJ 2975 (All) (DB) .

88 *State of UP v Jai Prakash* (2007) Cr LJ 3534 (SC) .

89 For details, refer to s 311 *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

90 *State of Madhya Pradesh v Pattu alias Pratap Singh* (2001) Cr LJ 3217 (MP) (DB) .

91 *The Public Prosecutor, High Court of Andhra Pradesh v Pendli Gopi* (2001) Cr LJ 4367 (AP) (DB) .

92 *Major Singh v State of Punjab* (2002) 10 AD (SC) 82, (2002) JT 9 SC 576 .

93 *Rachapalli Abbulu & ors v State of Andhra Pradesh* (2002) Cr LJ 2527 (SC) .

94 *Anil Rai v State of Bihar* (2001) Cr LJ 3969 (SC) .

1 *Mohar & anor v State of Uttar Pradesh* (2002) Cr LJ 4310 (SC) .

2 *Ravi Gontia v State of MP through PS Madhav Nagar, Katni,* 2013 (2) Crimes 490, p 494 (MP) (DB) .

3 *Sajjan Sharma v State of Bihar* 2011 Cr LJ 1169 (SC), AIR 2011 SC 632, (2011) 2 SCC 206, 2011 (1) Scale 137 .

4 *Dalpat Singh v State of Rajasthan* (2005) Cr LJ 749 (Raj) (DB) .

5 *State of Rajasthan v Inder Singh* (1968) Raj LW 147 .

6 *Mohan Lal v State of Uttar Pradesh* AIR 1974 SC 1144, p 1146, (1974) Cr LJ 800 ; *Joginder Pal Pandey v Hazura Singh* (1980) Chand LR 100, p 104 ; *Jaswant Singh v State (Delhi Admn)* AIR 1979 SC 190, (1978) Cr LJ 1869 ; *State of Maharashtra v Annappe Bandu Kavatage* AIR 1979 SC 1410 ; *Devendra Prasad Tiwari v State of Uttar Pradesh* AIR 1978 SC 1544, (1978) Cr LJ 1614 ; *Hukam Singh v State of Rajasthan* AIR 1977 SC 1063, (1977) Cr LJ 639 ; *Har Dayal v State of Uttar Pradesh* AIR 1976 SC 2055, (1976) Cr LJ 1578, p 1583 ; *Ramu v State of Madhya Pradesh* (1972) Jab LJ 380, (1972) MPLJ 715 ; *Eradu v State of Hyderabad* AIR 1956 SC 316, p 318 ; *Raghav Prapanna Tripathi v State of Uttar Pradesh* AIR 1963 SC 74, p 89 ; *Farman Shah v State* (1981) Chand LR 46, p 56 (J&K) (DB); Re *Rayappa Asari*(1972) Cr LJ 1226, (1972) Mad LW (Cr) 48.

7 *Mahmood v State of Uttar Pradesh* AIR 1976 SC 69, p 70-71, (1976) Cr LJ 10 ; *Banarsi Dass v State of Punjab* (1981) Cr LJ 1235, p 1237 (Punj) (DB) ; *Parag v State of Rajasthan* (1981) Cr LJ 1244, p 1248 (Raj) (DB) ; *Chauna Orang v State* (1981) Cr LJ 1661, p 1663 (Gau)(DB) (distinction between circumstantial evidence and direct evidence and their admissibility in a particular case discussed at length); *Shankarlal Gyarsilal Dixit v State of Maharashtra* (1981) 2 SCC 35, p 39 ; *Basant Singh v State of Punjab* (1980) Cr LR 666, p 667 (SC) ; *Rama Nand v State of Himachal Pradesh* (1981) Cr LJ 298, p 303 (SC), **affirming**(1974) ILR HP 509; *Jana Munda v State* (1981) Cr LJ 1763, p 1764 (Ori)(DB); *Ashok Kumar v State of Madhya Pradesh* (1981) Cr LR 289, p 290 (MP High Court Notes) (DB) .

8 *Narain Baraik v State* (1972) Cr LJ 177, p 181 (Pat) ; *Rama Nand v State of Himachal Pradesh* (1981) Cr LJ 298, p 303 (SC), **affirming**(1974) ILR HP 509.

9 *Liyakat v State of Uttaranchal* 2008 Cr LJ 1931 (SC), AIR 2008 SC 1537, 2008 (3) Scale 108, (2008) 16 SCC 148 .

10 *Naresh Kumar v State of Maharashtra* AIR 1980 SC 1168, p 1169 ; *Bisroo v State of Madhya Pradesh* (1980) Cr LR 78, p 80 (MP) (Notes) (DB) ; *Vidya Sugar v State of Uttar Pradesh* AIR 1977 SC 1116, p 1120, (1977) Cr LJ 950 ; *State (Delhi Admn) v Gulzarilal Tandon* AIR 1979 SC 1382, p 1383 ; *Narayan Shankar Gaikwad v State of Maharashtra* AIR 1974 SC 675, (1974) Cr LJ 601 ; *Shankarlal Gyarsilal Dixit v State of Maharashtra* (1981) 2 SCC 35, p 39 ; *Basant Singh v State of Punjab* (1980) Cr LR 666, p 667 (SC) ; *Rama Nand v State of Himachal Pradesh* (1981) Cr LJ 298, p 303 (SC), **affirming**(1974) ILR 509 (HP).

11 *Shivu & Anr v RG, High Court of Karnataka* (2007) Cr LJ 1806 (SC) .

12 *Padala Veera Reddy v State of AP* AIR 1990 SC 79 .

13 *Shivu & Anr v RG, High Court of Karnataka* (2007) Cr LJ 1806 (SC) .

14 *State of UP v Ashok Kumar Srivastava* (1992) Cr LJ 1104 (SC) .

15 *Shivu & Anr v RG, High Court of Karnataka* (2007) Cr LJ 1806 (SC) .

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17 *Tarsem Kumar v Delhi Admn* (1994) 5 LT 264 (SC), (1995) Cr LJ 470 (SC) .

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20 *Rangadhar Barik v State* (1996) Cr LJ 5 (Ori) (DB) .

21 *Kali Nayak alias Mukhi, etc v State of Orissa* (1996) Cr LJ 344 (Ori) (DB) ; *Rajan v State of Kerala* (2000) Cr LJ 3531 (Ker) (DB) .

22 *Vasa Chandrasekhar Rao v Ponna Satyanarayana & ors* (2000) Cr LJ 3175 (SC) .

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26 *Anantalal Ghosh v State of West Bengal* 2005 Cr LJ 4123 (SC), AIR 2005 SC 3415, 2005 (6) Supreme 432 .

27 *Ashok v State of Maharashtra* 2015 Cr LJ 2036, p 2039 (SC) ; *Kanhaiya Lal v State of Rajasthan* (2014) 4 SCC 715, AIR 2014 SC (Supp) 788, 2014 AIR SCW 1828, 2014 Cr LJ 1950 .

28 *Gajrag Singh v State of Madhya Pradesh* 2015 Cr LJ 2012, p 2018 (MP) (DB) .

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32 *Chandraiangari Anantharedd i & Ors v State of Andhra Pradesh* (1996) Cr LJ 2109 (AP) (DB) ; *Arjun Malik v State of Bihar* (1994) Supp 2 SCC 372 ; *Didar Singh v State of Haryana* (1993) Supp 2 SCC 557 .

33 *Bakru Bhavrao Bhaskar v State of Maharashtra* AIR 2013 SC 3564, 2013 Cr LJ 4221, p 4225 .

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35 *Rishi Pal v State of Uttarakhand* 2013 Cr LJ 1534, p 1537 (SC), 2013 AIR SCW 1167, (2013) 1 Scale 609 .

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58 *Trimukh Maroti Kirkan v State of Maharashtra* (2007) Cr LJ 20 (SC) .

59 *Vaman Jaidev Raval v State of Goa* (2007) Cr LJ (NOC) 431 (Bom) .

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65 *Slim Babamiya Sutar alias Janadaar v State of Maharashtra* (2000) Cr LJ 2696 (Bom) (DB) .

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72 *Harivadan Babuibhai Patel v State of Gujarat* 2013 Cr LJ 3944, p 3949 (SC), 2013 (8) Scale 17, (2013) 7 SCC 45 ; *Dharminder Singh v State* 2013 Cr LJ 4054 (SC), AIR 2013 SC 3390, 2013 (10) Scale 217, (2013) 12 SCC 263 (Last seen evidence-Dead body recovered next day-Conviction upheld).

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81 *Kantilal v State of Gujrat* (2003) Cr LJ 850 (SC), AIR 2003 SC 684 .

82 *Jagjit Singh v State of Himachal Pradesh* (1994) Cr LJ 233 (SC) .

83 *Vasa Chandrasekhar Rao v Ponna Satyanarayana & anor* (2000) Cr LJ 3175 (SC) .

84 *Kuldeep Singh & ors v State of Rajasthan* (2001) Cr LJ 479 (SC) .

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87 *Santosh Kumari v State* (1973) Cr LJ 1651, p 1657 .

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89 *Rahman v State of Uttar Pradesh* AIR 1972 SC 110, (1972) Cr LJ 23 ; *Deveeramma v State* AIR 1960 Mys 199, (1960) Cr LJ 1108 ; *Sarwan Singh v State of Punjab* (1980) Cr LJ 4 (NOC) (Punj) (DB); *Bhagat Bahadur v State* (1996) Cr LJ 2201 (Del) (DB) ; *Kundula Bala Subrahmanayam v State of Andhra Pradesh* (1993) 2 SCC 634, (1993) Cr LJ 1635 (SC) .

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1 *Vaman Jaidev Raval & etc v State of Goa* (2007) Cr LJ (NOC) 431 (Bom) (DB), (2007) 3 AIR Bom R 24 (DB).

2 *Bikash Koiri v State of Tripura* 2014 Cr LJ 186 (Tripura) (DB) .

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4 *Krishna Singh v State of Bihar* AIR 1988 SC 863, (1988) Cr LJ 925 (SC) .

5 *Mohan Rai v State of Bihar,* (1968) Cr LJ 1479, AIR 1968 SC 1281 ; *Lakshimi Singh v State of Bihar* (1976) Cr LJ 1736, AIR 1976 SC 2263 ; *Bhaba Nanda Sarma v State of Assam* (1977) Cr LJ 1930, AIR 1977 SC 2252 ; *Ramlaghu Singh v State of Bihar* (1973) Cr LJ 44, AIR 1972 SC 2593 ; *Onkarnath Singh v State of Uttar Pradesh* (1974) Cr LJ 1015, AIR 1974 SC 1550 ; *Jagdish v State of Rajasthan* (1979) Cr LJ 888, AIR 1979 SC 1010 .

6 *Man Bharan Singh v State of Madhya Pradesh* (1996) Cr LJ 2707 (MP) (DB) .

7 *Babu Ram v State of Punjab* 2008 Cr LJ 1651, p 1654 (SC), AIR 2008 SC 260, (2008) 3 SCC 709, 2008 (2) Scale 499) (*Laxmi Singh v State of Bihar* AIR 1976 SC 2263, 1976 Cr LJ 1736 **referred**).

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9 *Sukhjindar Kaur v Jaswant Singh & anor* (1997) Cr LJ 4428 (SC) .

10 *Bhartu & ors v State of Haryana* (1997) Cr LJ 242 (SC) ; *Rajendra Singh & ors v State of Bihar* (2000) Cr LJ 2199 (SC)*; Mahesh Janardhan Gonnade v State of Maharashtra* 2008 Cr LJ 3602, p 3617 (SC), 2008 (7) Scale 10, 2008 AIR SCW 4231 (Simple injury on little finger of the right hand of the accused, non-explanation of by the prosecution is no ground to reject the prosecution case); *Krishna v State of Haryana* (2006) 12 SCC 459, 2006 FAJ 116, 2006 (1) GLH 558, (2006) 1 GLR 255).

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13 *Mohar Rai and Bharath Rai v State of Bihar* (1968) 3 SCR 525 .

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15 *Vijayee Singh v State of UP* AIR 1990 SC 1459, (1990) Cr LJ 1510 .

16 *Thoti Manohar v State of Andhra Pradesh* 2012 Cr LJ 3492, p 3500 (SC), 2012 AIR SCW 3752, 2012 (7) Scale 215 . **See also***Mohd Khalid Chisti v State of Rajasthan* 2013 Cr LJ 637 (SC), 2012 (12) Scale 254, (2013) 2 SCC 541 ; *Ram Vishambhar v State of UP* 2013 Cr LJ 1311 (SC) .

17 *Ramlagan Singh v State of Bihar* AIR 1972 SC 2593 .

18 *Hare Krishna Singh v State of Bihar* AIR 1988 SC 863 .

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20 *Pandappa Hanunappa Hanamar & anor v State of Karnataka* (1997) Cr LJ 2493 (SC) ; *Prakash Dattu Kamble v State of Maharashtra* (1999) Cr LJ 431 (Bom) .

21 *DV Shanmugham & anor v State of Andhra Pradesh* (1997) Cr LJ 3129 (SC) ; *Rama Krishnan Nair alias Raju v State of Kerala* (2000) Cr LJ 416 (Ker) (DB) ; *Bhola Yadav & anor v State of Uttar Pradesh* (2001) Cr LJ 377 (All) (DB) .

22 *Takhaji Hiraji v Thakore Kubersing Chamansing* (2001) Cr LJ 2602 (SC) .

23 *Raj Kumar v State* (1998) Cr LJ 424 (Del) (DB) .

24 *Shivaji Ganu Naik v State of Maharashtra* (1999) Cr LJ 471 (Bom) (DB) .

25 *State of Orissa v Sutra Singh* (1975) Cr LJ 200, p 204 ; *Kangia v State of Madhya Pradesh* (1980) Cr LR 271 (MP) (DB) .

26 *Abdul Waheed v State of Maharashtra* AIR 1979 SC 1828, (1979) Cr LJ 1196 .

27 *Mohamed Ghouse v State* (1965) 2 Cr LJ 288 (Mys) .

28 *Bhabha Naada v State of Assam* AIR 1977 SC 2252, p 2253, (1977) Cr LJ 1930 .

29 *Triveni Ahir & ors v State of Bihar* (1999) Cr LJ 2004 (Pat) (DB) .

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31 *Nagalla Mukha Lingam v State of AP* 2005 Cr LJ 2583, p 2584, AIR 2005 SC 2466, 2005 (5) JT 109, 2005 (4) Scale 471 .

32 *Alauddin Mian v State of Bihar* AIR 1989 SC 1456, (1989) Cr LJ 1466 .

33 *Alauddin Mian v State of Bihar* AIR 1989 SC 1456, (1989) Cr LJ 1466 .

34 *Registrar General, High Court of Karnataka v Prakash Jadav* (2006) Cr LJ 3393 (Kant) (DB) .

35 *Jai Kumar v State of Madhya Pradesh* (1999) Cr LJ 2569 (SC) .

36 *Chawla & anor v State of Haryana* AIR 1974 SC 1039, (1974) Cr LJ 791 (SC) ; *Triveniben v State of Gujarat* AIR 1989 SC 1335 ; *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1979) 3 SCC 727 ; *Bhashendra v State of UP* (2005) Cr LJ 2757 (All) (DB) .

37 *Chawla & anor v State of Haryana* AIR 1974 SC 1039, (1974) Cr LJ 791 (SC) ; *Apren Joseph alias Current Kunjukunju & ors v State of Kerala* AIR 1973 SC 1, (1973) Cr LJ 185 ; *Subhag & ors v State* (1964) 2 Cr LJ 75 (All) (DB) ; *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1979) 3 SCC 727 .

38 *Apren Josepli alias Current Kunjukunju & ors v State of Kerala* AIR 1973 SC 1, (1973) Cr LJ 185 .

39 *Raghubir Singh v State* AIR 1971 SC 2156, (1971) Cr LJ 1468 .

40 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1979) 3 SCC 727 .

41 *Chawla & anor v State of Haryana* AIR 1974 SC 1039, (1974) Cr LJ 791 (SC) ; *Bhashendra v State of UP* (2005) Cr LJ 2757 (All) (DB) .

42 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1980) Cr LJ 636 (SC) .

43 *Rajender Prasad v State of Uttar Pradesh* AIR 1979 SC 916, (1979) Cr LJ 792 .

44 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1980) Cr LJ 636 .

45 *Third Addl Judge, Genture v GV Rao & anor* (1996) Cr LJ 703 (AP) (DB) .

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47 *Bishnu Deo Shaw v State of West Bengal* AIR 1979 SC 764, (1979) Cr LJ 841 .

48 *Shiv Mohan Singh v State (Delhi Administration)* AIR 1977 SC 949, (1977) Cr LJ 767 .

49 *Ravji alias Ramchandra v State of Rajasthan* AIR 1996 SC 787, (1995) 8 JT 520 .

50 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1979) 3 SCC 727, (1980) Cr LJ 636 (SC) .

51 *Ashok Kumar v State (Delhi Administration)* AIR 1980 SC 636 .

52 *Apren Joseph v State of Kerala* AIR 1973 SC 1, (1973) Cr LJ 185 .

53 *Shankar alias Gauri Shankar v State of Tamil Nadu* (1994) 4 SCC 478, 1994 AIR SCW 2083 .

54 *Dhananjay Chatterjee alias Dhana v State of West Bengal* (1994) 2 SCC 220 .

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56 *State of Punjab v Kulwinder Singh* (2005) Cr LJ 3937 (P&H) (DB).

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58 *Dennis Councle Mcgautha v State of California* (1971) 402 US 183, 38 Led 2d 711.

59 *Shanker v State of Tamil Nadu* (1994) 4 SCC 478, 1994 AIR SCW 2083 .

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61 *Ram alias Ram Chandra v State of Rajasthan* (1995) 8 JT 520 (SC), 1996 AIR SCW 132 .

62 *Jashubha Bharat Singh v State of Gujarat* (1994) 4 SCC 353, 1994 AIR SCW 2360 .

63 *Surja Ram v State of Rajasthan* (1997) Cr LJ 51 (SC) .

64 *Jai Kumur v State of Madhya Pradesh* (1999) Cr LJ 2569 (SC) .

65 *State of Karnataka v Registrar General, High Court of Karnataka* (2000) Cr LJ 3958 (SC) .

66 *Shivu & Anr v RG, High Court of Karnataka* (2007) Cr LJ 1806 (SC) .

67 *Shivu & Anr v RG, High Court of Karnataka* (2007) Cr LJ 1806 (SC) ; *Adu Ram v Mukna* (2004) Cr LJ 4674 (SC) .

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70 *Dennis Councle MCGDAUTHA v State of California* 402 US 183, 28 LD 2d 711.

71 *State of UP v Virendra Prasad* (2004) Cr LJ 1373 (SC) .

72 Code of Criminal Procedure 1973, s 235(2) .

73 *Dewan Singh v Queen* ILR 22 Cal 805 ; *Emperor v Jasha Bewa* 6 Cr LJ 154, 11 CWN 904 ; Re *Duraiswami Tevan* 12 Cr LJ 145.

74 *Shamim Rahmani v State of Uttar Pradesh* AIR 1975 SC 1883, p 1889, (1975) Cr LJ 1654 .

75 *Nirpal Singh v State of Haryana* AIR 1977 SC 1066, p 1078, (1977) Cr LJ 642, **distinguishing***Pyarelal v State of Punjab* (1962) 3 SCR 328, AIR 1962 SC 690 .

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82 *Gopal Mahadeo Tambada v State of Maharashtra* (1997) Cr LJ 2425 (Bom) (DB) .

83 *Shamim Rahmani v State of Uttar Pradesh* AIR 1975 SC 1883, p 1889, (1975) Cr LJ 1654 ; *Ramdeo Chauhan alias Raj Nath Chauhan v State of Assam* (2001) Cr LJ 2902 (SC) .

84 *Kosal & ors v State and etc* (1996) Cr LJ 3800 (Mad) (DB) .

85 *Shri Bhagwan v State of Rajasthan* (2001) 6 SCC 296 .

86 *Dalbir Singh v State of Punjab* (1979) 3 SCC 745 .

87 *Rajendra Prasad v State of Uttar Pradesh* (1979) 3 SCC 646 .

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89 *Sangeet v State of Haryana* AIR 2013 SC 447, 2013 Cr LJ 425, 2012 (11) Scale 140, (2013) 2 SCC 452 .

90 *Dhanno Khan v State* AIR 1957 All 317, p 319 ; *State v Pandurang Tatyasahab Shinde* AIR 1956 Bom 711 .

91 *Bidhan Nath alias Parijat Kusum Nath & ors v State of Assam* (2000) Cr LJ 1144 (Gau) (DB) .

92 *Ibid*.

93 *Chaha v Emperor* 14 Cr LJ 522, p 523 .

94 *Palaniappa Gounder v State of Tamil Nadu,* AIR 1977 SC 1323, p 1327, (1977) Cr LJ 992 .

95 *State v Pandurang Tatyasahab Shinde* AIR 1956 Bom 711, p 714 .

96 *Dhanno Khan v State* AIR 1957 All 317 ; *State v Pandurang Talyasahab Shinde* AIR 1956 Bom 711 .

97 Code of Criminal Procedure 1973, s 354(5) .

98 *Fakirchand v State* AIR 1955 MB 119, (1955) Cr LJ 1073 (FB) .

99 *Nga Thein Manng v Emperor* AIR 1936 Rang 46, (1937) Cr LJ 290 .

1 *Dasaundhi v State* AIR 1965 HP 68, p 72, (1965) 2 Cr LJ 765 .

2 *Deen Dayal v UOI* AIR 1983 SC 1155, p 1186, (1983) Cr LJ 1602, (1983) 4 SCC 645 .

3 *Ibid*; *Shashi Nayar v UOI & ors* AIR 1992 SC 395, (1992) Cr LJ 514 .

4 See s 53, vol 1.

5 *Attorney General of India v Lachma Devi & ors* AIR 1986 SC 467, (1986) Cr LJ 364 .

6 *Jashubha Bharatsingh Gohil v State of Gujarat* (1994) 4 SCC 353, (1994) AIR SCW 2360 .

7 *Suresh & anor v State* (2000) Cr LJ 2792 (All) (DB) .

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9 *Alluddin Mian & ors v State of Bihar* AIR 1989 SC 1456, (1989) Cr LJ 1466 .

10 *Machhi Singh v State of Punjab* AIR 1983 SC 957 .

11 *Common Cause v Union of India* 2008 (5) SCC 511 (*vide* paragraphs 25 to 27), AIR 2008 SC 2116, 2008 AIR SCW 3164 ; *Ajitsingh Harnamsingh Gujral v State of Maharashtra* AIR 2011 SC 3711, (2011) 14 SCC 401 .

12 *Shankar v State of Tamil Nadu* (1994) Cr LJ 3071, p 3104, (1995) AIR SCW 2083 .

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17 *K Govidaswami Pillai v Govt of India & ors* AIR 1986 Mad 204, p 209, (1986) Cr LJ 1326 (FB), AIR 1992 SC 395, p 397, (1992) Cr LJ 514, AIR 1991 SC 345, p 349, (1991) Cr LJ 439 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 302.

Punishment for murder.--

192. Other Indications in The Constitution Regarding Death Penalty

Article 21 reads as under:

'No person shall be deprived of his life or personal liberty except according to procedure established by law'.

If this article is expanded in accordance with the interpretative principle indicated in *Maneka Gandhi,* it will read as follows: 'No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law'.

In the converse positive form, the expanded article will read: A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.

Thus, expanded and read for interpretative purposes art 21 clearly brings out the implication that the founding fathers recognised the right of the state to deprive a person of his life or personal liberty in accrodance with fair, just and reasonable procedure established by valid law. There are several other indications also, in the Constitution which show that the Constitution makers were fully cognizant with the existence of the death penalty for murder and certain other offences in the IPC . Entries 1 and 2 in List III--Concurrent List of the Seventh Schedule, specifically refer to the Indian Penal Code and the Code of Criminal Procedure as in force at the commencement of the Constitution. Article 72(1)(c) of the Constitution specifically invests the President with the power to suspend, remit or commute the sentence of any person convicted of any offence, and also 'in all cases where the sentence is a sentence of death'. Likewise, under art 161, the Governor of a state has been given power to suspend, remit or commute *inter alia*, the sentence of death of any person convicted of murder or other capital offence relating to a matter to which the executive power of the State extends. Article 134 in terms gives a right of appeal to the Supreme Court to a person who on appeal, is sentenced to death by the High Court, after reversal of his acquittal by the trial court. Under the successive Criminal2449 Procedure Code which have been in force for about 100 years a sentence of death is to be carried out by hanging. In view of the aforesaid constitutional postulates, by no stretch of imagination can it be said that death penalty under s 302, Penal Code, either *per se* or because of its execution by hanging, constitutes any unreasonable, cruel or unusual punishment. By reason of the same constitutional postulates it cannot be said that the framers of

the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would defile 'the dignity of the individual' within the contemplation of the preamble to the Constitution. On party of reasoning, it cannot be said that death penalty, for the offence of murder violates the basic structure of the Constitution.[18]

193. Convict in Prison till Execution of Death Sentence--No Double Jeopardy

A prisoner who is sentenced to death and kept in jail custody under a warrant under s 366(2), CrPC,[19] is neither serving rigorous imprisonment nor simple imprisonment. In substance, he is in jail where he is kept with safety and protection so that he may be available for execution of the sentence awarded. Therefore, when capital punishment is awarded, the sentence awarded is only a sentence of death and not a sentence of death plus imprisonment, and therefore, if a condemned prisoner has to live in jail for long, in substance, it would not amount to punishment which is sentence of death and imprisonment for sometime. Thus, there would be no double jeopardy or violation of art 21 of the Constitution .[20]

194. Confirmation of Death Sentence

When a reference is made to the High Court under s 366, CrPC by the learned sessions judge on passing a sentence of death, the High Court has to satisfy itself whether a case beyond reasonable doubt has been made out against the accused for infliction of the extreme penalty of death. The proceedings before the High Court in such a case require reappraisal and reassessment of the entire facts and law so as to come to its independent conclusion, but while so doing, the High Court cannot also overlook the conclusion arrived at by the learned sessions judge. In performing its duty, the High Court is of necessity bound to consider the merits of the case and examine the entire evidence on record. The Legislature having provided in the confirmation proceedings a final safeguard to the life and liberty of the subject in cases of capital sentence, the duty of the High Court becomes more onerous to consider independently the matter carefully and examine all relevant material evidence, and come to a conclusion one way or the other. It is therefore, the duty of the High Court in a death reference to consider the evidence afresh.[21] A sentence of death passed by the sessions court cannot be executed without confirmation of sentence by the High Court. The procedure for submission of sentences for confirmation is given in ch 28, ss 366-371, CrPC .[22] While rejecting the reference under s 366, CrPC, the High Court should discuss in detail why it came to the conclusion that the death sentence awarded by the trial court be not confirmed. It2450 would be appropriate for the High Court to give reasons for differing from the view taken by the trial court, rather than mechanically rejecting the reference.[23]

195. No Norms can be Laid Down for Awarding Death Sentence

The circumstances in which the extreme penalty should be inflicted cannot be enumerated in view of the complex situation in society and the Legislature, therefore, was right in leaving to the discretion of the judicial decision as to what should be the sentence in the particular circumstance of the case. However, the Legislature has put a further rider that when the extreme penalty is inflicted, it is necessary for the Court to give special reasons thereof,[24] under s 354(3), CrPC . In *Bachan Singh's* case,[25] the question of laying down standards for categorising cases in which the death penalty could be imposed was considered, and it was felt that it would be desirable to indicate the broad guidelines consistent with s 354(3) of the Code without attempting to formulate rigid standards. That was because it was felt that standardisation of the sentencing process would leave little room for judicial discretion to take account of variations in culpability even within the same category of cases. After referring to the aggravating circumstances (para 202) and the mitigating circumstances (para 206) pointed out by counsel, the Court observed that while these were relevant factors it would not be desirable to fetter judicial discretion. It pointed out that these factors were not exhaustive and cautioned: 'courts, aided by broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and human concern' consistent with s 354(3) of the CrPC . In the subsequent decision in *Machhi Singh's* case,[26] the

court tried to indicate the type of cases which may fall within the exceptional class without attempting to introduce rigidity. It would not be fair to read the decision as an attempt to fetter judicial discretion. Even in cases of the type indicated in the case, circumstances may vary, which would necessitate a different approach.[27] No straight-jacket formula for awarding death sentence can be evolved which is applicable to all cases. The facts of each case will have their own implication on the question of awarding sentence.[28] No litmus test is provided nor any test formulated to discern precisely what is the rarest of rare cases in which the alternative option of awarding life sentence is foreclosed.[29] Even though the categories framed in *Machhi Singh* provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable, and even in those categories, there would be scope for flexibility as observed in *Bachan Singh* itself. The judgment in *Machhi Singh*was rendered on 20 July 1983, nearly twenty five years ago, that is to say a full generation earlier. Classification in that case was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983, the country was relatively free from organized and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the Legislature to create special slots for those offences in the Penal Code. At the time of *Machhi Singh*, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were2451 no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contacts purely by muscle power. There were no reports of killings of social activists and 'whistle blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. In a given case, the Court may, for a good and strong basis substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.[30]

In *Bachan Singh v State of Punjab* ,[31] their lordships of the Supreme Court have not categorised the circumstances in which murder is to be punishable with death. They have laid down certain guidelines for imposing the death sentence depending on the facts and circumstances of each case. They were of the view that the rigid categorisation of death sentence would offend the legislative policy.[32]

Two Landmark Judgments of the Supreme Court on Death Penalty

Bachan Singh v State of Punjab [33] and *Machhi Singh v State of Punjab* [34] are two landmark judgments of the Apex Court profusely quoted by the Apex Court and different High Courts while deciding the question of death sentence in murder cases. *Bachan Singh's* case was interpreted in *Machhi Singh's* case by the Supreme Court laid down the following propositions of law:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before, opting for the death penalty the circumstances of the offender also require to be taken into consideration alone with the circumstances of the 'crime';

(iii) Life imprisonment is, the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime and provided and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstance of the crime and all the relevant circumstance;

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstance has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In order to apply these guidelines *inter alia* the following questions may be asked and answered.[35]2452

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstance which speak in favour or the offender?

(v) If upon taking an overall global view of all the circumstances in the light of the aforesaid circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.[36]

196. Hearing on Sentence

The requirement of hearing the accused in the sub-section is intended to satisfy the rule of natural justice. It is a fundamental requirement of fairplay that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt, should on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the Court in determining the correct sentence to be imposed, the Legislature introduced sub-s (2) to s 235, CrPC .[37] The said provision, therefore, satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence, and at the same time helps the Court choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the Court all relevant material having bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality.[38] An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of sub-s (2) to s 235, CrPC[39] in letter and spirit, would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing Court must approach the question seriously and must endeavour to see that all relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. As a general rule trial courts should after recording conviction, adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it, and thereafter, pronounce the sentence on the offender.[40] The courts have impressed the need to adjourn the matter to some other day, thereby giving an opportunity to the convict under s 235, CrPC to explain2453 all circumstances in favour of a lenient sentence.[41] It is to be noted that the statute has engrafted in the statute book provisions of s 235(2) to see that proper appreciation of the evidence takes place and proper opportunity of hearing as regards punishment be afforded, but if there is no taker of such opportunity inspite of there being lawyers appearing for the accused, the question of further adjournment of the matter would not arise. It is true that the obligation is not discharged by putting a formal question to the accused. The Judge is supposed to elicit material questions of sentence, and this requirement of law would show whether there was infact such genuine attempt to elicit such material before passing such sentence.[42] Where the accused is not heard by the sessions court before passing the death sentence on account of non-compliance with s 235(2), CrPC, the High Court directed that they be heard and allowed production of evidence/material having a bearing on the question of sentence before passing order on sentence, and the sentence of death already awarded was set aside.[43] If such opportunity of being heard is not given by the sessions court to the accused, the accused can be heard on the point of sentence by the High Court in the appeal before it.[44]

Opportunity for Hearing on Sentence--Legal Position

In *Ramdeo Chauhan alias Rajnath Chauhan v State of Assam* ,[45] the Supreme Court explained the legal position regarding the necessity to afford opportunity for hearing to the accused on the question of sentence, as follows:

(i) When the conviction is under s 302, IPC (with or without the aid of ss 34 or 149 or 120B, IPC), if the sessions judge does not propose to impose death penalty on the convicted person it is unnecessary to proceed to hear the accused on the question of sentence. Section 235(2) of the Code will not be violated if the sentence of his imprisonment is awarded for that offence without hearing the accused on the question of sentence;
(ii) In all other cases the accused must be given sufficient opportunity of hearing on the question of sentence;
(iii) The normal rule is that after pronouncing the verdict of guilty the hearing should be made on the same day and the sentence shall also be pronounced on the same day;
(iv) In cases where the judge feels or if the accused demands more time for hearing on the question of sentence [especially when the judge proposes to impose the death penalty the proviso to s 309(2) is not a bar for affording such time];
(v) For any reason the Court is inclined to adjourn the case after pronouncing the verdict of guilty in grave offences, the convicted person shall be committed to jail till the verdict on the sentence is pronounced. Further detention will depend upon the process of law.2454

197. Accused Sentenced to Life Imprisonment--Hearing Not Necessary

Where an accused has been awarded the minimum sentence prescribed in this section, it is not necessary to remit his case to the Sessions Judge for giving a hearing on the question of sentence under s 235(2), CrPC .[46] If, therefore, conviction under s 302, IPC stands, the sentence of life imprisonment is beyond interference.[47] When it is a case of conviction under s 302, IPC, if the minimum sentence is imposed, the question of providing an opportunity of being heard to the accused under s 235, CrPC, would not arise.[48]

It is required to be noted that when the statute prescribes minimum sentence then even of the accused is heard on the question of sentence, the minimum sentence is to be imposed. However, if the Court has to exercise discretion in imposing sentence, *i.e.*, where minimum sentence is not prescribed, then the question of hearing the accused would arise. If the accused is convicted for an offence under s 302, IPC, and if the Court is of the view that punishment provided for this offence is minimum, is to be imposed, then there may not be question of hearing the accused on the question of sentence, but if the Court is of the opinion that more than the minimum sentence is required to be imposed, then the Court has to hear the accused on the question of sentence. When there is discretion with the Court, the Court will have to hear the accused on the question of sentence. However, when minimum sentence is prescribed and the Court is awarding that sentence, there may not be a question of hearing the accused as contemplated under s 235(2) of the CrPC .[49]

198. Relevant Considerations for Determining Sentence

The important aspect of sentence in a murder case depends on several considerations based upon facts and circumstances of a given case. In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence also are relevant. Mere number of persons killed is not, by itself, a circumstance justifying the death sentence.[50]

The question of sentence is a matter of judicial discretion. The relevant considerations in determining the

sentence, broadly stated, include the motive for and the magnitude of the offence, and the manner of its commission.[51] The determination of sentence in a given case depends on a variety of considerations; the more important being the nature of the crime, the manner of its commission, the motive, which impelled it and the character and antecedents of the accused.[52] The2455 heinousness of the crime is a relevant factor in the choice of the sentence. The circumstances of the crime, specially social pressures which induce the crime which we may epitomise as a 'just sentence in an unjust society' are another consideration.[53] The manner in which the crime was committed, the weapons used, and brutality or the lack of it, are some considerations which must be present in the mind of the Court while awarding sentence in a murder case.[54] A proper sentence is the amalgam of many factors such as the nature of the offence; the circumstances--extenuating or aggravating--of the offence; the prior criminal record, if any, of the offender; the age of the offender; the record of the offender, as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment; the emotional and mental condition of 'the offender'; the prospects for rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender; the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding the appropriate sentence, and therefore, the Legislature felt that for this purpose, a separate stage should be provided after conviction when the Court can hear the accused in regard to these factors bearing on sentence, and then pass proper sentence on the accused. Hence, the new provision in s 235(2), CrPC .[55]A number of factors which are to be taken into account while imposing penalty of death, are the motive of the crime; the manner of the assault; the impact of the crime on society as a whole; the personality of the accused; the circumstances and facts of the case as to whether the crime committed is for satisfying any kind of lust, greed or in pursuance of any organised anti-social activity or by way of organised crime, drug trafficking or the like or the chances of inflicting the society with a similar criminal act, that is to say, vulnerability of the members of the-society at the hands of the accused in future or commission of murder which may be shocking to the conscience.[56]

Relevancy of Mental Condition of Accused in Awarding Sentence

The mental condition or state of mind of the accused is one of the factors that has been legitimately taken into account in various cases and that can be taken into account in considering the question of sentence. There are various cases in which the Court having regard to the disturbed or imbalanced state of mind of the accused at the time of commission of offence, thought it fit not to impose the death sentence *vide*: *Shamshul Kanwar v State of UP;* [57]*Lehna v State of Haryana* [58] and *Om Prakash v State of Haryana.* [59] In *Francis v State of Kerala* ,[60] the following pertinent observations were made:

> Nevertheless, in deciding whether the case merits the less severe of the two penalties prescribed for murder a history of relations between the parties concerned, the background, the context, or the factual setting of the crime, and the strength and nature2456 of the motives operating on the mind of the offender, are relevant considerations. The state of feelings and mind produced by these, while insufficient to bring in an exception may suffice to make the less severe sentence more appropriate.

Where the killing of two other policemen without premeditation and without any motive whatsoever further reveals that these acts were done out of panic reaction and in a state of frenzy. It is not a case where it can be said with certitude that the murderous attacks were 'diabolical in conception and cruel in execution' as pointed out in *Bachan Singh v State of Punjab.* [61] Nor can it be said that 'the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society'or that the 'collective consciousness of the community would be shocked' if the death sentence is not inflicted. Above all, the sentence of death has been haunting him for considerable time, *videAllauddin Mian v State of Bihar.* [62] So, extreme penalty of death sentence is not desirable in such a case.[63]

199. Special Reasons for Awarding Death Sentence

Under sub-s (3) of s 354, CrPC, the court is required to state the reasons for sentence awarded, and in case of imposition of sentence of death, the judge has to record 'special reasons' for imposing the death sentence. Punishment for murder as a rule should be life imprisonment and death sentence is only an execution. In *Balwant Singh's case,*[64]*Ambaram's case,*[65] and *Sarveshwar Prasad Sharma's case,*[66] the Court held that it was neither necessary nor possible to specify the 'special reasons' which may justify the passing of death sentence in a given case.

It would thus be obvious that it is neither feasible nor legally permissible for this court to give a definite connotation to the expression 'special reasons' occurring in sub-s (3) of s 354, CrPC . It is difficult to put 'special reasons' in a strait-jacket. Each case must depend on its own particular facts. The question of sentence must be left to the discretion of the sessions judge trying the accused.[67]

The Court is not required to record reasons for commuting the death sentence to one of life imprisonment, it is only required to record reasons for either confirming the death sentence or awarding it.[68]

200. Death Sentence in Rarest of Rare Cases

Section 302 of the IPC authorises the Court to punish the offender of murder with death or imprisonment for life--the statute therefore has provided discretion to the Court to sentence the offender either with death or with imprisonment for life. Obviously, a serious decision and a heavy burden is imposed on the Court--this discretion conferred however, shall have to be exercised in a manner and in consonance with the concept of law to subserve the ends of justice and it is on this aspect that the Supreme Court in a long catena of cases in no uncertain terms laid down that award of death sentence though within the ambit of jurisdiction of the2457 courts but that does not clothe the courts to exercise the same in a indiscriminate manner. The Supreme Court has been candid enough to record on more occasions than one that it is only in the rarest of the rare cases that this discretion as regards capital punishment ought to be exercised, civilisation and due process of law coupled with the social order ought not to permit us to be hasty in regard to the award of capital punishment and courts ought to be slow in that direction.[69]

It is open for the Court to grant a death penalty in an extremely narrow set of cases, which is signified by the phrase 'rarest of rare'. The rarest of the rare test relates to 'special reasons' under s 354(3), CrPC . This route is open to the Court only when there is no other punishment which may be alternatively given. This results in the death penalty being an exception in sentencing, especially in the case where some other punishment can suffice.[70]

In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.
(2) When the murder is committed for a motive which evinces total depravity and meanness; *e.g.*, murder by hired assassin for money or reward or a cold-blooded murder for gains of a person *vis-à-vis* whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland.
(3) When murder of a member of a scheduled caste or minority community, *etc.*, is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman or account of infatuation.
(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste,

community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person *vis- à-vis* whom the murderer is in a dominating position or a public figure generally loved and respected by the community.[71]

The law is well-settled by reason of decisions of the Supreme Court as to circumstances in which capital punishment can be imposed. Capital punishment can be imposed in the rarest of rare cases if there are any aggravating circumstances such as the accused having any criminal record in the past, the manner of committing the2458 crime, delay in imposing the sentence and so on.[72] While applying this test, the Court has to look into a variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like rape and murder of minor girls, minor girls with physical disability, old and infirm women with disabilities *etc.*, these examples being only illustrative and not exhaustive. Courts award death sentence because the situation demands so due to constitutional compulsion, which is reflected by the will of the people, and it is not Judge centric.[73]

Death sentence remains in the statute book and its constitutional validity stands approved by the Constitution Bench in the celebrated decision of *Bachan Singh v State of Punjab.* [74] The Constitution Bench while upholding the validity of death sentence, has laid down as a legal principle that such sentence can be awarded only in 'rarest of rare cases when the option is unquestionably foreclosed'. No litmus is provided nor any test formulated to screen precisely what is the rarest of the rare cases in which the alternative option is thus foreclosed. However, a three judge Bench of this court in *Machhi Singh v State of Punjab* ,[75] elaborated the ratio in *Bachan Singh.* The Bench laid stress on the reaction of the community at large in cases 'when its collective conscience is shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion a regards desirability or otherwise of retaining death penalty. Rarest of rare cases would be discerned when the crime is viewed 'from the platform of the motive for, or the manner of commission of the crime or the anti-social or abhorrent nature of the crime'. The Bench has suggested a few instances thereof as guidelines and has observed that in order an apply those guidelines the following questions may be asked and answered:

(a) was there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?;

(b) were the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender.[76]

The accused respondents committed rape on the deceased and thereafter murdered her by strangulating her with scarf. The reasons recorded by the Trial Court for awarding death sentence to the respondents were that the respondents deceived and took the deceased away, turn-wise committed rape on her in the darkness of night and thereafter, committed her murder by throttling her by her chunni (scarf) and hence they were not entitled for any leniency and should be punished with death. The Supreme Court held that the reasons given by the Trial Court do not make out the case to be a rarest of rare case in which death sentence could be awarded to the respondents. There was no material to establish that the character of the respondents was of extreme depravity so as to make them liable for the punishment of death. Accordingly, the Court awarded life imprisonment to the two accused respondents for offence under s 302, IPC and maintained the sentence of ten years rigorous imprisonment for offence under s 376(2)(g), IPC as awarded by the Trial Court.[77]2459

The accused shot the deceased dead while the deceased was riding on the hind seat of motor cycle driven by the PW. Held, it was not a rarest of the rare case. The accused was not a professional killer. The death sentence awarded by the High Court was substituted by life imprisonment.[78]

The accused had burnt alive his wife and four daughters. Held, the case was rarest of rare cases. However, since the High Court in appeal had acquitted the accused and he was free for more than 6 years, the Supreme Court did not restore the penalty of death sentence awarded by the trial Judge.[79]

Accused appellant killed his wife and four children in a planned brutal and barbaric manner, and threw the dead bodies into the river. Accused held to be a menace to the society, and case fell in the category of rarest of rare cases. Death sentence was held proper.[80]

Accused appellant had raped and murdered a seven years old girl. Accused was held to be a menace to the society. Death sentence was held proper.[81]

The accused staying as paying guest in the house of the complainant had fallen in arrears of rent and boarding charges, and committed murder of the informant's three children and caused injuries to one during night hours in brutal manner. Family members were natural witnesses, their evidence was natural and proved the complicity of the accused appellant. The case was a rarest of rare case, thus, death penalty awarded to the accused appellant was confirmed.[82]

The instant case, the accused wife, along with accused her husband put an end to the lives of her step-brother and his whole family, which included three tiny tots of 45 days, 2½ years and 4 years, her own father, mother and sister in a very diabolical manner so as to deprive her father from giving property to her step-brother and his family. The fact that murders in question were committed in such a diabolical manner while the victims were sleeping, without any provocation whatsoever from the victims' side indicated the cold-blooded and premeditated approach of the accused to cause the death of the victims. The case was a rarest of rare case, hence, death penalty awarded confirmed.[83]

The accused had committed rape on a minor girl aged 6 years and thereafter had brutally murdered her. The case fell in the category of rarest of rare case. Death sentence awarded by the Sessions Judge was proper.[84]

Where the appellant accused committed the murder of his wife, two sons and one person on account of abject poverty, and tried to kill himself, he was not a menace to society, and had no criminal record, thus, death sentence awarded to him was converted into life imprisonment.[85]2460

Where the accused persons had killed five persons and caused injuries to several others, and the offence was triggered by thirst for revenge, the hope of reformation and rehabilitation of the accused persons could not be ruled out, held that the case did not fall in the category of rarest of rare cases, hence, alteration of death sentence into life imprisonment by the High Court was upheld.[86]

Where the case was of double murder, but could not be called an exceptional one, held that the situation could not be treated as rarest of rare case, thus, death penalty awarded by the Sessions Judge was converted into life imprisonment.[87]

Relevant Factors for Ascertaining Rarest of Rare Cases

In *Machhi Singh v State of Punjab* ,[88] the following five factors are emphasised for desirability or otherwise of retaining the death penalty by society in the rarest of rare cases.

(i) Manner of Commission of Murder

When murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner which arouses intense and extreme indignation of the community, for instance;

(a) when the house of the victim is set aflame with the end in view is to roast him alive in the house;
(b) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death;
(c) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner;

(ii)Motive for Commission of Murder

When the murder is committed for a motive which evinces total depravity and meanness.

For instance, when:

(a) a hired assassin commits murder for the sake of money or reward;
(b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or where the murderer is in a dominating position or in a position of trust;
(c) a murder is committed in the course for betrayal of the motherland.

(iii) Anti-social or Socially Abhorrent Nature of the Crime

(a) When murder of a member of a scheduled caste or minority community *etc.*, is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits2461 conferred on them with a view to reverse past injustices and in order to restore the social balance.
(b) In cases of 'bride burning' and what are known as 'dowry-deaths', or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(iv)Magnitude of crime

When the crime is enormous in proportion.

For instance when multiple murders say of all or almost all the members of the family or a large number of persons of a particular caste, community, or locality, is committed.

(v) Personality of Victim of Murder

When the victim of murder is:

(a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder;
(b) a helpless woman or a person rendered helpless by old age of infirmity;
(c) when the victim is a person whose murderer is in a position of domination or trust;

when the victim is a public figure generally loved and respected by the community for services rendered by him and the murder is committed for political or similar reasons other than personal reasons.[89] The way in which the crime was executed shows that it was pre-meditated and was not on account of a sudden provocation or any 'mental derange', and the manner in which the crime was committed, the weapon used, the brutality of the crime, the number of persons murdered, the helplessness of the victims are also relevant factors for ascertaining whether a case falls amongst the rarest of rare cases.[90] Capital punishment can be imposed in the rarest of rare cases if there are any aggravating circumstances such as

the accused having any criminal record in the past, the manner of committing the crime, delay in imposing the sentence and soon.[91]

Where the following facts are proved beyond doubt:

(1) there is no provocation or quarrel between the accused and the five deceased. All the five deceased were unarmed and sleeping during midnight and were helpless. There was no scope or chance for them to face the attack;
(2) it is proved beyond doubt that it was a pre-meditated one, but not on account of any sudden provocation;
(3) there is no mental derangement for the accused to kill five human beings in five strokes one after the other and were killed during the course of their sleep.
(4) the nature of the manner in which the accused committed the five murders found to be gruesome, calculated, heinous, atrocious and cold-blooded.2462

Accordingly, in the above circumstances, it is proved beyond doubt that the said heinous and calculated offence committed by the respondent/accused in killing the five persons with five strokes one after the other is a rarest of the rare cases of the present age in this State as a whole.[1] In *Bachan Singh v State of Punjab* ,[2] the Supreme Court has laid down certain guidelines for imposing death sentence depending upon facts and circumstances of each case. For example:[3]

(1) only in the gravest cases of extreme culpability, extreme penalty of death need to be inflicted;
(2) along with the crime, circumstances of the criminal has to be considered while marking choice of punishment;
(3) death sentence must be imposed only when life imprisonment appears to be altogether inadequate;
(4) before inflicting extreme penalty of death on the convict the Court has to strike a balance between aggravating and mitigating circumstances.

While deciding the question whether a case falls under 'rarest of rare category' the nature of the offence and its impact on the society is a determinative factor. Mere acquittal or lesser sentence imposed by sessions court or the High Court does not really relate to the gravity of the offence or its impact on society.[4]Where the murders of three persons had been committed in an extremely brutal, diabolical, revolting and dastardly manner with 9, 4, and 21 stab injuries being inflicted by the accused one after the another in succession on the three deceased, the motive for crime evinced total depravity and meanness. This was a cold blooded murder for money and for gains in the property without any immediately provocation, crime committed was an enormous one as all the members of the deceased family had been wiped out. The victims of the murder were an innocent girl of 18 years and a boy in his teens with a mother who was helpless before the accused, the brutality of the act as noted earlier is amplified by repeated stab wounds inflicted on the three deceased persons one after another in succession, these demonstrate that accusssed did not possess basic humaness and lacked the psyche or mind set which, might be amenable for any reform, therefore the case falls amongst rarest of rare cases.[5] The deceased, a child of less than 6 years was raped and thereafter brutally murdered by accused and it was held that the case falls in rarest of rare category and awarding death sentence would be proper.[6]

(vi) Contract killers

Contract killers deserve death sentence. In the instant case, *prima facie* some police officers and staff were engaged by some private persons to kill their opponent and the police officers and the staff acted as contract killers for them. Such a case would be a rarest of rare case.[7]2463

(vii) Serial killer

Accused was a serial killer who lured a number of small girls and killed them. He used to kill the girls after luring them inside the house, and he would then chop up and eat up their body parts after cooking them. Case fell under rarest of rare case. Death sentence awarded was held proper.[8]

(viii) Honour killing covered

The appellant was very annoyed with his daughter, who had left her husband and was living in an incestuous relationship with her uncle. This infuriated the appellant as he thought this conduct of his daughter had dishonoured his family, and hence he strangulated her with an electric wire causing death. Honour killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behavior. All persons who are planning to perpetrate 'honour' killings should know that the gallows await them. Death sentence was affirmed.[9]

It was a case of honour killing. Three accused appellants had killed six persons and had finished the whole family. The case fell within the category of rarest of rare case. However, as the incident was 20 years old, and the High Court in appeal had recorded the judgment of acquittal, the Supreme Court altered the sentence of death awarded by the Trial Court into that of life imprisonment.[10]

The 'rarest of the rare case' exists when an accused would be a menace, threat and antithetical to harmony in the society. Where the appellant had killed his brother and entire family (eight persons) of his brother, without any provocation, death sentence awarded to the appellant accused was held proper.[11]

201. Principles Governing Rarest of Rare Case

The following principles govern whether a case falls within the category of rarest of rare cases for inflicting punishment of death:[12]

(i) Though under the IPC the Court has very wide discretion in the matter of awarding sentence, yet when conviction is for an offence punishable with death, or in the alternative with imprisonment for life, or imprisonment for the term of years, the Court, if it deems fit to award death sentence, shall state special reasons for such sentence and the choice of maximum punishment of death should be reserved for the rarest of rare case.

(ii) What reasons constitute special reasons, will have to be determined on the facts and circumstances of each case, and in the very nature of things no criteria can be specified. Even so, a case of special reasons is made out, where the facts of the case disclose that culpability of the accused has assumed extreme depravity; where the accused it found to be an ardent2464 criminal and menace to the society; where the crime is committed in an organised manner and is gruesome, cold blooded, heinous atrocious and cruel where innocent unarmed persons are attacked and murdered without any provocation and where murder is committed by an accused who was duty bound to protect the victim. This is not exhaustive.

(iii) To determine whether the case falls in the rarest of rare cases, the Court shall consider aggravating as well as mitigating circumstances in the case.

(iv) Here again we may observe that it is neither possible nor desirable to attempt to specify the aggravating and the mitigating circumstances. They take their colour from the setting in which they occurrence their effect will have to be considered on the facts of each case. However, the number of deaths *ipso facto* to will not make a case the rarest of the rare case but will be a relevant aggravating circumstance and the mental condition of an accused will be a relevant mitigating circumstance.

202. Number of Persons Killed--Should Death Penalty be Imposed

The number of persons killed in the incident is not the determinative factor for deciding whether the extreme penalty of death could be awarded or not.[13] The number of persons murdered is a consideration but that is not the only consideration for imposing death penalty unless the case falls in the category of rarest of rare case.[14] Considering number of persons who had lost their lives at the hands of assailants by burning, then the motive for commission of the crime is not the only consideration which has to be kept in view for imposing the death penalty.[15] The number of victims alone would not make the case, 'rarest of the rare'.[16] Thus, where the accused aged 19 years under some psychic disorder and without any previous enmity, murdered three women by stabbing, the death sentence awarded to him by the sessions court was commuted to that of life imprisonment.[17] Likewise, when three persons were killed by using a bomb, deadly weapons and the sessions court awarded the death sentence only to the accused attacking with bombs and life imprisonment to the other accused, the death sentence of the accused attacking with the bomb was modified to life imprisonment by the High Court.[18] Again, when the accused persons forming an unlawful assembly and armed with axe and sticks, allegedly killed five deceased persons and injured five others, there being no premeditation to commit the five murders and no material to show that the accused who killed two persons with an axe was a person of desperate and dangerous character, the case was not found amongst rarest of rare case, and so the sentence of life imprisonment awarded by the sessions court could not be enhanced to capital punishment.[19]

True, the number of victims by itself is not a yardstick to discern a case to the category of rarest of rare cases, yet none the less, the number of victims is not2465 altogether outside the scope of consideration and should not be marginalised in appropriate cases.[20] In several cases where several victims were murdered, the Apex Court or the High Courts have awarded death sentence to the accused persons.[21] The accused, along with the co-accused, killed as many as 13 persons for a flimsy reason. All the victims were closely related to the accused and they were killed in the most dastardly manner. Most of the victims were sleeping when they were attacked. The accused did not spare even the small kids with whom he had apparently no enmity, the accused did not have even a grain of mercy or human kindness in his heart. Considering all these aspects, it was not found a fit case where the death penalty is to be commuted to life imprisonment.[22]

Brutality does not Necessarily make it Rarest of Rare Case

In every incidence of murder, brutality is involved. Brutality, obviously would be an existing factor, but how the same did take place is the relevant and necessary material to be considered. Brutality by itself will not bring it within the ambit of rarest of rare cases.[23] In *Subhas Ramkumar Bind alias Vakil v State of Maharashtra* ,[24] the Supreme Court emphasised that in every murder case, brutality is involved, but how the same took place is the relevant and necessary material to constitute a crime, such as murder committed for gain and when there is nothing exceptionally gruesome about the manner of committing the murder, the death penalty is not justified.[25]

203. Aggravating Circumstances

In *Bachan Singh v State of Punjab* ,[26] the following aggravated circumstances have been indicated by the Supreme Court on the basis of which death penalty may be imposed by the Court in its discretion:

(i) if the murder has been committed after previous planning and involves extreme brutality; or
(ii) if the murder involves exceptional depravity; or
(iii) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed:

(i) while such member or public servant was on duty; or
(ii) in consequences of anything done or attempted to be done by such member of public

servant in the lawful discharge of his duty as such member or public servant, whether at the time of the murder he was2466 such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(iv) if the murder is of a person who had acted in the lawful discharge of his duty under s 43 of the CrPC 1973 or who had rendered assistance to a magistrate or police officer demanding his aid or requiring his assistance under s 37 and s 129 of the said Code.

The aggravating circumstances given below were found enough to pass death sentence:

(1) This was a case of cold-blooded murder.
(2) Two victims were burnt to death by locking the house from outside.
(3) One of the victims was a young boy, aged about six years who somehow managed to come out of the burning house, but he was mercilessly thrown back to the fire.
(4) The victims did not provoke or contribute to the incident.
(5) One of the deceased persons was forcibly brought out from his house despite protests by his wife and, thereafter killed in a dramatic manner in broad daylight in the presence of people.
(6) The entire incident took place in the broad day light and the crime was committed in a most barbaric manner to deter others not to challenge the supremacy of the appellant in the village.
(7) The entire incident was pre-planned by the accused.[27]

204. Mitigating Circumstances

In *Bachan Singh's case,*[28] the Apex Court has pointed out the following mitigating circumstances, which may be considered by the Court in awarding sentence:

(i) that the offence was committed under the influence of extreme mental or emotional disturbance;
(ii) the age of the accused--if the accused is young or old, he shall not be sentenced to death;
(iii) the probability that the accused would not commit criminal acts of violence to constitute a continuing threat to society;
(iv) the probability that the accused can be reformed and rehabilitated the state shall by evidence prove that the accused does not satisfy conditions 3 and 4 above;
(v) that in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence;
(vi) that the accused acted under duress or domination of another person;
(vii) that the conditions of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.2467

Mitigating Factors are Negative Elements Against Postive Theory of Death Punishment

The Court has to follow the basic ingredients, which, emerge from the settled principle of doctrine of 'rarest of rare case' and 'sufficient cause' as contemplated under CrPC for proposing and confirming death penalty. All the sides of this aspect of confirming the death penalty have to be scrutinised with great care and caution. The 'mitigating circumstances', always play dominant role in confirming the death sentence. The mitigating circumstance has to be gathered and or collected and to be weighed from the facts and circumstances of the case. The confirmation of death sentences, therefore, cannot be based only on the

precedents and or aggravating facts and circumstances of any other case. The essential and relevant mitigating circumstances of the particular case always play a role of negative elements against the positive theory of death punishment. Therefore, the Court has to re-appreciate and re-assess the facts and circumstances of the case for the purposes of sentence.[29]

Young Age Whether a Mitigating Factor

Under s 82, IPC, only children under seven years of age are totally exempted from liability under the criminal law and, under s 83, a child above seven and under 12 years of age is immune from liability if he has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct on the particular occasion. However, apart from these provisions, the Code has not created any special categories or classes of persons, who can claim exemption from death sentence as a matter of right.[30]

Young age may be a circumstance to be taken into consideration in offences where the accused person is not fully able to understand the nature of his act or has been influenced by older persons. However, in a case in which a youth had deliberately murdered a small boy for motive of greed and there was no suggestion that he was prompted to the crime by any motive except his own basic nature, the proper sentence is one of death.[31] In the absence of extenuating circumstances, the sentence of death was, therefore, imposed on youthful offenders in several cases.[32] In *State of Rajasthan v Bhagwandas* ,[33] it was held that young age alone is not a mitigating circumstance to justify a lesser penalty when the accused has committed cruel and cold-blooded murders, though young age may be taken into consideration in a mercy petition.[34] In *Bachchey Lal v State of Uttar Pradesh* ,[35] the Supreme Court observed2468 that it is not in every case in which the accused is below 18 years of age, that the Court would necessarily and always decline to impose sentence of death, though the fact that the accused was below 18 years of age at the time of commission of offence is certainly an important factor which would guide the Court in determining whether it should, or it should not, inflict the penalty of death. In *Raghubir Singh v State of Haryana* ,[36] the fact of the convict being in his twenties won the modification of his death sentence into one of life-imprisonment. Where an accused of 19 years, on his father and mother being insulted, in an excited and emotional mood, shot the deceased without any premeditation, it was held that imprisonment for life would meet the ends of justice.[37] Similarly, where a young woman of 15, being roused to frenzy by the way in which she was treated, seized the first weapon that came to her hand, and made a murderous attack on her stepson in order to avenge herself against her husband, it was held that capital sentence was not called for and the lesser sentence would meet the ends of justice.[38] In *Amrit Lal Someshwar Joshi v State of Maharashtra* ,[39] their lordship of the Hon'ble Supreme Court observed that the age of the accused is a mitigating circumstance and that if the accused is young he should not be sentenced to death but it is not an inflexible rule that he cannot be sentenced to death.[40] The young age of the accused was considered as one of the factors in awarding lesser sentence of life imprisonment in several cases.[41]

Age definitely is a factor which cannot be ignored, though not a determinative factor in all fact situations. The accused had committed the murder of four members of a family. But keeping in view the fact that the accused was a young man and possibility of reformation could not be ruled out, death sentence awarded by Courts below was converted into life imprisonment.[42]

In the context of young age, the Supreme Court pointed out, in *Raisul v State of Uttar Pradesh* ,[43] that the courts would not be right if they substitute their own estimate in regard to the age of the accused, and reject on the basis of such estimate the statement as to age made by the accused.

Sex if a Mitigating Factor

The fact that the accused is a woman is not conclusive reason for not passing the sentence of death.[44] Even if the accused is a pregnant woman, capital sentence can be imposed, but its execution may be deferred till after delivery.[45] Similarly, the2469 existence of an extremely young baby, born to the accused since the murder, is not a ground for passing the lesser sentence when there are no extenuating circumstances.[46]

Old Age Whether a Mitigating Factor

No indulgence can be shown to old age when the crime has been committed in a most high handed and cruel manner on a small provocation.[47] Where an accused of 60 years age, killed his daughter and son-in-law with an axe, inflicting injuries on selected parts of their bodies, and the murders were not only pre-planned and cold-blooded but also treacherous of the worst kind, the Supreme Court did not interfere with the sentence of death.[48] In *Sunder v State* ,[49] it was held that the mere fact that the accused was 70 or 75 years of age, could not be taken to be a circumstance warranting the lesser sentence. However in *Ananta Kumar Karan v State* ,[50] the lesser sentence was imposed on the ground of the present old age of the appellant, and out of consideration for his family, and on the ground of absence of sufficiency of motive on record. However, when the accused aged 76 years was found guilty of an offence, punishable under s 302, IPC and got lesser of the two sentence, *viz*., life imprisonment, his sentence was not further reduced as the same would be contrary to the provision contained in s 302, IPC .[51]

Old age has emerged as a mitigating factor.[52] The Court substituted death sentence to life imprisonment since the convicts were 64 years old and had been in custody for 16 years.[53]

Criminal Antecedents

Where the accused found guilty for committing the murder of minor girl by strangulation had no criminal antecedents, and there was no evidence on the record that the accused was likely to repeat the crime, death sentence awarded to him by the Sessions Judge was modified to life imprisonment.[54]

Mere pendency of criminal cases against the accused is not a ground for awarding death sentence to the accused guilty for offence under s 302, IPC .[55]2470

Mob Violence Whether a Mitigating Circumstance

It is common experience that when people congregate in crowds, normal defences are lowered by offering a release from inhibitions from personal doubts and anxiety. In such a situation, one can well imagine that a member of such a group loses one's self, and normal standard or sense of judgment and reality. The primary motivational factor in the assembly of a violent mob may result in murder of several persons. Experts in criminology often express that when there is collective action, as in the case of a mob, there is diminished individual responsibility unless there are special circumstances to indicate that a particular individual had acted with any predetermination such as by use of a weapon not normally found. If, however, a member of such a crowd picks up an article or a weapon which is close by and joins the mob, either on his own volition or at the instigation of the mob responding to the exhortation of the mob playing no role of leadership, one may very well say that such a person did not intend to commit all the acts which a mob would commit left to himself, but did so under the influence of collective fury.[56]

Vicarious Liability Whether a Mitigating Factor

It is possible that in a given set of facts that the Court might think even in a case where death sentence can be awarded, the same need not be awarded because of the peculiar facts of that case like the possibility of one or more of the accused being responsible for offences less culpable than the other accused. In such circumstances, in the absence of their being no material available, to bifurcate the case of each accused person the Court might think it prudent not to award the extreme penalty of death. However, then such a decision would rest on the availability of evidence in a particular case.[57]

Prime Motive Robbery and not Murder--Whether a Mitigating Factor

Where the accused persons set ablaze the bus resulting in roasting of passengers and death of 24 passengers, the fact that the accused person were of young age or their prime motive was not murder but only robbery and the act of arson might have been committed in a weak moment or the fact that the

accused did not prevent atleast some of the passengers who tried to get out of the bus from escaping the scene, are not necessarily mitigating circumstances. Even if these three circumstances have any overtone of mitigation, they have been totally eclipsed by the other aggravating features looming large in the scenario of the crime unfurled in the evidence.[58]

Delay in Trial or in Disposal of Appeal Whether a Mitigating Factor

The value of delay as a mitigating factor depends upon the features of a particular case, and it cannot be divorced from the diabolical circumstances of the crime itself if it justifies the award of capital sentence.[59] Delay in hearing of an appeal, may, in conjunction with other circumstances, justify the commutation of death sentence, but this is not an absolute rule in the matter of sentence in every case.[60] Delay between the imposition of death sentence and its actual execution is not always a relevant consideration on the question as to whether the death sentence should be confirmed.2471 In matters of sentencing, there can be no inflexible rule that a delay of this or that particular number of years is a necessary impediment in the confirmation of sentence, including the sentence of death.[61]

The sense of masculine jealousy in the accused which developed into indignation over the infidelity of his beloved, an already married lady, and the fact of the long lapse of time between the imposition of capital sentence by the trial court and the hearing of the appeal by the Supreme Court were considered to be relevant grounds for reducing the sentence of death to that of life-imprisonment.[62] In *State of Maharashtra v Manglya Dhavu Kongil* ,[63] the Supreme Court was deciding the appeal in 1972 while the trial in the case was over on 27 April 1968 and the High Court in the meantime had acquitted the accused and set him free. In these circumstances, while reversing the judgment of acquittal, the Supreme Court sentenced him only to life-imprisonment. In the *State of Uttar Pradesh v Ramesh Prasad Misra* ,[64] the incident took place in September 1985 in which deceased die, the sessions court convicted the accused but the High Court acquitted them in appeal, the Apex Court while deciding the criminal appeal on 13 August 1996 reversed the order of acquittal of the High Court and convicted the accused under s 302, IPC, but in view of the long passage of time from the date of commission of the offence and the date of judgment in appeal by the Apex Court, the sentence of death recorded by the sessions judge was converted into rigorous imprisonment for life.[65] Where the occurrence had taken place in 1987 where the accused was 19 years of age and the accused was acquitted by the sessions court and the revision filed against the order of acquittal was dismissed by the High Court, the Supreme Court deciding the criminal appeal on 5 February 1996, *ie*, after about 8 years, reversed the orders of the two courts below and convicted the accused for the offences of murder but sentenced him to the lesser punishment of life imprisonment.[66] However, in a later case, *State of Uttar Pradesh v Dharmandra Singh* ,[67] the Supreme Court held that while it is true that a prolonged trial or execution of death sentence beyond all reasonable period may be a ground for converting the death sentence in a given case, it will be highly erroneous to lay down as a principle in law or draw an inference on fact that awarding of death sentence is improper in cases where accused persons are in custody for three years or more, even though the facts of the case otherwise call for a death sentence. If the former view is to be accepted as a correct principle, then practically in no murder case can death sentence be awarded, since in this country, normally, a murder trial and confirmation of death sentence takes more than three years.[68] However, where the accused persons were not habitual offenders and the trial had ended after 16 years, the case was not found amongst rarest of rare cases.[69] In *State of Haryana v Sher Singh* ,[70] though the2472 murder was ghastly and brutal and the trial court imposed the sentence of death upon the accused, the Supreme Court, in view of the fact that the trial court passed the order of conviction and sentence as early as 27 July 1974, and the High Court passed its order of acquittal as early as 2 April 1975, refrained from visiting the accused-respondent with the extreme penalty, provided by law for murder, and sentenced him to imprisonment for life. In *Vivian Rodrick v State of West Bengal* ,[71] it was observed that excessive delay in the disposal of a case, would by itself be sufficient for imposing a lesser sentence and when there has been an inordinate delay in the disposal of the appeal by the High Court, it should be a relevant factor for the High Court to take into consideration for imposing a lesser sentence. However, delay, caused by abscondence on the part of the accused, cannot be considered as an extenuating circumstance.[72]

Mental Derangement, Short of Insanity, Whether a Mitigating Factor

Under s 84, IPC, nothing is an offence which is done by a person, who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or what he is doing is either wrong or contrary to law. However, there may be cases where a man may not be insane in the strict sense so as to be entitled to the benefit of that section, but may, at the time of committing the murder, be in a frenzied mood or something in the nature of an abnormal state of mind. In such cases, the courts have generally imposed the lesser sentence of life imprisonment.[73] Where the accused, feeling insulted at his wife giving birth to an illgitimate child in his house and resenting the villagers congratulating him for the child birth, killed his wife, it was held that it was not a case for imposing the extreme penalty of law, and that the ends of justice would be met by imposing the lesser sentence.[74] Where feeling life unbearable on account of domestic quarrels, a woman (accused) jumped into a well with her children, it was held that the only sentence that could be passed, was the lesser sentence of imprisonment for life.[75]

Fear complex and excitement or irresistible impulse with loss of self-control do not substantiate the plea of insanity. They may, however, be relevant for the mitigation of the offence from murder to culpable homicide in certain circumstances.[76] In *Jai Dev v State of Punjab* ,[77] excitement was regarded as an extenuating circumstance.

Drunkenness Whether a Mitigating Factor

A person under intoxication can be excused, under s 85, IPC, if he had committed any offence, provided, intoxicating material was given to him without his knowledge2473 and against his consent, since a person cannot become drunk himself with liquor and commit an offence and then come and say that he had consumed liquor and therefore the benefit of s 85 should be given to him.[78] However, s 85, IPC is relevant only to ascertain whether the accused who was under intoxication at the time of commission of the offence is guilty or not. Once found guilty, the question arises whether drunkenness is an extenuating circumstance or not. In the absence of any evidence of motive, drunkenness, at the time of committing the murder, will be a good ground for passing the lesser sentence.[79] Where, therefore, the accused has committed the offence, in a state of drunkenness, as a result of provocation, however slight, it is a case in which the extreme penalty of law should not be inflicted.[80] Drunkenness was taken into consideration and the lesser sentence was passed in the undermentioned cases.[81] However, where the attack is a premeditated one, the mere fact that the accused had taken some liquor, cannot be regarded as sufficient reason for not imposing the penalty of death.[82]

Murder by a Deaf and Dumb Whether a Mitigating Factor

The law does not provide for a sane deaf-mute, who has never been instructed, from being exempted from punishment.[83]Of course, presumption may be made in the case of the deaf and mute, in favour of an absence of mind, but it cannot always be taken as an irrebuttable presumption; every case has to be judged on the evidence available in a particular case. The conduct of the accused, immediately after the occurrence, may be taken into consideration in determining whether he is incapable of understanding the nature of the act.[84]

In the undermentioned cases, on a conviction of a deaf-mute for murder, only the lesser sentence was passed.[85]

Provocation Whether a Mitigating Factor

If it looks more probable that some kind of provocation was offered by the deceased to the accused, death sentence should not be passed.[86] Where the accused waylaid the deceased, pursued him and stabbed him to death because he (*i.e.*, the accused) believed that the deceased had illicit intimacy with his wife, it was held that this was a sufficient provocation to constitute an extenuating circumstance for modifying the2474 sentence of death into one of life-imprisonment.[87] Where, therefore, the crime has been committed, in the heat of passion, on provocation and without premediation, it is not proper to pass the extreme penalty of law.[88] But the mere fact, that the attack was preceded by some exchange of abuse between the assailants and the deceased, is not a mitigating circumstance.[89]

Perverted Sense of Family Honour Whether a Mitigation Circumstance

That the murder was motivated by a perverted sense of family honour cannot be regarded as a mitigating circumstance.[90]

Accused having 2 children

In a case[91] before Karnataka High Court the lenient view was sought in the matter of sentence as the accused had two children. The request was declined by the Karnataka High Court as accused himself was responsible for making them orphans by killing their mother. It was something like an accused killing his own parents and praying for mercy in the Court on the ground that he has become orphan.

Absence of Premeditation Whether a Mitigating Circumstance

When the murder is committed in the course of sudden premediation, or on an impulse of the moment, usually the death sentence is not passed unless the circumstances are exceptional.[92] In *Dalel Ram Sarup v Emperor* ,[93] the extreme penalty of the laws was not considered desirable in view of the young age of the accused, the loss of temper in the heat of the moment, the sudden and trivial origin of the fight, the absence of any premediation and his anxiety to help his elder brother who too had received an injury. Where there was no sufficient motive for a premeditated murder and the probabilities were that there was some violent quarrel between the parties, the death sentence was commuted to the lesser sentence.[94] Where the murder was not a premeditated one, but was committed by the accused with a sense of frustration by the fact that his wife eloped with a stranger, it was held that the ends of justice would be amply met by sentencing the accused to imprisonment for life.[95] Where the accused, with a view to rob the ornaments and2475 money the deceased was having with her, suddenly succumbed to the temptation and murdered her when he found a suitable opportunity, it was held that the ends of justice would be met by awarding the lesser penalty of imprisonment for life.[1] In several cases the murder committed without premeditation and not in cold blood then it is recognised as one of the factors for awarding lesser punishment of life imprisonment.[2]

Acquittal of, or Passing of a Lesser Punishment on the Principal Offender Whether a Mitigating Factor

Where murder has been committed by the accused at the instigation of another person, the fact that the principal instigator has been acquitted is not an extenuating circumstance. However, where the accused, who are young men, have come under the influence of an elderly man and would not have committed the murder but for that baneful influence upon them, the ends of justice do not require that they should be sentenced to death.[3] Where, in participating in the murder, a son may have been acting under the influence of his father, the death sentence is not called for.[4] However, too much leniency should not be exercised in favour of persons whose participation alone made the commission of the crime possible, merely because the accused had no direct motive and probably participated in the murder to oblige a friend.[5] Therefore, merely because a son uses a pistol and causes the death of another at the instance of his father is no mitigating circumstance which the courts would take into consideration.[6]

Acquittal of or Sentence of Life Awarded, by Trial Court/ High Court Whether a Mitigation Circumstance

If after consideration the courts come to the finding that the case belongs to the rarest of the rare categories, acquittal or sentence of life awarded by trial court or High Court should not be considered to be a mitigating factor by the Apex Court.[7]

18 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1979) 3 SCC 727 .

19 For details refer to *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

20 *Triveniben v State of Gujarat* AIR 1989 SC 1335, (1990) Cr LJ 1890 ; *Sunil Batra v Delhi Admn* (1979) 1 SCR 392, AIR 1968 SC 1675 .

21 *State of Tamil Nadu v Rajendran* (1999) Cr LJ 4552 (SC) .

22 For detail refer to *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

23 *Ramji Rai & ors v State of Bihar* (2000) Cr LJ 19 (SC) .

24 *Triveniben v State of Gujarat* AIR 1989 SC 1335, (1990) Cr LJ 1890 .

25 *Bachan Singh's* case AIR 1980 SC 898, (1980) Cr LJ 636 .

26 *Machhhi Singh v State of Punjab* AIR 1983 SC 957, 1983 Cr LJ 1457 .

27 *Allauddin Mian & ors v State of Bihar* AIR 1989 SC 1456, (1989) Cr LJ 1466 .

28 *State of Uttar Pradesh v Dharmendra Singh* (2000) Cr LJ 5 (SC) .

29 *Gentela Vijayawardhana Rao v State of Andhra Pradesh* AIR 1996 SC 2791, (1996) Cr LJ 4151 (SC), (1996) 6 SCC 241, 1996 AIR SCW 3555 (SC) .

30 *Swamy Shraddananda v State of Karnataka* 2008 Cr LJ 3911, p 3921 (SC), AIR 2008 SC 3040, 2008 (10) Scale 669 .

31 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1980) Cr LJ 636 (SC) .

32 *State of Orissa v Dayamdhi Bisoi* (2003) Cr LJ 123 (Ori) (DB) .

33 *Bachan Singh v State of Punjab* AIR 1980 SC 898 .

34 *Machhi Singh v State of Punjab* AIR 1983 SC 957 .

35 *Machhi Singh v State of Punjab* AIR 1983 SC 957 .

36 *Machhi Singh v State of Punjab* AIR 1983 SC 957 .

37 For more details see *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

38 *Allauddin Mian & ors v State of Bihar* (1989) Cr LJ 1466 (SC), AIR 1989 SC 1456 ; *State of Rajasthan v Unied Malhotra* (1997) Cr LJ 1488 (Raj) (DB) .

39 For more details see *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

40 For more details see *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

41 *Ibid*; *Shohhit Chammar v State of Bihar* (1998) Cr LJ 2259 (SC), 1998 SCC (Cr) 790 ; *Heeralal v State* (2001) Cr LJ 2849 (All) (DB) ; *Sattan alias Satyendra v State of Uttar Pradesh* (2001) Cr LJ 676 (All) (DB) .

42 *Jai Kumar v State of Madhya Pradesh* (1999) Cr LJ 2569 (SC) .

43 *Sattan alias Satyendra v State* (2001) Cr LJ 676 (All) (DB) .

44 *Sattan alias Satyendra & ors etc v State of Uttar Pradesh* (2001) Cr LJ 676 (All) (DB) ; *Dr Heera Lal v State of Uttar Pradesh* (2001) Cr LJ 2849 (All) (DB) .

45 *Ramdeo Chauhan alias Rajnath Chauhan v State of Assam* 2001 Cr LJ 2902 (SC) .

46 *Nirpal Singh v State of Haryana* AIR 1977 SC 1066, p 1078, (1977) Cr LJ 642, **distinguishing Pyarelal v State of Punjab**[1962] 3 SCR 328, AIR 1962 SC 690 .

47 *Dharambir v State of Uttar Pradesh* AIR 1979 SC 1595 ; *Kuruvi Muthu v State of Tamil Nadu* AIR 1978 SC 1397, p 1398, (1978) Cr LJ 1421 ; *Bishnu Deo Shaw v State of West Bengal* AIR 1979 SC 964, p 972 ; *Rajendra Prasad v State of Uttar Pradesh* AIR 1979 SC 916, p 958 ; *Aditya Mahapatra v State of Orissa* (1980) SCC (Cr) 133, 135, (1979) 4 SCC 563 ; *Ram Nay-am v State of Uttar Pradesh* AIR 1971 SC 757, (1971) Cr LJ 649 ; *Dalip Singh v State of Punjab* AIR 1953 SC 364, p 367 ; *Roman v State of Kerala* (1968) ILR Ker 218 .

48 *Tarlok Singh v State of Punjab* AIR 1977 SC 1747, (1977) Cr LJ 1139, *State of Gujarat v Gandabhai Govindhbhai & ors* (2000) Cr LJ 92 (Guj) (DB) .

49 *State of Gujarat v Gandabhai Govindbhai* (2000) Cr LJ 92 (Guj) (DB) .

50 *Dilip Premnarayan Tiwari v State of Maharashtra* 2010 Cr LJ 905, p 919 (SC), 2009 AIR SCW 7592, AIR 2010 SC 361, 2009 (14) Scale 489, (2010) 1 SCC 775, [2009] 16 SCR 322 .

51 *Krishan v State of Haryana* (1997) Cr LJ 3180 (SC) .

52 *Apren Joseph alias Current Kunjukunju & ors v State of Kerala* AIR 1973 SC 1, (1973) Cr LJ 185 .

53 *Shiv Mohan Singh v State (Delhi Admn)* AIR 1977 SC 949, (1977) Cr LJ 767 .

54 *Anshad v State of Karnataka* (1994) SCC (Cr) 1204 .

55 *Jai Kumar v State of Madhya Pradesh* (1999) Cr LJ 2569 (SC) .

56 *State of Punjab v Gurmej Singh* (2002) Cr LJ 3741 (SC) .

57 *Shamshul Kanwar v State of UP* (1995) 4 SCC 430 .

58 *Lehna v State of Haryana* (2002) 3 SCC 76 .

59 *Om Prakash v State of Haryana* (1999) 3 SCC 19 .

60 *Francis v State of Kerala* (1975) 3 SCC 825 .

61 *Bachan Singh v State of Punjab* (1980) Cr LJ 636 .

62 *Allauddin Mian v State of Bihar* (1989) 3 SCC 5 .

63 *Gyasuddin Khan v State of Bihar* (2004) Cr LJ 395 (SC) .

64 *Balwant Singh v State of Punjab* AIR 1976 SC 230, [1976] 2 SCR 684 .

65 *Ambaram v State of Madhya Pradesh* AIR 1976 SC 2196, (1976) 4 SCC 298 .

66 *Sarveshwar Prasad Sharma v State of Madhya Pradesh* AIR 1977 SC 2423, [1978] 1 SCR 560 .

67 *Rajendra Prasad v State of Uttar Pradesh* AIR 1979 SC 916 .

68 *Shankar Kisanrao Khade v State of Maharashtra* 2013 Cr LJ 2595, p 2619 (SC), 2013 AIR SCW 2668, 2013 (5) SCC 546, 2013 (6) Scale 277 .

69 *Jai Kumar v State of Madhya Pradesh* (1999) Cr LJ 2569 (SC) .

70 *Mulla v State of UP* 2010 Cr LJ 1440, p 1454 (SC), AIR 2010 SC 942, 2010 (2) Scale 179, (2010) 3 SCC 508 ; *Ravji v State of Rajasthan* 1996 AIR SCW 132, (1996) 2 SCC 175, AIR 1996 SC 787, 1996 (1) ALD (Cri) 116 ; *Ram Singh v Sonia* 2007 AIR SCW 1278, (2007) 3 SCC 1, AIR 2007 SC 1218, 2007 (2) ALT (Cri) 203, 2007 Cr LJ 1642 .

71 *Sushil Murmu v State of Jharkhand* (2004) Cr LJ 658 (SC) .

72 *Kishori v State of Delhi* (1999) Cr LJ 584 (SC) .

73 *Gurvail Singh v State of Punjab* AIR 2013 SC 1177, 2013 Cr LJ 1460, p 1464 (SC) .

74 *Bachan Singh v State of Punjab* (1980) 2 SCC 684, AIR 1980 SC 898 .

75 *Machhi Singh v State of Punjab* AIR 1983 SC 957 .

76 *Gentelu Vijuyuwardhan Rao & anor v State of Andhra Pradesh* (1996) Cr LJ 4151 (SC) .

77 *State of Rajasthan v Balveer* 2014 Cr LJ 314, p 323 (SC), AIR 2014 SC 1117, JT 2013 (14) SC 366, 2013 (13) Scale 429 .

78 *Sheo Shankar Singh v State of Jharkhand* 2011 Cr LJ 2139, p 2156 (SC), 2011 AIR SCW 1845, (2011) 3 SCC 654, 2011 (2) Scale 654 .

79 *State of MP v Vishweshwar Kol* 2011 Cr LJ 2172, p 2175 (SC), 2011 AIR SCW 1910 .

80 *Sudam v State of Maharashtra* 2011 Cr LJ 4240, p 4243 (SC), 2011 AIR SCW 4335, (2011) 7 SCC 125, 2011 (7) Scale 415 .

81 *Md Mannan v State of Bihar* 2011 Cr LJ 3380 (SC), 2011 AIR SCW 2780, (2011) 5 SCC 317, 2011 (5) JT 167, 2011 (4) Scale 809 .

82 *Prajeet Kumar Singh v State of Bihar* 2008 Cr LJ 3596 (SC), (2008) 4 SCC 434, 2008 (4) Scale 442 .

83 *Ram Singh v Sonia* 2007 Cr LJ 1642 (SC), AIR 2007 SC 1218 .

84 *State of UP v Satish* 2005 Cr LJ 1428, p 1435, (2005) 3 SCC 114, AIR 2005 SC 1000 .

85 *Sunil Damodar Gaikwad v State of Maharashtra* (2013) 4 SCC (Cri) 83, 2013 AIR SCW 5836 .

86 *State of UP v Om Prakash* 2015 Cr LJ 1706 (SC), 2015 (1) Scale 380, (2015) 4 SCC 467 .

87 *State of Kerala v Santosh Kumar* 2015 Cr LJ 1527 (Ker) (DB) .

88 *Machhi Singh v State of Punjab* AIR 1983 SC 957 .

89 *Machhi Singh v State of Punjab* AIR 1983 SC 957 .

90 *Umashankar Panda v State of Madhya Pradesh* (1996) Cr LJ 1988 (SC) .

91 *Kishori v State of Delhi* (1999) Cr LJ 584 (SC) .

1 *Govindsami v State of Tamil Nadu* (1998) Cr LJ 2913 (SC) .

2 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1980) Cr LJ 636 .

3 *State of Orissa v Dayawidhi Bisoi* (2003) Cr LJ 123 (Ori) (DB) .

4 *Devender Pal Singh v State, NCT of Delhi & anor* (2003) I AD 5 (SC) .

5 *State v Atbir* (2006) Cr LJ 1802 (Del) (DB) .

6 *State of UP v Satish* (2005) Cr LJ 1428 (SC) .

7 *Prakash Kadam v Ramprasad Vishwanath Gupta* 2011 Cr LJ 3585, p 3589 (SC), AIR 2011 SC 1945 .

8 *Surendra Koli v State of UP* 2011 Cr LJ 3137 (SC), AIR 2011 SC 970, (2011) 4 SCC 80 .

9 *Bhawan Das v State (NCT of Delhi)* 2011 Cr LJ 2903, AIR 2011 SC 1683, 2011 AIR SCW 2867, 2011 (6) SCC 396, 2011 (95) Scale 498 .

10 *State of UP v Krishna Master* 2010 Cr LJ 3889, p 3905 (SC), AIR 2010 SC 3071, 2010 AIR SCW 4733, (2010) 7 Scale 597 .

11 *Mofil Khan v State of Jharkhand,* (2015) 1 SCC 67, 2014 (4) Crimes 529 (SC), 2014 (4) RCR (Criminal) 683, 2014 (11) Scale 623 .

12 *Guntur v GV Rao & anor* (1996) Cr LJ 703 (AP) (DB) .

13 *A Deivendmn v State of Tamil Nadu* (1998) Cr LJ 814 (SC) ; *Shamshul Kanwar v State of Uttar Pradesh* AIR 1995 SC 1748, (1995) AIR SCW 2741 ; *State of Uttar Pradesh v Bhoore* (1998) 1 SCC 128, (1997) AIR SCW 4224 .

14 *Anshad v State of Karnataka* (1994) SCC (Cr) 1204 (SC) .

15 *Shiekh Ishaque v State of Bihar* (1995) Cr LJ 2682 (SC), 1995 AIR SCW 2001 (SC) .

16 *Ibid*; *SG Gundegowda alias Moganna v State* (1996) Cr LJ 852 (Kant) (DB) .

17 *Joseph alias Jose v State of Kerala* (1996) Cr LJ 4094 (Ker) (DB) .

18 *Chandrahasan, Prisoner (Accused no 2)*(1996) Cr LJ 4308 (SC).

19 *Rataniya Bhina Bhil & ors v State of Gujarat* (1997) Cr LJ 891 (Guj) (DB) .

20 *Gentela Vijayawardhana Rao & anor v State of Andhra Pradesh* (1996) Cr LJ 4157 ; *Sheikh Ishaque v State of Bihar* (1995) Cr LJ 2682 (SC), 1995 AIR SCW 2001 (SC) .

21 *Govindasami v State of Tamil Nadu* (1998) Cr LJ 2913 (SC) ; *Gentela Vijayavardhana Rao & anor v State of Andhra Pradesh* (1996) Cr LJ 4151 (SC) ; *Panchhi & ors v State* (1998) Cr LJ 3305 (All) (DB) ; *State of Haryana v Nirmal Singh & anor* (1999) Cr LJ 662 (P&H) (DB); *Shiv Ram & anor v State of Uttar Pradesh* (1998) Cr LJ 76 (SC) ; *State of Haryana v Ram Krishan* (2000) Cr LJ 2649 (P&H) ; *Suresh & ors v State of Uttar Pradesh* (2000) Cr LJ 2792 (All) (DB) ; *Narayan Chetanram Chaudhary & anor v State of Maharashtra* (2000) Cr LJ 4640 (SC) .

22 *Gurmeet Singh v State of UP* (2005) Cr LJ 4384 (SC) .

23 *Registrar General, High Court of Karnataka v Prakash Jadav* (2006) Cr LJ 3393 (Kant) (DB) ; *Shyamlal v State of Chhattisgarh* (2006) Cr LJ 4743 (Chhattisgarh) (DB) .

24 *Subhas Ramkumar Bind alias Vakil v State of Maharashtra* (2003) Cr LJ 443 (SC) .

25 *State of Himachal Pradesh v Manohar Singh Thakur* (1998) Cr LJ 3630 (SC) .

26 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1979) 3 SCC 727 .

27 *State of Assam v Holiram Bordoloi* (2005) Cr LJ 1020 (Gau) (DB) ; *Holiram Bordoloi v State of Assam* (2005) Cr LJ 2174 (SC) .

28 *Bachan Singh's case*AIR 1980 SC 898, (1979) 3 SCC 727 .

29 *State of Maharashtra v Sahebrao* (2005) Cr LJ 2788 (Bom) (DB) .

30 *Ram Singh v State* AIR 1960 All 748 ; *Vaghari Madha Kana v State* AIR 1956 Sau 83 ; *Gurdev Singh v Emperor* AIR 1948 Lah 58 ; *Mool Chand v State* AIR 1953 All 220 ; but **see***Nga Thas Kin v Emperor* 12 Cr LJ 448 ; **see also***Gurvail Singh v State of Punjab* AIR 2013 SC 1177, 2013 Cr LJ 1460 .

31 *Emperor v Bhawwandin* (1931) Oudh 89 (1), 32 Cr LJ 83 .

32 *Jamndas Parashram v State of Madhya Pradesh* AIR 1963 MP 106 ; *Dhooni Chand v State* (1960) J & K 116; (1960) Cr LJ 1208; *Gurdev Singh v Emperor* AIR 1948 Lah 58 ; *Sheo Dina v Emperor* AIR 1933 All 939 ; *Jangli v Emperor* AIR 1934 Oudh 19, 35 Cr LJ 664 ; *Jai Kumar v State of Madhya Pradesh* (1999) Cr LJ 2569 (SC) ; *Ram Dec Chauhan & anor v State of Assam* (2000) Cr LJ 3954 (SC) ; *State of Haryana v Raju alias Raju Chauhan* (2000) Cr LJ 2726 (P&H) (DB); *Om Prakash alias Raja v State of Uttaranchal* (2003) Cr LJ 483 (SC) .

33 *State of Rajasthan v Bhagwandas* (1973) WLN 330 ; *Chevveti Ramudu*AIR 1943 Mad 69, p 71, 44 Cr LJ 299 ; *Chinnasami*AIR 1960 Mad 462, p 467, (1960) Cr LJ 1344 ; *Amritlal Someshwar Joshi v State of Maharashtra* (1994) 6 SCC 197 .

34 *Bhagwan Swarup v State of Uttar Pradesh* AIR 1971 SC 429 ; *Hjiktu Bhogta v Emperor* AIR 1942 Pat 427, 43 Cr LJ 544 .

35 *Bachchey Lal v State of Uttar Pradesh* AIR 1977 SC 2094, p 2095, (1977) Cr LJ 1733 .

36 *Raghubir Singh v State of Haryana* AIR 1974 SC 677, p 678, (1974) Cr LJ 603 ; *Mohd Aslam v State of Uttar Pradesh* AIR 1974 SC 678, (1974) Cr LJ 605 ; *Harnam v State of Uttar Pradesh* AIR 1976 SC 2071, (1976) Cr LJ 1642 .

37 *T Munirathnam Reddi*AIR 1955 AP 118, p 123, 56 Cr LJ 917 ; *State v Dukhi Dei* AIR 1963 Ori 144, (1963) 2 Cr LJ 294 ; *Ghunnai v Emperor* AIR 1934 All 132, p 134, 35 Cr LJ 448 .

38 *Daulan v Emperor* AIR 1926 Lah 144, 26 Cr LJ 1373 ; *Brijesh Kumar v State* AIR 1958 All 514, p 522 ; (1958) Cr LJ 842 .

39 *Amrit Lal Someshwar Joshi v State of Maharashtra* (1994) SCC (Cr) 1604, (1995) Cr LJ 600 (SC) .

40 *Ibid*.

41 *State of Rajasthan v Baisakha Singh* (1999) Cr LJ 1399 (Raj) (DB) ; *Joseph alias Jose v State of Kerala* (1996) Cr LJ 4094 (Ker) (DB) ; *Lalit Kumar v State* (1997) Cr LJ 848 (All) (DB) ; *Nirmal Singh alias Manbir Singh v State of Haryana* (1998) Cr LJ 1008 (F&H) (DB); *Om Prakash v State of Haryana* (1999) Cr LJ 2044 (SC) ; *Bantu alias Waresh Giri v State of Madhya Pradesh* (2002) Cr LJ 211 (SC) ; *Anil v State of Uttar Pradesh* (2002) Cr LJ 2694 (All) (DB) .

42 *Gurvail Singh v State of Punjab* AIR 2013 SC 1177, 2013 Cr LJ 1460, p 1464 .

43 *Raisul v State of Uttar Pradesh* AIR 1977 SC 1822, (1977) Cr LJ 1555 .

44 *Mi She Yi v Emperor* 1924 Rang 179, p 181, 25 Cr LJ 1121 ; *Rasammal*AIR 1915 Mad 821, 16 Cr LJ 20 ; *Empress v Nibbls* (1888) AWN 134 .

45 *Queen v Panh Aurat* 15 WR (Cr) 66 .

46 *Thalappile Thithachumma*AIR 1941 Mad 27, 42 Cr LJ 257 ; *State v Dukhi Dei* AIR 1963 Ori 144, p 151 ; *State of Tamil Nadu v Mini & ors* (1999) Cr LJ 3124 (SC) .

47 *Rameshwar v State of Uttar Pradesh* AIR 1973 SC 926, (1973) Cr LJ 940 .

48 *Rau Chima Chougule v State of Maharashtra* AIR 1977 SC 2407, (1978) Cr LJ 14, p 18 .

49 *Sunder v State* AIR 1957 All 809, p 816, (1957) Cr LJ 1378 .

50 *Ananta Kumar Karan v State* AIR 1962 Cal 428, (1962) 2 Cr LJ 179 .

51 *Gopal Mahadeo Tambada v State of Maharashtra* (1997) Cr LJ 2425 (Bom) (DB) .

52 *Mulla v State of UP* 2010 Cr LJ 1440 (SC), AIR 2010 SC 942, JT 2010 (2) SC 35, 2010 (2) Scale 179, (2010) 3 SCC 508 ;

Ravji v State of Rajasthan 1996 AIR SCW 132, (1996) 2 SCC 175, AIR 1996 SC 787, 1995 (4) Crimes 695 (SC), 1995 (6) Scale 745 .

53 *Bachhan Singh v State of Punjab* AIR 1980 SC 898, 1980 Cr LJ 636, (1980) 2 SCC 684 ; *Swamy Sharddananda v State of Karnataka* (2008) 13 SCC 767, 2008 AIR SCW 5110, AIR 2008 SC 3040, 2008 (10) Scale 669, (2008) 13 SCC 767 .

54 *Tufail Ansari v State of UP* 2015 (3) All LJ 129 (All) (DB) ; *Lalit Kumar Yadav v State of Uttar Pradesh* 2014 (4) All LJ 152 (SC) (Possibility of reformation not ruled out); *Ashok v State of UP* 2014 (1) All LJ 676 (All) (DB) (Rape and murder of a six year old girl, case not a rarest of rare case).

55 *Birju v State of MP* (2014) 3 SCC 421, 2014 Cr LJ 1568, AIR 2014 SC 1504 .

56 *Kishori v State of Delhi* (1999) Cr LJ 584 (SC) .

57 *State of Uttar Pradesh v Dharmendra Singh & anor* (2000) Cr LJ 5 (SC) .

58 *Gentela Vijayavardhon Rao v State of Andhra Pradesh* (1996) Cr LJ 4151 (SC) .

59 *Lajar Masih v State of Uttar Pradesh* AIR 1976 SC 653, p 656, (1976) Cr LJ 580 .

60 *Shanker v State of Uttar Pradesh* (1975) Cr LJ 634, p 637, AIR 1975 SC 757 .

61 *Bachan Singh v State of Punjab* AIR 1980 SC 898, (1980) Cr LJ 636 ; *Triveni Ben v State of Gujarat* AIR 1987 SC 142, (1989) Cr LJ 870 (SC), (1988) 4 SCC 574 .

62 *Neti Sreeramulu v State of Andhra Pradesh* AIR 1973 SC 2551, p 2554, (1973) Cr LJ 1775 .

63 *State of Maharashtra v Manglya Dhavu Kongil* AIR 1972 SC 1797, p 1804, (1972) Cr LJ 570 ; *Mudathamoole Shankappa Rai v State of Kerala* AIR 1969 Ker 120, (1968) Mad LJ (Cr) 485 ; *State of Uttar Pradesh v Hakim Singh* AIR 1980 SC 184, p 185 ; *State of Uttar Pradesh v Sahai* AIR 1981 SC 1442 ; *State of Uttar Pradesh v Suresh* (1981) 3 SCC 635 .

64 *State of Uttar Pradesh v Ramesh Prasad Misra,* (1996) Cr LJ 4002 (SC) .

65 *Ibid*.

66 *Dharma v Nirmal Singh Bith & anor* (1996) Cr LJ 1631 (SC) .

67 *State of Uttar Pradesh v Dharmandra Singh,* (2000) Cr LJ 5 (SC) .

68 *Ibid*.

69 *Gopal & etc v State of Uttar Pradesh* (1999) Cr LJ 2501 (All) (FB) .

70 *State of Haryana v Sher Singh* AIR 1981 SC 1021, p 1026 .

71 *Vivian Rodrick v State of West Bengal,* AIR 1971 SC 1584, p 1586, (1971) Cr LJ 1171 ; *Gudder Singh v State* (1954) Cr LJ 302 ; *Kalawati v State of Himachal Pradesh* AIR 1953 SC 131, p 135, 54 Cr LJ 668 ; *Rasammal*AIR 1915 Mad 821, 16 Cr LJ 20 ; *Vikram Singh v Raj Singh* (1998) SCC (Cr) 578 ; *State v Surya Prasad Verura* (2001) Cr LJ 2481 (All) (DB) .

72 *State of Rajasthan v Jawan Singh* (1971) Cr LJ 1656, p 1669 ; *Vettukattu Pachayanna Goundan v Vettukattu Pachayanna Goundan* AIR 1941 Mad 258, p 259, 42 Cr LJ 265 ; *Ananta Kumar Koran v State* AIR 1962 Cal 428, p 438, (1962) 2 Cr LJ 179 .

73 *Nga Pa Aung Gyaw v Emperor* AIR 1936 Rang 115, 37 Cr LJ 467 ; *Siddeshwari Bora v State of Assam* (1981) Cr LJ 1005 (Gau) (DB) ; *Perumal Kudumban v Emperor* AIR 1940 Mad 562, 42 Cr LJ 64 ; *Mitha v Emperor* (1933) Lah 123, 34 Cr LJ 909 ; *Emperor v Tincouri Dhopi* AIR 1923 Cal 460 .

74 *Kartar Singh v Emperor* AIR 1938 Lah 556, 39 Cr LJ 769 .

75 *Gyarsibai v State* AIR 1953 MB 61, p 63, 54 Cr LJ 588 .

76 *Kannakunnummal Ammed Koya v State of Kerala* (1966) KLT 613, AIR 1967 Ker 92 .

77 *Jai Dev v State of Punjab,* AIR 1963 SC 612, p 621, (1963) 1 Cr LJ 495 .

78 *Venkappa Kannappa Chowdari v State of Karnataka* (1996) Cr LJ 15 (Kant) (DB) .

79 *Kanji v State* AIR 1953 Raj 40, (1953) Cr LJ 434 ; *Judagi Mallah v Emperor* AIR 1930 Pat 168, 31 Cr LJ 243 ; *Pal Singh v Emperor* 1917 Lah 226, p 230, 18 Cr LJ 858 .

80 *Nga Po Than v King* 1938 Rang 448, 40 Cr LJ 67 .

81 *Batcha Sahib v Emperor* 14 Cr LJ 115 ; *Nga Kyin Baw v Emperor* (1933) Rang 278, 34 Cr LJ 1245 ; *Nga Sein Ge v Emperor* 1934 Rang 10, 35 Cr LJ 1065 .

82 *Sheru v Emperor* AIR 1926 Lah 232, 27 Cr LJ 630 .

83 Re *Peethambaran*AIR 1959 Ker 165, (1959) Cr LJ 596 ; *Emperor v Ulfar Singh* AIR 1947 All 301 ; Re *Oomai*(1955) 1 MLJ 113; *Emperor v Boya Polamma* AIR 1941 Mad 225, 42 Cr LJ 315 ; *Emperor v Khashaba Tatyai Lawand* AIR 1923 Bom 194, 25 Cr LJ 660 ; *Emperor v A Deaf and Dumb Accused* AIR 1917 Bom 288, 18 Cr LJ 143 (1) ; *Emperor v Nga San Myin* 12 Cr LJ 386 .

84 *King v Arakhit* AIR 1953 Ori 30, 54 Cr LJ 289 .

85 Re *Peethambaran*AIR 1959 Ker 165 ; *Emperor v Boya Polamma* AIR 1941 Mad 225 ; **see also***Empress v Somir Bowra* ILR 27 Cal 368, 4 Cal WN 421 .

86 *Gurdip Singh v State of Punjab* AIR 1971 SC 2240, (1971) Cr LJ 1544 .

87 *Jamkhokhai Kuki v State of Manipur* (1968) Cr LJ 64 (2), AIR 1968 Mani 7 ; Re *Gavisiddappa*AIR 1968 Mys 145, (1968) Cr LJ 762 ; *Mudathamoole Sankappa Rai v State of Kerala* AIR 1969 Ker 120, (1969) Cr LJ 494 ; *Balakrishna v State* AIR 1960 Ker 149, (1960) Cr LJ 594 ; *KM Nanavati v State of Maharashtra* AIR 1962 SC 605 ; *Chindan Nair v State of Kerala* AIR 1957 Ker 166, (1957) Cr LJ 1261 ; *Imam Bakhsh v Emperor* 1937 Lah 562, 38 Cr LJ 637 ; *Nur Ilahi v Emperor* AIR 1934 Lah 239, 35 Cr LJ 1476 ; *Gohra v Emperor* 7 PR 1890 ; *Jagar Beg Jat v Emperor* AIR 1937 Lah 692, 38 Cr LJ 105 .

88 *Abdul Alim v Emperor* AIR 1927 All 105, 27 Cr LJ 1392 ; *Gosain v Emperor* AIR 1920 All 199, 21 Cr LJ 607, AIR 1935 Cal 591, p 595, 36 Cr LJ 1254 ; *Emperor v Prem Singh* AIR 1942 Lah 301 ; *Emperor v Bhimji Jeram* 1 Cr LJ 491 ; *Khan v State* AIR 1955 Cal 146, 56 Cr LJ 485 .

89 *Kala v Emperor* AIR 1944 Lah 206, p 209, 45 Cr LJ 660 .

90 Re *Naina Mohamed*AIR 1960 Mad 218, p 222, (1960) Cr LJ 620 ; *Sohrai Sao v Emperor* AIR 1930 Pat 247, p 252 .

91 *Venkappa Kannappa Chowdari v State of Karnataka* (1996) Cr LJ 15 (Kant) (DB) .

92 *Gurdev Singh v Emperor* AIR 1948 Lah 58, p 61 ; *Narayanan Nair v State of Tr & Coch* AIR 1956 SC 99, (1956) Cr LJ 278 ; *State v Ajoti Pradhan* (1966) 32 Cut LT 494, p 500 ; *Hasil v Emperor* AIR 1942 Lah 37, 43 Cr LJ 370 ; Re *Sankappa Shetty*AIR 1941 Mad 326, 42 Cr LJ 558 ; *Emperor v Girdhari Teli* AIR 1940 Pat 605, 41 Cr LJ 587 ; *Sher Singh v Emperor* AIR 1931 Lah 538, 32 Cr LJ 1083 .

93 *Dalel Ram Sarup v Emperor* AIR 1946 Lah 222, p 229, 47 Cr LJ 730 ; *Gaman v Emperor* AIR 1928 Lah 913 .

94 *Pirthi v Emperor* AIR 1924 Lah 654, 26 Cr LJ 349 .

95 Re *Ramaswamy Nadar*AIR 1965 Mad 385, (1965) 2 Cr LJ 366 .

1 *State of Rajasthan v Poonam Singh* (1972) WLN 366 .

2 *Rajendra Rai v State of Bihar* (1999) Cr LJ 1448 (SC) .

3 Re *Moorthy*AIR 1956 Mad 536, p 540 ; *Gurdev Singh v Emperor* AIR 1948 Lah 58 .

4 *Kala v Emperor* AIR 1944 Lah 206, 45 Cr LJ 660 ; *Gulab v Emperor* AIR 1925 Lah 584, 26 Cr LJ 1133 .

5 *Sukhram Singh v Emperor* AIR 1945 Oudh 140, p 143, 46 Cr LJ 532 ; *Amru v Crown* 1950 EP 159 .

6 *Mjzajii v State of Uttar Pradesh* AIR 1959 SC 572, p 577, (1959) Cr LJ 777 (UP) .

7 *Devander Pal Singh v State NCT of Delhi & anor* (2003) I AD 5 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 302.

Punishment for murder.--

Acquittal of Some of the Accused Persons Whether a Mitigation Factor

Merely because eight persons convicted by the trial court were acquitted, by itself cannot be termed to be a justified ground for commuting the death sentence.[8] However, when the High Court exercised discretion and commuted the death sentence of some accused on account of acquittal of the other accused, the Supreme Court observed that for interfering with the discretion of the High Court, further exceptional grounds are required to be made out. Thus, though the Supreme Court had reservation about the sentence awarded by the High Court by way of exercise of discretion in commuting the death sentence, the Supreme Court declined to interfere with the sentence awarded by the High Court.[9]2476

Where in a case of kidnapping and murder of a child and causing disappearance of evidence, the other accused persons were given the benefit of the doubt having discarded the sole testimony of the prosecution witness but the conviction of the accused had been upheld in view of the evidence other than that of the said prosecution witness, *i.e.*, on presumptive evidence, in these circumstances, the death penalty imposed on the accused was converted into imprisonment for life.[10]

Life Imprisonment to Some of the Accused Persons--Whether a Mitigating Factor

Where the role played by the accused was somewhat similar to the role played by the other accused persons who had been given lesser sentence while the accused had been awarded death sentence, that too, with the aid of s 149, IPC, therefore, a question arose why this accused should not be considered at par with those accused for the purpose of awarding the sentence. The specific overt act attributed to the accused that he climbed the house of the informant and threatened to shoot the victims if they came out of their houses, while the other accused latched and set the houses on fire seemed to be an afterthought not having been told to the investigating officer by the witnesses when their statements were recorded by him. The accused was not treated by the prosecution itself as the leader of the gang but was considered to be one amongst other accused who took part in the incident. So, due to these mitigating circumstances sentence of accused was converted from death penalty to life imprisonment.[11]

Superstition and Religious Fanaticism Whether a Mitigating Factor

The fact that the accused was a weak man with a weak mind, labouring under strong religious superstition and belief, which actuated him in cutting off his wife's head, to the effect that profit and gain could come to him thereby, is not sufficient to exempt him from criminal liability for his wrongful acts unless the impulse was such as to render him unconscious of what he was doing or make him ignorant of the fact that the act which he was about to commit was wrong.[12] However, in *Queen v Orem Sungra* ,[13] where the accused committed murder in the belief that the deceased was a wizard and the cause of his child's illness, and that by killing the deceased, the child's life might be saved, the court commuted the sentence of death to the lesser sentence. Likewise, where the accused killed a woman under the conviction that she was a witch and was responsible for the illness of his wife and daughter, the court held that the proper sentence to be inflicted was the lesser sentence.[14] However, where a religious fanatic deliberately stabbed the deceased as he made speeches against the head of his (accused's) community, the sentence of death was confirmed with the observation that it would be dangerous in this country to give cause for belief that death would not, as a rule, result from murders even when they are committed for attacks on leaders of religious communities or under their influence2477 unless they are committed in circumstances which do

amount to grave and sudden provocation.[15]

Circumstantial Evidence Whether a Mitigating Factor

The mere fact that the case rests on circumstantial evidence, and not on the direct evidence, should not affect the sentence. If the evidence, whichever it be, leaves reasonable doubt about the accused's guilt, he is entitled to an acquittal. If it does not, the accused should receive an appropriate sentence.[16] There is no flexible rule that a death sentence cannot be awarded in a case resting on circumstantial evidence but Courts are, as a matter of prudence, hesitant in awarding this sentence in such a situation. Death sentence awarded on the charge of rape and murder was commuted to life imprisonment.[17]

The accused had eliminated three deceased. However, as the case was based on circumstantial evidence, death sentence awarded by Courts below was reduced to life imprisonment.[18] Even in the absence of direct evidence, the commission of the crime and the relative offence can be established if the circumstances on record prove the crime beyond reasonable doubt.[19] Witnesses may lie, but circumstances do not and generally speaking, it is possible to conclude on the basis of circumstantial evidence than with the evidence of eyewitnesses.

In cases where conviction in a murder case is based on circumstantial evidence, it would not be safe to award death sentence.[20]

Accused appellants had cut the dead body of the deceased stealthily. There was no direct evidence as to the manner in which the gruesome murder had taken place. No doubt the accused appellants committed the crime in a cold-blooded manner but they did it quite stealthily. The entire case rested on the circumstantial evidence. The High Court having taken all relevant factors into consideration rightly came to the conclusion that the case is not the one which falls in the category of 'rarest of rare'. The accused appellant was sentenced to life imprisonment.[21]

Accused respondent out of frustration arising from property dispute committed the murder of his father, step-mother and step-sister by administering poison in prasad and by strangulation. Held, the case did not fall in the category of rarest of rare cases. The Supreme Court refused to enhance the life imprisonment awarded to death sentence.[22]

Manner of Disposal of the Body of Deceased by Accused Whether a Mitigating Circumstance

It cannot be said that the manner in which the body of a deceased is disposed off should not influence the mind of an ordinary person, but the Court should not forget that it is to convict a man and award sentence for what he has done at the first2478 instance, and not by the manner in which he reacted after committing the crime. If in a case the accused did commit murder of his mother, then, the effect would remain that he committed murder and after committing the same realises that he would be caught and punished, because of which he disposed of the body in a particular manner. The disposal of the body in a particular manner would be punishable under s 201, IPC, and could not provide a foundation for awarding the capital punishment.[23] One would justify the award of capital punishment if the medical report said that the deceased was butchered and cut into pieces while she was alive.[24]

Not Running Away from Scene after Committing Murder whether a Mitigating Circumstance

The circumstance that after killing the deceased the accused did not run away and did not resist from being taken to the police station is not an extenuating circumstance.[25]

Being the only Son of his Mother Whether a Mitigating Circumstance

The circumstance that the accused is the only son of his widowed mother, cannot be taken into consideration in deciding whether or not the death sentence should be inflicted.[26]

Compromise Between the Accused and the Relations of Deceased Whether a Mitigating Circumstance

Nothing, including a compromise between the accused and the husband or father of the deceased victim, can be considered as an extenuating circumstance for imposing a lesser penalty than death where the accused commits murder of the victim by using a dangerous weapon like a dagger.[27]

Absence of Motive Whether a Mitigating Factor

In cases of multiple murders, where an accused is clearly not insane in the sense that he did no know what he was doing, the mere absence of motive, the apparent senselessness of the murders and the fact that he murdered persons in his own family in cold blood can furnish extenuating circumstances which can be taken into consideration in mitigation of the sentence, and the only sentence that can be passed is the sentence of death.[28]

Public Feeling Whether a Mitigating Circumstance

In Re *Sambangi Lakshumanna*,[29] it was pointed out that there may be individuals who may have strong views against capital punishment but it is wrong to say that the public as a whole, is urging the total abolition of capital punishment and, even if it were so, it is not part of the duty of the trial Judge to be influenced by public feeling.2479 His duty is to administer the law. The state of public feeling is not an admissible reason for refraining from passing the sentence of death.

Murder of an Illegitimate Child Whether a Mitigating Factor

It has invariably been held in all courts in India that in the murder of her newly born illegitimate child by a woman, there are mitigating circumstances sufficient to reduce the appropriate penalty very much below a sentence of imprisonment for life. It can safely be said that most of them apply, though certainly in a less degree, to the case of the father of such a child, more especially where the mother is his own sister.[30]

Receiving of Severe Injuries by the Accused Himself Whether a Mitigating Circumstance

The fact that the accused himself received severe injuries is no reason for mitigating his punishment.[31]

Accused in Jail for Years--Whether a Mitigating Factor

The fact that accused has spent nearly 17 years in custody after the incident in question can also be treated as a mitigating circumstance while considering the question of sentence.[32]

Expectation of Survival after Judgment of High Court Whether a Mitigating Factor

There is no legal basis that after the High Court refused to confirm the death sentence, the accused persons have entertained a just expectation of survival and therefore, the Supreme Court should not

interfere with the judgment of the High Court. In a judicial system like ours where there is a hierarchy of courts, possibility of reversal of judgments is inevitable, therefore, the expectations of an accused cannot be a mitigating factor to interfere in an appeal for enhancement of sentence if the same is otherwise called for in law.[33]

Sole Deposition of Child Witness Whether a Mitigating Circumstance

The sole deposition of a child witness, even if true, is not enough,[34] even if the murder may have been committed in a premeditated and calculated manner with extreme cruelty and brutality.[35] Therefore, when conviction in a murder case is based upon the sole testimony of a child witness, it amounts to mitigating circumstance in favour of the accused.

Conviction Based on Sole Evidence of Informant Whether a Mitigating Circumstance

Where the accused entered the house of the informant mother, armed with a pistol in order to rape her and shot dead her minor child, such act is gruesome and executed with extreme cruelty more so when both the informant mother and child were helpless2480 and defenceless, the case was found dangerously close to rarest of rare cases having regard to the fact that the conviction of the accused was based upon the sole testimony of the informant, not as a matter of law but by way of abundant caution, the High Court converted the sentence of death into one of rigorous imprisonment for life.[36]

205. Discrimination in Sentence Where Several Accused Commit the Offence

It would not be right to inflict death penalties upon a number of persons merely because a large number of persons have been killed. A good deal of authority shows that in proper cases, the Court should discriminate and that is probably for the reason that although a sentence may be logical, it may not be proper. The discrimination is based upon the ground of the assailant having taken a major part or a minor part and, in that process of reasoning a sense of propriety is involved.[37] Similarly, greater penalty may be inflicted upon the ring leader and lesser on those who took a comparatively subsidiary part.[38] Likewise, if, in a case, one particular accused, out of several accused, has a strong and direct motive for committing murder, he may be sentenced to death while others may be sentenced only to imprisonment for life.[39] Thus, where out of the two accused, the two shots fired by one, were separately sufficient in the ordinary course of nature to cause death, but the one fired by another and hitting the clavicle of the deceased was not sufficient to cause death, discrimination was made in the matter of sentence, upholding the death sentence on the one but commuting the same, on the other, into one of imprisonment for life.[40] Where, however, there are several persons accused of murder, and there is no reliable evidence as to who struck the fatal blow, it is not safe to differentiate the guilt of the accused and sentence some of them to the extreme penalty of the law.[41] Where it was difficult to say that the injuries, caused by *B* alone by gunshot led to the death of the deceased, and not the injuries, caused by *S* with the pharos, it was held that *B* could not be sentenced to death when sentence of *S* was reduced to one of life imprisonment.[42] Where, in *Jose v State of Kerala* ,[43] there was no indication that the appellant had played any greater part in murder than the other three accused, who had been sentenced only to life imprisonment, it was held that the appellant, too could not be singled out for a different punishment and, therefore, the sentence of death, imposed on him, was converted into that of life imprisonment. Where, in another case, nine persons had been shot dead and all the four accused had a role in causing such death, and there was no doubt that appellant 2 and appellant 4 must also have been responsible for causing death of some of the deceased, it was held that there was no reason for distinguishing the case of appellant 1 and appellant 3 from that of2481 appellant 2 and appellant 4. The sentence, on two of them, enhanced to death by the High Court, was, therefore, set aside and all were sentenced to life imprisonment.[44]

In a case where murder has been committed by one or more members of an unlawful assembly in pursuance of the common object of that assembly, the question whether sentence of death should not be imposed on those members of the unlawful assembly who themselves did not commit the murder has to

be decided on the facts and circumstances of each case.[45] However, it was held, in *Ajmer Singh v State of Punjab* ,[46] that when the offence is committed in consort, in pursuance of a prearranged plan and in furtherance of the common intention, there can be no justification for distinguishing the case of one accused from that of his co-accused in the matter of sentence. The view that five persons should not be sentenced to death for a murder of two persons is not in accordance with law.

206. Delay in Execution of Death Sentence by Judicial Process

Delay in execution of death sentence by judicial process is not a ground for commutation of death sentence.[47]

207. Inordinate Delay in Disposal of Mercy Petition

In *Ajay Kumar Pal v Union of India* ,[48] a three Judges Bench of the Supreme Court has held that an inordinate delay in the disposal of mercy petition and the solitary confinement of the accused during this period is violative of art 21 of the Constitution of India . In this case, the death sentence awarded by the Trial Court on 9 April 2007 attained finality on 16 March 2010 with the dismissal of appeals by the Supreme Court. His mercy petition preferred on 10 April 2010 *i.e.* within a month of the decision of the Court was forwarded the same day with all relevant documents so as to enable the concerned functionaries to exercise requisite jurisdiction. Held, though no time limit can be fixed within which the mercy petition ought to be disposed of, in the considered view of the Court the period of 3 years and 10 months to deal with such mercy petition in the present case comes within the expression 'inordinate delay'. The delay is not to the account of the petitioner or as a result of any proceedings initiated by him or in his behalf, but is certainly to the account of the functionaries and authorities concerned. The death sentence was commuted into life imprisonment.

208. Effect of Acquittal of Some Accused on Conviction of Others

See commentary under the same heading in s 34, *ante,* Vol. 1.

Where, after acquittal of 14 accused persons out of 15, there was no finding that the unlawful assembly consisted of five or more persons, known or unknown, identified or unidentified, it was held that the charge under s 149 had failed and2482 ss 149 and 147 could not be invoked for convicting one single accused.[49] Likewise, if out of seven persons charged under s 149 along with s 302, three persons are acquitted, the remaining three cannot be convicted because the essential requirement of an unlawful assembly would be lacking.[50] Where, however, four persons are prosecuted under s 302 read with s 34, failure of the prosecution to prove that one of them took part in the commission of the offence does not introduce any infirmity in its case against the remaining accused at all. Even if he is held not to be present at the scene of the offence, that, in law, cannot prevent the prosecution from presenting its case against the remaining accused if the evidence, adduced by it, is otherwise satisfactory and cogent.[51] In *Prabhu Babaji Navle v State of Bombay* ,[52] it was held that if a person is charged under s 302 read with s 34, for having shared common intention and participated in the crime and all other persons, except him, are acquitted, the element of sharing common intention with them disappears; and unless it can be proved that he shared common intention with the actual murderers, he cannot be convicted with the aid of s 34 . On the other hand, in *Wasim Khan v State of Uttar Pradesh* ,[53] the High Court found that the appellant, along with two others committed the offence of robbery and murder, but the two co-accused were acquitted. The Supreme Court held that, on the finding of the High Court, the appellant could be convicted by the application of s 34 even though the two co-accused of the appellant were acquitted. Where two co-accused are charged under s 302 read with s 34, and one of them is acquitted or found not guilty of the offence charged, the other co-accused can be convicted of murder under s 302 if the evidence justifies it.[54] Where an accused is charged with a substantive offence by invoking the aid of s 34, there is no legal bar to his conviction under the substantive offence simpliciter[55] if no prejudice is caused to the accused.[56] When the only evidence against accused No 1 was that he gave a *lalkara* and report of ballistic expert did not support the prosecution in regard to the complicity of accused No 2 and, therefore, they were given the benefit of the doubt and came to be acquitted, the acquittal of the co-accused 1 and 2 cannot to be a

ground for giving the benefit of the doubt to the main accused no 3,[57] even if the acquittal of two accused or the remaining accused is erroneous.[58] When the evidence showed that the accused intentionally fired at the deceased causing fatal injuries to him and subsequently fired at the injured his conviction under s 302 and ss 307 / 34, IPC was found proper but there was no evidence showing that the co-accused fired the shot either at the injured or at the deceased or made any exhortation to kill, the co-accused was given the benefit of the2483 doubt.[59] As the Supreme Court doubted the veracity of the prosecution case against all the accused persons and acquitted them, the Court found it just and expedient to extend the benefit of doubt even to two non-appellants accused and recorded acquittal of all the accused of the charge under s 302, IPC .[60]

Four accused persons armed with iron rod, knife, dang had assaulted the deceased, and caused injuries. The appellant no. 4 inflicted 4-5 knife blows in the abdomen of the deceased as a result of which the deceased fell down. After the deceased fell own, appellant nos. 1, 2 and 3 did not inflict injuries on the deceased. Conviction of the other appellant nos. 1, 2 and 3 under ss 302 / 34, IPC was set aside. However, they were convicted under ss 323 / 34 and 324 / 34, IPC .[61]

209. Death Sentence held Proper

Where the accused had committed murder of three innocent children when they were returning from school, and accused aged 28 years, was not suffering from a mental disorder, there was no chance of his reformation and rehabilitation, hence, death sentence awarded by Sessions Judge was held proper.[62] Appellants accused attempted to commit rape on village girls twice, on being admonished by village Panchayat, committed rape and brutally murdered a girl aged 18 years. Case was based on circumstantial evidence. Held, case fell in the category of rarest of rare case, thus, death sentence was held proper.[63]

Appellant accused along with others committed the murders of 13 persons of his family in most dastardly manner on flimsy motive. Death penalty imposed was held justified and proper.[64]

Two persons were burnt to death by the accused appellants after locking the house from outside. One person was dragged from his house and cut into pieces. The aggravating circumstances against the accused were (a) this was a case of cold-blooded murder; (b) the accused was leading the gang; (c) the victim did not provoke or contribute to the incident; (d) two victims were burnt to death by locking the house from outside; (e) one of the victims was a young boy, aged about 6 years, who, somehow, managed to come out of the burning house, but he was mercilessly thrown back to the fire by the appellant; (f) the dragging of Nagarmol Bordoloi by the appellant to his house and then cutting him into pieces in broad day-light in the presence of by-standers; (g) the entire incident took place in broad daylight and the crime was committed in the most barbaric manner to deter others from challenging the supremacy of the appellant in the village; (h) the entire incident was pre-planned by the accused appellant. Death sentence awarded to appellant was held proper.[65]2484

210. Pardons, Suspension, Remission *etc*. of Sentences under Constitution and the Code of Criminal Procedure 1973--Legal Position

Few provisions in the CrPC and others in the Constitution deal with such a situation, ss 432, 433, and 433A of the CrPC and arts 72 and 161 of the Constitution deal with pardon. Article 72 of the Constitution confers upon the President the power to grant of pardons, reprives, respites or remission of punishment or to suspend, remit or commute sentence of any person of any offence. The power so conferred is without prejudice to the similar power conferred on the Governor of the State. Article 161 of the Constitution confers upon the Governor of a State similar powers in respect of any offence against anybody relating to a matter to which the executive power of the State extends. The power under art 72 and art 161 of the Constitution is absolute and cannot be altered by any statutory provision such as ss 432, 433, 433A of the CrPC or by any Prison Rules.[66]

Section 432 of the Code empowers the appropriate government to suspend or remit sentences. The expression 'appropriate government' means the Central Government in cases where the sentences or

order relates to the matter to which the executive power of the Union extends and the State Government in other cases. The release of prisoners condemned to death in exercise of the powers conferred under s 432 of the CrPC and art 161 of the Constitution does not amount to interference with due and proper course of justice, as the power of the Court to pronounce upon the validity, propriety and correctness of the conviction and sentence remains unaffected, similar power as those contained in s 432 of the CrPC or art 161 of the Constitution can be exercised before during or after trial. The power exercised under s 432 of the CrPC is largely an executive power vested in the appropriate government and by reducing the sentence, the authority concerned thereby modify the judicial sentence. The section confines the power of the Government to the suspension of the execution of the sentence or remission of the whole or any part of the punishment as s 432 of the CrPC gives no power to the Government to revise the judgment of the Court. It only provides power of remitting the sentence. Remission of punishment assumes the correctness of the conviction and only reduces punishment in part or whole. The word 'remit' as used in s 432 is not a term of art. Some of the meanings of the word 'remit' are to pardon to refrain from inflicting to give up. It is therefore, no obstacle in the way of the President or Governor as the case may be in remitting the sentence of death. A remission of sentence does not mean an acquittal.[67]

The power to commute a sentence of death is independent of s 433A, CrPC . The restriction under s 433A of the Code comes into operation only after power under s 433, CrPC is exercised. Section 433A is applicable to two categories of convicts:

(a) those who could have been punished with sentence of death; and
(b) those whose sentences have been converted into imprisonment for life under s 433 .[68] It was observed in *Mura Ram v Union of India* .[69] That s 433A does not violate art 20(1) of the Constitution .2485

In the circumstances, if any motion is made in terms of ss 432, 433, and 433A of the Code and or art 72 and art 161 of the Constitution as the case be the same may be appropriately dealt with.[70]

Wide Powers of President and Governor Regarding Pardon, *etc.*, are Subject to Judicial Review by Higher Courts

There cannot be any dispute with the proposition of law that the power of granting pardon under art 16 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. However, the said power being a Constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under art 161 of the Constitution if the governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is a mala fide one or the Governor has passed the order on some extraneous consideration.[71] The extent of judicial review in relation to an order of the President under art 72 of the Constitution of India was a subject matter of consideration before this court in *Kehar Singh's* case[72] where the Constitution Bench had observed, 'It appears to us clear that the question as to the area of the President's power under art 72 of the Constitution falls squarely within the judicial domain and can be examined by the Court by way of judicial review.'

The Court had further indicated that 'as regards the considerations to be applied by the President to the petition we need say nothing more as the law in this behalf have already been laid down by this court in *Maruram's* case.'[73] What has been stated in relation to the President's power under art 72 applies equally to the power of the Governor under art 161 of the Constitution . In *Maruram's* case the Court came to the conclusion that the power under arts 72 and 161 can be exercised by the Central and State Governments and not by the President or Governor on their own. The advice of the appropriate government binds the head of the State. The Court also came to the conclusion that considerations for exercise of power under art 72 or art 161 may be myriad and their occasions protean, and are left to the appropriate Government,

but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or *mala fide*. Only in these rare cases will the Court examine the exercise. In para 62 of the judgment in *Maruram's* case[74] the Court had observed:

> An issue of deeper import demands our consideration at the stage of the discussion. Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot: for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms are valid in our constitutional order.2486

> It was further held that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism.

A three judge Bench of the Supreme Court considered the question of judicial review against an order granting pardon by the Governor under art 161 of the Constitution in the case of *Swaran Singh v State of Uttar Pradesh.* [75] In that case, an MLA of the State Assembly had been convicted of the offence of murder and within a period of less than two years he succeeded in coming out of the prison as the Governor of Uttar Pradesh granted remission of the remaining long period of his life sentence. The son of the deceased moved the Allahabad High Court challenging the aforesaid action of the Governor, and the same having been dismissed the matter had been brought to the Supreme Court by grant of special leave petition. The Supreme Court had come to the conclusion that the Governor was not told of certain vital facts concerning the prisoner such as his involvement in five other criminal cases of serious offences, the rejection of his earlier clemency petition and the report of the jail authority that his conduct inside the jail was far from satisfactory, and out of two years and five months he was supposed to have been in jail, he was in fact on parole during the substantial part thereof. The Court further held that when the Governor was not posted with material facts the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner and the order fringes on arbitrariness. The Court, therefore, quashed the order of the Governor with a direction to reconsider the petition of the prisoner in the light of the materials which the Governor had no occasion to know earlier.

The Governor should be made aware of as to what is the total period of sentence the accused has really undergone, and if at all has undergone any sentence. When an accused is convicted of the heinous offence of murder and is sentenced to imprisonment for life the authority who has been conferred with the power to grant pardon and remission of sentence under art 161 of the Constitution must be made aware of the period of sentence in fact undergone by the said convict, as well as his conduct and behaviour while he has been undergoing the sentence which would all be germane considerations for exercise of the power.[76] Not being aware of such material facts would tend to make an order granting pardon arbitrary and irrational as has been held by this court in *Swaran Singh's* case.[77]

211. Alteration of Conviction from Section 302 to Section 304, Part I

Commentary under the same heading in s 304, *post*, may be referred to.

Where the deceased was an intervener, was trying to pacify the dispute, and the accused appellant had no intention to cause the death of the deceased, he had fired one gunshot which proved fatal, his conviction under s 302, IPC was altered to one under s 304, Pt I.[78]

212. Alteration of Conviciton from Section 302 to Section 304, Part II

Where appellant A2 had inflicted two injuries by knife which were sufficient to cause death of the deceased, and the doctor also opined that these injuries were sufficient to2487 cause death, the plea of the appellant A2 that he had no intention to cause death as such was repelled, and he was liable for conviction under s 304, Pt II.[79]

Commentary under the same heading in s 304, *post*, may be referred to.

213. Alteration of Conviction from Section 302 to Either Section 304, Part I or Part II

Commentary under the same heading in s 304, *post*, may be referred to.

214. Alteration of Conviction from Section 304 to one Under Section 302 or *Vice Versa*--Legal Position

Commentary under the same heading in s 304, *post*, may be referred to.

215. Alteration of Conviction from Section 304 to Section 302 But Not *Vice Versa*--Cases

Commentary under the same heading in s 304, *post*, may be referred to.

216. Alteration of Conviction from Section 302 to Section 304A

Commentary under the same heading in s 304A, *post*, may be referred to.

217. Alteration of Conviction from Section 304A to Section 302

Commentary under the same heading in s 304A, *post*, may be referred to.

218. Alteration of Conviction from Section 302 to Section 304B

Commentary under the same heading in s 304B, *post*, may be referred to.

219. Alteration of Conviction under Sections 300 / 302 to Section 307

Where the doctor who examined the injury of the deceased had stated that his condition was serious and pulse ineffable; however, the deceased died while being taken from one hospital to another and was cremated without post-mortem; the evidence showed that the accused made an assault on the life of the deceased with a country made pistol with an intention to cause death, due to which his condition was serious; the conviction of the accused under s 302 was set aside, and he was held guilty under s 307, IPC .[80]

Where the victim died due to an injury as a result of being fired at by the co-accused as per the opinion of the doctor, and the said co-accused was acquitted by the High Court, the accused who fired at the deceased causing the injuries on his back which were not fatal was not convicted for the offence under s 302 but as he had fired at the victim with a rifle, he could not escape his conviction for attempt to commit murder.[81] Where the accused persons were convicted and sentenced under ss 302 / 149 and ss 307 / 149 but the death of the victims were caused by the sole fatal arrow injury, the accused who caused the arrow injuries were held guilty under s 302, and the remaining accused who caused grievous and simple injuries to the prosecution witness were held guilty under ss 307 / 34, and acquitted under ss 302 / 149 2488 and ss 307 / 149, IPC .[82] When one of the eyewitness stated that the accused persons did not continue to be a member of the unlawful assembly, the conviction of the accused person was modified from under ss 302 / 149 to that under ss 307 / 149, IPC .[83]What was proved against the appellant was

that he shot at the deceased, but there was no evidence to show that it was the injury inflicted by the appellant which was the cause of death. However, from the facts proved, there was no doubt that he shot at the deceased with an intention to kill him or at least he had the knowledge that the act would cause the death. Held that the allegations proved constituted an offence under s 307, IPC . Conviction of the appellant accused under s 302, IPC was altered to one under s 307, IPC .[84]

There was really no direct exhortation to kill but the same was to the effect that the deceased and others should not be permitted to run away and should be attacked. On hearing the exhortation, accused no. 2 pierced the spear in the chest of the deceased. The evidence of PWS was different as to the manner of exhortation. Accused was convicted under s 307 read with s 110 and not under s 302, IPC .[85]

220. Alteration of Conviction from Section 302 to Section 323

The fact of death supervening upon infliction of hurt is not imputable to the person, who inflicts the hurt, if all that he intends or knows to be likely, is hurt. The conviction, in such cases, must be for hurt only.[86]

Obviously, if no hurt has been caused, there can be no offence under this section. Even if hurt has been caused, it would not be an offence under this section if it was caused without an intention to cause it or without knowledge of its being likely to be caused. The fact of death, supervening upon infliction of hurt, is not imputable to the person who inflicted the hurt if all that he intended or knew to be likely was hurt. The conviction, in such cases, must be for hurt only.[87]

Where a large number of persons armed with sticks and stones caused death of one victim and injury to another, it was not established as to who specifically attacked whom, the intention to cause death of the deceased was not clearly established and there was more possibility that intention was to give a severe beating to the deceased, in the circumstance's the conviction of the accused under s 302 read with s 149 was2489 altered to one under ss 147, 323 and 325 .[88] The deceased who had come to the field of the accused unexpectedly was attacked by gandasa. Held, the accused did not have common intention to cause the death of the deceased. The accused who gave fatal blow was convicted under s 302, IPC, others were convicted under s 323, IPC .[89]

There was no evidence of plan or prior meeting of minds between the two accused appellants A1 and A2. A1 had assaulted and caused injuries to the PW5, hence his conviction under ss 302 / 34, IPC was altered to one under s 323, IPC . The appellant A2 had assaulted the deceased with a Tabbal, had caused as many as 8 incised wounds on various parts of the body of the deceased, thus, his conviction under s 302, IPC was upheld.[90]

The question of convicting the accused under s 302 or s 304, Pt I/Pt II, IPC, would arise only if it can be established that the fatal blow can be traced to the accused. Similarly, the question of convicting the accused under s 325 can arise only if it can be established from the evidence on record that the accused inflicted one of the grievous injuries sustained by the deceased. However, when there is no evidence and accused's involvement in the crime has been established, he can be convicted being one of those who assaulted the deceased with a stick and the autopsy report shows injuries attributable to a stick on the corpse of the deceased. Under these circumstances there is no option but to convict the accused under s 323 so the conviction under s 302 was altered to one under s 323, IPC .[91] Where other accused persons other than main accused found guilty under s 302, IPC had inflicted only simple injuries, they were acquitted of the charge under s 302, IPC and convicted only under ss 323, 324 and 325, IPC .[92]

Where the deceased was assaulted with fists and kicks, the accused did not have any weapon, the doctor did not find any visible injury and death was caused due to spleen rapture, the accused could not be attributed with knowledge that by such act they were likely to cause death of the deceased, nor it could be said that they intended to cause that particular injury which they caused, under the circumstances, the offence would fall under ss 323 / 34 and not under ss 302 / 34 .[93] Where the accused caught hold of the shirt collar of the deceased and pushed to fall on the rough surface and when the deceased fell down, he succumbed to the head injury. The evidence of the Medical Officer revealed only one external and one

internal injury. There was not even a fracture. Neither any weapon was used nor the push given by the accused was followed by any violent attack. Therefore, as the medical evidence was clear to the effect that the deceased received only simple injuries, even though the death ensued conviction under s 302 was altered to one under s 323 .[94]

Where the accused kicked on testicles of the deceased, intention to cause death or knowledge that said act would cause death, could not be inferred, it was an accidental and not homicidal death and the offences under s 302 or 304, Pts 1 or 2 were not2490 made out, when the accused persons did not use any deadly weapons in causing assault on the deaceased, the case falls under s 323 and not under s 302 of IPC .[1]

Where the accused inflicted a single *lathi* blow on the head of the deceased resulting in simple injury which was in the nature of a lacerated wound on the left side of the parietal region with swelling extending upto the left eye lid, which did not result in fracture. A lacerated wound on the head cannot be said to be dangerous to life or of a serious nature; the medico-legal report described this injury as simple, caused by a blunt weapon, the cause of death was an internal injury in the nature of intracranial hemorrhage caused by the single *lathi* blow inflicted by the accused; the conviction of the accused was modified from under s 302 to s 323, IPC .[2] Where the accused inflicted a *lathi* blow, and the co-accused inflicted a single spear blow on the stomach of the deceased causing his death, the spear injury intentionally caused by the co-accused was sufficient in the ordinary course of nature to cause death but the same was not in the contemplation of the accused, the conviction of the accused under s 302 read with s 34 was altered to one under s 323 and that of the co-accused under s 302 was found proper.[3]

Where the only evidence against the accused was that he instigated the main accused to give blows and he would take care of the situation, he having entered the scene after the quarrel had started, did not have the knowledge that the main accused had knife with him, would not mean that the accused had an intention to cause the death of the deceased, particularly, under s 324 read with s 114 or s 302 read with s 34, IPC . The appropriate provision under which he was convicted was s 323 read with s 34, IPC or s 114, IPC .[4] Where the evidence of the witnesses proved that while the accused and his wife, the deceased, were alone he beat her, and on hearing her cries the witnesses ran to the spot and found her lying in injured condition. The injuries caused on her head and chest, resulted in her death, however, no weapon with which injuries were caused was found or discovered, and the accused was held liable to be convicted under s 323 and not under s 302 .[5]

221. Free Fight Case

Where both the complainant and the accused had sustained injuries in a free fight, and the accused appellant had not caused fatal injury on the deceased, his conviction under s 302, IPC was converted into one under s 323, IPC .[6]

222. Alteration of Conviction under Sections 302 / 149 to Sections 324 / 149

Where on the basis of the evidence of the prosecution witnesses including an eyewitness and a medical witness on record, it was clear that the accused persons in furtherance of their common object gave a beating to the deceased causing simple injuries on non-vital parts of the body and superficial injuries on the head, the accused persons had ample opportunity and time to inflict serious injuries to the deceased, the conviction of the accused persons under ss 300 / 302 / 149 IPC was set aside and instead they were convicted under ss 324 / 149, IPC .[7] When one of the accused instigated the2491 co-accused by saying '*maro*' *i.e.*, 'to strike' the deceased, which did not mean 'to kill', the conviction of the accused was altered from ss 302 / 34 to s 324 read with s 110, IPC .[8] Where all the accused persons were armed with deadly weapons and attacked the deceased, the main accused hurled a bomb on the deceased while other co-accused persons joined the main accused in chasing the deceased and beating him indiscriminately with hunting sickles, the conviction of the main accused under ss 148 and 302 IPC, and ss 3 and 5 of the Explosive Substances Act 1908, was found proper, but since the vital injuries were not caused by the co-accused persons, they were found liable to be convicted for the offence under ss 324, 148, IPC .[9]

223. Alteration of Conviction from Section 302 to Section 325

Where there was no positive evidence in the case to hold as to which particular injury was inflicted by the accused and which injury sustained by the deceased was responsible for his death, the co-accused having been acquitted making s 34, IPC, inapplicable, the conviction of the accuse was converted from one under s 302 to one under s 325, IPC .[10] Where the accused after conniving with the other accused entered in house of the complainant unauthorisedly, beat the deceased and by twisting his neck murdered him, and the incident had occurred suddenly as accused persons were abusing family members of the deceased, no specific role has been assigned to the accused by the eye-witnesses except one witness in relation to twisting of neck, there was no evidence showing that the accused had any intention to cause death of the deceased or to cause such bodily injury which was likely to cause his death. Therefore, the conviction of the accused was altered from s 302 to one under s 325 .[11] Where the 8 persons assaulted the deceased and others, and only *lathis* were used as weapons, both hands, right fibula and 4 metacarpal bones of the deceased got fractured, no injury was found on vital parts of the deceased, the deceased died five days after the attack, and injuries were not such as to attract s 300, the accused first assaulted the injured witnesses causing them minor injuries then moving to house of injured calling deceased out and assaulting him, manner of the attack as given by the injured witnesses and injuries caused, did not show their intention to cause death, so, conviction only under s 325 and not under s 302 was found justified.[12]

Except one witness who stated that the appellant assaulted the deceased with a stick, the other purported eye-witnesses stated that the appellant gave only fist blow to the deceased. The conviction of the appellant accused under s 302, IPC was altered to one under s 325, IPC .[13]

Where the accused hurled stones at the deceased and the fourth accused inflicted a stick blow, they were not found guilty under s 302, since all of them assaulted the deceased conjointly, nor were they were found guilty under s 302 read with s 34 or under s 324 but were found guilty under ss 325 / 34, IPC .[14] Where the main accused inflicted *lathi* blows on the deceased the co-accused caught hold of the deceased2492 while the main accused inflicted blows; only intention to cause grievous hurt was attributed to the co-accused, while the main accused was convicted under s 302 and conviction of co-accused was altered from ss 302 / 34 to s 325 read with s 34, IPC .[15] When a mob of 200 persons armed with different weapons assaulted the complainant party causing death to the deceased, all accused were not convicted under ss 304 / 34, the conviction of the accused persons was based on assaulting the deceased not on his vital parts but only causing minor injuries was converted from ss 302 / 34, IPC to ss 325 / 34, IPC .[16] Where accused persons inflicted blows resulting in injuries to several persons and death of one of them, the incident occurred on the spur of the moment and no intention or knowledge of causing death could be attributed to the accused but it could be inferred from the circumstances of the case that the accused persons had shared common intention of causing only grievous hurt to the deceased, maintaining the conviction under ss 323 / 34, and the conviction under ss 302 / 34 of the accused persons was changed to one under ss 325 / 34, IPC .[17] Where the incident occurred on the spur of the moment during an altercation between the accused and the deceased, and all the injuries were caused by the blunt side of the weapon, and none of the injuries was on a vital part, it could not be said that the common object of the unlawful assembly was to cause murder or such bodily injuries which were likely to cause death, the conviction of the accused persons was altered from ss 302 / 149 to ss 325 / 149, and that under ss 323 / 149 regarding simple injuries caused to a person other than the deceased was maintained.[18] Where the three accused persons assaulted the deceased and others with *pharsa* and *lathis*, and there was no evidence as to who caused the fatal injury, all other injuries on the person of the deceased were simple injuries by blunt weapons, the conjuction of accused persons under ss 302 / 34 was modified to ss 325 / 34, IPC .[19] Where, in a case of assault and murder the evidence of eyewitness established that the accused persons assaulted the deceased with sticks, their statements were corroborated by medical evidence, no injury was found on the vital part of the body of the deceased and injuries suffered were not sufficient in normal course to cause death, the accused were acquitted of the charge under s 302 but were held liable to be convicted under ss 148 and 325 read with s 149, IPC .[20] Where the weapon of offence is a wooden stick of soft wood, the conviction of the accused under s 325 is proper as against one under s 302, IPC .[21] Where the accused and the main accused arrived at the scene with *lathis*, the accused held

the deceased and main accused gave a *lathi* blow on his head with severity, the accused did not use the lathi though he was alleged to have given a kick and the fist blows to the deceased, this story was not corroborated by medical evidence, and the main accused died during the pendency of appeal, the conviction of the accused under ss 302 / 34 was altered to under s 325, IPC .[22]

Due to enmity between two rival groups in the incident, one person died. Medical evidence showed that the deceased was aged 60 years and suffering from cervical spondylosis. The deceased had sustained fracture of cervical spine. The injuries2493 sustained by the deceased were simple in nature. The injury caused to the deceased was neither intentional nor did the members of the unlawful assembly have knowledge that the injury received by the deceased could cause death. Accused were convicted under ss 325, 323 read with s 34 .[23]

When a large number of persons were armed only with sticks and pelted stones which they could find anywhere either near the fields or on their way, and it was not established as to who specifically attacked whom, it was not clear as to whether the intention was to cause death, it is more probable that intention was to give a beating only, so the accused persons were acquitted of the charges under s 302 read with s 149 while they were convicted under ss 147, 323 and 325, IPC .[24]

224. Alteration of Conviction from Section 302 to Section 326

There is abundance of cases in which the High Courts and the Supreme Court, depending upon the facts and circumstances of the cases, have altered the conviction of the accused from one under ss 300 / 302 IPC to ss 299 / 304, Pt I/Pt II, IPC . The facts and circumstances in a particular case may be so peculiar that may necessitate the conversion of conviction under ss 300, 302 to one under ss 320, 325 or 326, IPC, where, according to the doctor, the cause of death of the deceased was asphyxia associated with shock, and not the injuries inflicted by the accused on the person of the deceased, where some of the injuries caused the accused on the person of the deceased were grievous injuries, so the conviction of the accused under s 302 read with s 34 was set aside and instead the accused was convicted under s 326 read with s 34 .[25] Where the gunshot injuries were not the immediate cause of death of the deceased, but the deceased died due to improper care, and the injuries sustained by the deceased in the normal course were not sufficient to cause death, conviction of the accused under s 302, IPC was altered to one under s 326, IPC .[26]

Where the appellant had inflicted several injuries on the deceased by sickle, the deceased died on next day of the occurrence on account of heart attack, the deceased had already undergone angioplasty, the injuries caused by the appellant accused were not sufficient to cause death in the ordinary course of nature, the appellant accused was convicted under s 326, IPC and not under s 304, IPC .[27] Where the accused persons were alleged to have caused firearm injuries on the deceased, and excepting one incised injury on the skull of the deceased, all other injuries were found to be lacerated and no injuries were found on vital parts of the body, such being the state of evidence in record, the common object of unlawful assembly was not to cause death but to cause injuries of hurt to the deceased with dangerous weapons the conviction of the two accused persons was converted from s 302 to s 326, and the other from ss 302 / 149 to ss 326 / 149, IPC .[28] Where there was enmity between the accused and the prosecution witnesses, the accused persons armed with weapons like country-made gun, *pharsa* and *ballam* came to the place of incident to teach lesson to the prosecution witnesses, the deceased intervened and was shot dead, there was no enmity between the accused and the deceased and no motive for the accused to cause death of the deceased, common object of assembly cannot be said to cause death of2494 the deceased, grievous injuries found to have caused to the deceased and the prosecution witnesses, common object of unlawful assembly can be said to cause grievous injuries. The conviction of the accused persons was altered from ss 302 / 149 to offence under s 326 read with s 149 .[29]

The prosecution case was that the accused appellant along with other co-accused assaulted the deceased causing death and inflicted injuries to others. The injured witness deposed before the Court that co-accused inflicted injury by sword on the deceased. The other eye-witness deposed that the appellant

had given blow on the belly of the deceased but no injury was found in the belly. The conviction of the accused was altered to one under s 326, IPC .[30]The appellant and the accused no. 1 had entered the house of the deceased, and accused no. 1 poured a watery substance over her from the pot carried by him leading to her death. The deceased had refused sexual favour to them. However, no overt act was attributed to the appellant. Held, in absence of any active role played by the appellant or overt act being done by the appellant, it cannot be said with certainty that the appellant had accompanied the accused no. 1 to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under s 302 read with s 34, IPC was not sustained. The appellant was convicted under s 326, IPC and s 304, Pt II, IPC . As the death ensued after twenty six days of the incident as a result of septicemia and not as a consequence of burn injuries, the sentence was reduced to the period already undergone.[31]

Where the injury which caused the death of the deceased was attributed to accused *X* and accused *Y* was sought to be made vicariously liable for that injury by the operation of s 34, IPC, assuming that substance of the prosecution case against *Y* was proved, then also as a result of acquittal of accused *X,* s 34 became inapplicable and accused *Y* would be liable under s 326, IPC, for causing grievous hurt to the deceased.[32]

Where only accused A2 gave fatal blow, and other accused A2, A3 and A5 had not caused any injury but had carried deadly weapons, the knowledge that grievous injury may be caused can be attributed to them. Accused A2, A3 and A5, could not be convicted under ss 302 / 149, IPC, but were convicted under s 326 read with s 149, IPC .[33]

Where the deceased was assaulted with sticks, axes, etc and sustained multiple injuries; the nature and gravity of injuries could not be assessed from the inquest report, and there was no evidence that there were internal injuries corresponding to external injuries which were sufficient to cause death, the cause of death of the deceased could not be assessed though involvement of the accused person in attacking the deceased which was proved satisfactorily by the eyewitness; the conviction of the accused was modified from s 302 to s 326, IPC .[34] Where the accused allegedly poured kerosene and set the deceased wife ablaze when she refused to give him money, statement of the eye-witness, two dying declarations and2495 medical evidence amply proved the complicity of the accused, however, death of the deceased had occurred after two and a half months. Initially, the doctor noticed only 32 percent burns and later at the hospital 38 percent burns were noticed, degree of burns increased to 70 percent when autopsy was performed, death of the deceased occurred much after her discharge from hospital, prosecution could not explain as to how the deceased sustained burns once again during intervening period of two months, there was no co-relation between original burns and death, accused would be therefore liable to be convicted under s 326 and not under s 302 .[35]

Where the accused persons acted in self-defence for protecting their property, their common intention was not to cause the death of the deceased. However, since the weapon used by the accused was a sickle, a sharp edged round blade which is sufficient to cause grievous hurt to any person, the conviction of the two accused was modified from s 302 to one under s 326, IPC .[36]

Where one of the accused inflicted fatal blows on the deceased with a *gupti* and the others assaulted them *lathis*, the post-mortem reports showed that one of the deceased had sustained an abrasion on the left shoulder, on dissection of which, fracture could be noticed, and the others deceased had no other injury except a stab wound, this clearly indicated that accused who were armed with *lathis* and bow and arrows had no intention to do away with the deceased, their intention, however, was to give beat them for fooling their womenfolk and children. Though the conviction of the accused who assaulted the deceased with *gupti* was confirmed under s 302, but that of the accused person were altered from ss 302 / 34 to ss 326 / 34, IPC .[37] Where none of the accused was armed with deadly weapon, only one injury out of two caused on head, caused death of the deceased though no common intention to kill can be inferred, the accused shared common intention to cause grievous injuries hence conviction under ss 302 / 34 was converted into one under ss 326 / 34 .[38]

Where the accused caused two injuries with a dagger on the abdomen and left thigh of the deceased, he did not cause injuries on vital parts like the chest, which shows that his intention was not to kill the deceased, the evidence of the doctor who conducted post-mortem showed that the death of the deceased had occurred 39 days after the injury due to septicaemia; on these facts, the conviction of the accused under s 302, IPC, was set aside and instead he was convicted under s 326, IPC .[39] Where the two unarmed accused alongwith the main accused with *dhasia* in his hand, went together, but the two unarmed accused pelted stones on the deceased while the main accused inflicted *dhasia* blow, the conviction of the two unarmed accused was altered from ss 302 / 34 to ss 326 / 34, IPC .[40] Where the deceased and his brothers were harvesting crops and the accused persons, having failed to obtain police assistance came armed and assaulted deceased and his brother, the fact that the accused came armed with deadly weapons showed that they shared the common intention, but the common intention was not to cause death of the deceased, the fact that the accused had sought police help indicates that they did not intend to take law into their own hands in first instance, and further, though many of accused carried axes, doctor who conducted post-mortem found only one incised wound, the prosecution failed to2496 identify person who caused fatal injury, the conviction of the accused persons was, therefore, altered from s 302 / 34 to 326 /34.[41]

Where some of the accused cannot conclusively be said to have known that murders were likely to be committed in prosecution of common object of unlawful assembly, their conviction under ss 302 / 149 was altered to one under ss 326 / 149, IPC .[42] Where the accused was disturbed because his wife deserted him, so he and one more person attacked her with a *kripan*, and the wife died in the hospital after 23 days of hospitalisation, there was no evidence that the injury on the person of the deceased was sufficient to cause death or the accused had knowledge that the death of his wife would be caused, whereby the conviction of the accused was altered from s 302 to s 326, IPC .[43] In the absence of conclusive evidence to prove that injuries inflicted by the accused resulted in the death of the victim, conviction by the accused under s 302 was altered to s 326, IPC .[44] Where the main accused gave a solitary blow with *tangia* (sharp-edged weapon) on the head of the deceased causing his death while the other accused persons assaulted the deceased by means of a cycle chain and *lathis*, causing grievous injuries, the main accused was convicted under ss 302 and 323 read with s 34, while the conviction of the accused persons was altered from ss 302 / 34 to ss 326 / 34, IPC .[45] Where the doctor who examined the deceased stated that the deceased who was injured at that time was initially given blood from group A but subsequently the blood of that group went out of stock, and therefore, he was given blood of O+ group, and the witness further stated that he was concerned that the patient might die because of blood rejection or because of injuries suffered by him, so he gave medicines to prevent it, the conviction of the accused persons under ss 302 / 34 was converted into under ss 325 to 326 read with s 34, IPC .[46] The fact that for four full hours the deceased did not receive any medical assistance and as a result had lost a lot of blood, and none of the injuries were on vital parts of the body or serious enough to endanger life, in the circumstances, the accused at the most could be held guilty of having caused grievous hurt under s 326 read with s 34, and not under s 302 read with s 34, IPC .[47] Where, it was alleged that accused persons armed with bassi lathis assaulted the deceased and injured the person who come to his rescue, and the deceased died of a head injury caused by a blunt weapon, but it could not be proved which accused caused the fatal injury; there was no equity between the accused persons and the deceased, nor the common intention of accused persons to commit the murder to the deceased was established, the accused persons were held liable to be convicted under ss 325 / 34, 326 / 34 and 324 / 34, and not under ss 302 / 34, IPC .[48] In a case of murder, and grievous injuries, and simple injuries caused by unlawful assembly of accused persons, the accused who only caught hold of the hands of the deceased, and there was nothing on record to suggest proof of their intention or knowledge to kill, were however, entitled to the benefit of the doubt for the offence under s 302, but were convicted under ss 326, 323 read with s 34 instead of s 302 read with s 149, the accused who was allegedly holding a gun but did not2497 participate in the incident nor proved to have uttered instigating word, was given the benefit of doubt and was acquitted.[49]

Where the accused in police custody was assaulted and died of the injuries at the hands of the police officials, the co-accused police officials against whom there was no evidence and his presence at the police station at the relevant time was doubtful, was acquitted and keeping in view that intention of the main accused police official was to assault and cause hurt to the deceased and not to cause such bodily

injury as was likely to result in his death, he was convicted under s 326 instead of ss 302 / 34, IPC .[50] Where the assaulted person died due to a single head injury caused by the accused after 35 days from the date of the incident, the prosecution did not come forward with any explanation, or with any material as to what happened during the interregnum period, more specifically with regard to the condition of the patient and the treatment received by him, and the doctor who gave treatment to the deceased was not being examined; the accused was held liable to be convicted under s 326, IPC and not for the offence of the murder.[51]

225. Alteration of Conviction from Section 326 / 149 to Section 302 / 149

The conviction under s 326 cannot be altered to s 302 read with s 149 in the absence of any charge framed against accused under ss 302 / 149, IPC, since failure to mention nature and ingredients of offence committed by accused in charge-sheet is not a mere irregularity.[52] Where none of the accused persons used any deadly weapon carried by them on any vital part of the body like the head, head injury which led to the death of the deceased was caused by the fall caused by the accused no 1, the fact that he only kicked the deceased after the fall shows that he had no intention to kill him. Similarly, even according to the prosecution, the other three accused used the iron rods and oars to hit the deceased on his limbs only and not on any vital part of the body, all these facts show that the accused persons did share a common intention but the same was only to cause grievous hurt to the deceased and not to cause his death, under the circumstances the conviction of the accused was altered from s 302 read with s 149 to s 326 read with s 34, IPC .[53]

226. Juvenile Accused

As one of the accused found guilty and convicted under s 302, IPC was juvenile on the date of the offence, his conviction under s 302, IPC and sentence of life imprisonment were quashed.[54]

Accused appellant on the date of the commission of offence was above 16 years, but below 18 years of age. As accused on the date of the hearing of appeal was aged 40 years and had undergone sentence of more than three years, his sentence was reduced to the period already undergone.[55] The appellant accused convicted under s 302 IPC did not raise the plea that he was juvenile before the courts below, but2498 raised the plea for the first time before the Supreme Court. The Supreme Court called report from the trial court about the age of the appellant accused at the time of commission of offence.[56]

227. Accused Acquitted-Illustrative Cases

The prosecution case was that the accused appellant, his father and mother (Both father and mother acquitted by courts below), committed the murder of deceased for dowry and also subjected her to cruelty on account of demand of dowry. Allegation that the deceased was severely beaten by slaps and fists was not supported by medical examination. Copy of FIR was not sent to the concerned Magistrate as required by s 157, CrPC . The testimony of the eye-witnesses was found not reliable. The father and mother of the accused appellant had been acquitted by the courts below. There was no convincing evidence that it was the accused husband alone who throttled the deceased to death. Accused husband was also acquitted of the charge under s 302, IPC, his conviction was set aside.[57]

Eye-witness (Police Officer) deposed before the court that he saw the accused from a distance of 30 yards when the latter were chasing the deceased and inflicted 10 knife injuries on the deceased. The evidence of the eye-witnesses was not corroborated by medical evidence. Recovery of offence weapon *viz* knife was also not found reliable. Accused were acquitted of the charge under s 302 IPC .[58]

Accused (A3) armed with stick and another armed with iron pipe had assaulted the deceased. The eye-witness did not assign any role to the accused (A3), did not depose that the accused (A3) assaulted the deceased on head by stick. The doctor who conducted postmortem deposed that the death of the deceased was caused by head injuries. The conviction of the appellant Accused A3 under s 302 / 34 IPC was set aside.[59]

Evidence showed that two groups of people clashed *interse* with weapons causing injuries to each other. Accused persons had sustained injuries, including grievous injuries, which were not explained by the prosecution. The complainant party was held aggressor. Accused persons were acquitted of the charge of murder.[60]

The accused appellant was alleged to have caused the death of the deceased by firing gunshots. Eye-witnesses were close relatives of the deceased, their testimony suffered from material contradictions, omissions, was not corroborated by medical and ballistic expert report. The case against the accused appellants was held not proved beyond reasonable doubt, they were acquitted of charges under ss 302, 149, IPC .[61]

It is true that five persons were done to death in the dead of night in a ghastly manner and the whole incident is quite shocking but in the absence of cogent and reliable evidence against the appellants connecting them to crime, view of the trial2499 court in passing the judgment of acquittal could not be said to be unjustified.[62] Accused persons were prosecuted on charge of murder on allegations that enmity existed between the parties, the accused persons and the deceased were travelling by the same bus, the accused after stopping the bus fired shots at deceased causing death. Evidence of injured eye-witness was falsified by medical evidence, another passenger travelling in the same bus could be eye-witness, but he was not examined in the case. Acquittal of the accused respondents by the High Court on the charge of murder s 302, IPC was held proper.[63]

The prosecution case was that the accused assaulted the deceased with sharp edged weapon, committed his murder and also injured another person. The injured did not depose anything about the assault on the deceased. She stated that someone else was the assailant, she did not name the accused. There was enmity between the parties and the complainant had every reason to falsely implicate the accused appellant. Appellant accused was acquitted of the charges under ss 302 and 307, IPC .[64] Appellant accused was prosecuted for offence under s 302, IPC on allegation that he assaulted his mother with burning wooden plank, causing death. The witnesses of the extra judicial confession did not inspire confidence, merely on the ground of recovery of weapon of offence at the instance of the appellant, it was found unsafe to record conviction of the appellant. Appellant accused was given benefit of doubt, was acquitted of the charge under s 302, IPC .[65] Appellant no. 1 had illicit relations with the wife (accused no. 2) of the deceased, had taken the wife of the deceased in the presence of the relatives of the deceased. The deceased suffered humiliation and committed suicide. The close relatives of the deceased who were also examined as witnesses had categorically stated in their statements that on coming to know of the fact that Appellant no. 1 has taken Accused no. 2 from the house of PW5 and left her only on 06.01.1996 at her parents' house, the deceased stated before the inmates of his house that because of the said insult and humiliation he does not like to live. It is also established that immediately thereafter in the night intervening 7th and 8th of January 1996 the deceased committed suicide. Held, the facts lead to only one conclusion that it is on account of humiliation and insult due to the behavior and conduct of Appellant no. 1 and Accused no. 2 that deceased committed the suicide. The conviction of the appellant under ss 107 and 306, IPC was held proper.[66] There was unexplained delay in sending FIR to concerned Magistrate. Inquest had started before FIR was filed in the case. Prosecution evidence was full of discrepancies. Conviction of the accused appellants under ss 302 / 34, IPC was set aside.[67]

There was no evidence that the accused appellant was present at the place of the occurrence. There was also no evidence that the appellant accused and the deceased were last seen together. Appellant accused was acquitted of the charge of murder under ss 302 *etc.* of the IPC .[68] Appellant accused was alleged to have committed2500 murder of the deceased and robbed her gold ornaments. Evidence showed that the accused was present in the funeral ceremony of the deceased. Motive was also not proved. No test identification parade of the recovered gold ornaments was held. Accused was acquitted of the charges under ss 302, 392 read with s 397, IPC .[69]

The prosecution case was that the appellant accused fired at the deceased causing death. PW deposed that appellant was not present when the incident took place. IO and the Doctor were not examined in the case. Appellant accused was acquitted of the charge under s 302, IPC .[70] The prosecution case was that

the accused S driver of the car along with the occupants of the car (other accused) committed the murder of the deceased. Name of accused S was not mentioned in FIR nor in statement under s 161, CrPC . No test identification parade was held, though the witnesses did not know him from before. The High Court had drawn an inference that because he was a driver in preplanned manner, the role of such driver is crucial. Such an inferential conclusion was without any evidence to show participation of accused S. The conviction of the accused S under s 302, IPC read with s 149, IPC was found not sustainable, hence was set aside.[71]

Where the prosecution case was that the appellant accused kidnapped a 12 years old girl, raped her, committed her murder and threw her dead body in the bushes, the evidence of last seen was found not reliable, the identity of the appellant accused was not fully established, the appellant accused was not convicted of offences under ss 363, 376, 302 and 201, IPC .[72] Seven accused persons were alleged to have indiscriminately attacked the deceased. Three accused persons in the case in view of the discrepancies in the FIR, alleged dying declaration and superficial injuries, were given benefit of doubt and acquitted of the charge under ss 302, 307, 326, 148 and 149, IPC and conviction of the other four accused appellants under s 302, IPC was altered to one under s 304, Pt I.[73]

Deceased along with his wife was returning to his village when the accused fired at the deceased causing death. Wife eye-witness was not examined in the case. In medical examination only exit wound was found, no wound of entry was found, though the eye-witness (PW1) examined in the case stated that the accused fired with gun hitting on the back. Another eye-witness (PW2) examined in the case was highly inimical, he had committed the murder of the uncle of the accused, accused would not have spared him also, his presence on the spot was doubtful. Acquittal was not interfered.[74] Husband, wife and their servant were found murdered during night. Three injured children were found unconscious next day morning. Apart from the delay in the examination of the injured witnesses, the three injured children did not depose before the court that any of the appellants accused assaulted the deceased persons. Possibility of dacoity was not ruled out. Benefit of doubt was given. All accused were held entitled to benefit of doubt and acquitted of charge under s 302, IPC .[75]2501

The main accused in his confessional statement named R as conspirator. But there was no independent evidence that the accused R actively participated in the commission of the offence. Accused 'R' was given benefit of doubt and acquitted of charge under s 302, IPC .[76]Where a large number of persons are made accused, the possibility of some accused persons committing murder at the spur of the moment cannot also be ruled out. Co-accused to whom no overt act was attributed, the common object of unlawful assembly also not proved, were acquitted of the charge under s 302 / 149, IPC .[77]

Four appellant brothers were alleged to have murdered the deceased at about 8.45 p.m. in the night. All the four appellants were named in FIR, but IO had charge sheeted only one appellant and filed final report against the three appellants. Information about the commission of offence was received at the police station at 10.30 p.m., but FIR was registered at 11.30 p.m. Independent eye-witnesses were not examined in the case, no offence weapon was recovered from any appellant nor blood stains were found on the scene of occurrence. There was a reasonable possibility of some accused who were not involved in the attack having been convicted. Benefit of doubt was given to the appellants, all were acquitted of the charge under s 302 / 34, IPC .[78] The prosecution case against the accused R was that he exhorted PW-1 to fire at the deceased. It was not the prosecution case that though carrying a weapon, he fired at anyone. If all the four accused had come determined to kill the deceased and three of them were armed with country made pistols, there was no need for the accused R to exhort his companion to fire at the deceased. Accused R was given benefit of doubt, he was acquitted of the charge under s 302, IPC .[79] A mob consisting of 18-20 persons came to the house of the deceased, abducted the five deceased and committed their murder. Out of the eleven accused persons four were not named in the FIR. Hence they were acquitted of the charge under ss 302 / 149, IPC .[80] Accused policemen entered the house of the deceased with intention to commit rape, but could not succeed, co-accused killed the deceased. No role was assigned to the accused appellants in killing the deceased. Conviction of the accused appellants under s 302, IPC was set aside. However as the appellants had forcibly entered the house of the deceased, they were convicted under s 450, IPC .[81]

There was no direct evidence to prove that the accused respondent had either assaulted the deceased or had buried her dead body. The prosecution relied upon three main circumstances. The first circumstance was that PW3 was shown two ear tops by the accused at the bus stop. Secondly, the respondent had mentioned about the ear tops and chain to PW2 though he had not shown them to him. In his statement to the Police he had mentioned only about the chain and not about the ear-studs. Lastly, the respondent had buried the dead body of the deceased in his own field and the said body was recovered on the basis of the disclosure statement made by the respondent himself. The circumstances were not sufficient to prove the guilt of the accused. The evidence on record disclosed that a part of the dead body was exposed and had come out from the grave and was visible, even before the body was2502 exhumed, a large number of persons had already collected there, which itself established that the fact was known to everyone in the village, and the body was really not discovered at the instance of the respondent. Accused was acquitted of offence under s 302, IPC .[82]

Accused persons armed with *lathi* and *dharias* assaulted the deceased, caused injuries which resulted in death of the deceased. Injuries were not caused on the vital parts of the body of the deceased. The absence of any injury on any vital part and particularly the absence of external injury on the skull clearly showed that the accused did not intend to cause the death of the deceased nor caused any bodily injury as was likely to cause death. Accused persons were acquitted of the charge of murder under s 302, IPC .[83]

228. Accused Convicted-Illustrative Case

There was evidence that the appellant accused S actually participated in the conspiracy. There was independent evidence to prove that he made all the arrangements pursuant to the criminal conspiracy and induced appellant to commit the murder of deceased. S was present at the scene of the occurrence and that fact is proved by the evidence of PWS. It was proved that S abetted the commission of the murder and as he was present at the scene of occurrence at the time of commission of the crime, s 114, IPC also would apply. Appellant S was convicted under s 302 read with ss 120B and 34, IPC .[84]

Medical evidence stated that the death of the deceased was caused by hard and blunt object like *lathi*. Motive for commission of the crime was shown. There was extra judicial confession of the accused made before the witness that he had killed his deceased wife with stone. Blood stained stone was also recovered near the body of the deceased. Accused was not suffering from any mental order at the time of the occurrence. The conviction of the accused for offence under Section 302IPC was held proper.[85]

There was homicidal death of the wife within one year of marriage. Injuries were found on the person of the deceased. There was evidence of demand of dowry. The accused appellant after the incident locked the house, ran away, even did not attend the funeral ceremony. Accused appellant was convicted under ss 302 and 498A, IPC .[86] The evidence showed that the accused appellant a guide took a young girl of a foreign country to his village, committed her murder and buried the dead body in his own house. The skeleton of the deceased was recovered from the house of the accused on the disclosure statement made by him. The DNA sample got from the skeleton matched with the blood sample of the father of the deceased. The conviction of the accused appellant concurrently recorded by the courts below under ss 302 / 201, IPC was affirmed.[87]2503

Evidence of wife was that the accused her husband's brother assaulted the deceased (her husband) with sickle at about 2 a.m. in the night while the deceased was sleeping with his wife, children and relative inside the house. Accused was named in FIR promptly filed. There was no reason for false implication, identification of the accused by the PWS was also found reliable. Accused appellant was convicted under s 302, IPC .[88]Accused appellant had fired from pistol (*tamancha*) at deceased causing death. As the identity of the accused was not disputed, test identification parade was found not necessary. Testimony of first informant (father) of the deceased and eye witness was found reliable, was believed. Accused appellant was convicted under s 302, IPC .[89]

Accused appellant was prosecuted on allegation that he fired shot at the deceased causing death. The

testimony of the brother and brother-in-law of the deceased was found reliable, was believed, their version was corroborated by medical evidence. No charring or burning of the skin was found in the medical examination as shot was fired from a distance of more than six feet. FIR was spontaneous. The report of the ballistic expert also stated that the fire was shot from the gun of the accused. Accused was convicted under s 302, IPC .[90]

Eight accused persons formed unlawful assembly and assaulted the deceased causing death. The deceased had sustained five incised wounds. Offence weapons were recovered at the instance of the appellants. Conviction of the accused appellants under s 302 / 34, IPC was held proper.[91]Accused appellants were prosecuted on allegations that the accused appellants fired at deceased causing death. The eye-witnesses at the time of the incident were a few steps behind the deceased, had seen the incident. Their evidence could not be rejected merely because they did not sustain any injury and they were inimical to the accused. The conviction of the accused appellants under ss 302 / 1489, 148, 307 / 149, IPC was held proper.[92]The first injury was caused by A-1 with *aruval* on the neck and the corresponding injury caused the death. At the same time, A-2, A-4, A-5 and A-6 were armed with *aruval*, A-7 with knife and A-3 with iron rod and they had attacked the deceased and contributed corresponding injuries. Held A-1 had to be convicted in terms of s 302, IPC, acts of other accused persons attracted s 304, Pt II, IPC .[93]Accused respondent was alleged to have stabbed the deceased on his chest with a sharp edged weapon. The blood stained knife was recovered at the instance of the accused from his house. Oral dying declaration also implicated the accused. Acquittal recorded by the High Court was not proper, hence was set aside.[94]Accused persons had attacked the deceased with sword. In post mortem examination eight cut and curved injuries were found on the body of the deceased. The testimony of the brother of the deceased was found reliable. He was natural witness. There was no reason for false implication of the2504 accused. Conviction under ss 302 / 307, IPC was held proper.[1] The accused appellants gang raped the deceased and when she was dead threw her into pit. The evidence of wife of co-accused was found reliable. The conviction of the appellants under ss 302 and 201 read with s 34, IPC was found proper.[2]

Accused persons and deceased were travelling in the same tractor. The accused persons robbed him and threw him in the canal. The deceased even after being thrown in the canal tried to save himself desperately. He wanted to come out of the canal by catching the grass. He was kicked on the face and again thrown in the canal. The fact that he was in an inebriated condition was not in dispute. He could not swim to the shore to save his life. Accused appellant was convicted under ss 302 and 392, IPC .[3] Prosecution case that the accused fired shot at deceased causing instantaneous death was proved by the evidence of the son of the deceased. Recovery of bullets from the body of the deceased corroborated the prosecution case. FIR was promptly filed. Conviction of the accused for offence under s 302, IPC was held proper.[4]

Both the complainant and the accused parties were on inimical terms. Murder took place out of enmity between parties, earlier murder and counter murders had also taken place. The testimony of witnesses even though relatives of the deceased was found reliable. Conviction under s 302, IPC was held proper.[5] Prosecution case was that appellant accused persons armed with clubs, sticks and stones assaulted the victim and caused injuries. The omission of the victim to disclose the name of all the accused assailants to the doctor who examined him was held immaterial as he disclosed the names of all the accused to the police next day. Conviction of the accused appellants under ss 302 / 149, IPC was maintained.[6] The prosecution story was that the appellants father-in-law and husband (accused) smothered the deceased and her child and threw them into the well. The two accused and the deceased were last seen together. There was reliable confession of the accused A2 made before the Secretary of Society working for the cause of woman. Conviction of the accused appellants under ss 302 and 498A, IPC was held proper.[7] The deceased died unnatural death within seven years of her marriage at her matrimonial home as ligature marks were found on her neck, the in-laws used to quarrel with her, she wanted to go to her husband who was serving outside the village, the appellants father-in-law and mother-in-law cremated the dead body without informing the parents of the deceased and post mortem of the deceased being done; the in-laws2505 were convicted under s 302 and s 201, IPC .[8] The prosecution case was that the four appellant accused persons robbed the deceased of her jewellery and murdered in the field. There was

evidence of the eye-witnesses that they had seen appellants accused coming out of the field of the deceased. There was also recovery of the jewellery. The witnesses also identified the appellants accused in test identification parade. Omission of the jewels in details in FIR was held of no consequence. Appellants accused persons were convicted under ss 392 and 302, IPC .[9]

Name of accused M was not mentioned in FIR, hence accused M was given benefit of doubt, and acquitted of the charge of murder. The same yardstick could not be applied to the case of the respondent whose name was mentioned in FIR. His conviction under s 302 / 34, IPC was upheld.[10] Where twenty seven accused persons had set the house on fire causing death of ten persons, the testimony of eye-witness was found reliable, minor discrepancies about the role played by each accused were eschewed from consideration especially when the witnesses were examined in court after 4-5 years of the incident, accused were convicted under ss 302 / 149, IPC .[11] Main accused appellant had fired from a double barrel country made pistol at the deceased from a close range, which resulted in death of the deceased. Confession and extra judicial confession made by accused were found reliable and believed. Conviction under s 302, IPC was held proper.[12]

There was convincing and trustworthy evidence of the witnesses that after committing the murder of the child, the appellant accused concealed the dead body. It was the appellant and the appellant alone who caused the death of the deceased, an innocent child, by strangulating him and then concealing his body inside a tin box in the inner room of the quarter exclusively occupied by the appellant. Appellant accused was convicted under ss 302 / 201, IPC .[13]A mob of 18-20 persons, the mob after coming to the dalan of the deceased forced them to handover their gun by show of force. The ladies eye-witness inmates of the house threw the gun. All the accused persons abducted five male members of the family (deceased), took them to the nearby orchard. Soon thereafter the female members of the family heard the gun shots 10-15 in number. The dead bodies of the five abducted persons were found in the orchard. All the seven appellants accused were convicted under ss 302 / 149, IPC .[14]

Appellants accused used to demand 'rangdari tax' (goonda tax) from the deceased, on account of non-payment thereof committed the murder of the deceased when the latter along with his brother was returning to the village. The evidence of the brother and the witness who had reached on the spot immediately after the incident and to whom the brother of the deceased had told about the incident and the role of the appellants accused was found reliable. The testimony of the brother of the deceased who along with the deceased was going for the purpose of bringing timber was found2506 most natural. Conviction of the appellants accused under s 302, IPC was held proper.[15]

229. Death Sentence Committed to Life Imprisonment Illustrative Cases

Accused appellant convicted for offence of robbery and murder. The accused appellant was not a hardened criminal and possibility of his reformation was not ruled out. The death sentence awarded to the accused appellant by the courts below was commuted into life imprisonment.[16]Accused persons armed with country made pistols and knives had committed the murder of four persons. On account of longevity of incarceration, and the fact that the case did not fall in the category of rarest of rare cases, death sentence was converted into life imprisonment.[17]

The deceased (District Magistrate) killed in another district as an occupant of a car by chance on account of mob fury and exhortation by A-1 and firing by one BS and as A-1 was not the assailant himself, death sentence was held not appropriate sentence, hence the same was committed to life imprisonment.[18]

Accused was convicted for rape on his minor daughter. Thereafter on parole he committed the murder of his wife and daughter raped earlier. Accused was driven out of the house and was living in rented house with no earning. Subsequent offence was committed out of retaliation and frustration, death sentence awarded was converted into life imprisonment.[19]

The accused appellant severed the head of his mother and fled with the head. The accused was under impression that his mother was the cause of his wife running away from his house, he had annoyance

against his mother. The death sentence concurrently awarded by the court below was converted into life imprisonment.[20]

Accused appellant was found guilty and convicted for committing rape and murder of a young child. The accused was young aged 27 years, the possibility of rehabilitation could not be ruled out. Hence death sentence was commuted to life imprisonment.[21]

In the instant case multiple mass murders were committed, which were outcome of inter-caste marriage. Appellant accused sentenced to death was brother of bride, was2507 below age of 25 yrs and was victim of caste considerations. The murders committed were not diabolic. Death sentence was converted into life imprisonment.[22]

The accused appellants committed murder of five persons. One accused was aged 45, the two accused came from poor background, had been in prison for the last 14 years. Keeping in view the circumstances of the case, the death sentence was altered into life imprisonment. The Supreme Court however, directed that the life sentence shall extend to their full life subject to any remission by the Government for good reasons.[23]

The accused appellant aged 28 years committed rape on and murder of a 3 years old girl. He was a first offender. The possibility of reformation was not ruled out. Death sentence concurrently awarded by the courts below was converted into life imprisonment.[24]

In the instant case the accused appellant had administered a high dose of sleeping drugs to the deceased, she was put in a wooden box and buried in a pit outside the bedroom. The appellant had confessed his guilt. The Supreme Court substituted the death sentence by life imprisonment for the rest of his life.[25]

Murder committed in the heat of passion, does not come in the category of rarest of rare cases. Death sentence was reduced to life imprisonment.[26]

Accused appellant had committed the murder of his wife and three children. He had committed offence out of frustration and suspicion as the deceased wife was seen talking to neighbour. Held, the case did not fall in the case of rarest of rare cases, the death sentence was converted into life imprisonment.[27]

Accused persons armed with country made pistols and knives had committed the murder of four persons. On account of longevity of incarceration, and the fact that the case did not fall in the category of rarest of rare cases, death sentence was converted into life imprisonment.[28]2508

8 *Subhash Chander v Krishan Lal & ors* (2001) Cr LJ 1825 (SC) .

9 *Ibid*.

10 *Kalpana Mazumdar v State of Orissa* (2002) Cr LJ 3756 (SC) .

11 *Ram Pal v State of UP* (2003) Cr LJ 3760 (SC), AIR 2003 SC 4168 .

12 *Seat Ali v Emperor* AIR 1917 Pat 503, 18 Cr LJ 766 .

13 *Queen v Orem Sungra* 6 WR (Cr) 82 .

14 *Mata Ho v Emperor* AIR 1921 Pat 63 ; *Sardaran v Emperor* AIR 1933 Lah 718, p 719, 34 Cr LJ 1251 ; *Empress v Lakshman Dagdu* (1886) ILR 10 Bom 512 ; *Empress v Kader Nasyer Shah* (1896) ILR 23 Cal 604 ; *Empress v Venkatasami* (1889) ILR 12 Mad 459 ; *Empress v Razai Mia* (1895) ILR 22 Cal 817 ; *Emperor v Dinobandhu Moitra* (1903) 8 CWN 218 .

15 *Aziz Ahmad Jan Mohammad v Emperor* AIR 1938 Lah 355, p 357, 39 Cr LJ 695 .

16 Re *Rasammal*AIR 1915 Mad 821, p 823 ; Re *Kamya*AIR 1960 AP 490, p 492, (1960) Cr LJ 1302 ; *Emperor v Soni Narain*

Jiwa 2 Cr LJ 359, p 365 .

17 *Purna Chandra Kusal v State of Orissa* 2012 Cr LJ 615, 2011 AIR SCW 6473 (SC) .

18 *Sanaullah Khan v State of Bihar* 2013 Cr LJ 1527, p 1534 (SC), 2013 AIR SCW 1159, 2013 (3) SCC 521 .

19 *Ashapura v State of Gujarat* (1997) Cr LJ 3702 (Guj) (DB) .

20 *Bulakiram Koiri v State* (1970) Cr LJ 403 (Cal) .

21 *Wakkar v State of UP* 2011 Cr LJ 1639 (SC), 2011 AIR SCW 1215 .

22 *State of Maharashtra v Goraksha Ambaji Adsul* 2011 Cr LJ 4286, p 4295 (SC), AIR 2011 SC 2689 .

23 *State of Madhya Pradesh v Bhim Mohd* (2002) Cr LJ 1906 (Chhattisgarh) (DB) .

24 *Ibid*.

25 *Jan Mohammad v State* AIR 1963 All 501, p 505 .

26 *Mominuddi Sardar v Emperor* AIR 1935 Cal 591, p 594, 36 Cr LJ 1254 .

27 *Ummilal Dharam Singh v State of Madhya Pradesh* (1979) MPLJ 294, (1980) Cr LJ (NOC) 86 (MP), **reversed** in *Ummilal v State of Madhya Pradesh* AIR 1981 SC 1710, in which the sentence of death was converted into imprisonment for life on the ground that the accused, who was about 22 years of age, committed murder under a sudden impulse in a grave fit of rage.

28 Re *Rajagopaln Aiyangar*AIR 1952 Mad 289, p 291, 53 Cr LJ 625 .

29 Re *Sambangi Lakshumanna*, AIR 1939 Mad 109, p 112, 40 Cr LJ 249 ; *Mool Chand v State* AIR 1953 All 220, p 224 ; *Kuar Koeri v Emperor* AIR 1937 Pat 497, 38 Cr LJ 1007 .

30 *Dhania Kunbi v Emperor* AIR 1924 Nag 119, 120 ; *Emperor v Bai Pani Ramji* 2 Cr LJ 193 ; *Alam Bibi v Emperor* 1932 Lah 297, 33 Cr LJ 448 .

31 Re *Campala Subbigadu*AIR 1941 Mad 280, p 282, 42 Cr LJ 305 .

32 *Ram Pal v State of UP* AIR 2003 SC 4168, (2003) Cr LJ 3760 (SC) .

33 *State of Uttar Pradesh v Dharmendra Singh & anor* (2000) Cr LJ (SC) .

34 *Suresh v State of Uttar Pradesh* AIR 1981 SC 1122 .

35 *Raja Ram Yadev & ors v State of Bihar* (1996) Cr LJ 2307 (SC) .

36 *State of Bihar v Triloki Singh* (1999) Cr LJ 2447 (Pat) (DB) .

37 *State v Shankar Sakharam Jadhav* AIR 1957 Bom 226, p 231 ; *Empress v Basvanti* ILR 25 Bom 168, 2 Bom LR 761 ; *Dalip Singh v State of Punjab* AIR 1953 SC 364, (1953) Cr LJ 1465 ; *Benoyendra Chandra Pandey v Emperor* AIR 1936 Cal 73, 37 Cr LJ 394 ; *Emperor v Nibharesh Mandal Mohar Mandal* AIR 1938 Cal 295, 39 Cr LJ 479 .

38 *Tun Khineu v King* AIR1938 Rang 331, p 333, 40 Cr LJ 49.

39 **See***Ragho Mani v State of Uttar Pradesh* AIR 1977 SC 703, (1977) Cr LJ 345 .

40 *Sultan v State of Haryana* AIR 1972 SC 811, p 814, (1972) Cr LJ 527 .

41 Re *Butari Chinna Vobiah* 12 Cr LJ 48; *Mohan Singh v State of Punjab* AIR 1971 SC 2519, p 2521, (1971) Cr LJ 1746 ; *State of Uttar Pradesh v Mahendra Singh* (1974) SCC (Cr) 922, (1974) Cr LR 667 (SC) ; *Karnesh Kumar Singh v State of Uttar Pradesh* AIR 1968 SC 1402, (1968) Cr LJ 1655 .

42 *Brahma Singh v State of Uttar Pradesh* AIR 1972 SC 1229, p 1232, (1972) Cr LJ 763 .

43 *Jose v State of Kerala* AIR 1973 SC 944, p 947, (1973) Cr LJ 687 .

44 *GPL Narasimha Raju v State of Andhra Pradesh* AIR 1971 SC 1232, p 1238, (1973) Cr LJ 1066 ; *State v Gouranga Sahu* (1978) Cr LJ 276, p 285 ; *Asgar Hossain v State of Uttar Pradesh* AIR 1974 SC 336, p 337, (1974) Cr LJ 279 .

45 *Masalti v State* AIR 1965 SC 202, (1965) 1 Cr LJ 226 ; *Apren Joseph v State of Kerala* (1972) Cr LJ 1162, p 1171, (1972) Mad LJ (Cr) 10 .

46 *Ajmer Singh v State of Punjab* AIR 1977 SC 1078, (1977) Cr LJ 659 .

47 *Gurmeet Singh v State of UP* 2005 Cr LJ 4384, AIR 2005 SC 3611 .

48 *Ajay Kumar Pal v Union of India* AIR 2015 SC 715, (2015) 2 SCC 478 .

49 *Achhey Lal v State of Uttar Pradesh* AIR 1978 SC 1233, (1978) Cr LJ 1101 .

50 *Daupa Chammar and ors v State of Bihar* (2002) Cr LJ 3764 (SC) .

51 *Sunder Singh v State of Punjab* AIR 1962 SC 1211, p 1215, (1962) 2 Cr LJ 290, **distinguishing***King v Plummer* (1902) 2 KB 339 .

52 *Prabhu Babaji Navle v State of Bombay* AIR 1956 SC 51, (1956) Cr LJ 147 ; *Babulal Bajpai v State* AIR 1959 Cal 693, (1959) Cr LJ 1313 ; *Sukh Ram v State of Uttar Pradesh* AIR 1974 SC 323, (1974) Cr LJ 354 ; *Mathur Dhana v State* AIR 1956 Bom 393, (1956) Cr LJ 715 ; *Deear Singh v State of Uttar Pradesh* (1972) SCC (Cr) 173 ; *Nana Gangaram Dhore v State* (1970) Cr LJ 621, 71 Bom LR 375, p 386 .

53 *Wasim Khan v State of Uttar Pradesh* AIR 1956 SC 400, (1956) Cr LJ 790 .

54 *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116 ; *Basanta Gohain v State* AIR 1957 Assam 45, (1957) Cr LJ 360 ; observation of Agarwala J in *Harchanda v Rex* AIR 1950 All 355, p 361, 51 Cr LJ 993 ; *Rajendra Tiwari & ors v State of Madhya Pradesh.*

55 *Om Prakash v State* AIR 1956 All 241, (1956) Cr LJ 452 .

56 *Ude Singh v State* AIR 1966 Ori 210, (1966) Cr LJ 297 ; *Rawalpenta Venkalu v State of Hyderabad* AIR 1956 SC 171 .

57 *Harbhajan Singh v State of Punjab* (1997) Cr LJ 1638 (SC) .

58 *Brath v State of Punjab* (1999) SCC 519, (1991) Cr LJ 402 ; *Pullania v State of Andhra Pradesh* (1996) (SCC) Cri 1235, (1996) Cr LJ 3398 .

59 *Mahandra Singh & ors v State of Uttar Pradesh* (1999) Cr LJ 4669 (All) (DB) .

60 *Sohan Singh v State of Uttaranchal* 2006 Cr LJ 316, p 318, 319 (SC), AIR 2006 SC 520, (2005) 12 SCC 607, 2005 (9) Scale 110 .

61 *Raghbir Chand v State of Punjab* 2013 Cr LJ 4456, p 4464, 2013 AIR SCW 5192, (2013) 10 Scale 20 .

62 *State of Chhattisgarh v Manoj Suryavanshi* 2014 Cr LJ 345 (Chh) (DB) .

63 *Shivu v RG, High Court of Karnataka* 2007 Cr LJ 1806, p 1812 (SC), 2007 (3) Scale 157, (2007) 4 SCC 713 .

64 *Gurmeet Singh v State of UP* 2005 Cr LJ 4384 (SC), AIR 2005 SC 3611, (2005) 12 SCC 107 .

65 *Holiram Bordoloi v State of Assam* 2005 Cr LJ 2174, p 2179, AIR 2005 SC 2059, (2005) 3 SCC 793, 2005 (3) Scale 804 .

66 *Ram Deo Chauhan alias Raj Nath Chauhan v State of Assam* (2001) Cr LJ 2902 (SC) .

67 *Ibid*.

68 *Ram Deo Chauhan alias Raj Nath Chauhan v State of Assam* (2001) Cr LJ 2902 (SC) .

69 *Mura Ram v Union of India* AIR 1980 SC 147, (1981) 1 SCC 107 (1980) Cr LJ 1440.

70 *Ram Deo Chauhan alias Raj Nath Chauhan v State of Assam* (2001) Cr LJ 2902 (SC) .

71 *Satpal & anor v State of Haryana & ors* (2000) Cr LJ 2297 (SC) .

72 *Kehar Singh v Union of India* AIR 1989 SC 653, (1989) 1 SCC 204, (1989) Cr LJ 941 .

73 *Maruram v Union of India* AIR 1980 SC 2147, (1981) 1 SCC 107, (1980) Cr LJ 1440 .

74 *Maruram v Union of India* AIR 1980 SC 2147, (1980) Cr LJ 1440 .

75 *Swaran Singh v State of Uttar Pradesh* AIR 1998 SC 2026, (1998) 4 SCC 75, 1998 AIR SCW 1880 .

76 *Satpal & anor v State of Haryana & ors* (2000) Cr LJ 2297 (SC) .

77 *Swaran Singh v State of Uttar Pradesh* AIR 1998 SC 2026, (1998) 4 SCC 75, 1998 AIR SCW 1880 .

78 *Swaran Singh's* case *Jhaptu Ram v State of HP* (2014) 6 SCC (Cri) 757, (2014) 136 AIC 249 .

79 *Subramani v State* (2011) 11 SCC 643, (2011) 3 SCC (Cri) 450 .

80 *State of Uttar Pradesh v Nawab Singh* (1996) Cr LJ 934 (All) (DB) .

81 *Jarnail Singh v State of Punjab* (1996) Cr LJ 1139 (SC) .

82 *Jadu Sahani & ors v State of Bihar* (1999) Cr LJ 593 (SC) .

83 *Kotta Prakashan & ors v State of Kerala* (1998) Cr LJ 1239 (SC) .

84 *MB Suresh v State of Karnataka* 2014 Cr LJ 1104, p 1106, (2014) 4 SCC 431, (2014) 135 AIC 263 .

85 *Jaleshwar Singh v State of Bihar* 2009 Cr LJ 3995, p 3997 (SC), 2009 AIR SCW 4258, 2009 (7) Scale 219 .

86 *R v Fox* ILR 2 All 522 ; *R v Randhir Singh* ILR 3 All 597 ; *Emperor v Beshor Bewa* 18 WR (Cr) 29 ; *Empress v Bysagoo Noshyo* 8 WR (Cr) 29 ; *Empress v Punchanan Tantee* 5 WR (Cr) 97 ; *Bhajan Das v Emperor* AIR 1924 Lah 218, 24 Cr LJ 421 ; *Emperor v Vasta Uka* 1 Cr LJ 593, 14 KLR 61 ; *R v Vajesing Naranji* 16 KLR 177 ; *Dhani Ram v Emperor* 14 Cr LJ 104 ; *Public Prosecutor v NS Murthy* (1973) Cr LJ 1238, p 1240, (1972) 2 Andh LT 363 ; *Ramkrishna Panicker v State of Kerala* AIR 1959 Ker 372, p 375, (1959) Cr LJ 1331 ; *Urmese v State of Kerala* AIR 1960 Ker 197, p 198, (1960) Cr LJ 827 ; *State of Orissa v Giridhari Biswal* (1973) Cr LJ 1435, 39 Cut LT 415 ; *Sridevi v State* (1974) Cr LJ 126, p 127 (All) ; *Jamuna Chaudhur v State of Bihar* (1971) Cr LJ 898, 903 (Pat); *Marceline Fernandes v State* AIR 1971 Goa 18, (1971) Cr LJ 598 .

87 *R v Fox* ILR 2 All 522 ; *R v Randhir Singh* ILR 3 All 597 ; *Emperor v Vasta Uka* 1 Cr LJ 593, 14 KLR 61 ; *Kanhaiyalal Sewaram v State* AIR 1953 MB 262, p 264, 55 Cr LJ 6 ; *Nga Moe v Emperor* AIR 1941 Rang 141, 42 Cr LJ 591 ; Re *Thipperudrappa*AIR 1954 Mys 53, p 54, 55 Cr LJ 481 ; *R v Vajesing Naranji* 16 KLR 177 ; *Dhani Ram v Emperor* 14 Cr LJ 104 ; Re *Marana Gaundan*AIR 1941 Mad 560, 42 Cr LJ 707 ; Re *Nachal*AIR 1941 Mad 746, 42 Cr LJ 638 ; *Ambika Singh v Emperor* AIR 1922 Pat 498, 25 Cr LJ 431 .

88 *Bhima alias Bhimarao Sida Kamble & ors v State of Maharashtra* (2002) Cr LJ 4293 (SC) .

89 *State of HP v Nazar Singh* 2009 Cr LJ 3984, p 3987 (SC), 2009 AIR SCW 4243, 2009 (7) Scale 666 .

90 *Gharbharan v State of Chhattisgarh* 2010 Cr LJ 471, p 475 (Chhat) (DB) .

91 *Babu Bhika Jadhav v State of Maharashtra* (1996) Cr LJ 3952 (Bom) (DB) .

92 *Raghubir Singh v State of Rajasthan* (2011) 12 SCC 235, 2011 (9) Scale 472, [2011] 10 SCR 739 . **See also***Fulchand Gope v State of Jharkhand* (2011) 12 SCC 514 .

93 *Ram Chandra v State* (2006) Cr LJ 2966 (Uttaranchal) (DB) .

94 *Chakali Sreenu v State of AP* (2005) Cr LJ 4406 (AP) (DB) .

1 *State of Karnataka v R Raju* (2007) Cr LJ 920 (Kant) (DB) .

2 *Dunga Ram v State of Rajasthan* (1996) Cr LJ 3672 (Raj) (DB) .

3 *Badri Das v State of Rajasthan* (1997) Cr LJ 3372 (Raj) (DB) .

4 *Hanumantu Nagappa Joglekar v State of Maharashtra & ors* (2002) JT 10 SC 268 .

5 *State of Maharashtra v Dinkar Balkrishna Palande* (2005) Cr LJ 1280 (Bom) (DB) .

6 *Jagat Singh v State of HP* 2011 Cr LJ 949, p 953 (SC), 2011 AIR SCW 260, 2011 (1) Scale 25 .

7 *Gopa Ram v State of Rajasthan* (1996) Cr LJ 2987 (Raj) (DB) .

8 *Ajay Sharma v State of Rajasthan* (1998) Cr LJ 4590 (SC) ; *Jai Narain Mishra v State of Bihar* AIR 1972 SC 1764 ; *Matadin v State of Maharashtra* (1998) JT 5 SC 264 .

9 *Setty Balija Punduranga Rao & ors v State of Uttar Pradesh* (2000) Cr LJ 5029 (AP) (DB) .

10 *Khagopati Gouda v State* (1996) Cr LJ 2741 (Ori) (DB) .

11 *Balu v State of Rajasthan* (2005) Cr LJ 4715 (Raj) .

12 *State of Andhra Pradesh v Naragudem Papireddy* (2004) Cr LJ 1768 (SC) .

13 *Shaikh Karimullah v State of AP* 2009 Cr LJ 1551, p 1552 (SC), AIR 2009 SC 1711, 2009 (2) Scale 254 .

14 *Pandurang Dadu Patil v State of Maharashtra & anor* (1997) Cr LJ 3827 (Bom) (DB) .

15 *Ganga & ors v State of Rajasthan* (1997) Cr LJ 3913 (Raj) (DB) .

16 *Dukhmochan Pandey & ors v State of Bihar* (1998) Cr LJ 66 (SC) .

17 *Nathu & ors v State of Uttar Pradesh* (1998) Cr LJ 2382 (All) (DB) .

18 *Nathoo Ram & ors v State of Uttar Pradesh* (2000) Cr LJ 3870 (All) (DB) .

19 *Lalta & ors v State of Uttar Pradesh* (2000) Cr LJ 4528 (All) (DB) .

20 *Walu alias Walmik Popat Khairnor & ors v State of Maharashtra etc* (2001) Cr LJ 1322 (Bom) (DB) .

21 *Sardul Singh v State of Haryana* (2002) 7 AD 638 (SC) .

22 Re *Bhup Smgh & anor v State of Haryana* (2002) JT 8 230 (SC) .

23 *State of Maharashtra v Arjun Bharmaji Waghchoure* 2013 Cr LJ (NOC) 259 (Bom) (DB).

24 Re *Bhima alias Bhimarao Sida Kamble & ors*(2002) Cr LJ 4293 (SC).

25 *Pratap Singh & ors v State of Maharashtra* (1996) Cr LJ 790 (Bom) .

26 *Jabar Singh v State of MP* (2011) 11 SCC 742 .

27 *Mayandi v State* (2010) 11 SCC 774 .

28 *Kartar Singli v State of Punjab* (1996) Cr LJ 1772 (SC) .

29 *Chander Pal v State of Haryana* (2004) Cr LJ 285 (SC) .

30 *Jitu v State of MP* 2009 Cr LJ 1884, p 1885 (SC), AIR 2009 SC 1337, 2009 (3) Scale 534 .

31 *Bengali Mandal v State of Bihar* 2010 Cr LJ 1420 (SC), AIR 2010 SC 686, 2010 AIR SCW 877, (2010) 2 SCC 91, 2010 (1) Scale 182 .

32 *State of J&K v Hazara Singh* AIR 1981 SC 451, (1980) Cr LJ 1501 (SC) .

33 *Radha Mohan Singh v State of UP* 2006 Cr LJ 1121, p 1131, AIR 2006 SC 951, (2006) 2 SCC 450, 2006 (1) Scale 369 .

34 *Simon & ors v State of Kerala* (1996) Cr LJ 3368 .

35 *Mohabbat v State of MP* (2006) Cr LJ 3208 (MP) (DB) .

36 *State of Gujarat v Rahjibhai Jethabhai Pandhiyar & ors* (1996) Cr LJ 3652 (Guj) (DB) .

37 *Mahuri Kistian & ors v State* (1996) Cr LJ 4017 (Ori) (DB) .

38 *Abu Bahar Siddik v State of Tripura* (2005) Cr LJ 1332 (Gau) (DB) .

39 *Sarabit Singh v State of Punjab* (1996) Cr LJ 4335 (P&H) (DB).

40 *Dajya Moshya Bhil v State of Maharashtra* (1984) Cr LR 435 (SC), (1984) Cr LJ 1728 (SC) .

41 *Daulat Trimbak Shewale v State of Maharashtra* (2004) Cr LJ 2825 (SC) .

42 *Tanaji Govind Misel v State of Maharashtra* (1998) Cr LJ 340 (SC) .

43 *Gurmail Singh v State of Rajasthan* (1999) Cr LJ 991 (Raj) (DB) .

44 *Roopa Ram v State of Rajasthan* (1999) Cr LJ 2901 (SC) ; *Jitendra Singh v State of Bihar* (1999) Cr LJ 3093 (Pat) (DB) .

45 *Chain Singh & ors v State of Madhya Pradesh* (2002) Cr LJ 1870 (MP) (DB) .

46 *State of Haryana v Mange Ram & ors* (2002) 10 AD 312 (SC) .

47 *State of Karnataka v Shivaraj & ors* (2002) Cr LJ 2443 (Kant) (DB) .

48 *Bhaiya Lal & ors v State of Uttar Pradesh* (2002) Cr LJ 3592 (All) (DB) .

49 *Ashwani Vashishtha & ors v State of Uttar Pradesh* (2002) Cr LJ 619 (All) (DB) .

50 *Daryao Singh & ors State of Rajasthan*(2002) Cr LJ (NOC) 43 (Raj) (DB), (2001) Raj Cr C 439.

51 *Kothandapani v State* (2003) Cr LJ 151 (Mad) (DB) .

52 *Bala Seetharamaiah v Perike S Rao* (2004) Cr LJ 2034 (SC) .

53 *Hamlet v State of Kerala* AIR 2003 SC 3682, (2003) Cr LJ 4898 (SC) .

54 *Kallu v State of Haryana* 2012 Cr LJ 4244, p 4249 (SC), AIR 2012 SC 3212, 2012 AIR SCW 4605, 2012 (7) Scale 404 .

55 *Lakhan Lal v State of Bihar* 2011 Cr LJ 1116 (SC), AIR 2011 SC 842, 2011 AIR SCW 889, 2011 (1) Scale 504 .

56 *Gurpreet Singh v State of Punjab* 2006 Cr LJ 126, AIR 2006 SC 191 .

57 *Arun Kumar Sharma v State of Bihar* 2010 Cr LJ 428 (SC), 2009 AIR SCW 6586, 2009 (13) Scale 124), 2009 AIR SCW 6586, 2009 (13) Scale 124 .

58 *Govindraju v State by Srirampuram PS,* 2012 Cr LJ 1991 (SC), AIR 2012 SC 1292, (2012) 4 SCC 722, 2012 AIR SCW 1994 .

59 *Nagappan v State by Inspector of Police, Tamil Nadu* AIR 2013 SC 3298, 2013 Cr LJ 3878, p 3882 (SC) .

60 *Ganpat v State of Haryana* 2011 Cr LJ 701, p 705 (SC), 2010 AIR SCW 7032, (2010) 12 SCC 59 .

61 *Jalkpat Rai v States of Rajasthan* 2011 Cr LJ 4295 (SC), AIR 2011 SC 2719, 2011 AIR SCW 4222, (2011) 7 Scale 348 .

62 *Md. Ankoos v Public Prosecutor, High Court of AP* 2010 Cr LJ 861 (SC), 2009 AIR SCW 7132 .

63 *State of UP v Guru Charan* 2010 Cr LJ 2024, p 2032 (SC), AIR 2010 SC 1459, 2010 AIR SCW 1661, (2010) 3 SCC 721, 2010 (2) Scale 554, 2010 (3) All LJ 273 .

64 *Gajula Surya Prakasarao v State of Andhra Pradesh* 2010 Cr LJ 2102, p 2106 (SC), (2010) 1 SCC 88, 2010 AIR SCW 140, 2009 (13) Scale 656 .

65 *Podyami Sukada v State of MP* 2010 Cr LJ 4273, AIR 2010 SC 2977, (2010) 7 Scale 168, 2010 AIR SCW 4809 .

66 *Dammu Sreenu v State of Andhra Pradesh* 2009 Cr LJ 3728, p 3730 (SC), AIR 2009 SC 2532, (2009) 8 Scale 71 .

67 *Motilal v State of Rajasthan* 2009 Cr LJ 3971, p 3972 (SC) .

68 *Vijay D Nagar v State of Rajasthan* 2008 Cr LJ 1907, AIR 2008 SC 1558 .

69 *Pannayar v State of Tamil Nadu by Inspector of Police* 2009 Cr LJ 4454 (SC), (2009) 9 SCC 152, 2009 AIR SCW 5608 .

70 *Kapil Deo Sinha v Kirandeo Prasad* 2009 Cr LJ 367 (SC), 2008 AIR SCW 6978 .

71 *Suresh v State of Haryana* 2008 Cr LJ 2619, p 2622 (SC), AIR 2008 SC 2042, (2008) 6 Scale 76 .

72 *Sheo Kumar v State of Chhattisgarh* 2009 Cr LJ 3165 (Chh) (DB) .

73 *Marimuthu v State of Tamil Nadu* 2008 Cr LJ 1055, p 1058 (SC), (2008) 3 SCC 205, 2008 (1) Scale 346 .

74 *State of UP v Shiv Kumar* 2005 Cr LJ 2604, p 2605, AIR 2006 SC 2992, 2006 SCC (Cri) 99 .

75 *Sohan Singh v State of Uttaranchal* 2006 Cr LJ 316, p 318 (SC), AIR 2006 SC 520, (2005) 12 SCC 607, 2005 (9) Scale 110 .

76 *Sidharth v State of Bihar* 2005 Cr LJ 4499, p 4508, AIR 2005 SC 4352, 2006 SCC (Cri) 175 .

77 *Sabbi Mallesu v State of Andhra Pradesh* 2006 Cr LJ 4038, p 4041, AIR 2006 SC 2747 .

78 *Hemraj v State of Haryana* 2005 Cr LJ 2152, p 2157, AIR 2005 SC 2110, 2005 (3) Supreme 136 .

79 *Nirmal Singh v State of Bihar* 2005 Cr LJ 672, p 677, (2005) 9 SCC 725, 2005 (1) Crimes 68 (SC) .

80 *Rameshwar Pandey v State of Bihar* 2005 Cr LJ 1407 (SC), 2005 (9) SCC 210 .

81 *Surjit Singh v State of Punjab* 2007 Cr LJ 2768, 2007 (4) Supreme 285 .

82 *State of Kerala v Baby* 2005 Cr LJ 2565 (SC), AIR 2005 SC 3010, 2006 SCC (Cri) 123 .

83 *State of Rajasthan v Mohan Lal* 2012 Cr LJ 2084, p 2086 (SC), AIR 2012 SC 1595, 2012 (3) Scale 590, (2012) 4 SCC 564 .

84 *Sidharth v State of Bihar* 2005 Cr LJ 4499, p 4508, AIR 2005 SC 4352, 2006 SCC (Cri) 175 .

85 *Sudhakar Krishna Uthekar v State of Maharashtra* 2014 Cr LJ (NOC) 53 (Bom) (DB).

86 *Chimmanamada Ganesh v State of Karnataka* 2012 Cr LJ 585 (Kant) (DB) .

87 *Dharam Deo Yadav v State of UP,* 2014 Cr LJ 2371 (SC), (2014) 5 SCC 509, (2014) 138 AIC 30 (SC) .

88 *Maloth Somaraju v State of AP* 2012 Cr LJ 402 (SC), 2011 AIR SCW 4877 .

89 *Ram Bharosey v State of UP* 2010 Cr LJ 871, p 874 (SC), 2009 AIR SCW 7220 .

90 *Sukhdeep Singh v State of Uttar Pradesh* 2010 Cr LJ 605, p 608 (SC), 2010 AIR SCW 161, (2010) 2 SCC 177, 2010 (1) All LJ 735 .

91 *Khilan v State of MP* 2010 Cr LJ 2445, p 2450 (SC), AIR 2010 SC 2485 .

92 *Dharamveer v State of UP* 2010 Cr LJ 2393, AIR 2010 SC 1378, 2010 AIR SCW 2078, (2010) 4 SCC 469, 2010 (4) All LJ 57 .

93 *Jagebar Ali v State of Tamil Nadu* 2009 Cr LJ 1711, p 1713 (SC), AIR 2009 SC 1774, 2009 (1) Scale 674 .

94 *State of Himachal Pradesh v Rakesh Kumar* 2009 Cr LJ 3060, p 3063 (SC) .

1 *Vijay Kumar v State by Inspector of Police, Madras* 2009 Cr LJ 3056, p 3060 (SC), 2009 AIR SCW 3690, 2009 (6) Scale 364 .

2 *State of Rajasthan v Hanif Khan* 2009 Cr LJ 1765 (SC), AIR 2009 SC 2043, (2009) 3 SCC 549, **See also***Pawan v State of Uttaranchal* 2009 Cr LJ 2257 (SC) (Rape and murder-Case based on circumstantial evidence-Conviction held proper).

3 *Jai Kumar v State of Haryana* 2009 Cr LJ 3719, p 3721 (SC), 2009 AIR SCW 4735, 2009 (9) Scale 704

4 *Ram Pal v State of UP* 2008 Cr LJ 1395, 2008 AIR SCW 101 ; *Sat Narain v State of Haryana,* 2008 Cr LJ 1416 (SC) (Testimony of the complainant and injured witness believed, conviction proper); *Shinde v State of Maharashtra* AIR 2008 SC 1198, 2008 Cr LJ 1632 (SC) (Conviction under s 302, IPC recorded on the evidence of the eye-witnesses, **upheld**).

5 *Ramesh v State of UP* 2009 Cr LJ 4432 (SC) .

6 *Chikkarangaiah v State of Karnataka* 2009 Cr LJ 4667, p 4676 (SC), 2009 AIR SCW 6092, (2009) 12 Scale 146 .

7 *Chattar Singh v State of Haryana* 2009 Cr LJ 319, p 326 (SC), 2008 AIR SCW 7426 .

8 *Diwan Singh v State of Utaranchal* 2012 Cr LJ 3256 (Utr) (DB) .

9 *Krishnamoorthy v State by Inspector of Police* 2007 Cr LJ 1803, p 1806 (SC), 2007 (2) Crimes 372 .

10 *State of MP v Badri Yadav* 2006 Cr LJ 2111, p 2128 (SC) .

11 *State of Karnataka v Ramappa Bhimappa Kattimani* 2006 Cr LJ (NOC) 446 (Kar) (DB), 2006 (5) Kant LJ 85.

12 *Siddharth v State of Bihar* 2005 Cr LJ 4499 (SC), AIR 2005 SC 4352, 2006 SCC (Cri) 175 .

13 *Yogesh Narain Saxena v State of Uttaranchal* 2007 Cr LJ 2282, p 2291 (SC), 2007 (4) Scale 247 .

14 *Rameshwar Pandey v State of Bihar* 2005 Cr LJ 1407 (SC), 2005 (9) SCC 210 .

15 *Ramashray Yadav v State of Bihar* 2006 Cr LJ 133, p 136 (SC), AIR 2006 SC 201 .

16 *Sandesh Kailash Abhang v State of Maharashtra* 2013 Cr LJ 651 (SC), 2013 (2) SCC 479, 2012 (12) Scale 407 .

17 *State of UP v Narendera* (2014) 10 SCC 261, 2014 (11) Scale 47 ; **See also***Birju v State of MP* (2014) 3 SCC 461, 2014 Cr LJ 1568 (Murder of one year old child, life imprisonment awarded); *Alber Oraon v State of Jharkhand* AIR 2014 SC 3202, 2014 Cr LJ 4238 (Murder of a lady and two children to grab their property, dead bodies buried in soak pit - Life imprisonment awarded); *Amar Singh Yadav v State of UP* (2014) 13 SCC 443, AIR 2014 SC 2486 (Murder of wife and two children, death sentence converted into life imprisonment); *Mohd Bin Beerankutti v State of Karnataka* (2014) 14 SCC 493 (Robbery and murder - Death sentence converted into life imprisonment.

18 *Anand Mohan v State of Bihar* 2013 Cr LJ 2644 (SC), 2013 AIR SCW 2613, 2012 (7) SCC 225 .

19 *Mohinder Singh v State of Punjab* 2013 AIR SCW 1120, (2013) 3 SCC 294, 2013 Cr LJ 1559 .

20 *Absar Alam v State of Bihar* AIR 2012 SC 968, 2012 Cr LJ 1624, p 1625 (SC) .

21 *Rameshbhai Chandubhai Rathod v State of Gujarat* 2011 Cr LJ 1458, p 1460 (SC), AIR 2011 SC 803 .

22 *Dilip Premnarayan Tiwari v State of Maharashtra* 2010 Cr LJ 905, p 919, 920 (SC), 2009 AIR SCW 7592 .

23 *Mulla v State of UP* 2010 Cr LJ 1440, p 1459 (SC), AIR 2010 SC 942, (2010) 3 SCC 508, 2010 AIR SCW 1194, 2010 (2) Scale 179 .

24 *Amit v State of Uttar Pradesh* AIR 2012 SC 1433, 2012 Cr LJ 1791 (SC) (*Rameshbhai Chandubhai Rathod v State of Gujarat* AIR 2011 SC 803, **followed**); *Ramnaresh v State of Chattisgarh* 2012 Cr LJ 1898 (SC) ; **See however***Rajendra*

Prahladrao Wasnik v State of Maharashtra 2012 Cr LJ 1917 (SC) (Rape and murder -- Death penalty awarded).

25 *Swamy Shraddananda v State of Karnataka* 2008 Cr LJ 3911 (3921) (SC), AIR 2008 SC 3040, 2008 (10) Scale 669 .

26 *Kulwinder Singh v State of Punjab* 2007 Cr LJ 4290 (4292) (SC), AIR 2007 SC 2868, 2007 (9) Scale 621, 2007 (5) Supreme 817 .

27 *Brajendrasingh v State of Madhya Pradesh* AIR 2012 SC 1552, 2012 Cr LJ 1883 .

28 *State of UP v Narendera* (2014) 10 SCC 261 (SC) ; **See also***Birju v State of MP* (2014) 3 SCC 461, 2014 Cr LJ 1568 (Murder of one year old child, life imprisonment awarded; *Alber Oraon v State of Jharkhand* AIR 2014 SC 3202, 2014 Cr LJ 4238 (Murder of a lady and two children to grab their property, dead bodies buried in soak pit-Life imprisonment awarded); *Amar Singh Yadav v State of UP* (2014) 13 SCC 443, AIR 2014 SC 2486 (Murder of wife and two children, death sentence converted into life imprisonment); *Mohd Bin Beerankutti v State of Karnataka* (2014) 14 SCC 493 Robbery and murder-Death sentence converted into life imprisonment.

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 303.

Punishment for murder by life convict.--

Whoever, being under sentence of [1][imprisonment for life], commits murder, shall be punished with death.

Comments

1. Scope and Applicability

This section prescribes the punishment for murder committed by a person already under sentence of imprisonment (formerly transportation) for life. Where a person under the sentence of imprisonment for life, on a conviction for murder, is found guilty of murder on a subsequent and different charge, the only sentence, that can be passed on him according to this section, is the sentence of death.[2] The section which is like a *proviso* to s 302, removes the alternative punishment of life-imprisonment and makes the sentence of death compulsory.[3]

Section 303 is not confined only to cases where a person undergoing sentence of imprisonment for life, actually and infact, himself commits an act which results in the death of the victim. The section would apply even in cases where a person undergoing a sentence of imprisonment for life, is convicted under s 302 read with s 34, or under s 302 read with s 149 .[4]Where a person is convicted under ss 302 / 34, it must be said that he has committed the murder as much as the person by whose act the victim was killed. Similarly, where a person is convicted under ss 302 / 149, the true legal position is that, in law he must be deemed to have committed the murder as much as the actual murderer has.

An accused cannot be under a sentence of imprisonment for life at the time of commission of the second murder, unless he is actually undergoing such a sentence or there is legally standing a judicial final

sentence which he is bound to serve without the requirement of a separate order to breathe life into the sentence which was otherwise dead on account of remission under s 432, Crpc . Section 303 , IPC, is applicable only to an accused who on the date of commission of the second offence of murder had earlier committed a murder for which his conviction and sentence of imprisonment for life were beyond judicial controversy and were operative.[5] A person must be actually and irrevocably a lifer beyond the pale of judicial controversy at the time of commission of the second offence of murder to be visited with a penalty of death under s 303, IPC . If the sentence of a convict has already been remitted, either conditionally2509 or unconditionally, at the time of commission of the second murder, he would cease to be an actual lifer to come within the lethal clamp of s 303, IPC .[6] 'Under sentence of imprisonment for life' means, under an operative and executable sentence of imprisonment for life. A sentence once imposed but later set aside is not executable, and such a sentence cannot, therefore, be taken into account.[7] However, suspension of sentence by virtue of granting of bail to a convict, by the appellate court during the pendency of an appeal against a sentence of imprisonment for life, does not mean that the sentence has been set aside.[8] The crucial point of time to be considered is the time when the second murder is committed.[9]

2. Procedure

An offence under this section is cognizable, non-bailable, non-compoundable, and exclusively triable by a court of sessions.

3. Charge

The following form of charge may be adopted:

> I (*name and office of sessions judge, etc*) hereby charge you (*name of accused person*) as follows:
>
> That you, while under a sentence of imprisonment for life, on or about the.....day of .....at.....committed murder by intentionally (or knowingly) causing the death of (name of the deceased) and thereby committed an offence, punishable under s 303 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

4. Proof

Prove that:

(i) the accused committed the murder of the deceased under consideration; and
(ii) the accused at the time of committing the murder aforesaid was under a sentence of imprisonment for life.

5. Section 303 Struck down being not Constitutionally Valid

In *Mithu v State of Punjab* [10] the Constitutional Bench of the Apex Court after discussing the forty-second report of the Law Commission of India brought out in 1971 and the thirty-fifth report on capital punishment published in 1967 considered by the Law Commission of India and the recommendations of the Parliamentary Committee that s 302 and s 303, IPC should be brought under one section of the IPC and considering that the sentence of life imprisonment is provided in 51 sections of the IPC, and a convict sentenced to imprisonment of life other than the offence of murder would also be liable to sentence of death by virtue of s 303, IPC, which was2510 not found proper, and hence, struck down s 303 of the IPC as unconstitutional and declared void with the following observations of Chandrachud CJ (for himself and on behalf of Murtaza Fazal Ali, Tulzapurkar and Vardarajan JJ):

> On a consideration of the various circumstances which we have mentioned in the judgment, we are of the opinion that s 303 of the Penal Code violates the guarantee of equality contained in art 14 as also the right conferred by art 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law. The section was originally conceived to discourage assaults by life convicts on the prison staff, but the legislature chose language which far exceeded its intention. The section also assumes that life convicts are a dangerous breed of humanity as a class. That assumption is not supported by any scientific data. As observed by the Royal Commission in its Report on Capital Punishment, 1949-1953, para 517, 'There is a popular belief that prisoners serving a life sentence after conviction of murder form a specially troublesome and dangerous class. That is not so. Most find themselves in prison because they have yielded to temptation under the pressure of a combination of circumstances unlikely to recure'. In *Dilip Kumar Sharma v State of Madhya Pradesh* ,[11] this court was not concerned with the question of the view of s 303, but Sarkaria J in his concurring judgment, described the vast sweep of that section by saying that the section is draconian in severity, relentless and inexorable in operation. We strike down s 303 of the Penal Code as unconstitutional and declare it void.

Justice Chinnapa Reddy supporting the above observation of four judges in the same judgment made the following observations:

> Judged in the light shed by *Maneka Gandhi* and *Bachan Singh*, it is impossible to uphold s 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the judge as soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that s 303, IPC, must be struck down as unconstitutional.

6. Effect of Striking down Section 303

The Constitution is the basic law of the land and all other laws made by Parliament are subordinate to it. Any provision of any law, Act or notification which infringes the constitutional provisions is declared void and is ineffective. After declaring s 303, IPC as void by the Apex Court, this provision of law though remains in the IPC and is not yet deleted by the legislature, however, has become ineffective and unenforceable.

It is needless to add that all cases of murder will now fall under s 302, and there shall be no mandatory sentence of death for the offence of murder.[12]

Thus, if an accused is convicted under s 303, IPC, after the same has been struck down by the Supreme Court, the conviction and sentence of the accused has to be set aside and conviction of the accused is liable to be altered to s 302, from s 303, IPC, and the sentence needs to be accordingly awarded.[13]2511

7. Accused convicted under Sections 302 / 34 cannot be convicted under Sections 506 / 34 or under Section 303,IPC

Commentary under the same heading in s 302, *ante*, may be referred to.

1 Substituted by Act 26 of 1955, s 117 and Sch for 'transportation for life' (wef 1-1-1956).

2 *Queen v Doorjodhan Shamonto* 19 WR (Cr) 45 .

3 *Pratap v State of Uttar Pradesh* AIR 1973 SC 786, p 791, 1973 Cr LJ 565 ; *MV Joshi v MU Shimpi* AIR 1961 SC 1494, (1961) 2 Cr LJ 696 ; *Dilip Kumar Sharma v State of Madhya Pradesh* AIR 1976 SC 133, p 138, 1976 Cr LJ 184 .

4 *Mahabir Gope v State of Bihar* AIR 1963 SC 118, p 120, (1963) 1 Cr LJ 86 .

5 *Shaikh Abdul Azeez v State of Karnataka* AIR 1977 SC 1485, p 1489, 1977 Cr LJ 1121, **overruling** (1) *Sohan Singh Nand Singh v State* AIR 1965 Punj 156, (1965) 1 Cr LJ 473, and (2) *Po Kun v King* ILR 1939 Rang 124 .

6 *Shaikh Abdul Azeez v State of Karnataka* AIR 1977 SC 1485, p 1489, 1977 Cr LJ 1121, overruling (1) *Sohan Singh Nand Singh v State* AIR 1965 Punj 156, (1965) 1 Cr LJ 473, and (2) *Po Kun v King* ILR 1939 Rang 124 .

7 *Dilip Kumar Sharma v State of Madhya Pradesh* AIR 1976 SC 133, p 137, 1975 Cr LR 624 (SC) .

8 *Kalicharan v State of Uttar Pradesh* 1973 All WR (HC) 384, 1973 A Cr R 238 .

9 *Dilip Kumar Sharma v State of Madhya Pradesh* AIR 1976 SC 133, p 137, 1975 Cr LR 624 (SC) .

10 *Mithu v State of Punjab* AIR 1983 SC 473, 1983 Cr LJ 811 (SC) .

11 *Dilip Kumar Sharma v State of Madhya Pradesh* AIR 1976 SC 133, [1976] 2 SCR 289 .

12 *Mithu v State of Punjab* AIR 1983 SC 473 .

13 *Surjeet Singh v State of Punjab* AIR 1983 SC 838, 1983 Cr LJ 111 1 (SC) ; *Bhagwan Bux Singh v State of Uttar Pradesh* AIR 1989 SC 1120 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 304.

Punishment for culpable homicide not amounting to murder.--

Whoever commits culpable homicide not amounting to murder, shall be punished with [14][imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.2512

Comments

1. Scope

Section 304, IPC does not create any offence; it merely provides the punishment for culpable homicide not amounting to murder and draws a distinction between the penalty to be inflicted in cases, where, an intention to kill being present, the act would have amounted to murder, but for its having fallen within one of the exceptions in s 300, IPC, and cases in which the crime is culpable homicide not amounting to murder, that is to say, where there is knowledge that death will be a likely result, but the intention to cause death, or bodily injury likely to cause death, is absent.[15] The section is in two parts; the first part is concerned with culpable homicide committed with either of the two types of intention and the second part is concerned with culpable homicide committed with particular knowledge.[16] The first and second forms of culpable homicide, *viz*, where there is an intention to cause death, or bodily injury likely to cause death, fall under the first part of the section, are under the terms of this section, more severely punished than culpable homicide of the third form in which there is only knowledge of a likelihood of death which falls under the second part of the section.[17]So, different punishments are prescribed for the offence of culpable homicide not amounting to murder according to the different state of mind of the offender with which the act, by which the death is caused, is done. In short, the degree of punishment is made commensurate with the degree of culpable evidence of the state of mind of the offender with which the act by which the death is caused, is done.[18]

Where the injuries to the deceased were caused during the course of a mutual fight and there was no evidence as to the nature of the injuries, the accused was held guilty under s 304, IPC .[19] Where accused appellant inflicted knife blow2513 causing injury on posterior thoracic wall, death was due to lung injury, there was no motive to cause death, held offence fell under s 304, IPC .[20] When there is absolutely nothing to connect the accused with the offence, culminating in the death of the deceased, conviction under s 304, IPC is not sustainable.[21] If, however, the injury, found to be sufficient in the ordinary course of nature to cause the death of the deceased, is not found to have been caused by the accused intentionally, the accused cannot be held guilty of an offence under s 302, IPC . On the other hand, he can be convicted of a lesser offence falling under s 304, Pt II, IPC .[22] So also, if the death of a deceased is committed without any premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel, and without the accused having taken undue advantage or acted in a cruel or unusual manner, the accused can be convicted only under Pt II of s 304, IPC .[23]

The accused picking up a heavy stone weighting about 15 kilograms and dropping it from the roof of his house on the head of the deceased could be said to have knowledge that he would by his act likely to cause death of the deceased and so liable under s 304, Pt II, IPC .[24] However, a fatal injury caused with force on a vital part of the body by a sharp and formidable weapon, would bring the offence clearly under s 302, and not under Pt I or II of s 304 .[25] When the medical evidence shows that the blow given by the accused on the head of the deceased, caused extensive injury resulting in fracture of the skull and breaking of the bone into four pieces, as a consequence of which the deceased died, he can only be convicted under s 302, and not under s 304, Pt I, IPC .[26] Where the accused appellant used steel pipe for supplying water in bathroom and caused injuries to the victim, held the accused was guilty of culpable homicide not amounting to murder.[27]

The section must be interpreted as providing punishment for the offence of culpable homicide in all cases where the accused cannot be convicted of murder,[28] though the tendency on the part of judges avoiding conviction of the accused for offences under s 302 and bringing the offence under s 304 cannot be countenanced.[29]2514

2. Applicability

The section 304 applies:[30]

(i) when the case falls under one or the other of the clauses of s 300, but is covered by any of the exceptions to that section;[31] or

(ii) when the injury caused is not of the higher degree of likelihood, which is covered by the expression 'sufficient in the ordinary course of nature to cause death', but is of a lower degree of likelihood which is generally spoken of as an injury likely to cause death and the case does not fall under cl 2 of s 300 ;[32] or

(iii) when the act is done with the knowledge that death is likely to ensue, but there is no intention to cause death or an injury likely to cause death. In such cases, there may be either no intention to cause any injury at all, or there may be an intention to cause simple or grievous hurt, but not an injury likely to cause death.

Commission of the offence of culpable homicide would require some positive act on the part of the accused as distinguished from silence, inaction or a mere lapse. Allegations of not carrying out a prompt search of the missing children; or delay in the lodging of formal complaint with the police and failure to take adequate measures to guard the access from the ashram to the river, which are the principal allegations made in the FIR, cannot make out a case of culpable homicide not amounting to murder punishable under s 304, IPC . To attract the ingredients of the said offence something more positive than a mere omission, lapse or negligence on the part of the named accused will have to be present.[33]

3. Death must be caused

Commentary under the same heading in s 299, *ante*, may be referred to.

4. Section 304 and Section 304A --Distinction

In order to be encompassed in the protection under s 304A, IPC, there should neither be intention nor knowledge to cause death. When any of these two elements is found to be present, s 304A has no application. Where the accused picked up the gun, unlocked it, loaded it with cartridges and shot the gun from a close range of about 4/5 ft aimed at chest of deceased, in view of the scenario described by prosecution witnesses and evidence of ballistic expert, the accused was held liable to be convicted under s 304, Pt II.[34]2515

5. Doctors Deliberately Conducting Surgery in Ill-equipped Store-room

Where the accused doctors were deliberate in conducting surgery keeping the victim patient who complained of severe stomach pain in a store-room which was ill-equipped for such a major surgery to be held, registration of case against accused doctors not for negligence, but for offence punishable under s 304 was found proper, therefore, the court declined to interfere with chargesheet.[35]

6. Scope of Part I of Section 304

The first part of s 304, IPC is intended to include those cases in which the act of the accused person would be culpable homicide amounting to murder but for the fact that it was committed in circumstances which render one or the other of the exceptions to s 300 applicable.[36]Section 304, Pt I, IPC, applies where the accused causes bodily injury with intention to cause death.[37] It is intention to cause death which is essential in such cases and is that to which the law principally looks.[38] If the case of an accused, on facts, falls under exception 1 to s 300, he can be convicted under s 304, Pt I, and not under s 302, IPC .[39] Similarly, if the case of an accused falls, on the facts of the case, under exception 2 to s 300, IPC, he will be punishable under s 304, Pt I, IPC .[40]If, from the circumstances, it becomes clear that the act of the accused comes under any of the exceptions, mentioned under s 300, it is not necessary that the accused ought to have pleaded it.[41] Culpable homicide may not, therefore, amount to murder: (a) where, though the evidence is sufficient to constitute murder, one or more of the exceptions to s 300 apply, or (b) where the degree of *mens rea*, specified under s 299, IPC, is present, but not the special degree referred to by s

300 .[42] The Supreme Court stated, in one case, that when 'all the conditions, mentioned in Exception 4 to s 300, are fulfilled, the conviction of the accused cannot be sustained under s 302, instead the conviction can be sustained under s 304, Pt I.[43] In another case, an accused, while exceeding the right of private defence, caused death of the victim, his conviction under s 304, Pt I, was confirmed.[44] In the instant case though the appellant accused person was exercising right of private defence, but had exceeded the same by continuing the attacks after the threat to life had ceased.2516 Conviction under s 302, IPC was altered to one under s 304, Pt I, ten years RI was awarded.[45]

Appellant accused seeing the deceased plucking of Mahua from his tree, protested against the same. There was exchange of hot words between them in course of which the appellant accused by means of an axe assaulted the deceased who succumbed to the injuries. Held in the due exercise of private defence of person and property and as a result of the exchange of hot words, appellant accused got excited and assaulted the deceased. Therefore, the act committed by the accused did not attract the provisions of s 302, IPC, but it fell under the purview of s 304, Pt I, IPC .[46]Again, in *Baljit Singh v State of Uttar Pradesh* [47] the accused were found to have grossly exceeded their right of private defence and their case was, therefore, held to be covered by exception 2 to s 300 and, as such their conviction was altered from ss 302 / 149 to that under s 304, Pt I. There was land dispute between the parties. The accused was in possession of the land, the deceased with oxen came and started cultivating the land of the accused. The accused lifted stone boulders and gave three blows on the deceased causing death. Held, the incident occurred all of sudden. The accused exercised right of his private defence to save his property agricultural land in his possession but he exceeded his right by giving repeated blows of stone boulders and, therefore, he had committed the offence under s 304, Pt I, IPC . A sentence of ten years RI was imposed.[48] The appellants accused exceeded the right of private defence. In a boundary dispute between the parties, the accused appellants armed with lethal weapons had caused the death of two persons. However, their conviction under s 302, IPC was altered to one under s 304, Pt I.[49]

Accused appellant upon seeing his sister with the deceased at odd hours assaulted with knife. It was a case of loss of control on the spur of moment. The accused appellant had not taken undue advantage of the situation or acted in cruel or in unusual manner. Conviction of the accused appellant under s 302, IPC was altered into one under s 304, Pt I and in the ends of justice ten years RI was imposed.[50] Where the circumstances clearly indicated that the accused while exercising their right of private defence, took undue advantage or acted in a cruel or unusual manner so as to almost take them beyond the protection of exception 4 to s 300, and their acts, by which the deaths were caused, were done with the intention of causing death, or at least, of causing such bodily injury as was likely to cause death, they were held liable under s 304, Pt I, IPC .[51]

Where the accused inflicted injuries on his younger brother who was in illicit cohabitation with his wife, it was held that this fact would straightway show that the accused was subject to grave and sudden provocation, which, in the event of the subsequent death of the victim, would make exception 1 to s 300 applicable and2517 reduce the offence to one under s 304, Pt I.[52] There was a verbal argument and heated exchange of words amongst the accused and complainant and his family members over a trivial issue of parking of auto rickshaw. The accused appellant no. 3 being driven by grave and sudden provocation gave knife blows to the deceased causing death. There was no pre-meditation and intention to kill the deceased. The case of the accused appellant fell under s 300, Exception I, his conviction under s 302, IPC was altered to one under s 304, Pt I, IPC .[53] In the instant case one blow was given with a small stick, and the place where the assault took place was dimly lit. Held, case fell under s 304, Pt I, conviction of the accused appellant under s 302 was converted into one under s 304, Pt I.[54] Considering the fact that the occurrence took place in the night in almost dark conditions with feeble light and attack was made indiscriminately, appellant accused was convicted under s 304, Pt I, IPC . Custodial sentence of 10 years RI was held proper.[55]

Appellant accused immobilized the deceased by attack on his legs. Co-accused thereafter caused fatal injuries leading to death. Held, the appellant had common intention to cause death, his conviction under s 304, Pt I read with s 34, IPC was held proper.[56]

The mother (deceased) was advising his son appellant accused that he should not quarrel with his wife. On hearing this, the appellant caught hold of his mother and dragged her out from the house and took her in front of the temple of deity Karni Mata, where he throttled her neck, on account of which she died. The conviction of the accused under s 302 was converted into one under s 304, Pt I, IPC .[57] The appellant accused a lame person who normally moved on a tricycle gave single knife blow on the deceased while the latter was asleep. Held, offence was not murder, the appellant accused was convicted under s 304, Pt I.[58]

There was no evidence that the death of the deceased wife was unnatural or the appellants husband and in-laws committed the murder of the deceased wife and to conceal the evidence of offence, consigned her dead body to flames. Appellants were acquitted of the charge under ss 201 and 304, Pt I, IPC .[59]

As stated above, there is another class of cases to which Pt I of s 304 applies and in which no question of application of exceptions to s 300 arises. If the injury, which the accused intended to cause, was likely to kill, his case would fall under Pt I[60] because an offence may amount to culpable homicide, but not murder, even though none of the exceptions, mentioned in s 300, are applicable to the case.[61] If, on2518 referring to s 300, IPC, the judge is of the opinion that the killing does not come within one of the four clauses of that section, he can then refer to s 299 . If the killing comes within the second part of s 299, which relates to the intention of causing a bodily injury likely to cause death, it comes under s 304, Pt I.[62] Where it was found that the accused caused the death of the deceased with the intention of causing such bodily injury as is likely to cause death, the accused was held guilty under the first part of s 304 .[63] Occurrence had taken place in course of sudden quarrel, the accused assaulted the deceased. Held, case was covered by Exception 4 of s 300, accused was convicted under s 304, Pt I.[64] The appellant accused S had caused 4 inches wound by ballan (spear) in the abdomen of the deceased. Injury was caused out of sudden altercation. Appellant accused was convicted under s 304, Pt I, IPC .[65]Where the accused inflicted injuries upon the deceased in order to extricate himself from the latter's grip when he (the deceased) was trying to catch hold of him (the accused) who was running away after causing fatal injuries to another deceased, the conviction of the accused was altered by the High Court, from one under s 302 to that under s 304, Pt I, with regard to the death caused due to injury inflicted by the particular accused with the sole object of extricating himself from his grip.[66] PWS deposed that the deceased who first pulled the collar of appellant's shirts and tried to press his neck, in the process, the appellant inflicted knife blow in the abdomen of the deceased with a view to escape from the clutches of the deceased. The appellant accused clearly exceeded the right of private defence. In these circumstances his case fell under s 304, Pt I, IPC . The conviction of the accused appellant under s 302 was altered to one under s 304, Pt I.[67]

The theory of firing in self-defence was probable. The accused was convicted under s 304, Pt I.[68]Where the common object of the unlawful assembly, of which the accused were members at the time of the incident, was merely to cause injuries which were likely to cause death, it was held that the accused were guilty of an offence under s 304, Pt I read with s 149, IPC .[69]

In a sudden fight going on the deceased out of curiosity came to enquire about the fighting going on, the accused dragged him and his brother inflicted solitary *Hasua* blow on neck causing instantaneous death. Held, the act done was in heat of passion, upon sudden quarrel, the accused had not taken undue advantage, nor acted in cruel manner. Case was covered by s 300, Exception 4, fell under s 304, Pt I and not s 302, IPC, the conviction of the accused under s 302, IPC was altered to one under s 304, Pt I, sentence of 10 years RI was held sufficient.[70] At the time of the incident the deceased was cutting karuvela trees. He was having a spade and *aruval* in hand. At that time, the accused came there and questioned how he could cut the trees, and following the same, there was a wordy duel. Immediately, the accused snatched the2519*aruval* and cut him on the neck and shoulder indiscriminately, causing instantaneous death. Held, the occurrence took place in course of sudden quarrel, Exception 4 to s 300, IPC applied. The appropriate conviction would be under s 304, Pt I, IPC .[71]

In a sudden quarrel/fight the accused had given two blows by wooden log on the head of the deceased resulting in death. Held, accused was entitled to benefit of Exception 4 to s 300, IPC, he was convicted under s 304, Pt I and not under s 302, IPC .[72]

Pushing a person into the sea, with a bleeding head injury may not have been with the intention to kill, but it would certainly show the "intention of causing a bodily injury as was likely to cause death", within the meaning of ss 300 & 304, Pt I of the IPC .[73]

Where one accused on being infuriated brought a *dah* (a sword like weapon), and at the instigation of another accused struck a blow on the neck and hit another blow on the hands of the deceased, the conviction of the accused persons under ss 302 / 34 was altered to one under s 304, Pt I read with s 34, IPC .[74] There was heated exchange of words between the deceased and the appellant. The deceased had thrown the accused appellant on the ground. They were separated by A and R. PW1 admitted that her husband/deceased had told the appellant that he could shoot at him if he had the courage. It was upon this provocation that the appellant fired the shot which hit the deceased in his stomach and ultimately resulted in his death. The conviction of the appellant accused under s 302, IPC was altered to one under s 304, Pt I.[75]

Death caused by the accused was not premeditated, accused had no common intention to cause death of deceased, the injuries were not sufficient in the ordinary course of nature to have caused his death. Only accused no. 1 had caused vital injury on the head of the deceased. Held, the case was covered by Exceptions 1 and 4, IPC . Appellant accused No. 1 was convicted under ss 304, Pt I/149. Other accused were convicted under ss 323 / 149, 147 and 148, IPC .[76] Where A and B accused caught hold of the deceased and the C accused with knife inflicted two fatal blows on the deceased, the intention was not to cause death but to create terror, all would be guilty and convicted under s 304, Pt I/34 IPC .[77]

It was established on record that the appellants and the deceased were taking liquor and an altercation had taken place amongst the three. After the altercation the appellant N had slapped the deceased resulting into some grappling. It was at this moment that appellant B had picked up an iron rod which was lying nearby and in the heat of passion had given the fatal blow on the head of the deceased. Only one injury was given which clearly shows that appellant B had not taken any undue advantage nor had he acted in a cruel manner. Held, the case falls under Exception IV to s 300, conviction of the appellant under s 302 / 34 IPC was altered to one under2520 s 304, Pt I, IPC .[78]There was evidence that the bullocks of the accused had damaged the crops standing in the field of the complainant. This led to exchange of hot words between the accused persons and the complainant. After initial exchange of hot words and quarrel the accused persons went inside their house and immediately *i.e.* in less than two and three minutes they came back with arms and assaulted the deceased. The conviction of the accused appellants under ss 302 / 149, IPC was altered to one under s 304, Pt I, read with s 149 .[79]

There was no *mensrea* on the part of the accused to commit the murder of the deceased. The act appeared to have been committed out of deep frustration, the accused was a vagabond. The conviction of the accused under s 302, IPC was altered to one under s 304, Pt I, IPC .[80]

Where the common object of the unlawful assembly originally was to cause hurt, but, later, the object developed into killing the deceased, or, at least, into giving him a beating likely to cause death, the conviction under Pt II of this section, read with s 149, was upheld.[81] As no injuries were inflicted on any vital parts of the body of the deceased, the appellants never intended to kill the deceased. They being armed with axe and *Lathi* could have assaulted on the vital parts of the body of the deceased if they had any intention to cause death. The very fact that the appellants were alleged to have assaulted on arm and wrist and corresponding injuries were also found in course of post-mortem examination, it was held proper to convict the appellants for commission of offence under s 304, P II read with s 34, IPC since they had no intention to cause death but had knowledge that such injuries may cause death.[82]

In a sudden fight between two religious groups over the issue of prayer, a single blow from a small knife was given to the deceased. Held the accused could not be convicted on the charge of murder, his conviction under s 302, IPC was altered to one under s 304, Pt I.[83] Where the deceased and the accused were close friends, there was no previous enmity between them, the incident took place on the spur of the moment, the accused had not taken any undue advantage nor acted in cruel manner, conviction of the accused for offence under s 304, Pt I was held proper.[84]

The accused in a sudden altercation with his wife and mother-in-law assaulted his mother-in-law causing three injuries which proved fatal. The accused was convicted under s 304, Pt I and not under s 302, IPC .[85] On sudden quarrel and exchange hot words, the accused appellants went to their nearby house, brought weapons *viz* axe, knife and gupti, and caused injuries which proved fatal. Held, the case fell under Exception 4 of s 300, the accused were convicted under s 304, Pt I, IPC .[86]

In a sudden quarrel and exchange of hot words the accused husband hacked the deceased (wife) on her back with a sickle and the deceased fell down and the accused once again hacked on the neck and left ear of the deceased causing severe bleeding2521 injuries. The deceased fell down and died, the accused was convicted under s 304, Pt I and not under s 302, IPC .[87] In the course of sudden quarrel the occurrence took place, the case fell under Exception 4 of s 300, IPC the conviction of the accused appellant under s 304, Pt I, instead of s 302, IPC was held proper.[88]

(a) Causing Death by Arrow from Distance

The facts of the case showed that appellants accused fired arrows from a distance, not with any accuracy, one of such arrows hit the deceased. There was no sudden quarrel. Conviction of the accused under s 302, IPC was altered to one under s 304, Pt I.[89]

(b) Sudden Firing after Verbal Altercation

There was exchange of abuses between the accused persons and one of the deceased. Being provoked accused D asked his son L to bring revolver, L brought revolver and fired causing death. Both accused D and L were convicted under s 304, Pt I.[90]

(c) Frequent Quarrel between Accused and Deceased wife

As appellant accused was involved in wayward habits, there were frequent quarrels between the accused husband and the deceased wife. On the day of occurrence the deceased poured kerosene oil over herself and the accused lighted match stick, set the deceased on fire, causing death. Appellant accused was convicted under s 304, Pt I.[91]

Accused belonging to scheduled tribes and inhabitant of tribal area committed the murder of his wife. There were frequent quarrels between the accused and the victim. On the date of incident the accused under provocation assaulted his wife from the blunt side of the axe. Since he did not assault from the sharp cutting side of the axe, he could not be imputed with intention to cause the death of the deceased. His conviction under s 302, IPC was altered to one under s 304, Pt I, IPC, a sentence of ten years RI already undergone by him was found sufficient.[92]

(d) Accused Shot in Air/Indiscriminately Causing Death

Where the deceased had refused to take wine with the appellant, the later first fired in the air and thereafter fired indiscriminately. Offence was committed under s 304, Pt I and not under s 302, IPC .[93]

(e) Solitary Injury

On account of election rivalry, the appellant accused inflicted a single *lathi* blow on the deceased, supporter of the opposite party. The injury proved fatal. The second injury found on the person of the deceased was in the nature of abrasion on left arm. No other injury was caused by the appellant to the deceased after he became unconscious. The evidence did not show that the appellant inflicted injury with the2522 intention/knowledge to cause the death of the deceased. Conviction of the appellant accused under s 302, IPC was altered to one under s 304, Pt I.[94]

There was enmity between the parties. The accused gave single blow of yoke to the deceased in night, causing death by single injury. His conviction under s 302, IPC was altered to one under s 304, Pt I.[95]

In the instant case single blow was given on the head of the deceased by a small wooden yoke. Conviction of the accused under s 302, IPC was altered to one under s 304, Pt I.[96]

(f) Honour Killing

The accused respondents were prosecuted on allegations that they had taken the deceased from his field to their house and strangulated the deceased (G) and their sister (P) as both had sexual relations. The accused persons took defence that the deceased sneaked into the house of the accused persons and tried to strangulate their sister and when the accused saw, they strangulated the deceased. The High Court in appeal on the basis of the postmortem report that semen was found in the vaginal swabs of deceased which were sent for chemical examination, came to the conclusion that it was deceased G who himself sneaked into the house of the accused persons and must have had sexual intercourse with P and on seeing them in a compromising position, the accused persons must have killed them. The High Court came to the conclusion that even if this was proved, it was a case of grave and sudden provocation and as such it could not be a case of murder and would come under s 304, Pt I read with s 34, IPC on the basis of first exception to s 300, IPC . The Supreme Court agreed with the view taken by the High Court. Conviction of the accused respondents under s 304, Pt I was affirmed.[97]

(g) Honour Killing -- Sentence Undergone held Proper

The incident was old, the accused were below 25 years at the time of the offence, the sentence of five years already undergone was not interfered with.[98]

7. Applicability of Section 34 to the first part of Section 304 of IPC

Commentary under s 34, *ante*, Vol. 1, may be referred to.

Where two or more accused persons in furtherance of their common intention commit an offence punishable under s 304, Pt I, IPC, the liability under s 304, Pt I can be fastened on them by taking recourse to s 34, IPC .

Where the accused entertaining apprehension that the complainant party had come to take forcible possession of land, attacked them by chasing the complainant party and firing 30-40 rounds of gunshot unnecessarily at the complainant party killing some persons, the accused were held to have exceeded their right of private2523 defence, and thereby, held to have committed the offence under s 304, Pt I read with s 34, IPC .[1]

Where the accused persons in furtherance of their common intention caused the death of two persons, none of the injuries on the persons of the deceased could be attributed to any sharp cutting weapon, most of them were lacerated injuries and others were bruises or aberrations, the conviction of the accused persons was altered from s 302, read with s 34 to s 304, Pt I read with s 34 .[2] Where some of the accused persons formed common intention to commit an offence and used weapons like spears, *lathis* and inflicted injuries on the vital parts of the body of the deceased, alteration of their conviction from ss 302 / 149, IPC to one under s 304, Pt I read with s 34, IPC, was held justified.[3]

Where the deceased died of *banka* blows not attributed to one of the accused who had only pressed down the deceased before the other two accused persons gave the blows, the Apex Court held on these facts that by merely pressing down the victim before the other two accused persons assaulted, it cannot be held that the accused had shared common intention of causing the death of the victim; in the facts and circumstances of the case it has to be held that he shared only the common intention of culpable homicide not amounting to murder. He can be attributed with the intention that the injuries which were being caused by the other two accused persons were likely to cause death of the victim, accordingly; the conviction of this accused was converted from s 302 read with s 34 to s 304, Pt I read with s 34, IPC .[4]

8. Applicability of Section 149 to Part I of Section 304

Commentary under the same heading in s 149, *ante*, Vol. 1, may be *referred* to.

Where two groups of accused persons came from different directions, and attacked the victims causing fatal injuries to one and grievous hurt to another, it amounted to formation of unlawful assembly on the spot with the common object of atleast causing injuries likely to cause death to one and grievous hurt to another victim; the fact as to which accused person caused injuries to the victim and with which weapon, pales into insignificance in view of their common object, the two accused persons had gone to the place of occurrence armed with pistol but they did not use the pistol, however, they did not even protest against the fatal attack on one of the victims by the other accused persons and throughout remained at the place of occurrence till the victim met his death, the non-user of pistol by the accused on the two victims proved that they had not formed an unlawful assembly on the spot with the object of causing death of the victim; thus, all accused persons were liable under s 304, Pt I read with s 149, and not under s 302 read with s 149, IPC .[5] Where there was a free fight between the parties, and the fatal injury was caused on the deceased by the accused in the course of a sudden quarrel and was not found sufficient in the ordinary course to cause death, conviction of the accused under s 302 read with s 149 was altered to s 304, Pt I, s 325 and s 148, IPC .[6]2524

9. Part I Distinguished from Part II

Section 304, IPC does not create an offence, but provides the punishment for culpable homicide not amounting to murder. In view of s 299, whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the intention of causing such bodily injury as is likely by such act to cause death, commits the offence of culpable homicide. In view of s 300, except in cases covered by the five exceptions mentioned therein, culpable homicide is murder. It is well-known that if death is caused and the case is covered by any one of the five exceptions of s 300 then such culpable homicide shall not amount to murder. Section 304 provides punishment for culpable homicide not amounting to murder and draws a distinction in the penalty to be inflicted in cases covered by one of the five exceptions, where an intention to kill is present and where there is only knowledge that death will be a likely result, but intention to cause death or such bodily injury which is likely to cause death is absent. To put it otherwise, if the act of the accused falls within any of the cll 1, 2 and 3 of s 300, but is covered by any of the five exceptions, it will be punishable under the first part of s 304 . If, however, the act comes under cl 4 of s 300, *i.e.*, the persons committing the act knows that it is so imminently dangerous that it must in all probability cause death but without any intention to cause death and is covered by any of the exceptions, it will be punishable under the second Part.[7]

We need to record here that there is a fine distinction between the class of cases that the framers of the IPC contemplated while prescribing the two parts of s 304, IPC . The first part of the section postulates a more serious class of offences where the court can infer that there is a clear intention to cause death, whereas, the second part of the section contemplates a slightly lesser class of offence where there is knowledge that the act is likely to cause death, but where the intention to cause death is not present.[8] The first part of the section applies where there is guilty intention and the second where there is no such intention, but there is knowledge.[9] In Pt I, the mental element or *mens rea* is intention, whereas, in Pt II, the *mens rea* is knowledge.[10] Where the accused intended to cause such bodily injury to the deceased which was likely to cause death, the offence made out against him is under s 304, Pt I and not under s 304, Pt II, IPC .[11] Where the injuries intentionally inflicted are not such as are sufficient in the ordinary course of nature to cause death, but are merely injuries which are likely to cause death, then the accused are guilty under s 304, Pt I, and not under Pt II.[12]However, the punishment is lighter in a case falling under Pt II, where there is no intention, either to cause death or even to cause such bodily injury as is likely to cause death, but only knowledge that death would fall under Pt I, and not under Pt II. Stated differently, Pt II comes into play when death is caused by doing an act with knowledge that it is likely to cause death, and when such act is the infliction of bodily injury, the infliction must not be intentional. A person who intentionally causes bodily injury with knowledge that such act is likely to cause2525 death, must necessarily be a person who does an act with intent to cause bodily injury likely to result in death.[13] Where it appeared that the occurrence took place suddenly, without any intention to cause death of the deceased, where only one blow from the corner of an axe was caused by the accused, the conviction of

the accused was altered from s 304, Pt I to s 304, Pt II, IPC .[14] Cases under the exception to s 300 fall under s 304, Pt I of the IPC .[15]

If the accused commits an act while exceeding the right of private defence by which the death is caused, either with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, then he would be guilty under Pt I of s 304, IPC . On the other hand, if, before the application of any of the exceptions of s 300, it is found that he was guilty of murder within the meaning of clause 'fourthly', then no question of such intention arises and only knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death, but without any intention to cause it or without any intention to cause such bodily injury as was likely to cause death.[16] In the latter case, the accused is liable to be convicted only under Pt II of s 304, and not under Pt I of s 304, IPC .

Whether the act committed would bring the offence within Pt I, or Pt II, of s 304, would ultimately depend upon the lower or the greater degree of likelihood of death being caused.[17] In other words, whether a case would fall under s 304, Pt I, or under s 304, Pt II, would depend upon whether the injury was caused with an intention or with knowledge that it was likely to cause death. If a person loses self-control and uses a stick, one cannot say that he intended to inflict the very injury which was caused by him. If that injury was not intended to be inflicted, but it landed at that particular place, and if the court comes, under the circumstances, to the conclusion that he had only knowledge that death was likely, it cannot be suggested that the view taken by the court is wrong.[18] Where the accused could only have known that death was likely to be caused, but he did not intend to cause death, it was held that the accused could only be convicted under the second clause of s 299, *i.e.,* for culpable homicide, punishable under Pt II of s 304, instead of s 302,[19] but where considerable force was applied in strangulating an old lady and death was caused by asphyxia, the offence was held to fall under s 302, and not under s 304 .[20] If an accused causes a blow on the head of the deceased, with a *lathi*, he should know that he is likely to cause death or he is likely to cause such injury which is likely to cause death. His case would fall under s 304, Pt II, and not under s 304, Pt I, IPC, if, taking into consideration, the past relations between the parties and the manner of occurrence, it cannot be said that the accused had the intention of causing the death of the deceased or of causing such bodily injury as was likely to cause his death.[21]2526

10. 'Death Caused by Act done with Intention of Causing such Bodily Injury as is Likely to Cause Death'

Such homicide is culpable homicide and falls under the second clause of s 299 . It would be murder under clause 'secondly' of s 300 if the offender does the act with the intention of causing such bodily injury which, he knows, is likely to cause the death of the person to whom the harm is caused. If the element of knowledge is wanting, the offence would not be murder, but only culpable homicide not amounting to murder or even a lesser offence.[22] If the bodily injury intentionally caused is so likely to cause death that it can be said to be sufficient, in the ordinary cause of nature, to cause the death of a normal human being, the homicide would be murder under clause 'thirdly' of s 300 . However, if the injury intentionally caused is only likely to cause death, but is not sufficient in the ordinary cause of nature to cause death, it does not amount to murder, but remains culpable homicide not amounting to murder which is punishable under the first part of s 304 .[23] Where the two accused were teenagers at the time of the incident, and one accused inflicted one blow with a sharp edged weapon, and the deceased died after six days of the injury, it was a penetrating wound according to the medical report, it appeared that there were some other injuries which admittedly were neither serious nor fatal; on these facts the Apex Court opined that the offence under s 302 cannot be attributed to the accused, the conviction of the two accused was altered from s 302 to s 304, Pt I read with s 34, IPC .[24] When the injury is not serious and there was no intention to cause death or grievous hurt, nor had the accused knowledge that it was likely to cause grievous hurt or death, the accused will be guilty of causing hurt, and not death, even though death is caused.[25] It is only grievous hurt if death is not caused, and wherever death is caused, it immediately becomes culpable homicide not amounting to murder.[26] A person, who voluntarily inflicts injury such as to endanger life, must always, except in the most extraordinary and exceptional circumstances, be taken to know that he is likely to cause death and if the victim is actually killed, the conviction, in such cases, ought ordinarily be of the offence of culpable homicide.[27] However, in a subsequent Full Bench case, the same court held that 'the

line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one'. In one case, the injuries must be such as are likely to cause death; in the other, the injuries must be such as endangers life.[28] Following this, it has been held that an act which is not likely to cause death, amounts to grievous hurt even though death is caused.[29]

11. Intention and Knowledge

The framers of the IPC designedly used the words 'intention' and 'knowledge', and it is accepted that knowledge of consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue. Firstly, when an2527 act is done by a person, it is presumed that he must have been aware that certain specified harmful consequences would or could follow. However, that knowledge is bare awareness and not the same thing as intention that such consequences should ensure. As compared to 'knowledge', 'intention' requires something more than mere foresight of the consequences, namely the purposeful doing of a thing to achieve a particular end.

Kenny in *Outlines of Criminal Law*[30] has observed:

> Intention: To intend is to have in mind a fixed purpose to reach a desired objective; the noun 'intention' in the present connection is used to denote the state of mind of a man who not only foresees but also desires the possible consequences of his conduct. Thus if one man throws another from a high tower or cuts off his head it would seem plain that he both foresees the victim's death and also desires it: the desire and the foresight will also be the same if a person knowingly leaves a helpless invalid or infant without nourishment or other necessary support until death supervenes. It will be noted that there cannot be intention unless there is also foresight, since a man must decide to his own satisfaction, and accordingly must foresee, that to which his express purpose is directed.

> Again, a man cannot intend to do a thing unless he desires to do it. It may well be a thing that he dislikes doing, but he dislikes still more the consequences of his not doing. That is to say he desires the lesser of two evils, and therefore has made up his mind to bring about that one.

Russell on Crime[31] has observed:

> In the present analysis of the mental element in crime the word 'intention' is used to denote the mental attitude of a man who has resolved to bring about a certain result if he can possibly do so. He shapers his line of conduct so as to achieve a particular end at which he aims.

It can thus be seen that 'knowledge' as contrasted with 'intention', signifies a state of mental realisation with the bare state of conscious awareness of certain facts in which the human mind remains supine or inactive. On the other hand, 'intention' is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one's conduct so as to bring about a certain event. Therefore, in the case of 'intention', mental faculties are projected in a set direction. Intention need not necessarily involve premeditation. Whether there is such an intention is a question of fact.[32]

12. Intention main criterion of Part I

Intention of causing death, or such bodily injury as is likely to cause death, is the main criterion of the first part of the section. In ascertaining the intention of the accused, the true rule is that where the injury caused is not the result of accident or negligence, a strong presumption arises that the injury caused was

intended to be caused, though this presumption may be rebutted by other circumstances, *e.g.*, the motive of the accused, the nature of attack, the time and place of attack, the position and condition of the deceased, the number of injuries and the force used *etc*.[33] When the intention of the accused persons might be to cause bodily injury to the deceased2528 but their intention was not to cause the death of the deceased, in such circumstances, the case of the accused person will not fall within the purview of s 300, IPC and under the definition of murder but the case will fall only within the purview of s 299, IPC culpable homicide not amounting to murder and for that accused persons can only be convicted under s 304, Pt II, IPC .[34] But when from the evidence it is evident that the deceased died due to the wound in his abdomen which was 4 inches deep, this shows the intention of the accused was to kill or to cause such bodily injury as is likely to cause death.[35] If it is found that there was no intention to cause death, the injury, resulting even in internal hemorrhage and causing death, would suffice conviction only under s 323, and not under Pt I of this section.[36] If a small stone is thrown at another man, it is very rare that his stomach would be ruptured so as to entail death. In such a case, an intention to cause death cannot be attributed to the assailant, and therefore, there can be conviction only under s 323, and not under the first part of this section.[37]

13. Intention and Knowledge are Distinct, but may also merge

In many cases, intention and knowledge merge into one another, and mean the same, more or less, and intention can be presumed from knowledge. The demarcating line between knowledge and intention is, no doubt, thin, but it is not difficult to perceive that they cannot mean to be very different.[38] The IPC in the current section, has used two different terms, 'intent' and 'knowledge', and has provided different punishments according to the act being done with the requisite 'intent' or the requisite 'knowledge'. The two terms, 'intent' and 'knowledge', cannot, therefore, be equated with each other. Sometimes, the consequence is so apparent that from the knowledge, 'intent' may be presumed. However, it will not mean that 'intent' and 'knowledge' are to mean the same. 'Knowledge' will be only one of the circumstances while determining or inferring the requisite intent.[39]

14. Distinction between Injury being likely to cause death and of its being Sufficient to cause death

The distinction between the knowledge that injury is likely to cause death and one that is sufficient in the ordinarily course of nature to cause death is, though subtle, real. It is, indeed, a question of probability which depends on the nature of the weapon used and the particular part of the body against which it is used.[40] To quote an example, if the weapon used happens to be a small club, the manner in which the blow is inflicted, *viz*, the degree of force used and more importantly the part of the body at which it is aimed would be of prime relevance, but the courts would still take cognizance of the fact that the use of this sort of weapon would signify the intention of really causing hurt rather than of killing.

The real difference is between the aspect of intention and knowledge. If on the other hand, the weapon used is a lethal weapon such as a dagger and the blow is2529 aimed at a vital part of the body, the only legitimate inference which the court will draw is that the accused definitely intended to kill.[41] A blow with the fist or a stick on a vital part may likely cause death; a wound with a sword on a vital part is sufficient in the ordinary course of nature to cause death.[42]

Where there was no escape from the conclusion that the injuries sustained by the deceased were sufficient in the ordinary cause of nature to cause death, but there was difficulty to say that the accused intended more injuries, the conviction of the accused under s 302 was altered to s 304, Pt II, IPC .[43]

15. Scope of Part II of Section 304 , IPC

Part II of this section covers those cases which fall within the third part of s 299, but do not fall within the fourth clause of s 300 .[44]If the act is so imminently dangerous that it must, in all probability, cause death, the offence would still be murder unless an exception to s 300 is applicable.[45]Section 304, Pt II comes into play when the death is caused by doing an act with knowledge that it is likely to cause death but there is

no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death.[46]If the act, by which the death is caused, was done with the knowledge that it was likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death, the offence is not murder, but culpable homicide not amounting to murder under Pt II of this section.[47] Similarly, where it is difficult to conclude whether an offence is culpable homicide or culpable homicide not amounting to murder, the accused can only be convicted under the second part of this section.[48] In an offence punishable under s 304, Pt II, 'knowledge' is an important element.[49] If, however, there is no evidence to show any knowledge of the likelihood of causing death on the part of the accused, the second part of this section will not apply; but if the injury is such as to endanger life, the accused would be guilty of the offence under s 325 .[50]

In one case, after the deceased become unconscious, in panic the accused hung him unmindful of whether he was alive or dead. It was held that in hanging the deceased, the accused must be attributed to have knowledge that their act was likely to cause death, and, therefore, though they were not liable for the offence of murder, they2530 were punishable under s 304, Pt II.[51] Where the accused's father had killed his child by throwing her in a well, the conviction of the accused under s 304, Pt II was upheld.[52] The accused appellant robbed the deceased of money and tractor and after committing robbery threw the deceased and one more person into canal. The evidence available on record did not suggest that there was any intention of causing the death of the deceased. The case fell under Pt II of s 304, IPC . The appellant committed the offence of culpable homicide not amounting to murder. The appellant was accordingly convicted under Pt II of s 304, IPC and sentenced to undergo rigorous imprisonment for 7 years.[53]. Where the blow struck by the appellant, was at random and in all probability, intended to be struck on *A*, but, as *D* flung herself on *A*, it accidentally struck *D* on the right side of her back on account of which she died, it was held that the appellant could not be fastened with the intention of causing such bodily injury as was likely to cause death of *D*, and, the offence of the appellant fell under s 304, Pt II.[54]

Where a quarrel arose all of a sudden, and only one injury was caused with a pair of scissors, which is not usually a weapon of offence for committing murder or for causing injuries, and the accused had not taken any undue advantage or acted in a cruel or unusual manner, and verbal altercation had taken place before the accused inflicted the injury on the person of the deceased, it was held that the case fell within exception 4 to s 300 and the accused was liable to be convicted under s 304, Pt II.[55] On quarrel between the appellant and the deceased over trivial issue, the accused appellant picked up the Dhangu and gave two Dhangu blows on the head of the deceased. Two wounds proved fatal. Appellant accused was convicted under s 304, Pt II and not under s 302, IPC .[56] The facts of the case showed that there was no premeditation, the fight resulted on drinking of water from the hand pipe after an exchange of abuses. There appeared no intention on the part of the appellants to cause the death of the deceased, nor were the injuries caused with the intention of causing such bodily injuries as the accused knew were likely to cause death. The case was covered by Exception 4 to s 300 IPC, the offence committed by the appellants, was culpable homicide not amounting to murder. The accused appellants were convicted of the offence under s 304, Pt II of the IPC and not under s 302 of the IPC .[57] The Accused A-2 had himself received severe injuries and he might have apprehended that the deceased would further assault him. As such he gave axe blows on the neck of the deceased. However, he used excessive force and caused injuries on vital parts of the body of the deceased. The Accused A-2 was given benefit of doubt of Exception 4 to s 300, his conviction under s 302, IPC was altered to one under s 304, Pt I, IPC .[58] Where the deceased was put on the ground and run over by a2531 bullock-cart, driven by the accused, but he took steps to bear the expenses of his (deceased's) treatment, it was held that the accused had no clear intention to cause the murder of the deceased, and therefore, he could be convicted under s 304, Pt II, and not under s 302 .[59]Where it appeared to the court that the death of the deceased was caused by an act of causing such injury as was likely to cause death and there was no intention of the accused to kill the deceased, it was held that the conviction of the accused was not warranted under s 302 read with s 149, and the accused were liable to be convicted under s 304, Pt II, IPC .[60] Appellant and co-accused were tenants of the landlord PW2. The appellants accused assaulted the landlord when the latter asked for payment of rent. Nephew (deceased) of the landlord intervened, the appellant S delivered a knife blow to the deceased. Held, Exception 4 to s 300 was fully attracted in the case, the conviction of the accused under s 302, IPC recorded by the trial court was converted into one under s 304, Pt II.[61] The appellant

accused wanted to keep, the widow of his brother, as his mistress, but she refused to be his mistress. On the day of the incident the accused was forcibly trying to drag the widow to his house. At that very time, he was told by his brother (the deceased) that he could not force and drag the widow to his house. The appellant got enraged by such unwarranted advice lifted a wooden plank (pat) and hit deceased with it on his head, and also kicked and punched him, deceased died on the spot. As the incident occurred in a sudden fit of anger, the Supreme Court held that the case fell under s 304, Pt II and not under s 302, IPC . The appellant accused had already undergone 11 years imprisonment, the sentence was reduced the period already undergone.[62]

The son of the deceased threw stone on a cat which while jumping landed on the terrace of the first accused (acquitted for want of evidence), where some grain was lying for drying. The boy was scolded and beaten by the appellant. The mother of the boy hearing altercation called his husband (deceased). There was scuffle between the accused and the deceased, the accused struck the head of the deceased with tekani (piece of wood) used for supporting the bullock carts. The deceased fell down, was shifted to the hospital, when he died nearly four hour after the incident. The available evidence showed that there was no premeditation on the part of the accused appellant and that it was a sudden fight. The wife of the deceased had called the deceased on the spot to settle the dispute once for all. The blow was given in scuffle between the accused and the deceased. There was only one hit. There was nothing to show that there was any cruelty involved by inflicting any other injury or by any other conduct on the part of the appellant so as to hold that the appellant was taking any undue advantage of the situation or that he behaved in a cruel or unusual manner. There was no evidence that the accused intended to cause the death of the deceased. The case was fully covered by Exception 4 to s 300, IPC, fell under s 304, Pt II, IPC . The life imprisonment awarded by the Sessions Judge confirmed by the High Court was substituted by imprisonment for ten years and a fine of Rs. 50,000/- payable to the wife of the deceased.[63]

Accused entered the house of the deceased to commit rape on the deceased. When resisted the accused poured kerosene oil and set her on fire. When she cried the2532 accused also poured water on her to save her life. As the act of the accused was not premeditated, the accused only wanted to frighten the deceased, conviction of the accused under s 302, IPC was altered to one under s 304, Pt II, IPC .[64]

The accused husband suspected illicit relation of his deceased second wife, he sat on her chest, assaulted with hands which resulted in death. Considering the manner of assault, the conviction of the accused appellant husband under s 304, Pt II was held proper. Sentence of ten years RI was imposed.[65]

The defence of the appellant was that he had gone to the deceased's house for repairing his TV. The deceased had just come home. He expressed a desire to have unnatural sex with the appellant. The appellant said no to it. Thereupon the deceased removed all his clothes. He became naked and with a view to having unnatural sex with the appellant and for the purpose of gratifying his unnatural lust he attacked the appellant. The appellant received bruises and contusions. The appellant apprehended that the deceased would force him to have unnatural sex with him. He felt that he may not be able to prevent it and he may fall prey to the deceased's desire for unnatural lust. Since he was certain that he would be a victim of unnatural lust, he picked up a weapon and to protect himself from unnatural sex and assault, he attacked the deceased with the weapon. The deceased fell down because of the assault. Held, the defence version was probable, accused caused death in exercise of right of private defence, but exceeded the right of private defence, he was held guilty under s 304, Pt II.[66]

Initially the accused-appellant also did not have any weapon with him, during the course of the incident he went inside and came back with a knife with the help of which he stabbed the deceased. Held, the case cannot be said to be a case under s 302, IPC but it is a case falling under s 304, Pt II, IPC . Accused was convicted under s 304, Pt II, IPC .[67]

Where there was no preparation, nor any premeditation after altercation in heat of passion, the accused inflicted knife blow in the abdomen of the deceased, which hit in latter's kidney and proved fatal, accused was convicted under s 304, Pt II instead of s 302, IPC .[68]

Evidence showed that it was a case of free fight preceded by sudden provocation. Accused A1 fired shots in the air and not on the deceased. Thereafter he picked up axe and gave blow with axe on the neck of deceased who being old man succumbed to injuries. Held, the accused A1 had no intention to cause the death of the deceased but he had knowledge that the axe assault was likely to cause the death of the accused. Accused A1 was convicted under s 304 IPC, Pt II.[69]

The accused after consuming alcohol had gone to the house of the deceased. There was exchange of hot words, the accused caught-hold of the deceased by neck and dashed against the mud wall. Asphyxia and cardiac arrest were the cause of death.2533 There was no preparation or pre-meditation on the part of the accused. The accused had no intention but he could be imputed with knowledge that his act was likely to cause the death of the deceased. The accused was convicted under s 304, Pt II and not under s 302, IPC .[70]

Mere fact that no single injury sustained by the deceased is sufficient in the ordinary course of nature to cause the death of the deceased is no ground to convict the accused under s 304, Pt II, or s 326, IPC .[71]

In a restaurant when the deceased and his friends were having food, the accused while passing by made an abusive comment on the complainant party at which the deceased laughed. The accused stabbed the deceased with a broken bottle causing death. Held the incident was out of sudden quarrel, the accused was convicted under s 304, Pt II, IPC . The incident had taken place 15 years before and the accused had a mentally challenged brother, sentence of three years was imposed.[72]

In a case of voluntary drunkenness, knowledge has to be presumed as in the state of not being drunk. Where death was caused by an accused when he was heavily intoxicated and clearly out of his mind, it was held that he would be guilty of the offence under Pt II of this section.[73]Prosecution evidence proved that the accused appellant in the state of drunkenness, by rash and negligent driving, caused the death of seven persons and injuries to eight persons sleeping on footpath. The appellant could be attributed with the knowledge that his act of driving the vehicle at a high speed in the rash or negligent manner was dangerous enough and he knew that one result would very likely be that people who were asleep on the pavement may be hit, should the vehicle go out of control. Essential ingredients of s 304, Pt II were satisfied in the case. Accused was convicted under s 304, Pt II, IPC .[74]The appellant accused in drunken condition was quarrelling with his wife when the son intervened. Accused picked up chopper and inflicted injury on the leg of his son. Due to excess blood loss son died. The accused could not be said to have caused injury which would be likely to cause the death but he could be imputed with knowledge that the injury caused with a weapon like chopper may cause such injury as is likely to cause death. The offence fell under s 304, Pt II and not under s 302, IPC .[75]However, if, on direct or circumstantial evidence, an offence under s 302, IPC, is established against the accused, then merely because of heavy intoxication and/or want of motive or enmity of the accused, the offence does not get reduced to an offence under s 304, Pt II, IPC .[76]

(a) Single Gun Shot Jnjury on Left Side of Chest

Appellant accused inflicted single gun shot injury on the left side of chest resulting in death. The act was done with the knowledge that by such act the accused was likely to cause the death of the deceased, the case fell under IIIRD Pt of s 299, as culpable homicide not amounting to murder. The conviction of the appellant accused under2534 s 302, IPC was converted into one under s 304, Pt II, a sentence of five years RI was imposed.[77]

(b) Single *lathi* Blow Injury which Proved Fatal

Accused appellant gave a single *lathi* blow on the head of the accused, deceased was hospitalized and died after six days. Other co-accused had not given any blow, as such were acquitted by the courts below. There was no intention or pre-meditation in the mind of the accused appellant to inflict such injuries to the deceased as were likely to cause his death in the ordinary course of nature. Accused appellant was convicted under s 304, Pt II and not under s 302, IPC .[78]

In a sudden quarrel without premeditation, the appellant accused inflicted one *lathi* blow on the deceased, prior to it he was not armed. Appellant accused was convicted under s 304, Pt II.[79] Where in a sudden quarrel on a minor issue in heat of passion, the appellant No. 1 had given a single *lathi* blow on the head of the deceased, he did not repeat the blow, he was convicted under s 304, Pt II.[80]

(c) Single Firearm Injury on Thigh

Appellant accused had caused single firearm injury on the thigh of the deceased. His conviction under s 302 was altered into one under s 304, Pt II, and a custodial sentence of 7 years was imposed.[81]

(d) Injuries Simple

The respondent accused was alleged to have caused injuries by knife on the person of the deceased. However, the medical evidence in the case disclosed that the injuries found on the person of the deceased were simple injuries and none of them was described as grievous. There was no evidence to prove that the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death. There was a bruise on the front of the neck of the deceased and the medical evidence disclosed that there was bleeding of the trachea as a result in clotting of the blood in the trachea leading to Asphyxia. This injury was not attributed to the respondent accused, and there was nothing to establish that the injury which ultimately resulted in the death of the deceased was intended by any one. Both the High Court and2535 Supreme Court held that offence under s 302, IPC was not made out and that the offence made out was one punishable under s 304, Pt II, IPC .[82]

(e) Air Gun Weapon of Offence

Appellant accused caused the death of the deceased by air gun. Air gun was recovered at the instance of the appellant. Appellant was convicted under s 304, Part II.[83]

(f) Accused Fired Indiscriminately

Over the cable connection, a sudden quarrel took place between the appellant accused and the son of the deceased. On account of heat of passion, the appellant went home; took out his father's revolver and started firing indiscriminately, and one of the bullets hit the deceased on her chin. The appellant had the knowledge that the use of revolver was likely to cause death and, as such, the present case would fall within the third clause of s 299, IPC . The offence committed by the appellant was only "culpable homicide not amounting to murder". The accused appellant was convicted under s 304, Pt II and not under s 302, IPC .[84]

(g) Grave and Sudden Provocation

The appellant's niece had eloped with teacher in the school. The appellant suspected the hand of the deceased. On the date of the incident the appellant was working in his field, the deceased came there. After verbal duel, which had lasted for pretty long time, the appellant had picked up a sickle which is an agricultural implement, lying on the ground and delivered a blow on the neck of the deceased. There was no pre-meditation or pre-plan of the accused to cause the death of the deceased. The accused did not repeat the blow, he acted under grave and sudden provocation. The accused was convicted under s 304, Pt II and not s 302, IPC .[85]

The deceased who used to collect waste papers from the roadside, collected the waste papers and cardboard boxes and threw them inside the shop of the accused. On seeing this the accused got angry and shouted at deceased "why do you do this everyday?" and pulled his hair. The deceased thereupon pushed the accused. Then the accused took a knife from the top of a table in the shop and stabbed deceased in the chest. Deceased fell down due to this injury and died. Held the accused was deprived of the power of self control by grave and sudden provocation which led him to commit the offence. If rubbish is thrown into one's house or shop one would naturally get very upset. It is evident that the accused had no motive or intention to cause the death of the deceased since the accused was not carrying the knife

from before, and only picked it up during the scuffle with the deceased. The incident in question occurred in a sudden fight and a heat of passion by a sudden quarrel without the accused having taken undue advantage or acted in a cruel or unusual manner.2536 Hence, the accused is entitled to the benefit of Exceptions 1 and 4 and the case comes under s 304, Pt II, IPC .[86]

(h) Accused Throwing Stone Causing Death

In the present case, appellant was not armed with any deadly weapon. The appellant and deceased were grappling and fighting and in that sequence when the deceased jumped down in another's field the appellant threw a stone which hit the deceased on his head. Held, s 304, Pt II was attracted in the case. Appellant accused was convicted under s 304, Pt II, IPC .[87]

(i) Death by Throwing Bricks

Accused appellant along with other accused persons had thrown bricks at the deceased causing his death. When the bricks were thrown on the vital parts of the body of the deceased who was an old man of 78 years, in that event, knowledge to commit murder can definitely be attributed to the appellant. The deceased died instantaneously after receiving the brick injuries. The conviction of the accused appellant under s 302, IPC was altered to one under s 304, Pt II, sentence of five years imprisonment was imposed.[88]

(j) Incident Occurred at Spur of Moment

As the incident occurred over cutting of the bazra crop on the spur of moment, appellant accused had no motive, he was convicted under s 304, Pt II IPC .[89]

(k) Single Blow with a Pen Knife Causing Death

The accused appellant inflicted single blow with pen knife which caused the death of the deceased. The blow as not repeated. Held, intention to cause death could not be imputed to the accused. However, the accused knew that his act was likely to cause the death of the deceased. The case was covered by Exception 4 to s 300 . Conviction of the accused under s 302, IPC was altered into one under s 304, Pt II, IPC .[90]

(l) Use of *gandasi* by Accused from Blunt Side

There was clear evidence of the doctor that the accused appellants inflicted injuries on the deceased from blunt side of the *gandasi*. The accused appellants did not intent to cause the death of the deceased, their conviction under s 302 IPC was altered to one under s 304, Pt II, IPC, and sentence of five years RI was imposed.[91]

(m) Use *kandali* from Reverse Side

The defence substantiated that accused R received injuries in this incident and accused M in order to save his son, gave *kandali* blow from the reverse side on the2537 head of deceased. Right of private defence of the accused stood established from the evidence of the prosecution. The Supreme Court affirmed the trial court's view and conviction of the accused under s 304, Pt II.[92]

(n) Death of the Accused in Police Custody

Accused police officers being annoyed with the stabbing of their constable, in police custody gave beating to the deceased causing death. Held, the accused appellant did not intend to cause death, but the act was done with the knowledge that it was likely to cause the death of the deceased. The case falls within the IIIRD Pt of s 299 and will be punishable under the IIND Pt of s 304, accordingly the accused appellant was convicted under s 304, Pt II.[93]

(o) Parents Confining their Child in Bathroom Causing Death

The appellant mother and her husband had confined their child (deceased), in a bathroom for 14 days, did not provide food and water and caused her death. The appellant and her husband had definite knowledge that their act of confining child, in a bathroom would result into her starvation which was likely to cause her death. Both the accused were convicted for offence under s 304, Pt II of the IPC . The accused husband had not preferred appeal and served out the sentence. Only appellant mother filed appeal. Sentence of the appellant mother was reduced to the period already undergone.[94]

16. Applicability of Section 34 to Part II of Section 304

Commentary under s 34, *ante*, Vol. 1, may be *referred* to.

Even in cases, covered by s 304, Pt II, IPC, it is legally permissible to apply s 34, IPC, if the facts establish common intention. It is wrong to say that the constructive liability under s 34 can, in no case, be fixed on a person when the actual injury, giving rise to an offence under s 304, Pt II, is caused by his co-accused.[95] However, the accused persons should have acted in concert, and not individually. Thus, where the co-accused caused simple injury with an axe, and the main accused caused stab-injury on a vital part of the body of the deceased, though the incident occurred in quick succession, but each accused was found to have acted individually and not in concert, the liability of each accused would thus be individual and not under s 34, the co-accused was convicted under s 324 and the main accused was convicted under s 304, Pt II, IPC .[96] Prosecution evidence was not very specific with regard to the role played by A1, A2 and A3. It was the prosecution version that A 4 had the knife in his pocket which he suddenly brought out and stabbed the deceased. Section 34IPC was not attracted in the case. The conviction of Accused 1, 2 and 3 with the aid of Section 34IPC was not proper, hence was set aside. Only Accused 4 was convicted under s 304, Pt II, IPC .[97]2538

When the facts clearly indicate that the accused were acting in furtherance of a common objective, that they had participated in the incident together and consequently, irrespective of the weapons which each one used or what direct effect of the individual blow might have been, the liability in law of all the accused persons would be common,[1] by virtue of s 34 . Thus, where the accused person armed with cart-peg, iron-rod and axe assaulted the deceased, (where the incident was not pre-planned, but the accused were provoked by the fact that the deceased after cutting the tree took its timber), the accused were found liable to be convicted under s 304 Pt II, s 34 instead of ss 302 / 34, IPC .[2] The accused persons acted in furtherance of their common intention to assault the deceased without any intention to cause death, they inflicted a single blow with an iron rod on head of the deceased, the deceased fell down and the other accused persons inflicted *lathi* blows over different parts of his body, the conviction of the accused persons under ss 302 / 34 was altered to one under s 304, Pt II/ s 34, IPC .[3]

Where the seven accused persons, who were armed with sticks or *dharia* (a stick with a sickle shaped metal fitted at the top), assaulted the deceased in the field of the deceased, the only injury which caused the death of the deceased was an incised wound inflicted on the left humerus which cut the artery and vein, it was observed that one particular injury on the humerus cannot be said to be a wound specifically intended by the assailant to cause that injury as the deceased was sometimes standing up and at other times running and being surrounded by the assailants, and so the offence did not fall under cl 'thirdly' of s 300 . The conviction was converted from s 302 read with s 149 to s 304, Pt II read with s 34 of only those accused persons who possessed dharia, and not of those who had only sticks with them. However, the conviction under s 447, IPC against all the accused persons was confirmed.[4]

In the factual matrix in which the incident took place, although the deceased did not die on the spot but only a solitary knife-blow was inflicted on him by the accused while the co-accused was catching hold of him, the offence under s 304, Pt II read with s 34 would be made out against the accused, and not an offence under ss 302 / 34, IPC .[5] In a gang-rape, committed in a violent manner, leading to the death of the prosecutrix, the accused persons are guilty of an offence punishable under s 304, Pt II read with s 34 besides under s 376 read with s 34, IPC .[6]

Where no regular weapon of assault was being carried by any of the accused, and each of the deceased had sustained only one fatal injury on the head, there was no clear evidence as to who was the author of which injury, the conviction of the accused persons was altered from ss 302 / 34 to s 304, Pt II/ s 34, IPC .7 The second part of s 304, no doubt, speaks of knowledge and does not refer to intention which is segregated in the first part, but knowledge is the knowledge of the likelihood of death. A question posed is whether it can be said that when three or four persons start beating a man with heavy *lathis*, each hitting his blow with the common intention of severely beating him, and each possessing the knowledge that death is the likely2539 result of the beating, the requirements of s 304, Pt II, are not satisfied in the case of each of them. If it can be said that knowledge of this type is possible in the case of each one of the accused, there is no reason why s 304, Pt II, cannot be read with s 34 . The common intention is with regard to the criminal act, i.e., the act of beating. If the result of the beating is the death of the victim and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act, *i.e.*, beating, there is no reason why s 34 or s 35 should not be read with the second part of s 304 to make each liable individually.[8]Similarly, it is possible to convict an accused person of an offence under s 304, Pt II, read with s 34, if the court is of the opinion that each person taking part in committing the crime in furtherance of the common intention of all, had knowledge that their act was likely to cause death.[9] However, the accused cannot be convicted under s 304, unless there is a finding that they intended to cause any injury to any person though they had the common intention to force their right of way by using force, if necessary.[10]

Where intensive damage had been done to the limbs of the victim, where the infliction of vital injury no 1, the doctor opined that leaving aside injury no 1, injuries no 9-13 were collectively sufficient to cause death in the ordinary cause of nature, it could safely be inferred that despite the assailant's choosing non-vital parts of the body for inflicting those injuries, they must be attributed the knowledge that by their concerted act they were likely to cause death of the deceased, for which act they could be punished under s 304, Pt II read with s 34, be punished under s 304, Pt II read with s 34, IPC .[11]

Where evidence against six accused persons was that they in prosecution of their common object of unlawful assembly committed murder of the deceased, the evidence of the eye-witnesses showed that deceased went towards the accused person and two of the accused armed with axes inflicted fatal injuries on the deceased, no overt acts were attributed to the remaining accused persons, the conviction of the two accused persons under s 302 read with s 149 was altered to one under s 304, Pt II read with s 34, IPC, while the acquittal of the remaining accused persons was confirmed.[12]

Where it could not be said that the accused had no intention to kill and the offence would fall only under s 304, Pt II, the rejection of the bail application of the accused was found proper.[13] Where the accused after satisfying his lust, mercilessly and intentionally killed the victim, a girl of 5 years, the accused was charged for the offences punishable under ss 366, 376 and 302, IPC and also under s 135(1) of the Bombay Police Act by the sessions court, the trial court convicted the accused under s 304, Pt II, IPC, and sentenced him to undergo rigorous imprisonment for 10 years and pay a fine of Rs 1000/-, in default, to undergo simple imprisonment for2540 6 months, the accused was also found guilty under s 376 read with s 511, IPC and sentenced to rigorous imprisonment for 5 years and pay fine of Rs 1000, and in default to undergo simple imprisonment for six months. Both sentences were directed to run concurrently, however, the accused was granted unmindful acquittal of charges under ss 366, 302 and 376, IPC and also under s 135(1) of Bombay Police Act . The accused preferred an appeal which was dismissed by the High Court. However, the High Court reprimanded the state in acquiescing and not taking any action against the acquittal of the accused for offences under ss 366, 302 and 376, IPC and observed that in the absence of any appeal by the state or revision by private party, the High Court itself could not take action in view of s 401(3) of CrPC .[14]

Where the accused gave several *lathi* blows on the head of the deceased without any provocation given by the deceased to the accused, the sessions court was held to have diluted the higher offence (s 302, IPC) that was logically flowing from the facts of the case, by convicting the accused under s 304, Pt II, IPC . However, since the state government in its wisdom did not prefer an appeal for enhancement of sentence and the conviction related to the year 1995 and by the time of judgment by the High Court (in

1999) the accused would have served most of his sentence imposed by the trial court so the High Court refrained from giving notice of enhancement of sentence at that stage. However, the appeal filed by the accused was dismissed.[15]

17. Accused Merely Passerby

The accused appellants A2 and A3 were merely passerby and near the spot picked up stone on the spur of the moment caused one simple injury each on the person of the deceased, held, their conviction under s 304, Pt II read with s 34, IPC was not proper, hence was set aside.[16]

14 Substituted by Act 26 of 1955, s 117 and Sch for 'transportation for life' (wef 1-1-1956).

15 *Empress of India v Idu Beg* ILR 3 All 776 (1); *Gajraj v Emperor* AIR 1942 Oudh 368, p 370, (1942) 43 Cr LJ 634 ; *Afrahim Sheikh v State of West Bengal* AIR 1964 SC 1263, (1964) 2 Cr LJ 350 .

16 *Afrahim Sheikh v State of West Bengal* AIR 1964 SC 126, (1964) 2 Cr LJ 350 ; *Gaddam Btahmama alias Chinna v State* (1996) Cr LJ 7 (AP) (DB) .

17 *Kunda Singh v Emperor* (1914) 15 Cr LJ 178 .

18 *Ibra Akanda v Emperor* AIR 1944 Cal 339, p 347, (1944) 45 Cr LJ 771 .

19 *Munir Khan v State of Uttar Pradesh* 1970 UJ 725 (SC) .

20 *Mevabhai Bhikhabai Gamar v State of Gujarat* 2014 (2) GLR 1081 (Guj), 2014 (140) AIC 553 (Guj) (DB).

21 *Rama Singh v State* 1970 Cut LT 429 ; *Jasiya v State of Rajasthan* 1972 WLM 633 ; *Arjuna Pradhan v State of Orissa* 1975 Cut LT 186 ; *Hira Rai v State of Bihar* AIR 1972 SC 244, p 246, (1972) Cr LJ 225 ; *Mindhai v State* 1981 ALJ 972, 1981 All Cr R 265 (accused held guilty under s 325, and not under s 304, IPC in this case).

22 *Gokul Parashram Patel v State of Maharashtra* AIR 1981 SC 1441, p 1442, 1981 Cr LR 491 (SC), p 492 ; *Harjinder Singh v Delhi Administration* AIR 1968 SC 867 ; *Laxman Kalu Nikalje v State of Maharashtra* AIR 1968 SC 1390 ; *Kulwant Rai v State of Punjab* AIR 1982 SC 126 ; *Randhir Singh v State of Punjab* (1981) 4 SCC 484, p 487 ; *Munna v State of Madhya Pradesh* (1981) Cr LR 287, p 288 (MP High Court Notes) (DB) .

23 *Sadananda v State* 1981 Cr LJ (NOC) 147 (Ori) ; 1981 Cr LJ 1474 (Raj) (DB) .

24 *Santosh and etc v State of Madhya Pradesh* 2000 Cr LJ 1140 (MP) .

25 *Rau Bhagwanta Nargude v State of Maharashtra* 1978 SCC (Cr) 600, (1971) 1 SCC 211 ; *Mohan Singh v State of Punjab* AIR 1977 SC 1800, p 1801, 1977 Cr LJ 1447 ; *Jagrup Singh v State of Haryana* AIR 1981 SC 1552, p 1554 ; *Chahat Khan v State of Haryana* AIR 1972 SC 952 .

26 *Kantibhai Dhansukhbhai Patel v State of Gujarat* 1980 Cr LR (SOC) 16 ; *State of Orissa v Bhuben Chirgun* 1981 Cr LJ 1461 (Ori) (DB) .

27 *Ramkaran v State* 2014 Cr LJ 3297 (Del) .

28 *Mohammadi Gul v Emperor* ILR 1932 Nag 121, p 123, (1932) 33 Cr LJ 849 (FB) .

29 Re *Govindamsu*1970 LW (Cr) 199.

30 Re *Kudumula Mahanandi Reddi*AIR 1960 AP 141, p 144, 1960 Cr LJ 303 ; Re *Jabamalai Royappan*1981 LW (Cr) 136, p 147 (DB); Re *Dadi Abdul Gaffoor*AIR 1955 AP 24, 1955 Cr LJ 329 ; *Pasupat Gape v Ram Bhajan Ojha* (1875-1876) 1 Cal WN 545; *Reg v Govinda,* ILR 1 Bom 342 ; *Hanuman Prasad v Crown* AIR 1949 Nag 254, 50 Cr LJ 597 ; *Behari v State* AIR 1950 All 203, 54 Cr LJ 565 ; *King v Aung Nyun* AIR 1940 Rang 259 (FB), (1941) 42 Cr LJ 124.

31 *Ghanshyam v State* 1978 All CR 415 ; *Hansa Singh v State of Punjab* AIR 1977 SC 1801, 1977 Cr LJ 1448 ; *Indreswar Kalita v State of Assam* 1981 Cr LJ 1887 (Gau) (DB) .

32 *Gulab Singh v State of Rajasthan* 1974 WLN 168, 1974 Raj LW 130 .

33 *Shantibhai J Vaghela v State of Gujarat* AIR 2013 SC 571, 2013 Cr LJ 390, p 398 (SC) .

34 *Shankar Narayan Bhadolkar v State of Maharashtra* 2004 Cr LJ 1778 (SC) .

35 *Ajith v State* 2003 Cr LJ 4387 (Mad) .

36 *Masti v Emperor* 1911 (12) Cr LJ 274, p 276 ; *Pukhan v State* 1980 Cr LR 313, p 316 (All) (DB), (1980) 17 All Cr Cas 318 (accused's case falling under exception 4 to s 300, IPC); *Bhanubhai Ramnath Dave v State* AIR 1956 Bom 267, 1956 Cr LJ 503 (2) ; *Ganjraj v Emperor* AIR 1942 Oudh 368, p 370 ; r**elying** on *Empress of India v Idu Beg* (1881) ILR 3 All 776 (1); Re *Ganesan*1974 Cr LJ 381, p 384; *Ram Dhan v State of Haryana* 1974 CLR 47 .

37 *Asu v State of Rajasthan* 2000 Cr LJ 207 (Raj) .

38 *Ibid*.

39 *Kapoor v State* 1980 Cr LR 352, p 357 (UP) ; *Swamiprasad v State* 980 Cr LR 361, p 366 (UP) .

40 *Hanif Banomiya Shikalkar v State of Maharashtra* 1981 Cr LJ 1622, p 1638 (Bom) (DB) .

41 *State of Orissa v Kabasi Suba* (1978) 45 CLT 533 .

42 *Mahomed Hasan v Emperor* AIR 1934 Sind 145, p 149, (1935) 36 Cr LJ 22 .

43 *Ram Swarup v State of Haryana* AIR 1977 SC 664, 1977 Cr LJ 252 ; *Thakarda Lalaji Gamaji v State of Gujarat* AIR 1974 SC 1351, 1974 Cr LJ 612 ; *Harej Ali v State of Assam* 1981 Cr LJ 1745, p 1750 (Gau) (DB) ; *Pukhan v State* 1980 Cr LR 313, p 316 (All) (DB), (1980) 17 All Cr Cas 318 .

44 *Prabhu Prasad Sah v State of Bihar* AIR 1977 SC 704, 1977 Cr LJ 346 ; *Ramchandra v State of Madhya Pradesh* ILR 1954 Nag 126, p 128, 55 Cr LJ 575 ; *Thommen Thomas v State of Kerala* AIR 1957 Ker 53, 1957 Cr LJ 635 ; *Wazir Muhammad v Emperor* AIR 1933 Lah 1048, (1934) 35 Cr LJ 639 ; *State of Rajasthan v Baltej Singh* 1968 Raj LW 133 ; *Bhaja Pradhan v State of Orissa* 1976 Cr LJ 1347, p 1350 .

45 *Naveen Chandra v State of Uttaranchal* 2007 Cr LJ 874, p 880 (SC), AIR 2007 SC 363 .

46 *Bipin Bihari Nag v State of Orissa* 2009 Cr LJ 3610, p 3613 (Ori) (DB) .

47 *Baljit Singh v State of Uttar Pradesh* AIR 1976 SC 2273, p 2282, 1976 Cr LJ 1745 ; *Kanhaiyalal v State of Madhya Pradesh* 2014 Cr LJ 2553 (MP) (DB) ; *Genda Singh v State of UP* 2008 Cr LJ 3618, p 3621, 2008 AIR SCW 4863 ; *Jalaram v State of Rajasthan* 2006 Cr LJ 528, AIR 2006 SC 618 .

48 *Kanhaiyalal v State of Madhya Pradesh* 2014 Cr LJ 2553, p 2555, 2556 (MP) (DB) .

49 *Genda Singh v State of UP* 2008 Cr LJ 3618, p 3621 (SC), 2008 AIR SCW 4863 .

50 *Mangesh v State of Maharashtra* 2011 Cr LJ 1166 (SC), AIR 2011 SC 637, 2011 AIR SCW 463, (2011) 2 SCC 123, 2011 (91) Scale 57 .

51 *Akil Ali v State of Assam* 1981 Cr LJ 516, p 521 (Gau) (DB) .

52 Re *Govindan*1975 Cr LJ 114, p 115; *Tiquire v State* 1973 All LJ 571 ; *Raj Kishore v State* AIR 1953 All 464, 1953 Cr LJ 1034 ; *Emperor v Jate Uraon* AIR 1940 Pat 541, (1940) 41 Cr LJ 472, AIR 1939 Lah 471, (1940) 41 Cr LJ 15 ; *Babulal v State* 1960 ILR All 223, p 226, 1960 Cr LJ 437 ; *Desraj v Emperor* (1928) 29 Cr LJ 454 (Lah) ; *Ajudhi v Emperor* (1915) 16 Cr LJ 625 ; *Mohammad Zaman v Emperor* AIR 1933 Lah 165, p 166, (1933) 34 Cr LJ 1161 (2) .

53 *Dudabhai Dalabhai Gohil v State of Guajrat* 2014 Cr LJ 125, p 130 (Guj) (DB) .

54 *Phulia Tudu v State of Bihar* 2007 Cr LJ 4690, p 4694 (SC), AIR 2007 SC 3215, 2007 (11) Scale 103, 2007 AIR SCW 5826 .

55 *Sunder Lal v State of Rajasthan* 2007 Cr LJ 3281, p 3287 (SC), 2007 (3) Supreme 984, 2007 (6) Scale 649 .

56 *Prakash v State of Madhya Pradesh* 2007 Cr LJ 798, p 802 (SC), (2007) 2 Crimes 74 (SC) .

57 *Shakti Dan v State of Rajasthan* 2007 Cr LJ 3426, p 3430 (SC) .

58 *Abbas Ali v State of Rajasthan* 2007 Cr LJ 1667, p 1671 (SC), AIR 2007 SC 1239 .

59 *Chandan Singh v State of Uttaranchal* 2011 Cr LJ (NOC) 471 (UTR) (DB).

60 *Sitaram Mahton v State of Bihar* 1970 SCD 507 .

61 *Raja Ram v Emperor* AIR 1935 Oudh 239, (1935) 36 Cr LJ 454 .

62 *Hari Khudu v Emperor* AIR 1939 Sind 57, p 60, (1939) 40 Cr LJ 375 ; *Jagat Singh v State of Haryana* AIR 1976 SC 2619, p 2621, 1976 Cr LJ 2002 .

63 *Somnath Das v State* AIR 1969 Ori 138, (1969) 35 Cut LT 165 .

64 *Iqbal Singh v State of Punjab* 2008 Cr LJ 4679, p 4682 (SC), 2008 AIR SCW 6368 .

65 *Sukumar Roy v State of West Bengal* 2006 Cr LJ 4776, p 4778, AIR 2006 SC 3406 .

66 *Ramesh v State* 1980 Chand LR 30, p 46 (Del) (DB) .

67 *Raman v State of Kerala* 2008 Cr LJ 4695, p 4697 (SC) .

68 *Mahendra Singh v State of Uttaranchal* 2011 Cr LJ 4825, p 4826 (SC), 2011 AIR SCW 4939 : (2011) 9 Scale 520 .

69 *Sarwan Singh v State of Punjab* AIR 1978 SC 1525, p 1528 .

70 *Kulesh Mondal v State of West Bengal* 2008 Cr LJ 325 (SC), AIR 2007 SC 3228, 2007 AIR SCW 5880 ; *Ramesh Krishna Madhusudan Nayar v State of Maharashtra* 2008 Cr LJ 1023 (SC), AIR 2008 SC 927, 2008 (1) Scale 118 ; *A Maharaj v State of Tamil Nadu* 2009 Cr LJ 315 (SC) .

71 *Kulesh Mondal v State of West Bengal* 2008 Cr LJ 325 (SC), AIR 2007 SC 3228, 2007 AIR SCW 5880 ; *Ramesh Krishna Madhusudan Nayar v State of Maharashtra* 2008 Cr LJ 1023 (SC), AIR 2008 SC 927, 2008 (1) Scale 118 ; *A Maharaj v State of Tamil Nadu* 2009 Cr LJ 315 (SC) .

72 *Ramesh Krishna Madhusudan Nayar v State of Maharashtra* 2008 Cr LJ 1023, p 1025 (SC), AIR 2008 SC 927, 2008 (1) Scale 118, 2008 AIR SCW 370 .

73 *Abdul Nawaz v State of West Bengal* 2012 Cr LJ 2901, p 2906 (SC), AIR 2012 SC 1951 .

74 *Azad Ali and Anor v State* 2002 Cr LJ 2085 (Cal) (DB) .

75 *Rampal Singh v State of UP* 2012 Cr LJ 3765 (SC), 2012 AIR SCW 4211, 2012 (6) Scale 574, 2012 (5) All LJ 248 .

76 *Veeran v State of MP* 2011 Cr LJ 2688 (SC), AIR 2011 SC 1655 .

77 *Babloo alias Babu v State* 2013 Cr LJ (NOC) 578 (Delhi) (DB).

78 *Nirmal Singh v State* 2011 Cr LJ 2258, p 2267 (Delhi) .

79 *Ramjit v State of UP* 2009 Cr LJ 1139, p 1141 (SC), 2009 AIR SCW 618, 2009 (1) Scale 446 .

80 *Makhmalsingh v State of Gujarat* 2014 Cr LJ 519, p 522 (Guj) (DB) .

81 *Mehtab Singh v State of Madhya Pradesh* 1974 Cr AR 374 .

82 *Kanhu Gouda v State of Orissa* 2008 Cr LJ 2716, p 2718 (Ori) (DB) .

83 *Shaikh Majid v State of Maharashtra* 2008 Cr LJ 1062, p 1065 (SC), AIR 2008 SC 1091, 2008 (1) Scale 561 .

84 *State of Gujarat v Mukeshbhai Panchabhai Patel Dobariya* 2014 Cr LJ 835 (Guj) (DB) .

85 *Gurdev Raj v State of Punjab* 2008 Cr LJ 382, p 386 (SC), 2007 (7) Supreme 417, 2011 (11) Scale 729 .

86 *Ravindra Shalik Naik v State of Maharashtra* 2009 Cr LJ 1549, p 1550 (SC), 2009 (2) Scale 354 .

87 *Golla Yelugu Govindu v State of AP* 2008 Cr LJ 2607, p 2610, AIR 2008 SC 1842 .

88 *Bhola v State of HP* 2009 Cr LJ 1885 (SC), AIR 2009 SC 1338, 2009 AIR SCW 1942 .

89 *Laxman v State of MP* 2006 Cr LJ 4626 (4630) : AIR 2006 SC 3240 .

90 *Lachman Singh v State of Haryana* 2006 Cr LJ 4041 (SC), AIR 2006 SC 2763 .

91 *Ongole Ravikanth v State of AP* 2009 Cr LJ 3944, p 3948 (SC), AIR 2009 SC 2129, 2009 (8) Scale 824 .

92 *Sukra Munda v State of Odisha* 2014 Cr LJ 275, p 277 (Ori) (DB) .

93 *Balkar Singh v State of Uttarakhand* 2009 Cr LJ 2980, p 2984 (SC), 2009 AIR SCW 3499 .

94 *Kallu Patil v State of Maharashtra* 2008 Cr LJ 4574, p 4575 (SC), 2008 AIR SCW 6225 .

95 *Ramchandra Dhondiba Kaware v State of Maharashtra* 2009 Cr LJ 1739, p 1740 (SC), AIR 2009 SC 1835, 2009 (2) Scale 20, 2009 AIR SCW 1445 .

96 *V Subramani v State of Tamil Nadu* 2005 Cr LJ 1727, p 1732, (2005) 10 SCC 358, AIR 2005 SC 1983, 2005 (2) Scale 546 (SC) ; *Budh Singh v State of UP* 2005 Cr LJ 2005 (2009) (All) (DB).

97 *State of Punjab v Jagtar Singh* 2011 Cr LJ 4368 (SC), AIR 2011 SC 3028, (2011) 8 Scale 108 .

98 *State of Punjab v Jagtar Singh* 2011 Cr LJ 4368 (SC), AIR 2011 SC 3028, (2011) 8 Scale 108 .

1 *Harjinder Singh v Kamail Singh* 1998 Cr LJ 2053 (SC), AIR 1998 SC 1648, 1998 (1) ALD (Cri) 602, JT 1998 (2) SC 448, 1998 (2) Scale 292 .

2 *Ayodhya Pathak v State of Bihar* (2002) I CCR 31 (SC) .

3 *Mathu Yadav v State of Bihar* (2002) II CCR 236 (SC) .

4 *Ram Asrey v State of Uttar Pradesh* (1993) II CCR 174 (SC) .

5 *Mizra v State of Uttar Pradesh* 1996 Cr LJ 472 (All) (DB) .

6 *Magal Singh v State of Madhya Pradesh* 1996 Cr LJ 1908 (MP) .

7 *Havendra Nath Mandal v State of Bihar* (1993) I CCR 117 (SC) ; *Narayan v State of Madhya Pradesh* (1992) I CCR 492 (MP) (DB) .

8 *Loki alias Lokesha v State of Karnataka* 2000 Cr LJ 149 (Kant) (DB) .

9 Re *Thimmuraya Chetty*1970 LW (Cr) 267; *Ifatulla v Emperor* AIR 1931 Cal 345, p 349, (1931) 32 Cr LJ 598 ; *Harendre Nam Mandal v State of Bihar (1)* (1993) CCR 117 (SC) .

10 *State of Kerala v Daniel Nadar* 1971 KLT 182 ; *Duraisamy Gundu v State* 1998 Cr LJ 1470 (Mad) (DB) .

11 *Prakash alias Om Prakash v State of Rajasthan* (1995) I CCR 411 (Raj) (DB) .

12 *Badri v State* AIR 1953 All 189, 1953 Cr LJ 450 .

13 *Dayal v Union of India* AIR 1963 HP 18, p 20, (1963) 1 Cr LJ 762 .

14 *Kamode v State of Madhya Pradesh* (1995) IV CCR 292 (MP) .

15 *Haji Khudu v Emperor* AIR 1939 Sind 57, p 60, (1939) 40 Cr LJ 375 ; *State of Himachal Pradesh v Wazir Chand* AIR 1978 SC 315, p 324, 1978 Cr LJ 347 .

16 *Mohinder Pal Jolly v State of Punjab* AIR 1979 SC 577, 1979 Cr LJ 584 .

17 *State of Orissa v Ratnakar Sahu* (1979) 47 CLT 439 .

18 *State of Gujarat v Vijai Arjanji* (1980) 17 Guj LT 308, p 309 ; *Gangada v State of Rajasthan* 1975 Cr LJ 1445, 1975 Raj LW 91 ; *Chand v State of Uttar Pradesh* AIR 1972 SC 955, p 957, 1972 Cr LJ 590 ; *Radhey v State* 1970 Cr LJ 1544, p 1547, 1969 All WR (HC) 670 .

19 Re *Chennapaiyan*(1969) 1 MLJ 511, pp 513, 514.

20 *Kailash v State of Uttar Pradesh* AIR 1979 SC 1711, p 1712 .

21 *Lachhiya v State* 1980 All LJ 887, p 889 .

22 *Anda v State of Rajasthan* AIR 1966 SC 148, p 150 ; *Behari v State* 1953 ILR All 203, 54 Cr LJ 565 .

23 *Badri v State* AIR 1953 All 189 ; *Behari v State* AIR 1953 All 203 .

24 *Gulshan and Ors v State of Punjab* AIR 1988 SC 2110, 1989 Cr LJ 120 .

25 *Ramakrishan Panicker v State of Kerala* AIR 1959 Ker 372, p 375 ; *State v Babar Ali* AIR 1952 Assam 110,p 112, 53 Cr LJ 997; Re *Marana Goundan*1941 ILR Mad 560, 42 Cr LJ 707; *Ram Pal v State* AIR 1952 Ajmer 29, 53 Cr LJ 1165, wherein the offence was held to be under s 325, IPC .

26 *Bai Jiba v Emperor* AIR 1917 Bom 259, p 260, (1917) 18 Cr LJ 1010 .

27 *Mana Gendal v Emperor* AIR 1930 Bom 483 .

28 *Government of Bombay v Abdul Wahab* AIR 1946 Bom 38, p 41 (FB), (1946) 47 Cr LJ 378 .

29 *Sarapada Jamatia v State* AIR 1953 Trip 9, p 10, 1954 Cr LJ 154 ; *State of Mysore v Nanja* AIR 1958 Mys 48, 1958 Cr LJ 529, in which the accused was convicted under s 324, IPC .

30 Kenny, *Outlines of Criminal Law*, seventeenth edn, p 31.

31 *Russell on Crime*, twelfth edn, p 41.

32 *Jai Prakash v State (Delhi Admn)* (1991) 2 SCC 32 .

33 *Behari v Stair* AIR 1953 All 203, p 206 ; 1953 Cr LJ 565 ; *Bansi v State* AIR 1956 All 668, p 689, 1956 Cr LJ 1272 ; *Inder Singh Bagga Singh v State of Pepsu* AIR 1955 SC 439, p 441, 1955 Cr LJ 1014 .

34 *Gendalal v State of Madhya Pradesh* 2006 Cr LJ 4320 (MP) (DB) .

35 *Sukumar Roy v State of West Bengal* 2006 Cr LJ 4776 (SC) .

36 *Ayyapazham v State* 1972 LW (Cr) 219 .

37 *Daveed Manas v State* 1972 Ker LT 640 ; *Digendra Nath Roy v State* 1970 Cr LJ 529 .

38 *Per* Chandrasekhara Aiyar J in *Basdev v State of Pepsu* AIR 1956 SC 488, p 490, 1956 Cr LJ 919 .

39 *State of Gujarat v Ramanlal Chimanlal Khatri* (1969) 10 Guj LR 611, p 616 ; Re *Kudunulu Mahanandi Reddi*AIR 1960 AP 141 .

40 *James Dowdall v Emperor* AIR 1936 Nag 103, p 111, (1936) 37 Cr LJ 607 .

41 *Loki alias Lokesha v State of Karnataka* 2000 Cr LJ (149) (Ker) (DB) .

42 *Reg v Govinda* (1875-77) ILR 1 Bom 342.

43 *Nansay v State of Madhya Pradesh* (2000) IV CCR 262 (SC) .

44 *State v Raja Parida* 1972 Cr LJ 193, p 199, 37 Cut LT 667 .

45 *Haider v Crown* AIR 1950 Lah 169, p 171, 51 Cr LJ 1368 .

46 *Satish Narayan Sawant v State of Goa* 2009 Cr LJ 4655 (4666) (SC), 2009 AIR SCW 6077, 2009 (12) Scale 494 .

47 *Chamru Budhwa v State of Madhya Pradesh* AIR 1954 SC 652, 55 Cr LJ 1676 ; *Jagrup Singh v State of Haryana* AIR 1981 SC 1552 ; *Gokul Parashram Patil v State of Maharashtra* AIR 1981 SC 1441 ; *Sayeed Khan v State of Madhya Pradesh* 1980 Cr LR 371, p 372 (MP) (DB) ; *Jaishankar v State of Madhya Pradesh* 1980 Cr LR 365 (MP)(DB); *Mishrilal v State of Madhya Pradesh* 1980 Cr LR 407 (MP) (DB) ; *Baboli Singh v State of Madhya Pradesh* 1980 Cr LR 388 (MP) (DB) ; *Kalloo v State of Madhya Pradesh* 1980 Cr LR 401, p 402 (MP) (DB) ; *State of Madhya Pradesh v Shaligram* 1971 MPLJ 150 ; *Shiv Singh v State* 1975 Cr LJ 704 (All) ; *State v Dharmidhar* 1975 OJD 558 ; *Bunnilal Chaudhary v State of Bihar* 2006 Cr LJ 3297, AIR 2006 SC 2531 .

48 *Lakshmi Pasi v State of Bihar* 1971 BLJR 336 ; *Ram Kumar v State of Rajasthan* AIR 1970 Raj 60, 1970 Cr LJ 486 ; *Nga Po Ein v Emperor* 1934 ILR Rang 110, 1934 (35) Cr LJ 1112 .

49 *Kadapagunta Swaminathe Reddy v State of Andhra Pradesh* 1996 Cr LJ 1387 (AP) .

50 *Sarapada Jamatia v State* AIR 1953 Tri 9 ; *Government of Bombay v Abdul Wahab* 1946 ILR Bom 38 (FB) .

51 *Southi v State of Madhya Pradesh* 1976 Cr LJ 594, p 597-98 ; *Nanku v State* 1973 Cr LJ 498, p 501, 1972 All CR 293 .

52 *Ganapathi alias Ganesan v The State* 1997 Cr LJ 3849 (Mad) .

53 *Subhash v State of Haryana* 2008 Cr LJ 693 (696) (SC), 2007 AIR SCW 7233, 2007 (10) Scale 105

54 *Shiv Singh v State* 1975 Cr LJ 704, p 707 (All) .

55 *Bahulal v State of Rajasthan* 1977 Cr LJ 59, p 68, 1976 Raj LW 345 ; *Pandurang Narayaa Jawalekar v State of Maharashtra* AIR 1978 SC 1082, 1978 Cr LJ 995 ; *Shankar v State of Madhya Pradesh* 1980 Cr AR 167, p 168 (SC) ; *State of Madhya Pradesh v Badri Prasad* 1980 Cr LR 104, p 102, (MP) (Notes) (DB).

56 *Ravi Kumar v State of Punjab* 2005 Cr LJ 1742, (2005) 9 SCC 315, 2005 (2) Supreme 402 .

57 *Dharam Pal v State of UP* 2008 Cr LJ 1016, p 1023 (SC), AIR 2008 SC 920, 2008 (1) Scale 9, 2008 (1) All LJ 721 .

58 *Dattu Shamrao Valake v State of Maharashtra* 2005 Cr LJ 2555 (SC), AIR 2005 SC 3331, 2006 SCC (Cri) 114 .

59 *Jaspal Singli v State of Punjab* (1980) 24 Mad LJ (Cr) 222, p 224-25 (SC), AIR 1979 SC 1708 .

60 *Bariha v State of Madhya Pradesh* 1980 Cr LR 203, p 205 (MP) (DB) .

61 *Sandhya Jadhav v State of Maharashtra* 2006 Cr LJ 2111 (SC), 2006 SCC (Cri) 394).

62 *Shankar Diwal Wadu v State of Maharashtra* 2007 Cr LJ 1802, p 1803 (SC), AIR 2007 SC 1410 .

63 *Chenda v State of Chhattisgarh* 2014 Cr LJ 172, p 173 (SC), 2013 AIR SCW 6260, (2013) 12 SCC 110).

64 *Sanjeev Girraj Kirar v State of Madhya Pradesh* 2014 Cr LJ 512 (MP) (DB) .

65 *Budhi Lal v State of Uttarakhand* 2009 Cr LJ 360, p 362, 363 (SC), 2008 AIR SCW 6968 .

66 *Samir Nijam Landge v State of Maharashtra* 2006 Cr LJ 3429, p 3433 (Bom) (DB), 2006 (2) Bom CR (Cri) 42 .

67 *Satish Narayan Sawant v State of Goa* 2009 Cr LJ 4655, p 4666 (SC), 2009 AIR SCW 6077, 2009 (12) Scale 494 .

68 *Mohammad Iqbal v State of Madhya Pradesh* 2012 Cr LJ 337, p 342 (Chh) (DB) .

69 *Dattu Shamrao Valake v State of Maharashtra* 2005 Cr LJ 2555, p 2560, AIR 2005 SC 3331, 2006 SCC (Cri) 114 .

70 *Umesh Suresh Vale v State of Maharashtra* 2014 Cr LJ (NOC) 50 (Bom) (DB).

71 *Atmaram v State of Madhya Pradesh* 2012 Cr LJ 2882, p 2888 (SC), AIR 2012 SC 1956 .

72 *Subramani v SHO Odiyansalai* 2011 Cr LJ 2897, 2011 AIR SCW 3765, 2011 (2) Scale 225 .

73 *Krushna Singh v State* (1971) 37 CLT 321*; Thankachan v State of Kerala* AIR 2005 SC 3819, 2005 Cr LJ 4130 ; *Alister Anthony Pareira v State of Maharashtra* 2012 Cr LJ 1160, AIR 2012 SC 3802 .

74 *Alister Anthony Pareira v State of Maharashtra* 2012 Cr LJ 1160, p 1176 (SC), AIR 2012 SC 3802 .

75 *Thankachan v State of Kerala* 2005 Cr LJ 4130, p 4131, AIR 2005 SC 3819 .

76 *State of Orissa v Lachhmi Mushli* (1978) 46 Cut LT 122, p 128 (DB) ; *State of Orissa v Mutuka Bank* (1978) 45 Cut LT 604, p 611 (DB) .

77 *Bunnilal Chaudhary v State of Bihar* 2006 Cr LJ 3297, p 3301, AIR 2006 SC 2531, 2006 (6) Scale 527 .

78 *Gurmukh Singh v State of Haryana* 2010 Cr LJ 450, p 454 (SC), JT 2009 (11) SC 117, 2009 (11) Scale 688, (2009) 15 SCC 635 ; *Abani K Debnath v State of Tripura* AIR 2006 SC 518, 2006 Cr LJ 314 (Accused gave single dao blow on spur of moment which proved fatal); *Pappu v State of MP* 2006 AIR SCW 3623, (2006) 7 SCC 391 ; *Jagrup Singh v State of Haryana* (1981) 3 SCC 616, AIR 1981 SC 1552 (Single blow from blunt side of Gandhala, accused convicted under s 304, Pt II, IPC); *Gurmail Singh v State of Punjab* (1982) 3 SCC 185, AIR 1982 SC 1466 (Single blow of spear on the chest of the deceased causing death); *Kulwant Rai v State of Punjab* AIR 1982 SC 126, (1981) 4 SCC 245 (On a short quarrel, accused gave single dagger blow which proved fatal); *Jagtar Singh v State of Punjab* (1983) 2 SCC 342, AIR 1983 SC 463 (Single fatal knife blow on chest of the deceased); *Hem Raj v State (Delhi Administration)* (1990) Supp SCC 291, AIR 1990 SC 2252 (Single fatal stab injury on chest of the accused.

79 *Pappu v State of Madhya Pradesh* 2006 Cr LJ 3640 (SC), AIR 2006 SC 2659, (2006) 7 SCC 391, 2006 (7) Scale 24 .

80 *Ramesh v State of Madya Pradesh* 2009 Cr LJ 3268, p 3271 (MP) (DB) .

81 *Rajinder v State of Haryana* 2006 Cr LJ 2926 (SC), AIR 2006 SC 2257, (2006) 5 SCC 425, 2006 (6) Scale 454 .

82 *State of Rajasthan v Jora Ram* 2005 Cr LJ 2578, p 2579, AIR 2005 SC 2440, 2005 (2) Crimes 157 .

83 *Sivakumar v State by Inspector of Police* 2006 Cr LJ 536, p 543 (SC), AIR 2006 SC 653, (2006) 1 SCC 714, 2005 (10) Scale 75 .

84 *Vineet Kumar Chauhan v State of UP* 2008 Cr LJ 1367, p 1371 (SC), AIR 2008 SC 780, 2008 AIR SCW 1, 2008 (1) All LJ 735, (2007) 14 Scale 386, 2007 (8) Supreme 502 .

85 *Chinnathaman v State Rep. by Inspector of Police* 2008 Cr LJ 1372, p 1375 (SC), AIR 2008 SC 784, 2008 AIR SCW 7, 2007 (14) Scale 357, 2007 (8) Supreme 417 .

86 *Muthu v State* 2008 Cr LJ 442 (SC), AIR 2008 SC 1, 2007 AIR SCW 6982 ; **See also***D Sailu v State of Andhra Pradesh* 2008 Cr LJ 686 (SC) ; *Gali Venkataiah v State of Andhra Pradesh* 2008 Cr LJ 690 (SC), 2007 AIR SCW 7282 .

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88 *Naimuddin v State of West Bengal* 2010 Cr LJ 392, p 395 (SC), 2009 AIR SCW 7062, 2009 (13) Scale 605 .

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91 *Gurdial Singh v State of Punjab* 2011 Cr LJ 1110 (SC), AIR 2011 SC 840, (2011) 2 SCC 768, 2011 (1) Scale 669 .

92 *Ranbaj Singh v State of Punjab* 2007 Cr LJ 295, p 298 (SC), AIR 2007 SC 129 .

93 *RP Tyagi v State (Govt of NCT of Delhi)* 2010 Cr LJ 609, p 611 (SC), 2010 AIR SCW 169 .

94 *Panchashila Dada Meshram v State of Maharashtra* 2010 Cr LJ 1919, p 1922 (SC), 2010 AIR SCW 1609, (2009) 14 Scale 50 .

95 *Afrahim Sheikh v State of West Bengal* AIR 1964 SC 1263, (1964) 2 Cr LJ 350 ; *Mohammad Masoom v State of Uttar Pradesh* 1971 SC Cr R 348 .

96 *State of Karnataka v Aarsab Ameensab Umachagi* 2000 Cr LJ 5036 (Kant) (DB) .

97 *Sripathi v State of Karnataka* 2009 Cr LJ 4646 (SC), 2009 AIR SCW 5927, 2009 (5) Scale 5 .

1 *Siddasetty v State of Karnataka* 2000 Cr LJ 703 (Kar) (DB) .

2 *Ibid*.

3 *Ram Kumar Pal v State of West Bengal* 1999 Cr LJ 3868 (Cal) (DB) .

4 *Chavda Jivanji Chelaji v State of Gujarat* 2001 Cr LJ 3299 (SC)*; Shri Haran Pator v State of Assam* 2013 (2) Crimes 298 (Gauh) (Single blow by broken bamboo stick caused death).

5 *Subrao Chintu Sathe v State of Maharashtra* (2000) I CCR 148 (Bom) (DB) .

6 *State of Orissa v Dibakar Naik* (2002) CCR 205 (SC) .

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8 *Afrahim Sheikh v State of West Bengal* AIR 1964 SC 1263, (1964) 2 Cr LJ 350 ; *Addepalli Gpaiah v State of Andhra Pradesh* 1978 Cr LJ 798 ; *Moutom Sihku v State of Bihar* (1999) IV CCR 48 (Pat) (DB) .

9 *State v Saidu Khan* 1951 ILR All 21 (FB), (1951) 52 Cr LJ 131 ; *Ibra Akanda v Emperor* AIR 1944 Cal 339, (1944) 45 Cr LJ 771 ; *Rai Singh v State* AIR 1965 HP 49, (1965) 2 Cr LJ 499 ; *Muklesur Rahman v King* AIR 1950 Assam 98, (1950) 51 Cr LJ 945 ; *Bashir v State* AIR 1953 All 668 ; *Rajindra Kumar v State* AIR 1960 Punj 310, 1960 Cr LJ 851 ; *Oswal Danji Tejsi v State* (1961) 1 Cr LJ 251 ; *Rex v Sadia* AIR 1950 All 418, (1950) 51 Cr LJ 1133 .

10 *Kanbi Nanji Virji v State of Gujarat* 1970 Cr LJ 363, AIR 1970 SC 219 .

11 *Darbare Singh v State of Haryana* (1992) II CCR 57 (SC) .

12 *State of Karnataka v AY Gainal alias Gangand* 2000 Cr LJ 2148 (Kant) (DB) .

13 *Anand Fondu Solyekar v The State* 1997 Cr LJ 1311 (Bom) .

14 *Koli Thakarda Babubhai Bhagahhai v State of Gujarat* 1999 Cr LJ 363 (Guj) (DB) .

15 *Nanku v State of Uttar Pradesh* 1999 Cr LJ 4693 (All) .

16 *Swaminanthan v State of Tamil Nadu* 2011 Cr LJ 1683, p 1684 (SC), 2011 AIR SCW 1301, 2011 (2) Scale 229 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 304.

Punishment for culpable homicide not amounting to murder.--

18. Applicability of Section 149 to Part II of Section 304

Where the common object of the unlawful assembly originally was to cause hurt, but, later, the object developed into killing the deceased, or, at least, into giving him a beating likely to cause death, conviction under Pt II of this section read with s 149 was upheld.[17] Once a case of a person falls within the ingredients of s 141, the question that a particular member of the assembly did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hands commit the offence, committed in prosecution of the common object of unlawful assembly, or as the members of the assembly knew likely to be committed in prosecution of their common object.[18] Therefore, when members of the unlawful assembly knew that death was the likely result of the injuries caused to the deceased, they are liable to be convicted under s 304, Pt II, read with s 149, IPC .[19]

The accused appellants committed the murder of the deceased, packed the dead body of the deceased into a gunny bag and had thrown in the river. There was2541 evidence that some accused persons actively participated in the assault, while others helped them. Conviction under s 304, Pt II, read with s 149, IPC was held proper.[20]

Where all the ingredients of s 149 were clearly indicated in the charge framed against the accused and no prejudice is shown to have been caused by not framing a specific charge under s 149, conviction of the accused persons under s 304, Pt II read with s 149, IPC is proper.[21]

Where accused persons formed an unlawful assembly and armed with lethal weapons entered the house of the complainant and assaulted its inmates and killed his mother with a deadly weapon causing grievous injury, the evidence of the doctor not stating that the said injury was sufficient in the ordinary course to cause death, the conviction of the accused was altered from s 304, Pt II to s 326 read with s 149, IPC .[22]

Where there was an assault by several accused persons resulting the death of the complainant's son, in the absence of evidence showing that the co-accused persons came to the scene of the incident with the common object of trespass and assault on the complainant and his son, the co-accused cannot be made vicariously liable for the overt acts of other accused persons, the conviction of such co-accused persons was therefore, set aside; however, the three accused persons who had knowledge but no intention that their act of giving *lathi* blows was likely to cause death were liable under s 304, Pt II read with s 149 instead of s 304, Pt II, IPC .[23] Where several accused persons armed with various weapons, attacked the deceased and the members of his family but only one appellant accused had inflicted the fatal injury, accused appellants were convicted under s 304, Pt II read with s 149, IPC .[24]

Where the accused persons assaulted the deceased with daggers but no specific overt acts could be attributed to each accused, *i.e.*, who stabbed and on which part of the body and it was difficult to say as to which injury was the immediate cause of death of the deceased, the evidence of the doctor showed that the cause of death was due to shock and hemorrhage due to multiple injuries, in these circumstances the accused were held liable to be convicted under s 304, Pt II read with s 149, IPC .[25] When it was proved that the accused formed an unlawful assembly and chased a person who was attacked by all the accused with sharp and blunt weapons, and several injuries were inflicted resulting in his death, though the accused had no intention to kill him but they certainly had knowledge that their act could lead to the death of the victim, the accused persons were held liable under ss 323, 324 read with s 149, IPC, for causing injuries to the other person.[26]

Where both the accused persons who as real brothers inflicted repeated injuries to the exclusion of any grievous or fatal injury on a vital part like the head, still inflicted injuries on the chest, back and scapular regions of the deceased with the knowledge that it was likely to cause death but without any intention, the

accused persons were found liable under s 304, Pt II read with s 34 and the findings of the trial judge2542 holding both the accused liable under s 302 *simpliciter* as well as under ss 302 / 149, IPC, was found not sustainable as the same did not stand to legal test and the same was held liable to be modified to that extent.[27]

Where the common object of unlawful assembly initially was to cause grievous hurt but while causing the injuries, the common object developed into causing such injuries to the brother of the informant as the accused knew was likely to cause death, the injuries being inflicted in the head region causing his death, the accused persons were held liable for the offence under s 304, Pt II read with s 149, IPC, as only *lathis* were used to assault the deceased.[28]

Where the accused formed an unlawful assembly and assaulted the deceased with their respective weapons, the conviction of the accused persons under s 304, Pt II, ss 148 and 323 read with s 149 was upheld.[29]Where the accused persons formed an unlawful assembly and assaulted the deceased with iron bars and sticks and committed the act with the knowledge in terms of cl 3 of s 299, they were held liable for the offence under s 304, Pt II read with s 149, IPC .[30]

Seven accused persons were alleged to have committed the murder of one KR. The appellant (Accused 6 and 7) were named in FIR. The eye witnesses also did not mention the names of the two appellants present on the spot at the time of the occurrence and did not attribute any role to them in the occurrence. It is settled law that mere presence or association with other members alone does not *per se* be sufficient to hold everyone of them criminally liable for the offence committed by the others unless there was sufficient evidence on record to show that one such person also intended to or knew the likelihood of commission of such an offending act. In this case there was no legally acceptable material to prove that the appellants acted as members of unlawful assembly to connect them with the murder of the deceased KR. In the absence of reliable evidence to prove that the appellants were either present on the spot or that they had committed any overt act that could show that they share the common object of the unlawful assembly it is not possible to support their conviction and benefit of doubt has to be given to them. The conviction of the two accused appellants under ss 304, Pt II, ss 147 and 148, IPC recorded by the High Court was set aside.[31]

19. Section 304, Part II and Section 84

Commentary under s 84, *ante*, Vol. 1, may be *referred* to.

In order to establish that the act done are not offences under s 84, IPC, it must be proved clearly that at the time of the commission of the act, the appellant by reason of unsoundness of mind was incapable to either knowing that the acts were either morally wrong or contrary to law. The question is whether the appellant was suffering from such incapacity at the time of commission of the acts. The state of mind before and after the crucial time is relevant. If a person by reason of unsoundness of mind is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, he cannot be guilty of any criminal intent. Such a person lacks the requisite *mens rea* and is entitled for acquittal. The general2543 burden is on the prosecution to prove beyond reasonable doubt not only the *actus reus*, but also the *mens rea*.[32]

Where there was no evidence as to how exactly the accused who was suffering from chronic and incurable illness fell into the well at midnight along with her child aged 1½ years, the child was also suffering from rickets prior to his death; it was observed that it may be possible to hold that the accused attempted to commit suicide by jumping along with her child. However, in absence of any evidence clearly indicating as to exactly how they fell into the well, it would be wrong to play on the operation and hold the accused guilty under s 309 or s 302, IPC and exclude the operation of s 84, IPC . Although the burden of proof of the defence under s 84 is on the accused, that burden is not so heavy on the accused as on the prosecution. The absence of medical evidence does not justify exclusion of common sense.[33]

An act committed by a person by reason of incapability of the person committing the offence of knowing the nature of the act on account of unsoundness of mind or that what he was doing was either wrong or contrary to law is not an offence as per s 84, IPC . The burden of proof of the defence under s 84, IPC is on the accused though it is not so heavy as burden to prove the case by prosecution.

Where accused mother attempted to end her life by jumping into well alongwith female child in her lap, the life of female child lost in the incident, mental condition of the accused at the time of the incident was not normal as she was suffering from illness of tuberculosis coupled with severe and continuous stomach pain, the accused was in full sense when she was brought out of the well and had narrated to the witnesses. The reasons justifying her act, the case was not found fit which can be covered for the purposes of plea of insanity available under s 84, IPC .[34]

20. Section 304, Part II is not confined to single Injury Cases

It is wrong to think that s 304, Pt II is confined to cases of single injury only. Cases of more than one injury may also fall within it. As an illustration is the decision of *Mathew v State of Kerala* [35] where more than one stab wound was caused and even then the offence was held to be one under s 304, Pt II, IPC .[36] There is no universal rule that whenever two blows are given on the head or successive blows are given on the head by a hard and blunt weapon by using the back side of an axe, the offence would not be murder, but would be punishable under s 304, Pt II, IPC .[37]

21. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and exclusively triable by the court of session.

22. Jurisdiction

Sections 177 to 189, ch XIII, CrPC, may be referred to.[38]2544

23. Supreme Court's Jurisdiction--Special Leave Petition under Article 136 of the Constitution

It will be necessary to keep in view the limited scope of the proceedings which arise out of grant of special leave to appeal against orders of conviction as rendered by the court below against the accused. The concurrent finding reached by both the court below and the evidence cannot be lightly brushed aside, and unless it is shown that the findings are against the weight of evidence or are vitiated by any legal errors, the Apex Court does not interfere with them as a matter of course, especially when they are based on appreciation of evidence of eyewitnesses found to be acceptable by both the courts below.[39]

Very wide powers have been conferred on the Apex Court for due and proper administration of justice apart from the jurisdiction and powers conferred under arts 32 and 136 of the Constitution . The Apex Court retains and must retain interest, power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injuries being done. This power must, by necessity, be sparingly used only in exceptional circumstances for furthering the ends of justice.[40] Thus, where the co-accused was sentenced and the sentence was confirmed by the Apex Court earlier and his special leave petition and review petition were dismissed by the Apex Court and even his petition for clemency had been rejected by the President, on a finding that another accused is entitled not to the death sentence, the same benefit should be extended to the earlier co-accused inspite of dismissal of appeal and petition for clemency.[41]

Similarly, where the special leave petition of one of the accused was dismissed and his conviction under s

302 confirmed, the co-accused was found entitled to alteration of his conviction from s 302 to s 304, Pt I, keeping in view the spirit of art 21 of the Constitution, the Apex Court granted the same benefit to the other accused where the special leave petition had already been dismissed.[42]

It is now well established that the Supreme Court does not, by special leave, convert itself into a court to review evidence for a third time. However, where the High Court is shown to have failed in appreciating the true effect and material change in the version given by the witnesses, in such a situation it would not be right for the Supreme Court to affirm such a decision when it occasions a failure of justice. The power under art 136 of the Constitution is, no doubt, extraordinary in amplitude and the Supreme Court goes into action only to avert miscarriage of justice if the existence of perversity is shown in the impugned judgment. Unless some serious infirmity of grave failure of justice is shown, the Supreme Court normally refrains from reappreciating the matter on appeal by special leave. The findings of the High Court have to be judged by the yardstick of reason to ascertain whether such findings were erroneous, perverse and resulted in miscarriage of justice. If the conclusions of the courts below can be supported by acceptable evidence, the Supreme Court will not exercise its overriding powers to interfere with such a decision.[43]2545

In *Pritam Singh v State* ,[44] it was held that special leave to appeal can be granted only if it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. In *Sadhu Singh Harnam Singh v State of Pepsu* ,[45] the Supreme Court observed that it is well established that this court does not, by special leave, convert itself into a court of review to review evidence for a third time. However, where the court below is shown to have failed in appreciating the true effect of material change in the version given by the witness, it would be right for this court to interfere to avert the failure of justice.

The Apex Court in *State of Jammu & Kashmir v Hazara Singh* ,[46] held:

> It is well settled that in appeal by special leave under art 136 of the Constitution, against an order of acquittal passed by the High Court, this court does not normally interfere with a finding of fact based on appreciation of evidence, unless the approach of the High Court is clearly erroneous, perverse or improper or there has been a grave miscarriage of justice.

Where the deceased-sister of the accused had an illicit relationship with a person, the accused was provoked and unable to resist himself, kicked and gave knife blows causing death of his sister, and after more than 6 years lapsed since the occurrence, the conviction of the accused under s 304, Pt I was maintained but the sentence of imprisonment was reduced from 7 years to 3 years as awarded by the trial court.[47]

As far as the question of sentence in the bride burning case, which has now become a common affair, is concerned, the Apex Court has also shown serious concern in such matters, since the trial court appears to have taken a lenient view by convicting the accused under s 304, Pt I instead of s 302, but the state has not preferred any appeal and as such it does not become desirable to reopen the question, however, there is no justification in reducing the sentence to the period already undergone on the ground that accused is a lady and has now become old.[48]

24. Charge

The following form of charge may be adopted:

'I (name and office of sessions judge etc,) hereby charge you (name of accused person) as follows :

That you, on or about the .....day of..... at..... committed culpable homicide not amounting to murder, causing the death of ..... and thereby committed an offence, punishable under s 304 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.'

There is no impediment in law for an offender being charged for the offence under s 304, Pt II, IPC and also under ss 337 and 338, IPC . The two charges under s 304, Pt II, IPC can legally co-exist in a case of single rash or negligent act2546 where a rash or negligent act is done with the knowledge of likelihood of its dangerous consequences.[49]

The accused charged with s 304 read with s 149 can be convicted under s 304 read with s 34, IPC .[50] The importance of framing charge need not be over-emphasised. It should not be treated as a mere ritual. The substance and not the form is important while considering the provisions relating to charge.[51] The charge should be so framed that the accused shall not be prejudiced in the trial.[52]Section 211 of the CrPC prescribes the contents of the charge. Sub-section (2), thereof, requires 'if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only'. The IPC has given the offence punishable under s 304, a specific name: 'culpable homicide not amounting to murder'. While framing charge against the accused, the offence should have been described by that name in terms of the aforesaid provision failing which prejudice to the accused could not be ruled out. The accused could not clearly be convicted on the charge so framed by the learned trial judge. Hence, the necessity for sending back the case on remand for re-trial.[53]

25. Alteration of charge from Section 304 to Section 304A

Where allegations against the accused were that he not being a gynaecologist, pressed and squeezed stomach of the complainant's wife thereby inducing delivery of child, child was born alive and was taken to clinic of child specialist where he died within about 20 minutes, it could not be said that petitioner-accused undertook to conduct delivery of complainant's wife with intention of causing death of child in her womb, though *primafacie* case under s 304A made out but it could not amount to culpable homicide not amounting to murder, order framing charge under s 304, Pt II was set aside and accused was directed to be charged under s 304A, IPC .[54]

26. Proof

For a conviction under this section, there must be proof that:

(1) there was a death of a human being; and
(2) it was caused, by the accused, by doing an act:

(a) with the intention of causing death when the case does not fall under any of the exceptions mentioned in s 300, or punishment...not amounting to murder;
(b) with the intention of causing such bodily injury as is likely to cause death; or

(c) with the knowledge that he is likely, by such act, to cause death.

Where the accused gave a beating to the deceased who succumbed to the injuries after five days, the motive for the occurrence totally lacking, there was conflict and inconsistency between the version of the witnesses, there was no basis for an opinion on the death of the deceased by the doctor, no X-ray films were produced, the2547 investigation was found not proper, it was held that the prosecution failed to prove the guilt of the accused beyond the realm of doubt, the conviction of the accused under s 304, Pt II read with s 34, IPC was set aside.[55]

The cause of death of the deceased was consumption of illicit liquor. The prosecution case was that the deceased had purchased illicit liquor from the shop of the accused and drinking of that illicit liquor was the cause of death of the deceased. The complainant deposed that he had seen the deceased drinking illicit liquor in the shop of the accused. However, he did not depose that the deceased had purchased illicit liquor from the shop of the accused. As such there was no evidence to connect the accused with the commission of the crime, the conviction of the accused under s 304, Pt II, IPC was set aside.[56]

The accused was alleged to have stabbed the deceased inside the car at night time. The solitary eye-witness deposed that he saw the incident which took place in the rear seat of car in the light of headlights of the car was found not reliable. Conviction of the accused appellant under s 304, Pt I, recorded by court below was set aside.[57]

In a case where there is direct evidence, even the seizure of weapon is not material.[58] It would not be proper in acquitting accused person solely on account of defect in investigation.[59] If evidence of a solitary eyewitness is cogent, truthful, unimpeachable, the conviction can be recorded under s 304, Pt II, IPC .[60]

27. Appreciation of Evidence--Typical Cases

Where the doctor who first examined the body, attributed the case of death to extensive burn injuries; on the second occasion after the body was exhumed, the doctor who conducted the post-mortem examination attributed the case of death to homicide-strangulation; this contradictory nature of medical opinion definitely casts a doubt on the prosecution case, the accused might have been the author of the crime, but as the saying goes, there is a lot of difference between moral conviction and legal conviction to sustain the punishment for any crime, the second medical opinion based on the post-mortem report done within two months of death cannot prevail over the post-mortem done immediately after the death of the deceased to convict the accused under s 304, Pt II, IPC .[61] Sometimes it is seen that the doctor who conducted the post-mortem examination on the dead body was not put in the witness box by the prosecution for one reason or the other.

No doubt it is the duty of the prosecution to prove post-mortem findings in murder cases, if they are available; absence of such proof with the prosecution evidence in a murder case is a drawback for the prosecution. However, the case cannot be visited with fatal consequences on account of such a lapse when the accused has admitted that the death of the deceased was a case of homicide.[62]2548

Where the record of the case has been lost or destroyed or the complete record has not been reconstructed, the material available an record is not sufficient to dispose off the appeal on merits and it was not possible to reconstruct the record, no order for re-trial should be passed, if the incident had taken place a long time ago, the conviction and sentence of the accused under s 304, Pt I is liable to be set aside in appeal.[63]

Where the deceased gave sickle blows to the accused causing eight injuries on the person of the accused, and the accused gave only a single *tangia* blow which resulted in the death of the victim, it could not be expected from the accused that he should have weighed in golden scales as to what was the maximum amount of force necessary in using his *tangia* for giving that single blow, he was fully within his right to use the *tangia* in exercise of private defence of his person. The conviction of the accused under s

304, Pt I was therefore set aside.[64]

Where in a fight between two parties the accused himself received injuries, of which two were on his vital parts, and the accused having fired one shot from his gun, cannot be said to have exceeded the right of private defence, however, the gunshot by the accused did not hit the assailants but an innocent person present on the scene, the right of private defence was not available to the accused *qua* even an innocent party who got fatally hurt on account of exercise of such right of private defence which ensured for the accused under clause secondly to s 100, IPC . Consequently, the conviction of the accused under s 304, Pt I, IPC and also under s 27 of Arms Act was set aside.[65]

The alleged eye-witness deposed that he saw the accused sister-in-law (A2) pouring poison in the mouth of the deceased. The witness did not prevent the accused from pouring poison, he should have rushed to the police station rather than waited in the house, his conduct was unnatural, as such was disbelieved, conviction of the accused (A2) under s 304, Pt I was set aside.[66]

The recital in the inquest report regarding the time of death of the deceased is only a reproduction of what witness would have told the investigation officer, it falls within the sweep of the interdict contained in s 162, CrPC, and hence, could not be used for any purpose (except to contradict its author). The mere fact that such recital found a place in the inquest report is not enough to save it from the prohibition provided in the section. Even otherwise the time 10:30 pm shown in the inquest report is only a mistake for 10:30 am and hence no implication would flow out of such an error.[67]

The inquest is held under s 174, CrPC, it is required to be held when the death occurs otherwise than under natural causes. The requirement of law is that the wounds, fractures, bruises and injuries found on the body and the weapon by which such injuries appear to have been inflicted should be mentioned in the inquest memo.2549 Therefore, on the ground that in the inquest memo, names of eyewitnesses are not mentioned, the evidence of three eyewitnesses cannot be seen with suspicion.[68]

As a legal proposition it cannot be agreed that the statement of an accused recorded under s 313, CrPC, does not deserve any value or utility if it contains inculpatory admissions. The need of law for examining the accused with reference to incriminating circumstances appearing against him in prosecution evidence is not for observance of a ritual in a trial, nor is it a mere formality. It has a salutary purpose. It enables the court to be apprised of what the indicted person has to say about the circumstances pitted against him by the prosecution. Answers to the questions may sometimes be a flat denial or outright repudiation of those circumstances. In certain cases, the accused would offer some explanations to incriminative circumstances. In very rare instances, the accused may even admit or own incriminating circumstances adduced against him, perhaps for the purpose of adopting legally recognised defence. In all such cases, the court has to effectively appreciate and evaluate the evidence in the case. If an accused admits any incriminating circumstance appearing in evidence against him, there is no warrant that those admissions should altogether be ignored merely on the ground that sub-s (4) of s 313 of the case contains necessary support to the legal position that answers given by the accused during such examination are intended to be considered by the court. The words 'may be taken into consideration in such enquiry or trial' in sub-s (4) would amount to a legislative guideline for the court to give due weight to such answers, though it does not mean that such answers could be made the sole basis of any finding.

Time and again, the Apex Court has pointed out that such answers of the accused can well be taken into consideration in deciding whether the prosecution evidence can be relied on, and whether the accused is liable to be convicted for the offence charged against him, vide *Sampath Singh v State of Rajasthan* ,[69]*Jethamal Pitaji v Assistant Collector of Customs, Bombay* ,[70]*Rattan Singh v State of Himachal Pradesh* .[71]

The Apex Court made it clear that answers of the accused, when they contain admission of circumstances against him are not by themselves delinked from the evidence, can be used for arriving at a finding that the accused had committed the offence.[72]

The statement of the accused under s 313, CrPC, is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for evidence of the prosecution if the exculpatory part of his statement found to be false and the evidence led by prosecution if reliable, the inculpatory part of the statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain conviction of the accused, the inculpatory part of his statement under s 313, CrPC, cannot be made the sole basis of his conviction.[73]

The law is that the burden of proving such an exception 1 to s 300, is on the accused. However, the mere fact that the accused adopted another alternative defence2550 during his examination under s 313, IPC, without referring to exception 1 to s 300, IPC, is not enough to deny him the benefit of the exception, if the court can cull out materials from evidence pointing to the existence of circumstances leading to that exception. It is not the law that failure to so set up such a defence would foreclose the right to rely on the exception once and for all. It is axiomatic that burden on the accused to prove any fact can be discharged either through defence evidence, or even through prosecution evidence by showing a preponderance of probability.[74]

Statement under s 164, CrPC, is not a substantive piece of evidence. It is not necessary to call the magistrate to give evidence to prove s 164 statements. The statements under s 164, CrPC are available to the defence for contradiction by obtaining the certified copies. The s 164 statements recorded by the magistrate is a public document.[75] Therefore, the practice of calling the magistrate to give evidence to prove s 164, CrPC statement should stop.[76]

In the absence of pendency of any proceeding before any court of law, though the magistrate cannot direct the accused to gave his specimen handwriting on the request of the police for comparison with his recovered handwriting from the place of occurrence by invoking s 73 of the Evidence Act during the course of investigation by the police, but such directions can be issued by the magistrate under s 164, CrPC .[77]

When a person hits another with a *danda* on a vital part of the body with such force that the person hit meets his death, the knowledge that his act was likely to cause death has to be imputed to the accused. In such situation the case will fall in Pt II of s 304, IPC .[78]

Where, from the injuries mentioned in the post-mortem report, it is not possible to say if anyone of them or all of them cumulatively would be sufficient to cause death of the deceased in ordinary course of nature,[79] or when the doctor who examined the internal organs noted that the left plural cavity was filled with clotted blood and that all organs were normal except that the spleen showed a deep cut injury on the upper surface, when blood was found in the plural cavity and surgical emphysema was also noted by the doctor, there is high possibility of lungs being injured and the death of the deceased cannot unequivocally be attributed to injury no 2--(deep perforated injury- 5 cm × 2cms with a loop of intestine {10´´} projecting outside from the injury, how lungs were perforated cannot be discerned from the default of the medical evidence given by the doctor who conducted post-mortem examination,[80] in such cases it cannot be said that accused inflicted the injuries with the intention to cause death and so the accused in liable to be convicted under s 304, Pt II instead of s 302, IPC .

Where the accused caused only one serious injury to the deceased with a *jambia* while all other injuries were not serious, the Apex Court held that in the circumstances, it is reasonable to infer that only one serious injury was caused by the2551 appellant to the deceased which is injury no 1 while all other injuries, as opined by the doctor, could have been caused during the scuffle. This appreciation of evidence by the trial court stands to reason. The High Court brushed aside the medical evidence to draw an inference that there was an intention on the part of the appellant to cause all the injuries. The evidence of the doctor means that injury, nos 4 to 10, which are mere abrasions or skin deep, could not have been caused by him, but these abrasions could have been caused by falling on the ground and coming in contact with a rough surface. The probability that while injury no 1 could have been inflicted by the

appellant, injury nos 2 and 3 could have been caused in the course of the scuffle, cannot be ruled out. In this view of the matter, we think that the view taken by the trial court is preferable to the view taken by the High Court as there is sufficient cogency in the reasoning adopted by the trial court. The High Court does not appear to have appreciated this aspect of the matter at all.[81]

Where both the complainant and the accused party exchanged blows and sustained injuries, the case can be justifiably brought within the ambit of exception IV to s 300 making the accused persons liable to be convicted under s 304, Pt II.[82]

In a gang-rape committed in a violent manner, the accused persons are presumed to have knowledge that by their action the deceased (prosecution) would have died, making them liable for not only the offence under s 304 Pt II read with s 34, but also under s 376 read with s 34, IPC .[83]

28. Accused charged under Section 304 cannot be convicted under Section 328

When the charge under s 304 framed against the accused was with definite allegation of culpable homicide not amounting to murder by reason of administration of drug without taking precaution for reaction therefrom, this is totally different from causing hurt by means of administration of unwholesome drug. On no count a definite charge of culpable homicide can be an error for causing hurt. Going by s 214, CrPC, in every charge words used in describing an offence shall be deemed to have been used in the sense attached to them by law under which such offence is punishable. Therefore, to construe the section relating to culpable homicide as only an error for causing hurt by unwholesome drug will lead to misleading so far as the accused is concerned resulting in failure of justice so far as his opportunity to defend is concerned. Therefore, an accused charged with s 304, IPC cannot be convicted under s 328, IPC .[84]

29. Release of Convict on Probation

Almost two centuries and a decade back thus spoke Edmund Burke:

> Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere and the less of it there2552 is within, the more there must be without. It is ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters.[85]

Similar note was expressed by E Barrett Prettyman, a retired chief judge of US Court of Appeals:

> In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product of restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematised restrain. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive globe of faceless annotations but as perfect realisation of each separate human mind, soul, and body; not in mute, motionless meditation but in flashing, thrashing activity.[86]

> Thus, liberty, a priceless treasure of the human soul, is not an absolute abstract concept. It is true that individual liberty is the most important aspect of human existence but it has to be guided and governed by law. Individuality and the power to exercise free will cannot give total freedom. Liberty is to be achieved by rule of law which includes procedural law. Procedures are to be followed as they are the hallmark of authenticity and exposit sacrosanctity. Sometimes, procedure is evolved to curb wanton moves of unscrupulous litigants, and curtail the unwarranted passion of an unethical and unprincipled mind and further to nip the unnecessary and uncalled for problems, in the bud.[87]

Section 6 of the Probation of Offenders Act, however, provides to give benefit of s 3 or s 4 of the said Act to a person who is below 21 years of age at the time of commission of an offence if such offence is not punishable with life imprisonment. These provisions, no doubt, are of mandatory nature, however, the court is not to give the benefit of probation if it is not warranted in view of the circumstances of the case, nature of the offence and the character of the accused.[88] Where the accused appellants fully armed forcibly entered the land of the deceased, caused instantaneous death by inflicting injuries with *barchhi* and *jei*, probation was refused.[89]

To be a student is no reason by itself for showing leniency to a culprit,[90] to release him an probation. Where on account of grave and sudden provocation the accused suddenly pierced the weapon, which *adivasis* generally have with them, in the chest of the victim causing fatal injury, the accused being 21 years of age at the time of occurrence and not a previous convict, and there was no evidence showing that his antecedents were bad or questionable, the accused convicted under s 304, Pt II, IPC was released on probation of good conduct with direction to pay Rs 5000 as compensation to the widow of the victim.[91]

Where appellant accused during free fight had assaulted the deceased with *lathi*, was convicted under s 304, Pt II, in view the fact that he had secured a doctorate2553 degree was Assistant Professor employed in University, his conduct and attainments after his involvement in the case justified his release on probation, he was released on probation by the Supreme Court.[92]

Where the accused stood charged under s 302 but the sessions court convicted him under s 304, Pt II and sentenced him to 4 years imprisonment, the appeal filed by the convict and also by the state were dismissed by the High Court, the accused was also less than 21 years on the date of occurrence and so was directed to be released on probation on executing a bond to the satisfaction of the concerned magistrate for a period of two years.[93] Where the co-accused persons have been granted benefit of probation, and no appeal has been filed challenging that part of the High Court's judgment, the other accused/appellant in appeal before the Supreme Court cannot take advantage of that if his definite role in the crime was established and he was the main brain behind the crime.[94]

30. Punishment

Section 304, IPC does not create an offence but provides the punishment for culpable homicide not amounting to murder. In view of s 299, IPC whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he so likely by such act to cause death, commits the offence of culpable homicide. In view of s 300, IPC, except in cases covered by the five exceptions mentioned therein, culpable homicide is murder. It is well known that if death is caused and the case is covered by any one of the five exceptions of s 300 then such culpable homicide shall not amount to murder. Section 304 provides punishment for culpable homicide not amounting to murder, and draws a distinction in the penalty to be inflicted in cases covered but one of the five exceptions, where an intention to kill is present and where there is only knowledge that death will be a likely result, but intention to cause death or such bodily injury which is likely to cause death is absent. To put it otherwise, it is that act of the accused which falls within any of the cll 1, 2 and 3 of s 300, but is covered by any of the five exceptions, it will be punishable under the first Pt of s 304, if, however, the act comes under cl 4 of s 300, *i.e.*, the person committing the act knows that it is so

imminently dangerous that it must in all probability cause death but without any intention to cause death and is covered by any of the exceptions, it will be punishable under the second part. The first part of s 304 applies where there is guilty intention, whereas the second part applies where there is guilty knowledge.[95]

The first part of this section authorises a sentence of imprisonment for life or imprisonment of either description for a term which may extend to ten years, and also fine. The second part of it authorises a sentence of imprisonment of either description for a term which may extend to ten years, or to fine or both. It is now well settled that imposition of sentence is the reaction of discretion of the court and2554 unless this sentence is found to be grossly inadequate, the appellate court would not be justified in interfering with the discretionary roles of sentence.[1]

However, where the accused persons alongwith a number of other persons armed with hockey sticks, iron chains *etc* attacked the aged, defenceless including women and children indiscriminately turning the happy marriage occasion into one of mourning, the High Court was held justified in enhancing the sentence and the fact that the accused persons were settled in life during pendency of appeal did not constitute as mitigating circumstances.[2]

31. Justified Punishment

Long pendency of matter cannot by itself justify lesser sentence, just and appropriate sentence is to be imposed after giving due consideration to facts and circumstances of each case.[3] The sentence of 7 year's rigorous imprisonment under Pt I of this section to the accused for causing the death of his own father, while deprived of the power of self-control, was held justified in *State of Assam v Nanda Kumar Singh* .[4] Where the accused was sentenced to 7 years rigorous imprisonment under s 304, Pt I, IPC by the sessions judge in appeal pursuant to notice of enhancement, the High Court thought it fit to enhance the sentence to life imprisonment, however, to that extent the decision of the High Court seemed consistent when the High Court held that the accused had not committed the offence of murder, and therefore, as a logical corollary he was not liable to be sentenced to life imprisonment, it is difficult to appreciate now the same sentence of life imprisonment could be imposed on him by enhancing his sentence under s 304, Pt I, on facts of the case it may not be said that the sentence of imprisonment imposed by the trial court is grossly inadequate which order was restored by the Apex Court.[5] In *Om Prakash v State of Haryana* ,[6] the blow being on a vital part of the body and a life having been lost, a sentence of seven years rigorous imprisonment was awarded. *State of Mysore v Upparagatti Hanmanthappa* [7] was a case in which, owing to the absence of requisite intention, the accused was sentenced to two years rigorous imprisonment under the second part of this section and this sentence, on an appeal by the state, was held to be not grossly inadequate.

32. Reduction in Sentence

Following reasons have been found appropriate for reduction of sentence, where:

(a) the accused persons were in custody for some years;[8]
(b) the accused in his twenties lost his life companion by his own act of violence done in the weaker moments of irritation and anger, which could haunt him throughout his life;[9]2555
(c) the accused was a young lady of about 17 years at the time of commission of offence with no criminal history and had not indulged in criminal activities during appeal;[10]
(d) the accused an old person, without any provocation and motive, stabbed his own son on a small matter;[11]
(e) no reason was given by trial court for imposing higher sentence on some accused persons as against other accused persons;[12]
(f) offence was committed in the heat of passion and on the spur of the moment;[13]
(g) accused killed the person seeing him lying in bed with his wife[14] or when both his wife and

the person were found in a compromising position;[15]

(h) accused deprived of self control by grave and sudden provocation caused death of person who gave the provocation;[16]

(i) long time elapsed from date of commission of offence and the date of decision of court;[17]

(j) accused being a young boy of 15 years had already suffered imprisonment for two years;[18]

(k) accused a young man of 21 years of age and offence was committed by him 12 years ago;[19]

(l) there were absence of criminal antecedents of accused and the peculiar facts and circumstances in which the crime occurred;[20]

(m) the accused exceeded the right of private defence;[21]

(n) the accused persons young in age gave only single blow to deceased without repeating the same;[22]

(o) the accused was the only earning member of a big family and had already undergone the sentence of imprisonment of four years;[23]2556

(p) the accused was old person and incident took place years ago;[24]

(pp) Case was pending for the last 26 years, ten years' RI was reduced to five years' RI.[25]

(ppp) the wife convicted had minor children, hence the sentence was reduced to the period already undergone.[26]

(q) the accused killed his sister by *danda* blow on account of the fact that she was moving with other persons while her husband was abroad;[27]

(r) the accused was directed to pay compensation;[28]

(s) the accused was young and immature;[29]

(t) several years have elapsed since accused persons (who were later convicted by Supreme Court) were acquitted by High Court;[30]

(u) the accused had three minor children and aged parents to look after and the occurrence took place years before.[31]

(v) Keeping in view of the age of the father-in-law and mother-in-law, convicted under s 304B, IPC, sentence of ten years RI awarded by the courts below was reduced to 7 years RI.[32]

(w) Appellants accused were convicted under s 304, Pt II with the aid of s 149, IPC, they had not committed the substantive offence punishable under s 304, Pt II. Sentence of seven years imposed on the appellants by the court below was reduced to five years RI.[33]

(x) As the death ensued after twenty six days of the incident as a result of septicemia and not as a consequence of burn injuries, the sentence was reduced to the period already undergone.[34]

33. Sentence Undergone

Where the accused had acted in exercise of right of private defence, sentence of nine years already undergone was held sufficient.[35]

The conviction of the accused appellant G under s 304, Pt I, IPC, was upheld, but in view of the contentions raised by the Counsel that the injuries sustained by the2557 accused persons have not been explained by the prosecution and the accused acted in exercise of right of private defence, in the ends of justice sentence of ten years RI imposed on the accused appellant was reduced to the sentence to the period already undergone which was more than six years.[36]

34. Enhancement of Sentence

In case of patricide there is no scope for showing any leniency on the point of sentence.[37] When in a sudden quarrel the accused gave single blow of *phrasa* causing the death of the victim, the sentence under Pt I of s 304, IPC of 2 years and fine of Rs 500 as given by the trial court was found grossly inadequate and unreasonable, the sentence of imprisonment was enhanced to rigorous imprisonment of 6 years and a fine of Rs 1000/- and in default in paying the fine, the accused was to undergo rigorous imprisonment for five months.[38]

Where the trial court sentenced the accused under s 304, Pt I on exceeding right of private defence to undergo rigorous imprisonment for 4 years, on appeal by the state, the Madhya Pradesh High Court observed that the case falls under s 304 when it is not covered by s 302 because right of private defence has been exceeded. Similarly, special leniency cannot be shown because right of private defence has been exceeded. The trial court was wrong in being lenient to the accused persons. No other reasoning has been given to award such a low sentence, therefore, the sentence of the accused persons was enhanced to rigorous imprisonment for 10 years each and a fine of Rs 5000/- each, and in default of payment of fine, further rigorous imprisonment for one year each.[39] Where four injuries were found on the person of the deceased which resulted in injuries as well as fractures damaging vital parts of the body, the sentence of fine of Rs 3000 was found inadequate and so was enhanced to rigorous imprisonment of two years in addition to the fine.[40]

35. Compensation to Victim/Persons Entitled to Recover Damages

Commentary under s 357, CrPC, may be referred to.[41]

The accused under grave and sudden provocation inflicted knife blow on the deceased causing death. The accused had no intention to cause the death of the deceased. The accused was convicted under s 304, Pt I, IPC . In the interest of justice, the accused was directed to pay compensation to the heirs of the deceased.[42]

36. Alteration of Conviction under Section 304 to one under Section 302 or *Vice Versa*--Legal Position

If, against an order of acquittal passed under s 302, IPC, an appeal is preferred by the state and no appeal is filed by the convicted person against his conviction under s 304, IPC, it is only the order of acquittal which falls to be considered by the appellate court, and not the order of conviction. Similarly, if an order of conviction is challenged by the convicted person, but the order of acquittal is not challenged by the2558 state, then it is only the order of conviction that falls to be considered by the appellate court, and not the order of acquittal. Therefore, the assumption that the whole case is before the High Court when it entertains an appeal against a conviction, is not well founded.[43] Where, therefore, on a trial for murder, the accused is convicted only of culpable homicide not amounting to murder under s 304 and he appealed against his conviction, but no appeal is filed by the state against his acquittal of murder, and the complainant applied in revision for enhancement of sentence, it is not open to the High Court under ss 385(2), 386 and 401 of the CrPC, to set aside the conviction and sentence under s 304, IPC and convict and sentence the accused for murder under s 302, IPC .[44] On the other hand, if the state has appealed against the acquittal on the charge of murder, but the accused has filed no appeal against his conviction under s 304, he is not entitled to challenge his conviction under s 304 in the appeal by the state against the acquittal on the charge of murder.[45] However, when the state had not filed an appeal against acquittal of accused persons under ss 302 / 149, IPC, the informant who is the son of the deceased is entitled to maintain the appeal by special leave before the Supreme Court so as to bring to the notice of the Apex Court that grave miscarriage of justice had occurred by the judgment of the High Court in altering the conviction of accused persons from one under ss 302 / 149 to s 304, Pt II read with s 149, IPC .[46]

37. Alteration of Conviction from Section 304 to Section 302, but not *Vice Versa*--Cases

The question whether a case comes under s 302 or falls under s 304, Pt I or Pt II has to be decided on consideration of various reasons, *viz*, intention of the assailant, weapon of offence used, nature of injuries caused, location of injuries on the deceased and other relevant considerations. The single blow inflicted by the assailant, by itself, is not decisive. Each case has to be judged on the facts and circumstances.[47]

In a case where the trial court convicted the accused of an offence under s 304, Pt I, the High Court must

be slow in finding him guilty for a graver offence of murder, unless the facts and circumstances clinchingly establish that the case falls under any of the clauses of s 300 .[48]

Where the accused assaulted the deceased with a knife on a vital part of the body, killing him, the conviction of the accused under s 302 cannot be altered to one under s 304, Pt II on the ground that the deceased had no concern with the quarrel between the accused and the complainant.[49]

Where eight accused persons armed with fire-arms entered the house of the complainant, fired indiscriminately caused death of one person and injuries to two persons, the prayer of the accused for alteration of conviction from s 302, IPC2559 to s 304, Pt I or Pt II was refused.[50] Held, no ground to convert conviction under s 302, IPC into conviction under s 304, Pt I.

Where the deceased was taken to the house of the accused and was asked to withdraw the partition suit, and on his refusal, the accused poured kerosene and set him on fire causing his death due to burn injuries. Exception IV of s 300 was not attracted, and so the conviction of the accused could not be altered from s 302 to s 304, Pt I.[51]

There was no evidence that there was sudden fight or that the accused attacked the deceased in heat of passion. The case was held not covered by Exception 4 to s 300, IPC . The conviction of the accused under s 304, Pt I, IPC was altered to one under s 302, IPC .[52]

The accused persons had gone together armed with *lathis* with a common intention to kill the deceased and they brought their intention into effect by simultaneously assaulting the deceased. They had no provocation. The intention to kill was apparent. Held, the case would not squarely fall under Pt II of s 304, IPC . Accused was convicted under s 302, IPC . The Supreme Court refused to alter the sentence into one under s 304, Pt II.[53]

Where the accused persons emerged from the house and beaten the deceased with deadly weapons on the head and other vital parts of the body and death was caused as a result of injuries, which also developed later which cannot be taken into account, the injuries caused to the deceased were sufficient to cause death in ordinary course, the conviction of the accused under s 304, Pt II was altered to ss 302 / 34, IPC .[54]

Where the accused, a lady alongwith co-accused son and son's associate attacked the deceased by throwing acid and thereafter assisted co-accused in stabbing the deceased, circumstances proved that all accused shared common intention for committing murder of the deceased, accused were found responsible for causing such bodily injuries to the deceased which were sufficient in the ordinary course of nature to cause death, thereafter, the offence of murder was made out against them and conviction under s 304, Pt II was not found proper and so was altered to one under s 302 read with s 34, IPC .[55]

Pre-meditation can develop on the spot as well, it all depends upon the facts and circumstances of the case. Where the deceased was caught hold by the two accused, and another accused gave five/six dagger blows, the conviction of the accused persons cannot be altered from ss 300 / 302 / 34 to one under Pt I or Pt II of s 304, IPC .[56]2560

Where on account of dispute regarding sharing of agricultural produce the accused threw crude bomb at his brother from close range which hit his head and exploded resulting into death of his brother on the spot and also caused injures to accused and his paternal uncle, case was not found fit for conversion of conviction of accused from s 302 to s 304 Pt I, IPC .[57]

38. Alteration of conviction from Section 302 to either under Section 304, Part I or Part II

Where the accused is convicted under s 302, IPC, by the sessions court but the facts and circumstances of the case attract any of the exceptions to s 300, the conviction of the accused is liable to be altered from s 302 to s 304 by the appellate court. If the death of the victim is caused by the accused with the intention of causing death or causing such bodily injury as is likely to cause death but the first three clauses of s 300 are not attracted, then conviction of the accused from s 302 is liable to be altered to s 304, Pt I. However, when the death of the victim is caused by the accused with the knowledge that it is likely to cause death but without any intention to cause death and clause fourthly of s 300 does not apply, then Pt II of s 304 is attracted and conviction of the accused by the trial court in such a case is liable to be modified to s 304, Pt II from s 302, IPC .

The accused appellant had gone to the house of the deceased (maid servant) for asking her to join duty. As the deceased (maid servant) refused to return to duty, the accused poured kerosene oil on her and set her on fire causing death. The accused had gone unarmed, it appeared that he lost self control on the provocative words uttered by the deceased. The case fell under s 304, Pt II, IPC . The conviction of the accused appellant under s 302, IPC was altered into one under s 304, Pt II, sentence of life imprisonment awarded by the court below was reduced to the period already undergone.[58]

Appellant accused A1 had inflicted single dab blow, the deceased sustained injury succumbed to injuries after seven days. His conviction under s 302, IPC was converted into one under s 304, Pt II, IPC .[59]

Where in a sudden quarrel, the accused gave single knife blow to the deceased, he was convicted under s 304, Part II, IPC .[60]

Accused appellant assaulted the deceased with iron rod causing death. The accused did not intend to cause death but he can be attributed with knowledge that his act was likely to cause death of the victim. The conviction of the accused appellant under s 302, IPC was altered to one under s 304, Pt II and accused was sentenced to ten years RI.[61]

The prosecution evidence was that the accused appellant hit the deceased and the eye-witness by a wooden bat and pushed them into bushes. It could not be stated that the accused appellant intended to cause the death of the deceased. However, knowledge could be imputed to him that his action was likely to cause the death of2561 the deceased. The conviction of the appellant under s 302, IPC was altered into one under s 304, Pt II, IPC .[62]

39. Alteration of conviction from Section 302 to Section 304, Part I--Cases

Considering the fact that the occurrence took place in the night in almost dark conditions with feeble light and attack was made indiscriminately. The conviction under s 302 was altered to one under s 304, Pt I.[63] The accused causing death of his mother by throttling, incident happening on mother trying to advice his son (accused) that he should not treat his wife cruelly, conviction of the accused was altered from s 302 to conviction under s 304, Pt I.[64]

The accused appellants had chased the deceased, the appellants R and M caught hold of the deceased while the appellants A B and S gave knife blows to the deceased, causing death. One day prior to the date of the incident, the deceased in an inebriated state in a marriage ceremony had teased the women folk while they were participating in the marriage ceremony. Held, the cause of conflict arose from the conduct of the deceased in the marriage party which ultimately as a sequence of events resulted in fatal injuries on the person of the deceased. The role attributed to them would, attract the provisions of s 304, Pt I, IPC and not s 302 read with s 34, IPC . The appellants' conviction under s 302 / 34 IPC was altered into one under s 304, Pt I.[65]

Where there was no intention of the accused to kill the person/victim who rushed to rescue the other

person and was stabbed on the vital parts only once, which in turn caused his death, the accused was found guilty of culpable homicide not amounting to murder and his conviction was altered from s 302 to s 304, Pt I, IPC .[66] Where the evidence on record disclosed that it was blunt side of axe which was used for inflicting blow on deceased, there was only one blow on head of deceased which proved to be fatal, offence of culpable homicide not amounting to murder made out so, conviction of accused under s 302 altered to one under s 304, Pt I.[67] Where there was no premeditation and in the course of a sudden quarrel the accused had given only one *lathi* blow to the deceased which resulted in his death, the conviction of the accused was altered from s 302 to s 304, Pt I.[68]The accused appellant armed with a large knife inflicted three blows on the head of the deceased causing death. There was no premeditation, the act was committed in a heat of passion and the appellant had not taken any undue advantage or acted in a cruel manner and there was a fight between the parties. Held, his case fell under the fourth exception to s 300, IPC and hence it was just and proper to alter the conviction from s 302, IPC to s 304, IPC .[69]2562

A scuffle had taken place on the dinghy where the accused and his companions were trying to recover the dinghy. The deceased was preventing them from doing so. In the course of this sudden fight and in the heat of passion the accused assaulted the deceased and pushed him into the sea eventually resulting in his death. The act of the accused was punishable under s 304, Pt I of the IPC instead of s 302 of the IPC . Conviction of the accused under s 302, IPC was altered to one under s 304, Pt I.[70]

When the quarrel between the accused and the deceased parties took place while digging the foundation, the fight which started all of a sudden, there was no evidence to show that the accused attacked the deceased with deadly or dangerous arms, it was only in a fight that both accused and co-accused held the neck of the deceased with such force as to ultimately result in strangulation and death, it could not be definitely concluded as to who actually inflicted the fatal injury, the conviction of the accused under s 302 read with s 34 was set aside and instead he was convicted under s 304, Pt I.[71] Where incident occurred out of sudden and grave provocation on a petty matter and facts and circumstances clearly attract exception I to s 300, the accused is liable to be convicted under s 304, Pt I and not under s 302 . Hence the appeal was partly allowed.[72]

When the death of the deceased-wife was caused by a pistol-shot fired by her husband/accused, the possibility of the husband using the firearm in a fit of rage, owing to quarrel with the deceased could not be ruled out, the accused was convicted under s 304, Pt I and was acquitted of the charge under s 302 .[73] When the hot exchange of words took place between two groups proceeding the incident, the hot exchange of filthy language resulted in some kind of provocation and in the heat of passion without premeditation, a single stab wound was inflicted in the stomach of the deceased, it could not be ascertained that it was inflicted with intention to cause death, the only intention which could be attributed to the accused could be to cause such bodily injury as is likely to cause death, the conviction of the accused was altered from s 302 to s 304, Pt I, IPC .[74]

Where the accused/appellant and co-accused had felled the deceased, who had declined to oblige them by offering liquor which infuriated the accused/appellant, who gave a single blow on the chest of the deceased, the conviction of accused/appellant was converted from s 302 to s 304, Pt I, IPC .[75] When the accused without premeditation, at the spur of the moment inflicted a single axe blow on the head of his brother causing his death, his conviction was altered from s 302 to s 304, Pt I.[76] Where there was a sudden fight without premeditation, the head of the deceased which is a vital part of the body had been inflicted with injuries which were2563 likely to cause death, the accused was convicted for the offence under s 304, Pt I instead of s 302 .[77]

Where the accused inflicted single knife blow on the thigh of the deceased, the deceased died due to external hemorrhage, the accused appellant after causing injury ran away from the spot, his conviction under s 302, IPC was converted to s 304, Pt I, IPC .[78]

Where keeping in view the manner in which blows were inflicted and the parts of the body on which they

were inflicted and the manner in which the weapons were used, it was difficult to conclude that the intention of the accused was to cause death or cause such injuries which were sufficient in the ordinary course of nature to cause death, but knowledge could be attributed to the accused that by causing such injuries they were likely to cause death of the deceased, the conviction of the accused was altered from s 302 to one under s 304, Pt I, IPC .[79] Where the accused had no previous enmity with the deceased who abused the mother of the accused, and the occurrence had taken place all of a sudden, exception IV of s 300 was found attracted.

Similarly, the conviction of the accused under s 302 for giving a single knife blow at the chest of the deceased was convicted to one under s 304, Pt I.[80] When the accused killed his young sister and her paramour by inflicting multiple stab injuries with a small pen-knife, all of a sudden, the conviction of the accused was altered from s 302 to s 304, Pt I.[81]

Against mischief to their property, the accused had first degree of right of private defence but he exceeded it by committing murder of the wrong doers as there was no fear of death or grievous hurt of the accused, the conviction of the accused was altered from s 302 to s 304, Pt I.[82] Where the accused and the deceased were on guard duty on the day of the occurrence, the allegations against the accused were of causing death with a rifle, considering the fact that the crime was committed in the heat of passion, the conviction of the accused was altered from s 302 to s 304, Pt I.[83] Where the accused went to the victim unarmed, picked up a pair of scissors from a nearby shop giving a blow on a vital part of the deceased, preceding a scuffle, the accused did not have intention to cause such injuries as would cause death so he was convicted under s 304, Pt I and his conviction under s 302 was set aside.[84]Where there was a sudden quarrel over the cutting of a tree, and the accused gave a single blow with a wooden reaper on the head of the deceased causing his death, the act of2564 the accused was due to heat of passion, the conviction of the accused was altered from s 302 to s 304, Pt I.[85]

Where the accused husband alleged to have wordy altercation with deceased wife suddenly dealt knife blows on her person and thereafter stabbed himself by same knife, there was no allegation that in past also accused had shown his intention to eliminate his wife, accused was held entitled to benefit of exception 4 of s 300 in view of sudden quarrel and giving knife blows to wife in a spur of the moment, hence conviction of accused under s 302 altered to one under s 304, Pt I.[86] Where in a sudden quarrel between two brothers without premeditation, the accused held the collar of the shirt of his deceased brother and his son, and the co-accused gave knife-blows, and the accused did not act in any cruel or unusual manner and did not take undue advantage, the conviction of the accused was altered from ss 302 / 109 read with s 111, IPC to one under s 304, Pt I read with ss 109 and 111, while that of his son co-accused under s 304, Pt I, IPC .[87] Where the accused and the deceased both were drunk, quarreled and had a fight, and the accused who sustained minor injuries had a right of private defence, and presuming the accused had exceeded his right of private defence, he could at the most be convicted under s 304, Pt I; similarly, he was also entitled to get the benefit of exception IV of s 300 because the incident was without pre-meditation, in the heat of passion, on a sudden quarrel and the accused had not taken any undue advantage of the situation, therefore, the conviction of the accused was altered from s 302 to s 304, Pt I.[88] Where the accused lost balance of his mind and gave a knife-blow to his deceased father without intending to cause his death but with the knowledge that the bodily injury inflicted by him by means of a knife was likely to cause death of his father, the conviction of the accused was altered from s 302 to s 304, Pt I.[89]

40. Alteration of Conviction from Section 302 to Section 304, Part II

If the act of the accused, by which death is caused, was done without any intention to cause death or cause such bodily injury as is likely to cause death, the accused can be attributed with the knowledge that his act was likely to cause death, the offence committed by the accused is not murder but culpable homicide not amounting to murder under s 302 under Pt II of s 304, IPC . If in such a case the accused is convicted by the trial court under s 302, then his conviction is liable to be altered to s 304, Pt II.[90]2565

In a sudden quarrel and in the heat of passion, the accused was in an inebriated condition.[1] Injuries inflicted upon the deceased by the accused were not on vital parts[2] or all injuries except the fatal injury were on non-vital parts of the deceased,[3] the conviction of the accused was modified from s 302 to s 304, Pt II. Where it was not established as to who against the four assailants would have inflicted the fatal injury the conviction of the accused persons was altered from s 302 to s 304, Pt II.[4]Where in a marriage ceremony, three persons had fired guns, from the evidence adduced in the case it was not possible to attribute the act of killing to the appellant alone, but since the act of firing was done with the knowledge that it was likely to cause death, the appellant was convicted under s 304, Pt II instead of s 302, IPC .[5] The appellant husband assaulted his deceased wife with a wooden bar, caused severe injuries on back and chest which resulted in internal bleeding and caused death, it could not be said that the appellant had beaten his wife with intention to cause death, his conviction under s 302, IPC was altered to one under s 304, Pt II, IPC .[6]When it is difficult to say as to which injury was the immediate cause of death of the deceased or accused caused single injury and deceased died after several days,[7] the accused is liable to be convicted under s 304, Pt II and not under s 302, IPC .[8]

The prosecution case was that the cattle of the appellant accused had damaged the standing crops of the deceased. After exchange of hot words between the accused and the deceased over the damage caused to the crops of the complainant by the accused, the appellant accused fired one shot causing death of the deceased. The accused was not apprehended on the spot. It could not be said that the appellant accused had intention to cause the death of the deceased. Explanation 4 to s 300 was attracted. The appellant accused was convicted under s 304, Pt II, IPC, the sentence imposed was reduced to the sentence undergone, which was seven years.[9]

Appellant accused had nurtured grievance against the deceased, gave two or three stick blows on the head of the deceased. The deceased fell down, was admitted in the hospital where he was treated by several doctors and died after about forty days. Appellant accused was convicted under s 304, Pt II and not under s 302, IPC .[10]

41. Alteration of Conviction from Section 304, Part I to Section 304, Part II

Once the sessions court arrives at the conclusion that there was no intention on the part of the accused to cause death or bodily injury likely to cause death, there is no question of convicting the accused persons under s 304, Pt I, IPC ; when by maintaining such conviction, the High Court also appears to have failed to discharge2566 its essential duty of reappreciating evidence in the conviction appeal and of arriving at an independent finding; based on the appraisal of such evidence, the Apex Court altered the conviction of the accused from s 304, Pt I to s 304, Pt II read with s 149, IPC .[11] Where the accused persons were chasing the son of the deceased with the intention to kill, the deceased interfered and was killed instead, the accused had no intention to kill the deceased so the accused who inflicted the fatal injury with an iron angle on the head of the deceased was convicted under s 304, Pt II and his conviction by the trial court under s 304, Pt I was set aside.[12]

Where the accused persons formed an unlawful assembly and armed with *lathis*, spears *etc*, assaulted the complainant and his son resulting in the death of his son, where one accused gave a single blow with *lathi* on the head of the deceased and later another accused hit the deceased with a *lathi*, the deceased was alive for 32 hours after the incident, the knowledge of the accused and not the intention that their act was likely to cause death can be inferred, so, the conviction of the accused persons was altered from s 304, Pt I to s 304, Pt II read with s 149, IPC .[13] When the deceased started raising alarm, the accused persons possibly to make the deceased to be silent assaulted with slap, and then one of them gave blow with plough. This fact never goes to show that the accused persons had any intention to cause bodily injury for causing death rather the accused persons did assault with a view that the deceased may not raise alarm. In that event it appears that death was caused on account of hitting on the head through plough by one of the accused persons with knowledge that it is likely to cause death. Therefore, case falls under s 304, Pt II of the IPC and not under s 304, Pt I of the IPC, so the conviction was altered to one

under s 304A, Pt II.[14]

42. Alteration of Conviction from Section 304, Part II to Section 323

There was enmity between the parties from before and the deceased was also in the drunken stage at the relevant time as well as the occurrence did not show premeditation, rather it was a sudden fight and no lethal weapon was used at the relevant time. The injury caused was said to be simple in nature and also not on the vital part of the body. There was nothing specific or definite coming forward to show that the deceased died due to said injuries and the injured was treated in the house by the village doctor and the deceased died after five days of occurrence which itself gives suspicion about the death due to said injuries. On these facts conviction of accused persons was altered from s 304, Pt II to s 323 .[15]

Where the accused got hold of the deceased and dashed his head against the wall of the house, who then sat over the chest of the deceased and gave him fist-blows, the evidence available on record did not point to any such injury which was so grievous as to constitute knowledge in the mind of the accused that by infliction of such injuries, he was likely to cause the death of the deceased; in an offence punishable under s 304, Pt II 'knowledge' is an important element which was missing, and hence, it remained *simpliciter* an offence of 'voluntarily causing hurt' as defined under s 321 and punishable under s 323, the conviction of the accused was therefore, altered from s 304, Pt II to s 323, IPC .[16]2567

Where the accused gave a beating to the deceased who was a frail old man of 60 years weighing only 38 kg, the High Court altered the conviction of the accused from s 302 to one under s 323, the nature of injuries which were found on the deceased went on to show that the accused could not be punished barely for the offence under s 323 as the ribs of the deceased were broken which led to the death of the deceased, holding that the law will presume that the accused intended the consequences of his act and the case would squarely fall within the ambit of s 304, Pt II and the accused must be attributed with requisite knowledge, the Apex Court converted the conviction of the accused from s 323 to one under s 304, Pt II, IPC .[17]

Where the intention of the accused was merely to beat the deceased on their hands and legs, and it was not clear that they knew that the injuries which they caused were sufficient or likely to cause death, it was held that they could not be convicted for the offence under s 304, though they could be held liable under s 323, IPC .[18]

43. Alteration of Conviction from Section 323 to Section 304, Part II

Commentary under the same heading in s 323, *post*, may be referred to.

Where the accused going to house of deceased, catching hold of deceased, hitting him on cheek and neck, on sight that neighbours have come, accused stating that he would not leave the deceased alive and kicking him on private parts, deceased dying due to neurogenic shock resulting from injury to private parts, injury opined by doctor to be sufficient to cause immediate death, statement of accused followed by kick shows that he had knowledge that it was likely to cause death, on these facts it was held that conviction of a accused could only be for murder, trial court convicting him under s 304 Pt II, High Court in appeal should not have interfered with the conviction and altered it to s 323, IPC . Hence, Supreme Court altered the conviction of accused from s 323 to s 304 .[19]

Where the accused a police constable alleged to have beaten the deceased old man weighing only 38 kilogram, as a result of which the ribs of the trailed old man were broken leading to his death, the trial court convicted the accused under s 302, IPC, The High Court altered the conviction of the accused from s 302 to s 323 but on appeal against the order of the High Court filed by the state, the Apex Court held that the law will presume that the accused intended the consequences of his act, therefore, his case would sparely fall within the ambit of s 304, Pt II or he must be attributed the requisite guilty knowledge. The

Apex Court accordingly converted the conviction of the accused from s 323 to one under s 304, Pt II, IPC .[20]

44. Alteration of Conviction from Section 304, Part II to Section 324

It need not be stated that to bring a case within the purview of s 304, Pt II, IPC, it is required that the act is done with the knowledge that it is likely to cause death but without any intention to cause death.[21] Where the accused assaulted the victim with a knife and the victim succumbed to the injuries on his way to the hospital, the sessions court convicted the accused under s 304, Pt II, the High Court held that s 304, Pt II is2568 not attracted, it is no doubt true that the victim does not fall in any of the eight categories of 'grievous hurt' as defined by s 320 and as such the case cannot fall either under ss 325 or 326, IPC, considering the fact that the accused did not intend or had any knowledge to cause an injury on a particular part of the body and the injury was a solitary and single lacerated wound on the right elbow joint, the High Court opined that the case squarely fell within s 324, IPC which punishes for voluntary causing hurt by a dangerous weapon, the conviction of the accused under s 304, Pt II was altered to one under s 324 .[22] Where accused was having cart-peg with him not with a deliberate premeditated determination to kill deceased, incident occurred during altercation between them when both were going to *sarpanch* to settle a dispute between them, since there was absence of knowledge to cause death; and suspicion existed about place of incident, accused was liable to be convicted under s 324 and not under s 304, Pt II.[23]

Where the deceased was hit by the accused only once by a hard weapon reaper used for wall leveling and was as a weapon very dangerous, two injuries were found on the body of the deceased, and the second injury was caused due to a fall which proved fatal, on these facts it cannot be said that the accused had the intention to kill or knowledge that death was likely to result, however, since the weapon used for causing injury on neck of the victim was dangerous, the conviction of the accused was altered from s 304, Pt II to s 324 .[24] Where the possibility of the deceased receiving fatal injuries on the chest after lodging of FIR could not be ruled out, the conviction of the accused was altered from s 304, Pt II to s 324 .[25] However, where in a sudden quarrel the co-accused caused a simple injury with an axe and the main accused caused a stab injury on a vital part of the body of the deceased, each of the accused was found to have acted individually and not in concert so s 34 was not attracted, the co-accused was convicted under s 324 and the main accused under s 304, Pt II.[26]

45. Alteration of Conviction from Section 304, Part II to Section 325

If amongst the six named accused persons, the blow by some person has struck on the head of the deceased, which has clotted a very fine vein or artery of his brain, it could not be inferred that common object of all the accused persons was to commit an offence of culpable homicide punishable under s 304, IPC . All that could be inferred from the circumstances was that the accused knew that at least grievous hurt would result to the deceased as a result of such altercation. In such circumstances, the accused could appropriately be convicted under s 325 read with s 149, IPC instead of ss 304 / 149, IPC .[27] Where the accused, after a brief quarrel, dragged the deceased towards his house, and then pushed him and in the process the head of the deceased hit the door-frame, as a result of which he died, the conviction of the accused under s 304, Pt II was altered to one under s 325, IPC and sentence was reduced from 5 years rigorous imprisonment to 2 years rigorous imprisonment.[28] Where the quarrel took place between the accused and the deceased, and the accused pushed the deceased2569 down the steps of the staircase at which the deceased fell on the stepping stone and sustained injuries, and the second accused kicked the deceased with the result that he died, there was no evidence that the accused pushed the deceased deliberately on the stepping stone, the conviction of the accused under s 304, Pt II was altered to s 325, IPC .[29]

Where four persons attacked the deceased, and caused six injuries out of which five were simple and only the sixth was grievous which resulted in the death of the deceased, and it was not known who caused the grievous injury, it was held that the grievous injury could have been caused by only one of the assailants

and only he could be taken to have knowledge that the injury was likely to cause death, and as he was not known, none of the assailants could be convicted of the offence under s 304, Pt II read with s 34, though they could all be convicted under ss 325-34 .[30]

Where there was no evidence to show that the accused had given the fatal blow or any blow which was likely to cause the death of the deceased, the conviction of the accused was altered from s 304, Pt I to s 325 .[31] Where the accused constable gave fist blows to the deceased resulting into pain in his abdomen and flanks, no definite and conclusive opinion given by the doctors that it were abdominal injuries which caused death of deceased, said injuries were also not mentioned to be sufficient to cause death in ordinary course of nature, there was no allegation that any weapon was used as such by anyone in causing injuries to deceased, the conviction of accused was altered from s 304, Pt II to s 325, IPC .[32]

Where the accused assaulted the deceased an account of previous enmity, there was no statement by the doctor that injuries found on the person of the deceased were sufficient in the ordinary cause of nature to cause death of the deceased, there was no finding of the sessions court that the accused had knowledge that he was likely to cause such bodily injury as was likely to cause the death, the conviction of the accused was altered from s 304, Pt II to one under s 325, IPC .[33]

Where the deceased died 28 days after the incident, the size of the injury in the MLC and in the post mortem report did not reconcile, depth of injury was not given by the doctor who examined the patient, all these factors clearly showed that the death could not have been the direct result of the said injury, in that view of the matter it could not be stated that the accused had the intention or could be attributed only to the cause of the death of the deceased, at the best, therefore, the accused persons could only be held guilty of the offence punishable under ss 325 / 34, IPC, therefore the conviction of the accused persons was altered from s 304, Pt II and s 324 to ss 325 / 34 and ss 324 / 34, IPC .[34] Where the accused and the deceased exchanged kicks and fist-blows, with the kicks in the stomach of the victim proving fatal, and the incident having occurred on the spur of the moment, there was no intention to cause death or to cause such bodily injury as was likely to cause death, the conviction of the accused was altered from s 304, Pt II to under s 325 .[35]2570

46. Alteration of Conviction from Section 304, Part II to Section 326

The line between culpable homicide not amounting to murder and grievous hurt is a very thin line. In the former, injuries must be such as are likely to cause death, in the latter, the injuries must be such as to endanger life. An injury can be said to endanger life if it is in itself such that it may put the life of the injured in danger. Where there is no intention to cause death or no knowledge that death is likely to be caused from the harm inflicted, and death is caused, the accused would be guilty of grievous hurt if the injury was of a serious nature, but not of culpable homicide.[36] Where the accused had given *prasad* to the accused and others openly, and no motive to kill the deceased was established by the prosecution, the accused was held liable under s 304, Pt II for causing death of the deceased and also under s 326 for causing grievous hurt to five other persons.[37] Where accused caused only injury to deceased by knife, death of deceased was due to meningitis, which was asserted, was result of air entry and consequent entry of bacteria into skull cavity, doctors were emphatic that there was no specific injury on skull though there is evidence to show that maxilla was cut, specific expert evidence show that injury was not fatal, it was not shown that death was direct and proximate effect of injury, the conviction of accused was altered from s 304 to s 326, IPC .[38]

Where the accused persons formed an unlawful assembly and struck a single blow on the head of the deceased by means of a deadly weapon causing grievous injury, the doctor's evidence did not state that the said injury was sufficient in the ordinary course to cause death, the conviction of the accused under s 304, Pt II was altered to one under s 326 read with s 149, IPC .[39]Where the act of the accused was one of causing grievous hurt with a deadly weapon which is punishable under s 326, IPC, noticing the fact that the incident in question has occurred as far back as 1978 and the appellant had no enmity against the deceased nor any motive to cause a fatal injury, Supreme Court thought that the ends of justice would be

met if the accused's conviction is altered from s 304, Pt I to one under s 326, IPC .[40]

Where the accused hit the deceased on head, which is a vital part of the body with such force with *danda*, the deceased fell unconscious and later succumbed to his injuries, the conviction of the accused under s 302 was altered to s 304, Pt II; the other four accused were similarly convicted with him with the aid of s 149 and were held guilty only for offence under s 326 .[41] Where accused caught hold of deceased while co-accused inflicted knife-blow on him, accused was convicted under s 326 read with s 34 while the conviction of co-accused was altered from s 302 to s 304, Pt I, IPC .[42] Where two external injuries with corresponding injuries 1 to 5 were necessarily found and the injuries could have been caused due to a beating with the weapon, an iron pipe, these injuries could not have been caused only by one beating and even according to the prosecution these injuries were caused by different persons and it was not known that of the two injuries which injury was responsible for the death and there was no evidence on the prosecution side as to who caused the particular injuries on the head, hence, the conviction of the accused under s 304, Pt II2571 was found not sustainable and he was held liable to be convicted for the offence under s 326, IPC .[43]

Where the intention to cause death was not proved, and one accused caused injury to the deceased victim with the knowledge that it was likely to cause death and was held liable to be convicted under s 304, Pt II and not under s 302 ; the other two accused who caused injury but not on the vital parts of the body of the deceased, their conviction under ss 326 / 34 was maintained.[44]

The appellant and the accused no. 1 had entered the house of the deceased, accused no. 1 poured a watery substance over her from the pot carried by him on the deceased leading to her death. The deceased had refused sexual favour to them. However, no overt act was attributed to the appellant. Held, in absence of any active role played by the appellant or overt act being done by the appellant, it cannot be said with certainty that the appellant had accompanied the accused no. 1 to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under s 302 read with s 34, IPC was not sustained. The appellant was convicted under s 326, IPC and s 304, Pt II, IPC . As the death ensued after twenty six days of the incident as a result of septicemia and not as a consequence of burn injuries, the sentence was reduced to the period already undergone.[45]

47. Alteration of Conviction from Section 326 to Section 304, Part II

When the co-accused has been convicted under s 326, IPC, his conviction under the same was untenable because he did not inflict any injury on the deceased. He also could not be convicted with the aid of s 34, because main accused had not been convicted under s 326, IPC . His role was that he took out a knife but witness caught hold of him, in fact he did not inflict any injury. Both accused persons were charged under ss 302 / 34, IPC . When the only distinguishing feature in the role of main accused and co-accused was that main accused, infact inflicted the injury whereas co-accused was prevented from inflicting the injury. The conviction of co-accused was, therefore, converted from s 326, IPC to s 304, Pt II, IPC, since he did not inflict any injury on the deceased.[46]

17 *Mehtab Singh v State of Madhya Pradesh* 1974 Cr AR 374 .

18 *Ganga Singh v State of Uttar Pradesh* 2000 Cr LJ 1695 (All) (DB) .

19 *Ibid*.

20 *Sheo Prasad Bhor v State of Assam* 2007 Cr LJ 1423, p 1424 (SC), AIR 2007 SC 918 .

21 *Ramkrishan v State of Rajasthan* 1998 Cr LJ 54 (SC) .

22 Re *Amir Hussain alias Ali*1998 Cr LJ 495 (SC).

23 *Sudhi Samanta v State of West Bengal* 1998 Cr LJ 495 (SC)*; Gurmukh Singh v State of Haryana* 2010 Cr LJ 450 (SC), JT

2009 (11) SC 117, 2009 (11) Scale 688, (2009) 15 SCC 635 .

24 *Suresh Singh v State of Haryana* 2007 Cr LJ 4717, p 4721 (SC), AIR 2007 SC 3093, 2007 (7) Supreme 167 .

25 *Kallam Btahmananda Reddy v State of Andhra Pradesh* 1999 Cr LJ 2368 (AP) (DB) .

26 *Kesra v State of Rajasthan* 1999 Cr LJ 2625 (Raj) (DB) .

27 *Pahar Singh v State of Rajasthan* 1999 Cr LJ 1150 (Raj) (DB) .

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Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

[47][S. 304A.

Causing death by negligence.--

Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]25722573

Comments

1. Scope and Applicability

This section is such a provision which discloses that criminality may be there even if there is no *mens rea*. Inspite of the fact that there may be no motive or intention, a person may venture to practice such rashness or negligence which may cause the death of another. The death caused is, therefore, not the determining factor.[48]It is well settled that the very foundation to constitute an offence there must be an act or omission on the part of the petitioner as defined under s 36 of the Act, but for the purpose of s 304A, IPC, there must be rash and negligent act on the part of the accused which has led to the death of the deceased.[49] The section applies only to acts which are not criminal in themselves, but are punishable by

reason of death having been caused[50]by what is described as 'rash' or negligent' act.[51] The section, thus, applies where there is neither intention to cause death nor knowledge that the act done will, in all probability, cause death.[52]The section speaks of death being caused by 'any rash or negligent act'.[53] It has no application to a case where death is caused by an act which is, in its nature criminal,[54]i.e., where there is an intention to cause death or knowledge that the act done will, in all probability, cause death.[55] When intent or knowledge is the direct motivating force of the act complained of, s 304A, IPC, has to make room for the graver and more serious charge of culpable homicide. Section 304A comes out as a specific offence where death is caused by a rash or negligent act and the act does not amount to culpable homicide under s 299, IPC or murder under s 300 . If a person willfully drives a motor vehicle into the midst of a crowd which amounts to negligent driving; the act, then, will amount to culpable homicide punishable under s 304 .[56] Acts, which are offences in themselves, must be judged with regard to the knowledge, or means of knowledge, of the offender and placed in their appropriate place in the class of offences of the same character.[57]In view of the above, in order to constitute an offence under s 304A, there must be positive proof that the rash or negligent act of the accused was the proximate cause,2574 which resulted in the death of the accused,[58] without intervention of another's negligence.[59] The mere fact that the accused contravened certain rules or regulations in the doing of an act which caused the death of another, does not establish that death was the result of rash or negligent act or that any such act was the proximate and efficient cause of the death.[60]

Where the accused driver of the bus even though was driving the vehicle at a slow speed, but hit a scooterist from behind causing death was held guilty under ss 279, 304A, IPC .[61]

For an offence punishable under s 304A, the point to be established is that the act of the accused was responsible for resulting in the death, and such act of the accused was rash and negligent, although it did not amount to culpable homicide.[62]

2. Law of Singapore

Whoever causes the death of any person, by doing any rash or negligent act not amounting to culpable homicide, will be punished with imprisonment for a term which may extend to two years, or with a fine, or with both.[63]

As to the meaning of 'cause', the test for causation under this offence is that the death must have been the direct result of the rash or negligent act of the accused and that act must have been the proximate and efficient cause without the intervention of another's negligence. The chain of causation is not necessarily broken whenever another party's negligence intervenes. Instead, criminal liability attaches to the person whose negligence or rashness contributed substantially and not merely peripherally to the result.[64]

In *Mohamad Iskandar Bin Basri v Public Prosecutor* ,[65] it was observed, 'The appellant wrongly assumed that all other vehicles at the junction had noticed the Red Rhino and would give way to him. It is true that he was being paid to do the public duty and was not doing voluntary firefighting but one would have to be extremely cynical if one were to compare him to a salesman rushing to meet a prospective client. This does not mean that emergencies justify rashness. They do not. This case is a good reminder for all drivers of emergency services vehicles that a duty of care is still owed to other road users whatever the emergency may be.'

3. Ingredients of the Offence

The following ingredients are required to be established to prove an offence under s 304A, IPC :2575

(i) death of the person in question;
(ii) accused to cause such death; and
(iii) such act of the accused was rash or negligent, although it did not amount to culpable

homicide.[66]

Section 304A excludes all the ingredients of s 299 or s 300 .[67]

4. Sections 279 and 304A --Distinction

Commentary under the same heading in s 279, *ante*, Vol. 2, may be referred to.

To establish either of the ss 279 or 304A, rash and negligent act has to be established, but the only distinction is that in s 279 rash and negligent act related to the manner of driving or riding on a public way, while the offence under s 304A extends to any rash and negligent act falling short of culpable homicide.[68] This section being distinct from s 279, an accused, if found guilty of rash or negligent act under s 304A as well as 'negligent driving', can be convicted for both the offences.[69]

5. Sections 287 and 304A --Distinction

Commentary under the same heading in s 287, *ante*, Vol. 2, may be referred to.

6. Sections 304 and 304A --Distinction

Commentary under the same heading in s 304, *ante*, may be referred to.

7. Section 304A Distinguished from Sections 3 / 112, 89 and 126 of the Motor Vehicles Act 1939 (Now Sections 177, 134 and 18, Motor Vehicles Act 1988)

The offence under this section is quite distinct from that under ss 3 / 112, 89, and 126 of the Motor Vehicles Act 1939, and an acquittal on a charge under those sections is, therefore, no bar to a subsequent trial of the accused on a charge under this section.[70]

8. Section 304A Distinguished from Section 101 of the Railways Act 1890 (Now Section 175 of the Railways Act 1989)

The offence under this section is distinct from the one punishable under s 101 of the Indian Railways Act 1890, (now s 175 of the Railways Act 1989) and, therefore, a person can be punished under both the said provisions.[71]

9. Sections 301 and 304A

Commentary under the same heading in s 301, *ante*, may be referred to.2576

10. Duty of Court

The courts are expected to appreciate evidence in an unbiased manner to find out whether there was rash and negligent driving or otherwise on the part of the accused-drivers, especially when two vehicles are involved and the accident is head-on-collision, the courts have to scrutinize the evidence carefully.[72]

11. *Causa Causans* and *Causa Sine Qua Non*

Causa Causans is nothing but the immediate cause or in other words the last link in the chain of causation. *Causa sine qua non* is a cause without which the effect in question would not have happened or in other words a necessary or invariable cause.[73]The act causing the death must be the *causa causans*, it is not enough that it may have been the *causa sine qua non*.[74]

12. 'Whoever Causes the Death'[75]

In *Emperor v Omkar Ram Pratap* ,[76] Sir Lawrence Jenkins observed as follows:

> To impose criminal liability under s 304A, Indian Penal Code, it is necessary that the death should have been the directly result of a rash and negligent act of the accused and that act must be the proximate and efficient cause without the intention of another's negligence. It must be the *causa sine qua non*.

The test applied in this case was whether the act was caused without the intervention of another's negligence, though contributory negligence on the part of the person killed is no defence, by itself, to a charge under this section. This case has been followed generally by the High Courts in India,[77] and applied by the Supreme Court in *Kurban Hussein Mohamedalli Rangawalla v State of Maharashtra* .[78]

13. No Vicarious Liability

Where the accused, a layman, was putting up a building, employing masons and it was not the case of the prosecution that the accused himself constructed the building, undisputedly the masons constructed the building negligently by not mixing the lime mortar in proper proportions leading to the collapse of building resulting in the death of 35 school children, the accused was held not liable for the negligence of persons who actually constructed the building which negligence was *causa causans* for the collapse of the building.[79]The death must be a direct result of the rash or negligent act of the accused and the act must be an efficient cause without the intention of2577 another's negligence, and it must be the *causa causans*, and it is not enough that it may have been the *causa sine qua non*.[80] Even though, the accused is a co-owner of land where the live wire was spread and victim died, who was a member of a joint family but in a case under s 304A, IPC, vicarious liability does not arise.[81]

14. 'Of any Person'

The term 'person', as used in this section, would include an unborn child in the mother's womb after seven months' pregnancy if the post-mortem report shows that the child had developed sufficiently to have an identity of its own as a child.[82]

15. Essential Components of Negligence

Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.[83]

16. 'By doing any rash or Negligent Act'

The death of the deceased must have been caused by the accused 'by doing any rash or negligent act', and not otherwise.[84] The expression 'rash or negligent act', as used in this section, means an act which is the immediate cause of death, and not an act or omission which can, at best, be said to be a remote cause of death.[85] It must be shown that the accident was the direct result of the negligence or rashness of the accused.[86]However, it is very dangerous to attempt to distinguish between the approximate and ultimate cause of death due to a rash or negligent act.[87] Similarly, whenever human life can reasonably be said to be endangered by a rash or negligent act, and the risk of death is not too remote a consequence of it, and death is actually caused by such an act, an offence under this section is committed.[88]

Whether the accused, in a particular case, acted rashly or negligently will depend upon the facts of that particular case. The mere fact that an accident has taken place, or that some lives have been lost, or that some persons have received injuries, will not lead to any presumption of a rash or negligent act on the part of the accused,[89] nor is there any presumption in law that a person, who possesses only a learner's license or possesses no license at all, does not know driving.[90] In *Baldevji Bhathiji Thakore v State of*

Gujarat ,[91] the accused had run over the deceased while the latter2578 was trying to cross the road. The accused did not make any attempt to save the deceased by swerving to the other side when there was sufficient space. The Supreme Court did not find any reason to interfere with the conviction of the accused under this section. If, however, the accident is due to any weak point in the hitch assembly of the trailer, no negligence can be attributed to the accused.[92] In a case against a motor driver of causing death by rash or negligent driving, the court should not take into account the speed which the accused developed after the accident, the court should judge the speed at which he was driving the truck prior to the accident. It is common human failing, however reprehensible it may be, for a man to attempt to run away if he has committed an accident.[93]

The petitioner accused was found guilty of driving auto rickshaw rashly and negligently. The petitioner had dashed the said vehicle against the deceased and as a result, the deceased, sustained grievous injury and was admitted to the hospital. During treatment the deceased died after 38 days of the accident. The injury sustained by the deceased in the accident caused by the accused was the direct and proximate cause, which led to the death of the deceased. The accused was convicted for offences under ss 279 and 304A .[94]

Evidence of witnesses established that the accused appellant driving a jeep loaded with passengers, dashed with roadside trees, collapsed by the side of the road, and as result 12/13 passengers on board sustained injuries, one injured died later in the hospital. Vehicle was seized from the spot in damaged condition. The Motor Vehicle Inspector reported that the vehicle was having no mechanical defect at the time of the accident. Accused appellant had suffered injuries in the accident. The appellant driver was convicted under ss 279, 338 and 304A, IPC .[95]

For bringing in application of either s 279 or 304A it must be established that there was an element of rashness or negligence. Appellant accused was a driver in Himanchal Pradesh Transport Corporation. On the day of the incident while he was driving the vehicle, the bus had stopped at a bus stop. One passenger after alighting from the bus went to its roof top for the purpose of unloading his luggage. The accused without waiting for a signal from the conductor and without verifying if all the passengers who were to board, had boarded and who were to alight had alighted, all of a sudden started the bus as a result of which the said passenger fell down and sustained injuries. He was carried to the hospital where he succumbed. Even if the prosecution version is accepted in *toto*, there was no evidence led to show that any negligence was involved. The conviction of the accused appellant under ss 279 and 304A, IPC was set aside.[96]

Where the accused driving vehicle overtakes the another vehicle in fast speed having total disregard to the passengers who might have been crossing the road after alighting from the vehicle, he is guilty of rash and negligent driving. Accused appellant was convicted under s 304A .[97]2579

Where the appellant driver of police jeep under the influence of alcohol was driving jeep at high speed, caused the death of five persons and injured seven, went 93 feet ahead of the incident, could be stopped by the Police Officer who was travelling in vehicle, held it was a case of culpable negligence, he was convicted under ss 304A, 337, 338 and 279, IPC .[1]

17. Relative Scope of Rashness and Negligence

Rashness is a very high degree of negligence. Culpable rashness implies the consciousness that the intended consequences would surely ensue;[2]it conveys the idea of recklessness of doing of an act without due consideration.[3] On the other hand, 'negligence' means a breach of duty caused by omission to do something, which a reasonable man, guided by those considerations, which ordinarily regulate conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do;[4] it, in ordinary parlance, connotes want of proper care.[5] Negligence must be of a high degree, and not of the type which gives rise to a claim for compensation. In other words, simple lack of care may give rise to a civil liability, but without a degree of culpability, amounting to gross negligence, there is no criminal liability.[6]

18. 'Act' Includes Omission[7]

An 'act' generally means something voluntarily done by a person, but in the IPC the term 'act' is not confined to its ordinary meaning of possible conduct of doing something, but includes also an illegal omission. The effect of ss 32 and 33, IPC, taken together is that the term 'act' comprises one or more 'acts' or one or more illegal omissions. The IPC makes punishable omissions which have caused, which have been intended to cause or which have been known to be likely to cause certain evil effects in the same manner as it punishes acts, provided they were illegal and when the law imposes on a person a duty to act, his illegal omission to act renders 'him' liable to punishment.[8] This section, *i.e.,* s 304A, uses the word 'act' only, and not an omission. However, under s 32 of IPC, 'In every part of this Code, except where a contrary intention appears from the context, words, which refer to acts done, extend also to illegal omissions'. In this manner, the word 'act', in this section, will include an omission. An omission is the negation of an act.[9] An omission on the part of an overman of a mine to make periodical inspection, as required by the Mines Act 1952, is a negligent act and if death is caused by such act, he may be prosecuted under this section.[10] Where the accused sent boxes, containing fireworks, declaring2580 them to be iron locks, and in loading, one of the boxes exploded and killed a coolie, it was held that the omission on the part of the accused to declare the goods to be fireworks was an illegal omission, which came within the meaning of the word 'act' in this section, and, therefore, the accused was liable.[11]

19. 'Act' may be 'Rash or Negligent', and Not Both

The section requires the causing of death by doing a 'rash or negligent act', and not a 'rash and negligent act'.[12] It has been held that one is exclusive of the other, the same can not be rash as well as negligent.[13] However, in another case, the same act is found to be rash as well as negligent.[14]An act, which is only negligent in its initial stages, may, if negligence exceeds a certain limit (depending upon the circumstances), also become rash.[15]

20. Culpable Rashness and Culpable Negligence defined and Distinguished

Holloway J, in the leading case of *Nidamarti Nagabhushanam*,[16] defined and distinguished culpable rashness and culpable negligence as follows:

> Culpable rashness may follow, but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (luxuria). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution, incumbent upon him, and that if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty circumspection. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories which are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the direct producers of death.

Following this, in the well-known case of *Empress of India v Idu Beg* ,[17] Straight J, observed:

> Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without intention to cause injury or without knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally, or to an individual in particular, which, having regard to all the circumstances, out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

The above interpretations of culpable rashness and culpable negligence have been followed in many subsequent cases.[18] In *State v Bhalchandra Woman Pethe* ,[19] the Bombay High Court observed:

> There is a distinction between rashness and negligence. When one does an act with utter indifference to the consequences, of which the doer may be conscious and which, he knows, may not take place, one is said to be rash while criminal negligence is neglect to take that precaution which a reasonable and prudent person is expected to take under the circumstances obtaining in a given case. In order to infer whether or not there is criminal rashness or negligence on the part of the accused, all relevant facts must be considered.[20]

However, this is only a paraphrase of what has been observed in *Empress of India v Idu Beg* ,[21] although that case has not been referred to.

Distinction between rashness and negligence is that negligence connotes want of proper care, while rashness conveys the idea of rashness, the doing of an act without consideration of any consequences.[22]

Negligence is the failure to take reasonable care and the degree of the reasonable care is not to be measured by any abstract standard. Negligence does not mean absolute carelessness or indifference, but want of such degree of care as is required in particular circumstances.[23] When the car is in motion, the driver is expected to keep his eye towards the front side, and not on the back side. It is only if the car is being taken on the reverse side that the driver's attention must be towards the back side.[24]

21. Dashing against a Stationary Vehicle

Commentary under the same heading in s 279, Vol. 2, *ante*, may be referred to.

Where the deceased who was untying rope of a stationary lorry and tractor died in the accident and the accused driver had no knowledge that the deceased was working in front of lorry, therefore dashing against lorry may amount to rash and negligent driving, but death of the deceased cannot be attributed to rash and negligent driving, so, the accused can be convicted under s 279 and not under s 304A .[25]2582

22. Dashing Against Tree

There was reliable evidence of eye-witnesses that the accused was driving bus in rash and negligent manner. As a result, the bus dashed against the tree on the right side of the road. No mechanical defect or defect in the offending bus was found/detected. Conviction of the accused appellant under s 304A, IPC was held justified.[26]

23. Trailer detached from tractor causing death and injury

The testimony of the witnesses showed that the accident took place when the driver accused was driving the tractor overloaded with goods and passengers at high speed resulting in detachment of trailer. Accused was convicted under s 304A and ss 337 and 338, IPC .[27]

24. Passenger Jumping out of bus in Motion

Commentary under same heading in s 279, *ante*, Vol. 2, may be referred to.

25. Driver Taking Turn should be more Cautious

What matters is not the speed of the bus at 90 kms per hour. What is important is to prove that the speed of the bus was rather high. It has to be noticed that the bus was taking a turn to enter the terminal and it was all the more essential for the driver to be more cautious than on a straight road.[28]

26. Principle of *Res Ipsa Loquitur*--If Applicable

In a criminal trial, as opposed to civil proceedings, where preponderance of probabilities is sufficient, the burden of establishing the charge against the accused rests on the prosecution and the standard of proving the same is always beyond all reasonable doubt. Criminality is never to be presumed, subject to statutory exceptions, and criminal negligence or rashness should not be presumed in such a case merely on the application of the maxim *res ipsa loquitur*.[29]*Res ipsa loquitur* (thing speaks for itself) is a principle which, in reality, belongs to the law of torts.[30] It is thus clear that the principle of *res ipsa loquitur* has limited application in the domain of criminal law. Useful reference can also be made to the decision of the Apex Court in the case of *Jacob Mathew v State of Punjab* .[31] While reiterating the fact that the principle of *res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law, the Apex Court has held that it has limited application in trial on charges of criminal negligence. The Apex Court has also held that a case initiated for an offence under s 304A cannot be decided solely on the basis of this rule.[32]

Where the prosecution witnesses deposed that the appellant accused was driving truck at a very high speed, even one PW deposed that the accused was driving truck2583 like an aeroplane, more than fifty persons were occupants in the truck, appellant accused was convicted under s 304A, IPC .[33]
Eye-witnesses deposed that the accident was due to rash and negligent driving of the truck, the truck dashed against the scooter causing the death of two brothers. The conviction of the accused under ss 279 and 304A, IPC was held proper.[34] The accused driver driving tanker in rash and negligent manner dashed against the car of the complainant, caused the death of the wife of the complainant. The manner in which the accident took place showed that the accident was due to negligence of the driver. Conviction of the accused for offence under s 304A, IPC was held proper.[35]

Where the matador being driven by the accused came at high speed and hit the deceased, and went off the road breaking down the fencing of the roadside plantation and got stuck in the ditch. In the absence of any explanation from the accused as to how it all happened, the maxim *res ipsa loquitur* (the facts speak for themselves) is liable to be invoked and it can safely be concluded that the incident took place as a result of rash and negligent driving of the vehicle.[36] When in addition to the deposition of witness, the material relating to the rule of *res ipsa loquitur* is available in the case, the rule should apply.[37] Extending illegal connection over a length of 2200 feet through standing trees is *per se* culpable negligence on the part of the doer, making him liable under s 304A where any person dies of shock from such live energised wire.[38] Even if there is no oral evidence of rash and negligent driving of the bus by the accused, but the fact that the accused was driving the bus on the wrong side of the road at a high speed proves rash and negligent driving by the accused. Accused appellant was convicted under ss 279 and 304A, IPC .[39]

Where the accused driver of the bus in the process of overtaking the bullock cart dashed against the motorcycle coming from the opposite side, the pillion rider of the motorcycle injured in the accident was the best witness about the incident. The accused driver of the bus dragged the motorcycle for about 20 feet and stopped the vehicle on the footpath on the western side of the road. Held, the accused driver of the bus was guilty of rash and negligent driving of the bus. He was convicted under ss 279, 338 and 304A, IPC .[40]

Where the accused driving a bus at a fast speed struck against the deceased at green signal held it was sufficient proof that the accused was driving the bus rashly and negligently.[41]

27. Dragging Marks/skid Marks on Road--Absence of

Absence of dragging marks/skid marks on the road are not always or invariably necessary to prove rashness/negligence of the driver of the offending vehicle.[42]2584

28. Poor Maintenance of Vehicle

The accused appellant by rash and negligent driving of scooter had caused serious injuries to a four years old boy. The appellant had taken plea that the accident had occurred as tyre of the scooter had bursted.

Poor maintenance of the vehicle is itself a negligent act as it speaks of 'absence of care' so far as the vehicle is concerned. Accused appellant was convicted under s 279 / 304A .[43]

29. Mechanical Defect in Vehicle

Where the evidence established that the accident by a Road Transport Corporation bus occurred due to mechanical defect in the bus, the accused driver of the bus was acquitted of the charges under ss 279 and 304A, IPC .[44]

30. Direct Nexus between Victim's Death and Rash or Negligent Act of the Accused

There can be no general presumption that a person should have driven a motor vehicle in a rash and negligent manner, merely because there was an accident.[45] The requirement of s 304A, IPC is that the death of any person must have been caused by doing any rash or negligent act. In other words, there must be a proof that the rash and negligent act of the accused was the proximate cause of death. There must be a direct nexus between the death of the persons and the rash or negligent act of the accused.[46]The act causing the death must be the *causa causans*, it is not enough that it may have been the *causa sine qua non*,[47] the death must be the direct result of rash and negligent act of the accused and that act must be the proximate and affluent cause without the intervention of another's negligence, and it must be the *causa causans*; it is enough that it may have been the *causa sine qua non*.[48] Where the cause of the deceased's fall from the running bus was not proved, the accused was acquitted under ss 279 / 304A, IPC .[49] The requirement is that the death of any person must have been caused by the accused by any rash or negligent act. In other words, there must be proof that the rash or negligent act of the accused was the proximate cause of death. There must be a direct nexus between the death of the person and the rash and negligent act of the accused.[50]Where electrocution of boy coming in contact with extra high tension line happened and the accused were employees of KPTCL, the high tension wire transmission lines were drawn much before they entered into service and much prior to the construction of building in question and a disclaimer had also been issued by KPTCL, but the local municipal authority was at fault for issuing licence for construction of said building, and there was no direct nexus between death of boy and alleged act of negligence of the accused, the accused cannot be held negligent and proceedings under s 304A were quashed.[51]2585

31. Degree of Rashness or Negligence Required

Merely because the witnesses did not use the words rashness or negligent in his testimony and instead used the words high speed, cannot be taken that the accused was not driving the vehicle in a rash or negligent manner, what is important is to find out if the driver of the offending vehicle was driving in public place rashly and in negligent manner so as to endanger human life or to be likely to cause hurt or death to any other person.[52]

The question of speed, in each case under s 304A, IPC, has to be decided and considered after considering various facts and circumstances of the case. For instance, in a crowded and busy road in a town or city, even if the speed of the vehicle may not be much, still he has to drive it cautiously and carefully at slow speed to arrest any accident. If, in such a case, an accident is caused on account of rash or negligent driving of the driver, he cannot be permitted to take the only plea that he was driving the vehicle slowly and, therefore, he is not liable. Similarly, speed, though a very material and important factor, would always depend on the facts of each case.[53] For an offence under this section, the degree of rashness or negligence must be higher than what is necessary to establish civil liability.[54] The degree of rashness and negligence on the part of the accused, required to be proved in criminal cases, should be of such a nature that an inference about the commission of a crime may safely be made against him.

Simple lack of care, which may give rise to a civil liability will not be enough for the purpose of establishing the offence under this section.[55] The rashness or negligence to be established must be more than error of judgment.[56] Though the gravamen of the offence consists in the conduct of the accused being rash or

negligent, yet the degree of rashness or negligence will have to be proved which will make it safe for the court to infer that the conduct of the accused which is complained of, is a crime.[57] In *Public Prosecutor v Pitchaiah Moopanar* ,[58] the accused, who was the manager of a school, got a building constructed by masons. As excessive sand was put in the mortar, the building collapsed killing 35 girl students. The accused, being not responsible for the negligence of the masons, was not held guilty under this section.

32. Accidents on account of Mechanical defect in the Vehicle

Commentary under same heading in s 279, *ante*, Vol. 2, may be referred to.

If the accident is due to any weak point in the hitch assembly of the trailer, no negligence can be attributed to the accused.[59] When there is an accident owing to2586 failure of foot-brake, the driver cannot be held guilty for rash and negligent driving.[60] Similarly, when on account of sudden burst of tyre of the motor vehicle, the driver is unable to control the vehicle or to avoid an accident, he cannot be held guilty for rash and negligent driving.

Where the evidence led by the prosecution as well as by the defence clearly shows that the accident had taken place because of a mechanical defect mainly and that the steering of the bus had got locked, at the time when it met with the accident with the motorcyclist, the accused is entitled to be acquitted.[61] Where the steering wheel of offending vehicle was broken all of a sudden which resulted into an accident causing death of a person, the mechanic stated that it was not possible to control tractor with such steering wheel, so, it can be said that incident was merely an accident and the accused cannot be held guilty of rash and negligent driving.[62]

33. Relationship between speed, Rashness and Negligence

Where there is no speed limits, prescribed by law, the vehicle should be driven only at a reasonable speed,[63] and particularly the act of entering the cross-roads at a speed at which it is not possible for the driver to control the vehicle, would lead to an inference of rash and negligent driving.[64] Where the accused, who was driving a lorry at high speed in order to keep pace with a train running parallel to the road, suddenly swerved to the right, to avoid collision with an approaching bullock-cart, and overturned the lorry, with the result that two persons were killed, it was held that the accident was due to negligent conduct of the accused in concentrating his attention on the train, and not keeping a sharp look on the traffic on the road, and, therefore, he was guilty under this section.[65] In Re *Sundaram Pillai,*[66] the accused, the driver of an express bus, was coming fast from east to west, dashed against the deceased who was riding a bicycle in the same direction ahead of the bus on the south side of the road. The evidence was that the bus was coming in the centre of the road and overtaking sheep and carts on their south. In the circumstances, it was found that there was a very high degree of rashness or negligence on the part of the accused and his conviction and sentence under the section was maintained.

34. Slow and Fast Speed--Depends upon Individual Motions

Commentary under same heading in s 279A, *ante*, Vol. 2, may be referred to.

35. Speed alone not the test of Rashness and Negligence--Real test Indicated

Commentary under same heading in s 279A, *ante*, Vol. 2, may be referred to.

Rashness or negligence are not dependent on the speed of the vehicle. The speed of the vehicle is only one of the several other factors which determine whether the act is2587 rash or negligent. Negligence is the absence of due care and caution, whereas culpable rashness results from lack of circumspection.[67]

36. Speed of opposite coming Vehicle

It is also not possible for the occupants of the jeep to observe the speed of the vehicle coming from opposite, especially during night time. At best he can say the speed of the jeep in which he was travelling, but not the speed of the vehicle coming in the opposite direction.[68]

37. Contributory Negligence[69]

The doctrine of contributory negligence, well known as a defence in the law of torts, has, as such, no place in criminal law,[70] though it may minimise damages in a civil case.[71] The fact that the victim has also contributed a little by his negligence, is absolutely immaterial where there is ample proof that the accused brought about the accident by his own negligent and rash driving.[72] In criminal jurisprudence, if the victim has also contributed to the causation of the accident by contributory negligence and in the absence of any material to show that only on account of rash and negligent driving of the accused driver that the accident occurred, it would not be permissible under such circumstances to hold the accused driver guilty of committing an offence under ss 279 and 304A, IPC, since contributory negligence of the victim affords as intervening circumstances, i.e., without the intervening circumstance, the accident could not have happened. A boatman, who carried passengers beyond his boat's capacity, as a result of which the boat capsizes and some passengers are drowned, cannot plead, in defence, the contributory negligence of the passengers.[73] A driver of a motor vehicle, who is himself negligent, cannot plead, in defence, the negligence of a pedestrian whom he knocked down unconscious and killed.[74] Where the driver of a truck observes a car approaching at high speed, he should, as a matter of prudence and caution, slow down. If he does not do so and an accident occurs, he would be held liable inspite of the contributory negligence of the driver of the car.[75] The negligence of the victim may, thus be relevant in deciding whether the negligence of the accused was the direct and efficient cause of the death, though it is no defence to the case against him. The car should always be kept in a state of2588 control, sufficient to enable the driver to avoid running into any passenger who may fail to stop, off the road, however annoying the dilatoriness of the foot passenger may be to the driver.[76] The crucial question, on which liability depends, is whether either party could, by the exercise of reasonable care, have avoided the consequences of the other's negligence. If he could, then that party is legally responsible for the accident.[77] In *Sheo Kumar v State of Madhya Pradesh* ,[78] the deceased girl crossed three-fourths of the road and then, instead of proceeding further and crossing the road in full, turned back. Seeing this, the truck driver had to take a turn to the extreme right. In doing so, the victim's legs were crushed and she died. As the girl did not follow the rule of the road, the driver of the truck was held not guilty.

38. Composite Negligence and Contributory Negligence--Distinction

The law keeps a clear distinction between cases of composite negligence and contributory negligence. In cases of composite negligence, the drivers of both the vehicles would be guilty of rash and negligent driving, whereas in a case of contributory negligence, no penal liability can be fastened on the accused/driver, obviously, for the reason that but for the contributory negligence, the accident could not have occurred.[79] Due to rash and negligent driving of cart, the deceased child came under the wheel of the cart, was crushed. Three carts were involved in the accident. As the case was of contributory negligence, sentence was reduced to the period already undergone.[80]

39. Accident of Heavy Vehicle with Light Vehicle

Merely because the jeep driver died in the accident, with the bus which is a heavy vehicle when compared to the jeep, it cannot be said that the accident took place on account of the negligent act of driver of bus. Only because more damages were caused to the jeep, it cannot be inferred from that circumstance that the bus driver went at a high speed and hit the jeep. In fact the said damages indicate that the jeep driver went at a high speed and hit the bus and, therefore, there was extensive damage to the jeep and not to the bus.[81]

40. Person Suddenly Crossing a Road

If a person suddenly crosses a road without taking note of the approaching vehicle, there is every

possibility of his dashing against the oncoming vehicle without the driver becoming aware of his crossing, till it is too late. If a person suddenly crosses the road, the driver, however slowly he may be driving, may not be in a position to save the accident.[82] Where the deceased alighted from the jeep and was impatient to get to the other side of the road and made his way across the highway regardless of oncoming vehicles and there was every possibility that he was the main contributory2589 to the accident resulting in his death, the accused was acquitted for the offence under ss 279 and 304A, IPC, which was found proper.[83] A lady passenger getting down from another truck and coming under rear wheel of truck, driven by accused while crossing the road does not prove the guilt of the accused. If a person suddenly crosses road on highway, driver of vehicle would not be in position to save accident and it cannot be said that driver was negligent.[84]

While the truck was going on the main thoroughfare from south to north, the ill-fated young girl was crossing the road from east to west and she had already covered 35 ft. of the road. There was sufficient time and margin for the driver to see that the young child was crossing the road and he could have applied brakes instead of knocking down the girl only 17 ft. away from the kerb. Appellant accused was convicted of charge under ss 279 and 304A, IPC .[85]

41. Accidents on Highway

The situation that prevails in the open highways is slightly different to the one that the court would take into account had the incident taken place within the city limits. One needs to take into account the factor that on the highway, the vehicle would legitimately be moving at a relatively high speed. The more important aspect is that on the highway the vehicles have a right of way and if a person desires to cross the highway, the rules of the road require that the person would have to wait until the traffic has passed and only then embark on crossing the highway. It is a very familiar error committed by pedestrians even on the national highways that they saunter on to the road regardless of the movement of the traffic and if a person does a suicidal act of this type, then it would be impermissible for a court in situation of this type to hold the driver of the vehicle responsible for the consequences of the act.[86]

42. Automobile Accidents

A person, driving a truck with defective brakes, while in a drowsy condition, would be liable under this section if an accident occurs.[87]If a driver drives a vehicle with its hand brake disconnected and foot-brake poorly functioning, and an accident occurs in which a person meets his death, the driver will be guilty of a rash and negligent act.[88] A person driving rashly, relying upon his brakes, does an act which might bring him within the provisions of this section will be guilty of a rash and negligent act.[89] However, when there is an accident owing to the failure of foot-brake, the driver cannot be held guilty for rash and negligent driving.[90] If a driver is driving his vehicle at a high speed and death is caused, it does not make him guilty under s 304A, unless rashness or negligence of the driver is established.[91] The mere fact that the car was driven on the wrong side of the road, is no proof of negligence on the2590 part of the driver.[1] Similarly, negligence on the part of the driver cannot be presumed by the mere fact that a pedestrian is knocked down and killed by a motorist.[2] If there is an accident because of the negligence of the gateman in keeping the gate open and inviting the vehicles to pass, the driver of the bus cannot be held guilty of negligence under this section.[3] Where the truck driver, while driving his truck through a *bazar*, swerved to the right in order to save a girl crossing the road but the girl was hit by the rear side of the truck and died as a result, it was held that having seen the girl safely crossing the road, it was no part of his duty to look backward to see if the truck was likely to hit the girl, and therefore, he was not guilty of rashness or negligence.[4]

The expression "high speed" is an unambiguous/unclear expression. There must be prosecution evidence that the accused was driving the vehicle in rash and negligent manner.[5]

Overloading of 60-65 people in the truck like folder contributes to the negligence of the accused driver. In the present case the truck had turned turtle, causing injuries to several persons and death of three persons on the spot. The appellant accused driver was convicted under ss 279, 304A and 338, IPC .[6]

43. Railway Accidents

Where a railway guard omitted to give to the engine-driver, the required signal to sound the whistle before starting the engine and the driver started the engine without sounding the whistle, with the result that a boy was run over and killed, it was held that the death was caused by the negligent act of the guard and he was liable under this section.[7] In *Empress v Nand Kishore* ,[8] the accused, a railway servant, entrusted with moving trucks down an incline, neglected to uncouple and move the trucks singly, thereby, disobeying official instructions, with the result that the trucks got out of control and a coolie who tried to stop them under instructions of the accused was run over and killed. It was held that the accused was guilty under this section as the death was caused by his negligence. In *Tapti Prasad v Emperor* ,[9] the accused, a station master, gave the line clear to an incoming passenger train knowing that at the time there was a goods train standing on the line with the result that there was a collision attended by loss of life. It was held that the loss of life was due to that rash and negligent act of the accused and he was, therefore, guilty under this section.

44. Shooting Accidents

If a person, in his zeal to try his hand at shooting, fires a gun, in a jungle at a late hour of the night at a place where no human being can be suspected to be present, at2591 what he considers to be an animal, he cannot be held guilty of a rash or negligent act within the meaning of this section.[10] Where, in a dark night in a cremation ground, the accused believed a man to be a ghost, inflicted injuries which caused his death, it was held that he was not liable under this section as he had no reason to think that a human being would arrive on the scene at such a time and place and that he probably thought that a ghost had actually appeared.[11]

In Re *Samuel*,[12] an armed reserve police officer, trained in shooting, was shooting birds with a rifle near a police station. Unfortunately, the bullet missed the bird and ricocheted from the water surface and hit a constable in the police station who died of the injury. It was held that this ricocheting was a sheer unforeseen accident and even though it was irregular for the officer to use a rifle for hunting, he could not be said to have committed the offence under the section. Where the accused desiring to show hospitality to a *mahant* (the head of a religious order), who had visited him (i.e., the accused), and requested him (i.e., the *mahant*) to stay over and on the *mahant*'s insisting to go away, pulled, in a state of intoxication, the trigger of his gun, without aiming, the *mahant* was hit and killed, it was held that the accused was guilty of an offence under this section.[13] In *Ram Das v State* [14] the accused, a man of ordinary prudence or caution, removed the magazine from the rifle, proceeded to witness a nautch, viewed by an assembly of 300 to 400 persons, and sat down with his rifle resting on his knees pointing towards the deceased. When the accused sat down in the assemblage, he had the belief that the chamber of the rifle was no longer loaded.

Unfortunately, a cartridge still remained lodged inadvertently in the chamber of the rifle. When the accused was lifting his towel for wiping his face, the trigger was inadvertently touched and the rifle fired causing the death of the deceased. In these circumstances, it was held that because the accused acted as a man of ordinary prudence and there was no evidence to show that he knew that the chamber of the rifle was loaded and that he never intended to move the trigger, the case was not covered by s 304A . In *Hiralal v State of Madhya Pradesh* ,[15] the accused, who was a forest guard, while on duty, saw some thieves stealing forest produce. In an attempt to apprehend the running thieves the forest guard shot at them resulting in their death, it was held that the accused's act of shooting, in the manner in which it hit the victim in his back, causing his death, was undoubtedly a rash act which satisfied the ingredients of s 304A, IPC, and not of culpable homicide amounting to murder.

45. Electrocution

There was a coconut tree which was standing between the electric lines. Due to constant rubbing of the trunk of the coconut tree, the aluminium wire snapped and fell on the ground causing the death of two minor school going children. The petitioners, Overseer and the Assistant Lineman of the Major Section of

the2592 Electricity Department were found grossly negligent, hence were convicted under s 304A, IPC .[16]

46. Drowning cases

In the instant case school boys and girls of a school who had come on picnic decided to have bath in the river. The accused members of the staff who had accompanied the students before hand inspected the water level, to ascertain whether it was safe for the children and earmarked a zone where children could play. Fourteen children entered the uncharted water and died. Held, there was no negligence on the part of the accused appellants, they were acquitted of the charge under s 304A, IPC .[17]

47. Ferryman's Rashness or Negligence

Where the lessee of a government ferry, having the exclusive right of conveying passengers across a certain river at a particular spot, allowed an unsound boat to be used at the ferry, in consequence of which the boat sank while crossing the river, and some of the persons in it were drowned, it was held that the lessee of the ferry was properly convicted of the offence provided for by this section.[18]A ferry contractor would be guilty under this section if he loses the risk and exposes lives of passengers by his rash or negligent act of putting the boat in the water when the river is in floods and there is every risk of the boat capsizing on account of the waves. 'Negligence of rashness will consist in taking the decision to ferry passengers inspite of the river being in floods.'[19] However, if there is loss of life owing to the sinking of a boat carrying passengers, the boat overturning owing to strong winds and rough water with high waves, the boat itself being not in an unseaworthy condition, the boatman cannot be convicted.[20]

48. Other Cases of Negligence

In the instant case the accused appellant had filled excess quantity of LPG gas in petromax, which on ignition in a hotel got burst and caused the death of an employee of the hotel. Accused was convicted under s 304A, IPC .[21]

49. Legal Position in the Context of Medical Profession

The Supreme Court in *Jacob Mathew v State of Punjab* ,[22] has elaborately discussed the circumstances under which doctors are liable for the offence under s 304A, IPC . The Supreme Court has summed up the conclusions, to say under what circumstances doctors would be liable for the offence under s 304A, which read as:[23]

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the2593 conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in *Ratanlal and DhirajlalLaw of Torts*, (edited by GP Singh J), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the

ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (i.e., the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in *Bolam*'s case [(1957) 1 WLR 582, p 586] holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea*must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher, *i.e.*, gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law, but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in s 304A of IPC, yet it is settled that in criminal law, negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in s 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses2594 and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law especially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining *per se* the liability for negligence within the domain of criminal law. *Res ipsa loquitur* has, if at all, a limited application in trial on a charge of criminal negligence.[24]

Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person prosecuted. The essential components of negligence are 'duty', 'breach' and 'resulting damage'. The deceased injured in his leg, was admitted in hospital for treatment, died for want of medical treatment. Doctor was guilty for negligence as in ordinary course injury sustained by the deceased would not have caused death.[25]

Rash and Negligence of Doctor(s) -- Patient Admitted in Private Hospital Died for want of Oxygen Cylinder

Even if it is found that the patient admitted died in a private hospital for want of oxygen cylinder, it does not make out a case of criminal rashness or negligence on the part of the accused appellant. It was not the case of the complainant that the accused appellant, was not a doctor qualified to treat the patient whom he agreed to treat. It was a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Held, the hospital may be liable in civil law (or may not be) but the accused appellant cannot be proceeded against under s 304A, IPC . Prosecution of the accused appellant under s 304A was quashed.[26]

A complaint for medical negligence of the accused doctor does not lie in the absence of expert opinion which speaks negligence of the doctor.[27]The negligence of the doctor should be gross negligence or carelessness. Mere inadvertence or some decree of want of adequate care and caution is not enough.[28]In case(s) of medical negligence proof of *mens rea* is not necessary.[29]

Medical Practitioner's Rashness or Negligence

It is a matter of common sense that a medical practitioner is not obliged and can never be expected to achieve success in all cases. This duty like other professionals is to exercise reasonable care, caution and skill. If he is found failing in exercise of such things, then obviously he is to be visited with legal consequences either under civil law or under criminal law. Even the best surgeon is likely to make honest errors in judgment. Therefore, what is required to be judged is causation nexus of injury with the action alleged to be negligent. A doctor can be found guilty only if he fails the2595 standard of reasonable skillful medical practice.[30] For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as 'gross negligence' or 'recklessness.' It is not merely lack of necessary care, attention and skill.[31] The principles laid down in the under mentioned authorities[32] show that the death of persons on the operation table is itself not sufficient to prove negligence against the doctor. The criminality lies in running the risk of doing such an act with recklessness and indifference to the consequences. In other words, a doctor is not criminally responsible for the patient's death, unless his negligence or incompetence showed such disregard for life and safety as to amount to a crime against the state.

There may be a few cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment which has never been tried before to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, the doctor cannot be held liable.[33].

A medical practitioner is not liable to be held negligent, simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable if he leaves a surgical gauze inside the patient after an operation,[34] or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade.[35]

There is a tendency to confuse a reasonable person with an error free person. An error of judgment may or may not be negligent. It depends on the nature of the error.[36]

It is not enough to show that there is a body of competent professional opinion which considers that the decision of the accused professional was a wrong decision, provided there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances.[37]

The standard of care has to be judged in the light of knowledge available at the time of the incident and not at the date of the trial. Also, where the charge of negligence is of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time.[38]2596

The higher the acuteness in an emergency and the higher the complication, the more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and has to choose the lesser evil. The doctor is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case but a doctor cannot be penalized if he adopts the former procedure, even if it results in a failure.[39]

Where the child fell from stairs of the school and sustained injuries on the forehead, and the child was taken to a school dispensary where the pharmacist only applied ice and ointment, and advised that nothing will happen and instructed to take the child home, on the *challan* being filed by the police after the

child succumbed to his injuries, the magistrate took cognizance of offences under ss 304, Pt II, 317 and 304A, IPC . The accused then approached the High Court under s 482, CrPC, for quashing cognizance of offences taken by the magistrate against them, observing that when the child was taken to the dispensary it was the duty of the pharmacist to either diagnose the injury correctly or advise for immediate check-up by an expert or doctor, in the absence of such advise, the headmaster or the class-teacher could not have realised the gravity of the injury, so, they could not be held responsible. Likewise, the order of the magistrate taking cognizance against the headmaster and class-teacher was quashed and not against the pharmacist.[40] Where the surgeon after operating patient declined/refused to examine patient post operation when he was informed about condition of patient, however, he examined patient next day and patient was again operated upon, it was not the case that he made any mistake either in first or second surgery and proximate cause of death was not failure to visit patient when he was informed about condition of patient, so, prosecution under s 304A was held liable to be quashed.[41]

In cases of medical negligence a private complaint should not be entertained unless the complainant has produced *prima facie* evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.[42]

In *ASV Narayan Rao v Ratnamala* ,[43] the appellant cardiologist had performed angioplasty and bypass surgery on the husband of the respondent, various complications developed and the husband of the respondent died. The respondent filed complaint against the appellant under s 304A, IPC, on which both the Magistrate and the High Court found *prime facie* case of negligence under s 304A, IPC against the appellant and summoned the appellant. The State Medical Council had opined that in the present case the doctors had done their best. In appeal, the Supreme Court took the view that it was not a case of gross negligence, and quashed the criminal proceedings against the respondent.2597

The accused staff nurse told the doctor that the snake bite injection was not available in the hospital, though it was available. The husband of the complainant died because of delay in giving injection to the deceased. The deceased was brought to the hospital after delay of two and half hours. There was no direct nexus between the negligent act of the accused and the death of the deceased. Accused was acquitted of the charge under s 304A, IPC .[44]

In *Juggan Khan v State of Madhya Pradesh* ,[45] the accused, a homoeopathic practitioner, administered 24 drops of stramonium and a leaf of *dhatura* to the deceased who died as a result thereof. It was held that it was a rash and negligent act to administer such poisonous drugs without studying their effect and the accused was, therefore, guilty of an offence under this section. The fact, that a person, totally ignorant of the science of medicine or practice of surgery, undertakes a treatment or performs an operation, is a materiel fact from which an inference of gross rashness and negligence in the treatment can be inferred. In *Khusaldas Pammandas v State of Madhya Pradesh* ,[46] a *hakim* (a unani medical practitioner), who had no knowledge of penicillin injection treatment, yet gave such an injection to a patient, as a result of which the patient died, was held guilty of the offence under this section. In *PN De'Souza v Emperor* ,[47] a doctor, incharge of a dispensary, carelessly mixed up bottles of poisonous drugs and administered them, without reading the labels on the bottles, with the result that several patients died. He was held guilty under this section. In *Ram Niwas v State of Uttar Pradesh* ,[48] the accused was not a qualified doctor and had administered injection to the deceased causing his death, there was no evidence that the accused gave any test-dose to the deceased before administering a full dose of injection, the accused was found guilty under s 304A, IPC . Omission on the part of the hospital authorities to provide ambulance service would not constitute medical negligence.[49]

In the family planning the deceased was injected with Alrophine and Fortwine injections by authorized nurse under the supervision of the qualified and skilled doctor. There was no gross negligence or negligence on the part of the doctor, the death of the deceased, was *vismajor*. Order of the Magistrate for framing charge under s 304A, IPC against the doctor was set aside.[50]

In case(s) of medical negligence, the investigating officer is not bound by the opinion expressed by the Expert Panel, Apex Body Committee. He is free to form his own independent opinion on the basis of the material and evidence of the case.[51]

In this case the wife of the complainant was patient of ovarian tumor. The accused doctor found operation necessary to save the life of the deceased. Even if the decision taken turns out wrong, the accused doctor cannot be prosecuted under s 304A, IPC for medical negligence.[52]A mere injury to leg would not in normal course cause2598 death, *prime facie* case of negligence due to secondary cause in providing treatment which was required has to be shown for prosecution under s 304A, IPC .[53]

The accused, a doctor having Ayurvedacharya Bachelor of Medicine and Surgery, had administered allopathic medicine, and the patient died. The trial court referred the medical reports of the treatment given by the accused doctor to a panel of specialists for opinion and report.[54]

Where the record of the hospital relating to the treatment given to the cyclist involved in accident was not produced, the medical officer was also not examined in the case, the prosecution failed to prove that the cyclist despite proper treatment died due to injuries recorded in the accident, the accused was convicted under ss 338 and 279, IPC and not under s 304A, IPC .[55]

In the instant case the respondent and team of doctors gave treatment to the deceased, but the deceased died. Held, the respondent and the team of doctors were negligent, but their negligence was not gross negligence, they could not be held guilty for commission of offence under s 304A, IPC .[56]

The deceased B had pain in his body hence was taken to the clinic of the appellant medical practitioner. The appellant administered three injections to the deceased B and the deceased died within half an hour. The illness of the deceased was not of such a nature that he could die during the treatment. *Prima facie* case of gross negligence was made out against the appellant for proceeding under s 304A, IPC . Process were issued against the appellant.[57]In another case the petitioner doctor made wrong diagnosis of the child, he diagnosed tuberculosis who died later on due to cancer. Held, it was a case of medical negligence to be decided upon the evidence to be adduced by the parties during the trial of the case. Proceedings under s 304A, IPC against the petitioner medical practitioner were not quashed.[58]

50. Accidental Killing

Where the accused kept a bottle of the 'Atlas Tree Killer' in his farm-shed and two of his farm servants, who thought the stuff to be arrack, drank it and died as a consequence, it was held that the accused could not be convicted under s 304A as the accused was protected by s 80 .[59] In *Janardan Prasad v State of Rajasthan* ,[60]it was observed that though it is unusual to expect death of another man when a person is cleaning a loaded revolver without a safety valve, yet when the accused happens to be a sub-inspector of police, it can safely be said that he must be aware of the dangerous character of a loaded revolver, having no safety catch attached, though the act itself may not be regarded of such a nature which must, in all probability, cause death. In this case, death resulted from the bullet of the revolver accidentally going2599 off while being cleaned by the accused i.e., the sub-inspector of police, and he was convicted under this section.

51. Poison Administered as Love Potion Causing Death

The mere administering of a love potion or drug, which a person thinks might be beneficial, is not, in itself, an offence. If what is administered turns out to be poison and causes death, the person, administering it, cannot be convicted of murder unless it is shown clearly and without possible doubt that his intention was to cause death or that he knew that death was likely to be caused. However, even though the person had neither the intention to cause death, nor the knowledge that his act was likely to cause death, yet if he was careless of the consequences of his act and administered the poison without due care and caution or any inquiry as to what it really was, he would be guilty of the offence under this section.[61] In *Empress v Bhakhan* ,[62] the facts were that the accused having an intrigue with a paramour, accepted poison from her paramour to administer it to her husband as a charm, with the result that death of the husband was caused by the substance administered to him, the substance being arsenic, though the accused did not know the substance given to her to be noxious till she had seen its effect. It was held that the offence, committed by the accused was punishable under s 304A, because her act did not amount to culpable homicide, but only a rash act, causing the death of her husband. It was further held that because the

accused knew that the substance came from her paramour and was to operate on her husband as a charm, it became her duty to ascertain whether it was innocuous before she administered it to him; culpability was imputable for the absence of that caution and circumspection which ought to have been exercised in ordinary prudence under the circumstances stated.

52. 'Act Not Amounting to Culpable Homicide'

This section is directed to offences outside the range of ss 299 and 300, IPC, and therefore, contemplates cases, into which neither intention, nor knowledge of the kind, mentioned in the said sections, enters. Violence, directly and wilfully caused, is, thus, excluded. The section does not say that every unjustifiable or inexcusable act of killing shall be punishable. It specifically and in terms limits itself to those rash or negligent acts, which cause death but fall short of culpable homicide of either description. Cases of direct violence, wilfully inflicted, cannot, therefore, be regarded as either rash or negligent acts.[63]It has, therefore, no application to cases where death has been caused by an act which was intended to cause hurt.[64] When death is caused2600 to a person other than the one whose death was intended, the offence committed is murder under s 300 read with s 301, and not under s 304A .[65]

53. Other Cases of Negligence

The hand of the victim was crushed while he was repairing conveyor belt. No negligence or overt act was attributed to the petitioner. It was also not the case that the petitioner had not taken care/steps against the probable danger. No case under s 287 or s 304A, IPC against the petitioner was made out.[66]

54. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class. The offence under s 304A is punishable with imprisonment or a term not exceeding two years or with fine or both. The period of limitation for taking cognizance of this offence would be three years in view of s 468, CrPC (2 of 1974).[67] Quick justice is *sine qua non* of art 21 of the Constitution . The delay of 9½ years for taking cognizance vitiates the trial. Keeping a person in suspended animation for 9½ years without any cause cannot be in spirit of the procedure established by law. Even Regulation 32 of the Assam Frontier (Administration of Justice) Regulation 1945 does not save the vitiation of the trial.[68]

Offences punishable under ss 279 and 304A are not mentioned in the two tables of s 320, CrPC, the offences are not compoundable.[69]

55. Sanction under Section 197 , CrPC

Where the accused was on duty as an emergency medical officer on call, previous sanction in terms of s 197 of CrPC is necessary in the absence of which the order framing charge and taking cognizance under s 304A, IPC is liable to be set aside.[70]

Where the death of the victim was caused by the accused, a public servant, by negligence, if no offence was made out, the question of taking cognizance even without sanction under s 197, CrPC,[71] would not arise. If there was, however, negligence, the question whether the acts or omissions of the accused constituted criminal negligence is to be considered, if sanction is accorded as set out in s 197, CrPC .[72]

56. Charge

Framing a formal charge is not necessary, the offence under this section being triable as a summons case (s 221, CrPC). Where the accused is charged with the offence under s 302 or s 304, IPC, it is not possible to enter into a conviction under2601 s 304A, IPC without a charge under that section. Section 22 , CrPC, cannot be attracted because s 304A is not a minor offence constituting only some of the several particulars of the major offence punishable under the second part of s 304 . Both are independent and mutually exclusive offences. Even s 221, CrPC is not attracted.[73]

Where the fire in Delhi Vidyut Board's transformer spread upto the parked vehicles outside the cinema hall and emitted thick smoke and toxic gases resulting in entrapment and asphyxiation of patrons in the balcony of the cinema hall, the fire in the transformer alone was not found to be *causa causans* for the death, but the absence of rapid, dispersal facilities, the various acts of omission and commission, the violation of rules and bye-laws meant for safety of the public were other causes contributing to the tragedy in equal proportion, the accused persons who were found to be incharge of looking after the cinema hall on behalf of the owner/occupier were held rightly charged under ss 304A, 337, 338, IPC, and s 14 of Cinematography Act.[74]

57. Notice under Section 251 , CrPC

In a prosecution of an offence under this section, the following form of the notice under s 251, CrPC, may be adopted:

> I (*name and office of the magistrate etc*) hereby give notice to you (*name, father's name & address of accused*) as follows:
>
> That on or about the..... day of..... at..... (*give particular of place of incident*), you while driving the vehicle no. ..... make ..... in a rash or negligent manner caused the death of Mr. ..... not amounting to culpable homicide and thereby committed an offence punishable under section 304A of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried for the said offence.

58. Plea of Guilty

Where on the plea of guilty the accused was convicted under s 304A, IPC, by the trial court and sentenced to undergo rigorous imprisonment for one month and pay a fine of rupees one thousand, and in the appeal filed by the accused before the sessions court, the conviction was maintained, but the sentence catered to payment of fine of Rs 2500 instead of Rs 1000 and the sentence of imprisonment was set aside, in the appeal filed by the state against inadequacy of sentence, the High Court set aside the conviction and sentence of the accused on account of the existence of element of plea bargaining, and remanded the matter for the trial court to record the plea of the accused afresh and defend himself against the charge.[75] The statement made by the accused motor driver with the reservation that the accident was due to the failure of brakes may not be regarded as a plea of guilty. Hence, the conviction and sentence based on such plea of the accused was liable to be set aside and the accused was entitled to a retrial under s 304A, IPC, according to law.[76]2602

59. Can Accused Charged under Section 302 or Section 304 be convicted under Section 304A

There is no legal impediment in convicting an accused under s 304A, IPC who is charged with ss 302 or 304, IPC and no separate charge under s 304A has been framed against him.[77] However, a contrary view is taken by the Kerala High Court in a case,[78] wherein it was held that an accused charged under s 302 or 304 cannot be convicted under s 304A, IPC .

60. Importance of Circumstantial Evidence

In accident cases it is too much to expect oral evidence to prove the rash and negligent driving as accidents take place within fraction of seconds and it may not be possible for any witness to speak about the exact manner in which the accident took place. Therefore, it is only the circumstantial evidence which is very important to come to a conclusion as to how the accident took place, and whether there was any rash and negligent driving on the part of the driver of the vehicle. More so, in accidents of head-on-collision involving two vehicles where it is to be decided as to which driver was responsible for the accident or if both the drivers were responsible.[79]

61. Proof

To establish an offence under this section, the prosecution must prove that:

(i) there was the death of the person in question;
(ii) the accused caused the said death;[80] and
(iii) the act of the accused, causing the death, was rash or negligent, but it did not amount to culpable homicide.

As in any criminal case, in a case under s 304A also, the prosecution must establish the guilt of the accused beyond reasonable doubt. The mere fact that the motor cycle leaves the road and hits against a milestone, would not be presumptive proof of rash or negligent driving requiring an accused to prove the contrary. The prosecution must stand on its own legs rather than take advantage of the weakness of the accused.[81] The accused may refuse to enter any plea; he may refuse to given an explanation, and he may refuse to examine any witnesses on his behalf. Still none of these facts can be taken into consideration to assess the guilt of the accused. The burden of proof, in a criminal case, never shifts and it is on the prosecution to prove its case. Explanation of an accused, to the plea entered by him or the evidence adduced by him, may succeed in making the case of the prosecution somewhat doubtful, and to that extent the plea or the explanation or the evidence may be taken into account by the court.[82] Similarly, the onus of an accused, if any, in a criminal case, is discharged on the theory of balance of2603 probabilities.[83]However, the prosecution must establish that the accused went beyond mere carelessness and that death of the person involved was the direct result of rash or negligently act of the accused without intervention of another's negligence.[84]

It must be proved that the driver was driving rashly or negligently.[85] There can be no burden on an accused to prove that he was not driving the vehicle in a rash or negligent manner.[86] In the case of death by rash or negligent driving, the prosecution has to prove, beyond reasonable doubt, that the accused acted with the consciousness that death or other evil consequences were likely to follow.[87] Failure to do so should result in acquittal of the accused.[88] In *Baijnath Singh v State of Bihar* ,[89] a number of corrugated iron sheets loaded on the roof of a bus, jerked and fell down, on a *kachcha* road, thereby injuring some persons including the one who died. The prosecution did not care to find out who had loaded the iron sheets. It was held that unless the driver could be held to be entirely responsible for loading the iron sheets and putting them in a negligent manner or not tying them properly, it was difficult to sustain his conviction either under this section or under s 279, IPC . An accident, merely due to an error of judgment of the driver, or without anything to show that he was conscious of the risk that evil consequences will follow or that his rash driving was of such a degree that injury was most likely to be occasioned thereby, would not make the driver criminally liable for an offence either under s 279, of under s 304A . If there is hardly any evidence against the accused, to the offence that he was rash and negligent in driving the vehicle at the relevant time, he cannot be convicted under s 304A .[90]

In order to maintain a conviction under s 304A, IPC, the prosecution must, therefore, establish, beyond reasonable doubt, that death of the deceased was due to the rash or negligent act of the accused.[91] If a driver is driving at high speed and death is caused, it does not make him guilty under s 304A, unless

rashness or negligence is proved.[92] In the absence of any satisfactory and convincing proof regarding the rashness or negligence of the driver of the vehicle, the mere fact, that an accident had occurred, is not sufficient to hold the driver guilty of an offence under s 304A .[93] If the prosecution does not discharge its burden beyond a reasonable doubt, the benefit of doubt should go to the accused.[94]

Where the deceased climbed to get into a moving truck from the back side, over which the accused, i.e., the driver of the truck could not have held watch, but the deceased instead fell down and died, it was held that the accused could not be held guilty of an offence under s 304A, IPC . It was the deceased himself who was rash and negligent in trying to get into the moving vehicle.[95] Where the prosecution neither2604 proved the cause of death of the deceased nor examined any doctor to prove the nature of injuries sustained by the victim, the conviction of the accused under s 304A and s 279 was not found proper.[1] Prosecution case was that the accused driving goods truck in rash and negligent manner dashed against Tata Sumo which was coming from opposite direction. All the PWS were sitting in the rear seats of the Tata Sumo as such they had no opportunity to see the driver of the offending vehicle. The witnesses did not depose before the court that they saw the face of the driver of the offending vehicle. The identity/identification of the accused was not proved beyond reasonable doubt. The accused were acquitted of the charge under ss 279, 337 and 304A, IPC .[2]

Accused driver of a canter was prosecuted on allegations that while driving rashly and negligent he dashed against the two girls, caused the death of one and injuries to another. If the accused is not known to the witness previously and he is identified in the court for the first time then it becomes a question of fact whether reliance is to be placed upon that evidence or not. In the instant case there was evidence of PW1 that the accused alighted from the canter and came to them and disclosed his name, parentage and address and it was only thereafter that he had escaped from the spot leaving behind the canter. Thus, the complainant interacted with the accused and had sufficient opportunity to note his distinctive features which made the basis of identification of the accused by him in the court. There was nothing on the record to disbelieve that part of the testimony of the complainant. The accident had occurred in the day at 10:15 AM. The identification of the accused was found reliable. He was convicted under ss 279 and 304, IPC .[3]

Prosecution case was that the accused was driving a truck at a very fast speed dashed against the deceased from behind, causing his death. There was evidence of one witness who was also not cross-examined, there was no other evidence showing the speed of the truck at the time of the accident. Accused was acquitted of the charges under ss 279 and 304A, IPC .[4]Accused appellant, driver of a van, attempted to overtake the car had hit the scooter, had caused the death of the deceased rider and injuries to the pillion rider of the scooter. The name of the accused was not mentioned in the FIR. He was arrested after one month of the accident. Identifying witness had only a glimpse of the driver of the vehicle. There was no interaction between identifying witness and the driver of the vehicle at the spot for a sufficient longer period. In these circumstances, the identification of the accused for the first time, after six years, in the court, in the absence of any test identification parade, during the course of investigation was held not be said to be sufficient to connect him with the present case. Accused was acquitted of the charges under ss 279 and 304A, IPC .[5]

The eye-witness occupant of the same vehicle stated before the court that the appellant accused driver of the vehicle was driving the vehicle at a very high speed, the road was quite wide and there was no traffic at that time. RTO (PW) deposed that the accident was not due to mechanical defect in the vehicle. Appellant accused was convicted under s 304A, IPC .[6]2605

About 10-15 persons had gathered on the spot at the time of the accident, two of them were examined by the prosecution. One witness deposed that he came to know from the mob assembled on the spot that the accused was driving the offending vehicle, another witness deposed that on the next day of the accident he came to know that the accused was driving the vehicle. The identity of the accused driver was not proved beyond reasonable doubt. He was given benefit of doubt and acquitted of the charge under ss 279 and 304A, IPC .[7]

62. Panchnama

Panchnama is not substantive evidence and without there being evidence in court the contents of *panchnama* cannot be relied upon and that the contents can be used only to corroborate the oral testimony given in the court.[8] In a case under s 304A, ordinarily the *panchnama* of the scene of offence which is recorded soon after the occurrence, assumes importance because it gives the various relevant positions wherefore certain inferences can be drawn for or against the accused. It cannot be said that a document of this nature requires merely a formal proof and can be read in evidence on the establishment of the fact that such a *panchnama* of the scene of the offence was, in fact, recorded. *Panchnama* of this nature being significant in a trial for an offence under s 304A, it is highly desirable that the prosecution should examine a least one of the *panches* to prove the contents of the *panchnama*. If none of the *panches* are examined in court, the prosecution is bound to disclose reasons for not doing so.

If the investigating officer, who has recorded the *panchnama*, merely states in the witness-box that he prepared the *panchnama* and the same is produced in court and does not even state that the contents of the *panchnama* are correctly recorded,[9] it cannot be said that the *panchnama* has been proved and should, therefore, be read in evidence. Mere marking of *panchnama* is not sufficient, the contents of *panchnama* are to be brought on record through the mediators or through the investigating officer through whom the *panchnama* is marked.[10]

63. Inspection of Vehicle by an Expert

Ordinarily, whenever a vehicle is inspected by an expert, after the accident, to find out the condition of the vehicle, he should state his qualifications, his experience, his duties or the capacity in which he inspected the same, so that the court may be in a position to place reliance on the testimony of such a witness. In the absence of such material piece of evidence, his testimony cannot be safely relied upon.[11]

64. Non-examination of Motor Vehicle Inspector

It is to be seen despite the fact the vehicle was coming from the wrong side, whether there was any mechanical defect in the vehicle has to be ascertained as there would have been possibility of the accused losing control over the vehicle at the time of the alleged accident either due to failure of the brake or any other reason. In this regard, it has to be ascertained by securing the report of the motor vehicles inspector and2606 marking the same to know exactly as to whether there was any mechanical defect and if need be, to examine the inspector of motor vehicles who has inspected the vehicle.[12] When occurrence did not take place on account of mechanical defect of vehicle, non-examination of motor vehicle inspector would not prejudice the accused.[13] When the motor vehicles inspector's report is marked as an exhibit without any protest from or with the consent of the defence, it is not necessary to call upon the prosecution to examine the motor vehicles inspector to prove his report.[14] However, when there are no eyewitnesses and if the motor vehicles inspector's report is marked inspite of protest by the defence, it is fatal to the prosecution's case.[15] When the opinion of the motor vehicle inspector that the accident did not occur because of mechanical defect and was a circumstance appearing in evidence against the accused, but while examining the accused under s 213, CrPC, the motor vehicles inspector's report was not put to him to seek his explanation, the conviction of accused is liable to be set aside and inevitable course in a situation like this is to remit the case to the magistrate for re-examining the accused afresh under s 313, CrPC .[16]

65. Non-examination of Doctors Conducting Post-mortem Examination

In the absence of examination by the doctor who performed the postmortem examination on the dead body, the cause of death of the deceased will remain unproved.[17]Due to non-examination by the doctor as to the nature of injuries, the time and cause of death remain obscure so it cannot be said that the deceased died due to the rash and negligent act of the accused.[18] In such a case, the case should not be remanded while deciding criminal revision when the accused has faced trial before the magistrate for 4 years and after his conviction, remained in appeal before the sessions court for over 3 years, and it would not be justified that the accused be troubled over and again after 8 years.[19]

66. Examination of the Accused

Examination of the accused under s 313 of the CrPC after the closure of prosecution evidence and before he is called on for his defence is a very important step in a criminal trial. This examination is not an empty formality. The underlying object behind this provision is to enable the accused to explain any circumstance appearing in evidence against him. This important step in the trial is based on the maxim *audi alteram partem*, *ie*, hear the other side or hear both sides, an injunction which means that no man shall be condemned unheard. Therefore, a duty is cast upon the court conducting the trial to formulate questions in such a way that the accused can understand from such questions what adverse material in evidence he is required to explain. There is no need to formulate separate questions for the evidence of each witness. If an inculpatory material is spoken to by more than one witness, question formulated with regard to that material may mention which of the witnesses have2607 spoken to about that material factor. Where a question is a combination of different materials in evidence, there is possibility of the accused being confused about the material which he is required to explain. In that event, if by such omnibus question, the accused has been prejudiced, the trial may be vitiated from that stage. Therefore a trial court shall, while examining the accused under s 313 of the CrPC, avoid stringing together several circumstances into one question and seeking explanation of the accused to such common question. It may also be borne in mind that whatever may be the number of accused persons, each and every accused must be examined separately and distinctly. The answers given by the accused shall not be scribbled, since answers which may be given by an accused in his examination under s 313 of the CrPC may throw light on the question of guilt or otherwise of the accused and in some cases, the truth may be crystallized by such answer. Answers so recorded shall be legible and in understandable handwriting.[20]

67. Defence of Accused

Where the accused has taken a positive defence that he was not driving the truck at the time of the incident, it was necessary for the prosecution to prove by direct evidence that the accused was in fact driving the truck at the time of the incident in question, the mere statement of the owner of the truck that the accused was employed by him as a driver of the said truck is not sufficient to draw a conclusion without any hesitation of the mind that the accused was actually driving the truck at the time of the incident in question.[21]

68. Acquittal

An accused cannot be convicted under s 304A, IPC and is entitled to an acquittal when:

(a) the deceased climbed to get into a moving truck from the back side, over which the accused, *ie*, the driver of the truck could not keep a watch, due to which the deceased fell down and died;[22]

(b) the accused had taken a positive defence that he was not driving the truck at the time of the incident and the prosecution failed to prove by direct evidence that he was infact, driving the truck at the time of the accident;[23]

(c) the prosecution case was that a motorcycle caused the accident but subsequently the prosecution produced evidence that it was a scooter, but it failed to produce any person who might have seen the scooter causing the accident;[24]

(d) two eyewitnesses stated that the accused was driving the bus at very high speed but their statements were fully disbelieved by another prosecution witness who stated that at the time of occurrence the accused was reversing the bus. There is no question of driving the bus at high speed when it was in the process of being reversed. Further, the deceased had been struck with the right side of the bumper of the bus and was shown to have fallen2608 towards the extreme left side of the bus in the site plan by the investigation officer which was not probable;[25]

(e) the doctor performing post-mortem on the dead body of the victim was not examined and it

was not proved that the deceased died due to the negligent act of the accused;[26]

(f) the alleged eyewitnesses appeared to have reached the spot after the accident had taken place, the identity of the accused as the driver of the offending vehicle was not established, there was no evidence showing that the accused was driving the vehicle rashly or negligently or at excessive speed;[27]

(g) the deceased suddenly crossed the road, and therefore, it was not possible for the driver to avoid the accident;[28]

(h) the accused alighted from the jeep and was impatient to get to the other side of the road and made his way across the highway regardless of oncoming vehicles and there was every possibility that he was the main contributory to the accident;[29]

(i) the cumulative effect of evidence of witnesses was that the injuries suffered by the deceased were in consequence of a fall whereon the victim was standing giving way and not the immediate motion of the bus before the victim had completed the process of getting down from the bus;[30]

(j) the accused sitting on the tractor by side of the driver on the mudguard fell down and was fatally wounded, eyewitnesses traveling in the trolley though proved that the accident did take place but were unable to prove that there was any rashness or negligence on the part of the accused driver;[31]

(k) the oral evidence that the bus was driven in a rash and negligent manner and the driver of the bus arrived at the roundabout circle and took a short cut, thus, causing the accident, was contradictory to the documentary evidence, *panchnama* and rough sketch of the place of accident which revealed that the accident took place much before the circle, i.e., about 50 ft before the circle, therefore, the theory that the driver of the bus avoided taking the roundabout circle proceeded towards the right side of the road, appeared to be an untenable version being contrary to the documentary evidence;[32]

(l) the accident took place due to a mechanical defect in the motor vehicle and not due to rash or negligent driving of the accused driver;[33]2609

(m) the victims jumped out of the truck before it collided with a railway engine and there was nothing in the evidence to show whether the victims died due to jumping or due to collision between the truck and the railway engine.[34]

(n) where the death of the deceased was due to the slip when he was peeping down through the hole near a pulley to see whether the stone had been tied to the rope. The allegation is that the occupier has not provided safety and protective measures which led to the fall and consequently death of the deceased. This act of the deceased cannot be attributed to the accused persons stating that there was a rash and negligent act on the part of the accused persons.[35]

69. Hearing Accused before Sentence

The provision of sub-s 2 of s 248, CrPC,[36] contain a salutary principle and is mandatory and identical to s 235(2) of the said Code. The purpose for which the 'hearing' is given to the accused in both the sections is the same. When the fundamental requirement of hearing the accused before sentencing was not followed by the trial court, the sentences awarded by the trial court are vitiated and have to be set aside, and the matter has to be remanded to the trial court for the limited purpose of hearing the accused before sentencing, as required under s 248(2), CrPC .[37]

70. Benefit of Probation

When the accused has committed the offence only as a result of his over zealousness in the performance of his official duty, in attempting to apprehend thieves of the forest produce, he should be released under s 3 of the Probation of the Offenders Act after due admonition instead of sentencing him to any punishment.[38] Accused was a young man and only earning member of his family and he was a first offender and no previous sentence has been proved against him, in the circumstances, accused was directed to be released on probation.[39] Where the accused-truck driver was convicted under s 304A and

persons were dependent upon him, he being a first offender and belonging to a poor family and there being no complaint of his conduct during the trial, the parties having also settled their dispute, the accused was directed to be released on probation under s 360, CrPC read with s 4 of Probation of Offenders Act, on furnishing a personal bond of Rs 10000/- with one surety of the like amount.[40] In another case, where the accused was convicted under s 304A, the Apex Court directed that the accused be released under s 360, CrPC, on entering into a bond with one surety to keep good conduct and good behaviour and peace for a period of one year.[41] However, where the accused in a motor accident case caused the death of 8 persons due to his rashness and negligence, he is not entitled to the benefit of s 360, Crpc or s 4 of Probation of Offenders Act (20 of 1958).[42] Where death is caused as a2610 result of rash and negligent driving, probation should not be granted in such cases. Lenient approach in such cases would increase road accident cases.[43]

Where the accused though not a qualified doctor was found guilty of the offence under s 304A for causing the death of the deceased by administering an injection, the occurrence which took place more than two decades ago there was no allegation of any misuse of bail by the accused, the benefit of s 4 of the Uttar Pradesh First Offenders Probation Act 1938 was given to the accused.[44] The release on probation of the accused convicted under s 304A depends upon the facts and circumstances of the case. In some cases,[45] the Apex Court granted the benefit of probation under s 4 of Probation of Offenders Act and s 361, CrPC .

71. Declining Probation

In *Rattan Singh v State of Punjab* ,[46] the Supreme Court held that the benefit of probation cannot be extended in a case where the accused was convicted for the offence under s 304A, IPC . Relying upon *Rattan Singh*'s case, the Rajasthan High Court declined the benefit of probation to the accused convicted under s 304A, IPC in some cases.[47] The Supreme Court in *State of Karnataka v Krishna alias Raju* ,[48] has held that in cases of conviction under s 204-A, leniency should not be shown. In that case the sentence of fine of Rs 250/- under s 304A was found grossly inadequate and enhanced to 6 months rigorous imprisonment and fine of Rs 1000 and in default to undergo rigorous imprisonment for 2 months. Relying upon *Krishan*'s case, the Rajasthan High Court declined the benefit of probation under s 279 read with s 304 .[49] Relying upon *Krishna*'s case, the Apex Court in *Dalbir Singh v State of Haryana* [50] and bearing in mind the galloping rise in road accidents in India and the devastating consequence visiting the victims and their families, has held that criminal courts cannot treat the nature of the offence under s 304A as attracting the benevolent provisions of s 4 of the Probation of Offenders Act (20 of 1958). In *State of Himachal Pradesh v Varinder Singh* ,[51] Himachal Pradesh High Court declined the benefit of Probation of Offenders Act to the convict under s 304A relying upon *Dalbir Singh*'s case[52] and also the case of *Aitha Chander Rao*.[53] In case of rash and negligent driving, normally probation should not be granted. In such case(s) grant of probation would increase road accidents.[54]2611

In the case of *Dalbir Singh v State of Haryana* ,[55] it is clearly held that s 4 of the Probation of Offenders Act, 1958 cannot be made applicable for the offence under s 304A, IPC where the accused is convicted.[56]

72. Probation Instead of undergoing Remainder of Sentence

In the light of the mitigating circumstances especially the accused's age and the fact that a solitary offence was attributed to him, it appeared to be too inequitous to direct him to undergo the remainder of the sentence. So, the accused was put on probation for a period of one year instead of subjecting him to undergo the actual sentence of imprisonment.[57]

73. Sentence

Sentence is a matter of discretion and the limits cannot be fixed by judicial precedents for all times to come.[58] When a life has been lost and circumstances of punishment show that the accused has large family to support and the proprietor of the truck has left his family in the cold, cannot be the mere ground for compassion.[59] Where fine forms a part of the sentence, the amount may be directed to be paid to the

surviving relative of the deceased.[60]

While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver paddles the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the paddle of a vehicle in locomotion. He must always keep in his mind the fear psyche that if he is convicted for the offence for causing the death of a human being due to his callous driving, he cannot escape jail sentence. This is the role which the courts can play, particularly at the level of the trial court for lessening the high rate of motor accidents due to callous driving of automobiles.[61]

In order to show compassion in favour of the accused, the overall conduct of the accused is very important. If after having committed the offence, which resulted in the death of two persons and injuries to three other persons, a strange defence is taken by the accused that he was not driving the vehicle, in such case he is not entitled to such compassion.[62] In the following cases of *Ram Singh v State of Rajasthan and Poonma Ram v State of Rajasthan* [63] the deterrent punishment for the offence under s 304A is emphasised.2612

74. Enhancement of Sentence

When only the sentence of fine of Rs 250 was imposed upon the accused on his conviction under s 304A, IPC and the High Court also failed to enhance the sentence, the Apex Court enhanced the sentence to 6 months rigorous imprisonment and a fine of Rs 1000 in default of which to undergo rigorous imprisonment for 2 months.[64] When a life has been lost and circumstances of driving is deemed harsh, no compassion should be shown in the matter of punishment merely on ground that the accused has a large family to support and the proprietor of the truck has left his family in the cold.[65] Where the trial court and the appellate court convicted the accused under ss 279, 337, 338 and 304A, IPC, and sentenced, in revision the High Court reduced the sentence under s 304A to a fine for reasons that the collision took place because of the bursting of the front tyre of the complainants' car on account of which the car dashed against the lorry. The observations of the High Court did not find favour with the Apex Court as the possible cause of the collision because the bursting of the tyre was not accepted by the trial court and appellate court, and the evidence of the motor vehicles inspector also ruled out such possibility, observing that the sentence imposed by the courts should have a deterrent effect on potential wrong-doers and it should commensurate with the seriousness of the offence, and the discretion in awarding sentence should be exercised with due regard to the larger interests of society. The sentence of the accused under s 304A was enhanced to simple imprisonment for 6 months.[66]

75. Reduction of Sentence

Where the accused was of young age and the only bread earner to the family, his sentence was reduced to the period of imprisonment already undergone by him.[67] However, this decision runs somewhat contrary to the decision of the Apex Court in *Rattan Singh*'s case.[68] In some other cases where the incident leading to the conviction of the accused under s 304A, IPC took place a long time back[69] or accused was a young man,[70] or when accused had already undergone imprisonment for several months[71] or due to the lapse of several years in the trial,[72] or similar reason,[73] either the sentence of imprisonment was reduced to the period of imprisonment already undergone or reduced to some other period. But the Rajasthan High Court in a case[74] has observed that mere pendency of case for 15 years cannot be a ground to interfere with the order of sentence. However, the same High Court in another case[75] on account of the fact that the incident occurred 16 years ago2613 enhanced the sentence of fine of Rs 2500/- under s 304A in place of maintaining the sentence of imprisonment. The Supreme Court also in an earlier case[76] opined that harassment of a criminal trial of more than 8 years and the expenses, which may have been incurred by the accused, is ground of reduction of sentence. The accused appellant after pouring petrol, had set the Tobacco stock on fire kept inside the house. The accused had been suffering from epilepsy and had been treated for that ailment, the sentence was reduced to the sentence already undergone.[77]

While considering the quantum of sentence to be imposed for the offence of causing death or injury by rash and negligent driving of automobiles, one of the prime considerations should be deterrence. The accused respondent by rash and negligent driving had caused the death of five persons. Reduction of sentence to a period of 15 days already undergone by the High Court was held not justified. Sentence was modified to six months RI.[78]

76. Compensation

Accused by rash and negligent driving had caused the death of six persons. Accused was aged 21 years of age and married. He had already served the sentence of two years RI awarded by the High Court. In appeal the Supreme Court directed the accused to pay Rs. 50 lakhs to the Government of India to be used for paying compensation to victims of motor accidents and further directed the respondent to do community service for two years.[79]Appellant accused while driving tanker in rash and negligent manner caused the death of the scooterist. There was no allegation that the appellant at the time of accident, was under the influence of liquor or any other substance impairing his driving skills. The sentence awarded to him was reduced to the period already undergone. In addition he was directed to pay Rs one lac as compensation to the mother of the deceased.[80]

77. Whether Conviction/Sentence both under Section 279 and Section 304A is Permissible

Commentary under the same heading in s 279, *ante*, Vol. 2, may be referred to.

Where a person is convicted and sentenced under this section, a separate conviction under s 279, IPC, for the minor offence which is included in the offence under s 304A, IPC, is not justified.[81]

78. Whether Conviction/Sentence inder Section 304A and under Section 121, Motor Vehicles Act 1939 (Now Motor Vehicles Act 1988) is Permissible

A person, convicted and sentenced under this section for rash or negligent driving, cannot again be punished for the same under s 121 of the Motor Vehicles Act 1939.[82]2614

79. Alteration of Conviction from Section 302 to Section 304A

Where the accused was convicted under s 302, IPC by the sessions court but the evidence on record showed that the accused was driving the tractor negligently when the accident took place on a *kacha* road after leaving the main road causing death of the victim, the conviction of accused under s 302 was set aside and instead he was convicted under s 304A .[83]

Where both the accused were convicted for the offence of murder by the sessions court but, on appeal the High Court acquitted one of the accused as he had made a gift of three acres of land in favour of the widow of the deceased as compensation on account of loss of life of her husband and converted the conviction of another accused from s 302 to s 304A, the judgment of the High Court was criticised by the Apex Court and was therefore set aside and the matter was remanded to the High Court for rehearing.[84]

Where the accused-labourer was digging earth with spade, the deceased suffered injury when he came close to the accused, it was held that the accused ought to have been vigilant that nobody came in between the spade and the earth while he was digging, the act of the accused did not attract either s 302 or s 304 or s 80 but the act constituted criminal negligence and fell under s 304A, so, the conviction of the accused under s 302 was set aside and instead the accused was convicted under s 304A, IPC .[85] Where on the basis of evidence led by the prosecution it was difficult to hold that a case of murder was established with the accused intentionally driving the vehicle at high speed and then dashing against the scooter of the deceased in turn crushing the deceased under the truck, can be said to have been made out beyond reasonable doubt, the conviction of the accused under s 302 was altered to one under s 304A,

IPC .[86]

80. Alteration of Conviction from Section 304A to Section 302

Where there was enmity between the accused, and the accused was seen grappling with the deceased on the day of the incident, on being separated by witnesses the accused went running to his jeep and drove it on the wrong side towards the deceased at high speed and ran over him, the road on which incident took place was wide and deserted and no reason existed for the accused to take his jeep on the wrong side, in these circumstances the alteration of the conviction to s 302 by the High Court from s 304A, IPC, held by the sessions court was found proper by the Apex Court.[87]

Where the statement of eyewitness showed that the accused persons had called the deceased boy aged 11 years and gave him electric shock, and thereafter, threw his body into the river alongwith the wire, the statement of witness cannot be said to be absurd or inherently improbable in view of the fact that five burn injuries were found on the dead body of the deceased boy. As such, the injuries *prime facie* suggested direct contact of the deceased with live wire and not by the live wire falling in to river in which the boy was allegedly swimming, on these facts the order of the High Court quashing the charges under ss 302 and 304 framed by the sessions court and directing that the accused persons be proceeded only under s 304A, IPC and s 39 of Indian Electricity Act was not found proper, and the Apex Court directed the trial court to proceed with the trial on the basis of charges framed by it.[88]2615

47 Inserted by Act 27 of 1870, s 12 .

48 *Kanti Parshad v State* 1971 Cr LJ 1241, p 1244 (Del) .

49 *DS Ghai v State of Karnataka* 2004 Cr LJ 1024 (Kant) .

50 *Mehr Ilahi v Emperor* 12 Cr LJ 485, p 488, 26 PWR 1911 (Cr) ; *Challu v Emperor* AIR 1941 All 288, 42 Cr LJ 621 ; *Empress v Randhir Singh* ILR 3 All 597 .

51 *Tika Ram v Rex* AIR 1950 All 300, 51 Cr LJ 865 ; *Dayal v Union of India* AIR 1963 HP 18, (1963) 1 Cr LJ 762 ; *Shiva Ram v State* AIR 1965 All 196, p 198, (1965) 1 Cr LJ 524 ; *Shankar Narayan Bhadolkar v State of Maharashtra* 2004 Cr LJ 1778 (SC), AIR 2004 SC 1966, 2004 AIR SCW 1511 .

52 *Sukaroo Kobiraj v Empress* ILR 14 Cal 566 ; Re *Nidamarti Nagabhushanam* 7 Mad HCR 119, 1 Weir 324.

53 *Tiramareddi Satyanarayan v State* 36 Cut LT 301, p 305 ; *State v Kamlakar Prabhakar Juvekar* AIR 1960 Bom 269, p 270, 1960 Cr LJ 814 ; Re *Parthasarathy*AIR 1959 Mad 497, p 499, 1959 Cr LJ 1344 ; *Emperor v Akbar Ali* AIR 1936 Oudh 400, p 401, 37 Cr LJ 539, wherein the act of the accused, in firing from rifle with the full knowledge of the children and others near about and killing a child with the hitting of bullet, was held to be a rash and negligent act bringing her within the mischief of this section.

54 *Empress v Damodaran* ILR 12 Mad 56, 1 Weir 325 ; *Ballan v State* AIR 1955 All 626, p 629, 56 Cr LJ 1448 .

55 *Tika Ram v Rex* AIR 1950 All 300, 51 Cr LJ 865 ; *Dayal v Union of India* AIR 1963 HP 18, (1963) 1 Cr LJ 762 ; *Emperor v Istlingapa Shivapa* 13 Cr LJ 798, p 799, 14 Bom LR 887 ; *Empress v Ketabadi Mundul* ILR 4 Cal 764 ; *Shiva Ram v State* AIR 1965 All 196, p 198, (1965) 1 Cr LJ 524 .

56 *State of Gujarat v Haidarali Kalubhai* AIR 1976 SC 1012, pp 1014-1015, 1976 Cr LJ 732 .

57 *Empress v Ketabadi Mundul* ILR 4 Cal 764, p 765 ; *Ballan v State* AIR 1955 All 626, p 629, 56 Cr LJ 1448 .

58 *Pritam Singh v State* 35 Cut LT 723, p 726 ; *Suleman Rahiman v State of Maharashtra* AIR 1968 SC 829, 1968 Cr LJ 1013 ; *Ghanshyamdas v State of Madhya Pradesh* 1977 Cr LJ 1373, p 1374 .

59 *Krushna Chandra Ojha v State* 1972 Cr LJ 1404, p 1405, (1972) 1 Cut WR 631 .

60 *Shah Amin Ahmad v State* 1970 All Cr Cas 153 ; *Golam Jilani Khan v State* 1972 Cut LT 945 ; *Sachidanand Bhitria v State of Orissa* 1975 Cut LT 158 ; *Kishna Chand v State of Haryana* 1970 UJ 845 (SC), 1970 SCD 1166 ; *Ladu-Kishore v State* (1971) 2 CWR 585, 37 Cut LT 1142 ; *Ambalal D Bhatt v State of Gujarat* AIR 1972 SC 1150, p 1155, 1972 Cr LJ 727 ; *Udham Singh v State of Himachal Pradesh* 1981 Chand LR 41 (HP) ; *Suleman Rahiman Mulani v State of Maharashtra* AIR 1968 SC 829 ; *Keshab Pradhan v State* 31 Cut LT 279, p 281 .

61 *Mehnga Singh v State* 2012 Cr LJ 4930 (Delh) .

62 *Badri Prasad Tiwari v The State* 1994 Cr LJ 389 (Ori) .

63 See *Halsbury's Law of Singapore*.

64 *Ng Keng Yong v PP* Appeal [2004] 4 SLR 89

65 *Mohamad Iskandar Bin Basri v Public Prosecutor* (2006) SGHC 158, [2006] 4 SLR 440 (8 September 2006).

66 *Lakshmanan Prakash v State* 1999 Cr LJ 2348 (Mad), *State of Tr PS Lodhi Colony, New Delhi v Sanjeev Nanda* 2012 Cr LJ 4174, AIR 2012 SC 3104 .

67 *State Tr PS Lodhi Colony, New Delhi v Sanjeev Nanda* 2012 Cr LJ 4174 (SC) .

68 *Ibid*.

69 *Kallu v State of Madhya Pradesh* (1970) 19 Jab LJ 20 (SN) .

70 *State v Khetaram* AIR 1965 Raj 221, p 222, (1965) 2 Cr LJ 683 .

71 *State of Madhya Pradesh v Ranjit Kumar Chattarjee* AIR 1959 MP 284, p 287, (1959) Cr LJ 983 .

72 *Suruvu Parshaiah v State of Andhra Pradesh* 2006 Cr LJ 824 (AP) .

73 *Sujoy Das v State* 2006 Cr LJ 1148 (Bom) .

74 *Ambalal D Bhatt v State of Gujarat* AIR 1972 SC 1150, 1972 Cr LJ 727 ; *Md Riajudding Ahmed v State of Assam* 2013 (125) AIC 467 (Gauh) .

75 See commentary under s 299 .

76 *Emperor v Omkar Ram Pratap* 4 Bom LR 679 .

77 *State of Madhya Pradesh v Ranjit Kumar Chattarjee* AIR 1959 MP 284, p 287 ; *Satnarain Pandey v Emperor* AIR 1933 All 232, 34 Cr LJ 1013 ; *Jahur Mia v State* AIR 1954 Assam 169 ; *Emperor v Akbar Ali* AIR 1936 Oudh 400, 37 Cr LJ 975 ; *Kanji Juma Khoja v Emperor* AIR 1938 Sind 100, 39 Cr LJ 705 ; *Judhistir v State* (1971) 2 Cut WR 673 ; *Satya Mali v State* AIR 1964 Ori 173, (1964) 2 Cr LJ 42 ; *Jiwanlal v Devi Luhar* (1970) 19 Jab LJ 161 ; *Municipal Committee v Romesh Saggi* AIR 1970 Punj 137 ; *Captain D'Souza v Pashupati Nath Sarkar* 1968 Cr LJ 405 (Cal) .

78 *Kurban Hussein Mohamedalli Rangawalla v State of Maharashtra* AIR 1965 SC 1616, p 1618, (1965) 2 Cr LJ 550 .

79 *Public Prosecutor v Pitchaiah Moopnar alias Pitchaiah Pillai* AIR 1970 Mad 198, 1970 Cr LJ 705 .

80 *Mohd Rangawalla v State of Maharashtra* AIR 1965 SC 1616 .

81 *Nallapareddy Janardana Ready v State of Andhra Pradesh* 1996 Cr LJ 3034 (AP) .

82 *Jabbar v State* AIR 1966 All 590, p 593 .

83 *M Reghava Rao v Oruganti Buchireddy* 2006 Cr LJ 3087 (AP) .

84 *Jabbar v State* AIR 1966 All 590, p 593 ; *Pritam Singh v State* 35 Cut LT 723, p 726 .

85 *Ananda Singh Neggi v State* 34 Cut LT 1189, p 1192, AIR 1969 Ori 49, **following**1968 SCD 581.

86 *State v Balchandra Woman Pethe* AIR 1966 Bom 122, p 124, **affirmed** in AIR 1968 SC 1319, 1968 Cr LJ 1501 ; *Ganeshgir v State of Madhya Pradesh* AIR 1966 MP 311, p 313 ; *State v Hemappa Chandrasidappa Angaddi* AIR 1969 Goa 39, it was held that the question, whether, in a particular case, death is directly due to rash or negligent act, is not a question of fact only, but a mixed question of fact and law.

87 *Emperor v Khan Mahomed Shermahomed* AIR 1937 Bom 96, 38 Cr LJ 660 .

88 *Shiva Ram v State* AIR 1965 All 196, 201 .

89 *Banwarilal v State* (1961) 1 Cr LJ 561, p 563 .

90 *Suleman Rahiman v State of Maharashtra* AIR 1968 SC 829, 1968 Cr LJ 1013 ; *Shivaputra Mahadevappa v State of Mysore* (1970) 1 Mys LJ 375 .

91 *Baldevji Bhathiji Thakore v State of Gujarat* AIR 1979 SC 1327, p 1328 .

92 *Raghunath Behera v State* 34 Cut LT 500, p 506, **following***Kurban Hussein v State of Maharashtra* AIR 1965 SC 1616 .

93 *Chamman Lal v State* AIR 1954 All 186, p 188 .

94 *Aleem Pasha v State of Karnataka* 2013 Cr LJ 174 (Kant) .

95 *Hardhan Gope v State of Tripura* 2012 Cr LJ 3232 (Gauh) .

96 *Braham Dass v State of HP* 2009 Cr LJ 4297, p 4298 (SC), AIR 2009 SC 3181, (2009) 7 SCC 353 .

97 *State of Goa v Devendra Kashinath Chopedekar* 2010 Cr LJ 1011, p 1019 (Bom) .

1 *Shaikh Maheboob v State of Maharashtra* 2008 Cr LJ 4729 (Bom) .

2 *Moti Lal v State* (1965) 67 PLR 94 (SN) ; *Namadevan v State of Madras* 1972 Cr LJ 1414, p 1415, 1972 MLJ (Cr) 126 .

3 *Emperor v Abdul Latif* AIR 1944 Lah 163, p 164, 45 Cr LJ 699 ; *State of Bihar v Mongol Singh* AIR 1953 Pat 56, 54 Cr LJ 518 ; Re *JC May*AIR 1960 Mad 50, 1960 Cr LJ 239 .

4 *Raghunath Behera v State* 34 Cut LT 500, p 504 .

5 *Emperor v Abdul Latif* AIR 1944 Lah 163, p 164, 45 Cr LJ 699 ; *State of Bihar v Mangal Singh* AIR 1953 Pat 56, 54 Cr LJ 518 ; *Abraham Daveed v State of Kerala* 1980 Ker LN 63 (SN) ; Re *JC May*AIR 1960 Mad 50, Cr LJ 239.

6 *Nandlal v State* 1980 Rajdhani LR (Notes) 17 .

7 See ss 32 and 33, vol I.

8 *Raj Karan Singh v State of Uttar Pradesh* 2000 Cr LJ 555 (All) .

9 *Ganeshgir v State of Madhya Pradesh* AIR 1966 MP 311, p 313, 1966 Cr LJ 1273 .

10 *Ganeshgir v State of Madhya Pradesh* AIR 1966 MP 311, 1966 Cr LJ 1273 ; *Kanubhai Baldevdas Desai v State of Gujarat* 1968 Cr LJ 408 .

11 *Kamruddin v Emperor* 2 Cr LJ 207, ILR 7 R 112 .

12 *State v Banshi Singh* AIR 1960 MP 105, 1960 Cr LJ 482 ; *Motilal v State* (1965) 67 PLR 94 (SN) .

13 *Shakar Khan v Emperor* AIR 1931 Lah 54, p 55, 32 Cr LJ 587 .

14 *Chamman Lal v State* AIR 1954 All 186, p 187, 55 Cr LJ 405 .

15 *Tika Ram v Rex* AIR 1950 All 300, 311, wherein it been said that negligence is a genus and rashness is a species.

16 *Nidamarti Nagabhushanam* 7 Mad HCR 119, 1 Weir 324; *Subhash Chandra Mahapatra v State* 31 Cut LT 305 ; *State of Orissa v D Suryanarayana* ILR 1962 Cut 947, 29 Cut LT 59 ; Re *Ibramsa*(1963) 1 Cr LJ 690.

17 *Empress of India v Idu Beg* ILR 3 All 776 ; *Balchandra v State of Maharashtra* AIR 1968 SC 1319, 1968 Cr LJ 1501 ; *Chamman Lal v State* AIR 1954 All 186, p 187 ; *Tikaram v Rex* AIR 1950 All 300 per MH Beg J, in (1) *Ram Kishun v State* 1966 AWR (HC) 249, p 253, and (2) *Shiva Ram v State* AIR 1965 All 196, pp 200-1, 1964 AMR (HC) 134 .

18 *AW Lazarus v State* AIR 1953 All 72, 1953 Cr LJ 324 ; *Chhote Lal v Emperor* AIR 1945 All 16, 46 Cr LJ 260 ; *HW Smith v Emperor* AIR 1926 Cal 300, 27 Cr LJ 153 ; *State Government v Rangaswami* AIR 1952 Nag 268, 53 Cr LJ 1191 ; *State of Bihar v Mangal Singh* AIR 1953 Pat 56, 54 Cr LJ 518 ; *Bharosi v State* AIR 1957 MP 236, 1957 Cr LJ 1416 ; *State Government v Bhawnesh Kumar* AIR 1958 MP 205, 1958 Cr LJ 1032 ; *State of Madhya Pradesh v Ranjit Kumar Chattarjee* AIR 1959 MP 284, 1959 Cr LJ 983 ; *State v Banshi Singh* AIR 1960 MP 105, 1960 Cr LJ 482 ; Re *JC May*AIR 1960 Mad 50, 1960 Cr LJ 239 ; *Bhanwarlal v State* (1961) 2 Cr LJ 561 ; *Empress v Ketabadi Mundul* ILR 4 Cal 764 ; *Empress v O'Brien* ILR 2 All 766 ; *Empress v Randhir Singh* ILR 3 All 597 ; *Pika Bewa v Emperor* ILR 39 Cal 855, 13 Cr LJ 195 .

19 *State v Bhalchandra Woman Pethe* AIR 1966 Bom 122, p 124 .

20 *Bhalchandra v State of Maharashtra* AIR 1968 SC 1319, 1968 Cr LJ 1501, which **affirmed**AIR 1966 Bom 122 and wherein Supreme Court observed that, as between rashness and negligence, rashness is undoubtedly a graver offence.

21 *Empress of India v Idu Beg* ILR 3 All 776 .

22 *Badri Prasad Tiwari v State* 1994 Cr LJ 389 (Ori) (Cri) 652.

23 *Jamman v Emperor* AIR 1944 Nag 285, p 286 .

24 *Gulamsaeed Gulam Amir v State* AIR 1954 MB 41, 55 Cr LJ 553 .

25 *State v Mohammadsab Urf Baba* 2006 Cr LJ 3410 (Kant) .

26 *KP Shivappa v State* 2013 Cr LJ 1680, p 1684 (Kar) .

27 *Guru Basavaraj v State of Karnataka* 2012 Cr LJ 4474, 2012 AIR SCW 4822, (2012) 8 SCC 734, 2012 (3) All Cri Cases 782).

28 *Narender Singh v State* 2005 Cr LJ 2735 (Del) .

29 *Penu v State* (1980) 49 Cut LT 337, p 340, 1980 Cut LR (Cr) 95 ; *Bijuli Swain v State of Orissa* 1981 Cr LJ 583, p 584 .

30 *Syad Akbar v State of Karnataka* 1980 SCC (Cr) 59, p 65, 69, AIR 1979 SC 1848 .

31 *Jacob Mathew v State of Punjab* 2005 AIR SCW 3685, AIR 2005 SC 3180 .

32 *BC Ramchandra v State of Karnataka* 2007 Cr LJ 475 (Kant) .

33 *Kuldeep Singh v State of Himachal Pradesh* 2008 Cr LJ 3932, p 3935, 3936 (SC), 2008 (10) Scale 64, AIR 2008 SC 3062 .

34 *Satnam Singh v State of HP* 2014 Cr LJ (NOC) 55 (HP) .

35 *State v Kamlesh Kumar Bind* 2014 Cr LJ (NOC) 109 (Bom) .

36 *State of Madhya Pradesh v Jagdish* (1992) 1 Crimes 62 (MP) ; *K Perumal v State* 1998 Cr LJ 4436 (Mad) .

37 *K Perumal v State* 1998 Cr LJ 4436 (Mad) ; *Ishwar Sadeppa v State of Karnataka* 2004 Cr LJ 4912 (Kant) .

38 *State of Madhya Pradesh v Bhagwandas and Ors* (1995) 1 CCR 286 (MP) .

39 *Mohan Singh v State of Haryana,* 2011 Cr LJ (NOC) 553 (P&H).

40 *State of Karnataka v Kumayian* 2010 Cr LJ 3376 (Kant) .

41 *Harpal Singh v UT Chandigarh* 2009 Cr LJ (NOC) 1177 (P&H).

42 *Mehnga Singh v State* 2012 Cr LJ 4930, p 4933 (Delh) .

43 *Binoda Bihari Sharma v State of Orissa* 2011 Cr LJ 1989, p 1991 (Ori) .

44 *State of Himachal Pradesh v Manohar Singh* 2011 Cr LJ 3402 (HP) .

45 Re *Kothandam*1972 Mad LW (Cr) 52.

46 *Sudalaimuthu v State* 1997 Cr LJ 1038 (Mad) ; *Lakshmanan Prakash v State* 1999 Cr LJ 2348 (Mad) ; *Suleman Rehaman Mulani v State of Maharashtra* (1968) 2 SCR 515, 1968 Cr LJ 1013 (SC) .

47 *Ambalal D Bhatt v State of Gujarat* AIR 1972 SC 1150, 1972 Cr LJ 727 .

48 *Mohmmedaly v State of Maharashtra* AIR 1965 SC 1616, (1965) 2 Cr LJ 550 (SC) .

49 *Niranjan Singh v State (Delhi Admn)* 1997 Cr LJ 336 (Del) .

50 *BE Chandrashekar v State of Karnataka* 2007 Cr LJ 486 (Kant) .

51 *Ibid*.

52 *Paras Nath v State of Delhi* 2004 Cr LJ 731 (Del) .

53 *State of Madhya Pradesh v Humid Khan* 1980 Cr LR 427, p 428 (MP) .

54 *Bhanwarlal v State* (1961) 2 Cr LJ 561, p 563 ; *Bharosji v State* AIR 1957 MP 236, p 237, 1957 Cr LJ 1416 ; *State v Bhakchandra Woman Pethe* AIR 1966 Bom 122, p 124, **affirmed in***Bhalchandra v State of Maharashtra* AIR 1968 SC 1319, 1968 Cr LJ 1501 .

55 *Bhanwarlal v State* (1961) 2 Cr LJ 561, p 563 .

56 *Syad Akbar v State of Karnataka* AIR 1979 SC 1848, p 1854, 1980 SCC (Cr) 59 ; *Badri Prasad Tiwari v State* 1994 Cr LJ 389 (Ori) ; *Kanji Juma Khoja v Emperor* AIR 1938 Sind 100, p 102 ; *State Government v Bhawanesh Kumar* AIR 1958 MP 205, p 208, 1958 Cr LJ 1032 ; *State of Maharashtra v Goutam* 1977 Cr LJ 403, p 404-05 .

57 *State Government v Bhawanesh Kumar* AIR 1958 MP 205, p 208 .

58 *Public Prosecutor v Pitchaiah Moopanar* 1970 Cr LJ 705, AIR 1970 Mad 198 .

59 *Raghunath Bahera v State* 34 Cut LT 506 .

60 Re *Kothanadam* AIR 1972 Mad LJ (Cr) 315, 1972 LW (Cr) 52.

61 *Gajanan Majik v State* 2006 Cr LJ 1146 (Bom) .

62 *Mahadev v State of Madhya Pradesh* 2006 Cr LJ 4246 (MP) .

63 *Shakila Kheder v Nausher Gama* AIR 1975 SC 1324, p 1326-27, 1975 Cr LJ 1105 .

64 *Kasturilal Gopaldas v Prabhakar Martand* AIR 1971 MP 145, p 151, 1971 Jab LJ 991 .

65 *Raghavan Pillai v State* AIR 1954 Tr & Coch 25, 55 Cr LJ 7; *Bhagwandas Bakshi v Emperor* AIR 1928 Bom 208, p 210, 29 Cr LJ 897 .

66 Re *Sundaram Pillai*(1969) 1 Mad LJ 464; *Damodaran v State of Kerala* AIR 1968 Ker LT 202, p 203 .

67 *Madhukar Bhausaheb Mhaske v State of Maharashtra* 2006 Cr LJ 3700 (Bom) .

68 *Suruvu Parshaiah v State of Andhra Pradesh* 2006 Cr LJ 824 (AP) .

69 Refer to synopsis notes of s 279, IPC .

70 *State Government v Bhawanesh Kumar* AIR 1958 MP 205, p 209 ; *Tika Ram v Rex* AIR 1950 All 300 ; Re *Ponnuswami*AIR 1950 Mad 308 ; *Woodward v Emperor* AIR 1925 Sind 233, 27 Cr LJ 257 ; *Shankar Balkrishna v Emperor* ILR 32 Cal 73 ; *Kamaruddin v R* 2 Cr LJ 207 ; *Municipal Committee v Ramesh Saggi* AIR 1970 Punj 137, 1969 ACC CJ 135 ; *Taran Parkash Mohan Lal v State* (1962) 1 Cr LJ 189 ; *State of Kerala v Rama Krishnan Nadar* 1970 MLJ (Cr) 854 ; *Prabhu Dayal v State* 1965 AWR (HC) 63 (but in order to find out whether there was negligence at all or whether the negligence was so gross as to make the accused ciminally liable, the court will take into consideration, all the attending circumstances); *State v Hari Singh* 1968 Raj LW 485 ; *Easo Mathew v State of Kerala* 1967 Ker LT 227 ; *R v Acharjys* 1 Weir 322, p 323 ; *K Srinivas v State of Karnataka* 2002 Cr LJ 3865 (Kant) .

71 *Jawanlal v Devi Luhar* (1970) 19 Jab LJ 161 ; *K Srinivas v State of Karnataka* 2002 Cr LJ 3865 (Kant) .

72 Re *Ponnuswami*AIR 1950 Mad 308, 51 Cr LJ 733 ; *Deota Misir v Emperor* AIR 1931 All 708, p 710, 32 Cr LJ 1061 ; *K Srinivas v State of Karnataka* 2002 Cr LJ 3865 (Kant) .

73 *State of Kemla v Krishnan Thampi* 1965 Ker LT 6 (SN) ; *Empress v Bhutan* ILR 16 All 472 .

74 *Muhammad Bux v Emperor* AIR 1935 Nag 200, p 202, 36 Cr LJ 1368 .

75 *Taran Prakash Mohan Lal v State* (1962) 1 Cr LJ 189, p 191 .

76 *Kanshi Ram v Emperor* AIR 1927 Lah 165, 28 Cr LJ 351 .

77 *Deota Misir v Emperor* AIR 1931 All 708, 32 Cr LJ 1061 ; *Swading v Crown* 1930 WN 204, 46 TLR 597 ; *Emperor v Homnarain Sukhailal Kachhi* AIR 1934 Nag 65, p 66, 35 Cr LJ 696 ; *Ham Prasad Jena v State* 33 Cut LT 882 .

78 *Sheo Kumar v State of Madhya Pradesh* (1970) 19 Jab LJ 79 (SN) .

79 *K Srinivas v State of Karnataka* 2002 Cr LJ 3865 (Kant) .

80 *Vijai Rai v State of Bihar* 2014 Cr LJ (NOC) 176 (Pat) .

81 *Suruvu Parshaiah v State of Andhra Pradesh* 2006 Cr LJ 824 (AP) .

82 *Makadeo Hari Lokre v State of Maharashtra* AIR 1972 SC 221, 1972 Cr LJ 49 (SC) ; *Manju Baradia v State of Chattisgarh* 2001 Cr LJ 3762 (Chatt) .

83 *State v Mohd Yusuf* 2001 Cr LJ 5 (Kant) .

84 *Shri Madhukar Gaurishankar Swami v State of Maharashtra* 2007 Cr LJ (NOC) 434 (Bom), (2007) 3 AIR Bom R 103 .

85 *Bansilal Babuji Vanjara v State of Gujarat* 2007 Cr LJ 2879, p 2880 (Guj) .

86 *State v Mohammad Yusuf* 2001 Cr LJ 5 (Kant) .

87 *Shiva Ram v State* AIR 1965 All 196, 200 .

88 *State of Gujarat v Manek Lal Roognath* 1972 Guj LR 309 ; Re *Parthasarathy*AIR 1959 Mad 497, p 501 .

89 *Chhote Lal v Emperor* AIR 1945 All 16, p 19, 46 Cr LJ 260 ; *Bhanwarlal v State* (1961) 2 Cr LJ 561 .

90 Re *Kothaadam* 1972 Mad LJ (Cr) 315, 1972 LW (Cr) 52.

91 *State v Hari Singh* AIR 1969 Raj 86, 1968 Raj LW 485 .

1 *Sanku Balan v State* 1972 Ker LT 982, 1972 Ker LR 542 .

2 *Tukaram Sitaram Gore v State* AIR 1971 Bom 164, 1971 Cr LJ 767 ; *Mahadeo Hari Lokre v State of Maharashtra* AIR 1972 SC 221, p 223, 1972 Cr LJ 49 .

3 *SN Hussain v State of Andhra Pradesh* AIR 1972 SC 685, p 688-89, 1972 Cr LJ 496 .

4 *Gulamsaeed v State* AIR 1954 MB 41, 55 Cr LJ 553 ; *Chhotey Khan v State of Madhya Pradesh* 1967 Jab LT 71 (SN) ; *Bhanwarlal v State of Rajasthan* 1970 Raj LW 68, 1970 ACJ 267 ; *ED Kaup v State of Madhya Pradesh* 1967 Jab LJ 107 (SN) .

5 *Abdul Subhan v State* 2007 Cr LJ 1089 (Delhi) .

6 *Zora Singh v State of Punjab* 2008 Cr LJ 1572 (Pat) .

7 *Emperor v Thompson Ratanlal* Unrep Cr Cas 721.

8 *Empress v Nand Kishore* ILR 6 All 248 .

9 *Tapti Prasad v Emperor* AIR 1918 All 429, 18 Cr LJ 815 .

10 *Emperor v Jagmohan Thukral* AIR 1947 All 99, p 102, 48 Cr LJ 829 ; *State Government v Rangaswami* AIR 1952 Nag 268, p 270, 1952 Cr LJ 1191 .

11 *Waryam Singh v Emperor* AIR 1926 Lah 554, 28 Cr LJ 39 ; *Bonda Kui v Emperor* AIR 1943 Pat 64, 43 Cr LJ 787 .

12 Re *Samuel*(1970) 1 MLJ 492, p 493.

13 *Sadhu Singh Hamam Singh v State of Pepsu* AIR 1954 SC 271, 55 Cr LJ 727 ; *Emperor v Morgan* ILR 36 Cal 302, 9 Cr LJ 393 .

14 *Ram Das v State* 1967 AWR (HC) 710 .

15 *Hiralal v State of Madhya Pradesh* 1981 MPLJ 36 (notes of cases).

16 *Somnathan v State of Kerala* 2013 (2) KLT 9 (Ker) .

17 *State of HP v Surinder Pal Singh* 2013 Cr LJ 3670 (HP) .

18 *Empress v Bhutan* ILR 16 All 472 .

19 *Tulsiram Sitaram v State* AIR 1963 Bom 1, p 3, (1963) 1 Cr LJ 44 .

20 *Raghu v Emperor* AIR 1914 Oudh 412 .

21 *Jabar Singh Saroba v State of Uttarakhand* 2014 Cr LJ 3732 (Uttar) .

22 *Jacob Mathew v State of Punjab* (2005) 6 SCC 1, 2005 Cr LJ 3710 ; **See also***Martin F D'Souza v Mohd Ishfaq* (2009) 3 SCC 1, AIR 2009 SC 2049, (2009) 3 All LJ 165 (Principles laid down in *JacobMathew's* case (2005) 6 SCC 1, AIR 2005 SC 3180, (2005) Supp (2) SCR 307, **endorsed**).

23 *M Reghava Rao v Oruganti Buchireddy* 2006 Cr LJ 3087 (AP) .

24 *Jacob Mathew v State of Punjab* 2005 Cr LJ 3710 (SC) ; *ASV Narayanan Rao v Ratnamala* (2012) 10 SCC 741 ; *Malay Kumar Ganguly v Dr Sukumar Mukherjee* (2009) 9 SCC 221, AIR 2010 SC 1162, 2009 (10) Scale 675, (2010) 2 SCC (Cri) 299, [2009] 13 SCR 1 .

25 *Shivanand Doddamani v State of Karnataka* 2011 Cr LJ 230 (Kant) .

26 *Jacob Mathew v State of Punjab* 2005 Cr LJ 3710, AIR 2005 SC 3180, (2005) 6 SCC 1).

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Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

[1][S. 304B.

Dowry death.--

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that

soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.--(1) For the purposes of this sub-section "dowry" shall have the same meanings as in section 2 of the Dowry Prohibition Act 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.]2616

Comments

1. Scope

Even before this section was inserted in the IPC, the Apex Court in a case[2] stated that greed for dowry, indeed the dowry system as an institution, calls for severest condemnation. It is evident that legislative measures such as the Dowry Prohibition Act have not met with the success for which they were designed. Where death in such cases is due to the crime, the perpetrators frequently escape from the clutches of the law because of inadequate police investigation. The Apex Court emphasised the need for expeditious investigation of such cases and also the need of a female police officer of sufficient rank and status in the police force to be associated with the investigation from its very inception.

The highly injurious and deleterious effect on the girl, her parents and the society at large required legislative interference. It started with the enactment of the Dowry Prohibition Act 1961, containing some penal provisions also. However, as the evil could not be taken care of by this soft statute, the IPC was amended first by inserting ch XX-A (containing only s 498-A, IPC) in it by the Criminal Law (Second Amendment) Act 1983 (46 of 1983); and then, by insertion of s 304B, IPC by the Dowry Prohibition (Amendment) Act 1986 (43 of 1986). Section 498 -A, IPC seeks to protect a married woman from being subjected to cruelty by her husband or his relative. Section 304B , IPC is aimed at those who indulge in 'dowry deaths'. To give teeth to these provisions, Act 46 of 1983 inserted s 113-A in the Evidence Act, permitting a court to presume, having regard to the circumstances of the case, that suicide by the woman was abetted by her husband or his relative. Similarly, Act 43 of 1986 inserted s 113B in the Evidence Act requiring some presumption to be drawn in case of dowry death. Amendment was also made in the CrPC making the offence of dowry death cognizable, non-bailable and triable by a court of session.[3]

So far as offence under s 304B, IPC is concerned, there may be different facts and circumstances of each case. There may be death of woman within two months of her marriage or within seven years of her marriage. There may be death of woman in an advanced stage of pregnancy. There may be death of a woman where demand of dowry is made, with some more cruelty or regular harassment by her husband or any relative of her husband.[4] To attract the provisions of s 304B, one of the main ingredients of the offence which is required to be established is that soon before her2617 death the deceased wife was subjected to cruelty and harassment in connection with the demand for dowry.[5]

Section 304B, IPC excludes all ingredients of ss 299 and 300, IPC .[6]

If all the other ingredients of s 304-B of the IPC are fulfilled, any death (whether homicidal or suicidal or accidental) and whether caused by burns or by bodily injury or occurring otherwise than under normal circumstances shall, as per the legislative mandate, be called a "dowry death" and the woman's husband or his relative "shall be deemed to have caused her death". The section clearly specifies what constitutes the offence of a dowry death and also identifies the single offender or multiple offenders who has or have caused the dowry death.[7]

Section 304B would apply both in cases of homicide and suicide, if the deceased is subjected to

harassment and cruelty on account of dowry demand.[8]

2. Statement of Objects and Reasons

The Dowry Prohibition Act 1961 (28 of 1961) was enacted by the legislature effective from 1 July 1961. The Statement of Objects and Reasons for enactment of the legislation are as follows:

> The object of this bill is to prohibit the evil practice of giving and taking of dowry. This question has been engaging the attention of the Government for some time past, and one of the methods by which this problem, which is essentially a social one, was sought to be tackled by the conferment of improved property rights on women by the Hindu Succession Act 1956. It is, however, felt that a law which makes the practice punishable and at the same time ensures that any dowry, if given does ensure for the benefit of the wife will go a long way to educating public opinion and to the eradication of this evil. There has also been a persistent demand for such a law both in and outside Parliament. Hence the present Bill:
>
> (1) Ever since the Act came into being there is a sea of change by various amendments so as to make the Act more purposeful and punishment deterrent. Realising that despite the Dowry Prohibition Act, the evil practice of giving and taking of dowry remains unabated and dowry related offences were menacingly on the increase, the Act was amended by Act no 63 of 1984. After taking note of the observations of the Committee on Statute of Women in India and with a view to making a thorough and compulsory investigation into cases of dowry deaths and stepping up anti-dowry publicity, the Government referred the whole matter for consideration by a Joint Committee of both houses of Parliament. The Committee, after examining the whole matter in great depth in its proceedings, recommended the examination of the working of the Dowry Prohibition Act. The Act was further amended vide Act no 43 of 1986. The statement of objects and reasons are as follows:
>
> The Dowry Prohibition Act 1961 was recently amended by the Dowry Prohibition (Amendment) Act 1984 to give effect to certain recommendations2618 of the Joint Committee of the House of Parliament to examine the question of the working of the Dowry Prohibition Act 1961 and to make the provisions of the Act more stringent and effective. Although the Dowry Prohibition (Amendment) Act 1984 was an improvement on the existing legislation, opinions have been expressed by representatives from women's voluntary organisations and others to the effect that the amendments made are still inadequate and the Act needs to be further amended.
>
> (2) It is, therefore proposed to further amend the Dowry Prohibition Act 1961 to make provisions therein more stringent and effective. The salient features of the Bill are:
>
> (a) The minimum punishment for taking or abetting the taking of dowry under s 3 of the Act has been raised to five years and a fine of rupees fifteen thousand.
> (b) The burden of proving that there was no demand for dowry will be on the person who takes or abets the taking of dowry.
> (c) The statement made by the person aggrieved by the offence shall not subject him to prosecution under the Act.
> (d) Any advertisement in any newspaper, periodical, journal or any other media by any person offering any share in his property or any money in consideration of the marriage of his son or daughter is proposed to be banned, and the person giving such advertisement and the printer or publisher of such advertisement will be liable for punishment with imprisonment of six months to five years or with fine up to fifteen thousand rupees.
> (e) Offences under the Act are proposed to be made non-bailable.
> (f) Provision has also been made for appointment of dowry prohibition officers by the state governments for the effective implementation of the Act. The dowry prohibition officers will be assisted by the Advisory Boards consisting of not more than five social welfare workers (out of whom at least two shall be women).
> (g) A new offence of 'dowry death' is proposed to be included in the Indian Penal Code and the necessary consequential amendments in the Code of Criminal Procedure 1973 and the Indian Evidence Act 1872 have also been proposed.[9]

In view of the aforesaid statement of objects and reasons, s 304B was incorporated in the IPC by the Dowry Prohibition (Amendment) Act 1986 with a view to curb the increasing menace of evil practice of giving and taking of dowry by imposing deterrent punishment.

3. Analogous Law

Section 113B of the Indian Evidence Act 1872 was inserted by the same Act 43 of 1986 wef 5 January 1986 It reads:

> **"113B. Presumption as to dowry death.--**When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.
>
> *Explanation.*--For the purposes of this section "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860)."2619

4. Sections 304B and 306

Section 306 of the IPC is much broader in its application and takes within its fold one aspect of s 304B of the IPC . These two sections are not mutually exclusive. If a conviction for causing a suicide is based on s 304B of the IPC, it will necessarily attract s 306 of the IPC . However, the converse is not true.[10]

Cruelty or harassment sans any dowry demands which drives the wife to commit suicide attract the offence of 'abetment of suicide' under s 306, IPC which defines the offence and punishment for 'dowry death.'[11]

5. Sections 304B and 498A, IPC

Section 304B and 498A, IPC are both distinct and separate offences. The 'cruelty' is a common essential ingredient of both the offences. Under s 304B, it is the "dowry death" that is punishable and such death should have occurred within seven years of the marriage. In the statute, no such period is mentioned in s 498A, IPC . The husband or his relative would be liable for subjecting the woman to 'cruelty' any time after the marriage. A person charged and acquitted under s 304B can be convicted under s 498A, IPC . The demand of dowry is an essential ingredients to attract s 304B, IPC, whereas under s 498A, IPC the demand of dowry is not the basic ingredient of the offence. Therefore, even if there is acquittal under s 304B, IPC, still conviction under s 498A can be recorded under the law.[12]

6. Section 304B has no Retrospective Effect

Section 304B, IPC has no retrospective effect.[13]Article 20(1) of the Constitution provides protection in respect of conviction for offences. No person as per this provision of the Constitution shall be convicted of any offence except for violation of the law in force at the time of commission of the act charged as an offence nor be subject to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence. Section 304B is a new offence inserted in the IPC wef 19 November 1986 when Act no 43 of 1986 came into force. A person committing such an offence prior to 19 November 1986 cannot be tried for the offence under s 304B as this provision of the law was non-existent,[14] nor a charge under s 304B can be framed against him.[15]

7. Death should be Homicidal and not Accidental--Burden of Proof of Accidental Death

It is well settled that before an accused can be held guilty of offence under s 304-B of the IPC, the prosecution has to establish that the homicidal death had taken place within seven years of the marriage. In case, the death is found to be accidental,2620 s 304B of the IPC is not at all attracted.[16]Having regard to the provision of s 113B of the Evidence Act together with s 304B of the IPC, if accused raises the question of accidental death, whereas all the ingredients of s 304B are satisfied by prosecution, the onus would lie upon the accused to prove that the housewife died in an accident.[17]

8. Essential Ingredients

A careful analysis of s 304B, shows that this section has the following essentials:[18]

(i) the death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances;
(ii) such death should have occurred within seven years of her marriage;
(iii) she must have been subjected to cruelty or harassment by her husband or any relative of her husband;
(iv) such cruelty or harassment should be for or in connection with demand of dowry;[19]
(v) such cruelty or harassment is shown to have been meted out to the woman soon before her death.[20]

In order to hold an accused guilty of an offence under s 304B, IPC, it has to be shown that apart from the fact that the woman died on account of burn or bodily injury, otherwise than under normal circumstances, within 7 years of her marriage, it has also to be shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Only then would such death be called 'dowry death' and such husband or relative shall be deemed to have caused the death of the woman concerned.[21]

9. Jurisdiction

Where the occurrence of burning took place at Giridih, *i.e.*, matrimonial house, the victim was immediately shifted to hospital at Bokaro where she died, the2621 consequence of death was result of demand of dowry and torture committed by accused persons and offence under s 304B completed at Bokaro, so, court where victim died has got the jurisdiction to try case.[22]

10. Mens Rea

The requirement of proving that soon before her death the woman was subjected to cruelty or harassment by her husband or any relation of her husband for or in connection with any demand of dowry clearly shows that the legislature had imbibed the necessary *mens rea* for the offence of dowry death.[23]

11. Death Otherwise than under Normal Circumstances

To attract s 304B, the death of the woman should be caused by any burns or bodily injury or have occurred otherwise than under normal circumstances, provided other ingredients of s 304B are also satisfied. Therefore, in addition to deaths by burn or bodily injury, other deaths under unnatural circumstances are also covered under s 304B, subject to satisfaction of other ingredients of the section. The death of the wife by strangulation,[24] or stomach ache without any history of any dreadful disease of the stomach,[25] are covered within deaths otherwise than under normal circumstances. The expression 'otherwise than under normal circumstances' would mean the death due to an unusual cause and under suspicious circumstances, if not caused by burns or bodily injury.[26]

When it is not a case of unnatural death the question whether the unnatural death of the woman was homicidal or suicidal is irrelevant for the purpose of s 304B . [27]Section 304B applies to a case of suicide,

whether it is a sequel to cruelty or harassment with the demand of dowry.[28]

In a dowry death case, deceased died within seven years of marriage, of poisoning. There was evidence of the father of the deceased and one witness about the demand of dowry and harassment. The provisions of s 304B, IPC were attracted in the case. Appellant husband of the deceased was convicted under s 304B, IPC .[29]

Appellant husband was alleged to have administered poison to his deceased wife. Death could not be called unnatural as on examination of the bones and ashes of the deceased, no poisonous substance was found present. Merely because the deceased was a young lady, it could not be inferred/adjudged an unnatural death. There was no evidence of demand of dowry. Appellant husband was acquitted of the charge of murder under s 304B, IPC .[30]

A suicide note cannot be taken to be encyclopedia of the entire situation in which the deceased was placed. It is not possible to infer from the said note that the2622 deceased was unhappy in her matrimonial home. When a young married girl finds herself in helpless situation and decides to end her life, in the absence of any other circumstances, it is natural to infer that she was unhappy in her matrimonial home. A suicide note cannot be treated as conclusive of there being no one responsible for the situation when evidence on record categorically points to the harassment for dowry. The appellant husband was convicted under s 304, IPC .[31]

A young girl in her early twenties ending her life with 100% burns within eight months of her marriage due to ill treatment, by mother-in-law cannot be overlooked to show sympathy towards the mother-in-law found guilty for offences under ss 498A and 304B, IPC .[32]

Section 304B stipulates that 'where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances'. It may appear that the former limb which is described by the words 'death caused by burns or bodily injury' is a redundant because such death would also fall within the wide province of death caused otherwise than under normal circumstances'. The former limb was inserted for highlighting that by no means death caused by burns or bodily injury should be treated as falling outside the ambit of the offence.[33]

Death caused by burn injuries is covered by the expression "otherwise than under normal circumstances".[34]

12. Suicide by wife

The deceased committed suicide by hanging as she could not fulfil dowry demands made by accused husband. The deceased died unnatural death within seven years of marriage. There was pressure on the deceased to arrange a further sum of Rs.50,000/- and the consequent misdemeanor on the part of the appellant put serious apprehension on the mind of the deceased, that, if she continued to stay with the appellant, she might be assaulted physically and mentally. Threats by the husband of the deceased over the course of two days, when the deceased was in her matrimonial home might have been enough for the deceased who was in a fragile state of mind to reach breaking point and end her life. Accused appellant was convicted under s 304B, IPC .[35]

Allegation was that due to dowry demand the deceased wife committed suicide. The parents of the deceased deposed that she had committed suicide due to stomach ache. The PWS though in examination-in-chief deposed about dowry demand, but in cross- examination turned hostile. Evidence of dowry demand was not produced by prosecution. Accused husband was acquitted of charge under s 304B, IPC .[36]

There was no evidence to show dowry demand by the appellant husband. Parents of the deceased had not filed FIR, appellant husband had filed FIR, case against him2623 was registered on mere suspicion. Appellant accused alleged that the deceased insisted to go to her parents house, she was not allowed, so

she committed suicide, the defence version was accepted. Appellant accused was acquitted of charge under s 304B, IPC .[37]

Suicide note written by the deceased in her handwriting signed by her exculpated the accused husband and in-laws. Reasonable doubt was created about prosecution story. Accused husband was acquitted of the charge under s 304B and s 498A, IPC .[38]

In the case of burning the fracture of skull is not a necessary fact but in the present case the skull bones were broken. Therefore, the fact remains that she was killed before death. It was not a case of suicide. The evidence of PWS clearly showed the greed of the accused who was persistently taunting and harassing the deceased for not having brought sufficient dowry. Conviction of the appellant mother-in-law under s 304B, IPC was proper.[39]

Dowry death -- Suicide by pregnant woman

A pregnant woman ordinarily would not commit suicide unless relationship with her husband comes to such a pass that she would be compelled to do so.[40]

13. News of Death and Cremation of wife not sent to her Parents--Effect

The deceased died after eating the *prasad* and thereafter she was neither taken to any doctor, nor any treatment was given to her. The most suspicious circumstance which supported the story of the prosecution was that the news of the death of the deceased was not sent to the parents of the deceased who were living only a few miles away from the village of the accused. The accused persons clandestinely, secretly and hurriedly cremated the deceased without informing the factum of death to the parents of the deceased. This circumstance strongly proved and lent immense credibility to the prosecution version.[41] But the conviction of the accused husband merely because he did not inform about death of the deceased to her maternal relations is not proper.[42]

Where between 10 am to 5 pm neither the husband nor the in-laws took any step to inform the concerned police about the so-called accidental fall or the death due to hanging as noticed by one of the accused. This would only indicate that they were very well aware of the cause or reason why the deceased met with unnatural death. But they were reluctant to intimate the concerned authority or the parents of the deceased themselves. This would only suggest though the inmates of the house of2624 husband of victim were very well aware of the cause of death of the deceased, they came out with false explanation. Therefore, by taking recourse to s 106 of the Evidence Act, adverse inference can be drawn against them.[43]

The disposal of the dead body in a hush-hush manner clearly established that the accused had done so with the sole object of concealing the real cause of death. Even the parents of the deceased were not informed. Accused appellant husband was convicted for offence under s 304B, IPC .[44]

When the dead body was disposed of, in unceremonious way without giving information to parents of the deceased, the accused was found liable for adverse inference.[45]

14. Accused not Saving his Wife and Taking Long Time in Taking Victim to Hospital *etc.*--Effect

Where the incident took place at about 12 noon as was apparent from statement of deceased wife made before the investigation officer. Her MLC clearly went to depict that she was brought to the hospital at about 1.40 pm. Besides the accused persons took unusually long time to bring the deceased to the hospital, *i.e.*, nearly an hour and forty minutes considering the distance being of nearly 8 kilometers. The plea of the accused persons that they had promptly rushed deceased to the hospital and their conduct as not of guilty persons does not cut any ice.[46]

The conduct of the accused can also establish his guilt; firstly that the evidence nowhere shows that the accused tried to save his wife as no burn injury on the person of the accused was found. It is a natural phenomenon that in case if the wife of anybody has caught fire on account of any reason then that person would certainly try to save the life of his wife and in this process the person saving the life of his wife will also sustain burn injuries if there was no burn injury found on the person of the accused which may clearly suggest that the accused did not make any attempt to save the life of his wife. The second aspect is that the accused instead of making efforts to save the life of his wife, wasted the time for making irrelevant efforts. The occurrence in this case had taken place at 10.30 pm in the night but the report of this incident was lodged at 2.45 pm at the police station. The doctor found that there were 95 percent burns over the body of deceased, hence in view of the injuries, she needed immediate medical aid, but the accused instead of providing her immediate medical aid, tried to inform the different persons that his wife is burnt and this conduct of the accused shows that he infact tried to create the defence since very beginning.[47] But when information of death of wife was sent to the parents of the deceased to their village, but when no one arrived in time, the dead body was disposed of, no adverse inference can be drawn against accused.[48]2625

15. Expression 'Soon before' used in this Section, Section 113B and Illustration (A) of Section 114, Evidence Act

A conjoint reading of s 113B of the Evidence Act and s 304-B, IPC shows that there must be material to show that soon before her death, the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'. The expression 'soon before' is very relevant where s 113B of the Evidence Act and s 304B, IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of 'soon before' the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under s 113-B of the Evidence Act . The expression 'soon before her death' used in the substantive s 304B, IPC and s 113B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in s 114, illust (a) of the Evidence Act is relevant. It lays down that a court may presume that a man who is in the possession of goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term 'soon before' is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effects of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.[49]

16. 'Soon before Death'

The expression 'soon before' is very relevant where s 113B of the Evidence Act and s 304B, IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by the prosecution. 'Soon before' is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period soon before the occurrence. It would be hazardous to indicate any fixed period. The importance of a proximity test lies both for proof of an offence of dowry death, as well as for raising a presumption under s 113B of the Evidence Act . The expression 'soon before her death' used in the substantive s 304B, IPC, and s 113B of the Evidence Act is pregnant with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to the expression 'soon after' used in s 114, illust (a)

of the Act is relevant. It lays down2626 that a court may presume that a man who is in possession of the goods, soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term 'soon before' is left to be determined by the courts, depending upon the facts and circumstances of each case. However, to indicate that the expression soon before would normally imply that the interval should not be much, between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.[50] Days or months are not what is to be seen. The word 'soon' does not mean 'immediate'. A fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of s 304B would make it clear that the expression is a relative expression. Time lags may differ from case to case. All that is necessary is that the demand for dowry should not be stale but should be the continuing cause for the death of the married woman under s 304B .[51]

Where there is no evidence that the wife was subjected to cruelty and harassment soon before her death, the husband or his relative would not be convicted on the charge of dowry death under s 304B, IPC . Conviction of the husband was set aside.[52]

It is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if s 304B, IPC is to be invoked. However, it should have happened soon before her death. The said phrase no doubt is an elastic expression and can refer to a period either immediately before her death or within a few days or even a few weeks before it. However, the proximity to her death is the pivot indicated by that expression. The legislative object in providing such a radius of time by employing the words 'soon before her death, is to emphasis the idea that her death should, in all probability have been the aftermath of such cruelty or harassment. In other words, there should be a perceptible nexus between her death and the dowry related harassment or cruelty inflicted on her. If the interval elapsed between the infliction of such harassment or cruelty and her death, is wide, the court would be in a position to gauge that in all probability the death would not have been the immediate cause of her death. Hence, it is for the court to decide on the facts and circumstances of each case, whether the said interval in that particular case was sufficient to snuff its cord from the concept soon before her death.[53] It is obvious from this provision that the term 'soon before her death' has been employed by the2627 Parliament to refer to cruelty or harassment which has meted out in proximity to the death has to be considered as the cause of the death. The provision does not employ the term 'at any time before' nor 'immediately before' and must be construed according to its true import.[54] The expression 'soon before her death' is not defined. The determination of period which can come within the term 'soon before' is left to be determined by the court depending upon the facts and circumstances of each case.[55]The word 'shown' in s 304B, IPC means to "prove". In other words, it is for the prosecution to prove that a 'dowry death' has occurred, namely: (i) that the death of a woman has been caused in abnormal circumstances by her having been burned or having been bodily injured, (ii) within seven years of a marriage, (iii) and that she was subjected to cruelty or harassment by her husband or any relative of her husband, (iv) in connection with any demand for dowry, and (v) that the cruelty or harassment meted out to her continued to have a causal connection or a live link with the demand of dowry.[56]

The words 'soon before her death' do not necessarily mean immediately before her death. This phrase is an elastic expression and can refer to a period either immediately before death of the deceased or within a few days or few weeks before death. In other words, there should be a perceptible nexus between the death of the deceased and the dowry related harassment or cruelty inflicted on her.[57]

In the present case the deceased died about 7 months after her marriage. There was evidence that she had been harassed for dowry 10 or 15 days before her death. Section 304B , IPC was held attracted in the case.[58]

Cruelty caused to the deceased on any day from the date of her marriage *i.e.* 20.04.1994 till the date of her death *i.e.* 22.07.1994 could be cruelty caused 'soon before' her death. Death of the deceased took

place within three months and four days. There was evidence that the appellant husband was unhappy over the quantity and quality of the dowry given in marriage. The husband appellant was convicted under s 304B .[59]

Whether or not the cruelty or harassment meted out to the victim for or in connection with the demand of dowry was 'soon before her death' and the proximate cause of her death, under abnormal circumstances, would depend upon the facts of each case. There can be no fixed period of time in this regard.[60]

The basic ingredient of s 304B, IPC is that there should be evidence of cruelty or harassment soon before the death. Thus, when the nearest relatives of the deceased stated that she had complained of cruelty, and that the accused persons wanted more2628 dowry but as there was no evidence of causing cruelty to her by the accused persons in relation to demand of dowry soon before her death, their discharge by the sessions court under s 304B was found proper.[61] Where there was no evidence that soon before her death, the deceased was subjected to cruelty or harassment by the accused husband for or in connection with any demand of dowry, case was not covered by s 304B, IPC .[62]

The expression 'soon before death' has to be given its due meaning as the legislature has not specified any time which would be the period prior to death, that would attract the provisions of s 304B of IPC . The concept of reasonable time would be applicable, which would primarily depend upon the facts of the case, the conduct of the parties and the impact of cruelty and harassment inflicted upon the deceased in relation to demand of dowry to the cause of unnatural death of the deceased. Where the marriage itself has not survived even for a period of two years, the entire period would be a relevant factor in determining such an issue.[63]

17. Cruelty, Demand of Dowry not soon before Death--Effect

The proximity of time between the alleged ill-treatment and time of death is a highly relevant factor, and is an essential and necessary evidence for proof of dowry death.[64]

To attract the provisions of s 304B, one of the main ingredients of the offence which is required to be established is that 'soon before her death', she was subjected to cruelty and harassment in connection with the demand for dowry.[65] The criminal liability under s 304B, IPC is attracted not just by the demand of dowry but by the act of cruelty or harassment by the husband or any relative of her husband in connection with such demand; thus, unless such an act of cruelty or harassment is proved to have been caused by the accused to the deceased soon before her death in connection with the demand of dowry, the accused cannot be held to be liable for the offence of dowry death under s 304B, IPC .[66] Merely making of dowry demand would not attract the provisions of s 304B, IPC .[67]There was no evidence that any demand of dowry was made soon before the death of the deceased. The cause of action for committing the offence was an ego problem on the part of the appellant, namely, the deceased had not been coming to her matrimonial home on her own, while he had been coming to his home on leave. Appellant husband was acquitted of the charge under s 304B, IPC .[68] When the demand of dowry is made soon after marriage by the accused but beyond the range2629 of 'soon before death' of the deceased woman, s 304B is not attracted.[69] Likewise is the position when there is a gap of two,[70] or three to four, years between the harassment by the husband and the in-laws on account of monetary claims which had been satisfied, and the suicide committed by the deceased woman as the nexus or interconnection between these two is not established, but when the gap between the death and last demand of dowry is of two months,[71] there is direct nexus between the two and it can be reasonably inferred that the victim was subjected to cruelty in connection with the demand of dowry soon before her death. Some cruelty, harassment meted out to the deceased one year prior to the date when the deceased committed suicide without anything more was held not cruelty inflicted soon before the death. Appellant accused was acquitted of the charge under s 304B, IPC .[72]Where there was reliable evidence of the father and brother of the deceased that the deceased had been harassed 10 or 15 days before her death for dowry, appellant husband was convicted under s 304B, IPC .[73]

Where there was no cogent evidence against the appellants/accused that they subjected the deceased to

cruelty or harassment for demand of dowry soon before her death, the accused appellants could not be held guilty for the offence of causing death of the deceased wife. Merely because the dead body of the deceased was found inside the house of the husband, the husband cannot be convicted for offence under s 304B, IPC .[74]

Where there is no allegation or evidence of demand of dowry, s 304B, IPC would not be attracted.[75]

18. 'Within Seven Years of Marriage'

The death of a woman in unnatural circumstances must be caused within seven years of marriage to attract s 304B, IPC, or the presumption under ss 113A and 113B of the Evidence Act, if other conditions are also satisfied. When death of the wife by burning took place beyond a period of 8 years[76] from the date of marriage, neither s 304B, IPC, nor s 113A, Indian Evidence Act 1872 is attracted. Where no evidence regarding the date of marriage was tendered, as such it was not proved that death occurred within seven years of marriage, appellant accused was not convicted for offence under s 304B, IPC .[77]

19. Misunderstanding between Accused and his Deceased Wife

If it was a case of misunderstanding between the accused and the deceased, the same would not automatically lead to the conclusion that the accused had committed an offence under s 304-B of the IPC . The law does not raise any such presumption.[78]2630

20. Cruelty

The expression 'cruelty' postulates such treatment as to cause reasonable apprehension in the mind of the wife that her living with the husband will be harmful and injurious to her life. To decide the question of cruelty the relevant factors are the matrimonial relationship between the husband and wife, their cultural and temperamental state of life, their state of health and their interaction in daily life.[79] Human reactions may be different and the more sensitive persons may react more violently even to minor incidents. At the same time, however, unless cruelty is demonstrated to be of a level that would give rise to suicide or it has in fact given rise to the committing of suicide, it would not be correct to record a conviction under s 304B, even in a situation where conviction under s 498A, IPC, is justified. While in many instances the two offences could lead one to the other, there could be and there are many situations in which this is not necessarily so.[80] Explanation to s 498A gives the meaning of cruelty. In s 304B, there is no such explanation about the meaning of 'cruelty'. However, having regard to the common background of these offences, it has to be taken that the meaning of 'cruelty or harassment' is the same as prescribed in the explanation to s 498A under which 'cruelty' by itself amounts to an offence.[81]

Thus, the ordinary dictionary meaning of 'cruelty' would not be applicable to hold that it is vague being interpreted in so many ways. Obviously, the legislature has defined the term 'cruelty' while keeping in view the object which was required to be achieved.[82]

The meaning of the word 'cruelty' for the purpose of s 304B, IPC has to be gathered from the language as it appeared in the explanation of s 498A, wherein cruelty means 'any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman or such harassment to coerce her or any other person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand'.[83]

Whether one spouse has been guilty of cruelty to the other is essentially a question of fact.

The impact of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education *etc.* Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words, each

case has to be decided on its own facts to decide whether mental cruelty was established.[84] When persistent and continuous demands for dowry by the accused-husband were not met by his father-in-law and mother-in-law, with the accused going to the extent of even disowning his deceased wife, it is needless to say that such conduct of the2631 accused is eloquent proof of his having subjected the deceased to mental cruelty.[85] Where deceased died within seven years of marriage, the prosecution evidence established that the accused appellants had mentally harassed the deceased for bringing insufficient dowry, conviction of the appellants accused under ss 304B, 498A and 306, IPC was upheld.[86]

Cruelty referable to dowry harassment could be brought under s 304B, but there is need for Parliament to consider such legislation as is necessary to enlarge the scope of s 304B, to include such cruelty meted out to a wife other than only such cruelty referable to dowry harassment.[87]

21. Dowry

For the purposes of sub-s 1 of s 304B, 'dowry' shall have the same meaning as in s 2 of the Dowry Prohibition Act 1961 in view of the explanation to sub-s 1 of s 304B .[88] Section 2 of Dowry Prohibition Act is as follows:

> " **S. 2 . Definition of "dowry".**--In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly--
>
> (a) by one party to a marriage to the other party to the marriage; or
> (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person.
>
> at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.
>
> Explanation 1.--***.
>
> *Explanation 2.*--The expression "valuable security" has the same meaning as in s 30 of the Indian Penal Code (45 of 1860)."

According to the definition of 'dowry', any property or valuable security given or agreed to be given either at or before or anytime after the marriage, comes within the meaning of dowry.[89] 'Dowry' definition is to be interpreted with the other provisions of the Act including s 3, which refers to giving or taking dowry and s 4 which deals with penalty for demanding dowry under the Dowry Prohibition Act 1961 and the IPC . This makes it clear that even the demand of dowry on other ingredients being satisfied is punishable.[90] Customary payments in connection with the birth of a child or other ceremonies, are not enveloped within ambit of 'dowry'.[91]

The definition of 'dowry' beyond all proportions is not permissible by s 2 of the Dowry Prohibition Act 1961. To illustrate, after 4 or 5 years of marriage the husband, being in some difficulty in his business, requests or demands some money from his father-in-law directly or through his wife, only with the view that he is able2632 to advance in life. Such demand cannot be termed as 'dowry'.[1] The demand of Rs 50,000 made by the husband and in-laws of the deceased after 4 years of marriage for sending the husband's brother

abroad cannot be termed as 'dowry' under s 2 of the Dowry Prohibition Act .[2]

22. Demand of Dowry

The deep rooted social evil of dowry requires to be controlled not only by effective implementation of the Dowry Prohibition Act 1961, but also by society. Society has to find out ways and means of controlling and combating this menace of receipt and payment of dowry. It appears that instead of controlling payment and receipt of dowry in one or other form, it is increasing even in the educated class. It may be that it is increasing because of accumulation of unaccounted wealth with the few and others having lesser means following the same out of compulsion.[3]Demand neither conceives nor would conceive of any agreement. If for convicting any offender, agreement for dowry is to be proved, hardly any offenders would come under the clutches of law. When s 304-B refers to 'demand of dowry', it refers to the demand of property or valuable security as referred to in the definition of 'dowry' under the Act.[4] Dowry should be any property or valuable security given or agreed to be given in connection with marriage.[5]

However, the crucial words are 'in connection with the marriage of the said parties'.[6] Demand of any property/valuable security, directly or indirectly having nexus with marriage is dowry demand for the purpose of s 304B, IPC .[7]

If a demand for property or valuable security, directly or indirectly, has a nexus with marriage, such demand would constitute 'demand of dowry, the cause or reason for such demand being immaterial.[8]

When persistent demands for TV and scooter are made from the bride after marriage or from her parents, it would be a case of demand of dowry within the meaning of s 304B .[9] The persistent demand for money from bride or her parents after marriage for purpose of kidney transplantation, would constitute to be in connection with marriage and would be a case of demand of dowry.[10] Where the bride committed suicide not on account of any demand, but on account of harassment caused by the accused husband, conviction of the accused under s 304B, IPC was converted into one under s 306, IPC .[11]2633

Where wife had committed suicide within eight months of marriage, there was adequate evidence that the wife was subjected to torture in connection with demand of dowry by the appellant husband, she was also not allowed to visit her parents, the appellant husband was convicted under s 304B, IPC .[12]

Where evidence of the members of the family of the deceased about dowry demand is reliable and inspires confident, non-production of independent witness(es) to prove the same would not be fatal to the prosecution case.[13]

Where as per the statement of the prosecution witness, the financial position of the accused was good, and one prosecution witness stated that only the accused demanded Rs 50,000 while the other witness stated that demand was also made by the father of the accused, the story regarding the demand of dowry was first made in the FIR which was lodged after seven months of the incident, on these facts it was held that the demand of dowry was not proved and the accused had to be acquitted.[14]

Evidence did not prove demand of dowry, ill-treatment or harassment. The deceased had received 99% burn injuries, was suffering from mental illness, her dying declaration was also not found reliable. Accused appellant was acquitted of charges under ss 304B, 306 and 498A, IPC .[15]

23. Greed for Dowry

The greed for dowry is explained by the Apex Court in the following words:

child in this holy land of ours where in good old days the belief was (where woman is worshipped there is abode of God). We have mentioned about dowry thrice, because this demand is made on three occasions: (i) before marriage; (ii) at the time of marriage; and (iii) after the marriage, greed being limitless, the demands become insatiable in many cases followed by torture on the girl, leading to either suicide in some cases or murder in some.16

24. Demand of Dowry--Agreement not Necessary

Explanation to s 304B, IPC refers to dowry 'as having the same meaning as in s 2 of the Dowry Prohibition Act 1961'. The question is what is the scope of dowry, as defined therein.

The offence under s 304B, IPC, makes the demand of dowry itself punishable. It is significant that s 4 of the 1961 Act, was also amended by means of Act 63 of 1984, under which it is an offence to demand dowry directly or indirectly from the parents or other relatives or guardian of a bride. The word agreement referred to in s 2 has to be inferred from the facts and circumstances of each case. The interpretation that the appellant seeks that there can be conviction only if there is an agreement for dowry is misconceived. This would be contrary to the mandate and2634 object of the Act. The definition of dowry is to be interpreted with the other provisions of the Act including s 3, which refers to giving or taking dowry and s 4 which deals with penalty for demanding dowry, under the 1961 Act and the IPC . This makes it clear that even a demand of dowry on the ingredients being satisfied is punishable. This leads to the inference that when persistent demands for a TV and scooter are made from the bride, after marriage or from her parents, it would constitute to be in connection with the marriage and it would be a case of demand of dowry within the meaning of s 304B, IPC . It is not always necessary that there be any agreement for dowry.[17]The word 'agreement' referred to in s 2 has to be inferred from the facts and circumstances of each case. The interpretation, that conviction can only be if there is agreement for dowry, is misconceived. This would be contrary to the mandate and object of the Act. 'Dowry' definition is to be interpreted with the other provisions of the Act including s 3, which refers to giving or taking dowry and s 4 which deals with a penalty for demanding dowry, under the Act and the IPC . This makes it clear that even demand of dowry on other ingredients being satisfied is punishable. It is not always necessary that there be any agreement for dowry.[18] Testimony of brother and father of deceased as to payment of part of dowry, cannot be discarded on ground that they failed to establish that there was an agreement to pay the dowry.[19]

The Andhra High Court was of the view that unless any prior agreement to pay some valuable security, money etc is proved, demands made for 'amounts' will not fall under 'dowry' and the accused is not liable for an offence punishable under s 304B .[20] However, this view of the Andhra Pradesh High Court being contrary to the decision of the Supreme Court[21] shall be deemed to be impliedly overruled.

25. Cases not Falling under 'Demand of Dowry'

Following are the instances which were not found to be 'demand of dowry' within the meaning of s 304B, IPC :

(a) when there was no evidence on record to show that land was demanded as dowry though it was given by the father of the deceased woman in the marriage ritual as *Pasupukumuma*, the harassment or cruelty meted out to the deceased by the husband after marriage, to force her to transfer the land in his name was 'not in connection with any demand for dowry'.[22]

(b) where letters written by the deceased to her sister, mother and friend as well as the suicide note and letters written by her mother to her did not show any demand of dowry, and make the case projected by the prosecution at the trial about demand of a car unacceptable, and there was no evidence on record to suggest that the deceased was being maltreated or tortured, except that she was constantly being taunted for not bringing a car as dowry.[23]2635

(c) Customary payment in connection with birth of child or other ceremonies are not enveloped within the ambit of 'dowry'.[24]

(d) When there is no consistency with regard to the amount of gold allegedly demanded, and the statement of witnesses regarding the promise to give gold after marriage was missing from their earlier statement under s 161, CrPC, recorded by the investigating officer, such demands were found as not falling within the meaning of dowry.[25]

(e) The demand made by the accused from the date of the function, held, to celebrate the seventh month of pregnancy and onwards, cannot be styled as a demand in connection with the marriage. Such demands have no nexus with the marriage and so the conviction of the accused for the offence under s 304B is unsustainable in law.[26]

(f) The demand of Rs 50,000/- made by the husband and her in-laws after four years of marriage for sending her husband's brother abroad cannot be termed as 'dowry' under s 2 of the Dowry Prohibition Act 1961.[27]

(g) When evidence led by the prosecution regarding demand of Rs 15,000 by the accused-husband was self-contradictory, and even otherwise, such mere demand does not constitute cruelty or harassment.[28]

(gg) Verbal alteration about money matters between the accused husband and the deceased wife.[29]

(h) Where the parents of the deceased-wife presented a dining-table to the accused voluntarily but the accused expressed his preference to cash instead of table does not constitute cruelty, harassment.[30]

(i) Where in the letter written by accused to father of deceased wife, he only requested him to help in getting service, it is not a demand for dowry.[31]

(j) Demand of clothes from parents of the deceased/wife for family members of the accused husband in function, *i.e.*, *Akhand Ramayan Katha* organized at place of the accused and about condition for parents of the accused to live separately from couple do not come within definition of dowry.[32]

(k) A demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood.[33]2636

(l) Demand of money by accused husband to repay loan is not dowry demand.[34]

(m) Demand made by the accused husband for purchasing a computer to start a business six months after the marriage, would not be in connection with the marriage and is not really a 'dowry demand' within the meaning of s 2 of the Dowry Prohibition Act, 1961. Conviction of the accused under s 304B, IPC was set aside.[35]

Where the bride is subjected to ill-treatment and harassment which leads the wife to commit suicide by consuming poison, but it is not related to dowry demand, accused would not be convicted under s 304B, IPC . Conviction of the accused under s 304B, IPC was converted under s 306, IPC .[36]

26. Section 304B and Section 498A --Distinction

The offence punishable under s 304B, IPC, known as dowry death, was a new offence created by insertion of the provision in the IPC providing for a more stringent offence than s 498A .[37]Sections 304B and 498A cannot be held to be mutually exclusive. These provisions deal with two distinct offences.[38] Under s 304B, it is 'dowry death', *i.e.*, punishable, and such death should have occurred within 7 years of marriage. No such period is mentioned in s 498A .[39] Unlike s 304B, it is not necessary to establish demand of dowry for conviction under s 498A .[40] If death occurs due to cruelty under the wider definition of 'cruelty' under s 498-A, and is not referable to cruelty in connection with demand of dowry required under s 304B, then it would not be permissible for the court to convict a person under s 304B, although he may be liable for conviction under s 498A .[41]

Unless cruelty is demonstrated to be of a level which would give rise to suicide or that it has in fact given rise to the committing of the suicide, it would not be correct to record a conviction under s 304B even in a situation where conviction under s 498A is justified.[42]

27 'Husband'

Husband in ss 304B and 498A need not be a legally married person.[43]

28. 'Any Relative of her Husband'

The expression 'relative of the husband' in s 304B, IPC would mean such persons, who are related by blood, marriage or adoption.[44]2637

The respondent brother of the husband's aunt by marriage, who is not relative of her husband within the meaning of s 304B, IPC was not prosecuted under s 304B, IPC, the order summoning him as accused was quashed.[45]

1 Inserted by Act 43 of 1986, s 10 (wef 19-11-1986).

2 *Bhagwant Singh v Commissioner of Police, Delhi* AIR 1983 SC 826, 1983 Cr LJ 1081 (SC) .

3 *State of Himachal Pradesh v Nikku Ram* 1995 Cr LJ 4184 (SC) .

4 *Keshav Dev v State of Rajasthan* 2005 Cr LJ 3306 (Raj) .

5 *K Prema S Rao v Yadala Shrinivasa Rao* 2003 Cr LJ 69 (SC), 2002 VIII AD 615 (SC) ; *Rajesh Bhatnagar v State of Uttrakhand* AIR 2012 SC 2866, 2012 Cr LJ 3442 ; *Mustafa Sahadal Shaikh v State of Maharashtra* (2012) 11 SCC 397, 2012 Cr LJ 4763 .

6 *Mahadev Prasad Kaushik v Sttae of UP* AIR 2009 SC 125, (2008) 14 SCC 479 .

7 *Suresh Kumar v State of Haryana* 2014 Cr LJ 551, p 556 (SC), (2013) 16 SCC 353, (2014) 133 AIC 185 (SC) .

8 *Raja Lal Singh v State of Jharkhand* 2007 Cr LJ 3262, p 3264 (SC), AIR 2007 SC 2154, 2007 (6) Scale 568, 2007 (3) Supreme 1037 ; *Satvir Singh v State of Punjab* (2001) 8 SCC 633, AIR 2001 SC 2828, 2001 Cr LJ 4625, II (2001) DMC 734 SC, JT 2001 (8) SC 208, 2001 (6) Scale 513 .

9 *State of Karnataka v MV Manjunathagowda* 2003 I AD (SC) 601 .

10 *Bhupendra v State of Madhya Pradesh* 2014 Cr LJ 546, p 551 (SC), AIR 2014 SC 378, (2014) 2 SCC 106 .

11 *Narwinder Singh v State of Punjab* AIR 2011 SC 686, p 691, (2011) 2 SCC 47, (2011) 98 AIC 35 (SC) .

12 *State of UP v Santosh Kumar* (2009) 9 SCC 626, p 633, 634, 2009 AIR SCW 6177, (2009) 12 Scale 269 ; **See also***Shanti v State of Haryana* (1991) 1 SCC 371, 1991 SCC (Cri) 191 .

13 *Soni Devrajbhai Babubhai v State of Gujarat* AIR 1991 SC 2173, 1991 Cr LJ 3135 (SC) .

14 *Bhagirathibai Surji Bhanushali v State of Maharashtra* 1998 Cr LJ 2209 (Bom) (DB) ; *Soni Devraj Bhai Babubhai v State of Gujarat* AIR 1991 SC 2173, 1991 Cr LJ 3135 (SC) .

15 *Pradeep Kumar Dhawan v State of Madhya Pradesh* 1995 Cr LJ 2623 (MP) .

16 *Suresh Singh v State of Bihar* 2007 Cr LJ 92 (Pat) (DB) .

17 *Jashoda v The State of Madhya Pradesh* 2004 SCC (Cr) 67, AIR 2005 SC 1411 ; *Tapas Kumar Ghosh v State of West Bengal* 2007 Cr LJ 434 (DB) .

18 *Rohit Das v State of Bihar* 2005 Cr LJ 4 (Jhar) ; *Anup Kumar Verma v State of Jharkhand* 2004 Cr LJ 1712 (Jhar) ; *Anguri Devi v State of Jharkhand* 2007 Cr LJ 1074 (Jhar) .

19 *Hajarimal v State of Rajasthan* 1998 Cr LJ 4253 (Raj) ; *Shanti v State of Haryana* AIR 1991 SC 1226, 1991 Cr LJ 1713 ; *Sambhu Paul v State of Assam* 2002 Cr LJ 3359 (Gau) ; *Major Singh v State of Punjab* (1998) 3 Crimes 131 (P&H) ; *Suresh Kumar v State of Haryana* (1997) 1 RCR 794 ; *Bijoy Maan alias Phagu Maw v State of Bihar* 2000 Cr LJ 3384 (Pat) ; *Tapas Kumar Ghosh v State of West Bengal* 2007 Cr LJ 434 (Cal) (DB) ; *Biswajit Halder alias Babu Halder v State of West Bengal* 2007 Cr LJ 2300 (SC) .

20 *Tirath Kumari v State of Haryana* 2005 Cr LJ 4977 (4978), AIR 2005 SC 4429 ; *Taiyab Khan v State of Bihar* 2006 Cr LJ 544 (SC) ; *Rajinder Kumar v State of Haryana* 2015 Cr LJ 1560 (SC) . *Keshav Chandra Panda v State* 1995 Cr LJ 174 (Ori)*;*

Pradeep Yadav v State of Bihar 2013 (2) Crimes 312 (Pat) ; *Bharat Bhushan v State of MP* (2014) 13 SCC 525, (2013) 125 AIC 270 (SC) ; *Panchanand Mondal v State of Jharkhand* (2013) 9 SCC 800 ; *Rajesh Bhatnagar v State of Uttrakhand* (2012) 7 SCC 91, AIR 2012 SC 2886 ; *Sanjai Kumar Jain v State of Delhi* (2011) 11 SCC 733, AIR 2011 SC 363, (2011) 98 AIC 136 (SC) ; *Bachni Devi v State of Haryana* (2011) 4 SCC 427, AIR 2011 SC 1098, 2011 Cr LJ 1634 ; *Gurdeep Singh v State of Punjab* (2011) 2 SCC 408).

21 *Durga Prasad v State of MP* 2010 Cr LJ 3419, p 3422 (SC), 2010 AIR SW 3673, 2010 (8) SCC 73, 2010 (6) Scale 18 .

22 *Anokhey Mishra v State of Jharkhand* 2005 Cr LJ 4231 (Jhar) .

23 *Krishan Lal v Union of India* 1994 Cr LJ 3472 (P&H) (FB).

24 *Hemchand v State of Haryana* AIR 1995 SC 120 .

25 *Santraj v State of Haryana* (1998) 8 SCC 605 .

26 *Kans Raj v State of Punjab* 2000 Cr LJ 2993 (SC) .

27 *Shanti v State of Haryana* AIR 1991 SC 1226 .

28 *Satvir Singh v State of Punjab* 2001 Cr LJ 4625 (SC), (2001) 8 SCC 633 ; *Raja Lal Singh v State of Jharkhand,* 2007 Cr LJ 3262, AIR 2007 SC 2154, 2007 (6) Scale 568 .

29 *Sukhwinder Singh v State of Punjab* 2014 Cr LJ 446 (SC), (2014) 12 SCC 490, (2014) 6 SCC (Cri) 825 .

30 *Gurdeep Singh v State of Punjab* (2011) 12 SCC 408, AIR 2011 SC 3616, JT 2011 (10) SC 265, 2012 (1) RCR (Criminal) 300, 2011 (10) Scale 89 .

31 *Naresh Kumar v State of Haryana* (2015) 1 SCC 797, p 800, 2014 (13) Scale 58 .

32 *Tarabai v State of Maharashtra* (2015) 3 SCC 530, p 535, 2015 Cr LJ 1326, 2015 (1) Crimes 157 (SC), 2015 (1) Scale 521 .

33 *Satvir Singh v State of Punjab* 2001 Cr LJ 4625 (SC) .

34 *State of Rajasthan v Girdhari Lal* (2013) 15 SCC 269, 2014 Cr LJ 41, (2013) 132 AIC 104 ; *Surinder Singh v State of Haryana* AIR 2014 SC 817, 2014 Cr LJ 561 .

35 *GV Siddaramesh v State of Karnataka* 2010 Cr LJ 1649, 2010 AIR SW 1387, 2010 (3) SCC 152, 2010 (2) Scale 102 ; *Uday Chakraborty v State of West Bengal* 2010 Cr LJ 3862 (SC) (Death by burning within two years of marriage -- Evidence of dowry demand).

36 *Gopti v State* 2011 Cr LJ 4815 (Kant) .

37 *T Aruntperunjothi v State* 2006 Cr LJ 3290, AIR 2006 SC 2475, 2006 (4) Scale 103 .

38 *Vipin Jaiswal v State of AP* 2013 Cr LJ 2095, AIR 2013 SC 1567, (2013) 3 SCC 684 .

39 *Prem Kanwar v State of Rajasthan* 2009 Cr LJ 1123 (SC), AIR 2009 SC 1242, (2009) 3 SCC 726 .

40 *Rameshwar Dass v State of Punjab* 2008 Cr LJ 1400 (SC), AIR 2008 SC 890, 2008 AIR SCW 282, 2007 (14) Scale 378 .

41 *Ram Badan Sharma v State of Bihar* 2006 Cr LJ 4070 (SC), AIR 2006 SC 2855, 2006 (8) Scale 210, (2006) 10 SCC 115*; Sri Chand v State of Punjab* (2014) 10 SCC 293, 2014 Cr LJ 4896, 2015 (2) Crimes 194 (SC), 2014 (1) Scale 78 ; *Rammurti v State of MP* (2012) 13 SCC 739 .

42 *Satvir Singh v State of Punjab* 2001 Cr LJ 4625 (SC) ; *State of Andhra Pradesh v Raj Gopal Asawa* 2004 Cr LJ 1791 (SC), AIR 2004 SC 1933, JT 2004 (3) SC 560, 2004 (3) Scale 339, (2004) 4 SCC 470 ; *Kans Raj v State of Punjab* (2000) 5 SCC 207, AIR 2000 SC 2324 ; *Madhusudan Rai v State of Jharkhand* 2006 Cr LJ 332 (Jhar) ; *Nand Kishore Singh v State of Jharkhand* 2005 Cr LJ 389 (Jhar) ; *Kunhiabdulla v State of Kerala* 2004 Cr LJ 5005 (SC) ; *Raja Lal Singh v State of Jharkhand* 2007 Cr LJ 3262 (SC), AIR 2007 SC 2154, 2007 (6) Scale 568, (2007) 15 SCC 415 .

43 *State of Karnataka v Chowdegowda* 2007 Cr LJ 2812 (Kant) (DB) .

44 *Dasrath v State of MP* 2010 Cr LJ 4382 (SC), AIR 2010 SC 2592, 2010 AIR SCW 4611, 2010 (7) Scale 389 ; *State of Rajasthan v Jaggu Ram* AIR 2008 SC 982, (2008) 12 SCC 51 .

45 *Uma Devi v State of Bihar* 2007 Cr LJ (NOC) 679 (Pat)*; Rammurti v State of MP* (2012) 13 SCC 739 .

46 *Gyano Devi v State* 2006 Cr LJ 4168 (Del) (DB) .

47 *Banbir Singh v State of Uttaranchal* 2006 Cr LJ 4181 (Uttar) (DB) .

48 *Saro Rana v State of Jharkhand* 2005 Cr LJ 65 (Jhar) (DB) .

49 *Kamesh Panjiyar v State of Bihar* 2005 Cr LJ 1418 (SC) ; *Narayanamurthy v State of Karnataka* (2008) 16 SCC 512, AIR 2008 SC 2377 .

50 *Keshab Chandra Panda v State* 1995 Cr LJ 174 (Ori) ; *Rohit Das v State of Bihar* 2005 Cr LJ 4 (Jhar) ; *Kans Raj v State of Punjab* (2000) 3 PLJR 68 (SC), 2000 Cr LJ 2993, AIR 2000 SC 2324 ; *Hira Lal v State (Govt of NCT) Delhi* AIR 2003 SC 2865, 2003 Cr LJ 3711 ; *Mustafa Shahadal Shaikh v State of Maharashtra* 2012 Cr LJ 4763 (4766), 2012 AIR SCW 5308, 2012 (8) Scale 692 ; *Kashmir Kaur v State of Punjab* 2013 Cr LJ 689, AIR 2013 SC 1039, 2012 (12) Scale 272 ; *Yashoda v State of Madhya Pradesh* (2004) 3 SCC 98, AIR 2005 SC 1411, 2004 AIR SCW 7299 ; *Kaliaperumal v State of Tamil Nadu* AIR 2003 SC 3838, 2003 AIR SCW 4387 ; *Navin Chandra Kandpal v State of Uttrakhand* 11 (2012) DMC 120 (Uttr) .

51 *Rajinder Singh v State of Punjab* AIR 2015 SC 1359, p 1368, 1369 (**Overruling***Dinesh v State of Haryana* 2015 (5) Scale 641, 2014 AIR SCW 3400); **See also***Sher Singh v State of Haryana* AIR 2015 SC 980 .

52 *Jatashankar Sah v State of Bihar* 2013 Cr LJ 1992 (Pat) .

53 *Satvir Singh and ors v State of Punjab* 2001 Cr LJ 4625 (SC)*; Asha v State of Uttrakhand* (2014) 4 SCC 174, (2014) 1 All LJ 446 (Cruelty, harassment not proved, conviction set aside); *Bharat Bhushan v State of MP* (2014) 13 SCC 525, (2013) 125 AIC 270 ; *Madivallappa V Morabal v State of Karnataka* (2014) 12 SCC 448 (Dowry demand and cruelty not proved, accused acquitted).

54 *Tummala Venkateswar Rao v State of Andhra Pradesh* 2014 Cr LJ 1641, p 1644, AIR 2014 SC 889, (2014) 2 SCC 240 .

55 *State of Maharahtra v Rajendra* 2014 Cr LJ 3811, p 3816, (2014) 12 SCC 496 ; *Dinesh v State of Haryana* (2014) 12 SCC 532, 2014 Cr LJ 3092 .

56 *Sher Singh v State of Haryana* AIR 2015 SC 980, p 989 (SC), (2015) 3 SCC 724, 2015 (1) JT 441, 2015 (1) SCALE 250, 2015 (1) SLT 482, 2015 Cr LJ 1118 .

57 *Raja Lal Singh v State of Jharkhand* 2007 Cr LJ 3262, p 3264 (SC), AIR 2007 SC 2154, 2007 (6) Scale 568, 2007 (3) Supreme 1037

58 *Raja Lal Singh v State of Jharkhand* 2007 Cr LJ 3262, p 3264 (SC), AIR 2007 SC 2154, 2007 (6) Scale 568, 2007 (3) Supreme 1037 .

59 *Surinder Singh v State of Haryana* 2014 Cr LJ 561 (SC), (2014) 4 SCC (Cri) 769, (2014) 13 AIC 174 (SC) .

60 *Deen Dayal v State of UP* 2009 Cr LJ 1119, p 1122 (SC), AIR 2009 SC 1238, 2009 (1) Scale 408 ; *Prem Kumar v State of Rajasthan* 2009 Cr LJ 1123 (SC) .

61 *Sarveshwar Singh v State* 1999 Cr LJ 2179 (Raj)*; Manohar Lal v State of Haryana* (2014) 9 SCC 645, AIR 2014 SC 2555 (Accused acquitted); *Panchanand Mandal v State of Jharkhand* (2013) 9 SCC 800 ; *Indrajit Sureshprasad Bind v State of Gujarat* (2013) 14 SCC 678, (2013) 125 AIC (SC) ; *Gurnaib Singh v State of Punjab* (2013) 7 SCC 108, (2013) 3 SCC (Cri) 49).

62 *State of Rajasthan v Girdhari Lal* (2013) 15 SCC 269, 2014 Cr LJ 41 .

63 *Uday Chakraborty v State of West Bengal* 2010 Cr LJ 3862, p 3866, AIR 2010 SC 3506, 2010 AIR SCW 4435, (2010) 7 SCC 518, 2010 (6) Scale 743 (SC) ; *Ashok Kumar v State of Haryana* 2010 Cr LJ 4402 (SC), AIR 2010 SC 2839 .

64 *Niranjan Mohapatra v State of Orissa* 1998 Cr LJ 630 (Ori) .

65 *K Prema S Rao v Yadia Srinivasa Rao* 2003 Cr LJ 69 (SC), 2002 VIII AD 615 (SC)*; Bharat Bhushan v State of MP* (2014) 5 SCC (Cri) 736, (2013) 125 AIC 270 ; *Bhola Ram v State of Punjab* (2013) 16 SCC 421, AIR 2014 SCC 241

66 *Bharat Bhushan v State of MP* (2013) 15 AIC 270, p 272 (SC), (2014) 13 SCC 525, (2014) 5 SCC (Cri) 736 .

67 *Bhola Ram v State of Punjab* AIR 2014 SC 241, (2013) 16 SCC 421 .

68 *Tarseem Singh v State of Punjab* AIR 2009 SC 1454, (2008) 16 SCC 155 .

69 *Mungeshwar Prasad Chaurasia v State of Bihar* 2002 Cr LJ 3505 (SC) .

70 *Rajinder v State of Haryana* 2000 Cr LJ 2492 (P&H) .

71 *Tarsem Singh v State of Punjab* (1999) 1 Crimes 401 (P&H) .

72 *Suresh Kuamr Singh v State of UP* (2009) 4 All LJ 662, (2009) 17 SCC 243 .

73 *Raja Lal Singh v State of Jharkhand* 2007 Cr LJ 3262, p 3264 (SC), AIR 2007 SC 2154, 2007 (6) Scale 568, 2007 (3) Supreme 1037 .

74 *Shambhudayal v State of MP* 2015 Cr LJ 1578, p 1584 (MP) (DB) .

75 *Ramaiah v State of Karnataka* AIR 2014 SC 3388, 2014 Cr LJ 4159 .

76 *Malyala Vishwanatha Rao v State of Andhra Pradesh* 2003 Cr LJ (NOC) 11 (AP), (2002) 1 ALT (Cr) 499 .

77 *Gurdip Singh v State of Punjab* (2013) 10 SCC 395, 2013 (11) Scale 122 .

78 *T Aruntperunjothi v State* 2006 Cr LJ 3290 (SC), AIR 2006 SC 2475, (2006) 4 Scale 103 .

79 *State of Karnataka v Baleppa* 1999 Cr LJ 3064 (Kant) (DB) .

80 *State v Shivappa Bhimappa Pathat* 2002 Cr LJ (NOC) 222 (Kant) .

81 *Keshab Chandra Panda v State* 1995 Cr LJ 174 (Ori) ; *Shanti v State of Haryana* AIR 1991 SC 1226 .

82 *Krishan Lal v Union of India* 1994 Cr LJ 3472 (P&H) (FB).

83 *Sambhu Paul v State of Assam* 2002 Cr LJ 3359 (Gau) ; *Major Singh v State of Punjab* (1998) 3 Crimes 131 (P&H) .

84 *Mohd Hoshan v State of Andhra Pradesh* 2002 VIII AD 26 (SC) .

85 *Rajayyan v State of Kerala* AIR 1998 SC 1211 .

86 *Amrutlal Liladharbhai Kotak v State of Gujarat* AIR 2015 SC 1355, (2015) 4 SCC 452, 2015 (2) Scale 688, 2015 Cr LJ 1951, 2015 (1) Crimes 251 (SC) .

87 *State of Karnataka v KS Manjunathachari* 1999 Cr LJ 3949 (Kant) (DB) .

88 *State of Andhra Pradesh v Raj Gopal Asawa* 2004 Cr LJ 1791 (SC) . For details refer to s 2 of the Dowry Prohibition Act 1961.

89 *Sambhu Paul v State of Assam* 2002 Cr LJ 3359 (Gau) ; *Rajinder Singh v State of Punjab* AIR 2015 SC 1359, 2015 Cr LJ 1934 .

90 *Pawan Kumar v State of Haryana* AIR 1998 SC 958, 1998 Cr LJ 1144 (SC) ; *State of Andhra Pradesh v Raj Gopal Asawa* 2004 Cr LJ 1791 (SC) .

91 *Satvir Singh v State of Punjab* 2001 Cr LJ 4625 (SC) .

1 *State of Punjab v Daljit Singh* 1999 Cr LJ 2723 (P&H) (DB).

2 *Ibid*.

3 *Vikas v State of Rajasthan* 2002 Cr LJ 3760 (SC) ; *Sanjai Kumar Jain v State of Delhi* (2011) 11 SCC 733, AIR 2011 SC 363 (Dowry system a big slur on the society).

4 *State of Andhra Pradesh v Raj Gopal Asawa* 2004 Cr LJ 1791 (SC) .

5 *Vasant Bhagwat Patil v State of Maharashtra* 2012 Cr LJ 65, 1 (2012) DMC 738 (Bom) .

6 *Satvir Singh v State of Punjab* AIR 1998 SC 958 .

7 *Raminder Singh v State of Punjab* (2014) 12 SCC 582, (2014) 5 SCC (Cri) 116 (Deceased wife came under wheels, overwhelming evidence of dowry demand, accused husband convicted under s 304B, IPC); *Surinder Singh v State of Haryana* AIR 2014 SC 817, 2014 Cr LJ 561 (Death of wife by burns, conviction proper.

8 *Bachni Devi v State of Haryana* 2011 Cr LJ 1634, p 1638 (SC), AIR 2011 SC 1098, (2011) 4 SCC 427, 2011 (2) Scale 265 .

9 *Pawan Kumar v State of Haryana* AIR 1998 SC 958, 1998 Cr LJ 1144 (SC) .

10 *Dhani Ram v State of Rajasthan* 2006 Cr LJ 3491 (Raj) (DB) .

11 *Narwinder Singh v State of Punjab* AIR 2011 SC 686, p 691, (2011) 2 SCC 47 .

12 *Bisa Sheikh v State of Assam* 2014 Cr LJ 251 (Gauh) ; **See also***State of Maharashtra v Rajendra* 2014 AIR SCW 4095 ; *Bhupendra v State of MP* (2014) 2 SCC 106, 2014 Cr LJ 546, AIR 2014 SC 378 ; *Saryu Sharma v State of Bihar* 2014 Cr LJ 658 (Pat) ; *Pradeep Kumar v State of Haryana* (2014) 7 SCC 395, 2014 AIR SCW 4088 .

13 *Ramaiah v State of Karnataka* AIR 2014 SC 3388, 2014 Cr LJ 4159, (2014) 9 SCC 365 .

14 *Nand Kishore alias Kishore Bhimrao Kshirsagar v State of Maharashtra* 1995 Cr LJ 3706 (Bom) (DB) .

15 *Shanta w/o Babu Malaganvi v State of Karnataka* 2013 Cr LJ (NOC) 381 (Kar) .

16 *State of Himachal Pradesh v Nikku Ram* 1995 Cr LJ 4184 (SC), AIR 1995 SCW 3721 .

17 *Pawan Kumar v State of Haryana* AIR 1998 SC 958, (1998) 3 SCC 309 ; *Public Prosecutor Mytheswar Ganghadhar*(2009) 16 SCC 255, (2010) 3 SCC (Cri) 248).

18 *State of Andhra Pradesh v Raj Gopal Asawa* 2004 Cr LJ 1791 (SC) .

19 *State of Karnataka v MV Manjunathegowda* 2003 Cr LJ 900 (SC), AIR 2003 SC 809 .

20 *Nunna Venkateswaralu alias Venkateswara Rao v State of Andhra Pradesh* 1996 Cr LJ 108 (AP) ; *Ayyala Rambabu v State of Andhra Pradesh* (1993) 1 ALT (Cr) 73(AP) (DB).

21 *Pawan Kumar v State of Haryana* AIR 1998 SC 958 .

22 *K Prema S Rao v Yadala Srinivasa Rao* 2003 Cr LJ 69 (SC), 2002 VIII AD 615 (SC) .

23 *Gurucharan Kumar v State of Rajasthan* (2003) I AD 217 (SC) .

24 *Satvir Singh v State of Punjab* 2001 Cr LJ 4625 (SC) .

25 *M Yadaiah v State of Andhra Pradesh* 1996 Cr LJ 1456 (AP) .

26 *Balasaheb Annappa Waghmare v State of Maharashtra* 1997 Cr LJ 3476 (Bom), (1997) IV RCR 525 .

27 *State of Punjab v Daljit Singh* 1999 Cr LJ 2723 (P&H) (DB).

28 *State of Himachal Pradesh v Yograj* 1997 Cr LJ 2033 .

29 *Gopi v State* 2011 Cr LJ 4815, 1 (2012) DMC 339 (Kant) .

30 *S Abboy Naidu v R Sundrarajan* 1994 Cr LJ 641 (Mad) .

31 *Prabhakar K Ghate v State of Maharashtra* 2004 Cr LJ 5074 (Bom) .

32 *Vikram Singh v State of Rajasthan* 2007 Cr LJ 1622 (Raj) .

33 *State of Karnataka v Chowdegowda* 2007 Cr LJ 2812 (Kant) (DB) ; *Jagjit Singh v State of Punjab* 2009 Cr LJ 2440 (2442) (SC), AIR 2009 SC 2133, 2009 (4) SCC 759 .

34 *Modinsab Kasimsab Kanchagar v State of Karnataka* 2013 Cr LJ 2056 (SC), AIR 2013 SC 1504, (2013) 4 SCC 551 (Accused husband acquitted).

35 *Vipin Jaiswal v State of AP* 2013 Cr LJ 2095, AIR 2013 SC 1567, (2013) 3 SCC 684 .

36 *Karan Singh v State of Haryana* (2014) 5 SCC 738, 2014 Cr LJ 2708 ; ***See also****State of Rajasthan v Girdhari Lal* (2013) 15 SCC 269, 2014 Cr LJ 141 .

37 *Soni Deverajbhai Babubhai v State of Gujarat* AIR 1991 SC 2173, 1991 Cr LJ 3135 (SC) .

38 *Keshab Chandra Panda v State* 1995 Cr LJ 174 (Ori) .

39 *Ibid*.

40 *Pyare Lal v State of Haryana* AIR 1999 SC 1563 ; *Satpal v State of Haryana* AIR 1999 SC 1476, 1999 Cr LJ 596 .

41 *State of Karnataka v KS Manjunatha Chari* 1999 Cr LJ 3949 (Kant) (DB) .

42 *State v Shivappa Bhimappa Pathat* 2002 Cr LJ NOC 222 (Kant) (DB).

43 *Koppsetti Subbarao v State of AP* 2009 Cr LJ 3480, p 3485 (SC), AIR 2009 SC 2684, 2009 (6) Scale 528 .

44 *State of Punjab v Gurmit Singh* 2014 (9) SCC 632, AIR 2014 SC 2561, 2014 Cr LJ 3586 .

45 *State of Punjab v Gurmit Singh* 2014 (9) SCC 632, AIR 2014 SC 2561, 2014 Cr LJ 3586 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

[S. 304B.

Dowry death.--

29. Death of second Wife--Whether Section 304B Attracted

It is the duty of the court to give effect to the legislative intendment which was directed towards punishing husbands who indulge in atrocities against their spouses, and in the absence of evidence to the contrary all these provisions will have to be applied on the footing that the marriage is presumed to be a valid one, and the parties are presumed to be husband and wife unless the contrary is established. It is to be noted that unless this view is enforced that it will lead to an atrocious situation with double injustice being done to the victim-women who are led through ceremonies of marriage and imparted the status of a wife, in situations where they are not aware of the possible impediments, and if those impediments are upheld to the benefit of the wrong doer-husband, it would lead to the unthinkable and untenable conclusion of allowing a party to take advantage of his own wrong and that is not the scheme of the law.[46] The fact that the deceased was second wife and not legally wedded wife of the accused is no ground to hold that conviction under s 304-B and s 498-A is not attracted.[47]

The provisions of both the IPC and the Dowry Prohibition Act would apply in all cases where there is evidence of marriage between the parties, unless and until it is established that the marriage in question was a void marriage. Even as far as the latter position is concerned, drawing a parallel with the provisions relating to the legitimacy of children in the case of void or voidable marriage, it would be in the interest of justice, perhaps be permissible to construe that even in cases where a marriage was declared void at a point of time after the commission of the offence the court would still treat the parties as having deemed to be husband and wife on the date of commission of the offence.[48]

However, a contrary view is taken by the Madhya Pradesh High Court in a case,[49] where the victim was the second wife of the accused who at the time of the second marriage already had a wife living, holding that the marriage with the victim was thus void in view of the provisions of ss 5 and 11 of the Hindu Marriage Act 1955, and thus, the marriage of the victim and the accused-husband was not a marriage in the eyes of law, and the accused cannot be treated as the husband of the deceased for the purposes of ss 304B and 498A, IPC, the charges framed against the accused under these two sections were quashed, and it was directed that the trial shall proceed against the accused under s 306, IPC .[50]

30. Section 304B Applies even if the Marriage is not valid

Where in the marriage of the deceased with accused no religious rites were performed and the *mandap* was not made and there was total absence of participation of the priest and the barber in the said marriage and the said marriage in *Chumauna*2638 form was performed in the house of prosecution witness, who was the maternal uncle of the deceased. It, therefore, appeared that the marriage of the deceased with accused was definitely unlawful and *void ab initio*, but in view of the evidence on the record, it was crystal clear that the deceased was living in the house of the accused persons leading marital life as husband and wife for the last one year prior to the occurrence. The Apex Court has settled the controversy regarding the concept of the marriage for the purposes of s 304-B of the IPC in the case of *Rema Aggarwal v Anupam* ,[51] and has thus observed in para 12:

> The concept of marriage to constitute the relationship of 'husband' and 'wife' may require strict interpretation where claims for civil rights, right to property etc may follow or flow and a liberal approach and different perception cannot be an anathema when the question of curbing a social evil is concerned.

The Apex Court has further observed:

> The concept of "dowry" is intermittently linked with a marriage and the provisions of the Dowry Act apply in relation to marriages. If the legality of the marriage itself is an issue further legalistic problems do arise. If the validity of the marriage itself is under legal scrutiny, the demand of dowry in respect of an invalid marriage would be legally not recognizable. Even then the purpose for which Sections 498 -A and 304-B, IPC and Section 113-B of the Indian Evidence Act, 1872 (for short the "Evidence Act") were introduced cannot be lost sight of. Legislations enacted with some policy to curb and alleviate some public evil rampant in society and effectuate a definite public purpose or benefit positively requires to be interpreted with certain element of realism too and not merely pedantically or hyper-technically. The obvious objective was to prevent harassment to a woman who enters into a marital relationship with a person and later on, becomes a victim of the greed for money. Can a person who enters into a marital arrangement be allowed to take a shelter behind a smokescreen to contend that since there was no valid marriage the question of dowry does not arise? Such legalistic niceties would destroy the purpose of the provisions. Such hairsplitting legalistic approach would encourage harassment to a woman over demand of money. The nomenclature "dowry" does not have any magic charm written over it. It is just a label given to demand of money in relation to marital relationship. The legislative intent is clear from the fact that it is not only the husband but also his relation who are covered by Section 498-A . Legislature has taken care of children born from invalid marriages. Section 16 of the Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that Legislature which was conscious of the social stigma attached to children of void and voidable marriages closed eyes to plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship. If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the Legislature for avoiding harassment to a woman over demand of money in relation to marriages. The first exception to Section 494 has relevance too. According to it, the offence of Bigamy will not apply to "any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction." It would be appropriate to construe the expression "husband" to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any manner or for any of the purposes enumerated in the relevant provisions - Sections 304-B / 498-A, whatever be the legitimacy of the marriage itself for the limited purpose of Sections 498 -A and 304-B, of the Indian Penal Code . Such an interpretation, known and recognized as purposive construction has to come into play in a case of this nature. The absence of a definition of husband to2639 specially include such persons who contract marriages ostensibly and cohabitate with such woman, in the purported exercise of his role and status as 'husband' is no ground to exclude them from the purview of Section 304 -B or 498-A, of the Indian Penal Code, viewed in the context of the very object and aim of the legislations introducing those provisions.

On the touchstone of the ratio of the Apex Court referred to above coupled with the facts mentioned hereinabove, accused falls under the expression of 'husband' by solemnizing his marriage with the deceased in the *Chumauna* form of marriage and the accused had entered into marital relationship with the deceased under the colour of such proclaimed or feigned status of husband and the absence of definition of husband to specifically include such person to contract marriage ostensibly and cohabitate with such woman in the purported exercise of his role and status as husband is no ground to exclude them from the purview of s 304-B or s 498-A of the IPC, viewed in the context of the very object and aim of the legislations introducing those provisions.[52]

31. Section 304B and Section 34

When the accused-husband and his co-accused parents were convicted under ss 304B / 34, IPC by the sessions court and the conviction was confirmed by the High Court, and it appeared that there was no clear and pointed evidence to maintain the conviction of the parents, the accused-husband was convicted under s 304B *simpliciter* without the aid of s 34 by the Apex Court, and his parents were acquitted.[53]

32. Section 304B , IPC and Section 113A, Indian Evidence Act

> **113A. Presumption as to abetment of suicide by a married woman.--**When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

On a plain reading of s 113A of the Indian Evidence Act 1872, it is obvious that if a wife is shown to have committed suicide within a period of 7 years from the date of marriage, and there is evidence that she was subjected to cruelty by her husband or his relatives, it would be permissible for the court to presume that such suicide was abetted by her husband or by such relatives of her husband.[54]

33. Section 304B , IPC and Section 113B, Indian Evidence Act 1872

Both ss 304B, IPC, and s 113B of the Indian Evidence Act were inserted by the Dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry deaths. Section 113B reads as follows:

> **S. 113 B. Presumption as to dowry death.--**When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.2640
>
> *Explanation.*--For the purposes of this section "dowry death" shall have the same meaning as in s 304B of the Indian Penal Code (45 of 1860).

The necessity for insertion of the two provisions has been amply analysed by the Law Commission of India in its ninety-first report dated 10 August 1983 on 'Dowry death and Law Reform'. Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry related deaths, the legislature thought it wise to insert a provision relating to presumption of dowry death, or proof of certain essentials. It is in this background that s 113B of the Evidence Act, in the Act has been inserted. As per the definition of 'dowry death' in s 304B, IPC, and the wording in the presumptive s 113B of the Evidence Act, that one of the essential ingredients, amongst others, in both the provisions is that the concerned woman must have been (soon before her death) subjected to cruelty or harassment (for or in connection with the demand of dowry). Presumption under s 113B is a presumption of law. On proof of the essentials[55] mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on the proof of the following essentials:

(1) the question before the court must be whether the accused has committed the dowry death of a woman (this means that the presumption can be raised only if the accused is being tried for the offence under s 304B);
(2) the woman was subjected to cruelty or harassment by her husband or his relatives;
(3) such cruelty or harassment was for or in connection with any demand for dowry; and
(4) such cruelty or harassment was soon before her death.[56]

The legislative intent is clear that the compelling presumption of s 113B of the Evidence Act is confined

only to cases where proximity of time by itself lands a safe assurance about the existence of a proximate relation between torture over dowry demand and unnatural death, as cause and effect.[57]

34. Presumption under Section 113B, Indian Evidence Act 1872

In order to establish the offence under s 304B, IPC, the prosecution is obliged to prove that the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances and such death occurs within 7 years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband. Such harassment and cruelty must be in connection with any demand for dowry.[58]2641

If the prosecution is able to prove the aforesaid circumstances, then the presumption under s 113B of the Evidence Act will operate.[59] It is the rebuttable presumption, and the onus to rebut, shifts on the accused.[60] However, merely because the accused had been acquitted under s 302, IPC, the presumption under s 113B of the Evidence Act does not stand automatically rebutted.[61]When there is overwhelming evidence against the accused with regard to the demand of dowry and acceptance of a part of dowry, the presumption as to dowry death envisaged under s 113B of the Evidence Act remains not rebutted, notwithstanding the fact that the accused was examined under s 313, CrPC, and his defence was a total denial of the prosecution case.[62] But when there is no evidence showing that deceased was subjected to cruelty or harassment by accused husband or any of his relative for or in connection with any demand of dowry, the presumption arising either under s 304-B or s 113-B of Evidence Act could not be invoked against accused.[63]

There was evidence that 15-20 days before the death, the deceased was harassed and beaten for dowry. The defence plea was that death was accidental and due to electrocution. The accused husband did not took any such plea in his statement under s 313 CrPC . Held, the accused had not rebutted the presumption under s 113B, Indian Evidence Act. Accused was convicted under s 304B, IPC .[64]

Where the prosecution has proved by cogent evidence that soon before death the lady was subjected to cruelty or harassment in connection with demand for dowry, it becomes obligatory for the court to raise presumption that death is dowry death.[65]

35. Presumption under Section 113B, Indian Evidence Act 1872 is Rebuttable

In order to establish the offence under s 304-B, IPC, the prosecution is obliged to prove that the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances and such death occurs within 7 years of her marriage and if it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband. Such harassment and cruelty must be in connection with any demand for dowry. If the prosecution is able to prove these circumstances then the presumption under s 113-B of the Evidence Act will operate, it is the duty of the court to raise presumption under s 113-B, Evidence Act that the accused has caused dowry death.[66] It is a rebuttable2642 presumption and the onus to rebut shifts on the accused. When the defence of the accused was a total denial, the presumption as to dowry death envisaged under s 113-B of the Evidence Act remained unrebutted.[67] Once the prosecution is able to establish the ingredients of s 304B, the presumption against the accused starts as enjoined under s 113-B of the Indian Evidence Act . Of course, it is a rebuttable presumption and the onus lies, on the accused against whom the presumption lies to discharge it. On this aspect the laws are no more *res integra*. In catena of decisions, Supreme Court has repeatedly held that once the ingredients of s 304-B, IPC have been established by the prosecution, the onus lies on the accused to rebut the presumption under s 113-B of the Evidence Act .[68] The accused were present on the scene at the time of the occurrence, which turned out to be fatal, and that added to their responsibility to give a credible version of their innocence in the dowry death.[69]Where the deceased wife had died within four years of marriage, there was reliable evidence of the witnesses that the

deceased was mentally harassed for bringing inadequate dowry, presumption under ss 113A and 113B of the Evidence Act was attracted in the case, appellant accused was convicted under ss 304B, 498A and 306, IPC .[70]

The deceased had died within one year of marriage due to burn injuries. There was reliable evidence of continued demand of Rs. 50,000/- and one sewing machine. The burden lay on the accused to prove that the death was accidental. At the stage of arguments it was urged that the death was accidental, the deceased died while preparing milk. No such assertion was made by the accused in his statement under s 313, CrPC . The accused was convicted under s 304B, IPC and ss 3 / 4 of the Dowry Prohibition Act . In appeal the High Court keeping in view the age of the appellant no. 2 husband, reduced the sentence of ten years imposed by trial court to 7 years RI.[71]

36. Investigation

The greed for dowry, and indeed the dowry system as an institution, calls for severest condemnation. It is evident that legislative measures such as the Dowry Prohibition Act have not met with success for which they were designed. What is important to point out is where death is due to crime, the perparators of the crime frequently escape from the nemesis of the law because of inadequate police investigation. It would be of considerable assistance if appropriate priority was given to the expeditious investigation of such cases, *i.e.*, a special magisterial machinery was created for the purpose of prompt investigation of such incidents and efficient investigative techniques and procedures were adopted taking into account the peculiar features of such cases. The Apex Court even before s 304B was inserted in the IPC suggested and recommended that a female police officer of sufficient rank2643 and status in the police force should be associated with the investigation from its very inception.[72]

Thereafter, in another case, the Apex Court directed that investigation into unnatural dowry death of the wife should be conducted by an officer not below the rank of the superintendent of police. In case it has so far been conducted by an officer lower in rank to him, the superintendent of police will also give a fresh look to the whole matter and proceed further with the investigation without being inhibited by the view taken by subordinate officers earlier if circumstances so demand. The Supreme Court also directed the states of Rajasthan and Haryana by way of an interim order to create a special dowry cell at the state level to investigate into dowry deaths through specialised investigative units.[73]

Disturbed by the rate of acquittal rising to 96.7 percent in dowry death cases, the Division Bench of the Karnataka High Court has issued guidelines/directions regarding investigation against and prosecution of offenders in the undermentioned case.[74]

Where the investigating agency took an indifferent attitude in not prosecuting the husband of the deceased and the brother of the husband, but only the mother-in-law of the deceased, the husband being a silent spectator of the dastardly attack on his wife, he had not even taken his wife to the hospital, and did not make any arrangement for securing blood when his wife was struggling for her life, however despite his tacit understanding with the perparators of the crime he was not chargesheeted, the indifferent attitude of the investigating agency was deprecated by the Apex Court.[75]

However, it is not necessary for the investigating agency to implicate every member of the family of the husband indiscriminately in all dowry death cases.

Unless there is specific material, it is downright wrong on the part of the investigating authorities to indiscriminately include the whole of the family as accused persons. The police needs to discriminate by looking at the possibility of strong evidence against the husband or parents or immediate residents of the house before adding the whole of the family as accused persons in the case.[76]

37. Section 304B , IPC and Section 167(2) , CrPC

The circumstances of the situation brings the offences under s 304B, out of mischief of s 167(2)(a)(i), CrPC and lands it under s 167(2)(a)(ii), CrPC . Thus, the result is that in cases under s 304B, IPC, investigation has to be completed within 60 days from the date of arrest/surrender of the accused and if the chargesheet is not submitted then the accused becomes entitled to statutory bail under s 167(2)(a)(ii), CrPC, if he was ready and furnishes bail bonds. This statutory right that had accrued to him cannot be defeated.[77] But a contrary view is taken by Rajasthan High Court by observing that it is clear that the offence under s 304B, IPC is punishable for imprisonment for a term which shall not be less than seven years but which may2644 extend to imprisonment for life, therefore, provisions of cl (i) of *proviso* (a) to s 167(2), CrPC would be attracted and if chargesheet has been filed within a period of 90 days, the accused persons are not entitled for bail under s 439 read with s 167(2), CrPC .[78]

38. Shock Suffered by Parents of Deceased Daughter

Human nature is very complex. Different persons react differently under pressure or in times of sudden bereavement or grief. The shock suffered by a parent having seen his daughter dead in an unnatural manner can in some cases prevent immediate outpouring of reasons. Each case would have to be tested on its own facts and no hard and fast rule can be laid down in this behalf.[79]

39. Bail

If the accusation is that within seven years of the marriage unnatural death had taken place of the deceased wife in the house of the husband accused who tortured her soon before her death on the demand of dowry, the prayer of bail should be refused.[80] Where the accused was convicted under ss 304B and 498A, IPC, and was in custody for more than three years and there was no likelihood of an appeal being heard early, the accused was found entitled to bail.[81]

40. Anticipatory Bail

In *Samunder Singh v State of Rajasthan* ,[82] emphasising that it is not prudent to grant anticipatory bail by the High Court in dowry death cases, the Apex Court made the following observations:

> The widespread belief that dowry deaths are even now treated with some casualness at all levels seems to be well grounded. The High Court has granted anticipatory bail in such a matter. We are of the opinion that the High Court should not have exercised its jurisdiction to release the accused on anticipatory bail in disregard of the magnitude and seriousness of the matter. The matter regarding the unnatural death of the daughter in law at the house of her father in law was still under investigation and the appropriate course to adopt was to allow the concerned Magistrate to deal with the same on the basis of the material before the court at the point of time of their arrest in case they were arrested. It was neither prudent nor proper for the High Court to have granted anticipatory bail which order was very likely to occasion prejudice by its very nature and timing. We therefore consider it essential to sound a serious note of caution for future. The High Court is under no compulsion to exercise it jurisdiction to grant anticipatory bail in a matter of this nature. So far as the present matter is concerned, since it has become infructuous, we do not propose to pass any order, subject to these observations, the appeal is dismissed.

41. Dying Declaration

When the dying declaration of the deceased recorded during investigation is not relied or filed by the prosecution in the report submitted under s 173, CrPC, it cannot2645 be considered for any purpose, unless proved in accordance with law.[83] The conviction of the accused, solely on the basis of dying declaration, in the absence of contemporaneous certificate from the doctor that the deceased was in a fit condition, mentally and physically, to understand and answer questions, is improper.[84] Therefore, the dying declaration recorded barely 48 hours after the deceased was certified as unfit without the fitness of

the deceased certified by the doctor, subsequently, should not be relied upon when there was possibility that the deceased was brainwashed by her parents.[85] Thus, in the absence of a medical certificate as to the fitness of the deceased to give a statement, the dying declaration cannot be relied upon,[86] and such a dying declaration cannot be used against the accused though admitted by the defense under s 294, CrPC .[87] When the deceased made two dying declarations, one before the investigating officer and other before the magistrate in a fit condition as opined by the doctor, then such dying declaration is reliable.[88] However, the Andhra Pradesh High Court has taken a somewhat contrary view in which mere omission to mention that the deceased was in a fit state of mind by the doctor was held immaterial when the dying declaration was recorded by the magistrate who had put various preliminary questions to the actual recording of the circumstances leading to her death, the answers given pursuant to such questions and what the deceased has stated on the substantial questions and the reasons of her death all go to indicate that the deceased was in absolutely perfect state of mind to know as to what she was talking about and give expression to those thought.[89]

The prosecution case was that the deceased wife died due to burn injuries at her matrimonial home. The reason was demand of dowry. As the dying declaration of the deceased recorded by the Executive Magistrate did not implicate the accused, accused appellant was acquitted for offence under s 304B, IPC .[90]

When part of the dying declaration of the deceased is patently false and not corroborated even by the parents of the deceased, it cannot be relied upon to base the conviction of the accused. [91]Section 32 of the Evidence Act does not require that the statement sought to be admitted in evidence, should have been made in imminent expectation of death. The words 'as to any of the circumstances of the transaction which resulted in his death' appearing in s 32 must have some proximate relation to the actual occurrence. In other words, the statement of the deceased relating to the cause of death or the circumstances of the transaction which resulted in his death must be sufficiently or closely connected with the actual transaction.[92] The death referred to in s 32(1) of the Evidence Act includes suicidal besides homicidal death.[93]

In the absence of corroborative evidence which might prove the participation of the brother of the husband and his wife who had been summoned on petition under2646 s 319, CrPC, benefit of doubt was given and brother, the husband and his wife (since deceased) were acquitted of the charge under s 304B, IPC .[1]

In a case of multiple dying declarations where the divergent statements are capable of being fully and totally reconciled, the court need not reject them merely because *prima facie* they read differently.[2]

42. Charge

I (*name and office of sessions judge/additional sessions judge etc*) hereby charge you (*name of the accused persons*) as follows:

That on or about the ..... day of ..... (*month and year*) at ..... (*place*) you being husband of the deceased and you co-accused being mother-in-law, father-in-law etc soon before death subjected the deceased ..... (*name of the deceased*) to cruelty or harassment by making demand of dowry in furtherance of common intention of you all within seven years of her marriage and there by you accused persons have committed the offence of 'dowry-death' punishable under s 304B, IPC and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

The charge may be framed against the accused on the basis of grave suspicion about commission of offence.[3] When there was no evidence of dowry demand during wedding or after wedding and element of 'soon before her death she was subjected to cruelty or harassment by her husband in connection with, any demand for dowry' was absent, framing of charge under s 304-B was found not proper.[4]

When the facts noted in the charges under ss 302, 201 and 498A, IPC framed against the accused are sufficient to attract s 304B also, and these facts were put to the accused in the examination under s 313, CrPC, merely because there is no separate charge under s 304B, IPC, it cannot be said that any prejudice is caused to the accused since the facts noted in the other charges put together satisfy the ingredients of s 304B, IPC .[5] The accused cannot be convicted under s 304-B, IPC without a charge being framed specifically.[6]

Cancellation of charge after evidence has been led is unknown to criminal jurisprudence. Before a charge is framed an accused may be discharged if the facts and circumstances so justify. After the charge is framed the accused has either to be found guilty or not guilty of the charge.[7] The charge under s 304B as well as under s 302, IPC may co-exist.[8]Sections 302 and 304B, are not mutually exclusive. If in a case, material on record, suggest commission of offence under s 302 as well as under s 304B, the proper course would be to frame charges under both these sections and if the case is established, then the accused can be convicted under both the sections but no separate sentence needs to be awarded under s 304B in view of the substantive2647 sentence being awarded for the higher offence under s 302, IPC .[9] In the undermentioned case the Supreme Court directed all the trial Courts of the country to ordinarily add s 302, IPC to the charge under s 304B, IPC, so that death sentence can be imposed in such heinous and barbaric crimes against the women.[10]Similarly, on conviction no separate sentence under s 498A is necessary in view of the substantive sentence under s 304B .[11]

Section 304B , IPC is not substitute for s 302, IPC . It is generally seen that in cases where a married woman dies within seven years of marriage, otherwise than under normal circumstances, no inquiry is usually conducted to see whether there is evidence, direct or circumstantial, as to whether the offence falls under s 302, IPC . Sometimes, s 302, IPC is put as an alternate charge. In cases where there is evidence, direct or circumstantial, to show that the offence falls under s 302, IPC, the trial court should frame the charge under s 302, IPC even if the police has not expressed any opinion in that regard in the report under s 173(2) of the Crpc . Section 304B , IPC can be put as an alternate charge if the trial court so feels. In the course of trial, if the court finds that there is no evidence, direct or circumstantial, and proof beyond reasonable doubt is not available to establish that the same is not homicide, in such a situation, if the ingredients under s 304B, IPC, are available, the trial court should proceed under the provision.[12]

43. Failure on Charge under Section 304B does not Essentially Lead to Conviction under Section 306

Omission to frame charges under s 306 in terms of s 215 of CrPC may or may not result in failure of justice, or prejudice the accused. It cannot, therefore, be said that in all cases, an accused may be held guilty of commission of an offence under s 306 of the IPC wherever the prosecution fails to establish the charge against him under s 304-B thereof. Moreover, ordinarily such a plea should not be allowed to be raised for the first time before the court, unless the materials on record are such which would establish the said charge against the accused.[13]

44. Accused Charged under Section 302 or 304B cannot be Convicted under Section 306 or 498A

Commentary under the same heading in s 306, *post*, may be referred to.

45. Deletion of Charge

When cause of death of deceased is attributed to extensive pulmonary tuberculosis which could not be attributed to any of accused persons, death of deceased would not fall within description of death as contemplated under s 304-B so, charge framed under s 304-B is liable to be deleted.[14]2648

46. Accused Charged under Section 304B can be Convicted under Section 498A

As a matter of fact, when there is a charge under s 304B, IPC, it is not imperative in law to frame a separate charge under s 498A, IPC .[15] Further, a person charged and acquitted under s 304B can be convicted under s 498A without charge being there, if such a case is made out.[16]

47. Discharge

The basic ingredient of s 304B, IPC is that there should be evidence of cruelty or harassment soon before the death. Thus, when the nearest relatives of the deceased stated that she had complained of cruelty, the accused persons wanted more dowry, but as there was no evidence of causing cruelty to her by the accused persons in relation to demand of dowry soon before her death, their discharge by the sessions court under s 304B was found proper.[17]

48. Proof

It is the settled law that in order to establish charges under s 304-B of the IPC, four ingredients of the offence were necessarily to be established by the prosecution:

(i) That the death took place within seven years of the marriage.
(ii) The death was not under normal circumstances.
(iii) The deceased was tortured and ill- treated with regard to demand of dowry.
(iv) Soon before her death, the deceased was subjected to mental or physical cruelty with respect to the demand of dowry.[18]

The initial burden of proving the death of a woman within seven years of her marriage in circumstances that are not normal is on the prosecution; such death should be in connection with or for a demand of dowry which is accompanied by such cruelty or harassment that eventually leads to the woman's death in circumstances that are not normal. After the initial burden of a deemed dowry death is discharged by the prosecution, a reverse onus is put on the accused to prove his innocence by showing, *inter alia*, that the death was accidental.[19]

Where the appellant husband and the deceased wife were living in the same house there was evidence of demand of dowry, wife had died within seven years of her marriage, the cause of death was strangulation, the appellant husband was convicted under s 304 B, IPC .[20]2649

In normal circumstances, in the Indian Society demand for dowry or harassment for the same take place within four corners of the house. Even the parents or relatives of the girl will not be aware of these, unless they are informed either by the girl herself or demand is made directly to them. The police officials or others cannot depose anything about the harassment in connection with demand of dowry in the absence of any complaint or statement made by witness under s 161, CrPC . Seldom, the villagers-neighbours may come to know of the same. In this background, statement of family members of the deceased lady cannot be discarded on the ground that they are relatives and are interested witnesses, till a contradiction is shown in their deposition or cross-examination.[21]

The proximity of time between the alleged ill-treatment and time of death is a highly relevant factor, and is an essential and necessary evidence for proof of dowry death.[22] Performance of a ceremony of the younger sister of the deceased married in the accused's family, about a month before the incident could not believe the case of harassment nor the non-production of letters written by the deceased about the ill-treatment is sufficient to disprove the prosecution case.[23] However, when the injuries found on the person of the deceased-wife could not have caused her death despite the demands being dowry demands, the offence would not attract the mischief of s 304B .[24]

Poisoning--Viscera Report--Absence of

Normally, the viscera are preserved and submitted for chemical analysis under the following circumstances: (1) When the investigating officer requests for such an examination; (2) When the medical officer suspects the presence of poison by smell or some other evidence while conducting an autopsy on injury cases; (3) To exclude poisoning, in cases where the cause of death could not be arrived at on post-mortem examination and there is no natural disease or injury to account for it; and, (4) In decomposed bodies. A chemical examination of the viscera is not mandatory in every case of a dowry death; even when a viscera report is sought for, its absence is not necessarily fatal to the case of the prosecution when an unnatural death punishable under s 304B of the IPC or under s 306 of the IPC takes place. In a case of an unnatural death inviting s 304B of the IPC (read with the presumption under s 113B of the Evidence Act 1872) or s 306 of the IPC (read with presumption under s 113A of the Evidence Act 1872) as long as there is evidence of poisoning, identification of the poison may not be absolutely necessary.[25]

Where poison in prasad was given to deceased causing death, occurred within seven years of marriage, death was unnatural. There was reliable evidence of persistent demand of dowry and continuous harassment. Presumption under s 113B Evidence Act was attracted. Parents living in nearby village were not informed. Appellants husband, his father and mother were convicted under s 304B, IPC .[26]2650

49. Husband accused

Death of the deceased was caused by strangulation and burning within seven years of her marriage at her matrimonial home. Evidence of the father and other relatives of the deceased about the persistent demand for Maruti car and harassment and cruelty meted out to the deceased was found reliable and believed. Both of husband and mother-in-law were convicted under ss 304B and 498A, IPC .[27]

The deceased wife died due to poisoning. There was no evidence showing demand of dowry or harassment. Letter written by the deceased to the appellant prior to death showed cordial relations between the two. Accused husband was acquitted for offence under s 304B, IPC .[28]

The evidence of the brother of the deceased about the demand of dowry by the accused persons was found not reliable. The father of the deceased deposed before the court that the deceased had written/sent two/three letters in this connection, but those letters were not brought on record. The conviction of the accused appellant (husband) under s 304B, IPC was found not sustainable, was set aside.[29]

The deceased wife died within eleven months of her marriage. There was reliable evidence of the father of the deceased about the dowry demand and harassment caused to the deceased corroborated by letters written by the deceased to her father, in which she had mentioned about the demand of dowry and the harassment meted out to her. Conviction of the husband and mother-in-law appellants for offence under s 304B, IPC was sustained.

Death of the deceased occurred at her matrimonial home within 7 months of marriage. Accused husband and his parents were only persons present at the time of death. There was reliable evidence of grand father and parents of the deceased about the demand of dowry, harassment and cruelty meted out to the

deceased. Accused husband was convicted under s 304B, IPC .[30]The appellant accused was married to the deceased. The deceased died unnatural death by burning within seven years of marriage. Prosecution evidence proved demand of dowry. Dead body of the deceased was cremated before investigation, parents of the deceased were not informed. Conviction of the accused appellant husband under s 304B, IPC was proper.[31]The deceased set herself on fire within 2½ years of marriage at her matrimonial home. There was convincing evidence that the accused husband had demanded dowry two days before the incident. The plea of accused that it was a case of accidental death was not supported by any evidence. The accused did not say so in his statement under s 313 CrPC . Accused appellant was convicted under s 304B, IPC .[32]Evidence of the mother about dowry demand by the deceased was hearsay evidence, hence is inadmissible in evidence. Conviction of the accused husband and his parents under s 304B, IPC was set aside.[33]2651

Demand of motorcycle and harassment and cruelty by the husband and mother-in-law after marriage was proved. The harassment led the deceased to commit suicide. Both the accused appellants mother-in-law and husband were convicted under s 304B, IPC .[34]Prosecution witness mother and uncle of the deceased gave evidence before the court about demand of dowry by the accused appellant. There was definite ocular, expert and documentary evidence to show that the deceased died an unnatural death, she was subjected to cruelty and ill-treatment, there was demand of dowry of specific items like refrigerator, television and cooler and she died within seven years of her marriage. Conviction of appellant husband and sentence of life imprisonment was held proper.[35]

The deceased wife had committed suicide by hanging herself. Allegation was that the accused husband and father-in-law had persistently demanded dowry which led the deceased to commit suicide. In the suicide note the deceased did not implicate any of the two accused appellants. The evidence of dowry demand was found not reliable. The High Court recorded conviction merely on the basis of probability. The High Court was not justified in reversing the judgment of acquittal and convicting the accused appellants. Appellants accused *viz*. husband and father-in-law were acquitted.[36]There were material contradictions in the testimony of PWS about the demand of dowry. Accused husband performed the funeral ceremonies of the deceased, had made investments in the name of the deceased. There was evidence that relations between the accused and the deceased were cordial prior to occurrence. Accused respondent husband was acquitted of the charge under s 304B, IPC .[37]

The deceased wife died of poisoning within seven years of marriage. There was no evidence that the deceased prior to her death was subjected to cruelty. Presumption under s 113B, IPC could not be drawn. The husband, his father and mother were acquitted of charges under ss 304B, 306 IPC and 498, IPC .[38] There was evidence of dowry demand, deceased died of burn injuries in her bedroom in wee hours. There was evidence that the accused appellant husband and in-laws burnt the deceased alive within seven years of marriage on account of non-fulfilment of dowry demand. Appellant accused was convicted for offence under s 304B, IPC .[39]

The appellant accused persons, husband and mother-in-law, on account of non-fulfilment of dowry demand poured kerosene oil on the deceased and set her on fire. Letter written by the deceased had not mentioned about dowry demand. In the history sheet of the hospital where the deceased was treated it has been categorically stated that while the deceased tried to ignite a gas stove the deceased suddenly caught fire. Appellants were acquitted of the charge under s 302, IPC .[40] Father deposed that there was no ill-treatment by the husband and parents-in-law, only brother-in-law and2652 sister-in-law ill treated her. The husband and parents of the deceased were acquitted of the charges under ss 304B, 306 and 498A, IPC .[41]

The deceased wife had died within few months of marriage. The cause of death in post-mortem examination was asphyxia by throttling. There was evidence of the parents of the deceased about demand of dowry by the accused appellant, cruelty and harassment meted out to the deceased immediately prior to the date of occurrence. The ingredients of s 304B, IPC were satisfied in the case. Conviction of the accused appellant husband was held proper.[42]Deceased wife died unnatural death at

her matrimonial home by strangulation within one year and three months of marriage. Father and brother of the deceased deposed about demand of dowry. Appellant husband was convicted under s 304B, IPC .[43]

The court did not find any evidence to show that soon before her death the deceased was subjected to cruelty by the husband or in-laws in connection with a demand of dowry. The accused appellants were acquitted of the charge under s 304B, IPC .[44]

The deceased woman died within three years of her marriage, as such it was a case of unnatural death. It was clear from the evidence of the brother, mother and maternal uncle of the deceased that the deceased was being constantly harassed for demands on account of dowry. The deceased was being asked to bring further cash and gold/silver ornaments and on account of non-compliance of such demand, she was being denied food. On the fateful day she was removed from hospital in an unconscious state. Her death was unnatural. Appellants husband, father-in-law, mother-in-law were convicted under s 304B, IPC .[45]

The brother of the deceased, first informant in the case when reached hospital immediately after the incident, the accused was not found present, he absconded for 6 days after the incident. There was evidence of demand of dowry at the time of the marriage. The accused husband had not admitted the deceased in the hospital. He was convicted under s 304B, IPC .[46]The only evidence relatable to s 304B, IPC against the appellant husband was of a neighbour who was examined after about two months of the alleged date of occurrence. Though the evidence appeared to be sufficient to bring in application of s 498A, there was definite inadequacy of evidence to attract s 304B, IPC . In view of the evidence, conviction of the accused under s 304B, IPC was set aside, but conviction under s 498A, IPC was maintained.[47]

The evidence on record fully established that there was a persistent demand of dowry by the appellants husband, father-in-law and mother-in-law and they subjected deceased to cruelty and harassment in connection with the demand of dowry and eventually beat her to death due to its non-fulfilment. The appellants threw the deceased into well. The medical evidence corroborated the prosecution version that2653 after commission of murder the deceased was thrown into well, ruled out the case of the accused appellants that the deceased fell down in well accidently and died. Conviction of the appellants was held proper.[48]

Except the bald statements of the mother and brother of the deceased, there was no other evidence showing that the deceased had been subjected to cruelty and harassment prior to her death, which compelled the deceased to commit suicide. The accused husband and other relatives were acquitted of charges under s 304B and 498A, IPC .[49]

Suicide note written by the deceased in her handwriting signed by her exculpated the accused husband and in-laws. Reasonable doubt was created about prosecution story. Accused husband was acquitted of the charge under s 304B and s 498A, IPC .[50]

50. Mother-in-law

Mother of the deceased testified before the court that no demands for dowry had been made by the accused mother-in-law either before, during or after the marriage. Only general allegations were made against her, there was some doubt about her involvement in the dowry demand. Accused mother-in-law was acquitted of the charge under ss 304B and 498A, IPC .[51]

Death of the deceased was due to asphyxia caused by hanging. Deceased had died within few months of marriage. Evidence of father of the deceased and other witnesses about demand of dowry and harassment was found reliable. Accused led no evidence to show how and in what circumstances the deceased died. Conviction of the accused husband and mother-in-law was held proper, acquittal of the

father-in-law recorded by the High Court was not interfered. However, life imprisonment awarded was reduced to ten years RI.[52]As all the living relations, namely, husband, sister-in-laws and brothers-in-laws were found not guilty and acquitted of the charges under ss 304B, 498A, 306, IPC and ss 3, 4 and 6 of the Dowry Prohibition Act, the appellant mother-in-law in the absence of evidence was also acquitted.[53]

Where the deceased died within one year of marriage on account of burn injuries, there was evidence of ill treatment and demand of dowry by the appellant mother-in-law, the appellant mother-in-law was convicted under s 304B and s 498A, IPC .[54]

51. Father-in-law and Mother-in-law Acquitted

Evidence was lacking to show that the accused appellants mother-in-law and father-in-law subjected the deceased to cruelty in connection with the demand of dowry soon before the death. The two accused appellants were acquitted for offence under s 304B, IPC .[55]2654

52. Dowry Death--Brother of the Accused Husband and his Wife Given Benefit of Doubt

There was evidence of PW that the appellant accused husband and his brother were living on separate floors and there was no evidence that the brother of the husband and his wife had hand in the incident, which led to the death. Both brother and his wife were given benefit of doubt and acquitted of the charge under s 304B, IPC .[56]

53. Circumstantial Evidence

In cases of dowry deaths and suicides, circumstantial evidence plays an important role and inferences can be drawn on the basis of such evidence. That could be either direct or indirect.[57]

54. Medical Evidence

In *Medical Jurisprudence and Toxicology*, Dr KS Narayana Reddy refers to absence of ligature mark, if a soft material is used either for hanging or strangulation. If a person is in unconscious state of mind due to head injury and if that person were to be hanged or strangulated when such person is still alive, all appearances of case of asphyxia would definitely be present. Similarly, if a person commits suicide subsequent to sustaining head injury it would also give the indication of death due to asphyxia as a result of hanging.[58]

55. Benefit of Doubt

The accused is/are entitled to the benefit of doubt under s 304B, IPC when:

(a) The letters written by the deceased to her mother and sister, and letters written by the mother to her deceased daughter did not cast allegations of torture and demand of dowry, and there was no evidence on record to suggest that the deceased was being maltreated or tortured, except that she was constantly being taunted for not bringing a car in dowry;[59]

(b) there was no specific mention of demand of dowry in the FIR, no eyewitness with regard to causing of murder of the deceased and material improvements by the witnesses of the prosecution in their statements before the court;[60]

(c) there is no specific allegation of any active role played by the accused (mother-in-law) except the solitary expression in one letter of the deceased;[61]

(d) the father of the deceased being the complainant stated in his examination that his daughter was treated with love and affection by her in laws and there was no demand for dowry; the mother and relatives of the deceased woman were also declared hostile, and the magistrate while making2655 investigation under s 174, CrPC had reached the conclusion that no offence was committed by the accused;[62]

(e) prosecution evidence implicating the accused-husband and mother-in-law was not found truthful, credible and trustworthy, the defence plea that the deceased met with natural death out of chest pain cannot be ruled out;[63]

(f) none of the prosecution witnesses stated that the accused had done anything against the deceased woman soon before her death;[64]

(g) there is no nexus between instances of harassment for money claims and the suicide committed by the deceased woman on account of a gap of 3-4 years between the two;[65]

(h) the parents and relatives of the deceased woman failed to disclose to the police on the next day of occurrence that there was a demand of dowry by the accused persons and there was also inordinate delay of 2½ years in lodging the FIR rendering the testimony of the defence witness that there was no demand of dowry, probable;[66]

(i) there was a reconciliation between the husband and the wife, and thereafter, both were living together, during her stay with her parents immediately before her death, the wife did not complain of any ill-treatment or assault by her husband, and there was absence of cruelty or harassment 'soon before' the death of the wife;[67]

(j) the material witnesses were not examined, the testimony of the father and the uncle of the deceased did not clearly spell out harassment on the issue of insufficient dowry, the post-mortem report did not indicate marks of violence on the body of the deceased to conclude forceful administration of poison and the deceased was living separately from her in-laws.[68]

(k) the oral dying declaration of the deceased was found directly in contrast to the FIR where no such allegation of beating was made, the conduct of the deceased in not disclosing the alleged ill-treatment to her parents, reduced the importance of the dying declaration;[69]

(l) the testimony of the father of the deceased contradicted in material particulars by his own son and real brother, and there was no reliable evidence on record to prove that the alleged cruelty or harassment on the part of the accused towards the deceased soon before her death, was for, or in connection with the demand for dowry;[70]

(m) the allegations regarding demand of dowry made by the father of the deceased were of a vague and non-specific nature, the younger sister of the deceased who was married to the younger brother of the accused-husband of the deceased did not depose to any demand of dowry made to her, not even a whisper or even a suggestion of any demand for dowry being made by anyone;[71]2656

(n) they being sisters of the husband of the deceased, were present in the house during the relevant time where the deceased-wife was set on fire, there was no evidence that there was any sort of hostility between them and the deceased, there was no direct evidence as to how the incident occurred and the circumstantial evidence did not show the nature and extent of their participation;[72]

(o) only vague and inconsistent statements were made by interested witnesses, being the parents and brother of the deceased, there was no evidence of any relative or neighbour of the parties about cruelty to the deceased by the accused in relation to the demand of dowry, there was no demand of dowry at the time of marriage, there was no mention of demand of dowry in the letter of the deceased written to her parents soon before her death;[73]

(p) the important witnesses, the mother and brother of the deceased, turned hostile and the dying declaration was not supported by a certificate from the doctor that the deceased was mentally and physically fit to understand and answer questions;[74]

(q) the prosecution improved and exaggerated its case regarding demand of dowry and torture meted out to the deceased, and none of the witnesses of the prosecution was reliable, and the evidence regarding extra judicial confession was also not reliable;[75]

(r) there was no evidence showing demand of the amount ever being made by any accused, the evidence of witnesses was not reliable and the fact that the accused-husband made a

desperate attempt to save the deceased and himself got severe burn injuries, renders the prosecution case doubtful;[76]

(s) the accused-husband and the deceased-wife were living separately from the co-accused, the mother-in-law and brother-in-law of the deceased, there was no evidence of torture or harassment by the other co-accused so they were entitled to the benefit of the doubt.[77]

(t) Evidence of prosecution witnesses shows that there was never any demand for dowry by accused persons and relationship between the deceased and accused persons was quite good and cordial.[78]

(u) The statements of the prosecution witnesses, age of the deceased mentioned in post-mortem report established that the deceased did not die within seven years of her marriage, the fact that the deceased died of burn injuries sustained by her accidentally while cooking food, found support from MLC report, post-mortem report and inquest which did not show presence of smell of kerosene oil, medical report although admitted by defence was not admissible as same was not put to accused persons in their statement recorded under s 313 of CrPC .[79]2657

(v) The accused and deceased had lived for almost six years after the marriage. For sheer a half *tola* of gold, it is preposterous to expect the accused to inflict cruelty on deceased and it is unnatural to believe that version and the evidence showed that the illicit relationship of accused husband prompted the deceased to commit suicide.[80]

(w) No cogent evidence was adduced to establish demand of dowry by accused, the prosecution witness, who alleged to have demanded dowry and was responsible for death of deceased, not prosecuted, there was no direct or indirect evidence as to harassment or cruelty by accused towards deceased and the defence version that cause of death was that deceased insisted to go to her mother's house but she was not allowed, was plausible.[81]

(x) Story about demand of Rs 1 lakh by accused was an after thought, there was nothing on record to lend corroboration to allegation of ill-treatment to the deceased, there was no circumstance and motive to indicate that accused administered poison to deceased and post mortem report showed that she died because of self poisoning.[82]

(y) A lawfully wedded wife in no case tolerates extra- marital relationship of her husband. Therefore, where the deceased wife had a melancholic and pensively sad conjugal life in her matrimonial home which had compelled her to end her life by committing suicide and there was neither evidence co-relating demand of money with dowry nor any proof of cruelty soon before death, conviction of husband under s 302 was not sustainable.[83]

(z) No material to substantiate that the deceased was subjected to cruelty and harassment soon before her death and there was any ill treatment on account of the demand of dowry, death of the deceased was due to fire accident.[84]

(z1) Death of the deceased was not unnatural since evidence of witnesses coupled with postmortem report showing that the deceased died due to injury to the spleen, further evidence showing that there was no harassment by the accused to the deceased demanding dowry for or in connection with marriage, and as a consequence of non-payment of alleged dowry, the death of the deceased had taken place.[85]

(z2) There was no evidence to show that there was any harassment in connection with demand of dowry and there was no finding in this regard recorded by lower courts.[86]

56. Conviction under Sections 498A, 306 and 304B --No Double Jeopardy

The provisions of s 498-A of the IPC creates a specific offence for punishing a husband or relation of the husband of a married women, if they subject her to cruelty. The punishment provided therein is for a term which may extend to three years besides fine, whereas the offence of abetment to suicide is punishable under s 306, IPC is a graver offence and provides for imposition of sentence of imprisonment which may extend to ten years besides the sentence of fine. The2658 provisions of s 304B are specific in nature as these relate to imposition of imprisonment, attributing that the husband or the relation of the husband had caused the death of the married woman. Thus, by no stretch of imagination, it can be said to be a case of

double jeopardy. Consequently, it cannot be said that these provisions are violative of the mandate contained in sub-cl (2) of art 20 of the Constitution of India .[87]

57. Sentence

There is no yardstick to measure the heinousness of an offence so as to grant the extreme penalty of imprisonment for life. Death in every case is an unfortunate event, but suicides also depends a lot on the sensitivity of a person who takes his life.[88]Section 304B, IPC, only raises a presumption and lays down that the minimum sentence should be seven years but it may extend to imprisonment for life. Therefore, awarding the extreme punishment of imprisonment for life should be in rare cases and not in every case.[89]

The practice of giving and demanding dowry is a social evil having deleterious effect on the entire civilised society and has to be condemned by the judiciary. Despite various amendments providing deterrent punishment with a view to curb the increasing menace of dowry deaths, the evil practice of dowry remains unabated. The court cannot be oblivious to the intendment of the legislature and the purpose for which the enactment of the law and amendment has been effected. No leniency is warranted to the preperators of the crime against society, against whom different punishment is called for.[90] Misplaced leniency may cause injustice to society of which the accused persons are also members.[91] In case of offence of causing dowry death of woman, a stringent view should be taken while imposing sentence. When the accused-husband and in-laws of the deceased practised cruelty on deceased for greed, no lenient view can be taken while imposing sentence.[92]

58. Sentence of fine cannot be imposed

Section 304B, IPC provides for imposition of sentence of imprisonment as such fine cannot be imposed for offence under this section.[93]

59. Reduction in Sentence

The accused persons were found entitled to reduction in sentence of imprisonment with due regard to the facts that minimum imprisonment cannot be reduced to less than seven years, due to following reasons by appellate court:

(a) old age of accused;[94]2659
(b) one accused of young age and others of old age;[1]
(c) accused young man and might have lost his job,[2] or took his wife to hospital and was by her side during treatment;[3]
(d) accused in custody for several years.[4]

60. Enhancement of Sentence

In the matter of enhancement, there should not be interference when sentence passed imposes substantial punishment. It will only be interfered with when it is manifestly inadequate.[5] Trial court's discretion in awarding sentence does not require any interference when adequate punishment has been awarded.[6]

61. Should the Death Penalty be Provided under Section 304B

Dowry death is considered a heinous crime but the sentence provided under s 304B is a minimum seven

years imprisonment extendable to life imprisonment. The Division Bench of the Allahabad High Court recommended to Parliament to amend the law to provide for death sentence in dowry death cases with the following observations:

> We are surprised that while an ordinary murder can be punished by a death sentence under s 302, IPC, a dowry death, which is a much worse offence has a maximum punishment of life imprisonment. An ordinary murder is committed in a fit of rage or for a property, but a dowry death is not just an ordinary crime. It is a social crime. It outrages the modern conscience it makes the whole of society revert to feudal barbarism. Hence we recommend to Parliament to amend the law and provide for death sentence in dowry death cases.

This is why this barbaric practice must be ruthlessly stamped out by imposing harsh punishment.[7]

The Apex Court in *Alauddin Mian v State of Bihar* ,[8] while dealing with the murder case indicated that death penalty should be awarded to the accused for bride burning and acid pouring. In *Machhi Singh v State of Punjab* ,[9] the Apex Court held that killing of the wife for extraction of dowry would fall amongst the rarest of rare cases.

The fact that killing the wife for demand of dowry in the face of direct evidence of killing would be covered under s 302, IPC and dowry death cases covered by s 304B, IPC are only those cases where no direct evidence of murdering the wife is available, and on account of the circumstances indicated under s 304B and also under s 113B of2660 Evidence Act, the dowry death presumed may not weigh in the opinion of the legislature to prescribe the death penalty under s 304B .

In the undermentioned case, the Supreme Court has held that extreme penalty of death should be awarded in cases accused is convicted under s 304B, IPC only in exceptional cases where the case falls in the category of rarest of rare cases, and not in each and every case.[10]

62. Section 302 and Section 304B are not Mutually Exclusive

Sections 302 and s 304B, IPC are not mutually exclusive. If in a case the material on record suggest commission of an offence under s 302 as well as s 304B, the proper course would be to frame charges under both these sections and on establishing the prosecution's case, the accused can be convicted under both the sections but no separate sentence need be awarded under s 304B in view of the substantive sentence being awarded for the higher offence under s 302 .[11]

63. Appeal against order of Acquittal or Conviction

It may be stated that although in an appeal from an order of acquittal the powers of the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an order of conviction, yet, as a rule of prudence, one should always give proper weight and consideration to such matters as:

(i) the views of the trial judge as to the credibility of the witnesses;
(ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial;
(iii) the right of the accused to the benefit of any doubt, and the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. Where two reasonable conclusions can be drawn on the evidence on record, the High Court should as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the court below. In other words, if the main grounds on which the court

> below has based its order acquitting the accused, are reasonable and plausible, and cannot be entirely and effectively dislodged or demolished, the High Court should not disturb the acquittal.[12]

The well settled principle of law is that an order of acquittal ought not to be set aside, unless it is found to be patently wrong and wholly unsustainable.[13]

64. Suspension of Sentence Pending Appeal

When the accused had already undergone imprisonment for more than three years and seven months after his conviction under ss 304B / 34, IPC, imposing the sentence2661 of imprisonment of ten years if the accused is kept in detention till the decision of the appeal, it would not advance the cause of justice specially when the appeal is not likely to be heard in the near future. In such a case, the sentence[14] of imprisonment awarded to the accused is liable to be suspended under s 389, CrPC (2 of 1974) during pendency of appeal.[15]

65. Appeal/Special Leave Petition under Article 136 before Supreme Court

In an appeal under art 136 of the Constitution, the Apex Court will not reappreciate and/or re-appraise the evidence to arrive at a different conclusion on, unless it is shown that the courts below have not taken into consideration some relevant facts or have not appreciated the evidence in a correct perspective or the Supreme Court finds serious infirmities in the findings of the courts below.[16]

> The Apex Court has laid down a judicious principle that even in a case where one of the accused has not preferred an appeal, or even if his special leave petition is dismissed, in case relief is granted to the remaining accused and the case of the accused who has either not appealed or whose special leave petition has been dismissed, stands on the same footing, he should not be denied the benefit which is extended to the other accused.[17]

66. Alteration of Conviction from Section 302 to Section 304B

In large number of dowry death cases, demands have gone on for a long period of time after marriage, and so far as it is a demand for money or property addressed to the parents of the wife, it would came squarely within the four corners of dowry related offence. The time factor is not of much significance in a case of burning of a woman in relation to demand for money from the wife's parents, the conviction under s 304B, IPC, would be appropriate, and not under s 302 .[18] Even if a charge under s 304B was not framed against the accused, but the charges under ss 302, 498-A and 201 put together satisfy the ingredients of s 304B .[19] However, when the accused is acquitted under ss 302, 498-A he cannot be convicted for the alternative charge under s 304B in the absence of opportunity being given to him in respect of the offence under s 304B, in view of s 464(1), CrPC[20] as s 304B is not 'a minor offence' for the purpose of s 222, CrPC .[21] In such a case, after the accused is found not guilty under s 302 and s 498A, he should be afforded the opportunity to give his defence on charge under s 304B, and thereafter his guilt should be decided *qua* s 304B .[22]2662

Once accused was found guilty for committing death of the deceased under s 304 B, IPC, he need not be convicted under s 302, IPC so, conviction under s 302 was set aside maintaining conviction under ss 304B and 498A .[23]

67 Alteration of Conviction from Section 304B to Section 498A

A person charged and acquitted under s 304B, IPC can be convicted under s 498A, IPC without that charge being there, if such a case is made out.[24] If the case is established, there can be a conviction under ss 304B and 498A . However, when mental torture and cruelty has been established and no demand of dowry is proved, the conviction of the accused under s 304B and 498A can be altered to one under s 498A, IPC .[25] When there is inadequate material to attract culpability under s 304B, but s 498A, IPC is clearly attracted, conviction under s 304B, IPC can be altered to offence punishable under s 498A, IPC .[26] However, when no charge is framed under s 498A and charge under s 304B is not established, the accused cannot be convicted under s 498A, though he is entitled to an acquittal under s 304B .[27]

68. Alteration of Conviction from Section 304B to Section 306

Where the accused-husband was charged with and convicted under s 304B, IPC by the sessions court, but the demand of dowry by the husband was not proved, however, the fact that the wife had committed suicide in consequence of cruelty or torture meted out to her by the accused husband was established, treating s 306, IPC as minor offence of s 304B, the conviction of the accused was altered from s 304B to s 306 even though no charge under s 306 had been framed against him.[28]

46 *State of Karnataka v Shivaraj* 2002 Cr LJ 2741 (Kant) (DB) .

47 *Havgirao v State of Karnataka* 2007 Cr LJ (NOC) 79 (Bom), (2006) 6 AIR Kar R 450 .

48 *Ibid*.

49 *Ram Narayan v State of Madhya Pradesh* (1998) I CCR 542 (MP) .

50 *Ibid*.

51 *Rema Aggarwal v Anupam* AIR 2004 SC 1418, 2004 Cr LJ 892, 2004 AIR Jhar HCR 1026 ; **See also***Koppsetti Subharao v State of AP* 2009 Cr LJ 3480, AIR 2009 SC 2684 .

52 *Rohit Das v State of Bihar* 2005 Cr LJ 4 (Jhar) .

53 *Salamat Ali v State of Bihar* AIR 1995 SC 1863 .

54 *State of Rajasthan v Kesa* 2002 Cr LJ 432 (Raj) .

55 *See* also Synopsis 'Essential Ingredients'.

56 *Keshab Chandra Panda v State* 1995 Cr LJ 174 (Ori) ; *State of Andhra Pradesh v Raj Gopal Asawa* 2004 Cr LJ 1791 (SC) ; *Kaliyaperumal v State of Tamil Nadu* 2003 Cr LJ 4321 (SC) .

57 *Samir Samanta v State* 1993 Cr LJ 134 (Cal) ; *Mongol Ram v State of Madhya Pradesh* 1999 Cr LJ 4342 (MP) .

58 *Hem Chand v State of Haryana* (1994) 3 Crimes 608 (SC) ; *State of Karnataka v MV Manjunathegowda* 2003 I AD 601 (SC)*; Pradeep Kumar v State of Haryana* (2014) 7 SCC 395, AIR 2014 SC 2694, 2014 Cr LJ 3806 ; *Gurdip Singh v State of Punjab* (2013) 10 SCC 395 ; *Tarseem Singh v State of Punjab* AIR 2009 SC 1454, (2008) 16 SCC 155 ; *Raja Lal Singh v State of Jharkhand* (2007) 15 SCC 415 ; *Narayanamurthy v State of Karnataka* (2008) 16 SCC 512, AIR 2008 SC 2377, (2008) 16 SCC 512 .

59 *Suresh v State of Rajasthan* 1999 Cr LJ 1787 (Raj) (DB) ; *Fatima Kom Mastansab Nadaf v State of Karnataka* 1999 Cr LJ 1175 (Kant) (DB)*; Gurdip Singh v State of Punjab* (2013) 10 SCC 395 ; *Amar Singh v State of Rajasthan,* (2010) 9 SCC 64, AIR 2010 SC 3391 .

60 *Ibid*; *Jai Ram v State of Rajasthan* (1995) 1 Crimes 611 (Raj) ; *Kailash Chand v State of Rajasthan* (1998) 3 Crimes 74 Raj (DB); *GM Natrajan v State* 1995 Cr LJ 2728 (Mad) 1, (1998) CCR 274 (Raj) (DB); *Amar Singh v State of Rajasthan* (2010) 9 SCC 64, AIR 2010 SC 3391 .

61 *Alamgir Sani v State of Assam* (2003) I AD 360 (SC) .

62 *State of Karnataka v MV Manjunathegowda* (2003) I AD 601 (SC) .

63 *Harjit Singh v State of Punjab* 2006 Cr LJ 554 (SC)*; S Anil Kumar v State of Karnataka* (2013) 7 SCC 219, (2013) 3 SCC (Cri) 289 .

64 *Suresh Kumar v State of Haryana* 2014 Cr LJ 551 (SC), (2013) 16 SCC 353, (2014) 133 AIC 185 (SC) (*Shamnasaheb M Multtani v State of Karnataka* AIR 2001 SC 921, (2001) 2 SCC 577, 2001 (2) JT 92, 2001 (1) Scale 365, 2001 Cr LJ 1075, 2001 SCC (Cr) 358, 2001 (1) Crimes 206 (SC), **followed**).

65 *Bhim Singh v State of Uttrakhand* 2015 Cr LJ 1428, p 1433 (SC) (Death within four months of marriage by burn injuries -- Appellants convicted under s 304B, IPC); **See also***Rajinder Kumar v State of Haryana* 2015 Cr LJ 1560 (SC) (Dowry death -- Accused convicted under s 304B, IPC).

66 *Bansi Lal v State of Haryana* (2011) 11 SCC 359, AIR 2011 SC 691, (2011) 1 All LJ 539 .

67 *State of Karnataka v MV Manju-nathegowda* (2003) 2 SCC 188, 2003 Cr LJ 900, AIR 2003 SC 809 ; *Satbir Singh v State of Haryana* 2005 Cr LJ 4137 (SC) ; *Bansi Lal v State of Haryana* (2011) 3 SCC (Cri) 188, AIR 2011 SC 691, (2011) 99 AIC 1291 (SC) (Conviction of the appellant accused confirmed).

68 *Satbir Singh v State of Haryana* 2005 Cr LJ 4137 (SC)*; Ramakant Mishra v State of UP* 2015 Cr LJ 1947 (SC) .

69 *Ramakant Mishra v State of UP* 2015 Cr LJ 1947 (SC), 2015 (3) Scale 186, (2015) 8 SCC 299 .

70 *Amrutlal Liladharbhai Kotak v State of Guajrat* 2015 Cr LJ 1951 (SC), AIR 2015 SC 1355, 2015 (2) Scale 688, (2015) 4 SCC 452 .

71 *Saryu Sharma v State of Bihar* 2014 Cr LJ 658 (Pat) .

72 *Shri Bhagwant Singh v Commissioner of Police, Delhi* AIR 1983 SC 826, 1983 Cr LJ 1081 .

73 *Joint Women's Programme v State of Rajasthan* AIR 1987 SC 2060 .

74 *State of Karnataka v Pundalik* 1999 Cr LJ 4751 (Kant) (DB) .

75 *Lichhamadevi v State of Rajasthan* AIR 1988 SC 1785, 1988 Cr LJ 1812 (SC) .

76 *State v Srikanth* 2002 Cr LJ 3605 (Kant) (DB) .

77 *Sunil Kumar v State of Jharkhand* 2002 Cr LJ 2507 (Jharkhand) .

78 *Keshav Dev v State of Rajasthan* 2005 Cr LJ 3306 (Raj) .

79 *Alamgir Sani v State of Assam* 2003 Cr LJ 4917 (SC), AIR 2003 SC 2108 .

80 *Khacher Mal v State of Uttar Pradesh* 2006 Cr LJ 714 (All) .

81 *Shailendra Kumar v State of Delhi* 2000 Cr LJ 2452 (SC) .

82 *Samunder Singh v State of Rajasthan* AIR 1987 SC 737 .

83 *Arun Kumar v State of Madhya Pradesh* 1999 Cr LJ 717 (MP) .

84 *State of Karnataka v Shankar* 2000 Cr LJ 1917 (Kant) (DB) .

85 *Fatima Kom Mastansab Nadaf v State of Karnataka* 1999 Cr LJ 1175 (Kant) (DB) .

86 *State of Karnataka v Neelawwa* 2002 Cr LJ 3981 (Kant) (DB) .

87 *KS Lingam and Ors v State of Andhra Pradesh* 2001 Cr LJ 602 (AP) (DB) .

88 *Budhi Singh v State of Himachal Pradesh* 2000 Cr LJ 4879 (HP) .

89 *Kodam Gangaram v State of Andhra Pradesh* 1999 Cr LJ 2181 (AP) .

90 *Rakesh Kumar v State of Haryana* 2009 Cr LJ 1895, p 1896 (SC), 2009 AIR SCW 2114, 2009 (3) Scale 567 .

91 *Kosipalli Satyanarayana v State of Andhra Pradesh* 2002 Cr LJ NOC 379 (AP), 2002 (2) Andh LT Cr 85 .

92 *Kans Raj v State of Punjab* 2000 Cr LJ 2993 SC .

93 *Ibid*.

1 *Prem Kumar Gulati v State of Haryana* (2014) 14 SCC 646, 2015 Cr LJ 159, 2015 (2) Crimes 247 (SC), 2014 (11) Scale 393 .

2 *Siddesha v State* 2001 Cr LJ 38 (Kant) .

3 *Suryabhan Singh v State of Madhya Pradesh* 2002 Cr LJ (NOC) 353 (MP), (2002) 3 MPLJ 419 .

4 *Vishwa Kumar Sharma v State of Rajasthan* 2006 Cr LJ 2096 (Raj) .

5 *Vemuri Venkateswara Rao v State of Andhra Pradesh* 1992 Cr LJ 563 (AP) .

6 *Mohd Dowlath v State of Andhra Pradesh* 2004 Cr LJ 760 (AP) .

7 *Prakash Chancier v State* (1994) 1 Crimes 865 (Del) 53, (1994) ILT 113 (Del) (DB).

8 *Bhoore Singh v State* 1993 Cr LJ 2636 (All) .

9 *Ibid; Rajbir v State of Haryana* (2010) 15 SCC 116 ; *Vijay Pal Singh v State of Uttarakhand* AIR 2015 SC 684, 2015 Cr LJ 1338 (SC) .

10 *Rajbir v State of Haryana* (2010) 15 SCC 116, p 118, AIR 2011 SC 568, 2010 (12) Scale 31 .

11 *Shanti v State of Haryana* AIR 1991 SC 1226 .

12 *Vijay Pal Singh v State of Uttarakhand* 2015 Cr LJ 1338, p 1344 (SC), AIR 2005 SC 684 .

13 *Harjit Singh v State of Punjab* 2006 Cr LJ 554 (SC) .

14 *Vishnu Prasad v State* 2006 Cr LJ 2865 (Del) .

15 *Nandkishore alias Kishore Bheemrao Khirsagar v State of Maharashtra* 1995 Cr LJ 3706 (Bom) (DB) .

16 *Shanti v State of Haryana* AIR 1991 SC 1226, 1991 Cr LJ 1713 (SC) .

17 *Sarveshwar Singh v State* 1999 Cr LJ 2179 (Raj) .

18 *Sunil Kumar Jha v State of Bihar* 2006 Cr LJ 4522 (Jhar)*; Rajeev Kumar v State of Haryana* (2013) 16 SCC 640, AIR 2014 SC 227 ; *Dinesh v State of Haryana* (2014) 12 SCC 532, 2014 Cr LJ 3092 ; *Manohar Lal v State of Haryana* (2014) 9 SCC 645, AIR 2014 SC 2555 ; *Panchanand Mandal v State of Jharkhand* (2013) 9 SCC 800 ; *Suresh Kumar Singh v State of UP* (2009) 17 SCC 243, (2009) 4 All LJ 662 ; *Rajinder Kumar v State of Haryana* 2015 Cr LJ 1560 (SC) .

19 *Suresh Kuamr v State of Haryana* 2014 Cr LJ 551, p 559 (SC), (2013) 16 SCC 353, (2014) 133 AIC 185 (SC) (*Shamnasaheb M Multtani v State of Karnataka* AIR 2001 SC 921, (2001) 2 SCC 577, 2001 Cr LJ 1075, 2001 SCC (Cr) 358, 2001 (1) Crimes 206 (SC), **followed**).

20 *Dhonthula Ravindranath v State of AP* AIR 204 SC 1060, 2014 Cr LJ 1217, (2014) 3 SCC 196 .

21 *Rajinder Kumar v State of Haryana* 2015 Cr LJ 1560, p 1562 (SC) .

22 *Niranjan Mohapatra v State of Orissa* 1998 Cr LJ 630 (Ori) .

23 *Ram Kumar v State of Haryana* 1997 Cr LJ 462 (SC) .

24 *State of Himachal Pradesh v Nikku Ram* 1995 Cr LJ 4184 (SC) .

25 *Bhupendra v State of Madhya Pradesh* 2014 Cr LJ 546, p 549, 550 (SC), AIR 2014 SC 378, (2014) 2 SCC 106 .

26 *Ram Badan Sharma v State of Bihar* 2006 Cr LJ 4070, AIR 2006 SC 2855 .

27 *Satya Narayan Tiwari v State of UP* 2011 Cr LJ 445, p 455 (SC), 2010 AIR SCW 7144, (2011) 97 AIC 246, (2010) 13 SCC 689, (2011) All LJ 539

28 *Anil Kumar Gupta v State of UP* 2011 Cr LJ 2131 (SC), 2011 AIR SCW 1825 .

29 *Gurnaib Singh v State of Punjab* 2013 Cr LJ 3212, 2013 AIR SCW 3348 (SC) .

30 *Mustafa Shahadal Shaikh v State of Maharashtra* 2012 Cr LJ 4763 (SC), 2012 AIR SCW 5308, 2012 (8) Scale 692 .

31 *Dasrath v State of MP* 2010 Cr LJ 4382, p 4386 (SC), AIR 2010 SC 2592, 2010 AIR SCW 4611, 2010 (7) Scale 389 .

32 *Sharad v State of Maharashtra* 2012 Cr LJ 2170, p 2171 (SC), AIR 2012 SC 1818 .

33 *Bakshish Ram v State of Punjab* 2013 Cr LJ 2052, AIR 2013 SC 1484, (2013) 4 SCC 141

34 *Bachni Devi v State of Haryana* 2011 Cr LJ 1634, p 1638 (SC), AIR 2011 SC 1098, (2011) 4 SCC 427, 2011 (2) Scale 265 .

35 *Rajesh Bhatnagar v State of Uttarakhand* 2012 Cr LJ 3442, AIR 2012 SC 2866, 2012 AIR SCW 3776, (2012) 7 SCC 91, 2012 (5) Scale 311, 2012 (5) All LJ 79 .

36 *Arulvelu v State* 2010 Cr LJ 433, p 436 (SC), 2009 AIR SW 6593, 2009 (13) Scale 143 .

37 *State of Karnataka v KA Harsha* 2012 Cr LJ 1421 (Kant) (DB) .

38 *Harjit Singh v State of Punjab* 2006 Cr LJ 554 (SC), AIR 2006 SC 680 .

39 *Govindraju v State of Karnataka* 2009 Cr LJ 3457, p 3462 (SC), 2009 AIR SCW 3970, 2009 (8) Scale 607 .

40 *Raman Kumar v State of Punjab* 2009 Cr LJ 3034, p 3039 (SC), 2009 AIR SCW 3598, 2009 (6) Scale 335 .

41 *Bhaskar Ramappa Madar v State of Karnataka* 2009 Cr LJ 2422, p 2432 (SC), 2009 AIR SCW 2624, 2009 (5) Scale 100 .

42 *Ranjit Singh v State of Punjab* 2013 Cr LJ 3959, p 2964, AIR 2013 SC 2991, 2013 (9) Scale 117 .

43 *Jagjit Singh v State of Punjab* 2009 Cr LJ 2440, p 2442 (SC), AIR 2009 SC 2133, 2009 (4) SCC 759 .

44 *Tirath Kumari v State of Haryana* 2005 Cr LJ 4977 (SC), AIR 2005 SC 4429 ; *Taiyab Khan v State of Bihar* 2006 Cr LJ 544 (SC) .

45 *Taiyab Khan v State of Bihar* 2006 Cr LJ 544 (SC), AIR 2006 SC 673, 2005 (9) Scale 483 .

46 *Rameshwar Dass v State of Punjab* 2008 Cr LJ 1400 (SC), AIR 2008 SC 890, 2008 AIR SCW 282, 2007 (14) Scale 378 .

47 *D Jayana v State of Karnataka* 2009 Cr LJ 3977 (SC), (2009) 6 SCC 675, 2009 (8) Scale 8 .

48 *Deen Dayal v State of UP* 2009 Cr LJ 1119, p 1122 (SC), AIR 2009 SC 1238, 2009 (1) Scale 408 ; *Prem Kumar v State of Rajasthan* 2009 Cr LJ 1123 (SC) .

49 *Durga Prasad v State of MP* 2010 Cr LJ 3419, p 3422 (SC), 2010 AIR SW 3673 .

50 *Vipin Jaiswal v State of AP* 2013 Cr LJ 2095, AIR 2013 SC 1567, (2013) 3 SCC 684 .

51 *Maniklal Jain v State of MP* 2012 Cr LJ 613, p 614 (SC), (2011) 14 SCC 584 .

52 *Pathan Hussain Basha v State of AP* 2012 Cr LJ 4230, p 4236 (SC), AIR 2012 SC 3205, 2012 AIR SCW 4584, 2012 (7) Scale 346 .

53 *Kuldeep Kaur v State of Uttrakhand* (2014) 8 Supreme 413 (SC), (2014) 10 SCC 584 .

54 *Tarabai v State of Maharashtra* 2015 Cr J 1326 (SC) .

55 *Mool Chand v State of Rajasthan* AIR 2012 SC (Cri) 684, 2012 AIR SCW 1857, 2012 Cr LJ 1881 (SC) ; *Nakhtaram v State of Rajasthan* 2012 Cr LJ (NOC) 228 (Raj) (DB); *State of Karnataka v Mallikarjuna* 2012 Cr LJ (NOC) 227 (Kar) (DB).

56 *Raja Lal Singh v State of Jharkhand* 2007 Cr LJ 3262, p 3264 (SC), AIR 2007 SC 2154, 2007 (6) Scale 568, 2007 (3) Supreme 1037 .

57 *State of Andhra Pradesh v Raj Gopal Asawa* 2004 Cr LJ 1791 (SC) .

58 *State of Karnataka v Chowdegowda* 2007 Cr LJ 2812 (Kant) (DB) .

59 *Gurucharan Kumar v State of Rajasthan* (2003) I AD 217 (SC) .

60 *Swaroopa Ram v State of Rajasthan* 2002 Cr LJ 463 (Raj) .

61 *M Srinivasulu v State of Andhra Pradesh* 2002 Cr LJ (NOC) 30 (AP), (2001) 2 Andh LT (Cr) 179 .

62 *State of Rajasthan v Gyaneshwar* 2002 Cr LJ 1312 (Raj) .

63 *Dilip alias Bidyadhar Pradhan v State of Orissa* 2002 Cr LJ 1613 (Ori) (DB) .

64 *Mungeshwar Prasad Chaurasia v State of Bihar* 2002 Cr LJ 3505 (SC) .

65 *State v Srikanth* 2002 Cr LJ 3605 (Kant) (DB) .

66 *Kamlesh v State of Madhya Pradesh* 2002 Cr LJ 4523 (MP) .

67 *Keshab Chandra Panda v State* 1995 Cr LJ 174 (Ori) .

68 *Nirmala Devi v State of Punjab* 1995 Cr LJ 3553 (P&H) (DB).

69 *Santosh Kumar v State of Madhya Pradesh* (1997) 3 Crimes 342 (MP), 1997 CLR 257 (MP) .

70 *Inder Singh v State of Haryana* 1995 Cr LJ 2944 (P&H) .

71 *Chander Pal v State* (1997) 67 DLT 571 (Del) .

72 *Jawahar Lal v State of Madhya Pradesh* 2001 Cr LJ 2923 (SC) .

73 *Sunil Bajaj v State of Madhya Pradesh* 2001 Cr LJ 4700 (SC) .

74 *State of Karnataka v Shankar* 2000 Cr LJ 1917 (Kant) (DB) .

75 *Ram Kumar v State of Haryana* 1997 Cr LJ 324 (P&H) (DB).

76 *Rajinder Kumar v State of Haryana* 1996 Cr LJ 3742 (P&H) .

77 *Chandrabhushan Bhimraj Bhushanwar v State of Maharashtra* 1995 Cr LJ 101 (Bom) .

78 *Vijay Kumar Yadav v State of Bihar* 2006 Cr LJ 105 (Pat) (DB) .

79 *Amritlal v State of Madhya Pradesh* 2006 Cr LJ 888 (MP) (DB) .

80 *Vishwambar v State of Karnataka* 2006 Cr LJ 3168 (Kant) .

81 *T Aruntperunjothi v State* 2006 Cr LJ 3290 (SC) .

82 *Aftab Alam Abdul Hamid Ansari v State of Maharashtra* 2005 Cr LJ 3634 (Bom) (DB) .

83 *Anup Kumar Verma v State of Jharkhand* 2004 Cr LJ 1712 (Jhar) .

84 *Pukkaraj v State* 2007 Cr LJ (NOC) 275 (Mad) .

85 *Angirekula Ramakrishna v State of Andhra Pradesh* 2007 Cr LJ (NOC) 344 (AP) .

86 *Biswajit Halder alias Babu Halder v State of West Bengal* 2007 Cr LJ 2300 (SC) .

87 *Krishan Lal v Union of India* 1994 Cr LJ 3472 (P&H) (FB).

88 *Anoop Singh v State of Haryana* 2006 Cr LJ 3077 (P & H) (DB).

89 *Hem Chand v State of Haryana* (1994) 3 Crimes 608 (SC), AIR 1995 SC 120 .

90 *State of Karnataka v MV Manjunathegowda* 2003 I AD 601 (SC) .

91 *Nallam Veera Satyanandam v State of Andhra Pradesh* 1996 Cr LJ 4034 (AP) .

92 *Mohan Lal v State of Madhya Pradesh* 2005 Cr LJ 16 (MP) .

93 *Anoop Kumar v State of UP* 2010 Cr LJ (NOC) 442 (All) ; *Nilu v State of West Bengal* 2012 (9113) AIC 295 (Cal) .

94 *Mustt Sajida Begum v State of Assam* 1996 Cr LJ 4352 (Gau) (DB) ; *Kaliya Perumal v State* 2003 Cr LJ 300 (Mad) ; *Dilip alias Bidyedhar Pradhan v State of Orissa* 2002 Cr LJ 1613 (Ori) (DB) ; *Taiyab Khan v State of Bihar* 2006 Cr LJ 544 (SC) ; *K Prema S Rao v Yadla Srinivasa Rao* 2003 Cr LJ 69 (SC), AIR 2003 SC 11 ; *Kaliyaperumal v State* 2003 Cr LJ 300 (Mad) ; *Ramvir Singh v State of Uttar Pradesh* 2007 Cr LJ (NOC) 602 (All), (2007) 4 ALF 51 (DB) .

1 *Gurcharan Singh v State of Punjab* 1999 Cr LJ 1616 (P&H) (DB).

2 *M Sreenivasulu v State of Andhra Pradesh* 2002 Cr LJ (NOC) 30 (AP), (2001) 2 Andh LT 179 (Ori) .

3 *Sallo alias Salim Khan v State of Madhya Pradesh* 1997 Cr LJ 1983 (MP) (DB) .

4 *Updesh Singh v State of Bihar* 2000 Cr LJ 2161 (Pat) ; *Mukat Bihari v State of Rajasthan* 2006 Cr LJ 439 (Raj) ; *Karnail Singh v State of Punjab* 2006 Cr LJ 2725 (P&H) (DB); *Khiru Rabidas v State of Jharkhand* 2003 Cr LJ 3658 (Jhar) .

5 *Bed Raj v State of Uttar Pradesh* AIR 1955 SC 778, 1955 Cr LJ 1642 .

6 *Surinder Kumar v State of Haryana* 1997 Cr LJ 1737 (P&H) .

7 *Dev Prasad v State of Uttar Pradesh* 2002 Cr LJ 4291 (All) (DB) .

8 *Alauddin Mian v State of Bihar* AIR 1989 SC 1456, 1989 Cr LJ 1466 (SC) .

9 *Machhi Singh v State of Punjab* AIR 1983 SC 957, 1983 Cr LJ 1457 (SC) .

10 *Hari Om v State of Haryana* (2014) 10 SCC 577, 2015 Cr LJ 641, 2015 (2) Crimes 156 (SC), 2014 (12) Scale 491, (2014) 10 SCC 577 (Sentence reduced from life imprisonment to ten years RI); *Sunil Dutt Sharma v State (NCT of Delhi)* (2014) 4 SCC 375, 2013 (132) AIC 69 ; *Satish Chandra v State of MP* (2014) 6 SCC 723, 2014 Cr LJ 2737 .

11 *Prakash Chander v State* (1994) 1 Crimes 865 (Del) (DB), (1994) 53 DLT 113 (Del) (DB)*; Rajbir v State of Haryana* (2010) 15 SCC 116 (118) .

12 *State of Rajasthan v Kesa* 2002 Cr LJ 432 (Raj) .

13 *Rajayyan v State of Kerala* 1998 Cr LJ 1633 (SC) .

14 Refer to *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

15 *Sukhmander Singh v State of Punjab* 1999 Cr LJ 1398 (P&H) .

16 *Alamgir Sani v State of Assam* (2003) I AD 360 (SC) .

17 *Gurucharan Kumar v State of Rajasthan* (2003) I AD 217 (SC) ; *Harbans Singh v State of Uttar Pradesh* (1982) 2 SCC 101 ; *Raja Ram v State of Madhya Pradesh* (1994) 2 SCC 568 ; *Dandy Lakshmi Ready v State of Andhra Pradesh* (1999) 7 SCC 69 ; *Akhil Ali Jehangir Ali Sayed v State of Maharashtra* (2002) JT 2 158 (SC) .

18 *Devendrappa v State of Karnataka* 2002 Cr LJ 2867 (Kant) (DB) .

19 *Vemuri Venkateswara Rao v State of Andhra Pradesh* 1992 Cr LJ 563 (AP) ; *Rajeshwar Prasad v State of Bihar* 2000 Cr LJ 727 (Pat) (DB) ; *Venugopal v State of Karnataka* (1998) 5 JT 307 SC, 1999 Cr LJ 29 ; *Bhoora Singh v State* 1993 Cr LJ 2636 (All), 1993 All LJ 920 ; *Kamaladass v State* 1999 Cr LJ 1395 (Mad) ; *Ravi Shah v State* 1999 Cr LJ 188 (Mad) .

20 Refer to *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

21 *Ibid.*

22 *Shamnsaheb M Multtani v State of Karnataka* 2001 Cr LJ 1075 (SC) .

23 *Bhagaban Pradhan v State of Orissa* 2007 Cr LJ 378 (Ori) (DB) .

24 *Shanti v State of Haryana* AIR 1991 SC 1226, 1991 Cr LJ 1713 (SC) ; *Keshab Chandra Panda v State* 1995 Cr LJ 174 (Ori) .

25 *Satpal v State of Haryana* AIR 1999 SC 1476, 1999 Cr LJ 596 ; *Pyare Lal v State of Haryana* AIR 1999 SC 1563 ; *Inder Raj v State of Rajasthan* 1996 Cr LJ 924 (Raj) ; *Public Prosecutor, AP v Mohd Hoshan* 1996 Cr LJ 2834 (AP) ; *State of Karnataka v Balappa* 1999 Cr LJ 3064 (Kant) (DB) ; *Sham Lal v State of Haryana* 1997 Cr LJ 1927 (SC) .

26 *Kaliyaperumal v State of Tamil Nadu* 2003 Cr LJ 4321 (SC), AIR 2003 SC 3828 ; *Dinesh Seth v State* 2003 Cr LJ 4532 (Del) .

27 *GA Mahomed Mojdeen v State* 2000 Cr LJ 4355 (Mad) ; *Bhaskaran v State* (1995) 1 Mad LW 57 (Ori) .

28 *Bijoy Uraon alias Phagu Uraon v State of Bihar* 2000 Cr LJ 3394 (Pat)*; Karan Singh v State of Haryana* (2014) 5 SCC 738, 2014 Cr LJ 2708 ; *State of Rajasthan v Girdhari Lal* (2013) 15 SCC 269 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 305.

Abetment of suicide of child or insane person.--

If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or [29][imprisonment for life], or imprisonment for a term not exceeding ten years, and

also shall be liable to fine.2663

Comments

1. Scope and Applicability

The offence of committing suicide itself is, obviously, unpunishable,[30] but its abetment is punishable under this section and an attempt to commit suicide is punishable under s 309, IPC . The abetment of suicide by persons of immature years, or of impaired mental powers, is more severely punished under this section than in the case of normal type of persons. Mayne observes that suicide is the only offence for which it is impossible to punish the principal offender. He is already beyond the reach of human law; those, who instigate him, or help him in the act, remain. Where two persons agree to commit suicide together, but if the means employed only take effect upon one, the survivor is held guilty of murder.[31] A person, who takes an active part in the suicide of another by actually shooting him or administering poison to him, would commit culpable homicide not amounting to murder under Exception 5 to s 300, IPC, if the person, being over 18 years of age, gave such consent as defined by s 90, IPC . If he was younger than 18, or if his consent did not come within the purview of s 90, he would be guilty of murder. If, however, he did not actually cause the death, but abetted it within the meaning of s 107, IPC, he would be punishable under s 305 or 306, IPC, as the person, actually committing suicide, was, or was not, capable of giving consent.[32]

Even the effacement of s 309, IPC from the statute as being violative of art 21 of the Constitution by the Supreme Court,[33] would not affect the charge of abetment of suicide punishable under ss 305 and 306, IPC .[34]

This and the next section apply only when suicide has been committed. They do not apply to cases of attempted suicide.

2. 'Commits suicide'

Suicide is the third offence affecting life; it is self-murder, *i.e.*, a person who kills himself in a manner which, in the case of another person, would amount to murder, is guilty of that species of murder called 'suicide'. The killing must take place by the hand of the person himself.[35]

3. 'Abets'[36]

'Abets', *i.e.*, instigates the commission, or conspires to commit, or aids in the commission of the suicide.[37]

4. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of sessions.2664

5. Charge

The following form of the charge may be adopted:

I (*name and office of sessions judge etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the.....day of ....., at....., you abetted one AB, a person under 18 years of age (*or an idiot or an insane person, etc*.), to commit suicide, and he committed it, and you thereby committed an offence, punishable under s 305 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

When the accused who was convicted for commission of rape on child and was released on bail alleged to have continuously intimidated and threatened child that he would take revenge and would kill her and her mother, the statement of mother of victim and her friend disclosed that she had gone into depression and was constantly under fear, so, it could be said that act of suicide committed by victim was direct and proximate cause of abetment or instigation offered by accused, therefore, the charge against accused cannot be quashed.[38]

Where evidence was lacking to show that the death of the deceased was a suicidal death, basic constituent of offence under s 305, IPC was lacking in the case, order for framing charges against the accused was set aside.[39]

6. Proof

To establish an offence under this section, prove that:

(1) the person in question committed suicide;
(2) he was:

- (a) under 18 years of age, or
- (b) insane person, or
- (c) delirious person, or
- (d) an idiot, or
- (e) intoxicated, or
- (f) at the time of the commission of the offence; and

(3) the accused abetted the commission of the said suicide.

29 Substituted by Act 26 of 1955, s 117 and Sch for 'transportation for life' (wef 1-1-1956).

30 *Purabi Banerjee v Basudeb Mukherjee* AIR 1969 Cal 293, 72 CWN 905 .

31 *Reg v Alison 8 Car & P* 418; *Purabi Banerjee v Basudeb Mukerjee* AIR 1969 Cal 293, 72 CWN 905 .

32 *Mayne's Criminal Law,* p 675.

33 *Rethinam Nagbhusan Patnaik v Union of India* (1994) 2 RCR 564, (1994) JT 3 SC 392 .

34 *Subendran v State of Kerala* (1995) 1 RCR 399 ; *Naresh Marotrao Sakhre v Union of India* (1995) CUJ 96 (Bom) (DB).

35 *Purabi Banerjee v Basudeb Mukerjee* AIR 1969 Cal 293, 72 CWN 905 .

36 Refer to ss 107-08, vol 1.

37 *R v Fretwell* (1862) L and Ca 161, 10 WR (Cr) 545 .

38 *Chandan Soni v State of Chhattisgarh* (2006) Cr LJ 3528 (Chattishgarh) .

39 *Rajendra Sharma v State of Chhattisgarh* 2012 (110) AIC 750 (Chh) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 306.

Abetment of suicide.--

If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.2665

Comments

1. Scope

This section provides punishment for abetment of suicide generally while the preceding section provided for abetment of suicide by persons under a disability.

Before s 306, IPC, can be acted upon, there must be clear proof of the fact that the death in question was a suicidal death.[40] Abetment of suicide is confined to the case of persons who aid and abet the commission of suicide by the hand of the person herself who commits suicide. When the question is whether commission of suicide by a woman had been abetted by her husband or any relative of her husband, and it is shown that she had committed suicide within a period of seven years from the date of her marriage, and that her husband or such relative of her husband had subjected her to cruelty, the court may presume having regard to all other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. However, the *sine qua non* for application of s 306, is the factum of suicide.2666 Where the circumstances did not establish either murder or abetted suicide, the accused can escape the jaws of ss 300 and 306, IPC, but they can be caught in the web of s 498A, IPC . The offence of 'abetment' must naturally conform to the definition of that term as given in s 107, that is to say, there must be instigation, co-operation or intentional assistance given to the suicide. It is not necessary, nor indeed is it a part of the definition that the suicide should have been committed in consequence of the abetment. However, in order to render a person liable as an abettor, it is of course necessary, as indeed it is in the case of any other offence, that the abettor should be something more than a mute spectator--*spectator hand particeps.* It is conceivable that such presence may encourage a woman to do a deed, which she might otherwise refrain from. In that case the question whether mere presence amounted to intentionally aiding another will have to be decided. Suicide is self-murder. Suicide as such is no crime, as one committing suicide places herself beyond the reach of law, but its abetment does not.[41] The fact that other accused persons, *i.e.*, mother-in-law and father-in-law of the deceased are acquitted, can be no ground to extend benefit of doubt to the accused husband.[42]

2. Law of Canada

It is an indictable offence to counsel or aid or abet a person to commit suicide. The maximum sentence is 14 years imprisonment, whether suicide ensues or not. For the survivor of a suicide pact to be guilty of this offence, as opposed to murder, requires a common and irrevocable intent to commit suicide together, simultaneously and by the same act, where the risk of death is identically equal for both.

Euthanasia

'In *Carter v Canada (Attorney General)* ,[43] it was stated would be wrong, in my view, to judge this case as a contest between life and death. The Charter is not concerned only with the fact of life, but also with the quality and dignity of life. In my view, death and the way we die is a part of life itself.'

The plaintiffs, Carter, Johnson, Doctor Shoichet, the BCCLA, and Taylor, challenged the constitutionality of the Criminal Code provisions prohibiting physician-assisted death. Taylor suffered from a fatal neurodegenerative disease, ALS. She sought the availability of physician-assisted death as an option in the event life became unbearable. Carter and Johnson helped arrange a physician-assisted death for Carter's mother in Switzerland and were of the view that a similar procedure should be available in Canada. Doctor Shoichet was a family physician in British Columbia who was willing to participate in physician-assisted dying if it were no longer prohibited. Physician-assisted death was prohibited by s 241(b) of the Criminal Code and related provisions. The plaintiffs urged that, to the extent the provisions prohibited physician-assisted dying, they unjustifiably infringed ss 7 and 15 of the Canadian Charter of Rights and Freedoms. In particular, the plaintiffs claimed that to the extent that the impugned provisions prohibited competent, grievously and irremediably ill adult individuals who voluntarily sought physician-assisted dying on an informed basis from receiving such assistance, they deprived the plaintiffs of their rights to life, liberty and security of the person in a manner that was2667 not in accordance with the principles of fundamental justice, contrary to s 7 of the Charter. In addition, the plaintiffs submitted that the impugned provisions had a disproportionate impact on physically disabled persons, and thus infringed s 15 of the Charter to the extent that they prohibited competent, materially physically disabled, grievously and irremediably ill adult individuals who voluntarily sought physician-assisted dying on an informed basis from receiving such assistance. The federal and provincial Crowns submitted that there was no basis for departure from the Supreme Court of Canada Rodriguez decision affirming the constitutionality of the affirmed provisions.

Held: Action allowed. The legislative and social fact evidence distinguished the predicated case from Rodriguez. The impugned provisions unjustifiably infringed the equality rights of Taylor, as they had a more burdensome effect on persons with physical disabilities unable to commit suicide without assistance. The provision thus created a distinction based on physical disability, the impact of which was particularly felt by those who were grievously and irremediably ill, physically disabled or soon to become so, mentally competent, and who sought control over their circumstances at the end of their lives. The distinction perpetuated disadvantage and was thus discriminatory. The legislation's infringement of s 15 of the Charter was not demonstrably justified under s 1 . The purpose of the absolute prohibition against physician-assisted suicide was to prevent vulnerable persons from being induced to commit suicide at times of weakness. That purpose was pressing and substantial and the absolute prohibition was rationally connected to it. However, a less drastic means of achieving the legislative purpose existed in the form of a carefully designed and monitored system of exceptions allowing access to physician-assisted death under stringent conditions. Thus, it could not be said that the provisions met the threshold of minimal impairment of Taylor's equality rights. The adverse effects on Taylor and others similarly situated were not outweighed by the benefits. In addition, the impugned provision engaged the rights to life, liberty and security of the person of Taylor, Lee and Johnson in a manner inconsistent with principles of fundamental justice. The legislation was overbroad. The absolute prohibition was grossly disproportionate to the legislative objectives. For the same reasons as the s 15 infringement, the s 7 infringement was not justified under s 1 . The provisions were declared invalid with operation of the declaration suspended for one year. During the period of suspension, Taylor was permitted a constitutional exemption to avail herself of physician-assisted death subject to certain conditions.

Most Western countries do not permit physician-assisted dying or assisted dying, but a few do (Netherlands, Belgium, Luxembourg and Switzerland). Three of the United States permit physician-assisted dying, in the case of Oregon and Washington through legislation.

3. Ingredients

The necessary ingredients to attract s 306, IPC, are:

(a) a person must commit suicide;
(b) the accused must abet the commission of such suicide.[44]

In order to convict a person under s 306, IPC there has to be a clear *mens rea*to commit the offence. It also requires an active act or direct act which led the deceased2668 to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide.[45] The accused appellant who was an agriculturist was alleged to have harassed his agriculture labour (servant) deceased, making allegations that the deceased had committed theft of some gold ornaments two days prior to his death. It was also alleged that the appellant had demanded Rs.7,000/- from the deceased which was given in advance to him at the time when he was kept in employment. The deceased could not bear the harassment meted out to him, consumed pesticide and committed suicide. The deceased was highly supersensitive. His conviction under s 306, IPC was set aside.[46]

4. Section 306 is not Violative of Articles 14 and 21 of the Constitution of India

The offence under s 306, IPC, which makes abetment of suicide an offence, is constitutional and does not suffer from any vice and it is not violative of arts 14 and 21 of the Constitution of India .

5. Section 302 and Section 306 --Distinction

The two offences under s 302 and s 306, IPC, are of distinct and different categories. While the basic constituent of an offence under s 302 is homicidal death, that of s 306 is suicidal death and abetment thereof.[47]

6. Section 306 and Section 498A --Distinction

A distinction must be borne in mind between the ingredients of offences under ss 306, IPC and 304B therof.[48]

The charges under ss 306 and 498A, IPC are independent of each other. Under s 498A of the IPC, the cruelty is committed by the husband and his relations dragging the woman to commit suicide, while under s 306, IPC, suicide is abetted and intended.[49]

The basic difference between the two sections, *i.e.*, s 306 and s 498A is that of intention. Under the latter, cruelty committed by the husband or his relations drag the women concerned to commit suicide, while under the former provision suicide is abetted and intended.[50] A person guilty under s 498A, IPC, should not necessarily be guilty under s 306, IPC . Every case of assault and harassment will not lead to conviction under s 306, IPC, unless nexus is established.[51]

7. Mens Rea

The abetment of suicide implies intentional abetment. There can be no abetment if *mens rea* is missing.[52] When there was no transaction between the accused and the2669 deceased lady, and the accused made persistent demand for refund of his amount and also uttered filthy words to the deceased and the deceased committed suicide under great mental stress, as accused did not know that the deceased

purchased poisonous tablets and committed suicide, so the accused was not held liable for abetment of suicide.[53]*Mens rea* is essential ingredient of the offence of abetment. Where the deceased wife on account of stress, depression or family problem commits suicide, the accused cannot be held liable for abetment of suicide. The husband and his brother were habituated to drinking often demanding money and the wife commits suicide, the accused husband cannot be convicted for offence under s 306, IPC .[54]

In order to proceed against a person for criminal offence under s 107, IPC, the prosecution must prove the element of *mens rea*. The negligence or carelessness or the facilitation cannot be termed to be abetment so as to punish the guilty as per the provisions of penal laws.[55]

Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing is required before a person can be said to be abetting the commission of offence under s 306 of IPC .[56]

The law on the subject is fairly well settled. *Mens rea* is an essential ingredient of a criminal offence unless the statute expressly or by necessary implication excluded it.[57] Presence of *mens rea* is the necessary concomitant of instigation.[58]

8. Suicide by Daughter-in-law -- In-laws Acquitted

Merely because the accused appellants in-laws were of the opinion that the deceased, as a good daughter-in-law, should look after them in old age could not be said to be an abetment of suicide by the daughter-in-law. Conviction of the in-laws accused appellants was set aside.[59] Deceased daughter-in-law set fire to herself committed suicide within two years of her marriage. There was evidence that the deceased was unhappy as her husband was poor and illiterate. The mother-in-law used to ask the deceased to run hand driven flour mill. There was no direct evidence that the accused abetted the deceased to commit suicide. Mother-in-law was given benefit of doubt and acquitted of the charge under ss 306 and 498A, IPC .[60]

9. Suicide

The word 'suicide' is not defined in the IPC . One must, therefore, look at the dictionary meaning of the word. As per the *New Webster's Deluxe Encyclopaedic Edition*, the word 'suicide' appearing at page 980 means: 'One who intentionally2670 takes his own life; the intentional taking of one's own life, destruction of one's own interests or prospects... To commit suicide...to kill (oneself)'.

In the *Concise Oxford Dictionary,*[61] the word 'suicide' is stated to mean the intentional killing of oneself.

In the *Halsbury's Laws of England,*[62] the word 'suicide' has been dealt with in the following words:

> A finding of suicide must be an evidence of intention. Every act of self-destruction is, in common language described by the word 'suicide', provided it is an intentional act of a party knowing the probable consequence of what he is about. Suicide is never to be presumed. Intention is the essential legal ingredient.

In Re *Davis,*[63] the court of appeal ruled that suicide required an intention on the part of a person to kill himself so that to justify a verdict of suicide, it must be shown that he knew what he was doing and was aware of the probable consequences of his acts. The earlier decision in *Cliff v Schwable* ,[64] was approved.

The word 'suicide' in plain English language would mean a person voluntarily putting an end to his life. It is obvious, on a plain reading of the definition of 'suicide', that the causes and circumstances leading one to

take such a decision are wholly irrelevant for deciding the question as to whether the death was a suicide or not. A person who is frustrated or defeated in life, or considers himself to be frustrated or defeated in life, may, on the spur of the moment or after proper deliberation, come to the conclusion that he needs to put an end to his life. On the other hand a person who is otherwise happy and claims to be successful in life, and had led a content life, also take a conscious decision of putting an end to one's life. Such a decision may be taken on a full consideration of the relevant facts. Such a decision, as in the case before us, is stated to have been based in one's own interest with a view to avoid any pain or misery, or suffering in old age, to himself or one's dependants. Nevertheless on a plain meaning of the word 'suicide' it is difficult to say that the decision taken to voluntarily put an end to one's life, in the latter case where a person claims to be successful in life and happy, is not suicide.[65]

A woman may attempt to commit suicide due to various reasons, such as, depression, financial difficulties, disappointment in love, tired of domestic worries, acute or chronic ailments and so on and need not be due to abetment. The reasoning of the High Court that no prudent man will commit suicide unless abetted to do so by someone else, is a perverse reasoning. Where the wife committed suicide because the husband accused left the deceased wife with his parents in the village (Sasural) it did not amount to cruelty so as to drive the wife to commit suicide. Conviction of the appellant husband was not maintained, was set aside.[66] Where the appellant husband started harassing the deceased wife eight days after the marriage, and the wife committed suicide appellant husband was convicted under ss 306 and 498A, IPC .[67]2671 In the absence of evidence that the harassment meted out by the accused led the wife to commit suicide, accused cannot be convicted under s 306, IPC .[68]

Abetment of suicide

Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be recorded.[69]

Wife committed suicide by hanging. There was evidence of the witnesses and the father of the deceased of dowry demand and harassment meted out to the deceased by the appellant husband and in-laws. Defence theory that the deceased was under mental tension as she was pregnant hence committed suicide was rejected. A young pregnant woman having a child in the womb would not ordinarily commit suicide unless she was compelled to do so. She would not have fell depressed if she had not been harassed on account of dowry demand. Appellant husband was convicted under ss 306 and 498A .[70]

The mere fact that certain persons have been named by the deceased in the suicidal note to be responsible for his death is not by itself a ground to fasten one with the charge of abetment. The act or conduct of the accused, even if there may be any, however insulting and abusive those may be, will not by themselves suffice to constitute abetment of commission of suicide, unless those are reasonably capable of suggesting that the accused intended by such acts consequence of suicide.[71]

There was no evidence of ill treatment and cruelty meted out by the accused to the deceased which led the latter to commit suicide. The High Court had recorded the conviction of the accused on the basis of letter alleged to be written by the deceased to her sister-in-law, in which she had stated that her husband accused had beaten her and had asked her to take divorce. The authenticity of the letter was doubtful, as the letter was not produced at the stage of the investigation of the case. The view taken by the trial court in acquitting the accused was possible view. Accused was acquitted of the charge under s 306, IPC .[72]

Suicide by pregnant woman

A pregnant woman ordinarily would not commit suicide unless relationship with her husband comes to such a pass that she would be compelled to do so.[73]

Suicide or Homicide

Commentary under same heading in s 309, *post*, may be referred to.

To prove whether the death is due to homicide or suicide, most important evidence is the medical evidence.[74] Where the death of wife was due to combined effect of smothering and carbofaran (Faradan) poisoning and ante mortem injuries sustained2672 by deceased were not possible during struggle for existence after self consumption of poison, it was a case of homicide and not suicide.[75]

When and Where Suicide Ordinarily Committed

Ordinarily suicide would be committed at a secluded place and not in an open place. It would not be committed before anybody and certainly not when everybody in the house was present.[76]

'Commits suicide'

Before s 306, IPC can be acted upon, there must be clear proof of the fact that the death in question was a suicidal death.[77] The proof of commission of suicide is essential for conviction under s 306 . When no definite opinion is given by the doctor about suicide and cause of death, the accused cannot be convicted under s 306 .[78]

Cause for Committing Suicide

Where the prosecutrix committed suicide four and a half months after the date of the alleged commission of rape on her and the charge of rape against the accused was not proved, in the absence of proof of cause for committing suicide, the accused cannot be held responsible for the abetment of the ultimate offence of suicide.[79]

10. Abetment of Attempt to Commit Suicide-- Section 306 not Attracted

Section 306 penalises abatement of suicide. It is a unique legal phenomenon in the IPC, the only act, the attempt of which alone will become an offence. The person who attempts to commit suicide is guilty of the offence under s 309, IPC, whereas, the person who committed suicide cannot be reached at all. Section 306 renders the person who abets the commission of suicide, punishable, for which the condition precedent is that suicide should necessarily have been committed. It is possible to abet the commission of suicide. However, nobody would abet a mere attempt to commit suicide. It would be preposterous if the law could afford to penalise abetment to the offence of mere attempt to commit suicide. It is wrong to convict the appellants under s 116 linked with s 306, IPC . The former is abetment of the offence punishable with imprisonment if the offence be not committed. However, the crux of the offence under s 306 itself is abetment. In other words, if there is no abetment there is no question of the offence under s 306 coming into play. It is inconceivable to have abetment of an abetment. Hence, there cannot be an offence under s 116 read with s 306, IPC .[80]

Thus, before s 306 is attracted, the commission of suicide must be proved.[81]

11. 'Abets'

Commentary under s 107, *ante*, vol. 1, may be *referred* to.2673

In cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without their being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of s 306, IPC is not sustainable.[82]

In order to bring a case within the purview of s 306 of IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under s 306, IPC .[83]

Abetment of Suicide by Cruelty -- Husband Convicted

The evidence of sister of the deceased and neighbour showed that this was a case of extreme mental cruelty which was perpetuated from the point of marriage and lasted till the deceased had committed suicide. The appellant was wholly responsible for creating all the circumstances which led the deceased to take an extreme step of putting an end to her life. Accused appellant was convicted for offence under s 306, IPC .[84]

Appellant no. 1 had illicit relations with the wife (accused no. 2) of the deceased, had taken the wife of the deceased in the presence of the relatives of the deceased. The deceased suffered humiliation and committed suicide. The close relatives of the deceased who were also examined as witnesses had categorically stated in their statements that on coming to know of the fact that Appellant No. 1 has taken Accused No. 2 from the house of PW5 and left her only on 06.01.1996 at her parents' house, the deceased stated before the inmates of his house that because of the said insult and humiliation he does not like to live. It is also established that immediately thereafter in the night intervening 7th and 8th of January 1996 the deceased committed suicide. Held, the facts lead to only one conclusion that it is on account of humiliation and insult due to the behavior and conduct of Appellant No. 1 and Accused No. 2 that deceased committed the suicide. The conviction of the appellant under ss 107 and 306, IPC was held proper.[85]

Where there was a normal dispute between the deceased and her husband regarding not sending the deceased to her parent's house, it cannot be presumed, that the husband appellant instigated or abetted the deceased wife to commit suicide.[86] It often happens that there are disputes and discords in the matrimonial home and the wife is harassed by the husband or her in-laws. This, however, would not by itself and without something more attract s 306, IPC read with s 107, IPC . Thus mere2674 harassment of wife by husband due to differences *per se* does not attract s 306 read with s 107, IPC, if the wife commits suicide.[87]

Where the wife for failure to satisfy dowry demand raised by her appellant husband was subjected to cruelty and set herself on fire, the theory of accidental fire by kerosene stove was ruled out, the appellant did not take any step to save her, the appellant was convicted under ss 306 and 498A, IPC .[88]

Act done to facilitate the commission of suicide should be closely proximate in time to the time of incident. The acts done at a distant time with no close, nearness or proximity to the time of a suicide will obviously have to be ruled out, as acts facilitating and accelerating the commission of suicide. There was a dispute between the family members of the deceased at one side and with the family of the petitioner on the other side. One case was pending in the court also. After consuming the poisonous substances, the deceased informed the prosecution witnesses that being afraid of the petitioners and on account of their terror, he has opted to die by committing suicide. Held, the act of the accused did not amount to abetment, the accused were discharged.[89]

Where the prosecution evidence was deficient to prove dowry death, but proved that the accused abetted suicide by the deceased, the conviction of the accused appellant under s 304B, IPC was altered to s 306, IPC .[90]

There must be evidence of goading, provoking, instigating, probing or so to a person prompting him to commit suicide. [91]Section 306 requires a reasonable nexus in between acts committed by accused person leading to commission of suicide by the victim and of abetment of commission of such suicide.[92]

Facts not Disclosing Abetment of Suicide

Following are the instances where accused was held not abetted suicide of the deceased:

(a) The relationship between wife and husband is based on love, affection, understanding and reposition of confidence in each other. If the wife being emotionally very weak and sensitive, felt badly insulted or humiliated as the husband did not grant permission to her for something, it could not be held that the accused-husband abetted the offence. It would be dangerous to come to the conclusion that the husband's such refusal would amount to cruelty or could come in the mischief of abetment for commission of the suicide. It may be improper on the part of the accused-husband to refuse such permission to his wife but it would not be a penal offence.[93]

(aa) Every quarrel between a husband and wife which results in a suicide cannot be taken as an abetment by the husband and the standard of a2675reasonable and a practicable woman as compared to a headstrong and oversensitive, one has to be applied. The deceased was married to the accused appellant five years before the incident. There was lack of evidence about the demand of dowry by the husband which allegedly drove the wife to commit suicide. The accused husband was acquitted of the charge under s 306, IPC .[1]

(b) When the deceased-wife committed suicide at the house of her parents and not in the house of the accused-husband the question of abetting the committing of suicide, by the husband-accused does not arise.[2]

(c) When the accused told the deceased that he did not bother if she lived or died and asked her to die.[3]

(d) When the accused threatened and abused the deceased that he would reveal the illicit contact of the deceased to her future husband.[4]

(e) The threat of police action to recover their own property would not amount to instigation to commit suicide.[5]

(f) The quarrel taking place between the accused and the deceased in which the accused was said to have told the deceased 'to go and die', the deceased found dead two days later, it was held that suicide was not proximate to the quarrel though the deceased was named in the suicide note.[6]

(g) Where sexual jealousy existed between the accused and the deceased, during a quarrel, the accused's alleged remarking to the deceased to go and die, where after the deceased went home and committed suicide, it was held that the suicide was not direct result of the words uttered by the accused.[7] The accused in a fit of anger, during the quarrel, told the deceased to go and die. The utterance of these words by the accused made the deceased to take the extreme step of suicide. This incident cannot be construed as the accused abetted the deceased to commit suicide.[8]

(h) A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged for abetting the offence of suicide should be found guilty.[9]2676

(i) Mere statement made by the deceased to the accused that he will die under circumstance to which the accused replied that it did not matter to him, cannot constitute abetment.[10]

(ii) Allegations against brother-in-law of nurturing vulgar attitude towards her. Conviction was set aside.[11]

(j) When there was no averment in alleged suicide note that accused had caused any harm to deceased or was in any way responsible for delay in paying salary to him, no reference of any act or incidence in alleged suicide note whereby accused has committed any wilful act or omission or intentionally aided or instigated deceased in committing act of suicide, it cannot be said that accused had in any way instigated deceased to commit suicide or he was responsible for suicide of deceased.[12]

(k) By making a statement 'why can't you go and die' etc, and insulting the deceased in public alone, accused cannot be said to have goaded or urged forward the deceased to commit suicide.[13]

(l) Uttering of abuses will not amount to provocation to commit suicide and it does not constitute abetment and so, no offence is made out under s 306, IPC .[14]

(m) The mere fact that some allegation was made against the deceased that she was unfit for conjugal happiness and the mere fact that some *panchayat* was held in this regard, cannot be sufficient to attract the ingredients of s 306 of the IPC and, hence, the acquittal recorded in this regard by the learned Judge cannot be found fault by this court.[15]

(n) Accused having doubt in his mind about his wife having eloped with someone for particular period and therefore was rarely talking with her.[16]

(o) The accused husband himself went to the house of her brothers and informed that the deceased was missing, there was no case of dowry harassment, there was no evidence, direct or otherwise, to show that the accused had induced or abetted the deceased to commit suicide, brother of the deceased had given statement that his sister could not have committed suicide leaving her child, under these circumstances the possibility was that the death could have been accidental.[17]

(p) Evidence did not prove demand of dowry, ill-treatment or harassment. The deceased had received 99% burn injuries, was suffering from mental illness, her dying declaration was also not found reliable. Accused appellant was acquitted of charges under ss 304B, 306 and 498A, IPC .[18]

(q) The deceased wife committed suicide by hanging at her matrimonial house. The allegation was that suicide was committed on account of unbearable2677 torture on her mental and physical by her husband and in-laws appellants. The deceased had been to her father's house with appellant husband on 15.10.2000 and they together stayed there till 20.10.2000. On 21.10.2000, the victim allegedly committed suicide at 8.30 a.m. During her stay in her paternal house with the appellant husband, she did not demand any money or her husband also had not given any hints that he demanded money through deceased by creating pressure on her to write a letter to her father. There was no history of torture or harassment caused to the deceased. There was no nexus between the death of the deceased and any overt act on the part of the accused appellants. The conviction of the appellants for offences under ss 306 and 498A, IPC was found not sustainable, was set aside.[19]

(r) Prosecution evidence about the demand of dowry *viz*. a thin gold chain made after six years of marriage was full of inconsistencies as such was not found reliable. The medical evidence adduced showed that the deceased was suffering from mental depression, had mental, epilepsy and psychosis problem. Husband and his relatives respondents were acquitted for offences under ss 306 and 498A, IPC .[20]

(s) Father deposed that there was no ill-treatment by the husband and parents-in-law, only brother-in-law and sister-in-law ill treated her. The husband and parents of the deceased were acquitted of the charges under ss 304B, 306 and 498A, IPC .[21]

(t) The deceased wife gave poison to her three children and committed suicide. The deceased wife in her letter described the accused as a sexual pervert and that he had behaved like an animal and the deceased had tolerated the insulting manner in which he behaved. They were married in court. It was stated that the accused was impotent and he was trying to defame the deceased for having relationship with ladies. Held, the ingredients of s 306, IPC were not established in the case. Accused husband was acquitted of the charge under s 306, IPC .[22]

(u) The mere fact that the husband treated the wife with cruelty is not enough. Where no element of investigation to constitute abetment to suicide is found in the evidence led by the prosecution, the accused would not be convicted under ss 107, and 306, IPC .[23]

Effect of Demand of Loan from Deceased

Mere demand of loan amount from the deceased does not amount the instigation or commission of the suicide by the deceased.[24]2678

Mere Ordinary Dispute or Harassment Not Sufficient

It often happens that there are disputes and discords in the matrimonial home and a wife is often harassed by the husband or her in-laws. This, however, would not by itself and without something more attract s 306, IPC read with s 107, IPC .[25]

Defamatory Article in Newspaper--No Abetment

Abetment involves a mental process of instigating a person or intentionally aiding that person in doing a thing. In cases of conspiracy also, it would involve that mental process of entering into a conspiracy for the doing of that thing. It cannot be said that by publication of articles, said to be of defamatory character, in a daily newspaper, the respondent no 2 editor or the other respondents who are also said to have published those articles meant to instigate or intentionally aid the commission of suicide by Narsinhbhai. The reaction against an article published can be different from different people who read it. A person may get enraged and retaliate or read it and commit suicide. The possible reaction would not be known before a defamatory statement is published, as it will depend upon the nature and sensitivity of a person. Therefore, the reaction to a defamatory article which cannot be predicted will not be attributable as intention to illegally aid or instigating suicide by the person concerned. In our view, a more active role which can be described as instigating or aiding the doing of a thing is required before a person can be said to abet the commission of the offence under s 306 .[26]

12. Mother-in-law Acquitted

The accused appellant mother-in-law was prosecuted on allegation that her cruel treatment abetted the deceased to committed suicide. The letter written by the deceased to her husband did not indicate the cruel treatment given by the accused mother-in-law to her. It indicated great suspicion against the husband. In matter of offence under s 306, IPC much stronger evidence was required than what was presented. The evidence adduced in the case was not sufficient to hold the accused mother-in-law guilty on the charge under s 306, IPC . The real culprit was the husband. The Investigating Agency instead made a scapegoat of the old mother perhaps to rely on the age old concept of bickering between the mother-in-law and daughter-in-law. That was not the universal truth. The appellant mother-in-law was therefore acquitted of the charge under s 306, IPC .[27]

13. Sati (Suttee)

Cases under this section are generally cases of suttee where a widow cremates herself with her deceased husband. In *R v Mohit Pandey* ,[28]*A,* a woman, prepared herself to commit suttee in the presence of *B, C* and others who stood around applauding and encouraging her. It was held that *B, C* and the rest abetted the suicide of *A.* If, in the last cited case, *X,* a spectator, who has just arrived on the scene, persuades her to return to the fire, *X* is also guilty of abetment of suicide.[29] In *Ramdial v Emperor* ,[30]2679*A,* a woman, prepared to commit *suttee* in the presence of the accused who at first dissuaded her, but on finding that she was determined, yielded and gave her *ghee* which she poured over the pyre and over herself. The pyre was then burnt which consumed *A* and the corpse. It was held that the accused were guilty under this section. In *Tejsingh v State* ,[31] the accused joined the funeral procession from the house of the deceased to the cremation ground, crying 'sati mata ki jai' while the widow of the deceased, wearing new clothes with the intention to become suttee, was going in the front. The funeral pyre was set on fire and the woman sat on it. It was held that the accused were guilty under this section as they were aiding the woman in her decision to commit suicide by taking her to the pyre of the cremation ground.

The cases where people gave *ghee* to the widow which she poured over the fire and burnt herself, where the accused induced a woman to get herself burnt along with the body of her deceased husband and with that object they made her sit on the pyre, where persons had joined a funeral procession were encouraging the widow to commit *sati* and such similar cases where there is abetment within the meaning of s 107 in the commission of suicide by a person the courts have held it to be abetment of suicide.[32]

14. Conviction under Sections 498A, 306 and 304B --No Double Jeopardy

Commentary under the same heading in s 304B, *ante*, may be *referred* to.

15. Section 306 and Section 113A of the Indian Evidence Act 1872

Though in s 113A of the Evidence Act the words 'soon before' have not been used but the cruelty would become abetment if there have been instances of cruelty soon before death of the woman. Cruel treatment in the long past could not be abetment if such a course of conduct has not persisted soon before the commission of suicide. When the deceased was not treated with cruelty by the accused at least during a period of about three years prior to the commission of suicide by her, the accused could not be held guilty for the offence under s 306, IPC .[33]

Incorporation of s 113A of Evidence Act in the statute book, depicts a legal presumption though however the time period of within seven years of marriage is the pre-requisite for such a presumption.[34]When death has taken place beyond seven years of marriage, the presumption under s 113A, Evidence Act is not available.[35]

The court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance discord and differences in domestic life quiet common to the society to which the victim belonged and such petulance discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied2680 for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.[36] Where an account of domestic quarrel between deceased and her sister-in-law over milk, the accused abused the deceased and dragged her to courtyard, in the ordinary course such quarrel abuses or even pushing the woman do not drive her to take extreme step of committing suicide, so the presumption of suicide cannot be raised under s 113A, Evidence Act and accused is entitled to acquittal under s 306, IPC .[37]

Reason Behind Presumption Under Section 113A, Indian Evidence Act 1872

The legislature was cognizant of the difficulty of the prosecution attempting to enter the matrimonial home to collect evidence about the acts of abetment. The presumption is permitted to be drawn only considering the difficulty in securing specific evidence of culpable conduct of abetment of suicide of the bride in the matrimonial home. The presumption has got to be drawn carefully and cautiously.[38]

Conditions for Presumption Under Section 113A, Indian Evidence Act 1872

Section 113A of the Evidence Act raises a presumption against the accused, subject of course to the following conditions:

(a) That the husband or any member of his family had subjected the married woman to cruelty within the meaning of s 498A, IPC .
(b) The presumption is not mandatory; it is only permissive according to the facts and circumstances of a given case.
(c) A consideration of all the other circumstances of the case may strengthen the presumption or may cause the court to abstain from drawing the presumption.[39]

Nature of Presumption Under Section 113A, Indian Evidence Act 1872

The presumption to be drawn is the presumption of 'may presume' as defined in s 4 of the Evidence Act . It reads as follows:

> May presume. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

> It mandates that when such a presumption of fact is drawn, the Court may either regard such fact as proved unless and until it is disproved or may call for proof of it.[40]

Drawal of Presumption under Section 113A, Indian Evidence Act 1872 not Obligatory

Section 113A of the Evidence Act shows that a permissive discretionary presumption can be drawn against the indictee, if the circumstances enumerated exist. The legislature had very cautiously reiterated that the presumption can be drawn only 'having regard to all the other circumstances of the case'. It is not obligatory that the presumption should be drawn.[41] When the prosecution could not prove that deceased2681 was subjected to cruelty by the accused, no presumption under s 113A of the Evidence Act of abetment of suicide of deceased can be drawn against the accused though deceased committed suicide within seven years of her marriage.[42]

Rebuttal of Presumption under Section 113A, Indian Evidence Act 1872

When the acts of cruelty proved against the accused cannot at all convey to the court that the accused ever desired, intended or contemplated the consequence of suicide by his wife. Even assuming that the presumption under s 113A of the Evidence Act can be drawn, these circumstances and the total absence of any other circumstance to indicate that commission of suicide by the wife was intended by the accused, are sufficient to rebut the presumption under s 113A of the Evidence Act .[43]

Cases Fit for Drawing Presumption Under Section 113A, Indian Evidence Act 1872

Following are instances of cases wherein presumption under s 113A, Indian Evidence Act was drawn:

(a) The accused completely failed to rebut this presumption by any cogent evidence to explain as to how and under what circumstances the wife committed suicide and why her parents and other relatives were not informed about her death and why they hurried to cremate her dead body in the absence of any of her near relatives.[44]
(b) The act of accused keeping his concubine as wife and bringing up child constitutes cruelty within definition as encompassed in s 498A, IPC, such acts of accused would certainly destroy normal mental frame of deceased who was simple housewife and unable to bear mental agony, deceased committing suicide by self immolation so, presumption under s 113A of Evidence Act arises.[45]
(c) Insofar as s 306, IPC is concerned, though there was no direct abetment, committing of rape can be said to be an insulting act. Unable to bear such insult, the deceased must have committed suicide. The prosecution, therefore, proved its case beyond reasonable doubt.[46]
(d) Where husband suspecting her character abused his wife and said 'why don't you die', it was held that the act of husband can be a serious provocation for wife to commit suicide.[47]
(e) The creation of a circumstance for the deceased to commit the suicide constitutes abetment, deceased having felt humiliated by the nefarious activities indulged in by his wife and accused committed suicide by hanging himself, accused not only developed illicit relationship with wife of deceased but had openly declared the same, the outrageous acts resorted to by the accused have left the deceased with no alternative and have2682 driven

him to commit suicide, so, the accused was found guilty of abetting suicide.[48]

(f) There was overwhelming evidence that accused husband has made his wife's life intolerable by ill-treating her and beating her frequently and on the day of incident she was not permitted to attend marriage ceremony of her near relative whereas husband had gone to attend that ceremony, such cruel behaviour by husband instigated wife to commit suicide, hence, husband was liable to be convicted under s 306, IPC, though charge thereunder was not specifically framed.[49]

(g) Accused-husband allegedly ill-treating his wife on suspicion of fidelity and that she became pregnant through somebody else and thus forcing deceased wife to commit suicide.[50]

(h) The evidence on record showed that the deceased consumed poison because of beating by the accused as she sold certain agricultural product without permission.[51]

(i) The dying declaration recorded by the magistrate and certified by the doctor that the deceased was fully conscious and she was quite able to give the statement, the deceased in said dying declaration had stated that on account of ill-treatment by in-laws she put herself on fire by pouring kerosene over body and dying declaration was supported by the contents of *Dehati Nalishi* stating that the deceased was being treated with cruelty and was harassed by the accused persons and she was beaten just one day prior to date of incident by them.[52]

(j) The deceased a newly wedded girl died at *verandah* of matrimonial house, inmates fleeing away by locking matrimonial house, the medical opinion was that the death was by poisoning, the plea of the accused that the death was accidental, was found not tenable as no attempt was made by inmates to take the deceased to the hospital in these circumstances.[53]

(k) The deceased died at her matrimonial house on account of 96% burn injuries. There was, reliable evidence of the witnesses that the accused husband had harassed and tortured his wife, which compelled her to commit suicide. Accused was convicted under s 306, IPC .[54]

Cases not Fit for Drawing Presumption under Section 113A, Indian Evidence Act 1872

(a) Where in a criminal trial against husband for abetment of suicide by his wife, the prosecution was guilty of improving its case from stage to stage inasmuch as the allegations that the accused did not like to keep the deceased-wife with him because she was not good looking, or that he was addicted to liquor or that the deceased had reported these matters to her parents and others, or that the accused intended to re-marry and had told2683 his wife about it, or that the deceased had once come to her father's house in an injured condition, or even the allegations regarding beatings, did not find place in the statements recorded by the police in the course of investigation and these allegations were made at the trial for the first time and all that was alleged in the FIR or even at the stage of investigation was that there were frequent quarrels between the husband and wife, sometimes resulting in physical assault, on account of the husband being addicted to consumption of 'Bhang' and the other allegation that the accused was aggrieved of the fact that his sister was not being properly treated by her husband who was brother of the deceased was also appeared to be untrue, it was held that the presumption under s 113A of the Evidence Act could not be invoked to find the accused guilty of the offence under s 306, IPC .[55]

(b) Nothing was shown by prosecution to the effect that accused created such circumstances for deceased that she had been forced to end her life.[56]

(c) Where there was no direct evidence against the accused, the father of the deceased had categorically stated that the accused had never demanded any cash or property from him and as per evidence of neighbours, there was no quarrel between the accused and the deceased.[57]

(d) Allegation was that the deceased was not provided food or meals due to financial crises, suicidal note/letter was not proved to be written by the deceased and nothing incriminating against the accused was mentioned in it.[58]

Husband Committing Suicide? No Presumption Under Section 113A, Indian Evidence Act 1872 Arises

The provisions of presumption under s 113A of Evidence Act do not arise against the wife due to whose cruelty the husband commits suicide on account of immoral character of his wife as stated by him in his suicide note, it is not sufficient to infer that wife abetted suicide.[59]

16. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of session.

17. Section 306 , IPC and Section 167(2)(a)(i), Code of Criminal Procedure 1973

A plain reading of s 167(2)(a)(i), CrPC would show that the magistrate may authorise detention of an accused person in custody for a total period which shall not exceed 90 days, where the investigation relates to an offence punishable with death or imprisonment for life, or imprisonment for a term of not less than 10 years. The above referred provision clearly conveys that the punishment provided for the offence committed in any eventuality should not be less than 10 years, the2684 punishment which is provided for the offence under s 306, IPC, is punishable with imprisonment of either description for term which may extend to 10 years. This means that punishment can be awarded which can also be less than 10 years, which in fact is not the purport of s 162(2)(a)(i), CrPC and therefore, the period of 90 days contemplated in this provision is not attracted to s 306, IPC .[60] Provision of s 167(2)(a)(ii), CrPC contemplates that where the punishment provided for the offence is less than 10 years, then a magistrate is authorised to detain the accused person in the custody of the police, only till the expiry of 60 days from the date of arrest, and not beyond. The investigation which relates to the offence punishable with death, imprisonment for life, or imprisonment for a term of not less than 10 years, is covered by s 167(2)(a)(i) CrPC, and the magistrate is authorised to detain the accused not beyond the period of 90 days. The offence under s 306, IPC, is punishable with imprisonment of either description for a term which may extend to 10 years and, therefore, on a plain reading of these provisions, it is amply clear that for the offence under s 306, IPC, the punishment provided is up to 10 years, and it can also be less than 10 years and if it is less than 10 years, sub-cl (i) of cl (a) of sub-s (2) of s 167, CrPC is not attracted, which only deals with offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and hence, a magistrate is not authorised to detain the accused person in the custody of the police beyond the period of sixty days as contemplated under sub-cl (ii) of cl (a) of sub-s (2), s 167, CrPC[61] and has to be released on bail.

18. Bail

Where the deceased, a young lady had been beaten up in the presence of many in broad daylight by another lady on making reckless allegations, which led the deceased to go to forest and consume poison, the other accused present at the time of the said allegation about an illicit relationship, did not even attempt to save their daughter-in-law, and under the circumstances if she had committed suicide then it cannot be said that no offence under s 306, IPC, is made out, the bail application of the accused persons under these circumstances is liable to be dismissed.[62]

When the first bail application of the accused charged with s 306 was dismissed by the High Court with liberty to the accused to move fresh bail application after six months, but no information was received from the public prosecutor as to what happened after eight months of rejection of the earlier bail application, the accused was released on bail on the principle of speedy trial which is a fundamental right of the accused guaranteed to him under art 21 of the Constitution of India .[63]

18. Charge

The following form of the charge may be adopted.

I (*name and office of sessions judge etc*.) hereby charge you (*name of accused person*) as follows:

That, on or about the..... day of..... at..... one AB committed suicide, and that you abetted its commission by..... (*specify the act*) and thereby committed an offence,2685 punishable under s 306 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

At the stage of framing charge the allegation made in the complaint/FIR and other material seized in the report under s 373, CrPC, only has to be taken into consideration. The evidence collected has to be taken on its face value and at this stage it cannot be expected to screen evidence or apply the standard as to whether the prosecution will be able to prove the case against the accused on trial.

The charge may be framed even on the basis of grave suspicions.[64] Where the accused persons were charged for the offence under ss 304B, 498A, 304 and 494, IPC, the parents of the deceased-wife in their statement to the police stated that the deceased committed suicide when the fact of second marriage of the accused came to her knowledge, the statement of the brother of the deceased was that the accused used to demand money from the father of the deceased, on these facts no illegality or impropriety in framing charge was found against the accused persons.[65]

Where there was a quarrel between the accused and the deceased, and the accused told the deceased 'to go and die', that itself would not constitute on ingredient of 'instigation', the fact that the deceased committed suicide after two days of quarrelling during which the said words were uttered by the accused, would show that the suicide was not a direct result of the quarrel, on these facts the charge framed against the accused under s 306 was quashed as ingredients of abetment were found absent.[66] When there is no averment in the charge sheet or material on record to show that accused either induced the deceased to commit suicide or aided the suicide of the deceased, he is not liable to be charge sheeted for an offence under s 306, IPC, and so charge against him for the said offence is liable to be quashed.[67]

Failure of Charge under Section 304B does not Necessarily Lead to Conviction under Section 386

Commentary under s 304B, *ante*, may be referred to.

Omission to Frame Charge

Mere omission or defect in framing charge does not disable the criminal court from convicting the accused for the offence, which is found to have been proved on the evidence on record. The CrPC has ample provisions to meet such a situation. The charge was framed under ss 304B and 498A of the IPC . It is clear from the facts that ingredients for framing charge for the offence under s 306 of IPC existed in the case. The mere omission on the part of the trial judge to mention s 306 of IPC does not preclude the court from convicting the accused for the said offence when found proved. In the charge framed under ss 304-B and 498-A of the IPC, it has been clearly mentioned that the accused subjected the deceased to such cruelty and harassment as to drive her to commit the suicide. The provisions of s 221, CrPC take care of such a situation and safeguard the powers of criminal court to convict an accused for an offence with which he is not charged although on facts found in2686 evidence, he could have been charged for such offence.[68] When from the statement of charge framed under s 304B and in the alternative under s 498A, it is clear that all facts and ingredients for framing charge for the offence under s 306 existed in the case, the

mere omission on the part of the trial judge to mention s 306 with s 498A does not preclude the court from convicting the accused for the said offence when found proved.[69] Where basic ingredients of offence under s 306 were established by prosecution in order to substantiate charge under s 498A, IPC and accused was also confronted with said features of prosecution case in his statement under s 313, CrPC, therefore, in absence of charge under s 306 conviction of accused under s 306 is permissible since it will not result in failure of justice.[70]

Discharge

Where the deceased was treated harshly and unfairly but it cannot be said that petitioners instigated, goaded or incited her to commit suicide, the order framing charge under s 306 against petitioners is liable to be set aside.[71]

Accused Charged under Section 302 or 304B cannot be Convicted under Section 306 or 498A

It is true that s 222, CrPC read with s 302, IPC, entitles a court to convict a person of an offence which is minor in comparison to the one for which he is tried for the offence under s 302 but s 306 read with s 498A cannot be said to be a minor offence in relation to the offence under s 302 . While the basic constituent of the offence under s 302 is homicidal death, those of s 306 read with s 498A are suicidal death and abetment thereof. Thus, where the accused was acquitted of the charge under s 302 which was the only charge framed against him, the sessions court could not have convicted him of the offence under s 306 read with s 498A .[72]Section 306 cannot be said to be a minor offence in relation to s 304B or s 302 within the meaning of s 222, CrPC .[73] Similarly, when only the charges under ss 498A and 304B, IPC,[74] or ss 302 / 34, IPC, are framed[75] against the accused, the conviction of the accused under s 306 is not proper.

Where the conviction of the accused under s 302 was not found proper, in the absence of essential ingredients of abetment against the husband-accused of the suicide of the deceased-wife, the conviction of the accused cannot be altered from s 302 to s 306 by taking recourse to s 222, CrPC .[76]

Quashing of Charge under Section 306

Where there was a quarrel between the accused and the deceased, and the accused told the deceased 'to go and die', that itself would not constitute an ingredient of 'instigation', the fact that the deceased committed suicide after two days of2687 quarrelling during which the said words were uttered by the accused would show that suicide was not a direct result of the quarrel, on these facts the charge framed against the accused under s 306, IPC, was quashed as ingredients of abetment were found absent.[77] When there is no averment in the charge sheet or material on record to show that the accused either induced the deceased to commit suicide or aided the suicide of the deceased, he is not liable to be charge sheeted for the offence under s 306 and therefore the charge against him for the said offence is liable to be quashed.[78]

Where the accused, a motor vehicle inspector, gave a beating and humiliated a lorry driver by using vulgar language for want of some papers related to the vehicle as a result of which the lorry driver committed suicide, there was nothing to show that the accused committed any act of 'abetment' as defined in s 107, IPC, the charge under s 306 framed against the accused was quashed by the High Court of Andhra Pradesh.[79] When there was no evidence of material on record to infer that the accused at any point of time instigated the deceased or created such circumstances which compelled him to end his life, then *primafacie* no offence under s 306 is made out against the accused, the charge sheet submitted against the accused and proceedings initiated on the basis of the same are liable to be quashed.[80] Where the suicide note of the deceased does not show that the accused had goaded, provoked, incited, urged or encouraged the deceased-wife to commit suicide, the framing of charge under s 306 [81] against the accused is bad and liable to be quashed.

Mere harassment of the deceased-wife by the accused-husband before her death is not sufficient to show that the accused-husband has abetted suicide within the meaning of s 306, so the charge framed against the accused for the said offence cannot be legally sustained and deserves to be set aside.[82]

Where the allegation in the FIR was that the accused murdered the deceased, and during investigation it was found that the deceased woman had committed suicide, except the statement that there was an illicit relation between the accused and the husband of the deceased, there was no other averment against the accused and there was no material to show that suicide was committed because of the illicit relationship between her husband and the accused, the circumstances of the case, therefore, did not justify sustaining of charge under s 306 which was, therefore, set aside.[83] Where the accused-factory manager assigned night duty to the deceased and none of the witnesses stated in their statement under s 164, CrPC, that the deceased committed suicide because of his continuance with night duty for 3-4 months, in the absence of any nexus between relationship of death of the deceased and functioning of the accused as factory manager of the spinning mill, it is impermissible in law to charge a person with such a serious crime under s 306, so the charge under s 306 read with s 34 was quashed.[84] Where in the suicide note the deceased had stated that the accused had demanded a sum of Rs 15,000/- from him, and on refusal to pay the same the accused had got the deceased declared unfit for recruitment into the Army;2688 the accused was not a member of the selection board and the suicide note did not show that he had instigated the deceased into committing suicide, therefore, the cognizance taken against the accused and summoning him to stand trial under s 302 by sessions court was quashed.[85]

The deceased had already paid the amount of the plots demanded registration of plots from the accused appellants but the accused appellants abused him in filthy language and neither registered the plots and also did not return the amount paid by the deceased. On the utterances made by the accused appellants the victim felt humiliated and committed suicide. The suicide note clearly referred to the acts of the accused appellants and the roles played by them. The order of the High Court rejecting petition under s 482 CrPC for quashing the proceedings was held proper.[86]

20. Proof

To establish an offence under this section, prove that:

(a) a suicide has been committed; and
(b) the accused abetted the said suicide.

In cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. The mere fact that the husband treated the deceased-wife with cruelty is not enough.[87]

There was evidence of demand of dowry *viz* cash and tape recorder, proved by the father of the deceased and also by independent witness. Appellants husband and his elder brother had created such hostile environment that the deceased was compelled to commit suicide. Appellants accused were convicted under ss 306 and 498A, IPC .[88]

21. Poison Cases

When there is no convincing evidence on the basis of which any finding can be made that the deceased-wife had committed suicide by consuming poison, the mere possibility of such consumption of poison by her is not sufficient for conviction of the accused under s 306, IPC . The possibility of death by other means must be proved.[89] Where the deceased-wife committed suicide within two years of her marriage by consuming a pesticide, andosulphan, which is a chemical poison, the evidence of her parents clearly established that she was subjected to cruelty, torture and assault with a burning log by the accused-husband, the conviction of the accused under ss 306, 498A was found proper.[90] Where the deceased before her death had sufficient time to disclose to the doctor and other witnesses the cause of her committing suicide, but she only stated that she took insecticide tablets which did not connect the accused person even remotely, the ingredients of s 498A and2689 s 306, IPC did not stand legally established.[1] The deceased wife died of poisoning within seven years of marriage. There was no evidence that the deceased prior to her death was subjected to cruelty. Presumption under s 113B, IPC could not

be drawn. The husband, his father and mother were acquitted of charges under ss 304B, 306 and 498A, IPC .[2]

Evidence showed that the deceased wife was harassed for not giving consent for second marriage by the accused husband. She consumed poison and committed suicide. Husband accused was convicted under ss 306 and 498A, IPC .[3]

Where all that the prosecution established was that two bodies were found in the channel that of the wife and infant child of the accused but there was not even an iota of evidence to indicate the circumstances under which the deaths look place; for want of this material link, the order of acquittal under s 304B and 306 was found justified.[4] Mere allegation of harassment is not sufficient to lead to the inference that the accused has abetted suicide of his wife within the meaning of s 306 .[5] The act of the accused in not making an attempt to put off fire and save the life of the deceased does not fall within the expression 'illegal omission' mentioned in s 107, so the accused was not guilty of abetment of suicide under s 306, IPC .[6]

22. Dying Declaration

When the dying declaration was not found genuine in view of infirmities in its recording as well as the fact that the deceased had suffered 100 percent burn injuries, and the accused was not made aware of the said dying declaration to seek his explanation in his statement under s 313, CrPC, the accused was found entitled to an acquittal under s 306, IPC .[7]

Mere allegation of harassment made by the deceased in her dying declaration against the accused is not sufficient to constitute an offence punishable under s 306 .[8] The statement made by the deceased many months prior to her death is not admissible as a dying declaration.[9]

23. Benefit of Doubt

The benefit of doubt to the accused would be available provided there is supportive evidence on record. For creating doubt or granting the benefit of the doubt, the evidence has to be such which may lead to such doubt.[10]Where the accused alleged to have tried to outrage the modesty of deceased and she committed suicide by hanging with help of rope because she felt very much ashamed after two days of incident, the period of two days which elapsed between two incidents showed that act2690 of accused did not instigate her to commit suicide, so, the accused cannot be held guilty of offence under s 306 .[11]

24. Acquittal under Section 306 --No Effect on charge under Section 498A

The charges under ss 306 and 498A, IPC, are independent of each other and acquittal of one does not lead to the acquittal on the other. Although acquittal on a charge under s 306 is not by itself a ground for acquittal under s 498A but some cogent evidence is required to bring home the charge of s 498A, without which the charge cannot be said to be maintained.[12] However, once the accused is acquitted of a charge under s 498A, the requisite ingredients whereof are such which may impel a woman to cause physical or mental injury to herself including suicide, the conviction under s 306, in the absence of any other type of abetment will not be sustainable in law or in fact.[13]

25. Sentence

The offence under s 306, IPC, is against society, womanhood and humanity. Thus, the accused are not entitled to invoke any sympathy or leniency in the sentence which has to be exemplary in such cases.

The custom of becoming *sati*, which was prevalent up to 1833, was forbidden more than 100 years ago by law. Therefore, a sentence of six month's rigorous imprisonment for such a barbarous act of abetment of *sati* is ludicrous and a severely deterrent sentence is called for.[14]

The composite sentence on conviction under ss 306 and 498A should not be passed under both sections.[15] The accused should be sentenced under these two sections separately.

Where the husband contracted a second marriage and subjected his first wife-deceased to mental and physical cruelty of an extreme level, leaving her with no alternative and thus provoking her to commit suicide, the accused-husband was sentenced to undergo rigorous imprisonment for five years and fine under s 306 .[16] On account of her mature age of 62 years the accused mother-in-law was expected to treat the deceased with tenderness and sympathy, however, she joined with her sons to force the deceased's parents and brothers to fulfil their demands, and to ensure their fulfilment treated her in a most inhuman manner, so the accused mother-in-law did not deserve sympathy and the sentence of six years rigorous imprisonment under s 306, IPC awarded to her was maintained.[17]

Considering the fact that the incident took place 14 years ago, and both accused-husband and his mother were in custody for about two months, and the accused mother was aged 60 years, the sentence under ss 306 and 498A, IPC of the accused person was reduced to the period already undergone.[18]2691

Reduction in Sentence

Following are reasons due to which the sentence of accused/convict was reduced:

(a) Accused was a young person and an agriculturist and father of two children;[19]
(b) Deceased wife was sent to matrimonial house against her wishes, where she never reached;[20]
(c) Accused remarried and had a small female child who was bound to suffer tremendous loss due to custody of accused;[21]
(d) Occurrence took place years before and accused had already suffered some years of imprisonment.[22]

Alteration of Conviction from Section 304B to Section 306

Commentary under the same heading in s 304B, *ante*, may be referred to.

Alteration of Conviction from Section 306 to Section 354

Where it was not a case of a married woman who having been subjected to a continuous treatment of torture had ended her life, rather it was a case of a woman whose modesty was outraged while she was with her paramour, there was neither any intention nor any positive act on the part of the accused to instigate her or aid her in committing suicide, the conviction of the accused under s 306, IPC was set aside and instead the two accused were convicted under s 354, IPC .[23] Where the accused tried to outrage modesty of deceased few days prior to incident, outraging modesty itself could not be construed as an act of abetment to commit suicide as accused never intended to instigate her to commit suicide, admittedly, the deceased was deserted by her husband and he was not ready to take her back which was cause of her unhappiness and could be main reason for her to commit suicide, so, accused cannot be held guilty of offence under s 306, therefore, the conviction of accused was altered from s 306 to s 354, IPC .[24] It is immaterial for s 306 of IPC whether the cruelty or harassment was caused 'soon before her death' or caused earlier; 'soon before her death', the special provision in s 304B of IPC would be invocable, otherwise, resort can be made to s 306 of IPC . Where it is doubtful as to whether the death of wife has happened because of the cruelty or harassment meted out by the accused No 1 soon before her death in connection with the demand of dowry or not. However, the material on record amply proves that the victim was subjected to cruelty and harassment by the accused, which has led the victim to commit suicide. Thus, the offence committed by the accused squarely falls within the ambit of s 306 read with s 498A of the IPC and not under s 304 B of the IPC . Therefore, conviction of accused under s 304B, IPC read with ss 3, 4, 6 of the2692Dowry Prohibition Act was altered to that under s 306, IPC besides

maintaining conviction under s 498A, IPC .[25]

Alteration of Conviction from Section 306 to Section 498A

Where the evidence on record showing cruelty and harassment by husband but no case was made out that husband was instigating or intentionally aiding victim to commit suicide and no active role of husband in that regard proved the husband was found liable to be convicted under s 498A and not under s 306 .[26]

Where it was not established that accused had instigated deceased to commit suicide by doing any act, but his acts in harassing deceased, drinking continuously and beating her regularly which amounted to cruelty to deceased-wife, the conviction and sentence imposed on the accused under s 306 was set aside and he was convicted and sentenced under s 498A .[27]

40 *Wazir Chand v State of Haryana* AIR 1989 SC 378, (1989) CUJ 804 (SC) .

41 *Krushana Hari Debnath v State* (1995) CUJ 3049 (Ori) .

42 *Bajirao v State of Karnataka* (2007) Cr LJ 3176 (Kant) .

43 *Carter v Canada (Attorney General)* (2012) BCJ No. 1196 .

44 *Satvir Singh v State of Punjab* (1998) Cr LJ 405 (P&H) .

45 *Gangula Mohan Reddy v State of Andhra Pradesh* 2010 Cr LJ 2110 (SC), AIR 2010 SC 327, (2010) 1 SCC 750, 2010 (1) Scale 1 .

46 *Gangula Mohan Reddy v State of Andhra Pradesh* 2010 Cr LJ 2110 (SC), AIR 2010 SC 327, (2010) 1 SCC 750, 2010 (1) Scale 1 .

47 *Ghan Shyam v State of UP* (2004) Cr LJ 967 (All) .

48 *Ananda Mohan Sen v State of West Bengal* (2007) Cr LJ 2770 (SC) .

49 *Jamnalal Pande v State of Madhya Pradesh* 2010 Cr LJ 538 (544) (MP) ; *Girdhar ShankarTawade v State of Maharashtra* (2002) 5 SCC 177, **referred**.

50 *Sushil Kumar Sharma v Union of India* (2005) Cr LJ 3439 (SC), AIR 2005 SC 3100, 2005 AIR SCW 3569 .

51 *Chittaranjan Mahanta v State of Assam* (2004) Cr LJ 5068 (Gau) .

52 *Manish Kumar Sharma v State of Rajasthan* (1994) Cr LJ 3066 (Raj) .

53 *Ibid*; *Vedprakash Bhaiji v State of Madhya Pradesh* (1995) Cr LJ 893 (MP) .

54 *State of Maharashtra through PSO, Police Station, Hinganghat v Natthu Laxman Thutarkar* 2013 Cr LJ (NOC) 294 (Bom) .

55 *B Ammu v State of Tamil Nadu* 2009 Cr LJ 866 (870) (Mad) .

56 *Sohan Raj Sharma v State of Haryana* 2008 Cr LJ 2569, p 2570 (SC), AIR 2008 SC 2108, 2008 (6) Scale 192, 2008 AIR SCW 3202 .

57 *Nathu Lal v State of Madhya Pradesh* AIR 1996 SC 43, (1996) Cr LJ 71 (SC) .

58 *Sanju alias Sanjay Singh Sengar v State of Madhya Pradesh* (2002) Cr LJ 2796 (SC) .

59 *Nachhatar Singh v State of Punjab* 2011 Cr LJ 2292, p 2293 (SC), 2011 AIR SCW 1946, 2011 (3) Scale 411 .

60 *Rajbabu v State of MP* 2008 Cr LJ 4301, p 4306 (SC), AIR 2008 SC 3212, 2008 (10) Scale 437 .

61 *Concise Oxford Dictionary*, ninth edn, p 1393.

62 *Halsbury's Laws of England*, fourth edn, vol 9, p 686, para 1124.

63 In Re *Davis*[1968] 1 QB 72.

64 *Cliff v Schwable* (1846) 3 CB 437 .

65 *CA Thomas, Master v Union of India* (2000) Cr LJ 3729 (Ker) (DB) .

66 *Mangat Ram v State of Haryana* 2014 Cr LJ 2425 (SC), (2014) 12 SC 595, AIR 2014 SC 1782 .

67 *Ravindra Trimbak Patel v State of Maharashtra* (2014) 13 SCC 405, 2014 Cr LJ 2664 .

68 *State of Maharashtra v Rajendra* 2014 Cr LJ 3811 (SC), 2014 (8) Scale 441 ; **See also***Kuldeep Kaur v State of Uttrakhand* (2014) 10 SCC 584, 2014 (12) Scale 223 .

69 *M Mohan v State, Represented by the Dy Superintendent of Police* AIR 2011 SC 1238, 2011 Cr LJ 1900, 2011 AIR SCW 1601, 2011 (3) Scale 78, 2011 (3) SCC 626 . (Proceedings quashed on petition under s 482 CrPC).

70 *Surender v State of Haryana* 2007 Cr LJ 779 (SC), 2006 (12) Scale 254 .

71 *Anil Kr Sarkar v State of West Bengal* 2009 Cr LJ 4678, p 4681, 4682, 4683 (Cal) ; *Brij Lal v Premchand* AIR 1989 SC 1661

72 *Sharadbhai Jivanlal Vaniya v State of Gujarat* 2012 Cr LJ 1575, p 1576 (SC), 2011 (3) Scale 534 ; *Anand Kumar v State of Madhya Pradesh* AIR 2009 SC 2155, 2009 (3) SCC 799 .

73 *Rameshwar Dass v State of Punjab* 2008 Cr LJ 1400 (SC), AIR 2008 SC 890 .

74 *Ramachandran v State of Kerala* (2005) Cr LJ 1843 (Ker) (DB) .

75 *Ramachandran v State of Kerala* (2005) Cr LJ 1843 (Ker) (DB) .

76 *Ananda Mohan Sen v State of West Bengal* (2007) Cr LJ 2770 (SC) .

77 *Wazir Chand v State of Haryana* AIR 1989 SC 378, (1989) Cr LJ 804 (SC) .

78 *State v Gopal* (2001) Cr LJ 3878 (Raj) .

79 *Sudhakar v State of Maharashtra* (2000) Cr LJ 3490 (SC) .

80 *Satvir Singh v State of Punjab* (1998) Cr LJ 405 (P&H) .

81 *Wazir Chand v State of Haryana* (1989) 1 SCC 244, 1989 Cr LJ 809 (SC) .

82 *Amalendu Pal v State of West Bengal* AIR 2010 SC 512, p 515, (2010) 1 SCC 707, (2009) 84 AIC 122 (SC) .

83 *Amalendu Pal v State of West Bengal* AIR 2010 SC 512, p 515, (2010) 1 SCC 707, (2009) 84 AIC 122 (SC) .

84 *Milind Bhagwanrao Godse v State of Maharashtra* 2009 Cr LJ 1736, p 1739 (SC), AIR 2009 SC 1828, (2009) 3 SCC 699 .

85 *Dammu Sreenu v State of Andhra Pradesh* 2009 Cr LJ 3728, p 3730 (SC), AIR 2009 SC 2532, (2009) 8 Scale 71 .

86 *Jetha Ram v State of Rajasthan* 2012 Cr LJ 2459, p 2463 (Raj)

87 *Bhagwan Das v Kartar Singh* (2007) 11 SCC 205, AIR 2007 SC 2045 ; *Jetha Ram v State of Rajasthan* 2012 Cr LJ 2459, p 2463 (Raj) (Conviction of accused husband under s 306, IPC set aside).

88 *Jamnalal Pande v State of Madhya Pradesh* 2010 Cr LJ 538 (MP) .

89 *Khyaliram v State of MP* 2007 Cr LJ 4634 (MP) (DB) .

90 *Rajesh Kumar Kaushik v State of Madhya Pradesh* 2015 Cr LJ 1673 (Chh) (DB) .

91 *Tapan Das v State of WB* III (2013) DMC 354 (Cal) .

92 *State of Maharashtra v Madhukar Raghunath Kambri* III (2013) DMC 530 (Bom) ; **See also***Arvind v State of Chhattisgarh,* 2014 (136) AIC 503 (Chh) .

93 *Ram Kumar v State of Madhya Pradesh* (1998) 2 Crimes 376 (MP) .

1 *Assoo v State of Madhya Pradesh* 2012 Cr LJ 658, p 659 (SC), (2011) 4 SCC 448 .

2 *Vanamela Amaranadh v State of Andhra Pradesh* (2001) Cr LJ 4498 (AP) .

3 *Bommidi Rajamallu v State of Andhra Pradesh* (2001) Cr LJ 1319 (AP) .

4 *V Adinarayana v State of Andhra Pradesh* (2000) Cr LJ 1182 (AP) .

5 *Avinash J Mahale v State of Maharashtra* (2006) Cr LJ 3123 (Bom) .

6 *Sanju alias Sanjay Singh Sengar v State of MP* (2002) SCC (Cri) 1141, AIR 2002 SC 1998 .

7 *Swamy Prahaladdas v State of MP* (1995) SCC (Cri) 943 .

8 *K Ramakrishnappa v State of Karnataka* (2006) Cr LJ 4314 (Kant) .

9 *Ramesh Kumar v State of Chattisgarh* (2001) 9 SCC 618, AIR 2001 SC 3837 .

10 *Shiv Dan Ram v State of Rajasthan* (2005) Cr LJ 36 (Raj) .

11 *Narottam v State of Rajasthan* 2014 Cr LJ 3742 (Raj) .

12 *Netai Dutta v State of West Bengal* (2005) Cr LJ 1737 (SC), AIR 2005 SC 1775, 2005 Cr LJ 1737, JT 2005 (3) SC 46, (2005) 2 SCC 659 .

13 *Cyriac v Sub-Inspector of Police, Kaduthuruthy* (2005) Cr LJ 4322 (Ker) ; *Arokiasamy v State* 2014 (140) (AIC) 416 (Mad) (Words uttered in a quarrel or spur of moment - No abetment, Conviction set aside).

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15 *The Public Prosecutor, AP High Court v Jangili Sammaiah* (2004) Cr LJ 4489 (AP) .

16 *Rameshbhai Dalaji Godad v State of Gujarat* (2003) Cr LJ 2445 (Guj) .

17 *Sivakumar v State by Deputy Superintendent of Police, Tirupattur* (2007) Cr LJ 3481 (Mad) .

18 *Shanta w/o Babu Malaganvi v State of Karnataka* 2013 Cr LJ (NOC) 381 (Kar) .

19 *Sambhunath Das v State of West Bengal* 2014 Cr LJ 523, p 527 (Cal) .

20 *Sunil Kumar Sambhudayal Gupta v State of Maharashtra* 2011 Cr LJ 705, 2010 AIR SCW 7049 .

21 *Bhaskar Ramappa Madar v State of Karnataka* 2009 Cr LJ 2422, p 2432 (SC), 2009 AIR SCW 2624, 2009 (5) Scale 100 .

22 *Sohan Raj Sharma v State of Haryana* 2008 Cr LJ 2569, p 2571 (SC), AIR 2008 SC 2108, 2008 (6) Scale 192, 2008 AIR SCW 3202 .

23 *Kajal Datta v State of Tripura* 2013 Cr LJ 4939, p 4945 (Gauh) .

24 *Paramjeetsingh Chawala v State of MP* 2007 Cr LJ 3343 (MP) ; *Vedprakash v State of MP* (1995) Cr LJ 893 (MP) ; *Prakashchand v State of MP* (2007) 1 MPWN 20 ; *Ramnaresh v State of MP* (2002) 2 MPLJ 360 (MP) ; *Madiya alias Mahadev v State of MP* (2006) 1 MPLJ 583, (2006) Cr LJ 1963 (MP) ; *Santosh Nathumal Goenka v State of Maharashtra* 2010 Cr LJ (NOC) 219 (Bom), 2010 (1) Bom CR (Cri) 233, 2009 All MR (Cri) 3377 .

25 *Bhagwan Das v Kartar Singh* (2007) Cr LJ 3420 (SC) .

26 *State of Gujarat v Praduman Ramanlal Mehta* (1999) Cr LJ 736 (Guj) (DB) .

27 *Mankamma v State of Kerala* 2010 Cr LJ 389, p 392 (SC), 2009 AIR SCW 7053, 2009 (13) Scale 367 .

28 *R v Mohit Pandey* 3 NWP 316 .

29 *Reg v Sachbloll Reetlool* 1 RJ and P 174.

30 *Ramdial v Emperor* 14 Cr LJ 634, (1914) All 249 ; *Emperor v Vidyasagar Pande* AIR 1928 Pat 497, p 500 .

31 *Tejsingh v State* AIR 1958 Raj 169, p 171, (1958) Cr LJ 967 .

32 *State of Gujarat v Pradyuman Ramlal Mehta* (1999) Cr LJ 736 (Guj) (DB) .

33 *Dwarika Prasad Soni v State of Madhya Pradesh* (2002) Cr LJ 1080 (MP) .

34 *Pawan Kumar v State of Haryana* (2001) Cr LJ 1679 (SC) .

35 *Chagan v State of Madhya Pradesh* (1998) Cr LJ 2179 (MP) ; *State of Punjab v Iqbal Singh* AIR 1991 SC 1532, (1991) Cr LJ 1897 (SC) ; *Ram Kumar v State of Madhya Pradesh* (1998) Cr LJ 952 (MP) .

36 *State of West Bengal v Orital Jaiswal* AIR 1994 SC 1418, (1994) Cr LJ 2014 .

37 *Laxmi Bai v State of Madhya Pradesh* (2000) Cr LJ 3597 (MP) .

38 *Devassia v State of Kerala*(2006) Cr LJ 3480 (Ker).

39 *Ananda Mohan Sen v State of West Bengal* (2007) Cr LJ 2770 (SC) .

40 *Devassia v State of Kerala* (2006) Cr LJ 3480 (Ker) .

41 *Ibid*.

42 *State of Madhya Pradesh v Geetabai* (1998) Cr LJ 2724 (MP) (DB) .

43 *Devassia v State of Kerala* (2006) Cr LJ 3480 (Ker) .

44 *Neni v State of Rajasthan* (2006) Cr LJ 4527 (Raj) .

45 *Packirisamy v State of Pondicherry* (2005) Cr LJ 467 (Mad) .

46 *Kokkiligadda Veeraswamy v State of AP* (2005) Cr LJ 869 (AP) .

47 *Mohan Chand Kholia v State* (2003) Cr LJ 710 (Del) .

48 *Dammu Sreenu v State of AP* (2003) Cr LJ 2185 (AP) .

49 *Batool v State of Rajasthan* (2003) Cr LJ 3286 (Raj) (DB) .

50 *Yadlapati Kutumba Rao v State of AP* (2003) Cr LJ 4220 (AP) .

51 *Shankar Rajwar v State of Jharkhand* (2007) Cr LJ (NOC) 97 (Jhar), 2006 (3) AIR Jhar R 864 .

52 *Govind Revaram Sahu v State of MP* (2007) Cr LJ (NOC) 340 (Chh) .

53 *Ananda Mohan Sen v State of West Bengal* (2007) Cr LJ 2770 (SC) .

54 *Kishorilal S/o Nanakdas v State of Madhya Pradesh* 2014 Cr LJ (NOC) 83 (MP) .

55 *Hans Raj v State of Haryana* (2004) Cr LJ 1759 (SC) .

56 *Mehar Dass v State of Haryana* (2003) Cr LJ 2203 (P&H) .

57 *Mohan Singh Panwar v State of Uttaranchal* (2007) Cr LJ 2069 (Uttaranchal) .

58 *Sanjiv v State of MP* (2007) Cr LJ 2020 (MP) .

59 *Alka Grewal v State of Madhya Pradesh* (2000) Cr LJ 672 (MP) .

60 *Pralhad Vittal Gin v State of Maharashtra* (2002) Cr LJ 3162 (Bom) .

61 *Prahlad Vittal v State of Maharashtra* (2003) Cr LJ 3162 (Bom) .

62 *Bheru Lal v State of Rajasthan* (1999) Cr LJ 1006 (Raj) .

63 *Munna Lal v State of Rajasthan* (1996) 1 Crimes 254 (Raj) .

64 *CP Malik v State* (1999) CUJ US 25 (Del) .

65 *Suryabhan Singh v State of Madhya Pradesh* (2002) Cr LJ (NOC) 353 (MP), (2002) 33 MPLT 419 .

66 *Sanju alias Sanjay Singh Sengar v State of Madhya Pradesh* (2002) Cr LJ 2796 (SC) .

67 *V Shankaraiah v State of Andhra Pradesh* (2002) Cr LJ 3201 (AP) .

68 *MC Narayana v State of Karnataka* (2005) Cr LJ 210 (Kant) .

69 *K Prema S Rao v Yadala Srinivasa Rao* (2003) Cr LJ 69 (SC) ; *Rajesh Kumar Kaushik v State of Madhya Pradesh* 2015 Cr LJ 1673 (Chh) (DB) .

70 *Dalbir Singh v State of UP* (2004) Cr LJ 2025 (SC) .

71 *Kartar Singh v Central Bureau of Investigation* (2006) Cr LJ 4099 (Del) .

72 *Thangappandian v State* (1998) Cr LJ 993 (Mad) ; *Sungarbonta Sreenu v State of Andhra Pradesh* (1997) 2 Crimes 55 (SC), AIR 1997 SC 3233 .

73 *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

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75 *Ram Ballabh Mandal v State of Bihar* (1999) Cr LJ 3945 (Pat) .

76 *Balkar Singh v State of Haryana* (1999) Cr LJ 718 (P&H) (DB).

77 *Sanju alias Sanjay Singh Sengar v State of Madhya Pradesh* (2002) Cr LJ 2796 (SC) .

78 *V Shankaraiah v State of Andhra Pradesh* (2002) Cr LJ 3201 (AP) .

79 *Bura Manohar v State of Andhra Pradesh* (2002) Cr LJ 3322 (AP) .

80 *Asha Shukal v State of Uttar Pradesh* (2002) Cr LJ 2233 (All) .

81 *Hira Lal Jain v State* (2001) Cr LJ 1212 (Del) .

82 *Pradeep S Ahluwalia v State* (1999) Cr LJ 4145 (Del) .

83 *Saroj Sharma v State of Rajasthan* (1998) Cr LJ 3419 (Raj) .

84 *Krishan Kumar Mishra v State of Rajasthan* (1998) Cr LJ 1513 (Raj) .

85 *Col JS Bhura v State of Rajasthan* (1996) Cr LJ 2158 (Raj) .

86 *Didigam Bikshapathi v State of AP* 2008 Cr LJ 724, p 727 (SC), 2007 (13) Scale 535, 2007 AIR SCW 7411 .

87 *Sohan Raj Sharma v State of Haryana* 2008 Cr LJ 2569, p 2571 (SC), AIR 2008 SC 2108, 2008 Cr LJ 2569, 2008 (6) Scale 192, (2008) 11 SCC 215 (*Mahendra Singh v State of MP* 1995 AIR SCW 4570, 1996 Cr LJ 894**relied on**.

88 *Sahebrao v State of Maharashtra* 2006 Cr LJ 2881, p 2886, AIR 2006 SC 2002, (2006) 4 Supreme 94 .

89 *Satpal v State of Haryana* AIR 1999 SC 1476, (1999) Cr LJ 596 (SC) .

90 *Syed Oniya v State of Madhya Pradesh* (1999) Cr LJ 4398 (MP) .

1 *Prem Dass v State of Himachal Pradesh* (1996) Cr LJ 951 (HP) .

2 *Harjit Singh v State of Punjab* 2006 Cr LJ 554 (SC), AIR 2006 SC 680 .

3 *State of Karnataka v Anni Poojary* 2005 Cr LJ 2662 (Kant) .

4 *State of Karnataka v Murthi* (2002) Cr LJ 1683 (Kant) (DB) .

5 *Pradeep S Ahluwalia v State* (1999) Cr LJ 4145 (Del) ; *Mohd Haroon v State of Rajasthan* (1999) Cr LJ 2532 (Del) .

6 *Surendra Agnihotri v State of Madhya Pradesh* (1998) Cr LJ 4443 (MP) .

7 *Raju alias Rajendra Prasad v State of Madhya Pradesh* (2002) Cr LJ 2367 (MP) .

8 *Mahendra Singh v State of Madhya Pradesh* (1996) Cr LJ 894 (SC), AIR 1995 SCW 4570 ; *Mohd Haroon v State of Rajasthan* (1999) Cr LJ 2532 (Raj) .

9 *Bansiya v State of Rajasthan* (1996) Cr LJ 1393 (Raj) .

10 *Pawan Kumar v State of Haryana* (1998) Cr LJ 1144 (SC) .

11 *Madiya v State of MP* (2006) Cr LJ 1963 (MP) .

12 *Girdhar Shanker Tawade v State of Maharashtra* (2000) Cr LJ 2814 (SC) .

13 *Khem Singh v State of Himachal Pradesh* (2000) Cr LJ 4326 (HP) .

14 *Tejsingh v State* AIR 1958 Raj 169, p 171, (1958) Cr LJ 967 .

15 *Samir Samanta v State* (1993) Cr LJ 134 (Cal) (DB) .

16 *State v Siddaraju* (2000) Cr LJ 4220 (Kant) .

17 *Bhagirathi Bni Surji Bhanuspali v State of Maharashtra* (1998) Cr LJ 2209 (Bom) (DB) .

18 *Mohd Hoshan & anor v State of Andhra Pradesh* (2002) Cr LJ 4124 (SC) .

19 *ST Dayananda Reddy v State of Karnataka* (2000) Cr LJ 2064 (Kant) (DB) .

20 *Girdhar Shankar Tawade v State of Maharashtra* (2000) Cr LJ 2814 (SC) .

21 *Ashok Kumar v State of Haryana* (1997) Cr LJ 1377 (P&H) (DB).

22 *Jayanta Das v State of West Bengal* (2007) Cr LJ 2841 (Cal) (DB) ; *Shankar Rajwar v State of Jharkhand* (2007) Cr LJ (NOC) 97 (Jhar) .

23 *Deepak v State of Madhya Pradesh* (1994) Cr LJ 767 (MP) .

24 *Suryakanth v State of Karnataka* (2003) Cr LJ 3562 (Kant) .

25 *MC Narayana v State of Karnataka* (2005) Cr LJ 210 (Kant) .

26 *Suvarnasingh Tiratsingh Dhanjal v State of Maharashtra* (2006) Cr LJ 185 (Bom) (DB) .

27 *Pachipala Laxmaiah v State of Andhra Pradesh* (2001) Cr LJ 4063 (AP) ; *Sanagala Yagna Sree v State of Andhra Pradesh* (1996) Cr LJ 1249 (AP) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 307.

Attempt to murder.--

Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to [28][imprisonment for life], or to such punishment as is hereinbefore mentioned.

Attempts by life convicts.--[29][When any person offending under this section is under sentence of [30][imprisonment for life], he may, if hurt is caused, be punished with death.]

Illustrations

(a) *A* shoots at *Z* with intention to kill him, under such circumstances that, if death ensued, *A* would be guilty of murder. *A* is liable to punishment under this section.

(b) *A,* with the intention of causing the death of a child of tender years, exposes it in a desert place. *A* has committed the offence defined by this section, though the death of the child does not ensure.

(c) *A,* intending to murder *Z,* buys a gun and loads it. *A* has not yet committed the offence. *A* fires the gun at *Z.* He has committed the offence defined in this section, and, if by such firing he wounds *Z,* he is liable to the punishment provided by the latter part of [31][the first paragraph of] this section.

(d) *A,* intending to murder *Z* by poison, purchases poison and mixes the same with food which remains in *A*'s keeping; *A* has not yet committed the offence defined in this section. *A* places the food on *Z's* table or delivers it to *Z's* servants to place it on *Z's* table. *A* has committed the offence defined in this section.26932694

Comments

1. Scope and Applicability

An attempt is an intended, but unfinished, crime, tending, but failing, to effect its commission. Specific intention to commit the crime of murder is a necessary prerequisite of this section. In so far as the offence relates to an attempt, the overt act must necessarily be left unaccomplished because otherwise the prosecution would be for the completed crime. Apart from the necessary *mens rea, actus reus* must be more than a preliminary preparation.[32] The attempt must have gone so far that it would result in the commission of the crime intended unless frustrated by the intervention of extraneous circumstances, independent of the will of the accused.[33]So, in order to constitute an offence under this section, it must be established that the offender did an act (the *actus reus*) and that act was actuated by an intention (the *mens rea*) to go further and to achieve a definite end, which is a specific crime, namely, murder.[34] The prosecution has to establish both the elements of the crime by proving that the accused did something, which, in point of law, would be an intention of the commission of an offence and in taking that step, he was inspired by an intention to achieve the definite objective which constituted the particular crime.[35]

For the application of this section, it is not necessary that the injury, capable of causing death, should have actually been inflicted,[36]because the offence would emerge if the act attempted, if not prevented or intercepted, is such as to be sufficient to cause the death of the victim.[37] An accused charged under s 307, IPC cannot be acquitted merely because the injuries received by the victim are simple injuries, intention and knowledge have to be seen.[38]

In order to attract s 307, the injury need not be on the vital part of the body. A gun shot, as in the present case, may miss the vital part of the body, may result in a lacerated wound, that itself is sufficient to attract s 307 .[39]

Even if the shot, fired by the accused at the victim does not hit him, the offence under s 307, is made out however a lenient view may be taken in awarding2695 sentence.[40] In *Bharat Dube v Emperor* ,[41]it was observed that in order that an act should amount to an attempt to murder, all that is necessary to prove is that, if the act had caused death, it would have amounted to murder if it was done with such intention or knowledge as would be necessary to be proved in the case of murder. The fact that an act results in minor injuries or even in no injuries at all, is not relevant for the purpose of deciding whether it amounted to an attempt to murder. Where the accused uses sharp-edged weapons, with which causing of death cannot be ruled out, and causes injuries, dangerous to the lives of the victims, the accused can be held guilty under s 307 .[42] If, as a result of some injuries caused to the vital parts of the victim, the possibility of death is not ruled out according to the medical evidence, the offence would fall within the purview of s 307, and not of s 324, IPC .[43] Thus, though the presence of injuries is not of vital importance, yet the number and nature of the injuries are helpful in finding out the intention of the accused.[44]Under this section, the intention precedes the act, and it should be proved independently of the act, and not merely gathered from the consequences that ensue. All that is necessary to be established is the intention with which the act is done, and if once that intention is established, the nature of the act will be immaterial.[45]

Three Parts of Section 307

This section, which deals with an attempt to commit the offence of murder, may be divided into three parts. The first part says that whoever does any act with such intention or knowledge and under such circumstances, that if he, by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Here, the stress is laid on the intention of knowledge of accused and, on the circumstances. All that is, therefore, necessary, is that the accused should have the intention to commit murder of the victim or he should have knowledge that he is likely to cause his death. If he commits a certain act with that intention or knowledge and there are circumstances to show that if he had by that act caused the death of the victim, he would have been guilty of murder, he may be punished under this section even though the

victim may not be hurt at all.[46]This is clear from the second part of the section which says that if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life or to such punishment as is2696 hereinbefore mentioned. So, if no hurt is caused, a lighter punishment is provided in the first part; but if hurt is caused, then the second part of the section would come into play and the offender would be liable to an enhanced punishment provided by the second part of the section. Also, the third part of the section provides that if the offender is already under sentence of imprisonment for life and if hurt is caused, he may be punished with death.[47]

First part of s 307, IPC does not contemplate that receipt of any injury on the part of the victim is a pre-requisite for convicting an accused thereunder. In the event injuries are received, the second part of s 307 would be attracted.[48]

2. Law of Singapore

Whoever does an act with such intention or knowledge and under such circumstances, that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment for a term which may extend to 10 years and will also be liable to a fine, and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life or to such punishment as is hereinbefore mentioned and shall also be liable to caning.

When any person offending against this provision is under a sentence of imprisonment for life, he may, if hurt is caused, be punished with death.

Thus, where:

(1) *A* shoots at *Z* with the intention to kill him under such circumstances that, if death ensued, *A* would be guilty of murder. *A* is liable to punishment under this provision.
(2) *A*, with the intention of causing the death of a child of tender years, exposes it in a desert place, *A* has committed the offence of attempt to murder, though the death of the child does not ensue.
(3) *A*, intending to murder *Z*, buys a gun and loads it. A has not yet committed the offence. If *A* fires the gun at *Z* he has committed the offence defined as attempt to murder and if by such firing he wounds *Z*, he will be liable to punishment provided by the first paragraph of this provision.
(4) *A*, intending to murder *Z* by poison, purchases poison and mixes the same with food which remains in *A*'s keeping; *A* has not yet committed the offence defined in this provision. If *A* places the food on *Z*'s table or delivers it to *Z*'s servants to place it on *Z*'s table *A* has committed the offence defined under this provision.[49]

The intention of the accused can be ascertained by reference to: (1) the nature of the injuries inflicted; (2) the nature of the weapon utilised; and (3) the part of the body where the injuries were inflicted or at which the accused's blows were aimed. The intention or knowledge must be followed by an overt act to constitute the offence.[50] Where 'hurt' is caused in attempted murder, the higher tier of punishment may be invoked and that includes life imprisonment and caning.[51]2697

In *Saeng-Un Udom v Public Prosecutor* it was observed, 'It is true that he caused the death of the deceased. It was argued that he said that because he honestly believed that he did it. However, subsequent investigations revealed that he was mistaken. There was irrefutable evidence that the fatal wounds were not inflicted by him. It was pointed out that at the time when he entered the room of the deceased, armed with the metal rod, the room was dark, and he did not realise that the object which he hit with the iron rod was not the deceased's head, which he believed it was. He therefore did not kill the deceased.'[52]

3. Essential Ingredients

To constitute an offence under s 307, IPC, two ingredients of the offence must be present:

(a) an intention of or knowledge relating to commission of murder; and
(b) the doing of an act towards it.[53]

The essential ingredients required to be proved in the case of an offence under s 307, IPC are:

(i) That the death of a human being was attempted;
(ii) That such death was attempted to be caused by, or in consequence of the act of the accused;
(iii) That such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as; (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.[54]
(iv) To justify conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted.[55]

What was proved against the appellant was that he shot at the deceased, but there was no evidence to show that it was the injury inflicted by the appellant which was the cause of death. However, from the facts proved, there was no doubt that he shot at the deceased with an intention to kill him or at least he had the knowledge that the act would cause the death. Held, that the allegations proved constituted an offence under s 307, IPC . Conviction of the appellant accused under s 302, IPC was altered to one under s 307, IPC .[56]

4. Relevancy of Evidence of Section 300 in Section 307

In order to bring a case within the ambit of s 307, IPC, the prosecution should make out the facts and circumstances envisaged by s 300, IPC . If the ingredients of s 300 2698 are wholly lacking, there can be no conviction under s 307 .[57] Unless it can be said that the intention (or knowledge) of the accused was to cause such bodily injury as would come within one of the four clauses of s 300, he cannot be held guilty of an offence under this section.[58]

5. Simple Injuries and Points for Consideration

The mere fact that the injuries caused to the complainant were simple in nature and were not such as were likely to result in death of the complainant, is not by itself sufficient to take the case out of the purview of s 307 . It, however, still remains to be considered:

(i) whether, but for the intervention of something beyond the control of the accused, the accused's act in question, if completed, would have caused the death of the complainant in the usual course of events; and
(ii) whether there was the requisite guilty intention of knowledge existent in the minds of the accused while doing the said act.[59]

6. Section not Violative of Articles 14 and 21 of the Constitution

Section 307 envisages two types of cases, namely:

(i) where the victim suffers hurt; and
(ii) where the victim does not suffer hurt, in the course of the transaction.

It is needless to point out that in both the cases, the offender intends to cause death of the victim. The legislature accordingly wanted to bring in a distinction between cases where the victim suffers hurt and where he does not suffer hurt, in so as the prescription of sentence is concerned. So it prescribed a sentence of imprisonment for 10 years and fine in cases where the victim does not suffer hurt, and a sentence of imprisonment for life or for ten years in cases where the victim suffers hurt. Therefore, the imposition of sentence depends upon the fact whether the victim suffered hurt or not in the course of the transaction. Therefore, when the section is clear and categorical with regard to the prescription of sentence by saying that in cases where the person assaulted suffers hurt during the course of attempt to murder him, the sentence to be imposed is imprisonment for life or for ten years with fine and in cases where the person assaulted does not suffer hurt in the sentence prescribed is imprisonment for ten years and fine, it cannot be said that the section is violative of the fundamental rights under arts 14 and 21 of the Constitution, and therefore, the question of discrimination does not arise.[60]

7. Section 307 and Section 511 --Distinction

This section deals with an attempt to commit the specific offence of murder which, under s 302, IPC, is punishable with death or imprisonment for life. On the other2699 hand, s 511, IPC deals with an attempt to commit an offence punishable with imprisonment for life or imprisonment 'where no express provision is made by this Code for the punishment of such offences'. In *Empress v Niddha* ,[61] the court, dissenting from the view taken in *Reg v Francis Cassidy* ,[62] which was followed in *Jiwandas v Emperor* ,[63] and considered in *Vasudeo Balwant Gogte v Emperor* ,[64] held that s 307 is exhaustive and no court has a right to resort to the provisions of ss 299 and 300, read with s 511, IPC, for the purpose of convicting a person of the offence of attempted murder. An act done by a person, who has formed an intention to commit a murder, can escape falling under s 307, IPC only if the act does not amount to an attempt, but is still a preparation or if it amounts to an attempt, it is an attempt to commit some offence other than murder. If it does amount to an attempt to commit murder, it is difficult to understand how it can escape falling under s 307 and fall under s 511 . If the act does not amount to an attempt, it cannot fall even under s 511 . If it does not amount to an attempt, but is an attempt to commit some offence other than murder, no question of its falling under s 307 arises, and it may fall under s 511 only if other conditions of that section are satisfied. Section 307 is, thus, exhaustive. Section 511 applies to attempts to commit crimes generally. It does not apply to attempts to commit 'murder' or 'culpable homicide not amounting to murder' which are fully and exclusively provided for under ss 307 and 308 respectively.[65] In *Om Prakash v State of Punjab* ,[66] which was an appeal by the accused against his conviction under s 307 for attempting to murder his wife by starvation, it was contended on behalf of the accused-appellant that the ingredients of the offence under s 307 were materially different from those of an offence under s 511, the difference being that, fit for an act to amount to the commission of the offence of attempting to commit an offence, it need not be the last act and can be the first act towards the commission of the offence while for an offence under s 307, it is the last act which, if effective to cause death, would constitute the offence of an attempt to commit murder. The contention was that even if a woman had been deprived of food for a certain period, the act of so depriving her did not come under s 307 as that act could not, by itself, have caused her death, it being necessary for the period of starvation to continue for a longer period to cause death. However, the Supreme Court did not agree with this contention. Referring to ss 307 and 308, the Supreme Court observed:

A person commits an offence under s 308, when he has an intention to commit culpable homicide not amounting to murder and, in pursuance of that intention, does an act towards the commission of that offence, whether that act be the penultimate act or not. On a parity of reasoning, a person commits an offence under section 307 when he has an intention to commit murder and, in pursuance of that intention, does an act towards the commission, irrespective of the fact whether that act is the penultimate act or not. It is to be clearly understood, however, that the intention to commit the offence of murder means that the person concerned has the intention to do certain act with necessary intention or knowledge mentioned in section 300 . The intention to commit an offence is different from the intention or knowledge requisite for constituting the act of that offence. The expression 'whoever attempts to commit an offence', in section 511, can2700 only mean whoever intends to do a certain act with the intent or knowledge necessary for the commission of that offence. The same is meant by the expression 'whoever does an act with such intention or knowledge, and under such circumstances, that if he, by that act, caused death, he would be guilty of murder' in section 307 . This simply means that the act must be done with the intent or knowledge requisite for the commission of the offence of murder. The expression 'by that act' does not mean that the immediate effect of the act committed must be death. Such a result must be the result of that act, whether immediately or after a lapse of times. The word 'act' again does not mean only any particular, specific, instantaneous act of a person, but denotes, according to section 33, in the case of the appellant in regularly starving the woman, a series of acts and therefore acts falling short of completing the series would, therefore, come within the purview of section 307 of the Code.

8. Sections 307 and 308 --Relative Scope

Commentary under s 308, *post*, may be referred to.

9. Constructive Liability under Section 34

Commentary under s 34, *ante*, may be referred to.

It may, in many cases, be difficult to decide whether the criminal act in question has been done by several persons in furtherance of the common intention of all. However, once it is decided that the acts so done by a number of persons in furtherance of the common intention of all, the legal position that results is that each persons shall be held to have committed the entire criminal act and s 34 applies even if that act amounts only to an attempt to murder.[67] Where, being aware that his companion was armed with a pistol, the appellant incited the said companion to shoot, whereupon the companion, pointing to the complainant, proclaimed that he (victim) was doing *pairvi* against the accused in a previous case, it was held, in these circumstances, that the appellant shared the common intention with his companion to attempt to kill the victim who was hit, on his palm by the pistol-shot.[68] If, however, the common intention to kill on the part of the accused is wanting, they cannot be convicted of an offence under s 307, read with s 34, IPC . However, they may be held guilty of an offence under s 323, read with s 34, IPC, if conditions of s 323, IPC, are fulfilled.[69]

The requirement of the statute is sharing the common intention upon being present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused. The same depends upon the fact situation of the matter under consideration and no steadfast rule can be laid down therefor.[70]

Mere presence together at the time of incident is not sufficient to hold that accused persons shared common intention. Further, s 34 is attracted only if accused shared common intention and not when they shared only similar intention.[71]

10. Constructive Liability under Section 149

Commentary under s 149, *ante*, may be referred to.2701

A charge of entertaining the common object of attempting to murder is not maintainable because it cannot be said that the common object of an assembly would be that they should be frustrated in the commission by some unforeseen event just before the completion of the offence.[72] When occurrence took place at the spur of the moment the accused persons cannot be said to be members of an unlawful assembly.[73] An accused not identified by eye-witness cannot be convicted by taking recourse to s 149 even though the

co-accused persons are convicted under s 307 read with s 149, IPC .[74] When five co-accused were acquitted, the conviction of other accused on the basis of some prosecution evidence with the aid s 149 was not proper.[75] Failure to establish existence of unlawful assembly would make each accused liable for only his individual acts.[76]

11. Attempt

There are different stages in a crime, first intention to commit it, second preparation to commit it and third, an attempt to commit it. If at the third stage, the attempt fails, the aims is not complete, but law punishes for attempting the same.[77] An 'attempt' means doing everything by an accused within his power to achieve the final result, but the final result alludes because something beyond his control intervenes *e.g.*, there may be slight deflection of the shot or something comes in between suddenly or the victim is saved with medical aid after being struck.[78]It is to be borne in mind that the question, whether a certain act amounts to an attempt to commit a particular offence, is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it.[79] It is, thus, left to the commonsense of the court to determine whether the stage reached by the accused is preparation or attempt.[80] The Supreme Court in *Abhayanand Mishra v State of Bihar* ,[81] observed:

> A person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that particular offence and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be penultimate act towards the commission of that offence, but must be an act during the course of committing that offence.[82]2702

In Re *T Munirathnam Reddy,*[83] it was said that the distinction between preparation and attempt may be clear in some cases, but in most of the cases the dividing line is very thin. Nonetheless, it is a real distinction. The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the accused intends that the natural consequence of his act should result in death, but is frustrated only by extraneous circumstances, he would be guilty of an attempt to commit the offence of murder. Therefore, what has to be established is that if the victim had met his death, the offence would have been one under s 302, IPC .[84] In *Om Prakash v State of Punjab* ,[85] the Supreme Court observed:

> It may, however, be mentioned that, in cases of attempt to commit murder by firearm, the act, amounting to an attempt to commit murder, is bound to be the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence, and once he fires and something happens to prevent the shot taking effect, the offence under s 307 is made out...

In an attempt, every element of the thing attempted is present except the fact of success. Thus, in an attempt to murder, all the elements of murder exist except the fact of death. The cause of the want of success is immaterial. It may be the timely escape or rescue of the person assailed,[86] the missed fire of the gun, the insufficiency of the dose of poison administered,[87] or recovery from a wound. Whatever the intervening obstacle to success may be, the accused cannot plead it in his aid if it was not known to himself.[88] Chief Justice Beamount, in *Vasdeo Balwant Gogte v Emperor* ,[89]observed that what s 307 really means is that the accused must do an act with such a guilty intention and knowledge, and in such circumstances, that but for some intervening fact, the act would have amounted to murder in the normal course of events. This has been accepted as correct by the Supreme Court in *Om Prakash v State of Punjab.* [90]

Child Accused

In *Gopi Nath Ghosh v State of West Bengal* ,[91] the Hon'ble Supreme Court had firstly voiced its concern

about the failure to raise any objection as to the age of the accused in the courts below. The Apex Court took note of the provision of art 39(f) of the Constitution which provides that the state shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. The Hon'ble Supreme Court thereafter set aside the conviction and sentence. In another case, the same path was traversed by Delhi High Court. Accordingly, the conviction and the sentence of2703 the accused who was only 14 years of age at the time of commission of offence was set aside as unsustainable.[1]

'Attempt' Distinguished from 'Preparation'

Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. Everything, however remotely connected with the commission of the crime, may be regarded as preparation towards it.[2]On the other hand, as a rule, it is the last proximate act, done in the execution of the crime, the completion of the offence being prevented only by some cause independent of the offender's volition.[3] In other words, an attempt to commit an offence is an act, or series of acts, which leads inevitably to the commission of the offence unless something, which the doer of the act or acts neither foresaw nor intended, happens to prevent this. An act done towards the commission of an offence, which does not inevitably leads to the commission of the offence unless it is followed or perhaps, preceded by other acts, is merely an act of preparation.[4]

If something is yet to be done, the act of omission of the accused would be at the preparatory stage and would not amount to an attempt to murder.[5]An attempt is an act of such a nature that it is itself evidence of the criminal intent with which it is done. A criminal attempt bears the criminal intent upon its face. The thing speaks for itself.[6] Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. As soon as he commences to do an act with the necessary intention, he commences his attempt to commit the offence.[7]An act, which is punishable under this section, must be an act which is itself capable of causing death. Merely aiming the loaded pistol towards a person does not amount to 'an attempt to murder' within the meaning of this section. In cases of attempt to cause death by firearm, the weapon must be fired. So long as it is not fired, no offence of attempt to murder, as contemplated by this section, is committed. However, once he fires and something happens to prevent the shot from taking effect, the offence under s 307 is made out.[8] Also, mere firing does not raise inference of attempt to murder. Fire should be specifically aimed, the *mens rea* required under s 300, IPC has to exits, there has also to exist an effective act to achieve the end of killing.[9] In the case of an attempt to murder by starvation, the conduct of the accused in regularly starving the victim to accelerate her/his end would amount to an attempt of murder.[10] In *Empress v Ramakka* ,[11] a woman, on account of a quarrel with her father and brother, ran2704 towards a well shouting that she would fall into it. In a prosecution for an attempt to commit suicide, she was not held guilty. Her running towards the well merely amounted to a preparation and no more. She must have reached the well and must also have done something so that she may fall into it, *eg* tried to jump from the parapet wall of the well. It was held that she had not gone past the *locuspoenitentiae* allowed to her by the law. In a similar case, where accused, a husband and wife, jumped into a well with their infant child and, when they were doing so, the child slipped from the hands of the woman, fell into the well and drowned, it was held that they went beyond the stage of preparation and *locus poenitentiae*, which is available only prior to the *actus reus*, ceased to exist.[12]

12. 'Act' Denotes Series of Acts Also

The 'act' referred to in this section, does not mean only any particular, specific, instantaneous act of a person; it denotes,' according to s 33, IPC, a series of acts as well.[13]

13. Mens Rea

Mens rea is one of the two essential elements of the offence of an attempt to murder. The *mens rea* may

consist of a guilty intention or of a guilty knowledge. To constitute an attempt to murder, there must be some overt act combined with the evidence of *mens rea*. The burden is always on the prosecution to prove, first, the *actus reus*, that is, the accused had done something which, in point of law, marked the commission of the offence, and secondly, the *mens rea*, that is, in taking this step, he was inspired by the intention to reach a definite objective which would constitute a specific offence. A man cannot be convicted for an attempt to murder if the evidence merely discloses that he was rash, negligent or reckless.[14] If, therefore, the essential ingredient of s 307, pertaining to the proof of existence of intention or knowledge on the part of the accused has not been established, he cannot be held guilty under s 307, IPC .[15] Mere firing does not raise inference of attempt to murder. Fire should be specifically aimed. For the *mens rea* required under s 300, IPC to exist, there has also to exist an effective act to achieve the end of killing.[16] Where the injuries inflicted were simple, even if one of the accused had assaulted by *lathi*, held the accused persons had no intention to kill, their conviction under s 307, IPC was altered to one under s 323, IPC .[17]

The crux of every case (apart from cases resting on knowledge) is the intention of the assailant.[18]Intention has been defined to consist of desire that certain consequences shall form a party's act (or omission).[19] If there is no such intention or2705 knowledge as is necessary to constitute murder, there can be no attempt to commit it and therefore, no offence under this section.[20] The intention may be any of the three kinds referred to in the first three clauses of s 300 .[21] Where neither the FIR disclosed that the accused had intended to kill the complainant, nor was such intention disclosed from the medical evidence, it was held that the accused could be convicted only under ss 326 / 149, IPC, and not under ss 307 / 149, IPC .[22]

Intent which is a state of mind cannot be proved by precise direct evidence, as a matter of fact it can only be detected or inferred from other factors. Some of the relevant considerations may be the nature of the weapon used, the place where injuries were inflicted, the nature of the injuries and the circumstances in which the incident took place.[23]

The intention, which brings a case within s 307, IPC, must be inferred from the totality of all the facts and circumstances of a case.[24] Intention, being an act of a mind, has to be gathered by the surrounding circumstances. The mere fact, that the accused used a small pen-knife and because only one injury was caused, is not sufficient to come to a conclusion that the accused did not intend to cause the death of the victim. The conviction of an accused under s 307 must be sustained where the accused has caused the injury under the circumstances that if, by the stab blow, he had caused the death of the victim, he would have been guilty of murder.[25] Where the accused fired at his opponents with his gun, and the firing went on for some time, it cannot be denied that either the intention of the accused was to cause death or he had knowledge that death would be caused.

If death is not caused, the accused must be held guilty under this section.[26] Where the weapon used by the accused was not heavy and the injuries caused were such that the victim did not even loose consciousness, it was held that there could be no intention of causing the death of the victim.[27] Merely because one or two victims has received their injuries on the vital parts of their body, it cannot necessarily be inferred that the intention of the accused was to cause their death unless there is evidence to show that the injuries, received by the victims, were dangerous to their lives.[28] Where the stab injuries caused in the back of the victim were penetrating, the weapon going to the pleural cavity, it was held that it was not difficult to infer that the accused had an intention to cause death of the victim.[29] The mere fact that no2706 vital organ was cut, is not sufficient to take the case out of s 307 .[30] An inference from the injuries inflicted, as to presence or absence of intention to cause death, cannot to drawn unless the doctors, who examined the wounds, are examined.[31] In *Farroq v State* ,[32] the doctor, in his statement on oath, stated that the injury, inflicted on the victim, could cause his death though he did not say so in his supplementary report. It was observed that if he had written so in the supplementary report, he would have characterised the injury as grievous. Therefore, it could not be held that the injury in question was dangerous to life or could cause death. From this, it could be concluded that the intention of the accused was merely to cause a simple injury to the victim and not to cause his death. In view of this, he could be convicted only under s 324, and not under s 307 . In *Kali Charan v State* ,[33] six accused were sent for assaulting the victims. Four of them had pistols and two of them *pharsa* and *lathi* respectively. First of all, *pharsa* and *lathi* were

wielded despite the fact that four accused had pistols. However, when an intevener came, pistols were used from some distance, and not from a close range. There was no scorching or tattooing in any gunshot wound of the two injured persons. The dispute was for a trifling matter of digging up of a portion of a water tube of a person of the *accused's* party. In these circumstances, it was observed that if the accused had come with the intention of taking the life of the two persons, than the four accused having pistols, could have immediately used their weapons and they would not have allowed the other accused having *lathi* and *pharsa*, to wield their weapon first, and therefore, the provisions of s 307, could not be said to have been attracted. Of course, the accused could be convicted under ss 326 / 149, IPC . It must be remembered that it is the date on which the injury was examined, and the circumstances of the incident which are to be taken into consideration for determining the nature of the offence committed by an offender. If, on the date of occurrence, the injury caused by the offender is not declared, it cannot be said to have had the intention to commit murder of the deceased merely because, about three weeks after the incident, the injury becomes grievous and dangerous to life.[34] In *State of Haryana v Hawa Singh* ,[35] it was observed that it is a matter of common knowledge that even a minor wound can cause a serious situation because of the negligence of a doctor to the recipient of the wound himself. Merely because a wound could become serious in future does not show that the nature of the injury, at the time of its infliction, was dangerous to life enabling the court to convict the accused person under s 307, IPC .

Where fire made by accused by pistol missed but the fire was followed by attack with sword, gupti and rod carried by the accused persons, medical evidence showing injuries corroborated the prosecution case, conviction of the accused for offence under ss 307 / 149, IPC was held proper.[36]2707

14. Intention may be Proved by *Res Gestae*

Intent which is a state of mind cannot be proved by precise direct evidence, as a fact it can only be detected or inferred from other factors. Some of the relevant considerations may be the nature of the weapon used, the place where injuries were inflicted, the nature of the injuries and the circumstances in which the incident took place.[37]

Intention, because of not capable of being proved by direct evidence as a fact, can only be deducted or inferred from other facts which are proved. The intention may be proved by *res gestae*, by acts or events, previous or subsequent to the incident or occurrence. The various relevant circumstances,[38] from which the intention can be gathered, may be stated as under:

(i) nature of the weapon used;[39]
(ii) the place where the injuries were caused;[40]
(iii) the nature of the injuries caused;[41] and
(iv) the opportunity available to the accused.

In cases under s 307, IPC, the court should carefully consider the provisions of ss 324, 326 and 307, IPC . The circumstances, in which the injury has been caused, should also be considered.[42]

When medical certificate revealed that victim suffered 12 incised wounds, the intention to commit offence under s 307 can be gathered.[43]

15. Nature of Injury and Intention

Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The sections make a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, it is not correct to acquit an accused of the charge under s 307, IPC

merely because the injuries inflicted on the victim were in the nature of a simple hurt.[44]The intention to commit murder can be gathered either from the act of the accused or from the impact of the injuries.[45]

Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances2708 that the injury inflicted by the accused was simple or minor will not by itself rule out application of s 307, IPC . The determinative question is intention or knowledge, as the case may be, and not nature of the injury.[46]

It is sufficient to justify a conviction under s 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, an accused charged under s 307, IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.[47]

The doctor in injury report had not stated that the injury of the victim in the ordinary course of nature was sufficient to cause death. Conviction of the accused under s 307, IPC was altered to one under s 308, IPC and sentence was reduced to the period already undergone.[48]

16. Intention or Knowledge

Intention of or knowledge relating to the commission of murder and the doing of an act towards it are the two ingredients of the offence under s 307, IPC .[49]

For the purpose of s 307, IPC what is material is the intention or the knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. The section clearly contemplates an act which is done with intention of causing death but which fails to bring about the intended consequence on account of intervening circumstances. The intention or knowledge of the accused must be such as is necessary to constitute murder. In the absence of intention or knowledge which is the necessary ingredient of s 307, there can be no offence 'of attempt to murder'.[50] The question whether the accused had intention or knowledge that death would be caused by his act is a question of fact dependent upon the facts of each case.[51]

Intention to kill is the most important ingredient of the offence under this section and if this is not proved, no conviction can be had under the section even if the act committed is sufficient to cause death under normal circumstances. [52]Section 307 requires that the act must be done with such intention or knowledge and under such circumstances that if death be caused by that act, the offence of murder will emerge. If, in the light of the medical evidence, this requirement is not satisfied, no conviction under s 307 can be sustained.[53] Where the accused persons entered the2709 office of the victim, strangulated him by throwing a telephone wire around his neck, held, the accused had intention to cause the death of the victim, they were convicted under s 307, IPC .[54]Section 307, IPC does not contemplate that the hurt/injury caused should be grievous or of any particular degree or kind.[55]

The appellant accused fired gun shots at the victim injured which was proved by the evidence of the eye-witnesses present on the spot. Prosecution story was corroborated by medical evidence. The doctor deposed that injuries received by the victim could be caused by gun shots. It was immaterial that the injuries were not caused on vital parts of the body of the injured. FIR was filed promptly in the case. The accused could be imputed with the knowledge that his act might cause the death of the injured. Accused was convicted under s 307, IPC .[56]

Where several accused persons attack an unarmed person there is ground to presume that the accused persons had intention/knowledge that the attacks would cause death the victim.[57]

The evidence did not indicate that there was any intention or motive for the accused to assault the victims. The injuries received by the victims were on non-vital parts of their body, none of them either individually

or collectively were likely to cause danger to the life of the injured persons. The intention of the accused persons to commit the murder of the injured was not at all made out. Accused appellants were acquitted of the charge under s 307, IPC .[58]

'Or Knowledge'

'Knowledge' is an alternative ingredient of an offence or murder under s 300, IPC . Hence, an offence under s 307, IPC, can be said to have been committed even if knowledge and not intention, on the part of an accused is proved to the effect that the act in question is so dangerous that it must, in all probability, cause the death of the victim.[59] It must be remembered that the knowledge required under this section, is the knowledge, referred to in cl 4 of s 300, and not the knowledge, referred to in cl 3 of s 299 .[60]Where a person, offended by an act of another, deliberately arms himself with a *chhuri* (knife), enters the latter's house in darkness and strikes him on the neck, causing him an injury, he must be deemed to have intended to cause that other's death or at least, to have had the knowledge that the result of his act would be death. If, however, the victim escapes death, the offender would be liable under this section.[61]If a man, with an evil intent, fires at another at close range, he must be deemed, at least, to know that his act is likely to cause death, and if the victim escapes death, he would be liable under this section.[62]2710

Intention/knowledge of the accused and not injury relevant

It is sufficient to justify a conviction under s 307, IPC if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. An accused charged under s 307, IPC cannot be acquitted merely because injuries inflicted on the victim were in the nature of a simple hurt.[63]

17. 'And Under Such Circumstances'

In order to constitute the offence under this section, the act in question must be done not only with the intention or knowledge, but also under such circumstances that if death is caused by that act, the person, doing the act, would be guilty of murder. Justice Straight, in *Empress v Niddha* ,[64] dissenting from the view, taken by Couch J in *Reg v Francis Cassidy* ,[65] observed that the words 'under such circumstances' have no other meaning than this that the act must be done in such a way and with such ingredients, that if it succeeded, and if death was caused by it, the legal result would be murder according to s 300 .[66] An almost similar view was taken by Beaumont CJ, in *Vasudeo Balwant Gogte v Emperor* ,[67] where he observed:

> But if you have an act done with a sufficiently guilty intention and knowledge and in circumstances, which do not, from their nature, afford a defence to a charge of murder, and if the act is of such a nature as would have caused death in the usual course of events but for something beyond the accused's control which prevented that result, than it seems to me that the case falls within s 307 .

Justice Teja Singh, in *Bakhshish Singh v State* ,[68] agreeing with Straight J and Beaumont CJ, explained the meaning of the words 'and under such circumstances' thus:

> ...these words have nothing to do with the question whether the act, committed by the accused, could, or could not, cause the death, but relate to the nature of the offence which the accused would have committed of the act did cause death.

It must be remembered that the view taken by Straight J in *Empress v Niddha* ,[69] and Beaumont CJ in *Vasudeo Balwant Gogte v Emperor* ,[70] is in consonance with the interpretation of the Supreme Court in

Om Prakash v State of Punjab. [71]If a person, who has an evil intent, does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in mind, he is not entitled to plead, in his aid, an obstacle intervening not known to himself. If he did all that he could do and completed the only remaining proximate act in his power, he2711 cannot escape criminal responsibility, and this is because his own set volition and purpose, having been given effect to, to their full extent, a fact unknown to him and at variance with his own behalf, intervened to prevent the consequences of that act which he expected to ensue, ensured.[72]

Accused appellants had chopped off victim's leg by axe. They were held guilty of offence under s 307, IPC, even though the injury caused could not be held under the ordinary circumstances sufficient to cause the death of the victim.[73]

18. 'If he, by that act, caused death'

The words 'if he, by that act, caused death' necessary imply that the act must be capable of causing death. An act intrinsically incapable of causing death, like witchcraft or pulling of the trigger of an unloaded gun, cannot constitute the offence.[74] The means must be apparently, though not really, suitable so that they can be adapted to the designed purpose. Well-laid plans, after careful preparation, are sometimes unexpectedly foiled and rendered ineffectual. The best firearms, loaded, capped, primed and well-aimed, any misfire. It may even be that the party, shot at, may be wearing a jacket of impervious mail or the shot may hit a bullet-proof object inside a pocket, *eg*, metal clasp of a pocket-book or of a purse or of a cigarette case. In all such cases, the accused is guilty of the offence of attempt to commit murder. However, if the means adopted are such as are apparently and also absolutely inadequate to accomplish the designed purpose, then the case for attempted murder cannot be made out. This is illustrated when a man threatens the life of another with a child's popgun, using a cork or similar innocuous thing, as a projectile.[75] In Re *Maragatham,*[76] Ramswami J, observed:

> To constitute an indictable attempt to commit a crime, its consummation must be apparently possible or, in other words, there must be, at least, an apparent ability to commit it. If the means employed are so clearly unsuitable that it is obvious that the crime cannot be committed of if its consummation is dependent on the conduct of a third-person-principal, who has an opportunity to frustrate it, the attempt is not indictable. On the other hand, if there is an apparent ability to commit the crime in the way attempted, the attempted is indictable.

19. Illustrative Cases

Tangi and Tangia

In general, an axe is termed both *tangi* and *tangia* colloquially, as such these are two distinct weapons.[77]

Abandonment Cases

Illustration (b) to this section gives an example of a case when abandonment of a child amounts to an offence under this section. However, if *A* does not expose the2712 child but leaves it well-wrapped and protected from cold and that too not in a deserted place, but in a place, not far off from the house and the footpath, where the villagers are in the habit of grazing cattle, so that the villagers can easily find it, the offence falls under s 317 .[78]

Drowning Cases

In a case, the accused a woman, in the course of a quarrel with her sister-in-law and in a fit of anger, flung her child, aged three years, into a pond, on the edge of which her house was situated, and, at the same time, gave expression to a wish that the death of the child should rest as a curse on the head of the

woman with whom she was quarrelling. Fortunately, there were bystanders about and one of them picked up the child and saved its life. It was also found that the water in the pond was not less than four feet deep. It was held that to throw a child of three years into water four feet in depth gives rise to a presumption that the intention was to cause its death, even though there may have been bystanders ready to pick the child out without loss of time, that the words, used by the accused when flinging the child, also indicated such an intention, and that the accused was, therefore, guilty of the offence under this section.[79] In Re *Maragatham,*[80] the two accused, who were husband and wife, and were starving for want of means and employment, determined to put an end to their own lives and also that of their infant child. With this determination, they proceeded towards a well, tied themselves together and jumped into it. They were, however, saved from drowning. However, the child, who slipped from the hands of the mother, while they were jumping, drowned to death. It was held that, though the accused had the intention to cause the death of the child, its death was not directly caused by their act, but by accident of the child slipping, and that the accused were guilty of an offence under this section, and not of murder.

Poisoning Cases

A, intending to kill *B,* gives him large doses of opium in his milk. Unknown to *A, B* is a confirmed opium-eater with the result that the opium has little or no effect on *B. A* has attempted to kill *B.*[81] Where a woman of 20 years of age was found to have administered *dhatura*, to the members of her family, it was held that she must be presumed to have known that he administration of *dhatura*, was likely to cause death, even though she might not have administered it with that intention, and as the woman's act might have resulted in death, she was guilty under this section.[82] Powdered glass, mixed with food, may possibly cause death of the person eating it, and the person, administering it with the intention of causing death, is liable under this section if death has not resulted from it.[83] Where it was proved that the accused put into the food cooked for the complainant's family, some vegetable similar in appearance to fragments of *dhatura* seeds, and it gave physiological reactions, similar to those produced by atropine, but there was no evidence of the quantity of the poison found in the food, or of its possible effects on anyone who might have eaten it, it was held that it was not possible to say that the accused intend to cause2713 anything more than hurt and that the accused could be held guilty only of the offence under ss 328 and 511, IPC .[84]

Attack by Brickbats

Where prosecution case was that the accused R had thrown brickbats causing injuries to one member of complainant party, but the doctor had stated that none of the injuries was caused by brickbats, conviction of the accused R under s 307, IPC was set aside.[85]

Shooting Cases

Mere firing does not raise inference of attempt to murder fire should be specifically aimed. The *mens rea* required under s 300, IPC has to exist. There should also exist an effective act to achieve the end of killing. Once an accused fires his firearm to shoot the victim, an offence under this section is made out if something happens to prevent the shot taking effect.[86] Firing even two to three shots successively at another indicates a murderous intent.[87] If a person fires several shots with a rifle at a person, it would ordinarily mean that the wants to kill that person. The fact that the person fired at was not killed does not mean that the person firing did not intend to kill him.[88] Likewise, a person firing at the body of another at close range, must be taken to have, at least, the knowledge that he is thereby likely to cause his death. If the shot takes effect on or about the feet of the victim and causes only a simple injury, an intention to cause death may be inferred.[89]

Where the accused lowered down his range and aimed only at the thigh of the victim, and the injury caused was very simple, it was held that these facts indicated that the accused had no intention to murder.[90] When the only evidence against accused was that he aimed gun shot only at the leg of injured, which resulted in fracture. In this view of the evidence it cannot be said that accused intended to cause death or to cause such bodily injuries which may be sufficient to cause his death in the ordinary course of nature, so as to bring the offence within the purview of s 307, IPC . Thus considering the part of body at which the gun shot was fired and taking in view the fact that accused did not repeat the shots, as also the

fact that he fired gun shot at the leg and caused fracture, it must be held that accused voluntarily caused grievous hurt by dangerous weapon *viz*, the gun and hence he must be held liable for committing offence under s 326 IPC and not under s 307, IPC .[91] The mere use of the gun,[92] or of a country-made pistol on a non-vital part of the body from a close2714 range,[1] will not make the offence punishable under this section. Even pulling the trigger would not amount to an offence under this section if the gun is not proved to have been loaded because it is quite possible that the person firing was only trying to frighten the complainant.[2] No assumption can be drawn that by use of firearm in causing injuries on non-vital part of the body, the accused had intention to cause death of the injured. Intention of the accused has to be proved from the nature of the injuries actually received, the part of the body where he caused injuries, number of injuries, the force which he used in causing such injuries and other surrounding circumstances of the case. The prosecution is under an obligation to establish whether or not injury caused by the accused.[3] It must be proved that the accused, while firing the gun, had intended to fire at the victim.[4]If a man fires a loaded gun with a guilty intention or knowledge, he cannot escape liability simply because a fact, unknown to him and at variance with his own belief, intervenes to prevent the consequences of his act, which he expected to ensue.[5] Where the accused fired a country-made pistol from a close range at the upper part of the body of the complainant and not at the lower non-vital parts, it was held that even though the complainant had taken to his heels, the knowledge, contemplated by the section, could be easily attributed the accused and an offence under this section, and not under s 324, was made out.[6] Mere non-examination of fire-arms by a ballistic expert is not fatal for prosecution case.[7]

Where three miscreants appellants were said to have fired when they were surrounded by the police party but none of the police officials had received any injury, the prosecution story was adjudged doubtful, accused appellants were acquitted of the charge under s 307, IPC and s 25 of the Arms Act.[8]

Shot Fired by Accused did not Hit Victim -- Acquittal not Interfered

The shot fired by the accused did not hit the victim. As the propensity to implicate falsely is not uncommon in India. Accused respondent was acquitted of the charge under s 307, IPC .[9]

Where the appellant had fired a shot which missed the target, his conviction under s 307 IPC was maintained. The sentence, however, was reduced from ten years to five years.[10]

Firing at Police Party

The prosecution case was that accused with armed nexallites opened fire on the police party, the fire continued for two hours. No one of the police party was hurt. No empty cartridges were recovered from the spot. The accused were arrested from the place near the incident. The prosecution witnesses divergent versions about the2715 incident. Accused were entitled to benefit of doubt and acquitted of the charges under ss 307 / 149, IPC .[11]

The accused was driving car, on interception by Police Officer (ASI), in scuffle the accused snatched service revolver of the ASI and was alleged to have fired at him. All the public witnesses turned hostile, did not support the prosecution case. Injury caused was superficial abrasion. There was lot of discrepancy in regard to the manner in which the incident had taken place. The bullet holes in the pant of the ASI were found inconsistent with the case of single shot of the prosecution. Seizure witnesses also turned hostile. Appellant was acquitted of the charge under s 307, IPC .[12]

Accused Firing Shot not Identified, Acquitted

Even the injured did not identify the appellant to be the person who had fired the shot. Merely because he is the owner of the weapon that cannot be a ground to convict him in terms of s 307, IPC . No question was put to the appellant in his examination under s 313, CrPC regarding his purported role. Accused appellant was acquitted of the charge under s 307, IPC .[13]

Accused Firing in Air

The appellant accused fired in the air from his licensed gun only with an idea to scare away the aggressor

and in pursuance of right of private defence of his property and life. Accused appellant was acquitted of the charge under ss 307 / 149, IPC .[14]

Accused Pulled Trigger of Weapon--Did not Fire

Where the evidence was that the accused by a country-made pistol targeted the informant but did not fire. There was no ejectment of shot from barrel. Held, the case would not be covered by s 307, IPC .[15]

The appellant accused was alleged to have stabbed PW2 with a knife while co-accused was driving the scooter. PW2 was an injured witness who was the victim of the assault and PW3 was accompanying him. The offence weapon knife was recovered at the instance of the appellant accused. On scrutiny of the evidence of PW2 and the medical evidence, the court held that medical evidence corroborated the statement of eye-witness PW2. Conviction of the appellant accused under s 307, IPC was held proper.[16]

Stabbing Cases

The presence of two incised wounds on the head and nose, which were both bone deep and were caused by a spear, coupled with severe fractures of bones of other parts of the body, do lead to an inference that it was the intention of the assailants to2716 cause death.[17] However, mere intention to cause even grievous injuries is not sufficient to bring the offence within the mischief of this section. Where, therefore, the common object of the accused was not to cause death, but only grievous injuries, it was held that s 307 could not apply.[18] Where it is found that the immediate purpose of the accused was to release himself from a constable's hold, the fact, that he inflicted a wound on the chest of the constable with a knife, is not sufficient to prove the requisite intention or knowledge.[19] Where only one stab was given, and there was nothing to show that the injury inflicted was likely in the ordinary course of nature to cause death, it was held that the mere fact that if sepsis or gangrene had intervened, it would have endangered life, is not sufficient to come to the conclusion that it was an attempt to murder.[20] Where a person pushed the accused, who fell down and on getting up, took out a knife and attacked that person, but inflicted only trivial injuries, it was held that it was not safe to convict him under this section and that he could be convicted only under s 324 .[21]

Where accused threatened that he would kill the victim, and thereafter, took out a knife and gave a blow on the stomach of the victim, he could not be safely imputed with the knowledge that the blow given by him would be likely to cause death of the victim and so accused was liable under s 307, IPC .[22] A simple hurt caused by the accused voluntarily by means of a knife is only an offence under s 324, IPC .[23] Where three out of the four injuries caused by four or five persons by means of deadly weapons were simple and the fourth one, caused by the appellant, though endangering life, could not be deemed to be an injury which would have necessarily caused death but for timely medical aid, it was held that the appellant could be convicted under s 326, IPC, and not under s 307, IPC .[24] The accused had inflicted six knife injuries on the person of the injured, out of which two injuries were of grievous nature, whereas the other injuries were simple. The guilt of the accused fell under s 307 and not under s 308, IPC .[25]

Accused appellants along with others had gone to the shop of the complainant to settle certain dispute. One of the accused persons with the assistance of the accused appellant who had caught hold of the injured, inflicted knife injuries, the conviction of the accused appellant under ss 307, 323 with the aid of s 34, IPC was held proper.[26]

Sword Cases

The accused tried to assault the police officer deputed to search his house, when he entered his house along with his staff, but the police officer escaped. Thereafter, the accused attacked him with a sword, but he again escaped. On being nabbed, the2717 accused threatened to kill the police officer. A charge of this nature when there is not even an injury upon the victim cannot lead to an inference that there was any attempt to kill when the incident took place.[27]

Where the accused persons alleged to have inflicted sword injuries upon the deceased and eyewitness, and the prosecution evidence was found satisfactory, there was complete corroboration between medical

and ocular evidence, the conviction of accused persons under ss 302 and 307, IPC was upheld.[28]

Accused persons had attacked the deceased with sword. In post mortem examination eight cut and curved injuries were found on the body of the deceased. The testimony of the brother of the deceased was found reliable. He was natural witness. There was no reason for false implication of the accused. Conviction under ss 302 / 307, IPC was held proper.[29]

Starvation Cases

In a Madras case, the accused enticed into her house a boy aged nine years, used violence and removed several jewels from his person and being unable to remove his anklets and earrings, tied his wrists and neck with a rope, put a cloth in his mouth, took him into a room and made him sit in a receptacle which was only 22 inches deep, all night and put a mill-stone around him but later replaced the mill-stone. The boy untied the rope and, owing to the omission of the accused to watch the receptacle and the room, got out in the morning and ran away. Holding that the accused was properly convicted under this section, it was observed that it is immaterial how death might result, whether from suffocation, from terror or from starvation; it is sufficient if the final act was done and if, under the circumstances it was done, it was such as might result in death, any subsequent carelessness in watching the jar or the room would make it nonetheless an offence punishable under s 307 .[30] In *Om Prakash v State of Punjab* ,[31] the accused deliberately starved his wife and kept her locked in a room; she was not allowed to leave the house and only sometimes a morsel or so used to be thrown at her as alms are given to beggars. She was denied food for days together and used to be given gram husk, mixed in water, after five or six days.

She was kept locked inside a room. One day, however, she found her room unlocked and managed to reach the civil hospital in a state of extreme emaciation. The doctors found her condition to be alarming and critical, but medical treatment saved her life. It was held that the accused was guilty of the offence under this section.[32]

Burn Cases

A scuffle over payment of rickshaw charges led the accused customer to pour kerosene on the rickshaw puller and set him on fire. The evidence of victim was corroborated by the evidence of neighbours of the accused who tried to extinguish the fire. Any person, who pours kerosene on another and sets him on fire must be2718 presumed to know the nature of the act committed by him and if in such circumstances, death ensues, it would be deemed to be a murder under the fifth clause of s 300, IPC . Therefore, the conviction of the accused under s 307, IPC was found proper.[33]

20. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and triable by a court of sessions.

Though the offence under s 307, IPC is non-compoundable, yet the factum of compromise between the accused and the complainant can be taken into consideration for determining the quantum of sentence.[34]

21. Compromise

Accused persons armed with iron rod and strips of iron had inflicted grievous injuries on the head of the victim. Offence under s 307, IPC is non-compoundable. Offence cannot be compounded merely because it is a crime against an individual order of the High Court accepting compromise and recording order of acquittal was set aside.[35]

22. Cognizance

While taking cognizance of an offence, a magistrate is under obligation and is required to apply his judicial mind on the material on record and he should not be guided or influenced by any concession made by a

public prosecutor to take cognizance of offence under s 326 instead of s 307, IPC . The concession made by the public prosecutor while disposing of a bail application has no relevance and is rather immaterial, and such concession cannot form the ground for taking cognizance by a magistrate.[36]

23. Compounding of Offence under Section 307

Where the accused persons were acquitted by the trial court, but were committed by the High Court for an offence under s 307, this offence was not compoundable under s 320, CrPC . There was a counter case arising out of the same transaction which has already been compromised by the parties. The parties in a special leave petition before the Supreme Court challenging the validity of the conviction wanted to have the offence compounded. After examining the nature of the case and the circumstances under which the offence was committed, the Apex Court directed the trial judge to accord permission to compound the offence, after giving an opportunity to the parties and after being satisfied with the compromise agreed upon.[37] This view of the Supreme Court was taken into consideration by a Division Bench of Calcutta2719 High Court in a case[38] and it was held that an offence under s 307 is not compoundable in view of s 320, CrPC and so, it cannot be made compoundable by invoking a Supreme Court decision compounding a non-compoundable offence as a special case.

Where the complainant and the victim had settled dispute amicably with the accused persons, in the interest of justice, proceedings under ss 307 and 504, IPC were quashed.[39]

Compounding of Offence by Invoking Inherent Powers--Permissibility

The injured suffered grievous injuries and multiple fractures. He remained hospitalised for about one year. He had suffered permanent disability on account of injuries sustained. A competent court has found the appellants/accused guilty of the offences committed in the aforesaid gruesome manner. These are offences against the society. When a person is accused of committing an offence under s 307 read with s 34, IPC in such a gruesome manner, the court need not in the exercise of inherent powers quash the criminal proceedings or allow compounding even though s 320 of the CrPC does not limit or affect the powers under s 482 of CrPC . In such cases, law should be permitted to take its own course and the matter ought to be decided on merits. The persons, who are accused of committing offences in such a gruesome manner, cannot be permitted to set at naught their prosecution by means of affecting a monetary settlement even if the complainant had retracted his statement and supports the settlement. This is a case, where criminal justice system cannot be permitted to be bartered on the plea of settlement, enabling the parties to live in harmony, especially when the settlement is arrived at for commercial considerations.[40]

24. Section 307 , the Indian Penal Code 1860, and Section 167(2) , Code of Criminal Procedure 1973

A perusal of s 307 would show that where hurt is not caused, the punishment may extend to 10 years and fine. The expression 'which may extend to ten years' used in s 307, includes a sentence of 10 years. In other words, even in an offence under s 307, where hurt is not caused, punishment of ten years can be imposed and if punishment of 10 years can be imposed in such a case, the period for completing the investigation under s 167(2)(a)(i), CrPC would be 90 days.

The expression 'not less than 10 years used in s 167(2)(a)(ii), CrPC would include offences wherein a sentence of no injury under s 307 can be awarded. Since in a case of no injury under s 307, imprisonment of ten years can be awarded, s 167(2)(a)(i), CrPC would be applicable and the period for completing the investigation would be 90 days. It is only where the period of imprisonment is less than ten years that the investigation has to be completed within 60 days in terms of s 167(a)(ii), CrPC .[41] Therefore, in a case under s 307 where hurt is not caused to the victim, the accused is entitled to bail when investigation is not completed within 90 days and not when investigation is not completed within 60 days.2720

25. Bail

The allegations in the FIR were that the accused and his companion assaulted the complainant with hockey-sticks and *lathis* with a view to kill him. However, the injuries caused to the complainant were of such nature that bail may not be refused to the accused despite an offence under s 307 indicated in the chargesheet. Although Uttar Pradesh Gangsters and Anti-social Activities (Prevention) Act 1985 bars the jurisdiction of the court to grant bail, but a special law overrides a general law in so far as they are inconsistent. However, if the special law was not a complete code, then the general law would prevail over the special law. As the said Act is not a complete code and does not restrict the powers under s 439, CrPC to deal with bail applications, even s 19 of the said Act puts a bar on the exercise of power under s 439, CrPC, the court can find out by looking at FIR if person seeking bail has been accused of an offence punishable under the said Act, the court can grant bail depending upon facts and circumstances of the case irrespective of the bar under the said Act.[42]

Where an advocate attacked the presiding officer of the court in his chamber and the injury caused to presiding offence was not of a serious nature, the plea of the accused that he sometimes became mentally unbalanced and hence may have attacked the presiding officer cannot be a deciding factor at the time of grant of bail, and in the facts and circumstances of the case, the bail was refused.[43]

28 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

29 Inserted by Act 27 of 1870, s 11 .

30 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

31 Inserted by Act 12 of 1891, s 2 and Sch II.

32 *Mohindar Singh v State* AIR 1960 Punj 135, p 138 .

33 *Mohindar Singh v State* AIR 1960 Punj 135, p 137 ; *Moidu v State of Kerala* (1967) Ker LT 223 .

34 Re *Maragatham*AIR 1961 Mad 498 ; *Kalu Ram Brahma v State of Assam* (1977) Cr LJ 98, p 99 (Gau) ; *Tulsa Devi v Chhote Singh* (1981) 8 Cr LJ 24 (Punj) .

35 *Russel on Crime,* eleventh edn, p 187; *Mansuri Nizamuddin v State* AIR 1955 Pat 330 .

36 *State of Maharashtra v Balram Bama Patil* AIR 1983 SC 305, (1983) Cr LJ 331 (SC) ; *Brahmanand v State of Rajasthan* AIR 1970 Raj 220, p 222, (1970) Cr LJ 1512 ; *Sarju Prasad v State of Bihar* AIR 1965 SC 843, p 844 ; *Rameshwar v Emperor* AIR 1935 Oudh 281, p 284, 36 Cr LJ 534 ; *Manik Bandu Gawli v State of Maharashtra* (1998) Cr LJ 2246 (Bom) ; *State of MP v Kedar Yadav* (2009) 17 SCC 280 .

37 *John alias Kunjukutty v State of Kerala* (1969) Ker LT 488, p 497 ; *Sarju Prasad v State of Bihar* AIR 1965 SC 843 ; *Rekha Mandal v State of Bihar* (1968) 1 SCWR 14 .

38 *State of MP v Kedar Yadav* (2009) 17 SCC 280, 2006 (12) Scale 629 .

39 *State of MP v Mohan* 2013 Cr LJ 4007, p 4010, 2013 AIR SCW 5150, AIR 2013 SC 3521 ; *Anjani Kumar Choudhary v State of Bihar* AIR 2014 SC 2740, 2014 Cr LJ 3798, (2014) 12 SCC 286 .

40 *Shabbir Malihabadi v State of Uttar Pradesh* (1981) All WC 28 .

41 *Bharat Dube v Emperor* AIR 1941 Pat 51, 42 Cr LJ 303 ; *Sarju Prasad v State of Bihar* AIR 1965 SC 843, p 844 ; *Ramla v State* (1963) 1 Cr LJ 387, p 390 ; *Wazira v Emperor* AIR 1940 All 113, p 114, 41 Cr LJ 362 ; *Badshah Singh v State* AIR 1958 All 677, 58 Cr LJ 1112 ; *Pracho Kewalram v Emperor* AIR 1944 Sind 83 (FB), 45 Cr LJ 598; *Crown v Gangoo* AIR 1941 Nag 302, 43 Cr LJ 54 .

42 *Pooran Singh v State* (1981) Cr LJ (NOC) 60 (All) .

43 *Kamlesh Kumar Dixit v State* (1981) Cr LJ (NOC) 92 (All) ; *Ramsahai v State of Madhya Pradesh* (1981) Cr LR 174 (MP High Court Notes); *Pratap Singh v State of Uttaranchal* (2001) Cr LJ 3154 (DB) ; *Ranveer Singh alias Rana v State of Uttar Pradesh* (1997) Cr LJ 2266 (All) .

44 *Ram Chander v State* AIR 1960 Punj 282, p 283, (1960) Cr LJ 651 ; *Jagrup Singh v State of Punjab* (1973) Chand LR 253 ; *Naran Swain v State of Orissa* (1973) 1 Cut WR 142 .

45 *Ram Chander v State* AIR 1960 Punj 282, p 284, (1960) Cr LJ 651 ; *Provincial Government v Abdul Rahman* AIR 1943 Nag

145, p 148 ; *Ghulam Qadir v Emperor* AIR 1937 Lah 619, p 620 ; *Vasudeo Balwant v Emperor* AIR 1932 Bom 279 ; *Bharat Dube v Emperor* AIR 1941 Pat 51 ; *Amavasa Nadan v Emperor* (1937) Mad WN 556 ; Re *Maragatham*AIR 1961 Mad 498 ; *Mutalli v Emperor* AIR 1930 Lah 253, 31 Cr LJ 782 ; *Bakhshish Singh v State* AIR 1952 Pepsu 138 ; *Gaya Prasad v State* AIR 1954 All 59 ; *Ram Rattan v State* AIR 1959 J&K 119 .

46 *Ramla v State* (1963) 1 Cr LJ 387, p 389-90 ; *Ram Chandra Bhairu Shingate v State of Maharashtra* (1971) 73 Bom LR 811*; Prakash Chandra Yadav v State of Bihar* 2008 Cr LJ 438 (SC), 2007 (2) Scale 368 .

47 *Ramla v State* (1903) 1 Cr LJ 387, p 389-90 .

48 *Prakash Chandra Yadav v State of Bihar* 2008 Cr LJ 438, p 440 (SC), 2007 (12) Scale 368, 2007 AIR SCW 6798 .

49 *Vide Halsbury's Law of Singapore*.

50 *Selvaraju s/o Satippan v PP* (2005) 1 SLR 238 .

51 *PP v Ng Kwok Soon* (2002) 3 SLR 199 .

52 *Saeng-Un Udom v Public Prosecutor* (2001) 3 SLR 1 - 12 May 2001.

53 *Parsuram Pandey v State of Bihar* (2004) Cr LJ 4978 (SC), 2004 AIR SCW 5779 ; *Sagayam v State Karnataka* 2000 AIR SCW 2225, (2000) 4 SCC 454 ; *Merambhai Punjabhai Khachar v State of Gujarat* AIR 1996 SC 3236, 1996 AIR SCW 2094 ; *Sumersingh Umedsingh Rajput v State of Gujarat* 2008 Cr LJ 1388 (SC), AIR 2008 SC 904, 2008 AIR SCW 302, 2007 (8) Supreme 457, 2007 (14) Scale 74 .

54 *State of Maharashtra v Kashirao* (2003) Cr LJ 4464 (SC), AIR 2003 SC 3901 .

55 *State of Madhya Pradesh v Kedar Yadav* (2011) 1 SCC (Cri) 1008 ; *Ajay v State of Chhattisgarh* 2013 (2) Crimes 283 (Chh) ; *Anil Kumar v State of UP* 2013 (2) Crimes 325 (Utr) .

56 *MB Suresh v State of Karnataka* 2014 Cr LJ 1104, p 1106, (2014) 4 SCC 431, (2014) 135 AIC 263 .

57 *Abdul Wahid v State of Uttar Pradesh* (1980) Cr LJ (NOC) 77 (All) ; *Thansingh v State* (1981) Cr LR 46, p 49 (MP High Court Notes) ; *Sardarsingh v State* (1981) Cr LR 33, p 35 (MP High Court Notes) ; *Latura v State of Madhya Pradesh* (1981) Cr LR 5, 6 (MP High Court Notes); *Keshaba Mudull v State* (1973) 2 Cut WR 1685 .

58 *Naran Swain v State of Orissa* (1973) Cr LJ 892, 894, (1973) 1 Cut WR 142 .

59 *Devi Singh v State* (1981) Cr LR 106, p 110 (MP High Court Notes) 106; *State of MP v Kashiram* 2009 Cr LJ 1530, AIR 2009 SC 1642, (2009) 4 SCC 26 ; *Sri Ram v State of Rajasthan* 2013 (129) AIC 390 (Raj) ; *Papuleti Siva Ramakrishna Rao v State of AP* (2014) 5 SCC 369 (Hurt caused need not be of a particular decree).

60 *Jash Punnarao v State of Andhra Pradesh* (1985) Cr LJ 16 (AP) .

61 *Empress v Niddha* ILR 14 All 38 .

62 *Reg v Francis Cassidy* 4 Bom HCR (Crown Cases) 17.

63 *Jiwandas v Emperor* 30 PR (Cr) 1904 (Punj).

64 *Vasudeo Balwant Gogte v Emperor* AIR 1932 Bom 279, ILR 56 Bom 434 .

65 *Empress v Niddha* ILR 14 All 38 **overruled** on another point in *Om Prakash v State of Punjab* AIR 1961 SC 1782 .

66 *Om Prakash v State of Punjab* AIR 1961 SC 1782 .

67 *Matiullah Sheikh v State of West Bengal* AIR 1965 SC 132, p 134, (1965) 1 Cr LJ 126 .

68 *Rauf v State* AIR 1978 SC 1604, p 1605, (1978) Cr LJ 1474 .

69 *Ganga Singh v State* (1980) Cr LJ 235, p 240 (All) (DB) .

70 *Lalla Rai v State of Bihar* (2003) Cr LJ 465 (SC) .

71 *State v Roshan Singh* (1996) Cr LJ 2884 (SC) .

72 *Moolchand v State* AIR 1955 Bhopal 9, p 13, (1955) Cr LJ 1033 ; *Lakhan Singh v State* (1977) All Cr Cas 69, p 73 ; **butsee***Elengbam Dharma Singh v State of Manipur* AIR 1952 Manipur 2, p 3, (1952) Cr LJ 1500 ; *Sidhu v State* (1973) MPLJ 721, (1973) Jab LJ 934 .

73 *Nauransi Mahto v State* (2001) Cr LJ 1525 .

74 *Mohamad Arif v State of Gujarat* (1997) Cr LJ 65 (SC) .

75 *Santosh Kumar v State* (1997) Cr LJ 984 (All) (DB) .

76 *Gahininath Jagannath Shirsath v State of Maharashtra*(2007) Cr LJ (NOC) 445 (Bom), (2007) 2 AIR Bom R 820.

77 *Sagayan v State of Karnataka* (2000) Cr LJ 3182 (SC) .

78 *Rajan alias Rajendra Brahman v State of Madhya Pradesh* (2000) Cr LJ 2423 (MP) .

79 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698, p 1703, (1961) 2 Cr LJ 822 ; *State of Bihar v Jagdish Narain Singh* AIR 1959 Pat 376, p 377, 1959 Cr LJ 1014 ; *Re R Mac-Crea* ILR 15 All 173; *Chokhey v State* 1968 Cr LJ 218 .

80 *Jain Lal v Emperor* AIR 1943 Pat 82, 44 Cr LJ 337 ; *Reg v Padala Venkatasami* ILR 3 Mad 4 ; *King v Tustipada Mandal* 52 Cr LJ 837, AIR 1951 Ori 284 ; Re *R Mac-Crea* ILR 15 All 173; Re *Maragatham*AIR 1961 Mad 498, 502.

81 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698 **reaffirmed** in *Om Prakash v State of Punjab* AIR 1961 SC 1782 .

82 *State of Maharashtra v Mohd Yakub* AIR 1980 SC 513, p 518, (1980) 3 SCC 57 .

83 In Re *T Munirathnam Reddy*AIR 1955 AP 118, 56 Cr LJ 917 ; *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698, p 1703 .

84 *State of Maharashtra v Bodya Ramji Patil* (1978) Cr LJ 411 (Bom) ; *Gurcharan Singh v State of Punjab* (1970) 72 Punj LR 526 .

85 *Om Prakash v State of Punjab* AIR 1961 SC 1782, p 1787 .

86 *Emperor v Nunnhi Bahu* 11 Cr LJ 48 .

87 *R v White* (1910) 2 LR KB 124, 79 LJKB 854 ; *Lala v Emperor* 12 Cr LJ 125 .

88 *Empress v Niddha* ILR 14 All 38, **overruled** on another point, in *Om Prakash v State of Punjab* AIR 1961 SC 1782 ; *Emperor v Abdul Rahman* 10 Cr LJ 57 .

89 *Vasdeo Balwant Gogte v Emperor* AIR 1932 Bom 279, p 281 .

90 *Om Prakash v State of Punjab* AIR 1961 SC 1782, p 1787 ; *Ramla v State* (1963) 1 Cr LJ 387 .

91 *Gopi Nath Ghosh v State of West Bengal* (1984) Supp SCC 228, (1984) Cr LJ 168 .

1 *Kavi v State* (2004) Cr LJ 1652 (Del) .

2 *Queen v Peterson* ILR 1 All 316 ; *Reg v Padala Venkatasami* ILR 3 Mad 4 ; *Emperor v Srinivasan* ILR 25 Mad 726 .

3 *Empress v Niddha* ILR 14 All 38, **overruled**, on another point in *Om Prakash v State of Punjab* AIR 1961 SC 1782 .

4 *Province of Bihar v Bhagwat Prasad* AIR 1949 Pat 326, p 327, 50 Cr LJ 682 ; *State of Bihar v Jagdish Narain Singh* AIR 1959 Pat 376, p 377, (1959) Cr LJ 1014 .

5 *Buta Ram v State of Haryana* (1981) Cr LJ 461, 462 (Punj).

6 *Ganpathi Udayar v TA Chinnaya Mudaliar* AIR 1953 Mad 609, (1953) Cr LJ 1152 .

7 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698, p 1700 ; *State of Maharashtra v Mohd Yakub* (1980) SCC (Cr) 513, p 518, (1980) 3 SCC 57 .

8 *Awadhesh Mahto v State of Bihar* (1979) Cr LJ 1275, p 1277 .

9 *Rajan alias Rajendra Brahman v State of Madhya Pradesh* (2000) Cr LJ 2423 (MP) .

10 *Om Prakash v State of Punjab* AIR 1961 SC 1782 ; **overruling***Empress v Niddha* ILR 14 All 38 .

11 *Empress v Ramakka* ILR 8 Mad 5 .

12 Re *Maragatham*AIR 1961 Mad 498, p 500, (1961) 2 Cr LJ 781 ; Re *Bavaji*AIR 1950 Mad 44 ; *Narayanaswami Pillai v Emperor* AIR 1932 Mad 507, 33 Cr LJ 582 .

13 *Om Prakash v State of Punjab* AIR 1961 SC 1782 ; **overruling***Empress v Niddha* ILR 14 All 38, Re *R Mac-Crea* ILR 15 All 173.

14 *Mansuri Nizamuddin v State* AIR 1955 Pat 330, p 332, 56 Cr LJ 1092 .

15 *Gurmukh Singh v State of Punjab* (1973) Chand LR 290 ; *Udhab Charan Samal v State* (1973) Cut LT 303 .

16 *Ibid*.

17 *Dau Ram v State of MP (now Chhattisgarh),* 2015 Cr LJ 1327 (Chh) (DB) .

18 *Provincial Government v Abdul Rahman* AIR 1943 Nag 145, p 149 .

19 *Sardarsingh v State* (1981) Cr LR 33, p 35 (MP High Court Notes) 33; *Latura v State of Madhya Pradesh* (1981) Cr LR 5, p 6 (MP High Court Notes) ; *Thansingh v State* (1981) Cr LR 46, p 49-50 (MP High Court Notes) .

20 *Provincial Government v Abdul Rahman* AIR 1943 Nag 145, p 149 ; *Khuda Bakhsh v Emperor* AIR 1936 Lah 914, 38 Cr LJ 24 ; *Wazira v Emperor* AIR 1940 All 113 ; *Kanbi Nagli Kala v State* AIR 1966 Sau 107 ; *Thakar Das v State* AIR 1960 J&K 104, p 106, (1960) Cr LJ 1080 ; *Om Prakash v State of Punjab* AIR 1961 SC 1782, p 1785 .

21 *Sarju Prasad v State of Bihar* AIR 1965 SC 843, p 844 ; *Sanku Sreedharan v State of Kerala* (1969) Ker LT 472, p 482 .

22 *Lakhan Singh v State* AIR 1977 All Cr Cas 69, p 73 .

23 *Parsuram Pandey v State of Bihar* (2004) 13 SCC 189, 2004 Cr LJ 4978, AIR 2004 SC 5068 ; *Prakash Chandra Yadav v State of Bihar* 2008 Cr LJ 438 (SC), 2007 (12) Scale 368, 2007 AIR SCW 6798 .

24 *Maqbulan v State of Uttar Pradesh* (1965) All LJ 1128, (1965) All WR (HC) 829 ; *Surinder Singh v State* (1976) 78 PLR 867 (FB) .

25 *Gangadhar v State of Maharashtra* (1981) Cr LJ 1724, p 1727 (Bom) .

26 *Bakhshish Singh v State* AIR 1952 Pepsu 138 ; *Ramchander v State of Rajasthan* (1970) Cr LJ 653, p 659, (1970) Raj LW 118 .

27 *Kalu Ram Brahma v State of Assam* (1977) Cr LJ 98 (Gau) .

28 *Shivraj Singh v State of Uttar Pradesh* (1980) All LJ 337, p 341-42 (DB), (1980) All Cr Cas 70 (Summary of Cases).

29 Re *Balan*(1974) Cr LJ 857, p 858, (1973) Mad LW 206; *Ramakrishna Panicker v State of Kerala* AIR 1971 Ker 18, (1971) Cr LJ 57 .

30 *Sarju Prasad v State of Bihar* AIR 1965 SC 843, p 844 ; *Partap Singh v State of Punjab* (1981) 7 Cr LT 357, p 359 (Punj), in which it was held that no offence under s 307, IPC, can be made out when there is no motive on the part of the accused and there is no previous enmity, attributable to him, and the doctor has not opined that any of the injuries was dangerous or was sufficient in the ordinary course of nature to cause death.

31 Re *Radhi*AIR 1962 MP 239 .

32 *Farroq v State* (1980) All LJ 816, p 817 ; *Sucha Singh v State of Punjab* (1978) 80 PLR 61, (1979) CLR 264 (P&H) .

33 *Kali Charan v State* (1980) Cr LR 20 (UP), (1980) All Cr Cas 68 .

34 *Rattan Singh v State of Punjab* (1980) 7 Cr LT 154, p 155 (Punj) .

35 *State of Haryana v Hawa Singh* (1977) 4 Cr LT 139 .

36 *Jani v State of MP* 2015 Cr LJ 1682 (MP) (DB) .

37 *Parsuram Pandey v State of Bihar* (2004) Cr LJ 4978 (SC) .

38 *Kalu Ram Brahma v State of Assam* (1977) Cr LJ 98, p 99 (Gau) ; *Sardarsingh v State* (1981) Cr LR 33, 35 (MP High Court Notes); *Lutura v State* (1981) Cr LR 5, p 6 (MP High Court Notes) .

39 *Gujram v State* (1978) All Cr Rep 318 ; *Kumar Majhi v State* (1981) Cr LJ 1787, p 1790 (Ori) (DB) ; *Kunhi Kanaram v State of Kerala* (1966) Ker LT 677 ; *Narain v State of Karnataka* (1998) Cr LJ 1549 (Kant) (DB) .

40 *Sarju Prasad v State of Bihar* AIR 1965 SC 843, p 844 ; *Kumar Majhi v State* (1981) Cr LJ 1787, p 1790 (Ori) (DB) ; *Kunhi Kanaram v State of Kerala* (1966) Ker LT 677 .

41 *Ganga Ram v State* (1968) Cr LJ 134 (Raj) ; *Balwant Singh v State* (1998) Cr LJ 2753 (Del) .

42 *Abdul Waheed v State of Uttar Pradesh* (1980) Cr LJ (NOC) 77 (All), (1980) 433 Cr LR 432 (UP) .

43 *State of Karnataka v K Ganapathi Bhat* (2006) Cr LJ 1834 (Kant) .

44 *R Prakash v State of Karnataka* (2004) Cr LJ 1391 (SC) .

45 *Nand Singh v State of Punjab* (2007) Cr LJ 716 (P & H).

46 *State of MP v Kashiram* 2009 Cr LJ 1530, AIR 2009 SC 1642, (2009) 4 SCC 26 .

47 *State of MP v Kashiram* 2009 Cr LJ 1530, AIR 2009 SC 1642, (2009) 4 SCC 26 ; *State of Maharashtra v Balram Bama Patil* 1983 (2) SCC 28 ; *Girija Shanker v State of Uttar Pradesh* 2004 (3) SCC 793 ; *R Parkash v State of Karnataka* JT 2004 (2) SC 348, AIR 2004 SC 1812, [2004] 2 SCR 281, (2004) 9 SCC 27, 2004 Cr LJ 1391, 2004 SCC (Cr) 1408, 2004 (2) Crimes 72 (SC) ; *State of Madhya Pradesh v Saleem alias Chamaru* 2005 (5) SCC 554, AIR 2005 SC 3996 .

48 *Jagannath v State of Rajasthan* 2014 Cr LJ (NOC) 69 (Raj) .

49 *Prakash Chandra Yadav v State of Bihar* 2008 Cr LJ 438, p 440 (SC), 2007 (12) Scale 368, 2007 AIR SCW 6798 .

50 *Parsuram Pandey v State of Bihar* (2004) Cr LJ 4978 (SC) .

51 *Anjani Kumar Choudhary v State of Bihar* AIR 2014 SC 2740, 2014 Cr LJ 3798, (2014) 12 SCC 286 .

52 *Krishnan v Abdulla* (1968) Ker LT 929 ; *Jaswant Singh v State* (2007) Cr LJ (NOC) .

53 *Shivraj Singh v State of Uttar Pradesh* (1980) 17 All Cr Cas 70 (Summary of Cases) (DB), (1980) ALJ 337, 342.

54 *Pasupuleti Siva Ramakrishna Rao v State of Andhra Pradesh* 2014 Cr LJ 1677, (2014) 5 SCC 360, (2014) 137 AIC 129 (SC) .

55 *Pasupuleti Siva Ramakrishna Rao v State of Andhra Pradesh* 2014 Cr LJ 1677, (2014) 5 SCC 360, (2014) 137 AIC 129 (SC) .

56 *Satyavir Singh v State of UP* 2010 Cr LJ 1659, p 1668 (SC), 2010 AIR SCW 1442, (2010) 3 SCC 174, 2010 (2) 313 .

57 *Anjani Kumar Chaudhary v State of Bihar* AIR 2014 SC 2740, 2014 Cr LJ 3798, (2014) 138 AIC 185 .

58 *Narayanaswamy v State by Srinivasapura Police* 2011 Cr LJ 239 (242) (Kant) .

59 *Provincial Government v Abdul Rahman* AIR 1943 Nag 145, p 148 .

60 *Om Prakash v State of Punjab* AIR 1961 SC 1782, p 1785 ; *Sanku Sreedharan Kottukallil Veettil Konathadi Kara v State of Kerala* AIR 1970 Ker 98, (1969) Ker LT 472 .

61 *Mutalli v Emperor* AIR 1930 Lah 253 .

62 *Emperor v Abdul Rahaman* 10 Cr LJ 57 ; *Empress v Niddha* ILR 14 All 38 ; *Thakur Das v State* AIR 1967 All 495 ; *Sudhindra Kumar Roy v Emperor* AIR 1933 Cal 354, 34 Cr LJ 611 ; *Dhanwantri Durga Das v Emperor* AIR 1933 Lah 852, 35 Cr LJ 171 ; **but see***Munsuri Nizamuddin v State* AIR 1955 Pat 330 .

63 *State of Madhya Pradesh v Imrat,* 2008 Cr LJ 3869 (SC), AIR 2008 SC 2967, (2008) 10 Scale 143 ; *State of MP v Saleem* 2005 AIR SCW 3511, 2005 (5) SCC 554 ; *Girja Shanker v State of Uttar Pradesh* (2004) 3 SCC 793, AIR 2004 SC 1808 ; *R Prakash v State of Karnataka* JT 2004 (2) SC 348, 2004 AIR SCW 815 .

64 *Empress v Niddha* ILR 14 All 38, p 43 .

65 *Reg v Francis Cassidy* 4 Bom HCR (Crown Cases) 17.

66 *Thansingh v State* (1981) Cr LR 46, p 49 (MP High Court Notes) ; *Sardarsingh v State* (1981) Cr LR 33, p 35 (MP High Court Notes) ; *Latura v State of Madhya Pradesh* (1981) Cr LR 5, p 6 (MP High Court Notes) .

67 *Vasudeo Balwant Gogte v Emperor* AIR 1932 Bom 279, p 281 ; *Thansingh v State* (1981) Cr LR 46, p 49 (MP High Court Notes) ; *Sardarsingh v State* (1981) Cr LR 33, p 35 (MP High Court Notes) ; *Latura v State of Madhya Pradesh* (1981) Cr LR 5, 6 (MP High Court Notes).

68 *Bakhshish Singh v State* AIR 1952 Pepsu 138, p 139 .

69 *Empress v Niddha* ILR 14 All 38 .

70 *Vasudeo Balwant Gogte v Emperor* AIR 1932 Bom 279 .

71 *Om Prakash v State of Punjab* AIR 1961 SC 1782, p 1785-86 ; *Provincial Government v Abdul Rahaman* AIR 1943 Nag 145 ; **butsee***Jaeetmal v State* AIR 1950 MB 21 .

72 *Empress v Niddha* ILR 14 All 38 ; *Vasudoe Balwant Gogte v Emperor* AIR 1932 Bom 279, p 281 ; *Sarju Prasad v State* AIR 1965 SC 843 ; *Sardarsingh v State* (1981) Cr LR 33, p 35 (MP High Court Notes) ; *Latura v State of Madhya Pradesh* (1981) Cr LR 5, p 8 (MP High Court Notes) ; *Thansingh v State* (1981) Cr LR 46 (MP High Court Notes).

73 *State of MP v Kashiram* 2009 Cr LJ 1530, AIR 2009 SC 1642, (2009) 4 SCC 26 .

74 *Sanku Sreedharan Kottukalli Veettil Konathadi Kara v State of Kerala* AIR 1970 Ker 98, p 101, (1970) Cr LJ 688 ; *Isaac v*

State of Kerala (1967) Ker LT 689 .

75 *Mohindar Singh v State* AIR 1960 Punj 135, p 138 .

76 In Re *Maragatham*AIR 1961 Mad 498, p 0503 .

77 *Bholi v State of Orissa* (2005) Cr LJ 2785 (Ori) .

78 *Khuda Bux v Emperor* 10 WR (Cr) 52 .

79 *Emperor v Nannhi Baku* 11 Cr LJ 48 .

80 In Re *Maragatham*AIR 1961 Mad 498 ; **butsee***Emperor v Dhirajia* AIR 1910 All 486 .

81 *Emperor v Ananda Bhau* 3 Cr LJ 85, 7 Bom LR 985 .

82 *Emperor v Tulsha* ILR 20 All 143 .

83 *Crown v Gangoo* AIR 1941 Nag 302 .

84 *Mi Pu v Emperor* 10 Cr LJ 363 .

85 *Lachman Singh v State of Haryana* 2006 Cr LJ 4041 (SC), AIR 2006 SC 2763 .

86 *Om Prakash v State of Punjab* AIR 1961 SC 1782, p 1787 ; *Jermej Singh v State* (1968) 70 Punj LR 359 ; *Liyakat Mian v State of Bihar* AIR 1973 SC 807, p 810, (1973) Cr LJ 584 ; *Yashpal v Emperor* AIR 1933 All 627, 35 Cr LJ 573 ; *Dhanwantrai Durga Das v Emperor* AIR 1933 Lah 852, 35 Cr LJ 171 ; *Emperor v Munshi* AIR 1936 Oudh 294, 37 Cr LJ 787 ; *Sudhindra Kumar Roy v Emperor* AIR 1933 Cal 354 .

87 *Ahmad Yar Khan v Emperor* 11 Cr LJ 171 .

88 *Jagjit Singh Yanman Singh v State of Kutch* AIR 1956 Kutch 1, p 7 ; *Bakhshish Singh v State* AIR 1952 Pepsu 138, p 142 .

89 *Emperor v Abdul Rahaman* 10 Cr LJ 57 ; *Ramchander v State of Rajasthan* (1970) Cr LJ 653 ; *Jarmej Singh v State* (1968) 70 PLR 359 .

90 *Ram Rattan v State* AIR 1959 J&K 119 .

91 *Ghasita v State of Rajasthan* (2006) Cr LJ 2408 (Raj) .

92 *Piyare Lal v Shanker Das* (1972) Cr LJ 185 ; *Bhagwan Din v State* AIR 1967 All 580, (1967) Cr LJ 1588 .

1 *Hakim Singh v State* (1965) All LJ 282 .

2 *Nga Nwaik v Emperor* AIR 1923 Rang 251, 24 Cr LJ 850 ; *Mansuri Nizamuddin v State* AIR 1955 Pat 330 .

3 *Kala Singh v State of Rajasthan* (2006) Cr LJ 4135 (Raj) .

4 *Hazara Singh v State of Punjab* (1971) 1 SCC 529 .

5 *Empress v Niddha* ILR 14 All 38 ; *Vasudeo Balwant Gogte v Emperor* AIR 1932 Bom 279 ; *Bakhshish Singh v State* AIR 1952 Pepsu 138 ; *Sarju Prasad v State of Bihar* AIR 1965 SC 843 .

6 *Ghani v State* 1967 AWR (HC) 217 .

7 *State of Madhya Pradesh v Sarnamsingh* (2000) Cr LJ 3636 (MP) (DB) .

8 *Anil Kumar v State of UP* 2013 (2) Crimes 325 (UTR) .

9 *State of UP v Siya Ram* 2010 Cr LJ 4441, p 4442 (SC), 2010 AIR SCW 5216

10 *Alkoo Ahir v State of Bihar* 2010 Cr LJ 3822, p 3823 (SC), 2010 AIR SCW 3950 .

11 *Punem Sonu v State of Chhattisgarh* 2014 Cr LJ (NOC) 499 (Chh .)(DB).

12 *Sumersingh Umedsingh Rajput v State of Gujarat* 2008 Cr LJ 1388, p 1391 (SC), AIR 2008 SC 904, 2008 AIR SCW 302, 2007 (8) Supreme 457, 2007 (14) Scale 74 .

13 *Prem Singh v State of (NCT) Delhi* 2009 Cr LJ 4296, p 4297 (SC), AIR 2009 SC 3179, (2009) 6 Scale 381 .

14 *Deomuni Sharma v State of Jharkhand* 2009 Cr LJ 3948, p 3952 (SC), AIR 2009 SC 2731, 2009 (8) Scale 303

15 *Ajay Singh v State of Bihar* 2014 (136) AIC 731 (Pat) .

16 *Nasir Sikander Shaikh v State of Maharashtra* 2005 Cr LJ 2621, p 2622, AIR 2005 SC 2533, (2005) 10 SCC 585 .

17 *Gaya Prasad v State* AIR 1954 All 59, p 62-63, 55 Cr LJ 68 ; *Afsar Mian v State* (1974) Cr LJ 834, p 838, ILR (1973) 2 Del 68 .

18 *Jit Singh v State* AIR 1957 Punj 278, p 283, (1967) Cr LJ 1307 .

19 *Provincial Government v Abdul Rahman* AIR 1943 Nag 145, p 147 .

20 Re *GuruswamiTevan*AIR 1939 Mad 780, 40 Cr LJ 922 ; *Rattan Singh v State of Punjab* (1980) 7 Cr LJ 154, p 155 .

21 *Khuda Baksh v Emperor* AIR 1936 Lah 914 .

22 *Rajinder Kumar alias Munna v State of Himachal Pradesh* (2000) Cr LJ 468 (HP) .

23 *Shrawan Kumar v State of Madhya Pradesh* (1980) Cr LR 72, p 74 (MP) (Notes) .

24 *Jai Narain Mishra v State of Bihar* AIR 1972 SC 1764, p 1766, (1972) Cr LJ 469 .

25 *Shaukat v State of Uttaranchal* 2010 Cr LJ 4310, p 4319, 2010 AIR SCW 5017, (2010) 5 SCC 68, (2010) 4 Scale 299 .

26 *Satbir v Sate of Haryana* 2013 Cr LJ 7 (SC), 2013 AIR SCW 5780, 2012 (10) Scale 371 .

27 *Sagayam v State of Karnataka* (2000) Cr LJ 3182 (SC) .

28 *State of Rajasthan v Moti* (2000) Cr LJ 4817 (Raj) (DB) .

29 *Vijay Kumar v State by Inspector of Police, Madras* 2009 Cr LJ 3056, p 3060 (SC), 2009 AIR SCW 3690, 2009 (6) Scale 364 .

30 Re *Mangavalli Ranganayakamma* 1 Weir 328.

31 *Om Prakash v State of Punjab* AIR 1961 SC 1782 .

32 *Vir Singh v State of Punjab* (1980) 7 Cr LT 401 (Punj) ; *Ram Pujan v State of Uttar Pradesh* AIR 1972 SC 2418 .

33 *Gellapudi Satyam v State* (2002) Cr LJ 762 (AP) .

34 *Vir Singh v State of Punjab* (1980) 7 Cr LT 401 (Punj) ; *Ram Pujan v State of Uttar Pradesh* AIR 1972 SC 2418 *; Rajendra Harakchand Bhandari v State of Maharashtra* 2011 Cr LJ 2891, AIR 2011 SC 1821 (Sentence reduced to sentence already undergone).

35 *State of Rajasthan v Shambhu Kewat* 2014 Cr LJ 609, p 613 (SC), (2014) 4 SCC 149, (2014) 133 AIC 15 (SC) .

36 Re *Thigyal Lakhra*2001 Cr LJ 2662 (Sikkim).

37 *Mahesh Chand v State of Rajasthan* AIR 1988 SC 2111, (1989) Cr LJ 121 (SC) ; *Suresh Babu v State of Andhra Pradesh* (1987) 2 JT 361 (SC) .

38 *Desvo alias Nirmala Naskar alias Nirmalmoy Naskar v State* (1992) Cr LJ 74 (Cal) (DB) .

39 *Harjinder Singh v State of Uttranchal* 2015 Cr LJ (NOC) 249 (UTR) .

40 *Rohtas v State of Delhi* (2005) Cr LJ 805 (Del) .

41 *Muhammad Arif Din Mohd Sheikh v State of Maharashtra* 1999 Cr LJ 2645 (Bom) .

42 *Rajesh Rai v State of Uttar Pradesh* 1998 Cr LJ 4163 (All) .

43 *Om Prakash Dwivedi v State* 1996 Cr LJ 603 (All) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 307.

Attempt to murder.--

Bail by Magistrate

Section 437, CrPC envisages that the magistrate is empowered to grant bail to an accused person who is not charged with an offence punishable with death or imprisonment for life when the accused was brought before the court either by the police or the accused appears on his own before the court. The prohibition against grant of bail under s 437, CrPC, is confined to cases where the sentence prescribed is 'either death or alternatively, imprisonment for life'. Thus, a magistrate is empowered to grant bail to the accused charged with an offence under s 307 punishable with imprisonment for life even though the offence is exclusively triable by a court of sessions.[44]

Cancellation of Bail

The bail under s 167(2), CrPC is bail under s 437(1) and (2) and s 439(1), CrPC and can only be cancelled when a case for cancellation is made out under s 437(5) and 439(2), CrPC .[45] It is well-settled that under ss 437(5) and 439(2), CrPC, twin reasons for cancellation of bail are: possibility of accused absconding and/or his tempering with the prosecution witnesses.[46]

26. Charge

The following form of the charge may be adopted:

> I (*name and office of session judge, etc*) hereby charge you (*name of accused person*) as follows:2721
>
> That, on or about the...day of..., at..., you did an act, to wit..., with such intention (*or knowledge*), and under such circumstances that, if, by that act, you had caused the death of *AB*, you would have been guilty of murder and that you thereby caused hurt to the said *AB*, and thereby committed an offence, punishable under section 307 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

Merely quoting or translating the wording of a section 'with such intention or knowledge and under such circumstances' in a charge is not enough. The accused should be told the accusation against him precisely.[47]

If the injury inflicted on the head is only a simple injury, no charge under this section can at all be framed till it was found to be a dangerous one.[48] Since the simple offence gets merged in a graver one, there would be an error in convicting the accused on a charge under ss 307 / 34 as also under ss 326 / 34 . The

charge should be not under ss 307 / 34 .[49] So, a conviction under both s 307 and s 326 cannot be maintained.[50] At any rate, there should be only one punishment for the two offences.[51]

Propriety demands that a magistrate should be careful while converting an offence exclusively triable by a court of sessions into an offence triable by magistrate of the first class. Taking cognizance and framing charge under s 326, IPC instead of s 307, IPC is highly improper even though on the form of application for bail, there were no materials for an offence under s 307, IPC though facts of the case *prima facie* disclose commission of offence under s 307, IPC .[52]

Where an accused has been charged only under s 307, his conviction for an offence under s 387, IPC is illegal unless justified by the provisions of ss 221(2) and 222, CrPC .[53]

Where the suicide note left by the deceased and other evidence *prima facie* showed that tremendous pressure was exercised on the deceased and the deceased was left with no option but to commit suicide, charge under s 306 / 34, IPC was framed against the accused.[54]

Where, in a case under ss 307 and 323, the magistrate disbelieves the prosecution evidence and discharges the accused, it is not open to the sessions judge in revision to dissect the order of discharge, confirm it in respect of s 307, and order further inquiry in respect of the offence under s 323 .[55]

Quashing of Charges

Where the allegations were that the accused aimed at and fired a gunshot towards a person, but it missed and hurt another resulting in simple injuries, there was delay in lodging FIR and there was no evidence of ballistic expert to support prosecution story, besides absence of medical evidence that injuries so alleged were caused by a2722 fire-arm, there was no evidence to show that the accused shared a common intention along with co-accused and fired from his gun with intention or knowledge to kill, the order framing the charge under ss 307 / 34, IPC against the accused persons was gushed.[56] When the prosecution case that the accused with intention to cause death of the deceased, gave three axe blows to him while co-accused caused an injury from blunt side of axe, there was no material on record for framing a charge under s 307, IPC against the co-accused as injuries caused by him are simple in nature, hence, charge framed under s 307 against co-accused, was set aside.[57]

27. Joint Trial of two Offences under Section 302 and under Section 307 Maintainable

Section 219, CrPC, allows the trial of an accused for three or less number of offences of the same kind, committed within the space of 12 months, and provides that offences of the same kind are those which are punishable with the same amount of punishment under the same section of the IPC or of any special law or local law. Two offences under s 302 with respect to the murder of two persons are punishable under the same section of the IPC with the same amount of punishment. In view of the *proviso* to s 219(2), an offence of attempting to commit an offence is of the same kind as that of the other offence. Thus, the offence under s 307 is of the same kind as the offence under s 302 . The three offences are, therefore, of the same kind and one joint trail of the said three offences would be justified under s 219, Crpc . Section 223 , CrPC, lays down the joinder of persons at one trial and provides that persons, accused of more than one offence of the same kind, within the meaning of s 219, committed by them jointly within a period of twelve months, can be charged and tried together. Therefore, the trial of a number of persons for the said three offences, each of which was alleged to have been committed by them jointly within 12 months, would be justified.[58]

28. Proof

It is for the prosecution to prove conclusively, by producing not only the medical records relating to the treatment given to the injured, but also by producing the doctor, who had attended to the injured in the surgical ward, that the injury under consideration was of such nature which would be covered by the definition of grievous hurt as given in s 320, IPC . Alternatively, it is open to the prosecution to prove that

the intention of the accused in inflicting the said injury was of the kind referred to under s 300, IPC .[59] As held in *Sarju Prasad v State of Bihar* ,[60] the burden is still on the prosecution to establish such an intention where, in fact, no vital part has actually been cut as a result of the injury. When the requisite intention has not been proved, it is unsafe to hold that the injury caused was grievous, especially in the absence of the reasons which prompted the doctor to opine it as such.[61]

Appellant No. 2 was alleged to have given *lathi* blow on the knees of the victim who fell down. Appellant No. 1 was alleged to have caused serious injuries with *gandasa*. It was highly doubtful if the Appellant No. 2 shared common intention with2723 Appellant No. 1and both of them wanted to kill the injured victim. Appellant No. 2 was acquitted of the charge under s 307 read with s 34, IPC .[62]

There was some ill feeling between the accused and members of the prosecution party on account of land dispute. The accused persons armed with and *gandasa* attacked the complainant party causing sever injuries, the arms of the victim had to be amputated. There was reliable evidence of the victim and his brother, an eye-witness. Conviction of the accused under s 307, IPC was proper, sentence was reduced from eight years to six years RI.[63]

Accused respondents were prosecuted under ss 307, 498A and 506, IPC on allegations that as their dowry demand was not fulfilled, they subjected the wife to cruelty and attempt was also made to set her on fire. Only relative witnesses were examined. There was no evidence that the accused persons ever demanded or accepted dowry. The testimony of the victim wife was full of contradictions, there were complaint and counter complaints between the parties. Acquittal of respondents accused recorded by the trial court was proper.[64]

29. Benefit of Doubt

The accused appellant in the company of the co-accused was alleged to have assaulted the victim with knife. The co-accused was not named in FIR. He was given benefit of doubt and was acquitted of the charge under s 307, IPC .[65] Appellant accused R was alleged to be armed with *lathi*. PWS did not state that the accused R had caused any *lathi* injury, no overt act was attributed to him. The appellant accused R was held entitled to benefit of doubt, was acquitted.[66]

Accused appellant was prosecuted on allegation that on dispute regarding loan transaction accused assaulted the complainant with chopper causing injury below the ear. The testimony of the complainant and the witnesses was inconsistent about the place of occurrence and the recovery of weapon. The accused was given benefit of doubt, was acquitted of the charge under s 307, IPC .[67]

30. Appellant not Aware that Co-Accused was Carrying Knife--Acquitted of Charge under Sections 307IPC

As no specific over act was attributed to the accused appellant by the injured and perhaps she was also not aware that the co-accused was carrying knife with him, she was held entitled to benefit of doubt and acquitted of the charge under s 307, IPC .[68]

31. Self-defence

The law is settled that in spite of the plea of right of private defence of property having not been taken by the accused in their statements under s 313, CrPC, the said defence is available if it is borne out and sustainable from the testimony adduced on2724 record. The crucial factor is not what the accused pleaded, but whether the accused could show the existence of right of private defence of person or property from the record itself.[69] An accused firing gunshot in self defence cannot be held guilty under s 307 particularly when he was in actual possession of the field and was ploughing it before the complainant party went there duly armed.[70] If an accused uses a fire-arm to exercise his right of private defence, he cannot be convicted under s 307 .[71] Where the circumstances of the case proved that the accused and not complainant was in possession of disputed land and the evidence showed that the complainant party

armed with fire-arms and *lathis* attempted to take possession of land forcibly, the accused having reasonable apprehension of death or grievous hurt cannot be said to have exceeded his right of self-defence by firing at the complainant party. While exercising such right accused persons cannot be said to have shared common intention to commit an offence, the conviction of accused persons under ss 302, 307 read with s 34, IPC was set aside.[72]

If an accused uses a firearm to exercise his right of private defence, he cannot be convicted under s 307 .[73] Where the plea of self-defence taken by the accused alleging that he was attacked by the complainant party appeared to be true in the absence of explanation from the prosecution about injuries sustained by the accused, the medical papers of complainant in primary health centre where he had gone for treatment did not find mentioning name of assailant though it was present in the medico-legal case, the conviction of accused under s 307 was set aside.[74] When the prosecution failed to explain the reasons for injuries received by accused persons, the plea of self-defence of the accused was acceptable entitling them to acquittal.[75]

32. Appreciation of Evidence

When there is evidence to show that the accused had enmity towards the victim and his family, and there is no evidence to show that the victim had enmity with anybody else, it is not correct to say that the accused had no reason to assault the victims and that they had falsely implicated the accused. There is no reason as to why the victims would leave their real assailants and implicate the innocent ones.[76]

Accused would not be acquitted on the mere ground that the PW first informant in the witness-box could not give the name of the father of the accused, though mentioned in the FIR.[77]

33. Only Role of Exhortation--Accused Appellants Acquitted

The three accused appellants were armed with *lathi* which had not been used by them in any manner and the only allegation against them was that they had exhorted their co-accused to fire at the opposite party. Held, the possibility that the three accused persons were roped in on account of animosity could not be ruled out. The three2725 accused appellants were given benefit of doubt and acquitted of the charge under ss 149, 302 and 307, IPC .[78]

34. Non-Examination of Injured Victim--Effect

The victim was alleged to have received injuries with an axe in an incident in which his four relatives were also killed, but the prosecution had come with the explanation that the victim could not be medically examined because he was busy in making arrangements for last rites ceremony of dead persons; however, the police-witness stated that because of danger to his life the victim being the sole eyewitness of the incident could not be examined, the victim nowhere stated that because of safety to life he was not medically examined. In view of these contradictions, the non-examination of injuries of sole witness was held fatal to the prosecution case.[79]

35. Medical Evidence

Where the medical evidence showed that as a result of one shot by the accused in question, same injuries on the back of deceased were caused which were not sufficient to cause death, the co-accused who caused fatal injuries was acquitted by the court below, ss 34, IPC would have no application, the conviction of the accused was converted from s 302 to s 307, IPC .[80]

Since the medical report in the case did not support the allegations against the Appellant No. 2 and No. 4 they were given benefit of doubt and acquitted of the charge under ss 307, IPC and 149, IPC .[81]

The question as to whether an injury in the parietal region with a *lathi* would fall within the scope of s 307 would ultimately depend upon the evidence which is brought on record and also the opinion which may be

expressed by the medical experts when they came into the witness box.[82] The mere fact that out of the several injuries found inflicted by the accused, one, which was a punctured wound on the left side of the victim, was dangerous in nature, does not necessary make the offence one under s 307, particularly when the medical evidence in the case does not prove that the injury, characterised as dangerous by the doctor, 'would have necessary caused death but from timely medical aid'.[83]

Evidence of injured victim was also contrary to the medical evidence, according to him there was one shot. But there were three injuries. There was no explanation for the third injury. Even doctor's evidence was that the two injuries cannot be treated as an entry and exist wounds. Accused was acquitted of charge under s 307, IPC .[84]

Evidence of injured victim was also contrary to the medical evidence, according to him there was one shot. But there were three injuries. There was no explanation for the third injury. Even doctor's evidence was that the two injuries cannot be treated as an entry and exist wounds. There was unexplained delay of two days in filing FIR.2726 The IO was not examined in the case. The judgment of acquittal recorded by the High Court was not interfered.[85]

DNA Test

DNA stands for deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. Experts opine that the identification is a 100 percent precise.

The key feature of this technique is that no matter what biological sample is obtained--hair, a bit of skin, blood--the results are not going to be different. This is because all the cells in the body contain the same set of DNA something unique for each individual.[86]

An article written by one Lalji Singh, Centre for Cellular and Molecular Biology, Hyderabad, in DNA Profiling and its applications in which the learned Author has observed as under:

> Precautions:
>
> DNA profiling is technically demanding. There are cases on record in the US where mistakes seem to have been prompted by human errors. There is a need for quality control. Every precaution should be taken to ensure preparation of high-molecular-weight DNA complete digestion of the samples with appropriate enzymes, and perfect transfer and hybridization of the blot to obtain distinct bands with appropriate control. If necessary the analysis should be repeated. The DNA fingerprinting test, if performed properly, is infallible. However, there is need to interpret DNA typing with a thorough understanding of the populations involved.

The Division Bench of Andhra Pradesh[87] has accepted said proportion.

Contradiction between Ocular and Medical Evidence

When the statement of injured that the accused open fired from back side was belied by medical evidence

suggesting that injury was on front of right side of chest of the injured, it could be inferred that injured could not see faces of real assailants and falsely roped in the accused. Thus, the order of conviction of the accused under s 307 was not found proper.[88]

36. Dying Declaration

Commentary under s 302, *ante*, may be referred to.

Where the husband inflicted injuries on his wife, her statement was recorded while she was in hospital, she died two months after the incident and 21 days after she was discharged from the hospital, her statements not relating to the cause of her death cannot be termed as dying declaration as per s 32(1) of the Evidence Act .[89]2727

When the victim whose dying declaration was recorded survived, the dying declaration so recorded is to be treated as a statement under s 164, CrPC .[90] Such a declaration cannot be used as a substantive piece of evidence against the accused as the victim survived.[91] The statement given by an injured to the investigation officer and also FIR lodged by him is not admissible as dying declaration.[92]

37. Motive

Commentary under s 302, *ante*, may be referred to.

Where direct evidence is worthy of evidence, the question of motive is of academic importance only. Motive is a fact which is only within the knowledge of the person doing the act and which no human being but the party himself can be familiar with. Therefore, failure to discover the motive for an offence does not signify its non-existence and failure to produce evidence does not fatally affect it. It is not the *sine qua non* for the success of prosecution.[93]

38. Res Gestae

Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. However, for bringing such hearsay evidence within the scope of s 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of *res gestae*, must have been made contemporaneously with the acts or immediately thereafter.[94]The statement of the witness indicating that the injured told him that his nephew had fired at him, would become admissible under s 6 of the Evidence Act as the witness on hearing sound of firing went to the scene of occurrence and found the injured lying on the ground when he made that statement.[95]

39. Identification of Accused

When the parties are well-known to each other, the identification of accused by injured eye-witness cannot be doubted,[96] when there was sufficient moonlight.[97]

When the victim survived due to efforts of the doctor and medical treatment, the dying declaration so recorded is to be treated as his statement under s 164, CrPC, in which the accused persons were named and corroboration regarding their identity came from other eyewitness, the mere fact that the doctor who treated victim deposed that victim did not disclose names of accused to him, would not make their identification doubtful.[98] The plea that the injured eyewitness met the accused only once so identification was improbable is not tenable when the incident had taken2728 place in broad daylight and accused was introduced to the eyewitness a few days back in a hotel.[1]

The prosecution witnesses did not describe the appellant accused either in their statement recorded under

s 161, CrPC or prior to holding of T.I. Parade before the Magistrate. Although, they claimed in their testimonies, that they had seen the appellant in the full moon light, but this fact was not mentioned by them in their statements recorded under s 161, CrPC . The identification of appellant accused in T.I. parade was highly doubtful. He was acquitted of the charges under ss 399, 392 and s 307 read with s 149, IPC .[2]

The conviction of accused under s 307, IPC on the basis of a statement recorded under ss 161, and 164, CrPC in the absence of proper identification of the accused is not proper.[3]

40. Benefit of Doubt

Where five co-accused were not named in FIR, nor their names appeared in statements of the witnesses recorded under s 161, CrPC, the prosecution witnesses for the first time in statements made before the court, gave out their names, the five co-accused persons were held entitled to benefit of doubt and acquitted of the charge under s 107, IPC .[4]

41. Conviction

It is sufficient to justify a conviction under s 307, IPC if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, an accused charged under s 307, IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.[5]

To justify a conviction under this section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not2729 be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.[6]

Accused had inflicted two grievous injuries by *Farsa* and *lathi* on the head of the victim. The High Court was not justified in recording the acquittal of the accused on the ground that the injuries were not grievous or sufficient in the ordinary course of nature to cause death. The injuries were serious and investigating agency felt the necessity of recording the dying declaration. Order of conviction passed by the trial court under ss 307 / 34, IPC was restored.[7]

The appellants came on motorcycle, entered the clinic of the injured, fired shots at the injured who suffered two injuries. Both the appellants were convicted under ss 307 / 34, IPC .[8] The accused appellants assaulted the victim with blows, kicks, iron rods and poured acid leading to disfigurement. Accused appellants were convicted under s 307, IPC .[9]

There was really no direct exhortation to kill but the same was to the effect that the deceased and others should not be permitted to run away and should be attacked. On hearing the exhortation accused no. 2 pierced the spear in the chest of the deceased. The evidence of PWS was different as to the manner of exhortation. Accused was convicted under s 307 read with s 110 and not under s 302, IPC .[10]

The two injured persons by tempo were going to courts, the appellant accused persons emerged on the

road stopped the tempo and inflicted a number of injuries with sharp edged weapons and blunt weapons like hockey sticks. They were mercilessly beaten and attack was also so severe that all the other passengers sitting on the tempo ran away from spot and none came forward to save the injured. The injuries caused were dangerous to life. Persons who have suffered injuries would not shield the actual culprit and implicate an innocent person when false implication is pleaded. The testimony of eye-witnesses was found reliable. The conviction of the appellants under ss 307, 326 / 34, IPC was held proper.[11]

Accused Convicted under Section 307 cannot be Convicted and Sentenced under Section 326

An offence under s 326, IPC, is a minor offence in relation to that under s 307, IPC, and it is a trite that where the court convicts for a major offence, it should not convict for a minor offence. Thus, an accused convicted under ss 307 / 34, IPC cannot be convicted and sentenced under s 326 read with s 149, IPC .[12]2730

Accused cannot be Convicted under Sections 302 and 307 for Murder of same Person

When the victim is only one person for whose death the accused were charged under s 302, IPC, there was no need for framing charges under s 307 read with s 34, IPC, against them. The accused cannot be convicted both under s 302, IPC and s 307 read with s 34, IPC . When it was done by the trial court and ignored by High Court, the Supreme Court maintaining the conviction and sentence of accused under s 302, IPC, set aside the sentence and conviction under s 307 read with s 34, IPC .[13]

42. Benefit of Probation

In order to be eligible for the benefit of probation, the accused should meet two conditions simultaneously; (i) he is not a previous convict, and (ii) the offence must be of the character specified in s 360, Crpc or s 4 of the Probation of Offenders Act 1958. When the accused is charged with an offence of s 307, IPC, which entails imprisonment for life or imprisonment for ten years, he cannot be dealt with under s 360, CrPC .[14] In a case of attempt to murder the accused cannot be acquitted by giving benefit of probation.[15]

43. Admonition

In *Radharani v State of Madhya Pradesh* ,[16] it was observed that when an accused has been released on admonition for an offence under s 309, IPC, he should also be released in admonition for the offence under s 307, IPC, as there is no valid distinction for releasing him for the former offence and convicting him for the latter offence.

44. Sentence

Section 307 provides sentence of both imprisonment and fine. The imprisonment may extend to 10 years along with fine. A reading of s 307 would make it clear that there is no minimum sentence, but imposition of imprisonment and fine is mandatory.[17] Though retribution is not the main plank of sentencing justice, yet the criminal propensities of the offender may something impel the court his segregation from society. When the crime is not impulsive, but a calculated one, the comparative young age of the offender pales into insignificance when viewed with the substratum of the crime.[18] Where the accused attempted to commit murder by firing shots at victims from their guns, and the victims escaped with injuries as pallets did not hit their vital parts, sentence of seven years' rigorous imprisonment awarded to accused persons is not disproportionate.[19] In passing a sentence under this section, the facts that the crime was committed at a time when the accused, a police constable, was labouring under great mental strain as a result of a departmental punishment which was inflicted on him, that the result of the conviction would inevitable be that he would lose the benefit of a long and meritorious service and the rewards of that2731 service, and that he had already been in detention for a year, were taken into consideration as mitigating circumstances.[20] In *State v Murugan* ,[21] the occurrence took place in 1989 and the appeal was disposed of in the year 2001 by setting aside judgment of acquittal rendered by the trial court, so each accused was

awarded under s 307, IPC sentence of four years' rigorous imprisonment and fine of Rs 1,000. In *State v Narsingh Khunti* ,[22] five years' rigorous imprisonment was held to meet the ends of justice in a case where a skilled artisan had been permanently incapacitated by an attack of the accused.

Reduction in Sentence

In the following circumstances the sentence of accused was reduced.

(a) The convict had for years been in the habit of taking opium daily.[23]
(b) Inquired person himself became friendly with convict and desired reduction of his offence.[24]
(c) Accused was prosecuted for offence after about 14 years and/or occurrence took place years ago.[25] Accused forced provocation for 15 years. [26]
(d) A small scuffle over payment of rickshaw charges, without any motive.[27]
(e) No definitive evidence that the convict, by firing a rifle, had caused hurt to any one of victims.[28]
(f) Accused was an illiterate woman belonging to an aboriginal tribe and had young kids.[29]
(g) About three years ago convict was treated for schizophrenia and if he were sent back to prison, it would lead to his mental imbalance or mental disorder.[30]
(h) Accused was 65 years old and not keeping good health.[31]
(i) Accused was only aged about 20 years at the time of incident and had already served sentence of about three years.[32]
(j) Injuries inflicted were simple in nature.[33]2732
(k) Non-examination of independent witness, non-seizure of weapon of offence and the fact that accused had already undergone 4 years of custody.[34]
(l) Accused and his victim wife leading separate life after divorce.[35]
(m) Accused and victim were mere relatives.[36]
(n) There was no evidence to show that injured lost his speech because of injuries inflicted by the accused.[37]
(o) The incised wound inflicted by the accused appellant on the victim which attracted s 307, IPC on right side below abdomen was of 1/2 (× 1/4 (of very small dimension. Other three injuries were inflicted on hand and were simple. Incident occurred 18 years before, hence the sentence of five years imposed by the courts below was reduced to two years RI.[38]

Sentence Reduced to Sentence Already Undergone

Offence under s 307, IPC is not compoundable. However, the accused appellants were agriculturists by profession, had no criminal background as the incident was 20 years old, there was reconciliation amongst the parties to maintain peace and in the interest of justice, the Supreme Court reduced the sentence to the period already undergone.[39]

Accused appellants were convicted under ss 307, and 323, IPC . During the pendency of the appeal pending before the Supreme Court, the parties entered into compromise. Held, settlement/compromise arrived at between the parties can be taken into consideration for the purpose of determining the quantum of sentence to be awarded to the appellants. As the incident related to the year 1994 and the parties had entered into the compromise, sentence was reduced to the period already undergone.[40]

No Foolproof Formula for Just Sentence

After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Councle Mcgautha v State of California* (402 US 183, 28

LD 2d 711), that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished. The object should be to protect the society and to deter the criminal in achieving the avowed object to law by imposing2733 appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, *eg*, where it relates to offences relating to narcotic drugs or psychotropic substances which have great impact not only on the health fabric but also on the social order and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time or personal inconveniences in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.[41]

Reduction of Sentence Without Satisfactory Reasons is Not Proper

Where sentence of seven years rigorous imprisonment under s 307 was imposed by the trial court but no satisfactory reason for reducing sentence to less than one year was assigned by the appellate court, the order of the appellate court was set aside.[42] Where in an appeal against conviction of an accused under s 307, the High Court reduced the sentence from three years' imprisonment to just three months' imprisonment by enhancing fine on the ground that accused were not previous convicts and some co-accused were acquitted, though assault was at night and pre-planned. This order of the High Court did not find favour with the Supreme Court and while holding the same unjustified, the Supreme Court set it aside and restored the sentence imposed by the sessions court.[43]

Proportion Between Crime and Punishment

Commentary under similar heading in s 302, *ante*, may be referred to.

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably, these considerations cause a departure from just desserts as the basis of punishment and create cases of apparent injustice that are serious and wide-spread. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that2734 make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.[44]

The object of imposing sentence should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a

crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'.[45]

Accused Juvenile on the Date of Offence

Where the accused was a juvenile on the date of commission of offence under s 307 the entire trial of the accused by the sessions court and his conviction and sentence of imprisonment under s 307, IPC were without jurisdiction. The case was, therefore, remanded for disposal in accordance with the law keeping in view the provisions of West Bengal Children Act 1959.[46] Where the accused was aged 15 years only at the time of occurrence, and was convicted under ss 302 / 149 and ss 307 / 149, IPC and had already served five years in the institution under s 7 of United Provinces Borstal Act 1938, for such an offender the sentence of five years will be equivalent even to a higher sentence of life imprisonment. Therefore, it was held that he need not surrender for the remaining sentence.[47]

Combined Sentence under Sections 302 and 307 --Not Proper

Where the accused was convicted under s 302, IPC for killing the deceased and also under s 307, IPC for injuring others, the awarded of combined sentence under s 302 and s 307 was not proper. Separate sentence under s 302 and s 307 should be passed.[48]

Attempt by Life-Convicts--Sentence

Although attempt by a life convict to murder is punishable with death sentence if hurt is caused in such attempt to kill any person. However, in *Mithu v State of Punjab* ,[49] the Supreme Court while considering s 303, IPC which provides the only sentence of death to the person who commits murder while being under sentence of imprisonment for life, held s 303, IPC violative of arts 14 and 21 of the Constitution of India . Thus, a person undergoing the sentence of imprisonment of life who commits a murder, is not necessarily liable to the death penalty and his case is to be considered as under s 302 and not under s 303, IPC, the latter provision having been held unconstitutional. Thus, by the same analogy and attempt to murder under s 307, IPC cannot lead to the only punishment of death sentence. In such a case, the court2735 should pass sentence under s 307 in first or second part and not in the third part. However, judicial pronouncement to the effect seems to be abetted.

45. Alteration of Conviction from Section 307 to Lesser Offence

In cases under s 307, IPC, the court should carefully consider the provisions of ss 324, 326 and 307, IPC . The circumstances, in which the injury has been caused, should also be considered.[50]

An offence under s 307, IPC is a very serious offence and it requires the same very factors to be proved as are needed to prove an offence under s 302, except that in this case the act falls short of the death of the deceased which is necessary under s 302, IPC . Sometimes, it becomes very difficult to differentiate between an offence under s 307, and under ss 324, 325, 326, IPC*etc.* In both cases, injuries may be present. There may be existence of motive or intention or knowledge on the part of the wrongdoer. Care has, therefore, to be taken that in such cases there may not be a wrong application of the evidence looking to the serious consequences following from such an error, as the penalty prescribed under them vary to a great extent.[51]

46. Alteration of Conviction from Section 307 to Section 308

It has to be examined whether the act committed by the appellant comes within the scope and orbit of s 307 or s 308, IPC . If an accused does any act with such intention or knowledge and under such circumstances that, if he, by that act, caused death, he would be guilty of murder, he shall be guilty of committing an offence punishable under s 307, but if an accused did any act that he would be guilty of culpable homicide not amounting to murder, he shall be guilty of committing an act punishable under s 308 .[52]

The accused, in a sudden flash of anger, pierced a sharp-edged weapon which was at the time in his hand and had not gone anywhere to pick up the instrument of assault. Prior to the incident, he was not quarrelling with the injured. As the victim intervened in the quarrel, the accused gave two quick blows with the sharp edged instrument, *i.e.*, a screwdriver. The part of the body which he chose to hit, was a vital part of the body, *i.e.*, the chest. The force he used was not very strong so as to penetrate the lungs. Thus, the intention and knowledge of the accused seemed to be to cause such bodily injury that he would be guilty of culpable homicide not amounting to murder, if the injured had died. His act, therefore, comes within the ambit of s 308 and not s 307 .[53]

Where the doctor's evidence showed that none of the vital organs of the victim was injured, a doubt arises whether the accused intended to commit murder and thus, made an attempt. He, however, can be attributed with knowledge that by inflicting such injuries, he was likely to cause death to attract s 308 . Thus, conviction of accused under s 307 was set aside and instead conviction under s 308 .[54]

A heavily intoxicated accused caused abdominal injury dangerous to life to the victim, the requisite intention envisaged in s 300 was not proved. However, the2736 knowledge could be imputed to the accused under s 86, IPC of this act and the conviction of accused was, therefore, altered from ss 302 and 307, IPC to s 304, Pt II and s 308 .[55] Where in a sudden fight without premeditation, accused persons alone suffered injuries, the conviction of accused was modified from s 307 to s 308 .[56] However, where during an attempt by the police party to apprehend the accused, accused fired a loaded revolver at a member of the police party who was saved as revolver misfired, the offence fell under s 307 and not under s 308 .[57] The state of mind of the accused, showing that he was so heavily drunk that he was incapable of forming the requisite intent while inflicting a dangerous injury on the person of the victim, would bring the case within the purview of s 308 instead of s 307 .[58]

Where the accused fired at *A,* but the bullet missed the target and hit *B's* thigh, the conviction of the accused was altered from s 307 to s 308 .[59]

47. Alteration of Conviction from Section 307 to Section 323

When the common intention to kill on the part of the accused is wanting, they cannot be convicted of an offence under s 307 read with s 34, IPC though they may be held guilty of an offence under s 323 read with s 34, IPC,[60] or without s 34,[61] if condition of s 323, IPC are fulfilled. When the injuries found on the victims were not sufficient in ordinary course to cause death and injuries cannot also be said to be grievous in absence of X-ray report, the conviction of accused persons under ss 307, 325 was altered to ss 148, 323, 324, IPC .[62]

48. Alteration of Conviction from Section 302 to Section 307

Commentary under s 302, *ante*, may be referred to.

49. Alteration of Conviction from Section 307 to Section 324

Where the accused stabbed complainant on his chest with a knife but the prosecution did not examine the doctor nor there was any evidence on record to show that injury caused to the complainant was dangerous to life, the conviction of the accused under s 307 was altered to one under s 324 .[63] Where the injuries inflicted by the accused persons on informant were not of grievous nature and were not on vital parts and medical evidence not suggesting that injuries could have caused death but for treatment given by the doctors, the conviction under s 307 was altered to s 324 .[64] Where the accused allegedly gave a knife blow on injured during quarrel ensued between them over grazing of cattle in fields, the doctor who examined injured classified injury received by him to be simple in nature, the evidence showed that altercation between the injured and the accused was on spur of moment, there was no serious dispute between injured and the accused so that the accused could entertain intention of doing away life of injured, therefore, the conviction of the accused was2737 modified to under s 324 from s 307 .[65] Where the cause of dispute was cutting of earth by the accused from field of informant party, the evidence of

doctor showed that injuries received by injured were simple in nature and they were not on any vital part of their body, there was no evidence to show that the accused had any intention to kill or commit murder of informant or any of his brother, the conviction of the accused was altered from s 307 to s 324 .[66]

When the injuries are simple and have been caused by a weapon like a spear, knife, *lathi*, gun, etc, and the medical evidence shows that they are not sufficient, in the ordinary course of nature, to cause death, the accused can be held guilty under s 324, IPC, and not under s 307 .[67] Where a single knife blow given on the chest of the victim caused incised wound which was a simple injury, the conviction of there accused was modified from s 307 to s 324 .[68] Where two accused had come together, but the co-accused did not assault the injured who was the real target, but caused minor injury to his son, the conviction of co-accused under s 307 read with s 34, IPC along with main accused was not found proper and was altered to one under s 324 .[69]Where only a single shot was fired which only resulted in an entry wound with one pellet which entered the body but did not go deep enough to damage spinal cord or injured any internal organ, it cannot be said that the act was done with an intention or knowledge to commit culpable homicide amounting or not amounting to murder, and so an offence under s 307 or even s 308, IPC was not made out. The conviction of accused was, therefore, altered from s 307 to s 324 .[70] Where the evidence of victim was that she has sustained gunshot injury on her leg, in view of nature of injuries sustained by victim, offence of attempt to murder not made out, but as the hurt has been caused by a firm arm, the offence squarely falls within the mischief of s 324, hence, the conviction of the accused persons under ss 307 / 149 altered to one under ss 324 / 149 .[71]

When, in a skull injury, the skull is neither cut nor fractured and the depth of the injury is only a quarter of a centimetre, the injury cannot be said to be dangerous to life because it is highly improbable that such an injury would worsen the condition of2738 the injured to such an extent that it would prove dangerous of life. The offender can only be convicted under s 324, and not under s 307 .[72]

Where a single firearm injury was caused on a non-vital part of the body of the victim, and the medical evidence showed that injury was not grave but only simple, the conviction of the accused was altered from s 307 to s 324 .[73]

50. Alteration of Conviction from Section 307 to Section 325

The evidence of injured that when the co-accused caught hold of him, the accused at first instance gave a stone blow and later on gave blows by the reverse side of a *tangia* as a result of which he sustained injuries, medical evidence showed that said injuries were grievous in nature, and there was no material showing that the accused had the intention or knowledge to kill the injured, the act of the accused falls under s 325 and not under s 307 .[74] Where two accused persons armed with *machus* (sharp cutting instrument) on being instigated by other three accused persons assaulted the injured, the intention of the accused was to assault and not to kill and the possibility of use of reverse side of weapon of offence could not be ruled out, the conviction of accused persons under s 307 was altered to one under s 325 .[75] Where there was an assault by 11 assailants, and one of the victims sustained head injury, but the persecution evidence was silent with regard to who gave the head injury to the victim, and the statement of medical officer did not support the fact that head injury suffered by victim was sufficient in ordinary cause of nature to cause his death, the conviction of accused persons under s 307 read with s 149 was set aside and that under s 325 read with ss 149 and 147, IPC was maintained.[76] Where in a sudden quarrel, the accused persons caused grievous as well as simple injuries by a sharp-edged weapon on the head of the victim which were not sufficient in the ordinary course of nature to cause death, the conviction of accused under s 307 was altered to one under s 326, IPC . Further, for causing grievous injury on the head of the victim by a blunt object, the accused were also convicted under s 325 .[77] Where the accused causing grievous and simple hurt with a knife, the said hurt was caused when victim, sister-in-law of accused, obstructed him from taking away his teenage daughter with wrong intention of having illicit relation with her, however, considering relationship between parties accused cannot be said to have requisite intention to do away with life of victim, so, ingredients of s 307, IPC, having not been satisfied to base conviction under s 307, so conviction of accused was altered to s 325, IPC .[78] When the accused persons have caused injury to complainant by *lathi*, fist and kicks causing injury on his head, hand and leg and complainant remained in

hospital for treatment for more than one month and there was absence of fracture on his body, on account of nature and number of injuries caused and weapon used it could not be said that attempt was made to cause death of complainant, so, conviction of accused persons under ss 307 / 149 was altered to one under ss 325 / 149 IPC .[79]

Where the common object of a unlawful assembly did not travel beyond commission of offences under ss 325 and 323, IPC, the conviction of the accused2739 persons under s 307 with aid of s 149 was altered to one under ss 147, 325 / 149 .[80] Where there was no intention on the part of accused persons to attempt to commit murder of the victims who sustained grievous injuries, the conviction of one accused was modified from s 307 to s 325 and that of two others altered from ss 307 / 34 to ss 325 / 34, IPC .[81]

51. Alteration of Conviction from Section 307 to Section 326

Commentary under the same heading in s 326, *post*, may be referred to.

When in the light of evidence of eyewitness and doctor, there is no difficulty in coming to the conclusion that the accused had intended to cause only grievous hurt and it could not be said that he had the intention to cause death of the victim, the conviction of accused under s 307, IPC was set aside; instead he was convicted for the offence under s 326 .[82] Where the injuries caused to the injured were neither dangerous to his life nor capable of causing his death, the conviction of accused was altered from ss 307 / 34 to one under ss 326 / 34 .[83] Where the medical evidence did not support case of the prosecution that victim could have lost his life as a result of the injuries, in the ordinary cause, but for availability of immediate medical treatment.[84] When the only evidence against accused was that he aimed gun shot only at the leg of injured, which resulted in fracture. In this view of the evidence it cannot be said that accused was intended to cause death of injured or to cause such bodily injuries which may be sufficient to cause his death in the ordinary course of nature, so as to bring the offence within the purview of s 307, IPC . Thus considering the part of body at which the gunshot was fired and taking in view the fact that accused did not repeat the shots, as also the fact that he fired gunshot at the leg and caused fracture, it must be held that accused voluntarily caused grievous hurt by dangerous weapon *viz*, the gun and hence he must be held liable for committing offence under s 326, IPC and not under s 307, IPC .[85] When the accused allegedly came from behind inflicted two wounds with knife and fled, the doctor who examined and treated injured, not examined, further from size of blade of knife it could not be said that intention was to commit murder of injured, however, accused had inflicted two wounds on stomach of injured for which he was operated and hospitalised for nine days, the conviction of accused was altered from s 307 to s 326, IPC .[86] Where the accused only attacked once on person of the injured and injuries were not on vital part of body, there was absence of intention or knowledge to commit murder, so, the accused convicted under s 326 instead of s 307 .[87] Where the injuries caused to the victim were grievous, but not on any vital part of the body, conviction of the accused appellant under s 307, IPC was altered to one under s 326, IPC .[88]

Where the injuries caused to the victims were established to be grievous in nature, the conviction of the accused persons was altered from ss 307 / 34 to one under2740 ss 326 / 34 .[89] Spear injuries, even if caused by the accused on the vital part of the body of the victim, cannot bring a case under s 307, if none of the injuries is found, by the medical witness, to be dangerous to life in any way.[90] Such a case falls under s 326 . Simply because the injuries were caused by a sharp-edged weapon and were on the head, *i.e.,* a vital part of the body is not sufficient toshow that accused had any intention to murder the victim. The accused had given only one blow so conviction of the accused under s 307 was set aside and that under s 326 was maintained.[91] Where one of the injuries found on the person of victim was of grievous nature, but not sufficient to cause death, the fact that when the injured fell down, the accused did not try to cause further injuries shows that he had no intention to kill the victim, the conviction of accused under s 307 was set aside and that under ss 324 and 326 maintained.[92]

The doctor examined in the case had not categorically deposed that the knife injury caused to the victim by the appellant no. 2 was dangerous to life, the conviction of the appellant no. 2 under s 307, IPC was altered to one under s 326, IPC . Sentence imposed was reduced to the period already undergone.[93]

In *Kali Charan v State* ,[94] where three out of the four injuries caused by four or five persons by means of deadly weapons were simple and the fourth one caused by the appellant though endangering life, could not be deemed to be an injury which would have necessary caused death, but for timely medical aid, it was held that the appellant could be convicted under s 326 and not under s 307 .[95]

There was no allegation that the accused wanted to kill or eliminate the victim, None of the injuries inflicted on the victim was on the vital part of the victim, there was no enmity between the parties, conviction of the accused recorded under s 307, IPC was altered into one under s 326, IPC .[96]

Where the accused amputated the left forearm of son of the deceased who tried to intervene and save his father from the attack of an unlawful assembly but only single blow was inflicted on the son of the deceased and no fatal blow was inflicted, the conviction of the accused was altered from s 307 read with s 149 to one under s 326 read with s 149 .[97]

Complainant while returning from other village after his meals was interrupted by the accused persons inquiring from him as to why he came to their village. An altercation took place between parties, wherein two accused persons caught hold of complainant and the main accused shot an arrow which pierced near right ear of the complainant. There was no previous enmity between parties. The evidence of Medical expert neither proved that the injury could or could not be dangerous to life, but that the injury was caused on the vital part of body. only single injury was caused by main accused though other accused persons were also armed with bow and arrow, thus it could not be said that accused had caused injury with intention to cause death2741 of complainant and conviction of main accused was altered from s 307 to one under s 326 and in case of other co-accused from s 307 / 34 to one under s 324 / 34 .[1]

52. Alteration of Conviction from Section 307 to Section 328

Where the accused administered poison to his brother through food under instigation of a person who had absconded, the conviction of the accused was altered from s 307 to s 328 .[2]

44 *Ashireddygari Narasimhareddy v State of Andhra Pradesh* (2001) Cr LJ 2010 (AP) .

45 *Mohammad Iqbal Madar Sheikh v State of Maharashtra* (1996) 1 SCC 722 .

46 *Mohammad Arif Dinmohd Shaikh v State of Maharashtra* (1999) Cr LJ 2645 (Bom) .

47 *Hira Pearelal Kirar v State* AIR 1960 MP 11, (1960) Cr LJ 78 .

48 *Ram Murat v State* (1973) All Cr R 242, (1973) All WR (HC) 388 .

49 *Brajbandhu Naik v State* (1975) Cr LJ 1933, p 1937, 41 Cut LT 496 .

50 *Nardeo Singh v State* AIR 1953 All 726, p 728, 54 Cr LJ 1677 .

51 *Manghan Khan v Emperor* AIR 1937 Sind 61, 38 Cr LJ 487 .

52 Re *Thigyal Lakhar*(2001) Cr LJ 2662 (Sikkim).

53 *Hira Pearelal Kirar v State* AIR 1960 MP 11, p 12, (1960) Cr LJ 78 .

54 *Chitresh Kumar Chopra v Stater (NCT of Delhi),* (2009) 16 SCC 605, AIR 2010 SC 1446 .

55 *M Mohamed Ibrahim Sahib v Bazhul Asu Habu* AIR 1950 Mad 503, 51 Cr LJ 1176 .

56 *Ram Kumar v State of Rajasthan* (1998) Cr LJ 3131 (Raj) .

57 *Prabhu Dayal v State of Madhya Pradesh* (2004) Cr LJ 2990 (MP) .

58 *Banwari v State of Uttar Pradesh* AIR 1962 SC 1198, p 1202, (1962) Cr LJ 278 .

59 *Narinder Kumar v State of Delhi* (1981) Chand LR 180, 185-86 (Del) .

60 *Sarju Prasad v State of Bihar* AIR 1965 SC 843 .

61 *Narinder Kumar v State of Delhi* (1981) Chand LR 180, p 185-86 (Del) .

62 *Jagdish v State of Haryana* 2005 Cr LJ 3073 (SC), AIR 2005 SC 2576, (2005) 11 SCC 146 .

63 *Jagdish v State of Haryana* 2005 Cr LJ 3073 (SC), AIR 2005 SC 2576, (2005) 11 SCC 146

64 *State of Karnataka v Satish Sathyanaayana* 2012 Cr LJ 379 (Kant) .

65 *Nasir Sikander Shaikh v State of Maharashtra* 2005 Cr LJ 2621, p 2622, AIR 2005 SC 2533, (2005) 10 SCC 585 .

66 *Narain v State* 2005 Cr LJ 2001 (All) (DB), 2005 All LJ 979, 2005 (2) Crimes 2 .

67 *Betta v State by Nanjangud Rural Police, Bangalore* 2011 Cr LJ 4822 (Kant) .

68 *Neelam Bahal v State of Uttarkhand* 2010 Cr LJ 2100, AIR 2010 SC 428, (2010) 2 SCC 229 .

69 *State of UP v Dhakan* (2005) Cr LJ 4206 (SC) .

70 *Ajeet Singh v State of Uttar Pradesh* (2000) Cr l.J 3828 (All).

71 *Karnail Singh v State of Rajasthan* (1997) Cr LJ 1729 (Raj), (1977) Raj LW 336 .

72 *Jotram v State of Rajasthan* (1998) Cr LJ 1492 (Raj) (DB) .

73 *Karnail Singh v State of Rajasthan* (1977) Cr LJ 1729, (1977) Raj LW 336 .

74 *Rahmat v State of Haryana* (1997) Cr LJ 764 (SC) .

75 *Hardeep Singh v State* AIR 1996 Cut 3091 .

76 *Poran Singh v State* (1981) Cr LJ (NOC) 60 (All) .

77 *Brahm Swaroop v State of UP* 2011 Cr LJ 306 (SC), 2010 AIR SCW 6704 .

78 *Prahlad Singh v State of MP* 2011 Cr LJ 4366, p 4368 (SC), [2011] 9 SCR 282, (2011) 15 SCC 136, 2011 (8) JT 591, 2011 (8) Scale 105 .

79 *Nabob Khan alias Nawab v State of Madhya Pradesh* (2003) Cr LJ 94 (MP) (DB) .

80 *Jamail Singh v State of Punjab* (1996) Cr LJ 1139 (SC) .

81 *Raju Mahto v State of Jharkhand* 2010 Cr LJ (NOC) 731 (Jhar) .

82 *Khajjan Singh v State of Madhya Pradesh* (1996) Cr LJ 3774 (MP) .

83 *Bedi Chhanni v State of Uttar Pradesh* (1980) ALJ 715, p 717 .

84 *Balmiki Singh v Ram Chander Singh,* 2009 Cr LJ 318 (SC), 2008 AIR SCW 7424, (2008) 10 SCC 218 .

85 *Balmiki Singh v Ram Chander Singh* 2009 Cr LJ 318 (SC), 2008 AIR SCW 7424, (2008) 10 SCC 218 .

86 *Pantangi Balarama Venkata Ganesh v State of AP* (2003) Cr LJ 4508 (AP) (DB) .

87 *Pantangi Balarama Venkata Ganesh v State of AP* (2003) Cr LJ 4508 (AP) (DB) .

88 *Jawahar Lal v State of Uttar Pradesh* (1997) Cr LJ 1662 (All) .

89 *Satwa Wakode v State of Maharashtra* (1996) Cr LJ 4028 (Bom) (DB) .

90 *Shrawan Bhadaji Bharad v State of Maharashtra* (2002) IX AD 455 (SC) .

91 *Baswanath Jena v State* (2002) Cr LJ (NOC) 37 (Ori) .

92 *Sukhar Singh v State of Uttar Pradesh* (2000) Cr LJ 29 (SC) .

93 *Atish Behere v State of Orissa* Cr LJ 270 (Ori).

94 *Sukhar v State of Uttar Pradesh* (2000) Cr LJ 29 (SC) .

95 *Ibid*.

96 *Chitlarmal v State of Rajasthan* (2003) I (AD) 239 (SC) .

97 *Gangadhar Naga Naik v State of Karnataka* (1997) Cr LJ 3655 (Kant) .

98 *Shrawan Bhadaji Bharad v State of Maharashtra* (2002) IX AD 455 (SC) .

1 *Surendra Singh Rautela alias Surendra Singh Bengali v State of Bihar* (2002) Cr LJ 555 (SC) .

2 *Ramji v State of Rajasthan* 2011 Cr LJ 4771, p 4773 (Raj) .

3 *Bishnu v State* (1996) Cr LJ 3572 (Del) .

4 *Jani v State of MP* 2015 Cr LJ 1682 (MP) (DB) .

5 *State of Madhya Pradesh v Saleem* (2005) Cr LJ 3435 (SC) .

6 *Vasant Vithu Jadhav v State of Maharashtra* (2004) Cr LJ 1786 (SC) ; *Hari Mohan Mandal v State of Jharkhand* (2004) Cr LJ 3112 (SC) .

7 *State of Madhya Pradesh v Imrat* 2008 Cr LJ 3869, p 3871 (SC), AIR 2008 SC 2967, (2008) 10 Scale 143 ; *State of MP v Saleem* 2005 AIR SCW 3511, 2005 (5) SCC 554 ; *Girja Shanker v State of Uttar Pradesh* (2004) 3 SCC 793 ; *R Prakash v State of Karnataka* JT 2004 (2) SC 348, 2004 AIR SCW 815 .

8 *Babloo v Stat of Uttarakhand* 2012 Cr LJ 198, p 200 (Utr) .

9 *Sachin Jana v State of West Bengal* 2008 Cr LJ 1596 (SC), 2008 AIR SCW 885 .

10 *Jaleshwar Singh v State of Bihar* 2009 Cr LJ 3995, p 3997 (SC), 2009 AIR SCW 4258, 2009 (7) Scale 219 .

11 *Suresh v State of Haryana* 2009 Cr LJ 2985, p 2987 (SC), 2009 AIR SCW 3525, 2009 (4) Scale 22 .

12 *Heeralal Ramlal Parmar v State of Maharashtra* (1998) Cr LJ 574 (Bom) ; *Jagadish Medhi v State of Assam* (2007) Cr LJ 1040 (Gau) .

13 *Jagtar Singh v State of Punjab* AIR 1993 SC 2448, (1993) Cr LJ 2886 (SC) .

14 *Sirish Chandra Paul v State of Tripura* (1997) Cr LJ 2617 (Gau) .

15 *Ramesh v State of MP* (2006) Cr LJ 3815 (MP) .

16 *Radharani v State of Madhya Pradesh* AIR 1981 SC 1776 .

17 *State v Murugan* (2002) Cr LJ 670 (Mad) .

18 *Sukhvinder Singh v State of Punjab* (1981) Cr LJ 840, p 842 (Punj) .

19 *Bhagirath v State of Haryana* (1996) Cr LJ 3499 (SC) .

20 *Bharat Dube v Emperor* AIR 1941 Pat 51, 42 Cr LJ 303 .

21 *Ibid.*

22 *State v Narsingh Khunti* (1971) 1 Cut WR 711 .

23 *Alexander Ruffee v Emperor* 13 Cr LJ 197 .

24 *Sona Raut v Emperor* AIR 1944 Pat 37, 44 Cr LJ 336 .

25 *Shanabhai Dhulabhai Parmar v State of Gujarat* AIR 1977 SC 1338, (1977) Cr LJ 1007 ; **See also***Madan Pal v State of Uttar Pradesh* (1999) Cr LJ 3383 (All) ; *Ramnath v State* (1998) Cr LJ 2622 (Del) ; *Sheikh Jago v State of Bihar (now Jharkhand)* (2007) Cr LJ 463 (Jhar) .

26 *Bheru D Balai v State of MP* (2006) Cr LJ 2845 (MP) ; *Kuldip Singh v State of Punjab* (2007) Cr LJ (NOC) 497 (P & H); *Sheikh Jago v State of Bihar (now Jharkhand)* (2007) Cr LJ 463 (Jhar) .

27 *Gellapudi Satyam v State* (2002) Cr LJ 762 (AP) .

28 *Bakhtawar Singh v State* (1975) Cr LJ 968, p 972 .

29 *Maharanibai v State of Madhya Pradesh* (1981) Cr LR 209 (MP High Court Notes).

30 *Venkatesh v State of Karnataka* (2005) Cr LJ 1112 (Kant) .

31 *Varri Appalanaidu v State* (2005) Cr LJ 1459 (AP) ; **See also***Sirish Chandra Paul v State of Tripura* (1997) Cr LJ 2617 .

32 *Pappu v State of MP* (2004) Cr LJ 1080 ; **See also***Khem Chand Tukaram Badgijar v State of Maharashtra* (1996) Cr LJ 2482 (Bom) ; *Sukha v State of Rajasthan* (1996) Cr LJ 1283 (Raj) ; *Joshi v State of Kerala* (1996) Cr LJ 143 (Ker) .

33 *Aravdlly Shankar v State of AP* (2004) Cr LJ 4456 (AP) .

34 *Muna Jani v State of Orissa* (2003) Cr LJ 4392 (Ori) .

35 *Veerta Venkaiah v State of Andhra Pradesh* (1999) Cr LJ 1618 (AP) .

36 *Ram Kumar v State* (1999) Cr LJ 3522 (SC) .

37 *Heer Singh v State of Rajasthan* (2007) Cr LJ (NOC) 280 (Raj), (2007) 1 Cr LR (Raj) 141 .

38 *Ram Sigh v State of Madhya Pradesh* 2012 Cr LJ 2178, p 2179 (SC), (2011) 14 SCC 563 .

39 *Rajendra Harakchand Bhandari v State of Maharashtra* 2011 Cr LJ 2891 (SC), AIR 2011 SC 1821, 2011 AIR SCW 2653, (2011) 4 Scale 450 .

40 *Gulab Das v State of MP* 2012 Cr LJ 667, p 669 (SC), AIR 2012 SC 888, 2011 AIR SCW 6757 .

41 *Siddarama v State of Karnataka* (2006) Cr LJ 4622 (SC) .

42 *State of MP v Sangram* (2005) Cr LJ 4642 (SC) .

43 *Sadhe Singh v State of Punjab* AIR 1985 SC 1130, (1985) Cr LJ 1361 (SC) .

44 *Siddarama v State of Karnataka* (2006) Cr LJ 4622 (SC) .

45 *State of Madhya Pradesh v Saleem* (2005) Cr LJ 3435 (SC) .

46 *Pradip Ghosh v State* (1988) Cr LJ 366 (Cal) (DB) ; *Gopinath Ghosh v State of West Bengal* AIR 1984 SC 237, (1984) Cr LJ 168 (SC) .

47 *Kunwar Bahadur v State of Uttar Pradesh* AIR 1979 SC 1509 .

48 *Madan Mohan Rai v State of Orissa* AIR 1996 Cut 2578 (Ori) (DB) .

49 *Mithu v State of Punjab* AIR 1983 SC 473, (1983) Cr LJ 811 (SC) .

50 *Abdul Waheed v State of Uttar Pradesh* (1980) Cr LJ (NOC) 77 (All), (1980) 433 Cr LR 432 (UP) .

51 *Madan Lal v State of Himachal Pradesh* (1990) Cr LJ 310 (HP), (1989) 2 Crimes 373 .

52 *Mohan Rathore v State of Madhya Pradesh* (1986) Cr LJ 1280 (MP) ; **see also***Shaukat v State of Uttranchal* 2010 Cr LJ 4310, (2010) 5 SCC 68 .

53 *Ibid*.

54 *Tukaram Gundu Naik v State of Maharashtra* (1994) Cr LJ 224 (SC) .

55 *Enrique F Rio v State* (1974) Cr LJ 1337 (Goa) .

56 *Laxmi Naraw alias Poodam & ors v State of Punjab* (1992) 2 Crimes 496 (DB) .

57 *Om Prakash v State* (1982) Cr LJ 751 (Del) .

58 *Enrique F Rio v State* (1975) Cr LJ 1337, p 1339 .

59 *Sukhdev Singh v State* (2002) Cr LJ 3964 (Del) (DB) .

60 *Ganga Singh v State* (1980) Cr LJ 235 (All) (DB) .

61 *Sunder Lal v State of Madhya Pradesh* (2001) Cr LJ 3286 (SC) .

62 *Indo Singh v State of Bihar* (2007) Cr LJ (NOC) 302 (Jhar), (2007) 1 AIR Jhar R 804 .

63 *Om Prakash v State* (1998) Cr LJ 2625 (Del) .

64 *Pehtu Kanwar v State of Bihar (now Jharkhand)* (2007) Cr LJ 683 (Jhar) .

65 *Tatigari Durgaiah, s/o Lakshmaiah v State of AP* (2007) Cr LJ 524 (AP) .

66 *Pran Yadav v State of Jharkhand* (2007) Cr LJ 1059 (Jhar) .

67 *Akos Joseph Vargis v State of Maharashtra* (1999) Cr LJ 1430 (Bom) (DB) ; *Triveni Ahir v State of Bihar* (1999) Cr LJ 2004 (Pat) (DB) ; *Prabhu alias HC Prabhakara v State of Karnataka* (2001) Cr LJ 1427 (Kant) ; *Rajendar Singh v State of Bihar* (2000) Cr LJ 1844 (Pat) ; *Khuda Baksh v Emperor* AIR 1936 Lah 914 ; *Shrawan Kumar v State of Madhya Pradesh* (1980) Cr LR 72 (MP) Notes ; *Ram Kumar Gautam v State of Madhya Pradesh* (2001) Cr LJ 1604 (MP) ; *Raju alias Veerendra Singh v State of Madhya Pradesh* (2001) Cr LJ 3707 (MP) ; *Shiv Singh v State* (1975) Cr LJ 704 ; *Raja Singh v State of Punjab* (1981) 8 Cr LT 47 ; *Jhumarlal v Maganlal* (1976) Assam LR 93, (1976) Cr LJ 1355 ; *Fariq v State* (1980) Cr LR 560 (All) ; *Keshaba Muduli v State* (1973) 2 Cut WR 1685 ; *Kundan Singh v State of Punjab* AIR 1982 SC 62 ; *Dhani Ram v State of Madhya Pradesh* (1999) Cr LJ 2221 (MP) ; *Bakhtavar Singh v State of Rajasthan* (1999) Cr LJ 4271 (Raj) ; *Kesra v State of Rajasthan* (1999) Cr LJ 2625 (Raj) (DB) ; *Jugi Khan v State* (1999) Cr LJ 2984 (All) ; *Balwant Singh v State* (1998) Cr LJ 2753 (Del) ; *Pappu v State of Uttar Pradesh* (1998) Cr LJ 122 (All) ; *Manohar v State of Karnataka* (1997) Cr LJ 398 (Kant) ; *Merambhai Runjabhai Khachar v State of Gujarat* (1996) Cr LJ 2465 (SC) ; *Rup Kumar v State of Madhya Pradesh* (2007) Cr LJ (NOC) 633 (MP) ; *Sarjug Turi v State of Bihar* (2003) Cr LJ 2864 (Jhar) ; *Gula v State of Orissa* (2007) Cr LJ 2582 (Ori) .

68 *Keulash v State of Rajasthan* (2002) Cr LJ 390 (Raj) .

69 *BM Suresh v State of Karnataka* (2001) Cr LJ 36 (Kant) .

70 *Rohtas v State of Uttar Pradesh* (2000) Cr LJ 89 (All) ; **See also***Rameshwar v State* (2003) Cr LJ 3437 (All) .

71 *State of Bihar v Umesh Choudhary* (2007) Cr LJ 2607 (Pat) (DB) .

72 *Pritam Singh v State of Punjab* (1980) 7 Cr LT 132, p 134-35 .

73 *Pooran Singh v State of Uttar Pradesh* (1997) Cr LJ 2253 (All) .

74 *Maheshwar Tandi v State of Orissa* (2007) Cr LJ (NOC) 399 (Ori) .

75 *Rudrappa v State of Karnataka* (2001) Cr LJ 78 (Kant) .

76 *Uma Shanker Bharti v State of Uttar Pradesh* (2001) Cr LJ 362 (All) .

77 *Chanan Singh v State of Rajasthan* (2001) Cr LJ 3058 (Raj) .

78 *Gurram Sambaiah v State* (2005) Cr LJ 238 (AP) .

79 *Chand Patel v State of MP* (2005) Cr LJ 3420 (MP) .

80 *Pahar Singh v State of Rajasthan* (1999) Cr LJ 1150 (Raj) (DB) .

81 *Jagdish Mahra v State of Bihar* (1997) Cr LJ 3748 (Pat) .

82 *Jamilselvane v Union Territory of Pondicherry* (1997) Cr LJ 2094 (Mad) ; *Mangal Singh v Kishan Singh* (2009) 17 SCC 303, AIR 2009 SC 1535 .

83 *State of Maharashtra v Harish Chandra Tukaram Awatade* (1997) Cr LJ 612 (Bom) (DB) ; *Gaddem alias Chinna v State* (1996) Cr LJ 2035 (AP) (DB) ; *Nand Singh v State of Punjab* (2007) Cr LJ 716 .

84 *Premchand S Bansode v State of Maharashtra* (2007) Cr LJ 142 (Bom) .

85 *Ghasita v State of Rajasthan* (2006) Cr LJ 2408 (Raj) .

86 *Prakash Chandrappa Channur v State of Maharashtra* (2005) Cr LJ 1085 (Bom) .

87 *Lalit Singh v State of Uttar Pradesh* (2007) Cr LJ (NOC) 560 (UP) .

88 *Mangal Singh v Kishan Singh* (2009) 17 SCC 303, AIR 2009 SC 1535 .

89 *Lallan Rai & ors v State of Bihar* (2003) Cr LJ 465 (SC) .

90 *Ram Swat v State* (1980) ALJ 890, (1980) Cr LJ 465 (UP) .

91 *Santokh Singh v State of Rajasthan* (2002) Cr LJ 1410 (Raj) .

92 *Raju alias Kurhsu v State of Rajasthan* (2002) Cr LJ 1720 (Raj) .

93 *Neelam Bahal v State of Uttarkhand* 2010 Cr LJ 2100, AIR 2010 SC 428, (2010) 2 SCC 229 .

94 *Kali Charan v State* (1980) Cr LR 20 (UP), (1980) All Cr Cas 68 .

95 *Jai Narain Mishra v State of Bihar* AIR 1972 SC 1764, p 1766, (1972) Cr LJ 469 .

96 *Narayanaswamy v State by Srinivasapura Police* 2011 Cr LJ 239, 2010 (3) KCCR 1958 (Kant) ; *Raghunath v State by Police of Vijayapura Police Statio,* 2011 Cr LJ 549 (Kant) .

97 *Basappa Balappa Bhangi v State of Karnataka* (1999) Cr LJ 2689 (Kant) (DB) .

1 *Bhadriya v State of Madhya Pradesh* (2006) Cr LJ 4756 (MP) .

2 *Emperor v Israil Mahto* AIR 1931 Pat 346 (SB), (1932) Cr LJ 1228.

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 308.

Attempt to commit culpable homicide.--

Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration

A, on grave and sudden provocation, fires a pistol at *Z,* under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. *A* has committed the offence defined in this section.

Comments

1. Scope and Applicability

This section corresponds to s 307 with the exception that it deals with an attempt to commit culpable homicide not amounting to murder. The punishment provided under this section is less than that provided under the preceding section.

A person commits an offence under this section if he does not act with such intention or knowledge, and under such circumstances, that if he thereby caused death, he would be guilty of culpable homicide not amounting to murder. In *Om Prakash v State of Punjab* ,[3] it was held that:2742

A person commits an offence under s 308 when he has an intention to commit culpable homicide not amounting to murder and, in pursuance of that intention, does an act towards the commission of that offence whether that act be

> the penultimate act or not. But this is meant only to show the nature of the intention and of the act required to constitute the offence. It does not speak of the alternative requirement of knowledge. Again, except for a few lawyers, nobody knows, or is expected to know, the fine distinction between culpable homicide amounting to murder and culpable homicide not amounting to murder and it is, therefore, difficult to conceive of a man to have an intention to commit culpable homicide not amounting to murder.

If an accused does any act with such intention or knowledge, and under such circumstances that if he, by that act, caused death, he would be guilty of murder, he shall be guilty of committing an offence punishable under s 307, but if an accused did any act that he would be guilty of culpable homicide not amounting to murder, he shall be guilty of committing an act punishable under s 308 .

Culpable homicide does not amount to murder:

(i) if the act is done with the intention or knowledge referred to in s 300 but under circumstances which would bring the case within one of the Exceptions mentioned in that section; or
(ii) if the act is done with the intention or knowledge referred to in s 299, IPC but not falling under cll (2), (3) and (4) of s 300, IPC .

In the latter case, it is not necessary that any of the exceptions mentioned in s 300 should be applicable. Thus, if an accused does not intend to cause death or any bodily injury which he knows to be likely to cause death or even to cause such bodily injury as is sufficient in the ordinary course of nature to cause death, this section would apply even if the case is not covered by any of the exception mentioned in s 300 .[4] Where injuries, including three serious head injuries, with underlying fractures of the skull were inflicted, it was held that it could be considered sufficient to bring the case of the accused under s 308, because, had the injured died, the accused would have been easily convicted under s 304 .[5]

The accused appellant had inflicted injuries by lathi on the left side of head, seven cm above eye-brow, the victim had sustained fracture on left parietal bone also, the accused appellant was convicted under s 308, IPC .[6]

Where in a land dispute in a tussle between the parties to grab possession of the land, the accused persons suddenly fired causing simple injuries to the members of the prosecution party, accused persons were convicted under s 308 instead of ss 307 / 149, IPC .[7]

2. Sections 308, 307 and 511

Both ss 307 and 308, IPC have to be interpreted similarly. An attempt to commit culpable homicide is punishable with imprisonment for a certain period and therefore, but for its being expressly made an offence under s 308, it would have fallen under s 511, IPC which applies to all attempts to commit offences punishable2743 with imprisonment where no express provisions are made by the Code for the punishment of that attempt. It should follow that the ingredients of an offence of attempt to commit culpable homicide not amounting to murder should be the same as the ingredients of an offence of attempt to commit that offence under s 511 .

It was held in *Abhayanand Mishra v State of Bihar,*[8]that a person commits the offence of attempting to commit a particular offence, when he intends to commit that particular offence and having made preparations and with the intention to commit that offence, does an act towards its commission and that such an act need not be penultimate act towards the commission of that offence, but must be an act during the course of committing such offence. It follows, therefore, that a person commits an offence under s 308 when he has an intention to commit culpable homicide not amounting to murder and in pursuance of that intention does an act towards the commission of that offence whether that act be the penultimate act or not. On a parity of reasoning, a person commits an offence under s 307 when he has an intention to commit murder and in pursuance of that intention, does an act towards its commission

irrespective of the fact whether that act is the penultimate act or not. It is to be clearly understood, however, that the intention to commit the offence of murder means that the person concerned has the intention to do certain act with the necessary intention or knowledge mentioned in s 300 . The intention to commit an offence is different from the intention or knowledge requisite for constituting the act as that offence. The expression 'whoever attempts to commit an offence' in s 511, can only mean whoever intends to do a certain act with the intent or knowledge necessary for the commission of that offence. The same is meant by the expressions whoever does an act with such intention or knowledge and under such circumstances that is he by that act, caused death, he would be guilty of murder' in s 307 . This simply means that the act must be done with the intent or knowledge requisite for the commission of the offence of murder. The expression 'by that act' does not mean that the immediate outcome of the acts committed must be death. Such a result must be the result of that act whether immediately or after a lapse of time.[9]

The accused had inflicted six knife injuries on the person of the injured, out of which two injuries were of grievous nature, whereas the other injuries were simple. The guilt of the accused fell under s 307 and not under s 308, IPC .[10]

Sections 307 and 308 --Relative Scope

Section 308, IPC is *per verba et literis*, the same as s 307, IPC, with the only difference that it relates to an attempt to commit culpable homicide whereas s 307 relates to an attempt to commit murder. Punishment under s 308, IPC as provided is consequently also less. In other respects the constituting element of the two sections are the same.[11]

3. Sections 308, 323 / 324 and 325 / 326

An offence punishable under s 308 postulates doing of an act with such intention or knowledge and under such circumstances that if one by that act caused death, he2744 would be guilty of culpable homicide not amounting to murder. An attempt of that nature may or may not actually result in hurt. It is the attempt to commit culpable homicide which is punishable under s 308, whereas punishment for simple hurts can be meted out under ss 323 and 324 and for grievous hurts under ss 325 and 326, IPC . Qualitatively, these offences are different.[12]

4. 'Act' Denotes Series of Acts Also

Commentary under the same heading in s 307, *ante* and s 33, vol 1, may be referred to.

5. 'And under such Circumstances'

Commentary under the same heading in s 307, *ante*, may be referred to.

6. Mens Rea

Commentary under the same heading in s 307, *ante*, may be referred to.

Before an act can be said to have been committed under s 308 of the IPC, it is essential to examine the *mens rea* of the appellant at the time of the incident, because *mens rea*is one of the two essential elements of the offence of an attempt of murder. To constitute an offence of attempt to murder, there must be an act coupled with *mens rea*. Intention has been defined to consist of a desire that certain consequence shall follow from the act or omission of the accused. If there is no such intention or knowledge as is necessary to constitute murder, there can be no attempt to commit it. The intention may be proved by *res gestae*, by acts or events, previous or subsequent to the incident or occurrence. Various relevant circumstances from which the intention may be gathered are the nature of the weapon used, part of the body where injury was caused and nature of injury and opportunity available to accused.[13]

7. Intention

Intention is a mental state of a person. It cannot be ascertained with an instrument. Since intention manifests itself in an overt act, intention has to be gathered from the act of the party. In a case, weapon of offence, nature of injuries, body parts towards which injuries are directed, *etc*., guide in formation of the opinion as to intention.[14]

8. 'If he, by That Act, Caused Death'

Commentary under the same heading in s 307, *ante*, may be referred to.

Offence punishable under s 308, IPC postulates doing an act with such intention or knowledge and under such circumstances that if one, by that act, caused death, he would be guilty of culpable homicide not amounting to murder.[15]

If an accused does any act with such intention or knowledge and under such circumstances that, if he, by that act, caused death, he would be guilty of murder, he shall be guilty of committing an offence punishable under s 307, but if an accused2745 did any act that he would be guilty of culpable homicide not amounting to murder, he shall be guilty of committing an act punishable under s 308 .

9. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and triable by a court of sessions.

10. Charge

The following form of the charge may be adopted:

> I (*name and office of sessions judge, etc*) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about the...day of ..., at ..., did an act, to wit ..., with such intention (*or knowledge*), and under such circumstances, that, if, by that act, you had caused-the death of AB, you would have been guilty of culpable homicide not amounting to murder, and that you caused hurt to the said AB by the said act, and thereby committed an offence, punishable under section 308 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tired by this court on the said charge.

Where the injuries were caused with *lathis* to four persons by the accused resulting in fracture of head bone and grievous injuries, the complaint was lodged under ss 323 and 504, IPC . However, charge was framed under s 308, IPC ; it was held that the evidence sufficient to prove charge is not necessary at stage of framing of charge, hence, there was no illegality if charge has been framed under s 308 .[16]

11. Appreciation of Evidence

Where the accused fired a shot from airgun at the complainant which hit near his eyes though the shot was aimed to the head, the accused was held guilty under s 308 .[17] Where the fact of possession of airgun by the family of the accused is proved, the non-recovery of the such airgun which happens to be

the weapon of offence is not fatal to the prosecution case.[18] Where the accused fired at one person, but the bullet missed the target and hit the thigh of another person, the accused was found guilty under s 308 .[19] Where there was an argument between the accused conductor of the bus and the injured, and the accused pushed injured out of the running bus, the injured fell down and sustained injuries, the conviction of accused under s 308 was found proper.[20] Even if no injury grievous in nature has been noticed by the doctor who medically examined the injured and that injury which has been proved dangerous to life has no basis, yet the conviction can be recorded under s 308 in the facts and circumstances of a case. When the accused were armed with deadly weapons like *gandasi* and *lathis*, and they had selected the sensitive parts of the body like the head for inflicting injuries and one injury was even bone-deep, the conviction was found proper.[21]2746

12. Right of Private Defence

When no plea is set up by the accused that he assaulted the injured because latter encroached upon his land by ploughing the same, no question of exercise of right of private defence by the accused arises.[22]

13. Sentence

There is purpose and policy behind the provision of s 235(2), CrPC which came to be introduced in this Code and commands that the court is obliged to take into account various facts and circumstances peculiar and personal to the accused before determining quantum of sentence like: (i) age; (ii) economic standard; (iii) nature of employment or vocation; (iv) character; (v) nature of offence; or (vi) mode and manner in which weapon came to be employed during the course of offence. It is the duty of the court to bear in mind all these facts and circumstances, the proposition of law and existing prevailing policy and philosophy of criminology and penology without being oblivious to the vitality and has to strike a balance so that sentence does not become disproportionate to the harm caused in the offence and at the same time, too lenient or inadequate that it may affect to an extent, social good.[23]

The accused cannot be granted any benefit because of the gap between time of occurrence and date of conviction of the accused. The scales of justice have to be kept even and a wrongful acquittal of the accused made by the trial court must be set aside and adequate sentence must be awarded.[24] The fact that the sentence is being awarded to the accused after about 10 years from the date of the incident cannot weigh consideration in a case where very severe injuries were caused by accused to the victim and a number of his bones were broken and no mercy was shown by the accused to the victim. In these circumstances sentence of three years' rigorous imprisonment cannot be said to be harsh.[25]

The accused appellant had inflicted injuries by lathi blows on the left side of head, seven cm above eye-brow, the victim had sustained fracture of left parietal bone also. Sentence of two years RI was imposed.[26]

Where the accused and complainant parties were neighbours and were on good terms before the incident and the accused persons were of young age, the sentence of imprisonment of accused persons was reduced from three years' rigorous imprisonment and fine of Rs 3000.[27] Where the accused faced trial for four years, though benefit of probation under s 360, CrPC was not given to him, his sentence was reduced from five years' rigorous imprisonment to one year.[28] Where the accused convicted under s 308 was 19 years old, he had no previous conviction or any other antecedents of violence, the sentence of imprisonment of the accused was reduced to the period of imprisonment already undergone, but the sentence of fine was maintained.[29]2747

Compromise--Effect on Sentence

Although an offence under s 308 is not compoundable, but the fact that complainant and the accused have compromised is a instigating factor in awarding lesser sentence to the accused.[30] Where the 70 years old accused and co-accused were economically poor and had already undergone one month's imprisonment, the dispute between accused and complainant party had already been resolved, and

compromise reached, the sentence of the accused person under s 308 was reduced to the period of imprisonment already undergone and fine.[31]

14. Alteration of Conviction from Section 307 to Section 308

Commentary under the same heading in s 307, *ante*, may be referred to.

The doctor in injury report had not stated that the injury of the victim in the ordinary course of nature was sufficient to cause death. Conviction of the accused under s 307, IPC was altered to one under s 308, IPC and sentence was reduced to the period already undergone.[32]

Where the doctor stated that the injury found on the person of the injured was not sufficient to cause death in the ordinary cause of nature, conviction of the accused under s 307, IPC was altered to one under s 308, IPC .[33]

15. Alteration of Conviction from Section 308 to Section 323

Where the accused inflicted injuries on the victim which in the opinion of the doctor were grievous injuries but the doctor had not given sufficient reasons for opining the injuries to be grievous in nature, the conviction of the accused under ss 308 / 34 was set aside and instead they were convicted under s 323 .[34] Where the accused was alleged to have attacked the victim with iron rod, the evidence of eyewitnesses was infirm and contradicting as to the weapon of offence, the opinion of the doctor was that the injuries found on the person of victim were simple and caused by blunt object, the conviction of the accused was altered from s 308 to one under s 323 .[35]

16. Alteration of Conviction from Section 308 to Section 324

Where in a sudden fight, the accused inflicted a blow with iron pipe in a spur of moment, there was no pre-plan or pre-meditation, the conviction of accused was altered from s 308, Pt, II to s 324 .[36]

17. Alteration of Conviction from Section 308 to Section 352

Where it was not established as to which of the accused persons inflicted the head injury on the victim, but each of the accused aimed a *lathi* blow at the victim, an act which, irrespective of whether the blow hit the mark, renders the wielder guilty of2748 assault as defined under s 351, IPC, the conviction of accused person was altered from s 308 to s 352 .[37]

3 *Om Prakash v State of Punjab* AIR 1961 SC 1782, p 1785, (1961) 2 Cr LJ 848 .

4 *State of Madhya Pradesh v Shanker Gangaram* AIR 1956 Nag 208, (1956) Cr LJ 908 ; *Mohan Rathore v State of Madhya Pradesh* (1986) Cr LJ 1280 (MP) .

5 *Mohanlal v State* AIR 1961 Raj 24, p 29, (1961) 1 Cr LJ 155 ; *Suraj Din v State* (1957) All LJ 308 ; *Ganpat v State* (1951) Raj LW 313 .

6 *Jameel v State of UP* 2010 Cr LJ 2106 (SC), 2010 AIR SCW 217, 2009 (13) Scale 578 .

7 *Rameshwar Lal v State of Rajasthan* 2015 Cr LJ (NOC) 276 (Raj) .

8 Criminal Appeal no 226 of 1959, AIR 1961 SC 1698 .

9 *Om Prakash v State of Punjab* AIR 1961 SC 1782 .

10 *Shaukat v State of Uttaranchal* 2010 Cr LJ 4310, p 4319, 2010 AIR SCW 5017, (2010) 5 SCC 68, (2010) 4 Scale 299 .

11 *Basti Ram v State of Rajasthan* (2007) Cr LJ 3359 (Raj) .

12 *Sunil Kumar v NCT Delhi* (1998) SCC (Cri) 1522 .

13 *Mohan Rathore v State of Madhya Pradesh* (1986) Cr LJ 1280 (MP) .

14 *Robil Shah v State* (2005) Cr LJ 2630 (Del) .

15 *Sunil Kumar v NCT Delhi* (1998) SCC (Cri) 1522 ; *Velu v State* (2004) Cr LJ 3783 (Mad) .

16 *Kamlesh Kumar v State of UP* (2004) Cr LJ 4271 (All) .

17 *Balkrishan Dattaram Salgaokar v State* (1987) 3 Crimes 421 (Bom) .

18 *Ibid*.

19 *Sukhdev Singh v State* (2002) Cr LJ 3964 (Del) (DB) .

20 *Ajay Singh v State Govt of NCT of Delhi* (2002) Cr LJ 1970 (Del) .

21 *Jarnail Singh v State of Haryana* (1999) 2 RCR 343 (P&H) .

22 *State of Uttar Pradesh v Ramesh & ors* (2000) Cr LJ 1354 (All) .

23 *State of Gujarat v Pandya Premshankar* (1999) Cr LJ 1841 (Guj) (DB) .

24 *State of Uttar Pradesh v Ramesh & ors* (2000) Cr LJ 1354 (All) .

25 *Yadav & ors v State* (1984) 2 Crimes 747 (All) .

26 *Jameel v State of UP* 2010 Cr LJ 2106 (SC), 2010 AIR SCW 217, 2009 (13) Scale 578 .

27 *Jeet Ram and Sumer Singh v State* (1987) 2 Crimes 80 (Del) .

28 *Meher Singh v State of Punjab* (1999) 2 RCR 778 (P&H) .

29 *Baldev Singh v State of Punjab* (1987) CCC 169 (P&H) .

30 *Surja Singh v State of Haryana* (1999) 4 RCR 101 (P&H) ; *Ram Lal v State of J&K* (1999) 1 SCC 147 ; *Mohan Rathore v State of Madhya Pradesh* (1986) Cr LJ 1280 (MP) ; *Ram Pujan v State* AIR 1973 SC 2418 .

31 *State of Gujarat v Pandya Premshanker* (1999) Cr LJ 1841 (Guj) (DB) .

32 *Jagannath v State of Rajasthan* 2014 Cr LJ (NOC) 69 (Raj) .

33 *Bhanwar Singh v State of Rajasthan* 2014 Cr LJ 73 (Raj) .

34 *Ashok Kumar v State* (1996) 1 Chand Cr Cas 154 (Del) (DB).

35 *Ranjit Singh v State* (1995) AIHS 4282 (Del) .

36 *Velu v State* (2004) Cr LJ 3783 (Mad) .

37 *Suraj Din & ors v State* (1957) All LJ 308 (All) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 309.

Attempt to commit suicide.--

Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year [38][or with fine, or with both].

Comments

1. Scope

This section punishes the act of 'attempt to commit suicide'. This section is the only instance in the whole IPC wherein an attempt is made punishable while what is attempted is not an offence because the offender, being dead, cannot be punished. In the expression 'any act towards the commission of such offence', the word 'offence' does not refer to 'suicide' but to the 'attempt to commit suicide' which is made punishable, as an offence, under this section.

The question as to whether the suicide was committed explosively or whether it was committed after prolonged deliberation is wholly irrelevant.

No distinction can be drawn between the suicide committed by a person who had led a successful life, and the mission of his life been completed, and between suicide committed by a person who is a citizen frustrated or defeated in life. The same should be the position with regard to attempt to commit suicide.[39]

2. Law of Australia

'Suicide' is the intentional killing of oneself with knowledge of the probable consequences of such an act. In no jurisdiction is suicide an offence. It is an offence in every jurisdiction to assist or encourage another person to commit suicide. In most jurisdictions it is an offence to assist or encourage someone to attempt to commit suicide. In South Australia, the offender is liable for murder or attempted murder if he or she procures the suicide or attempted suicide by means of fraud, duress or undue influence. Under the (CTH) Criminal Code, it is an offence to use a carriage service (such as the Internet) to access, transmit, make available, publish or distribute suicide related material, or to possess, control, produce, supply or obtain such material for use through a carriage service.2749

In some jurisdictions, legislation further provides that it is lawful for a person to use force that is reasonable to prevent the suicide of another person or any act that the person believes on reasonable grounds would, if committed, result in the suicide by another person. However, such provisions do not permit apprehension or arrest of a person who has threatened or is threatening suicide.[40]

""Suicide" would not be a correct finding if the proper conclusion on the evidence were that, although the deceased was aware that she was projecting herself through an upper storey window, she was unable through a temporary defect in understanding to appreciate that death was the probable consequence of her actions, so that she did not intend to kill herself. In such a case, the finding should be "misadventure", though insanity or disturbed balance of mind will justify a finding of suicide unless it is of such a character as to deprive the person of the ability to appreciate the probable consequences of the act."[41]

3. Sections 309, 302 and 84

Where a woman jumped into a well along with her children and was convicted under ss 302 and 309 for murdering her two children and attempting to commit suicide, the plea of insanity as a defence was not accepted, as mere insanity as is known in medical science is not sufficient to dismiss a charge of criminal prosecution unless the insanity alleged is one which is shown to have suffered at the time of commission of offence and the accused woman on being rescued voluntarily offered exculpatory explanation ruling out the plea of insanity, conviction of the accused under ss 302 and 309 was found proper.[42]

Constitutional Validity of Section 309

It would be appropriate to refer to the decisions wherein the question of constitutional validity of s 309 was considered.

Maruti Shripati Dubal v State of Maharashtra ,[43] is a well-known case decided by a Division Bench of the Bombay High Court. In that decision, PB Sawant J, as he then was, speaking for the Division Bench held that s 309 is violative of art 14 as well as art 21 of the Constitution . The provision was held to be discriminatory in nature and also arbitrary so as to violate the equality principle enshrined in art 14 . Article 21 was construed to include the 'right to die' or to terminate one's own life. For this reason it was held to violate art 21 also.

State v Sanjay Bhatia ,[44] is a decision of Delhi High Court, wherein Sachar J, as he then was, speaking for the Division Bench held that the continuance of s 309 is an anachronism unworthy of human society like ours. However, the question of its constitutional validity with reference to any provision of the constitution was not considered.

In *Chenna Jagadeeswar v State of Andhra Pradesh* ,[45] a decision by a Division Bench of Andhra Pradesh High Court, the challenge to the constitutional validity of s 309, IPC was rejected. The argument that art 21 includes the 'right to die' was2750 rejected. It was also pointed out by Amareshwari J, speaking for the Division Bench that the courts have sufficient power to see that unwarranted harsh treatment or prejudice is not meted out to those who need care and attention. This negatives the suggested violation of art 14 .

The first decision of the Supreme Court in *P Rathinam*[46] by a Division Bench, wherein Hansaria J, speaking for the Bench rejected the challenge to the constitutional validity of s 309 based on art 14 of the Constitution, but upheld the challenge on the basis of art 21 of the Constitution . The earlier decisions of the Bombay High Court and the Andhra Pradesh High Court were considered and agreement was expressed with the view taken by the Andhra Pradesh High Court as regards s 309 *qua* art 14 . The decision then proceeds to consider the challenge with reference to art 21 of the Constitution . It was held that art 21 has enough positive content in it so that is also includes the 'right to die' which inevitably leads to the right to commit suicide. Expressing agreement with the view taken by the Bombay High Court in respect of the content of art 21, it was held as under: 'Keeping in view all the above, we state that right to live of which art 21 speaks of can be said to bring in its trail the right not to live a forced life'.

The conclusion of the discussion was summarised as under:

> On the basis of what has been held and noted above, we state that section 309 of the Penal Code deserves to be effaced from the statute book to humanise our penal laws. It is a cruel and irrational provision and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which state's interference with the personal liberty of the persons concerned is not called for.
>
> We, therefore, hold that s 309 violates Article 21 and so, it is void. May it be said that the view taken by us would advance not only the cause of humanization, which is a need of the day, but of globalization also, as by effacing section 309 we would be attuning this part of our criminal law of global wavelength.

In *Gyankaur v State of Punjab* ,[47] a Constitutional Bench of the Supreme Court examined the aforesaid decisions of the High Courts and the Supreme Court and overruled *P Rathinam's* case,[48] stating as

follows:

> When a man commits suicide he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to, or be included within the protection of the 'right to life' under Article 21 . The significant aspect of 'sanctity of life' is also not to be overlooked. Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can extinction of life be read to be included in 'protection of life'. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the 'right to die' as a part of the fundamental right guaranteed therein. 'Right to life' is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of 'right to life' with respect and in all humility, we find no similarity in the2751 nature of the other rights, such as the right to 'freedom of speech' *etc.* to provide a comparable basis to hold that the 'right to life' also includes the 'right to die'. With respect, the comparison is inapposite, for the reason indicated in the context of Article 21 . The decisions, relating to other fundamental rights wherein the absence of compulsion to exercise a right was held to be included within the exercise of that right are not available to support the view taken in *P Rathinam*, qua Article 21 .

To give meaning and content to the word 'life' in art 21, it has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. The 'right to die', if any, is inherently inconsistent with the 'right to life' as 'death' with 'life'.

The Constitutional Bench however, approved the view taken in *P Rathinam* case that s 309 is not violative of art 14 by observing as follows:

> With respect, we are in agreement with the view so taken qua Article 14, in *P Rathinam*,.

> We have already stated that the debate on the desirability of retaining such a penal provision of punishing attempted suicide, including the recommendation for its deletion by the Law Commission are not sufficient to indicate that the provision is unconstitutional being violative of Article 14 . Even if those facts are to weigh, the severity of the provisions is mitigated by the wide discretion in the matter of sentencing since there is no requirement of awarding any minimum sentence and the sentence of imprisonment is not even compulsory. There is also no minimum fine prescribed as sentence, which alone may be the punishment awarded on conviction under s 309, IPC . This aspect is noticed in *P Rathinam* for holding that Article 14 is not violated.

It is pertinent to note that against the decision of Bombay High Court in *Maruti Shripati Dubal v State of Maharashtra* ,[49] the matter came up in appeal before the Supreme Court and the decision of Bombay High Court was overruled.[50] In the below mentioned case, the Supreme Court opined that although s 309 of the IPC (attempt to commit suicide) has been held to be constitutionally valid in *Gian Kaur* case, the time has come when it should be deleted by Parliament as it has become anachronistic. A person attempts suicide in depression, and hence he needs help, rather than punishment, the Court recommend to Parliament to consider the feasibility of deleting s 309 from the IPC .[51]

4. 'Attempts to Commit Suicide'

Commentary under heading 'Attempt' in s 307, *ante*, may be referred to.

An attempt belongs to the stage of execution of the offence in question; it is not merely an act of preparation. Hence, the mere running to a well, with the intention of committing suicide, is not an attempt to commit suicide.[52] A person who jumps into a well in order to avoid and escape from the police and subsequently comes out of the well himself, cannot be convicted under this section if there is no evidence

to show2752 that he wanted to commit suicide.[53] A person cannot be convicted under this section for emasculating himself.[54]

'Attempt' involves a conscious effort to achieve a particular result. A mere refusal to take any food or nourishment would not amount to such a conscious effort towards achieving the object to putting an end to one's own life. It may be a stage of preparation after the formation of an intention. It is only refusal to take food or nourishment, at the critical stage, when the individual is hanging between life and death, which would amount to a conscious attempt to commit suicide. In a case, Broome J, observed that unless there is some overt declaration by the accused of his intention to fast to death, it is difficult to be sure that he really intends to persevere to the bitter end. Also, even if there is such an intention at the beginning, one has always to make allowance for the possibility of the accused's changing his mind and breaking his fast before it becomes dangerous. If, therefore, a person openly declares that he will fast to death and then proceeds to refuse all nourishment, even when there is imminent danger of death ensuing, he can be held guilty of the offence of attempted suicide.[55] Where a woman, who had been driven almost frantic by pains of prolonged labour, attempted to take her own life by throwing herself into a well, in which she delivered the birth of a child, who was unfortunately born dead, it was held that she was guilty under this section.

5. 'Suicide'

Commentary under the same heading in s 306, *ante*, may be referred to.

Suicide consists of a self-killing inspired by deliberate intention of the deceased to put an end to his own existence.[56]

Where the accused was convicted for murder of her three children by throwing them into a river after which she had attempted to commit suicide by jumping into the river, and her conviction was based on extra-judicial confession before a village administrative officer and evidence of one eyewitness, the evidence showed the possibility of receding said extra-judicial confession in presence of the police, there was a huge rock between eyewitness, accused and her children standing on river bank, the defence's plea that accused accidentally slipped into river with her children was corroborated by evidence of doctor, motive for commission of offence by accused was also absent, the conviction of accused under ss 302 and 309 was set aside.[57]

Cause of death of deceased wife was burn injuries. In her dying declaration she stated that the accused (her husband) had beaten her, poured kerosene oil and set her on fire. Burn injuries were not found on the back side of chest, abdomen and right foot of the deceased. The theory of suicide and accidental death was ruled out. Conviction of the accused appellant under s 302, IPC was held proper.[58]2753

Suicide or Homicide

Commentary under the same heading in s 306, *ante*, may be referred to.

Where the death of a recently wed and highly educated wife occurred by burning during midnight in a dark kitchen, no kerosene or other catalyst or a match box was found in kitchen where the incident happened; there was a discord between spouses and deceased reconciled to the prospect of separation and determined to embark upon new life by obtaining a job, the conduct of husband was unnatural as on knowing about burning of his wife, he also absconded for a month, it was held to be a case of murder and not suicide.[59]

The very fact that the body with ligature mark around the neck was found on a cot and not hanging, completely demolished the theory of suicide and proves that the deceased-wife was murdered. As regards the possibility of murder by some intruder, the most eloquent circumstance against its acceptance is that there was no sight of scuffle or mark of sexual assault on the deceased and no proof of theft of any article from the room or any attempt of such a thing. In these circumstances, the conclusion could be drawn that the accused after strangulating his wife to death, which according to the doctor could be caused within two

to three minutes, came out with a false version that she was lying unconscious. The conviction of the accused under s 302 was, therefore, found proper.[60] Where the accused-husband used to make acquisitions against his deceased-wife that she was suffering from leprosy showing the motive of accused for her murder, the doctors after seeing the report of chemical analyst, stated that poison would have worked fatally on the victim, the accused had opportunity to administer poison when he was in the same room with deceased on the fateful night, acquittal of accused by the High Court on coming to conclusion that deceased-wife had committed suicide, was set aside by the Supreme Court.[61]

Where in a case of death by hanging, there was no direct or circumstantial evidence to show any cause of murder, the opinion of autopsy surgeon that the death might be homicidal was not decisive but ambivalent in nature, the body of the deceased was found hanging by rope, eyes partly open, light whitish secretion was coming out from the nose, and the tongue had also come out, these features were suggestive of possibility of suicide, so conviction of the accused for murder under s 302 and imposition of death sentence was found improper and set aside.[62]

Fast unto Death

The fast unto death is also an attempt to commit suicide. Where the accused had undertaken a 'fast unto death', and an FIR under s 309 was registered against him, his challenge to the registration of FIR in the writ petition on the ground that s 309 is *ultra virus* the constitution was not accepted in the wake of *Gyan Kaur v State of Punjab* ,[63] and the writ petition of the accused was, therefore, dismissed.[64]

6. Euthanasia--Meaning

The word 'euthanasia' originated from the Greek words '*eu*' which means 'good' and '*thanatos*' which means 'death'. One meaning given to the word is 'the2754 intentional termination of life by another at the explicit request of the person who dies'.[65]

The term euthanasia normally implies that the act must be initiated by the person who wishes to commit suicide. However, some people define euthanasia to include both voluntary and involuntary termination of life.

Euthanasia may be classified as active and passive, or alternatively as voluntary, non-voluntary and involuntary. Active euthanasia involves painlessly putting individuals to death for merciful reasons, as when a doctor administers a lethal dose of medication to a patient. Passive euthanasia involves not doing something to prevent death, as when doctors refrain from using devices necessary to keep alive a terminally ill patient or a patient in a persistent vegetative state. Voluntary euthanasia is when a person asks to die (by either active or passive euthanasia). Non-voluntary euthanasia refers to ending the life of a person who is not mentally competent to make an informed request to die, such as a comatose patient. In addition, there is another category of involuntary euthanasia. This is said to occur when a patient is killed against his express will.[66]

It is important that euthanasia should not be confused with assisted suicide. The latter involves a patient's voluntarily bringing about his or her own death with the assistance of another person, typically a physician. In this case, the act is a suicide (intentional self-inflicted death), because the patient actually causes his or her own death. Thus while in assisted suicide the doctor makes available to the patient the means by which he can kill himself, in euthanasia the doctor himself (by act or omission) kills the patient. The issue of assisted suicide is closely related to that of euthanasia because it also involves questions of a similar nature. Furthermore some countries have preferred to legalise assisted suicide though they remain averse to permitting euthanasia.[67]

Merey killing or Euthanasia

Euthanasia is of two types: Active and passive. Active euthanasia entails the use of lethal substances or forces to kill a person *e.g.* a lethal injection given to a person with terminal cancer who is in terrible agony.

Passive euthanasia entails withholding of medical treatment for continuance of life, *e.g.* withholding of antibiotics where without giving it a patient is likely to die, or removing the heart lung machine from a patient in coma. While active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation, provided certain conditions and safeguards are maintained. In India, active euthanasia is illegal and a crime under s 302 or at least s 304, IPC . Physician assisted suicide is a crime under s 306, IPC (abetment to suicide). In this case, the petitioner Aruna Ramchandra Shanbaug was working as Staff nurse in King Edward Memoriam Hospital, Bombay. On 27 November 1973, a sweeper in the hospital tried to rape/sodomize her and to immobilize her during the act twisted the chain around her. Due to strangulation by the chain the supply of oxygen to the brain stopped and the brain got damaged. After about 36 years from the date of the incident, the petitioner aged 60 years and in a persistent vegetative state, was virtually dead. Prayer of the petitioner was that the respondent be directed to stop feeding the petitioner and leave her to die peacefully. The Supreme Court held:2755

> There is no statutory provision in our country as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection. We agree with Mr. Andhyarujina that passive euthanasia should be permitted in our country in certain situations, and we disagree with the learned Attorney General that it should never be permitted. Hence, following the technique used in *Vishakha's* case, we are laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject.
>
> (i) A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken *bona fide* in the best interest of the patient.
>
> (ii) In the present case, we have already noted that Aruna Shanbaug's parents are dead and other close relatives are not interested in her ever since she had the unfortunate assault or her. As already noted above, it is the KEM Hospital staff, who have been amazingly caring for her day and night for so many long years, who really are her next friends, and not Ms. Pinky Virani who has only visited her on few occasions and written a book on her. Hence it is for the KEM Hospital staff to take that decision. The KEM Hospital staff have clearly expressed their wish that Aruna Shanbaug should be allowed to live.

Unfortunately the petitioner has died in the year 2015, while the accused who put the petitioner in such a stage is still alive.[68]

Euthanasia--Legal Position in India

Suicide by its very nature is an act of self killing or self-destruction, an act of terminating one's own life without the aid or assistance of any other human agency. Euthanasia or mercy-killing on the other hand means and implies the intervention of other human agency to end a life. Mercy-killing is not covered by the provisions of s 309 . The two concepts are both factually and legally distinct. Euthanasia or mercy-killing is nothing but homicide whatever the circumstances in which it is effected.[69]

Being pro-euthanasia on the view that existence in Persistent Vegetative State (PVS) is not a benefit to the patient of a terminal illness being unrelated to the principle of 'sanctity of life' or the 'right to live with dignity' is of no assistance to determine the scope of art 21 of the Constitution for deciding whether the guarantee of 'right to life' therein includes the 'right to die'. The 'right to life' including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing. However, the 'right to die' with dignity at the end of life is not to be confused or equated with the 'right to die' an unnatural death curtailing the natural span of life.[70]

A question may arise, in the context of a dying man who is terminally ill or in a PVS that he may want to terminate his life in such circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and

imminent and the process of natural death has commenced. These are not cases of2756 extinguishing life, but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret art 21 to include there in the right to curtail the natural span of life.[71]

Only cases of voluntary euthanasia (where the patient consents to death) that would attract exception 5 to s 300 . Cases of non-voluntary and involuntary euthanasia would be struck by proviso 1 to s 92, IPC and thus, be rendered illegal.

The law in India is also very clear on the aspect of assisted suicide. Abetment of suicide is an offence expressly punishable under ss 305 and 306, IPC .

Moreover, after the decision of a five judge bench of the Supreme Court in *Gian Kaur v State of Punjab* ,[72] it is well settled that the 'right to life' guaranteed by art 21 of the Constitution does not include the 'right to die'. The court held that art 21 is a provision guaranteeing protection of life and personal property and by no stretch of the imagination can extinction of life be read to be include in the protection of life.[73]

7. 'Act' Denotes a Series of Acts also

Commentary under the same heading in s 307, *ante* and also commentary under s 33, vol 1, may be referred to.

8. Procedure

The offence under this section is cognizable, bailable, non-compoundable and triable by a magistrate.

9. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.

10. Notice under Section 251 , Code of Criminal Procedure 1973

In the prosecution of an offence under this section, the following form of the notice under s 251, CrPC may be adopted:

> I (*name and office of the magistrate etc*) hereby give notice to you (*name, father's name & addres of accused*) as follows:
>
> That on or about the..... day of..... at..... (*give particular of place of incident*), you attempted to commit suicide and did any act towards the commission of such offence by ..... (*give particulars of the act by which such attempt is made e.g., by consuming poison, by strangulation etc.*) and thereby committed an offence punishable under section 309 of the Indian Penal Code and within my cognizance.
>
> And I hereby direct that you be tried for the said offence.2757

Q. Have you heard and understood the notice?

Ans. Yes

Q. Do you plead guilty or have any defence to make?

Ans.

Name of the office of the Magistrate

11. Drowning, Sunk and Floating Body

As regards the buoyancy of the human body, Taylor in his *Principles and Practice of Medical Jurisprudence* opined as under:[74]

The recovery of an immersed body:

After drowning has occurred the body usually sinks and then may reappear after a variable period of time. The time interval depends on:

1. the nature of water--salt or fresh;
2. the specific gravity of the body;
3. the rate of putrefactive change.

It may be recalled that according to the principle of Archimedes a body in water will experience a buoyant force equal to the weight of water it displaces. Also the specific gravity of the body relates the weight and volume of the body to that of the water. The specific gravity of the human body is very close to that of water. Small variations, therefore, have considerable effect on the buoyancy.

In a study in which the specific gravity and buoyancy were calculated related to specific volume of air in the lungs of each subject Donoghue and Minnigerode concluded that all subjects would be capable of floating in either fresh water or sea water at total lung capacity. At functional residual capacity (the

approximate lung volume of the dead body), 69 percent of the subjects would float in sea water whereas only 7 percent would float in fresh water.

In addition to the amount of air in the lungs, the specific gravity of the human body varies with the size and composition of that body. The weight of the skeleton is balanced against the amount of fat present. Thus women generally have a lower specific gravity than men while infants and young children appear to float more readily than adults.

Clothing will tend to support the body initially with natural buoyancy and later perhaps assist in sinking because of its weight. The addition of weights to the body will also assist the process.

Thus, as a general rule the body with water in the lungs and stomach will sink. It will go down to the bottom because hydrostatic pressure which increases with depth will compress but gas is present and thus increase specific gravity. There it may remain until, if it is free to move, the formation of the gases of putrefaction will decrease the specific gravity. It will then rise to the surface and float.

In *Modi's Textbook of Medical Jurisprudence and Toxicology,*[75] it is stated as follows:

> Length of time the body was in water:
>
> Normally the human body is slightly heaven than fresh water and immediately the person becomes unconscious, sinks and goes down is the bottom unless there is some2758 obstruction between or there is a strong upward current it the water. Owing to putrefaction and formation of gases all bodies sooner or later again come up to the surface, it is much quicker in warm water than cold. Usually the sunk body comes to the surface a little distance away from the site of drowning, however, the current, its speed and the tide in sea water are some of the factors.[76]

Where the accused mother was alleged to have thrown her children into well and therefore jumped in well to commit suicide, the statement of eyewitness that she saw the body of accused son floating when he looked down into the well after seeing her jumping into it cannot be believed as the body of the boy would also have sunk and not floated after the accused jumped into the well, the statement of the witness was also against the principles of buoyancy of human body, the evidence of the doctor prior conducted post-mortem was also not clear as to how the body of the son could instantly float while the body of the daughter was fully sunk in the water, the conviction of the accused under ss 300 and 309 IPC was set aside giving her benefit of doubt.[77]

12. Proof

It is to be proved that the accused did an act in the course of an attempt to commit suicide and that it was for the purposes of committing suicide.

Where from the evidence of prosecution witness, it is clearly established that when they tried to take accused into custody, he had attempted to commit suicide by biting a cyanide capsule, the accused in his statement made under s 313, CrPC, also admitted that he had tried to bite a cyanide capsule when he was caught by the police, the acquittal of the accused under s 309 was altered to his conviction under the same section.[78] Where accused mother after altercation with other family members proved to have locked herself in a room along with the deceased son, circumstantial evidence listed and witness corroborated prosecution story, conviction of the accused woman under ss 300 and 309 was found proper.[79]

13. Probation

Many decisions show that even on conviction under s 309, IPC, in practice the accused have been dealt with compassion by giving benefit under the Probation of Offenders Act 1958 or s 562, CrPC 1898 corresponding to s 360 of the CrPC 1973.

14. Admonition

Where accused woman jumped into well with her two children and after being convicted under ss 307 and 309, IPC she was released on admonition for the offence under s 309, IPC and had been sentenced to imprisonment for three years for offence under s 307 for attempting for murder her children, the Supreme Court did not see any valid reason for making this distinction in award of sentence under ss 309 and 307 and thus, directed the offence to be dealt with under s 307 also.[80]2759

15. Sentence

The law confers, upon the court, a very wide discretion in the matter of punishment and it is not necessary to inflict a sentence of imprisonment upon a person who, on account of family discord, destitution, loss of a dear relation, or other cause of a like nature, overcomes the instinct of self-preservation and decides to take his life. In such a case, the unfortunate person deserves indulgence and should be either released on probation for good conduct or sentenced to a fine if he is not too poor to pay it. These observations apply with greater force to the case of a woman who attempts to commit suicide in similar circumstances. It is not possible to lay down any hard and fast rule on the subject, but the court must, in each case, consider the motive which has prompted a person to destroy his or her own life.[81] A severe punishment should not be inflicted where the accused suffers from a bodily ailment likely to cause acute mental depression.[82]

Remission of Sentence

Where after altercation with other family members, the accused woman murdered her child and attempted to commit suicide, she had apparently no motive to commit murder of her own son, her age was about 17 years, a Division Bench of Allahabad High Court while confirming her conviction under ss 302 and 309, IPC recommended that it is a fit case in which the government may consider the feasibility of remitting a part of punishment to which the accused has been sentenced in exercise of their power under s 32, CrPC .[83]

38 Substituted by Act 8 of 1882, s 7 for 'and shall also be liable to fine'.

39 *CA Thomas Master v Union of India* (2000) Cr LJ 3729 (Ker) (DB) .

40 *Halsbury's Law of Australia*.

41 In re *DAVIS, DECD*[1968] 1 QB 72.

42 *Barati v State* (1989) Cr LJ 415 (Ori) (DB) .

43 *Maruti Shripati Dubal v State of Maharashtra* (1987) Cr LJ 743 (Bom) .

44 *State v Sanjay Bhatia* (1985) Cr LJ 931 (Del) .

45 *Chenna Jagadeeswar v State of Andhra Pradesh* (1988) Cr LJ 549 (AP) .

46 *P Rathinam/Nagbhusan Patnaik v Union of India* AIR 1994 SCW 1764, (1994) 3 SCC 394, AIR 1994 SC 1844, (1994) Cr LJ 1605 (SC) .

47 *Gyankaur v State of Punjab* (1996) Cr LJ 1660 (SC) .

48 *P Rathinam/Nagbhusan Patnaik v Union of India* AIR 1994 SCW 1764, (1994) 3 SCC 394, AIR 1994 SC 1844, (1994) Cr LJ 1605 (SC) .

49 *Maruti Shripati Dubal v State of Maharashtra* (1987) Cr LJ 743 (Bom) .

50 *State of Maharashtra v Maruti Shripati Dubal* (1996) Cr LJ 4457 (SC) ; **See also***Aruna Ramchandra Shanbaug v Union of India* AIR 2011 SC 1290, 2011 (3) Scale 298, (2011) 4 SCC 454, (2011) 2 SCC (Cri) 352, [2011] 4 SCR 1057 .

51 *Aruna Ramchandra Shanbaug v Union of India* (2011) 4 SCC 454, p 512, AIR 2011 SC 1290, (2011) 2 SCC (Cri) 294 .

52 *R v Ramada* ILR 8 Mad 5 ; *Rattan Omni v R* ILR 32 Cal 292 .

53 *Emperor v Dwarka Poonja* 13 Ker LJ 246 ; *Emperor v Dhirajia* AIR 1940 All 486, 42 Cr LJ 146 .

54 Re *Madho Singh* 22 PR (Cr) 1878.

55 *Ram Suner Dubey v State* AIR 1962 All 262, (1962) 1 Cr LJ 697 ; *Girjabai Ramlal v State* (1960) MPLJ (Notes) 194 .

56 *R v Russell* (1832) 1 Moor CC 356 ; *R v Gaylor* (1857) D&B 288 .

57 *Kulandai Ammal v State* (1999) 3 Crimes 75 (DB) .

58 *Jayabalan v UT of Pondicherry* 2010 Cr LJ 2234, p 2245 (SC), 2010 AIR SCW 419, (2009) 13 SCC 614, 2010 (1) SCC 199 .

59 *Subedar Tewari v State* AIR 1989 SC 733, (1989) Cr LJ 923 (SC) .

60 *Ram Kumar Madhusudan Pathak v State of Gujarat* (1998) Cr LJ 4048 (SC) .

61 *State of Himachal Pradesh v Jeet Singh* (1999) Cr LJ 2025 (SC) .

62 *Digambar Gope v State of West Bengal* (1997) Cr LJ 2072 (Cal) (DB) .

63 *Gyan Kaur v State of Punjab* (1996) 2 SCC 648, (1996) SCC (Cri) 374, (1996) Cr LJ 1660 (SC) .

64 *Banwari Lal Sharma v State of Uttar Pradesh* (1998) 3 SCC 604, (1998) SCC (Cri) 885 .

65 Definition of 'Euthanasia' by Netherlands State Commission on Euthanasia.

66 Shriyans Kasliwal, 'Should euthanasia be legalised in India', 2002 Cr LJ (Journal), p 209.

67 *Ibid.*

68 *Aruna Ramchandra Shanbaug v Union of India* AIR 2011 SC 1290, p 1331, 1332, (2011) 4 SCC 454 .

69 *Naresh Marotrao Sakhre v Union of India* (1995) Cr LJ 96 (Bom) .

70 *Gyan Kaur v State of Punjab* AIR 1996 SC 946, (1996) Cr LJ 1660 (SC) .

71 *Gyan Kaur v State of Punjab* AIR 1996 SC 946, (1996) Cr LJ 1660 (SC) .

72 *Gian Kaur v State of Punjab* AIR 1996 SC 946, (1996) Cr LJ 1660 (SC) .

73 Shriyans Kastiwal, 'Should euthanasia be legalised in India?' 2002 Cr LJ (Journal) 209.

74 Taylor, *Principles and Practice of Medical Jurisprudence*, thirteenth edn, p 300.

75 *Modi's Textbook of Medical Jurisprudence and Toxicology*, twenty-first edn, p 220.

76 *Kavita v State of Tamil Nadu* (1998) Cr LJ 3624 (SC) .

77 *Kavita v State of Tamil Nadu* (1998) Cr LJ 3624 (SC) .

78 *State of Tamil Nadu v Sivarasan alias Boyhee alias Sivarasa* (1977) 1 SCC 682 .

79 *Rukhmini Devi v State* (1989) Cr LJ 548 (All) (DB) .

80 *Radharani v State of Madhya Pradesh* AIR 1981 SC 1776 .

81 *Barkat v Emperor* AIR 1934 Lah 514, 515.

82 *Emperor v Appulaswamy* 1 Cr LJ 477, 2 LBR 209 ; *State of Maharashtra v Maruti Shripati Dubal* (1996) Cr LJ 4457 (SC) .

83 *Rukhmini Devi v State of Uttar Pradesh* (1989) Cr LJ 548 (All) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 310.

Thug.--

Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder, is a thug.

Comments

1. Scope

This section defines the term 'thug'. In order to be thug, a person must:

(i) habitually
(ii) associate
(iii) with any other or others;
(iv) for the purpose of committing robbery or child-stealing;
(v) by means, or accompanied with, murder.2760

2. 'Shall have been Habitually Associated with any Other or Others'

There must be, at least, one more person besides the thug and they must habitually, *i.e.*, regularly for some time, associate. A casual association is not enough. There must be evidence of their habitual association.[84]

3. 'For the Purpose of Committing Robbery or Child-stealing'

The habitual association must be for the definite purposes of committing robbery or child-stealing.

4. 'Robbery'

Commentary under s 390, *post*, vol. 4, may be referred to.

5. 'Child-stealing'

Presumably, 'child-stealing' means kidnapping or abduction (s 359-362, IPC). A human being cannot be the subject of theft.

Commentary under s 378, *post,* vol. 4, may be referred to.

6. 'By means of, or Accompanied with, Murder'

The modus operandi, intended to be employed for the purpose of robbery or child-stealing, must involve murder. This is what distinguishes *thugee* from robbery and *dacoity*. Merely administering a stupefying drug like *dhatura* is not enough because *dhatura* can be, and, in practice frequently, is, used by robbers without a fatal result. It is necessary, therefore, to show, against a person, accused of a purpose to commit robbery with murder, something more than that he proposed to administer, or did, on a particular occasion, administer *dhatura* in order to effect his purpose of robbery though it may not be absolutely necessary to show that, on any occasion, culpable homicide amounting to murder was, in fact, committed.[85]

84 Re *Pira* 28 PR (Cr) 1881.

85 Re *Pira* 28 PR (Cr) 1881.

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF OFFENCES AFFECTING LIFE

S. 311.

Punishment--

Whoever is a thug, shall be punished with [86][imprisonment for life], and shall also be liable to fine.

Comments

1. Scope

The preceding section defined a 'thug' and this section provides the penalty for being a 'thug'.

2. Imprisonment for Life

Commentary under s 57, vol 1, may be referred to.2761

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of sessions.

4. Jurisdiction

The offence under this section may be tried by a court within whose local jurisdiction the offence was committed or the accused person is found.[87]

5. Charge

The charge, for an offence under this section, may run thus:

> I (*name and office of sessions judge, etc.*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the .....day of ..... at..... you were a thug and you thereby committed an offence, punishable under s 311 of the Indian Penal Code, and within the cognizance of this Court.
>
> And I hereby direct that you be tried by this court on the said charge'.

6. Proof

To establish an offence under this section, it has to be proved that:

(a) the accused habitually associated with any person or persons;
(b) he did so since or after the passing of the Indian Penal Code ; and
(c) the purpose of such association was to commit robbery, or child stealing, by means of, or accompanied with, murder.

86 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation for life' (wef 1-1-1956).

87 Refer to the Code of Criminal Procedure 1973, s 181 (1) .

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Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 312.

Causing miscarriage.--

Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.--A woman, who causes herself to miscarry, is within the meaning of this section.2762

Comments

1. Scope and Applicability

Under this section, voluntarily causing a woman with a child to miscarry is an offence if such miscarriage is not caused in good faith for the purpose of saving the life of the woman; and the offence is liable to additional punishment if the woman is quick with the child. The explanation added to the section, points that a woman who causes herself to miscarry, is within the purview of the section. The section only applies to a 'woman with child', *i.e.*, a pregnant woman, at the relevant time. If she is pregnant and the means used do not succeed, the accused can only be convicted, under s 511, IPC, for an attempt.

2. Ingredients

The ingredients of the offence under s 312, IPC, are that the accused voluntarily does some act to cause a woman with a child or quick with a child to miscarriage and that he did not cause the miscarriage in good faith in order to save the mother's life.[88]

3. 'Whoever'

This means the woman herself or any other person.

The section may even apply to the pregnant woman herself, who causes her own miscarriage.[89]

4. 'Voluntarily'

Commentary under s 39, vol 1, may be referred to.

A bare reading of s 39, IPC shows that the person need not intend to cause a certain effect. If an act is a probable consequence of the means used by him, he is said to have caused it voluntarily whether he really means to cause it or not. The section implicitly lays down the principle that a man is presumed to intend the probable consequences of his act.[90]

5. 'Voluntarily Causes Miscarriage'

Miscarriage must actually take place in consequence of what has been done. The expression 'Voluntarily causes a woman to miscarry' would include any act such as delivery of medicine which causes the

miscarriage, but if a person merely pledges ornaments and raises money to aid and facilitate the miscarriage, he would properly be charged for abetment under s 312 read with s 109 .[91]2763

6. Woman with Child

This section requires proof that woman is 'with child'; it is enough if the fact of pregnancy and the intentional expulsion of the immature contents of the uterus are established. The words 'with child' mean pregnant, and it is not necessary to show that 'quickening', *i.e.*, perception by the mother of the movements of the foetus has taken place or that the embryo has assumed a foetal form.[1]

'Quick with Child'

The expression 'quick with child' means that the process of quickening has taken place. This refers to any time after the woman first feels the movements of the child within her.[2] In common, quick with a child, simply means the stage of pregnancy where the quickening takes place. It is the perception by the mother of the movement of the foetus.[3] The process of quickening is not an indication that the foetus has acquired life in any different sense from that which it had before. It merely shows that a particular stage of the pregnancy has been reached, which stage generally produces a particular sensation in the mother. The 'quickening' describes the sensation, and not the stage.[4] No evidence but that of the woman herself canestablish the fact of quickening. Cases every now and then occur in which healthy women do not experience the sensation of quickening during the whole course of pregnancy, and the movements of the child may be, at no time, perceptible to the examiner. The discovery of the movements of a child by an examiner is proof that the usual period of quickening is past; but their non-discovery at the time of examination is no proof whatever that the woman has not quickened because the movements are, by no means constant and may be accidentally suspended at several successive examinations.[5]

Woman not Pregnant

Section 312, IPC can even apply to a pregnant woman herself, who causes her own miscarriage.[6] The woman must, as a fact, be pregnant. Therefore, a woman, who is not pregnant, though she imagines herself to be so, cannot be convicted of an offence under this section. Of course, she, and other people concerned (if any), may be convicted of abetment of the offence,[7] or of an attempt, under s 511, IPC to commit it, according to circumstances.

7. Miscarriage

The term 'miscarriage' is not defined in the IPC . In its popular sense, it is synonymous with abortion,[8] it consists of expulsion of embryo or foetus that is termination of pregnancy before the period of viability[9] and consists in the expulsion of the embryo or foetus, *i.e.*, the immature product of conception. The stage, to which2764 pregnancy has advanced and the form, which the ovum or embryo may have assumed, are immaterial.[10] In *Modi's Medical Jurisprudence*, it is stated thus;

> Legally, miscarriage means the premature expulsion of the product of conception, an ovum or a foetus, from the uterus, at any period before the full term is reached. Medically, three distinct terms, ie, abortion, miscarriage and premature labour, are used to denote the explosion of a foetus at different stages of gestation. Thus, the term abortion' is used only when an ovum is expelled within the first three months of pregnancy, before the placenta is formed 'Miscarriage' is used when a foetus is expelled from the fourth to the seventh month of gestation, before it is viable, while 'premature labour' is the delivery of a viable child possibly capable of being reared, before it has become fully mature.

Child Born at or After 210 Days

In *Modi's Medical Jurisprudence*, it is stated that children, born at or after 210 days or seven calendar months of uterine life, are viable, *i.e.*, are born alive and are capable of being reared. Similarly, where the pregnancy has advanced beyond seven months, the act of doctors and nurses, who facilitate or accelerate delivery cannot be treated as offences under the section, only because the delivery otherwise would have been delayed and particularly when the child is born alive and no injury is caused to the mother or the child.[11] If, therefore, the period is completed, *i.e.*, the child is fully grown, the offence of causing miscarriage cannot be effected; an attempt to bring about a miscarriage, in such a case, would be punishable under s 511 .[12]

8. 'If such Miscarriage be not caused in Good Faith for the Purpose of Saving the Life of the Woman'

These words exclude from the section, acts done in the course of proper treatment in the interest of the life or health of the mother.[13] Where the accused has only accompanied the pregnant girl to the nursing home but there was no evidence to show that the pregnancy was terminated on his instructions, the pregnant girl and the doctor were not arrayed as accused, the doctor had opined that the termination of pregnancy was to save the girl's life, the conviction of the accused under ss 366 and 312, IPC, was set aside.[14]

9. Protection to Medical Practitioner under Medical Termination of Pregnancy Act 1971

According to s 3(1) of the Medical Termination of Pregnancy Act 1971, notwithstanding anything contained in the IPC, a registered medical practitioner shall not be guilty of any offence under the said Code, or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of the Medical Termination of Pregnancy Act 1971 as aforesaid. The text of s 3 of the above Act is given below:

S. 3 . When pregnancies may be terminated by registered medical practitioners.--

(1) Not withstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code, or2765 under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,--

- (a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or
- (b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that--
  - (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
  - (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I.--Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation II.--Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purposes of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(4)

(a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.
(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

'Good Faith'

Commentary under the same heading in s 52, vol 1, may be referred to.

Good faith by itself is not enough. It has to be good faith for the purpose of saving the life of the mother or the child and not otherwise.[15]

Accused Doctor Administering Injection of 'Menstrogen Forte'

Where the deceased woman was living separately from her husband for about a period of 3 to 4 years, during which she conceived a child as a result of her illicit relations with a distant cousin, and she contacted the accused-doctor who administered an injection of 'menstrogen forte,'. However, the literature accompanying menstrogen forte medicine under the sub-head 'warnings and precautions', had the following specific instructions:

(1) There is some evidence to show that preparation when used during pregnancy may lead to foetal abnormalities and as such these should not be used during pregnancy or for pregnancy diagnosis.2766
(2) Before administering Menstrogen forte injection to women, pregnancy should be excluded.
(3) This preparation should neither be used for the diagnosis of pregnancy nor for the management of threatened or habitual abortion.

The accused-doctor must be presumed to know the effect of the medicine as revealed from the literature issued by the manufacturer of Menstrogen forte that such use of medicine was likely to result in a miscarriage. Merely because of the evidence of the doctor as prosecution witness that there was no miscarriage, it cannot be said that the charge under ss 312 / 511, IPC, for attempt to cause miscarriage against the accused or his conviction for the said offence was not proper.[16]

10. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

11. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:

That you, on or about the .....day of..., at...., voluntarily caused..... (*name of the woman*), then being with child, to

miscarry, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said..... and thereby committed an offence, punishable under s 312 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

12. Proof

To establish an offence under this section, it has to be proved that:

(1) the woman in question was with the child or (if under the second clause) she was quick with child;
(2) the accused caused the woman to miscarry;
(3) the accused did so voluntarily; and
(4) such miscarriage was not caused in good faith in order to save the woman's life.

13. Sentence

The first Part of s 312 does not make any mandatory provision for jail sentence and therefore, for an offence to make an attempt to commit the offence under the first Part of s 312 the sentence of imprisonment may appear to be excessive in the facts and circumstances of the case. Thus, where the accused doctor attempted to cause miscarriage of the patient by giving an injection of Menstrogen forte, the sentence of rigorous imprisonment for one year awarded to the accused by the trial court was set aside but the sentence of fine was enhanced from Rs 5000 to Rs 15000.2767

88 *Meeru Bhatia Prasad (Dr) v State* (2002) Cr LJ 1674 (Del) .

89 *Ibid*.

90 *Ibid*.

91 *Emperor v Marian Sidi* 10 Cr LJ 19 .

1 *Empress v Bandi Ademma* ILR 9 Mad 369, 1 Weir 331 .

2 *Goldsmith's case* 3 Camp 76; *R v Phillips* 3 Camp 77 .

3 *Meeru Bhatia Prasad (Dr) v State* (2002) Cr LJ 1674 (Del) .

4 *Mayne on Criminal Law*, p 681.

5 *Taylor's Medical Jurisprudence*, p 149.

6 *Meeru Bhatia Prasad v State* (2002) Cr LJ 1674 (Del) .

7 *R v Kabul Pattur* 15 Wr (Cr) 4 .

8 *Meeru Bhatia Prasad (Dr) v State* (2002) Cr LJ 1674 (Del) .

9 *Meeru Bhatia Prasad v State* (2002) Cr LJ 1674 (Del) .

10 *Empress v Bandi Ademma* ILR 9 Mad 369 .

11 Re *Malayara Seethu*AIR 1955 Mys 27, 29, 56 Cr LJ 372 .

12 *R v Arunja Bewa* 19 Wr (Cr) 32 .

13 *R v Bourne* (1939) 1 KB 687 .

14 *Md Sharif v State of Orissa* 1996 Cr LJ 2826 (Ori) .

15 *Meeru Bhatia Prasad (Dr) v State* (2002) Cr LJ 1674 (Del) .

16 *Akhil Kumar (Dr) v State of Madhya Pradesh* (1992) Cr LJ 2029 (MP) .

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Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 313.

Causing miscarriage without woman's consent.--

Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with [17][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

The offence of voluntarily causing miscarriage under s 312, IPC may be aggravated by reason of the fact that the woman never gave her consent to what was done. In such a case, the offence is more severely punished under this section, whether the woman was quick with child or not.

Section 313, IPC, is an aggravated form of offence defined under s 312 . It provides for a more severe punishment if the offence defined under s 312 is committed without the consent of the woman whose miscarriage is caused.[18]

2. Consent

Where the victim a pregnant lady was kicked in the abdomen by the accused-lady resulting in her abortion, the other accused though present, did not participate in the assault or abuse, the lady-accused was found guilty under s 313, IPC, but the other accused persons were acquitted by getting the benefit of the doubt.[19]

3. Quick with Child

Commentary under s 312, *ante*, may be referred to.

4. Procedure

The offence under this section is cognizable, non-baliable, non-compoundable, and triable by a court of session.

Section 313,Indian Penal Code 1860, and Section 319 , Code of Criminal Procedure 1973

In order to take action under s 319, CrPC, it postulates the existence of evidence. The expression 'evidence' in the context with reference to the statement of witness,2768 would mean a complete statement, *i.e.*, examination-in-chief and cross-examination. The statement which does not satisfy this test, cannot be called 'evidence' within the meaning of s 319, CrPC .[20] Thus, where the accused was issued a show-cause notice during trial for offences under ss 498A and 313, IPC, on the basis of incomplete examination of the witness who was examined-in-chief but was partly cross-examined and her cross-examination was not concluded, the order issuing show cause notice to the accused under ss 313 / 34, CrPC was set aside.[21]

Accused Kicking the Abdomen of Pregnant Wife

Where the accused and the complainant-wife were living separately, and the accused-husband was already married twice and had children out of the said wedlock, the relation between the accused and the complainant were strained on account of pregnancy of the complainant as the latter had refused to terminate it, the accused after gaining entry into the house of the complainant kicked her on her abdomen resulting into expulsion of her six months old foetus, the criminal proceedings and issue of process against the accused was found proper as *prima facie* offences under ss 313, 448 and 506, IPC were made out, so the petition of the accused under s 482, CrPC, for quashing criminal proceedings was dismissed.[22]

5. Setting Aside of Erroneous order of Summoning of Accused Doctor

In a complaint case it is all the more necessary for the magistrate to first ensure that there was at least some sort of evidence on the basis of which summons against the doctors could be issued. Thus, where the magistrate has acted in haste and proceeded against a respectful doctor without caring to ask the complainant to substantiate his allegations as provided under s 200, CrPC, and summoned the doctor under ss 313 to 316, IPC, the summoning of the accused doctor was found palpably erroneous and illegal, so the High Court on a petition under s 482, CrPC, set aside the order of the magistrate summoning the doctor and the other accused and quashed the complaint.[23]

6. When Abetting Doctor not Made Co-accused--Effect

Where the accused persons brought the prosecutrix to clinic of doctor for termination of her pregnancy, though s 313, IPC makes person performing operation of termination of pregnancy without consent of prosecutrix responsible and liable under s 313 but the doctor was not made as the accused, the case of prosecution was that doctor performed operation on misrepresentation made by the accused persons and it was not the case of prosecution that the accused had abetted doctor in performing the operation, accused cannot be convicted under s 313 .[24]

7. Charge

The following form of the charge may be adopted:2769

I (*name and office of sessions judge, etc*.) hereby charge you (*name of accused person*) as follows:

That, on or about the ....day of..., at...., you voluntarily caused AB (*the woman who was miscarried*), then being with child, to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said AB, and thereby committed an offence, punishable under s 313 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

Where the allegations against the accused-doctor were that she was negligent and careless while injecting needles twice, for performing abdominocentesis test, as a result of which the patient-pregnant woman had to undergo forced abortion as septicaemia had developed while performing the test, no consent of the patient and her spouse had been taken by the accused, required as per practice before conducting the test, the framing of charge under ss 313 / 269, IPC against the accused was found proper.

8. Proof

To establish an offence under this section, it has to be proved that:

(1) the woman in question was with a child;
(2) the accused caused her to miscarry;
(3) he did it voluntarily and without her consent; and
(4) such miscarriage was not caused in good faith in order to save the woman's life.

9. Conviction under Section 313 or Alternatively under Section 315 --Validity

Commentary under the same heading in s 315, *post*, may be referred to.

10. Sentence

Where the accused kicked the lady in the abdomen resulting in her abortion, and the occurrence took place two decades earlier, the sentence of the accused-lady was modified under s 313, IPC, from four years' rigorous imprisonment to two years rigorous imprisonment and also a fine of Rs 2000, in default of such payment, three months rigorous imprisonment.[25]

11. Alteration of Conviction from Section 314 to Section 313

Commentary under the same heading in s 314, *post*, may be referred to.

17 Substituted by Act 26 of 1955, s 117 and Sch for 'transportation for life' (wef 1-1-1956).

18 *Meeru Bhatia Prasad (Dr) v State* (2002) Cr LJ 1674 (Del) .

19 *Tulsi Devi v State of Uttar Pradesh* (1996) Cr LJ 940 (All) .

20 *Rukhaminabai Vithalrao Jogdand v State of Maharashtra* (2001) Cr LJ 2109 (Bom) ; *RJ Lakha v State of Gujarat* (1982) Cr LJ 1687 (Guj) ; *Amarjit Singh v State of Punjab* (1983) Cr LJ (NOC) 98 (PBH) ; *Gulam Mondal v Nazam Hussain* (1987) Cr LJ 729 (Cal) ; *SB Kalal alias Kumcharkar v State of Karnataka* (1991) Cr LJ 21 (Kant) .

21 *Rukhaminabai v Vithalrao Jogdand v State of Maharashtra* (2001) Cr LJ 2109 (Bom) .

22 *AEbenezer (Dr) v Smt M Mary* (2002) Cr LJ (NOC) 302 (Kant), 2002 AIR Kant HCR 1927 .

23 *Asha Rawal v Basant Lal* (1985) DLT 428 (Del) .

24 *Shantaram Krishna Karkhandis & Ors v State of Maharashtra* (2007) Cr LJ 149 (Bom) .

25 *Tulsi Devi v State of Uttar Pradesh* (1996) Cr LJ 940 (All) .

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OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 314.

Death caused by act done with intent to cause miscarriage.--

Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;2770

If act done without woman's consent.--And if the act is done without the consent of the woman, shall be punished either with [26][imprisonment for life], or with the punishment above mentioned.

Explanation.--It is not essential to this offence that the offender should know that the act is likely to cause death.

Comments

1. Scope and Applicability

This section provides punishment for the offences mentioned in the preceding two sections, where death has occurred in causing miscarriage. A distinction is made in this section in awarding punishment, between an act done with the consent of the woman and an act done without such consent. The Explanation, added to the section, states that it is not essential to an offence under this section that the offender should know that the act was likely to cause death. If the death is caused by an act likely to cause death, it would be, at least, culpable homicide not amounting to murder and might even be murder if the act was of an eminently dangerous character. This section will, however, apply only where the act, done by the offender, or for which he is jointly responsible,[27]is the act which causes death. In *Queen v Kalachan Gope* ,[28] a poisonous drug administered to a woman to procure miscarriage, resulted in her death. It was not proved that the accused knew that the drug would be likely to cause death, *etc*. They were not held guilty of murder, but only for the offence under this section.

2. 'Miscarriage'

Commentary under same heading in s 312, *ante*, may be referred to.

3. 'With Intent to Cause the Miscarriage of a Woman with Child'

Under this section, miscarriage need not have taken place. However, the accused must have an intent to cause it by means of any act, as a result of which the death of the woman is caused. The act in question must cause death.

4. Common Intention

Commentary under s 34, vol 1, may be referred to.2771

To apply s 34, IPC, apart from the fact that there should be two or more accused, two factors must be established:

(i) common intention, and
(ii) participation of the accused in the commission of an offence.

If common intention is proved but no overt act is attributed to the individual-accused, s 34 will be attracted as it involves vicarious liability, but if participation of the accused in the crime is proved and common intention is absent, s 34 cannot be invoked, in every case, it is not possible to have direct evidence of common intention, it has to be inferred from the facts and circumstances of each case.[29]

Where the accused was alleged to have illicit relations with the deceased and took her to the clinic of the doctor with the intent to cause her miscarriage, the deceased woman died during abortion by the doctor who was not competent to terminate pregnancy of the deceased nor his clinic had the approval of the government under s 4 of the Termination of Pregnancy Act 1971, where even basic facilities for abortion were not available in his clinic, the act was done by accused persons in furtherance of their common intention so the accused was found rightly convicted under ss 314 / 34, IPC .[30]

5. Direct Nexus between Death and Act of the Accused

Nexus between acts done by the accused and death of the woman must be direct.[31]Where the deceased-woman had a love affair with the accused and they had also developed a physical relationship due to which the deceased became pregnant, the deceased was taken to the house of the accused, where the accused with the consent of the deceased administered crude mechanical means to induce abortion resulting in the rupture of blood vessels causing the death of the deceased, and the abortion-stick was also found in her body during post-mortem examination, and direct nexus between death of the deceased and act done by the accused was established, the accused also did not inform the police, the conviction of the accused under s 314, IPC, was therefore found proper.[32]

6. 'Consent'

'Consent' mitigates an offence.[33]

Commentary under same heading in s 90, vol 1, may be referred to.

7. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of sessions.

8. Charge

The following form of the charge may be adopted:2772

> I (*name and office of sessions judge, etc*.) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about the.....day of..... at..... with intent to cause the miscarriage of....(*name the woman*), did a certain act, to wit ..... which caused the death of the said..... and thereby committed an offence, punishable under s 314 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.'

Accused Charged with Section 302 can be Convicted under Section 314

When the accused is charged under s 302 and not under s 314, but the broad facts necessary for charge under s 314 are incorporated in the charge under s 302 framed by the sessions court, the court can then convict the accused and sentence him under s 314 while acquitting him under s 302, even though the charge under s 314 was not framed against him.[34]

Accused Charged with Abetment with Co-Accused Person Cannot be Convicted for Abetment with Deceased Woman

In *Madan Raj Bhandari v State of Rajasthan* ,[35] the accused was charged and tried for an offence of abetting one *R* to cause abortion of the child in the womb of the deceased, but curiously enough he was convicted for abetting the deceased to cause her miscarriage. Throughout the trial, the accused was asked to defend himself against the said charge and, at no stage, he was asked that he would be tried for an offence of having abetted the deceased to cause her miscarriage. It was held that the accused was likely to have been prejudiced by the charge on the basis of which he was tried, and, therefore, the conviction of the accused under this section, read with s 109, IPC, was set aside.

9. Proof

To establish an offence under this section, it has to be proved that:

(1) the woman in question was with a child;
(2) the accused did an act with intent to cause her miscarriage;
(3) such act caused the death of the woman; and
(4) such act was done by the accused (if the case comes under the second clause) without the consent of the woman.

In the absence of any evidence from the prosecution side to the effect that the accused had the intent to cause the deceased's miscarriage resulting in her death, the accused cannot be convicted for the offence under s 314 .[36]

10. Probation

In *V Manickam Pillai v State* [37] on consideration that the accused being a government servant, in the event of sentence of imprisonment may lose her job, it was thought fit that an order under s 4(1) of the Probation of Offenders Act 1958, would meet the2773 ends of justice and she was, therefore, released on probation of good conduct for three years.

If a homeopath takes it upon his hand to operate on a pregnant lady, and perforate her uterus by trying to abort, he does not deserve the benefit of probation. It would have been a different matter if a trained surgeon while carrying out the operation in question with the consent of the lady, would have committed a mistake in judgment resulting in the death of the patient.[38]

11. Sentence

Where the accused had an illicit relation with the deceased and took her to a clinic with intent to cause her miscarriage where the doctor neither had the basic facilities nor the competency to cause miscarriage, and caused the death of the woman during abortion, the sentence of seven years imprisonment was found excessive which was reduced to one and a half years rigorous imprisonment but the sentence of fine of Rs 10000 was enhanced to Rs 25000, and in default the accused was to undergo further rigorous imprisonment for one year. It was also directed that in case fine is realised from the accused, the same shall be payable to the mother of the deceased.[39] Where the accused with the consent of the deceased administered or got administered crude mechanical means to induce an abortion which resulted in rupture of blood vessels causing death of the deceased, the sentence of imprisonment awarded to the accused was reduced from eight years rigorous imprisonment to five years rigorous imprisonment while maintaining the sentence of fine of Rs 1000 in default of payment of which the accused was to further undergo rigorous imprisonment for six months.[40]

12. Alteration of Conviction from Section 314 to Section 313

Where there was no proof that the death of the woman resulted due to miscarriage, the conviction of the accused was altered from s 314 to s 313, IPC .[41]

26 Substituted by Act 26 of 1955; s 117 and Sch for 'transportation for life' (wef 1-1-1956).

27 Refer to s 32 .

28 *Queen v Kalachan Gope* 10 WR (Cr) 59 .

29 *Surendra Chauhan v State of Madhya Pradesh* (2000) Cr LJ 1789 (SC) .

30 *Ibid.*

31 *Vatchhalabai Maruti Kshirsar v State of Maharashtra* (1993) Cr LJ 702 (Bom) .

32 *Yelanga Munda v State of Bihar* (2001) Cr LJ 3094 (Pat) .

33 *Queen v Kalachand Gope* 10 WR (Cr) 59 .

34 *Sorhab Ali v State of Assam* (1993) Cr LJ 3525 (Gau) (DB) .

35 *Madan Raj Bhandari v State of Rajasthan* AIR 1970 SC 436, p 438 .

36 *Bandhani v State of Madhya Pradesh* (1981) Cr LR 200, p 201 (MP High Court Notes) .

37 *V Manickam Pillai v State* (1972) Cr LJ 1488 .

38 *Jacob George (Dr) v State of Kerala* (1994) Cr LJ 3851 (Ker) (DB) .

39 *Surendra Chauhan v State of Madhya Pradesh* (2000) Cr LJ 1789 (SC) .

40 *Telanga Manda v State of Bihar* (2001) Cr LJ 3094 (Pat) .

41 *Kochu v State of Kerala* (1979) Cr LJ (NOC) 49 (Ker) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 315.

Act done with intent to prevent child being born alive or to cause it to die after birth.--

Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causing it to die after its birth, and does, by such act, prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.2774

Comments

1. Scope

Section 315 and s 316, IPC are intended for the protection of unborn children. If a man intending to prevent the birth of a living child, does any act, either through the medium of a miscarriage or otherwise, which prevents the child from being born alive or causes it to die after its birth, and if such act is not done in good faith for the purpose of saving the life of the mother, he commits an offence under this section. If, however, without any special intention to injure the child, he injures the mother in such a way that she dies, he would be guilty of culpable homicide; then if his act causes the death of her quick unborn child, he commits an offence under s 316 .[42]

To attract the provisions of this section, the act or omission of the accused must be such that there should be prevention for the child to be born alive or must be caused to die after its death. The act or omission of the accused must be timed during the time when the child is in the womb of the mother. However, if a child is allowed to be born alive without any such act or omission and is killed thereafter, then it is homicide of an alive human being and s 302, IPC, would, then, be attracted.[43]

Intention is one of the major ingredients of s 315 . To attract and prove s 315, IPC, the act of the accused must have been done with the intent of causing the miscarriage of a woman with a child. The criminal liability envisaged by this section will not extend to a case where the abortion/miscarriage was caused by totally extraneous factors or ones which were not directly connected with it. The prosecution is required to prove beyond reasonable doubt that it was that very act which ultimately caused the miscarriage, that is, nexus between acts done by the accused and the miscarriage must be direct. The accused must be in the know of the fact that the lady was in the family way having pregnancy. In the instant case, nothing emerged if the appellant alleged to have hit the victim with leg, who was the brother-in-law of the victim,

was aware of the pregnancy of the victim. The relations were strained to share this development with him specifically when the duration of pregnancy was very short. The occurrence had taken place all of a sudden when appellant's mother objected to her son P going upstairs with dirty shoes. Arrival of the complainant at the spot to intervene was not anticipated. In the scuffle she allegedly suffered a leg blow on her intervention. It did not cause any immediate pain or bleeding to the complainant. The prosecution was unable to establish that the abortion was the result of leg blow or that the criminal act of assault was done intentionally or deliberately to prevent the child from being born alive. The conviction of the appellant under s 315, IPC was not permissible and was not sustained.[44]

2. 'Before the Birth'

The words 'Before the Birth' used in the section means before the child is born or during the period the child was in womb of his mother.

3. 'Good Faith'

Commentary under s 52, vol 1, may be referred to.2775

4. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of sessions.

5. Charge

The following form of the charge may be adopted:

> I (*name and office of sessions judge, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the.....day of...., at...., you did an act, to wit..... before the birth of a child, with the intention of preventing that child from being born alive (*or of causing it to die after its birth*), and that act did prevent that child from being born alive (*or caused it to die after its birth*), and the said act was not done in good faith for the purpose of saving the life of the mother, and you thereby committed an offence, punishable under s 315 of the Indian Penal Code, and within the cognizance of this Court.
>
> And I hereby direct that you be tried by this Court on the said charge.

6. Proof

To establish an offence under this section, it has to be proved that:

(1) the woman in question was with a child;
(2) the accused did an act, before the child was born, with the intention of preventing the child

from being born alive or causing it to die after its birth;
(3) in consequence of the act the child was born dead or died after its birth; and
(4) the said act was not done in good faith to save the life of the mother of the child.

Where there was no medical evidence to show that the accused lady had either aborted by taking any drug or the child died immediately after birth due to administration of any drug to it, and it was not proved that abortion was unnatural, the evidence of the prosecution witnesses being full of contradictions and the extra-judicial confession of the accused was of no consequence in the absence of laboratory evidence, the accused were acquitted of the charge under s 315 read with s 34, IPC .[45]

7. Conviction under Section 313 or Alternatively under Section 315 --Validity

The law does not envisage or endorse conviction of a person under s 313 or in the alternative under s 315, IPC . Such conviction is itself an illegality vitiating the judgment.[46] Where there was no iota of legal evidence on record to substantiate the prosecution case, the conviction of the accused under s 313 or in the alternative under s 315 was found unjustified.[47]2776

42 *Mayne's Criminal Law*, para 465; *Jabbar v State* (1966) All WR (HC) 254 (2), AIR 1966 All 590 (even if injury to the child in the womb was unintended).

43 *Leela Wati v State of Punjab* (1981) 8 Cr LT 120, p 122 (Punj) ; *Dalip v State of GNCT of Delhi* 2014 (139) AIC 611 (Del) .

44 *Dalip v State of GNCT of Delhi* 2014 (139) AIC 611, p 613, 614 (Del) .

45 *Hirdan Bai & ors v State of Maharashtra* (1996) Cr LJ 2585 (Bom) .

46 *Pato Devi v State of Bihar* (2002) Cr LJ 4534 (Jharkhand) .

47 *Ibid*.

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Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 316.

Causing death of quick unborn child by act amounting to culpable homicide.--

Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Illustration

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. *A* is guilty of the offence defined in this section.

Comments

1. Scope and Applicability

Under s 299, Explanation 3 of the IPC, the causing of the death of a child in the mother's womb is not homicide. Such killing is made punishable by ss 317 and 318, IPC, which deal with abandonment and secret disposal of the dead body of a child, born alive.

This section punishes the causing of death of a quick unborn child by an act amounting to culpable homicide.[48] This section has no application to a case where the act, attributed to the accused person, has resulted in the causing of death of a pregnant woman.[49] However, a man who assaults a pregnant woman with such violence that her death is a likely result, or sets fire to a house in which she happens to be, would be punishable under this section if the mother survives but gives birth to a dead child in consequence of her injuries or fright.[50]

2. 'Quick Unborn Child'

In order to hold a person guilty under s 316, IPC it must be established that the woman was quick with the unborn child. Neither the 'child' nor the quick unborn child has been defined under the IPC . However, on the basis of medical opinion and authorities, it has been held that a woman is considered to be with a child as soon as she becomes pregnant.

It is enough if the pregnancy and the intentional expulsion of immature contents of the uterus are established for the purpose of holding that the woman was with a child. Quickening is the name applied to peculiar sensations which are experienced by a woman after about four months of pregnancy. The symptoms are ascribed to the first perception of movements of the foetus which occur or the womb begins to rise out of the pelvis. These movements are perceptible to the mother before they are made2777 evident by an external examination. It is acknowledged that the woman starts feeling the movements of the foetus between 14 to 18 weeks of pregnancy.[51]

Accused was prosecuted on allegations that he assaulted a pregnant lady on her stomach causing death of the child. However, evidence showed that the child was born alive in the hospital and the child died later. The doctor who held medical examination of the victim was not examined in the case. Offence under s 316, IPC was found not proved, accused was acquitted of the charge.[52]

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of sessions.

4. Charge

The following form of the charge may be adopted:

I (*name and office of sessions judge, etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the....day of..... at.....you did an act, to wit...., under circumstances, to wit...., that if you had thereby caused death, you would have been guilty of culpable homicide, and did, by such act, cause the death of a quick unborn child of AB and thereby committed an offence, punishable under s 316 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

5. Proof

To established an offence under this section, it has to be proved[53] that:

(i) the woman was quick with a child;
(ii) the accused did an act to cause the death of such child;
(iii) the circumstances, under which the act was done, were such as to make the accused guilty of culpable homicide if death had been caused; and
(iv) the said act did cause the death of the quick unborn child.

The emphasis appears to be on the fact that the unborn child should have already been quick inside the womb of the mother.

Where the accused-husband had strained relations with the deceased-wife, and gave a single blow on the head of the deceased causing her death, and made no attempt to report the occurrence to the police and told other persons that his wife had committed suicide; the medical officer stated that in the uterus of the deceased there was a male body 20 weeks old and that 12 after weeks of conception, the foetus gets life, the charge for the offence under ss 302 and 316, IPC, was found proved against the accused-husband.[54]

Where the accused-husband caused the death of his pregnant wife, the motive of which was proved to be his illicit relations with his sister-in-law, the medical2778 evidence corroborated the prosecution case of the death of the deceased due to throttling, the accused and the deceased were present in the house of the accused on the date of the incident and slept adjacent to each other, the conviction of the accused under ss 302 and 316 was found proper.[55]

6. Separate Sentences under Section 302 and Section 316 --Permissibility

Where the accused is sentenced under s 302 for causing the death of a woman in an advanced stage of pregnancy and also for causing the death of her quick unborn child, then, even if a separate conviction is not open to exception, separate punishment would offend s 71, IPC .[56]

But a contrary view was taken by the Bombay High Court (Division Bench) where the conviction and sentence of the accused under ss 302 and 316 was found justified and proper.[57] However, when the accused are convicted under ss 302 / 34, IPC, and sentenced, it is not desirable to add sentences for the offence under s 316 and ss 498-A / 34, IPC .[58]

7. Alteration of Conviction from Section 316 to Section 323

Where a woman claimed to have been assaulted while she was pregnant with a quick unborn child,

though the medical evidence indicated that she was pregnant for about three months and the woman did not state about the sensations which were likely to be felt in case of a quick unborn child/ the conviction of the accused under s 316 was not sustainable, however, they were guilty for causing hurt to the woman and convicted under s 323, IPC .[59]

48 *Pappan Damodaran v State* AIR 1953 Tr & Coch 374, p 375, 54 Cr LJ 1551; *Birnnchi Gour v Subhaji Dei* (1970) Cut LT 711 .

49 *Pappan Damodaran v State* AIR 1953 Tr & Coch 374, p 375, 54 Cr LJ 1551; *Jabhar v State* (1966) AWR (HC) 254, AIR 1966 All 590 (even if injury to the child in the womb was unintended).

50 *Mayne on Criminal Law,* pp 684-85.

51 *Suresh Chander & anor v State* Cr LJ 1708 (J&K).

52 *State by Sathnur Police v Raju s/o Siddegowd* 2012 Cr LJ (NOC) 186 (Kar) .

53 *Biranchi Gaura v Subhagi Dei* (1970) Cut LT 711 ; *Suresh Chander & anor v State* (1994) Cr LJ 1708 (J&K) .

54 *Murugan v State* (1991) Cr LJ 1680 (Mad) (DB) .

55 *Narayan v State of Maharashtra* (1997) Cr LJ 4537 (Bom) (DB) .

56 *Pappan Damodaran v State* AIR 1953 Tr & Coch 374, p 375, 54 Cr LJ 1551.

57 *Ibid*.

58 *Ravindra Trimbak Chouthmal v State of Maharashtra* (1996) 1 Crimes 137 (SC) .

59 *Suresh Chander & anor v State* (1994) Cr LJ 1708 (J&K) .

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Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 317.

Exposure and abandonment of child under twelve years by parent, or person having care of it.--

Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.--This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.2779

Comments

1. Scope

This section renders punishable the act of anyone who, being the parent, or having the care, of a child under the age of 12 years, exposes it or leaves it in any place with the intention of wholly abandoning it.[60] The Explanation of this section indicates with clearness its scope and purview. It provides for the case of injuries, actually ensuing, that the guilty person shall be punished for the injury so inflicted according to the circumstances under which the injury is done, *i.e.*, for murder or culpable homicide, as the case may be.[61] If the child dies, charges should be added under ss 302 and 304, IPC, and, in case of a conviction, a sentence in respect of the most serious offence proved should be passed.[62]

2. Object

The object of this section is the prevention of abandonment or desertion, by a parent, of his or her children of tender years in such manner that the children, not being able to take care of themselves, may run the risk of dying or being injured. The section implies that children, left without any protection, are the object of its provision.[63]

3. Gist of the Offence

The gist of this offence, therefore, is the exposure or leaving of the child in any place with the intention of wholly abandoning it.[64]

4. 'Being the Father or Mother of a Child...or Having the Care of Such Child'

The exposure or leaving must be the act of the father, mother or caretaker of the child, done with the intention of 'wholly abandoning such child'. Both the father and the mother are equally bound by ties of duty, whether the child be born out of wedlock or is illegitimate. An infant, requiring nurture, or a child of tender years, will ordinarily be in the immediate charge of the mother, the father's duty being that of providing for both the mother and the off spring. The person, who has the immediate care of the child, is the person contemplated. A parent, who is absent, but who has duly provided for the maintenance and protection of his child, would not be criminally answerable for its abandonment by the person in whose charge he had left it. The offence consists in the desertion of the child by a person, who is bound, by nature, to support and protect it, or who has taken on himself that duty, whether by adopting the child, or by way of contract with the parent, or in some other way.[65] A person, having the *de facto* possession of the child, has the care of the child for the purpose of the statute.[66] A person, receiving an infant from its mother on the distinct understanding that the mother never desired or wished to have the child back again, must, in law, be regarded as a person having the care of that child until he or she had transferred it to the care and custody of some other person or institution.[67]2780

5. 'Expose'

To 'expose' denotes laying open to danger or risk of some harm or injury of a bodily nature. The offence is the exposure to such risk and is wholly independent of the consequences of such exposure.[68] Likewise, the exposure, as contemplated by this section, must be one by which some danger to the life of the child may ensue. In order to make it an offence under this section, the child must have been exposed alive. If the child is dead, before exposing, or if the person exposing remains with the child till it is dead, or if the person exposing murders the child and then leaves its body somewhere, a case under this section is not made out.[69] A married woman, who eloped leaving her suckling baby, aged about a month and a half, in the house of her husband, was not held guilty of an offence under this section as she knew that her husband would surely take care of it.[70] A mother, who, being too ill to move, sends another to expose her child, is not guilty of an offence under this section as she is not the mother; nor can either of them be guilty of abetting the other.[71]

6. 'Leave'

Justice Fitzpatrick, in Re *Bhuran,*[72] observed that, in order to make the leaving of a child an offence under s 317, IPC, the child must be left without protection. Similarly, Blair J, in *Empress v Mirchia* ,[73] observed that 'leaving' cannot mean leaving in the large sense of abandonment; it must be construed in strict connection with the word 'exposure'. In Re *Khairo,*[74] a woman left her daughter's newly born baby with the sister of her son-in-law, who was absent from the place, saying that it was her brother's child, and the baby died shortly after her departure, it was held that the woman was not guilty of an offence under this section and that her daughter had not abetted any such offence.

7. 'In any Place'

The child need not necessarily be exposed to any particular danger; it may simply be left in any place, *i.e.*, deprived of the protection necessary for one of tender age and place on its own resources.[75] Therefore, to leave a child in the care of someone, capable of protecting it, is not to leave such child 'in any place' although there is an intention to abandon it.[76] A mother, who leaves her child with a friendly stranger, in a crowded railway station, to mind for a few minutes and then decamps, does not leave the child 'in any place'; on the contrary, she leaves it in the custody of another person. It would be otherwise if she left the child alone in the crowd or if she had deserted the child in the jungle. A mother would, however, be liable to be punished under this section, and not under s 307, when she leaves her child in a place, which is quite close to a village and also near a public road where it is, in fact, shortly after being discovered.[77]2781

8. 'With the Intention of Wholly Abandoning Such Child'

The only intention, required to complete the offence under this section, is the intention of wholly abandoning the child. It is not necessary that there should be intention to abandon the child so as to endanger its life.[78]

To constitute abandonment contemplated by this section, the child must be left under circumstances where it would be deprived of the protection which the law considers due to it.[79] The section will not apply to a case of mere neglect or temporary abandonment.[80] In *Empress v Mirchia* ,[81]*A,* in order to get rid of her newly born illegitimate child, left it with *B,* a blind woman to take charge of it till she returns. A did not return. B protected the child. It was held that *A* had not exposed or left the child 'in any place' though she did intend to abandon it. *A* left her child at a certain spot with the intention of abandoning it, but in the expectation that the child would be found and cared for by the owner of a neighbouring house. *A* committed an offence under this section.[82]

9. 'In Consequence of the Exposure'

The Explanation to the section renders a party, abandoning a child, liable for murder or culpable homicide, as the case may be, 'if the child dies in consequence of the exposure', *i.e.*, the Explanation, contemplates cases in which death is caused due to cold or some other result of exposure. Death must be the immediate, and not a remote consequence of the exposure. In *Queen v Khodabux* ,[83] a prisoner was proved to have taken the child away, shortly after its birth, and to have abandoned it in a thicket, not far from the house and footpath, and in a place where the villagers were in the habit of herding cattle. The child was found almost immediately after exposure and was taken into the village. Ineffectual means were used to feed it, but the child died (for want of sustenance) some six hours after. It was held that the prisoner was guilty of wholly abandoning the child, but not of murder.

10. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

11. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the.....day of..... you, being the father (*or mother, or person having the care*) of the child, named..... which was then aged under twelve years exposed (or left) it, in a certain place, to wit..... with the intention of wholly abandoning it, and thereby committed an offence, punishable under s 317 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.2782

12. Proof

To establish an offence under this section, it has to be proved that:

(1) the accused is the father or mother, or the person having the care, of the child in question;
(2) the child is under 12 years of age;
(3) he or she exposed or left such child in a certain place; and
(4) he or she so exposed or left the child with the intention of wholly abandoning it.

Before any person can be convicted of an offence punishable under this section, it is incumbent on the prosecution to prove, beyond all reasonable doubt, that such person has exposed (or left) a child under the age of 12 years in some place with the intention of wholly abandoning it.[84] The prosecution cannot expect a conviction of the accused at the hands of the court unless and until it proves its case beyond all reasonable doubt. Where the prosecution alleges perfect ignorance of the actual occurrence, the explanation given by the accused cannot be lightly put off.[85]

60 *Mayne's Criminal Law,* p 685; *Ram Saran Singh v State* (1973) Chand LR 262 .

61 *Empress v Mirchia* ILR 18 All 364 .

62 *Empress of India v Banni* ILR 2 All 349 IPC, 150.

63 *Felani Hariani v Emperor* 16 WR (Cr) 12 .

64 *Emperor v Antakke* ILR 24 Mad 662 .

65 *Morgan and Macpherim's Indian Penal Code,* p 284.

66 *Emperor v Blanche Constant Cripps* AIR 1916 Bom 135, p 136, 18 Cr LJ 98 .

67 *Ibid.*

68 *Emperor v Antakke* ILR 24 Mad 662, 1 Weir 332 .

69 *Motia v Government* AIR 1951 Raj 123, p 124, 52 Cr LJ 981 .

70 Re *Bhuran*(1878) PR 5**approved** in *Empress v Bhajan* 4 PR 1879 ; *Feluni Hariani v Emperor* 16 WR (Cr) 12 .

71 1 Mad Sess 1889.

72 Re *Bhuran*1878 PR 5.

73 *Empress v Mirchia* ILR 18 All 364 .

74 Re *Khairo*1872 PR 33.

75 *Empress v Mirchia* ILR 18 All 364, p 366 .

76 *Ibid*.

77 Re *Kundan*(1903) 23 AWN 43; Re *KhodabuxFakeer* 10 WR (Cr) 52; Re *Nakee*1886 PR 23.

78 Re *Boya Sankulnmura* 1 Weir 331; *Emperor v Antakke* ILR 24 Mad 662 ; *Emperor v Mirchia* ILR 18 All 364 .

79 Re *Bhuran*(1878) PR 5; *Empress v Bhajan* (1879) PR 4 ; *Felani Hariani v Emperor* 16 WR (Cr) 12 .

80 *Gitabai v Emperor* AIR 1920 Nag 181, p 182, 21 Cr LJ 253 .

81 *Empress v Mirchia* ILR 18 All 364, p 366 .

82 *Emperor v Antukke* ILR 24 Mad 662 .

83 *Queen v Khodabux* 10 WR (Cr) 52, Re *Jeoni*(1893) 13 AWN 100.

84 *Gitabai v Emperor* AIR 1920 Nag 181, p 182, Cr LJ 253.

85 *Motia v Government* AIR 1951 Raj 123, p 125, 52 Cr LJ 981 ; *Empress of India v Banni* ILR 2 All 349 .

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Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 318.

Concealment of birth by secret disposal of dead body.--

Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope and Applicability

This section punishes a person for secretly burying, or otherwise disposing of, the dead body of a child and, also for intentionally concealing, or endeavouring to conceal, the birth of such child.[86]It is important to note that it is the act of secretly2783 disposing of the dead body of the child with the intention of concealing its birth, and not with the intention of concealing the death of the child, that is made punishable under this section.[87] Where a woman gives her newly born illegitimate child to another woman with instructions to dispose of it secretly and the latter carries out the instructions by throwing it in a river, the mother cannot be convicted of the substantive offence under this section though her offence can more appropriately come under the definition of abetment.[88]

The application of this section is not, like s 317, IPC, limited to parents and persons having the care of children. The section is so framed as to include every person who conceals or endeavours to conceal the birth of a child; it is quite immaterial whether there be any evidence against the mother or not. 'A person, assisting the mother in concealing a birth, will come within the terms of this section as a principal',[89] and not as an abettor.

2. Object

Section 318, IPC, like the previous one, is intended to prevent infanticide and penalise the disposal of the corpse to prevent detection of the infanticide. Mayne, in his *Criminal Law*[90] observes that this section is designed to meet the case of illegitimate children which is probably the only case in which such concealment would be attempted. A woman is not bound to announce that she is going to have a child, and if the child lives, she is at liberty to keep its existence secret. However, if it is born dead, or dies after its birth, the dead body must not be concealed by getting rid of it privately.

3. Ingredients of an Offence under this Section

This section lays down two essential ingredients of the offence, and they are:

(i) the secret burial or disposal, in any manner, of the dead body of a child, whether such child died before, during, or after, its birth; and
(ii) the intention to conceal the birth of such child by such act of burial or disposal.

The first ingredient specifies the act and the second ingredient specifies the intention that should permeate the act. The act is the means through which a certain end is to be achieved, the end being to conceal the birth of the child. The act, thus, forms the foundation on which the fabric of intention stands.[91] A person does not commit the offence of endeavouring to conceal the birth of a child if such person puts it, while it is still alive, in a place of concealment even though it may subsequently die.[92]

4. 'Secretly Burying or Otherwise Disposing'

In order to constitute an offence under this section, there must be a secret burial, or disposal, of the dead body. The disposal need not necessarily be a final disposal. It is sufficient if the body be temporarily concealed with the intention of removing it2784 elsewhere when opportunity offers.[1] There must be a secret disposition of the body; an offence under this section is not committed when the body is left in a public place.[2] Throwing the dead body of a child on a *botora*, or dung heap, close to a public road, is not secretly disposing of the body within the meaning of this section.[3] However, putting the body into a pit would be a secret disposal.[4]

5. 'Of the Dead Body'

In order to convict a woman of attempting to conceal the birth of her child, the dead body must be found

and identified as that of the child which she is alleged to have delivered.[5]

6. Recovery of Dead Body of Child at the Instance of Accused

Recovery of the dead body of a child at the instance of the accused only shows that the accused knew the spot. There can be no inference that the accused had buried it in order to conceal it.[6] However, where the dead body of a child was recovered from inside the quarter of the accused, who was present in the house from the moment the child was born till the time of discovery of its dead body, the accused was held guilty of the offence punishable under this section read with s 201 .[7]

In the instant case mother AI had shown the place where the dead body of her infant child was lying. She had concealed the birth of the child by secret disposal of the dead body, she was convicted under s 318, IPC .[8]

7. 'Of a Child'

The word 'child' is not defined in the IPC . A mere foetus of a few months formation is not a child within the meaning of this section.[9] To support a conviction under this section, it is sufficient to show that a child was born and that the child was sufficiently developed to have lived if born alive.[10]

8. 'Whether Such Child Dies Before, or After, or During, its Birth'

The offence contemplated by this section becomes complete when the accused conceals the birth of her child by burying its body, independently of the question 'whether such child dies before, or after, or during, its birth'.[11]

9. 'Intentionally Conceals or Endeavours to Conceal the Birth of Such Child'

The concealment, sought to be checked by this type of legislation, is that which would keep the world at large in ignorance of the birth of a child.[12] Where the birth of the child was known to most of the villagers in the village, it was held that no2785 inference could be drawn that the disposing of the body of that child was with the intention of concealing the birth of that child within the meaning of the expression in this section.[13] Where a woman was found to have delivered a dead child and to have left it at the place of its birth, which was in the compound of her house, and to have told no one of the birth, she could not be convicted of an offence under this section as there was no secret burying, or otherwise disposing of the dead body of the child.[14]

10. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

11. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[15]

12. Proof

To establish an offence under this section, it has to be proved that:

(1) the birth of a child, and not a mere foetus;

(2) its death before, during, or after, its birth;
(3) the accused buried, or otherwise disposed of, the dead body of the child;
(4) such burial or disposal was done secretly; and
(5) in so doing, his, or her, intention was to conceal its birth.

13. Evidence Not Believed for Section 302 Should Not be Believed for Section 318

The same evidence which has not been believed for an offence of murder should not be believed for an offence under s 318, IPC, when there is no eyewitness to show that the accused herself came to *charwada* and secretly buried the body of the child there. The fact that the accused absconded soon after the incident is not sufficient to base a conviction under s 318 . Even grave suspicion against the accused cannot be taken to be a substitute for proof.[16]

86 *Sailabala Dasi v Emperor* AIR 1935 Cal 489, p 490, 36 Cr LJ 1460 ; *State v Kehari Singh* AIR 1952 MB 124, 53 Cr LJ 1187 ; *Kamalamma v State of Kerala* AIR 1961 Ker LR 49 ; *Lachchman Kunwar v State* (1960) MPLJ (notes) 227 ; *Meghanath v State of Chhattisgarh* 2013 (2) Crimes 421 (Chh) (DB), 2013 Cr LJ 4728.

87 *State v Kehari Singh* AIR 1952 MB 124, 53 Cr LJ 1187 .

88 *Empress v Baji* Ratanlal's Unrepresented Cr Cas 775.

89 *Russell on Crimes*, vol 1, eleventh edn, p 673.

90 Mayne, *Criminal Law,* para 467.

91 *Annu v State* (1958) AWR (HC) 761 .

92 *Radha v State of Rajasthan* (1973) WLN 709, AIR 1973 Raj 634 .

1 *Saraswati v Emperor* 2 Cr LJ 667, 1 NLR 89 ; *Emperor v Mi Pyo Nyo* 3 Cr LJ 462 .

2 *Abbas Bi v Emperor* 12 Cr LJ 562 ; *Sailabala Dasi v Emperor* AIR 1935 Cal 489, 36 Cr LJ 1460 .

3 *Emperor v Bakhtawari* 14 Cr LJ 525 .

4 *Emperor v Woman Behni Bechar* 3 Cr LJ 317, 15 KLR 377 .

5 *Sailabala Dai v Emperor* AIR 1935 Cal 489, p 490, 36 Cr LJ 1460 .

6 *Jankibai v State of Madhya Pradesh* (1970) 19 Jab LJ 74 (SN) .

7 *Amna v State* (1972) All Cr R 565, (1972) All LJ 958 .

8 *Meghanath v State of Chhattisgarh* 2013 (2) Crimes 421 (Chh) (DB).

9 1 Weir 333; Re *Sunna* 1 Weir 334.

10 Re *Radha* 1 Bom LR 155.

11 *Empress v Lalbu* Ratanlal's Unrepresented Cr Cas 961.

12 *Sailabala Dasi v Emperor* AIR 1935 Cal 489, 36 Cr LJ 1460 .

13 *State v Kehari Singh* AIR 1952 MB 124, 3 Cr LJ 118 .

14 *Empress v Amina* Ratanlal's Unrepresented Cr Cas 607.

15 Code of Criminal Procedure 1973, s 251 .

16 *Setabanbai v State* AIR 1953 MB 224 .

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S. 319.

Hurt.--

Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

Comments

1. Scope

Section 319 of the IPC, gives the definition of hurt. It defines that whoever causes bodily pain, disease or infirmity to any person is said to cause hurt. Section 323 of2786 the IPC provides that whoever except in the case provided for by s 34, of the IPC voluntarily causes hurt shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. Therefore, when a complaint in respect of offences punishable under provisions of sections of IPC has been presented before the court, the court is bound to make a scrutiny of the material which has been placed before it for the purpose of finding out whether any *prima facie* case has been made out showing commission of offence punishable under provisions of IPC or any other penal law. The court should not mechanically issue the process whenever complaint has been presented before the magistrate. The court has to make the scrutiny *qua* definition given by the penal provisions of the relevant law brought in picture by allegations made in the complaint.[17]Where there was absolutely no allegation in the complaint that accused persons committed any act for the purpose of causing any bodily pain, disease or infirmity as contemplated by the provisions of s 319 of the IPC, when that was so there was no question of issuing process against them for the offence punishable under s 323 of the IPC .[18]

Sections from s 319 onwards relating to hurt do not postulate death as the end result of the alleged act.[19]

2. 'Causes Bodily Pain'

A person, causing bodily pain to another, is said to cause 'hurt'. However, it is not necessary that the hurt should be caused by direct physical contact between the accused and his victim.[20] If a person, by administration of a drug, is thrown into delirium, with the possible risk of falling into coma and becoming unconscious for the time being, it is clear that both bodily pain and infirmity is caused.[21] It may be remembered that bodily pain or infirmity may either be permanent or temporary.[22]

Swelling amounts to hurt. Swelling necessarily causes bodily pain and as such the injury amounts to hurt within the meaning of s 319 .[23]

3. 'Infirmity'

Infirmity denotes an unsound or unhealthy state of the body or mind, and clearly a state of temporary mental impairment or hysteria or terror would constitute infirmity within the meaning of this expressions in this section.[24] It is an inability of an organ to perform its normal function, whether temporarily or permanently.[25]

17 *Jancy Nelson D'Souza v Nelson D'Souza* (2004) Cr LJ 1690 (Bom) .

18 *Ibid*.

19 *Richhpal Singh Meena v Ghosi* 2014 AIR SCW 4785, (2014) 8 SCC 918 .

20 *Jashanmal Jhamatmal v Brahmanand Sarupanand* AIR 1994 Sind 19, p 21, 45 Cr LJ 247 .

21 *Anis Beg v Emperor* AIR 1924 All 215, p 217, 26 Cr LJ 413 .

22 *Ibid*.

23 *State of Himachal Pradesh v Karam Chand* (1980) Chand LR 21, 25 (HP) (DB) .

24 *Jashamal Jhamatmal v Brahmanand Sarupanand* AIR 1944 Sind 19, p 21, 45 Cr LJ 247 .

25 *Anis Beg v Emperor* AIR 1924 All 215, p 217, 26 Cr LJ 413 .

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S. 320.

Grievous hurt.--

The following kinds of hurt only are designated as "grievous":

First.--Emasculation

Secondly.--Permanent privation of the sight of either eye.2787

Thirdly.--Permanent privation of the hearing of either ear.

Fourthy.--Privation of any member or joint.

Fifthly.--Destruction or permanent imparing of the powers of any member or joint.

Sixthly.--Permanent disfiguration of the head or face.

Seventhly.--Fracture or dislocation of a bone or tooth.

Eighthly.--Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Comments

1. Scope

The previous section having defined 'simple hurt', this section should logically have defined 'grievous hurt' which is an aggravated form of hurt. However, the framers of the IPC found it difficult to draw a line between the two forms of hurt, and, following art 309 of the French Penal Code, enumerated eight kinds of hurt and designated them as 'grievous'. They observed:

> We have found it very difficult to draw a line between those bodily hurts, which are serious, and those which are slight. To draw such a line with perfect accuracy is, indeed, absolutely impossible; but it is far better that such a line should be drawn, though rudely, than that offences, some of which approach in enormity to murder, while others are little more than frolics which a good natured man would hardly resent, should be classed together.....Who have, therefore, designated certain kinds of hurt as grievous.

Before a conviction can be passed for the offence of grievous hurt, one of the injuries, defined in this section; must be strictly proved.[26] To make out a case of grievous hurt, therefore, there must be evidence to show that hurt was caused and that it came within one or more of the eight kinds of hurt enumerated in this section. If a man died of a blow, it must have been a violent blow, but that is not technically the same as grievous hurt.[27] A surgical injury for curing diseases cannot be said to be injury caused voluntarily, punishable under s 326, or else every surgeon will be guilty of an offence under s 326 .[28] It should be remembered that it is the court that2788 has to decide whether a bodily injury constitutes hurt or grievous hurt. It is not the duty of a medical witness to classify a hurt; he is simply to describe the facts.[29]

2. Strict Construction of the Section

Some hurts which are not like those hurts which are mentioned in the first seven clauses, are obviously distinguished from a slight hurt, may nevertheless be more serious. Thus, a wound may cause intense pain, prolonged disease or lasting injury to the victim, although it does not fall within any of the first seven clauses. Before a conviction for the sentence of grievous hurt can be passed, one of the injuries defined in s 320, IPC must be strictly proved and the eighth clause is no exception to the general rule of law that a penal statute must be construed strictly.[30]

3. 'First--Emasculation'

Emasculation means depriving a person of masculine vigour, castration. Emasculation naturally applies only to a man. This clause was inserted to counteract the practice, common in this country, for women to squeeze men's testicles on the slightest provocation.

4. 'Secondly--Permanent Privation of the Sight of Either Eye'

An injury of equal gravity is the permanent privation of the sight of either eye, the effect of which would be depriving the person of the use of his one or both eyes permanently. The gravity of such an injury lies in its permanency because it deprives a man of the use of his sight and also disfigures him.

5. 'Thirdly--Permanent Privation of the Hearing of Either Ear'

This injury also is classified as grievous injury because it deprives a man of his sense of hearing. Such

injury is caused by a stemming blow, given on the head, ear, or those parts of the head which communicate with and injure the tympanum or other auditory nerves, caused by thrusting something into the ear or putting into it, some such substance which causes deafness.

6. 'Fourthly--Privation of any Member or Joint'

This injury is also classified as a grievous injury whereby a man is rendered less able to defend himself or to annoy his adversary. The term 'member', as used here, means nothing more than an organ or a limb, being a part of a man, capable of performing a distinct function. As such, it includes eyes, ears, nose, mouth, hands, feet and, in fact, all distinct parts of the human body designed to perform a distinct offence. A 'joint' is a place where two of more bones or muscles join. Similarly, there are well known joints in human anatomy at the lower jaw, shoulder, elbow, wrist, thumb, hip, knee and great toe. All these joints are in the nature of hinges which perform a similar function.[31]2789

7. 'Fifthly--Destruction or Permanent Impairing of the Powers of any Member or Joint'

The use of limbs and joints of the body are very essential to the discharge of normal functions of the body in the ordinary course of life. Their deprivation entails lifelong crippling and makes the person defenceless and miserable. The law has classified the destruction or permanent impairing of the powers of any member or joint as grievous hurt as it causes great hardship to the human body by its retention without normal function which is like amputation.

8. 'Sixthly--Permanent Disfiguration of the Head or Face'

The word 'disfigure', in this section, means to do a man some external injury which detracts from his personal appearance, but does not weaken him, as the cutting off a man's nose or ears.[32] Branding a girl's cheeks with a red hot iron, which leaves scars of a permanent character, amounts to disfigurement.[33] Likewise, is the case when acid is thrown on victim girls causing disfigurement of their faces.[34] A cut on the bridge of the nose of a girl, caused by a sharp weapon like a razor or knife has been held to be permanent disfigurement within the meaning of this section even though the internal wall, separating the nostrils, is intact. [35]Section 320, IPC clearly lays down that injuries caused by way of permanent disfiguration of head or face will be grievous in nature and even though doctor has come to a finding that injuries are simple but in fact as per provision as laid down in s 320, IPC, this injury will definitely be grievous in nature.[36]

9. 'Seventhly--Fracture or Dislocation of a Bone or Tooth'

The term 'fracture' has not been defined in IPC . In *Maung Po Yi v Ma E Tin* ,[37] it was held that the primary meaning of the word 'fracture' is breaking, though it is not necessary in the case of a fracture of skull bone that it should be divided into two separate parts because it may consist merely of a crack; but if it is a crack, it must be a crack which extends from the outer surface of the skull to the inner surface, which means the entire depth of the bone, it does not amount to a fracture. The Patna High Court has also held that where the evidence is merely that a bone has been cut and there is nothing to indicate the extent of the cut, whether it is deep or a mere scratch upon the surface, it is impossible to infer from that evidence alone that grievous hurt has been caused within the meaning of this section.[38] However, the said two cases have not been followed fully in a later decision in *Kalya v State* ,[39] where the view, expressed in this case, is stated thus:

> Ordinarily, fracture means breaking of a bone. Fissured fracture is one, in which there is no displacement of the fragments, and this condition may be caused by direct or indirect violence, usually resulting from a fall or a blow from a blunt object. These fissures may extend far and wide from the point struck, may implicate one or both tables, and not infrequently run down into the base. A scratch or a cut, which does not go across the2790 bone, cannot be

> said to be a fracture of a bone within the meaning of s 320 . Both outer and the inner tables of the skull bone may be considered to be bones by themselves and fracture of outer or the inner table by itself can be taken to be a fracture of a bone within the meaning of s 320 . A crack, which does not involve both the tables of the skull bone, may amount to a fracture of a bone. A fissured fracture of the outer table of the skull bone would, therefore, bring the case within the definition of a grievous hurt. It would, thus, appear that both the outer and the inner tables of the skull bone are bones by themselves and fracture of outer or the inner table, by itself, will be a fracture of a bone within the meaning of this section.[40]

The Supreme Court has, in a later case, said in unambiguous term, that it is not necessary that a bone should be cut through and through or that the crack must extend from the outer to the inner surface or that there should be displacement of any fragment of the bone. If there is a break by cutting or splintering of the bone, or there is a rupture or fissure in it, it would amount to a fracture.[41] It cannot, therefore, be said that unless the crack extends to the inner side, the hurt cannot be said to be grievous within the meaning of this section. There can be a cut, though the division or split resulting from the cut need not be complete. If, however, a cut results only in a scratch and does not go deep in length into the bone, it will not be a fracture; otherwise, it should be deemed to be one.[42] In the absence of the extent of the cut, fracture or dislocation, the injury cannot, therefore, be designated as grievous.[43] Where the result of a joint attack by several persons on one party is a fracture of the arm of the party assaulted, the offence committed is grievous hurt, and not assault.[44]

The dictionary meaning of 'dislocation' is displacement or putting out of joint or derangement. A mere statement, that 'the four teeth were loose', is not sufficient to even make it an injury, much less make it a grievous injury within the meaning of this section. It has to be proved that there was fracture or dislocation by the injury.[45]

10. 'Eighthly--Any Hurt...his Ordinary Pursuits'

Under this clause, three different classes of hurt are designated as dangerous. They are:

Any hurt:

(1) which endangers life, or
(2) which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or
(3) which causes the sufferer to be, during the space of twenty days, unable to follow his ordinary pursuits.[46]

The said three classes are independent of each other; a hurt of any of the three classes would be grievous hurt under this clause. An injury, which endangers life, may, unless it results in instantaneous death, also causes severe bodily pain for twenty days; but an injury, which causes such pain, may not be dangerous to life and it may2791 still be grievous hurt under this clause. Where a woman by reason of certain injuries inflicted on her, was confined to a hospital for only seventeen days, but her life was in danger for three days, it was held that her injuries amounted to grievous hurt.[47] However, where the medical evidence does not reveal that the abdomen injury had endangered the life of the victim, there can be no conviction by virtue of this clause.[48] An injury, even if called by the medical witness to be a grievous one, may still not satisfy the ingredients of s 320 .[49]

11. 'Any Hurt Which Endangers Life'

This phrase is not intended to apply to cases in which life is not only endangered, but is also actually taken away.[50] The line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one. In one case, the injuries must be such as are likely to cause death; in the other, the injuries must be such as which endanger life.[51] A wound on the neck is dangerous to life within the meaning of cl 8 and, therefore, grievous.[52] Where, in the course of an altercation the appellant stabbed the deceased on the left forearm with a knife, piercing the radial artery, causing hemorrhage, and resulting

in the death of the deceased, it was held that the offence was neither murder, nor culpable homicide not amounting to murder, as the forearm was not a vital part of the body, he could be guilty of voluntarily causing grievous hurt with a deadly weapon because he must have known when he stabbed the deceased that he was likely to cause grievous hurt.[53]

An injury which endangers life means that the injury which is actually found should itself be such that it may put the life of the injured in danger. A simple injury cannot be called grievous simply because it happens to be caused on a vital part of the body, unless the nature and dimensions of the injury, or its effects, are such that in the opinion of the doctor, it actually endangers the life of the victim.[54] However, an injury 'dangerous to life' is synonymous with an injury 'which endangers life'.[55] The expression 'dangerous' is an adjective while the expression 'endangers' a verb. An injury which can put life in immediate danger of death, would be an injury which can be termed as 'dangerous to life' and, therefore, when a doctor describes an injury as 'dangerous to life', he means an injury which 'endangers life' in terms of cl (8) of s 320, IPC, because he describes the injury 'dangerous to life' only for the purpose of the said clause. Both expressions have, thus, the same meaning.[56] A vital difference between the expressions 'dangerous to life' and 'could have been dangerous to life' was, however, pointed out, in the case of *Karnail Singh v Nihal Singh* ,[57] by saying that what the latter expression connotes is that the injury may, or may not, be2792 dangerous to life. A large number of injuries with a hot iron *chimta* in the belief of driving out evil spirits, will certainly endanger life of the victim.[58] Similarly, the thrusting of a *lathi* into the anus of a man has been held to be the causing of a grievous hurt which endangers life.[59] However, the mere administration of a deleterious drug to a person in order to render him insensible is not causing grievous hurt even though it may cause death in some cases if the drug is administered in large doses. If, in a particular case, the life of the party to whom the drug has been administered has not been endangered, it is not a case of grievous hurt,[60] but the administration of poisonous *prasad* has been held to be causing grievous hurt.[61]

12. Medical Jurisprudence on Injuries Dangerous to Life

Taylor, in *Principles and Practice of Medical Jurisprudence*,[62] stated thus:

> The meaning of the words 'dangerous to life' is left entirely to the professional knowledge of a witness. It is not sufficient that he should make a simple assertion that the wound was dangerous to life; he must be prepared to state, to the court, satisfactory reasons for this opinion, and these reasons may be rigorously inquired into by counsel for the defence.

Danger to life primarily depends upon haemorrhage, shock or damage to a vital organ, and secondly on the chance of complications such as infection leading to septicaemis, payemia, tetanus or gas gangrene and of infection of particular parts of tissues-pneumonia, pleurisy, empyema, pericariditis, meningitis or peritonitis or more remotely to the effects of scrarring, causing structure (of the urethra, oesophagus, gas, *etc*.) paralysis, urinary infection, *etc*.

Modi, in *Medical Jurisprudence and Toxicology*,[63] states:

> Danger to life should be imminent before the injuries are designated 'dangerous to life'. Such injuries are extensive, and implicate important structures or organs, so that they may prove fatal in the absence of surgical aid. For instance, a compound fracture of the skull, a wound of a large artery, or rupture of some internal organ, such as the spleen, should be considered 'dangerous to life'. But the injuries, which prove fatal remotely by intercurrent diseases, such as tetanus, erysipelas, etc, should not be considered as dangerous.

The above extracts clearly reveal:

(1) That danger to life from an injury should be imminent to constitute as grievous. Haemorrhage, shock or injuries, implicating important structures or organs, are instances of injuries causing imminent danger. Extensiveness of the injuries may also cause imminent danger. Injuries, which only cause remote danger to life, cannot be treated as dangerous to life.

(2) That the concept of an injury dangerous to life cannot in the very nature of things be very precise. While there may be cases which can be easily placed either in the category of injury dangerous to life or in some other category, there may be marginal and border line cases where it may be very2793 difficult to categorise the injuries as dangerous to life, or not, and, in such cases, the medical experts may also differ.

(3) That the concept of injury dangerous to life, being not very precise, it is necessary that the medical witness should not remain content with making bald statement that the injury, in a particular case, is dangerous to human life. He should place all the relevant data, namely whether the injury caused haemorrhage or shock or implicated important structures or organs or was very extensive or otherwise caused imminent danger, and should also state the various grounds on which he considers the injury to be a dangerous one.

(4) That in arriving at the finding, whether an injury is dangerous to human life, the court should apply its mind to all the relevant data, brought on record, and to the reasons given by the medical witness or witnesses and record its finding, after an overall consideration of the materials on record, giving reasons for its conclusion.[64]

13. 'Which Causes the Sufferer to be, during the Space of Twenty Days, in Severe Bodily Pain or unable to follow his Ordinary Pursuits'

With regard to this, the authors of the IPC say that the length of time during which a sufferer is in pain, diseased or incapacitated from pursuing his ordinary avocations, though a defective criterion of the severity of a hurt, is still the best criterion that has ever been devised. It is a criterion which may be employed not merely in cases where violence has been used, but also in cases where hurt has been caused without any assault such as by the administration of drugs, the setting of traps, the digging of pitfalls, the placing of ropes across a road.

Though it is difficult to prove that an injured person was in severe bodily pain for a period of twenty days, yet it is easier to prove that he was on account of the hurt unable to follow his ordinary pursuits. This must, however, be strictly proved.[65] When the victim was hospitalised for 23 days before her death, the accused was held liable to be convicted under s 326, IPC .[66] Where the evidence was that the injured man 'had to be kept treated in the hospital as an in-patient for 45 days', but the medical witness stated, in evidence, that, after 14 days the injured man could have been discharged and that after that period he was in a position to attend to his ordinary avocations in life, it was held that the hurt was not a grievous one.[67] It is only a disability for 20 days that constitutes grievous hurt. A disability for a fortnight constitutes only simple hurt.[68] It was observed, in *Empress v Vasta Chela* ,[69] that though an injured man may be quite capable of following his ordinary pursuits long before twenty days are over, yet he may, for the sake of permanent recovery of greater ease or comfort, be willing to remain as a convalescent in a hospital, especially if he is fed at public expense. In such a case, the opinion of the medical2794 officer attending on him on the point of his ability is very important. Similarly, the medical evidence is more reliable, but it is not legally necessary because the law does not say that the injured must get himself admitted inside the hospital.[70] The mere fact that the sufferer did not attend to his duty for the statutory period,[71] or that he or she was in hospital for twenty days,[72] is no indication of his inability to do so.

26 *Empress v Vasta Chela* ILR 19 Bom 247 .

27 *Queen v Badri Roy* 23 WR (Cr) 65 .

28 *SD Koretane (Dr) v State of Rajasthan and Anor* 1998 Cr LJ 2493 (Raj) .

29 *Po Maung v Emperor* 4 Cr LJ 202 .

30 *Mathai v State of Kerala* 2005 SCC (Cri) 695, AIR 2005 SC 710 ; *State of Karnataka v Parashram Kallappa Ghevade and Ors* 2007 Cr LJ 479 (Kant) (DB) .

31 *Ellis's Anatomy*, tenth edn, pp 85, 314, 317, 320, 324, 453, 692, 701 and 709.

32 Law Commission, First Report, s 373 .

33 Re *Anta Bin Dadoha* 1 BHCR 101.

34 *Syed Shafiq Ahmed v State of Maharashtra and Ors* 2002 Cr LJ 1403 (Bom) .

35 *Kedarmal v Crown* AIR 1950 Ajmer 13, 51 Cr LJ 799 .

36 *Sangeeta Kumari v State of Jharkhand* 2004 Cr LJ 1734 (Jhar) .

37 *Maung Po Yi v Ma E Tin* AIR 1937 Rang 253, 38 Cr LJ 960 .

38 *Mutukdhari Singh v Emperor* AIR 1942 Pat 376, 43 Cr LJ 511 .

39 *Kalya v State* AIR 1955 Raj 36 .

40 *Kalya v State* AIR 1955 Raj 36, 38, 1955 Cr LJ 579 ; *Parma v State* AIR 1959 Raj 39 .

41 *Hori Lal v State of Uttar Pradesh* AIR 1970 SC 1969, p 1971, 1970 Cr LJ 1665 ; *State of Punjab v Naib Singh* (1978) 80 PLR 326 .

42 Re *Mokkasamy*AIR 1965 Mad 10, p 11, (1965) 1 Cr LJ 48 .

43 *Balwant Singh v State of Punjab* (1979) 81 PLR 37 .

44 *Queen v Ramtohul Singh* 3 WR (Cr) 12 .

45 *Thockchom Bira Singh v Manipur Administration* (1962) 2 Cr LJ 147, p 154-55 .

46 *State of Gujarat v Samaj* AIR 1969 Guj 337 .

47 *R v Bassoo Rannah* 2 WR (Cr) 29 .

48 *Jagrup Singh v State of Punjab* 1973 Chand LR (Cr) 253 .

49 *Dabbal v State of Madhya Pradesh* 1980 Cr LR 305, p 309 ; *Pratap Singh v State of Punjab* (1981) 7 Cr LT 357, p 359 (Punj) .

50 Re*Marimuthu*AIR 1924 Mad 41, p 43, 24 Cr LJ 721 .

51 *Government of Bombay v Abdul Wahab* AIR 1946 Bom 38, p 41, 47 Cr LJ 378 (FB) .

52 *Muhammad Rofi v Emperor* AIR 1930 Lah 305, p 306, 31 Cr LJ 77 ; *Kalicharan v State* 1980 Cr LJ (NOC) 16 (All) .

53 Re*Kottengodan Alaxi*AIR 1939 Mad 269, 40 Cr LJ 308 .

54 *Ramla v State* (1963) 1 Cr LJ 387, 388 .

55 *Monammad Rafi v Emperor* AIR 1930 Lah 305, 31 Cr LJ 77 ; *Jat Narain Mishra v State of Bihar* 1972 Cr LJ 469 (SC) ; *Atma Singh v State of Punjab* 1980 Cr LJ 1226, p 1228 .

56 *Atma Singh v State of Punjab* 1980 Cr LJ 1226, p 1228 (DB) ; **overruling***Jagrup Singh v State of Punjab* 1973 Chand LR (Cr) 253 .

57 *Karnail Singh v Nihal Singh* (1979) 81 PLR 151 .

58 *Pratap Kumar v State of Punjab* 1976 Cr LJ 818, p 820 .

59 *Makka v Emperor* AIR 1934 Oudh 87, 35 Cr LJ 467 .

60 *Queen v Joygopal* 4 WR (Cr) 4 .

61 *State of Bihar v Ramnath Prasad and Ors* 1998 Cr LJ 679 (SC) .

62 Taylor, *Principles and Practice of Medical Jurisprudence*, eleventh edn, p 230.

63 Modi, *Medical Jurisprudence and Toxicology*, eleventh edn, p 224.

64 *Roopa v State of Rajasthan* AIR 1966 Raj 68, p 69, 70 ; *State of Mysore v Narayanappa* (1970) 2 Mys LJ 402, wherein it was held that it is not the business of the medical officer to clarify whether the hurt is grievous or simple; he need only to describe its nature from which the court will decide whether the hurt is grievous or simple.

65 *Mathu Paily v State of Kerala* (1962) 1 Cr LJ 652, p 653-54 .

66 *Gurmail Singh v State of Rajasthan* 1999 Cr LJ 991 (Raj) (DB) .

67 *Marudevi Avva v State of Kerala* AIR 1958 Ker 8, p 12, 1958 Cr LJ 33 .

68 *Queen v Bishooram Surma* 1 WR (Cr) 9 .

69 *Empress v Vasta Chela* ILR 19 Bom 247 .

70 *Jaganath v State of Uttar Pradesh* 1974 Cr LJ 1239 (All) .

71 *Mathu Paily v State of Kerala* (1962) 1 Cr LJ 650, p 653-54 .

72 *State (Delhi Admn) v Mewa Singh* 71 PLR 290, p 295 (Del) .

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Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 321.

Voluntarily causing hurt.--

Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

Comments

1. Scope

This section defines 'voluntarily causing hurt' which is an offence made punishable under s 323, IPC . Almost every other offence has two elements, *viz*, *actus reus* and *mens rea*. It is only a certain kind of act and certain intent or knowledge that makes an offence. What constitutes a particular offence depends not only upon the nature of the act done (*actus reus*), but also upon the nature of the intention or knowledge (*mens rea*) with which it is done. Section 319 described the nature of the *actus reus*or act, which would constitute the offence of voluntarily causing hurt, punishable under s 323, and this section describes the

mens rea, or the intention or knowledge, necessary to constitute that offence. The *mens rea*required to constitute the offence punishable under s 323 is either the intention of causing such hurt as is described in s 319, or the knowledge that, by this act, the offender is likely to cause such hurt. If the *actus reus* described in s 319 and the *mens rea*, described in this section are present, the two together would constitute the offence which is compendiously called 'voluntarily causing hurt', and is made punishable under s 323 .

2. 'Voluntarily'

Commentary under s 39, vol 1, may be referred to.

The word 'voluntarily', in connection with causing hurt, does not bear quite so wide a meaning as it does in general in IPC, an effect is said to be caused 'voluntarily' if it is either intended or is known to be likely, or if the doer of the act in question has reason to believe that effect to be likely to happen. In this section (and in s 322, IPC), the word is restricted in meaning to intention or knowledge, and does not, therefore, include a case of causing hurt by an act which the doer has only reason to believe to be likely to cause hurt (for which refer to ss 337 and 338, IPC). That the hurt was caused 'voluntarily', in the above sense, is of the very essence of the offence,[73] and a verdict of 'guilty of causing hurt, but not2795 voluntarily' is in effect a verdict of 'not guilty'. However, surgical injury for curing diseases cannot be said to be injury caused voluntarily punishable under s 326 .[74]

3. 'To any Person'

The person actually hurt need not necessarily be the person who was intended to be hurt, *e.g.*, *A* aims a blow at *B*, a woman who is carrying a child in her arms, and, failing to hurt *B*, hits the child.[75]

73 *Emperor v Khudiram Dass* 7 Cr LJ 362, 12 CWN 530 .

74 *SD Khetani (Dr) v State of Rajasthan and Anor* 1998 Cr LJ 2493 (Raj) .

75 *R v Sahae Rae* ILR 3 Cal 623 .

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S. 322.

Voluntarily causing grievous hurt.--

Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

Explanation.--A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Illustration

A, intending or knowing himself to be likely permanently to disfigure *Z's* face, gives *Z* a blow which does not permanently disfigure *Z's* face, but which causes *Z* to suffer severe bodily pain for the space of twenty days. *A* has voluntarily caused grievous hurt.

Comments

1. Scope

This section defines 'voluntarily causing grievous hurt' which is an offence punishable under s 325, IPC . To make out an offence of voluntarily causing grievous hurt, there must be some specific hurt, voluntarily inflicted, and coming within some of the eight kinds, enumerated in s 320 .[76]

In order to determine whether the offence has been committed, both the nature and extent of the hurt caused and the intention or knowledge of the offender have to be taken into account.[77] The court has to see that the accused intended to cause grievous hurt, or that he knew that grievous hurt was likely to be caused, and that such grievous hurt was actually caused.[78]

2. 'Voluntarily'

Commentary under same heading in s 321, *ante* and commentary under s 39, vol 1, may be referred to.2796

3. Explanation

The explanation to this section really unfolds the significance of the expression 'voluntarily to cause grievous hurt'. It states, in clear terms, that the offence of grievous hurt is not caused unless the offender both causes grievous hurt and intends, or knows himself to be likely, to cause grievous hurt.[79] It will appear from a perusal of s 325, IPC, read with this section, that the essential ingredients of the offence of causing grievous hurt are three,[80] which are as follows:

(1) Grievous hurt as described in s 320, IPC, must first be caused. If the hurt, actually caused is simple, a person cannot be held guilty of voluntarily causing grievous hurt even if it was in his contemplation.[81]
(2) The offender intended, or knew himself to be likely, to cause grievous hurt. If he intended, or knew himself likely, to cause only simple hurt, he cannot be convicted for the offence under s 325 even if the resultant hurt was grievous.[82] In other words, to constitute the offence of voluntarily causing grievous hurt, there must be complete correspondence between the result and the intention.[83]
(3) The hurt was caused voluntarily. In other words, the causation of the grievous hurt was either in contemplation or was the likely result of the act done.

In order that a person may be held guilty of an offence of causing grievous hurt, it must be proved that he either intended, or knew himself to be likely to cause grievous hurt, and not otherwise.[84] And even if the necessary intention is not proved, the requirement of the explanation will stand satisfied if the offender is shown to have the knowledge that, by his act, he was likely to cause grievous hurt.[85] When a man strikes

a woman with a child in her arms, on that part of her person which is close to the head of the child, it is impossible to say that he does not know that he is likely to cause grievous hurt to the child.[86] A violent blow inflicted upon the body indicates an intention to cause grievous hurt.[87]

4. Determination of Nature of Injury

In the nature of the things, it is difficult to obtain direct proof of what the offender thought was likely to happen. In all cases, it is really a question of inference from the nature of the act committed by the offender, his conduct and the surrounding circumstances of the case. When the act, that he did in the process of causing hurt, is such as any person of ordinary prudence knows it likely to cause grievous hurt, he may safely be taken to have intended to cause grievous hurt or, at least, to have contemplated grievous hurt as likely to occur. If the act was such that nothing more than simple hurt could reasonably be thought likely to ensue from it, then, although2797 grievous hurt may unexpectedly have ensued, the offender can be convicted of simple hurt only, assuming that grievous hurt was not in his contemplation. The means by which the injury is caused are not the true criterion. If it were so, however grievous an injury may be, the provision of s 325 will not be attracted if no weapon were used in causing it. The answer really depends upon the nature of the injury caused and the manner in which the blows were administered, whether by fists and slaps or by a weapon.[88]

76 *Queen v Badri Roy* 23 WR (Cr) 65, p 66 .

77 *Joseph Cheriyan v State* AIR 1953 Tr & Coch 129, 54 Cr LJ 706.

78 *Param Dev v State* 1975 Cr LJ 1346, 1347 .

79 *Rambarn Mohton v State* AIR 1958 Pat 452, p 456, 1958 Cr LJ 1077 .

80 *Ibid*.

81 *Ramakrishna Panicker v State of Kerala* AIR 1959 Ker 372, p 375 .

82 *Nga Tun E v Emperor* AIR 1914 UB 26, p 27, 16 Cr LJ 431 ; *Dipa v Emperor* AIR 1947 All 408, p 409, 48 Cr LJ 858 .

83 *Dipa v Emperor* AIR 1947 All 408, p 409, 48 Cr LJ 858 ; *Ramakrishna Panicker v State of Kerala* AIR 1959 Ker 372, p 375 .

84 *Abdul Karim v State of Maharashtra* 1978 Cr LJ 1485, p 1487 (Bom) .

85 *Joseph Cheriyan v State* AIR 1953 Tr & Coch 129, 54 Cr LJ 706.

86 *Empress v Sdhae Rae* ILR 3 Cal 623, p 625 .

87 Re *Narayan Pais* 24 WR (Cr) 24; *Sital v Emperor* AIR 1935 Oudh 468, p 469, 36 Cr LJ 1151 .

88 *Rambaran Mahton v State* AIR 1958 Pat 452, p 456, 1958 Cr LJ 1077 .

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Chapter XVI

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OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE

EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 323.

Punishment for voluntarily causing hurt.--

Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

Section 319, IPC defines 'hurt' and s 321, IPC defines 'voluntarily causing hurt'. This section declares such voluntarily causing hurt to be an offence and prescribes a punishment for it. It makes an exception only in cases provided for by s 334, IPC,2798*i.e.*, 'voluntarily causing hurt on provocation', for which a much lighter punishment is provided. Section 337 , IPC also prescribes a lighter punishment for causing hurt, but there the hurt caused is not voluntarily, but by doing an act rashly or negligently. Sections 324 , 327, 328 and 394, IPC also prescribe punishment for voluntarily causing hurt, but they prescribe heavier punishment if the hurt is caused in aggravating circumstances, while this section prescribes a punishment for voluntarily causing simple hurt when there are no aggravating circumstances. It may be noted that even the voluntary causing of hurt would not be an offence if the harm caused is so slight that no person of ordinary sense and temper would complain of such harm.[89] In this regard s 95, IPC may also be referred to. Similarly, it would not be an offence if any of the general exceptions applies to it. Thus, a person causing hurt in the exercise of the right of private defence of person or property, cannot be convicted of an offence under this section.[90] Where the accused caused slight injury while rescuing persons who were unlawfully detained, it was held that he could not convicted of causing hurt under this section.[91]

2. 'Whoever'

Where hurt is caused, it is only the person, who voluntarily caused it, who is directly liable for it under this section. Others, who have not actually caused the hurt, can only be held liable constructively under this section, read with s 34 or s 149, if any of those sections apply.[92] Thus, where the common object of an unlawful assembly was to give a beating and if there was any resistance to their taking away the buffaloes, and, in prosecution of that common object, some members of the assembly gave a beating, all its members would be liable for the beating under this section read with s 149 .[93] However, if the common object of a party is only to rescue a person, and not to beat anybody, there is no unlawful assembly, and if some members of the party, in effecting the rescue, cause hurt, only they can be held liable under this section, and not the other members of the party.[94] Where the common object of the assembly was to chastise the owners for certain trespassing cattle, but one of the members caused death by beating, it was held that the other members who caused only simple hurt, could be held guilty only of the offence under this section.[95] However, merely because the charge under s 34, IPC, is not established, it does not debar the court from convicting the accused under s 323 *simpliciter* if an offence under it is established and proved.[96]

3. Essential Ingredients

Reading this section with ss 319 and 321, IPC, it would appear that the essential ingredients of the offence under this section are that:

(1) hurt, as described in s 319, must be actually caused; and2799
(2) it must be caused with the intention of causing it or with knowledge of its being likely to be caused.

If hurt actually caused is simple, a person cannot be held guilty of voluntarily causing grievous hurt even if it was in his contemplation.[1]

If he intended, or knew himself to be likely to cause only simple hurt, he cannot be convicted for the offence under s 325 even if the resultant hurt was grievous. In other words, to constitute the offence of voluntarily causing hurt, there must be complete correspondence between the result and the intention or the knowledge of the accused.[2]

To constitute offence of voluntarily causing hurt punishable under s 323, IPC, the act attributed to the accused must have caused hurt as defined in s 319, IPC .[3] Where during scuffle between the accused and the injured, the latter fell down over stone and received injuries over shoulder and back, the accused would not be guilty of offence under s 323, IPC .[4]

4. 'Voluntarily'

Commentary under the same heading in s 321, *ante*, and also commentary under s 39, vol 1, may be referred to.

5. 'Hurt'

Commentary under s 319, *ante*, may be referred to.

6. Illustrative Cases

(a) School Master's Liability

In the case of a pupil under twelve years of age, a schoolmaster, chastising him, is protected under s 89 of IPC, from prosecution under this section. In *Emperor v Maung Ba Thaung* ,[5]a schoolmaster was prosecuted under this section for caning a schoolboy under his charge. It was not suggested that the schoolmaster was actuated by improper motives or that he was not acting bonafide in the interest of the school discipline or that the punishment was unduly excessive. It was held that the schoolmaster had committed no offence. The act of a schoolmaster in administering corporal punishment to a pupil over twelve years of age will in the like circumstances be covered by s 88 .[6]

Where the accused supervisor in a school had slapped the deceased student who was found sitting on scooter of the accused, his conviction under s 323, IPC was held justified, he was held not entitled to the protection of ss 88 and 89, IPC .[7]2800

(b) Husband's Liability for Beating his Wife

A husband has no general or unqualified right of punishing his wife by beating her for imprudence and impertinence.[8]

(c) Slapping by Mother-in-law

When the prosecution has proved that the accused mother-in-law had slapped the deceased on the day of the incident during the course of the quarrel and had also abused her, the accused mother-in-law was held to be rightly convicted under s 323, IPC, by the trial court.[9]

(d) Rescue

However, since the word 'rescue' used in s 225, IPC, necessarily implies the use of a certain amount of

criminal force, a person who helps the accused in rescuing another in lawful custody must not be visited with a separate sentence under s 323 .[10]

(e) Stone Blow

It is not that in every case a stone would constitute a dangerous weapon. It would depend upon the facts of the case.[11] Where the accused was alleged to have caused simple hurt to the victim by inflicting a stone blow, the prosecution witness did not support the prosecution in the examination-in-chief but in the cross-examination by the public prosecutor he stated that the accused hit the victim with stone but when cross-examined by the accused he stated that he had not seen anyone hitting with the stone. The self contradictory and self destroying version of the witness is utterly unacceptable as an eye account of the occurrence, the sole testimony of the injured was found unacceptable to prove commission of the offence under s 323, IPC, by the accused.[12]

(f) Fist and Slaps

Where the accused person were alleged to have assaulted the complainant with fist and slap, none of the prosecution witnesses stated that the complainant was actually assaulted by all other accused persons, the doctor who examined the complainant stated that the injuries caused to him were simple and superficial which could also be caused by a fall. Contradictions were also found in the statement of the prosecution witnesses, the acquittal of the accused persons was, therefore, found proper.[13]

(g) Kick

Where ten accused persons were alleged to have assaulted the complainant by kick, and it was not possible for the Court to fix the liability of any one individual out of total 10 accused persons for causing injuries on the body of the complainant which were found very simple in nature, the conviction of the ten accused appellants under s 323, IPC was found not sustainable, and was set aside.[14]2801

(h) Pushing

Where the accused pushed the deceased on the chest and the deceased fell down on a stone which resulted in his death, there was no intention of the accused to kill the deceased, the conviction of the accused was altered from s 304, Pt II to one under s 323, IPC .[15]

(i) Free fight case

Where both the complainant and the accused had sustained injuries in a free fight, the accused appellant had not caused fatal injury on the deceased, the accused was convicted under s 323, IPC . [16]

(j) Bamboo stick

Where the accused appellant A5 had caused simple injury by bamboo stick to the deceased, while other accused A1 had given fatal blow, he was convicted under s 323, IPC .[17]

(k) Single lathi Blow

Where the accused inflicted a single *lathi* blow on the head of the deceased causing simple injury, and the deceased died due to intra-cranial haemorrhage, the accused did not have knowledge that a single *lathi* blow could cause such internal injury as to result in death, the conviction of the accused was altered from s 302 to s 323, IPC .[18] The accused appellant had inflicted injuries by lathi on the left side of head, seven cm above eye-brow. The victim had sustained fracture of left parietal bone also. Held, the case did not fall under s 323, IPC, but under s 308, IPC .[19] Where the appellant accused in exercise of right of private defence had hit the deceased with thorny stick lying on the spot causing death, the appellant accused was acquitted of the charges under ss 302 and 323, IPC .[20]

(l) deceased aged 60 years suffering from cervical spondylosis

Due to enmity between two rival groups in the incident, one person died. Medical evidence showed that the deceased was aged 60 years and suffering from cervical spondylosis. The deceased had sustained fracture of cervical spine. The injuries sustained by the deceased were simple in nature. The injury caused to the deceased was neither intentional nor the members of the unlawful assembly had knowledge that the injury received by the deceased could have caused death. Accused were convicted under ss 325, 323 read with s 34 .[21]

7. Procedure

An offence under this section is non-cognizable, bailable, compoundable, and is triable by a magistrate. It may also be tried summarily.2802

The cognizance of offences under ss 323 and 324, IPC, by the magistrate after the period of limitation and without any explanation regarding extension of period of limitation by the prosecution is bad in law and liable to the quashed.[22]

8. Investigation

The offence under s 323, IPC, is non-cognizable, so the police cannot investigate it without the order of the magistrate.[23] However, if this offence is committed by the accused along with a cognizable offence, the investigation can be done by the police for this offence and like a cognizable offence the investigation should be done in a fair and proper manner by the police with due regard to the facts and circumstances of the case. Thus, when the victim lodged an FIR under s 506 and s 323, IPC and the complainant did not wish to go to a government hospital but wanted to go to a private hospital, the case was closed by the police as a mistake of fact, the High Court of Madras took a serious view and observed that only make believe investigation has been done and the investigation was not only faulty, but also partial.

The submission that the injured wished to go to the private hospital and the police having allowed to do so was found unacceptable as it was for the police to keep track of the evidence and preserve the same and they ought to have sent the complainant to the government hospital with a memo which was a clear lapse, the Madras High Court directed a detailed departmental enquiry to be conducted against the sub-inspector and inspector of police for their lapses by the superintendent of police and also *de novo* investigation of the case of the complainants.[24]

Once, on the circumstances prevalent at the time of registration of the case, it is evident that a non-cognizable offence is not made out, permitting the police to first register a cognizable offence, carry out investigation and ultimately if it is found that a cognizable offence was not made out, would be giving a long rope to the police. The nature of offence is to be gathered from the facts available at the relevant time and if there is doubt as to whether a cognizable offence is made out, the police can report it to the magistrate concerned and obtain appropriate orders. Therefore, when the offence under s 323, IPC, was made out but the police registered the case under s 324 read with s 34, IPC, to make the non-cognizable offence cognizable, the investigation done by the police was without jurisdiction and magistrate could not take cognizance upon the submission of *challan* by the police after investigations and charge under ss 323 / 34, IPC, framed by the court on such illegal investigation is also liable to be quashed.[25]

9. Acquittal on a charge under Section 352 Bars a Fresh Trial on the same Facts under Section 323

Commentary under the same heading in s 352, *post*, may be referred to.

10. Summary Trial

A chief judicial magistrate, a metropolitan magistrate, or a magistrate of a first class, especially empowered in this behalf by the High Court, may, if he thinks fit, try the offence, under this section, in a

summary manner, as per s 260, CrPC .2803

11. Case Triable as a Summons Case

The maximum punishment prescribed for an offence under this section does not exceed imprisonment for one year. Similarly, a case relating to an offence under this section is a summons case,[26] and the procedure, to be observed by a magistrate in the trial of such a case, is prescribed in ch XX of the CrPC .

The adoption by a magistrate of the procedure prescribed for warrant cases where the offence is triable as a summons case does not constitute an illegality and it is only an irregularity which is curable under s 465(1) of the CrPC, if no prejudice is caused to the accused.[27] It must be remembered that the breach of every mandatory provision of the CrPC does not render the trial of an accused person illegal. There is a distinction between provisions which prescribe the mode or manner of a trial, and provisions which provide for the conduct of the trial. An infringement of a provision as to the mode or manner of a trial constitutes an illegality which vitiates the whole trial and cannot be cured by s 465(1) of the CrPC, but an infringement of a provision which prescribes even mandatorily a matter relating to the conduct of a trial constitutes a mere irregularity which can be cured by the said section if no prejudice is caused to the accused.[28]

12. Compounding of an Offence under this Section

Under s 320 of the CrPC, the offence of hurt can be compounded only by the person to whom the hurt is caused. Where a widow complained of hurt caused to her husband in consequence of which he died, compounded the offence and the magistrate thereupon acquitted the accused, it was held that the acquittal was wrong.[29] Similarly, where hurt is caused to three persons one of whom dies subsequently, the remaining two cannot lawfully compromise the offence as regards the deceased.[30] However, a compromise cannot be refused merely because the masterof the person, in whose quarrel the complainant was injured, refuses to give his permission.[31]

In a case relating to an offence under this section, a compromise petition filed by the complainant alone would be effective even though it is not signed by the accused person.[32] The compromise is effective even without the permission of the court.[33] In a compromise case, the acquittal is recorded because the parties come to terms.[34] Since the composition of an offence has the immediate effect of acquittal, so as to deprive the magistrate of his jurisdiction to try the case, the subsequent withdrawal from it by any party can neither affect the acquittal, nor revive the jurisdiction of the magistrate to proceed with the case.[35]2804

The composition of an offence under s 323, IPC, does not amount to an acquittal of the accused of an offence under s 147, IPC .[36] In *State v Bherulal Dagadulal Jain* ,[37] where the accused was tried under ss 323, 504, 506, read with s 148, IPC, and offences under ss 323, 504 and 506, IPC, were compounded, it was held that the proper order for the magistrate to pass under s 148, was to discharge the accused under s 239, CrPC . There is, however, no reason forthcoming from the last cited case as to how the composition of the offences under ss 504, 506, and 323, IPC, could render the charge under s 148, to be groundless so as to attract the said provision of s 239, CrPC . In order to supply such omission, reference may usefully be made to the case in *Tarakanta Bhadra v Bhanu Charan Sahu* ,[38] to the effect that, since the compromise is bonafide and has already been acted upon, one cannot lose sight of the fact that there would be no evidence forthcoming to support the prosecution and no purpose would be served in continuing the prosecution.

13. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[39]

14. Proof

To establish an offence under this section, it has to be proved that:

(1) the accused caused hurt, that is, bodily pain, disease or infirmity to the complainant; and
(2) he caused the hurt, voluntarily, that is, he did the act, causing hurt, with:

(a) the intention of causing hurt to the complainant, or
(b) the knowledge that he is thereby likely to cause hurt to the complainant.

Where a person, who intervened, was said to have been beaten but appeared to have compromised and did not appear in the witness-box, and his injuries were not proved, it was held that conviction on a charge under s 323 read with s 34, IPC, in a murder case was not maintainable.[40]

15. Appreciation of Evidence

When the witness suppresses the genesis of the incident and when the witness is not found truthful, in major part of his testimony, the court should not rely on the statement of the witness to convict the accused.[41]

Unless the evidence is good enough to warrant a clear finding as to the facts and guilt of the accused, no conviction can be arrived at.[42]

Where the story given in the FIR was that the accused pelted stones on the complainant and his sons causing injuries and whereas, in the statement before the2805 court it was stated that the bleeding injury to the nose of the complainant was caused due to a *lathi* blow, the acquittal of the accused was found proper.[43] Where the accused constables had merely accompanied the station officer to cause arrest of the victim, no specific allegation of assault was made by the accused constables upon the deceased either in the statements of witnesses under s 161, CrPC, or before the court, the accused constables were found entitled to the benefit of the doubt.[44] The intention or knowledge may be gathered from the circumstances of the case and nature of the injuries.[45]

When the accused is arrested on the spot, the question as to the presence of sufficient light becomes inconsequential.[46] However, the evidence is to be weighed as a whole, and not piece-meal. It is difficult to believe that the accused would enter the room at midnight only to commit an offence under s 323, IPC .[47]

16. Acquittal

The accused allegedly insulting the complainant by referring to his caste and assaulting him but all the witnesses examined by the prosecution were interested witnesses and were from same family, there were glaring contradictions in their evidence, the witnesses referred to presence of independent witnesses who were not examined, in these circumstances the accused was found entitled to acquittal.[48]

Where evidence of the witness was that during course of quarrel, the accused gave a *tangia* blow aiming at head of the victim causing bleeding from his nose, however, injuries sustained by the accused persons during same transaction were not explained by the prosecution and the prosecution was guilty of suppression of facts, therefore, acquittal of the accused persons was found proper.[49]

In the instant case the complainant went to touch the feet of the accused at the place which was almost overcrowded and all of a sudden he (complainant) felt that accused gave a blow with a kick on his head when the accused was going to pick up a car. Held, there was no intention on the part of the accused to kick on the head of the complainant because at the place which was completely filled with large group of persons it was practically impossible for the accused to move and see the particular person who has

touched his feet and in that event if he waved his feet aside, it will not mean that intentionally the accused had given the blow with a kick on the head of the complainant. No offence under s 323, IPC was made out, order summoning the accused for offence under s 323, IPC was set aside.[50]

17. Contradiction between Medical and Oral Evidence--Effect

Where the oral evidence of sole injured eyewitness did not corroborate by the medical evidence and the injury said to be sustained by her by sword was not caused in the manner and by weapon as stated by her, there was delay of three days in2806 lodging FIR which was not explained, the evidence of sole eyewitness was not found believable, trustworthy and reliable.[51]

18. Conviction

When the ocular testimony regarding date, time and place of occurrence is supported by medical evidence, the accused is liable to be convicted inspite of the fact that eyewitnesses are the brothers of the victim.[52] An accused charged under s 323 with the aid of s 149 cannot be convicted under s 323 when there is no specific allegation in the charge that the accused caused simple hurt to the victim.[53]

Where the charge against the five accused is only of an offence under this section and there is no charge under s 147, only those accused who caused the injuries can be convicted under this section.[54] However, in the absence of a charge under this section framed during trial, a conviction under s 147, IPC, cannot be altered to one under this section,[55] but where an accused charged under ss 147 and 325 / 34, IPC, is convicted of the former and acquitted of the latter, the appellate court can alter the conviction under s 147 to one under s 323 .[56] A charge under ss 147 and 323 cannot, however, be altered to one under s 160 .[57]

If an accused is charged under s 290 (where the elements of the offence are essentially different from those for an offence under s 323), and he has no notice of a charge under s 323, his conviction under the latter section is vitiated as he is misled by the charge put to him.[58]

An accused charged under s 323, cannot be convicted for abetment under ss 323 / 109, IPC, if there is no mention in the complaint of facts constituting abetment.[59]

Conviction under ss 147 and 323 or 326 are not illegal.[60] In *Chhidda v Emperor* ,[61] and *Emperor v Sahab Raj Singh* ,[62] it was held that separate convictions under ss 147 and 323, read with s 149, IPC, are not illegal. In *Tiny v State* ,[63] Brij Mohan Lal J, relying on a Full Bench decision, reported in *Empress v Ram Sarup* ,[64] held that a person who actually causes hurt and is also a member of an unlawful assembly can be convicted of committing riot under s 147, and of causing hurt under s 323, and there is no illegality in it.2807

Where no injury is inflicted pursuant to the common object to kill the deceased, all members of the unlawful assembly cannot be guilty of murder, the conviction of the accused who caused the injury and the one who instigated him to inflict injury under ss 302 / 34 and of other members of the unlawful assembly under ss 323 / 149, 147, 148 was found proper.[65]

Only evidence against the appellant was that he gave chappal blow to the mother of the deceased, he was convicted under s 323, IPC .[66]

Death caused by the accused was not premeditated, accused had no common intention to cause death of deceased, the injuries were not sufficient in the ordinary course of nature to have caused his death. Only accused no. 1 had caused vital injury on the head of the deceased. Held, the case was covered by Exceptions 1 and 4 to s 300 of IPC . Appellant accused No. 1 was convicted under ss 304, Pt I/149. Other accused were convicted under ss 323 / 149, 147 and 148, IPC .[67]

The deceased who had come to the field of the accused unexpectedly was attacked by accused by gandasa. Held, the accused did not have common intention to cause the death of the deceased. The

accused who gave fatal blow was convicted under s 302, IPC, others were convicted under s 323, IPC . [68]

19. Conviction and moral Turpitude

Conviction under every section of IPC cannot be said to be conviction of an offence involving moral turpitude affecting government service of the convict.[69]

20. Conviction of some Accused under Section 323 and others under other Offence

Where the accused persons armed with *lathis* went to the house of the complainant to belabour the complainant party, the main accused who was not a member of the assembly picked up a heavy stone and dropped it from the roof of his house on the head of the deceased who had arrived there, the act of the main accused was an isolated act unconnected with the purpose or object of unlawful assembly formed by the accused persons, however, there was sufficient evidence with regard to formation of an assembly and causing injury to the complainant and others, in these circumstances the main accused was convicted under s 304, Pt II and other accused persons were convicted under s 148 and ss 323 / 149, IPC .[70] Where the main accused attacked the deceased with *mushal* on the head causing his death, but the co-accused only assaulted the deceased with fists and slaps, the co-accused did not share the common intention to commit murder of the deceased, therefore, the main accused was convicted under s 304, Pt II and the co-accused under s 323 .[71]2808

21. Accused Convicted under Section 302 cannot be convicted under Section 323

When the accused are convicted for a major offence under s 302, IPC, of causing murder of the victim, their conviction under s 323 is unjustified and unsustainable.[72]

22. Acquittal under Section 376, but conviction under Sections 323 / 354 / 34

The acquittal of the accused under s 376 was found proper. The prosecutrix did not support the prosecution case and the medical evidence also did not support the prosecution regarding the offence under s 376 . However, the prosecutrix had clearly deposed to the fact that the accused had bitten her on the breasts and the bite-marks had been recorded by the doctors. Therefore, the accused person were convicted under ss 323 / 354 / 34, IPC, for outraging the modesty of the prosecutrix and in respect of injuries caused to her.[73]

23. Admonition

When an accused is guilty of an offence punishable with imprisonment for not more than two years or five or with both and for some other specified offences and no previous conviction is proved against him, having regard to the circumstances of the case including the nature of offence and the character of the offender, or any extenuating circumstances under which the offence was convicted, instead of sentencing the accused, the court may release him after due admonition.[74] Where the accused was less than 21 years of age at the time of commission of offence and at the time of the trial, the report of probation officer clearly showed that the accused deserved the benefit of the Probation of Offenders Act but since more than 14 years has lapsed since the decision of the first appellate court, so it was not thought proper to release the accused on probation by bounding him and instead the accused was released with due admonition as per s 360(3), Crpc and s 3 of the Probation of Offenders Act .[75]

Interest of justice may, in fit cases of first offenders be served by admonishing the accused under the provision of the Probation of Offenders Act 1958.[76]

Where the injuries sustained by the victim were minor and superficial, the sentence of 30 days simple imprisonment awarded to the accused was set aside and the accused persons were directed to be

released after due admonition by giving them the benefit of s 3 of the Probation of Offenders Act .[77]

24. Probation

An order under s 4(1) of Probation of Offenders Act cannot be said to be a punishment.[78]

When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and no previous conviction is proved against him,2809 having regard to circumstances of the case including the nature of the offence and the character of the offender the court may instead of sentencing the accused, release him on his entering into a bond, with or without sureties to appeal and receive sentence when called upon during such period not exceeding 3 years and in the meantime to keep the peace and maintain good behaviour.[79]

Before making any order for release of the accused on probation, the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.[80]

Consideration of a variety of factors like gravity of the crime, its impact and effect on the morals of society, its defenceless and unprotected state of the victims, the age of the criminal, his conduct, the circumstances under which crime was committed are relevant factors to ascertain whether the accused is entitled to the benefit of probation or is liable to be sentenced.[81]

Where the allegations were that the accused assaulted with a *lathi* causing bleeding injuries, the injuries were trifling in nature and were also possible due to a fall. Three of the accused persons were ladies, in these circumstances the accused were found entitled to the benefit of Probation of Offenders Act and were released on execution of a bond instead of a harsh sentence.[82] Where the accused assaulted the informant with a *lathi* causing injury to the head, the conviction of the accused under s 323, IPC, and his release on probation under s 360, CrPC, was found proper.[83]

In another case, the accused convicted under s 323 were released on probation under s 360(1), CrPC, by setting aside the sentence imposed against them.[84]

Where the incident took place 9 years and 8 months ago, extending the benefit of Probation of Offenders Act to the accused persons was found just and proper.[85] The incident was thirty years old, some of the accused appellants had become old, the accused were released on probation of one year.[86]

25. Punishment

The question of punishment is a matter of discretion of the trial court. However, that discretion must be exercised judicially.[87] Inexcusably shocking and reckless anti-social behaviour, causing hurt to an innocent person, does not deserve a lenient sentence.[88] Similarly, if the discretion is not judicially exercised and the sentence passed by the trial court is too lenient, the appellate court may enhance the sentence.[89] Where the injuries sustained by the complainant were simple in nature and more or less superficial, the sentence of nine months' rigorous imprisonment was2810 found to be erring on the side of severity and was, accordingly reduced to about one and a half months as already served out.[90]

Where different persons are injured and grievous hurt is caused to some while simple hurt to others, it is competent to pass separate and cumulative sentences.[91]

When the accused suffered the ordeal of protracted litigation for about 12 years, the substantive sentence of imprisonment imposed on the accused was converted into fine.[92] Where the occurrence took place 16 years ago, the accused was aged about more than 55 years, he was re-arrested and was in custody since then, under the circumstances the sentence was modified to period already undergone and a fine of Rs 1,000.[93]

When the incident took place 12 to 20 years ago,[94] and litigation prolonged since, the sentence of the

accused was reduced to the period already undergone by him in jail and also pay the fine.

Where the accused persons were convicted under ss 342 and 323, IPC, and remained in police custody and judicial custody for one month and the incident took place 16 years ago and this period is sufficient to exhaust anybody mentally, physically or economically, so the sentence of imprisonment of the accused persons was reduced to the period already undergone.[95] Where the incident took place 20 years ago, the sentences under ss 323, 324 awarded to the accused were reduced to the period already undergone by them, (*i.e.*, about 23 days) as no useful purpose would be served to send them to jail.[96] Where the occurrence took place eight years back, the accused were in jail custody for about one month and seven days, the sentence of imprisonment of the accused under s 323 was reduced to the period of imprisonment already undergone and a fine of Rs 3000 was also imposed.[97]

Where the incident took place in a heated moment as a result of exchange of abuses between the parties, the sentence of six months rigorous imprisonment was reduced to the period of imprisonment of one month already undergone by the accused.[98]

26. Compensation to Victim

The court should take into consideration that if some fine is imposed on the accused, then a sufferer must be compensated by taking recourse to s 357, CrPC, if the trial court is satisfied that the benefit under the Probation of Offenders Act is not required to be given to the accused and on recovery of fine amount the trial court ought to award proper compensation to the complainant. Section 5 of Probation of Offenders Act provides that the court while directing the release of an offender under s 3 or s 5 may at the same time give a further order directing the accused to pay such2811 compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence.[1]

The compensation so awarded, if not paid by the accused, can be realised as per provisions of ss 421 and 422, CrPC, but the accused cannot be sentenced to imprisonment in default of payment of compensation, while it can be done if the fine imposed by the court is not paid by the accused.[2]

27. *Autrefois* Convict

An accused convicted of an offence under this section, cannot, afterwards be tried under s 325 on the same facts unless the case falls under s 300(3), CrPC .[3] Where the facts, necessary to make out an offence of hurt, are altogether different from those for affray, the previous trial and conviction under s 160, IPC, are no impediment to a subsequent case under s 323, IPC, filed by one of the parties to that affray.[4] If a person is tried for a petty offence under s 51, Kerala Police Act, and acquitted, a subsequent trial for an offence under s 323, or s 324, IPC, is not barred when the two offences are distinct and fall under two different enactments, and the one is not cognate with the other so as to be clubbed together in the same trial.[5] Where, however, the accused, along with some others, are jointly tried on charges of rioting and extortion and are acquitted, because the magistrate disbelieves the evidence, the accused cannot, on the same evidence, be convicted of voluntarily causing hurt in a separate trial.[6] Similarly, a person, acquitted on a charge of using criminal force, cannot afterwards be charged with causing hurt in respect of the same transaction.[7]

28. Alteration of Conviction from Section 302 to Section 323

Commentary under the same heading in s 302, *ante*, may be referred to.

Four accused persons armed with iron rod, knife, dang had assaulted the deceased, and caused injuries. The appellant no. 4 inflicted 4-5 knife blows in the abdomen of the deceased as a result of which the deceased fell down. After the deceased fell own, appellant nos. 1, 2 and 3 did not inflict injuries on the deceased. Conviction of the other appellant nos. 1, 2 and 3 under ss 302 / 34, IPC was set aside. However, they were convicted under ss 323 / 34 and 324 / 34, IPC .[8]

There was no evidence of plan or prior meeting of mind between the two accused appellants A1 and A2. A1 had assaulted and caused injuries to the PW5, hence his conviction under ss 302 / 34, IPC was altered to one under s 323, IPC .[9]2812

29. Alteration of Conviction from Section 304, Part II to Section 323

Commentary under the same heading in s 304, *ante*, may be referred to.

30. Alteration of Conviction from Section 323 to Section 304, Part II

Commentary under the same heading in s 304, *ante*, may be referred to.

31. Alteration of Conviction from Section 307 to Section 323

Commentary under the same heading in s 307, *ante*, may be referred to.

32. Alteration of Conviction from Section 308 to Section 323

Commentary under the same heading in s 308, *ante*, may be referred to.

33. Alteration of Conviction from Section 316 to Section 323

Commentary under the same heading in s 316, *ante*, may be referred to.

34. Alteration of Conviction from Section 332 to Section 323

Commentary under the same heading in s 332, *post,* may be referred to.

35. Alteration of Conviction from Section 354 to Section 323

Even though, it is true that assault or criminal force towards a woman is one of the essential pre-conditions for applicability of s 354, IPC, but the same has to be with an intent to outrage her modesty or knowing it to be likely that he will thereby outrage her modesty. When the second element or ingredient of the offence, *i.e.*, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, is completely missing in the case, then a case of pure and simple hurt has been converted into an offence under s 354, IPC, which is wholly impermissible and illegal. Therefore, conviction under s 354 was altered to one under s 323 .[10]

36. Alteration of Conviction from Section 395 to Section 323

Where the quarrel took place between six boys and a scooterist in front of the house of the informant, and when the informant asked them not to quarrel, the accused boys grappled with him and allegedly looted one wrist watch and one silver ring of *gomade* from the possession of the informant, the informant stated the same in his examination-in-chief. During cross-examination, he stated that the wrist watch and the ring were snatched away by someone of the assailants but he added *ho sakta hai ki guttam guttha me wahin giri ho lekin mujhe waha mili nahi*, this reply of the informant rules out the offence of dacoity or attempted dacoity punishable under s 395, IPC . However, since voluntarily causing hurt was established, the conviction of the accused was altered from s 395 to ss 323 and 147 .[11]

37.Accused Charged under Section 376 or Sections 376 / 511 or Sections 376 / 109 can be Convicted under Sections 354 and 323

Commentary under the same heading in s 376, *post*, may be referred to.2813

89 *State of Karnataka v M Babu Lool* Cr LJ 3604 (Kant) CD; *Veeda Menezes Yusuf Khan v Haji Ibrahim Khan* AIR 1966 SC 1773, 1966 Cr LJ 1489 .

90 *Mansur Ali v Union Territory* AIR 1964 Tri 45, 48, (1964) 2 Cr LJ 213; *Thakur Tanti v State* AIR 1964 Pat 483, (1964) 2 Cr LJ 571*; Kailas Bakru Sonamani v State of Maharashtra* 2009 Cr LJ (NOC) 456 (Bom) (DB).

91 *Didar Khan v State* AIR 1965 Cal 368, (1965) 2 Cr LJ 89 .

92 *Tika Ram v State* AIR 1960 All 453, 1960 Cr LJ 1040 ; *Mitter Sen v State of Uttar Pradesh* AIR 1975 SC 1156, p 1159, 1976 Cr LJ 857 .

93 *Ibid*.

94 *Ambika Singh v Emperor* AIR 1922 Pat 498, 25 Cr LJ 431 .

95 *Har Prasad Singh v Emperor* AIR 1925 Oudh 482, 26 Cr LJ 1160 .

96 *Jinappa v State of Maharashtra* (1980) 2 Mah LR 100, p 102 (Bom) .

1 *Rambaran Mahton v State* AIR 1958 Pat 452 ; *Kanhaiyalal Sewaram v State* AIR 1953 Madhya Bharat 262, p 264 .

2 *Rambaran Mahton v State* AIR 1958 Pat 452 .

3 *Rahimuddin Ahmed v State of Assam* 2012 (118) AIC 619 (Gauh) .

4 *Puran v State of Madhya Pradesh* 2012 Cr LJ 3704 (MP) .

5 *Emperor v Maung Ba Thaung* AIR 1926 Rang 107, 27 Cr LJ 636 .

6 *GB Ghatge v Emperor* AIR 1949 Bom 226, 50 Cr LJ 789 .

7 *Hasmukhbhai Gokaldas Shah v State of Gujarat* 2009 Cr LJ 2919, p 2919 (Guj) (DB), 2009 (1) GLH 526, (2009) 2 GLR 984 ; *Ganesh Chandra Saha v Jiw Raj Somani* 1965 (1) Cr LJ 24 (Cal), AIR 1965 Cal 32, 68 CWN 1081 ; *M Natesan v State of Madras* AIR 1962 Mad 216, **dissented from**.

8 Re *Subbia Gaundan*AIR 1936 Mad 788, 37 Cr LJ 1153 .

9 *Vishvanath Kalubhai Kristi and Anor v State of Gujarat* 2002 Cr LJ 3066 (Guj) (DB) .

10 *Golok Chandra Dutta v State* 1971 Cr LJ 910, p 911 (Tripura) .

11 *Mathai v State of Kerala* 2005 Cr LJ 898 (SC) .

12 *Som Dutt v State of Himachal Pradesh* 2002 Cr LJ 1059 (HP) .

13 *Shyam Sunder Ram v State and Ors* 2001 Cr LJ 3835 (Jharkhand) .

14 *Rafikbhai S Dodiya v State of Gujarat* 2008 Cr LJ 1197, p 1204, 2007 (3) GLH 701 (Guj) .

15 *Pichapillai v State* 1996 Cr LJ 3634 (Mad) .

16 *Jagat Singh v State of HP* 2011 Cr LJ 949 (SC), 2011 AIR SCW 260, 2011 (1) Scale 25, (2011) 2 SCC 234).

17 *Pratap Singh v State of Madhya Pradesh* 2006 Cr LJ 314 (SC), AIR 2006 SC 518, JT 2005 (12) SC 553, (2005) 8 SCC 364 .

18 *Dunga Ram v State of Rajasthan* 1996 Cr LJ 3672 (Raj) (DB) .

19 *Jameel v State of UP* 2010 Cr LJ 2106 (SC), 2010 AIR SCW 217, 2009 (13) Scale 578, (2010) 12 SCC 532 .

20 *Krishnan v State of Tamil Nadu* 2006 Cr LJ 3907, p 3914 (SC), AIR 2006 SC 3037, 2006 (8) Scale 27, (2006) 11 SCC 304 .

21 *State of Maharashtra v Arjun Bharmaji Waghchoure* 2013 Cr LJ (NOC) 259 (Bom) (DB).

22 *Kuldeep Singh and Ors v State and Anor* 1999 Cr LJ 193 (Raj) .

23 Code of Criminal Procedure 1973, s 155(2) .

24 *T Krishnan v State and Anor* 2001 Cr LJ 2986 (Mad) .

25 *Nem Chand and Ors v State* 1999 Cr LJ 1512 (Del) .

26 Code of Criminal Procedure 1973, s 2(w) .

27 *Gopal Das Sindhi v State of Assam* AIR 1961 SC 986, p 989, (1961) 2 Cr LJ 39 .

28 *Ibid*.

29 Re *Gangamma Dorayya* 1 Weir 418; *Emperor v Rohmat* ILR 37 All 419 ; *Mayna Dasi v Hiralal Mandal* AIR 1947 Cal 31, 47 Cr LJ 699 .

30 *Emperor v Sultan Singh* ILR 31 All 606, 10 Cr LJ 473 ; *Kapu Kerianna v R Kodappa* 1974 Cr LJ 1325, p 1326 (AP), wherein it was held that where only one of the injured person files a complaint, which is subsequently withdrawn resulting in the acquittal of the accused, such acquittal would not debar the other injured persons from filing the complaint against the accused.

31 *Lalla v Emperor* 15 Cr LJ 567 ; *Shib Chandra Chakravarty v Rabbani Mondal* AIR 1923 Cal 168, 24 Cr LJ 578 .

32 *Suravi Mukherjee v State* AIR 1965 Cal 469, (1965) 2 Cr LJ 353 .

33 *Prithvi Bhagat v Birju Sada* AIR 1962 Pat 316, p 318, (1962) 2 Cr LJ 206 .

34 *State of Uttar Pradesh v Janni* 1970 Cr LJ 441, AIR 1970 All 235 .

35 *Prithvi Bhagat v Birju Sada* AIR 1962 Pat 316, p 318, (1962) 2 Cr LJ 206 .

36 *State of Uttar Pradesh v Janni* AIR 1970 All 235, p 237, 1970 Cr LJ 441 ; *Ramphal Gope v State of Bihar* (1964) 2 Cr LJ 111 (Pat) .

37 *State v Bherulal Dagadulal Jain* 1970 Cr LJ 1038, p 1043, 70 BLR 694 .

38 *Tarakanta Bhadra v Bhanu Charan Sahu,* 1972 Cut LT 824 .

39 Code of Criminal Procedure 1973, s 251 .

40 *Shyam Niranjan Dubey v State of Uttar Pradesh* AIR 1974 SC 541, p 543, 1974 Cr LJ 475 .

41 *Ashok Somalal Thakkar and Anr v State of Gujarat* 2007 Cr LJ 3579 (Guj) (DB) .

42 *Dani v Emperor* 22 Cr LJ 199, p 200 .

43 *State of Orissa v Purnabasi Rana and Ors* 2002 Cr LJ 4854 (Ori) .

44 *JF Katariya v State of Uttar Pradesh* 2002 Cr LJ 2220 (All) (DB) .

45 *Urmese v State of Kerala* AIR 1960 Ker 197, p 198 .

46 *Virendra Singh v State of Uttar Pradesh* 1999 Cr LJ 4645 (All) .

47 *Mohd Siddique Hussain v State of Assam* 2003 Cr LJ 1487 .

48 *Gulab Khavale v Hiraji Ghuge* 2006 Cr LJ 3451 (Bom) .

49 *State of Orissa v Bhikari Mohanty and Ors* 2007 Cr LJ (NOC) 348 (Ori) .

50 *Ashram Bapu v Aman Singh Dangi* 2015 Cr LJ 1765, 1770 (MP), 2014 (3) JLJ 295, 2014 (5) MPHT 71 .

51 *Diwan Singh v State of Uttarakhand* 2007 Cr LJ (NOC) 490 (Uttr) .

52 *Ram Ratan v State of Uttar Pradesh* 2002 Cr LJ 2688 (All) (DB) .

53 *Som Dutt v State of Uttar Pradesh* 2002 Cr LJ 1059 (UP) .

54 *Dendati Sannibahu v Varadapureddi Sannibabu* AIR 1959 AP 102, p 103, 1959 Cr LJ 167 .

55 *Rakhal Chandra Biswas v Jamini Kanta Banerjee* AIR 1926 Cal 431, p 432 ; *Genu Manjhi v Emperor* 15 Cr LJ 704 ; *Yaqub Ali v Lethu Kaken* ILR 30 Cal 288 ; *Lal Mohan Mandal v Kali Kishore* ILR 38 Cal 293 .

56 *Kinja Bhuiya v Emperor* ILR 39 Cal 896 ; Re *Theethumalai Gounder*AIR 1925 Mad 1 (FB), 25 Cr LJ 1297 .

57 Re *Mahankalu Sreeramulu*AIR 1924 Mad 375, 25 Cr LJ 554 .

58 Re *Gunasingam*(1970) 1 MLJ 242; Re *Govinda Naidu*1959 Mad LJ (Cr) 346.

59 *Prasanna Kumar Samal v Anand Chandra Swain* AIR 1970 Ori 10, 1970 Cr LJ 62 ; *Jainul Haque v State of Bihar* AIR 1974 SC 45, p 47, 1974 Cr LJ 143 .

60 *Nardeo Singh v State* AIR 1953 All 726, p 728, 54 Cr LJ 1677 .

61 *Chhidda v Emperor* AIR 1926 All 225, 27 Cr LJ 287 .

62 *Emperor v Sahab Raj Singh* AIR 1933 All 819, 34 Cr LJ 1099 .

63 *Tiny v State* AIR 1952 All 92 .

64 *Empress v Ram Sarup,* ILR 7 All 757 ; *Prakash Chandra Kundu v Emperor* AIR 1914 Cal 675 (DB) .

65 *Sukhan Raut and Ors v State of Bihar* 2002 Cr LJ 560 (SC) .

66 *Vithal Laxman Chalawadi v State of Karnataka* 2011 Cr LJ 83 (SC), 2010 AIR SCW 6408, AIR 2011 SC 173, 2010 (11) Scale 65, (2010) 14 SCC 739 .

67 *Veeran v State of MP* 2011 Cr LJ 2688 (SC), AIR 2011 SC 1655, 2011 (2) Crimes 172 (SC), 2011 (4) Scale 618, (2011) 11 SCC 367 .

68 *State of HP v Nazar Singh* 2009 Cr LJ 3984, p 3987 (SC), 2009 AIR SCW 4243, 2009 (7) Scale 666, (2009) 12 SCC 89 .

69 *Kanta Prasad and Ors v State of Uttar Pradesh* 2007 Cr LJ (NOC) 224 (UP) .

70 *Santosh and etc v State of Madhya Pradesh* 2000 Cr LJ 1140 (MP) .

71 *Hari Ram and Ors v State of Bihar* 1999 Cr LJ 2453 (Pat) (DB) ; *Gajanan Amrut Gaykwad v State of Maharashtra* 1996 Cr LJ 2887 (SC) .

72 *Shyam Lal and Ors v State of Himachal Pradesh* 2002 Cr LJ 3178 (HP) (DB) .

73 *State v Rangaswamy* 2003 Cr LJ 607 (Kant) (DB) .

74 Probation of Offenders Act 1958, s 3 ; Code of Criminal Procedure 1973, s 360(3) .

75 *Suresh alias Suresh Chand v State* 1995 Cr LJ 3741 (Del) .

76 Re *LN Srinivasa Chetty*AIR 1970 Mad 359, p 360, 1970 Cr LJ 1238 .

77 *Narayan Badi v State* 1996 Cr LJ 1901 (Ori) .

78 *Vijai Sharma Mishra v State of Uttar Pradesh* (1986) 1 Crimes 323 (All) .

79 Probation of Offenders Act 1958, s 4(1) ; refer to Code of Criminal Procedure 1973, s 360(1) .

80 Probation of Offenders Act 1958, s 4(2) .

81 *Badri Lal v State of Rajasthan* 1997 Cr LJ 2060 (Raj) .

82 *Raj Kaliya Devi and Ors v State of Bihar* 2002 Cr LJ NOC 39 (Pat), (2001) 2 BLJR 1273 .

83 *Madan Yadav v State of Bihar* 2001 Cr LJ 209 (Jharkhand) ; *Vijay Singh v State* 2015 Cr LJ (NOC) 86 (Raj) (Accused persons Government servants, released on probation).

84 *Om Prakash and Ors v State of Madhya Pradesh* AIR 1982 SC 783, 1982 Cr LJ 628 (SC) ; *Sat Parkash v State of Haryana* 2006 Cr LJ 4787 (P & H).

85 *Moharam v State of Rajasthan* (1987) 1 Crimes 474 (Raj) ; *Mahesh Raj v State of Bihar* 2013 Cr LJ 2874 (Pat) (Incident of the year 1988 -- Probation granted).

86 *Jagdish Giri v State of UP* 2010 Cr LJ (NOC) 764 (All) .

87 Re *Subbia Goundan*AIR 1936 Mad 788, p 789, 37 Cr LJ 1153 .

88 *Raghbir Singh v State* 1968 Cr LJ 681 (Del) .

89 Re *Subbia Goundan*AIR 1936 Mad 788, p 789, 37 Cr LJ 1153 .

90 *Raman Kalia v State of Gujarat* AIR 1979 SC 1261, p 1262 .

91 *Bateshar v Emperor* AIR 1915 All 417, 16 Cr LJ 669 .

92 *Sriniwas Sharma v State of Bihar* 2002 Cr LJ NOC 242 (Pat) ; *Rajulu and Ors v State of Tamil Nadu* 2007 Cr LJ 2124 (Mad) .

93 *Mimaka Asai v State* 2007 Cr LJ (NOC) 146 (Ori) .

94 *Bhiruj v State of Uttar Pradesh* 2002 Cr LJ 271 (All) .

95 *Shanti Lal v State of Rajasthan* 2002 Cr LJ 1719 (Raj) .

96 *Maninge and Ors v State of Rajasthan* 2000 Cr LJ 5001 (Raj) ; *State of Karnataka v R Raju* 2007 Cr LJ 920 (Kant) (DB) .

97 *Virendra Singh v State of Uttar Pradesh* 1999 Cr LJ 4645 (All) .

98 *Rati Ram v State of Uttar Pradesh* 1997 Cr LJ 1525 (All) (DB) .

1 *Manoj Kumar v State of Madhya Pradesh* 2000 Cr LJ 1997 (MP) ; *State of Maharashtra v Udhao Pandurang Aglawe* 2005 Cr LJ 989 (Bom) .

2 *Ram Kishan v State of Rajasthan* 1999 Cr LJ 2143 (Raj) .

3 Refer to Code of Criminal Procedure 1973, s 300, illust (d).

4 *Kariyappa v Somanna* AIR 1955 Mys 138, p 139, 56 Cr LJ 1611 .

5 *Kannan Nair v Kausalya* 1969 KLT 946 ; *Ishodanand Biswas v State* AIR 1955 Pat 396 ; *Joy Shankar Bhattacharjee v Sushil Kumar Gupta* AIR 1969 Tripura 31 .

6 *Sahju Koeri v Mallar Koeri* AIR 1917 Pat 500, 18 Cr LJ 987 .

7 *Kaptan v Smith* 16 WR (Cr) 3 .

8 *Raghbir Chand v State of Punjab* 2013 Cr LJ 4456, p 4464, 2013 AIR SCW 5192, (2013) 10 Scale 20, (2013) 12 SCC 294 .

9 *Gharbharan v State of Chhattisgarh* 2010 Cr LJ 471, p 475 (Chhat) (DB) .

10 *Vasudevan v State of Kerala* 2006 Cr LJ 3173 (Ker) .

11 *Virendra Singh v State of Uttar Pradesh* 1999 Cr LJ 4645 (All) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 324.

Voluntarily causing hurt by dangerous weapons or means.--

Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope and Applicability

This section deals with a case of causing voluntary hurt by means of an instrument which, used as a weapon of offence, is likely to cause death.[12] In *Thakar Das v State* ,[13] in the course of a scuffle between the complainant and the accused, while grappling, the accused fired a pistol shot which caused simple hurt to the complainant. There was no evidence to show that the accused fired at the complainant with the intention of killing him. It was held that the offence, committed by the accused, fell within the purview of this section, and not under s 307 . Since a push, followed by blows with the blunt edge of a *tangia* on the legs and joint of knees of the deceased, would not afford ground to hold that accused had intended death of the deceased, a conviction can be made only under this section.[14] If this2814section is to be applied, regard must be had, not to the injury caused, nor even to the part of the body on which it is caused, but to the weapon with which it is caused. The other considerations may be taken into account in assessing the punishment, but not in determining the applicability of this section.[15] To constitute an offence under this section, the extent of the injury caused is therefore, immaterial.[16] The stress of the section is more on the nature of the weapon, and not on the gravity of the injury.[17] If bleeding head injuries are caused with a wooden club and reaper, the offence under s 324, IPC, is made out.[18] However, in the absence of any grievous injury, the case would fall within the purview of s 323, rather than under s 324 .[19]

2. Object

This section prescribes a heavier punishment where hurt is caused by a dangerous weapon or means. The reason for prescribing a heavier punishment than what is prescribed in the last section is that the use of dangerous means to inflict hurt indicates great malignity. The framers of the IPC said thus:

> Bodily hurt may be inflicted by means, the use of which generally indicates greater malignity. A blow with the fist may cause as much pain and produce as lasting an injury, as laceration with a knife or branding with a hot iron. But it will scarcely be disputed that, in the vast majority of cases, the offender, who has used a knife, or a hot iron, for the purpose of wreaking his hatred, is a far worse and more dangerous member of society than he who has only used his fist. It appears to us that many hurts, which would not, according to our classification, be designated as grievous hurt, ought yet, on account of the mode, in which they are inflicted, to be punished more severely than any grievous hurts. We suppose, therefore, that where bodily hurt is voluntarily caused by means of any sharp instrument, or fire of any heated substance, of any corrosive substance, of any explosive substance, of any poison, internal or external, or of any animal, the maximum of imprisonment may be increased, in cases of grievous bodily hurt, to fourteen years, and in other cases to three years.

3. This Section Distinguished from Section 307

The two elements of the offence under this section, namely, (1) the use of a dangerous weapon or means and (2) the causing of simple hurt, may also be found in a case, under s 307, IPC, of an attempt to murder. However, there is a clear distinction between the offences under the two sections. In order to make out an offence under s 324, IPC, all that is necessary is to establish the two elements mentioned above, but those two elements by themselves are not sufficient to make out an offence under s 307 . In order to bring home an offence under that section, the prosecution must prove that the act causing the hurt, was done 'with such intention of knowledge, and under such circumstances, that if he (the offender), by that act, caused death, he would be guilty of murder'. If such intention or knowledge is not proved, the case will fall under s 324, and not under s 307 .[20] The mere circumstance2815 that a knife had been used as a weapon of attack on a vital part of the body,[21] or a firearm was used to cause injuries to the victim (*vide* s 324, IPC), would not be sufficient to establish that the accused had committed an offence punishable under s 307 . Evidence has further to be led by the prosecution to establish the intention of the accused to cause death or his knowledge as envisaged under s 300, IPC . The burden of proof is on the

prosecution, and not on the accused.[22]

Where the accused inflicted injuries by *kassi*, the injured fell down after receiving injuries and became unconcious, the accused had the occassion and full liberty to cause further injuries in order to murder the injured, the fact that the accused did not do so shows that he did not attempt to commit murder of the victim so his conviction under s 307, IPC was set aside, but that under ss 324 and 326, IPC, was maintained.[23]

4. Applicability of Section 34 to Section 324

Commentary under s 34, vol 1, may be referred to.

Mere presence at the place of occurrence would not, *ipso facto*, attract provision of s 34 of IPC .[24]

Where the common intention of two or more persons is to deprive the party of the deceased of the weapons which they are carrying, and to cause hurt to them with those very weapons, and while carrying out the common intention, one of them exceeds the common intention and kills a member of the deceased's party, the others will not be held liable for the murder; if, however, they cause any hurt with *lathis* seized from the deceased, they would be liable for the offence under s 324 read with s 34 .[25] However, in the absence of any evidence of 'common intention', a conviction under ss 324 / 34, IPC, cannot be sustained.[26] In *Malkhan Singh v State of Uttar Pradesh* ,[27] the shot was fired by one accused and the other accused merely continued pedalling the cycle to run away with the first accused and there was no evidence that the shot was fired in furtherance of any common intention. It was held that the conviction of the second accused under ss 324 / 34, IPC, was liable to be set aside.

5. 'Whoever'

Commentary under the in s 323, *ante,* may be referred to.

6. 'Voluntarily Causes Hurt'

Commentary under s 321, *ante*, may be referred to.

7. 'Instrument for Shooting'

The expression 'instrument of shooting' is not confined to a firearm like a gun, pistol or revolver. It may include a bow and arrow because the word 'shoot' means 'to let2816 fly or drive with force as an arrow'. All firearms, like guns, pistol and revolvers are shooting instruments.[28]

8. Dangerous Weapon

Commentary under the same heading in s 326, *post*, may be referred to.

9. 'Instrument for...Stabbing or Cutting'

With regard to this, the law commissioners said: 'The instrument must be a sharp instrument with an edge, which will cut, or a point which will stab; any instrument, which answers this description, we apprehend, will be within the definition, whether made of metal or not'.

Stabbing instruments are, therefore, instruments with a point, such as a dagger, a bayonet or a *kukri*. A spear was classed as a cutting weapon by the Lahore High Court,[29] but the Assam High Court has held it to be a dangerous weapon.[30] A dao is an instrument for cutting.[31] A knife is an instrument of stabbing or cutting.[32] Tooth is an instrument for cutting and biting.[33]

In the present case, eye-witnesses described the knife, and merely because the knife was not recovered during investigation, same could not be a factor to discard the evidence of PWS. Wounds noticed by the Doctor examined in the case also threw considerable light on this aspect. Doctor's opinion about the weapon, though theoretical, cannot be totally wiped out. Appellant accused was convicted under s 324, IPC .[34]

Where the evidence of the injured and the eye-witnesses that when the appellant chased the injured received injury on his testicle by the point of the knife possessed by the appellant, the injury was simple, held the appellant did not cause injury to the injured, thus, the conviction of the appellant under s 324, IPC was not proper, and was set aside.[35]

10. 'An Instrument which, used as a Weapon of Offence, is Likely to Cause Death'

The expression 'an instrument, which used as a weapon of offence, is likely to cause death' should be construed with reference to the nature of the instrument and not the manner of its use. What has to be established by the prosecution is that the accused2817 voluntarily caused hurt and that such hurt was caused by means of an instrument referred to in this section.[36]

The expression 'dangerous weapon', used in the marginal note is described in the body of this section, as 'any instrument which, used as a weapon of offence, is likely to cause death' which expression should be construed with reference to the nature of the instrument, and not with reference to its use.[37] To be a dangerous weapon, the instrument must be one which is 'likely to cause death', and not one which is liable to cause death. It must be inherent in the very nature of the weapon used that death is likely to ensue.[38] Thus, a spear thrust in the chest, is likely to have a fatal result; so, the spear is a dangerous weapon although the actual injury caused in a particular case may not endanger life so as to make it a grievous hurt.[39] A granite stone with rough edges will come under 'instrument which, used as a weapon of offence, likely to cause death'.[40] A hockey stick is an instrument 'which, used as a weapon of offence, is likely to cause death'.[41] A hatchet has been taken to be a dangerous weapon.[42] In *Ghulam Muhay-ud-Din v Emperor* ,[43] it was held that a pen-knife of not more than four inches' length could not, under ordinary circumstances, be deemed to be a dangerous weapon, but this decision has been dissented from in *Varkey Joseph v State of Kerala* .[44] In *Allah Din v Emperor* ,[45] the Lahore High Court has itself held that causing grievous hurt with a pen-knife is an offence under s 326 . Where the accused had caused injuries by scissors, a dangerous weapon, he was convicted under s 324, IPC .[46]

Accused who were armed with axe and sword, had assaulted witnesses, were convicted under ss 324 / 149 IPC .[47]

Although a bamboo or common stick has been held not to be a dangerous weapon,[48] an iron-rod stick has been held to be a dangerous weapon.[49] In *Saidino v2818 Emperor*,[50] it was remarked that a wooden *kharwanji* is not a weapon of a lethal nature, but in *Preman v Emperor* ,[51] a *dang* was described as a lethal or dangerous weapon, and, following this, in *Sewa Singh v Emperor* ,[52] a *lathi* was described as a lethal weapon. Cudgels have been held to be deadly weapons.[53] However, whether a *lathi* is a weapon which is likely to cause death depends upon the weight and length of the *lathi*. Whether the *lathi* used is a lethal weapon is, therefore, a question of fact in each case. Where the *lathi* used is not produced in court and what was the weight and length of the *lathi* is not known, it cannot be said to be a dangerous weapon.[54] In order that a *lathi* may be regarded as a dangerous weapon, there must be evidence about its length, weight, diameter and whether it was iron-rod or tied with wires.[55]

The victim had sustained one grievous lathi injury on right forearm. There were two accused M and B armed with lathi. It was not clear from the evidence of the eye-witnesses as to who amongst the two appellants M and B had caused the injury. Both the accused were held entitled to benefit of doubt and were acquitted of the charge under s 324, IPC .[56]

Where the accused R had caused lathi injury on the left shoulder of the victim, the accused R was convicted under s 324, IPC and sentenced to two years RI.[57]

11. Single Sickle Blow on Back of Deceased

On the date of the incident, all of a sudden, altercation ensued between the appellant and deceased on the issue of payment of Rs.150/- as interest amount. There was no previous enmity between the appellant and the deceased. A single blow of sickle was inflicted by the appellant on the back of the deceased. In the opinion of the doctor, injury nos. 1 to 9 were in the nature of 'Ulcers' and indirect outcome of injury no. 10. The deceased died two years after the incident. The doctor opined that the deceased had not died due to direct result of injury no. 10 sustained by him. The conviction of the appellant under s 324, IPC was affirmed. In view of the mental agony and financial sufferings, the sentence of three years imposed by the High Court was reduced to the period already undergone.[58]

12. 'By Means of Fire or any Heated Substance'

Inflicting bum injuries with the help of burning firewood would fall under this head and is, therefore, an offence under this section.[59] Pouring boiling water on a person would come under this head.[60]2819

13. 'By Means of any Poison'

It is difficult to give an exact definition of the term 'poison' because substances which are harmless to the body in certain conditions, may become dangerous in other conditions. Broadly speaking, a 'poison' may be defined as a substance of the nature of a drug which, if administered in a way and in an amount, in which it is likely to be administered, will produce deleterious effects resulting in ill-health, disease or death. This, however, applies to the term as usually employed. It does not cover poisonous gases which are not substances of the nature of a drug.

In cases of criminal poisoning in India, the law does not insist on the precise definition of a poison because sections of the IPC dealing with the offences relating to the administration of a poison, make use of such self-explanatory term as any poison or 'any stupefying, intoxicating of unwholesome drug, or other thing', or 'any corrosive substance...or any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood'. All, that the law requires, is that the substance is such as, if taken, will endanger human life, or will be likely to cause hurt or injury to any person. Again, the law takes cognizance of the malicious intention of the individual who administers a drug or other substance with a view to causing injury or death, irrespective of the quantity or quality of the substance.[61]

14. 'Corrosive Substance'

A corrosive substance is a substance which irritates the system causing local hyperaemia and discomfort like burning or pain, *etc*., *e.g*., copper, iron, lead, mercury, silver, thallium or zinc salts; antimony, arsenic, barium, bismuth, boron, bromine chlorine, iodine, phosphorus; abrin, aloes, bilowan, chillie, colchicine, croton, ipecac, ricin; benezen-hexachloride, DDT, dinitrocresols, kerosene oil, *etc*. Mineral acids have a local chemical action of corroding and destroying the tissues they come into contact with, a coagulation necrosis is produced by the precipitation of protein, and may produce fatal consequences, if extensive. They have no remote effects on the system. They act as irritants, when slightly diluted, but as stimulants, when well diluted and given in the pharmacopoeial doses.[62]

15. 'By means of any Explosive Substance'

'Explosive substance', according to s 2 of the Explosive Substance Act 1908, shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement, or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine, or implement. The expression 'explosive substance' would also include any explosive, or finished product, ready for explosion.[63]

16 'Any Substance which is Deleterious to the Human Body to Inhale, to Swallow,

or to Receive into the Blood'

Where acid was thrown on the face of informant by the accused, the accused was found guilty under s 324 .[64] Causing hurt by the administration of a substance, which,2820 if administered in small quantities, is not deleterious, is punishable under this section.[65]

17. Corporal Punishment to Child/Student by Teacher

Commentary under the same heading in s 88, vol 1; commentary under the heading 'Delegation of Parental Authority for Corporal Punishment by School Master and its Extent' in s 89, vol 1; commentary under sub-head 'School Master's liability' under the heading 'Illustrative Cases' in s 323, *ante*, may be referred to.

18. Procedure

The offence under this section is cognizable, bailable, compoundable only with the permission of the court, before which the prosecution is pending,[66] and is triable by a magistrate.

19. Compounding of Offence

The finest hour of justice is the hour of compromise when parties after burying the hatchet reunite by a reasonable and just compromise.[67] The offence under s 324 is compoundable only with the permission of the court concerned and the effect of compounding of offence is the acquittal of the accused.[68] Where in an appeal the conviction of non-compoundable offence is altered to that of a compoundable offence, the permission to compound the offence can be granted.[69]

By the CrPC (Amendment) Act 2008 (5 of 2009), s 320, CrPC has been amended and offence under s 324, IPC is no more compoundable. The Amendment Act of 2005 came into force from 23 June 2006. Where the offence was committed prior to this date *viz*. 23 June 2006, permission to compound the offence can be granted by the Court.[70]

20. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc*.) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the-day of..., at..., you voluntarily caused hurt to AB by means of ..... which is an instrument for shooting (*or stabbing, or cutting, or which, used as weapon of offence, is likely to cause death, etc*), and thereby committed an offence, punishable under s 324 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.2821

The charge should mention the particular kind of weapon used for causing the hurt. Merely saying that a dangerous weapon was used is not sufficient.[71] Though a *dao* is an instrument for cutting, yet this fact

should be stated in the charge so as to make the charge comply with the law in all respects.[72]

Even in the absence of a charge, an accused can be found guilty of an offence under s 324, IPC, if the facts found on a charge under s 394 read with s 397, support his conviction, as an offence under s 324 is a minor offence as compared to the offence under s 394 read with s 397 .[73]

21. Proof

To secure a conviction under this section, it must be established that:

(a) the accused voluntarily caused hurt; and
(b) the said hurt was caused by a dangerous weapon or means specified in the section.[74]

Where the ocular testimony regarding date, time and place of occurrence is supported by medical evidence, the conviction of the accused is proper inspite of the fact that eyewitnesses were the real brothers of the victim.[75]

If there is other reliable evidence on the basis of which the court enters a finding and convicts an offender, the absence of evidence of a medical witness of the wound certificate issued by him, is insufficient to set aside such conviction.[76] The stress of the section is more on the nature of the weapon, and not on the gravity of the injury.[77]Where the act itself is proved, it is no part of the duty of the prosecution to establish intention for the act.[78]

The medical evidence showed that the sole injured eye-witness had received injuries on the previous day of the occurrence. The conviction of accused appellant rested solely on the testimony of the injured witness. Inference drawn that the eye-witness was not present at the time of occurrence. Appellant accused were acquitted of the charges under ss 302 and 324, IPC .[79]

22. Contradiction between Oral and Medical Evidence

Where the evidence of eye-witnesses was that *bhala* was used in manner in which it was used and there was nothing to show that *bhala* was used by side portion of blades and that too in slanting fashion, the very finding of incised wound and the opinion of doctor that it was caused by sharp cutting weapon, created a doubt over prosecution story that accused persons had caused *bhala* injury to two injured as alleged by prosecution, so the conviction of the accused persons was found not sustainable.[80]2822

23. Self Defence

If the accused pleads self-defence, the burden is on him to show that he had a right of self-defence.[81] In *Deep Singh v State* ,[82] the persons of the accused party were found to be injured at the hands of the complainant's party, but none of the prosecution witnesses could give any explanation of the injuries suffered by the accused's party. It was concluded that the accused were acting in exercise of the right of private defence of persons.[83]

Where the complainant party was found to be the aggressor and the accused apprehended that the aggressor might cause death or grievous hurt to him and his family members, so he fired at the victim, a mere reasonable apprehension was held to be enough to put the right of private defence into operation.[84] Appellant accused had caused simple injury to the victim, and in the same incident he had also received injuries. Held, appellant was justified in causing injuries in the exercise of right of private defence, his conviction under s 324 IPC, was set aside.[85]

24. Acquittal

Where there was no evidence as to who amongst the two accused caused the injury in question, both of them were found liable to be exonerated.[86] Where the allegations were that the accused persons armed with firearms and *barcha* entered the *beda* (*gher*) of the complainant and fired at him and inflicted injuries, both parties were involved in various civil and criminal litigation, the weapon of offence were not identified by any of the eyewitnesses, the FIR was antitime and antedated, the evidence of witnesses was contradictory as to the place of occurrence, blood was not recovered from the spot, the conviction of the accused persons under ss 324 / 34 was not found proper, so they were acquitted by the appellate court.[87]

Where the eyewitnesses neither stated how incident occurred, nor explained satisfactorily the injuries caused to the accused persons, the testimony of the eyewitnesses was that one of the accused gave a *gandasa* blow to the victim, but no injury by sharp-edged weapon like a *gandasa* was found on the person of the victim, the explanation given by the accused as to how and under what circumstances they caused injuries appear to be more probable, the conviction of the accused persons was not found proper, and was set aside.[88] Where seven persons received injuries in the incident but the prosecution evidence suffered from grave infirmities, the evidence of injured witnesses examined by the prosecution was not reliable, one of the injured persons in the incident appeared as a defence witness in the trial and did not name any of the accused as culprits, the conviction of the accused persons under ss 324 / 149, IPC, was therefore set aside.[89] If however, there is no evidence to prove that the accused inflicted a knife blow and the knife produced contains no blood stains, there is no justification for convicting the accused under s 324 . The accused was alleged to have been armed with a gun and inflicted injuries, the statements2823 recorded in the FIR were found unreliable, the testimony of injured witnesses as regard firing by the accused was not found conclusive and conviction under s 324, IPC, was set aside.[90]

25. Conviction

When the evidence of the eye-witness and the medical evidence showing that the accused in question caused lathi injury on shoulder of the victim, the accused was found liable to be convicted under s 324 .[91] Where the accused and co-accused caused injuries to the prosecution witnesses, the evidence of injured witnesses was consistent, reliable and clear regarding parts played by each accused, their evidence was also corroborated by evidence of other witnesses, the conviction of both accused under s 324, IPC, was found proper.[92]

26. Conviction of some Accused under Section 324 and others under Different Sections

Where the accused persons chased the son of the deceased to kill, the deceased-father interfered and was got killed instead, and the accused persons had no intention to kill the deceased-father, the accused who inflicted fatal injury on the head of the deceased was convicted under s 304, Pt II and the other accused persons who inflicted sword-injury were convicted under s 324, IPC .[93]

Where the accused persons being the father, mother and their son, were involved in causing grievous and simple hurt on the person of the injured, the accused-father who caused the head injury was convicted under s 326, and the other accused were convicted under s 324, IPC .[94]

If a person urinates in front of the house of another person occupied by members of his family including woman folk, the owner of the house has a right to object and if a person persists in using that place as an urinal, this would amount to causing of provocation. Thus, the accused who caused injuries to the victim on such provocation was found guilty under s 335 and the other accused who caused injuries to the intervener or who gave no provocation was held guilty for causing simple injury under s 324, IPC .[95]

27. Probation

In view of fact that occurrence took place more than decade ago and accused persons were not previous convicts and remained in jail for considerable period of time, the benefit of probation was extended to them.[96] Accused, a yound lady was not a previous convict so was entitled to benefit of the Uttar Pradesh

First Offenders Probation, other accused being a male person, his case could not be equated with lady accused though role assigned to him during incident might be the same.[97]2824

Where the accused person inflicted injuries with a knife on the person of the injured and the injuries were not caused with an intention to kill, the benefit of probation extended to the accused persons was not found unjustified.[1] The simple injuries caused to the victim were suggestive of intention of the accused to give a beating only and not to cause the death of the victim, more so, when the accused did not inflict fatal blows despite having plenty of time, the conviction of the accused was altered from s 307 to s 324, IPC . However, since the injuries sustained by the injured were minor and superficial in nature, the case was found fit where the benefit of s 4 of the Probation of Offenders Act should be extended to the accused.[2] Where it was apparent that the incident occurred at the spur of the moment and was traverse in nature, there was no material on record to indicate that the accused persons were having any previous conviction, in the absence of such evidence, they were first offenders, and were released on probation.[3] The accused persons who made assault using *danda* and fists which caused simple injuries to victim were found entitled to benefit of s 4 of Probation of Offenders Act 1958.[4]

However, where the occurrence took place on account of the victim, the brother of the accused, asking the accused to refund borrowed money, the assault inflicted by the accused was pre-determined, the accused was found not entitled to the benefit of s 4 of the Probation of Offenders Act .[5]

28. Sentence

A proper reading of ss 326 and 324, IPC, read with s 354, CrPC shows that a separate order of sentence is required to be passed for each offence proved for which the accused is convicted.[6] Where the accused are convicted of offences under ss 324, 325 and 326 read with s 147, it is not proper to pass one sentence for all the offences; but if the cumulative sentence passed is such that it can be passed by the magistrate in respect of any one of the offences, it is not illegal.[7] A sentence of three years rigorous imprisonment is not excessive for an offence under this section even though the injury caused is simple.[8] The fact that injuries were simple, or that five years have elapsed from the date of incident, is no just ground for the reduction of sentence.[9] However, in *State of Bihar v Lala Mahto* ,[10] the sentence inflicted on a boy of 18 years was reduced to one years rigorous imprisonment where it was not known as to who began the assault and the accused was not found vindictive. In *Modi Ram v State of Madhya Pradesh* ,[11] the Supreme Court keeping in view the nature of the act of the victim, which caused provocation and sense of humiliation in the accused, reduced sentence of eight years rigorous imprisonment (which was enhanced by the High Court from one year's rigorous imprisonment) into three years rigorous imprisonment.2825

The gunshot injury caused to the victim was a muscle injury, the doctor did not depose that the injury was grievous. The incident took place 20 years before. The sentence of 3 years imposed by Court was reduced to one year RI and compensation of Rs. 20000/-.[12]

In considering sentence, the appellate court must take into account the fact that the appellant was not released on bail during the trial as also during the pendency of the appeal, and has, thus, undergone rigorous imprisonment.[13]

Where the accused had suffered an ordeal of protracted trial for about 15 years his sentence of imprisonment was reduced to the period of imprisonment already undergone, but he was directed to pay a fine of Rs 1,000[14] where the incident took place 24 years ago, the accused convicted under s 324 was found entitled to reduction of sentence to the period already undergone.[15] Where there was a long gap between the date of occurrence and the hearing of appeal, and the accused was on bail during trial and appeal for about 16 years, and he also remained in custody for 55 days, the sentence of the accused was reduced to the period already undergone by him as an undertrial and as a convict but the amount of fine was enhanced from Rs 1000 to Rs 3000.[16] Where the accused person caused simple bodily injuries to victims with a deadly weapon, the trial continued for 22 years, the sentence of imprisonment of the accused was reduced to the period already undergone.[17] Where the occurrence took place on the spur of the moment without any premeditation or plan by the accused, the incident took 15 years back and each

accused remained in jail for a period of a fortnight, the sentence of the accused was reduced to imprisonment already undergone, and also a sentence of fine was increased from Rs 200 to Rs 500.[18]

Where the accused were agriculturists and not regular or hardened criminals, the sentence of fine of Rs 1000 was found proper.[19]

The accused persons attacked the victim with casuarina sticks and caused simple injuries on his legs. The imposition of sentence of fine of Rs 500 was found proper.[20] The accused were convicted under s 324 for causing hurt by dangerous weapon. The incident took place nearly 24 years back. The imposition of sentence of fine of Rs 5000 for each accused was found proper.[21]

Where the conviction of the accused was altered from s 307 to s 324, IPC, the accused had been in custody as an undertrial for a period of one month and 18 days and as a convict two months and 12 days which makes the total period of his custody as 120 days, the sentence of the accused was reduced to the period of imprisonment2826 already undergone by him, but fine was enhanced from Rs 200 to Rs 6000 out of which Rs 4000 were directed to be paid to the injured.[22]

The incident was 12 years old. The High Court had reduced the sentence to period of four years already undergone. The reduction of sentence ordered by the High Court was held proper.[23]

29. Alteration of Conviction from Section 302 to Section 324

Four accused persons armed with iron rod, knife, dang had assaulted the deceased, and caused injuries. The appellant no. 4 inflicted 4-5 knife blows in the abdomen of the deceased as a result of which the deceased fell down. After the deceased fell own, appellant nos. 1, 2 and 3 did not inflict injuries on the deceased. Conviction of the other appellant nos. 1, 2 and 3 under ss 302 / 34, IPC was set aside. However, they were convicted under ss 323 / 34 and 324 / 34, IPC .[24]

Evidence of reliable eye-witnesses proved assault by the accused persons on the deceased causing injuries. Accused was also named in dying declaration of the deceased. The medical evidence did not show that the deceased eventually died on account of the injuries, the accused were acquitted of the charge under s 302, IPC, but were convicted under ss 326 and 324, IPC .[25]

Where both oral and medical evidence established that the accused inflicted lathi injury on the left shoulder of the victim, his conviction under ss 302 / 34, 307 / 34, IPC was altered into one under s 324, IPC .[26]

Commentary under s 302, *ante*, may be referred to.

30. Alteration of Conviction from Section 304 to Section 324

Commentary under s 304, *ante*, may be referred to.

31. Alteration of Conviction from Section 307 to Section 324

Commentary under the same heading in s 307, *ante*, may be referred to.

32. Alteration of Conviction from Section 308 to Section 324

Commentary under the same heading in s 308, *ante*, may be referred to.2827

33. Alteration of Conviction from Section 326 to Section 324

Medical report showing two injuries on the head of injured, but there was no evidence as to which of those

two injuries were caused by the accused, thus, the accused could not be held responsible for causing fracture of parietal bone and so, he was found liable to be convicted under s 324 instead of s 326 .[27] Where the accused assaulted the complainant with an axe, the injury caused on the person of the complainant was found simple and not grievous, the conviction of the accused was altered from s 326 to s 324, IPC .[28] Where the accused caused a knife injury on the belly of the injured, the injured was discharged from hospital after a few days, there was no material on record to conclude that the injury caused severe physical pain for 20 days or that the victim was unable to follow his ordinary pursuits for 20 days, in the absence of appropriate material on record by categorical evidence through the mouth of the doctor that the injury had endangered the life of the victim, it would not be appropriate to come to a conclusion that a grievous injury had been caused inspite of the opinion of the two doctors to the contrary, the conviction of the accused under s 326 was therefore altered to one under s 324 for simple hurt with a deadly weapon.[29] Where one accused gave a knife blow where the other accused caught hold of the victim, the mere opinion of a doctor that the injury if grievous without supporting reasons may not be sufficient in every case to hold that grievous injury as envisaged in s 320 has been caused, the injured was discharged from the hospital after about 7 days and there was no material on record to indicate that injury had endangered life of the victim, the conviction of the accused was therefore altered from s 326 to s 324, IPC .[30]

The mere fact that the victim remained in hospital for 20 days is not sufficient to attract cl 8 of s 320 when the evidence of the doctor does not show that during that period the victim was in severe bodily pain or unable to follow his ordinary pursuits, the conviction of the accused was therefore altered from s 326 to one under s 324, IPC .[31]

12 *Nga Po Nyan v Emperor* AIR 1937 Rang 8, p 9, 38 Cr LJ 299 .

13 *Thakar Das v State* AIR 1960 J&K 104, 1960 Cr LJ 1080 .

14 *State v Raja Panda* (1971) 37 CLT 667 .

15 *Shamsher Singh v State of Uttar Pradesh* 1968 AWR 512 (SC) .

16 *Empress v Baboo Moondu* 13 WR (Cr) 28 ; *Pan Singh v Emperor* AIR 1935 All 282 .

17 *State of Kerala v Haridasan* 1978 Cr LJ 1204, p 1206 .

18 *Habeeb Khan v State of Karnataka* 1981 Cr LJ 562 (Kant) .

19 *Shamsher Singh v State of Uttar Pradesh* 1968 AWR 512, p 514 (SC) ; *Roopa v State of Rajasthan* AIR 1966 Raj 68, 1966 Cr LJ 298, wherein it was held that this section applies only when the injury caused is simple, though it was caused by a dangerous weapon.

20 *Sarju Prasad v State of Bihar* AIR 1965 SC 843, (1965) 1 Cr LJ 766 ; *Bhagwan Din v State* AIR 1967 All 580 ; *Thakar Das v State* AIR 1960 J&K 104, 1960 Cr LJ 1080 ; *Hakim Singh v State* 1965 ALJ 282 ; *Martu Vilhoba Prabhu v Emperor* 14 Cr LJ 641 ; *Fatta v Emperor* AIR 1931 Lah 63, 32 Cr LJ 582 ; *Ghulam Sabir Amir Khan v Emperor* AIR 1942 Pesh 21, 43 Cr LJ 595 .

21 *Sarju Prasad v State of Bihar* AIR 1965 SC 843 .

22 *Bhagwan Din v State* AIR 1967 All 580, p 584 .

23 *Raju alias Kushu v State of Rajasthan* 2002 Cr LJ 1720 (Raj) .

24 *Ramesh Dey v State of West Bengal* 2007 Cr LJ 3104 (Cal) (DB) .

25 *Nannapaneni Ramakrishnaiah v State* AIR 1965 AP 361, (1965) 2 Cr LJ 458 .

26 *Sheodan v State of Rajasthan* 1973 WLN 582, 1973 Raj LW 572 .

27 *Malkhan Singh v State of Uttar Pradesh* AIR 1974 SC Cr R 177, 1974 SCC (Cr) 919 ; *Koli Gator Sura v State of Gujarat* AIR 1966 Guj 221, 1966 Cr LJ 994 .

28 *Bhagwan Din v State* AIR 1967 All 580 ; *Thakardas v State* AIR 1960 J&K 104, 1960 Cr LJ 1080 .

29 *Fatteh Khan v Emperor* AIR 1930 Lah 950 .

30 *State v Mohd Misir Ali* AIR 1963 Assam 151, p 153, (1963) 2 Cr LJ 255 .

31 3 WR (Letters) 15.

32 *Sarju Prasad v State of Bihar* AIR 1965 SC 843 ; *Fatta v Emperor* AIR 1931 Lah 63 ; *Polar Munda v State* AIR 1958 Ori 69, p 72 ; 1958 Cr LJ 541 ; *Ghulam Sabir Amir Khan v Emperor* AIR 1942 Pesh 21 .

33 *Jamil Hasan v State* 1974 Cr LJ 867 (All) (cutting of a nose with tooth is an offence under s 324 or s 326 according to the nature of injury caused); *Chaurasi Manjhi v State of Bihar* AIR 1970 Pat 322, 1970 Cr LJ 1235 ; *Gopalbhai Chhaganlal Soni v State of Gujarat* AIR 1972 Guj LR 848, wherein it has been held that tooth is not an instrument for cutting, and hurt, caused thereby, is a simple hurt punishable under s 323 .

34 *Anwarul Haq v State of Uttar Pradesh* 2005 Cr LJ 2602, p 2604 (SC), AIR 2005 SC 2382, (2005) 10 SCC 581, [2005] 3 SCR 917 .

35 *Mohammad Iqbal v State of Madhya Pradesh* 2012 Cr LJ 337, p 343 (Chh) (DB) .

36 *Anwarul Haq v State of Uttar Pradesh* 2005 Cr LJ 2602 (SC) .

37 Re *Nga Po Thil* (1897-1901) 1 UBR 311, 1 Weir 335.

38 *Nga Po Nyan v Emperor* AIR 1937 Rang 8, p 10, 38 Cr LJ 299 .

39 *State v Mohd Misir Ali* AIR 1963 Assam 151, (1963) 2 Cr LJ 255 ; *Narinder Kumar v State of Delhi* 1980 Cr LJ (NOC) 121 (Del), wherein it was observed that an injury, caused even to the vital part of the body of a victim, is merely a simple injury and the offence is punishable under s 324, IPC, if the medical witness, examining the victim, though he labels it as a grievous injury, does not give his reasons for labelling it as a grievous injury and the intention of the kind. Referred to in s 300, IPC, in inflicting the injury, is not proved; *Pratap Singh v State of Punjab* (1981) 7 Cr LT 357, p 359 (Punj), wherein it was held that even if the doctor opines particular injury as grievous injury, yet if there is nothing abnormal in that injury and it does not fall within the ambit of s 326 on account of no extent or dimensions having been given of the fracture by the doctor and no fracture having been actually found on X-ray, the accused cannot be convicted under s 326 and the offence will fall under s 324 ; *Dabbal v State of Madhya Pradesh* 1980 Cr LR 305, p 309 .

40 *Varkey Joseph v State of Kerala* AIR 1960 Ker 301, p 303, 1960 Cr LJ 1213 .

41 *Ibid*; *Ghulam Jilani v Emperor* AIR 1925 Lah 559, 26 Cr LJ 1118 .

42 *Martu Vithoba Prabhu v Emperor* 14 Cr LJ 641 .

43 *Ghulam Muhay-ud-Din v Emperor* AIR 1922 Lah 26 .

44 *Varkey Joseph v State of Kerala* AIR 1960 Ker 301, p 303 .

45 *Allah Din v Emperor* AIR 1924 Lah 234, 24 Cr LJ 663 .

46 *Dulu Kakatgi v State of Assam* 2012 (117) AIC 464 (Gauh) .

47 *Raju v State of Rajasthan* 2013 Cr LJ 1248 (SC), 2013 AIR SCW 812, 2013 (1) Crimes 158 (SC), JT 2013 (1) SC 552, 2013 (1) KCCR 609, 2013 (2) RCR (Criminal) 131, 2013 (1) Scale 303, (2013) 2 SCC 233 .

48 *Nga Po Nyam v Emperor* AIR 1937 Rang 8, 38 Cr LJ 299 ; *Emperor v Bhagu Suva* 1 Cr LJ 903, 14 KLR 214 ; *Emperor v Kala Kana* 1 Cr LJ 627, 14 KLR 90 ; *Emperor v Haja Naran* 3 Cr LJ 181, 15 KLR 311 ; *Emperor v Dhana Pancha* 2 Cr LJ 196 ; *State of Karnataka v Parashram Kallappa Ghevade* 2007 Cr LJ 479 (Kant) (DB), 2006 (5) Kant LJ 522, (*Mathai v State of Kerala* 2005 Cr LJ 898 (SC), AIR 2005 SC 710, 2005 (1) Scale 293, (2005) 3 SCC 260, **relied on**).

49 *Koli Gator Sura v State of Gujarat* AIR 1966 Guj 221, 1966 Cr LJ 994 ; *Oswas Danji Tejsi v State* AIR 1961 Guj 16, (1961) 1 Cr LJ 251 .

50 *Saidino v Emperor* 16 Cr LJ 710 .

51 *Preman v Emperor* AIR 1928 Lah 93, 28 Cr LJ 966 .

52 *Sewa Singh v Emperor* AIR 1930 Lah 490, 31 Cr LJ 1069 .

53 *State of Mysore v Raju Shetty* AIR 1961 Mys 74, p 83, (1961) 1 Cr LJ 403 .

54 *Pritam Singh v Crown* AIR 1950 EP 209, p 210, 51 Cr LJ 1005 .

55 *Shamsher Singh v State of Uttar Pradesh* 1968 AWR 512 (SC) .

56 *Mukati Prasad Rai v State of Bihar* AIR 2005 SC 1271, 2005 Cr LJ 681, p 683, 2005 SCC (Cri) 69, (2004) 7 Supreme 695 .

57 *Mukati Prasad Rai v State of Bihar* AIR 2005 SC 1271, 2005 Cr LJ 681, p 683, 2005 SCC (Cri) 69, (2004) 7 Supreme 695 .

58 *Ramdas v State of MP* 2009 Cr LJ 1136, p 1137 (SC), 2009 AIR SCW 604, 2009 (1) 364, (2009) 4 SCC 57 .

59 *Sham Behera v State* AIR 1953 Ori 308, p 311 ; *Empress v Baboo Moondu* 13 WR (Cr) 23 ; *Pan Singh v Emperor* AIR 1935 All 282 .

60 *R v Crawford* 1 Den 100 CCR .

61 *Modi's Medical Jurisprudence and Toxicology*, Lexisnexis Butterworths.

62 *Ibid*.

63 *Ramchandar Singh v State* (1961) 2 Cr LJ 391 .

64 *Awadesh Ray alias Babua Parhak v State of Jharkhand* 2007 Cr LJ (NOC) 418 (Jhar), (2007) 2 AIR Jhar R 32 .

65 *R v Cramp* LR 5 QBD 307 .

66 Code of Criminal Procedure 1973, s 320(2) ; *Thomas D'Souza v State of Mysore* AIR 1966 Mys 53, p 55, 1966 Cr LJ 150 (permission may be given, even by the High Court, in revision); *Bhim Singh v State of Uttar Pradesh* AIR 1974 SC 1744, p 1745, 1974 Cr LJ 1285 (permission may be given, even by the Supreme Court, in an appeal).

67 *Shakuntala Sawhney v Kaushalya Sawhney (*1980) 1 SCC 63.

68 Code of Criminal Procedure 1973, s 320(8) .

69 *Ram Shankar v State of Uttar Pradesh* (1982) 2 SCC 388 ; *Ram Kumar Gautam v State of Madhya Pradesh* 2001 Cr LJ 1604 (MP) .

70 *Mohd Abdul Saan Laskar v State of Assam* (2008) 9 SCC 333, (2008) 3 SCC (Cri) 770 ; *Naresh Kumar v State of Haryana* (2012) 9 SCC, (2012) 3 SCC (Cri) 1137, (2012) 119 AIC 381 SC .

71 18 WR (Letters) 1.

72 3 WR (Letters) 15.

73 *Dabbal v State of Madhya Pradesh* 1980 Cr LR 305, p 310 (MP) .

74 Re *Mooka Nadar*AIR 1943 Mad 590, p 591 .

75 *Ram Ratan v State of Uttar Pradesh* 2002 Cr LJ 2688 (All) (DB) .

76 *State of Kerala v Haridasan* 1972 Cr LJ 1204, 1206 .

77 *Ibid*.

78 *Chaitan Bhuyan v State of Orissa* 1978 Cr LJ 1303, p 1305 .

79 *Hari Kishan v State of Haryana* 2010 Cr LJ 920, p 925 (SC), AIR 2010 SC 3215, (2010) 2 SCC 131 .

80 *Parmanand Singh v State of Bihar* 2004 Cr LJ 4430 (Pat) .

81 *Chaitan Bhuyan v State of Orissa* 1978 Cr LJ 1303, p 1305 .

82 *Deep Singh v State* 1973 CLR 565 .

83 *Hirianna Shetty v State of Mysore* 1972 Cr LJ 976, p 977, 1972 Mad LJ (Cr) 228 .

84 *Raju alias Virendra Singh v State of Madhya Pradesh 2001* Cr LJ 3707 (MP).

85 *Kailas Barku Sonawane v State of Maharashtra* 2009 Cr LJ (NOC) 456 (Bom) (DB).

86 *Mukati Prasad Rai v State of Bihar* 2005 Cr LJ 681 (SC) .

87 *Bahusva v State of Uttar Pradesh* 2001 Cr LJ 359 (All) .

88 *Ram Singh v State of Haryana* 1998 Cr LJ 2279 (SC) .

89 *Santosh Kumar v State* 1997 Cr LJ 984 (All) (DB) .

90 *Raghubir v State* 1996 Cr LJ 364 (All) .

91 *Mukati Prasad Rai v State of Bihar* 2005 Cr LJ 681 (SC) .

92 *Shivam v State* 1999 Cr LJ 4153 (Mad) (DB) .

93 *Asu v State of Rajasthan* 2000 Cr LJ 207 (Raj) ; *Rajendra Shantaram Todankar v State of Maharashtra* 2003 Cr LJ 1277 (SC) .

94 *Kuppan and Ors v State of Tamil Nadu* 2000 Cr LJ 3503 (SC) .

95 *State of Madhya Pradesh v Rajesh and Ors* 1997 Cr LJ 2466 (MP) (DB) .

96 *Sat Parkash v State of Haryana* 2006 Cr LJ 4787 (P&H) .

97 *Panchvati Auto Centre and Ors v State of Gujarat* 2007 Cr LJ (NOC) 464 (Guj) .

1 *Jugi Khan v State* 1999 Cr LJ 2984 (All) ; *Ajay v State of Rajasthan* 2015 Cr LJ 770 (Raj) .

2 *Pravat Kumar Mishra v State of* Orissa 1996 Cr LJ 4357 (Ori).

3 *Sitaram Paswan v State of Bihar* 2005 Cr LJ 4135 (SC), AIR 2005 SC 3534 .

4 *Ibid*.

5 *Shyama Pradhan alias Shyam Sunder Pradhan v State* 1996 Cr LJ 2936 (Ori) .

6 *Nomesh Janimal Lohana (Sindhi) v State of Gujarat* 1998 Cr LJ 3574 (Guj) (DB) .

7 *Debi Dayal v Emperor* AIR 1942 Oudh 444, p 447 .

8 *Basappa v State* AIR 1960 Mys 228, p 229, 1960 Cr LJ 1222 ; *Sheo Dularey v State* 1997 Cr LJ 269 (All) (DB) .

9 *Sheodan v State of Rajasthan* 1974 Cr LJ 234, p 237, 1973 Raj LW 572 .

10 *State of Bihar v Lala Mahto* AIR 1955 Pat 161, p 167, 56 Cr LJ 597 .

11 *Modi Ram v State of Madhya Pradesh* AIR 1972 SC 2438, 1972 SCD 961 ; *Shivam v State* 1999 Cr LJ 4153 (Mad) (DB) .

12 *Gopal Sngh v State of Uttarkahand* AIR 2013 SC 3048, 2013 Cr LJ 3872, p 3878, 2013 (2) Scale 533, (2013) 7 SCC 545 .

13 *Parveen Kumar v State* 1980 Rajdhani LR 381, 384 .

14 *Galloor Mian v State of Bihar* 2002 Cr LJ 3844 (Pat) .

15 *Prithvey Singh v State* 2002 Cr LJ 2874 (Del) (DB) ; *Waseem v State of Uttar Pradesh* 2003 Cr LJ 1080 (All) .

16 *Jagdish v State of Uttar Pradesh* 1999 Cr LJ 4660 (All) .

17 *Ramharakh v State of Uttar Pradesh* 1999 Cr LJ 3001 (All) (DB) ; *Pritam Singh v State* 1996 Cr LJ 7 (Del) .

18 *Ram Dhan v State of Uttar Pradesh* 1996 Cr LJ 1803 (All) .

19 *State of Karnataka v Basavaraj* 1999 Cr LJ 4750 (Kant) (DB) .

20 *Kothandapani v State* 2003 Cr LJ 151 (Mad) (DB) .

21 *Subedar v State of Uttar Pradesh* 2003 Cr LJ 1090 (All) .

22 *Rohtas v State of Uttar Pradesh* 2000 Cr LJ 89 (All) ; *Rajendar Singh v State of Bihar* 2000 Cr LJ 1844 (Pat) ; *Bakhtawar Singh v State of Rajasthan* 1999 Cr LJ 4271 (Raj) ; *Kesra v State of Rajasthan* 1999 Cr LJ 2625 (Raj) (DB) ; *Matadin v State of Maharashtra* 1999 Cr LJ 22 (SC) ; *Ajay Sharma v State of Rajasthan* 1998 Cr LJ 4590 (SC) ; *Om Parkash v State* 1998 Cr LJ 2625 (Del) ; *Pappu v State of Uttar Pradesh* 1998 Cr LJ 122 (All) ; *Manohar v State of Karnataka* 1997 Cr LJ 398 (Kant) ; *Akhi alias Akhil Behera v State of Orissa* 1996 Cr LJ 2352 (Ori) ; *Dulu Kakati v State of Assam* 2012 (117) AIC 5464 (Gauh) (Accused remained in custody for 27 days, sentence reduced to the period already undergone).

23 *State of Rajasthan v Mohan Lal* 2012 Cr LJ 2084 (SC), AIR 2012 SC 1595, 2012 (3) Scale 590, (2012) 4 SCC 564 .

24 *Raghbir Chand v State of Punjab* 2013 Cr LJ 4456, p 4464, 2013 AIR SCW 5192, (2013) 10 Scale 20 .

25 *Parr Seenaiah v State of Andhra Pradesh* 2012 Cr LJ 3309, AIR 2012 SC 2875, 2012 AIR SCW 3529, (2012) 6 SCC 800, 2012 (5) Scale 323 .

26 *Mukati Prasad Rai v State of Bihar* 2005 Cr LJ 681 (SC), AIR 2005 SC 1271, (2004) 13 SCC 144 .

27 *Suraj Mal v State of Rajasthan* 2006 Cr LJ 2663 (Raj) .

28 *Sheo Dularey v State* 1997 Cr LJ 269 (All) (DB) .

29 *Abhiram Mukhi v State of Orissa* 1996 Cr LJ 2341 (Ori) .

30 *Akhi alias Akhil Behera v State of Orissa* 1996 Cr LJ 2352 (Ori) .

31 *Pritam Singh v State* 1996 Cr LJ 7 (Del) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 325.

Punishment for voluntarily causing grievous hurt.--

Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.2828

Comments

1. Scope

This section prescribes the punishment for voluntarily causing grievous hurt which is made an offence under s 322, IPC . A person is said to voluntarily cause grievous hurt when the hurt caused by him, is of the nature of any of the eight kinds of hurt enumerated in s 320, IPC, and he intends or knows himself to be likely to cause grievous hurt. It may be presumed from the conduct of several persons, striking another with *lathis*, that each of them intends to cause grievous hurt; but such a presumption alone is not sufficient to establish the offence of causing grievous hurt against an accused unless it is further shown that that accused actually caused grievous hurt.[32] In short, to make out the offence of voluntarily causing grievous hurt, there must be some specific hurt, voluntarily inflicted within the meaning of s 322, and coming within some of the eight kinds of hurt enumerated in s 320 .[33]A person can be said to voluntarily cause grievous hurt even if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind. Where a person struck a blow to another causing death without any intention of causing death, or of causing such bodily injury as was likely to cause death, or without the knowledge that he was likely, by such act, to cause death, but with the intention of causing grievous hurt, it was held that the offence, of which such person was guilty, was not the offence of causing death by a rash act, but the offence of voluntarily causing grievous hurt.[34] The intention can be inferred from the circumstances of the case and the nature of the injury caused. [35]Section 335, IPC provides an exception to this section.

2. Motive

Where the complainant and his daughter were the victims of the highhandedness of the accused who teased the daughter of the complainant, because the complainant and his daughter had reported the matter to the *panchayat*, the accused felt offended and that was the motive for the commission of the crime.[36]

3. Grievous Hurt Distinguished from Culpable Homicide not Amounting to Murder

Culpable homicide not amounting to murder presupposes that the party inflicting the injury does it either with the intention that it should cause death, or with the2829 knowledge that it may do so, and the offence is modified from murder (which it would be if the above mentioned knowledge or intention is proved) by the existence of certain exceptions, noted under s 300 of the IPC . When there is neither intention, nor knowledge, nor likelihood, that the injury inflicted will or can cause death, the offence would be 'voluntarily causing grievous hurt' under s 322, punishable under s 325 .[37] The only distinction between culpable homicide not amounting to murder as defined in s 299, IPC, and an injury which falls within the definition of grievous hurt, on the ground that it 'endangers life' is this that, in the former case death occurs while, in the latter case death does not take place.[38] Giving of fist blows on the abdomen of the victim under normal conditions is neither likely to cause his death nor endangers his life so as to invoke the provision of s 320 .[39] Whether there was danger to life is to be taken with reference to the normal condition, and not with reference to the abnormal physique or health of the victim.[40] In *Bai Jiba v Emperor* ,[41] it was held that phrases such as 'hurt which endangers life' used in s 320, IPC, or 'injury which is likely to cause death' within the meaning of s 299, IPC, must be applied with reference to normal condition, and any hurt, which endangers human life, must also be likely to cause death. Where a person struck another a blow, which caused his death, without any intention of causing death, or of causing such bodily injury as was likely to cause death, or with the knowledge that he was likely, by such act, to cause death, but with the intention of causing grievous hurt, it was held that the offence, of which such person was guilty, was not the offence of causing death by a rash act, but of the offence of voluntarily causing grievous hurt.

4. Benefit of Exception

Where an accused claims the benefit of an exception, the burden of proving that exception lies on him; but the burden is to be undertaken by the accused only when the prosecution case establishes that in the absence of such a plea, he would be guilty of the charge (under s 325 read with s 34, IPC). If there is no reliable evidence in support of the prosecution and the liability of the accused arises only from the plea of right of private defence, raised by him in his examination in the trial court, he can be convicted only if his plea amounts to a confession of guilt. However, if the plea amounts only to an admission of facts and raises a plea of justification, the court cannot proceed to deal with the case as if the admission of facts, which do not form part of the prosecution case, were true and the evidence does not warrant the plea of justification.[42]

5. 'Voluntarily'

Commentary under the same heading in ss 321, 322, *ante*, may be referred to.

6. 'Grievous Hurt'

Commentary under s 320, *ante,* may be referred to.2830

7. 'Voluntarily Causes Grievous Hurt'

Commentary under s 322, *ante,* may be referred to.

8. Inference of Intention or Knowledge

The intention or knowledge of a person causing hurt to another is a matter of inference from the nature of the weapon used, the manner of its use, the part of the body on which the hurt is caused, and the nature of injury, *etc*. If a man strikes another person a ferocious blow with a heavy stick upon a vital part of the body, he cannot complain of the inference being drawn that at the very least he must have known that grievous hurt was likely to be caused.[43] The probable result of the use of a *lathi* is at least grievous hurt caused and the assailants may be deemed to intend to cause grievous hurt.[44] It is much more so when a violent blow is struck with a *lathi*.[45]

When a person strikes a hard and determined blow on a vital part of the body of the victim, he must be deemed to have intended to cause, or, at least, to have known that he was likely to cause grievous hurt.[46] When it has come in evidence that the act complained of, was sufficient to cause fracture, the doer can well be attributed with knowledge that, by doing that act, he would be likely to cause grievous hurt.[47]

9. Stone

It is not that in every case a stone would constitute a dangerous weapon. It would depend upon the facts of the case. In view of the size of the stone used as weapon of assault, it could not be said that a dangerous weapon was used, hence, the conviction of the accused under s 326, IPC was altered to one under s 325, IPC .[48]

10. Illustrative Cases

(1) *A* struck *B*, a woman, carrying a child in her arms at the time, some violent blows on the head and shoulders. One of the blows fell on the child's head, from the effects of which it died. It was held that *A* was guilty of causing grievous hurt to the child.[49]

(2) *A*, *B* and *C* attacked *D* with *lathi*. One of them fractured *D*'s skull by a blow and he died. It was held that they were all guilty under s 325, IPC, but not of culpable homicide.[50]

(3) *A* administered *dhatura* to *B* with the object of robbing him. *B* died therefrom. It was held that *A* was guilty of an offence under this section, but not of culpable homicide.[51]2831

(4) Where the deceased, after he was cured and discharged from the hospital, though it was not clear from medical evidence as to whether the injury on his head was, or was not, sufficient, in the ordinary course of nature, to cause death, was re-admitted after an attack of dysentery and thereafter, died, it was held that the accused was guilty of an offence under s 325, IPC .[52]

(5) Where it was found that the accused did not intend to kill the deceased nor cause such injury as was likely, in all probability, to cause his death, and all that he intended was to cause grievous hurt, it was held that he could be convicted under s 325, IPC .[53]

(6) Where the deceased died on account of the pus formation and toxaemia and not owing to the grievous hurt caused by the accused, the accused was held liable under s 325, and not under s 302 or s 323, IPC .[54]

(7) Accused inflicted knife blow on the chest, vital part of body, causing death of the deceased. He was convicted under s 302, IPC and not under s 325, IPC .[55]

Where the accused, duly armed with *lathis*, launched a concerted attack on the victim, causing 33 injuries on the various parts of his body, it was held that knowledge to cause grievous hurt could safely be attributed to the assailants.[56]

In *Kalika Singh v State of Uttar Pradesh* ,[57] several injuries caused to the complainant by the accused by fists and a *lathi*, included a fracture caused to his left thumb by his fall to the ground during his beating by the accused. It was held that they were liable under s 325 read with s 34, IPC, even though the fracture was caused by the fall, and not by the *lathi*.

One accused P had given beating with her plastic shoes to the deceased an old lady, causing death. Petitioner persons who arrived on the spot were not armed, did not indulge in or facilitating the shoe

beating by the accused P. Held, the petitioners accused did not share common intention of the accused P, thus, all were acquitted of the charge under ss 325 / 34, IPC .[58]

Where the accused husband inserted his fingers and a stick in the vagina of his wife as a result of which she sustained heavy bleeding injury, delay in lodging FIR was properly and satisfactorily explained, evidence of victim wife was convincing and trustworthy and corroborated by medical evidence with regard to nature and cause of injuries sustained by her, mere non-seizure of the stick alleged to have been inserted in the vagina of victim would not affect the prosecution case and so the conviction of the accused under s 325 was found proper.[59]

11. Procedure

The offence under this section is cognizable, bailable, compoundable only with the permission of the court, before which the prosecution is pending, and is triable by a magistrate.2832

12. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the.....day of...., at..... you voluntarily caused grievous hurt to AB and thereby committed an offence, punishable under s 325 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

It is wrong to use the word 'willingly', instead of 'voluntarily', in the charge as the word 'voluntarily' is used in the section in a technical sense and means something more than 'willingly'. It is, however, not necessary to specify the kind of grievous hurt caused by the accused, as, under the explanation to s 322, the accused can be said to voluntarily cause grievous hurt even if, intending, or knowing himself likely, to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Even if a charge is initially framed only for an offence under s 323, IPC, the magistrate, by virtue of the provisions in s 216 (1) and (2) of the CrPC, can alter the charge and frame a new charge under s 325, IPC .[60]

13. Proof

To establish an offence under this section, the prosecution must establish that:

(a) the accused caused grievous hurt;[61] and
(b) he did it voluntarily.[62]

When the accused persons made a concerted assault on the victim with weapons like axe, cycle-chain

and stick, it can be reasonably presumed that they shared a common intention to inflict grievous hurt on him in terms of s 325, IPC making them liable under s 325 read with s 34, IPC .[63]

In case(s), where several accused persons assault and give numerous blows to the deceased, evidence is quite unclear as to whose blow resulted in the death of the deceased, accused have no intention to kill, the accused would be convicted under ss 325 / 34, IPC and not under ss 302 / 34, IPC .[64]

14. Medical Evidence

There must be evidence to show that the hurt caused is such as is described in s 320, IPC . A mere report of the civil surgeon is not sufficient.[65] The production of X-ray photo is essential to establish a fracture.[66]2833

Non-examination by doctors is not proper even though the tendering of wound certificates which are public documents by the investigating officer is legally permissible. The court, however, should never overlook the fact that there are various special features in relation to medical evidence about which only the doctor can depose. However, when the wound certificate by the prosecution is not disputed by the defence and examination of the doctor is also not insisted upon, the non-examination of the doctor is not fatal to the prosecution.[67]

15. Non-Explanation of Injuries on the Person of Accused

It is for the prosecution to explain as to how the accused suffered injuries, if the prosecution did not explain any of the injuries found on the accused and on the contrary, it totally denied that the accused suffered injuries at the hands of the witnesses. It gives presumption that the witnesses were suppressing genesis and the origin of the incident when they gave evidence in the case, so the accused is entitled to be acquitted.

16. Cross-Examination by Prosecutor

Ordinarily, a party calling his witness is not allowed to cross-examine him but this ordinary rule is relaxed by s 154 of the Evidence Act . The purpose of such relaxation is only to find out if the witness is telling the truth and can be relied on, because cross-examination is the most powerful and effective instrument for bringing out and testing the truth. However, before permitting the prosecution to cross-examine the witness it has to be shown that the witness has resiled from the statement made by him during investigation. The prosecution must lay foundation for examining his own witness in the nature of cross-examination and if the court finds from the temper, attitude, inconsistent statement or otherwise, that leave should be granted, the court should readily grant the permission at any stage of examination of the witness.[68]

17. Compounding of Offence under this Section

An offence under s 325, IPC, can be compounded with the permission of the court. The effect of such permission is the acquittal of the accused in view of the provisions of s 320(8) of the CrPC .[69] But the compounding of offence after the judgment of conviction is not permissible as once a court passes a judgment of conviction, it has to pass the order regarding sentence in accordance with the law, regard being had to the provisions of s 360 of the CrPC in appropriate cases, and it cannot permit compounding of offence at that stage. However, if further order is passed by the trial court and if it is challenged in appeal, the appellate court can consider the prayer for compounding of the offence under sub-s (5) of s 321 and if a revision is preferred either to the court of session or to the High Court, the revisional court can consider the same under sub-s (6) of s 320 of the CrPC .[70]

18. Acquittal

Where the accused gave slaps and fist blows to the victim whereby he fell down and sustained grievous

and simple injuries, the version of the victim in the FIR and in his2834 statement in the court was contradictory, the case seemed to have been instituted and initiated as a counter-blast to the report lodged by the accused earlier against the victim, the acquittal of the accused under s 325, IPC, was found proper.[71] The allegation against the accused-persons were of causing voluntarily grievous hurt and assault, the statement of the complainant before the court and in the FIR were contradictory, the story given in the FIR was that the accused pelted stones on the complainant and his sons which caused injuries, whereas in the statement before the court it was stated that the bleeding injury to the nose of the complainant was caused due to a *lathi* blow, because as per the medical report, the injuries caused were not serious and the same did not match the prosecution story, the acquittal of the accused in these circumstances was found proper.[72] Where the injuries on the accused were not explained and eyewitnesses showed their ignorance about them, no independent witness was examined by the prosecution, statements of the accused under s 313, CrPC, were not properly recorded, the probability of a quarrel at the instance of the complainant party could not be ruled out, the accused were found entitled to be acquitted.[73] The conviction of the accused under s 325 based on the evidence of the widow of the deceased victim, supported by medical evidence and to some extent by the testimony of hostile witnesses is not improper.[74] When the victim who had suffered grievous injury on his right arm did not state that he had suffered any injury on his right arm at the hands of the accused persons, it is not possible to maintain conviction of accused persons under s 325, IPC .[75] Where the trial court examined three injured witnesses but did not give reasons for discarding their testimony, the acquittal of the accused by the trial court for want of availability of independent eyewitnesses was found not proper and was set aside and the case remanded back to the chief judicial magistrate for further necessary action in accordance with law.[76]

19. Conviction

An accused can be convicted under s 325 even when he is acquitted under s 397, IPC .[77] If, out of the two accused, charged under s 325 read with s 34, one is acquitted after being given the benefit of the doubt, the other accused cannot be convicted under ss 325 / 34 .[78] However, a conviction under s 304 read with s 34, can be altered to one under s 325 read with s 34 .[79] Similarly, a person, charged under s 326 read with s 149, may be convicted under s 325 read with s 34,[80] or merely under s 325 .[81]

Due to enmity between two rival groups in the incident, one person died. Medical evidence showed that the deceased was aged 60 years and suffering from cervical spondylosis. The deceased had sustained fracture of cervical spine. The injuries2835 sustained by the deceased were simple in nature. The injury caused to the deceased was neither intentional nor the members of the unlawful assembly had knowledge that the injury received by the deceased could have caused death. Accused were convicted under ss 325, 323 read with s 34 .[82]

Where an accused is charged under s 325 read with s 149 and he has been acquitted of this charge, he cannot be convicted for the specific offence under s 325, IPC .[83] If, however, the common object of an unlawful assembly is found to be merely causing simple hurt, and not grievous hurt, but one of them causes a grievous hurt, he alone is liable for the grievous hurt; all cannot be held guilty of an offence under s 325 read with s 149 .[84] In *Pritam Singh v State of Punjab* ,[85] where two out of six persons in a trial under ss 325, 148 and 149, had been acquitted, it was held that as s 148 under the circumstances could not apply, conviction of the remaining accused under ss 325 / 149, IPC, was not maintainable.

20. Separate Convictions

Where the two offences under s 147, and ss 325, 149, IPC, are held to have been committed by the same acts and the accused convicted thereof, the offenders are not liable to be punished with the punishment for more than one of such offences under s 71 .[86] However, in *Empress v Bisheshar* ,[87] the rioting under s 147 could not be held to be a part of voluntarily causing grievous hurt under s 325 and, therefore, the provisions of s 71 were held to be inapplicable.[88] In *Empress v Bana Punja* ,[89] it was held that separate sentences for s 147, and ss 323 / 149, IPC, are legal if the total punishment does not exceed the maximum for any of the offences.

21. Probation

Where there were cross-versions and the accused persons had already undergone part of the sentence awarded, they should be released on probation.[90]

Where the accused committing an offence under s 325, IPC, were less than 21 years of age and were first offenders and had given fist and leg blows on the stomach and waist of the injured, and they had faced trial for about 10 years, the accused persons were released on probation of good conduct under s 4 of the Probation of Offenders Act 1958 on their furnishing a personal bond in the sum of Rs 1000 each, together with surety bond of the like amount for a period of 3 years. In addition, they were directed to pay compensation of Rs 12,500 each to the injured.[91]2836

To be a student is no reason by itself for showing leniency to a culprit. Section 6 of the Probation of Offenders Act 1958, however, provides to give benefit of s 3 or s 4 of the said Act to a person who is below 21 years of age at the time of commission of an offence if such offence is not punishable with life imprisonment. These provisions, no doubt, are of mandatory nature. However, the court is not to give the benefit of probation if it is not warranted in view of the circumstances of the case, nature of the offence and the character of the accused.[1]

Since the grievous injury inflicted was intentional, the appellant accused convict was not released on probation of good conduct. However, as the incident was ten years old, and the appellant had been in custody for 15 days, the sentence of one year imposed was reduced to the period already undergone, and he was directed to pay Rs.10,000/- as compensation.[2]

22. 'Shall also be Liable to Fine'

It is not obligatory for the court to impose a sentence of imprisonment, and also a sentence of fine.[3] The court has, under this section, no option to dispense with the sentence of imprisonment and award the sentence of fine only. To award a sentence of fine only is illegal, which illegality can be set aside by the High Court under s 401 of the CrPC .[4] There must be a sentence of imprisonment, irrespective of whether a sentence of fine is imposed.[5]

23. Punishment

The imposition of sentence is always a matter of discretion, and unless the discretion has been exercised arbitrarily or capriciously, based on unsound principles, or the court has not taken into account any relevant factors in imposing sentence, a reduction in sentence would not be justified in appeal.[6] In awarding sentence, the court should take, into account, the weapon used, the manner in which the offence was committed, and the consequences that had ensued.[7] Provocation may be taken as a mitigating circumstance.[8] If, however, the court is satisfied that the accused is responsible for the injuries caused, he must be given a substantial sentence of imprisonment, and not a nominal sentence of imprisonment till rising of the court.[9] The fact that the accused persons are settled in life during pendency of appeal does not constitute mitigating circumstances to award lesser punishment.[10] In *Abadhraj Dukharam v State of Maharashtra* ,[11] the submission for reducing the sentence of one2837 year's rigorous imprisonment was rejected because the injury caused was serious and it was inflicted by tearing a portion of the abdomen by razor. In *Rabi Deb Burma v State* ,[12] however, a sentence of seven year's rigorous imprisonment, along with a fine of Rs 1,000, was reduced to a sentence of five year's rigorous imprisonment with a fine of Rs 500 as the assault made by the appellant was not found premeditated.

Where 16 years had passed from the date of incident and the accused did not have any criminal antecedents or adverse criminal history, the sentence was reduced to the period already undergone and the accused were directed to pay the fine of Rs 10000 each to be payable to the widow of the deceased.[13] Where the impugned incident took place more than 26 years ago and the accused were now more than 60 years old, the sentence of imprisonment was reduced from the period of 5 years to 2 years.[14]

Where the incident took place about 8 years ago and by that time the socio-economic conditions of the accused persons had undergone a radical change, the accused were in jail during the pendency of the case for 42 days and they had no criminal history or bad antecedents, the sentence of the accused were reduced to the period of imprisonment already undergone but the fine imposed upon them was enhanced to Rs 2000 each.[15] Where the incident took place 15 years back, and accused were not previous convicts, the injuries caused to the victim were almost superficial except the fracture of the fifth metacorpal bone of the right hand of the victim, the accused persons were sentenced to pay a fine of Rs 800 each and in default to undergo rigorous imprisonment for 6 months, the fine realised was to be paid as compensation to the victim or his legal representatives as the case may be.[16] The accused being the old man of 86 years; having caused injury on the non-vital part of the body and having undergone one year of sentence was sentenced to imprisonment already undergone by him.[17]

However, in some cases, the High Court refused to interfere on the ground that it was only a formal defect,[18] or that a court, sitting in revision, is not bound to interfere even though an illegality has been committed by the lower court if it finds that substantial justice has been done.[19] In *Ghariby v State* ,[20] the High Court exercised its revisional powers, suo motu, to alter a conviction under s 304, read with s 34, to one under s 325 read with s 34, and to reduce the sentence. It was also held there that the mere fact, that a man who unfortunately lost his life, should not be a reason for inflicting too severe a punishment. Where the injuries inflicted were of a minor nature and one of them, which was described to be grievous and detected only after four or five days, involved a fracture of a metacarpal bone in the right hand, the High Court interfered in revision and reduced a sentence of six months imprisonment to2838 that already undergone (one and a half months).[21] A gun shot was fired by one of the accused appellants on the left leg of the injured. The accused appellants were convicted under ss 325 / 34, IPC, the sentence awarded was already undergone.[22]

Injury was caused by stone. As major portion of the sentence had already been served by the accused convict, sentence was reduced to the period already undergone.[23]

24. Alteration of Conviction from Section 302 to Section 325

Commentary under the same heading in s 302, *ante*, may be referred to.

Except one witness who stated that the appellant assaulted the deceased with a stick the other purported eye-witnesses stated that the accused appellant gave only fist blow to the deceased. The conviction of accused appellant under s 302, IPC was altered to one under s 325, IPC .[24]

25. Alteration of Conviction from Section 304 to Section 325

Commentary under s 304, *ante*, may be referred to.

The prosecution story was that the accused appellant, nephew of the deceased aged 76 years, sat on the chest of the deceased and had hit his head with stone. There was evidence of PW that after the appellant had sat on the chest of the deceased he had held his head and repeatedly hit it against the ground. The injuries caused were apparently not with a stone but it was the concussion and the rough handling by the appellant that had led to the internal injury to the brain which had resulted in haematomal haemorrhage and then to death. The conviction of the accused under s 304, Pt II, IPC recorded by Courts below was altered to one under s 325, IPC and sentence of seven years was reduced to sentence (two years) already undergone.[25]

26. Conviction of Accused when not Alterable to Section 325 from Section 304, Part II

When one of the injuries inflicted over the left ear caused fracture of left parietal and left temporal bone extending to the frontel and occipital region, such an injury is not contemplated by s 325, so the conviction of the accused under s 304, Pt II was found proper.[26]

27. Alteration of Conviction from Section 307 to Section 325

Commentary under the same heading in s 307, *ante*, may be referred to.

28. Alteration of Conviction from Section 326 to Section 325

Commentary under the same heading in s 326, *post*, may be referred to.2839

Where grievous injuries were caused to the victim by using the blunt part of the axe, the conviction of the accused was altered from s 326 to s 325, IPC . Where the accused struck the victim with a *lathi* which is a blunt weapon, the conviction of the accused was altered from s 326 to s 325 . Where one accused assaulted the deceased with a stick, and others used only fists and kicks, the stick with which the assault was caused was not identified, there was no finding that the stick was capable of causing death, the conviction of the accused was altered from s 326 to s 325, IPC .[27]

29. Alteration of Conviction from Section 325 to Section 335

Where the handicapped brother of the accused was thrown on ground by the deceased, the accused in a sudden provocation picked up a stick and beat the deceased on his head, the offence of voluntarily causing grievous hurt on provocation under s 335 was made out, hence, conviction of the accused under s 325 was altered to one under s 335 .[28]

30. Alteration of Conviction under Section 324 to Section 325

Injury inflicted on the victim by the accused was contusion on the left side of chest. X-ray report showed that there was fracture of the first rib on the left side. Held, the injury was not a 'hurt', but was a grievous hurt. Conviction of the accused under s 324, IPC was altered to one under s 325, IPC .[29]

32 *Dipa v Emperor* AIR 1947 All 408, 48 Cr LJ 858 ; *Amalesh Chandra v State* AIR 1952 Cal 481, p 485, 53 Cr LJ 1013 .

33 *Empress v Budri Roy* 23 WR (Cr) 65, p 66 .

34 *Empress of India v Idu Beg* ILR All 776.

35 *Nga Ba Gyaw v R* 13 Cr LJ 471 .

36 *State of Himachal Pradesh v Tek Chand* 2006 Cr LJ 1893 (HP) .

37 *Empress v Magha Meeah* 2 WR (Cr) 39 ; *Bai Jiba v Emperor* AIR 1917 Bom 259 (DB) ; *Dayal v Union of India* AIR 1963 HP 18, p 21, (1963) 1 Cr LJ 762 .

38 *Bai Jiba v Emperor* AIR 1917 Bom 259 ; *Chanda v State* 1980 Chand LR 112, p 118 .

39 *Chanda v State* 1980 Chand LR 112, p 118 (Del) .

40 *Ibid*.

41 *Bai Jiba v Emperor* AIR 1917 Bom 259 ; *Anbu Mani v State of Tamil Nadu* 1980 LW (Cr) 19 (SC) .

42 *Ram Kunwar v State* 72 PLR 181, p 184, 185, AIR 1970 Punj 301 .

43 *Empress v Duma Baidya* ILR 19 Mad 483 ; Re *Munnuswami*1970 LW (Cr) 275; *Jani Gulub Shaikh v State of Maharashtra* 1970 SCC (Cr) 532 .

44 *Emperor v Bhola Singh* ILR 29 All 282, 5 Cr LJ 130 ; *Agra v Emperor* AIR 1914 Lah 579, 16 Cr LJ 209 .

45 *Raghubir v State* AIR 1957 All 132, 1957 Cr LJ 366 ; **distinguishing***Chatur Nath v Emperor* AIR 1920 Bom 224, 21 Cr LJ 85 ; Re *Narayan Pasi* 24 WR (Cr) 24.

46 *Dissu v State* AIR 1953 HP 1, p 2, 54 Cr LJ 84, **dissenting from** Re *Marana Goundan*AIR 1941 Mad 560, 42 Cr LJ 707 .

47 *Santokhi Yadav v Jagdeo Tanti* 1976 BLJR 105 ; *Putti Lal v State* 1969 Cr LJ 531 (All) ; *State v Desraj* 1979 Cr LJ 558 .

48 *Mathai v State of Kerala* 2005 Cr LJ 898, p 900 (SC), AIR 2005 SC 710, (2005) 3 SCC 260, 2005 (1) Scale 293 .

49 *R v Sahae Rae* ILR 3 Cal 623 ; *Nga Ba Gyaw v Emperor* 13 Cr LJ 471 .

50 *Emperor v Bhola Singh* ILR 29 All 282 ; **following***Empress v Duma Baidya* ILR 19 Mad 483 ; *Nga Tun Baw v Emperor* 7 Cr LJ 205 ; *Gouidas v R* ILR 36 Cal 659 .

51 *R v Bhagwan Din* ILR 30 All 568 .

52 *State v Jang Singh* 1969 Raj LW 301 ; *Emperor v Kanji Mithal* 1 Cr LJ 622 .

53 *Seth alias Shivprasad v State of Madhya Pradesh* (1980) 2 MPWN 253 (DB) .

54 *State of Madhya Pradesh v Bhagwat* 1980 Cr LJ 24 (MP) (notes)(DB).

55 *Balraje v State of Maharashtra* 2010 Cr LJ 3443, 2010 AIR SCW 3707, (2010) 6 SCC 673, 2010 (5) Scale 576 .

56 *Rajaram v State of Madhya Pradesh* 1980 Cr LJ 39, p 41 (MP) (notes) .

57 *Kalika Singh v State of Uttar Pradesh* 1981 Cr LJ 639 (All) .

58 *Dhian Singh v State of Himachal Pradesh* 2009 Cr LJ 1977 (HP) .

59 *Bomma Ilaiah v State of Andhra Pradesh* 2003 Cr LJ 2439 (AP) .

60 *Jayantilal v State* 9 Guj LR 889 ; Re *Bomma Reddi Satyanarayana Reddi*AIR 1947 Mad 174, p 175 ; *Emperor v Chinna Kalippa* ILR 29 Mad 126 (PB) ; Re *Ponnuswami Goundan* ILR 55 Mad 622, AIR 1932 Mad 369 (FB) .

61 *Empress v Kaminee Dossee* 12 WR (Cr) 25 .

62 *Ibid*.

63 *State of Maharashtra v Datta Maruti Salagon* 1998 Cr LJ 3756 (Bom) (DB) .

64 *Mohan v State of UP* 2014 Cr LJ 69, p 72 (All) (DB), 2013 (3) ACR 2746, 2013 (6) ALJ 601, (*Shri Kishan v State of UP* AIR 1972 SC 2056, (1972) 2 SCC 537, 1972 Cr LJ 1313, **followed**.

65 *Empress v Kaminee Dossee* 12 WR (Cr) 25 .

66 *Sarat Chandra Naik v State of Orissa* 1975 Cut LT 1392 .

67 *State v Sheker alias Shekhara Raojari and Ors* 2002 Cr LJ 2148 (Kant) (DB) .

68 *Samir Das v State of Tripura* 1999 Cr LJ 953 (Gau) .

69 *Rajender Singh v State* AIR 1980 SC 1200 .

70 *State of Karnataka v Cyabrial* 2005 Cr LJ 2352 (Kant) .

71 *State of Himachal Pradesh v Latif Mohammed* 2002 Cr LJ 1434 (HP) .

72 *State of Orissa v Pumabasi Rana and Ors* 2002 Cr LJ 4854 (Ori) .

73 *State of Himachal Pradesh v Krishan Chand* 2000 Cr LJ 2143 (HP) .

74 *State of Karnataka v Diwakara Bhat* 1997 Cr LJ 226 (SC) .

75 *Nena Ram v State of Rajasthan* 1999 Cr LJ 2801 (Raj) .

76 *Ram Karan v State of Uttar Pradesh* 1999 Cr LJ 3972 (All) .

77 *Babulal v State of Madhya Pradesh* 1980 Cr LJ 32, p 33 (MP) (notes) .

78 *Bhagat Singh v State* 68 PLR 53 (SN) ; **following***Krishna Govind Patil v State of Maharashtra* AIR 1963 SC 1413, p 1416 .

79 *State v Saidu Khan* AIR 1951 All 21 (FB), 52 Cr LJ 131; *Ghariby v State* AIR 1953 All 491, 54 Cr LJ 1111 .

80 *Node Gulamamad Bhachu v Kutch State* AIR 1952 Kutch 4 ; *BN Srikantiah v State of Mysore* AIR 1958 SC 672 .

81 *Teethumalai v Emperor* ILR 47 Mad 746 (FB) ; **dissenting** from *Reazudding v Emperor* 16 CWN 1077 .

82 *State of Maharashtra v Arjun Bharmaji Waghchoure* 2013 Cr LJ (NOC) 259 (Bom) (DB).

83 *Sagwan Pasi v State of Bihar* 1978 Cr LJ 1062, p 1065 ; *Lakhan Mahto v State of Bihar* AIR 1966 SC 1742, 1966 Cr LJ 1349 ; *Nanak Chand v State of Punjab* AIR 1955 SC 274, 1955 Cr LJ 721 .

84 *Udal v State of Uttar Pradesh* 1980 Cr LR 337, p 340 (UP) .

85 *Pritam Singh v State of Punjab* 1977 Cr LJ 51, p 55 .

86 *Moolchand v State* AIR 1955 Bhopal 9, p 14 .

87 *Empress v Bisheshar* ILR 9 All 645 .

88 *Raghubar v Emperor* AIR 1939 Oudh 91 .

89 *Empress v Bana Punja* ILR 17 Bom 260, which **follows***Empress v Ram Sarup* ILR 7 All 757 .

90 *Balbir Singh v State of Punjab* 2003 Cr LJ 3148 (P & H).

91 *Rajesh Kumar and Anor v State of Haryana* 2002 Cr LJ 756 (P&H) ; *Deo Sahay v State of Chhattisgarh* 2015 Cr LJ 358 (Chh) (Accused was less than 21 years of age at the time of the occurrence, was released on probation); *Vijay Singh v State* 2015 Cr LJ (NOC) 86 (Raj) (Accused persons Government servants, released on probation).

1 *Om Parkash and Anor v State of Uttar Pradesh* 2000 Cr LJ 2675 (UP) .

2 *Manjappa v State of Karnataka* 2007 Cr LJ 3220, p 3222 (SC), (2007) 6 SCC 231, 2007 (4) Supreme 708, 2007 (7) Scale 513 .

3 *Rabi Deb Barma v State* 1973 Cr LJ 105, p 107 .

4 *State v Theyyan* AIR 1960 Ker 147, 1960 Cr LJ 592 ; *Emperor v Pallan Ahmadulla* 1935 MWN 476 ; *Abdul Majith Sahib v Emperor* 1937 MWN 575 ; Re *Venkata Suhbayya*AIR 1942 Mad 550, 44 Cr LJ 65 ; *Mohanlal v State* 1965 AWR (HC) 698 .

5 Re *Venkata Subbaya*AIR 1942 Mad 550, (1943) 44 Cr LJ 65 ; *Rajeshwar Prasad v State of Bihar* AIR 1972 Pat 50, p 52, 1972 Cr LJ 258 .

6 *Swendra v State of Uttar Pradesh* 1977 Cr LJ 351, AIR 1977 SC 709 .

7 *Bherusing v State* AIR 1956 MB 269, p 271, 1956 Cr LJ 1408 .

8 *Sajjan Das v State* AIR 1964 Ori 251, (1964) 2 Cr LJ 567 ; *State of Karnataka v Chamundappa* 1980 Cr LJ 165 (NOC) (Kant) (DB); *State of J&K v Hazara Singh* 1980 Cr LJ 1501, pp 1506-1507 (J&K) (DB).

9 *Amir Sam v State of Himachal Pradesh* 1974 Cr LJ 196, p 197 .

10 *Rakesh Singha v State of Himachal Pradesh* 1996 Cr LJ 2311 (SC) .

11 *Abadhraj Dukharam v State of Maharashtra* AIR 1979 SC 1703 .

12 *Rabi Deb Burma v State* 1973 Cr LJ 105, p 108 .

13 *Walu alias Walmik Popat Khairnar and Ors v State of Maharashtra* 2001 Cr LJ 1322 (Bom) (DB) ; *Rudrappa and Ors v State of Karnataka* 2001 Cr LJ 78 (Kant) ; *SS Walia v State of Punjab* 1998 Cr LJ 2524 (SC) ; *Uma Shankar Bharti and Ors v State of Uttar Pradesh* 2001 Cr LJ 362 (All) ; *Bhoop Singh and Ors v State of Rajasthan* 1996 Cr LJ 3709 (Raj) .

14 *Abhilakh Singh v State of Uttar Pradesh* 2006 Cr LJ 1419 (All) .

15 *Gyan Singh and ors v State of Uttar Pradesh and Ors* 2000 Cr LJ 2802 (All) .

16 *State of Maharashtra v Datta Maurti Salagar* 1998 Cr LJ 3756 (Bom) (DB) .

17 *Mohinder Singh and Ors v State of Punjab* 2007 Cr LJ 2478 (P & H) (DB).

18 *Ramchander Rai v Ram Belas Tewari* AIR 1933 Pat 179, 34 Cr LJ 407, **followed** in *State v Kangan Suba Gujjar* AIR 1953 Punj 201, 1953 Cr LJ 1288 .

19 *Bisheshar v Rex* AIR 1949 All 213, p 215, 50 Cr LJ 322 .

20 *Ghariby v State* AIR 1953 All 491 **relying** on *State v Saidu Khan* AIR 1951 All 21 (FB) .

21 *Altaf Hussain Shah v Emperor* AIR 1933 Lah 311, 35 Cr LJ 605 .

22 *Jagga Singh v State of Punjab* 2011 Cr LJ 1457, AIR 2011 SC 960 .

23 *Mathai v State of Kerala* 2005 Cr LJ 898, p 900 (SC), AIR 2005 SC 710, (2005) 3 SCC 260, 2005 (1) Scale 293 .

24 *Shaikh Karimullah v State of AP* 2009 Cr LJ 1551, p 1552 (SC), AIR 2009 S 1711, 2009 (2) Scale 254 .

25 *Swapan Kumar Senapati v State of West Bengal* 2011 Cr LJ 2631 (SC), 2011 AIR SCW 2316, (2011) 15 SCC 189 .

26 *Tarsem Singh and Ors v State of Punjab* 2002 Cr LJ 1021 (SC) .

27 *Madhukar Awadhutroa Taide v State of Maharashtra* 1996 Cr LJ 4025 (Bom) .

28 *Upparapalli Tirumala Rao v State of Andhra Pradesh* 2004 Cr LJ 4514 (AP) .

29 *State of Karnataka v Parashram Kallappa Ghevade* 2007 Cr LJ 479 (Kant) (DB), 2006 (5) Kant LJ 522 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 326.

Voluntarily causing grievous hurt by dangerous weapons or means.--

Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with [30][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.2840

Comments

1. Scope

This section closely corresponds to s 324, IPC, the only difference between the two being that while s 324 relates to simple hurt, this section relates to grievous hurt. The offences under this section and s 324 are only aggravated forms of the offences under ss 325 and 323, IPC, respectively. This section applies only to a person who does a substantive act, causing grievous hurt, as defined in s 320, IPC, by some dangerous weapon or means.[31]

Section 325, IPC is an exception to this section also.

Since this section closely corresponds to s 324, IPC, the commentary under that section may be read as the commentary under this section also, and what follows may be read as supplementing that commentary.

2. Essential Ingredients

For commission of an offence under s 326, IPC, the essential ingredient is that the grievous hurt must be caused by means of an instrument of cutting, stabbing, shooting, *etc*.[32] The heading of the section provides some insight into the factors to be considered. The essential ingredients to attract s 326 are: (1) voluntarily causing a hurt; (2) hurt caused must be a grievous hurt; and (3) the grievous hurt must have been caused by dangerous weapons or means.[33]

3. Applicability of Section 34 to Section 326

To apply s 34, IPC, apart from the fact that there should be two or more accused, two factors must be established (i) common intention; and (ii) participation of the accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, s 34 will be attracted as it essentially involves vicarious liability, but if participation of the accused in the crime is proved and common intention is absent, s 34 cannot be invoked. In every case it is not possible to have direct evidence of common intention. It has to be inferred from the facts and circumstances of each case.[34]2841

The accused caught hold of the victim while the co-accused inflicted knife blow on the victim. The accused could be said to have shared common intention of causing grievous hurt to the victim and their conviction under ss 326 / 34, IPC, was held proper.[35]

Where the accused, though he went with the two other offenders, did not, at all, participate in the assault on the deceased, but, on the other hand, threw brickbats on somebody else and was not even armed with a stick, which was the weapon, with which the deceased was assaulted, it was held that his conviction under ss 326 / 34 was proper.[36] Where grievous hurt has been caused by a particular accused, but not in furtherance of the common intention of all the accused, the other accused cannot be held guilty under s 326 read with s 34, IPC .[37]

If it is proved that the accused armed with a deadly weapon, gave an order to other persons armed with deadly weapons, to assault the complainant, the accused can be convicted under s 326 read with s 34, even if the original charge is under s 326 read with s 149, IPC .[38]

For further commentary, text under s 34, *ante*, vol 1, may be referred to.

4. Applicability of Section 149 to Section 326

Where, in a free fight, the accused are not found to be the aggressors, though the prosecution side might get the worse of it after the fight was started, no case against them under ss 147, 148 or 149, IPC can be maintained, and it is for the prosecution to prove the individual assaults.[39] In *Ram Prasad Singh v Emperor* ,[40] it was held that if a member of an unlawful assembly is to be found constructively guilty of an offence, it must be the same offence of which the principal is guilty, and not some other offence. Once an assembly becomes unlawful, all things, done in the prosecution of the common unlawful object of that assembly, are chargeable against every member thereof. The liability of every member extends not only to the acts intended by all to be done, but also to those offences which were likely to be committed in achieving the common object.[41] It has to be determined, with reference to the facts of a case, as to what offence the members must have known to be likely to be committed. If such offence is a minor offence, then they should be convicted accordingly.[42] As long ago as 1894, it was pointed out, in *Jahiruddin v Empress* ,[43] that members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and that the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not2842 only according to information at command, but also according to the extent to which he shares the community of object, and, as a consequence of this, the effect of s 149 of the IPC may be different on different members of the same unlawful assembly. Therefore, a conviction for an offence under s 326 read with s 149, may be recorded against the members of an unlawful assembly even if it be established that the offence of murder was committed only by a member of that assembly.[44]

Where grievous hurt has been caused by a particular accused, but not in prosecution of the common object of the unlawful assembly, the other accused cannot be held guilty of an offence under s 326 read with s 149, IPC .[45] Where the three accused were armed with *jellis* and there was nothing to rule out that each of them gave one blow, it was held that even assuming that one of the accused did not cause any injury, that fact alone could not exculpate him.[46] In *MuthaNaicker v State of Tamil Nadu* ,[47] it was held that when some of the accused, charged under ss 326 / 149 have been acquitted, it would not only be unfair, but also self contradictory, to sustain the conviction of the remaining accused under ss 326 / 149, IPC .

5. 'Voluntarily Causes Grievous Hurt'

To constitute an offence under this section, the act of the offender must have been done voluntarily.[48] Even if death ensues, the offender can be held guilty only under this section unless his intention or knowledge is proved to be such as is required by s 300, or even by s 299,[49] and the injury inflicted is the direct cause of death.[50] Reading s 321 with s 322, it is obvious that the guilt of an accused person remains just the same, whether in seeking to inflict simple or grievous hurt, as the case may be, upon one person, he actually causes the intended hurt to that person or to some other.[51]

6. 'Any Instrument which used as a Weapon of Offence, is Likely to Cause Death'

A perusal of s 326, IPC, would show that a stone would only fall within its ambit if it is of a size and weight that if 'used as a weapon of offence, is likely to cause death'. When stones used were not as big and heavy as were likely to cause death, the conviction of the accused under s 326 is not proper.[52]

An offence of grievous hurt stipulated in s 326, IPC would be made out if grievous hurt is caused by 'any instrument which used as a weapon of offence, is likely to cause death'. The stick would fall within the ambit of the said expression under s 326 .[53]2843

7. Dangerous Weapon

Whether a particular article can *per se* cause any serious wound or grievous hurt or injury has to be determined factually. It would be relevant to note that in some provisions *e.g.*, ss 324 and 326, IPC, expression 'dangerous weapon' is used. In some other more serious offences the expression used is 'deadly weapon' (*e.g.*, ss 397 and 398). The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on the question whether the weapon was a dangerous or deadly weapon. That would determine whether in the case s 325 or s 326 would be applicable. It is not that in every case a stone would constitute a dangerous weapon. It would depend upon the facts of the case.[54]

8. Stone

It is not that in every case a stone would constitute a dangerous weapon. It would depend upon the facts of the case. In view of the size of the stone used as weapon of assault, it could not be said that a dangerous weapon was used, hence, the conviction of the accused under s 326, IPC was altered to one under s 325, IPC .[55]

9. Identity of Accused

As a matter of fact, in case of known persons the existence of light is not essential for their recognition.[56] Known persons can be recognised by their gait, timbre of their voice, *etc.*[57] When the accused was the husband of one of the victims and his name was disclosed to the police immediately after the occurrence, the identity of the accused cannot be mistaken by the victims.[58]

10. Procedure

An offence under this section is cognizable, non-bailable, non-compoundable, and can be tried by a magistrate of the first class.

Offence under s 326, IPC is non-compoundable, the Court would not grant permission to compound the offence.[59]

11. Reference of Case to the Lok Adalat--Permissibility

Sub-section (5) of s 19 of Ch 6 of the Legal Services Authorities Act 1987 reads as follows:

> ...
>
> (5) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of--
>
> (i) any case pending before; or
> (ii) any matter which is falling within the jurisdiction of and is not brought before, any court for which the Lok Adalat is organised:2844
>
> *Provided* that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

Merely because the police may invoke a particular section which may appear to be non-compoundable, that *ipso facto* will not bar the jurisdiction of the lok adalat provided the following factors are prevalent. Firstly, if on an examination of the material, *i.e.*, the evidence and in particular the injuries, it clearly emerges that had a court even come to the conclusion that the accused was guilty, that the conviction would only be under a lesser offence as for instance where the chargesheet may invoke s 326, IPC, but the statements and the medical certificates only make out a charge under s 323 or s 324 ; the reference to the lok adalat would not be bad in such a situation. In many instances, where there is suspicion that the injury is more serious than it actually was, such as to where there is suspicion that a fracture has occurred and s 326 or s 307, IPC is originally invoked, which on a subsequent examination of the material before the court is wholly unjustified.

The legislature has intended through this enactment to put an end to a large number of disputes wherein cases are pending before the courts and where in the general and social interest a compromise is far more desirable. If the authority is satisfied that the parties have willingly compromised the dispute, the enactment provides for a closure of the proceedings, and that laudable objective should not be frustrated merely on technical grounds that the chargesheet may mention a section that is not compoundable. A careful examination of the record must be undertaken, and the order must clearly specify that the charge could only be under a section that is compoundable, but this does not mean that if the material discloses a non-compoundable offence, that the authority would still be entitled to entertain the dispute.[60]

12. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the...day of..., at..., you voluntarily caused grievous hurt to AB by means of exhibit, which is an instrument for shooting (or stabbing, etc, as the case may be), and thereby committed an offence, punishable under s 326 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

The charge under this section should mention the particular kind of weapon used for causing the hurt. Merely saying, that a dangerous weapon was used, is incorrect.[61]

Omission to mention s 149, IPC, in the charge is only an irregularity curable under s 215 and s 465 (1) of the CrPC, unless the accused has been prejudiced.[62]

Similarly, where a charge has been framed under ss 326 and 149, IPC, a conviction under s 326 alone is not necessarily bad when the accused has not been materially prejudiced by the form of the charge.[63]

However, when the victim had sustained firearm injuries on the neck and during his treatment a projectile/pellet of a bullet was extracted from the chest wall of the2845 victim, the *prima facie* offence under s 307 was made out. The framing of charge and taking cognizance of the offence by the magistrate under s 326 instead of s 307 is not proper inspite of the fact that then public prosecutor at the times of disposal of bail application had conceded that there was no material for an offence under s 307, IPC, which is exclusively triable by the court of session.[64] Whether the accused has committed offence punishable under s 326 or under s 307 of IPC are matters to be considered at the time of trial and not at the stage of framing of charges. Therefore, framing of charge for an offence under s 307, IPC is proper.[65]

13. Plea of Guilty

Conviction based on a plea of guilty is not sustainable when the question put by the magistrate, is found to be illegal.[66]

14. Proof

To establish an offence under this section, the prosecution must prove that:

(1) the accused voluntarily caused grievous hurt to some person; and
(2) it was caused by one of the means mentioned in the section.

Merely because the accused did not try to abscond immediately after the incident cannot establish that he was not guilty of the offence.[67]

In cases where there is admittedly enmity and when, in an occurrence, persons, belonging to the prosecution as well as the accused, are injured, it is necessary to look into the facts that have been proved, rather than accept the testimony of the witnesses at their face value.[68] Mere non- examination of investigating officer is not a prejudice to defence.[69] In the case of *Sarat Chandra Naik v State of Orissa* ,[70]

the Orissa High Court has held that in the absence of proof of X-Ray report, it is not proper to warrant a conviction for grievous hurt.

Where the accused appellant was convicted for having assaulted a police constable on duty with brick and caused injuries to him, the incident was 26 years old, the accused was now aged 74 years, the jail sentence of two years awarded to the accused was substituted by a fine of Rs. 8000/-.[71]

Non-production of the X-ray report and non-examination of the doctors who took the X-ray are sufficient to deduce that criminal liability either under s 325 or 326, IPC, is not established.[72]

It is imperative on the part of the trial Court to appreciate the evidence in proper prospective which would prove the prosecution case against the accused beyond reasonable doubt.[73] A close relative of the victim cannot be branded as interested witness.[74]2846

15. Putting Contradiction/Suggestion to the Witness

By putting suggestions to the witness and the witness denying the same will not amount to putting contradiction to the witness. The contradiction has to be put to the witness as contemplated under s 145 of the Evidence Act . If a contradiction is put to the witness and it is denied by him, then his attention has to be drawn to the statement made by such witness before the police or any other previous statement, and he must be given a reasonable opportunity to explain as to why such contradiction appears and he may give any answer if the statement made by him is shown to him and if he confronted with such a statement, and thereafter, the said contradiction must be proved through the investigation officer. Then only it amounts to putting the contradiction to the witness and getting it proved through the investigation officer.[75]

16. Private Defence

Under s 106 of the Evidence Act, a court is bound to presume absence of circumstances which fall within the exclusive knowledge of any person. Under s 105 of Evidence Act the burden of proving the general exception of private defence under ss 96 to 106 of the Evidence Act falls squarely on the shoulders of the accused. All courts shall presume the absence of such circumstances. The expression 'shall presume' is defined under s 4 of the Evidence Act . It is, of course, trite that the burden on an accused raising the plea of private defence is not as heavy or onerous as an initial paramount burden resting on the shoulders of the prosecution. At least by the inferior standards applicable to an accused facing a criminal trial, the burden under s 105 of the Evidence Act has to be discharged by the accused. The slender and feeble attempt to claim the right of private defence cannot succeed in generating any reasonable doubts in the mind of the court.[76] Where the accused on hearing his widowed sister-in-law's cry for help rushed to her house with a *gandasa* and found the injured grappling with her and trying to outrage her modesty, the accused saved his sister-in-law from the clutches of the injured and inflicted *gandasa*blow while the injured was running away, the act of the accused can be said to be in exercise of his right of private defence under s 100, IPC . Likewise, the accused was found entitled to be acquitted.[77]

The accused being the co-owner and possessor of land where the occurrence took place, is entitled to protection of right of private defence of property under s 104 .[78] However, when the accused persons are aggressors and came to the place of incident armed with deadly weapons, they cannot claim the right of private defence.[79]

17. Acquittal

An order convicting the accused alone under s 326, IPC on the ground that the injury in question was corresponding to the statement of one witness while rejecting the same evidence in relation to all other co-accused is not proper, moreso, when the2847 evidence of the doctor was that the injuries in question could have been caused by a weapon other than the seized weapon. So, the accused was entitled to acquittal.[80] The accused persons were alleged to have thrown acid on the complainant who was sleeping in the ward of the hospital. The testimony of the eyewitness and injured witness suffered from material

discrepancies and their statements that they saw and identified the miscreants and disclosed their names did not corroborate with the evidence of the independent witness, there was delay in recording the FIR and sending it to the magistrate. The possibility of false implication of the accused persons on account of previous enmity would not be ruled out, so conviction of the accused persons was set aside.[81] The accused persons armed with *kirpans* and *dang* were alleged to have inflicted injuries on the person of the victim on account of a land dispute. The investigation of the case was bound to be biased and partial. The eyewitnesses had not given a correct account of the incident. The prosecution had not presented the true version and thereby suppressed the genesis and origin of the occurrence. The accused persons were found entitled to the benefit of the doubt and were acquitted of the charge under s 326, IPC .[82] Where the delay in recording the FIR was not properly explained by the prosecution who were liable to adverse inference, the injuries sustained by the accused were not explained by the prosecution, only interested witnesses were examined by the prosecution and no effort was made to examine independent witnesses, the conviction of the accused under s 326 was reversed to an acquittal.[83] Where most of the accused persons were acquitted by the High Court, the evidence of the prosecution witness including eyewitness was not reliable, the evidence of the witness examined to corroborate the testimony of the main witnesses be relied as a witness of truth, the prosecution failed to establish that the accused persons in questions attacked the deceased, the conviction of these accused under s 326 was therefore, set aside.[84]

The mere fact that the assault was made with a knife in the abdomen of the victim, does not establish an offence under s 26 unless, from the medical report, it is clearly made out that the injury caused was on a vital part of the body, was grievous in nature and likely to cause death.[85]

If the victim has sustained no grievous injury, nor any serious injury on any vital part of his body, no conviction under this section can be passed.[86]

18. Probation

By a cursory look at the provision of s 4(1) of the Probation of Offenders Act (20 of 1958), it is clear that when a person is guilty of an offence punishable with death or imprisonment for life, the section has got no application at all. As the punishment prescribed for the offence under s 326 is imprisonment for life or imprisonment for 10 years and fine, the benefit of probation under s 4(1) of the said Act cannot be extended to the accused convicted under s 326, IPC .[87] Where the accused was a2848 young man and 17 years have elapsed after commission of the offence under s 326 but keeping in view the manner in which the deceased was killed, and the deceased's wife being a young woman was left without a husband, the benefit of probation under s 360, CrPC, was declined.[88]

19. Conviction

The accused was alleged to have attacked his sister-in-law with a iron rod in a fit of anger. The evidence of the injured was found trustworthy and nothing was elicited in cross-examination to discredit the same. The evidence of ocular witnesses was affirmed by medical evidence. The conviction of the accused under s 326 was found proper.[89] Where the appellant accused had caused grievous hurt by sharp edged weapon and the deceased died in hospital after 24 days, he was convicted under s 326, IPC .[90]

The ferocity with which all the accused chased and attacked the victim and grievously injured the victim, clearly made out a case for the offence under s 326, as the victim had a fracture and was bed-ridden for 15 days at the hospital.[91] The eyewitnesses and medical evidence supported the prosecution version of the injury, not sending of the sword for chemical examination was of no consequence when the charge was amply proved. The conviction of the accused under s 326, IPC, was found proper.[92]

20. Conviction Both Under Sections 307 And 326 Improper

Where an accused shoots one with a pistol, and thereby caused hurt to him, he is liable to conviction under the latter part of s 307 ; his conviction under s 326 for the same offence is not warranted.[93]

Commentary under the heading 'Accused convicted under Section 307 cannot be convicted and sentenced under Section 326 ' in s 307, *ante*, may be referred to.

21. Conviction of some accused under Section 326 and other under Different Section(S)

When the accused persons act individually in the fight and ss 34 and 149 are not attracted, they are liable for their own acts. Thus, where the deceased party tried to enter into possession of land occupied by the accused persons, forcibly, the accused who caused death was held to have exceeded his right of private defence and held liable under s 304, Pt I, while the other accused who caused grievous injury with a spear to an armed member of the deceased party was convicted under s 326, IPC .[94]

Where the members of an unlawful assembly, animated with the common object of causing grievous hurt, cause death and it is found that one of them was immediately2849 responsible for one of the deaths caused, that member is guilty of the offence of rioting under s 147, and of culpable homicide under s 304, and the rest are guilty of rioting and causing grievous hurt under s 325 read with s 149, IPC .[1]

The accused who inflicted knife injuries on the deceased and stabbed him to death was guilty under s 302 and the other accused who only caught hold of the hands of the deceased and there was nothing on record to suggest or prove their intention or knowledge to kill were found guilty under ss 326, 323 read with s 34, IPC .[2]

The two injured persons were going to Courts by tempo, the appellant accused persons emerged on the road, stopped the tempo and inflicted a number of injuries with sharp edged weapons and blunt weapons like hockey sticks. They were mercilessly beaten and attack was so severe that all the other passengers sitting on the tempo ran away from the spot and none came forward to save the injured. The injuries caused were dangerous to life. Persons who have suffered injuries would not shield the actual culprit and implicate an innocent person when false implication is pleaded. The testimony of eye-witnesses was found reliable. The conviction of the appellants under ss 307, 326 / 34, IPC was held proper.[3]

Where only accused A2 gave fatal blow, and other accused A2, A3 and A5 had not caused any injury but had carried deadly weapons, the knowledge that grievous injury may be caused can be attributed to them. Accused A2, A3 and A5, could not be convicted under ss 302 / 149, IPC but were convicted under s 326 read with s 149, IPC .[4]

Evidence of reliable eye-witnesses proved assault by the accused persons on the deceased causing injuries. Accused was also named in dying declaration of the deceased. The medical evidence did not show that the deceased eventually died on account of the injuries, the accused were acquitted of the charge under s 302, IPC, but were convicted under ss 326 and 324, IPC .[5]

22. Conviction under Section 326 Based on Doctrine of Transfer of Malice

See text under the same heading in s 301, *ante*.

23. Compounding Mitigates the Offence

An offence which the law declares to be non-compoundable even with the permission of the court cannot be compounded at all. The offence under s 326 is not compoundable under s 320, CrPC . So the court cannot permit the composition of this offence.[6]2850

Though an offence under this section is non-compoundable, the fact of compromise between the injured and the accused was taken into consideration by the Supreme Court in reducing the sentence of four years rigorous imprisonment to the period of four months already undergone.[7]

Similarly, some other cases where due to settlement between victims and the accused a lenient view was taken by the Supreme Court and the sentence of imprisonment was reduced to the period of 6 months,[8] 3 months,[9] several months[10] the accused had already undergone.

Where the accused had reached the age of about 60 years, and 16 years had passed since the date of offence, the dispute amongst the parties had been amicably settled, the sentence of imprisonment of the accused was reduced to the period already undergone and a fine of Rs 5000 was also imposed.[11]

24. Sentence

The section makes grievous hurt more grave and liable to more severe punishment which may extend to imprisonment for life. The important points to be considered in the matter of sentence would be the nature of injury, the weapon used and the part of the body on which the injury was caused.[12] Lapse of a long period between the date of commencement of the trial and the hearing of the appeal is a factor, which in the context of a particular case, may, in conjunction with other circumstances, justify the reduction of sentence. However, this is not an absolute rule justifying interference with the discretion of the trial court in the matter of sentence in every case.[13]

Where the accused inflicted a solitary blow with a sharp-edged weapon on the neck of the victim, the conviction of the accused was altered from s 302 to s 326 and his sentence was modified from life imprisonment to 5 years imprisonment.[14] Where in a sudden quarrel, only one blow was inflicted by the accused, the sentence of ten years was altered to that of two years and fine of Rs 5,000/-.[15] Where the accused threw acid on the face and body of the injured thereby not only causing grievous injuries, but also destroying one of his eyes, the incident occured nineteen years back and the accused was 48 years of age at the relevant time, considering the old age of the accused, sentence of 3 years imprisonment was reduced to period of one year.[16]

25. Reduction in Sentence

Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter-productive in the long run and against the interest of the society. As the accused had inflicted simple and grievous injuries on the complainant, the High Court merely on the ground of lapse of time was not justified in reducing the sentence to the period already undergone.[17]2851

Incident occurred in spur of moment and the accused and members of prosecution party were close relatives, the sentence of 5 years imprisonment reduced to 2 years.[18] Where the occurrence took place prior to 19 years and the accused had remained in jail for about 10 months as under-trial convict, the accused was sentenced to the period already undergone.[19] Although the sentence of three and a half years awarded to them was reasonable, but in view of the fact that all the accused persons were young within the age group of 23-25 years and 14 years had lapsed from the date of incident, their sentence was reduced to the period already undergone.[20] The incident occurred 22 years before and there was no indulgence of accused persons, who assaulted the victim with *barchhi* and *lathis*, in any criminal activity during this span, the accused armed with the *barchhi* was sentenced to two years rigorous imprisonment under s 326 and one years rigorous imprisonment under s 324 with set off of the period of imprisonment already undergone and fine, the accused persons who were armed with *lathis* were sentenced to the period of imprisonment already undergone by them plus a fine.[21] The incident took place 16 years ago when the accused inflicted a solitary sword blow on the head of the victim causing grievous hurt, the accused remained in jail for nearly 2 months, the sentence of imprisonment of the accused was reduced from 3 years rigorous imprisonment to one year rigorous imprisonment.[22] The accused persons were college students when the offence under ss 326 / 34, IPC, was committed. They had undergone the ordeal of a trial for 15 years. The case was found fit to reduce the sentence to the period of imprisonment already undergone by the accused persons.[23] The incident took place 11 years back, the sentence of imprisonment of the accused was converted to fine of Rs 50,000 to be paid to the victim and in default of payment of fine the sentence of imprisonment of 3 years awarded by the trial court was directed to be implemented.[24]

The incident took place 17 years ago so considering long pendency of trial, the sentence of imprisonment was reduced to the period already undergone and sentence of fine was confirmed and the accused was directed to pay Rs 10000 as compensation to the injured.[25] Where the incident took place 6 years ago and the accused persons were not habitual criminals or previous convicts, the sentence of imprisonment of the accused persons was reduced to the period already undergone with fine of Rs 5,000 each.[26] However, the Apex Court has taken a contrary view which is not in consonance with the foregoing decisions of the different High Courts. The Supreme Court held that merely because the occurrence took place sometime back, the same cannot be affected to reduce the sentences.[27]2852

Where the role attributed to the appellant accused was of catching hold of the injured victim, and more than three decades had elapsed from the date of the incident, sentence awarded under ss 326 / 34, IPC was reduced to the period already undergone.[28]

In *Kalu v State* ,[29] the accused, who was a young lad of only 18 years at the time of commission of the offence, was found to be a junior member of the family and acting under the influence of the senior member of the family. It was held that he deserved to be treated leniently in the matter of sentence and an imprisonment for one year was considered sufficient under this section read with s 34 .

The accused had thrown acid on complainant tenant while the latter was sleeping inside the house, had caused acid burn injuries to the complainant. He had acted under the influence of his father. The incident was 30 years old and after being released in 2006 on bail, it was considered not proper to send the accused back to jail, more particularly, because nothing was stated against him regarding his indulgence in any criminal activity. The sentence was reduced to the period already undergone.[30]

An offence under s 326, IPC is not compoundable under s 320, CrPC . As ten years had elapsed from the date of occurrence, one year sentence imposed was reduced to the period already undergone. A fine of Rs. 5000/- was imposed on each accused out of which Rs. 4000/- was to be paid as compensation to the injured.[31]

26. Deterrent Punishment

The age of 27 years of the accused cannot be considered as a young age for showing any leniency in the sentence.[32]

Where the accused caused grievous hurt with an axe to a public servant performing his duty, presumably to prevent him from doing it, and the injury eventually resulted in his death, it was held that the case called for a severe sentence, in view of which a sentence of three years rigorous imprisonment was enhanced to seven years rigorous imprisonment. It was also held that the fact that the accused was an unusually excitable and pernicious individual, was not a ground for imposing a lighter sentence in such a case.[33] Deliberately cutting the nose of a woman, simply because she would not live with the accused as his wife, deserves severe punishment, and a sentence of two years rigorous imprisonment was considered very inadequate.[34] In *Zora Singh v Emperor* ,[35] the accused, who fired a shot at point blank range on the upper portion of the thigh of the victim, caused him grievous hurt, as a result of which he died. The accused was found guilty under this section. It was held that the case called for a heavy sentence and was sentenced to transportation (now imprisonment) for life. Where the nature of the injury showed that both the hands of the victim were almost2853 maimed by the shots fired by the appellant, it was held that there could be no room for reducing the sentence of three years imprisonment along with a fine of Rs 600.[36]

27. Enhancement of Sentence

Where the accused had fired several shots on the complainant causing major and minor injuries to him and was sentenced to undergo one year rigorous imprisonment, the High Court in appeal while upholding the conviction reduced the sentence to the period of custodial sentence already undergone and fine was enhanced by it. No reasons were indicated to justify the reduction in sentence, and the accused had undergone only 63 days of custodial sentence. So, the reduction in sentence was not justified by the Apex

Court and the sentence was fixed at eighteen months, taking into the account the enhanced fine which was already deposited.[37]

28. Alteration of Conviction from Section 302 to Section 326

In *Karnail Singh v State of Punjab* ,[38] it was held that because, the two accused assaulted the deceased, and out of the two, one was acquitted of the charge under ss 302 / 34, IPC, the other accused could not be convicted under ss 302 / 34, but since he was armed with a *kripan* and he used that *kripan* in assaulting the accused, he must be taken to have committed an offence only under s 326 as the injury causing the death of the deceased was found dangerous to life.

(a) Where an accused, on grave and sudden provocation, inflicted a wound, with a penknife, in the abdomen of a woman and caused her death, it was held that the first exception to s 300, IPC, applied and would be convicted of the offence under s 326, IPC, because he must be taken to have intended to cause grievous hurt.[39]

(b) Where the accused inflicted with a knife as many as 15 incised injuries, on his wife, one of which was caused to the child, which his wife was carrying at that time, and the injury to the child proved fatal, it was held that the accused could properly be convicted under s 326, and not under s 302, having regard to the facts and circumstances of case.[40]

The accused allegedly dealt a blow to the deceased by means of *katau* on his right leg. The doctor stated that if the best of treatment would have been provided immediately, death might not have occurred. Conviction of the accused was altered from s 302 to s 326, IPC .

The prosecution case was that the accused appellant along with other co-accused assaulted the deceased causing death and inflicted injuries to others. The injured witness deposed before the Court that co-accused inflicted injury by sword on the deceased. The other eye-witness deposed that the appellant had given blow on the belly of the deceased but no injury was found in the belly. The conviction of the accused recorded under s 302, IPC was altered to one under s 326, IPC .[41]2854

Mere fact that no single injury inflicted on the victim is sufficient in the ordinary course of nature to cause the death of the deceased is no ground to convict the accused under s 304, Pt II, or s 326, IPC and not under s 302, IPC .[42]

The appellant and the accused no. 1 had entered the house of the deceased. Accused no. 1 poured a watery substance over her from the pot carried by him on the deceased leading to her death. The deceased had refused sexual favour to them. However, no over act was attributed to the appellant. Held, in absence of any active role played by the appellant or overt act being done by the appellant, it cannot be said with certainty that the appellant had accompanied the accused no. 1 to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under s 302 read with s 34, IPC was not sustained. The appellant was convicted under s 326, IPC and s 304, Pt II, IPC . As the death ensued after twenty six days of the incident as a result of septicemia and not as a consequence of burn injuries, the sentence was reduced to the period already undergone.[43]

The accused appellant attacked the deceased with sickle and had caused several injuries, the deceased died next day in the hospital. The deceased had a serious heart problem which was a matter not within the appellant's knowledge and on the contrary, the medical evidence revealed that he had undergone an angioplasty but had nevertheless suffered heart attack thereafter. The doctors had not opined that the death was caused due to the injuries caused by the appellant. There was also no evidence to show that the injuries could have independently caused the death of the deceased even if the deceased had not been suffering from a heart problem. The conviction of the appellant accused under s 302, IPC was altered to one under s 326, IPC .[44]

For further commentary, the same heading in s 302, *ante*, may be referred to.

29. Alteration of Conviction from Section 304, Part II to Section 326

Where the accused, who had no right of private defense to cause the death of the deceased, who, with his son, was the aggressor and made an attack on the accused, was found to have no knowledge that the wound he was inflicting was likely to cause the death of the deceased, it was held that he was guilty of the offence under this section, and not under s 304, IPC .

For further commentary, the same heading in s 304, *ante*, may be referred to.

30. Alteration of Conviction from Section 326 to Section 304, Part II

Commentary under the same heading in s 304, *ante*, may be referred to.

31. Alteration of Conviction from Section 307 to Section 326

Causing grievous hurt with a cutting instrument, though with the intention of causing death, but not actually resulting in death, would be an offence under this section, and not under s 307 .[45]2855

The essential ingredients of an offence punishable under s 307 underlines the fact that the act of assault committed should be capable of causing death. If in the case of an assault, only injuries are caused and the injuries caused are not dangerous to life, and cannot have effect of causing death, there cannot be a conviction under s 307 in such a situation. Necessarily, the conviction has to be only under ss 326, 324 or 323, IPC, as the case may be.[46] When the accused caused a fracture to the rib of the victim, the conviction of the accused was altered from s 307 to s 326, IPC .[47] Merely by keeping bow and arrows does not prove the intention of the accused person that by causing injuries to the complainant they had the intention of causing death of him. So, the charge under s 307 cannot be proved against the accused persons. They can be held guilty for causing grievous hurt to complainant under s 326 .[48]

The doctor examined in the case had not categorically deposed that the knife injury caused to the victim by the appellant no. 2 was dangerous to life, the conviction of the appellant no. 2 under s 307, IPC was altered to one under s 326, IPC . Sentence imposed was reduced to the period already undergone.[49]

There was no allegation that the accused wanted to kill or eliminate the victim. None of the injuries inflicted on the victim was on the vital part of the victim, and there was no enmity between the parties, thus, conviction of the accused recorded under s 307, IPC was altered into one under s 326, IPC .[50]

For further commentary, the same heading in s 307, *ante*, may be referred to.

32. Alteration of Conviction from Section 326 to Section 324

Commentary under the same heading in s 324, *ante*.

33. Alteration of Conviction from Section 326 to Section 325

There was no evidence to indicate that the stones used for causing injuries were so big and heavy that they were likely to cause death, the conviction of the accused was altered from s 326 to s 325 .[51]

Causing grievous hurt with a cutting instrument, though with the intention of causing death, but not actually resulting in death, would be an offence under this section and not under s 307 .[52]

For further commentary, the same heading in s 325, *ante*, may be referred to.

34. Alteration of Conviction from Section 326 to Section 352

Where the initial purpose of unlawful assembly of the accused persons was to assault the victim, and some of the accused went inside the house of the victim and others remained outside, the subsequent change of common object of some of the members2856 of the assembly who entered the house of the victim and caused him grievous injuries cannot make the other accused members of the assembly equally guilty who remained outside the house, so the conviction of the accused who remained outside the house of the victim was converted from ss 326 / 149 to ss 352 / 149, IPC .[53]

35. Alteration of Conviction from Section 397 to Section 326

Where a charge under s 397, IPC, is not proved, the accused can be convicted of an offence under s 326 if the offence under this section is proved.[54]

30 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation for life' (wef 1-1-1956).

31 Re *Ram Sarup Rai* 6 CWN 98.

32 *Amir Hassain alias Ali v State of Tripura* 1998 Cr LJ 4315 (Gau)*; Santosh Kumar Shukla v State of UP* 2014 (137) AIC 307 (All) .

33 *Mathai v State of Kerala* 2005 Cr LJ 898 (SC), AIR 2005 SC 710, (2005) 3 SCC 260, 2005 (1) Scale 293 .

34 *Jai Bhagwan and Ors v State of Haryana* 1999 Cr LJ 1634 (SC) .

35 *Tirthi Lal and Ors v State of Punjab* 1994 Cr LJ 2356 (P&H) .

36 *State of Maharashtra v Kalu Shivram Jagtap* 1980 Cr LJ 570, AIR 1980 SC 898 ; *Hammu v State of Madhya Pradesh* AIR 1979 SC 1755 ; *Md Isak v State of Maharashtra* AIR 1979 SC 1434 .

37 *Ram Rattan v State of Uttar Pradesh* 1977 Cr LJ 433, AIR 1977 SC 619 .

38 *Bhondu Das v Emperor* AIR 1929 Pat 11, p 13, 30 Cr LJ 205 ; *Government of Bengal v Mahaddin* ILR 5 Cal 871 ; *Abhiram Jha v Emperor* 15 CWN 224 ; *Empress v Ramjirav Sivbajirav* (1875) 12 Bom HCR 1 ; *Kripal v State of Uttar Pradesh* AIR 1954 SC 706, 55 Cr LJ 1757 .

39 *Ishwar Singh v State of Uttar Pradesh* AIR 1976 SC 2423, p 2427, 1976 Cr LJ 1883 .

40 *Ram Prasad Singh v Emperor* AIR 1923 Pat 50, p 53, 24 Cr LJ 65 .

41 *Rahmam Samail v Emperor* AIR 1939 Lah 245, p 251, 40 Cr LJ 712 ; *Emperor v Ramji Lal Budha* AIR 1941 Lah 117, 42 Cr LJ 475 ; *Parmeshwar Din v Emperor* AIR 1941 Oudh 517, 42 Cr LJ 758 .

42 *Bhagwat Singh v Emperor* AIR 1936 Pat 481, p 484, 37 Cr LJ 630 ; *Sidhu Gope v Emperor* AIR 1946 Pat 84, p 91 ; *Bindeshwari Singh v State* AIR 1958 Pat 12, p 18 .

43 *Jahiruddin v Empress* ILR 22 Cal 306, p 312 .

44 *Shambhu Nath Singh v State of Bihar* AIR 1960 SC 725, p 727, 1960 Cr LJ 1144 ; **overruling***Ram Prasad Singh v Emperor* AIR 1923 Pat 50, 24 Cr LJ 65 .

45 *Kshudiram Majhi v State of West Bengal* 1972 Cr LJ 756, AIR 1972 SC 1221 .

46 *Balwant Singh v State of Haryana* AIR 1972 SC 860, p 863, 1972 Cr LJ 645 .

47 *MuthaNaicker v State of Tamil Nadu* AIR 1978 SC 1647, 1978 Cr LJ 1713 .

48 *Emperor v Khudiram Dass* 7 Cr LJ 362, p 365 .

49 *Zora Singh v Emperor* AIR 1929 Lah 433, 31 Cr LJ 44 ; *Ghulam Muhuy-Ud-Din v Emperor* AIR 1922 Lah 26, 22 Cr LJ 658 ; *Jogi Pershad v Amir Baksh* AIR 1925 Lah 561 ; *Fatteh Khan v Emperor* AIR 1930 Lah 950 ; *Varkey Joseph v State of Kerala* AIR 1990 Ker 301 ; Re *Kottengodam Alaxi*AIR 1939 Mad 269, 40 Cr LJ 308 .

50 *Isher Das v State* AIR 1954 J&K 19, p 21, 55 Cr LJ 505 .

51 *Chhallu v Emperor* AIR 1941 All 288, 42 Cr LJ 621 .

52 *Pandurang Dadu Patil v State of Maharashtra* 1997 Cr LJ 3827 (Bom) (DB) .

53 *Shyamrao Vishnu Patil v State of Maharashtra and Anor* 1998 Cr LJ 3446 (Bom)(DB).

54 *Mathai v State of Kerala* 2005 Cr LJ 898 (SC) .

55 *Mathai v State of Kerala* 2005 Cr LJ 898, p 900 (SC), AIR 2005 SC 710, (2005) 3 SCC 260, 2005 (1) Scale 293 .

56 *Shyamrao Vishnu Patil v State of Maharashtra and Anor* 1998 Cr LJ 3446 (Bom) (DB) .

57 *Kripal Singh v State of Uttar Pradesh* AIR 1965 SC 712, (1965) I Cr LJ 636 .

58 *Syed Shafiq Ahmed v State of Maharashtra* 2002 Cr LJ 1403 (Bom) (DB) .

59 *Kareem v State* 2009 Cr LJ 1236 (Kant) .

60 *State of Karnataka v Gurunath and Anor* 2000 Cr LJ 1192 (All) (DB) .

61 8 WR(Letters) 1.

62 *Madan Mohan Mohapatra v State* AIR 1956 Ori 171, 1956 Cr LJ 1083 .

63 Re *Theethumalai Gounder*AIR 1925 Mad 1, p 6, 25 Cr LJ 1297 (FB) ; *Ghusbux Mahomed Amin Khan v Emperor* AIR 1935 Sind 34, 36 Cr LJ.

64 Re *Thigyal Lakhar*2001 Cr LJ 2662 (Sikkim).

65 *State of Karnataka v K Ganapathi Bhat* 2006 Cr LJ 1834 (Kant) .

66 *Jit Bahadur Chetri v State of Arunachal Pradesh* 1977 Cr LJ 1833 .

67 *Syed Shafiq Ahmed v State of Maharashtra and Ors* 2002 Cr LJ 1403 (Bom) .

68 *Ghunnu v State of Uttar Pradesh* AIR 1980 SC 864, p 865, 1980 ALJ 397 .

69 *Basudev Kar v State of Orissa* 2004 Cr LJ 1572 (Ori) .

70 *Sarat Chandra Naik v State of Orissa* (1975) 41 Cut LT 1392 ; **see also***State of Orissa v Kanhu Mohapatra* 2005 Cr LJ 3361 (Ori) .

71 *Ram Autar v State of MP* 2012 (119) AIC 620 (MP) .

72 *P Johnson and Ors v State of Kerala* 1998 Cr LJ 3651 (Ker) .

73 *Swapan Kumar Naskar v State of West Bengal* (2013) 1 Cal LT 404 (Cal) .

74 *Binod Rai v State of Meghalaya* 2013 Cr LJ 497, 2013 (1) GLT 209 (Gauh) .

75 *Shaik Subhani alias Bombay Subhani and Anor v State of Andhra Pradesh* 2000 Cr LJ 321 (AP) (DB) .

76 *Sreenivasan v State of Kerala* 2006 Cr LJ 1485 (Ker) .

77 *Bhadar Ram v State of Rajasthan* 2000 Cr LJ 1174 (Raj) .

78 *Jai Bhagwan and Ors v State of Haryana* 1999 Cr LJ 1634 (SC) .

79 *Ram Bilas Yadav and Ors v State of Bihar* 2002 Cr LJ 978 (SC) ; *AC Gangadhar v State of Karnataka* 1998 Cr LJ 3602 (SC) .

80 *Mohan S Mane v State of Maharashtra* 2006 Cr LJ 220 (Bom) .

81 *Keshari Singh alias Ramu and Ors v State of Madhya Pradesh* 1999 Cr LJ 2606 (MP) .

82 *Gumam Singh and Ors v State of Punjab* 2001 Cr LJ 561 (P&H) .

83 *P Johnson and Ors v State of Kerala* 1998 Cr LJ 3651 (Ker) .

84 *Malepati Pattabi Narendra v Ghatta Maneni Maruthi Prasad and Ors* 2000 Cr LJ 3449 (SC) .

85 *Devendra Singh v State of Madhya Pradesh* 1980 Cr LR 162 (MP) (notes) .

86 *Kailash Prasad Kanodia v State of Bihar* AIR 1980 SC 106 .

87 *State of Karnataka v A Puttaswamy Gowda and Ors* 1999 Cr LJ 708 (Kant) (DB) ; *Kailashy Dan v State of Rajasthan* 2015 Cr LJ (NOC) 205 (Raj) .

88 *State of Tripura v Swapan Dey* 1997 Cr LJ 2032 (Gau) .

89 *Rajendra v State* 1997 Cr LJ 171 (Mad) ; *Mukhtiara Sotheis v State of Haryana* 1998 Cr LJ 899 (P&H) ; *Lakhiya Devi v Girja Yadav and Ors* 1998 Cr LJ 3605 (SC) ; *Hardev Singh and Ors v State of Rajasthan* 2000 Cr LJ 1900 (Raj) .

90 *Nripen das v State of West Bengal* 2015 Cr LJ 497, p 500, 2015 (3) Crimes 267 (Cal) (DB).

91 *State v Chikkarangaiah and Ors* 2002 Cr LJ 1734 (Kant) .

92 *Nain Singh v State of Rajasthan* 1999 Cr LJ 376 (Raj) .

93 *Nardeo Singh v State* AIR 1953 All 726, p 728, 1953 Cr LJ 1677 ; *Jagadish Medhi v The State of Assam* 2007 Cr LJ 1040 (Gau) .

94 *State of Haryana v Sher Singh and Ors* 2002 Cr LJ 4120 (SC) .

1 *Barkau Singh v Emperor* AIR 1920 Oudh 152, 22 Cr LJ 279 ; *Mohammad v Emperor* AIR 1947 Lah 106, 47 Cr LJ 391 ; *Faiz Bakhsh v Emperor* AIR 1947 Lah 188, 48 Cr LJ 269 .

2 *Ashwani Vashisht and Ors v State of Uttar Pradesh* 2002 Cr LJ 619 (All) (DB) ; *Chain Singh and Ors v State of Madhya Pradesh* 2002 Cr LJ 1870 (MP) (DB) .

3 *Suresh v State of Haryana* 2009 Cr LJ 2985, p 2987 (SC), 2009 AIR SCW 3525, 2009 (4) Scale 22 .

4 *Radha Mohan Singh v State of UP* 2006 Cr LJ 1121, p 1131, AIR 2006 SC 951, (2006) 2 SCC 450, 2006 (1) Scale 369 .

5 *Parr Seenaiah v State of Andhra Pradesh* 2012 Cr LJ 3309, AIR 2012 SC 2875, 2012 AIR SCW 3529, (2012) 6 SCC 800, 2012 (5) Scale 323 .

6 *Ram Lal and Anor v State of J&K* 1999 Cr LJ 1342 (SC) ; *Bankat v State of Maharashtra* 2005 Cr LJ 646 (SC) .

7 *Ram Pujan v State of Uttar Pradesh* AIR 1973 SC 2418, 1973 Cr LJ 1612 .

8 *Ibid*.

9 *Surendra Nafh Mohanty and Anor v State of Orissa* 1999 Cr LJ 3496 (SC), (1999) 5 SCC 238 .

10 *Bankat v State of Maharashtra* 2005 Cr LJ 646 (SC) .

11 *Vankar Jahabhai Shanperbhai v State of Gujarat and Ors* 2001 Cr LJ 1647 (Guj) .

12 *Patel Bechar Narsinh v State of Gujarat* AIR 1970 Guj 186, 1970 Cr LJ 1351 .

13 *Ghisa v State of Uttar Pradesh* AIR 1973 SC 2418, 1973 Cr LJ 1612 .

14 *Ramchandra Ohdar v State of Bihar* 1999 Cr LJ 1449 (SC) .

15 *Padamati Venkata Sundara Rao v State of Andhra Pradesh* 2006 Cr LJ 2168 (AP) .

16 *Basudev Kar v State of Orissa* 2004 Cr LJ 1572 (Ori) .

17 *State of Punjab v Bawa Singh* 2015 Cr LJ 1701, p 1706 (SC), (2015) 3 SCC 441 .

18 *Iqbal Singh v State of Rajasthan* 2004 Cr LJ 4163 (Raj) .

19 *Nand Singh v State of Punjab* 2007 Cr LJ 716 (P&H) .

20 *Joginder Singh and Ors v State of Punjab* 2007 Cr LJ (NOC) 513 (P&H).

21 *Bhaiya Lal and Ors v State of Uttar Pradesh* 2002 Cr LJ 3592 (All) (DB) .

22 *Santokh Singh v State of Rajasthan* 2002 Cr LJ 1410 (Raj) .

23 *Swendra Singh and Ors v State (Delhi Admn)* 2001 Cr LJ 3126 (Del) ; *Suraj Singh and Ors v State* 2000 Cr LJ 1544 (Del) ; *Satnarain v State* 2000 Cr LJ 1018 (Del) .

24 *Nirmada v State* 2000 Cr LJ 2679 (Raj) ; *Tamil Selvene v Union Territory of Pondicherry* 1997 Cr LJ 2094 (Mad) .

25 *Nain Singh v State of Rajasthan*1999 Cr LJ 376 (Raj); *Shyamrao Vishnu Patil v State of Maharashtra and Anor* 1998 Cr LJ 3446 (Bom) (DB) .

26 *Pratap Singh v State of Maharashtra* 1996 Cr LJ 790 (Bom) (DB) ; *Heera Lal Ram Lal Parmar and etc v State of Maharashtra* 1998 Cr LJ 574 (Bom) ; *Hazari Das v State of Bihar* 2013 Cr LJ 3363, 2013 (125) AIC 799 (Pat) (Accused aged 53

years at the time of the incident, sentence reduced to the period already undergone).

27 *Rizan v State of Chhatisgarh* 2003 Cr LJ 1226 (SC) .

28 *Pritam Singh v State* 2010 Cr LJ 1059 (All) .

29 *Kalu v State* AIR 1965 Raj 74, p 78, 1965 1 Cr LJ 478 .

30 *Radhey Shyam v State of UP* 2009 Cr LJ 1107, p 1109 (SC), AIR 2009 SC 1168, (2009) 1 SCC 720 .

31 *Bankat v State of Maharashtra* 2005 Cr LJ 646, 648 (SC), AIR 2005 SC 368, (2005) 1 SCC 343 .

32 *State of Maharashtra v Hindurao Daulu Charapale* 1997 Cr LJ 1649 (Bom) (DB) .

33 Re *Rupa Sonya*AIR 1956 Bom 193, p 195, 1956 Cr LJ 479 .

34 *Empress v Abdul Rahiman* ILR 16 Bom 580 ; *Empress v Bhagwan Chhagan* AIR 1915 Bom 120, 16 Cr LJ 168 ; *Empress v Sulamut Russooa* 4 WR (CR) 17 ; *Ismail Umar v Emperor* AIR 1938 Bom 430, p 431 .

35 *Zora Singh v Emperor* AIR 1929 Lah 433, 31 Cr LJ 44 .

36 *Gurdeep Singh v State of Rajasthan* AIR 1979 SC 1432, p 1433 ; *State v Chirkarangaiah and Ors* 2002 Cr LJ 1734 (Kant) (DB) .

37 *Surjit Singh v Nahara Ram* 2004 Cr LJ 3879 (SC) .

38 *Karnail Singh v State of Punjab* AIR 1977 SC 893, p 894, 1977 Cr LJ 550 .

39 *Alladin v Emperor* AIR 1933 Lah 234 ; *Chilamakur Nagireddy v State of Andhra Pradesh* AIR 1977 SC 1998, p 2000, 1977 Cr LJ 1602, in which the accused was convicted under s 326, IPC, and not under s 302, IPC .

40 Re *Kannan*(1969) 2 MLJ 109.

41 *Jitu v State of MP* 2009 Cr LJ 1884, p 1885 (SC), AIR 2009 SC 1337, 2009 (3) Scale 534 .

42 *Atmaram v State of Madhya Pradesh* 2012 Cr LJ 2882 (SC), AIR 2012 SC 1956 .

43 *Bengali Mandal v State of Bihar* 2010 Cr LJ 1420 (SC), AIR 2010 SC 686, 2010 AIR SCW 877, (2010) 2 SCC 91, 2010 (1) Scale 182 .

44 *Mayandi v State* 2010 Cr LJ 4707 (SC), 2010 AIR SCW 5524, (2010) 11 SCC 774 .

45 *Sutra Oram v State* AIR 1959 Ori 21, p 22, 1959 Cr LJ 213 ; *Lenson Koireng v Manipur Administration* (1963) 2 Cr LJ 592, p 595 .

46 *Baby Kumar alias Janardhana v State of Karnataka* 2003 Cr LJ 1425 (Kant) .

47 *Ibid*.

48 *Jamsingh and Ors v State of Madhya Pradesh* 2007 Cr LJ (NOC) 670 (MP) .

49 *Neelam Bahal v State of Uttarkhand* 2010 Cr LJ 2100, AIR 2010 SC 428, (2010) 2 SCC 229 .

50 *Narayanaswamy v State by Srinivasapura Police* 2011 Cr LJ 239, 2010 (3) KCCR 1958 (Kant) ; *Raghunath v State by Police of Vijayapura Police Station* 2011 Cr LJ 549 (Kant) .

51 *Pandurang Dadu Patil v State of Maharashtra* 1997 Cr LJ 3827 (Bom) (DB) .

52 *Sukra Oram v State* AIR 1959 Ori 21, p 22, 1959 Cr LJ 213 ; *Lenson Koireng v Manipur Administration* (1963) 2 Cr LJ 592, p 595 .

53 *Bhimrao alias Ramesh Pandhari Bhade and Ors v State of Maharashtra* 2003 II AD 418 (SC), 2003 Cr LJ 1204 (SC) .

54 Re *Adabala Muthiyalu*AIR 1914 Mad 425, p 428, 13 Cr LJ 739 ; *Empress v Anga Valayan* ILR 5 Cal 871 ; *Abhiram Jha v Emperor* 15 CWN 224 ; *Empress v Ramjirav Sivbajirav* (1875) 12 Bom HCR 1 ; *Kripal v State of Uttar Pradesh* AIR 1954 SC 706, 55 Cr LJ 1757 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

[55][S. 326A.

Voluntarily causing grievous hurt by use of acid, etc.--

Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.]

Comments

1. Legislative Changes

This section is new, inserted by the Criminal Law (Amendment), 2013 (13 of 2013), with effect from 3 February 2013 on the recommendations of Justice J.S. Verma Committee.

2. Scope

This section is new.

3. Procedure

An offence under this section is cognizable, non-compoundable, non-bailable and triable by the Court of Sessions.

4. Charge

The following form of the charge may be adopted:2857

I,.....(*name and office of Session Judge etc*.) hereby charge you.....(*name etc. of the accused*) hererbelow:

That you, on or about the day of .....at District..... Voluntarily threw acid on the face of A (*name of the victim*),

disfigured her face and thereby committed an offence punishable under Section 326 -A, IPC and within the cognizance of this Court.

And I hereby direct you to be tried by this Court for the said charge.

55 Inserted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 5 (wef 3-2-2013).

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

[56][S. 326B.

Voluntarily throwing or attempting to throw acid.--

Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Explanation 1.--For the purposes of section 326A and this section, "acid" includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability.

Explanation 2.--For the purposes of section 326A and this section, permanent or partial damage or deformity shall not be required to be irreversible.]

Comments

1. Legislative Changes

This section is new, inserted by the Criminal Law (Amendment), 2013 (13 of 2013), with effect from 3 February 2013 on the recommendations of Justice J.S. Verma Committee.

2. Scope

This section is new.

3. Procedure

An offence under this section is cognizable, non-compoundable, non-bailable and triable by the Court of Sessions.

4. Charge

The following form of the charge may be adopted:

> That you, on or about the day of .....at District..... Voluntarily threw (*or attempted to throw*) acid.....on one B (*name of the victim*) with the intention of causing permanent (*or partial damage, or disability*) to her and thereby committed an offence punishable under Section 326 -B IPC and within the cognizance of this Court.
>
> And I hereby direct you to be tried by this Court for the said charge.2858

56 Inserted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 5 (wef 3-2-2013).

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 327.

Voluntarily causing hurt to extort property, or to constrain to an illegal act.--

Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

This section punishes voluntarily causing hurt to extort property or to constrain another to do an illegal act. The simple offence of causing hurt is aggravated by the criminal motive or object of the offender in causing the hurt.

2. 'Voluntarily Causes Hurt'

Commentary under ss 319 and 321, *ante*, may be referred to.

3. 'For the Purpose of Extorting'

For definition of extortion, s 383, vol 4, may be referred to.

4. 'Person Interested in the Sufferer'

To make a person 'interested in the sufferer', any tie of blood relationship, marriage, service, or even friendship seems sufficient. The court must ascertain for what purpose the suffering was caused, whether it was directed wholly at the sufferer or at another through him.[57]

5. 'Any Property'

For the various senses, in which the word property is used, *Bans Gopal Sheo Narain v PK Banerji* may be referred to.[58]

For further commentary, s 22, *ante*, vol 1, may be referred to.

6. Valuable Security

Commentary under the same heading in s 30, *ante*, vol 1, may be referred to.

7. 'Constraining'

The word 'constraint' implies that a person is controlled or obstructed from doing an act which the person wants to do. To 'constrain' means to compel or to confine.2859 Constraining is an alternative to extorting. The section is not confined to causing hurt for the purpose of extorting property, it extends also to causing hurt for the purpose of constraining a person to do an illegal act.

8. 'Illegal'

Commentary under s 43, *ante*, vol 1, may be referred to.

9. 'Offence'

Commentary under s 40, *ante*, vol 1, may be referred to.

10. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

11. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the... day of, at..., you voluntarily caused hurt to *AB* for the purpose of extorting, from the said *AB* (*or from CD who was interested in the said AB*), a certain property (*or valuable security*), to wit (or, for the purpose of constraining *AB* (*or CD who was interested in the said AB*) to do..., which is illegal (*or, which may facilitate the commission of an offence*), and thereby committed an offence, punishable under s 327 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

12. Proof

To establish an offence under this section, the prosecution must prove that:

(1) the accused caused hurt, and
(2) he did so:

(a) to commit extortion, or
(b) to constrain a person to do anything illegal, or
(c) to facilitate the commission of an offence.

57 *Morgan and Macpherson's Indian Penal Code*, p 294.

58 *Bans Gopal Sheo Narain v PK Banerji,* AIR 1949 All 433, p 435-36 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 328.

Causing hurt by means of poison, etc., with intent to commit an offence.--

Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.2860

Comments

1. Scope

This section punishes causing hurt by means of poison, or any stupefying, intoxicating or unwholesome drug, or other thing, with the intent to commit an offence. The offence of administering deleterious drugs, when life is not endangered, is punishable under this section.[59]To administer an innocuous substance, intended to act as a 'charm' is no offence under this section.[60] However, it is otherwise if the 'charm' causes suffering.[61] Where poison is administered but the victims escape death owing to ready help rendered, the question is whether the offence falls under this section or under s 307 . In *Emperor v Israil Mahto* ,[62] the question was raised, but, without deciding it, the High Court convicted the accused under this section on the ground that he was a youth and probably acted under the instigation of another person, who was absconding, and even if he was convicted under s 307, he would not have been sentenced to more than ten years rigorous imprisonment which was the sentence impossible under this section. In *Narayani Dasi v State* ,[63] a lady-accused, on her lover's marriage having been arranged, offered arsenic poison in his food. The lover did not die as the arsenic poison was in small quantity, but he succumbed due to maltreatment. It was held that the proper section, which could be invoked to convict the lady, was s 328, and not s 307, IPC .

2. Essential Ingredients

The following elements are essential to constitute on offence under s 328, IPC :

(i) some person or persons should administer and cause to be taken by any person any poison and stupefying, intoxicating or unwholesome drug, or other thing; and
(ii) the intention of the person or persons mentioned in (i) should be to cause hurt to the person concerned, or should be to commit or to facilitate commission of an offence or there should be knowledge on the part of the person or persons that the result of his act or their act was likely to cause hurt to the concerned persons2861

Both these elements should exist conjunctively, then and then alone would the offence be complete and the person or persons, as the case may be, would be guilty of the offence contained in s 328 .[64]

3. 'Administers to or Causes to be Taken by'

Merely procuring a dangerous drug, at the request of another, is not administering.[65] To constitute administering, or causing to be taken, it is not necessary that there should be a delivery by hand. Where,

therefore, on an indictment for administering poison, it appeared that the prisoner had mixed poison with coffee and told his mistress that the coffee was for her, who then drank some of it, it was held that this was sufficient for the act to fall within the mischief of this section.[66] It has, however, to be proved that the dangerous drug, such as *dhatura* or any other dangerous drug, was actually administered to the victim by producing clear evidence.[67]

It need not be emphasised that administering of poison is only one of the modes by which an act may fall within the mischief contemplated by this section.[68]

4. 'Any Person'

The hurt may be caused to any person, whether known or unknown. In *R v Dhania Daji* ,[69]*A* placed, in his toddy-pots, some juice of the milk bush, knowing that such a substance, if taken, causes injury, with the intention of detecting an unknown thief. Some soldiers drank the toddy, having purchased it from an unknown vendor, and suffered in consequence. *A* was held guilty of an offence under this section.

5. 'Any Poison'

What is made punishable, under this section, is administering to, or causing to be taken by, any person, a poison or other noxious or destructive thing. Where the evidence disclosed that there was a reeling sensation after a person had eaten the curry served by the accused, and had also got a bitter taste of the curry, it was held that this was sufficient to constitute an offence under this section.[70]

Where if the victim was given some stupefying drug though sugar-cane juice before removing her ornaments from her neck, the offence under s 328, IPC, was held made out and the prosecution did not need to prove that any poison was also administered to the victim.[71] Where an accused was charged with the offence of murder by poisoning the deceased with sodium nitrate, the lethal dose of which was about twenty to thirty grains, and only one grain of the poison was detected in the viscera of the deceased, it was held that the accused was guilty under this section.[72] Where the accused poured out of a bottle, a mixture of arsenic poison into a *chatti* of cooked fish and curry, without any knowledge of the real contents of the bottle that it2862 was a deadly poison, with the result, that one of the persons, who ate the curry, died, it was held that the accused could not be convicted of murder, but he was guilty under this section though he was found to have become a tool in another's hand.[73] Where, for the purpose of facilitating a robbery, *dhatura* was administered by two persons to certain travelers, in consequence of which one of the travelers died and others were made seriously ill, it was held that in respect of the traveler, who died, the offence committed was that punishable under s 325, *viz.*, grievous hurt, and in respect of the travelers, who did not die, the offence committed was that defined by this section of the IPC .[74]

The prosecution case was that the accused administered some sedative to the victim to remove his belongings. The medical officer was not examined to state that any poisonous substance was found/detected in the body of the victim. Mere injury report was found not sufficient. The appellant accused was acquitted of the charge under s 228, IPC .[75]

6. 'Any Stupefying, Intoxicating or Unwholesome Drug'

The offence of administering deleterious drugs, when life was not endangered, is punishable under this section.[76] A compounder, dispensing a deleterious substance to his own doctor was held guilty under this section.[77]

So far as applicability of s 328, IPC is concerned, that will attract only after having administration of the drugs, poisonous substance, sedative or other items so identified therein and for that, positive evidence should be on the record to justify administration of any one of the aforesaid items.[78]

7. 'Or other Thing'

The words 'or other thing' in this section, must be referred to the preceding words and be taken to mean unwholesome or other thing, and not any other thing simply. To administer an innocuous substance, intended to act as a charm, is not an offence.[79]

8. 'With Intent to Cause Hurt to such Person'

This section renders punishable anyone who administers, to any person, any poison with an intention to cause hurt to such person.[80] Mere administering of a drug will not be sufficient for a conviction in the absence of intent or knowledge specified in the section.[81] Where the accused without any intention to kill her husband, but only to obtain some kind of domination over him, mixed some minor aconite powder in his evening meal and he died afterwards, it was held that the accused was guilty under this section, and not under s 302 .[82]2863

9. 'Offence'

Commentary under s 40, *ante*, vol 1, may be referred to.

10. 'Knowing it to be Likely that he will Thereby Cause Hurt'

A person of age 16 years, must be presumed to know that *dhatura* is poisonous, and if he causes such a drug to be administered, he must be presumed, at least, to know that it is likely to cause hurt.[83]

11. Procedure

An offence under this section is cognizable, non-bailable, non-compoundable, and exclusively triable by a court of sessions.

12. Charge

The following form of the charge may be adopted:

> I (*name and office of sessions judge, etc*) hereby charge you (*name of accused person*) as follows:
>
> That on or about the ....day of...., at...., you administered, to AB, a certain poison (*or any stupefying thing, etc.*), to wit....(*or caused the same to be taken by AB*), with intent to cause hurt to the said AB or to commit or to facilitate the commission of the offence of....(*or knowing it to be likely that you will thereby cause hurt to the said AB*), and thereby committed an offence, punishable under s 328 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

Where the only link between the accused and the offence of sale of adulterated mustard oil which was poisonous, was the statement of co-accused, the investigation has not procured any evidence to show that the contents of the tin recovered from the co-accused could not have been supplied to him by anyone other than the accused. The label, sticker and the print on the tin recovered from the accused showed that the manufacturer of the oil was Haryana Oil Industries, therefore, the oil recovered from the co-accused

could have been supplied to him by any manufacturer of oil and even if it was the same oil which was produced by Haryana Oil Industries, the same could have been supplied to him directly by Haryana Oil Industries or by any other middle-man, thus the very foundation of the charge against the accused, namely the link of the sale of adulterated/poisonous mustard oil and the accused was missing and the accused cannot be charged for the offence under s 328, IPC .[84]

13. Proof

To establish an offence under this section, the prosecution must prove that:

(1) the accused administered to, or caused to be taken by, any person, a thing;
(2) the said thing was poison, or a stupefying, intoxicating or unwholesome drug, or any other thing; and2864
(3) the accused did so:

(a) intending to cause hurt to the said person, or
(b) knowing it to be likely that he will thereby cause hurt, or
(c) intending to commit, or to facilitate the commission of an offence.

14. Acquittal

Where the accused was found to be in possession of liquor adulterated with a poisonous substance known as methyl alcohol, even though the accused was not a licencee of arack, the offence under s 272, IPC, and s 55(a) of the Abkari Act stood proved, however, in view of important links in prosecution evidence missing, and the act of the accused in adulterating liquor *per se*, as the law then stood sans amendments, would not attract the provision of s 328, IPC, unless there is punitive evidence that the accused administered the poisoned liquor directly or indirectly causing it to be taken by the victim, with the necessary intent and *mens sea*. The accused was acquitted of the charge under s 328, IPC .[85]

Dhahera seeds were found in their hard form in the stomach of the deceased-wife which contradict the theory of seed being administered without being noticed by the deceased. Adverse inference cannot be drawn against the accused who allegedly represented to the doctor, a prosecution witness, that the deceased suffered from hysteria which fact was not established on record. The act of the accused in going to the village of his in-laws to inform in time that the deceased had been taken ill, indicated no ill-intention on his part, the conviction of the accused under ss 328 and 302, IPC, was not found proper.[86]

15. Conviction

The accused offered stupefying drug mixed in *laddus* to the victims which rendered them unconscious, the accused stripped the victims of their belongings and was arrested after being identified by the victims, the conviction of the accused under ss 328 and 379, IPC, was found proper.[87]

The accused was alleged to have offered intoxicating biscuits to the complainant who became unconscious after its consumption. The accused thereafter made off with valuable articles belonging to the complainant and the administered poisonous substance. The testimony of the complainant and the investigating officer were duly corroborated. The accused had the intention to cause death and take away valuable articles of the complainant. The fact that no hurt was actually caused to the complainant is immaterial. The conviction of the accused under ss 328 and 378, IPC, was found proper.[88]

When the evidence of a person working in a medical shop that the accused used to purchase intoxicating

medicine from a shop and he was identified by the victim during the test identification parade, the gold bracelet stolen from the victim was disposed of by the co-accused within a short period after the incident, the presumption would be that the co-accused was one of the persons committing the offence of administering simplifying/intoxicating drugs to passengers in train and2865 then committing theft of their properties, as the discovery of the gold bracelet was made at the instance of the co-accused, the conviction of the accused and the co-accused under ss 328, 379 was found proper.[89]

Where the accused and the the co-accused lady stayed in a hotel room with eight co-pilgrims, the co-pilgrims became unconscious after consuming food prepared by the accused and the co-accused lady, both fled from the spot, on arrest the accused admitted that he stayed in hotel with the co-pilgrims, the victims stated that they were administered with some poisonous substance by serving food, the fact was further corroborated by medical opinion of a pharmacist, the conduct of the accused and the co-accused absconding from the place of incident further corroborated that they administered poisonous food to the co-pilgrims, so, the conviction of the accused was found proper.[90]

16. Accused Charged with Section 304 cannot be convicted under Section 328

The charge under s 304, IPC framed against the accused was with definite allegation of culpable homicide not amounting to murder by reason of administration of drug without taking precaution for reaction therefrom. This is totally different from causing hurt by means of administration of unwholesome drug. On no count a definite charge of culpable homicide can be an error for causing hurt. Going by s 214, CrPC, in every charge words used in describing an offence shall be deemed to have been used in the sense attached to them by law under which such offence is punishable. Therefore, to construe the section relating to culpable homicide as only an error for causing hurt by unwholesome drug will lead to misleading so far as the accused is concerned resulting in failure of justice so far as his opportunity to defend is concerned. Therefore, the accused charged with s 304 cannot be convicted under s 328 .[91] Where the accused appellant in a restaurant had administered some intoxicating substance to the victims and deprived them of golden chain, locket, car key, driving licence and Rs. 3500/- and all these articles were recovered from the possession of the accused persons, their conviction under s 328, IPC was held proper.[92]

17. Sentence

The offence under s 328 of IPC is punishable with imprisonment, which may extend to 10 years with fine. The offence of administering stupefying or intoxicating drug to passengers in train and then committing offence of theft is a serious offence and such criminals do not deserve any leniency. The imprisonment for 4 years for the offence under s 328 of IPC imposed by the trial court was found just and reasonable.[93] Persons guilty of performing depraved acts do not deserve any sympathy. If the sentence of such persons is reduced, it would be case of misplaced sympathy resulting in society losing confidence and faith in the criminal justice delivery system.[94] Thus, when a simple, innocent lady aged 50 years was given some2866 stupefying drug through sugar cane juice and robbed off her ornaments, the court refused to reduce the sentence of 5 years rigorous imprisonment and fine of Rs 500.[1] Similarly, in another case where the accused offered stupefying drug mixed in *ladoos* to three victims and which rendered them unconscious, the accused stripped the victims of their belongings, the court declined to reduce the sentence of 4 years rigorous imprisonmentof the accused despite the fact that the accused had already undergone the period of 2 years and seven months imprisonment.[2]

59 *Empress v Joygopal* 4 (Cr) 4.

60 *R v Jottee Ghoraee* I WR (Cr) 7.

61 Re *Dasi Pitchigadu* 1 Weir 335.

62 *Emperor v Israil Mahto* AIR 1931 Pat 346 .

63 *Narayani Dasi v State* (1969-70) 74 CWN 424.

64 *Madhukar Damu Patil v State of Maharashtra* 1996 Cr LJ 1062 (Bom) ; *Birjo Mahto v State of Bihar* 2015 Cr LJ 930 (Pat) .

65 *R v Fretwell* (1862) L&C 161 .

66 *R v Hurley* (1830) 4 C&P 369 .

67 *Pardesi v State* 1968 AWR 711 (HC) ; *Birjo Mahto v State of Bihar* 2015 Cr LJ 930 (Pat) .

68 1996 Cr LJ 1062 (Bom).

69 *R v Dhania Daji* 5 Bom HC (Cr) C 59.

70 *Sushila Teluni v State* ILR 1959 Cut 682, 25 Cut LT 391 .

71 *Ibid*.

72 Re *Hanumantha Rao*AIR 1957 AP 456, Cr LJ 1930.

73 Re *Vokkaligara Yengtappa*AIR 1952 Mad 535, 53 Cr LJ 1150 .

74 *Emperor v Bhagwan Din* ILR 30 All 568, 8 Cr LJ 383 .

75 *Birjo Mahto v State of Bihar* 2015 Cr LJ 930 (Pat) .

76 *Empress v Joygopal* 4 WR (Cr) 4 .

77 *Dharam Das v State of Uttar Pradesh* 1974 Cr LJ 1249, p 1252 (SC) ; 1974 SCC (Cr) 429 .

78 *Birjo Mahto v State of Bihar* 2015 Cr LJ 930, p 932 (Pat) .

79 *R v Jottee Ghoraee* 1 WR (Cr) 7 .

80 Re *Kuruba Chinna Hanumakka*AIR 1943 Mad 396, p 397, 44 Cr LJ 550 .

81 *Muruga Goundan v Emperor* 15 Cr LJ 599 .

82 *Ibid*.

83 *Anis Beg v Emperor* AIR 1924 All 215, 26 Cr LJ 413 ; *Nanhu v Emperor* AIR 1923 All 608, 24 Cr LJ 937 ; *Gulali v Emperor* ILR 31 All 148 ; *Jeoni v Emperor* AIR 1917 All 455, 17 Cr L] 505 ; *Gouri Shankar v Emperor* AIR 1918 All 283, 19 Cr LJ 382 .

84 *Kailash Chand Gupta v State* 2005 Cr LJ 2846 (Del) .

85 *Jospeh Kurian Philip Jose v State of Kerala* (1994) 6 JT 395 (SC), AIR 1994 SLW 3989 .

86 *Kaushal Prasad v State of Madhya Pradesh* 1996 Cr LJ 2268 (MP) (DB) .

87 *Lachman v State* (1987) 31 DLT 245 (Del) .

88 *Gaya Prasad v State of Uttar Pradesh* 1996 Cr LJ 1599 (All) .

89 *Prabhat Mahadev Naik v State of Maharashtra* 2007 Cr LJ 2569 (Bom) ; **see also**, *Budh Ram v State of Uttaranchal* 2006 Cr LJ 1050 (Uttr) .

90 *Ganga Dass v State of Uttaranchal* 2005 Cr LJ 2365 (Uttr) .

91 *Radha Sasidharan v State of Kerala* 2006 Cr LJ 4702 (Ker) .

92 *Manish Soni v State (Govt of NCT) Delhi* 2013 Cr LJ 1949 (Delhi) .

93 *Prabhat Mahadev Naik v State of Maharashtra* 2007 Cr LJ 2569 (Bom) .

94 *Madherkar Damu Patil v State of Maharashtra* 1996 Cr LJ 1062 (Bom) .

1 *Ibid*.

2 *Lachhman v State* (1987) 31 DLT 245 (Del) .

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Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 329.

Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.--

Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything that is illegal or which may facilitate the commission of an offence, shall be punished with [3][imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

This section is similar to s 327 of IPC except for the difference that hurt caused in the offence under this section is grievous, whereas, only simple hurt is caused in an offence under s 327 . The commentary under that section may, therefore, usefully be read under this section also.

This section will come into play if the act, which the other person is constrained to do, is itself illegal. The illegality appertains to the action that the other person is compelled to take; it does not arise from the means adopted in constraining that person to take the action.[4]

2. 'Voluntarily Causes Grevious Hurt'

Section 329, IPC, deals with grievous hurt caused for the particular purpose, *i.e.*, extortion or other purposes mentioned in the section.[5]

Commentary under ss 320 and 322, *ante*, may be referred to.

3. 'For the Purpose of Extorting'

The words 'for the purpose of extorting' are most important in s 329, IPC and include an attempt to extort also. The provision would be attracted even if extortion is not complete. For definition of extorting, s 383 in vol 4, may be referred to.2867

4. 'Person Interested in the Sufferer'

Commentary under the same heading in s 327, *ante*, may be referred to.

5. 'Any Property'

Commentary under the same heading in s 327, *ante*, may be referred to.

6. 'Valuable Security'

Commentary under s 30, vol 1, may be referred to.

7. 'Constraining'

Commentary under the same heading in s 327, *ante*, may be referred .

8. 'Illegal'

Commentary under the same heading in s 43, vol 1, may be referred to.

9. 'Offence'

The accused persons allegedly wanted to obstruct the complainant from deposing against them in another criminal case. It is clear from the section that whatever be 'an offence' within the meaning of IPC would be covered by it. If a person refuses to take oath or state on affirmation before a court of law, he is liable to be punished under s 178, IPC . If a person refuses to answer questions as a witness in a court of law, he is liable to be punished under s 179, IPC . When the accused persons tried to prevent the complainant from deposing in the case attracting offences under ss 178 and 179, their act is covered under s 329, IPC .[6] For further commentary, s 40, vol 1, may be referred to.

10. Procedure

Commentary under the same heading in s 328, *ante*, may be referred to.

11. Charge

The charge should be in the same form as that under s 327, IPC, except that the expression 'grievous hurt' should be substituted for 'hurt', s 329, IPC should be substituted for s 327, and the expressions 'sessions judge' and 'within the cognizance of this court' should respectively be substituted for 'magistrate' and 'within my cognizance'.

Causing grievous hurt to obstruct a person from deposing in the court amounts to forcing him to commit an illegal act which is an offence under ss 178 and 179, IPC, so the framing of charge against the accused under s 329, IPC is not improper.

12. Proof

The elements which have to be proved for an offence under s 327, IPC, have to be established under this section with the only difference that 'grievous hurt' instead of 'hurt' has to be proved for establishing an offence under this section.[7]2868

Wherein a case of causing grievous hurt and extortion of money, three of the accused persons stabbed the complainant, causing injuries dangerous to life if not treated, the testimony of the complaint was corroborated with the FIR as well as the medical evidence, the accused persons could be said to be acting in concert and in furtherance of their common intention to extort money, the conviction of the accused persons under s 148 and ss 329 / 149 and in the alternative under ss 329 / 34 IPC was held proper.[8]

3 Substituted by Act 26 of 1955, s 117 and Sch for 'transportation for life' (wef 1-1-1956).

4 *Jorubha Anandsang v State* AIR 1951 Sau 40, p 41, 52 Cr LJ 704 .

5 *Ibid*.

6 *Jorubha Anandsang v State* AIR 1951 Sau 40, p 41, 52 Cr LJ 704 .

7 Refer to s 327 .

8 *Virendra Kumar v State of Madhya Pradesh* 1998 Cr LJ 2170 (MP) .

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S. 330.

Voluntarily causing hurt to extort confession, or to compel restoration of property.--

Whoever voluntarily causes hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore, or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Illustrations

(a) *A*, a police officer, tortures *Z* in order to induce *Z* to confess that he committed a crime. *A* is guilty of an offence under this section.
(b) *A*, a police officer, tortures *B* to induce him to point out where certain stolen property is deposited. *A* is guilty of an offence under this section.
(c) *A*, a revenue officer, tortures *Z* in order to compel him to pay certain arrears of revenue due from *Z. A* is guilty of an offence under this section.
(d) *A*, a Zamindar, tortures a ryot in order to compel him to pay his rent. *A* is guilty of an offence under this section.

Comments

1. Scope

This section is similar to s 327, IPC, with the difference that, while that section punished the causing of hurt for the purpose of extorting property or valuable security or constraining one to do anything illegal or to commit or facilitate the commission of an offence, this section deals with the same offence when hurt is

caused for the purpose of extorting a confession, or information, leading to the detection of an offence or misconduct, or for constraining the sufferer or another to restore any property or valuable security, or to satisfy any claim or demand or do2869 anything subservient thereto. The difference between the two sections lies only in the purpose for which the hurt is caused.

To constitute an offence under this section, the hurt must be caused to extort a confession of some offence or misconduct, *etc.*;[9] and whether that offence or misconduct had been committed is wholly immaterial.[10] Where the deceased having been suspected of theft, was beaten by the accused, a police officer, to extort a confession and the beating resulted in the death of the suspect, but there was no intention on the part of the accused to cause death so as to bring the case under s 300, IPC, it was held that the accused was guilty under this section.[11] Where an accused, a police officer, with a view to extort a confession or information, used third-degree methods, as a result of which the suspect died, it was held that the accused was guilty under this section.[12]

2. 'Voluntarily Causes Hurt'

Commentary under ss 319 and 321, *ante*, may be referred to.

3. 'For the Purpose of Extorting'

Commentary under the same heading in s 327, *ante*, may be referred to.

4. 'Person Interested in the Sufferer'

Commentary under the same heading in s 327, *ante*, may be referred to.

5. 'Confession'[13]

It must be proved that the hurt, to the complainant was caused with the intent to extort a confession of some offence or misconduct punishable under the IPC . This section, therefore, does not apply to a case where the confession extorted has reference only to a charge of witchcraft.[14] 'A confession', as stated in *Pakala Narayana Swami*'s case,[15] must either admit, in terms of the offence or, at any rate, substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not, of itself, a confession.

A police officer is under a legal duty to prevent the infliction of torture on those who are in his custody, and his failure to discharge that duty makes him a party to the crime.[16] A policeman, who stands by, acquiescing in an assault on a prisoner, committed by another policeman, for the purpose of extorting a confession or information, leading to the detection of a crime, is, therefore, guilty of the offence punishable under this section.[17]2870

6. 'Offence'

Commentary under s 40, vol 1, may be referred to.

7. 'Constraining'

Commentary under the same heading in s 327, *ante*, may be referred to.

8. 'Restoration'

Voluntarily causing grievous hurt to the complainant to extort a promise from him to restore the woman, whom he was alleged to have abducted, does not fall under this section.[18] There must be immediate connection between the assault and the restoration of the property, that is to say, the intention of the

person causing the assault must be proved to be to obtain from the person assaulted, a confession or the restoration of stolen property, and there must be no reasonable ground for explaining the assault otherwise than upon that foundation.[19]

9. 'Any Property'

Commentary under the same heading in s 327, *ante*, may be referred to.

10. 'Valuable Security'

Commentary under s 30, vol 1, may be referred to.

11. 'Demand'

Demand must be in respect of property.[20]

12. Procedure

An offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

13. Sanction

A case, falling under s 197 of the CrPC, cannot be instituted under this section, unless sanction is obtained from the Central or State Government, as the case may be. Such cases depend upon the status of the accused and the nature of the offence committed in the execution of his duty.

14. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the .....day of....., at.....you voluntarily caused hurt, to AB, for the purpose of extorting, from him (*or from a certain person, namely, CD,2871 interested in the said AB*), a confession (*or information*), which may lead to the detection of the offence of.....(*or misconduct*) (*or for the purpose of constraining the said AB* (*or CD*) to restore (*or to cause the restoration of*) any property (*or valuable security*) (*or to satisfy any claim or demand*) (*or to give information which may lead to the restoration of any property or valuable security, to wit.....*), and thereby committed an offence, punishable under s 330 (or s 331) of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

15. Proof

To establish a charge under this section, the prosecution must prove that:

(1) the accused voluntarily caused hurt (for which prove all that is required under s 321, IPC); and
(2) the accused caused such hurt, to the sufferer or other person interested in him:

(a) to extort a confession, or some information, which may lead to the detection of an offence or misconduct, or
(b) to constrain such person to restore, or to cause the restoration of, any property or valuable security, or
(c) to satisfy any claim or demand, or
(d) to give information which may lead to the restoration of any property or valuable security.

Where the accused, an investigating officer and his assistant having no reliable information, entertained suspicion about two persons in a case of theft subjected them to ill-treatment to extort a confession on information leading to the detection of stolen properties, the accused persons were found guilty for the offence under s 330, IPC .[21] However, when the police resorted to violence while pursuing investigation and not pursuing any unlawful object, the suspect in trying to escape custody was beaten up by a police party which caused him to die on the spot, ss 147 and 149 could not be invoked and the conviction of the accused-police officials under ss 147, 325 / 149 and 330 / 149 and 354 / 149 was not found proper and set aside.[22]

16. Onus of Custodial Crime and duty of Court

Though ss 330 and 331 of the IPC make punishable those persons who cause hurt for the purpose of extorting the confession by making the offence punishable with sentence up to 10 years of imprisonment, but the convictions, as experience shows from track record have been very few compared to the considerable increase of such onslaught because the atrocities within the precincts of the police station are often left without much traces or any ocular or other direct evidence to prove as to who the offenders are. Disturbed by this situation, the Law Commission in its 113th Report, recommended amendments to the Indian Evidence Act 1872 so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in the police custody, the court may presume that the injury was caused by the police officer having the custody of that2872 person during that period, unless the police officer proves to the contrary. The onus to prove the contrary must be discharged by the police official concerned. Keeping in view the dehumanizing aspect of the crime, the flagrant violation of the fundamental rights of the victim of the crime and the growing rise in the crimes of this type, where only a few come to light and others don't, the government and the legislature must give serious thought to the recommendation of the Law Commission and bring about the appropriate changes in the law not only to curb the custodial crime, but also to see that the custodial crime does not go unpunished. The courts are also required to have a change in their outlook, approach, appreciation and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the truth is found and guilty should not escape so that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed.[23]

17. Sentence

An offence of the nature, described in this section, can rarely be proved. It is, therefore, the duty of the court, when a case of this kind is proved, to pass a sentence which may have a deterrent effect.[24] In

Public Prosecutor v Kanniappan ,[25] the accused, suspecting a boy for committing a theft, in order to extort a confession from him, brought both his hands together wrapped pieces of cloth round his hands, poured kerosene oil over the wrapping and set fire to it, as a result of which the hands of the boy were burnt, on account of which the boy had to remain, as an in-patient in a hospital for twelve days. The trial court, trying the accused under this section read with s 511, IPC, sentenced him to imprisonment till the rising of court. The High Court enhanced the sentence, to one year's imprisonment, with the observation thus:

> ...When the statute says that, for an offence, the offender shall be imprisoned, it normally means that he should be sent to jail. To impose a sentence of imprisonment till the rising of court is an evasion of the statutory provisions, and such an evasion would be justified only in very exceptional circumstances as, for instance, where the offence is found to be very severely technical or where there are extenuating circumstances possessing unusual force..... Those, who are called upon to administer the criminal law, must bear, in mind, that they have a duty not merely to the individual accused before them, but also to the State and to the community at large.

9 *Empress v Baboo Moondu* 13 WR (Cr) 23 .

10 *Empress v Nim Chand Mookerjee* 20 WR (Cr) 41, p 44 .

11 *Emperor v Miran Bakhsh* 18 Cr LJ 710 ; *Bhudesar v State of Madhya Pradesh* 1980 Cr LR 56 (MP) (Notes) (DB).

12 *Public Prosecutor v Shaikh Ibrahim* AIR 1964 AP 548, (1964) 2 Cr LJ 636 .

13 Refer to Indian Evidence Act 1872, ss 24 to 31 . For detailed commentary, see *Woodroffe & Ameer Ali's Evidence Act*, Lexisnexis Butterworths.

14 *Empress v Baboo Moondu* 13 WR (Cr) 23 .

15 *Pakala Narayana Swami*'s case, AIR 1939 PC 47, 40 Cr LJ 364 .

16 *Empress v Latif Khan* ILR 20 Bom 394 .

17 *Dinanath v Emperor* AIR 1940 Nag 186, p 190, 41 Cr LJ 757 ; *Empress v Latif Khan* ILR 20 Bom 394 ; *Parmanand v Emperor* AIR 1940 Nag 340, p 347-48, 42 Cr LJ 17 ; *Mehter Ali v Empress* ILR 11 Cal 530 ; *Mecah Mahomed v Crown* 86 PR 1866 (Cr) .

18 *Maula Bakhsh v Emperor* AIR 1924 Lah 167, 24 Cr LJ 576 .

19 *Satya Deva Swami v Emperor* AIR 1918 Pat 643, p 645, 19 Cr LJ 749 .

20 *R v Ella Boyan* AIR 11 Mad 257 ; *Abdool Karim v Emperor* 4 Cr LJ 71, 4 CLJ 92 ; *Maula Bakhsh v Emperor* AIR 1924 Lah 167, 24 Cr LJ 576 .

21 *Sham Kant v State of Maharashtra* AIR 1992 SC 1879, 1992 Cr LJ 3243 (SC) .

22 *Maiku and Ors v State of Uttar Pradesh* AIR 1989 SC 67, 1989 CR LJ 860 (SC) .

23 *Shakila Abdul Gafar Khan v Vasant Raghunath Dhoble* 2003 Cr LJ 4548 (SC), AIR 2003 SC 4567 .

24 *Lal Muhammad v Emperor* AIR 1936 Lah 471, p 473, 37 Cr LJ 811 .

25 *Public Prosecutor v Kanniappan,* AIR 1955 Mad 424, p 425, 1955 Cr LJ 1080 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 331.

Voluntarily causing grievous hurt to extort confession, or to compel restoration of property.--

Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.2873

Comments

1. Scope and Applicability

This section is similar to s 330, IPC, the only difference being that the hurt caused in a case under this section is grievous. The commentary under the preceding section may, therefore, be usefully read under this section also.

The section applies to cases where grievous hurt is caused by a person for the purpose of having a claim or demand, which the other person owes to him, satisfied, and not to cases where the claim or demand is owed by the culprit to the victim of assault.[26]

2. 'Voluntarily Causes Grievous Hurt'

Commentary under ss 320 and 322, *ante*, may be referred to.

3. Procedure

An offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of sessions.

4. Charge

The same form of the charge which is used for an offence under s 330, IPC, may be adopted for a charge under this section subject to the following changes, *i.e.*, the expressions 'grievous hurt', 'sessions judge' and 'within the cognizance of this court' must be substituted for 'hurt', 'magistrate' and 'within my congnisance', respectively.

5. Proof

The elements, which require proof for establishing an offence under s 330, IPC, necessary to be established for securing a conviction under this section, except the fact that hurt need to be proved, must be grievous hurt, and not merely simple hurt.

6. Onus of Custodial Crime and duty of Court

Commentary under the same heading in s 330, *ante*, may be referred to.

26 *Jorubha Anandsang v State* 52 Cr LJ 704, AIR 1951 Sau 40 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 332.

Voluntarily causing hurt to deter public servant from his duty.--

Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.2874

Comments

1. Scope

So far, the IPC has dealt, under the heading of 'hurt', with causing hurt or grievous hurt to any person. This section deals with causing hurt, and the next section with causing grievous hurt, to a public servant. A similar provision is to be found in s 353, IPC which deals with assaulting or using criminal force on a public servant. Except for the nature of the act done by the offender, in all other respects, the three sections are in exactly the same or similar terms and they all mean the same thing. The object of this section is to protect public servants so that they may discharge their duties without fear of being hurt or assaulted. This protection is given to the public servant not only during, but also before and after, the execution of his duty. The first clause in each of the said sections speaks of causing hurt to a public servant while he is engaged in the discharge of his duty. The second clause speaks of causing hurt to prevent or deter a public servant from discharging his duty in future, and the third clause speaks of causing hurt in consequence of anything done by the public servant in the past in the discharge of his duty. The said three clauses also make it clear that the offence under this section is related not so much to a public servant, but to the discharge of his duty by him. Therefore, merely causing hurt to a public servant would not constitute an offence under this section if it is not connected with the discharge of his duty as a public servant, whether in the present, future or past.[27]

As regards *mens rea*, it is only the second clause that requires an intention to prevent or deter a public servant from the discharge of his duty. The other two clauses do not require any particular intention or knowledge. In cases falling under these two clauses, causing hurt to a public servant is made an offence because it has the effect of preventing or deterring the public servant from discharging his duty.[28]

2. Relative Scope of Sections 353, 332 and Section 333

Commentary under the same heading in s 353, *post*, may be referred to.

3. 'Voluntarily Causes Hurt'

Commentary under ss 319 and 321, *ante*, may be referred to.2875

4. 'To any Person'

As these words are qualified by the words 'being a public servant', *etc.*, in this section, refer to public servants only, and not to private individuals. The general words 'any person' are used because the offence is against the person though that person is a public servant.

5. 'Public Servant'

Commentary under s 21, vol 1, may be referred to.

6. 'In the Discharge of his Duty as such Public Servant'

The words 'in the discharge of his duty' can have only one meaning, namely, that the officer has a duty, imposed by law, to discharge and a duty to discharge at the relevant time. They cannot mean that the officer is acting under the colour of his office. If the public servant, who is hurt, is a police officer, he must be acting at the relevant time as a police officer, and in the particular matter, must be discharging a duty imposed upon him as a police officer.[29] Persons, not having, strictly speaking, a right to test the main switch in a certain premises by reason of s 20(2)(b) of the Indian Electricity Act 1910 (9 of 1910), cannot be said, while so testing, to be discharging their duties as public servants.[30]When the forest in question, from which the timbers are being removed, has not been legally proved to be a reserve forest, it cannot definitely be said that the forest officers who obstruct the complainants from removing the timbers, act strictly in due discharge of the duties imposed on them.[31] The act of a police constable in prohibiting men from playing cards cannot be said to be in the discharge of his public duty, and if hurt is caused to him while doing so, the offence does not fall under this section, but under s 323 .[32]

Prosecution evidence established that train was stopped by the accused appellant, he cut the hotch pipe and on being restrained from doing so, assaulted the complainant police constable. When the accused appellant and other persons were taken to the guard room, they were shouting at him and threatening to throw him on the railway track. The accused was duly identified. He had obstructed a public servant and voluntarily caused hurt to him in order deter him from discharging his duty. He was convicted under ss 186 and 332, IPC .[33]

The accused respondent driving auto on the M.G. Road jumped the signal line. Police constable PW2 chased the auto of the accused appellant. The appellant denied the commission of any traffic offence, hit PW2 on his chest, and three ribs of the left2876 side of the chest of PW2 were fractured. Evidence of Sub Inspector PW2 who intercepted the auto of the accused was found reliable, and was corroborated by independent witness and medical evidence. Appellant accused was convicted under s 333, IPC and sentenced to three months RI and fine of Rs. 25000/-.[34]

However, where the accused caused hurt and grievous hurt to a forest guard in uniform while on patrol in his beat tried to apprehend the accused, who cut pieces of wood and was removing them from the reserve

forest without permit, it was held that the accused were guilty of offences under ss 332 and 333, IPC .[35] A person, who causes hurt to a police officer making a search commits an offence under s 332, IPC .[36]

7. Public Servant not Acting as per Law--Effect

The words 'in the discharge of his duty' do not cover an act done by the public servant in excess of his authority, though the same may have been done in good faith and under the colour of his office.[37] Where a *naib-tahsildar*, collecting arrears of land revenue from a defaulting landlord, was assaulted by the landlord and his men, but it was found that hurt was caused by the accused in resisting a beating, given by the *chaprasis* of the *naib-tahsildar* under his orders, it was held that s 332 did not apply.[38] A police officer executing an illegal warrant cannot be said to be acting in the discharge of his duty, and an accused causing hurt to him, while doing so, cannot be held guilty under this section.[39] A police officer conducting a search is bound under s 100, CrPC, to call upon two or more respectable inhabitants of the locality to attend and witness the search; and if he ignores this provision in conducting the search and hurt is caused to him in resisting the search, the offence would not be covered by this section.[40] Where a constable, not in possession of a warrant of arrest and not entrusted with the duty of arresting the accused, proceeded to arrest him and was assaulted by him, it was held that the accused could not be convicted under this section.[41]

8. Public Servants Protecting their Private Properties

Where public servants were hurt when they were protecting their private property, it was held that in protecting their private property, they were merely acting as private persons, and therefore, this section had no application.[42]

9. 'With Intent to Prevent or Deter'

These words are sufficiently wide to take in acts of obstruction. Slamming of a door in the face of an officer, just when he is about to enter, is obstruction. However, mere2877 objection or protest does not fall within the section, unless, it verges on threat which is likely to be carried out immediately.[43] To constitute obstruction, actual physical force is not necessary. If there is sufficient indication that force would be used if the officer persists in executing the work, which he is commissioned to do, it would be sufficient to constitute obstruction.[44] Even the use of abusive language, as a result of which a sale had to be adjourned by an officer, was held to be obstruction.[45] Blocking a gateway, or deliberately placing a cycle in front of a police constable and thereby preventing him from dealing with an offender, was held to be obstruction. Similarly, closing a house, and thus, preventing a policeman from removing stolen articles found in the room and threatening to kill him was held to be an obstruction. Again, obstruction like jostling an officer was held to be an offence.[46] Threats may not, however, amount to obstruction in all cases. The point for determination in such cases is whether the act of the accused was such as to prevent the public servant from carrying out his duties. Where threats are combined with an attitude of an aggressive character, or where there is an exhibition of dangerous weapons by the accused, or where the threat is likely to be carried out immediately, the offence of obstruction may be held to be made out.[47] Where the appellant accused, in attempt to escape, tried to overturn his four wheeler overloaded with cows over police constable on duty causing injuries, he was convicted for offence under s 332, IPC .[48]

A convict undergoing imprisonment removed the bolt of the prison cell, hit warders with wooden plank, caused simple injuries, was convicted under ss 332 and 333, IPC .[49]

The duty of a public servant may be negative as well as positive. It is the duty of a *patwari* not to make entries, in his official records, under pressure from an interested party which he would not otherwise have made. Where the accused dragged a *patwari* to a place, put pressure upon him to make certain entries in their favour, and then beat him when he refused to do so, it was held that the accused intended to prevent or deter the *patwari* from discharging his duties as a public servant and were guilty of the offence under this section.[50]

10. 'In Consequence of anything done or Attempted to be done by that person in the Lawful Discharge of his duty as such Public Servant'

The offence under this section can be committed not only when a person is assaulted when he is discharging his public duty, but also when he is assaulted in consequence of the discharge of his duty. Where, therefore, a *naib-tahsildar* had made a report against a *patwari* in the lawful discharge of his duty, and as a consequence thereof,2878 he was beaten by the accused, it was held that the accused were guilty of the offence under this section.[51] The expression 'in consequence', as used in this and the next section, includes the motive which actuates the accused to cause voluntary hurt or assault upon a public servant.[52]

11. Section 186 Distinguished from Sections 332 and 353

Commentary under the same heading in s 186, vol 2, may be referred to.

12. Procedure

An offence under this section is cognizable, bailable, non-compoundable, and is triable by a magistrate of the first class.

13. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the .....at..... you voluntarily caused hurt to one *A B*, a public servant, in the discharge of his duties as such a public servant (or with intent to prevent or deter that person (or any other public servant (or with intent to prevent or deter that person (*or any other public servant, to wit.....*) from discharging his duties as such a public servant) (*or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such a public servant*), and thereby committed an offence punishable under s 332 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

While framing a charge under this section, it is not essential to state, in all cases, that hurt was caused to the public servant while he was actually discharging his official duty. If the beating is given as a consequence of anything done by him in the discharge of his duties as a public servant, then it would be sufficient to attract the application of this section.[53]

14. Proof

To establish an offence under this section, the prosecution must prove that:

(1) the accused voluntarily caused hurt to a public servant; and
(2) the said public servant, at the time of being hurt, was discharging his duty as such public servant, or
(3) the hurt was caused with intent to prevent or deter that public servant or any other public servant from discharging his duty as such public servant, or
(4) the hurt was caused in consequence of anything done, or attempted to be done, by that public servant in the lawful discharge of his duty as such public servant.2879

In the absence of corroboration by medical evidence, the allegation that the injured was beaten by the accused, was not believed in *Nirbhai Singh v State of Madhya Pradesh* .[54]

15. Examination of the Accused

The accused was known by more than one name. The fact that an accused person has an alias is not a circumstance appearing against him, and therefore, the accused need not have been put to answer any question regarding such facts not required to be asked to the accused under s 313, CrPC .[55]

16. Acquittal

Where the ingredients of offences under ss 332 and 353, IPC were not proved, the injury suffered by the complainant is too trivial and general and could be accidental as a consequence of the defence by the accused, the conviction of the accused is not proper.[56] The allegations against the accused were that they assaulted two police officers while they were executing a non-bailable warrant, the statements of the two police officers were contradictory to each other, the prosecution did not examine any independent witness, the alleged recovery of a shoulder flap from the uniform of a police officer and nickel-stars, *etc.* from the place of occurence was doubtful, so the conviction of the accused under s 332, IPC, was not found proper.[57] The accused persons entered into the school premises and gave *lathi* blows to the victim-teacher for beating their children. The evidence of the victim was not corroborated by medical evidence. The other teachers who were eyewitnesses to the occurrence, also did not corroborate the statement of the victim in material particulars, the recovery memo of the *lathi* and victim's clothes, allegedly formed by the accused at the time of occurrence, was proved to be a farce. The acquittal of the accused under ss 353 / 332 / 34, IPC, was found proper.[58] The independent witness did not support the prosecution version, the testimony of the public servant (victim) and another witness (conductor of the bus) was discarded due to infirmities in their statements. The essential ingredients of s 332 were not proved on record. The origin, manner and genesis of occurrence were highly suspicious. The acquittal of the accused under s 332 was found proper.[59]

The prosecution case was that the accused persons forcibly entered the office of the DCP Traffic, gheraoed and manhandled DCP. The prosecution case of causing hurt, assault or use of criminal force to deter a public servant from discharging his duty was not proved, the accused was acquitted of the charges under ss 186, 353 and 332, IPC .[60]

17. Tendering Apology by the Accused

Where the accused-clerk picked up a wooden roller and gave a beating to the victim/complainant-headmaster of the school, resulting in injuries, the High Court set2880 aside the conviction of the accused, the occurrence took place more than 20 years before, in the criminal appeal filed by the complainant/victim-headmaster under art 134 of the Constitution of India, the accused filed an apology by way of an affidavit clearly stating that with a view to assuage the hurt feelings of the victim and maintain good relations, he is tendering the said apology. He also stated he apologises to the victim for any injury, physically or otherwise, if any, caused because it was unintended and unintentional. In view of the written apology of the accused which showed repentant mood of the accused, the Apex Court directed the written apology to be placed on record and declined to interfere with the order of acquittal under s 332, IPC, of the High Court.[61]

18. Probation

The object of the Probation of Offenders Act 1958 is to prevent the conversion of youthful offenders into obdurate criminals as a result of their association with hardened criminals of mature age, in case the youthful offenders are sentenced to undergo imprisonment in jail. However, if the court came to the conclusion that the release of a convict under the said Act will have a detrimental effect on society, it will be slow to release him under the Act. When the accused, an educated person heading an association who was expected to behave in a very orderly manner, but instead of doing that he assaulted the public servant to defer him from his duty in a public place, the benefit of the said Act was declined to the accused who was convicted under ss 332 and 26, IPC .[62] However, when the victim sustained simple injuries and no previous conviction was proved against the accused, the accused persons convicted under s 332, IPC, were extended the benefit of s 4 of the Probation of Offenders Act 1958.[63] Where in the first appeal, the case was not argued on merits and the counsel of the accused prayed for benefit of probation which was allowed, the plea taken in the second appeal that no such concession was given by the counsel is not acceptable, moreso, when the conviction of the accused is justified by the evidence on record.[64]

19. Sentence

The causing of a series of injuries to a public servant on duty in broad daylight shakes the confidence of people in law enforcement machinery, and it is necessary that whenever such an offence is found to be proved, the court must award a deterrent sentence.[65] The accused caused injuries to the police constable in uniform and persisted with unruly behaviour in a public place under the influence of liquor. The plea for a lenient sentence was declined by the High Court observing that the sentence of 2 years imposed by the trial court did not warrant any interference.[66]

However, when the incident took place about 19 years ago and one of the accused was acquitted by the trial court, the sentence of 2 years imprisonment each under ss 332 / 34 and ss 324 / 34, IPC, of the accused persons was reduced to the period2881 already undergone in addition to imposing a fine of Rs 500/- in lieu of the remaining period of imprisonment.[67]

The court should not allow an offender to go, on the payment of a small fine only, where a public servant has been assaulted and beaten with sticks.[68] Where, however, instead of the *amin*, a peon was sent for collecting land revenue and an altercation followed, the same was considered to be an extenuating circumstance for reducing the sentence of six months rigorous imprisonment to that already suffered.[69]

The incident having taken place in the year 1992, the accused had attained the age of 50 years, the sentence of two years imposed was reduced to a period of three months, and a fine of Rs. 5000/- was imposed.[70]

20. Alteration of Conviction from Section 332 to Section 323

Where the incident was the sequel of a private quarrel, which took place between the complainant and the accused on the preceding day, and the assault had no connection, or consequential relation, with the complainant's performance of his duty as a public servant, the accused's conviction was altered from one under s 332 to one under s 323, IPC .[71]

21. Alteration of Conviction from Section 333 to Section 332

In the case of assault on a police party while executing an irregular warrant, the offence falls under s 323, IPC, and not under this section.[72] The accused dealt a fist blow on the face of the victim resulting in the loosening of one of his teeth. The victim was discharged from the hospital on the same day, and moved throughout the day and also attended his duties the next day. The injury suffered by the victim cannot be said to be grave and serious and the case of simple hurt was made out. The conviction of the accused was therefore altered from s 333 to s 332, IPC .[73]

27 *Hardit Singh v Emperor* 12 Cr LJ 236 .

28 *Ibid*.

29 *Empress v Dalip* ILR 18 All 246, p 250 ; *Narasayya Lachmayyu v State* AIR 1953 Nag 292 ; *Provincial Government v Nonelal* AIR 1946 Nag 261, 47 Cr LJ 633 ; *Raghubar v Emperor* AIR 1941 Oudh 385, 42 Cr LJ 501 ; *Roman Singh v Empress* AIR 28 Cal 411 ; *Chundar Coomar Sen v Emperor* 3 CWN 605 ; **distinguished** in *Nowrangi Singh v Emperor* 5 CWN 135 ; Re *Mahomed Yakoob* 7 MLT 386, 6 IC 12, 11 Cr LJ 221; *Emperor v Gaman* 14 Cr LJ 142 ; *Emperor v Yusuf* 1910 PR 18 ; *Mukhtar v Emperor* 37 All 353 ; *Mir Shah Newaz Khan v Emperor* 8 SLR 1, 26 IC 319 ; Re *Kandaswamy* 76 IC (M) 962; *Gaya Din v Emperor* AIR 1934 Oudh 124 ; Re *D Madar Sahib*AIR 1930 Mad 430, 31 Cr LJ 639 ; *Hardit Singh v Emperor* 12 Cr LJ 236 .

30 Re *Baburao*(1969) 1 MLJ 88, p 90.

31 *Udayanath Swain v State* 35 Cut Lt 343, p 348 .

32 *Mul Chand v Emperor* AIR 1926 Lah 250, 27 Cr LJ 377 ; *Meghraj v Emperor* 37 Cr LJ 375 ; *Miran v Emperor* AIR 1926 All 168, 27 Cr LJ 240 ; *Devi Prasad v State of Uttar Pradesh* 1973 All Cr R 214 .

33 *Gyan Bahadur v State of Madhya Pradesh* 2013 Cr LJ 1729, p 1732 (Chh .).

34 *State of Karnataka v Mohammed Sadiq* 2006 Cr LJ 3391, p 3392 (Kant), 2006 (4) AIR Kar R 548 .

35 *Nakula Barik v State* AIR 1967 Ori 1, p 3 .

36 *Lachuman Singh v Emperor* AIR 1942 Pat 281, 43 Cr LJ 279 .

37 *Empress v Dalip* ILR 18 All 246 .

38 *Niru v Emperor* AIR 1933 Lah 162 .

39 *Narasayya Lachmayya v State* AIR 1953 Nag 292 . It is submitted that the correctness of this decision requires reconsideration as a police officer has to execute a warrant even if it may subsequently be found to be illegal.

40 *Nirmal Singh v Emperor* AIR 1919 All 41, 20 Cr LJ 695 ; *Bhikugir v Emperor* AIR 1932 All 449 ; *Ramji Ahir v Emperor* AIR 1930 Pat 387, 31 Cr LJ 937 ; *Emperor v Mukhtar Ahmad* 16 Cr LJ 493 ; *Shanta Govindrao Apte v State of Madhya Pradesh* AIR 1957 Nag 93 .

41 *Raghubar v Emperor* AIR 1941 Oudh 385, 42 Cr LJ 501 ; *Meghraj v Emperor* 37 Cr LJ 375 .

42 *Hardit Singh v Emperor* 12 Cr LJ 236 .

43 *Thakur Prasad v Emperor* AIR 1936 Pat 74, 37 Cr LJ 104 ; Re *Ganapathia Pillai*AIR 1953 Mad 936, p 938-39, 54 Cr LJ 1730 ; *Empress v Somanna* 15 Mad 221 ; *Maturam v Emperor* AIR 1924 Lah 238, 24 Cr LJ 594 ; *Thimmakka v Emperor* AIR 1942 Mad 552, 43 Cr LJ 757 ; *Aijaz Husain v Emperor* AIR 1916 All 53, 17 Cr LJ 413 ; *Empress v Gangappa* 2 Bom LR 541 ; *Ah Choung v Emperor* AIR 1932 Rang 21, 33 Cr LJ 175 ; *Darkan v Emperor* AIR 1928 Lah 827, 29 Cr LJ 645 .

44 *Emperor v Annawadin* AIR 1923 Rang 231, 24 Cr LJ 848 .

45 *Provincial Government v Balaram Jagannath* AIR 1938 Nag 529, 39 Cr LJ 954 .

46 Re *Babulal*AIR 1936 Nag 86, 37 Cr LJ 587 ; Re *Gottumukkula Narayanaraju*AIR 1924 Mad 760, 26 Cr LJ 97 ; *Jatto v Emperor* AIR 1915 Lah 456, 16 Cr LJ 700 .

47 *Nafur Sardar v Emperor* AIR 1932 Cal 871 ; *Emperor v Tohfa* AIR 1933 All 759, 34 Cr LJ 1211 ; *Nanhu v Emperor* AIR 1938 All 118, 39 Cr LJ 363 ; *Dukhan Sahu v Emperor* AIR 1937 Pat 633 .

48 *Chillu v State of Haryana* 2015 Cr LJ (NOC) 274 (P&H).

49 *Rakesh Rai v State of Sikkim* 2012 Cr LJ 4033 (Sikk) .

50 *Gaya Prasad v Emperor* AIR 1941 Oudh 267, p 268, 42 Cr LJ 321 .

51 *Jageshwar Dayal v State* AIR 1952 All 933, 1952 Cr LJ 1709 ; *Harish Kumar v State* 1966 AWR (HC) 202 .

52 *State v Usman Gani* (1964) 1 Cr LJ 254 .

53 *State v Usman Gani* (1964) 1 Cr LJ 254, p 255 .

54 *Nirbhai Singh v State of Madhya Pradesh,* 1972 Cr LJ 1474, p 1478, 1972 Jab LJ 383 .

55 *Ranveer Singh alias Rana v State of Uttar Pradesh* 1997 Cr LJ 2266 (All) .

56 *Murlidhar v State of Maharashtra* 2005 Cr LJ 3378 (Bom) .

57 *Goma Gobinda Das v State of Orissa* 2000 Cr LJ 1978 (Ori) .

58 *State of Himachal Pradesh v Bharat Ram* 1999 Cr LJ 4705 (HP) .

59 *State of Himachal Pradesh v Nokh Ram* (1992) 2 Crimes 30 (HP) .

60 *State v Ramesh* 2011 Cr LJ (NOC) 556 (Del) .

61 *Rama Mahadev Nagpurkar v Madhukar Nathuji Kathawate* AIR 1994 SC 1909, AIR 1994 SCW 1855 .

62 *Judhistir Gouda v State* (1994) 2 CCR 934 .

63 *Hari Singh v State* 1990 Cr LJ 66 (All) .

64 *Biram Dass v State of Punjab* 2003 Cr LJ 2652 (P & H).

65 *Ranveer Singh alias Rana v State of Uttar Pradesh* 1997 Cr LJ 2266 (All) .

66 *Krishan Kutty v State of Kerala* 1989 Cr LJ 2257 (Ker) .

67 *Jamil v State of Uttar Pradesh* (1995) 1 Crimes 491 (All) .

68 *Prabhudas Chhaganlal v Babubhai Virabhai Miseria* 1977 Cr LJ 1666, p 1673 .

69 *Gangadhar v State of Uttar Pradesh* 1972 All Cr R 319 .

70 *Gyan Bahadur v State of Madhya Pradesh* 2013 Cr LJ 1729, p 1732 (Chh) .

71 *D Chattaiah v State of Andhra Pradesh* AIR 1978 SC 1441, p 1442, 1978 Cr LJ 1473 ; Re *Babu Rao*(1969) 1 MLJ 88, p 90; *Udayanath Swain v State* 35 Cut LT 343, p 348 ; *Hardit Singh v Emperor* 12 Cr LJ 236 .

72 *Nawab Singh v State* 1973 All WR (HC) 453, 1973 All Cr R 296 ; *Devi Prasad v State* 1973 All Cr R 464 .

73 *VR Murthy v State* 1995 Cr LJ 1819 (Cal) (DB) .

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Chapter XVI

Of Offences Affecting the Human Body

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 333.

Voluntarily causing grievous hurt to deter public servant from his duty.--

Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.2882

Comments

1. Scope

An offence under this section is an aggravated form of the same offence, which has been dealt within the preceding section, with the only difference that hurt caused under this section is grievous hurt, on account of which the section provides an enhanced penalty. The commentary on the preceding s 332, IPC may, therefore, be usefully read as a commentary on this section also.

Under the provisions of this section, a person who causes grievous hurt to a public servant can be convicted under the following three circumstances:

(a) when the public servant, grievously hurt, was discharging his duty as such public servant;
(b) when grievous hurt was caused with intent to prevent or deter the public servant, or any public servant, from discharging his duty as such public servant; and
(c) when grievous hurt was caused in consequence of anything done, or attempted to be done, by the public servant in the lawful discharge of his duty.

In the first case, motive and object are irrelevant. Similar is the position in the third case. In the second case, it is, however, necessary that the object of the accused should be to prevent or deter the public servant from discharging his duty, but it is not necessary that the public servant should be discharging his duty at the time of being grievously hurt.[74]

2. Relative Scope of Sections 353, 332 and 333

Commentary under the same heading in s 353, *post*, may be referred to.

3. 'In the Discharge of his Duty as such Public Servant'

If a forest guard in order to prevent an accused from cutting wood in government forest, endeavours to snatch the axe of the accused cutting wood, on account of which a scuffle ensues in which grievous hurt is caused to the guard, the act of the forest guard is in discharge of his duty as a public servant and the accused is guilty under this section.[75] While driving the bus, or even while standing at the bus-stand, the driver discharges his duties, and if he tries to prevent an accused from committing trespass by entering into the driver's cabin, he undoubtedly acts in the due discharge of his duties as a driver of the bus belonging to the transport2883 department. If, despite the attempt of the driver to stop the accused from entering the driver's cabin, the accused abuses the driver and gives him a kick, which results in grievous injury, it cannot be said that s 333, IPC has no application.[76]

A convict undergoing imprisonment removed the bolt of the prison cell, hit warders with wooden plank, caused simple injuries, was convicted under s 332 and 333, IPC .[77]

A person, arrested illegally, has a right to defend himself.[78]

For further commentary, text under the same heading in s 332, *ante*, may be referred to.

4. Public Servant not Acting as per Law--Effect

Commentary under the same heading in s 332, *ante*, may be referred to.

5. Public Servants Protecting their Private Properties

Commentary under the same heading in s 332, *ante*, may be referred to.

6. Procedure

An offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of session.

7. Charge

The charge is the same as under s 332 by substituting 'grievous hurt' for 'hurt', ' s 333 ' for ' s 332 ', 'sessions judge' for 'magistrate' and 'withing the cognizance of this court' for 'withing my cognizance'.

8. Proof

The proof is the same as under s 332, by substituting 'grievous hurt' for 'hurt'.

The accused dealt a *gupti* blow on the chest of deceased-police constable who had caught hold of his co-accused, there was sufficient light available at the spot to enable the witnesses to identify both the accused and the co-accused, the medical evidence was in consonance with the oral evidence of the prosecution witnesses. The conviction of accused under ss 302 and 333, IPC was found proper.[79]

9. Accused Acquitted under Section 302 cannot be Convicted under this Section

An accused cannot be convicted under this section when he is acquitted on a charge under s 302, IPC, on the ground that firing of the gun was accidental.[80]2884

10. Sentence

The object of imposing sentence should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim, but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'.[81] Therefore, when attempt to murder and causing grievous hurt to public servant, both offences are of serious nature, reduction of sentence to custodial sentence of 6 months 23 days that was already undergone on the ground that the accused were illiterate persons belonging to lower income group and were of 23 years of age is not proper.[82]

11. Alteration of Conviction from Section 333 to Section 332

Commentary under the same heading in s 332, *ante*, may be referred to.

74 *Emperor v Bandhoo Ahir* AIR 1935 All 563, 36 Cr LJ 964 ; *Hardit Singh v Emperor* 12 Cr LJ 236 .

75 *Nemchand v State of Madhya Pradesh* (1963) 2 Cr LJ 95, p 96 .

76 *Manumiya v State of Gujarat* AIR 1979 SC 1706, 1979 Cr LJ 1384 .

77 *Rakesh Rai v State of Sikkim* 2012 Cr LJ 4033 (Sikk) .

78 *Gaman v Emperor* AIR 1930 Lah 348, 31 Cr LJ 294 ; *Jafar v Emperor* AIR 1916 All 253, p 254, 17 Cr LJ 529 ; *Jageshwar v*

State 1973 Cr LJ 501, p 502, 1972 All LJ 903 ; *Birdha v State* AIR 1959 Raj 124, p 126, 1959 Cr LJ 770 .

79 *Sabhabhai Kanabhai v State of Gujarat* 2002 Cr LJ 4040 (Guj) (DB) .

80 *Nirbhai v State of Madhya Pradesh* 1972 Cr LJ 1474, p 1478, 1972 Jab LJ 383 .

81 *State of Madhya Pradesh v Saleem* 2005 Cr LJ 3435 (SC) .

82 *Ibid*.

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OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 334.

Voluntarily causing hurt on provocation.--

Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Comments

1. Scope

This section provides punishment for voluntarily causing hurt on grave and sudden provocation, and forms a proviso to ss 323 and 324, IPC . It is immaterial in this section, whether the instrument used for causing hurt is simple or deadly.[83]

Under the explanation to s 335, IPC, this and that section are subject to the same provisos to which exception 1 to s 300, IPC, is subject.

2. 'Voluntarily Causes Hurt'

Commentary under s 321, *ante*, may be referred to.2885

3. 'Grave and Sudden Provocation'

Provocation, which is involved in the apprehension of an offence against person or property (in certain cases), is the basis of the right of private defence (ss 96 to 106, IPC) against the person threatening such offence (s 97, IPC). Sections 334 and 335, IPC have nothing to do with that subject.[84] Other provocation, if grave and sudden, which causes the person provoked to kill the person, who offers the provocation, or

any other person by mistake or accident, renders the killing culpable homicide, but not murder (s 300, exception 1, IPC). If, in the case of such provocation, the person provoked does not kill another, but causes hurt or grievous hurt, the case falls under s 334 or s 335, IPC, whereby the punishment is reduced by reason of the fact of provocation. It should, however, be remembered that grave and sudden provocation mitigates the offence of voluntarily causing hurt or grievous hurt only if the offender neither intends, nor knows himself to be likely, to cause such hurt or grievous hurt to any person other than the person who gave the provocation. What is done intentionally or knowingly cannot be said to be done whilst the offender is deprived of the power of self control by the grave and sudden provocation.

As to what grave and sudden provocation is, exception 1 to s 300, IPC, and the commentary under s 300, may be referred to.

Accused an ex-service man released from army on medical grounds suffering from Neurosi s 300D, and depressive disorder, shot at the complainant with fire arm. He was convicted under ss 335 and 337, IPC .[85]

4. Procedure

An offence under this section is non-cognizable, bailable, compoundable, and triable by any magistrate, and may also be tried summarily.

5. Charge

Commentary under the same heading in s 323, *ante*, may be referred to.

6. Proof

The prosecution has only to prove the commission of the offence under ss 323 or 324 .

7. Burden of Proof

The burden of proof of grave and sudden provocation lies on the accused.[86] He has further to prove that he neither intended, nor knew himself to be likely, to cause hurt to any person other than the person who gave the provocation.

83 *R v Bhala Chula* 1 BHCR 17 .

84 *R v Bhala Chula* 1 BHCR 17 .

85 *Baljeet Singh v State of HP* 2013 (124) AIC 825 (HP) .

86 Indian Evidence Act 1872, s 105 and illust (c).

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S. 335.

Voluntarily causing grievous hurt on provocation.--

Whoever [87][voluntarily] causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with2886 imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

Explanation.--The last two sections are subject to the same provisos as Exception 1, section 300 .

Comments

1. Scope

This section, which, by virtue of the explanation annexed to it, is subject to the provisos to exception 1 to s 300, IPC, prescribes punishment for voluntarily causing hurt on grave and sudden provocation, and has to be read as a proviso to ss 325 and 326, IPC . Where grievous hurt is caused to the person who gave the provocation, all that is necessary to attract the provisions of this section is that it is caused on grave and sudden provocation. This section is not attracted when hurt caused is not grievous within the meaning of s 320 .[88]

2. 'Voluntarily Causes Grievous Hurt'

Commentary under ss 320 and 322, *ante*, may be referred to.

3. 'Grave and Sudden Provocation'

A person who by a single blow with a deadly weapon killed another, entering at the dead of night into a dark room, where he and his wife were sleeping separately, for the purpose of having sexual intercourse with her, was held guilty of causing grievous hurt on grave and sudden provocation.[89] In *Dhondey v State of Uttar Pradesh* ,[90] the accused, who cut off the nose of his wife along with that of her lover on finding the former in the company of the latter, was convicted under this section. Commentary under s 300, *ante*, may also be referred to.

4. Explanation

According to the explanation, this section and the preceding s 334 are subject to the same provisos to which exception 1 to s 300, IPC, is subject.

5. Procedure

An offence under this section is cognizable, bailable, compoundable only with the permission of the court before which the prosecution is pending, and is triable by a magistrate of the first class.2887

6. Charge

The charge is the same as in the case of an offence under s 325 or s 326, as the case may be.

7. Proof

The proof required is the same as under s 334, except that the prosecution has to prove that the hurt caused is grievous hurt.

8. Burden of Proof

Commentary under the same heading in s 334, *ante*, may be referred to.

9. Sentence

Grave and sudden provocation mitigates the offence of causing grievous hurt, but an act of nose-cutting or ear-cutting aggravates the offence under this section and deserves heavier punishment.[91] A sentence of fine only is not enough.[92]

10. Alteration of Conviction from Section 325 to Section 335

Commentary under the same heading in s 325, *ante*, may be referred to.

87 Inserted by Act 8 of 1882, s 8 .

88 *Sham Behera v State* AIR 1953 Ori 308, p 311, 54 Cr LJ 1713 .

89 *Empress v Chullundee Poramanick* 3 WR (Cr) 55 .

90 *Dhondey v State of Uttar Pradesh* (1971) 1 SCWR 810 ; *Emperor v Lal Bakhsh* AIR 1945 Lah 43, 46 Cr LJ 736 ; *Emperor v Ghulam Nabi* AIR 1932 Lah 194 ; *Emperor v Bhagwan Chhagan* AIR 1915 Bom 120, 16 Cr LJ 168 .

91 *Emperor v Bhagwan Chhagan* AIR 1915 Bom 120 ; *Ismail Umar v Emperor* AIR 1938 Bom 430, 39 Cr LJ 928 .

92 *Emperor v Ghulam Nabi* AIR 1932 Lah 194 .

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OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

S. 336.

Act endangering life or personal safety of others.--

Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

Comments

1. Scope

This section punishes doing an act so rashly or negligently as to endanger human life or personal safety of others.[93] The offences, punishable under this section and ss 337 and 338, IPC, are confined, in their operation, to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient.[94]

2. 'Act'

Only rash or negligent act, which endangers human life, or the personal safety of others, is punishable under this section, even though no harm follows, and is additionally punishable under s 337, or s 338, IPC, if the same causes hurt or grievous hurt, as the case may be. Naked wires of an electric line, when taken out on2888 bamboo poles, can hardly be said to be anything less than rash or negligent act endangering human life.[1]

It is not the act, but the manner of doing it, which is made punishable by this section. The act may itself be lawful, but if it is done so rashly or negligently that it becomes a positive nuisance,[2] it is punishable under this section.[3] In Re *Thippana Gangi Reddy*,[4]it was observed that the real question for decision is whether the act done was such as was likely to endanger life, and in determining this question, no distinction ought to be made between the act itself and the instrument with which it is done. If injury is actually caused to the person, then the case falls within s 337 or s 338, IPC, according to the nature of the injury.[5]Sections 33 and 52, and the commentary thereunder may be referred to.

3. 'Rashly or Negligently'

'A rash act is primarily an overhasty act and is opposed to a deliberate act. Even if it is partly deliberate, it is done without due thought and caution'.[6] If the act, complained of, is a deliberate act, it cannot be called a rash or negligent act.[7]Similarly, a rash act is primarily a hasty act and is, thus, opposed to a deliberate act.[8]

The phrase 'rashly' means something more than mere inadvertence or inattentiveness or want of ordinary care. A person, who acts rashly, shows indifference to obvious consequences and to the rights of others, and does not mind whether a danger would result. A rash act is indicative of disregard of consequences. A drunken person, firing a gun in the dark, does so 'negligently'.[9]Where a person commits a wanton or dangerous act with the knowledge that it is so, but without knowing that it may probably cause injury and without the intention of causing it, it will be a rash act. In such a case, the person, committing the act, does not know that the result of his recklessness or negligence may probably cause injury to somebody, and he never intends that such injury should be caused. When a person is negligent as to the consequences of his act and there is failure on his part to take reasonable and proper care and precaution to guard against injury to somebody else, it may be a negligent act. However, if, on the other hand, a person commits an act with the intention of causing injury to somebody else, it is an intentional act, done with consideration, and cannot, therefore, be a rash and negligent act.[10] In *Gaya Prasad v Emperor* ,[11] the *pujari* of a temple left the temple at night in charge of a third person. While he was away, he deliberately threw bricks at the temple in the hope that the Hindus would believe that the bricks came from the Mahomedan quarter with the result that the Hindus would be enraged against the Mahomedans and there would be a riot between the Hindus and the Mahomedans. It was held that the act was done deliberately, and not rashly or negligently.2889

For further commentary, text under ss 279 and 304A, *ante*, may be referred to.

4. 'To Endanger Human life or the Personal Safety of others'

On the occasion of a festival, a temple becomes a place of public resort, and it is the bounden duty of the person-in-charge to take all reasonable precautions, necessary to ensure the safety of pilgrims. Where a well stands by the path, which the pilgrims must necessarily take to reach the shrine, which they have come to visit, and the person-in-charge of the temple omits to enclose the well and even indicate its position by lights, and removes the light, placed near the well at the instance of the officers on duty, he acts with gross negligence and thereby endangers the safety of a large number of persons within the meaning of this section.[12] Where an engine driver was taking an engine, which was letting off steam, along a public thoroughfare at a time, when the traffic was exceptionally heavy, and within a few yards of a large number of horses and carriages which had been parked together, in spite of warnings from the police that to do so would endanger public safety, it was held that he was guilty of an offence under s 336, IPC, though he might have believed that no danger would, in fact, be caused.[13]

Except the first petitioner, the Master of the vessel, the others were not responsible for rash and negligent navigation. Evidently, the rest of the crew members who belonged to different nationalities, were working in the fishing vessel to earn their livelihood. The case registered against the rest of the crew members except the first petitioner, the Master of the vessel, was set aside.[14]

It would be a rash or negligent act for a person, with defective eyesight, to drive a motor car without wearing spectacles. However, an omission to wear the spectacles at the time of driving the car, in every case, where a driver may properly use spectacles, would not necessarily render the driver liable under this section. It must depend upon the nature of the defect in the eyesight.[15]When the riots are taking place in different parts of the town, a man, possessing a gun, may very well fire shots just to indicate to the would be mischief-makers that there are arms of defence in the house, and anybody who is mischievously inclined should take care of his safety. Such an act does not amount to an offence under this section.[16]

When after surgery, the girl recovered from her illness and started living without any stomach pain, it cannot be said that accused-doctor had done any act to endanger the life of the girl.[17]

Whether pelting of stones by a large crowd can be held to be an act which endangers life, cannot be answered in the absence of certain and categorical evidence. The answer would depend on having regard to the entire situation, the locality, the rapid movements and the shifting of scenes.[18] However, when a person intentionally throws a stone at a house, under such circumstances, although he does not intend to cause hurt, and does not, in fact, cause hurt, yet he must know that he is likely to cause hurt, he commits an offence punishable under this section.[19]2890

5. Sections 279, 337, 336 --Distinction

Commentary under the same heading in s 279, vol 2, may be referred to.

6. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by any magistrate, and it may be tried summarily.[20]

7. Quashing of Complaint

The death or premature delivery must be the direct result of the accused and must be the proximate and efficient cause without intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non*.[21] The accused-doctor was alleged to have acted negligently in removing the intra-uterine device during fourth months of pregnancy of the complainant. The complainant had premature delivery and the child died after 22 days of delivery. There was no material to come to the conclusion that the premature delivery and the death of the child were the direct consequence of the act of the accused-doctor. The taking of cognizance of a complaint and issuing process against the accused were held to be abuse of process of the court, so all the proceedings in the complaint were quashed.[22]

The allegation against accused-doctor were that due to his negligence the right ovary of the patient was lost while performing surgery of appendectomy. The surgery of the ovary was done by a gynecologist when it was diagnosed that the right ovary had been covered by cystic mass. The fact that consent of the complainant for such surgery was duly obtained was suppressed in the complaint. The reports of the medical college hospital showed that the removal of right ovary was necessary and done for the safety of the patient. On these facts the complaint under ss 336 and 338, IPC, were quashed by the High Court on a petition under s 482, CrPC .[23]

8. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[24]

9. Proof

To establish an offence under this section, the prosecution must prove that:

(1) the accused did an act rashly or negligently; and
(2) the rashness or negligence was such as to endanger human life or the personal safety of others.

In order to convict a person under this section, the prosecution must prove rashness or negligence on the part of the accused, and also that by such rashness or negligence, human life or the personal safety of others was actually endangered.[25]2891

93 *State v Kamalakar Prabhakar Jarvakar* AIR 1960 Bom 269, p 270, 1960 Cr LJ 814 ; *Gopinatha Pillai (Dr) v State of Kerala* 2000 Cr LJ 3682 (Ker) .

94 *Chhallu v Emperor* AIR 1941 All 288, 42 Cr LJ 621 .

1 *Indrapal v State* 1978 All Cr R 221 .

2 Re *Nga Tha Ku*1872-1892 LRB 91; *Mahadeo Pandey v Emperor* AIR 1932 All 322, 33 Cr LJ 889 .

3 *Babu Ram v Emperor* AIR 1925 All 396, p 397, 26 Cr LJ 987 .

4 In Re *Thippana Gangi Reddy*(1890) 1 Weir 337 (2).

5 *R v Abdul Sattar* ILR 28 All 464 ; *Kamr-Ud-Din v Emperor* 2 Cr LJ 207 .

6 *Gaya Prasad v Emperor* AIR 1928 All 745 ; *Kundan Singh v State of Punjab* 1975 Chand LR 523 ; *Maung Ba Kyi v Emperor* AIR 1937 Rang 273, 38 Cr LJ 897 ; *Mahendra v State* ILR 33 Pat 1006 ; *Babu Ram v Emperor* AIR 1925 All 396 .

7 *Maung Ba Kyi v Emperor* AIR 1937 Rang 273, 38 Cr LJ 897 ; *Gaya Prasad v Emperor* AIR 1928 All 745 ; *Kala Bhika Baria v State* AIR 1966 Bom 13, p 15, 1966 Cr LJ 7 ; *Chhallu v Emperor* AIR 1941 All 288, 42 Cr LJ 621 .

8 *Mahendra v State* ILR 33 Pat 1006 .

9 *Remal Dass v State* (1963) 2 Cr LJ 718, p 719 .

10 *Kala Bhika Baria v State* AIR 1966 Bom 13, p 15, 1966 Cr LJ 7 .

11 *Gaya Prasad v Emperor* AIR 1928 All 745, 29 Cr LJ 1088 .

12 *Nursing Charan v Emperor* AIR 1915 Cal 295, p 296, 16 Cr LJ 131 .

13 Re *George Loveday* 1 Weir 337.

14 *Hisa A Sheng v Administrator, Union Territory of Lakshadweep* 2007 Cr LJ 821, p 824 (Ker) .

15 *Abbas Mirzn v Emperor* AIR 1918 Bom 230, p 231, 19 Cr LJ 605 .

16 *Babu Ram v Emperor* AIR 1925 All 396, p 397, 26 Cr LJ 987 ; *Gopinath Mahto v Mansaram Koomar* (1900) 5 CWN 376 .

17 *Gopinatha Pillai (Dr) v State of Kerala* 2000 Cr LJ 3682 (Ker) .

18 *Karuni Samal v State* (1976) 42 CLT 207 .

19 Re *Nga Myat Thin*(1989) PJLB 426; *Mahadev Pandey v Emperor (Dr)* AIR 1932 All 322, p 323, 33 Cr LJ 889 .

20 *Sirajaddin Kazi v Sergeant H Jemmer* AIR 1929 Cal 776 .

21 *Kurban Hussaen Mohamedalli Rangawalla v State of Maharashtra* AIR 1965 SC 1616, (1965) 2 Cr LJ 550 .

22 *K Shaheed (Dr) v PK Shahida* 1998 Cr LJ 4638 (Ker) .

23 *Gopinatha Pillai (Dr) v State of Kerala* 2000 Cr LJ 3682 (Ker) .

24 Code of Criminal Procedure 1973, s 251 .

25 Re *Nga Tha Ku*(1879) SJLB 91.

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Chapter XVI

Of Offences Affecting the Human Body

S. 337.

Causing hurt by act endangering life or personal safety of others.--

Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Comments

1. Scope

Under this section, whoever causes hurt to any person, by doing an act so rashly or negligently as to endanger human life or the personal safety of others, is liable to be punished in the manner provided. It is an aggravated form of the offence defined in s 336, IPC .[1] The operation of this section is confined to acts done without any criminal intent, apart from the rashness or negligence which is its essential ingredient.[2] If there is no rashness or negligence, there is no offence.[3]Personal injury, intentionally or knowingly caused, can never be a rash or negligent act,[4]*e.g.*, throwing missiles at human beings.[5]

2. Sections 279, 337 and 336 --Distinction

Commentary 0075nder the same heading in s 279, IPC, vol. 2, may be referred to.

3. Essential Ingredients

The main ingredients of an offence under this section are:

(a) the doing, by the accused, of an act;
(b) so rashly or negligently as to endanger human life or the personal safety of other; and
(c) thereby causing hurt to any person.[6]

2892

4. 'Hurt'

Commentary under s 319, *ante*, may be referred to.

5. 'Act'

Commentary under ss 33 and 52, IPC, vol. 1, may be referred to.

6. 'So rashly or negligently as to Endanger Human life or the Personal Safety of others'

Where, on account of the rash and negligent driving of a vehicle, a collision occurs and hurt is thereby caused to a person, the driver of the vehicle would be guilty under this section.[7] The person hurt may be an occupant of the vehicle itself.[8] The driver of a motor vehicle is under a duty of using whatever means at hand to avoid a threatened collision. It will constitute culpable negligence if a driver drives a vehicle with patently defective brakes or fails to apply the brakes in time.[9] Mere negligence or rashness is not, therefore, enough to bring a case within the ambit of s 337, or s 338, IPC . Negligence or rashness, proved by evidence, must be such as should necessarily carry with it criminal liability.[10] Criminal negligence is the gross and culpable neglect, or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances, out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.[11] Where two buses were racing and competing with each other, the owners of both the buses were held guilty under ss 279 and 337 because racing or competition involves rash driving on both sides.[12]

The accused driver was driving the bus which took deviation at the spot of the accident and hit the house. The injured passenger, PW, did not depose that the accused was driving the bus rashly and negligently. The defence version was that somebody was crossing the road and to avert the collision, the deceased driver took the vehicle to the other side of the road and hit the house. The defence version being probable was believed; the accused appellant was acquitted of the charge under ss 279, 337, 338 and 427, IPC .[13]

The respondent accused was prosecuted under ss 279 and 337, IPC on allegations that he was driving the motorcycle at high speed and that he hit the victim from wrong side, causing injuries on his legs, chest, head *etc.* There were material omissions and contradictions in the statement of the prosecution witness. The respondent was acquitted of the charges under ss 279 and 337, IPC .[14]

There was explosion of a bomb kept inside a passenger bus which caused the death of one passenger and injuries to several passengers. The prosecution witnesses2893 identified the accused appellant. There was enough material to connect the accused appellant with the heinous crime of planting a live bomb in a passenger bus and getting down from the same before the bomb exploded, thereby causing death of one person and grievous injuries to several other passengers. The accused appellant was convicted for offences under ss 285, 337, 338, 427, 302, IPC and s 3 of the Explosive

Substances Act .[15]

Where the accused, driving mini bus, rashly and negligently dashed against the bus, causing injuries to the passengers of both the buses, the mini bus driven by the accused was on the wrong side of the road; the passengers of the mini bus deposed that the accused driver was driving the bus at a high speed and the accused respondent was convicted under ss 279 and 337, IPC .[16]

The accused appellant, by his rash and negligent driving, had caused various injuries to the victims which suffered simple hurt. The conviction of the accused appellant under s 337, IPC, concurrently recorded by the trial Court and High Court was held proper.[17]

In prosecution of the accused for rash and negligent driving under ss 279, 337 and 338, IPC, witness supporting the prosecution case, who was minor at the time of the incident, testified before the Court that the driver was not on the wheels at the time of the accident. Another hostile witness deposed that he could not see the driver of the offending vehicle. Therefore, the accused was not convicted for offences under ss 279, 337 and 338, IPC .[18]

Where the photographs of the spot showed that the offending truck was on the wrong side of the road, *i.e.,* on the extreme right side of road on the curve, whereas the victim's Maruti Car was at its left side, the appellant accused was convicted under s 279, IPC .[19]

Speed is not a criterion, even to infer the rash or negligent act of driving; it is merely a corroborative factor.[20] The accused driver of a roadways bus was driving the bus at a high speed, which dashed against a tempo coming from the opposite direction, caused injuries to three persons being the occupants of the tempo. The accused was convicted under ss 279 and 337, IPC .[21]

The prosecution's case was that, the accused, driving the goods truck in a rash and negligent manner, dashed against the Tata Sumo which was coming from opposite direction. All the PWS were sitting in the rear seats of the Tata Sumo and as such they had no opportunity to see the driver of the offending vehicle. The witnesses did not depose before the Court that they saw the face of the driver of the offending vehicle. The identity/identification of the accused was not proved beyond reasonable doubt. The accused was acquitted of the charge under ss 279, 337 and 304A, IPC .[22]

Where the appellant driver of police jeep, under the influence of alcohol, was driving the jeep at a high speed, and thereby caused the death of five persons and2894 injured seven and went 93 feet ahead of the incident, he could be stopped by the Police Officer who was travelling in the vehicle. It was held to be a case of culpable negligence. He was convicted under ss 304A, 337, 338 and 279, IPC .[23]

Illustrative Cases

Negligent Shooting

The causing of hurt by negligence in the use of a gun would fall within the purview of s 337, rather than s 286, IPC . However, where all the evidence against the accused was that he went out for shooting in the month of July, when people were likely to be in the fields, and that a single pellet from his gun struck a man who was sitting in a field, it was held that this was not sufficient evidence of rashness or negligence to support a conviction under this section.[24] If a man fires blindly, in the dark, with a shotgun in the direction from which he has heard sounds coming from a long distance, it cannot be held that his act must, in all probability, cause death, or such bodily injury as is likely to cause death, and, therefore, he must be convicted under this section, and not under s 307 .[25]

Rash and Negligent Operation

In *Gulam Hyder Punjabi v Emperor* ,[26] the accused, who was a *hakim*, performed an operation on the outer side of the upper lid of the eye of the complainant. The instruments used were a pair of scissors and needle, which would ordinarily be used by a tailor, and not by an eye-surgeon. The wound was sutured

with ordinary thread. The most ordinary precautions, such as using proper instruments for the operations as well as for protecting the eyeball, disinfecting and sterilising the instruments and using antiseptics, were entirely neglected. The medical evidence showed that the operation was needless and performed in a primitive way, and not in accordance with any recognised Indian method. It was held that whether a practitioner is trained or not, he is bound, by law, to avoid such rashness or negligence as would endanger human life or the personal safety of others, and if he undertakes an operation and he has been properly found to have acted rashly and negligently, he is guilty of an offence under this section.

Where during cesarean operation the accused doctor left a scissor in the abdomen of the patient and no injury was caused to the patient, the case appeared to be more close to a case of accident; refusal to frame charge under ss 337 and 338, IPC against the accused was held proper.[27]

Negligence in Administering Drug

The mere administering of a love potion or drug, which a person thinks might be beneficial, is not in itself an offence; but when it is supposed to have effect upon persons, with whom the paramour of the accused has enmity, and when she administers it without due care and caution or any enquiry as to what it really is, she commits an offence punishable under this section.[28]2895

Use of Old and Crude Method by Doctor--If Negligence

The doctor has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency.[29] For draining out wine from the bladder, two methods are proved; one of them being the doctors treats the patient with a method normally adopted to drain out wine by using a catheter. The plea of the complainant that using a catheter is old and a crude method and the doctors ought to have used the above public method which is proper, is not tenable and the doctors cannot be said to be negligent in treating the patient.[30]

Pelting of Brickbats

The victim was alleged to have suffered injuries by the pelting of brickbats. The police officer who visited the place of occurrence did not find any brickbats there. There was no explicit accusation against any of the accused to be the author of injuries found on the victim by pelting of brickbats. The accused were acquitted under s 337, IPC, by getting the benefit of doubt.[31]

7. Procedure

An offence under this section is cognizable, bailable, compoundable only with the permission of the court before which the prosecution is pending, and triable by any magistrate, and may also be tried summarily.

Unless the person, who has been hurt, joins the petition of compromise, the case cannot be compounded merely with the consent of the person making the FIR.[32] The court before which the prosecution is pending should permit the offence to be compounded.[33] However, when in a joint trial under ss 337, 426 and 279, IPC, the court permits the compounding of offences under ss 337 and 426, IPC ; the permission does not result in the acquittal of the accused for the offence under s 279, IPC .[34]

8. No Effect of Repealing Provision of Section 25, Prevention of Food Adulteration Act (37 of 1954)

Commentary under same heading in s 270, IPC, vol. 2, may be referred to.

9. Quashing of Complaint

Commentary under same heading in s 336, *ante*, may be referred to.

10. Joint Trial under Sections 279, 337 and 426 --Not Illegal

Where, in a case, the series of acts were: (1) the rash and negligent driving of a bus by its driver; (2) the rash and negligent driving of a car by its driver; and (3) the acts of both the drivers in acting negligently leading to a collision, the combined effect of which resulted in damage to the bus and the car, and injuries to the driver of the car,2896 constituting offences under ss 337, 426 and 279, IPC, it was held that the drivers of both the vehicles could be tried together and a joint trial was not illegal.[35]

11. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.

12. Proof

To establish an offence under this section, the prosecution must prove that:

(1) the accused did an act so rashly or negligently as to endanger human life or the personal safety of others; and
(2) he thereby caused hurt to certain person/persons.

Once the accident stands proved and the circumstances which appear on the record conclude the rash or negligent driving by the offending vehicle, immediately the onus shifts upon such driver to prove due care and caution.[36]

When no witness was available to show that the accused was driving a truck at the time of accident, the sole evidence relied on by the prosecution was '*Bilti*' showing the name of the accused as driver of the truck in question, in the statement under s 313, CrPC, the accused stated that another driver belonging to the same company took away his truck before the accident took place, the conviction of the accused under ss 279, 337, 338 and 304-A, IPC, was not found proper.[37] However, the mere fact that the injured witness admitted that he failed to see the accused as he fell down when he was hit is not sufficient to hold that the accused was not properly identified or was not driving the vehicle at the time of the accident.[38] If an accident occurs on a public road in a village and is witnessed by one or more witnesses, the eye witnesses are more likely to be the residents of the locality or the persons visiting that locality on business or some other purpose. Merely because the persons are residents of the village or the locality where the accident occurred, they cannot be called as interested witnesses.[39]

The non-examination by the motor vehicle inspector is not fatal when his report was admitted in evidence by the consent of the accused.[40]

13. Acquittal under Section 337 or Section 338 --No bar to Prosecution under Section 279

Commentary under same heading in s 279, IPC, vol. 2, may be referred to.

14. Conviction both under Sections 279 and 337 or Section 338 --Legality of

Commentary under same heading in s 279, IPC, vol. 2, may be referred to.2897

The offence punishable under s 279, IPC, is a grave offence, the sentence prescribed is higher; the

accused can be punished under s 279, IPC only, and not under both ss 279 and 337, IPC .[41]

15. Sentence

Where the accused driver of a Government Roadways bus was not previously convicted and had not repeated the offence after conviction by the Court below, the High Court substituted the sentence of imprisonment by fine.[42]

Where the accused appellant by driving a jeep on a public road in a rash and negligent manner, had endangered the life of innocent persons, caused death of an occupant of the jeep and injuries to others, the High Court by showing undue sympathy, was not justified in reducing the sentence to the period already undergone.[43]

1 *State v Kamalakar Prabhakar Juvekar* AIR 1960 Bom 269, p 270, (1960) Cr LJ 814 .

2 *Chhallu v Emperor* AIR 1941 All 288, 42 Cr LJ; *Emperor v Suraj Bali* 7 Cr LJ 306, 5 ALJ 155 .

3 *Emperor v Suraj Bali* 7 Cr LJ 306, 5 ALJ 155 ; *Desai v State of Maharashtra* AIR 2014 SC 795, 2014 Cr LJ 385, 2013 (11) Scale 429 .

4 *Emperor v Nga Shwe Lu* 1 Cr LJ 557 .

5 *R v Nga San Pe* 1 LBR 259 ; *Emperor v Po Taw* 4 Cr LJ 201 .

6 *Fiduhusen Abdulati v State* AIR 1962 Guj 318, (1962) 2 Cr LJ 760 (1) ; *A Rahiman v M Wabber* (1973) Cr LJ 1682 (Mys), (1973) AC CJ 409 .

7 *Mahomed Jamal v Emperor* AIR 1930 Sind 64, 30 Cr LJ 1077 ; *Raghavan Pillai v State* AIR 1954 Tr & Coch 25, 55 Cr LJ 7; *State v Mathai Abraham* AIR 1953 Tr & Coch 617, 54 Cr LJ 1850.

8 *Arumugham Pillai v Gnanasoundara Pandian* AIR 1962 Mad 362, p 363, (1962) 2 Cr LJ 386 .

9 Re *Parthasarathy*AIR 1959 Mad 497, p 501, (1959) Cr LJ 1344 .

10 *Arumugham Pillai v Gnanasoundara Pandian* AIR 1962 Mad 362, p 364-365, (1962) 2 Cr LJ 388 .

11 *State (Delhi Admn) v Kainilat* (1975) PLR 145 .

12 *Parameswaran Pillai v State of Kerala* (1972) KLT 11 (SN) . For further commentary, see s 279, IPC, Vol. 2 and ss 304A and 336, *ante.*

13 *Durgappa v State of Karnataka* 2009 Cr LJ 226, p 228 (Kant), 2008 (5) Karlj 668 .

14 *State of Rajasthan v Mohan Ram* 2009 Cr LJ (NOC) 43 (Raj) .

15 *D Dandasi Reddy v State of Orissa* 2009 Cr LJ 4400, p 4404 (Ori) (DB), CLT (2009) Supp Crl 1246 .

16 *State of Mohandas S Gawade*2007 Cr LJ 850 (Bom).

17 *Alister Anthony Pareira v State of Maharashtra* 2012 Cr LJ 1160, p 1176 (SC), AIR 2012 SC 3802 .

18 *Sunil Kumar v State of HP* 2014 Cr LJ (NOC) 278 (HP) .

19 *State of Himachal Pradesh v Amrik Singh* 2007 Cr LJ 4177 (HP) .

20 *State of HP v Baljit Singh* 2012 Cr LJ 237, p 239 (P&H).

21 *State of HP v Baljit Singh* 2012 Cr LJ 237, p 239 (P&H).

22 *State v S Manoharan* 2014 Cr LJ 3307, p 3310 (Kant) (DB), 2014 (3) AKR 55 .

23 *Shaikh Maheboob v State of Maharashtra* 2008 Cr LJ 4729 (Bom) .

24 *Emperor v Abdus Sattar* ILR 28 All 464, 3 Cr LJ 363 .

25 *Mohamed Cassim v King* AIR 1938 Rang 220, p 222, 39 Cr LJ 692 .

26 *Gulam Hyder Punjabi v Emperor* AIR 1915 Bom 101, p 102, 16 Cr LJ 437 .

27 *Hemaben Sanjeev Kumar Kanodia v DN Nanavati* 2013 Cr LJ 2472, p 2478 (Guj), (2013) 2 GLR 1317 .

28 *Bhagava Giriyappa v Emperor* AIR 1916 Bom 98 (2), p 99, 18 Cr LJ 43 ; *Pika Bewa v Emperor* ILR 39 Cal 855 ; *Emperor v Ramava Chetnappa* AIR 1915 Bom 297, 16 Cr LJ 305 ; Re *NidamartiNagkabhushanam* (1871-75) 7 MHCC 119.

29 *Bhasker Acharya (Dr) & ors v Chandreshekhar Shervegar* (1998) Cr LJ 1005 (Kant) .

30 *Bhasker Acharya (Dr) & ors v Chandreshekhar Shervegar* (1998) Cr LJ 1005 (Kant) .

31 *Gafoor Mian v State of Bihar* (2002) Cr LJ 3842 (Pat) .

32 *Ramanaya v State of Bihar* (1977) Cr LJ 467 (Pat) .

33 *Bhagwat Rai v State of Bihar* (1972) Bihar LJR 353 .

34 *State v Kamalakar Prabhakar Juvekar* AIR 1960 Bom 269, p 270, (1960) Cr LJ 814 .

35 *State v Mangtu Ram* AIR 1962 Raj 155, p 156, (1962) 1 Cr LJ 763 ; *MK Baliah v Emperor* (1931) MWN 556 ; Re *Vankayalapati Gopalarao* AIR 1956 Andh Pra 21.

36 *State of HP v Baljit Singh* 2012 Cr LJ 237, p 239 (P&H).

37 *Jogendra Singh v State* (1999) Cr LJ 994 (Raj) .

38 *Malleshi v State of Karnataka* (1999) Cr LJ 2617 (Kant) .

39 *Digamber Baburao Ingavale v State of Maharashtra* 2008 Cr LJ 2418, p 2419 (Bom) (Accused bus driver driving rashly and negligently, colliding with an autorickshaw, convicted under ss 279 and 337, IPC).

40 *Ibid.*

41 *Md Hiran Mia v State of Tripura* 2010 Cr LJ 189, p 191 (Gauh), 2009 (5) GLT 661 .

42 *State of HP v Baljit Singh* 2012 Cr LJ 237, p 239 (P&H).

43 *State of Madhya Pradesh v Suresh Singh* AIR 2015 SC 398, (2015) 1 SCC 222 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

S. 338.

Causing grievous hurt by act endangering life or personal safety of others.--

Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

A reading of s 338, IPC would clearly indicate that there must be some act done by the accused and that act must be done so rashly or negligently as to endanger human life or the personal safety of others.[44] This section deals with causing grievous hurt by any act endangering human life or the personal safety of others. The offence under this section is only an aggravated form of the offence under the previous section, the only difference between the two being the degree of the injury caused. Under the preceding section, it is simple hurt whereas, under this, it is grievous hurt. Otherwise, the two sections are in identical terms.2898

The main feature of the offence under this section is the causing of grievous hurt by any act, which is not voluntary, but which is rash or negligent. The liability is to be judged with reference to the effect produced by the rash or negligent conduct of the accused.

2. Main Ingredients

The main ingredients[45] of an offence under this section are:

(a) the doing, by the accused, of an act;
(b) so rashly or negligently as to endanger human life or the personal safety of others; and
(c) thereby causing grievous hurt to any person.

3. Sections 279 and 338 --Distinction

Commentary under the same heading in s 279, IPC, vol. 2, may be referred to.

4. 'Grievous Hurt'

Commentary under s 320, *ante*, may be referred to.

5. 'By doing any Act'

For the purpose of this section, the nature of the act is immaterial. All, that is necessary, is that, whatever be the act, it should be done so rashly or negligently as to endanger human life or the personal safety of others. The act done may even be lawful in itself. Thus, where the accused, who was a fully developed man, had sexual intercourse with his child-wife, who had not yet attained puberty, with such violence as to rupture her vagina and destroy the portion between the vagina and the rectum with the result that she died, it was held that he did a dangerous act with reckless indifference to the welfare and personal safety of his wife and was guilty of the offence under this section.[46]

Commentary under s 337 and under s 326, may be referred to.

6. 'So rashly or Negligently as to Endanger Human Life or the Personal Safety of Others'

Commentary under s 279, IPC, vol. 2 and 304A, 336, 337 *ante*.

7. Illustrative Cases

In *State of Bihar v Mangal Singh* ,[47] the respondent was driving a bus, with defective brakes, at such high speed that when he made an attempt to apply the foot brakes on being signalled to stop, he was completely unable to control it. Two of the wheels had already gone into a *nala* by the side of the road.

The bus after having swerved to the right and to the left ultimately capsized on the road. Several passengers received injuries, some receiving serious injuries. One of the passengers even succumbed to2899 his injuries. The driver was tried for offences under ss 279, 338 and 304-A . It was held that he was rightly convicted for the offences charged. Where grievous hurt was caused to a person in an accident and it was found that the accident was due, mainly, if not entirely, to the rashness of the accused in driving the motor car, when he was drunk, and getting on the wrong side of the road, while there were vehicles in front, or otherwise, to his negligence in not seeing a *tonga* in front of him and not properly controlling the motor car so as to avoid a collision, it was held that he was rightly convicted of the offence under this section.[48] If the driver of a truck allows another person to drive the truck, knowing that the person has no driving licence, and that person causes grievous hurt to a person by driving the truck rashly or negligently, the driver would be liable under this section read with ss 107 and 115 .[49]

Where during cesarean operation the accused doctor left scissor in abdomen of the patient, no injury was caused to the patient, the case appeared to be more close to the case of the accident, refusal to frame charge under ss 337 and 338, IPC against the accused was held proper.[50]

The accused driver was driving the bus; the bus took deviation at the spot of the accident and hit the house. The injured passenger PW did not depose that the accused was driving the bus rashly and negligently. The defence version was that somebody was crossing the road and to avert accident, the deceased driver drove the vehicle to the other side of the road and hit the house. The defence version being probable was believed, the accused appellant was acquitted of the charge under ss 279, 337, 338 and 427, IPC .[51]

Evidence of witnesses established that the accused appellant driving a jeep loaded with passengers, dashed with roadside trees, collapsed by the side of the road, and as a result 12/13 passengers on board sustained injuries and one injured died later in the hospital. The vehicle was seized from the spot in a damaged condition. The Motor Vehicle Inspector reported that the vehicle was having no mechanical defect at the time of the accident. The accused appellant had suffered injuries in the accident. The appellant driver was convicted under ss 279, 338 and 304A, IPC .[52]

Where the accused driver of the bus, in the process of overtaking the bullock cart, dashed against the motorcycle coming from the opposite side, the pillion rider of the motorcycle injured in the accident was the best witness for the incident. The accused driver of the bus dragged the motorcycle for about 20 feet and stopped the vehicle on the footpath on the western side of the road. Held, the accused driver of the bus was guilty of rash and negligent driving of the bus. He was convicted under ss 279, 338 and 304A, IPC .[53]

Accused appellant by rash and negligent driving caused grievous injuries to two PWS on temporal parietal region causing deep scar with bleeding. The injuries were covered by the definition of 'grievous hurt' under s 320, IPC . Conviction of the accused appellant under s 338, IPC was held proper.[54]2900

In prosecution of the accused for rash and negligent driving under ss 279, 337 and 338, IPC, the witness supporting the prosecution case, who was minor at the time of the incident, testified before the Court that the driver was not on the wheels at the time of the accident. Another hostile witness deposed that he could not see the driver of the offending vehicle. Accused was not convicted for offences under ss 279, 337 and 338, IPC .[55]

There was prosecution evidence that the accused respondent was driving motorcycle at a high speed on the wrong side of the road after it had become dark and without lights. In mechanical examination, the motorcycle was found in order. Held, the act of the accused was such a wanton one that it must be presumed that he had the knowledge that his act would cause injury to any person on the road. He was convicted under ss 279 and 338, IPC .[56]

Where the appellant driver of police jeep under the influence of alcohol was driving the jeep at a high speed, and thereby caused the death of five persons and injured seven, went 93 feet ahead of the incident spot and could not be stopped by the Police Officer who was travelling in vehicle, held it was a case of culpable negligence and was convicted under ss 304A, 337, 338 and 279, IPC .[57]

8. 'Act'--Covers Medical Profession

Expression 'act' occurring in s 338, IPC, includes acts of omission as well. Section 338 of the IPC does recognize unambiguously that the particular offence can be committed by omission. The medical profession is included in it. The offence under s 338 of the IPC is capable of being committed by omission.[58]

Medical Negligence--Criminal Liability of Doctor

If the conduct in question involves elements of recklessness, then it is punishable and should not be described as merely negligent. If, however, there is nothing to suggest that the accused (doctor) was aware of the risk deliberately taken, then he is morally blameless and should face, at the most, a civil action for damages.[59]

The appellant a renowned surgeon advised Exploratory Laparotomy of a cancer patient which was not an act of negligence much less a wanton negligence. On opening the abdomen, one Dr. A.K. Mukherje found plastering of intestines as well as profuse oozing of ascetic fluids. He immediately called the appellant who was performing other surgical procedures in another operation theatre. The appellant after seeing the condition of the patient, albeit, from the distance found that it was not possible to proceed with the operation. He advised Dr. A.K. Mukherjee to close the abdomen. Dr. Mukherjee thus closed the abdomen. It was because of the deplorable condition of the patient, the surgery could not be completed as on the opening of the abdomen other complications were revealed. This would have happened in any case, irrespective whether abdomen was opened by Dr. Mukherjee or by the appellant himself. Held, the act of the accused appellant was not punishable under s 338, IPC and accordingly his conviction under s 338 read with s 109, IPC was set aside.[60]2901

In the instant case the complainant's wife was admitted in the respondent's hospital for second pregnancy. On 01 January 2010, she underwent a caesarian operation for the delivery and the delivery was successful, but, while the abdomen was to be closed, she developed unexpected cardiac arrest and though she was shifted to some other hospital, she became unconscious and fell in coma. The complainant filed complaint against the respondent hospital and the doctors who were working as gynecologists. The Special Medical Board gave opinion that there was no negligence on the part of the respondent doctors. The proceedings filed under s 338, IPC were quashed on petition under s 482, CrPC .[61]

9. Procedure

An offence under this section is cognizable, bailable, compoundable only with the permission of the court, before which the prosecution is pending, and triable by any magistrate, and may also be tried summarily.

10. Quashing of Complaint

Commentary under the same heading in s 336, *ante*, may be referred to.

11. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[62]

However, when the offence under this section is clubbed with other offences attracting a warrant trial, the charge under this offence may also be framed. But when no negligence or rashness of the accused-doctor in performing an operation endangering the life of the patient was averred or proved, the surgical injury for curing deceases cannot be said to be injury caused voluntarily, punishable under s 326, by performing the operation no wrongful gain was made to the doctors or to the hospital, the order framing of charges under ss 326, 338, 420 read with s 120 B, IPC was quashed.[63]

There is no impediment in law for an offender being charged for the offence under s 304, Pt II, IPC and also under ss 337 and 338, IPC . The two charges under s 304, Pt II, IPC can legally co-exist in a case of single rash or negligent act where a rash or negligent act is done with the knowledge of likelihood of its dangerous consequences.[64]

12. 'Proof'

The proof required is the same as under s 337, by substituting 'grievous hurt' for 'hurt'.

Merely because a person got injured when he came in contact with the bumper of the car, cannot lead to an inference that the driver must have been rash or negligent. The prosecution should lead evidence to establish the fact of negligence.[65]2902

13. Accidents on Account of Mechanical Defect, in the Vehicle

Commentary under the same heading in s 304A, *ante*, may be referred to.

14. Examination of the Accused

Commentary under the same heading in s 304A, *ante*, may be referred to.

15. Acquittal under Section 337 or Section 338 --No Bar to Prosecution under Section 279

Commentary under the same heading in s 279, IPC, vol. 2, may be referred to.

16. Conviction Both under Sections 279 and 337 or 338 --Legality of

Commentary under the same heading in s 279, IPC, vol. 2, may be referred to.

17. Conviction

A conviction under s 121 of the Motor Vehicles Act 1939 is no bar to a conviction under this section.[66]

44 *Abdul Kalam v State (Govt of NCT of Delhi)* (2006) Cr LJ 3071 (Del) .

45 *Arumugham Pillai v Gnanasoundara Pandian* AIR 1962 Mad 362, 363, (1962) 2 Cr LJ 386; *State Government of Madhya Pradesh v Bhawanesh Kumar* AIR 1958 MP 205, p 208 .

46 *Empress v Huree Mohan Mythee* ILR 18 Cal 49 ; *Emperor v Shahuwalad Meharab* AIR 1917 Sindh 42 (1), 18 Cr LJ 1003 .

47 *State of Bihar v Mangal Singh* AIR 1953 Pat 56, (1953) Cr LJ 518 .

48 *Chaudhri v Emperor* AIR 1933 Oudh 568, 35 Cr LJ 296 .

49 *Provincial Government v Saidu* AIR 1947 Nag 113, 47 Cr LJ 968 .

50 *Hemaben Sanjeev Kumar Kanodia v DN Nanavati* 2013 Cr LJ 2472, p 2478 (Guj), (2013) 2 GR 1317 .

51 *Durgappa v State of Karnataka* 2009 Cr LJ 226, p 228 (Kant), 2008 (5) Karlj 668 .

52 *Hardhan Gope v State of Tripura* 2012 Cr LJ 3232 (Gauh) .

53 *State of Karnataka v Kumayian* 2010 Cr LJ 3376 (Kant), 2010 (3) KCCR 2402 .

54 *Alister Anthony Pareira v State of Maharashtra* 2012 Cr LJ 1160 (SC), AIR 2012 SC 3802 .

55 *Sunil Kumar v State of HP* 2014 Cr LJ (NOC) 278 (HP) .

56 *State of HP v Niti Raj* 2009 Cr LJ 1922, p 1926 (HP), 2009 (1) Shimlc 271 .

57 *Shaikh Maheboob v State of Maharashtra* 2008 Cr LJ 4729 (Bom) .

58 *PB Desai v State of Maharashtra* AIR 2014 SC 795, 2014 Cr LJ 385 (SC), 2013 (11) Scale 429 .

59 *PB Desai v State of Maharashtra* AIR 2014 SC 795, 2014 Cr LJ 385 (SC), 2013 (11) Scale 429 .

60 *PB Desai v State of Maharashtra* AIR 2014 SC 795, 2014 Cr LJ 385, 2013 (11) Scale 429 .

61 *KJ Marykutty v State of Kerala* 2015 Cr LJ 1777 (Ker), ILR 2015 (2) Kerala 560 .

62 Code of Criminal Procedure 1973, s 251 .

63 *SD Khetani (Dr) v State of Rajasthan* (1998) Cr LJ 2493 (Raj) ; *KJ Marykutty v State of Kerala* 2015 Cr LJ 1777 (Ker), ILR 2015 (2) Kerala 560 .

64 *Alister Anthony Pareira v State of Maharashtra* AIR 2012 SC 3802, 2012 Cr LJ 1160, p 1169 (SC), (2012) 2 SCC 648 .

65 *Ram Jiwan v State of Uttar Pradesh* (1972) All Cr R 507 .

66 *State of Bihar v Mangal Singh* AIR 1953 Pat 56, p 58, (1953) Cr LJ 518 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

S. 339.

Wrongful restraint.--

Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Exception.--The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration

A obstructs a path along which *Z* has a right to pass. *A* not believing in good faith that he has a right to stop the path. *Z* is thereby prevented from passing. *A* wrongfully restrains *Z.*

Comments

1. Scope

This section defines wrongful restraint which is made an offence punishable under s 341, IPC . Similarly, s 340, IPC defines wrongful confinement which is an offence2903 made punishable under s 342, IPC . The remaining sections under this head, *i.e.*, ss 343 to 348, IPC, deal with aggravated forms of wrongful confinement.

2. Law of Singapore

Whoever voluntarily obstructs any person, so as to prevent that person from proceeding in any direction in which he has a right to proceed, is said to wrongfully restrain that person. The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct is not an offence within the meaning of this provision.[67]

The accused was convicted of this offence when he raised his hands to prevent the victim from proceeding to the washroom.[68]

3. Wrongful Restraint--Essentials

The essential ingredients of the wrongful restraint are:

(1) Accused obstructs voluntarily;
(2) The victim is prevented from proceeding in any direction;
(3) Such victim has every right to proceed in that direction.[69]

By wrongful restraint is meant the keeping of man out of a place where he wishes to be and has a right to be. Wrongful confinement, which is a form of wrongful restraint, is the keeping of a man within certain limits out of which he wishes to go and has a right to go.[70] The offence of wrongful restraint, as has been pithily put, is linear in its scope while wrongful confinement is circular in its character. The illustration to this section refers merely to the ordinary case of a path.[71]

A person may obstruct another by causing it to appear to that other that it is impossible, difficult or dangerous to proceed, as well as by causing it actually to be impossible, difficult or dangerous for that other to proceed. The obstruction-must be physical, a verbal prohibition or remonstrance does not amount to such obstruction. The offence is the abridgment of the liberty of a person against his will. In a wrongful restraint, there need not be any stoppage of the movement; it may be directed into a channel different from the direction in which the victim intends to move. Physical presence of the obstructer is not necessary, nor is any actual assault necessary, and fear of immediate harm restraining a man out of place, where he wishes to be and has a right to be, is sufficient to constitute an offence under this section. The slightest unlawful obstruction to the liberty of a person to go when and where he likes to go, provided he does so in a lawful manner, cannot be justified and is punishable.[72]2904

4. 'Voluntarily'

This section relates to the voluntary obstruction by a person, and not obviously, at least, to obstructions which are not voluntarily continued by the persons, accused of the obstruction, throughout the time the obstruction lasts.[73]What the section contemplates is that there must be obstruction attributable directly to the person charged; the section does not include, within its scope, an act which, in its remote and indirect consequence might obstruct the free movement of a person.[74] It is not voluntary obstruction of a person unless the obstructor intends it or knows or has reason to believe it to be likely that the means adopted

would cause his obstruction. The section does not say that whoever does an act, which causes obstruction to a person so as to prevent him from proceeding in any direction, *etc.*, wrongfully restrains that person.[75]

5. 'Obstructs'

Obstruction, within the meaning of this section, must be physical obstruction although it may be caused by physical force as well as by being a menace and using threats.[76] There must be some physical coercion or threat of physical injury. Mere exercise of moral influence does not amount to restraint.[77] Ploughing up a path, over which a person has a right to pass, is not obstruction.[78] The obstruction must be such as to prevent the ordinary normal movements of a person.[79] To constitute an offence under s 341 or s 342, IPC, it is not necessary that the person, to be deprived of his liberty, should be touched or assaulted or actually arrested or confined within walls. The offence may be committed by words alone, or by acts alone, or by both, or by merely operating on the will, or by personal force, or by both. A person can be deprived of his liberty of his locomotion by the exercise of force as well as by the express or implied threat of it.[80]

6. 'Any Person'

To come within the section, the obstruction must be to the passage of a person, and not of cattle,[81] or of a vehicle.[82] However, voluntary obstruction of a vehicle, in2905 which persons are travelling, would amount to wrongful restraint of the persons in the vehicle.[83]

Even a child of tender age can be 'a person' within the meaning of this section.[84]

7. 'So as to Prevent that Person from Proceeding in any Direction in which that Person has a Right to Proceed'

To prevent a person from doing something, which he has a right to do, is not necessarily wrongful restraint, *e.g.*, *A* prevents *B* from building a party wall between their backyards.[85] To justify a conviction for wrongful confinement, it must be found that: (1) the complainant had a right to proceed in a certain direction, say along a path; and (2) he was so obstructed that he was prevented from so doing. Ploughing up a path would not, by itself, prevent people from walking over it.[86] Mere unyoking of the bullocks, tied to a plough, does not amount to wrongful restraint.[87] Where the accused placed a lock on the outer door of the complainant's house intending to prevent, and thereby actually preventing, his ingress, it was held that the offence of wrongful restraint was established.[88]

8. 'From Proceeding'

The word 'proceed' is not confined to the case of a person who can walk on his own legs or can move by physical means within his own power.

It includes the case of a person proceeding by outside agency which in the case of a baby would mean the agency of its natural protector or guardian.[89] It includes proceeding by a car or a bus,[90] or on horse-back.[91]

9. 'In any Direction'

These words would include a vertical direction so that the section would cover the case of a person reasonably wanting to go vertically upwards,[92] or downwards.[93] Proceeding in any direction must mean proceeding in that direction, and not in any other direction, much less in the reverse direction.[94]2906

10. 'In which that Person has a Right to Proceed'

For an action to amount to 'wrongful restraint', the person concerned must have 'right to proceed', in the

direction in question.[1] The right to proceed may be vested in a person on account of his being a tenant or a licensee or right as a member of the public, *etc.*, which is discussed below separately.

License

This section applies only if a person is prevented from proceeding in a direction in which he has a right, and not when he has only a license to proceed. The right to proceed in that direction must be clearly established.[2]

The complainant teacher who was licensee of a room in the hostel cannot have the right to live after termination of his license. Hence, the school authorities cannot be charged for wrongfully restraining the said teacher from entering the said room.[3]

Tenant

This section does not, however, cover cases where there is no ordinary or special reason for a person to proceed in the direction which is obstructed.[4]

Where a landlord prevented a tenant from going to, and using a bathroom and a privy by locking the door, and it was not established beyond a reasonable doubt that the bathroom and privy were part of the tenancy and the tenant had a right to use them, it was held that the landlord could not be convicted of the offence of wrongful restraint.[5] A tenant, holding over, however, has a right to retain possession of the premises which he occupies, until he is dispossessed in due course of law, and if the landlord blocks his passage to the premises, he is guilty of the offence of wrongful restraint.[6] Even an intending emigrant, who has been treated as an emigrant and has been given meals and an advance of money by the authorities at an emigration depot, has a right to proceed in any direction he likes, and if he is prevented by the accused-watchman of the depot, the latter would be guilty of wrongful restraint.[7]

Offering *Namaaz* in a Public Mosque

Every person professing Islam has a right to offer *namaaz* in a public mosque according to religious faith and belief and the traditions. The *Jama Masjid*, the mosque in question, happens to be a public mosque. Therefore, *prima facie* the trustees of the said mosque had no right to lock the doors of it for preventing the other persons of *Harkul Budruk* from entering into the said mosque for offering *namaaz* and worshipping God as per the Islamic faith, belief and traditions.[8]

Others

A person, preventing another from proceeding along the public street, would be guilty of the offence of wrongful restraint.[9] Any member of the public has a right to2907 use a public street in any lawful manner.[10] Persons of whatever sect are entitled to conduct religious processions through public streets subject to such directions as the magistrate may lawfully give to prevent obstructions of the thoroughfare or breaches of public peace.[11] The worshippers in a mosque or a temple, which abuts on a high road, cannot compel processionists passing along the road, to interrupt their worship while passing the mosque or temple on the ground that there was continuous worship there.[12]

Wrongful restraint--Prosecution of Director of company

The respondent company was carrying out construction work on the road through workers. The directors of the company had asked the workers to work on the spot; they were not present on the spot. The prosecution of the Managing Director and other directors of the company for offence under s 341, IPC was bad. The order summoning the respondent company was quashed.[13]

11. Exception

The exception specially exempts from the operation of s 341, IPC, obstruction to a private right of way. Where there is a dispute between the parties as to whether the obstruction is to a public thoroughfare or to a private way, the procedure, provided by s 133, CrPC, is more fitting than a prosecution under this section.[14] The question whether the complainant has acquired a right of way over the land of the accused, can be decided authoritatively only in a civil court, and not in a proceeding under this section. If the accused believes, in good faith, that he has a right to prevent the complainant from passing over his ground, he cannot be convicted of the offence of wrongful restraint.[15] Where the obstruction is made in good faith and the accused believes himself to have a lawful right to obstruct, no offence under this section committed.[16] However, a person cannot be deemed to believe, in good faith, that he has a lawful right to obstruct the passage by closing the door which is necessary for the occupant's egress and ingress. The exception cannot be attracted in such a case.[17]

Apart from the exception appended to this section, the general exceptions in ss 76 to 79, IPC, also protect persons acting *bona fide*, *i.e.*, in good faith believing in a right. Similarly, a police officer, arresting a person with warrant and refusing to let him go home without furnishing bail, can seek the protection of the said provisions only if he acted in good faith, *i.e.*, with due care and attention. Otherwise, he would be guilty under this section.[18]2908

67 *Halsbury's Law of Singapore*.

68 *Cheng William v Loo Ngee Long Edmund* (2001) 3 SLR 583 .

69 *Keki Hormusji Gharda v Mehervan Rustom Irani* 2009 Cr LJ 3733, p 3736 (SC), AIR 2009 SC 2594, 2009 AIR SCW 4513, (2009) 6 SCC 475 .

70 *Arumuga Nadar v Emperor* 11 Cr LJ 708, p 709, 1 MWN 727 .

71 *Chhagan Vithal v Emperor* AIR 1927 Bom 369, p 370, 28 Cr LJ 1023 .

72 *Malady Peraiah v Voruganti Chendraiah* AIR 1954 Mad 247, p 248, 55 Cr LJ 283 ; Re *AttappaGoundan*AIR 1951 Mad 759, 52 Cr LJ 716(1); Re *Saminada Pilial* 1 Weir 339, p 340; Re *Shanmugham*(1971) Cr LJ 182, p 183, (1970) Mad LW (Cr) 35, wherein it has been held that the fact of physical obstruction, even by words, would not fall outside the ambit of s 339, IPC . To a similar effect is a decision in *Om Prakash Tilak Chand v State* AIR 1959 Punj 134, p 142, (1959) Cr LJ 368 .

73 *Emperor v Abdul Sattar Ilahibax* 5 Cr LJ 97, p 99 .

74 Re *Venketaramiah* 11 Cr LJ 192; *Arumuga Nadar v Emperor* 11 Cr LJ 708, p 709 ; *Chhagan Vithal v Emperor* AIR 1927 Bom 369, 28 Cr LJ 1023 .

75 *Arumuga Nadar v Emperor* 11 Cr LJ 708, 709, 1 MWN 727 ; *Chhagan Vithal v Emperor* AIR 1927 Bom 369, 28 Cr LJ 1023 ; *Madhab Chandra Charchari v Nalini Manna* AIR 1964 Cal 286, p 289, (1964) 2 Cr LJ 20 . Refer also to s 39 and the commentary thereunder.

76 *Nripendra Nath Basu v Kisen Bahadur* (1952) ILR 1 Cal 251 .

77 *Reg v Lakshman Kalyan* Ratanlal Unrepresented Cr Cases 89; *Acting Government Pleader v Venkatachala Mudali* 1 Weir 341 .

78 Re *Rama Reddi* 16 Cr LJ 701 (1).

79 *Chhagan Vithal v Emperor* AIR 1927 Bom 369, p 370 (1), 28 Cr LJ 1023 .

80 *Om Parkash Tilak Chand v State* AIR 1959 Punj 134, p 142, (1959) Cr LJ 368 ; Re *Shanmugham*(1971) Cr LJ 182, p 183 (Mad), (1970) Mad LW (Cr) 35.

81 1 Weir 340 (3).

82 *Durga Pada Chatterjee v Nilmani Ghose* AIR 1935 Cal 253, 36 Cr LJ 740 (1); *State v Naguesh G Shet Govenmar* AIR 1970 Goa 49, p 50-51, (1970) Cr LJ 465 .

83 *Pipireddigari Gopala Reddi v N Lakshmi Reddi* AIR 1947 Mad 124, 48 Cr LJ 459 ; Re *Peria Ponnuswami Goundan*AIR 1927 Mad 506, 28 Cr LJ 320 ; *Muthu Padayachi v Emperor* (1934) MWN 620 ; *Gurucharan Kaur v Province of Madras* AIR 1942 Mad 539 ; *Madhab Chandra Charachari v Nalini Manna* AIR 1964 Cal 286, (1964) 2 Cr LJ 20 ; *Mangal Singh v Emperor* AIR 1941 Pat 384, 42 Cr LJ 526 ; *Chiranji Lall v Durga Datta Tripathi* AIR 1948 Pat 299, 48 Cr LJ 418 ; *Lahanu Manaji v Emperor* AIR

1926 Bom 118, 27 Cr LJ 139 ; *Hardeva v Lachmminarain* 55 Cr LJ 1005 .

84 *Mahendranath Chakravarti v Emperor* 39 CWN 396, ILR 62 Cal 629 .

85 1 Weir 339; *Sheo Nath v Emperor* 15 Cr LJ 532 (2).

86 Re *Rama Reddi* 16 Cr LJ 701 (1).

87 *Dhulipalle Remgamma v State* (1955) NUC 3628 (AP) .

88 *Arumuga Nadar v Emperor* 11 Cr LJ 708 .

89 *Mahendra Nath Chakravarti v Emperor* 39 CWN 396, ILR 62 Cal 629 .

90 *Madhab Chandra Charachsri v Nalini Manna* AIR 1964 Cal 286 .

91 Re *Perla Ponnuswami Goundan*AIR 1927 Mad 506 .

92 *Chhagan Vithal v Emperor* AIR 1927 Bom 369 .

93 Re *Telapola Subbadu* 1 Weir 340 (2).

94 Re *M Abraham*AIR 1950 Mad 233, p 234, 51 Cr LJ 568 .

1 *Ms Vijaykumari Nagee v Smt SM Rao & ors* (1996) Cr LJ 1371 (SC), AIR 1996 SC 1058 .

2 *Abdul Rehman v Gulam Nabi* AIR 1964 J&K 4, p 5, (1964) 1 Cr LJ 40 .

3 *Ibid.*

4 Re *Saminada Pillai*(1882) 1 Weir 339, p 340.

5 *Sovarani Roy v King* AIR 1950 Cal 157, 51 Cr LJ 668 .

6 *Gulam Mohammad Azam v Emperor* AIR 1919 Bom 97 .

7 *Public Prosecutor v Sheikh Ahmad* 12 Cr LJ 212 .

8 *Noor Mohamed v Nadirshah Ismailshah Patel* (2004) Cr LJ 985 (Bom) .

9 *Sundareswara Srouthigal v Emperor* AIR 1927 Mad 938, p 939, 28 Cr LJ 545 ; *Sadagopal Chariar v Krishnamoorthy Rao* ILR 30 Mad 185, 34 IA 93 .

10 *Saiyed Mamur Hasan v Saiyed Mohammad Zaman* AIR 1925 PC 36 .

11 *Parthasarathi Ayyangar v Chinna Kishna Ayyangar* ILR 5 Mad 304 .

12 *Sundaram Chetti v Empress* ILR 6 Mad 202 .

13 *Keki Hormusji Gharda v Mehervan Rustom Irani* 2009 Cr LJ 3733, p 3736 (SC), AIR 2009 SC 2594, 2009 AIR SCW 4513, (2009) 6 SCC 475 .

14 *Emperor v Abdul Sattar Ilahibax* 5 Cr LJ 97 .

15 *Natha Singh v Emperor* 11 Cr LJ 495 ; *Kalida Raha v Deodhari Misir* AIR 1925 Cal 1214 ; *Abdul Rehman v Gulam Nabi* AIR 1964 J&K 4 ; *Sovarani Roy v King* AIR 1950 Cal 157 ; P*rava Debi v Santi Ram Chatterji* AIR 1949 Cal 112, 50 Cr LJ 211 ; *Bai Samrath v Emperor* AIR 1918 Bom 256, 19 Cr LJ 351 .

16 *Abdul Rehman v Gulam Nabi* AIR 1964 J&K 4, p 5, (1964) 1 Cr LJ 40 .

17 *Shyam Narain Mishra v State of Uttar Pradesh* (1975) All Cr C 329 .

18 *Sheo Saran Sahai v Mohammed Fazil Khan* 10 WR (Cr) 20 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

S. 340.

Wrongful confinement.--

Whoever wrongfully restrains any person in such a manner as to prevent that person form proceeding beyond certain circumscribing limits, is said "Wrongfully to confine" that person.

Illustrations

(a) *A* causes *Z* to go within a walled space, and locks *Z* in. *Z* is thus prevented from proceeding in any direction beyond the circumscribing line of wall. *A* wrongfully confines *Z*.
(b) *A* places men with firearms at the outlets of a building, and tells *Z* that they will fire at *Z* if *Z* attempts to leave the building. *A* wrongfully confines *Z*.

Comments

1. Scope

This section defines the offence of wrongful confinement which is made punishable under s 342, IPC . Wrongful confinement, which is a form of wrongful restraint, as defined in the s 339, IPC, is the keeping of a man within the prescribed limits, out of which he wishes to go and has a right to go. In the case of wrongful restraint, a person is restrained from proceeding in any direction, in which he has a right to proceed, while, in the case of wrongful confinement, he is restrained from proceeding beyond certain prescribed limits. If the acts, complained of, come within both the definitions, the offence under this section has been committed unless there are other sections in this Code, which provide an excuse for, or a defense to, what otherwise, would be a crime.[19] Where the accused, a district traffic superintendent, being under the *bona fide* impression that the complainant admitted that he had travelled without a ticket, seized the hand of the complainant, dragged him to the ticket collector and ordered the ticket collector to realise the full fare, it was held that the accused was guilty of wrongful confinement, and even submission, by the complainant to arrest, could not diminish the legal effect of his acts.[20] Arrest and detention by a police officer, not strictly justified by the provisions of law, would be unlawful and wrongful and would render the police officer liable under s 342, IPC .[21] A police officer is, in no case, justified to keep a person in confinement even for a single hour except on reasonable grounds warranted by the circumstances of the case.[22]However, where there was no malice, no intention of doing an act of the nature spoken of in s 339 or s 340, IPC, and no voluntary obstruction or restraint, though2909 there was probably excessive and mistaken exercise of powers, not a civil excuse in a police officer, the facts were held not to amount to the criminal offence of wrongful restraint.[23] Where a police officer, in execution of a warrant to arrest a certain person, arrests another person by mistake, he would be protected by s 76 .[24] Where the arrest of the victim has been strictly legal, the accused cannot successfully be proceeded against on a charge under s 342, IPC .[25] If a constable and a *chaukidar* are sent to jail for six months for taking a man to the police station in order that a sub-inspector, conducting an investigation into a burglary, might ask him some questions, it would be impossible for the police administration of the country to be carried on.[26]

2. Law of Canada

Unlawful confinement deprives a person of the liberty to move from point to point. Unlawful confinement is a general intent offence requiring proof only of a minimal intent to effect deprivation of freedom of

movement. Confinement does not require proof of total physical restraint or confinement for the entire time period alleged. It is sufficient to show that the confinement lasted for a significant period of time. An ability to escape is not necessarily inconsistent with an unlawful confinement.[27]

Physical restraint standing alone will satisfy the minimum intent to perform the act which constitutes the *actus reus* of unlawful confinement. Although the serious nature of the crime itself might be suggestive of the necessity of establishing an 'ulterior intent', over and above the minimal intent required for general intent offences, the minimal intent to effect deprivation of freedom of movement will suffice. A robber who instructs staff and customers to raise their hands as he empties the cash box does so in order to hold them captive. The minimal intent associated with unlawful confinement is to prevent the victim from leaving or from being removed. A temporary restraint will suffice if it is a purposeful detention.[28]

Within the context of s 279, kidnapping is a more serious offence than forcible confinement. Unlike murder, there is neither any stigma attached to a conviction for forcible confinement, nor is the penalty especially harsh.[29]

3. Issue of Process Against Accused on Complaint

The complaint has to be read as it is and the allegations made by the complainant in the complaint have to be read as they are and the magistrate has to apply judicial mind and to find out whether an offence indicated by the provisions of IPC has been spelt out *prima facie* or not. If he is satisfied that such an offence has been spelt out, it is his duty to take the cognizance of such complaint and to take every legal step as2910 indicated by the IPC by issuing the process against the accused named in the said complaint.[30]

4. Kidnapping Distinguished from Wrongful Confinement

Commentary under the same heading in s 360, *post*, may be referred to.

5. 'Whoever Wrongfully Restrains'

To constitute wrongful confinement, there must first be wrongful restraint, and, secondly, that restraint must be such as to prevent the person restrained from proceeding beyond certain circumscribing limits.[31] Where there is evidence of wrongful restraint only and there is no independent evidence of wrongful confinement, the offence would fall under the preceding s 339, punishable under s 341, and not under this section, punishable under s 342 .[32]

There can be no wrongful confinement when a desire to proceed has never existed, nor can confinement be wrongful if it was consented to by the person affected.[33] If escape is open to the person confined if he himself wishes to avail of it, his confinement will not be wrongful confinement. However, whether an escape was open, will depend not upon the person confined could open a door and escape if she wished, but upon whether she would be feeling confident that she would be able to extricate herself from the confinement notwithstanding the presence of the confiner, who was able bodied, robust and strong man, as against a lean and thin girl who was confined.[34]

As to what is wrongful restraint, commentary under s 339 may be referred to.

6. 'Any Person'

Commentary under the same heading in s 339, *ante*, may be referred to.

7. 'In such a Manner as to Prevent that Person from Proceeding Beyond Certain Circumscribing Limits'

Neither in wrongful restraint, nor in wrongful confinement, is the liberty of movement totally restricted. Even in wrongful confinement, the person confined is free to move within certain limits. He is prevented only from proceeding beyond those limits.[35] A person may be guilty of wrongful confinement though he acts without malice.[36] Of course, it may always be a question whether such person is protected by s 79 of the IPC .[37] In *Habib Khan v State* ,[38] the accused, a *chaukidar* and *daffadar*, charged the complainant with theft, tied him with a turban and compelled him to proceed towards the police station, and, on the way, detained him in an2911 orchard, made a proposal of payment of certain amount of money for his release, and released him only on such payment. It was held that the action of the accused in keeping the complainant tied in the orchard was certainly an act which amounted to wrongful restraint in such manner as to prevent that person from proceeding beyond certain circumscribing limits.

8. Physical Obstruction--If Necessary

Proof of actual physical obstruction is not essential to support a charge of wrongful confinement. It must, in each case, be proved that there was, at least, such an impression produced, in the mind of the person detained, as to lead him reasonably to believe that he was not free to depart and that he would be forthwith restrained if he attempted to do so.[39] The mere threat of some future harm in case of departure would not suffice if he knew that it was open to him to go away. However, if the circumstances were such as to justify and create the belief that he could not depart without being seized immediately, then it would be proper to hold that he was obstructed and confined.[40]

In *Madala Peraiah v Voruganti Chendriah* ,[41] it was observed that physical presence of the obstructer is not necessary, nor is any actual assault necessary, and fear of immediate harm, restraining a man out of a place, where he wishes to be and has a right to be, is sufficient to constitute an offence under s 341 of this Code. The same reasoning applies to an offence under s 342, the emphasis being on the apprehension produced in the mind of the person restrained or confined.[42]

9. Duration of Confinement Immaterial

The time during which a party is kept in wrongful confinement is immaterial, except with reference to the extent of the punishment. However, s 342, IPC, under which wrongful confinement is punishable as such, refers only to confinement for less than three days because s 343, IPC provides a heavier penalty for wrongful confinement for three or more days and s 344, IPC provides a still higher penalty for wrongful confinement for 10 or more days. But wrongful confinement even for a single hour is punishable under s 342 unless it is justified in law.[43]

10. Rightful Confinement

It has to be understood that unless the confinement of the victim is wrongful, the offence under s 340 read with s 342, IPC cannot be said to have been committed. A confinement of a person which is authorised by law cannot be said to be wrongful confinement and such authorised confinement does not attract ss 340 / 342, IPC .

The arrest and detention of a person accused of an offence under s 307, IPC, by the accused-police inspector and constables is not illegal so they cannot be held guilty of the offence of wrongful confinement punishable under s 342 .[44] However, when a person is detained against an order of detention passed by a judicial magistrate2912 having no authority to order detention under s 3 of the National Security Act which authorises the state or the Central Government pass a detention order but not the judicial magistrate, the detention of the said person is highly illegal, unwarranted and wrongful and besides being liable to be quashed by the High Court in the writ petition filed on behalf of the persons detained, he was also held entitled to compensation. It was further held that the judicial magistrate passed an order of illegal detention.[45]

11. Habeas Corpus

In cases of wrongful detention of the victim, the petition under art 226 of the Constitution of India is maintainable before the High Court. However when a person having attained majority live out of his/her own freewill then such a writ is not maintainable. Thus, where the petition under art 226 by the husband for the production and release of his wife was allowed by the High Court, an appeal by special leave was filed by the wife against the order of the High Court, the wife/appellant completed 21 years of age during pendency of the appeal before the Supreme Court, observing that the petition for writ of habeas corpus was not maintainable as the court satisfied itself that the appellant wife was not being detained against her will and without her consent, the Supreme Court reversed the decision of the High Court.[46] However, in another case where a woman was illegally confined, the letter of that woman to the Supreme Court was treated as a writ under art 32 and the Supreme Court directed the person against whom the complaint was made to produce that woman before additional chief judicial magistrate concerned. The additional chief judicial magistrate was also directed to ascertain true facts from the woman concerned and if he is satisfied that the said woman was being detained against her wishes, she was to be set at liberty forthwith and provided police protection in order to escort her to the place where she wants to go. Thereafter, the additional chief judicial magistrate was to report the matter to the Supreme Court.[47]

19 *Gopal Naidu v Emperor* AIR 1923 Mad 523 (2) (FB), 24 Cr LJ 599 .

20 *SA Hamid v Sudhir Mohan Chose* AIR 1929 Cal 730, p 732, 733 CWN 751 .

21 *Mohammad Ali v Ram Swarup* AIR 1965 All 161, p 165-166, (1965) 1 Cr LJ 413 ; *Empress v Behary Singh* 7 WR (CR) 3, p 5 ; *Ramdass Sadhoo v Anund Chunder Roy* 19 WR (Cr) 27 .

22 *RV Suprosunno Ghosul* 6 WR (Cr) 88; *Sheo Surun Sahai v Mohamed Fazil Khan* 10 WR (Cr) 20 ; *Bhawoo v Mulji* ILR 12 Bom 377, 1 Weir 339 ; Re *Lakshmigadu* 2 Weir 121; *Parankusam Narasaya v Stuart* 2 Mad HCR 396 ; *Baistab v R* ILR 30 Cal 95 ; *Ram Lal v Emperor* AIR 1916 Lah 318 (2), 17 Cr LJ 525 .

23 Re *Budrool Hoossein* 24 Wr (Cr) 51.

24 *Gopalia Kallaiya v Emperor* AIR 1924 Bom 333, 25 Cr LJ 797 .

25 *Empress v Amarsang Jetha* ILR 10 Bom 506 ; *Emperor v D Samuel* ILR 30 Mad 179, 5 Cr LJ 102 ; *Kadamali v Emperor* AIR 1935 Cal 551, 36 Cr LJ 1252 ; *U Thwe v A Kim Fee* AIR 1930 Rang 131 .

26 *Abdul Karim v Emperor* AIR 1930 Oudh 505, p 506, 32 Cr LJ 632 ; Re *Vishwanatha Ayyar*1930 MWN 723; Re *Titus*AIR 1941 Mad 720, 43 Cr LJ 3 .

27 *Halsbury's Law of Canada*.

28 *R v SJB* (2002) AJ No 726 .

29 *R v SJB* (2002) AJ No 726 .

30 *Noor Mohamed v Nadirshah Ismailshah Patel* (2004) Cr LJ 985 (Bom) .

31 *Sujaya Misalo v State* 34 Cut LT 1004, p 1007 .

32 *Raja Ram v State of Haryana* (1970) 1 SCWR 698, (1970) SCD 449 ; *Ram Ratan v State* (1980) All LJ 107, p 102, (1980) All Cr C 277 ; *Mani v State* AIR 1972 Ker LT 544, (1972) Mad LJ (Cr) 664 .

33 Re *Muhammad Din*1894 PR 36.

34 *K Jogayya v Emperor* AIR 1951 Ori 142, p 145 .

35 *Dhania v Clifford* ILR 13 Bom 376, p 382, per Birdwood J.

36 *Dhania v Clifford* ILR 13 Bom 376, p 382, per Birdwood J; *S Ahamid v Sudhir Mohan Ghose* AIR 1929 Cal 730, p 732, 33 CWN 751 .

37 *Dhania v Clifford* ILR 13 Bom 376, p 382, per Birdwood J.

38 *Habib Khan v State* AIR 1952 Pat 379, p 380, 53 Cr LJ 1391 .

39 *Samir Saha v State of Tripura* (1998) Cr LJ 13760 (Gau) .

40 *Emperor v Shamlal Jairam* 4 Bom LR 79, **cited with approval** in *K Joggayya v Emperor* AIR 1951 Ori 142, p 145, (1950) ILR Cut 185 .

41 *Madala Peraiah v Voruganti Chendriah* AIR 1954 Mad 247, (1954) Cr LJ 283 .

42 *Om Parkash Tilak Chand v State* AIR 1959 Punj 134, p 142, (1959) Cr LJ 368 .

43 *Empress v Suprosunno Ghosaul* 6 WR (Cr) 88(2), p 89.

44 *JB Katariyav State of West Bengal*(2002) Cr LJ 2220 (All) (DB).

45 *Paothing Tangkhul v State of Nagaland* (1993) Cr LJ 2514 (Gau) (DB) ; (1992) 3 Crimes 424 (Gau) (DB).

46 *Madhu Bala v Narinder Kumar* (1982) Cr LJ 855, AIR 1982 SC 938 .

47 *Nitima Priyadarshini v State of Bihar* AIR 1987 SC 2021, (1988) Cr LJ 197 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

S. 341.

Punishment for wrongful restraint.--

Whoever wrongfully restrains any person shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.2913

Comments

1. Scope

This section prescribes punishment for an offence of wrongful restraint as defined in s 339, IPC .

In order to attract this section, the alleged restraint must be wrongful. If the accused is lawfully authorised to put restraint, he cannot be punished under this section.[48] For an action to amount to 'wrongful restraint', the person concerned must have the 'right to proceed' in the direction in question, as would appear from what has been stated in s 339, IPC, which has spelt out what is wrongful restraint.[49] Where, owing to the keeping of a car, by the petitioner on the pathway, there was obstruction to the complainant in bringing out his car from the garage, it was held that the complainant could have some other remedy, but not the prosecution of the petitioner under this section.[50] In *Ayyapazhan v State* ,[51] the accused did nothing beyond dragging the deceased from the car, conceivably, for the purpose of questioning him. It was held that the conviction of the accused under this section could not be maintained.

2. Procedure

An offence under this section is cognizable, bailable, as well as compoundable, and is triable by any

magistrate, and may be tried summarily. However, it is not advisable to try summarily public servants whose whole career might depend upon the result.[52]

Order of the court taking cognizance of an offence under s 341, IPC, after expiry of the period of limitation, in violation of s 468, CrPC is bad in law and so, is liable to be set aside.[53]

3. High Court Ordering Retrial after Six Years--Not Proper

The accused were acquitted of charges under ss 341 / 34 or 149, IPC, and s 36AD of the Banking Regulation Act 1949 by the trial court. The appeal remained pending before the High Court for six years. Disagreeing with the finding of the trial court, the High Court ordered a retrial. The Supreme Court was of the view that the High Court should have dismissed the appeal even if it disagreed with the view taken by the trial court, having regard to inordinate delay of nearly six years that had ensued after the judgment of acquittal, the nature and magnitude of the offences alleged to have been committed and the difficulties that may have to be encountered in securing the presence of witnesses in a case of this nature nearly seven years after proceedings would secure the ends of justice, as it would bring about reconciliation between the management and the employees and also an end to state criminal proceedings in which the public had no longer sufficient interest. Accordingly, the Supreme Court set aside the judgment of the High Court and restored the order of acquittal passed by the trial court.[54]2914

4. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[55]

If despite the statement of several witnesses under s 161, CrPC attracting *prima facie* s 341, IPC, the accused was discharged by the magistrate, holding that the question raised was of a civil nature and criminal restraint cannot be found, the order of discharge was held liable to be set aside.[56]

5. Vicarious Liability

Where the accused persons were charged under ss 341 / 326 / 324 / 34, IPC, and some of the accused persons were acquitted of the charges while one accused was convicted, there was no independent charge framed against the accused excluding s 34, so the conviction of the accused under ss 323, 324 and 341 read with s 34, IPC, was not found proper, and was set aside.[57]

6. Wrongful Restraint

Wrongful Restraint and Lurking House Trespass

The accused was charged for committing the offence of wrongful restraint under s 341 and house trespass under s 454, IPC . The FIR was lodged by the complainant stating that he and his brother were tenants in the shop of the accused and the accused forcibly took its possession from them. No evidence was produced, *i.e.*, no rent note and rent receipts were produced to prove that the complainant was a tenant of the accused. The possession of the shop in question remained with the accused. The conviction of the accused under ss 147, 341 and 454, IPC, was not found proper and was reversed.[58]

Wrongful Restraint and Attempt to Murder

The accused persons armed with deadly weapons stabbed the victim and restrained the police officials from discharging their duties. The occurrence took place inside cantonment premises in broad daylight. The testimony of police witnesses who followed the accused persons and caught them red-handed was found truthful. The fact that the informant and injured witness turned hostile cannot be the sole ground to reject police witnesses nor non-production of medical memo and discrepancies regarding its preparation would affect the prosecution case. The conviction of the accused persons under ss 307, 148, 341 and

353, IPC, was found proper.[59]

Wrongful Restraint and Rape

The accused was alleged to have stopped the prosecutrix who was passing through the field and forcibly committed rape on her; there was no inconsistency between the statement of the eye witnesses and the statement of the prosecutrix. The order of acquittal of the accused by discarding evidence was held not proper and the accused2915 was convicted under ss 341 and 376, IPC .[60] When the prosecutrix stated that she was threatened and a piece of cloth was put on her mouth by the accused in order to prevent her from shouting, the mere absence of injury on the body of the victim cannot be taken to mean that no rape was committed, so the conviction of the accused under ss 341, 376(2)(f), IPC was found proper.[61] When the prosecutrix was waylaid in broad daylight and raped twice in presence of witnesses, the conviction of the accused under ss 341 and 376, IPC, was confirmed.[62]

Wrongful Restraint and Outraging Modesty of a Woman

The victim, a young girl of 13 years was taken forcibly to a nearby bush in the jungle and made to lie down by the accused when she was returning alone from the school. Her evidence was cogent, convincing and corroborated by evidence of other witnesses. However, seminal stains were absent on her body or clothes, though rape was not established but the intention of the accused to outrage the modesty of the victim was proved. The accused was held liable to be convicted under ss 341 and 354, IPC .[63]

7. Proof

To establish an offence under this section, the prosecution must prove that:

(1) there was obstruction by the accused;
(2) the obstruction prevented a person from proceeding in a particular direction; and
(3) the person, so prevented from proceeding, had a right to proceed in that direction.

8. Acquittal

Where the allegation was that the accused persons prevented the victim from going in the direction he wanted to go and beat him but the evidence by the eye-witnesses was that the victim was beaten when he was sitting in the house of some person, therefore, no question of the victim having been obstructed so as to prevent him from proceeding in the direction in which he had a right to proceed arises. The conviction of the accused persons was set aside.[64] Even if it is assumed that visitors to a liquor shop have a right to proceed to consume alcohol, preventing them from entering the liquor shop would cause only slight harm which warrants no serious concern. Those who cause such harm are guided and inspired by the noble ideal that it is their fundamental duty to dissuade people from drinking alcohol. The further protection of the criminal case against the accused persons under s 341, IPC, is abuse of process of law.[65]

9. Conviction

In order to secure a conviction under this section, it must be established that the complainant was obstructed from proceeding along a particular direction. Where one2916 of the doors was admittedly not closed, it was held that it could be said that the complainant was obstructed wrongfully from passing along the passage.[66] Victim, a head constable on patrolling duty at night questioned four accused sitting inside a van parked authorizedly. The four accused pulled the victim inside the van and inflicted injuries on him, including fracture of nasal bone. The accused were convicted under ss 341, 367, 333 and 506, IPC .[67]

Conviction of Main Accused under Section 302 and other Accused under Section 341

Where the main accused stabbed the deceased, and the co-accused was only holding the deceased, the common intention to cause death of the victim could not be inferred, the main accused was convicted under s 302 while the co-accused was found guilty under s 341 and not under ss 302 / 34, IPC .[68]

10. Sentence

If a substantial sentence of two years rigorous imprisonment in respect of an offence, punishable under s 148, in addition to the maximum sentence of one month simple imprisonment under s 341 read with s 149, IPC, has been inflicted, a further sentence of fine is uncalled for.[69]

When the prosecutrix was waylaid in broad daylight and raped twice in the presence of witnesses, simple imprisonment of one month under s 341 and rigorous imprisonment for seven years under s 376, IPC, cannot be said to be excessive.[70]

48 *Keso Sahu v Saligram Shah* (1977) Cr LJ 1725, p 1728 (Ori) .

49 *Vijay Kumar Magee v SM Rao & ors* (1996) Cr LJ 1371 (SC), AIR 1996 SC 1058 .

50 *Shankarlal Surma v State of Assam* (1975) Cr LJ 1077, p 1078 .

51 *Ayyapazhan v State* (1972) LW (Cr) 219 .

52 *D'Souza v Sheregara* (1932) MWN 478 .

53 *Haradhan Purohit v Mahadev Mohapatra* (1988) 1 Crimes 549 (Ori) .

54 *S Gum and ors v Grindlays Bank Ltd* AIR 1986 SC 289, (1986) Cr LJ 255 (SC) .

55 Code of Criminal Procedure 1973, s 251 .

56 *Paritosh Chowdhury v Sipra Banerjee* (1988) Cr LJ 1298 (Cal) .

57 *Chakradhar Rath alias Chakradhara Rath v State of Orissa* (2002) Cr LJ 2141 (Ori) .

58 *Kana Ram v State of Rajasthan* (2002) Cr LJ 1867 (Raj) .

59 *Kumar alias Welding Kumar v Inspector of Police, Chennai* (2000) Cr LJ 4270 (Mad) .

60 *State of Rajasthan v Chathu Ram* (1998) Cr LJ 1528 (Raj) .

61 *Shanmugham v State* (1996) Cr LJ 3808 (Mad) .

62 *Kaltaiyan Rajangam v State* (1997) Cr LJ 38 (Mad) .

63 *State v P Balan* (1996) Cr LJ 3705 (Mad) .

64 *Ramdayal and Ors v State of Rajasthan* (2007) Cr LJ (NOC) 369 (Raj) (DB).

65 *Narayanan v State of Kerala* (1987) Cr LJ 741 (Ker) .

66 *Sankar Chandra Ghose v S Bhansally* (1981) Cr LJ 4004 (Cal) (DB) .

67 *Chand Ram v State of HP* 2013 Cr LJ 1415 (HP), 2013 (1) Shimlc 411 .

68 *Kishore Kumar alias Kishore v State of Kerala* (2001) Cr LJ 2137 (Ker) (DB) .

69 Re *P Abdul Sattar*AIR 1961 Mys 57, p 62, (1961) 1 Cr LJ 291 .

70 *Kattaiyan Rajangam v State* (1997) Cr LJ 387 (Mad) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

S. 342.

Punishment for wrongful confinement.--

Whoever wrongfully confines any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

This section, which prescribes the punishment for the offence of wrongful confinement defined in s 340, IPC, is confined to simple wrongful confinement for2917 less than three days. The aggravated forms of the offence of wrongful confinement are dealt with in ss 343 to 348, IPC . Wrongful confinement is defined in s 340 . As observed by the Supreme Court in *Shyam Lal Sharma and another v State of Madhya Pradesh* ,[71] where a person is wrongfully restrained in such a manner as to prevent that person from proceeding beyond certain circumscribed limits, he is wrongfully confined within the meaning of this section.[72]

If some persons taking shelter in a house, being afraid of a crowd outside, and if that crowd remains there, effectively preventing the inmates of the house from coming out, there is no reason why it cannot be said that an offence punishable under s 342, IPC is committed.[73] Where the accused brought the victim at night to the house of the co-accused under wrong pretext, the accused had earlier taken the daughter of the victim to the house of the co-accused, thus making it compulsory for the victim to go to the house of the co-accused, the door of the house of the co-accused was locked from outside making it compulsory for the victim to stay in with the accused and the co-accused. She could come out of the house only in the morning. The accused was held guilty of the offence of wrongful confinement.[74] The statements of the prosecutrix and the manager of the hotel that the accused had illegally confined the prosecutrix in hotel room were found reliable; accused was convicted under s 342, IPC .[75]

Where Sarita as PW6 deposed that when her father and brother came to her matrimonial home, she was sitting in her bedroom and she came out of the bedroom of her own freewill, the prosecution case that PW6 was locked up in a room was found false; the accused persons were acquitted of the charge under s 342, IPC .[76]

2. Essential Ingredients

The essential ingredients of the offence 'wrongful confinement' are that the accused should have wrongfully confined the complainant and such restraint was to prevent the complainant from proceeding beyond certain circumscribed limits beyond which he/she has a right to proceed.[77]

3. Wrongful Confinement by Public Servant/Police

This section, being a general section, is not confined to offences against public servants. Thus, where a public servant, who had come out on the road after taking the search, was seized, lifted, taken into the office, thrown on a chair, and threatened with a *lathi*, to comply with the demand of giving in writing to the effect that he had taken a search of the barrier, it was held that an offence under this section read with s 353 had been committed.[78]

No offence under this section is committed when a person, legally arrested and taken to the police station, is released after the ascertainment of his proper identity.[79]2918 However, a police officer who pays no heed to a bail order and detains the person concerned in custody for an offence which is bailable, would be guilty under this section.[80] Similarly, the right to protect one's property from apprehension of theft does not include a right to put a neighbour in wrongful confinement.[81]

Where a person was arrested as he was required in a kidnapping case and died in police custody, no offence under s 342, IPC was made out; appellant accused was acquitted of the charge under s 342, IPC .[82]

Where the accused police officials kept the victim in lock up from 2 February 1994 to 5 February 1994, subjected the victim to third degree methods, their conviction under s 342, IPC was held proper.[83]

Where in the dispute between the occupiers of a land and its developer, the complaint against the developer was made by the occupiers, show cause notice was issued to the developer under s 107, CrPC, the petitioner (developer) furnished security bond in the said proceedings, thereafter again on the complaint against the petitioner by the occupier second show cause notice was issued cancelling earlier bond on the ground that he was in the breach of earlier bond, the petitioner was asked to furnish fresh bond with two securities, however, without giving any opportunity to arrange for those securities, the petitioner was taken in custody and detained for five days. The petitioner was held deprived of his personal liberty without following the procedure established by law. The executive magistrate acted illegally without following the provisions of the CrPC before confining the petitioner to jail. So, he cannot claim protection under s 3(1) of the Judges (Protection) Act 1985.[84]

4. Procedure

In cases under this section and s 166, IPC, against police officers, delay in making the allegations against them to a magistrate, or other competent authority, is almost fatal to the prosecution.[85] For further commentary, see under same heading under s 341 *ante*.

5. Sanction for Prosecution

In a complaint against the executive magistrate for wrongfully detaining the petitioner for five days behind the bars in violation of the provisions of law, the executive magistrate being a public servant could not be proceeded against without the sanction under s 197, CrPC . So, the dismissal of complaint for the want of sanction to prosecute him was found.[86]

6. Writ under Article 226 --High Court can direct the Police to Investigate the Offences

The High Court, while exercising the power under art 226 of the Constitution of India, in a case where the allegation leads to commission of a criminal offence, can2919 direct the police force of the state to perform its legal duty to investigate the offences. However, a direction for appointment of a high ranking judicial officer to conduct enquiry or direction to the CBI to conduct such enquiry cannot be passed by the High Court in exercise of such jurisdiction.[87] Thus in a case of custodial death and illegal detention at the hands of the police, the High Court while exercising jurisdiction under art 226 directed the police force to investigate the offences.[88]

7. Identification of Accused

The question of holding an identification parade does not arise when the accused persons were caught and taken to the police and remained in the company of the complainant, right from going to their house to reaching at the police station.[89]

8. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[90]

Where the accused forcibly dragged the victim from her house and the offence of wrongful confinement was proved, it was held that they could be held guilty under ss 342 and 352, IPC, even if they were not charged under the said sections.[91]

The complainant, a public servant, was assaulted while making a telephone call to his senior as he had made a complaint against the assailants. He was kept in confinement in a jeep for sometime. The assault upon him was neither with a view to prevent him from performing his official duties nor was it a result of any official act. The accused were found entitled to be discharged for offences under ss 147, 148, 332, 352, 427, IPC, but the charge under ss 323 and 342, IPC, was framed against the accused.[92] However, when the public servant being a police official, visited to check fresh electric wiring and leakage of the current, with permission, and were conducting a search, were obstructed from taking photographs and confined wrongfully in the house, the framing of charges under ss 186, and 342, IPC, was found proper.[93]

Case under Section 342 and Section 363

A boy residing at Meerut was confined at Haridwar, a *prima facie* case against the accused was made out under s 363, IPC, but the accused was summoned by the magistrate under s 342 . On a revision petition being filed, the sessions court revised the order of the magistrate, and remanded the matter to the magistrate for re-consideration of the matter according to law as the offence under s 363 was also attracted. The order of the sessions court also found favour with the High Court.[94] There was unimpeachable evidence that the appellants had wrongfully confined the complainant, therefore their conviction under s 342, IPC was held proper.[95]2920

Case under Section 342 and Section 354

The accused attempted to commit rape on a 10 year old girl and was convicted by two courts below under ss 354 and 342, IPC . The concurrent finding of fact of the courts below was based on credible and sufficient evidence, so the High Court declined to interfere in the criminal revision filed by the accused, with the orders of the courts below.[1]

Case under Section 342 and Section 376

The accused was alleged to have lifted the prosecutrix and committed rape on her when she had gone to the shop for purchasing a matchbox. The testimony of the prosecutrix was not trustworthy and was inconsistent with the statement of prosecution witness. The circumstances of the case showed that she had gone inside the shop willingly and was not lifted by the accused. The conviction of the accused under ss 376 and 342, IPC, was set aside and the accused was acquitted.[2] However, when the accused, a teacher, alleged to have restrained the prosecutrix, a minor student, from going home and thereafter committed rape, the statements of the prosecutrix was corroborated by medical evidence as well as oral evidence of witnesses, any minor omission and contradictions found in the statement of prosecutrix were found immaterial, the conviction of the accused under ss 376 and 342, IPC, was found proper.[3]

Case under Section 342 and Section 302

Where the evidence showed that the accused persons in furtherance of common intention to extract confession regarding the alleged theft of a bicycle took the deceased along with them and wrongfully confined him and assaulted him with an iron pipe and a wooden stick, the fact that the deceased was wrongfully confined after his hands and legs were tied was established by the testimony of witnesses. Further, the accused persons left the deceased in an injured condition confined to the said place. The conviction of the accused persons under s 342 read with s 34, IPC was maintained.[4]

9. Proof

To establish an offence under this section, the prosecution must prove that:

(1) the accused wrongfully restrained the complainant; and
(2) the restraint was such as to prevent the complainant from proceeding beyond certain circumscribing limits beyond which he had a right to proceed. Proof of actual physical restraint is not essential.[5]

It is sufficient if the evidence shows that such an impression was produced in the mind of the victim as to create reasonable apprehension in the mind of the victim to lead him reasonably to believe that he was not free to depart.[6]2921

The accused is not to be convicted under this section on the sole testimony of the prosecutrix when there is no corroboration.[7]

10. Acquittal

The victim was arrested in a case under s 307, IPC, and was allegedly beaten and confined in police custody by the accused police inspector and the constables. The arrest and detention of the victim was not illegal. Therefore, the accused persons cannot be held guilty of offences of wrongful confinement punishable under s 342 .[8] When the evidence on record clearly established that prosecutrix had attained the age of puberty about a year before the first act of sexual intercourse, and even the said act was with her consent, the question of holding the conviction of the accused under s 342 does not arise at all.[9] The prosecution case that PW6 was locked up in a room was found false; the accused persons were acquitted of the charge under s 342, IPC .[10]

11. Punishment

When a person is convicted of an offence under this section, and of one under s 352, IPC, the case is within the second paragraph of s 71 and infliction of separate punishments is not illegal if the aggregate punishment awarded is not in excess of what the court can inflict for either of the offences.

The accused who attempted to commit rape on a 10 year old girl was convicted under s 354 and sentenced to undergo rigorous imprisonment for two years and pay a fine of Rs 500. In addition, he was convicted under s 342 and sentenced to undergo rigorous imprisonment for six months and pay a fine of Rs 100.[11] The incident took place 14 years ago when the accused were about 18-19 years old. The accused had no criminal antecedents. Each of the three accused was sentenced to 5 years rigorous imprisonment under s 376 and one month rigorous imprisonment under s 342, IPC .[12]

Where a person is charged with, and acquitted of, an offence (of abduction) under s 365, but is convicted for an offence under s 342, the appellate court can alter the finding of the trial court and convict him under s 365 without altering the sentence so as to enhance it.[13]

12. Acquittal under Section 342 is No Bar to Trial under Section 436

Acquittal of an accused on a charge under this section is no bar to his subsequent trial on a charge under s 436, IPC .[14]

Commentary under s 436, IPC, Vol. 4 may be referred to.

13. Alteration of Conviction from Section 342 to Section 365

Commentary under the same heading in s 365, *post*, may be referred to.2922

71 *Shyam Lal Sharma v The State of Madhya Pradesh* AIR 1972 SC 886 .

72 *Raju Pandurang Mahale v State of Maharashtra* (2004) Cr LJ 1441 (SC) .

73 *Gambhir Dala Bhil v State of Maharashtra* (1984) Cr LR 71 (Mah) .

74 *Raju Pandurang Mahale v State of Maharashtra* (2004) Cr LJ 1441 (SC) .

75 *State of Uttranchal v Jai Prakash Rastogi* 2014 Cr LJ 2649 (Uttr) .

76 *Kanhaiya Lal v State of Rajasthan* 2012 Cr LJ 252, p 256 (Raj) .

77 *Ibid*; *Kanhaiya Lal v State of Rajasthan* 2012 Cr LJ 252 (Raj) ; *Sunil Mahadeo Jadhava v State of Maharashtra* (2013) 15 SCC 177, (2014) 3 SCC (Cri) 609 .

78 *Shyamlal Sharma v State of Madhya Pradesh* AIR 1972 SC 886, p 890-891, (1972) Cr LJ 638 .

79 *State v Fateh Alam Khan* 1980 All LJ 9, p 12-13 .

80 *Dharmu Naik v Rabindranath Acharya* (1978) Cr LJ 864 .

81 *Shyam Narain Mishra v State of Uttar Pradesh* (1976) ALJ 498, (1975) All Cr C 329 .

82 *Sunil Mahadeo Jadhav v State of Maharashtra* (2013) 15 SCC 177, (2014) 3 SCC (Cri) 609 .

83 *CBI v Kishore Singh* (2011) 6 SCC 369, (2011) 2 SCC (Cri) 970, (2010) 96 AIC 268 (SC) .

84 *Deelip Bhikaji Sonawane v State of Maharashtra* (2003) Cr LJ 4008 (Bom) (DB) .

85 *Ram Charan Surdas v Gaya Prasad* AIR 1952 VP 57 .

86 *Deelip Bhikaji Sonawane v State of Maharashtra* (2003) Cr LJ 4008 (Bom) (DB) .

87 *Samji Ladha & ors v State of Gujarat* (1998) Cr LJ 2746 (Guj) (DB) .

88 *Ibid.*

89 *Jalam Singh v State of Madhya Pradesh* (2002) Cr LJ 2586 (MP) .

90 Refer to the Code of Criminal Procedure 1973, s 251 .

91 *Raghusingh v State of Madhya Pradesh* (1980) Cr LR 71-72 (MP) 69, (Notes).

92 *Upendra Singh Solanki v State of Rajasthan* (1997) Cr LJ 1850 (Raj) (DB) .

93 *Veena Rangnekar v State* (2000) Cr LJ 2543 (Del) .

94 *Harendra & ors v Naipal Singh* (1996) Cr LJ 91 (All) .

95 *Raju v State of Chhattisgarh* 2015 Cr LJ 374 (Chh), 2015 (1) CGLJ 89 .

1 *Shivraj Chandrappa Yadav v State of Maharashtra* (1998) Cr LJ 3068 (Bom) .

2 *Suresh N Bhusare v State of Maharashtra* (1998) Cr LJ 4559 (SC) ; *Tulsi Ram v State of Rajasthan* (2000) Cr LJ 1634 (Raj) ; *Nandlal Yadav v State of Madhya Pradesh* (2002) Cr LJ 2184 (MP) .

3 *Om Parkash v State of Rajasthan* (2001) Cr LJ 230 (Raj) .

4 *Sham Shankar Kankaria v State of Maharashtra* (2005) Cr LJ 502 (Bom) (DB) .

5 *Bhagwat v State* (1971) Cr LJ 1222, p 1224 (All) .

6 *Samir Saha v State of Tripura* (1998) Cr LJ 1360 (Gau) ; *K Joggayya v Emperor* AIR 1951 Ori 142 .

7 *Chhattu v State* (1973) All Cr R 391 .

8 *JB Kataria v State of Uttar Pradesh* (2002) Cr LJ 2220 (All) (DB) .

9 *Hariram v State of Rajasthan* (1992) 2 Chand Cri 58 (SC) .

10 *Kanhaiya Lal v State of Rajasthan* 2012 Cr LJ 252, p 256 (Raj) .

11 Re *Burkundaz* 1 Cr LJ 365, 8 CWN 483; *Ramdiyal v R* 3 CWN 174 .

12 *State of Maharashtra v Suresh Nivrutti Bhusare* (1997) Cr LJ 2003 (Ban) (DB) .

13 *Roshan v State* AIR 1954 All 51, p 53, 55 Cr LJ 46 .

14 *Sitaram Sao v Sahdeva Gape* AIR 1963 Pat 13, (1962) 1 Cr LJ 73 ; *Ranjit Singh Karam Singh Punjabi v Prabhakar Rajaram Kharoten* (1986) 2 Crimes 243 (Kant) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

S. 343.

Wrongful confinement for three or more days.--

Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section prescribes punishment for wrongful confinement, as defined in s 340, IPC, for a period of three days, or more, but less than 10 days. If the wrongful confinement is for less than three days, it would be punishable under the precedings 343 while wrongful confinement for 10 days or more is punishable under the nexts 344.[15] As remarked elsewhere, the offences dealt with under this section and under s 344, are only aggravated forms of the offence of wrongful confinement, the aggravating circumstance being the longer duration of the confinement.

For the general subject of wrongful confinement, refer to the commentary under ss 339, 340 and 342 .

2. Relative Scope of Sections 324 and 343

Under s 324, IPC, it must be shown that the accused caused hurt voluntarily and such a hurt was caused by means of any instrument referred to in that section. Insofar as s 343, IPC, is concerned, whoever wrongfully confines any person for three days or more shall be punished. Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits is said 'wrongfully to confine' that person, as defined under s 340, IPC . Use of physical force is not necessary for the offence of wrongful confinement. A mere detention of a person against law would attract s 343, IPC .[16]

3. Procedure

The offence under this section is cognizable, bailable, compoundable only with the permission of the court before which the prosecution is pending, and triable by any magistrate, and may also be tried summarily.

4. Sanction for Prosecution

Where the sub-inspector of police illegally detained an accused against whom a non-bailable warrant was issued for one week and he was also alleged to have assaulted the said accused, the said action of the sub-inspector being not a part of his official duty, obtaining the prior sanction for his prosecution was not necessary.[17]

5. Charge

Commentary under the same heading in s 342, *ante*, may be referred to.2923

6. Proof

The points, requiring proof of an offence under this section are the same as under s 342, in addition to which it has also to be proved that the wrongful confinement was for three days, or more.

The appellant accused Suman Sood, wife of the main accused kept the kidnapped person inside her house, supplied him food knowing fully that her husband and his companions had kidnapped the victim. Her conviction under ss 364A, 365, 346, 343 read with 120B, IPC was held proper.[18]

Where the prosecutrix admitted in her evidence that she did not complain to anyone at the places where she was kept and stayed for 10 days, that she was brought by deceit or was being detained against her will, she was, thus, not a helpless victim who had surrendered or resigned to her fate, she also did not complain in the bus even though she was with other passengers for 8-9 hours, the obvious inference is that the prosecutrix cannot be said to have been detained or abducted against her will and she was a consenting party, the conviction of the accused under ss 342, 343 and 366, IPC, was therefore set aside.[19]

15 *Empress v Suprosunno Ghosaul* 6 WR (Cr) 88 (2), 89.

16 *SA Azeez v Pasam Hari Babu* (2003) Cr LJ 2462 (AP) .

17 *Ibid.*

18 *Suman Sood v State of Rajasthan* 2007 Cr LJ 4080 (SC), AIR 2007 SC 2774, (2007) 5 SCC 634, 2007 (7) Scale 312 .

19 *Hariram v State of Rajasthan* (1992) 2 Chand Cri 58 (SC) .

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Chapter XVI

Of Offences Affecting the Human Body

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

S. 344.

Wrongful confinement for ten or more days.--

Whoever wrongfully confines any person for ten days or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Comments

1. Scope

This section punishes wrongful confinement for 10 days or more.

For 'wrongful confinement', refer to the commentary under s 340 .

2. Procedure

The offence under this section is cognizable, bailable and compoundable only with the permission of the court before which the prosecution is pending, and triable by a magistrate.

3. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc.*) hereby charge you *(name of accused person*) as follows:
>
> That, on or about the ....day of ..... at...you confined *AB* for ....days and thereby committed an offence, punishable under s 344 of the Indian Penal Code, and within my cognizance.

> And I hereby direct you to be tried by this court on the said charge.

Omission in the charge, to mention the period of wrongful confinement for 10 days, or more, has been

held to be a grave defect entailing acquittal of the accused.[20]

4. Proof

The points requiring proof are the same as those for an offence under s 342, IPC, in addition to which it must further be proved that wrongful confinement lasted for 10 days, or more.

Where in a case of wrongful confinement for more than 10 days and abduction and rape, the age of prosecutrix was found to be above 18 years, it was also established that she had earlier also, gone with the accused and stayed with him and had also admitted not only close intimacy with the accused but also that she had remained in his house willingly for many days, the prosecutrix thus was a consenting party, and the conviction of the accused under ss 344, 366 and 376, IPC, was set aside.[21]

5. Sentence

Under this section, a sentence of imprisonment, even for a very short period, is compulsory and cannot be dispensed with. Fine alone is not a legal sentence.[22]

20 *Pandara Nadar v Jagadeesan* (1970) LW (Cr) 124 .

21 *Mojuddin v State of Rajasthan* (2001) Cr LJ 2000 (Raj) .

22 Re *Bhirji Bin Krishnaji* 1 Bom HCR 39.

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Chapter XVI

Of Offences Affecting the Human Body

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

S. 345.

Wrongful confinement of person for whose liberation writ has been issued.--

Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any term of imprisonment to which he may be liable under any other section of this Chapter.

Comments

1. Scope

This section provides an additional penalty for the offence of wrongful confinement, the aggravating

circumstance being the keeping of a person in wrongful confinement in contempt of a writ issued for his liberation. The section applies only if a writ for the liberation of a person, wrongfully confined, has been issued and the offender keeps such person in wrongful confinement even after knowing that a writ for his liberation has been issued.

2. 'Wrongful Confinement'

Commentary under s 340, *ante*, may be referred to.2925

3. 'Knowing'

Knowledge, on the part of the accused, that a writ for liberation of the person confined has been issued is an essential ingredient of the offence under this section. Mere belief is not sufficient; 'knowledge' is a much stronger word than 'belief as the latter is stronger than 'suspect'.[23]

4. 'Writ for Liberation'

The Constitution of India guarantees to all the citizens of India, certain fundamental rights, one of which is the right 'to move freely throughout the territory of India'.[24] Article 32 of the Constitution empowers the Supreme Court to issue writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari for the enforcement of the fundamental rights. Article 226 confers similar powers on all the High Courts. The power under art 226 (as under art 32) is not confined to the issuing of prerogative writs only. The court has been conferred additional powers to frame proper directions or orders to suit the exigencies of particular cases even though they may not conform to any of the prerogative writs.

5. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and is triable by a magistrate of the first class.

6. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[25]

7. Proof

To establish an offence under this section, the prosecution must prove that--

(a) the accused kept a certain person in wrongful confinement; and
(b) he kept the said person wrongfully confined even after knowing that a writ for the liberation of that person had been duly issued.

23 *Empress v Rango Timaji* 6 Bom 402 .

24 Constitution of India, art 19(1)(d) .

25 Code of Criminal Procedure 1973, s 251 .

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Chapter XVI

Of Offences Affecting the Human Body

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

S. 346.

Wrongful confinement in secret.--

Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as herein before mentioned, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any other punishment to which he may be liable for such wrongful confinement.2926

Comments

1. Scope

This section deals with wrongful confinement in secret which is another aggravated form of wrongful confinement. To render a person liable under this section, it must be shown that there was wrongful confinement of a person and that the wrongful confinement was of such a nature as to indicate intention on the part of the accused, that the person confined should not be discovered. If the complainant was only induced and not forced, to go to different places and that her confinement was not actual, but only potential, it is not sufficient to constitute wrongful confinement. Again, where, after taking the complainant to different places, the accused themselves produced her before a pleader of the court, the conduct of the accused cannot be said to indicate an intention on their part that the complainant should not be discovered. In such circumstances, the accused cannot be convicted of an offence under this section.[26]

Appellant accused Suman Sood, wife of the main accused, kept the kidnapped person inside her house, supplied him food knowing fully that her husband and his companions had kidnapped the victim. Her conviction under ss 364A, 365, 346, 343 read with 120B, IPC was held proper.[27]

2. 'Public Servant'

See commentary in s 21, IPC, Vol. 1.

3. Procedure

An offence under this section is cognizable, bailable, compoundable only with the permission of the court, before which prosecution is pending, and triable by a magistrate of the first class.

4. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons

case.[28]

5. Proof

To establish an offence under this section, the prosecution must prove that:

(a) the complainant was wrongfully confined by the accused; and
(b) the manner of the confinement was such as to indicate an intention, on the part of the accused, that the confinement of the complainant, or the place of the confinement, may not be known to any person, interested in the complainant, or to any public servant, or that the place of confinement may not be known to, or discovered by, such person or public servant.

26 *Empress v Sreenath Banerjee* ILR 9 Cal 221 .

27 *Suman Sood v State of Rajasthan* 2007 Cr LJ 4080 (SC), AIR 2007 SC 2774, (2007) 5 SCC 634, 2007 (7) Scale 312 .

28 Code of Criminal Procedure 1973, s 251 .

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Chapter XVI

Of Offences Affecting the Human Body

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

S. 347.

Wrongful confinement to extort property or constrain to illegal act.--

Whoever wrongfully confines any person for the purpose of extorting from the2927 person confined, or from any person interested in the person confined, any property or valuable security or of constraining the person confined or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Comments

1. Scope

This section deals with wrongful confinement, as s 329, IPC deals with voluntarily causing grievous hurt, to extort any property or valuable security, or to constrain a person to do an illegal act or to give any information which may facilitate the commission of an offence. The difference between the two sections

lies in the nature of the act, which is made punishable, though the motive for doing the act is almost the same. The aggravating circumstances, calling for enhanced punishment, are the same.

Wrongful confinement, under this section, may be of the person, from whom the property is extorted or the information is received, or it may be of any other person interested in such person.

2. 'Whoever Wrongfully Confines'

Under this section, the person liable for punishment, is the person who wrongfully confine.[29] Where the appellants charged the prosecutor with theft and handed him over to the police and it was the police, who wrongfully confined the prosecutor, it was held that the police, and not the appellants, were responsible for the oppression or extortion, practised, by the police, on the prosecutor when he was in confinement.[30]

3. 'For the purpose of Extorting'

Commentary under the same heading in s 327, *ante*, may be referred to.

4. 'Valuable Security'

The affixing of a thumb impression to a piece of paper is 'authority, to the holder of the same, to make the document into a valuable security'. The thumb impression is regarded everywhere as the signature of an illiterate man.[31]

Where, therefore, the accused intentionally put a person in fear of injury to himself and thereby dishonestly induced him to place his thumb-impression upon certain2928 pieces of paper, being, in each case something signed, which could be converted into a valuable security under s 30, IPC, it was held that the accused was guilty of the offence under this section.[32]

5. 'Constraining'

Commentary under the same heading in s 327, *ante*, may be referred to.

6. 'Illegal'

Commentary under s 43, IPC, Vol. 1, may be referred to.

7. 'Offence'

Commentary under s 40, IPC, Vol. 1, may be referred to.

8. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate.

9. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (name of accused person) as follows:

That, on or about the .....day of.....at.....you wrongfully confined one *AB* for the purpose of extorting, from the said *AB* (*or from one CD, interested in the said AB*), certain property (*or a valuable security*), to wit....., (or for the purpose of constraining the said *ABor one CD, interested in the said AB*) to do.....,that is illegal (*or to give any information, which may facilitate the commission of an offence*), and thereby committed an offence, punishable under s 347 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

10. Proof

To establish an offence under this section, the prosecution must prove that:

(a) the accused wrongfully confined a person; and
(b) he did do for the purpose of:

(i) extorting, from the person confined, or from a person interested in the person confined:

- any property,
- valuable security, or

(ii) constraining the person confined or a person interested in the person confined:

- to do anything that is illegal,
- or to give any information which may facilitate the commission of an offence.

2929

11. Separate Convictions under Sections 147 and 347 Not Illegal

Separate convictions under s 147 and s 347 are perfectly legal though the aggregate sentences, which may be passed, cannot be in excess of the sentence which can be passed for the offence which is more heavily punishable under the IPC .[33]

29 *Emperor v Luchman Singh* ILR 31 Cal 710, 1 Cr LJ 797 .

30 *Empress v Shumbhoonath Pandey* 1 WR (Cr) 26 .

31 *Jawahir Thakur v Emperor* 17 Cr LJ 203, ILR 38 All 430 .

32 *Batisa Singh v Emperor* AIR 1932 Pat 335, p 336, 34 Cr LJ 81 .

33 *Batisa Singh v Emperor* AIR 1932 Pat 335, p 336 .

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Chapter XVI

Of Offences Affecting the Human Body

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

S. 348.

Wrongful confinement to extort confession, or compel restoration of property.--

Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Comments

1. Scope

This section deals with wrongful confinement, as s 330 deals with voluntarily causing hurt, to extort a confession or to compel restoration of property. The difference between the two sections lies only in the nature of the act made punishable, the motive for doing the act being the same. The commentary on s 330 may, therefore, be usefully read as a commentary on this section.

2. 'Whoever Wrongfully Confines'

Commentary under the same heading in s 347, *ante*, may be referred to.

3. Procedure

The procedure is the same as in the case of an offence under s 347 .

4. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the .....day of.....,at....., you wrongfully confined one *AB* for the purpose of extorting, from the

said *AB* (*or from one CD, interested in the said AB*), any confession (*or any information which might lead to the detection of an offence or misconduct*) (*or for the purpose of constraining the person confined*) (*or a person interested in the person confined*) to restore (*or to cause the restoration of*) any property (*or valuable security*) (*or to satisfy any claim or demand*), (*or to give information which2930 might lead to the restoration of any property or valuable security*), and thereby committed an offence, punishable under s 348 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

5. Joinder of Charges

Where the accused causes hurt as well as wrongful confinement, he may be charged for both the offences.[34]

6. Proof

To establish an offence under this section, the prosecution must prove that:

(1) the accused wrongfully confined a certain person; and
(2) the said confinement was for the purpose of:

(a) extorting

(i) from the person confined, or
(ii) from the person interested in the person confined,

(a) a confession, or
(b) an information which might lead to the detection of an offence of misconduct; or
(c) constraining

(i) the person confined, or
(ii) the person interested in the person confined.

(a) to restore, or to cause the restoration of, a certain property or valuable security, or
(b) to satisfy a claim or demand, or
(c) to give information which might lead to the restoration of a certain property or valuable security.

34 *Empress v Fakirappa* ILR 15 Bom 491 .

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Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

S. 349.

Force.--

A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: *Provided* that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:

First.--By his own bodily power.

Secondly.--By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

2931Thirdly.--By inducing any animal to move, to change its motion, or to cease to move.

Comments

1. Scope

This section does not define any offence; it only gives an elaborate explanation of the use of force. Under the terms of the section, to cause motion, change of motion, or cessation of motion, by one or other of the three means mentioned, to another person, either directly or indirectly, bringing some substance in contact with his body, or with something that he is wearing or carrying, or with something that affects his sense of feeling, is to use force. Where the accused raised their *lathis* to strike another person with the result that he had to flee to save himself, it was held that they used force on that person and by using bodily power.[35]

'Force' as defined in this section, and 'criminal force', as defined in s 350, must necessarily be used against a human being, and not against an inanimate object. If any motion, change of motion, or cessation of motion, is caused to any property without affecting a human being, there is no use of force within the meaning of this section.[36] Where the accused removed a ladder and thereby detained a person on the roof of a house, it was held that the act did not amount to an act of using criminal force, but to an act of wrongful restraint.[37] However, causing an animal to move is to use force within the definition of this section.[38]

2. 'Motion'

See illust (a) to s 350, *post.*

3. 'Change of Motion'

See illust (b) to s 350, *post*.2932

4. 'Cessation of Motion'

See illust (c) to s 350, *post.*

5. 'Causes to any Substance Such Motion'

See illusts (d), (e), (f), (g) and (h) to s 350, *post.*

6. 'Brings that Substance into Contact with any Part of that Other's Body'

See illusts (d), (e), (g) and (h) to s 350, *post.*

7. Firstly 'By his Own Bodily Power'

See illusts (c), (d), (f) and (g) to s 350, *post.*

8. Secondly 'By disposing any Substance in such a Manner that the Motion or change or Cessation of Motion Takes Place Without any Further Act on his Part or on the Part of any other Person'

See illust (a) to s 350, *post.*

9. Thirdly 'By Inducing any Animal to Move, to Change its Motion or to Cease to Move'

See illusts (b) and (h) to s 350, *post.*

35 *Jai Ram v Emperor* 15 Cr LJ 231 .

36 *Maiku v State* AIR 1953 All 749, p 750, 54 Cr LJ 1729 ; *Ramsingh Babanji v State of Mysore* (1972) Cr LJ 1212, p 1213, (1972) Mad LJ (Cr) 54 ; *Sadasib Mandal v Emperor* AIR 1915 Cal 131, 15 Cr LJ 720 ; *Ram Chand v Emperor* AIR 1939 Lah 184, 40 Cr LJ 781 ; *Bhani v Narain Singh* AIR 1940 Lah 84, 41 Cr LJ 387 ; *Balram Sahu v Vhamru Sahu* AIR 1921 Pat 391, 22 Cr LJ 329 ; *Hari Chand v Emperor* AIR 1919 Lah 248 (1), 20 Cr LJ 488 ; *Teja Singh v Emperor* AIR 1927 Lah 792 ; *Mangi Ram v Emperor* AIR 1927 Lah 830, 28 Cr LJ 964 ; *Bihari Lal v Emperor* AIR 1934 Lah 454, 36 Cr LJ 59 ; *Suba v Ali Gauhar* AIR 1935 Lah 477, 36 Cr LJ 1161 (1); *Kalar Din v Emperor* AIR 1940 Pesh 51 ; *Ramakant Rajarama Painguinkar v Manuel Femandez* AIR 1969 Goa 45, p 46 ; *Gordhan Das v State* AIR 1968 Raj 241, (1968) Cr LJ 1304 ; **But see***Muneshwar Bux Singh v Emperor* AIR 1939 Oudh 81, wherein it has been held that as, acceding to s 47, IPC 'animal' does not include a human being, 'force' as used in this section, cannot be said to have been used by one person to another by causing change in the position of another human being.

37 Re *Telapolo Sabbad* 1 Weir 340.

38 *Sheo Pratap Singh v Emperor* AIR 1930 All 820, p 822, 32 Cr LJ 306 ; Re *Kama Kondiah*AIR 1923 Mad 608 1, 24 Cr LJ 456 .

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Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

S. 350.

Criminal force.--

Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Illustrations

(a) *Z* is sitting in a moored boat on a river. *A* unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here *A* intentionally causes motion to *Z,* and he does this by disposing substances in such a manner that the motion is produced without any other act on any person's part. A has therefore intentionally used force to *Z;* and if he has done so without *Z's* consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to *Z, A* has used criminal force to *Z.*

(b) *Z* is riding in a chariot. *A* lashes *Z's* horses and there by causes them to quicken their pace. Here *A* has caused change of motion to *Z* by inducing the animals to change their motion. A has therefore used force to *Z;* and if *A* has done this without *Z's* consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy *Z, A* has used criminal force to *Z.*

(c) *Z* is riding in a palanquin. *A*, intending to rob *Z*, seizes the pole and stops the palanquin. Here *A* has caused cessation of motion to *Z*, and he has done this by his own bodily power. *A* has therefore used force to *Z*; and as2933*A* has acted thus intentionally, without *Z's* consent, in order to the commission of an offence, *A* has used criminal force to *Z*.

(d) *A* intentionally pushes against *Z* in the street. Here *A* has by his own bodily power moved his own person so as to bring it into contact with *Z*. He has therefore intentionally used force to *Z*; and if he has done so without *Z's* consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy *Z*, he has used criminal force to *Z*.

(e) *A* throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with *Z*, or with *Z's* clothes, or with something carried by *Z*, or that it will strike water and dash up the water against *Z's* clothes or something carried by *Z*. Here, if the throwing of the stone produce the effect of causing any substance to come into contact with *Z*, or *Z's* clothes, *A* has used force to *Z;* and if he did so without *Z's* consent, intending thereby to injure, frighten or annoy *Z,* he has used criminal force to *Z.*

(f) *A* intentionally pulls up a woman's veil. Here, A intentionally uses force to her, and if he does so without her consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

(g) *Z* is bathing. *A* pours into the bath water which he knows to be boiling. Here A intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with *Z,* or with other water so situated that such contact must affect *Z's* sense of feeling; *A* has therefore intentionally used force to *Z;* and if he has done this without *Z's* consent intending or knowing it to be likely that he may thereby cause injury, fear, or annoyance to *Z. A* has used criminal force.

(h) *A* incites a dog to spring upon *Z,* without Z's consent. Here, if *A* intends to cause injury, fear or annoyance to *Z,* he uses criminal force to *Z.*

Comments

1. Scope

The preceding section, s 349, IPC defined force or, rather, explained as to when a person is said to use force. However, mere force or use of force is not criminal. This section, therefore, proceeds to define 'criminal force' or, rather, to explain as to when the use of force becomes criminal, or, in the language of the section, when a person 'is said to use criminal force'. If added, to the use of force, as defined in the preceding section: (1) the intentional use of such force; (2) without the other person's consent; and (3) with the object of either committing an offence or of causing injury, fear or annoyance to the person, to whom the force is used, the force becomes 'criminal force'.2934

The use of criminal force, as defined in this section, is itself an offence made punishable under s 352, IPC . However, there can be no question of using 'criminal force' if an investigating officer uses reasonable means to obtain a few specimens of hair of the accused for establishing the identity of those who took part in a crime.[39]

Relative Scope of Section 349 and Section 350

It is obvious from a bare reading of ss 349 and 350, IPC, that it is the using of force when a person brings a substance in contact with any part of another's body. It would be criminal force because by using force if fear or annoyance is caused to the person or an offence is committed, it would be falling within the expression of 'criminal force'.[40]

Section 349 does not define any offence though it explains the use of force. The use of criminal force defined in s 350 is punishable under s 352 .

2. 'Criminal Force' Distinguished from 'Assault'

Though the definition of 'criminal force' as defined in this section, has been included in the definition of 'assault', defined in s 351, evident from the fact that in ss 352 to 358, which prescribe the punishment for the offences, the expression used is 'assault or criminal force', and no distinction is made between them in the matter of punishment, they have been made separate offences in the IPC . However, 'assault' is confined to a mere gesture or preparation to use criminal force while the actual use of criminal force is made a separate offence designated as 'criminal force'.

3. Essentials of an Offence Defined in this Section

To constitute the offence, defined in this section, the following elements are essential:

(1) there must be an intentional use of force to any person;
(2) such use of force must have been without the said person's consent; and
(3) the said use of force must have been

(a) to commit any offence, or
(b) to cause, or knowing it to be likely that he will cause, injury, fear or annoyance to the person to whom the force is used.

Mere use of force is not enough to bring an act within the ambit of s 350 or s 353, IPC . It has further to be shown that force was used intentionally to any person, without that person's consent, in order to commit an offence or with the intention to cause, or with the knowledge that the use of force will cause, injury, fear or annoyance to the person against whom this

force is used.[41]

4. 'Whoever Intentionally Uses Force to any Person'

Commentary under s 349, *ante*, may be referred to.2935

5. 'Without That Person's Consent'

Commentary under s 90, IPC, Vol. 1, may be referred to.

6. 'In Order to the Committing of any Offence'

Commentary under s 40, IPC, Vol. 1, may be referred to.

7. 'Intending, by the Use of Such Force, to Cause, or Knowing it to be Likely that, by the use of such Force, he will Cause, Injury, Fear or Annoyance to the Person to Whom the Force is Used'

To constitute an offence, the force must be used with the intention, or knowledge that it is likely, to cause injury, fear or annoyance to the person to whom the force is used.[42] The use of criminal force may cause hurt, grievous hurt, or even death. However, the nature of the offence will depend upon the intention or knowledge of the offender. If his intention or knowledge falls short of the intention or knowledge, required by ss 321, 322, 299 or 300, IPC, and is limited to the intention or knowledge to cause 'injury, fear or annoyance to the person to whom the force is used', the offence would fall only under s 352, IPC . Thus, where the accused struck the deceased, who had an enlarged spleen, in the course of a quarrel, and caused his death thereby, but the accused had no knowledge of the state of the deceased's spleen, it was held that the accused was guilty only of using criminal force under s 352, IPC, but not of culpable homicide.[43] To strike a pot of *lahn*, which a man is carrying and is in contact with that man's body, constitutes the offence of criminal force if it is done to cause him fear, annoyance, *etc*.[44]

Snatching of ballot box from Presiding Officer would not amount to criminal force.[45]

39 *Mahipal Maderna v State of Rajasthan* 1971 Cr LJ 1405, p 1410, 1971 Raj LW 43 .

40 *Bhupinder Singh v State of Punjab* (1997) Cr LJ 3416 (P&H) .

41 *Chandrika Sao v State of Bihar* AIR 1967 SC 170, p 171, (1967) Cr LJ 261*; Durga Prasad v State of Kerala* 2014 (3) KLJ 875 (Ker) .

42 *Ashiq Hussain Khan v Emperor* AIR 1923 All 333, p 334, 24 Cr LJ 857 .

43 Re *Jai Dayal*(1876) PR 21.

44 *Emperor v Darshan Singh* AIR 1941 Lah 297, p 298, 42 Cr LJ 812 .

45 *Saji v State of Kerala* 2012 (4) KLJ 188 (Ker) .

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Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

S. 351.

Assault.--

Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation.--Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

Illustrations

(a) *A* shakes his fist at *Z,* intending or knowing it to be likely that he may thereby cause *Z* to believe that *A* is about to strike *Z. A* has committed an assault.

(b) *A* begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause *Z* to believe that he is about to cause the dog to attack *Z. A* has committed an assault upon *Z.*

(c) *A* takes up a stick, saying to *Z,* "I will give you a beating". Here, though the words used by *A* could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not2936 amount to an assault, the gesture explained by the words may amount to an assault.

Comments

1. Scope

The preceding section defined the offence of using criminal force and this section defines the offence of 'assault' which may be committed even by a mere gesture causing an apprehension of criminal force being used. It is something less than the use of 'criminal force'. An assault, when completed, becomes 'criminal force'. According to this section, a gesture or preparation, made by a person, who intends, or knows that it is likely, that some person present will thereby apprehend that he is about to use criminal force is assault. Any gesture, calculated to excite in the party threatened, a reasonable apprehension that the party threatening intends immediately to offer violence, or is about to use criminal force to the person threatened, constitutes, if coupled with a present ability to carry such intention into execution, an assault in law.[46] However, mere threatening words, unaccompanied by any gesture or preparation, may amount to intimidation under s 503, but not an assault punishable under s 352 or s 353 .[47]

Before an act can amount to an assault under s 351, IPC, it is necessary that gesture or preparation should be made by the person who would cause another to apprehend that the person is about to use criminal force to him, then and there, and the preparation, taken with the words used, must cause him to apprehend that criminal force would be used on him if he persisted in the particular course of conduct and there would be no assault if he desisted from that conduct.[48]

The gist of the offence lies in the effect which the threat creates upon the mind of the victim. Whether a particular act amounts, or does not amount, to an assault depends upon the circumstances of each

particular case. Thus, where an accused went away from the scene, threatening certain officers that he would return and teach them a lesson, and soon afterwards returned with a *lathi* in his hand and went sufficiently close to the officers to raise in their minds a reasonable apprehension that actual force was likely to be used, it was held that in these circumstances, the act of the accused fell within the definition of assault.[49] However, where a person takes a *lathi* and shouts that he will break the head of a policeman if he insists upon taking his thumb impression, it will not amount to an assault.[50]2937

For an assault, it is not necessary that the threatened force should be used. An apprehension, that it is about to be used, is sufficient. It is an assault to point a loaded pistol at any one.[51] In the case of attacks on human beings, mere preparation by itself may amount to an assault.[52]

The offence of assault is one that is committed against a person, and not against the public. It involves a breach of the peace, and *a fortiori* the offence of actually causing hurt to a person must also involve a breach of the peace.[53]

2. English Law

A person commits an assault if he intentionally or recklessly causes another person to apprehend the application to his body of immediate, unlawful force. An assault can be committed by words alone if they cause the necessary apprehension. The requirement of the apprehension of immediate force is satisfied if the prosecution proves a fear of force at some time not excluding the immediate future.

A person commits a battery if he intentionally or recklessly applies unlawful force to the body of another person. The slightest degree of force, even mere touching, suffices. It is not necessary that the victim should feel the force through his clothes; a touching of a person's clothes is the equivalent of touching him. Without the application, however, of some force there cannot be a battery. Thus causing someone psychiatric harm by a threat does not constitute a battery. Similarly, the use of force merely to pull away from another does not constitute a battery.

Although an assault is a separate, independent crime and should be treated as such, for practical purposes, the term 'assault' is generally synonymous with 'battery' and is used to mean the actual use of unlawful force to another person with the requisite *mens rea*. Where there is actual as well as apprehended unlawful force, the charge should be assault by beating rather than assault and battery since the latter form is duplicitous.[54]

The only exception is where the defendant has created a dangerous situation (even inadvertently) in which case he is under a duty to take such steps as lie within his power to counteract the danger, and a failure to do so which is accompanied by the requisite *mens rea* will suffice if it results in the necessary application of force.[55]

In *Wood v Director of Public Prosecutions* , it was observed, 'where a police officer restrains a person, but does not at that time intend or purport to arrest him, then he is committing an assault, even if an arrest would have been justified.'[56]

3. Essential Ingredients of an Offence under this Section

The essential ingredients[57] of an offence under this section are as follows:

(a) the accused must make a gesture or preparation to use criminal force;2938
(b) the said gesture or preparation must be made in the presence of the person with respect to whom it is made;
(c) the accused must, by the said gesture or preparation, intend to cause, or know that it would cause, that person to apprehend that criminal force would be used against him by the

accused; and

(d) the said gesture or preparation must cause, in the mind of that person, apprehension that the accused would use criminal force against him.

4. 'Whoever'

A person in uniform, be he an officer, NCO or private, is not entitled to assault another person, whether in peace or at the time of war.[58]

5. 'Gesture' as under Illustration (a) to Section 351

Lifting a *lota* to hit is a gesture.[59] Similarly, the taking up of a *lathi* or raising a bottle,[60] drawing a sword or bayonet, aiming a gun at a person who is within its reach, are all also gestures.

6. 'Preparation' as under Illustration (b) to Section 351

This is one of the few sections in the IPC which makes a mere preparation, not amounting to an attempt, by itself an offence.[61]

7. 'Intending or Knowing it to be Likely'

Intention or knowledge is an ingredient of the offence under this section. Throwing of a bottle by an accused, into the complainant's house, for the purpose of either hurting some of the inmates of the house or frightening them, was held to be an assault.[62] Where all that was found was that the accused surrounded a constable and showed a threatening attitude, it was held that it was not sufficient to find that an assault was committed by the accused.[63]

8. Apprehension must be from the Accused

According to the section, the apprehension of the use of criminal force must be from the person making the gesture or preparation, and if that apprehension arises not from that person, but from somebody else, it does not amount to assault on the part of that person. Even if his followers moved a little forward at his gesture, and caused the apprehension, it would not amount to an assault.[64]

9. Conviction of some Accused under Section 326 and others under Section 352

Where the original common object of the accused persons was to assault the victim, some of the accused persons, however, after entering the house of the victim2939 developed different common object and caused grievous injuries to the victim attracting s 326, IPC, so far as those accused who stood outside the house of the deceased and who could not have known what actually transpired inside the house, the act of those members of the original unlawful assembly who entered the house cannot be attributed. Hence, at the most these accused persons will be liable to be punished for sharing the original common object which is only to assault the deceased. Therefore, they can be held guilty of an offence punishable under s 352 read with s 149 only.[65]

46 *AC Cama v HF Morgan* (1864) 1 Bom HCR 205 .

47 Re *Annakamu Chettiar*(1959) Cr LJ 1084.

48 *Sriram Chandra Das v Krushna Chandra Roy* (1969) 35 Cut LT 788, (1970) Cr LJ 264 .

49 *Ram Singh v Emperor* AIR 1935 Pat 214, p 217-218 (FB), 36 Cr LJ 714 .

50 *Birbal Khalifa v Emperor* ILR 30 Cal 97, 6 CWN 342 .

51 *Awadhesh Mahto v State of Bihar* (1979) Cr LJ 1275, p 1277 (Pat) ; *Kwsaku Mensah v Emperor* AIR 1946 PC 20, 47 Cr LJ 569 .

52 *Parasram Ji v Imtiaz* AIR 1962 All 22, 23 .

53 *Nazir-Ud-Din v Emperor* AIR 1933 All 609, p 611, 34 Cr LJ 859 .

54 *Halsbury's Law of England.*

55 *DPP v Bermudez* (2003) EWHC 2908 (Admin) .

56 *Wood v Director of Public Prosecutions* (2008) All ER (D) 162 (May) .

57 *Banka Sahu v Mukta Sahu* (1974) Cut LT 155 .

58 *Eric Regiland Charles Alexander Strologo v King* AIR 1945 PC 46, p 47, 46 Cr LJ 620 .

59 *Dhanalal v State* AIR 1951 MB 42, 43.

60 *Birbal Khalifa v Emperor* ILR 30 Cal 97 .

61 *Parasram Jii v Imtiaz* AIR 1962 All 22, (1962) All WR (HC) 92 .

62 *Mahadeo Pandey v Emperor* AIR 1932 All 322, p 323, 33 Cr LJ 889 ; *Nazir-Ud-Din v Emperor* AIR 1933 All 609, p 611, 34 Cr LJ 859 .

63 *Munisami v Emperor* 11 Cr LJ 483 (2), p 484.

64 *Muneshwar Bux Singh v Emperor* AIR 1939 Oudh 81, p 82, 40 Cr LJ 221 .

65 *Bhimrao v State of Maharashtra* (2003) Cr LJ 1204 (SC), AIR 2003 SC 1493 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

S. 352.

Punishment for assault or criminal force otherwise than on grave provocation.--

Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Explanation.--Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

If the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or

If the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

Comments

1. Scope

Assault under s 351, IPC and the intentional use of criminal force under s 350 are punishable alike, and this section provides just such a punishment. The application of this section is, however, limited to the said two offences committed 'otherwise than on grave and sudden provocation', given by the complainant. For assault and use of criminal force on grave and sudden provocation, given by the complainant, mitigated punishment is provided by s 358 .

An assault, committed by a person in resisting an illegal arrest,[66] or an illegal attachment of property or to defend his right of possession by ousting the2940 complainant party[67] is no offence under this section. However, a defence under s 97 is not available to a person assaulting another, when that other has not done anything amounting to an offence against a human body or an offence of any kind specified in that section against property.[68]

2. Section 186 Distinguished from Sections 332 and 353

Commentary under the same heading in s 186, IPC, Vol. 2, may be referred to.

3. 'Assaults or Uses Criminal Force'

Forcibly taking the thumb-impression of a person on a blank piece of paper amounts to an offence of assault or use of criminal force punishable under this section.[69]

Sections 350 and 351, and the commentary thereunder, may be referred to.

4. 'Otherwise Than on Grave and Sudden Provocation'

The punishment provided in the section is mitigated in circumstances of grave and sudden provocation attending the assault or use of criminal force under the provisions of s 358, IPC . The terms of the explanation, regarding provocation, are identical with the provisos to exception 1 to s 300, IPC, so refer to exception I to s 300, *ante*.

5. Procedure

The offence under this section is non-cognizable, bailable, compoundable, and triable by a magistrate, and may also be tried summarily.

6. Sanction

Charges under ss 352 and 353 are not such as would require any sanction.[70]

7. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[71]

8. Proof

To establish an offence under this section, the prosecution must prove that:

(a) in the case of an assault:

(i) the accused made a gesture or preparation to use criminal force in the presence of the complainant;
(ii) the accused, by the said gesture or preparation, intended to cause, or knew that it would cause, the complainant to apprehend that criminal force would be used against him by the accused;2941
(iii) the said gesture or preparation did cause such apprehension in the mind of the complainant; and
(iv) the accused received no grave and sudden provocation to make the gesture or preparation.

(b) in the case of use of criminal force:

(i) the accused used force to the complainant;
(ii) he did so intentionally;
(iii) he used it without the complainant's consent;
he did so to commit an offence, or to cause, or knowing it to be likely that he would cause, injury, fear or annoyance to the complainant;[72] and he received no grave and sudden provocation from the complainant.

Absence of medical evidence about the injury is inconsequential when there is positive evidence to the effect that the complainant had been assaulted by the accused. The offence would fall under s 351, IPC .[73]

9. Acquittal on a charge under Section 352 Bars a fresh trial on the same facts under Section 323

A person, tried and acquitted on a charge of using criminal force under s 352, cannot be tried, in respect of the same criminal matter, on a charge of hurt.[74]

10. Sentence

Where no substantial hurt is caused, no useful purpose would be served by sending the accused to jail for a short term, and a sentence of fine would meet the ends of justice.[75] Where, however, a railway officer of some status, whose duty as such officer was to behave fairly and courteously to passengers, was convicted of an offence under this section, for forcibly occupying a berth occupied by a lady, by not only assaulting her when she resisted, but also by casting aspersions on her character, the Supreme Court observed that his conduct called for censure and the maximum sentence permissible under the section.[76]

The occurrence took place 15 years back when the accused was 32 years and co-accused 35 years of age. Thus keeping in view the age of the accused persons and passing of a long period from the date of occurrence the sentence under s 352, IPC, was reduced from three months rigorous imprisonment to a fine of Rs 3000, in default of payment of which rigorous imprisonment for three months.[77]

As this section limits the imprisonment for a term of three months, imprisonment in default of payment of fine cannot, in view of s 65 of this Code, exceed one-fourth of the term of three months fixed. A sentence of imprisonment for one month[78] or for three months[79] in default of payment of fine is illegal.2942

11. Conviction of main Accused under Section 304, Part I and Co-accused under Section 352

Where the main accused inflicted a knife injury on the deceased causing his death, and the co-accused wielding a stick intended to hit the victim but he averted the same, the main accused was convicted under s 304, Pt I and the co-accused under s 352, IPC .[80]

12. Alteration of Conviction from Section 353 to Section 352

Commentary under the same heading in s 353, *post*, may be referred to.

13. Alteration of Conviction from Section 326 to Section 352

Commentary under the same heading in s 326, *ante*, may be referred to.

66 *Mahendra Singh v State* AIR 1960 Assam 206, (1960) Cr LJ 1420 ; Re *Pedda Muni Reddi*AIR 1948 Mad 472, 49 Cr LJ 705 ; *Pasuvathi Pillai v Emperor* AIR 1928 Mad 624, 29 Cr LJ 541 .

67 *Hemram Saikia v Loboram Saikie* (1987) 1 Crimes 319 (Gau) .

68 *Sitaram Ahir v Emperor* AIR 1944 Pat 222, p 224, 45 Cr LJ 806 ; *Kaluram Nenuram v Emperor* AIR 1934 Sind 52, 34 Cr LJ 963 .

69 *Jadunandan Singh v Emperor* AIR 1941 Pat 129, p 130, 42 Cr LJ 361 .

70 *Emperor v Arjun Pramanik* ILR 31 Cal 664, refer to s 353 (commentary).

71 Refer to the Code of Criminal Procedure 1973, s 25 .

72 *M Waugh v Emperor* AIR 1940 Cal 59, 41 Cr LJ 247 .

73 *Bharat Nath v Karmakar Nath* (1980) Cut LR (Cr) 139, p 141 .

74 *Kangi Hizra v Golap Hizra* AIR 1953 Cal 197, 54 Cr LJ 496 .

75 *Gurucharan Singh v State* AIR 1965 All 543, (1965) 2 Cr LJ 582 .

76 *Ram Das v State of West Bengal* AIR 1954 SC 711, 55 Cr LJ 1793 .

77 *Nagar Prasad v State of Uttar Pradesh* (1998) Cr LJ 1580 (All) .

78 Re *Jehan Buksh* 16 WR (Cr) 41 (1).

79 *Pratap Kumar v State of Punjab* (1976) Cr LJ 761, **dissenting from** Re *Akbar Momin* 6 CWN 202.

80 *Nagar Prasad v State of Uttar Pradesh* (1998) Cr LJ 1580 (All) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

S. 353.

Assault or criminal force to deter public servant from discharge of his duty.--

Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

Sections 353 to 357, IPC provide for five aggravated forms of assault or use of criminal force. This section deals with assault or use of criminal force to prevent or deter a public servant from discharging his duty as such public servant.[81]Section 3532943 of the IPC states that whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant is punishable as stated in that section.[82]

To attract the offence under this section, there should have been an assault or use of criminal force on any public servant in the execution of his duty as a public servant or with an intention to prevent or deter such public servant from discharging his duty.

Relative Scope of Sections 353, 332 and 333

This section is similar to ss 332 and 333, the only difference between the three sections being the act constituting the offence. In s 353, it is assaulting or using criminal force; in s 332, it is causing hurt; and in s 333, it is causing grievous hurt. In all other respects, they are exactly similar and are couched in the same terms.

2. Principle Underlying this Section

A public servant is often exposed to considerable risks in the discharge of his official duties; the law, therefore, throws around him a special protection by prescribing especially deterrent sentences to those who offend against the majesty of the law, of which he is a minister. However, it is not intended to encircle him with a perennial halo of sanctity and inviolability and the IPC has throughout, in referring to him, protected him only when he is in the execution of duty, he being left at other times to have recourse to the ordinary law, applicable to all alike.[83]

Section 353, IPC, postulates that the public servant has jurisdiction to execute and insist that he should be in the process of execution of his duty when he is assaulted or criminal force is used. Legality of the execution of duty is the *sine qua non* for the application of s 353 . When, therefore, a duty is prohibited by statute or by orders of a superior authority, it cannot be said that the public servant acts in execution of his duty, for he was not duty bound to execute any order. Administrative discipline compels obedience to the order of the superior authority by the subordinate. A stay of an order issued by a higher authority prevents its execution by the subordinate.[84]

3. Section 353 Distinguished from Section 24 of the Cattle Trespass Act 1871

Section 24 of the Cattle Trespass Act 1871 does not supersede s 353 of the IPC . They co-exist. In s 353, use of criminal force and assault are essential while in s 24 all that is required is that the cattle should be

rescued after seizure; assault or use of criminal force is not necessary.[85]

4. Section 186 Distinguished from Sections 332 and 353

Commentary under the same heading in s 186, IPC, Vol. 2, may be referred to.

5. Ingredients

The essential ingredients[86] of an offence under this section are as follows:2944

(1) there must be assault or use of criminal force by the accused;
(2) the victim of the assault or use of criminal force must be a public servant; and
(3) the assault or use of criminal force must have a link with the discharge, by the public servant, of his public duty.[87]

It must be committed:

(a) while the public servant is engaged in the discharge of his duty so that he cannot proceed with it, or
(b) in order to prevent him from discharging his duty in future, or
(c) in consequence of anything, done, by him, in the past in discharging, or attempting to discharge, his duty.[88]

Similarly, the assault or use of criminal force to a public servant, while he was doing his official duty as such, is a necessary ingredient of the offence under this section. The criminal force contemplated under this section is intended to mean criminal force as applied to a person, and not as applied to an inanimate object or substance.[89]

Where offence of criminal force is not attracted, the offence would not fall under s 353, IPC .[90]

6. 'Assaults'

A constable is entitled to arrest a person, causing hurt to another person, by inflicting injuries with a knife, and if the constable is assaulted while effecting the arrest, the offender commits an offence under this section.[91] For further commentary, see text under s 351, *ante*.

7. 'Uses Criminal Force'

Commentary under s 350, *ante*, may be referred to.

8. 'Public Servant'

Where it is doubtful whether the person assaulted is a public servant or not, the accused is entitled to the benefit of doubt and the offence would be treated as one falling under s 352, and not under this section.[92]

A police constable is a police officer and is supposed to be so all during 24 hours of the day as he can at any moment may be called upon for duty. However, in order to sustain the charge of the offence punishable under s 353, IPC, what has to be established is that the public servant was actually engaged in execution of the duty.[93]

For further commentary, see under s 21, IPC, Vol. 1.2945

9. 'In the Execution of his Duty as Such Public Servant'

It is essential for a conviction under this part of the section, that the public servant at the time of being assaulted was acting in the execution of his duty.[1] If, at the relevant time, he is not doing his duty as a public servant, the offence does not fall under s 353, but under s 352, IPC .[2] Similarly the test is whether at the time of the assault, the public servant was lawfully discharging a duty imposed on him by law as such and whether he was doing what it was his duty to do.[3] If, without justification, a public servant prevents a person from going home in his car and that person pushes the public servant aside and goes his way, the person commits no offence under this section.[4] Similarly, where a *tahsildar*, having no authority to issue a search warrant or to make a search, was merely present at a search conducted by a police officer when he was assaulted, it was held that the assault on the *tahsildar* fell under s 352, and not under this section.[5]

An officer who exercises his official duties grossly, illegally and in an outrageous manner, cannot be deemed to be a public servant in the execution of his duty so as to bring an assault against such an officer within the purview of this section.[6]

Where a forest officer apprehended the accused, without having the power to so apprehend, and a scuffle entailed, it was held that no offence under this section was committed.[7] If an attachment is itself without jurisdiction, the act of the accused in causing obstruction to the bailiff, while he is putting to auction a buffalo in execution of an order of maintenance, does not constitute an offence under this section.[8] Likewise, if an accused attempts to release his relation from being arrested by police constables, who are neither in uniform, nor authorised to arrest the particular individual, nor disclose their identity and purpose, he commits no offence under this section.[9] Similarly, if the action of a public servant at the relevant time is not found to be valid in law, an assault on him, or using criminal force against him, would not amount to an offence under this section.[10]2946

If a constable is having a private quarrel with another man and is beaten in the course of that quarrel, that will not be use of criminal force in the course of his duty. Likewise, is the case when a constable is trying to commit an offence like a theft, and hurt is caused during the scuffle to prevent it. However, a constable, interfering in an affray in order to prevent it, is only discharging his duty as a public servant. If, as a result of his warning to persons committing the affray, to desist from committing the affray, or even as a result to his taking them illegally into his custody for persisting in the affray, he is subjected to criminal force by pelting stones after the persons have escaped from his custody, and there is no need to inflict any criminal force on him for the purpose of such escape, an offence under this section will be made out.[11] Similarly, a police constable, searching a person or a boat for illicit liquor, acts in the execution of his duty as a public servant and if he is assaulted, or criminal force is used against him, an offence is committed under this section.[12] A police officer, receiving information, which he believes to be correct that gambling is going on in a public place, is entitled to apprehend the gamblers without warrant, and if he is prevented by the accused from doing so by the use of criminal force, the accused is guilty under this section.[13] Likewise is the case when a person resists the search by pushing the public servant who is legally authorised to make it.[14] Where the accused had submitted to their arrest by a constable, who was entitled to arrest them and take them to the *thana*, but, subsequently, in endeavouring to escape, they assaulted the constable when he tried to prevent them from escaping, it was held that they were guilty of an offence under this section.[15] Allegations were that the accused persons had voluntarily caused grievous hurt to the junior engineer and foreman of the electricity department when they were discharging public duty. The incident took place at 7.30 p.m.; the duty chart was not filed to show that at the relevant time, the junior engineer and the foreman were on public duty. The accused persons were acquitted of the charges under ss 353 and 332, IPC .[16] If a police officer executing a warrant, which, on the face of it is valid, is assaulted, the accused commits an offence under this section.[17] Where, however, the warrant of arrest, the execution of which is resisted by a person, is clearly an illegal one, the person resisting cannot be convicted under this section.[18]

Where the complainant police officer entered the house of the accused in connection with the investigation of a case, had not obtained any warrant or written permission, the accused had not used any criminal

force or assaulted the complainant2947 to deter her from discharging her duty, it was held that no offence under s 186 or s 353, IPC was committed. FIR was quashed on petition filed under s 482, CrPC .[19]

In the instant case, the appellants on Facebook posted adverse comments against the respondent police officer. The appellants had met with an accident with an auto rickshaw and sustained injuries. The constable present at the time of the incident directed the appellants to meet police inspector *K*. When the appellants entered the office of *K*, the latter asked the appellant to produce her driving licence and other documents. As at that time no FIR was lodged, the appellant questioned the police inspector as to why she was being asked to produce those documents. The respondent *K,* in reply, alleged to have threatened appellant by saying that he would drag her to Court if she continued to argue and she was also thrown out of his office. On the order of *K*, his deputy told the appellants that they are booking them on the charge of rash and negligent driving. Being aggrieved with the manner with which they were treated, the appellants posted comments on the Bangalore traffic Police Facebook page, accusing *K* of his misbehavior and also forwarded an email complaining about the harassment meted out to them at the hands of the respondent police inspector. The respondent filed complaint for offences under ss 353 and 503, IPC . Held, there was absolutely nothing on record to show that the appellants either assaulted the respondents or used criminal force to prevent the second respondent from discharging his official duty. Considering the uncontroverted allegations, the ingredients of the offence under s 353, IPC were not made out.[20]

10. 'With Intent to Prevent or Deter that Person from Discharging his Duty as such Public Servant'

Where a sales tax officer attempted to take possession of the account books from the hands of the accused's son and the accused gave him a jerk to allow his son to run away with the account books, it was held that the accused had used criminal force to deter the officer from discharging his duty and, consequently, was liable under this section.[21]

11. 'In Consequence of Anything Done or Attempted to be Done by Such Person in the Lawful Discharge of his Duty as Such Public Servant'

The expression 'in consequence', as used in s 332, IPC, and this section, includes the motive which actuates the accused to cause voluntarily hurt or assault to a public servant.[22] Where the assault did not relate to anything done or attempted to be done by the public servant as a public servant, and it was to feed the personal grudge of the accused against the public servant, conviction under this section was not held sustainable though conviction under s 325 was maintained.[23]

The words 'in the lawful discharge of his duty as such public servant' mean in the discharge of a duty imposed by law on such public servant in the particular case; they do not cover an act done by him in good faith under colour of his office.[24] The duty,2948 assigned to a public servant by his master, be it under a statute or by an executive order, will assume the character of a public duty if the duty assigned is not illegal or against public policy.[25]

In certain pension matter proceedings before the Deputy Secretary to the Government of Karnataka, the counsel for the petitioner had made certain submissions, when the counsel was required to sign the proceedings, he was said to have refused to sign those proceedings. Held, no offence under s 180 or s 353, IPC was made out; proceedings were quashed on petition filed under s 482, CrPC .[26]

12. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate, and may also be tried summarily.

13. Sanction

Where, upon the facts, the commission of several offences is disclosed, some of which require sanction and others do not, it is open to the complainant to proceed with respect to those offences only which do not require sanction.[27] However, at the same time, the provisions of s 195, CrPC, cannot be evaded by the device of charging a person with an offence, to which that section (*i.e.*, the said s 195) does not apply, and then convicting him of an offence, to which it does, on the ground that the latter offence is a minor one of the same character, or by describing the offence as one punishable under some other section of this Code, though, in truth and substance, the offence falls in the category of sections mentioned in s 195, CrPC .[28] Again, since the offences under ss 228 and 353 fall in the same category and they are of the same nature, it is not permissible for the prosecution to split up the facts of the case in order to get rid of the bar of s 195, CrPC, and proceed only in respect of the offence under s 353 .[29]

14. Prison Act and Section 353 --Jurisdiction

Where a regular *challan* or complaint is instituted, the ordinary courts of criminal law can proceed with the inquiry and trial of the cases, notwithstanding the fact that such offences may also fall in the definition of prison offences under s 45 of the Prisons Act . In cases, where the offence also constitutes an offence under the IPC, the superintendent of prison has the option either to take cognizance of the cases himself or to file a regular complaint in a criminal court. Where, therefore, a constable, who is assaulted, makes a complaint under s 353, IPC, and the police submits a *challan* to the magistrate, the magistrate cannot refuse to exercise his jurisdiction and acquit the accused on the ground that he has no jurisdiction.[30]

The offence under s 60 of the Uttar Pradesh Excise Act 1910, and the one under s 353, IPC, being distinct and different, a person prosecuted under both the sections,2949 if acquitted on a charge under the former section, can be convicted on the same facts, under s 353, IPC .[31]

15. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[32]

16. Proof

To establish a charge under this section, the prosecution must prove that:

(1) the accused assaulted or used criminal force to a public servant; and
(2) the said assault or use of criminal force was:

    (a) in the execution of his duty as such public servant, or
    (b) with intent to prevent or deter that person from discharging his duty as such public servant, or
    (c) in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant.

There must be evidence of the terms of the warrant, in execution of which the public servant was acting, either by production of the original warrant or secondary evidence of it. In the absence of such evidence, it would not be possible to regard the warrant as a valid warrant and convict the accused under this section.[33] Likewise, it is incumbent on the prosecution, in cases of disobedience to a warrant, to show that the accused is the person against whom the warrant was issued.[34]

17. Acquittal

Where the complainant was alleged to have been assaulted by the accused person when he was checking the electric meter installed in the latter's premises, there was complete silence about the motive of the assault which probabilised the defence version that the motive of the alleged assault was not as alleged in the complaint. There was a delay of two days in lodging the complaint which created serious doubt about the correctness of the prosecution version. Further, the complainant was not assaulted as per the prosecution version in discharge of his duty as a public servant. Therefore, the acquittal of the accused was found proper.[35] The accused persons allegedly entered into the school premises and gave *lathi* blows to the victim-teacher for beating their children. The evidence of the victim was not corroborated by the medical evidence or by the statement of other teachers/eyewitnesses to the occurrence. The recovery memo, *lathi* and victims clothes allegedly torn by the accused proved to be only a farce. The acquittal of the accused persons under ss 353, 332, 506 / 34, IPC, was held proper.[36] The allegations against the accused were that they obstructed police officials in discharge of their official duties. The eyewitnesses failed to identify the accused. The other evidence was not found sufficient to convict2950 the accused. The conviction of the accused under s 353 was therefore not found proper.[37]

The allegation against the accused was that when the public servant/complainant was checking the vehicles while performing his official duties, the accused tried to run the truck over him with an intention to kill him. There were material contradictions in the statement of witnesses. The independent witnesses who were present at the place of the incident did not support the prosecution version. The accused had stopped the truck when asked for and a *challan* was filed, the truck was seized, so there remained nothing to be done so far as seizure of the truck in question was concerned. In these circumstances, the order of acquittal of the accused under ss 353 and 307, IPC was found proper.[38] The allegations against the accused were that he abused and assaulted the municipal officials. There was no evidence to show that the said officials had gone to the scene of the offence in the discharge of their duties as public servants. Even deputation of these officials upon oral instructions was not proved. No independent witness was cited by the prosecution. The FIR was lodged by the sweeper of the municipality and not by any responsible officer. On these facts, the accused was found to be acquitted under ss 353 and 323, IPC .

The prosecution case was that the accused persons forcibly entered the office of the DCP Traffic, gheraoed and manhandled the DCP. The prosecution case of causing hurt, assault or use of criminal force to deter a public servant from discharging his duty was not proved and thus, the accused was acquitted of the charges under ss 186, 353 and 332, IPC .[39]

18. Quashing of FIR/Charges

The accused person had picked up/snatched the ballot papers from the custody and possession of the public servants. It is patent that criminal force had been used by them. They had even torn the ballot papers and in the process used criminal force. The charges framed against the accused persons under ss 353 and 171-F, IPC, was found proper and the petition under s 482, CrPC, by the accused persons for quashing the charges and the FIR was dismissed.[40]

19. Conviction

Where an assault on the police officer on duty was made by the accused, an auto driver who intercepted his auto for violating traffic rules, the prosecution version about the interception of auto and the assault was proved by the eye-witnesses and corroborated by independent witness and medical evidence, the accused was liable to be convicted.[41]Where the accused assaulted to deter a public servant from the discharge of his duty and sprinkled black paint and used the abusive language against the commissioner of the municipal corporation while he was in office, such an act of humiliation was done intentionally and was sufficient to obstruct the duty of the public servant. The cognizance was taken when the written complaint under s 195, CrPC, was filed by the public servant. Therefore it was not necessary for the2951 complainant to be present when the FIR was registered and the conviction of the accused was found proper.[42]

Where the accused was firing shots on the Revenue Officials, thereby obstructing them in discharge of

their official duty, two persons were injured in firing. The mere fact that the Revenue Officials visited the place of occurrence eight months after making an application for demarcation of the land by the complainant would not, by itself, make the prosecution version doubtful. The injuries found on the person of the victims were caused by the fire-arms as per the evidence of the doctor. The FIR was lodged with promptness. The conviction of the accused under ss 307, 353 was found proper.[43]

20. Sentence

A breach of peace, even if it involves an assault on a public officer of a mild character, unless there be some elements of criminality in it, should not ordinarily be punished by a sentence of imprisonment.[44] Where, therefore, a conviction under this section is only technically correct, imposition of a small fine is sufficient.[45] In *Vaney Singh v State* ,[46] the unexpired portion of the accused's sentence was converted into fine as he was not a previous convict. Generally, however assaulting a public servant in the discharge of his duty is a serious offence which requires to be punished severely and a mere sentence of fine would not suffice,[47] particularly when the occurrence took place inside court premises in broad daylight.[48]

21. Alteration of Conviction from Section 353 to Section 352

Where it is doubtful whether the person assaulted is a public servant or not, the accused is entitled to the benefit of the doubt and the offence would be treated as one falling under s 352, and not under this section.[49] Even when the person assaulted is a public servant but when he was assaulted while not discharging any duty imposed on him by virtue of his office and was not performing any act connected with the duty attached to his office, the case will riot be covered by s 353 but will only be covered by s 352, IPC .[50]

Where a magistrate takes cognizance of a case on a police charge-sheet under s 353, IPC, for assault on a public servant, finds on the evidence that the person assaulted was not a public servant, the magistrate is not debarred from convicting the accused for the offence under this section. If the magistrate has convicted him of the offence under s 353, the appellate court can alter the conviction to one under this section.[51] Where the evidence produced in a case shows that the person against2952 whom the accused made an assault or used criminal force was not the public servant at all, or was not the public servant mentioned in the original complaint, but some other person,[52] or was not acting as a public servant at the relevant time,[53] the conviction of the accused can be altered under s 352, from one under s 353, IPC . It may, however, be remembered that alteration of a conviction under s 351 from one under s 353, IPC, does not amount to an acquittal under s 353 .[54]

22. Alteration of Conviction from Section 353 to Section 503

Where the accused threatened to kill a revenue inspector for lawfully distraining his properties, his conviction under s 353 was altered to one under s 503 .[55]

23. Alteration of Conviction from Section 353 to Section 355

Where an elderly peon attempted with an open knife in his hand to assault the railway magistrate in whose house he was working, the act of the accused came within the ambit of s 355 and not s 353 . The conviction of the accused accordingly was altered from s 353 to s 355 .[56]

81 *Mohd Ayub v State of Bihar* AIR 1974 Pat LJR 150 ; *P Ramarao v State of Andhra Pradesh* (1984) Cr LJ 27 (AP) .

82 *Mohammed Kutty v State of Kerala* (2004) Cr LJ 1603 (Ker) .

83 *Richard Saldana v State* AIR 1960 Ker 200, (1960) Cr LJ 828 ; *Jitendera Mohan De v Emperor* AIR 1944 Cal 79 ; Re *Rakhmaji* ILR 9 Bom 558; *Asa v Emperor* 14 Cr LJ 512 .

84 *Poulose v State* (1985) Cr LJ 222 .

85 *Watan Singh v State* (1965) PLR (Supp) 366 .

86 *Dhunnalal v State* AIR 1951 MB 42, p 43 .

87 *Manik Taneja v State of Karnataka* 2015 Cr LJ 1483, p 1485 (SC), (2015) 7 SCC 423 .

88 *Basavaraj Shivarudrappa Sirsi v State of Karnataka* 2011 Cr LJ 4809 (Kant), 2011 (5) Kar LJ 153 .

89 *Devaki Amma v State of Kerala* AIR 1981 Ker LT 475, p 478 .

90 *Durga Prasad v State of Kerala* 2014 (3) KLJ 875, 2014 (4) KLT SN 8 (Ker) .

91 *Patar Munda v State* AIR 1958 Ori 69, p 72, (1958) Cr LJ 541 .

92 *Fazal Nabi v State* AIR 1952 Ajmer 13 (1), (1952) Cr LJ 217 .

93 *State of Karnataka v M Chandrappa* (1987) Cr LJ 950 (Kant), (1986) 3 Crimes 137 (Kant) .

1 Re *Latchmana Goundan* 1 Weir 343, p 344; *Meharban Singh v Emperor* 12 Cr LJ 112 ; *Emperor v Thaver Issuji Boree* 12 Cr LJ 457 ; *Gopal Singh v Emperor* 5 Cr LJ 179 ; *Bissar Misser v R* ILR 41 Cal 261 ; *Bhim Singh v Emperor* AIR 1919 All 207, 20 Cr LJ 174 ; *State of Karnataka v M Chandrappa* (1986) 3 Crimes 137 (Kant), (1987) Cr LJ 950 (Kant) .

2 *Jai Ram Sahu v Emperor* AIR 1923 Pat 338 ; *Emperor v Bhopo* AIR 1933 Sind 174, 34 Cr LJ 1147 .

3 *Emperor v Bhopo* AIR 1933 Sind 174, 34 Cr LJ 1147 ; *Gulabi Mahto v Emperor* AIR 1940 Pat 361, 41 Cr LJ 742 ; *Keshav Rao v Madhya Bharat Government* (1954) Cr LJ 531 .

4 *Ramesh Chandra Sharma v State* (1965) AWR (HC) 69 .

5 *Provincial Government v Nonelal* AIR 1946 Nag 261, 47 Cr LJ 633 .

6 *Dhannalal v State* AIR 1951 MB 42, p 43 ; *Ngwe Yon v Emperor* AIR 1931 Rang 169, 32 Cr LJ 939 .

7 *State of Tripura v Sashimohan Malakar* (1977) Cr LJ 1663 .

8 *State of Himachal Pradesh v Durga* (1980) Chand LR 32 (HP) 25 (DB); *Pasuvathi Pillai v Emperor* AIR 1928 Mad 624 .

9 *Gorakhnath v State of Maharashtra* (1980) 2 Mah LR 271, 273 ; Re *Pedda Muni Reddi*AIR 1948 Mad 472 .

10 *Doraiswamy Pillai v Emperor* ILR 27 Mad 52 ; Re *Pedda Muni Reddi*AIR 1948 Mad 472, p 473 ; *Gulabi Mahto v Emperor* AIR 1940 Pat 361 ; *Keshav Rao v Madhya Bharat Government* (1954) Cr LJ 531 ; Re *Bozagellaya* 11 Cr LJ 220; *Abinash Chandra v Ananda Chandra* ILR 31 Cal 424 ; *Nanda Lal v Emperor* AIR 1924 Nag 68, 25 Cr LJ 223 ; *K Laxmidhar Behera v State* (1980) Cut LR (Cr) 151, p 155 ; *State v Sant Prakash* (1976) Cr LJ 274 ; *Janu Khan v State* AIR 1960 Pat 213, (1960) Cr LJ 634 ; *R v Bahal* ILR 28 All 481 ; Re *Ganapathia Pillai*(1953) Cr LJ 1730; *R v Narain* 7 NWR 209 ; *R v Bhajrangi Gope* ILR 38 Cal 304 ; *Roman Singh v R* ILR 28 Cal 411 ; *Gokal Chand v Emperor* AIR 1920 All 301, 22 Cr LJ 65 ; *Asa v Emperor* 14 Cr LJ 512 ; Re *Parasurama Asari* 11 Cr LJ 727; *Khota Ram v Emperor* 6 Cr LJ 107 ; *Emperor v Allah Baksh* 1 Cr LJ 956 ; *Prakash Chandra Kundu v Emperor* 15 Cr LJ 251 .

11 *Public Prosecutor v Munusswamy* AIR 1950 Mad 365, p 366 ; *Emperor v Amir Khan* 14 Cr LJ 141 .

12 *Budhoo v State* (1968) AWR (HC) 788, p 792 .

13 *Ramdeo v Emperor* AIR 1935 All 516, 36 Cr LJ 558 .

14 *Kalipada Dalal v State* AIR 1955 Cal 470, p 472, 56 Cr LJ 1243 ; *Land Customs Inspector v Jagannath Bhandar* AIR 1953 Cal 663, 57 CWN 686 .

15 *Superintendent and Remembrancer of Legal Affairs v Kaloo Khan* AIR 1948 Cal 68, p 69, 49 Cr LJ 22 .

16 *State of Himanchal Pradesh v Gulzar* 2015 Cr LJ 861 (HP) (DB) .

17 *Shib Charan v Emperor* AIR 1938 All 220, 39 Cr LJ 570 ; *R v Narbadeshwar* ILR 27 All 491 ; *Rajani Kanta Sahu v Emperor* AIR 1931 Cal 443, p 444, 32 Cr LJ 886 .

18 Re *Yedama Subbaramiah*AIR 1934 Mad 206, p 207, 35 Cr LJ 782 ; *Kishori Lal v Emperor* AIR 1934 All 1016, 36 Cr LJ 295 ; *Jairam Sahu v Emperor* AIR 1923 Pat 338, p 339, 24 Cr LJ 490 ; *Rajani Kanta Sahu v Emperor* AIR 1931 Cal 443, p 444, 32 Cr LJ 886 ; *Sukheswar Phukan v Emperor* ILR 38 Cal 789 ; *Yasinkhan v Emperor* 5 NIR 125 ; Re *Karuthan Ambalam* ILR 38 Mad 1038; *Beta Singh v Emperor* AIR 1919 Lah 67, 19 Cr LJ 443 ; *Indra Dew v Sarnagat Singh* AIR 1955 Punj 81, (1955) Cr LJ 698 .

19 *Aniruddha Ganesh Pathak v State of Maharashtra* 2010 Cr LJ (NOC) 1069 (Bom) .

20 *Manik Taneja v State of Karnataka* 2015 Cr LJ 1483, p 1484, 1485 (SC), (2015) 7 SCC 423 .

21 *Mangat Rai v State of Madhya Pradesh* (1970) 2 SCJ 227, (1970) Mad LJ (Cr) 525 .

22 *State v Usman Gani* (1964) 1 Cr LJ 254 ; *Mehr Din v Emperor* AIR 1927 Lah 162, 28 Cr LJ 199 ; *Mohan Prakash Dubey v State* (2001) Cr LJ (NOC) 94 (Del), (2001) 92 DLT 206 (Del) .

23 *Suresh Narayan Roy v State of Arunachal Pradesh* (1978) Cr LJ 1514, p 1517, 1518 .

24 *Empress v Dalip* ILR 18 All 246 ; *Roman Singh v Empress* ILR 28 Cal 411 ; *Bolai De v Emperor* ILR 35 Cal 361 ; *Meharban Singh v Emperor* 12 Cr LJ 112 ; *Asa v Emperor* 14 Cr LJ 512 ; *Muhammad Ibrahim v Emperor* AIR 1931 Lah 524, 32 Cr LJ 853 ; *Gulabrai Santdas v Emperor* AIR 1944 Sind 89, 45 Cr LJ 550 ; *Empress v Pukot Kotu* ILR 19 Mad 344 .

25 *Dattatraya Narayan Patil v State of Maharashtra* AIR 1975 SC 1685, p 1688, (1975) Cr LJ 1490 .

26 *Basavaraj Shivarudrappa Sirsi v State of Karnataka* 2011 Cr LJ 4809, p 4811 (Kant), 2011 (5) Kar LJ 153 .

27 *Satish Chartdra Chakrabarti v Ram Dayal De* AIR 1921 Cal 1, 22 Cr LJ 31 (SB) ; *Basir-ul-Haq v State of West Bengal* AIR 1953 SC 293, (1953) Cr LJ 1232 .

28 *Durgacharan Naik v State of Orissa* AIR 1966 SC 1775, p 1779, (1966) Cr LJ 1491 .

29 *Radhey Shyam Gupta v State* (1968) Cr LJ 1329 .

30 *State v Radhey Shyam* AIR 1960 Raj 288, (1960) Cr LJ 1661 .

31 *Budhoo v State* (1968) AWR 788, p 790 .

32 Code of Criminal Procedure 1973, s 251 .

33 *Tafazzul Ahmed Chowdhry v Empress* ILR 26 Cal 630 ; *Shwe Ko v Emperor* 3 Cr LJ 361 ; *Emperor v Radhe Lal* ILR 29 All 272 .

34 *Debi Singh v Empress* ILR 28 Cal 399 .

35 *State of HP v Tara Chand* (2006) Cr LJ 3073 (HP) .

36 *State of Himachal Pradesh v Bhagat Ram* (1999) Cr LJ 4705 (HP) .

37 *Sikhar Jena v State of Orissa* (2000) Cr LJ 1277 (Ori) (DB) .

38 *State of Rajasthan v Poonam Ram* (2002) Cr LJ 1596 (Raj) .

39 *State v Ramesh* 2011 Cr LJ (NOC) 556 (Del) .

40 *Bhupinder Singh v State of Punjab* (1997) Cr LJ 3416 (P&H) .

41 *State of Karnataka v Mohammed Sadiq* (2006) Cr LJ 3391 (Kant) .

42 *Virender Sharma v State* (2005) Cr LJ 2644 (Del) .

43 *Kuldip Singh v State of Punjab* (2007) Cr LJ (NOC) 497 (P & H).

44 *Ananda Parhi v Emperor* AIR 1931 Pat 342, 32 Cr LJ 1166, **followed in***Iqbal Bahadur Lal v State* AIR (1952) Ajmer 38 (1), (1952) Cr LJ 1242.

45 Re *Ganapathia Filial*AIR 1953 Mad 936, p 939 ; *Badri Prasad v State* AIR 1953 All 494, (1953) Cr LJ 1137 .

46 *Vaney Singh v State* (1970) 1 WLN 650 .

47 *Anadi Gin v State* (1963) 1 Cr LJ 826, p 827 ; *Chandrika Sao v State of Bihar* (1961) SCWR 324, 1963 BLJR 450 ; *Chouthmal Agarwalla v State* AIR 1965 Pat 8, (1965) 1 Cr LJ 60 .

48 *Kumar alias Welding Kumar v Inspector of Police, Chennai* (2000) Cr LJ 4270 (Mad) .

49 *Fazal Nabi v State* AIR 1952 Ajmer 13 (1), (1952) Cr LJ 217 .

50 *Naresh Chandra Jauhary v State of Uttar Pradesh* (1988) 1 Crimes 567 (All) .

51 *Maung Ba v King* AIR 1938 Rang 281, 39 Cr LJ 761, **dissenting from** Re *Akbar Momin* 6 CWN 202.

52 *Maung Ba v King* AIR 1938 Rang 281, p 282, 39 Cr LJ 761 ; Re *Akbar Monim* 6 CWN 202.

53 *Sudarshan Jena v State of Orissa* (1973) 1 Cut WR 195 .

54 *Fazul Khan v Empress* AIR 1927 Lah 369, 28 Cr LJ 508 ; *Emperor v Gian Singh* AIR 1928 Lah 230, 29 Cr LJ 905 .

55 Re *Annakamu Chettiar*AIR 1959 Mad 343, 1959 Cr LJ 1084 .

56 *Santanu Kumar Sadangi v State* (1989) Cr LJ 2355 (Ori) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

S. 354.

Assault or criminal force to woman with intent to outrage her modesty.--

Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, [57][shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine].

STATE AMENDMENTS

Andhra Pradesh-- Section 2 of the Andhra Pradesh Act 6 of 1991 states as follows:

"In its application to the State of Andhra Pradesh, for section 354, substitute the following section, namely:--

"**354. Assault or criminal force to woman with intent to outrage her modesty.**--Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term which may be less than five years, but which shall not be less than two years." "

Madhya Pradesh--Section 3 of the Madhya Pradesh Act 14 of 2004 states as follows:

"In its application to the State of Madhya Pradesh, after section 354, insert the following section, namely:--2953

"**354A. Assault or use of criminal force to woman with intent to disrobe her.**--Whoever assaults or uses criminal force to any woman or abets or conspires to assault or uses such criminal force to any woman intending to outrage or knowing it to be likely that by such assault, he will thereby outrage or causes to be outraged the modesty of the woman by disrobing or compel her to be naked on any public place, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to ten years and shall also be liable to fine."

Orissa-- Section 3 of the Orissa Act 6 of 1995 (wef 10-3-1995) states as follows:

"In its application to the State of Orissa, in First Schedule to the Code of Criminal Procedure, in the entry under column 5 relating to section 354 of the Indian Penal Code, for the word "bailable", substitute "non-bailable".2954

Comments

1. Legislative Changes

Section 354 has been amended by the Criminal Law (Amendment), 2013 (13 of 2013), (wef 3-02-2013) on the recommendations of the Justice J.S. Verma Committee. The punishment/sentence imposable under this section has been enhanced, which now shall not be less than one year but which may extend to five years and also fine.

2. Scope

This section deals with another aggravated form of assault or use of criminal force. The offence under this section is committed only when a person assaults or uses criminal force upon a woman, intending to outrage, or knowing it to be likely that he will thereby outrage her modesty. It is not the act of outraging the modesty that is made an offence under this section. In order to constitute an offence under this section, there must be an assault, or use of criminal force, to any woman with the intention or knowledge that the woman's modesty will be outraged.[58]

As the section is intended to promote morality, its operation is not confined only to females above a certain age. 'Modesty', in this section, is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. 'Modesty' is to be considered to be an attribute of a female human being, irrespective of the fact whether the female concerned has developed enough understanding as to appreciate the nature of the act or realise that it is offensive to decent female behaviour or sense of propriety concerning the relations of a female with others.[59]

If any person uses criminal force upon any woman with the intention or knowledge that the woman's modesty will be outraged, he is to be punished.[60]

3. English Law

A person (*A*) who intentionally touches another person (*B*) commits an offence if the touching is sexual, *B* does not consent to it, and *A* does not reasonably believe that *B* consents to it. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum, or to both.[61]

'Intentional touching' means deliberate touching which is in fact sexual; it is not necessary to prove that the touching was done for any sexual purpose.[62]

In *R v Heeney* , it was held, 'True it is that the sexual assault here was limited in time and extent, but in this case it is not the extent of the assault which makes it so serious, it is the circumstances surrounding the assault which make it particularly serious. It is a classic case for the application of the principle that the presence of2955 aggravating features makes the offence significantly more serious than the nature of the activity alone might suggest'.[63]

In a case, it was observed, 'Despite the drink which she had taken, the complainant had not consented, and had never given the offender the slightest reason that she would or might consent, to sexual

familiarity with him. Rather, she had been defenceless and the offender had taken advantage of her vulnerability to molest her when he knew perfectly well that she would not have agreed to sexual familiarity of any kind. The exploitation of her vulnerability was an aggravating feature, not a mitigating feature'.[64]

4. Law of Canada

It is an offence to commit sexual assault. Sexual assault is an assault committed in circumstances of a sexual nature such as to violate the sexual integrity of the complainant. It is a crime of general intent. The test of sexual nature is objective, the issue being whether, viewed in the light of all the circumstances, the sexual or carnal context of the assault would be visible to a reasonable observer. The term 'sexual' in sexual assault is not so vague as to offend ss 7 or 9 of the Charter. A husband or wife may be charged with sexual assault in respect of his or her spouse, whether or not the spouses were living together at the time the activity that forms the subject matter of the charge occurred.

Elements

To determine whether sexual assault has been committed, a court should consider all relevant factors, including the body part touched, the nature of the contact, any words or gestures including threats accompanying the conduct, and the accused's intent or purpose, including the presence or absence of sexual gratification. Sexual assault does not, however, require sexuality or sexual gratification. A misguided and primitive disciplinary exercise that is an aggressive act of domination, which violates the sexual integrity of the complainant and constitutes an assault, may be a sexual assault. The accused's intent is only one factor to consider in deciding whether the overall conduct has a sexual context. Its importance depends on the circumstances.

Actus reus

The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour. The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred.

Mens rea

Sexual assault is a crime of general intent. Therefore, the Crown needs only to prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement. However, since sexual assault only becomes a crime in the absence2956 of the complainant's consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant.

Sexual orientation

There is no special obligation of inquiry where the accused is homosexual and charged with the sexual assault of someone of the same sex. The test is still whether the accused was wilfully blind or reckless in acting on an assumption without receiving or eliciting consent to the sexual activity.[65]

In *R v Larue* ,[66] considering the particular facts, it was held that 'how she became undressed, and any prior sexual activity, were legally irrelevant considerations'.

In *R v Cooper* ,[67] the Court observed, 'It is not enough for the appellant to assume that F.C. wanted to have a sexual experience with a man because he said that he had had an unsatisfactory experience with

a woman and that this therefore meant F.C. was consenting to a sexual relationship with the appellant. The appellant should have inquired further to satisfy himself that F.C. was in fact consenting to a sexual relationship with him. The appellant was therefore willfully blind or reckless with the result that the defence of honest but mistaken belief failed'.

5. Validity of the Section

This section is neither opposed to the provisions of art 14, on the ground that men only, and not women are made punishable under this section, nor to the provisions of art 15 Constitution of India, on the ground that it discriminates between men and women on the basis of sex alone.[68]

6. Section 354 Distinguished from Section 3(1)(xi), Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989

There is lot of difference in between prosecution under s 354 of IPC and under s 3(1) (ix) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (SCST Act). The investigation is always made by a Circle Inspector or SHO, in case arising under s 354, whereas the investigation has to be made under s 3(1)(xi) of the SCST Act by an officer not less than the rank of a Deputy Superintendent. The penal sections are also quite different. Under s 354, IPC, as per the Andhra Pradesh Amendment, the offence is punishable for not less than five years, but may extend to seven years and also liable for fine. A lesser sentence can always be imposed after recording special reasons as per s 354, proviso. Whereas, the penal provision under s 3(1)(xi) of the SCST Act makes the offence punishable up to five years and with fine, and the minimum punishment being six months.

7. Section 354 Distinguished from Section 366

Both ss 354 and 366, IPC require a particular intention or knowledge on the part of the offender. However, the intention or knowledge, required by the one, is different from that required by the other. The intention or knowledge, required by this section, is of outraging the modesty of the woman concerned. On the other hand, the intention2957 or knowledge, required by s 366, is of compelling her to marry somebody against her will or seducing her to illicit intercourse. In the absence of some evidence, that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, a conviction under s 366 cannot stand. Where all that is known is that the accused caught hold of a woman and dragged her, but there is nothing to indicate what his real intention was, he cannot be convicted of an offence under s 366 . However, it may be taken that he, at least, intended to outrage the modesty of the woman, or, at any rate, the culprit knew it to be likely that her modesty would be outraged by his act, and he may be convicted of an offence under this section.[69]

8. Section 354 Distinguished from Sections 376 / 511

In this country, indecent assaults are often magnified into attempts at rape, and more often into rape itself. The distinction between the two offences, one under this section and the other under s 376 read with s 511, is sometimes very meagre, but, nonetheless, it is real.[70] The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.[71] There may be cases, and frequently there are, where assault on a woman neither amounts to rape nor an attempt to commit it. It may still be such an assault as it interferes with her modesty or is considered indecent, not only according to the prevalent notions of morality, but also in the eye of law.[72]

As observed by Patterson J in *Rex v James Lloyd* ,[73] in order to find the accused guilty of assault with intent to commit rape, the court must be satisfied that the accused when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and not withstanding any resistance on her part. The point of distinction between an offence of attempt to commit

rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.[74] Where the prosecutrix admitted in the cross-examination that the accused rubbed his male organ on her private part, and when she cried, the accused released her and started wearing his clothes. In the facts and circumstances of the entire case it was a clear case of attempt to commit sexual intercourse with the prosecutrix and it cannot be said that it was a simple case of outraging her modesty.[75] Putting saliva on the private part of the girl after removal of her underwear is a step forward towards commission of the actual penetration of the male organ. It is a positive attempt to commit rape. It cannot be brought within purview of mere outraging modesty.[76] When there is evidence showing that there was an intention on the part of an accused person to commit rape followed by an attempt on his part,2958 merely because he had failed in his attempt to complete the act it cannot be said that he is liable to be punished only for an offence punishable under s 354 and not for offence punishable under s 376 read with s 511 .[77]

9. Essential Ingredients

In order to constitute an offence under this section, there must be: (1) an assault or use of criminal force, (2) to any woman, (3) with the intention or knowledge that her modesty will be outraged.[78] There must be either criminal force or assault on any woman, intending to outrage the modesty and in case if this much of evidence is available, the offence under s 354, IPC stands proved.[79]

Holding arms of the prosecutrix, gagging her mouth with one hand and holding her breast with the other hand constitutes offence under s 354 .[80]

To pull a woman's hair and hand, in the presence of several persons, is calculated to outrage the woman's modesty.[81] However, there would be no offence under this section if the girl is a consenting party to the affair.[82] Where a court peon, executing a decree for delivery of possession to the decree-holder, forcibly removed the judgment-debtor and his wife, when they refused to vacate the house, and as the woman, offering resistance, struggled and her *dhoti* got loose, it was held that as the woman was not a *pardanashin* lady, the peon was within his powers when he forcibly removed her and as the getting loose of her *dhoti* was a result of her own violence during the struggle and was not a deliberate act of the peon, he was not liable under this section or even under s 323 .[83]

10. 'Whoever'

The word 'whoever' in the section, means any person, whether male or female. The pronoun 'he', used in the expression 'that he will thereby outrage her modesty', must, in view of s 8 of this Code, be taken to import a male or female.[84] Similarly, a man as well as a woman can be held guilty under this section for the offence of assaulting, or using criminal use of force to a woman with the intention or knowledge that the woman's modesty will be outraged.[85]

11. 'Assaults or uses Criminal Force to'

To constitute an offence under this section, there must be assault or use of criminal force. Unless there is assault or use of criminal force, a person cannot be punished under this section. Of course, physical assault is not necessary, but assault, or use of criminal force, as defined in ss 350 and 351, IPC, will certainly be necessary. Merely removing one's clothes and showing his private parts to a lady may amount to2959 indecency, but not an offence under this section. Where an accused caught hold of the hands of a woman from behind and in the struggle that followed, she was thrown to the ground on her back, it was held that it amounted to assault, or use of criminal force, under this section.[86]

In the undernoted case, there was evidence of the eye-witnesses that the appellant accused forcibly stopped the minor girl going on cycle and tried to make physical contact with her; however, he did not depose that the accused used criminal force or assaulted the victim. Held, the act fell under s 354A and not under s 354, IPC . Accused was convicted under s 354A, IPC .[87]

Winking his eye at woman in public and beckoning her to the notice of others, catching hold of her arm are obvious acts of assault to outrage her modesty.[88] The touching of the body of the woman by the accused by placing his hand on her cheek and his leg on her waist attract s 354, IPC .[89]

12. 'Any Woman'

The word 'woman', as defined in s 10 of this Code, denotes a female human being of any age. An offender cannot, therefore, contend that the victim of his assault was too young, or too old, to understand the purport or significance of his act.[90] The essence of a woman's modesty is her sex. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses modesty capable of being outraged. The test of a woman's individual reaction to the outrage, perpetrated on her has to be rejected. Even if a victim is a baby of seven and a half months old, she possesses, from her birth, the modesty which is the attribute of her sex. Therefore, if an accused deliberately interferes with the vagina of the child, he must be deemed to have outraged her modesty and is punishable under this section.[91]

13. Modesty

What constitutes an outrage to female modesty is not defined anywhere. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her sari, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word 'modesty' is not defined in IPC . The *Shorter Oxford English Dictionary*[92]2960 defines the word 'modesty' in relation to woman as follows: 'Decorous in manner and conduct; not forward', or 'scrupulously chaste'.

Modesty is defined as the quality of being modest; and in relation to a woman, 'womanly propriety of behaviour scrupulous chastity of thought, speech and conduct. It is the reserve or sense of shame, proceeding from instinctive aversion to impure or coarse suggestions.[1]

'Intending to Outrage, or Knowing it to be Likely that he will Thereby Outrage, her Modesty'

An offence of indecent assault on a woman cannot be complete unless there is intention or knowledge that the woman's modesty will be outraged.[2] Intention is not the sole criteria of the offence punishable under s 354, IPC, and it can be committed by a person assaulting or using criminal force to any woman, if he knows that by such act the modesty of the woman is likely to be affected. Knowledge and intention are essentially things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed.[3]It is not necessary under this section that the act complained of, should have resulted in outraging or insulting the modesty of a woman. What is necessary to prove is that such an act has been committed with the intention of outraging the modesty of a woman or knowing it to be likely that her modesty would be outraged by such act. It is not necessary for the prosecution to prove that the act complained of, has in fact resulted in outraging the modesty of the woman concerned. Once the act complained of, is found to have been done with the specified intention or knowledge, the court is not to go further to find out the effect of such an act.[4]The act of pulling a woman by the arm, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge that modesty is likely to be outraged is sufficient to constitute the offence without any deliberate intention having such outrage alone for its objects.[5]

Holding a woman by her breast by a person who is not her husband in public and particularly by a person who is an utter stranger, will be an act very much likely to outrage the modesty of a woman.[6]

The appellant accused had called the minor girls, took them inside the room, removed their

undergarments, and to satisfy his lust touched their bodies also, he was convicted under s 354, IPC .[7]2961

Omission to mention s 34, IPC, in the order of conviction has nothing more than academic significance as observed in *Ude Singh v State.* [8] When one of the accused stripped the complainant and all of them carried her in her naked condition, all of them are guilty of the offence of outraging her modesty.[9]

Ultimate Test to Ascertain Outraging Modesty

Webster's Third New International Dictionary of the English Language defines modesty as 'freedom from coarseness, indelicacy or indecency; a regard for propriety in dress, speech or conduct'. In *State of Punjab v Major Singh* ,[10]a question arose whether a female child of seven and a half months could be said to be possessed of 'modesty' which could be outraged. In answering the above question the majority view was that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of s 354, IPC . Needless to say, the 'common notions of mankind' referred to have to be gauged by contemporary societal standards. It was further observed in the said case that the essence of a woman's modesty is her sex and from her very birth she possesses the modesty which is the attribute of her sex. From the above dictionary meaning of 'modesty' and the interpretation given to that word by the Supreme Court in *Major Singh's* case (*supra*) the ultimate test for ascertaining whether modesty has been outraged is whether the action of the offender is such as could be perceived as one which is capable of shocking the sense of decency of a woman.[11]

The Approach that 'Ordinarily a lady would not put her character at Stake' cannot be Applied Universally

The approach of the learned trial judge that ordinarily a lady would not 'put her character at stake' may not be wrong but cannot be applied universally. Each case has to be determined on the touchstone of the factual matrix thereof. The law reports are replete with decisions where charges under ss 376 and 354 of the IPC have been found to have been falsely advanced.[12] No decent woman would risk her reputation and honour for no apparent reason to falsely implicate the accused.[13] It would, however, be unusual in a conservative society that a woman would be used as a pawn to wreck vengeance. When a plea is taken about false implication, courts have a duty to make deeper scrutiny of the evidence and decide acceptability or otherwise of the accusations.[14]

14. Honour and Prestige of the Family

Needless to say that in such cases, the honour and prestige of the family is involved and nobody would like to drag female members of the family to courts unnecessarily.[15]2962

15. Conspiracy cannot be *Post Facto* and Conspirators cannot be Accessories after the Fact

The case of the defence that the complainant went to the airport with the specific intention of being seen in the company of the accused with the motive of later on falsely implicating the accused makes nonsense of the defence charge that complainant has falsely implicated the accused at the instance of prosecution witness. There is nothing to show that prosecution witness had contacted the complainant at any time prior to prosecution witness complainant visiting the airport and 'deliberately' allowing herself to be seen in the company of the accused. Conspiracy cannot be *post facto* and the conspirators cannot be accessories after the fact.[16]

16. Outraging modesty does not mean Abetment of Suicide

The mere act of outraging the modesty itself cannot be construed that it has caused an act of abetment to the deceased so as to commit suicide. There should be clinching evidence so as to believe that the accused caused such an act of abetment to the deceased so as to drive her to commit suicide. In the

absence of proof of the ingredients of s 306, IPC, the question of basing conviction for the said offence does not arise.[17]

17. Procedure

The offence under this section is cognizable, bailable, compoundable with the permission of the court, before which the prosecution is pending, and triable by a magistrate, and may also be tried summarily.

When, in the course of trial, it appears that the offence committed would fall under s 376, it would be proper for the magistrate to commit the case to the court of session.[18] Where the father was alleged to have committed sexual assault against his minor daughter, compounding of offence was refused.[19]

18. Provocation under Section 354 and Section 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989--Propriety

When investigations have to be made by different officers under different Acts and the court takes the cognizance of the offence and frames the charge treating the offence under s 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, the investigation is sealed. In any view of the matter, a person cannot be prosecuted for s 354, IPC as well as for the offence under s 3(1)(ix) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 at one and the same time and cannot be tried for the offence under different Acts. When the victim happens to be a person belonging to SC community, the only provision that can be applicable is s 3(1)(ix) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 and not s 354, IPC . The prosecution under s 354 as well as giving a finding of guilt is not proper.[20]2963

19. Recalling of Prosecutrix for Further Cross-Examination

In cases of rape and outraging the modesty of a woman, recalling the victim for further cross-examination requires some exceptionally serious grounds. The vague allegation in the application of the accused under s 311 read with s 242, CrPC that during the earlier cross-examination of the victim, certain main points were left out from being asked, are not sufficient for permitting the accused further cross-examination by recalling the victim.[21]

20. Quashing of FIR

The accused, a top most official of the state police, slapped a senior lady IAS officer on her posterior in the presence of a gathering of elite persons of society which amounted to outraging her modesty. There was nothing in the FIR that the alleged act was committed accidentally or mistakenly by the accused. The offence relating to modesty of a woman being not trivial, s 95, IPC, is not attracted. Thus, quashing of FIR and complaint in the absence of finding that allegations made in the FIR were absurd and inherently improbable, was held by the Apex Court to be improper.[22]

21. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[23]

Where the allegation was that the accused entered the house of the complainant dragged her out, tearing her clothes and improperly behaving with her, *prima facie*, the essential ingredients of the offence under s 354 were made out, so the refusal of the court to frame charge under s 354 was held not proper.[24]

22. Discharge

Unless the requirements of s 354 are satisfied which requires participation of a minimum of 5 persons, the

charge under s 354 read with s 149, IPC, cannot be framed. The framing of charge under s 354 read with s 149 against the accused only and under s 354 against the other two co-accused is improper.[25] In the absence of charge under s 354 there is no occasion for acquitting the accused of the said offence.[26] Where the allegations were made that the petitioner called the informant an 'ugly bitch' and assaulted her by punching on her hips in the presence of the constable and other witnesses, the police constable who immediately reached the spot gave a completely different version than the informant's version and stated that there was no quarrel in that place nor was there any fight. The other witnesses mentioned about a quarrel started by the informant herself and that the accused did not threaten, assault or abuse the informant. Besides the informant there was no one speaking about the incident as alleged by her. The order of framing charge against the accused was found not proper.[27]2964

23. Proof

In order to establish an offence under this section, it must be proved that:

(1) the accused assaulted, or used criminal force upon, a woman; and
(2) he did so intending to outrage, or knowing it to be likely that he will thereby outrage, her modesty.

The solitary evidence of the prosecutrix not supported by any corroborative evidence is no ground to fasten guilt under s 354, IPC .[28]

24. Physical Injury

Physical injury is not *sine qua non* for offence under s 354, IPC .[29]

25. Acquittal

Where in a case of outraging the modesty of a woman and her abduction the allegations were that the accused forcibly offered a lift to the complainant and her daughter on his scooter and took them to a lodge instead of her home, where the complainant did not raise any alarm during their travel. It is difficult to visualise that the accused had asked the complainant to have sexual intercourse with her in presence of her 11 year old child and that he allowed her to easily slip out of his hands from the lodge, if that was his intention. On these facts, the conviction of the accused under s 354 read with s 366, IPC, was set aside, and the accused was acquitted.[30] The accused was acquitted by the trial court under s 354 . Nine years elapsed from the date of the incident and the prosecutrix also got married during this period. The suit for damages filed by the accused against the prosecutrix was withdrawn by him in view of the order of his acquittal. On these facts, the Madras High Court refused to interfere with the order of acquittal passed by the trial court, on being approached in the revision petition under s 397, CrPC, despite the finding that appreciation of evidence in the case by the trial court was not proper.[31]

Where in a case of causing hurt and outraging the modesty of a woman, the testimony of the eyewitness was inconsistent and self-contradictory, the medical evidence did not corroborate with the evidence of the injured witness, giving the benefit of the doubt, the accused was acquitted.[32] The testimony of the prosecutrix that she received injuries on her head, breast and shoulder was not corroborated by medical evidence. The fact that talks of compromise were going on between the parties showed that the hidden story was something different. The independent witnesses turned hostile. On these facts the accused was acquitted under ss 354, 341 and 323, IPC .[33]2965

The prosecution case was that the accused forcibly fingered in the private parts of the body of the prosecutrix, thereby outraged the modesty of the prosecutrix. The evidence of all the witnesses except the prosecutrix was hearsay. As spurted out in the cross examination of the prosecutrix, there was enmity between her father and the family of the accused. There was unexplained delay in lodging FIR, though the

police station was situated at a distance of one kilometer only. Accused was acquitted of the charge under s 354, IPC .[34]

Appellant accused was prosecuted on allegations that he embraced the complainant from back and touched her breasts, thus outraged the modesty of the complainant. There were frequent disputes between the parties; the complainant had been pressing the appellant tenant to vacate the premises. Material contradictions were found in the statement of the witnesses as to the place and manner of occurrence. Held, the appellant accused was entitled to benefit of doubt, he was acquitted of the charge under s 354, IPC .[35]

Accused Acquitted under Section 376 or 376 / 511 Should not be Convicted under Section 354

Where, the accused is charged with rape or, at least, an attempt to rape and these offences are not proved, the court should not convict him for indecent assault under this section, especially when she has never deposed to it.[36]

26. Conviction

Where a primary school teacher molested young girl students, the evidence of the victim girls was reliable. Nothing was brought out in their cross-examination to discredit their evidence. Their evidence was also corroborated by the evidence of the in-charge headmaster and their parents. The conviction of the accused teacher was found proper.[37] The accused entered the house of the complainant and tried to outrage the modesty of his wife, the statement of the victim was supported by the complainant, eyewitness and investigating officer. The mere fact that the accused denied the prosecution case or some witnesses did not support the prosecution case would not make it unreliable. The conviction of the accused under s 354 was held proper.[38] The accused along with another person went to the house of the victim in the night, and by deceitful means induced her to go with him from her house and on the way tried to molest her and beat her. The evidence of the victim was reliable, trustworthy and corroborated, not only with medical evidence but also with oral as well as circumstantial evidence. The conviction of the accused under ss 366 and 354 was held proper, but since the name of the co-accused was not mentioned in the FIR and no identification parade was conducted to identify him, the co-accused was acquitted.[39] The accused persons took the prosecutrix to a lonely place by deception and with cruelty pushed a bunch of leaves into her mouth and untied her undergarments to satisfy their carnal desire. The evidence of the prosecutrix was cogent and consistent. The mere fact that there was animosity between the parties2966 and the other witnesses were clear relations of the prosecutrix, is not sufficient to discard the prosecution case. The conviction of the accused under s 354 was found proper.[40]The accused forcefully held the breast of the prosecutrix. The act of the accused was described by prosecutrix immediately after the occurrence and corroborated by evidence of witnesses, the order of acquittal of the accused was set aside and the accused convicted under s 354, IPC .[41] The accused appellant neighbor, taking advantage of the absence of male members of the family, entered the house of the prosecutrix and tried to commit sexual intercourse. Held, all the ingredients of offence punishable under s 354, IPC such as, the criminal force applied on the woman and that force had been used on the woman intending to outrage her modesty or knowing that the act would likely to outrage her modesty were proved beyond reasonable doubt. Appellant accused was convicted under s 354, IPC .[42]

The victim girl deposed that the accused blinked his eyes and asked her to accompany him and when she told him that he has no sense of humanity and showed her leg and chappal (footwear), the accused suddenly dragged her stole and abused in filthy language and threatened to kidnap her and also disfigure her face by throwing acid. The evidence of the victim girl and her brother was believed. The delay of 24 hours in filing FIR was held not fatal. Accused appellant was convicted under s 354, IPC .[43]

Bottom Slap Case Against DGP

The appellant accused Director General of Police of the State of Punjab at the dinner hosted by Secretary to the Government of Punjab, gently slapped on the posterior of the prosecutrix in the presence of some

guests. This act on the part of the accused did constitute the ingredient of s 354, IPC . The accused used criminal force with intent to outrage the modesty of the complainant and he knew fully well that gently slapping on the posterior of the prosecutrix in the presence of other guests would embarrass her. Knowledge can be attributed to the accused that he was fully aware that touching the body of the prosecutrix at that place and time would amount to outraging her modesty. He was convicted under ss 354 and 509, IPC . However, he was granted probation and directed to pay Rs. 2 lacs as compensation to the prosecutrix.[44]

27. Probation

The Supreme Court has held that an accused convicted for offences under ss 354, 354A, 354B and 354C, IPC should not be released on probation.[45]

Where the accused, aged 45 years, finding the victim who was 22 years old, alone, when she was returning to her house, fell upon her like a vulture and lifted her and carried her to the *bajra* field, laid her on the ground and made every effort to gratify his lust on her by trying to open the string of her *salwar*, keeping in view these facts and circumstances, the case was not found fit to extend the benefit of release of the2967 accused on probation of good conduct.[46] In another case pertaining to abduction and outraging the modesty of a woman, the benefit of probation was declined to the accused despite a lapse of 16 years from the date of the incident.[47] The accused was convicted for committing offences of house trespass and outraging the modesty of a woman under ss 457 and 354, IPC . Keeping in view the gravity of the offences and the fact of commission of such offences in a dare devil manner, the benefit of the Probation of Offenders Act was not extended to the accused.[48] However, the accused who was aged 17 years at the time of commission of the offence under s 354, IPC, was not a previous convict or habitual offender, was extended the benefit of probation under s 360, CrPC .[49] In another case, accused A1 was found guilty and convicted for offences under ss 380 and 354, IPC . As the accused A1 was 20 years of age at the time of the commission of offence, he was released on probation.[50] Where the incident happened in 1988, despite the accused holding a high position in the state police, the various courts found him guilty of the offence punishable under ss 354 and 509, IPC and that by itself is setting a model for others and would enhance the faith in the judicial system. The accused had completed the period of probation. There was no occasion for any complaint or violation of any of the terms of the bond. Therefore, the Supreme Court did not think that it is just and proper to resort to any other punishment.[51]

Where probation was refused, however, keeping in view the age of the accused, the sentence of one year simple imprisonment imposed by the Court below was reduced to 3 months simple imprisonment and a fine of Rs. 5000/-.[52]

28. Sentence

In *Bhagwat Ganpat Tayade v State of Maharashtra* ,[53] the accused was a teacher. Imparting knowledge is a noble profession. The accused was in *locoparentis* to his pupil. Instead of imparting knowledge, the accused was indulging in molestation of young girls of tender age. If the conduct of the accused is considered, this is not a fit case for showing leniency. A deterrent sentence ought to be passed in a case where a man takes advantage of the absence of the girl's parents to commit an attack upon the defenceless girl.[54]

The accused persons took the prosecutrix to a lonely place by deception and cruelly pushed leaves into her mouth and untied her undergarments to satisfy their carnal desire. In view of the manner in which the offence was committed, and the deception adopted by the accused, the High Court refused to interfere with the order of the trial court sentencing the accused to 4 months RI.[55] Where the accused, a young married agriculturist of 22 years age, was convicted and had completed six2968 months and twelve days sentence, he was first the offender having the responsibility to maintain his wife, children and other members of his family. In the circumstances, he was sentenced to period already undergone with the fine of Rs. 1,000.[56] In the instant case, the High Court in a very casual manner reduced the sentence of the accused to the period already undergone merely on the ground that the accused is a first time offender.

The reduction of sentence in such cases is totally detrimental to the society which would embolden the accused to repeat the crime. The sentence of six months RI imposed by the trial Court was restored.[57]

When about 16 years elapsed from the date of the incident, though benefit of probation was not extended to the accused, yet his sentence of two years RI under s 354, IPC, was reduced to six months RI.[58] In another case, on account of a long lapse of time the accused was sentenced under s 354 to pay a fine of Rs 1000, and in default to undergo SI for 15 days.[59]

29. Alteration of Conviction from Section 376 to Section 354

Where the witness testified that she saw the accused committing rape on the prosecutrix and on raising a hue and cry the accused ran away from the place of occurrence, the prosecutrix who was a patient of mental retardation on the date of occurrence, gave no evidence herself about the alleged rape committed by the accused, no injury was received by the prosecutrix on her private parts or other parts of her body, no definite opinion regarding rape could be given in absence of FSL report, the prosecution however proved that the accused used criminal force on the prosecutrix with an intention to outrage her modesty, on these facts the conviction of the accused under s 376 was altered to one under s 354, IPC .[60] The prosecutrix nowhere stated about the removal of her clothes. '*Ulta Kam Kiya*', stated by the prosecutrix in her evidence, cannot in local parlance mean commission of sexual intercourse. Medical evidence did not support the prosecution case and the statement of witnesses was discarded being hearsay evidence, the conviction of the accused was modified from s 376 to s 354, IPC .[61]

For further commentary, see under the same heading in s 376, *post*.

30. Alteration of Conviction from Section 354 to Section 376 by the Session Court

Commentary under the same heading in s 376, *post*, may be referred to.

31. Alteration of Conviction from Section 354Sections 376 / 511

A conviction under s 354 can, on appeal, be altered to one under ss 376 / 511 .[62] When a girl, aged about 5½ years, was found, by her mother, sitting without her trousers, on a naked lad of 18 years and, except for fresh redness at the entrance of the vagina, the girl bore no other marks of injury and her hymen was intact and further the girl had not cried out till she saw her mother, the lad was held guilty of an attempt to2969 commit rape, and not merely of indecent assault.[63] Similarly, an accused, who had laid himself on a girl and tried to thrust his male organ in her private parts despite the girl's strong resistance, and gave up only when witnesses arrived on the spot, was held to have gone beyond the stage of preparation and committed an attempt to commit rape.[64]

The difference between preparation and attempt to commit an offence, consists chiefly in the greater degree of determination, and what is necessary to prove for an offence of an attempt to commit rape has been committed, is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then makes her lie flat on the ground, undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate into her vagina, and on such rubbing ejaculates himself then it cannot be said that it was a case of assault under s 354 and not an attempt to commit rape under s 376 read with s 511, IPC .[65] For further commentary, see under the same heading in s 376, *post*.

32. Alteration of Conviction from Sections 376 / 511 to one under Section 354

Where the allegations were that the accused entered the house of the victim when she was alone and asked her to undress at the point of knife and fled away due to the intervention by the sister of the victim, it was held that asking to undress at point of knife and even trying to molest the lady cannot be held to be offence of attempt to rape, however a case under s 354 of the Penal Code can be said to be made out wherein an attempt and the use of criminal force is made to outrage the modesty of the victim and her sister. Therefore, the conviction of the accused under ss 376 / 511 was altered to one under s 354 .[66]

Where the evidence on record was only to the effect that the accused catching hold of the hand of the informant/victim and when one of the prosecution witnesses came there hearing the alarm of the victim, the accused fled away, in the aforesaid facts, the conviction was converted from ss 376 / 511 to the one under s 354 for outraging the modesty of the victim.[67] Where the allegations were that while the victim aged about four years went to shop of the accused to purchase a sweet *pudia* (small packet), he called her inside and took her in his lap and did something as a result of which her dress was wet, but there was no material showing that any attempt was made by the accused to commit rape or intercourse. There was no material that the accused had undressed himself and any attempt was made by him to undress the victim, hence the conviction of the accused under ss 376 / 511, IPC, was altered to one under s 354, IPC .[68] When according to confession made by the accused, no attempt whatsoever was made by them to commit rape, the conviction recorded under ss 376 / 511, IPC, is wholly illegal and unsustainable but in view of the fact that the accused persons with an ill motive did catch hold of the deceased, same sufficiently constituted an offence under s 354 of the IPC . Consequently, even in absence of specific charge, there would be no difficulty,2970 keeping in view the provision made under s 222 of the CrPC, to record the conviction under s 354 of the IPC against the accused persons.[69]

The accused entered the house of the prosecutrix when she was all alone, and misbehaved with her by making her lie down on the cot. There was nothing to show that any preparation to commit rape, like by starting to undressing himself was done by the accused. The prosecution story that the apparels of the victim found by the accused was not reliable for want of production of such apparels, on these facts the conviction of accused under ss 376 / 511 was altered to one under s 354, IPC .[70]Where the evidence of the prosecutrix showed that her clothes were neither removed nor opened, and moreover, the accused had spent himself and left the prosecutrix before doing anything more to her, on these facts it was held that the act of the accused did not amount to either rape or an unnatural offence but amounted to indecent assault, the conviction of the accused under s 376 read with s 511, IPC, was therefore modified to one under s 354 .[71] The accused forcibly laid the prosecutrix on the bed and broke the string of her *pyjama* but made no attempt to undress himself. The prosecutrix pushed him away and the accused made no effort to grab her again. The conviction of the accused under s 376 read with s 511 was altered to one under s 354, IPC .[72] The evidence showed that the accused removed the *sari* of the victim and ran away on seeing some person. There was no material to show that the accused were determined to have sexual intercourse at all events. The case was found to be one of indecent assault and not of an attempt to commit rape. The conviction of the accused under ss 376 / 511 read with s 34, was altered to one under s 354 read with s 34, IPC .[73] Where the accused tried to seduce a girl, assaulted and made her lie down, stripped her naked, but did not expose his private part, and fled when attracted by her cries her uncle came, it was held that the offence did not amount to an attempt to rape and that it was one under this section.[74] For further commentary, see s 376, *post*.

33. Accused charged under Section 376 , Conviction under Section 354,IPC proper

There was no evidence that the accused penetrated his private part into private part of the prosecutrix. Medical evidence did not establish sexual intercourse. The accused merely put his finger into the private part of the prosecutrix. Held, no offence under s 376, IPC was made out. Accused was convicted under s 354, IPC .[75]

34. Alteration of Conviction from Section 354 to Section 323

Commentary under same heading in s 323, *ante*, may be referred to.

35. Accused Charged under Section 376 or 376 / 511 or 376 / 109 can be Convicted under Section 354 or Section 323

Commentary under s 376, *post*, may be referred to.2971

36. Alteration of Conviction from Section 354 to one under Section 353

Where the prosecutrix is found to have exaggerated the story, the benefit thereof must go to the accused and the conviction of the accused may be altered from one under s 354 to that under s 352,[76] but such a course cannot be adopted where the main charge under s 354 has failed because of scanty evidence.[77]

37. Alteration of Conviction from Section 354 to one under Section 451

Where, however, a person has been charged and convicted under ss 451 and 354, IPC, and on appeal, the appellate court finds that the accused committed house trespass in order to commit some offence, other than the offence under s 354, IPC, it can acquit the accused of the offence under s 354 and maintain the conviction under s 451, IPC . It need not acquit the accused of both the offences simply because the charge under s 355 fails.[78]

The six accused persons were alleged to have attacked and raped a 14 year old village girl. Out of these six accused, three were actual participants and the remaining three were instigators and abettors to the crime. Though the involvement of the three accused who actually participated in the alleged rape was established, but the medical evidence was slightly weak and there was infirmity in the evidence of the victim. The conviction of the three accused who actually participated in the offence was altered from s 376, IPC and the three accused-abettors were found entitled to be acquitted as the victim did not say anything against them in her statement in court.[79]

However, when on the evidence on record, the charge under s 376, IPC, has not been proved beyond reasonable doubt, but it is proved beyond doubt that the accused outraged the modesty of the prosecutrix, he can be held guilty of an offence under s 354, IPC .[80]

57 Substituted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 6 (wef 3-2-2013) for "shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

58 *State of Punjab v Major Singh* AIR 1967 SC 63, (1967) Cr LJ 1 ; **reversing***Major Singh Lachhman Singh v State* AIR 1963 Punj 443 (FB), (1963) 2 Cr LJ 390.

59 *Girdhar Gopal v State* AIR 1953 MB 147, 54 Cr LJ 964*; Ajhar Ali v State of WB* (2013) 10 SCC 31, 2013 (12) Scale 410 .

60 *Ajahar Ali v State of West Bengal* (2013) 10 SCC 31, 2013 (12) Scale 410 .

61 *Halsbury's Laws of England.*

62 *R v Heard* (2007) EWCA Crim 125 .

63 *R v Heeney (Mark)* (A-G Ref: 26 of 2009) (2009).

64 *Attorney General's Reference* (No 120 of 2009); *R v Wright* (2010) All ER (D) 93 (Mar) .

65 *Vide Halsbury's Laws of Canada*.

66 *R v Larue* (2003) SCJ No 20 .

67 *R v Cooper* (2006) OJ No 35 .

68 *Kuriminelli Chinna v State of AP* (2004) Cr LJ 1634 (AP) .

69 *Fakir v Emperor* 29 Cr LJ 479, p 480, 29 PLR 444 ; *Ganga Dei v Emperor* AIR 1914 All 17(1), 15 Cr LJ 154 .

70 *Saber Hussain v State* (1965) 14 Jab LJ 42 (SN) .

71 *Aman Kumar v State of Haryana* (2004) Cr LJ 1399 (SC) .

72 *Mahraj Din v Emperor* 28 Cr LJ 244, AIR 1927 Lah 222 .

73 *Rex v James Lloyd* (1876) 7 C&P 817 .

74 *Damodar Behera v State of Orissa* (1996) Cr LJ 346 (Ori .)

75 *Kamla Nanda v State of Himachal Pradesh* (2003) Cr LJ 547 (HP) .

76 *Anokhe Lal v State of Uttaranchal* (2003) Cr LJ 2602 (Uttr) .

77 *Dokka Bhushaiah v State of AP* (2007) Cr LJ 1499 (AP) .

78 *Girdhar Gopal v State* AIR 1953 MB 147 ; **see also***Vidyadharan v State of Kerala* (2004) Cr LJ 605 (SC) ; *Aman Kumar v State of Haryana* (2004) Cr LJ 1399 (SC) ; *Ramkripal s/o Shyamlal Charmakar v State of Madhya Pradesh* (2007) Cr LJ 2302 (SC), 2007 AIR SCW 2198, 2007 (5) Supreme 297, 2007 (4) Scale 438 . (Expln I to s 375, IPC, now omitted).

79 *Jayakanth v State of Karnataka* 2009 Cr LJ 1224, p 1226 (Kant), 2008 (4) KCCR 2739 .

80 *State of Himachal Pradesh v Ramdas* (1999) Cr LJ 2802 (HP) .

81 *Mi Hla So v Nga Than* 13 Cr LJ 53, 4 Bom LT 268 .

82 *Sadananda Borgohain v State of Assam* (1972) Cr LJ 658, p 659 .

83 *Baij Nath v Emperor* AIR 1936 Oudh 379, 37 Cr LJ 822 .

84 *Girdhar Gopal v State* AIR 1953 MB 147, p 148, 54 Cr LJ 964 .

85 *Ibid.*

86 *Moidu v State of Kerala* (1967) KLT 223, p 226 ; *Pappu v State of Chhattisgarh* 2015 Cr LJ 351 (Chh), 2015 (1) CGLJ 418 .

87 *Pappu v State of Chhattisgarh* 2015 Cr LJ 351 (Chh), 2015 (1) CGLJ 418 .

88 *State of Kerala v Hamsa* (1988) 3 Crimes 161 (Ker) .

89 *Sailendra Nath Hati v Ashwini Mukherji* (1988) Cr LJ 343 (Cal) .

90 *Ghose J in Soko v Emperor* AIR 1933 Cal 142, 34 Cr LJ 308 ; *State of Punjab v Major Singh* AIR 1967 SC 63, (1967) Cr LJ 1 ; **reversing***Major Singh Lachhman Singh v State* AIR 1963 Punj 443 (FB), (1963) 2 Cr LJ 390; *Emperor v Tatia Mahadev* 13 Cr LJ 858 .

91 *State of Punjab v Major Singh* AIR 1967 SC 63, (1967) Cr LJ 1 ; **reversing***Major Singh Lachhman Singh v State* AIR 1963 Punj 443 (FB), (1963) 2 Cr LJ 390.

92 *Shorter Oxford English Dictionary*, third edn.

1 *Damodar Behera v State of Orissa* (1986) Cr LJ 346 (Ori) ; see also *Ramkripal s/o Shyamlal Charmakar v State of Madhya Pradesh* (2007) Cr LJ 2302 (SC), 2007 AIR SCW 2198, 2007 (5) Supreme 297, 2007 (4) Scale 438 . (Expln I to s 375, IPC, now omitted).

2 *Fatima v Mccormick* 14 Cr LJ 149 (FB) ; *Champa Pasin v Emperor* 29 Cr LJ 325(2), AIR 1928 Pat 326, p 332 .

3 *Vidyadharan v State of Kerala* (2004) Cr LJ 605 (SC) .

4 *State of Punjab v Major Singh* AIR 1967 SC 63, (1967) Cr LJ 1 ; **reversing***Major Singh Lachhman Singh v State* AIR 1963 Punj 443 (FB), (1963) 2 Cr LJ 390; *Girdhar Gopal v State* AIR 1953 MB 147, p 148, 54 Cr LJ 964 .

5 Re *Sena Shetty* 1 Weir 347, p 348; *Kana Ram v State of Rajasthan* (1984) Cr LR 484 (Raj) .

6 *State of Himachal Pradesh v Ramdass* (1999) Cr LJ 2802 (HP) ; *Asharaf Khan v State of MP* 2013 Cr LJ 1286 (Chh) ; *Ramesh Ram v State of Uttrakhand* 2013 Cr LJ 3080 (Utr) .

7 *Yad Ram Verma v State of Chhattisgarh* 2012 (117) AIC 894 (Chh) ; **See also***State of Sikkim v Sanjay Sherpa* 2013 Cr LJ 2266 (Sikk) (Prosecutrix, a deaf and dumb 13 years old girl).

8 *Ude Singh v State* AIR 1966 Ori 210 .

9 *Trinath Konhara v State* 34 Cut LT 741, p 744 .

10 *State of Punjab v Major Singh* AIR 1967 SC 63 .

11 The above position was **noted** in *Rupan Deol Bajaj (Mrs) and Anr v Kanwar Pal Singh Gill and Anr* (1995) 6 SCC 194 ; **see also***Raju Pandurang Mahale v State of Maharashtra and Anr* (2004) 4 SCC 371 ; *Ramkripal s/o Shyamlal Charmakar v State of Madhya Pradesh* (2007) Cr LJ 2302 (SC) .

12 *Pandurang Sitaram Bhagwat v State of Maharashtra* (2005) Cr LJ 880 (SC) .

13 *State of Maharashtra v Satyendra Dayal Khare* (2004) Cr LJ 3399 (Bom) .

14 *Vidyadharan v State of Kerala* (2004) Cr LJ 605 (SC) .

15 *Som Das v State of Uttar Pradesh* (2004) Cr LJ 3570 (All) ; *Aman Kumar v State of Haryana* (2004) Cr LJ 1399 (SC) .

16 *State of Maharashtra v Satyendra Dayal Khare* (2004) Cr LJ 3399 (Bom) .

17 *Suryakanth v State of Karnataka* (2003) Cr LJ 3562 (Kant) .

18 *Shiv Ray v State* (1977) Cr LJ 843 ; *State v Dalu Maya Ram* (1962) 1 Cr LJ 343, p 345 (if the sessions judge, after inquiry, concludes that no offence of rape is made out against the accused and, therefore, he discharges him, the charges originally framed under s 354, IPC, cannot subsist to be proceeded with); *State of Madhya Pradesh v Babulal* AIR 1960s MP 155, (1960) Cr LJ 612 .

19 *Naushad v State of Kerala* 2014 (4) KLT 751 (Ker) .

20 *Kuriminelli Chinna v State of AP* (2004) Cr LJ 1634 (AP) .

21 *Hari Babu v State of Uttar Pradesh* (2002) Cr LJ 2213 (All) .

22 *Rupan Deol Bajaj (Mrs) v KPS Gill & Anor* (1996) Cr LJ 381 (SC) .

23 Code of Criminal Procedure 1973, s 251 .

24 *Ibid.*

25 *Public Prosecutor, High Court of Andhra Pradesh v Potharlanka Venkateswarlu* (2002) Cr LJ 3145 (AP) .

26 *Ibid.*

27 *Ashok Kumar Nayyar v State* (2007) Cr LJ 3065 (Del) .

28 *Bondal v State of Madhya Pradesh* (1983) Cr LJ 607 (MP) .

29 *State of Sikkim v Sanjay Sherpa* 2013 Cr LJ 2266 (Sikk) .

30 *Rajendra v State of Maharashtra* (2002) Cr LJ 4353 (SC) ; *Kamaljit v State of HP* 2014 Cr LJ 295 (HP), 2013 (3) Shimlc 1563 (Contradiction in the statement of the prosecutrix and the witness on material points--Unexplained delay in filing FIR, accused acquitted); *State of HP v Ram Murti* (2014) 136 AIC 655 (HP) (PWs, related witnesses, evidence of mother hearsay, accused acquitted); *State of MP v Mukesh Kumar* 2013 (130) AIC 592 (MP) (Prosecution case not proved, PWS-- Hearsay witnesses--Accused acquitted).

31 *Juli John (Mrs) v Roman* (1999) Cr LJ 2174 (Mad) .

32 *Peedikandi Abdulla v State of Kerala* (1998) Cr LJ 2718 (Ker) .

33 *State v Prithei Singh* (2001) Cr LJ 2770 (Raj) .

34 *State of Madhya Pradesh v Mukesh Kumar* 2014 Cr LJ (NOC) 70 (MP) .

35 *Pandurang Sitaram Bhagwat v State of Maharashtra* 2005 Cr LJ 880, p 882 (SC), AIR 2005 SC 643, 2004 (10) Scale 508, (2005) 9 SCC 44 .

36 *Damodar Behera v State of Orissa* (1996) Cr LJ 346 (Ori) .

37 *Bhagwat Ganpat Tayade v State of Maharashtra* (2006) Cr LJ 2214 (Bom) .

38 *Rajendra v State of Rajasthan* (1997) Cr LJ 3578 (Raj) .

39 *Shaikat v State of Rajasthan* (2002) Cr LJ 364 (Raj) .

40 *Kuthu alias Tejram Rawat v State of Madhya Pradesh* (1998) Cr LJ 960 (MP) .

41 *State of Himachal Pradesh v Ram Dass* (1999) Cr LJ 2820 (HP) .

42 *Buddhadeb Debnath v State of Tripura* 2015 Cr LJ 1512, p 1515 (Tripura), 2015 (3) RCR (Criminal) 44 .

43 *Jayakanth v State of Karnataka* 2009 Cr LJ 1224, p 1128 (Kant), 2008 (4) KCCR 2739 .

44 *Kanwar Pal S Gill v State (Admn UT Chandigarh)* 2005 Cr LJ 3443 (SC), 2005 SC (Cri) 1420, AIR 2005 SC 3104 .

45 *Ajahar Ali v State of West Bengal* (2013) 10 SCC 31, (2013) 3 SCC (Cri) 794 .

46 *Ram Meher v State of Haryana* (1998) Cr LJ 1999 (P&H) .

47 *Shoukat & Anor v State of Rajasthan* (2002) Cr LJ 364 (Raj) .

48 *Kanhu Charan Patra v State of Orissa* (1996) Cr LJ 1151 (Ori)*; Jayakanth v State of Karnataka,* 2009 Cr LJ 1224 (Kant), 2008 (4) KCCR 2739 (Sentence was reduced).

49 *Dilip v State of Maharashtra* (1996) Cr LJ 72 (Bom) .

50 *KE Lokesha v State of Karnataka* 2012 Cr LJ 2120, p 2122 (Kar) (*Ishar Das v State of Punjab* AIR 1972 SC 1295, 1972 Cr LJ 874 **followed**).

51 *Kanwar Pal S Gill v State (Admn UT Chandigarh)* (2005) Cr LJ 3443 (SC), AIR 2005 SC 3104 .

52 *Jayakanth v State of Karnataka* 2009 Cr LJ 1224, p 1226 (Kant), 2008 (4) KCCR 2739 .

53 *Bhagwat Ganpat Tayade v State of Maharashtra* (2006) Cr LJ 2214 (Bom)*; State of MP v Bablu* (2014) 9 SCC 281, 2014 Cr LJ 4565 (Deterrent sentence required).

54 *Emperor v Tatia Mahadeo* 13 Cr LJ 858, p 859 .

55 *Kuthu alias Tejram Rawat v State of Madhya Pradesh* (1998) Cr LJ 960 (MP) .

56 *Ashok v State of MP* (2005) Cr LJ 2301 (MP) .

57 *State of MP v Bablu* AIR 2015 SC 102, p 106, (2014) 9 SCC 281 .

58 *Shoukat v State of Rajasthan* (2002) Cr LJ 364 (Raj) .

59 *State of Himachal Pradesh v Ramdass* (1999) Cr LJ 2820 (HP) .

60 *Bali alias Bahal Singh v State of Rajasthan* (2001) Cr LJ 909 (Raj) ; *State v Rangaswamy* (2003) Cr LJ 607 (Kant) (DB) .

61 *Narayan v State of Madhya Pradesh* (2003) Cr LJ 268 (MP) .

62 *Ram Pratap v State of Rajasthan* (2002) Cr LJ 1430 (Raj) .

63 *Girdhar Gopal v State* AIR 1953 MB 147 .

64 *Sittu v State* AIR 1967 Raj 149 ; *Bhartu v Emperor* AIR 1933 Lah 1002 (1), 35 Cr LJ 432 (1); *Kishan Singh v Emperor* 28 Cr LJ 663, AIR 1927 Lah 580, p 581 ; *Madan Lal v State of J&K* (1998) Cr LJ 667 (SC) .

65 *Madan Lal v State of J&K* (1998) Cr LJ 667 (SC) ; *Kamla Nand v State of Himachal Pradesh* (2003) Cr LJ 547 (HP) .

66 *Md Nizam v State of Jharkhand* (2006) Cr LJ 3925 (Jhar) .

67 *Bisheshwar Murmu v State of Bihar* (2004) Cr LJ 326 (Jhar) .

68 *Trinath Bhoi v State of Orissa* (2007) Cr LJ 3227 (Ori) .

69 *Bechan Manjhi & Ors v State of Jharkhand* (2007) Cr LJ 2454 (Jhar) .

70 *Ram Pratap v State of Rajasthan* (2002) Cr LJ 1430 (Raj) .

71 *Premanidhi Singh v State of Orissa* (1997) Cr LJ 1902 (Ori) .

72 *Jai Chand State*(1996) Cr LJ 2039 (Del).

73 *Damodar Behera v State of Orissa* (1996) Cr LJ 346 (Ori) .

74 *State of Madhya Pradesh v Babulal* AIR 1960 MP 155 .

75 *S Ishwar Bhat v State* 2010 Cr LJ (NOC) 479 (Kant) .

76 *Hanuman v State of Haryana* AIR 1977 SC 1614, (1977) Cr LJ 1118 .

77 *Mani Ram v State* (1970) 72 Punj LR 425 .

78 *State of Madhya Pradesh v Bhuresingh Chandansingh* AIR 1960 MP 375, p 377, (1960) Cr LJ 1611 ; *Jadav Mahton v Emperor* AIR 1921 Pat 217 ; *Karali Prasad Guru v Emperor* AIR 1917 Cal 844, 17 Cr LJ 424 .

79 *State of Karnataka v Chandrayya Hanumanthappa Mallapnattapanavar* (2003) Cr LJ 258 (Kant) (DB) .

80 *State of Madhya Pradesh v Tolaram* (1981) Cr LJ (MP) (Notes) 188, p 189 (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

[81][S.354A.

Sexual harassment and punishment for sexual harassment.--

(1) A man committing any of the following acts--
(i) physical contact and advances involving unwelcome and explicit sexual overtures; or
(ii) a demand or request for sexual favours; or
(iii) showing pornography against the will of a woman; or
(iv) making sexually coloured remarks,

shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.2972

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.]

Comments

1. Legislative changes

This section is new, inserted by the Criminal Law (Amendment) 2013 (13 of 2013), (wef 3-02-2-13) on the recommendations of Justice J.S. Verma Committee.

2. Scope

This section is new.

In the undernoted case, there was evidence of the eye-witnesses that the appellant accused forcibly stopped the minor girl going on cycle and tried to make physical contact with her, but did not depose that the accused used criminal force or assaulted the victim. Held, act fell under s 354A and not under s 354, IPC . Accused was convicted under s 354A, IPC .[82]

3. Procedure

The offence under this section is cognizable, bailable, non-compoundable and triable by any Magistrate.

4. Charge

The following form of charge may be adopted:

I,.....(*name and office of the Judicial Magistrate 1st Class etc.*) charge you.....(*name etc. of the accused*) as under -

That you on or about the day of ..... at District ..... made physical contact and advances involving unwelcome and explicit sexual overtures or showed pornography against the will of *X*, and thereby caused sexual harassment to A and committed an offence punishable under Section 354A , IPC and within the cognizance of this Court.

And I hereby direct you to be tried by this Court on the said charge.

81 Inserted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 7 (wef 3-2-2013).

82 *Pappu v State of Chhattisgarh* 2015 Cr LJ 351 (Chh), 2015 (1) CGLJ 418 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

[83][S.354B.

Assault or use of criminal force to woman with intent to disrobe.--

Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.]2973

Comments

1. Legislative Changes

This section is new, inserted by the Criminal Law (Amendment), 2013 (13 of 2013), (wef 3-02-2013) on the recommendations of Justice J.S. Verma Committee.

2. Scope

This section is new. It deals with the offence of voyeurism.

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundale and triable by any Magistrate.

4. Charge

The following form of charge may be adopted:

I,.....(*name and office of the Judicial Magistrate 1st Class etc*.) charge you.....(*name etc. of the accused*) as under :

That you on or about the day of ..... at District ..... assaulted (*or used criminal force*) to *B* (*name of the woman*) with the intention of disrobing her (*or compelling her to be naked*) and thereby committed an offence punishable under Section 354B , IPC and within the cognizance of this Court.

And I hereby direct you to be tried by this Court on the said charge.

83 Inserted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 7 (wef 3-2-2013).

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

[84][S.354C.

Voyeurism.--

Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation 1.--For the purpose of this section, "private act" includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2.--Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.]2974

Comments

1. Legislative Changes

This section is new, inserted by the Criminal Law (Amendment), 2013 (13 of 2013), (wef 3-02-2013) on the recommendations of Justice J.S. Verma Committee.

2. English Law

A person commits an offence of voyeurism if:

(1) for the purpose of obtaining sexual gratification, he observes another person doing a private act and knows that the other person does not consent to being observed for his sexual gratification;
(2) he installs equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit the above offence;
(3) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (*B*) doing a private act and he knows that *B* does not consent to his operating equipment with that intention; or
(4) he records another person (*B*) doing a private act and does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of *B* doing the act, and knowing that *B* does not consent to his recording the act with that intention.

A person guilty of any of these offences is liable on conviction or indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum, or to both.[85]

In many cases the question of whether or not there is a reasonable expectation of privacy is closely related to the nature of the observing in question; although in the context of communal showers or changing rooms there is no reasonable expectation of privacy from casual observation by other users of the communal showers or changing rooms, there is a reasonable expectation of privacy from being spied on in such places by someone who has drilled a hole in the wall for this purpose.[86]

In *R v Sturgess* ,[87] the Court held that, taking into account the extreme gravity of the offence of voyeurism perpetrated over a significant period in the circumstances here pertaining, with the additional aggravating offence of the photographing of young females, justified the sentence of two and a half years, and on no footing can that total sentence be regarded as manifestly excessive.2975

In *R v Hodgson* ,[88] it was observed, 'Although there had been no recording or dissemination of images of a sexual nature, the offence had been a 'continuing' one, not a single instance of spying; it had involved the use of relatively sophisticated technology, which implied a high degree of planning and premeditation; and the fact that the ladies who had been the target of the defendant's activities had been colleagues of his had added to their distress, and had to be regarded as an aggravating factor.'

3. Law of Canada

It is an offence to surreptitiously observe, including by mechanical or electronic means, or make a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if:

- the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;
- the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
- the observation or recording is done for a sexual purpose.

Similarly, it is also an offence to print, copy, publish, distribute, circulate, sell, advertise or make available the recording, or have the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available, where the accused knows that the recording was surreptitiously obtained illegally. 'Visual recording' includes a photographic, film or video recording made by any means.

Reasonable Expectation of Privacy

A 'reasonable expectation of privacy' under s 162(1), Criminal Code must relate to the character of the location or space where the viewing occurs, and the usual activities and uses of that space. An expectation of privacy does not relate to the manner or intention under which that location or space is observed. A couple in a spare bedroom in a third party's private residence have a reasonable expectation of privacy. Any reasonable person would understand that unless otherwise told, a couple engaged in sexual activities would not wish to be observed or intruded upon. A restaurant storage room where employees sometimes change into uniforms is not a 'place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity' within s 162(1)(a) . It has been held that persons in a public park had 'a reasonable expectation of privacy' so that an accused who surreptitiously video records them for a sexual purpose commits an offence contrary to s 162(1)(c) of the Criminal Code.

Defences and Exemptions

No conviction lies if the acts that are alleged to constitute the offence serve the public good and do not extend beyond what serves the public good. It is a question of law2976 whether an act serves the public good and whether there is evidence that the act alleged goes beyond what serves the public good, but it is a question of fact whether the act does or does not extend beyond what serves the public good. The motives of an accused are irrelevant.

Warrant

A police officer acting under a warrant may make a surreptitious observation or recording, but not for a sexual purpose. See s 487 .01, Criminal Code for warrant making authority.

Procedure and Punishment

These are hybrid offences. Where the Crown proceeds by way of indictment, the maximum sentence is five years' imprisonment.[89]

The applicant was not guilty of voyeurism as, while he clearly took pictures at a nude beach, he did not act in a surreptitious manner. His camera was clearly visible and not concealed. The fact that most of the photos were taken from behind or to the side of his subjects did not render his activity surreptitious. While the complainant may have had a subjective expectation of privacy at the beach, in that she did not expect to be photographed, none of the nude sunbathers at this public beach had an objectively reasonable expectation of privacy.[90]

In *R v Hamilton* ,[91] the Court held, 'A business owner would be guilty of voyeurism under this section if a hidden in-office security camera captured an employee exposing their genital organs in their office or a female employee exposing her breasts in her office. Speculatively, it is certainly possible that such exposure would occur.'

4. Scope

This section is new, and deals with the offence of voyeurism.

5. Procedure

The offence under this section is cognizable, bailable, non-compundable and triable by any Magistrate.

6. Charge

The following form of charge may be adopted:

> I,.....(*name and office of the Judicial Magistrate 1st Class etc*.) charge you.....(*name etc. of the accused*) as under:
>
> That you on or about the day of ..... at District ..... watched (*or captured*) the image of *X* (*name of the woman*) in private act in circumstances where she would usually have the expectation of not being observed by your or others and (*or disseminated such image*) and thereby committed an offence punishable under Section 354C , IPC and within the cognizance of this Court.
>
> And I hereby direct you to be tried by this Court on the said charge.2977

84 Inserted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 7 (wef 3-2-2013).

85 See *Halsbury's Laws of England.*

86 *R v Bassett* (2008) EWCA Crim 1174 .

87 *R v Sturgess (David Alan)* (2010).

88 *R v Hodgson* (2008) All ER (D) 64 (Jun) .

89 *Vide Halsbury's Law of Canada.*

90 *R v Lebenfish* (2014) OJ No 1261 .

91 *R v Hamilton* (2009) BCJ No 2592 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

[92][S.354D.

Stalking.--

(1) Any man who--
- (i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
- (ii) monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking:

Provided that such conduct shall not amount to stalking if the man who pursued it proves that--
- (i) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or
- (ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or
- (iii) in the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.]

Comments

1. Legislative Changes

This section is new, inserted by the Criminal Law (Amendment), 2013 (13 of 2013), (wef 3-02-2013) on the recommendations of the Justice J.S. Verma Committee.

2. Law of Australia

It is an offence to stalk another person. Stalking involves engaging in prescribed conduct towards another person on more than one occasion or, in some jurisdictions, on one occasion in a protracted manner. The conduct prescribed for the purpose of stalking varies from jurisdiction to jurisdiction, and includes the following:

(1) following or approaching a person;
(2) loitering near, watching, approaching or entering a place where a person lives, works or frequents;
(3) keeping a person under surveillance;
(4) interfering with property in the possession of a person;
(5) giving or sending offensive material to, or leaving such material where it is likely to be found by, given to or brought to the attention of, a person;
(6) contacting or communicating with a person;2978
(7) sending or making available to anyone else electronic messages about a person;
(8) acting in a way that could reasonably be expected to arouse apprehension or fear;
(9) engaging in conduct amounting to intimidation, harassment or molestation;
(10) engaging in an act of violence or a threat of violence against a person or against the property of a person;
(11) causing a person to receive unsolicited items;
(12) communicating with another person by way of mail, telephone, facsimile, internet or other form of electronic communication in a manner which could reasonably be expected to arouse fear or apprehension;
(13) causing an unauthorised computer function in a computer owned or used by a person; or
(14) tracing a person's use of the internet, email or electronic communication
(15) using abusive or offensive words to or in the presence of the victim, performing abusive or offensive acts in the presence of the victim and directing abusive or offensive acts towards the victim.

In most jurisdictions, the offender must act with the intention of causing physical or mental harm or of arousing an apprehension or fear for the safety of the person being stalked, or another person. In Western Australia, stalking may also include an intention to prevent or hinder someone from doing an act they are lawfully entitled to do, or to compel a person to do an act that person is legally entitled to abstain from doing.

In the Australian Capital Territory, an offender has the requisite intent if he knows or is reckless as to whether the stalking would be likely to cause fear or apprehension or harassment. In the Northern Territory, intention is presumed if a reasonable person in the particular circumstances would have been aware that the conduct would be likely to cause harm or arouse fear or apprehension. In New South Wales, it is sufficient that the offender knew the conduct was likely to cause fear. In Tasmania and Victoria, it is sufficient that the offender knew or ought to have known the conduct would be likely to cause harm, apprehension or fear if actual harm, apprehension or fear was caused.

In Queensland, the conduct constituting the stalking must be intentionally directed at the stalked person, and must be:

(1) conduct that would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or
(2) conduct that causes detriment, reasonably arising in all the circumstances to the stalked person or another person.

It is immaterial whether the offender intended to cause the apprehension, fear or detriment.

In some jurisdictions, it is not necessary to prove that anyone actually apprehended or feared harm. In the Northern Territory, it is an element of the offence that the conduct actually caused physical or mental harm or aroused fear or apprehension. In Western Australia, a person who pursues another person in a manner that could2979 reasonably be expected to intimidate, and that does in fact intimidate, that person or a third person, is guilty of an offence.

Some jurisdictions make provision for specific circumstances of aggravation. Some jurisdictions also expressly provide that conduct engaged in as part of a person's employment, and which is not otherwise unlawful, does not constitute stalking.

In New South Wales, in addition to the stalking offences under the crimes of domestic violence legislation, it is an offence to do any of the following:

(1) use violence or intimidation towards a person, his wife, child or dependent;
(2) do any injury to a person, his wife, child or dependent;
(3) follow a person from place to place;
(4) hide any tools, clothes or other property owned or used by a person; or
(5) follow a person with two or more other persons in a disorderly manner through any street, road or public place,

with the intention of compelling that person to do or not do any act, or in consequence of any act the person did or did not do. It is also an offence to stalk, harass or intimidate a police officer or other law enforcement officer while in execution of that officer's duty, and to stalk, harass or intimidate any person with whom the officer has a domestic relationship, with the intention of causing the officer to fear physical or mental harm, as a consequence of, or in retaliation for, actions undertaken by the officer in the execution of the officer's duty, or because the officer is a police or law enforcement officer. It is an offence to obtain personal information about a person with whom a police or law enforcement officer has a domestic relationship, with the intention of using or permitting the use of the information to cause the officer to fear physical or mental harm, as a consequence of, or in retaliation for, actions undertaken by the officer in the execution of the officer's duty, or because the officer is a police or law enforcement officer. It is an offence to stalk, harass or intimidate a school student or member of staff of a school while the student or member of staff is attending a school.

In the Northern Territory and South Australia, there are separate offences of stalking with intent to influence a person involved in a criminal investigation or judicial proceedings and stalking with intent to influence a public official in the performance of their official duties.

Both Tasmania and Victoria make provision for the extra-territorial operation of the offence to acts committed outside the jurisdiction.[93]

'Loiter' has no fixed technical meaning but can include 'linger idly' about a place or hang about in an idle manner; a complainant 'frequents' a place if he or she visits constantly, habitually or regularly.[94]

An intention to cause serious apprehension or fear is not restricted to apprehension or fear for personal safety and could include fear for reputation or public embarrassment.[95]2980

In *Longfield v Glover* ,[1] it was observed, 'Whilst he in his own mind might simply say he's doing it purely

for his children, the number of calls made in a short span of time, in a background where he knows that already there are protection orders in place that may or may not be breached, can only lead to one conclusion, that whatever he might pretend his intention is, it is to cause harassment at least and, in my view, there are certain statements there that could also be interpreted as possibly causing an apprehension or fear.'

Stalking by surveillance may be made out by keeping watch over a location with the intent of observing or recording a specific victim's movements. But there was no focus upon the requirement that the appellant have the intent during the period alleged to keep the complainant under surveillance. A continuity of purpose in relation to the complainant was essential. It was for this reason that the director acknowledged that the evidence of photos of other boys taken at the same location during the same period did not assist the prosecution's task of establishing that the appellant had a specific intent to stalk the complainant. It would not have been enough to prove an intention to photograph young boys at random as they happened to pass by his camp site and that coincidentally the same boy was photographed on more than one occasion.[2]

3. Scope

This section is new, and deals with the offence of stalking.

4. Procedure

The offence under this section is cognizable, bailable in case of first conviction and non-bailable in case of second and subsequent conviction(s), non-compoundable and triable by any Magistrate.

5. Charge

The following form of charge may be adopted:

> I,.....(*name and office of the Judicial Magistrate 1st Class etc*.) charge you.....(*name etc. of the accused*) as under :
>
> That you on or about the day of ..... at District ..... followed (*or attempted to contact*) *A* (*give name of the victim woman*) to foster personal interaction repeatedly despite a clear indication of disinterest of *A* thereby committed an offence punishable under Section 354D , IPC and within the cognizance of this Court.
>
> And I hereby direct you to be tried by this Court on the said charge.

92 Inserted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 7 (wef 3-2-2013).

93 *Vide Halsbury's Law of Australia.*

94 *Wild v O'Neill* (2012) 31 NTLR 206 ; 263 FLR 187 ; (2012) NTSC 39 .

95 *Police v Gabrielsen* (2011) SASC 39 at [11]-[14].

1 *Longfield v Glover* BC200501698.

2 *R v Anders* 20 VR 596 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

S. 355.

Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.--

Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.2981

STATE AMENDMENT

Andhra Pradesh--In Andhra Pradesh, the offence under section 355 is non-cognizable, bailable and triable by any Magistrate *vide* Section 2 of the Andhra Pradesh Act 3 of 1992.

Comments

1. Scope

This section deals with another aggravated form of assault or use of criminal force, the aggravating element being the intention to dishonour a person. In every case of assault or use of criminal force, the victim may feel dishonoured, but that does not bring the assault or use of criminal force within this section. To come within this section, the assault or use of criminal force must have been committed with specific intent to dishonour the victim. It is not necessary that the victim should be at the accused's place.[3]

This section makes an exception in the case of an assault or use of criminal force committed on grave and sudden provocation. In order to bring a case under this section, it is necessary, therefore, for the prosecution to establish that the accused did not receive grave and sudden provocation from the person assaulted.[4]

2. 'To any Person'

The word 'person' includes both male and female, and therefore, this section is not confined to an assault, or use of criminal force, to a woman as is the case in the previous section.

3. 'Intending Thereby to Dishonour'

The intention to dishonour the person assaulted, or to whom the criminal force is used, is an essential ingredient of an offence under this section. There can be no conviction under this section in the absence of proof of such intention. Such intention cannot be imputed to the accused, or inferred, if it is proved that he assaulted, or used criminal force to the person concerned on grave and sudden provocation from the victim.[5]

An act likely to outrage the modesty of a woman is likely to dishonour her, but an act likely to dishonour her need not necessarily outrage her modesty. If, therefore, a man catches hold of a woman's hand, in circumstances in which it cannot be said that he intended to outrage her modesty, he cannot be held guilty under s 354 though he may be held guilty under this section if he did the act, without grave and sudden provocation, with intent to dishonour the woman.[6]2982

Pulling a person's nose, or kicking or assaulting him with a shoe,[7] is likely to dishonour him. Where the accused, while under trial before a magistrate, struck a sub-inspector of police giving evidence in the case, with intent to dishonour the sub-inspector, it was held that the accused was guilty of the offence under this section.[8]

4. 'Grave and Sudden Provocation'

See Exception 1 to s 300, *ante*.

5. Procedure

An offence under this section is non-cognizable, bailable, compoundable, and triable by a magistrate, and may also be tried summarily.

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[9]

6. Proof

Prove that:

(1) the accused assaulted, or used criminal force upon a person;
(2) he did so intending thereby to dishonour the said person; and
(3) he did so otherwise than on grave and sudden provocation given by the said person.

In order to prove that the assault by the accused was made with intent to dishonour, absence of grave and sudden provocation has to be proved by the prosecution.[10] Where there was consistent and convincing testimony of three eyewitnesses to the effect that a government servant, doing official work, was assaulted with a *chappal* and the medical evidence had corroborated the assault, it was held, in *M Maaiah v State of Karnataka* ,[11] that the offences under ss 332 and 355, IPC, were fully proved. Where the finding is that no force was used, there can be no conviction under this section.[12]

7. Alteration of Conviction from Section 353 to Section 355

Commentary under the same heading in s 353, *ante*, may be referred to.

8. Sentence

Where police personnel ill-treated and dishonoured advocates, the trial court imposed a sentence of fine under ss 341 and 355, IPC, holding that the sentence should be compatible with the gravity of the offence. The sentence of imprisonment was awarded to the head constable in addition to fine and a sentence of

fine to his juniors was confirmed if police personnel entrusted with security and liberty of people act against their interest they are liable to harsh punishment.[13]2983

3 *Babulal v State of Madhya Pradesh* (1980) MPWN 236 .

4 *Sheodin Hari Prasad v Juwni* AIR 1927 Nag 47, 27 Cr LJ 1003 .

5 *Sheodin Hari Prasad v Juwni* AIR 1927 Nag 47, 27 Cr LJ 1003 .

6 *Ibid.*

7 *Krishna Nath Tewari v Emperor* 12 Cr LJ 359 .

8 *Emperor v Altaf Mian* 6 Cr LJ 22 .

9 Code of Criminal Procedure 1973, s 251 .

10 *Sheodin Hari Prasad v Juwni* AIR 1927 Nag 47, p 48, 27 Cr LJ 1003 .

11 *M Maaiah v State of Karnataka* (1978) Cr LJ 734, p 735, 736 .

12 Re *Periasami*(1970) LW (Cr) 167.

13 *M Bhaskaraselty v N Venkataiah & Ors* (1994) Cr LJ (NOC) 188 (AP) .

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Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

S. 356.

Assault or criminal force in attempt to commit theft of property carried by a person.--

Whoever assaults or uses criminal force to any person, in attempting to commit theft of any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section deals with another aggravated form of assault or use of criminal force. The *actus reus* consists of assault or use of criminal force, and it being committed during attempt to commit theft is the aggravating element. The theft, contemplated by this section, is of property, which the person is then wearing or carrying, and not of 'movable property out of the possession of any person' as in s 378, IPC . This section applies only to cases where the assault or use of criminal force is committed in attempting to

commit theft, and not to cases in which actual theft has been committed.[14]

2. 'In Attempting to Commit'

Commentary under s 307, *ante* and s 511, IPC, vol. 4, may be referred to.

3. 'Theft'

Commentary under s 378, IPC, vol. 4, may be referred to.

4. Procedure

An offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate, and may also be tried summarily.

5. Quashing of FIR

The accused persons were involved in a case under ss 323 / 427 / 452 / 356 / 506 / 34, IPC . During the pendency of the case, parties arrived at an amicable settlement. The High Court, exercising its powers under s 482, CrPC, quashed the FIR in question and consequential proceedings including the charge-sheet framed against the accused.[15]

6. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[16]2984

7. Proof

Prove that:

(1) the accused assaulted, or used criminal force upon, some person;
(2) that person was then wearing, or carrying, certain property; and
(3) the said assault, or use of criminal force, was committed in attempting to commit theft of that property.

14 Re *Kun* (1865) Ratanlal Unrep Cr C 3.

15 *Hardev Singh v State of Punjab* (1996) 1 Chand Cri C 149 (P&H).

16 Code of Criminal Procedure 1973, s 251 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

S. 357.

Assault or criminal force in attempt wrongfully to confine a person.--

Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Comments

1. Scope

This section provides punishment for assault, or use of criminal force, in attempting to wrongfully confine the victim. Punishment for wrongful confinement is provided for in s 342, IPC . It appears that this section is intended to apply to cases where an assault is made, or criminal force is used, to a person in order to disarm opposition, offered by the victim, against getting into wrongful confinement, and not to cases where the assault is made, or criminal force is used, to prevent escape of a person from wrongful confinement after such confinement has been effected.

2. 'In attempting'

Commentary under s 307, *ante* and s 511, IPC, vol 4, may be referred to.

3. 'Wrongfully to Confine'

Commentary under s 340, *ante*, may be referred to.

4. Procedure

An offence under this section is cognizable, bailable, compoundable with the permission of the court before which the prosecution is pending, and triable by a magistrate, and may also be tried summarily.

5. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[17]

Where the complaint and material on record showed that the SHO was actively involved in the alleged detention of the complainant in the police station, in the beatings given to her and in outraging her modesty, the SHO being in-charge of the2985 police station and expected to know what was happening within its four walls and the fact that he was in the know, was *prima facie* borne out from the threats extended by him while letting the complainant go on these facts, the order of the sessions court holding that there was no sufficient ground for proceeding against the SHO and thereby discharging him under ss 343, 354, 357, 376, 506, 120-B read with s 34, IPC, was set aside and the case was remanded to the sessions court for proceeding further.[18]

6. Proof

The prosecution is required to prove that:

(1) the accused assaulted, or used criminal force to, another person; and
(2) he did so in attempting to wrongfully confine that person.

17 Code of Criminal Procedure 1973, s 251 .

18 *Bimla Devi Smt v Ishwar Singh* (1997) 3 Chand Cri C 443 (Del) .

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Chapter XVI

Of Offences Affecting the Human Body

OF CRIMINAL FORCE AND ASSAULT

S. 358.

Assault or criminal force on grave provocation.--

Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Explanation.--The last section is subject to the same explanation as section 352 .]

Comments

1. Scope

Section 352, IPC provides punishment for assault or use of criminal force, otherwise than upon grave and sudden provocation. This section provides punishment for the contrary case of an assault or use of criminal force upon grave and sudden provocation. Such provocation acts in mitigation of punishment for an assault, or use of criminal force, under this section.[19]

2. 'Grave and Sudden Provocation'

See exception 1 to s 300 and the relevant commentary on it in s 300, *ante*.

3. Explanation

The expression 'The last section', in the explanation, is incorrect. It should be 'This section' and it is

subject to the same Explanation as is found in s 352, IPC .

4. Procedure

An offence under this section is non-cognizable, bailable, compoundable, and triable by a magistrate, and may also be tried summarily.2986

5. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.[20]

6. Proof

The prosecution is required to prove that:

(a) the accused assaulted (or used criminal force to) a person; and
(b) he did so on grave and sudden provocation from the said person.

19 *EC Chinnaswami Pillai v Chairman of the Arkonam Union* 15 Cr LJ 637 .

20 Code of Criminal Procedure 1973, s 251 .

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Chapter XVI

Of Offences Affecting the Human Body

OF KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

S. 359.

Kidnapping.--

Kidnapping is of two kinds: kidnapping from [21][India] and kidnapping from lawful guardianship.

Comments

1. Scope

The word 'kidnapping', which seems to be derived from the words 'kid', which means a child, and 'nap' or

'nab', which means 'to steal', originally meant 'child-stealing'. However now, it simply means the carrying away of a person against his will or, if he/ she is a minor, against the will of his/her lawful guardian.

This section simply declares that kidnapping is of two kinds, namely: (a) kidnapping from India; and (b) kidnapping from lawful guardianship, both of which terms are defined in the next ss 360 and 361, IPC respectively and both of which are made punishable alike by s 363, IPC .

The classification of kidnapping in this section is not exhaustive as there may be cases in which the two kinds overlap each other. For instance, a minor may be kidnapped from India as well as from his/her lawful guardianship.

21 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule, to be read as above.

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Chapter XVI

Of Offences Affecting the Human Body

OF KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

S. 360.

Kidnapping from India.--

whoever conveys any person beyond the limits of [22][India] without the consent of that person, or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from [23][India].

Comments

1. Scope

Out of the two kinds of kidnapping specified in s 359, IPC, this section defines the first kind of kidnapping, namely, kidnapping from India, which is made punishable as an offence by itself under s 363, IPC .2987

2. Kidnapping Distinguished from Wrongful Confinement

Kidnapping and abduction do not include the offence of wrongful confinement or keeping, in confinement, a kidnapped person.[24]

3. Essential Ingredients

The following are the essential ingredients of an offence under this section:

(1) conveyance of a person;
(2) beyond the limits of India; and
(3) without the consent of that person or of some person legally authorised to consent on behalf of that person.

4. 'Conveys'

'To convey' means to 'carry from one place to another'. The conveyance or carrying is a continuous process until the destination is reached. In the case of an offence under this section, the destination may be some place in a foreign territory, but it is not necessary that it should be reached. The offence is complete as soon as the limits of India are crossed; but until then, the offence cannot be said to have been committed and a person, abetting the kidnapping, can be convicted only under s 363, read with s 116, and not under s 363 read with s 109, IPC .[25]

5. 'Any Person'

The use of the word 'any' before 'person' indicates that the person kidnapped may be a male of female, major or minor, sane or insane, and a citizen of India or a foreign subject.

6. 'Beyond the limits of India'

These words, in the section, indicate that for an offence under it, the kidnapping or conveyance must be from some place, within the limits of India, to some place outside those limits. The offence is not completed until the person is conveyed to some place outside India, and until such time, the offence is going on, but is capable of being abetted.[26]

As to the limits of India, refer to see s 1 of the IPC .

7. 'Without the Consent'

Having regard to the provisions of s 90, IPC, a girl, who is more than 12 years old, is competent to give a valid consent. A person, kidnapping her from India with her consent, cannot be held guilty of the offence defined in this section.[27]

A consent, given under a misapprehension of fact, is not a true consent (s 90, IPC), *e.g.*, to induce women to go to Ceylon by promising to find husbands for them there, and, on their arrival, to employ them as *coolies* is an offence under this section.[28]2988

22 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule, to be read as above.

23 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Schedule, to be read as above.

24 *Badlu Shah v Emperor* AIR 1929 All 454, ILR 46 All 38 ; *Adhik Gope v Emperor* AIR 1947 Pat 17, 48 Cr LJ 189 .

25 *RV Samia Kaundan* ILR 1 Mad 173.

26 *Ibid.*

27 *Haribhai Dada v Emperor* AIR 1916 Bom 205, 19 Cr LJ 602 .

28 Re *Periaswami Kangani* 11 Cr LJ 368.

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

S. 361.

Kidnapping from lawful guardianship.--

Whoever takes or entices any minor under [29][sixteen] years of age if a male, or under [30][eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

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

Exception.--This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

STATE AMENDMENT

Manipur--In s 361, for the word "eighteen", substitute the word "fifteen".[31]

Comments

1. Scope and Applicability

This section defines the second kind of kidnapping, namely, kidnapping from lawful guardianship. This is kidnapping in the literal sense of the term, *i.e.*, child-stealing. Obviously, the section applies only to the kidnapping of a minor, or of a person of unsound mind, whether male or female. The law does not permit even a girl of easy virtues to be taken away from lawful guardianship without the consent of parents, the object of the section being to provide security and protection to the wards themselves.[32] Persuasion by the accused, which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian, would be sufficient to attract this section.[33]2989

The offence of kidnapping under s 363, IPC consists solely of taking or enticing a minor from the keeping of her/his lawful guardian and no intention on the part of the accused is required to be established. All that is needed is that a minor under 16 years of age in the case of a male, or under 18 years of age in the case of a female, is taken or enticed from the keeping of the lawful guardian.[34] The moment a child is taken out of the keeping of his/her lawful guardian, the offence of kidnapping is complete, the criminal intention being not a necessary ingredients for making out this offence.[35]

Since the offence under this section consists in taking or enticing a minor, or a person of unsound mind, out of the keeping of a lawful guardian, it has no application to the taking, or enticing, or a minor, or a person of unsound mind, who has no guardian, whether legal, lawful or *de facto*, such as a street child who may permit himself to be taken away by anyone who may choose to do so. But the person, taking away such a child, may himself become the 'lawful guardian' of the child and any other person taking or enticing the child out of his keeping, may be guilty of kidnapping.[36] The same rule applies to a lunatic without a lawful keeper.

2. English Law

It is an offence in common law, punishable by fine and imprisonment at the discretion of the court, to kidnap any person. Kidnapping consists of the taking or carrying away of one person by another by force or fraud without the consent of the person so taken or carried away and without lawful excuse. In addition to being taken or carried away, the victim must have been deprived of liberty.[37]

The common law offence of kidnapping exists in the case of a victim under the age of 14; and it may be committed by a parent who takes away by force or fraud his own unmarried child under the age of 18, without the child's consent and without lawful excuse, or by a husband on his wife if he treats her with hostile force and carries her away from the place where she wishes to remain.[38]

Kidnapping is not committed where a defendant, by a fraudulent misrepresentation, induces another person to go unaccompanied by the defendant from one place to another; in such circumstances there is nothing capable of constituting a taking or carrying away or a deprivation of liberty.[39]

In *R v Cort* , [40] it was observed, 'Without considering the issue of deprivation of liberty, the Court of Appeal upheld a conviction for kidnapping where a man had induced a woman to accept a lift by fraud on the ground that the woman's consent to the taking or carrying away had been induced by fraud.'

3. Law of Canada

It is an indictable offence to kidnap a person with intent to cause the person to be confined or imprisoned against the person's will, to cause the person to be unlawfully2990 sent or transported out of Canada against the person's will, or to hold the person for ransom or to service against the person's will. It is an offence to confine, imprison or forcibly seize another person, without lawful authority. A kidnapping necessarily entails an unlawful confinement, but the converse is not always true.[41]

Kidnapping consists of taking control of another person, and transporting that person away from one point to another. 'Taking' the person by fraud or trickery is kidnapping notwithstanding the absence of a forcible conveyance. The absence of a demand for ransom or any other demand is irrelevant. The American power of bail bondsman to seize an escapee does not legalize such a seizure in Canada and is not a defence to a kidnapping.

One's participation in the movement is not a necessary element to convict him as a party to kidnapping. Knowledge that the victim has been taken is sufficient.[42]

4. Object

The object of this section seems to be as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards.[43]

5. Essential Ingredients

To constitute an offence of kidnapping of a minor under this section:

(a) there must be taking or enticing of a minor;
(b) the minor must be under 16 years of age, if a male, or under 18 years of age, if a female;
(c) the taking or enticing must be out of the keeping of the lawful guardian of the minor; and
(d) the taking or enticing must be without the consent of such guardian.[44]

The consent of the minor, who is taken or enticed, is wholly immaterial; it does not affect the commission of the offence though it is a matter for consideration under the question of sentence.[45] The motive of the kidnapper is also immaterial unless it falls within the exception to the section. Motive is, however, an important consideration with reference to the question of punishment.[46]2991

6. 'Takes'

Taking or enticing away a minor, or a person of unsound mind, out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping.[47] Without a taking or enticing, there can be no kidnapping.[48] The section requires either taking or 'enticing', and not both.[49]

'Taking' may not be by Force

'Taking' need not be by force, whether actual or constructive,[50] as it implies neither force,[51] nor misrepresentation,[52] nor fraud.[53] The word 'take' merely means 'to cause to go', 'to escort' or 'to get into possession'. No doubt, it does mean physical taking, but not necessarily by use of force or fraud.[54] Persuasion by the accused person, which creates willingness on the part of the minor so he taken out of the keeping of the lawful guardian, would be sufficient to attract the section.[55] The word 'take' implies want of wish and absence of desire of the person taken.[56] When a girl under 18 years of age was taken away by the accused who threatened to her to kill her, and even though subsequent conduct of the victim showed was that she was a consenting party for cohabitation, however, it cannot be inferred that she was not 'taken away' by the accused from lawful guardianship.[57]

'Taking' Need Not be by a Single Act

Taking need not be constituted by a single act. A whole series of acts may together constitute the-process of taking.[58] Similarly, the question whether the 'taking' of a minor out of the custody of her lawful guardian was complete at a given moment, is a question for determination with reference to the circumstances proved in each particular case. Generally speaking, the keeping of the guardian is at an end when the person of the minor is transferred from the custody of the guardian, or some person on his behalf, into the custody of some person, not entitled to the custody of the2992 minor.[59] Thus, the act of taking is complete when the accused takes the minor with him or accompanies him in the ordinary sense of the term, irrespective of his/her mental attitude.[60] In determining whether a person has taken the minor out of the lawful keeping of its guardian, the distance is immaterial. Even if a person takes a minor girl without the consent of her guardian to a distance of 20 or 30 yards, it would amount to taking her out of the keeping of her lawful guardian.[61]

7. Minor Leaving Guardian

A minor may not be competent to give her consent to her taking, but is certainly competent to leave the protection of her guardian on her own accord. Similarly, if a minor girl, without any inducement on the part of the accused, has left her home to come to him, he is not bound to return her to her father's custody. To hold him guilty of the offence of kidnapping, it must be shown that he took some active step by persuasion or otherwise to cause the girl to leave her home. In the absence of any evidence as to inducement or actual taking, the mere finding of the victim girl and the accused, living together under the same roof, would not substantiate the prosecution case of kidnapping.[62] In order to prove the offence of kidnapping from lawful guardianship under s 361, IPC, it is required of the prosecution to prove that the accused had taken the minor out of the keeping of her lawful guardian. The only happenstance that the minor girl was

seen in the company of the accused, is not sufficient unless some evidence is forthcoming as to the taking of the minor, by the accused, out the keeping of her lawful guardianship.[63]What is necessary is to make out that the active part in going away together was the act of the accused, and not of the girl. Factors, to be taken into consideration, are the conduct of the parties particularly of the accused at the time and before their going away together, the maturity of the girl and her intellectual capacity to think for herself and to make up her own mind and the circumstances, under which, and the object, for which, she felt it necessary to leave her guardian's protection.[64]

Where the minor, alleged to have been taken by the accused, leaves her father's protection, knowing and having capacity to know the full import of what she is doing and voluntarily joins the accused, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in such a case and that is some kind of inducement held out by the accused or an active participation by him in the formation of the intention of the minor to leave the house2993 of the guardian.[65] When the evidence on record showed that the victim aged 16 years on her own consent had travelled with the accused knowing fully well that she was going to meet her boyfriend, it cannot be said that it amounts to taking her out of keeping of her lawful guardian. Kidnapping can be said to have taken place only when she was detained against her will by her boyfriend for purpose of pressurising her to agree to his proposal for marriage, *etc.*[66] It would be sufficient if the prosecution establishes that though, immediately prior to the minor leaving the father's protection, no active part was played by the accused, yet he had, at some earlier stage, solicited or persuaded the minor to do so. If evidence to establish one of these things is lacking, it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because, after she had actually left her guardian's house, she joined the accused and he helped her in her design not to return to her guardian by taking her along with him from place to place. Of course, the part played by the accused can be regarded as facilitating the fulfilment of the intention of the girl, that, however, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and does not, therefore, tantamount to 'taking'.[67] Where the evidence shows that there was, between the girl and the accused, an arrangement from before that she would leave her father's house to meet the accused in park from where she would be taken away, and under this arrangement she left the protection of her father, even if with the intention of not returning again, that will be sufficient to hold the accused guilty of kidnapping.[68] In such a case, the mere circumstance, that the act of the accused was not the immediate cause of the girl's leaving her father's protection, would not absolve him if he had, at an earlier stage, solicited her or induced her, in any manner, to take the final step.[69] Where the minor was a poorly educated girl, belonging to a backward class, and it could not be said that she knew, or had the capacity to know, the full import of what she was doing when she left her family with the accused on the carrier of his bicycle, it was held that it was a clear case of the minor being taken out of the custody of her lawful guardian so as to invoke s 363 for the offence of kidnapping.[70] However where a person of less than 16 years voluntarily left his father's house to go with the accused, it was held that the accused had committed no offence of kidnapping punishable under s 363, IPC .[71] Similarly, if the suggestion to leave home comes from the minor girl and the accused merely acquiesces, he commits no offence.[72] If a minor girl runs away from her home in consequence of ill-treatment and goes, of her2994 own accord, to *B,*[73] or if a minor girl, having been driven out of her father's house, is found, some days after, in the company of *B,*[74]*B* does not commit the offence of kidnapping. Similarly, mere passive consent on the part of a person is giving shelter to the minor does not amount to taking or enticing of the minor.[75] Of course, the active bringing about of the stay of the minor in the house of person by playing upon the weak and hesitating mind of the minor would amount to taking within the meaning of this section.[76]

8. 'Or Entices'

'Enticing'[77] is one mode of taking a minor. It is inducing the minor to go, of her/his own accord, to the kidnapper. The word 'entice' involves an idea of inducement or allurement by exciting hope or desire in the other.[78] The inducement of allurement may take many forms difficult to visualise and describe exhaustively; some of them may be quite subtle, depending, for their success, on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual, but imperceptible, impression, culminating, after some time, in achievement of its ultimate purpose of successful inducement.[79] It may be in such a way that though the

person kidnapped may have left the keeping of the lawful guardian willingly, yet the state of mind, that brought about that willingness must have been induced or brought about, in some way, by the accused.[80] Similarly, anything, which is likely to allure the minor girl, will do. It need not always be sweetmeats or money; it can also be an offer of sexual intercourse. The fact that the minor girl had gone to the accused's house for sexual intercourse a year before the offence is no defence to a charge under s 363 . The minor's infatuation with her enticer will be no answer to a charge of kidnapping.[81] Enticing need not be deceitful.[82] A promise of marriage made to the prosecutrix which amounts to enticement of a minor because of which she had left the house of her lawful guardian.[83]It is also not necessary that it should be by a single act, it may consist of a continuous process. It is no one particular fact, isolated from others; it is that totality of the relevant facts, to which regard must be had in deciding whether a girl was enticed out of the keeping of her guardian within the meaning of this section.[84] It must be shown that the accused took some active steps by persuasion or otherwise to induce the minor to leave home; if the suggestion comes from her and the accused merely acquiesces, he is entitled to be acquitted.[85] Where the girl went of her own accord to the accused, persuaded him to execute a marriage agreement, got the same registered, returned to her father's house and told him about the agreement,2995 whereupon her father locked her in a room, which she broke open after three days and went to stay with the accused, it was held that no offence under this section was made out[86] as there was neither 'taking away' nor 'enticing'. Where there was no evidence to show that the accused had taken away the minor girl from her father's field (possession) and there was evidence on record to shown that she wanted to marry him and probably had the illegal intimacy with him, it was held that the accused had committed no offence of kidnapping.[87] Similarly, where the girl, after the examinations were over, as agreed with her classmate, went, from the school, straight to the station, from where they went together to his relation's place and stayed there, like sister and brother, for 10 days, it was held that the accused committed no offence under s 363, IPC .[88]

9. Taking and Enticing--Distinction

There is an essential distinction between taking and enticing. The mental attitude of the minor is immaterial in the case of taking. The word 'take' means 'to cause to go', 'to escort' or 'to get into possession'. When an accused takes a minor with him, whether he or she is willing or not, the act of taking is complete and the condition is satisfied. However the word 'entice', as stated in the preceding paragraph, involves an idea of inducement or allurement by exciting hope or desire in the other. One does not entice another unless the latter attempts to do a thing which she or he would not otherwise do.[89] The Supreme Court, in *Varadarajan v State of Madras* ,[90] envisaged circumstances in which the two words 'take' and 'entice', though not synonymous, may be regarded as meaning the same thing for the purpose of s 361 . In *Thakorlal D Vadama v State of Gujarat,*[91] the Supreme Court observed that the two words 'takes' and 'entices', as used in s 361, IPC, are intended to be read together so that each takes, to some extent, its colour and content front the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement, emanating from the accused, then the latter cannot be considered to have committed the offence, as defined in s 361, IPC . However if the accused has laid a foundation by inducement, allurement or threat, *etc.*, and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the accused, then *prima facie*it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he has, at an earlier stage, solicited or induced her, in any manner, to leave her father's protection by conveying or indicating an encouraging suggestion that he would give her shelter, then the mere circumstance, that his act was not the immediate cause of her leaving her parental home or guardian's custody, would not absolve him. The question would truly fall for determination on the facts and circumstances of each case.2996

'Any Minor'

Any female, whether married or unmarried, if under the age of 18 years, is included in the expression 'any minor' in this section.[1] No doubt, occurrence of puberty determines the minority of a female under the Mohammedan law. But, for the present purpose, regard must be had only to female's age specified in this section. This section itself makes it clear that it applies to any minor, whether male or female. If he is a male, his age must be under 16 years at the time of kidnapping.

10. Age of Minor

Birth entry in the Municipal record is best evidence.

Section 361 does not leave any doubt that a girl until completing her 18th year shall be regarded as a minor so far as the offence of kidnapping is concerned.[2]

In a minor's kidnapping case, the important question for consideration is the age of the victim.[3] It can be proved any legal evidence.[4] Evidence of Municipal Register of Births, properly authenticated, is the best evidence regarding the age of a victim. Even medical evidence cannot stand against it. However the birth entry does not prove itself and does not furnish any proof of age of any particular person unless that person is connected with the birth entry.[5] An unproved and unexhibited school certificate, giving the date of birth of the prosecutrix, cannot be treated as evidence in a case.[6]

Medical Evidence as to Age

Medical evidence as to age is no doubt valuable, but, it, by itself, is not sufficient to fix the age.[7]

The age of the victim given in the ossification test by the doctor cannot outweigh the oral/documentary evidence of the age of the victim.[8]

However the ossification test, though not a sure test, is generally accepted as the best available test for the determination of age of human beings.[9] It has, therefore, better credence over a physician's opinion.[10] In ossification test, x-ray examination of the bones is absolutely necessary. If the doctor has formed an opinion on other characteristics like height, weight, teeth, *etc.*, her opinion is, in no way, better than the opinion of a layman and is not entitled to the weight which the court should attach to the opinion of an expert under s 45 of the Indian Evidence Act 1872. A2997 certificate, given by a doctor about the age on an examination of the teeth, appearance and voice, *etc.*, is not the certificate of an expert, but only an assertion of his opinion which is worthless.[11]

The variation of the age in the ossification test can be up to three years in either way.[12]

The statement of a doctor as the age of a girl, based entirely on certain physical peculiarities such as her height, weight, teeth, *etc.*, is no legal proof of the age, but only an opinion if it does not appear that the doctor has brought any scientific knowledge to bear the opinion.[13] In *Somgir v State of Gujarat* ,[14] it was observed that the medical opinion as to age on the basis of medical science is admissible, but, in the absence of any explanatory statement from the doctor as to what factors individually or cumulatively were significant, the opinion cannot carry much weight. For further commentary, see under the same heading in s 366, *ante*.

Birth Certificate Issued by *Sarpanch Gram Panchayat*

The birth certificate issued by *sarpanch* of a common *gram panchayat,* wherein age of the prosecutrix is shown below 16 years, being public document is admissible in evidence.[15]

Birth Certificate Issued by School

Certificate regarding date of birth of prosecutrix issued by head master of the school as per *dakhal kharij*register of the school can be proved by the prosecution[16] but in case of variance in date of birth of the prosecutrix in birth entry in government register and that in school regard, the birth entry must prevail as that is the conclusive evidence.[17] In case of difference in age given in school certificate and medical opinion, the school certificate would prevail since medical opinion is based on estimate, and possibility of errors is not ruled out.[18] However, the school admission register cannot be regarded as the sole clinching factor for determination of the age.[19]The entries of the date of birth in the school record is relevant under s 35 of the Evidence Act put when the basis on which sent enters were made in not proved the said enters

do not carry much weight.[20]

If the evidence of the doctor and that of the father of the girl,[21] or that of the school register, without any evidence from the birth register,[22] make two inferences possible2998 as to her age, the benefit of doubt should go to the accused. Once it is held that the girl might have been above 18 years, it is not possible to convict the accused.[23] If the evidence of the doctor is not conclusive,[24] or when, according to the prosecution evidence itself, the age of the prosecutrix is proved to be 17 to 19,[25] the benefit must go to the accused. The onus of proving the age of the girl is on the prosecution.[26]

11. Ignorance of age is no Defence

In cases, where the age of the girl is one of the elements in an offence, the accused cannot take shelter behind the defence that he did not know that the girl was under the statutory age and that from her appearance he concluded that her age was more than that prescribed by the law. A person, who commits an offence in respect of a female, when the law has laid down that the offence would be complete only if he female is below a certain age, does so at his peril and if it turns out that the age of the girl is below that prescribed by the law, he must suffer the consequences and he would not be permitted to plead in defence that he *bona fide* believed, or had reasonable ground for his belief, that the girl was over the prescribed age.[27]Section 361, IPC, is framed in such terms as to make it immaterial that the offender took the age of the victim.[28] If, subsequently, it turns out that she was below 18 years of age, the accused, even if he honestly believed her to be above 18 years, cannot protect himself as he must be deemed to have acted at his peril.[29]

12. 'Person of Unsound Mind'

An unconscious person cannot be said to be of unsound mind. For example, a person under an anaesthetic for an operation can hardly be said to be of unsound mind.[30] For further commentary, see s 84, IPC, vol 1.

13. 'Out of the keeping of the Lawful Guardian'

The most important question is when a minor can be said to have been taken out of the keeping of the lawful guardian in given facts and circumstances of a case.[31] The word 'keeping', in the expression 'out of the keeping of the lawful guardian', used in this section, connotes the idea that it is compatible with independence of action and movement in the minor kept. It implies neither prevention not detention, but rather maintenance, protection nor control, manifested not by continual action, but as available on necessity arising.[32] And this relation between the minor and the guardian is certainly not dissolved so long as the minor, at will, takes advantage of it and place herself within the sphere of its operation.[33] The word 'keeping' cannot be interpreted in a narrow sense. It is no the physical presence in the precincts of the father's house2999 that matters to determine the 'keeping of the lawful guardian'.[34] It is not necessary that the girl should be in the physical possession of the guardian. It is enough if it is under a continuous control which is, for the first time, terminated by the act complained of. If a girl goes out into the street or into a field by herself, or goes on a visit either with or without the knowledge of the guardian, she is still said to be in the legal keeping of her parents.[35] The mere fact, that a girl, at the time of the taking or enticement, was playing in a public place,[36] or was on a visit to a friend[37] or a relative,[38] does not render her free from her guardian's keeping. The protection and control of the guardian is not put an end to by the fact that the minor has temporarily left the guardian's house.[39] Where a girl under 18 years of age went out to a market in search of work and a woman, promising to obtain work for her, took the girl to her own house and then handed her over to the accused, it was held that the relation of minor and guardian was not dissolved at the time when the woman met the girl in the market and the girl must still be deemed to be in the keeping of her guardian.[40] Similarly, a married girl under 18 years of age who leaves her husband's house of her own accord and proceeds to the house of her maternal uncle, does not cease to be in the keeping of her lawful guardian and a person who induces her at that time to go with him, is guilty of kidnapping.[41]

Guardian Abandoning the Minor and *Vice Versa*

The minor does not cease to be in the keeping of the guardian unless the guardian himself abandons the minor or the minor, having attained years of discretion, voluntarily and definitely abandons the protection of the guardian. In *Pandyaram Sastrulu v Emperor* ,[42] and in *Francis Hector v Emperor* ,[43] in which the guardian had abandoned the minor and had turned her out, it was held that the minor ceased to be in the keeping of the guardian. There may also be circumstances in which the minor herself may be said to have voluntarily abandoned the keeping of the guardian.[44] All these cases recognise that the minor of her own accord may leave the keeping of the guardian, but such inference is not to be ordinarily drawn unless evidence quite clearly establishes that the minor had formed a definite intention and had abandoned the protection of the guardian, either permanently or for a substantial temporary period, by setting up her own independent life or seeking and obtaining protection in the *de facto* guardianship of some other person. However, where a minor leaves her husband's house temporarily on account of anger, with no intention to leave it for good, it cannot be said that she is not in the keeping of the husband and a person,3000 taking or enticing her away, would be guilty of kidnapping her.[45] Where a minor leaves the immediate custody of her lawful guardian for a temporary purpose such as a visit to friends, she will be deemed to be still in his keeping for the purposes of s 361 . There must, however, be a point after which it can no longer be held that the girl, while out of the immediate custody of the guardian, can still be deemed to be in his keeping. The court must, therefore, consider all the facts and see whether they are consistent, or not, with the continuance of the father's keeping of the minor. If they are not inconsistent, the minor must be held to be in the father's keeping even though the actual physical possession should be temporarily with a friend or other person.[46] Where a minor boy was entrusted to the care of the accused to teach and feed him at his place with the money supplied by the father, and the accused took the boy to some other city without the knowledge of the father, it was held that the accused was not the lawful guardian and the removal of the boy amounted to taking the boy out of the keeping of the lawful guardian.[47] In *Debaprosad Bose v King* ,[48] the court observed thus:

> The mere fact, that a minor leaves the protection of her guardian, does not put her out of the guardian's keeping. If, however, it is proved that a minor had abandoned her guardian with no intention of returning back, she cannot, therefore, be deemed to continue in the keeping of the guardian. What will be deemed to be sufficient to constitute an abandonment of a guardian by a minor girl depends on the fact of each particular case. It cannot be that whenever a child, being taken to task by the guardian, leaves the guardian's house with the mental reservation that he or she will not be returning back to be under that guardian, it must, in the eye of law, be taken to put an end to the protection of the guardian at the sweet will of the minor. If it is shown that such conduct is due to a mere petulant outburst in consequence either of a quarrel with her relations or because of the guardian reprimanding her for her conduct, that will be a relevant question to be considered for deciding whether her conduct was sufficient to put an end to the ties of guardianship.

Want of Knowledge of Guardianship--No Defence

The circumstance that he accused omitted to inquire whether the minor has a guardian or not, is no defence to a charge of the offence of kidnapping. By not inquiring, the accused takes upon himself, the risk of being held guilty and he cannot escape its legal consequences.[49] A person taking away a minor girl, must be taken to have known that she had a lawful guardian and that he was taking her away from her lawful guardianship. It is not necessary that he should know definitely who that lawful guardian was, when he found and used her for his own purposes.[50]

14. 'Lawful Guardian'

The 'guardian' is described, in this section, as a 'lawful' guardian, and not as a 'legal' guardian, and the significance of the adjective is emphasised by the explanation which shows that it includes any person who is lawfully entrusted with3001 the care or custody of the ward-concerned.[51] In *Empress v Pemantle* ,[52] it was observed that the word 'lawful guardian', in s 361, are intended to obviate the difficulty which would otherwise arise if the prosecution were required to prove strictly that the person, from whose care or custody a minor had been abducted or kidnapped, came strictly within the meaning of a guardian

according to the legal acceptation of that word, in *Kesar v Emperor* ,[53] it was observed that it must, in fact, duly, properly and legally be proved that taking or enticing away of a minor was from the custody of the following persons, namely: (a) the natural guardian; or (b) the legal guardian, if the natural guardian be dead; or (c) a person lawfully entrusted with the care and custody of a minor. Class (c) enumerated above, covers all persons other than the legal and natural guardian, who, for the time being, may be lawfully entrusted with the care and custody of a minor, such as a schoolmaster, or a friend, at whose house a minor maybe staying on a long visit, or such like persons standing in a similar degree of relationship. However, this has not been accepted in subsequent cases. As observed in *State v Harbansing Kisansing* ,[54] 'there may be cases where the minors or lunatics would have no legal guardians as such, and, in their case, if the word 'lawful guardian' are strictly construed so as to include only legal guardians, taking, or enticing them away from the custody of persons, who are looking after them in a legal and legitimate way, would not constitute the offence of kidnapping. The word 'lawful' is deliberately used in its wider denotation and must, in the context, be distinguished from the word 'legal'. Wherever the relationship of a guardian is established by means, which are lawful and legitimate, that relationship is intended to be included within the explanation to s 361 . A strict and narrow construction of word 'lawful guardian', used in s 361, would, thus, expose a large class of minors and lunatics to the danger of kidnapping. Therefore, the words 'lawful guardian', as explained in the light of the explanation, include all person who have obtained the care and custody of their wards in a lawful manner, in other words, the expression 'lawful guardian' includes the legal guardian as well as a person who has become the guardian of the minor or the lunatic in a lawful manner. There should, however, be no doubt that the expression 'lawful guardian' cannot include a person who obtains the care or custody of the minor by illegal or unlawful means.[55] The term 'lawful guardian' does not, therefore, include a person who has himself gained possession of the minor by an offence under this section.[56] However, it includes not only the parents or relations in whose house the minor lives and is brought up, but also any other person with whom the minor resides by the consent, express or implied, of those who have the higher legal right.[57]

15. Explanation

A guardian may be lawful without being a legal guardian.[58] The words 'lawful guardian', as is apparent from the language of this section, are of wider connotation3002 than the words 'legal guardian'. The word 'lawful', in the section, has deliberately been used in its wider connotation[59] and the explanation is intended to extend protection, given, to parents and minors, by the section, by including, in the term 'lawful guardian', any person lawfully entrusted with the care or custody of a minor.[60] The entrustment may be by a legal guardian, it may be written, oral, express or implied. In the absence of a legal guardian, the entrustment may be presumed from the course of conduct of the person, actually taking, upon himself, the duties of the care and custody of a minor,[61] as the guardianship connotes maintenance, protection and control of the minor.[62] The entrustment may be proved by oral evidence as well as by surrounding circumstances and the conduct of the parties concerned,[63] and the prosecution need not prove the guardianship in the strict legal acceptance of the word[64] if an orphan is left without the protection of the legal guardian and a philanthropic person, out of humanitarian or charitable motives, takes up the care and custody of such an orphan and treats him as his child, the person so taking the custody and care of the orphan, would be a lawful guardian of the orphan within the meaning of this section.[65] However, it does not mean that the guardian, so treated as a lawful guardian, would have any higher rights than the natural or legal guardian.[66] A person in temporary charge of a minor cannot be regarded as a lawful guardian as against the guardian at civil law.[67]

16. Civil Law Guardians

Though the explanation to s 361, IPC, may extend the accepted definition of the words 'lawful guardian' under the civil law, yet, as against a person, who, in fact, is the civil law guardian of the minor, mere *de facto* guardianship cannot be set up so as to convict the real civil law guardian of an offence under s 361 .[68] Where a minor in question happens to be in the custody of a *de facto* guardian and the legal guardian takes such a minor from the custody of such a *de facto* guardian, the case would not fall under s 363 . The *de facto* guardian cannot be said to have higher rights than the natural guardian and, therefore, there would be no question of taking a minor girl away from the custody of a lawful guardian.[69]

A Muslim father, according to the Privy Council, in *Imambandi v Haji Mursaddi* ,[70] is the natural and legal guardian of a minor. When such a guardian takes his minor3003 child from the custody of its mother, he does not take the child out of the keeping of the lawful guardian. The right of the mother to the custody of her minor child is something different from the right of the lawful guardian.[71]

Guardianship under Hindu Law

The term lawful guardian has been explained in s 361, IPC, to include any person lawfully entrusted with the care or custody of such minor or person of unsound mind. When parties are Hindu by religion and the provision in Hindu Minority and Guardianship Act 1956 (the Act 1956) is applicable to the parties. In s 4(b) of the Act 1956, 'guardian' has been defined as a natural guardian and guardian appointed, in various manner. In that respect s 4(c) read with s 6 defines the term 'natural guardian'. For ready reference the relevant portion from s 6 is quoted below:

> **S. 6 . Natural guardians of a Hindu minor.--**The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--
>
> (a) in the case of a boy or an unmarried girl--the father, and after him, the mother:
>
> *Provided* that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
>
> ...

Even according to s 4(2) of the Guardians and Wards Act 1890 (the Act, 1890) 'guardian' means a person having the care of the person of a minor or of his property or of both his person and property. The provision in the Act provides for appointing a person other than the father as the guardian of a minor with respect to his person or property only in appropriate cases. On a conjoint reading of the aforesaid provisions in the said two statutes it appears that the father who is the natural guardian, has right of domain over the minor unless there is order of a competent court debarring him to have custody or guardianship of such minor.[72]

It is thus clearly readable from the position of law as noted and discussed above that unless there is legal prohibition by order of a court of competent jurisdiction, the father cannot be booked for taking away his minor child from the custody of his wife because he is the natural guardian and, therefore, the offence under s 363, IPC, cannot be attracted against him for taking the child from the custody of the mother.[73]

However, if the father acquiesces in the retention by the mother of the custody of the child from the date of its birth for over three years, the mother clearly becomes the 'lawful guardian' within the meaning of the explanation to this section.[74] Similarly, where the mother has the custody of her minor daughter by virtue of an order passed in a suit for divorce, she is the lawful guardian of the minor and if the father takes or entices the minor from the keeping of the mother, he would be guilty of kidnapping the minor.[75] However, even then, since, under the exception to this section, a person, who, in good faith, believes himself to be

entitled to the lawful custody of a child, cannot commit an offence under s 361, IPC, it seems to follow *a3004 fortiori* that a person, who is, in fact, the father of the child and, therefore, in law, entitled to the lawful custody of the child, cannot come within the scope of this section.[76]

In the case of illegitimate children, the mother is the lawful guardian,[77] and not the father.[78] However, the father has the preferential claim to the custody of his illegitimate daughter when he is under an obligation to maintain her and the mother is leading an immoral life.[79]

On the death of the father, or in his absence, and in the absence of a valid appointment by him, the natural or adoptive mother, as the case may be, is entitled to the guardianship of her minor children.[80] In the case of an orphan girl, her paternal uncles would, according to the provisions of the Hindu law, be entitled to the guardianship of the minor. However, if she has been residing with her maternal uncle for over 18 months, without objection on the part of anybody, and is carried away forcibly by the paternal uncle from the custody of the maternal uncle, the paternal uncle is guilty of kidnapping her.[81] However, being the maternal uncle would be no defence to a charge of kidnapping a minor from the custody of a *de facto* guardian.[82]

A brother of the deceased husband of a minor widow is her guardian in preference to her own father and mother,[83] and if, with his consent, the minor widow is living with her mother in-law, the latter would be her lawful guardian. In such a case, the person, who takes, or entices, away the minor widow from the keeping of her mother-in-law, would be guilty of kidnapping her.[84] Where the husband of a minor girl sold her away to one person with whom she resided with the consent of the husband, it was held that person was her lawful guardian and the accused, who enticed the girl from the keeping of the person, was guilty of kidnapping her.[85]

A person has no absolute right to the custody of a minor on the sole ground that he happens to be the nearest male relation of the minor.[86]3005

Guardianship under Mohammedan Law

Among Mohommedans, the *Sunnis* and *Shias* have different laws.

Under the *Hanafi* or law, the mother is entitled to the custody of her son until he attains the age of seven years,[1] and of her daughter, even against the husband of that daughter,[2] until her puberty.[3] The right continues even if she is divorced by the father of the child,[4] unless she marries a second husband who is not related to the minor within the prohibited degrees, in which case the custody belongs to the father.[5] If, after the mother has so lost her right of being the lawful guardian, a person removes the minor from her custody, he cannot be convicted of kidnapping the minor.[6]

Failing the mother, the custody of a boy under the age of seven years, and of a girl, who has not attained puberty, belongs to the mother's mother how highsoever; failing her to the father's mother, how highsoever; failing her to the sister; failing her to the maternal aunt; and failing her to the paternal aunt.[7] In default of the mother and the female relations, mentioned above, the custody belongs to the father; failing him to the nearest grandfather; failing him to brother; failing him to his son, failing him to paternal uncle; and failing him to his son.[8]

The father is entitled to the custody of his son over seven years of age[9] and of an unmarried daughter who has attained puberty. Failing the father, the custody belongs to the paternal relations in order given above.[10] Thus, a brother would be the lawful guardian of an orphan minor girl though he is not over 18 year of age.[11]

According to the Shias, the mother is entitled to the custody of the male child until he is two year's old,[12] and of her female child until she is seven years old.[13] The father then becomes entitled,[14] but failing him the mother's right returns. Failing both parents, the agnates become entitled.[15]

The custody of illegitimate children, whether under the *Sunni* law or the *Shia* law, belongs to the mother and her relations.[16]3006

17. 'Without the Consent of such Guardian'

The consent required is of the lawful guardian,[17] and not of the minor kidnapped,[18] at the time of taking or enticing. It may be express or implied,[19] but it must be given prior to the taking or enticing. A subsequent consent of ratification cannot take the case out of the purview of this section.[20] It is not necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section.[21] Where a Mohammedan girl of 10 or 11 years of age was married without the consent of her lawful guardian under the Mohammedan law, but with the full approval of the minor's mother, it was held that the accused were guilty under s 366 .[22]

A consent given under a misconception of fact, as where it is obtained by fraud, is not a true consent. Consent must be a voluntary consent.[23] For further commentary, see s 90, IPC, vol 1.

Father Cannot be Guilty of Kidnapping

It is clearly readable from the position of law that unless there is legal prohibition by order of a court of competent jurisdiction, the father cannot be booked for taking away his minor child from the custody of his wife because he is the natural guardian and, therefore, the offence under s 363, IPC, cannot be attracted against him for taking the child from the custody of the mother.[24]

18. Exception

The exception is personal to the father or other person acting in good faith. The belief in the fatherhood,[25] or in the right to custody, must be entertained in good faith. Where a mother of an illegitimate child, believing herself to be entitled to the custody of the child, removed the child from the father's care, it was held that she was protected by this exception.[26]

The exception has no application where the taking or enticing is 'for an immoral or unlawful purpose'. An intention to give a child in marriage in contravention of Act 19 of 1929 is an unlawful purpose.[27] It is upon the prosecution to prove that the3007 kidnapping under consideration was committed for immoral or unlawful purpose.[28] If there is no proof of the purpose for which the accused caused the child to be taken away from the keeping of his mother, and all that is proved is that the father of the child, by deceitful means, got the child from the keeping of his mother to his own, it is no offence under s 361, IPC .[29]

The exception relates only to a person who in good faith believes himself to be the father of an illegitimate child or who in good faith believes himself to be entitled to the lawful custody of the child. It has no application to a person who does happen to be a lawful guardian. Consequently the words 'unless such act is convicted for an immoral or unlawful purpose' do not apply to a lawful guardian. The words 'to the act of any person' and 'unless such act' have to be read in conjunction with each other and not in isolation.[30] For further commentary, see s 52, IPC, vol 1.

29 Substituted by Act 42 of 1949, s 2 for 'fourteen'.

30 Substituted by Act 42 of 1949, s 2 for 'sixteen'.

31 *Vide*Act 30 of 1950, s 3 (2) (16-4-1950), read with s 3 of Act 81 of 1971 (25-1-1972).

32 *Rassol v State* (1976) Cr LJ 363, p 365 ; *Varadarajan v State of Madras* AIR 1965 SC 942, p 946, (1965) 2 Cr LJ 33 .

33 *State of Haryana v Raja Ram* AIR 1973 SC 819, p 822 .

34 *State v Sulekh Chand* AIR 1964 Punj 83, p 85, (1964) 1 Cr LJ 220 .

35 *State v Jhankar Singh* (1980) ALJ 82, p 83 ; *Ram Ratan v State* (1980) ALJ 101, 102 ; *Dharmarajan v State of Kerala* (2014) 2 Ker LJ 314 (Ker), 2014 Cr LJ 3162 .

36 *State v Harbansing Kisansing* AIR 1954 Bom 339, 55 Cr LJ 1032 ; *KK Ali v Emperor* ILR 15 Pat 817 .

37 *Vide Halsbury's Laws of England*.

38 *Vide Halsbury's Laws of England*.

39 *R v Hendy-Freegard* (2007) EWCA Crim 1236 .

40 *R v Cort* (2003) EWCA Crim 2149 .

41 *Vide Halsbury's Law of Canada*.

42 *R v Vu* (2011) BCJ No 399 .

43 *State of Haryana v Raju Ram* AIR 1973 SC 819, p 822 L, 1973 Cr LJ 651 ; *State v Jhankar Singh* (1980) ALJ 82, p 83 ; *Ram Ratan v State* (1980) ALJ 101, p 102 ; *Empress v Pemantle* ILR 8 Cal 971 (FB) ; *Jagannatha Rao v Emperor* ILR 24 Mad 284, 1 Weir 349 ; *State v Harbansing Kisansing* AIR 1954 Bom 339, p 340, 55 Cr LJ 1032 ; *Varadarajan v State of Madras* AIR 1965 SC 942, p 946 (1965) 2 Cr LJ 33; *Rasool v State* (1946) Cr LJ 363, p 365 ; *Asma v State* AIR 1967 All 158, p 159 ; *Emperor v Safdar Reza* AIR 1922 Cal 508, p 509, 24 Cr LJ 379 ; *Parkash v State of Haryana* (2004) Cr LJ 595 (SC) .

44 *Habibulla v Emperor* 14 Cr LJ 93 ; *Padmanabhan Nair v Kallyani Amma* (1967) KLT 534 .

45 *State v Sulekh Chand* AIR 1964 Punj 83, p 85, (1964) 1 Cr LJ 220*; Rasool v State* (1976) Cr LJ 363, p 365 (All) ; Re *Davood Saheb*(1954) MWN 389, (1955) NUC (Mad) 94; *Chhajju Ram Maru Ram v State of Punjab* AIR 1968 Punj 439, (1968) Cr LJ 1300 ; *Habibulla v Emperor* 14 Cr LJ 93 ; *State of Haryana v Raja Ram* AIR 1973 SC 819, p 822, (1973) Cr LJ 651 ; *Thakorlal D Vadgoma v State of Gujarat* AIR 1973 SC 2313, p 2321, (1973) Cr LJ 1541 ; Re *Khalandar Saheb* 56 Cr LJ 581; *Ganpat Singh v State of Rajasthan* (1972) WLN 407 ; *Gurdial Singh v State* (1965) 67 PLR 628 ; *Taj Mohammad v State of Madhya Pradesh* AIR 1961 MP 104, p 105-106, (1961) I Cr LJ 513 ; Re *Abdul Azeez* 54 Cr LJ 1913.

46 *R v Ganesh* ILR 31 All 448 .

47 *S Varadarajan v State of Madras* AIR 1965 SC 942, p 944, (1965) 2 Cr LJ 33 ; *Larence Kannandus v State of Maharashtra* (1983) Cr LJ 1819 (Bom) .

48 *R v Neela Bebee* 10 WR (Cr) 33 ; *Sheoraj Singh v State* AIR 1967 All 528 ; *Bishwanath Ghosh v State* AIR 1957 Cal 589, (1957) Cr LJ 1114 .

49 *State v Sulekh Chand* AIR 1964 Punj 83, p 85, (1964) 1 Cr LJ 220, **overruling***Bhajna v State* (1962) 1 Cr LJ 841 .

50 *Marudevi Awa v State of Kerala* (1958) Cr LJ 33 ; *Thakorlal D Vadgama v State of Gujarat* AIR 1973 SC 2313, p 2320, (1973) Cr LJ 1541 ; Re *Abdul Azeez* 54 Cr LJ 1913; *State v Sulekh Chand* AIR 1964 Punj 83, (1964) 1 Cr LJ 220 .

51 *State v Sulekh Chand* AIR 1964 Punj 83, p 85, (1964) 1 Cr LJ 220 ; *Thokorlal D Vadgama v State of Gujarat*AIR 1973 SC 2313, p 2320, (1973) Cr LJ 1541 ; *State of Haryana v Raja Ram* AIR 1973 SC 819, 822, 1973 Cr LJ 651 ; *Empress v Sookee* 7 WR (Cr) 36 ; *Empress v Amgad Bugeah* 2 Wr (Cr) 61 .

52 *State v Sulekh Chand* AIR 1964 Punj 83, p 85, (1964) 1 Cr LJ 220 ; *Empress v Sookee* 7 Wr (Cr) 36 ; *Empress v Amgad Bugeah* 2 WR (Cr) 61 .

53 *State of Haryana v Raja Ram* AIR 1973 SC 819, p 822, (1973) Cr LJ 651 .

54 *Thakorlal D Vadgama v State of Gujarat* AIR 1973 SC 2313, p 2320, (1973) Cr LJ 1541 ; Re *Khalandar Saheb*AIR 1955 AP 59, 56 Cr LJ 581 ; *Jagan Nath v Emperor* 15 Cr LJ 630 ; *Somgir v State* (1966) 7 Guj LR 378 ; *Abdul Sathar v Emperor* 29 Cr LJ 635 .

55 *State of Haryana v Raja Ram* AIR 1973 SC 819, p 822, (1973) Cr LJ 651 ; *A Krishna Raj v State of Mysore* (1969) 1 Mys LJ 304 .

56 *Jai Narain v State of Haryana* 71 PLR 688, p 692 ; *Rasool v State* (1976) Cr LJ 363, p 365-366 (All) .

57 *Palipeireddi Satyanaryana alias Sathi Babu v State of Andhra Pradesh* (2002) Cr LJ 2319 (AP) .

58 *Biseswar Misra v King* 50 Cr LJ 650 ; *State v Sunder Singh* (1961) Jab LJ 870, p 879 .

59 *Gurdit Singh v Emperor* 17 Cr LJ 236 ; *Rekha Rai v Emperor* AIR 1928 Pat 159, p 160, 28 Cr LJ 820 ; *Khushal v Emperor* 32 Cr LJ 615 .

60 Re *Khalandar Singh* 56 Cr LJ 581; *Dalchand v State* (1967) All Cr R 418 ; Re *Abdul Azeez*(1954) Mad 62, 54 Cr LJ 1913; *Nemai Chattoraj v Empress* (1900) ILR 27 Cal 1041, p 1047, 4 CWN 645 (FB) ; *Rekha Rai v Emperor* 28 Cr LJ 820 ; *Empress v Ram Dei* ILR 18 All 350 ; *Empress v Ram Sundar* ILR 19 All 109, **followed** in *Emperor v Tika* ILR 26 All 197, 1 Cr LJ 561 ; *Durga Das v Emperor* 1 Cr LJ 949 ; *Debaprosad Bose v King* AIR 1950 Cal 406, p 408, 51 Cr LJ 1486 ; *Nanhak Sao v Emperor* AIR 1926 Pat 493, 27 Cr LJ 792 ; *Rakhal Nikari v Empress* 2 CWN 81 ; *Chekutty v Emperor* ILR 26 Mad 454 ;

Shemaj Singh v State AIR 1967 All 528, (1967) Cr LJ 1465 .

61 *Chhajju Ram Maru Ram v State of Punjab* (1968) Cr LJ 1300 .

62 *Sachindra Nath Majumdar v Bistupada Das* (1978) Cr LJ 1494, p 1496 (Cal) ; *Chathu v P Govindan Kutty*AIR 1958 Ker 121, (1958) Cr LJ 637 ; *Lachi Ram v Crown* (1923) Lah 330, p 331 ; *Naru v Rex* AIR 1949 All 710, 51 Cr LJ 29 ; *Emperor v Ramchander* AIR 1914 All 376 (1), 15 Cr LJ 265 (1) ; *Emperor v Ewoz Ali* AIR 1915 All 390, 16 Cr LJ 663 .

63 *Davalasab v State of Karnataka* (1977) Cr LJ 1255, p 1256 (Kant) ; *S Varadarajan v State of Madras* (1965) 2 Cr LJ 33 ; *Pandyaram Sastrulu v Emperor* 13 Cr LJ 598 .

64 *Somgir v State* (1966) 7 Guj LR 378 .

65 *S Varadarajan v State of Madras* (1965) 2 Cr LJ 33 ; *Ganpat Singh v State of Rajasthan* (1972) WLN 407 ; *Suresh Babu v State of Kerala* (2001) Cr LJ 1483 (Ker) .

66 *Mihir Das v State of Tripura* (2006) Cr LJ 1500 (Gau) .

67 *S Varadarjan v State of Madras* (1965) 2 Cr LJ 33 ; *Thakorlal D Vadgama v State of Gujarat* AIR 1973 SC 2313, p 2321, (1973) Cr LJ 1541 ; *Harmel Singh v State of Haryana* (1972) Cr LJ 1648, p 1649, 74 PLR 212 ; *Khyali Ram v State of Himachal Pradesh* (1978) CLR (HP) 101, p 107 ; *Davalasab v State of Karnataka* (1977) Cr LJ 1255, p 1256 ; *Ganpat Singh v State of Rajasthan* (1972) WLN 407 ; *Somgir v State of Gujarat* (1966) 7 Guj LR 378 ; *Abdul Sathar v Emperor* 29 Cr LJ 635 ; Re *Abdul Azeez*(1953) Cr LJ 1913; *Mahadeo Rama v Emperor* 44 Cr LJ 584 ; *Hassaini Mehtor v Emperor* 38 Cr LJ 986 .

68 *Debaprosad Bose v King* 51 Cr LJ 1486 ; *Thakorlal D Vadgama v State of Gujarat* (1973) Cr LJ 1541 ; *Lakshmidhar Mistra v State* (1957) Cr LJ 213 .

69 *S Varadarajan v State of Madras* AIR 1965 SC 942, p 947, (1965) 2 Cr LJ 33 ; *Thakorlal D Vadgama v State of Gujarat* (1973) Cr LJ 1541 .

70 *Trilok Singh v State* 1967 AWR (HC) 848 .

71 *Pramod Kumar v State* 1979 Cr LJ 1094 (All) .

72 *Nga San Hiaing*(1902) 1 LBR 205, 8 Bur LR 255.

73 *RV Gunder Singh* 4 WR (Cr) 6; *Asma v State* AIR 1967 All 158, p 159, (1967) Cr LJ 311 ; *Taj Mohammad v State of Madhya Pradesh* 1 Cr LJ 513 ; *Emperor v Ramchander* 15 Cr LJ 265 (1).

74 *Pandyaram Sastrulu v Emperor* 13 Cr LJ 598 .

75 *Biseswar Misra v King* 50 Cr LJ 650 ; *Jai Narain v State of Haryana* 71 PLR 688, p 692 .

76 *Biseswar Misra v King* 50 Cr LJ 650 .

77 *Nemai Chattroraj v Emperor* ILR 27 Cal 1041, p 1047 (FB) ; *Rekha Rai v Emperor* 28 Cr LJ 820 ; *Emperor v Tika* ILR 26 All 197, 1 Cr LJ 561 ; *Debaprosad Bose v King* 51 Cr LJ 1484 .

78 Re *Khalandar Saheb* 56 Cr LJ 581; *Thakorlal D Vadgama v State of Gujarat* (1973) Cr LJ 1541 .

79 *Thakorlal D Vadgama v State of Gujarat* (1973) Cr LJ 1541 .

80 *Abdul Sathar v Emperor* 29 Cr LJ 635 ; Re *Sellan*(1972) LW (Cr) 75.

81 Re *Davood Saheb*(1954) MWN 389, (1955) NUC (Mad) 94; *Asma v State* (1967) Cr LJ 311 .

82 *R v Bhungee Ahur* 2 WR (Cr) 5 ; *R v Sookee* 7 WR (Cr) 36 .

83 *Moniram Hazarika v State of Assam* (2004) Cr LJ 2553 (SC) .

84 Per Shivdaya J, *State v Sunder Singh* (1961) Jab LJ 870, p 879 .

85 Re *Nga San Hiaing*(1902) 1 LBR 205, 8 Bur LR 255.

86 *Ram Das v State of Madhya Pradesh* (1970) UJ (SC) 864, (1970) 2 SCWR 651 ; *Jitmohan Lohar v State* (1997) Cr LJ 2842 (Ori) .

87 *Ram Veer v State* (1981) Cr LJ (NOC) 47 (All) ; Re *Deep Chand alias Deepu*(2000) Cr LJ 463 (Delhi); *State of Karnataka v Suresh Babu Puk Raj Porral* 1994 AIR SC 966, (1994) Cr LJ 1216 ; *Shyam v State of Maharashtra* (1995) Cr LJ 3974, AIR 1995 SC 2169 ; *Suresh Babu v State of Kerala* (2001) Cr LJ 1483 (Ker) .

88 Re *Sahadevan*(1972) LW (Cr) 169.

89 Re *Khalandar Sahab* 56 Cr LJ 581.

90 *Varadarajan v State of Madras* AIR 1965 SC 942 .

91 *Thakorlal D Vadama v State of Gujarat* (1973) Cr LJ 1541 .

1 Re *Kammu* 12 PR 1879 (Cr); *Mahbub v Emperor* 6 Cr LJ 9 ; *Kesar Mal v Emperor* 33 Cr LJ 673 .

2 *Manguli Muduli v State of Orissa* (2000) Cr LJ 4176 (Ori) .

3 *State of Orissa v Rahasa Naik* (1978) Cut LT 317 ; *Vishnu Kumar v State of Rajasthan* (2002) Cr LJ 3346 (Raj) (DB) .

4 *R v Cox* LR [1898] 1 QB 179.

5 *Joginder Singh v State of Punjab* (1975) Cr LJ 1604 ; *Manna & anor v State of Rajasthan* (2001) Cr LJ 3496 (Raj) ; *Suryavanshi v State of Madhya Pradesh* (1999) Cr LJ 3451 (MP) .

6 *Ram Murti v State of Haryana* (1970) Cr LJ 991, p 995 .

7 *Bishnath Prasad v Emperor* 48 Cr LJ 542 ; *Hatem Ali v Emperor* 47 Cr LJ 325 .

8 *Jitmohan Lohar v State* (1997) Cr LJ 2840 (Ori) .

9 *Sachindra Nath Majumdar v Bistupada Das* (1978) Cr LJ 1494, p 1495 (Cal) ; *State of Gujarat v Jyotindra* (1980) Guj LT 329 (DB) ; *Kashiram v State* (1980) Cr LJ 333, p 334 (MP) ; *Bhawanidin v State of Madhya Pradesh* (1980) Cr LR 338, p 340 (MP) wherein it has been held that range of error, in an ossification test, may be about 1-2 years.

10 *Khyali Ram v State of Himachal Pradesh* (1979) Cr LJ 620, (1978) Chand LR (Cr) 101 (HP) .

11 *Mahomed Syedol Ariffin v Yeoh Ooi Gark* (1916) PC 242 .

12 *Bishnudas Behero v State of Orissa* (1997) Cr LJ 2207 (Ori) ; *Balasaheb v State of Maharashtra* (1994) Cr LJ 3044 (Ori) .

13 *Emperor v Qudrat* 41 Cr LJ 142 ; *Laimayum Tonjou Singh v Manipur Administration* (1962) 1 Cr LJ 49 ; *Marudevi Avva v State of Kerala* (1958) Cr LJ 33 .

14 *Somgir v State of Gujarat* (1966) 7 Guj LR 378, p 382 ; *Rajan & ors v State of Rajasthan* (2002) Cr LJ 3152 (Raj) .

15 *Maroti U Wankhede v State of Maharashtra* (2003) Cr LJ 778 (Bom) .

16 *Ibid*.

17 *Mohandas Suryavanshi v State of Madhya Pradesh* (1999) Cr LJ 3451 (MP) .

18 *Rajan & ors v State of Rajasthan* (2002) Cr LJ 3152 (Raj) .

19 *Bishnudas Behera v State of Orissa* (1997) Cr LJ 2207 (Ori) ; *Prevakar Pati v Ajaya Kumar Das* (1996) Cr LJ 2626, (1996) 81 Cut LT 592 .

20 *Rakesh v State of Rajasthan* (1998) Cr LJ 1434 (Raj) .

21 *Ramesh v State* (1966) AWR 572 (HC) .

22 *Rasunki Saroop v State* (1970) Cr LJ 1383 ; *Akeel v State of Madhya Pradesh* (1999) Cr LJ 4530 (MP) .

23 *Chhattu v State* (1973) All Cr R 391 ; *Madho Singh v State of Rajasthan* (1997) Cr LJ 2641 (Raj) .

24 *Phool Chand v State* (1974) Chand LR 553 .

25 *Nirmal Singh v State* (1974) Chand LR 92 .

26 *Emperor v Jagannath Gir* AIR 1937 All 353, p 356 .

27 *Kesar Mal v Emperor* 33 Cr LJ 673 ; *Prem Narain v Emperor* 30 Cr LJ 218 (2); *Krishna Maharana v Emperor* AIR 1929 Pat 651 .

28 *Krishna Maharana v Emperor* AIR 1929 Pat 651 .

29 *Prem Narain v Emperor* 30 Cr LJ 218 (2).

30 *Din Mohammad v Emperor* 40 Cr LJ 706 .

31 *Mihir Das v State of Tripura* (2006) Cr LJ 1500 (Gau) .

32 *Emperor v Jetha Nathoo* 1 Cr LJ 931, p 933, 6 Bom LR 785 ; *State of Haryana v Raja Ram* (1973) Cr LJ 651 ; *Parkash v State of Haryana* (2004) Cr LJ 595 (SC) .

33 *Emperor v Jetha Nathoo* 1 Cr LJ 931, p 933, 6 Bom LR 785 .

34 Re *Khalandar Saheb* 56 Cr LJ 581.

35 *Lakshmidhar Mishra v State* AIR 1957 Ori 29, p 31 ; *Amamath v State of Haryana* (1970) 72 Punj LR 943 .

36 *R v Oozeerun* 7 WR (Cr) 62 ; *Nga Shwe Thwe v Emperor* 6 Cr LJ 30 .

37 *R v Gooroodoss* 4 WR (Cr) 7 ; *R v Koordan Singh* 3 WR (Cr) 15 ; *Emperor v Vilaitalishah* 8 Cr LJ 361 ; *Emperor v Asgar Ali* 11 Cr LJ 81 .

38 *Jagannadha v Kamaraju* ILR 24 Mad 284 ; *Emperor v Manshomal Deumal* 13 Cr LJ 736 .

39 *Emperor v Manshomal Deumal* 13 Cr LJ 736 .

40 *Lakshmidhar Misra v State* AIR 1957 Ori 29, p 31 .

41 *Karan Singh v Emperor* 17 Cr LJ 532 ; *Jagannatha Rao v Kamaraju* ILR 24 Mad 284, 10 MLJ 405 ; *Banamali Tripathy v Emperor* 44 Cr LJ 590 ; *Bhagia v State of Bihar* 1967 Cr LJ 1240 (Pat) .

42 *Pandyaram Sastrulu v Emperor* 13 Cr LJ 598 .

43 *Francis Hector v Emperor* 38 Cr LJ 401 .

44 *Empress v Gander Singh* 4 WR (Cr) 6 ; *Jagannatha Rao v Kamaraju* ILR 24 Mad 284, 10 MLJ 405 ; *Emperor v Ramchander* 15 Cr LJ 265 (1); *Ottapurakkal Thazhath Suppi v Koyanna Koya Kunhi Koya* AIR 1916 Mad 446 ; *Emperor v Abdur Rahman* 17 Cr LJ 498 ; *Lachhi Ram v Emperor* 24 Cr LJ 564 ; *Nura v Rex* 51 Cr LJ 29 ; *Ewaz Ali v Emperor* 16 Cr LJ 663 .

45 *Biseswar Misra v King* 50 Cr LJ 650 .

46 *Queen v Jagannadha Row* ILR 24 Mad 284, 10 MLJ 405 ; *Banamali Tripathy v Emperor* 44 Cr LJ 590 .

47 *Mohammad Husain v Emperor* 26 Cr LJ 796 .

48 *Debaprosad Bose v King* 51 Cr LJ 1486 ; *RW Valliant v N Eleazer* 26 Cr LJ 977 ; Re *Abdal Azeez*(1953) Cr LJ 1913; *Mammootty v State of Kerala* (1958) Cr LJ 31 .

49 *R v Umsadhaksh* ILR 3 Bom 178 .

50 *Burmha v Emperor* 31 Cr LJ 1023 ; *Idu v Emperor* (1924) Oudh 335 ; Re *Muthu Ibrahi* 16 Cr LJ 169.

51 *State v Harbansing Kisansing* 55 Cr LJ 1032 ; *S Varadarajan v State of Madras* (1965) 2 Cr LJ 33 .

52 *Empress v Pemantle* ILR 8 Cal 971 (FB) .

53 *Kesar v Emperor* 20 Cr LJ 161 .

54 *State v Harbansing Kisansing* 55 Cr LJ 1032 .

55 *Empress v Pemantle* ILR 8 Cal 971 (FB) ; *Fatti v Emperor* 12 Cr LJ 221 ; *Queen v Buldeo* 2 NWPHCR 286 ; *State v Harbansing Kisansing* 55 Cr LJ 1032 .

56 *Ranjeet Singh v State of Haryana* 76 PLR 370, (1974) CLR 364 ; *Fatti v Emperor* 12 Cr LJ 211 ; *Velagupudi Appayya v Emperor* 12 Cr LJ 239 (1).

57 *Fatti v Emperor* 12 Cr LJ 211 ; *Velagupudid Appayya v Emperor* 12 Cr LJ 239 (1).

58 *Nathu Singh v Emperor* AIR 1941 Nag 66, p 68 ; *Empress v Pemantle* ILR 8 Cal 971 (PB) .

59 *State v Ramji Vithal Chaudhari* (1958) Cr LJ 1296 .

60 *Jagannadha v Kamaraju* ILR 24 Mad 284, 1 Weir 349 ; *Kesar v Emperor* 20 Cr LJ 161 ; *R v Baldeo* 2 NWR 286 .

61 *Nathu Singh v Emperor* 41 Cr LJ 356 ; *State v Harbansing Kisansing* 55 Cr LJ 1032 ; *State v Ramji Vithal Chaudhari* (1958) Cr LJ 1296 ; *Saharali Mahammad v Kamizuddin Mahammad* 32 Cr LJ 888 .

62 *Nathu Singh v Emperor* 41 Cr LJ 356 ; *Saharali Mahammad v Kamizuddin Mahammad* 32 Cr LJ 888 .

63 *Nageshwar Jha v State of Bihar* (1962) 1 Cr LJ 449 ; *Mohansingh v Emperor* 31 Cr LJ 949 (not only the offer but also the

acceptance of the trust must be proved); *Kesar v Emperor* 20 Cr LJ 161 (entrustment must be proved to have been made by a person competent to do so).

64 *R v Pemantle* ILR 8 Cal 971 ; *Das v Bhaishinai Nekunjo* ILR 4 Cal 374 .

65 *State v Harbansing Kisansing* 55 Cr LJ 1032 ; *State v Ramnji Vithal Chaudhari* (1958) Cr LJ 1296 .

66 *State v Ramji Vithal Chaudhari* 1958 Cr LJ 1296 ; Re *Kannegati Chowdrayya* 39 Cr LJ 993; *GovindaBiswas v State* 1951 Cr LJ 1238 ; *Dhuma Manjht v Emperor* 43 Cr LJ 918 ; *Banamali Tirpathy v Emperor* 44 Cr LJ 590 .

67 *Sital Prasad v Emperor* 21 Cr LJ 50 .

68 *Saharali Muhammad v Kamizuddin Muhammad* 32 Cr LJ 888 ; *Dhuma Manjhi v Emperor* 43 Cr LJ 918 ; Re *Kannegati Chowdrayya* 39 Cr LJ 993.

69 *State v Ramji Vithal Chaudhari* 1958 Cr LJ 1296 ; *Sital Prasad v Emperor* (1919) 42 All 146 .

70 *Imambandi v Haji Mursaddi* (1918) PC 11 .

71 *Ismail Aboobaker Puthuparambil Thodupuzha v State of Kerala* (1968) Cr LJ 62 .

72 *Ashok Kumar Seth v State of Orissa* (2003) Cr LJ 642 (Ori), *Empress v Prem Krishna Surma* ILR 8 Cal 969 .

73 *Ibid.*

74 Re *Kannegati Chowdrayya* 39 Cr LJ 993, p 995, **relying on***Soha Ali Muhammad v Kamizuddin Muhammad* 32 Cr LJ 888.

75 *State v Ramji Vithal Chaudhari* (1958) Cr LJ 1296 .

76 Re *Kannegati Choudrayya* 39 Cr LJ 993, p 995.

77 *Venkamma v Savitramma* ILR 12 Mad 67 ; *Empress v Pemantle* ILR 8 Cal 971, in which it has been held that where the mother, on her death bed, entrusts the care of such child to a person, who accepts the trust and maintains the child, such a person is lawfully entrusted with the care and custody of the minor within the meaning of this section.

78 Re *Saithri* 16 Bom 307.

79 *Prem Kuer v Banwari Das* ILR 19 Lah 630 ; *Ghana Kanta v Gereli* ILR 32 Cal 479 ; *Kooverji Devji v Motibai* 1936 Sind 63 ; *Venkamma v Savitramma* ILR 12 Mad 67 .

80 *Modhoosoodan Mookerjee v Jodub Chunder Banerjee* 3 WR (Civil) 194 ; *Kaulesra v Jorai Kasaundan* ILR 28 All 233 ; *Mohableswar Krishnappa v Ram Chandra Mangesh* ILR 38 Bom 97, 15 Bom LR 882 ; *Natabar Rautray v State* 36 Cut LT 187, p 190 .

81 *Baij Nath v Emperor* 1914 ILR Oudh 329 15 Cr LJ 640.

82 *Nageshwar Jha v State of Bihar* (1962) 1 Cr LJ 449 .

83 *Khudiram Mookerjee v Banwar Lal Roy* ILR 16 Cal 584 .

84 *Miran Bakhsh v Emperor* 6 PLR 148, 2 Cr LJ 190 ; *Emperor v Tek Chand* 16 Cr LJ 780, 27 PR (Cr) 1915 .

85 *Fatti v Emperor* 12 Cr LJ 211 ; *Jildar Kaiyer v Emperor* 30 Cr LJ 980 (person, obtaining, in pledge, a minor girl from her father, not guilty under s 361 if the minor girl is not married or disposed of in such a manner as to make it impossible for her father to get back her custody).

86 *Sital Prasad v Emperor* (1919) ILR All 36 .

1 *Tayeb Ali v Ameeronissa* 11 WR (Civil) 297 ; *Alim Ulloh Khan v Abadi Begum* ILR 29 All 11 .

2 *Nur Kadri v Zuleikha Bibi* ILR 11 Cal 649 ; *Khatija Bibi v Emperor* 5 BLR 557 ; *Korban v Emperor* ILR 32 Cal 444 ; *Mahni Bibi v Emperor* 13 BLR 160 .

3 *Khatija Bibi v Emperor* 5 BLR 557 ; *Beedhun Bibee v Fuzuloollah* 20 WR (Civil) 411 ; *Mohomuddy Begum v Oomduttoonissa* 13 WR (Civil) 454 ; *Korban v Emperor* ILR 32 Cal 4 ; *Nur Kadri v Zuleikha Bibi* ILR 11 Cal 649 ; *Humid Ali v Imtiuzan* ILR 2 All 71 .

4 *Zara Bibi v Abdul Razak* 8 IC 618, 12 Bom LR 891 ; *Emperor v Ayshabai Bom* LR 536; *Allah Rakhi v Karam Ilahi* 1933 Lah 969 ; *Haidri v Jawwad Ali* AIR 1934 All 722 .

5 *Ansar Ahmad v Samidan* (1928) ILR Oudh 220 ; *Ulfat Bibi v Bafati* ILR 49 All 773 *State v Harbansing Kisansing* AIR 1954 Bom 339, p 340 .

6 *Harbhorsha Mohommed v Jhapuran Bibi* 32 Cr LJ 90 .

7 *Baillie's Digest,* Pt I, p 431; *Sultan Khan Mangalkhan v Gullu* (1959) Cr LJ 327 .

8 *Baillie's Digest,* p 437.

9 *Idu v Amiran* ILR 8 All 322 .

10 *Baillie's Digest,* Pt I, pp 431 and 432; *Sultan Khan Mangalkhan v Gullu* (1959) Cr LJ 327 .

11 *Mehr Hussain v Emperor* AIR 1929 Lah 835 .

12 *Baillie's Digest,* Pt II, p 95.

13 Re *Hosseini Begam* 7 Cal 434; *Raj Begum v Reza Hossein* AIR 2 WR (Civil) 76.

14 *Salimunnsa v Saadat Hussain* AIR 36 All 466 .

15 *Baillie's Digest,* Pt II, p 95.

16 *Empress v Pemantle* ILR 8 Cal 971 .

17 *Parkash v State of Haryana* (2004) Cr LJ 595 (SC) ; *Chathan Kunjukunju v State* AIR 1959 Ker 197, (1959) Cr LJ 716 ; *Queen v Bhungee Ahur* 2 WR (Cr) 5 ; *Queen v Koordan Sing* 3 WR (Cr) 15 ; *Empress v Sookee* 7 WR (Cr) 36 ; *Queen v Gooroodos Rajbansee* 4 WR (Cr) 7 ; *Fatima v Mccormick* 6 Bur LT 21 (FB) .

18 *State of Haryana v Raja Ram* AIR 1973 SC 819, p 822, (1973) Cr LJ 651 ; *Thakorlal D Vadgama v State of Gujarat* AIR 1973 SC 2313, p 2321, (1973) Cr LJ 1541 ; Re *Khalandar Saheb*(1955) 56 Cr LJ 581; Re *Abdul Azeez*AIR 1954 Mad 62, 1953 Cr LJ 1913 ; *Emperor v Asgar Ali* 11 Cr LJ 81 ; *Parkash v State of Haryana* (2004) Cr LJ 595 (SC) .

19 *Abdul Rahman v Emperor* 5 Bur LT 157 .

20 *Oyali Mia v Naib Ali* AIR 1952 Tri 27, (1953) Cr LJ 73 ; *Abdul Rahman v Emperor* 14 Cr LJ 109 .

21 *Parkash v State of Haryana* (2004) Cr LJ 595 (SC) .

22 *Ahmed Bepari v Emperor* AIR 1925 Cal 578, 26 Cr LJ 290 .

23 **See***Phoola v State of Rajasthan* (1980) Raj Cr C 193, p 196, (1980) Cr LJ (NOC) 42 .

24 *Ashok Kumar Seth v State of Orissa* (2003) Cr LJ 642 (Ori) .

25 Re *Kannegati Chowdrayya*AIR 1938 Mad 656, p 658, 39 Cr LJ 993 .

26 Re *Howka Ramlakshmi* 1 Weir 348.

27 *Khalilur Rahman v Emperor* 1933 Rang 98 (100) (FB), 34 Cr LJ 696.

28 *Mahendranath v Chakravarti v Emperor* ILR 62 Cal 629, 39 CWN 396 ; Re *Kannegatl Chowdrayya*AIR 1938 Mad 658, p 659, 39 Cr LJ 993 .

29 Re *Kannegati Chowdrayya*AIR 1938 Mad 656, 39 Cr LJ 993 .

30 *Smt Sudesh Jhaku v KCJ and ors* (1998) Cr LJ 2428 (Delhi) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

S. 362.

Abduction.--

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

Comments

1. Scope

This section merely defines what 'abduction' is. It does not define as offence Abduction becomes an offence only when it is accompanied by one of the three intentions described in ss 364, 365 and 366 of the IPC .[31] Apart from the elements or force or fraud, which may be involved in abduction and which may attract punishment under other sections of the Code, abduction, *per se*, of an adult person is not punishable under this Code.[32]If kidnapping is accompanied by any of the said intentions, it is more severely punished, in consequence, under the same section. The offences of kidnapping and abduction are kindred or cognate offences. The abduction of minors or persons of unsound mind from lawful guardianship may constitute a species of kidnapping (differing from the usual form of that offence in the nature of the means employed), if they are removed from the keeping of their guardians without the latter's consent, and is punishable under s 363 . There may be cases in which an act falls under both offences, *e.g.*, when force or deceit is employed in removing a female minor from the custody of the guardian with intent to murder her,3008 or to force her to illicit intercourse, *etc*.[33]However, in the majority of cases, the act, while coming within the purview of one of the offences, will not attract the provisions of the other.[34] There may be abduction without the removal of a person from lawful guardianship.[35] It may also be observed that the words 'kidnapping' and 'abduction' do not include the offence of wrongful confinement of a kidnapped person.[36]

The offence of abduction is a continuing offence and a woman is abducted not only when she is first taken from any place, but also when she is subsequently removed from the place to another.[37]

2. 'Abduction' Distinguished from 'Kidnapping'

The offences of kidnapping and abduction, though cognate, are essentially dissimilar. In the former, the person kidnapped, if not a person of unsound mind, must be minor of the age specified in s 361 while the subject of abduction may be a person of any age. A child, without a guardian, cannot be kidnapped, except when it is taken out of India, which is a separate offence applicable equally to persons of all ages. Abduction, on the other hand, has reference exclusively to the person abducted. Again, consent of the person abducted, if freely and voluntarily given, condones abduction, and while in kidnapping, consent of the kidnapped person is wholly immaterial. Further, the means employed in abduction must have an element of force or deceit in it, whereas, in kidnapping, they may be entirely absent. Another important distinction is that in kidnapping, the intent of the offender is a wholly irrelevant consideration, whereas in abduction, it is an important factor. Kidnapping from lawful guardianship is a substantive offence while 'abduction' is an auxiliary act, not punishable by itself, but made criminal only when it is done with one or other of the intents specified in ss 364, 365, and 366.[38] Kidnapping from lawful guardianship is not a continuing offence because as soon as the minor is removed out of his or her guardianship, the offence is completed whereas a person is being abducted not only when he is first taken away from any place but also when he is removed from one place to another.[39]

3. Essential Ingredients

This section requires the following two essentials:3009

(1) there must be forcible compulsion or inducement by deceitful means; and
(2) the object of such compulsion or inducement must be the going of the abducted person from any place.[40]

Under this section, it is necessary for the prosecution to establish that the victim was, by force, compelled to leave not only her house, but also to go to various places.[41]

4. 'By Force Compels'

There can be no conviction for abduction if no force or deceit has been practiced in the person abducted.[42] Compulsion by force or inducement by deceitful means in an essential element of abduction.[43] In the case of a grown-up woman, it would be an offence to carry her away by force even if it be with the object of restoring her to her husband.[44] However if a minor girl voluntarily leaves the roof of her guardian and, when out of her house comes across another who treats her with kindness, or at least, without employing any force or without practising any fraud on her, he cannot be held guilty for kidnapping or for abduction.[45]

Where in a case the person alleged to have been abducted on being persuaded went inside the house and after being dressing properly accompanied the persons abducting him, no charge of abduction can succeed against him.[46]

The compulsion, contemplated by this section, must be by force. The word 'force' is defined in s 349, IPC of this Code as implying a contact between the person, on whom force is used, and some other person or object in order to compel the former to move, or to ceases to move, from a certain place. The word 'force' in this section means actual force and not merely a show or threat of force,[47] or imaginary apprehension of force.[48] Where the accused lifted a woman to carry her away but dropped her when she raised an alarm, it was held that he was not guilty of abduction as the woman was not compelled to go from the place where she was, but was merely lifted up, and that the action of the accused merely amounted to an attempt to abduct.[49]

It is for the prosecution to prove compulsion by force.[50]

5. 'By Deceitful Means'

The expression 'deceitful means' is wide enough to include the inducing of a girl to leave her guardian's house on some pretext. 'Deceit', according to its plain dictionary meaning, signifies anything intended to mislead another. It is, really speaking, a matter of intention, and even if the promise, held out by the accused, is3010 fulfilled by him, the question is whether he is acting in a *bona fide* manner when he is extending certain promises to a woman and thereby inducing her to accompany him.[51] If a woman is found to have voluntarily gone from place to place with the accused without his employing any deceitful means for inducing her so to go, then abduction cannot be said to have taken place at all.[52]

6. 'Induces'

To induce means 'to lead into'; it connotes a leading of the abducted person in some direction in which he would not otherwise have gone. There must be a change of mind caused by an external pressure of some kind. Inducement does not involve any force or compulsion.[53] It simply means persuasion, but for abduction it must be by deceitful means. Leading a girl to go by making a false representation would be inducing her to go by deceitful means.[54] When the girl is above 18 years of age and there is no evidence that the accused induced her to go from her house to various places by deceitful means, conviction for abduction cannot be sustained.[55]

The recovery of money from the house of the accused A6 and A7 was proved, but there was no evidence to show that the said amount was paid as ransom to the accused. The two accused A6 and A7 were also not involved in his confessional statement by the co-accused. Acquittal of the accused A6 and A7 for

offences under ss 362 and 383, IPC was held proper.[56]

31 *Dighola Ahom v King* AIR 1950 Assam 37, 51 Cr LJ 408 ; *Krishna v State* (1980) Cr LJ 121, p 123 (All) ; *Ganga Dei v Emperor* AIR 1914 All 17 (1), 15 Cr LJ 154 ; *Bidhoomookhee Dabee v Sreenath Haldar* 15 WR (Cr) 4 (1); *Sant Ram v Emperor* (1929) Lah 713, 30 PLR 573 ; *Nura v Emperor* (1934) Lah 227, 35 Cr LJ 1386 ; *Durga Das v Emperor* 1 Cr LJ 949 ; *Pirmohammad Kukaji v State of Madhya Pradesh* AIR 1960 MP 24, p 25, (1960) Cr LJ 83 ; *Nanhua Dhimar v Emperor* AIR 1931 All 55, 32 Cr LJ 690(2); *Chitasen Goala v State of Assam* (1998) Cr LJ 2118 (Guj) (DB) .

32 Re *Arusami Goundon*AIR 1959 Mad 274, p 277, (1959) Cr LJ 852 ; *Krishna v State* (1980) Cr LJ 121, p 123 (All) ; **see also***Public Prosecutor v Balkrishna* (1979) Mad LJ (Cr) 131, (1979) 1 Andh WR 393, wherein it has been held that an attempt to catch another for the recovery of dues and immediate payment, of for surrendering him to police, does not invoke this section.

33 *Sant Ram v Emperor* AIR 1929 Lah 713, p 716 ; *Gurcharan Singh v State of Haryana* AIR 1972 SC 2661, p 2663, (1973) Cr LJ 179 .

34 *Sant Ram v Emperor* 1929 Lah 713, p 716, (1929) Cr App 879 .

35 *Nanhua Dhimar v Emperor* AIR 1931 All 55, 32 Cr LJ 690 ; *Ganga Dei v Emperor* AIR 1914 All 17 (1), 15 Cr LJ 154 .

36 **See***Badlu Shah v Emperor* ILR 46 All 138, AIR 1924 All 454 .

37 *Kashiram v State* (1980) Cr LJ 333, p 335, (MP); *Gurdas v State* AIR 1953 Punj 258, p 259, (1953) Cr LJ 1790 ; *Ganga Dei v Emperor* 15 Cr LJ 154 ; *Sundar Singh v Emperor* AIR 1925 Oudh 328, 26 Cr LJ 695 ; *Nanhua v Emperor* AIR 1931 All 55, 32 Cr LJ 690 ; *Parappa Sidram Karlati v Dundawwa* (1980) 24 MLJ 56, p 58 (Kant) .

38 *Sant Ram v Emperor* AIR 1929 Lah 713, p 715-16 ; *Gurdas v State* AIR 1953 Punj 258, p 259, 1953 Cr LJ 1790 ; *Sheoraj Singh v State* AIR 1967 All 528, p 529 .

39 *Gurdas v State* AIR 1953 Punj 258, 259, 1953 Cr LJ 1790 ; *Ganga Dei v Emperor* 15 Cr LJ 154 ; *Parappa Sidram Karlati v Dundavwa* (1980) 24 MLJ (Cr) 56, 58 (Kant); *Sundar Singh v Emperor* AIR 1925 Oudh 328, 26 Cr LJ 695 ; *Nanhua Dhimar v Emperor* AIR 1931 All 55, 32 Cr LJ 690 ; *Sant Ram v Emperor* 1929 Lah 713 ; *Adhik Gape v Emperor* AIR 1947 Pat 17, 48 Cr LJ 189 ; *Ramjilal v State* AIR 1951 Raj 33, 52 Cr LJ 217 .

40 *Gurdas v State* AIR 1953 Punj 258, p 259, (1953) Cr LJ 1790 ; *Kashiram v State of Madhya Pradesh* (1980) Cr LR 333, p 334, 336 (MP) .

41 *Keramat Mandal v Emperor* AIR 1926 Cal 320, p 321, 27 Cr LJ 263 .

42 *Empress v Komal Dass* 2 Weir (Cr) 7 .

43 Re *Arusami Goundan*AIR 1959 Mad 274, (1959) Cr LJ 852 .

44 *Fatnaya Lal Khan v Emperor* 1942 Lah 89, p 92, 43 Cr LJ 588 .

45 *Nura v Rex* AIR 1949 All 710, p 712, 51 Cr LJ 29 ; *Jai Narain v State of Haryana* 71 PLR 688, p 692, 693 .

46 *Vinod Chaturvedi v State of Madhya Pradesh* (1984) Cr LJ 864 (MP) .

47 *Nura v Rex* AIR 1949 All 710, p 713, 51 Cr LJ 29 ; *Koya Moidin v Emperor* (1937) MWN 1198 .

48 *Kashiram v State of Madhya Pradesh* (1980) Cr LR 333, p 336 (MP) .

49 *Allu v Emperor* AIR 1925 Lah 512, 26 Cr LJ 943 .

50 *Allahrakhio v Emperor* AIR 1934 Sind 164 .

51 *Ramjilal v State* AIR 1951 Raj 33, p 36, Cr LJ 217; *Phoola v State of Rajasthan* 1980 Raj Cr C 193, p 195, (1980) Cr LJ (NOC) 42 .

52 *Shyamasundar v State* (1969) Cr LJ 1310 (Ori) .

53 *Allahrakhio v Emperor* AIR 1934 Sind 164, p 168 .

54 *Bahadur Ali v Crown* AIR 1923 Lah 158, p 160, 24 Cr LJ 622 .

55 See *Hayath v State of Mysore* (1972) MLJ (Cr) 177 (Mys) ; *Madho Singh and ors v State of Rajasthan* (1997) Cr LJ 2641 (Raj) ; *Amarshibhai v State of Gujarat* 2013 (3) Guj LR 1921 (Guj) (Victim girl had gone of her own accord with prior appointment--No inducement); *Naresh Kumar Satnami v State of Chhattisgarh* 2012 Cr LJ 3665 (Chh), 2012 (2) BLJ 521 (Accused acquitted); *Lokesh v State of Chhattisgarh* 2012 Cr LJ 3484 (Chh), 2012 (2) CGLRW 112 .

56 *Abdulvahab Abdul Majid Shaikh v State of Gujarat* 2007 Cr LJ 3529, p 3533, 3534 (SC), AIR 2007 SC 2492 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

S. 363.

Punishment for kidnapping.--

Whoever kidnaps any person from [57][India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section merely prescribes the punishment for kidnapping whether it be from India or from lawful guardianship. The offence of kidnapping from lawful3011 guardianship, penalised by this section, is the offence which is defined in s 361 .[58]

To constitute an offence of kidnapping, as defined in s 361, IPC, all that is required, is that a minor, under 16, in the case of a male, or under 18, in the case of a female, must be taken or enticed from the keeping of the lawful guardian of the minor without such guardian's consent. No intention of the kidnapper needs to be established.[59] Where the victim is below 18 years of age, her consent is immaterial.[60]

2. 'Kidnaps any Person from India'

Commentary under s 360, *ante*, may be referred to.

3. 'Kidnaps any Person from....Lawful Guardianship'

Commentary under the relevant heading in s 361, *ante*, may be referred to.

4. Procedure

The offence punishable under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

A *de facto* guardian, who has the keeping of a minor with the consent of a *de jure* guardian, is competent to make a complaint of the offence under this section.[61]

5. Delinquent Child

When the crime is committed by a child below 16 years of age, when he is produced before a court not competent to hold any inquiry against him, it is the duty of such court to forward the delinquent child to the court which is competent to try him.[62]

6. Jurisdiction

Under s 181(2), CrPC, any offence of kidnapping or abduction may be inquired into, or tried by, a court within whose jurisdiction the person was kidnapped or abducted or was conveyed or concealed or detained.

7. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*.) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the.....day of....., at....., you kidnapped *AB* (*AB*, a minor male then under 16 years of age (*orAB*, *a minor female then under 18 years of age*), from India (*or from the lawful guardianship of PQ his/her*.....), and thereby committed an offence, punishable under section 363 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

3012

Where a person is charged both under ss 363 and 366 and is acquitted of the charge under s 366, he can still be convicted under s 363 .[63]

8. Proof

The prosecution must prove:

(1) for kidnapping from India, that:

- (a) the person kidnapped was, at the time of offence, was in India;
- (b) the accused conveyed him beyond the limits of India; and
- (c) he did so without his consent or the consent of another legally authorised to consent on his/her behalf.

(2) for kidnapping from lawful guardianship, that:

- (a) the person kidnapped was, at the time of offence, a minor under 16 years of age, if a

male, or under 18 years of age, if a female, or he/she was a person of unsound mind;
(b) such person was in the keeping of a lawful guardian;
(c) the accused took or enticed such person out of such keeping;[64] and
(d) he did so without the consent of the lawful guardian.[65]

Prosecution should prove all the ingredients of the section, including the 'want of consent of the guardian'. The accused has not to prove the consent.[66]

When the evidence of the mother of the prosecutrix and that of her school master showed that she was below 16 years, the medical evidence also corroborated the same and the said evidence was not challenged by the defence, the finding of trial court that age of prosecutrix was below 16 years was found proper.[67]

The rule of prudence requiring corroboration of prosecutrix's evidence in a case of rape does not apply to the offence of kidnapping.[68] The rule requiring corroboration of the evidence of the prosecutrix is generally accepted only in cases of rape, and not in other cases involving a sexual offence[69] though, in *MP Ponnamma v State of Karnataka* ,[70] the conviction based on the bare statement of the prosecutrix, was set3013 aside. Uncorroborated testimony of the prosecurtrix if found reliable and trustworthy can form the basis of conviction for offence under ss 363, 366 and 376, IPC .[71]

9. Acquittal

There was no conclusive proof that prosecutrix was below 18 years. She made statement before the court that she had voluntarily gone with the accused and was not kidnapped and earlier on occasions also, she had gone with the accused. On these facts the conviction of the accused under s 363, IPC, was set aside.[72] In light of the fact that the victim was about 18 years of age and in the absence of any other credible evidence, the accused was found entitled to acquittal.[73]

The only prosecution evidence against the accused appellant was that he was present at the home where the victim was brought after kidnapping; the victim was not available for examination in Court. The appellant was not named in the FIR, other evidence on the record did not show the involvement of the appellant in the offence of kidnapping. The appellant could not be implicated in the offence under s 363 or s 366A, IPC*dehors* other evidence to show his involvement in the events preceding the kidnapping. His conviction on the basis of s 164, CrPC statement was found not sustainable and was set aside.[74]

10. Conviction

The medical evidence showed that prosecutrix was below 18 years of age at the time of the incident. She was undisputedly taken in a tempo to a particular place by the accused. The conviction of accused under s 326, IPC, was found proper.[75] The victim girl aged below 16 year left her house of her own, the accused, therefore met her and took her to his house and detained for several days. The conviction of accused under s 363, IPC was confirmed.[76] The point of the matter is when the prosecutrix was a minor, her taking away by the accused from her school on whatever pretext and even with her consent amounted to kidnapping her from her lawful guardianship. He, thus, committed an offence of s 363, IPC .[77]

After the complaint about missing of a boy was filed, telephone call was received demanding ransom amount. From the nearby place where the ransom amount was to be paid, accused persons were arrested and on their pointing out, the dead body of the kidnapped boy was recovered. The accused persons could not explain their presence. Held, the circumstances proved beyond doubt that the accused persons committed the offence. Conviction of the accused persons under ss 363, 302 and 201, IPC was held proper.[78]3014

11. Punishment

The act of taking and keeping away a young minor girl from her parents' house should be viewed by the court with sternness and the culprits should not be lightly dealt with, otherwise it is likely to have adverse effect on the morals of the society.[79] However, a lighter sentence is sufficient if the offence is merely a technical one.[80] The court is not bound to sentence an accused to fine in every case. What is essential is that a person, convicted of such an offence, should be punished with imprisonment, and should not be punished with fine alone,[81] though sentence of imprisonment can be reduced when victim is a consenting party after the commission of offence.[82]

57 The words 'British India' have successively been substituted by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Sch, to read as above.

58 *Emperor v Ismail Sayadsaheb Mujawar* AIR 1933 Bom 417 (FB), as per majority, 34 Cr LJ 1239.

59 *State v Sulekh Chand* AIR 1964 Punj 83, p 85, (1964) 1 Cr LJ 220 .

60 *Lalit Singh Vohra v State of Uttrakhand* 2013 Cr LJ 4807 (Utr), 2014 (1) NCC 491 .

61 *Velagupudi Appayya v Emperor* 10 IC 281 .

62 *State of Himachal Pradesh v Arjun Singh* (1985) 1 Crimes 49 (HP) .

63 *Jitindra Nath v State* AIR 1951 Assam 168, (1951) Cr LJ 1484 ; **but see also***Krishna Chandra v Emperor* 45 CWN 27 ; **see also***Empress v Mungrao* 6 NWP (HCR) 293 ; *Empress of India v Ram Adhin* ILR 2 All 139 ; *Empress v Wazir Jan* ILR 10 All 58 .

64 *RW Valliant v N Eteazer* 26 LJ 977 ; *Natabar Rautray v State* (1970) Cut LT 187 ; *Rekha Rai v Emperor* AIR 1928 Pat 159, 28 Cr LJ 820 ; *Bishnath Prasad v Emperor* 1948 Oudh 1, 48 Cr LJ 542 ; Re *Abdul Azeez*(1952) 1 MLJ 536, 1952 MWN 231.

65 *Rekha Rai v Emperor* 28 Cr LJ 820, AIR 1928 Pat 159 .

66 *State of Madhya Pradesh v Behera* (1968) 17 Jab LJ 143, 1968 MPLJ 157 .

67 *Vishnu v State of Maharashtra* (1999) Cr LJ 1724 (Bom) .

68 *Shamrao v State of Maharashtra* (1973) Mah LJ 688, (1973) Bom LR 274 ; **see also***Bauribandhu Panda v State of Orissa* (1980) Cr LJ (NOC) 14 (Ori) .

69 *Emperor v Kasamalli Mirzalli* AIR 1942 Bom 71, p 74 (FB), 43 Cr LJ 529 ; *Emperor v Banubai Ardeshir Irani*AIR 1943 Bom 150, p 154 (FB), 44 Cr LJ 534 ; *Ramjilal v State* AIR 1951 Raj 33, 52 Cr LJ 217 ; *Motiram Krishnarao v State of Madhya Pradesh* (1955) Cr LJ 819 ; **but see***Surendra Nath Das v Emperor* AIR 1933 Cal 833, 35 Cr LJ 508 ; *Taser Pramanik v Emperor* AIR 1940 Cal 391, 41 Cr LJ 841 ; *Emperor v Nur Ahmed* AIR 1934 Cal 7, 36 Cr LJ 796 ; *Chamuddin Sardar v Emperor* AIR 1936 Cal 18, 37 Cr LJ 359 .

70 *MP Ponnamma v State of Karnataka* (1978) Cr LJ 1241, (1978) MLJ (Cr) 204 .

71 *Dinesh Kumar v State* 2014 Cr LJ 3344 (Delhi), 2015 (2) Crimes 242 (Del.) .

72 *Bhajan Lal v State of Uttar Pradesh* (1996) Cr LJ 460 (All)

73 *Naresh Sonkusare v State of Maharashtra* (2006) Cr LJ 2034 (Bom) ; *Kishore Bahadur v State of Chhattisgarh* (2006) Cr LJ 2556 (Chattisgarh) .

74 *Brij Nath Sah v State of Bihar* 2010 Cr LJ 3821, p 3822 (SC), 2010 AIR SCW 3900, (2010) 6 SCC 736 .

75 *Kuldeep K Mahato v State of Bihar* (1998) Cr LJ 4033 (SC) .

76 *Bagula Naik v State of Orissa* (1999) Cr LJ 2077 (Ori) .

77 *State of UP v Jalal Ahmad* (2005) Cr LJ 3482 (All) (DB) ; *Nabi Hussain v State of Assam* 2012 (117) AIC 739 (Gauh) .

78 *AN Venkatesh v State of Karnataka* 2005 Cr LJ 3732 (SC), AIR 2005 SC 3809, 2005 SCC (Cri) 1938 .

79 *State v Babulal* AIR 1965 Raj 90, p 96, (1965) 1 Cr LJ 483 .

80 *Wali Muhammad v Emperor* AIR 1926 Lah 677, 27 Cr LJ 1018 .

81 *Jeewan v Rex* AIR 1949 All 587, p 588, 50 Cr LJ 884 .

82 *Palipireddi Satyanarayana alias Sathi Babu v State of Andhra Pradesh* (2002) Cr LJ 2319 .

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Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

[83][S. 363A.

Kidnapping or maiming a minor for purposes of begging.--

(1) Whoever kidnaps any minor or, not being the lawful guardian of a minor, obtains the custody of the minor, in order that such minor may be employed or used for the purposes of begging, shall be punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

(2) Whoever maims any minor in order that such minor may be employed or used for the purposes of begging, shall be punishable with imprisonment for life, and shall also be liable to fine.

(3) Where any person, not being the lawful guardian of a minor, employs or uses such minor for he purposes of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging.

(4) In this section--

(a) "begging" means--

(i) soliciting or receiving alms in a public place, whether under the pretence of singing, dancing, fortune-telling, performing tricks or selling articles or otherwise;

(ii) entering on any private premises for the purpose of soliciting or receiving alms;

(iii) exposing or exhibiting, with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal;

(iv) using a minor as an exhibit for the purpose of soliciting or receiving alms.

(b) "minor" means--3015

(i) in the case of a male, a person under sixteen years of age; and

(ii) in the case of a female, a person under eighteen years of age.]

Comments

1. Scope

To effectively curb the evil of kidnapping of children for exploiting them for begging, the provisions existing in the IPC, were quite inadequate. There was also no special provision for deterrent punishment for the greater evil of maiming of children so as to make them object of pity. This section makes kidnapping or obtaining custody of a minor and maiming of a minor for employing him for begging specific offences and provides for deterrent punishment.

2. 'Kidnaps'

Commentary under s 361, *ante*, may be referred to.

3. 'Minor'

'Minor', according to sub-s (4)(b) of this section, means:

(a) in the case of a male, a person under sixteen years of age; and
(b) in the case of a female, a person under eighteen years of age.

4. 'Lawful Guardian'

Commentary under s 361, *ante*, may be referred to.

5. 'Begging'

'Begging', contemplated by this section, is defined in sub-s (4)(a) of this section.

6. 'Maims'

'Maiming' means injuring by inflicting a disabling wound. Cutting off or disabling, or weakening a man's hand or finger, or striking out his eyes or foretooth, or depriving him of those parts, the loss of which, in all animals, abates their courage, are held to be maims, but the cutting off of a man's ear, or nose, or the like, are not held to be maims at common law because they do not weaken a man; they only disfigure him.[84]

7. Presumption Regarding Kidnapping

Sub-section (3) of this section enacts a special rule of evidence. Under this sub-section, the mere fact of the minor being employed or used for begging raises a3016 presumption that he has been kidnapped in order that he might be employed or used for the purposes of begging. However, this presumption is made rebuttable.

8. Procedure

The offence under this section is cognizable, non-bailable and non-compoundable. It is triable by a magistrate of the first class when the offence relates to kidnapping, and by a court of sessions when it relates to maiming.

9. Jurisdiction

Section 181(2), CrPC, may be referred to.[85]

10. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate/sessions judge, etc*.) hereby charge you (*name of accused person*) as follows:

That you, on or about the.....day of...., at...., kidnapped or obtained custody of *AB*, a minor (*or maimed AB, a minor*), in order that such minor may be employed, or used, for purposes of begging, and thereby committed an offence, punishable under section 363 -A of the Indian Penal Code, and within my cognizance (*or within the cognizance of this court*).

And I hereby direct that you be tried by this court on the said charge.

11. Proof

The prosecution must prove that:

(a) the accused kidnapped, or otherwise obtained the custody of, or maimed, a minor; and
(b) he did so in order that the said minor might be employed, or used, for the purpose of begging.

83 Inserted By Act 52 of 1959, s 2 (wef 15-1-1960).

84 1 East PC 393.

85 For detailed commentary see *Sohoni's Code of Criminal Procedure*, twenty-first edn., Lexisnexis.

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

S. 364.

Kidnapping or abducting in order to murder.--

Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with [86][imprisonment for life] or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations

(a) *A* kidnaps *Z* from [87][India], intending or knowing it to be likely that *Z* may be sacrificed to an idol. *A* has committed the offence defined in this section.
(b) *A* forcibly carries or entices *B* away from his home in order that *B* may be murdered. *A* has committed the offence defined in this section.3017

Comments

1. Scope and Applicability

This section deals with cases of kidnapping or abduction in order that the person, kidnapped or abducted, may be murdered or may be so disposed of as to be put in danger of being murdered.[88] Abduction, *per se* (*i.e.*, pure and simple), is not punishable under this Code.[89] In the absence of proof of any of the said intentions, mere decoying a boy is not punishable under this section.[90]

To establish an offence under s 364, IPC, it must be proved that the person charged with the offence had the intention at the time of kidnapping or abduction that the person was kidnapped or abducted or so disposed of so as to put him in danger of being murdered.[91]

Since this section provides for the case of a kidnapper, whose object is that the person kidnapped may be murdered or may be so disposed of as to be put in danger of being murdered. It has no application to a case where the object of the kidnappers is only to hold the kidnapped person to ransom.[92] However, where the *modus operandi*, disclosed in the letters from the accused demanding ransom from the father of the boy, whom the accused had kidnapped, was to put the father in fright of the boy being murdered and there was throughout the likelihood of the boy being murdered in case the ransom, for any reason, was not paid, it was held that the accused were guilty of the offences under ss 364, IPC (kidnapping) and 386, IPC (extortion).[93] However, where the deceased died even before he was kidnapped, it was held that the accused could not be held guilty under this section.[94]

This section provides for the punishment of a specific offence and, is not intended as an indirect method of punishing persons who are suspected, but not proved, to have committed a murder.[95]

Where the evidence did not show the complicity of the appellant in the abduction of his deceased wife, he was acquitted of the charge under s 364, IPC .[96]3018

2. Intention

The intention to murder or to so dispose of the victim as to put him in danger of being murdered, being the important element of the offence under this section, must be proved to have existed at the time of kidnapping or abduction. If the accused is not proved to have had the necessary intention at the time of kidnapping or abduction, he cannot be held guilty even though the kidnapping or abduction placed the victim in danger of being murdered.[1] The intention of the accused, or the common object of the unlawful assembly, can be judged from the acts committed by the accused at the time of abduction or thereafter till the time of their arrest.[2] The intention of the accused while dragging away the victim is evidenced by the statement attributed to one of the accused which the accused addressed to the son of victim, calling him to bring a *lathi* to kill the victim. The acts and words imputed to the accused when they pulled the victim,

belaboured him and dragged him away, leaves in no doubt that their intention was to so dispose him as to put him in danger of being murdered.[3]

The action of the accused in bringing back his wife to the matrimonial home cannot attract the necessary ingredients of either the offence of kidnapping or abduction so as to attract s 364, IPC .[4]

3. 'Kidnaps'

Commentary under ss 360 and 361, *ante*, may be referred to.

4. 'Abducts'

Where there was no evidence on record to show that the deceased was forced for compelled by any deceitful means was induced by the accused to go with him, the abduction of the victim was not proved.[5] Commentary under s 362, *ante*, may be referred to.

5. Principles of Holding test Identification Parade

The principles for holding test identification parade may be summarised as follows : (i) Identification tests do not constitute substantive evidence, they can only be used as corroborative of the statement in court; (ii) the main object of holding an identification parade during the investigation stage is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye-witnesses of the crime; (iii) in order to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade and it is desirable that a test identification parade should be conducted as soon as after the arrest of the accused; (iv) appreciation of such evidence would depend upon the strength and trustworthiness of witness.[6]3019

6. Absconding or Disappearance of Accused--Effect

Mere absconding or disappearance of the accused by itself can not form the basis of conviction. Even an innocent person may, when suspected of a grave crime be tempted to evade arrest, such being the instinct of self preservation. When a false accusation is raised, any innocent person may behave like a guilty one to avoid a false charge or harassment in the hands of police.[7]

7. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of sessions.

8. Bail

The question as to the likelihood of tampering with the prosecution witnesses relates to ensuring a fair trial of the case in a court of justice and is, therefore, of paramount consideration to be given due weight, while considering a bail matter.[8] In a case where accused is alleged to have committed offences under ss 364 and 302, IPC, the question is not whether the evidence, of produced and remains unrebutted at the trial would sustain the charge but is merely whether there are grounds for believing that the accused were guilty of such offences. If it is so, the bail should be refused otherwise it should be granted.[9]

9. Jurisdiction

Any offence of kidnapping or abduction of a person may be inquired into, or tried by a court within whose local jurisdiction the person was kidnapped or abducted or was conveyed or concealed or detained. See s 181(2), CrPC .[10]

10. Issue Estoppel

In a case of assault on a family to death of there family members, two of the seven accused were convicted of murder under s 302, IPC, while the others under s 364, IPC . The special leave petition against conviction of two murder convicts was dismissed by the Apex Court. In a criminal appeal against conviction under s 364, the Apex Court opined that it would be impermissible for it to go into the question of identification of the accused persons in the wake of rejection of special leave petition of two murder convicts.[11]

11. Charge

The following form of the charge may be adopted:

> I (*name and office of Sessions Judge, etc*) hereby charge you (*name of accused person*) as follows:
>
> 3020
>
> That you, on or about the....day of...., at...., kidnapped (or abducted *AB*, in order that the said *AB* might be murdered (*or might be so disposed of as to be put in danger of being murdered*), and thereby committed an offence, punishable under s 364 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

Where a man has been abducted and taken away and later on found dead, the accused should be charged under s 302, or under s 302, read with s 109, IPC, and not merely under s 364 which is a special case of enhanced punishment for a particular type of abetment of murder.[12]

When the person abducted has been murdered by the abductor there can be no scope for a charge under s 364, IPC . The abductor should be charged with murder pure and simple.[13]

12. Burden of Proof

The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. If the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.[14] So the onus is cast upon the prosecution to prove that the deceased was compelled to go from his house or by deceitful means he was asked to leave the house along with the accused and that the said abduction was in order to commit murder of the said person.[15]

13. Proof

The prosecution must prove that:

(a) the accused kidnapped (as contemplated by s 360, or s 361, IPC, as the case may be), or

abducted (as contemplated in s 362, IPC), a person; and

(b) he did so in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered.

The recognition of known persons in the bright room light is not possible from a distance of 50 feet.[16]

To prove a charge under the said section it is necessary for the prosecution to prove forcible compulsion or inducement by deceitful means and object of such compulsion or inducement must be the going of a person from any place. To prove a charge under this section, the prosecution must prove that there was a misrepresentation, that the particular misrepresentation was the result of a plan to murder and that it was one by which, the abducted person was himself deceived and induced to go. In order to bring home a charge under s 364, IPC, the prosecution3021 must establish that at the time when the victim was taken away the accused had the intention to cause his death.[17]

14. Presumption of Fact

Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition of India when s 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard in the common course of natural events, human conduct, *etc.*, in relation to the facts of the case.[18]

What is frequently happening during these days is persons are kidnapped in the sight of others and are forcibly taken out of the sight of all others and later the kidnapped are killed. If a legal principle to be laid down is that for the murder of such kidnapped there should necessarily be independent evidence apart from the strong circumstances be providing a safe jurisprudence for protecting such criminal activities, India cannot now afford to lay down any such legal principle insulting the marauders of their activities of killing kidnapped innocents outside the ken of others.[19]

Abductors can be Presumed to be Murderers

The abductors alone could tell the court as to what happened to the deceased after they were abducted. When the abductors withheld that information from the court there is every justification for drawing the inference, in the light of all the preceding and succeeding circumstances, that the abductors are the murderers of the deceased.[20]

Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilty of the accused beyond reasonable doubt but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.[21]

When more persons than one have abducted the victim, who was later murdered, it is within the legal province of the court to justifiably draw a presumption depending on the factual situation, that all the abductors are responsible for the murder. Section 34 of the IPC could be invoked for the aid to the end. Unless any particular abductor satisfies the court with his explanation as to what else he did with the victim subsequently, *i.e.*, whether he left his associates enroute or whether he left his dissuaded others from doing the extreme act, *etc.*[22]3022

Presumption that Abduction was to Commit Murder

Where the abductors were armed with weapons and there was no explanation by the accused as to why

the victims were abducted, it could be presumed that victims were abducted with at least the knowledge that they were likely to be murdered and thus, the accused were guilty of offence under s 364 . When a fact is especially or pre-eminently within the knowledge of an accused, the onus lies on him to offer his explanation for his conduct if his intention was contrary to, or in consistent with what his conduct indicated. When the prosecution succeed in proving certain facts, the court may presume the existence of certain other facts, which are likely to follow, in normal circumstances, from the proven facts. Such a presumption is available to a court in the light of the provisions of s 114 of the Evidence Act .[23]

15. Acquittal

When an accused is charged under ss 302 and 364, IPC,[24] if the evidence of murder is disbelieved and there is no evidence upon which it can be said that the person was abducted with the object that the person may be murdered or placed in danger of being murdered, there is no scope for a conviction under s 364 .[25]

Only one out of five witnesses of last seen evidence examined in the case identified the accused appellant in the court. The recovery memo of *dranti* alleged to be recovered from the possession of the accused was not witnessed by any one; it contained the signature of police officer only. Five other accused had been discharged/acquitted by the trial court. The case of the accused appellant was not distinguishable; conviction of the accused appellant under s 364, IPC was also set aside.[26]

The prosecution case was that the deceased boy was kidnapped and murdered as the accused persons wanted to offer a human sacrifice to please deities. The prosecution case rested entirely on the testimony of one prosecution witness without any corroboration of his testimony on any of the material aspects. Despite the testimony of informant witness that tongue, hair and nails of the deceased boy were found in the house of one of the accused, the same were not recovered by the police. There was no explanation as to what was interconnection between the accused and other accused nor there was evidence to connect accused persons with the crime. On these facts these accused persons were found entitled to benefit of doubt and were so acquitted under ss 364 and 302, IPC .[27] The prosecution case based on circumstantial evidence was that accused kidnapped the victim child about four years of age from the house of the parents and took him to the village and pushed him into the well thereby causing his death. The extra judicial confession made by accused to the witness was not found genuine and voluntary. The non-examination of the material witness, *i.e.* auto driver in whose auto-rickshaw deceased was allegedly taken was considered fatal to the prosecution case. The evidence showed that the dead body of the victim was recovered from the well only after the police came to the spot and not on pointing of well by the accused. Holding that there was no evidence to connect the3023 accused with the offences under ss 364 and 302, IPC, the accused was acquitted.[28] The allegation against the accused was that he kidnapped his two step-brothers and therefore killed them in order to solely succeed to his father's property. There was absence of the corpse and other evidence regarding death of the deceased brothers. The alleged eyewitnesses to the kidnapping did not name the accused in the FIR. There was no sufficient light on the place of incident for eyewitness to identify the accused. The conviction of the accused under ss 364 / 302 / 149, IPC, and under ss 201 / 149, IPC, and under s 120B, IPC, was set aside.[29]

Where in examination under s 313, CrPC no question regarding kidnapping or abduction of the victim was put to the accused, conviction of the accused appellant under s 364, IPC was set aside.[30]

16. Conviction

An accused, charged under ss 302 and 364, IPC and acquitted of the charge under s 302, can still be convicted under s 364 .[31] The victim was dragged away by accused person from two places. The words attributed to the accused persons showed that abduction was done for the purpose of finishing off the victim, these words spoken by the accused were also quoted in the FIR. When informant did not know that the victim was not alive, the accused were held guilty for abducting victim in order to murder him and convicted for offence under s 364, IPC .[32] A boy of 10 years was taken from his house by the accused in presence of his father and brother. The accused and the victim boy were missing for about two months

and accused alone returned thereafter and told that he had employed the victim boy in a shop in Bombay. The boy was not traced nor returned thereafter. The conviction of the accused, on these facts, under s 364, IPC, was found proper.[33] A three year old child was kidnapped from the lap of his mother by three accused persons and subsequently was found murdered. The testimony of mother of the child was most natural, reliable, trustworthy and could not be shaken in the cross-examination. The conviction of accused persons under s 364 was found proper.[34] Where in a case of kidnapping and murder of a girl and then concealing her body, the evidence of the prosecution witnesses mutually corroborated each other regarding presence of the deceased in the company of the accused on fateful day, the prosecution proved and accused admitted that the house from where the body of the deceased was exhumed, belonged to the accused but accused failed to explain as to how the body of the deceased came to be exhumed from his house, the conviction of the accused under ss 302, 364 and 201, IPC, was confirmed.[35] The prosecution case based on circumstantial evidence was that the accused person abducted a jeweller and subsequently murdered him. The accused absconded from the scene of occurrence soon after co-accused was apprehended. The revolver was found from the person of accused at the time of his3024 arrest. The opinion of the ballistic expert was that the bullet recovered form the head of the deceased could only have been fired from the said revolver. The bags of ornaments which were in possession of the deceased jeweller at the time of his abduction were recovered from the house of co-accused pursuant to the information elicited from the accused. The conviction of the accused under ss 364 and 302, IPC, was confirmed.[36] A four year old boy allegedly kidnapped by the accused persons with the motive to sacrifice him in their field under instructions of a *tantrik* for being blessed with son and a pot of gold. The eyewitness, a servant of the accused witnessed the incident and intimated the police. His testimony remained unshaken and was corroborated by the medical evidence. The accused who was detected by the informant while he was disposing off the dead body in a pond, later made extra-judicial confession about the offence before the informant. The recovery of '*puja* materials' from the field of the accused strengthened the prosecution case. Conviction of the accused under ss 364, 302 and 201, IPC, was found proper.[37]

There was reliable evidence that the accused appellant along with other accused wrongfully restrained the deceased by inflicting severe injuries on the body of the deceased *i.e.* by causing as many as 36 injuries in which process the deceased lost his conscious whereafter he was shifted to a different place, where it ultimately came to light that the person was killed by hanging. The conviction of the accused under s 364, IPC was held proper.[38]

17. Sentence

Where two persons are kidnapped, there are two distinct offences of kidnapping and it is lawful to award separate sentence for each offence. However, if the two offences are committed in the course of the same transaction, it is not necessary to order the sentences to run consecutively.[39]

In a case, in which two accused act in concert by virtue of a common intention and of a criminal conspiracy, their entire activities cannot, in the very nature of things, be brought out in evidence and, therefore, no distinction should be made between the two accused in the matter of sentence.[40]

86 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation of life' (wef 1-1-1956).

87 The words 'British India' have successively been substituted, by the AO 1948 the AO 1950 and Act 3 of 1951, s 3 and Sch, to read as above.

88 Re *Arusami Goundan*AIR 1959 Mad 274, p 277, (1959) Cr LJ 852 ; *Chunda Murmu v State of West Bengal* 2012 Cr LJ 2861, AIR 2012 SC 2160, (2012) 5 SCC 753 .

89 See *Raghu Singh v State of Madhya Pradesh* (1980) Cr LR 69 (MP) (Notes) ; *Krishna v State* (1980) Cr LJ 121, p 123 (All) ; *Mahesh Paswan v State of Bihar* 2013 (127) AIC 738 (Pat) .

90 Re *Arusami Goundan*AIR 1959 Mad 274, p 277, (1959) Cr LJ 852 .

91 *Rabin Mallick v State of West Bengal* 2011 Cr LJ 3801, p 3804 (Cal) (DB), 2011 (5) CHN 488 .

92 *Po Lan v Emperor* 14 Cr LJ 167 (2); *Samundar v Emperor* 17 Cr LJ 64 ; **see also***Veerana Kone v Emperor* (1939) MWN 519, AIR 1939 Mad 593, (1939) 2 MLJ 487 .

93 *Ram Chandra v State* AIR 1957 SC 381, p 388, (1957) Cr LJ 559 .

94 *Podda Narayana v State of Andhra Pradesh* AIR 1975 SC 1252, p 1258, (1975) Cr LJ 1062 .

95 *Alimjan Bibi v Emperor* AIR 1937 Cal 578, p 580, 39 Cr LJ 31 .

96 *Sukhjit Singh v State of Punjab* (2014) 10 SCC 270, 2014 (11) Scale 414 .

1 *Upendra Nath Chose v Emperor* AIR 1940 Cal 561, p 564 ; *Nedo Kar v State* AIR 1956 Cal 600, (1956) Cr LJ 1313 ; *Vadia Kistiah v State of Hyderabad* AIR 1954 Hyd 88, 55 Cr LJ 641*; Rabin Mallick v State of West Bengal* 2011 Cr LJ 3801 (Cal) (DB), 2011 (5) CHN 488 ; *Mahesh Paswan v State of Bihar* 2013 (127) AIC 738 (Pat) .

2 *State v Laiq Singh* (1968) Cr LJ 584, AIR 1968 All 170, p 183 ; **see also***Vadla Kistiah v State of Hyderabad* AIR 1954 Hyd 88, p 89, 55 Cr LJ 641 .

3 *Murlidhar v State of Rajasthan* (2005) Cr LJ 2608 (SC) .

4 *Chunda Murmu v State of West Bengal* 2012 Cr LJ 2861, p 2864 (SC), AIR 2012 SC 2160, (2012) 5 SCC 753 .

5 *Gulab Singh v State of Punjab* (2002) Cr LJ 1575 (All) .

6 *Mahesh v State of Rajasthan* (2006) Cr LJ 1657 (Raj) (DB) .

7 *Uttam Kirtonia v State of West Bengal* 2006 Cr LJ 2328 (Cal) (DB) .

8 *State of Sikkim v Rolland Christopher Cheltri and anor* (1989) Cr LJ 207 (Sikkim), (1998) 2 Crimes 70 (Sikkim) .

9 *Ibid.*

10 For detailed commentary see *Sohoni's Code of Criminal Procedure,* twenty-first edn., Lexisnexis.

11 *Shankar Mahto v State of Bihar* (2002) Cr LJ 3775 (SC) .

12 *Akam Sheikh v Emperor* AIR 1947 Cal 35, 47 Cr LJ 680 ; *Upendra Nath Ghose v Emperor* AIR 1940 Cal 561, 564.

13 *Amur Layek v State of West Bengal* (1988) Crimes 961 (Cal) (DB).

14 *State of West Bengal v Mir Mohammed Omar* AIR 2000 SC 2988, (2000) Cr LJ 4047 (SC), 2000 AIR SCW 3230 (SC) .

15 *Lakhan Sah v State of Bihar* (2006) Cr LJ 2524 (Jhar) (DB) .

16 *Anant Ram v State* (1984) 2 Crimes 772 .

17 *Uttam Kirtonia v State of West Bengal* (2006) Cr LJ 2328 (Cal) (DB) .

18 *State of West Bengal v Mir Mohammed Omer* AIR 2000 SC 2988, (2000) Cr LJ 4047, 2000 AIR SCW 3230 .

19 *Sucha Singh v State of Punjab* (2001) Cr LJ 1734 (SC) .

20 *Ibid.*

21 *Ibid.*

22 *Sucha Singh v State of Punjab* (2001) Cr LJ 1734 (SC) .

23 *Moni Neog v State of Assam* (2006) Cr LJ 1944 (Gau) (DB) .

24 *Ijjutulla Akanda v Emperor* AIR 1945 Cal 42, 46 Cr LJ 557 ; *Gulab Singh v State* (2002) Cr LJ 1575 (All) .

25 *Ijjutulla Akanda v Emperor* AIR 1945 Cal 42, 46 Cr LJ 557 .

26 *Girdhari v State (NCT) of Delhi* 2012 Cr LJ 984 (SC), 2012 AIR SCW 425, (2011) 15 SCC 373 .

27 *Kalpane Mazumdar v State of Orissa* (2002) Cr LJ 3756 (SC) .

28 *Sarala v State* (2003) Cr LJ 1195 (Mad) .

29 *Murari Lal v State of Uttar Pradesh* (2001) Cr LJ 2831 (All) (DB) ; **see also***Raj Kumar Pandit v State of Bihar* (2001) Cr LJ

3570 (Jhak) (DB) .

30 *Anil Singh v State of Bihar* 2013 Cr LJ 3359 (Pat) .

31 *Mahavir v State of Uttar Pradesh* (1990) Cr LJ 1605 (All) ; *Vadia Kistiah v State of Hyderabad* AIR 1954 Hyd 88, 55 Cr LJ 641 ; *Ahmad v Emperor* (1933) Lah 1035 (2), 35 Cr LJ 426 ; **see also***Ram Chandra v State of Uttar Pradesh* AIR 1957 SC 381, (1957) Cr LJ 559 .

32 *State of West Bengal v Mir Mohammad Omar* (2000) Cr LJ 4047 (SC) .

33 *Manoj Kumar Thakur alias Lucho Thakur v State of Bihar* (2000) Cr LJ 2166 (Pat) .

34 *Jhapsa Kabari and ors v State of Bihar* (2002) Cr LJ 587 (SC) .

35 *Damodar v State of Karnataka* (2000) Cr LJ 175 (SC) .

36 *Manish Dixit v State of Rajasthan* (2001) Cr LJ 133 (SC) .

37 *Subhash Chandra Panda v State of Orissa* (2001) Cr LJ 4108 (Ori) (DB) .

38 *Subhash Krishnan v State of Goa* 2012 Cr LJ 4369, p 4380, AIR 2012 SC 3003, (2012) 8 SCC 365 .

39 *Samundar v Emperor* 27 Cr LJ 64, p 65 .

40 *Ram Chandra v State of Uttar Pradesh* AIR 1957 SC 381, p 389, (1957) Cr LJ 559 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

[41][S. 364A.

Kidnapping for ransom, *etc.*--

Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or [42][any foreign State or international inter-governmental organisation or any other person] to do or abstain from doing any act or to pay a ransom,shall be punishable with death, or imprisonment for life, and shall also be liable to fine.3025

Comments

1. Scope

This section was incorporated in the IPC in 1993 but was amended soon in 1995 with a view to insert the cases pertaining kidnapping or abduction to compel any foreign state or international or international inter-governmental organisation or to any other person to do or abstain from doing any act or to pay a ransom. The offence committed under this section is considered so serious that the punishment provided under IPC to a more serious offence, *i.e.*, murder under s 302, IPC is provided in it. An offence under s

364A, IPC is a serious offence, but the court should not be influenced by sentiments, and the judgment of the court should be objective, based on judicial considerations and evidence adduced in the case.[43]

From the language of s 364A, IPC, it becomes crystal clear that this section is applicable only when the kidnapping for ransom *etc.*, is done in order to compel the government or any foreign state or international inter-governmental organisation to do or abstain from doing any act.[44] If it is established that offender after kidnapping/abducting a person keeps him in detention and threatens to cause death or hurt in order to extort ransom and communicates that demand, he is guilty for kidnapping for ransom.[45] When an individual person has been compelled to pay the ransom amount, the offence under s 364A, IPC, is not made out at all.[46] Once a person (victim) is shown to have been kidnapped, onus would shift on the kidnapper to show when the person kidnapped was released by him.[47]

It is established that if the offender after kidnapping a person keeps the said person in detention or threatens to cause death or hurt in order to extort ransom, s 364A, IPC is attracted.[48]

2. 'Kidnaps'

Commentary under ss 359 to 361, *ante*, may be referred to.

3. 'Abducts'

Commentary under s 362, *ante*, may be referred to.

4. 'Hurt'

Commentary under s 319, *ante*, may be referred to.3026

5. Demand of Ransom and its Communication

To pay a ransom, as per *Black's Law Dictionary,*would mean 'to pay price or demand for ransom.' The word 'demand' means 'to claim as one's due:' 'to require' 'to ask relief' 'to summon' 'to call in Court'; 'An imperative request preferred by one person to another requiring the latter to do or yield something or to abstain from some act'; 'An asking with authority, claiming'. The definition as pointed out above would show that the demand has to be communicated. It is an imperative request or a claim made. Therefore, that claim or imperative request or asking with authority could only be if the demand is conveyed or communicated. Communications means 'information given;' 'the sharing of knowledge by one with another;' bargaining preparatory to making a contract;' 'to convey;' 'made known;' 'to talk over;' 'to transmit information.' That the demand in order to communicate requires necessarily the information to be conveyed to the person for whom it is meant. It is only after receipt of this information that the question to pay a ransom would arise.[49]

'To Pay a Ransom'

On the failure on the part of the prosecution to prove that the letters demanding payment of ransom emanated from the accused or were sent at the behest of the accused, the accused cannot be convicted for kidnapping for ransom under s 364A .[50] It is important to know what do the words 'to pay a ransom' stand for. Does it mean that kidnapping or abduction with the intention to demand ransom is sufficient to cover the prosecution case under s 364A or such a demand has to be translated into action by communicating the demand either by post or by contact.[51] To pay a ransom, in the ordinary sense means to pay the price or demand for ransom. This would show that the demand has to be communicated. It is not necessary for the prosecution to establish the offence under s 364A of IPC that the abductors have actually extorted some ransom and not fulfilling the demand of ransom had resulted in the death of the abductee. But the prosecution has to prove that the abductee was kept in detention and that the abductor threatens to cause death or hurt in order to extort ransom and communicates that demand for ransom.[52]

Where the accused has demanded ransom for return of the child kidnapped, s 364A, IPC has clear application.[53]

'To pay' means to set in motion the demand for payment. Demand cannot be by keeping the letter in one's pocket. It has to be communicated to the person from whom the demand to pay is made. Unless that is done, prosecution cannot succeed in covering its case under s 364A IPC .[54] 'To pay a ransom' means demand which requires communication by the kidnapper on the family of the kidnapped. Unless it is established 'to pay a ransom' cannot be inferred.[55] Thus, when the accused did not post the letter containing demand of ransom after kidnapping the child, nor the3027 accused personally contacted the family of that child, he was held to have not raised the demand to pay a ransom.[56] In another case,[57] where the demand for ransom by the accused from the uncle of kidnapped child was not established, the prosecution theory of ransom was found not proved despite the fact that kidnapping of boy by the accused was proved.[58] However, when the communication of demand of ransom to the family of kidnapped child is established, the accused is liable to be convicted.[59] In the instant case, the father of the minor kidnapped had received 89 calls from the kidnappers for payment of ransom and was told that if ransom was not paid his son would be killed; the conviction of the accused appellant was sustained.[60]

Accused appellant was prosecuted on allegations that he had been removed from service by the mother of the kidnapped children and hence, he abducted the minor children. There was no evidence on record to establish that infuriated by his removal from service and non-payment of dues, the appellant master-minded the plot to abduct the children or played any active role in abducting them. If a telephone call was received making ransom demand and making grievance about alleged ill-treatment of the appellant, the police should have traced the calls and identified the caller. Suspicion, however, grave, cannot take the place of proof. The conviction of the accused appellant for offence under s 364A, IPC was not justified and therefore, was set aside.[61]

Where a child returning from school was kidnapped by two accused persons, the father of the child received telephone call and paid ransom amount at the appointed place, child was recovered from the custody of one accused, the kidnapped child disclosed information of co-accused also, both the accused persons were convicted for offence under s 364, IPC .[62]

6. 'To Compel the Government or any Foreign State..... Any Act'

From the language of s 364A, IPC, it becomes crystal clear that this section is applicable only when the kidnapping for ransom, *etc.*, is done in order to compel the government or any foreign state or international inter-governmental organisation to do or abstain from doing any act.[63] When an individual person has been compelled to pay the ransom amount the offence under s 364A IPC is not made out at all.[64]

7. 'May' cannot be Raised to the Level of 'Must'

There may be cases when the court is left with the mere possibility amounting almost to certainty as to there being some motive for the entire exercise of kidnapping or abduction. However, what may be there cannot take the place of what is established by proof. 'May' cannot be raised to the level of 'Must', unless there is material warranting such conclusion.[65]3028

8. Admissibility of Ransom Note

The ransom note could not be compared with the writing of the accused during investigation while in custody as the same is not admissible under s 73 of the Indian Evidence Act and cannot be acted upon under s 45 of the Indian Evidence Act by an expert. When the admitted hand writing was never taken before the court seized of the matter, the comparison of the ransom note with the specimen taken in contravention of law would not be admissible in evidence.[66]

9. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and triable by the court of sessions.

10. Charge

The following form of charge may be adopted:

> I, (*name and office of the Sessions/Additional sessions judge*) hereby charge you (*particulars of the accused*) as follows:
>
> That on or about-day of-month of-year, you kidnapped (*or abducted*) or kept, (Particular of the victim) in detention after such kidnapping (*or abduction*), and threatened to cause death (*or hurt*), or caused death (*or caused hurt*) to such person in order to compel the Government or any Foreign state or International Inter-Governmental organisation or any other person to do or abstain from doing any act of (*particulars of the act*) or to pay a ransom, and you have thereby committed an offence punishable under section 364 -A, IPC and within the cognizance of this court of sessions.
>
> And I hereby direct that you be tried by this court on the said charge.

When no charge under s 364A, IPC, has been framed by the sessions court, the conviction of the accused for the said offence is not justified.[67]

11. Proof

In order to prove the offence under s 364A, IPC, the prosecution must establish that:

(a) the accused kidnapped or abducted any person; or
(b) the accused kept the person in detention after such kidnapping or abduction; and
(c) the accused threatened to cause death or hurt to that person; or
(d) the accused actually caused hurt or death that person in order to compel the government or any foreign state or international inter-governmental organisation;
(e) such kidnapping or abduction was for ransom.[68]

Once the person concerned has been shown as having been kidnapped, the onus would shift on the kidnapper to establish how and when the kidnapped individual came to be released from his custody. In the absence of any such proof produced by3029 the kidnapper, it would be natural to infer/presume, that the kidnapped person continued in the kidnapper's custody, till he was eliminated.[69]

Where the accused appellant along with other co-accused was alleged to have kidnapped niece of his brother-in-law, but there was no reliable evidence showing the involvement of the accused appellant, the maruti car recovered from the possession of the accused was not used in the kidnapping of the child, his conviction under s 364A, IPC was set aside.[70]

12. Acquittal

Accused persons had kidnapped the son of the complainant, had demanded rupees five lacs as ransom, threatened the safety of the kidnapped boy on telephone. A trap was laid, the accused were arrested and on the disclosure statement made by them, the kidnapped boy was recovered. The testimony of the father of the boy was believed. Non-examination of the independent witnesses was held immaterial. Accused persons were convicted under ss 120B and 364A, IPC .[71]

Where there was no evidence to show that the co-accused had instigated the appellant accused to kidnap the child, his acquittal did not entitle the appellant accused to be acquitted on charge of s 364A, IPC amply proved by prosecution evidence.[72]

13. Conviction

Appellant accused, Suman Sood, wife of the main accused kept the kidnapped person inside her house, supplied him food knowing fully that her husband and his companions had kidnapped the victim. Her conviction under ss 364A, 365, 346, 343 read with 120B, IPC was held proper.[73]

The evidence on record showed that in terms of the disclosure made by the accused the child was recovered. The accused came near the culvert and picked up the bag containing money. The prosecution case was that the place was indicated where the bag was to be kept. Adequate arrangements were worked out and the bag was put as indicated by the accused who came to collect the same. Conviction of the appellant accused under s 364A, IPC was held proper.[74]

Accused persons had kidnapped the son of the complainant, had demanded rupees five lacs as ransom, and threatened the safety of the kidnapped boy on telephone. Trap was laid, accused were arrested and on the disclosure statement made by them, the kidnapped boy was recovered. The testimony of the father of the boy was believed. Non-examination of the independent witnesses was held immaterial. Accused persons were convicted under ss 120B and 364A, IPC .[75]3030

In the instant case, it was duly proved that the victim had been kidnapped by the accused appellant; the accused appellant did not produce any material as to when he released the victim from his custody. The conviction of the accused appellant under s 364A, IPC was held proper.[76]

In the instant case, the deceased and his son were kidnapped for ransom and killed by the appellants accused. Recovery of dead bodies from covered gutters and personal belongings of the deceased from other places disclosed by the accused stood fully established. The conviction of the appellants accused for offences under s 364A, IPC was held proper.[77]

The kidnapped boy was got released by the police and the neighbours. Two of the accused persons who were found along with the kidnapped boy were arrested on the spot. There was also evidence of demand of ransom. The accused were convicted for offence under s 364A, IPC .[78]

14. Sentence

An offence under s 364A is punishable with death or imprisonment for life and shall be liable to fine. In the instant case, looking at the facts of the case, award of sentence of imprisonment for life and a fine of Rs. 500/- with default clause was held appropriate.[79]

41 Inserted by Criminal Law (Amendment) Act, 1993 (42 of 1993), s 2 (wef 22-5-1993).

42 Substituted for the words 'any other persons' by the Indian Penal Code (Amendment) Act, 1995 (24 of 1995) s 2 (wef 26-5-1995).

43 *Lohit Kaushal v State of Haryana* (2009) 17 SCC 106, 2009 (13) SCALE 15 .

44 *Balwant Singh & anor v State of Haryana* (2002) 2 RCR (Cri) 369 (P&H).

45 *Balindar Kumar v State of Madhya Pradesh* 2015 Cr LJ 1418, p 1421 (MP) (DB), 2015 (3) RCR (Criminal) 59 .

46 *Ibid.*

47 *Sunder v State by Inspector of Police* JT 2013 (2) SCC 483, AIR 2013 SC 777, (2013) 3 SCC 215 .

48 *Akram Khan v State of WB* (2012) 1 SCC 406, AIR 2012 SC 308, (2012) 109 AIC 133 (SC) .

49 *Netra Pal v State (NCT of Delhi)* (2001) Cr LJ 1669 (Del) .

50 *Pappu v State* (2005) Cr LJ 3380 (Del) (DB) .

51 *Netra Pal v State (NCT of Delhi)* (2001) Cr LJ 1669 (Del) .

52 *Balindar Kumar v State of Madhya Pradesh* 2015 Cr LJ 1418, p 1421 (MP) (DB), 2015 (3) RCR (Criminal) 59 . (Accused convicted under s 364A, IPC).

53 *P Liaquat Ali Khan v State of Andhra Pradesh* 2009 Cr LJ 3736, p 3736 (SC), AIR 2009 SC 2597, 2009 (6) Scale 113 ; *Akram Khan v State of WB* (2012) 1 SCC 406, AIR 2012 SC 308, (2012) 109 AIC 133 (SC) .

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*

58 *Mohammad Rashid Ansari v State* (1998) 2 CCR 608 (Bom) .

59 *Mohan v State of Tamil Nadu* (1998) SCC 336, (1998) Cr LJ 3276 (SC) .

60 *Akram Khan v State of WB* (2012) 1 SCC 406, AIR 2012 SC 308, (2012) 109 AIC 133 (SC) .

61 *Md Faizan Ahmad v State of Bihar* 2013 Cr LJ 1631, p 1634 (SC), 2013 AIR SCW 1286, (2013) 2 SCC 131 .

62 *Auab v State of Uttrakhand* 2013 Cr LJ 4310 (Utr), 2014 (1) NCC 750 .

63 *Balwant Singh & anor v State of Haryana* (2002) 2 RCR (Cri) 369 (P&H).

64 *Balwant Singh & anor v State of Haryana* (2002) 2 RCR (Cri) 369 (P&H).

65 *Mohammad Rashid Ansari v State* II (1998) CCR 608 (Bom) (DB); *Netra Pal v Delhi State (NCT of Delhi)* (2001) Cr LJ 1669 (Del) (D6).

66 *Devender Kumar v State* (2002) 3 SCC 1789 (Del) (DB).

67 *Balwant Singh & anor v State of Haryana* (2002) 2 RCR (Cri) (P&H) (DB).

68 *Akram Khan v State of WB* (2012) 1 SCC 406, AIR 2012 SC 308, (2012) 109 AIC 133 .

69 *Sunder v State by Inspector of Police* AIR 2013 SC 777, p 787, 788, (2013) 3 SCC 215 .

70 *Lohit Kaushal v State of Haryana* (2009) 17 SCC 106, 2009 (13) Scale 15 .

71 *Jaswinder Singh alias Kala v State of Punjab* 2012 Cr LJ (NOC) 46 (P&H).

72 *Vinod Kumar v State of Haryana* AIR 2015 SC 1032, p 1039, (2015) 3 SCC 138 .

73 *Suman Sood v State of Rajasthan* 2007 Cr LJ 4080 (SC), AIR 2007 SC 2774, (2007) 5 SCC 634, 2007 (7) Scale 312 .

74 *P Liaquat Ali Khan v State of Andhra Pradesh* 2009 Cr LJ 3736, p 3736 (SC), AIR 2009 SC 2597, 2009 (6) Scale 113 .

75 *Jaswinder Singh alias Kala v State of Punjab* 2012 Cr LJ (NOC) 46 (P&H).

76 *Sunder v State by Inspector of Police* AIR 2013 SC 777, p 787, 788, (2013) 3 SCC 215 .

77 *Suresh v State of Haryana* AIR 2015 SC 518, p 521, (2015) 2 SCC 227, 2015 Crlj 661, 2014 (4) Crimes 363 (SC) .

78 *Shivkumar v State of Gujarat* (2013) 3 Guj LR 2240 (Guj) .

79 *Balindar Kumar v State of Madhya Pradesh* 2015 Cr LJ 1418, p 1421 (MP) (DB), 2015 (3) RCR (Criminal) 59 . (Accused convicted under s 364A, IPC).

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

S. 365.

Kidnapping or abducting with intent secretly and wrongfully to confine person.--

Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

STATE AMENDMENT

Madhya Pradesh.--In its application to the State of Madhya Pradesh, in section 365, for the words "Magistrate of the First Class", substitute "Court of Session".[80]3031

Comments

1. Scope

The gravamen of the offence under this section is the intention to keep the wrongful confinement a secret.[81] When the motive behind kidnapping the victim was to confine him wrongfully for passing information to the army about the ULFA, the conduct of the accused clearly fells within the mischiefs of this section.[82]

The intention of the accused at the time of kidnapping or abduction can be deduced only from what they subsequently did.[83] Where a woman is forcibly dragged out of her house and kept locked up in a room in the house of the accused, an offence under this section is made out. The mere fact, that the house, where the woman is confined, is in the *abadi*, does not negative secret confinement.[84]

A child, who cannot walk on his own legs, can be the subject of wrongful confinement and so of this section also.[85] However, in case of kidnapping, a person, who cannot be convicted under s 363, cannot be convicted under this section.[86]

Even a person, who joins at a subsequent stage while the victim is being taken from place to place, would be guilty under this section.[87]

2. 'Kidnaps'

Sections 259, 360 and 361,*ante*, and commentary thereunder, may be referred to.

3. 'Abducts'

Commentary under s 362, *ante*, may be referred to.

4. 'Secretly and Wrongfully Confined'

It would be apparent from s 365, IPC, that this section enacts that kidnapping or abduction with intent to secretly and wrongfully confine a person is an offence. The gravamen of the offence under this section is the intention to keep the wrongful confinement a secret.

This section again embraces the offences of kidnapping as well as abduction and prescribes the punishment, for either or both, if committed with the particular intention of causing the person kidnapped or abducted to be secretly and wrongfully confined. Mere kidnapping or abduction without the particular intent is not punishable under this section.[88]

The intention must be to cause the kidnapped or abducted person to be confined not only wrongfully, but also secretly.[89]

If it is found that the kidnapped or abducted person was merely wrongfully confined, the case would fall under s 342, IPC, and not under this section.[90] Where,3032 however, a person is abducted in order that he might be held to ransom, there is always present the intent to cause the person abducted to be secretly and wrongfully confined and, therefore, the case would fall under this section as well as under the appropriate extortion section.[91]

5. Conduct of Accused

When the motive of kidnapping the victim was to confine him wrongfully for passing information to the army about the ULFA, the conduct of the accused clearly falls within the mischiefs of s 365, IPC .[92]

6. Common Intention

The accused who was driver of the car, after the sudden quarrel between occupants of the car and the petrol salesman drove away the car and even after the car got stuck in the ditch, no act whatsoever is attributed to this accused except for his trying to make good his escape on the arrival of police. There was no evidence on record to suggest that this accused along with other set out that morning in pursuance of a pre-arranged plan to commit any crime. There was no evidence of pre-concert of any kind. Merely because the said accused was in the company of the other accused persons and happened to be driving the vehicle at that time, he cannot be tied down by the fragile and unsafe threat of s 34, IPC, and sent to the gallows, especially when the others have got away unpunished.[93]

7. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

8. Subsequent Trial

Previous conviction of the accused for an offence under s 149, or s 452, IPC, is no bar to their subsequent trial under s 365 . In *Baldeo Prasad v Emperor* ,[94] it was held that when the case fell under s 235(1) [present s 220(1)] CrPC, and, therefore, having regard to s 403(2) [present s 300(2)] the previous trial was no bar to the subsequent prosecutor.

9. Jurisdiction

Section 181(2), CrPC, regulates jurisdiction for trial of any offence of kidnapping or abduction.

10. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc)* hereby charge you *(name of accused person*) as follows:

3033

> That you, on or about the.....day of....., at....., kidnapped (*or abducted*) one *AB*, with intent to cause the said *AB* to be secretly and wrongfully confined, and thereby committed an offence, punishable under s 365 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

11. Proof

In order to establish the offence under this section, the prosecution must prove that:

(1) the accused kidnapped or abducted a person; and
(2) he did so with intent to cause him secretly and wrongfully confined.

It must be clearly proved that at the time of kidnapping or abduction, the intention of accused was to cause the kidnapped or abducted person secretly and wrongfully confined.[1] The existence of an intention, like any other fact, may be inferred from the circumstances of the case and the subsequent conduct of the accused after the kidnapping or abduction has taken place.[2] The mere circumstances of a kidnapped girl, staying, in the accused's house, for a day or two, does not warrant the conclusion that she was wrongfully confined with the object of baffling any search that might be made for her.[3] Where the accused appellant was identified in the court, by the prosecution witness (Head Mistress of the School) who had sufficient conversation with the accused when the kidnapped child was given to the accused, holding of test identification parade was found not necessary.[4]

12. Acquittal

Though the main accused is liable to be convicted under s 365, IPC on account of consistent testimony of prosecutrix and eye-witness about abduction by the accused but when investigating officer has not put up co-accused at a test identification parade, mere nomination of co-accused by the prosecutrix at trial cannot be made a foundation of his conviction, so the co-accused is entitled to be acquitted on a charge under this section.[5] The accused who were related to victim child were charged with kidnapping. The three accused were acquitted by the trial court. In the absence of evidence or circumstances attributing prior knowledge of kidnapping, guilt under ss 365 and 368, IPC, cannot be fastened or the fourth accused and so he was also acquitted.[6]

13. Conviction

When there is consistent testimony of prosecutrix and eyewitness about abduction by the accused, the accused is liable to be convicted under s 365, IPC .[7] When the testimony of victim is corroborated by other witnesses, the prosecution evidence3034 showed that the victim was confined to a room, ignoring the delay of one day in recording FIR being not found fatal, the conviction of accused under s 365, IPC, was found proper.[8] In a case of kidnapping and murder based on circumstantial evidence, both the accused and deceased were last seen together, the testimony of witnesses was free from contradictions. Extra judicial confession made by the accused was proved by the prosecution, the conduct of accused before and after commission of offence was found inconsistent with the innocence of the accused. On these facts, discarding the fact that specimen handwriting of the accused did not match with the writing of letter demanding ransom, conviction of accused under ss 365 and 302, IPC, was found proper.[9]

Appellant accused, Suman Sood wife of the main accused kept the kidnapped person inside her house, supplied him food knowing fully that her husband and his companions had kidnapped the victim. Her conviction under ss 364A, 365, 346, 343 read with 120B, IPC was held proper.[10]

14. Probation

On account of gravity of offence under this section the benefit of probation under s 360, CrPC, cannot be extended to the accused.[11]

15. Sentence

The fact that the accused has mother, wife and children to support is no ground for leniency in awarding sentence. Human consideration is no ground for showing leniency to the perpetrator of the crime against the organised, civilised society, which is abhorrent to the concept of rule of law. The offence of kidnapping in any form imposes upon human rights and right to life enshrined in art 21 of the Constitution . Such acts not only strike a terror in the mind of the people but have deleterious effects on the civilised society and have to be condemned by imposing deterrent punishment.[12] When motive behind kidnapping the victim was that he was being accused for giving information to the Army about ULFA, the sentence of five years rigorous imprisonment awarded to accused though found lenient was still confirmed.[13]

However, where the appellant had taken an active part in abducting and torturing the complainant and had demanded ransom, it was held that there was no ground to reduce the sentence of three years rigorous imprisonment.[14]

Where the accused abducted a woman merely in order to put pressure upon her friends to restore another young girl, whom they had abducted, and this object was achieved by the abduction and no harm was done to the woman abducted, it was held3035 that under these circumstances, a heavy sentence was not called for.[15] Where the girl abducted is of easy virtues and is perhaps not averse to what is happening to her, ends of justice would be satisfied by reducing the sentence to the period of imprisonment already undergone by the accused.[16] When the accused are men of respectable position, it is not necessary to keep them in prison for so long a period as three years. A short term imprisonment will do.[17]

16. Alteration of Conviction from Section 342 to Section 365

Where the accused has been charged under this section, but has been convicted by the trial court under s 342, IPC, the appellate court can alter the conviction to one under this section without altering the sentence imposed by the trial court.[18]

17. Alteration of Conviction from Sections 366 and 376 to Section 365

An offence under s 365, IPC, within the meaning of s 222, CrPC 1973, being a minor offence, as

compared with offences under s 366 and s 376, IPC, an accused can be convicted of the former offence without a formal charge having been framed.[19]

18. Alteration of Conviction from Sections 366A and 372 to Section 365

Before convicting a person under ss 366A and 372, IPC, it has to be conclusively proved that the victim was below 18 year of age on the date of occurrence. There is no specific provision in the IPC which makes kidnapping or abduction for the purpose of sale as a prostitute an offence if the subject is above 18 years of age. Thus, in a strange case where though it was proved that the victim was abducted and then sold to a brother house where she was used for the purpose of prostitution but on account of age of the prosecutrix not being below 18 years, the conviction of the accused was altered from s 366A and s 372, IPC to s 365 IPC .[20]

80 Madhya Pradesh Act 2 of 2008, s 4 .

81 *Samir Saha and anor v State of Tripura* 1998 Cr LJ 1360 (Gau) .

82 *Tarun Bora alias Alok Hazarika v State of Assam* 2002 Cr LJ 4076 (SC) .

83 *Ghungru v Emperor* AIR 1936 All 360, 361, 37 Cr LJ 827; *Bahadur Ali v Emperor* 1923 Lah 158, 160, 24 Cr LJ 622 .

84 *Roshan v State* AIR 1954 All 51, p 52, 1954 Cr LJ 46 .

85 *Mahendra Nath Chakravarty v Emperor* ILR 62 Cal 629, 39 CWN 396 ; *Madhab Chandra Charchari v Nalini Manna* AIR 1964 Cal 286, (1964) 2 Cr LJ 20 .

86 *Kan Kanwari v State of Rajasthan* (1957) Cr LJ 688 .

87 *Ramdayal v State of Rajasthan* (1975) WLN 362 .

88 Re *Amsami Goundan*AIR 1959 Mad 274 ; *Sheoraj Singh v State* AIR 1967 All 528 ; **see also***Bhagwat v State* (1971) Cr LJ 1222, p 1223 (All) .

89 *Akbar Ali v Emperor* 1925 Lah 614 .

90 *Akbar Ali v Emperor* 1925 Lah 614 ; *Indar Singh v Emperor* 29 Cr LJ 597, p 598 .

91 *Po Lan v Emperor* 14 Cr LJ 167, p 169 ; *Bahadur Ali v Emperor* 1923 Lah 158, p 160, 24 Cr LJ 622 .

92 *Tarun Bora alias Alok Hazarika v State of Assam* (2002) Cr LJ 4076 (SC) .

93 *Brahmjit Singh and anor v State* (1991) Crimes 673 (Del), (1992) Cr LJ 408 (Del) .

94 *Baldeo Prasad v Emperor* 3 ALJR 2, 3 Cr LJ 93 .

1 *Baharuddin Mandal v Emperor* 15 Cr LJ 43 (2), 46.

2 *Ram Singh Har Narain v State of Madhya Bharat* AIR 1944 MB 97, p 100, (1954) MBLJ 462 ; **see also***Prem Shankar v State* (1977) All Cr R 273 .

3 *Emperor v Mangroo* 6 NWP (HCR) 293 .

4 *Jyoti v State of Punjab* 2015 Cr LJ 2024 (P&H) .

5 *Ram Chandan and anor v State of Uttar Pradesh* (1998) Cr LJ 3368 (All) .

6 *Tikam v State of Uttar Pradesh* (1992) Cr LJ 1381 (All) .

7 *Ram Chandan and anor v State of Uttar Pradesh* (1998) Cr LJ 3368 (All) .

8 *Samir Saha and anor v State of Tripura* (1998) Cr LJ 1360 (Gau) .

9 *Latik Kumar v State* (1997) Cr LJ 848 (Delhi) (DB) .

10 *Suman Sood v State of Rajasthan* 2007 Cr LJ 4080 (SC), AIR 2007 SC 2774, (2007) 5 SCC 634, 2007 (7) Scale 312 .

11 *Ibid.*

12 *Tarun Bora alias Alok Hazarika v State of Assam* (2002) Cr LJ 4076 (SC) .

13 *Ibid.*

14 *Ranchhod v State of Madhya Pradesh* AIR 1979 SC 1493, p 1494 .

15 *Waris v Emperor* 1916 Lah 269, 17 Cr LJ 472 .

16 *Laiq Singh v State of Uttar Pradesh* (1970) Cr LJ 741, AIR 1970 SC 658 .

17 *Ghungru v Emperor* AIR 1936 All 360, 37 Cr LJ 827 .

18 *Roshan v State* AIR 1954 All 51, p 52, (1954) Cr LJ 46 .

19 *Empress v Sitanath Mandal* ILR 22 Cal 1006 ; *Ram Singh Har Narain v State of Madhya Bharat* AIR 1954 MB 97, p 101, (1954) MBLJ 462 .

20 *Shaik Ramjan v State* (1999) Cr LJ 2161 (AP) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

S. 366.

Kidnapping, abducting or inducing woman to compel her marriage, etc.--

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [21][and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person, shall also be punishable as aforesaid].3036

Comments

1. Scope and Applicability

This section, which deals with kidnapping and abduction with the intention or knowledge of forcibly marrying a woman or forcing or seducing her to illicit intercourse,[22] is an aggravated form of the offence punishable under s 364 .[23]

In the case of abduction, this section would apply where the woman, at the time of her abduction, had no intention of being married or to be put to illicit intercourse which, the offender contemplated, was to be

brought about afterwards by force or seduction.[24]

In the case of kidnapping, if the object of the offender is that which is specified in this section, the consent of the minor girl does not affect the commission of the offence thought that may be a consideration under the question of sentence.[25] In *Emperor v Safdar Reza* ,[26] it has been held that the offence, dealt with in s 366, IPC, is merely an aggravated form of the offence, created by s 363, IPC, and it would, therefore seem to follow that when the matter under consideration, in relation to s 366, is the seduction to illicit intercourse of a girl under 18 years of age, her consent or intention would be just as immaterial as it would be in connection with the offence dealt with under s 363, the object of this section being also to protect the girls themselves and to prevent persons taking improper advantage of their youth and inexperience. The fact that the girl, at the time when she was enticed away from her3037 home by the accused, had the intention of having illicit intercourse with him, is no defence to a charge under s 366 .

The offence under this section being only an aggravated form of the offence under s 363, the same person cannot be convicted on the same facts under both the sections.[27]

In the absence of a finding to the effect that the accused had abducted the victim for any of the purposes mentioned in s 366, a charge under s 366, IPC, cannot be sustained on the mere finding that the accused had abducted the victim.[28] If a husband, by force, compels his wife to come to him for living as wife, he commits no offence under this section[29] even if he might have earlier turned her out, but not divorced her, and even if she might have started living with another man on the pretext that she has married him.[30]

Where a girl kidnapped by a person from her lawful guardianship and another person, who was no party to that kidnapping, takes the girl away for illicit intercourse, the latter person cannot be convicted under this section.[31] Similarly, a person, joining the accused at a subsequent stage, cannot be held guilty of an offence under this section if he was not associated with him from the very beginning.[32]

A man committing sexual intercourse with a minor girl in a field near her own home without having any intention of taking her away with him, is not guilty of an offence under s 366 though he may be held guilty of the offence of rape even if the sexual intercourse may have been committed with her consent.[33] Where the offence of rape was committed by a father on her own minor daughter in his own home, it was held that no charge under this section could survive.[34] It was held, in *Emperor v Sakhanam Jan* ,[35] that the offences under ss 366 and 376 are distinct offences and it is not competent to a judge, in an appeal, to alter a charge under s 376 to one under s 36 because a charge under s 366 involves different elements and different questions of fact from a charge under s 376 .

2. Section 366 Distinguished from Section 498

Section 366 applies to cases where, at the time of her abduction, the woman has no intention of marriage or illicit intercourse, but it is evident that the intention of the abductor was to compel her afterwards to marry any person against her will or to force or seduce her afterwards to illicit intercourse, whereas to constitute an offence under s 498, IPC, the ingredients of compulsion or deceit need not be there and further s 498 applies to cases where the object of taking or enticing is that the woman may have illicit intercourse with some other person even though, as generally3038 happens she is quite aware of the purpose for which she is quitting her husband and is an assenting party to it.[36]

3. Sections 366 and 366A --Distinction

When the language of s 366A is contrasted with the language of s 366, it is clear that s 366A will be attracted only when the accused induces a minor girl to go from any place with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person, meaning thereby with a person other than accused.[37]Section 366, IPC, is an aggravated form of the offence under s 363 . For proving the offence under s 366, IPC, it must be proved by the prosecution that the girl may be forced or seduced to illicit intercourse or knowing to be likely that she will be forced or seduced to illicit intercourse. However, for proving the offence under s 366A, IPC, the prosecution has to

prove that the girl was kidnapped with the intention that she will be forced or seduced to illicit intercourse with another person.[38]

4. *Jati Panchayat,* Customs, Traditions and Dignity of Woman

Jati panchayats are guided by caste taboos. The *jati panchayat* gives verdict against women for breaking caste-taboos and directs barbarous punishments. The members of assembly abet and become executors. The perpetrators of the crime do not allow the law to take its course. Public opinion is sought to be formed in favour of the caste taboos and against the women resulting into punishment of victim and protection of criminals. Anti-social people, criminals and law brokers with the help of muscle power and money enters in such *jati panchayats* and exploit the situation for their benefit, monetary or otherwise. If such cases are closely analysed, the act constitutes an offence of kidnapping for ransom, *etc*, punishable under s 364A, IPC . People do not have the courage to stand against the caste *panchayat*. Even the so called social or political workers play their role under the pressure of *jati panchayat* for the sake of votes at all levels, ie, election of the *Gram Panchayat,* Assembly or Parliament. Academicians also play role misdirecting the issue by asking a debate on personal law or customs. Arguments are advanced that these are social problems and will vanish with economic development. It is well settled that the customs or traditions in conflict with the basic rights of citizens, cannot be given preference. Sometimes the protection of such customs and traditions are given in the name of freedom of religion without under standing that it is not absolute. It is subject to public order, morality and health and other provisions of the Constitution, which includes the gender equality and right of women to make a choice about her personal life. In the case of rape, the physical integrity of a woman is destroyed. No amount of justifications under religious texts and their purported interpretation can justify an inhuman action. The basic principle of justice in the civilised society is that a person committing crime is punished and not the victim. Indeed, the victim is compensated and rehabilitated. Apart from the fundamental right of a woman of right to life, to live with dignity free from cruel degrading treatment, there is also a duty cast on every citizen by art 51(e) of the Constitution to renounce practices derogatory to the dignity of women. It must be realised that the security of a woman is essentially a3039 law and order problem, which is a state subject. In discharge of its constitutional obligation, the state cannot take plea of helplessness in the name of tradition.[39]

5. Ingredients

The first of the section requires:

(1) kidnapping, or abduction, of any woman;
(2)
  (a) with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will; or
  (b) in order that she may be forced, or seduced, or knowing it to be likely that she will be forced, or seduced, to illicit intercourse.

The second part of the section requires:

(1) inducing, by means of criminal intimidation or of abuse of authority or any other method of compulsion, any woman to go from any place;
(2) with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person.

What the first part of the section requires is kidnapping or abduction. If the girl is 18 or over, she can only be abducted and not kidnapped; if, however, she is under 18, she can be kidnapped as well as abducted.[40] It may be noted that the second part of the section does not require kidnapping, as defined in

s 360 or s 361, or abduction, as defined in s 362 ; it requires that a woman should be induced, by intimidation or abuse of authority or any other method of compulsion, to go from a place with the same intent as in (2) (b) of the ingredients of the first part of the section mentioned above.

To prove an offence of abduction, under the first part of the section, in respect of a major woman, two ingredients must be established, namely:

(i) she was abducted; and
(ii) she was abducted with the intention of compelling her to marry any person against her will or in order that she may be forced or seduced to illicit sexual intercourse.

In other words, for an offence under s 366, IPC, abduction, by itself, is not sufficient; in the absence of evidence that the accused abducted the woman with the intention or knowledge, specified in the section, a conviction under s 366 cannot be sustained.[41] Similarly, where the first ingredients of abduction itself is not proved, the allegation, that the prosecutrix was forced to sexual intercourse with particular persons, would carry no weight to prove an offence under s 366 .[42]

Unless it is established that the abduction was for the purposes specified in s 366, IPC, the accused cannot be convicted under s 366, IPC ; mere abduction by the accused does not establish charge under s 366, IPC .[43]3040

For a prosecution for an offence under this section, it is not necessary that the woman kidnapped or abducted was already married. Such a question is relevant only in a prosecution for an offence under s 497 or s 498 .[44] If, in the case of kidnapping of a minor girl, the ingredients of an offence under s 363, IPC, are proved along with the intention or knowledge that the girl might be compelled to marry against her will, a charge under s 366, IPC, is established.[45]

To constitute offence under s 366, IPC, it is not necessary that the woman abducted should be subjected to sexual intercourse, mere intention to do it or even the knowledge that it is likely that she would be subjected to illicit intercourse, is sufficient.[46]

6. 'Kidnaps'

Commentary under ss 359, 360 and 361, *ante*, may be referred to.

7. 'Abducts'

Commentary under s 362, *ante*, may be referred to.

8. 'Women'

Under s 10 of this Code, the word 'woman' denotes a female human being of any age.[47] So, even a minor female is a 'woman',[48] and it is not necessary that she should be a virgin.[49]

9. Custody of Victim Girl

When the girl attains the age of majority as per law, she is at liberty to live anywhere she likes and there shall be no necessity for the court to pass any order for the stay in a particular place unless she applies for protection. However, when the victim girl is a minor, *i.e.* below 18 years of age, her custody cannot be given to accused against whom an offence under s 366, IPC, for kidnapping the victim, is alleged.[50]

10. 'With Intent'

The intention of the accused is the gravamen of an offence under this section. If an accused kidnaps or abducts a woman with the necessary intent, the offence is complete, whether or not the accused succeeds in effecting his purpose, or even if the woman has, in fact, consented to the marriage or the illicit intercourse taking place.[51] In the absence of the intention, specified in the section, the accused cannot be held guilty under it, however reprehensible his conduct may be.[52] It may be noted that the first part of the section itself specifies two alternative intentions, either of which is3041 sufficient to constitute the offence. It is only when the intention of either marrying the woman against her will, or of forcing her to subject herself to illicit intercourse, is proved that abduction becomes an offence under this section. Otherwise, the mere act of assault and outraging the modesty of a woman is covered by s 354, and not by this section.[53]

Ordinarily speaking, when a body of person is alleged to have abducted a girl with the intention of compelling her to marry one of the abductors or a stranger, it is reasonable to suppose that the abductors, apart from the abductor with whom the girl is being compelled to marry, would not have the intention of seducing her to illicit sexual intercourse. Even if one of the accused asks the girl to have sexual intercourse with him after the abduction, it does not follow that, at the time of abduction, he had the intention of seducing her to illicit intercourse.[54]

The question of intent is a pure question of fact.[55] Each case turns on its own facts. Therefore, before an accused can be convicted of an offence under the first part of this section, the court must be satisfied, as a matter of fact, upon the evidence that the accused, when he kidnapped or abducted the woman, whatever her age might be, did so with intent to compel her, or knowing it to be likely that she would be compelled, to marry against her will, that is to say, in spite of her opposition, and unless such an intent is proved, the accused is entitled to be acquitted.[56] However if, whenever the marriage was talked of, the woman's consent was asked for, it cannot be said that the intention was to compel her to marry against her will.[57]

11. Inference of Intention

Direct proof of intention is not always possible. It can be inferred from the facts and circumstances of each case.[58] It is impossible for the prosecution to establish the intention except by proving the conduct of the accused.[59] Where the intention of the accused was not only to persuade the girl abducted to change her mind to accept him as her groom but also to marry her, her refusal notwithstanding, it was held that there could be no other conclusion than this that his intention was to compel her to marry or, if opportunity permitted, to marry her forcibly and, therefore, he would be guilty under this section.[60]

However, if the girl's consent has already been sought, it cannot be said that the intention of the accused was to compel her to marry.[61]

It is difficult to visualise that the accused had asked the prosecutrix to have sexual intercourse with her in the presence of her 11 years old child, and that further, the3042 accused had allowed her to easily slip out of his hands from the lodge, if that was his intention.[62]

12. 'Or Knowing it to be Likely'

This simply means with intent implied in law.

Commentary under s 39, IPC, vol 1, may be referred to.

13. 'Against her Will'

The 'will', mentioned in this expression in the first part of this section, means the 'will' of the victim girl, and not of her guardian.[63] The consent of the guardian in the case of a minor girl is relevant in kidnapping, punishable under s 363, but that should not be confused with an offence under this section which requires an intent to compel a woman to marry a person against her will.[64]

When a minor girl had known the accused who was her neighbour for quite some time and had gone with him to Meerut and other places for eight days voluntarily but did not complaint of her alleged kidnapping by accused to anyone, the conviction of accused under s 366, IPC, was set aside.[65] Where the victim minor girl had visited a number of places but had not raised any protest, her conduct showed that she was a consenting party; the accused was acquitted of the charges under ss 366 and 376, IPC .[66] Where the prosecutrix was major, she along with the accused lived in a rented house for a period of sixty eight days from the date of alleged abduction. She did not raise alarm or protest during this long period. The prosecutrix was held a consenting party. The conviction of the accused under ss 366 and 376, IPC was set aside.[67]

Where the medical evidence showed that the victim girl was aged 18/19 years at the time of the occurrence, no injuries were found on her body, the evidence showed that the victim girl had eloped voluntarily with the accused, acquittal of the accused for offence under s 366A, IPC was held proper.[68]

Where the victim girl deposed before the court that the accused appellant had put vermilion or her head, also had photographs with her, she was treated well, even given food, she did not raise any protest when she had opportunity to react with the ladies of the house where she stayed, held the victim girl was not kidnapped, the accused was acquitted.[69]3043

In a case, the mother-in-law, abducting her daughter-in-law and compelling her to marry against her will, was held guilty of the offence under this section.[70]

14. 'To Marry'

In s 366, the expression 'to marry' implies, as in s 494 of this Code, going through a form of marriage, whether the same is, in fact, valid or not.[71]

15. Constitutional Right of Adults to Love and Marry

Article 19(1) (a), (b) and (c) of the Constitution of India reads as follow:

19. Protection of certain rights regarding freedom of speech *etc.*--(1) (1) All citizens shall have the right--

(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) .....
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India;

...

From a conjoint in depth reading of the aforementioned article it is clear that the Constitution guarantees its citizens freedom of expression, who can meet peaceably without arms, and move freely, reside and settle throughout the country.

Article 21 of the Constitution of India reads as follows--

> **21. Protection of life and personal liberty--**No person shall be deprived of his life or personal liberty except according to procedure established by law.

Its bare perusal shows that life and liberty of accused and prosecutrix both stand guaranteed except according to the procedure established by law. When both are adults the law does not prohibit them to love each other. They have a right to live with dignity and honour and make their life meaningful. In *Kharak Singh v State of Uttar Pradesh* ,[72]*Gobind v State of Madhya Pradesh* [73] and *PUCL v Union of India* ,[74] it was held that art 21 guarantees the right to privacy.[75]

16. 'Forced'

'Forced' implies not merely physical force, but also the force of circumstances. For instance, a girl, who has been kidnapped from her father's house, may be placed in such circumstances that she has no option but to submit to illicit intercourse. The word 'forced', as used in s 366, IPC, is used in its ordinary dictionary sense which would include forced by stress of circumstances.[76] If a woman voluntarily surrenders herself and her chastity to the accused and voluntarily follows him from village to village, no offence of abduction under this section can be said to have been3044 committed in view of her consent.[77] This section does not apply if the girl, at the time of kidnapping or abduction, intends to cohabit of her own free will with the kidnapper or abductor.[78]

17. 'Seduced'

Etymologically, the word 'seduction' is derived from two Latin words '*se*' which means away, and '*duco*', which means to lead, and together they mean to lead away or to draw away. The term 'seduction', therefore, implies that the woman is led away or is induced when the girl is drawn away from the virtuous course and then made to yield her chastity. However, where the deviation on the part of the girl is the result of the promptings of her own inclinations and she herself permits or encourages improper sexual relations, as opportunity comes her away, without the aid of any artifice or will on the part of the man, there is no seduction.[79]

'Seduced', in this section, is not used in the narrow sense of inducing a girl to part with her virtue for the first time; it includes subsequent seduction for further acts of illicit intercourse. The words 'seduced to illicit intercourse' do not refer to the first act of seduction only when she is lured into surrendering her chastity.[80] In *Pessumal v Emperor* ,[81] it was held that the word 'seduction' was not to be confined to the first connection with an unmarried girl. When a man has induced a girl, while in the custody of her parents, to surrender her chastity to him and has thereafter induced her to leave the protection of her parents and live with him in a condition of concubinage, not sanctioned by law, he commits an offence under s 366 . Every time a woman surrenders herself to lover, whether it is the first or the twentieth time, there is a seduction.

In *Krishna Maharana v Emperor* ,[82] it was held that a person may be guilty of kidnapping a girl for the purpose of seducing her to illicit intercourse even *though he also had such intercourse prior to the kidnapping.*[83] Following *Lakshman Bala v Emperor* ,[84] it has been held, in *State v Gopichand Fattumal* ,[85] that it is true that in its ordinary sense, it may have the same meaning as inducing, but, then, in conjunction with illicit intercourse, the word 'seduced' seems to be more appropriate than the word 'induced'. The word is used in the ordinary sense of enticing or tempting, irrespective of whether the girl has been previously compelled, or she has previously3045 submitted, to illicit intercourse. The Calcutta High Court has also held that the expression 'seduced to illicit intercourse' means induced to surrender. It is not restricted to inducing a girl to surrender her chastity for the first time; it covers the case in which the girl, having surrendered her virtue in the past, had returned to a life of purity at the time of the kidnapping.[86] The Orissa,[87] Assam,[88] Andhra Pradesh,[89] and Madras,[90] High Courts have also accepted the same line of reasoning. The Supreme Court,[91] upholding the above wide view, observed thus:

> Seduction implies surrender of her body by a woman, who is otherwise reluctant or unwilling to submit herself to illicit intercourse, in consequence of persuasion, flattery, blandishment or importunity, whether such surrender is for the first time or is preceded by similar surrenders on earlier occasions. However, where a woman offers herself for intercourse for money not casually, but in the course of her profession as a prostitute, there are no scruples nor

reluctance to be overcome, and surrender by her is not seduction within the Code. It would, then, be impossible to hold that a person, who instigates another to assist a woman, following the profession of prostitute, abets him to do an act with intent that she may, or with knowledge that she will, be seduced to illicit intercourse.

18. 'Illicit Intercourse'

The words 'illicit intercourse' means the sexual intercourse between a man and a woman who are not husband and wife.[92] A wife may be chaste and may be seduced, that is to say, induced to surrender her chastity, by some man other than her husband. Therefore, 'seduced to illicit intercourse', in s 366, cannot be intended to be restricted to inducing a girl to surrender her chastity for the first time.[93]

19. 'By Means of Criminal Intimidation'

'Criminal intimidation' is defined, in s 503, thus ' Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one, in whom that person is interested, with intent, to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.'

For abduction, as defined in s 362, a person has to be compelled 'by force' or induced by 'any deceitful means' to go from any place. However, under the second part of this section, the compulsion to go may be by means of 'criminal intimidation or of abuse of authority or any other method of compulsion'. The compulsion need not be by force alone. But to convict a person under the said part, it is essential that he is found to have practised some criminal intimidation or employed any other method of compulsion. If the woman goes with a person willingly and without3046

anybody exercising any compulsion on her, no offence under this section is made out.[1] Where *A,* a procuress, induced *B,* a married woman, aged 20, to leave her husband and become a prostitute in Calcutta and *B* made a deliberate choice to do so and left her husband, it was held that *A* had committed no offence under this section.[2]

20. Age of Prosecutrix

The finding of the age of the prosecutrix being 16 years by the medical witness was primarily based on the x-ray report read with existence of eruption of 28 permanent teeth. The estimation of age from the teeth by noting the number and position of teeth and with x-ray examination with some amount of certainty is possible up to 17 to 20 years of age and beyond that it is merely guesswork. Third molar teeth which are six in number erupt between the age group of 17 to 25 years. In this case four 'third molars' teeth had not so far erupted in case of the prosecutrix on the date of her examination and the fusion of the epiphysis of her iliac crest had not yet started. As per *Modi's Medical Jurisprudence and Toxicology,* crest of iliac appears at the age of 14 and its fusion starts between the age of 17 to 19. Medical jurisprudence aforesaid further reveals that distal end of ulna appears between age of 8 to 10 while its fusion in case of female starts at the age of 17. Therefore, the finding of the medical witness in view of the radiological report appears to be well founded and there should be no hesitation to come to the finding that prosecutrix was a woman under 18 years of age on the date of the occurrence.[3] See commentary under s 361, *ante*.

Where the victim is below 18 years of age, her consent is immaterial.[4]

The entries in school register by the Head Master of the School and certificate of birth issued by Municipality showed that the prosecutrix was aged about 14 years and was not major on the date of the incident. Both these documents were *ante litem motam*. Documents made *ante litem* can be relied upon safely, when such documents are admissible under s 35, of the Indian Evidence Act. Accused appellant was convicted under ss 366 and 376, IPC .[5]

Normally for various reasons, the guardians do understate the age of their children at the time of admission in school.[6]

Age of Prosecutrix Based on Unproved Marksheet

Where the mark sheet showing the age of the victim below 18 years was neither filed along with the challan by the prosecution nor it was exhibited by the prosecution, the finding of trial court that age of victim was below 18 years based on the said marks sheet, is not sustainable.[7]

Unreliable Evidence of Prosecutrix as to Age

Where the evidence of the father of the girl showing that the age of the girl on date of the incident was around 19 years, the physique of the girl as explained by the doctor indicated the probability of that girl being above the age of 18 years, the evidence of3047 the girl in such background appeared to be wholly unreliable when she stated that she was only about 14 years old.[8]

21. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of sessions.

22. Judicial Restraint while Dealing with Judgments of Lower Courts

The Apex Court has, time and again, advised the courts below to be extra careful in commenting upon the judicial conduct of the members of the judiciary. The adage 'to err is human' must always be borne in mind and this understanding must percolate down to the appellate and the trial courts.[9] For further commentary, see under same heading in s 302, *ante*.

23. Jurisdiction

When the prosecutrix is kidnapped from place '*A*' and taken to place '*B*' with intent to commit sexual intercourse, the act of kidnapping and that of rape formed part of same transaction, so by virtue of s 220, CrPC, both courts at place '*A*' and '*B*' would have jurisdiction to try offences under ss 366, 376, IPC .[10] The offences of kidnapping and rape are not only so interconnected as to cause and effect but also that the series of acts are so connected as to form part of the same transaction within the meaning of s 223(d), CrPC . Thus, when the offence of kidnapping was completed when the prosecutrix was kidnapped with the intention that she may be forced or seduced to illicit intercourse at place '*N*' and the purpose of kidnapping was achieved at place '*I*', the offences in question being connected together as to form part of same transaction within the meaning of s 223(d), CrPC, the accused person can be tried at place '*N*'.[11] See s 181(2), CrPC .[12]

24. Charge

The following form of the charge may be adopted:

I (*name and office of session judge, etc*.) hereby charged you (*name of accused person*) as follows:

That, on or about the.....day of...., at....., you kidnapped (*or abducted*) *AB*, a woman, with intent (*or knowing it to be likely*) that she might be compelled to marry any person against her will (*or in order* (*or knowing it to be likely*) that she might be forced (*or seduced*) *to illicit intercourse*) (or you induced *AB*, a woman, by means of criminal

intimidation (*or by means of abuse of authority*) or by any other method, to go from any place with intent (*or knowing it to be likely*) that she might be forced (*or seduced*) to illicit intercourse with another man), and thereby committed an offence, punishable under s 366 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charged.

Kidnapping and abduction are two distinct offences though they are punishable under the same section.[13] If it is desired to charge the accused with both the offences,3048 separate charges, and not one framed in the alternative in respect of both the offences, should be framed because the accused is entitled to know as to which of the charges he is asked to meet.[14] If there is only one charged framed in the alternative in respect of both the offences, the result would be that it cannot be ascertained for which the accused has been convicted.[15]

25. Evidence not Worth Believing

It is difficult to believe that the prosecutrix who is a mature lady married for 10 years would be made to walk from her place of residence to the other village and she would not raise any hue and cry apart from the fact that her husband who was sleeping with her had woken up and yet the accused had forcibly taken the prosecutrix away from her house. The husband in natural course of conduct would have resisted her wife being taken away forcibly. If he had some handicap because of being single, he would have certainly raised alarm and called the other persons. The place from where the prosecutrix was taken away, as referred in the FIR on one hand and stated in the evidence of the prosecutrix on the other, raises a grave doubt about the happening of the incident as alleged by the prosecution.[16]

26. Proof

Prove:

(1) for an offence under the first part of this section, that:

(a) the accused kidnapped, or abducted, a woman; and
(b) he did so with the intent, or knowledge of likelihood, of her being:

(i) compelled to marry any person against her will, or
(ii) forced, or seduced, to illicit intercourse;

(2) for an offence under the second part of this section, that:

(a) the accused induced, by means of criminal intimidation, or abuse of authority, or any other method of compulsion, a woman to go from any place; and
(b) he did so with the intent that she may be, or knowing it to be likely that she will be, forced, or seduced, to illicit intercourse with another person.
(c) to constitute an offence under s 366, IPC, it is necessary for the prosecution to prove that the accused induced the complainant-woman or compelled by force to go from any place, that such inducement was by deceitful means, that such abduction took place with the intent that the complainant may be seduced to illicit intercourse and/or

that the accused knew it to be likely that the complainant may be seduced to illicit intercourse as a result of her abduction. Mere abduction does not bring an accused under the ambit of this penal section.[17]

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In a case of abduction and rape, conviction of the accused can be based entirely on the statement of a rape victim.[18]

27. Acquittal

In the absence of any evidence to prove the offence of abduction, simply because it is alleged that the accused committed rape, that does not necessarily mean that the prosecutrix was abducted by the accused. The conviction of the accused under s 366 was set aside.[19] Where the accused promised to marry the victim who was a major and voluntary party having followed path paved by the accused, there was absence of evidence on record showing compulsion on the part of accused, the conviction of accused under s 366, IPC, was found not proper and so was set aside.[20] Where the prosecution case was that the appellant accused kidnapped a 12 year old girl, raped her, committed her murder and threw her dead body in the bushes, the evidence of last seen was found not reliable, the identity of the appellant accused was not fully established, the appellant accused was not convicted of offences under ss 363, 376, 302 and 201, IPC .[21] Where the testimony of the prosecutrix does not inspire confidence, the conviction of the accused for kidnapping her cannot be based on her false testimony.[22] Accused appellant was prosecuted on allegations that he along with other accused persons abducted the prosecutrix and committed rape on her. Accused was not named in FIR. The mother and the sister were present at the time of abduction; the most important witnesses were not examined by the prosecution. The prosecutrix did not raise alarm for help while travelling certain distance after alleged abduction. Her testimony was shaky and not corroborated by medical evidence. The accused was shown to the prosecutrix at the police station. Conviction of the accused appellants under ss 366 and 376(2)(g), IPC was held not proper.[23] In a case under s 366, IPC one *P* who allegedly introduced the accused/appellant with the victim woman was neither made a witness nor she was made accused. Similarly, the other two ladies with whom the victim woman had allegedly gone to Mumbai were also not examined. The non-examination of the three ladies was held fatal to the prosecution case. Conviction of the accused appellant under s 366, IPC recorded by court below was set aside.[24] For further commentary, see under the same heading in s 365, *ante*.3050

The evidence showed that the victim girl had gone willingly. There was no evidence of any threat, coercion or inducement alleged to be extended by the accused. The victim girl was habituated to sexual intercourse and as such no injury was found on the person of the victim girl. Accused appellant was acquitted of the charges under ss 363, 366 and 376, IPC .[25]

28. Conviction

Unless the prosecution proves that the abduction is for the purposes mentioned in s 366, IPC, the court cannot hold the accused guilty and punish him under s 366, IPC .[26] If, instead of kidnapping, the offence of abduction with the same intention is proved, the accused can be convicted on a charge under this section in view of s 221(2), CrPC .[27]

Separate convictions for the two offences, if supported by evidence, cannot be said to be illegal.[28]

Where the evidence showed that the accused had visited the prosecutrix's house on earlier date and made sure that she goes to the school the next day, accused on the next day countered her on the way and made her sit in autorickshaw on false pretext of meeting someone, and she was taken to the railway station and to another city forcibly for sexual purposes, the conviction of the accused under ss 363 and 366, IPC was found proper.[29] The accused forcibly abducted the prosecutrix on gun point and carried her away and kept her confined and forcibly subjected her to sexual intercourse. The testimony of the prosecutrix, though not corroborated by other witnesses, was found consistent, reliable and trustworthy. The conviction of the accused was found proper.[30] The prosecutrix stated that the accused persons

caught hold of her hand and dragged her to near by place and ravished her. The prosecutrix fled from there after the accused went to sleep. No consent on part of prosecutrix was proved. Holding that the fact that the version of prosecutrix was not corroborated by the medical evidence was immaterial, conviction of accused persons was found proper.[31] The accused and his companions were alleged to have abducted the prosecutrix with the object of getting her married with the accused. One doctor of the locality of prosecutrix followed accused persons while they were taking her away in car along with a police constable and arrested the main accused. The evidence of prosecutrix, doctor and police constable implicated the accused and his companions. Minor omissions in the testimony of prosecutrix were found immaterial. The conviction of the accused under s 366, IPC, was found proper.[32]3051

The accused kidnapped a girl aged about 18 years, took her to a lonely place and committed rape on her. The accused appellant was convicted under ss 366 and 376, IPC .[33]

The school leaving certificate and school register produced before the court showed that the age of the victim was 14 years on the date of the commission of the offence, there was also evidence of the Head Master of the School. There was no material before the High Court to ignore the said evidence. The acquittal of the accused was set aside and the accused was convicted for offences under ss 366 and 376, IPC .[34]

Four accused appellants entered the courtyard of the prosecutrix at about 11 p.m., on the point of pistol took her to the house in another village and committed rape on her. FIR was lodged the next day. Testimony of the prosecutrix and her mother was found reliable and was believed. Plea of false implication had no substance and as such was rejected. Conviction of all the accused under ss 366 and 376, IPC, sentence of 10 years RI for offence under s 376, IPC, and five years for offence under s 366, IPC was held proper.[35]

Three accused persons entered the house of the victim forcibly, lifted her, carried her to the shop of one accused, committed rape on her, the testimony of the prosecutrix was found reliable, accused were convicted under ss 366 / 457, 376 / 34, IPC .[36]

29. Probation

The benefit of probation should not be given to the abductor.[37] When the accused is convicted for offence under ss 366 and 354, IPC as he by deceitful means took the prosecutrix from her house and then outraged her modesty, though about 16 years elapsed from the date of the incident, the benefit of probation was not extended to the accused.[38]

30. Sentence

In the case of a woman, who, though under age of 18 year, is not only fully developed but is also used to sexual intercourse and is perhaps indulging in it for quite some time, the offence is just a little more than a technical one and the end of justice will be met if only a sentence of short term of imprisonment is inflicted.[39] Where the accused, who abducted the prosecutrix, who was of their own community and was a relation of theirs, forcibly took away the prosecutrix to their house, detained her for long against her will to pressurise her for marrying one of accused, to which she never yielded, and as such, finally released her to go back to her home, the sentence of four years rigorous imprisonment was reduced to one year's rigorous imprisonment and also a fine of Rs 2,000 each and in default of payment of fine, to further undergo two years rigorous imprisonment. It was further added that out of the fine, if realised, Rs 3,500 be paid to the prosecutrix by way of compensation.[40]

On account of lapse of 16 years from the date of incident the sentence of imprisonment was reduced from four years RI to one year RI under s 366, IPC .[41] When the accused has undergone the rigmarole of a criminal trial and trauma of3052 criminal proceedings for almost 24 years and had already served more than 1½ years custody out of total sentence of two years, the sentence of imprisonment was reduced to the period already undergone.[42] When the incident took place about seven years ago and accused was

known to the prosecutrix and believed that she would come with him and accused wanted to marry her, the sentence of imprisonment was reduced from two years RI to one year RI.[43] When the prosecutrix below 16 years was consenting party, the sentence of four years RI awarded to main accused was reduced to three years RI and that of co-accused who had remained in jail for more than 21 months, was reduced to period already undergone.[44]

In the instant case the offence in question was a serious one, the accused appellant had seduced, kidnapped, sexually exploited a young girl of 16 years and thereafter deserted her, the trial court awarded the sentence of 4 years' RI which itself was inadequate. The reduction of sentence to the period already undergone (one month and three days) by the High court was ridiculously disproportionate to crime committed by the accused. The sentence awarded by the trial court was restored.[45]

The accused lady purchased the girl to compel her to have illicit intercourse, the accused lady was 76 years old when the appeal was decided by the High Court, the incident took place about 22 years ago, so the sentence of four years RI under s 366, IPC, was converted into the fine of Rs 10000 and in default of payment of fine to undergo RI for two years.[46]

The main accused was convicted under ss 376, 366 and 342, IPC, by the sessions court and sentenced to undergo imprisonment for seven years, five years and one year, respectively, and fine of Rs 200. The two co-accused were convicted under ss 366 and 342 IPC and sentenced to undergo imprisonment of five years and one year respectively. The session court also directed all the sentences to run concurrently. On appeal filed by the accused persons, the High Court reduced the sentences of the accused persons to the period already undergone, *i.e.*, one and a half months after confirming their conviction for the said offences. The Apex Court set aside the order of the High Court and sentenced the main accused to undergo five years RI under s 376, IPC . Equally, all the accused were sentenced to undergo imprisonment for 5 years under s 366 and one year under s 342, IPC . The main accused was also directed to pay a fine of Rs 2000 and other accused Rs 1000 each.[47]

31. Alteration of Conviction from Section 366A to Section 366

When the prosecutrix had been kidnapped by the accused for the purpose of having illicit intercourse by the accused themselves and not others, the ingredients of s 366 IPC and not of s 366A, IPC, are attracted. Similarly, the conviction of accused was altered from s 366A to s 366, IPC .[48]

32. Alteration of Conviction from Sections 366 and 326 to Section 365

Commentary under s 365, *ante*, may be referred to.3053

21 Added by Act 20 of 1923, s 2 .

22 *Emperor v Kali Udayan* 12 Cr LJ 241 .

23 *Asma v State* AIR 1967 All 158, p 159 ; *Emperor v Safdar Reza* AIR 1922 Cal 508, p 509, 24 Cr LJ 379 .

24 *Emperor v Kali Udayan* 12 Cr LJ 241 ; *Parappa Sidram Karlati v Dondawwa* (1980) 24 Mad LJ (Cr) 56 .

25 *State v Sulekh Chand* AIR 1964 Punj 83, p 85, (1964) 1 Cr LJ 220 ; **but see also***Bhajna Singh Nand Singh v State* (1962) 1 Cr LJ 841 ; *Durga Das v Emperor* 1 Cr LJ 949 ; *Emperor v Nga Nge* 2 Cr LJ 476 .

26 AIR 1922 Cal 508, p 509, 24 Cr LJ 379. **See also***Asma v State* AIR 1967 All 158, 159 ; *State v Harbansing Kisansing* AIR 1954 Bom 339, p 340, 55 Cr LJ 1032 ; *S Varadarajan v State of Madras* AIR 1965 SC 942, p 946 ; *Emperor v Ayubkhan Mirsultan* AIR 1944 Bom 159 ; *Sultan v Emperor* AIR 1930 All 19, p 21 ; *District Magistrate v K Subbanna* AIR 1951 Mad 900, 52 Cr LJ 1115 .

27 *Empress v Isree Pandey* 7 WR (Cr) 55 ; *Bangaru Asari v Emperor* ILR 27 Mad 61 ; *Emperor v Isap Mahmad* 5 Cr LJ 164, 9 Bom LR 148 .

28 *Chotelal v State of Haryana* (1980) Cr AR 316 (SC)*; Anil Kumar v State of Karnataka* 2013 Cr LJ (NOC) 113 (Kant) (DB).

29 *Pirmohammad Kukaji v State of Madhya Pradesh* AIR 1960 MP 24, p 25, (1960) Cr LJ 83 .

30 *Mannalal v State of Rajasthan* AIR 1966 Raj LW 460 .

31 *State v Gopichand Fattumal* AIR 1961 Bom 282, (1961) 2 Cr LJ 578 .

32 *Ramjilal v State* AIR 1951 Raj 33, p 36, 52 Cr LJ 217 .

33 *Abdul v Emperor* AIR 1932 All 580, p 581, 34 Cr LJ 100 .

34 *Garakh Daji Ghadge v State of Maharashtra* (1980) Cr LJ 1380, p 1383 (Bom) (DB) ; **see also***Shyamsundar Kar v State* 35 Cut LT 951, (1969) Cr LJ 1310 (Ori) .

35 *Emperor v Sakhanam Jan* 8 Bom LR 120 .

36 *Parappa Sidram Karlati v Dundawwa* (1980) 24 MLJ (Cr) 56, p 58 (Kant) ; *Jatra Shekh v Reazat Shekh* ILR 20 Cal 483 .

37 *Mahendra Murtiyan Madrasi v State of Gujarat* (2004) Cr LJ 539 (Guj) (DB) .

38 *Moti Chand and anor v State of Rajasthan* (2001) Cr LJ 1916 (Raj) .

39 *Birju Ram v State of Rajasthan* (2006) Cr LJ 1794 (Raj) (DB) .

40 *Profulla Kumar Base v Emperor* AIR 1930 Cal 209, p 210, 32 Cr LJ 903 .

41 *Kashiram v State of Madhya Pradesh* (1980) Cr LR 333, p 334 (MP) ; *Parappa Sidram Karlati v Dundawwa* (1980) 24 MLJ (Cr) 56, p 58 (Kant)*; Anil Kumar v State of Karnataka* 2013 Cr LJ (NOC) 119 (Kant) (DB).

42 *Ibid.*

43 *Anil Kumar v State of Karnataka* 2013 Cr LJ (NOC) 119 (Kar) (DB).

44 *State of Himachal Pradesh v Kala* AIR 1957 HP 42, p 44, (1957) Cr LJ 847 .

45 *Sachindra Nath Mazumdar v Bistupada Das* (1978) Cr LJ 1494, p 1495 (Cal) .

46 *Pramod v State of Kerala* 2013 (1) KLT 841, 2013 (1) KLJ 802 (Ker) .

47 *Emperor v Tatiya Mahadev* 13 Cr LJ 858 ; *Dhara Singh v Katina* 8 PR 1878 .

48 *Dhara Singh v Katina* 8 PR 1878 .

49 *Abdul Hameed v State* (1974) All Cr R 218 .

50 *P Aashriya v State of Orissa* (1998) Cr LJ 3162 (Ori) .

51 *Khalilur Rahman v Emperor* (1933) Rang 98, p 100 (FB), 34 Cr LJ 696 . See also *Nura v Emperor* (1934) Lah 227, 35 Cr LJ 1386 ; *Pramod v State of Kerala* 2013 (1) KLT 841, 2013 (1) KLJ 802 (Ker) .

52 *Emperor v Parag* (1933) Oudh 45, p 49, 34 Cr LJ 220 ; *Dalchand v State* AIR 1969 All 216, (1969) Cr LJ 585 .

53 *Gharib Shah v Emperor* 1934 Pesh 69, p 70, 35 Cr LJ 1273 ; *Ghulam Yusuf v Emperor* 24 Cr LJ 921 .

54 *State v Ashiruddin Master* AIR 1951 Assam 95, 52 Cr LJ 698 .

55 *R v Hughes* ILR 14 All 25 ; *Naba v Emperor* 12 Cr LJ 393 .

56 *Khalilur Rahman v Emperor* 1933 Rang 98, p 102 (FB), 34 Cr LJ 696 .

57 *Bishnath Prasad v Emperor* 1948 Oudh 1, p 4, 48 Cr LJ 542 .

58 *Khali Sahu v State* 1975 Cut LT 751, OJD 175; *Haidar Shah v Emperor* (1930) Lah 52, p 53, 31 Cr LJ 529 ; *Kholilur Rahman v Emperor* AIR 1933 Rang 98, p 102 (FB), 34 Cr LJ 696 .

59 *Haidar Shah v Emperor* (1930) Lah 52, p 53, 31 Cr LJ 529 ; *Jowaya v Emperor* (1930) Lah 163, p 165, 31 Cr LJ 131 .

60 *K Joggayya v King* AIR 1951 Ori 142, p 145 ; *Jowaya v Emperor* (1930) Lah 163, 31 Cr LJ 131 .

61 *Bishnath Prasad v Emperor* (1948) Oudh 1, Cr LJ 542; *Lalta Prasad v State of Madhya Pradesh* AIR 1979 SC 1276, p 1277, (1979) Cr LJ 867 .

62 *Rajendra alias Raju v State of Maharashtra* (2002) Cr LJ 4353 (SC) .

63 *Fulchand Tepriwalla v Emperor* AIR 1932 Cal 442, p 444, 33 Cr LJ 512 ; **see also***Ahmed Bapari v Emperor* AIR 1925 Cal 578, 26 Cr LJ 290 ; *Khalilur Rahman v Emperor* (1933) Rang 98, 34 Cr LJ 696 (FB) ; *Bishnath Prasad v Emperor* (1948) Oudh 1, 48 Cr LJ 542 .

64 **See***Hulla v Emperor* 1934 Oudh 89, 35 Cr LJ 469 . **But see also***District Magistrate v K Subbanna* AIR 1951 Mad 900, p 901, 52 Cr LJ 1115 ; *Bhagwati Prasad v Emperor* AIR 1929 All 709, 30 Cr LJ 985 ; *Sultan v Emperor* AIR 1930 All 19 ; *Emperor v Ayubkhan Mirsultan* AIR 1944 Bom 159 . In all these Madras, Allahabad and Bombay cases, it has been held that 'minor's consent is no consent at all for the purpose of s 366 '. It is submitted that the question of marriage of the girl 'against her will' was not considered at all in these cases and they are not relevant to the first part of this section.

65 *Mehmood alias Mudia v State* (1998) Cr LJ 2408 (Delhi) ; *Md Ali v State of UP* 2015 Cr LJ 1967 (SC), (2015) 7 SCC 272 (Accused acquitted of the charges under ss 366 & 376, IPC).

66 *Suresh Nishad v State of Chhattisgarh* 2013 (2) Crimes 313 (Chh) .

67 *Sanganna Shivasharanappa Hugar v State of Karnataka* 2013 Cr LJ (NOC) 445 (Kar) ; **see also***B Suresh v State of Karnataka* 2013 Cr LJ (NOC) 444 (Kar) .

68 *State of Orissa v Jagdish Mandal* 2015 Cr LJ (NOC) 28 (Ori) .

69 *Ramji Prasad v State of Bihar* 2013 Cr LJ 446 (Pat) ; **see also***Neeraj Kadam Singh Naini v State of Uttrakhand* 2013 Cr LJ 3066 (Utr), 2014 (1) NCC 731 (Case of voluntary elopement).

70 *Sant Ram v Emperor* (1929) Lah 713, 30 PLR 573 . **But see also***Paras v State* AIR 1960 All 479, p 481, (1960) Cr LJ 1054 .

71 *Sant Ram v Emperor* AIR 1929 Lah 713, p 717, 30 PLR 573, **relying on***Taker Khan v Emperor* AIR 1918 Cal 136, 19 Cr LJ 640 ; *Rathinam v State* (1967) 1 MLJ 286, p 287 .

72 *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295 .

73 *Gobind v State of Madhya Pradesh* AIR 1975 SC 1378 .

74 *PUCL v Union of India* AIR 1997 SC 568 .

75 *Shamsher Alam alias Sheru and anor v State of Uttar Pradesh & ors* (2002) Cr LJ 3588 (All) (DB) .

76 *Profulla Kumar Bose v Emperor* 1930 Lah 209, p 210, 31 Cr LJ 903 .

77 *State Government of Manipur v Kakchingtabam Gourachandra Sharma* (1968) Cr LJ 1390, p 1394 ; *Bishnath Prasad v Emperor* AIR 1948 Oudh 1 ; *Gurdas v State* AIR 1953 Punj 258 ; *Aswiai Kumar Roy v State* AIR 1955 Cal 100 .

78 *Kasan v State of Rajasthan* (2002) Cr LJ 1460 (Raj) ; *Thanga Muthu v State* (1996) Cr LJ 3815 (Mad) ; *Suresh Kumar v State of Himachal Pradesh* (2002) Cr LJ 498 (HP) ; **See also***Shivnath v State of Madhya Pradesh* 1998 Cr LJ 2691 (MP) ; *Shakeel alias Pappoo v State of Uttar Pradesh* 2000 Cr LJ 153 (All) ; *Gambhir Singh v State* (1987) 3 Crimes 739 (Delhi) ; *Manohar Lal v State* (1988) 1 Crimes 627 (Delhi) ; *Satish Kumar v State* (1998) Cr LJ 565 (Delhi), (1987) 3 Crimes 597 ; *Tara Devi v State of Haryana* (2003) Cr LJ 725 (P&H) ; *Manna v State of Rajasthan* (2001) Cr LJ 3496 (Raj) .

79 *Kartara v State* AIR 1958 Punj 323, p 324, (1958) Cr LJ 1097 .

80 *Ramesh v State of Maharashtra* AIR 1962 SC 1908, (1963) 1 Cr LJ 16 ; *Kartara v State* AIR 1958 Punj 323, p 324, (1958) Cr LJ 1097 .

81 *Pessumal v Emperor* 27 Cr LJ 1292, AIR 1927 Sind 97 .

82 *Krishna Maharana v Emperor* AIR 1929 Pat 651, 31 Cr LJ 306 .

83 *Lakshman Bala v Emperor* AIR 1935 Bom 189 ; *Emperor v Ayubkhan Mirsultan* AIR 1944 Bom 159, 45 Cr LJ 750 ; *Prem Narain v Emperor* AIR 1929 All 82, Cr LJ 218 (2); *Emperor v Jaganath Gir* AIR 1937 All 353, 38 Cr LJ 621 .

84 *Lakshman Bala v Emperor* AIR 1935 Bom 189, 36 Cr LJ 1509 .

85 *State v Gopichand Fattumal* AIR 1961 Bom 282, p 284 (DB), (1961) 2 Cr LJ 578 .

86 *Aswini Kumar Roy v State* AIR 1955 Cal 100, p 101, 56 Cr LJ 347 ; *Profulla Kumar Base v Emperor* AIR 1930 Cal 209, 31 Cr LJ 903 .

87 *Dolgobinda Rath v State* AIR 1958 Ori 224, (1958) Cr LJ 1211 .

88 **See***Kamakhya Prasad Agarwalla v State* AIR 1957 Assam 39, p 42, (1957) Cr LJ 353 .

89 Re *Khalandar Saheb*(1955) Cr LJ 581.

90 *Manicka Chetty v Emperor* (1935) Mad WN 358 .

91 *Ramesh v State of Maharashtra* AIR 1962 SC 1908, (1963) 1 Cr LJ 16, **overruling** (1) *Emperor v Baijnath* AIR 1932 All 409, 33 Cr LJ 669 ; (2) *Saheb Ali v Emperor* AIR 1933 Cal 718, 35 Cr LJ 307 ; and (3) *Nura v Emperor* 1934 Lah 227, 35 Cr LJ 1386 .

92 *Abdul Hameed v State* (1974) All Cr R 218 ; *Mahbub v Emperor* 6 Cr LJ 9, 4 ALJ 482 ; *Emperor v Mavji Govind* 10 Cr LJ 176 ; *Kesar Mat v Emperor* (1932) Lah 555, 33 Cr LJ 673 .

93 *Shahebali v Emperor* AIR 1933 Cal 718 .

1 *Nura v Rex* AIR 1949 All 710, p 712, 51 Cr LJ 29 .

2 *R v Poddee* 1 WR (Cr) 45 .

3 *Md Mahfooj Ansari v State of Bihar* (2005) Cr LJ 1771 (Jhar) .

4 *Lalit Singh Vohra v State of Uttrakhand* 2013 Cr LJ 4807 (Utr), 2014 (1) NCC 491 .

5 *Murugan v State of Tamil Nadu* 2011 Cr LJ 2948 (SC), AIR 2011 SC 1691 .

6 *State of Maharashtra v Gajanan* 2008 Cr LJ 3549, p 3551 (SC), (2008) 3 SCC (Cri) 418, 2008 AIR SCW 4854, 2008 (9) Scale 802 .

7 *Sita Ram v State of Rajasthan* (2004) Cr LJ 4320 (Raj) .

8 *Jinish Lal Sha v State of Bihar* AIR 2003 SC 2081, (2003) Cr LJ 4914 (SC) .

9 *State of Uttar Pradesh v Om alias Om Prakash* (1999) Cr LJ 5030 (SC) .

10 *State of Haryana v Naresh alias Pappi* (1996) Cr LJ 3164 (P&H) (DB).

11 *Praveen v State of Maharashtra* (2001) Cr LJ 3417 (Bom) .

12 For detailed commentary see *Sohoni's Code of Criminal Procedure,* twenty-first edn., Lexisnexis.

13 *Jangli Mian v Emperor* AIR 1934 Pat 170, p 171, 35 Cr LJ 814 ; *Mafizaddi v Emperor* (1977) Cal 644, 28 Cr LJ 805 .

14 *Mafizaddi v Emperor* AIR 1927 Cal 644, 28 Cr LJ 805 ; *Jangli Mian v Emperor* AIR 1934 Pat 170, p 171, 35 Cr LJ 814 ; *Mahomed Ali v Emperor* AIR 1933 Cal 194, 34 Cr LJ 1107 ; **see also***Profulla Kumar Bose v Emperor* AIR 1930 Cal 209, 31 Cr LJ 903 ; *Mohiuddin v Emperor* AIR 1930 Cal 437, 32 Cr LJ 455 .

15 *Jangli Mian v Emperor* AIR 1934 Pat 170, 35 Cr LJ 814 ; *Mahomed Ali v Emperor* AIR 1933 Cal 194, 34 Cr LJ 1107 .

16 *Gabbu v State of MP* (2006) Cr LJ 3276 (SC) .

17 *Gabbu v State of MP* 2006 Cr LJ 3276 (SC) .

18 *Vijay @ Chinee v State of Madhya Pradesh* (2010) 8 SCC 191, 2010 (7) Scale 502 ; *State of Rajasthan v Babu Meena* 2013 (2) Scale 479, AIR 2013 SC 2207 ; *State of Haryana v Basti Ram* 2013 (2) Crimes 154 (SC), AIR 2013 SC 1307, [2013] 4 SCR 850, (2013) 4 SCC 200 ; *Rajendra Patel v State of Orissa* 2013 (2) 331 (Ori) (Conviction upheld).

19 *Maguni Ranjan v State of Orissa* 2003 Cr LJ 530 (Ori) .

20 *Shamsher Alam alias Sheru v State of Uttar Pradesh* 2002 Cr LJ 3588 (All) (DB) ; *Tara Devi v State of Haryana* 2003 Cr LJ 725 (P&H) ; *Satish Kumar v State* 1988 Cr LJ 565 (Delhi), (1987) 3 Crimes 597 ; *Manohar Lal v State* (1988) 1 Crimes 627 (Delhi) ; *Manna and anor v State of Rajasthan* 2001 Cr LJ 3496 (P&H) ; *Gambhir Singh v State* (1987) 3 Crimes 739 (Delhi) ; *Bishnudas Behera v State of Orissa* 1997 Cr LJ 2207 (Ori) ; **See also***Biswanath Mallick v State of Orissa* 1995 Cr LJ 1416, (1995) 80 Cut 2 T 269 ; *Shyam v State of Maharashtra* AIR 1995 SC 2169, 1995 Cr LJ 3974 (SC) ; *State of Haryana v Naresh alias Pappi* 1996 Cr LJ 3164 (P&H) (DB); *Suresh Kumar v State of Himachal Pradesh* 2002 Cr LJ 498 (HP) ; *Kasan v State of Rajasthan* 2002 Cr LJ 1460 (Raj) ; *Vishnu Kumar v State of Rajasthan* 2002 Cr LJ 3346 (Raj)*; Madan Lal v State of Himachal Pradesh* 2014 Cr LJ 641 (HP), 2014 (2) RCR (Criminal) 657 ; *Anil Kumar v State of Karnataka* 2013 Cr LJ (NOC) 119 (Kant) (DB).

21 *Sheo Kumar v State of Chhattisgarh* 2009 Cr LJ 3165 (Chh) (DB), 2009 (3) MPHT 50 (CG) .

22 *Niranjan Singh v State of Haryana* (1984) 2 Crimes 61 (P&H) .

23 *Krishan Kumar Malik v State of Haryana* 2011 Cr LJ 4274, AIR 2011 SC 2877, 2011 AIR SCW 4118, (2011) 7 SCC 130 .

24 *Rumi Borah v State of Assam* 2015 Cr LJ 1719, p 1722 (Gauh) .

25 *Lokesh v State of Chhattisgarh* 2012 Cr LJ 3484 (Chh), 2012 (2) CGLRW 112 ; **See also***Amarshibhai v State of Gujarat* 2013 (3) Guj LR 1921 (Guj) ; *Naresh Kumar Satnami v State of Chhattisgarh* 2012 Cr LJ 3665 (Chh), 2012 (2) BLJ 521 ; *Jiwan Lal v State of Himachal Pradesh* 2012 (120) AIC 343 (HP) ; *Bhupatbhai Somabhai Sardiya v State of Gujarat* 2012 (119) AIC 558 (Guj) (Prosecutrix moved with accused at different places, did not raise alarm, accused held entitled to benefit of doubt, acquitted).

26 *Gabbu v State of MP* 2006 Cr LJ 3276 (SC) .

27 *Ghanchi Vora Samsuddin Isabhai v State of Gujarat* AIR 1970 Guj 178, p 180, (1970) Cr LJ 1348 .

28 *Ghulam Muhammad v Crown* 1927 Lah 88, 28 Cr LJ 136 .

29 *Vishnu and ors v State of Maharashtra* (1997) Cr LJ 1724 (Bom) .

30 *Chandan Paswan v State of Bihar* (1999) Cr LJ 371 (Pat) ; *Imtiaz Ansari v State of Bihar* (2000) Cr LJ 2576 (Pat) .

31 *Miyanlal v State of Madhya Pradesh* (1999) Cr LJ 2227 (MP) ; **see also***Maruti U Wankhede v State of Maharashtra* (2003) Cr LJ 728 (Bom) .

32 *Rajesh and ors v State of Maharashtra* (1998) Cr LJ 4042 (SC)*; Fateh Chand v State of Haryana* 2009 Cr LJ 3944, AIR 2009 SC 2729 .

33 *Rajinder v State of HP* 2009 Cr LJ 4133 (SC), AIR 2009 SC 3022, 2009 (9) Scale 176 .

34 *State of Maharashtra v Gajanan* 2008 Cr LJ 3549, p 3551 (SC), (2008) 3 SCC (Cri) 418, 2008 AIR SCW 4854, 2008 (9) Scale 802 .

35 *Jaswant Singh v State of Punjab* 2010 Cr LJ 41 (SC), 2009 AIR SCW 6843 .

36 *Balwan Singh v State through P/s Katra* 2013 Cr LJ (NOC) 553 (J&K).

37 *Devki v State of Haryana* AIR 1979 SC 1948, (1979) Cr LJ 1309 (SC) .

38 *Shoukat v State of Rajasthan* (2002) Cr LJ 364 (Raj) .

39 *Brij Lal Sud v State of Punjab* (1970) 1 SCWR 689 ; *Ram Krishna v State of Haryana* (1980) 7 Cr LT 80 (Punj) (in both these cases, sentence was reduced to that already undergone by the accused).

40 *Bhawani Prasad v State of Madhya Pradesh* (1980) Cr LR 389, p 390 (MP) .

41 *Shoukat v State of Rajasthan* (2002) Cr LJ 364 (Raj) .

42 *Dewan Singh v State* (1998) Cr LJ 3905 (Del) .

43 *Rajesh and ors v State of Maharashtra* (1998) Cr LJ 4042 (SC) .

44 *Rajan and ors v State of Rajasthan* (2002) Cr LJ 3152 (Raj) .

45 *State of Madhya Pradesh v Rameshwar* 2005 Cr LJ 912, p 913, 2005 SCC (Cri) 505 .

46 *Smt Shamshad v State of Uttar Pradesh* (2003) Cr LJ 1322 (All) .

47 *State of Rajasthan v Ram Narain & ors* (1996) Cr LJ 1882 (SC) .

48 *Moti Chand & anor v State of Rajasthan* (2001) Cr LJ 916 (Raj) .

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Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

[1][S. 366A.

Procuration of minor girl.--

Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.]

Comments

1. Scope

This section is aimed at procurers only. If a person induces a girl under 18 years of age, by whatever means, to go from one place, or do any act, with the intention that such girl may be, or knowing that it is likely that she will be, forced, or seduced, to have illicit intercourse with another man, he is punishable under this section.[2] When the prosecutrix had attained majority at time of occurrence, the offence under s 366A is not made out.[3] If, however, the accused procures the girl for himself, his offence is not one which comes within the purview of this section.[4] Similarly, where it was found that the prosecutrix, who was herself responsible for her misdeeds, herself wanted to have a good time and earning out of prostitution and no force, threat, deceit or inducement were used, upon her, by the accused and the illegal sexual intercourse, which she had, was not the result of any force or seduction, it was held that the accused could not be held guilty under this section.[5]Likewise, a person, who merely accompanies a woman, going out to ply her profession of a prostitute, even if she has not attained the age of 18 years, does not thereby commit an offence under this section. It cannot be said that merely by accompanying her, he induces her to go from any place, or to do any act, with the intent, or knowledge, contemplated in this section.[6] An offence under this section is a continuing offence.[7] Similarly, when, after inducement, the offender offers the girl to several persons, a fresh offence is not3054 committed at every fresh offer for sale and therefore several offers for sale show as much of a criminal intention of the offender as that of one offer for sale.[8]

2. Essential Ingredients

The principal ingredients,[9] which are essential for an offence under this section, are as follows:

(a) the accused must induce a girl;
(b) the age of the girl must be under 18 years;
(c) the said girl must be induced to go from a place or to do any act; and
(d) the accused must do so with the intention that she may be, or knowing that it is likely that she will be, forced, or seduced, to illicit intercourse with another person.

To constitute an offence under s 366A of the IPC, there must be kidnapping of an woman under 18 years of age by inducing her to go from a place with intent that such woman may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person.[10]

3. 'Induces'

Inducement is an essential ingredient to constitute an offence under this section which requires that a minor girl must be induced, by the accused, to go from one place, or to do any act, with the requisite intention or knowledge. If, in a case, there is no evidence of any direct talk between the accused and the girl, nor even of any inducement offered, no offence is committed by the accused under this section.[11] Where evidence showed that the victim girl had left in the company of the accused of her

own will and she was not forced to have sexual intercourse with any person other than the accused, the conviction of the accused under s 366A, IPC was set aside.[12] However, once the offence is committed by inducement, the girl's subsequent willingness will neither prevent the offence, nor would it reduce the gravity of the offence.[13]

The offence under s 366A is complete, if a girl under the age of 18 years is induced to go from any place by the culprits on any pretext.[14]

Once the age of the prosecutrix is found to be of about 12 or 13 years that is much below the age of 16 at the time of her having been taken away by the accused, her consent in going with him becomes quite immaterial.[15]3055

4. 'Minor Girl under the age of 18 Years'

Whether there is consent or no consent, kidnapping of a minor girl from the lawful custody of the guardian is punishable under s 366A, IPC .[16] One of the essential ingredients of the offence under s 366A is that the prosecutrix must be under the age of 18 years. Thus, when the victim is not a minor on the date of occurrence, in view of the oral evidence and in the absence of any authentic document regarding her age, the accused is entitled to be acquitted under s 366A .[17] On the point of proof of age, school certificate is the best evidence and so far as the medical certificate is concerned, the same is based on estimate so possibility of error cannot be ruled out.[18] It is true that the medical evidence in respect of age cannot be exact and the determination of the age is with reference to certain lower and higher margins and the benefit of outer margin must be given to the accused.[19] When the age of the victim is not proved to be below 18 years at the time of occurrence, the offence under s 366A, IPC, is not made out.[20] When the oral evidence of parents of the prosecutrix is corroborated by oral evidence of other witnesses and also medical evidence to show that her age was 12 or 13 years, her consent in going with accused becomes quite immaterial.[21]

For further commentary, s 361, *ante*, may be referred to.

5. Age of Prosecutrix--Determination of

The principal means which enable one to form a fairly accurate opinion about the age of an individual especially in the earlier years are teeth and ossification of bones. The estimation of age from the teeth by noting the number and position of the teeth erupted and the x-ray examination with some amount of certainty is only possible up to 17 and 20 years of age and beyond that it is merely guesswork. Primary teeth are replaced by permanent teeth which are 32 in number consisting of four incisors, canines, four premolars or bicuspids and six molars in each jaw. As per *Modi's Medical Jurisprudence and Toxicology*[22] the third molar tooth erupts in the age group between 17th to 25th year. The Apex Court in the case of *Jaya Mala v Home Secretary, Govt Of J&K* ,[23] has observed that one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.[24] In *Bhoopram v State of UP* ,[25] the Hon'ble Supreme Court held that on the point of proof of age, school certificate is the best evidence and so far as the medical certificate is concerned, the same is based on estimate and possibility of error cannot be ruled out.

6. 'With Intent'

The intention of the accused is the gravamen for an offence under this section. An offence under this section is committed only when the accused induces the minor3056 girl, to go from one place, or to do any act, with intent that she may be, or knowing that it is likely that she will be, forced, or seduced, to illicit intercourse with another person. Removal of the minor girl, by the accused, with the intention of marrying her is no offence under this section though under s 366, IPC, the removal of a girl even with the intention of giving her in marriage without her consent is illegal.[26]

7. 'Forced, or Seduced, to Illicit Intercourse with Another Person'

Commentary under the relevant headings in s 366, *ante*, may be referred to.

8. Sections 366 and 366A --Distinction

If the charge is under s 366A then 'kidnapping' is not the essential ingredient as there is a difference between s 366 and s 366A, IPC . While kidnapping, abduction is a part of the offence under s 366 and its latter part, *viz.*, 'inducement' is the only common ingredient in s 366 and s 366A, IPC .[27]

Commentary under same heading in s 366, *ante*, may be referred to.

9. Anticipatory Bail

The provision under s 438, CrPC,[28] had to be sparingly used in rarest of rare cases where the conscience of the court of justice is satisfied that the accused is innocent or he has been falsely implicated due to some *mala fide* intent or it appears that it is a case of over-implication by an unscrupulous complainant. It is a condition precedent that anticipatory bail must be moved before cognizance is taken and non-bailable warrant is issued.[29] When from the perusal of case diary it appears that ingredients of s 366A, IPC are fully satisfied against the accused, he is not entitled to be enlarged on anticipatory bail.[30]

10. Identification of Accused

The identification of the accused in the court is substantive evidence. When it has come in evidence that the hotel manager and servant of the hotel had disclosed the name of the accused and on that basis he was arrested, and the mother, daughter, servant of hotel who identified the accused in the court had enough opportunity to identify the accused, so not holding of the test-identification parade for identification of the accused is not fatal to the prosecution case.[31]

11. Procedure

In view of the provisions of s 180, CrPC, a charge of abetment of an offence under s 366A may be enquired into and tried by the court within the local limits of whose jurisdiction the offence itself was committed even if the abetment took place outside those limits.[32] For further commentary, s 366, *ante*, may be referred to.3057

12. Compounding of Offence--Permissibility

Whether there is consent or no consent, kidnapping of a minor girl from the lawful custody of the guardian is punishable under s 366A, IPC, so also the offence under s 376, IPC . Such offences are offences both against the individual and the society, and are not compoundable in nature. If a minor girl is kidnapped, raped and compelled to marry, then there is perhaps no other way for such a girl and her parents to agree to the terms of the accused of the crime. Quashing of such a criminal proceedings may or may not enure to the benefit of the prosecutrix in the long run, but compounding of such type of offences amounts to a disservice to the society in as much as by invoking the inherent power of the High Court tends to protect an accused who committed such heinous crime.[33]

13. Charge

The following form of the charge may be adopted:

I (*name and office of session judge, etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the.....day of....., at....., you induced AB, a minor girl under the age of eighteen years, to go from.....(*name the place*), (*or to do the following act, namely,.....*), with the intent that the said AB May be (*or knowing that it is likely that the said AB will be*) forced (*or seduced*) to illicit intercourse with CD, and thereby committed an offence, punished) to illicit intercom's with CD, and thereby committed an offence, punishable under s 366A of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

14. Evidence of Abducted Woman

The most important witness in an abduction case is generally the abducted woman herself and when her evidence is solitary one and other witnesses are not corroborating her evidence, then in such a situation the evidence of the abducted woman has to be scrutinised with care and caution to find as to whether there is ring of truth in the statement of the said abducted woman.[34]A prosecutrix of a sex offence cannot be put at par with an accomplice. She is in fact a victim of the crime. The Evidence Act 1872, nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under s 118 of the Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood, and it would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. The standard of proof to be expected by the court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Ordinarily a woman, more so a young girl, will not stake her reputation by leveling a false charge3058 concerning her chastity.[35] In the case of *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* ,[36] it has been observed by the Apex Court that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, as a general rule, corroboration cannot be insisted upon, except from the medical evidence where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. It has further been observed in the same case that, on principle, the testimony of a victim of sexual assault stands on par with the testimony of an injured witness. Just like the testimony of the injured witness, that of the victim of sex offence is entitled to great weight.

15. Proof

To establish an offence under this section, it has to be proved that:

(1) the accused induced a minor girl under the age of 18 years to go from a place or to do any act; and
(2) he did so with the intent that the girl may be, or knowing it that it is likely that the girl will be, forced, or seduced, to illicit intercourse with another person.

The prosecution must prove that the accused intended that the girl would be forced or seduced. If a person induces a girl to go from one place to another for the purpose of seducing her for himself, the offence is not one which comes within the purview of this section.[37] Similarly, the fact that a girl is

beautiful is no evidence at all to show that the persons, with whom she goes away, had any intention that she should become an inmate of a brothel.[38]

When the evidence of informant father that victim was last seen going with the accused was not found convincing, it was proved that victim had left her house on earlier day of occurrence and there was no other evidence against the accused, the accused was acquitted under s 366A, IPC by giving the benefit of doubt.[39] The evidence does not always need corroboration in cases under s 366A, but where it is found that the girl in question has been definitely lying on important points in her story, then it is unsafe to rely on other parts of her evidence to convict any person of a criminal offence unless that evidence is corroborated on material points.[40]

The only prosecution evidence against the accused was that he was present at the house where the victim was brought after kidnapping, the victim was not available for examination in Court. The accused was not named in the FIR, and other evidence on the record did not show the involvement of the accused in the offence of kidnapping, therefore, it was held that the accused could not be implicated in the offence under ss 363 or 366A, IPC dehors other evidence to show his involvement in the events preceding the kidnapping.[41]3059

Where the victim girl stated that she was kidnapped while she was going to school and a tablet was put in mouth by which she got unconscious and the next day the victim was found in an unconscious state and then hospitalized, and the doctor's report also suggested that she had been hospitalized where she gained consciousness after 4-5 days, the uncorroborated testimony of the victim girl was believed, and the conviction of the accused under s 366A, IPC was held proper.[42]

Where it was not conclusively proved that the victim at the time of the occurrence was below 18 years of age and that the accused had induced the victim to leave her house, the accused was acquitted of the charge under s 366A, IPC .[43]

16. Sentence

Where the accused convicted under s 366A, IPC, had already remained in jail for about three and a half years and both the victim girl and accused had already been married, the sentence of imprisonment of the accused was reduced from seven years to five years.[44] The accused had been in custody for more than seven years so his sentence under s 366A, IPC, was reduced from seven years rigorous imprisonment to the period of custody already undergone.[45]

Where the accused kidnapped a minor girl and sold her at a place far away for illegal and immoral purpose, it was held that in such a case it was just and proper that a deterrent sentence be imposed on the accused. Thus, a sentence of 7 years rigorous imprisonment and fine of Rs. 50,000/-, as awarded by the High Court, was upheld.[46]

17. Alteration of Conviction under this Section into One under Section 498

A conviction under s 366A, IPC, does not, by necessary implication involve an acquittal on an alternative charge under s 498, IPC, and an appellate court is competent under ss 385 and 386, CrPC, to alter the conviction under s 366A, IPC, into a conviction on the alternative charge under s 498, IPC .[47]

18. Alteration of Conviction from Section 366A to Section 366

Commentary under the same heading in s 366, *ante*, may be referred to.

19. Alteration of Conviction from Section 366A to Section 365

Commentary under s 365, *ante*, may be referred to.

1 Inserted by Act 20 of 1923, s 3 .

2 *Manik Molla v Emperor* AIR 1945 Cal 432, p 433, 49 CWN 533 ; *Abbas Behara v Emperor* AIR 1933 Cal 362, 34 Cr LJ 341 ; *Abdullah v State* (1974) All Cr R 209, (1974) All Cr C 34 ; *State v Gopichand Fattumal* AIR 1961 Bom 282, (1961) 2 Cr LJ 578 .

3 *Badal Toppo v State of Bihar* (2004) Cr LJ 545 (Jhar) .

4 *Manik Molla v Emperor* AIR 1945 Cal 432, p 433, 49 CWN 533 ; *Abbas Behara v Emperor* AIR 1933 Cal 362, 34 Cr LJ 341 .

5 *State of Madhya Pradesh v Suklu* (1980) Cr LR 233 (MP) (DB) ; *State of Bihar v Rakesh Kumar* 2013 Cr LJ 1990 (Pat) (No evidence of use of force, ingredients of s 366A, IPC not satisfied in the case).

6 *Ramesh v State of Maharashtra* AIR 1962 SC 1908, p 1911, (1963) 1 Cr LJ 16 .

7 *Nanhua Dhimar v Emperor* AIR 1931 All 55, p 56, 32 Cr LJ 690 (2); *Chiragh v Emperor* (1936) Lah 850, p 851 .

8 *Sis Ram v Emperor* AIR 1929 All 585, 30 Cr LJ 904 .

9 *Ramesh v State of Maharashtra* AIR 1962 SC 1908, p 1911, (1963) 1 Cr LJ 16 ; *State (Delhi Admn) v Jagdish* (1988) 3 Crimes 6 (Delhi) (DB); *Pankaj v State of Rajasthan* (1996) Cr LJ 3265 (Raj) ; *Binod Kumar Rajak v State of Bihar* (2002) Cr LJ 4410 (Jhar) .

10 *Gulab Mochi v State of Bihar* (2005) Cr LJ 1759 (Jhar) .

11 *State v Gopichand Fattumal* AIR 1961 Bom 282, p 283, (1961) 2 Cr LJ 578 ; **see also***State of Kerala v Rajayyan and ors* (1996) Cr LJ 145 (Ker) .

12 *Iqbal v State of Kerala* 2008 Cr LJ 436, p 438 (SC), 2007 (12) Scale 556, 2007 AIR SCW 6771 .

13 *Bhagwati Prasad v Emperor* AIR 1929 All 709, p 710, 30 Cr LJ 985 .

14 *Ranjeet Singh alias Ranjan Singh v State of Bihar* (2000) Cr LJ 2574 (Pat) .

15 *Mohesh alias Sanjay v State of Rajasthan* (1999) Cr LJ 4625 (Raj) .

16 *Siba v State of Orissa* (2006) Cr LJ 80 (Ori) .

17 *Binod Kumnr Rajak v State of Bihar* (2002) Cr LJ 4410 (Jhar) .

18 *Bhoopram v State of Uttar Pradesh* AIR 1989 SC 1329, (1990) Cr LJ 2671 (SC) .

19 *Dev Kishan v State of Rajasthan* (2003) Cr LJ 1118 (Raj) .

20 *Ibid.*

21 *Mahesh alias Sanjay v State of Rajasthan* (1999) Cr LJ 4625 (Raj) ; *Aash Mohammad v State of Uttarakhand* 2013 Cr LJ 3823 (Utr) .

22 *Modi's Medical Jurisprudence and Toxicology,* twenty-fourth edn, Lexisnexis.

23 *Jaya Mala v Home Secretary, Govt Of J&K* AIR 1982 SC 1297, (1982) Cr LJ 1777 (SC) .

24 *Kuber Chandra Das v State of Bihar* (2004) Cr LJ 4776 (Jhar) .

25 *Bhoopram v State of Uttar Pradesh* AIR 1989 SC 1329, (1990) Cr LJ 2671 (SC) .

26 *Bishnath Prasad v Emperor* (1948) Oudh 1 (3), 48 Cr LJ 542 .

27 *Kailash Laxman Khamkar v State of Maharashtra* 2010 Cr LJ 3255, p 3263 (Bom), 2010 (1) Crimes 792, 2010 (2) Bom CR (Cri) 337 .

28 *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

29 *Pankaj v State of Rajasthan* 1996 Cr LJ 3265 (Raj) .

30 *Ibid.*

31 *Krishna Mohan Thakur alias BDO v State of Bihar* 2000 Cr LJ 1898 (Pat) .

32 *Nanhua Dhimar v Emperor* AIR 1931 All 55, p 56, 32 Cr LJ 690 (2). **See also***Sundar Singh v Emperor* AIR 1925 Oudh 328,

26 Cr LJ 695 .

33 *Siba v State of Orissa* (2006) Cr LJ 80 (Ori) .

34 *Gulab Mochi v State of Bihar* (2005) Cr LJ 1759 (Jhar) .

35 *Gulab Mochi v State of Bihar* (2005) Cr LJ 1759 (Jhar) .

36 *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* AIR 1983 SC 753, (1983) 3 SCC 217 (1983) Cr LJ 1096.

37 *Manik Molla v Emperor* AIR 1945 Cal 433, p 437, 49 CWN 533 ; *Abbas Behara v Emperor* AIR 1933 Cal 362, 34 Cr LJ 341 .

38 *Ekkari Das v Emperor* AIR 1939 Cal 290, p 291, 40 Cr LJ 660 .

39 *Saheed Mian v State of Bihar* (2000) Cr LJ 1221 (Pat) ; *State of Bihar v Rakesh Kumar* 2013 Cr LJ 1990 (Pat) (No evidence of use of force, ingredients of s 366A, IPC not satisfied in the case).

40 *Kamij Shaikh v Emperor* AIR 1948 Pat 73, (1947), 48 Cr LJ 301 (Pat); **see also***Saheed Mian v State of Bihar* (2000) Cr LJ 1221 (Pat) .

41 *Brij Nath Sah v State of Bihar* 2010 Cr LJ 3821, p 3822 (SC), 2010 AIR SCW 3900, (2010) 6 SCC 736 .

42 *Sunil Kumar Choudhary v State of Bihar* 2015 Cr LJ 855, p 858 (Pat) .

43 *State of Tripura*2014 Cr LJ 1415 (Tripura).

44 *Satendra Kumar Singh Kushwaha v State of Bihar* (2003) Cr LJ 392 (Pat) .

45 *Shri Sushanta alias Tutan Chakraborty alias Bhattacharji v State of Tripura* (2002) Cr LJ 195 (Gau) .

46 *Manjappa v State of Kanataka* 2010 Cr LJ 4729, p 4731, 2010 AIR SCW 5815, (2010) 9 Scale 444, (2010) 9 SCC 334 (SC) .

47 *Emperor v Jagannath Gir* AIR 1937 All 353, p 358, 38 Cr LJ 621 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

[48][S. 366B.

Importation of girl from foreign country.--

Whoever imports into [49]India] from any country outside India [50][or from the State of Jammu and3060 Kashmir] any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, [51][***] shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.]

Comments

1. Scope

This section penalises the importation of minor girls, below the age of 21 years for purposes of prostitution. The section makes it an offence to import, into India: (1) from any country outside India, or (2) from the State of Jammu and Kashmir, a girl under the age of twenty one years with the intent

or knowledge as specified in the section.

2. 'With Intent'

No case under this section will be made out if it is not the case of the prosecution that the girls in question were imported, into India, from a country outside India, with the accused's intention that they may be, or knowing it to be likely that they will be, forced, or seduced, to have illicit intercourse with other persons.[52] For further commentary, under the same heading in s 366A, *ante.*

3. 'Forced, or Seduced, to Illicit Intercourse with Another Person'

Commentary under s 366, *ante*, may be referred to.

4. Procedure

Commentary under s 366, *ante*, may be referred to.

5. Charge

The following form of the charge may be adopted:

> I (*name and office of sessions judge, etc*) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about the....day of....., at....., imported, into India, from.... (specify the name of the country), a country outside India (or from the State of Jammu and Kashmir), AB, a girl under the age of twenty one years, with intent that she may be (or knowing it to be likely that she will be) forced (or seduced) to illicit intercourse with another person, to wit.... and thereby committed an offence, punishable under s 366B of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

6. Proof

To establish an offence under this section, it has to be proved that:3061

(1) the accused imported, into India, a girl below the age of twenty one years;
(2) the girl was imported from a country outside India or from the State of Jammu and Kashmir; and
(3) he did so with intent that she may be, or knowing it to be likely that she will be, forced, or seduced, to illicit intercourse with some person other than himself.

48 Inserted by Act 20 of 1923, s 3 .

49 The words 'British India' have successively been substituted, by the AO 1948, the AO 1950 and Act 3 of 1951, s 3 and Sch, to read as above.

50 Inserted By Act 3 of 1951, s 3 and Sch.

51 Certain words omitted by Act 3 of 1951, s 3 and Sch.

52 *Ramjilal v State* AIR 1951 Raj 33, p 35, 52 Cr LJ 217 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

S. 367.

Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.--

Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

This section penalises kidnapping or abduction in order to subject a person to:

(1) grievous hurt,
(2) slavery, or
(3) unnatural lust.

2. 'Person'

The word 'person' in this section, would denote any male or female human being, and under s 5, the singular number would include the plural number.

3. 'Grievous Hurt'

Commentary under s 320, *ante*, may be referred to.

4. 'Slavery'

Commentary under the heading 'slave' in ss 370 and 371, *post*, may be referred to.

5. 'Unnatural Lust'

When despite the fact the accused was arrested within 24 hours of commission of offence, he was not examined to discover injuries on his private parts or presence of any organic matter around his private parts and no injury was found around the anus of the victim, the charge under s 367, IPC, against the accused was found not proved.[53] For further commentary, see s 377, *ante*.3062

6. Procedure

When the police officials while discharging their official functions are accused of having committed some excesses and offences under ss 367, 368, 363, 365, 330 and 331, IPC, sanction under s 197 of CrPC for prosecution of police officials is mandatory.[54] For further commentary, see s 366, *ante*.

7. Charge

The following form of the charge may be adopted:

> I (*name and office of sessions judge, etc*.) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the .....day of ....., at..... you kidnapped (*or abducted*) AB in order that the said AB may be subjected (*or may be so disposed of as to be put in danger of being subjected*) to grievous hurt (or slavery (*or to the unnatural lust*) of CD, or knowing it to be likely that such person will be so subjected (or disposed of), and thereby committed an offence, punishable under s 367 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

A person can be charged with an auxiliary offence when he stands charged with the main offence. An offence under s 326, IPC is triable by a magistrate of the first class. So, the charge under this section can be framed along with a charge for the auxiliary offence under s 326 and the offence under s 326 can be tried by the court of session, if committed to it by a competent magistrate.[55]

8. Proof

To establish an offence under this section, it has to be proved that:

(1) the accused kidnapped or abducted a person; and
(2) he did so:

(i) in order that such person may be subjected, or may be so disposed of as put in danger of being subjected, to

(a) grievous hurt, or
(b) slavery, or unnatural lust, of any person, or

(ii) knowing it likely that such person will be subjected, or disposed of, as stated in the above sub-cl (a) or (b).

When the High Court did not accept the story of murder by the accused who was alleged to have abducted the deceased nor did the High Court record a finding that the grievous hurt was caused to the deceased by the accused, the conviction of the accused under s 367, IPC was held not warranted.[56]

9. Conviction

When the abduction of the victim is proved by evidence adduced by the injured and also by his son and the co-villager, the place of occurrence has also been established by the prosecution, the finding of the trial court that accused persons armed with3063 guns were members of the unlawful assembly and in prosecution of common object to cause grievous hurt to the victim, they had abducted him from his village and thereby committed offence under s 367, IPC, which were subsequently upheld by the High Court, is not liable to be disturbed.[57]

10. Sentence

The accused was convicted under ss 342, 367 and 377 read with s 511, IPC and sentenced to undergo imprisonment for one year under s 342 and three and a half years RI and fine of Rs 500 each for committing offence under ss 367 and 377, IPC, read with s 511, IPC . In default of payment of fine he was ordered to undergo further RI for six months on each court. All the substantive sentences of imprisonment were to run concurrently as per order of the trial court. Taking into consideration the fact that the accused underwent agony of trial for about eight months in the trial court and his appeal also remained pending for the last more than one and a half years in the High Court, and he was in jail for about 11 and a half years, the sentence of imprisonment awarded to the accused was reduced to the period already undergone in jail whereas the sentence of fine or in default thereof awarded by the trial court was maintained.[58]

53 *Sanjiv Kumar v State of Punjab* (1989) 2 RCR 108 (P&H) (DB).

54 *Satyavrat v State and anor* (1992) 3 Crimes 654 (Delhi) .

55 *BC Chenna Reddy v State of Andhra Pradesh* AIR 1962 AP 267, p 270, (1962) 2 Cr LJ 28 .

56 *Vinod Chaturvedi v State of Madhya Pradesh* AIR 1984 SC 911, (1984) 1 Crimes 733 (SC) .

57 *Darshan Singh and ors v State of Punjab* (1994) Cr LJ 226 (SC), 1993 AIR SCW 3539 .

58 *Satta @ Saleem Singh @ Saleem Khan v State of Haryana* (1994) 2 Chand C Cases 193 (P&H).

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

S. 368.

Wrongfully concealing or keeping in confinement, kidnapped or abducted person.--

Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

Comments

1. Scope and Applicability

This section applies to persons who assist in concealing or confining a kidnapped or abducted person, and not to the principal offender,[59] whose conviction is not necessary in order to convict the person who assists even knowing that kidnapping or abduction has been committed by someone or the other.[60] The section presupposes that the offence of kidnapping or abduction has taken place so that anyone, wrongfully concealing or confining the person kidnapped or abducted, is guilty of an3064 offence under this section.[61] There must be a concealment or confinement, and not merely keeping by giving food and shelter and allowing the person to live in the house.[62]

2. 'Knowing that any Person has been Kidnapped or has been Abducted'

A conviction under this section can be maintained only if the accused can be charged with the knowledge of the fact that a person had been kidnapped or abducted. The mere fact that a girl was brought to his house at night and was kept there in a locked room, is not enough to credit the accused with a knowledge that the girl had been kidnapped or abducted.[63] It must be remembered that this section is confined only to knowledge of the fact of kidnapping or abduction. It contains no words, as do certain other sections of the Code (*e.g.*, ss 411, 497 and 498, IPC), such as 'or having reason to believe or suspecting'. Similarly, the only question that has to be considered, is whether the accused can be said to have known that the person in question had been kidnapped or abducted.[64] If knowledge required by the section is not established, the question of wrongful confinement would remain. And if the wrongful confinement is proved, the accused can be convicted for that offence.[65]

3. 'Wrongfully Conceals or Confines'

As to wrongful concealment, a Full Bench of the Punjab Chief Court observed that the act of concealment refers to the withdrawal, from the actual observation of others, by removal or otherwise, of the person, kidnapped or abducted, and does not include the mere giving of false information about such person.[66] Merely taking the kidnapped or abducted girl away to a long distance, so that her father or guardian should not know where she is, does not amount to concealment.[67] The mere fact of a girl being received into a house and retained there by the owner, even after he may have become aware, or found reason to believe, that she has been kidnapped, does not amount to concealment of her unless an intention of keeping her out of view is apparent.[68] If the evidence is that the girl was recovered from a room in the house of the accused which had no shutters and which opened on an outer verandah, it cannot be said that the girl was concealed within the meaning of the section.[69]

However, where the accused took a girl to her own house and kept her there till evening and then removed her in a closed carriage to a solitary bungalow, far away from the town, it was held to be a good evidence of concealment.[70] For further commentary, see s 340, *ante*.

4. Bail

The offences under ss 366, 368, 376 / 34, IPC, were alleged against accused. Two of the accused had already been granted bail. Though police has not registered the3065 offence under s 370, IPC, despite the fact that prosecutrix was treated as a chattel as a subject of sale and purchase, such omission by police does not reduce the gravity of offences alleged against accused person, thus, considering the seriousness of the allegations made against the accused, the bail application was dismissed.[71]

5. Grant of Custody of Prosecutrix

Though father sought custody of the prosecutrix alleging her to be minor but once it is found that the marriage between prosecutrix is valid in law, her custody should be given to the accused only as he is her husband in the eyes of law. The order of the trial court directing the custody of the prosecutrix with Nari Niketan is unsustainable. During the pendency of the proceedings under ss 363, 366, 368 and 376, IPC, before magistrate, the question of guardianship or custody of the guardian does not arise at all. To have the custody of the prosecutrix if she is found to be minor, the father of the girl may approach the appropriate civil court under the Guardianship and Ward Act, and the Hindu Minority and Guardianship Act.[72]

6. Procedure

The offence under this section is cognizable, non-bailable, non compoundable, and triable by a court by which the kidnapping, or abduction, is triable.

7. Place of Trial

A charge under this section may be enquired into or tried by the court having jurisdiction at the place of concealing or at the place where the kidnapping took place.[73]

8. Joint Trial

A person charged under this section can be jointly tried with persons charged under ss 366 and 498, IPC, where all the offences are committed in the course of the same transaction.[74] However, two persons charged for separate acts of concealment of the same girl cannot be tried jointly.[75]

9. Charge

The following form of the charge may be adopted:

I (*name and office of Magistrate/sessions judge, etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the .....day of.....at... you wrongfully concealed (*or confined*) AB, knowing that the said AB had been kidnapped (*or abducted*), and thereby committed an offence, punishable under s 368 of the Indian Penal Code, within my cognizance (*or3066 within the cognizance of this court*). And I hereby direct that you be

tried by this court on the said charge.

10. Statement made by Prosecutrix Against Accused to her Parents--Admissibility

The statement made by the prosecutrix against the accused persons to her parents narrating the incident soon after the occurrence is a corroborative piece of evidence under ss 8 and 157 of the Evidence Act 1872.[76] The statement is also admissible as *res gestae* under s 6 of the Evidence Act 1872.[77]

11. Proof

In order to secure conviction under this section, the prosecution must prove[78] that:

(a) the person in question had been kidnapped or abducted;
(b) the accused knew that the said person had been kidnapped or abducted; and
(c) he, having such knowledge, wrongfully concealed or confined the person concerned.

The prosecution has to prove that the accused wrongfully concealed or confined a person knowing that person was kidnapped or abducted. Mere evidence to show that the accused said that they wanted to sell the girl is not sufficient to warrant their conviction under this section.[79] Unless it is proved that the accused had knowledge that the girl was kidnapped or abducted, he or they cannot be held guilty on mere presumption.[80]

12. Acquittal

When the statement of prosecutrix is contradictory and inconsistent and she is not a woman of virtue, the conviction of the accused persons under ss 366, 368, IPC is not proper on the basis of the sole testimony of such prosecutrix.[81]

13. Conviction

A person convicted of the offence under this section or its abetment, can again be convicted on the same facts under s 343, IPC .[82]

Where the prosecutrix aged 15 years was induced and taken by first accused from her house to the house of second accused and second accused confined her therein concealing her presence, the conviction of first accused under s 363 and second accused under s 368, IPC, was upheld. However, in the absence of any overt act by other co-accused persons, their conviction under ss 363 and 366, IPC, was set aside.[83] When the minor girl was kidnapped and kept in confinement by the accused, conviction of accused under ss 366 and 368, IPC, was found proper.[84]3067

The offences under ss 365 and 368 are lesser offences as compared to offence under s 366 . Where there was sufficient evidence to show that the woman was abducted from her home and was taken to various places by the accused persons, she was also confined in a house till she was recovered by the police, the conviction of the accused under ss 366 / 34, IPC, was altered to one under ss 365 and 368, IPC .[85]

14. Sentence

The accused convicted of offence under s 368, IPC, was sentenced to 11 and a half years

imprisonment by the sessions court. He had been facing trial and prosecution for more than 25 years and had already undergone part of the sentence, so sentence of imprisonment of the accused was reduced to the period already undergone by him.[86] Keeping in view that age of accused lady convicted under ss 366-368, IPC was 76 years at the time of disposal of the appeal, and also taking into account the fact that she was ill, instead of sentencing her to imprisonment she was sentenced to pay a fine of Rs 10,000, each under ss 366 and 368, IPC, and in default of payment of fine, rigorous imprisonment for two years on each count.[87] However, where the accused had taken an active part in abducting and torturing the complainant and had demanded ransom, it was held that there was no ground to reduce the sentence of three years rigorous imprisonment.[88]

59 *R v Sheikh Ooozeer* 6 WR (Cr) 17 ; *Bannumal v Emperor* (1926) Oudh 560, 27 Cr LJ 1200 .

60 *R v Ameer Daraz* 4 WR (Cr) 8 .

61 *Francis Hector v Emperor* AIR 1937 All 182, p 187, 38 Cr LJ 401 .

62 *R v Jhurrup* 5 NWP (HCR) 133 ; *R v Chubbooa* 5 NWP (HCR) 189 ; *Emperor v Jetha Nathoo* 1 Cr LJ 931, 6 Bom LR 785 .

63 *Sohan Singh v Emperor* (1939) Lah 180, p 181, 40 Cr LJ 684 .

64 *Emperor v Zamin* (1932) Oudh 28, p 30, 33 Cr LJ 275 .

65 *Raghunath Singh v State of Madhya Pradesh* 1967 AWR 508 (SC), 1967 Jab LJ 234 (SC) .

66 *Phula Singh v Crown* 10 PR 1874 (Cr) (FB); *Shiv Singh v Emperor* 1939 Lah 26, p 27, 40 Cr LJ 277 .

67 *Shiv Singh v Emperor* (1939) Lah 26, p 27, 40 Cr LJ 277 .

68 *R v Jhurrup* 5 NWP (HCR) 133 ; *Ram Shastri* 15 CPLR 185; *The Queen v Chubbooa* (1873) 5 NWP (HCR) 189 .

69 *Kalapraj Singh v State* 1965 AWR (HC) 56 .

70 *Emperor v Jetha Nathoo* 1 Cr LJ 931, 6 Bom LR 785 ; *Express v Isree Pandey* 7 WR (Cr) 56 .

71 *Mahaver v State of Madhya Pradesh* (1994) CCR 2911 (MP) .

72 *Seema Devi alias Simran Kaur v State of Himachal Pradesh* (1998) 2 Chand Cr Cases 203 (HP), (1998) 1 RCR 697 (HR) .

73 Code of Criminal Procedure 1973, s 180 . **See***Nanhua Dhimar v Emperor* AIR 1931 All 55, p 56, 32 Cr LJ 690 (2).

74 *Kushai Malik v Emperor* AIR 1924 Cal 389, 25 Cr LJ 1082 ; *Dosa v Emperor* AIR 1928 Lah 751, 29 Cr LJ 496 .

75 Re *Durgamoni Dassi* 43 CWN 196.

76 *State of Tamil Nadu v Suresh* (1998) 2 SCC 372, (1998) Cr LJ 1416 (SC) ; *Sumita Bai v State of Madhya Pradesh* (1999) Cr LJ 2541 (MP) .

77 *Ibid.*

78 *Saroj Kumari v State of Uttar Pradesh* AIR 1973 SC 201, p 203, (1973) Cr LJ 267 .

79 *Amar Ali v Emperor* AIR 1926 Cal 384, 27 Cr LJ 554 .

80 *Griftar Alia Bux v State* 1975 Cr LJ 12, 13 ; **see also***Ramesh v State of Haryana* (1999) 1 Chand Cri Cases 424 (P&H); *Shakeel Alias Pappu v State of Uttar Pradesh* (2000) Cr LJ 153 (All) .

81 *Wahiuddin v State* (1998) IV AD 652 (Delhi) .

82 *Empress v Ishwar Chandra Jogee* (1864) WR (Cr) 21 .

83 *Sumita Bai v State of Madhya Pradesh* (1999) Cr LJ 2541 (MP) .

84 *Upendra Baraik v State of Bihar* (2001) Cr LJ 286 (Pat) ; **see also***Shamshad v State of Uttar Pradesh* (2003) Cr LJ 1322 (All) .

85 *Faiyaz Ahmed v State of Bihar* AIR 1990 SC 2147, (1990) Cr LJ 2241 (SC) .

86 *Dharam Pal v State* (2000) Cr LJ 5060 (Delhi) .

87 *Shamshad v State of Uttar Pradesh* (2003) Cr LJ 1322 (All) .

88 *Ranchhod v State of Madhya Pradesh* AIR 1979 SC 1493, p 1494 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

S. 369.

Kidnapping or abducting child under ten years with intent to steal from its person.--

Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly any moveable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section deals with the kidnapping or abduction of a child under the age of 10 years with the intention to take away the movable property from the person of such child.

'Taking Dishonestly any Moveable Property'

Commentary under ss 22 and 24, vol 1, may be referred to.

Grant of Custody of Prosecutrix

Commentary under s 368, *ante*, may be referred to.3068

2. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

3. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the....day of....at....you kidnapped (*or abducted*) AB, a child then under the age of ten years, with the intention of taking dishonestly the moveable property, to wit..... from the person of the said AB, and thereby committed an offence, punishable under s 369 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

4. Proof

To establish an offence under this section, it has to be proved that:

(1) the accused kidnapped or abducted a child;
(2) such child was, then, under 10 years of age; and
(3) he did so with the intention of taking dishonestly any movable property from the person of such child.

The prosecution case was that the accused kidnapped a one and a half year old girl from the house of her parents and relieved her of the gold ornaments which she was wearing and then threw her dead body into a nearby pond after tying stones to it. The prosecution story regarding arrest of the accused was not believable and prosecution evidence regarding commission of offence under ss 302, 392, 417, 369 and 201, IPC, was found unreliable. The acquittal of accused for the said offences was held proper.[89]

5. Separate Conviction and Punishment under Sections 369 and 363 --Permissibility

Since the offence under s 363, IPC is included in an offence under this section, separate convictions and sentences under the two sections are not maintainable.[90]

89 *State of Kerala v Chellappan Sanal Kumar* 1981 AIR 275 (SC), 1981 CLR 218 (SC) .

90 *Empress v Shama Sheikh* 8 WR (Cr) 35 .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

[91][S. 370.

Trafficking of person.--

(1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by--

First.--using threats, or

Secondly.--using force, or any other form of coercion, or

3069Thirdly.--by abduction, or

Fourthly.--by practising fraud, or deception, or

Fifthly.--by abuse of power, or

Sixthly.--by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1.--The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2.--The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.]

Comments

1. Legislative Changes

The present ss 370 and 370A have been substituted for the old s 370, IPC by the Act No. 13 of 2013,

s 8 (wef 3-2-2013). The heading of the old s 370, IPC "Buying or3070 disposing of any person as a salve" has been substituted by the heading "Trafficking of person". The new s 370 deals with the heinous offence of trafficking a person, more rampant these days, and prescribes various sentences ranging from seven years to imprisonment for life. The consent of the victim is immaterial in determination of the offence of trafficking.

The new s 370A makes the sexual exploitation of a trafficked person punishable.

Recommendations of Justice J.S. Verma Committee

> This report will be incomplete without dealing with the heinous offence of trafficking of humans, whether it is of children or women for various purposes, understated as immoral but in reality heinous. It now stands undisputed that one of the main reasons for human trafficking is for Commercial Sexual Exploitation (CSE) of these children and women. This view has been reaffirmed by the Supreme Court in the decision of (*Bachpan Bachao Andolan v. Union of India* [92]. Offences committed initially on them never come to light. Over time the sexual abuse becomes part of their life. It then gets termed s prostitution and then the abuse borders on being consensual. It is this vicious circle of missing children/women-trafficking-abuse-prostitution which needs to be curbed with urgent measures.
>
> The NHRC, in a report[93] published on 'missing children' says that on an average 44000 children go missing in the country every year. Of these children, 11,000 remain untraced. It cannot be ignored that there are cases where children run away from their homes. However, it also cannot be ignored that many are taken away against their volition. We are surprised by the fact that when the factum of a child going missing is reported to the police station, no FIR is registered. It is merely educed to a General Diary (GD) entry which then passés through various information dissemination channels and finally rests in the National Crime Records Bureau's (NCRB) TALAASH Information System. This database is not properly updated since the police reporting of having recovered missing children to the NCRB is, apparently, lax.
>
> It is quite unacceptable that cases of 'missing children', which may or may not be the result of trafficking in humans, is considered at part with a 'lost and found' situation of inanimate objects. Further, the accountability of the police in these cases is almost non-existent. We are of the strong opinion that it be made legally mandatory that FIRS be registered by the police in case where children are reported to be missing. This makes the police more accountable and under the direct control of the Courts.
>
> .....
>
> As far as the trafficking of these children is concerned, the law seems to lag behind social realities. The only law in India dealing with offence of trafficking is the ITPA apart from the IPC, the latter having many provisions which may be employed to deal with different aspects of trafficking. Ironically though, the term 'trafficking in persons' is nowhere defined in our law. It has been however defined in the United Nations Palermo Protocol (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman And Children, Supplementing The United Nations Convention Against Transnational Organized Crime, 2000) as:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the going or receiving of payments or benefits of achieve the consent of a person having control over another person, for the purpose of exploitation.3071 Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery servitude or the removal of organs

The above definition links traditional offences under the Indian Penal Code to the composite offence of 'trafficking in persons' and this inexorable link will put an additional burden on the police to lodge an FIR and investigate it in accordance with law. The above definition is also pertinent because the nadir of an offence need not always be in another offence. Phrases like 'abuse of power or a position of vulnerability' and 'giving or receiving benefits to achieve the consent of a person having control of another person' etc. are per se not offences in the eyes of our law. It is therefore imperative that these actions be linked to the offence of 'trafficking' so as to make them culpable. This definition has been adopted in the Goa Children's Act, 2003[94] which can also be used as a template to evolve law in this area

In any event, we recommend that the definition of 'trafficking' contained in the Palermo Protocol ought to be adopted by the Legislature as a definition of the offence in the Indian context, since the lack of definition of trafficking and the ineffective law enforcement in relation to trafficking and in particular the non-application of the provisions contained in the Indian Penal Code in relation to the same have actually made trafficking a huge industry which has not been brought to any critical gaze of law enforcement for reasons already cited. We believe that in order to protect the dignity of women in particular, it is necessary that the definition of trafficking as contained above must be incorporated as an independent definition in the Penal Code as a separate offence.[95]

2. Essential Ingredients of Offence

Where a person for the purpose of exploitation--

(a) recruits,
(b) transports,
(c) harbours,
(d) transfers, or
(e) receives, a person or persons, by--

(i) using threats, or
(ii) using force, or any other form of coercion, or
(iii) by abduction, or
(iv) by practicing fraud, or deception, or
(v) by abuse of power, or
(vi) by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control3072 over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and triable by the Court of Session.

4. Charge

The following form of the charge may be adopted:

> I,..... (*name and office of Session Judge etc*.) hereby charge you.....(*name etc. of the accused*) as herebelow:
>
> That you on or about the ..... day..... at.....abducted P, by use of force (*or threats, etc give the details of incident*) for the purpose of sexual exploitation (*or slavery, servitude or forced removal of organs*), and thereby committed an offence punishable under Section 370 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct you to be tried by this Court for the said charge.

5. Commentary under the old Section 370 , IPC

For assistance in the disposal of the pending cases, the commentary below under the old s 370 has been retained.

Scope

The institution of slavery flourished in ancient days, however, with the advance of civilisation, slavery came to be considered as one of the worst social evils. Blackstone defined it as the civil relation in which one man possesses an absolute power over the life, liberty and future of another. The circumstance which made slavery the worst of all social evils was that the master had a legal right to enforce the performance of certain services without the slave having recourse to any tribunals.[1] This section and the succeeding s 371, IPC were enacted to suppress the practice of slavery.[2] The section makes it an offence:

(i) to import, export, remove, buy, sell or dispose of any person as a slave; or
(ii) to accept, receive or detain, against his will, any person as a slave.

The crux of the offence is the disposal as a slave. Disposal of a girl in marriage cannot be said to be a disposal of the girl as a slave. Where the accused bought a girl, aged nine, and gave her in marriage to his brother, it was held that he was not guilty of the offence of disposing a girl as a slave.[3] A sale of an infant by a parent for value would not be an exploitation of the child under s 370, IPC .[4] A person who buys young girls in one district and disposes of them in marriage in another district, is not, therefore, guilty of an offence under this section or the succeeding s 371, IPC .[5] Similarly, if a person purchases a girl in a foreign territory knowing her to be a slave and imports her into India, the purchase is not in itself an offence under this section.3073 Nor is importing her into India such an

offence unless it is shown that the accused imported her as a slave.[6] Where, however, in *Koroth Mammad v Emperor* ,[7] Pulayan, aged 25 years, was sold by the second accused to the first accused under a *jenman* deed, by which Pulayan and his heirs were granted to the first accused in absolute ownership, it was held that the transaction amounted to disposing of a person as a slave within the meaning of the section and both the accused were guilty. Similarly, where a girl, aged 13 years, was sold as a *vellati*, *i.e.* as a slave, it was held that the offence under this section was committed by the person who transferred, or purported to transfer, his supposed rights of property in the girl.[8]

Crux of the Offence

The crux of the offence under this section, as stated earlier, is the disposal of a person 'as a slave'. A slave is a creature, without any right or status whatsoever, who is, or may become, the property of another as a mere chattel, the owner having absolute power of disposal by sale, gift, or otherwise, and even if life or death, without any responsibility to any legal authority.[9] Disposal of a girl in marriage cannot be said to be a disposal of the girl as a slave.

Slave

The world 'slave', as appearing in s 370, IPC, has not been defined in the Code. We have, therefore, to look for its ordinary meaning. The *Oxford Dictionary* defines slave as a human chattel, a helpless victim to or of some dominating influence, a person having no leisure or a contemptible person, captured by others and made to serve them. In *Webster's Dictionary,* a slave is defined as one who has no freedom of action but whose person and services are wholly under the control of another.

The *Black's Law Dictionary* defines slave to mean a person who is wholly subject to the will of another, one who has no freedom of action, but whose person and services are under the powers of a master, and who belong to him, so that the master may sell and dispose his person.

Such is the determinate and fixed condition of the slave and it is not, as ruled in *Empress v Sikundur Bukhut* ,[10] a condition capable of degrees.[11] A person is treated as a slave if another asserts an absolute right to restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, guardian or jailor.[12] The minimum requirement of the status of slavery is the absolute power asserted over the liberty of the slave on his personal services.[13] In the last cited case, Napier J, said that the word 'slave', in this Code does not connote any thing more than a right to property in the person, a right to retain his services, and a right to dispose of his person and services. In *Ganpat v Empress* ,[14] it was said that the word 'slave', in this section, is not used in a metaphorical sense.3074

Slavery Earlier and The Present Position

In the ancient world, the slave girls staffed brothels and filled harems. It was also possible for a free individual to sell himself, or under his authority, a wife or a child, grandchild, a ward into slavery for money or other considerations, until the vassal was recognised as a person before law.[15]

Although the sale of persons into chattel slavery has been virtually eliminated, however, it can be seen that practices leading to the similar results frequently have outlived the legal prohibitions. One such practice has been the adoption of children, especially girls of extremely poor households by wealthy people who pay a certain price to the natural parents and thereafter exploit the child. Such practices have perpetuated in disguise, and this kind of practice continues even after its official legal condemnation.[16]

91 Sections 370 and 370 A, substituted by Criminal Law (Amendment) Act, 2013 (13 of 2013), s 8 for s 370 (wef 3-2-2013). Prior to substitution s 370 read as under: " **S. 370 . Buying or disposing of any person as a slave.--**Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.".

92 *Bachpan Bachao Andolan v Union of India* (2011) 5 SCC 1, AIR 2011 SC 3361, [2011] 5 SCR 353, 2011 (5) JT 68, 2011 (4) Scale 769

93 *Vide* Report of NHRC Committee on Missing Children. NHRC 2007.

94 The Goa Children's Act 2003. Section 2(z) : (z) "Child trafficking" means the procurement, recruitment, transportation, transfer, habouring or receipt of children legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for monetary gain or otherwise. [0]

95 *Vide* the Report of the Committee on Amendments to Criminal Law by Justice J.S. Verma dated 23 January 2013.

1 *Empress of India v Ram Kuar* ILR (1880) 2 All 723, p 731 (FB) per Qldfield J ; *Amina v Empress* ILR 7 Mad 277, 1 Weir 354 .

2 *Ibid.*

3 *Crown v Roda* 1867 PR (Cr) 19, 38 .

4 *Prema v State of Kerala* 2013 (3) KLT 1012 (Ker) .

5 *Ganpat v Empress* 1884 PR (Cr) 20, 36 .

6 *Nanda v Empress* 1882 PR (Cr) 26 .

7 *Koroth Mammad v Emperor* 19 Cr LJ 17, AIR 1918 Mad 647 .

8 *Amina v Empress* 7 Mad 277, 1 Weir 354 .

9 Per Stuart CJ in *Empress of India v Ram Kuar* (1880) ILR 2 All 723, p 726 (FB) .

10 *Empress v Sikundur Bukhut* 1871 NWP (HCR) 146 .

11 *Empress of India v Ram Kuar* ILR (1880) 2 All 723 .

12 *Ibid*, p 728 per Spankie J.

13 *Koroth Mammad v Emperor* AIR 1918 Mad 647, p 649 per Abdur Rahim J .

14 *Ganpat v Empress* 1884 PR (Cr) 20 .

15 *Mahaveer v State of Madhya Pradesh* IV (1994) CCR 2911 (MP).

16 *Ibid*.

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

[17][S. 370A.

Exploitation of a trafficked person.--

(1) Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine.

(2) Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.]

Comments

1. Legislative Changes

This section is new, inserted by Act 13 of 2013, s 8 (wef 3-2-2013). See comments under s 370, *ante*.

2. Scope

This section prescribes the punishment for offence of exploitation of a trafficked person.

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and triable by the Court of Session.

4. Charge

The following form of the charge may be adopted:3075

I,..... (*name and office of Session Judge etc*.) hereby charge you.....(*name etc. of the accused*) as herebelow:

That you on or about the ..... day of..... at..... knowingly (*or having reason to believe*) that P a minor has been trafficked, engaged the said P for sexual exploitation.....(*give details*) and thereby committed an offence punishable under Section 370A(2) of the Indian Penal Code and within my cognizance.

And I hereby direct you to be tried by the Court for the said charge.

17 Sections 370 and 370 A, substituted by Criminal Law (Amendment) Act, 2013 (13 of 2013), s 8 for s 370 (wef 3-2-2013).

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

S. 371.

Habitual dealing in slaves.--

Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with [18][imprisonment for life], or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Comments

1. Scope

This section is aimed at punishing a habitual slave-dealer. He is one who makes a profession of buying and selling slaves. In other words, he trades in them. The word 'traffic' should be construed *ejusdem generis* with the words preceding it. It may include an agent who negotiates the purchase and sale on a commission basis. A person, who steals a child for being sold as a slave, is punishable under this section, in addition to that for kidnapping for which he may be principally liable.

2. Slave

The term 'slave' is not defined in this Code. 'Slave', according to *Chambers' Twentieth Century Dictionary*[19] is a 'person who is held as property' or 'one who is submissive under domination' and, according to the *ConciseOxfordDictionary*,[20] a slave is a 'person who is the legal property of another or others and is bound to absolute obedience'. Similarly, slavery is the 'civil relation in which one man has absolute power over the liberty of another.'[21] The institution of slavery is now virtually defunct and shocks the civilised conscience of mankind. A dealer in slaves enables a continuous supply of slaves. If he conducts his trade on the seas, he is a pirate and punishable as such. And if he carries on his trade on land, he is punishable under this section. For further commentary, see the same heading in s 370, *ante*.

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of sessions.3076

4. Charge

The following form of the charge may be adopted:

I (*name and office of sessions judge, etc*.) hereby charge you (*name of accused person*) as follows:

That, on or about the.....day of.....at.....you habitually imported (*or exported*) (*or removed*) (*or bought*) (*or sold*) (*or trafficked in*) (*or dealt with in*) slaves.....(*name the slave or slaves*), and thereby committed an offence, punishable under s 371 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

5. Proof

To establish an offence under this section, it has to be proved that:

(1) the accused imported, exported, removed, bought, sold, trafficked in, or dealt with in, slaves; and
(2) he did so habitually.

18 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation for life' (wef 1-1-1956).

19 *Chambers' Twentieth Century Dictionary*, 1964 edn.

20 *Concise Oxford Dictionary*, sixth edn, 1976.

21 *Wharton's Law Lexicon,* fourteenth edn.

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

S. 372.

Selling minor for purposes of prostitution, etc.--

Whoever sells, lets to hire, or otherwise disposes of any [22][person under the age of eighteen years with intent that such person shall, at any age, be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will, at any age be], employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[23]*[Explanation I.*--When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.--For the purposes of this section, "illicit intercourse" means sexual intercourse between persons not united by marriage, or by any union or tie which, though not amounting to a marriage, is

recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.]3077

Comments

1. Scope and Applicability

The prevalence in the country of the menace of children being used for unlawful and immoral purposes is well-known. Doctors in nursing homes who, contrary to all norms of professional ethics, sell a recently born child without ascertaining satisfactorily the purpose for which the child is being purchased and without taking proper precautions to ensure that the child may not fall in undesirable hands must, *prima facie*, be imputed with the knowledge that the child, at some age, is likely to be employed or used for any unlawful and immoral purpose within the meaning of s 372 of the IPC .[24] This section, which is enacted to protect the chastity of girls under the age of 18 years, prohibits the disposition of minor girls for the purpose of prostitution or illicit intercourse.[25] To sell a woman as a mistress comes within the purview of this section as this is an immoral purpose. Even where the woman in question is a married woman, any sexual intercourse with her would be immoral.[26] The section is applicable to married as well as unmarried female minors,[27] even if they were prostitutes before the accused obtained possession of them.[28] The section applies whether the woman is taken as a mistress or as a prostitute. This section and the succeeding s 373 do not cease to be applicable because the minor[29] concerned is the dancing girl by caste.[30]

2. Ingredients

The essential ingredients of the offence under this section are:

(1) there should be, by the accused, selling, or letting to hire, or other disposal of a person;
(2) such person should be under the age of 18 years;
(3) the selling, letting to hire, or other disposal should be with intent, or knowledge of the likelihood, that such person shall, at any age, be employed or used for

    (i) the purpose of prostitution, or
    (ii) illicit intercourse with any person, or
    (iii) any unlawful and immoral purpose.

The offence, made punishable under this section, is complete when the person, intending that a minor should be employed or used for the purpose of prostitution or for any unlawful or immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, intentionally places the minor in a position calculated to bring about the result intended or known to be likely. The offence, under this section, consists in the intentional or conscious exposure of the minor to the danger of degradation. If the accused did all, which they could, to expose the minors to such danger, it is immaterial whether the customary ceremonial3078 accompaniments, for giving the prostitutes a particular status, were actually completed or not.[31]

An offence under s 372, IPC may be made out on the proof of sale of a girl, even without the proof of change of possession.[32]

3. 'Disposes of'

The term 'disposes of' does not necessarily mean a change of possession.[33] It is not required that the accused should give up present possession of the minor in order to be amenable to the law under this section.[34] In a Madras case,[35] it was observed that the term 'dispose of', as used in this section, contemplates some physical disposal for a mercenary purpose or the exercise of some power of control which would be final and irrevocable in its moral effects. In a later case,[36] the Madras High Court took the view that the word 'disposal' necessarily connotes some control, at any rate, by the person disposing over the minor, disposed of, and therefore, a mere direction to a minor to go over to a brothel would not constitute a disposal of the minor. When minor girls who were begging were taught singing and dancing, and made to accompany their grandmother, a *dasi*, to the temple, to take part in the ceremonies of the temple with a view to qualify them as *dasis*, it was held that this did not amount to a disposal under this section.[37] However, in *Public Prosecutor v Maddila Mutayulu* ,[38] it was observed that the language of this section and s 373, IPC shows that there must be making over possession of the minor girl either by sale or by hire or some similar arrangement in order that the case may come within the mischief of the section. If the only evidence is that the ceremony of *Kanyadikam* was performed between the minor girl and the accused with the help of her mother, entitling the accused to enjoy the girl's bed for three days successively, and the minor girl continued to live with her parents, who did not part with her possession to the accused, the facts cannot support conviction of the mother under this section (and, of the lover under s 373, IPC).

It may be regarded as settled law that the dedication of a minor to a temple in order that she might serve the temple as a dancing girl amounts to disposal of the minor for the purpose of prostitution, particularly when there is evidence of the kind of life led by girls so dedicated.[39] It is a notorious fact that women, who are temple dancers, lead the life of prostitutes.[40] If a minor girl is taken for singing and dancing in a temple and received *prasadam* as the daughter of the accused, a temple *dasi*, though without any formal adoption of the girl, it is sufficient3079 evidence to raise a presumption of guilt under the section and casts, upon the accused, the burden of showing the absence of a guilty intention or knowledge.[41] However, the mere performance of a *gejjee* ceremony, which may be a preliminary to the final *falshobhan* ceremony, is an incomplete dedication to the temple as a dancing girl and would not amount to disposal within the meaning of the section.[42] Similarly, a ceremony, such as the tying of a talisman on a minor girl, worshipping of basin of water and distributing food, may be a preliminary step before the selling or letting out or disposing of the minor and would not constitute an offence under the section.[43]

4. 'Person under the Age of Eighteen Years'

The person disposed of should not attain, at the time of disposal, the age of 18 years. If a person is above that age, the offence, under this section, is not committed, however immoral the transaction may be. Thus, the precise age of the person, at the time of disposal is an essential ingredient of the offence and it must be clearly established.[44] The question of age of a girl, when she is on the verge of becoming a major, presents difficulties. In such a case, medical evidence is useful, but it is liable to err within a year or two of the correct age.[45]

Nevertheless, such evidence may corroborate the direct testimony of witnesses on the question.

5. Intention or Knowledge

The question, whether or not the disposal of the minor was effected with the intention or knowledge which must be combined with the disposal to constitute the offence, is a question of fact to be determined according to the circumstances of each case.[46] The crucial point of time, for determining the culpability of a person under the section, is one when the sale takes place.[47] In order to support a conviction under this section, it would be sufficient to show that the minor (girl) was given and accepted with the intention,[48] or with the knowledge, specified therein. If a minor girl is sold with the intent that she should become the wife of a certain person and cohabit with him as such, no offence under this section is committed[49] even if it subsequently turns out that the marriage did not strictly conform to Hindu Law.[50]3080

6. 'Likely'

It has to be taken notice of that the word 'likely' in the section denotes 'probability' and not 'certainty'.[51]

7. 'For the Purpose of Prostitution'

Prostitution is 'the indiscriminate consorting of a woman with men for hire'.[52] The idea underlying prostitution is that a woman should surrender her body for a monetary consideration to someone who is not, in law, entitled to have sexual intercourse with her.[53] Explanation I provides that if a minor girl is disposed of to a prostitute or the keeper or manager of a brothel, it shall be presumed, until the contrary is proved, that such disposal was with the intent that the minor girl shall be used for the purpose of prostitution.

A brothel is 'a place resorted to by persons of both sexes for prostitution'. The premises are used as a brothel if it is proved that persons of opposite sexes meet there for having illicit sexual intercourse.[54]

8. 'Illicit Intercourse'

The meaning to be given to the words 'illicit intercourse' for the purpose of this section, is provided by Explanation II. In substance, intercourse is illicit if it is between persons who are not united by marriage or do not have a quasi-marital relationship.[55]It is, therefore, no defence, after the amendment of this section in 1924, that there was only a single act of intercourse and that the girl was not used habitually for the purpose of indiscriminate sexual intercourse.

9. 'Unlawful and Immoral Purpose'

This expression demands that the purpose must be unlawful as well as immoral. But an act may be unlawful, though not immoral, it may, likewise, be immoral, but not unlawful. Where the accused falsely represented to a person that a certain minor girl, really belonging to a lower caste, belonged to a higher caste and that person, believing the representation to be true, married her, it was held that it could not be said that the prohibited act was done with the intent that the minor should be used for an 'unlawful and immoral purpose'. Even if the marriage was not broken and the wife became a mistress, the purpose may be immoral, but it is impossible to say that it is unlawful.[56] In Re *Ponrangam,*[57] it was held that, in the absence of any special custom, at all events, it is unlawful for a person to enter into a transaction whereby a minor is transferred to another as his concubine, the purpose of such a transaction is both illegal and immoral.

10. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a court of sessions.3081

11. Place of Trial

The offence under this section must be tried by the court having jurisdiction over the place in which the sale of the minor (girl) took place.[58]

12. Charge

The following form of the charge may be adopted:

I (*name and office of Sessions Judge, etc*.) hereby charge you (*name of accused person*) as follows:

That you, on or about the.....day of .....at.....sold (*or let to hire*) (*or disposed of*) AB, a person under the age of eighteen years, with intent that such person should, at any age, be employed (*or used*) for the purpose of prostitution (*or illicit intercourse with CD* (*or for any unlawful and immoral purpose, viz,....*(*state the purpose*)), (*or knowing it to be likely that the said AB would, at any age, be employed (or used) for any such purpose*), and thereby committed an offence, punishable under s 372 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

13. Order of Discharge--Validity

Doctors in nursing homes who, contrary to all norms of professional ethics, sell a recently born child without ascertaining satisfactorily the purpose for which the child is being purchased and without taking proper precaution to ensure that the child may not fall in undesirable hands must, *prima facie*, be imputed with the knowledge that the child, at some age, is likely to be employed or used for any unlawful and immoral purpose within the meaning of s 372 of the Penal Code. It has to be taken notice of that the word 'likely' in the section denotes 'probability' and not 'certainty'. Thus, an offence under s 372 of the IPC is clearly made out against doctors, nurse and cashier of a hospital who were caught red handed while selling a newly born child of an unwed mother in their hospital. Hence, an order discharging them of the charges under ss 372, 120B and 34 of the IPC would not be proper. So far as a lab technician in the hospital is concerned, there is absolutely no allegation that he was present when the deal was struck between the decoy customers and other co-accused persons for selling a child. There being also no evidence that the transaction of sale and purchase of a minor child took place before him or he had the knowledge of same. Hence, order discharging him would be proper.[59]

14. Proof

To establish an offence under this section, it has to be proved that:

(1) the accused sold, let to hire or otherwise disposed of the person in question;
(2) such person, at the time of offence, was under the age of 18 years; and
(3) he did so with intent that such person should be employed, or used, at any age, for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or with knowledge that it was3082 likely that such person would be employed, or used, at any age, for such purpose.

15. Sentence

Where the accused kidnapped a minor girl and sold her at a place far away, for illegal and immoral purpose, it was held that in such a case it was just and proper that a deterrent sentence be imposed on the accused. The sentence of 7 years rigorous imprisonment and a fine of Rs. 50,000/-, as awarded by the High Court was upheld.[60]

16. Alteration of Conviction from Sections 366A and 372 to Section 365

Commentary under the same heading in s 365, *ante*, may be referred to.

22 Substituted by Act 18 of 1924, s 2 for certain words.

23 Inserted by Act 18 of 1924, s 3 .

24 *State of Madhya Pradesh v PK Jain* (2005) Cr LJ 877 (MP) .

25 *Venku v Mahalinga* ILR 11 Mad 393, p 401 .

26 *Girdhari v Emperor* AIR 1934 All 324, 35 Cr LJ 571 .

27 Re *Kammu*1879 PR (Cr) 12, pp 34, 35.

28 *Emperor v Ismail Rustomkhan* 8 Bom LR 237, 3 Cr LJ 334 .

29 *Girdhari v Emperor* 35 Cr LJ 571, AIR 1934 All 324 .

30 *Empress v Ramanna* (1889) 12 Mad 273, 1 Weir 375 .

31 *Emperor v Bhimde Pandu Deoll* 7 Bom LR 562, 2 Cr LJ 500 .

32 *Dharanrajan v State of Kerala* 2014 (2) KLT 314, 2014 (2) KLT SN 62 (Ker) .

33 1 Weir 359, p 362 (FB).

34 *R v Jaili Bhavin* 6 Bom HC Cr C 60; *R v Arunachallam* ILR 1 Mad 164, 1 Weir 358 .

35 *Srinivasa v Annasami* (1892) 15 Mad 323, 1 Weir 366, per Parker J.

36 Re *Nari* 26 Cr LJ 868, AIR 1925 Mad 716, p 717 .

37 Re *Dasi Marimuthu* 1 Weir 364.

38 *Public Prosecutor v Maddila Mutayulu* 19 Cr LJ 965, (1918) MWN 484, 35 MLJ 157, AIR 1919 Mad 892, 47 Ind Cas 865 .

39 *Public Prosecutor v Rajammal* (1911) 2 MWN 479, 12 Cr LJ 566 ; *Empress v Tippa* (1892) 16 Bom 737 (dedication of a minor aged about 6 years); Re *Padmavati* 1 Weir 356, 1 Weir 359 (FB); *Empress v Basava* (1891) 15 Mad 75,1 Weir 372 (girl dedicated as a *baswi* involving a ceremony of marriage between the girl and an idol); (1876) 1 Mad 164,1 Weir 358 (FB) (minor girl married to idol).

40 *Kamalakshi v Ramaswami Chetti* 19 Mad 127, 130 per Subramania Aiyar J. **See also***Guddati Obala Reddi v Ganapati Kandanni* 23 MLJ 493 (it is presumed that a minor, adopted by a *dasi*, will become a prostitute).

41 *Public Prosecutor v Kannammal* 24 MLJ 211, 14 Cr LJ 33, 34, **following***Srinivasa v Annasami* 15 Mad 41, **reiterated** in *Srinivasa v Annasami* 15 Mad 323, and **differing** from the dictum, contra of Muttusami Aiyar J, in *Empress v Ramanna* 12 Mad 273 . **See also***Empress v Baku* ILR 24 Bom 287, 1 Bom LR 678 .

42 *Parmeshwari Subbi v Emperor* 21 Cr LJ 721, 1920 Bom 63 (it was pointed out that *R v Jaili Bhavin* (1863) 6 Bom HCR Cr C 60, and *Empress v Tippa* (1892) 16 Bom 737, were cases of complete dedication).

43 *Emperor v Sahebava Birappa* 26 Cr LJ 1482, AIR 1925 Bom 478 .

44 Re *Ponrangnm* 1 Weir 373.

45 Re *Ponrangam* 1 Weir 373; *Kashiram v State* (1980) Cr LR 333, p 334 (MP) ; *Bhawanidin v State* (1980) Cr LR 338, p 340 (MP) .

46 1 Weir 359, p 363.

47 *Lal Singh v State* AIR 1954 HP 43 .

48 *Empress v Ramanna* (1889) 12 Mad 273, 276 per Muttusami Ayyar J.

49 Re *Kammu*1879 PR (Cr) 12, p 34.

50 *Lal Singh v State* AIR 1954 HP 43, **distinguishing***Girdhari v Emperor* AIR 1934 All 324 .

51 *State of Madhya Pradesh v PK Jain* (2005) Cr LJ 877 (MP) .

52 *Winter v Woolfe* (1931) 1 KB 549 ; *Mozley and Whiteley's Law Dictionary,* seventh edn.

53 *Emperor v Lalya Bapu Jadhav* 31 Bom LR 521, 30 Cr LJ 787 ; *Dowlath Bee v Shaik Ali* 5 MHCR 473, p 476 (FB), 1 Weir 377 .

54 *Winter v Woolfe* (1931) 1 KB 549 .

55 See *Abdul Hameed v State* 1974 All Cr R 218 ; *Mahbub v Emperor* 6 Cr LJ 9, 4 ALJ 482 ; *Emperor v Mavji Govind* 10 Cr LJ 176 ; *Kesar Mal v Emperor* AIR 1932 Cal 555, 33 Cr L 673 .

56 *Empress of India v Sri Lal* (1889) 2 All 694, p 697, 698 (FB) .

57 Re *Ponrangam* 1 Weir 373.

58 *Gul Mohammad v Crown* 52 Cr LJ 891, 1951 Ajmer 68 (sale of girl in Sind; offence cannot be tried by court in Ajmer-Merwara).

59 *State of Madhya Pradesh v PK Jain* (2005) Cr LJ 877 (MP) .

60 *Manjappa v State of Karnataka* 2010 Cr LJ 4729, p 4731, 2010 AIR SCW 5815, (2010) 9 Scale 444, (2010) 9 SCC 334 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

S. 373.

Buying minor for purposes of prostitution, etc.--

Whoever buys, hires or otherwise obtains possession of any [61][person under the age of eighteen years with intent that such person shall, at any age, be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will, at any age be], employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[62][*Explanation I.*--Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years, shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.--"Illicit intercourse" has the same meaning as in section 372 .]

Comments

1. Scope

This section deals with buying, hiring or otherwise obtaining possession of minors for the purpose of prostitution, *etc.* One is punishable under this section if he buys, hires or otherwise obtains possession of a minor, whether a male or a female, under the age of 18 years, with intent or knowledge that such minor shall, at any age, be employed or used for the purpose of prostitution or

illicit intercourse with any person or for any unlawful or immoral purpose. An offence, under this section, is3083 complete as soon as the buying, *etc*, by the accused and the guilt, knowledge or intent on his part are proved though the minor bought may not enter upon prostitution until years after she has attained maturity or may not enter upon such a profession at all.[63] The section does not require that a minor, taken possession of by an accused person, should necessarily be employed or used for the purpose of prostitution. It is quite enough that such employment or use would be the probable result of the detention of the girl by the accused though the accused might not have intended the result.[64]

2. Ingredients of the Offence under this Section

The offence consists in: (1) buying, hiring or otherwise obtaining possession of a minor, (2) who is under the age of eighteen years, (3) with intent, or knowing it to be likely, that the minor will, at any age, be employed, or used, for the purpose of prostitution or illicit intercourse with any person or for a purpose which is both unlawful and immoral.

3. 'Otherwise Obtains Possession'

To constitute an offence under this section, it is not essential that obtaining of the possession should be from a third person; the section is quite applicable to an agreement or understanding arrived at with the minor without the intervention of a third person.[65] There need not be a third party from whom possession of the minor should be obtained.[66] There are no words in the section as to the necessity of there being a third party from whom possession of the minor is obtained.[67]

If the keeper of a brothel meets the girl and by physical force or false representation, induces her to enter the brothel and keeps her there, he undoubtedly obtains possession of the girl, and the fact that no third party is involved as the giver of the possession is irrelevant.[68] It is, therefore, enough if it is established that the accused, in fact, obtained possession of the minor with intent that the minor shall be employed or used for the purpose of prostitution.[69] A person, who steals a minor girl under eighteen years of age, may, thus, be held to have obtained possession of the minor within the meaning of s 373, IPC .[70]3084

Obtaining possession involves exercising some sort of control over the person of the girl, possession of whom has been obtained.[71] Where a girl runs away with the accused of her own accord and there is nothing to show that he attempted to control her movements in any way, or that she was prevented from leaving him at any moment she chose, or that he exercised any sort of control over her, his conviction and sentence under this section must be set aside.[72]

The law does not specify the nature of possession, its duration or its intensity; it only specifies the object, namely, prostitution or illicit intercourse, *etc*.[73] In *Emperor v Vithabai Sukha* ,[74] the girl came to a brothel whose keeper allowed her to prostitute herself for money for two or three hours in the night. The possession, set up by the girl, was held to be sufficient possession within the meaning of s 373, IPC . But in the following cases,[75]it has been held that in order to amount to possession under this section, something more is required than such possession as is obtained for the purpose of a single act of sexual intercourse.

The expression 'otherwise obtains possession' includes even a valid adoption.[76]

4. Intention or Knowledge

The intention or the knowledge, requisite for the offence under this section, may be presumed from the facts proved and the circumstances of the case.[77] For further commentary, see under s 372, *ante*.

5. Presumption under Explanation I--When can be Raised?

In order that presumption under Expln I may be raised against an accused, it has to be established by the prosecution that at the time, when he/she bought, hired or otherwise obtained possession of the minor girl, he/she was a prostitute or was keeping or managing a brothel.[78] If the accused, though originally a prostitute, had given up prostitution long before the alleged offence and had been carrying on propaganda for the upliftment of her community, appealing to it to give up prostitution, the presumption cannot be raised.[79] However, once the presumption is raised, it is upon the accused to rebut it. If he/she fails to rebut the presumption, the case against him/her under this section must be considered to have been established.[80]3085

6. Procedure

An offence under this section is cognizable, non-bailable, non-compoundable, and is triable by a court of sessions.

7. Place of Trial

The offence under this section can be tried by the court within whose jurisdiction the offence is completed. In *Emperor v Batubai Ganeshu* ,[81] it was arranged in Kashmir that a minor girl from that place should be brought to Bombay to keep her in the brothel of the accused who paid the girl's railway fare. It was held that what happened in Kashmir was only a preparation for committing the offence which was thereafter completed in Bombay, when the girl was put in the brothel of the accused, and, therefore, the offence could be tried at Bombay.

8. Joint Trial

The offence under this section is distinct from the one under the preceding section. Therefore, persons accused of the two distinct offences, cannot be tried together unless the offences are committed in the course of the same transaction.[82]

9. Charge

The following form of the charge may be adopted:

I (*name and office of sessions judge, etc*.) hereby charge you (*name of accused person*) as follows:

That, on or about the .....day of .....at..... you bought (*or hired or obtained possession of*) AB, a person then under eighteen years of age, with intent that the said AB shall, at any age, be employed (*or used*) for the purpose of prostitution (or illicit intercourse with CD) (*or for any unlawful and immoral purpose, viz.,.....*(*specify the purpose*)), or knowing it to be likely that the said AB will, at any age, be employed (or used) for any such purpose, and thereby committed an offence, punishable under s 373 of the Indian Penal Code, and within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the said charge.

10. Proof

To establish an offence under this section, the prosecution must prove that:

(1) the accused bought, hired, or otherwise obtained possession of, a person in question;
(2) such person was, at that time, under eighteen years of age; and
(3) the accused did so with intent, or knowing it to be likely, that the said person will, at any age, be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose.

It is incumbent on the prosecution to prove that the girl is under the age of 18 years.[83] Where there is no reliable evidence as to the age of the girl, the conviction cannot be3086 sustained.[84] The question, whether a person under the age of 18 years has been bought, hired, or otherwise obtained possession of, is a question of fact.[85]

11. Sentence

Where the accused kidnapped a minor girl and sold her at a place far away, for illegal and immoral purpose, it was held that, in such a case, it was just and proper that a deterrent sentence be imposed on the accused. The sentence of 7 years rigorous imprisonment and fine of Rs. 50,000/-, as awarded by the High Court was upheld.[86]

61 Substituted by Act 18 of 1924, s 2, for certain words.

62 Inserted by Act 18 of 1924, s 4 .

63 *Empress v Chanda* (1895) 18 All 24, p 28, 55 AWN 141 .

64 *Public Prosecutor v Kannammal* 24 MLJ 211, 14 Cr LJ 33 (on the facts, it was held that it could be presumed that the accused knew that it was likely that the girl would be employed for immoral purposes before she was 16 years of age); *Srinivasa v Annasami* ILR (1891) 15 Mad 41 ; *Empress v Tippa* ILR (1892) 16 Bom 737 ; *Emperor v Bhimde Pandu Deoli* 7 Bom LR 562, 2 Cr LJ 500 ; *Empress v Papa Sami* ILR (1910) 23 Mad 159 . **See also** Re *Padmavati*(1870) 5 MHCR 415.

65 *Dowlath Bee v Shaik Ali* (1870) 5 MHCR 473, p 475 (FB), per Scotland CJ, 1 Weir 377 .

66 *Emperor v Shamsunderbai* 2 Bom LR 1234, AIR 1921 Bom 323 ; *Bhagchand Jasraj Marwari v Emperor* 35 Cr LJ 1437, AIR 1934 Bom 200 ; *Emperor v Gordhan Kalidas* 43 Cr LJ 400, AIR 1942 Bom 23 ; *Sham Sunder Prusti v Emperor* AIR 1930 Pat 219 . For the **contrary view**, see *Dowlath Bee v Shaik Ali* (1870) 5 MHCR 473, p 477, 478, per Holloway J, 1 Weir 377 ; *Public Prosecutor v Maddila Mutayalu* 35 MLJ 157, AIR 19 Cr LJ 965; *Jatindra Mohan Das v Emperor* 38 CR LJ 696, AIR 1937 Cal 250 .

67 *Emperor v Shamsunder Bai* 22 AIR 1921 Bom 323, Bom LR 1234, p 1238.

68 *Emperor v Gordhan Kalidas* AIR 1942 Bom 23, p 24, 43 Cr LJ 400 .

69 *Emperor v Shamsunder Bai* AIR 1921 Bom 323, 22 Bom LR 1234, p 1238 .

70 *Bhagchand Jasraj Marwari v Emperor* AIR 1934 Bom 200, 35 Cr LJ 1437 .

71 *Bhagchand Jasraj Marwari v Emperor* AIR 1934 Bom 200, 35 Cr LJ 1437 ; *Emperor v Shamsunder Bai* 22 Bom LR 1234, AIR 1921 Bom 323 ; *Jatindra Mohan Das v Emperor* AIR 1937 Cal 250, 38 CR LJ 696 . *Emperor v Gordhan Kalidas* 43 Cr LJ 400, AIR 1942 Bom 23 .

72 *Jatindra Mohan Das v Emperor* AIR 1937 Cal 250, 38 Cr LJ 696 ; *Emperor v Gordhan Kalidas* AIR 1942 Bom 23, 43 Cr LJ 400 .

73 *Emperor v Vithabai Sukha* AIR 1928 Bom 336, 29 Cr LJ 993, **following***Empress v Tippa* ILR 16 Bom 737 .

74 *Emperor v Vithabai Sukha,* AIR 1928 Bom 336, 29 Cr LJ 993, **following***Empress v Tippa* ILR 16 Bom 737 .

75 *Bhagchand Jasraj Marwari v Emperor* AIR 1934 Bom 200, 35 Cr LJ 1437 ; *Emperor v Shamsunder Bai* AIR 1921 Bom 323, 22 Bom LR 1234 ; *Dawlath Bee v Shaik Ali* 5 MHCR 473 (FB), 1 Weir 377 .

76 *Munshilal v State of Madhya Pradesh* (1959) Jab LJ 614, (1960) MPLJ 177 .

77 *Public Prosecutor v Kannammal* 24 MLJ 211, 14 Cr LJ 33 ; *Khetramani Dasi v Emperor* AIR 1922 Cal 539, 24 Cr LJ 104 .

78 *Emperor v Banubai Ardeshir Irani* AIR 1943 Bom 150, 152 (FB), 44 Cr LJ 534 ; *Emperor v Chiragh* 30 Cr LJ 376 (2); *Emperor v Sunder* (1904) 1 ALJ 559 .

79 *Munshilal v State of Madhya Pradesh* (1959) Jab LJ 614, (1960) MPLJ 177 .

80 *Emperor v Chiragh* 30 Cr LJ 376 (2).

81 *Emperor v Batubai Ganeshu* AIR 1927 Bom 666, 28 Cr LJ 465 .

82 *Empress v Ramanna* ILR 12 Mad 273, 1 Weir 375 .

83 *Bhola Sardar v Emperor* AIR 1932 Cal 417, 33 Cr LJ 553 ; *Abdul Gohur Sikdar v Emperor* AIR 1922 Cal 505, 24 Cr LJ 76 .

84 *Bhola Sardar v Emperor* AIR 1932 Cal 417, 33 Cr LJ 553 .

85 *Emperor v Vithabai Sukha* 29 AIR 1928 Bom 336, Cr LJ 993.

86 *Manjappa v State of Karnataka* 2010 Cr LJ 4729, p 4731, 2010 AIR SCW 5815, (2010) 9 Scale 444, (2010) 9 SCC 334 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

S. 374.

Unlawful compulsory labour.--

Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Comments

1. Scope

This section, the primary object of which is to suppress the pernicious practice of landlords, who as a matter of right, forced their tenants to labour and thus render customary service to them recognises the right of individual freedom, which is now enshrined in arts 19 to 23of the Constitution of India and the essence of which is that no man shall be compelled to labour against his will. Forced labour is clearly an inverse of the right of individual freedom.[87]

'Unlawful compulsory labour' made punishable under this section, is not far different from slavery which is dealt with in s 371, IPC .

2. Essential Ingredients

Following are the essential ingredients of an offence under this section:

(a) there must be taking of labour, by the accused, from another person;
(b) such taking of labour must be under compulsion and against the will of the labourer; and
(c) such compulsion must be unlawful.

3. 'Labour'

'Labour' means toil or work and includes physical as well as mental work. Thus, excavation of earth is as much 'labour' as the composition of a poem or the painting3087 of a picture. Therefore, a person who unlawfully compels another to labour, commits the offence under this section, whether the work be physical or mental. The exaction of such labour becomes criminal when: (1) the person is unlawfully compelled to labour; and (2) he labours against his will. The offence is complete even if the compulsion was exercised only to overcome resistance. However, where the labourer had agreed to work, but later refused, it cannot be said that the compulsion was unlawful though such compulsion might expose the person to the penalties of other offences, such as under s 352, IPC .[88] In cases of labour under a contract, it must be determined, having regard to the nature of the contract, whether the consent was extorted by fear or due to misconception of facts, and it is for the prosecution to prove that there was, in fact, no consent or there was not, in law, a consent. Therefore, if a creditor insists that the debtor should pay his debt or work it off and the debtor, in accordance with the custom of bondage, meekly works for his creditor, he cannot afterwards complain of such compulsion.

Agreement for Work with Minor Victim for Labour--Effect

Even under the provisions of Child Labour (Prohibition and Regulation) Act 1986, employment of children below 14-15 years has been prohibited by the aforesaid Act as well as under various other acts. The age of the child has been defined under the aforesaid Act as a person who has not completed 14 years of age. Though, the provisions of the said Act are not applicable in this case, but for forced domestic labour provisions of s 374, IPC will be applicable. Where, admittedly at the time of incident, the victim was a minor and was below 14 years and even under general law, a contract or agreement with a minor is void, therefore, an acquittal of accused persons on the ground that there was an agreement between the accused persons and the victim for domestic work *prima facie* appears to be illegal. Even his father could not have entered into such kind of an agreement or contract for the minor. If the minor victim was forcefully compelled to work or labour, it constitutes an offence punishable under s 374, IPC .[89]

4. 'Unlawfully Compels'

Not only must there be compulsion, but such compulsion must be unlawful. In other words, both the elements of compulsion and unlawfulness must be present in the labour. Service rendered under a contract is not compulsory labour as when labour is recruited for employment in tea gardens or sugar plantations outside the country. The term 'unlawfully' in this section is of wider import than the term 'illegally' defined in s 43, IPC . An act or omission, though not prohibited by law or capable of forming the ground for a civil action, may still not be warranted by law and in such a case, it would be unlawful. Forced labour, customary in several parts of India, will not, however, be hit by this section because if such labour has been long customary and recorded in the *wajib-ul-arz,* it would be treated as a species of rent rendered in kind.

Only Prisoners Sentenced to Rigorous Imprisonment can be Compelled to do Labour

Jail authorities are enjoined by law to impose hard labour on a particular section of the convicted prisoners who were sentenced to rigorous imprisonment. Section 53 of the IPC which falls under the

chapter entitled 'Of Punishments' divides punishment3088 into five categories, of which the category 'imprisonment' has been further sub-divided into two sub categories as rigorous and simple. Rigorous imprisonment is explained as 'imprisonment with hard labour'. Section 60 of the IPC confers power on a sentencing court to direct that such imprisonment shall be wholly rigorous or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple. The sentence of imprisonment for life tagged along with a number of offences delineated in the IPC is interpreted as rigorous imprisonment for life and not simple imprisonment.[90]

A person sentenced to simple imprisonment cannot be required to work unless he volunteers himself to do the work. Section 374 of the IPC makes imposition of work on an unwilling person as an offence.[91]

However, the jail officer who requires a prisoner sentenced to rigorous imprisonment to do hard labour would be doing so as enjoined by law and mandated by the court. No prisoner sentenced to rigorous imprisonment can complain that the jail authorities committed offence under s 374, IPC, by compelling him to do work during the term of an imprisonment. Similarly, the task to do labour can be imposed on a prisoner only if he has been sentenced to rigorous imprisonment. Neither under trial internees nor the detainee undergoing simple imprisonment nor even detainees kept in jails as a preventive measure can be forced to do manual work during their prison term, however, it is a different matter that he is allowed to do it on request.[92]

Two profiles emerge from the above discussion. Firstly, a vast majority of prisoners are not concerned about the wages for the labour in jails. It is only for a small section of the detainees that this exercise would benefit. Secondly, hard labour is enforced on those sentenced to rigorous imprisonment by sanction of law and jail authorities cannot disobey the directions of the court which passed the sentence.[93]

5. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate, and may be tried summarily.

6. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case. Section 251 , CrPC, may be referred to.

7. Proof

To secure conviction under this section, it must be proved that:

(a) the accused took labour from some person;
(b) such labour was taken under compulsion and against the will of the labourer; and
(c) such compulsion was unlawful.3089

87 *Dulal Samanta v District Magistrate* AIR 1958 Cal 365 .

88 *Madan Mohan Biswas v Empress* (1892) ILR 19 Cal 572, p 581 .

89 *State of MP v Sumitrabai* (2006) Cr LJ 3245 (MP) .

90 *GV Godse v State* AIR 1961 SC 600 ; *Naib Singh v State of Punjab* AIR 1983 SC 855 ; *State of Gujarat v Hon'ble High Court of Gujarat* (1998) Cr LJ 4561 (SC) .

91 *State of Gujarat v Hon'ble High Court of Gujarat* (1998) Cr LJ 4561 (SC) .

92 *State of Gujarat v Hon'ble High Court of Gujarat* (1998) Cr LJ 4561 (SC) .

93 *Ibid.*

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

SEXUAL OFFENCES

[1][S. 375.

Rape.--

A man is said to commit "rape" if he--

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:--

First.--Against her will.

Secondly.--Without her consent.

Thirdly.--With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.--With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.--With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any3090 stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.--With or without her consent, when she is under eighteen years of age.

Seventhly.--When she is unable to communicate consent.

Explanation 1.--For the purposes of this section, "vagina" shall also include *labia majora*.

Explanation 2.--Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.--A medical procedure or intervention shall not constitute rape.

Exception 2.--Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]3091

Comments

1. Legislative changes

The present section has been substituted for the old s 375, IPC by the Criminal Law (Amendment), 2013 (13 of 2013), s 9 (wef 3-02-2013) on the recommendations of the Justice J.S. Verma Committee.

> The constitution of this Committee was in response to the country-wide peaceful public outcry of civil society, led by the youth, against the failure of governance to provide a safe and dignified environment for the women of India, who are constantly exposed to sexual violence. The immediate cause was the brutal gang rape of a young woman in the heart of the nation's capital in a public transport vehicle in the late evening of 16 December 2012...

> The urgency of the matter impelled the Committee to undertake the performance of the assigned task within the short period of 30 days to enable the authorities, with all their resources, to take the necessary follow-up action within a further 30 day period, so that the same or a substantial portion of the same may be completed before commencement of the next session of the Parliament, which, we hope, will undertake the needed legislative exercise recommended by this Committee.[2]

New ss 375, 376, 376A, 376B, 376C, 376D and 376E have been substituted for old ss 375, 376, 376A, 376B, 376C and 376D by the Act No. 13 of 2013, s 9 (wef 3-2-2013). The notable changes introduced by the present amendment are --

(i) When a person is said to commit rape, has been defined in s 375, IPC .
(ii) The definition of rape has been expanded.
(iii) Explanation to old s 375, which provided "penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape" has been omitted in new s 375 .
(iv) Explanation I to old sub-s 376 provided for offence of gang rape. New s 376-D specifically deals with the offence of gang rape.
(v) A new s 376-E provides for enhancement of punishment where the accused is a repeat offender.
(vi) Under the new sections, sentence has been enhanced. The sections prescribe punishment extending to the sentence of death, for an offence where in the course of commission of an

offence of rape, the offender inflicts any injury which causes the death of the victim or causes the victim to be in a persistent vegetative state, and punish the repeat offenders of rape with imprisonment for life (which shall mean the remainder of the person's natural life), or with death, prescribe that those convicted for the offence of gang rape shall be punished with rigorous imprisonment for a3092 minimum of twenty years extendable to life (which shall mean the remainder of that person's natural life) and fine; to be paid to the victim to meet the medical expenses, *etc.*

The definition of the offence of rape has been expanded but the essential ingredients of the offence of rape remain the same.

Prior to its substitution, s 375 ran thus --

" **S. 375 . Rape.--**A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--

First.--Against her will.

Secondly.--Without her consent.

Thirdly.--With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.--With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.--With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.--With or without her consent, when she is under sixteen years of age.

Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.".

2. Scope

The offence of rape is stated in ch XVI of the IPC . It is an offence affecting the human body. In that chapter, there is a separate heading for 'Sexual Offences', which encompasses ss 375, 376, 376A, 376B, 376C, 376D and 376E, IPC . 'Rape' is defined in s 375 . Sections 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act 1983, and several new sections were introduced by the said new Act, *i.e.*, ss 376A, 376B, 376C and 376D, IPC . Sections 375 , 376376A to 376D have further been amended and a new s 376E, IPC has been added by the Criminal Law (Amendment) Act 2013 (13 of 2013).

The fact that sweeping changes were introduced reflects the legislative intent to curb with an iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will[3]; or as expressed more fully, 'rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will'[4]. The essential words in an indictment for rape are *rapuit and carnaliter cognovit;* but *carnaliter cognovit,* nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape[5]. In the crime of rape, 'carnal knowledge' means the penetration to3093 any slightest degree of the organ alleged to have been carnally known by the male organ of generation.[6] In the *Encyclopaedia of Crime and Justice*,[7] it is stated '...even slight penetration is sufficient and emission is unnecessary'. In *Halsbury's Statutes of England and Wales*,[8]it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. By the very nature of the offence it is an obnoxious act of the highest order. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame.[9] The offence of rape may be defined, in its simplest terms, as 'the ravishment of woman, without her consent, by force, fear or fraud',[10] or as 'the carnal knowledge of a woman by force against her will'.[11] Ordinarily, rape is violation, with violence, of the private person of a woman--an outrage by all means.[12] Under this Code, prior to its substitution *vide* the Criminal Law (Amendment) Act 2013, the offence consisted in having sexual intercourse with a woman without her consent, or when she is of such an age that she cannot, in law, consent, and the offence consisted in the fact of intercourse, independently of the circumstances of intention, knowledge and consequences.[13]

The essence of the offence is that the connection takes place without the consent of the woman. Non-consent is, therefore, the gist of the offence and the seven clauses set out the circumstances in which the law holds that there is no consent. If there be no consent or the sexual intercourse is against the will of the girl, the age of the girl is immaterial for the offence of rape.[14]Under the Code, consent is no defence when the girl is under 16 years (now, 18 years) of age; or if the sexual intercourse is by a man with his own wife, and the wife is under 15 years of age.[15] When the intercourse is with the consent of the prosecutrix, aged above 16 years (now, 18 years), the sexual intercourse does not come within the definition of rape and, therefore, is not punishable under this section.[16] Sexual intercourse, to constitute an offence of rape, in the case of a married woman, aged about 19 years, who has already given birth to a child, should have been committed against her will or without her consent.[17]

The Courts should bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not, would depend ultimately on the facts and circumstances of each case.[18]3094

A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely assault, it is often destructive of the whole personality of the victim. The murderer destroys the physical body of his victim. The rapist degrades the very soul of the helpless female.[19]

3. English Law

A person *A* who intentionally penetrates, with his penis, the vagina, anus or mouth of another person *B* commits an offence if *B* does not consent to the penetration and if *A* does not reasonably believe that the person consents to it. A person guilty of such an offence is liable on conviction on indictment to imprisonment for life or shorter term.[20]

In *R v T* ,[21] the learned judge considered the definitive guidelines issued by the Sentencing Guidelines Council under which the starting point for the offence was eight years and the sentencing range was six to 11 years. Bearing in mind the aggravating features in the case, he considered that the appropriate sentence, after a trial, would have been 12½ years' imprisonment. He reduced that by 20% for the guilty pleas to sentences of 10 years' imprisonment on each count, to run concurrently..

In *Regina v Mitchell Moir* ,[22] it was observed, 'Much of the reasoning identified in the sentencing remarks, and the further sentencing remarks, is criticised on behalf of the Attorney General. But in the end the real difficulty with the way in which the judge made the observations that he did can be simply expressed: the offender raped the victim. She was not aware of the rape and she was therefore not frightened or fearful; she did not seek to fight off the rapist. The penetration cannot have lasted for a very long time, although it was sufficient in whatever form it took, to have made her sore. But the fact that she was asleep does not constitute mitigation any more than it would have been mitigation if she had been unconscious through drink. There is no scope for much jurisprudence on this issue. It is true that the victim will not remember the precise circumstances of what is always a ghastly experience. But, on the other hand, she was the victim, and she knew perfectly well that she had been the victim of a gross breach of trust. It made her angry. She was fully entitled to be angry at what had happened. In the end a sentencing judge must reflect what actually happened and the circumstances in which the offence of rape took place. In this case the rape occurred just two weeks after the victim's pregnancy by the offender had been terminated; she had made it clear to him, quite unequivocally, that she did not want to have a sexual relationship with him; and in the course of the incident of rape he put her at risk of another pregnancy when she did not want to become pregnant, and certainly did not want to be pregnant by him.'

4. Law of Australia

In all jurisdictions, it is an offence to have sexual intercourse with another person without the consent of that person. Different terminology is used in different3095 jurisdictions to describe this offence. In some jurisdictions, the offence is described as sexual intercourse without consent. In some jurisdictions, the offence is described as rape. In Tasmania, the term rape refers to a sexual assault involving penetration of the vagina, genitalia or anus by a penis and aggravated sexual assault refers to penetration of the vagina, genitalia or anus by any other part of the human body, or by an inanimate object. In Western Australia, the offence is described as sexual penetration without consent. In both Queensland and Western Australia, the term carnal knowledge is used to describe sexual penetration in respect of other sexual offences.

In South Australia, 'rape' is specifically defined to include compelling a person, without their consent, to have sexual intercourse with a third person. In Victoria and Western Australia, it is a separate offence to compel a person, without their consent, to sexually penetrate the offender or another person.

In South Australia, there is an offence of compelling a person to engage in an act of sexual manipulation of the offender or a third person where sexual manipulation means the manipulation by the victim of the anus or genitals of another person and may involve sexual penetration.

The common law presumption that a boy under 14 years is incapable of sexual intercourse has been abolished by statute.

In Tasmania, a male person under 7 years is conclusively presumed to be incapable of having sexual intercourse.

The fact that the accused is married to the other person is not longer a bar to a conviction for non-consensual sexual intercourse.

In the Northern Territory and Queensland, there are separate offences of attempted sexual intercourse without consent and attempted rape. In New South Wales, an offender who attempts to have sexual intercourse without consent is liable to the same penalty as the substantive offence. Other jurisdictions rely upon general attempt provisions. In most jurisdictions, there is an offence of assault with intent to have sexual intercourse.[23]

In a case, it was held that the false representation must be as to the nature or purpose of the act and does not include a false promise to provide a benefit or gift.[24]

5. Essential Ingredients of the Offence of Rape

Prior to its substitution *vide* the Criminal Law (Amendment) Act 2013, the two essential ingredients of s 375, IPC, were:

(i) Sexual intercourse by a man with a woman;
(ii) The sexual intercourse must be under circumstances falling under any of the six clauses of s 375, IPC .[25]

Under the substituted section,

A person is said to commit rape if he--

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or3096
(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the seven clauses specified immediately below in the section.

This is a new definition of rape in the amended section.

Under s 1 of the Sexual Offences Act 2003 (UK), 'rape' occurs when person (A) 'intentionally penetrates the vagina, anus or mouth of another person (B) with his penis' without consent. This carries a maximum sentence of life imprisonment.

Where the accused and the prosecutrix above the age of 16 years (now, 18 years) have fallen in love, no offence under s 375, IPC is committed.[26] Further, in the absence of evidence of sexual intercourse, the accused would not be convicted on the charge of rape.[27]

Sexual intercourse by a man with his wife, if she is not under 15 years of age, is not rape.

In *Daji Ghadge v State of Maharashtra* [28] it was held that penetration is necessary to the offence of rape, while seminal emission is not necessary to establish rape.

6. *Jati Panchayat*, Customs, Traditions and Dignity of Woman

Commentary under the same heading in s 366, *ante*, may be referred to.

7. Dehumanising Effect of Rape--Violation of Prosecutrix's Right Under Article 21 --Socially Sensitised Judge

No father or mother of a girl will falsely involve her daughter in a rape case. Sexual violence, apart from being a dehumanising act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity--it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman, *i.e.*, her dignity, honour, reputation and not the least, her chastity. Rape is not only a crime against the person of a woman; it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victims' most cherished of the fundamental rights, namely, the right to life contained in art 21 of the Constitution of India . The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially3097 sensitised judge is better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.[29]

8. 'Man'

'Man', according to s 10 of this Code, denotes a male human being of any age. By s 82 of the Code, a child under seven years of age is immune from criminal liability. By s 83, if the child is above seven and under 12 years of age, his criminal liability depends on his understanding being sufficiently mature to judge the nature and consequences of his conduct on that occasion.[30] However, a child not under 12 years of age has no such immunity and the question of his criminal liability for the offence of rape must be decided as in the case of an adult.[31]

9. 'Sexual Intercourse'

Cohabitation by a man with a woman is called 'sexual intercourse'.

10. 'Woman'

'Woman', according to s 10 of this Code, denotes a female human being of any age.

11. 'Under Circumstances'

The seven clauses of the section set out the circumstances which would constitute an offence under this section.

12. First Clause--'Against her Will'

The expression 'against her will' imports that the act is done inspite of the opposition of the person to the doing of the act, whereas 'without her consent' imports only a passive attitude without active opposition. The IPC draws a distinction between an act, which is done against the will, and an act, done without the consent, of a person. Every act done against the will of a person is done without his consent, but an act done without the consent of a person is not necessarily against the will of that person, which expression imports that the act is done inspite of the opposition of the person to the doing of it.[32] Where it is not at all established that the woman was ever subjected to any sexual intercourse by the accused against her will, the charge under this section must fail.[33]

13. Second Clause--'Without her Consent'

Forcible sexual intercourse with a woman falls in this clause. When the accused caught the prosecutrix by her neck and felled her on the ground and had sexual intercourse with her without her consent, he committed rape.[34]3098

Bruises, abrasions and scratches on the victim, especially on the forearms, wrist, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault.[35]

Where the prosecutrix was 13-15 years of age at the time of the incident, the consent of the prosecutrix, if any, was held immaterial. The accused was convicted for the offence of rape under s 376, IPC .[36]

14. Third Clause--'With her consent when her Consent has been Obtained by Putting her or any Person in whom she is Interested, in Fear of Death or of Hurt'

Submission of her body, by a prosecutrix, under fear or terror, is no consent.[37]A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be a consent as understood in law.[38] However, to vitiate consent, the threat of injury must be sufficient to show that it instilled fear and coerced the woman into submission so as to make the consent involuntary. Where, however, the fear, to which the woman is subjected, is neither of death, nor of hurt, but only of being arrested, when, actually, there is no warrant of arrest against her, the consent, though obtained by fraud, is none the less consent because, in such a case, she is willing to allow sexual intercourse for a price, even if it is fictitious.[39] In a case, the prosecution evidence showed that the prosecutrix was having a love affair with the accused appellant and was a consenting party. The accused appellant belonged to the same caste and gotra as the prosecutrix and was a frequent visitor to the house of the prosecutrix. There was a love affair between them and she never resisted being repeatedly deflowered by the accused appellant. In this background, close and careful determination of the age of the prosecutrix was imperative. The doctor who had clinically examined the prosecutrix, found that her secondary sex character were well developed. Thus, the appellant accused was entitled to benefit of doubt, and he was acquitted of the charge under s 376, IPC .[40]

15. Fourth Clause--Sexual Intercourse with a Married Woman by the Accused by Impersonating himself to be her Husband

Clause fourthly of s 375 of the IPC applies when a man induces a married woman to have sexual intercourse with him by impersonating her husband. When consent by a woman to a man is given under the misconception that he was her husband, it amounts to rape by a person to whom the woman believes to be her husband.[41] This clause is attracted where the woman consents, but the man knows: (1) that he is not3099 her husband; and (2) that the consent is given under the belief that he is the man to whom she is, or believes herself to be, lawfully married. In such a case, the sexual intercourse is rape. The kind of consent, envisaged by the fourth clause, is covered by s 90, which deals, *inter alia*, with consent given under a misconception of facts that arises under the mistaken belief that the ravisher is her husband whereby the married woman consents to have sexual intercourse with him. Consent, in such circumstances, is not such a consent as is required by law, and the offender is guilty of rape if he knew

that he was not her husband; if however, he too believed that he was her husband, he would be innocent of the offence. The misconception must have been induced by the fraud of the ravisher; even if he does not actively induce the belief in the woman, but he has knowledge of it and chooses to keep silent, when he is under a duty to speak the truth, in order to effectuate his criminal intention, he is guilty of rape. In *A Krishnaraj v State of Mysore* ,[42] the accused, a married person, tied a *thali* round the neck of a Christian girl of 17 years before the picture of Christ and thereby induced her to believe that he was her husband. He took her out occasionally for sexual intercourse. The girl agreed believing the accused to be her husband. It was held that he was guilty of the offence of rape.

This clause covers a case where a prosecutrix marries a man without the knowledge of the first marriage of the husband. In any event, the accused could not have lawfully married the complainant. Further, a bare reading of cl 'Fourthly' of s 375, IPC makes this position clear. The delay in filing FIR would not be fatal in such a case and the accused would be guilty of the offence of rape if the complainant had given her consent considering the accused to be her husband, therefore, the conviction of the accused under s 376, IPC was upheld[43].

16. Fifth Clause--Consent of the Prosecutrix when Immaterial in a Case of Rape

The fifth clause was added to s 375, IPC by virtue of statutory amendment by the Criminal Law (Amendment) Act, 1983 (43 of 1983). Even before this amendment, the legal position was that a woman, who is in a state of insensibility, arising from sleep, liquor, drugs or hypnotism, is incapable of giving her consent; so also a woman who suffers from feebleness of intellect or any other defect of mind.[44]

The essence of the offence is that the connection takes place without the consent of the woman.

The same legal portion is incorporated in the definition of rape by virtue of this fifth clause.

Non-consent is, therefore, the gist of the offence and the five clauses set out the circumstances in which the law holds that there is no consent. If there be no consent or the sexual intercourse is against the will of the girl, the age of the girl is immaterial for the offence of rape.[45]An idiot girl may 'consent' to the act from mere animal instinct as in the case of *R v Fletcher* .[46]3100

Consent given under Fear/coercion/misconception -- No Consent

The concept of 'consent' in the context of s 375, IPC has to be understood differently, keeping in mind the provision of s 90, IPC, according to which consent given under fear/coercion or misconception/mistake of fact is not a consent at all.[47]

17. Sixth Clause--Consent of the Prosecutrix, when Prosecutrix is under Eighteen Years of Age

In a case it was held that sex with a woman above the age of 16 years (now, 18 years) is not rape.[48]

Further, consent is immaterial in the case of rape on a girl under 16 years (now, 18 years) of age[49] subject to the exception that if the sexual intercourse is by a man with his own wife, the wife is under 15 years of age, as the law of rape does not apply as between husband and wife when the wife is above 15 years of age.[50] This clause embodies the principle that the consent of a girl below the age of 16 years (now, 18 years) is immaterial to the offence of rape as, by reason of their immaturity, such girls require to be protected against premature cohabitation[51] as well as immature prostitution. Resistance, therefore, need not be looked for when the girl is incapable of giving consent by reason of her age, as prescribed in the section, *i.e.*, when the girl is under 16 years (now, 18 years) of age, and if sexual intercourse is by a man with his own wife when she is under fifteen years of age.[52] However, when the age of the victim at the time of incident was 11 years and four months and in any circumstances of the matter, she was below the stated age, then the question of consent does not arise at all and the case of the prosecution would fall under s 375(6) of the IPC .[53]

18. Seventh Clause--When she is Unable to Communicate Consent

This clause is new, added by the Criminal Law Amendment Act (13 of 2013).

19. Consent--Meaning of

A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of physical and moral power to act in a manner she wants. Consent implies the exercise of a free and untrammeled right to forbid or3101 withhold what is being consented to; it is always a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.[54] Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having freely exercised a choice between resistance and assent.[55]It must be an act of reason, accompanied with deliberation, after the mind has weighed, as in a balance, the good and evil on each side with the existing capacity and power to withdraw the assent according to one's will or pleasure.[56] Consent, that the law requires to negative rape, is free and conscious permission and the act of sexual intercourse must be contemporaneous with the consent.[57]

If a woman is unable to put up resistance, consent cannot be inferred. Similarly, any request for money, from the accused, by the woman, subsequent to her rape, would not mean the consent of the woman.[58] The fact, that the victim of the alleged rape was *virgo intacta* up to the date of the occurrence, is proof that the sexual intercourse was without her consent.[59]

If there is no evidence, on the record, of any struggle, having taken place, nor are there any marks of injuries found on the person, either of the complainant or of the accused, it cannot be said that the accused had connection with the woman without her consent.[60] If the evidence of the prosecutrix herself shows that she was a girl of easy virtues and that, though she was raped, one after another, by as many as five persons within less than 24 hours, yet she never complained to any one, it can be concluded that those, who had sexual intercourse with her, had it with her consent.[61] The circumstances, that a girl of more than 16 years left her house without any compulsion, travelled with the accused from place to place, was literate and could write letters, but did not write to, or communicate with her people, and never complained to any of the people, whom she met, of any ill-treatment by the accused, indicate that if there was any sexual intercourse, it was with her consent.[62] Where a grown-up girl (aged about 18) submitted to being carried about and raped, without protesting, specially when she, according to her own story, was every now and then left by herself by the accused, it3102 was held that she must be held to have been a consenting party in the elopement.[63] The evidence of the prosecution that rape was committed on prosecutrix in the presence of so many persons of the family in a small house was found not believable. It was held that the prosecutrix was a consenting party.[64]

A woman, who is in a state of insensibility, arising from sleep, liquor, drugs or hypnotism, is incapable of giving her consent; so also a woman who suffers from feebleness of intellect or other defect of mind.[65]

The essence of the offence is that the connection takes place without the consent of the woman. Non-consent is, therefore, the gist of the offence and the five clauses set out the circumstances in which the law holds that there is no consent. If there be no consent or the sexual intercourse is against the will of the girl, the age of the girl is immaterial for the offence of rape.[66]

20. Burden of Proof of Consent

It is not for the victim to show that there was no consent. The question of consent is really a matter of defence by the accused and it was for him to place materials to show that there was consent.[67]

21. Act Without Consent, Against the Will--Distinction

The expression 'against her will' imports that the act is done in spite of the opposition of the person to the doing of the act whereas 'without her consent' imports only a passive attitude without active opposition. The IPC draws a distinction between an act, which is done against the will, and an act, done without the consent of a person. Every act done against the will of a person is done without his consent, but an act done without the consent of a person is not necessarily against the will of that person, which expression imports that the act is done in spite of the opposition of the person to the doing of it.[68]

The expression 'against her will' and 'without her consent' may overlap sometimes but surely the two expressions in cll 'First' and 'Secondly' have different connotations and dimensions. The expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression 'without her consent' would comprehend an act of reason accompanied by deliberation.[69]

22. Male Aggressiveness and Females Submissiveness *vis-à-vis* Consent--Quantum of Resistance

Male aggressiveness and female submissiveness *vis-à-vis* consent as defence in an offence of rape would be always factual, to be decided in a given case. Quantum of resistance of a woman may vary from person to person and no3103 uniform standard can be laid down. Male aggression and female submission in this regard out of threat, timidity, fear or other like physical or psychological factors also may have some impact on the quantum of resistance. The mere absence of serious injuries on the person of the prosecutrix cannot always be taken as an inference of consent.[70]

23. Resistance or Non-Resistance by Woman--Effect

Since no woman, who values her honour, will yield her body to a stranger without a struggle, resistance on her part is looked for in a case of rape, to negative consent. Hence, non-resistance by the woman may raise an inference of consent.[71] However, absence of resistance does not always imply consent. Where a woman surrendered herself to the accused, policemen, who were following her and accusing her of vagrancy, it was held that it was a case more of helpless resignation under a threat, than of free consent, and the absence of injuries on her person, indicating resistance, was not surprising.[72] If a woman, being in an advanced state of pregnancy,[73] or due to drink,[74] is unable to put up resistance, consent cannot be inferred.

A woman, who is in a state of insensibility, arising from sleep, liquor, drugs or hypnotism, is incapable of giving her consent; so also a woman who suffers from feebleness of intellect or other defect of mind.[75] An idiot girl may 'consent' to the act from mere animal instinct as in *R v Fletcher* .[76] When the prosecutrix stated that she did not scratch the faces of accused persons and their hands because both of her hands were pressed by their legs, it cannot be said that she was a consenting party.[77]

24. Can a Healthy Adult Female be Violated Against her Will

Modi's Medical Jurisprudence and Toxicology,[78] states:

Can a healthy adult female be violated against her will?

> Under ordinary circumstances it is not possible for a single man to hold sexual intercourse with a healthy adult female in full possession of her senses against her will, unless she is taken unawares, thrown accidentally on the ground and placed in such a position as to render her completely helpless, or unless she swoons away from fright or exhaustion after long resistance. The act may be accomplished, if more than one man are concerned in the crime, or if the woman is too feeble to resist. In giving a definite opinion, it is necessary to take into consideration the relative strength of the parties and the community to which particularly the woman belongs. It is obvious that a woman belonging to a labouring class who is accustomed to hard and rough work will be able to offer a good deal of resistance and deal blows on her assailant and will thus succeed in frustrating his attempts at violation. On the contrary, a woman belonging to a middle or rich class of an educated family and not habituated to go about along by herself will not be able to resist for long and will soon faint or will be rendered powerless from fright or exhaustion. [79]3104

25. Consent is a Matter of Inference

The question of consent is the most important question for consideration in a case of rape. The consent to an act of sexual intercourse may be express or implied. Cases of express consent are rarely brought before a court and if they are brought, the court will have to decide whether such consent was likely to have been given by the ravished woman. Unless the women are prostitutes or otherwise depraved, it is not in their nature to openly state their willingness because they use the language of signs or hints. In such cases, consent is, therefore, a matter of inference from evidence of previous or contemporaneous acts and conduct and other surrounding circumstances.[80]

If a full grown woman consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity on her part and not an act induced by misconception of fact.[81] In a case decided prior to the substitution of this section *vide* the Criminal Law (Amendment) Act 2013, where the prosecutrix was above the age of 16 years (now, 18 years), and she neither resisted nor told anyone about the crime, and participated with the accused in the act of sexual intercourse many times and became pregnant, and only when she had been pregnant for 32 weeks she disclosed the crime, looking at such circumstances it was held that the prosecutrix was a consenting party.[82] Bad character of the prosecutrix is not relevant to draw the conclusion that she had given her consent.[83]

The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of the fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 , IPC, cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability.[84]

When no injury is found on the person of prosecutrix, and she remained in the company of accused for more than seven days and did not put up any resistance when sexually assaulted, she also did not make any hue and cry while she was in the company of the accused, the inference is that the prosecutrix was a consenting party.[85] However, the submission of the body by the prosecutrix under the fear of3105 terror cannot be construed as consent to sexual act as the consent is to be ascertained only on a careful study of all relevant circumstances.[86]

When the prosecutrix in her examination-in-chief has clearly stated that the accused had kept her in the concerned hut for two days and had sexual intercourse with her on three occasions and she had not object to it, and in her cross examination she had admitted having written letters to the accused which showed that she had precious relationship with the accused, the consent of prosecutrix who was more than 76 years of age was established so there was no question of commission of offence under s 376, IPC by the accused.[87] Where there was no mark of injury on the body of the prosecutrix showing absence of her resistance, and the incident took place in the morning and a large number of persons were present near the place of occurrence but no alarm was raised by her, the accused did not use any force against

her, it can be inferred that the prosecutrix was a consenting party.[88]

There was a distinct belief that there would be a marriage, as the complainant herself mentioned that when the accused first proposed to her, she had expressed that he should seek the consent of her parents and since they were already related, there was a strong possibility of such marriage and therefore, the relationship continued. The fact that the accused and the prosecutrix continued the relationship over a period of time would indicate that the complainant had consented to have sexual intercourse with the accused consciously, freely and voluntarily, therefore the accused was acquitted of the charge of rape.[89]

26. Consent Withdrawn before Act or Given after Act is Immaterial

The act of sexual intercourse must be 'against her will' at the time it takes place. Therefore, a consent given but withdrawn before the act, or a consent given after the act, is wholly immaterial,[90] nor does the cessation of a genuine resistance amount to a consent.[91]

27. Absence of Injury on the Person of Prosecutrix--Effect

If the victim is unwilling to yield to sexual intercourse, she is expected to receive injuries on her person. The absence of injuries on the body of the prosecutrix, generally, gives rise to an inference that she was consenting party to coitus. Where the prosecutrix had received multiple injuries on the various parts of her body it indicated that she offered resistance when she was subjected to sexual intercourse. The absence of injuries either on the accused or on the prosecutrix shows that the prosecutrix did not resist but absence of injuries is not by itself sufficient to hold that the prosecutrix was a consenting party.[92] In *Idan Singh v State of Rajasthan* [93] it was held that it is too much to hold that whenever a prosecutrix is found to have sustained no visible injury, consent on her part should be presumed. But where the allegation was that rape was committed on rough and uneven ground, the absence of any visible3106 injury or scratch was held to suggest that sexual intercourse was not forcible.[1] When the girl is used to sexual intercourse and there are no marks of violence on her private parts, it can be said that she might be a consenting party.[2] Willingness of the woman may be presumed where the accused was misbehaving with her for a long time and there were not sufficient injuries on her person.[3] Where the medical evidence showed that there was no sign of recent intercourse or of any injury on her private parts, that the girl, though unmarried and over 16 years of age, was used to sexual intercourse, and that there was also no corroborative evidence, it was held that it could not be said that the accused had intercourse with her against her will.[4] For further commentary, see under s 376, *post*.

28. Acts and Conduct of Prosecutrix Showing Consent

Where the evidence of the radiologist showed that the prosecutrix was of consenting age, and since the families of the accused and the prosecutrix were not on cordial terms, conduct of the victim responding to call of the accused was quite unnatural and unbelievable. The contents of the letter written by the prosecutrix to the accused showed that there was intimacy between them. So, it can be said that there was consent.[5]

29. Prolonged Forcible Intercourse--Possibility and Effect

Prolonged forcible intercourse is not ordinarily possible without injury to the private parts or other parts of the ravished person.[6]Where, from the circumstances, it appeared that the accused was copulating, in a room, with a married woman, aged 20, and she, when caught in the act of copulation, concocted a story to save her face and stated that the accused had carried her into the room by force, it was held that the conviction of the accused for rape could not be maintained.[7]

Where eyewitness stated that they saw the accused lying over prosecutrix in compromising position and the accused had sex with her, but no injury was found on the person of accused as well as on the person of prosecutrix, the conviction of accused under s 376, IPC was not found proper as it was a case of consent.[8]

30. The Consent After the First Act of Coitus--Effect

Even consent after the first act of coitus does not relieve the accused as it might purely be the result of sexual urge and would not affect the first act of coitus which has already taken place against her will.[9]

31. Plea of consent when not taken

Where the accused has not taken any defence of consent of prosecutrix, the Court would not be justified in recording the finding that there was consent of prosecutrix to the sexual intercourse committed by the accused.[10]3107

32. Consent and Submission--Distinction

There is a difference between consent and submission. Every consent involves submission, but the converse does not follow, and therefore, a mere act of submission does not involve consent.[11] Submission of the body by a woman under fear or misconception of fact cannot be construed as consent to sexual act for the purpose of s 375, IPC .[12]

33. Consent means unequivocal voluntary agreement (Explanation 2)

The new expln 2, s 375 provides that consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

A woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

34. Presumption of Absence of Consent-- Section 114A, Indian Evidence Act 1872

In *State of Karnataka v Mahabaleshwar Surya Naik* ,[13] the Supreme Court went to the extent of laying down that even if the victim of rape is not available to give evidence on account of her having committed suicide, the prosecution case cannot be thrown overboard. In such a case, the non-availability of the victim will not be fatal and the court can base conviction on the basis of the available evidence brought on record by the prosecution.

In spite of the decision of the Supreme Court that (depending upon the circumstances of the case) corroboration of the prosecutrix was not necessary, the cases continued to end in acquittal on account of mishandling of the crime by the police and the invocation of the theory of 'consent' by the courts who tried the offence. To overcome this difficulty, the legislature intervened and introduced s 114A in the Evidence Act 1872 reading as under:

> **S. 114-A . Presumption as to absence of consent in certain prosecution for rape.--**In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.
>
> *Explanation.*--In this section "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code (45 of 1860)."

A bare perusal of s 114A of the Evidence Act 1872 shows that in a prosecution for rape under cll (a)-(n) of sub-s (2) of s 376 of the IPC, where sexual intercourse by the accused is proved and the woman alleged to have been raped states that she did not consent, the court shall presume she did not consent.

Section 114A of the Evidence Act enables a court to raise a presumption that the woman who was the victim of rape had not consented and that the offence was committed against her will. The situation, however, has hardly improved. Conviction3108 rates for rape are still lower than any other major crime and the woman continue to argue even today that in rape cases the victimised women, rather than the rapists, were put on trial. A large number of women still fail to report rapes to the police because they fear embarrassing and insensitive treatment by the doctors, the law enforcement personnel and/or the cross examining defence attorneys. The fear has to be allayed from the minds of women so that if and when this crime is committed, the victim may promptly report the matter to the police and on a charge sheet being submitted, the trial may proceed speedily without causing any embarrassment to the prosecutrix who may come in without fear psychosis.[14]

It may further be stated here that the presumption about want of consent under s 114A is not conclusive. Evidence may still be given to disprove it. But in the absence of any evidence of disproof, there is no option with the court but to raise a presumption about non-consent if circumstances for raising the presumption under s 114A exist.[15]

35. Fear of Death or Hurt--Meaning

'Fear of death or of hurt' means fear of the death of a human being under s 46, or fear of bodily pain, disease or infirmity (s 319). There is nothing to limit the death or hurt to the woman herself. A ruffian who waylaid a woman carrying an infant, and, by reason of threats to strangle or injure the infant, obtained the woman's consent to sexual intercourse, which followed accordingly, would be guilty of rape.

The clause does not say in terms from whom the fear of death or of hurt should proceed. The provisions of s 90 indicate that it may proceed from the accused, but he may not be the direct cause of the fear as when he employs others for the purpose of overcoming the woman's resistance, whatever the methods employed by the others. A consent, produced by fear of injury as when a constable takes on a woman unaware while she is asleep in a room and the *chowkidar* keeps the door of the room closed to prevent all attempt at rescue, it does not relieve the act of sexual intercourse of criminality, and the act constitutes rape.[16]

36. Explanation [under Old Section]

For assistance in the disposal of the pending cases, the commentary below under the old s 375 has been retained.

Penetration is the *sine qua non* for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little.[17] It is well-known in the medical world that the examination of smegma loses all importance after 24 hours of the performance of the sexual intercourse.[18] In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not3109 circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The *actus reus* is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is

variable. This variation sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, *viz.*, labia majora are the first to be encountered by the male organ. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under s 376, IPC .[19]

Before an accused can be held guilty of the offence of rape, it must be proved that there was penetration in vulva.[20] Penetration is constituted when it is proved that any part of the virile member of the accused was within the labia of the pudendum of the female, no matter how little.[21] For constituting the offence of rape, it is not necessary that there should be full penetration of the male organ into the vagina.[22] The penetration, however, sight is sufficient for constituting the offence of rape.[23] It is not necessary that there should be complete penetration of penis, emission of semen and rupture of hymen.[24] The *sine qua non* of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape.[25] The only question is whether the private parts of the accused3110 did, or did not, enter into the woman.[26]If there has been no penetration, the act is outside the mischief of the section.[27] However, the law does not require proof of perfect and absolute penetration and the absence or presence of hymen is not conclusive either way.[28] A partial penetration, though insufficient to cause any injury to the hymen, is penetration within the meaning of the Explanation.[29] Partial penetration of the penis within the labia major of the vulva or pudendum with, or without, the emission of semen or such an attempt at penetration is sufficient to constitute the offence of rape.[30] Partial penetration, leading to the rupture of the hymen, without deep penetration into the vaginal canal, is therefore, sufficient to constitute rape.[31] Vulva penetration is as much rape as the vaginal penetration.[32] The statute merely requires medical evidence of penetration[33] and this may occur even if the hymen is intact.[34] It must, however, be remembered that though it is not necessary, in every case, that the hymen should be ruptured,[35] yet the courts are reluctant to believe that there could have been penetration without that, which is so very near to the entrance, having been ruptured.[36] For further commentary see under the heading 'penetration', s 376, *post*.

Slightest Penetration is Sufficient

Even a slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial.[37] Modi in *Medical Jurisprudence and Toxicology*[38] writes that:

> Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the Medical Officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the Medical Officer treating the victim. The only statement that can be made by the Medical Officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.3111

Similarly in *Parikh's Textbook of Medical Jurisprudence and Toxicology*, 'sexual intercourse' has been defined as under :

> Sexual intercourse:-- In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.

All Forms of Penetration Do Not Constitute Rape

The main question which requires consideration is whether by a process of judicial interpretation the provisions of s 375, IPC can be so altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within its ambit. Section 375, uses the expression 'sexual intercourse' but the said expression has not been defined. The dictionary meaning of the word 'sexual intercourse' is heterosexual intercourse involving penetration of the vagina by the penis. The IPC was drafted by the First Indian Law Commission of which Lord Macaulay was the President. It was presented to the Legislative Council in 1856 and was passed on 6 October 1860. The IPC has undergone very few changes in the last more than 140 years.

Except for clause sixthly of s 375 regarding the age of the woman (which in view of s 10 denotes a female human being of any age) no major amendment has been made in the said provision. Sub-section (2) of s 376 and ss 376A to 376D were inserted by Criminal Law (Amendment) Act 1983 but sub-s (2) of s 376 merely deals with special types of situations and provides for a minimum sentence of 10 years. It does not in any manner alter the definition of 'rape' as given in s 375, IPC . Similarly, s 354, IPC which deals with assault or criminal force to woman with intent to outrage her modesty and s 377, IPC which deals with unnatural offences, have not undergone any major amendment.[39]

It is a well-settled principle that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly, it is wrong and dangerous to proceed by substituting some other words for words of the statute. It is equally well settled that a statute enacting an offence or imposing a penalty is to be strictly construed. The fact that an enactment is a penal provision is in itself a reason for hesitation before ascribing to phrases used in it a meaning broader than that they would ordinary bear.[40] Only sexual intercourse, namely, heterosexual intercourse involving penetration of the vagina by the penis coupled with the explanation that penetration is sufficient to constitute the sexual3112 intercourse necessary for the offence of rape has been held to come within the purview of s 375, IPC .[41]

Prosecution of an accused for an offence under s 376, IPC on radically enlarged meaning of s 375, IPC may violate the guarantee enshrined in art 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.[42] In *Sakshi v Union of India* ,[43] the Apex Court has held that if the hymen is ruptured by inserting a finger it would not amount to rape and for the purpose of 'constituting rape the penetration of the vagina by the male organ of generation is a must'.[44]

Now, with the enactment of the Criminal Law (Amendment) Act 2013, the position has changed.

37. Explanation 1--Vagina

The new expln 1 provides that for the purposes of this section, 'vagina' shall also include *labia majora*.

38. Explanation 2--Consent

The new expln 2 provides that the consent in this section means an unequivocal voluntary agreement

when woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

39. Exception 1--Medical Procedure or Intervention is not Rape

The new Exception 1 to s 375 provides that medical procedure or intervention shall not constitute rape.

40. Exception 2

The exception embodies the rule that when the woman is married and not less than 15 years of age, sexual intercourse, by the husband, with her is not rape. If this exception had not been there, clause fifthly would have applied to such a case holding the husband guilty of rape. However, if a husband has connection with his wife, who is under 15 years of age, whether with her, or without her consent, he is guilty of rape.[45] The object of the exception is to protect married women, of less than 15 years, against being forced into premature sexual intercourse with their husbands3113 with disastrous consequences to themselves and also the infant mortality that may follow such cohabitation.[46]

1 Substituted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 9 (wef 3-2-2013). Prior to substitution s 375 stood as under:-" **S. 375 . Rape.--** A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--*First.*--Against her will.*Secondly.*--Without her consent.*Thirdly.*--With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.*Fourthly.*--With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*Fifthly.*--With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.*Sixthly.*--With or without her consent, when she is under sixteen years of age.*Explanation.*--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.*Exception.*--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.".

2 *Vide* the Preface to Report of the Committee on Amendments to Criminal Law by Justice J.S. Verma dated 23 January 2013.

3 Co Litt 123-b

4 Hale PC 628

5 1 Hon.6, 1-a, 9 Edw. 4, 26 a (Hale PC 628)

6 *Stephen's Criminal Law,* ninth edn, p 262.

7 *Encyclopaedia of Crime and Justice*, vol 4, p 1356.

8 *Halsbury's Statutes of England and Wales*, vol 12, fourth edn.

9 *State of Madhya Pradesh v Munna Choubey* (2005) Cr LJ 913 (SC) ; *Rajendra Patel v State of Orissa* 2013 (127) AIC 796 (Ori) (Rape destroys the whole personality of a woman).

10 *Mozley and Whiteley's Law Dictionary,* seventh edn, 1962.

11 *Wharton's Law Lexicon,* fourteenth edn.

12 *Phul Singh v State of Haryana* AIR 1980 SC 249, (1980) Cr LJ 8 .

13 *Empress v Thuree Mohun Mythre* ILR 18 Cal 49 .

14 *Kamakhya Prasad Agarwalla v State* (1957) Cr LJ 353, AIR 1957 Assam 39, p 43 ; *Dolgobinda Rath v State* (1958) Cr LJ 1211, AIR 1958 Ori 224, p 227 (girl not more than 14 years of age).

15 Re *Anthony*AIR 1960 Mad 308 (rape on a girl aged about seven and a half years); *Harpal Singh v State of Himachal Pradesh* 1981 Cr LJ 2 (SC), AIR 1981 SC 361 .

16 *Gurdial Singh v State of Punjab* 1980 Chand LR 108, 113 (Punj) ; *Sahablal v State of Madhya Pradesh* 1980 Cr LR 4 (MP) (Notes) .

17 *Ishwarpal v State* 1980 Cr LR 472-73, 486 (UP).

18 *Radhu v State of Madhya Pradesh* 2007 Cr LJ 4704, p 4706 (SC), 2007 (11) Scale 96, 2007 (6) Scale 196 .

19 *State of Punjab v Gurmit Singh* 1996 AIR SCW 998 ; *Rajiner v State of HP* 2009 Cr LJ 4133 (SC), AIR 2009 SC 3022, 2009 (9) Scale 176 .

20 *Halsbury's Laws of England*, Butterworths, London.

21 *R v T* (2008) EWCA Crim 2894 .

22 *Regina v Mitchell Moir* (2011) EWCA Crim 636 .

23 See *Halsbury's Law of Australia*.

24 *R v Barry David Winchester* (2011) QCA 374 at p 101, 112.

25 *DA Jakati v State of Karnataka* 2005 Cr LJ 2687 (Kant) ; *Syed Pasha v State of Karnataka* 2004 Cr LJ 4123 (Kant) .

26 *Vinod Kumar v State of Kerala* (2014) 5 SCC 678, 2014 Cr LJ 2360 (SC)

27 *Hussain Kutty v State of Kerala* 2013 (2) KLJ 474 (Ker) .

28 *Daji Ghadge v State of Maharashtra* 1980 Cr LJ 1380, 1386 (Bom) (DB); *Puran Chand v State of HP* (2014) 5 SCC 689 (SC) ; *Pushpanjali Sahu v State of Orissa* (2012) 9 SCC 705, (2012) 3 SCC (Cri) 1238 .

29 *Bahadur Singh v State of Uttaranchal* (2005) Cr LJ 2865 (Uttr) .

30 See *Khalilur Rahman v Emperor* 1933 Rang 98 (FB) ; *Emperor v Nga Tun Kaing* 1918 LB 96 (1) ; *Emperor v Paras Ram Dubey* 37 All 187, (1915) All 134 ; *Emperor v Nga Nyun 37* Cr LJ 94, (1935) Rang 393.

31 *Khalilur Rahman v Emperor* AIR 1933 Rang 98 (FB) ; **see also***Emperor v Paras Ram Dubey* AIR 1915 All 134, 16 Cr LJ 322 .

32 *Kalilur Rahman v Emperor* 1933 Rang 98, p 101 (FB), 34 Cr LJ 693 .

33 *Lalta Prasad v State of Madhya Pradesh* 1979 Cr LJ 867, AIR 1979 SC 1276, p 1278 ; *State of Madhya Pradesh v Ramesh* 1980 Cr LR 135, 136 (MP High Court Notes) (DB) .

34 *Parbata v State of Rajasthan* (2006) Cr LJ 562 (SC), AIR 2006 SC 747, 2005 (9) SCALE 423, (2005) 13 SCC 398 .

35 *Radhu v State of Madhya Pradesh* 2007 Cr LJ 4704, p 4706 (SC), 2007 (11) Scale 96, 2007 (6) Scale 196 .

36 *Abbas Ahmad Choundhary v State of Assam* 2010 Cr LJ 2060, p 2061 (SC), 2010 AIR SCW 1917 .

37 *Gopi Shanker v State of Rajasthan* AIR 1967 Raj 159, (1967) Cr LJ 922 ; *Motiram Krishnarao v State of Madhya Pradesh* AIR 1955 Nag 121, 1955 Cr LJ 819 ; *Joseph v State of Kerala* AIR 1962 (2) Cr LJ 668, 1961 Ker LT 933 .

38 *Gopi Shanker v State of Rajasthan* AIR 1967 Raj 159, 1967 Cr LJ 922 ; *Rao Hamarain Singh v State* AIR 1958 Punj 123, 126, 1958 Cr LJ 563 ; *Bhimrao Hamooji Wanjari v State of Maharashtra* 1975 Mah LJ 660 .

39 *Sarangthem Ihochouba Singh v Manipur Administration* (1972) Cr LJ 395, p 398 (Manipur) .

40 *Sunil v State of Haryana* 2010 Cr LJ 839 (SC), 2009 AIR SCW 7656, AIR 2010 SC 392, 2009 (14) Scale 370, (2010) 1 SCC 742 .

41 *Sunil Vishnu Salve v State of Maharashtra* (2006) Cr LJ 587 (Bom) .

42 *A Krishnaraj v State of Mysore* (1969) 1 Mys LJ 304 ; *Kartick Kundu v State* (1967) Cr LJ 1411 (Cal) .

43 *Bhupinder Singh v Union Territory of Chandigarh* 2008 Cr LJ 3546, p 3549 (SC), (2008) 8 SCC 8531, 2008 (10) Scale 3 .

44 *Rao Hamarain Singh v State* AIR 1958 Punj 123, p 126, 1958 Cr LJ 563 .

45 *Kamakhya Prasad Agarwalla v State* 1957 Cr LJ 353, AIR 1957 Assam 39, 43; *Dolgobinda Rath v State* 1958 Cr LJ 1211, AIR 1958 Ori 224, p 227 (girl not more than 14 years of age).

46 *R v Fletcher* (1859) Bell 63, p 70 .

47 *Satpal Singh v State of Haryana* 2010 Cr LJ 4283, p 4289 (SC), 2010 AIR SCW 4951, (2010) 3 SCC (Cri) 1081, (2010) 7

Scale 322 ; *Uday v State of Karnataka* AIR 2003 SC 1639, 2003 Cr LJ 1539 ; *Deelip Singh @ Dilip Kumar v State of Bihar* AIR 2005 SC 203, 2004 AIR SCW 1035 ; *Yedla Srinivasa Rao v State of AP* (2006) 11 SCC 615 .

48 *KP Thimmappa Gowda v State of Karnataka* 2011 Cr LJ 2591, p 2592 (SC), AIR 2011 SC 2564, 2011 (4) Scale 224, 2011 AIR SCW 2281 .

49 Re *Anthony*AIR 1960 Mad 308, p 312, 1960 Cr LJ 927 ; *Baru v Rakesh* 1980 All LJ 428, p 431 ; *Duli v State* 1952 Cr LJ 1575, AIR 1952 Ajmer 54 (girl of 10 years); *Harpal Singh v State of Himachal Pradesh* AIR 1981 SC 361, 1981 Cr LJ 1 ; *Mohiuddin v Emperor* 32 Cr LJ 455, AIR 1930 Cal 437 (age about 14 years); *Abdul v Emperor* 34 Cr LJ 100 AIR 1932 All 580, 581 (girl between 14 and 16, conviction under s 366 altered to conviction under s 376); *Emperor v Qudrat* AIR 1939 All 708 (burden on prosecution to prove that the victim was below the age of consent); *Emperor v Asadali* 29 Cr LJ 12 (Pat) ; *Pabananda Bennia v State of Orissa* (1965) 70 JD 183 (girl below 16 but willing party); *Kartick Kundu v State* 1967 Cr LJ 1411 (Cal) ; *Shabir Rashid v State* 1969 Cr LJ 1282 (Del) (girl only 13½ years old).

50 *Empress v Hurree Mohan Mythee* ILR 18 Cal 49 .

51 *Ibid*.

52 Re *Anthony*1960 Cr LJ 927, AIR 1960 Mad 308 .

53 *Rafik Khan Asgarkhan Pathan v State of Gujarat* 2005 Cr LJ 1284 (DB) .

54 *Rao Harnarain Singh v State* 1958 Cr LJ 563, AIR 1958 Punj 123, 126 (an attractive girl of 19, under pressure of her lowly-placed husband, obliged to surrender her chastity to third person); *Arjan Ram Naurata Ram v State* 1960 Cr LJ 849, AIR 1960 Punj 303 ; Re *Anthony*1960 Cr LJ 927, AIR 1960 Mad 308 (rape on a girl aged about 7½ years); *Joseph v State of Kerala* 1961 Ker LT 933, (1962) 2 Cr LJ 668 (overpowering the woman and threatening to kill her). **See also***Koli Tapu Dharamshi v State* AIR 1955 Sau 96 (story of prosecution improbable so that sexual intercourse must have been with her consent).

55 *Gopi Shanker v State of Rajasthan* AIR 1967 Raj 159, 1967 Cr LJ 922 ; *Rao Harnaroin Singh v State* AIR 1958 Punj 123, p 126, 1958 Cr LJ 563 ; *Roop Singh v State of MP* (2013) 7 SCC 89, (2013) 3 SCC (Cri) 24 .

56 *Gopi Shanker v State of Rajasthan* AIR 1967 Raj 159, (1967) Cr LJ 922 .

57 *Jarnail Singh v State of Rajasthan* 1972 Cr LJ 824, p 828 (Raj), AIR 1972 Raj LW 18 (if the woman consents prior to penetration, no matter how reluctantly and no matter how much force had been used, the act is not rape).

58 *Thingom Shashikumar v Manipur Administration* (1963) 2 Cr LJ 562 .

59 *Sultan v Emperor* 1925 Lah 613, p 614, 26 Cr LJ 1488 .

60 *Mahla Ram v Crown* 25 Cr LJ 74, 1924 Lah 669, p 670 ; *Puttan v State* 1971 AWR (HC) 535 .

61 *Krishna Kumar v State of Madhya Pradesh* 1962 Jab LJ 825, (1963) 1 Cr LJ 686 .

62 *Bishnath Prasad v Emperor* 48 Cr LJ 542, 1948 Oudh 1, p 3 ; *Tukaram v State of Maharashtra* 1978 Cr LJ 1864, AIR 1979 SC 185, p 189 ; *Suresh Nishad v State of Chhattisgarh* 2013 (2) Crimes 313 (Chh) .

63 *Nathu v Emperor* 32 Cr LJ 1041 (2), 1931 Lah 401 ; *Trilok Singh v State* 1967 AWR (HC) 848, p 851 ; *Koli Tapu Dharamshi v State* AIR 1955 Sau 96, p 98 ; *Jindu v State of Punjab* (1979) 81 PLR 194 ; *State of Orissa v Pradip Kumar Gaur* (1979) 47 Cut Lt 648 .

64 *Amar Bahadur Singh v State of UP* (2011) 14 SCC 671, 2011 Cr LJ 1921, AIR 2011 SC 1352 .

65 *Rao Harnarain Singh v State* AIR 1958 Punj 123, p 126, (1958) Cr LJ 563 .

66 *Kamakhya Prasad Agarwalla v State* 1957 Cr LJ 353, AIR 1957 Assam 39, p 43 ; *Dolgobinda Rath v State* 1958 Cr LJ 1211, AIR 1958 Ori 224, p 227 (girl not more than 14 years of age).

67 *State of Himachal Pradesh v Shree Kant Shekari* 2004 Cr LJ 4232 (SC) .

68 *Kalilur Rahman v Emperor* 1933 Rang 98, p 101 (FB), 34 Cr LJ 693 .

69 *State of UP v Chhoteylal* AIR 2011 SC 697, p 701, (2011) 2 SCC 550, (2011) 100 AIC 150 (SC) .

70 *Revella Sivaiah v State of AP* 2005 Cr LJ 526 (AP) .

71 See *Mahla Ram v Crown* 25 Cr LJ 74, 1924 Lah 669, p 670 ; *Puttan v State* 1971 AWR (HC) 535 .

72 *Arjan Ram Naurata Ram v State* 1960 Cr LJ 849, AIR 1960 Punj 303, p 304 ; *Rao Hamarain Singh v State* AIR 1958 Punj 123 .

73 *Lalu Kamumal v State* 1953 Cr LJ 1196, AIR 1953 Ajmer 12 ; *Gopi Shanker v State of Rajasthan* 1967 Raj 159, 1967 Cr LJ

922 .

74 *Bhonri v State* (1953) 4 Raj LW 255, ILR (1952) 2 Raj 817 .

75 *Rao Hamarain Singh v State* AIR 1958 Punj 123, p 126, 1958 Cr LJ 563 .

76 *R v Fletcher* (1859) 68 Bell 63, p 70 .

77 *State of Maharashtra v Suresh Nivrulti Bhusare & ors* 1997 Cr LJ 2003 (Bom) (DB) .

78 *Modi's Medical Jurisprudence and Toxicology,* twenty second edn.

79 *Revella Sivaiah v State of AP* 2005 Cr LJ 526 (AP) .

80 **See***Gopi Shanker v State of Rajasthan* AIR 1967 Raj 159, 1967 Cr LJ 922 ; *Bhonri v State* (1953) 4 Raj LW 225 ; *Kaini Rajan v State of Kerala* (2013) 9 SCC 113, (2013) 3 SCC (Cri) 858 .

81 *A Qinelo alias Robert Fernandas v State* 2002 Cr LJ 3007 (Bom) ; *Juntu Das v State of Assam* 2003 Cr LJ 1411 (Gau) ; *Jayanti Rani Panda v State of West Bengal* 1984 Cr LJ 1535 (Cal) ; *Kaini Rajan v State of Kerala* (2013) 9 SCC 113, (2013) 3 SCC (Cri) 858 .

82 *Indrajeet v State of MP* 2013 (2) Crimes 486 (MP) ; **see also***Ishwar v State of MP* 2013 (2) Crimes 408 (Chh) (Rape on a married woman, consenting party, acquittal recorded).

83 *Public Prosecutor, APHC v Badana Ramayya* 2004 Cr LJ 3510 (AP) .

84 *Sarimoni Mahato v Amulya Mahalo* 2002 Cr LJ 3271 (Jhar) ; *State of UP v Naushad* (2013) 16 SCC 651, AIR 2014 SC 384, 2014 Cr LJ 540 .

85 *Manna and anor v State of Rajasthan* 2001 Cr LJ 3496 (Raj) ; *Deboji Choudhury v State of Assam* 2015 Cr LJ 1464 (Gauh) (Rape allegedly committed in common toilet--Prosecutrix held consenting party); *State of Orissa v Sudhansu Sakhar Jena* 2015 Cr LJ (NOC) 174 (Ori) ; *State of Orissa v Nilakantha Behera* 2015 Cr LJ 1614 (Orissa) ; *Suresh Murmu v State of Bihar* 2015 Cr LJ 1371 (Pat) .

86 *State of Himachal Pradesh v Mange Ram* 2000 Cr LJ 4027 (SC) .

87 *Shivnath v State of Madhya Pradesh* 1998 Cr LJ 2691 (MP) .

88 *Chander Bahadur v State* 1997 Cr LJ 2195 (Del) .

89 *Mallesh Khemanna v State of Karnataka* 2013 Cr LJ 3196, p 3204 (Kar) .

90 1 Hawk, PC Cls 16, 47.

91 *Empress v Akbar Kazee* 1 WR (Cr) 11 .

92 *Jogi Dan v State of Rajasthan* 2004 Cr LJ 1726 (Raj) .

93 *Idan Singh v State of Rajasthan* 1977 Cr LJ 556, p 559 (Raj) .

1 *Puttan v State* 1972 Cr LJ 270, p 271, 1971 AWR (HC) 535 .

2 *Abdullah v State* 1974 All Cr C 34, 1974 All Cr R 209 .

3 *Sudarsan v State* 1958 MPLJ (Notes) 120 ; *Jhalkan v State* 1959 MPLJ 196 (Notes) ; *Amir-ud-Din v Emperor* 25 Cr LJ 1200, 1923 Lah 238 .

4 *Nasrullah v Emperor* 35 Cr LJ 498, 1934 Oudh 32, 34 .

5 *Vaddi Srinivasa Rao v Public Prosecutor, High Court of AP* 2005 Cr LJ 2857 (AP) .

6 *Jaideep Singh v State* 1953 Raj LW 243 .

7 *Beli Singh v Emperor* 1927 Lah 858 (1) .

8 *Dhokla Ram v State of Rajasthan* 2001 Cr LJ 3547 (Raj) .

9 Per Ramaswami J, in Re *Anthony*1960 Cr LJ 927, AIR 1960 Mad 308, 312.

10 *Ganga Singh v State of Madhya Pradesh* AIR 2013 SC 3008, 2013 Cr LJ 3966 .

11 *Gopi Shanker v State of Rajasthan* AIR 1967 Raj 159, 1967 Cr LJ 922 .

12 *Md Jakir Ali v State of Assam* 2007 Cr LJ 1615, p 1619 (Gauh) .

13 *Karnataka v Mahabaleshwar Surya Naik* AIR 1992 SC 2043, 1992 Supp (3) SCC 179 .

14 *Bodhisatwa Gautam v Ms Subra Chakraborty* AIR 1996 SC 922 .

15 *Jogi Dan v State of Rajasthan* 2004 Cr LJ 1726 (Raj) .

16 *Empress v Akbar Kazee* 1 WR (Cr) 21 ; *Lalu Kamumal v State* AIR 1953 Ajmer 12, p 14 ; *Dhanna v State* (1950) 5 Dom LR 61 (MB) .

17 **See***Aman Kumar v State of Haryana* 2004 Cr LJ 1399 (SC) .

18 *SP Kohli (Dr), Civil Surgeon, Ferozepur v High Court of Punjab and Haryana through Registrar* (1979) 1 SCC 212, 1978 Cr LJ 1804, AIR 1978 SC 1753 ; *Aman Kumar v State of Haryana* 2004 Cr LJ 1399 (SC) .

19 *Aman Kumar v State of Haryana* 2004 Cr LJ 1399 (SC) .

20 *Shankar Tukamm Ursal v State of Maharashtra* 1977 Cr LJ 476, 479 (Bom). **See also***Suresh Chand v State of Haryana* 1975 Cur LJ 145, 1975 PLR 59 (absence of damage to the fourchette, hymen, labia majora, labia minora, vulva and the vaginal canal, in the case of rape upon a girl of less than 14 years, would militate against the factum of penetration).

21 *R v Joseph Lines* (1844) 1 C & K 393; *Daji Ghadge v State of Maharashtra* 1980 Cr LJ 1380, 1386 (Bom) (DB) (seminal emission not necessary to establish rape); Re *Myllsami*1970 LW (Cr) 182; Re *Anthony*1960 Cr LJ 927, AIR 1960 Mad 308, 311 (a completed act of sexual intercourse is not, at all, necessary).

22 *Dalbir v State of Haryana* 2002 Cr LJ 39, p 60 (P&H).

23 *Madan Gopal Kakkar v Naval Dubey* 1992 (2) Cri Cant judgments 545 (so) ; 1992 AIR SCW 1480 .

24 *Rahul Pundalik Birahade v State of Maharashtra* (2002) 2 RCR 394 ; *Durgalal v State of Rajasthan* 2001 Cr LJ 3652 (Raj) .

25 *Ramkripal v State of Madhya Pradesh* 2007 Cr LJ 2302, p 2305 (SC), 2007 AIR SCW 2198, 2007 (5) Supreme 297, 2007 (4) Scale 438 .

26 *R v Allen* (1839) 9 C&P 31 .

27 Re *Tottitodiyil Ahmed Kutti* 1 Weir 383.

28 *R v Wyles* (1839) 3 JP 196 ; *AW Khan v State* AIR 1962 Cal 641, p 647, (1962) 2 Cr LJ 751 .

29 *Abdul Majid v Emperor* 28 Cr LJ 241, 1927 Lah 735 (2) ; *Pooram Ram v State of Rajasthan* 2001, Cr LJ 91 (Raj).

30 *Budhan Lal Sarma v State* (1961) 1 Cr LJ 689 (Ori) ; Re *Anthony*1960 Cr LJ 927, AIR 1960 Mad 308, p 311 .

31 *Ghanashyam Misra v State* 1957 Cr LJ 469, AIR 1957 Ori 78 .

32 *Jantan v Emperor* 1934 Lah 797, 36 Cr LJ 310 ; *Natha v Emperor* 1923 Lah 536, 26 Cr LJ 1185 .

33 *Jantan v Emperor* 1934 Lah 797, 36 Cr LJ 310 . **See also***Das Bernard v State* 1974 Cr LJ 1098, 1100 (Goa) (presence of seminal stains on the underwear of the girl may show that there was emission of semen, but this cannot be a conclusive proof of the fact that there was penetration).

34 *Jantan v Emperor* 1934 Lah 797, 36 Cr LJ 310 ; *Natha v Emperor* 1923 Lah 536, 26 Cr LJ 1185 .

35 *Jantan v Emperor* 1934 Lah 797, 36 Cr LJ 310 ; *Natha v Emperor* 1923 Lah 536, 26 Cr LJ 1185 ; *Mahraj Din v Emperor* 1927 Lah 222, 28 Cr LJ 244 .

36 *Mahraj Din v Emperor* 1927 Lah 222, p 223, 28 Cr LJ 244 .

37 *Wahid Khan v State of Madhya Pradesh* 2010 Cr LJ 517, p 520 (SC), AIR 2010 SC 1, (2010) 2 SCC 9, 2009 (14) Scale 220 .

38 *Medical Jurisprudence and Toxicology*, twenty-second edn, p 495.

39 *Sakshi v Union of India* 2004 Cr LJ 2881 (SC), AIR 2004 SC 3566, 2004 (6) Scale 15, (2004) 5 SCC 518, (2004) Supp (2) SCR 723 .

40 Justice GP Singh, *Principles of Statutory Interpretation*, pp 58 and 751, ninth edn, as quoted in *Sakshi v Union of India* 2004 Cr LJ 2881 (SC), AIR 2004 SC 3566, 2004 (6) Scale 15, (2004) 5 SCC 518, (2004) Supp (2) SCR 723 .

41 *Sakshi v Union of India* 2004 Cr LJ 2881 (SC), AIR 2004 SC 3566, 2004 (6) Scale 15, (2004) 5 SCC 518, (2004) Supp (2) SCR 723 .

42 *Sakshi v Union of India* 2004 Cr LJ 2881 (SC), AIR 2004 SC 3566, 2004 (6) Scale 15, (2004) 5 SCC 518, (2004) Supp (2) SCR 723 .

43 *Sakshi v Union of India* (2004) 5 SCC 518, 2004 Cr LJ 288, AIR 2004 SC 3566, 2004 (6) Scale 15, (2004) Supp (2) SCR 7231 .

44 *State of Mizoram v Zoduhliana* 2005 Cr LJ 3756 (Gau) (DB) .

45 **See***Kartick Kundu v State* 1967 Cr LJ 1411, p 1416 (Cal) .

46 *Ibid*.

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

SEXUAL OFFENCES

[47][S. 376.

Punishment for rape.--

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,--

(a) being a police officer, commits rape--

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or3114

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or
(l) commits rape on a woman suffering from mental or physical disability; or
(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or
(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.--For the purposes of this sub-section,--
(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;
(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;
(c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);
(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a3115 widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.]31163117

Comments

1. Legislative Changes

The present section has been substituted for the old s 376, IPC by the Criminal Law (Amendment), 2013 (13 of 2013), s 9 (wef 3-02-2013) on the recommendations of the Justice J.S. Verma Committee.3118

Recommendations of Justice J.S. Verma Committee on Sentence

While we believe that enhanced penalties in a substantial number of sexual assault cases can be adjudged on the basis of the law laid down in the aforesaid cases, certain situations warrant a specific treatment. We believe that where the offence of sexual assault, particularly 'gang rape', is accompanied by such brutality and violence that it leads to death or a Persistent Vegetative State (or 'PVS' in medical terminology), punishment must be severe - with the minimum punishment being life imprisonment. While we appreciate the argument that where such offences result in death, the case may also be tried under Section 302 of the IPC as a 'rarest of rare' case, we must acknowledge that many such cases may actually fall within the ambit of Section 304 (Part II) since the 'intention to kill' may often not be established. In the case of violence resulting in Persistent Vegetative State is concerned, we are reminded of the moving story of Aruna Shanbagh, the young nurse who was brutally raped and lived the rest of her life. (i.e. almost 36 years) in a Persistent Vegetative State.

In our opinion, such situations must be treated differently because the concerned effort to rape and to inflict violence may disclose an intention deserving an enhanced punishment. We have therefore recommended that a specific provision, namely, Section 376(3) should be inserted in the Indian Penal Code to deal with the offence of "rape

followed by death or resulting in a Persistent Vegetative State"

In our considered, view, taking into account the views expressed on the subject by an overwhelming majority of scholars, leaders of women's organizations, and other stakeholders, there is strong submission that the seeking of death penalty would be a regressive step in the field of sentencing and reformation. We, having bestowed considerable thought on the subject, and having provided for enhanced sentences (short of death) in respect of the above-noted aggravated forms of sexual assault, in the larger interest of society, and having regard to the current thinking in favour of abolition of the death penalty, and also to avoid the argument of any sentencing arbitrariness, we are not inclined to recommend the death penalty.[48]

Prior to its substitution, the old s 376 ran thus:

" S. 376 . Punishment for rape.--

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,--

(a) being a police officer commits rape--
  (i) within the limits of the police station to which he is appointed; or
  (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
  (iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or3119

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.--"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.--"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.".

2. Scope

The general features of the offence, punishable under this section, have already been set out in the commentary under the preceding s 375 . Under s 375, irrespective of consent, it is rape when a man has sexual intercourse with a woman (a) under sixteen years of age (now, 18 years), if she is not his wife; or (b) under fifteen years of age if she is his wife. In this class of cases, only the following two questions will arise:

(1) was the woman, at the time of the act, under the prescribed age aforesaid? and
(2) was there penetration?[49]

However, there is another and larger class of cases where the girls are of the prescribed age of 15 or 16 years, as the case may be. In this class of cases, different questions will arise. All persons, other than the husbands, commit rape on a woman without her consent. Consent is, thus, the most important ingredient of the offence of rape in this large class of cases. Hence, the evidence will focus on that question to show that there was no consent which the law requires, namely, free and conscious permission before the act began or was completed. The consent, that will relieve the act of sexual intercourse of criminality, must be real consent to the act and it must be both free and previous to the act. A consent, subsequent to the act, is no defence to a charge of rape. This is why the law does not allow an offence of rape to be compounded. Further, consent, after the first act of rape, might purely be the result of3120 sexual urge and would not, therefore, be after the first act of coitus against the will of the woman. Every act of sexual intercourse would, thus, be a separate offence of rape.[50] The circumstances, vitiating apparent consent, have been explained in the commentary under the preceding s 375, IPC .

The alarming frequency of crime against women led the Parliament to enact the Criminal Law (Amendment) Act 1983 (Act 43 of 1983) and the Criminal Law (Amendment) Act 2013 (Act 13 of 2013) to make the law of rape more realistic. By the amendment Acts, ss 375 and 376 were amended and certain other penal provisions were incorporated for punishing such custodians who molest a woman under their custody or care. Section 114A was also added in the Evidence Act for drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape, involving such custodians.[51]

Prior to its substitution *vide* the Criminal Law (Amendment) Act 2013, sub-s (1) to s 376 had a proviso and provided a minimum sentence (which has now changed). Sub-section (2) *vide* the different clauses of the section highlighted the aggravated form of the offence for which a higher punishment, *i.e.*, rigorous imprisonment for not less than 10 years but which may extend for life and also fine was provided as against s 376(1), which provided for sentence of imprisonment of not less than 7 years but which may be for life or for a term which may extend to 10 years and accused was also liable to pay fine. When the accused committing the offence was the husband of the woman who was above the age 12 years but below 15 years, then the legislature had shown some leniency and the sentence of imprisonment up to 2 years or fine or both was prescribed in such cases. However, when the woman raped was less than 12 years of age, then the offence committed by the husband was at par with the other offenders falling within the then sub-s (1) of s 376, IPC . The court, however, had discretion both under sub-ss 1 and 2 to s 376 to impose a sentence of imprisonment prescribed for adequate and special reasons to be mentioned in the judgment.

3. Normally Rape Case is not Concocted

Rape leaves a permanent scar and has a serious psychological impact on the victim and also her family members and, therefore, no one would normally concoct a story of rape just to falsely implicate a person.[52]

4. False Implication

No girl of self-respect and dignity who is conscious of her chastity having expectations of married life and livelihood would falsely level an accusation of rape against a person, much less against her father, sacrificing thereby her chastity and also expose the entire family to shame and at the risk of condemnation and ostracization by the society. It is unthinkable to suggest that the mother would go to the extent of inventing a story of sexual assault of her own daughter and tutor her to narrate a story of sexual assault against a person who is no other than her husband3121 and father of the girl, at the risk of bringing down their social status and spoil their reputation in the society as well as family circle to which they belong to.[53]

In a case, the accused forcibly entered the hut of the prosecutrix, knocked her down on the floor and pulled up her saree and committed sexual intercourse, while she kept shouting to break free, but there was nobody. Then, the accused ran away. In such case, the testimony of the prosecutrix was found reliable and the plea of false implication taken by the accused was rejected and he was convicted for offences under ss 376 and 450, IPC .[54]

5. Law Commission Reports

The Law Commission of India in its forty-second report on the IPC submitted in June 1971, suggested amendments to ss 375 and 376, IPC, thereby expanding the definition of rape and providing for a more severe punishment. The Commission also suggested the incorporation of other sexual offences in the IPC . In its sixty-ninth report on the Indian Evidence Act 1872, the Law Commission had also recommended reforms in the law. Nothing, however, was done and the law not amended. Then the subsequent Law Commission in its eighty-fourth report suggested changes in the law on rape and allied offences and amendments to the laws of procedure and evidence. The commission submitted its report in April 1980 to the Central Government after that the IPC, CrPC and Evidence Act were amended by the Criminal Laws (Amendment) Act 1983. In the statement of objects and reasons while presenting the Bill, it was mentioned that recommendations of the Law Commission had been examined in consultation with the State Governments and suggestions on the subject received. It was mentioned that the changes proposed in the Bill had been formulated principally on the basis of the following considerations:

(1) the law should be made more stringent without jeopardising considerations of fair trial;
(2) the definition of rape should be amended to remove certain loopholes and inadequacies and to ensure that consent should be vitiated unless it is real and given out of free choice;
(3) minimum punishments for rape should be prescribed;
(4) the prosecutrix should be protected from the glare of embarrassing publicity during the investigation as well as trial stage, and any information leading to the identification of the victim should not be disclosed;
(5) in the case of rape by a police officer or by a group of persons or by a person having custodial control, by virtue of his special position over the victim, once it is proved that sexual intercourse has taken place, the onus should be on the accused to prove that the sexual intercourse was with the consent of the woman.

It will be useful to quote the following passage from the eighty-fourth report of the Law Commission:

> It is often stated that a woman who is raped undergoes two crises, the rape and the subsequent trial. While the first seriously wounds her dignity, curbs her individual, destroys her sense of security and may often ruin her physically, the second is no less3122 potent or mischief, in as much as it not only forces her to re-live through the traumatic experience, but also does so in the glare of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focused up on her. In particular, it is now well established that sexual activities with young girls of immature age have a traumatic effect which often persists throughout life leading subsequently to disorder, unless there are counter balancing factors such a family life and social attitudes which

> could act as a cushion against such traumatic effects. Rape is the ultimate violation of the self. It is a humiliating event in a woman's life which reads to fear for existence and a sense powerlessness. The victim needs empathy and safety and a sense of reassurance. In the absence of public sensitivity to these needs, the experience of figuring in a report of the offence may itself become another assault. Forcible rape is unique among crimes, in the manner in which its victims are dealt with by the criminal justice system. Raped women have to undergo certain tribulations. These begin with their treatment by the police and continue through a male dominated criminal justice system acquittal of many de facto guilty rapists adds to the sense of injustice.

In effect, the focus of the law upon corroboration, consent and character of the prosecutrix and standard of proof of guilt beyond reasonable doubt have resulted in increasing alienation of the general public of the legal system, who find the law and language difficult to understand and who feel that the courts are not run as well as one would expect.[55]

6. Section 509 and Section 376 Read with Section 511 and Section 376 --Relative Scope

Commentary under s 509, *post*, vol 4, may be referred to.

7. Essential Ingredients of the Offence of Rape

Commentary under s 375, *ante*, may be referred to.

8. Crux of the Offence and Intercourse

The crux of the offence under s 376, IPC is rape and it postulates a sexual intercourse. The word 'intercourse' means sexual connection. It may be defined as mutual frequent action by members of independent organization. By a metaphor, the word 'intercourse' like the word 'commerce' is applied to the relation of sexes. In intercourse, there is temporary visitation of one organisation by a member of the other organization for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. There is no intercourse unless the visiting member is enveloped at least partially by the visited organization, for intercourse connotes reciprocity. In intercourse between thighs the visiting male organ is enveloped at least partially by the organism visited, the thighs; the thighs are kept together and tight.[56]

9. Problems Posed by rape and defect in Present System

It is rather unfortunate that in recent times, there has been an increase in violence against women causing serious concern. Rape does indeed pose a series of problems3123 for the criminal justice system. There are cries for very harsh penalties, but often such crimes eclipse the real plight of the victim. Rape is an experience which shakes the foundations of the lives of the victims. For many, its effect is a long term one, impairing their capacity for personal relationships, altering their behavioural values and generating fears. In addition to the trauma of rape itself, victims have had to suffer further agony during legal proceedings.[57]

The defects in the present system are that complaints are roughly handled and not given the attention warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had to suffer as a result of the rape itself.[58]

10. Acquittal on flimsy grounds improper

The Courts should be more cautious in appreciating the evidence in rape cases and the accused should not be left scot-free merely on flimsy grounds. [59]

11. Rape of Girl Child--Parameters and Factors to be kept in Mind

The following parameters and factors that need to be kept in mind, clearly emerge in cases of a rape of a girl child:

(1) Such cases need to be dealt with sensitively and not like cases involving other penal offences. In other words, the whole approach of the courts must be quite different.
(2) The traditional non-permissive bounds of Indian society must be kept in mind while examining the evidence in cases involving sexual offences. Social factors play an important role in the nature and quality of available evidence.
(3) The sole testimony of a prosecutrix is enough to convict a person accused of rape, if the testimony is free from blemish and implicitly reliable.
(4) Such testimony does not need corroboration; but if there is some doubt about the implicit reliability of the testimony, then the court may look for assurance to the acceptability of the testimony, short of its corroboration.

If the testimony of the prosecutrix is reliable and trustworthy, then minor contradictions are not enough to throw out the evidence and other issues such as non-examination of an available witness, even the non-examination of a doctor or the non-production of the doctor's report would not be fatal to the case of the prosecution.[60]

12. Delay in Lodging FIR

It is a recurring feature in most criminal cases that there would be some delay in furnishing the first information to the police. It has to be remembered that the law has3124 not fixed any time for lodging the FIR. Hence, a delayed FIR is not illegal, however, a prompt and immediate lodging of the FIR is ideal as that would give the prosecution a twin advantage. First, it affords commencement of the investigation without any time lapse. Secondly, it expels the opportunity for any possible concoction of a false version. Barring these plus points for a promptly lodged FIR, demerits of the delayed FIR cannot operate as fatal to any prosecution case. It cannot be overlooked that even a promptly lodged FIR is not an unreserved guarantee for genuineness of the version incorporated therein.[61]

When the delay in lodging the FIR is properly explained, it has no adverse effect on the prosecution case.[62] Where the father of the victim was not in the village on the day of the incident and after his return to the village was absent for 3-4 days and the FIR was lodged the next day, it can be said that the delay is explained.[63] Where rape was committed on a minor girl by a teacher, which was duly proved by evidence on record, and the FIR in the case was filed three months after the incident, it was held that a mere delay in filing the FIR was not sufficient to reject the prosecution case.[64]

The delay in filing a FIR in a case of sexual assault, cannot be equated with the case involving other offences as there are several factors which weigh on the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR.[65]

13. Natural Inclination of the Prosecutrix and Delay in FIR

A girl in a tradition bound non-permissive society would be extremely reluctant even to admit that any incident, which is likely to reflect upon her chastity, had occurred, being conscious of the danger of getting ostracized by the society or looked down by the society. Her not informing any one about the incident in the circumstances cannot detract from her reliability. In normal course of human conduct an unmarried girl would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed to narrate such an incident. Overpowered, as she may be, by a feeling of shame her natural

inclination would be to avoid talking to anyone, lest the family name and honour is brought into controversy. Thus, a delay in lodging the first information report cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same on such a ground in lodging the first information report. Delay has the effect of putting the court on guard to search if any explanation has been offered for the delay and, if offered, whether it is satisfactory.[66]

It needs to be observed that in cases involving sexual assault, delay in reporting the matter to the police by itself is not fatal to the prosecution case. It is well settled that the courts cannot overlook the fact that in sexual offences delay in lodging the FIR3125 can be due to a variety of reasons, particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving a cool thought that a complaint of sexual offence is generally lodged.[67]

14. Quashing of FIR

Where the petitioner/accused, an IAS officer, filed a petition under s 482, CrPC 1973 for quashing of an FIR for having committed the offence of rape, there were specific allegations by the victim in her complaint that the petitioner/accused bolted the door of his chamber and allured her for promotion, and on her refusal forcibly committed rape by threatening her. Plea of alibi taken by the petitioner which is required to be proved by substantial evidence is to be determined during the trial. Further, cases filed by the petitioner against the complainant for malicious prosecution are not relevant for declaring an FIR false. Since the allegations made in the complaint *prima facie* disclosed the offence alleged, the FIR could not be quashed.[68]

15. Lapses/Laches on the part of Investigating Agency--Effect

The lapses/laches on the part of the investigating agency and prosecution while conducting investigation or during trial is not fatal to the prosecution case, unless serious prejudice has been caused to the accused by reason of such lapses/laches and it cannot be considered to be a ground for discrediting the testimony of the prosecutrix.[69]

When no prejudice can be said to have been caused, the question of trial being vitiated would not arise. When the eyewitness account available on record is trustworthy, the lapses in investigation are overshadowed by the testimony of the eyewitness.[70] Where on account of defective investigation, loopholes in the investigation are left designedly to help the accused at the cost of the poor prosecutrix, a labourer, acquitting the accused solely on that ground is not justified as it would be adding insult to her injury.[71]

16. Non-Examination of Person Writing Police Report--Effect

The non-examination of the person who is said to have written the report is fatal to the prosecution case when all the witnesses have categorically stated that some person wrote the report. but they had not even stated the name of that person, which throws serious doubt about the genuineness of the police report.[72]

17. Identification of Accused and Identification Parade

By mere lapse of time or by the mere fact that the test identification parade was not conducted, the identification made by the prosecutrix in the open court cannot be3126 disbelieved.[73]Section 9 of the Evidence Act deals with relevancy of facts necessary to explain or introduce the relevant facts. It says, *inter alia*, facts which establish the identity of any thing or person whose identity is relevant, insofar as they are necessary for the purpose, are relevant. Likewise, the evidence of identification is a relevant piece of evidence under s 9 of the Evidence Act, where the evidence consists of identification of the accused person at his trial. The statement of the witness made in the court, a *fortiori* identification by him of the accused is substantive evidence but from its very nature it is inherently of a weak character. The evidence of identification in the test identification parade is not substantive evidence, but is only

corroborative evidence. It falls in the realm of investigation. The substantive evidence is the statement of the witness made in court. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what he has seen earlier, strength or trustworthiness of the evidence of identification of the accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time after a long time, the probative value of such uncorroborated evidence becomes minimal, so much so that it becomes unsafe to rely on such piece of evidence. However, if a witness has known the accused earlier in such circumstances which lend assurance to identification by him in court, and if there is no inherent improbability or inconsistency, there is no reason why his statement in court about the identification of the accused should not be relied upon as any other acceptable but uncorroborated testimony.[74] In a case, there was clear evidence of the prosecutrix that the accused truck driver committed rape on her. She also correctly identified the accused in test identification parade. Since the accused was not known to the prosecutrix from before, therefore omission of the name of the accused in FIR was held immaterial and conviction of the accused under s 376, IPC was sustained.[75]

It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine.[76] The non-acquaintance of the victim with the accused and the absence of test identification parade is not fatal, when the offence was committed in the broad daylight as well as in the night for a few days giving sufficient time for the victims to identify the accused persons.[77]

In ch 1 of the Criminal Manual issued by the Bombay High Court it has been directed that two suspects roughly of similar appearance should be paraded, with at least twelve other persons, but when the two suspects are not similar in appearance, separate parades should be held using different persons for each parade.[78] The number of dummies per accused should be in the ratio of 1:4 or 1:6. Generally, not3127 more than two accused should be placed in an identification parade. The dummies so placed along with the accused should be of similar appearance to the accused.[79]

During the investigation of a crime, the police agency is required to hold identification parade for the purpose of enabling the witness to identify the person alleged to have committed the offence, particularly, when such person was not previously known to the witness or the informant. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement. Identification parade may also not be necessary in a case where the accused persons are arrested on the spot. The evidence of identifying the accused person at the trial for the first time is, from its very nature, inherently of a weak character.[80]

The evidence in order to carry out a conviction should ordinarily clarify as to how and under what circumstances the complainant or the witness came to pick out the particular accused person and the details of the part which he allegedly played in the crime in question with reasonable accuracy. In such cases, test identification is considered as a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them. There may, however, be exceptions to this general rule, when for example, the court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration. Though the holding of identification proceedings are not substantive evidence, yet they are used for corroboration purposes for believing that the person brought before the court was the real person involved in the commission of the crime. The identification parade even if held, cannot in all cases, be considered as safe, sole and trustworthy evidence on which the conviction of the accused could be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant.[81]

The identification of the accused by the prosecutrix is not acceptable when she admits in cross-examination that she identified the accused in court because the police and her father had tutored her to identify the accused.[82] However, when the accused lived in the vicinity of the house of prosecutrix

and the prosecutrix had sufficient opportunity to see the accused at the time of the occurrence, not holding the identification parade is not fatal to the prosecution case.[83] When the accused and the victim are both of the same locality, and the victim identifies the accused on the next day of the offence, she and her family members know the accused and that renders not holding of the test identification parade inconsequential. Moreover, substantive evidence is the evidence of identification in court.[84] Unlike some others, the accused was not caught at the place of occurrence and there was no test identification parade in the eye of law, thus, identification of the accused for the first time in Court was really of no consequence. The only evidence pressed into service by the prosecution so far as the accused was concerned was that his name was similar to one of the names by which the accused persons were addressing each other, as stated by the prosecutrix. That could not be, by any stretch of the imagination, an incriminating material and the accused was acquitted of the charge under s 376, IPC .[85]3128

18. Attempt to Commit Rape

The expression '*whoever attempts to commit an offence'* in s 511, IPC can only mean, whoever intends to do a certain act with intention or knowledge necessary for the commission of the offence. All offences may be viewed in four distinct stages (i) intention; (ii) preparation; (iii) attempt; and (iv) completed act. There is a thin line between preparation and attempt. Attempt has been defined in *Stephen's Digest of Criminal Law* as follows: 'an attempt to commit a crime is an act done with intent to commit that crime, and forming part of a serious (series) of acts which would constitute its actual commission if it were not interrupted'.[86]

The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination, and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation.[87]It is true that mere intention to commit an offence is not a crime, unless such intention is followed by an act. Mere intention is not suggestive of attempt when the accused with intent to commit rape to satisfy his lust laid the victim on the ground over the shawl, tore her *salwar*, opened his pants, laid over her which would show that he intended to gratify his passion on her person in all events. It is only when the mother of the victim calling and looking for the victim reached near the spot that he got up from the body of the victim and fled away. This prevented him from penetrating but in the process, he ejaculated on the shawl, stains of which were also found on his pants. The act of the accused would squarely fall under s 376 read with s 511, IPC .[88]

A person commits the offence of attempting to commit the particular offence, when he intends to commit that particular offence and having made preparations and with the intention to commit that offence, does as act toward its commission and that such act need not be the penultimate act towards the commission of that offence, but must be an act during the course of committing that offence.[89]

19. Attempt to Rape or Outraging the Modesty

It is now well settled that in a case of attempt to rape, in order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events and in spite of all resistance, a preparation reasonably proximate to the consummation of the offence is sufficient to bring home the offence of attempt to rape.[90]

It is not only that the accused tore the clothes and took bites on the cheeks of his victim but forcibly tore the cord of the *salwar* and tried to go on the grown up lady from the leg-side. It is definitely an act beyond the stage of preparation proximate to the commission of the offence of rape taking it to the stage of attempt.[91]

The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination, and what is necessary to prove for an offence of an attempt to commit rape is that the accused has gone beyond the stage3129 of preparation. If an accused strips a girl naked and then making her lie flat on the ground undresses himself and then forcibly rubs his erected penis on the private part of the girl, but fails to penetrate the same into her vagina and on such rubbing ejaculates himself, then it is difficult to hold that it was a case of merely assaulting under s 354 and not an attempt to

commit offence under s 376 read with s 511, IPC .[1]

Where the accused rubbed his male organs on the private parts of the minor girl and the semen leaked out of his male organ and fell on her private part, the case was found to be one of attempt to commit rape punishable under ss 376 / 511, IPC, and not outraging her modesty, punishable under s 354, IPC .[2]

When the clothes of the victim were found intact and examination of her genital area conclusively established that there was no sexual assault on her, though there was some evidence of minor injuries on the lower part of her body from which the offence of outraging her modesty was made out, the accused was found liable to be convicted under s 354, and not under ss 376 / 511, IPC[3]

When the *sari* of the victim was removed and nothing was done beyond that, the case was not found to be an attempt to commit rape, but of outraging the modesty of the woman.[4]

The accused-stranger representing himself as the *sarpanch*managed to get shelter for the night in the house of the complainant. In the night the prosecutrix awakened and found the cord of her petticoat loosened and the accused was trying to sit on her waist. She pushed the accused and cried out to her husband. In this state of evidence, the court held that the act of the accused would constitute not an attempt to commit rape, but only preparation for the same.[5]

20. Abetment of Rape

In order to bring home the conviction under s 376 read with s 114, IPC, the prosecution has to establish the presence of the accused person if it was committed as also their abetment to commit the offence by the perpetrator.[6]

In order to bring home such conviction under s 376 read with s 114, IPC, there must be evidence on record to show, (a) that there was abetment of rape to be committed; (b) that the abettors have actually abetted the commission of rape; and (c) that they were present at the time when the commission of rape took place.[7]

Abetment of doing of a thing is when a person instigates any person to do that thing or enters into conspiracy for the doing of that thing and if an act or illegal omission takes place in pursuance thereof, in order to the doing of that thing or intentionally aids by any act or illegal omission the doing of that thing. If anything is done in order to facilitate the commission of that act, it amounts to aiding the doing of that thing.[8] When the two accused did not commit rape with the prosecutrix, they3130 did not physically hold any part of her body nor intimidate her nor do any other act to facilitate the commission of rape by the main accused, the two accused could hardly be held to have committed abetment of the offence of rape.[9] The mere fact that rape was committed in a hut in possession of the accused is not sufficient to conclude any abetment on his part.[10] However, the accused though not himself committing rape but kept watch while rape was being committed by other persons and aided and abetted the commission of the crime instead of preventing it, is liable to be convicted under s 376 read with s 109, and not under s 376 read with s 34, IPC .[11]

21. Rape and Abetment of Suicide

The prosecution case was that the accused committed rape on the prosecutrix who committed suicide 5½ months after the date of occurrence on account of the rape committed on her. The charge of rape was not proved against the accused, so the cause for committing suicide was not legally proved. The accused cannot, therefore, be held responsible for abetment of the ultimate offence of suicide. Further, statement of the prosecutrix recorded by the police 11 days after the date of occurrence of rape, cannot be treated as her dying declaration under s 32 of Evidence Act, for suicide was committed after 5½ months, when it was not in a series of circumstances of the transaction which resulted in her death.[12] When the raped woman committed suicide three days after the commission of the offence, it was held that her statement to her mother-in-law was not admissible under s 32(1) of the Evidence Act 1872, because rape was not the

cause of her death, though it might be the contingent motive, nor could it be relevant under s 6 of the said Act, as her statement was not so connected with her rape as to form part of the same transaction.[13]

22. Sexual Intercourse with false Promise of Marriage is Cheating

When an accused makes a false promise to marry, which he never intends to carry out, and induces thereby the victim, so deceived, to have with him the sexual act, which the victim would not have indulged in or permitted, had she not been induced by such deception and when such act of having sexual intercourse by her with the accused causes, or is likely to cause, damage or harm to her body, mind or reputation, the act of the accused would amount to cheating. Thus, when a woman is induced to part with her chastity or virginity, which is the most valued possession of hers, the person, who so induces the woman by making false representation, would be liable for punishment under s 417, IPC . If the victim's having sexual intercourse with such a person, causes, or is likely to cause harm to her body, mind or reputation, for, in such a case, unless so deceived, the victim would not have permitted sexual act by the accused. To put it differently, had such a victim not been deceived, she would not have permitted sexual act or would have refrained from allowing such sexual act and clearly in such a case, but for her permitting such sexual act, she would not have suffered harm to her body, mind or reputation.[14]3131

A representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If, on the facts, it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of s 375, IPC cl second.[15] In the instant case, the prosecutrix came from the lower rung of the society and had read upto Class VI only. The accused exploited the position by making her believe that he would marry her. Therefore, pinning faith on such repeated assurance, the prosecutrix consented to her having physical relationship with the accused. However, it was not a case of simple allurement or mere promise to marry, and the accused hailing from a well to do family made her believe that their physical relationship would culminate in marriage. In such case, the plea of consent was rejected, and the accused was convicted under s 376, IPC .[16] Where the accused was alleged to have committed sexual intercourse with the false promise to marry the girl, which continued for a long period of six months, the accused was held entitled to benefit of doubt and acquitted of charge under s 376, IPC .[17]

In a case, the prosecutrix and the accused had sexual intercourse continuously for a long period and when the prosecutrix became pregnant, she filed complaint for offence under s 376, IPC, on the allegation that she gave consent on misconception of fact or belief of false promise of marriage by the accused. It was held that the circumstances of the case showed that continuous sex between the parties was consensual. This was a relationship between two co-workers who were intimately known to each other, and in the circumstances, they had spent time together for long periods and that it was also possible that the desire to have sex was mutual and consensual. Hence, given the circumstances of the case, it was possible to hold in favour of the accused that there was consensual sex between the complainant and the accused. It is only when the relationship soured and when the appellant refused to marry the complainant that a case of rape has been brought against him. The accused was acquitted of the charge of rape under s 376, IPC .[18]

Where the prosecutrix and the accused continued sex for a long period and she never resisted the overtures of the accused for a long time, and she freely exercised a choice between resistance and assent, the evidence showed that the prosecutrix was well aware that the accused was already married and had children. Further, no marks of violence were found on her, therefore, it was held that there was no misconception of fact/misrepresentation by the accused, and it was clearly a case of consensual sex and the accused could not be convicted on the charge of rape under s 376, IPC .[19] The prosecutrix was a widow living in the village and the accused, a co-villager, showed sympathy and promised to marry her and had sexual relations with the prosecutrix for about 6-7 months. When the prosecutrix became pregnant, the accused refused to3132 marry her. Hence, case was filed for the prosecution of the accused for offence under s 376, IPC . The evidence of the prosecutrix showed that she was aware of the fact that

the appellant is a married person and already has a legally wedded wife besides children, and she (legal wife) is also mother of seven children, eldest of which, at the time of her deposition, was about eighteen years old. In such circumstances, it was difficult to accept that any sexual assault of the prosecutrix would have been done perforce so as to attract the rigors of s 376, IPC, hence, the conviction of the accused under s 376, IPC was set aside.[20]

There was evidence that the prosecutrix had left her home voluntarily, of her own free will to marry the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. The prosecutrix had called the appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived, she went with him to the lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to any one. Thereafter, she also went to Kurukshetra with the appellant, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the appellant at the Birla Mandir. Thereafter, she even proceeded with the appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in Court at Ambala. However, here they were apprehended by the police. Held, the allegation of 'promise of marriage' made by the prosecutrix was baseless, and no charge of deceit/rape was made out against the accused appellant. The accused appellant was acquitted of the charge under s 376, IPC .[21]

Where the complainant filed FIR with the allegation that the accused had promised to marry her and developed physical relationship with her, such that her consent for rape was obtained on promise of marriage; but the complainant was already married, and there was no evidence of commission of rape by the accused on the prosecutrix, the FIR and charge sheet were quashed on petition filed under s 482, CrPC .[22]

Since the definition of the offence of cheating indicates that even when no parting of property is occasioned by deception, the deception may still amount to cheating if, as a result of the deception, a woman does anything or omits to do anything, which she would not have, but for such deception, done or omitted to do, it logically follows that when an accused, not intending to marry a woman, induces the woman, so deceived, to have sexual intercourse by him with her, the act of the accused of having sexual intercourse with such a woman would amount to offence of cheating if the act of the woman in letting such a man have sexual intercourse with her or the act of the woman in omitting to resist the act of sexual intercourse by such a man with her causes or is likely to cause damage or harm to the person of such a woman, her mind or reputation.[23] For further commentary, the heading 'Prosecutrix consenting to sexual intercourse on false promise of marriage' *post*, may be referred to.3133

If a woman, believing in the promise of marriage made by a man, consents to the promisor having sexual intercourse with her, the promisor would be liable for the offence of rape if the Court finds, on examination of the materials on record, that the promise of marriage made by the promisor was really a hoax to obtain consent of the woman, for, such a consent given by the woman would not, in the light of the provisions of s 90, IPC, amount to consent in law and the sexual intercourse by such a promisor with a woman, so induced, would constitute a offence of rape.[24]

Where the victim was aged more than 16 years and the accused was a middle aged person who had two wives and many children living under the same roof, and the victim maintained silence regarding her sexual relations with the accused and became pregnant thereafter, the act was found a consensual act, and the accused was acquitted of the charge under s 376, IPC .[25]

23. Rape Committed by a Person in Authority

When a crime like rape is committed by a person in authority, *e.g.* a police officer, the court's approach should not be the same as in any other case involving a private citizen. By our criminal laws, wide powers are conferred on police officers investigating cognizable offences. The infrastructure of our criminal

investigation system recognises and indeed protects the right of a woman to decent and dignified treatment at the hands of the investigating agency. It was also observed that a person in authority, such as a police officer, carries with it the awe of the office which is bound to condition the behaviour of his victim. The court must not be oblivious to the emotional turmoil and psychological injury that a prosecutrix suffers on being molested or raped. She suffers from a sense of shame and the fear of being shunned by society and her near relatives, including her husband. Instead of treating her with compassion and understanding, more often than not, one who is an injured victim of a crime, is shunned. It must, therefore, be realised that a woman who is subjected to violence would always be slow in disclosing her plight. The court should, therefore, evaluate her evidence in this background.[26]

The rape committed by a person in authority, *e.g.* a police officer, is considered a severe offence, and by virtue of sub-cll (a) to (d) of s 376(2), a higher punishment is prescribed for this offence in comparison to the ordinary rape committed under sub-s (1) of s 376 .

24. Rape by School Employee on Student

The accused was an employee of the school and was alleged to have committed rape on a school student. The statement of the prosecutrix and her father was found worth placing reliance on, and a delay of a few days in filing the FIR was found inconsequential. The accused had not pleaded false implication and was convicted under s 376, IPC .[27]

25. Accused Teacher

Where the accused, a teacher, committed rape on his student aged more than 18 years of age, and the student and teacher fell in love with each other, the same would not3134 mean that the teacher had taken undue advantage of his official position. There must be an inducement or seduction by a public servant so far as the woman in his custody is concerned. Even if the accused teacher is held to be a public servant, he could not be convicted under s 376(2)(b), as the prosecutrix was found to be more than 18 years of age and a consenting party, further, the offence was committed outside the school. Hence, the accused was acquitted of the charge under s 376B, IPC .[28]

26. Section 376(2)(h) [old clause (e)] -- Accused should have Knowledge and not Possibility of Knowledge of Pregnancy of Prosecutrix

The language of s 376(2)(e) is clear. It requires prosecution to establish that the accused knew her to be pregnant. This is clear from the use of the expression 'knowing her to be pregnant'. This is conceptually different that there is a possibility of his knowledge or that probably he knew it. Positive evidence has to be adduced by the prosecution about the knowledge.[29] There is a gulf of difference between possibility and certainty. While considering the case covered by s 376(2)(e), what is needed to be seen is whether evidence establishes knowledge of the accused. Mere possibility of knowledge is not sufficient.[30] In the absence of any material brought on record to show that the accused knew the victim to be pregnant, s 376(2)(e), IPC cannot be pressed into service.[31]

27. Section 376(2)(i) [old clause (f)] -- Commits Rape on a Woman when she is under Sixteen Years [Twelve Years under old clause] of Age

Child rape cases are cases of perverse lust for sex where even innocent children are not spared. It is a crime against humanity. Many such cases are not even brought to light because of social stigma attached thereto. According to some surveys, there has been a steep rise in child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the country's future. However, in our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape, besides sexual abuse. These factors point towards a different approach required to be adopted.[32]

Where the evidence on record clearly established that the victim was less than 16 years of age, the conviction for offences punishable under s 376, IPC was held proper.[33]

Where an accused commits rape on a minor girl aged 6 years, the accused would be convicted under s 376(2)(i), IPC .[34]

The rape of a woman when she is under twelve years of age was considered more severe than ordinary rape under sub-s (1) of s 376, so it was included in sub-s (2) of3135 s 376 *vide* cl (f) to fall amongst severe cases of rape falling under sub-s (2) of s 376 for which a higher sentence than the one in sub-s (1) of s 376, IPC, is provided.

Prosecutrix was above 16 Years of Age - Accused Acquitted

The accused had sex with the prosecutrix, aged more than 16 years, on several occasions and the prosecutrix was a consenting party, thus, the accused was given the benefit of doubt and acquitted of the charge under s 376, IPC . [35]

28. Section 376(2)(g) [36] [old clause]--Gang Rape--Ingredients

To bring the offence of rape within the purview of s 376(2)(g), IPC, read with expln 1 to this section, it is necessary for the prosecution to prove:

(i) that more than one person had acted in concert with the common intention to commit rape on the victim;
(ii) that more than one accused had acted in concert in commission of crime of rape with pre-arranged plan, prior meeting of minds and with element of participation in action. Common intention would be action in consort in pre-arranged plan or a plan formed suddenly at the time of commission of offence which is reflected by element of participation in action or by the proof of the fact of inaction when the action would be necessary. The prosecution would be required to prove pre-meeting of minds of accused persons prior to commission of offence of rape by substantial evidence or by circumstantial evidence; and
(iii) that in furtherance of such common intention one or more persons of the group actually committed offence of rape on victim or victims. Prosecution is not required to prove actual commission of rape by each and every accused forming the group.[37]

In order to establish an offence under s 376(2)(g), IPC, read with expln 1 thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused would be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention pre-supposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offender. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence.[38]3136

Explanation I of old Section 376(2) --Gang Rape with Common Intention

The explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. 'Common intention' is dealt with in s 34, IPC and provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the

same manner as if it was done by him alone. 'Common intention' denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character, but must be actuated by the same common intention, which is different from same intention or similar intention. The *sine qua non* for bringing in application of s 34, IPC is that the act must be done in furtherance of the common intention to do a criminal act.[39] When a woman is raped by one or more several persons in furtherance of their common intention, each one of those persons shall be deemed to have committed gang rape under s 376(2)(g), IPC . The principle underlying the expln I to s 376 is the vicarious liability on account of common intention of the accused persons as defined under s 34, IPC .

Once it is established that the accused persons had acted in concert and entered the house of the victim, and thereafter raped her, then all of them would be guilty under s 376(2)(g), IPC in terms of expln I, irrespective of the fact that the victim had been raped by one or more of them.[40]

Explanation I--A Woman Cannot Be Prosecuted For Gang Rape

A bare reading of s 375 makes the position clear that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376(2) makes certain categories of serious cases of rape, as enumerated therein, attract more severe punishment. One of them relates to 'gang rape'. The language of sub-s (2)(g) provides that whoever commits 'gang rape' shall be punished *etc.* The explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each such person shall be deemed to have committed gang rape within this sub-s (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable.[41] The expression 'in furtherance of their common intention' as appearing in the explanation to s 376(2) relates to intention to commit rape. A woman cannot be said to have an intention to commit rape. Therefore, a woman cannot be prosecuted for alleged commission of the offence punishable under s 376(2)(g), IPC .[42]

29. Presumption of absence of Consent-- Section 114A of Evidence Act

Commentary under the same heading in s 375, *ante*, may be referred to.3137

When sexual intercourse by the accused with the prosecutrix is proved to have taken place and the prosecutrix, in such a case, claims in her evidence before the Court that she had not consented to the sexual act, the Court shall draw a presumption under s 114A, Evidence Act 1872 that she had not consented to the sexual act and the burden would then shift to the accused to prove that his sexual act with the prosecutrix was with her consent.[43]

30. Procedure

The procedure for the trial of an offence of rape varies as the accused is, or is not, the husband of the woman raped. If the accused is the husband, the offence is non-cognizable, bailable, non-compoundable, and triable by a court of sessions. If the accused is not the husband, the offence is cognizable, non-bailable, non-compoundable and triable by a court of sessions.

As the offence under s 376, IPC is not compoundable, rejection of a prayer for recalling the prosecutrix for further cross-examination on the ground that the parties have settled the matter outside the Court was held proper.[44]

31. Dismissal of complaint under Section 376 , IPC --Competency of Magistrate

The complaint includes both the cases, whether it is warrant triable case or sessions triable case. Thus, if the magistrate arrived at the conclusion that the complainant in a sessions triable case cannot be believed and it is not proper to summon the accused, the magistrate is empowered to dismiss the complaint. Therefore, to say that the magistrate had no jurisdiction to dismiss the complaint filed by complainant

under s 376, IPC is contrary to the provisions of s 203, CrPC .[45]

32. Sessions Court Specified as Special Court Continues to be Sessions Court

The Supreme Court has considered the question whether the sessions court specified as a special court under the provisions of the Act will cease to be a sessions court, or whether he would continue to be the sessions judge *videGangula Ashok v State of Andhra Pradesh* .[46] The Supreme Court found that even after such specification the sessions court would continue to be the sessions court and a trial before that court can be held only in accordance with the provisions contained in ch XVII of the Code of Criminal Procedure . The following is the dictum laid down by this court:

> It is clear from sections 14 and 2 (1) (d) of the Act that it is for trial of the offences under the Act that a particular court of sessions in each district is sought to be specified as a special court. Though the word 'trial' is not defined either in the Code or in the Act it is clearly distinguishable from inquiry. Inquiry must always be a forerunner to the trial.3138

Thus, the court of sessions is specified to conduct a trial and no other court can conduct the trial of offences under the Act. Evidently the legislature wanted the special court to be a court of sessions.

33. Power of Court to Summon Documents in Rape Cases

A bare perusal of s 91, CrPC reveals firstly, that it is not subjected to s 172 and s 173 of the Code. Therefore, the prohibitions contained in ss 172 and 173 of the Code do not crib, cabin and confine the powers of the court under s 91 of the CrPC .[47] The only harmonious interpretation of the two provisions would be that sub-s (6) of s 173 does not curtail the power of the court under s 91 of the Code. In case the court is of the opinion that the prosecution has withheld vital, relevant and admissible evidence from the court, it can legitimately use its power under s 91 of the Code to discover the truth and to do complete justice to the accused.[48] Thus, in a rape case, refusal to summon documents by the trial court, such as photos, love letters between the prosecutrix and the accused, STD bill slips and a ledger book and earlier complaint filed by father of prosecutrix wherein there were no allegations of sexual exploitation was not proper as such documents were necessary for purposes of trial.[49]

34. In Camera Trial and Maintaining Anonymity of the Victim

Section 327 of the CrPC which deals with the right of an accused to an open trial was amended[50] by addition of sub-ss (2) and (3) after renumbering the old section as sub-s (1). Sub-sections (2) and (3) of s 327, CrPC provide in camera trial in cases falling under ss 376, 376A and 376D .

These two sub-sections of s 327, CrPC are in the nature of exceptions to the general rule of an open trial. Inspite of the amendment, however, it is seen that the trial courts either are not conscious of the amendment or do not realise its importance, for hardly does one come across a case where the enquiry and trial of a rape case has been conducted by the court in camera. The expression that the inquiry into and trial of rape 'shall be conducted in camera' as occurring in sub-s (2) of s 327, CrPC is not only significant, but very important. It casts a duty on the court to conduct the trial of rape cases *etc*. invariably 'in camera'. The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of sub-ss (2) and (3) of s 327, CrPC and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable, and answer the questions with greater ease in not too familiar surroundings. Trial in camera would not only be in keeping with the self respect of the victim of crime, and in line with the legislative intent, but is also likely to improve the quality of evidence of the prosecutrix because she would not be so hesitant or bashful to depose frankly as she may in an open court, under the gaze of the public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from

falsehood. The High Courts would therefore be well advised to draw the attention of the trial courts to the amended provisions of s 327, CrPC and impress upon the presiding officers to invariably hold the trial of3139 rape cases in camera, rather than in open court as envisaged by s 327(2), CrPC . When trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the court as envisaged under s 327(3), CrPC . This would save any further embarrassment being caused to the victim of a sex crime. Wherever possible, it may also be worth considering whether it would not be more desirable for cases of sexual assault on females being tried by lady judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The courts should as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of crime. The anonymity of the victim of crime must be maintained as far as possible throughout.[51] There is no doubt that rape cases are to be tried in-camera in the chambers of the sessions judge. But when the trial court has no sufficient accommodation to accommodate the accused, prosecutrix, defence counsel and so also the staff, which are required to assist the trial court in recording the evidence of the prosecution, considering these facts and that the court ought to have allowed the application filed by the petitioner under s 327 of the CrPC, for recording the evidence of the prosecutrix in the court hall, after sending the general public and the advocates, who are unconnected with the case by closing the doors and windows.[52]

35. Name of Rape Victim Should be Avoided in Judgment

Commentary under the same heading in s 228A, vol 2, may be referred to.

36. Absconding Accused--Declaring him Proclaimed Offender--Propriety of

The provisions of s 82 of the new code are mandatory in nature. The trial court passed an order for issuing a standing warrant and directed the SHO concerned for making entry regarding absconding of the petitioner. However, the mandatory requirements of s 82 of the new code had not been complied with. There was nothing on the record of the trial court to show that there was a written proclamation requiring the accused-petitioner to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation. Likewise, there was no mention in the record that the proclamation was published at the conspicuous place of the town or village of the accused-petitioner or some conspicuous part of his house or homestead or a copy of the same was affixed at the conspicuous part of the court-house. There was no publication of the proclamation in a newspaper having circulation in the area where accused-petitioner resides. Again, there was no statement in writing by the court that the proclamation was duly published. Thus, there was complete non-compliance of the mandatory provisions of s 82 of the new code and as such it was held that the impugned order cannot be sustained in the eyes of law.[53]3140

37. Sessions Trial--Examination of Witnesses on Day-to-day Basis

The trial before the court of sessions must proceed and be dealt with continuously from the inception to its finish. It will be in the interest of both the prosecution and the defence that the trial proceeds from day to day. Sessions cases must not be tried piecemeal. Once the trial commences, he must, except for a very pressing reason which makes an adjournment inevitable, proceed *de die in diem* until the trial is concluded.[54] The Supreme Court in *Ambika Prasad v Delhi Administration* ,[55] in para 11 has held as under:

> It is also to be pointed out that PW4 Vikram Singh (informant) who had lodged FIR immediately was under constant threat and was compelled not to speak the truth despite the fact that he was the brother the deceased. Other witnesses also turned hostile including PW6 Prem Singh and Pratap Singh and PW8 Rattan Singh, which indicates, as observed by the High Court that the accused party was stronger in terms of money power and muscle power. At

> the stage, we would observe that the session judge ought to have followed the mandate of section 309, Cr PC of completing the trial by examining the witnesses from day to day and not giving a chance to the accused threaten or win over the witnesses so they may not support the prosecution. It appears from the record that the examination-in-chief of PW4 Vikram Singh was over on 6-2-1984. The counsel representing Ambika Prasad requested the court that because of his uncle's demise, he would not be in a position to cross-examine the witnesses and therefore, recording of further cross-examination might be adjourned. Thereafter, the witness was cross-examined in the month of July, 1985 in our view, this is highly improper. Even if the request for adjournment of the learned counsel for the accused was accepted, the cross-examination ought not to have been deferred beyond two or three days.

The Supreme Court in State of *Uttar Pradesh v Shambhu Nath Singh* [56] has held as under:

> We make it abundantly clear that if a witness is present in court he must be examined on that day. The court must know that most of the witnesses could attend the court only at heavy cost to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income. The meagre amount of bhatta (allowance) which a witness may be paid by the court is generally a poor solace for the financial loss incurred by him. It is a sad plight in the trial courts that witnesses who are called through summons or other processes stand at the doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by the presiding officers of the trial courts and it can be reformed by everyone provided the presiding officer concerned has a commitment towards duty. No sadistic pleasure, in seeing how other persons summoned by him as witnesses are stranded on account of the dimension of his judicial powers can be a persuading factor for granting such adjournments lavishly, that too in a casual manner.

Thus, the legal position is that once the examination of witnesses starts, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are 'special reasons', which would find a place in the order for adjournment,3141 can jurisdiction be conferred on the court to adjourn the case without examination of witnesses who are present in court.

38. Compounding of Offence--Permissibility

Offence under s 376, IPC is a serious and heinous one not only effecting an individual, but the society also. On the face of existence of *prima facie* case such offence should not be allowed to be compounded by importing s 482, CrPC, simply because that benefits individuals. Such a course if adopted, reduces and may, in certain cases, convert the offence of rape to prostitution in a different manner. If the accused is innocent and victimised by the family members of the prosecutrix then at the stage of trial, accused can have the remedy of bringing appropriate evidence in support of his defence plea regarding his innocence. It is for the trial court to consider at that stage, about the statement of the prosecutrix and on finding that a false FIR was lodged by the prosecutrix, it should follow with appropriate criminal proceeding against the person who lodged the false FIR and the persons who abetted the same.[57]

39. Place of Trial

According to s 177, CrPC, every offence shall ordinarily be inquired into, and tried by a court within whose local jurisdiction it was committed, whereas, according to s 180, CrPC, when an act is an offence by reason of its relation to any other act, which is also an offence, or which would be an offence, if the doer were capable of committing an offence, the first mentioned offence may be inquired into, or tried by a court within whose local jurisdiction either act was done. Similarly, the offences of kidnapping and rape can be tried at either of the two places if they are closely related to one another.[58]

An offence of rape by a person in active defence service is also triable by a court martial according to s 70, Army Act 1950, if the designated officer has exercised his discretion under s 125 of the said Act, but if the said officer has not exercised such discretion, the regular criminal court would be competent to try the accused.[59]

40. Anticipatory Bail

The remedy of anticipatory bail is an extraordinary remedy provided in law, and has to be resorted to only in exceptional cases and that too, if special grounds are made out. In a case where it is not *prima facie* made out that attempt is being made to falsely involve the accused in a case with a view to disgrace him or malign him with some ulterior or *mala fide* motive, anticipatory bail cannot be granted. Similarly, where a serious and heinous offence is *prima facie* shown to have been committed, anticipatory bail should not be granted.[60]

When the allegations against the accused-petitioners *prima facie* show their involvement in the commission of a serious and heinous offence, and thereby having satisfied their lust after administering something to the prosecutrix, whereby she3142 became unconscious and it was in that state of unconsciousness that she was subjected to sexual intercourse. The investigation in the case is yet in progress. Therefore, on the face of it, it is not a case where anticipatory bail should be granted to the accused for committing the alleged offences under ss 376 / 328 / 34, IPC .[61]

The accused, a student aged 19 years, was alleged to have raped a deaf and dumb woman successively with others. The victim was the wife of a poor *rickshawwalla*, the prosecution case *prima facie* appeared true so the application for anticipatory bail of the accused was rejected.[62] However, when there was delay in lodging the FIR and medical evidence did not support the prosecution story, and the victim was left all alone at the scene of occurrence by her relatives who saw the accused running from the spot, the accused alleged that the case was concocted on account of money dealings, thus, anticipatory bail was granted to the accused.[63]

41. Bail

Where the sessions court while granting bail to the accused imposed the condition that the accused shall pay Rs 700 per month as compensation to the prosecutrix till disposal of the case, the sessions court relied upon decision of the Supreme Court.[64] Wherein by using plenary power under art 142 of the Constitution, the Apex Court indicated broad parameters in assisting the victims of rape, the condition of interim maintenance imposed by the sessions court was set aside by the High Court observing that the order of the Supreme Court under art 142 cannot be relied upon as a precedent, unless the Apex Court so directs.[65]

42. Charge

In case falling under s 376(1), the following form of the charge may be adopted:

I (*name and office of sessions judge, etc*.) hereby charge you (*name of accused person*) as follows:

That you, on or about the day of..... at... committed rape on AB (*name the woman raped*), and thereby committed an offence, punishable under s 376(1) of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

For offence falling under sub-s (2)(a) of s 376, following charge may be adopted:

> I (*name and office of sessions judge, etc*.) hereby charge you (*name of accused person*) as follows:
>
> That you being a police officer, on or about the day of .....at.....within the premises of any police station (*or within the limits of police station in which you are appointed*) committed rape on AB (*name of the woman raped*) or on a woman in your custody or in the custody of the police officer subordinate to you and thereby committed an offence, punishable under s 376 (2) (a) IPC and within cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

For offence of following under sub-ss 2(b), (d) and (e) of s 376, the following form of charge may be adopted:3143

> I (*name and office of sessions judge, etc*.) hereby charge you (*name of accused person*) as follows:
>
> That you being a public servant (or being on the management of or on the staff of the jail etc for sub-s 2(c) or being on the management or staff of a hospital for sub-s 2 (d).
>
> That you, on or about the day of ..... at..... taking advantage of your official position committed rape on AB (name of the woman raped), and thereby committed an offence punishable under s 376 (2) (and clause (b), (c) or (d) of sub- section 2 whichever is applicable IPC and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

A charge is not invalid merely because it does not specify the particular date and time at which an offence is alleged to have been committed,[66] if no prejudice has been caused to the accused.[67] Where different accused raped different girls, but the charge did not make it clear that two of the accused ravished one girl and the two others ravished another, it was held that there was a possibility of prejudice, but if the circumstances showed that the accused had in fact, not been prejudiced, it could not be contended that the accused had been prejudiced in their defence.[68]

In a case, a charge under s 302, IPC was framed, but no charge under s 376, IPC was framed against the accused, and there was also not an iota of evidence that the accused committed rape on the victim girl before the commission of murder, thus, the accused was acquitted of the charge for offence under s 376,

IPC .[69]

Where the medical report in the case revealed the age of the prosecutrix as 14 years and reported recent penetration of vagina, the order of the trial Court discharging the accused for offence under s 376, IPC was set aside.[70]

43. Accused Charged with Murder Cannot be Convicted for Rape

Where the accused was charged for the offence of murder but no charge was framed under s 376, nor was there any evidence to show that the accused had committed rape on the victim before committing the murder, the finding of the trial court that the accused was guilty of rape was held to be not sustainable.[71]

44. Confession

A confession statement, as is well known, is admissible in evidence. It is a relevant fact. The court may rely thereupon if it is voluntarily given. It may also form the basis of the conviction, wherefor the court may only have to satisfy itself in regard to voluntariness and truthfulness thereof and in given cases, some corroboration thereof. A confession which is not retracted even at a later stage of the trial and even accepted by the accused in his examination under s 313 of the Code, can be fully relied upon.[72] Where two confessions were recorded one after the other in quick succession, and the first confession was recorded in just 15 minutes, and no legal aid was provided to the accused, the confessional statement of the accused was inconsistent with the3144 prosecution case. There was no other material to establish the guilt of the accused. Under the circumstances, the conviction could not be based on confession.[73]

45. Accused in Statement under Section 313 of CrPC Admitting Rape

Where the accused under s 313 of CrPC has admitted that he had sex with the victim and also admitted that though he had sex with victim he did not penetrate his male organ in full as she got up, from the narration of the evidence on record, more particularly evidence of victim as well as the statement of the accused recorded under s 313 of CrPC, it is proved beyond all reasonable doubt that the accused has raped the victim and there was penetration of the male organ in the vagina of the victim notwithstanding the fact that no injury was found in the male organ of the accused.[74] Though a statement, recorded under s 313, CrPC, is not a statement made on oath and is not, strictly speaking, evidence, yet the statement, so made, can, indeed, be taken into consideration at the trial stage against the accused for the purpose of arriving at the guilt or otherwise of the accused. If an accused person, in his examination under s 313, CrPC confesses to the commission of the offence(s) charged with, the court may, relying upon such confession, proceed to convict the accused and that it is only if the accused does not confess and/or chooses to explain the circumstances appearing in the evidence against him or sets up his own version of the occurrence claiming to the effect that he had committed no offence, the statement of the accused, made during the course of examination under s 313, CrPC can be considered in its entirety along with other pieces of evidence on record. To put it differently, there is no impediment in law for a court to find conviction of an accused on his confession made by him during his examination under s 313, CrPC .[75]

When the accused appeared in a *panchayat*meeting before the elders after the incident, and admitted his guilt in writing, which was recorded, the accused was a resident of the village, a youngster and in the absence of legal advice he would normally have told the truth in the presence of his parents and elders, in any event, wherein an admission in writing has been recorded, the onus of disproving it shifts upon the defence and on the failure of the defence to dispose it, the court can act upon such admission of guilt.[76]

46. Settled Principles of Administration of Criminal Justice

There are certain well-settled principles of administration of criminal justice. These are:

(i) an accused person is presumed to be innocent unless proved guilty;
(ii) the charge against the accused is to be proved by the prosecution and it has to stand on its own legs to prove such charge; and
(iii) the accused may take more than one line of defence in a charge against him and the prosecution cannot take advantage of the weakness of the defence. Therefore, even if it is assumed that the accused has not been able to prove the plea(s) in defence, it cannot be taken as a circumstance lending corroboration to the prosecution case.[77]

3145

47. Criminal Trial--Duty of Court

A criminal trial concerns itself with the question as to whether the accused at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses.[78]

The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the courts are required to adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hyper technicalities of figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of the particular circumstances keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be utopian, but has to be considered as part and parcel of the human civilisation and the realities of life. The courts cannot ignore the erosion in values of life which are common features of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and mankind.[79]

48. Burden of Proof

In a case of rape, the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and her mother have falsely implicated the accused. The evidence of prosecution witnesses cannot be accepted merely because an accused person has not been able to say as to why they have come forward to depose against him. However great the suspicion against the accused and however strong the moral belief and conviction of the judge, unless the offence of the accused is established beyond reasonable doubt or beyond the possibility of reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring the offence home to the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.[80]

49. Proof

To establish the offence of rape, it must be proved that: [81]3146

(1) the accused man had sexual intercourse with the woman in question;
(2) the said sexual intercourse was under circumstances falling under any of the five descriptions specified in s 375 ;[82]

(3) the woman was not the wife of the accused (or if she was his wife, she was under fifteen years of age); and
(4) there was penetration.

It is for the prosecution to prove each of the above elements. Where there are circumstances to show consent of the woman to sexual intercourse with the accused, the burden is on the prosecution to establish non-consent.[83] Penetration being an essential ingredient of the offence of rape, there must be proof of actual penetration.[84] The word 'penetration' is not, however, necessarily to be used.[85] The only witness, who can prove that, is the prosecutrix.[86] In practice, a conviction for rape depends almost entirely on the evidence of the prosecutrix so far as the essential ingredients of the offence are concerned, the other evidence being only corroborative.[87] Such evidence, *i.e.*, the evidence of the prosecutrix, must necessarily be received with caution. The fact that there has been sexual connection would be proved by medical examination and evidence, if possible. Then it must be proved that such connection was against the woman's will or without her consent. In regard to this point, the character of the woman, her degree of intimacy with the accused, the place where the act took place, and her conduct and appearance after the act are all important circumstances.

EVIDENCE

50. Enmity between Accused and Family Members of Prosecutrix-- Effect

To suggest that because of enmity of the father of the prosecutrix against the accused, the accused had been falsely implicated, is an absurdity.[88] The prosecutrix and her parents would not allow the real culprit to escape and falsely involve an innocent person in the commission of the crime.[89] Despite the fact that litigation between the accused party and the complainant party was going on, it cannot be stated that because of the litigation or enmity, the father of the prosecutrix will involve his daughter to falsely implicate the accused.[90] The fact that some litigation was pending between the accused father and the maternal uncle of the prosecutrix, is no ground to presume that the false case was instituted on the accused by the mother of the prosecutrix.[91] The plea that the accused was falsely implicated as there was enmity3147 between him and the husband of the prosecutrix regarding land dispute is not tenable in the absence of sufficient evidence to prove the same.[92] When the relationship of the mother of the prosecutrix and the accused was not cordial, it is absurd to suggest that because of this enmity the mother of the child-prosecutrix will falsely involve her daughter in a case of rape by the accused.[93] The entire family would, for no reason, combine to demolish their social reputation and shatter the future marriage prospects of their child to rope the accused in a crime under s 376, so the defence plea of false implication due to pre-existing animosity is absolutely unacceptable.[94]

51. Facts and Circumstances

The facts and circumstances often vary from case to case, the crime situation and the myriad psychic factors, social conditions and people's lifestyles may fluctuate, and so, rules of prudence relevant in one factual situation may be inept in another. We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guideline of prudence under given circumstances. Indeed, from place to place, from age to age, varying life styles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of presidential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed.[95]

52. Circumstantial Evidence

In the cases of circumstantial evidence, for the conviction of the accused, it is essential that the

incriminating facts and circumstances must be incompatible with the innocence of the accused or guilt of any other person. Circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.[96] In a rape on minor girl based on circumstantial evidence, because of the number of missing links in the prosecution case, the accused was held to be entitled to the benefit of doubt.[97]

53. Non-examination of Material Witness--Effect

Non-examination of a material witness is not a mathematical formula for discarding the weight of testimony available on record, however natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court, leveled against the prosecution, should be examined in the background of facts and circumstances of each case so as to find whether the witnesses were available for3148 being examined in court and were yet withheld by the prosecution. The court has first to assess the trustworthiness of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted on, though there may be other witnesses available who could also have been examined, but were not examined. However, if the available evidence suffers from some infirmity or cannot be accepted in the absence of other evidence, which though available has been withheld from the court, then the question of drawing an adverse inference against the prosecution for non-examination of such witnesses may arise. It is now well settled that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination, *etc.*, if the same is found to be natural, trustworthy and worth being relied on.[1]

When the accused is a relation of the in-laws of the mother of the prosecutrix, and the other young girls who are alleged to have been not examined, being from the family of such in-laws, it is futile to expect that such girls would have been allowed by their parents to be examined as witnesses, and if allowed, could have freely deposed in court. The question of drawing an adverse inference against the prosecution for such non-examination does not arise.[2]

When the testimony of the prosecutrix inspires confidence and is also corroborated by medical evidence and other witnesses, non-examination of the mother of the prosecutrix does not make the prosecution case doubtful.[3]

54. Discrepancies and Contradictions in the Statement of Witnesses

Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal to the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of human conduct would be that while narrating a particular incidence there may occur minor discrepancies, and such discrepancies, in law, may render credence to the depositions. Parrot like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness are making the statement.[4] The Supreme Court in *Ousu Varghese v State of Kerala* [5] held that minor variations in the accounts of witnesses are often the hallmark of truth in their testimony. In *Jagdish v State of Madhya Pradesh* [6] the Supreme Court held that when discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. The Supreme Court again in *State of Rajasthan v Kalk* [7] held that in the depositions of witnesses there are always normal discrepancies, however honest and truthful they may be, such discrepancies are due to normal errors of observation, normal errors of memory3149 due to lapse of time, due to mental disposition of shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person. Referring to and relying upon its earlier judgments,[8] the Supreme Court in *Leela Ram v State of Haryana* [9] held that there are bound to be some discrepancies between the narrations of different witnesses when they speak on details and unless the contradictions

are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishments, there may be, but variations by reason therefore should not render the evidence of eyewitnesses unbelievable, trivial discrepancies ought not to obliterate which otherwise is acceptable evidence.

The court shall have to bear in mind that different witnesses react differently under different situations. Whereas, some become speechless, some start wailing, while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact, it depends upon individual to individual. There cannot be any set pattern or uniform rule of human reaction, and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.

55. Suggestions to Witness--No Inference Against Accused

Where in a case of charge of rape under s 376, IPC, the statement of the accused contained a plain denial and a plea of false implication, the subsequent suggestion by the defence lawyer to the prosecutrix about consent on her part would not amount to admission of guilt on behalf of the accused. A mere suggestion thrown by the defence counsel to a prosecution witness does not amount to an admission on the part of the accused. It is common practice to suggest to a witness while he or she is under cross-examination the case of the defence when such evidence or suggestion is denied. It does not constitute any evidence. Suggestions put are no evidence at all against the accused and on the basis of such suggestion, no inference can be drawn against the accused that he admitted the fact suggested in the cross-examination. The proof of guilt required of the prosecution does not depend on the suggestion thrown to a witness.[10]

56. Additional Evidence at Appellate Stage--Affidavit of Prosecutrix not Permissible

It is clear from the provisions of s 391, CrPC that discretion is given to the appellate court to take further evidence by itself or direct the sessions court or magistrate to take additional evidence in appropriate cases by recording reasons for taking additional evidence. The discretion vested in the appellate court under s 391, CrPC, to take additional evidence is not intended to fill up the lacuna in the prosecution evidence or to make out a case different from the one already on record.[11] When no additional evidence is sought to be adduced by the appellant/accused but by3150 tendering the affidavit of the victim and prosecutrix in the case, the appellant is seeking to erase the entire prosecution evidence regarding rape in the guise of further evidence at the appellate stage by cutting at the very root of the prosecution case, such affidavits sworn by the prosecution witness cannot be accepted as additional evidence under s 391, CrPC . Tendering of such affidavit by the prosecution witness who has given specific evidence before the trial court making contradictory statement against the evidence given by them before the trial court is not contemplated or envisaged under the provisions of s 391, CrPC .[12]

AGE OF PROSECUTRIX AND ACCUSED

57. Age of the Prosecutrix

No age is safe from rape because small babies and even elderly women are not safe.[13] If, in a case of rape, the defence pleads consent, the question arises whether the prosecutrix was of the prescribed age as to give consent in law.[14] In such a case, the prosecution is bound to prove that the victim was below the prescribed age so that her consent to have sexual intercourse with the accused, was no consent in law.[15] Where the prosecution produces no evidence that the girl was examined for the ossification test, or was taken for X-ray examination in spite of the suggestion in the doctor's certificate, and does not also explain this serious omission, the benefit of doubt on the question of age must go to the accused.[16] In case of contradiction between medical evidence and statement of parents of the prosecutrix regarding her

age, benefit of doubt should go to the accused.[17] The court has to base its conclusion upon all the facts and circumstances disclosed on examining all the physical features of the person, whose age is in question, in conjunction with such oral testimony as may be available.[18] In a case, the parents of the prosecutrix deposed before the Court that the prosecutrix was below the age of 16 years on the date of commission of rape, their evidence was corroborated by the entry in the birth register of the Municipal Corporation and entry made in the hospital where the prosecutrix was born. Further, the entry in the school certificate which recorded age about 16 years was ignored as the parents admitted to having given an incorrect date of birth of their daughter, presumably with a view to make up the age to secure admission in the school. The prosecutrix was held to be below 16 years of age on the date of the commission of offence and consequently, the consent of the prosecutrix was found immaterial, hence, the conviction of the accused for offence under s 376, IPC was held proper.[19]

For further commentary, s 361, *ante*, may be referred to.3151

58. Medical Evidence as to age of Prosecutrix

For determining the age of the prosecutrix, the results of an ossification test are also helpful. It cannot, however, be laid down as a rule of law that, in all cases, this test must be performed,[20] as this test leaves much room for speculation and does not give a sure indication as to the age of a girl, when it is in the border region.[21] The radiological test margin of error in age ascertained by radiological examination is two years on either side.[22] Modi in his *Medical Jurisprudence* stated as follows:

> ....In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, and an opinion should be given according to the following table, but it must be remembered that too much reliance would not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of the development. Recent work has shown that the range of error may be up to 3 years. [23]

When the doctor in his evidence has given the age of the prosecutrix which is contrary to the opinion of Modi as stated in *Medical Jurisprudence*, the benefit of the doubt should go to the accused.[24]

The evidence of the doctor based on ossification test about the age of the rape victim is of advisory character. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on an ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion which is based on the ossification test for determination of age, if the age varies.[25]

It cannot, therefore, be taken as a matter of rule that an expert (medical) evidence must always be preferred to the evidence of other witnesses of fact if that evidence is otherwise found to be unimpeachable, particularly where the trial court, which has the opportunity of seeing the witnesses of fact, including that of the victim, prefers their evidence to that of the doctor, and the doctor's evidence does not entirely falsify the story of the prosecution.[26] The opinion of the doctor based upon the ossification test cannot repeal the age of the prosecutrix given in the school admission certificate and consistent oral evidence.[27] Courts have, however, in several cases, acted on the opinion of doctors, arrived at without conducting an ossification test and based on other factors such as growth of the hair, teeth, pubic and axillaries hairs, breasts, height, and weight of the girl.[28]

The ascertaining of age based on the growth of pubic hair can be scientifically arrived. On the basis of secondary sex characters and eruption of teeth, the prosecutrix was found aged 14 years on the date of occurrence, even though the3152 accused indulged in sexual intercourse with the consent of the victim girl, the consent of the victim was immaterial and the accused was convicted under s 376, IPC .[29]

Twenty Eight Teeth in Jaws of Prosecutrix

Where the doctor deposed that the prosecutrix was having only 28 teeth in each jaw, it was held that the prosecutrix was aged 14 years and therefore, the consent of the prosecutrix is immaterial.[30]

If the statement of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the ossification test for determination of age, as the age varies.[31]

The medical report and the deposition of the Radiologist cannot predict the exact date of birth, rather it gives an idea with a long margin of 1 to 2 years on either side.[32]

In *Jaya Mala v Home Secretary, Governmnt of J&K* ,[33] the Supreme Court held:

> However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.[34]

59. Birth Certificate *Etc*., as to age of Prosecutrix

Normally, the age recorded in the school certificate is considered to be the correct determination of age, provided the parents furnish the correct age of the ward at the time of admission and it is authenticated.[35] However, the date of birth recorded in the school certificate can be believed by the unimpeachable evidence of prosecution witnesses and contemporaneous documents like Date of Birth Register of Greater Bombay Municipal Corporation and the register of the nursing home where the prosecutrix was born and can be proved by the doctor.[36] The birth certificate, on the point of age, is a conclusive piece of evidence.[37] In the ascertainment of age, the entry in the *kotwari* book, which is genuine, can be considered a strong piece of evidence.[38] It may be true that an entry in the school register is not conclusive, but it has evidentiary value. Such evidentiary value of a school register is corroborated by oral evidence.[39] The admission form on the basis of which school certificate was prepared is primary evidence when the primary3153 evidence has not been produced in the court. The school certificate, which is prepared on the basis of some other document, has no evidentiary value in the eyes of law and thus, the prosecution cannot take any advantage of this document which is inadmissible in evidence. There is nothing on record so as to indicate that the primary evidence was lost and if that be the position, secondary evidence is not permissible.[40] The register maintained in a school is admissible evidence to prove the date of birth of the person concerned in terms of s 35 of the Indian Evidence Act 1872. It may be true that the entry of the school register is not conclusive but it has evidentiary value.[41]

The transferor School leaving certificate issued and duly signed by the Headmaster of the school is admissible in evidence in view of the provisions of s 35 of the Indian Evidence Act 1872.[42] The entries in school register by the Head Master of the School and certificate of birth issued by Municipality showed that the prosecutrix was aged about 14 years and was not a major on the date of the incident. Both these documents were *ante litem motam* and such documents made *ante litem* can be relied upon safely, when such documents are admissible under s 35, of the Indian Evidence Act 1872.[43]

The birth registration certificate issued by the municipal corporation is the primary evidence where an employee of the municipal corporation deposes that concerned birth entry has been made on the basis of information received by the corporation from the concerned hospital, it means that it is a basic information which has been received by the corporation through a proper channel and, therefore, it cannot be said to be an insufficient proof to prove the age of the victim. When a child is admitted in a school, parents of the

child usually submit a form on the basis of cogent evidence on record which will be either the certificate from the hospital where the child is born or the birth registration certificate. When the original evidence which has been produced by the official of the corporation and proved by him, is there on record, there is no reason to discard the said evidence. But as per the settled principles of law, the certificate issued by the doctor conducting the ossification test is not to be treated as scientific proof which can surpass the actual evidence which are on record wherein also, there can be a variation of two years.[44] A mere non-production of admission register of school to prove the age of victim is not fatal to prosecution case.[45] A register maintained in a school is admissible in evidence to prove date of birth of the person concerned in terms of s 35 of the Indian Evidence Act 1872. Such dates of birth are recorded in the school register by the authorities in discharge of their public duty and an entry in the school register about the age of a person, though not conclusive, has evidentiary value. On the basis of the entry in school register and the testimony of the father of the victim girl, the age of the victim girl was found below 16 years.[46]3154

Where the genuineness of the contents of the school transfer certificate were not disputed by the defence, and the entries made therein were admitted as true, the prosecutrix was adjudged as a minor, being 12 years old.[47]

60. Age of Accused

The law of England presumes that a boy under fourteen years of age is sexually impotent, and therefore, incapable of committing rape. The presumption cannot be rebutted by evidence as to his physical capacity, but he may be convicted of an indecent assault under the Sexual Offences Act 1956.[48] However, the law in India does not presume any such age limit under which a boy is considered physically incapable of committing rape. In a charge of rape brought against a boy, the court decides the question of his potency from evidence in the case and is guided by ss 82 and 83, IPC, in awarding punishment.[49] Old men are also known to have committed rape on small girls.[50]

In the case of determination of date of birth of the child, the best evidence is that of the father and mother.[51]

PENETRATION[52]

61. Penetration--Meaning

For penetration, the Apex Court[53] said that according to the *Concise Oxford Dictionary* 'penetrate' means 'find access into or through, pass through'.[54]

In *Nirmal Kumar v State of Haryana* ,[55] while examining the question whether the case before it was of rape or attempted rape, the Punjab and Haryana High Court has quoted the following relevant portions from different sources dealing with penetration:

> "In Parikh's Medical Jurisprudence and Toxicology, the following passage is found:
>
> Sexual intercourse, in law, is held to mean the slightest degree penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.

In *Encyclopedia of Crime and Justice* (vol 4) at p 1356, it is stated:

'Even slightest penetration is sufficient and emission is unnecessary'.

In *Halsbury's Statutes of England and Wales* (fourth edn) vol 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of s 44 of the Sexual Offences Act 1956.3155

In *American Jurisprudence* it is stated that slight penetration is sufficient to complete the crime of rape.

Code 263 of Penal Code of California reads thus:

The essential guilt of rape consists as the outrage to the person and feelings of the victim of the rape. Any sexual penetration however, slight is sufficient to complete the crime.

In Gaur's *The Penal Law of India*, sixth edn, 1955 (vol 11) p 1678, it is observed that even vulval penetration has been held to be sufficient for a conviction of rape.

In *Taylor's Principles and Practice of Medical Jurisprudence* at p 69, rape is defined as unlawful sexual intercourse by a man with a female other than his wife without her consent. The merest penetration of the penis between the labia associated with the lack of consent is sufficient to constitute the offence.

It was submitted that the offence of rape is constituted even if there is the slightest penetration of the male organ in the vagina of the prosecutrix. In order to constitute the offence of rape, penetration of the male organ in the vulva of the vagina of the prosecutrix is a condition *sine qua non*."

Merely because the doctor opined that the vagina admitted one finger with difficulty, absence of penetration cannot be inferred on that basis.[56] For further commentary, text under the heading

'Explanation' in s 375, *ante*, may be referred to.

62. Penetration--Determination of Rape--Legal and not Medical Conclusion

It is for the prosecution to prove that there was a penetration. In *Modi's Medical Jurisprudence and Toxicology*,[57] it is stated:

> Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda, with or without emission of semen, or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

The observation made above makes clear that if there is slightest degree of penetration with or without ejectment, attracts the ingredients of s 375, IPC . It is therefore quite possible that the offence of rape may take place with or without causing injury to the genital organs or leaving any seminal stains. Therefore, it is for the court to come to a legal conclusion.[58]

If assuming for a while, forcible sexual intercourse were to have taken place on a girl aged about 10 to 12 years and the penetration were to have been taken place, it is needless to say that there will be rupture of vagina at least with some tear. The doctors who examined the prosecutrix did not find any injury over the private parts. Therefore, there could not have been any penetration so as to hold that the rape has3156 taken place. If some injuries or lacerations, abrasions or swelling were to have found over the vaginal portion, it could have been held that there is penetration and a forcible sexual intercourse had taken place. Therefore, only on the ground that the hymen may or may not be ruptured itself is not sufficient to hold that the rape has taken place.[59]

63. Penetration, Not Ejaculation Matters

The *sine qua non* of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of 'rape' as contained in s 375, IPC refers to 'sexual intercourse' and the explanation appended to the section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection.[60]

64. All forms of Penetration do not Constitute Rape

Commentary under the same heading in s 375, *ante*, may be referred to.

INJURIES

65. Injuries on the Person of the Accused

The plea that no marks of injuries were found either on the accused or the prosecutrix does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix.[61]

66. Injuries on Genital Parts

In *Modi's Medical Jurisprudence and Toxicology*[62] it has been observed as under:

> Injuries to the genital parts may result from force exerted by the accused or from forces applied by the victim. In addition to scratches or lacerations on the penis caused by the finger nails of the victim during a struggle an abrasion or a laceration may be discovered on the prepuce or glans penis but more often on the frenum, due to the forcible introduction of the organ into the narrow vagina of a virgin especially of a child but it is not necessary that there should always be marks of injuries on the penis in such cases.

According to the *Modi's Medical Jurisprudence*, therefore, it is not necessary that there should always be marks of injuries on the penis in such cases.[63]

67. Injuries on the Male Organ of the Accused

It is quite possible to legally commit the offence of rape without producing any injury either to the genital part of the victim or to the male organ.[64] It is not necessary3157 that there should always be marks of injuries on the male organ of the accused in such cases.[65] The cut in the tip of the penis of the accused is possible due to forcible intercourse with the virgin.[66]

When the vagina of the prosecutrix can admit two fingers, it is not necessary that the penis of the accused should have injuries during the sexual intercourse with her.[67]

In a case of rape by an adult of thirty-nine years on a girl of 10 years, the absence of a satisfactory explanation from the accused to account for the injury on his penis was held to be corroborative piece of evidence relating to his participation in the commission of the offence.[68] Accused committed rape on a minor girl aged 5 years. It was held that when a fully developed man has committed sexual assault with a minor girl aged about 4 or 5 years, there is likelihood of an injury being caused on the penis.[69]

A Doctor who examined the accused found a wound on the bottom of his penis and had found the hymen of the prosecutrix torn. Further, there was no motive for false implication and the accused was convicted under s 376, IPC, and a sentence of seven years rigorous imprisonment was imposed.[70]

In *Rahim Beg v State of Uttar Pradesh* ,[71] the Supreme Court set aside the conviction of the accused, who was a fully developed man at the time of offence, holding the prosecution case to be false on the ground that there was no injury on the male organ of the accused, while, according to the medical evidence, when a girl of 10 or 12 years, who is a virgin and whose hymen is intact, is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. However, in spite of the injuries on the private parts of the victim, there may be no injury on the penis of the accused. Likewise, the prosecution case cannot be discarded on the mere ground that no injuries were found on the person of the accused.[72] When the vagina of the prosecutrix can admit two fingers, it is not necessary that the penis of the accused should have injuries during the sexual intercourse with her.[73]

Non-explanation by the accused of the injury to his glans of the penis and presence of semen on his *pyjama* are circumstances operating very harshly against the accused.[74]

Where a minor girl of 10 years is alleged to have been subjected to rape by a fully developed man, there will be injuries on the male organ of the accused. Absence of injuries on the male organ of the accused would point to his innocence.[75] However, Modi[76] has opined that even in case of a child victim being ravished by a grown up3158 person, it is not necessary that there would always be marks of injuries on the penis in such cases.

68. Injuries on the Person of Prosecutrix

Even mere existence of injury to the vagina may not necessarily and inevitably justify the inference that there had been rape, as rupture of the hymen may be caused by some instrument other than the male genital.[77] But the doctor having recorded in his report that hymen of the vagina was torn was not justified in giving an opinion that the male organ would not have penetrated into the young girl's vagina.[78]

When the prosecutrix alleges that she and the accused were stark naked and the rape took place on the floor, which was rough, absence of some marks or injuries at least on the knees of the accused and on the person of the prosecutrix would create great suspicion about the truthfulness of the prosecution story. In such a case, the accused cannot be held guilty under s 376, IPC .[79] However, non-resistance by a helpless prosecutrix and, therefore, the absence of any injuries on the person of the accused are not such circumstances which can create a doubt as regards the case established against the accused on the basis of evidence and circumstances in the case.[80]

It is most unlikely, that only to falsely implicate the accused, the prosecutrix would inflict injury on her private parts.[81]

When there is redness around the vaginal orifice of the prosecutrix, which leads to the conclusion that some sort of penetration was there, and if her hymen is not ruptured it does not mean that no rape is committed by the accused on her.[82]

The statement of the prosecutrix regarding commission of rape by the accused on her is corroborated when injuries are found on her vagina which were of probable duration of 24 to 48 hours.[83] The bleeding and injury in the private parts of the prosecutrix, a virgin, is suggestive of sexual assault.[84]

It would be pertinent to point out that Modi in *Medical Jurisprudence and Toxicology*,[85] has mentioned that in cases of commission of rape on a minor girl, it is not always necessary for the hymen to be torn. If the hymen of the prosecutrix was not torn, then it is apparent that the injuries of the prosecutrix were trivial.[86]

Prosecutrix Married Woman -- Absence of Injuries

Where the prosecutrix is a married woman, overpowered by several persons, absence of injuries on her would not be fatal to the prosecution case.[87]3159

69. Absence of Injuries on the Prosecutrix

It is not always necessary that in all cases of sexual assault, injuries must be there on the body of the victim of rape.[88] Injuries are not always a *sine qua non* to prove a charge of rape.[89] When the prosecutrix was examined by the doctor on the fifth day of the occurrence, the absence of any external or internal injury on her private part or any seminal stains is of no consequence.[90]

In case of children who are incapable of offering any resistance, external marks of violence may not be found.[91]

When the injuries which the prosecutrix suffered or might have suffered in defending herself and offering resistance to the accused were abrasions or bruises which would heal in ordinary course of nature within 2 to 3 days of the incident, the absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. The absence of injuries on the person of the prosecutrix is not necessarily evidence of falsity of the allegation or evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case.[92]

The absence of any injuries on the prosecutrix, who was the helpless victim of rape, belonging to a backward community, living in a remote area, not knowing the need of rushing to a doctor after the occurrence of the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable.[93]

Every resistance need not necessarily be accompanied by some injury on the body of the victim. The prosecutrix being a girl of 19-20 years of age was not, in the facts and circumstances of the case, expected to offer such resistance as would cause injuries to her body.[94]

The absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse. It will all depend on the facts and circumstances of each case.[95] A judge shall have to apply the rule of common sense while testing the reasonability of the prosecution case. The prosecutrix on account of age of infirmity or overpowered by fear or force may have been incapable of offering any resistance. She might have sustained injuries but on account of lapse of time, the injuries might have healed and marks vanished.[96]3160

In a gang rape case of a married woman, the absence of injuries on her was held of no consequence when the gang rape was otherwise proved.[1]

However, the absence of injury, as per medical evidence, on the person of the prosecutrix, including her private parts coupled with the fact that her conduct showed that she was a consenting party to the sexual intercourse entitles the accused for acquittal under s 376, IPC .[2] Similarly, when rape was alleged to have been committed by eight persons and that too twice, and the accused had pushed the prosecutrix out of a running train after giving kicks, but except for a small incised wound on her right hand and some minor superficial abrasions no other injury was found on her person, coupled with the fact that there was no evidence that the prosecutrix raised shouts while the accused were taking her forcibly to the railway yard showed that the prosecutrix was a consenting party.[3] While appreciating the absence of injuries on the person of the prosecutrix, two things should not be overlooked, firstly when the prosecutrix is examined after 2½ days, traces of rape would have disappeared on account of passage of time, and secondly when the prosecutrix is a married lady and so used to sexual intercourse, it would have been very difficult for a medical witness to opine whether she had been raped.[4] For further commentary, s 375, *ante*, may be referred to.

In a case, the prosecutrix was kidnapped, further, the accused by deceitful means subjected her to rape and coerced her to indulge in flesh trade. As the prosecutrix was below 16 years of age and had become habituated to sexual intercourse, the absence of injuries on her body was found inconsequential and the accused was convicted under ss 366 and 376, IPC .[5]

Prosecutrix Habitual to Sexual Intercourse.--Absence of Injuries on her Body-- Inconsequential

Where the prosecutrix had become habitual to sexual intercourse, the absence of injuries on her body would be of no consequence.[6]

47 Substituted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 9 (wef 3-2-2013). Prior to substitution s 376 stood as under:--**" S. 376 . Punishment for rape.--**

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,--

(a) being a police officer commits rape--

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or
(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or
(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or
(e) commits rape on a woman knowing her to be pregnant; or
(f) commits rape on a woman when she is under twelve years of age; or
(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.--"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.--"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.".

48 *Vide* Report of the Committee on Amendments to Criminal Law by Justice J.S. Verma dated 23 January 2013. See also, relevant extracts from the report at the end of vol 4.

49 This was the position prior to the substitution of s 375 *vide* the Criminal Law (Amendment) Act 2013.

50 Re *Anthony*AIR 1960 Mad 308, p 312, 1960 Cr LJ 927 ; *Kartick Kundu v State* 1967 Cr LJ 1411, p 1413 (rape is not a continuing offence) .

51 *State of Punjab v Gurmit Singh* AIR 1996 SC 1393, 1996 Cr LJ 1728 (SC) .

52 *Rajendra Datta Zarekar v State of Goa* 2008 Cr LJ 710 (SC), 2007 AIR SCW 7588, 2007 (13) Scale 664 .

53 *State of Himachal Pradesh v Asha Ram* 2006 Cr LJ 139, p 143 (SC), AIR 2006 SC 381 .

54 *Moti Lal v State of MP* 2008 Cr LJ 3543, p 3545, 3546 (SC), 2008 (10) Scale 81, (2008) 3 SCC (Cri) 950, 2008 AIR SCW 4846 .

55 *State of Maharashtra v Rajendra Jawanmal Gandhi* 1997 Cr LJ 4657 (SC) .

56 *State of Kerala v Kundumkara Govindan* 1969 Cr LJ 818 (Ker) ; **see also***Yadu Kumar Patel v State of Chhattisgarh* 2007 Cr LJ 2846 (Chhattis) .

57 *Delhi Domestic Works Women's Forum v Union of India* (1995) 1 SCC 14 .

58 *Delhi Domestic Works Women's Forum v Union of India* (1995) 1 SCC 14 .

59 *State of UP v Munesh* AIR 2013 SC 1778, 2013 Cr LJ 194 (SC) .

60 *Mohd Alam v State (NCT of Delhi)* 2007 Cr LJ 803 (Del) (DB) .

61 *Ravindra Kumar v State of Punjab* (2001) 7 SCC 690, 2001 Cr LJ 4242 (SC) ; *Deepak v State of Haryana* 2015 Cr LJ 2049 (SC), 2015 (3) SCALE 414, (2015) 4 SCC 762 .

62 *State of Himachal Pradesh v Gian Chand* 2001 Cr LJ 2548 (SC)*; Jaganu Sahu v State of Chhattisgarh* 2013 (2) Crimes 424 (Chh) (DB).

63 *Satpal alias Satnam Singh v State of Rajasthan* 2001 Cr LJ 564 (Raj) ; *State of Rajasthan v NK* 2000 Cr LJ 2205 (SC) .

64 *Dildar Singh v State of Punjab* 2006 Cr LJ 3914 (SC), AIR 2006 SC 3084 .

65 *State of Himachal Pradesh v Prem Singh* 2009 Cr LJ 786 pp 786, 787 (SC).

66 *Dildar Singh v State of Punjab* 2006 Cr LJ 3914 (SC) .

67 *Mangi Lal v State of Rajasthan* 2002 Cr LJ 3687 (Raj) ; *State of Rajasthan v Narayan* AIR 1992 SC 2004, 1992 Cr LJ 3655 (SC) .

68 *Munku Ram Sarthi v State of Chhattisgarh* 2005 Cr LJ 3248 (Chattis) .

69 *Mangi Lal v State of Rajasthan* 2002 Cr LJ 3687 (Raj) .

70 *Sukhdev Yadav v State of Bihar* (2001) 8 SCC 86, 2002 Cr LJ 80 (SC) ; *Baleshwar Mandal v State of Bihar* AIR 1997 SC 3471, 1997 Cr LJ 4084 (SC) .

71 AIR 1995 SC 2472, 1995 AIR SCW 3644 ; *Satpal alias Satnam Singh v State of Rajasthan* 2001 Cr LJ 564 (Raj) .

72 *Mirthagai Ali v State* 2007 Cr LJ 1247 (Mad) .

73 *Toorpati Majsaiah v State of Andhra Pradesh* 2005 Cr LJ 568 (AP) .

74 *Ronny alias Ronald James Alwaris etc v State of Maharashtra* 1998 Cr LJ 1638 (SC) .

75 *Mohan Chand v State of Uttarakhand* 2009 Cr LJ 1755, p 1757 (SC), AIR 2009 SC 1896, (2009) 4 SCC 63 .

76 *Sarafat v State of Uttaranchal* 2006 Cr LJ 654 (Uttr) .

77 *Ibid*.

78 *Ganesh Bhagwati Pandyan v State of Maharashtra* 1985 Cr LJ 191 (Bom) ; *State of Gujarat v Mohamed alias Munno Usmanbhai Chauhan* 1996 Cr LJ 3400 (Guj) (DB) .

79 *Thambi Nasir and etc v State* 2003 Cr LJ 493 (Bom) .

80 *State of Himachal Pradesh v Lekh Raj and Anor* 2000 Cr LJ 44 (SC) .

81 *Budhsen v State of Uttar Pradesh* AIR 1970 SC 321, 1970 Cr LJ 1149, (1970) 2 SCC 128 .

82 *Prahlad Singh v State of Madhya Pradesh* 1997 Cr LJ 4078 (SC) .

83 *Arasappa v State* 1997 Cr LJ 1456 (Kant) .

84 *Jameel v State of Maharashtra* 2007 Cr LJ 1425 (SC) .

85 *Arjun Singh v State of HP* 2009 Cr LJ 384, p 385, 2008 AIR SCW 5553, AIR 2008 SC 3270 .

86 *Sulekhan Singh and Ors v State* 1999 Cr LJ 3798 (Raj) .

87 *Madan Lal v State of J&K* 1998 Cr LJ 667 (SC) .

88 *Gulam Ahmed v State of Himachal Pradesh* 2006 Cr LJ 361 (HP) .

89 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 169, (1961) 2 Cr LJ 822 .

90 *Sulekhan Singh and Ors v State* 1999 Cr LJ 3798 (Raj) .

91 *Ibid.*

1 *Madan Lal v State of J&K* 1998 Cr LJ 667 (SC) .

2 *Kamla Nand v State of Himachal Pradesh* 2003 Cr LJ 547 (HP) .

3 *State of Karnataka v Shivputrappa Basappa Kori* 2002 Cr LJ 1686 (Kant) (DB) .

4 *Damodar Behra v State of Orissa* 1996 Cr LJ 346 (Ori) .

5 *Ankariya v State of Madhya Pradesh* 1991 Cr LJ 751 (MP) .

6 *Mangiya and Ors v State of Rajasthan* 2000 Cr LJ 4814 (Raj) .

7 *Mangiya and Ors v State of Rajasthan* 2000 Cr LJ 4814 (Raj) .

8 *Lakhan Singh and Ors v State of Uttar Pradesh* 1999 Cr LJ 4087 (All) .

9 *Lakhan Singh and Ors v State of Uttar Pradesh* 1999 Cr LJ 4087 (All) .

10 *Ashok Nivruti Desai v State of Maharashtra* 1995 Cr LJ 826 (Bom) .

11 *Nawabkhan v State* 1990 Cr LJ 1179 (MP) .

12 *Sudhaker and Anor v State of Maharashtra* 2000 Cr LJ 3490 (SC) .

13 *Kappinaiah v Emperor* AIR 1931 Mad 233, 1932 Cr LJ 751 (Mad) ; *Nga San Pu v Emperor* 1919 Cr LJ 155 .

14 *Md Jakir Ali v State of Assam* 2007 Cr LJ 1615 (Gau)*; State of UP v Naushad* 2014 (1) All LJ 450, AIR 2014 SC 384, 2014 Cr LJ 540, (2013) 16 SCC 651 (Accused convicted).

15 *Pradeep Kumar Verma v State of Bihar* 2007 Cr LJ 4333, p 4337 (SC), AIR 2007 SC 3059, (2007) 7 SCC 413, 2007 (5) Supreme 918 .

16 *Swapan Chatterjee v State of West Bengal* 2009 Cr LJ 16, p 19 (Cal) (DB) .

17 *Sandeep Kaniram Rathod v State of Maharashtra* 2011 Cr LJ (NOC) 196 (Bom) .

18 *Anjinappa v State of Karnataka* 2014 Cr LJ 82, p 86 (Kant), (*Deelip Singh v State of Bihar* AIR 2005 SC 203, 2004 (9) Scale 278, (2005) 1 SCC 88 ; *Uday v State of Karnataka* AIR 2003 SC 1639, 2003 Cr LJ 1539, JT 2003 (2) SC 243, 2003 (2) Scale 329, (2003) 4 SCC46, **referred**); *Mallesh Khemanna v State of Karnataka* 2013 Cr LJ 3196 (Kant) .

19 *Babu v State of Kerala* 2013 Cr J 4286, p 4298 (Ker) (DB) .

20 *Buni Lal Mahto v State of Bihar* 2014 Cr LJ 284, p 285 (Pat) .

21 *Deepak Gulati v State of Haryana* AIR 2013 SC 2071, 2013 Cr LJ 2990, p 2996 (SC), 2013 (7) Scale 383 (*Uday v State of Karnataka* AIR 2003 SC 1639, **relied on**).

22 *Prashant Bharti v State of NCT of Delhi* AIR 2013 SC 2753, 2013 Cr LJ 3839 .

23 *Md Jakir Ali v State of Assam* 2007 Cr LJ 1615 (Gau) .

24 *Bipul Medhi v State of Assam* 2008 Cr LJ 1099, p 1108 (Gauh) (DB) .

25 *State of Orissa v Radhakanta Behera* 2015 Cr LJ 174 (Ori) .

26 *State of Maharashtra v CK Jain* AIR 1990 SC 650, 1990 Cr LJ 889 (SC) .

27 *Ashok Surajlal Uike v State of Maharashtra* 2011 Cr LJ 2330, p 2332, 2011 AIR SCW 2201, 2011 (2) Scale 616, (2011) 15 SCC 174, [2011] 2 SCR 246 .

28 *Omkar Prasad Verma v State of Madhya Pradesh* 2007 Cr LJ 1831, p 1833 (SC), AIR 2007 SC 1381, 2007 AIR SCW 1728, (2007) 4 SCC 323, 2007 (2) Supreme 883 .

29 *Om Prakash v State of Uttar Pradesh* 2006 Cr LJ 2913 (SC), AIR 2006 SC 2214 .

30 *Ibid.*

31 *Ibid.*

32 *State of Rajasthan v Om Prakash* 2002 Cr LJ 2951 (SC) .

33 *Iqbal v State of Kerala* 2008 Cr LJ 436, p 438 (SC), 2007 (12) Scale 556, 2007 AIR SCW 6771 .

34 *Md Kalam v State of Bihar* 2008 Cr LJ 3194 (SC), (2008) 7 SCC 257, 2008 AIR SCW 4269, 2008 (9) Scale 413 .

35 *KP Thimmappa Gowda v State of Karnataka* 2011 Cr LJ 2591, p 2592 (SC), AIR 2011 SC 2564, 2011 (4) Scale 224, 2011 AIR SCW 2281 .

36 Position prior to the enactment of the Criminal Law (Amendment) Act 2013. For assistance in the disposal of the pending cases, the old commentary for this section has been retained. See commentary under s 376D, *post*.

37 *Pardeep Kumar v Union Administration, Chandigarh* 2006 Cr LJ 3894 (SC) .

38 *Ashok Kumar v State of Haryana* 2003 Cr LJ 4932 (SC), AIR 2003 SC 777 .

39 *Priya Patel v State of Madhya Pradesh* 2006 Cr LJ 3627 (SC) .

40 *Pramod Mahto v State of Bihar* AIR 1989 SC 1475, 1989 Cr LJ 1479 (SC) ; *Devendra Das and Ors v State of Bihar* 1999 Cr LJ 4805 (Pat) ; *Mahesh Kumar and Anor v State of Rajasthan* 1998 Cr LJ 1597 (Raj) .

41 *Priya Patel v State of Madhya Pradesh* 2006 Cr LJ 3627 (SC) .

42 *Priya Patel v State of Madhya Pradesh* 2006 Cr LJ 3627 (SC) .

43 *Bipul Medhi v State of Assam* 2008 Cr LJ 1099, p 1108 (Gauh) (DB) .

44 *Rama Paswan v State of Jharkhand* 2007 Cr LJ 2750 (SC), 2007 (5) Scale 646, (2007) 11 SCC 191 .

45 *Charan Singh v Shanti Devi* 2004 Cr LJ 2408 (All) .

46 *Gangula Ashok v State of Andhra Pradesh* (2000) 2 SCC 504, 2000 AIR SCW 279, AIR 2000 SC 740, 2000 Cr LJ 819 .

47 *Neelesh Jain v State of Rajasthan* 2006 Cr LJ 2151 (Raj) .

48 *Ibid*.

49 *Ibid*.

50 By Criminal Law (Amendment) Act 1983 (Act 43 of 1983).

51 *State of Punjab v Gurmit Singh* AIR 1996 SC 1393, 1996 Cr LJ 1728 (SC) ; *Trilochan Singh Johar v State and Anor* 2002 Cr LJ 3268 (Del) .

52 *Varadaraju v State of Karnataka* 2005 Cr LJ 4180 (SC) .

53 *Chokha v State of Rajasthan* 2005 Cr LJ 4708 (Raj) .

54 *Lt Col SJ Chaudhary v State (Delhi Admn)* AIR 1984 SC 618, 1984 Cr LJ 340 (SC) .

55 *Ambika Prasad v Delhi Administration* (2000) 2 SCC 646, 2000 Cr LJ 810 (SC) .

56 *State of Uttar Pradesh v Shambhu Nath Singh* (2001) 4 SCC 667, 2001 Cr LJ 1740 (SC), paras 9, 12 .

57 *Rabi Narayan Ojha v State of Orissa* 2004 Cr LJ 3645 (Ori) .

58 *Rampratap v State* AIR 1970 Raj 250, p 251, 1970 Cr LJ 1559 . For **contrary view**, refer to *State v Sri Lal* 1971 Cr LJ 141, 142 (All) .

59 *Roshan Lal v State* 1971 Cr LJ 554, p 558, 559 (Del) .

60 *Tara Chand v State of Himachal Pradesh* 2000 Cr LJ 3764 (HP) .

61 *Tara Chand v State of Himachal Pradesh* 2000 Cr LJ 3764 (HP) .

62 *Ramdhan Meena v State of Rajasthan* 1981 Cr LJ (NOC) 218 (Raj) .

63 *Abdul Majid v State of Rajasthan* 1981 Cr LJ 1316 (Raj) .

64 *Bodhisattwa Gautam v Subhra Chakraborty* AIR 1996 SC 922, 1996 AIR SCW 325 .

65 *Mukeshbhai Nanubhai Patel v State of Gujarat* 1998 Cr LJ 94 (Guj) .

66 *Chittaranjan Das v State of West Bengal* AIR 1963 SC 1696 (also a case of rape).

67 *Kartick Kundu v State* 1967 Cr LJ 1411 (Cal) .

68 *Kamakhya Prasad Agarwalla v State* 1957 Cr LJ 353, AIR 1957 Assam 39, p 41, 42 .

69 *Jagjit Singh v State of Punjab* 2005 Cr LJ 955 (SC), (2005) 3 SCC 689 .

70 *State of Sikkim v Binod Khawas* 2013 (2) Crimes 272 (Sikk) .

71 *Jagjit Singh v State of Punjab* 2005 Cr LJ 955 (SC) .

72 *Bishnu Prasad Sinha and Anr v State of Assam* 2007 Cr LJ 1145 (SC) .

73 *Babubhai Udesinh Parmar v State of Gujarat* 2007 Cr LJ 786 (SC) .

74 *State of Mizoram v Rualhleithanga* 2005 Cr LJ 3184 (Gau) (DB) .

75 *Mithu Kalita v State of Assam* 2006 Cr LJ 2570 (Gau) .

76 *S Krishna v State of Karnataka* 1998 Cr LJ 785 (Kant) (DB) .

77 *Om Prakash v State of Himachal Pradesh* 2000 Cr LJ 1591 (HP) (DB) .

78 *State of Punjab v Jagir Singh* AIR 1973 SC 2407, 1973 Cr LJ 1589 (SC), (1974) 3 SCC 277 .

79 *State of Himachal Pradesh v Lekh Raj and Anor* AIR 1999 SC 3916, 2000 Cr LJ 44 (SC), (2000) 1 SCC 247, 1999 AIR SCW 4008 .

80 *Jogi Dan v State of Rajasthan* 2004 Cr LJ 1726 (Raj) .

81 Position prior to the enactment of the Criminal Law (Amendment) Act 2013.

82 *DA Jakati v State of Karnataka* 2005 Cr LJ 2687 (Kant) .

83 *Bishali v State of Madhya Pradesh* 1964 MPLJ (notes) 194 ; *DA Jakati v State of Karnataka* 2005 Cr LJ 2687 (Kant) .

84 Re *Karichiappa Goundan* 43 Cr LJ 576, AIR 1942 Mad 285, p 286 .

85 *State v Angom Naobi Singh* (1963) 2 Cr LJ 715 (Manipur), (prosecutrix stated, before the committing court and in the statement before the police, that she was forcibly ravished by the accused).

86 Re *Karichiappa Goundan* 43 Cr LJ 576, AIR 1942 Mad 285, p 286 ; *Joginder Singh v State of Haryana* 1974 Cr LJ 117, p 119, 1973 Cur LJ 291 .

87 Re *Karichiappa Goundan* 43 Cr LJ 576, AIR 1942 Mad 285, p 286 .

88 *Balwant Singh v State of Punjab* AIR 1987 SC 1080, 1987 Cr LJ 971 (SC) .

89 *Ramchandra Mahadev Shinde v State of Maharashtra* 1999 Cr LJ 1428 (Bom) (DB) ; *Prilhichand v State of Himachal Pradesh* AIR 1989 SC 702, 1989 Cr LJ 841 (SC) .

90 *Satpal alias Satnam Singh v State of Rajasthan* 2001 Cr LJ 564 (Raj) .

91 *Pooran Ram v State of Rajasthan* 2001 Cr LJ 91 (Raj) .

92 *Maduru alias Damruwa v State of Madhya Pradesh* 2001 Cr LJ 1857 (MP) .

93 *Duyalal v State of Rajasthan* 2001 Cr LJ 3652 (Raj) .

94 *Mangila v State of Madhya Pradesh* 1998 Cr LJ 2304 (MP) .

95 *Rafique v State of Uttar Pradesh* AIR 1981 SC 559, 1980 Cr LJ 1344 (SC) .

96 *State of Uttar Pradesh v Satish* 2005 Cr LJ 1428 (SC) .

97 *Appasaheb Maruti Shedge v State of Maharashtra* 2005 Cr LJ 1503 (Bom)

1 *State of Himachal Pradesh v Gian Chand* 2001 Cr LJ 2548 (SC) .

2 *Ibid.*

3 *Santosh Kumar Pachori v State of Madhya Pradesh* 2001 Cr LJ 2981 (MP) (DB) ; *Nagam Gangadhar v State* 1998 Cr LJ 2200 (AP) .

4 *State of Himachal Pradesh v Lekh Raj and Anor* 2000 Cr LJ 44 (SC) .

5 *Ousu Varghese v State of Kerala* AIR 1974 SC 739, 474 Cr LJ 624, (1974) SCC 769 .

6 *Jagdish v State of Madhya Pradesh* AIR 1981 SC 1167, 1981 Cr LJ 630, 1981 SCC (Cri) 676 .

7 *State of Rajasthan v Kalk* AIR 1981 SC 1390, 1981 Cr LJ 1012, (1981) 2 SCC 752 .

8 *State of Uttar Pradesh v MK Anthony* AIR 1985 SC 48, 1985 Cr LJ 493 ; *Tehsildar Singh v State of Uttar Pradesh* AIR 1959 SC 1012, 1959 Cr LJ 1232 ; *Appabhai v State of Gujarat* (1988) JT 1 249 (SC), AIR 1988 SC 696, 1988 Cr LJ 848 ; *Rammi alias Rameshwar v State of Madhya Pradesh* (1999) 7 JT 247 (SC) ; *Bhura alias Sajjan Kumar v State of Madhya Pradesh* (1999) 7 JT 247 (SC) .

9 *Leela Ram v State of Haryana* (1999) 8 JT 274 (SC), 1999 AIR SCW 3756 ; *Joseph v State of Kerala* 2000 Cr LJ 2467 (SC) .

10 *Sakariya v State of Madhya Pradesh* 1991 Cr LJ 1925 (MP) .

11 *Thomas alias Thomachan v State of Kerala* 1999 Cr LJ 1297 (Ker) .

12 *Thomas alias Thomachan v State of Kerala* 1999 Cr LJ 1297 (Ker) .

13 *Modi's Medical Jurisprudence and Toxicology*, twenty-second edn, (reprint 2001), p 498.

14 *Samuel John v Emperor* AIR 1935 All 935, p 937, 1935 All LJ 1079 ; *Kamakhya Prasad Agarwalla v State* 1957 Cr LJ 353, AIR 1957 Assam 39 (if the sexual intercourse is without the consent, or against the will, of the prosecutrix, the question of her age is immaterial).

15 *Emperor v Qudrat* 41 Cr LJ 142, AIR 1939 All 708, p 709 ; *Nathu v Emperor* 32 Cr LJ 1041, AIR 1931 Lah 401 .

16 *Banspati Mangal v State of Madhya Pradesh* 1962 Jab LJ 840, 1962 MP LJ 330 (Notes), (1963) 2 Cr LJ 354 .

17 *Moola Ram v State of Rajasthan* 2000 Cr LJ 2506 (Raj) .

18 *Sidheswar Ganguly v State of West Bengal* 1958 Cr LJ 273, AIR 1958 SC 143, p 148 .

19 *Vishnu v State of Maharashtra* 2006 Cr LJ 303, p 308 (SC), AIR 2006 SC 508, (2006) 1 SCC 283, 2005 (9) Scale 510 .

20 *Kamakhya Prasad Agarwalla v State* AIR 1957 Assam 39, p 45, 1957 Cr LJ 353 .

21 *Debaprosad Base v King* AIR 1950 Cal 406, 54 CWN 329 .

22 *Jaya Mala v Home Secretary, Government of J&K* AIR 1982 SC 1297, 1982 Cr LJ 1777 .

23 *MC Prasannan v State* 1999 Cr LJ 999 .

24 *Ibid*.

25 *Vishnu v State of Maharashtra* 2006 Cr LJ 303, p 308 (SC), AIR 2006 SC 508, 2005 (Supp-5) SCR 474, (2006) 1 SCC 283 .

26 *Bhagaban Patra v State* 31 Cut LT 909 ; *Sherkhan v State* 1980 Cr LR 434, p 435-36 (MP) ; *Vipin Kumar v State of Haryana* (1985) 1 Crimes 105 .

27 *Jitmohan Lohar v State* 1997 Cr LJ 2842 (Ori) .

28 *Anam Swain v State* 1954 Cr LJ 132, AIR 1954 Ori 33 ; *Dogobinda Rath v State* 1958 Cr LJ 1211, AIR 1958 Ori 224, p 226 ; *Krishnan Chithan v State of Kerala* 1961 MLJ (Cr) 785, (1962) 1 Cr LJ 650 .

29 *Kailash v State of Madhya Pradesh* AIR 2013 SC 3005, 2013 (9) Scale 591, 2013 Cr LJ 3646 .

30 *Dilip v State of Madhya Pradesh* 2013 Cr LJ 2449, p 2452, 2013 AIR SCW 2538 (*Bishnudayal v State of Bihar* AIR 1981 SC 39 **relied on**).

31 *Vishnu v State of Maharashtra* 2006 Cr LJ 303, p 308 (SC), AIR 2006 SC 508, (2006) 1 SCC 283, 2005 (9) Scale 510 .

32 *Mohd Imran Khan v State (Govt of NCT of Delhi)* 2011 AIR SCW 6821, 2012 Cr LJ 693 (SC), 2011 (11) Scale 376, (2011) 10 SCC 192

33 *Jaya Mala v Home Secretary, Governmnt of J&K* AIR 1982 SC 1297, 1982 Cr LJ 1777 .

34 **Also see***Mohd Imran Khan v State (Govt of NCT of Delhi)* 2011 AIR SCW 6821, 2012 Cr LJ 693 (SC) ; **See also***Ram Suresh Singh v Prabhat Singh @ Chhotu Singh* (2009) 6 SCC 681, AIR 2009 SC 2805, 2009 AIR SCW 4261 ; *State of Uttar Pradesh v Chhotey Lal* (2011) 2 SCC 550, AIR 2011 SC 697, 2011 AIR SCW 662 .

35 *Vishnu v State of Maharashtra* 2006 Cr LJ 303 (SC) .

36 *Ibid.*

37 *Jarnail Singh v State of Rajasthan* 1972 Cr LJ 824, 1972 Raj LW 18 ; *Manna and Anor v State of Rajasthan* 2001 Cr LJ 3498 (Raj) ; *Mohandas Suryavanshi v State of Madhya Pradesh* 1999 Cr LJ 3451 (MP) ; *Rafik Khan Asgarkhan Pathan v State of Gujarat* 2005 Cr LJ 1284 (Guj) (DB) .

38 *Krishna Kumar v State of Madhya Pradesh* 1962 Jab LJ 825, (1963) 1 Cr LJ 686 .

39 *State of Chhattisgarh v Lekhram* 2006 Cr LJ 2139 (MP) .

40 *Jeev Rakhan v State of Madhya Pradesh* 2004 Cr LJ 2359 (MP) .

41 *Arjun Singh v State of HP* 2009 Cr LJ 1332, p 1334 (SC), AIR 2009 SC 1568, (2009) 4 SCC 18 ; *State of Chattisgarh v Lekhram* AIR 2006 SC 1746, 2006 Cr LJ 2139 .

42 *Almelu v State* (2011) 2 SCC 385, AIR 2011 SC 715 .

43 *Murugan v State of Tamil Nadu* 2011 Cr LJ 2948 (SC), AIR 2011 SC 1691 .

44 *Rafik Khan Asgarkhan Pathan v State of Gujarat* 2005 Cr LJ 1284 (Guj) (DB) .

45 *Gulab Mochi v State of Bihar* 2005 Cr LJ 1759 (Jhar) .

46 *State of Chhattisgarh v Lekhram* 2006 Cr LJ 2139, p 2141, AIR 2006 SC 1746 .

47 *Md Ekram Hussain v State of Assam* 2014 Cr LJ 699, p 701 (Gauh) .

48 *Modi's Medical Jurisprudence & Toxicology*, twenty-second edn (2001 reprint), p 497.

50 *Ibid.*

51 *Vishnu v State of Maharashtra* 2006 Cr LJ 303, p 307 (SC), AIR 2006 SC 508, (2006) 1 SCC 283, 2005 (9) Scale 510 .

52 Position prior to the enactment of the Criminal Law (Amendment) Act 2013. For assistance in the disposal of the pending cases, the old commentary has been retained.

53 *Tarkeshwar Babu v State of Bihar* (2006) 8 SCC 560 .

54 *Yadu Kumar Patel v State of Chhattisgarh* 2007 Cr LJ 2846 (Chhattis) .

55 *Nirmal Kumar v State of Haryana* 2002 Cr LJ 3352 .

56 *Prithish Chand v State of Himachal Pradesh* AIR 1989 SC 702, 1989 Cr LJ 841 (SC) ; *Durgalal v State of Rajasthan* 2001 Cr LJ 3652 (Raj) .

57 *Modi's Medical Jurisprudence and Toxicology*, twenty-second edn, p 495.

58 *DA Jakati v State of Karnataka* 2005 Cr LJ 2687 (Kant) .

59 *DA Jakati v State of Karnataka* 2005 Cr LJ 2687 (Kant) .

60 *Koppula Venkat Rao v State of Andhra Pradesh* 2004 Cr LJ 1804 (SC) ; **See also***DA Jakati v State of Karnataka* 2005 Cr LJ 2687 (Kant) .

61 *Santhosh Moolya v State of Karnataka* 2010 Cr LJ 2892, p 2896 (SC), AIR 2010 SC 2247, 2010 AIR SCW 3125, (2010) 5 SCC 445, 2010 (4) Scale 348 ; **See also***Utpal Das v State of West Bengal* 2010 Cr LJ 2867, p 2870, 2871, AIR 2010 SC 1894, (2010) 6 SCC 493, 2010 (5) Scale 328 .

62 *Modi's Medical Jurisprudence and Toxicology*, twenty-first edn.

63 *State of Mizoram v Zoduhliana* 2005 Cr LJ 3756 (Gau) (DB) .

64 *Durgalal v State of Rajasthan* 2001 Cr LJ 3652 .

65 *State of Mizoram v Zoduhliana* 2005 Cr LJ 3756 (Gau) (DB) .

66 *Nagam Gangadhar v State* 1998 Cr LJ 2200 (AP) .

67 *Ramsahai v State of Madhya Pradesh* 1980 Cr LR 18, p 20 (MP High Court notes) .

68 *Ghanasham Misra v State* 1957 Cr LJ 469, AIR 1957 Ori 78, p 80 .

69 *State of Tamil Nadu v Ravi* 2006 Cr LJ 3305 (SC), AIR 2006 SC 2568, 2006 (6) Scale 441 .

70 *State of Tamil Nadu v Ravi* 2006 Cr LJ 3305 (SC), AIR 2006 SC 2568, 2006 (6) Scale 441 .

71 *Rahim Beg v State of Uttar Pradesh* 1972 UJ 898 (SC), 1972 SCC (Cr) 827 .

72 *Dalchand v State* 1967 AWR (HC) 649, p 651-52 .

73 *Ramsahai v State of Madhya Pradesh* 1980 Cr LR 18, 20 (MP High Court notes) .

74 *Bhupinder alias Mohinder Singh v State of Haryana* 2002 Cr LJ 1286 (P&H) .

75 *Mohd Habib v State* (1988) RCR 150, 1989 Cr LJ 137 (Del) .

76 *Modi's Medical Jurisprudence and Toxicology*, twenty second edn, (2001 reprint), p 509 as quoted in *State of Himachal Pradesh v Gian Chand* 2001 Cr LJ 2548 (SC) .

77 *Maung Ba Yin v King* 39 Cr LJ 944, AIR 1938 Rang 298, p 300 (injury might have been caused by some person other than the accused, whatever the object).

78 *State of Tamil Nadu v Ravi* 2006 Cr LJ 3305 (SC) .

79 *Balkishan v State of Madhya Pradesh* 1981 Cr LR 267, p 269 (MP High Court notes) .

80 *Ramji v State of Madhya Pradesh* 1981 Cr LR 252, p 255 (MP) .

81 *State of Orissa v Thakara Besra and Anor* 2002 Cr LJ 2642 (SC) .

82 *Pooran Ram v State of Rajasthan* 2001 Cr LJ 91 (Raj) ; *Madan Gopal Kakkar v Naval Dube* (1992) 3 SCC 204 ; *Mahesh Kumar and Anor v State of Rajasthan* 1998 Cr LJ 1597 (Raj) .

83 *State of Himachal Pradesh v Kamal Kishore* 2000 Cr LJ 2661 (HP) (DB) .

84 *Nagam Gangadher v State* 1998 Cr LJ 2200 (AP) .

85 *Modi's Medical Jurisprudence and Toxicology*, twenty-second edn (2001 reprint).

86 *State of Maharashtra v Sawala Sagu Kokare and anor* 1997 Cr LJ 786 (Bom) (DB) .

87 *Manoj Giri v State of Chhattisgarh* 2013 Cr LJ 3024 (SC), 2013 AIR SCW 3034, (2013) 5 SCC 798 .

88 *Mangi Lal v State of Rajasthan* 2002 Cr LJ 3687 (Raj) ; *State of Himachal Pradesh v Cyan Chand* AIR 2001 SC 2075, 2001 Cr LJ 2598 (SC) .

89 *Joseph v State of Kerala* (2000) JT 6 SC 195 ; *Jayasena Pradhan v State* 2001 Cr LJ 1953 (Ori) ; *Harpal Singh v State of Himachal Pradesh* AIR 1981 SC 361, 1981 Cr LJ 1 (SC) ; *Santosh Moolya v State of Karnataka* 2010 Cr LJ 2892, AIR 2010 SC 2247, (2010) 5 SCC 445 .

90 *Paltu Rai v State of Jharkhand* 2005 Cr LJ 2824 (Jhar) .

91 *Modi's Medical Jurisprudence and Toxicology*, twenty-second edn, (2001 reprint) p 502 as quoted in *State of Himachal Pradesh v Gian Chand* 2001 Cr LJ 2548 (SC) .

92 *State of Rajasthan v NK (Accused)* 2000 Cr LJ 2205 (SC) ; *Rajinder v State of HP* 2009 Cr LJ 4133 (SC), AIR 2009 SC 3022, 2009 (9) Scale 176

93 *Sheikh Zakir v State of Bihar* AIR 1983 SC 911, 1983 Cr LJ 1285 .

94 *Balwant Singh v State of Punjab* AIR 1987 SC 1080, 1987 Cr LJ 971 .

95 *Karnel Singh v State of Madhya Pradesh* AIR 1995 SC 2472, (1995) 5 SCC 518, 1995 AIR SCW 3644 .

96 *State of Rajasthan v NK* 2000 Cr LJ 2205 (SC) .

1 *Sohan Singh v State of Bihar* (2010) 1 SCC 68, (2009) 83 AIC 65 (SC) .

2 *Kuldeep K Mahato v State of Bihar* 1998 Cr LJ 4033 (SC)*; Shiv Kumar Khare v State of UP* 2015 (3) All LJ 285 (All) (No external, internal injury found, prosecutrix major, accused acquitted); *Suhila v State of Uttar Pradesh* 2015 (3) All LJ 320 (All) (DB) ..

3 *State of Maharashtra v Abdul Hafiz Faruki and Ors* 1998 Cr LJ 3603 (SC) .

4 *State of Maharashtra v Suresh Nibrurathi Bhusare and Ors* 1977 Cr LJ 2003 (Bom) .

5 *Fateh Chand v State of Haryana* 2009 Cr LJ 3942, p 3944 (SC), AIR 2009 SC 2729, 2009 (8) Scale 801 ; *Rajinder v State of HP* 2009 Cr LJ 4133 (SC) (Absence of injuries on the person of the prosecutrix not sufficient to hold that she consented to sexual intercourse).

6 *Fateh Chand v State of Haryana* 2009 Cr LJ 3942, p 3944 (SC), AIR 2009 SC 2729, 2009 (8) Scale 801 ; *Rajinder v State of HP* 2009 Cr LJ 4133 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

SEXUAL OFFENCES

[S. 376.

Punishment for rape.--

EVIDENCE OF PROSECUTRIX

70. Court to Ensure that Prosecutrix is not Harassed in Cross-examination

There has been lately, a lot of criticism on the treatment of victims of sexual assault in the court during their cross-examination. The provisions of the Evidence Act 1872, regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat the details of the rape incident not so much as to bring out3161 the facts on record or to test her credibility, but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again, in unfamiliar surroundings, what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as 'discrepancies and contradictions' in her evidence.[7]

71. Mind of Woman Difficult to Fathom

It is difficult to fathom the working of the mind of the woman. The sexual offence is very easy to allege and difficult to refute, it is expected that immediately after the incident of molestation or rape/sexual intercourse, a report to the police be lodged.[8]

72. Prosecutrix Accustomed to Sexual Intercourse--Effect

Even assuming that the victim was previously accustomed to sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give license to any person to rape her. It is the accused who was on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behavior earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone.[9]

73. Statement of the Prosecutrix

It is hardly possible that any self respecting woman would come forward in a court of justice to make a humiliating statement against her honour, such as is involved in rape on her, unless it is absolutely true.[10] Therefore, the evidence of the prosecutrix should carry more weight than the evidence of an ordinary witness[11], and is considered more reliable than that of an injured witness.[12] The testimony of the prosecutrix is almost at par with an injured witness and can be acted upon without corroboration.[13] In such a case, the absence of the hymen and the absence of injuries3162 are not sufficient to dispose of the

statement of the girl, her mother and the eyewitnesses.[14] In practice, however, a conviction for rape almost entirely depends on the credibility of the woman so far as the essential ingredients are concerned, the other evidence being merely corroborative. Her testimony is vital in a case where the woman is married and the medical evidence, in no way, corroborates the charge of rape. Naturally, no violence may be revealed in the genital organs of a woman who has several times been a mother. Even if spermatozoa, indicating semen, is found in her genitals or on her *saree*, it would, by no means, be final in the case of a married woman.[15] In the matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully.[16] Not only has one to consider the possibility of deliberate falsehood, but those who have to arrive at a verdict have to consider the possibility of unintentional mis-statements produced by hysterical conditions which are apt to be found in cases of this nature.[17]

The evidence of a prosecutrix is more reliable than that of an injured witness and the testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate the looking for corroboration of her statement.[18]

The physical scar on a rape victim may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole the case spoken of by the victim strikes a judicial mind as probable.[19] The rule, which according to the cases, has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge. Therefore, corroboration is not the *sine qua non* for conviction in a rape case.[20]

74. Reliability of the Testimony of a Child Witness

The tender years of the child, a victim of rape, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render its evidence reliable and safe to be acted upon without corroboration.[21] It is, however, desirable that the courts should always record their opinion that the child understands the duty of speaking the truth and state why they think so; otherwise, the credibility of the witness may be seriously affected so much3163 so that, in some cases, it may be necessary to reject the evidence altogether.[22] Similarly, if, by reason of tender years and consequent immaturity of judgment, a child, in a case of rape on her, is unable to understand the questions put to her and convey the relevant information to the court, it ought not to be examined at all.[23] Therefore, the unsworn testimony of a girl, aged about 12 years, received by the court (in a case of rape), after satisfying itself that the girl possessed sufficient understanding, is admissible.[24]

A child witness of about 12 years of age can often be expected to give out a true version because of his/her innocence, however there is always the danger in accepting the evidence of such a witness that, under influence, she might have been coached to give out a version by persons who may have influence on her.[25]

Before the decision of the Supreme Court in *Rameshwar v State of Rajasthan* ,[26] the authorities, on the necessity of corroboration in the case of a child witness, were not uniform. According to the Nagpur High Court, when the victim of rape is a girl of tender age, her evidence carries great weight.[27] A child of ten, in a case of rape on her, cannot possibly have any motive for false incrimination which may attract the necessity of corroboration as to the identity of the accused.[28] However, in *Gangaram Nanhoosingh v Crown* ,[29] the view taken by the Nagpur High Court was that the rule of corroboration would apply, whether the prosecutrix is an adult or a girl of only seven years of age. The Madras High Court held, in Re *Boya Chinnappa*,[30] that where a girl of immature (seven) years has been raped, and made a disclosure of the rape at the earliest possible opportunity to her mother and another, the court will not insist upon independent testimony connecting the accused with the crime. In a case from Ajmer,[31] it was held that the court, in a case of rape on a small girl of seven years, would not insist on the same amount of

corroboration as when the victim of rape is a grown up woman. However, as a matter of prudence, conviction should not ordinarily be based on the uncorroborated evidence of a child witness, whether sworn or unsworn.[32]

75. Prosecutrix Testimony--Whether Requires Corroboration

Prosecutrix cannot be considered to be an accomplice; her testimony cannot be equated with that of an accomplice.[33] Similarly, there is no rule of law which may3164 require that there should be corroboration before conviction can be based on the sole testimony of the prosecutrix.[34] The prosecutrix should be treated as an injured witness.[35] It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence and the evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material placed on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary.[36]

A conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the case of the prosecutrix becomes liable to be rejected.[37] The prosecutrix is a victim of, and not an accomplice in a sex offence and there is no provision in the Indian Evidence Act 1872, requiring corroboration in material particulars of the evidence of the prosecutrix as is in the case of evidence of accomplice.[38]

It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Further, an assurance, short of corroboration as understood in the context of an accomplice would do.[39]

In a case of abduction and rape, conviction of the accused can be based entirely on the statement of a rape victim.[40]3165

Corroboration is not the *sine qua non*for a conviction in a rape case. In the initial setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration, as a rule is adding insult to injury. Why should the evidence of the woman who complains of rape/sexual molestation be viewed with doubt, disbelief or suspicion? To do so would justify the charge of male chauvinism in a male dominated society.[41]

It is not the law that in every case the version of the prosecutrix must be corroborated in material particulars by independent evidence on record. It all depends on the quality of the evidence of the prosecutrix. If the Court is satisfied that the evidence of the prosecutrix is free from blemish and is implicitly reliable, then on the sole testimony of the prosecutrix, the conviction can be recorded. In appropriate cases, the court may look for corroboration from an independent source or from the circumstances of the case before recording an order of conviction.[42] The woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as if she were an accomplice. [43]

The appellants accused though were armed with sharp cutting weapons *viz*. tangies, yet inflicted injuries by blunt object *viz.* lathis, held, it could not be said that they share common object to cause the death of the deceased, they were convicted under s 304, Pt II IPC instead of s 302, IPC .[44]

In a case of rape, testimony of a prosecutrix stands at par with that of an injured witness. It is really not necessary to insist on corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible.[45]

To insist on corroboration except in the rarest of rare case is to equate a woman who is a victim of lust of another, with an accomplice to a crime, and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissible society as in some of the Western and European countries. Our standard of decency and morality, in public life is not the same as in those countries. Decency and morality in public life can be promoted and protected only if the courts deal strictly with those who violate societal norms. The standard of proof to be expected by the court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by leveling a false charge concerning her chastity.[46]3166

The testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony if it inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief of suspicion? The court while appreciating evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inference has to be drawn from the given sets of facts and circumstances with realistic diversity and not dead uniformity test that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole. The case spoken of by the victim of sex crime strikes the judicial mind as probable.[47]

Of late, crime against women in general and rape in particular is on the rise. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a reflection of the attitude of indifference in the society towards the violation of her dignity of the victims of sex crimes and not only violates the victim's privacy and personal integrity, but inevitably caused serious psychological as well as physical harm in the process. Rape is not merely an assault. It is often destructive to the whole personality of the victim. The courts, therefore, should realise the great responsibility while trying an accused on charges of rape. They must deal with rape cases with utmost sensitivity. The court should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which may be of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars for some reasons the court finds it necessary to place implicit reliance on her testimony. It may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be aware of its responsibility and be sensitive dealing with cases involving sexual molestations.[48] If the testimony of the prosecutrix is cogent and reliable, it alone can form the basis of the

conviction of the accused and corroboration is not required.[49]3167

It is open to the court to base its conviction of the offence solely on the evidence of the prosecutrix, if it is satisfied that the evidence is worthy of credence,[50], and if the prosectrux does not have strong motive to falsely implicate the accused.[51]

76. Legal Aspect as to Appreciation of Evidence of Prosecutrix

About legal aspect with respect to appreciation of evidence of prosecutrix, the same can be summarised in the following manner:

(1) That the main evidence in all such cases is that of victim herself.
(2) That corroboration of the testimony of the prosecutrix in rape case is not required as a rule of law. But, corroboration should ordinarily be required in the case of a woman having attained majority and who is habitual to sexual intercourse and is found in a compromising position, as in such cases there is likelihood of her having leveled such an accusation on account of instinct of self preservation or when the probabilities factor is found to be out of time.
(3) That corroboration may be by facts and circumstances.
(4) That the injury on the person of the victim, especially her private parts, had corroborative value.
(5) That if the evidence of the victim does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.[52]

77. Suggestions Given to Prosecutrix--Effect

Any suggestion given by the defence to the prosecution witness cannot take the place of evidence and moreover, the suggestion given by the defence to the effect that she had made statement never goes to show that the defence accepted the fact that they had outraged the modesty of the prosecutrix.[53]

78. Principles Underlying Corroboration of Testimony of Prosecutrix

In *Moti Chand v State of Rajasthan* [54] the Rajasthan High Court after analysing the observations of the Apex Court in several cases[55] has summarised the principles3168 pertaining to corroboration of testimony of prosecutrix based upon these decisions of the Apex Court as follows:

(1) corroboration of the testimony of prosecutrix in rape cases is not required as a rule of law;
(2) corroboration in such cases is, however, required as a matter of prudence and this rule of prudence has now almost hardened into rule of law;
(3) the rule of prudence which has been hardened into rule of law is that the rule as to corroboration must be present in the mind of the judge and must have been incorporated in the judgment;
(4) if the evidence of the prosecutrix does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence, as a general rule, corroboration should not be insisted upon;
(5) the corroboration of the prosecutrix evidence may be dispensed with where circumstances of a case make it safe to do so, but the reasons for dispensing with the necessity of such corroboration should be forthcoming in the judgment;
(6) corroboration should ordinarily be required in the case of a woman having attained majority

and who is habitual to sexual intercourse as, in such cases, there is likelihood of her having leveled such an accusation on account of her instinct of self preservation or when the probabilities factor is found to be out of time;

(7) the view that though corroboration should ordinarily be required in the case of a grown up woman, it is unnecessary in the case of a child of tender years is not correct; whether corroboration is unnecessary is a question of fact in every case.

79. If No Motive to Falsely Implicate Accused, Statement of Prosecutrix should be Accepted

A prosecutrix of sex offence cannot be put at par with an accomplice, she is in fact a victim of the crime. The Evidence Act 1872, nowhere says that her evidence cannot be accepted, unless it is corroborated in material particulars. She is undoubtedly a competent witness under s 118 of the Evidence Act and her evidence must receive the same weight as is attached to an injured in a case of physical violence, the same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law of practice incorporated in the Evidence Act similar to illust (b) to s 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. However, if the prosecutrix is an adult and of full understanding, the court is entitled to base a conviction on her evidence, unless the same is shown to be infirm and untrustworthy. If the totality of circumstances appearing on the record of the case disclose that the prosecutrix does3169 not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.[56]

It is most unlikely that only to falsely implicate the accused the prosecutrix would inflict injury on her private parts.[57]

Circumstantial evidence, that soon after the crime the girl told her parents that the accused lifted her and caused her injuries, that there was some admission of the accused having committed a wrongful act, that there were injuries on the person of the accused and blood stains on his *dhoti*, was held sufficient to corroborate the girls direct evidence.[58]

80. Prosecutrix Stating Accused had 'Physical Contact' or did *Ulta Kaam etc*, with Her--If Sufficient to Prove Rape

When the prosecutrix in her local language made a statement in exact translation that accused no. 1 had physical contact with her 3-4 times in these two days, but the public prosecutor did not get it clarified in the examination in chief what she had exactly meant by 'physical contact', her statement cannot establish the commission of offence of rape under s 376, IPC, in order to bring home this offence. The prosecuting agency is required to bring on record the clinching evidence of penetration without which the offence under s 376 cannot be said to be proved against the accused.[59] However, when the prosecutrix aged 5 years being a child witness stated before the court that the accused beat her and had done dirty things to her private parts as a result whereof she bled, and the medical evidence also supported the prosecution case, the accused was found guilty under s 376, IPC .[60] When the prosecutrix nowhere stated about the removal of her clothes, *ulta kam kiya* as stated by the prosecutrix without any evidence by the prosecution cannot in local parlance mean the commission of sexual intercourse.[61]The prosecutrix in her statement said that the accused committed an indecent act on her and did the same forcibly without her consent. When she was asked as to what she meant by the words 'indecent act', she did not utter a single word in reply. Her father stated that his daughter informed him that she was raped by the accused. He also

informed that his daughter informed him that the accused did *hath path* on her.

A Comparative and Etymological Dictionary of the Nepali Language by Ralph Lilley Turner which was first published in the year 1913 and first reprinted in India 1980 and thereafter in 1990. The word *hath path*, according to this dictionary, means laying hands on.

Taking note of the fact that the prosecutrix has used the words like, 'indecent act' but has also used the expressions, 'forcibly' and 'without her consent' also, and her father used the word 'rape', so 'indecent act' and *hath path* were understood by all the witnesses suggesting sexual intercourse and in local common parlance *hath path* means sexual assault on a woman the conviction of the accused under s 376, IPC, was found proper.[62]3170

In *State of Karnataka v Narayanamurthy* ,[63] the victim was a child and she did not describe sexual assault but stated that the accused did all sorts of things to her. The technical view taken by the trial court that penetration and sexual assault was not established did not find favour with the Karnataka High Court which observed thus:

> A reading of the judgment indicates that the learned trial judge has virtually taken off at a tangent and has gone into the technicalities of the offence of rape which undoubtedly requires that it must be a sexual assault and if it is to be punished under s 376, IPC the aspect of penetration is one of the necessary ingredients. The reasoning proceeds on the footing that the girl has not specifically described the act and that therefore, the evidence falls short of the requirement of establishing that it was an act of rape. We are rather distressed at this line of approach because the Legislature in this country has consciously stepped up the punishments prescribed for any form of atrocities against females particularly offences of rape and in cases where the victim is a minor the law views the offence so seriously that it provides for a minimum sentence of 7 years RI. It is necessary for the courts to appreciate the trauma which a victim of any age undergoes in these situations when one has to virtually relive the horrifying incident and in the background of this emotional struggle, the very serious limitations when it comes to the question of describing before a court as to what happened. It virtually means that the victim has to almost re-enact the incident particularly while facing cross-examination, which is one of the most traumatic aspects even in cases where, due to the passage of time victim has to some extent recovered. This is therefore not a category of cases where courts go to look for elaborate picturesque and precise descriptions of every gory details the incident. Even if the evidence is sufficient convey to the court that sexual assault particular type had taken place, that should more than sufficient because the courts always look to the important supportive evidence such the medical evidence and the forensic evidence relating to the clothes, CA Report etc.[64]

81. Prosecutrix Consenting to Sexual Intercourse on false promise of Marriage

Even if the accused had made a false promise to marry the prosecutrix and whereupon she consented to sexual intercourse with him, it would not vitiate her consent for the sexual intercourse which she had given, fully understanding the nature and implication of the act involved therein. It is not that the girl consented to the act on any understanding or misunderstanding that the accused was her husband (as distinct from 'would be' husband). It is not a case where the girl had any misconception about the nature of the act which she consented to, that being so it does not become a case of rape when she consented to the act of sexual intercourse fully knowing the nature and implication of such act and when she was fully aware that the person concerned was not yet her husband, even if he had proposed to marry her.[65]

However, a contrary view is taken by the Patna High Court according to which consent always means free will or voluntary act. When the consent was obtained on the basis of some fraud and allurement or practising deception upon the lady on the pretext that ultimately she will be married and under that pretext she allowed the3171 accused to have sexual intercourse with her, the act committed by the accused with such tainted consent should be treated as committed without consent.[66] However, in a subsequent decision the same High Court took the opposite view.[67] The accused, a class teacher of the prosecutrix was alleged to have committed rape on a promise to marry her. There was no question of dominating the will of the victim girl since she herself gave consent to have sexual intercourse according to the case of

the prosecution, there was no allegation however that subsequently the accused declined to marry her, so it was held that no case under s 376, IPC, was made out.[68] However, in such cases the accused can be convicted under s 417, IPC .[69]

It appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. But there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.[70] But when the consent of the prosecutrix was obtained in a deceitful manner tantamounting lack of her consent, the conviction of the accused under s 376, IPC was found proper.[71] For further commentary, text under s 375, *ante*, may be referred to.

Plea of Consensual Intercourse

The plea of the accused that it was consensual intercourse raised for the first time before the Supreme Court was not entertained.[72]

82. Story of Prosecutrix having Immoral Character

It must, however, be conceded that immoral character would still not be an absolutely irrelevant circumstance. It may render the story itself as incredible. It may take away probative force of the story, told as it is by a woman with no scruples or morals. It may be difficult to believe a woman of immoral character if she says that some persons had sexual intercourse with her, unless there existed satisfactory proof in support of the story of sexual intercourse.[73]3172

Prosecutrix of Easy Virtue/unchaste Woman, Accustomed to Sexual Intercourse

Even if the prosecutrix is of easy virtue or an unchaste woman, that itself cannot be a determinative factor and the Court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.[74] Even assuming that the victim was previously accustomed to sexual intercourse, that is not a determinative question. On the contrary, the question which is required to be adjudicated is, did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law, give licence to any person to rape her. It is the accused who is on trial and not the victim. In a given case, if the victim has been promiscuous in her sexual behavior earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone.[75]

83. Contradiction between Statement of Prosecutrix and Medical Evidence--Effect

When the medical evidence did not corroborate the testimony of the prosecutrix in as much as there was an absence of struggle marks and the statement of other witness was also inconsistent with her testimony, the conviction of the accused recorded by the High Court was set aside.[76] When the medical evidence did not corroborate the testimony of the prosecutrix; and the version of the prosecutrix was found to be not tallying with that of her maternal aunt to whom she said to have narrated the incident, and none were attracted to the place of incident despite her hue and cry to the maximum, the accused was found entitled to be acquitted.[77] Where the prosecution case was that the victim was forcibly pulled down to the ground in a jungle and was raped, the victim was an able bodied tribal woman aged thirty five years, the evidence

of the eye witness was that he found the victim lying on the ground and the accused was on her, but not state that the victim was either struggling or making any endeavour to dislodge. There was no external injury, nor even a bruise was detected on the body of the victim. Medical evidence contradicted the ocular testimony of the eye witness as no semen stains or any blood-stain were detected either on the wearing apparels of the victim or that of the accused as per the chemical examination report. It was held that guilt of the accused was not proved beyond doubts.[78]

84. Subsequent conduct of the Prosecutrix--How far Relevant in a case of Rape

The Supreme Court has time and again said that, the post event conduct of a witness varies from person to person. It cannot be a cast iron reaction to be followed as a model by everyone witnessing such event. Different persons would react differently on seeing any violence and their behaviour and conduct would, therefore, be different.[79]3173

The statement made by the prosecutrix to prosecution immediately after the occurrence is *res gestae* and is a relevant fact under s 6 of the Evidence Act 1872. That is also relevant as her conduct under s 8 of the Evidence Act . When there was spontaneity in the disclosure of the incident by the prosecutrix and this disclosure was made almost contemporaneous with the occurrence, there was not much interval, such a statement immediately after the incident has a greater value as *res gestae* and it is a substantive evidence.[80]

Immediate conduct is also important while deciding the case of molestation or rape. If a statement or disclosure is made by the ravished girl either to the members of her family or others, it is an evidence of conduct admissible as corroboration by illust (j) to s 8 and under s 157 of the Evidence Act 1872. In all cases of rape, importance is attached to the subsequent conduct of the complainant. Delay in prosecution or failure to make a complaint at the earliest possible opportunity, weakens the case of the complainant.[81]

In all cases of rape, importance is attached to the subsequent conduct of the prosecutrix; whether she makes a charge promptly or not is always, relevant,[82] though not, by itself, enough.[83] In the absence of proper explanation, failure of the prosecutrix to make a complaint at the earliest possible opportunity affords strong presumptive evidence of consent.[84]

In assessing the value of the evidence, her conduct, immediately after the offence was committed, is important and such conduct is relevant under s 8 of the Evidence Act 1872.[85] The allegation of the prosecutrix is, however, admissible in evidence, not as evidence of truth of the charge, but as corroborating the credibility of the prosecutrix.[86] If the prosecutrix does not go to the witness box, there is nothing to confirm or corroborate as her statement to her mother-in-law cannot be proved.[87] In3174*Kappinaiah*'s case, cited above, the raped woman committed suicide three days after the commission of the offence and it was held that her statement to her mother-in-law was not admissible under s 32(1) of the Indian Evidence Act 1872, because rape was not the cause of her death, though it might be the contingent motive, nor could it be relevant, under s 6 of the said Act, as her statement was not so connected with her rape as to form part of the same transaction. In *Ghulam Hussain v Emperor* ,[88] it was held that in the absence of definite and reliable evidence that the outrage on the victim of rape and her statement to her father constituted together *res gestae*, much value cannot be attached to the statement.

85. When Prosecutrix should not be Believed--Instances

There may be factors in a case tending to show that the testimony of the prosecutrix suffers from infirmities in a manner so as to make it either unsafe or impossible to base a finding of guilt to the same. Some of the salient factors of this type may briefly be stated thus:

(a) Circumstances showing on the part of prosecutrix an animus against the accused.

(b) Where the question of want of consent is material, circumstances tending to show consent eg, absence of material showing an attempt at resistance absence of any marks of struggle.
(c) Attempt at imprisonment or exaggeration in the version as attempted by the prosecutrix.
(d) Conduct on the part of the prosecutrix, inconsistency with the credibility of the version *e.g.* omission to make a disclosure at the earliest opportunity.
(e) Element of artificiality or unnaturalness in the story as attempted by the prosecutrix.
(f) Absence of signs of rape in the findings of the medical examination or on chemical analysis.[89]

The version of the prosecutrix (or prosecution) that she has forcibly been raped cannot be believed when,

(a) after the alleged rape she went to a dance performance rather than to her parents to inform them of the crime and she kept quiet for six months about it;[90]
(b) for months together she had never informed her mother or anybody else that the accused had committed rape against her wish and under a threat;[91]
(c) she stated in the course of investigation that on earlier occasions she had been paid Rs 50 by the accused and that she had tea with them on the day of the occurrence. However, she had not stated in the course of investigation that she was forcibly pushed inside the room of the accused, or that the accused had slapped her, and out of fear she did not raise a hue and cry; or that after the accused went away, she was not permitted to leave by the wives of the two brothers of the accused, but on the contrary she had3175 hidden herself inside the room after having seen her cousin, one of the prosecution witnesses;[1]
(d) the alleged rape took place at 12.30 pm on a Sunday when most of the residents are at home but none heard her cries when she was raped, thereafter she was loitering in the locality till about 2.30 pm, ie, for about 2 hours after the incident but did not report to anybody about the incident, she returned home and went to sleep, in the evening when her husband came she did not report the incident to him, at night she cooked food for the family and went to sleep, the next morning she attended to her routine work and worked in four flats but she didn't report the matter to anyone, later she went to the house of her brother and for the first time there she reported the matter to her sister-in-law who was not been examined and only thereafter they went to the police station and lodged the report;[2]
(e) there is contradiction between her statement and medical evidence, and inconsistency between her statement and statement of other witness;[3]
(f) even after the rape, while plucking grass in the field, she alongwith her aunt kept plucking the grass for about an hour and thereafter went to their residence, there was a negative report from the doctor about the rape and no injury was found on the person or private parts of the prosecutrix, the prosecutrix could not recognise the accused when the occurrence took place but her uncle told the name of the accused, and therefore she named him;[4]
(g) a full grown woman consents to the act of sexual intercourse on a promise of marriage;[5]
(h) the prosecutrix being a married woman had no injury and the doctor did not find any injury suggesting forcible rape;[6]
(i) the prosecutrix has given a version in her evidence, which is totally contradictory to the FIR;[7]
(j) she alleged that the accused during the night forcibly lifted her to a near by bank of the river on knife point, and by threatening to kill her son, committed sexual intercourse but no sign of forcible intercourse or any mark of violence was found either on the spot or during medical examination of the prosecutrix, the medical examination of the prosecutrix found no local injury on her private parts nor any sign of sexual intercourse nor any living or dead spermatozoa;[8]
(k) the prosecutrix was only a child of three or four years and when produced by the prosecution there were remarks of the court that when she was asked her name she did not reply and therefore her evidence was not taken and declared nil, the mother of the prosecutrix and neighbours has been3176 declared hostile and did not support the prosecution,[9] and similar is the position when the father of the prosecutrix turned hostile;[10]
(l) the consent of the prosecutrix is apparent when she silently abided to have intercourse with

the accused without putting up any resistance and shouting by her is also doubtful, the medical evidence also clearly discloses that the prosecutrix does not appear to have put up any resistance to the alleged onslaught committed on her by the accused;[11]

(m) she stated that the accused did not do anything with her, she was declared hostile but nothing could be extracted against the accused from her in her cross-examination on behalf of the state;[12]

(n) there are material contradictions in her statement before the court and the contents of FIR lodged by her;[13]

(o) the prosecutrix turned hostile and the evidence of the prosecutrix, her father and brother did not support the prosecution;[14]

(p) she has stated that when the incident took place she was pregnant for about seven months and because of the rape she had aborted on the third day, however, when she was examined by the doctor after a few days, no positive sign of recent abortion was noticed and she had also not stated in the FIR about the said pregnancy at the time of alleged rape;[15]

(q) she was tutored by her father and the police because of which she identified the accused in court;[16]

(r) she kept silent throughout the places she stayed at with the accused, which is indicative of the fact that she was a consenting party and it was not proved that she was below 16 years of age on the date of the incident;[17]

(s) the prosecutrix stated in court that after having the cold drink given to her by the accused, she became giddy and thereafter fell down on the cot and did not know what happened as she lost her senses;[18]

(t) there were no injuries on the private parts of the prosecutrix, her statement that she was forcibly thrown down and made to lie on her towel by spreading it on the ground, and accused then tied both her hands on either side with creeper trees was not worth believing as such an act by the3177 accused is not humanly possible, particularly when a woman exerts resistance as alleged by her and therefore, it can be inferred that she was a consenting party;[19]

(u) the prosecutrix stated that the accused had 'physical contact' with her 3-4 times in two days, but the prosecution agency has not got it clarified from her as to what she meant by 'physical contact' and also there was no evidence to establish penetration;[20]

(v) there was no mark of injury on her body showing absence of resistance and the incident took place in the morning when large number of persons were present near the place of the occurrence and no alarm was raised by her;[21]

(w) she did not disclose the alleged incident to her parents, and the medical report also did not support her story;[22]

(x) the accused and the prosecutrix stayed at different hotels without any protest from the prosecutrix at three places, on the other hand she stated that the accused intended to marry her, the inference that they leave from the house to marry to satisfy their lust, the inference that the prosecutrix was a consenting party can be drawn;[23]

(y) the victim stated that while committing rape the accused was holding a gun, but the accused, the father-in-law, was a handicapped person with one arm amputated, and the husband of the victim stated that he was at home and no such incident occurred.[24]

(z) it has also come in the evidence of the prosecution itself that nothing in the room of the prosecutrix, where the rape was allegedly committed, was found disturbed and everything was in order. This fact gives a lie to the statement of the prosecutrix, made in the course of cross-examination, that she had a scuffle with the accused before he committed rape on her. The absence of injuries on the person of the prosecutrix also belies her version that she had struggled and put up resistance to save her honour.[25]

(za) the testimony of the prosecutrix, a married woman, was that she had been raped but she did not raise any alarm to attract the attention of her brother-in-law and his wife, who were sleeping 20-25 feet away, she did not offer any resistance while having sexual intercourse with the accused and the knife, which the accused allegedly brandished to threaten the prosecutrix had not been recovered.[26]

(zb) the prosecutrix claimed that she was dragged and forcible rape was committed, however, in

evidence forcible sexual marks of assaults on sexual organs were not seen. The medical evidence was that there were no injuries on her private part as well the doctor opined that the sexual intercourse had not taken place much less whether it was in the nature of3178 forcible act of sexual assault. The chemical analyser's report did not support and corroborate the story brought by the prosecutrix.[27]

(zc) the prosecutrix stated that she was repeatedly subjected to rape 9 times during 3 days but her testimony was not corroborated by medical evidence. There was a long unexplained delay of six days in lodging the FIR and the absence of any bloodstain on the underwear of the prosecutrix.[28]

(zd) the medical opinion about absence of any injury, external or internal, on the virgin prosecutrix aged 13 years and the fact that the hymen was intact and the absence of any injuries on the penis of the accused clearly negatives the story of rape for half an hour to one hour by the accused, as narrated by her.[29]

(ze) the testimony of the prosecutrix that she offered stiff resistance to the accused and made efforts to scratch and bite them during the repeated rape thrice by each accused is rendered doubtful in view of the fact that no external injury was found on both the accused. The prosecutrix was alleged to have been gang raped thrice after being undressed completely yet no external injury or injury on her private parts was found by medical officer.[30]

(zf) neither any injury on her private part nor on her person was found by doctor in spite of her allegation that she was thrown on ground and her blouse was torn.[31]

(zg) the prosecutrix alleged that while she was grazing buffaloes the accused forcibly took her away, put off her clothes and committed rape. No injury was found either on her body or on her private parts. The doctor who examined the prosecutrix found her hymen intact and labia majora and labia minora in contact with each other and were not separated. It cannot be said that there was slight penetration. The version of the prosecutrix that there was complete sexual intercourse cannot be believed.[32]

MEDICAL EVIDENCE

86. Medical Evidence

Invariably in rape cases the court would lean very heavily in favour of the medical evidence before holding that the offence has been conclusively established.[33] The mere fact that the doctor after one year of examination of the accused stated during cross-examination that duration of injuries on the person of the accused was more than 48 hours, would not be accepted as a factor which would falsify the entire prosecution case because the duration of injuries has nowhere been recorded by the doctor in his certificate.[34]3179

It is always desirable that the accused and the prosecutrix, in a case of rape, should be medically examined as soon as possible.[35] If this is not done as quickly as possible, valuable evidence bearing on the guilt of the accused may be lost.[36] Extreme delay in informing the police and subjecting the prosecutrix to medical examination will obliterate evidence on her clothes as to the commission of the offence.[37]

When the prosecutrix had taken a bath and cleaned the clothes after the rape was committed, no sign of sexual intercourse would be found by the doctor examining her and no stains would be found on her wearing apparels.[38]

When rape is denied, one looks for corroboration of the offence in medical evidence showing injury to the private parts of the prosecutrix, injury to other parts of her body, which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused or on places where the offence is alleged to have been committed.[39] The fact that the victim of an alleged rape did not offer herself for medical examination, cannot weigh against her. It is the duty of the police officer, before whom she is

produced, to ask her if she is willing to submit to a medical examination in order to substantiate her charge.[40] It is also the duty of the prosecution to ensure medical examination of the accused within a period of time, when conclusive results can be achieved, so that the accused may not plead in defence that if such medical examination had been conducted of the vital, or material, parts of his body, that would have negatived penetration. Paramedical evidence cannot be disbelieved merely because the mother of the victim was working as maid-servant in the house of the doctor.[41]

87. Rape Victim--Statement under Section 161CrPC and Medical Examination

The victim of rape should generally be examined by a female doctor, and at the same time, she should be provided the help of a psychiatric. The medical report should be prepared expeditiously and the Doctor should examine the victim of rape thoroughly and give his/her opinion after looking at all possible angles *e.g.* an opinion regarding the age, taking into consideration the number of teeth, secondary sex characters, and radiological test, *etc*. The Investigating Officer must ensure that the victim of rape be handled carefully by a lady police official/officer, depending upon the availability of such official/officer. The victim should be sent for medical examination at the earliest and her statement should be recorded by the Investigating Officer in the presence of her family members making the victim comfortable, except in incest cases.[42]3180

88. Importance of Examination of Potency and Sterility of Accused

In the case of rape or sexual intercourse, examination of the accused by a doctor is also important to ascertain the physical capacity of the alleged rapist to commit the sexual intercourse. A person suffering from no incapacity whatsoever, may find it impossible to have intercourse. Therefore, in the case of rape, the examination of the accused and medical evidence conclusively establishes that the person is potent for all intents and purposes of committing sexual intercourse. As the police took no cognizance in this case, no such examination is made and thereby no evidence is on record. Besides this, in cases of rape where the child is delivered, the examination of the rapist is essential and important to ascertain whether a person can be sterile without being impotent and can perform the sexual act without being able to impregnate or get conceived. In this direction also, in such cases, the medical examination collecting the semen is necessary.[43]

89. Venereal Diseases

The prosecutrix and the accused should specifically be examined with a view to ascertain if they are infected with venereal diseases.[44] In *Emperor v Asadali* ,[45] it was held that the fact that the prosecutrix was not infected with gonorrhea from which the accused was suffering, was by no means, conclusive of the innocence of the accused. The communication of a venereal disease by one person to another is highly probable, but not certain.[46] Similarly, though gonorrhea, in a mild form, may be present in the girl, yet the absence of signs of gonococcus in the smears, pertaining to the accused, cannot establish his innocence.[47] Gonorrhea may exist even in young girls and infants as a result of infection, and without sexual intercourse.[48]

90. DNA Test is Clinching

DNA (Deoxyribonucleic acid) is found especially in cell nuclei which are the foundation of heredity. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA testing can make a virtually positive identification when the two samples match. It exonerates the innocent and helps to convict the guilty.[49]

91. Existence of Semen and Blood

It is well settled in law that absence of semen or spermatozoa is of no consequence and cannot negative the offence of rape.[50] The lack of semen stains on the clothes of the accused is natural when the accused was examined more than 23 days after the3181 incident.[51] The absence of any stains of semen on the

clothes of the prosecutrix or the accused is of no consequence when the clothes of the accused were seized and examined after four days of the occurrence.[52] It is immaterial that the doctor who examined the prosecutrix stated about the non- presence of blood stains on her vaginal part and on her clothes, when it was a categorical statement by the mother of the prosecutrix that she was given bath and her clothes were washed before taking her to the doctor.[53]

The existence of semen and blood is always a material piece of evidence in cases of rape.[54] In *State v Hiraman Punja Vidhate* ,[55] the Court observed:

> The mere absence of semen on the clothing of the girl or in the vaginal 'swab, or the request of the girl's father to the doctor to give antitetanus injection to her, did not mean that rape was not committed on the girl when the circumstances are that the girl made the complaint naming the accused, that her private parts did show that she had been raped, and that the clothing of the accused, at the time of the offence, had stains of blood and semen suggesting that the accused could be the offender.

However, in Re *Karichiappa Goundan*,[56] it was held that even the presence of semen in the woman's genitals, or on her *saree*, is by no means conclusive that she was raped, particularly when she was a married woman at the time of the offence.[57]

Similarly, the detection of semen on a piece of cloth, recovered from the house of the accused, and the *salwar*, alleged to have been worn by the prosecutrix, is a neutral circumstance, helping neither the accused nor the prosecutrix, where both the persons are married and the prosecutrix, a grown up woman, admittedly passed the night before making the first information report at her husband's house.[58] A stain of semen on the *langot* of a young man may exist because of a variety of reasons, not connecting him with the offence of rape.[59]

The blood and semen found on the clothes of the prosecutrix, and semen found on the *pyjama* of the accused are strong circumstances appearing against the accused.[60] When blood and semen stains are found on the petticoat of the prosecutrix and there was no possibility that the said stains were due to physical contact with her husband, since her husband had left the house the previous afternoon, the testimony of the prosecutrix was found truthful, and the accused were convicted.[61]

Likewise, the presence of blood in the vagina may be due to either local injuries or occurrence of bleeding at the usual interval in pregnant ladies right up to the sixth month of pregnancy.[62]3182

In *Pratap Misra v State of Orissa* ,[63] the Supreme Court held that for the accusation of rape to be absolutely false, on the ground that according to the medical evidence, if the prosecutrix, a pregnant lady, had been raped by three persons, one after the other, in quick succession, with force and violence, the abortion would have been immediate, and not after four or five days.

In the case of *State of Gujarat v Kishanbhai* ,[64] the Supreme Court held that absence of semen or blood from pubic hair of accused would *prima facie* exculpate him from offence of rape.

92. Existence of Spermatozoa

It is well settled in law that absence of spermatozoa is of no consequence and cannot negative the offence of rape.[65] The discovery of spermatozoa in the private parts of the victim is not imperative to establish penetration. There are several factors which may negative the presence of spermatozoa.[66]

The presence or absence of spermatozoa dead or alive would differ from person to person and its positive presence depends upon various circumstances. Otherwise also, the presence of spermatozoa is ascertained for the purpose of corroboration of the prosecutrix and hence, when the prosecutrix is believed, absence of spermatozoa loses its significance.[67] As per *Modi's Medical Jurisprudence and*

Toxicology,[68] it has been stated that presence of spermatozoa in the vagina after intercourse has been reported by Polock (1943) from 30 minutes to 17 days and by Morrison (1972) up to nine days in vagina and 12 days in cervix.[69]

In *RK Agarwal v State of Orissa* ,[70] the facts were that the girl was playing in broad day light, that she was carried away by the accused and brought back crying after some time, the FIR was made shortly thereafter, and the medical examination of the accused's genitals indicated the presence of spermatozoa and there were blood stains on clothing of the accused. The said circumstances were held to be sufficiently corroborative of the act of rape by the accused on the victim.

The mere finding of spermatozoa on a quilt, by itself, may not have much evidentiary value, but it is a strong piece of evidence, when taken with the evidence given by the girl that the accused had raped her on the quilt.[71]

When the doctor examined the victim within 15 hours of the occurrence and did not find spermatozoa on the vaginal smear, the innocence of the accused can be inferred.[72] However, when there is medical corroboration of the version of the prosecutrix as on her clothes the presence of human spermatozoa has been3183 established and vaginal smear and swelling was also found on her private parts, the performance of forcible sexual intercourse with her is established.[73] The presence of semen/human spermatozoa on the *salwar* of the prosecutrix is strong corroborative piece of evidence to the prosecutrix version even if it has not been established that the human spermatozoa is that of the accused.[74]

Spermatozoa can be found if the woman is examined within 12 hours after intercourse/thereafter they may be found between 48 and 72 hours but in dead form. If the prosecutrix washes herself by then, the spermatozoa may not be found. In that case the court after satisfying itself regarding the presence of semen on the clothes of the prosecutrix, held that the absence of semen or spermatozoa in the vaginal smear and slides, cannot cast doubt on the creditworthiness of the prosecutrix.[75]

Modi in his Medical Jurisprudence and Toxicology[76] has noted:

> The presence of spermatozoa in the vagina after intercourse has been reported by Polock (1943) from 30 minutes to 17 days and by Morrison (1972) 9 days in vagina and 12 days in the cervix. However, in the vagina of a dead woman, they persist for a longer period.

93. Sperm Detection Test

Where there was a categorical finding of the doctor that the hymen was found to have been ruptured, and the other prosecution witnesses also stated injury on her private parts and oozing of blood, and the medical evidence proved that the victim was raped before her death and died, the absence of a Sperm detection test was held not fatal. [77]

94. Examining the Hymen

It is evident that while examining the hymen, certain anatomical characteristics have to be remembered before assigning significance to the findings. It is also clear that the shape and texture of the hymen is variable. Sometimes, this variation permits penetration without injury because of peculiar shape of the orifice or increased elasticity. On the contrary, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt.[78] When the victim was a minor girl of 14 years age, and the doctor examined her, giving the opinion that there was no definite evidence of sexual intercourse and her hymen was intact, it would be highly doubtful whether the offence of rape was completed.[79]

95. Rupture of Hymen

In a case of girl of tender age, rupture of hymen, in the event of penetration, is not as a matter of rule. In cases where the hymen is deep seated, it may not rupture though there may be a penetration. In case of a forcible attempt to penetrate also, there are chances that the hymen of the victim may not rupture particularly when it3184 is deep seated. The presence of redness and inflammation over the vagina is at least a sign that either a complete penetration has taken place or a partial penetration has taken place or a forcible attempt to penetrate was made against the victim. Modi[80] opines that in small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum.[81] Where the hymen of the prosecutrix remained intact, it was held that, the offence under s 376, IPC against the accused was not proved beyond reasonable doubt.[82]

To constitute the offence of rape, the rupture of hymen is not necessary.[83]

The mere fact that hymen was intact, would not by itself negative the commission of rape by the accused as tearing of hymen would depend upon the extent of penetration and force used while committing sexual assault. The slightest penetration is sufficient for the commission of offence of rape and proof of rupture of hymen is unnecessary.[84]

Two Fingers Test

The fact of admission of two fingers and the hymen rupture does not give a clear indication that prosecutrix is habitual to sexual intercourse. The doctor has to opine as to whether the hymen stood ruptured much earlier or carried an old tear. The factum of admission of two fingers could be held adverse to the prosecutrix, as it would also depend upon the size of the fingers inserted. The doctor must give his clear opinion as to whether it was painful and bleeding on touch, for the reason that such condition obviously relates to the hymen.[85]

96. Absence of Hair, fresh Bleeding on Private Part of Prosecutrix

The absence of the matting of pubic hairs, foreign hair or fresh bleeding coupled with the absence of scratches on the prosecutrix's back and sperm, dead or alive, in her vaginal swab cannot outweigh the injuries appearing on her private parts as deposed by the medical witness and it cannot be said that the lacerated wounds on her private parts is the result of itching self-inflicted by the informant by her nail.[86]

97. Prosecutrix a Married Woman having Children -- Absence of Injuries

Where the prosecutrix is a married grown up lady, and blessed with two children, in such circumstances, the absence of injuries on her private parts is not of much significance. The mere fact that no injuries were found on the private parts of her3185 body cannot be a ground to hold that she was not subjected to any sexual assault, hence, the accused was convicted for offence under s 376, IPC .[87]

98. Existence of Smegma

It is well known in the medical world that the examination of smegma loses all importance 24 hours after sexual intercourse.[88]

The presence of smegma on the glans penis covered by the foreskin proves that the accused could not have had sexual intercourse at least during the last 24 hours.[89] However, the medical examination report of the accused indicating that no smegma was seen and he was capable of performing sexual intercourse supports the version of the prosecutrix.[90]

In *Modi's Jurisprudence and Toxicology*, it has been mentioned that the smegma accumulates on the

glans penis if no bath is taken for 24 hours. The presence of smegma on the glans penis is a strong circumstance against sexual intercourse especially where the prosecutrix is alleged to have been ravished thrice by each accused one by one at the same time. In a case of gang rape of this character, it was most unlikely that smegma would be present on the glans penis of the accused persons. It is true that to constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora or vulva with or without emission of semen is sufficient to constitute the offence of rape. However, in case where the prosecutrix is alleged to have been ravished by two young boys aged about 18 and 19 years repeatedly one by one, the presence of smegma on the glans penis of both the accused is a strong circumstance consistent with their innocence.[91] However, the presence of a negligible amount of smegma on the coronagrandis cannot disprove penetration.[92]

In *Medical Jurisprudence*[93], the learned authors have observed as under:

> **Presence of smegma--**In rape cases if the gland of male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration since it is rubbed off during the act. The smegma accumulates, if no bath is taken within 24 hours. In rape cases, the investigation must get the male organ of the alleged offender examined.[94]

However, when the accused aged 35 years committed rape on a girl of 5-6 years of age, there is no question of complete penetration of the accused's penis, therefore, by presence of smegma only on the dorsal side of the accused's glens, cannot completely rule out or negative the possibility of rape committed by him on the said girl.[95]3186

99. Ladies Bearing Child

Even if the prosecutrix is a married woman and is actually pregnant at the time of the alleged rape, medical evidence can help the prosecution.[1] When the doctor who had examined the prosecutrix has clearly stated that, no definite opinion could be gathered about any recent sexual intercourse. The doctor to a court's question replied that in the case of ladies bearing child if rape is committed on such ladies, the signs and injuries may not appear because vaginal walls of such ladies are dilated. The evidence of doctor does not rule out the possibility of commission of rape on prosecutrix, in such type of medical evidence, it is the only evidence of prosecutrix that has to be considered to find out the truth.[2]

100. Gang Rape--Medical Evidence not Supporting Prosecution

Where the prosecutrix was alleged to have been subjected to sexual intercourse by 5 persons, a perusal of the report of the doctor showed that there was no injury on any part of the body. There was no matting of pubic hair with discharge. There were no injuries or tenderness on genital areas, the hymen was ruptured and the old scars were present. No fresh scars or tenderness were found. There was no tenderness in vaginal organ or the cervical area. In the doctor's opinion there was no evidence of recent sexual intercourse and there was no sign of struggle. The prosecutrix was used to sexual intercourse. In her statement, the doctor has explained that in the case of sexual assault on a lady, if she is put under fear, there may or may not be injuries and if the concerned lady is habituated to sexual intercourse there may not be any injury. She, however, asserted that there was no evidence of recent sexual intercourse with the prosecutrix. It was held that the prosecution can derive no support from medical evidence.[3]

101. Delayed Medical Examination of Prosecutrix -- Absence of Injuries on her Private Parts Immaterial

In case of delayed medical examination of the prosecutrix, if the medical officer has not found injuries on her private parts, it would not affect the prosecution case. Where the prosecutrix was taken to doctor after

the expiry of one month and 14 days, the absence of injuries in medical examination on her private parts was held immaterial. [4]

102. Medical Examination of Victim--Refusal by Doctor

The refusal of some government hospital doctors, particularly in rural areas, where hospital are few and far between, the conduct of any medical examination of a rape victim unless the case of rape is referred to them by the police would not be proper. Such refusal to conduct the medical examination necessarily results in delay in the ultimate examination of the victim, by which time the evidence of the rape may have been washed away by the complainant herself or be otherwise lost. The state is expected to ensure that such a situation does not persist.[5]3187

103. Medical Examination of Prosecutrix Twice--Effect

Where it appeared from the record that the medical examination of the victim girl was authorised by the court and the question of her examination, twice by the medical officer was occasioned only due to the mentioning of a wrong name by the victim girl and for mentioning the wrong case number, there appeared overwhelming evidence as to what prompted the victim girl to suppress her real name at different stages, no illegality was found in the manner the victim girl was examined by the medical officer, particularly when the medical reports were not different and the medical officer was consistent in his cross-examination being unshaken to depose that features of forcible sexual intercourse of recent origin were there in the private parts of the victim girl.[6]

104. Manipulation in Medical Report by Doctor

When the doctor has been found to help the accused by making interpolations in the report, it cannot be said that the doctor has given an independent report.

Such interpolated reports cannot be acted upon to ascertain the age of the prosecutrix.[7]

It is expected that the members of the medical profession and particularly doctors who are working in public hospitals should grasp the seriousness and horrifying consequences of the offence of rape and other sexual assaults, and that they should act in a far more professional, responsible and considerate manner. The fact that such an incident took place is bad enough and the fact that because of this type of handling in the hospitals, the courts are forced to acquit the accused, is compounding injustice and it is high time that the medical profession realises the damage that it is doing, and acts in the manner which the law and the courts expect of them.[8]

It is found that time and again the medical evidence in almost every case of sexual assault on women is tampered with and that the doctors come out with evidence that can only be termed as 'pro accused'. It does not require much intelligence to see through these malpractices which clearly indicate that there is a very serious integrity problem at this level. One comes across instances where doctors have brazenly given evidence that has virtually sabotaged the prosecution case as has happened in this instance. The court should not close its eyes to this state of affairs and direct the government to immediately formulate adequate safeguards to ensure that there is a full stop to these illegalities.[9]

When the government doctor examining the victim gave a certificate of commission of rape on the victim, turned hostile during trial, and tried to protect the accused, the court took a serious view of the matter and recommended the concerned authorities to take appropriate disciplinary action against him after affording him a reasonable opportunity to show cause. The court took the serious view of the fact that where heinous offence of sexual assaults on minors take place, and the medical authorities which should be instrumental in assisting the administration of justice in bringing such persons to book, are found to join hands with the culprits and subvert the due process of law.[10]3188

105. Non Examination of Doctor and Non-production of Medical Report--Effect

The non-examination of the lady doctor is fatal to the prosecution case.[11] It is well settled that non-examination of doctor and non-production of medical report would not be fatal to the prosecution case if the evidence of prosecutrix and other witnesses is worthy of credence and inspire confidence.[12] But when there is no dispute as to the contents of the certificate produced before the learned trial court, it is not necessary to examine the doctor.[13] The non -examination of the doctor who examined the prosecutrix, and the non-production of the doctor's report is not fatal to prosecution if the evidence of the prosecutrix and other witnesses is reliable.[14] When the testimony of the prosecutrix of rape having been committed on her by the accused is truthful and reliable, the non-examination of the lady doctor and non-production of medical report pales into insignificance.[15]

106. Plea of Insanity

When on conducting enquiry under s 329, CrPC, the trial court found that the accused was fit to make his defence, and accordingly, the trial proceeded ahead, the material on record also did not show that the accused was suffering from unsoundness of mind and that too of a nature which would have rendered him incapable of knowing the nature of the act which he was doing or incapable of distinguishing between wrong or right as per law, the plea of insanity would not be tenable.[16]

BENEFIT OF DOUBT AND ACQUITTAL

107. Principle of benefit of doubt and Conscience of the Court

The conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must commensurate with the nature of the offence to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice, according to law.[17]

108. Benefit of Doubt

When it is proved that rape was committed by 'some one' on the prosecutrix, but there is no evidence connecting the accused with the commission of the crime, the3189 benefit of doubt should go to the accused.[18] In *Gaya Rout v State* ,[19]it was alleged that the act of rape continued for a long time and throughout that time the prosecutrix who was a girl of 11-12 years, struggled her best to get up from the ground where she was made to lie down, but her evidence to that effect was not corroborated by anything on record. No injury was found on her body during medical examination. It was observed that it sounds improbable how a girl of 11-12 years was forcibly raped by the accused at a rough and rugged place near the railway lines for a long time and all that time she was struggling hard to extricate herself from the clutches of the accused, yet she did not sustain any injury, indicating such struggle on her back, buttocks and other parts of her body. In these circumstances, the accused was given the benefit of the doubt. In *Surat Singh v State of Madhya Pradesh* ,[20] there was a sole evidence of the prosecutrix, a girl of 8 or 9 years, the other witnesses having turned hostile. The medical evidence only partly supported the prosecution version and the police report was lodged after a week of the occurrence. In these circumstances, it was observed that all that can be said is that there is a strong degree of suspicion, but it cannot be said that the guilt has been proved to the hilt and, therefore, the benefit of the doubt should go the accused. Where direct evidence as to the commission of the crime is untrustworthy and neither the absence of semen and blood the existence of which is always a material piece of evidence in cases of rape, nor the delay in making the first information report is satisfactorily explained and there is enmity between the accused's family and the prosecutrix's family, it is not possible to affirmatively hold that the accused raped the girl and the accused is entitled to the benefit of reasonable doubt as to his guilt.[21] No inference, adverse to the accused, can be drawn from the fact that the alleged victim of rape by him was

very much ashamed and even committed suicide owing to the shame brought on her.[22] If there is no acceptable evidence to the effect that the prosecutrix was subjected to sexual intercourse and the statement of the prosecutrix does not find corroboration from the evidence on record, the accused cannot be convicted under s 376, IPC .[23] Commentary under the heading. When prosecutrix should not be believed Instances' in this section, may be referred to.

The prosecution case was that on the day of the incident at about 3 PM when the prosecutrix aged about 18 years had gone to fetch water, the accused called her inside his house on the false pretext that her father was inside his house and thereafter he raped her. As per the evidence of the doctor, there was no injury on the body of the prosecutrix and there was no sign of semen on the private parts of the girl's body. Neither her clothes were torn nor was there any presence of hair of the accused on the private part of the prosecutrix. The doctor after examining the prosecutrix deposed that the girl was habituated to sexual intercourse and it was held that the accused charged under ss 376 and 511, IPC was entitled to benefit of doubt, and as such, was acquitted.[24]3190

109. Accused Acquitted -- Illustrative Cases

The accused was prosecuted on allegations that he confined the prosecutrix in a room and committed rape on her, however, the prosecutrix gave a totally different version in her cross-examination, which rendered the prosecution case doubtful and the medical evidence adduced in the case did not corroborate the case of rape, therefore, the accused was acquitted of the rape charge.[25]

Where the rape was alleged to have been committed by the side of a busy and electrified road, and curiously enough, the cries of the prosecutrix did not attract any passerby, further, there were material contradictions in oral evidence and medical evidence, it was found that the testimony of the prosecutrix did not inspire confidence and hence the accused was acquitted of charge under s 376, IPC .[26] The evidence of the prosecutrix, aged more than 18 years as to the time of the commission of the offence, was contradictory. Her shout for help was not supported by the landlord of the premises where the rape was alleged to have been committed and no other evidence was adduced to prove the charge of rape, it was held that the acquittal was proper.[27]

The accused constable was alleged to have committed rape on a child when the latter was playing on his terrace, however, the parents of the girl and the medical evidence did not support the prosecution story. The child eye-witnesses examined in the case were in the custody of the police before they were examined in court, hence their evidence was found not reliable. The accused was acquitted of the charge under s 376, IPC .[28] The prosecution case was that the accused abducted the prosecutrix, took her to a bus stand and gang rape was committed. It was alleged that since the bus stand is a busy place, and the prosecutrix did not cry for help, further, that in the medical examination the doctor did not find any injuries on her person, the prosecution and the charge under s 376, IPC was not proved.[29]

The prosecutrix aged 17 years and 2 months knew the accused from before. They were having some relationship for last one year, which was objected to by the parents of the prosecutrix. The accused was visiting the house of the prosecutrix and letters and calls were being exchanged between them. Further, the victim was not opposed to marry the accused, but it was only that her parents were objecting to the same and she was dressed like a bride at the time of recovery. The prosecutrix did not submit but in fact consented and voluntarily went with the accused and stayed with him for more than ten days, though her relationship with the accused was not palatable to her parents who reported the matter to police. It is not a case where she was under any psychological pressure, inducement or allurement of any nature. The possibility of the prosecutrix having consented to the rape could not be ruled out, hence the accused was acquitted of the charge under ss 366 and 376, IPC .[30]

The prosecutrix was a major and she along with the accused lived in a rented house for a period of sixty eight days from the date of alleged abduction, she did not raise3191 an alarm or protest during this long period, therefore, the prosecutrix was held a consenting party and the conviction of the accused under ss 366 and 376, IPC was set aside.[31]

In a case, the prosecution story was that the accused, a friend of the brother of the prosecutrix, forcibly committed rape against her will at 8.30 a.m. in daylight near a public road. The prosecutrix had previous acquaintance with the accused or else in all probability she would have resisted forcefully, attracting passersby or people from the neighbourhood. She had stated that she was threatened and made to believe that the accused would marry her, later she became pregnant and delivered a child, and the paternity of the child was disputed by the accused. An FIR was lodged after a period of 10 months from the date of incident, the prosecutrix version was found doubtful, and conviction of the accused appellant under s 376, IPC recorded by courts below, was set aside.[32] The prosecution case as testified by the prosecutrix was that when she was pursuing a computer course during the year 2007-2008, the accused was running a bakery shop nearby, and developed intimacy with the prosecutrix. The prosecutrix called the accused to the fields near her house, and on one evening they had sexual relations which continued for two years. The prosecutrix became pregnant, which was aborted, and when requested, the accused refused to marry the girl. Accordingly, the medical evidence did not support the case of the prosecutrix except that the prosecutrix was found habitual to sexual intercourse and there was paucity of evidence to show that the accused administered medicine which caused abortion, therefore, the accused was acquitted of the charge under s 376, IPC .[33]

The two accused at 1.30 a.m. at night were alleged to have entered in the house of the prosecutrix and committed rape on her, one after the other. The eye-witnesses, the nephew and niece of the prosecutrix denied the events narrated in the complaint. The testimony of the prosecutrix did not find corroboration from the averments made in the complaint. Intercourse was alleged to be forcible by the prosecutrix, but no injury was found on the prosecutrix in the medical examination. The accused were acquitted of the charge under s 376(2)(g), IPC .[34]

When the prosecutrix went to the house of the accused class-mate to fetch her book, she was alleged to have been raped by the accused. The FIR was delayed by 11 days, but the delay was not explained. The doctor and the Investigating Officer were not examined in the case. The prosecutrix and the accused were class-mates, were acquaintances, and were in terms of meeting with each other. The prosecution story was held doubtful and the conviction of the accused under s 376, IPC was set aside.[35] In the instant case, there was no evidence that act of rape was committed by the accused on the prosecutrix against her consent or will or after promise for marriage. The prosecutrix remained in the company of the accused and moved from3192 one village to another and from one town to another town for about one month and did not complain anything against the appellant to anybody. She nowhere stated that she submitted herself because of the promise made by the accused to marry her and she was having full belief and faith upon the accused that he will marry her. It was held that, it could not be said that the consent of the prosecutrix was obtained on misconception of fact and the accused was acquitted of the charge under s 376, IPC .[36].

An FIR was lodged after about by 48 hours of the incident, the doctor who conducted the examination of the prosecutrix found no injury on her genitalia and deposed that there was no evidence to show that she had been raped as the tear in her hymen was an old one. The prosecutrix also stated that at the time of her medical examination her vagina had been stitched. The doctor found no stitch on her and the accused was acquitted of the charge under s 376, IPC .[37]The accused had sexual intercourse with the prosecutrix by giving false assurance to her that he would marry her and after she got pregnant, he refused to do so. From this, it was evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her, which act of the accused falls squarely under the definition of rape as he had sexual intercourse with her consent which was obtained under a misconception of fact as defined under s 90 of the IPC, hence, the accused was convicted under s 376, IPC .[38] The evidence brought on record showed that the prosecutrix and the accused led marital life as married couple and there was intercourse with her by him. The prosecutrix herself fell in love with the accused and she went to the extent of threatening him that if he were not to love and would not marry her, she would die. Therefore, it was clear that she wanted to marry him at any cost, even without the consent of her parents. Since her parents were thinking of giving her in marriage to some other person, she communicated the same to the accused and compelled him to take her from her house and to marry her. The prosecutrix was a willing and consenting party. The testimony of the prosecutrix was not found reliable, the accused was thus acquitted of the charge under s 376, IPC .[39]

The prosecutrix in statement before the Court deposed that she was raped by the accused, but in statement under s 161, CrPC she had not attributed rape to the accused, therefore the accused was acquitted of the charge under s 376, IPC .[40]

Rape on Elderly Woman--Prosecution Story Improbable--Accused Acquitted

The accused, a young man was alleged to have entered the house of the prosecutrix an elderly woman, and inflicted injuries on her. The prosecutrix was alleged to have snatched a weapon from the accused and inflicted injuries on the accused. The accused had sustained serious injuries including a grievous one and the son of the prosecutrix and a relative who had reached the place of incidence, were both declared hostile and did not support the prosecutrix, even her husband who had accompanied her to the police station to lodge the report did not come into the witness box and the doctor was also unable to confirm the factum of rape. The prosecution story was3193 found improbable, and accused appellant was acquitted of the charge under s 376, IPC .[41]

In the FIR, it was stated by the prosecutrix that the accused raped her thrice, but in statement before the Court she deposed that she was raped twice. In medical examination no injury was found on her private parts and she had enough opportunity to get down from the tractor carrying her which passed through several villages. Her testimony was full of material contradictions such that the conviction of the accused under s 376, IPC was not sustainable, and was set aside.[42] Where the prosecution case was that the accused kidnapped a 12 years old girl, raped her, committed her murder and threw her dead body in the bushes, but the evidence of the last seen was found not reliable, and the identity of the accused was not fully established, the accused was not convicted of offences under ss 363, 376, 302 and 201, IPC .[43]

The accused was prosecuted on allegations that he threatened the prosecutrix, promised to marry her and thereafter committed rape on her. The prosecutrix was a major and knew that the accused was already married and so the accused could not marry her. She also became pregnant. The Court held that the consent of the prosecutrix was not under misconception of fact and the acquittal of the accused on charges under ss 376 and 417, IPC recorded by Court below was held to be proper.[44]

The only evidence against the accused was that he provided space and cot and helped in detaining the prosecutrix. The evidence was lacking to show that the accused knew about the kidnapping and commission of rape by the co-accused on the prosecutrix. The accused was acquitted of the charge under s 376(2)(g), IPC, though convicted under s 368, IPC .[45]

The accused and co-accused at 10 p.m. in the night, were alleged to have entered the house of the prosecutrix, and at the point of knife committed rape on the prosecutrix and ran away. The FIR was filed next day and admittedly there was enmity between the accused and the husband of the prosecutrix. The prosecutrix did not support the case against the co-accused, and hence he was acquitted by the trial Court. The testimony of the prosecutrix was full of material contradictions and was not supported by medical evidence. At a later stage, the prosecutrix filed an affidavit, whereby she exonerated the accused. The circumstances of the case taken as a whole created a doubt about the prosecution case and the accused was also acquitted of the charge under s 376, IPC .[46]

110. Accused Acquitted under Section 376 cannot be Convicted under Section 306

Where a careful reading of the material available on record would go to show that virtually on the same set of facts and basing on the same evidence, the trial in the case was conducted which had resulted in an acquittal for the offence of rape, the3194 only additional factor in the trial appears to be the dying declaration of the prosecutrix. On the strength of this additional factor, the trial court was found not justified in recording conviction under s 306, IPC especially, in the light of the fact that the charges in relation to both the offences had been founded on the same set of facts.[47]

111. Effect of Acquittal of Same Accused on Conviction of Others

The legal position is and reasonably well settled that merely because the co-accused have been acquitted and *prima facie* if the acquittal of the co-accused is bad and no appeal has been filed against the judgment of acquittal by the state, that by itself will not be ground of acquittal of the accused, who has been convicted, if there is evidence on record establishing the guilt of such accused beyond any reasonable doubt. Therefore, merely because the three accused persons have been acquitted by the trial court on almost identical evidence and the state has not chosen to file an appeal against the judgment of acquittal, if on the basis of the available evidence on record, the conviction of the accused/appellant could be sustained, the present accused/appellant cannot derive any advantage. What is, therefore, required to be seen is whether there is sufficient evidence on record to being home the guilt of the accused for the offence punishable under s 376(g), IPC .[48]

CONVICTION

112. Conviction

The statement of the prosecutrix corroborated by medical and circumstantial evidence on record, is sufficient to hold the accused guilty under s 376, IPC .[49] Where the accused who was running a photo studio committed rape on a seven years old, disposed of her dead body in a carton he was convicted under ss 201, 302 and 376, IPC .[50] Where there was evidence of a teacher, an independent and responsible witness who deposed that he had seen the accused and the deceased girl aged about 10 years going towards the orchard field and the dead body of the deceased victim recovered from the orchard field, the evidence of last seen was found reliable and the accused could not explain the injuries/scratches found on his face. Here, the accused was convicted for offence under ss 302 and 376, IPC .[51]

On the day of the incident, at about 12 noon, the accused criminally intimidated the prosecutrix, a married lady aged 22 years, and committed rape on her. The prosecutrix along with her husband was residing in the house of the accused and an FIR was filed by the husband of the prosecutrix. The delay in filing the FIR was found immaterial and the statement of the prosecutrix being straightforward was believed. A plea of false implication was not accepted and a conviction of the accused for offence under s 376, IPC was held proper.[52] There was reliable evidence of the prosecutrix that the accused entered the house of the prosecutrix during night hours and raped her. The brother, mother of the prosecutrix and other witnesses supported her version. The prosecutrix3195 was a mother of three children, her medical examination was held after several days, and as such, it did not corroborate her version, which was held immaterial, and the accused was convicted for offence under s 376, IPC .[53]

The accused was prosecuted on allegations that the accused conductor kidnapped the victim girl and raped her in a bus. The medical evidence did not show that sexual intercourse was committed, however the evidence showed that attempt was made by the accused to commit rape. The accused was convicted for attempt to commit rape under ss 376 / 511 and 366, IPC .[54]

The accused kidnapped a girl aged about 18 years, and took her to a lonely place and committed rape on her. The accused was convicted under ss 366 and 376, IPC .[55] The school leaving certificate and school register produced before the Court showed that the age of the victim was 14 years on the date of the commission of the offence, and there was also evidence of the Head Master of the School. There was no material before the High Court to ignore the said evidence and conclude that the entry in the school registers cannot be taken to be above the suspicion. The acquittal of the accused was set aside and the accused was convicted for offences under ss 366 and 376, IPC .[56] There was clear evidence of the prosecutrix that the accused truck driver committed rape on her and she also correctly identified the accused in test identification parade. The accused was not known to the prosecutrix from before, therefore, omission of the name of the accused in FIR, was immaterial. The conviction of the accused under s 376, IPC was sustained.[57]

The prosecutrix had gone in the field to bring green grass and after collecting the green grass she was on her way back to her home. The accused came to her and proposed for sexual intercourse. The victim protested and told that she will inform her mother in respect thereof. The accused felled her on the ground and removed her undergarment and ravished her. She was crying in pain and at this, the accused stuffed her mouth with clothes. The genitals of the accused had penetrated in her genitals which gave immense pain to her and, thereafter, the accused left her. She saw blood oozing from her private parts which had besmeared her undergarment. After the return from the said field, she narrated the incident to the brothers and their wives. The medical officer who had medically examined the prosecutrix had found superficial laceration present over perineum just at the bottom of Labia Majora and Labia Minora. She further deposed that the hymen membrane of the victim was found torn and there was fresh bleeding from slight touch and she has also found that her vaginal orifice admits one finger with difficulty. Therefore it was held that the charge under s 376, IPC was proved and the accused was convicted under s 376, IPC . The plea of the accused that the offence, if any, was under s 354, IPC was rejected.[58]3196

The prosecution story was that the accused committed rape on a minor girl aged 6 years and committed her murder. There was reliable evidence of the eye-witnesses that the accused was carrying the deceased girl on cycle and the dead body of the deceased was recovered next day from the sugar cane field. The evidence of their last seen together was found reliable and the omission of the name of the accused in FIR was explained. The accused was convicted under ss 376 and 302, IPC .[59]

When the statement of the prosecutrix is corroborated by medical evidence and evidence of other witnesses, the accused is liable to be convicted.[60]

Where three accused persons entered the house of the victim forcibly, lifted her, carried her to the shop of one accused and committed rape on her, the testimony of the prosecutrix was found reliable and the accused were convicted under ss 366 / 457 and 376 / 34, IPC .[61]

There was reliable evidence adduced by the prosecution that when the prosecutrix was returning after watching a movie, the accused took the victim about aged 12 years in an auto rickshaw and raped her. The statement of the victim girl was corroborated by medical report and FIR. It was immaterial that the hymen of the victim girl was found intact, and the conviction of the accused concurrently recorded by the Courts below was held proper.[62]

The statement of the prosecutrix that the accused, abducted her and committed rape on her was found in line with the averments made in the complaint. The prosecution established that the prosecutrix stayed with the accused in a lodge. The accused appellant was convicted for offences under ss 366 / 34 and 376 / 34, IPC .[63] Four accused entered the courtyard of the prosecutrix's house at about 11 p.m., and on the point of pistol, took her to the house in another village and committed rape on her. The FIR was lodged next day and the testimony of the prosecutrix and her mother was found reliable and believed. The plea of false implication had no substance and as such, was rejected. The conviction of all the accused under ss 366 and 376 IPC was held proper.[64] There was evidence of the villagers, that they asked the accused to marry the prosecutrix as he was having a physical relationship with her. When the accused refused, an FIR was filed and prosecution of the accused was launched. As long as commitment of marriage subsisted, the relationship between the parties could not be described as constituting the offence of rape under s 376 of the IPC . It is only after the accused declined to marry the prosecutrix that a different dimension came to be attached to the physical relationship, which had legitimately continued over the past six months. Things changed when the accused declined to marry the prosecutrix. After the promised alliance was declined, the prosecutrix without any delay, disclosed the entire episode to her immediate family, and the FIR was filed and the3197 prosecution launched. The conviction of the accused for offence under s 375, IPC was held proper.[65]The accused, brother-in-law of the prosecutrix, entered the victim's room during night, and committed rape on her. The statement of the prosecutrix was corroborated by oral evidence of the victim's younger sister, and the bite marks and the bruises found on the person of the victim in medical examination. Her hymen was found ruptured, the delay in filing the FIR was explained and the conviction of the accused on the charge of rape was held proper.[66] The evidence of the prosecutrix and other PWS to whom the prosecutrix informed immediately after the incident proved that

the accused committed rape on the complainant at knife point. In medical examination, the hymen of the prosecutrix was found torn and ruptured. The broken bangles were also recovered from the place of occurrence at the instance of the prosecutrix. The conviction of the accused under ss 376 and 511, Pt II was upheld.[67]

When the prosecutrix was studying in class VII, the accused had developed his physical relationship with her and when she was in class IX, she gave birth to the baby. The School Transfer Certificate proved that the prosecutrix, when she was in class VII, she was 12 years old. The testimony of the prosecutrix (PW2) was found reliable, thus, conviction of the accused for offence under s 376, IPC, with sentence of 7 years rigorous imprisonment and fine of Rs. 5000/- was found proper.[68] The testimony of the prosecutrix proved that the accused appellant committed rape on the prosecutrix, and her testimony was corroborated by the evidence of other eye-witnesses and the medical evidence. The victim had no control over the investigating agency and the negligence, if any, *e.g.* negligence of the investigating officer to send the blood stained clothes of the prosecutrix for chemical examination, would not affect the credibility of the statement of the victim. The accused appellant was convicted under s 376, IPC .[69]

The prosecution case was that the appellant accused committed rape on a pregnant woman while she was collecting cow dung cake in forest. The mere fact that semen stains were not found on the clothes of the prosecutrix was held immaterial as the clothes were seized and examined four days after the occurrence. There was no motive for false implication and minor inconsistencies and discrepancies in the testimony of the eye-witnesses were held of no consequence. The plea of the appellant accused that since the prosecutrix, a pregnant lady, did not abort hence she was a consenting party, in the presence of the statement of the prosecutrix was rejected. Therefore, the appellant accused was convicted under s 376, IPC .[70]

The charge against the accused appellant was that he committed rape on his own daughter. The testimony of the daughter victim of rape against her own father was found reliable as she had no reason to falsely implicate her father. The delay of one3198 week in filing FIR was held not fatal and conviction of the accused under s 376, IPC was upheld. [71]

113. Father Raping his own Daughter--Conviction Proper

Where there was evidence of the victim daughter and her mother that the accused father committed rape on the daughter, and their testimony was corroborated by medical evidence, the accused was convicted under s 376, IPC . [72]

114. Conviction of Accused and his Conspirator Wife

Where the co-accused wife of the accused took the prosecutrix, a minor girl to her house and closed the door from outside and thereafter the accused committed rape on the prosecutrix, there was convincing evidence of the prosecution that the co-accused entered into conspiracy with her husband, which cannot be discarded only on reasoning that a wife will not help her husband in commission of rape on a girl. The conviction of the accused under s 376 and the co-accused under s 376 read with s 120-B was found proper.[73]

7 *State of Punjab v Gurmit Singh and Ors* 1996 Cr LJ 1728 (SC) .

8 *Bandu v State of Maharashtra and Anor* 1996 Cr LJ 285 (Bom) .

9 *State of Uttar Pradesh v Pappu* 2005 Cr LJ 331 (SC) .

10 *Labh Singh v Emperor* 24 Cr LJ 877, AIR 1923 Lah 291, p. 292 .

11 *Bhagwat Prakash v State* 1956 Cr LJ 4, AIR 1956 All 22 .

12 *Rajendra Patel v State of Orissa* 2013 (2) Crimes 331 (Ori) .

13 *Munna v State of MP* (2014) 10 SCC 254, (2014) 143 AIC 99 (SC) ; *Bharwada Bhoginbai Hirjibhai v State of Gujarat* 1983 SCC (Cri) 728, (1983) 3 SCC 217 ; *State of Maharashtra v Chandraqprakash Kewalchand Jain* (1990) 1 SCC 550, 1990 SCC (Cri) 210 ; *State of Punjab v Gurmit Singh* (1996) 2 SCC 384 .

14 *Hari Har v Emperor* 36 Cr LJ 1095, AIR 1935 All 590, p 592 .

15 Re *Karichiappa Goundan* 43 Cr LJ 576, AIR 1942 Mad 285, p 286 ; *State of Rajasthan v Jaya* (1985) 1 Crimes 313 .

16 *Abbas Ahmad Choundhary v State of Assam* 2010 Cr LJ 2060, p 2061 (SC), 2010 AIR SCW 1917 .

17 *Emperor v Panna Lal* 25 Cr LJ 981, AIR 1924 All 411, p 412 .

18 *State of Himachal Pradesh v Asha Ram* 2006 Cr LJ 139, p 141, AIR 2006 SC 381 .

19 *Moti Lal v State of MP* 2008 Cr LJ 3543, p 3545, 3546 (SC), 2008 (10) Scale 81, (2008) 3 SCC (Cri) 950, 2008 AIR SCW 4846 . (Conviction of the accused appellant on the charge of rape on the testimony of the prosecutrix was held proper); *Ram Krishna v State* 2008 AIR SCW 8201 .

20 *Rameshwar v Stae of Rajasthan* AIR 1952 SC 54, 1952 Cr LJ 547 ; *Wahid Khan v State of Madhya Pradesh* 2010 Cr LJ 517, p 519 (SC), AIR 2010 SC 1, (2010) 2 SCC 9, 2009 (14) Scale 220 .

21 *Rameshwar v State of Rajasthan* 1952 Cr LJ 547, AIR 1952 SC 54 (girl, eight years of age, raped).

22 *Rameshwar v State of Rajasthan* 1952 Cr LJ 547, AIR 1952 SC 54 .

23 *Ghulam Hussain v Emperor* 32 Cr LJ 63, AIR 1930 Lah 337 (child age about six years).

24 *Lalaram Hari Ram v State of Madhya Pradesh* 1960 Cr LJ 237, AIR 1960 MP 59 ; *Mohamed Sugal Esa v King* AIR 1946 PC 3, p 5 .

25 *State of Rajasthan v Gaharoo* 2001 Cr LJ 3672 (Raj) .

26 *Rameshwar v State of Rajasthan* 1952 Cr LJ 547, AIR 1952 SC 54 (raped girl aged eight years).

27 *Soosalal Bania v Emperor* AIR 1925 Nag 74 ; *Ghanashyam Misra v State* AIR 1957 Ori 78, p 80, 1957 Cr LJ 469 .

28 *Bishram v Emperor* 46 Cr LJ 371, AIR 1944 Nag 363, p 364 .

29 *Gangaram Nanhoosingh v Crown* AIR 1950 Nag 9, 51 Cr LJ 244 .

30 Re *Boya Chinnappa*AIR 1951 Mad 760, 52 Cr LJ 718 .

31 *Nathu v State* 52 Cr LJ 584, AIR 1951 Ajmer 60, p 61 .

32 *Mohamed Sugal Esa v King* 1946 ALJ 100, AIR 1946 PC 3, p 6 ; *Rameshwar v State of Rajasthan* 1952 Cr LJ 547, AIR 1952 SC 54 .

33 *Gurcharan Singh v State of Haryana* 1973 Cr LJ 179, p 183, AIR 1972 SC 2661 ; *Rameshwar v State of Rajasthan* AIR 1952 SC 54, p 57 ; *Sidheswar Ganguly v State of West Bengal* AIR 1958 SC 143, p 147, 1958 Cr LJ 273 ; *Satendra Kumar Singh Kushwaha v State of Bihar* 2003 Cr LJ 392 (Pat) ; *State of Maharashtra v Chandraprakash Kewalchand Jain* AIR 1990 SC 658, 1990 Cr LJ 889 (SC) .

34 *Gurcharan Singh v State of Haryana* 1973 Cr LJ 179, p 183, AIR 1972 SC 2661 ; *Sitaram v State of Maharashtra* 1974 Cr LJ 82, p 84, 1973 Mah LJ 572 ; *State v Balakrishna Mahanto* 31 Cut LT 1044, p 1046 ; *Gurdial Singh v State of Punjab* 1980 Chand LR 108, p 111-12 ; *Rafiq v State* (1980) 4 SCC 262, p 265, 1980 SCC 947 (Cr) ; *Joginder Singh v State of Haryana* (1973) 75 PLR 466, 1973 Cur LJ 291 ; *Rameshwar v State of Rajasthan* AIR 1952 SC 54, p 57, 1952 Cr LJ 547 ; *State of Madhya Pradesh v Surendra Prasad Dave* 1969 Jab LJ 992, p 1002-03 ; *State of Orissa v Chandiprasad Joshi* 34 Cut LT 1273 ; *Satoakalias Satnam Singh v State of Rajasthan* 2001 Cr LJ 564 (Raj) ; *Vijay v State of MP* (2010) 8 SCC 191, (2010) 3 SCC (Cri) 639 ; *Wahid Khan v State of MP* (2010) 2 SCC 9, (2010) 1 SCC (Cri) 1208 .

35 *Satendra Kumar Kushwaha v State of Bihar* 2003 Cr LJ 392 (Pat) .

36 *Radhu v State of Madhya Pradesh* 2007 Cr LJ 4704, p 4705 (SC), 2007 (11) Scale 96, 2007 (6) Scale 196 .

37 *Narender Kumar v State (NCT of Delhi)* 2012 Cr LJ 3033, p 3039, AIR 2012 SC 2281, (2012) 7 SCC 171, 2012 (5) Scale 657 ; *Vimal Suresh Kamble v Chaluverapinake Apal SP* AIR 2003 SC 818, 2003 AIR SCW 253 ; *Vishnu v State of Maharashtra* AIR 2006 SC 508, 2005 AIR SCW 6149 .

38 *Ganga Singh v State of Madhya Pradesh* AIR 2013 SC 3008, 2013 Cr LJ 3966 (Conviction recorded) .

39 *State of UP v Munshi* 2009 Cr LJ 393, p 394 (SC), (2008) 9 SCC 3890, 2008 AIR SCW 7415 .

40 *Vijay @ Chinee v State of Madhya Pradesh* (2010) 8 SCC 191 ; *State of Rajasthan v Babu Meena* 2013 (2) Scale 479 ; *State of Haryana v Basti Ram* 2013 (2) Crimes 154 (SC) .

41 *Bharoada Bhoginbai Hirjibha v State of Gujarat* AIR 1983 SC 753, 1983 Cr LJ 1096 (SC) .

42 *State of Rajasthan v Biram Lal* 2005 Cr LJ 2561 (SC), AIR 2005 SC 2327, 2006 SCC (Cri) 78 .

43 *State of Tamil Nadu v Ravi* 2006 Cr LJ 3305, p 3308, 3309 (SC), AIR 2006 SC 2568, 2006 (6) Scale 441 .

44 *Badal Murmu v State of WB* AIR 2014 SC 1150, (2014) 3 SCC 366, (2014) 135 AIC 81 (SC) ; **See also***Thammu Pandurang Rao v State of AP* (2014) 6 SCC (Cri) 459 (Injuries caused by bamboo stick in stomach near naval, accused convicted under s 304, Pt II, instead of s 304, Pt I).

45 *Wahid Khan v State of Madhya Pradesh* 2010 Cr LJ 517, p 520 (SC), AIR 2010 SC 1, (2010) 2 SCC 9, 2009 (14) Scale 220 .

46 *State of Maharashtra v Chandra Prakash Kewalchand Jain* AIR 1990 SC 658, 1990 Cr LJ 889 (SC) ; *State of Himachal Pradesh v Lekh Raj v State of Maharashtra and Anor* 2000 Cr LJ 44 (SC) .

47 *State of Punjab v Gurmeet* (1996) 2 SCC 384, 1996 Cr LJ 1728 (SC) .

48 *State of Punjab v Gurmeet* (1996) 2 SCC 384, 1996 Cr LJ 1728 (SC) .

49 *F Nataraja v State* 2010 Cr LJ 2180 (Kant) .

50 *Motiram Krishnmao v State of Madhya Pradesh* 1955 Cr LJ 819, AIR 1955 Nag 121, 124 ; *Kishanlal v State of Haryana* (1980) 3 SCC 159, AIR 1980 SC 1252 ; *Narayana Dutta v State* 1980 Cr LJ 264, p 265 (Cal) (DB) ; *Gurdial Singh v State of Punjab* 1980 Chand LR 108, p 111-12 ; *Satendra Kumar Singh Kushwaha v State of Bihar* 2003 Cr LJ 392 (Pat) .

51 *Jaganu Sahu v State of Chhattisgarh* 2013 (2) Crimes 424 (Chh) .

52 *Jogi Dan v State of Rajasthan* 2004 Cr LJ 1726 (Raj) .

53 *Chandan and Ors v State of Bihar* 2007 Cr LJ 1062 (Jhar) .

54 *Moti Chand v State of Rajasthan* 2001 Cr LJ 1916 (Raj) .

55 *Rameshwar Kalyan Singh v State of Rajasthan* AIR 1952 SC 54, 1952 Cr LJ 547 (SC) ; *Ram Murti v State of Haryana* AIR 1970 SC 1020, 1970 Cr LJ 991 (SC) ; *Gurcharan Singh v State of Haryana* AIR 1972 SC 2661, 1973 Cr LJ 179 (SC) ; *RK Aggarwal v State of Orissa* AIR 1976 SC 1774, 1976 Cr LJ 1376 (SC) ; *Rajique v State of Uttar Pradesh* AIR 1981 SC 559, 1980 Cr LJ 1344 (SC) ; *Sheikh Zakir v State of Bihar* AIR 1983 SC 911, 1983 Cr LJ 1285 (SC) ; *State of Maharashtra v Chandra Prakash Kewal Chand Jain* AIR 1990 SC 658, 1990 Cr LJ 889 ; *Kamel Singh v State of Madhya Pradesh* AIR 1995 SC 2472, 1995 Cr LJ 4173 (SC) ; *State of Punjab v Gurmeet Singh* AIR 1996 SC 1393 .

56 *State of Maharashtra v Chandraprakash Kewalchand Jain* AIR 1990 SC 658, 1990 Cr LJ 889 (SC) .

57 *State of Orissa v Thakara Berra and Anor* 2002 Cr LJ 2642 (SC) .

58 *Nathu v State* 52 Cr LJ 584, AIR 1951 Ajmer 60, p 61 .

59 *Vishnu and Ors v State of Maharashtra* 1997 Cr LJ 1724 (Bom) .

60 *Zamir Ahmed v State* 1996 Cr LJ 2354 (Del) .

61 *Narayan v State of Madhya Pradesh* 2003 Cr LJ 268 (MP) .

62 *Madan Chettri v State of Sikkim* 2002 Cr LJ 3149 (Sikkim) (DB) .

63 *State of Karnataka v Narayanamurthy* 1998 Cr LJ 2481 (Kant) (DB) .

64 *State of Karnataka v SV Narayanamurthy* 1998 Cr LJ 2481 (Kant) (DB) .

65 *Baldhari Ohdar v State of Bihar* 2001 Cr LJ 883 (Pat) ; *Jayanti Rani Panda v State of West Bengal* 1984 Cr LJ 1535 (Cal) ; *Sudhamay Nath alias Bachchu v State of West Bengal* 1999 Cr LJ 4482 (Cal) ; *Gaurish v State of Goa* 1997 Cr LJ 1018 (Bom) (DB) ; *Commission Bebarta v State* (1997) 3 Crimes 244 (Ori) ; *Sunil Vishnu Salve v State of Maharashtra* 2006 Cr LJ 587 (Bom) ; *Budu Domb v State of Orissa* 2006 Cr LJ 4740 (Ori) ; *Premlal Bhagat v State of Bihar (now Jharkhand)* 2007 Cr LJ (NOC) 590 (Jhar), (2007) 2 AIR Jhar R 225 .

66 *Saleha Khatoon v State of Bihar* 1989 Cr LJ 202 (Pat) .

67 *Mirwali Mohd alias Kalu v State of Bihar* (1990) 2 Pat LJR 375 (Pat) .

68 *MC Prasannan v State* 1999 Cr LJ 998 (Cal) (DB) .

69 *Lakshmana Naik v State of Karnataka* 2004 Cr LJ 3913 (Kant) ; *State of Karnataka v KP Thimmappa Gowda* 2004 Cr LJ 4785 (Kant) (DB) .

70 *Uday v State of Karnataka* 2003 Cr LJ 1539 (SC), AIR 2003 SC 1639 .

71 *Santosh Sinha v State of Tripura* 2007 Cr LJ 7 (Gau) ; *Sri Niman Sonowal v The State of Assam* 2007 Cr LJ (NOC) 184 (Gau) .

72 *Utpal Das v State of West Bengal* 2010 Cr LJ 2867, p 2870, 2871, AIR 2010 SC 1894, (2010) 6 SCC 493, 2010 (5) Scale 328 .

73 *Jogi Dan v State of Rajasthan* 2004 Cr LJ 1726 (Raj) .

74 *Narender Kumar v State (NCT of Delhi)* 2012 Cr LJ 3033, p 3038, AIR 2012 SC 2281 .

75 *State of UP v Munshi* 2009 Cr LJ 393, p 394, (2008) 9 SCC 3890, 2008 AIR SCW 7415 .

76 *Suresh N Bhusare v State of Maharashtra* AIR 1998 SC 3131, 1998 Cr LJ 4559 (SC) .

77 *Dilip v State of Madhya Pradesh* AIR 2001 SC 3049, 2001 Cr LJ 4721 ; *Nandlal Yadav v State of Madhya Pradesh* 2002 Cr LJ 2184 (MP) .

78 *Sukru Gouda v State of Orissa* 2004 Cr LJ 1566 (Ori) (DB) .

79 *Rammi alias Rameshwar v State of Madhya Pradesh* AIR 1999 SC 3544, 1999 Cr LJ 4561 (SC) .

80 *State of Tamil Nadu v Suresh* (1998) 2 SCC 372, 1998 CR LJ 1416 ; *Mohan v State of Madhya Pradesh* 2001 Cr LJ 3046 ; *Bandu v State of Maharashtra and Anor* 1996 Cr LJ 285 (Bom) .

81 *Bandu v State of Maharashtra* 1996 Cr LJ 285 (Bom) ; *State of Orissa v Dibakar Naik* 2002 Cr LJ 2826 (SC) .

82 *Emperor v Mahadeo Taatya* 43 Cr LJ 621, AIR 1942 Bom 121, p 123 (FB) ; *Lachhman v State* 1973 Cr LJ 1658, p 1662 .

83 *Emperor v Mahadeo Tatya* AIR 1942 Bom 121, p 123 (FB), 43 Cr LJ 621 ; *Harpal Singh v State of Himachal Pradesh* 1976 Cr LJ 162, p 165 (delay in making FIR, in consonance with the desire of parents of the minor girl to save her honour, not fatal to the prosecution case; Re *Myllsami*1970 LW (Cr) 182.

84 *Abdul Rahman v Emperor* 17 Cr LJ 150, AIR 1916 Lah 292, p 293 (unexplained delay in making the first information report) ; *Multani Ram v Emperor* 28 PLR 235, AIR 1927 Lah 836, p 837 (no action taken for long time though girl living near police post) .

85 Re *Boya Chinnappa*AIR 1951 Mad 760, p 764, 52 Cr LJ 718 ; *Narayana Dutta v State* 1980 Cr LJ 264, p 265 (Cal) (DB) ; *Bandu v State of Maharashtra* 1996 Cr LJ 285 (Bom) .

86 *PF Convoy v Emperor* AIR 1944 Nag 245, p 246-47, 46 Cr LJ 68 ; *Narayana Dutta v State* 1980 Cr LJ 264, p 265 (Cal) (DB) ; *Bechu v King* AIR 1949 Cal 613, p 615, 51 Cr LJ 153 (sufficiency of corroboration is a question of fact and the manner, and the time, which elapsed between the occurrence and her statement, have to be considered); *State v Rameshwar* AIR 1951 Raj 30, p 33, 1952 Cr LJ 502, affirmed in *Rameshwar v State of Rajasthan* 1952 Cr LJ 547 (SC), AIR 1952 SC 54 ; *State of Madhya Pradesh v Surendra Prasad Dave* 1969 Jab LJ 992, p 1004 ; *Koli Tapu Dharamshi v State* 1955 Cr LJ 1525, AIR 1955 Sau 96 (if the story of the prosecutrix herself is not reliable, little or no weight can be given to her statements to other persons for purpose of corroboration); *State of Orissa v Hichia Parvatisam* AIR 1963 Ori 58, (1963) 1 Cr LJ 310 ; *Harendra Prasad Bagchi v Emperor* AIR 1940 Cal 461, p 463, 44 CWN 830 (statement by the prosecutrix to her mother and neighbours shortly after the incident).

87 *Kappinaiah v Emperor* AIR 1931 Mad 233, p 234, 32 Cr LJ 751 ; *Manga v State of Haryana* AIR 1979 SC 1194, p 1195, 1979 Cr LJ 939 (non-examination of the victim by the prosecution would not affect the prosecution case if there is reliable direct testimony of the full fledged eyewitness to the act of rape and the court believes that the accused had forcibly performed sexual intercourse with the victim, particularly when the victim is a deaf and dumb child witness, a girl of 13 years).

88 *Ghulam Hussain v Emperor* AIR 1930 Lah 337, p 338, 32 Cr LJ 63 .

89 *Suresh Kumar v State of Rajasthan* 2007 Cr LJ 1939 (Raj) .

90 *Jagannivasan v State of Kerala* 1995 SCC (Cr) 826, 1995 Cr LJ 3229 (SC) .

91 *Devanand v State (NCT of Delhi)* 2003 Cr LJ 242 (Del) .

1 *Mohan Lal v State of Rajasthan* 2003 Cr LJ 862 (SC) .

2 *Vimal Suresh Kamble v Chaluvarapinake Apal SP and Anor* 2003 Cr LJ 910 (SC) .

3 *Babu Lal v State of Rajasthan* 2001 Cr LJ 2282 (Raj) ; *Fota and Damra v State* 1999 Cr LJ 1677 .

4 *Fauji alias Mukhtear Singh v State of Rajasthan* 2001 Cr LJ NOC 131 (Raj) .

5 Refer text under s 375, IPC .

6 *Jayasena Pradhan v State* 2001 Cr LJ 1953 (Ori) ; *Ramnivas v State of Karnataka* 1994 SCC (Cri) 503 .

7 *State of Andhra Pradesh v Lankapalli Venkateswarlyu* AIR 2000 SC 3555, 2000 Cr LJ 4683 (SC) .

8 *Samped alias Srustidhar Mallick v State* 2001 Cr LJ 793 (Raj) .

9 *State of Karnataka v G Narayanamurthy* 1998 Cr LJ 2481 (Kant) (DB) ; *Nathunath v State of Rajasthan* 2001 Cr LJ 2712 (Raj) .

10 *Imran v State of Uttar Pradesh* 1998 Cr LJ 2888 (All) .

11 *Nathu Singh v State of Rajasthan* 2001 Cr LJ 171 .

12 *State of Karnataka v G Narayananmurthy* 1998 Cr LJ 2481 (Kant) (DB) ; *Moole Ram v State of Rajasthan* 2000 Cr LJ 2506 (Raj) .

13 *Om Parkash v State of Himachal Pradesh* 2000 Cr LJ 1591 (HP) (DB) ; *Babu Dey v State of West Bengal* 2000 Cr LJ 329 (Cal) (DB) .

14 *Babbu alias Babulal v State of Madhya Pradesh* 2000 Cr LJ 1123 (MP) .

15 *Suresh N Bhusare and Ors v State of Maharashtra* 1998 Cr LJ 4559 (SC) .

16 *Prahlad Singh v State of Madhya Pradesh* 1997 Cr LJ 4078 (SC) .

17 *Prakash v State of Maharashtra* 1997 Cr LJ 4199 (Bom) ; *Ajit Kumar v State* 1997 Cr LJ 4268 (Del) ; *Md Ali v State of UP* 2015 Cr LJ 1967 (SC), 2015 (3) Scale 274, (2015) 7 SCC 272 (Accused acquitted of the charges under Sections 366 & 376 IPC).

18 *Gaurish v State of Goa* 1997 Cr LJ 1018 (Bom) (DB) .

19 *Valliappa Harijan v State of Goa* 1997 Cr LJ 1484 (Bom) (DB) .

20 *Vishnu and Ors v State of Maharashtra* 1997 Cr LJ 1724 (Bom) .

21 *Chander Bahadur v State* 1997 Cr LJ 2195 (Del) .

22 *Anath Bandhu Kundu v State of West Bengal* 1996 Cr LJ 3449 (Cal) .

23 *State of Haryana v Naresh alias Pappi* 1996 Cr LJ 3164 (P&H) (DB).

24 *Mohan Singh v State of Rajasthan* 2005 Cr LJ 2127 (Raj) .

25 *Vijay Kumar v State of Himachal Pradesh* 2006 Cr LJ 112 (HP) .

26 *State of Rajasthan v Kishan Lal* 2002 SCC (Cri) 1149, 2002 Cr LJ 2963 ; **see also***Vijay Kumar v State of Himachal Pradesh* 2006 Cr LJ 112 (HP) .

27 *Bhagwan Charan Mate v State of Maharashtra* 2006 Cr LJ 579 (Bom) .

28 *Kishore Bahadur v State of Chhattisgarh* 2006 CRI LJ 2556 (Chhattis) .

29 *Afzal Ajmi v State of Madhya Pradesh* 2006 Cr LJ 2762 (Chhattis) .

30 *Kirtiwas v State of Chhattisgarh* 2006 Cr LJ 2829 (Chhattis) .

31 *Lal Marandi v State of Bihar* 2006 Cr LJ 3568 (Jhar) .

32 *Kishan Lal v State of Rajasthan* 2005 Cr LJ 1519 (Raj) .

33 *State of Karnataka v Chandrayya Hanumanthappa Mallappanavar* 2003 Cr LJ 258 (Kant) (DB) .

34 *Narayan v State* 37 (1989) DLT 350 (Del) .

35 *PF Conroy v Emperor* AIR 1944 Nag 245, p 246, 46 Cr LJ 68 .

36 *Ahamad Pillai Saithu Muhammad v State* AIR 1951 Tr&Coch 167, p 169, 1951 Cr LJ 874 .

37 *Ibid.*

38 *Shyama Sunder Kabat v State* 2003 Cr LJ 1354 (Ori) .

39 *Emperor v Mahadeo Tatya* 43 Cr LJ 621, AIR 1942 Bom 121 (FB) .

40 *Local Government v Guji* 17 NLJ 189, AIR 1935 Nag 69, p 73 .

41 *Gopal Tamang v State of West Bengal* 1999 Cr LJ 1585 (Cal) (DB) .

42 *Dilip v State of Madhya Pradesh* 2013 Cr LJ 2449, p 2454 (SC), 2013 AIR SCW 2538, 2013 (6) Scale 264 .

43 *Bandu v State of Maharashtra and Anor* 1996 Cr LJ 285 (Bom) .

44 *Anam Swain v State* AIR 1954 Ori 33, p 37, 55 Cr LJ 132 .

45 *Emperor v Asadali* 29 Cr LJ 12, p 13, 106 IC 348 (Lah) .

46 *Taylor's Principles and Practice of Medical Jurisprudence*, seventh edn, vol II, p 128 (infected individuals do not necessarily communicate gonorrhea); *Ryon's Medical Jurisprudence*, sixth edn, p 302.

47 *State of Madhya Pradesh v Surendra Prasad Dave* 1969 Jab LJ 992, p 1001, 1970 MPLJ 242 .

48 *Modi on Medical Jurisprudence and Toxicology*, seventh edn, p 335, under the heading 'Signs of Venereal Infection', *Taylor's Principles and Practice of Medical Jurisprudence*, twelfth edn, p 62.

49 *Jhala and Raju's Medical Jurisprudence*, sixth edn, p 249, as quoted in *Raghuvir Dessai v State* 2007 Cr LJ 829 (Bom) .

50 *Jayaseng Pradhan v State* 2001 Cr LJ 1953 (Ori) .

51 *State of Karnataka v Manjanna* 2000 Cr LJ 347 (SC) .

52 *Parbata v State of Rajasthan* 2006 Cr LJ 562 (SC) .

53 *State of Tamil Nadu v Ravi* 2006 Cr LJ 3305 (SC) .

54 *Abdul Rahman v Emperor* 17 Cr LJ 150, AIR 1916 Lah 292, p 293 .

55 *State v Hiraman Punja Vidhate* AIR 1965 Bom 154, (1965) 2 Cr LJ 349 .

56 Re *Karichiappa Goundan*, AIR 1942 Mad 285, p 286, 43 Cr LJ 576 .

57 *AW Khan v State* AIR 1962 Cal 641, (1962) 2 Cr LJ 751 ; *Joseph v State of Kerala* 2000 Cr LJ 2466 (SC) .

58 *Indar Singh v Emperor* AIR 1927 Lah 867, p 870 ; *Jalal v Emperor* AIR 1930 Lah 193, 31 Cr LJ 784 .

59 *Rahim Beg v State of Uttar Pradesh* AIR 1973 SC 343, 1972 Cr LJ 1260 (absence of injuries on his male organ would point to his innocence).

60 *Bhupender alias Mohinder Singh v State of Haryana* 2002 Cr LJ 1286 (P&H) ; *Nirmal Kumar v State of Haryana* 2002 Cr LJ 3352 (P&H) .

61 *State of Orissa v Thakare Besra* 2002 Cr LJ 2642 (SC) .

62 *Pratap Misra v State of Orissa* AIR 1977 SC 1307, p 1312, 1977 Cr LJ 817 .

63 *Pratap Misra v State of Orissa* AIR 1977 SC 1307, p 1312, 1977 Cr LJ 817 .

64 *State of Gujarat v Kishanbhai* (2014) 5 SCC 108, (2014) 136 AIC 129, 2014 (1) JT 508, 2014 (1) Scale 177 .

65 *State of Himachal Pradesh v Mange Ram* 2000 Cr LJ 4027 (SC) ; *Jayasena Pradhan v State* 2001 Cr LJ 1953 (Ori), (1994) 5 SCC 728 ; *State of Himachal Pradesh v Gianchand* 2001 Cr LJ 2548 (SC) .

66 *Narayananmma v State of Karnataka* (1994) 5 JT 436 (SC) .

67 *State of Himachal Pradesh v Lekh Raj* (2000) 1 SCC 247, 2000 Cr LJ 44 (SC) ; *Sri Mohan Sarma v State of Assam* 2002 Cr LJ 3894 (Gau) .

68 *Modi's Medical Jurisprudence and Toxicology*, twenty-second edn, p 504.

69 *Kuber Chandra Das v State of Bihar* 2004 Cr LJ 4776 (Jhar) .

70 *RK Agarwal v State of Orissa* AIR 1976 SC 1774, p 1775, 1976 Cr LJ 1376 .

71 *Harendra Prasad Bagchi v Emperor* 44 CWN 830, AIR 1940 Cal 461, p 463 .

72 *Ram Narayan Jha v State of Assam* 1998 Cr LJ 4650 (Gau), (1999) 1 Gau LT 54 ; *Sampad alias Srudtidhar Mallikk v State* 2001 Cr LJ 793 (Ori) .

73 *Nehru alias Jawahar v State of Madhya Pradesh* 2001 Cr LJ 1118 (MP) .

74 *Madan Lal v State of J&K* 1998 Cr LJ 667 (SC) .

75 *State of Maharashtra v Chandraprakash Kemalchand Jain* AIR 1990 SC 658, 1990 Cr LJ 889, (1990) 1 SCC 550 .

76 *Modi's Medical Jurisprudence and Toxicology*, Lexisnexis Butterworths publication.

77 *State of UP v Munesh* AIR 2013 SC 1778, 2013 Cr LJ 194, p 199 (SC) .

78 *Kishan Lal v State of Rajasthan* 2005 Cr LJ 1519 (Raj) .

79 *G Siva Kumar v State of Andhra Pradesh* 2005 Cr LJ 2839 (AP) .

80 *Modi's Medical Jurisprudence and Toxicology*, twenty-third edn, p 928.

81 *Yadu Kumar Patel v State of Chhattisgarh* 2007 Cr LJ 2846 (Chhattis) ; *Wahid Khan v State of Madhya Pradesh* 2010 Cr LJ 517, AIR 2010 SC 1 .

82 *State of Himachal Pradesh v Vipan Kumar* 2015 Cr LJ 1812, p 1822 (HP) .

83 *Rajendra Datta Zasrekar v State of Goa* 2008 Cr LJ 710, p 714 (SC), 2007 AIR SCW 7588, 2007 (13) Scale 664 .

84 *Ramachandrappa v State by CPI, Hiriyur* 2007 Cr LJ 3504 (Kant) ; *Puran Chand v State of HP* (2014) 5 SCC 689, 2014 Cr LJ 2577 ; *Parminder v State of Delhi* (2014) 2 SCC 592 .

85 *Lillu v State of Haryana* 2013 Cr LJ 2446 (SC), AIR 2013 SC 1784, 2013 (6) Scale 17, (2013) 14 SCC 643 .

86 *Dilip Kumar Jha v State of Bihar* 2005 Cr LJ 1783 (Jhar) .

87 *Utpal Das v State of West Bengal* 2010 Cr LJ 2867, p 2870, 2871, AIR 2010 SC 1894, (2010) 6 SCC 493, 2010 (5) Scale 328 .

88 *SP Kohli (Dr) v High Court of Punjab & Haryana* AIR 1978 SC 1753, 1978 Cr LJ 1804 (SC) ; *Gurjinder Singh v State of Punjab* 1998 Cr LJ 710 (P&H) .

89 *Modi's Medical Jurisprudence and Toxicology*, twenty-second edn, (reprint 2001), p 515.

90 *Nehru alias Jawaher v State of Madhya Pradesh* 2001 Cr LJ 1118 (MP) .

91 *Kirtiwas v State of Chhattisgarh* 2006 Cr LJ 2829 (Chhattis) .

92 *Joseph v State of Kerala* 1961 Ker LT 933, (1962) 2 Cr LJ 668, p 669 .

93 Jhala and Raju, *Medical Jurisprudence*, fifth edn, p 464.

94 *Thana Ram v State of Rajasthan* 1996 Cr LJ 502 (Raj) .

95 *Thana Ram v State of Rajasthan* 1996 Cr LJ 502 (Raj) .

1 *Jalal v Emperor* AIR 1930 Lah 193, 31 Cr LJ 784 .

2 *Aliyas Mian v State of Bihar* 2006 Cr LJ 288 (Pat) .

3 *Devinder Singh v State of Himachal Pradesh* Cr LJ 4976 (SC), AIR 2003 SC 3365 .

4 *Santhosh Moolya v State of Karnataka* 2010 Cr LJ 2892, p 2896 (SC), AIR 2010 SC 2247, 2010 AIR SCW 3125, (2010) 5 SCC 445, 2010 (4) Scale 348 .

5 *State of Karnataka v Manjanna* 2000 Cr LJ 3471 (SC) .

6 *Debidas Rudra v State and Anor* 2002 Cr LJ 1987 (Cal) (DB) .

7 *Upendre Singh and etc v State of Bihar* 2003 Cr LJ 1390 (Jhar) .

8 *State v Rangaswamy and Ors* 2003 Cr LJ 607 (Kant) (DB) .

9 *Ibid.*

10 *S Krishna v State of Karnataka* 1998 Cr LJ 785 (Kant) (DB) .

11 *Nandlal Yadav v State of Madhya Pradesh* 2002 Cr LJ 2184 ; *Asha Ram v State of Madhya Pradesh* (1995) 1 MPWN 24 ; *Asha Ram v State of Madhya Pradesh* (1995) 1 MPWN 24 ; *Lakhan Singh v State of Madhya Pradesh* 2004 Cr LJ 2642 (MP) .

12 *Ram Lal v State of Rajasthan* 2006 Cr LJ 2530 (Raj) ; *State of Madhya Pradesh v Dayal Sahu* (2005) 8 SCC 122, 2005 Cr LJ 4375 .

13 *Lalsingh Bhikhabhai Chaudhary v State of Gujarat* 2004 Cr LJ 3292 (Guj) .

14 *State of Madhya Pradesh v Dayal Sahu* 2005 Cr LJ 4375 (SC), AIR 2005 SC 3570 .

15 *Angad Ram v State of Bihar* 2007 Cr LJ 2337 (Pat) .

16 *State of Himachal Pradesh v Gian Chand* 2001 Cr LJ 2548 (SC) .

17 *Gurbachan Singh v Satpal Singh* AIR 1990 SC 209, 1990 Cr LJ 562 ; *State of West Bengal v Orilal Jaiswal* AIR 1994 SC 1418, 1994 Cr LJ 2104 ; *State of Rajasthan v Gaharoo* 2001 Cr LJ 3672 (Raj) .

18 *Dhian Singh v State of Haryana* 1974 Chand LR 29 ; *Gaya Rout v State* 1975 Cut LT 1301 ; *Surat Singh v State of Madhya Pradesh* (1970) 19 Jab LJ 16 (SN) .

19 *Gaya Rout v State* 1975 Cut LT 1301.

20 *Surat Singh v State of Madhya Pradesh* (1970) 19 Jab LJ 16 (SN) .

21 *Abdul Rahman v Emperor* 17 Cr LJ 150, AIR 1916 Lah 292, p 293 ; *Sadhu Singh v Emperor* 24 Cr LJ 625, AIR 1923 Lah 167, p 168-69 .

22 *Nga San Pu v Emperor* 19 Cr LJ 155, 1918 Lower Burma 81, p 82-83 .

23 *State of Madhya Pradesh v Ramesh* 1980 Cr LR 135, p 136 (MP) (notes) (DB) .

24 *Bibhishan v State of Maharashtra* 2008 Cr LJ 721, p 722 (SC), 2007 AIR SCW 7358, 2007 (11) Scale 276 .

25 *Radhu v State of Madhya Pradesh* 2007 Cr LJ 4704, p 4708 (SC), 2007 (11) Scale 96, 2007 (6) Scale 196 .

26 *Narender Kumar v State (NCT of Delhi)* 2012 Cr LJ 3033 (SC), AIR 2012 SC 2281 .

27 *State of Rajasthan v Babu Meena* AIR 2013 SC 2207, 2013 Cr LJ 1634, p 1636 (SC) .

28 *K Venskateshwarlu v State of Andhra Pradesh* 2012 Cr LJ 4388, AIR 2012 SC 2955, 2012 AIR SCW 4747, (2012) 8 SCC 73, (2012) 7 Scale 397 .

29 *Anil Kumar v State of Karnataka* 2013 Cr LJ (NOC) 119 (Kar) (DB).

30 *Madan Lal v State of Himachal Pradesh* 2014 Cr LJ 641, p 648 (HP) .

31 *Sanganna Shivasharanappa Hugar v State of Karnataka* 2013 Cr LJ (NOC) 445 (Kar) ; **see also***B Suresh v State of Karnataka* 2013 Cr LJ (NOC) 444 (Kar) .

32 *Kasni Rajan v State of Kerala* 2013 Cr LJ 4888, p 4892, 2013 AIR SCW 5455 (SC) ; *Ajinappa v State of Karnataka* 2014 Cr LJ 82 (Kar) (Prosecutrix and accused co-workers, sex held consensual, conviction set aside); *Vinod Kumar v State of Kerala* 2014 Cr LJ 2360 (SC) (Accused was not convicted as rape was consensual).

33 *Lal Singh v State of HP* 2014 Cr J 727, p 735 (HP) .

34 *Rai Sandeep v State of NCT of Delhi* 2012 Cr LJ 4119, AIR 2012 SC 3157, 2012 AIR SCW 4456, 2012 (7) Scale 188 .

35 *Rajesh Patel v State of Jharkhand* 2013 Cr LJ 2062, AIR 2013 SC 1497, (2013) 3 SCC 791 .

36 *Vinod Mangilal v State of Madhya Pradesh* 2009 Cr LJ 1204, p 1206, 1207 (MP)

37 *Bhaiyamiyan v State of Madhya Pradesh* 2011 Cr LJ 3577, p 3579 (SC), AIR 2011 SC 2218, 2011 AIR SCW 3104, (2011) 6 SCC 394 .

38 *State of UP v Naushad* AIR 2014 SC 384, (2014) 6 SCC (Cri) 364, 2014 Cr LJ 540, p 544 .

39 *F Nataraja v State* 2010 Cr LJ 2180 (Kant) .

40 *Abbas Ahmad Choundhary v State of Assam* 2010 Cr LJ 2060, p 2061 (SC), 2010 AIR SCW 1917 .

41 *Dinesh Jaiswal v State of MP* 2010 Cr LJ 1917, p 1919 (SC), AIR 2010 SC 1540, (2010) 3 SCC 232 .

42 *Naravan v State of Rajasthan* 2007 Cr LJ 2733 (SC), (2007) 6 SCC 465, [2007] 4 SCR 1096 .

43 *Sheo Kumar v State of Chhattisgarh* 2009 Cr LJ 3165 (Chh) (DB) .

44 *State v Muniyappa* 2012 Cr LJ (NOC) 183 (Kar) (DB). (*Uday v State of Karnataka* AIR 2003 SC 1639, **relied on**).

45 *Om Prakash v State of Haryana* 2011 Cr LJ 4225 (SC), AIR 2011 SC 2682, 2011 (7) Scale 396 .

46 *Munna v State of MP* (2014) 10 SCC 254, p 261, (2014) 143 AIC 99 .

47 *Janapati Krishna v State of Andhra Pradesh* 2005 Cr LJ 1187 (AP) .

48 *Anil Motibaba Barokar v State of Maharashtra* 1996 Cr LJ 494 (Bom) .

49 *State of Punjab v Gurmit Singh* AIR 1996 SC 1393, 1996 Cr LJ 1728 (SC) .

50 *Samir Bhowmik v State of Tripura* 2010 Cr LJ 3018, p 3040 (Gauh) .

51 *State of UP v Desh Raj* 2006 Cr LJ 2108, AIR 2006 SC 1712

52 *State of MP v Babulal* 2008 Cr LJ 714, p 722 (SC), 2007 AIR SCW 7601, 2007 (8) Supreme 294, 2007 (13) Scale 621 .

53 *State of Rajasthan v Biram Lal* 2005 Cr LJ 2561 (SC), AIR 2005 SC 2327, 2006 SCC (Cri) 78 .

54 *Arjun Singh v State of HP* 2009 Cr LJ 1332 (SC), JT 2009 (2) SC 413, 2009 (2) Scale 302, (2009) 4 SCC 18 .

55 *Rajinder v State of HP* 2009 Cr LJ 4133 (SC), AIR 2009 SC 3022, 2009 (9) Scale 176 .

56 *State of Maharashtra v Gajanan* 2008 Cr LJ 3549, p 3551 (SC), (2008) 3 SCC (Cri) 418, 2008 AIR SCW 4854, 2008 (9) Scale 802 .

57 *Mohan Chand v State of Uttarakhand* 2009 Cr LJ 1755, p 1757 (SC), AIR 2009 SC 1896, (2009) 4 SCC 63 .

58 *Ramkripal v State of Madhya Pradesh* 2007 Cr LJ 2302, p 2305 (SC), 2007 AIR SCW 2198, 2007 (5) Supreme 297, 2007 (4) Scale 438 .

59 *State of UP v Satish* 2005 Cr LJ 1428, p 1434, (2005) 3 SCC 114, AIR 2005 SC 1000 .

60 *Balbir Singh v State* 1996 Cr LJ 2403 (Del) (DB) ; *Kailash Khangar v State of Madhya Pradesh* 1996 Cr LJ 3189 ; *Manoj Mandrekar v State* 1996 Cr LJ 3341 (Bom) (DB) ; *Tofiq Ahmed Fauzdar Khan Ansari and etc v State of Gujarat* 1999 Cr LJ 1714 (Guj) (DB) ; *Laki Harijan v State of Orissa* 1998 Cr LJ 1129 (Ori) ; *Govinda Reddy v State* 1997 Cr LJ 148 (Mad) ; *Kattaiyan Rajangam v State* 1997 Cr LJ 382 (Mad) ; *Nankor Sharma v State of Uttar Pradesh* 1997 Cr LJ 3002 (All) ; *Arasappa v State* 1997 Cr LJ 1456 (Kant) ; *State of Rajasthan v Ram Narain* 1996 Cr LJ 1882 (SC) .

61 *Balwan Singh v State through P/S Katra* 2013 Cr LJ (NOC) 553 (J&K).

62 *Wahid Khan v State of Madhya Pradesh* 2010 Cr LJ 517, p 525 (SC), AIR 2010 SC 1, (2010) 2 SCC 9, 2009 (14) Scale 220 .

63 *N Vijaya v State of Karnataka* 2010 Cr LJ 1050, p 1057 (Kant) .

64 *Jaswant Singh v State of Punjab* 2010 Cr LJ 41 (SC), 2009 AIR SCW 6843, AIR 2010 SC 894, 2009 (13) Scale 554, (2009) 16 SCC 201 .

65 *Karthi v State Rep. by Inspector of Police, Tamil Nadu* 2013 Cr LJ 3765, p 3771 (SC), 2013 AIR SCW 4315 (SC), AIR 2013 SC 2645, (2013) 12 SCC 710 (offence of rape).

66 *Puran Lal v State of Uttaranchal* 2014 Cr LJ (NOC) 11 (Utr) .

67 *Swaroop Singh v State of MP* 2013 Cr LJ 3106, p 3110, 2013 AIR SCW 3190 (SC), AIR 2013 SC 2912, 2013 (5) Scale 738, (2013) 14 SCC 565 .

68 *Md Ekram Hussain v State of Assam* 2014 Cr LJ 699, p 701 (Gauh) .

69 *Ram Singh v State of HP* 2010 Cr LJ 1655 (SC), 2010 AIR SCW 1396, (2010) 2 SCC 445, 2010 (1) Scale 669 .

70 *Parbata v State of Rajasthan* 2006 Cr LJ 562, p 564, AIR 2006 SC 747, (2005) 13 SCC 398, 2005 (9) Scale 544 .

71 *Muniswamy v State of Karnataka* 2010 Cr LJ 2193 (Kar)

72 *State of Himachal Pradesh v Asha Ram* 2006 Cr LJ 139 (SC), AIR 2006 SC 381

73 *Tej Khan v State of Madhya Pradesh* 2004 Cr LJ 276 (MP) .

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

SEXUAL OFFENCES

[S. 376.

Punishment for rape.--

115. Appeal against Conviction--High Court cannot enhance sentence without Exercising Revisional Powers

In *Sahab Singh v State of Haryana* ,[74] the Apex Court made the following observations:

> "Now in the present case the appeal was settled under s 374(2) of the Code by the convicts against the order passed by the Additional Sessions Judge. No appeal was filed by the State under s 377(1) of the Code against the sentence awarded by the trial court for the offence under ss 302 / 149, IPC on the ground of its inadequacy. Nor did the High Court exercise suo motu revisional powers under s 397 read with s 401 of the Code. If the High Court was minded to enhance the sentence the proper course was to exercise suo motu powers under s 397 read with s 402 of the Code by issuing notice of enhancement and hearing the convicts on the question of inadequacy of sentence. Without following such procedure it was not open to the High Court in the appeal filed by the convicts to enhance the sentence by enhancing the fine. The High Court clearly acted without jurisdiction. For the above reasons we are clearly of the opinion that the appeal must succeed."

116. Special Leave Petition under Article 136 --General Principles

In an appeal filed under art 136 of the Constitution, generally the Supreme Court does not interfere with the finding of fact arrived after proper appreciation of evidence by the courts below. If, however, such a finding is perverse, based upon no evidence or based upon such evidence which is inadmissible or is the result of imaginative hypothesis and conjectures, the court is entitled to re-appreciate the evidence to ascertain the validity of the judgment impugned.[75] In 3199*Dalbir Kaur and Ors v State of Punjab* [76] the general principles governing interference by the Supreme Court, in criminal appeal by special leave were summarised as follows:

(1) that the court would not interfere with the concurrent finding of fact based on pure appreciation of evidence even if it were to take a different view on the evidence;
(2) that the court will not normally enter into a reappraisement or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on an error of record, misreading of evidence or is inconsistent with the evidence, for instance,

where the ocular evidence is totally inconsistent with the medical evidence and so on;

(3) that the court would not enter into credibility of the evidence with a view to substitute its own opinion for that of the High Court;

(4) that the court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provision of law or procedure resulting in serious prejudice or injustice to the accused;

(5) the court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence.

In exercise of jurisdiction under art 136 of the Constitution of India, the Supreme Court has set up judicial precedents for the purpose of averting miscarriage of justice and that is why in some cases where the court reached the conclusion that no conviction of any accused is possible, the benefit of that decision was extended to the co-accused, though he may not have challenged the order by means of an appeal petition to the Supreme Court.[77]

The power of the Supreme Court under art 136 of the Constitution of India is not circumscribed by any limitation. In any case, the power under art 142 of the Constitution of India is available to pass such order as may be deemed appropriate to do complete justice.[78] The limitations imposed under s 401(3), CrPC, cannot be read into the power available to the Supreme Court under art 136 of the Constitution . Therefore, in case of appeal against acquittal, if the acquittal was found wrongful, then the Supreme Court would be competent to convict the accused and the case would not be sent back for retrial.[79]

117 . Section 377 (3) of CrPC and Article 136 of the Constitution

In *State of Uttar Pradesh v Dharmendra Singh* ,[80] the Supreme Court considered s 377(3) of CrPC and observed, thus:

> A perusal of this section shows that this provision is applicable only when the matter is before the High Court and the same is not applicable to this court when an appeal for enhancement of sentence is made under art 136 of the Constitution . It is to be noted that3200 an appeal to this court in criminal matters is not provided under the code except in cases covered by s 379 of the Code. An appeal to this court under art 136 of the Constitution is not the same as a statutory appeal under the code. This court under art 136 of the Constitution is not a regular court of appeal which an accused can approach as of right. It is extraordinary jurisdiction which is exercisable only in exceptional cases when this court is satisfied that it should interfere to prevent a grave or serious miscarriage of justice, as distinguished from mere error in appreciation of evidence. While exercising this jurisdiction this court is not bound by the rules of procedure as applicable to the courts below. This court's jurisdiction under art 136 of the Constitution is limited only by its own discretion.[81]. In that view of the matter, we are of the opinion that s 377 (3) of the Code in terms does not apply to an appeal under art 136 of the Constitution ..."

This does not mean that this court will be unmindful of the principles analogous to those found in the Code including those under s 373(3) of the CrPC while moulding a procedure for the disposal of an appeal under art 136 of the Constitution . Apart from the Supreme Court Rules applicable for the disposal of criminal appeals in this court, the court also adopts such analogous principles found in the Code so as to make the procedure a fair procedure depending on the facts and circumstances of the case.

118. Orders of the Supreme Court under Article 142 are Not *Per Se* Precedent

The Supreme Court in its plenary power under art 142 of the Constitution of India can make any decree or order as may be found by it to be necessary for doing complete justice in any case or matter pending before it. Thus, when the Supreme Court in exercise of power under art 142, passes an order for assisting

the victims of rape that cannot be relied upon as precedent, unless the Apex Court so directs. It is expected that the State Government will soon constitute the Criminal Injuries Compensation Board. The other parameters laid down in para 17 of the judgment[82] shall be carried out by all concerned punctually and faithfully.[83]

119. Broad Parameters in Assisting the victim of Rape--Interim Compensation

In *Domestic Working Women's Forum v Union of India* ,[84] the Apex Court after considering various cases took note of the fact that in recent time, there has been increasing violence against women. It was also noticed that in addition to the trauma of rape itself, the victim have had to suffer further agony during legal proceedings. In this background, the court indicated broad parameters in assisting the victims of rape.

(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceeding, to prepare her for the case and to assist her in the police station and in court, but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked3201 after the complainant's interests in the police station represents her till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient movement, but in order to ensure that victims were questioned without undue delay, the advocate would be authorised to act at the police station before leave of the court was sought or obtained.

(6) In all rape trials anonymity of the victims must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under art 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board, since rape victims frequently incur substantial financial loss. Some, for example are too traumatised to continue in employment.

(8) Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board, whether or not a conviction has taken place. The board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and expenses of the child if this occurred as a result of the rape."

This decision in Delhi Domestic Workers recognises the right of the victim for compensation by providing that compensation shall be awarded by the court on conviction of the offender subject to the finalisation of scheme by the state government. If the court trying an offence of rape has jurisdiction to award compensation at the final stage, there is no reason to deny to the court the right to award interim compensation which should also be provided in the scheme. On the basis of principles set out in the aforesaid decision in Delhi Domestic Working Women's Forum, the jurisdiction to pay interim compensation shall be treated a part of the overall jurisdiction of the courts trying the offences of rape which, as pointed out is an offence against basic human rights as also against Fundamental Right of

personal liberty and life.[85]

Apart from the above, the Supreme Court has the inherent jurisdiction to pass any order it considers fit and proper in the interests of justice or to do complete justice between the parties.[86]

After laying down the aforesaid parameters, the court on the facts of the case, particularly, considering the fact that the accused 'B' having accepted the victim as his wife in the temple and also having impregnated her twice created a situation for miscarriage on both the occasions, it was considered a fit case where the matter could be disposed of by directing accused '*B*' to pay the victim *'S*' a sum of Rs 1000 every3202 month as interim compensation during the pendency of the criminal case and also for payment of arrears of compensation at the same rate.[87]

However, the Supreme Court in its plenary power under art 142 of the Constitution of India can make any decree or order as may be found by it to be necessary for doing complete justice in any case or matter pending before it. Thus, the Supreme Court in exercise of power under art 142, can pass an order that cannot be relied upon as precedent, unless the Apex Court so directs. It is expected that the state government will soon constitute the Criminal Injuries Compensation Board.[88] Therefore, the sessions court while granting bail to the accused for the offence under s 376, IPC, cannot impose condition of payment of interim compensation by the accused to the prosecutrix.[89]

120. Probation

As the offence under s 376, IPC, is punishable with imprisonment for life and a person convicted for that offence cannot be given the benefit of the provisions of Probation of Offenders Act 1958.[90] Thus, where the additional sessions judge erred in extending the benefit of probation under the Probation of Offenders Act to the accused convicted under s 376, the order of learned additional sessions judge to that extent was set aside.[91]

SENTENCE

121. Attempt to Rape-- Sections 376 / 511 --Sentence

Where the accused is found guilty under ss 376 / 511, IPC for offence of attempt to commit rape, it would be appropriate to impose half of the punishment as envisaged under s 511, IPC, which comes to imprisonment for a period of 10 years.[92]

The minimum awardable sentence for an offence punishable under s 376(1), IPC, is seven years, so the award of six years rigorous imprisonment for an offence punishable under ss 376 / 511 would be on the higher side. Therefore, an award of rigorous imprisonment of six years by a trial court was reduced to 3½ years.[93] However, when the delay in disposal of the case is entirely attributable to the accused who absconded with a view to evade the trial and punishment, immediately after commission of the offence and was apprehended after 7½ years, therefore, the delay in the disposal of the case cannot be treated as a mitigating circumstance in the case to reduce the sentence of 3 years rigorous imprisonment and five of Rs 3000, in default of which to undergo 6 months rigorous imprisonment, awarded by the trial court.[94] In another case, where the conviction of the accused was altered from s 376 to ss 376 / 511, IPC and the prosecutrix was 10 years old, the accused was sentenced to undergo rigorous imprisonment for 5 years and pay a fine of Rs 2000 and in3203 default of which to undergo rigorous imprisonment for one month.[1] The Apex Court while altering the conviction from s 354 to ss 376 / 511, IPC sentenced the accused to undergo rigorous imprisonment for 5 years and maintained the sentence of fine of Rs 40,000 imposed by the High Court out of which Rs 25,000 were directed to be paid to the complainant father of the victim girl.[2]

Where the accused was found guilty and convicted under s 376 read with s 511, IPC for having committed rape on a girl aged 6 years at the time of the commission of offence, a sentence of five years rigorous imprisonment and fine of Rs. 500/- was held appropriate.[3]

Where the accused was a young boy of 20 years and a daily wage earner, the occurrence which took place 7 years back, the sentence of 5 years rigorous imprisonment awarded by the trial court for the offence under ss 376 / 511 was reduced to 6 months imprisonment.[4]

122. Sentence--Position Prior to Criminal Law (Amendment) Act 1983

Prior to the Criminal Law (Amendment) Act 1983 (43 of 1983) the offence was punishable with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years and also fine when the accused was not the husband of the prosecutrix. However, when the age of the wife is under 12 years, the accused-husband is at par with the other accused (other than the husband of the prosecutrix).

The ordinary sentence of rape varied from 3 years to 5 years; in a very bad case, 7 years imprisonment was sometimes given. There is no recorded instance of a sentence of imprisonment for life in a case of rape.[5]

123. Sentence--Position after Passing of Criminal Law (Amendment) Act 1983

By Act 43 of 1983, new ss 375 and 376 were substituted in the IPC . Subsection (1) of s 376 which mainly represents s 376 earlier has provided a more severe punishment, ie, minimum sentence of imprisonment of 7 years but which may extend to life or for a term upto 10 years and also fine.

Sub-section (2) of s 376 vide its cll (a) to (g) denotes the aggravated form of rape for which punishment is harsher than sub-s (1) of s 376 . Here the accused is liable to be sentenced with rigorous imprisonment for a term which shall not be less than 10 years but which may be for life and accused is also liable to pay fine.

However, it is to be noted that under proviso to sub-s (1) and sub-s (2) the court for adequate and special reasons to be mentioned in the judgment, may impose a sentence of imprisonment of either description for a term less than the one which is prescribed as minimum under these two sub-sections.3204

124. Sentence--Position after Passing of the Criminal Law (Amendment) Act 2013

New ss 375, 376, 376A, 376B, 376C, 376D and 376E have been substituted for the old ss 375, 376, 376A, 376B, 376C and 376D *vide* the Criminal Law (Amendment) Act 2013.

Newly substituted s 376(1) now provides for a rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and fine.

Clauses (a) to (n) under s 376(2) are now made punishable with a rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life and also fine. Section 376(2) further clarifies that the term 'imprisonment for life' shall mean imprisonment for the remainder of that person's natural life.

Now the new s 376A provides for rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, or with death. Similarly, s 376D provides for rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life, and with fine.

125. Sentence--Proportionality of--Effect on Social Order

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a

sentence. Sometimes it is the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread. Imposition of sentence without considering its effect on the social order in any cases may be in reality a futile exercise. The social impact of the crime, *e.g.* where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.[6]

126. Sentence--Duty of the Court

It is an obligation of the sentencing court to consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the gravity of the offence. The sentencing court must hear the3205 loud cry for justice by society and more particularly, in cases of the heinous crime of rape of innocent helpless children, as in this case, of the victim of crime and respond by imposing a proper sentence.[7] No leniency in matter of sentence could be shown merely on ground that accused was in jail for last more than 4 years.[8]

The Supreme Court has time and again drawn attention of the subordinate courts to the sensitivity which is required of the court to deal with all cases and more particularly in cases involving crime against women. In *State of Andhra Pradesh v Bedem Sundara Rao* ,[9] the Supreme Court said:

> In recent years, we have noticed that crimes against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reason through the court's verdict in the sentence of punishment.

Again, in the case of *State of Karnataka v Krishnappa* ,[10] the Supreme Court pointed that rape is not merely a physical assault. It is an offence which is destructive to the whole personality of the victim of crime. Courts shoulder a great responsibility in trying an accused on charges of rape and must deal with such cases with utmost care and sensitivity referring to imposition of punishment in such cases.

The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years.[11]

Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her esteem and dignity, it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Therefore, such cases need to be dealt with sternly and severely especially while dealing with the offence of rape and its traumatic effect on a rape victim.[12]

The Supreme Court in *State of Punjab v Gurmit Singh* [13] observed:

> Of late, crime against woman in general and rape on particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or3206 no concern for her honour. It is a reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murder destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts therefore, shoulder a greater responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity.

A socially sensitised judge is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.[14]

127. Rape Cases--Sentence bargaining

Sentence bargaining is impermissible in a serious offences like rape.[15]

128. Sentence--Leniency--Impermissible

Rape is an offence against human dignity, it is a transgression which is destructive of the whole personality of the victim, thus, there is no question of being lenient in passing sentence against the accused.[16]

129. Sentence--Different Approaches

In the matter of punishment for offence committed by a person, there are many approaches to the problem. On the commission of crime, three types of reactions may generate. One such reaction is the traditional reaction of universal nature which is termed as punitive approach. It regards the criminal as a notoriously dangerous person who must be inflicted with severe punishment to protect society from his criminal assaults. The other approach is the therapeutic approach. It regards the criminal as a sick person requiring treatment, while the third is the preventive approach which seeks to eliminate those conditions from society which were responsible for crime causation.[17]

Under the punitive approach, the rationalisation of punishment is based on retributive and utilitarian theories. Deterrent theory which is also part of the punitive approach proceeds on the basis that punishment should act as a deterrent not only to the offender, but also to others in the community.[18]

The therapeutic approach aims at curing criminal tendencies which were the product of a diseased psychology. There may be many factors including the family problems. We are not concerned with those factors, as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment3207 prescribed must be meted out to him, but which also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, which may even be a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner after being lodged in jail does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy.[19]

Sexual offences, however, constitute an altogether different kind of crime which is the result of a perverse mind. The perversity may result in homosexuality or in the commission of rape. Those who commit rape are psychologically sadistic persons exhibiting this tendency in the rape forcibly committed by them.[20] In some states in the USA, therefore, emphasis was laid on psychotherapy treatment of the offender while he was under detention. For that purpose, psychopath sexual offenders laws have been enacted in certain jurisdictions in USA. These laws treat sex offenders as neurotic persons and psychotherapic treatment is given to them during the period of their detention which may, in some cases, be an indefinite period, in the

sense that they would not be released till they are cured. However, the provision for indefinite detention even beyond the maximum period of imprisonment for that offence was seriously objected to by a group of lawyers and, therefore, in many of the states, this provision was dropped from the statute.[21]

Here, in India, statutory provision for psychotherapy treatment during the period of incarceration in jail is not available, but reformist activities are systematically held at many places with the intention of treating the offenders psychologically so that they may not repeat the offence in future and may feel repentant of having committed their dastardly crime.[22]

130. A Juvenile Accused Tried by the Sessions Court cannot be Sentenced

It is a settled position of law that when a child accused, instead of a children court or juvenile court, is tried by the sessions court and is convicted and sentenced, and on an appeal being filed, the appellate court may confirm the conviction of such accused but would set aside the sentence imposed by the sessions court.[23] The crucial date for determining the question whether a person is a juvenile is the date when he is brought before the competent authority, and not the date of commission of the offence.[24]But when the accused charged of unnatural offence the incident of which was committed in 1989, the Juvenile Justice (Care and Protection of Children) Act3208 2000 would have no application.[25] However, when the learned additional sessions judge has given cogent reasons in not holding the accused below 16 years of age, in his order of sentence and conclusive evidence, ie, birth certificate or school certificate of the accused is missing in the case, the case is not fit for calling the report about the age of the accused under s 32 of the Juvenile Justice Act (53 of 1986) or for setting aside the sentence imposed by the sessions court.[26]

In the present case, the accused appellant was not a juvenile under the 1986 Act as he had crossed the age of 16 years. The case was, however, pending before the High Court in appeal and on that date, the 2000 Act came into force and had, therefore, to be dealt with under s 20 of the Act, which required the High Court to record a finding about the guilt of the accused but stop short of passing an order of sentence against him. Inasmuch as the High Court convicted the accused appellant, it did not commit any mistake for the power to do so was clearly available to the High Court under the provisions of s 20 . What was not permissible was the passing of a sentence, for which purpose, the High Court was required to forward the juvenile to the Juvenile Board constituted under the Act. The order of sentence therefore was found unsustainable and was set aside. At the time of hearing of appeal before the Supreme Court, the accused had reached the age of 36 years. The accused had already undergone three years of imprisonment awarded to him by the High Court. In the circumstances, reference to the Juvenile Justice Board at this stage of his life would serve no purpose. The only option available was to direct his release from custody, and the Supreme Court directed the release of the accused.[27]

131. Rape and Murder--Sentence

In a rape cum murder or attempt to rape and murder case, where the accused killed the prosecutrix in attempting to commit rape or after committing rape, the question of sentence for the offence of rape or attempt to rape loses much of its significance. The reason for this is not far to seek. The offence of murder being most heinous and important than the offence of rape or attempt to commit rape and the punishment prescribed for murder under s 302, IPC, is either death penalty or imprisonment for life in addition to fine. When the accused is convicted both under ss 302 and 376 and is awarded the death penalty under s 302, the punishment under s 376 becomes immaterial. Similarly, if life imprisonment is awarded to the accused on his conviction under s 302, the sentence under s 376 again loses its significance as the maximum sentence which can be imposed against the accused under s 376, IPC, is life imprisonment. However, whether death penalty or life imprisonment should be awarded to the accused for committing offence under s 302 is dependent upon the fact whether on the given facts and circumstances of the case it is found to be amongst the rarest of rare cases,[28] after balancing mitigating and aggravating circumstances present in the case. When the case is not found amongst the rarest of the rare cases, the accused is liable to be punished with life imprisonment.[29]3209 However, when the rape and murder case is found to be amongst the rarest of rare cases, the accused is liable to be punished with death penalty.[30] There were deficiencies in the investigation of the case, death sentence awarded by Courts below was substituted by life imprisonment.[31] Where the appellants accused attempted to commit rape on village girls twice, on

being admonished by village Panchayat, committed rape and brutally murdered a girl aged 18 years, the case was based on circumstantial evidence. It was held that the case fell in the category of rarest of rare case, and death sentence was held proper.[32]

The prosecution witnesses deposed that the accused was seen carrying a four years old child after having raped her. The accused committed the murder of the girl, threw the child in the wheat field and ran away. Conviction of the accused under ss 376 and 302, IPC was held proper.[33] The accused was alleged to have committed rape and murder of minor girl. The testimony of the mother and the brother of the deceased that the accused was last seen in the company of the deceased was found reliable and as such believed. On the disclosure statements made by the accused the clothes of the deceased and the accused, stained with human blood, were recovered. Therefore, the accused appellant was convicted under ss 302, 376, IPC .[34] There were major contradictions in the evidence of the prosecution witnesses, the participation of the accused appellants in the commission of the crime was not proved. Extra judicial confession made by the accused to Sarpanch was found not reliable, the Sarpanch had disclosed the extra-judicial confession to police after 16 days. The conviction of the accused appellants under ss 302 and 376, IPC was set aside.[35]

Even if it is accepted that the chappals and the utensils of the deceased were found in the fields of the accused appellant, the dead body of the deceased was found at another place *i.e.* in the field of another person. The conviction of the accused appellant under ss 376 and 302, IPC was set aside.[36]

132. Rape on false promise to marry -- Life imprisonment proper

Where the accused committed rape on the prosecutrix on false promise to marry her, which he subsequently refused when the prosecutrix got pregnant, he committed breach of trust. Award of life imprisonment was held proper. *(State of UP v Naushad* 2014 Cr LJ 540 (SC), AIR 2014 SC 384, (2013) 16 SCC 651).

133. Sentence under Section 376(1)[37]--Four Tier Punishment

The punishment prescribed for the offence punishable under s 376(1) of the IPC is a four tier proviso. The statute says that the period of sentence should be minimum of 7 years, if the offence is proved. The second tier is of 10 years, which means that the3210 court if decides to impose punishment for more than 7 years and to the extent of 10 years, then normally it should assign good and convincing reasons as to how the case falls in the category where punishment of more than minimum prescribed period needs to be imposed. The third tier is imposition of punishment for life. In a rape case, when the court decides to impose life imprisonment then detailed reasonings are required to be given by the learned trial judge as to how and why the case falls in the category where life imprisonment is required to be imposed. Fourth and last tier is for imposing less period of punishment than minimum prescribed. For this court is supposed to give adequate and special reasons. Therefore, the reasons must not be only adequate but also special. Unless the court is able to say so, there is no scope to award punishment less than minimum or to say that it is reduced to 'already undergone', if such period is less than seven years.[38]

134. Sentence--When Accused is the Husband of the Prosecutrix

By s 3 of Act 29 of 1925, the phrase 'unless the woman raped is his own wife and is not under 12 years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both' was added to s 376 . The position of law in this regard has not changed even after the Criminal Law (Amendment) Act 1983 (43 of 1983). By virtue of exception to s 375, sexual intercourse with his own wife, the wife being not under 15 years of age is not rape. Thus, though sexual intercourse by a man with his own wife aged 15 years and above is no offence, it is a mild offence when her age is 12 years and above, but less than 15 years. However, when the age of wife is under 12 years, the offence of rape committed by the accused-husband is at par with other cases falling under sub-s (1) of s 376 . However, it is yet to be explained by a judgment of the High Court or the Supreme Court whether such case would fall under sub-s (1) of s 376 or under cl (f) of sub-s (2) of s 376, IPC . The following table I depicts the legal position as to offence and sentence when a man commits

sexual intercourse with his wife on her age.

135. Sentence--Proviso to Section 376 (1) and (2)[39]--Meaning

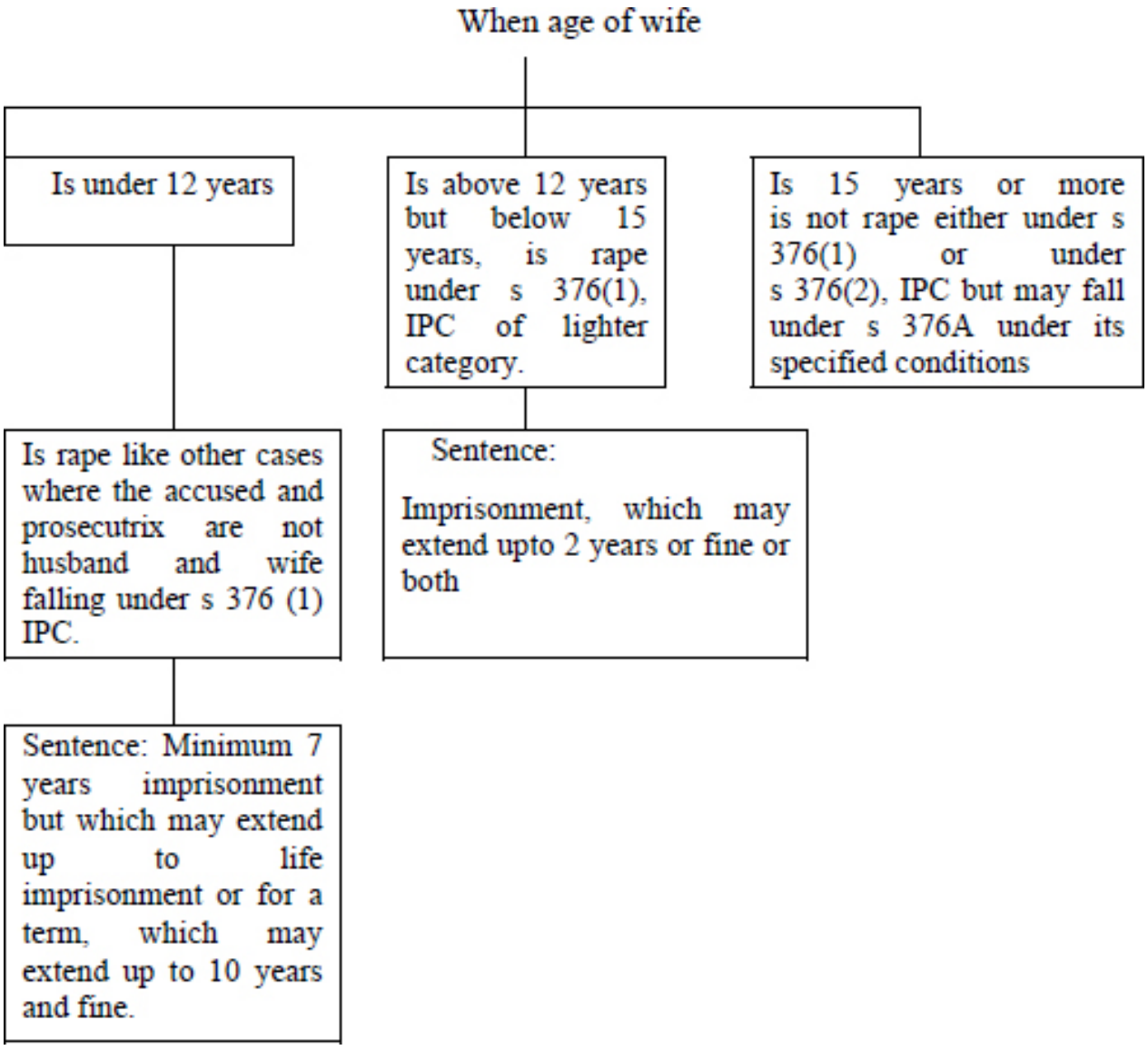
Sub-section (1) of s 376, IPC provides that whoever, except in the cases provided for by sub-s (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than 7 years but which may be for life or for a term which may extend to 10 years and shall also be liable to fine. In the category of cases covered under sub-s (2) of s 376, the sentence cannot be less than 10 years but which may be for life and shall also be liable to fine. The proviso appended to sub-s (1) lays down that the court may for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than 7 years. There is a similar proviso to sub-s (2) which empowers the court to award a sentence of less than 10 years for adequate and special reasons to be mentioned in the judgment.[40]

It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso particularly in such like penal provisions. The courts are obliged to respect the legislative mandate in the3211 matter of awarding sentence in all such cases. Recourse to the proviso can be had only for special and adequate reasons and not in a casual manner. Whether there exist any special and adequate reasons would depend upon a variety of factors and the peculiar facts and circumstances of each case.

TABLE I[41]

HUSBAND AND WIFE

Sexual Intercourse by Husband with or without consent



No hard and fast rule can be laid down in that behalf of universal application.[42] In order to exercise the discretion of reducing the sentence, the statutory requirement is that the court has to record 'adequate and special reasons' in the judgment and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate, but also special. What3212 is adequate and special would depend upon several factors and no strait jacket formula can be indicated.[43]

136. Sentence--Proviso to Section 376 (1) and (2)[44]--Adequate and Special Reasons

In order to exercise the discretion of reducing the sentence the statutory requirement is that the court has to record 'adequate and special reasons' in the judgment and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no straitjacket formula can be indicated.[45] The words 'special reasons' in the context in which they are used could only mean special to the accused on whom sentence is being imposed. The court has to weigh reasons advanced in respect of each individual accused whose case is taken up for awarding sentence. The word special has to be understood in contradistinction to the word general or ordinary. Now, what does term

special connote? Special means distinguished by some unusual quality, out of the ordinary. Webster defines special as particular; peculiar, different from others; designed for a particular purpose, occasion, or person; limited in range, confined to a definite field of action. Thus, anything which is common to a large class governed by the same statute cannot be said to be special to each of them. It would thus unquestionably appear that special reasons in the context of sentencing process must be special to the facts and the circumstances of the case in which the sentence is being awarded.[46]

The circumstances also must be special in the sense that they should be different from the normal. While using the circumstances for imposing a lenient sentence, the primary consideration should be whether the circumstances are special to the case. The special circumstances should be of such a nature which should have relation to the offence and not to the offender.[47]

The adequate and special reasons need to be disclosed in the order/judgment by the trial court itself so that the appellate forum is in a position to know as to what weighed with the court in awarding a sentence less than the minimum prescribed under the Act.[48] The accused, 21 years old at the time of the incident, having a love affair with a minor girl, eloped with her/prosecutrix to another village and married her under the misconception that they can do so. The accused had sexual relationship with the prosecutrix only after the marriage. Having regard to the tender age and offence having been committed out of reciprocal passion; coupled with the fact that the accused has already suffered substantial part of his sentence period, as imposed by the lower court, having undergone four years and nine months in jail, his sentence was reduced to the period already undergone under the circumstances of the case.[49] Where the incident was 20 years old, and the parties had married and settled in life, the Supreme Court reduced the sentence to the period already undergone.[50]3213

The expression 'adequate and special reasons' indicates that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons.

137. Sentence--Proviso to Section 376(1)[51]--Cumulative Requirement--Proviso Applies to both the trial Court and High Court

The reason has not only to be adequate, but also special. What is applicable to trial courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court. Where the only reason indicated by the High Court is the young age of the accused and the fact that he belongs to a Scheduled Tribe, the same can by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative.[52] Both in cases of sub-ss (1) and (2) the court has the discretion to impose a sentence of imprisonment less than the prescribed minimum for 'adequate and special reasons'. If the court does not mention such reasons in the judgment, there is no scope for awarding a sentence lesser than the prescribed minimum. In order to exercise the discretion of reducing the sentence the statutory requirement is that the court has to record 'adequate and special reasons' in the judgment and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate, but also special. What is adequate and special would depend upon several factors and no straitjacket formula can be indicated. What is applicable to trial courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court.[53]

138. Reasons not found Adequate and Special

The following reasons were not found adequate and special reasons:

(a) The accused was 17 years old at the time of incident and was an illiterate villager coming from a rural area.[54]
(b) The factors that the accused was 'unsophisticated' and illiterate citizen belonging to a weaker section of the society, that he was a chronic addict to drinking and had committed

rape on the girl while in a state of intoxication and that his family comprising of an old mother, wife and children were dependent upon him.[55]

(c) When parents of the accused are old and the victim was married subsequently.[56]

(d) The incident took place 13 years back and now the accused has matured and would be 31 years of age and has already undergone nearly three years sentence.[57]

(e) The accused has remained in custody for 2½ years.[58]3214

(f) Long pendency of case or the fact that the accused and the victim may have got married and settled in life during the pendency of proceedings are not relevant factors to award less than the prescribed minimum sentence. These factors may be relevant for consideration by the executive or constitutional authorities for revision of sentence.[59]

(g) The fact that the occurrence took place ten years ago and the accused might have settled in life.[60]

(h) The fact that prosecutrix and her husband expired by the time of hearing of appeal is no ground to take a lenient view.[61]

(i) The plea that the accused was aged 18-19 years and was at the threshold of life and due to his extreme youth he could not control his passion, is not sufficient to reduce sentence when the accused raped a girl 8-9 years old.[62]

(j) The offenders were youngsters at the time of commission of gang rape.[63]

(k) The incident took place long time back and the accused was then only 19 years old and is now married and settled in life is not sufficient to take a lenient view when accused had betrayed the trust reposed on him by a young girl of 13 years and had committed the heinous crime by ravishing her forcibly by holding out threats.[64]

(l) The fact that the victim has since then married and settled in life, whereas the accused could not marry because of disrepute.[65]

(m) The offence in question was first offence committed by accused and that he was only earning member of his family and is having two wives and six children.[66]

(n) The court has not assigned any satisfactory reason much less adequate and special reasons for reducing the sentence to a term which is far below the prescribed minimum.[67]

(o) In view of the fact the accused took undue advantage of a woman, who was alone in her house at the relevant time to satisfy his lust, the plea of the accused for reduction of the sentence on the ground that he is the only bread earner in his family is not tenable.[68]

139. Sentence--Character and Reputation of Victim Irrelevant

Factors like character or reputation of the victim has no bearing or relevance either in the matter of adjudging the guilt of the accused or imposing punishment under s 376, IPC . Such factors are wholly alien to the very scope and object of s 376 and can never serve either as mitigating or extenuating circumstances for imposing the sub-minimum sentence with the aid of the proviso to s 376(2), IPC . Thus, the character,3215 reputation or status of a raped victim is an irrelevant factor for consideration by the court while awarding sentence to the rapist.[69]

Sentence--Consent Mitigating Factor

Where the victim girl was below the age of 16 years, but was found a consenting party as she had lived with the accused in a rented house, the sentence of three years imposed by the trial court was reduced to the period already undergone by the accused, which was one and half years.[70]

140. Sentence--Compromise between Accused and Victim is not a Mitigating Factor

While dealing with the accused for commission of the offence of rape, it is to be borne in mind that the monetary pleasure of one causes devastating effect in another. The cry of the collective has to be answered and respected while imposing a sentence.[71]

When during the pendency of appeal an application was filed under s 320(5), CrPC for grant of leave to compound the offence and to take factum of compromise in consideration while awarding sentence, it was

held that apart from the fact that such an offence is not compoundable, compromise of this nature cannot be a factor for consideration in a case of rape for reduction with regard to quantum of punishment.[72]

141. Father Committing Rape with his Daughter--Sentence

Sexual offences constitute an altogether different kind of crime which is the result of the perverse mind. The perversity may result in homosexuality or in the commission of rape. Those who commit rape are psychologically sadistic persons exhibiting this tendency in the rape forcibly committed by them, particularly when the rape is committed by a father with his own daughter.[73] No lenient view in the matter of sentence could be taken looking at the relationship between the victim and the accused and in view the present trend of penology, the sentence has to be an eye opener so as to deter other members in the society from committing such crimes.[74]

If a person commits rape with his own daughter, such person cannot be regarded as a normal man and is psychologically sadistic person and some psychological treatment should be given to him during the period of detention, but whether such type of treatment is given in India is not clear. To prevent such type of offences, psychological treatment is a must and if such type of facility is not available in India, it should be provided in jail.[75]

However, looking at the facts and circumstances of the case, punishment of seven years rigorous imprisonment awarded to the accused was found sufficient by the Rajasthan High Court,[76] but the Madhya Pradesh High Court came to the conclusion3216 that sentence of imprisonment of life is appropriate sentence for such a shameful act of the father.[77]

The Rajasthan High Court in another such case reduced the sentence of imprisonment for life to imprisonment for ten years.[78] The Gauhati High Court in a case of a father committing rape on his daughter aged 11 years reduced the sentence of 10 years rigorous imprisonment imposed by the trial court to 5½ years while maintaining the sentence of fine, holding that the magnitude of the offence cannot be over emphasised in the context of the fact that the accused being the father who raped his minor daughter when there is no earning member in the family.[79]

The Supreme Court in a case enhanced the sentence of 5 years awarded by trial Court to imprisonment for life, as the accused respondent was found guilty of having committed rape on her daughter and convicted under s 376, IPC ..[80]

142. Child Rape Cases-- Section 376(2)(F)[81]--Sentence

Child rape cases are cases of perverse lust for sex where even innocent children are not spared. It is a crime against humanity. Many such cases are not even brought to light because of social stigma attached to it. According to some surveys, there has been a steep rise in child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other modes of sexual abuse. These factors point towards a different approach required to be adopted.[82]

A perusal of s 376(2)(f), IPC, shows that the legislative mandate is to impose a sentence for the offence of rape on a girl under 12 years of age, for a term which shall not be less than 10 years, but it may extend to life and also to fine. The proviso to s 376(2) lays down that the court may for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than 10 years. Thus, the normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years rigorous imprisonment. Though in exceptional cases for special and adequate reasons, a sentence of less than 10 years rigorous imprisonment can also be awarded.[83]

When during the pendency of appeal an application was filed under s 320(5), CrPC, for grant of leave to compound the offence and to take the factum of compromise into consideration while awarding the sentence, it was held that apart from the fact that such an offence is not compoundable, a compromise of

this nature cannot be a factor for consideration in a case of rape for reduction with regard to quantum of punishment. It is to be borne in mind that the accused was a married person at the time of commission of rape, and has not only betrayed the faith reposed3217 in him by his wife, but also destroyed the dreams of a child. The accused has created a situation by which the prosecutrix would be forced to carry the traumatic experience imposed on her in the blossom of adolescence. An offence against the body of a woman lowers her dignity and mars her reputation. It is said that every one's physical frame is his or her temple. No one has any right of encroachment.[84]

No leniency could be shown when the accused, a full grown adult, committed rape on a minor girl of 6 years of age, and sentence of rigorous imprisonment for 10 years cannot be slashed in view of the provisions of s 376(2)(f), IPC .[85] Having played with the life of a child aged eight years, the accused does not deserve any leniency on the ground that the incident took place 13 years back and the accused has now matured and is about 31 years old and undergone nearly three years of sentence.[86]

143. Child Rape Cases-- Section 376(2)(f) [87]--Reduction in Sentences

Section 376(2)(f) which deals with rape on a child below 12 years provides for punishment which is normally not to be less than 10 years, but which may extend to life. The courts are also empowered, for adequate and special reasons to be mentioned in the judgment to impose a sentence of imprisonment of either description for a term which is less than ten years. Where the facts of the case indicate that the accused at the initial stages did not seem to have fixed plan to rape anybody, and apart from the heinous crime of rape on a small girl, the child was not otherwise harmed. It was not the case of the prosecution that the accused was a habitual offender or was earlier guilty of any such crime. The sentence of life imprisonment was reduced to rigorous imprisonment for 10 years along with fine of Rs 1000.[88] Where the accused, a young unmarried man and a first offender having no past antecedents of any crime had already undergone five years of imprisonment, the sentence of life imprisonment was modified to 10 years of rigorous imprisonment.[89]

144. Reduction of sentence to less than the Minimum Prescribed (Sub-section (2), old section 376)

The Sessions Judge had sentenced the accused convict to seven years of rigorous imprisonment. The High Court in appeal reduced the sentence to the period already undergone, which was eleven months and the only reason given by the High Court was that the accused belonged to rural areas, but the same could by no stretch of imagination be considered either adequate or special.[90] The mere fact that the accused belonged to Schedule Tribe was held not special/adequate reasons for reducing the sentence, especially when the victim was below 12 years of age.[91] In a case, the accused teacher committed rape on his minor student. The mere fact that the3218 accused had a family to maintain was held not sufficient ground to reduce the sentence.[92]

The trial Court convicted the accused appellant under s 376, IPC and sentenced him to seven years rigorous imprisonment. The reduction of sentence to the period undergone *viz.* one year and two months without assigning adequate special reasons by the High Court was held not proper by the Supreme Court.[93] The accused was found guilty and convicted for committing rape on a girl aged 10 years, such that the case fell under s 376(2)(i), IPC . The trial Court sentenced the accused to ten years rigorous imprisonment and the High Court reduced the sentence to 7 years rigorous imprisonment on the ground that the accused was young and the only bread winner of his family. It was held that the High Court was not justified in reducing the sentence and the Supreme Court restored the sentence of ten years rigorous imprisonment as imposed by the trial Court.[94]

Under the new s 376, IPC, the Court cannot impose a sentence less than the minimum prescribed by the section. The Parliament in the wake of the increasing crimes against women by Criminal Law (Amendment) Act, 2013 has deleted the proviso to s 376(2), IPC .

In a case it has been held that merely because the parties have entered into a compromise is no ground to reduce the sentence.[95]

145. Reduction In Sentence--Instances

Following are the instances of cases in which the court reduced the sentence under s 376 :

(a) accused has remained in jail for about 3½ years and both the victim girl and the accused have already got married, so the sentence of imprisonment was reduced from 9 years to 5 years;[96]

(b) the incident occurred more than 13½ years ago and the accused was under the shadow of the case for a long time, the sentence of rigorous imprisonment of 7 years was reduced to 4 years rigorous imprisonment;[97]

(c) the incident took place about 7 years ago, the accused remained in custody and was released after 2 years when the High Court in appeal, acquitted him of the charge under s 376, IPC, the Apex Court though reversed the finding of acquittal of the High Court but sentenced the accused to the period already undergone by him and a fine of Rs 2000 in default of which further imprisonment of one year and nine months was to be imposed;[98]3219

(d) the accused deposited Rs 4 lakh with counsel for the prosecutrix, to be deposited as a fixed deposit in the bank, to fetch her a reasonable amount of interest on the said principal, the sentence of 7 years rigorous imprisonment was reduced to 6 months rigorous imprisonment and fine of Rs 1000 and in default of which to suffer rigorous imprisonment for one month;[1]

(e) the accused belonged to the Scheduled Caste category and there was some negotiation between the accused and the victim which had failed prior to the incident, so the sentence of 5 years rigorous imprisonment and fine of Rs 2000 was reduced to 3 years rigorous imprisonment and fine of Rs 1000;[2]

(f) the victim was above 14 years but below 16 years of age, so the offence would fall under s 376(1) and not under s 376(2)(f), IPC, so the sentence of 10 years rigorous imprisonment awarded by the trial court was reduced to 7 years rigorous imprisonment by the appellate court;[3]

(g) the accused was 21 years of age at the time of commission of offence, the offence was committed on account of erotic impulses with a view to satisfy the same, the injury done to the prosecutrix, a minor girl was healed after operation, the sentence of life imprisonment imposed by the trial court was reduced to 10 years rigorous imprisonment by the appellate court while maintaining sentence of fine of Rs 2000.[4]

(h) an offence under s 376, IPC is a non-compoundable offence. As the parties had entered into the compromise and had got married, and further the incident was 14 years old, the sentence was reduced to the period of 3½ years already undergone.[5]

Note: Proviso to s 376(2), IPC, prior to the amendment of the section by Criminal Law (Amendment) Act, 2013 gave discretion to the Court to award sentence less than the minimum prescribed by the section. After the amendment, the proviso to s 376(2), IPC stands deleted, such that now the Court has no such power.

(i) the accused aged 18-19 years was convicted for committing rape on a seven years old girl and was sentenced to life imprisonment. It was held that, life imprisonment was not warranted in the case and was reduced to 10 years rigorous imprisonment, and the fine of Rs. 20,000/- was reduced to Rs. 1,000/- . [6]

(j) the accused was a casual labourer and had been in custody for about 2 months less than 5 years, he was exposed to public ridicule so the3220 sentence of 10 years rigorous imprisonment awarded by the trial court was reduced to 5 years rigorous imprisonment;[7]

(k) the accused took poison after the incident showing his repentance for the crime, so the sentence of rigorous imprisonment was reduced from 10 years to 7 years.[8]

(l) the victim girl was below the age of 16 years, but was found a consenting party as she had lived with the accused in a rented house, hence the sentence of three years imposed by the trial Court was reduced to the period already undergone which was one and half year.[9]

(m) the accused aged 45 years was found guilty for having raped a 12 years old girl and was

sentenced to life imprisonment and a fine of Rs. 10,000/-. As the accused came from a tribal community, looking to the facts and circumstances of the case, sentence of fine was set aside, and a sentence of life imprisonment was reduced to period of ten years already undergone. [10]

146. Instances, where sentence not Reduced

The court refused to reduce the sentence in several cases as given below, when:

(a) the trial court imposed a sentence of 7 years rigorous imprisonment besides fine, and the incident occurred 13 years back and the accused who was now 31 years old had already undergone nearly 3 years of the sentence;[11]

(b) the sentence awarded to the accused by the trial court was less than the minimum sentence of 7 years under s 376(1), IPC,[12] or a minimum sentence of 10 years under s 376(2), IPC ;[13]

(c) the accused completely belied the trust of his niece and committed rape on his sister's daughter in a beastly manner and the court below had already shown leniency by imposing minimum imprisonment of 7 years and has not imposed a higher sentence;[14]

(d) the trial court has already taken a lenient view and awarded a minimum sentence prescribed for the offence of rape and since the accused had forcibly carried away a minor girl and committed rape on her with the result that injuries were caused to the private parts of the prosecutrix;[15]

(e) the accused aged 55-56 years, played with the modesty of the prosecutrix aged 15-16 years and ravished her by committing breach of faith which she3221 and her mother reposed in him and the minimum sentence of 7 years was imposed by the trial court;[16]

(f) the accused were guilty of gang rape of a minor girl punishable under s 376(2)(g), and sentenced to 10 years rigorous imprisonment and fine of Rs 3000, the plea of the accused for leniency on the ground that their parents were old and the prosecutrix got married subsequent to the incident was discarded;[17]

(g) the accused, a married man of about 36 years, committed the heinous crime of rape on a teenaged girl who used to call him uncle and who was his daughter's friend, so there was no room for leniency to reduce the sentence of seven years rigorous imprisonment imposed by the trial court;[18]

(h) the accused behaved like 'wolves in human frame' and committed gang rape on a lady, a nurse, who was of the age of their mother while she was on her way for her duty in the hospital;[19]

(i) in a gang rape case, the accused persons taking undue advantage of the situation when the prosecutrix was alone in the house, made a severe sexual assault taking turns by giving threats;[20]

(j) the accused was serving in a disciplined service (Military Engineering Service) and committed rape on a 50 year old woman, the fact that prosecutrix and her husband died by the time of hearing of appeal against the conviction was not considered a mitigating factor to take a lenient view in the matter of sentence, as the offence under s 376, IPC, is an offence against society and state;[21]

(k) the accused raped a girl aged 8-9 years and would have destroyed her vagina beyond repair, the plea that the accused was aged 18-19 years and was on the threshhold of his life and due to extreme youth could not control his passions was not considered sufficient to reduce the sentence;[22]

(l) the accused committed rape on the wife of his uncle;[23]

(m) the accused and the complainant party compromised because the offence under s 376, IPC, is not compoundable under s 320(5), Cr PC ;[24]

(n) the offence was not found to have been committed on the spur of the moment or passion and there was no mitigating circumstances in favour of the accused who committed rape on the prosecutrix aged 10-12 years and she suffered injuries on her private parts.[25]3222

(o) The mere fact that accused and the prosecutrix had a love affair, or that the accused belonged to rural area, could not be considered either adequate or special, so it was no ground to reduce the sentence.[26]

147. Enhancement of Sentence

In the following cases the court enhanced the sentence under s 376, IPC, when:

(a) the trial court awarded a sentence of 18 months rigorous imprisonment on consideration of young age of the accused which was found too inadequate by the appellate court as the dignity of a girl cannot be considered so casually, and a person who commits such an act of rape on the helpless young girl should not get away with the sentence of 18 months rigorous imprisonment, the sentence of imprisonment was therefore enhanced to rigorous imprisonment for 7 years and fine of Rs 3000 was also imposed in default of which 6 months rigorous imprisonment was to be undergone by the accused;[27]

(b) the accused, a married man of 49 years of age, committed rape on a 7-8 years old girl, the reduction of sentence to 4 years rigorous imprisonment, ie, less than 10 years prescribed minimum sentence under s 376(2) which was imposed by the trial court, did not find favour with the Apex Court which enhanced the sentence from 4 years rigorous imprisonment to 10 years rigorous imprisonment for the said offence;[28]

(c) a gang rape punishable under s 376(2)(g), IPC, was committed, the sentence of 5 years rigorous imprisonment in the absence of adequate and special reasons was held illegal and so was enhanced to 10 years rigorous imprisonment;[29]

(d) a person who has committed a heinous offence of rape upon a 4 year old girl deserves no sympathy in the matter of sentence and hence there are no adequate and special reasons for awarding a lesser sentence than the minimum of 10 years rigorous imprisonment, therefore, the sentence of imprisonment of three years rigorous imprisonment awarded by the trial court was enhanced to 10 years rigorous imprisonment by the appellate court;[30]

(e) in a case of abduction and rape of a minor girl, the High Court while maintaining conviction of the accused reduced their sentence to the period already undergone, *i.e.*, 1½ months, the Apex Court enhanced the sentence under s 376, IPC to 5 years rigorous imprisonment;[31]

(f) the accused, a middle aged man of 45 years raped a girl of 10 years, the trial court sentenced the accused to undergo rigorous imprisonment for three years which was enhanced to 3 years rigorous imprisonment and fine of Rs 5000 by the High Court, and in default of payment of fine, the3223 accused was to undergo rigorous imprisonment for two years more, the fine realised was to be paid to the prosecutrix.[32]

(g) Where the victim at the relevant time was about 19 years and not the wife of the accused, the order imposing a sentence of 2 years rigorous imprisonment which is less than minimum by showing misplaced sympathy on the accused was found not proper and the sentence was modified and enhanced to 7 years rigorous imprisonment with fine of Rs 2000.[33]

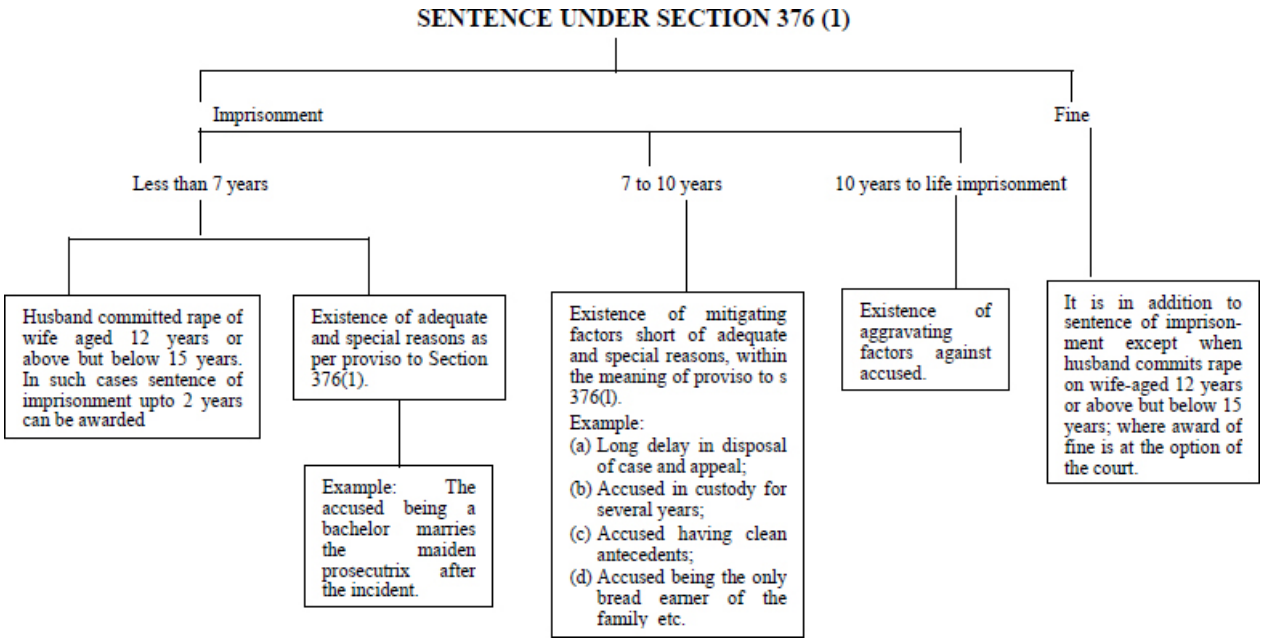
148. Instances where Sentence Not Enhanced

The High Court has plenary power to issue notice of enhancement of sentence in exercise of its power under s 397, CrPC, even if no appeal is filed by the State, provided that notice of enhancement of sentence is served upon the accused.[34] However, when the victim is a married lady, there was no injury noticed on the private parts of the victim, nor any seminal stain, blood stain, marks of violence on the persons of the accused were found, the sentence should not be enhanced.[35] The Bombay High Court declined to issue notice for enhancement of sentence to the accused holding that it was not appropriate to issue it after a period of 4 years from the date of conviction, particularly when the State has not preferred an appeal for enhancement of sentence under s 377(1), CrPC .[36]

149. Sentence under Section 376 --Tabular Analysis

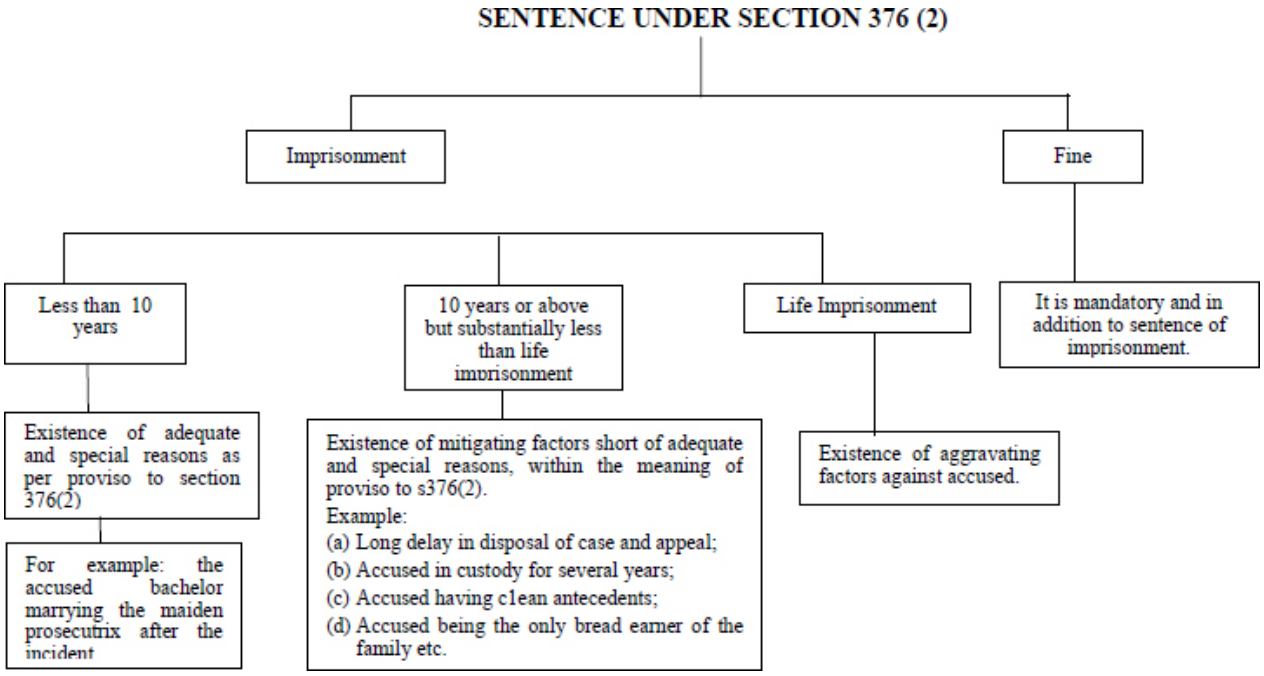
In the light of discussion pertaining to sentence and interpretation of s 376, the fairly correct position with regard to sentence under s 376(1) and (2) can be understood with the help of Table II and III, Table II gives the idea of sentence for offence falling within s 376(1), IPC . Table III pertains to cases falling under sub-s (2) of s 376, IPC . These tables are self-explanatory.3224

TABLE II[1]



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TABLE III[2]



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ALTERATION OF CONVICTION

150. Alteration Of Conviction

Even in cases where the main offence or the main charge has failed, the courts should not *ipso facto* jump to the conclusion that an acquittal is automatic. It is the duty of the trial court to ascertain from the evidence on record whether some lesser offence has been made out and if so, to convict the accused of that lesser offence.[1]

However, a conviction under s 376 cannot be altered on appeal to one under s 323 on the ground that there was reasonable doubt with respect to the allegations of rape. Such an alteration is illegal and the conviction should be set aside.[2] If the offence under s 376 is not proved, it cannot be possible to convict the accused on a charge under s 497 or s 498 for which a complaint of the husband is necessary.[3] It is not, however, competent for a judge, in appeal, to alter a charge under s 376 to one under s 366 because charge under s 366 involves different elements and different questions of fact from a charge under s 376 .[4] However, if the proved facts establish both the offences, the accused can be convicted separately for each offence.[5]

It must, however, be remembered that if the real offence is rape and abduction is an aggravating circumstance, two separate sentences under s 365 and s 376 should not be given.[6]

If no specific charge under s 376 is made, but there is no doubt that technical rape is committed, a conviction under s 366 may be altered to one under s 376 by virtue of the provisions of s 221(2), CrPC 1973.[7]

151. Conviction under Section 376 read with Section 109,IPC

Where the accused took a room on rent in his own name and facilitated the main accused in committing rape on the prosecutrix, he was convicted under s 376 read with s 109, IPC .[8]

152. Accused Charged under Section 376 , Conviction under Section 354,IPC Proper

There was no evidence that the accused penetrated his private part into the private part of the prosecutrix and medical evidence did not establish sexual intercourse. The accused merely put his finger into the private part of the prosecutrix. It was held that, no offence under s 376, IPC was made out and the accused was convicted under s 354, IPC . [9]3228

When the evidence showed that even though the accused persons had forcibly taken the prosecutrix to a room and undressed her with a complete intention of committing sexual intercourse upon her, had ultimately only succeeded in making an attempt in furtherance of their heinous crime, and the medical testimony completely pointed to the completion of sexual act to establish the charge of rape against the accused, the conviction of the accused persons under s 376 was altered to one under s 376 read with s 511 .[10] When the prosecution is not able to prove the commission of the offence under s 376, IPC, by the accused but has been able to prove its attempt by the accused, the conviction of the accused under s 376 is liable to be altered from s 376 to one under ss 376 / 511 .[11] When the prosecutrix was 8 years old, it was noticed that fourchette was lacerated but hymen was not injured, the vaginal orifice was too small and did not even admit a single finger, the medical officer was of the definite view that it was an attempt to commit sexual intercourse, the accused was found liable to be convicted under ss 376 / 511, and not under s 376, IPC .[12] When there was complete absence of human semen in vaginal smear of the prosecutrix, and the report of the medical board stated that no intercourse had been performed on the prosecutrix, the presence of the human semen on *dhoti* of the accused and *ghagra* of the prosecutrix merely proves that the accused had ejaculation at the time of incident, the injuries on the body of the prosecutrix and their dimension and location suggested that accused attempted to ravish her, the conviction of the accused under s 376 was altered to one under ss 376 / 511 .[13]

153. Alteration of Conviction under old Section 376(2)(f) to Sections 376 / 511

Where the evidence of the father, the eye-witness, only reveals that on hearing the screaming sound of his daughter, he rushed to spot noticed that the accused was lying on his daughter and attempted to commit rape, but, did not succeed and fled away from the place, the medical evidence had not noticed any injury over private part and there being no penetration, therefore, offence falls under s 376 read with s 511, IPC, *i.e.*, attempt to commit rape and not under s 376(2)(f), the conviction of the accused was altered from s 376(2)(f) to ss 376 / 511, IPC .[14]

154. Alteration of Conviction from old Section 376(2)(g) to Section 376(1)

Where two accused persons allegedly committed rape on the prosecutrix and one of the accused persons was acquitted by the trial court, the conviction of the remaining accused was altered to s 376 instead of s 376(2)(g), IPC .[15]

155. Alteration of Conviction from Section 376 to one under Section 509

If the offence under s 376, IPC, is not proved but that under s 509 is established, the conviction of the accused under s 376 is liable to be altered to one under s 509, IPC .[16]3229

156. Alteration of Conviction from Sections 376 / 511 to one under Section 509

Commentary under s 509, vol 4, may be referred to.

157. Alteration of Conviction from Section 376 to Section 354

When a charge under s 376, IPC, is not established but the evidence on record proves that the accused outraged the modesty of the prosecutrix, the conviction under s 376 is liable to be altered to s 354, IPC .[17] The prosecutrix being a patient of mental retardation on the date of occurrence was not examined in the court. The FSL report had not been produced by the prosecution and the doctor clearly stated that no definite opinion regarding rape on the prosecutrix can be given for want of the FSL report. The prosecutrix was having no injury on her private parts when she was medically examined. She was also a married woman. There was no actual evidence to prove that sexual intercourse actually took place with her. The prosecution, however, was able to prove that the accused used criminal force on the prosecutrix with the

intention to outrage her modesty. On these facts the conviction of the accused under s 376 was altered to one under s 354, IPC .[18] It is difficult to believe that the accused though not suffering from paralysis yet his whole body trembled, could forcibly commit sexual intercourse with a grown up lady, more so when it is not alleged that he had threatened her by showing any weapon, however, he outraged the modesty of the prosecutrix, so the conviction of the accused under s 376 was altered to one under s 354, IPC .[19] The prosecutrix was the only prosecution witness who stated that the accused committed rape on her. The other witness stated that the accused caught hold of prosecutrix who was weeping and when the prosecutrix raised cries, the accused ran away, suggesting that the accused outraged her modesty. The medical evidence was doubtful. The conviction of the accused under s 6 was altered to one under s 354 .[20] Vaguely stating that the accused had sexual intercourse would not be a substitute for the statutory mandate, as contained in the explanation to s 375 without indication about the penetration aspect. When the offence of rape is not made out and the materials on record clearly make out a case under s 354, the conviction of the accused under s 376 is liable to be altered to one under s 354, IPC .[21] The accused was proved to have dragged the prosecutrix inside the house but the commission of rape was not proved, the accused were acquitted under s 376 but convicted under s 354, IPC .[22] The prosecution story regarding the commission of rape by the accused was not proved as even the parents of the child prosecutrix turned hostile but there was sufficient evidence to show that the accused outraged the modesty of the girl by playing with her in sexual manner. Thus, the conviction of the accused under s 376 was altered to one under s 354, IPC .[23] For further commentary, text under the same heading in s 354, *ante*, may be referred to.3230

158. Alteration of Conviction from Section 354 to one under Section 376 by the Sessions Court

The state filed the appeal and the High Court held the accused guilty under s 354, IPC . The state did not prefer any further appeal before the Supreme Court. However, the father of the victim girl who was also a complainant filed a criminal appeal before the Supreme Court. The Supreme Court found that all the necessary ingredients under s 376 had been satisfactorily established against the accused and therefore the conviction of the accused was altered from s 354 to one under s 376, IPC .[24]

159. Alteration of Conviction from Section 376 Read with Section 511 to one under Section 354

Where the accused tried to fulfil his lust from the back side of the prosecutrix without removing or lifting the clothes, the conviction of the accused was altered from one under s 376 read with s 511 to one under s 354, IPC .[25] The accused forcibly laid the prosecutrix on the bed and broke the string of her *pyjama* but made no attempt to undress himself, the prosecutrix pushed the accused away and he made no effort to grab her again. On these facts, the conviction under s 376 read with s 511 recorded by the sessions court was altered to one under s 354, IPC, by the High Court.[26] The accused had removed the cord of the petticoat of the prosecutrix and was about to sit on her waist when she cried out for her husband, the conviction of the accused under ss 376 / 511 was altered to one under s 354, IPC .[27] When the allegations against the accused were that he held the *saree* and tore the blouse of the prosecutrix but did not proceed ahead from the stage of preparation, the charge under ss 376 / 511, 448 was altered to one under ss 354 and 448, IPC .[28] The accused was seen holding the hand of the prosecutrix, an inmate of the hospital and pulling her towards the corner of the corridor and embracing her tight at which time her hospital dress was raised above the knee. The accused kept the zip of his pant half open so that even his pubic hair could be noticed. There was no determined effort to forcefully maintain sexual intercourse, nor medical evidence pointed out to any physical effort or violence which the accused might have made on the prosecutrix. On these facts the conviction of the accused under ss 376 / 511 was altered to one under s 354, IPC .[29] For further commentary, text under s 354, *ante*, may be referred to.

160. Alteration of Conviction from Section 354 to Sections 376 / 511

The accused charged under s 376 was convicted under s 354 by the sessions court. The prosecutrix was a dumb witness and through the expert interpreter stated by signs that the accused by lifting her *lehnga* and making her lie did 'something' in her vagina and for that she did not agree. There was no evidence to show that actual intercourse in fact had taken place, the conviction of the accused under s 354 was altered to ss 376 / 511, IPC .[30] The accused charged with s 376 was acquitted by the3231 sessions court

on appeal filed by the state before the High Court, the High Court convicted the accused under s 354, IPC . The Supreme Court found that the offence under ss 376 / 511, IPC was established against the accused, the High Court after having come to the conclusion that the accused was guilty of an offence under ss 376 / 511 could not have convicted the accused for an offence under s 354 . Therefore, the conviction of the accused under s 354 was altered to ss 376 / 511, IPC .[31] For further commentary, text under the same heading in s 354, *ante*, may be referred to.

161. Alteration of Conviction from Section 366 to one under Section 376

If no specific charge under s 376 is made, but there is no doubt that technical rape is committed, a conviction under s 366 may be altered to one under s 376 by virtue of the provisions of s 221(2) of CrPC 1973.[32]

162. Alteration of Conviction from Sections 366 and 376 to Section 365

Commentary under the same heading in s 365, *ante*, may be referred to.

163. Alteration of Conviction from Section 376 to Section 417

Where the prosecutrix voluntarily visited the house of the accused who allegedly raped her, the testimony of the prosecutrix indicated that she did not disclose incident as the accused had promised her to marry, the complaint was lodged only two days prior to the birth of child, the act of the accused did not attract the ingredient of s 375 . However, accused having sex with her by making a false promise of marriage and thereafter when she became pregnant, he refused to marry her, such an offence does fall under s 417, IPC so the conviction of the accused was altered from s 376 to s 417, IPC .[33]

Accused was prosecuted on allegations that the accused conductor kidnapped the victim girl and raped her in bus. The medical evidence did not show that sexual intercourse was committed. Evidence showed that attempt was made by the accused appellant to commit rape. Accused was convicted for attempt to commit rape under ss 376 / 511 and s 366, IPC .[34]

164. Accused Charged under Section 376 or Sections 376 / 511 or Sections 376 / 109 can be Convicted under Sections 354 and 323

When the accused is charged with committing rape or attempted rape but these charges are not proved, the statement of the prosecutrix that the accused had bitten her on the breasts and these bite marks are corroborated by a medical report of the doctor, are sufficient to establish that the modesty of the prosecutrix was outraged and injuries were caused to her, in such circumstances though the accused are entitled to acquittal of the charge under s 376 or ss 376 / 511, they are liable to be3232 convicted under ss 354, 323 / 34, IPC .[35] In the face of weak medical evidence, though the accused were found entitled to the benefit of the doubt under s 376 read with s 109, but instead were convicted for the offence under s 354, IPC .[36] An accused charged under s 376 and acquitted of the said charge can be convicted under s 354, IPC .[37]

74 *Sahab Singh v State of Haryana* AIR 1990 SC 1188, 1990 Cr LJ 1202 (SC) ; *Sadhu Patra alias Sadhu Charan Patra v State of Orissa* 2002 Cr LJ 863 (Ori) (DB) .

75 *State of Orissa v Dibakar Naik and Ors* 2002 Cr LJ 2826 (SC) .

76 *Dalbir Kaur and Ors v State of Punjab* AIR 1977 SC 472, 1977 Cr LJ 273 (SC), (1976) 4 SCC 158 ; *Dull Chand v Delhi Admn* AIR 1975 SC 1960, 1975 Cr LJ 1732 (SC), (1975) 4 SCC 649 ; *Naranbhai Paid v State of Gujarat* (2000) 1 SCC 358, 1999 AIR SCW 4770 .

77 *Raja Ram v State of Madhya Pradesh* (1994) 2 SCC 568, (1994) 2 JT 36 ; *Dandu Laxmi Reddy v State of Andhra Pradesh* AIR 1999 SC 3255, 1999 Cr LJ 4287 (SC) .

78 *EK Chandrasenan v State of Kerala* (1995) 1 JT 496 (SC) ; *Dharma v Nirmal Singh Bittu and Anor* 1996 Cr LJ 1631 (SC) .

79 *Dharma v Nirmal Singh Bittu and Anor* 1996 Cr LJ 1631 (SC) .

80 *State of Uttar Pradesh v Dharmendra Singh* (1999) JT 7 SC 207, AIR 1999 SC 3789, (1999) 8 SCC 325 .

81 *Nihal Singh and Ors v State of Punjab* AIR 1965 SC 26 .

82 *Bodhisattwa Gautam v Subhra Chakraborty* AIR 1996 SC 922, 1996 AIR SCW 325 .

83 *Mukeshbhai Nanubhai Patel v State of Gujarat* 1998 Cr LJ 194 (Guj) .

84 *Domestic Working Women's Forum v Union of India* (1995) 1 SCC 14 .

85 *Bodhisaltwa Gautam v Subhre Chakraborty* AIR 1996 SC 922 .

86 *Ibid.*

87 *Bodhisaltwa Gautam v Subhre Chakraborty* AIR 1996 SC 922 .

88 *Mukeshbhai Nanubhai Patel v State of Gujarat* 1998 Cr LJ 194 (Guj) .

89 *Mukeshbhai Nanubhai Patel v State of Gujarat* 1998 Cr LJ 194 (Guj) .

90 *Shabir Rashid v State* 1969 Cr LJ 1282 (Del) ; *Narayan Iranna Potkanthi v State of Maharashtra* 1994 Cr LJ 1752 (Bom) .

91 *Ibid.*

92 *Syed Ghouse v State of Andhra Pradesh* 2009 Cr LJ 311, p 315 (AP) (DB) .

93 *Ramdil v State of Madhya Pradesh* 2002 Cr LJ 861 (Chattisgarh) .

94 *Nand Lal v State of Himachal Pradesh* 2000 Cr LJ 3106 (HP) .

1 *S Krishma v State of Karnataka* 1998 Cr LJ 785 (Kant) (DB) ; *Public Prosecutor, High Court of Andhra Pradesh v Lingisetty Sreenu* 1997 Cr LJ 4003 (AP) .

2 *State of Maharashtra v Rajendra Jawanmal Gandhi* 1997 Cr LJ 4657 (SC) .

3 *Md Kalam v State of Bihar* 2008 Cr LJ 3194 (SC), (2008) 7 SCC 257, 2008 AIR SCW 4269, 2008 (9) Scale 413 .

4 *Gananath Jena v State of Orissa* 1996 Cr LJ 229 (Ori) .

5 *Emperor v Mahadeo Tatya* 1943 Cr LJ 621, AIR 1942 Bom 121 (FB) .

6 *State of Madhya Pradesh v Munna Choubey* 2005 Cr LJ 913 (SC) .

7 *State of Andhra Pradesh v Polamala Raju* 2000 Cr LJ 4014 (SC) .

8 *Chhotu Harijan v State* 2005 Cr LJ 3926 (Raj) .

9 *State of Andhra Pradesh v Bedem Sundara Rao* (1995) 6 SCC 230, 1995 AIR SCW 4435, AIR 1996 SC 530 .

10 *State of Karnataka v Krishnappa* 2000 AIR SCW 1040, 2000 Cr LJ 1793 .

11 *State of Rajasthan v Madan Singh* 2008 Cr LJ 1939, p 1940 (SC), AIR 2009 SC 1292, 2008 (2) SCC (Cri) 550 .

12 *State of Karnataka v Krishnappa* 2000 Cr LJ 1793 (SC) .

13 *State of Punjab v Gurmit Singh* (1996) 2 SCC 384, AIR 1996 SC 1393, 1996 Cr LJ 1728 .

14 *State of Karnataka v Krishnappa* 2000 Cr LJ 1793 (SC) .

15 *State of Haryana v Janak Singh* 2013 Cr LJ 3317, 2013 AIR SCW 3530 (SC), AIR 2013 SC 3246, 2013 (9) Scale 697, (2013) 9 SCC 431 .

16 *Bishnu Deo Mishra v State of Assam* 2012 Cr LJ 701, p 702 (SC), 2011 AIR SCW 6833, (2011) 14 SCC 705 .

17 *TK Gopal alias Gopi v State of Karnataka* 2000 Cr LJ 2286 (SC) .

18 *Ibid.*

19 *TK Gopal alias Gopi v State of Karnataka* 2000 Cr LJ 2286 (SC) ; *Sunil Batra v Delhi Admn* AIR 1978 SC 1675, (1978) 4 SCC 494, [1979] 1 SCR 392, 1978 Cr LJ 1741 ; *Sunil Batra (II) v Delhi Admn* AIR 1980 SC 1579, (1980) 3 SCC 488, [1980] 2 SCR 557, 1980 Cr LJ 1099 ; *Charles Sobraj v Superintendent, Central Jail, Tihar* AIR 1978 SC 1514, 1978 Cr LJ 1534 ; *Francis*

Coralie Mullin v The Administrator, Union Territory of Delhi (1981) 1 SCC 608, AIR 1981 SC 746, [1981] 2 SCR 516, 1981 Cr LJ 306 .

20 *TK Gopal alias Gopi v State of Karnataka* 2000 Cr LJ 2286 (SC) .

21 *Ibid*.

22 *TK Gopal alias Gopi v State of Karnataka* 2000 Cr LJ 2286 (SC) ; *Durga Ram v State of Rajasthan* AIR 2015 SC 1016, p 1021, 2015 Cr LJ 1403, 2015 (1) Crimes 81 (SC), (2015) 2 SCC 775 (Accused appellant aged 17 years, 2 month on the occurrence--Accused appellant set at liberty).

23 Refer to text under s 302 .

24 *Armit Das v State of Bihar* AIR 2000 SC 2111, 2000 Cr LJ 3167, 2000 AIR SCW 2169 .

25 *Jameel v State of Maharashtra* 2007 Cr LJ 1425 (SC) .

26 *Om Prakash v State of Rajasthan* 2001 Cr LJ 230 (Raj) .

27 *Bharat Bhushan v State of Himanchal Pradesh* 2013 Cr LJ 2932, p 2938 (SC), AIR 2013 SC 2018 s.

28 Refer to text under s 302 .

29 *Kumudi Lal v State of Uttar Pradesh* 1999 Cr LJ 2523 (SC) ; *Mohd Chaman v State (NCT of Delhi)* 2001 Cr LJ 725 (SC) ; *Raju v State of Haryana* 2001 Cr LJ 2580 (SC) ; *State of Andhra Pradesh v Gangula Satyamurthy* 1997 Cr LJ 774 (SC) ; *Bantu alias Naresh Giri v State of Madhya Pradesh* 2002 Cr LJ 211 (SC) ; *Ganesh Lal v State of Rajasthan* 2002 Cr LJ 967 (SC) ; *Ronny alias Ronald James Alwaris etc v State of Maharashtra* 1998 Cr LJ 1638 (SC) ; *Dharma v Nirmal Singh Bittu* 1996 Cr LJ 1631 (SC) ; *Moharram Ali v State of Uttar Pradesh* 1999 Cr LJ 3005 (All) (DB) .

30 *Molai and Anor v State of Madhya Pradesh* 2000 Cr LJ 392 (SC) ; *State of Madhya Pradesh v Molai* 1999 Cr LJ 2698 (MP) (DB) .

31 *Ram Deo Prasad v State of Bihar* 2013 Cr LJ 2369 : 2013 AIR SCW 2463 (SC), (2013) 7 SCC 725. **See also***Selvam v State* (2014) 12 SCC 274, AIR 2014 SC 1911

32 *Shivu v RG High Court of Karnataka* 2007 Cr LJ 1806, p 1812 (SC), (2007) 4 SCC 713, [2007] 2 SCR 555 .

33 *Ram Deo Prasad v State of Bihar* 2013 Cr LJ 2369, 2013 AIR SCW 2463 (SC) .

34 *Purna Chandra Kusal v State of Orissa* 2012 Cr LJ 615, 2011 AIR SCW 6473 (SC) .

35 *Tejinder Singh v State of Punjab* 2013 Cr LJ 3130 (SC), 2013 AIR SCW 3289, 2013 (5) Scale 553, (2013) 12 SCC 503 .

36 *Baldev Singh v State of Haryana* 2009 Cr LJ 948 (SC), AIR 2009 SC 958, 2008 (15) Scale 400 .

37 Position prior to the enactment of the Criminal Law (Amendment) Act 2013.

38 *Shanabhai Chandubhai Vasava v State of Gujarat* 2006 Cr LJ 3252 (Guj)(DB).

39 Position prior to the enactment of the Criminal Law (Amendment) Act 2013.

40 *State of Madhya Pradesh v Rajesh* 2006 Cr LJ 553 (SC) ; *State of Madhya Pradesh v Makhmal Khan* 2005 Cr LJ 4363 (SC) ; *State of Madhya Pradesh v Rakesh* 2005 Cr LJ 4527 (SC) .

41 Position prior to the enactment of the Criminal Law (Amendment) Act 2013.

42 *State of Karnataka v Krishnappa* 2000 Cr LJ 1793 (SC) .

43 *State of Madhya Pradesh v Santosh Kumar* 2006 Cr LJ 3636 (SC) .

44 Position prior to the enactment of the Criminal Law (Amendment) Act 2013.

45 *Ibid.*

46 *Meet Singh v State of Punjab* 1980 Cr LJ 1802 (SC), 1980 Mad LW (Cri) 119 (SC) .

47 *Union of India v VP Selvarajan* 1976 Mad LW (Cri) 50 (Mad), 1976 JSCTL 97 (Mad) .

48 *State of Andhra Pradesh v Polamala Raju* 2000 Cr LJ 4014 (SC) .

49 *Mohammed Nisar Riyaz Khan and etc v State of Maharashtra* 2007 Cr LJ 562 (Bom) .

50 *Rajinder Singh v State of Punjab* AIR 2015 SC 1359, p 1368, 1369, 2015 Cr LJ 1934, 2015 (2) Crimes 90 (SC), (2015) 6

SCC 477 ; **See also***Sher Singh v State of Haryana* AIR 2015 SC 980, 2015 Cr LJ 1118, 2015 (1) Scale 250, (2015) 3 SCC 724 ; **See also***Baldev Singh v State of Punjab* 2011 (13) SCC 705, 2013 AIR SCW 5524, AIR 2011 SC 1231 .

51 Position prior to the enactment of the Criminal Law (Amendment) Act 2013.

52 *State of Madhya Pradesh v Santosh Kumar* 2006 Cr LJ 3636 (SC) .

53 *State of Madhya Pradesh v Munna Choubey* 2005 Cr LJ 913 (SC) .

54 *State of Madhya Pradesh v Balu* 2005 Cr LJ 335 (SC) .

55 *State of Karnataka v Krishnappa* 2000 Cr LJ 1793 (SC), 2000 AIR SCW 1040 .

56 *Mayavan alias Ravi Rauya and Anor v State* 2002 Cr LJ 4426 (Mad) .

57 *State of Rajasthan v Om Prakesh* 2002 Cr LJ 2951 (SC) .

58 *State of Rajasthan v Kishanlal* 2002 Cr LJ 2963 (SC) .

59 *State of Andhra Pradesh v Polamala Raju alias Raja Rao* 2000 Cr LJ 4014 (SC) .

60 *Kamal Kishore etc v State of Himachal Pradesh* 2000 Cr LJ 2292 (SC) .

61 *Doonger Singh v State of Rajasthan* 2000 Cr LJ 1646 (Raj) .

62 *Bhupinder alias Mohinder Singh v State of Haryana* 2002 Cr LJ 1286(P&H).

63 *Rajendran and etc v State of Tamil Nadu* 2002 Cr LJ 2292 (Mad) .

64 *State of Haryana v Jang Bahadur* 1999 Cr LJ 5028 (SC) .

65 *Kamal Kishore etc v State of Himachal Pradesh* 2000 Cr LJ 2292 (SC) .

66 *State of Maharashtra v Mohan Shankarrao Janrao* 2004 Cr LJ 3998 (Bom) (DB) .

67 *State of Madhya Pradesh v Rajesh* 2006 Cr LJ 553 (SC) .

68 *Md Taher Ali v State of Assam* 2007 Cr LJ 1024 (Gau) .

69 *State of Haryana v Prem Chand and Ors* AIR 1990 SC 538, 1990 Cr LJ 454 (SC) .

70 *State of Chhattisgarh v Lekhram* 2006 Cr LJ 2139, p 2141, AIR 2006 SC 1746, 2006 (4) Scale 118 .

71 *Bholaram v State* (1997) 2 MPLJ 504 (MP) ; *Mongilal v State of Himachal Pradesh* 1998 Cr LJ 2304 (MP) .

72 *Mangilal v State of Madhya Pradesh* 1998 Cr LJ 2304 (MP) .

73 *Pooran Ram v State of Rajasthan* 2001 Cr LJ 91 (Raj) .

74 *Sukhdev Anand v State of Himachal Pradesh* 2006 Cr LJ 98 (HP) (DB) .

75 *Pooran Ram v State of Rajasthan* 2001 Cr LJ 91 (Raj) .

76 *Ibid.*

77 *Gajraj Singh v State of Madhya Pradesh* 2000 Cr LJ 3765 (MP) (DB) .

78 *Mangoo Khan alias Mohammad Ali Bisayati v State of Rajasthan* 2001 Cr LJ 3001 (Raj) (DB) .

79 *Narayan Dev v State of Tripura* 1997 Cr LJ 2613 (Gau) .

80 *State of Himachal Pradesh v Asha Ram* 2005 Cr LJ 139 (SC), AIR 2006 SC 381, 2005 (9) Scale 371, (2005) 13 SCC 766 .

81 Position prior to the enactment of the Criminal Law (Amendment) Act 2013.

82 *State of Rajasthan v Om Prakash* 2002 Cr LJ 2951 (SC) .

83 *State of Karnataka v Krishnappa* 2000 Cr LJ 1793 (SC) .

84 *Mangilal v State of Madhya Pradesh* 1998 Cr LJ 2304 (MP) .

85 *Dalveer v State of Haryana* 2002 Cr LJ 3960 (P&H) ; *State of Karnataka v Krishnappa* 2000 Cr LJ 1793 (SC) ; *Nankoo Shama v State of Uttar Pradesh* 1997 Cr LJ 3002 (All) ; *Nagam Gangadhar v State* 1998 Cr LJ 2200 (AP) .

86 *State of Rajasthan v Om Prakash* 2002 Cr LJ 2951 (SC) .

87 Position prior to the enactment of the Criminal Law (Amendment) Act 2013.

88 *Vaijnath v State of Maharashtra* 2006 Cr LJ 202 (Bom) (DB) .

89 *Suresh v State* 2006 Cr LJ 282 (Del) (DB) .

90 *State of Madhya Pradesh v Babu Barkare* 2005 Cr LJ 3117 (SC), AIR 2005 SC 2846, 2005 SCC (Cri) 1335 .

91 *State of Madhya Pradesh v Santosh Kumar* 2006 Cr LJ 3636 (SC), AIR 2006 SC 2648 .

92 *Dildar Singh v State of Punjab* 2006 Cr LJ 3914 (SC), AIR 2006 SC 3084 .

93 *State of MP v Parasram* 2005 Cr LJ 4365 (SC), AIR 2005 SC 3629 ; *State of MP v Rakesh* 2005 Cr LJ 4527 (SC) ; *State of MP v Bala* 2005 Cr LJ 4371 (SC) ; *State of MP v Makhmal Khan* 2005 Cr LJ 4363 (SC) ; *State of MP v Mulli* 2005 Cr LJ 4976 (SC) ; *State of MP v Rajesh* 2006 Cr LJ 553 (SC) .

94 *Sate of Rajasthan v Madan Singh* 2008 Cr LJ 1939, p 1940 (SC), AIR 2009 SC 1292, 2008 (2) SCC (Cri) 550 .

95 *Shimbhu v State of Haryana* (2014) 13 SCC 318, AIR 2014 SC 739, 2014 Cr LJ 308 .

96 *Satendra Kumar Singh Kushwaha v State of Bihar* 2003 Cr LJ 392 (Pat) .

97 *Upendra Baraik and Anor v State of Bihar* 2001 Cr LJ 286 (Pat) ; *Nehru alias Jawahar v State of Madhya Pradesh* 2001 Cr LJ 1118 (MP) ; *Maduru alias Damruwa v State of Madhya Pradesh 2001* Cr LJ 1857 (MP); *State of Himachal Pradesh v Kamal Kishore* 2000 Cr LJ 2661 (HP) (DB) ; *State of Maharashtra v Sasbala Sagu Kokare* 1997 Cr LJ 786 (Bom) (DB) ; *State of Maharashtra v Suresh Nivruth Bhusare* 1997 Cr LJ 2003 (Bom) (DB) .

98 *State of Rajasthan v NK (Accused)* 2000 Cr LJ 2205 (SC) .

1 *Suresh Balkrishna Nakhava v State of Maharashtra* 1998 Cr LJ 284 (Bom) (DB) .

2 *Laki Harijan v State of Orissa* 1998 Cr LJ 1129 (Ori) .

3 *M Ramachandran v State of Kerala* 1996 Cr LJ 3566 (Ker) (DB) .

4 *Zamir Ahmed v State* 1996 Cr LJ 2354 (Del) (DB) ; *Balbir Singh v State* 1996 Cr LJ 2403 (Del) (DB) .

5 *Baldev Singh v State of Punjab* 2011 Cr LJ 1746 (SC), AIR 2011 SC 1231, 2011 AIR SCW 1475

6 *Bavo v State of Gujarat* 2012 Cr LJ 1573 (SC), AIR 2013 SC 979, 2012 (2) SCC 684 ; **See also***Rajendra Datta Zarekar v State of Goa* AIR 2008 SC 572, 2007 AIR SCW 7588, (2007) 14 SCC 560 (Accused aged 20 years, victim aged 6 years - Ten years RI awarded by High Court, confirmed).

7 *Pidigi Narasimha v State* 1996 Cr LJ 2997 (AP) .

8 *Manoj Mandrekar v State* 1996 Cr LJ 3341 (Bom) (DB) .

9 *State of Chhattisgarh v Lekhram* 2006 Cr LJ 2139, p 2141, AIR 2006 SC 1746, 2006 (4) Scale 118 .

10 *Basil Lakra v State of Orissa* 2014 Cr LJ (NOC) 25 (Ori) (DB).

11 *State of Rajasthan v Om Prakash* AIR 2002 SC 2235, 2002 Cr LJ 2951 (SC) .

12 *Prem alias Bailee v State of Haryana* 2003 Cr LJ 962 (P&H) ; *Ram Swarup v State of Uttar Pradesh* 1999 Cr LJ 3726 (All) ; *Narayan Iranna Pot Kanthi v State of Maharashtra* 1994 Cr LJ 1752 (Bom) .

13 *Babu Yadav v State of Uttar Pradesh* 2001 Cr LJ 356 (All) .

14 *Maguni Ranjan Jyoti v State of Orissa* 2003 Cr LJ 530 (Ori) .

15 *Maroti v Wangkhede v State of Maharashtra* 2003 Cr LJ 778 (Bom) ; *Nankoo Sharma v State of Uttar Pradesh* 1997 Cr LJ 3002 (All) ; *Narain v State* (1989) 37 DLT 350 (Del) ; *TK Gopal alias Gopi v State of Karnataka* 2000 Cr LJ 2286 (SC) ; *Kailash Khangar v State of Madhya Pradesh* 1996 Cr LJ 3189 (MP) .

16 *Baba Jagga Singh v State of Punjab* 2002 Cr LJ 3817 (P&H) ; *Chander Nath v State* (1987) 33 DLT 245 (Del) .

17 *Mayavan alias Ravi Rauya and Anor v State* 2002 Cr LJ 4426 (Mad) .

18 *State of Manipur v Moirangthem Ningthon Singh* 2002 Cr LJ 4495 (Gau) .

19 *Munshi alias Munesh and etc v State of Madhya Pradesh* 2002 Cr LJ 4808 (MP) .

20 *Ashok K Salome and Anor v State of Maharashtra* 2001 Cr LJ 1555 (Bom) .

21 *Doongar Singh v State of Rajasthan* 2000 Cr LJ 1646 (Raj) .

22 *Bhubinder alias Mohinder Singh v State of Haryana* 2002 Cr LJ 1286 (P&H) .

23 *Bhola Ram v State of Madhya Pradesh* 1998 Cr LJ 2167 (MP) .

24 *Mangilal v State of Madhya Pradesh* 1998 Cr LJ 2304 (MP) .

25 *Mahadeva v State of Rajasthan* 1996 Cr LJ 4219 (Raj) .

26 *State of Punjab v Rakesh Kumar* 2009 Cr LJ 396, p 399 (SC), 2008 AIR SCW 7444 .

27 *Halla v State* 2002 Cr LJ 4239 (MP) .

28 *State of Karnataka v Krishnappa* 2000 Cr LJ 1793 (SC) .

29 *Rajendran etc v State of Tamil Nadu* 2002 Cr LJ 2292 (Mad) .

30 *Nagam Gangadhar v State* 1998 Cr LJ 2200 (AP) .

31 *State of Rajasthan v Ram Narain and Ors* 1996 Cr LJ 1882 (SC) .

32 *Sridhar Bindhani v State of Orissa* 1988 Cr LJ 1022 (Ori) .

33 *State of Mizoram v Lalrinkhuma* 2005 Cr LJ 3414 (Gau) (DB) .

34 *Sahub Singh v State of Haryana* AIR 1990 SC 1188, 1990 Cr LJ 1202 ; *Sadhu Charan Patra Cr ors v State of Orissa* 2002 Cr LJ 863 (Ori)(DB).

35 *Sadhd Patra alias Sadha Charan Patra and Ors v State of Orissa* 2002 Cr LJ 863 (Ori) (DB) .

36 *Ramchandra Mahadev Shinde v State of Maharashtra* 1999 Cr LJ 1328 (Bom) (DB) .

1 Position prior to the enactment of the Criminal Law (Amendment) Act 2013.

2 Position prior to the enactment of the Criminal Law (Amendment) Act 2013.

1 *State of Karnataka v Shivputrappa Basappa Kori* 2002 Cr LJ 1686 (Kant) (DB) .

2 *Mange v Emperor* 35 Cr LJ 519, AIR 1934 Lah 178, p 179 .

3 *Joginder Singh v State of Haryana* 1974 Cr LJ 117, 75 PLR 456 ; *Chaman Garo v Emperor* ILR 29 Cal 415, p 416 ; *Emperor v Jagdamba Prasad* AIR 1933 All 626, 1934 Cr LJ 1227 ; *Haider Ali v Emperor* AIR 1940 All 201 .

4 *Emperor v Sakharam Ganu* 8 Bom LR 120 ; *Ghulam Mohammad v Crown* AIR 1927 Lah 88, p 89, 28 Cr LJ 136 ; *Ebadi Khan v Emperor* 39 Cr LJ 674, AIR 1938 Cal 460, p 462-63, (if the accused has been charged under ss 366 and 376, he may be held guilty under s 366, and not under s 376).

5 *Tek Singh v Emperor* 29 Cr LJ 248, p 249 (Lah) .

6 *Buta Singh v Emperor* 26 Cr LJ 1440, AIR 1926 Lah 114 .

7 *Abdul v Emperor* 34 Cr LJ 100, AIR 1932 All 580, p 581 .

8 *Ramakant Tiwari v State of Madhya Pradesh* 2007 Cr LJ (NOC) 306 (MP) .

9 *S Ishwar Bhat v State* 2010 Cr LJ (NOC) 479 (Kant) .

10 *Kuldeep Kumar alias Bittu and Anr v State of Punjab* 2007 Cr LJ 3338 (P & H).

11 *Sithu v State* AIR 1967 Raj 149, 1967 Cr LJ 920 ; *Manik Debnath v State of Tripura* 1999 Cr LJ 607 (Gau) ; *S Krishna v State of Karnataka* 1998 Cr LJ 785 (Kant) (DB) .

12 *Mahesh Kumar v State of Rajasthan* 1998 Cr LJ 1597 (Raj) .

13 *Kailash v State of Rajasthan* 2006 Cr LJ 4708 (Raj) (DB) .

14 *DA Jakati v State of Karnataka* 2005 Cr LJ 2687 (Kant) .

15 *Sheo Chand v State of Rajasthan* 2007 Cr LJ 1781 (Raj) (DB) .

16 *Bankey v State* AIR 1961 All 131, (1961) 1 Cr LJ 330 .

17 *Jalal v Emperor* AIR 1930 Lah 193, 1931 Cr LJ 784 ; *Nanak Chand Balleran v State* (1962) 1 Cr LJ 843 .

18 *Bali alias Bahal Singh v State of Rajasthan* 2001 Cr LJ 909 (Raj) .

19 *Suvraj v State* 1999 Cr LJ 731 (Raj) .

20 *Kallu v State of Madhya Pradesh* (1997) 1 Crimes 149 (MP), (1996) 4 CCR 75 (MP) .

21 *Rafi Uddin Khan alias Rafik Uddin Khan v State of Orissa* 1992 Cr LJ 874 (Ori) .

22 *State v Musa and Anor* 1991 Cr LJ 2168 (Ori) .

23 *Moh Mian v State* (1989) 37 DLT 35 (Del) .

24 *Madan Gopal Kakkad v Naval Dube* (1992) 3 SCC 204, 1992 AIR SCW 1480 .

25 *Premanidhi Singh v State of Orissa* 1997 Cr LJ 1902 (Ori) .

26 *Jai Chand v State* 1996 Cr LJ 2039 (Del) .

27 *Ankariya v State of Maahya Pradesh* 1991 Cr LJ 751 (MP) .

28 *Jitendra Nath Saha v State of West Bengal* (1996) II CCR US (Cal) .

29 *Shivaji Tukaram Kurle v State* (1994) 2 Crimes 516 (Bom) .

30 *Public Prosecutor, High Court of Andhra Pradesh v Lingisetty Sreenu* 1997 Cr LJ 4003 (AP) .

31 *State of Maharashtra v Rajendra Jawanmal Gandhi* 1997 Cr LJ 4657 (SC) .

32 *Abdul v Emperor* 34 Cr LJ 100, AIR 1932 All 580, p 581 .

33 *Lakshmana Naik v State of Karnataka* 2004 Cr LJ 3913 (Kant) .

34 *Arjun Singh v State of HP* 2009 Cr LJ 1332 (SC), AIR 2009 SC 1568, 2009 (2) Scale 302, (2009) 4 SCC 18, [2009] 1 SCR 983, 2009 (2) Shim LC 83 .

35 *State v Rangaswamy* 2003 Cr LJ 607 (Kant) (DB) .

36 *State of Karnataka v Chandrryye Hanumanthappa Mallappannar* 2003 Cr LJ 258 (Kant) (DB) .

37 *State of Orissa v Sukadev Pradhan* 1987 Cr LJ 605 (Ori), (1986) 1 Ori LR 444 ; *State v Musa* 1991 Cr LJ 2168 (Ori) .

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Chapter XVI

Of Offences Affecting the Human Body

SEXUAL OFFENCES

[38][S. 376A.

Punishment for causing death or resulting in persistent vegetative state of victim.--

Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term

which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.]

Comments

1. Legislative changes

This section is new, inserted by the Criminal Law (Amendment), 2013 (13 of 2013), with effect from 3-2-2013 on the recommendations of Justice J.S. Verma Committee.

2. Scope

This section is new, providing severe punishment when in the course of commission of rape, the offender inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state.

When the accused committing rape kept his hand on mouth of the prosecutrix, so that she should not shout and in that process, if she died due to suffocation, then certainly the accused caused an injury to the prosecutrix which caused the death of the prosecutrix, and the offence falls within the purview of s 376A, IPC . The conviction of the accused appellant under s 376A, IPC was held proper.[39]

3. Vegetative state

Concised Oxford Dictionary defines vegetative state as 'concerned with growth and development as distinct from sexual reproduction'. We are reminded of the moving3233 story of Aruna Shanbaug, the young nurse who was brutally raped and lived the rest of her life (*i.e.* almost 36 years) in a persistent vegetative state. Unfortunately the petitioner has died in the year 2015, while the accused who put the petitioner in such a stage is still alive.[40]

4. Procedure

An offence under this section is congnizable, non-compoundable, non-bailable and triable by the Court of Sessions.

5. Charge

I, ... (*name and office of Session Judgeetc.*), hereby charge you.....(*name etc. of accused*) as follows:

That you, on or about the .....day of.....at ....., committed rape on X, and during the course of such commission inflicted injury which caused the death of X (*or caused the said X to be in persistent vegetative state*) and thereby committed offence punishable under Section 376 -A IPC, and within the cognizance of this Court.

And I hereby direct you to be tried by this Court for the said charge.

38 Substituted by the Criminal Law (Amendment) Act 2013 (13 of 2013), s 9 (wef 3-2-2013). Prior to substitution s 376A stood as under:-- " **S. 376A . Intercourse by a man with his wife during separation.--**Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.".

39 *Sessions Judge v Arvind* 2014 Cr LJ 4024, p 4030 (MP) (DB) .

40 *Aruna Ramchandra Shanbaug v Union of India* AIR 2011 SC 1290, p 1331, 1332, (2011) 4 SCC 454 .

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Chapter XVI

Of Offences Affecting the Human Body

SEXUAL OFFENCES

[41][S. 376B.

Sexual intercourse by husband upon his wife during separation.--

Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.--In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of Section 375 .]

Comments

1. Legislative Changes

This section has been substituted for old s 376A by the Criminal Law (Amendment) Act 2013 (13 of 2013), s 9, wef 3-2-2013 on the recommendations of Justice J.S. Verma Committee. Explanation to the section is new, though the new section is the same as the old section. However, under the new section, the punishment shall not be3234 less than two years, which may extend to seven years while under the old section, the punishment could be imposed upto two years. The old s 376A ran thus:

"376A. Intercourse by a man with his wife during separation.--Whoever has sexual intercourse with his wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine."

2. Scope

Sexual intercourse, whether forced or voluntary, between the husband and wife is no offence when the age of the wife is not less than 15 years. When the age of the wife is under 12 years then the sexual intercourse by a man with his wife amounts to rape. However, when the age of the wife is 12 years and above but less than 15 years, the sexual intercourse by a husband with his wife though it amounts to rape, but of mild category, is punishable with imprisonment with imprisonment of either description for a term which shall not be less than two years, but which may extend to seven years, and shall also be liable to fine. By insertion of this section in the IPC, another offence against a husband is added, when despite a decree of separation or under any custom or usage the husband and wife are living separately but still the husband has sexual intercourse with his wife without her consent.

3. Procedure

An offence under this section is non-cognizable, bailable, non-compoundable and triable by Court of Sessions.

4. Charge

I, ... (*name and office of Session Judgeetc.*), hereby charge you.....(*name etc. of accused*) as here below:

That you, on or about the .....day of.....at about ..... a.m/p.m. in village/town..... Police Station..... District.....committed rape of 'A' your wife, who has been living separately from you under a decree of separation (*or under any custom or usage*) without her consent, and thereby committed an offence punishable under Section 376 -B, IPC and within the cognizance of this Court.

And I hereby direct you be tried by this Court for the said charge.

5. Proof

In order to establish the offence against the accused under this section, the prosecution has to prove that,

(a) the accused had sexual intercourse with his own wife.
(b) the wife was living separately from him under a decree of separation or any custom or usage,
(c) sexual intercourse was done by the accused without her consent.3235

41 Substituted by the Criminal Law (Amendment) Act 2013 (13 of 2013), s 9 (wef 3-2-2013). Prior to substitution s 376B stood as under:-- " **S. 376B . Intercourse by public servant with woman in his custody.--**Whoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.".

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Chapter XVI

Of Offences Affecting the Human Body

SEXUAL OFFENCES

[42][S. 376C.

Sexual intercourse by a person in authority.--

Whoever, being--

(a) in a position of authority or in a fiduciary relationship; or
(b) a public servant; or
(c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or
(d) on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1.--In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375 .

Explanation 2.--For the purposes of this section. *Explanation 1* to section 375 shall also be applicable.

Explanation 3.--"Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4.--The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in *Explanation* to sub-section (2) of section 376 .]

Comments

1. Legislative changes

This section has been substituted for old s 376C and s 376D by the Criminal Law (Amendment) Act 2013

(13 of 2013), s 9 on the recommendations of Justice J.S. Verma Committee wef 3-02-2013. The old s 376C and s 376D ran thus--3236

> **" S. 376C . Intercourse by superintendent of jail, remand home, etc.--**Whoever, being the superintendent manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's children's institution takes advantage of his official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.
>
> *Explanation 1.* 'Superintendent' in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he can exercise any authority or control over its inmates.
>
> *Explanation 2.* The expression women's or children's institution shall have the same meaning as in Explanation 2 to sub-section (2) of Section 376 .
>
> **S. 376D . Intercourse by any member of the management or staff of a hospital with any woman in that hospital.--**Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.
>
> *Explanation.* The expression 'hospital' shall have the same meaning as in Explanation 3 to sub-section (2) of Section 376 ."

2. Scope

When a person being on the management or on staff of jail or other place, custody established by or under the law takes advantage of his official position and commits rape on any inmate of such jail *etc*., he commits rape of a severe category punishable under s 376(2)(b), IPC . However, when he being a superintendent or manager of a jail *etc*., takes advantage of his official position and induces or seduces any female inmate of such jail *etc.* to have sexual intercourse with him which does not amount to rape, he commits a milder offence under this section inserted by the Legislature in the IPC to avoid the misuse of their position by the superintendent or manager of the jail *etc.* by taking advantage of custody of female inmates and committing sexual intercourse with them.

The two accused hospital employees allured the prosecutrix, a patient, with refund of money and free treatment, s 376D was attracted in the case.[43]

3. Procedure

An offence under this section is cognizable, non-compoundable, non-bailable and triable by the Court of Sessions.

4. Charge

(i) Section 376-C(b)

I,.....(*name and office of the Sessions Judge etc.*) hereby charge you.....(*name of the accused*) as follows :

That you on or about.....day of.....at about..... in village/ town.....Police Station.....District working on the post to wit.....3237 being a public servant, took advantage of your official position, and induced (*or seduced*) 'X' who was in your custody as such public servant (*or in the custody of a public servant to wit.....subordinate to you*) to have sexual intercourse with you, such sexual intercourse not amounting to rape, and thereby committed an offence punishable under Section 376 -C(b) of the Indian Penal Code, and within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the said charge.

(ii) Section 376-C(c)

I,.....(*name and office of the Sessions Judge etc.*) hereby charge you.....(*name of the accused*) as follows :

That you on or about.....day of.....at about..... in village/town.....Police Station.....District working as Superintendent (*or Manager*) of a jail (remand home or other place of custody established by or under any law, for the time being in force or of a women's or children's institution) took advantage of your position and induced (*or seduced*) 'X' inmate of such jail (*remand home, place or institution*) to have sexual intercourse with you, such sexual intercourse not amounting to the offence of rape, and thereby committed an offence punishable under Section 376 -C(c) IPC, and within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the said charge.

(iii) Section 376-C(d)

I,.....(*name and office of the Sessions Judge etc.*) hereby charge you.....(*name of the accused*) as follows :

That you on or about.....day of.....at about..... in village/town.....Police Station.....District working as .....(*specify the post*) being in the management of a hospital to wit.....(*or being on the staff of hospital to wit.....*) took advantage of your position and had sexual intercourse with 'X' a woman in that hospital, such sexual intercourse not amounting to the offence of rape, and thereby committed an offence punishable under Section 376 -C(d) IPC, and within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the said charge.

42 Substituted by the Criminal Law (Amendment) Act 2013 (13 of 2013), s 9 (wef 3-2-2013). Prior to substitution s 376C stood as under:-- " **S. 376C . Intercourse by superintendent of jail, remand home, etc.--**Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.*Explanation 1.*--"Superintendent" in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he can exercise any authority or control over its inmates.*Explanation 2.*--The expression "women's or children's institution" shall have the same meaning as in Explanation 2 to sub-section (2) of section 376 .".

43 *Babubhai Punjabhai Vaghela v State of Gujarat* 2013 Cr LJ (NOC) 182 (Guj) (DB).

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Chapter XVI

Of Offences Affecting the Human Body

SEXUAL OFFENCES

[44][S. 376D.

Gang rape.--

Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:3238

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.]

Comments

1. Legislative Changes

This section is new, inserted by the Criminal Law (Amendment) Act 2013 (13 of 2013), s 9 wef 3-02-2013 on the recommendations of Justice J.S. Verma Committee. Explanation 1 to old s 376, IPC provided as under:

...

"*Explanation 1.* Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section."

...

2. Scope

This section deals with the offence of gang rape and provides enhanced punishment for the offence. It is not necessary that in case of a gang rape, the victim should have been raped by all the accused persons. If she is raped by one or more in a group of persons, each of the persons shall be 'deemed to have committed gang rape', provided those persons are acting in furtherance of their common intention. The common intention of all the five accused persons can be gathered from their conduct, prior to the incident and during the course of the incident.[45]

A woman cannot be said to have an intention to commit rape. Therefore, the woman cannot be prosecuted for alleged commission of the offence punishable under s 376(2)(g) .[46]

3. Procedure

An offence under this section is cognizable, non-compoundable, non-bailable and triable by the Court of Sessions.

4. Charges

I,.....(*name and office of the Sessions Judgeetc.*) hereby charge you.....(*name of the accused*) as herebelow:

That you A alongwith B and C constituted a group and in furtherance of the common intention you all committed rape on H and thereby committed the offence of gang rape punishable under Section 376 -D IPC, and within the cognizance of this Court.

And I hereby direct you to be tried by this Court on the said charge.3239

5. Illustrative Cases

Prosecution case was that the accused appellants committed gang rape on the prosecutrix when she along with her husband had gone to market for making purchases. The prosecutrix shouted for help but no one except her husband came for help. No marks of injury were found on the body of the prosecutrix in medical examination. Report of forensic laboratory was also not filed in the case. Evidence revealed that there was some dispute between the parties regarding the distribution of their earnings as labourers. Case against the accused was not proved beyond reasonable doubt. Accused were acquitted of the charge of rape.[47]

The accused police officials had called the complainant at police station in connection with the visit of the terrorists in the village, the complainant was detained at the police station and tortured. During night the accused police officials committed gang rape at police station. The testimony of the prosecutrix, her husband and neighbor was found reliable hence believed. As the prosecutrix was not young, importance was not attached to the absence of medical examination. Accused appellants were convicted for offence of gang rape punishable under s 376, IPC .[48]

Accused appellant was prosecuted on allegations that he along with other accused persons abducted the prosecutrix and committed rape on her. Accused was not named in the FIR. The most important witnesses mother and the sister who were present at the time of abduction were not examined by the prosecution. The prosecutrix did not raise any alarm for help while travelling certain distance after alleged abduction. Her testimony was shaky and not corroborated by medical evidence. Accused was shown to the prosecutrix at police station. Conviction of the accused appellants under s 366 and s 376(2)(g), IPC was held not proper.[49]

Two accused persons committed rape on a minor girl sleeping on the rear seat of bus at bus stand. Testimony of two Head Constables on patrol duty was believed. Medical examination report also proved prosecution case. Conviction was held proper (Old s 376(2)(g), IPC).[50]

The prosecutrix in an earlier part of statement stated that accused arrived on the spot after the rape had been committed. No common intention to commit rape was proved. Accused was acquitted of the charge of gang rape.[51]

The accused appellants gang raped the deceased and when she was dead, threw her into pit. The evidence of wife of co-accused was found reliable. The conviction of the appellants under s 302 and s 201 read with s 34, IPC was found proper.[52]

The theory of consent of the prosecutrix in a gang rape case was not accepted where the prosecutrix categorically deposed before the court that she was raped by six persons. [53]3240

44 Substituted by the Criminal Law (Amendment) Act 2013 (13 of 2013), s 9 (wef 3-2-2013). Prior to substitution s 376D stood as under:-- " **S. 376D . Intercourse by any member of the management or staff of a hospital with any woman in that hospital.--**Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.*Explanation.*--The expression "hospital" shall have the same meaning as in Explanation 3 to sub-section (2) of section 376 .".

45 *Nitin Ramprasad Bachicha (Dhobi) v State of Gujarat* 2009 Cr LJ 2330, p 2341 (Guj) (DB) ; *State of Rajasthan v Roshan Kaur* (2014) 2 SCC 476, 2014 AIR SCW 608, 2014 Cr LJ 1092 .

46 *Priya Patel v State of MP* 2006 Cr LJ 3627 (SC), AIR 2006 SC 2639 .

47 *Ram Tej Verma v State of Uttarakhand* 2014 Cr LJ (NOC) 14 (Utr) .

48 *Charanjit v State of Punjab* AIR 2013 SC 2896, 2013 (8) Scale 301, 2013 AIR SCW 4105, 2013 Cr LJ 3728 .

49 *Krishan Kumar Malik v State of Haryana* 2011 Cr LJ 4274, AIR 2011 SC 2877, 2011 AIR SCW 4118, (2011) 7 SCC 130 .

50 *Santosh Kumar v State of MP* 2006 Cr LJ 4594 (SC), AIR 2006 SC 3098 .

51 *Pardeep Kumar v Union Administration, Chandigarh* 2006 Cr LJ 3894 (SC), AIR 2006 SC 2992 .

52 *State of Rajasthan v Hanif Khan* 2009 Cr LJ 1765 (SC), AIR 2009 SC 2043, (2009) 3 SCC 549 ; **see also***Pawan v State of Uttaranchal* 2009 Cr LJ 2257 (SC) (Rape and murder--Case based on circumstantial evidence--Conviction held proper.

53 *State of Rajasthan v Roshan Khan* (2014) 2 SCC 476, 2014 Cr LJ 1092 .

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Chapter XVI

Of Offences Affecting the Human Body

SEXUAL OFFENCES

[54][S. 376E.

Punishment for repeat offenders.--

Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.]

Comments

1. Legislative Changes

This section is new, inserted by the Criminal Law (Amendment) Act 2013 (13 of 2013), s 9 wef 3-2-2013 on the recommendations of Justice J.S. Verma Committee.

2. Scope

This section is new. It provides enhanced punishment in case of repeated offences.

3. Procedure

An offence under this section is cognizable, non-compoundable, non-bailable and triable by the Court of Sessions.

4. Charge

I,.....(*name and offence of Session Judge etc*.) hereby charge you.....(*name etc. of the accused*) as herebelow :

That you having being previously convicted on ..... for offence under Section 376 of the Indian Penal Code in ST No. 210 of 2003 State v Javed & Others again on or about the day of .....at.....District.....committed the offence of rape on A and thereby committed an offence punishable under Section 376 -E of the Indian Penal Code and within the cognizance of this Court.

And I hereby direct you to be tried by this Court for the said charge.

54 Sections 375, 376, 376A to 376E substituted for ss 375, 376, 376A to 376D by the Criminal Law (Amendment) Act 2013 (13 of 2013), s 9 for (wef 3-2-2013).

Indian Penal Code (Act XLV of 1860)

Chapter XVI

Of Offences Affecting the Human Body

OF UNNATURAL OFFENCES

S. 377.

Unnatural offences.--

Whoever voluntarily has carnal intercourse against the order of Nature with any man, woman or animal, shall be punished with [55][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.--Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Comments

1. Constitutional Validity

Recently three Judges Bench of the Supreme Court has held that s 377, IPC is constitutionally valid, is not *ultra vires* of art 14 and art 15 of the Constitution .[56] The Supreme Court held:

> Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 , IPC*ultra vires* Articles 14 and 15 of the Constitution .

2. Scope

A civilised society abhors unnatural carnal intercourse and reckons it a crime which this section punishes. The crime is committed by persons of all ages, in all stations of life, and in all countries, and it is committed stealthily.

Unlike in an offence of rape under s 376, consent of the victim is immaterial though it may be taken into consideration in awarding punishment.[57] However, as in rape penetration is an essential ingredient of the offence under this section.[58]

The unnatural carnal intercourse with a human being generally consists in penetration per anus. Under the English law, to constitute the offence, the act must be in that part where sodomy is usually committed. Hence, the act, in child's mouth, does not constitute the offence.[59] However, in *Khanu v Emperor* ,[60] it was held that *coitus per os* (through the mouth) is punishable under this section, though not with the same severity as coitus per anus.3241

3. Sodomy

By virtue of the explanation to the section, it is necessary to prove penetration, however little, to constitute carnal intercourse. Under the English law, to constitute a similar offence the act must be in that part where sodomy is usually committed. According to that law, the unnatural carnal intercourse with a human being generally consists in penetration per anus.[61] In *R V Jacobs*,[62] and Re *Govindarajulu,*[63]it was held that the act in a child's mouth does not constitute the offence. However, in *Khanu v Emperor* ,[64] it was held that *coitus per os* is punishable under the section. These is no statutory definition of sodomy.[65]

The *Shorter Oxford English Dictionary* gives the meaning of the term 'Sodomy' thus:

> An unnatural form of sexual intercourse, esp that of one male with another.

Webster's Third New International Dictionary gives the meaning of the term 'sodomy' thus:

> Carnal copulation with a member of the same sex or with an animal, non coital carnal population with a member the opposite sex, specific, the penetration of the male organ into the mouth or anus of another.

Thus, it enlarges the meaning of the term 'sodomy' to include non coital carnal copulation with a person of

the other sex also. *Halsbury's Laws of England*,[66] under criminal law, gives the meaning of Sodomy thus in para 1281--

> 1281. Sodomy. The offence of Sodomy can only be committed per annum (RV Jacobs (1817), Russ & Ry 331, CCR). It may be committed by a man upon a woman (R v Wiseman (1718) Fortes Rep 91, 1 Russel on Crime (10th edn 846) even upon his own wife (RV Jellyman (1838) 8 C&P 604; Stathan v Statham (1929) p 131 CA).

Further in *Jowitts Dictionary of English Law,* the term 'Sodomy' is described thus:

> Sodomy, unnatural sexual intercourse by a man whether with a man or a woman so called from Sodom (Gen xiii 13). In the criminal law it is known as buggery.

In *American Jurisprudence*[67] Sodomy is dealt with by Emmanuel S Tipon; giving a general introduction to the term, the learned author writes.

> In most of the states, statutes have been enacted making sodomy a criminal offence, although considerable variation exists as to the wording of such statutes and such variation accounts to a large extent for the differences in the decisions of the courts in the various jurisdictions as regards sodomy cases. The making of unnatural sexual relations a crime is embedded in the history of the common law and finds its sanction in the broader basis of the settled mores of our western civilisation, and although there is a considerable body of opinion that as between willing adults, the question should be left to moral sanctions alone and eliminated from the criminal law, it has been held that such matter presents a legislative question and not one for the courts. At least one jurisdiction has amended its statute so as to require force or threat of force in order for an offence to be committed under its statute penalising the crime of deviate sexual assault.3242

> Sodomy, 'Sodomy appears originally as part of the Hebriac law, taking its name from the practices reputedly indulged in by the inhabitants of the cities of Sodom and Gomorrah, but unfortunately, the Biblical text is not explicit about the various types of conduct for which these cities were visited with fire and brimstone, although other portions of the Old Testament prohibit sexual congress between man and man in general terms (Though shall not lie with mankind, as with womankind; it is abomination.' Levitieus 18: 22).[68]

Taylor's Principles and Practice of Medical Jurisprudence,[69] also states thus in this behalf.

> Sodomy, It is a felon by the Sexual Offences Act 1956 (s 12) for a person to commit buggery with another person, while means the action of a male person attempting to obtain sexual gratification by means of a human being (sodomy), or with an animal (bestiality), whether per vaginam or per annum.

In terms of s 377, IPC whoever, voluntarily has carnal intercourse against the order of nature with any man, woman or animal, commits the offence. Words used are quite comprehensive and an act like putting the male organ into the victim's mouth which was an initiative act of sexual intercourse for the purpose of his satisfying the sexual appetite, would be an act, punishable under s 377, IPC .

In *Corpus Juris Secundum*,[70] the following comments have been made:

> Words used in statutory definitions of the crime of sodomy have been frequently construed as more comprehensive and as not depending on, or limited by the common law definition of the crime, at least as no dependent on the narrower definition of sodomy afforded by some of the common law authorities and are generally interpreted to include within their provisions all acts of unnatural population, whether with mankind or beast, other authorities, however, have taken a contrary view, holding that the words used in the statute are limited by the common law definition of the crime where the words of the statute themselves are not explicit as to what shall be included.

It is competent for the legislature to declare that the doing of certain acts shall constitute the crime against nature even though they would not have constituted that crime at common law, and the statutory crime against nature is not necessarily limited to the common law crime of sodomy, but in imposing a punishment for the common law crime it is not necessary for the legislature to specify in the statute the particular acts which shall constitute the crime.

Under statutes providing that whoever has carnal population with a beast, or in any opening of the body, except sexual parts, with another being, shall be guilty of sodomy, it has been held that the act of cunnilingus is not a crime, but that taking the male sex organ into the mouth is sodomy. On the other hand, under such a statute it has been held that the crime of sodomy cannot be committed unless the sexual organ of accused is involved, but there is also authority to the contrary, under a statute defining sodomy as the carnal knowledge and connection against the order of nature by man with man, or in the same unnatural manner with woman, it has been held that the crime cannot be committed by woman with woman. A statute providing that any person who shall commit any act or practice of sexual perversity, is either with mankind or beast, on conviction shall be punished, is not limited to instances involving carnal population, but is restricted to cases involving the sex organ of at least one of the parties. The term sexual perversity does not refer to every physical contact by a male with the body of3243 the female with intent to cause sexual satisfaction to the actor, but the condemnation of the statute is limited to unnatural conduct performed for the purpose of accomplishing abnormal sexual satisfaction for the actor. Under a statute providing that any person participating in the act or populating the mouth of one person with the sexual organ of another is guilty of the offence a person is guilty of violating the statute when he has placed his mouth on the genital organ of another, and the offence may be committed by two persons of opposite sex.[71]

In Stroud's *Judicial Dictionary*, the word buggery is said to be synonymous with sodomy. In KJ Ayer's *Manual of Law Terms and Phrases* (as judicially expounded), the meaning of the word 'sodomy' is stated to be carnal knowledge committed against the order of nature by a man with a man or in the same unnatural manner with a woman, or by a man or woman in any manner with a beast. This is called buggery. As observed in *Lohan Vasantlal Devchand's* case, sodomy will be a species, and unnatural offence will be general in that view of the matter, there can be scope for any doubt that the act complained of is punishable under s 377, IPC .[72]

4. Orifice of Mouth and Intercourse

The orifice of the mouth is not, according to nature, meant for sexual or carnal intercourse. 'Intercourse may be defined as mutual frequent action by members of independent organisation'. Commercial intercourse is therefore, referred to; emphasis is made on the reciprocity. By metaphor the word intercourse like the word commerce is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crises. However, there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity, and in this view it would seem that sin of gomorrah is no less carnal intercourse than the sin of sodomy. These aspects have been illuminatingly highlighted in *Khanu v Emperor.* [73]*Coitus per os* is punishable under s 377, IPC .[74]

5. Age of Victim

Section 377, IPC would apply irrespective of age and consent. Section 377 , IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.[75]

When the victim is minor, consent is not a defence.[76]

6. Consent of Victim

In cases of unnatural offences the consent of the victim is hardly of any consequence.[77] Unlike in an offence of rape under s 376, IPC, the consent of the3244 victim in a case under s 377, IPC, is immaterial though it may be taken into consideration in awarding punishment.[78]

7. Attempt to Commit Unnatural Offence Under Sections 377 / 311

For committing or for attempting to commit an offence under s 377, IPC, penetration must be proved before the accused can be convicted.[79] The only allegation of opening of the lungi and pulling of the underwear in the FIR without any fact showing that any attempt was made by the accused to commit the offence under s 377, the charge under s 377 read with s 511 IPC, could not have been framed.

8. Law of Australia

A person who commits an act of bestiality with any animal is guilty of an offence. 'Bestiality' consists of any form of sexual intercourse with an animal or bird. Anal penetration is not essential. Bestiality may be committed by either a man or a woman. In some jurisdictions, it is an offence to compel a person to commit an act of bestiality. In the Australian Capital Territory, the definition of sexual intercourse includes penetration by an animal. In Western Australia, it is a separate offence to procure, incite or encourage a child or an incapable person to commit an act of bestiality. In Tasmania, it is an offence to make or reproduce or possess a bestiality product.[80]

In *Reg v Brown* [81], the Court held that it cannot be accepted that because a man pleads guilty, any difficulty with respect to the statement of the case against him is immaterial, that he is absolutely concluded forever after from taking any point upon it, and that the judge who tries him cannot state a case for the opinion of the Court.

9. 'Penetration'

Carnal intercourse against the order of nature is the gist of the offence in this section. By virtue of the Explanation to the section, it is necessary to prove penetration, however little, to constitute carnal intercourse.[82]

Penetration is *sine qua non* for establishing the offence under s 377, IPC, without which the accused cannot be convicted.[83] However, it is not necessary to prove emission to establish the unnatural offence. A mere filthy and indecent assault without proof of attempted or intended penetration, would not amount to an offence under this section.[84]

10. Procedure

The offence under this section is congnisable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

Where a person while going to a particular destination in a truck, made a halt at some place and

committed the offence of sodomy, the offence would be deemed to3245 have been committed during the course of the journey, and it could not be said that a new journey started from place of where he came to a halt. Consequently, the court having jurisdiction over the place of termination of journey would be competent to take cognizance of the offence. It could not be said that the journey being terminated at the place of destination the accused did not pass through it within the meaning of s 283, CrPC .[85]

Such an interpretation would tantamount to stretching the ordinary meaning of the word 'pass' under s 183, CrPC, beyond the sense in which it is commonly understood. The legislature has carefully employed the words 'through or into' under s 183, CrPC, and its intendment is abundantly clear that the court having local jurisdiction at the place of termination of journey will also be competent to try the accused for an offence committed in the course of performing the said journey. Moreover, the objects of s 183, CrPC, is to overcome the difficulties which are likely to be encountered in cases it is insisted that the trial of an offence committed during the course of performing a journey should be held at the place where the offence is actually committed. The section, therefore, embodies a sort of legal fiction by which the offence is deemed to have committed within the local limits of certain courts other than where the offence has been actually committed.

11. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about the ..... day of ..... at ..... had carnal intercourse, against the order of nature, with *AB* (*specify the man, woman or animal*), and thereby committed an offence, punishable under s 377 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

A charge under this section must allege the time when, the place where, and the person, known or unknown, with whom the particular act, charged as an offence, was committed. Conviction upon a vague charge cannot be sustained even though there may be evidence to show that the accused was a habitual sodomite.

However, when the accused is fully aware of the true import of the prosecution case against him pertaining to the offence under s 377, though the place of occurrence is not indicated correctly in the chargesheet, no prejudice can be said to have been caused to the accused and error in the charge is not material.[86]

12. Quashing of Charge

When the only allegation of opening the lungi and pulling of the underwear was there but the FIR did not reveal that after the pulling of the underwear any attempt was made by the accused to commit the offence nor there was any material to suggest penetration, the charge under s 377 read with s 511, IPC, was quashed by the High Court.[87]3246

13. Child Witness

There can be no two opinions that before a statement of a child witness is recorded by a magistrate or a judge, he is required to put some questions in order to ascertain whether he is able to understand the questions put to him and can give rational answers. For compliance of *voir dire*, the magistrate or the judge may either give his certificate or keep such record as to enable the appellate court to find out that the magistrate or the judge had satisfied that the child witness had reasonable understanding to answer the questions put to him in order to appreciate his evidence. This care and caution is necessary in recording the statement of the child witness because of his innocence and also vulnerability to undue influence and tutoring. On the other hand, we cannot lose sight of the fact that it is because of his innocence that the child is expected to give a true version of an incident.[88]

Where the accused was proved to have had carnal intercourse against the order of nature with a bullock by placing his penis inside the nostril of a bullock, it was held that the offence was punishable under this section.[89]

14. Proof

Prosecution has to prove that:

(1) the accused had carnal intercourse with man, woman or animal;
(2) such intercourse was against the order of nature;
(3) the act by the accused was done voluntarily; and
(4) there was penetration.[90]

As a charge under this section is difficult to refute, evidence in support of the charge must be convincing.[91]

The accused police officials were indulged in indiscriminate firing at the hard core wanted criminal in retaliation to killing of innocent police official. Their conviction with the help of s 34, IPC was held proper.[92]

There was evidence of the child victims that the accused used to have sex with them and also asked them for fellatio with other boys of the shelter home. The victims stood the test of cross-examination, their evidence was found reliable. The acquittal of the accused on the ground that there was no corroboration of the testimony of the victims by other inmates of shelter home was not proper. Accused was convicted.[93]3247

15. Medical Evidence

It is very desirable that there should be some medical evidence on record, if it is possible to get it, as to the condition of the anus of the person, on whom the act of sodomy is said to have been perpetrated, or, at any rate, some proof as to the appearance of the part of his body shortly after the alleged act of unnatural intercourse from which penetration may properly be inferred.[1] If it is not the case of the prosecution that the unnatural offence remained incomplete, the medical evidence ought to be definite against the accused.[2] In a charge of sodomy, stains of semen constitute important evidence.[3] Great weight must therefore, be attached to the chemical examiner's report.[4]

Likewise, the post mortem report of a victim in a case of sodomy and murder, showing clearly that there were at least three tear marks leading to the irresistible conclusion that some hard object (implicitly like a male organ) was thrust violently into the anus of the deceased.[5] However, when the doctor did not find any external injury over the private parts of the accused and no semen was detected on the underwear as per the report of CFSL, the sample of pubic hair of the accused though sent for an opinion to the chemical examiner from whom no opinion was found possible, the prosecution's case against the accused had

become doubtful notwithstanding the presence of blood stains on the underwear of the accused as the report of the serologist suggested that the blood found on the underwear was insufficient for grouping.[6]

16. Conviction

When the statement of the victim is natural and trustworthy, the medical report shows that the anus of the victim was found swollen, the delay of one day in lodging the FIR was properly explained, the conviction of the accused under s 377, IPC, was found proper.[7] When the statement of the victim is corroborated by medical evidence, the accused is liable to be convicted.[8]

The appellant Swamiji of Math was prosecuted for an offence under s 377, IPC on allegations that he committed the alleged offence on a minor boy in morning hours continuously for seven days. FIR was filed one month after the incident when a dispute arose between the accused and Senior Swamiji of Math. It is against natural human conduct that such an act of sodomy would be committed at 8 o'clock in the morning and that too continuously for seven days. Medical evidence did not corroborate the prosecution case. Appellant was acquitted of the charge under s 377, IPC .[9]3248

17. Probation

The social ostracisation and humiliation likely to have been suffered by the accused are no grounds to release the accused on probation.[10] As the offence under s 377, IPC, is punishable upto imprisonment of life, the benefit of the Probation of Offenders Act cannot be extended to the accused.[11]

18. Attempt to Convict Unnatural Offence--Sentence

The trial court convicted the accused under s 377 but the appellate court altered the conviction to one under ss 377 / 511 instead of s 377, IPC, and sentenced the accused to 1 year rigorous imprisonment and fine of Rs 2000 in default to further undergo 2 months SI. Sentence of 2 years rigorous imprisonment passed by trial court for offence punishable under s 377, IPC . On revision being filed, the High Court taking into account the fact that accused was in custody for about eight months reduced the sentence awarded under ss 377 / 511, IPC to the period already undergone.[12]

19. Sentence Under Section 377

The sentence should be proportionate to the gravity of the offence. The court while imposing sentence should keep into consideration the antecedents and character of the convict and the circumstances in which the alleged offence has been committed. No hard and fast rule can ever be laid down for imposing a just and proper sentence upon the convict, and the question differs from case to case.[13] Under s 377, IPC, the accused can be punished with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years. The age of the accused, his belonging to a socially backward strata of the society of his village and the fact that he is a first offender are factors which may be taken into account for awarding sentence.[14] Sodomy is one of those offences for which there can hardly be any extenuating circumstance. Sentence of imprisonment for four months only, for such an offence, is a very lenient punishment. *Coitus per os* is punishable under this section but not with the same severity as *coitus per anum*.

20. Reduction In Sentence

In the following cases the sentence awarded by the trial court was reduced by the appellate court:

(a) an accused aged 20/21 years was not a previous convict and a sentence of long term imprisonment may not have had a healthy effect or result in that case, so the sentence of imprisonment was reduced from 10 years rigorous imprisonment to 3 years rigorous

imprisonment, but sentence of fine of Rs 1000 was maintained.[15]

(b) the accused was aged about 22 years at the material time of the incident and was in custody for about one year, so the sentence of imprisonment of the accused was reduced from 2½ years to 1½ years.[16]

3249

However, in *Chitranjan Dass v State of Uttar Pradesh* ,[17] the Supreme Court, looking to the fact that, as a result of his conviction, the appellant would suffer loss of service and other serious consequences in his career, reduced his sentence to that already undergone which was more than two months.

21. Enhancement of Sentence

Under s 377, IPC, the accused can be punished with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years. The sentence of two years imprisonment awarded by the trial court without specifying whether it is in the nature of rigorous or simple imprisonment is not proper and is grossly inadequate taking into account the fact that besides the offence under s 377 the accused has also committed the offence under s 376 for rape on the prosecutrix who was less than 12 years of age. The sentence of 2 years awarded by the trial court under s 377 was enhanced to 5 years rigorous imprisonment and fine of Rs 2000 in default of which rigorous imprisonment for 3 months, taking into account the fact that the accused belonged to a socially backward strata of society of a village and age of the accused and the fact that the accused was a first offender, the maximum sentence prescribed was not awarded.[18]32503251

55 Substituted by Act 26 of 1955, s 117 and Sch, for 'transportation for life' (wef 1-1-1956).

56 *Suresh Kumar Koushal v NAZ Foundation* 2014 Cr LJ 784, AIR 2014 SC 563, (2013) 4 SCC (Cri) 1, (2014) 133 AIC 174 (SC) ; (*NAZ Foundation v Government of NCT* 2010 Cr LJ 94 (Delhi), **reversed**.

57 *Jagif Singh v State* 69 PLR 34 (SN) .

58 *Nowshirwan Irani v Emperor* 36 Cr LJ 718, AIR 1934 Sind 206 .

59 *R v Jacobs* (1817) R&R 331, **followed**, *obiter*, in Re *Govindarajulu Naicker*(1886) I Weir 382, 383.

60 *Khanu v Emperor* AIR 1925 Sind 286, 26 Cr LJ 945 ; *Lohana Vasantlal Devchand v State* AIR 1968 Guj 252, 1968 CR LJ 1277 .

61 *Calvin Francis v State of Orissa* 1992 (2) Crimes 455 (Ori) .

62 *R V Jacobs*(1817) Russ & Ry 331 CCR.

63 Re *Govindarajulu*(1886) 1 Weir 382.

64 *Khanu v Emperor* AIR 1925 Sind 286 .

65 *Calvin Francis v State of Orissa* 1992 (2) Crimes 455 (Ori) .

66 *Halsbury's Laws of England*, III edn, vol 10.

67 *American Jurisprudence,* II edn, vol 70.

68 *Grace Jayamani v EP Peter* AIR 1982 Kash 46 (SB) .

69 Taylor,'*Principles and Practice of Medical Jurisprudence*, XII edn, vol II.

70 *Corpus Juris Secundum*, vol 81, pp 368-370.

71 *Calvin Francis v State of Orissa* 1992 (2) Crimes 455 (Ori) .

72 *Ibid*.

73 *Khanu v Emperor* AIR 1925 Sind 286 ; *Calvin Francis v State of Orissa* 1992 (2) Crimes 455 (Ori) .

74 *Khanu v Emperor* AIR 1925 Sind 286 .

75 *Suresh Kumar Koushal v NAZ Foundation* 2014 Cr LJ 784, p 824 (SC), AIR 2014 SC 563, 2013 (15) Scale, (2014) 1 SCC 1 .

76 *Anil v State of Maharashtra* 2014 Cr LJ 1608 (SC), 2014 (2) Scale 54, (2014) 4 SCC 69 .

77 *State of Madhya Pradesh v Ram Pal* 1989 (2) Crimes 84 (MP) .

78 *Jagif Singh v State* 1969 PLR 34 (SN)*;Suresh Kumar Koushal v NAZ Foundation* 2014 Cr LJ 784 (SC) .

79 *Biren Lal v State of Bihar* I (1996) CCR 427 (Pat) .

80 *Vide Halsbury's Law of Australia*.

81 *Reg v Brown* (1889) 24 QBD 357 .

82 *Nowshirwan v Emperor* 36 Cr LJ 718, AIR 1934 Sind 206 ; *Kishan Lal v State of Rajasthan* 1998 Cr LJ 4508 (Raj) (DB) .

83 *Biren Lal v State of Bihar* 1 (1996) CCR 427 (Pat) .

84 Re *Tottitodiyil Ahmed Kutti* 1 Weir 383.

85 *Charanjit Singh v State of Himachal Pradesh* 1986 Cr LJ 173 (HP) .

86 *Charanjit Singh v State of Himachal Pradesh* 1986 Cr LJ 173 (HP) .

87 *Biren Lal v State of Bihar* (1996) 1 CCR 427 (Pat) .

88 *State of Himachal Pradesh v Anmol Kumar* 1996 (4) Crimes 501 (HP) .

89 *Khandu v Emperor* 35 Cr LJ 1096, AIR 1934 Lah 261, where it was observed that the remark, in Re *Govindarajuly Naicker*(1886) 1 Weir 382, 383 that *coitus per se* (through the mouth) does not amount to an unnatural offence, was *obiter dicta*.

90 *Calvin Francis v State of Orissa* 1992 (2) Crimes 455 (Ori) .

91 *Emperor v Sain Dass* 27 Cr LJ 593, AIR 1926 Lah 375 .

92 *Satyavir Singh Rathi v State thr. CBI* 2011 Cr LJ 2908 (SC), AIR 2011 SC 1748, (2011) 6 SCC 1, 2011 (5) Scale 339 .

93 *Childline India Foundation v Allan John Waters* 2011 Cr LJ 2305 (SC), 2011 AIR SCW 1966, (2011) 6 SCC 261, 2011 (3) Scale 639 ; *State of Kerala v Kurissum Mootal Antony* (2007) 1 SCC (Cri) 403), 1994 (Supp-1) SCC 512, 1993 Cr LJ 3544 .

1 Per Straight J, in Re *Ghasita*(1884) 4 AWN 25.

2 *Mirro v Emperor* AIR 1947 All 97 .

3 Taylor's *Principles and Practice of Medical Jurisprudence,* second edn, Vol II, p 283.

4 *Devi Das v Emperor* 31 Cr LJ 343, AIR 1930 Lah 318 .

5 *Kishan Lal v State of Rajasthan* 1998 Cr LJ 4508 (Raj) (DB) .

6 *Kishan Lal v State* 1991 Cr LJ 742 (Del) (DB) .

7 *Chandra Shekhar v State of Madhya Pradesh* I (1995) CCR 86 (MP) .

8 *Manmath Biswal v State of Orissa* 1997 (3) Crimes 536 (Ori) ; *State of Madhya Pradesh v Ram Pal Singh* 1989 (2) Crimes 84 (MP) .

9 *Gowrishankara Swamigalu v State of Karnataka* 2008 Cr LJ 3042, p 3049 (SC), AIR 2008 SC 2349, 2008 (4) Scale 389 .

10 *Calvin Francis v State of Orissa* 1992 (2) Crimes 455 (Ori) .

11 *Ratan Mia v State of Assam* 1988 Cr LJ 980 (Gau), (1988) 1 Crimes 404 .

12 *Sukhdeo Singh v State of Rajasthan* 2002 Cr LJ 1975 (Raj) .

13 *Raju v State of Haryana* 1988 Cr LJ 2587 (P&H) .

14 *State of Himachal Pradesh v Harbilas* (1998) III CCR 279 (HP) (DB) .

15 *Raju v State of Haryana* 1998 Cr LJ 2587 (P&H) .

16 *Mohan Ojha v State of Bihar* 2002 Cr LJ 3344 (Pat) .

17 *Chitranjan Dass v State of Uttar Pradesh* 1975 Cr LJ 30, AIR 1974 SC 2352 ; *Jagir Singh v State* 69 PLR 34 (SN) ; *Mangat Ram v State of Himachal Pradesh* (1985) 1 Crimes 77 ; *Fazal Rab Choudhary v State of Bihar* 1983 Cr LJ 632, AIR 1983 SC 323 .

18 *State of Himachal Pradesh v Harbilas* (1998) III CCR 279 (HP) (DB) .

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Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

TOPICAL INTRODUCTION

For human society to regulate its administration, it requires the protection of not only the person of individuals, but also of their property. All systems of jurisprudence from the earliest times have, therefore, made provisions for its protection.To a considerable extent, provisions for violation of property rights have been provided in civil law and remedies are sought by private individuals in civil courts to obtain relief. A stage is, however, reached when violations of property rights become so violent, mischievous or fraudulent that the state finds it necessary to step in and utilise the machinery of its criminal law to afford protection to property in a speedy and effective way. To achieve this objective, this chapter, *i.e.*, ch XVII, classifies the offences against property under the following ten heads:

(a) Theft (ss 378 to 382).
(b) Extortion (ss 383 to 389).
(c) Robbery and dacoity (ss 390 to 402).
(d) Criminal misappropriation of property (ss 403 to 404).
(e) Criminal breach of trust (ss 405 to 409).
(f) Receiving stolen property (ss 410 to 414).
(g) Cheating (ss 415 to 420).
(h) Fraudulent disposal of property (ss 421 to 424).
(i) Mischief (ss 425 to 440).
(j) Criminal trespass (ss 441 to 462).

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Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF THEFT

S. 378.

Theft.--

Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Explanation 1.--A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.--A moving effected by the same act which effects the severance may be a theft.

Explanation 3.--A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.3251

Explanation 4.--A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.--The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations

(a) *A* cuts down a tree on *Z's* ground, with the intention of dishonestly taking the tree out of *Z's* possession without *Z's* consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(b) *A* puts a bait for dogs in his pocket, and thus induces *Z's* dog to follow it. Here, if *A's* intention be dishonestly to take the dog out of *Z's* possession without *Z's* consent, *A* has committed theft as soon as *Z's* dog has begun to follow A.

(c) *A* meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, *A* has committed theft of the treasure.

(d) *A*, being *Z's* servant, and entrusted by *Z* with the care of *Z's* plate, dishonestly runs away with the plate, without *Z's* consent. *A* has committed theft.

(e) *Z*, going on a journey, entrusts his plate to *A*, the keeper of a warehouse, till *Z* shall return. *A* carries the plate to a goldsmith and sells it. Here the plate was not in *Z's* possession. It could not, therefore, be taken out of *Z's* possession, and *A* has not committed theft, though he may have committed criminal breach of trust.

(f) *A* finds a ring belonging to *Z* on a table in the house which *Z* occupies. Here the ring is in *Z's* possession, and if *A* dishonestly removes it, *A* commits theft.

(g) *A* finds a ring lying on the high-road, not in the possession of any person. *A*, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) *A* sees a ring belonging to *Z* lying on a table in *Z's* house. Not venturing to misappropriate the ring immediately for fear of search and detection, *A* hides the ring in a place where it is highly improbable that it will ever be found by *Z*, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here *A*, at the time of first moving the ring, commits theft.

(i) *A* delivers his watch to *Z*, a jeweller, to be regulated. *Z* carries it to his shop. *A*, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of *Z's* hand, and carries it away. Here *A*, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j) If *A* owes money to *Z* for repairing the watch, and if *Z* retains the watch lawfully as a security for the debt, and *A* takes the watch out of *Z's* possession, with the intention of depriving *Z* of

the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if *A*, having pawned his watch to *Z*, takes it out of *Z's* possession, without *Z's* consent, not having paid what he borrowed on the watch he commits theft, though the watch is his own property, inasmuch as, he takes it dishonestly.

(l) *A* takes an article belonging to *Z* out of *Z's* possession, without *Z's* consent, with the intention of keeping it until he obtains money from *Z* as a reward for its restoration. Here *A* takes dishonestly; *A* has therefore committed theft.

(m) *A*, being on friendly terms with *Z*, goes into *Z's* library in *Z's* absence, and takes away a book without *Z's* express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that *A* may have conceived3252 that he had *Z's* implied consent to use *Z's* book. If this was *A's* impression, *A* has not committed theft.

(n) *A* asks charity from *Z's* wife. She gives *A* money, food and clothes, which *A* knows to belong to *Z* her husband. Here, it is probable that *A* may conceive that *Z's* wife is authorised to give away alms. If this was *A's* impression, *A* has not committed theft.

(o) *A* is the paramour of *Z's* wife. She gives *A* valuable property, which *A* knows to belong to her husband *Z*, and to be such property as she has no authority from *Z* to give. If *A* takes the property dishonestly, he commits theft.

(p) *A*, in good faith, believing property belonging to *Z* to be *A's* own property, takes that property out of *B's* possession. Here, as *A* does not take dishonestly, he does not commit theft.3253

Comments

1. Scope

This section defines the offence of theft and the next section prescribes the punishment thereof. In order to constitute the offence of theft, there must exist the following ingredients,[1] namely:

(a) the accused must have an intention to taking dishonestly;
(b) the subject of the theft must be some movable property;
(c) the said movable property must be taken out of the possession of any person;
(d) the said taking must be without that person's consent; and
(e) the property must be moved in order to such taking.

Similarly, the commission of theft consists in: (a) moving a movable property of a person out of his possession without his consent; and (b) the moving being in order to taking the property with dishonest intention. Thus, the absence of the person's consent at the time of moving and the presence of dishonest intention in so taking at that time are essential ingredients of the offence of theft.[2] The Supreme Court while analysing the ingredients of this section in *Pyarelal Bhargava v State of Rajasthan* ,[3] observed that this section may be dissected, into its component parts. Thus, a person will be guilty of the offence of theft:

(a) if he intends to cause a wrongful gain, or a wrongful loss, by unlawful means, of property to which the person gaining is not legally entitled, or to which the person losing is legally entitled, as the case may be;[4]
(b) the said intention to act dishonestly is in respect of movable property;
(c) the said property is taken out of the possession of another person without his consent; and
(d) he moves that property in order to such taking.

As theft is an offence against possession and not title, the criminal courts are not required to adjudicate on

rival claims of the parties about title while deciding whether offence of theft is made out or not.[5]

2. Law of England

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'theft' and 'steal' are to be construed accordingly. It is immaterial whether the appropriation is made with a view to gain or is made for the thief's own benefit.

A person guilty of theft is liable on conviction on indictment to imprisonment for a term not exceeding seven years, or on summary conviction to imprisonment for a3254 term not exceeding six months or to a fine not exceeding the prescribed sum or to both.

In *R v Smith* ,[6] it was observed, 'Applying settled principles, notwithstanding that the victim had been in unlawful possession of a prohibited Class A drug, the appropriation of drugs constituted theft and the circumstances in which the drugs and been taken amounted to the offence of robbery. On the question of sentence, the instant case fell within level two of the guidelines of the Sentencing Guidelines Council, in which the range of sentence was seven years' custody. It followed that the sentence imposed in each case was manifestly excessive.' In *P v Director of Public Prosecutions* , [7] it was held, 'The instant case fell squarely on the side of pick-pocketing and other such cases, in which there was no direct physical contact between the thief and the victim. It could not be said that the minimal use of force used to remove a cigarette from the fingers of a person sufficed to use of force on that person. Such force could not cause any pain unless perhaps the person resisted strongly, inevitably resulting in direct contact between the persons. That unexpected removal was no more than removal of an item from a pocket. The offence was perfectly categorised as simple theft.'

3. Law of Canada

It is an indictable offence to commit theft where the property stolen is a testamentary instrument or the value of what is stolen exceeds $5,000. Where the value of what is stolen does not exceed $5,000, theft is a hybrid offence. 'Theft' means to take or convert anything, whether animate or inanimate, to the use of the accused or another person, with intent:

- to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
- to pledge it or deposit it as security;
- to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
- to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

The taking or conversion must be done fraudulently and without colour of right. A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

Special Property or Interest

This phrase includes the equitable interest that trust beneficiary has in shares of a company held in trust. It includes the interest of the holder of a conditional sales agreement. The National Research Council has been held to have 'special property or interest' in moneys given by way of a grant to a professor. The phrase includes the retention of a reversionary interest in the moneys, any shared interest in the moneys, or a right to have the moneys applied in a particular manner for a specific purpose. The *de facto* owner of an illegal narcotic drug has a special property or interest in the narcotic.3255

A person may be convicted of theft notwithstanding that anything that is alleged to have been stolen was stolen:

- by the owner of it from a person who has a special property or interest in it;
- by a person who has a special property or interest in it from the owner of it;
- by a lessee of it from his reversioner;
- by one of several joint owners, tenants in common or partners of or in it from the other persons who have an interest in it; or
- by the representatives of an organization from the organization.

Theft was held to be made out where an article was sold with knowledge of a bank's chattel mortgage and hence there was special interest in it. A neighbour looking after a house for the owner is within this section in respect of the house and its contents.

A person who has a wild living creature in captivity is deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity. Where oysters and oyster brood are in oyster beds, layings or fisheries that are the property of any person and are sufficiently marked out or known as the property of that person, that person shall be deemed to have a special property or interest in them. An indictment is sufficient if it describes an oyster bed, laying or fishery by name or in any other way, without stating that it is situated in a particular territorial division.

De Minimis Defence

The *de minimis* defence was rejected and the accused was convicted of theft of a bottle of nail polish, but the doctrine was applied where a handful of nuts was involved.

The offence of 'theft' is defined in s 322(1) of the Criminal Code. For the purposes of this trial, s 322(1)(a) is the applicable section. It states as follows:

> "**322.**
>
> (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent:
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it."[8]

In *R v Fowler* ,[9] it was held, 'What is established is this accused put his hand in a bulk bin at the grocery store and took out some nuts. Given the accused's physical disability, which limits the use of his hands, I am satisfied, that the quantity of the nuts taken would be something significantly less than a full handful. The private investigator estimated the value of the nuts at $2.50, however the way he provided this estimate and the fact that he was not sure what type of nuts or candy were taken, does not provide me with any confidence that the value of the product taken has been established. It is my conclusion that the value was minimal, and likely less than the $2.50 estimated. The test is whether the conduct is sufficiently serious that it should be properly stigmatized as criminal. I have concluded that while this conduct is unacceptable and wrong, it should not be stigmatized as criminal, and therefore I3256 apply the principle of *de minimis non curat lex*. The accused is found not guilty of both charges.'

4. Theft Distinguished from Larceny

For a distinction between 'theft' under the IPC and 'larceny' in English law, *KN Mehra v State of Rajasthan* ,[10]*Empress v Churn Chungo* ,[11] and *Empress v Nagappa* [12] may be referred to.

The law relating to larceny, being substantially different from that under the IPC, it would not be proper to apply the principles under the English law, which is not in consonance with the Indian law, to cases in India.[13]

Similarly, cases decided in England, must be received in India with careful allowance because of great difference in law in the two countries.[14]

5. Theft Distinguished from Mischief

When a person commits mischief, he only causes loss to another, but does not gain himself. In theft, the wrongdoer makes dishonest gain at the expense of his victim. This is the essential distinction between theft and mischief.[15]

6. Theft Distinguished from Extortion

A distinction between theft and extortion is well known. Whereas offence of extortion is carried out by over-powering the will of the owner; in commission of an offence of theft the offender's intention is always to take without that person's consent.[16]

7. Criminal Misappropriation Distinguished from Theft

Theft and criminal misappropriation are two distinct offences and are defined in ss 378 and 403, IPC, respectively. A person commits theft when he dishonestly removes any movable property out of the possession of another person without that person's consent. In other words, a person is said to have committed theft of a movable property which is not in his own possession but in the possession of some other person. On the other hand, a person commits the offence of criminal misappropriation when he dishonestly misappropriates or converts to his own use any movable property which has already come into his possession by innocent means.[17]

Where a person commits theft or criminal misappropriation, the subsequent restoration of the theft or criminal misappropriation will not undo the offence which3257 has already been committed although in fit and proper circumstances the High Court in view of the particular facts and circumstances of the case may, in exercise of its inherent power under s 482, CrPC, quash the proceeding or pass such other order as it may deem fit and proper in view of the subsequent development or the parties may even compromise or compound the offence where it is permissible or the trial court in awarding punishment may take into consideration the subsequent development in mitigating the severity of punishment.[18] Where an exclusive property of one of the spouses is unwarrantedly taken away or misappropriated by the other and the marriage breaks down, it will not be correct to have a rigid approach, divorced from facts and circumstances of each case, to hold that the offence of misappropriation or theft cannot be made out.[19]

8. Theft and Criminal Breach of Trust by Public Servant

Where certain property is in possession of the main accused as a public servant as its custodian and it is dishonestly removed by the accused himself or by someone else at his instance, the offence does not amount to theft as the removal is with the consent of the accused, but amounts to a criminal breach of trust punishable under s 409, IPC .[20]

9. 'Intending to Take'

The intention of the accused must be to take, *i.e.*, to acquire, possession of something in another's possession. The moving of property should be effected with a view to take possession or custody of

property.[21] Again, to commit theft, one need not take movable property permanently out of another's possession with the intention of not returning the same to him. It would be sufficient if he takes any property out of the possession of another person though he intends to return it to him later on.[22] Where the accused snatched away some books from a boy, as he came out of school, and told him that they would be returned when he came to his house, it was held that theft had been committed.[23] However, snatching of a revolver by the accused from a member of the complainant's party, in order to prevent further bloodshed and surrendering it to the police at the earliest possible opportunity, is not theft as there is no intention to steal it.[24]

10. 'Dishonestly'

The word 'dishonestly', as is used in this section, does not carry its ordinary meaning.[25] It is a technical term which has been expressly defined in s 24, IPC . A person can be said to have dishonest intention if, in taking the property, it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled, or to cause loss, by unlawful means, of property to3258 which the person so losing is legally entitled.[26] 'Dishonestly' involves the twin ingredients of 'intention' and 'dishonestly'. 'Dishonestly' again involves intention, *i.e.*, the doing of a thing with an intention to cause wrongful gain or wrongful loss.[27] The intention of a person who takes a thing, is not dishonest unless it is with the intention to cause either such gain or loss as is provided in s 24 .[28] A person cannot be convicted of theft of a property unless it has been found, as a matter of fact, that he is not entitled to it.[29] The section requires that the removal of property from the possession of another should be with the intent to cause wrongful gain to himself or wrongful loss to another person. Dishonest intention is the gist of the offence.[30] This intention is known as *animus furandi* and without it the offence of theft is not complete.[31] Unless the removal of property by the accused with dishonest intention is established, no offence under s 378, IPC, can be made out.[32]

The element of 'dishonest intention' which is an essential element to constitute the offence of theft cannot be attributed to a person exercising his right under a hire-purchase agreement entered into between the parties as he may not have an intention of causing wrongful gain or to cause wrongful loss to the hirer.[33] However, on the other hand, his motive in intending wrongful gain or loss is immaterial and motive does not form an ingredient in the definition of theft.[34] The following points should, however, be noted:

(a) It is not essential that both gain and loss should be intended, *i.e.*, the act, causing wrongful loss to one, need not simultaneously cause wrongful gain to the accused. It is sufficient if the person, from whose possession the removal takes place, has suffered wrongful loss.[35] Usually, of course, the thief intends to acquire a gain to himself or to a third party and a loss to the former possessor of the thing, but it is sufficient if only loss is intended. However, if neither of these intentions is present, there can be no theft by the taking since the intention, whatever it may be, is not dishonest. Where the accused, charged by his master for having committed theft of a box, admitted that he had removed the box and left it concealed in the cow-shed to teach a lesson to his master, it was held that he could not be convicted of theft.[36]

(b) Wrongful loss is said to be caused in keeping, without legal right, a person out of possession of his property as also in wrongfully retaining possession3259 by one of another's article.[37] In *Empress v Rambaran* ,[38] it was held that a theft would not be any less because it is committed by members of one denomination in regard to the property of members of any other denomination under some religious incentive.

(c) The intended gainer need not necessarily be to the thief personally. The thief may intend gain to a third party or to himself and a third party. Where a post office peon, employed for sorting letters for delivery, secreted two bearing letters in his cloth, intending to hand them over to the delivery peon and to share with him the bearing postage, it was held that he was guilty of theft.[39]

(d) The gain or loss may be permanent or temporary.

11. 'Any Movable Property'

Under this section, the subject of theft can only be 'movable property'. The words 'movable property', as defined in s 22, IPC, 'are intended to include corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth'. A thing, as long as it is attached to the earth, is not movable property and cannot be the subject of theft. It can, however, be so as soon as it is severed from the earth. In the definition of movable property, the property includes corporeal property of every description. Corporeal property is property which may be perceived by the senses in contradistinction to incorporeal rights which are not so perceivable. It must, therefore, be tangible. A house is not the subject of theft, but its materials would be movable property and their removal would be theft.[40] A boat, used for residence, does not cease to be movable property because it is used for residence. It may be the subject of theft.[41]Standing crop, when cut, becomes movable property. Infact, the very act of severance may constitute the offence of theft and this is made clear by explanations 1 and 2 of this section.[42] Removal of fallen trees, or the cutting of standing trees, by a tenant from the land of his landlord without his consent would be theft.[43] However, the sale of trees, belonging to others and not cut down at the time of sale, does not constitute theft.[44] Earth, *i.e.*, the soil, and all the component parts of soil, inclusive of stones and minerals, when severed from the earth or land, to which it is attached, becomes movable property and it becomes the subject of theft. Thus, cart-loads of earth,[45] or of stones and other minerals,[46] would become subjects of theft. The position of some other movable properties is constituted below.3260

(a) Salt

Taking salt against the will of the government from a swamp, which is government property and is guarded by the police, is theft.[47] However, the removal of salt for one's own use from a creek, not forming part of any salt-work, would not constitute any offence; a dishonest removal from a creek under the supervision of an officer of the customs department would, however, be theft.[48]

(b) Mining of sand without licence/permit

Where a person mines sand from river bed without licence/permit from the Government, his act constitutes offence under ss 378 punishable under s 379 IPC .[49]

(c) Electricity--Position under Indian Electricity Act 1910

Electricity, not being movable property, cannot be the subject of theft under the IPC .[50] Section 39 of the Indian Electricity Act (9 of 1910), brings the act of dishonest abstraction, consumption or use of electricity within the meaning of theft as understood in the IPC . The offence is not theft within the meaning of IPC ; it is deemed to be theft within the meaning of IPC in view of s 39, without which theft of electrical energy could not be so deemed as theft.[51] Similarly, the view, taken in *Omprakash v State* ,[52] and *State (Delhi Administration) v Dharampal* ,[53] that the charge of dishonest abstraction of electricity must be framed under s 379, IPC, read with s 39, Indian Electricity Act (9 of 1910), seems to be the correct approach.

Where the consumer had willfully or fraudulently altered the index of the meter or tampered with the wiring for preventing it from duly registering the energy consumed, he must be held to have committed the offence of theft of energy under s 39 read with s 44(c) of the Indian Electricity Act (9 of 1910).[54]

The prosecution launched by the electrical engineer of the electricity board without any authority from the board being in contravention of the Indian Electricity Act (9 of 1910), the conviction and sentence awarded to the accused are liable to be quashed.[55]When the initiation of prosecution is by a junior engineer and not at the instance of persons mentioned in s 50 of the said Act, the lapse is fatal to the prosecution.[56]

In case of death of the deceased while he went to catch fish in the river due to electrocution on coming

into contact with the unauthorised electric hook line drawn3261 by the accused, the SDO (electrical) is competent under s 50 of the Indian Electricity Act (9 to 1910) to lodge a written complaint against the accused for offences under ss 379 and 304A, IPC read with s 39 of the Indian Electricity Act (9 of 1910).[57] The electrical engineer is also a person aggrieved and thus the competent person to initiate prosecution against the accused.[58] However, when the entire amount of impugned theft of electricity bill is paid by the accused, the FIR lodged against the accused under s 44 of the Indian Electricity Act (9 of 1910) read with s 379, IPC, is liable to be quashed.[59]

When the name/particulars of the accused and the date of raid to detect the theft is not correctly given in the complaint, the FIR, charge sheet and consequential proceedings against the accused are liable to be quashed.[60]

The offence of theft of energy is not made compoundable under the Indian Electricity Act (9 of 1910). The same cannot also be compounded under s 320, CrPC, when the amount involved exceeds Rs 250.[61]

(d) Electricity--Position under Indian Electricity Act 2003

Commentary under the headings 'Theft of Electricity--Complaint by "Person aggrieved"' and 'Theft of Electricity-- Section 379 not attracted--Special Law Overrides General Law' in s 379, *post*, may be referred to.

Section 135 of the Electricity Act 2003 deals with the offence of theft of electricity and s 136 of the Act deals with the theft of electric lines and connected materials. Section 152 of the Act provides for compounding of the offence of theft of electricity. Where a consumer has committed theft of electricity, on the payment of compounding sum as specified in the section on the spot, the consumer is set at liberty and no proceedings in criminal court shall be instituted against such person. For theft of electricity, see the undermentioned case.[62] Where a consumer is found guilty of tampering with the meter by the courts below, interference with the findings by the High Court is not proper.[63]

Where the allegation against the accused was of tampering with electric meter, the tampering and seizure of meter were not proved, the investigating officer of the case was not examined. Held, the prosecution failed to prove the charge, accused was acquitted of the charge under s 379, IPC .[64]

(e) Telegraph Wire

'Telegraph Wire' means any copper wire the diameter of which in millimeters, is:

(i) not less than 2.43 and not more than 2.53; or
(ii) not less than 2.77 and not more than 2.87; or3262
(iii) not less than 3.42 and not more than 3.52.[65]

A mere visual appreciation of the colour and lustre of the wire coupled with the measurement of the diameter is not sufficient to establish that the wire in question was copper wire which came within the prohibited category of telegraph wire as defined in s 2(b) of the Telegraph Wires (Unlawful Possession) Act 1950. The three tests namely: (a) measurement of diameter, (b) taking of weight, and (c) finding out the resistance of wire are not sufficient to establish that the wire in question was copper wire, the possession of which is prohibited and punishable under the said Act.[66] A mere possession of telegraph wire is punishable under s 5 of the said Act, while to attract ss 379 / 411, IPC, such possession should be dishonest.[67]

(f) Aircraft

The taking out of an aircraft by the accused for an unauthorised flight gives him the temporary use of the aircraft, for his own purpose and temporarily deprives the owner of the aircraft, *viz*, the government, of its

legitimate use for its purposes, *i.e.*, the use of the aircraft for the Indian Air Force squadron that day. Such use being unauthorised and against all regulations of aircraft-flying is a gain or loss by unlawful means. In such a case, all the circumstances of the unauthorised flight justify the conclusion, both as to the absence of consent and as to the unlawfulness of the means by which there is a temporary gain or loss by the use of the aircraft.[68] Although the ultimate purpose of the flight was to go to Pakistan, the use of the aircraft for that purpose was unauthorised and hence, unlawful gain of that use by the accused and the consequent loss to the government of its legitimate use, can only be considered intentional.[69]

(g) Gas

Gas is distinctly a tangible and corporeal property and can be the subject of theft,[70] though electricity, as stated above, is not a movable property.

(h) Idol

Idol, when fixed to the earth, is an immovable property. However, if it is severed from the earth, it is a movable property and may be the subject-matter of theft.[71]

(i) Fish

Fish in an open and unenclosed water body are *ferae naturae* and cannot be the subject of theft,[72] but if the fish have been taken at a time when they are restrained of their natural liberty and are liable to be taken at the pleasure of the owner of the tank, the accused may be held guilty of theft.[73] When there was nothing to show that the creek was anything in the nature of a tank in which fish are caught and stored in any3263 sense, but was a natural reservoir of water which had come there without human agency and in which fish would naturally be, it was held that the catching of fish from such a place was not an offence of theft.[74]

Where fish are able to go in, or come out of a private fishery, the removal of fish from such fishery would not amount to theft.[75] Therefore, the removal of fish from a running stream is not theft.[76] Similarly, fishing in a tank by one in assertion of his own *bona fide* claim of right does not constitute the offence of theft.[77]

In the absence of any evidence to show that the complainant was in exclusive possession of disputed *jala* (net) at the relevant time, the acquittal of the accused of the charge under s 379, IPC, that he trespassed into the disputed *jala* (net) belonging to the complainant and caught fish is justified.[78]

As stated earlier, fish in their free state are regarded as *ferae naturae*, but they are regarded as being in the possession of the person who owns an exclusive right to catch them in a particular spot, known as a fishery, but only within that spot. There can, thus, be theft of fish from a tank which belongs to another and is in his possession.[79] Similarly, the removal of fish from an enclosed tank can be the subject of theft.[80] When once the water in a pond has fallen to such a level that fish cannot leave it, they are trapped, and consequently in the possession of the owner of the pond. That being so, any person, who takes fish from that pond, may be guilty of theft.[81] Where the accused broke open the bank of a tank, which had been recorded as *khas* property of the *zamindar*, and took a large quantity of fish therefrom, they were held guilty of theft.[82]

(j) Birds

Birds in their wild state are not the subject of theft even though they may be on the land or in the forest which is the subject of private ownership. If, however, they are reduced to possession and are reclaimed (and known to be so) or confined, they can be the subject of theft. Thus, where pigeons are shut up in their boxes every night,[83] or are so tame that they come home every night to roost in the boxes at the house of the owner,[84] and have retained *animus revertendi*,[85] they may be the subject of theft even though they have an opportunity of getting out and enjoying themselves in the3264 open air.[86] Similarly, there may be larceny of pheasants if they are under the control and dominion of the keeper at the time when they are taken.[87] A peacock, though *ferae naturae*, if it is tamed and remains with the owners and does not consort with other wild peacocks, it can be the subject of theft.[88]

Edible bird's nests are not in the possession of anybody until they are collected. A person who collects them without a licence, does not commit theft.[89]

(k) Animals

Animals, other than domestic animals, can be the subject of theft if they are so enclosed in a park, or in some other enclosed space, which is private property and from where they may be taken at pleasure. In order to render any animal *ferae naturae*, the property of any person, there must be a complete capture, the result of which is to reduce the animal completely into possession. Mere pursuit short of capture will not do, and so long as it is possible for the animal to escape, it cannot be said that there is such a reduction into possession as makes the animal the property of the pursuer. The mere fact of the accused's dog overtaking an animal and pulling it down, does not preclude the possibility of escape so as to make the animal his property.[90] The wildness of an elephant, which has escaped from a life of domestication, must, in every case, depend upon the circumstances. Where an elephant has apparently been in a state of domestication for a long time and it has resumed its habits on being recaptured, it is not wild, and the property in it never ceases. Therefore, the property in it of the owner, before recapture, does not come to an end.[91]

If a person kills a wild animal or wild bird on the land of another person, such dead creature does not belong to the killer, but to the proprietor of the land and such proprietor can lawfully demand and, if refused, seize such dead creature from the possession of its killer.[92]

(l) Human Body

A human body, whether living or dead, except perhaps bodies or portions thereof or mummies, preserved in museums or scientific institutions, cannot be the subject of theft.[93]

(m) Water

Water, running freely along a channel, is not reduced to possession till it is actually brought on to the land irrigated.[94] Whether, in the case of any particular river, channel or reservoir, the government can be said to be in possession of water, must depend on circumstances, and the question must be decided as one of fact. Waters in rivers are presumably vested in the government and when the government has taken elaborate steps and employed a large establishment to control the use of water in a3265 river or channel and to prevent any person from using it, the water in the river or channel should be regarded as being in possession of the government so as to be the subject of theft.[1] When water is conveyed in pipes and reduced into possession, it can be the subject of theft. Thus, the taking of water, supplied in municipal pipes, without permission would amount to theft.[2]

(n) Standing Timber

The petitioners who were alleged to have removed the standing timber from the property in their possession even after the civil court had declared the title of the complainant, cannot be charged with the offence of theft.[3]

(o) Things of no Value

Under s 378, IPC, the mere fact that the stolen thing is not, in itself, of any value, does not belittle the offence.[4] A cancelled cheque falls within the meaning of the term 'property' even if it is worth no more than the value of the paper upon which it is written.[5] In such cases, if the property has absolutely no value, s 95, IPC, may be applied and the accused acquitted of theft.[6]

12. 'Out of the possession'

To constitute an offence of theft within the ambit of s 378, IPC, the prosecution has to prove that the offender has taken movable property from the actual/physical possession of the victim without consent.[7]

13. *Bona Fide* Claim to a Movable Property--a Good Defence

Although, in law, the taking of property out of possession dishonestly without the consent of the person concerned is sufficient, yet the *bona fide* claim of right will constitute a good defence in a charge of theft. No charge of theft can be sustained, unless the conduct of the accused is compatible with that of a thief. For example, the conduct of an accused, proceeding in a challenging way towards his car, seized in a case, with gesture made articulate that he would take the same, is not the conduct compatible with that of a thief.[8] If a crop is removed,[9] or if a property is taken away,[10] under a *bona fid*e claim of right, it would not amount to an offence under s 379, IPC, even though the claim may be ill-founded in fact or in law.[11] A conviction for theft cannot be sustained if there is a *bona fide* assertion of a claim of3266 right and the court should not convict unless it is in a position to say that his claim is a mere pretence.[12]

14. *Bona Fide* Claim--Plea Should be Honest, and Not a Mere Pretence

In order however to set up a *bona fide* claim of right as a defence in a case of charge for theft, it is necessary that the plea must be an honest one, and not a mere pretence. If it is not so made and is a mere pretence, it will be of no avail.[13] A mere assertion of right does not constitute a claim of right.[14] Thus, a mere plea by an accused, that the property, with the theft of which he is charged, is his own property unsupported by poor or by some circumstances which tend to indicate that there is some truth in the statement, is insufficient.[15] Where the entire question of possession and even of title was in an extremely fluid state, the respondent's stand, that he cultivated the land, was held, by the Supreme Court, to be a matter of considerable doubt.[16]

15. *Bona Fide* Claim--Colour of a Legal Right

It is well settled that a *bona fide*claim of right is a good defence against a charge of theft and an act does not amount to theft unless there is not only any legal right but also no appearance or colour of legal right. However, the expression 'colour of a legal right' means not a false pretence, but a fair pretence, not a complete absence of the claim, but a *bona fide* claim, however weak. Therefore, when the removal is in the assertion of a *bona fide* claim of right however ill-founded that claim may be, the removal thereof does not constitute a theft.[17]

A *bona fide* claim of right has reference to an honest belief in the accused that he can legally claim that property which he has taken. Such a claim is *bona fide* when there is existence, appearance or even colour of a legal right, the last being a fair pretence of the claim even if it be weak.[18] The above proposition seems to imply a distinction between mere existence, appearance or colour of a right and the *bona fide* nature of a claim. The claim of the right as well as the *bona fide* nature of the claim both seem to be essential in order to constitute a good defence because it is stated that the court has to examine both--that the belief existed and that the claim was *bona fide*.[19] Where a *bona fide* claim of right exists, it can be a good defence to a prosecution for theft. An act does not amount to theft unless there is not only any legal right, but also no3267 appearance or colour of a legal right.[20] In *State of Uttar Pradesh v Tota Ram* ,[21] the accused was the highest bidder at an auction, held by the *gram sabha*, for the sale of a *khandhar*. The accused, even without complying with the condition of depositing one-fourth of the auction price, removed bricks from the *khandhar*. It was held that since no contingent title relating to the *khandhar*, had vested in the accused, it could not be said that the accused believed, in good faith, that he had right to the *khandhar* when there was not even a semblance or colour of a legal right over the same.

16. Whether a Claim is a *Bona Fide* Claim is a Question of Fact

It is a question of fact in each case as to whether the accused acted under a *bona fide* claim or colour of right.[22] The honesty, or otherwise, of the claim, advanced by the accused, has to be decided in each case.[23] The court has to decide this question by considering all the circumstances of the case.[24] Where, in *Brajabehari Mohapatra v Chakradhar Misra* ,[25] one of the accused had the right, whereas most of the other accused had only some right to fish in a tank, it was held that the assertion of their claim was not at all a false pretence. Where there was a dispute with respect to a crop, which was reaped, but not removed

from the land by the accused, and the accused claimed a share as joint owner of the land on which the crops were raised, it was held that the accused was acting in assertion of a *bona fide* claim.[26]

17. Cases in Which a Question of *Bona Fide* Claim may Arise

The question as to whether an act done amounts to theft, when a plea of *bona fide* claim is raised, may arise in the following cases:

(a) Where the person, who takes property from the possession of another, claims any right to the property. This may be claimed:

(i) because the claimant is the owner of the article and he has not parted with the right of possession with the owner in favour of another; or
(ii) because he *bona fide* believes himself to be the owner of the article as he has not parted with its possessory rights; or
(iii) because he claims possession of the property on behalf of another person, who is the owner of the article, or the claimant, in good faith, believes another to be the owner.

(b) Where the property admittedly belongs to another person, and the person, taking it out of the possession of such person, or anyone else in possession3268 on his behalf, is under the mistaken notion that he is not entitled to keep that property to enforce any right that he may, in good faith, believe himself to be possessed of.

When the plea of *bona fide* right of claim of the accused persons is believed by the court to be proved, the charge under s 379, IPC, cannot stand.[27]

A mere doubt as to one's right is not sufficient. The doubt must be shown to be reasonable.[28] The claim must not be *mala fide*, but must be tried and determined by the court and must be proved by evidence to be fair and adequate, though not necessarily acceptable or adequate in a civil court for making, or refusing of a decree.[29] In cases where a person has removed crop grown by another at his cost, it cannot be laid down as an inflexible rule of law that a plea of *bona fide* claim of right can be rejected as a matter of course; only the plea has to be examined with great care than in other types of cases. It is always necessary that in such cases, the courts should give a clear finding as to the assertion of the *bona fide* claim of right being well-founded or not. Where properties stand recorded jointly in the name of several persons, though the disputed property stands in the name of one branch alone and remains to be partitioned, the accused persons may honestly believe that they still had the right to the said property, and even if they had no right, there may be a *bona fide* dispute as to title and possession. Thus, the accused persons cannot he held to have dishonestly removed the crop. Such removal would not amount to an offence.[30] A *bona fide* claim of right can be asserted between two rival claimants to the property as when the same property is the subject-matter of sale to two different persons and the theft alleged is in respect of that property.[31]

18. Removal of Crop--Whether Theft

In the case of an alleged theft of crop grown on land, the real test is as to which of the parties has grown the crop,[32] and a decision on this point will, in a majority of cases, enable the court to come to a definite conclusion as to whether the claim of the accused person is made in good faith or is a mere pretence.[33] It can be a good defence only if the accused can show that he has a *bona fide* claim to crops which he had harvested and taken away.[34] The court must see whether the prosecution has3269 established, beyond reasonable doubt, that the complainant had raised the disputed crop.[35] The *animus* has to be determined with reference to the plea of the accused because a mere plea of denial and the plea of ignorance as to who was the real grower of crop are poles apart.[36]

When the land is alleged to be purchased by the complainant from the accused, the cultivating possession of the accused cannot be denied in the absence of any documentary evidence so the offence of theft is not made out against the accused.[37]

Where the accused removed some paddy crops and claimed that he was in possession of the plot and had himself grown the crops, but the court, without coming to any specific finding as to who was in possession of the plot, was of the opinion that the crops were grown by the accused himself, it was held that his claim was *bona fide*.[38] Where the adjoining fields of the complainant and the accused were demarcated by a line and the accused removed some crops from the complainant's side of the line under the impression that he had sown the crops and he was entitled to them, it was held that the accused was not guilty.[39] Where the crops are grown by the accused and merely a decree for possession,[40] or an order under s 145, CrPC, is made,[41] a charge of theft would not be sustainable. In execution of a decree of rent against the accused, his holding was put to sale and was purchased by the decree-holder who was put in possession thereof by the court. The accused filed a suit to set aside the rent decree and contended that the decree was obtained by fraud. He removed the crops from the field in his possession. It was held that the accused was not guilty of the offence of theft.[42] In the absence of any cogent and unimpeachable proof on behalf of the prosecution that the paddy crops were grown and harvested by the complainant, the plea of the accused, that the said crops were grown by him on the land in question and they were harvested by him and his brother, has to be accepted. In such a case, removal of paddy crops, grown and harvested by them, cannot amount to theft.[43]

However, when the oral evidence, tendered by the prosecution witnesses firmly established the uprooting of some of the crops and removal of the same, the mere non-recovery of the crop from the accused is immaterial for the offence under s 379, IPC .[44]

Generally speaking, the question as to who grew the crop is the first matter to look into, but it is not the only matter in all cases. The question of title, though secondary,3270 is relevant and so is the state of evidence as regards past possession.[45] The rule can, at best, be treated only as a general principle and circumstances may vary wherein other factors may also be found necessary to be taken into consideration.[46] In such case, the documentary evidence regarding possession is very often unsatisfactory because, in most cases, the actual possession of land and the sowing of the crop therein has only an oral source of proof. Where there is no oral evidence as to ownership and actual possession of land and of growing crops therein by the complainant, the accused is entitled to an acquittal,[47] but when the crop has been grown by another, the person, removing the same, cannot escape liability merely by asserting his claim of title to the land containing the crop.[48] The removal of the crops by a person, who knows, or when it is proved,[49] that they had been raised by another person, who was in possession of the land, would be theft, and it cannot be contended that there was a *bona fide* claim of right.[50] Where the possession of the land had been delivered to the complainant, who had throughout remained in possession and had grown paddy crop, which was the subject of theft, the accused were convicted of theft.[51] The mere fact that some trouble arose,[52] or there was some disturbance caused to the complainant at the time of his sowing the crop, will not lead to any contrary conclusion unless the disturbance was of the character actually dispossessing the complainant.[53] Similarly, the mere institution of a civil suit for partition just a few months before the alleged occurrence will not justify a *bona fide* claim of right when the complainant has been in possession for the last 14 years.[54] In *Abinash Chandra Sarkar v Atul Krishna Bose* ,[55] the trespasser had grown paddy on the land in dispute. The complainant obtained a decree for ejectment against the trespasser and got into actual possession of the land. The accused, acting on behalf of the trespasser, cut and removed the paddy. It was held that as they had no right to enter upon the land and remove the paddy, they were guilty of theft. Where a person, appointed as guardian of a minor, allows the lessees of a field to prepare the land, sow and cultivate it and, when the crops are ripe, takes forcible possession and removes the crop, he would be guilty of theft.[56] Where the complainant was in possession of the disputed land and had grown crops on it, the cutting and forcible removing of the standing crops from the disputed land would amount to theft.[57] In *Durga Tewari v Emperor* ,[58] certain land, on which there was a standing crop of paddy, was entrusted to the accused to take care and watch till paddy was ready, when they were to give notice to the factory people, who would reap it. It was held3271 that by cutting the crops themselves and disposing of the same, the accused

made themselves liable for theft.

19. Removal of Movable Property Other than the Crop--Whether Theft

When there is a *bona fide* dispute regarding certain land, the cutting of trees from such land is not theft. In *Suraj Ali v Arfan Ali* ,[59] the accused claimed that the disputed land belonged to him and he was in possession of that land and, therefore, he had lawfully taken his own bamboos. It was held that the accused could not be convicted of theft unless the court is in a position to say that his claim is a mere pretence.[60] Where each party was asserting its right to take some sand from a particular spot of a river, it was observed that though one or the other of them was wrong, yet as both of them were claiming a *bona fide* right to take the sand, a conviction under s 379, IPC, could not be maintained.[61] If the ownership of a tank is in dispute, removal of fish from such tank is not theft.[62] However, the removal of fish from a tank, which belongs to another and is in his possession, is theft if they are caught without the consent of the owner and without any *bone fide* claim of right.[63] Similarly, entering land in another's possession and cutting down and removing trees therefrom is certainly a wrongful loss of the usufruct from the trees to that another, and in such a case, the pretence of *bona fide* right cannot be sustained.[64]

Where the accused demolished a small encroachment in the *bona fide* belief that the land belonged to him and took away the demolished materials, it was held that howsoever high-handed the action of the accused might have been, he could not be convicted of theft as criminal intent was doubtful.[65] Where some property of the deceased was in possession of his concubine and, on his death, his heir and servants removed the property from the possession of the concubine as belonging to the deceased, it was held that the accused could not be convicted of theft.[66] Where an accused, who had lost a buffalo, found some buffaloes with some persons, who claimed that they had found them straying, claimed one of them as his own, took it away and subsequently cut off the tips of her horns, it was held that the accused had a3272*bona fide* claim and was not guilty of theft.[67] In *Suvvari Sanyasi Apparao v Boddepalli Lakshminarayana* ,[68] a printing press was sold by a person, who was admittedly a printer for some years and the declared keeper of that press, to one person. A declaration was made by the purchaser under s 4 of the Press and Registration of Books Act (25 of 1867) and it was accepted. The two accused, one of whom was the owner, in law and in fact, of the press and the other a lessee, removed the printing press in the absence of the purchaser. Both of them were prosecuted for the offence of theft. Their plea was that they had removed the press in the *bona fide* exercise of their right. It was held that a declared keeper of the press is not necessarily the owner thereof so as to be able to confer title to the press upon another and, therefore, a *prima facie* case was established that the accused had taken possession of the press under a *bona fide* claim of right as a result of which they were not guilty of the offence of theft. In *Harnam Singh v Emperor* ,[69] the foreman in a printing press removed several bags of types from the press without the consent and permission of the employers. He pleaded that the things belonged to him and that he had removed them because the employers failed to carry out their part of the contract which was that they would either take him as a person in the business or purchase the disputed materials from him for their press. There was no finding as to whether the ownership of the things removed did or did not belong to the complainants. It was held that there was a *bona fide* assertion of right on the part of the accused with respect to the articles removed and the fact that the things were removed secretly and were dispatched by railway as locks, and not as types, was not sufficient to indicate dishonest intention. It is not theft if the accused removes some property from the possession of a vendee of his partner (who had not paid the balance of money due from him) under a mistaken notion of law that the property belonged to the accused.[70] In *Jagdish Chandra Dey v Nilkanta Chakraborty* ,[71] the case against the accused was that they had removed some jack fruits, *etc*, from the ail of the complainant. The complainant failed to prove that the disputed ail was in his possession and that the accused removed jack fruits, *etc*, with dishonest intention. In these circumstances, the accused could not be convicted of theft. In *EJ Judah v Emperor* ,[72] the accused gave a kettle for repairs to the complainant on the promise to finish it within six or seven days. The complainant did not complete the repairs within the stipulated time. The accused went to his shop and took forcible possession of the article. It was held that the accused was not guilty of theft as there was no dishonest intention. A person who had removed bulls from the cattle-pound and returned them to the true owner, was not held guilty of theft.[73] In *Paltu Goswami v Ram Kumar Das* ,[74] the land of the accused on which paddy was grown, surrounded a pond. There was a dispute between the accused

and the villagers regarding the use of the pond for wetting their jute on the ground that such use would damage the paddy land of the accused. The accused removed the jute of the complainant and kept it outside the pond asking the complainant to take the jute away. It was held that no question of theft at all arose in the case. Where the accused, in pursuance of the common object, broke into a temple and removed idols for celebrating a festival3273 without any dishonest intention, it was held that they were guilty under s 147, IPC, but not of theft.[75] Where a buffalo of the complainant, which had injured the buffalo of the accused, was taken away by the accused who thought that they could retain it until compensated, it was held that the accused was not guilty of theft.[76] In *Matabbar Sheikh v Emperor* ,[77] A, a ticket collector of a steam-boat company, when collecting tax-tickets, found *B*, a passenger, without a ticket and took, from him, his umbrella as security for paying, by him, his fare. It was held that *A* was not guilty of theft as the conduct of the accused might be overzealous, but it was not theft in the sense that he had no intention to appropriate the umbrella for his own use.

The complainant had first sold a bullock to the accused. The accused subsequently left the bullock with the complainant and took away another bullock in replacement of the one, sold to him, on the ground that the complainant had promised that another bullock would be given if the accused was not satisfied with the bullock sold. He made this belief known to the complainant at the time of purchase. It was held that though the claim might have been unfounded in law or fact, that, by itself, was not sufficient to infer that there was dishonest intention.[78]

The mere inability to prove a prescriptive right to fish within certain limits free from payment of rent is quite distinct from the want of right of any kind to fish therein rendering a person, so fishing, liable for the theft of fish taken by him.[79] In *Harendra Narayan Das v Ramjan Khan* ,[80] the accused removed some wood from a forest and his case was that he had a right to take the wood without a pass. It was held that the accused could not be convicted of theft as the magistrate had refused to decide whether he had such a right.

Where the charge is for theft of clods of earth worth 6 pies from the public channel bed belonging to the government, any dishonest intention need not be assumed unless it is shown that the accused knew that the public officer in charge of the bed, had notified that the removal of earth would injure the pecuniary or other interests of the government or unless, from the clandestine nature of the act, such knowledge can be inferred.[81] Some bark from trees in a government forest, which was not defined and notified and was not a bark subject to seigniorage, would not be theft in the absence of proof of dishonest intention.[82]

Cutting branches of a tree, causing obstruction to an overhead electricity supply line, without permission under s 18(3) of the Electricity Supply Act, under the orders of the superior officers in good faith would not amount to theft.[83]

20. Removal of Attached Movable Property--Whether Theft

Once a property is attached by a court of competent jurisdiction, the custody thereof shall be deemed to be with the court.[84] There is no doubt that property under3274 attachment under s 145, CrPC 1973, is in *custodia legis*.[85] Where the crops are grown by the accused and merely a decree for possession,[86] or an order under s 145, CrPC, is made,[87] a charge of theft would not be sustainable.

When property is attached under s 145, CrPC, and so its possession is with the court, the reaping and removal of crop therefrom by a party to the proceeding under s 145, CrPC, would amount to theft, but such act of a non-party to the proceeding or a non-party engaged by the respondents in the proceedings would not amount to theft when such non-party had no criminal intention of committing theft.[88]

Where the attachment of the movable property is not legally valid, removal thereof by the accused with the consent of the judgment-debtor is not theft.[89]

Where a process is signed only by the *amin* and it does not bear the seal of the court, the attachment is illegal and property does not pass from the possession of the judgment-debtor into that of the court and the removal of such property does not constitute any offence.[90]

The removal of property, which has been attached without a proper warrant of attachment, would not be theft.[91] If, however, the movable property, belonging to a judgment-debtor, is attached in execution of a decree and is placed in the custody of another person in a proper way, the judgment-debtor would be guilty of theft if he removes the property and appropriates it.[92] Where property is attached by a receiver, a person, removing the property with the knowledge of such attachment, from the receiver's possession the person would then be guilty of theft.[93]

However, when no material is brought on record by the prosecution to show that the accused persons had any knowledge relating to the order of attachment or auction sale of standing crop, they cannot be held liable for theft or criminal trespass.[94]

Where the claim of the accused in respect of some articles, attached in execution of a decree, was allowed, but the accused, instead of taking delivery through court, broke open the locks of the shop, where the articles were, and took forcible possession in the absence of the complainant, it was held that the accused only took his own property secured in his own shop, and it could not be said that he intended to cause wrongful loss to the complainant or wrongful gain to himself.[95] Where the3275 accused cut the crops, which were attached for arrears of revenue, to prevent them from being damaged and placed them on the threshing floor on the land for which arrears were due, its was held that it would not be theft if they had no intention to carry it off and defeat the attachment.[1]

21. Removal of Movable Property by a Vendor or Vendee--Whether Theft

If a vendor, after giving notice to his vendee, removes his article from the place of delivery on non-payment of the balance of price, he commits no theft, there being no dishonest intention.[2] If, however, a vendor takes away a thing from the possession of the vendee not because of a *bona fide* belief that he has a right to take it away, but with the intention of coercing him to pay the balance of the price even though he does not intend to deprive the vendee of the thing permanently, he must be deemed to have committed theft.[3] In *AV Srinivasalu v Govinda* ,[4] the accused, who purchased some land from one of the land-owners in a village, removed grass from the land. The contention of the vendor was that he had sold the land without the right to share the grass, and that the right was severable from the land. It was held that the accused did not commit theft and the court could not go into the question whether the claim was good or bad. The only question before the court, was whether the accused had acted *bona fide*, and not whether there was any right at all.

22. Removal of Movable Property by Spouse--Whether Theft

When the husband and wife even on the date of the incident were residing together in the house as husband and wife, and all the household goods belonging to either of the spouses were in their joint possession, if the wife has removed anything from her own house and from her own possession, it cannot be said that the removal was from somebody else's possession much less than it was done with any dishonest intention, particularly, when in the circumstances of the case it can safely be said that she removed her goods with a view to protect her interest and not to remain at the mercy of her husband, who was maltreating her.[5] However, this view of the Delhi High Court runs counter to its earlier decision wherein it was held that:

> Where an exclusive property of one of the spouses is unwarrantedly taken away or misappropriated by the other, and the marriage breaks down, it will not be correct to have a rigid approach, divorced from facts and circumstances of each case, to hold that the offence of misappropriation or theft cannot be made out. Similar must be held to be the position of the dowry items given for the exclusive use of one of the spouses. Even with regard to the articles of dowry which are given for common use and enjoyment, the purpose for which they are brought in for such use and enjoyment disappears when the commonality no longer remains with the breakdown of the matrimonial life. In such a case, the spouse bringing in the articles in the commonality should be entitled to render that into his or her possession severally. If in such eventuality the other spouse is not ready to see reason, and is bent upon unwarranted retention or usurpation, the law must take its course. The bonds of matrimonial home are already fallen

> asunder and when the human beings constituting the wedlock part companying for good, it is folly to treat3276 what belonged to each one of them exclusively as continuing to remain joint or common.[6]

Under normal situations, a wife may even entrust her ornaments with her husband for safe custody for a prudent or careful husband may, for reasons of safety, keep the ornaments with him or under his control, and such an arrangement could never lead to the inference that the husband was disentitled to retain the wife's ornaments, and that it is a guilty circumstance against him. Particularly, in criminal cases, such facts are not to be considered in a vacuum, but must be looked at strictly in relation to the special situation that prevails in that particular case. When the wife has very clearly stated in her evidence that these ornaments belong to her as they had been made by her father for her wedding, and that they were in her custody and on her person and that the accused under threat, took the ornaments away from her. If the custody of the ornaments has come to the accused under these circumstances, then his possession becomes clearly unlawful. The ornaments and personal property belonging to a wife necessarily constitutes her personal possessions and divesting a wife of these against her wishes or without her consent would clearly bring the case within the ambit of a criminal offence. It is a misnomer to argue that irrespective of such a situation, the possession of the wife's personal ornaments by her husband still continues to be lawful.[7]

23. Removal of Movable Property by a Tenant--Whether Theft

The offence of theft being one against possession, a tenant has a right to the possession of a tree standing on his holding and there can be no theft in cutting down the trees standing on it.[8] Where the accused were in possession of a shop for a about three years and some trees, growing upon the bank of a tank near it, formed the compound of the house, occupied by the accused, it was held that the cutting of the trees would not amount to theft as the trees were admitted to have been on the holding in possession of the accused.[9] Removal of the trees by the tenant would not amount to theft even though his landlord is jointly interested in them if the tenant is in actual possession of the trees.[10] Similarly, the removal, by a tenant, of the heaps of grain in his possession and control does not amount to theft, unless there was actual delivery to the landlord, of his share of the grain.[11] Where a landlord, who ejected the tenant from his holdings and received formal possession, failed to tender the price of the standing crops, raised by the tenant, and the tenant cut and removed them, it was held that he was not guilty of theft.[12] Where the mortgagee, who, under the terms of the mortgage-deed, was given possession over the trees without the right to cut or appropriate them, it was held that he could not be convicted of theft as the possession over the trees clearly lay with the mortgagee upon the terms of the deed.[13]3277

Some trees, blown down by a dust storm, were removed and appropriated by some tenants of the village. It was pleaded that the tenants had customary right to the trees uprooted by a storm, but they could not substantiate their plea. It was held that they were guilty of theft.[14] In *Abdul Ali v Net Ali* ,[15] under the terms of a *kabuliyat*, it was provided that if the tenant cut down any trees, he would pay compensation to the landlord. The tenant assigned his interest to the accused who cut down some valuable trees. It was held that the accused was guilty of theft.

24. Removal of Movable Property of a Debtor by his Creditor--Whether Theft

A creditor cannot dispossess the debtor of movable property without his consent in order to coerce him to satisfy the amount of debt. The creditor's remedy is to sue his debtor in a court of law. He cannot take the law into his own hands. There is no question of a *bona fide* exercise of right in such cases.[16] Thus, where the bullocks of a debtor were seized by the creditor in order to put pressure on the debtor to discharge his debt, it was held that the he was guilty of theft.[17] Where a *chaukidar* forcibly took away the cattle of the complainant and divided them among the creditors, it was held that he was guilty of theft.[18]

25. Removal of Articles in the Case of Hire-purchase Transactions--Whether Theft

Hire-purchase agreements are executory contracts under which the goods are let on hire and the hirer has an option to purchase in accordance with the terms of the agreement. These types of agreements were

originally entered into between the dealer and the customer, and the dealer used to extend credit to the customer. However, as a hire-purchase scheme gained in popularity and in size, the dealers who were not endowed with liberal amount of working capital found it difficult to extend the scheme to many customers. Then the financiers came into the picture. The finance company would buy the goods from the dealer and let them to the customer under a hire-purchase agreement. The dealer would deliver the goods to the customer who would then drop out of the transaction leaving the finance company to collect instalments directly from the customer. Under a hire-purchase agreement, the hirer is simply paying for the use of the goods and for the option to purchase them. The finance-charge representing the difference between the cash price and the hire-purchase price is not interest but represents a sum which the hirer has to pay for the privilege of being allowed to discharge the purchase price of goods by instalments.[19]3278 Under a hire-purchase agreement, the finance company is the owner of the vehicle till the entire payment was made and the option to the accused purchaser to purchase the vehicle was given after the entire payment, on some of the instalments remaining unpaid the reference to arbitration was made according to the agreement and the award was passed and filed in court, the receiver was appointed by the court for taking possession of vehicle with the help of police and the vehicle was kept with police in safe custody, no offence of cheating, criminal breach of trust or theft was made out against the accused.[20]

Though in India, Parliament has passed the Hire Purchase Act 1972, the same has not been notified in the Official Gazette by the Central Government so far. An initial notification was issued and the same was withdrawn later. The rules relating to hire-purchase agreement are delineated by the decisions of higher courts. There are a series of decisions of the Supreme Court explaining the nature of the hire-purchase agreement and mostly these decisions were rendered when the question arose whether there was a sale so as to attract payment of tax under the Sales Tax Act.[21]

In *Damodar Valley Corporation v State of Bihar* ,[22] the Supreme Court took the view that a mere contract of hiring, without more, is a species of the contract of bailment, which does not create a title in the bailee, but the law of hire-purchase has undergone considerable development during the last half a century or more, and has introduced a number of variations, thus, leading to categories and it becomes a question of some nicety as to which category a particular contract between the parties comes under. Ordinarily, a contract of hire-purchase confers no title on the hirer, but a mere option to purchase on fulfillment of certain conditions. However, a contract of hire-purchase may also provide for the agreement to purchase the thing hired by deferred payments subject to the condition that the title to the thing shall not pass until all the instalments have been paid. There may be other variations of a contract of hire-purchase depending upon the terms agreed upon between the parties. When rights in third party have been created by acts of parties or by operation of law, the question may arise as to what exactly were the rights and obligations of the parties to the original contract.

In *KL Johar and Co v Deputy Commercial Tax Officer* ,[23] the Supreme Court took the view that a hire-purchase agreement has two elements: (a) the element of bailment; and (b) the element of sale in the sense that it contemplates an eventual sale. The element of sale fructifies when the option is exercised by the intending purchaser after fulfilling the terms of the agreement. When all the terms of the agreement are satisfied and the option is exercised, a sale takes place of the goods which till then had been hired.

Similar views were expressed earlier for *Instalment Supply (Pvt) Ltd v Union of India* [24] and reiterated in *Sundaram Finance Ltd v State of Kerala.* [25]3279

The owner repossessing the vehicle delivered to the hirer under the hire-purchase agreement will not amount to theft as the vital element of dishonest intention is lacking. The element of dishonest intention which is an essential element to constitute the offence of theft cannot be attributed to a person exercising his right under an agreement entered into between the parties as he may not have an intention of causing wrongful gain or wrongful loss to the hirer.[26]

Where the hypothecation deed envisaged provision for re-possession of vehicle in the event of default payment of installment without the court's invention, seizure of the vehicle by the bank would not amount to offence of theft.[27]

The hire-purchase agreement in law is an executory contract of sale and confers no right in *rem* on hirer until the conditions for transfer of the property to him have been fulfilled. Therefore, the repossession of goods as per the term of the agreement may not amount to any criminal offence.[28]

In the undermentioned case, the Supreme Court elaborately discussed the earlier law on the subject and summarized the law thus: In an agreement of hire purchase, the purchaser remains merely a trustee/bailee on behalf of the financier/financial institution and ownership remains with the latter. Thus, in case the vehicle is seized by the financier, no criminal action can be taken against him as he is repossessing the goods owned by him.[29]

Removal of articles, in the case of hire-purchase transactions is not theft if there is no dishonest intention on the part of the accused. The law leaves the parties to their own agreement in respect of various incidents of hire-purchase agreements. If the parties specifically provide in their agreement for certain situations and prescribe a particular procedure, which they are to adopt, and specify the means, which they may use to resolve situations, they are bound by those provisions in their agreement.[30]

In case of seizure of vehicle by an employee of the finance company according to one of the clauses of the hire-purchase agreement, the dispute between the parties would be a *bona fide* civil dispute and proceedings initiated under s 379, IPC, would be an abuse of process of the court.[31]

The criminal court in exercise of powers under s 457, CrPC, cannot deliver the property to a 'deemed owner' under the Motor Vehicles Act 1988 as against a person who is exercising his right to get back the vehicle for which he paid the price at the instance of the owner on condition that owner shall repay part of the price.[32]3280

26. Repossession of Vehicle Under Hire Purchase Agreement--Complaint when Maintainable

The owner/financier after expiry of the period of agreement, especially after long lapse of time cannot exercise the right to take possession of the vehicle covered by hire-purchase agreement. The rights of the owner/financier under the agreement is extinguished in accordance with s 27 of the Limitation Act. In such a case, the complaint of theft is maintainable.[33]

27. Conversion of Joint Possession of Property into Exclusive Possession--Whether Theft

Conversion of joint possession of property into exclusive possession does not constitute the offence of theft. For theft, it is necessary that the property should be in the exclusive possession of the person other than the thief. If, therefore, a joint owner takes some moveable property from the joint possession (in which possession his own possession is included) with a view to make it his separate property, he commits no theft.[34] There are, however, some exceptions. If the shares in the movable property among co-owners are defined, one co-sharer who converts joint property into his separate property is guilty of theft.[35] Likewise, if a coparcener, with the aid of more than five persons, removes property from joint possession, he along with his accomplices, is guilty under s 395, IPC .[36]

Where the accused broke open a lock of a room and removed a box of ornaments belonging to his sister-in-law, claiming them to be joint family property in which he had a share, and it was found that the ornaments were the *stridhan* property of the sister-in-law and were not ancestral property, it was held that the asserted claim of right of the accused could not be said to be *bona fide* and he was guilty of theft.[37] In *Emperor v Sitaram Rai* ,[38] a Hindu, who had migrated to a foreign country, returned to his family after thirty years and brought some money with him. On returning to his family, he lived in commensality with it, but did not treat such property as the joint family property. It was held that his brother was not a joint owner of such property and he was, therefore, convicted of theft in respect of it.

28. Removal of Complainant's Articles for Recovery of Legal Dues--Whether Theft

Where the complainant did not pay rent for a temporary projection and the accused, who was a lessee for collection of rent due in respect of temporary stalls in the municipal market, removed the planks of the complainant's stall, it was held that he was not guilty of theft as he had no intention either to cause wrongful loss to the complainant or to obtain wrongful gain for himself though his intention might have3281 been to do something which could compel the complainant to pay him the lawful rent.[39]

29. Seizing Cattle and Taking it to the Cattle-pound for Impounding--Whether Theft

A person who seizes cattle on the ground that they were trespassing on his land and were causing damage to his crop or produce and gives out that he was taking them to the cattle-pound, commits no offence of theft, however mistaken he may be about his right to the land or the crop.[40]However, a person, not in possession of a field, has no right to take the cattle of another person to the cattle-pound; his act in taking them to the cattle-pound would amount to theft.[41] Taking away of the cattle, which has not trespassed and has not caused damage to the crop, to the cattle-pound, without the consent of the owner, would amount to theft even though the person, taking them, may not have any intention of any wrongful gain to himself because it would mean deprivation of cattle to the owner and consequently wrongful loss to him.[42] Therefore, a person, who illegally seizes cattle to impound them, commits theft even though he had no intention of causing wrongful gain to himself.[43]

30. Civil Disputes about Rights to Movable Property--Whether it can be the Subject of Theft

It is not pertinent to a criminal court to decide a complicated question of title.[44] In a case of clear plea of *bona fide* title, the court should leave the parties to have their rights determined by a civil court and throw out the criminal case.[45] Where, however, the court has clear evidence before it and the claim of the accused is not borne out by any acceptable material before it, the criminal court should not shirk its duty to decide the case on the material before it.[46] Where a complainant complained of the accused having cut the grass from his field, the title which was disputed by the accused, who had adjoining land, it was held that, it was a civil dispute and the criminal court was not competent to take action.[47]3282

When the dispute is civil in nature, the respective rights of the parties can be decided in a civil form, the finding in the criminal case would not be binding in any civil dispute regarding right, title and interest of the parties.[48]

It would be trespassing into the exclusive jurisdiction of a civil court for any charge of theft. All that the criminal court has to decide is whether the subject-matter of theft was moved out of the complainant's possession with dishonest intention.[49]

31. Removal of Movable Property by its Owner from the Legal Possession of Another is Theft

Theft, as defined in this section, is an offence relating to the possession of property. The mere act of ownership of property would not take it out of the purview of the section. The owner would, therefore, be guilty of theft if he takes the property out of the valid possession of another with dishonest intention.[50] Where a person removes cattle from the pound, where they are secured, without paying the legitimate fee, he has undoubtedly dishonest intention of saving himself from fees and it makes no difference whether the man, who so removes, is the owner himself or a stranger.[51] In *Kartikeswar Roy v Bansidhar Byas* ,[52] under an agreement, the accused was entitled to take advances upto 70 percent of the value of the goods hypothecated with the complainant firm. The accused somehow secured the key of the godown and removed the goods which was in the possession of the complainant firm. It was held that the accused was guilty of theft. In *Abdul Karim v Emperor* ,[53] the accused was charged excess fare after weighing of his luggage when he came by a train. The accused paid the excess fare. It was alleged that the accused

removed the entire luggage, including a box, which had traveled in the van, and took away the railway receipt for that box with him. On being asked to give the receipt, the accused left the station for bringing the receipt from his companion, but never returned. The accused denied having received the box at all. It was held that the box had been removed with the implied consent of the station master and there was no dishonest intention in removing the box after the demand had been satisfied.

Where a person is in possession of a vehicle by virtue of a lawful agreement either oral or written with the registered owner, he shall be deemed to be a person in rightful possession of the vehicle, and when vehicle is removed from his possession, the offence of theft is committed, even though the registered owner of the vehicle is another person.[54]

32. Servant Removing Articles Under the Order of his Master--Whether Guilty of Theft

If an employee, working under the order of his master, removes jackfruits from the trees in assertion of his employer's right to share in the proceeds, he commits no3283 criminal offence.[55] Where the servant of the Raj snatched away a bird, shot by the complainant, under the *bona fide* belief that all game, without the permission of the Raj, belonged to it, it was held that he committed no theft.[56] Likewise, the removal of some cut-timber by the servants of one *zamindar*, contending that the trees stood on the land of their employer, and not on the land of the complainant, would not be theft.[57] Similarly, where the accused, who was the servant of a company, seized the nets of a party of fishermen, who were encroaching on the company's fisheries, it was held that the accused, having acted *bona fide* in the interests of his employer in retaining the possession of the nets, pending orders, would not be guilty of theft.[58] Where, however, *gitti* was dishonestly removed from a quarry, owned by the ordinance factory, it was held that the accused was guilty of theft even though he was acting as a servant for some one else.[59] In order to dissociate himself from the animus of his master, the accused ought to state that he had no knowledge of the master's animus and that he entered the land without knowing that the crop was grown by the complainant, because the conviction cannot be set aside when the defence is based on mere denial.[60]

Where, however, the accused-servant went with his master to Akola from where they were coming to Mathura, and *enroute* Mathura the accused gave some food to his master and another person, but the accused-servant himself did not eat with them, after taking food, the said master and that person felt sick and regained conscious in Jhansi Hospital where the said master learnt that he was robbed of his money. The evidence against the accused was clear and clinching, so the conviction of the accused under ss 328 and 379, IPC, was upheld.[61]

33. 'Out of the Possession of any Person'

In order to bring home the charge of theft, the prosecution has to prove that the accused had the intention to take away the case property dishonestly from the victim out of his possession without his consent.[62]

The victim must be in rightful possession of the property.[63]

Where the averments in the complaint showed that neither the aircrafts nor their engines were ever in the possession of the Indian Oil Corporation of India, they were in possession of the NPC India Ltd., at all relevant time, held the question of NEPC committing the theft of something in its possession did not arise.[64] To hold a person guilty on the charge of theft, it is necessary to prove that the property was in possession of any person other than the accused.[65]3284

Theft is essentially an offence against possession[66] which comprehends legal control attended with lawful possession of the character attributable to movable property.[67] If a person has physical control over an article, sufficient for practical purposes, to exclude others and intends to exercise control to treat the thing as his own, then that person is in legal possession of that article and if another person takes it away from him dishonestly, it is theft. Thus, although the owner, who has not parted with his right of possession, is protected against the world at large, a thief in possession of property, stolen from the owner, is equally

protected as against the world at large except the owner. Both have legal possession, or possession in law, though the possession of the first is lawful, and that of the second unlawful. Similarly, the possession, which is violated, may be that of a person who has no right of ownership or no right of possession.[68] Stated conversely, a charge of theft would not be maintainable when neither party can claim to have been in possession of the property, for example, when both parties are restrained from going upon the agricultural land in question, the removal of crops by one party cannot be said to have been moved out of the possession of another.[69]

34. Possession

The term 'possession' has not been defined in the IPC . There is only a reference to the question of the possession of a person's property by his wife, clerk or servant being the property of such person if the possession is on account of that person as under s 27, IPC . The term has been explained by Stephen[70] as follows:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons and when the circumstances are such that he may be presumed to intend to do so in case of need.

35. Possession not lost when Owner or Possessor is Temporarily Away

The possession of a movable property is not lost if the owner or the person in possession is temporarily away from it. It would continue to be in his possession, and its removal would be theft.[71]If the materials of a house are taken away dishonestly, the act would be theft even though the house is left uncared for.[72] Cattle sent out to graze in pasture or jungle, are still in possession of the owner unless the contrary is shown and a taking of such cattle dishonestly is theft.[73] Where the complainant washed a carpet at the village tank and hung it up there to dry, it was held that the3285 dishonest removal of it by the accused was theft.[74] In leaving a cycle temporarily outside the market, the complainant cannot be said to have either abandoned or lost it because he did not intend to give up his possession or dominion over it when he left it. Its dishonest removal would be theft.[75] Where the accused, who was allowed to inspect a file, which was in possession of another person, extracted a paper from the file, it was held that the file remained in possession of that person even when the accused was inspecting it and the accused was guilty of theft.[76]

Possession of wood by a forest inspector, who is a government servant, is possession of the government itself.[77]

36. 'Without that Person's Consent'

The taking of property out of the possession of some person without his consent is one of the important ingredients of the offence of theft. Consent, which cannot be said to be a valid consent, is explained in s 90, IPC, where the trees, which a licensee cuts from a government forest, were not covered by his licence and he obtained consent for their removal on the understanding that they were covered by his licence, it was held that consent was given under a misconception of facts and, therefore, the offence committed by the licensee was one of theft.[78] In *Parshottam Mahadev v State* ,[79] a person, who had no right to take the goods, took delivery of the same from the luggage clerk, it was held that all the ingredients required for theft were established, as the delivery of the goods against the luggage ticket was made under a misconception of facts. Where, however, a debtor gave certain property to his creditor and it was subsequently found that the debt was a 'time-barred' debt, the charge of theft could not be sustained against the creditor in as much as there was a full and unqualified consent on the part of the debtor at the time of giving away his property.[80]

Theft, under the IPC, being essentially an offence against possession, any person, who is in possession of an article, may be the victim of theft. It is quite immaterial whether he is the owner of the chattel and whether his possession is rightful or wrongful, lawful or unlawful. The removal of any property without the consent of the person in possession would be theft. If the removal of the property is with the consent of the person in possession, there can be no theft.[81] If, however, the owner has given consent to the moving of the property in order to afford facility for the commission of the offence in view of detecting the thief in the act, the fact of which consent is not known to the taker, the latter is guilty of theft by reason of his criminal3286 intention, such a consent being immaterial.[82] In one case, *C*, knowing that *A* intended to steal his property, instructed *B*, his servant, to help *A* in doing so, in order to catch *A*, and *A* took the property. It was held that *A* did not commit theft because *C* had consented although *A* would be guilty of abetment of theft.[83] This view, it is submitted, is not correct. Under the terms of the section, the question is not as to whether *C* consented or not, but as to what *A* intended. An identical case is cited by Justinian in his illustration on theft.[84] In such a case, it cannot be said that the owner consented to the dishonest taking away of the property. He merely assisted the thief in carrying out his dishonest intention. *A* having had no knowledge of the owner's act, it would not be construed as consent.

37. Property Removed from a Dead Person

There must be proof of commission of the offence of theft by taking the property out of the possession of another person without that person's consent. A dead person cannot give consent. It follows that this offence would be wholly inapplicable if property is removed from a dead person. When it cannot be said from the evidence in the case that the property had been removed from the possession of the deceased while he was still alive, no offence under this section can be said to have been committed by the accused, though s 404, IPC, which provides for dishonest misappropriation of property possessed by a deceased person at the time of death may be attracted.[85]

38. 'Move that Property'

The only physical conduct involved in the offence of theft is movement of the property in question, in order to effect the intended taking or transfer or possession. By movement is meant 'such a removal of the thing that no part of it occupies the same particular position of pace as before', although the whole of it may not be moved from the whole of the space which it occupied. The section does not require that the thing stolen should be moved to any place or to any extent or indeed that it should have been permanently displaced. The bare removing of the thing taken from the place, where it was before, suffices to constitute offence of theft though it be not carried away.[86] Similarly, if a thief moves the goods even an inch from the place where they lay, the offence would be complete even though he may then leave them alone.[87] Where the string, by which the *hasli* was fastened to the neck of a woman was cut and the ends of the *hasli* forced slightly, and in order to remove the same from her neck and in the struggle that ensued between her and the thief, who was attempting to remove it from her neck, it fell from her neck and was found on the bed, it was held that the act of cutting the string and forcing the ends constituted sufficient moving to bring the act within the purview of s 378, IPC .[88]3287

Till the property is moved, no offence of theft can be committed even if the alleged offender had intended to take dishonestly the property out of the possession of any person without his consent. Where cattle is seized for taking them to the cattle-pound, the mere seizure of cattle found trespassing on land, does not amount to moving of the cattle. The act of moving the cattle would be subsequent to their seizing.[1]By virtue of expln 2 to the section, moving effected by the same act, which effects the severance, may be theft. The mere severance of trees amounts to theft.[2] Where trees are in the possession of the landlord under the terms of a *kabuliyat,* it is theft on the part of the tenant to sever them from the ground.[3] Severance of the soil from the earth,[4] or quarrying of stones,[5] or removing of crops from the earth,[6] would amount to theft.

A direct movement may be effected by actually moving the thing or by removing an obstacle as by slipping a collar and chain off a dog secured thereby, or opening the door of the horse-stable so that the horse therein comes out,[7] or by separating the thing from something to which it is attached as by cutting a rope

securing a boat. An indirect movement occurs where something's moved in consequence of a direct movement applied to something else. This is clear from illustrations (b) and (c) to this section.

39. 'In Order to such Taking'

To constitute a theft under this section, the moving of the property should be 'in order to such taking', meaning thereby that the accused must intentionally take away the movable property dishonestly from the possession of another possession.[8]

1 *Ajodhya Nath Parhi v Emperor* AIR 1920 Pat 582, p 583, 21 Cr LJ 280 ; *Pooran Mal v Sadho Ram* 1965 ALJ 214, 1965 AWR (HC) 674 ; *Dojakhia v Khamjathang Gangre* (1961) 1 Cr LJ 685 (Manipur) ; *Brajmohan Pradhan v State* (1985) 59 Cut LT 177*(*Ori).

2 *KN Mehra v State of Rajasthan* AIR 1957 SC 369, p 372, 1957 Cr LJ 552 ; *Ramratan v State of Bihar* AIR 1965 SC 926, p 930, (1965) 2 Cr LJ 18 ; *Advocate-General v Bhikhari Charan Mahani* AIR 1940 Pat 588, 41 Cr LJ 502 .

3 *Pyarelal Bhargava v State of Rajasthan,* AIR 1963 SC 1094, p 1097, (1963) 2 Cr LJ 178 .

4 *Refer* to Indian Penal Code 1860, ss 23 and 24 .

5 *Rajan Babu v Anitha Chandra Babu* 2011 (3) KLT 415 (Ker) ; 2011 (3) KLJ 519 .

6 *R v Smith* (2011) EWCA Crim 66 .

7 *P v Director of Public Prosecutions* (2012) EWHC 1657 (Admin) (*VideHalsbury's Law of England*).

8 *R v Gale* (2010) N.J. No. 5.

9 *R v Fowler* (2009) S.J. No. 605 (*Vide Halsbury's Law of Canada*).

10 *KN Mehra v State of Rajasthan,* 1957 Cr LJ 552, 566 (SC), AIR 1957 SC 369 .

11 *Empress v Churn Chungo* , (1895) ILR 22 Cal 1017 (FB).

12 *Empress v Nagappa* (1891) ILR 15 Bom 344 .

13 *KN Mehra v State of Rajasthan* AIR 1957 SC 369, 1957 Cr LJ 552 .

14 *Emperor v Moorga Chetty* (1880-1881) ILR 5 Bom 338, p 363.

15 *Gajadhar v State* 1971 Cr LJ 1361, 1971 All Cr R 315 ; *Shriram Damodar Muley v Thakurdas Sharma* 1977 Mah LJ 581, p 585 .

16 *Dhananjay alias Dhananjay Kumar Singh v State of Bihar and* 2007 Cr LJ 1440 (SC), 2007 AIR SCW 923, 2007 (1) Supreme 922, 2007 (2) Scale 418 .

17 *Tilak Raj Kohli v State* 1970 Cr LJ 1691 (Del) .

18 *Ahcon Engineering Company (P) Ltd v Sri Amitava Goswami* 1994 Cr LJ 351 (Cal) (DB) .

19 *Anil Bharadwaj v State* 1985 Cr LJ 613 (Del) . For further commentary, see the headings under s 403, *post*.

20 *M Ata Muhammad Khan v The Crown* AIR 1950 Lah 199 (FB) .

21 Re *Chockalingam Pillay* 13 Cr LJ 131; 11 M.L.T. 162.

22 *Pyare Lal Bhargava v State of Rajasthan* AIR 1963 SC 1094, p 1097, (1963) 2 Cr LJ 178 ; *KN Mehra v State of Rajasthan* AIR 1957 SC 369, 1957 Cr LJ 52 ; Re *Tiruvengada Chari* 1 Weir 407.

23 *Naushe Ali Khan v Emperor* (1912) ILR 34 All 89, 12 Cr LJ 580 .

24 *Mohar Singh v State of Rajasthan* 1980 Supp. SCC 655, p 659 .

25 1973 Cut LR (Cr) 373.

26 *KN Mehta v State of Rajasthan* AIR 1957 SC 369, 372, 1957 Cr LJ 552 ; *Sitaram v State of Mndhya Pradesh* 1981 Crlr (MP High Court Notes) 124, p 126.

27 Re *Puchalapalli Rama Chandrareddy*1960 Cr LJ 1414.

28 1 Weir 409.

29 *Harendra Narayan Das v Ramjan Khan* 15 Cr LJ 298, AIR 1914 Cal 476 .

30 Re *Kakarla Narasayya*AIR 1953 Mad 516, p 517, 54 Cr LJ 1035 ; *Bhurasing v Emperor* AIR 1935 Sind 115, 36 Cr LJ 1310 .

31 *Chandi Kumar Das v Abanidhar Roy* AIR 1965 SC 585, p 587 (1965) 1 Cr LJ 496.

32 *Satyanarayan v Bhanwarlal* 1978 Crlr (Raj) 608, p 611-12 ; *BR Rainikar v Uday Bhalchandra Warikar* 1981 Cr LJ 1613, p 1618 (Bom) (DB) .

33 *Charanjit Singh Chadha v Sudhir Mehra* 2001 Cr LJ 4255 (SC), AIR 2001 SC 3721, 2001 (6) Scale 29 .

34 *Parichat v Emperor* 9 Cr LJ 389, 5 NLR 17 .

35 *Ahmed v State* AIR 1967 Raj 190, 1967 Cr LJ 1053 ; *Sitaram v State of Madhya Pradesh* 1981 Crlr (MP High Court Notes) 124, p 127.

36 *Nabi Baksh v Emperor* (1898) ILR 25 Cal 416, 2 CWN 347 ; *Subrama Chanapati v Empress* (1881) ILR 3 Mad 261 .

37 1973 Cut LR (Cr) 174.

38 *Empress v Rambaran* , (1893) ILR 15 All 299 (FB); *Ganga Singh v State* 1955 NUC (Punj) 3440 ; *Sitaram v State of Madhya Pradesh* 1981 Cr LR (MP High Court Notes) 124, p 127.

39 *Empress v Venkatasami* (1891) ILR 14 Mad 229, 1 Weir 434 ; *Paryag Rai v Arju Mian* (1895) ILR 22 Cal 139 .

40 *Emperor v Nawtara Singh* 1 Cr LJ 558 .

41 Re *Mehar Dowalia* 16 WR (Cr) 63.

42 *Kunhayu v State of Kerala* 1965 Ker LT 66, p 67 .

43 *Abdul Ali Faquir v Netali Faqir* 19 Cr LJ 334 ; *Dunyapat v Emperor* AIR 1919 All 90 ((2)), 20 Cr LJ 710 .

44 Re *Balos alias Hussain Sahib* 1 Weir 419.

45 *Emperor v Shiv Ram* (1891) ILR 15 Bom 702 .

46 *Suri venkatapayya Sastri v Madula Venkanna* (1904) ILR 27 Mad 531 (FB), 1 Weir 417; **overruling***Empress v Kottayya* (1887) ILR 10 Mad 255 .

47 *Empress v Tomma Ghontaya* 4 Mad 228 1 Weir 412.

48 *Reg v Mansang Bhavsang* (1887) ILR 10 BHCR 74 .

49 *State (NCT of Delhi) v Sanjay* (2014) 9 SCC 772, (2014) 143 AIC 200, (2014) 3 KLT 1033) (Case law discussed).

50 *Avtar Singh v State of Punjab* AIR 1965 SC 660, (1965) 1 Cr LJ 605 ; **approving***Vishwanath v Emperor* AIR 1936 All 742 38 Cr LJ 53 ; and **overruling** (1) *State v Maganlal Chunilal* AIR 1956 Bom 354, 1956 Cr LJ 701 (2) ; *Tulsi Prasad v State* (1964) 1 Cr LJ 472 and (3) *Public Prosecutor v Abdul Wahab* AIR 1964 Mad 367 (FB), (1964) 2 Cr LJ 303; *Dhoolchand v State* 1957 Cr LJ 233 ; *H Krishna Murthy v Jagannath Singh* AIR 1965 Pat 76 .

51 *Rama Shanker Singh v State* 1968 Cr LJ 537, AIR 1968 Pat 131 ; *State (Delhi Admn) v Dharampal* 1980 Cr LR 1394, p 1396 (DB) .

52 *Omprakash v State,* 1972 WLN 449 ; *Jhalkan Singh v State of Madhya Pradesh* 1981 Cr LJ 1230 (MP) .

53 *TN Electricity Board v DK Kanniappa Mudaliar* 1985 Cr LJ 561 (Mad) .

54 *Ibid*.

55 *Arakhita Pathaik v State of Orissa* 1994 Cr LJ 2242 (Ori), (1994) 1 Orissa LR 562 .

56 *TN Electricity Board v DK Konniappa Mudaliar* 1985 Cr LJ 561 (Mad), 1984 Mad LW (Cri) 239 .

57 *Jogesh Chandra Das v State of Tripura* 2001 Cr LJ 4556 (Gau) .

58 *Hardwar Singh v State of Bihar* 1976 Cr LJ 942 (Pat) ; *State (Delhi Admn) v Dharampal* 1980 Cr LJ 1394 (Del) (DB), 21 (1982) DLT 50 .

59 *Jasvinder Singh v State* 2001 Cr LJ 3242 (Del) ; *Shiv Bhasun v State* Cri WP No 346 of 2000 (Del); *Harish Puri v State* Cri WP No 56 of 2000 (Del); *Jai Bhagwan v State* Cri WP No 69 of 2000.

60 *Harinder Knur v State of Haryana* (1996) 3 RCR 76 (P&H) .

61 *Mewar Marble Industries Pvt Ltd v Rajasthan State Electricity Board, Jaipur* 1993 Cr LJ 1191 (Raj) .

62 *Executive Engineer v Shri Seeta Ram Rice Mill* (2011) 12 Scale 243, 2012 (2) SCC 1008 .

63 *SC Jindal v UHVVNL thro Exceutive Engineer* 2011 AIR SCW 1937, 2011 (3) Scale 14 .

64 *State v Basavaraju* 2011 (101) AIC 514 (Kant) .

65 *Ibid*; Telegraph Wire (Unlawful Possession) Act 1950, s 2(b) .

66 *Gauri Ram v State of Uttar Pradesh* 1973 Cr LJ 6 (All) (DB) .

67 *Ibid*.

68 *KN Mehra v State of Rajasthan* AIR 1957 SC 369, 1957 Cr LJ 552 .

69 *Ibid*.

70 *R v White* (1853) Dears CC 203 ; *R v Firth* (1969) LR 1 CCR 172 .

71 *Ahmed v State* AIR 1967 Raj 190, 1967 Cr LJ 1053 .

72 *Changal Halapoto v Basarmal* 13 Cr LJ 22, 5 SLR 122 ; *Govindha Majhi v Arobinda Kar* AIR 1950 Ori 106, 51 Cr LJ 885 ; *Bhusun Parui v Denonath Banerjee* 20 WR (Cr) 15 ; *Horimoti Moddock v Deno Nath Malo* 19 WR (Cr) 47 ; *Khetter Nath Dutt v Indro Jalia* 16WR (Cr) 8.

73 *Maya Ram Surma v Nichala Katani* (1888) ILR 15 Cal 402 .

74 Re *Madhab Hari*(1888) ILR 15 Cal 390; *Bhagiram Dome v Abar Dome* (1888) ILR 15 Cal 388 ; *Emperor v Ohari Nayiat (*1876-1877) ILR 2 Cal 354.

75 *Kaloo Khan v Adya Nath Haldar* AIR 1931 Cal 358 ((1)), 32 Cr LJ 572(1) ; *Jokhan Singh v Emperor* AIR 1929 Oudh 14, 40 Cr LJ 22 ; *Empress v Ravu Pothadu* (1882) ILR 5 Mad 390, 1 Weir 385 .

76 *Elahi Bux v Emperor* AIR 1936 Pat 152, 37 Cr LJ 452 .

77 1974 Cut LR (Ori) 343, following *Chandi Kumar Das v Abanidhar Roy* AIR 1965 SC 585 .

78 *Bhupendra Das v Indra Bhusan Sen* 1988 Cr LJ (NOC) 82 (Cal) (DB).

79 *Chandi Kumar Das v Abanidhar Roy* AIR 1965 SC 585, (1965) 1 Cr LJ 496 ; *State of Rajasthan v Pooran Singh* 1977 Cr LJ 1055, p 1058, 197 Raj Cr Cas 70 (fish, in any water, being corporeal property, become the subject of theft as soon as they are separated from waters, dead or alive, and are removed).

80 *Empress v Sheikh Adam (*1886) ILR 10 Bom 193; *Manchu Paidugadu v Kadimsetti Tammayya* AIR 1914 Mad 453, 15 Cr LJ 77 .

81 *Krishna Reddy v Muniappa Reddi* AIR 1943 Mad 34, 44 Cr LJ 173 ; Re *Nokolo Behara*AIR 1928 Mad 20 ((2)), 28 Cr LJ 1002 ; Re *Subbian Servai*(1913) 36 Mad 472, 22 MLJ 184.

82 *Sreenibash Mahata v Emperor* 29 Cr LJ 501 .

83 *R v Luke* in Rosceo on Criminal Evidence, fourteenth edn, p 382.

84 *R v Brooks* (1829) 4 C&P 131 .

85 *Hamps v Darby* (1948) 2 All ER 474 .

86 *R v Cheafor* (1851) 2 Den 361 ; *R v Howell* (1820) 2 Den 363 .

87 *R v Head* (1858) 1 F 350 ; *R v Cory* (1864) 10 Cox 23 .

88 *Empress v Nanhe Khan* 1897 AWN 41 .

89 *Emperor v Aw Su* 8 Cr LJ 473 .

90 *Raghunandan v Emperor* 13 Cr LJ 556 .

91 *Mahadar Mohanta v Balaram Gagoi* (1908) ILR 35 Cal 413 .

92 *Emperor v Artu Rautra* AIR 1924 Pat 564, 25 Cr LJ 594 .

93 *Emperor v Ramadhin* (1903) ILR 25 All 129, 22 AWN 191 .

94 *Emperor v Sheikh Ariff* 12 CWN 534, 7 Cr LJ 367 .

1 Re *Chokalingam Pillay* 13 Cr LJ 131.

2 *Mahadeo Prasad v Crown* AIR 1924 All 131, 24 Cr LJ 911 .

3 *Rajan Babu v Anitha Chandra Babu* 2011 (3) KLT 415 (Ker) .

4 *Mali v Emperor* AIR 1925 Sind 21, 26 Cr LJ 189 .

5 *Emperor v Maula Baksh* (1905) ILR 27 All 28, 1 Cr LJ 603 .

6 Re *Ethirajan*1955 Cr LJ 816, AIR 1955 Mad 264 ; *Public Prosecutor v Tsandra Ramaswamy* 18 Cr LJ 632 (clods of earth worth six pies removed).

7 *Rajan Babu v Anitha Chandra Babu* 2011 (3) KLT 415 (Ker) .

8 *S K Jani v State* (1971) ILR 1 Del 243 .

9 *Meharban v Buddhi* 1971 Cr LJ 1363 .

10 *Binayak Swain v State* ILR 1965 Cut 234, 31 Cut LT 679 ; *Bishal v Dawwa* 1965 MPLJ (notes) 123 .

11 *Runnoo Singh v Kali Churn* 16 WR (Cr) 18 ; *Dhirendra Mohan v Emperor* 14 CWN 408, 11 Cr LJ 248 ; *Hari Bhuimali v Emperor* 9 CWN 974, 2 Cr LJ 8361 ; *Sadasiv Singh v Emperor* AIR 1917 Pat 40, 18 Cr LJ 507 ; *Bodh Kishen v Emperor* AIR 1924 Pat 125, 24 Cr LJ 454 ; *Ismail v Emperor* AIR 1926 Lah 683 ; *Ziba v Emperor* AIR 1927 Nag 404, 28 Cr LJ 949 ; *Jamiraddin v Dabendra Chandra Saha* (1964) 1 Cr LJ 616 .

12 *Suraj Ali v Arfan Ali* AIR 1917 Cal 648, 17 Cr LJ 456 ; *Sitaram Bhola Ram v State* AIR 1953 MB 79 ; *Gudar v Emperor* AIR 1933 Oudh 50, 34 Cr LJ 547 ; *Bhura singh v Emperor* AIR 1935 Sind 115, 36 Cr LJ 1310 ; *Kali Charan v Kartik Chandra* 29 Cut LT 425 .

13 *Hari Bhuimali v Emperor* 2 Cr LJ 836, 9 CWN 974 ; *Pandita v Rahi Mulla Akundo* (1900) ILR 27 Cal 501 ; *Abdul v Emperor* AIR 1929 Pat 86, 30 Cr LJ 511 ; *Rainu v Crown* AIR 1950 Nag 92, 51 Cr LJ 310 .

14 *Ram Saran v Emperor* 4 Cr LJ 293, p 304, 305 .

15 *Runnoo Singh v Kali Churn* 16 WR (Cr) 18 .

16 *Ram Ekbal Rai v Jaldhari Pandey* AIR 1972 SC 949, p 952, 1972 Cr LJ 584 .

17 *Antonie Douroado v Nilkant Sinai Kontok* (1988) 3 Crimes 695 (Bom) .

18 *Telaram Patel v Siba Shankar Kalu* (1969) 35 Cut LT 889, (1970) ILR Cut 220 ; *Chandi Kumar Das v Abanidar Roy* AIR 1965 SC 585, p 587, (1965) 1 Cr LJ 496 ; *Suvvari Sanyasi Apparao v Baddepali Lakshminarayana* AIR 1962 SC 586, (1962) 1 Cr LJ 518 ; *Advocate-General v Bhikhari Charn Mahanti* AIR 1940 Pat 588, p 591, 41 Cr LJ 509 ; *Rani Bewa v Pravakar Swain* 1974 Cut LT 276, 1974 Cut WR 271 ; *Joseph Thomas v State* 1972 Ker LT 175, 1972 MLJ (Cr) 248 .

19 *Ibid*.

20 *Suvvari Sanyasi Apparao v Eoddepalli Lakshminarayana* AIR 1962 SC 586, (1962) 1 Cr LJ 518 reversing *Bodderpalli Lakshminarayana v Suvvari Sanyasi Apparao* AIR 1959 AP 530 ; *Chandi Kumar Dad v Abanidhar Roy* AIR 1965 SC 585 ; *Mohd Siray Ali v State* 1985 Cr LJ 91 .

21 *State of Uttar Pradesh v Tota Ram* 1969 All Cr R 346 (All), 1969 All WR 531 (HC) .

22 *PK Mohammed Yusuf Rowther v Abdul Razack* AIR 1965 Mad 483, (1965) 2 Cr LJ 652 ; *Chandi Kumar Das v Abanidhar Roy* AIR 1965 SC 585, p 587, (1965) 1 Cr LJ 496 ; Re *Puchalapalli*AIR 1960 AP 569, p 571 ; *Antonie Douroado v Nilkant Sinai Kontok and Anor* (1988) 3 Crimes 695 (Bom) .

23 *Madhabananda Majhi v Mahendra Nath Puttal* (1973) 39 Cut LT 1334 .

24 *Suraj Ali v Arfan Ali* AIR 1917 Cal 648, 17 Cr LJ 456 ; *Sitaram Bhola Ram v State* AIR 1953 MB 79 ; *Gudar v Emperor* AIR 1933 Oudh 50, 34 Cr LJ 547 ; *Bhurasing v Emperor* AIR 1935 Sind 115, 36 Cr LJ 1310 .

25 *Brajabehari Mohapatra v Chakradhar Misra,* 1974 Cut LR (Cr) 343 .

26 *Bhurasing v Emperor* AIR 1934 Sind 115, p 120, 36 Cr LJ 1310 .

27 *Muhindur Rehman v State of Assam* (1987) 3 Crimes 729 (Gau) .

28 *Nassib Chowdhry v Nannoo Chowdhry* 15 WR (Cr) 47 ; Re *Thangavelu Odayar*AIR 1958 Mad 476, 1958 Cr LJ 1198 ; *Chandi Kumar Das v Abanidhar Roy* AIR 1965 SC 585, (1965) 1 Cr LJ 496 .

29 Re *Kakarla Narasayya*AIR 1953 Mad 516, p 518 ; *Hurish Chandra Das v Bolai* 16 WR (Cr) 75 .

30 *Situ Bewa v Bimbadhar Rout* 31 Cut LJ 749 ; *Suraj Ali v Arfan Ali* AIR 1917 Cal 648 ; *Abdul v Emperor* AIR 1929 Pat 86 ; *Kali Charan v Kartic Chandra* 29 Cut LT 425 ; Re *Puchalapalli Ramachandrareddy*AIR 1960 AP 569 ; *Niranjan Prakash v Manila Lal Dwivedi* AIR 1964 All 433 ; *Ismail v Emperor* AIR 1926 Lah 683 ; *Ziba v Emperor* AIR 1927 Nag 404 ; *Sitaram Bhola Ram v State* AIR 1953 MB 79 ; *Satish Chandra Ghosh v Rodha Ballav Dalal* AIR 1962 Tripura 25 .

31 Re *Ramnuja Naidu*(1968) 2 MLJ 279, p 280.

32 *Kailash Singh v Emperor* AIR 1941 Pat 613, 43 Cr LJ 294 ; *Nanda Bauri v State of Assam* 1971 Assam LR 291, p 292 ; *Sita Bewa v Bimbadhar Raut* 1955 Cut LT 749, p 756 ; *Binayak Swami v State of Orissa* 31 Cut LT 679, p 681 ; *Abdul v Emperor* AIR 1929 Pat 86 .

33 *Abdul v Emperor* AIR 1929 Pat 86, 30 Cr LJ 511 ; *Sheikh Ahmed v State* AIR 1956 Mysore 49 ; *Site Bewa v Bimbadhar Raut* 31 Cut LT 749, p 756 ; *Binayak Swain v State of Orissa* 31 Cut LT 679, p 681 ; *Abdul v Emperor* AIR 1929 Pat 80 .

34 *Fakira Uraon v Gandura* 1981 BLJR 541 .

35 *Hari Panda v State* AIR 1956 Ori 212, 1956 Cr LJ 1421 .

36 *Baishnab Sa v Laxmana Kumar Das* (1974) 1 Cut WR 147, 1974 Cut LT 769 .

37 *Dropadi Devi v Padmanahha Mishra and Ors* 1997 Cr LJ 2807 (Ori) .

38 *Makr Lohar v Ganga Sahu* AIR 1947 Pat 74, 27 Pat LT 173 ; *Dhananio Sen Mahesh Chandra Sen v Chandra Bashi Sen* (1961) 2 Cr LJ 435 ; *Nassib Chowdhry v Nannoo* 15 WR (Cr) 47 .

39 *Bodh Kishen v Emperor* AIR 1924 Pat 125, 24 Cr LJ 454 .

40 Re *Kota Appadu*AIR 1917 Mad 898, 17 Cr LJ 81 .

41 *Sarju v Emperor* AIR 1916 All 314 .

42 *Jhumak Rai v Emperor* AIR 1941 Pat 369, 42 Cr LJ 339 ; Re *Kota Appadu*AIR 1917 Mad 898, 17 Cr LJ 81 ; *Meharban v Buddhi* 1971 Cr LJ 1363 (All) (removal of crop under as asserted *bonafide* right does not make out an offence of theft); 1973 Cut LR (Cr) 287 (it makes no difference that asserted right proceeds from illegal entry in revenue record of possession of over ten years in the name of the accused); *Sit Pein v Emperor* AIR 1924 Rang 72, 25 Cr LJ 809 .

43 *Koran Singh v State of Rajasthan* 1978 Cr LR 677, p 680 (Raj) .

44 *Malhu Yadav v State of Bihar* 2002 Cr LJ 2819 (SC) .

45 *Harihar Narain Singh v Bankey Singh* AIR 1914 Pat 274, 46 Cr LJ 83 .

46 *Binayak Swain v State of Orissa* 31 Cut LT 679, ILR 1965 Cut 234 .

47 *Lal Chand v Sarup Singh* 1974 Chandigarh LR 359 (DB) .

48 *Benu Behera v Khetra Mohan Saha* (1974) 40 Cut LT 1059 .

49 *Uma Charon Chand v Charan Das* 1969 Cr LJ 1086 ; *Binayak Swain v Ramesh Chandra* ILR 1965 Cut 188, 31 Cut LT 601 ; *Kailash Singh v Emperor* AIR 1941 Pat 613, 43 Cr LJ 294 ; *Mohammad Ata v Emperor* 23 Cr LJ 402 .

50 *Abdul v Emperor* AIR 1929 Pat 86, 30 Cr LJ 511 ; Re *Ramanuja Naidu*(1968) 2 MLJ 279.

51 *Binayak Swain v State of Orissa* ILR 1965 Cut 234, 31 Cut LT 679 .

52 *Dukha Majhi v Balmati Majhiani* 1975 Cut LT 135 .

53 *Ibid*.

54 *Baishnab Sa v Laxman Kumar Das* (1974) 1 Cut WR 147, 1974 Cut LT 769 ; *Chakradhar Rout v State (*1975) 41 Cut LT 52, 54.

55 *Abinash Chandra Sarkar v Atul Krishna Bose,* AIR 1919 Cal 588, 20 Cr LJ 38 .

56 *Tukaram v Emperor* AIR 1924 Nag 311, 25 Cr LJ 349 .

57 *Kalandi Behera v State* AIR 1965 Ori 166, (1965) 2 Cr LJ 383 ; *Madhabananda Majhi v Mahendra Nath Puttal* 1973 Cut LT 1334 ; *Bidyadhar Naik v Shyamasundar Panda* (1971) 1 Cut WR 205 .

58 *Durga Tewari v Emperor,* (1909) ILR 36 Cal 756, 10 Cr LJ 253 .

59 *Suraj Ali v Arfan Ali,* AIR 1917 Cal 648, 17 Cr LJ 456 .

60 *Algarasawmi v Emperor* (1905) ILR 28 Mad 304, 2 Cr LJ 754 ; *Advocate-General v Bhikhari Charan Mahanti* AIR 1940 Pat 588, 41 Cr LJ 509 ; but **see***Rangasawmy v Emperor* AIR 1928 Rang 113, 29 Cr LJ 603 (if the claim to a property is disputed, the accused should take recourse to courts and should not take the law in his own hands to enforce it by removing the property from the possession of his opponent as his act being with dishonest intention, would amount to theft); *Ghulam Muhammad v Emperor* AIR 1933 Lah 481 ((1)), 34 Cr LJ 343(1) ; *Rishi Haldar v Manoranjan Pramanik* AIR 1943 Cal 73, 43 Cr LJ 886 (accused, the leader of the local dealers of fish, in order to maintain monopoly in the matter of purchase from the fishermen, snatched away the fish from the complainant's hand, he was held guilty of theft); *Empress v Gangaram Santram* (1885) ILR 9 Bom 135 (wife of the accused in his absence sold some working implements to the complainant to satisfy his debt which was due to him from the accused and the accused, on his return took back the implements against the wishes of the complainant; he was held guilty of theft).

61 *Kalipada Dos v State* AIR 1951 Cal 207, 51 Cr LJ 1575 .

62 *Satish Chandra Ghosh v Radha Ballav Dalal* AIR 1962 Tripura 25, (1962) 1 Cr LJ 766 ; *Dhirendra Mohan Gossain v Emperor* 14 CWN 408, 11 Cr LJ 248 ; *Hari Bhuimali v Emperor* 9 CWN 974, 2 Cr LJ 836 .

63 *Chandi Kumar Das v Abanidhar Roy* AIR 1965 SC 585, (1965) 1 Cr LJ 496 .

64 *Sudan Dey v Baidya Nath Chakravarty* 1966 Cr App R 392 (SC) ; *Jagmohan Singh v Emperor* AIR 1932 Pat 344, 34 Cr LJ 355 ; *Gudar v Emperor* AIR 1933 Oudh 50, 34 Cr LJ 547 .

65 *Sada Panigrahi v Raghunath Das* AIR 1950 Ori 196, 51 Cr LJ 1333 .

66 *Nataraja Mudahar v Devanai Ammal* AIR 1941 Mad 674, 42 Cr LJ 896 ; *Emperor v Ram Ditta* 11 Cr LJ 364 .

67 *Lakanaw v Emperor* 18 Cr LJ 355 .

68 *Suvvari Sanyasi Apparao v Boddepalli Lakshminarayana,* AIR 1962 SC 586, (1962) 1 Cr LJ 518 **overruling***Boddepalli Lakshminarayana v Suvvari Sanyasi Appa Rao* AIR 1959 AP 530 .

69 *Harnam Singh v Emperor,* AIR 1924 Lah 453, 25 Cr LJ 697 .

70 *Hamid All Bepari v Emperor* AIR 1926 Cal 149, 27 Cr LJ 80 **approved** in *Chandi Kumar Das v Abanidhar Roy* AIR 1965 SC 585 ; *Harikisan Balabaksh v State* AIR 1951 Nag 162, 52 Cr LJ 71 .

71 *Jagdish Chandra Dey v Nilkanta Chakraborty,* AIR 1965 Tripura 42, (1965) 2 Cr LJ 810 .

72 *EJ Judah v Emperor,* AIR 1926 Cal 464, 26 Cr LJ 1505 .

73 Re *Pacha Sahib* 1 Weir 716; Re *Veerasami Naicken*AIR 1931 Mad 18, 32 Cr LJ 354 .

74 *Paltu Goswami v Ram Kumar Das,* AIR 1960 Tripura 40, 1960 Cr LJ 1662 .

75 Re *Perumal Konan*AIR 1941 Mad 71 ((2)), 42 Cr LJ 263 (2).

76 *Jay Mahto v Emperor* AIR 1941 Pat 383, 42 Cr LJ 293 ; *Empress v Nagappa* (1891) ILR 15 Bom 14 ; *Budhan Singh v State* AIR 1960 Pat 518, 1960 Cr LJ 1485 for the **contrary** view.

77 *Matabbar Sheikh v Emperor,* 14 CWN 936, 11 Cr LJ 444 .

78 *Sitaram Bhola Ram v State* AIR 1953 MB 79, 54 Cr LJ 600 .

79 *Khetter Nath Dutt v Indro Jalia* 16 WR (Cr) 78 .

80 *Harendra Narayan Das v Ramjan Khan,* AIR 1914 Cal 476, 15 Cr LJ 298 .

81 *Public Prosecutor v Tsandra Ramaswamy* 18 Cr LJ 632 .

82 Re *Madan* 1 Weir 411 (2).

83 *Amirchand v State* AIR 1963 Pat 207, (1963) 1 Cr LJ 792 .

84 *Bhaghirathi Srichandan v Damodar* 1987 Cr LJ 631 (Ori), (1986) 1 Orissa LR 377 .

85 *Deo Kuer v Sheo Parsad Singh* AIR 1966 SC 359 .

86 Re *Kota Appadu*AIR 1917 Mad 898, 17 Cr LJ 81 .

87 *Sarju v Emperor* AIR 1916 All 314 .

88 *Bhaghirathi Srichandan v Damodar* 1987 Cr LJ 631 (Ori), (1986) 1 Orissa LR 377 .

89 *Ram Sakal Singh v Emperor* 32 Cr LJ 437, AIR 1931 All 142 (copy of warrant of attachment not affixed either on the land or on the house of the judgment-debtor though attachment was made by beat of drum).

90 *Beni v Emperor* AIR 1935 All 214, 36 Cr LJ 340 .

91 *Molai v Emperor* AIR 1920 All 306, 22 Cr LJ 107, Re *P Subbaiyya* 1 Weir 421; *Yagamurthi Thevan* 1 Weir 4221; *Gobaria v State* ILR 1965 Raj 166, 1964 Raj LW 617 .

92 *Chunnoo v Emperor* 8 ALJ 656, 12 Cr LJ 374 ; *State v Rama* AIR 1956 Raj 190, 1956 Cr LJ 1430 (2) ; *Dalganjan Koeri v State* AIR 1956 All 630, 1956 Cr LJ 1176 ; *Lambordar Dowrah v Priyanath Dowrah* AIR 1952 Assam 109, 1952 Cr LJ 994 ; *Lal Behari v Emperor* AIR 1925 Oudh 464, 26 Cr LJ 905(1) ; *Rahim Dino v Emperor* AIR 1928 Sind 68, 28 Cr LJ 989 ; *Emperor v Lallu Waghji* AIR 1919 Bom 39, 20 Cr LJ 391 ; *Kunhayu v State* 1965 Ker LT 66, 1965 MLJ (Cr) 119 .

93 *Kamalapat v Emperor* AIR 1926 All 382, 27 Cr LJ 860 .

94 *Narayan Chanitra Naik v Surjya Gomango* 1996 Cr LJ 1580 (Ori) .

95 Re *Lakshim Narayana Chettiar*AIR 1922 Mad 405 ((2)), 24 Cr LJ 414 ; *Emperor v Ram Dayal* AIR 1915 All 418, 16 Cr LJ 812 ; *Sheku Sahib v Venkataramanayya* AIR 1941 Mad 799, 1941 MWN 671 ; Re *Muni Swami Reddi*1934 MWN 889.

1 Re *Periyannan* 1 Weir 423.

2 *Sitabai Purshotlam v Emperor* AIR 1930 Bom 488 .

3 *Harikisan Balabaksh v State* AIR 1951 Nag 162, 52 Cr LJ 71 .

4 *AV Srinivasalu v Govinda,* AIR 1923 Mad 239, 24 Cr LJ 254 .

5 *Neelam v State* (1988) 34 DLT 152 (Del), (1988) 1 Crimes 545 .

6 *Anil Bharadwaj v State* 1985 Cr LJ 613 (Del) .

7 *State of Karnataka v Basavegowda alias Chandra* 1997 Cr LJ 4386 (Kant) (DB) .

8 *Ram Brich Lal v Emperor* AIR 1935 Pat 472, 37 Cr LJ 91(1) ; *Thoppulan v Sankaranarayana Iyer* AIR 1914 Mad 61 ((1)), 15 Cr LJ 440 .

9 *Shaikh Garib Haji v Muchiram Sahu* AIR 1925 Cal 1020, 27 Cr LJ 133 .

10 *Thoppulan v Sankaranarayana Iyer* 15 Cr LJ 440 ; *Phul Singh v Emperor* 10 ALJ 527, 14 Cr LJ 3 .

11 Re *Annamalai Odayar*AIR 1914 Mad 286 ((1)), 15 Cr LJ 186 ; *Manzur Hassan v Crown* AIR 1950 Lah 42, 51 Cr LJ 454 .

12 *Jodha Singh v Emperor* 11 ALJ 270, 13 Cr LJ 298 ; *Sobha Mahton v Emperor* AIR 1927 Pat 130, 28 Cr LJ 72 ; *Raghabacharan Panda v T Dindayal Patra* 2003 Cr LJ 1397 (Ori) .

13 *Tarachand Shah v Emperor* AIR 1940 Pat 701, 41 Cr LJ 795 ; *Bhagwat Saran Misir v Emperor* AIR 1916 All 196, 17 Cr LJ 295 .

14 *Dunyapat v Emperor* AIR 1919 All 90 ((2)), 20 Cr LJ 710 .

15 *Abdul Ali v Net Ali,* 27 Cal LJ 228, 19 Cr LJ 334 .

16 *Nana Seth v State* 1963 ILR Bom 524, 1963 Mah LJ 674 ; *Mahendra Patra v State of Orissa* 1977 Cut LR (Cr) 138-39; *Empress v Sri Churn Chungo* (1895) ILR 22 Cal 1017 (FB) **overruling***Prosonno Kumar v Udoy Sant* (1895) ILR 22 Cal 669 ; *Harikisan Balabaksh v State* 52 Cr LJ 71, AIR 1951 Nag 162, however, for a contrary view refer to *PK Mohammed Yusuf Rowther v Abdul Razack* AIR 1965 Mad 483, (1965) 2 Cr LJ 652 (2) .

17 1 Weir 405; *Empress v Preonath* 5 WR (Cr) 68 ; *Empress v Agha Mohd Yusuf* (1896) ILR 18 All 88 ; *Emperor v Ganpat Krishnaji Pant* AIR 1930 Bom 167 ((1)) ; *Bakhtawar v Emperor* AIR 1925 Lah 131(2), 25 Cr LJ 650 ; *State of Rajasthan v Keshrichand* AIR 1959 Raj 148, 1959 Cr LJ 908 (1) (camel) ; *Budhan Singh v State* AIR 1960 Pat 518, 1960 Cr LJ 1485 (cow) ; *Bhagya v Crown* 1938 NLJ 302 (leather bag).

18 *Empress v Madaree* 3 WR (Cr) 2 .

19 *Charanjit Singh Chadha and Ors v Sudhir Mehra* 2001 Cr LJ 4255 (SC) .

20 *Shiv Kumar Jalan v State of Bihar* 2005 Cr LJ 540 (Pat) .

21 *Charanjit Singh Chadha v Sudhir Mehra* 2001 Cr LJ 4255 (SC) .

22 *Damodar Valley Corporation v State of Bihar,* AIR 1961 SC 440 .

23 *KL Johar and Co v Deputy Commercial Tax Officer,* AIR 1965 SC 1082 .

24 *Instalment Supply (Pvt) Ltd v Union of India* AIR 1966 SC 1178 .

25 *Ibid.*

26 *Charanjit Singh Chadha v Sudhir Mehra* 2001 Cr LJ 4255 (SC) ; *KA Mathai v Kora Bibbikutty* (1996) 7 SCC 212 ; *Uma Shankar Gopalka v State of Jharkhand* 2004 Cr LJ 2954 (Jhar) .

27 *ING Vysa Bank Ltd v Sub-Inspector of Police* 2011 (2) KLT 621 : 2011 (3) KLJ 240 (Ker) .

28 *Ibid*; *Sekar v Arumugham* 2000 Cr LJ 1552 (Mad) ; *PVSSR Anjaneyulu v State of Andhra Pradesh* 2007 Cr LJ (NOC) 118 (AP) .

29 *Anup Sharmah v Bholanath Sharma* (2013) 1 SCC 400 (402) : 2012 (120) AIC 223 (SC) : JT 2012 (11) SC 79 ; *Sree Krishna Sharma v State of Kerala* 2013 (1) KLT 666 : 2013 (1) KLJ 693 (Ker) ; *Girish v State of Kerala* 2013 (3) KLT SN 95 (Ker) .

30 *Puran Mul v Sadhoram* 1965 ALJ 214 ; *Niranjan Prakash v Mannilal Dwivedi* AIR 1964 All 433, (1964) 2 Cr LJ 369 ; *Mohammad Abdul Khoyer v Asghar Khan* 35 Cr LJ 761 (Cal) ; however for a **contrary view** refer to *HJ Ransom v Triloki Nath* AIR 1942 Oudh 318, 43 Cr LJ 578 ; *Nawab Raza v Emperor* AIR 1934 Oudh 108, 35 Cr LJ 740 .

31 *Rajiv Gupta v State of Haryana* (1996) 3 RCR 608 (P&H) ; *Joginder Kumar v State* 1991 Cr LJ 2897 (Del), (1991) 44 DLT 518 .

32 *Sundaram Finance Ltd v Mohd Abdul Wakeel and Anor* 2001 Cr LJ 2441 (MP) . For further commentary, see under the headings under s 405, *post*.

33 *Utham Kumar Jain v State of Andhra Pradesh* 2005 Cr LJ 3601 (AP) .

34 *Badri v State* 1970 AWN (HC) 178, 1970 All Cr R 118 ; Re *Kakarla Narasayya*AIR 1953 Mad 516, 54 Cr LJ 1035 ; *Kolluri Rathiah v Ravipati Seetharamayya* (1961) 2 Cr LJ 453 (AP) distinguishing *Empress v Ponnurangam* (1887) ILR 10 Mad 186, however, for a **contrary view**, *refer* to *Vallabhram Ganpatram v Emperor* AIR 1926 Bom 122, 27 Cr LJ 689 ; *Emperor v Girdhari* 4 Cr LR 174 .

35 *Ramsharnagat Singh v State of Bihar* 1966 Cr LJ 856, p 861 (Pat) .

36 1970 ILR Bom 1.

37 *Rainu v Crown* AIR 1950 Nag 92, 51 Cr LJ 510 .

38 *Emperor v Sitaram Rai,* (1881) ILR 3 All 181 .

39 Re *Adimoola Mudaliar*AIR 1960 Mad 186, 1960 Cr LJ 492 ; *Daulat Shaw v Emperor* AIR 1921 Pat 390, 22 Cr LJ 673 ; *Matabbar Shekh v Emperor* 11 Cr LJ 444 ; *Abdul Khaliq Khan v Emperor* AIR 1941 Lah 221, 42 Cr LJ 625 ; *Wazuddi v Rohimuddi* AIR 1918 Cal 701 ((2)), 18 Cr LJ 849 .

40 *Remratan v State of Bihar* AIR 1965 SC 926, p 931, (1965) 2 Cr LJ 18 (remedy of the owner of the cattle so seized lies in taking action under s 20 of the Cattle Trespass Act).

41 *Lokenath Sahu v Rabas Beura* AIR 1963 Ori 52, (1963) 1 Cr LJ 308 ; *Jiwana v Emperor* AIR 1947 Lah 380 ; *Birdha v State* AIR 1959 Raj 124, 1959 Cr LJ 770 .

42 *Maide Khan v State* AIR 1965 Raj 12, (1965) 1 Cr LJ 476 .

43 *Madra v Emperor* AIR 1946 Nag 221, p 224, 47 Cr LJ 348 ; however, for a **contrary** view *refer* to *Emperor v Ram Jiawan* 1881 AWN 158 ; *Faiyaz Khan v Rex* AIR 1949 All 180, 50 Cr LJ 232 ; *Dayal v Emperor* AIR 1943 Oudh 280, 44 Cr LJ 640 ; *Aradhun Muandul v Myan Khan* 24 WR (Cr) 7 .

44 *Bhim Bahadur Singh v Emperor* AIR 1922 Pat 265, 21 Cr LJ 374 ; Re *Ramji Hajam*(1927) ILR 6 133 (Pat); *Dojakhai v Khamjathang Gangte* (1961) 1 Cr LJ 685 (Manipur) ; *Hari Bhuimali v Emperor* 2 Cr LJ 836, 9 CWN 974 ; *Madan Lal v Emperor* 1930 ALJ 457;*Rajan Babu v Anitha Chandra Babu* 2011 (3) KLT 415 (Ker) .

45 Re *Kakarla Narasayya*AIR 1953 Mad 516, p 518, 54 Cr LJ 1035 .

46 *Purustam Naik v Chakradhar Das* AIR 1959 Ori 19, 1959 Cr LJ 212 .

47 *Shib Das v Emperor* 14 Cr LJ 659 (Punj) .

48 *Droupadi Devi v Padmanabha Mishra* 1997 Cr LJ 2809 (Ori) .

49 *Soddepalli Lakshminarayana v Suvvari Sanyasi Apparao* AIR 1959 AP 530, 1959 Cr LJ 1141 reversed in *Suvvari Sanyasi Apparao v Boddepalli Lakshminarayana* AIR 1962 SC 586, (1962) 1 Cr LJ 518 on other grounds.

50 *Chittiboyina v Danduboyina Narappa* AIR 1939 Mad 775, 40 Cr LJ 908 .

51 Re *Veerasami Naicken*AIR 1931 Mad 18, 32 Cr LJ 354 .

52 *Kartikeswar Roy v Bansidhar Byas,* AIR 1923 Cal 594, 25 Cr LJ 222 .

53 *Abdul Karim v Emperor,* AIR 1916 All 89, 17 Cr LJ 468 .

54 *Abdul Gafoor v State of Kerala* 2013 (3) KLT 1001 (Ker) .

55 *Iman v Emperor* AIR 1917 Cal 98 ((7)), 18 Cr LJ 286(1) .

56 *Advocate-General v Bhikhari Charan Mahanti* AIR 1940 Pat 588, 41 Cr LJ 509 .

57 *Sadasiv Singh v Emperor* AIR 1917 Pat 40, 18 Cr LJ 507 ; *Hari Bhuimali v Emperor* 2 Cr LJ 836, 9 CWN 974 .

58 *Empress v Nobin Chunder Holdar* 6 WR (Cr) 79 .

59 *Pyare Lal v State* 1963 MPLJ (notes) 61 ; *Barhumdeo Rai v Emperor* AIR 1926 Pat 36, 26 Cr LJ 1559 .

60 *Dukha Majhi v Balmati Majhiani* 1975 Cut LT 135 .

61 *Tillu alias Hakimsingh v State of Madhya Pradesh* (1997) CCR 532 (MP) .

62 *Sashibhusan Giri v Kalakar Mohante* 2003 Cr LJ 1065 (Ori) ; *Batapa Kada Seth v State* 1987 Cr LJ 1976 (Ori) (DB), (1987) 1 Crimes 365 (Ori) (DB).

63 *Abdul Gafoor v State of Kerala* 2013 (3) KLT 1001 (Ker) .

64 *Indian Oil Corporation v NEPC India Ltd* (2006) 6 SCC 736, p 750, AIR 2006 SC 2780 .

65 *Indian Oil Corporation v NEPC India Ltd* (2006) 6 SCC 736, p 750, AIR 2006 SC 2780 .

66 *Arakhita Swain v State* 1975 Cut LT 35 .

67 *Nanak Singh v State* (1968) 1 Andh LT 254 .

68 *Public Prosecutor v Bullava Gowd* 1 Weir 426 (the fact that a person cultivated the land contrary to departmental rule of Board of Revenue cannot justify a taking of the crops out of his possession by a party who has no right to it).

69 See *Mahendra Prasad Singh v State of Bihar* 1970 Cr LJ 484, AIR 1970 Pat 102 ; *Osman Mistry v Atui Krishna Ghosh*AIR 1949 Cal 632, 1951 Cr LJ 97 ; however *Gokul Singh v Jagdish Singh* 1963 BLJR 211 dissents from *Osman Mistry v Atul Krishna Ghosh* AIR 1949 Cal 632, 1951 Cr LJ 97 .

70 *Digest of Criminal Law*, 1950, ninth edn, art 359 .

71 *Emperor v Karsan Bapu* 4 Bom LR 626 .

72 *Emperor v Nawtara Singh* 1 Cr LJ 558 (UB) .

73 *Nga Paw Din v King* AIR 1938 Rang 138, 39 Cr LJ 607 ; *Mahendra Patra v State of Orissa* 1977 Cut LR (Cr) 138, p 139 ; *Empress v Nga Thieno* 1 UBR 238 ; *Aahargir Chhotegiri v State* AIR 1954 Nag 55, 1954 Cr LJ 280, however, refer to *Nga Swhe Zan v Emperor* 1917 LB 15, 18 Cr LJ 300 ; *Nga Shwe Le v Emperor* 1 LBR 123 .

74 *Empress v Mathi* (1886) Unrep Cr Cas 314 .

75 *State v Bhoy Parshottam* 1954 Cr LJ 542 (Sau), AIR 1954 Sau 33 ; *Francis v State of Kerala* 1981 Ker LT 719 .

76 *Radha Kishan v Emperor* AIR 1925 Lah 327, 26 Cr LJ 847 ; *Vallabhram Ganpatram v Emperor* AIR 1926 Bom 122, 27 Cr LJ 689 ; *Pyare Lal Bhargava v State* AIR 1963 SC 1094, (1963) 2 Cr LJ 178 .

77 *Reg v Hasnanta* 1 Bom 560 .

78 *Moung Ba Chit v Emperor* AIR 1930 Rang 114, 31 Cr LJ 387 ; *R v Hanmant* (1875-1877) ILR 1 Bom 610; *Sterling Holiday*

Resort (India) Ltd v Murli Khemchand 2014 (137) AIC 576 (Mad) .

79 *Parshottam Mahadev v State,* AIR 1963 Bom 74, (1963) 1 Cr LJ 573 .

80 *Piari Dulaiya v Emperor* 1 Cr LJ 803 ; *Becharam Mukherjee v Emperor* AIR 1944 Cal 224, 45 Cr LJ 666 .

81 *Janak Yadav v State of Bihar* 1960 Cr LJ 1646, p 1647 (Pat), AIR 1960 Pat 546 ; *Piari Dulaiya v Emperor* 1 Cr LJ 803 .

82 *R v Egginton* (1801) 2 East 666, p 667, (1800) 2 Leach 913 ; *R v Chandler* (1931) 1 KB 125 ; *R v Turvey* (1946) 2 All ER 60, 31 Cr App R 154.

83 *Emperor v Troyluckho Nath Chowdhry* (1879) ILR 4 Cal 366 .

84 Just Inst IV 1 18.

85 *Batapa Bada Seth v State* 1987 Cr LJ 1976 (Ori) (DB), (1987) 1 Crimes 365 (Ori) (DB).

86 *Bisakhi v Emperor* AIR 1918 Lah 397, 18 Cr LJ 875 ; Re *Thangavelu Odayar*AIR 1958 Mad 476, 1958 Cr LJ 1198 ; *AM Chakroborty v Void Vrat (Dr)* 1986 (2) Crimes 49 (Del) .

87 Re *Thangavelu Odayar*AIR 1958 Mad 476, 1958 Cr LJ 1198 .

88 *Bisakhi v Emperor* AIR 1918 Lah 397, 18 Cr LJ 875 .

1 *Ramratan v State of Bihar* AIR 1965 SC 926, 930, (1965) 2 Cr LJ 18.

2 1 Weir 383.

3 *Abdul Ali Fakir v Netali Fakir* 19 Cr LJ 334 .

4 *Empress v Shiv Ram* (1891) ILR 15 Bom 702 .

5 *Suri v Madula* 1 Weir 417, 14 MLJ 155 .

6 *Kunhaya v State* 965 Ker LT 66 .

7 *R v Pitman* 2 C&P 423 .

8 *KN Mehra v State of Rajasthan* AIR 1957 SC 369, 372, 1957 Cr LJ 552 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF THEFT

S. 379.

Punishment for theft.--

Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.3288

Comments

1. Scope

This section deals only with the punishment for the offence of theft which has already been defined in the preceeding s 378, IPC . As all the aspects as to the ingredients, which constitute the offence of theft, have been dealt with under that section, the commentary under this section is confined to practice and procedure only.

2. Procedure

The offence, under this section, is cognizable, non-bailable, and triable by a magistrate. The mere fact that prior to the filing of the complaint, a prohibitory order had been made under s 144, CrPC, in respect of the land, cannot take away the jurisdiction of the magistrate to take cognizance of an offence under this section, for cutting away paddy crops from such land.[9] The offence under this section is compoundable, if the property stolen does not exceed two hundred and fifty rupees with the permission of the court before which the prosecution for such offence is pending, by the owner of the property stolen. Where the crop, cultivated in a field, belonging to the complainant's wife, was stolen, compounding of the offence by the complainant or his son could not be sustained in law.[10]

An offence under this section is triable summarily under s 260(1)(ii), CrPC 1973, where the value of the property stolen does not exceed rupees two hundred. However, it would be a wrong exercise of discretion to try a case summarily when complicated question of right and title are involved.[11]

Summary trials in cases in which the conviction of the accused is likely to result in dismissal from service, are not desirable.[12] Offences under ss 379, 380 and 381, IPC, are not triable summarily when a previous conviction of an offence under ch XVII of IPC is also charged.[13]

3. Who Can File a Complaint for Theft

It is necessary that only persons to whom wrongful loss by theft has been caused, should file the necessary complaint against it. Any person, who is aware of the offence of theft can make a complaint.[14] Where, however, a crop has been harvested3289 in violation of the order, passed under s 144 or s 145, CrPC, the magistrate would be the competent person to file a complaint of theft.[15] Similarly, where the parties having been restrained by the magistrate from going over the land in question, the chief of the *gram panchayat* was asked to harvest the crop and he made a complaint of theft of the crop, on its removal by one of the parties, it was held that the complaint was incompetent.[16]

4. Theft of Electricity--Complaint by 'Person Aggrieved'

Regarding taking cognizance of the offences under ss 135 and 138 of the Electricity Act 2003, s 151 clearly lays down that no court should take cognizance of those offences except upon a complaint in writing made by the appropriate Government or appropriate Commission or Chief Electrical Inspector or Electrical Inspector or licensee. Thus, the registration of FIR was clearly not permitted by the said provision.[17] The meaning of expression 'or/of a person aggrieved by the same' could not be confined to merely state electricity board and/or officers appointed or designated by that board to institute the prosecutions. The expression surely encompassed within its meaning persons who were directly affected or aggrieved by the offence. However, when prosecution was instituted by state electricity board, it could be instituted only by those officers who were authorised by the said board and not by other officers not so authorised.[18]

Cognizance of electric offences under the Act can also be taken on the basis of police report. *(Vishal Aggarwal v Chattisgarh State ELCETRICITY Board,* AIR 2014 SC 1539, 2014 AIR SCW 1001, 2014 (3) SCC 696).

5. Theft of Electricity-- Section 379 not Attracted--Special Law Overrides General

Law

Section 379, IPC deals with punishment for a simple case of theft. When there is a specific/special law covering the question of theft of electricity, *i.e.*, s 135 of the Electricity Act 2003, the general law contained in s 379, IPC will not be applicable. Any attempt by the police to add offence under s 379, IPC will be a crude devise by the prosecution to overcome the likely objection from the accused about the filing of the complaint instead of registration of FIR. Law is well settled that special law will prevail over the general law. Once there is a specific provision in the Electricity Act 2003 in respect of providing of punishment for theft of electricity, no offence under s 379, IPC could be alleged by the prosecution or later on added during the investigation so as to pre-empt the taking of plea by the accused that no prosecution for the offence under s 135 of the Electricity Act 2003 could be launched except upon a complaint by the authorised officer.[19]

6. Jurisdiction

The offence of 'theft' may be enquired into, or tried by, a court within the local limits of whose jurisdiction such offence was committed or the property stolen was3290 possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.[20]

7. Joint Trial

Where one of the accused who committed theft and was in the custody of a private person, who had arrested him in the act of stealing, was rescued by two other accused from such custody, it was held that though it was irregular to try all the accused together, yet it was only an irregularity which did not prejudice the accused.[21]

If two persons go to steal a particular article, and one who is committing theft, is not able to find that particular article but steals something else instead, both must be held guilty as they acted in furtherance of the common intention to commit theft.[22] Where the purse of a person was removed by the first accused, when he and the second accused were near the person from whom the purse was stolen, and both the accused ran away together and the first accused handed over the purse to the second accused immediately after the theft and the purse was recovered from the possession of the second accused, it was held that the second accused was also guilty of an offence under ss 379 / 34, IPC, and not of one under s 411, IPC . Where the accused went to a railway godown with a carter, who removed a bag from the godown, and the accused accompanied the carter to his house and there took delivery of the bag, consisting of pilfering from a number of bags, consigned to different persons, it was held that the accused and the cartman were jointly guilty of theft.[23] Persons forming a gang, came on to the land with the intention of removing the paddy by force and it fell to some of the accused to use the necessary violence while it fell to others to commit the actual theft, it was held that all the accused must be held responsible both for violence and theft.[24] However, where the common object of an unlawful assembly was the destruction of a mosque, and not the theft of the materials therein, and there was no finding that any of the accused individually took away any of the materials of the mosque, it was held that they could not be convicted under s 379, IPC .[25]

8. Subsequent Trial

Section 300(4) of the Code of Criminal Procedure 1973, is no bar to an accused being tried under s 3 (a) of the Railway Property (Unlawful Possession) Act 1966, after his acquittal under s 379, IPC .[26]

9. Charge

The following form of the charge may be adopted:

I am (*name and office of Magistrate, etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the..day of at you, intending to take dishonestly moveable property, to wit out of the possession of.. (*name of the person*), without his3291 consent, moved that property in order to such taking, and thereby committed an offence of theft, punishable under s 379 of the Indian Penal Code, and within my cognizance.

I hereby direct that you be tried by this court on the said charge.

It is well-settled that the court cannot discharge an accused on the basis of a document produced by him when the prosecution was taken by surprise.[27]

A mere non-mention in the charge of the person from whose possession the article was stolen, is not fatal.[28] However, non-mention in the charge of the place from where theft of fish was committed, was held to be fatal in *Lingaraj Pradhan v Jagannath Das* .[29] The grave lapse on the part of the trial court in not invoking s 34, IPC for holding joint trial is fatal.[30]

Framing of charge against the accused on the basis of his disclosure statement while in police custody when no recovery is effected at the instance of the accused and no material is collected in the investigation that the accused shared booty or was involved in the incident except the disclosure statement of the co-accused, is not proper.[31]

When the accused is admittedly the owner of the land, the allegations that he removed rocks for a commercial purpose from his own land are not sufficient to frame charges under ss 379 / 427, IPC .[32]

10. Joinder of Charges

An accused cannot be charged, at one trial for offences which are distinct and separate.[33] Where the accused, when detected by the complainant in stealing the crop, ran away and then returned and caused hurt to him, it was held that the two offences were distinct and separate and their joint trial was not, therefore, legal.[34]

Thefts of different things on different dates, separated by considerable periods, cannot be treated as theft on the analogy of successive blow constituting one assault. Each act of theft would be a complete offence by itself and cannot be lumped together.[35] Where the accused entered upon a land, belonging to the complainant, and looted the linseed crop and the next day they entered upon another plot and looted tobacco, it was held that the events of the two different dates were not parts of the same transaction and the trial was bad for misjoinder.[36] Where, however, the accused committed theft of paddy from three different fields, but a single charge was framed against the accused in respect of all the three thefts, though each was clearly specified in it, it was held that although, strictly speaking, three separate charges should have been drawn up in identical terms for the three offences under s 379, IPC,3292 yet as the charges were separately specified, the error was in form, rather than in substance, and, therefore, the irregularity was curable.[37]

Where the accused was tried for the offence of theft of some buffaloes (under s 379, IPC) and of receiving gratification to cause restoration of those buffaloes (under s 215, IPC), it was held that the latter offence having been committed some days after the former, the trial was bad and that a real thief could not be charged with an offence under s 215, IPC .[38] However, where the accused stole a bullock and returned it to the owner two days later on payment of Rs 20 and they were prosecuted under ss 380 and 215, IPC, it was held that the theft and the subsequent return might be considered to be the series of acts,

so connected as to form the same transaction, and there was no misjoinder.[39] However, a trial for theft and escape from lawful custody are not so connected as to form one transaction, and one trial for the two offences would be illegal.[40] Where a man was cheated and when he detected the cheating, the accused stole away the articles to destroy evidence against him, it was held that the two offences under ss 380 and 420, IPC, were not committed in 'one series of acts so connected together as to form the same transaction'.[41]

11. Proof

In order to establish a charge of theft, the prosecution must prove that:

(a) the accused moved some movable property;
(b) that property was in possession of some other person;
(c) the accused had the intention of taking the property out of the possession of that person;
(d) he moved the property without that person's consent;[42] and
(e) in intended to take that property dishonestly.

No conviction under s 379, IPC, is possible when the prosecution has failed to allege who had removed the gun of the victim.[43] The victim merely stated that someone stole money from his bag by cutting it and he had not seen his face. Neither identification parade was held, nor any recovery made from the accused. On these facts the accused cannot be held guilty of theft under s 379, IPC .[44] When the link between the seized timber and the accused was not established nor any evidence brought to show that the seized timber was transported by the accused under the guise of permits issued to him by the forest department, the acquittal of the accused was found proper.[45]

Allegation was that the accused had stolen several items from the victim after administering stupefying substance to him in tea. The incident had taken place at Railway Station between 3.45 p.m. to 4.15 p.m. Public persons were present on the3293 spot but no independent witness was examined. Accused was acquitted of the charge under s 379, IPC .[46]

12. Private Defence

The law is well settled, even if the plea is not taken by the accused, the court can definitely examine the question of right of private defence.[47]

13. Taking out of Possession

Taking out of possession being the essential ingredient of the offence of theft, it must be proved that at the time of the act being done, the property stolen was in the possession of the prosecutor.[48] Thus, when the documentary evidence on the point of possession is far from satisfactory and oral evidence is also not worthwhile, the ingredients of theft would not be made out.[49] In *Brahmachari Martha v State* ,[50] the accused removed some trees from a plot which was claimed to be in the possession of the government. The defence was that the trees were in possession of the village deity. It was held that unless it was affirmatively established that the trees were in the possession of the government, and not merely that the government was the owner, the charge of theft could not be maintained. In the case of removal of crops, it must be proved that the crops were grown by the person who was in possession of the disputed land.[51]

When the complainant or his witnesses did not describe the plot number of the land in question, the variety of land and when the paddy (stolen property) was sown, it cannot be said that the complainants were in possession of the land in question or have grown the paddy, therefore, the ingredients under s 378, IPC, cannot be said to be satisfied.[52]

The complainants were the owner of the shops were carrying wholesale business of crockery in the

shops. Evidence proved that the accused persons taking advantage of the riots trespassed into the premises by breaking open locks and committed theft of property kept in the shops and continued in illegal possession of shops for two years. Their conviction for offence under ss 379 and 448, IPC was held proper.[53]

14. Repossession of Vehicle by Bank due to Default in Payment of Loan

Where the car was repossessed by the bank which had given the car loan to the owner, due to default in the payment of loan and while repossessing the car, the bank had followed and exhausted the procedure laid down in that behalf, in such circumstances, it cannot be said that the offence of theft of car was made out, more so when the owner of the car had already got possession of the said car from bank after making certain payment.[54]3294

15. Removal of Articles in the Case of Hire Purchase Transactions--Whether Theft

Commentary under the heading under s 378, *ante*, may be referred to.

16. Repossession of Vehicle Under Hire Purchase--Complaint When Maintainable

Commentary under the headings under s 378, *ante*, may be referred to.

17. Recovery of Stolen Property at the Instance of Accused

It is generally perceived that a person accused of commission of theft, when in police custody, discloses before the police about the whereabouts of the stolen property, as a result of which the police during the investigation of the case recovers the stolen property, the question which arises is how much of the information received from the accused may be proved by the prosecution against the accused. The answer lies in s 27 of the Indian Evidence Act 1872, which allows one to prove the discovery of facts from the accused by the police. However, the discovery of facts should not be confused with the recovery of stolen articles by the police at the instance of the accused.

As observed by the Supreme Court in *Mohd Imayatullah v State of Maharashtra* ,[55]that 'fact discovered' means not only the physical object produced but also the place from which it is produced and the knowledge of the accused as to this. The above statement in view will not come within the purview of s 27 of the Evidence Act .

Similarly, in *Jaffar Husain Dastagir v State of Maharashtra* ,[56] it was held by the Supreme Court that only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused and, that the discovery of the fact must relate to the commission of the offence, and the essential ingredient of the section according to the Supreme Court is that the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information.

In *Himachal Pradesh Administration v Om Prakash* ,[57] the Supreme Court took the view that, what should be discovered is the material fact and the information that is admissible is that which has caused that discovery, so as to connect the information and the fact with each other as the cause and effect. That information which does not distinctly connect with the fact discovered or that portion of the information which merely explains the material thing discovered is not admissible under s 27 of the Evidence Act and cannot be proved. A witness cannot be said to be discovered under s 27 of the Evidence Act though the statement of the accused may be taken into consideration as conduct relevant under s 8 of the Evidence Act .

The accused must be deemed to be in exclusive possession of the articles concealed under the earth though the spots at which they were concealed may be accessible to the public.[58]3295

18. Possession of Stolen Property--Presumption

The court may presume that a man in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.[59] The circumstance of recovery of incriminating articles within a reasonable time after the incident at the places shown by the accused, unerringly points to the involvement of the accused. The accused who are in a position to explain as to how they could lay their hands on the stolen articles or how they had knowledge of the concealment of the stolen property, did nothing to explain, on the other hand, they denied knowledge of recoveries which turned out to be false in the light of cogent evidence produced by the prosecution; by omitting to explain it must be inferred that either they intended to suppress the truth or invited the risk of presumption being drawn as to the commission of offence envisaged by illustration (a) to s 114 of the Indian Evidence Act is essentially for the offence of theft or about the receiving of stolen property by the accused, but in a theft and murder case, this presumption cannot essentially be stretched regarding the commission of murder also by the accused.[60] When the recoveries of gold and silver ornaments and the currency notes which belong to the victim, were effected at the instance of the accused and they did not claim those recovered articles nor gave any explanation as to how they had come in possession of those articles, the presumption against the accused persons for committing theft under s 380, IPC, can be drawn keeping in view the provisions of s 114, illustration (a) of the Indian Evidence Act.[61] Where motorcycle was recovered from the possession of the accused, recovery memo was signed by the accused, four other theft cases and of receiving stolen property were pending against him, the accused was habitual offender, he was convicted under s 379, IPC .[62]

Purse of the victim containing cash Rs. 14,800/-, driving license and a memo issued by the MPSRTC to Police outpost was stolen at the Railway Station. Ten days after the incident, the accused appellant was arrested on suspicion and a sum of Rs. 7300/-, along with the driving license as well as the letter issued by MPSRTC were recovered from the possession of the accused. Section 114, Evidence Act was attracted in the case, accused was convicted for offence under s 379, IPC .[63]

19. Identity of Stolen Property

It is for the prosecution to establish the identity of the stolen property. The prosecution must establish that the paddy found was the stolen paddy, and the onus *probandi* is not on the accused.[64] The burden first rests on the prosecution to prove that the money and things seized from accused form part of the property stolen, and it is only after the initial burden has been discharged that burden can be cast on the accused to explain as to how he came to possess the cash and jewels.[65] Where the3296 allegation against the accused was that they had removed a *sal* log from the reserve forest but there was no evidence that the log found corresponded to the stump left, as alleged to have been cut, it was held that conviction under this section could not be sustained.[66] Similar is the case with currency notes recovered from a pick pocket.[67] Where the accused was found in possession of two freshly flayed skins of goats within twenty-four hours of the theft, it was held that for the purpose of establishing an offence of theft, it was absolutely necessary for the prosecution to establish that the skins, found in the possession of the accused, were those of the goats recently stolen.[68] From the mere fact that a common article of clothing similar in pattern and texture to the one lost by the complainant, is found in the possession of the accused, it cannot be presumed that the article was stolen by the accused.[69]

20. Non-production of Stolen Property in Court

Non-production of the stolen property in court may amount to a fault on the part of the prosecution, but that would not entitle the accused to an acquittal, the fault being a technical one.[70]

If the subject-matter of a theft, when it has already been seized by the police, has not been placed, for identification before the court, a conviction cannot be sustained, under this section, on account of non-production of material evidence.[71]

21. Accused Claiming Stolen Property

One of the ingredients of the offence of theft is intending to take dishonestly. This intention is known as *animus furandi*. Without it, the offence of theft is not complete.[72] Thus, a person who claims that he has a right to a property, cannot be convicted of theft for removing it where it has not been found as a matter of fact that he was not entitled to the property which he took.[73] There can be no conviction when the property removed is honestly believed by the accused to be his own and his claim, though ill-founded, is not merely a colourable excuse.[74] If, however, the claim is a mere colourable pretence to obtain or retain possession over the property, the same would not be available as a defence.[75]3297

Where an accused sets up the plea that he had a claim to the property, which he took away from the complainant, the prosecution must establish the dishonest intention to show that the so-called claim was not made in good faith, but only as a cloak to conceal the dishonest intention, and the accused himself knew that there was no substance in the claim.[76] When there is evidence that the crop was grown by the complainant and his vendor had been in possession prior to him, there can be no question of any *bona fide* claim by the accused.[77] The evidence that a particular crop belonged to the complainant necessarily means that the crop was raised by him and the latter fact need not be asserted in so many words.[78] Theft is established by the proof of dishonest intention, and not by proof of illegality.[79] Where the accused had no *bona fide* claim of right, but there was no finding that they did not *bona fide* believe that they had such a *bona fide* claim, it was held that the conviction for theft could not be upheld.[80] Where a *ratyat* took away the forest produce from the jungle in the state, not near his village, but long off, for domestic and agricultural use in the time-honoured manner without permit and did so openly, and not stealthily, it was held that there was no trace of dishonest intention.[81] It has, however, been held that theft is not always committed secretly. When there is nothing on record to show that the belief existed in their mind when they cut down the tree, a *bona fide* claim may not be inferred from the fact that the accused acted openly.[82]

22. Circumstantial Evidence

Circumstantial evidence of theft must exclude the possibility of the guilt of any other person and must point conclusively to the complicity of the accused.[83] The dishonest abstraction of electric energy was held to be circumstantially proved by an overhead main line of supply being abstracted in fittings in possession of the accused coupled by his admission and his failure to prove his plea of false charge levelled due to his non-payment of illegal gratification to the electricity department.[84] Where the bullocks were found in the field of the accused without there being evidence of stealing, it was held that he could not be convicted for theft as the possibility of the bullocks having gone astray into the field of the accused could not be excluded.[85] Where the only evidence against the accused was that fingerprints of the accused3298 were found on the stolen trunk and that he had handled it in the complainant's house two or three days before the occurrence, it was held that this evidence was not sufficient.[86]

23. Statement of the Accused Under Section 313 , CrPC 1973

The circumstances appearing against the accused, should not be considered unless an opportunity is given to him to explain the same in his examination under s 313, CrPC 1973.[87]

24. Double Conviction

Where the accused stole property belonging to different persons from the same room of a house, it was held that he could not be sentenced separately for the two offences of theft.[88] Similarly, the theft and the taking and retention of stolen property form one and the same offence and it cannot be punished separately.[89] Likewise, a person proved to have committed theft, cannot also be convicted for receiving the stolen property as the two offences are not distinct.[90]

25. Admonition

Where the accused persons forcibly entered into the land and cut away the paddy crop that was standing on the land, the case of the accused person was found fit to be dealt under cl 3 of s 360, CrPC, and the

direction was issued to the magistrate to deal with them under s 360(3), CrPC, and instead of being sentenced to any punishment to release them after due admonition.[91]

26. Probation

The provision of s 361, CrPC, makes it abundantly clear that in all cases where the conditions precedent prescribed for the application of s 360, CrPC, are satisfied, the court must apply the same or else must give special reason as to why the court does not apply the same.[92]

Theft of cars/scooter *etc.*, are quite rampant these days and have to be viewed seriously because this is peculiar to people belonging to the so-called higher strata of society. Such theft is prompted by the desire to enrich overnight. The benefit of the provisions of Probation of Offenders Act or ss 360 / 361, CrPC, cannot be granted in such cases.[93]

The accused cannot be released on probation for good conduct when he had committed theft of stones from the mine belonging to the government by employing six or seven labourers.[94]3299

No doubt the case of an accused, being less than 21 years of age at the time of occurrence, is fit to be considered for extending them the benefit of s 360, Crpc, or of the Probation of Offenders Act, but this benefit can be denied to them for the reason that they had taken the law into their hands and caused damage after they were not evicted from the house in question in pursuance of a decree of the competent court and that too with police help.[1]

However, where the accused picked the pocket of the victim and took currency amount of Rs 940, the accused aged 19/20 years at the relevant time was a first offender and the incident occurred 10 years ago, so the sentence of 1 year rigorous imprisonment imposed against the accused was maintained in different form, *i.e.*, the accused was released on probation on entering into a bond of Rs 1000 with one surety of the like amount. If the accused during the period of 2 years did not keep peace and bear good behaviour, his bond was directed to be forfeited and he was to undergo imprisonment for 1 year.[2] The accused persons forcibly cut the paddy crop and removed the same. The substantive sentence of 1 year rigorous imprisonment awarded by the two courts below was set aside and modified to the extent that the accused persons will execute bonds of Rs 2000 with one surety in the like amount and would undertake to maintain peace and bear good behaviour for a period of l year, failing which they will be called upon to receive sentence.[3]

27. Punishment

Sentencing is the cutting age of the judicial process, being the crucial strategy of criminal law in achieving social defence and delinquent rehabilitation. The court should consider the totality of factors bearing on the offence and the offender, and fix a punishment which will promote effectively the punitive object of the law, that being deterrence and habilitation.[4] The payment of fine brings home a sense for responsibility than even short terms of imprisonment in some cases.[5] Where there is only a case of simple theft without any aggravating circumstance, a sentence of rigorous imprisonment for one year would be more than necessary even if the accused might have been convicted on several prior occasions.[6] In *Okha v State of Rajasthan* ,[7] where the accused was a cultivator by profession and had no previous conviction, the sentence of one year's rigorous imprisonment was, by taking a lenient view, reduced to four months. When, however, convincing reasons are given for a sentence of one year and fine is imposed, the sentence cannot be said to be severe.[8]However, the fact, that the accused has, by his act, rendered the recovery of the stolen property impossible, is no ground for inflicting a heavier sentence.[9] Where the accused was convicted on the charge of theft of that of electricity, the incident was of3300 the year 1999, the accused was TB patient, the sentence was reduced to the period already undergone.[10]

The accused convicted under s 379, IPC was aged 21 years at the time of the incident, had no previous criminal record, had remained in jail for five months and 27 days, the sentence of one year imposed was reduced to the period already undergone, fine of Rs.5000/- was maintained.[11]

Accused found in possession of stolen motorcycle convicted and sentenced to one year and fine of Rs. 500/- was in jail for more than two and half months. His sentence was reduced to the period already undergone, however fine was enhanced to Rs. 15000/-.[12]

28. Theft of Cattle--Sentence

Theft of cattle in an agricultural country like India must be regarded as a serious offence.[13] Similarly, where cattle stealing is very rife in a particular locality, a severe sentence should be passed.[14] Cattle theft ordinarily calls for a sentence of two years.[15] There is, however, no hard and fast rule that a sentence of two years must be passed in all cattle and boat theft cases. A sentence should never be heavier than what is necessary to deter the criminal from committing the offence again.[16] At the very least, a heavy fine should be imposed.[17]

29. Theft of Crop--Sentence

In cases of theft of crop, the maximum sentence need not be imposed in the absence of substantive proof of the value of crop.[18]

30. Pick-pocketing--Sentence

Pick-pocketing having become extremely rampant, a sentence of six months imprisonment is not excessive.[19]

31. Theft on a Railway Train--Sentence

Thefts from running trains and waiting-rooms and from travellers, or from children should be visited with exemplary punishment. [20] In cases of thefts on a railway train, the sentence should be deterrent specially where the accused has already been convicted for theft.[21]3301

32. Alteration of Conviction

A person charged for a specific offence, may be convicted of a different offence if the evidence supports it. Therefore, a person, charged under s 379 can be convicted for an offence under s 430, IPC .[22] Likewise, an accused charged under s 392 can be convicted under s 379, IPC .[23] Where, however, the necessary ingredients for an offence under s 403 or s 424 have not been considered in a trial under s 379, the charge under s 379 can not be converted into an offence under s 403, or s 424, IPC .[24] Hence, conviction for theft cannot be altered to one for abetment of theft.[25]

A charge of theft is graver than a charge of criminal misappropriation and the magistrate cannot find a person charged under s 403 guilty of a graver offence under s 379 without framing a specific charge.[26] Where there is no charge of extortion under s 384, it is wholly illegal to punish a man for a grave offence, involving many totally different ingredients, on a charge of theft under s 379 .[27] An offence under s 379 cannot be said to be one of the component parts, constituting the major offence under s 394, nor can it be said that s 379 is a minor offence in relation to s 326, IPC .[28]

33. Alteration of Conviction from Section 392 to Section 379

Commentary under the headings under s 392, *post*, may be referred to.

34. Restoration Of Property Taken Away By The Accused

When the property is not proved to be stolen, the same has to be returned to the person from whom it was taken.[29]

9 *Bhagwan Das v Sub-Divisional Magistrate* 1976 Cr LJ 1775, 1778 .

10 *Suna Sathpathiani v Panchanan Padhi* AIR 1961 Ori 47, (1961) 1 Cr LJ 303 .

11 *Bhim Bahadur Singh v Emperor* 21 Cr LJ 374, 55 IC 854 .

12 *Sachidanand v State* AIR 1956 All 212, 1955 Cr LJ 368 .

13 2 Weir 324.

14 *Thanoo Pillay v Kumara Pillai* (1963) 1 Cr LJ 358, 1962 Ker LT 639 ; *Kanhaya v State* 1965 Ker LT 66, 1965 MLJ (Cr) 119 ; Re *Muthuswamy Pillai*AIR 1939 Mad 839, 41 Cr LJ 20 ; *Commandment 508 Army Base Workshop v PB Ready* 1977 All Cr C 243 .

15 *Mahendra Prasad Singh v State of Bihar* AIR 1970 Pat 102, 1970 Cr LJ 484 .

16 *Mohd Ayub v State of Bihar* AIR 1974 Pat LJ R 150 ; *Mani Muttayya Pillay v State* 1969 Cr LJ 728, AIR 1969 Goa 55 .

17 *Mahalakshmi Spinners Ltd and Ors v State of Haryana and Anr* 2007 Cr LJ 429 (P & H).

18 *Hargyan v State of Madhya Pradesh* 2003 Cr LJ 2936 (MP) (DB) .

19 *Mahalakshmi Spinners Ltd v State of Haryana* 2007 Cr LJ 429 (P&H) .

20 Code of Criminal Procedure 1973, s 181(3) ; *State v Ram Chand* AIR 1959 Assam 20, 1959 Cr LJ 169 ; *Thakur Narwar Singh v State of Madhya Pradesh* (1964) 2 Cr LJ 64, (1963) 2 SCJ 372 .

21 *Empress v Kutti* (1888) ILR 11 Mad 441, 1 Weir 210 .

22 *Gian Chand v Emperor* AIR 1942 Pesh 50, 43 Cr LJ 837 .

23 *Saunkhi Chand v Emperor* AIR 1918 Pat 314, 19 Cr LJ 884 .

24 *Emperor v Eases Meah* AIR 1936 Rang 70, 37 Cr LJ 416 .

25 *Bechan Jha v Emperor* AIR 1941 Pat 492, 42 Cr LJ 579 .

26 *Sambasivan v Inspector of Railway Protection Force* 1976 Cr LJ 36 .

27 *Jeet Ram v Gangaram* (1984) Crimes 613 .

28 *Ahmed v State* AIR 1967 Raj 190, 1967 Cr LJ 1053 .

29 *Lingaraj Pradhan v Jagannath Das* . (1973) 1 Cut WR 201 .

30 *State of Karnataka v Abdul Rasheem* 2006 Cr LJ 3169 (Kant) .

31 *Kamal Kishore v State through Delhi Admn* 1997 Cr LJ 2106 (Delhi) .

32 *Harichandran v State* 1997 Cr LJ 41 (Mad) .

33 Refer to Code of Criminal Procedure 1973, s 218 .

34 *Shafi v Emperor* AIR 1924 All 211, 25 Cr LJ 964 ; *Ram Subhag Singh v Emperor* 16 Cr LJ 641 .

35 *Becharam Mukherji v Emperor* AIR 1944 Cal 224, 45 Cr LJ 666 .

36 *Budhai Sheikh v Tarap Sheikh* (1906) ILR 33 Cal 292, 3 Cr LJ 126 .

37 *Moharuddi v Jadu Nath* 4 Cr LJ 415, 11 CWN 54 .

38 *Imperator v Alu* 12 Cr LJ 72 .

39 *Twet Pe v Emperor* 7 Cr LJ 464 .

40 *Emperor v Po Hla* 4 Cr LJ 389 ; *Nga San Daik v Crown* 1 LBR 361 .

41 *Bechai v Emperor* AIR 1922 All 244, 23 Cr LJ 671 (trial was however not held to be bad as there was no prejudice to the accused).

42 *State of Maharashtra v Vishwanath Tukaram* AIR 1979 SC 1825, p 1827, 1979 Cr LJ 1193 .

43 *Kalidin Singh v State* 2001 Cr LJ 655 (All) (DB) .

44 *Selvaraj v State* 1998 Cr LJ 2688 (Mad) .

45 *State of Himachal Pradesh v Jagat Ram* 1992 Cr LJ 1445 (HP) .

46 *Ajay Tiwari v State (NCT of Delhi)* 2014 (8) AD (Delhi) 670 .

47 *Mujhibur Rehman v State of Assam* (1987) 3 Crimes 729 (Gau) .

48 *Hossenee Sheikh v Raj Krishna Chatterji* 20 WR (Cr) 80 .

49 *Lal Chand v Sarup Chand* 1974 CLR 359 .

50 *Brahmachari Martha v State,* AIR 1959 Ori 207, 1959 Cr LJ 1460 (1) ; *Bairagi Rout v Brahmananda Das* (1969) 35 Cut LT 1154, 1970 Cr LJ 638 ; *Rakhal Dolui v Makhanlal* AIR 1927 Cal 701, 28 Cr LJ 827 ; *Anadi Giri v State* (1963) 29 Cut LT 100 .

51 *Anadi Giri v State* (1963) 29 Cut LT 100 .

52 *Sashibhusan Giri v Kalakar Mohanta* 2003 Cr LJ 1065 (Orissa) .

53 *Ashi Devi v State (NCT of Delhi)* 2014 Cr LJ 3238 : (2014) 12 SCC 591).

54 *Mahabir Singh v Commissioner of Police, Delhi* 2006 Cr LJ 1863 (Del) .

55 *Mohd Imayatullah v State of Maharashtra,* AIR 1976 SC 483, 1976 Cr LJ 481 .

56 *Jaffar Husain Dastagir v State of Maharashtra,* 1917 Mad LJ (Cri) 212, 1970 Cr LJ 1659 .

57 *Himachal Pradesh Administration v Om Prakash,* AIR 1972 SC 975, 1972 Cr LJ 606 ; *Joseph alias Thara alias Thankachan v State of Kerela* 1997 Cr LJ 4289 .

58 *Limbaji v State of Maharashtra* 2002 Cr LJ 590 (SC) .

59 Indian Evidence Act 1872, s 114, illust (a).

60 *Ibid*; *Union Territory of Goa v Boaventura D'souza* AIR 1993 SC 1199, 1993 Cr LJ 181 .

61 *State of Rajasthan v Satya Narain* 1996 Cr LJ 2146 (Raj) (DB) ; *Anil v State of MP* 2014 Cr LJ 649 (MP) .

62 *Saleem v State of Rajasthan* (2012) 117 AIC 587 (Raj) .

63 *Anil v State of Madhya Pradesh* 2014 Cr LJ 649, p 650 (MP), 2014 (2) RCR (Criminal) 696 .

64 1 Weir 423; *Bhan Prasad Chaudhury v Barahamdeo Chaudhury* AIR 1927 Pat 385, 28 Cr LJ 760 ; Re *Sini Tevan* 1 Weir 429; *Chandrakant Dixit v State of Madhya Pradesh* 1980 Cr LR 124, p 125 (MPh) (Notes) .

65 *Sathian v State* 1971 Cr LJ 1635, 1636, 1971 Mad LW (Cr) 99 (1) .

66 *Rajan Pradhan v State of Orissa* (1973) 1 Cut WR 164 .

67 *Karuna Behera v State* 3 Cut LT 146 (it is not the blade in the pocket of the pickpocket; it is the identity of currency notes recovered which can sustain his conviction); *Raghunath v State* 1979 Bom Cr R 179, 181-82 ; *Sabu v State of Rajasthan* 1979 Cr LR 133, 136 (Raj) .

68 Re *Irula Sadayan*AIR 1916 Mad 783, 16 Cr LJ 440 ; *Subarann Digai v State* 1973 Cut LT 889 ; *Kacharji Hariji v State of Gujarat* AIR 1969 Guj 100, 1969 Cr LJ 471 .

69 *Maung E Gyi v Emperor* AIR 1924 Rang 91, 25 Cr LJ 618 .

70 *MR Biswas v PP Tigge* 1978 All Cr R 22 .

71 *Murlidha Behera v State* (1980) 49 Cut LT (SN) 9 .

72 *Chandi Kumar Das v Abanidhar Roy* AIR 1965 SC 585, 587, (1965) 1 Cr LJ 496; *Bahadur Bhoi v State* 34 Cut LT 1255 .

73 *Harendra Narayan Das v Ramjan Khan* 1914 Cal 476, 15 Cr LJ 298 .

74 *Karamsani Matari v Natha Matari* (1966) 32 Cut LT 175 ; *Tularam Patel v Siva Sankar K Kalo* (1969) 35 Cut LT 889 ; *Sada Panigrahi v Raghunath Das* 1950 Ori 196, 51 Cr LJ 1333 ; *Harikrisan v State* AIR 1951 Nag 162, 52 Cr LJ 71 ; *Mujhibur Rehman v State of Assam* (1987) Crimes 729 (Gau) .

75 *Anadi Sahu v Narendra Naik* AIR 1969 Ori 70 ; *Badloo Prasad v State of Madhya Pradesh* (1970) 19 Jab LJ 31 (SN) ; *Uma Charan Chand v Charon Das* (1969) 35 Cut LT 186 ; *Hedayat Mohammad Shah v Rinu Charan* (1966) 32 Cut LT 859, p 863-64 ; Re *Kakarla Narasayya*AIR 1953 Mad 516, p 518, 54 Cr LJ 1035 .

76 *Jagadish Chandra Dey v Nilkanta Chakraborty* AIR 1965 Tripura 42, (1965) 2 Cr LJ 810 ; *Satish Chandra Ghosh v Radha Ballay Dalat* AIR 1962 Tripura 25, (1962) 1 Cr LJ 766 ; *Bhagwan Sahai v DFO* AIR 1947 Pat 264, 47 Cr LJ 992 ; Re *Kakarla Narasayya*AIR 1953 Mad 516, 54 Cr LJ 1035, however, in *Dunyapat v Emperor* AIR 1919 All 90 ((2)), 20 Cr LJ 710 (once it is proved that the accused removed away the property of complainant, it is for the accused to establish that the removal was not dishonest); *Bishal v Dawa* 1965 MPLJ 123 (notes) (accused has to prove that his claim was *bona fide*); *Nassib Chowdhury v Nannoo* 15 WR (Cr) 47 .

77 *Hedayat Mahammad Shah v Kinu Charan* (1966) 32 Cut LT 859, p 863-64 .

78 *Kishan Lal v State* 1978 All Cr R 160 .

79 *Jagadish Chandra Dey v Nikanta Chakraborty* AIR 1965 Tripura 42, (1965) 2 Cr LJ 810 ; *Satish Chandra Ghosh v Radha Ballay Dalal* AIR 1962 Tripura 25, (1962) 1 Cr LJ 766 ; *Bhagwan Sahai v DFO* AIR 1947 Pat 264, 47 Cr LJ 992 ; Re *Kakarla Narasayya*AIR 1953 Mad 516, 54 Cr LJ 1035 .

80 *Matilal De v Emperor* AIR 1935 Cal 675, 37 Cr LJ 1 .

81 *Iswar Panda v Emperor* AIR 1931 Pat 99, 12 PLT 577 ; *Suvvariii Sanyasi Apparao v Boddepalli* AIR 1962 SC 586, p 588, (1962) 1 Cr LJ 518 ; *Chandi Kumar Das v Abanidhar Roy* AIR 1965 SC 585, p 587, (1965) 1 Cr LJ 496 .

82 *Shib Lal Das v Emperor* AIR 1934 Pat 491, 36 Cr LJ 120 .

83 *Chiraguddin v Emperor* 15 Cr LJ 293, 18 CWN 1144 .

84 *Sadhu Charan Sahu v State* (1978) 46 Cut LT 340 .

85 *Dharampal v State* 1967 AWR (HC) 615 ; *Chiraguddin v Emperor* 15 Cr LJ 293, 18 CWN 1144 ; *Govind Mahto v Emperor* 23 Cr LJ 30, AIR 1923 Pat 121 ; Re *Sugasi Doraiswami Naidu*AIR 1939 Mad 765, 41 Cr LJ 96 (1).

86 *Tara Mia v Emperor* AIR 1941 Cal 479, 43 Cr LJ 64 .

87 *Sidhe Dome v State* 34 Cut LT 1018, p 1021 .

88 *Empress v Sheikh Moneah* 11 WR (Cr) 38 .

89 *Empress v Sree Mant Adap* 2 WR (Cr) 63 ; *Empress v Seeb Churn* 11 WR (Cr) 12 .

90 *Devaraj Daya v Joshi Vishanji* AIR 1950 Kutch 88 .

91 *Sukchand Harijan v State of Orissa* 1988 Cr LJ 1579 (Ori) .

92 *Ibid*.

93 *Ravinder Singh alias Billa v State* (1999) 1 RCR (Cri) 373 (P&H).

94 *Dharam Pal v State of Haryana* (1999) 3 RCR (Cri) 401 (P&H).

1 *Vimal Ram v State of Bihar* 1997 Cr LJ 2846 (Pat) .

2 *Sanchu Ray v State of Assam* 1987 Cr LJ 1378 (Gau) .

3 *Sukra Munda v State of Bihar* (1998) 1 Crimes 368 (Pat) .

4 *Ashok Kumar v State (Delhi Administration)* AIR 1980 SC 636, p 637 .

5 *Ibid*.

6 Re *Muniswami*(1947) 1 Mad LJ 336**followed** in *Kumaran alias Narayansami*1971 LW (Cr) 162, p 163.

7 *Okha v State of Rajasthan,* 1977 Raj Cr C 50, p 51 .

8 *Mani Muttayya Pillay v State* AIR 1969 Goa 55 ; *Jumma v State of Rajasthan* 1977 Cr LR (Raj) 197, p 198 ; *Shaikh Ayub Ismail v State of Maharashtra* 1977 Cr LR 403 (Maharashtra) .

9 *Empress v Nga Aung So* (1893-1900) LBR 633.

10 *Mansukhgiri Sureshgiri Bawaji v State of Gujarat* 2012 (110) AIC 651 (Guj) .

11 *Anil v State of Madhya Pradesh* 2014 Cr LJ 649, p 650 (MP), 2014 (2) RCR (Criminal) 696 .

12 *Rajesh Gyan Singh v State of MP* 2014 Cr LJ (NOC) 103 (MP) .

13 *Suraj Mal v State* 1951 ALJ 630, 1951 AWR (HC) 616 .

14 *Emperor v Seda* AIR 1927 Lah 893, 26 Cr LJ 651 (6 months imprisonment and fine); *Surajmal v State* 1951 ALJ 630, 1951 AWR (HC) 616 .

15 *Empress v Nga San* PJLB 198; *Empress v Nga Ni* PJLB cited in *Poe Nyein v Emperor* 19 Cr LJ 655 .

16 *Poe Nyein v Emperor* 19 Cr LJ 655 (6 months imprisonment imposed).

17 *Emperor v Miro Ghulam Hussain* AIR 1939 Sind 339, 41 Cr LJ 187 ; *Emperor v Jhangi* AIR 1933 Sind 44, 34 Cr LJ 420 .

18 *Malhu Yadav v State of Bihar* 2002 Cr LJ 2819 (SC) .

19 *Ganga v State* AIR 1957 All 678, 1957 Cr LJ 1060 .

20 Re *Syed Khader Sahib*1930 MWN 173.

21 *Emperor v Ananda Laxman Babaji* 13 Cr LJ 531, 14 Bom LR 504 (12 months); *Emperor v Ali Bakhsh* AIR 1941 Lah 312, 42 Cr LJ 823 .

22 *Khalle Fodalia v Harnarayan Sunderlal* AIR 1958 MP 1, 1958 Cr LJ 401 ; *Sahadat Ali Jotdar v State* AIR 1957 Assam 35, 1957 Cr LJ 349 ; *Ram Bharosay v State* AIR 1952 All 481, 1952 Cr LJ 904 .

23 *State v Rama* AIR 1956 Raj 190, 1956 Cr LJ 1430 (2) .

24 *Thoppuian v Sankaranarayana Iyer* 15 Cr LJ 440 .

25 Re *Varayal Krishnan* 13 Cr LJ 223.

26 *Jamiraddin v Debendra Chandra* (1964) 1 Cr LJ 616 .

27 *Amanullah v Emperor* 13 Cr LJ 597 .

28 Re *Raman Ambalam*AIR 1951 Mad 258, 1950 MWN 870 .

29 *Lalluram Mohanlal v State of Gujarat* 1967 Cr LJ 1639, AIR 1967 Guj 268 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF THEFT

S. 380.

Theft in dwelling house, *etc*.--

Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

STATE AMENDMENT

Tamil Nadu.-- Section 380 of the Indian Penal Code (Central Act XLV of 1860) shall be renumbered as sub-section (1) of that section and after sub-section (1) as so renumbered, the following sub-section shall

be added, namely:--

"(2) Whoever commits theft in respect of any idol or icon in any building used as a place of worship 'shall be punished with rigorous imprisonment for a term which shall3302 not be less than two years but which may extend to three years and with fine which shall not be less than two thousand rupees:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment for a term of less than two years."[30]

Comments

1. Scope

This and the following two sections treat all the three kinds of aggravated theft:

(a) on account of the place (s 380);
(b) on account of the capacity of the thief (s 381); and
(c) on account of the nature of the preparation for the theft (s 382).

This section provides for punishment for an offence of theft, committed inside any building, *etc*, in the committing of which the accused would not only commit trespass on the property, but would also endanger the security of the inmates of the building. The essential point in the offence of theft in a building is that the property should be under the protection of the building and the offence may be committed by the owner of the building, or by any other person, who has lawful access to the building.[31] In the case of theft in a dwelling-house, the invasion would not reduce the culpability by the presence of the owner of the house.[32] Where the accused finding the door of a house open, walked in and proceeded to steal certain articles therefrom, but before he could get away, he was actually caught, it was held that the offence was one under s 380, and not under s 457, IPC .[33]

To constitute offence under s 380, IPC, what is necessary is that movable property has been moved out of the possession of a person without his consent.[34]3303

In cases under this section, all the ingredients of the offence of theft have to be established.

Where accused was caught red handed committing theft of 84 ballot papers from the printing press, even if the offence falls under s 127(P)(iv) of Assam Panchayat Act, the accused can be tried for offence under s 380, IPC .[35]

Merely on the basis of possession of some stolen articles accused cannot be convicted for offences under s 380, IPC .[36]

2. Object

The object of this section is to give greater security only to property deposited in a house, under the protection of the house, and not to the property of the person or the party from whom it is stolen. Theft from a person in a dwelling-house is only a simple theft under s 379 .[37]

3. 'Building'

The expression 'building' has not been defined anywhere in the IPC . A building within the meaning of ss 380 and 442, IPC, includes structure, whether covered or not, made of any material whatsoever. The limitation, which appear to have been imposed by the legislature, are not as to the nature of the structures

or materials of which they are made, but to the use to which such structures are intended to be put.[38] The expression 'building', having regard to the expressions 'tent' and 'vessel' that follow, must be regarded as indicating some structure intended for affording some sort of protection to the persons, dwelling inside it, or for the property placed there for custody. Any structure, which does not afford any such protection by itself, but merely serves as a fencing or other means of merely preventing ingress or egress, cannot make the place a 'building' or 'house' within the meaning of s 380 or s 442, IPC .[39] Where theft of a cloth, spread out to dry on the top of a house, was committed by the accused getting access by scaling the wall, and there was no entry into the house, it was held that there was neither house-breaking, nor theft in a house and the fact that the roof was used for various domestic purposes, made no difference.[40] However, where the roof of the house had been used by the informant for the purpose of storage of stock of clothes, it was held that the theft of a portion of chillies from the roof of the house was theft from the dwelling house.[41]

4. Courtyard, Compound and *Dalan*

A courtyard, attached to the living rooms, walled in on all sides and provided by a door, leading to the street, comes within the purview of this section.[42] However, a compound or a courtyard of a house, surrounding a building, is not a building for the3304 purposes of this section.[43] Likewise, a *dalan* or entrance, surrounded by a wall, in which there are two doorways, but without doors, and used for custody of property, would be a building.[44]

5. Verandah

An ordinary verandah is no doubt a part of a building, but a theft from the verandah, which is outside the house, is not theft in a building. It may so happen that the verandah is so enclosed as to be a substantive building used for the custody of the property, but this is a question of fact to be determined on evidence of each case.[45] If the verandah forms part of a building, which is used as a human dwelling or for custody of property, it would be a building within the meaning of this section.[46]

6. Railway Carriage Van

A railway carriage is not a building, tent or vessel used as human dwelling or for the custody of property. Theft from a railway carriage is an offence under s 379, and not under s 380 .[47] Similarly, a brake-van from which theft is committed, would not be a theft in a building, tent or vessel.[48] However, a goods van, in which goods are carried, is a place used for the custody of property.[49] Where the accused stole some luggage and cash from the railway carriage when it was at a railway station, it was held that it was an offence under s 380 although the railway carriage was not a building while the railway station was.[50] A theft from a railway godown was considered to be an offence under s 380, IPC .[51] In *State v Nihal Singh* ,[52] a railway waiting room was held to be a building.

7. 'Tent'

While 'building' signified a permanent edifice of some kind, however simple; a tent is merely a temporary erection for the purpose of protecting man and property. Such portable provisions are frequently made for various purposes, such as for the camping of officers or for shopkeepers in markets, and particularly in fairs and exhibitions. The same protection is extended to temporary tents as it is to buildings.

8. 'Vessel'

This term, as defined in s 48, IPC, means anything made for the conveyance, by water, of human beings or of property. All means of transport, provided for the protection of the property, such as a boat, would be covered by the term. Theft by a person on a boat falls under this section.[53]3305

9. 'Used as Human Dwelling'

In order to bring the case under this section it is not enough that the building in question is one designed

for the purpose of human habitation, but not actually put to that use. It must be a building, whether designed for the purpose or not, for example, a room in a house,[54] or chambers in a college or inn or a court.[55] A building will, however, not lose its residential character by the mere absence of the person, residing there, so long as he has *animus revertendi*, but it is otherwise if he quits it with no intention of returning.[56] Dilapidated houses, which have fallen into disuse, would not be covered by the section.[57]

10. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate.[58] The offence is triable summarily if the value of the property does not exceed Rs 200.

The offence, alleged to have been committed by the accused under ss 380 and 420, IPC, being distinct from the offences committed by them under ss 467 and 471, IPC, and the said ss 380 and 420, IPC, not occurring in s 195(1)(b)(ii), CrPC 1973, the magistrate is competent to take cognizance under ss 380 and 420, IPC, against the accused.[59]

The two courts below convicted the accused persons under ss 147 / 427 and 380, IPC . During the pendency of the revision petition before the High Court there was a compromise between the accused persons and the victim, and the accused persons were found entitled to an acquittal for the offence under s 417, IPC . In view of the acquittal of the said offence it was observed, that the allegations made by the prosecution for the offences under ss 140 and 387, IPC, cannot stand. Further, the parties being co-villagers having entered into a compromise in order to promote a healthy relationship, it was just and proper that the accused persons should be acquitted of the offences for which they were convicted by the lower appellate court.[60]

11. Identification of Accused

When the identification parade is not conducted and authentic identification is made for the first time in court, such identification is inherently uninspiring and cannot be accepted or acted upon unless sufficient circumstances are there to corroborate such identification.[61]

12. Quashing FIR/ Police Investigation

When investigation had not culminated into final report or charge sheet as required by law. It is neither desirable nor possible, at this stage, to conclude that there was no3306*prima facie* case, so prayer for quashing of investigation proceedings under ss 380, 467 IPC cannot be allowed.[62]

13. Free Legal Assistance to the Accused

Free legal assistance at state cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty. This fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by art 21 of the Constitution . The exercise of this fundamental right is not conditional upon the accused applying for free legal assistance so that if he does not make an application for free legal assistance, the trial may lawfully proceed without adequate legal representation being afforded to him. On the other hand, the magistrate or the sessions judge before whom the accused appears is under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the state.

A conviction was reached without informing the accused that he was entitled to free legal assistance and inquiring from him whether he wanted a lawyer to be provided to him at state cost, This resulted in the accused remaining unrepresented by a lawyer in the trial which is clearly a violation of his fundamental right under art 21 of the Constitution and the trial must be held to be vitiated on account of a fatal constitutional infirmity.[63]

A court is under an obligation to ask the accused or any person coming under s 12 of the Legal Services Authority Act that he is entitled to free legal service and failure to do so is sufficient ground for demand of retrial or re-hearing of the case in question.[64]

14. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about. day of at you committed theft in ..(*specify building/tent/or vessel*), which was used as a human dwelling (*or which was used for the custody of property*), and thereby committed an offence, punishable under s 380 of the Indian Penal Code, and within my cognizance.
>
> I hereby direct that you be tried by this court on the said charge.

When the allegation of theft were vague in the absence of description of books and other equipments alleged to be stolen, the order discharging the accused was found proper.[65]

15. Quashing of Charge

The accused persons were alleged to have trespassed into a room and committed theft in respect of furniture and fixtures in the room. The prosecution having failed to3307*prima facie* show that the disputed room and the furniture and fixtures contained therein were in possession of the *de facto* complainant prior to the incident as alleged, and that being so the major ingredients of the offence of theft remained unfulfilled so the charges under ss 380 and 457, IPC, framed by the metropolitan magistrate were set aside.[66]

16. Proof

In order to secure a conviction under this section, the prosecution must prove that:

(a) the movable property was taken out of the possession of a person by the accused;
(b) such taking was without that person's consent;
(c) he did so with the intention of taking away the movable property dishonestly; and
(d) the said property was taken away from a building, tent or vessel which building, tent of vessel was used as a human dwelling or for the custody of the property.[67]

Thus, an offence under s 380, IPC would be committed:

(a) if the ingredients of theft, as required under s 378, IPC, are established; and
(b) if the theft is committed in a building, tent or vessel, which is used:

(i) as a human dwelling, or
(ii) for the custody of property.

However, where neither the stolen property is seized from the accused, nor has it been recovered from his possession, then the mere fact that it was recovered at his instance, will not prove that he was in possession of the stolen property, with the result that he cannot be convicted under s 380, IPC .[68] Similarly, an offence of theft cannot be said to have been committed by an accused merely because a silver bangle has been recovered from his possession.[69] Where the charge against an accused cannot be held to have been established beyond reasonable doubt, his conviction under s 380, IPC, cannot be sustained.[70]

Want of Recovery Evidence--Acquittal of the Accused

The two accused A1 and A2 were prosecuted for the offence of house breaking and theft. Evidence was lacking to show that the stolen articles were recovered at the instance of accused A2. Accused A2 was acquitted.[71]3308

The prosecution case was that when PW2 daughter of the complainant was sleeping in her room inside the house in night, the appellant along with two other co-accused entered the house of the complainant and committed theft of the golden chain which PW2 was wearing. FIR was lodged sixteen days after the incident when the police came to the complainant with that golden chain. The complainant or PW2 did not know about the theft of the chain even though PW2 was wearing the chain when it was stolen. Held, the chain in question was being worn by PW2. It was stated to have been stolen while she was sleeping. It was inconceivable that she would not realize that she had lost her chain. The appellant was acquitted of the charges under ss 380 and 451, IPC .[72]

Where in case of housebreaking and theft, stolen properties were recovered from the possession of the accused A-2, at his instance, which was spoken by the prosecution witnesses, the accused A2 did not offer any explanation, he was convicted for offence under s 380, IPC .[73]

17. Accused Convicted for Robbery Cannot be Convicted for Theft

When the accused persons are convicted for robbery under s 392, IPC, it is not necessary that they should be convicted for the offence of theft under s 380, IPC . Such a conviction by the trial court under s 380, IPC, is liable to be set aside by the appellate court though the conviction under s 392 is maintained.[74]

18. Probation

Under criminal jurisprudence the object of awarding punishment to a person who is guilty for the commission of an offence is prevention of the crime and future deterrence for other towards such crime. With the emergence of the new conception of dealing with the delinquents and criminals in a manner so as to reform them and to give them a chance to reform themselves, the Probation of Offenders Act was enacted by Parliament. The said Act shifts the emphasis from deterrence to reformation and from the crime to the criminal as per the modern concept of punishment. Reformation and rehabilitation of the offenders are the objects of the provisions regarding release of the accused persons after admonition or on probation. The legislative trend, of late, has also been for reformation and rehabilitation of offenders, and not mere deterrence, are now among the objects of the administration of criminal justice.[75]

In order to give benefit to a convict under s 3 of the Probation of Offenders Act the following conditions must be fulfilled:

(a) There must not be any previous conviction; and

(b) The offender should be found guilty of having committed one of the following offences:

(i) theft (s 379),
(ii) theft in dwelling houses, (s 380),3309
(iii) theft by clerk or servant of property in possession of master (s 381),
(iv) dishonest misappropriation (s 404),
(v) cheating (s 420),
(vi) any offence punishable with imprisonment for not more than two years or with fine or with both under the IPC or any other law.

Apart from the above, the court must be of the opinion that having regard to the circumstances of the case including the nature of the offence and the character of the offender it is expedient to give him the benefit of the provisions of s 3 of the Probation of Offenders Act .[76] Where the accused convict was aged 20 years only at the time of commission of offence, he was released on probation.

Accused A1 was found guilty and convicted for offence under ss 380 and 354, IPC .[77]

19. Deterrent Sentence

Deterrent sentence should be passed in the case of offences under ss 380 and 457, IPC, committed at night in an industrial area.[78]

The offence under s 380, IPC, is punishable with imprisonment of either description for a term which may extend to 7 years and also fine. The fact that the accused are first time offenders and villagers having no regular source of income is hardly a reason to justify leniency. The fact that the accused is a young boy of 22 years also does not justify leniency. These factors are not relevant for taking a lenient view against accused persons when they have been convicted for having stolen an unlicensed gun, making them liable also under s 25 of the Indian Arms Act 1959.[79]

20. Leniency in Sentence

When the accused is in custody for quite some time, taking liberal view, the court may direct that both sentences shall run concurrently instead of consecutively.[80]

The incident took place more than 14 years ago, no recovery had been set up against the accused persons who had suffered mental agony for years so the sentence of imprisonment of 1 year rigorous imprisonment and fine of Rs 2000 each was modified to the extent that instead of imprisonment, each of them shall pay a fine of Rs 2000 and in default, to undergo 3 months rigorous imprisonment.[81]

The accused was convicted under s 380, IPC, was sentenced to 1 year rigorous imprisonment by the trial court. On appeal, the sentence was reduced to 3 months rigorous imprisonment by the sessions court. On revision against the sessions court, keeping in view that the accused was a young boy and had already suffered 1 year rigorous imprisonment, the sentence was reduced to the period already undergone and a fine of Rs 30 was also imposed.[82]3310

21. This Section and Section 454, IPC

Offence under s 454, IPC, includes offence under s 380, IPC, where accused is convicted under s 380, IPC, separate conviction under s 454, IPC, is not required.[83]

22. Alteration of Conviction from Section 380 to one under Section 411

In the absence of any prejudice to the accused, the conviction under s 380 can be altered to one under s

411, IPC, in view of the provisions of s 221(2), CrPC 1973.[84]

Section 411, IPC, is actually a minor offence *vis-a-vis* the offence under s 380, IPC, though accused is charged under s 380, IPC, and not under the said section, by virtue of s 222 (2), CrPC .[85]

23. Alteration of Conviction from Section 394 to one Under Section 380

If there is no evidence as to whether the victim was dead or alive when the ornaments were removed by the accused from her person, an inference, favourable to him has to be drawn to the effect that he took away the ornaments from her body when she was already dead. In such circumstances, he cannot be convicted under s 394, IPC . It can, however, safely be inferred that he committed theft of the ornaments from a dwelling place and, therefore, he can be convicted under s 380, IPC .[86]

24. Alteration of Conviction from Section 395 to Section 380

In *Sheodeni Singh v State of Bihar* ,[87] during land acquisition proceedings in respect of a plot of land, on which some construction were standing, tenders were invited for constructing a motor car park on it. The contractor, who had offered the tender (but before its acceptance), demolished the construction with the help of his men and removed the materials. He did not exercise any violence or put anybody in fear when the demolition and removal of the materials were carried on. It was held that the offence fell under s 380, and not under s 395, IPC . Therefore, the conviction was altered from s 395 to s 380, IPC .

25. Alteration of Conviction from Sections 454 and 380 To Section 411

Where the recovery of stolen property was made at the instance of the accused 3 months after the alleged theft was committed, but there was no evidence on record that the accused was seen near the house of the complainant on the day of the theft, the conviction of the accused was altered from ss 454 and 380, IPC, taking recourse to illust (a) of s 114 of the Indian Evidence Act .[88]

26. Alteration of Conviction from Section 457 to Section 380

Commentary under the headings under s 457, *post*, may be referred to.3311

30 *Vide*Tamil Nadu Act 28 of 1993, s 2 (wef 13-7-1993).

31 *Empress v Nga Pan E* (1872-1892) LBR 367; *Gopal Chauhan v Satya* 1979 Cr LJ 446 ; *Shriram v Thakurdas* 1978 Cr LJ 715 ; 1977 Mah LJ 581 .

32 Re *Kashinath Bhaushet*(1871) Unrep Cr C 56.

33 *Bhagwana v Emperor* 19 Cr LJ 609 .

34 *Sterling Holiday Resort India Ltd v Murli Khemchand* 2014 (1) AIC 576 (Mad) .

35 *Prafulla Saikia v State of Assam* 2012 (115) AIC 828 (Gauh) .

36 *Bablu v State of MP* 2009 Cr LJ 1856 (MP), ILR [2001] MP 644.

37 *Tandi Ram v Crown* 1876 PR 14 .

38 *Walimahomed v Emperor* AIR 1929 Sind 17 ((2)), 29 Cr LJ 875 .

39 *Lakshmana Koundan v Emperor* AIR 1927 Mad 343, 28 Cr LJ 248 ; *Sucha Singh v Emperor* 57 PR 1887 .

40 1 Weir 433 (1).

41 *Satho Tanti v State of Bihar* 1973 BLJR 572, 573 .

42 *Walimahomed v Emperor* AIR 1929 Sind 17 ((2)), 29 Cr LJ 875 ; *Shera v Crown* 35 PR 1879 .

43 Re *Surja*(1882) 2 AWN 224.

44 *Dad v Crown* 10 PR 1879 .

45 1 Weir 435 (2).

46 *Jabar v Emperor* 1881 PR 1 ; Re *Ghulam Jelani*1889 PR 16: *Sheonandan v Emperor* AIR 1915 All 385, 16 Cr LJ 791 .

47 1 Weir 436 (2).

48 1 Weir 436 (2).

49 *Emperor v Ali Husain* (1901) ILR 23 All 306, 21 AWN 103 .

50 *Empress v Sheik Saheb* (1886) Unrep Cr C 293 .

51 *Soukhi Chand v Emperor* AIR 1918 Pat 314, 19 Cr LJ 884 .

52 *State v Nihal Singh,* (1971) 73 PLR 440, 441 .

53 *Empress v Bawool Manjee* 8 WR (Cr) 32 ; Re *Kurman Musalaiya* 1 Weir 436 (3).

54 *R v Roger* 1 Leach 89, 2 East PC 506 .

55 1 Hale 522, 1 Hawk c 38.

56 *Russell on Crimes*, eleventh edn.

57 Re *Surja*(1882) 2 AWN 224.

58 *Doma Sah v State of Bihar* AIR 1975 Pat LJR 411 .

59 *Suresh Chandra Srivastawa v State* 1980 Cr LJ 155, p 161 (UP) .

60 *Dhruva Charan Sahu v State of Orissa* (1989) 2 Crimes 607 (Ori) .

61 *Ayyappan v State of Kerala* 2005 Cr LJ 57(Ker).

62 *Pradeep Dutta Bhowmik v State of Tripura* 2004 Cr LJ 1697 (Gau) .

63 *Sukh Das v Union Territory of Arunachal Pradesh* AIR 1986 SC 991, 1986 Cr LJ 1084 ; *Anand Bardewa v State of Sikkim* 1999 Cr LJ 1804 (Sikkim) .

64 *Ibid*.

65 *NC Singhal (Dr) v State* 1998 Cr LJ 3568 (Del) .

66 *Rabi Kumar Agarwal v State of West Bengal* 2003 Cr LJ 1342 (Cal) .

67 *Boddepalli Lakshminarayana v Suvvari Sonyasi Apparao* AIR 1959 AP 530, 1959 Cr LJ 1141 overruled in AIR 1962 SC 586 (ingredients are however, correctly stated); *Prabha Saxena v Jagdish Prasad (*1980) 5 Raj Cr Cas 327, p 332; *Sterling Holiday Resort (India) Ltd v Murli Khemchand* 2014 (137) AIC 576 (Mad) ; *Prafulla Sakia v State of Assam* 2012 (115) AIC 828 (Gauh) .

68 *Samrath Singh v State of Madhya Pradesh* 1980 Cr LR 21, p 23 (MP), 1979 MPLJ 200, p 202 ; *Harihar Rout v State* (1978) 45 Cut LT 124, p 127-28, 1978 Cut LR (Cr) 129 ; *KE Lokesha v State of Karnataka* 2012 Cr LJ 2120 (Kant) (Accused A2 was entitled to benefit of doubt, and acquitted of the charges under ss 380 and 454, IPC).

69 *Prashada v State of Rajasthan* 1979 Raj Cr Cas 122, p 126 .

70 *Kailash Chandra v State of Madhya Pradesh* 1984 Cr LR 248 (MP) ; *Chhotia v State of Rajasthan* 1984 Cr LR 587 (Raj) .

71 *KE Lokesha v State of Karnataka* 2012 Cr LJ 2120 (Kar) .

72 *Azeez v State of Kerala* (2013) 2 SCC 184, p 187, 2013 (1) Scale 710, 2013 (1) Supreme 529, 2013 (1) SLT 612, 2013 (1) SCC (Cr) 910, 2013 (1) Crimes 211 (SC) .

73 *KE Lokesha v State of Karnataka* 2012 Cr LJ 2120 (Kant) .

74 *State v Sukh* 1989 Cr LJ 2401 (Ker) .

75 *State of Himachal Pradesh v Ishwar Dass* 1999 Cr LJ 3931 (HP) .

76 *State of Himachal Pradesh v Ishwar Dass* 1999 Cr LJ 3931 (HP) .

77 *KE Lokesha v State of Karnataka* 2012 Cr LJ 2120 (Kant) .

78 *State v Munilal* 1965 BLJR 555 .

79 *State of Sikkim v Tek Bahadur Tamang* 2001 Cr LJ 4617 (Sikkim) (DB) .

80 *Nikhi v Republic of India* 2006 Cr LJ 3074 (Ori) .

81 *Mukta Mani v State of Uttar Pradesh* (1996) 2 Crimes 552, (1996) 2 CCR 179 (All) .

82 *Kalu Ram Parma Viand v State* AIR 1967 Del 63, 1967 Cr LJ 1294 (Del) .

83 *KE Lokesha v State of Karnataka* 2012 Cr LJ 2120 (Kant) .

84 *Harihar Rout v State of Orissa* (1978) 45 Cut LT 124, p 128, 1978 Cut LR (Cr) 129 ; *Sardara v State of Rajasthan* (1984) 2 Crimes 656 (Raj) .

85 *Nazir v State* 2002 Cr LJ 4742 (Ker) .

86 *Balusingh v State of Madhya Pradesh* 1981 Cr LR (MP High Court Notes) 10, p 11 (DB).

87 *Sheodeni Singh v State of Bihar,* AIR 1961 Pat 362, (1961) 2 Cr LJ 364 .

88 *Karani Singh v State of Rajasthan* 1999 Cr LJ 1791 (Raj) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF THEFT

S. 381.

Theft by clerk or servant of property in possession of master.--

Whoever, being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

Possession of a clerk or that of a servant being the possession of his master or employer (s 27, IPC), theft (s 381, IPC) and breach of trust (s 408, IPC), *etc*, have been treated as the more aggravated forms of the offence because the very position of a clerk or of a servant, which involves the placing of confidence in him by his master or employer, give him ample opportunities to handle his (master's or employer's) property on account of which particular importance is attached to it. The distinction between an offence by a clerk or a servant under s 381 and one under s 408, IPC, is that under the former section, the property is taken out of the possession of the owner, by the clerk or servant, having, at the time of taking, a mere custody thereof, whereas under the latter section, the property is converted by the offender when it is in

his possession and before that possession is changed into mere custody by the property passing into the possession of the master. The main distinguishing feature is the nature of the possession of the property by a clerk or a servant. Where the possession of the master continues inspite of its physical possession by the clerk or servant, the offence would be under s 381, but if the clerk or servant, when he himself is in legal possession of the property in the nature of a trust, converts the property to his use or dishonestly uses and disposes it of, the offence would be one under s 408, IPC . Thus, if a clerk first reduces some property into his master's possession as by putting a bank-note into the master's till or cash box,[89] or by putting the goods in the master's cart,[90] and then takes it out *animo furandi*, he is guilty of theft; but if he dishonestly misappropriates it before putting it into his master's possession, he commits breach of trust.

2. 'Clerk or Servant'

A man may be a clerk or servant though:

(a) he was appointed or elected to the employment, in respect of which he is a clerk or servant, by some person, other than the master, whose orders he is bound to obey;
(b) he is paid for his services by a commission or a share in the profits of a business;
(c) he is a director of the company which he serves;
(d) he is a clerk or servant of more masters than one, *eg*, the clerk or servant of a firm is the servant of several partners, and therefore, of each of them;
(e) he acts as a clerk or servant only occasionally, or only on the particular occasion, on which the offence is committed.3312

An unpaid apprentice is a clerk or servant within the meaning of this section,[91] but not a hired boatman.[92] Where a *mamlatdar* left a file with his correspondence clerk, but the accused, another clerk of the same office, removed the file, without the *mamlatdar*'s consent, to show it to the *vakil* of his co-accused, it was held that it constituted as theft by a clerk within the meaning of this section.[93] Where the accused were charged with having stolen a sum of money, shut up in a box and placed in the police treasury buildings, over which they, as *burkandauzes*, were placed in guard, it was held that the case fell under this section as it was theft by a servant in possession of the property.[94]

It is immaterial whether the man is employed by one or by more than one master at the same time.[95] A clerk or a servant is a person bound, either by express contract of service or by conduct implying such a contract, to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such clerk or servant to transact.[96]

Section 381, IPC deals with the offence theft by a servant of the property in the possession of the master. Where the property was not in the possession of the master, the money was entrusted to the servant accused, and he misappropriated the same, the conviction of the accused under s 381, IPC, was held not sustainable.[97]

3. Procedure

The offence under this section is cognizable, non-bailable, compoundable, with the permission of the court before which prosecution of such offence is pending, by the owner of the stolen property, where its value does not exceed Rs 250, and triable by a magistrate. It is also triable summarily where the value of the property stolen does not exceed two hundred rupees in value.

4. Charge

The following form of the charge may be adopted:

I (*name and office of Magistrate, etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the. day of., at you committed theft of certain property, to wit..(*specify the property*), form the possession of AB, of whom you were (or by whom you were being employed in the capacity of) a clerk/servant, and thereby committed an offence, punishable under s 381 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

5. Proof

In order to secure conviction under this section the prosecution has to prove that:

(a) the accused committed theft (for which all the ingredients of theft required for an offence under s 378, IPC, must be proved);3313
(b) at the time, when the theft was committed, the accused was a clerk or servant or was being employed in the capacity of a clerk or servant; and
(c) the theft was committed by him in respect of the property of his master or employer.

Mere suspicion alone against the accused-domestic servants is not sufficient to point towards the guilt of the accused persons. The case against the accused has to be proved to the hilt and beyond all reasonable doubt.[1] The recovery of stolen property by the police at the instance of the accused-servant may not be sufficient to convict him for the offence of murder of his deceased master under s 302, IPC, but the same would bring home the guilt of the accused under s 381, IPC .[2]

6. Sentence

Sentence of imprisonment is mandatory under this section and the accused 'shall also be liable to fine', meaning thereby that fine cannot be substituted in lieu of imprisonment though it may be added to imprisonment.[3] The court may impose fine in appropriate cases in addition to imprisonment which alone is obligatory.[4] The word 'liable' means a future possibility or probability, the happening of which may or may not actually occur. In other words, the magistrate has the power to impose the sentence of fine, but it is discretionary.[5]

The appellate court can interfere if the sentence is inadequate.[6] Circumstances of any particular case may justify the reduction of a sentence as when the entire property, alleged to have been stolen, is recovered and the accused is a low paid servant whose wife is found to be pregnant when he committed the theft.[7]

89 *R v Grove* (1835) 7 C&P 635, p 637 .

90 *R v Hayward* (1844) 1 C&K 518 ; *R v Reed* (1854) 6 Cox 284 .

91 *Sohan Lal v Emperor* 3 Cr LJ 70, 6 PLR 556 .

92 *Empress v Bawool Manjee* 8 WR (Cr) 32 .

93 *Vallabhram Ganpatram v Emperor* AIR 1926 Bom 124, 27 Cr LJ 689 .

94 *Empress v Juggurnath Singh* 2 WR (Cr) 55 ; 1 Weir 437 ; *Empress v Boidnath Singh* 3 WR (Cr) 29 .

95 *R v Leech* (1821) 3 Stark NPC 70 ; *R v Carr* 1811 R & R 198; *R v Butty* (1842) 2 Mood 257 .

96 *Stroud's Judicial Dictionary,* vol 1, second edn, p 324.

97 *Vijay Kumar v State of Rajasthan,* 2012 Cr LJ 2790 (2796) (Raj) .

1 *Radhey Shyam v State of Uttar Pradesh* 2002 Cr LJ 1227 (All) (DB) .

2 *Slim Babamiya Sutar alias Jamadar v State of Maharashtra* 2000 Cr LJ 2696 (Bom) (DB) .

3 *Sheikh Dulloo v Zainab Bibi* 16 WR (Cr) 17 .

4 *Tetar Gope v Ganauri Gope* AIR 1968 Pat 287 .

5 *State v Amru Tulsi Ram* AIR 1957 Punj 55, 1957 Cr LJ 389 .

6 *Krishanlal v State* 1959 MFC 441, 1959 MPLJ 800 (domestic servant committing theft of ornaments of ten thousand rupees).

7 *Jayantilal Purshottamdas Patel v State of Gujarat* 1975 Cr LJ 1345, p 1346, (1975) 16 Guj LR 253 (the substantive sentence of one month coupled with a fine of Rs 200 was reduced only to a token fine of rupee one only).

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF THEFT

S. 382.

Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft.--

Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations

(a) A commits theft on property in *Z's* possession; and, while committing this theft, he has a loaded pistol under his garment, having provided this pistol for the purpose of hurting *Z* in case *Z* should resist. A has committed the offence defined in this section.3314

(b) A picks *Z's* pocket, having posted several of his companions near him, in order that they may restrain Z, if *Z* should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

Comments

1. Scope

The section provides for an even more aggravated form of the offence of theft. That which renders the theft an aggravated offence in this section, is when the thief has made preparation for causing:

(i) death, *i.e.*, death of a human being (s 46), or
(ii) hurt [ss 319 and 11(a)] or,
(iii) restraint [ss 340 and 11(b)], or
(iv) the fear of one or the other in order to show the commission of theft for his escape or the safety of the property after the theft.

An accused cannot be convicted under this section, unless there is proof of actual theft for which he was present at the scene of occurrence.[8]

2. Offence under Section 382 Distinguished from Robbery

When the offender makes preparation for causing death, *etc*, in the event of any resistance during the commission of theft, it would be an offence under this section. The guilty preparation is the essence of this offence. If, however, hurt is attempted or actually inflicted, the theft would amount to robbery.[9] If one, keeps a knife with him and commits theft, he may be liable for conviction for the offence under this section even though there was no occasion for him to wield the knife or cause injury. What is relevant is preparedness of the accused in such a manner that he may be able to cause hurt, *etc*, to others who might resist or may come in his way while escaping or taking the stolen property away.[10]

3. 'Preparation for Causing Death' *etc*

The possession by a thief at the time of his committing a theft, of a knife or other weapon which, if used (on a human being), might cause death, or hurt, *etc*, would not, by itself, justify the conviction under this section. There must be something to show, or from which it may properly be inferred, that the offender made a preparation for causing one or more of the result mentioned in this section.[11]3315

4. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

A complainant under this section cannot be legally dismissed in default of the complainant after a date has been fixed for evidence and the case has reached the stage contemplated by ss 243, 246 and 247, CrPC 1973.[12]

5. Anticipatory Bail

When the name of one of the accused was mentioned in the FIR but no role was attributed to him, the accused was found entitled to be granted concession of anticipatory bail which was granted to him, subject to the following conditions:

(a) in the event of his arrest, the accused shall be released on bail subject to the satisfaction of the arresting officer;

(b) he shall not tamper with the evidence of the prosecution in any way;
(c) he shall not leave the jurisdiction of the concerned court of competent jurisdiction without prior permission;
(d) this order of anticipatory bail shall remain operative for a period of 60 days from the date of order.[13]

6. Charge

The following form of the charge may be adopted:

I (*name and office of Magistrate,etc*) hereby charge you (*name of accused person*) as follows:

That you, on or about the..day of at committed theft of.. (*specify the property*) from the possession of AB, after having made preparation for causing death (*or hurt or restraint or fear of it*) (specify the nature of the injury) by.. (*specify the nature of the preparation*) in order to the committing of the said theft (*or in order to the effecting of your escape after committing the theft*) (*or in order to the retaining of property taken by the said theft*), and thereby committed an offence, punishable under s 382 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

7. Proof

To establish a charge under this section, the prosecution must prove that:

(a) the accused committed theft as defined in s 378, IPC ;
(b) the accused committed theft having made preparation for causing death, hurt, restraint or fear of death, hurt or restraint; and
(c) he did so:

(i) in order to the committing of theft, or
(ii) to effect his escape, or3316
(iii) to retain property taken by such theft.

If the prosecution fails to prove *mens rea* as contemplated in s 378 against the accused, the proceeding under s 382, IPC, must fail.[14]

8. Probation

The object of probation is three-fold. Firstly, many offenders are not dangerous criminals but are weak characters who have surrendered to temptation or, through misfortune have been brought within the

operations of the police and the courts. Secondly, in assigning this type of offender to the care of a probation officer, the court encourages his own sense of responsibility for his future and saves him from the stigma and possible contamination of prison. Thirdly, such a practice not only assists the offender, but also result in economy by relieving the prisons of a large number of first offenders, short-term prisoners and other classes of quasi-criminal offenders. The basic idea underlying a sentence of probation is very simple. Sentencing is in the large part concerned with avoiding future crimes by helping the defendant learn to live productively in the community. Probation proceeds on the theory that the best way to pursue this goal is to orient the criminal sanction towards the community setting in those cases where it is compatible with the other objectives of sentencing. The odds are that a given defendant will learn how to live successfully in the general community if he is dealt with in that community rather than being shipped off to an artificial and typical environment of an institution of confinement.[15]

The accused snatched a scooter by threatening with a dagger. The accused was a young man of 30 years of age having four children besides his wife, he did not have landed property or any other source of income and was a street hawker. Undisputedly, he was not a previous convict and had no past criminal record. On these facts his sentence of imprisonment imposed by the trial court was set aside and the accused was given the benefit of probation.[16]

9. Sentence

Where the accused persons have gone through lot of mental and financial strain during prolonged proceedings lasting 11 years and remained in jail for 6 months, the sentence of 3 years rigorous imprisonment awarded was reduced to the period already undergone and a fine of Rs 1000 each was also imposed in default of which they were to further undergo rigorous imprisonment for 6 months.[17]

10. Alteration of Conviction from Section 382 to Section 411

Where the accused were arrested after about 4 months from the date of the alleged theft, and stolen ornaments were recovered from them, no test identification parade of the accused was held, the conviction of the accused person under s 382 was set aside and instead they were convicted under s 411, IPC .[18]3317

8 *Lal Singh v Emperor* AIR 1923 Lah 512, 25 Cr LJ 386(2) .

9 *R v Hushrnt Sheikh* 6 WR (Cr) 85 ; Re *Diwan Singh*1980 Cr LJ 760, p 761 (MP), 1980 Cr LR (MP) 77, p 79.

10 Re *Diwan Singh*1980 Cr LJ 760, p 761 (MP), 1980 Cr LR 77, p 79 (MP).

11 *Nga Shan Gale v Crown* 1 Cr LJ 378 ; *Nga Shwe Brau v King* AIR 1937 Rang 542 ; however for a **contrary** view, refer to Re *Diwan Singh*1980 Cr LJ 760, p 761 (MP), 1980 Cr LR (MP) 77, pp 78-79.

12 *Lalji Singh v State* 1971 All Cr R 392, p 393 .

13 *Sanjeev Attri v State of Haryana* (1999) 2 RCR (Cri) 604 (P&H).

14 *Parmeshwar Singh v State* 1977 Cr Cas 185, p 187 (UP) .

15 *Satto State of Uttar Pradesh*AIR 1979 SC 1519 ; *Shiv Kumar v State of Punjab* (1996) 1 RCR 141 (P&H) .

16 *Shiv Kumar v State of Punjab* (1996) 1 RCR 141 (P&H) .

17 *Mohan Manjhi v State of Bihar* 2000 Cr LJ 4482 (Pat) .

18 *Ashok Kumar v State of Union Territory of Chandigarh* (1997) 3 RCR 342 (P&H) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF EXTORTION

S. 383.

Extortion.--

Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion".

Illustrations

(a) *A* threatens to publish a defamatory libel concerning *Z* unless *Z* gives him money. He thus induces *Z* to give him money. *A* has committed extortion.
(b) *A* threatens *Z* that he will keep *Z's* child in wrongful confinement, unless *Z* will sign and deliver to *A,* a promissory note binding *Z* to pay certain monies to *A*. *Z* signs and delivers the note. A has committed extortion.
(c) *A* threatens to send club-men to plough up *Z's* field unless *Z* will sign and deliver to B a bond binding *Z* under a penalty to deliver certain produce to *B* and thereby induces *Z* to sign and deliver the bond. *A* has committed extortion.
(d) *A*, by putting *Z* in fear of grievous hurt, dishonestly induces *Z* to sign or affix his seal to a blank paper and deliver it to *A*. *Z* signs and delivers the paper to *A*. Here, as the paper so signed may be converted into a valuable security. *A* has committed extortion.

Comments

1. Scope

If a person voluntarily delivers any property without there being any fear of injury, an extortion cannot be said to have been committed. Even the illustrations under s 383 of IPC would reveal that the delivery must be pursuant to threat of injury to reputation; to the body or to the body of another person. If someone forces another person to deliver some property, without there being an element of dishonest intention to cause injury or the feeling of fear of injury in the deliverer, an offence of extortion cannot be made out.[19] In contrast to theft, in extortion there is an element of consent, obtained by putting the victim in fear of injury. In extortion, the will of the victim has to be overpowered by putting him in fear of injury. Forcibly taking any property will not come under this definition. It has to be shown that the person was induced to part with the property by putting him in fear of injury. The illustrations to the section given in the IPC make this perfectly clear.[20]3318

The recovery of money from the house of the accused A6 and A7 was proved, but there was no evidence to show that the said amount was paid as ransom to the accused. The two accused A6 and A7 were also not involved in his confessional statement by the co-accused. Acquittal of the accused A6 and A7 for offences under ss 362 and 383, IPC was held proper.[21]

2. Law of Canada

It is an indictable offence to commit extortion. An accused commits extortion when he or she induces or attempts to induce any person by threats, accusations, menaces or violence to do anything or cause anything to be done without reasonable justification or excuse and with intent to obtain anything. It does not matter whether or not the person threatened, accused or menaced or to whom violence is shown is the person induced or threatened to be induced. A threat to institute civil proceedings is not a threat for the purposes of this section.

Nature of Offence

The threat need not be one for the accused to do anything personally. 'Attempt to obtain' is specifically made a mode of the full offence of extortion. The conviction should thus be for the full offence and not merely attempted extortion even if the target does not capitulate. Extortion contrary to s 346 of the Criminal Code can be made out by 'veiled' threats. The accused's conduct must be viewed in the context of his entire course of behaviour.

Example Situations

Sexual favours can be the 'anything' sought to be extorted. A request by the accused lawyer for security, suspected of theft and receiving stolen goods, consequently the lawyer representing the company for $10,000 to avoid bad publicity did not constitute extortion absent a threat, accusation, menace or violence.

Double Jeopardy

The Kienapple principle bars convictions for both extortion and robbery (s 344) arising from the same factual and legal nexus. Where accused was guilty of 2 counts: (1) sexual assault, and (2) making threats that induced the complainant to engage in sexual intercourse and fellatio (extortion), then the sexual assault conviction was stayed in accordance with Kienapple.

In *R v Gigliotti* ,[22] it was observed that 'The elements of extortion are included in the sexual assault offence, and the elements of sexual assault are included in the extortion offence. Therefore, in this way, I find that the elements of extortion are substantially the same as the elements of sexual assault in the present case. I find that there is a sufficient legal nexus between the two counts. The two counts refer to the same matter, cause, or delict.'[23]3319

2. Ingredients

The following ingredients would constitute the offence of extortion:

(i) The accused must put any person in fear of injury to that person or any other person.
(ii) The putting of a person in such fear must be intentional.
(iii) The accused must thereby induce the person so put in fear to deliver to any person any property, valuable security or anything signed or sealed which may be converted into a valuable security.
(iv) Such inducement must be done dishonestly.[24]

3. Cheating Distinguished from Extortion

Commentary under the same heading under s 415, *post*, may be referred to.

4. Criminal Intimidation--Distinguished from Extortion

Commentary under the same heading under s 503, *post*, may be referred to.

5. 'Whoever'

It is not necessary that the person, who threatens, should himself receive the property. It may be a matter of arrangement between several persons, who conspire, and threat is used by some and the property is received by others. They will all be guilty of extortion.[25]

6. 'Puts any Person in Fear'

The main feature of the offence of extortion, which distinguishes it from cheating, theft, *etc.*, by which the property is dishonestly obtained, is the intimidation by which the person extorts property from another. The kind of fear which will bring a case within the definition of this section, must be of a nature to operate on a man of reasonably sound, or ordinarily firm mind.[26]Where money was obtained by the accused by giving false representation to the effect that they held a warrant, signed by the magistrate, authorising them to make a distress upon the goods of the prosecutor for arrears of rent, it was held that if a man is induced to part with property through fear or alarm, he is no longer acting as a free agent if the threatened violence, whether to person or property, is of a character to produce, in a reasonable mind, some degree of alarm of fear. The essential factor is that it should be of a nature and extent to unsettle the mind of the person, on whom it operates, and take away, from his act, that element of free and voluntary action which alone constitutes consent.[27] The element of extortion was held to be lacking in a case where some persuasion to the members of the governing body of an institution, who were hard run were made to obtain an order to the effect that the earlier order of suspension of the head of the institution be rescinded.[28]3320

Merely because the accused was the chief minister at the relevant time and the sugar co-operative society had some of its grievances pending consideration before the government, and pressure was brought about to make the donations promising consideration of such grievances possibly by way of reciprocity, it could not be said that the ingredients of the offence of extortion had been made out.[29] The accused were charged with the offence of conspiracy to extort money under fear of injury. The material witness died before commencement of investigation. The prosecution failed to conduct an identification parade. In the absence of evidence, either oral or documentary or circumstantial, to conclude that the accused entered into a criminal conspiracy to commit the alleged offences, the acquittal of the accused recorded by the High Court cannot be interfered with under art 136 of the Constitution by the Supreme Court.[30]

7. 'Injury'

'Injury', as is defined in s 44, IPC, is not confined to physical injury.[31] Injury for purposes of this section and s 385 may take any of the forms of harm to a person's body, mind, reputation or property, caused illegally. So long as there is nothing illegal about the act of the person obtaining property, the offence would not be one of extortion. Where a junior *vakil*, in the absence of his senior, who had instructed him to simply apply for adjournment, took advantage of the occasion and obtained a bond for thirty rupees for conducting the case, it was held that the threat was only the non-rendering of service as a *vakil*, and this act, being clearly not an offence and not forbidden by law, did not amount to extortion.[32] Where the owners of trespassing cattle paid a penalty to a private person under the influence of threat that the cattle would be impounded if the payment was refused, it was held that the charges were paid under a threat of what was a lawful proceeding and the offence of extortion was not made out.[33] A *nikah khawan* is not bound to read the *nikah* for a person unless he chooses to do so. He might demand any fee that he likes. There is no law forbidding him to do so and the case does not fall under this section by his refusal to read the *nikah*.[34] Where possession of the property (bullocks) is taken peacefully without the use of any force or threat, and without resistance and objection to the taking possession of the property, there would be no offence of extortion even if the accused obtains the signature of the owner upon a receipt showing that they were sold to the accused by threatening the owner. The offence of extortion might, however, be said to have been committed in obtaining the signature upon the receipt.[35]

8. Harm to a Person's Body

A sub-inspector of police arrested one *J*, wrongfully confined him and extorted money from him under a threat that he would not be released unless the money was paid. The money was obtained from a moneylender. It was held that the money was3321 not voluntarily given and the accused was guilty of an offence under this section.[36] Where a *chowkidar* charged the complainant with theft, tied him with a turban and took him towards the police station and on the way the complainant was released on payment of rupees fifty demanded for his release, it was held that the action of the accused amounted to wrongful restraint, and the threat to take the complainant to the police station amounted to extortion.[37]

9. Harm to a Person's Mind

The terror of a criminal charge, whether true of false, amounts to a fear of injury. Though to threaten to use the process of law is lawful, to do so for the purpose of enforcement of payment of money not legally due, is unlawful and such a threat, made with such an object, is a threat of injury sufficient to constitute the offence of extortion. Thus, where the accused, a village headman, who found certain persons, setting cocks to fight near a public road, threatened them with prosecution and subsequently took money as a consideration for not prosecuting them, it was held that the accused was guilty under s 384, IPC .[38] Extortion may be equally committed whether the charge threatened is true or false.[39] Where the accused whose goat had been injured by the complainant, demanded a sum in excess of its value by threatening to prosecute her and succeeded in obtaining payment of that amount, it was held that the offence was one of extortion.[40]

10. Harm to a Person's Reputation

Harm to reputation is covered by the term 'injury'. Threat of harm to the reputation of a person is, and can be, an easy means of extortion. Where a *mukhtar*, engaged for the accused, threatened the complainant to put irrelevant, scandalous and indecent questions about him to the ladies of his house unless some money was paid to him, it was held that the *mukhtar* was guilty of extortion.[41]

11. Harm to a Person's Property

Whether the *gumashta* of a toll contractor illegally levied toll on carts preventing them from passing through the toll-gate unless the toll demanded was paid, he was held guilty of an offence under this section.[42] The making use of real or supposed influence to obtain money from a person against his will under threat, in case of refusal of the loss of appointment is extortion.[43] Where the complainant, who sold foreign cloth, was asked to pay five percent of the value of the stock and was threatened that pickets would be put if he refused to stop the sale, it was held that the accused committed extortion.[44]3322

12. 'Dishonestly'

It is not only sufficient that there should be wrongful loss, caused to one individual, but the person, putting that individual in fear of injury, must also have the intention that wrongful loss should be so caused. If the accused honestly believes that he has taken money, belonging to him, the attempt to get it back cannot be said to be with the intention of causing wrongful loss.[45] It is no offence to put a person in fear of injury unless it is done with criminal intention. If the object is merely to realise debts, which are admittedly due, the offence would not be extortion as 'dishonestly' would not be established.[46] To constitute the offence of extortion under s 383, IPC, a person must intentionally have put another person in fear of an injury and that by so doing he must have dishonestly induced the person so put to fear to deliver to any person any property or valuable security. If allegations in the complaint do not make out these ingredients, the conviction cannot be sustained.[47] Where the accused forcibly removed certain property from the possession of the complainant, claiming that it belonged to him, and placed it with a shopkeeper and there was a certain amount of evidence in support of the claim, it was held that the accused had no dishonest intention and was not guilty of the offence under s 384 .[48]

13. 'Induceto Deliverany Property'

One of the necessary ingredients of the offence of extortion is that the victim must be induced to deliver to any person any property or valuable security *etc*. That is to say, the delivery of the property must be with consent which has been obtained by putting the person in fear of any injury.[49]

There can be no extortion unless a person is, by a threat of injury, induced to deliver any property to the culprit.[50] The fear must be the inducement for delivery.[51] Where the thumb impression of the victims were forcibly taken from them on blank pieces of papers, which could subsequently be converted into valuable securities, it was held that this did not necessarily involve inducing the victim to deliver papers with their thumb impressions and the offence was not of extortion; it was no more than the use of criminal force.[52]

The snatching of the revolver by the accused from the complainant could not amount to extortion as there was no inducement to the complainant to part with the revolver.[53]

The persuasion to the members of the governing body to obtain an order to the effect that the earlier order of suspension was illegal and should be rescinded, and that persuasion might even at times have been hard-run, but the element of extortion which is necessary for the purpose of establishing a charge under s 384, IPC, was found lacking.[54]3323

14. Property

The word 'property' as used in the definition of extortion in s 383, IPC, is not defined. Property, therefore, can be understood in a wide sense. The letters got written from the victim while in confinement to his parents to fulfil the demands of the abductors would constitute property in the hand of the abductors.[55]

The word 'property' occurring in ss 327 and 383, IPC, must be taken to mean both movable and immovable property, and not movable property only.[56]

15. 'Valuable Security'

The offence of extortion under s 383 must be in relation to any property or valuable security or anything signed or sealed which may be converted into a valuable security. A blank promissory note and blank receipt, with forged signatures of the executant and a stamp of one anna at the top without specification of any details, would nevertheless be valuable securities within the meaning of s 30, IPC .[57] However, a document alleged to have been written by the complainant does not create any legal right, and it cannot be termed as a valuable security.[58]

Even an illegal order of the governing body of the college rendering an earlier order of suspension of the principal of a college to be *non est* continues to be valuable security.[59]

A promissory note, which a minor is forced to execute, is a valuable security.[60] Where the accused obtains illegally, from the complainant, a deed of relinquishment in respect of the complainant's property by threats, the offence would fall under s 383, IPC, even though the deed is unregistered as that would be a valuable security for the purpose of this section.[61]

16. Abetment to Extortion

The mere fact that the offence of extortion under s 384 is committed in the presence of the village *chowkidar* without eliciting any disapproval on his part, will not render him liable as an abettor to the offence.[62] The mere presence of a person on the occasion of giving a bribe and his omission to promptly inform the authorities does not constitute him as an accomplice, unless it can be shown that he somehow cooperated in the payment of the bribe or was instrumental in negotiating for the payment.[63] A constable, accompanied by civic guards, demanded a cash memo from a person, carrying a kerosene tin, and, after going some distance, demanded some money and then let that person go when the money was paid and the constable tore up the cash memo without protest from the civic guard, it was held that the civic3324 guard also considerably aided in giving force to the demand of the constable and abetted extortion.

19 *Lanka Hanumantha Rao v State of Andhra Pradesh* 2005 Cr LJ 4327 (AP) .

20 *Most Indrasana Kuer v Siya Ram Pandey* 1970 Cr LJ 647 (Pat) .

21 *Abdulvahab Abdul Majid Shaikh v State of Gujarat* 2007 Cr LJ 3529, p 3533, 3534 (SC), AIR 2007 SC 2492 .

22 *R v Gigliotti* (2012) O.J. No. 1066.

23 *Vide Halsbury's Law of Canada*.

24 *Dhananjay v State of Bihar* 2007 Cr LJ 1440 (SC) .

25 *Reg v Shankar Bhagvat* (1866) 2 BHCR 394 (Cr) .

26 *R v Tomlinson* (1885) 1 QB 706, p 710 .

27 *R v Walton* (1863) L & C 288, 9 Cox 268 **approved** in *R v Boyle* (1914) 3 KB 339 .

28 *Ram Kamal Bezboruah v Chandra Nath Kalita* 1971 Cr LJ 708 .

29 *RS Nayak v AR Antulay* AIR 1986 SC 2045, 1986 Cr LJ 1922 .

30 *State of Uttar Pradesh v Pheru Singh* AIR 1989 SC 1205, 1989 Cr LJ 1135 .

31 *Habib Khan v State* AIR 1952 Pat 379, 1952 Cr LJ 1391 .

32 1 Weir 438 (1); *Habibul Razzaq v Emperor* AIR 1924 All 197, 25 Cr LJ 961 .

33 1 Weir 438 (2); Re *Pethiredia Virappa* 1 Weir 440.

34 *Nizam Din v Crown* AIR 1924 Lah 162, 24 Cr LJ 958 ; *Laxmi Dhar v Rex* AIR 1951 Ajmer 64 ((2)), 52 Cr LJ 873 ; *Tanumal v Emperor* AIR 1944 Sind 203 ; Re *Doraswami Iyer*AIR 1925 Mad 480, 26 Cr LJ 755 ; Re *Mantri Pragada*AIR 1919 Mad 959, 19 Cr LJ 445 .

35 *Mangal Singh v Rex* AIR 1949 All 599, 50 Cr LJ 923 .

36 *Akhoy Kumar v Jagatchunder* (1900) ILR 27 Cal 925 ; *Jagdish Narain v Emperor* AIR 1942 Oudh 163, 43 Cr LJ 139 .

37 *Habib Khan v State* AIR 1952 Pat 379, 53 Cr LJ 1391 .

38 *Emperor v Nga Kan Tha* 14 Cr LJ 413 .

39 *Empress v Mabarruk* 7 WR (Cr) 28 ; *R v Cracknell* (1886) 10 Cox 408 ; *R v Richards* (1886) 11 Cox 43 .

40 Re *B Appalasami*(1892) 1 Weir 441.

41 *Emperor v Fazlur Rahman* AIR 1930 Pat 593, 32 Cr LJ 87 .

42 Re *B Appalasami*(1892) 1 Weir 441.

43 *Meer Abbbas Ali v Omed Ali* 18 WR (Cr) 17 ; *Shamumal v RA Gordon* AIR 1936 Sind 29, 37 Cr LJ 457 .

44 *Chaturbhuj v Emperor* AIR 1922 All 529, 20 ALJ 877 ; *Local Government v Hanmant Rao* AIR 1924 Nag 19, 25 Cr LJ 60 .

45 Re *Ganeshnal Suit*AIR 1948 Mad 513, 50 Cr LJ 33 .

46 *Lal Chand v Emperor* AIR 1942 Lah 253, 43 Cr LJ 849 .

47 *Vijay Pal Singh v State* 1979 PLR 40 (Del) .

48 *Ujagar Singh v Emperor* 26 Cr LJ 794 ; Re *Pethireala Virappa* 1 Weir 440.

49 *Mast Indrayana Kuer v Siya Ram Pandey and Ors* 1970 Cr LJ 647 (Pat) .

50 *Mangal Singh v Rex* AIR 1949 All 599, 50 Cr LJ 923 ; *Labhshanker Keshavji v State* AIR 1955 Sau 42, 1955 Cr LJ 839 .

51 *R v Walton* 32 LJMC 79 .

52 *Jadunandan Singh v Emperor* AIR 1941 Pat 129, 42 Cr LJ 361 .

53 *State v Umesh Bhatia* 1985 RLR 153 (Del), (1985) 1 Crimes 1067 (Del) (DB).

54 *Ram Kamal Bazboruah v Chandra Nath Kalita* 1971 Cr LJ 708 (Assam) (DB) .

55 *Gulab Chand v State of Madhya Pradesh* 1982 Cr LJ 665 (MP) (FB), AIR 1982 NOC 151 .

56 *Hyderabad State v Beerappa* AIR 1951 Hyd 91 (FB), 1952 Cr LJ 912 (FB) .

57 *Jawahir Thakur v Emperor* 17 Cr LJ 203, (1916) ILR 38 All 430 ; *Batisa Singh v Emperor* AIR 1932 Pat 335, 34 Cr LJ 81 .

58 *J Senthil Kumar v State of Jharkhand* 2006 Cr LJ 4524 (Jhar) .

59 *Ram Kamal Bezboruah v Chandra Nath Kalila and Ors* 1971 Cr LJ 708 (Assam) (DB) .

60 *Ramnarain Sahu v Emperor* AIR 1933 Pat 601 ((1)), 35 Cr LJ 123 .

61 *Prem Narain v Nogeswar Dass* 5 DLR 49 (All) .

62 *Gopal Chunder v Foolmoni Bewa* (1882) ILR 8 Cal 728, 11 CLR 223 .

63 *Empress v Deo Dhar Singh* (1900) ILR 27 Cal 144 ; *Deonandan Pershad Singh v Emperor* (1906) ILR 33 Cal 649, 3 Cr LJ 452 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF EXTORTION

S. 384.

Punishment for extortion.--

Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope

This section prescribes punishment for the offence of completed extortion which is defined in the preceding section. Provision for a minor offence of attempted extortion and punishment, therefore, has been made in s 385, IPC .

Where the accused husband took his wife to the forest and obtained her ornaments under threat to kill, but the FIR indicated a slightly less serious situation, the accused is liable to be convicted under s 384 and not under ss 386 / 392, IPC .[64]

There was evidence that mob of 18-20 persons after coming to the dalan of the deceased forced them to handover their gun by show of force. An offence under s 384 was, therefore, clearly made out and with the aid of s 149, IPC, all the appellants were held guilty of that offence.[65]

2. Theft Distinguished from Extortion

Commentary under the same heading under s 378, *ante*, may be referred to.

3. Criminal Intimidation distinguished from Extortion

Commentary under the same heading under s 503, *post*, may be referred to.

4. Bail

The accused occupied the property of the complainant as a tenant and there was a history of litigation between them, extortion and criminal intimidation was caused by anonymous communication, and threats were extended from Dubai on telephone referring the name of the accused. Considering these facts and the gravity of the offences under ss 384, 357 / 120B / 34, IPC, the accused was not found entitled to the discretion of bail.[66]3325

5. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable,[67] and triable by a magistrate.

6. Compounding of Offence

It is true that having regard to the decision of the Supreme Court in *Bankat v State of Maharashtra* [68] that the courts would have no power to allow compromise of a prosecution when the same is not permissible in terms of s 320 of the Code of Criminal Procedure 1973 but relying upon *Badrilal v State of Madhya Pradesh* ,[69] where a joint petition of compromise has been filed on behalf of the parties in which prayer has been made for recording the compromise for the offence under s 307, IPC which is not a compoundable one but the sentence of imprisonment awarded against the accused by the trial court as reduced by the High Court was further reduced to the period already undergone, by the Supreme Court.

The appellate court held that there was absolutely no reason as to why the settlement arrived at by and between the parties could not have been accepted, as the same would not come within the purview of sub-s (9) of s 320 of the Code of Criminal Procedure . So, while quashing the charge framed under s 384 of the IPC, the Supreme Court directed the learned magistrate to proceed to consider the question in regard to the maintainability of the compromise petition between the parties in accordance with law.[70]

7. Withdrawal from Prosecution--Duty of the Prosecutor and the Court

The sole consideration for the public prosecutor when he decides to withdraw from a prosecution is the larger factor of the administration of justice, not political favour nor party pressure nor like concerns; however, the interests of public justice being of paramount consideration, may transcend and overflow the legal justice of the particular litigation.[71]

The public prosecutor is an officer of the court and, therefore, responsible to it. It shall be the duty of the court to apprise itself of the reasons which prompted the public prosecutor to withdraw from the prosecution. Both the court and the public prosecutor have a duty to protect the administration of criminal justice against possible abuse or misuse by the executive by resort to the provisions of s 321, CrPC . The independence of the judiciary requires that once the case has gone to the court, the court and its officers alone must have control over the case and decide what is to be done in each case.[72]

The reasons, *viz*, that the case under ss 147, 342, 365 and 384, IPC, is pending for the last about 11½ years, there are a total sixteen accused who have been regularly appearing and no witnesses have been examined and no useful purpose is served by3326 continuing the case anymore, would not be a reason

under s 321, CrPC, to permit withdrawal of the case.[73]

8. Jurisdiction

Section 179, Code of Criminal Procedure 1973, may be referred to.[74]

9. Quashing of Complaint

A complaint was filed alleging that accused no 1 was bringing pressure and threatening to kill the complainant if he did not vacate the premises which was in his lawful possession. Against accused no 2 it was alleged that he called in the complainant and threatened him to vacate the premises and go to his native place. The court of the metropolitan magistrate concerned issued process against the accused. Nowhere in the complaint was it revealed that any property or valuable security was delivered by the complainant to accused no 1 and that any threat was given by accused no 2 to force the complainant to deliver the said property to accused no 1. Thus, the ingredients of extortion were not at all made out nor of the other offence alleged. Consequently, the issuance of process against accused no 2 and proceedings against him pending before the metropolitan magistrate were quashed.[75]

Second exercise of inherent power for one and the same subject of quashing of charge-sheet for offence under s 384, IPC is not maintainable.[76]

10. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc*), hereby charge you (*name of accused person*) as follows:
>
> That you, on or about the..day of., at intentionally put AB in fear of an injury, namely (*specify the injury*),to him/or to another person..(*specify the name*), and thereby dishonestly induced AB to deliver the property, or valuable security, to wit..(*specify the property or valuable security*), and thereby committed an offence, punishable under s 384 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

In the case of extortion of money from several persons, the charge must state, with some approach to accuracy, the approximate amount, alleged to have been extorted from each person, and the nature of the extortion used against each person.[77]

11. Accused Charged with Section 302 can be Convicted under Section 384

Where the accused are charged for the offence of murder by resorting to extortion, the prosecution failed to prove several particulars relating to the major offence of murder but proved the commission of the minor offence punishable under s 384 read3327 with s 34, IPC, the conviction of the accused for the minor offence, *eg* under s 384 read with s 34, IPC, was held proper.[78] However, when circumstantial evidence against the accused persons is firmly established, their conviction under ss 454, 380 and 302, IPC, was found proper.[79]

12. Proof

For establishing a charge of extortion, the prosecution must prove that:

(a) the accused put the complainant in fear of an injury:

(i) to the complainant, or
(ii) to any other person;

(b) the accused did so intentionally; and
(c) the accused induced the complainant to deliver, to any person:

(i) any property, or
(ii) valuable security, or
(iii) anything signed or sealed which could be converted into a valuable security.

In extortion, it has to be shown that the person was induced to part with the property by putting him in fear of injury. Mere taking away forcibly is not enough.[80]

When the witnesses did not say anything about one of the accused of harming, tried to extract money and the evidence on record did not show that the said accused accompanied the other three accused when they allegedly made a demand of Rs 5 lakh from PW1 and PW3, the evidence of PW1 regarding the presence of the said accused in the house of the co-accused at the relevant time cannot be accepted because he did not state that fact before the investigating officer in his statement under s 161, CrPC, the charges under s 384 read with s 34, IPC, along with charges under ss 504, 509 read with s 24, IPC, cannot be said to have been proved against the said accused.[81]

Where accused appellants A1 and A2 in collusion with other accused illegally confined the complainant and his wife at police station, snatched cash and ornaments from them and also got their property transferred in the name of accused A exercising threat and coercion, the case against them was held proved beyond reasonable doubt, conviction of accused A1 and A2 for offence under s 384, IPC was held proper.[82]

13. Sentence

The sentence should neither be too harsh, nor too lenient.[83] Where the police officer, whose duty is to help the helpless people of the village and protect them from oppression, who instead of doing that, adopts the rule of an oppressor and discharges the police force by committing the offence under ss 161 and 384, IPC, the sentence3328 should be deterrent to serve as an example to others.[84] If, however, the accused is convicted under ss 384 and 420 and the appellate court acquits him of the offence under s 420, IPC, the maintaining of the original aggregate sentence, passed for both offences, would amount to enhancement and would be illegal.[85]

When the sessions court has passed the sentence of 3 years rigorous imprisonment for the offence under s 395 and just 1 year for the offence under s 384 and made both sentences concurrent, there is no good ground to reduce the sentence awarded to the accused in the appeal to a lesser term or to substitute it by any amount of fine. A liberal attitude cannot be taken in regard to such offences on any sentencing policy.[86] Where the accused-husband took his wife to a forest and obtained her ornaments under threat to kill, he was sentenced to undergo rigorous imprisonment for 2 years for the offence under s 384, IPC .[87]

14. Alteration of Conviction from Section 384 to Section 161

Even if the offence is principally an offence under s 384, IPC, it would be no bar to a conviction and sentence under s 161, IPC if the offence comes within the definition of that section.[88]

15. Alteration of Conviction from Section 395 to Section 384

Commentary under the headings under s 395, *post*, may be referred to.

64 *State of Karnataka v Basavegowda alias Chandra* 1997 Cr LJ 4386 (Kant) (DB) .

65 *Rameshwar Pandey v State of Bihar* 2005 Cr LJ 1407 (SC), 2005 (9) SCC 210 .

66 *Ashok Malik v State of Delhi* (1999) 1 AD Del 733, (1999) 77 Del LR 821 .

67 *Virumal Manghanmal v Muhammad Khan* AIR 1936 Sind 146, 37 Cr LJ 1086 .

68 *Bankat v State of Maharashtra,* (2005) 1 SCC 343 .

69 *Badrilal v State of Madhya Pradesh,* (2005) 7 SCC 55 .

70 *Dhananjay alias Dhanajay Kumar Singh v State of Bihar* 2007 Cr LJ 1440 (SC), 2007 AIR SCW 923, 2007 (1) Supreme 922, 2007 (2) Scale 418, (2007) 14 SCC 768, 2007 (1) Crimes 299 (SC) .

71 *Balwant Singh v State of Bihar* AIR 1975 SC 2265 .

72 *Maulana Basha v State* 1992 LW Cr L 499 (SC) ; *Rajendra Kumar v State* AIR 1980 SC 1510 .

73 *K Murugarel v State* (1998) 2 Crimes 436 (Mad) .

74 For detailed commentary, see *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

75 *Sanjay Pande v Choggan Lal Jain* 2001 Cr LJ 2127 (Bom) .

76 *Thanickachalam v State* 2003 Cr LJ 2666 (Mad)

77 *Ram Chandar Sahai v Emperor* 17 Cr LJ 411 .

78 *State of Maharashtra v Bharat Chaganlal Raghani* 2002 Cr LJ 944 (SC) .

79 *Raju alias Rajkumar v State of Rajasthan* 1997 Cr LJ 4547 (Raj) (DB) .

80 *Indrasana Kuer v Sia Ram Pandey* 1970 Cr LJ 647, 1969 BLJR 359 .

81 *M Jignesh v State of Andhra Pradesh* 2003 Cr LJ 739 (AP) .

82 *Karipi Rasheed Ahmed v State of AP* (2009) 17 SCC 515, 2009 (3) JT 100, 2009 (4) Scale 30 .

83 *Ram Narain v State of Uttar Pradesh* 1973 Cr LJ 1187, p 1190, (1973) 2 SCC 86, AIR 1973 SC 2200 .

84 *Jagdish Nurain v Emperor* AIR 1942 Oudh 163, 43 Cr LJ 139 .

85 *Ramchandra Bhikaji Moharir v Emperor* AIR 1928 Bom 346, 29 Cr LJ 1082(2) .

86 *Karey Singh (Karay Jath) v State of Uttar Pradesh* 1999 Cr LJ 4652 (All), 1999 All LJ 2039, (1999) 25 All Cr R 1587 .

87 *State of Karnataka v Basavedowda alias Chandra* 1997 Cr LJ 4386 (Kant) (DB) .

88 *KH Bhattacharjje v Emperor* AIR 1944 Cal 374, 46 Cr LJ 94 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF EXTORTION

S. 385.

Putting person in fear of injury in order to commit extortion.--

Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section deals with a case of attempted extortion. The section prescribes punishment for extortion which remains incomplete by reason of the fact that the accused fails to induce delivery of property by putting the complainant in fear of an injury. Extortion consists of two parts, *i.e.*,

(a) causing fear of injury, which induces the person, labouring under the fear, and
(b) to deliver up the property.

If the complete offence, *i.e.*, fear caused and a consequent delivery of the property is committed, then it is punishable under s 384 . If only the first part of the offence is3329 committed, it is punishable under this section.[89] The extortion, defined in s 383, includes putting any person in fear of injury and covers this section which deals with a less serious offence.[90] Similarly, this section must be read in conjunction with s 383, IPC .[91]

2. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate.

3. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case (s 251, CrPC). Where an accused is alleged to have committed offences under ss 300 and 385, a conviction under s 385, IPC cannot be sustained if the accused never charged under the latter section and no opportunity is given to him to meet the charge. Both the offences have got distinct and separate ingredients.[92]

4. Proof

For establishing a charge under this section, the prosecution must prove that:

(a) the accused put, or attempted to put, the complainant in fear of an injury; and
(b) the accused did so in order to the committing of extortion (as defined in s 383).

Where the prosecution case was that the accused had asked the complainant to pay 10% of the project, otherwise he would be implicated in serious offences, the presence of the accused at that time was found doubtful, no other witness corroborated the prosecution case, the accused was acquitted of the charge under s 385, IPC .[93]

89 *Hem Chandra Singha v Emperor* AIR 1927 Pat 89, 27 Cr LJ 1244 wherein it has been held that a charge under s 384 read with s 511, IPC, is not bad. It is submitted that s 385 does provide for an attempt to commit extortion and s 11 has no application to it.

90 *Mansharam Gianchand v Emperor* AIR 1941 Sind 36, 42 Cr LJ 460 .

91 *Tonumal Udhosingh v Emperor* AIR 1944 Sind 203, 46 Cr LJ 149 .

92 *Thakur Singh v Emperor* AIR 1939 All 665, 40 Cr LJ 948 .

93 *State of Gujarat v Kiritsinh Mahobatsin Brahmbhath* 2014 (3) Crimes 187 (Guj), 2014 (3) Guj LR 1879 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF EXTORTION

S. 386.

Extortion by putting a person in fear of death or grievous hurt.--

Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.3330

Comments

1. Scope

This section prescribes punishment for an aggravated form of extortion by subjecting the victim in fear of death or of grievous hurt to him or to another person. Where the *modus operandi* disclosed in the ransom letters, was clearly to put the father of the kidnapped boy into a state of fright of the boy being murdered, and there was throughout the likelihood of the boy being murdered if the ransom money was not paid for one reason or the other, it was held that the accused were guilty of the offences under ss 364 and 386, IPC .[94]

2. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

3. Bail-- Section 167(2) , CrPC 1973

From the relevant part of s 167, CrPC, and s 386, IPC, it is apparent that pending investigation relating to an offence punishable with imprisonment for a term 'not less than 10 years' the magistrate is empowered to authorise the detention of the accused in custody for not more than 90 days. For the rest of the offences, the period prescribed is 60 days. Hence, in case, where the offence is punishable with imprisonment for 10 years or more, the accused could be detained up to a period of 90 days. In this context, the expression 'not less than' would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Under s 386, punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. This means, that imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that the minimum sentence would be 10 years or more. Further, in context also if we consider cl (i) of *proviso* (a) to s 167(2), CrPC . It would be applicable in case where investigation relates to an offence punishable:

(a) with death,
(b) imprisonment for life, and
(c) imprisonment for a term of not less than ten years.

It would not cover the offence for which punishment could be imprisonment for less than 10 years. Under s 386, IPC, imprisonment can vary from a minimum to a maximum of 10 years and it cannot be said that imprisonment prescribed is not less than 10 years.[95]

Therefore, when the accused is in custody for an offence punishable under s 386, IPC, and the chargesheet is not filed by the police within 60 days, the accused has to be released on bail by taking recourse to s 167(2), CrPC .

The accused kidnapped the complainant and demanded ransom money, the complainant was put in fright of being murdered and there was a likelihood of the complainant being murdered in case the money was not paid for any reason. The3331 offence attracted to these facts is not under s 386 but under s 364, IPC, punishable with life imprisonment. As the *challan* was filed within 90 days, the accused was not found entitled to bail on the ground of filing of *challan* beyond 60 days.[1]

4. Charge

The following form of the charge may be adopted:

I (*name and office of Magistrate, etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the..day of., at., you intentionally put AB in fear of death (*or of grievous hurt*) to him/or to another person, namely(*specify his name*), and thereby dishonestly induced AB to deliver the property/or valuable security, to wit.(*specify the property/or valuable security*), and thereby committed an offence, punishable under s 386 of the Indian Penal Code, and-within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

5. Proof

The offence under this section being an aggravated form of extortion in addition to the ingredients of the offence of extortion, which have to be proved to establish an offence under s 384, IPC, it has to be proved that the nature of fear was of death or of grievous hurt.

Where there was no proof of planning of conspiracy or execution thereof, the chain of events in a case based on circumstantial evidence were miserably incomplete, the accused were found entitled to the benefit of a reasonable doubt and acquittal of charges under ss 302, 120B, 364 and 386, IPC .[2] Where the accused was alleged to have abducted a girl aged 5 years, but there was no evidence on record to show that the girl was ever threatened or she was ever put in danger of being murdered by the accused, the letter demanding ransom alleged to have been written was held to be very weak type of evidence as no expert was produced, so the accused could not be convicted for offences under ss 364 and 386, IPC .[3]

Mere fact that a plastic bag containing 25 lakhs was found in the possession of the accused would not prove that he had demanded the said money. Tape recorded evidence did not reveal that ransom demand was made by the person who had made telephone call. Accused was acquitted of the charge under s 386, IPC .[4]

6. Conviction

Where, on circumstantial evidence, it was found that the two accused had actually committed offences under ss 364 and 386, IPC, in pursuance of a common intention, it was held that both could equally be held guilty for the offences with the aid of s 34, IPC .[5]

94 *Ram Chandra v State* AIR 1957 SC 381, 1957 Cr LJ 559 .

95 *Rajeev Chaudhary v State (NCT) of Delhi* 2001 Cr LJ 2941 (SC), AIR 2001 SC 2369, 2001 (2) Crimes 303 (SC), 2001 (3) Scale 671, (2001) 5 SCC 34, [2001] 3 SCR 508 .

1 *Sardar Singh Sarohi v State* 1994 Cr LJ NOC 82 (Del), (1993) 51 DLT 64 .

2 *State v Ravi alias Munna* (1999) 82 DLT 730 (Del) (DB).

3 *Chandar Shekhar v State of Punjab* 1980 Chand Cric 50 (P&H) .

4 *Nazeen Ahmed Wahid Ahmed Khan v State of Maharashtra* 2011 Cr LJ 1786 (Bom) .

5 *Ram Chandra v State* AIR 1957 SC 381, p 388, 1957 Cr LJ 559 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF EXTORTION

S. 387.

Putting person in fear of death or of grievous hurt, in order to commit extortion.--

Whoever, in order to the committing of extortion, puts or attempts3332 to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

Sections 386 and 387, IPC have the same relation as ss 384 and 385, IPC, the only difference being that in a case of this section and s 386, the injury in fear of which a person is put is death or grievous hurt. The sections do not, however, provide that the fear of death or grievous hurt should necessarily be instant.[6]

2. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

Although, the Bihar Act IV of 1976 required vide its *proviso* added wef 20 January 1976 that it is necessary that the sanction of the state government or such officer specified by the government should be obtained before initiating any prosecution under s 4 of the Dowry Prohibition Act 1961, but it does not require to obtain any sanction for prosecution for offences under the IPC . Therefore, cognizance of an offence under s 387 of IPC without any such sanction is not without jurisdiction.[7]

3. Charge

The form of the charge is the same as under s 385, IPC, except that the nature of injury, which has to be specified, is death or grievous hurt and s 387, IPC is to be substituted for s 385, IPC .

An accused charged under s 307, IPC, cannot be convicted under s 387, IPC if error in the charge causes prejudice to him.[8]

When the statement of the complainant's son *prima facie* indicates a threat of putting the complainant in fear, as contemplated by s 387, the special court, cannot be said to have committed any error in framing the charge for the offence punishable under s 120B read with s 387, IPC .[9]

4. Proof

To establish a charge under this section, all the ingredients required to be established under s 385 must be proved with the only exception that it has to be further proved that injury, of which the complainant was put in fear, was death or grievous hurt.3333

In *Hira Pearelal Kirar v State* ,[10] the real accusation of firing on the complainant by the accused having been disbelieved, the same witnesses could not be relied upon for their statements with respect to the demand of money, and, therefore, the conviction for extortion under this section could not be upheld.

In the absence of any physical act on the part of the accused and also any such material which may indicate that, as a matter of fact, the accused had practiced extortion by threat of fear of death and hurt,

the offence under this section is not constituted.[11]

5. Non-payment of Actual Currency Notes--Effect

Where the accused demanded ransom after kidnapping and the police arranged a trap and asked the witness to give a bundle of pieces of papers of size of the currency notes to the accused and give signal to the police, and the evidence of the witness and the police showed that the accused accepted the bundle, the offence of extortion stood proved. The fact of non-payment of actual currency notes does not make the prosecution case disbelievable as the intention to commit crime is important than the Act.[12]

6. Sentence

If a person is abducted in order that money may be extorted from his relatives, a conviction under s 385, IPC, would be justified; if this was done in order to compel the relatives of the abducted person to ransom by putting them in fear of death of the abducted person, the provision of s 387 would be applicable, but separate sentences cannot be passed both under ss 385 and 387 in view of the first part of s 71 .[13] Where the appellant took an active part in abducting and torturing the complainant and also demanded ransom, it was held that there was no ground to reduce the sentence of three years rigorous imprisonment and a fine of Rs 100.[14]

However, when a child was abducted for ransom the sentence (concurrent) of 3 years each awarded under ss 363 and 387, IPC, by the trial court was reduced from 3 years to 1 year.[15]

6 *Nga Tun Bow v Emperor* 13 Cr LJ 864 (FB) .

7 *Rajesh Kumar Kejriwal v State of Bihar* (1997) 10 SCC 524, 1997 SCC (Cri) 874 .

8 *Hira Pearelal Kirar v State* 1960 Cr LJ 78, AIR 1960 MP 11 .

9 *Jaisingh Wadhee Singh v State of Maharashtra* 2001 Cr LJ 456 (Bom) (DB) .

10 *Hira Pearelal Kirar v State,* 1960 Cr LJ 78, AIR 1960 MP 11 .

11 *Ramji Singh v State of Bihar* 1987 Cr LJ 137 (Pat) .

12 *Walji v State of Maharashtra* 2003 Cr LJ 4284 (Bom) .

13 *Po Lan v Emperor* 14 Cr LJ 167 (2).

14 *Ranchhod v State of Madhya Pradesh* AIR 1979 SC 1493, p 1494, 1979 UJ 381 (SC) .

15 *Rajiv v State of Uttar Pradesh* (2000) 1 RCR (Cri) 49 (P&H).

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF EXTORTION

S. 388.

Extortion by threat of accusation of an offence punishable with death or imprisonment for life, *etc*.--

Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, or with imprisonment for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the3334 offence be one punishable under section 377 of this Code, may be punished with imprisonment for life.

Comments

1. Scope

The preceding sections deal with the putting of a ransom into fear of different kinds of injury. This section also deals with an aggravated form of extortion, but under this section, the threat is of accusing the victim of an offence, punishable with death/or with imprisonment for life/or with imprisonment for a term which may extend to ten years. An accusation of a charge of unnatural offence under s 377, IPC, is viewed with even greater seriousness. In that case, the punishment extends to imprisonment for life, while in other cases, it may extend to ten years.

Accusation need not be against the person who is put in fear. Such accusation against any other person would bring the offence under this section if a person is put into fear of such accusation against another person. The term 'accusation' is not confined to a threat to prefer a charge before a tribunal; it includes a threat to accuse before any third person.[16]

2. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

3. Charge

The following form of the charge may be adopted:

I (*name and office of Magistrate,etc*) hereby charge you (*name of the accused person*) as follows:

That, on or about the... day of..at., you committed extortion by putting AB in fear of an accusation, against him or another person, of having committed (*or attempted to commit*) the offence of (s*pecify the offence*), which is punishable with death/or with imprisonment for life/or with imprisonment for a term which may extend to ten years (*or having attempted to induce another person, namely., to commit such offence, and thereby dishonestly induced AB to deliver*..(*specify the property,etc*), and thereby committed an offence, punishable under s 388 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

4. Proof

To establish a charge under this section, prove that:

(a) the accused put, or attempted to put, the complainant in fear of an accusation against him or against any other person;
(b) the accusation was:

(i) of an offence punishable with death/or with imprisonment for life/or with imprisonment for a term which may extend to ten years, or3335
(ii) of an offence under s 377, IPC, or
(iii) of having attempted to induce any other person to commit such offence; and

(c) the accused did so in order to commit extortion (as defined in s 383, IPC).

The accused were charged with the offence of conspiracy to extort money under fear of injury. The material witness died before commencement of investigation. The prosecution failed to conduct the identification parade. In the absence of evidence to conclude that the accused entered into a criminal conspiracy to commit the alleged offences, the acquittal of the accused recorded by the High Court was interfered with under art 136 of the Constitution by the Supreme Court.[17]

16 *R v Robinson* (1837) 2 M&R 14, 2 Lew 273 .

17 *State of Uttar Pradesh v Pheru Singh* AIR 1989 SC 1205, 1989 Cr LJ 1135 .

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Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF EXTORTION

S. 389.

Putting person in fear of accusation of offence, in order to commit extortion.--

Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed or attempted to commit, an offence punishable with death or with imprisonment for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten

years, and shall also be liable to fine; and, if the offence be punishable under section 377 of this Code, may be punished with imprisonment for life.

Comments

1. Scope

This section is to the preceding s 388, in the same position as s 385 is to s 384 and s 387 to s 386, IPC .

2. Anticipatory Bail

Where the sub-inspector of police and two other accused allegedly extracted money by threat from the complainant aged 80/85 years attracting offences under ss 384, 389 / 34, IPC, and also under s 13, Prevention of Corruption Act, the anticipatory bail should be refused. It is highly dangerous to let such a person on bail as it will be very easy for them to tamper with the evidence and even threaten the complainant.[18]

3. Procedure

Commentary under the headings under s 388, *ante*, may be referred to.

4. Charge

The charge would be similar to that under s 385, IPC, with consequential changes.3336

5. Proof

Prove that:

(a) the accused put, or attempted to put, a person in fear;
(b) the fear was of the accusation of an offence or an attempt to commit it;
(c) such offence was punishable with death or imprisonment for life or for a term which may extend to ten years; and
(d) this was done in order to commit extortion (as defined in s 383, IPC).

18 *Jeevan Kumar v State of Union Territory, Chandigarh* (1999) 3 RCR 714 (P&H), (1999) 3 All Cri LR 634 (P&H).

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 390.

Robbery.--

In all robbery there is either theft or extortion.

When theft is robbery.--Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.--Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.--The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Illustrations

(a) A holds *Z* down, and fraudulently takes *Z's* money and jewels from *Z's* clothes, without *Z's* consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to *Z. A* has therefore committed robbery.

(b) *A* meets *Z* on the high road, shows a pistol, and demands *Z's* purse, *Z*, in consequence, surrenders his purse. Here *A* has extorted the purse from *Z* by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. *A* has therefore committed robbery.

(c) *A* meets *Z* and *Z's* child on the high road. *A* takes the child, and threatens to fling it down a precipice, unless *Z* delivers his purse. *Z*, in consequence, delivers his purse. Here *A* has extorted the purse from *Z*, by causing *Z* to be in fear of instant hurt to the child who is there present. *A* has therefore committed robbery on *Z*.

(d) A obtains property from *Z* by saying--"your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees". This is extortion, and punishable as such; but it is not robbery, unless *Z* is put in fear of the instant death of his child.3337

Comments

1. Scope

Robbery involves either theft or extortion. The difference in the effects of theft and extortion for constituting robbery may be analysed as follows:

Robbery consists of either:

Aggravated theft or aggravated extortion,

(a) *i.e.*, where the offender, in order to commit the theft,
(b) or in committing the theft,
(c) or in carrying away the stolen property,
(d) or in attempting to carry it away, thereto voluntarily causes, or attempts to cause, to any person, death, hurt or wrongful restraint, or fear of instant death, hurt or wrongful restraint.

Where the property is taken under the above circumstances, the theft becomes robbery [refer to illust (a)].

(a) *i.e.*, where, at the time of extortion,--the offender, in the presence of the person put in fear,
(b) puts him in fear of instant death, hurt or wrongful restraint to himself or any other person,
(c) thereby inducing him then and there to deliver up the thing extorted.

Where the owner is induced, under above circumstances, to deliver up the property, the extortion becomes robbery [refer to illusts (b) and (c)]. Extortion need not fall immediately upon the restraint in order to constitute a robbery if there is fear of restraint at the relevant time.[19]

Robbery is only an aggravated form of offence of theft or extortion. Aggravation is in the use of violence of death, hurt or restraint. Violence must be in the course of theft and not subsequently. It is not necessary that violence actually should be committed but even attempt to commit it is enough. Where there is no theft committed, then as a natural corollary there cannot be robbery.[20]

The essence of the offence of robbery is that the offender, for committing theft, or for carrying away or attempting to carry away the looted property, voluntarily causes, or attempts to cause, death/or hurt/or wrongful restraint. The use of violence will not, therefore, *ipso facto* convert the offence of theft into robbery unless the violence is3338 committed for one of the ends specified in the section.[21] If violence is used in order to help an offender to escape,[22] or to make good his own escape,[23] the act does not become robbery. The mere fact that the assault and the theft took place in the same transaction, is not enough. The assault must be to facilitate commission of theft.[24]If the threat, if any, is occasioned subsequent to the act of carrying away the property, it is theft, and not robbery.[25]

Section 95, IPC provides that nothing is an offence if any harm caused, or intended to be caused, or known to be likely to be caused, is so slight that no person of ordinary sense would complain of such harm. The taking away of a stick of no utility and a torn and worn out piece of cloth, practically of no value, is harm of such slight nature that no person of ordinary prudence would complain. Therefore, no offence of robbery, as specified in this section, can be made out against an accused if there is neither any theft, which need be complained of is committed, nor there is any intention on the part of the accused to commit theft.[26]

2. Law of England

A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force. A person guilty of robbery, or of an assault with intent to rob, is liable on conviction on indictment to imprisonment for life or for any shorter term.

In *R v Smith* , it was held, 'Applying settled principles, notwithstanding that the victim had been in unlawful possession of a prohibited Class A drug, the appropriation of drugs constituted theft and the circumstances in which the drugs had been taken amounted to the offence of robbery. On the question of sentence, the instant case fell within level two of the guidelines of the Sentencing Guidelines Council, in which the range of sentence was seven years custody. It followed that the sentence imposed in each case was manifestly excessive.'[27]

It is irrelevant whether or not the person threatened is put in fear of being subjected to force.[28]

A professionally planned and executed commercial robbery falls outside the categories of robbery dealt with by the definitive guideline.[29] Section 8 of the Theft Act 1968, so far as material, provides: '(1) A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there3339 subjected to force. (2) A person guilty of robbery, or of an assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life.'[30]

3. Law of Canada

It is an indictable offence to commit robbery. The following situations constitute 'robbery':

- The accused steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property. Holding a person's arms to prevent resistance is sufficient "violence". Proof of a threat is sufficient.
- The accused steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person. The purpose for the violence is irrelevant. The violence need only be contemporaneous with or immediately before or after the theft. A mere technical assault, such as nudging or bumping the complainant to steal her purse, does not constitute required degree of the personal violence.
- The accused assaults any person with intent to steal from him. A charge of 'robbery of $15' particularizes a completed stealing and a conviction for robbery based upon para (c) is not available. Attempted robbery is the available verdict.
- The accused steals from any person while armed with an offensive weapon or imitation thereof. 'Armed' means equipped with or possessed of an instrument and an accused who merely pretends to have a gun cannot be convicted under s 343(d) . While the mere use of a hand, inside a coat pocket, to create the impression of a firearm, did not constitute the use of an imitation firearm, the accused may be convicted where it was not clear what he had in his pocket. Merely having the weapon or imitation is sufficient.

In order for a robbery to take place, there must be contemporaneous violence. In one case, the accused's tussle with police after he was caught shoplifting and dropped his stolen goods did not constitute the requisite contemporaneous violence required for robbery. The theft was complete when the accused exited the store. The violence cannot be said to be to overcome resistance to the theft.

If a particular mode of robbery is specified in the indictment, every essential averment as alleged must be proved and the other modes of robbery cannot be left with the jury. However, in a case, it was held on a charge of robbery that the accused did 'use a firearm, to wit: a sawed off shotgun, in robbing [CT] of cash monies contrary to s 344(a) of the Criminal Code'; the allegation of the shotgun is to engage the minimum penalty and not to particularize any particular type of robbery. Thus the jury could convict of robbery even if not satisfied that the particular firearm was used.

In *R v Mckay* , it was observed, 'Theft and assault were two separate events, a conviction for robbery could not be sustained. Here, the theft was complete prior to the threat made by the accused. Therefore, the robbery conviction could not stand, as the theft and the threat were two separate events. The robbery conviction was set3340 aside and a conviction for theft under $5,000 was substituted, as there was no evidence the knife was used in the course of the theft.'[31]

4. Robbery with Theft

Before theft can amount to robbery, the offender must have voluntarily caused, or attempted to cause, to any person, death/or hurt/or wrongful restraint/or fear of instant death/or fear of instant hurt/or fear of instant wrongful restraint. The second ingredient, necessary to constitute robbery, is that the (accused's)

act must be in order to the committing of the theft of, or carrying away, or attempting to carry away, the property obtained by theft. The third ingredient is that the offender must voluntarily attempt to cause, to any person, hurt for that end in view.[32]

However, before a person can be convicted of robbery, theft by him must be established; if theft is not established, the accused would not be guilty.[33] A charge of robbery cannot be entertained if there is evidence that the accused acted in good faith under a claim of right, however erroneous the belief may have been.[34] Where the accused seizes a truck under a claim of right, no offence of theft is made out with the result that the charge or robbery fails.[35]

5. Dishonesty

Dishonesty is one of the elements of the offences of theft and robbery. Where an *amin* attached some property under a warrant which had expired but which he failed to notice, it was held that the *amin* could not be held guilty of committing theft and, therefore, also not of robbery.[36] Where the estate official took away the cattle of the accused under a distraint, which was wholly illegal and the accused went to recover their cattle from the possession of the estate official, it was held that it could not be said that the accused were acting dishonestly. There being no theft, there was no offence under s 391, IPC .[37]

6. 'For that End'

The words 'for that end' are crucial words which distinguish a case of theft accompanied with assault from that of robbery;[38] They mean 'for the purpose or object of theft' or 'for the purpose of carrying away the stolen property'. An assault not made for such purpose or for that end would not make the theft a robbery.[39] The words 'for that end' in s 390 clearly mean that the hurt caused must be with the object of facilitating the committing of the theft or must be caused while the offender is committing theft or is carrying away or is attempting to carry away property3341 obtained by the theft.[40] If the assault and loot take place simultaneously, and there is no evidence to prove that the assault took place for any of the purposes specified in s 390, IPC, the accused cannot be convicted under s 392, IPC .[41]

Common sense admits of no dispute that a person who would commit a robbery would also attempt to run away with stolen articles with the utmost promptitude and if the victim or witnesses would try to obstruct this design of his, he would assault them with the weapon he is armed with. Therefore, the contention that the accused gave a knife blow to the informant only to extricate himself from his clutches and not to accomplish his design of carrying away the gold buttons which he had obtained during the course of theft cannot be accepted.[42]

In most of the cases where an offender obtains a property during theft and which the victim or witnesses try to catch while the offender tries to run away and if armed with a weapon assaults them, both the facets namely:

(a) in attempting to carry away property obtained by theft the offender causing hurt to the person who is trying to foil his attempt, and
(b) the normal instinct of self preservation on account of which the offender tries to run away and foil the bid of the person, who endeavours to thwart it by assaulting the said person may co-exist.

To ignore facet (a) in the judgment would cause gross miscarriage of justice.[43] The use of violence will not, therefore, convert the offence of theft into robbery unless violence is committed for one of the ends specified in this section.[44] The hurt caused by the offender, must be with the express object of facilitating the committing of the theft or must be caused while the offender is committing the theft or carrying away or is attempting to carry away the property obtained by the theft.[45] Where, with the object of stealing, the accused seized a bundle from the hands of a woman at a railway station and tried to run away with it but

the woman resisted and was dragged to some distance, it was held that the hurt caused was only accidental.[46] Where the inception of the struggle was only a quarrel between the complainant and the accused and it was at the end that the accused found a chance of taking the property to ensure payment of money due to him, it was held that the offence was one under s 379, IPC, and not robbery.[47] Where however, the accused attempted to remove a *nath* from the nose of a woman but the nose was torn as the clasp of the *nath* became loose though pain was caused and blood flowed, it was held that there was indubitably an intention seconded by an attempt to cause hurt and the offence was, therefore, robbery.[48]3342 Where a person through fear offers no resistance to the carrying away of his property but does not deliver any of the property to those who carry it off, the offence committed is robbery, and not extortion.[49]

7. Removal of Property from a Dead Body is not Robbery

Where the accused committing a murder removed some ornaments from the dead body, it was held that though the accused was guilty of an offence under s 302, IPC, the removal of ornaments from the dead body could not amount to a robbery because robbery is theft by force in taking property out of the possession of a person, and a dead body is not a person'. The accused was in that respect, guilty of dishonest misappropriation, and robbery.[50] If, however, a murder is committed for the purpose of stealing the jewels, the removal of the jewels would be robbery.[51] Where murder and robbery are committed in the course of the same transaction by the same person, the offence would fall under s 392, IPC, and not under s 404, IPC . In that context, the word 'person' cannot be narrowly construed as to exclude the dead body of the human being who was killed in the same transaction in which the theft was committed.[52]

8. 'Robbery' as used in Railway Risk Notes--Whether Theft

On the question as to whether the term 'robbery' in railway risk notes is synonymous with theft, there is a conflict of opinion among the different High Courts. According to the Allahabad High Court, both the terms are synonymous.[53] This view was followed in Lahore[54] and Bombay.[55] However, according to the Patna[56] and Calcutta[57] High Courts, robbery and theft are not synonymous, and the term 'robbery' is used in the sense in which this word is used in the IPC .

19 See illust (d); *Kattua Rewther v Suppan Asari* AIR 1927 Mad 307, 28 Cr LJ 164 ; *Queen v Duleelooddeen Sheikh* 5 WR (Cr) 19 ; *Venu v State of Karnataka* 2008 Cr LJ 1634, p 1635 (SC), 2008 AIR SCW 1172, AIR 2008 SC 1199, (2008) 3 SCC 94, 2009 (2) Scale 129 .

20 *Venu v State of Karnataka* 2008 Cr LJ 1634, p 1635 (SC), 2008 AIR SCW 1172, AIR 2008 SC 1199, (2008) 3 SCC 94, 2009 (2) Scale 129 .

21 *Abdul Rashid v Nausher Ali* 1979 Cr LJ 1158, 1159 (Cal) ; *Jagan Singh v State of Rajasthan* 1978 Cr LR 43, p 46 (Raj) .

22 *Jagan Singh v State of Rajasthan* 1978 Cr LR 43, p 46 (Raj) ; *Titir Dusadh v State of Bihar* AIR 1966 Pat 453, 1966 Cr LJ 1474 ; *Shea Ratan v State* 1955 ALJ 455 .

23 *Jagan Singh v State of Rajasthan* 1978 Cr LR (Raj) 43, p 46 ; *Nga Paing v Emperor* 7 Cr LJ 446 ; *Sheo Ratan v State* 1955 NUC 4439 (All) ; *Nga Po Thet v Emperor* 19 Cr LJ 27 ; *Ganga Singh v State* 195 NUC 3440 (Punj) ; *Jalli Gope v State* 1956 BLJR 473 .

24 *Indrasann Kuer v Sia Ram Pandey* 1970 Cr LJ 647, 1969 BLJR 359 .

25 *Nila Naik v Shyamasundar Mohapatra* (1966) 32 Cut LT 310, p 313 .

26 *Prabhu v State of Rajasthan* 1977 Cr LR 487, p 488, 489 (Raj) .

27 *R v Smith* (2011) EWCA Crim 66 .

28 *B v DPP* (2007) EWHC 739 (Admin)

29 *R v Considine* (2008) EWCA Crim 1407

30 *P v Director of Public Prosecutions* (2012) EWHC 1657 (Admin) (*VideHalsbury's Laws of England*).

31 *R v Mckay* (2014) S.J. No. 95. (*Vide Halsbury's Low of Canada*).

32 *K Muhammad v State* 1974 Cr LJ 204, p 206 (Ker) (DB), 1973 Ker LR 773 .

33 *Budho v Emperor* AIR 1945 Sind 38, p 41 .

34 Re *Karakn Nachiyar* 1 Weir 443; *Suvval Sanyasi Apparao v Boddepalli Lakshminarayana* AIR 1962 SC 586, (1962) 1 Cr LJ 518 .

35 *Pooran Mal v Sadho Ram* 1965 ALJ 214, p 220 .

36 *Emperor v Shivlal* AIR 1933 All 620 .

37 Re *Chitravelu Thevar*AIR 1941 Mad 763, 43 Cr LJ 106 ; *Gobaria v State* 1964 Raj LW 617 .

38 *Ram Deo Tewari v Dev Narain Tewari* 1953 BLJR 465 ; *Pati Kumar v Shiv Kumar* AIR 1954 Pat 157, 1954 Cr LJ 215 ; *Sitaram v State of Madhya Pradesh* 1981 Cr LR (MP High Court Notes) 124, p 126.

39 *Pati Kumar v Shiv Kumar* AIR 1954 Pat 157, 1954 Cr LJ 215 ; *Sitaram v State of Madhya Pradesh* 1981 Cr LR (MP High Court Notes) 124, p 126.

40 *Venu v State of Karnataka* 2008 Cr LJ 1634, p 1635 (SC), 2008 AIR SCW 1172, AIR 2008 SC 1199, (2008) 3 SCC 94, 2009 (2) Scale 29 .

41 *State v Banamali* 25 Cut LT 433 ; *Indrasana Kuer v Sia Ram Pandey* 1970 Cr LJ 647 .

42 *State of Maharashtra v Vinayak Tukaram Utekar* 1997 Cr LJ 3988 (Bom) (DB) .

43 *Ibid*.

44 1 Weir 442; *Emperor v Ram Sewan* AIR 1945 Pat 109, p 111, 46 Cr LJ 513 ; *Karuppa Gounden v Emperor* AIR 1918 Mad 821, p 824, 18 Cr LJ 346 ; *Emperor v Mathura Thakur* 6 CWN 72 ; *Otaruddi v Kafiluddi* 5 CWN 372 ; *Himatsing v State* (1962) 2 Cr LJ 415 .

45 *Bishambhar Nath v Emperor* AIR 1941 Oudh 476, 42 Cr LJ 530 ; *Goya Singh v State* 1971 BIJR 259, p 261 .

46 *Karmun v Emperor* AIR 1933 Lah 407, 35 Cr LJ 297 .

47 *Mir Baz v Emperor* AIR 1935 Pesh 49, 36 Cr LJ 894 ; *Nila Naik v Shyamasundar Mohapatra* (1966) 32 Cut LT 310, p 313 ; *Sant Ram v State* AIR 1953 HP 105, 1953 Cr LJ 1665 .

48 *Queen v Teekai Bheer* 5 WR (Cr) 95 ; *Harish Chandra v State of Uttar Pradesh* 1976 Cr LJ 1168, AIR 1976 SC 1430 ; *Jethiya v State* AIR 1955 Raj 147, 1955 Cr LJ 1285 ; *Queen v Hushrut* 6 WR (Cr) 85 ; *Kamal Sah v Surat Sah* 1958 BLJR 238 .

49 *Queen v Dulerlooddeen Sheik* 5 WR (Cr) 19 .

50 *Balla Munshi Bhoi v State* AIR 1953 MP 192, 1958 Cr LJ 902 .

51 Re *Muniyan*AIR 1927 Mad 243, 27 Cr LJ 1368 .

52 *Jamnadas v State of Madhya Pradesh* AIR 1963 MP 106, p 114, (1963) 1 Cr LJ 433 .

53 *EIR v Nathmal* (1917) ILR 39 All 418, 15 ALJ 321 ; *GIF v Bholanath* AIR 1923 All 79 ; *Gopal Rai v GIP Rly* AIR 1924 All 621, 46 All 837 .

54 *Gulab Rai v EI Rly* AIR 1925 Lah 515, 26 PLR 200 .

55 *BB&CI Rly v Ranchhod Lal* AIR 1919 Bom 126, 21 Bom LR 779 .

56 *Kashi Ram v EI Rly* AIR 1927 Pat 9, 8 PLR 147 .

57 *Karali Prasad Dutt v EI Rly* AIR 1928 Cal 498 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 391.

Dacoity.--

When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".3343

Comments

1. Scope

Dacoity, which is an aggravated form of robbery, is viewed with great seriousness and has been made punishable at different stages as follows:

(a) Preparation.--Preparation is not punishable except under a few sections like ss 121 and 126, IPC . Express provision has been made under s 399, IPC in respect of preparation to commit dacoity.
(b) Assembling for dacoity.--This is made punishable under s 402, IPC .
(c) Attempt at dacoity.--Preparation and attempt are treated as separate offences in other cases. In the case of dacoity, even attempt is itself a dacoity (s 391, IPC).
(d) Commission of the actual dacoity.

Punishments have also been graduated as under s 395, IPC . Even association with dacoits is made punishable under s 400, IPC .

The term 'dacoity' is defined in s 391 of the IPC, which clearly postulates that when five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit 'dacoity'. Where the offence is said to have been committed by only 3-4 persons, conviction in and sentence of accused under s 391 is illegal and cannot be sustained.[58]

2. Dacoity and Robbery--Distinction

For an offence of dacoity, minimum number of the miscreants required is five. The term 'dacoity' is defined in s 391, IPC, which clearly postulates that when five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit 'dacoity'. The offence of 'robbery' is defined in s 390, IPC, and as is clear from a perusal of the said section, even a theft is 'robbery' if during its commission, the offender voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. Whereas 'robbery' is punishable under s 392, IPC, dacoity is punishable under s 395, IPC .[59]

3. 'Conjointly'

The essential ingredient of the offence of dacoity is that five of more persons should be concerned in the commission of it, and they should either commit, or attempt to commit, a robbery.[60]3344

The word 'conjointly' is the most important word appearing on the liability of person against an offence of dacoity.[61] The word 'conjointly', used in s 391, IPC, manifestly refers to united or concerted action of the persons participating in the transaction.[62]

Where the two accused who were standing outside the house near the gate, came with the other three miscreants jointly, and had also participated in the dacoity, and then fled with the other three miscreants after the commission of the dacoity, all the five accused were found liable for the offence of dacoity.[63]

It is necessary that all the persons should share the common object of committing robbery.[64] Mere presence of an accused amongst the robbers is not sufficient. The accused must be shown to have conjointly committed the robbery or aided in such commission and that the accused were in the body of persons who extorted money or at least aided them in extorting the money.[65] Where the accused, not present at the relevant time, was, to some extent, aiding the commission of the dacoity, he could not be convicted on that finding as the accused was not one of those who were conjointly committing or attempting to commit robbery.[66] If individual acts of persons cannot reasonably be referred to as united or concerted action of such persons, there can be no question of any conviction for the offence of dacoity.[67]If the act of any of them is dissociated from the common object, it cannot be brought home to the other member.[68]Where the common object of the accused was to rescue some persons from the custody of some officials and one of them seized something from the hands of one of the officials, it was held that it was not a conjoint act and did not amount to dacoity.[69] Where, however it was established that the common object of certain Mohammedan rioters was both to hurt any member of the Hindu community, whom they might happen to find, and to rob the shops and houses of Hindus, any person, who is proved to have taken part in the disturbance, must be found guilty not only of the offence of riot, but also of the offence of dacoity.[70] Similarly, where a large body of Hindus, acting in concert, forcibly deprived, certain Mohammedans, of some cattle and the circumstances did not indicate any intention of subsequently restoring them, it was held that they were guilty of dacoity.[71] Where, however, several Hindus, acting in concert, forcibly removed an ox and two cows from the possession of a Mohammadan, not for the purpose of causing wrongful gain to themselves or wrongful loss to the owner of cattle, but for the purpose of preventing the killing of the cows, it was held that there being no dishonesty, the accused could not be convicted of dacoity, but only of riot.[72]3345

4. Motive Unnecessary in Dacoity Cases

In cases of dacoity and cognate offences where it is alleged that substantial property has been stolen, it is entirely unnecessary to consider motive at all. The taking of body in such cases itself provides a sufficient motive for the offence if any motive is required.[73] It is not necessary that the accused should have known their victim previously and should have some personal grievance against them before they would commit dacoity.[74]

5. Attempt to Robbery Sufficient for Dacoity

Dacoity begins as soon as there is an attempt to commit robbery. A shot fired in order to keep off the rescue party and allow the theft to be committed is an act committed in committing the dacoity.[75] It cannot be argued that no dacoity was committed if the dacoits were unsuccessful.[76] There is no distinction between a dacoity and an attempt to commit one.[77] It may be noted that in the case of robbery, an attempt at robbery is treated as a separate offence under s 393 with a much lesser punishment than for robbery under s 392, IPC . In the case of dacoity, however, attempt stands at the same level as the commission of dacoity and is punishable to the same extent.

6. Aiding the Commission of Dacoity

Under this section, not only the persons directly committing or attempting to commit robbery but also those present and aiding such commission or attempt will be guilty of dacoity. It may be noted that the word used is 'aiding', and not 'abetting'. The presence at the scene of the dacoity is necessary for aiding although it is not so for abetment.

Knowing of a design to commit dacoity and voluntarily concealing the existence of that design, with the knowledge that such concealment would facilitate the commission of dacoity, does not amount to the abetment of dacoity.

7. Putting in fear Without Show of Force or Violence--Whether Sufficient to be Dacoity

It is wrong to say that if no resistance is offered and no violence required, it will cease to be a dacoity and should be treated as theft.[78]

It is not necessary that force or menace should be displayed by an overt act. An overwhelming show of force sufficient to terrify and threaten violence would constitute dacoity.[79] Where a body of men plunders a house, the mere fact of the proprietor's family having been able to make their escape a few minutes before the robbers forced entrance, does not take the offence out of the purview of s 395, IPC .[80]3346

58 *Atar Singh v State of Uttar Pradesh* 2003 Cr LJ 676 (All) ; *Manmeet Singh v State of Punjab* 2015 (89) ACC 638, p 644 (SC), 2015 Cr LJ 2355, 2015 (2) Crimes 124 (SC), 2015 (2) RCR (Criminal) 550, 2015 (4) Scale 111, (2015) 7 SCC 167 .

59 *Ibid*.

60 *Shyam Behari v State of Uttar Pradesh* AIR 1957 SC 320, 1957 Cr LJ 416 .

61 *Raja Singh v State of Bihar* 2000 Cr LJ 3388 (Pat) .

62 *Gouranga Charan Bhuyan v Fakir Charan Nayak* (1977) 2 Cut LT 311, p 315 .

63 *Raja Singh v State of Bihar* 2000 Cr LJ 3388 (Pat) .

64 *Nathu Tulsi v Anokh Singh* AIR 1956 VP 18, 1956 Cr LJ 1021 .

65 *Atum Lengmel v Manipur Admn* AIR 1962 Manipur 7, (1962) 1 Cr LJ 168 ; *Naththu Tulsi v Anok Singh* AIR 1956 VP 18, 1956 Cr LJ 1021 ; *Reechchoo Hemraj v State of Madhya Pradesh* 1981 MPLJ 457, 1981 Cr LJ (NOC) 110 .

66 Re *Ibrahim*AIR 1926 Cal 374, 24 Cr LJ 1146 .

67 *Dambarudhar Injal v State* AIR 1951 Assam 142 ((2)), 52 Cr LJ 1380 .

68 Re *Boya Musala Hanumanthu*(1954) 2 MLJ 248 (AP).

69 *Ibid*.

70 *Daulat v Emperor* 28 Cr LJ 110, AIR 1927 Oudh 70 .

71 *Empress v Ram Baran* (1893) ILR 15 All 299 .

72 *Empress v Raghunath Rai* (1893) ILR 15 All 2 .

73 *Arjun Panda v Emperor* AIR 1942 Pat 199, 43 Cr LJ 230 .

74 Re *Mattaya Filial*AIR 1929 Mad 135, 30 Cr LJ 843 .

75 *Sita Ram v Emperor* AIR 1925 Oudh 723, 26 Cr LJ 1364 .

76 *Sirajuddin v State* AIR 1951 All 834, 52 Cr LJ 1514 ; *Shyam Behari v State* 1957 SC 320, 1957 Cr LJ 416 .

77 *State of Uttar Pradesh v Randhir Sri Chand* AIR 1959 All 727, 1959 Cr LJ 1274 .

78 *Ram Chandra v Emperor* AIR 1933 All 114, 34 Cr LJ 448, **dissented** from in *Basu Domb v State* AIR 1959 Ori 171, 1959 Cr

LJ 1203 .

79 *Emperor v Chandra Krishna* 8 Cr LJ 143, 10 Bom LR 632 .

80 *Queen v Kissoree Pater* 7 WR (Cr) 35 (1).

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 392.

Punishment for robbery.--

Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

Comments

1. Scope

The various aspects of the offence of robbery have been discussed in s 390, IPC . Punishments for robbery are prescribed under ss 392 to 394, IPC . This section covers the case of simple robbery and s 393, IPC of attempt to commit robbery. The punishment has been made heavier in the case of highway robberies between sunset and sunrise. Section 394 , IPC, provides for even higher sentences for causing hurt in committing robbery which is a more aggravated form.3347

2. Offence under Section 382 Distinguished from Robbery

Commentary under s 382, *ante*, may be referred to.

3. Sections 392, 394, 397 Compared

Commentary under s 394, *post*, may be referred to.

4. Unwanted Police Visits Cause Prejudice to Businessman and his Business

When an article, a golden chain, is not maintained to have been stolen during robbery in the FIR, it is totally improper on the part of the investigating officer to go for seizure of such an article. It casts serious prejudice to a businessman in his business, reputation as well as in his social reputation whenever police visit his shop; it causes a serious dent to his business and social reputation which never gets restored. Had there been a mention in the FIR that such an article was stolen at the time of said incident of dacoity, house breaking or robbery, there could have been some justification.

The jeweller cited as witness should be examined as a prosecution witness in the trial court. He should be given an opportunity of claiming that article in the court. Had he been examined, he would have said something about his ownership in respect of that golden chain. His non-examination is likely to cause him a financial loss and denial of an opportunity of putting a claim on the said chain.[81]

5. Violence--Two Views--Effect

The facts constituting the offence either by reason of it being a theft or extortion, as the case may be, must be proved for establishing a charge under this section. Ordinarily, if violence or hurt, *etc*, is caused at the time of theft it would be reasonable to infer that the violence or hurt was caused for facilitating the commission of theft or for facilitating the carrying away of the property stolen or for facilitating the attempt to do so. However, there may be something in evidence to show that hurt or violence was caused not for this purpose, but for a different purpose. If two views can be taken as to the object for which the violence has been used, it would be safer to take the view which would be more favourable to the accused.[82]

6. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

7. Importance of Evidence of an Identification Parade

Commentary under s 395, *post*, may be referred to.3348

8. Precautions in Holding test Identification Parade

There are no fixed rules about the procedure which has to be followed while holding the test identification and as to who is competent. As such to hold the test identification, para 9 of r 395 of the Madhya Pradesh Prisons Rules 1968, makes a provision with respect to the procedure in respect of under-trial prisoners who have to be subsequently identified.

The procedure of holding the identification as laid down in the Criminal Manual issued by the High Court of Judicature, appellate side, Bombay, provides that not more than two suspects at a time should be put for identification in one parade.[83]

The law with respect to test identification came up for consideration before a Division Bench of the Madhya Pradesh High Court in *Narayan Singh v Amarsingh.* [84] It was observed in that case that:

> As the identification parades are test for eliminating false assertions and to guard against honest mistakes of the witnesses, the court requires that they should be held under conditions most conducive to their being fair tests for the elicitation of truth, such as without undue delay, when the impressions are fresh and other influences are less likely to have operated, without giving an opportunity to the witnesses to see the accused or to acquaint themselves with his features with the aid of photographs, sketches, description or the like, by mixing the accused with sufficient number of other persons to eliminate chance identification, by mixing the accused with persons of the same race, culture, age, height and position in life, so that he is not easily picked out by reason of any of the aforementioned characteristics, by allowing the accused to select his own position in the line, by concealing the distinguishing marks of the accused if any by not permitting the identifying witnesses on their leaving the parade to communicate with the others who are yet to identify, by holding the parade free from the influence of the police the prosecuting agency *etc*.

A detailed consideration so far as the question of identification is concerned was made by a Division Bench of the Allahabad High Court as early as 1961 in *Ashrafi v State* .[85] In this case their lordships of the Allahabad High Court considered in great detail as to what is the object of test identification. Who can hold

and what is the legal effect of identification. Their lordship also took into consideration various aspects relating to identification, including delay in holding test identification, conditions necessary for acceptability of identification evidence, identification at the instance of the accused *etc*. The detailed consideration made in this authority and the law laid down therein still holds good and has not been dissented by any High Court. In this case their lordships also took into consideration a Division Bench decision of the Madhya Pradesh High Court reported in *State of Madhya Pradesh v Manka* ,[86] and quoted the following passage from that judgment:

> The evidence of identity must be thoroughly scrutinised, giving benefit of all doubt to the accused; but if after a thorough security there appears to be nothing on the record to suspect the testimony of the identification witnesses, the court ought not to feel shy of basing a conviction on such evidence alone, because of the bare possibility that there could be honest though mistaken identification.3349

Their lordships agreed with the above observation made by this court. After mentioning agreement with the above decision of the Division Bench of the Madhya Pradesh High Court, it held that twelve questions are apt to arise and must be answered by the court to its satisfaction before it can accept the evidence. They are as follows:

(a) Did the identifier know the accused from before?
(b) Did he see him between the crime and the test identification?
(c) Was there unnecessary delay in the holding of the test?
(d) Did the magistrate take sufficient precautions to ensure that the test was a fair one?
(e) What was the state of the prevailing light?
(f) What was the condition of the eye-sight of the identifier?
(g) What was the state of his mind?
(h) What opportunity did he have of seeing the offenders?
(i) What were the errors committed by him?
(j) Was there anything outstanding in the features or conduct of the accused which impressed him?
(k) How did the identifier fare at other test identification held in respect of the same offence?
(l) Was the quantum of identification evidence sufficient?

After laying down the aforesaid questions, the learned judges specifically held that no hard and fast rule can be laid down, and each case has to be dealt with on its own merits.

These questions are of universal application. There cannot be any denial with respect to the questions mentioned by the learned judges in the said authority and while acting upon the test identification the court must satisfy itself with the answers of these questions. If the court comes to the conclusion that answers to these questions do not convey that the result of the test identification is reliable and the test identification is not in conformity with para 9 of r 395 of the Madhya Pradesh Prison Rules mentioned above, it cannot be relied upon. On the other hand, if the court concludes that there is nothing on record to suspect the testimony of identification witnesses, the court can base conviction on the basis of such evidence alone as held by the Division Bench of the Madhya Pradesh High Court in the aforesaid authority of *State of Madhya Pradesh v Manka* .[87]

There are other authorities as well in which a more or less similar view was taken as was taken in *Ashrafi*'s case.[88] In *Kamaraj Groundar*, the counsel laid down certain hints and precautions which should be noted or observed. The precautions are given in detail and not being repeated here for the sake of brevity. It has to be observed that they are more or less similar to those mentioned above. A Division Bench of the Kerala High Court also considered the guiding principles for test identification parade in *Mohanan Nair v State of Kerala* .[89] They are also similar. Thus, before acting upon the test identification, the court must be satisfied that it is trustworthy3350 and reliable. The Apex Court in *Somappa*

Vamanappa Madar Shankarappa Ravanappa Kaddi v State of Mysore ,[90] held that if in an identification parade the accused was identified by most eyewitnesses, then because of some defects in proceeding relating to identification parade, the evidence of eyewitnesses regarding participation of the accused cannot be rejected.[91]

9. Identification of an Accused

It is the duty of the prosecution to lead evidence that all precautions were taken so that no witness could have the opportunity to see the accused after his arrest or before the test identification parade.[92] Identification of the accused by prosecution witnesses for the first time in court cannot be relied upon in the absence of corroboration by an earlier test identification parade.

It is settled principle of law that in the case of identification of a stranger by a victim, the victim should get sufficient time and opportunity of seeing the culprit and thereafter, impressing his features, identification marks, in his memory so as to allow him to recollect it at the time of the test identification parade, and thereafter, in court.[93] When the incident took place suddenly in a surprising way frightening the victims, it is difficult for them to maintain their balance and become alert to grasp the features of the culprit. If he happens to be a person well-acquainted with the victim, such circumstances may not weigh much against his identification. However, when that culprit is a stranger to the victim, the effect of surprise in which the victim had been caught, coupled with fright, are the factors which go against the capacity of such witness identifying such person, after a gap of even couple of days.[94] Likewise, the question of identification of the accused person would not arise when the accused persons were caught and taken to the police and remained in the company of the complainant right from going to their house and reaching the police station. When the accused remained in the company of witnesses for a long period in continuation, the question of holding identification parade would not arise.[95] Where the accused is not known to the witnesses from before holding of test identification parade is necessary.[96]

The accused persons were alleged to have beaten a scooterist and a pillion-rider at night and stole their belongings. None of the witnesses stated as to the availability of light at the place of the incident and the accused were not known to witnesses before the incident. The identification parade was conducted five months after the incident and the statement of the witnesses were recorded in the court after 3½ years. One witness failed to identify the accused in court and another failed to identify in the identification parade, but suspiciously identified the accused in court. The delay is conducting the identification parade without assigning any reason was held to be not3351 proper. Further, the witness having better chances of identifying the accused did not identify them and the injured witness who was riding the scooter when he was stated to be hit by the accused at night, identified the accused. In these circumstances, the identification of the accused was held improbable and the accused was acquitted.[1]

When an eyewitness has identified the accused by a general statement that all the accused persons standing in the dock are the culprits and the other eyewitness has not identified the accused, it would be difficult to sustain the conviction of the accused on the basis of identification by some of the witnesses in the court in the absence of any corroboration by way of the test identification parade.[2] When the complainant and his wife identified the accused persons in the court and they have sufficient time to closely observe the accused persons, merely because the test identification parade was not conducted properly, is no ground to discard their evidence.[3]

When there is no material to show that witnesses had any chance to see the suspect before the identification parade was held, the test identification parade held after the occurrence can be relied upon.[4]

The test identification parade held after more than 6 months from the date of occurrence and also from the subsequent arrest of the accused, cannot be relied upon when there is no plausible explanation regarding the inordinate delay in holding the identification parade. The accused cannot be convicted on the basis of such identification evidence, particularly when two co-accused had been acquitted on the same evidence.[5] Where the PWS did not give details of the accused in their s 161, CrPC statements, though they claimed to have identified the accused persons in full moon light at the time of the commission of

dacoity, even in TI parade they did not describe the accused, the accused were arrested three months after the incident, identification of the accused appellants was found doubtful, they were acquitted of the charge under s 392, IPC .[6]

10. Test Identification of Accused not held--Effect

There is no legal impediment in convicting an accused on the basis of his identification at trial in the absence of test identification parade, provided that the court has good reasons to believe the evidence of identification at trial, particularly, when there is other corroborative evidence on record, direct or circumstantial. Further, the absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint.[7] When the accused was identified by the complainant and even though no identification parade was conducted, the same cannot affect the case of prosecution.[8] Non-holding of test identification parade in3352 cases pertaining to robbery with an attempt to cause grievous hurt is neither fatal nor necessary.[9]

11. Identification of Culprit by Witnesses--Important Points

Commentary under the same heading in s 395, *post*, may be referred to.

12. Identification of Accused by Witnesses--When not Believed

Commentary under the same heading in s 395, *post*, may be referred to.

13. Identification of Accused by Witnesses--When Believed

Commentary under the same heading in s 395, *post*, may be referred to.

14. Value of Proof by Identification

Commentary under the same heading in s 395, *post*, may be referred to.

15. Test Identification of Accused on Bail

Commentary under the same heading in s 395, *post*, may be referred to.

16. Accused Refusing to Join Test Identification Parade--Effect

It is true that the normal rule is that testimony of a witness, who does not know an accused from before and identifies him for the first time in the court as person who had participated in the commission of the crime, without holding a previous identification parade, does not carry much weight. The substantive evidence of a witness is the statement in court, but as a rule of prudence earlier identification proceedings are held in order to corroborate the testimony of a witness given in court as regards the identity of the accused who is not known to him from before. However, this normal rule can have no application. When the accused was kept baparda (with his face muffled) for holding test identification parade, but the accused himself refused to participate in the test identification parade, in such a case, the identification of the accused by the witness for the first time in the court can be relied upon.[10] When the complainant has not identified the accused in court, the mere refusal by the accused to participate in the test identification parade is not sufficient to convict the accused under s 392, IPC .[11]

17. Delay in Holding Test Identification Parade--Effect

The conduct of an identification parade belongs to the realm and is a part of the investigation. The evidence of test identification is admissible under s 9, Evidence Act. However, the value of the test identification apart from the other safeguards appropriate to a fair test of identification depends upon the

promptitude in point of time with which the suspected persons are put up for test identification. If there is an unexplained and unreasonable delay in putting up the accused persons for test3353 identification, the delay by itself detracts from the credibility of the test. The test identification parade in the case was held after four months.[12] In view of the guidelines regarding appreciation of evidence in the matter of test identification parade, the Supreme Court has clearly observed that though there is no proposition of law like that, a test identification parade if it is delayed, cannot be relied upon, but what is required is that in such matter the courts are required to scrutinize the evidence cautiously. It has also been observed by the Apex Court that it could be a reason which may create doubts.[13]

In Soni v State of Uttar Pradesh ,[14] a test identification parade was held after a lapse of 42 days from the date of the arrest of the appellant. The delay in holding the test identification parade created a doubt on the genuineness thereof, apart from the fact that it may be difficult that after lapse of such a long time the witnesses would be remembering the facial expressions of the appellant. This court, therefore, held that if this evidence cannot be relied upon, there is no other evidence which can sustain the conviction of the appellant. In these circumstances the appellant was acquitted. The judgment is a short judgment of only one paragraph and conviction of the appellant in that case rested solely on his identification by the witnesses. There was no other evidence which proved the complicity of the appellant.

In *Asif Ahmad v State of Chhattisgarh* ,[15] the unexplained delay of 46 days in holding the test identification parade of the accused was held fatal, when the parade was conducted in jail premises in open verandah and when news regarding arrest of all accused persons was published in all the newspapers.

In Subhash v State of Uttar Pradesh ,[16] the test identification parade was held three weeks after the arrest of the appellant. There was, therefore, a room for doubt as to whether the delay in holding the test identification parade was in order to enable the identifying witnesses to see him in the police lock-up or in the jail premises and make a note of his features. The court also noticed that four months had elapsed between the date of occurrence and the date of holding of the test identification parade. The descriptive particulars of the appellant were not given when the report was lodged. But while deposing before the sessions judge, the witnesses had stated that the appellant was a tall person and had sallow complexion. If on account of these features the witnesses were able to identify appellant, Shiv Shankar, at the identification parade, they would have certainly mentioned about them at the earliest point of time when his face was fresh in their memory. As the conviction of the appellant was based solely on the identification at the test identification parade, the Supreme Court gave to him the benefit of doubt, while upholding the conviction of the co-accused. This is also a case where the conviction of the appellant was based solely on the evidence of identification. There being a delay in holding the test identification parade and in the absence of corroborative evidence this court found it unsafe to uphold his conviction.

In *Rajesh Govind Jagesha v State of Maharashtra* ,[17] accused no 2 was arrested on 20 January 1993, but the identification parade was held on 13 February 1993. It was also not disputed that at the time of identification parade the appellant was not having3354 beard and long hair as mentioned at the time of lodging of the FIR. It was also not disputed that no person with beard and long hair was included in the parade. The witnesses were alleged to have identified accused no 2 at the first sight despite the fact that he had removed his long hair and beard. The Supreme Court held that the magistrate should have associated 1-2 persons having resemblance with the persons described in the FIR and why it was not done was a mystery shrouded with doubts and not cleared by the prosecution. In these circumstances, the court observed that the possibility of the witnesses having seen the accused between the date of arrest and the test identification parade cannot be ruled out. This case also rests on its own facts, and mere delay in holding the test identification parade was not the sole reason for rejecting the identification. In *Delhi Administration v Bal Krishan* ,[18] it was held that it cannot be laid down as a proposition of law that after a lapse of a long period, witnesses would, in no case, be able to identify the dacoits they had seen in the course of a dacoity committed during the night. However, the courts will have to be extremely cautious when such evidence is before them. In *Vikram Singh v Raj Singh* ,[19] the Supreme Court held that in the absence of anything to indicate that the accused were shown to the witnesses, the test identification parade held after a month of the arrest of the accused could not be rejected. In *Bharat Singh v State of Uttar Pradesh* ,[20] the Supreme Court held that although it is desirable to hold identification parade at the

earliest opportunity, when there is a delay of three months in holding the identification parade, it is the duty of the accused to cross-examine the police officer who conducted the investigation and the magistrate who held the parade, if the accused wishes to take advantage out of such undue delay. In *Daya Singh v State of Haryana* ,[21] the Supreme Court held that the identification of the accused in court after seven or eight years would not affect the evidence of the eye-witnesses, where the trial was delayed for one or the other reason in a case where it was apparent that the witnesses had gained an enduring impression of the accused during the incident. It will thus be seen that the evidence of identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest possible opportunity, no hard and fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probablising the possibility of the accused having been shown to the witnesses, the court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the court has to consider the evidence in its entirety.[22]

18. Factum of Light and Identification Evidence

In cases resting on identification evidence, the burden is on the prosecution to prove that there was sufficient light wherein the victim and witnesses identified the miscreants. No presumption can be raised about sufficiency of light. The question of demolishing the factum of light by the accused arises only when the prosecution has established the presence of light.[23]3355

Where the complainant was robbed on a street by three persons when it was dark, and there was no mention of the fact that he had seen their faces in the head-light of a truck in his *parcha bayan* or police statement, and the accused were arrested after three years from the date of incidence, and they were not kept baparda and also their photos were flashed in newspaper, their identification by the victim was held to be doubtful and conviction cannot be based on it.[24]

19. Identification of Dacoits in Torch Light

Commentary under the same heading in s 395, *post*, may be referred to.

20. Identification of Case Property

The plea that the identity of the currency notes found must tally with the stolen notes before a conviction can be recorded is not tenable.[25]

The identification of case property in the court without test identification does not render the identification inadmissible. The weight to be attached to such identification is a matter to be decided by a court of fact.[26] When nothing has been stated by the investigating officer that ornaments were sealed at the time of recovery and so the test identification of case property was not reliable, but this does not make a difference to the overall weight of evidence of witnesses as it is in the prosecution's favour.[27] When the identity of the accused person to the persons responsible for committing the alleged robbery has not been established nor the identity of the stolen property has been established to be the stolen property of that robbery, the conviction of the accused under s 392 read with 397, IPC, is liable to be set aside.[28]

The identification of stolen articles by the owner or the persons who have the opportunity to see them very often cannot be discarded merely on the ground that no special identification marks were there on the said ornaments. It is so, because such persons can identify the articles by feel, touch or by other distinguishing features, though they may not be able to formulate the reasons since identification is based on the untranslatable impression of their minds.[29] When the test identification of the accused is liable to be ignored on account of doubt about its fairness and the test identification of case property has to be discarded because the investigating officer has not stated that the ornaments, *i.e.*, the case property were sealed at the time of recovery, but, if it is established by other reliable evidence beyond doubt that it was the accused who looted these ornaments from the victim in her house at knife point threatening to kill her,

the accused is liable to be convicted under s 392 read with 397, IPC .[30]3356

21. Doubtful Recovery of Stolen Articles

When the witnesses to recovery turned hostile and did not support the prosecution case, and the accused denied the aspect of having made the disclosure statement on the basis of which recovery was allegedly made, the houses from where recovery was made, were not proved to be the houses of the accused and the recoveries were made after a long lapse of time, under these circumstances, the recovery and identification of stolen articles is doubtful.[31]

22. Recovery of Property Looted-Non-Joining of Public Witnesses

Where the arresting officer deposes that he made effort to search/join public witness to the recovery, but none was prepared to be a public witnesses, the evidence of the police officials about the recovery of the looted property was reliable, the non-joining of public witness to the recovery would be of no effect.[32]

23. Failure to Hold Identification of Recovered Property--Effect

Commentary under the same heading in s 395, *post*, may be referred to .

24. Recovery of Huge Quantity of Case Property--Effect

Commentary under the same heading in s 395, *post*, may be referred to.

25. Separate Trial

Where persons were convicted on three different and distinct charges for three separate and distinct robberies committed on the same night in three different houses, it was held that they must be tried separately for each of the said charges.[33]

26. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about theday of, at, committed theft of (*specify the property*) and, in committing theft (*or in order to commit the theft or in carrying away* (*or attempting to carry away*) *the said property*), voluntarily caused (or attempted to cause) death of (*name the person*) (*or hurt, or wrongful restraint*) (*or fear of instant death, or of instant hurt, or of instant wrongful restraint, to* (*name the person*) [*or committed extortion on AB by putting the said AB (or CD) in fear of instant death* (*or of instant hurt, or of instant wrongful restraint*) and that you were in the presence of the said AB at the time of committing extortion and induced the said AB then and there to deliver up (*name the property*)], and thereby committed an offence, punishable under s 392 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

It is to be noted that in the case of a robbery committed on a highway between sunset and sunrise, this fact must be mentioned in the charge.3357

27. Burden of Proof

If the prosecution evidence in a case under s 392, IPC is insufficient by itself to justify a conviction, the mere fact that the accused in his statement adopted a story which was not believed by the court, would not remedy the defect. The prosecution cannot fill up the gap in the evidence by the statement of the accused,[34] nor can infirmities of the defence, if any, be taken advantage of.[35] Where the accused was not named in the FIR and the identifying witness was not found reliable as having already seen the accused at the police station, and the money recovered from the accused was not of the same value as alleged to be looted, it was held that there was no proof beyond reasonable doubt.[36]

28. Proof

To secure a conviction under this section, the prosecution must prove:

(a) in the case of a robbery by theft,[37] that:

(1) the offender voluntarily caused, or attempted to cause, to any person:

(i) death, or hurt, or wrongful restraint, or
(ii) fear of instant death, or of hurt, or of wrongful restraint; and

(2) the above was done that end, namely:

(i) in order to the committing of the theft, or
(ii) in committing the theft, or
(iii) in carrying away, or in attempting to carry away, property obtained by the theft;

(b) in the case of a robbery by extortion, that:

(1) extortion, as defined in s 383, IPC, was committed;
(2) the offender, at the time of committing extortion, was in the presence of the person put in fear;
(3) extortion was committed by putting that person in fear of instant death, or of hurt; or of wrongful restraint, to that person or to some other person; and
(4) by so putting the person in fear; he was induced to deliver up then and there the thing extorted.

In robbery cases, proof is adduced in the form of evidence relating to the identification of the accused or of the property recovered from his possession or on being pointed by him towards recovery. No importance can be attached to minor omissions. Non-mentioning of car number by the witness would be no ground to disbelieve the recovery memo.[38] Where the appellant accused admitted that he along with co-accused demanded money from the deceased at knife point and that a sum of Rs 6290/- was recovered from him by the police, this amount was part of Rs 8000/-3358 which fell out from the pocket of the deceased, was picked up by him from the ground, the conviction of the appellant accused under s 392, IPC was upheld.[39]

29. Presumption under Illustration (A) to Section 114, Indian Evidence Act 1872

Illustration (a) to s 114 of the Evidence Act provides that a presumption arises when a man is in possession of stolen goods, soon after the theft, he is either the thief or has received the goods knowing then to be stolen, unless he can account for his possession. Presumption of facts are assumptions resulting from one's experience in the course of the natural events of human conduct and character, and all those which one is entitled to make use of or has to make use of in the ordinary course of life, as well as the business of courts.[40]

The question, whether a presumption under illust (a) to s 114 of the Evidence Act, should be drawn, is a matter which depends on the evidence and the circumstances of each case, the nature of the recovered articles, the manner of their acquisition, the nature of their identification, the manner in which the articles were dealt with by the accused, the place and the circumstances of their recovery, the length of the intervening period and the ability of the accused to explain the recovery.[41] Recent and unexplained possession of stolen articles can well be presumptive evidence of the charge even of murder committed at the robbery.[42]

When a charge of murder on the accused is established, in a murder, and robbery case, the presumption under illust (a) to s 114, Evidence Act, may also arise that accused committed robbery of the stolen property.[43]

30. In Robbery-cum-Murder Cases Recent and Unexplained Possession of Stolen Property Raises Presumption of Murder as Well

Commentary under s 302, vol 3, may be referred to.

31. Acquittal

Where, in the absence of the owner of a factory, some excise officers illegally seized some account books which he afterwards forcibly recovered from their possession, it was held that the owner committed no offence under s 392, IPC .[44] When the identification of the accused by the witness is doubtful and no incriminating articles are seized from the accused, the conviction of the accused merely because he was found in the company of the other co-accused and tried to run away after seeing the police, is not proper.[45]3359

Prosecution case was that five persons including the appellant accused persons armed with *lathi*, revolver and knife entered the temple, tied the priest (complainant) of the temple with rope and took away collection box. Admittedly no injury was caused to the complainant. The testimony of the complainant and the sole witness examined in the case was inconsistent and contradictory. Conviction of the appellant accused under ss 452, 392 and 397, IPC was set aside.[46]

When the witnesses to recovery turned hostile and did not support the prosecution case, and the accused denied the aspect of having made the disclosure statement on the basis of which recovery was allegedly made, the houses from where recovery was made were not proved to be the houses of the accused,and the recoveries were made after a long lapse of time, under these circumstances, the recovery and identification of stolen articles is doubtful.[47] Appellant accused was alleged to have committed murder of the deceased and robbed her gold ornaments. Evidence showed that the accused was present in the funeral ceremony of the deceased. Motive was also not proved. No test identification parade of the recovered gold ornaments was held. Accused was acquitted of the charges under ss 302, 392 read with s 397, IPC .[48]

Appellant A1, A2 accused were alleged to have robbed a woman of her ornaments and committed her murder by drowning her. The evidence relied upon was the recovery of ornaments and the fact that the accused appellants were seen near the place of occurrence. The two circumstances were found not

sufficient to record the conviction of the accused appellants, their conviction under ss 392 and 302, IPC was set aside.[49]

There were material contradictions in the evidence of the prosecution witnesses. The participation of the appellant in robbery was not proved beyond reasonable doubt. Accused was acquitted of the charge under s 390, IPC .[50]

The prosecution witnesses did not describe the appellant accused either in their statement recorded under s 161, CrPC or prior to holding of TI Parade before the Magistrate. Although, they claimed in their testimonies, that they had seen the appellant in the full moon light, but this fact was not mentioned by them in their statements recorded under s 161 CrPC The identification of appellant accused in TI parade was highly doubtful. He was acquitted of the charges under ss 399, 392 and s 307 read with s 149, IPC .[51]

32. Conviction

The accused persons posed themselves as officers attached to the detective department. On the strength of a police belt and police monogram, they looted certain articles from the complainant. The stolen articles, one police belt and monogram, were recovered from the accused. The evidence of the complainant was found to be clear and cogent and was corroborated by evidence of other witnesses. The conviction of the accused3360 under ss 170 and 392 read with s 34, IPC, was found proper.[52] Articles looted in the robbery were recovered from the possession of the accused, the recovered articles were identified by the complainant as articles of theft. The accused could not furnish an explanation as to how he came into possession of articles recovered from his possession. Accused was convicted for offences under ss 392 and 302, IPC .[53] Accused persons and deceased were travelling in the same tractor. The accused persons robbed him and threw him in the canal. The deceased even after being thrown in the canal tried to save himself desperately. He wanted to come out of the canal by catching the grass. He was kicked on the face and again thrown in the canal. The fact that he was in an inebriated condition was not in dispute. He could not swim to the shore to save his life. Accused appellant was convicted under ss 302 and 392, IPC .[54] Victim was travelling in TSR. Accused driver of the TSR along with three other co-accused robbed the victim of his valuables at knife point, pushed down the victim and tried to flee away, but after chase was arrested. Valuables of the victim and the offending weapon knife were recovered from his possession. Accused in furtherance of common intention with other co-accused committed the offence. Conviction under ss 392 / 34 and 397 / 34, IPC was held proper.[55] The accused appellant robbed the deceased of money and tractor and after committing robbery threw the deceased and one more person into canal. On the basis of the disclosure statement made by the accused, the dead body of the deceased was recovered from the place of occurrence, the tractor and 'Barma' belonging to the deceased were recovered from the possession of the accused. The case of the prosecution against the accused appellants was held to be proved beyond reasonable doubt, the accused appellants were convicted for offences under s 392 read with s 397, IPC, sentence of seven years RI was imposed.[56]

The evidence of the victim, her husband, the factum of recovery of the vehicle used in the commission of offence clearly established the commission of offence by the appellants, on a public road, not a highway, committed during sunset and sunrise that is, at about 9.00 p.m. At that time when PW2 and PW3 were going on scooter, the accused appellants intercepted the victim and robbed cash, and ornaments on point of knife. The conviction of the appellants under s 392, IPC was upheld.[57] In the instant case the accused appellant with motive to rob the deceased of her ornaments, on the pretext of taking the deceased to Chikamangalur, took her in the taxi, on way committed her murder and robbed her of her ornaments and valuables. Circumstantial evidence, the recovery of the dead body and gold jewellery of the deceased on the pointing out of the accused proved the case beyond reasonable doubt. However, death sentence awarded by the courts below was converted into life imprisonment.

Accused A1 along with some others armed with weapons entered the house of the complainant PW1, inflicted knife injuries and looted articles. The prosecution evidence established that the gathering of mob outside the house of PW1 was an3361 unlawful assembly, which was armed with deadly weapons. The same would clearly fall within the ambit of ss 141 and 148, IPC . Accused A1 was convicted for offences

under ss 148, 392 and 452, IPC .[58]

Circumstantial Evidence--Robbery and Murder--Conviction upheld

The prosecution case was that the four appellant accused persons robbed the deceased of her jewellery and murdered her in the field. There was evidence of the eye-witnesses that they had seen appellants accused coming out of the field of the deceased. There was also recovery of the jewellery. The witnesses also identified the appellants accused in test identification parade. Omission of the jewels in details in FIR was held of no consequence. Appellants accused persons were convicted under ss 392 and 302, IPC .[59]

33. Acquittal of Some Accused and Conviction of Other

Where the evidence on record was not attributing any overt act on the part of two co-accused persons except bare allegation of their presence at the time of occurrence, and their involvement in alleged crime was doubtful, they are held entitled to acquittal under s 392 . However, evidence established that the main accused committed robbery of Rs 2,000/- by putting the victim to instant fear of death by putting (*bhujali*) weapon at his neck, he alone would be liable to be convicted under s 392 .[60]

34. Accused Convicted under Section 394 cannot be Convicted under Section 392

The offence of simple robbery is punishable under s 392 and that of robbery accompanied by hurt, under s 394 . When the accused is convicted under s 394 he should not be convicted under s 392, for the offence under s 392 is a minor offence in relation to the offence under s 394, and all the ingredients of the offence punishable under s 392 are covered in the offence under s 394, IPC .[61]

35. Accused Convicted for Robbery cannot be Convicted for Theft

Commentary under the same heading in s 380, *ante*, may be referred to.

36. Double Conviction

Where the accused entered the garden of the complainant and threatened to kill the farm servant, who was on watch, and then made away with the complainant's property leaving the servant tied up hand and foot, it was held that they could not be convicted of wrongful confinement in addition to robbery. They could be convicted only under s 392, IPC .[62] Theft and taking and retention of stolen goods form one and the same offence and cannot be punished separately. On conviction and sentence3362 under s 392, the conviction and sentence under s 441, IPC, cannot be sustained.[63] An offence under s 392 is a lesser offence in relation to s 395, IPC, and the accused can be convicted under the latter section.[64]

A person, who commits robbery being armed with a sword, for which he has no licence, can be convicted of robbery and of carrying arms without licence and sentenced separately.[65] If an accused, while carrying away the stolen property, is apprehended by the owner of the property and thereupon he (*i.e.*, accused) strikes him (*i.e.*, owner of the property) with a knife and kills him, he can be convicted both under ss 392 and 302, IPC .[66]

37. Sentence

It is well-settled that the question of sentence is primarily a question of discretion of the trial court and unless that discretion has been capriciously exercised and the sentence awarded is manifestly inadequate, the appellate court would not be justified in enhancing it. A sentence of 5 years rigorous imprisonment for offence under s 392, IPC, awarded by the trial court can by no stretch be castigated as one which is unduly lenient or inadequate.[67]

The accused, a student of eleventh standard in a higher secondary school, appeared to have fallen in bad company and along with another person robbed a person of his wrist watch. The accused was 20/22

years old and was in jail for about 8 months. On these facts, the sentence of the accused was reduced from 2 years of imprisonment to the one already undergone.[68]

Where the appellant was a young man of 32 years of age and he had a previous conviction of a similar nature to his discredit, and the looted property was returned soon after the commission of the offence, it was held that the ends of justice would be met if the sentence of seven years rigorous imprisonment is reduced to a term of three years rigorous imprisonment.[69] However, a sentence of seven years awarded to an accused, involved in a robbery committed on a highway between sunset and sunrise, which must, in all cases, be considered as a very serious crime, is not excessive.[70]

However, in a highway robbery where a taxi-driver was robbed of cash and a wristwatch though the sentence of three months and 17 days rigorous imprisonment imposed by the trial court under s 392 read with s 34, IPC, was found ridiculously and shockingly inadequate but since the accused had already undergone the custody for 3 months and 17 days, the offence was committed 11½ years ago and no overt act was attributed to the accused, the sentence was enhanced from a period of 3 months and 17 days rigorous imprisonment (period already undergone) by the accused in a manner that an additional fine of Rs 8000 was imposed and in default to undergo imprisonment for one year.[71]3363

38. Concurrent Sentence

The fact that the accused was already undergoing sentence in respect of two other offences is no ground to direct that the sentence in the offence of robbery would run concurrently with the sentence in respect of other offences.[72]

39. Alteration of Conviction from Section 392 read with Section 397 to Section 392

Commentary under the headings in s 397, *post*, may be referred to.

40. Alteration of Conviction from Section 392 to one under Section 411

Where the complainant in his evidence has not identified the accused person as the person who threatened him while taking the scooter from him at gun point but the recovery of the scooter from the possession of the accused was established, the conviction of the accused under s 392 read with s 34 was altered to one under s 411, IPC .[73]It is true that in cases where the recovery has been immediately effected, the court can draw an inference under illust (a) to s 114 of the Evidence Act and convict the accused for the substantive offence of theft or robbery or dacoity or dacoity with murder, *etc*, as the case may be. However, in a case where the recovery is not immediate and is affected after six days of the incident and identity of the accused is not established, the conviction of the accused is liable to be altered from s 392 to s 411, IPC .[74]

41. Alteration of Conviction from Section 392 read with Section 397 to one under Section 411

Commentary under the same heading in s 397, *post*, may be referred to.

42. Alteration of Conviction from Section 392 read with Section 397 to one under Section 412

Commentary under the headings in s 397, *post*, may be referred to.

43. Alteration of Conviction from Section 395 to one under Section 392

If it is not adequately proved that five or more persons had taken part in committing the robbery, the offence will not be converted into a dacoity.[75] Where, out of six persons put up for trial under s 395, IPC,

three were acquitted, the conviction of the remaining three was altered from dacoity to one of robbery.[76]3364

If seven persons are charged for the offence of dacoity and six of them are acquitted as no case is made out against them, the conviction of the seventh accused as a dacoit cannot also be sustained.[77]

Where four out of the five accused persons were acquitted, the conviction of the remaining one accused under s 395 was not found proper and so was altered from s 395 to one under s 392, IPC .[78]

The allegation as per the prosecution case was that five accused persons robbed the complainant of his wrist watch and currency notes and ran away. Two of the five accused were acquitted. Therefore, it was not proper to convict the remaining three accused under s 395, IPC . Their conviction was altered from s 395 to one under s 392, IPC .[79] When the five accused were charged under s 395 but four out of them were acquitted, the conviction of the fifth accused under s 395, IPC, was set as side and instead he was convicted under s 392, IPC .[80]

44. Alteration of Conviction from Section 392 to one under Section 379

Where the accused pushed the complainant and took away his goat, the conviction of the accused under s 392, IPC, is liable to be altered to one under s 379, IPC, because the mere fact of pushing the complainant does not constitute the offence of wrongful restraint.[81]

45. Alteration of Conviction from Section 394 to one under Section 392

The prosecution case was that *B* and *C* robbed *P* and caused abrasions on him by a knife. The doctor's evidence showed that the abrasions were caused by a blunt object. The trial court held that the abrasions were caused when *P* was pushed in the bush by *B* and *C* and convicted *B* and *C* under s 394 read with s 34, IPC . Holding that such conclusion could not reasonably be drawn in favour of the prosecution when that was not the case of the prosecution itself, the High Court altered the conviction of *B* and *C* from one under s 394 read with s 34 to one under s 392 read with s 34, IPC .[82]

81 *Fateh Mohamad Gulmohamad Sayed v State of Maharashtra* 2003 Cr LJ 3586 (Bom) .

82 *Himatsing Shivsing v State of Gujarat* (1962) 2 Cr LJ 415 ; *Titir Dusadh v State of Bihar* AIR 1966 Pat 453, 1966 Cr LJ 1474 .

83 *Ramcharan Budhiram Gupta v State of Maharashtra* 1995 Cr LJ 4048 (Bom) (DB) .

84 *Narayan Singh v Amarsingh* AIR 1965 MP 225, (1965) 2 Cr LJ 507 .

85 *Ashrafi v State* AIR 1961 All 153, (1961) 1 Cr LJ 340 .

86 *State of Madhya Pradesh v Manka* 1960 MPC 216 .

87 *State of Madhya Pradesh v Manka* 1960 MPC 216 .

88 *Ashrafi*'s case AIR 1960 Mad 125, 1960 Cr LJ 358 .

89 *Mohanan Nair v State of Kerala* . 1989 Cr LJ 2106 (Ker) (DB) .

90 *Somappa Vamanappa Madar Shankarappa Ravanappa Kaddi v State of Mysore,* AIR 1979 SC 1831, 1979 Cr LJ 1358 .

91 *Ramesh Kumar Soni v State of Madhya Pradesh* 1997 Cr LJ 3418 (MP) .

92 *Umesh v State of Madhya Pradesh* 1997 Cr LJ 1369 (MP) .

93 *Rajesh Kumar Babulal Sharma v State of Maharashtra* 2002 Cr LJ 1162 (Bom) ; *Saghir v State of UP* 2009 Cr LJ 1459, p 1463 (All) (DB) (The dacoits remained present in the hourse for an hour, the facial expressions of the accused imprinted on the mental screen of the witnesses, the identification of the accused by the PWS was found reliable).

94 *Ibid*.

95 *Jalamsingh v State of Madhya Pradesh* 2002 Cr LJ 2586 (MP) .

96 *State of Gujarat v Kishanbhai* 2014 (136) AIC 129, (2014) 5 SCC 108 .

1 *Shivarathri v State of Andhra Pradesh* (2001) Crimes 419, 2002 Cr LJ (NOC) 133 (AP) .

2 *Trilochan Harijan v State of Orissa* 1998 Cr LJ 1887 (Ori) ; *Husain Juma Dafar v State of Gujarat* (1986) 3 Crimes 229 (Guj) ; *Jamna v State of Madhya Pradesh* (1986) 2 Crimes 529 ; *Jaimal Singh v State of Haryana* (1988) 3 Crimes 442 (P&H) ; *Mohd Abdul Hafeer v State of Andhra Pradesh* AIR 1983 SC 367, 1983 Cr LJ 689 (SC) ; *Mohd Tahir v State* (1986) 2 Crimes 128 (Del) .

3 *Shahadat Hussain Rehmat Hussain v State of Maharashtra* 2007 Cr LJ (NOC) 588 (Bom), (2007) 3 AIR Bom R 816 .

4 *Prabhakar Behere v State of Orissa* 1997 Cr LJ 3291 (Ori) .

5 *Puttan alias Kamal Prasad v State of Uttar Pradesh* AIR 1992 SC 1032, 1992 Cr LJ 1122 (SC) .

6 *Ramji v State of Rajasthan* 2011 Cr LJ 4771 (Raj) .

7 *Nibaran Borah v State of Assam* 2006 Cr LJ 4222 (Gau) ; *Malkhan Singh v State of Madhya Pradesh* (2003) 5 SCC 746, 2003 Cr LJ 3535 (SC) .

8 *R Shanmugam v State* 2004 Cr LJ 873 (Mad) .

9 *Kashmirsingh Mohansingh Lathe v State of Maharashtra* 2003 Cr LJ 2491 (Bom) .

10 *Munna v State (NCT of Delhi)* 2003 Cr LJ 4440 (SC), AIR 2003 SC 3805 .

11 *Narender v State of Punjab* 2000 Cr LJ 1890 (P&H) ; *Bhagirath v State (NCT of Delhi)* 2014 (1) JCC 862 (Del) .

12 *Hari Nath v State of Uttar Pradesh* AIR 1988 SC 345, 1988 Cr LJ 422 (SC) .

13 *Sucha Singh v State of Rajasthan* 2005 Cr LJ 4357 (Raj) .

14 *Soni v State of Uttar Pradesh* (1982) 3 SCC 368 .

15 *Asif Ahmad v State of Chhattisgarh* 2011 Cr LJ 4461 (Chh) .

16 *Subhash v State of Uttar Pradesh* AIR 1987 SC 1222 .

17 *Rajesh Govind Jagesha v State of Maharashtra* AIR 2000 SC 160, 2000 Cr LJ 380, 1999 AIR SCW 4246 .

18 *Delhi Administration v Bal Krishan* (1972) 4 SCC 659, 1972 Cr LJ 51, AIR 1972 SC 3 .

19 *Vikram Singh v Raj Singh* 1998 SCC (Cr) 578 .

20 *Bharat Singh v State of Uttar Pradesh* (1973) 3 SCC 896, 1972 Cr LJ 1704, AIR 1972 SC 2478 .

21 *Daya Singh v State of Haryana* (2001) 3 SCC 468, (2001) Cr LJ 1268, 2001 AIR SCW 936, AIR 2001 SC 1188 .

22 *Lal Singh v State of Uttar Pradesh* 2004 Cr LJ 378 (SC) .

23 *Bala Pandurang Kesarkar v State of Maharashtra* 2000 Cr LJ 693 (Bom) (DB) .

24 *Sucha Singh v State of Rajasthan* 2005 Cr LJ 4357 (Raj) . For further commentary, see under the same heading in s 395, *post*.

25 *Suryamoorthy v Govindaswamy* AIR 1989 SC 1410, 1989 Cr LJ 1451 .

26 *Kanta Prashad v Delhi Administration* AIR 1958 SC 350, 1958 Cr LJ 698 (SC) ; *Earabhadrappa v State of Karnataka* AIR 1983 SC 446, 1983 Cr LJ 846 (SC) ; *Ravi Mayor v State* 1997 Cr LJ 2886 (Cal) (DB) .

27 *Umesh v State of Madhya Pradesh* 1997 Cr LJ 1369 (MP) .

28 *Jahagir v State of Haryana* 1997 Cr LJ 48 (P&H) .

29 *State of Madhya Pradesh v Mukund alias Kundu Mishra* 1997 Cr LJ 534 (MP) (DB) .

30 *Umesh v State of Madhya Pradesh* 1997 Cr LJ 1369 (MP) .

31 *Sucha Singh v State of Rajasthan* 2005 Cr LJ 4357 (Raj) .

32 *Akil v State (NCT of Delhi)* 2013 Cr LJ 571, (2013) 7 SCC 125, 2013 AIC 571 (SC) .

33 *Queen v Itwaree* 6 WR (Cr) 83 .

34 *Salleh v Emperor* AIR 1929 Sind 255, 30 Cr LJ 1135 .

35 *Lakshman v State* 1977 UP Cr Cas 69, p 71, 72 (All) .

36 *Paras v State* 1978 Cr LJ 634 ; *Dashrath v State of Maharashtra* 1984 Cr LR 553 (Mah) .

37 *Himatsing Shiv Singh v State of Gujarat* (1962) 2 Cr LJ 415 ; *Ramdev Tewari v Dev Narain Tewari* 1953 BLJR 465 .

38 *Dhian Singh v State of Punjab* 2006 Cr LJ 3177 (P&H) .

39 *Vabeiki Pochorana v State of Mizoram* 2013 Cr LJ 1596, p 1601 (Gauh), 2013 (1) Crimes 187 (Gau) . 2013 (1) GLD 775 (Gau), 2013 (1) GLT 273 .

40 *State of Karnataka v David Razorio* 2002 Cr LJ 4127 (SC) .

41 *Mohan Lal v Ajit Singh* AIR 1978 SC 1183, p 1195, 1978 Cr LJ 1107 ; *Baiju v State of Madhya Pradesh* AIR 1978 SC 522, 1978 Cr LJ 646 ; *Earabhadrappa v State of Karnataka* (1983) 2 SCC 330, 1983 Cr LJ 846 (SC) ; *State of Orissa v Dayamidhi Bisoi* 2003 Cr LJ 123 (Ori) (DB) .

42 *Wasim Khan v State of Uttar Pradesh* AIR 1956 SC 400, (1956) 1 Cr LJ 797 ; *Alisher v State of Uttar Pradesh* AIR 1974 SC 1830, 1974 Cr LJ 897 ; *Ganga Singh v State of Rajasthan* 1977 Cr LR 365 (Raj), 1977 Raj LW 178 ; *Jangsingh v State of Rajasthan* 1984 Cr LJ 1135 (Raj) .

43 *State of Orissa v Dayanidhi Bisoi* 2003 Cr LJ 123 (Ori) (DB) .

44 *Gurucharan v State* (1965) 2 Cr LJ 582, AIR 1956 All 543 .

45 *Rajesh kumar Babulal Sharma v State of Maharashtra* 2002 Cr LJ 1162 (Bom) .

46 *Dilawar Singh v State of Delhi* 2007 Cr LJ 4709, p 4717 (SC), AIR 2007 SC 3234, 2007 (10) Scale 556, (2007) 12 SCC 641 .

47 *Sucha Singh v State of Rajasthan* 2005 Cr LJ 4357 (Raj) .

48 *Pannayar v State of Tamil Nadu by Inspector of Police* 2009 Cr LJ 4454 (SC), (2009) 9 SCC 152, 2009 AIR SCW 5608 .

49 *Madhu v State of Kerala* AIR 2012 SC 664, 2012 Cr LJ 1230, (2012) 2 SCC 399, 2012 (110) AIC 89 (SC) .

50 *Prabhat Mark v State of Tripura* 2011 Cr LJ 1844 (Gauh), (2011) 4 GLR 247 .

51 *Ramji v State of Rajasthan* 2011 Cr LJ 4771, p 4773 (Raj) .

52 *Karuna Krishna Biswas v State of West Bengal* 1996 Cr LJ 2823 (Cal) .

53 *Akil v State NCT of Delhi* 2013 Cr LJ 571 (SC), (2013) 7 SCC 125, 2012 (11) Scale 709 .

54 *Jai Kumar v State of Haryana* 2009 Cr LJ 3719, p 3721 (SC), 2009 AIR SCW 4735, 2009 (9) Scale 704 .

55 *Lalit Kumar v State* 2014 Cr LJ (NOC) 437 (Del) .

56 *Subhash v State of Haryana* 2008 Cr LJ 693, p 696 (SC), 2007 AIR SCW 7233, 2007 (10) Scale 105 .

57 *Venu v State of Karnataka* 2008 Cr LJ 1634, p 1635 (SC), 2008 AIR SCW 1172, AIR 2008 SC 1199, (2008) 3 SCC 94, 2009 (2) Scale 29 .

58 *Mohammed Ishaq v S Kazam Pasha* 2009 Cr LJ 3063, p 3068 (SC), 2009 AIR SCW 3705, 2009 (7) Scale 575 .

59 *Krishnamoorthy v State by Inspector of Police* 2007 Cr LJ 1803, p 1806 (SC), 2007 (2) Crimes 372 .

60 *Dinabandhu Mohapatra v State of Orissa* 2004 Cr LJ 1931 (Ori) .

61 *Philip Vihmsent Aind v State of Maharashtra* 1995 Cr LJ 1694 (Bom) (DB) .

62 Re *Malta Parti* 1 Weir 445.

63 *Pakhar Singh v Crown* 1950 EP 66, 51 Cr LJ 581 .

64 *Ram Sankar v State of Uttar Pradesh* AIR 1956 SC 441, 445, 1956 Cr LJ 822 .

65 *Empress v Nand Lal* 1896 AWN 181 .

66 *Sohabat Ali v State* 1955 NUC 3573 (All) ; *Jamuna v Emperor* AIR 1936 Nag 200, 37 Cr LJ 1047 .

67 *Kayyumkhan alias Shankar v State of Maharashtra* 1997 Cr LJ 3137 (Bom) (DB) .

68 *Din Dayal v State (Union Territory of Delhi)* 1990 Cr LJ 2677 (SC) .

69 *Hari Ram v State of Rajasthan* 1978 Cr LR 521, p 522-24 (Raj) .

70 *Adhik Lal Fathak v Emperor* AIR 1942 Pat 156, 43 Cr LJ 615 ; *Om Prakash v State* AIR 1956 All 163, 1956 Cr LJ 358 (2) .

71 *State of Maharashtra v Manipal Singh Satyanarayana* 1996 Cr LJ 2485 (Bom) (UB) .

72 *Shahadat Hussain Rehmat Hussain v State of Maharashtra* 2007 Cr LJ (NOC) 588 (Bom), (2007) 3 AIR Bom R 816 .

73 *Narender Singh v State of Punjab* 2000 Cr LJ 1890 (P&H) ; *Ramchanran Bhudiram Gupta v State of Maharashtra* 1995 Cr LJ 4048 (Bom) (DB) .

74 *Bala Pandurang Kerarkar v State of Maharashtra* 2000 Cr LJ 693 (Bom) (DB) .

75 *Uda v Emperor* 16 Cr LJ 634 .

76 *Pidda Enumundugaru v Emperor* 11 Cr LJ 249 ; Re *K Appallaswamy*1957 Cr LJ 1227; *Gopaian v State of Kerala* 1977 Ker LT 714, p 717 ; Re *Chinnchoo Lingayya*1958 Cr LJ 1001; *Ram Shankar Singh v State of Uttar Pradesh* AIR 1956 SC 441, 1956 Cr LJ 822 .

77 *Z (Y) Amngul Haokip v State of Manipur* 1980 Cr LJ 83 (NOC) (Gau) .

78 *Madan Kandi v State of Orissa* 1996 Cr LJ 227 (Ori) .

79 *Om Prakash v State of Rajasthan* 1998 Cr LJ 1636 (SC) .

80 *Prahhakar Behera v State of Orissa* 1997 Cr LJ 3291 (Ori) ; *Ram Shankar Singh v State of Uttar Pradesh* AIR 1956 SC 441, 1956 Cr LJ 822 .

81 *Babulal v State of Rajasthan* 1979 Raj Cr Cas 381 .

82 *Behari Lal v State* 1985 Cr LJ 1507 (Del) ; *State of Kerala v Rnjappan Nair* 1987 Cr LJ 1257 (Ker) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 393.

Attempt to commit robbery.--

Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

Attempts for offences under the IPC are punishable under s 511, IPC where no express provision is made for punishment of such attempts. This section expressly3365 provides for punishment for an attempt to commit robbery. Section 511 would not apply to it. Robbery stands on a different footing from dacoity in this respect as an attempt at dacoity is punishable as a dacoity.

2. 'Attempts'

Commentary under the related headings in s 511, *post*, may be referred to.

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

4. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate,etc*) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about the..day of at attempted to commit robbery (*mention the facts constituting the attempts*) on AB and thereby committed an offence, punishable under s 393 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

Where the accused were charged with offences under s 393 (attempt to rob), s 394 (for robbery) on the same night, at one place, and under s 397, for a robbery at another place while armed with deadly weapons, it was held that the charges under ss 393, 394 and 397, IPC, could not be joined unless they formed parts of the same transaction and, therefore, there was a misjoinder of charges.[83]

5. Section 393 and Section 398 --Cases

The incident had taken place at about 7 am. The two appellants ran away when the witnesses reached the spot and were apprehended. After being apprehended, they were taken to the police station, where they were arrested. In such a case, there can be no doubt about the identity and therefore, the objection of the appellants based on the identification parade cannot be sustained. It is not a case where the appellants had succeeded in obtaining the property. They were unfortunately apprehended before they could succeed. That is the reason why they have been charged for attempt to commit robbery under ss 393 and 398, IPC . Nothing, therefore, turns on the absence of seizure of stolen property from their possession. The conviction of the accused was found proper.[84] The accused armed with a pistol tried to commit robbery, the hue and cry was raised by the inmates of the house. The accused fired a shot in the air. The accused was apprehended on the spot along with a pistol by neighbours and passerbys. Therefore, the question of identity of the accused did not arise as all the three witnesses have consistently deposed that the accused was armed with a deadly weapon, *i.e.*, pistol, tried to commit robbery. The conviction of the accused under s 393 read with s 398, IPC, was upheld.[85] Where the appellant accused attempted to loot

the informant at the point of dagger, PWS identified him and caught him3366 red-handed, and after seeing police, he attempted to run away, his conviction under ss 393 and 397, IPC was held proper.[86]

The very identification of the accused appellant was doubtful. The accused appellant was convicted solely on the evidence that the murder weapon which had been recovered at his instance had been matched with the bullet recovered from the dead body. Recovery of offence weapon was itself doubtful. The case of the acquitted co-accused was similar. The accused appellant was also acquitted of the charges under ss 393, 398 and 302, IPC .[87]

6. Sentence

Where the accused was aged about 18 years and no criminal antecedents were alleged against him, he was already in jail for 18½ months, the sentence of 3 years rigorous imprisonment was reduced to the period of custody already undergone by him.[88]

83 *Ajaib Singh v Emperor* AIR 1933 Lah 512, 34 Cr LJ 402 .

84 *Shyambabu v State of Madhya Pradesh* (1987) 2 Crimes 807 (MP) .

85 *Dalip Singh v State of Haryana* (1999) 2 RCR (Cri) 491 (P&H).

86 *Rabindra Chaurasia v State of Jharkhand* 2010 Cr LJ 3349 (Jhar) .

87 *Surender v State (NCT) of Delhi* 2012 Cr LJ 2177 (SC), AIR 2012 SC 1725, 2012 AIR SCW 2247 .

88 *Sanjay alias Ravindra N Gayakwad v State of Maharashtra* 1996 Cr LJ 2172 (Bom) (DB) ; *Vabeiki Pochorana v State of Mizoram* (2013) 1 Crimes 187 (Gauh) (Accused admitted having snatched monag from the Complainant due to the accused-Accused not a prenous contect)..

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 394.

Voluntarily causing hurt in committing robbery.--

If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.3367

Comments

1. Scope

This section applied to cases where, during the course of robbery, voluntary hurt is caused.[89] There may be a dacoity without hurt being caused, but in the case of an offence under this section, hurt is one of the essential elements and if no hurt is caused, no offence would be made out.[90] However, even if hurt is caused voluntarily, no offence under this section is committed where the victim does not offer resistance against the dispossession of movables during the course of robbery.[91] Similarly, no conviction can be sustained under this section if there is no convincing evidence that the ears of the victim were chopped off before her death. To attract the applicability of this section, hurt must be caused to a living person. If, after death, her ears were chopped off for removing the ornaments from her body, the accused cannot be held guilty under this section.[92] Where the accused caught hold of the complainant and brought him down from his horse and beat him with fists and kicks and two of them deprived him of his watch and Rs 40 in cash, it was observed that giving a beating to the complainant and making him fall down from the horse were certainly acts which facilitated the commission of the theft and, therefore, their conviction under s 394, IPC, was proper.[93] Where the accused while committing robbery, beat the complainant with stones and used bows and arrows, which they carried as the conventional weapons of the community to which they belonged, only when they were chased, but none of the chasers were injured, it was held that they could be guilty only under s 394 simpliciter, and not under ss 394 / 397, IPC .[94] Where the accused financiers forcibly removed the vehicle from the possession of the complainant on default in payment of installments, the accused did not resort to arbitration clause provided in the hypothecation deed, held the accused committed offence under s 304, IPC .[95]

PW4 had categorically stated that she knew the accused J six years prior to the incident. He had come to their house many times. Therefore, there was no difficulty in identifying accused J and naming him in the first information report. The conviction of the accused for offences under ss 394 and 302, IPC was held proper.[96]Section 394 describes punishment for voluntarily causing hurt in committing or attempting to commit robbery. The offence under this section is more serious offence than one under s 392 . Section 394 postulates and contemplates the causing of harm during commission of robbery or in attempting to commit robbery when such causing of hurt is hardly necessary to facilitate the commission of robbery. Section 394 applies to cases where during the course of robbery voluntary hurt is caused. Section 394 classifies two distinct class of persons. Firstly, those who actually cause hurt and secondly, those who do not actually cause hurt but are "jointly concerned" in the commission of offence of robbery. The second class of persons may not be concerned in the causing of hurt, but they become liable independently of the knowledge of its likelihood or a reasonable belief in its probability.[97]3368

2. Section 392, Section 394 and Section 397 Compared

In cases of robbery, the legislature has provided three different degrees of punishment which may be inflicted. Under s 392, IPC, the punishment may be extended to fourteen years imprisonment. Under s 394, IPC, the punishment may be extended to imprisonment for life, and under s 397, IPC, the punishment cannot be less than seven years. Section 392 is the general section, and the other two sections specify the same offence under aggravated circumstances. With reference to s 394, it is for the magistrate in the exercise of his discretion to decide whether he will dispose of the case himself or commit the accused to the sessions court. Under s 397, the effect of a sentence of imprisonment of not less than seven years being provided takes the case out of the jurisdiction of the magistrate.[1] If a magistrate finds that an accused has caused grievous hurt in committing robbery, he is bound to commit him to the court of sessions under s 397 and has no discretion to the contrary. It is illegal to treat the grievous hurt as a simple hurt and convict the accused under s 394 .[2]

The jurisdiction of a magistrate to try an accused under s 394, IPC, is, however, not ousted by the fact that the accused is also liable to be charged under s 397, IPC .[3]

3. Doubtful Recovery of Stolen Articles

Commentary under the same heading in s 392, *ante*, may be referred to.

4. 'Jointly Concerned'

Under this section, not only the persons, who cause hurt, are liable, but also the persons, who are jointly concerned in committing or attempting to commit a robbery are made punishable.[4] To constitute an offence under s 394, IPC, violence or hurt must be caused by a person while he is committing, or attempting to commit, a robbery. Other persons, who join him in committing such robbery, are also liable for the offences of robbery. Merely because one person removed the money from the pocket of the complainant does not mean that it was his solitary act, not connected with the offence in question, for which he alone should be held guilty, and not the others.[5] Similarly, where, out of four persons, who committed robbery two went about bullying and ill-treating the inmates and two kept guard on house tops, and one of those who were on the house tops fired a gun and killed one of the villagers, it was held that all the accused were guilty under this section.[6] Even if an accused is not a direct participant in a dacoity, he can be convicted under s 395, IPC, if he allows his vehicle to be used by the dacoits with knowledge to the effect that they have returned with the booty.[7]

5. Quashing of FIR

A large number of cases are coming before the court where the complaints against the police personnel are that they are robbing persons or extracting money from them3369 forcibly. The duty of police personnel is to protect the public and not loot them. The court should take a serious view against police personnel who are committing dacoity or theft against people. Thus, where the FIR showed that the two GRP personnel beat up and robbed a sum of Rs 50 from the complainant and they also robbed other persons, the Division Bench of the High Court of Allahabad declined to quash the FIR and dismissed the writ petition filed by the two GRP officials against the FIR.[8]

6. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

7. Identification of an Accused

Commentary under the same heading in s 392, *ante*, may be referred to.

8. Precautions in Holding Test Identification Parade

Commentary under the same heading in s 392, *ante*, may be referred to.

9. Test Identification of Accused not held--Effect

Commentary under the same heading in s 392, *ante*, may be referred to.

10. Accused Refusing to Join Test Identification Parade--Effect

Commentary under the same heading in s 392, *ante*, may be referred to.

11. Delay in Holding Test Identification Parade--Effect

Commentary under the same heading in s 392, *ante*, may be referred to.

12. Factum of Light and Identification Evidence

Commentary under the same heading in s 392, *ante*, may be referred to.

13. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate,etc*) hereby charge you (*name of the accused person*) as follows:
>
> That you, on or about the..day of., at., voluntarily caused hurt to AB in committing (or in attempting to commit robbery or were jointly concerned with any other person in doing so, and thereby committing an offence, punishable under s 394 of the Indian Penal Code, and within my cognizance
>
> And I hereby direct that you be tried by this court on the said charge.

The error in the charge of mentioning of wrong timing of occurrence does not vitiate the trial, particularly when the accused knew from the very beginning as to what charge he was facing.[9]3370

14. Accused Charged under Sections 394 / 34 can be Convicted under Section 394

The accused charged under s 394 read with s 34, IPC, can be convicted under s 394, IPC, particularly when no argument/objective to such conviction is made before the magistrate or before the additional sessions judge and no prejudice is caused to the accused persons.[10]

15. Accused Charged under Section 394 can be Convicted under Section 326

On reading ss 319 and 320, IPC, there can be no doubt that 'hurt' includes 'grievous hut'. If a person by voluntarily causing hurt in committing or in attempt to commit robbery can be convicted under s 394, IPC, it becomes incomprehensible that he will escape from the mischief of that section if he commits robbery and voluntarily causes grievous hurt to the victim, while committing or attempting to commit robbery, so it has to be held that the offence of grievous hurt under s 326 is included in s 394, IPC . Therefore, by application of s 222(1), CrPC 1973, an accused charged with the offence under s 394 can be convicted under s 326 although no charge under s 326, IPC, was framed against the accused.[11]

16. Proof

To secure a conviction under this section, the prosecution must prove that:

(a) the accused committed, or attempted to commit, robbery; and
(b) the accused (or someone jointly concerned in doing so) caused hurt;
(c) the hurt was caused voluntarily.[12]

Non-production of weapon before court or non-examination of medical officer is irrelevant. The non-examination of officer who effected seizure of articles or effected *panchanama* of the spot is also not material.[13] The allegation against the accused were that after giving two *lathi* blows to the complainant from behind and after snatching the crippling gold chain from around the neck of the complainant, the accused tried to flee away. The gold chain with its hard hooks could not have been snatched away from

around the neck without causing injury. The complainant did not suffer any injury around his neck. The theory of chain-snatching was found doubtful and so was not believed.[14]

Prosecution story was that the accused respondent committed murder of the deceased, amputated her legs and took away her silver anklets. Case was of circumstantial evidence. Evidence of last seen was found not reliable as such rejected. Prosecution evidence as to the time of the occurrence was scanty. The recovery of khurpi offence weapon was also found doubtful. Acquittal of the accused respondent for offences under ss 394 and 302, IPC was upheld.[15]3371

Prosecution case was that the appellant accused assaulted the complainant with iron rod on head, caused injuries and looted bag which contained gold items and cash. The looted articles and the cycle used by the accused in the commission of offence were recovered on the disclosure statements made by the appellant accused, he was also identified by the injured in the TI parade. Conviction of the appellant accused under s 394, IPC was held justified.[16]

Accused persons armed with weapons entered the bank premises. Members of the public apprehended the accused when they tried to flee away on alarm. Weapons were also recovered from the accused persons. The Bank Manager had no reason to depose against accused appellants. Conviction of the accused under s 393 / 34, IPC was upheld.[17]

17. Notes on the Site Plan

The notes on the site plan prepared by the investigating officer in accordance with the various situations pointed out to him by the witnesss are statements recorded by the police officer in the course of investigation, and are hit by s 162 . These notes can be used only for the purpose of contradicting the prosecution witnesses concerned in accordance with the provisions of s 145, Evidence Act, and for no other purposes. Therefore, where this was not done, and the witnesses were never confronted and contradicted with this record, the notes on that site plan cannot be used to contradict the account given by the witnesses in court in regard to the distances from which they saw the occurrence.[18]

18. Plea of Alibi

The plea of alibi involves a question of fact and when both the courts below concurrently found that fact against the accused, the Supreme Court cannot, on an appeal by special leave, go behind that concurrent finding of fact.[19] Plea of alibi is not tenable particularly when duty register and duty certificate of the department in question were not produced and defence witnesses were not creditworthy.[20]

19. Non-examination of the Investigating Officer

It is always desirable for the prosecution to examine the investigating officer. However, non-examination of the investigating officer is not fatal to the prosecution case, nor is it a ground to disbelieve the ocular witnesses.[21]3372

20. Acquittal

Discovery of loose silver coin at the instance of the accused without the evidence of identification of the said coin as stolen property is not sufficient for conviction under s 394 .[22]

There was evidence that at the time of arrest, appellants accused were brought to the hospital and shown to PW4. The test identification parade was really of no consequence because the appellant M had already been shown to the witnesses. That being only piece of material which was used for conviction of M, conviction was not sustainable, the conviction of the accused M for offences under ss 394 and 302, IPC was set aside.[23]

The prosecution failed to prove charge under s 394, IPC against the appellant accused beyond

reasonable doubt. Recovery made did not inspire confidence, TI parade report did not corroborate the prosecution case. Accused was acquitted of the charge under s 394, IPC .[24]

21. Conviction

The two appellants accused had snatched a cash box containing Rs. 5 lakhs from the complainant who had withdrawn the amount from the bank. The appellants fired at the witnesses and snatched the gun of the gunner. After chase the two appellants along with the looted cash and gun of the gunner were arrested. The witnesses identified the two appellants. Their conviction under ss 394 read with s 397, IPC was upheld.[25]

22. Double Conviction

A person, who has been convicted and sentenced under s 394, cannot be further convicted and sentenced under s 324, IPC . Likewise, an offence punishable under s 394 necessarily includes the offence punishable under s 392, and a person, who is convicted under both the sections, can be legally sentenced only under s 394, IPC . A sentence cannot be passed under both the sections.[26] Where, however, a gang of four robbers, armed with deadly weapons, raided a house and went fully prepared to commit murder in the event of resistance and two of them actually killed one person, it was held that each of the robbers was equally guilty of the offence of murder and were rightly sentenced under ss 302 and 394, IPC .[27]

23. Accused Convicted under Section 394 cannot be Convicted under Section 392

Commentary under the same heading in s 392, *ante*, may be referred to.

24. Probation

A convict convicted for an offence under s 394, IPC, cannot derive the benefits of s 4(1) of the Probation of Offenders Act 1958, so as to entitle him to be released on probation of good conduct.[28]3373

25. Sentence

The question of sentence is a matter of discretion and it is well-settled that when discretion has been properly exercised by the trial court along accepted judicial lines, the appellate court should not interfere, except in cases where strong reasons persists.[29]

Sentence of four years rigorous imprisonment to a young accused aged 22 years is neither excessive nor unreasonable.[30] When the accused was aged about 23 years at the time of the incident, having no criminal antecedents and the offence was committed 13 years ago, the sentence of the accused was reduced from seven years rigorous imprisonment to three years rigorous imprisonment.[31] The accused were aged about 22 and 23 years old at the time of occurrence and they did not assault any one of the witnesses except two simple injuries received by one person, and the accused persons had no antecedents and they were not hardened criminals which is why the sentence of seven years rigorous imprisonment was reduced to four years rigorous imprisonment.[32]

Consecutive sentences in respect of convictions under ss 394 and 397, based on the same set of facts, would be illegal and the case would be covered by s 71, IPC .[33]

Section 6 of the Probation of Offender Act rules out the benefit of the provisions of the Act being given to a person who is guilty of having committed an offence punishable with life imprisonment or death. Since the offence under s 394, IPC, is punishable with life imprisonment as such the benefit of probation cannot be extended to the accused.[34] In a case where the accused were convicted under s 394, IPC, the request of defence to let out them on probation of good conduct or to send them to borstel school was declined by

the Apex Court.[35]

26. Alteration of Conviction from Section 394 to Section 380

Commentary under the heading in s 380, *ante*, may be referred to.

27. Alteration of Conviction from Section 394 read with Section 397 to one under Section 394

Commentary under the same heading in s 397, *post*, may be referred to.

28. Alteration of Conviction from Sections 454 and 380 to Section 411

Commentary under the same heading in s 380, *ante*, may be referred to.

29. Alteration of Conviction from Section 396 to one under Section 394

Commentary under the same heading in s 396, *post*, may be referred to.3374

30. Alteration of Conviction from Section 394 to one under Section 392

Commentary under the same heading in s 392, *ante*, may be referred to.

89 *Bhopal v State of Uttar Pradesh* 1968 AWR 889, p 890 .

90 Re *Virummadithyan*AIR 1928 Mad 207, 28 Cr LJ 1007 .

91 *Devassia Joseph v State of Kerala* 1982 Ker LT 20, p 22 .

92 *K Muhammad v State* 1974 Cr LJ 204, p 206 (Ker) (DB), 1973 Ker LR 773 .

93 *Ramdas v State* 1980 Cr LR 271, p 273 (UP) .

94 *Chimaliya v State of Madhya Pradesh* 1981 MPLJ 23 (SN) ; *Naushad v State of UP* 2014 (2) All LJ 71 (All) .

95 *George v Abraham Augustine,* 2012 Cr LJ 3355 (Ker) .

96 *Mahabir v State of Delhi* 2008 Cr LJ 3036, p 3041 (SC), AIR 2008 SC 2343, 2008 (6) Scale 52 .

97 *Aslam v State of Rajasthan* (2008) 9 SCC 227, p 229, (2008) 3 SCC (Cri) 764 .

1 1 Weir 448.

2 *Empress v Jobania* Ratanlal Unrep Cr C 476.

3 Re *Surji Dass* 1 Weir 449.

4 *Harnam Singh v Emperor* AIR 1919 Lah 256, 20 Cr LJ 635 .

5 *Kishori v State* 1978 All Cr Cas 258, p 259-60 .

6 *Harnam Singh v Emperor* AIR 1919 Lah 256, 20 Cr LJ 635 ; *Brijmohan v State* (1984) 1 Crimes 658 .

7 *Kailash Chandra Sahu v State* 1981 Cut LR (Cr) 233, p 236-37 .

8 *Rama Kant v State of Uttar Pradesh* 2001 Cr LJ 2072 (All) (DB) .

9 *Tara Singh v State of Rajasthan* 2000 Cr LJ 1982 (Raj) .

10 *Ibid*; *Willie (William) Stancy v State of Madhya Pradesh* AIR 1956 SC 116 .

11 *Hemanta Kumar Pradhan v State* (1992) 3 Crimes 850 (Ori) .

12 *Paramjit Singh v State of Rajasthan* 2001 Cr LJ 757 (Raj) .

13 *Sanjay Somkunwar v State of Maharashtra* 2006 Cr LJ 3453 (Bom) .

14 *Nand Kishor v State of Uttar Pradesh* 2002 Cr LJ 4286 (All) .

15 *State of Rajasthan v Naresh* 2010 Cr LJ 1928, p 1934 (SC), 2009 AIR SCW 743 .

16 *Aslam @ Deewan v State of Rajasthan* 2008 (3) SCC (Cri) 227, 2008 AIR SCW 7405 .

17 *Sk Alauddin v State of West Bengal* 2009 Cr LJ 3138 (Cal) .

18 *Jit Singh v State of Punjab* AIR 1976 SC 1421, 1976 Cr LJ 1162 (SC) ; **See also***Vinod Laxmiprasad Rai v State of Madhya Pradesh* 2006 Cr LJ 4730 (MP) (DB) .

19 *Thakur Prasad v State of Madhya Pradesh* AIR 1954 SC 30, 1954 Cr LJ 261 (SC) ; **See also***Jalamsingh v State of Madhya Pradesh* 2002 Cr LJ 2586 (MP) .

20 *Ibid*.

21 *Shiv Shankar v State of Uttar Pradesh* 2002 Cr LJ 2673 (All)(DB); *Ramdeo v State of Uttar Pradesh* 1995 Supp. (1) SCC 547 ; *Bihari Prasad v State of Bihar* AIR 1996 SC 2905, (1996) 2 SCC 317 ; *Ambika Prasad v State (Delhi Administration)* AIR 2000 SC 718 ; *Bahadur Naik v State of Bihar* AIR 2000 SC 1582, 2000 Cr LJ 2466 ; *Ram Gulam Chaudhary v State of Bihar* AIR 2001 SC 2842, 2001 AIR SCW 3802 .

22 *Vinod Laxmiprasad Rai v State of Madhya Pradesh* 2006 Cr LJ 4730 (MP) (DB) .

23 *Mahabir v State of Delhi* 2008 Cr LJ 3036, p 3041 (SC), AIR 2008 SC 2343, 2008 (6) Scale 52 .

24 *Bijaya Pan v State of Orissa* 2011 (105) AIC 692 (Orissa) .

25 *Tajveer Singh v State of Uttranchal* 2012 (117) AIC 769 (Uttr) .

26 *Empress v Durga* Ratanlal Unrep Cr C 511; *Queen v Mootkee Kara* 2 WR (Cr) 1 .

27 *Said Nur v Emperor* AIR 1926 Lah 63, 26 Cr LJ 1406 .

28 *Jogi Nahak v State* AIR 1965 Ori 106, (1965) 2 Cr LJ 51, p 53 (Ori) .

29 *Paramjit Singh v State of Rajasthan* 2001 Cr LJ 757 (Raj) .

30 *Ibid*.

31 *Shravan Dashrath Detarange v State of Maharashtra* 1998 Cr LJ 1196 (Bom) (DB) .

32 *Sunil v State of Haryana* AIR 1994 SC 1536, 1994 Cr LJ 3181 (SC) .

33 *Mamrez v Emperor* AIR 1926 Lah 47, 26 Cr LJ 1350(1) .

34 *Suresh Kumar v State* (*Delhi Administration*) (1989) 2 RCR 415 (Del); *State of Maharashtra v Vinayak Tukaram Utekar and Anor* 1997 Cr LJ 3988 (Bom) (DB) .

35 *Sunil v State of Haryana* AIR 1994 SC 1536, 1994 Cr LJ 3181 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 395.

Punishment for dacoity.--

Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

The ingredients of the offence of dacoity and the various aspects of the requirements for committing the offence have been discussed under s 391, IPC . This section provides simply for the punishment for the offence. The section is to be read along with ss 397 and 398, IPC which prescribe the minimum sentence for the offences. In the case of an attempt at dacoity and of causing grievous hurt, the offence would be under s 395, and not under ss 395 / 511, IPC .[36]3375

2. Mandatory Requirement

The perusal of s 395, IPC reveals that it is mandatory that there must be 5 or more persons to commit the robbery. In other words, there must be 5 or more persons and injuries should have been caused to the injured.[37] In dacoity six or seven persons were alleged to have committed offence, the conviction of the sole appellant for offence under s 395, IPC was held not legal exercise. Conviction of the sole appellant recorded by court below was set aside.[38]

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable exclusively by the court of sessions.

If a district magistrate frames a charge under s 395, IPC, he is bound to commit the accused to the court of sessions. He cannot assume jurisdiction by reducing the charge to s 384, IPC . Jurisdiction is determined not by the final result reached, but by the charge under which the trial is held.[39] Under the new procedure, the committing magistrate merely commits the case to the court of sessions and it is the court of sessions which frames the charges. If, in the course of any inquiry or trial before himself the magistrate finds that the case should be committed to the court of sessions, he shall commit it as laid in s 323, CrPC .

The offences under ss 395 and 450, IPC, are triable exclusively by the court of sessions. Obviously, the magistrate cannot proceed with the trial of the case and direct the recording of evidence before charge.[40]

4. Duty of State in Improving Investigation/Prosecuting Agency

There is no improvement in the system because of lack of proper and penetrating supervision of the performances of the investigating/prosecuting agency. Unless the state government takes serious note of such lacuna, diligent follow-up action against the erring persons by monitoring the matter in detail in each individual case, then the fear of no action which has resulted in complacence of the investigating officer, the supervising officer and the prosecutors, ultimately results in casualty of justice delivery system in criminal cases. State, being the protector of each individual as well as of the whole society, its inaction to combat the perpetrators of crime by providing window exits to culprits through such lapses amounts to *magna negligentia culpa est*. Before criticism term it as *magna culpa dolus est*. The state government must exercise its authority to avoid 'much ado about nothing'.[41]

5. Cancellation of Bail--Justification

Where the accused persons allegedly exhorted the informant by demanding money and in that process committed dacoity, the magistrate acting hastily granted bail to two of the accused, while rejecting the prayer of the co-accused for bail on the ground that the offence involved is exclusively triable by the sessions court, the3376 magistrate cancelled the bail of the said two accused, the impugned order cancelling the bail was passed by the magistrate only to cover hasty order of bail which is not sustainable.[42]

6. Quashing of Criminal Complaint

Where the accused persons, being supervisors of Kuchinda Co-operative Agriculture Rural Development Bank under r 104 of the Orissa Co-operative Societies Rules 1965, were competent to break open the lock and seize property, they lawfully entered inside the house of the complainant and seized the articles in discharge of their official duties, and a complaint lodged against them under s 395, IPC, the order of the trial court taking cognizance for the said offence was quashed by the High Court on an application under s 484, CrPC, filed by the accused person.[43]

7. Identification of an Accused

Commentary under the same heading in s 392, *ante*, may be referred to.

8. Test Identification of Accused on Bail

There is no bar for conducting test identification parade in respect of accused who are on bail.[44]

9. Precautions in Holding Test Identification Parade

The High Court of Bombay has incorporated the procedure for test identification of an accused person which has been indicated by the Government of Maharashtra, Home Department, on 16 August 1963. The offence of robbery and dacoity are offences detrimental to social security and are on an increasing trend, thus, the Bombay High Court found it necessary to mention the procedure for holding the test identification parade of the accused for the purpose of awarding the possibility of commission of any error in future by the investigating officers.[45]

10. Importance of Evidence of an Identification Parade

The evidence in respect of the identification parade is quite important in a criminal trial, because now a days, on account of increasing number of crimes and the resultant prosecutions, the witnesses who identify the suspects before the court as the accused, are examined in court after a very long lapse. In majority of cases, the dacoits or culprits are strangers to the victim. When they are examined in the court of oath, they are required to identify the dacoits or culprits after a lapse of days, months and years. Not only that, they are required to face a barrage of question posed to them during cross-examination by experts in law. Some witnesses who are clever enough make a request for refreshing their memory by reading respective identification parade memorandum, but unfortunately on many occasions they do not3377 even know that they have such a right to refresh their memory. In number of cases the person who conducts the examination-in-chief forgets to refresh their memory. In number of cases it happens that such witnesses do not make a request to refresh their memory during the examination-in-chief and face the barrage of questions asked during cross-examination. The test identification parade memorandum is the document which establishes a nexus between the act done by him before some months or some years and the fact which is required to be deposed in the court in the examination-in-chief or cross-examination. It has to be kept in mind always that in a majority of cases, those witnesses are not well versed with niceties of court procedure. In majority of cases the *panch* witnesses are from lower strata of the society like farmers, workers, workmen and other common persons and they are required to face experts in law.[46]

11. Identification of Culprit by Witnesses--Important Points

The identification of the accused by witnesses involves serious consideration on a number of points:

(a) Whether the witness was having coolness of the mind at the time of happening of the incident in question?
(b) Whether he was having sufficient light for observing the features of the culprits vividly?
(c) Whether he was having coolness of the mind, suitability of the mind for storing the impression of the features of the culprits in his mind and brain?
(d) Whether the witnesses had sufficient opportunity and time to observe the features of the culprits and was having stability of the mind to store the impression in his mind and brain?
(e) Whether the culprit was previously known to him or was total stranger?
(f) Whether the culprit was having the special features of distinctly marking his identity life squint eyes, limping legs, shortened hands or feet or scars of face, blindness of one of the eye, stammering style of speaking of different voices, high distinctive voices. A person can identify the culprit at the time of happening of the incident like dacoity, burglary, murder, assault or of pick pocketing by observing such features. At the time of commission of the rape there would be different criteria because of the nearness of the body and face of the culprit and the victim. There may be possibility of the culprit being a man of acquaintance, but in cases of dacoity and burglary, generally the persons are strangers and therefore, close scrutiny and caution is very much necessary at the time of examination of the evidence in respect of the legal identification parade.[47]

Where the evidence of the two witnesses shows that they were frightened, the situation was panicky and the culprits were altogether strangers to them. This situation of panic and fright may shorten the ability to identify the culprit's impression and features in the mind becomes obscure. The capacity of witnesses to identify the culprit after a gap of some months when examined on oath in the court3378 depends on such factors, and conclusion is to be drawn in view of the facts and circumstances of each case.[48]

12. Delay in Holding Test Identification Parade--Effect

Commentary under the same heading in s 392, *ante*, may be referred to.

13. Identification of Accused by Witness--When not Believed

The following are the instances when identification of the accused/dacoits by the prosecution witnesses was not believed by the court:

(a) The dacoits were covering their faces and according to the prosecution witness the torches were focused downward by the dacoits and as such, in such means of light the possibilities of identification is more doubtful.[49]
(b) The prosecution witness stated that they saw the accused at the time of dacoity and in the identification parade but not in between. The identification parade was held within a month of the arrest of the accused. There was no evidence that accused was not produced in the court for obtaining remand within this period or the identity of the accused was concealed from the witness when he was brought before the court for remand.[50]
(c) The prosecution witnesses saw the accused for the first time at the time of commission of offence but no test identification parade was held. Possibility of identification of the accused in a night of darkness was extremely remote.[51]
(d) It was doubtful that the single eyewitness had the occasion to clearly see the miscreants so that he could identify at least two of them in the test identification parade which took place two months after the incident.[52]
(e) There was no explanation as to how the injured witness could see the miscreants inside a

driver's cabin in the darkness of night.[53]

(f) There is unexplained delay in holding test identification parade.[54]

(g) The witness identified the accused standing on dock during trial, in the absence of test identification parade, particularly when neither the name of the accused is mentioned in the FIR, nor any looted property recovered from his possession.[55]

(h) Identification of the accused is done by means of flashing of torch in the dark hour of night.[56]3379

(i) The incident took place all of a sudden and when the dacoits boarded the car, the inmates of the car were frightened as dacoits were armed with weapons. Thus, the capacity of the witnesses identifying the culprits was very much weak, keeping in view the panic situation created in their frightful mind.[57]

(j) The chance of the inmates of the house identifying dacoits in torch light flashed by the dacoits is very remote.[58]

(k) The incident took place at night and culprits covering their faces with monkey caps at that time. The suspects and other persons mixed with them were not asked to cover their faces at the time of the test identification parade. The identification parade was conducted in respect of seven suspects, though the investigating officer asked to conduct the parade with only five suspects. There was also possibility of witnesses seeing the accused prior to the test identification parade.[59]

(l) The accused person had amputated legs and this distinctive feature in their bodies was not taken note of in the test identification parade. Further, the accused having small pock marks on his face was not mixed up with persons with such distinctive feature while conducting the identification parade. The possibility of public witnesses seeing the accused in jail was also not ruled out.[60]

(m) The complainant could not identify the accused in the test identification parade.[61]

(n) There was a delay in holding test identification parade and the magistrate who conducted it was not examined.[62]

(o) No link evidence was adduced to show that the accused was not shown to any witness between the time of his arrest and the time of his lodging at jail.[63]

(p) The witnesses failed to identify in court some of the accused identified in the test identification parade. Photographs of eight of the accused were published in a daily newspaper prior to the test identification parade, the *ratio* of persons mixed in the said parade was also found to be quite low.[64]

(q) The dacoity was committed in the month of November, admittedly the night of offence was a dark night. The presence of the electric bulbs in the complainant's house was not shown in the site plan, the evidence of the witnesses was inconsistent. The date of arrest of the accused was postponed, after arrest the appellant accused were detained at the police station. Hence the evidence of test identification parade was found not3380 reliable. Appellants accused were given benefit of doubt and acquitted of the charge under s 395, IPC .[65]

14. Identification of Accused by Witness--When Believed

Following are the instances where identification of the accused by prosecution witnesses was believed by the court:

(a) The accused persons though strangers to the victim had not covered their faces with a mask and the victims had every opportunity to see them in light of the vehicle, which was on. The evidence of the witnesses in court coupled with the identification parade was found reliable.[66]

(b) The witness was the wife of the deceased in a dacoity and murder case. She stated in her evidence that she had known the accused persons, they being her neighbours, and she had

seen their faces in the light of burning flames of *dalan* and she also heard them when she was prevented from providing water to her father-in-law.[67]

(c) The witnesses had sufficient opportunity to see and identify the accused person in light of their torches and on account of their burning *kharis* of crop.[68]

(d) The identifying witnesses had sufficient opportunity to see the dacoits for over fifty minutes in their house and they did not find any difficulty in remembering their features. The identification parade was held after taking necessary precautions and in a manner which was fair to the suspects as well as the identifying witnesses.[69]

(e) The accused were named in the FIR and identified by the prosecution witness in court and the evidence of the witness was found reliable and trustworthy.[70]

(f) All four eyewitnesses had sufficient opportunity to see and identify the dacoits in the light of a lantern.[71]

(g) The dacoits spent considerable time in the house of the complainant and his wife had sufficient opportunity to observe them along with their weapons of crime. The presence of electric light in the house was also established.[72]

(h) The witnesses could recognise the dress colour of the accused, they could also recognise the accused who were known to them and there was possibility of light emanating from a bulb on one pole falling on the faces of the accused. The discarding of evidence of witnesses by the High Court on the ground that the accused were wearing *khaki* uniform and hats, and that the hats must have cast shadow on the faces of accused is not proper.[73]3381

(i) The evidence of the magistrate who held the identification parade disclosed that proper precautions had been taken and the accused persons had been properly identified by the identifying witnesses. There was no material on record to indicate that the accused persons were shown to the witnesses prior to holding the identification parade.[74]

(j) The test identification parade was conducted with promptitude immediately after the accused were apprehended. There was no material on record to show that identifying witnesses had a chance to see the accused earlier at the test identification parade.[75]

(k) The accused were kept in Baparda custody and thereby it cannot be said that they were shown to the witnesses prior to the identification parade. The evidence on record clearly proved the presence of sufficient light for witnesses to identify the accused persons.[76]

(l) The prosecution witness identified the accused as a dacoit in the identification parade conducted by the magistrate but failed to recognise him before the trial court and trembled when the accused stared at him. The testimony of the magistrate regarding conducting a proper test identification parade was reliable and was held to constitute substantive evidence. Further demand of the witness was taken note of by the trial court.[77]

(m) The accused spent considerable time in the house where dacoity was committed, the prosecution witnesses, thereby getting ample opportunity to identify them. The short delay of 20 days in conducting identification parade was explained.[78]

(n) Prosecution case was that accused appellants armed with fire arms committed murder of two persons, injured one and committed loot of valuable moveables. PW5 identified the accused appellants in TI parade and also before the court. Death of the deceased was due to gun shot injuries. Complainant and members of his family identified the moveables recovered on the disclosure statements made by accused. Accused appellants were convicted under ss 395, 396 and 397, IPC .[79]

(o) There was sufficient time for the identification of the accused by the witnesses during the course of commission of dacoity. Dacoity was committed in temple, the inmates of the temple were witnesses. The Special Executive Magistrate had supervised the TI parade. There was evidence that the accused were kept baparda after their arrest till then were produced in the TI parade. TI parade was held after the arrest of the accused. The delay in holding TI parade was explained. The conviction of A2, A4 and A5 for offence under s 395, IPC was upheld.[80]3382

(p) In a bank dacoity, the appellant accused were identified by the bank officials, customers, injured witnesses, corroborated by the recovery of huge amount of cash from the possession of the accused.[81]

15. Value of Proof by Identification

When practically, the accused persons are not identified, although the commission of dacoity is established, the participation of the accused persons in the dacoity is not proved beyond reasonable doubt.[82]

Where a person, who is not known from before, is accused of an offence, his identification is not of considerable importance because it is sometimes the sole evidence for the prosecution. This is particularly so in dacoity cases. When the prosecution witnesses have correctly identified the accused at the identification parade as well as in court, there is no good ground to disbelieve the testimony of such witnesses.[83] If a witness is able to pick out the accused in the identification parade, his assertion gets added weight and if he fails to do so and cannot reasonably explain his failure, his assertion is completely weakened.[84] A witness would not, however, be able to formulate his reason for identification since it is based upon general untranslatable impression of the mind and it would be fatuous to discredit such identification on the ground that reasons are not being formulated for them.[85] Statement made at the identification parades, being not made on oath, is admissible not as substantive evidence against the accused, but merely as evidence to corroborate or contradict the statements made in court. They provide a very good piece of corroborative evidence and greatly enhance the creditability of identification evidence given in court.[86]

The sworn testimony of witnesses in court as to the identity of the accused, who were strangers to the witnesses, generally speaking, requires corroboration which should be in the form of earlier identification proceedings.[87] Where the accused offers for test identification parade and the prosecution is reluctant to hold it, the testimony of the prosecution witnesses is rendered doubtful with the result that the conviction of the accused is liable to be set aside.[88]

There is no rule as to the minimum evidence required in order to prove identification. A Bench from Allahabad[89] has emphasised on having at least two good identifications.3383

Where the suspects are known to the eyewitnesses, the holding of test identification parade is a waste of time and a total farce, and no reliance should be placed on such identification parade.[1] If therefore, the so called test identification parade is no more than a farce and there is no other evidence on record to connect the accused with the crime of dacoity, his conviction cannot be sustained.[2] If the only evidence, on which the appellants have been convicted under ss 395 and 397, IPC, is the evidence of their identification by the witnesses in court, as corroborated by similar identification in the test identification by the magistrate during investigation, and that evidence is not reliable at all, they have to be acquitted.[3] However, if the accused has been arrested on the spot and there is no doubt about his identity, his conviction under s 395 is perfectly justified.[4] Even if the test identification parade and test identification of looted articles is not firmly proved, but is supported by the witnesses in their deposition in court, it would not be rejected. Conviction of the accused under s 395, IPC was upheld.[5]

Where there was strong possibility that the accused persons after arrest and before TI parade, were shown to the witnesses, no value was attached to the result of TI parade, the appellants accused were acquitted of the charge under s 395, IPC .[6]

It may be pointed out that in the absence of any description of the culprits having been given by these witnesses during their examination by the police under s 161, CrPC, the fact that they have chosen to give some description when examined just before the parade cannot be considered as a circumstances to strengthen the evidence of identification in the court. Any description coming forth from these witnesses after considerable time after the arrest of the accused cannot be considered as significant in as much as by that time such description could have been made available to them by any of the police officials associated with the arrest of the accused.[7]

16. Identification of Dacoits in Torch Light

The identification of dacoits in torchlight flashed by them is very remote. The light which will be reflected around would not be so much as to give witnesses or scared inmates an opportunity to look at the faces of the dacoits properly so that features of their faces will be exposed in broad focus. Moreover, scared inmates of the house could not be in such a psychological mood to look at the faces of the dacoits. In all circumstances, therefore, chances of the inmates identifying the dacoits in torchlight flashed by the latter, is very remote.[8]

When the dacoits had covered their faces and torches were focussed downward by them, in such means the possibility of identification of the dacoits is more doubtful.[9] Thus, the identification of the accused by means of flashing of the torch in the dark hour of night is not trustworthy.[10]3384

It is not acceptable that in a moment of stress and sudden cries, the witness would have identified the accused from a distance of 8-10 paces in the feeble light of torch. If the miscreant could shoot dead the neighbour who had simply rushed up on hearing shouts, then it does not fit in the scheme of things that the witness would have been spared without any harm, despite the fact that the accused had guns and when his house was the object of robbery. They would not have spared him unharmed if he was flashing a torch towards them, at a distance of 8-10 paces.[11]

17. Factum of Light and Identification Evidence

When the solitary witness clearly stated to have identified the dacoits in the light of lantern and thereafter, that witness identified the petitioner in test identification parade also, the conviction on the basis of the evidence of solitary witness and on his solitary identification is proper.[12] Testimony of witnesses about the lanterns burning in their house is proof of source of light for identification of the accused persons.[13]

18. Identification of Case Property

When the witnesses are not asked to state identification marks of their respective properties before showing the properties put up for test identification as required under r 35(3) of Criminal Rules of Practice, the properties recovered are not proved to be robbed at the time of incident.[14] The articles which were put on test identification parade were not recovered from the dacoits, rather the identified articles in the test identification parade were not produced in the court.[15]

None of the discovery memos contained the signatures of the accused persons, independent witnesses were not examined. Held, it was not established beyond reasonable doubts that the ornaments seized by the police were in fact seized at the instance of the respective accused persons as per their disclosure statements. The identification of the articles could not be attributed to the accused persons. Acquittal of the accused on the charge of dacoity under s 395, IPC was held proper.[16]

19. Failure to Hold Identification of Recovered Property--Effect

Normally, the identification of the recovered case property from the accused during investigation should be conducted but it cannot be laid down as an inflexible rule of law that failure to hold identification of recovered property renders the evidence of recovery unworthy of acceptance.[17] However, when the looted ornaments were kept in the iron safe and were not in daily use, the identification of the same for the first time in court without a prior test identification parade to ascertain their ownership, is not sufficient to fasten the accused with the offence.[18]3385

20. Charge

The following form of the charge may be adopted:

I (*name and office of Sessions Judge,etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the.day of., at., you committed dacoity, and thereby committed an offence, punishable under s 395 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

A charge of dacoity under s 395, IPC can be combined with a charge under s 120B, IPC . A conspiracy to commit dacoity is different from dacoity.[19]

An offence under s 395, IPC comes into existence only when an act of dacoity is committed by five or more persons jointly and a charge under s 149, IPC is, therefore, a mere surplusage.[20] The charge cannot, however, be said to be defective merely because of non-mention, in the charge, of the fact that dacoity was committed by five or more persons.[21] Where the FIR did not mention that theft was committed by any of the accused persons, the trial court was held not justified in framing charge under ss 395 / 397, IPC against the accused.[22]

Where the accused acts in good faith, there would be no criminal intention for a charge under s 395, IPC .[23]

21. Proof

To establish a charge under this section, the prosecution must prove that:

(a) the accused

(i) committed robbery, or
(ii) attempted to commit robbery, or
(iii) was present and aiding such commission or attempt; and

(b) the accused did so conjointly with four or more other persons.[24]

In the absence of proof/finding about the involvement of five or more persons an accused cannot be convicted for offence under s 396, IPC .[25] In cases of dacoity, strict proof is required. The fact that the accused person had absconded, does not raise any presumption as to his guilt. Similarly, the making of a statement before several witnesses incriminating himself and producing in their presence, some stolen property is not convincing or conclusive proof of his guilt.[26] It is not safe to up hold the conviction of an accused when the prosecution has failed to establish its case beyond all reasonable doubt.[27] Where there was no identification of the accused by3386 any of the prosecution witnesses and they were not named in the FIR, nor was any property recovered from their possession, it was held that their conviction could not be based solely upon the testimony of the two complainants.[28]

The evidence that the accused was standing in a large crowd which overflowed into public street, burnt the records in the post office, destroyed its books, carried away postage stamps, broke open a seed store and carried a part of its contents, is not satisfactory evidence to prove that he was actually committing a robbery or even aiding in the commission of a robbery.[29] When the documentary evidence fully supports

the defence plea that the accused was in possession of the plot in question on the relevant date, that the complainant had no right to trespass upon the land belonging to him, and that the accused had not exceeded the right of private defence of person and property, no case under s 395, IPC, can be said to have been made out.[30]Where, however, a large number of persons armed with deadly weapons, forcibly took away fishes from a tank and the witnesses, when protested, were threatened with dire consequence and even with the fear of death if they tried to interfere with the act of theft, sought to be committed by the accused, and no document of title was produced to support their claim of title, it was held that a case of dacoity was made out.[31] In the instant case accused appellants 18 in number had committed dacoity in a train. The two prosecution witnesses examined in the case were deliverymen of a courier service, who had kept bundles at the entrance of the coach. They had conversation and opportunity to see the accused persons as the latter had asked the PWS to remove the two bundles kept by them at the entrance of the coach, one of the PWS was injured in the firing made by the accused persons. The two PWS identified 9 accused appellants, they were convicted for offence under s 395, IPC . One accused was not identified by the prosecution witnesses, as such he was given benefit of doubt and acquitted of the charge under s 395, IPC .[32]

Where the accused persons got stolen articles recovered, the evidence of witnesses as to the arrest of the accused and the recovery of stolen articles was reliable and the informant had identified the accused persons and recognised the case property in the test identification parade, the conviction of the accused persons under s 395, IPC, was found proper.[33]

Where other accused persons were acquitted for want of adequate evidence, the conviction of the appellant accused against whom sufficient evidence was available on record on the charge under s 395, IPC was upheld.[34] Where the testimony of PW1, a ten years old girl, was found reliable corroborated by the recovery of articles looted during the commission of dacoity, PW1 also identified the appellant accused in test identification parade, conviction of the appellant under s 396, IPC was held proper.[35]

In bank dacoity there was evidence of PWS that the accused persons entered the bank premises, were armed with weapons. All the accused persons were identified in3387 test identification parade, there was no unusual delay in holding the parade. Accused persons committed offence punishable under s 397, IPC .[36]

22. Importance of Number of Accused Persons

If it is not adequately proved that five or more persons had taken part in committing the robbery, the offence will not be converted into a dacoity.[37]

Where, out of six persons, put up for trial under s 395, three were acquitted, the conviction of the remaining three was altered from dacoity to one of robbery.[38] If seven persons are charged for the offence of dacoity and six of them are acquitted as no case is made out against them, the conviction of the seventh accused as a dacoit cannot also be sustained.[39]

Less than five persons cannot be convicted as dacoits unless it is proved that at least five persons took part in its commission.[40] Where there is evidence of five or more persons being connected with a dacoity, then whosoever was concerned in the crime would be guilty of the offence under this section.[41] However, the mere fact, that the evidence was not sufficient to convict all those actually charged, would not affect the number of persons engaged.[42] If the evidence shows that more than five persons were involved, the fact that the court convicts only four persons and acquits the others, will not make the offence less than a dacoity.[43]

23. Known Persons Committing Dacoity

There is no hard and fast rule that known persons would not go to commit dacoity without taking care of concealing their faces. It depends on the temperament of a person. There can be hardened criminals. When a known person is desperate and very much inimical, he can go to commit dacoity without taking

the usual precaution of covering his face.[44]

However; when there is no evidence to show that the accused though named in the FIR was a hazardous character who could have gone to commit dacoity at the house of the known person with an open face, the possibility cannot be ruled out that there3388 was some bad blood between the prosecution witnesses on one hand and the accused on the other, which led to his naming in the FIR as one of the dacoits.[45]

The accused persons were belonging to the same village and were nextdoor neighbours and allegedly committed dacoity concealing their identity by painting their faces. The prosecution did not disclose eminent enmity between the parties which could be considered as motive for the crime. It is not probable that the neighbours who choose to commit the crime due to enmity with the person, would himself participate in the crime. Rather in such case where there is enmity, usually a neighbour would set up other persons to get the crime committed. The non-disclosure of motive, coupled with delay in lodging the FIR and also non-disclosure of identity of the accused person to the villagers, who came there soon after the occurrence makes the prosecution case doubtful with possibilities of false implication of the accused person.[46]

24. Recovery of Huge Quantity of Case Property--Effect

Appellants accused persons entered into the house of the deceased at midnight, looted gold, silver ornaments, assaulted the deceased leading to his death. Ornaments were recovered from the possession of the appellants accused. The appellants accused did not claim the recovered property as their own. The PWS identified the accused appellants in test identification parade and also identified the recovered ornaments. There was no possibility of false plantation by the police. Some delay in identification parade or identification of property is likely in cases of dacoity at mid night and the recovery of the ornaments. The delay is natural in such cases, it is not fatal as to throw the prosecution case outright. Conviction of the appellants accused under ss 395 and 396, IPC was held proper.[47]

25. Gap between the date of Dacoity and date of Recovery of Stolen Articles--Reasons

It needs to be noted that hardly there exists any standard pattern in dacoity between the date of the incident and the date of recovery of stolen articles from the accused. It depends upon the nature of booty the culprit comes into possession, his immediate necessities, his ability to dispose off the same and availability of the persons to receive such stolen property, particularly, where the culprit has notoriety to his credit. To prevent any chance of a third person coming to know of the theft or dacoity, the culprit may delay the disposal of the stolen property. In certain cases, he may intend to retain the same. Therefore, it all depends on the attendant circumstances and no uniformity can be contemplated in this regard. In the present case, the dacoities were committed by gangs. Various dacoities were committed by gangs with different combinations. They were very much aware that having regard to the frequency of instances and the nature of dacoities, the hunt for them is very severe. The instances did not depict an ordinary case of theft by an individual out of dire necessity. The crimes were committed in an organised manner. They used a vehicle and had the experience of committing theft within the state and outside. In many places, cash was stolen from the houses of victims. Since immediate necessities are taken care of by3389 the stolen cash, the accused may not be in dire necessity of disposing of the other stolen articles. Therefore, it can be said that the time lag between the date of the incident and date of recovery had improbabilised the very possession of the stolen articles by the accused.[48]

26. Recovery of Stolen Property--Presumption of Dacoity

Considering the circumstances that the recovery of property which was the subject-matter of dacoity was recovered from the possession of the accused within 24 hours of the incident, the inference that the said accused had committed dacoity can legitimately be raised.[49]

In *Lachhman Ram v State of Orissa* ,[50] the Apex Court found that there were dacoities on the same night

in the houses of the complainants one after the other in quick succession and the dacoits looted and bolted away. The dacoits belonged to Delhi and had come to commit dacoity at far off places in the state of Orissa. The looted property by these dacoits, were recovered from them and this had been established beyond doubt. Their lordships said that in view of the clear findings, the factum of recovery of articles at the instance of the accused persons in the presence of police officers and *panch* witnesses who have deposed to the same, is itself sufficient to bring the case not only under the provision of s 412, IPC but also under s 395, IPC with the aid to s 114 of the Evidence Act because the recoveries were made very soon after the occurrence. The judgment of the court did not refer to what time had lapsed between the dacoity and recoveries of the looted articles.

In *Earabhadrappa v State of Karnataka* ,[51] the Apex Court said that the nature of presumption under illust (a) to s 114 of the Evidence Act must depend upon the nature of the evidence adduced. No fixed time limit can be laid down to determine whether possession is recent or otherwise, and each case must be judged on its own facts. The question as to what amounts to recent possession of stolen property sufficient to justify the presumption of guilt, varies accordingly as the stolen article is or is not calculated to pass readily from hand to hand.

Where the important factors were that it was on the night of dacoity that murder was committed as a part of the transaction of dacoity committed by large number of persons and a large number of ornaments of gold and silver and cash were looted, most of the inmates of the house were beaten and one lady died as a result thereof, the accused persons were arrested within 2-4 days and they led to the recovery of the looted articles which had apparently been apportioned between them, the inference of dacoity has to be taken, *inter alia* under s 114, illust (a) of the Evidence Act against the accused.[52]Thus, when the prosecution has established beyond reasonable doubt that valuable articles which were robbed from the house of the victim after committing dacoity were possessed by the respective accused persons within a short time after the commission of dacoity, which even amounts to 'soon after' the commission of dacoity, thus attracting the presumption under s 114 of the Evidence Act, that they themselves are the dacoits.[53]3390

27. Non-examination of Investigation Officer

When the non-examination of the investigation officer has in no way prejudiced the accused, it is not fatal to the prosecution case.[54]

28. Non-examination of Doctor

When perhaps due to non-examination of the doctor the accused was convicted under s 395 and not under s 397, the accused, therefore, can have no grievance about non-examination of the doctor.[55]

29. Value of Evidence of Approver

Though an approver is a competent witness, he being a participant in the offence and usually an interested and infamous witness, his evidence requires corroboration from other evidence.[56] Granting pardon and examining the approver is at best a necessary evil in view of both the approver's escape from punishment and natural suspicion with which any court looks upon it.[57] The accused's producing stolen property from the place which was not in his possession, or the evidence of witnesses alleging to have recognised the accused at the time of dacoity, when his name was not mentioned in the FIR, would not be sufficient corroboration of an approver's testimony to base a conviction thereon.[58] The statement of the approver, that after the dacoity, he was offered rupees hundred which he took, is not a confession that he had committed dacoity. Such a statement cannot be taken into consideration as against the other accused.[59]

30. Value of Evidence of Co-accused

It is well-settled that no conviction can be based on the confession of a co-accused if there is no other

evidence which connects the accused with the dacoity.[60]

However, this view of the Bombay High Court is contrary to the view taken by the Andhra Pradesh High Court that the confession of a co-accused should be used as a piece of corroborated evidence and conviction based solely on confession of a co-accused is liable to be set aside.

The rule for relying on confession of an accused for the purpose of conviction of another accused is that the confession should be used as a piece of corroborative evidence which would mean that if there is any evidence against an accused person, that evidence may be corroborated by the confession of another accused person, courts should not begin the process of dealing with conviction of a person on the basis of a confession made by a co-accused. The beginning of the process has to be done with some cogent evidence which may then be corroborated with such confession.[61]3391

In *Hari Charan v State of Bihar* ,[62] which was also followed in *Param Hans Yadav v State of Bihar* ,[63] the Supreme Court while dealing with confession of a co-accused for the purpose of convicting the other accused, held:

> Thus, the confession may be regarded as evidence in that generic sense because of the provisions of s 30, the fact remains that it is not evidence as defined by s 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence.

31. Evidence not Believed for Section 395 may be Relied on for Section 400

Commentary under the same heading in s 400, *post*, may be referred to.

32. Acquittal

Where the informant himself could not identify the accused persons and the accused were not found in possession of the looted articles, they were regular visitor to shop of the informant. Thus, their alleged attempt to commit dacoity without covering their faces becomes doubtful. Guilt of accused cannot be said to have been established and they were entitled to acquittal.[64] Appellant accused was not identified by the prosecution witnesses. Only evidence against the accused was recovery of stolen properties, on the disclosure statement made by the accused. Although the recovery of stolen articles may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. It also depends on the nature of the property so recovered. Suspicion should not take the place of proof. Accused appellant was acquitted of offences under ss 395, 396 and 397, IPC .[65] Where the PWS in whose house dacoity was committed failed to identify the accused persons, the confession alleged to be made by the accused was found not voluntary, appellants accused were acquitted of the charge under s 395, IPC .[66] Where in a bank dacoity case, the PWS deposed before the court that the persons present in accused box, were not the persons who committed dacoity, the confessional statement of the accused led to recovery of some amount, the accused were acquitted of the charge under s 395, IPC .[67]Where the PWS deposed before the court that the accused appellants named in FIR had covered their faces which got untied during the course of commission of dacoity, and were identified but no specific role or overt act was3392 assigned to the appellants, held the prosecution case was not proved beyond reasonable doubt, appellants accused were acquitted.[68]

Prosecution case was that the accused appellants entered the house of the complainant on the pretext of conducting income tax raids and looted cash and jewels, no TI parade was conducted in the case, the PWS after seven years identified the appellants accused before the court, the accused were acquitted of the charge under s 395, IPC .[69]

Allegation was that the accused persons forcibly entered into the house of the informant and took away cash and golden ornaments. The testimony of the informant, her father and other material witnesses suffered from inconsistencies. Accused persons were acquitted of the charge under s 395, IPC .[70]

In any eventuality, once the prosecution case rests solely on the disclosure statements leading to recovery, it has to apply uniformly to all the persons who have been arrayed as accused. The sequence of events in such like incidents and the consequent recoveries are crucial and if the evidence is inseparable and indivisible, then it cannot be used selectively.[71]

Where the informant himself could not identify the accused persons, the accused were not found in possession of looted articles, they were regular visitors to shop of the informant, thus their alleged attempt to commit dacoity without covering their faces becomes doubtful, guilt of the accused cannot be said to have been established and they were entitled to acquittal.[72] Where the complainant and none of the PWS did not identify the accused during trial before the court, the conviction of the accused on the basis of statement of witnesses recorded in case diary was found not sustainable, hence was set aside.[73]

33. Conviction

An accused cannot be convicted for an offence under s 395, IPC, if there are inherent improbabilities in the prosecution evidence regarding his participation in the crime.[74] In *Nanhey v State of Uttar Pradesh* ,[75] the third accused was also held to be entitled to acquittal because it was found that the finding against him was inconsistent with the one on the basis of which the other two accused had been acquitted. In *Kalya Shankaraya alias Shankar Laxman Shinde v State of Maharashtra* ,[76] the charge against the appellant, as also against the other accused, was that all of them committed dacoity. The charge was not that these accused, or any of them, along with some unidentified persons committed this offence. The remaining accused were3393 acquitted. In these circumstances, it was held that the appellant could not be convicted under s 395, IPC, in the absence of any charge against him for any individual act. However, in *Nagnath Sudam Suryawanshi v State of Maharashtra* ,[77] the order of conviction, recorded by the trial judge on the basis of his conclusion that the accused had committed the offence of dacoity, was not interfered with inspite of the fact that the articles were recovered soon after the commission of the offence. Likewise, in *Jugal Gope v State of Bihar* ,[78] it was held that the appellate court would be justified in convicting the accused and reversing the order of acquittal, passed by the trial court, if it is perverse and it is fully proved by the evidence on record that they had participated in the dacoity.

Where the identification of accused by witnesses was believed and currency notes worth Rs 40,000/-, one pistol and a black coloured bag used to keep looted money was recovered from accused persons, the involvement of accused in a bank dacoity was proved beyond doubt. There conviction under ss 395 / 397 and 450 of IPC and ss 25 / 28 of the Arms Act was found proper.[79] Where the accused forcefully entered the house of the complainant, looted articles, he was identified by the PWS and recovery of looted articles from his possession was proved, *deshi katta* was recovered from him, he was convicted for offences under ss 395 and 397, IPC .[80]

Dacoity conviction proper

Appellants accused had committed dacoity in a temple in Mathura (UP). Witnesses had identified them in test identification parade and also before court. The defence plea that on the same evidence other co-accused has been acquitted was rejected as the case of the co-accused was distinguishable. Their conviction under s 395, IPC was held proper.[81]

Prosecution case was that accused appellants armed with fire arms committed murder of two persons,

injured one and committed loot of valuable moveables. PW5 identified the accused appellants in TI parade and also before the court. Death of the deceased was due to gun shot injuries. Complainant and members of his family identified the moveables recovered on the disclosure statements made by accused. Accused appellants were convicted under ss 395, 396 and 397, IPC .[82]

Dacoity at Petrol Pump--Accused Convicted

Appellants accused faced trial for offence under s 395, IPC on allegations that they attacked petrol pump and looted cash. In test identification parade, the appellants accused were properly identified by complainant worker at petrol pump and one more witness. Conviction of the accused appellants under s 395, IPC was held proper.[83]3394

Bank Dacoity--Accused Convicted

In broad day light dacoity was committed in Dena Bank, Bangalore, a cash of Rs. 13,95,720/- was looted. Appellant accused was identified by Bank Manager and one witness. A sum of Rs. 40,000/- and bank slips were recovered from the possession of the accused. Mere delay in holding TI parade was held of no significance. Conviction of the accused appellant under s 395, IPC was upheld.[84]

34. Effect of Acquittal of Some of the Accused on Conviction of Others

If five persons have been acquitted, only one person cannot be convicted under s 395, IPC .[85] In any eventuality, once the prosecution case rests solely on the disclosure statements leading to recovery, it has to apply uniformly to all the persons who have been arrayed as accused. The sequence of events in such like incidents and the consequent recoveries are crucial and if the evidence is inseparable and individual, then it cannot be used selectively.[86] When out of the ten accused persons involved in the dacoity, the case of four accused person was split and they were acquitted, the same witnesses were examined in the case of the remaining accused persons and the order of acquittal passed in favour of the four accused persons was not challenged, the remaining six accused persons were also entitled to an acquittal.[87]

35. Double Conviction--Under Sections 395 and 412

Where, though a person is not guilty under s 395, IPC for committing dacoity, looted property is found in his possession and he has knowledge that it is looted property, he can be held guilty under s 412, IPC ; but where he is convicted under s 395 for committing dacoity and it was in the course of that dacoity that the property which was found in his possession, came to him, he cannot be held guilty both under ss 395 and 412, IPC .[88]There is, however, no statutory prohibition for conviction, both under ss 395 and 412 . Where the act of dacoity, in respect of which there has been a conviction under s 395, does not necessarily involve a transfer of possession of the property, which is punishable under s 412, and the evidence relating to the participation in the robbery, is distinct from that relating to subsequent possession and it is quite likely that there is a separate act of division of the spoils by which the possession of the stolen property was transferred, simultaneous conviction under ss 395 and 412, IPC, is not illegal.[89]

36. Double Conviction--Under Sections 395 and 342

If wrongful confinement is committed in the course of dacoity, there is nothing in the IPC, or in the Code of Criminal Procedure, which says that no separate sentences would be necessary for the separate offence found to have been committed by the accused. Section 71 , IPC, will not apply to the case as the offence under s 342 has no connection at all with the offence under s 395 .[90]3395

The normal sentence in a case of dacoity is rigorous imprisonment for 5-7 years.[1] When the trial court taking into account the mitigating factors has passed sentence of just 3 years rigorous imprisonment for the offence under s 395, IPC, there is no good ground to reduce the sentence to a lesser term or to substitute it by any amount of fine. The offence of dacoity whether it be an aggravated form of theft or an aggravated form of extortion could not be encouraged. A liberal attitude cannot be taken in regard to such

offences on any sentencing policy.[2]

37. Sentence (Deterrent)

Heavy and deterrent sentences should be passed in cases of serious dacoities.[3] Where, in a very serious dacoity, two persons were wounded with shots and two with spears, and three fingers of one of the persons who had been shot, were completely blown away, the sentence of imprisonment for life was held to be justified. It was observed that if a dacoity is a very serious one, the maximum sentence or something approaching the maximum sentence should be passed under s 395 .[4] Where the accused committed a dacoity in broad daylight and stole a large sum and a maund of *gur*, a sentence of six years was held to be justified,[5] and the fact that the accused returned a part of the property, looted in a dacoity the next day, was not held to be a mitigating circumstances to reduce the sentence passed.[6] Similarly, the circumstances, that all, except the three accused, have been acquitted by the High Court, was held not to mitigate against the conviction of the three accused for dacoity in *Sakru v State of Uttar Pradesh* .[7] In *Israful Sheikh v State of Bihar* ,[8] no reduction in sentence; was considered necessary in view of the facts that the appellant played an important role in the commission of the dacoity, and did not hesitate in injuring even the informant, and a lot of properties, looted by the dacoits, was recovered from his house on his own extra-judicial confession. However, three years rigorous imprisonment was considered to be a proper sentence. Dacoity is a serious offence, in such cases no leniency is desirable in the matter of punishment. The defence plea that the sentence awarded be reduced to the sentence undergone, as the incident was old and accused appellants had served half of the sentence was rejected.[9] In *Moti v State of Madhya Pradesh* [10] where the accused were found to be novices in their maiden venture of committing a dacoity, it was held that a more severe sentence could turn them into hardened criminals.

In a case of road dacoity in which innocent passengers of a bus, quiet unaware of the catastrophe lurking over their heads were robbed of their belongings, the fact that the accused had faced rigour of the prosecution for about 14 years was not accepted to be sufficient to take a lenient view for awarding the sentence, so the sentence of imprisonment of 10 years rigorous imprisonment inflicted upon the accused was upheld.[11]3396

38. Sentence (Lenient View)

Where the accused convicted for offence under s 395, IPC has suffered trauma and harassment of criminal litigation for almost 31 years, to meet the ends of justice, his sentence for offence under s 395 was modified to one of the period undergone.[12] In *Nand Kumar v State* ,[13] looking at the young age of the appellants and the amount of property involved and that they had undergone sufficient period of imprisonment for about three years and were on bail when their appeal was being considered, it was thought to be in the interest of justice that they should not be sent to jail again and that the ends of justice would be met if the substantive sentence of the appellants was reduced to the period already undergone by them. Where the accused, while carrying away the stolen property, exploded a cracker to frighten the inmates of the house, who wanted to pursue them, and there was no attempt on their (accused's) part to cause injury to any of the inmates of the house or other persons at the time of commission of the offence or even thereafter, it was held that the ends of justice would be served if the sentence is reduced to imprisonment, already undergone by the accused.[14] As the occurrence was twenty eight years old, the appellants had not caused injury to any one, sentence imposed by the High Court was reduced to three years RI.[15]

To enhance the sentence of 2½ years rigorous imprisonment to seven years rigorous imprisonment by merely saying that the 'ends of justice' demand it, is to continue the question, and not to meet it. In the absence of any speaking order in the appellate court's substantial enhancement, the sentence imposed by the trial court for stated reasons, none of which has expressly been dissented from, or can be called impertinent, should be restored.[16]

The fact that dacoity under consideration is only a 'technical dacoity', and not a real one, or the fact that the offender was a young man who acted under the dominating will of his senior is a mitigating

circumstances.[17] If the accused is a young man of 23 years and there is no previous misconduct alleged against him, he deserves some reduction in his sentence.[18] One of the grounds for reducing the sentence to that already undergone, in *Nagnath Sudani Suryawanshi v State of Maharashtra* ,[19] was that the articles in the dacoity were ordinary and of common use. Where a dacoity was committed by the accused, under the influence of liquor and no serious injuries were caused and property of small value was taken away, the sentence of seven years was reduced to two years rigorous imprisonment.[20] Three years rigorous imprisonment was held sufficient to meet the ends of justice where no3397 injury was caused.[21] Similarly, where the accused, although armed with a gun, did not actively participate in the dacoity by using his gun, sentence awarded to him was reduced to the sentence of imprisonment already undergone by him.[22] In cases of rioting and dacoity committed while the accused suffer from a gross outrage on their religious feelings, comparative leniency may be made in sentence.[23] An approver in a dacoity case is entitled to some leniency.[24]

The accused suffering acute mental agony, and pain besides financial hardship by facing trial and appeal for 18 years are entitled to leniency so their sentence under s 395, IPC, was reduced from 4 years rigorous imprisonment to 2 years rigorous imprisonment each.[25] Where the minor injuries were caused to some of the policemen as the crowd pelted stones at the police party for not being able to enjoy the pop-light, there was no real desire to attack the police party in the special circumstances of the case, and the Apex Court reduced the sentence of imprisonment awarded to under different sections to the period already undergone but enhanced the fine imposed under s 395, IPC, to Rs 750 for each accused and in default of payment of fine, rigorous imprisonment for four months.[26] Where the incident was of the year 1998, the sentence of 7 years awarded by the trial court was reduced to the period of 5 years.[27]

39. 'And Shall also be Liable to Fine'

A sentence of fine only under s 395 is clearly illegal.[28] In *Re Narayan Singh Amar Singh's* case, it was expressed that though imposition of fine in addition to a jail sentence is obligatory, yet a token fine of only one rupee is utter contempt of the requirement of s 395, IPC, and, therefore, the fine imposed must bear a reasonable relationship with the enormity of the crime.[29] However, a sentence of fine is not appropriate in dacoity cases because dacoits are persons of little or no means. Where there are also sentences of long-term imprisonment, it simply means that a sentence of fine will cause hardship and sufferings to the unfortunate members of their families.[30]

40. Alteration of Conviction from Section 395 to one under Section 392

Commentary under the same heading in s 392, *ante*, may be referred to.3398

41. Alteration of Conviction from Section 395 to Section 380

Commentary under the same heading in s 380, *ante*, may be referred to.

42. Alteration of Conviction from Section 395 to one under Section 384

If the substantive evidence of the complainant does not refer to the allegations that the accused persons had looted away the articles or movables of the victims, they cannot be convicted under ss 395 / 149, IPC . If, however, his evidence and his statement in the FIR show that the appellants surrounded him and his party and extorted a sum of money as a price for sparing them and that this amount was paid to them, their conviction, in these circumstances can be altered from one under ss 395 / 149 to that under ss 384 / 149, IPC .[31]

43. Alteration of Conviction from Section 395 to Section 412

Where the description of the accused was not given in the FIR and the belated test identification was improper, however, in view of the recovery of articles and ornaments at the instance of the accused persons on the basis of their memorandums which have been proved, the conviction of accused persons

was altered from s 395 to s 412 .[32]

36 *Queen v Koonee* 7 WR (Cr) 48 .

37 *Arbinder Singh v State of Uttaranchal* 2006 Cr LJ 1021 (Uttr) ; *Ram Rais v State* 2012 (116) AIC 339 (All) ; *Sanjay Kumar Singh v State of Bihar* 2012 (118) AIC 713 (Pat) .

38 *Ram Rais v State* 2012 (116) AIC 339 (All) .

39 *Public Prosecutor v Muqarrab* AIR 1933 Pesh 3, 34 Cr LJ 212 .

40 *Vinod Kumar Shivhare v Tarachand Gupta* 2001 Cr LJ 2970 (MP) .

41 *Suresh Chandra Panda v State of Orissa* 2005 Cr L.J 4494 (Ori).

42 *Binod Amat v State of Orissa* 2004 Cr LJ 1021 (Ori) .

43 *Prafulla Kumar Patel v State of Orissa* 2000 Cr LJ 2724 (Ori) .

44 *Jarapala Deepala v State of Andhra Pradesh* 2006 Cr LJ 267 (AP) .

45 For detailed procedure for holding test identification parade, **See** Syed *Mohammed Awais v State of Maharashtra* 2003 Cr LJ 303 (Bom) . For further commentary, see under the same heading in s 392, *ante*.

46 *Syed Mohammed Awais v State of Maharashtra* 2003 Cr LJ 303 (Bom) .

47 *Syed Mohammed Awais v State of Maharashtra* 2003 Cr LJ 303 (Bom) .

48 *Ibid*. For further commentary, see under the same heading in s 392, *ante*.

49 *Takeshwar Yadav v State of Bihar* 2002 Cr LJ 698 (Pat) .

50 *Kansa alias Kansraj v State of Uttar Pradesh* 2002 Cr LJ 2216 (All) ; *Satrughana v State of Orissa* 1995 Supp (4) SCC 448, 1984 SCC (Cri) 1424 .

51 *Gurucharan Dusadh alias Sarin Disadh v State of Bihar* 2002 Cr LJ 1459 (Pat) ; *Robert Peter Kadam v State of Maharashtra* 1998 Cr LJ 3879 (Bom) (DB) .

52 *Shew Kumar Rai v State of West Bengal* 2003 Cr LJ 574 (Cal) (DB) ; *Wakil Singh v State of Bihar* AIR 1981 SC 1392, 1981 Cr LJ 1014 (SC) .

53 *Shew Kumar Rai v State of West Bengal* 2003 Cr LJ 574 (Cal) (DB) .

54 Refer to synopsis notes under s 395 .

55 *Kallan v State of Uttar Pradesh* 2001 Cr LJ 4403 (All) (DB) .

56 *Suha Yadav v State of Bihar* 2001 Cr LJ 3816 (Pat) .

57 *Syed Mohammed Owais v State of Maharashtra* 2003 Cr LJ 303 (Bom) .

58 *Jai Ram Aheer v State of Bihar* 2000 Cr LJ 3981 (Pat) .

59 *Prafulla Jeha v State of Orissa* 2000 Cr LJ 2684 (Ori) .

60 *Tulsi v State of Uttar Pradesh* 2000 Cr LJ 3080 (All) ; *Patali v State of UP* 2014 (5) All LJ 422 (All) DB) . (One accused had small pox marks on his face, only one person with small pox marks was put up in the TI Parade).

61 *Munna Mahato alias Munna alias Sanjay Kumar v State of Bihar* 2000 Cr LJ 3527 (Pat) .

62 *State of Uttar Pradesh v Ram Saroop and Hoker* 1998 Cr LJ 2856 (All) (DB) .

63 *Khan Singh alias Ujagar Khan and Chhotey v State* 1997 Cr LJ 2305 (All) (DB) .

64 *Fagu Das v State of Orissa* 1996 Cr LJ 2245 (Ori) .

65 *State of Rajasthan v Netrapal* 2007 Cr LJ 1783, (2007) 4 SCC 45, 2007 (2) Supreme 654, 2007 (3) Scale 689 .

66 *Kapporchand Chaudhary v State of Bihar* 2002 Cr LJ 1424 (Pat) .

67 *Sumesh Lal v State of Bihar* (2002) II AD 67 (SC) .

68 *Chheddu v State of Uttar Pradesh* 2000 Cr LJ 78 (All) .

69 *Rajababu v State of Maharashtra* 2000 Cr LJ 4072 (Bom) (DB) .

70 *Adan Mandal v State of Bihar* 2000 Cr LJ 3271 (Pat) (DB) .

71 *Subedar Yadav v State of Uttar Pradesh* 1999 Cr LJ 4663 (All) .

72 *Shavubhai Homabhai Vedava Vaghari v State of Gujarat* 1998 Cr LJ 3951 (Guj) .

73 *State of Uttar Pradesh v Bhoora* 1998 Cr LJ 478 (SC) .

74 *SK Jamir v State of Orissa* 1998 Cr LJ 1728 (Ori) .

75 *Akhaya Sehera v State of Orissa* 1996 Cr LJ 334 (Ori) ; **See also***Sahadat Answari v State of Orisa* (2014) 139 AIC 492 (Orisa) .

76 *Ram Mohan Singh v State* 1996 Cr LJ 692 (All) (DB) .

77 *Ram Nath Monto v State of Bihar* 1996 Cr LJ 3585 (SC) .

78 *Pllepu Venkati v State of Andhra Pradesh* 1996 Cr LJ 1458 (AP) .

79 *Ghure v State of Rajasthan* 2011 Cr LJ 3941 (SC), AIR 2011 SC 2268, 2011 AIR SCW 3893, 2011 (6) Scale 570 .

80 *Ram Babu v State of UP* (2010) 5 SCC 63, AIR 2010 SC 2143, 2010 Cr LJ 2856 .

81 *Sahadat Answari v State of Orissa* 2014 (139) AIC 492 (Ori) .

82 *Bhuvneshwar Singh v State of Bihar* 2003 Cr LJ 1008 (Pat) ; *Shew Kr Rai v State of West Bengal* 2003 Cr LJ 574 (Cal) (DB) ; *Tapeshwar Yadav v State of Bihar* 2002 Cr LJ 698 (Pat) ; *Kallan v State of Uttar Pradesh* 2001 Cr LJ 4403 (All) (DB) .

83 *Patiram v State of Rajasthan* 1977 Cr LR 33, p 34 (Raj) .

84 Re *Narayan Singh Amar Singh*AIR 1965 MP 225, (1965) 2 Cr LJ 507 ; *Public Prosecutor v Sankarapandia* 1952 MWN 427 ; Re *Sangiah*AIR 1948 Mad 113, 49 Cr LJ 89 ; *State v Gholam Mohiuddin* AIR 1951 All 475, 1951 ALJ 437 ; *Sarya Narain v State* AIR 1953 All 385 ; *Bhagwat Gorki v State of Bihar* 1973 Pat LJR 373 (if one of the witnesses is able to identify the accused at the identification parade or in court no conviction under this section is sustainable); *Udai Bhan Singh v State of Rajasthan* 1977 Cr LR 377, p 379, 380 and 381 (Raj) .

85 Re *Govinda Reddy*AIR 1958 Mysore 150, p 169, 1958 Cr LJ 1489 ; *Asharfi v State* AIR 1961 All 153, p 166, (1961) 1 Cr LJ 340 .

86 *State of Rajasthan v Ranjita Ladhuram* AIR 1962 Raj 78, (1962) 1 Cr LJ 461 ; *Provash Kumar Bose v King* AIR 1951 Cal 475, 52 Cr LJ 819 .

87 *Vaikuntam Chandrappa v State of Andhra Pradesh* AIR 1960 SC 1340, p 1342, 1960 Cr LJ 1681 ; Re *Kamaraj Goundar*AIR 1960 Mad 125, p 129, 1960 Cr LJ 358 .

88 *Hanif v State* 1973 All WR 408 .

89 *Ratan Singh v State* 1973 All WR 591 .

1 *Dashirai Riang v State* AIR 1964 Tripura 54, (1964) 2 Cr LJ 585 .

2 *Puran Singh v State of Rajasthan* 1979 Cr LR 314, p 315-16 (Raj) ; *Hazari v State of Rajasthan* 1979 Raj Cr Cas 48, p 50 .

3 *Udai Singh v State of Rajasthan* 1979 Cr LR 310, p 313 (Raj) ; *Matka alias Harprasad v State of Rajasthan* 1979 Cr LR 7, p 8 (Raj) .

4 *Hira v State* 1980 All CR 327 .

5 *Satyendra Mushar v State of Bihar* 2012 (117) AIC 718 (Pat) .

6 *Raj Narain Sahni v State of Bihar* 2015 (2) Crimes 592 (Pat) (DB).

7 *Mannepalli Anjaneyulv v State of Andhra Pradesh* 1999 Cr LJ 4375 (AP) (DB) .

8 *Jai Ram Aheer v State of Bihar* 2000 Cr LJ 3981 (Pat) .

9 *Tapeshwar Yadav v State of Bihar* 2002 Cr LJ 698 (Pat) .

10 *Suba Yadav v State of Bihar* 2001 Cr LJ 3816 (Pat) .

11 *Lal Man v State of Uttar Pradesh* 2000 Cr LJ 3336 (All) (DB) .

12 *Sadique Ansari v State of Bihar* 2006 Cr LJ 1592 (Jhar) .

13 *Shravan Ram v State of Bihar* 2006 Cr LJ 41 (Pat) (DB) . For further commentary, see under the same heading in s 392, *ante*.

14 *Jarapala Deepala v State of Andhra Pradesh* 2006 Cr LJ 267(AP).

15 *Ashraful Seikh v State of Bihar* 2004 Cr LJ 3716 (Jhar) . For further commentary, see under the same heading in s 392, *ante*.

16 *State of MP v Radheshyam* 2011 (101) AIC 442 (Chhat) .

17 *Robert Peter Kadam v State of Maharashtra* 1998 Cr LJ 3879 (Bom) (DB) ; *Earabhadrappa v State of Karnataka* AIR 1983 SC 446, 1983 Cr LJ 846 (SC) ; *Kantaprashad v Delhi Admn* AIR 1958 SC 350, 1958 Cr LJ 698 (SC) ; *Ravi Magor v State* 1997 Cr LJ 2886 (Cal) DB) .

18 *Dunu alias Biswajil Pattanaik v State of Orissa* 1996 Cr LJ 2107 (Ori) .

19 *Samunder Singh v State* AIR 1965 Cal 595, (1965) 2 Cr LJ 713 .

20 *Musakhan v State of Maharashtra* AIR 1976 SC 2566, 1976 Cr LJ 1987, p 1993 .

21 *Ram Pratap Mahato v State of Bihar* 1973 Cr LJ 364, p 365 (Pat) .

22 *Umesh Singh v State of MP* 2014 (2) Crimes 522 (MP) .

23 *Fatta v Emperor* 14 Cr LJ 601 .

24 *Deepak v State of Maharashtra* 2012 Cr LJ 4643, (2012) 8 SCC 785 .

25 *Manmeet Singh alias Goldie v State of Punjab* 2015 (2) Crimes 124 (SC), *Raj Kumar v State of Uttaranchal* (2008) 11 SCC 709 and *Ram Bilas Singh v State of Bihar* (1964) 1 SCR 775**relied** on).

26 *Nura v Emperor* 34 Cr LJ 1258 .

27 *Arjun Krishan Kamble v State of Maharashtra* 1977 Cr LR (Mah) 351 ; *Hazari v State of Rajasthan* 1979 Raj Cr Cas 48, p 50 .

28 *Parshadi v Emperor* AIR 1928 Oudh 417, 29 Cr LJ 989 ; *Yad Ram v State of Rajasthan* 1977 Raj Cr Cas 341, p 344 .

29 *Ram Das v Emperor* AIR 1945 All 385, 47 Cr LJ 240 .

30 *Kaitasnpati Gupta v State of Uttar Pradesh* 1977 All Cr C 100, p 104 .

31 *Gedda Raminaidu v State of Andhra Pradesh* AIR 1980 SC 2127, 1980 Cr LJ 1477, p 1478 .

32 *Surat Khan Abdul Rahiman v State of Karnataka* (2013) 14 SCC 682 .

33 *Lalu alias Bhala alias Rama Sadhu v State of Orissa* 2003 Cr LJ 1677 (Ori) ; *Md Imamuddin v State of Bihar* 2013 Cr LJ 269 (Pat) (Dacoity in running train, spot arrest, conviction upheld).

34 *Manoj Giri v State of Chhattisgarh* 2013 Cr LJ 3024, (2013) 5 SCC 798, (2013) 127 AIC 129 (SC) .

35 *Sonu Sardar v State of Chhattisgarh* AIR 2012 SC 1480, 2012 Cr LJ 1759, (2012) 4 SCC 97 .

36 *Mojaffar v State of West Bengal* 2011 Cr LJ 1249 (Cal) .

37 *Uda v Emperor* 16 Cr LJ 634 ; *Manmeet Singh Alias Goldie v State of Punjab* 2015 (2) Crimes 124 (SC), AIR 2015 SC 2355 .

38 *Pidda Enumundugaru v Emperor* 11 Cr LJ 249 ; Re *K Appallaswamy*AIR 1957 AP 954, 1957 Cr LJ 1227 ; *Gopaian v State of Kerala* 1977 Ker LT 714, p 717 ; Re *Chinnchoo Lingayya*AIR 1958 AP 510, 1958 Cr LJ 1001 ; *Ram Shankar Singh v State of Uttar Pradesh* AIR 1956 SC 441, 1956 Cr LJ 822 .

39 *Z (Y) Amngul Haokip v State of Manipur* 1980 Cr LJ 83 (NOC) (Gau) .

40 *Ikramuddin v Emperor* AIR 1917 All 173, 18 Cr LJ 491 ; *Gurucharan Dusadh alias Sarin Disaddh v State of Bihar* 2002 Cr LJ 1459 (Pat) ; *Manmeet Singh Alias Goldie v State of Punjab* 2015 (2) Crimes 124 (SC), AIR 2015 SC 2355 ; *Deepak v State of Maharashtra* 2012 Cr LJ 4643, (2012) 8 SCC 785 .

41 *Aziz Khan v State* 1958 Raj LW 527 ; *Deepak v State of Maharashtra* 2012 Cr LJ 4643, (2012) 8 SCC 785 .

42 *Rashidazzaman v Emperor* 12 Cr LJ 193 (2).

43 *Narayan v Emperor* AIR 1947 Nag 57, 47 Cr LJ 822 ; *Mohammad Ahsan v Emperor* AIR 1930 Lah 263, 31 Cr LJ 112 ; *State of Orissa v Susanta Kumar Dey* (1978) 46 Cut LT 496 ; Re *Abbas Ali Sahib*AIR 1928 Mad 144, 29 Cr LJ 5 .

44 *Siya Ram v State of Bihar* 1973 Cr LJ 155 (SC), AIR 1973 SC 51 ; *Chandra Bhan v State* 1981 Cr LJ 196, p 202 (All) (DB) .

45 *Ram Sagar v State* 2003 Cr LJ 1113 (All) .

46 *Suba Yadav v State of Bihar* 2001 Cr LJ 3816 (Pat) .

47 *Narayan Prasad v State of MP* 2006 Cr LJ 123, p 125, AIR 2005 SC 204, (2005) 13 SCC 247, 2006 (9) Scale 109 .

48 *Bandamedi Shankar v State of Andhra Pradesh* 2003 Cr LJ 2242 (AP) .

49 *Robert Peter Kadam v State of Maharashtra* 1998 Cr LJ 3879 (Bom) (DB) .

50 *Lachhman Ram v State of Orissa,* AIR 1985 SC 486, 1985 Cr LJ 753 (SC) .

51 *Earabhadrappa v State of Karnataka,* 1983 Cr LJ 846 (SC) .

52 *Kunwarlal v State of Madhya Pradesh* 1999 Cr LJ 3632 (MP) .

53 *State of Karnataka v Rajan* 1994 Cr LJ 1042 (Ker) (DB) .

54 *Akloo Sada v State of Bihar* 1998 Cr LJ 4345 (Pat) .

55 *Ibid*.

56 Re *Mukesh Ram Chandra*AIR 1958 AP 165, 1958 Cr LJ 343 .

57 *Kartar Singh v State of Vindhya Pradesh* AIR 1952 VP 42, p 44, 53 Cr LJ 986 .

58 *Uda v Emperor* 16 Cr LJ 634 .

59 Re *Ibrahim*AIR 1926 Cal 374, 26 Cr LJ 1146 ; *Deo Koran v State* 1960 MPLJ 1198 ; *Queen v Ram Saugor* 8 WR (Cr) 57 .

60 *Uttam Rajaram Bhil v State of Maharashtra* 1977 Cr LR 125, pp 126 and 127 (Mah) .

61 *Mandagiri Keshava Rao v State of Andhra Pradesh* 2001 Cr LJ 1360 (AP) .

62 *Hari Charan v State of Bihar,* AIR 1964 SC 1184, (1964) 2 Cr LJ 344 (SC) .

63 *Param Hans Yadav v State of Bihar,* AIR 1987 SC 955, 1987 Cr LJ 789 .

64 *Yogeshwar Hembram v State of Jharkhand* 2007 Cr LJ 1050 (Jhar) ; *Deepak v State of Maharashtra* 2012 Cr LJ 4643, (2012) 8 SCC 785 (Evidence of sole injured eye-witness found not reliable - Conviction of appellant was set aside).

65 *State of Rajasthan v Talevar* 2011 Cr LJ 3937 (SC), AIR 2011 SC 2271, (2011) 11 SCC 666 .

66 *Ramlal Chouhan v State of Assam* 2012 (115) AIC 810 (Gauh) .

67 *Manoj Murmu v State of Jharkhand* 2011 Cr LJ 4553 (Jhar), 2011 (103) AIC 641 .

68 *Ganga Ram v State of UP* 2012 (111) AIC 273 (All) .

69 *Thangapandian v State* 2011 Cr LJ 4006 (Mad) .

70 *Manaka Mohanty v State of Orissa* 2009 Cr LJ 1414 (Ori) .

71 *Mahesh Grover J Parlhad v State of Haryana* 2007 Cr LJ 1927 (P & H).

72 *Yogeshwar Hembram v State of Jharkhand* 2007 Cr LJ 1050 (Jhar) ; *Lalo Mandal v State of Bihar* 2010 Cr LJ 94 (Pat) (Participation of the accused in dacorty not proved beyond reasonable doubt, accused acquitted).

73 *Md Sahabuddin v State of Bihar* 2014 (2) Crimes 637 (Pat) ; **see also***Mohd Ali v State (Govt of NCT of Delhi)* 2014 (4) Crimes 320 (Delhi) (Accused acquitted); *Nanha v State* 2014 (40) Crimes 411 (Del) (No TI parade held, accused acquitted).

74 *Lakshman Prasad v State of Bihar* 1981 Cr LR 478, p 479 (SC) .

75 *Nanhey v State of Uttar Pradesh,* AIR 1977 SC 783, 1977 Cr LJ 583 .

76 *Kalya Shankaraya alias Shankar Laxman Shinde v State of Maharashtra,* 1978 Cr LR 294, p 295 (Mah) .

77 *Nagnath Sudam Suryawanshi v State of Maharashtra,* 1977 Cr LR 142 (Mah) .

78 *Jugal Gope v State of Bihar,* AIR 1981 SC 612, 613, 1981 Cr LJ 4 .

79 *Harish Indrapratap Singh Thakur v State of Madhya Pradesh* 2007 Cr LJ 1338 (MP) .

80 *Ramzan v State of Rajasthan* 2010 Cr LJ 2607 (Raj) .

81 *Ram Babu v State of UP* 2010 Cr LJ 2856, p 2860 (SC), AIR 2010 SC 2143, (2010) 5 SCC 63, 2010 (4) Scale 126 .

82 *Ghure v State of Rajasthan* 2011 Cr LJ 3941 (SC), AIR 2011 SC 2268, 2011 AIR SCW 3893, 2011 (6) Scale 570 .

83 *Heera v State of Rajasthan* 2007 Cr LJ 3514, p 3519 (SC), AIR 2007 SC 2425, 2007 (8) Scale 615, 2007 (4) Supreme 816 .

84 *Pravin v State of MP* 2008 Cr LJ 2980 (SC), AIR 2008 SC 1846, 2008 (4) Scale 431 .

85 *Arbinder Singh v State of Uttaranchal* 2006 Cr LJ 1021 (Uttr) .

86 *Prahlad v State of Haryana* 2007 Cr LJ 1927 (P&H) .

87 *Mendagiri Keshava Rao v State of Andhra Pradesh* 2001 Cr LJ 1360 (AP) .

88 *Narendra Kumar v State* AIR 1956 All 336, 1956 Cr LJ 662 ; *Abdul Jabbar v Emperor* AIR 1944 Cal 39, 45 Cr LJ 468 ; Re *Bhimla*1958 Andh LT 476.

89 *Venkatappa v State* 1956 Andh LT 915 .

90 *Atum Lengmel v Manipur Administration* AIR 1962 Manipur 7, (1962) 1 Cr LJ 168 .

1 *Karey Singh (Karay Jath) v State of Uttar Pradesh* 1999 Cr LJ 4652 (All) .

2 *Ibid*.

3 *Om Prakash v State* AIR 1956 All 163, 1956 Cr LJ 353 (2) .

4 *Bansi v Emperor* AIR 1941 All 359, 43 Cr LJ 97 .

5 *Darzao v Emperor* AIR 1945 All 100, 46 Cr LJ 525 .

6 *Ibid*.

7 *Sakru v State of Uttar Pradesh* . AIR 1973 SC 760, 1973 Cr LJ 599 .

8 *Israful Sheikh v State of Bihar,* 1973 Bih LJ 381, 384-85 .

9 *Ram Babu v State of UP* 2010 Cr LJ 2865, p 2860 (SC), AIR 2010 SC 2143, (2010) 5 SCC 63, 2010 (4) Scale 126 .

10 *Moti v State of Madhya Pradesh* , 1981 Cr LR (MP High Courts Notes) 58, p 60.

11 *Kapporchand Chaudhary v State of Bihar* 2002 Cr LJ 1424 (Pat) .

12 *Bhola Bind v State of Bihar* 2007 Cr LJ 2881 (Pat) .

13 *Nand Kumar v State,* 1978 Cr LR 463, p 466 (Raj) .

14 *Kusho Mahton v State of Bihar* AIR 1980 SC 788, 1980 Cr LJ 313 ; *Ram Babu v State of UP* (2010) 5 SCC 63, AIR 2010 SC 2143, 20 Cr LJ 2856 .

15 *Ram Sundar Mahto v State of Bihar* (2009) 16 SCC 191, (2010) 3 SCC (Cri) 234 .

16 *Lingala Vijay Kumar v Public Prosecutor* AIR 1978 SC 1527, p 1529, 1978 Cr LJ 1527 .

17 *Om Prakash v State* AIR 1956 All 163, p 167 .

18 *Satish Ramchandra Vaingankar v State of Maharashtra* 1977 Cr LR 64, p 65 (Mah) ; *Laltu Sardar v State of Jharkhand* 2010 Cr LJ 2955 (Jhar) (Sentence of the years imposed reduced to seven years RI).

19 *Nagnath Sudani Suryawanshi v State of Maharashtra,* 1977 Cr LR 142 (Mah) .

20 *Nabi Rasool v Emperor* AIR 1943 Cal 32, 44 Cr LJ 38 .

21 *Shivappa v State of Mysore* AIR 1971 SC 196, 1971 Cr LJ 260 .

22 *Patiram v State of Rajasthan* 1977 Raj Cr C 383, p 384 .

23 *Daulat v Emperor* AIR 1927 Oudh 70, 28 Cr LJ 110 .

24 *Naubat v Emperor* AIR 1945 All 344 .

25 *Satish v State of Uttar Pradesh* 1998 Cr LJ 3252 (All) .

26 *Ajab v State of Maharashtra* AIR 1989 SC 827, 1989 Cr LJ 954 .

27 *Satyendra Mushar v State of Bihar* 2012 (117) AIC 718 (Pat) .

28 *Sheodeni Singh v State of Bihar* AIR 1961 Pat 362, (1961) 2 Cr LJ 364 ; *Empress v Bhoja* 6 WR (Cr) 54 .

29 AIR 1965 MP 225, (1965) 2 Cr LJ 507 (the view of the court, that imposition of fine in addition to a jail sentence is obligatory it is submitted, is wrong. The words 'and shall also be liable to fine' in s 395, IPC, are not to be interpreted as meaning that both fine and imprisonment are obligatory); *Tetar Gope v Ganauri Gope* 1968 Cr LJ 1108, p 1109 (Pat), AIR 1968 Pat 287 in which it was held that it is not necessary that a sentence of fine must be imposed in every case under s 395, IPC .

30 *Dwarka Singh v Emperor* AIR 1947 Pat 107, 47 Cr LJ 780 ; AIR 1958 AP 165, 1958 Cr LJ 343 .

31 *Vishnu Shiv Ram Bhoir v State of Maharashtra* AIR 1979 SC 1943, 1979 Cr LJ 1305 .

32 *Devi Singh v State of Madhya Pradesh* 2007 Cr LJ (NOC) 368 (MP) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 396.

Dacoity with murder.--

If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

This section, which deals with dacoity with murder, the liability of the other accused persons, is co-extensive with that of the actual murderer. Similarly, any death, caused3399 by a dacoit in a dacoity is murder and is attributable to all of them, if it is proved that they were 'conjointly committing' dacoity,[33] even though they may have participated in dacoity, and not in murder.[34] It does not matter whether murder is committed in the immediate presence of the other accused persons.[35] In the case of committing dacoity (attempting to commit robbery conjointly by more than five persons is dacoity) if murder is caused, all persons who have conjointly committed the offence of dacoity are liable to be punished under s 396,

IPC . Dacoity begins as soon as an attempt is made to commit robbery by a gang of five or more persons and if a person is murdered during the attempt, every member of the gang is guilty under s 396, IPC .[36] It also does not matters whether the particular dacoity charged under s 396 was inside the house, or outside the house, when the dacoity was committed, or whether the murder was committed inside or outside the house, so long as the murder was committed in the commission of that dacoity.[37] It is not even necessary that the murder should have been with the previous contemplation of the perpetration of the crime.[38] It may be remembered that the offence of dacoity starts with the entry of the raiders into the premises, where they propose to commit dacoity, and ends with departure from the premises. So long as the culprits remain on the premises, the process of dacoity continues.[39]

The offence of murder is by specific language included in the offence under s 396 . IPC . It will have the same connotation, meaning and ingredients as contemplated under the provisions of s 302, IPC .[40]

2. 'In so Committing Dacoity'

The question, whether murder was committed during the course of committing dacoity, is a pure question of fact to be determined by the special circumstances of each case.[41] In deciding the question whether the transaction of murder is distinct from the transaction of dacoity, the helpful facts are whether the dacoits retreated without plunder and the murder was committed while retreating, the lapse of interval between the attempt at dacoity and murder, the distance between the places of the attempt at dacoity and murder, and whether the dacoits abandoned the booty, and the lapse of the interval between the abandonment of the booty and the commission of the murder. However, each fact should not, by itself, be treated as invariably3400 conclusive.[42] The question to be considered is whether the retreat was so separated by time or space from the offence, which was the common object of the assembly, as not to form part of it. Where there is no such separation and is the continuation of the actual dacoity, the case would fall under this section.[43] If there is nothing to show that murder was so dissociated by time or space from the dacoity that it can be said that one chapter had closed and a new chapter had begun, the case would fall under this section.[44]

Murder committed by dacoits while carrying away the stolen property is murder committed during the commission of the dacoity.[45]A shot fired in order to keep off the rescue party and allow the theft to be committed is an act committed in committing the dacoity.[46] Where, however, a police outpost was fired at by the accused, injuring four constables and killing one, not with the object of taking away the guns and rifles, but to show how powerful the communists were, and ultimately removed the rifles and guns, it was held that the death was committed before the dacoity, and not in commission of the dacoity.[47]

3. 'Offender' under Section 396 and 397 --Distinction

Commentary under the same heading in s 397, *post*, may be referred to.

4. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

5. Jurisdiction

An offence under this section may be inquired into, or tried by, a court within whose local jurisdiction the offence was committed or the accused person is found [s 181(1), CrPC 1973]. Where dacoity was committed in British India, though murder, which was committed soon after dacoity in attempting to carry away the stolen property, was committed in a native state, it was held that the British India court had jurisdiction to try the offenders under s 396 .[48]

6. Charge

The following form of the charge may be adopted:

> I (*name and office of Session Judge,etc*) hereby charge you (*name of accused person*) as follows:3401
>
> That you, on or about theday of, conjointly, with four or more other persons, committed dacoity and, in so committing dacoity, murder was committed by one of you, and that you thereby committed an offence, punishable under s 396 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge

The accused persons were initially charged under ss 302 and 392, IPC . Subsequently, the charge was altered to one under s 396, IPC . The complexion of the charge had remained unaltered. In the absence of any prejudice caused to the accused persons, the trial cannot be said to be vitiated.[49]

7. Dying Declaration

When there is no evidence to show that the dying declaration was recorded when the deceased was mentally fit to give a statement, such dying declaration is not admissible. For further commentary, s 302, vol 3, may be referred to.

8. Murder by one Dacoit--All Dacoits Liable

If a dacoit in the progress of, and in pursuance of the commission of a dacoity commits a murder, all his companions who are participating in the commission of the same dacoity may be convicted under this section, although they may have no participation in the murder beyond the fact of participation in dacoity. It is not necessary for the prosecution in such a case to establish either any common intention envisaged in s 34 or common object contemplated in s 149, IPC . It is not necessary that the murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in, or abetted, its commission. Indeed they may not have been present at the scene of the murder, or may not have known even that murder was going to be, or had in fact been committed. However, nonetheless they all will be liable for enhanced punishment, provided a person is in fact murdered by one of the members of the gang in commission of the dacoity.[50]

9. Proof

In order to establish a charge under this section, the prosecution must prove,[51] that:

(a) a dacoity was committed;
(b) any one of five or more persons committed murder; and
(c) the murder was committed while committing the said dacoity.[52]

The prompt recovery of articles soon after the dacoity from the house of the accused raises a strong presumption of the complicity of the accused in dacoity.[53] Non-examination of investigating officer would not be fatal in absence of prejudice to the accused persons.[54]3402

Appellant accused was not identified by the witnesses. The only evidence was of recovery of stolen articles on the disclosure statement made by the accused appellant. Only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. It also depends on the nature of the property so recovered, whether it was likely to pass readily form hand to hand. Suspicion should not take the place of proof. The acquittal of the accused appellant for offences under ss 395, 396 and 397, IPC recorded by the High Court was not set aside.[55]

When the testimony of the sole eyewitness, the wife of the deceased was found reliable and trustworthy, the fact that she suffered certain mental illness after the incident cannot be a ground to discard her testimony when she was got treated in the hospital when the said eyewitness also had every opportunity to identify the accused persons being her neighbours and also having seen their faces in the light of burning flames of *dalan*, the conviction of the accused under s 396, IPC, was found proper.[56] Appellants accused armed with deadly weapons entered into the house of the informant, caused injuries to the informant, fatal injury to his brother and father, also committed loot in the house. The evidence of witnesses was found reliable, their evidence could not be discarded because they were related to the deceased. Appellants were convicted for offence under s 396, IPC . Conviction was held proper.[57] Where the witnesses knew the accused from before, the accused can be easily recognized even in insufficient light. The identification/recognition of the accused in the light of lantern and flash of torch light was believed.[58] There was clear evidence of the PWS that the accused took away cash, ornaments, assaulted members of the family of the informant, killed the deceased, accused was convicted for offence under s 396, IPC .[59] In a bank dacoity case, the non-recovery of cash/money, failure of the prosecution as to how the accused utilized money/cash robbed is not fatal.[60] As there was long standing enmity between the parties, the manner of committing dacoity and the participation of the appellants accused was found doubtful. Accused persons were acquitted of the charge under s 396, IPC .[61] As the dacoits during the commission of the dacoity remained inside the house for an hour, the facial expression were imprinted on the mental screen of the PWS, the testimony of the PWS was found reliable, conviction of the appellants accused under s 396, IPC was held proper.[62]

If the evidence of identification fails to connect the accused with the dacoity, the mere fact that the property stolen in a dacoity is found with him after about six weeks, is no ground for holding him guilty of dacoity. Such a person is, however, guilty under s 411, IPC .[63] Where the common object of the dacoits including the accused who committed dacoity, was to resist all opposition even to the extent of3403 committing murder and one of the dacoits committed murder, it was held that all of them were responsible for that act.[64] If, however, the prosecution has not been able to establish any nexus between the death of the deceased and the commission of the dacoity or even his injuries, the charge under s 396, IPC, must fail.[65] Accused persons included a person aged 74 years, a boy aged 13 years, there was long standing enmity between the parties, identification of the accused persons in the light of lantern was found doubtful, there was every possibility of false implication, accused persons were acquitted of the charge under s 396, IPC .[66] Where six persons were alleged to have committed dacoity, two of them were simply acquitted, the remaining four accused appellants could not be convicted for offence under s 396, IPC .[67] Where in a dacoity with murder case, FIR was lodged against unknown persons, accused A2 was arrested after a period of ten years, no TI parade was held, his identification by the prosecution witnesses for the first time in the court was found not reliable since he was unknown to the witnesses, his conviction under s 396, IPC was set aside.[68]Merely because the act of the accused has a civil profile would not denude it of its criminal outfit. Criminal and civil proceedings are separate and independent of each other and the pendency of a civil suit cannot bring to an end of criminal proceedings even if they arise out of the same set of facts.[69]

The dacoits having remained present in the house for an hour the witnesses had ample opportunity and occasion to see them, the witness had been assaulted by the dacoits he had an opportunity to see them from close quarters, the facial expressions of the accused having been imprinted on the mental screen of witnesses, they would not have been erased from their memory within a period of two months. The identifying witnesses correctly identified the accused appellants at the TI parade as well as at the time of their testimony in the court. Accused appellant were convicted under s 396, IPC .[70]

When there is absolutely no material on record to show that the accused persons formed an unlawful assembly with the common object of dacoity in the house of the deceased and when nothing has been stolen; nothing has been removed from any of deceased by any member of the said assembly or any article, leaving aside the guns, was stolen from the said house, the conviction of the accused under s 396, IPC, is not proper.[71]3404

Accused persons entered the premises, looted articles and licensed gun, and killed two persons. All the witnesses stated that they had otherwise known the accused persons and they were not strangers to them. In the moonlight and lantern light they clearly identified them. Therefore, the TI parade was really not necessary in this case. Dying declaration of the deceased was found reliable. Conviction of the accused appellants under s 396, IPC was held proper.[72]

10. FIR Against unknown Persons--Accused Acquitted

FIR about dacoity was filed against unknown persons. The accused appellant was arrested after 10 years. No test identification parade was held. In the absence of TI parade the identification of the accused by the witness for the first time in the court was found not reliable. Accused A2 was acquitted of the charge under s 396, IPC .[73]

11. Circumstantial Evidence

Commentary under the related headings in s 302, vol 3, may be referred to.

12. Circumstantial Evidence--Accused Denying Established Facts, in the Statement under Section 313 , CrPC --Effect

In a case of circumstantial evidence when the accused offers an explanation and that explanation is found not to be true, then the same offers an additional link, in the chain of circumstances to complete the chain.[74] The false answer offered by the accused when his attention was drawn to a circumstance, renders that circumstance inculpating him. In such circumstances, the false answer can also be counted as providing a missing link for completing the chain.[75]

13. Test Identification (TI) Parade

Test Identification in the case though was held 14 days after the incident but within two days after the arrest of the accused. Judicial Magistrate who conducted TI parade was examined in the case, witnesses identified the accused in TI parade and in court. Appellant accused was convicted under s 396, IPC .[76]

The dacoits at the time of commission of dacoity had covered their face. The minor daughter of the deceased could not identify the accused. Identification by another witnesses was also doubtful, the accused were unknown. The conviction of the appellant recorded by courts below was set aside.[77]3405

14. Reliability of Witness

The Hon'ble Supreme Court in the case of *Vadivel Thevar v State of Madras* ,[78] has observed that generally speaking oral testimony may be classified into following categories:

(a) Wholly reliable.
(b) Wholly unreliable.
(c) Neither wholly reliable nor wholly unreliable.

Thereafter, the Hon'ble court proceeded to observe as follows:

> In the first category of proof, the court should have no difficulty in coming to its conclusion either way--it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach of suspicion of interestedness, incompetence or subornation. In the Second category, the court equally has no difficulty in coming to its conclusion. It is the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. However, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable

When the single eyewitness produced by the prosecution is not found reliable, the accused persons are liable to be acquitted.[79]

Where the evidence of the witnesses is found reliable, their evidence cannot be discarded merely because they are related to the deceased.[80]

15. Double Conviction

When while committing dacoity, murder is also committed, the punishment would be provided under s 396, IPC . In other words, s 396, IPC includes in itself, the ingredients of punishment for offence under s 395, IPC . Section 396 is a magnified version of s 395 as murder is also committed while committing dacoity. If, therefore, accused is held guilty for an offence under s 396, IPC and convicted accordingly, he cannot be convicted under s 395, IPC also.[81] The offence under s 395 is covered by s 396 . A separate sentence for that offence is improper as a man is not to be punished twice for the same criminal act.[82] If a person, concerned in a dacoity, unintentionally commits murder, he is liable to punishment under s 396 ; he cannot be separately convicted for murder under s 302 and of dacoity under s 395 .[83]

It is apparent that the accused cannot be convicted simultaneously for the offence under s 396 and also for the offence under s 302, IPC, unless there is specific evidence that one of the accused inflicted injuries on the deceased with the necessary3406 intention or the knowledge so that, that particular accused could be fastened with the offence under s 302, IPC .[84]

However, the offence under s 120B read with s 3, IPC, being a separate offence from the offence of participation in a particular dacoity, a separate sentence can be awarded to run consecutively for participation in separate dacoities, and to this can also be added a consecutive sentence of participation in conspiracy.[85] Entering into a conspiracy to beat and rob is *perse* an offence under s 120B even if the offences which had formed the object of the conspiracy, are not committed at all. If, however, the accused have actually carried out their conspiracy and are convicted and sentenced separately for several acts which constituted the object of the conspiracy, separate sentence for offences under s 120B will not be called for.[86]

16. Accused Charged with Section 396 Cannot be Convicted under Section 302

Where the FIR allegation and the documents under s 173, CrPC, collected by the prosecution clearly indicate that the accused person allegedly committed dacoity with murder and on the basis of allegations in the FIR and evidence collected during investigation, they were charged under s 396, IPC, but the prosecution could not prove that dacoity took place and two deceased were murdered, during commission of dacoity, it was held that the evidence no doubt show that the two deceased were murdered, the accused persons cannot be convicted under s 302 merely on the basis of these proved facts as no charge under s 302 was framed nor evidence led to show that they committed murder, if the accused persons are convicted under s 302, IPC, it would be denial of fair trial.[87] However, where no prejudice has been caused to the accused, the conviction of the accused under s 302, IPC would not be set aside merely for want of framing of a specific/alternate charge for an offence under s 302, IPC .[88]

17. Sentence

In a serious case of dacoity, any leniency in sentence would not only be undesirable but also would be improper. The passage of time cannot wash away gravity of offence. Conviction held proper.[89]

The offence under this section is punishable with death, or imprisonment for life, or a rigorous imprisonment for ten years. The section does not envisage rigorous imprisonment for a term exceeding ten years, there is no middle course between ten years rigorous imprisonment and imprisonment for life. Rigorous imprisonment for fourteen years cannot be awarded.[90] Courts will not be justified in not inflicting extreme sentence on grounds which are purely matters of grace and clemency.[91] The fact that murder was committed because the criminal was being brought to bay and in3407 the desire to escape, is not an extenuating circumstances.[1] Youth was not considered to be a ground for reduction of sentence of death in *Emperor v Sheo Shanker* .[2]

Where the accused betrayed a helpless old lady and murdered her before the dacoity and there was no question of any resistance by the said lady, the case was found amongst the rarest of rare cases and extreme penalty of death was awarded.[3] Where the appellant had committed dacoity and committed murders of five inmates of the house, deceased included two children, had no consideration for human lives, held the case fell within the category of rarest of rare cases, imposition of death sentence was held proper.[4]

The court should not hesitate in giving the maximum penalty of death in cases in which murders are committed.[5] It does not, however, mean that all the accused convicted under this section, must be sentenced to death.[6]

Where the case of dacoity with murder was not found amongst the rarest of rare cases, the sentence of death was reduced to imprisonment for life.[7]

Where no date for hearing of accused on the point of sentence was fixed, no opportunity of hearing was given to the accused, it is a valuable right of the accused which cannot be denied for speedy trial. Therefore, the sentence of life imprisonment was reduced to rigorous imprisonment for ten years and fine of Rs 2000/-.[8] Where the accused were already in custody for more than 7 years, and no proper opportunity was given to the accused persons to be heard on the point of sentence, however, remand of case for the said purpose was not necessary after a lapse of seven years from the date of conviction. Keeping in view the nature of the case specially that it was an unintentional murder of a child in course of the alleged dacoity, the sentence of life imprisonment reduced to sentence of 10 years rigorous imprisonment with a fine of Rs 5,000/-.[9] When the accused were from a poor section of society and they were coolies with no criminal antecedents, the sentence of life imprisonment awarded to them by the trial court was reduced to rigorous imprisonment for a period of 10 years.[10] Where the accused faced trial for a period of 15 years and thereafter, the reference and appeals have remained pending for two years, the sentence of death awarded to the accused under s 396, IPC, was reduced to one of life imprisonment.[11]

18. Consolidation of (Concurrent) Sentence in Different Cases

Sometimes, the same accused is convicted and sentenced in different cases. The question arises that if the sentences of imprisonment are awarded against the accused in different cases, whether it can be allowed to run concurrently.3408

The law in this regard is settled through a catena of decisions. In *V Venkateshwarlu v State of Andhra Pradesh* ,[12] a Division Bench of the Andhra Pradesh High Court had an occasion to consider the power and parameters of the court in directing the sentences to run concurrently. On an exhaustive review of the case law, Jayachandra Reddy J, as he then was, speaking for the Bench, held as under:

> It must be remembered that section 427 , CrPC, provides for directing the sentence awarded in the subsequent case to run concurrently with the previous sentence. It may be that the subsequent convicting court was not

> apprised about the existence of the previous sentence. At any rate ordering of sentence to run concurrently does not amount to altering the finding. It may be noted that section 31 , CrPC, provides for ordering the sentences to run concurrently in a given case. Likewise, under section 427 , CrPC, while awarding a sentence in a subsequent case in respect of the person who is already undergoing sentence in a previous case, a discretion is given to the subsequent convicting court to give such a direction and order the sentence to run concurrently with previous sentence. As laid down in the above decisions, even after such a sentence has become final, nothing prevents the High Court to exercise its *suo motu* revisional jurisdiction or entertain an application under section 482 , CrPC, and give the necessary directions as provided under section 427 , CrPC

However, as regard the exercise of power to direct the sentence to run concurrently, their lordship held as under:

> In the instant case, the petitioner is convicted for the offence of dacoity in both the cases. Having regard to the nature of the offence, we do not think that this is a fit case where we should exercise our inherent power or *suo motu* revisional power in favour of the petitioners.

A Full Bench of the Madhya Pradesh High Court in *Sher Singh v State of Madhya Pradesh* [13] held that such a course of action is permissible under s 437(1), CrPC, and the power can be exercised even when the matter is brought before the High Court in an application under s 482, CrPC .

In *Gandikota Narsaiah v Superintendent Central Prison, Warangal* ,[14] Bilal Nazki J took the view that though the High Court has the power to direct the sentences to run concurrently, it is not advisable to exercise such power in cases of dacoity.

In *Ammavasai v Inspector of Police* ,[15] the Hon'ble Supreme Court affirmed the view that consolidation of sentences against the same accused in various cases is permissible. As regard exercise of that power, it had struck a balance between the wholesale consolidation of sentences and total denial of the facility. The sentences in various cases were clubbed into two groups depending on the number of cases in which the respective appellants are involved and the sentences in the cases of each group were directed to run concurrently. The resultant sentences in the respective groups were ordered to run one after the other.

Thus, when the accused is found to have committed offences under ss 395, 412, 399, 400 and 402, IPC, in different places and at different times, their sentences can be directed to run concurrently in the interest of justice by way of consolidation of sentences.[16]3409

However, the same High Court in an earlier case took a contrary view and was of the opinion that if the sentence given to the accused in an offence committed during a period of two years is directed to run concurrently, it will be a licence to offenders particularly to those who appear to be professional dacoits. The present petitioner has also been convicted in three cases of dacoity and if the court directs that the sentence should run concurrently, it will be a licence for such offenders to go on committing offences for number of years before they are caught by the police. Whether they commit one offence or dozen offences they will know that they have to suffer only one set of sentence and this will be a dangerous trend. Therefore, the sentence of imprisonment in all cases would not be directed to run concurrently.[17]

19. Alteration of Conviction from Sections 396 / 149 to Sections 396 / 34 --Propriety of

When all the five accused are proved to have participated in the murder and dacoity, though out of them the trial of one juvenile accused has been split, the conversion of conviction of the accused from s 396 read with s 149, IPC, recorded by the sessions court to one under s 396 read with s 34, IPC, by the High Court is not proper.[18]

20. Alteration of Conviction from Section 396 to one under Section 395

Where the accused persons were convicted by the trial court under ss 302 / 149 and s 396, IPC, *etc*, but on an appeal being filed, the High Court found the accused guilty of culpable homicide not amounting to murder and not of murder, so altered the conviction of the accused persons from ss 302 / 149 to ss 304 / 149, Pt II, IPC . Further, in view of the conclusion arrived at by the High Court that the offence committed by the accused persons was not murder, the conviction of the accused persons was also altered from s 396 to one under s 395, IPC .[19]

21. Alteration of Conviction from Section 396 to one under Section 394

A reading of s 396, IPC shows that for the conviction of the said offence, there should be a minimum five persons. The number factor is often as crucial in law as in politics. A solitary number in the latter may bring down a government, while in the former a charge under s 396, IPC . When in a trial under s 396 against six accused persons, two accused are acquitted, the remaining four accused cannot be convicted under s 396, IPC . In such circumstances the conviction of the four accused persons by the trial court under s 396 is liable to be altered to s 394, IPC .[20]

22. Alteration of Conviction from Section 396 to one under Section 411

Where three days after the incident, recovery of looted property was effected, the Supreme Court reversed the judgment of the Allahabad High Court upholding the conviction and sentence of the accused for the offence under s 396, IPC, and instead convicted him for one under s 411, IPC .[21] When the offence of dacoity with murder was not proved against the accused, but the recovery of looted property was3410 established from the possession of the accused, and the accused could not account for such possession, the conviction of the accused under s 396 was altered to one under s 411, IPC .[22]

Where the evidence established against some of the accused persons showed that they were found in possession of looted property within a very short time, their conviction under s 3 was altered to one under s 411, IPC .[23]

23. Alteration of Conviction from Section 396 to one under Section 392 and Section 302

Where two of the three miscreants committed murder and robbery, the trial court convicted all the accused persons under s 396, the conviction of the said two accused was altered from s 396 to one under ss 392 and 302, IPC .[24]

33 *Onkarnath v State of Madhya Pradesh* 1980 Cr LJ (NOC) 131 (MP) (DB); *Samunder Singh v State* AIR 1965 Cal 598, p 612, (1965) 2 Cr LJ 713 ; *Akeila Sheikh v State* AIR 1953 Assam 45, 1953 Cr LJ 413 .

34 *Sheikh Halim v State of Orissa* (1978) 45 Cut LT 393 ; *Punjab Singh v Emperor* AIR 1933 Lah 977, p 985, 35 Cr LJ 322 ; *Empress v Shiv Shankar* AIR 1954 Pat 109 .

35 *Samunder Singh v State* AIR 1965 Cal 598, p 612, (1965) 2 Cr LJ 713 ; *Punjab Singh v Emperor* AIR 1933 Lah 977, p 985, 35 Cr LJ 322 ; *Emperor v Shiv Shankar* AIR 1954 Pat 109 .

36 *Seeta Ram v Emperor* AIR 1925 Oudh 723, (1925) 26 Cr LJ 1364 ; *Sharafu v State of Kerala* 2007 Cr LJ 2908 (Ker) (DB) ; *Manmeet Singh v State of Punjab* (2015) 89 ACC 638 (SC), (2015) 2 Crimes 124 (SC), 2015 (4) Scale 111, 2015 (3) SLT 366, 2015 Cr LJ 2355 .

37 *Empress v Teja* 17 All 86 **dissenting** from *Empress v Omrao Singh* 16 All 437 .

38 *Samunder Singh v State* AIR 1965 Cal 598, p 612, (1965) 2 Cr LJ 713 ; *Punjab Singh v Emperor* AIR 1933 Lah 977, p 985, 35 Cr LJ 322 ; *Emperor v Shiv Shankar* AIR 1954 Pat 109 .

39 Re *Katta Rama Krishna Reddi*(1974) 1 AP WR 358, 1974 MLJ (Cr) 273; *Nanwa v State* 1966 AWR 850, 1967 All Cr R 9 ; *State v Sadhu Singh* 1972 WLN 677 ; *Sitaram v Emperor* AIR 1925 Oudh 723, 26 Cr LJ 1364 .

40 *Rafiq Ahmad v State of UP* (2011) 8 SCC 300, p 329, (2011) 3 SCC (Cri) 498 .

41 *Empress v Sakharam* 2 Bom LR 325 ; *Sirajuddin v State* AIR 1951 All 834, 52 Cr LJ 1514 ; *Laliya v State of Rajasthan* AIR 1967 Raj 134, (1967) 1 Cr LJ 818 ; *Shyam Behari v State of Uttar Pradesh* AIR 1957 SC 320, p 323, 1957 Cr LJ 416 ; *Ragho Singh v State* (1963) ILR 42 Pat 454 .

42 *Laliya v State of Rajasthan* AIR 1967 Raj 134, p 137, (1967) 1 Cr LJ 818 ; *Nanwa v State* 1966 AWR 850, 1967 All Cr R 9 ; *State v Sadhu Singh* 1972 WLN 677 .

43 *Empress v Sakharam* 2 Bom LR 325 .

44 *Sirajuddin v State* AIR 1951 All 834, p 835, 52 Cr LJ 1514 ; *Kaley v State* AIR 1955 All 420, 1955 Cr LJ 1144 ; *Karim Bux v Emperor* AIR 1923 Lah 329, 25 Cr LJ 329(1) ; *Sundar v Emperor* AIR 1925 Lah 142 ((2)), 25 Cr LJ 700 ; *Lashkar v Emperor* AIR 1921 Lah 115, 22 Cr LJ 687 .

45 *Lashkar v Emperor* AIR 1921 Lah 115, 22 Cr LJ 687 ; *Punjab Singh v Emperor* AIR 1933 Lah 977, 35 Cr LJ 322 ; *Monoranjan Bhattacharjya v Emperor* AIR 1932 Cal 818, 33 Cr LJ 722 ; *Vitti Thevan v Vitti Thevan* 5 Cr LJ 1364 .

46 *Sitaram v Emperor* AIR 1925 Oudh 723, 26 Cr LJ 1364 .

47 *Shivappa v Hyderabad State* AIR 1955 Hyd 147, 56 Cr LJ 953 ; *Shyam Behari v State of Uttar Pradesh* AIR 1957 SC 320, 1957 Cr LJ 416 .

48 *Punjab Singh v Emperor* AIR 1933 Lah 977, p 984, 35 Cr LJ 322 .

49 *KM Ibrahim alias Bawa v State of Karnataka* 2000 Cr LJ 197 (Kant) (DB) .

50 *Kalika Tiwari v State of Bihar* 1997 Cr LJ 2531 SC ; *State of Maharashtra v Manipal Singh Satyanarayan Singh* 1996 Cr LJ 2485 (Bom) (DB) .

51 *Shivappa v Hyderabad State* AIR 1955 Hyd 147, 56 Cr LJ 953 ; Re *Mathura Thakur* 6 CWN 72.

52 *Rafiq Ahmad v State of UP* (2011) 8 SCC 300, p 329, (2011) 3 SCC (Cri) 498 .

53 *Dashirai Riang v State* AIR 1964 Tripura 54, (1964) 2 Cr LJ 583, p 588 .

54 *Shravan Ram v State of Bihar* 2006 Cr LJ 41 (Pat) (DB) .

55 *State of Rajasthan v Talevar* 2011 Cr LJ 3937 (SC), 2011 AIR SCW 3889, (2011) 6 Scale 575 .

56 *Sumesh Lal v State of Bihar* 2002 Cr LJ 1477 SC ; *Amitsingh Bhikamsingh Thakur v State of Maharashtra* AIR 2007 SC 676, 2007 Cr LJ 1168, (2007) 2 SCC 310 .

57 *Arjun Mahto v State of Bihar* 2008 Cr LJ 4313, p 4316 (SC), AIR 2008 SC 3270 .

58 *Mahendra v State of UP* 2015 (3) All LJ 34 (All) (DB) .

59 *Ghasia Munda v State of Jharkhand* 2012 Cr LJ 299 (Jhar) .

60 *Anuj Kumar Nathunprasad v State of Gujarat* 2012 (2) Guj LR 1494 (Guj) .

61 *Shrishti Narain Jha v Bindeshwar Jha* 2009 AIR SCW 6987 .

62 *Saghir v State of UP* 2009 Cr LJ 1459 (All) .

63 *Arshad Molla v Emperor* AIR 1919 Cal 85, 20 Cr LJ 525 .

64 *Emperor v Girya Laxmappa* 1 Cr LJ 258, 6 Bom LR 248 ; *Empress v Teja* 17 All 86 ; *Bhan Singh v Emperor* AIR 1932 Lah 367, 33 Cr LJ 460 .

65 *Wakil Singh v State of Bihar* AIR 1981 SC 1392 **reversing**1977 Cr LJ (NOC) 80 (Pat).

66 *Shrishti Narain Jha v Bindeshwar Jha* (2009) 6 SCC 457, (2009) 2 SCC (Cri) 1091 ; **see also***Kapildeo Mandal v State of Bihar* (2008) 16 SCC 99, 2008 Cr LJ 730, AIR 2008 SC 533 (Long standing dispute between the parties, identification of the accused in the light of torch/lantern found not reliable, conviction recorded by courts below set aside).

67 *Raj Kumar alias Raju v State of Uttranchal* (2008) 3 SCC (Cri) 888, AIR 29008 SC 3248, 2008 AIR SCW 5486 .

68 *OMA v State of Tamil Nadu* 2013 Cr LJ 997, AIR 2013 SC 825, (2013) 3 SCC 440 ; **See also***Hridyanand Shukla v Yadupati Chauhan* (2012) 13 SCC 427 (Accused persons were not named in the FIR, no TI parade held, their participation in dacoity was not disclosed at earliest opportunity, hence their acquittal was held proper.)

69 *Sitaram Agarwal v State of West Bengal* 2010 (88) AIC 490, p 499 (Cal), (2010) 1 Cal LT 622 .

70 *Saghir v State of UP* 2009 Cr LJ 1459, p 1463 (All) (DB) .

71 *State of Madhya Pradesh v Sarnam Singh* 2000 Cr LJ 3636 (MP) (DB) ; **see also***Manmeet Singh v State of Punjab* 2015 (89) ACC 638 (SC), 2015 Cr LJ 2355, 2015 (2) Crimes 124 (SC), 2015 (4) Scale 111, (2015) 7 SCC 167 .

72 *State of UP v Sukhpal Singh* 2009 Cr LJ 1556, p 1561 (SC), AIR 2009 SC 2441, 2009 (5) Scale 686 ; *Saghir v State of UP* 2009 Cr LJ 1459 (All) (DB) .

73 *OMA v State of Tamil Nadu* AIR 2013 SC 825, 2013 Cr LJ 997 .

74 *Swapan Patra v State of West Bengal* (1999) 9 SCC 242 .

75 *State of Maharashtra v Suresh* (2000) 1 SCC 471 ; *Kuldeep Singh v State of Rajasthan* (2000) 5 JT (SC) 161 ; *Anthony D'Souza v State of Karnataka* 2003 Cr LJ 434 (SC) .

76 *Sanatan Rana v State of Jharkhand* 2005 Cr LJ 4162 (SC), AIR 2005 SC 3532 .

77 *Umesh Kamat v State of Bihar* 2005 Cr LJ 908 (SC), AIR 2005 SC 726, 2005 SCC (Cri) 1218 ; **See also***Tahir Mohammad v State of MP* 1993 Supp (2) SCC 697, 1993 Cr LJ 193) (The dacoits were under masks, the witnesses had not given any description of the culprits identified by them, the identification of the accused culprits was held not reliable, accused were acquitted of charges under ss 395 to 397, IPC).

78 *Vadivel Thevar v State of Madras,* AIR 1957 SC 614, 1957 Cr LJ 1000 .

79 *Shiv Kumar Rai v State of West Bengal* 2003 Cr LJ 574 (Cal) (DB) .

80 *Arjun Mahto v State of Bihar* 2008 Cr LJ 4313, p 4316 (SC), AIR 2008 SC 3270 .

81 *Shiv Charan v State of Rajasthan* 2005 Cr LJ 3426 (Raj) (DB) .

82 *Sharif v Emperor* AIR 1944 Sind 113, 45 Cr LJ 704 .

83 *Empress v Rughoo* 1864 WR (Cr) 30 ; *Punjab v Emperor* AIR 1933 Lah 977, p 985, 35 Cr LJ 322 wherein it was held that where the object of conspiracy is to commit a dacoity and not a murder, and if the murder is committed by one of the dacoits, all others can be convicted only under s 396, and not under ss 302 / 149 .

84 *Manepanni Anjaneyulu v State of Andhra Pradesh* 1999 Cr LJ 4375 (AP) (DB) .

85 *Hazari Beria v Emperor* AIR 1928 Oudh 507, 30 Cr LJ 473 ; *Samunder Singh v State* AIR 1965 Cal 558, p 606, (1965) 2 Cr LJ 713 .

86 *Punjab Singh v Emperor* AIR 1933 Lah 977, p 986, 35 Cr LJ 322 .

87 *Har Pal Singh v State of Uttar Pradesh* 2000 Cr LJ 1552 (All) (DB) .

88 *Rafiq Ahmad v State of UP* (2011) 8 SCC 300, p 329, (2011) 3 SCC (Cri) 498 .

89 *Arjun Mahto v State of Bihar* 2008 Cr LJ 4313, p 4316 (SC), AIR 2008 SC 3270 .

90 *Om Prakash v State* AIR 1956 All 163, p 167, 1956 Cr LJ 358 (2) .

91 *Emperor v Nga Tha Hmwe* AIR 1935 Rang 504, 37 Cr LJ 267 .

1 *Kaley v State* AIR 1955 All 420, 1955 Cr LJ 1141 .

2 AIR 1954 Pat 109; *Om Prakash v State* AIR 1956 All 163, p 167, 1956 Cr LJ 358 (2), in which it was held that reasonable circumstances in mitigation can be the extreme youth of an offender, but leniency to those, who are old enough to understand the nature and consequences of their acts, is indefensible.

3 *State of Karnataka v Rajan* 1994 Cr LJ 1042 (Kant) (DB) .

4 *Sonu Sardar v State of Chhattisgarh* AIR 2012 SC 1480, 2012 Cr LJ 1759, (2012) 4 SCC 97 .

5 *Ragho Singh v State* (1963) ILR 42 Pat 454 .

6 *Sharif v Emperor* AIR 1944 Sind 113, 45 Cr LJ 704 .

7 *Brij Mohan v State of Rajasthan* AIR 1994 SC 739, (1994) CCR 84 (SC) .

8 *Sanatan v State* 2006 Cr LJ 1025 (Cal) (DB) .

9 *Raghunath Dey v State* 2003 Cr LJ 4592 (Cal) (DB) .

10 *KM Ibrahim alias Bava and Ors v State of Karnataka* 2000 Cr LJ 197 (Kant) (DB) .

11 *State v Subhash Chander* 2000 Cr LJ 1908 (Del) (DB) ; *State of Gujarat v Anirudh Singh* AIR 1997 SC 2780, (1997) 6 JT 236 (SC), 1997 Cr LJ 3397 (SC) .

12 *V Venkateshwarlu v State of Andhra Pradesh* 1987 Cr LJ 1621 .

13 *Sher Singh v State of Madhya Pradesh,* 1989 Cr LJ 632 .

14 *Gandikota Narsaiah v Superintendent Central Prison, Warangal,* (1999) 2 Andh LT 615, 1999 Cr LJ 3947 .

15 *Ammavasai v Inspector of Police,* AIR 2000 SC 3544, 2000 Cr LJ 4662 (SC) .

16 *Bandamedi Shankar v State of Andhra Pradesh* 2003 Cr LJ 2242 (AP) .

17 *Gandikota Narasaiah v Suptd* 1999 Cr LJ 3947 (AP) .

18 *Antony D'Souza v State of Karnataka* 2003 Cr LJ 434 (SC) .

19 *Boboo Lal v State of Madhya Pradesh* 2002 Cr LJ 3455 (MP) (DB) .

20 *Karna Dashrath Mali v State of Maharashtra* 2000 Cr LJ 1288 (Bom) (DB) .

21 *Shivnath v State of Uttar Pradesh* AIR 1970 SC 535, 1970 Cr LJ 601 .

22 *Ram Karan and Ram Gopal v State of Rajasthan* 1996 Cr LJ 3521 (Raj) (DB) .

23 *State of Madhya Pradesh v Samaylal* 1994 Cr LJ 3407 (MP) (DB), 1994 Cri LR (MP) 123 .

24 *Ibid*.

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 397.

Robbery or dacoity, with attempt to cause death or grievous hurt.--

If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

Comments

1. Scope

The plain reading of s 397 of IPC as well as per the settled legal position, it is merely a rider to s 394 of IPC . It does not create any substantive offence. It is complimentary3411 to ss 392 and 395 of IPC which create substantive offence. But merely because the offence committed falls in the area which could be covered under s 392 of IPC, has been committed by a mob of the persons who have been charge-sheeted

are more than five in number, by itself would not attract s 397 of IPC . The facts stated by each prosecution witness and the complainant should be weighed and some sifting permissible can be done.[25] A conviction under s 397 is equally good whether the number of thieves be five or less than five.[26] The provisions of this section are attracted if, at the time of committing robbery or dacoity, the offender uses a deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person.[27] A deadly weapon must have been used at the time of committing robbery or dacoity, and not before its commission.[28] Unless it is proved that the accused was armed with a gun or a deadly weapon at the time of commission of robbery or dacoity to threaten the persons robbed or their companions, the accused cannot be convicted under s 397, IPC .[29]

2. Sections 392, 394 and 397 Compared

Commentary under the same heading in s 394, *ante*, may be referred to.

3. Neither new Offence Created nor Constructed Liability is Attracted

The provisions of s 397, IPC, does not create any new substantive offence as such but merely serves as complementary to ss 392 and 395, IPC by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances *viz*., use of a deadly weapon, or causing of grievous hurt or attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract s 397, IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in s 34, IPC .[30]

4. Ingredients of the Offence

The ingredients of the offence are as under:

(1) The commission of robbery or dacoity as described in ss 392 and 395, IPC respectively;
(2) The accused -

   (a) used a deadly weapon, or
   (b) caused grievous hurt, or
   (c) attempted to cause death or grievous hurt;

(3) he did so at the time of committing the robbery or dacoity.[31]3412

5. 'Offender'

The term 'offender' in s 397, IPC, is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract s 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon.[32] The expression 'the offender' used in s 397 pertains to the actual offender or accused persons who at the time of committing robbery or dacoity uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person and it does not include all such persons who participate in the commissions of such robbery or dacoity.[33] Since the accused A-1 did not use any weapon in the commission of the offence, his conviction under s 397, IPC was set aside.[34]

The sentence for offence under s 397 of the IPC cannot be awarded to those of the members of the group dacoits who did not use any deadly weapon. Guilt under s 397 can be attributed only to that offender who uses any deadly weapon or causes grievous hurt to any person during course of the commission of the

robbery. The provision postulates that only the individual act of accused will be relevant to attract s 397, IPC .[35]

6. 'Offender' under Section 396 and Section 397 --Distinction

Unlike s 396, IPC, in which the principle of vicarious liability is explicit and which stipulates that if during the commission of dacoity, one or more of the persons committing dacoity commits murder, then all would be liable for identical punishment. Section 397 , IPC, contains the principle of individual liability. The words used in it are the 'offender'. In other words, before s 397 can have any application, prosecution has to establish as to who was that offender or accused person who during the course of commission of robbery or dacoity was armed with a deadly weapon or caused grievous hurt to any person or attempted to cause the death or grievous hurt to any person.

A comparison of the language used in ss 396 and 397, IPC, justifies this inference. Had the legislature intended that the expression 'the offender' used in s 397 should include all such persons participating in the offence of robbery or dacoity, then it could have used language similar to that contained in ss 396 and 397 in place of its present text which would instead have read as follows: 'If at the time of committing robbery or dacoity any person uses any deadly weapon or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person every one of those persons participating in the commission of such robbery or dacoity shall be punished with imprisonment which shall not be less than seven years.'3413

The difference in the language used in ss 396 and 397, leaves no room for doubt that the expression 'the offender' used in s 397 pertains to the actual offender or accused person who at the time of committing robbery or dacoity uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person and it does not include all such persons who participate in the commission of such robbery or dacoity.

It would also be pertinent to point out that the Apex Court in the decision reported in *Phool Kumar v Delhi Administration* ,[36] has also taken the same view in paragraph five. The Apex Court observed thus:

> A difficulty arose in several High Courts as to the meaning of the word 'uses' in s 397 . The term 'offender' in that section as rightly held by several High Courts, is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract s 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon.[37]

7. Distinction between Section 397 and Section 394

The liability under s 397, IPC is individual, and not constructive. This would become crystal clear from an analysis of the text of s 397, IPC . However, a perusal of the text of s 394, IPC would show that not only the person who causes hurt but an associate of his/her would be equally liable for the mischief contemplated by the section. Thus, unlike s 397 (wherein, the liability is only individual), the liability under s 394 is both individual and vicarious.[38]

8. Distinction between Sections 397 and 398

Commentary under the same heading in s 398, *post*, may be referred to.

9. 'Uses'

What is essential to satisfy the word 'uses' for the purposes of s 397, IPC is the robbery being committed

by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of victim, and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be.[39] The word 'uses', in s 397, should be given a wider meaning, and should not be confined merely to cutting, stabbing or shooting, as the case may be, but also to carrying the weapon for the purpose of overwhelming the victims of dacoity. If a dacoit is armed with a deadly weapon, then undoubtedly, he inspires the victim with the feeling of fear and his power of resistance is, to a great extent, paralysed.[40] This would be so even though a3414 gun,[41] or a revolver,[42] is not actually fired. It is sufficient if a deadly weapon is carried for the purpose of overpowering the person robbed.[43] If a knife is used for the purpose of producing such an impression upon the mind of a person that he would be compelled to part with his property, that would amount to using the weapon.[44] If a dangerous weapon is so exhibited as to intend that the persons sought to be robbed are likely to be further intimidated and the commission of the robbery might be facilitated, the case would fall under this section.[45] The section does not require the uses of a deadly weapon to be against the person robbed.[46]

10. Attempt to Cause Grievous Hurt

Attempt to cause grievous hurt attracts application of s 397, IPC, actual causing of grievous hurt is not necessary for application of s 397, IPC .[47]

11. The Expressions 'Accused with Deadly Weapon' in Section 398 and 'Uses Deadly Weapon' in Section 397

Commentary under the same heading in s 398, *post*, may be referred to.

12. Brandishing a Knife to Commit Robbery is use of Knife

Brandishing a knife in order to commit robbery amounts to use of knife. Even if the victim is not stabbed and at knife point he is robbed or looted, the offence under s 397 is made out. It is not necessary that in order to attract s 397, IPC the deadly weapon is to be used in the sense that by use of it the person has to be injured. The use of weapon is also there when the weapon is brandished and a person is robbed/looted under the fear of his life caused by weapon.[48] Appellant accused had pointed pistol towards the victim and robbed him of his cash and PAN Card. Even though the pistol in FSL examination was not found in working order, the appellant accused was convicted for offence under s 397, IPC .[49]

13. 'At the Time of Committing Robbery or Dacoity'

If, at the time of committing robbery or dacoity, the accused do not use any deadly weapon, or do not cause grievous hurt to any person, or do not even attempt to cause death or grievous hurt to any person, and cause the injuries only when they are about to be apprehended by the crowd, no offence against the accused under this section is constituted.[50]3415

14. 'Deadly Weapon'

A clasp knife',[51] or a knife,[52] depending, of course, upon its size,[53] or a dagger,[54] or a revolver,[55] or a hatchet,[56] has been held to be a deadly weapon. Guns and swords are, of course, deadly weapons.[57] However, plain sticks are not deadly weapons.[58]

A knife is often described as a pocket-knife, pen-knife, table-knife, kitchen-knife *etc*. It cannot be denied that a knife can be used as a weapon of offence. It can cut, it can pierce, it can be deadly. To say that a knife to be a deadly weapon should be of a particular size, would perhaps be not a correct statement.[59] Use of a knife at the time of commission of robbery does not *ipso facto* bring the case under s 397, IPC . The prosecution is required to prove that the knife used falls in the category of 'deadly weapon' within the meaning of s 397, IPC .[60]

As to *lathis* with which dacoits are frequently armed, it has been generally held that they do not fall within the meaning of deadly weapons.[61] It has, however, been held, in a Nagpur case,[62] that in a country like India, where many murders, if not most, are committed with sticks, *lathis* are deadly weapons within the meaning of s 397, IPC . However, the view of the Supreme Court[63] is that in the absence of other descriptions given to the weapon, merely describing the weapons as bamboo sticks or *lathis* is not enough to make the weapons lethal or deadly.

15. 'Causes Grievous Hurt'

It may be noted that the term 'voluntarily' has not been used in this section. Evidently, if, at the time of committing the robbery or dacoity, grievous hurt is caused even though not directly from the violence caused by the offender, the case would be covered by the section. Thus, if a fracture is caused not from the blows given by the offender but by reason of the fall, the case would fall within the purview of this section.[64] Any hurt which endangers life is a grievous hurt. The term 'endangers life' is much stronger than the expression 'dangerous to life'. Apart from that in s 397, IPC 'attempt' to cause grievous hurt attracts its application. The question whether the accused attempted to cause death or grievous hurt would depend upon the factual scenario. If the knife blow was given to a women on the chest just below the nipple, considering the place where injury was inflicted, *i.e.*, on the chest, s 397, IPC is attracted.[65]3416

16. 'Such Offender'

The words 'such offender', at the end of this section, indicate that the case of that dacoit alone, who has been directly, and not vicariously guilty of using any deadly weapon, or of causing grievous hurt to any person, or of attempting to cause death or grievous hurt to any person, falls within the scope of this section.[66] The provisions of this section cannot, therefore, apply constructively.[67]

17. Constructive Liability

To render s 397, IPC, applicable, it must be proved that the offender himself committed the act and not that he was vicariously liable under s 397 . It does not create a substantive offence but merely prescribes minimum sentences for the accused who actually uses the deadly weapon or causes or attempts to cause grievous hurt to a person in the course of committing robbery or dacoity. It, thus, postulates individual acts of the accused. It has no scope for constructive liability. The individual act of an offence covered by s 397 does not make his fellow miscreants liable under s 397 .[68]

The term 'offender', in s 397, is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract s 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon.[69]

Thus, it can be said that s 397 cannot be applied constructively and relates only to the offender who actually uses the weapon himself. Section 34 or s 149, IPC, have no application to a case covered by s 397, IPC .[70]

18. FIR

When the FIR contained the signature of the complainant, it cannot be said to be unreliable merely because the complainant stated before the court that his brother had accompanied him to the police station and lodged the report.[71]

19. Age of Accused

The estimate of an accused given in the statement recorded under s 313, CrPC, should be accepted as correct and the court would not be justified in substituting it by3417 its own estimate.[72] Where the date of occurrence was 10 November 1982; the date of birth of accused in school register was shown as 26 August 1969, and accused gives his age as 17 years in his statement under s 313, CrPC, made in

December 1983, the radiologist in his report dated 16November 1983 stated the age of the accused as not more than 16 years on the date of occurrence, no evidence was produced by the prosecution to rebut the date given in the school register. On these facts, it was held that the accused was not more than 16 years of age at the date of commission of the offence and the case was triable only by a children's court under the Children Act.[73]

20. Non-recovery of Weapon of Offence

It cannot be accepted, simply because the knife used in the commission of the offence could not be recovered that the weapon was not used at all. When there is unimpeachable evidence in the case that knives were used by accused persons, non-recovery of the knives is not fatal to the prosecution case. Therefore, there is no question of reduction of sentence from s 392 read with s 397 and s 34, IPC, to one under s 393 read with s 34, IPC .[74]

Allegations were that the appellant accused entered the house of the complainant, intimidated inmates of the house and decamped with stolen articles *viz*. ornaments. Weapon of knife was not recovered nor produced in the court. Section 397 , IPC was not attracted in the case. Conviction of the appellant under s 397, IPC was altered to one under s 392, IPC .[75]

21. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

22. Identification of the Accused

Commentary under the relevant headings in s 392 and s 395, *ante*, may be referred to.

Where there was abnormal delay in holding of TI parade, the offence was committed on 2.8.2004, the accused persons were arrested on 28.10.2004, but the first TI parade was held on 9.11.2004 and the second TI was held on 20.1.2005, no credence was given to the result of identification parade and the accused were acquitted of the charge under s 397, IPC .[76]

23. Charge

A substantive charge of the offence of robbery or dacoity, as the case may be, should be framed, and the following paragraph should be added:

> That, at the time of committing robbery/dacoity, you used deadly weapon, to wit, (or caused grievous hurt to(*name the person*), or attempted to cause death or grievous3418 hurt to(*name the person*), and thereby committed an offence, punishable under ss 392 / 395, read with s 39, of the Indian Penal Code, and within the cognizance of this court.

Section 397, IPC has reference not only to the offence of dacoity, but also to the offence of robbery. Where it is proposed to use s 397, either s 395 or s 392 should definitely be referred to in the charge so that the accused persons may know exactly what they have to meet.[77] A charge, if not so framed, would be defective,[78] but not when the accused have sufficient notice of the facts and no prejudice is caused to them.[79]

When the charge under s 397, IPC was framed against the accused, he can be convicted under s 394 read with s 397, IPC, inspite of the fact that he has not been charged under s 394, IPC .[80]

There can be no charge or conviction under s 397, standing by itself, as this section creates no separate offence.[81]

An order for framing charge is revisable.[82]

24. Discharge

Where the facts of the case showed that a mob of over 40 persons, due to anger against some media persons snatched their video camera and some individual accused snatched a gold chain, this would not constitute offence of robbery. So the accused were entitled to be discharged from charge under s 397, IPC .[83]

25. Trial

A person accused of an offence under s 397, can, at the same trial, be by reason of s 221 (1) of the Code of Criminal Procedure 1973, tried for an offence under s 394, IPC . Where the court can take cognizance of an offence under s 397 on the chargesheet submitted by the police, it can also try the accused for an offence under s 394, IPC .[84] Jurisdiction for trial is regulated by s 181(1), CrPC 1973.

26. Proof

To establish a charge under this section, the prosecution must prove that:

(a) the accused committed robbery or dacoity; and
(b) in committing the robbery or dacoity, he:

(i) used a deadly weapon, or
(ii) caused grievous hurt to any person, or
(iii) attempted to cause death or grievous hurt to any person.3419

Where the allegation against the three accused persons were that, they entered the shop armed with a knife and snatched a sum of Rs 400 from the hands of the complainant, the entry of the third accused into the shop in question was doubtful due to contradictory statements of witnesses and his identity has not been proved, the third accused was therefore, entitled to the benefit of the doubt.[85]

The fact that the accused were arrested, more than a week after the date of dacoity with gun-shot injuries on their persons, may lead to an inference that they were concerned in some transactions in which the injuries were received, but not to the inference that they were present in the village on the date on which the particular dacoity took place, and that the injuries were received by them when committing the dacoity.[86]

When there are grave and serious infirmities and contradictions in the statement of prosecution witnesses and the only independent witness has not supported the prosecution as he turned hostile, it would not be safe to base conviction under s 392 read with s 397, IPC, on the statement of these witnesses.[87] When there is no evidence to show that at the time of committing robbery the accused used any deadly weapon or caused grievous hurt or made any attempt to cause death or grievous hurt to any person, the offence under s 397, IPC, is not made out.[88]

However, when witnesses uniformly stated that the accused played a leading role in snatching money from the complainant with a lethal weapon in his hand, the conviction of the accused under s 392 read with s 397, IPC, was found proper.[89]

Where after the dastardly acts of rape and murder the prosecutrix was relieved of her ornaments, the acts of the accused cannot be robbery as it was not done with the idea of depriving the girl of her ornaments, therefore, the charge under s 397, IPC, must fail.[90]

27. Conviction

Section 397, IPC does not create a separate offence. It has to be read with the principal offence and with the aid of s 397, IPC . Thus, where the accused was convicted under a charge under s 392 and sentenced to undergo five years rigorous imprisonment. Again, in the same case, he was convicted on the charge under ss 392, 397, IPC, and sentenced to undergo seven years rigorous imprisonment. This is not proper and a technical mistake has been committed by the trial court, therefore, the conviction and sentence under s 392 *simplicitor* was set aside and the conviction and sentence of the accused under ss 392 / 397, IPC, was maintained.[91] Victim was travelling in TSR. Accused driver of the TSR along with three other co-accused robbed the victim of his valuables at knife point, pushed down the victim and tried to flee away, but after chase he was arrested. Valuables of the victim and the offending weapon knife were recovered from his possession. Accused in furtherance of common intention with other co-accused committed the offence. Conviction under3420 ss 392 / 34 and 397 / 34, IPC was held proper.[1] Where the stolen properties *viz*. gold and silver ornaments were recovered from the house of the appellant accused, the stolen properties had distinctive marks, were also identified by the dacoity victims, medical evidence also proved injuries sustained by the victims, of dacoity, appellants accused were convicted under s 397, IPC .[2]

Where twelve appellant accused carrying deadly weapons intercepted the vehicle of the victims carrying large amount of cash, robbed the victims of their money, incident was fully proved, accused appellant were identified during trial of the case, their conviction under s 397, IPC was upheld.[3] Where the appellant accused attempted to loot the informant at the point of dagger, PWS identified him and caught him red-handed, and after seeing police, he attempted to run away, his conviction under ss 393 and 397, IPC was held proper.[4]

The prosecution case was that the petitioner had not taken steps for the preparation of the pension papers of the complainant. There was nothing to show/infer that the petitioner was entrusted any property which he used dishonestly. There was no evidence to show that the accused had threatened to destroy the pension papers of the complainant. No case under s 408, IPC*prima face* was made out, cognizance and process issued against the petitioner were set aside.[5]

Prosecution case was that accused appellants armed with fire arms committed murder of two persons, injured one and committed loot of valuable moveables. PW5 identified the accused appellants in TI parade and also before the court. Death of the deceased was due to gun shot injuries. Complainant and members of his family identified the moveables recovered on the disclosure statements made by accused. Accused appellants were convicted under ss 395, 396 and 397, IPC .[6]

An accused cannot be convicted under s 397, IPC alone. It is only an enabling section to provide the minimum sentence of seven years in cases of robbery and dacoity where the offender uses a deadly weapon, or causes hurt to any person, or attempts to cause death, or grievous hurt to any person. Thus, the accused can only be convicted under s 395 with the aid of s 397, and not merely under s 397, IPC .[7] The sentence should be under s 395, or one of the preceding sections, read with this section.[8]

If a person is charged only under s 395, IPC, he cannot be convicted under this section.[9]

28. Acquittal

Appellant accused was not identified by the witnesses. The only evidence was of recovery of stolen articles on the disclosure statement made by the accused appellant.3421 Where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the

person in possession of the stolen property had committed the murder. It also depends on the nature of the property so recovered, whether it was likely to pass readily form hand to hand. Suspicion should not take the place of proof. The acquittal of the accused appellant for offences under ss 395, 396 and 397, IPC recorded by the High Court was not set aside.[10]

On the day of the occurrence at about 6.30 p.m., accused appellants were alleged to have committed dacoity at the house of the complaint, caused injuries and looted cash and ornaments worth Rs 50,000/-. Two of the accused also committed rape on two girls. The evidence showed that the accused were neighbours of the victim, the parties were on inimical terms. There was no evidence to substantiate the charge of rape. Oral evidence was full of contradictions. FIR was also delayed, was lodged long after the incident, in fact law was already set on motion after the telephonic message was received. Conviction of the accused under ss 395 / 397, IPC was not justified, was set aside.[11] In a serious case of dacoity, any leniency in sentence would not only be undesirable but also would be improper. The passage of time cannot wash away gravity of offence. Conviction was held proper.[12]

Prosecution case was that five persons including the appellant accused persons armed with *lathi*, revolver and knife entered the temple, tied the priest (complainant) of the temple with rope and took away collection box. Admittedly no injury was caused to the complainant. The testimony of the complainant and the sole witness examined in the case was inconsistent and contradictory. Conviction of the appellant accused under ss 452, 392 and 397, IPC was set aside.[13]

Where no question/suggestion was put to the accused in their examination under s 313 CrPC, accused were acquitted of the charge under s 397, IPC .[14]

Where the solitary eye-witness in the case failed to identify the accused at dock, the accused was acquitted of the charge under ss 397 and 302, IPC .[15]

29. Probation

Where the accused was a young man of 20 years and was convicted under ss 452, 397, IPC, and sentenced to seven years imprisonment, he hailed from a middle class respectable family having an atmosphere of educational culture, the report of the probation officer was also in his favour, the benefit of the Probation of Offenders Act was extended to the accused.[16]3422

30. Sentence--Plea-Bargaining not Permissible

When s 392 has to be read with s 397, IPC, in certain cases the court cannot award a sentence less than seven years of imprisonment. Neither the trial court nor the High Court has jurisdiction to bypass the minimum limit of sentence prescribed by law on the premise that a plea-bargain was adopted by the accused.[17]

Although by the Criminal Law (Amendment) Act 2005 (2 of 2006), the provisions of plea-bargaining have been inserted in the Code of Criminal Procedure 1973, but the offence under s 397 being punishable with the imprisonment for a minimum period of seven years, the legal position has not changed and the option of plea-bargaining is not available to the accused.[18]

31. Sentence

Section 397, IPC only makes the sentence more stringent so the imposition of a separate sentence for offences under ss 392 and 397, IPC, is illegal.[19] A person convicted under s 397 cannot be sentenced for a period of imprisonment less than seven years.[20] When the accused persons committed the offence of robbery by using deadly weapons, the award of sentence of three years is not legal. So, the sentence was enhanced to seven years rigorous imprisonment.[21]

However, when the weapon in possession of the accused were described as bamboo sticks or *lathis*

which was not enough to make the weapons lethal or deadly and there was no case that the accused inflicted or attempted to inflict grievous hurt, the limitation prescribed under s 397, IPC, for imposing minimum sentence of seven years cannot be applied.[22]3423

In ordinary circumstances, a sentence of seven years rigorous imprisonment is the minimum sentence which should be passed.[23] However, if there are mitigatingcircumstances, the appropriate Government, in an appropriate case, may, in exercise of its powers under s 432 of the Code of Criminal Procedure 1973, remit or reduce the sentence of the convict.[24]

Where five persons of a family were brutally murdered, a minor girl was raped and then murdered, award of death sentence was held proper.[25]

In a case where a highway robbery is committed and passengers are looted by use of a knife of unusual proportion, a deterrent punishment is called for.[26]

In broad daylight and a high handed act of robbery on the public road, the accused are not entitled to any leniency.[27] The accused brandished a knife and demanded money from the complainant. On seeing the police, the accused started running away but was chased and caught red- handed. As the minimum sentence of seven years rigorous imprisonment was awarded by the sessions court under s 397, IPC, the same was held not to be interfered with.[28]

32. Concurrent Sentence

Commentary under the same heading in s 392, *ante*, may be referred to.

33. Alteration of Conviction from Section 392 Read with Section 397 to one Under Section 392

Where the accused were convicted under ss 392 read with 397, IPC, but there was no evidence that at the time of committing robbery the accused used any deadly weapon or caused grievous hurt or made any attempt to cause death or grievous hurt to any person, the conviction of the accused was altered from under ss 392 read with s 397 read with s 34, IPC, to one under s 392 read with s 34, IPC .[29]

When the knife used for a robbery was found to be not a deadly weapon, the conviction of the accused under s 392 read with 397, IPC, was altered to one under s 392 .[30] In the absence of proof that pistols used were fire arms and hence deadly weapons, the conviction of the accused under ss 394 and 397 was modified to one under s 392, IPC .[31]

34. Alteration of Conviction from Section 394 Read with Section 397 to one Under Section 394

Where the prosecution witness stated that the accused gave a knife blow on his left thigh but the weapon was not recovered by the police, under these circumstances, it3424 could not be held that the weapons used by the accused in the commission of robbery was a 'deadly weapon', therefore, the conviction of the accused under s 394 read with s 397, IPC, was altered to one under s 394 .[32] Where the accused had not used the dagger for committing robbery though he subsequently inflicted injury on a constable with the dagger while being apprehended, the conviction of the accused was altered from ss 394 and 397 to one under s 394, IPC .[33]

In the absence of evidence establishing use of a deadly weapon and causing grievous injury to the victim, the conviction of the accused under ss 397 / 34 was altered to one under s 394, IPC .[34]

35. Alteration of Conviction from Section 397 to one under Section 412

Where the prosecution witnesses failed to identify the accused at the test identification parade, but the articles which were the subject-matter of dacoity were recovered at the instance of the accused giving rise to the presumption that he was a receiver of the property, the conviction of the accused under s 397 was altered to one under s 412, IPC .[35]

36. Alteration of Conviction from Section 392 Read with Section 397 to one under Section 411

Where there was no direct evidence of involvement of accused persons in the commission of robbery and only some of the robbed property was recovered from the accused, drawing presumption under s 114, Evidence Act, the conviction of the accused under s 392 read with s 397, IPC, was altered to one under s 411, IPC .[36]

25 *Amrish Devnarayan Rajput v State of Gujarat* 2006 Cr LJ 876 (Guj) .

26 *Empress v Dawarka Aheer* 2 WR (Cr) 49 .

27 *Jahan Singh v State of Rajasthan* 1976 Raj Cr C 203 .

28 *State v Kachara Sada* AIR 1961 Guj 20, (1961) 1 Cr LJ 255 .

29 *Jagdeva v State* 1977 Raj Cr C 348, p 350, 351 .

30 *Ashfaq v State (Govt of NCT of Delhi)* 2004 Cr LJ 936 (SC) .

31 *Niranjan Singh v State of Madhya Pradesh* 2007 Cr LJ 3523, p 3524, AIR 2007 SC 2434, 2007 (5) Supreme 418, 2007 (8) Scale 546 .

32 *Phool Kumar v Delhi Administration* AIR 1975 SC 905, 1975 Cr LJ 778, p 780 ; *Paramjit Singh v State of Rajasthan* 2001 Cr LJ 757 (Raj) ; *Manik Shankarrao Dhotre v State of Maharashtra* 2008 Cr LJ 1505, p 1508 (Bom) ; *Yashwantsinh Badalsinh Rajput v State of Gujarat* 2010 (88) AIC 921 (Guj) . For further commentary, see under the same heading in s 398, *post*.

33 *Yashwantsingh v State of Gujarat* 2010 (88) AIC 921, p 923 (Guj), (*Wilson Abraham Chouriappa v State of Maharashtra* 1995 Cr LJ 4042 (SC), **referred to**).

34 *Yashwantsingh v State of Gujarat* 2010 (88) AIC 921, p 923 (Guj), (*Wilson Abraham Chouriappa v State of Maharashtra* 1995 Cr LJ 4042 (SC), **referred to**); **see also***Pawankumar Sibban Kewat v State of Maharashtra* 2010 Cr LJ 1973 (Bom) (Pistol used but not fired, threats extended offence under s 397, IPC held made out).

35 *Manik Shankarrao Dhotre v State of Maharashtra* 2008 Cr LJ 1505, p 1508 (Bom) .

36 *Phool Kumar v Delhi Administration,* AIR 1975 SC 905, 1975 Cr LJ 778 ; *Dilawar Singh v State of Delhi* 2007 Cr LJ 4709, 2007 AIR SCW 5899, (2007) 12 SCC 641, (2008) 3 SCC (Cri) 330, AIR 2007 SC 3234 (*Phool Kumar v Delhi Administration* AIR 1975 SC 905, 1975 (2) APLJ (SC) 1, (1975) 1 SCC 797, [1975] 3 SCR 917 ; *Ashfaq v State* (2004) 3 SCC 116, AIR 2004 SC 1253, 2003 (10) Scale 732, 2004 Cr LJ 936, 2004 SCC (Cr) 687, 2004 (1) Crimes 117 (SC), **reliedon**).

37 *State of Maharashtra v Manipal Singh Satyanarayan Singh* 1996 Cr LJ 2485 (Bom) (DB) .

38 *Shravan Dashrath Detrange v State of Maharashtra* 1998 Cr LJ 1196 (Bom) (DB) .

39 *Ashfaq v State (Govt of NCT of Delhi)* 2004 Cr LJ 936 (SC) .

40 *Nagar v Emperor* AIR 1933 Lah 35, 34 Cr LJ 45 ; *Nazar Shah v Emperor* AIR 1926 Sind 150, 27 Cr LJ 334(2) (hatchet) ; *Phool Kunar v Delhi Administration* 1975 Cr LJ 778, p 780 (SC), AIR 1975 SC 905 **overruling***State v Chand Singh* AIR 1970 Punj 532 (FB) ; *Shiv Narain v State* 66 Punj LR 173 .

41 *Narhe v Emperor* AIR 1931 All 367, 32 Cr LJ 561 ; *Indar Singh v Emperor* 36 Cr LJ 233, AIR 1934 Lah 522 .

42 *Chandra Nath v Emperor* AIR 1932 Oudh 103, 33 Cr LJ 926 .

43 *Nga I v Emperor* 13 Cr LJ 267 (dagger) .

44 *Gobind Dipaji v State* AIR 1956 Bom 353, 1956 Cr LJ 700 .

45 Re *Thevar Servai*AIR 1938 Mad 477, 39 Cr LJ 323 .

46 *Public Prosecutor v Nagappan Servai* AIR 1941 Mad 718, 42 Cr LJ 868 (knife) .

47 *Niranjan Singh v State of Madhya Pradesh* 2007 Cr LJ 3523, p 3524, AIR 2007 SC 2434, 2007 (5) Supreme 418, 2007 (8) Scale 546 .

48 *Vinod Kumar v State* 2007 Cr LJ 2861 (Del) ; *Abdul Gani v State Govt of NCT of Delhi* 2015 (1) Crimes 523 (Del) .

49 *Abdul Gani v State Govt of NCT of Delhi* 2015 (1) Crimes 523 (Delhi) .

50 Re *Thavasi* AIR 1972 Cr LJ 445, p 446 (Mad); *Suresh Kumar v State* (1989) 2 RCR 415 (Del) .

51 *Ma Yi v Ma Gale* 14 Cr LJ 432 .

52 *Public Prosecutor v Naggappan* AIR 1941 Mad 718 ; *State of Maharashtra v Vinayak Tukaram Utekar* 1997 Cr LJ 3988 (Bom) (DB) .

53 *Ram Swarup v State* 1977 All Cr R 250 .

54 *Nga I v Emperor* 13 Cr LJ 267 .

55 *Chandra Nath v Emperor* AIR 1932 Oudh 103, 33 Cr LJ 926 .

56 *Nazar Shah v Emperor* AIR 1926 Bind 150, 27 Cr LJ 334 .

57 *Nanhe v Emperor* AIR 1931 All 367, 32 Cr LJ 567 .

58 *Emperor v Sukha Dana* 1 Cr LJ 901 .

59 *Salim v State of (Delhi Administration)* (1987) 3 Crimes 794 (Del) .

60 *Sukhvinder Singh v State (Govt of NCT of Delhi)* 2014 (3) JCC 2071 (Delhi) .

61 *Bachan v Emperor* AIR 1927 Lah 149, 28 Cr LJ 17 ; *Lad Khan v Emperor* 13 Cr LJ 182 (*lathi* or dang); *Akmat Ali v State* AIR 1957 Tripura 1957 Cr LJ 1457; *Jhagru Gond v Emperor* 2 Cr LJ 746 .

62 *Ghassu v Emperor* AIR 1925 Nag 156, 25 Cr LJ 1181 .

63 *Dhanai Mahto v State of Bihar* 2001 Cr LJ 147 (SC) .

64 *Harnaman v Emperor* 6 PR 1901 .

65 *Niranjan Singh v State of Madhya Pradesh* 2007 Cr LJ 3523 (SC), AIR 2007 SC 2434, 2007 (5) Supreme 418, 2007 (8) Scale 546 .

66 *Union Territory of Manipur v Moirangtham Khomei Singh* AIR 1971 Manipur 43, p 48, 1971 Cr LJ 1759 .

67 *Ambika Pandey v State* 1975 Cr LJ 1686 (Ori) ; *Bansi v Emperor* AIR 1941 All 359, 43 Cr LJ 97 ; *Abdul Salam v Emperor* AIR 1935 All 132, 36 Cr LJ 617 ; *Emperor v Naubat* AIR 1945 All 344, 1945 ALJ 184 ; *Danna v Emperor* 29 Cr LJ 449, AIR 1928 All 240 ; *Dulli v Emperor* AIR 1925 All 305, 26 Cr LJ 570 ; *Emperor v Nabibux Karimbux Mulla* AIR 1928 Bom 52 ((1)), 29 Cr LJ 383 ; *Emperor v Ali Mirza* AIR 1924 Cal 643, 25 Cr LJ 1024 ; Re *Arunachella* 13 Cr LJ 42; *Labedan Sam v Emperor* AIR 1931 Pat 49,; *Hazara Singh v State* AIR 1947 Pat 157 ; *Abdul Karim v Emperor* AIR 1927 Oudh 193, 28 Cr LJ 520 ; *Maru v Emperor* AIR 1937 Lah 561, 39 Cr LJ 119 ; *Akmat Ali v State* AIR 1957 Tripura 48, 1957 Cr LJ 1457 .

68 *Paramjit Singh v State of Rajasthan* 2001 Cr LJ 757 (Raj) .

69 *Phool Kumar v Delhi Administration* AIR 1975 SC 905, 1975 Cr LJ 778, p 780 ; *Paramjit Singh v State of Rajasthan* 2001 Cr LJ 757 (Raj) .

70 *Paramjit Singh v State of Rajasthan* 2001 Cr LJ 757 (Raj) ; Re *Arunachella Tevan*1912 Cr LJ 42; *Union Territory of Manipur v Moiragthem Khomei Singh* AIR 1971 Manipur 43, 1917 Cr LJ 1759 ; *Jang Singh v State of Rajasthan* 1984 Cr LJ 1135 (Raj) ; *Shawan Dashrath Deterange v State of Maharashtra* 1998 Cr LJ 1196 (Bom) (DB) ; *Wilson Chouriapa v State* 1995 Cr LJ 4042 (Bom) (DB) ; *State of Maharashtra v Manipal Singh Satyanarayan* 1996 Cr LJ 2485 (Bom) (DB) .

71 *Niranjan Singh and Ors v State of Madhya Pradesh* 2001 Cr LJ 1544 (MP)

72 *Raisul v State of Uttar Pradesh* AIR 1977 SC 1822, 1977 Cr LJ 1555 ; *Shravan Dashrath Detrange v State of Maharashtra* 1998 Cr LJ 1196 (Bom) (DB) .

73 *Shah Sueb Ahmed v State* (1985) 28 DLT 275 (Del) .

74 *Parvinkumar Kailashchandra Shukla v State of Maharashtra* 1997 Cr LJ 577 (Bom) (DB) .

75 *Samiuddin v State of NCT of Delhi* 2011 Cr LJ 901 (Del) .

76 *Thimmareddy v State of Karnataka* 2014 Cr LJ 2495, (2014) 5 SCC (Cri) 679, (2014) 139 AIC 163 .

77 *Hazara Singh v State* AIR 1947 Pat 157 .

78 *Ambika Pandey v State* 1975 Cr LJ 1686 (Ori) .

79 *Ibid*.

80 *State of Maharashtra v Vinayak Tukaram Utekar* 1997 Cr LJ 3988 (Bom) (DB) .

81 *Po Myaing v Emperor* 22 Cr LJ 593 ; *Dulli v Emperor* AIR 1925 All 305, 26 Cr LJ 570 ; *Chenna v State* 1981 Cr LJ (NOC) 219 (All) .

82 *Amar Chand v State of Rajasthan* 2014 (133) AIC 645 (Raj) .

83 *Amrish Devnarayan Rajput v State of Gujarat* 2006 Cr LJ 876 (Guj) .

84 *Jogabandhu Mitra v State* AIR 1955 Cal 177, p 179, 156 Cr LJ 657 .

85 *Niranjan Singh v State of Madhya Pradesh* 2001 Cr LJ 1544 (MP) .

86 *Mahamad Jamsher Tadvi v State* AIR 1956 Bom 186, 1956 Cr LJ 392 .

87 *Sikander Kumar v State* 1998 Cr LJ 3026 (Del) .

88 *Shrawan Dashrath Daterange v State of Maharashtra* 1998 Cr LJ 1196 (Bom) (DB) .

89 *Jaivir Singh v State of Uttar Pradesh* 1996 Cr LJ 1494 (All) .

90 *Veerabharathi v State* 2000 Cr LJ 4236 (Mad) (DB) .

91 *Kharag Singh v State of Uttar Pradesh* 1999 Cr LJ 82 (All) .

1 *Lalit Kumar v State* 2014 Cr LJ (NOC) 437 (Del) .

2 *Ramesh v State by Channagiri* 2014 (141) AIC 414 (Kant) .

3 *N Lokesh v State by Nonavinakere Police Station* 2015 (2) Crimes 145 (Kant) .

4 *Rabindra Chaurasia v State of Jharkhand* 2010 Cr LJ 3349 (Jhar) .

5 *Dukhabandhu Sahoo v Anant Charan Naik* 2009 Cr LJ 4626, 2010 (86) AIC 564 (Ori) .

6 *Ghure v State of Rajasthan* 2011 Cr LJ 3941 (SC), AIR 2011 SC 2268, 2011 AIR SCW 3893, 2011 (6) Scale 570 .

7 *Rajjan v State* 1980 ALJ 635, p 640, (1980) 17 All Cr C 221 .

8 *Tha Hmu v Emperor* 1 Cr LJ 475 ; *Akmat Ali v State of Tripura* AIR 1957 Tripura 48, 1957 Cr LJ 1457 ; *Maru v Emperor* AIR 1937 Lah 561, 39 Cr LJ 119 ; *Dangar Khan v Emperor* AIR 1923 Lah 104, 23 Cr LJ 593 .

9 *Empress v Punva Sakharam* Ratanlal Unrep Cr C 921.

10 *State of Rajasthan v Talevar* 2011 Cr LJ 3937 (SC), AIR 2011 SC 2271, [2011] 6 SCR 1050, (2011) 11 SCC 666, 2011 (7) JT 1, 2011 (6) Scale 575 .

11 *Abdul Gafur v State of Assam* 2008 Cr LJ 800, p 801 (SC), 2007 AIR SCW 7652, 2007 (13) Scale 801, 2007 (8) Supreme 189 .

12 *Arjun Mahto v State of Bihar* 2008 Cr LJ 4313, p 4316 (SC), AIR 2008 SC 3270 .

13 *Dilawar Singh v State of Delhi* 2007 Cr LJ 4709, p 4717 (SC), AIR 2007 SC 3234, 2007 (10) Scale 556, (2007) 12 SCC 641 .

14 *Rameshbhai Chandubhai Rathod v State of Gujarat* (2009) 5 SCC 740, 2009 (6) JT 132, 2009 (6) Scale 469 .

15 *Ratansingh v State of Gujarat* 2012 Cr LJ 145, 2012 (109) AIC 545, 2011 (3) Guj LR 2426 (Guj) .

16 *Masarullah v State of Tamil Nadu* AIR 1983 SC 654, 1983 Cr LJ 1043 (SC) .

17 *Kirpal Singh v State of Maharashtra* 1999 Cr LJ 5031 (SC), JT 1999 (9) SC 207, (1999) 5 SCC 649 .

18 Section 265A, Code of Criminal Procedure 1973 states : **S. 265A . Application of the Chapter**.--

(1) This Chapter shall apply in respect of an accused against whom--

(a) the report has been forwarded by the officer in charge of the police station under section 173 alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force; or

(a) a Magistrate has taken cognizance of an offence on complaint, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complainant and witnesses under section 200, issued the process under section 204,but does not apply where such offence affects the socio-economic condition of the country or has been committed against a woman, or a child below the age of fourteen years.

(2) For the purposes of sub-section (1), the Central Government shall, by notification, determine the offences under the law for the time being in force which shall be the offences affecting the socio-economic condition of the country.

19 *Yog Raj v State* 1999 Cr LJ NOC 80 (Del), (1989) 38 DLT 249 .

20 *Emperor v Radhia* 29 Cr LJ 35 ; *State v Rangaswami* 1980 Mad LJ (Cr) 808, p 809, 1981 Cr LJ 694 (Mad) ; *Bansi v Emperor* AIR 1941 All 359 (DB) ; *Ram Shankar v State of Madhya Pradesh* 1981 Cr LJ 162, p 163 (SC), AIR 1981 SC 644 ; *Narottam Das Manikpuri v State of Chhathisgarh* 2013 Cr LJ 2676 (Chhatt) .

21 *Inder Singh v State of Uttar Pradesh* 2003 Cr LJ 3434 (All) ; *Dharam v State* 2013 (129) AIC 834 (Del) .

22 *Dhanai Mahto and Anor v State of Bihar* 2001 Cr LJ 147 (SC) .

23 *Emperor v Lakhon Singh* AIR 1936 All 311, 37 Cr LJ 595 ; *Kartar Singh v State of VP* 1952 VP 42, 53 Cr LJ 986 ; *Emperor v Debi Charan* AIR 1942 All 339, 43 Cr LJ 867(10 years); *Dwarka Singh v Emperor* AIR 1947 Pat 107, 47 Cr LJ 780 (10 years); *State v Banaila Dome* (1965) 2 Cr LJ 839 (Pat) ; *Ashrfi v State* AIR 1961 All 153, p 168, (1961) 1 Cr LJ 340 (7 years) ; *Shiv Narain v State* 66 PLR 173 (10 years).

24 *Ram Shankar v State of Madhya Pradesh* 1981 Cr LJ 162, p 163 (SC), AIR 1981 SC 644 .

25 *Ankush Maruti Shinde v State of Maharashtra* (2009) 6 SCC 667 .

26 *Om Prakash v State* 1978 AWC 286, 1978 Cr LJ 797 .

27 *Jaivir Singh v State of Uttar Pradesh* 1996 Cr LJ 1494 (All) .

28 *Sanjay alias Ravindra N Gayakwad v State of Maharashtra* 1996 Cr LJ 2172 (Bom) (DB) .

29 *Shravan Dashrath Detarange v State of Maharashtra* 1998 Cr LJ 1196 (Bom) (DB) ; *Krishan Lal v State (Delhi Administration)* AIR 1981 SC 2008, 1981 Cr LJ 1689 .

30 *Murari Lal v State (Delhi Administration)* (1983) 23 DLT 410 (Delhi) .

31 *Piyush Ekka v State of Orissa* 1991 Cr LJ 1583 (Ori) .

32 *Adesh Kumar v State* (1985) 28 DLT 126 (Del), 1986 Cr LJ 233 (Del) .

33 *Suresh Kumar v State* (1989) 2 RCR 415 (Del) .

34 *Ashok Kumar v State of Madhya Pradesh* 1998 Cr LJ 4103 (MP) (DB) .

35 *Chhote Lal Singh v State of Madhya Pradesh* AIR 1978 SC 1390, 1978 Cr LJ 1411 (SC) .

36 *Shankar v State* 1989 Cr LJ 1066 (Del), (1989) 2 RCR 641 (Del) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 398.

Attempt to commit robbery or dacoity when armed with deadly weapon.--

If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

Comments

1. Scope and Applicability

This section also, like the preceding s 397, does not, by itself, create a substantive offence.[37]Sections 397 and 398 always revolve around the provisions of s 395, IPC .[38]3425

Where a dacoity has been committed, and not merely attempted, and weapons are not merely carried, but are actually used, s 397, and not s 398, would apply.[39] A man cannot be convicted of abetting an offence under s 398, IPC .[40]

2. Distinction between Sections 397 and 398

The distinction between the provision of ss 397 and 398, IPC will appear from a comparison of the provisions of the two sections as follows:

	Section 397		Section 398
(a)	If, at the time of committing robbery or dacoity,	(a)	If, at the time of attempting to commit robbery or dacoity,
(b)	The offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person,	(b)	The offender is armed with any deadly weapon,
(c)	The imprisonment with which such offender shall be punished shall not be less than seven years.	(c)	The imprisonment with which such offender shall be punished shall not be less than seven years.

It will thus appear that s 397, IPC would be attracted to cases in which robbery or dacoity has been committed, while s 398 would apply only to an attempt to commit robbery or dacoity.[41] Secondly, s 397 would operate where the offender, at the time of committing robbery or dacoity, uses the deadly weapon while, on the other hand, s 398, IPC would apply when, at the time of attempting to commit robbery or dacoity, he is merely armed with a deadly weapon though he has not used it at all.

3. 'Offender'

The word 'Offender', appearing in this section, can refer only to the person who is proved to have been armed with a deadly weapon, and not to any other who, in combination with such person may have attempted to commit robbery or dacoity.[42]

4. 'Deadly Weapon'

Commentary under the same heading in s 397, *ante*, may be referred to.

Where knives were seized from the possession of the accused, but it was not shown that the knives seized were deadly weapons to attract the provisions of s 398, IPC, conviction of the accused for offence under s 398, IPC was held not justified, hence was set aside.[43]3426

A person cannot be convicted for offence under s 498, IPC unless he is armed with a deadly weapon while committing or attempting to commit robbery or dacoity.[44]

5. The Expressions 'Accused with Deadly Weapon' in Section 398 and 'Uses Deadly Weapon' in Section 397

Section 398 uses the expression 'armed with any deadly weapon' and the minimum punishment provided therein is also seven years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of seven years under s 398, if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum punishment under s 397, IPC if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the legislature in the two sections, *viz,* 'uses' in s 397 and 'is armed' in s 398, IPC . In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery.[45] Knife has been held deadly weapon for the purpose of s 398, IPC .[46]

6. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions. For local jurisdiction, s 181(1), CrPC 1973, may be referred to.

7. Identification of an Accused

Commentary under the same heading in s 392, *ante*, may be referred to.

8. Charge

The form of the charge would be the same as under the preceding s 397 with necessary modifications.

To justify a conviction under s 398, IPC, there must be a charge framed of the offence in which the carrying of arms is distinctly illegal. Where the accused are charged and convicted for an offence punishable under s 395, IPC, they cannot be punished under s 398, IPC .[47]3427

9. Proof

To establish a charge under this section the prosecution must prove that:

(a) the accused attempted to commit robbery or dacoity; and
(b) he was armed with a deadly weapon at that time.

The accused attempted to commit robbery armed with a deadly weapon in the post office. The evidence showed that on shouts being raised other persons also came to the place of occurrence, and the accused was overpowered and caught red- handed. From the possession of the accused two chits written in Hindi were recovered in which the demand for handing over whatever cash was lying in the post office was made, failing which the employees of the post office would be murdered. In such type of cases when there are minor discrepancies in the evidence of the prosecution witnesses, the same cannot help the accused, particularly, when the evidence of the complainant and the other witnesses who were present at the time of the incident is found otherwise reliable. Therefore, the conviction of the accused under s 398, IPC, was found proper.[48]

10. Acquitted

Though PW3 complainant PSI has stated in his evidence that he secured the presence of CWS 1 and 2 as panchas at the scene of offence itself and seized 3 MO nos. 1 and 2 knives from the possession of accused nos. 1 and the said CWS 1 and 2 were not examined to prove the seizure of MO Nos. 1 and 2 under the panchnama Ex P1, PWS 4 and 5 did not depose anything about the Police apprehending the accused at the scene of offence itself and seizing of MO Nos. 1 and 2, the two knives from the person of accused nos. 1 and 3. Though it was alleged that the said four persons were holding knives and clubs also, no club was said to have been seized from any of the accused nos. 2 and 4. Besides this, no evidence whatsoever was produced on record by the prosecution to establish that MOS 1 and 2, the knives said to have been seized from the person of accused nos. 1 and 3 were deadly weapons so as to attract the penal provisions of s 398, IPC . Conviction of the accused appellant by the trial court recorded under s 398, IPC read with s 511, IPC was set aside.[49]

The very identification of the accused appellant was doubtful. The accused appellant was convicted solely on the evidence that the murder weapon which had been recovered at his instance had been matched with the bullet recovered from the dead body. Recovery of offence weapon was itself doubtful. The case of the acquitted co-accused was similar. The accused appellant was also acquitted of the charges under ss 393, 398 and 302, IPC .[50]

The prosecution case was that the appellants accused attempted to commit dacoity and also attempted assaults on the lives of the constables. There were serious discrepancies in the evidence of the PWS, the prosecution had suppressed the genesis of the crime. The prosecution case was found doubtful and accused appellants were acquitted of the charges under ss 398, and 307/34, IPC .[51]3428

11. Sentence

The fact that the accused was poor or only 19 years old at the time of the offence or he has to maintain his old parents and he is the only earning member of his family, are no grounds for imposing a lesser sentence. In our country lakhs of people are living below the poverty line, but they do not indulge in these types of activities of loot and robbery. Even if the accused had not fired from his *tamancha* or was unable to loot a paise, that could not be a ground for imposing a lesser sentence.[52]

In cases where the offender is armed with a deadly weapon, the legislature has prescribed a minimum sentence of seven years for an attempt to commit robbery. It would not be proper to exercise discretion to inflict a lesser punishment if the offender is found guilty of robbery.[53]

37 *Emperor v Nabibux Karimbux* 29 Cr LJ 383, AIR 1928 Bom 52 ((1)) ; *Emperor v Ali Mirza* AIR 1924 Cal 643, 25 Cr LJ 1024 .

38 *Syed Mohammed Owais v State of Maharashtra* 2003 Cr LJ 303 (Bom) .

39 *Ghassu v Emperor* AIR 1925 Nag 136, 25 Cr LJ 1181 .

40 *Nga Pu v Emperor* AIR 1926 Rang 207, 27 Cr LJ 1285(2) .

41 *Chandra Nath v Emperor* AIR 1932 Oudh 103, 33 Cr LJ 926 ; *Nga I v Emperor* 13 Cr LJ 267 .

42 *Emperor v Nabibux Karimbux* 29 Cr LJ 383, AIR 1928 Bom 52 ((1)) ; *Emperor v Ali Mirza* AIR 1924 Cal 643, 25 Cr LJ 1024 . For further commentary, see under the same heading in s 397, *ante*.

43 *Arun Anthony Swamy v State of Karnataka* 2010 Cr LJ 1948 (Kant) .

44 *Sharafu v State of Kerala* 2007 (3) KLT 112, 2007 (2) KLJ 341 (Ker) (Case law referred).

45 *Ashfaq v State (Govt of NCT of Delhi)* 2004 Cr LJ 936 (SC), AIR 2004 SC 1253, (2004) 3 SCC 116 .

46 *Ashfaq v State (Govt of NCT of Delhi)* 2004 Cr LJ 936, AIR 2004 SC 1253, (2004) 3 SCC 166 .

47 *Empress v Puny a Sakharam* Ratanlal Unrep Cr C 921.

48 *Avinash Shobhasing v State of Gujarat* 2002 Cr LJ 3476 (Guj) .

49 *Arun Anthony Swamy v State of Karnataka* 2010 Cr LJ 1948 (Kant) .

50 *Surender v State (NCT) of Delhi* 2012 Cr LJ 2177 (SC), AIR 2012 SC 1725, 2012 AIR SCW 2247 .

51 *Suresh Kanshi Rao Umak v State of Chhatisgarh* 2009 Cr LJ 2568 (Chhat) .

52 *Suresh Kanshi Rao Umak v State of Chhatisgarh* 2009 Cr LJ 2568 (Chhat) .

53 *Chandra Nath v Emperor* AIR 1932 Oudh 103, 33 Cr LJ 926 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 399.

Making preparation to commit dacoity.--

Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

Dacoity is the only offence which the legislature has made punishable at four stages, *i.e.*, preparation [s 399, IPC], assembling for the purpose of committing dacoity [s 402, IPC], attempt at dacoity [s 395 read with s 398, IPC], and commission of dacoity [s 395 read with s 397, IPC]. The last two stages are treated alike and come within the detention under s 395, IPC .[54]3429

This section provides for punishment for preparation of the offence of dacoity. Dacoity is one of those offences in which preparation alone is an offence which is not the case with any other offence except those under ss 122 and 126, IPC .

Preparation, which is punishable, is only for the offence of dacoity, and not for any lesser offence like house-breaking or robbery.[55] In the words, in 'preparation for committing dacoity', it is implicit that the persons making preparation have conceived the design of committing dacoity. In other words, the section contemplates that there is a general design to commit dacoity or engage in an expedition for that purpose though the plans of the dacoits are not matured.[56] It is not necessary that the persons shown to be making the preparation should be five or more in number. It is, however, necessary to prove that the raid, for which they were making preparation, was to be committed by five or more persons; otherwise, it would not be a dacoity, but merely a robbery.[57]It is also not necessary that the accused should have done an overt act towards the commission of dacoity. The law requires that they should have done some act to get ready for a dacoity. The prosecution need not prove what part the accused took. It is sufficient if it is shown that the accused was a member of the gang who made preparation for dacoity.[58] If five or more persons of different castes and places move about, armed with guns and a lot of ammunition and torches, and are found assembled at night, in a solitary place and begin to run when challenged by the police, then there are very strong circumstances for coming to the conclusion that the accused assembled for the purpose of and were all set for committing a dacoity.[59]

2. Section 399 and Section 402 Compared and Contrasted

The legislature wanted to draw a distinction between preparation for a dacoity and assembling for committing dacoity. There may be preparation for dacoity without any assembling. For example, five persons in their respective villages are asked by a person to make preparations, one by purchasing a gun, another by getting torches, the third by buying masks, the fourth by buying gun-powder, and the fifth by collecting *lathis*, each with the intention of committing dacoity. Each one of them would be guilty of preparation for dacoity.[60]Section 402 contemplates a stage when the whole project still lies in the realm of design and intention without any attempt having yet been made to give a concrete shape.

However, the project advances a step further when one of them does some act amounting to a preparation even if it be by himself. In certain circumstances, the assembly may itself amount to preparation, for example, when five or more persons, after having planned a dacoity and after having collected the necessary arms and implements, agree to assemble at a forsaken temple in a jungle in order to proceed therefrom to the place of the raid, and, in pursuance of that agreement, do, in fact, assemble there. The assembly, in such a case, would not be an assembly as contemplated by s 402, but would be an act of preparation and the person may be charged under s 399 .[61] Thus, the offence falling under s 402 and the one falling under3430 s 399, would probably involve almost similar ingredients, the only difference being that under s 402, mere assembly without other preparation is enough, whereas s 399 is attracted when some additional step is taken only in the course of preparation.[62] The offence under s 402 is complete as soon as five or more persons assemble together for the purpose of committing a dacoity. Preparation for committing a dacoity may take place before or after the dacoits assemble together.[63] However, a mere assembly without further preparation is not a preparation within the meaning of s 399 . If this were so, s 402 would be redundant. Section 402 applies to the case of mere assembling without proof of other preparations. Similarly, a person may be guilty of preparation though not of dacoity, or of an assembly though not of preparation.[64]Whether a case falls under s 402 or s 399 depends on the facts and circumstances of each case. It is not always easy to find out with what intention and purpose the persons had assembled because very rarely there would be direct evidence in this respect. The purpose or intention, with which the crime is committed, has to be deduced from the facts and circumstances of each case. If persons merely assemble with the object of committing a dacoity, the case may be covered by s

402, but may not be covered by s 399 without there being any preparation in that direction. Essential requirements of s 399 are that the accused had made some preparation and that the preparation was for the purpose of committing dacoity. As to what particular act or kind of steps would constitute preparation, no hard and fast rule can be laid down. Once the circumstances make out that the persons assembled had conceived the design of committing dacoity, then any step, taken with the intention or purpose of forwarding that design, would justify the court in coming to the conclusion that there had been preparation within the meaning of s 399, IPC .[65]

From the above discussion, it is clear that in order to establish an offence punishable under s 399, IPC, some act amounting to preparation must be proved and what must be proved further is an act for which preparation was being made was a dacoity, that is to say, robbery to be committed by five or more persons. The prosecution has to establish under s 402, IPC that there had been an assembly of five or more persons constituted for the purpose of committing dacoity, and that the accused persons were members of that assembly. If there is no clear and acceptable evidence of any assemblage of the appellants with three or more persons for the purpose of committing dacoity, then the appellants cannot be held liable under s 402, IPC .[66]

3. 'Preparation'

What is made punishable under this section is the making of a preparation for committing dacoity.[67] Preparation consists in devising or arranging means necessary for committing an offence,[68] and an attempt is a direct movement towards the3431 commission, after the preparations are made.[69] The test for determining whether the acts constitute attempt or preparation is that if overt acts, already done, are such that if the offender changes his mind and does not proceed further in its progress, the acts, already done, would be completely harmless, they would constitute only preparation, and not attempt, where, however, the thing done is such that, if not prevented by an extraneous cause, would fructify into commission of the offence, it would amount to an attempt to commit an offence.[70] If a single person, when he intends in his own mind to commit robbery conjointly with four other persons and having formed such intention, does some act towards achieving that end, he can be said to have made some preparation for committing dacoity.[71]The mere act of delivery of speeches by a naxalite for increasing membership of his cult and inviting them to adopt unlawful means, including commission of dacoity, does not amount to preparation.[72]

Mere assembling of accused persons and the recovery of weapons from their possession would not constitute offence under ss 399 and 402, IPC unless evidence proves that they were planning to commit dacoity. The possibility that they might have collected there, for the purpose of murdering somebody or committing some other crime, cannot be eliminated. The order discharging the accused persons was upheld.[73]

The prosecution is required to establish by evidence direct or indirect or from standing circumstances that the accused had assembled for preparation of dacoity. Mere assembly and mere recovery of fire arms are not sufficient to prove the charge.[74]

4. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

5. Sanction

No sanction under s 196, CrPC 1973, is necessary when the evidence led in the committing court, goes to show that the alleged offences fall within the purview of ss 120B and 399, IPC .[75] But in the absence of proof of valid sanction for prosecuting the accused persons under s 39 of the Arms Act, the charge under s 25(1B)(a) and s 25(1B)(b) of Arms Act also fails.[76]

6. Separate Appeals filed--one Appeal Decided--Effect on Other Appeal

Where out of the five accused convicted under ss 399 and 402, IPC, one accused preferred an appeal and other four accused preferred separate joint appeal, but both appeals were not connected or consolidated due to official error. The appeal of one3432 accused was allowed and his conviction and sentence were set aside, holding that whole prosecution story was concocted and was not worth believing. The principle of *stare decisis* applies in the matter, so in the joint appeal of the other four accused, observing that the assembly of the accused persons for the purposes of committing dacoity at the alleged date, time and place was not established, the joint appeal was also allowed.[77]

7. Identification of Accused

Commentary under the relevant heading in s 392 and s 395, *ante*, may be referred to.

The prosecution witnesses did not describe the appellant accused either in their statement recorded under s 161 CrPC or prior to holding of TI Parade before the Magistrate. Although, they claimed in their testimonies, that they had seen the appellant in the full moon light, but this fact was not mentioned by them in their statements recorded under s 161 CrPC . The identification of appellant accused in TI parade was highly doubtful. He was acquitted of the charges under ss 399, 392 and s 307 read with s 149, IPC .[78]

8. Charge

The following form of the charge may be adopted:

> I (*name and office of Session Judge,etc*) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about the.day of., at., made preparation, to wit. (*mention the acts*), for committing dacoity, and thereby committed an offence, punishable under s 399 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

9. Proof

To establish a charge under this section, the prosecution must prove that:

(a) the accused took some step which amounted to preparation; and
(b) he did so for the purpose of committing dacoity.

In order to convict a person of the offence under s 399, IPC, the prosecution is bound to prove that the accused was making or had made preparation for committing dacoity. In the absence of any evidence on record to show that any of the accused was devising or arranging any means or measures for committing

the dacoity, it cannot be said that the prosecution has proved that they were making, or had made, preparation for committing dacoity by showing the mere fact that they were sitting in the waiting hall at the railway station and started running away at the sight of the constable and were caught after a chase, and that a country-made gun, a whistle and a torch of five cells were recovered from their possession.[79] The prosecution must prove that there were persons who had conceived the design of committing dacoity. Where there was no evidence of any conspiracy between the accused to commit dacoity, none of the accused were seen at any time prior to their arrest in the village3433 in which they were arrested, no implements of house-breaking were recovered from any of them and none of them was a previous convict, it was held that the prosecution had failed to prove that the accused had conceived the design of committing dacoity.[80] Mere assembling of accused persons and the recovery of weapons from their possession would not constitute offence under ss 399 and 402, IPC unless evidence proves that they were planning to commit dacoity.[81] Where a group of persons were warming themselves around the fire in the open fields and some of them ran on seeing the headman's party and two of them were found carrying firearms and cartridges, it was held that the facts did not amount to proof of preparation for committing dacoity.[82] When 7-8 accused persons assembled at a place for committing dacoity, it cannot be believed that no injury could take place on either side.[83]

Similarly, the mere fact that certain persons (more than five in number) were found at 10 am in the campus of a school, quite dose to the market, does not, by itself, prove that they had assembled there for the purpose of committing dacoity or for making preparations to accomplish that object. The possibility that they may have collected for the purpose of murdering somebody or for committing any other offence, cannot be ruled out. In the absence of any legal evidence to support the charge, they cannot be convicted under ss 399 and 402, IPC .[84]

It is unbelievable that the accused person would be talking at the pitch of the voice so as to be audible by the police hiding or concealing nearby. The fact that inspite of the alleged possession of arms, the accused did not use them after the police fired two shots, makes the prosecution case unreliable. There was no public witness examined by the prosecution and not a single penny was recovered from the accused persons, which was improbable. On these facts, the accused persons were found entitled to an acquittal.[85] When the prosecution case about the occurrence, arrest of the accused and recoveries alleged to be made is highly doubtful, the accused are entitled to be acquitted under ss 399 / 302, IPC .[86] However, when the accused were arrested on the spot, the testimony of the police official who was the architect of the raid was corroborated by duly proved GD entry and articles recovered from the spot, the defence set up by the accused was found false, the accused were found liable for conviction under ss 399 and 402, IPC .[87]

In *Chaturi Yadav v State of Bihar* ,[88] eight persons, including the accused were found in the school premises, which was quite close to the market at 1 a.m. and some of them were armed with guns, some had cartridges and others ran away. In these circumstances, it was held that their mere presence, with some weapons, in the school premises at 1 a.m. did not, by itself, establish that they assembled there for making preparation, to commit dacoity. In *Choltuy Modi v State of Bihar* ,[89] some3434 persons were found present, with weapons, at that place, at night, which was under construction. In these circumstances it was held that their mere presence with weapons at that place, at night was not, by itself, sufficient to establish that they had assembled there, for the purpose of making preparation, to commit dacoity. In *Brijlal Mandal v State of Bihar* ,[90] the accused were found sitting in the waiting hall of a Railway Station armed with various types of weapons. They were apprehended, but there was no proof that they had assembled for making preparation, to commit dacoity and no other offence. In these circumstances, it was held that they did not commit the offences, punishable under ss 399 and 402, IPC .

10. Each case to be Judged on its own Merit

Each case must be considered on its own merits and must rest, in ultimate analysis on its own particular facts.[91]Accordingly, no hard and fast rule can be laid down that any particular act, or any particular kind of steps, towards the commission of an offence is necessary to constitute 'preparation'.[92] What can be stated broadly on the basis of an authority in *Ramchandra Madkami v State of Orissa* [93] is that the making of the preparation should be shown to the satisfaction of the court by such act as the collection of men, arms,

provisions, *etc*, which, coupled with other circumstances plainly manifests an intention to commit dacoity. Where the accused were found concealed in day time in a room, armed with weapons and no plausible explanation was offered by anyone of them regarding their presence in the house and one of them fired a gun when the sub-inspector opened the door, it was held that the burden of proof lay heavily upon the accused to show that their intentions were innocent, and that they had assembled in the house not for the purpose of committing any dacoity, but for some other ostensible lawful purpose.[94] Such presumption is, however, rebuttable, and it is open to such persons to show that they had assembled for a lawful purpose.[95] Where a band of armed men, miles away from their own village with unlicensed firearms, attempted to conceal their presence and threatened those who enquired who they were, resisted the pursuit and fired at those who pursued, it was held that the only reasonable inference was that they were dacoits and had made preparation to commit dacoity.[96]

11. Accused Possessing Deadly Weapon--Effect

The possession of chopper or knife or an axe or a dagger or a spear, by itself, is not sufficient to show that persons possessing such weapons are the members of a gang of dacoits and had assembled for committing dacoity. Since the possession of such day to day use weapons can be properly explained, especially by villagers/labourers, some more natural evidence, credible and specific evidence is necessary to attract offences under ss 399, 402, IPC .[97]3435

12. Accused Possessing Instruments of House-breaking--Effect

Member of a gang, taking into their possession, instruments of house-breaking and arms and actually proceeding to the place near the scene of the contemplated dacoity, would be guilty under this section,[1] and the mere fact that the accused charged with dacoity, did not carry instruments of house-breaking, or that they were not arrested near the place of the contemplated dacoity, is not sufficient for concluding that the accused did not assemble there after preparing for dacoity.[2]

However, the mere fact that the accused were arrested together and some of them were in possession of unlicensed weapons, but not in possession of any material required for committing house-breaking, would not necessarily lead to the inference that they had collected for the purpose of committing dacoity or that they had made preparation to commit dacoity.[3]

13. Police Party Hearing Conversation of the Accused--Evidence not Reliable

In cases falling under ss 399 / 402, IPC, the police usually come with a stereotyped story that on receiving secret information that a gang of dacoits would commit dacoity at the house of a person and that the gang would assemble at another place and the usual story of taking the witnesses, making them a part of the raiding party *etc*, and the conversation imputed to one of the dacoits was that it was now time that they should go to commit the dacoity at the house of the targeted person and thereupon the accused were challenged and had been overpowered and some of them were arrested and recoveries of various arms were made from their possession. However, it is difficult to believe that the dacoits would unnecessarily enter into a conversation as to where they were to commit dacoity and that too in such a loud voice that the police party hiding at a considerable distance would be able to hear them and that even if they discussed the details of what they were to do and also take the name of the person whose place the dacoity was to be committed, for they would discuss such matters only in whispers.[4]

When the accused persons were at a distance of 50 to 60 yards,[5] 40 to 80 paces,[6] or 45 to 76 paces,[7] or 25 to 30 paces,[8] the evidence of police officials who formed the raiding party, about the hearing of conversion amongst the dacoits was discarded and3436 was not at all found convincing keeping in view the distance between the raiding parties and, the alleged dacoits.

Where the accused persons were alleged to have assembled in the *dharamshala* and were planning to commit dacoity, it is doubtful that they were speaking so loudly that their conversation would be heard outside by the police.[9] However, where there was a common wall of the verandah and the two rooms in

the verandah and the place where the police party had taken position, the accused though were not visible but only their voice was audible, it was quiet natural and possible that talks of the accused amongst themselves were quiet audible to the police party.[10]

14. Accused Neither Attempting to flee on Seeing Police, nor Resisting Arrest--Evidence Unreliable

The testimony of police inspector is rendered doubtful due to the fact that though the accused persons were alleged to be armed with country made pistols, cartridges and jute bonds and making preparations to commit dacoity, yet they neither attempted to flee nor resorted to firing to avoid their arrest. The prosecution evidence also does not show that any resistance was offered by the three accused persons in their arrest. This renders the prosecution story extremely doubtful.[11]

15. Crime Number Mentioned in Arrest Memo but not on Seizure Memo--Effect

When deadly weapons like pistol and *tangi* were seized from the accused persons, on arrest memos of the accused persons the crime number was mentioned which created serious doubt that the accused persons were not arrested on the spot, whereas on seizure memos, no crime number was mentioned. If seizure memo and the arrest memo are kept in juxtaposition it would reveal that one of the document was manufactured. So, the conviction of the accused persons was liable to be set aside.[12]

16. Accused not Firing at Police Party--Prosecution Case Doubtful

This is rather unlikely when bad characters had actually assembled and were preparing to commit dacoity, they would keep their arms and ammunitions in their *jholas* or not take out the same even on being challenged by the station officer particularly when they were beaten with *lathis* in the process of arrest.[13] The fact that inspite of the alleged possession of arms, the accused did not use them after the police fired two shots,[14] or the dacoits did not notice the presence of the police and did not open fire is difficult to believe and makes the prosecution case unreliable.[15]3437

17. Non-Recovery of Coins and Currency Notes from Accused--Effect

The important point is that when the police party did not recover a single penny from the possession of any of the accused persons, non-recovery of coins or currency notes from the pockets of the accused persons makes the prosecution story doubtful.[16]

18. Non-Obtaining Signature of Accused on Seizure Memo and Non- supply of its Copy to Accused--Effect

When neither signatures of the accused persons were obtained on the seizure memo, nor copy thereof was furnished to any of the accused persons, it is a serious lacuna in the prosecution case.[17]

19. Delay in Sending Parcel to CFSL

Delay of 12 days in sending the parcel by *moharir malkhana* to CFSL is a serious lacuna in the prosecution version. This lapse casts serious doubt about the truthfulness and credibility of the prosecution version.[18]

20. Non-examination of *Moharir Malkhana*

Non-examination of *moharir malkhana* and failure of the prosecution to even file his affidavit to testify to the safe custody of the recovered country-made pistol is also a serious lacuna in the prosecution version.[19]

21. Non-Deposit of CFSL form in *Malkhana*

Non-depositing the CFSL form in *malkhana* nor sending it along with the sample parcel to the office of the CFSL puts a serious question mark on the credibility of the prosecution version.[20]

22. Discarding Defence Evidence in Routine--Not Proper

Totally discarding the defence evidence without proper analysis or consideration and to proceed with the basic presumption that the defence witnesses always lie and the prosecution witnesses always tell the gospel truth is neither justified nor legitimate nor proper.[21]

23. Conviction

A conviction of an accused can be made both under ss 399 and 402, IPC .[22] Where a charge against the accused was for two separate offences laid in an alternative form,3438*i.e.*, one under s 399 (for making preparation for committing dacoity), but the charges were treated not alternatively but as additional, it was held that the acquittal of the accused under s 399 did not involve an acquittal under s 402, IPC, and the conviction under the latter section was not vitiated by repugnancy.[23] The accused appellants residents of different villages armed with lethal arms had gathered at an unearthly hour in a desolate place under a tree with no explanation for their conduct whatsoever much less an acceptable one. The prosecution evidence was cogent and reliable. Accused appellants were convicted under ss 399 and 402, IPC . Sentence of five years imposed was found harsh, hence was reduced to three years RI.[24]

24. Non-Examination of Independent Witnesses

Non-availability of independent witness is not fatal in each and every case and statements of the police personnel should not be discarded in the absence of independent witness, if same are found to be trustworthy and police has furnished proper explanation for non-availability of independent witnesses.[25]

25. Probation

The accused, a young man and student was convicted under ss 399 and 402, IPC and there was no previous conviction to his credit. To avoid the prospect of his becoming a hardened criminal in the company of other criminals in the jail, the accused was released on probation under the Uttar Pradesh First Offenders Probation Act (6 of 1938).[26]

The conviction of an accused under s 399 is not illegal by the mere fact that he has been charged under s 398, IPC, and not under s 399, IPC, if no prejudice is caused to him.[27]

26. Sentence

The usual sentence in a case for an offence under s 399, IPC, unless it is attended with violence, is four years rigorous imprisonment. The sentence of seven years rigorous imprisonment was considered excessive, and was reduced accordingly, in *Khusali v State of Uttar Pradesh* .[28] The nature of the offence, the circumstances in which it was committed, the age, the character and the antecedents of the offender must be taken into account in determining the sentence.[29]However, the fact, that the accused is a youthful first time offender, is not, by itself, enough for imposing a lenient sentence. Where the act constituting the offence, was an act of daring and reprehensible nature, with well-planned preparation and deliberate effort, it was held that it would be misplaced sympathy and unjust leniency if the sentence of imprisonment passed is reduced.[30] Where, however, the accused were quite young3439 and there were no previous convictions, the sentence under ss 399 and 402 were reduced to three years.[31] The accused were sentenced to undergo four years rigorous imprisonment under s 399 and three years rigorous imprisonment under s 402, IPC, and both sentences were ordered by the trial court to run concurrently. Keeping in view that the accused remained in custody for a period of three years and three months. The

High Court reduced his sentence of imprisonment to the period already undergone.[32] However, the sentence of two years rigorous imprisonment is on the lesser side and there is no scope to reduce it.[33]

54 *State v Dhanpat Chamara* AIR 1960 Pat 582, 1960 Cr LJ 1650 .

55 *Crown v Shera* 1868 PR 18 .

56 *Karam Dass v State* AIR 1952 Punj 249, 53 Cr LJ 1119 .

57 *Karam Dass v State* AIR 1952 Punj 249, 53 Cr LJ 1119 ; *Khwaja Hassan v Emperor* 24 Cr LJ 136 .

58 *Karmun v Emperor* AIR 1916 Lah 334, 17 Cr LJ 280 ; *State of Uttar Pradesh v Randhir Sri Chand* AIR 1959 All 727, 730, 1959 Cr LJ 1274 ; *Lekh Raj v State* AIR 1960 Punj 482, 1960 Cr LJ 1234 .

59 *Popi v State of Rajasthan* 1976 Raj Cr C 303 .

60 *Jain Lal v Emperor* AIR 1943 Pat 82, 44 Cr LJ 337 .

61 *Madhusudan Sen Gupta v State of West Bengal* AIR 1958 Cal 25, p 31, 1958 Cr LJ 25 .

62 *Lekh Raj v State* AIR 1960 Punj 482, 1960 Cr LJ 1234 ; *Sukhlal v State of Madhya Pradesh* 1998 Cr LJ 1366 (BC) .

63 *State v Dhanpat Chamara* AIR 1960 Pat 582, p 586, 1960 Cr LJ 1650 .

64 *Romesh Chandra Banerjee v Emperor* AIR 1914 Cal 456, p 460, 15 Cr LJ 385 ; *Singha v State* 1972 PLR 176 .

65 *Singha v State* 1972 PLR 176 .

66 *Asgar v State of Rajasthan* 2003 Cr LJ 1997 (Raj) .

67 *Madhusudan Sen Gupta v State of West Bengal* AIR 1958 Cal 25, 1958 Cr LJ 25 ; *Asgar v State of Rajasthan* 2003 Cr LJ 1997 (Raj) .

68 *Brijial Mandal v State of Bihar* 1978 Cr LJ 877 ; *Karuna Jal v State* (1980) 49 Cut LT 222 (225) ; *Jain Lal v Emperor* AIR 1943 Pat 82, 44 Cr LJ 337 ; *State v Dhanpat Chamara* AIR 1980 Pat 582, 1960 Cr LJ 1650 .

69 *Jain Lal v Emperor* AIR 1943 Pat 82, 44 Cr LJ 337 ; *Karuna Jal v State* (1980) 49 Cut LT 222, p 225 ; *State v Dhanpat Chamara* AIR 1960 Pat 582, p 586 .

70 *Karuna Jal v State* (1980) 49 Cut LT 222, p 225 .

71 *Madhusudan Sen Gupta v State of West Bengal* AIR 1958 Cal 25, 1958 Cr LJ 25 .

72 *Ram Chandra Madkami v State of Orissa* (1974) 40 Cut LT 1108 .

73 *State of Haryana v Randhir Singh* 2009 Cr LJ 3717 (P&H) ; *Mahabir v State of Haryana* 2009 Cr LJ (NOC) 881 (P&H) (DB) (*Choltuy Modi v State of Bihar* 1986 Cr LJ 1031 ; *Chaturi Yadav v State of Bihar* AIR 1979 SC 1412 **followed**).

74 *Kuldeep Singh v State of Punjab* 2011 Cr LJ 488 (P&H) .

75 *D Bhudanmohan Patnaik v State* (1972) 1 Cut LT 50, p 53 .

76 *Santosh Kumar v State of Chhattisgarh* 2006 Cr LJ 1185 (Chhattisgarh) .

77 *Jarawar Sing v State* 1991 Cr LJ 1806 (All), 1991 All LJ 608 .

78 *Ramji v State of Rajasthan* 2011 Cr LJ 4771, p 4773 (Raj) .

79 *Brijial Mandal v State of Bihar* 1978 Cr LJ 877, p 878 (Pat) ; *Shridhar Koeri v State of Bihar* 2002 Cr LJ 138 (NOC) (Pat), (2000) 3 Pat LJR 295 .

80 *Barbara Singh v Crown* AIR 1949 EP 340, 51 Cr LJ 167 .

81 *State of Haryana v Randhir Singh* 2009 Cr LJ 3717 (P&H) ; *Mahabir v State of Haryana* 2009 Cr LJ (NOC) 881 (P&H) (DB) (*Choltuy Modi v State of Bihar* 1986 Cr LJ 1031 ; *Chaturi Yadav v State of Bihar* AIR 1979 SC 1412 **followed**).

82 *Nga Lin v Emperor* AIR 1935 Rang 294, 36 Cr LJ 1384(2) .

83 *Chhotey Singh v State* 2005 Cr LJ 185 (All) .

84 *Chaturi Yadav v State of Bihar* 1979 Cr LJ 1090 ; *Parshadi v State* 1980 ALJ 75, p 77 .

85 *Amar Singh v State of Uttar Pradesh* 2003 Cr LJ 1321 (All) .

86 *Shasita v State of Uttar Pradesh* 1999 Cr LJ 3719 (All) ; *Ram Sewak v State* 1999 Cr LJ 4680 (All) .

87 *Shiv v Ram Singh v State* 1999 Cr LJ 4103 (All) .

88 *Chaturi Yadav v State of Bihar* AIR 1979 SC 1412, 1979 Cr LJ 1090 .

89 *Choltuy Modi v State of Bihar* 1986 Cr LJ 1031 .

90 *Brijlal Mandal v State of Bihar* 1978 Cr LJ 877,

91 *State of Uttar Pradesh v Randhir Sri Chand* AIR 1959 All 727, 1959 Cr LJ 1274 .

92 *Jain Lal v Emperor* AIR 1943 Pat 82, p 85, 44 Cr LJ 337 .

93 *Ramchandra Madkami v State of Orissa* 1947 Cut LT 1108 .

94 *Bhagwan Bakhsh v Emperor* AIR 1935 Oudh 471, p 473, 36 Cr LJ 1003 ; *State of Uttar Pradesh v Randhir Sir Chand* AIR 1959 All 727, 1959 Cr LJ 1274 ; *State v Janardan* 1951 ALJ 466 ; *Harnandan v State* 1973 All Cr R 398 .

95 *Bhagwan Bakhsh v Emperor* AIR 1935 Oudh 471, p 473, 36 Cr LJ 1003 ; *State of Uttar Pradesh v Randhir Sir Chand* AIR 1959 All 727, 1959 Cr LJ 1274 ; *State v Janardan* 1951 ALJ 466 .

96 *Haffi v Emperor* AIR 1943 Sind 212, 45 Cr LJ 130 ; *State v Dhanpat Chamara* AIR 1960 Pat 582 .

97 *Sadashiv v State of Maharashtra* 2003 Cr LJ 3661 (Bom) .

1 *Karim Bakhsh v Emperor* AIR 1928 Lah 193, 29 Cr LJ 577 ; *State v Dhanpat Chamara* AIR 1960 Pat 582, 1960 Cr LJ 1650 ; *Emperor v Khushi Ram* AIR 1918 All 361, 19 Cr LJ 43 .

2 *State of Uttar Pradesh v Randhir Sri Chand* AIR 1959 All 727, p 730, 1959 Cr LJ 1274 .

3 *State v Ghissu Khan* AIR 1956 All 464, 1956 Cr LJ 956 ; *Nathwa v State* AIR 1951 All 452 ; *Tirkha v State* 1965 AWR 844 ; *Hari Bijal v Emperor* AIR 1915 Bom 247, 16 Cr LJ 745 ; *Bachinta v Emperor* AIR 1916 Lah 380, 17 Cr LJ 97 ; *Nijamudien v State of Kerela* 2002 Cr LJ 3266 (Ker) .

4 *Karam Singh v State of Uttar Pradesh* (1998) 25 All Cri C 352 (All) ; *Ram Kishan v State of Uttar Pradesh* 2000 Cr LJ 867 (All) ; *Ram Kishan v State of Uttar Pradesh* 2006 Cr LJ 1775 (All) .

5 *Raghubir Singh v State of Uttar Pradesh* 1996 All LJ 551, 1996 AIHC 851, (1995) 32 All Cr C 216 .

6 *Maqbool Ahmed v State of Uttar Pradesh* 1995 JIC 44 (All) as **quoted** in *Radharaman and Ors v State of Uttar Pradesh* 1997 Cr LJ 4129 (All) .

7 *Babu Lal v State of Uttar Pradesh* Criminal Appeal No 3398 of 1979 decided on 27 July 1991 by the Allahabad High Court (reported in 1999 All LJ 2315).

8 *Puttu Singh v State of Uttar Pradesh* Criminal Appeal No 1620 of 1980 decided by Allahabad High Court (reported in 25 All Cri R 1741); *Ram Kishan and another v State of Uttar Pradesh* 2000 Cr LJ 867 (All) .

9 *Suleman v State of Delhi* 1999 Cr LJ 2525 (SC) .

10 *Radharaman v State of Uttar Pradesh* 1997 Cr LJ 4129 (All) .

11 *Santosh Kumar v State of Chhattisgarh* 2006 Cr LJ 1185 (Chhattisgarh) .

12 *Shyam Bharia v State of Madhya Pradesh* 2005 Cr LJ 1907 (MP) .

13 *Ram Kishan v State of Uttar Pradesh* 2000 Cr LJ 867 (All) .

14 *Amar Singh v State of Uttar Pradesh* 2003 Cr LJ 1321 (All) ; *Mahabir Singh v State of UP* 2012 (112) AIC 293 (All) (Accused acquitted); *Jasbir Singh v State of Haryana* 2015 Cr LJ 2476 (SC), 2015 (4) Scale 541, (2015) 5 SCC 762 .

15 *Ram Sewak v State* 1999 Cr LJ 4680 (All) ; *Punni v State of Uttar Pradesh* 1999 Cr LJ 4641 (All) ; *Ram Kishan v State of Uttar Pradesh* 2006 Cr LJ 1775 (All) .

16 *Ram Kishan v State of Uttar Pradesh* 2006 Cr LJ 1775 (All) .

17 *Ibid*.

18 *Des Raj v State* 2000 Cr LJ 2083 (Del) ; *Baldev Singh v State of Punjab* 1990 Cr LJ 2604 (SC), 1991 CAR 81 .

19 *Des Raj alias Das v State* 2000 Cr LJ 2083 (Del) ; *Nand Kishore v State of Haryana* 1998 SCC (Cri) 568 .

20 *Ibid*.

21 *Ibid*.

22 *State of Uttar Pradesh v Randhir Sri Chand* AIR 1959 All 727, p 731, 1959 Cr LJ 1274 ; *Emperor v Khushiram* AIR 1918 All 361, p 362, 19 Cr LJ 43 ; *Karmun v Emperor* AIR 1916 Lah 334, p 335, 17 Cr LJ 280 .

23 *Romesh Chandra Banerjee v Emperor* AIR 1914 Cal 456, p 459, 15 Cr LJ 385 .

24 *Birbal B Cghouhan v State of Chhattisgarh* 2012 Cr LJ 671, p 672 (SC), (2011) 10 SCC 776 .

25 *Rakesh v State of Uttarakhand* 2014 Cr LJ 287, p 289 (Utr) .

26 *Moti Lal v State of Uttar Pradesh* AIR 1979 SC 1690, 1980 Cr LJ 800 (SC) .

27 *Karnuna Jal v State* (1980) 49 Cut LT 222, p 226 .

28 1968 Cr LJ 982, p 983; *Birbal B Cghouhan v State of Chhattisgarh* 2012 Cr LJ 671, p 672 (SC), (2011) 10 SCC 776 (Sentence of five years imposed was found harsh, was reduced to three years RI).

29 *Lekh Raj v State* AIR 1960 Punj 482, p 484, 1960 Cr LJ 1234 ; *Vijay Pal v State* AIR 1959 All 559, p 562, 1959 Cr LJ 1040 ; *Narpat v State* (1961) 1 Cr LJ 591, 1960 ALJ 567 .

30 *Lekh Raj v State* 1960 Punj 482, 484 Cr LJ 1234 .

31 *Vijai Pal v State* AIR 1959 All 559, p 562, 1959 Cr LJ 1040 ; *Narpat v State* (1961) 1 Cr LJ 591, 1960 ALJ 567 .

32 *Ravi Rajwar v State of Bihar* 2003 Cr LJ 634 (Jharkhand) .

33 *Shiv Ram Sing v State* 1999 Cr LJ 4103 (All) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 400.

Punishment for belonging to gang of dacoits.--

Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

The section was intended by the legislature to provide for punishing those who belong to a gang of

persons who make it their profession to commit dacoities.[34] Similarly, the offence is entirely a creature of statute,[35] and is intended to break up the gang, by punishing their associates who share their purpose.[36] Association for the habitual pursuit of dacoity is the gist of the offence.[37] In other words, the essence of the section is the agreement habitually to commit dacoity, and not the actual commission for attempted commission of dacoities.[38] The existence of such an agreement and the participation of any person in that agreement may be inferred from the established circumstances.[39]

Being a member of a gang of dacoits is a definite offence under this section, and, therefore, it cannot be permitted that instead of the specific charge being tried in a3440 proper court on proper evidence, the accused should be indirectly punished by the proceedings under a preventive section like s 110, CrPC 1973.[40]

2. 'Shall Belong'

The expression 'shall belong' in the section, implies something more than the idea of casual association. It involves the notion of continuity (rather than of permanency) and indicates a more or less intimate connection with the body of persons, extending over a period of time, sufficiently long, to warrant the inference that the person affected had identified himself with a band, the common purpose of which is the habitual commission of dacoities.[41] A person may belong to a gang of dacoits without having actually participated in the commission of even one dacoity. A clever member of the gang may always remain in the background while organising the operations of the gang, giving them active assistance for the purpose of meeting together, furnishing them with weapons and also screening them after commission of the offence and helping them in the disposal of the looted property.[42] However, a person cannot be said to belong to a gang of dacoits in respect of whom the court is satisfied that his connection with the gang was limited and was always intended to be limited to a series of acts, none of which amounted either to dacoity or to the abetment of dacoity.[43] Similarly, persons, who merely assist and shelter the dacoits,[44] or who, being without means of livelihood, associate with them by joining them in drinking,[45] or who meet them at fairs, weddings and liquor shops,[46] cannot be held to belong to a gang of dacoits. Likewise, the general criminality of a tribe or caste cannot be imputed to individual members operating in gangs.[47] Merely, being seen getting on a boat with four persons, who had on their own admission being convicted of belonging to a gang of dacoits, is not sufficient evidence against those so seen.[48] As to a receiver of stolen property, it cannot be laid down as a general proposition that if he receives stolen property from a gang of dacoits, he is a member of the gang.[49] However, the *atoos* (receivers of stolen property), who did not merely receive stolen property for their own benefit, but identified themselves with the gang and had held possession of the stolen property in the interests of the gang, were held to come under s 401, IPC .[50]

3. 'Gang'

The word 'gang' means 'any' band or company of persons who can go about together or act in concert'. The essence of the word 'gang' in this section is that the3441 persons should act in concert and two or more persons can, therefore, constitute a gang.[51] The identity of the gang concerned in dacoities in question must be established.[52] If it is established that a gang, however small, was formed for the purpose of habitually committing dacoities, all persons who thereafter join the gang in one or more cases, would be within the ambit of this section.[53] However, it does not mean that a person, who joins the members of such a gang in committing theft, becomes *ipso facto* a member of such gang. An accused person may take part in a theft with one or more members of a gang without himself becoming a member of that gang.[54]

4. 'Habitually'

For attracting the provisions of the section, it must be shown that the association of the accused with the gang was not casual, but was intended to be habitual. Habit is a fact in issue to be proved.[55] The habit must be proved by an aggregate of facts and though the charge may be of a single offence, the period, over which the association extends, is often very long and the longer the period, the better it is to establish habit.[56]

5. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

6. Jurisdiction

Any offence of belonging to a gang of dacoits may be tried by a court within whose local jurisdiction the offence was committed or the accused person is found [s 181(1), CrPC 1973]. Where the accused was charged under this section for belonging to a gang, associated for the purpose of habitually committing dacoities, with the headquarters of the gang in a district of West Bengal, but several of the dacoities, forming the subject-matter of the charge, were committed in the district of Dhanbad in Bihar, it was held that there was no irregularity in holding the commitment inquiry and trial at Dhanbad. Section 179 , CrPC 1973, neither controls, nor is controlled by, s 181, CrPC 1973, they having a cumulative effect and are not mutually exclusive.[57]

7. Joint Trial

Where fourteen persons were tried at one trial under this section and, during a period of about 21 months, four serious dacoities were committed at four different places,3442 two of which were accompanied by murders, and the prosecution had alleged that the accused had taken part in one or more of these dacoities, it was held that the joint trial of all the accused, though not illegal, was improper. It would have been better to try separately the accused persons for having committed offences under ss 396 and 397, IPC, in respect of the dacoities in which, it was alleged, they took part.[58]

8. Charge

The following form of the charge may be adopted:

> I (*name and office of Sessions Judge,etc*.) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about theday of,at, belonged to a gang of persons, associated for the purpose of habitually committing dacoity, and thereby committed an offence punishable under s 400 of the Indian Penal Code, and within the congisance of this court.
>
> I hereby direct that you be tried by this court on the said charge.

9. Proof

To sustain a conviction on a charge under this section, there must be (a) proof of association; and (b) proof that the association was for the purpose of habitually committing dacoities and the habit must be proved by an aggregate of facts.[59] It is necessary to prove that a gang of dacoits existed and the accused belonged to that gang.[60] It is not, however, necessary to prove that the accused had taken part in any particular dacoity.[61]

The association and the purpose of the association may be proved by direct evidence,[62] or by proof of facts from which they can be reasonably inferred.[63] The question whether the accused belongs to a gang of dacoits, ultimately depends on whether, from all the proved facts and circumstances, it can be reasonably held that he identified himself so much with the object of the gang and facilitated them in the commission of the offences so as to become a member of the gang. For this purpose, his intimate association with the gang before the commission of the dacoities, his subsequent association with them after the commission of the offence, the facilities given by him in disposing of the looted property and in screening the dacoits would all be relevant pieces of evidence along with the other evidence of his past activities.[64] The mere fact that women lived as wives or mistresses with men, who are dacoits, is not sufficient for a court to hold that they belong to a gang of persons3443 for the purpose of habitually committing dacoity unless it is proved that the women were themselves associated with their husbands or protectors for the purpose of habitually committing dacoities.[65]

10. Evidence not Believed for Section 395 may be Relied on for Section 400

To prove the charge under s 400, IPC it is not necessary to prove that the accused must have taken part in any particular dacoity. Evidence which though not believed for the purpose of conviction under s 395, may yet be relied upon for the purpose of proving the charge under s 400, IPC .[66]

11. Sentence

There are many points which have to be considered in determining what is an adequate sentence. Among these may be noted the following:

(i) how long has the accused belonged to the gang;
(ii) what dacoities have been committed by the gang since the accused joined it;
(iii) in how many of these dacoities did the accused actually take part (if the accused are separately prosecuted for every dacoity, in which they have been concerned as members of the gang, this point must be left out of consideration);
(iv) what was the character of the dacoities in which the accused actually took part; and
(v) whether they were accompanied with murder, culpable homicide, grievous hurt, torture or any acts of a specially brutal character or were the dacoities of ordinary character.[67]

In cases under s 400, IPC, against a gang consisting of desperate men prepared to go to any lengths in carrying out their crimes, the heaviest possible sentence should be passed.[68] If the offence is, in itself, from its nature, more serious than the charge of committing dacoity, the maximum penalty, prescribed under the section, should be awarded.[69] A sentence of two, three or four years is grossly inadequate.[70]

It is not illegal to pass separate sentences on a person, proved to have been a member of the gang of dacoits and participated in particular dacoity, in which case it will be at the discretion of the court whether two sentences should run concurrently.[71]

34 *Emperor v Kure* 1986 AWN 65 .

35 *Kader Sundar v Emperor* 13 Cr LJ 39, p 41 ; *Ramdas v State* AIR 1960 AP 344, p 346, 1966 Cr LJ 11234 ; *Sharaf Shah Khan v State of Andhra Pradesh* AIR1963 AP 314, p 320, (1963) 2 Cr LJ 121.

36 *Sharaf Shah Khan v State of Andhra Pradesh* AIR 1963 AP 314, p 320, (1963) 2 Cr LJ 121 ; *Queen v Mooktaram Sirdar* 23 WR (CR) 18 ; *Public Prosecutor v Bonigini Pottigndu* (1909) ILR 32 Mad 179, p 184 .

37 *Kader Sundar v Emperor* 13 Cr LJ 39, p 41 ; *Ramdas v State* AIR 1966 AP 344, p 346, 1966 Cr LJ 1234 .

38 *Suresh Chandra Banerjee v Emperor* AIR 1928 Cal 309, p 311, 29 Cr LJ 705 ; *State v Hetep Boro* 1972 Cr LJ 1074 ; *Ramdas v State* 1966 Cr LJ 1234 .

39 *Suresh Chandra Banerjee v Emperor* AIR 1928 Cal 309, p 311, 29 Cr LJ 705 ; *State v Hetep Boro* 1972 Cr LJ 1074 ; *Ramdas v State* 1966 Cr LJ 1234 ; Re *Akbar Ali*1980 LW (Cr) 245, p 247, 1980 MLJ (Cr) 793.

40 *Ram Prasad v Emperor* AIR 1925 All 250, 26 Cr LJ 746 .

41 *Hira Lal v Emperor* 11 Cr LJ 554, p 555 ; *Bachchu v Emperor* AIR 1930 Oudh 455, 32 Cr LJ 162 ; *Sharaf Shah Khan v State of Andhra Pradesh* AIR 1963 AP 314, p 322, (1963) 2 GLJ 121 ; *Bai Chaturi v State* AIR 1960 Guj 5, 1960 Cr LJ 1204 ; Re *Akbar Ali*1981 Cr LJ (NOC) 36 (All); *Suresh Chandra Banerjee v Emperor* AIR 1928 Cal 309, 29 Cr LJ 705 ; *Bhabuti v Emperor* AIR 1921 All 32, 22 Cr LJ 663 ; *Bandamedi Shankar v State of Andhra Pradesh* 2003 Cr LJ 2242 (AP) .

42 *Bhima Shaw v State* AIR 1956 Ori 177, p 181, 1956 Cr LJ 1208 ; *State v Hetep Boro* 1972 Cr LJ 1074 .

43 *Gaya Din v Emperor* 11 Cr LJ 551, p 553 ; *Ishar Das v Emperor* 13 Cr LJ 799 .

44 *Empress v Vithu* 1 Bom LR 156 .

45 Re *Subhan* 1 Weir 452 (2).

46 *Wasawa Singh v Emperor* AIR 1916 Lah 447, 17 Cr LJ 443 .

47 *Kader Sundar v Emperor* 13 Cr LJ 39, p 40 ; *Baksho v Emperor* AIR 1930 Sind 211, p 215, 31 Cr LJ 1046 ; *Empress v Savaldas* Ratanlal Unrep Cr C 418.

48 *Queen v Kamal Fukeer* 17 WR (Cr) 50 .

49 *Abdulla v Emperor* AIR 1927 Lah 524, 28 Cr LJ 179 ; *Arjan Das v Emperor* AIR 1932 Lah 486, p 488, 33 Cr LJ 584 .

50 *Beja v Emperor* AIR 1914 Lah 539 ((2)), 16 Cr LJ 33 .

51 *Sharaf Shah Khan v State of Andhra Pradesh* AIR 1963 AP 314, p 322, (1963) 2 Cr LJ 121 ; Re *Akbar Ali*1980 LW (Cr) 245, p 246, 1980 Mad LJ (Cr) 793 (ordinary meaning of 'gang' is a 'a number going in company hence a company or a number of persons associated for a particular purpose'; *Bandamedi Shankar v State of Andhra Pradesh* 2003 Cr LJ 2242 (AP) .

52 *Sharaf Shah Khan v State of Andhra Pradesh* AIR 1963 AP 314, p 323, (1963) 2 Cr LJ 121 .

53 *Ghulam Mustafa v Emperor* 12 Cr LJ 260, p 265 ; *Beja v Emperor* AIR 1914 Lah 539 ((2)), 16 Cr LJ 33 ; *Wasawa Singh v Emperor* AIR 1916 Lah 447, 17 Cr LJ 443 ; *Darya Singh v Emperor* AIR 1923 Lah 666, 25 Cr LJ 520 .

54 *Wasawa Singh v Emperor* AIR 1916 Lah 447, p 450, 17 Cr LJ 443 .

55 *Bhima Shaw v State* AIR 1956 Ori 177, p 182, 1956 Cr LJ 1208 .

56 *Kasem Ali v Emperor* AIR 1920 Cal 87, 21 Cr LJ 386 ; Re *Sriram Venktasami* 1 Weir 452 (1) (s 401); *Walia v Emperor* 11 Cr LJ 364 ; *Empress v Saval Dass* Ratanlal Unrep Cr C 418 (s 401).

57 *Lalchand Khatri v State* AIR 1961 Pat 260, p 263, (1961) 1 Cr LJ 841 .

58 *Ghulam Mustafa v Emperor* 12 Cr LJ 260 (Punj) .

59 *Walia v Emperor* 11 Cr LJ 364 (2); *Public Prosecutor v Bonigiri* (1909) ILR 32 Mad 179 ; *Bhima Shaw v State* AIR 1956 Ori 177, p 182, 1956 Cr LJ 1208 .

60 *Empress v Vithu* 1 Bom LR 156 ; Re *Gundla Narayana*AIR 1959 AP 387, 1959 Cr LJ 947 ; *Empress v Kure* 1886 AWN 65 .

61 *State v Hetep Boro* 1972 Cr LJ 1074 ; *Gaya Din v Emperor* 11 Cr LJ 551, p 553 ; *Bachchu v Emperor* AIR 1930 Oudh 455, p 459, 32 Cr LJ 162 ; *Lalchand Khatri v State* AIR 1961 Pat 260, p 266, (1961) 1 Cr LJ 841 ; *Late v Emperor* AIR 1929 Oudh 321, p 327, 30 Cr LJ 922 ; *Kader Sunder v Emperor* 13 Cr LJ 39 ; *Khilawan v Emperor* AIR 1928 Oudh 430, 29 Cr LJ 1009 .

62 *Public Prosecutor v Bonigiri* (1909) ILR 32 Mad 179 ; *State v Hetep Boro* 1972 Cr LJ 1074 (direct evidence of association of a particular accused with the gang may ordinarily be given only by an approver).

63 *Public Prosecutor v Bonigiri* (1909) ILR 32 Mad 179 .

64 *Bhima Shaw v State* AIR 1956 Ori 177, p 181, 1956 Cr LJ 1208 ; *Chaturi Yadav v State of Bihar* AIR 1979 SC 1412 .

65 *Empress v Yelli Kom Yella* Ratanlal Unrep Cr C 863; *Ajita v Emperor* 12 Cr LJ 204 (case under s 401).

66 *State v Hetep Boro* 1972 Cr LJ 1074 (Assam & Nagaland) (DB).

67 *Nga Lu Nge Gyi v Empress* 1872-1892 LBR 441.

68 *Ghulam Mustafa v Emperor* 12 Cr LJ 260 .

69 *Lalchand Khatri v State* AIR 1961 Pat 260, (1961) 1 Cr LJ 841 (sentence of 10 years rigorous imprisonment enhanced to rigorous imprisonment for life).

70 *Bhima Shaw v State* AIR 1956 Ori 177, p 186, 1956 Cr LJ 1208 (sentence enhanced to 10 years rigorous imprisonment).

71 *Murli v Emperor* AIR 1925 Oudh 374, 26 Cr LJ 1412 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 401.

Punishment for belonging to gang of thieves.--

Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery,3444 and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

The preceding section applies to persons belonging to a gang associated for the purposes of habitually committing dacoity, while this section relates to person belonging to similar gangs associated for the purpose of habitually committing theft or robbery. The section expressly excludes a gang of thugs and dacoits. A provision for the punishment of thugs, as defined in s 310, IPC, has been made in s 311, IPC for being habitually associated for the purpose of committing robbery or child stealing. For belonging to a gang of dacoits, the case is covered by s 400, IPC .

Before a person can be convicted under s 401, IPC, it should be proved that he belonged to a gang. Individual adventures of theft or robbery are not sufficient. It must be proved that he carries on his activities in conjunction with other thieves or robbers. Where individuals operate separately, they cannot be said to be members of a gang, a gang being an association of certain persons.[72] A resort to the provisions of s 401, IPC by the police for the purpose of sweeping into a wide net, a large number of persons, whom they suspect, or who gave them trouble, is not to be encouraged.[73]

It is not necessary for a conviction under s 401 that the person convicted must have taken part in any one theft or robbery.[74] Nor is it necessary that each individual member of the gang should be proved to have habitually committed theft in company with other members. Once it is established that a gang, however small in number, was formed for the purpose of habitually committing theft, all persons, who thereafter join the gang in one or more cases of thefts, come within the purview of this section.[75]

A conviction under this section cannot be considered to be bad in law merely because the evidence on

record also justifies conviction of a specific offence under s 379 or s 392, IPC .[76]

2. Section 401 Distinguished from Section 110,CrPC 1973

The difference between the two sections is that under this section, it is necessary to prove that several persons have associated together for the purpose of habitually3445 committing theft or robbery and their activities have, in fact, materialised into active robberies or thefts or attempts at such offences whereas s 110, CrPC, being only a preventive section, evidence of strong suspicion and evil repute, that such person or persons engage in criminal activities, is enough to render them liable to be bound down to be of good behaviour. This section is punitive, while s 100, CrPC 1973 is preventive.[77] There can be no ground under s 110, CrPC, rather than under this section.[78] There is also no bar to the subsequent punishment of a person bound in proceedings under s 110, CrPC, for an offence under this section.[79] If, however, the accused is tried and acquitted or discharged of an offence under s 401, then it would not be open to the police to proceed against him under s 110, CrPC .[80]

3. Essential Ingredients of an Offence under Section 401

The essential ingredients[81] of an offence under this section must be as follows:

(a) there should be, in existence, a gang of persons;
(b) such a gang should be associated for the purpose of habitually committing theft or robbery; and
(c) the accused should belong to that gang.

Essentially, the ingredients of the offence under this section are the same as for the offence under the preceding s 400, IPC, except that in one case the purpose of association is habitual commission of dacoity while in the other it is habitual commission of theft or robbery.[82]

4. 'Shall Belong'

Commentary under the same heading in s 400, *ante*, may be referred to.

5. 'Habitually'

Commentary under the same heading in s 400, *ante*, may be referred to.

6. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

7. Joint Trial

A joint trial of different sets of persons under ss 401 and 413, IPC, is illegal.[83] Where, however, two cases are started against persons, the accused being members of a gang, under s 401, IPC, it is not only permissible to combine the two trials, but3446 also convenient and proper because all the accused being members of one gang, they can conveniently be tried together in one trial.[84]

8. Charge

The following form of the charge may be adopted:

I (*name and office of Magistrate,etc*) hereby charge you (*name of accused person*) as follows:

That you, on or about theday ofat, belonged to a gang of persons, to with (*specify whether wandering or other gang*), associated for the purpose of habitually committing theft (*or robbery*), and that you thereby committed an offence, punishable under s 401 of the Indian Penal Code, and within my cognizance.[85]

And I hereby direct that you be tried by this court on the said charge.

9. Proof[86]

To sustain a conviction on a charge under this section, the prosecution must prove that:

(a) there existed a gang of persons,
(b) those persons were associated for the purpose of committing theft or robbery;
(c) the theft or robbery was to be committed habitually; and
(d) the accused was member of such gang.

The gist of the offence being association for the purpose of habitually committing theft or robbery,[87] the essential requisites are the proof of association and the proof that the association was for the purpose of habitually committing theft.[88] Hence, habit is a fact in issue to be proved for this purpose and habit being equivalent to character, it may be reasonably said that the character of an accused is itself a fact in issue for proving a charge under this section.[89]

In the absence of direct evidence, the purpose of association may be established by proof of acts from which this may be reasonably inferred. Similarly, the prevalence of theft in a certain area and its rise and fall, coinciding with the action taken against the members of the supposed gang, are as much relevant circumstances as are the convictions obtained against certain members.[90] Where, in addition to direct evidence, there was evidence that large number of thefts were committed by the accused within a comparatively short time, it was held that it would give rise to an inference that the accused must have been associated for the purpose of habitually committing theft.[91]3447

72 *Karma v State* (1965) 14 Jab LJ 88 (SN) .

73 *Empress v Jahangira* 1886 AWN 16 ; *Surjan Singh v Emperor* AIR 1932 Lah 298, p 301, 33 Cr LJ 251 .

74 *Lale v Emperor* AIR 1929 Oudh 321, p 327, 30 Cr LJ 922 (evidence showing the actual participation of an accused in a given theft or robbery is evidence both of his association with the gang and of his object in such an association).

75 *Beja v Emperor* AIR 1914 Lah 539 ((2)), p 542, 16 Cr LJ 33 .

76 *Lale v Emperor* AIR 1929 Oudh 321, p 327, 30 Cr LJ 922 .

77 *Ram lakhan v Emperor* AIR 1947 Oudh 86, p 87, 47 Cr LJ 1019 ; *Kasem Ali v Emperor* AIR 1920 Cal 87, 21 Cr LJ 386 .

78 *Huhdar Ali v Emperor* AIR 1933 Oudh 251, 34 Cr LJ 852 .

79 *Kasem Ali v Emperor* AIR 1920 Cal 87, p 88, 21 Cr LJ 386 .

80 *Huhdar Ali v Emperor* AIR 1933 Oudh 251, 34 Cr LJ 852 .

81 *Dhani Majhi v State* 1972 Cut LT 683 ; Re *Akbar Ali*1980 LW (Cr) 245, p 246, 1980 Mad LJ (Cr) 793.

82 *Dhani Majhi v State* 1972 Cut LT 683 .

83 *Chhajju v Emperor* AIR 1925 Lah 537, p 538, 26 Cr LJ 1097 ; *Arjan Das v Emperor* AIR 1932 Lah 486, 33 Cr L] 584 .

84 *Arumugam v Emperor* AIR 1938 Mad 858, p 861, 40 Cr LJ 355 .

85 Re *Akbar Ali*1980 LW (Cr) 245, p 246, 1980 MLJ (Cr) 793; *Beja v Emperor* AIR 1914 Lah 539 ((2)), p (542), 16 Cr LJ 133 ; *Wasawa Singh v Emperor* 1916 Lah 447, 17 Cr LJ 443 ; *Pir Bux v Crown* AIR 1923 Lah 327, p 328, 24 Cr LJ 703 .

86 Refer synopsis note 9 under s 400, IPC .

87 *Kasem Ali v Emperor* AIR 1920 Cal 87, p 88, 21 Cr LJ 386 .

88 *Afridi v Empress* 9 PR 1880 ; *Ishar Das v Emperor* 13 Cr LJ 799 ; Re *Sriram Venkatasami* 1 Weir 452; *Queen v Mooktaram* 23 WR (Cr) 18 ; *Bai Chaturi v State* AIR 1960 Guj 5, 1960 Cr LJ 1204 .

89 *Dhani Majhi v State* 1972 Cut LT 683 .

90 *Amdu Miyan v Emperor* AIR 1937 Nag 17, p 26 (FB), 38 Cr LJ 237 .

91 *Pir Bux v Crown* AIR 1923 Lah 327 ((329)), 24 Cr LJ 703 ; *Arumugam v Emperor* AIR 1938 Mad 858, p 860, 40 Cr LJ 355 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF ROBBERY AND DACOITY

S. 402.

Assembling for purpose of committing dacoity.--

Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section deals with the assemblage of persons for the purpose of committing dacoity.[1] Presence of at least five persons, assembled for the purpose of committing dacoity, is an essential ingredient for the operation of this section.[2] Similarly, before the members of an assembly can be punished under this section, it must be shown that there was agreement to commit dacoity,[3] and the purpose of the

assemblage must be to commit dacoity, and no other offence.[4] Thus, no conviction under this section can be recorded simply on the basis of the fact that a certain number of persons, some being armed, are apprehended at the platform of a railway station.[5] However, where some of the accused merely came to the assembly on the direction of other persons and there was no evidence that there was any previous consultation or agreement between them for assemblage at the particular place for the purpose of committing dacoity, and there was no other circumstance except the mere fact of assemblage for commission of dacoity, it was held that they were guilty only under s 402, but not under s 399 .[6] After assembling for the purpose of committing dacoity and proceeding to a certain distance on their way to their destination, it is possible that the idea be abandoned or the process be intercepted. Once the destination is reached or almost reached, preparation becomes complete and till then there would be mere assemblage. In that case, conviction can be made under s 402, and not under s 399 .[7]3448

2. Section 399 and Section 402 Compared and Contrasted

Commentary under the same heading in s 399, *ante*, may be referred to.

3. 'Assembled for the Purpose of Committing Dacoity'

Before the members of an assembly can be convicted of an offence under this section, it is essential for the prosecution to show that they had assembled for committing dacoity, and for no other offence.[8] Mere assembling of accused persons and the recovery of weapons from their possession would not constitute offence under ss 399 and 402, IPC unless evidence proves that they were planning to commit dacoity. The possibility that they might have collected there, for the purpose of murdering somebody or committing some other crime, cannot be eliminated. The order discharging the accused persons were upheld.[9]

Where several persons were found at 11 pm on a road just outside the city, all carrying unlicensed arms (guns and swords), concealed under their clothes, and none of them could give any reasonable explanation of his presence at the spot, it was held that they were guilty under this section.[10] Similarly, where, after darkness had set in, a number of persons, armed with a gun, came to a grove and, on being surprised by the police, four of them were caught and a gun and some gun-shots, gun-powder and dagger, *etc*, were recovered from their possession, it was held that they were guilty under this section.[11] Likewise, where the accused, residents of different distant villages, were caught and a lot of ammunition was recovered from some of them and they were all armed and gave entirely improbable reasons for their being caught in the particular village, the case was held to be proved against them.[12]

The accused appellants holding sticks in the hands, had gathered at a desolate place in the dead of night, tried to stop PW1. The appellants were residents of different villages, had gathered with lethal arms at an unearthly hour in desolate place under a tree with no explanation for their conduct whatsoever much less an acceptable one. The accused appellants were convicted for offences under ss 399 and 402, IPC .[13]

The accused persons armed with country made pistols at night had assembled near one Ashram Bridge, were planning to commit dacoity in the town. At about 11.30 p.m., the police party after hearing the talks of the accused persons *inter se* intercepted and arrested the accused persons with fire arms *viz*. country made pistols. The testimony of the police officials (PWs) was believed, the police officials (PWs) had no enmity with the accused persons. The accused persons could not explain their presence at such odd hours. Non-availability of independent witness is not fatal in each and every case and statements of the police personnel should not be discarded in the absence of independent witness, if same are found to be trustworthy and police3449 has furnished proper explanation for non-availability of independent witnesses. PWS deposed that no independent person was available on the spot. The conviction of the accused appellants under ss 399, 402, IPC and s 25 of the Indian Arms Act was held proper.[14]

4. 'Five or More Persons'

To bring the case within s 399 of IPC, it is not necessary that persons shown to be making the preparations should be five or more in number. It is, however, necessary for the prosecution to prove that

the raid for which the persons prosecuted were making preparation was to be committed by five or more persons, for otherwise it would not be dacoity but merely robbery, and mere preparation for committing robbery, unless it ends in an actual attempt, is not punishable by law.[15]

5. Accused Possessing Deadly Weapon--Effect

Commentary under the same heading in s 399, *ante*, may be referred to.

6. Accused Possessing Instruments of House Breaking--Effect

Commentary under the same heading in s 399, *ante*, may be referred to.

7. Each Case to be Judged on its own Merit

Commentary under the same heading in s 399, *ante*, may be referred to.

8. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

9. Identification of the Accused

Commentary under the relevant headings in s 392 & s 395, *ante*, may be referred to.

10. Charge

The following form of the charge may be adopted:

> I (*name and office of Sessions Judge,etc*.) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about theday of, at, were one of five (*or more*) persons, assembled for the purpose of committing dacoity, and that you thereby committed an offence, punishable under s 402 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

Where the charge under s 402 fully covers the ingredients of ss 417 and 148, IPC, the absence of a specific charge under s 147 would not prejudice the accused.[16]3450

11. Proof

To establish a charge under this section, the prosecution must prove,[17] that:

(a) five or more persons had assembled;
(b) they did so for the purpose of committing dacoity, and for no other purpose;[18] and
(c) the accused was one of five or more persons so assembled.

The first and third elements have to be factually established.[19] The purpose of an assembly for committing dacoity can be gathered only from the circumstances because it is difficult to give any direct evidence of such purpose.[20] When there is no reliable evidence to show that the purpose was to commit dacoity and the circumstances established in the case are equally consistent with the innocence of the accused, the accused cannot be held guilty because it is a well-settled principle of law that if there are two hypotheses where one is in favour of the accused and the other against him, and the one in favour of him must be accepted.[21] Where, from the evidence in a trial for dacoity, the utmost that could be urged against the accused, was that they met in order to discuss the possibility of committing a dacoity, but there was no evidence to prove that they had assembled for the purpose of committing a dacoity, it was held that they were not guilty of the offence under s 402 .[22]

The absence of identification of the accused, who have been in jail from the date of arrest, would be a fatal defect in the prosecution case because in such a case, it cannot be held that they were the persons who collected at the place alleged for the purpose of committing dacoity.[23]

12. Acquitted

The prosecution story was that the police nabbed the dacoits from the grove where they had assembled to commit dacoity. Adjoining grove holders or land holders who were said to have been present in the grove at the time of occurrence were not examined by the prosecution. The SO who had prepared plan to arrest the accused dacoits and who had filed FIR was also not examined. The accused dacoits did not offer any resistance when they were alleged to be arrested. One accused had enmity with the co-accused as such his participation was improbable. Acquittal recorded by the High Court after setting aside the conviction of the accused under ss 399 / 402, IPC recorded by the trial court was held proper.[24]

The incident was daylight incident which occurred at 12.30 p.m. within the limits of city police station. No public/independent witness was examined by the prosecution to prove the incident and the arrest of the accused appellant. The3451 investigation of the case was vitiated as it was done by the complainant himself. Out of six accused persons four were armed with deadly weapons, but, they did not offer resistance, nor caused injuries to the police party. The accused persons after seeing the police party did not try to run away. The prosecution case was not proved beyond reasonable doubt, the conviction of the appellant for offences under ss 399 / 402, IPC was set aside.[25]

13. Non-recovery of Coins and Currency Notes from Accused--Effect

Commentary under the same heading in s 399, *ante*, may be referred to.

14. Police Party Hearing Conversation of the Accused--Evidence not Reliable

Commentary under the same heading in s 399, *ante*, may be referred to.

15. Accused not Firing at Police Party--Prosecution Case Doubtful

Commentary under the same heading in s 399, *ante*, may be referred to.

16. Accused neither Attempting to Flee on Seeing Police nor Resisting Arrest--Evidence Unreliable

Commentary under the same heading in s 399, *ante*, may be referred to.

17. Sentence

When the accused remained in custody altogether for a period of 3 years and three months, the sentence of rigorous imprisonment for 4 years reduced to period already undergone.[26]

A lenient sentence may be given if the accused are young and have no previous convictions against them.[27] In *Khusali v State of Uttar Pradesh* ,[28] the sentence of five years was considered excessive and it was reduced to three years rigorous imprisonment. In *Harnandan v State* ,[29] with the observation that it is only in cases under s 395, IPC, that a sentence of seven years rigorous imprisonment is generally awarded, the court, to meet the ends of justice, reduced seven years and five years rigorous imprisonment to five years and three years' respectively and five years rigorous imprisonment to five years and three years rigorous imprisonment under ss 399 and 402, IPC, respectively.

The accused appellants residents of different villages armed with lethal arms had gathered at an unearthly hour in a desolate place under a tree with no explanation for3452 their conduct whatsoever much less an acceptable one. The prosecution evidence was cogent and reliable. Accused appellants were convicted under ss 399 and 402, IPC . Sentence of five years imposed was found harsh, was reduced to three years RI.[30]

1 *Brijial Mandal v State of Bihar* 1978 Cr LJ 877, p 878 ; *Madhusudan Sen Gupta v State of West Bengal* AIR 1958 Cal 25, p 28, 1958 Cr LJ 25 .

2 *Madhusudan Sen Gupta v State of West Bengal* AIR 1958 Cal 25, p 28, 1958 Cr LJ 25 ; *Chandrika v State* 1980 Cr LJ (NOC) 21 (All), 1979 All Cr R 179, wherein all seven persons, assembled at a particular place, were arrested, but there was no allegation that besides the said seven persons, some other persons had also collected at the said place, for committing dacoity and the presence of three persons, out of the said seven person, was found doubtful, it was held that none of the accused could be convicted under s 402 or s 399, IPC .

3 *Shive Sharnagat v State* AIR 1953 Bhopal 21, p 22, 1953 Cr LJ 990 .

4 *Brijial Mandal v State of Bihar* 1978 Cr LJ 877, p 879 (Pat) .

5 *Ibid*.

6 *Nathawa v State* AIR 1951 All 452 .

7 *Trays Bhoora Nathu v State of Kutch* AIR 1954 Kutch 1, 1954 Cr LJ 386 .

8 *Brijial Mandal v State of Bihar* 1978 Cr LJ 877, p 879 (Pat) .

9 *State of Haryana v Randhir Singh* 2009 Cr LJ 3717 (P&H) ; *Mahabir v State of Haryana* 2009 Cr LJ (NOC) 881 (P&H) (DB) (*Choltuy Modi v State of Bihar* 1986 Cr LJ 1031 ; *Chaturi Yadav v State of Bihar* AIR 1979 SC 1412, **followed**).

10 *Empress v Bholu* (1901) ILR 23 All 124, 21 AWN 16 .

11 *Than Singh v Rex* AIR 1950 All 93, 51 Cr LJ 399 .

12 *Bhola v Emperor* AIR 1925 All 62, 26 Cr LJ 380 ; *Emperor v Ahmad* AIR 1928 Lah 144, 29 Cr LJ 14 ; *Waryam Singh v Emperor* 27 Cr LJ 605 ; *State v Janardan* 1951 ALJ 466 ; *State of Uttar Pradesh v Randhir Sri Chand* AIR 1959 All 727, p 731, 1959 Cr LJ 1274 .

13 *Birbal B Chouhan v State of Chhattisgarh* (2011) 10 SCC 776, p 778, AIR 2012 SC 911, [2011] 13 SCR 151, 2011 (12) Scale 604, 2011 (8) SLT 471, 2012 Cr LJ 671 .

14 *Rakesh v State of Uttarakhand* 2014 Cr LJ 287, p 289 (Utr) .

15 *Asgar v State of Rajasthan* 2003 Cr LJ 1997 (Raj) .

16 *Rishipal v State* AIR 1962 All 13, p 18, (1962) 1 Cr LJ 3 .

17 *State v Om Prakash* 1960 AWR (HC) 219 ; *Asgar v State of Rajasthan* 2003 Cr LJ 1997 (Raj) .

18 *Brijial Mandal v State of Bihar* 1978 Cr LJ 877 .

19 *James Khalko v State of Orissa* 1975 Cut LT 768 .

20 *Than Singh v Rex* AIR 1950 All 93, 51 Cr LJ 399 ; *Shive Sharnagat v State* AIR 1953 Bhopal 21, 1953 Cr LJ 990 ; *James Khaiko v State of Orissa* 1975 Cut LT 768 .

21 *Shive Sharnagat v State* AIR 1953 Bhopal 21, p 26, 1953 Cr LJ 990 ; *Rishipal v State* AIR 1962 All 13, (1962) 1 Cr LJ 3 .

22 *Bachinta v Emperor* AIR 1916 Lah 380, 17 Cr LJ 97 .

23 *Balwant v State* 1965 AWR 519 ; *State of Uttar Pradesh v Rajju* 1971 Cr LJ 642, AIR 1971 SC 708 .

24 *State of UP v Punni* 2008 Cr LJ 1028, p 1033 (SC), AIR 2008 SC 932, 2008 AIR SCW 376, 2008 (1) All LJ 729, 2008 (1) Scale 43 .

25 *Jasbir v State of Haryana* 2015 (89) AIC 630 (SC) ; **see also***Tanveer Ahmed v State by High Court Grounds Police Station* 2015 (2) Crimes (Kant) (Prosecution evidence full of inconsistencies, no independent witness examined, accused acquitted).

26 *Ravi Rajwar v State of Bihar* 2003 Cr LJ 634 (Jhar) *; Birbal B Chouhan v State of Chhattisgarh* (2011) 10 SCC 776, p 778, AIR 2012 SC 911, [2011] 13 SCR 151, 2011 (12) Scale 604, 2011 (8) SLT 471, 2012 Cr LJ 671 (Looking to the facts and circumstances of the case, sentence of five years was found harsh, was reduced to three years RI).

27 *Vijai Pal v State* AIR 1959 All 559, 1959 Cr LJ 1040 (3 years) ; *Narpat v State* (1961) 1 Cr LJ 591, 1960 ALJ 567 .

28 *Khusali v State of Uttar Pradesh,* 1968 Cr LJ 982 .

29 *Harnandan v State,* 1973 All Cr Cas 398 .

30 *Birbal B Cghouhan v State of Chhattisgarh* 2012 Cr LJ 671, p 672 (SC), (2011) 10 SCC 776 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL MISAPPROPRIATION OF PROPERTY

S. 403.

Dishonest misappropriation of property.--

Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(a) *A* takes property belonging to *Z* out of *Z's* possession, in good faith believing, at the time when he takes it, that the property belongs to himself. *A* is not guilty of theft; but if *A*, after discoverings his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into *Z's* library in *Z's* absence, and takes away a book without *Z's* express consent. Here, if *A* was under the impression that he had *Z's* implied consent to take the book for the purpose of reading it. *A* has not committed theft. But, if *A* afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) *A* and *B* being joint owners of a horse, *A* takes the horse out of *B's* possession, intending to use it. Here, as *A* has a right to use the horse, he does not dishonestly misappropriate it. But, if *A* sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.--A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

A finds a Government promissory note belonging to *Z*, bearing a blank endorsement. *A*, knowing that the note belongs to *Z*, pledges it with a banker as a security for a loan, intending at a future time to restore it to *Z. A* has committed an offence under this section.

Explanation 2.--A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it: it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Illustrations

(a) *A* finds a rupee on the high road, not knowing to whom the rupee belongs. *A* picks up the rupee. Here *A* has not committed the offence defined in this section.3453
(b) *A* finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.
(c) *A* finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. *A* knows that this person can direct him to the person in whose favour the cheque was drawn. *A* appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.
(d) *A* sees *Z* drop his purse with money in it. *A* picks up the purse with the intention of restoring it to *Z*, but afterwards appropriates it to his own use. *A* has committed an offence under this section.
(e) *A* finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to *Z*, and appropriates it to his own use. *A* is guilty of an offence under this section.
(f) *A* finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. *A* is guilty of an offence under this section.

Comments

1. Scope

Section 403, IPC speaks about dishonest misappropriation of property. This section defines criminal misappropriation and prescribed penalty for it. Criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the accused was not previously acquainted, the retaining becomes wrongful and fraudulent. The essence of the offence of criminal misappropriation is that the property of another person comes into the possession of the accused in some neutral manner and is misappropriated or converted to his own use by the accused.[31]

The offence of dishonest misappropriation of property, with which this section deals, is distinguished from the foregoing offences of that, extortion, and robbery by the fact that whereas the taking must be dishonest in those offences, the taking of the3454 property is not necessarily dishonest (and to emphasise the distinction it may, therefore, be termed an innocent taking) under this section, but an innocent taking is followed by a dishonest misappropriation or conversion of the property thereby obtained. It may be that a person takes possession of a thing because it has been delivered into his possession by the former possessor under some relation of trust or confidence, existing between the parties, as to the thing in question, as where a man hands over his property to an agent, bailor or carrier for some specific purpose. In such a case, a subsequent dishonest misappropriation is termed 'criminal breach of trust', an offence which falls under ss 405 to 409, IPC . Therefore, the original taking, in offences falling under this section, is the taking possession of a thing by someone otherwise than in consequence of a delivery of possession thereof in pursuance of a fiduciary relation between a former possessor and himself. The three illustrations to the main section illustrate such an innocent taking:

(i) In illust (a) [illust (p) to s 378, IPC], the taking is not dishonest because it is under a *bonafide*, though mistaken, claim of right.
(ii) In illust (b) [illust (m) to s 378, IPC], the taking is dishonest because he intends to take the book with the implied consent of Z.
(iii) In illust (c), A takes the horse in the exercise of a valid claim of right, as owner to its use.

The English law on this point is different. A dishonest misappropriation, following an innocent taking, is not criminal (though it is a civil injury for which a civil action lies) unless it has been expressly declared an offence by some statute law. Therefore, many acts of criminal misappropriation, which are punishable under IPC, are not punishable under the English Law. In India, if a change of intention occurs, *i.e.*, intention becomes dishonest from honest, the offence of criminal misappropriation is committed.[32] In *Emperor v Anant Narayan* ,[33] the accused misappropriated a certain sum of money and, in order to conceal the misappropriation, also falsified the accounts. It was held that the offence of falsification of accounts was included in the offence of criminal misappropriation and the entire transaction should be considered as an offence of criminal misappropriation. The agent, including a commercial agent, who has been entrusted with the goods for the purpose of sale, may be guilty of dishonest conversion if, under the terms of entrustment, he is bound to hand over the sale proceeds to his constituent after deducting his commission.[34] However, a person cannot be convicted of misappropriation if his agent commits an offence of misappropriation.[35]

Section 403, IPC is in no way restricted to appropriating property to one's own use.[36] If a person sets apart an article for the use of another person, of which article he is a trustee of the complainant, he misappropriates it even though he has not put it to his own use,[37] because setting apart by one person for the use of some other person, other than himself and the true owner, is misappropriation.[38] The offence of3455 dishonest misappropriation may be committed by a person in respect of the property possessed by a deceased person at the time of his death by dishonestly appropriating the money entrusted to him although the accused does not bring such money to his own use.[39]

When the accused gets into possession of property on the basis of a certificate of heirship, there can be no case of dishonest misappropriation of property within the meaning of this section.[40] Likewise, an offence of criminal misappropriation falling under this section, is not made out in the case of property of a partnership firm, exclusively possessed by one of the partners, because, until dissolution, the property, which is appropriated by one of the partners, cannot be said to be another's property.[41] A partner has undefined ownership along with other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes, he may be accountable civilly to the other partners, but he does not thereby commit any misappropriation.[42] Where, however, a partner takes money from the partnership and utilises it for his own purpose, but enters in the accounts of the firm that it was drawn and utilised for the purpose of the partnership, he is liable to prosecution for criminal misappropriation of partnership property.[43]

A charge for dishonest misappropriation cannot lie against a managing member of a joint Hindu family until accounts have been taken and shares allotted. He may be liable to a charge of misappropriation if misappropriation takes place after a division of property.[44] If such property is in the sole possession of the father and is sold, there is no dishonest misappropriation.[45]

2. Object

The framers of IPC framed this section to keep 'dishonest misappropriation of property' distinguished from 'theft'. They observed: 'If we call it theft, we speak the popular language; if we call it misappropriation of property not in possession, we avoid an anomaly and maintain a line which in the great majority of cases is reasonable and expedient. On the whole, we are inclined to maintain this line'.

3. Essence of the Offence

The essence of an offence under this section is that the property of another person comes into the possession of the accused in some neutral manner and is misappropriated or converted to his own use, by the accused. No entrustment is required for this offence to be constituted unlike the offence defined in s 405 .[46] In other words, it must first be shown that the property, which did not belong to the accused, came in his possession and it was subsequently misappropriated by the accused.[47] Where, however, a person, in a crowded gathering, picks up from the3456 floor, a purse, containing articles of appreciable value, from the club, takes no action to discover its owner and is arrested a short while after, he is not guilty either under s 379, or of criminal misappropriation, as these circumstances alone cannot establish that the person intended to appropriate or convert the property to his own use.[48]

4. Ingredients

If s 403, IPC is analysed, it is gathered that it has following ingredients which reads thus :

(i) The property must belong to a person other than accused;
(ii) the accused must have misappropriated property or converted it to his own use; and
(iii) there must be dishonest intention on the part of the accused.[49]

5. Criminal Misappropriation Distinguished from Theft

In cases of theft, mere removal of property from the possession of a person with dishonest intention is enough, while under s 403 there must be further misappropriation or conversion.[50] Where property, lost by the owner, is found in the possession of the accused, the offence committed is not theft, but criminal misappropriation, as the property is not taken away from the possession of the owner.[51] However, the taking of cattle, turned out to graze in the pasture or jungle, is theft, and not criminal misappropriation, because they are still in the possession of the owner unless the contrary is shown.[52]

6. Criminal Breach of Trust Distinguished from Cheating, Theft and Criminal Misappropriation

Commentary under the same heading in s 405, *post*, may be referred to.

7. Criminal Misappropriation Distinguished from Criminal Breach of Trust

Entrustment is an essential element of the offence of criminal breach of trust and the essence of the offence of criminal misappropriation is that the property of another person comes into the possession of the accused in some neutral manner and is misappropriated, or converted to his own use, by the accused.

No entrustment is required for this offence.[53] Similarly, dishonest conversion of property, over which a person gets dominion otherwise than by entrustment, constitutes criminal misappropriation, and not criminal breach of trust.[54]

8. Criminal Misappropriation Distinguished from Cheating

In order to constitute the offence of cheating, it is necessary that the intention to deceive and thereby dishonestly obtain delivery of the property should exist at the3457 time when such delivery is sought. If no such intention exists at that time and possession is obtained innocently, the offence will in the absence of fiduciary relations between the parties, be one of criminal misappropriation.[55] Where money is paid to a person by mistake and such person, either at the time of the receipt of money or at any time subsequently before its refund, discovers the mistake and determines to appropriate the money, he is guilty of criminal misappropriation, but not of cheating.[56] The distinction would turn upon the fraudulent or dishonest inducement which is the essence of cheating. In a case, where a person is induced for delivery of certain goods and the goods taken thereafter are converted by the accused for his own use or misappropriated, the offence would be one of cheating rather than of misappropriation.[57] However, in *Rajendra v State of Uttar Pradesh* ,[58] it was held that it cannot be said that criminal misappropriation cannot be committed if the accused has dishonest intention at the time of taking possession of the article in question. If the prosecution proves a case of s 403, IPC, the accused, by proving that he had a dishonest intention at the time of taking delivery of the article, cannot change the nature of the offence of criminal misappropriation into that of cheating.

9. 'Dishonestly'[59]

The chief element for conviction under s 403 is the dishonest misappropriation of property or conversion to one's own use.[60] Therefore, in order to constitute an offence under s 403, IPC, there must be a wrongful gain to the person who commits the offence or there must be wrongful loss to another person. Thrust of the provision is to gain/loss. So long as the case property has not been recovered from the accused, it cannot be said that, he had an intention of causing wrongful gain by taking the said property particularly when no witness has taken the case property.[61]

Where there is merely an intention to deprive the owner temporarily of the use of property, dishonesty is not made out.[62] It means that mere retention of money, short of evidence of dishonesty, does not amount to an offence under this section.[63] Mere delay in payment of money, entrusted to a person, where there is no particular obligation to pay it at a certain date, does not amount to, and does not furnish by itself, a sufficient proof of misappropriation.[64] Where the accused found two logs of3458 wood drifting in a river and took possession of them and the logs were left by him in front of his house unused and exposed for several months, it was held that there was no dishonest intention.[65] Unless dishonest intention on the part of the accused is established, it cannot be assumed that his intention was dishonest.[66] A criminal complaint cannot, however, be thrown out merely because a remedy to recover the amount through the civil court is open.[67]

It is not necessary that the wrongful loss or gain should have actually accrued before completion of the offence of criminal misappropriation. All that is required is that there should be an intention of causing such gain or loss which would amount to dishonesty.[68]Loss to one person, though a normal result of an act of misappropriation by another, is not an ingredient of the offence of criminal misappropriation. The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender, irrespective of any loss which may ensue to any other person.[69]

10. 'Misappropriates'

'To misappropriate' means 'improperly setting apart for one's use to the exclusion of the owner'.[70] Where a woman handed over a ticket to the accused in order that he might tell her whether it was right, and the accused pretending to return it, substituted therefore his own ticket and kept her ticket for a longer distance, it was held that there was criminal misappropriation.[71] Where the accused, who were brothers

obtained a necklace from a goldsmith on the false representation that their mother (who had already died) wanted it for getting the design copied for the wife of one of them on the promise of returning it in the evening but did not do so, it was held that it having been proved that the accused had obtained delivery of the necklace and dishonestly misappropriated it, they were guilty under s 403 .[72] Where the judgment-debtor, whose standing crops were attached, harvested them, while attachment was in force and was convicted of theft, it was held that the accused was guilty of the offence under s 424, and also of criminal misappropriation under s 403 .[73] Actual manner of misappropriation need not be proved.[74]

Where an employee withdrew the amount deposited by him as security during his appointment, without the permission of the employer and before adjustment of the amounts between the employer and the employee, it was held that it amounted to criminal misappropriation.[75] Where a servant retained, in his hands, money which he3459 was authorised to collect and which he did collect from the debtors of his master, because money was due to him as wages, he was held guilty of criminal misappropriation.[76]

11. No Misappropriation by Joint Owners or Partners

Since no joint owner can commit misappropriation in respect of the property which he holds jointly with other co-owners, likewise no partner can commit misappropriation of partnership property belonging to him and his other partners. So the offence under s 403 is also not made out.[77]

12. 'Converts to his Own Use'

This expression means the appropriation and dealing with the property of another without right as if it were one's own property.[78] The essence of conversion is that the property in question is converted to the use and benefit of someone else other than the person who is entitled thereto, the thing being thereby wrongfully appropriated, *i.e.*, misappropriated. Where railway receipts were made over to the accused for taking delivery of goods and the railway authorities delivered the goods to him, the mere intention to misappropriate in holding the goods would not amount to misappropriation or conversion.[79] In the absence of any overt act on the part of the accused, no inference of dishonest motives can be imputed to him simply because he has retained certain documents in his custody.[80] Where, however, two notes were stolen, from *A*, by *B* (not a *bonafide* holder for valuable consideration), tendered them in payment for certain articles, purchased by him from *C*, who not knowing *B*, refused to accept them, whereupon *B* brought *D*, who was known to *C*, and the purchase was made by him, it was held that *D* thereby converted the notes to his own use.[81]

13. 'Any Moveable Property'[82]

The offence under this section consists in the dishonest misappropriation of conversion of movable property and therefore, before a conviction can be recorded, it must be proved that the article for which the charge is made was movable property.[83] What is not property at all cannot be the subject of criminal misappropriation. It is doubtful if a document, which has become valueless, can be said to be a movable property at all in the sense of this section.[84]

The property must be in the ownership of another person. Ownerless property, which does not belong to any one, for example, animals *ferae naturae*, cannot be the subject of criminal misappropriation. Similarly, abandoned property cannot be the subject of criminal misappropriation.3460

14. Explanation 1

According to this explanation, a dishonest misappropriation for a time only is 'misappropriation' within the meaning of this section. Accordingly, it is no answer to a charge of criminal misappropriation that the money, after the matter was reported to higher authorities, was subsequently disbursed for the purpose for which it was entrusted.[85] However, even to constitute temporary misappropriation, it must be shown that the accused retained the amount or converted it to his use dishonestly.[86] Retaining of the articles by the accused for some time does not mean that he has misappropriated them or converted them to his own

use.[87] Dishonesty can, however, be inferred from false accounting, absence of *bonafide* or reasonable explanation for non-accounting.[88] Where the accused, an income tax clerk, who was under a duty to receive moneys, paid by assessees, and to enter such receipts in the remittance book and pay the moneys into the treasury immediately, retained two sums for several months without entering them into the book and paid up the money when he knew that the detection was inevitable, it was held that he was guilty under this section.[89] Where a court *amin* collects a large sum of money and does not pay it into court until five months have lapsed, it is a fair presumption that he has misappropriated the amount unless he can explain his action.[90] However, this presumption may be negatived by evidence to the effect that the delay was caused by forgetfulness or that it was acquiesced in by the person to whom the money was due.[91] Temporary retention is, however, not necessarily misappropriation. The fact that the accused found a thing and merely retained it in his possession without conversion to his own use, would not amount to criminal misappropriation.[92]

15. Explanation 2

This explanation clarifies as to what extent a person, who finds property, not in possession of any other person, and takes such property, can be considered to be liable under this section. It makes it clear that:

(a) there will be no offence if:

(i) a person takes the property for the purpose of protecting it, or for the purpose of restoring it to the owner, and
(ii) does not take or misappropriate it dishonestly; but

(b) there will be an offence under this section if a person appropriates the property to his own use:

(i) when he knows, or has means of discovering, the owner, or
(ii) before the has used reasonable means to discover, and gives notice to, the owner and has kept the property for a reasonable time to enable the owner to claim it.3461

Thus, where the accused finding a gold *mohur* in an open plain, sold it the next day to a *saraf* for the full value and appropriated the sale-proceeds, it was held that no offence under this section was committed. It was observed that it might have been different if the *mohur* had been found on a thorough-fare in which case the finder would naturally believe that the property has been recently lost and the owner would be discoverable.[1] In *Mahadev Govind Nagarkar v Emperor* ,[2] the accused found a spanner lying on a public road. He tried to sell it. It was held that the accused was not guilty of the offence under this section because it was not such a case where the accused could be said to have reasonable means of discovering, and giving notice to the owner of the spanner of having found it. Where a sub-inspector of police, who found a *lawaris* bullock, sold it after keeping it for twenty days when no owner turned up even after he advertised it, it was held that he was not guilty.[3] In *Sirajul Haque v Emperor* ,[4] it was observed that a person finding a property, is not bound to adopt extraordinary means for the discovery, nor is he bound to discover the owner by means of advertisement. Thus, a person, who takes possession of cattle found wandering in the village, cannot be convicted under this section.[5]

With respect to the question as to when the appropriation of the stray cattle can be the subject of a charge under this section, it may be stated that when any stray animal is found and is taken into possession by the finder thereof, he may, in the first instance, do it with no criminal intent. If afterwards, he changes his intention and converts the animal to his own use, he commits an offence under this section. The finder of an article should take some steps in order to ascertain who the true owner is. If, after he has taken such steps, the true owner is not discovered, then, under certain circumstances, the finder may retain the article

and, in such a case, he would not be held guilty of criminal misappropriation. However, if he acts with reference to the article found in such a way that the true owner may never discover that it had been picked up by him, then he undoubtedly attempts to create a situation where the conversion of the article to his own use would be easy. In such a case, the conduct of the finder is criminal conduct and he would come within the ambit of s 403 .[6] Where the finder of a missing bullock not only tried to sell it knowing it fully well that it did not belong to him and without making an enquiry as to who the real owner was, but also set up his title to the bullock, it was held that he was guilty under this section.[7]

16. Constructive Liability

When there is nothing on record to indicate that in the action of misappropriation of property by the accused, the co-accused persons had also joined or that they had shared the intention with which the accused had taken away the watch and the cash of the victim, the accused having done the said acts beyond any intention of the others, he alone would be liable for that extra act under s 403 and not the other three accused persons who had not shared any common intention of criminal misappropriation and so were found entitled to an acquittal under s 403 read with s 34, IPC .[8]3462

17. Procedure

The offence under this section is non-cognizable, bailable, compoundable, by the owner of the property misappropriated, with the permission of the court before which such prosecution is pending, and triable by a magistrate, and may be tried summarily.

It is open to the magistrate, if he holds some doubt, to hold an enquiry under s 202, CrPC 1973, before summoning the accused, to find out whether a *primafacie* case is made out.[9] Where it is alleged that the complainant lent a jewel to the accused, who dishonestly retained it and converted it to his own use, *primafacie* an offence under s 403 or s 406, IPC is made out and it must be gone into and tried.[10]

18. Jurisdiction

The offence under this section, being dependent upon the act, which has been done, and not upon the consequence which has ensued, can be tried in the court within the local limits of whose jurisdiction it has been committed. Section 179 of the Code of Criminal Procedure 1973, does not, in terms, apply to the offence under this section.[11]

19. Quashing of Complaint

Commentary under the headings in s 406, *post*, may be referred to.

20. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case. Section 251 , CrPC may be referred to.

21. Proof

To establish a charge under this section, the prosecution must prove[12] that:

(a) the property in question was the property of the complainant;
(b) the accused misappropriated, or converted to his own use, that moveable property (even though for a time); and
(c) he did so dishonestly.

Dishonesty may be proved by evidence or may be provided from reasonable circumstances; but it can never be assumed as a matter of course.[13] Not only the prosecution has to prove that the accused received money and has not accounted for it, but has also to prove that he converted it to his own use. Proof of receipt and failure to account is naturally a long way towards the proof of misappropriation.[14] Where there is no finding that the accused had misappropriated or converted the properties in question to his own use, the conviction of the accused merely on the ground, that he had the intention of doing go, is bad in law. To have an intention of3463 doing a wrong and to do a wrong are two different things.[15] Where some bales of cloth, which were in the custody of the railways, were later recovered from the godown of the accused, but a charge under s 411, IPC was not established, it was held that the accused could not be convicted under s 403, IPC, there being no proof of misappropriation or conversion or any evidence of dishonest intention.[16] If, however, the evidence is sufficient to establish that some property, such as money, mentioned in the charge, has been misappropriated, it cannot be said that because the exact amount is not specified, the accused cannot be convicted.[17] Similarly, the mere fact that the complainant had agreed to give time to the accused to pay, is not sufficient to hold that there was no misappropriation.[18] If it is fully proved that soon after the death of the owner of goats, they were found in possession of the accused who also sold them, he can be held guilty under s 403, IPC .[19]

22. Conviction

An accused charged under s 379, IPC, can be convicted under this section if the facts alleged and proved constitute the offence.[20] Similarly, a conviction under this section may be made where the charge is under s 395,[21] or under s 406,[22], or under s 408,[23] or under s 409,[24] or under s 411,[25] or under s 414, IPC .[26]

23. Alteration of Conviction from Section 406 to Section 403

Commentary under the same heading in s 406, *post*, may be referred to.

24. Alteration of Conviction from Section 408 to Section 403

Commentary under the same heading in s 408, *post*, may be referred to.

25. Alteration of Conviction from Section 409 to Section 403

Commentary under the same heading in s 409, *post*, may be referred to.

26. Sentence

A sentence of fifteen months with fine for attempting to commit misappropriation was considered to be severe and was reduced to six months rigorous imprisonment.[27]3464 Where the accused, 25 years of age, misappropriated cattle, it was held that the offence was not a minor one and the sentence of one year was justified.[28]

31 *Mohammed Ali v State of Madhya Pradesh* 2006 Cr LJ 1368 (MP) .

32 *Surendra Bahadur Singh v State* 1955 AL 397 ; *Ministerio Pubico v Filomeno Joaquim* AIR 1967 Goa 51, p 60 (FB), 1967 Cr LJ 473 .

33 *Emperor v Anant Narayan* 1 Cr LJ 105 ; *Empress v Karim Bux* 3 NWP 30 .

34 *Sitaram Nandram v Jasubhai Raghubhai Jani* 1997 Guj LR 808, p 810, 1997 Cr LR (Guj) 47 ; *Empress v Karim Bux* 3 NWP 30 .

35 *Chimanlal Hargovanda v State* 8 Guj LR 552 .

36 See *RK Dalmia v Delhi Administration* AIR 1962 SC 1821 .

37 *Indar Singh v Emperor* AIR 1926 All 302, 27 Cr LJ 297 .

38 *Ram Dayal v Emperor* 24 PR 1886 .

39 Re *Enayet Hossein* 11 WR (Cr) 1.

40 *Mir Barkat Khan Bahadur v Syed Shujauddin* 1973 Cr LJ 1230, (1973) 1 AP LJ 205 .

41 *GS Rajakumar v Subramaniam Poti* 1979 Cr LJ 738, p 740 (Ker) .

42 *Veiji Raghavji Patel v State of Maharashtra* AIR 1965 SC 1433, p 1455-56, (1965) 2 Cr LJ 431 ; *Jethabhai Nanjibhai v Bipinchandra Parshottam* AIR 1968 Guj 183, 1968 Cr LJ 1074 (1) .

43 *A Ambalal Patel v Jethahhai Patel* 1967 MLJ (Cr) 797, 1967 Ker LT 802 .

44 1 Weir 453.

45 *Kalluri Rathiah v Ravipati Seetharamayya* (1961) 2 Cr LJ 453 (455) .

46 *State of Madhya Pradesh v Pramode Mategaonkar* (1965) 2 Cr LJ 562, 1964 MPLJ 750 .

47 *Balwantrao Anandrao Raut v Malharrao Rajam Desai* 1979 Bom Cr R 20 (21) ; *Bhagiram Dome v Abar Dome* 15 Cal 388, p 400-401 ; *Mahabir Prasad Garodia v State of Assam* AIR 1961 Assam 132, (1961) 2 Cr LJ 457 .

48 *Phuman v Emperor* 8 Cr LJ 250 .

49 *Mohammed Ali v State of Madhya Pradesh* 2006 Cr LJ 1368 (MP) .

50 *Nathulal v State* AIR 1953 Pat 100, p 103, 54 Cr LJ 842 .

51 *Nga Shwe Le v Emperor* 1 LBR 123 ; *Nga Shwe Zan v Emperor* 1917 LB 15, 18 Cr LJ 300(1) .

52 *Adhargir Chhotegir Gosal v State* AIR 1954 Nag 55, 55 Cr LJ 280 . For further commentary, see under the same heading in s 378, *ante*.

53 *State of Madhya Pradesh v Pramode Mategaonkar* (1965) 2 Cr LJ 562, 1964 MPLJ 750 .

54 *Atluri Sitaramdoss v State* (1975) 1 An Pra LJ 119 .

55 *Subbegowda v Majamma Heggadathe* 9 Cr LJ 312 .

56 *Empress v Shamsoondur* 2 NVVP 475 ; *State v Abu Ismail* AIR 1959 Bom 408, p 410, 1959 Cr LJ 1057 .

57 *Udho Rum v State* 1977 All Cr C 248, p 251 .

58 *Rajendra v State of Uttar Pradesh* AIR 1960 All 387, 394, 1960 Cr LJ 857 .

59 Refer synopsis notes under s 24, IPC .

60 *Ram Bayas v Emperor* 19 Cr LJ 943 .

61 *State of Maharashtra v Mohan Radhakrishan Pednekar* 1998 Cr LJ 3771 (Bom) (DB) .

62 *Jhandu v Emperor* 27 PR 1886 (Cr) .

63 *Sri Achutananda Dash v State of Orissa* (1978) 45 Cut LT 511 ; Re *C Raghava Menon*AIR 1941 Mad 250 . 42 Cr LJ 296(1); *Empress v Boystum Moochee* 17 WR (Cr) 11 (refusal to pay for hides taken from the complainant); *Tarumal Ghandumal v Ismail Haji Saleh* AIR 1939 Sind 48, 40 Cr LJ 278 (sale of potatoes, by the grower, to another person in breach of agreement between him and a commission agent of potatoes who advanced money to secure sale of himself); *Nazir Khan v Fyaz Hussain* 24 Cr LJ 348, AIR 1922 Cal 57 (refusal to return presents); *Empress v Parsotam Das* 1881 AWN 80 (failure of the mortgagor to comply with the provisions of the mortgage-deed does not necessarily amount to criminal liability); 6 CWN 34 (no criminal misappropriation in the absence of a finding of dishonest misappropriation); *Nripendra Nath Das v Emperor* AIR 1928 Cal 321, 29 Cr LJ 641 (breach of contract by the accused in payment of grass rent realised by him); *Emperor v Girji* 1 Cr LJ 1109, p 1110 (false denial of loan) .

64 *Munusami Nainar v Emperor* AIR 1930 Mad 507, p 508, 31 Cr LJ 1198(2) ; *Lala Raoji Mahale v Emperor* AIR 1928 Bom 205, 29 Cr LJ 922 .

65 Re *Murugan* 1 Weir 455 (1).

66 *Emperor v Mahammada* 3 Cr LJ 299 ; *N Dwarka Doss v Narasimhalu* AIR 1923 Mad 364 ; *Ramaswamy Nadar v State of Madras* AIR 1958 SC 56, 1958 Cr LJ 228 ; *Nagendra Nath v Emperor* AIR 1934 Cal 454, 35 Cr LJ 886 .

67 *Wahid Ali v Eshwaraiah* (1957) 1 Andh WR 242, 1957 MLJ 235 (Cr) ; *Indar Singh v Emperor* AIR 1926 All 302, 27 Cr LJ 297 .

68 *Kashiram Mehta v Emperor* AIR 1934 All 499, p 502 (FB), 35 Cr LJ 982 .

69 *Ahmad Ebrahim v Ganny* AIR 1923 Rang 209, 24 Cr LJ 746 .

70 *P Durugappa v State of Mysore* AIR 1956 Mysore 40, 1956 Cr LJ 630 ; *Ram Dayal v Emperor* 24 PR 1886 ; *Sohan Lal v Emperor* AIR 1915 All 380, p 381, 16 Cr LJ 795 ; *Rex v Krishnan* AIR 1940 Mad 329, 41 Cr LJ 824 .

71 *Emperor v Raza Husain* 2 Cr LJ 94 .

72 *Rajendra Singh v State of Uttar Pradesh* AIR 1960 All 387, 1960 Cr LJ 857 .

73 *Empress v Obayya* (1899) ILR 22 Mad 151 .

74 *Cardamom County Parks & Hotels (P) Ltd v Ansari* 2012 (2) KLJ 109 (Ker) .

75 *Surendra Nath Basu v Emperor* AIR 1938 Cal 451, 39 Cr LJ 691 .

76 *Empress v Bissessur Roy* 11 WR (Cr) 51 ; Re *Marudayya*AIR 1957 Mad 722, 1957 Cr LJ 1284 (2) .

77 *Ira Juneja v State* 2004 Cr LJ 3664 (Del) .

78 *P Durugappa v State of Mysore* AIR 1956 Mysore 40, 1956 Cr LJ 630 ; *Ram Dayal v Emperor* 24 PR 1886 .

79 *Nathulal v State* AIR 1953 Pat 100, p 102, 1953 Cr LJ 842 .

80 *Ram Byas v Emperor* AIR 1918 Pat 489, 19 Cr LJ 943 .

81 *Kissory Mohun v Raj Narain Sen* 1 Hyd 263 .

82 Refer synopsis notes under s 378 .

83 *Empress v Sita* 18 Bom 212, 214 .

84 *Empress v Abdool* 10 WR (Cr) 23A; *Ashbey Clarke v Emperor* AIR 1918 All 353, 19 Cr LJ 174 .

85 *Khandu Sonu Dhobi v State of Mararashtra* AIR 1972 SC 958, 1972 Cr LJ 593 .

86 *Mahananda Bhaduri v SE Railway* 1974 Lah 1C 1054, pp 1055-56.

87 *State v Rawatsingh* AIR 1957 Raj 26, 1957 Cr LJ 103 .

88 Re *Venkatasubbayya*AIR 1956 Mad 452, p 454, 1956 Cr LJ 1079 .

89 *Empress v Rama Krishna* 1 Weir 457, (1889) ILR 12 Mad 49 ; *Lila Dhar v State of Himachal Pradesh* AIR 1959 HP 14, 1959 Cr LJ 973 .

90 Re *Dewasikhamani Asari*AIR 1926 Mad 727, p 728, 27 Cr LJ 863 ; *Sughar Singh v State of Uttar Pradesh* 1977 UP Cr Cas (All) 13, p 14-15 ; Re *Madduri Krishnamma* 1 Weir 455 (2); Re *Venkatasubbayya*AIR 1956 Mad 452, 1956 Cr LJ 1079 .

91 Re *Venkatasubbayya*AIR 1956 Mad 452, 1956 Cr LJ 1079 .

92 *Empress v Abdool* 10 WR (Cr) 23-A.

1 *Empress v Sita* 18 Bom 212, p 214 .

2 *Mahadev Govind Nagarkar v Emperor,* AIR 1930 Bom 176, 31 Cr LJ 926 .

3 *Amir Hasan Khan v Emperor* AIR 1926 All 251, 27 Cr LJ 5 .

4 *Sirajul Haque v Emperor* 23 Cr LJ 401 .

5 *Sirajul Haque v Emperor* 23 Cr LJ 401 .

6 *Ram Bharosy v State* AIR 1952 All 481, p 484, 1952 Cr LJ 904 .

7 *Phul Chand Dube v Emperor* AIR 1929 All 917, 30 Cr LJ 1133 ; *Emperor v Sarju Mallah* AIR 1919 All 302(1), 20 Cr LJ 218 ; *Sahadat Ali Jotdar v State* AIR 1957 Assam 35, 1959 Cr LJ 349 .

8 *Raghuraj Singh v State of Uttar Pradesh* 1999 Cr LJ 3759 (All) (DB) .

9 *Gowkarant Lal v Sarju Saw* 21 Cr LJ 519 .

10 *Ginni Devi v Ratni Devi* 1951 ALJ 631 .

11 *K Simhachalam v Rati Kanta Laha* 18 Cr LJ 76 (Cal) ; *Ahmad Ibrahim v AA Ganny* AIR 1923 Rang 209, 24 Cr LJ 746 .

12 *Ramaswamy Nadar v State of Madras* AIR 1958 SC 56, p 60, 1958 Cr LJ 228 .

13 *P Durugappa v State of Mysore* AIR 1956 Mysore 40, 1956 Cr LJ 630 .

14 *Ghulam Haider v Emperor* AIR 1938 Lah 634, p 635, 39 Cr LJ 851 .

15 *Maisin Faqir v State of Assam* (1961) 1 Cr LJ 624 (Assam) .

16 *Mahahir Prashad v State of Assam* AIR 1961 Assam 132, (1961) 2 Cr LJ 457 ; *Chhotey Singh v State* 1955 NUC (All) 3530 ; *Ramaya v Crown* 1 Cr LJ 908 ; AIR 1938 Mad 172 ; *Shaikh Usman Ganj Shaikh Ahmad v State of Maharashtra* 1977 Cr LR (Mah) 212 (benefit of doubt be given to the accused if facts necessary to prove ingredients of s 403 are not established beyond reasonable doubt).

17 *Emperor v Byrnmju Jamsetji Chaewall* AIR 1928 Bom 148, 29 Cr LJ W.

18 *Nanhi Bahu v Dhunder* 10 Cr LJ 417 .

19 *Radhey Shyam v State* 1979 Cr LR (Raj) 703 .

20 *Khalle Fodalia v Harnarayan Sunderlal* AIR 1958 MP 1, 1958 Cr LJ 40 .

21 *Haroon v Emperor* AIR 1929 Sind 147, 30 Cr LJ 875 .

22 *Rajendra Singh v State of Uttar Pradesh* AIR 1960 All. 387, p 392, 1960 Cr LJ 857 ; *Narayana Naicken v Tahsildar* 7 Cr LJ 215 .

23 Re *Marudayya*AIR 1957 Mad 722, 1957 Cr LJ 1284 (2) .

24 *State of Madhya Pradesh v Pramode Mategaonkar* (1965) 2 Cr LJ 562, 1964 MPLJ 750 .

25 *Sahadat Ali Jotdar v State* AIR 1957 Assam 35, 1957 Cr LJ 349 .

26 *Sewa Dass v State* 1955 NUC (All) 1995 .

27 *Babu Saleh v Emperor* AIR 1933 Sind 139, 34 Cr LJ 802 .

28 *Ram Bharosey v State* AIR 1952 All 481, p 486, 55 Cr LJ 904 ; *Sidh Nath Awasthee v Emperor* AIR 1929 Cal 457 ; *Ram Pratap v State* 1961 Raj LW 119 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL MISAPPROPRIATION OF PROPERTY

S. 404.

Dishonest misappropriation of property possessed by deceased person at the time of his death.--

Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment

of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant *A*, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. *A* has committed the offence defined in this section.

Comments

1. Scope

The preceding s 403, IPC deals with criminal misappropriation in general. This section deals with an aggravated form of that offence. It specially provides for protection to the property of a deceased person and the offence is punishable with three years' imprisonment as against a punishment of two years under s 403, IPC . The punishment is made much higher in the case of criminal misappropriation by a clerk or a servant and it may be up to seven years. A person may commit the offence of dishonest misappropriation of money, possessed by a deceased person at the time of his death, although he does not bring such money to his own use.[29] Removal of ornaments from a dead body, a dead body not being a person, amounts to dishonest misappropriation of the property possessed by the deceased and falls within the ambit of this section.[30] Where, however, murder and robbery are committed in the course of the same transaction by the same person, the offence would fall under s 392, IPC, and not under this section.[31]

Under this section, all the elements, required to constitute the offence of criminal misappropriation in respect of the property of a living person, are necessary.[32]3465

2. Object

The object behind this section is to afford protection to property which, by reason of its being peculiarly placed, needs protection where the person, who could look after it, is dead and the person, who expected and is entitled to look after it, has not appeared on the scene, there being a change available to strangers to dishonestly misappropriate and convert the same to their own use. Under such circumstances, if such strangers are allowed to do so, the subsequent owner may lose that property entirely.[33] Where a certain bridge over a river gave way, causing death of several persons, and a wrist watch, a gold ring and cash, taken from one of the dead bodies by a *Mullah* of the river, were soon after taken by the accused, a police constable, by use of violence and he handed over the articles only after arrival of a search party and, prior to that, there was no entry to that effect in the general diary, it was held that the accused was rightly convicted under ss 394 and 404, IPC .[34] In Re *Karri Mangadu,*[35] it was observed that though this section was intended to punish servants and strangers, who can possibly have no right or interest in the effects of a dead man and misappropriate such effects, yet it was not intended to punish near relatives who take possession of and deal with, the deceased's effects under the claim of an independent ownership or claim to succeed as heir to the deceased. Thus, where the mother of the deceased took possession of his movables and discharged one of the debtors of her son from his obligation and there was dispute with a daughter-in-law as to who was entitled to the assets, it was held that the mother could not be convicted under this section.[36] Where the accused persons were the sons of the deceased, and not strangers or outsiders, and the question of their legitimacy had not been decided, it was held that when they took the plea that they acted in good faith, such plea could not be lightly brushed aside.[37]

3. 'Dishonestly'

Commentary under the same heading in s 403, *ante*, may be referred to.

4. 'Misappropriates'

Commentary under the same heading in s 403, *ante*, may be referred to.

Where the appellant accused misused the ATM card of the deceased taken out from the belongings of the deceased, the picture of the appellant in close circuit was identified by the PWS as that of the appellant, he had withdrawn Rs 20,000/- from the account of the deceased, he was convicted under s 404, IPC .[38]

5. 'Converts to his Own Use'

Commentary under the same heading in s 403, *ante*, may be referred to.

6. 'Property'

According to the High Courts of Bombay, Calcutta and Madhya Pradesh, the word 'property', used in this section, means only 'movable property', and not 'immovable3466 property'.[39] However, according to the Allahabad High Court, the section contains no such express limitation.[40]

7. 'Person Legally Entitled to such Possession'

Though a person may not have title to the property in the sense of title to the ownership of the property, yet he may be legally entitled to possession thereof. Thus, where a curator is appointed by the district judge under s 196 of the Indian Succession Act 1925, and he, being authorised to take possession of the property, takes possession thereof, he is legally entitled to possession.[41]

8. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

The offence under this section being not compoundable, the court cannot permit the withdrawal of the prosecution on a compromise made with the accused.[42]

9. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate,etc*.) hereby charge you (*name of accused person*) as follows:
>
> That, on or about theday of, at, you dishonestly misappropriated (*or converted to your own use*) property, to wit (*specify the property*), knowing that such property was in the possession of AB deceased at the time of his death and had not since been in possession of any person, legally entitled to such possession, and that you thereby committed an offence, punishable under s 404 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

Note: In the case of criminal misappropriation by a clerk or servant, employed by the deceased at the time of his death, words to that effect may be added in the charge.

No specific mention of any property in the charge is a fatal defect.[43]

10. Proof

To secure a conviction under this section, the prosecution must prove that:

(a) the property in question was in the possession of the deceased person at the time of his death;3467
(b) such property had not passed to the possession of any person, highly entitled to its possession;
(c) the accused had knowledge of the said facts; and
(d) he dishonestly misappropriated, or dishonestly converted to his own use, the said property.

In the absence of proof of any of the said four requirements, the charge under this section must fail.[44] When the prosecution has failed to prove facts and circumstances to establish charge under ss 404 and 201, IPC, against one accused and that under s 404 against another accused, the order of conviction and sentence passed by the courts below was set aside by the Supreme Court.[45] The prosecution has to establish the knowledge on the part of the accused that the property in question was in possession of the deceased person at the time of his death and had not since been in the possession of any person legally entitled to such possession. Without establishing this fact, the prosecution would not be entitled to claim conviction. The mere recovery of the ornaments, belonging to the deceased and last worn by that person, would not be sufficient.[46] However, the Division Bench of the Madhya Pradesh High Court observed that when after the recovery of gold and silver articles at the instance of the accused which have been identified as that of the deceased and the accused had not claimed these ornaments to be his own, the accused would be liable under s 404, IPC .[47]

When the accused misappropriated the jewellery of his deceased mother by removing the same from her person after murdering her, the conviction of the accused under ss 302 and 404, IPC, was found proper.[48]

11. Acquittal

The case of the prosecution was that immediately after committing the offence of murder, the accused took the cycle of the deceased and kept it in the house of a prosecution witness saying that he would collect the cycle again. But the accused had never stated that the cycle belonged to the deceased, nor the cycle was identified as that belonging to the deceased and nobody has deposed about the ownership of the cycle. Therefore, the prosecution has failed to establish the offence against the accused under s 404 of the IPC .[49]

12. Sentence

The incident took place nearly 15 years ago and there was nothing to indicate that the accused had any adverse criminal antecedents, so the accused was sentenced to rigorous imprisonment for two years.[50]3468

29 Re *Enayat Hossein* 11 WR (Cr) 1; *Empress v Nobin Chunder* 12 WR (Cr) 39 .

30 *Balla Munshi Bhoi v State* AIR 1958 MP 192, p 193, 1958 Cr LJ 902 .

31 *Jamnadas Parashram v State of Madhya Pradesh* AIR 1963 MP 106, p 114, (1963) 1 Cr LJ 433, p 441 .

32 Re *Enayat Hossein* 11 WR (Cr) 1; *Empress v Nobin Chunder* 12 WR (Cr) 39 .

33 *Dhulji v Kanchan* AIR 1956 Madhya Bharat 49, p 50, 1956 Cr LJ 224 .

34 *Sathi Prasad v State of Uttar Pradesh* AIR 1973 SC 448, 1973 Cr LJ 344 .

35 Re *Karri Mangadu* 15 Cr LJ 602.

36 Re *Karri Mangadu* 15 Cr LJ 602.

37 *Harendra Nath Mandal v Bejoy Krishna Das* AIR 1949 Cal 171, 50 Cr LJ 241 ; *Ram Ditto v Emperor* 11 Cr LJ 364 (1).

38 *Ashok Kumar Kundi v State of Uttrakhand* 2014 Cr LJ 378, 2013 (130) AIC 683 (Uttr) .

39 *Reg v Dharamdas* (1869) 6 BHCR (Cr) C 33 ; Re *Jugdown Sinha*(1895) ILR 23 Cal 372; *Dhulji v Kanchan* AIR 1956 MB 49, 1956 Cr LJ 224 .

40 *Uaud Khan v Emperor* AIR 1925 All 673, 27 Cr LJ 17 . For further commentary, see s 403, *ante*.

41 *Harendra Nath Mandal v Bejoy Krishna Das* AIR 1949 Cal 171, 50 Cr LJ 241 .

42 7 MHCR (App) xxxiv.

43 *U Mistir Wallang Nongseh v Ka Ephreban* AIR 1954 Assam 259, 1954 Cr LJ 1838 .

44 *Harendra Nath Mandal v Bejoy Krishna Das* AIR 1949 Cal 171, 50 Cr LJ 241 .

45 *Mallela Seetharmriah v State of Andhra Pradesh* AIR 1989 SC 421 .

46 *Kunwar Singh v State* 1961 MPLJ (Notes) 130 ; *Mahab Ali v State* 1963 MPLJ (Notes) 258 ; *Harendra Nath Mandal v Bejoy Krishna Das* AIR 1949 Cal 171, 50 Cr LJ 241 ; *State of Rajasthan v Bhupendra Joshi* 1997 Cr LJ 4445 (Raj) (DB) .

47 *Shobhan alias Shubhan v State of Madhya Pradesh* 1998 Cr LJ 3934 (MP) (DB) .

48 *Raj Kumar v State of Uttar Pradesh* 2003 Cr LJ 1073 (All) (DB) .

49 *Ballala Venkateswarlu v State* 2005 Cr LJ 1577 (AP) (DB) .

50 *State of Maharashtra v Vilas Pandurang Patil* 1999 Cr LJ 1062 (Bom) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL BREACH OF TRUST

S. 405.

Criminal breach of trust.--

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

[51][*Explanation 1.*--A person, being an employer [52][of an establishment whether exempted under section

17 of the Employees' Provident Funds and Miscellaneous Provision Act, 1952 (19 of 1952), or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

[53][*Explanation 2.*--A person, being an employer, who deducts the employee's contribution from the wages payable to the employee for credit to the Employee's State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Illustrations

(a) *A*, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. *A* has committed criminal breach of trust.

(b) *A* is a warehouse-keeper, *Z,* going on a journey, entrusts his furniture to *A*, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. *A* dishonestly sells the goods. *A* has committed criminal breach of trust.

(c) *A*, residing in Calcutta, is agent for *Z*, residing at Delhi. There is an express or implied contract between *A* and *Z*, that all sums remitted by *Z* to *A* shall be invested by *A*, according to *Z's* direction. *Z* remits *A* lakh of rupees to *A*, with directions to *A* to invest the same in Company's paper. *A* dishonestly disobeys the directions and employs the money in his own business. *A* has committed criminal breach of trust.

(d) But if *A*, in the last illustration, not dishonestly but in good faith, believing that it will be more for *Z's* advantage to hold shares in the Bank of Bengal, disobeys *Z's* directions, and buys shares in the Bank of Bengal, for *Z*, instead of buying Company's paper, here, though *Z* should suffer loss, and should be entitled to bring3469 a civil action against *A*, on account of that loss, yet *A*, not having acted dishonestly, has not committed criminal breach of trust.

(e) *A*, a revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. *A* dishonestly appropriates the money. *A* has committed criminal breach of trust.

(f) *A*, a carrier, is entrusted by *Z* with property to be carried by land or by water. *A* dishonestly misappropriates the property. *A* has committed criminal breach of trust.3470

Comments

1. Scope

The offence under this section is committed when a person, who is entrusted, in any manner, with property or with dominion over it, dishonestly misappropriates it, or converts it to his own use, or dishonestly uses it, or disposes it off, in violation of any direction of law, prescribing the mode, in which the trust is to be discharged, or of any lawful contract, express or implied, made by him, touching such discharge, or wilfully suffers any other person so to do.[54] What follows is that ownership or beneficial interest, in respect of which criminal breach of trust is alleged to have been committed, must be in some person, other than the accused, and the latter must hold it on account of some person or, in some way, for his benefit.[55] It cannot, however, be said that it is impossible, under all circumstances, for a person to commit criminal breach of trust in respect of his own property. Where the accused, who pledged promissory notes with the complainant as security for a loan, induced him to hand them over to him (*i.e.*, the accused) by pretending that he required them to collect money from his debtors with the aid of which he would pay cash to him (*i.e.*, the complainant), it was held that the possession of the promissory notes,

even without endorsement, in the hands of the person, with whom they were pledged, was of some value to the complainant as it gave him control over the accused and so long as they remained with him, they prevented the accused from using them to discharge the debts due by him to other creditors in preference to him and that the complainant had, thus, some sort of beneficial interest in the property and when he gave the notes to the accused for a definite purpose and the accused dishonestly disposed them of in violation of the legal contract, there was both entrustment and dishonest misappropriation.[56]

In cases of criminal breach of trust, a distinction has to be made between the person entrusted with the property and a person having control or general charge over the property. In case of entrustment of property, if it is found that the property is missing, the person, to whom the property has been entrusted, will, without further proof, be liable for accounting for the sums, whereas, in the case of a person having supervisory or general control over a certain property, he would be liable only when it is shown that he misappropriated it or was party to criminal breach of trust committed in respect of it by any other person.[57]3471

A criminal act can be dealt with under the provisions of the IPC if necessary ingredients to constitute an offence under this section are brought out or established even if the same criminal act is an offence under the provisions of another statute. Merely because the Carriers Act 1865, declares the liability of a carrier for loss, occasioned by the criminal acts of himself or his servant or agent, it cannot be said that the same criminal act cannot be dealt with under the provisions of the IPC if necessary ingredients are brought out or established.[58]

2. Ingredients

The following essential ingredients[59] are absolutely necessary to attract the operation of the section:

(a) the accused must be entrusted with property or dominion over property; and
(b) the person so entrusted (*i.e.*, the accused) must:

(i) dishonestly misappropriate, or convert to his own use, that property, or
(ii) dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation of--

(1) any direction of law, prescribing the mode, in which such trust is to be discharged, or
(2) any legal contract made touching the discharge of such trust.

However, rendering of the accounts is not a necessary ingredient of the offence under this section.[60] It is necessary, of course, to show both entrustment and dishonest misappropriation, or conversion to his own use, by the accused. In the absence of any allegation of misappropriation or conversion, the offence will not be constituted.[61] Even if the prosecution succeeds in proving entrustment, it would fail to bring home the guilt unless it is proved that the accused has misappropriated the amount entrusted.[62] The entrustment, which has to be shown, should be in respect of the property of another person.[63]

The essential ingredients in order to constitute a criminal breach of trust are (i) that the accused was entrusted with property or with dominion over property; (ii) dishonestly misappropriated or converted that property to his own; (iii) dishonestly using or disposing of that property or wilfully suffering any other person was so to do a violation, (a) of any direction of law prescribing the mode in which such trust is3472 to be discharged, (b) of any legal contract made touching the discharge of the trust.[64] The basic requirement to bring home the accusations under s 405 are the requirements to prove conjointly (i)

entrustment and (ii) whether the accused was actuated by dishonest intention or not, misappropriated it or converted it to his own use to the detriment of the persons who entrusted it.[65]

If at the very initiation of the negotiations, it was evident that there was no intention to cheat, the dispute would be of civil nature. Such a conclusion would depend on the evidence to be led at the time of trial.[66]

The essential ingredients of the offence of criminal breach of trust are (1) entrustment with property or with any dominion over property; (2) and dishonest misappropriation thereof.[67] To constitute an offence of criminal breach of trust, there must be an entrustment, there must be misappropriation or conversion to one's own use, or use in violation of a legal direction or of any legal contract and the misappropriation or conversion or disposal must be with a dishonest intention.[68]

In the commission of the offence of criminal breach of trust, two distinct parts are involved. The first consists of the creation of an obligation in relation to the property over which dominion or control is acquired by the accused. The second is a misappropriation of dealing with the property dishonestly and contrary to the terms of the obligation created.[69]

Mere showing of a person's dominion over the property is not enough, it must further be shown that the dominion of the person was the result of the entrustment.[70]

3. Section 405 not Repealed by Section 5(1)(c) of the Prevention of Corruption Act 1947 (Now Section 13 of the said Act)

The offences under this section and s 5(1)(c) of the Prevention of Corruption Act 1947 are not identical; they are distinct and separate offences. Therefore, there is no scope for the speculation about the repeal of this section by the said s 5(1)(c) of the Prevention of Corruption Act 1947.[71]3473

4. Criminal Misappropriation Distinguished from Criminal Breach of Trust

Commentary under the same heading in s 403, *ante*, may be referred to.

5. Criminal Breach of Trust and Cheating--Distinction

It is seen that for identifying the concept of criminal cheating, as provided under s 416, IPC, the ingredients of fraudulent dishonest intention has become the basic *sine qua non* and if it is there or, identified; then it is to be further ascertained that as a result of which the person so represented must be made to deliver any property to the other and that the inducement must be inherent with intention to keep the same or to utilise the said property for the use and utilisation of the person, who made such an inducement with such intention. Whereas, in the concept of criminal breach of trust, as defined under 405, IPC voluntary entrustment following dominion over such property by one to the other person has become necessary to be identified and that the property has become necessarily disentitled, misappropriated or converted in such a way as provided by the section. If the ingredients set out in the above sections of law are identified, upon the materials placed by the prosecution, then, ss 406 and 420, IPC, respectively, being the punishment sections come into operation.

However, while doing such legal exercises, it has become imperative for the court to see that criminal breach of trust and cheating, though, generally involves dishonest intention, but, both are mutually exclusive and different in the basic concept, in the context that criminal breach of trust is voluntary, and cheating is purely on the basis of inducement with dishonest intention. Both the concepts of law for the respective offences are totally distinct, different in nature and accordingly, mutually exclusive with each. Unless and until there are adequate materials available and made before the court of law, both the offences can be dealt with together.[72]

6. Criminal Breach of Trust Distinguished from Cheating, Theft and Criminal Misappropriation

The offence of criminal breach of trust is akin to cheating, theft and criminal misappropriation, but differs from them in important respects. In criminal breach of trust, the property is lawfully acquired or acquired with the consent of the owner, but dishonestly misappropriation by the person to whom it is entrusted. In cheating, the property is wrongfully acquired in the first instance by means of a false representation. In theft, the property is taken without consent of the owner and the dishonest intention to take property exists at the time of such taking. In criminal misappropriation, the property is innocently acquired, often casually or by chance, but by a subsequent change of intention, the remaining becomes wrong and3474 fraudulent.[73] Thus, if ornaments are handed over to the accused in the confidence that they would be returned after having been used for a particular purpose, the subsequent failure to return would become an offence of criminal breach of trust.[74] Where the accused induced the complainant to entrust a gold *mohur* to him so that he might induce the complainant's boy to stop weeping and misappropriated it, it was held that there was no deception and that the offence was not under s 420, but one under s 406 .[75] Where, however, movable property of the accused was attracted in execution of a decree and was placed in the custody of another person, who died, and the accused appropriated it to his own use, it was held that the accused was guilty of theft, and not criminal breach of trust under s 406, IPC .[76]

7. Criminal Breach of Trust Distinguished from Section 105, Insurance Act

The offence under s 409, IPC, and that under s 105, Insurance Act 1938 are not the same. If the offences are distinct, there is no question of the rule of double jeopardy as embodied in art 20(2) of the Constitution of India being applicable to bar the two trials under these offences.[77] A perusal of ss 104 and 105, Insurance Act makes it clear that they are not identical with the offences punishable under ss 405 and 409, IPC . Further, the offence of conspiracy punishable under s 120B, IPC is not reproduced in the Insurance Act. The complainant insurance company could not, therefore, be expected to prosecute the accused under s 105, Insurance Act rather than under ss 405, 409 and 120B, IPC, if the latter offences were suitable to the facts of the case.[78]

8. 'In any Manner'

The expression 'in any manner' is used, in this section, in a wide sense including all cases in which property is voluntarily handed over for a specific purpose.[79] The section does not limit the offence to the case of persons who are entitled to be called trustees in the technical sense.[80] The section contemplates the creation of a relationship whereby the owner of the property makes it over to another person to be retained by him until a certain contingency arises or to be disposed by him on the happening of a certain event.[81] As long as the accused is given possession of property3475 to deal with it in a particular manner, the ownership being in the person other than the accused, he can be said to be entrusted with that property.[82]

Where a person, who under a definite agreement, was to manage a large property and to spend a specific portion of its income on certain religious and educational objects, converted to his own use some portion of the share of the profits, which he should have devoted to those objects, it was held that he could be convicted of an offence of criminal breach of trust.[83]

9. 'Entrusted'

Where the first ingredient of criminal breach of trust *i.e.* entrustment is missing, the same would not constitute a criminal breach of trust.[84]

The term entrustment is not necessarily a term of law. It may have different implications in different context. In its most general signification all it imports is the handing over possession for some purpose which may not imply the conferring of any proprietary right at all.[85] The word 'entrusted' has to be understood in a wider sense; all that is necessary is that the ownership or beneficial interest in the property, which is subject matter of the offence should be in some person other than the accused.[86]

The word 'entrusted', being not a term of art embraces all cases in which a thing is handed over by one

person to another for a specific purpose.[87] It not only covers the relationship of a trustee and beneficiary between the complainant and the accused, like master and servant, guardian and ward, and pledger and pledgee, *etc*.[88] It connotes that the accused holds the property for, and on behalf of, another.[89] Hence, in all such transactions like that of a consignor and consignee, bailor and bailee and hirer and hiree, there is an element of trust implied in the transaction[90] because in all such relations, the property entrusted to the accused is 'property of another person'.[91] In order to constitute a legal entrustment, therefore, the complainant must be owner of the property; there must be a transfer of possession; such transfer must be an actual transfer, and not a fictional or notional one; such transfer must be made to somebody who has no right except that of a custodian, and such entrustment must be3476 made to a person, and not to a company or firm. These are the *panchsheel* of a legal entrustment.[1] Mere transaction of sale cannot amount to an entrustment; 'entrustment' means that the person handing over any property, or on whose behalf that property is handed over to another, continues to be its owner and the person handing over the property, must have confidence in the person, taking the property, so as to create a fiduciary relationship between them.[2]

There cannot be any entrustment of a property for its use or disposal contrary to the law or an illegal purpose with the owner of the property retaining dominion over the property. The moment he parts with the property for an illegal purpose, the entrustment as referred to in the Penal Code has no application.[3]

10. 'Entrustment' also Governed by the Words 'or with any Dominion over the Property'

Non-payment of wages does not constitute an offence under s 406 IPC .[4]

The word 'entrustment', in the section, governs not only the words 'with the property', immediately following it, but also the word 'or with any dominion over the property', occurring thereafter.[5] Similarly, the managing director of a company has substantial dominion over property of the company, including the amounts received from the subscribers,[6] and dominion is as good as entrustment for purposes of this section. But if there is nothing in the terms and conditions of the partnership deed to indicate that dominion of the partners over the partnership property was the result of any entrustment, the present section is not attracted. Therefore, if in the absence of such a specific agreement a partner receives money belonging to the partnership he cannot be said to have received it in a fiduciary capacity. Therefore, he cannot be said to have been entrusted with the dominion over the partnership property.[7]

11. Valid Entrustment

For a valid entrustment, it is not necessary that the accused should receive the money directly from the complainant.[8] Where, under the terms of a contract, some goods were entrusted to the accused, who was to sell those goods, obtain money for them, and hold that money on account of the complainant, it was held that though he did not actually receive the money from the complainant, he was 'entrusted' with it within the meaning of this section.[9]3477

12. Bank Loan

In cases of bank loan(s), there is no entrustment of the property so as to commit breach of trust, no offence under s 406, IPC is committed. Mere failure to pay loan does not amount to breach of trust as defined in s 405, IPC .[10]

13. Question of Fact--Cases

Whether in a particular set of circumstances, any property or money, passing from one to another, would amount to entrustment is not a question of law, but a question of fact.[11] Where the complainant, a goldsmith, gave some ornaments to the accused who was his intimate friend, for a function with a promise by the accused to return the ornaments after the ceremony, but the accused subsequently failed to return

them, it was held that this amounted to entrustment under s 406 .[12] Where a certain amount was paid to the accused for buying paddy and supplying it to the complainant but the accused dishonestly converted the money to his own use and did not supply the paddy, it was held that the accused had been entrusted with the money and was guilty of criminal breach of trust.[13] Where an arrangement was made between the vendor and the vendee that the property would pass to the vendee on payment, and the vendor disposed of the property prior to the payment to the vendor, it was held that it was an offence under s 406, IPC .[14] However, no question of entrustment arises in money, given, without any condition as to its use, by the parties in response to an appeal made by a bishop. Such money becomes the property of the bishop.[15] A mere transaction of sale,[16] or of purchase (of cement),[17] cannot amount to an entrustment. Similarly, a mere payment by a debtor to a creditor is no entrustment.[18] Where the distillers obtained a permit, for the movement of molasses, from the excise commissioner, to be used as raw material for manufacturing spirit, which was to be sold to the warehouses or licensed vendors under the terms of the licences, granted to them, it was held that the distillers had paid for the molasses, as also for the transport of the molasses, to the distilleries and it could not, therefore, be said that property in molasses or dominion over them was entrusted to them.[19]

The appellant was the Chairman of the Maharashtra State Electricity Board (MSEB), respondent no. 2 was a company which had entered into various contracts with MSEB for installation of low tension load management system. Respondent 2 had deposited3478 an amount of Rs. 5 lakhs with the MSEB as security deposit in lieu of bank guarantee to be used for tenders to be filed by respondent 2 from time to time in the future. As dispute arose between the MSES and the respondent 2, the latter informed MSES that they were not interested in participating in any tender and sought refund of the said amount of Rs. 5 lakhs. The Chief Engineer, MSEB, informed respondent 2 that the deposit of Rs. 5 lakhs had been adjusted by MSEB against the dues payable by respondent 2 to MSEB. On receipt of the said communication, respondents 2 to 4 filed complaint against the appellant and other senior officials of MSEB under ss 405 and 409 read with s 34, IPC . Held, the amount of Rs. 5 lakhs was deposited by the complainant company with MSEB and there was nothing in the complaint which may even remotely suggest that the complainant had entrusted any property to the appellant or that the appellant had dominion over the said money of the complainant, which was dishonestly converted by him to his own use, so as to satisfy the ingredients of s 405, IPC . The complaint did not disclose the commission of offence by the appellant under s 405, IPC punishable under s 409, IPC . The complaint against the appellant was quashed on petition under s 482, CrPC[20]

14. Own Property--No Offence

One cannot commit an offence, under this section, in respect of his own property. Where, according to the agreement, the accused (*i.e.*, the retailer) obtained supplies of sugar, on payment, to the authorised dealer, at the rate, fixed by the authorities from time to time, it was held that the accused was not guilty of the offence under this section, for the excess sugar alleged to have been found in his ration shop, because the sugar was purchased by him and it was his property.[21] An offence of the criminal breach of trust will be made out only if any amount paid is held by the depositee as a trust, and not as his own property. If the amount is paid in such a manner that the depositee becomes its full owner and is free to use it in any way he likes, but the same is not paid back under some pretext, then it is not a case of criminal misappropriation or a criminal breach of trust, but only that of a breach of contract which will give rise to a civil liability.[22] Property given by a husband to his wife at the time of marriage, becomes the property of the wife and no question of the wife misappropriating the same dishonestly can arise and no offence is committed by her under s 406, IPC, if she refuses to return the same to her husband after divorcing him.[23] Where the complainant advanced some money to a jeweller towards the cost of the gold and the cost of making it into a chain, but the jeweller neither delivered the chain on the date fixed nor returned the money, it was held that although the accused was guilty of dishonest and dishonourable conduct, he could not be said to have misappropriated the money because it was paid to him and it became his own money.[24] Similarly, where the money, deposited with a company, is to be utilised by the company as its own by giving it to other members as loan and depositors can get the equivalent amount back after a stipulated time along with interest, the money as3479 such cannot be termed as 'entrusted' to the company.[25] In *Kamal Faker v Crown* ,[26] a sum of money was paid as compensation for compromise

of a criminal case, to the complainant by the accused. The court, however, refused permission for compromise. It was held that the compensation money could not be said to have been paid in trust to make out a case of criminal breach of trust.

Where, there were business dealings between parties in which the complainant had been supplying goods to the accused on making payment by accused by cash/draft/cheque, one such cheque issued by accused was dishonoured, the complaint under ss 406 / 420, IPC, was filed, there was no entrustment of goods and the transaction was of mere sale of goods, the criminal prosecution by the complaint was found to be an abuse of the process of the court so the complaint was quashed.[27]

15. Quashing of Complaint--Civil Dispute Regarding Non-payment of Amount under Contract *etc*[28]

There were two independent contracts, one between the principal company and the contractor company and another between the contractor company and the sub-contractor. On completion of work, the sub-contractor demanded payment from the contractor company, due to a non-payment of the same, filed a criminal complaint, alleging that the contractor company through its person in-charge/accused having received the payment from the principal company has misappropriated his (sub-contractor's) money. When admittedly, the two contracts were independent of each other and payment under one has no relevance *qua* the others, therefore, even if the principle company has made the payment to the contractor company, under its contract with the latter it will not give rise to a plea of misappropriation of money because that money is not money or movable property of the sub-contractor/complainant. It cannot be said that there was any dishonest intention on the part of the accused person/contractor company/office bearer of the contractor company or other to have misappropriated or converted the movable property of sub-contractor/complainant to their own use. Further, the dispute being about recovery of money was purely of a civil nature. Since, the basic ingredient of ss 403, 406 and 420, IPC, were not satisfied, the order, taking cognizance of offences and issuance of summons to the office bearer of the contractor company was quashed.[29]

16. Customary Gifts in Cash or Kind--No Entrustment

Some gifts in cash or in kind are customarily given in certain communities as well as in certain families. Gifts which are customarily given at the time of engagement, *tilak* or marriage must therefore, be regarded as gifts according to custom prevalent in the concerned communities or families for the purpose of creating human relationships with the members of that family. These gifts cannot be regarded as entrustment, nor can they be regarded as dowry. These gifts are not intended to be consideration for marriage. Therefore, various amounts which were given by the complainant and his relatives to the prospective bridegroom, his maternal uncle, and grandfather and the amount which were spent on sweets and fruits and the amount which was spent for3480 arranging the band did not amount to entrustment for the purpose of s 406, IPC . If every voluntary gift whether of money or goods or of food of any kind, is regarded as a entrustment or as dowry, the very customary human interaction which is essential for creating the human relationships will end in place of entering into relationships, and people would avoid them and grave injustice would be caused to the people.[30]

17. 'Property'[31]

The word 'property', in this and other sections of IPC, is used in a much wider sense than the expression 'movable property'. There is no reason to restrict the meaning of the word property to movable property only when it is used without any qualification in s 405 or in any other section of the IPC . Whether the offence, defined in a particular section of the IPC, may be committed in respect of any particular kind of property, will depend not on the interpretation of the word 'property', but on the fact whether that particular kind of property can be subject to the acts covered by that section. It is in this sense that the word property in a particular section covers only this type of property with respect to which the offence contemplated in that section, can be committed'.[32] Where there was evidence of the informant only that he had seen the accused setting fire to his house, there were material contradictions in the evidence and the case diary,

appellants accused were held entitled to be acquitted of the charge under s 436, IPC .[33]

A chose-in-action, like a debt, is included within the expression 'property'.[34] Similarly, a cancelled cheque falls within the meaning of the term expression 'property'. As used in s 405, IPC, even if it is worth no more than the value of the paper upon which it is written.[35] In order to establish a charge of dishonest misappropriation or criminal breach of trust, it is not necessary that the accused should have actually taken tangible property such as cash from the possession of another and transferred it to his own possession. The transfer of certain amount from the account of another to one's own account in a bank is sufficient to constitute the offence.[36]

A blank cheque is a property.[37]

18. Sale Proceeds of Entrusted Property[38]

The scope of the section is wide enough to include the sale proceeds of the property entrusted. Even if the goods have been entrusted for sale and they are sold, the trust does not cease to exist.[39] In *Suganmal Bhojraj v Emperor* ,[40] a person was given, by3481 his master, a currency note of the value of rupees one thousand for depositing the same in his, *i.e.*, master's credit. He, instead of depositing, changed it into notes of smaller denominations and distributed them among his two confederates and himself. It was held that it was idle to say that the trust was extinguished immediately when the change in the value of the note was made.

Even if property is mortgaged to bank, sale thereof by the mortgagor is not barred by law. Sale of mortgaged property would not amount of breach of trust punishable under s 406 IPC .[41]

19. 'Dishonestly'[42]

Unless dishonest intention is shown, an offence under s 405, IPC, cannot be made out.[43] Every breach of trust, in the absence of *mens rea*, is not criminal.[44]

When a person misappropriates to his own use the property that does not belong to him, the misappropriation is dishonest even though there was an intention to restore it at some future point of time.[45] The court should ascertain whether the state of mind in which the accused was, did not exclude the existence of dishonest intention which is an essential ingredient of the offence of criminal breach of trust. Evidence is certainly relevant for purpose of ascertaining whether the state of mind of the accused render it possible or likely for him to have entertained dishonest intention when he dealt with the moneys entrusted to him. If the accused was really unable to form the criminal intention, he cannot be guilty of the offence under s 406 . [46]

In *Mohanlal Mulchand v Mehta Kanaiyalal Pranshanker* ,[47] certain title-deeds were entrusted to the accused for the purpose of making inquiries about some land. The accused did not return the documents and said that he had lost the bundle and that the task was not completed. It was found that the accused had used the title-deeds to harm the transferee. Under these facts, it was held that the offence was complete when the documents were used to harm the transferee, and that taking of money was not necessary to constitute the offence. The prosecution is not bound to establish the mode in which the accused has appropriated the amount of entrustment.[48] Dishonest misappropriation may be inferred from the established facts.[49] Dishonest intention was held to have been proved in the case of a post- master who entered an amount in the savings bank pass book of a depositor without entering the same in his account book.[50] Where the accused took a gold jewel from a goldsmith for showing it to his wife and placing an order for a similar jewel, but failed to return it and retained it with him towards some debt due to him by the goldsmith and claimed it to be his own, it was held that the accused was guilty of dishonestly retaining it and claiming3482 it to be his by misappropriating it.[51] Where, however, the accused took away some ornaments for approval and promised to return them in the evening the same day, the mere retention of the property without misappropriation was held not to constitute criminal breach of trust.[52] The false denial of the loan is compatible with the absence of criminal misappropriation.[53]

20. 'Misappropriate'

Even if misappropriation is found temporary, it would constitute offence of criminal breach of trust.[54]

Actual manner of misappropriation need not be proved.[55]

Where the complainant did not allege that the accused misappropriated the amount entrusted to him by the complainant, no offence under ss 406 and 420, IPC was committed.[56]

21. Hire-purchase Cases

The mere failure of a person to produce a meter, installed on his premises by an electric company, does not, by itself, constitute an offence of criminal breach of trust. This section does not embrace the case of a man who takes an article on hire and fails to produce it. There must be some evidence that he acted dishonestly.[57] Where the accused made defaults in payment of instalments for a gramophone purchased by him, and did not immediately produce the machine when demanded, but produced it in court, it was held that mere non-payment of monthly instalments could not be considered a criminal offence.[58] It was held, in *S Mitter v State* ,[59] that the mere non-payment of monthly instalments would not be a criminal offence if the hirer is entitled to keep and possess the article and fulfils the order condition of the hire-purchase agreement. Where, however, a hirer of a sewing machine sold to guilty of criminal breach of trust,[60] under the hire-purchase agreement, the hirer is simply for the use of goods and has the option to purchase the same. The finance charge representing the difference between the cash price, and the hire-purchase price is not interest but represents a sum which the hirer has to pay for the privilege of being allowed to discharge the purchased price of goods by installments. The repossession of the vehicle by the financer as per the terms of the hire-purchase agreement does3483 not attract criminal breach proceedings against the financer for committing criminal breach of trust, cheating and theft of vehicle.[61]

22. Civil Liability

The return of the deposit to the brother of a depositor under circumstances, indicating the best of intentions and an absence of moral turpitude, may render a person civilly liable to the depositor, but not to a criminal breach of trust.[62] Where the accused retained some money against a debt, which was due to him from the complainant, and there was nothing to show that in doing so he acted dishonestly, it was held that no offence of criminal breach of trust was made out.[63] Refusal by an agent to refund money to the person, paying it to him on behalf of his principle, would not make the agent criminally liable, the money so received being property of the principal.[64] a mere non-compliance by the creditor with the request of the debtor to make an endorsement of payment on the promissory note does not amount to an offence of criminal breach of trust.[65] When there was no dispute regarding payment of price, but the dispute related only to non-conveyance of form *H*, the dispute being of a civil nature, no liability under ss 406 and 409, IPC, arose.[66] The mere failure on the part of the employer to return a deposit, made by the employee, at the time of the termination of his service is not, by itself, sufficient for a conviction under s 406 .[67] Where materials for execution of a contract for construction of a primary school were issued by the government, to a contractor and the contractor utilised only a, part of the materials and appropriated the rest, it was held that under the rules, the materials issued became the property of the contractor and the failure of the contractor to use them and to account for them created only a civil liability and there was no offence under s 406, IPC .[68]

The act of criminal breach of trust *per se* may involve a civil wrong but a breach of trust with an ingredient of *mens rea* would give rise to a criminal prosecution as well.[69]

23. Arbitration Clause in the Agreement--No Effect on Criminal Proceedings

Civil and criminal proceedings both go side by side. Merely because of the arbitration clause, it cannot be said that the criminal proceedings cannot proceed.[70] The provision incorporated in the agreement for referring the dispute to arbitration is not an effective substitute for a criminal prosecution when the

disputed act is an offence. Arbitration is a remedy for affording relief to the parties effected by breach3484 of the agreement, but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement.[71] Mere pendency of arbitration proceeding or availability of civil remedy would not be a ground to discharge the accused under s 406, IPC .[72] However, when arbitration proceedings are going on for more than 17 years and the matter is purely of a civil nature, the proceedings under s 406, IPC, based on such matter are liable to be quashed.[73]

24. Both Criminal and Civil Proceedings can Run Side by Side

The civil and criminal remedies are not mutually exclusive, but clearly co-extensive and essentially differ in their content and consequence. The object of the criminal law is to punish an offender who commits an offence against a person, property or the state for which the accused on proof of the offence is deprived of his liberty and in some cases even his life. This, however, does not affect the civil remedies at all for suing the wrong doer. It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of action are quite different in content, scope and import.[74] The availability of civil remedy provided under the Punjab Co-operative Societies Act under which ss 54 and 55 is for recovery of embezzled amount, does not debar criminal prosecution of the accused under s 408, IPC .[75]

Merely because the act of the accused has a civil profile would not denude it of its criminal outfit. Criminal and civil proceedings are separate and independent of each other and the pendency of a civil suit cannot bring to an end the criminal proceedings even if they arise out of the same set of facts.[76]

25. Pendency of Civil Suit--Criminal Case should be Stayed[77]

Where a civil suit is instituted before the lodging of the FIR and the facts are intimately connected, the proceedings in the criminal case should be stayed. Where the parties had gone to civil court and where the entire dispute was likely to be thrashed out and competing interest conclusively determine that it was proper to have the matter decided in civil court and allow the complainant to get the complaint revived after decision by the civil court.[78]

26. Every Breach of Trust not a Criminal Breach of Trust

Every breach of trust gives rise to a suit for damages, but it is only when there is evidence of mental act of fraudulent misappropriation that the commission of embezzlement of any sum of money becomes a penal offence punishable as criminal3485 breach of trust.[79] A mere breach of contract is not synonymous with criminal breach of trust.[80]It is the mental act of fraudulent misappropriation that distinguishes an embezzlement, amounting to a civil wrong or tort, from the offence of criminal breach of trust.[81] If there is no *mens rea*, or if other essential ingredients are lacking, the same set of facts would not sustain a criminal prosecution, though a civil action may lie.[82] a mere failure to repay the loan would not constitute a criminal breach of trust.[83] Where the managing agents spent moneys upon business of the company with the knowledge and acquiescence of the directors and it was not proved that the managing agents acted dishonestly, it was held that they were not liable for criminal breach of trust even though there had been a breach of contract causing loss to the policy holders of the company.[84]

The mere fact, that the payment was delayed is no ground for imputing a criminal intention on the part of the accused,[85] when there is no particular obligation to pay it at a certain date. [86]

27. Refusal to Return the Property Entrusted--No Criminal Breach of Trust

A bare perusal of s 405, IPC shows that in order an offence of criminal breach of trust may be said to have been committed, it must be shown that the alleged offender was entrusted with property or with any dominion over property and that he dishonestly misappropriated or converted to his own use that property, or he dishonestly used or disposed of that property in violation of any direction of law prescribing the mode

in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching upon the discharge of such trust, or will fully suffers any other person so to do.

It shows that in addition to entrustment of the property in favour of the accused, the accused should have dishonestly misappropriated the property or converted that3486 property to his own use or dealt with the property in the manner prescribed in s 405, IPC . Mere refusal to return the property, which was entrusted to him does not satisfy the requirements of s 405, IPC . Failure to return the property may be occasional on account of several reasons. A person, who is called upon to return the property, which was entrusted to him may not receive the notice requiring him to return the property or for reasons beyond control, he may not be in a position to return the property by actually carrying it to the person, who entrusted it. In any case mere failure to return the property does not constitute an offence of criminal breach of trust under s 405, IPC . It is a quite different matter if from the act of not returning the property, it is inferred that the person to whom the property was entrusted is unable to return the property, because he has misappropriated it or that he is unable to return it, because he is converting the property for his own use in a dishonest manner. The offence under s 405 is therefore, committed when the property which was entrusted to the accused was actually misappropriated or dishonestly converted for his own use or is otherwise dealt with in the manner indicated by s 405, IPC . The date on which the notice for return of the property was served has little relevance so far as the point of time of commission of the offence under s 405, IPC, is concerned. The learned *munsiff* and judicial magistrate was therefore, not justified in coming to the conclusion that the offence of criminal breach of trust under s 405 was committed on a date which was five days prior to 20 March 1990.[87]

Stridhan

Property gifted before, at or after the marriage to the wife are her stridhan property, and the husband cannot claim return of the property. Where the wife with her stridhan properties, had gone to her parents' house, the husband cannot prosecute the wife or her parents for offence under ss 405 and 406, IPC .[88]

Misappropriation of stridhan properties constitutes offence of criminal breach of trust punishable under s 406, IPC .[89]

Case of the complainant was that she had entrusted her gold ornaments to her daughter-in-law. But the evidence showed that the complainant had entrusted her ornaments to her son. The accused daughter-in-law was given benefit of doubt and acquitted of the charge under s 406, IPC .[90]

28. No Criminal Breach of Trust on mere failure to Return Entrusted Property

Mere failure/omission of the accused to return entrusted property is not sufficient to constitute an offence under s 405, IPC . The prosecution has to go further and show that the accused, dishonestly misappropriated or converted the said property to his own use or dishonestly used or disposed it off.[91]3487

29. No Criminal Breach of Trust if the Amounts Received Fall Outside the Scope of the Trust

Where the president of a municipality, after purchasing some articles for the municipality and paying its price, obtained a certain amount form the vender as brokerage for which he gave the vendor a receipt, it was held that this amount was paid for his personal use, and not for the benefit of the municipality, and he was not guilty of criminal breach of trust.[92] Where the accused, a booking clerk, recovered an amount in excess of the legal charge and did not credit the same to the railways, it was held that he could not be convicted of the offence under s 405, the railways having no beneficial interest in the money dishonestly recovered in direct contravention of their own instructions.[93] In *Surendra Pal Singh v State* ,[94] the accused realised certain sums from the cultivators as canal dues in his capacity as a canal *amin* and deposited the amount, which was really due from cultivators in the treasury, but did not deposit the excess amount recovered by him, it was held that the excess amount was never due to the government and was never

the property of the government at any stage and the accused had never become its trustee on behalf of the government or on behalf of the cultivators.

The accused was, therefore, not guilty under s 409 though he could be punished under s 420, IPC . In *Labhu v Emperor* ,[95] a licensee from a municipal committee was to write receipts relating to the sale transactions of cattle in a fair. He was to pay the price of each receipt book at the rate of *annas* eight per receipt in advance, but he charged one rupee from each purchased. It was held that the accused was not entrusted with any property or with dominion over any property and merely making wrong entries in the receipt books could not possibly bring his case within the purview of ss 403 and 405, IPC .

30. No Criminal Breach of Trust if Action of the Accused is in Good Faith

A person, who is pleading a claim or right, may be acting without dishonest intention if he is asserting *bona fide* what he believes to be a lawful claim even though it may be unfounded in law or in fact.[96] If the accused has some claim to the property over which he still retains dominion, there would be no offence unless the claim is merely a pretence, and not *bona fide*, even if it turns out to be sustainable in law.[97] In a case of criminal misappropriation, the question is whether the wrongful detainer of the money was with a dishonest intention or only on a wrong opinion that the accused was justified in keeping back money adjudged to him under a decree. Where the accused admitted that he had collected the money, but claimed that he meant to retain what was due to him, the accused was held not to be guilty.[98]3488

32. No Criminal Breach of Trust when Goods sold to Accused

In a sale transaction between the-complainant and the accused, the goods in question were sold by the complainant to the accused on credit but the cheques issued by the accused towards payment of the amount due, bounced. The goods admittedly were sold by the complainant to the accused which meant that the title in the property passed to the accused the moment the sale was completed. It may be pertinent to remember that passing of the title in movable property is not dependent on the payment of sale considerations and it is completed when an offer to purchase at a price is accepted by the buyer and the delivery of goods or payment of price or both may be postponed under the agreement, as contemplated under s 5 of the Sale of Goods Act. Thus, the question of commission of any offence under s 409 or under s 406, IPC, in respect of goods sold does not arise.[1]

33. Partners, Ordinarily not Liable for Criminal Breach of Trust in Respect of Partnership Property

Partners of the firm do not hold property in trust for each other.[2] In case a partnership, every partner has dominion over the partnership property by reason of the fact that he is a partner. This is a kind of dominion which every owner of property has over his property. However, it is not dominion of this kind which satisfaction the requirements of s 405 .[3] Ordinarily, a partner cannot be held guilty of criminal breach of trust[4] unless there is any special agreement between the parties for the entrustment of property, or dominion over it, to any partner (*i.e.*, the accused) and the necessary ingredients, justifying a charge for criminal breach of trust under s 406, IPC, are present,[5] because the mere existence of dominion over the property, like that of any other partner is not enough. It is further to be shown that his dominion was the result of entrustment.[6] If, therefore, there is no proof of special agreement for3489 entrusting any property, or dominion over property, to any partner, the receiving of any money, belonging to the partnership, will not make a partner guilty of the offence of criminal breach of trust.[7] It is no criminal offence to withhold payment of a partner's share in the profit. He can only claim a dissolution of partnership and an account and payment to him on what is found due on taking the account.[8] In *M Rahaman v RD Khambatta* ,[9] the complainant alleged that there was an agreement (partnership) between him and the accused, in which they were partners, that he provided funds to the accused and the accused bought and sold timber, but when he demanded money the accused put him off on this pretext or that. On these facts, it was held that no *prima facie* case was made out for a criminal case, and the dispute was of a civil nature. A working partner, dishonestly misappropriating the property of the firm, entrusted to him is liable for committing criminal breach of trust.[10] However, where the facts of the case relate only to an ordinary partnership

dealing, there would be no offence.[11]

It was alleged that the complainant and the accused appellants were partners of the firm. The appellants accused conspired to deprive the complainant of his share of a dissolved firm. The evidence showed that the new firm was dissolved at its very inception. As such there was no question of depriving the complainant of his profits of partnership firm. The criminal proceedings were quashed.[12]

Where dispute between the accused and the complainant arose out of partnership business, allegations in complaint did not constitute offence under ss 405 / 406, IPC, and criminal proceedings were quashed.[13]

34. Partner when Liable in Respect of Partnership Property

The contention that one partner cannot commit criminal breach of trust against the other partners, though *prima facie* alluring, but may not be tenable on the facts of a given case. A partnership firm is not a legal entity, but a legal mode of doing business by all the partners, until the firm is dissolved as per law and the accounts settled, all the partners have dominion in common over the property and funds of the firm. Only after the settlement of accounts and allotment of respective shares, the partner becomes an owner of his share. However, criminal breach of trust under s 406 is not in respect of property belonging to the partnership firm, but in an offence committed by a person in respect of the property which has been especially entrusted to such a person under a special contract and he holds that property in fiduciary capacity under a special contract. If he misappropriates the same, it is an offence.[14]3490

Whether a partner can be said to have been entrusted with property must depend upon whether there is any special agreement between the parties. If there is no special agreement, he does not receive the property in fiduciary capacity. If there is, however, a special agreement between the partners, then it can be said that a partner is entrusted with the property or with dominion over it. For example, if, by the terms of the partnership agreement, one partner is given the sole right to the possession of the partnership assets or to receive moneys on behalf of the partnership, then such partner may be said to have entrusted another partner with money if he gives such other partner money for such specific purpose.[15] Where, however, one partner is given authority by the other partners to collect moneys or property of the firm, he is entrusted with dominion over the property and if he dishonestly misappropriates, then he comes within the ambit of s 406, IPC .[16]

35. Partners Liable for Third Party

Where the loan was taken by the partnership firm for construction of a plant and installation of machinery from a financial corporation against hypothecation of the said plant and machinery, the removal of machinery from the premises without the consent of the financial corporation in violation of the terms of the mortgage deed, attract the offence under s 406, IPC, committed by the partnership firm. Merely because one of the accused had withdrawn from the partnership firm subsequently, it could not be said that he was not liable.[17]

36. Prosecution of Company

Complaint under ss 405 and 420, IPC for criminal breach of trust and cheating respectively, was filed against the company and its Board of Directors. In the complaint no specific liability was imposed on the officers of the company, if the alleged offence was committed by the company. Held, in the absence of specific details about the same, no person other than the company could be prosecuted under the alleged complaint.[18]

As held by majority of the Constitution Bench in *Standard Chartered Bank v Directorate of Enforcement* [19] the company can be prosecuted even in a case where the Court can impose substantive sentence as also fine, and in such case only fine can be imposed on the corporate body.

37. Mohammedan Co-owners

The rule, that a co-partner cannot be convicted of an offence under s 406, IPC, in respect of a partnership business, does not apply to a Mohammedan co-owner as he has a specific share in the property left by a Mohammedan deceased.[20]3491

38. Pledgee--Whether Liable for Criminal Breach of Trust with respect to Property Pledged

A pledge may, according to the terms of pledge, be liable for a conviction under s 406 if he commits a breach in respect of the trust.[21] If a pledge, even after payment of the loan, uses the pledged ornaments as a pledge in respect of a completely independent transaction, he definitely uses the ornaments in violation of the legal contract, creating the trust, and would be guilty under s 406 .[22] In *Abinash Chandra Kumar v Dham Buksh Mohammad* , [23] the pledgee, on payment of the loan, asked the pledger to come the next day for getting back the ornaments and denied the pledge the very next day. It was held that the pledgee was guilty of criminal breach of trust. His criminal liability, however, depends on the terms of the pledge, Where certain articles were pledged with the accused, who was given the right to sell the article if the interest payable remained in arrears for three months, and he sold the articles in default of payment and credited the balance of the sale proceeds after deducting the amount of principal and interest, it was held that the accused was not guilty of any offence as there was nothing to show dishonest intention because he acted in good faith.[24] In Re *Gokauarapu Peravya*,[25] after a decree was obtained by the complainant, agreements were made in writing between the parties to the effect that the money due had been paid and the jewels pledged with the complainant, were delivered to the accused. Subsequently, the complainant alleged that the agreements were sham transactions and that the jewels were given to the accused who had undertaken to sell them and pay the sale proceeds to the complainant in discharge of his decree debt. It was held that the magistrate ought not to have taken upon himself to decide the question whether agreements in writing represented a real transaction between the parties or merely a *benami* arrangement between them. The accused was, therefore, acquitted.

Whether a pledgee can pledge what is pledged to him is a question which depends upon the facts of a particular case.[26] In the absence of any express condition to the contrary, it is open to the pledgee to make a sub-pledge of the property pledged with him. He has perfect legal right to deal with the pledged property in any manner he chooses so long as he is within the rights that can be exercised by a bailee.[27] a pawnee or a pledgee has the right to make the sub-pledge to the extent of his interest in the pledged property.[28]3492

39. Goldsmiths not Preparing Ornaments in Terms of Contract--How far Liable for Criminal Breach of Trust

If a goldsmith, who is given gold for preparing ornaments, dishonestly converts it to his own use in violation of the implied contract, he is guilty of criminal breach of trust because there is clearly an entrustment of gold to him for preparing ornaments, desired by the person who gives gold.[29] In this case the complainant had given three gold chains weighing 6.5 tolas to the appellant accused for making a new design chain after melting the old chains. Neither the three old chains nor a new gold chain were returned to him. The complainant sent a telegram and a legal notice asking the appellant accused to return the gold chains. When the accused appellant did not return the old chains nor gave a new one, the complainant filed complaint for offence under s 406, IPC . The High Court held that in such cases the burden was on the accused to rebut the allegation made against him. The High Court was right in directing the trial Court to decide the case on merits in the light of the statements of witnesses and evidence on record.[30] Where the accused to whom silver had been entrusted for making an ornament, introduced copper, it was held that the offence committed was of criminal breach of trust, and not of cheating.[31] However, where the accused was entrusted with some gold and he gave a receipt in token of his having received the gold and also promised to get the ornaments prepared within fifteen days, but he did not prepare the ornaments and even denied having received the gold, it was held that the existence of dishonest intention was proved beyond reasonable doubt. The very fact that receipt was given when gold was taken, would show that it was a *bona fide* transaction between the goldsmith and the customer and subsequently the accused was not able to fulfil his part of the contract.[32]

40. Suparddar--How far Liable for Criminal Breach of Trust with Respect to Property Entrusted to him

As to whether a person, to whom property is entrusted for return when necessary, the question of criminal liability has to be considered in the light of the terms of the agreement made with him. The mere fact, that there is a civil liability, does not necessarily absolve one from criminal liability.[33] In *Indrajit Singh Kohli v State* ,[34] a truck, seized from the possession of another person, was made over to the custody of the accused on executing a bond by him to the effect that he would produce the same whenever required. However, when he was called upon to produce the truck, he did not do so and remained untraced for sometime. It was held that the existence of other remedies by way of forfeiture of the bond or imposition of penalty did not exclude a criminal liability for an offence of criminal breach of trust. Where some property, attached in execution of a decree of the civil court, was handed over to the accused for safe custody and he refused to produce same when demanded at the time of auction, it was held that it amounted to repudiation of the trust, reposed in him, and3493 he was, therefore, guilty under s 406 .[35] Where, however, some movable property, attached in execution of a decree, was placed in the charge of the accused, and he evaded the service of notices, issued to him for producing the same at the time of auction-sale, and did not produce the property, it was held that as the property had not been misappropriated, or converted to the use of the accused, or used or disposed of in any manner contrary to the terms of the trust, the accused was not guilty under s 406 .[36] The offence would not be committed unless it is proved that the accused had dishonestly used the property in violation of the terms of the *supardnama*.[37] In *Shashi Bhushan Maity v State* ,[38] it was held that when the accused denies the execution of the *Zimmanama* and the entrustment depends entirely upon the existence and genuineness of the *Zimmanama*, the prosecution must produce good evidence in proof of execution of the *Zimmanama*. Unless the *Zimmanama* is considered to be a valid document, validity entrusting the accused with the custody of the property under consideration, the accused cannot be convicted of a criminal breach of trust, sought to be created by the *Zimmanama* itself.

41. Mortgage and Hypothecation and Breach of Trust

In the case of mortgage or hypothecation, the ownership does not pass to the persons in whose favour the mortgage or hypothecation is created, but it does create 'a beneficial interest' in his favour, if the property is removed without his consent and in violation of the terms of the agreement in that regard, *prima facie*, the offence of criminal breach of trust is made out.[39]

42. Dishonour of cheque

The cheques issued by the appellant/accused towards purchase price were dishonoured. There was neither allegation nor proof that the appellant had intention to cheat the respondent from the very beginning. Held, no offence of criminal breach of trust or cheating was committed. Appellant was acquitted of the charges under ss 405 and 420, IPC .[40]

Where the accused had promised to repay the amount, cheque issued was dishonored and amount was not made available in the account despite several reminders, *prima facie* case for proceeding under ss 406 and 409, IPC was made out.[41]

43. Blank cheque

Where a person misappropriates the amount of a blank cheque for a purpose other than for which the cheque was issued, he commits the offence of criminal breach of trust punishable under s 406, IPC .[42]3494

44. Misappropriation, even for a Short Period, is a Criminal Breach of Trust

The law makes a very clear provision for offences of temporary misappropriation and breach of trust and

similarly in cases where the property has been removed fraudulently and dishonestly and theft or robbery has taken place, the law envisages that the offence is complete when the ingredients of the section are satisfied.[43] Deprivation, even for a short-period, falls within the scope of this section.[44] To establish dishonesty, it is not necessary that the prosecution should establish an intention to retain permanently the property misappropriated. An intention to wrongfully deprive the owner of the use of property for a time, and secure the use of property for his own benefit for a time may be sufficient.[45]The offence would be committed even where the act of the accused was to cause wrongful loss to the complainant for the time being only.[46] A village officer of a temple remitting revenue collections to the treasury after excessive delay would be guilty of an offence under s 408 .[47] Where a *patwari* collected some cesses and process fees and made some other collections, did not deposit the amounts in the treasury for some months, it was held that he was guilty under s 409 as wrongful loss covers a temporary wrongful gain.[48] A *naib nazir,* receiving moneys in his capacity as such but not entering in the proper register, and not handing it over to his successor,[49] or a VP clerk, keeping the money for more than ten days and denying its receipt,[50] would be guilty of an offence under s 409 . Where the accused, in December 1957, received certain amounts as repayment of *taqavi* loan, but wrongly stated that they were received in April 1958, it was held that false explanation was sufficient to prove the element of dishonesty.[51]

45. Prosecution not to Prove Actual Manner of Misappropriation

The actual manner of misappropriation, it is well settled, is not required to be proved by the prosecution. Once entrustment is proved, it was for the accused to prove as to how the property entrusted to him was dealt with in view of s 405 of the IPC . If the accused had failed to produce any material for this purpose, the prosecution should not suffer therefor.[52]

46. 'In Violation of any Direction of Law'

These words relate, and are limited, to the words 'dishonestly uses or disposes of that property.'[53] Where the secretary of a society advanced money, against the rules of the society, to the person not entitled to it, the argument that there was no criminal offence as the society had ratified the advances, could not be upheld.[54]3495

Any act of omission or commission on the part of any authority of the Bank would amount to acting in violation of any direction of law. A direction of law need not be a law made by Parliament or a legislature; it may be made by an authority having the power therefor; the law could be a subordinate legislation, a notification or even a custom. Indisputably, the higher authorities of the Bank were entrusted with or otherwise had dominion over the properties of the Bank. They were dealing with public funds. Indisputably again they were required to apply the same in terms of the circulars issued by the Bank as also the Reserve Bank of India. It has been accepted at the Bar that failure on the part of the officers of the Bank to abide by the directives issued under the circulars would result in civil action. Subjecting the bank to a civil liability would thus attract one of the ingredients of criminal breach of trust. There cannot be, however, any doubt whatsoever that a mere error of judgment would not attract the penal provision contained in s 409, IPC . The materials brought on record by the parties must be judged keeping in view the aforesaid legal position.[55]

47. 'Legal Contract'

A mere breach of contract, or a mere breach of conditions of a permit, is not necessarily synonymous with the criminal breach of trust.[56] The section refers to legal contract. There is, however, controversy on the question whether in cases of illegal contracts, the misappropriation would be covered by s 405 . In some cases, it has been held that there will be criminal breach of trust. Where the complainant left his flock of sheep in possession of the accused to prevent them from being taken in execution of a decree and the accused misappropriated the sheep to his own use, it was held that the fact that the trust was created for an illegal purpose, will not justify the accused in selling the animals and appropriating the sale proceeds to his own use.[57] It was held in *Mahadev Koshti v Narayan* ,[58] that the question of criminal responsibility wholly stood on a different footing. The trust contemplated by ss 405 and 406, IPC, need not be in

furtherance of a lawful object. On the other hand, it has been held by the Madras High Court that a person cannot be convicted under this section if the contract is a wagering contract.[59] The violation of a contract must be in respect of a legal or valid contract in order to amount to a criminal breach of trust. It should not be for a criminal purpose (*e.g.*, purchase of stolen property, *etc.*).[60]

48. 'Contract, Express or Implied'

Entrustment need not be express; it may be implied.[61]

49. 'Wilfully Suffers any other Person so to do'

'Wilfully' means that an act is done deliberately and intentionally, and not by accident or inadvertence.[62] 'Wilfully', presupposes a conscious action while even by3496 negligence one can allow another to do a thing.[63] Mere acts of negligence in complying with the relevant rules would not suffice to hold one responsible on the ground that he willingly suffered the embezzlement.[64] In *Kedarnath v State* [65] the accused was a manager cum accountant and was responsible for the entire administration of a brick kiln, for which a high standard of care was required. The inspection notes of his work repeatedly warned him and useful suggestions for avoiding losses were made. He was given correct advice but he chose to disregard it. In these circumstances, it was held that the conduct of the accused was deliberate, and even if it be assumed that someone else committed that misappropriation, the accused wilfully suffered him to do so.

It is not necessary for the purpose of s 405, IPC that the property must be physically with the accused. All that is required, is that he should have dominion over it and it may be disposed of under his direction and in case he acts in violation of any direction of law, prescribing the mode in which such trust is to be discharged, and the property is accordingly disposed of, he is clearly liable for criminal breach of trust.[66] In the last cited case, the act of preparing false vouchers on the basis of exaggerated amounts, paid to various persons, was held to amount to criminal breach of trust within the meaning of s 405, IPC .

50. Explanations 1 and 2

The position of law prior to the coming into force of s 9 of the Employees Provident Funds and Family Pensions Fund (Amendment) Act 1973, adding expln 1 to this section, was that para 32(3) of the Employees Provident Funds Scheme 1952 created only a fiction of entrustment,[67] with the result that the sum deducted from the wages of an employee by the employer, could not be an entrustment so as to attract the provisions of s 405, IPC, though it did amount to an entrustment under the said paragraph.[68] Similarly, the mere fact that the employer made a deduction from the employee's wages but failed to make a deposit, was insufficient to hold that he committed criminal breach of trust because such deduction did not, by itself, constitute trust,[69] The employer in whose possession the deductions were, could not be regarded as having been entrusted with the sum.[70] After expln 1 was added to this section in 1973, the position has radically changed and the employer, who deducts the sums out of the wages of an employee, is regarded as having been entrusted with the sum and if he dishonestly misappropriates the said sum, he is liable for criminal breach of trust.[71] The position is further clarified by making insertions in expln 1 by Act 33 of 1988, s 27 *wef* 1 August 1988 by retaining expln 1, but clarifying with such3497 insertion that now an establishment which is exempted under s 17 of the Employees Provident Funds and Miscellaneous Provisions Act 1952 (19 of 1952) or not, who deducts the employees' contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid. Similar would be the position with regard to expln 2 which is obviously an extension of its principle to the Employees State Insurance Fund.

Where there was a controversy between the parties with regard to the question, whether contingencies on the happening of which money would be payable by the employer to the complainant employee did

actually happen, the mere non-payment of contribution in such a case does not amount to an offence under s 409, IPC, so the criminal proceedings initiated are liable to be quashed. [72]

The expression 'person' appearing in expln 2 clearly refers to the principal employer defined in the ESI Act.[73]

Non-remittance of the provident fund money deducted from the salary of the employees is an offence punishable under s 406, IPC, and subsequent remittance of the amount, even if accepted, would not condone the offence.[74] Where the petitioner had not deposited the employees contribution of fund, but remitted all dues in response to the notice received from the Employees State Insurance Corporation, the Amnesty Scheme exonerated the petitioner of the offence under s 85 of the Employees State Insurance Act 1948 and also under s 405, IPC .[75]

51. Director of a Company not Liable for Non-deposit of Provident Fund Amount

In view of the definition of the employer[76] the employer is the occupier of the company in question and he is a person who has ultimate control over the affairs of the company in view of the definition of the employer and in view of expln 1 to s 45, IPC, the employer is the person who deducts the employees' contribution under the Act from the wages payable to the employees for credit to the Provident Fund or Family Pension Fund established under the law and, therefore, in no way the directors of the company can be held liable for the prosecution under ss 406 and 409, IPC, as there was no entrustment to them in terms of expln 1 to s 405, IPC .[77] In this connection, reference can be made to the case of *Employees State Insurance Corporation v SK Agarwal.* [78]Section 2(e) of the Act appears to be *pari materia* to s 2(17) of the Employees State Insurance Act. The Apex Court in *Employees State Insurance Corporation* case has held that in view of the definition of the employer under s 2(17) of the Employees' State Insurance Act and in view of expln 2 to s 405, IPC, the expression employer does not include the director. The ratio laid down by3498 the Apex Court, is wholly applicable in view of the definition of the employer under s 2(c) of the Act and in view of expln 1 to s 405, IPC . The directors of the company in no way can be held liable for criminal prosecution for non-deposit of contribution of the employees for contravention of the provisions of the Employees Provident Fund Act.[79] But a contrary view is taken by the Calcutta High Court:[80]

> A director of a company can very well figure as an accused in an FIR for such offences. Of course ultimately if no material is found against the director in course of investigation about his involvement, he may not be chargesheeted. That apart a company cannot act on its own. It always acts through human agency. A company being a juristic person is incapable of having a particular state of mind, namely, the *mens rea* under Section 405IPC Essential ingredient of the offence under Section 405 is a particular state of mind, namely, dishonest misappropriation or conversion or use or disposal of the property in question. A company, being a juristic person, is incapable of having such state of mind and hence the company cannot be proceeded against for the offences under Section 406 and 409IPC where particular *mens rea* is an essential ingredient. Therefore, it is only the natural persons through whom the company committed the offences in question are liable to be proceeded against for offences under Section 406 and 409 . It may be pertinent to mention here that *mens rea* like dishonest misappropriation or conversion or use or disposal of the property in question is not an ingredient for the offences contemplated under the provisions of EPF and MP Act and hence, for offences under the said Act a company can be proceeded against, though it cannot be proceeded against for the offences under the Indian Penal Code . Therefore, the contention that a director only cannot be proceeded against and it is the company only which can be proceeded against for the offences under Sections 406 / 409 sounds like an absurd proposition and the same is untenable in law.

52. Company -- Liability of other directors

The complainant had taken loan from the company against his shares, had repaid the loan but his shares were not returned. Agreement relating to share was entered into between the complainant and one director of company. Other directors of the company cannot be prosecuted on the principle of vicarious liability.[81]

53. Partners of a Firm not Liable in the Absence of Necessary Averments in the Complaint

When the principal employer is not being prosecuted, the partners cannot be prosecuted without any specific allegation. Even if there was slightest suggestion in the complaint that the partners were actively involved in the business of the firm along with the principal employer then the complainant would be justified in prosecuting the partners. in the absence of any such averment, it is difficult to hold that the partners in the facts and circumstances of the case can be prosecuted, while the principal employer is not prosecuted. Under s 2(17)(i), Employees State Insurance Act the principal employer is the manager of the factory for the purposes of Factories Act. The manager of the factory need not be the partners.[82]3499

In the matter of *Sham Sunder v State of Haryana* [83] the Supreme Court held as follows:

> It is, therefore, necessary to add an emphatic note of caution in this regard. More often it is common that some of the partners of a firm may not even be knowing of what is going on day to day in the firm. There may be partners who are not required to take part in the business of the firm. There may be ladies and minors who were admitted for the benefit of partnership. They may not know anything about the business for the firm. It would be travesty of justice to prosecute all partners and ask them to prove under the *proviso* to sub-s 1 that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the *proviso* that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-s 1 is established. The requisite condition is that the partners were responsible for carrying on the business and were during the relevant time in charge of the business. In the absence of any such proof, no partner can be convicted. We, therefore, reject the contents urged by counsel for the state.

Reliance was also placed in a Division Bench judgment[84] in the matter of *ESIC v S Narayana Rao* , the Karnataka High Court held in para 7 as follows:

> It is now necessary to consider the liabilities of the present respondent in the light of the decisions referred to above. Again going back to the definition of the term 'occupier' under the Factories Act as it stood before insertion of the *proviso* in the year 1987 the person who has ultimate control over the affairs of the factory as the occupier. In our view, therefore, it is necessary for the complainant to allege and protest who exactly was in ultimate control over the affairs of the factory, if at all one is sought to be made liable as an occupier. As we have already pointed out from the definition of 'principal, employer', there may be managing agent appointed by the occupier or the owner, there may be legal representatives of a deceased-owner or occupier and where a person has been named as manager of the factory the person so named. Therefore, the complainant cannot ask the court to fit the accused into any one of the category and say that he was responsible for obeying one of the requirements under the statute. As we have already pointed out the evidence of PW 1 and the inspector is totally silent in this behalf. What he stated was that the respondent was a managing director and nothing more. The term 'principal employer' does not include in its definition the managing director. He does not say who was the occupier of the factory. He does not say who was having ultimate control over the affairs of the factory and does not even say that the respondent was the principal employer. Therefore, it is not possible to make out from the complaint and much less even from the evidence as to the capacity in which the respondent was sought to be prosecuted.

While the principal employer will be strictly liable, the partners can be made liable if there are averments in the complaint that they have also participated in the commission of the offence.

54. Death of Complainant--Proceeding can be Continued by Another Person

There is no specific provision in the Code of Criminal Procedure 1898, to deal with a situation wherein a complainant dies, therefore, s 302 of Code of Criminal Procedure, could be invoked and the complaint can be permitted to be continued by the mother of the complainant.[85] There are also decisions of various High Courts3500 where a similar view is taken, that on the death of the complainant the prosecution can be

entrusted on some other person.[86]

55. Complainant Company Amalgamating with another Company--Successor Company can Continue Prosecution

There is no provision in the Code of Criminal Procedure that the complaint abates on the death of the complainant. The fact that the old company has ceased to exist in the eyes of law is almost like the death of the complainant. In such a case the court can very well invoke the power under s 302, CrPC, and entrust the conduct of prosecution of the case to another person. Thus, where the complainant company had amalgamated with another company and now a new company has come into existence, it is open to the transferee company to file appropriate application under s 302, CrPC, before the magistrate for permission to continue the prosecution. It is not a case of the transferee company being substituted for the original complainant company. The name of the original complainant should continue on record. However, it can be mentioned that 'original complainant company now represented by the transferee company', for conducting the prosecution. On such application being filed by the transferee company, the magistrate shall permit the transferee company to continue the prosecution according to law.[87]

51 Inserted by Act 40 of 1973, s 9 (wef 1-11-1973).

52 Instituted by Act 33 of 1988, s 27 (wef 1-8-1988).

53 Inserted by Act 38 of 1975, s 9 (wef 1-9-1975).

54 *Sushil Kumar Gupta v Joy Shankar Bhattacharjee* AIR 1971 SC 1543, p 1546, [1970] 2 SCR 770 .

55 *Chelloor Mankkal Narayan v State of Travancore & Cochin* AIR 1953 SC 478, p 484 ; 1954 Cr LJ 102, p 108 ; Re *Ayyadurai Devar*1981 Cr LJ 258, p 259 (Mad); *Sardar Singh v State of Haryana* 1977 Cr LJ 1158, p 1159, AIR 1977 SC 1766 (what the section requires is much more than mere failure to return the property to its owner); *Sathi Ramireddy v SLT Sugar Mills* (1973) 1 An LT 78 ; *Nag Po Seik v Emperor* 13 Cr LJ 888, p 893 ; *Dalsingh v State of Madhya Pradesh* (1961) 2 Cr LJ 496, 1961 MP LJ 765 ; *Muhammad Ashfaq Imam Illahi v Motiram Manghanmal Advani* AIR 1939 Sind 1 ((2)), 40 Cr LJ 173 ; *Sheonarayan Jaiswal v State of Bihar* AIR 1953 Pat 225, 54 Cr LJ 1289 ; *Ramaswami Reddy v Emperor* AIR 1931 Mad 235, 32 Cr LJ 743 ; *Ram Niranjan Kajaria v State of Rajasthan* (1964) 1 Cr LJ 614 .

56 Re *Venkata Gurunatha*AIR 1923 Mad 597, p 598, 24 Cr LJ 452 .

57 *State of Rajasthan v Kesar Singh* 1969 Raj LW 235, 1969 Cr LJ 1595 .

58 *Kankuyalal Baid v Rajkumar Agarwal* 1981 Cr LJ 824, p 825 (Ker)

59 *Om Parkash Gupta v State of Uttar Pradesh* AIR 1957 SC 458, p 461, 1957 Cr LJ 575 ; *Organike Chemicals Corporation v Munirabad Chemicals Co* (1980) 24 MLJ (Cr) 229 (Kant) ; *Rex v V Krishnan* AIR 1940 Mad 329, 41 Cr LJ 824 ; *NN Burjorjee v Emperor* AIR 1935 Rang 453, 37 Cr LJ 190 ; *Sardar Singh v State of Haryana* AIR 1977 SC 1766 ; *VP Srivastava v Indian Explosives Ltd* (2010) 10 SCC 361, 2010 (10) Scale 177 (Accused acquitted); *Ram Niwas Modi v Nipen Kr Nath* 2011 (99) AIC 946 (Gauh) .

60 *Ramesh Chand Verma v Bhagat Ram* 1973 Cr LJ 1033 (J&K) .

61 *Chiranjilal Sharma v Raja Ramsingh* AIR 1964 Raj 267, p 270, (1964) 2 Cr LJ 730 ; *Radha v State of UP* 1 (2014) DMC 734 ; *Adi Burdoraji Godrej v State of Jharkhand* 2013 (132) AIC 454 (Jhar) .

62 *State v Jugal Kishore Nanda* AIR 1957 Ori 268, 1957 Cr LJ 1431 ; *Vasudevan Thambi v Maria Antoni* 1976 LW (Cr) 76 ; *Puna Chandra Behera v State* (1966) 32 Cut LT 719, p 731 ; *Sardar Singh v State of Haryana* (1977) 1 SCC 463, p 465 .

63 *P Raghunath Patro v State* 1977 Cut LR (Cr) 313 ; *Surinder Mohan v Kiran Saini* 1977 Ch LR (P&H) 212, pp 233-35.

64 *Satish Jain v State of Uttaranchal* 2006 Cr LJ 1172 (Utr) ; *Ghanshyam v State of Rajasthan* (2014) 2 SCC 683, (2014) 133 AIC 54 (SC) ; *Onkar Nath Mishra v State* 2008 Cr LJ 1391, p 1394 (SC), (2008) 2 SCC 561, 2007 (8) Supreme 405, 2007 (14) Scale 403 ; *Ashok Basak v State of Maharashtra* (2010) 10 SCC 660 ; *VP Srivastava v Indian Explosive Ltd,* (2010) 10 SCC 361, 2010 (10) Scale 177 ; *R Venkatakrishnan v CBI* (2009) 11 SCC 337, (2010) 1 SCC (Cri) 164 ; *Onkar Nath Mishra v State (NCT of Delhi)* (2008) 2 SCC 561, 2008 Cr LJ 1391, 2008 (1) SCC (Cr) 507, 2008 (1) Crimes 42 (SC) .

65 *Sadhupati Nageswara Rao v State of Andhra Pradesh* 2012 Cr LJ 4317 (SC), AIR 2012 SC 3242, 2012 AIR SCW 4445, 2012 (7) Scale 62 .

66 *SP Gupta v Ashuthosh Gupta* (2010) 6 SCC 562, p 565 .

67 *Ira Juneja v State* 2004 Cr LJ 3664 (Del) ; *Sumit Rajendre Bhalotia v State of UP* 2011 (108) AIC 585 (All) .

68 *Ram Narain Poply v Central Bureau of Investigation* 2003 Cr LJ 4801 (SC), AIR 2003 SC 2748 .

69 *Ghanshyam v State of Rajasthan* (2014) 2 SCC 683, (2014) 133 AIC 54 (SC) ; *Onkar Nath Mishra v State (NCT of Delhi)* (2008) 2 SCC 561, (2008) 1 SCC (Cri) 507 .

70 *Sesa Goa Ltd v State of Maharashtra* 2009 Cr LJ 3185 (Bom) .

71 *Om Parkash Gupta v State of Uttar Pradesh* AIR 1957 SC 458, p 463-64, 1957 Cr LJ 575, overruling *State v Gurcharan Singh* AIR 1952 Punj 89 ; *State of Bombay v SL Apte* AIR 1961 SC 578, (1961) 1 Cr LJ 725 ; *State v Shaikh Dadan* AIR 1958 AP 29, 1958 Cr LJ 15 ; *Amarendra Nath Roy v State* AIR 1955 Cal 236, 1955 Cr LJ 784 ; *Mahammad Ali v State* AIR 1953 Cal 681, 1953 Cr LJ 1523 ; *Bhup Narain Saxena v State* AIR 1952 All 35, 1952 Cr LJ 236 ; *Gopal Das v State* AIR 1954 All 80, 1954 Cr LJ 96 ; *Om Prakash v State* AIR 1995 All 275, 1955 Cr LJ 754 (FB) ; *State v Pandurang Baburao* AIR 1955 Bom 451, ILR 1955 Bom 984 (FB), overruling previous decision *VV Satyanarayanamurthy*AIR 1953 Mad 137, 1953 Cr LJ 309 ; *K Jayarama Iyer v State of Hyderabad* AIR 1954 Hyd 5, 1954 Cr LJ 464 ; *Gian Chand Madhok v State* AIR 1954 HP 76, 1954 Cr LJ 1481 .

72 *Vadivel v Packialakshmi* 1996 Cr LJ 300 (Mad) . For further commentary, see under the same heading in s 415, *post*.

73 *State v Jageram* AIR 1951 Punj 103, p 104 ; *Basudeb Patra v Kanai Lal Haldar* AIR 1949 Cal 207, 50 Cr LJ 382 ; *State v Venkatesh Bhat* 1967 MLJ (Cr) 20 ; *John v State* 1964 Ker LT 724, 1964 MLJ (Cr) 609 ; *Emperor v John Melver* AIR 1936 Mad 353 (FB), 37 Cr LJ 637, overruling *Crown Prosecutor v Melver* AIR 1936 Mad 1, 37 C LJ 142 which had followed Re *Theophius Ramppa* 13 Cr LJ 15; Re *Venkata Gurunatha*AIR 1923 Mad 597, 24 Cr LJ 452 ; *Nadir Ali Barqa Zaidi v State of Uttar Pradesh* AIR 1960 All 103, 1960 Cr LJ 188 .

74 *Basudeb Patra v Kanai Lal Holder* AIR 1949 Cal 207 .

75 *Rashubir Kurmi v Emperor* AIR 1919 All 309, 20 Cr LJ 413(1) .

76 *Chunnoo v Emperor* 12 Cr LJ 374 .

77 *State of Bombay v SL Apte* AIR 1961 SC 578, (1961) Cr LJ 725 .

78 *Management of the Advance Insurance Co Ltd v Shri Gurudasmal, Supdt of Police and Ors* AIR 1969 Del 330 (DB), (1969) ILR Delhi 426 (DB).

79 *Som Nath Puri v State of Rajasthan* (1972) 1 SCC 630, p 633 .

80 *Shah Naim Ata v Emperor* AIR 1930 Oudh 401, 31 Cr LJ 1012 ; *Jaswant Rai Manilal Akhaney v State of Bombay* AIR 1956 SC 575, 1956 Cr LJ 1116 ; *Kalaktar Singh v State of Bihar* 1978 Cr LJ 663 .

81 *Jaswantrai Manilal Akhaney v State of Bombay* AIR 1956 SC 575, p 582, 1956 Cr LJ 1116 .

82 *Som Nath Puri v State of Rajasthan* 1972 Cr LJ 897, p 900, AIR 1972 SC 1490 .

83 *Shah Naim Ata v Emperor* AIR 1930 Oudh 401, 31 Cr LJ 1012, p 1014 .

84 *VR Dalal v Yogendra Narainji Thakkar* AIR 2008 SC 2793, p 2795, (2008) 15 SCC 625 ; see also *Bhaskar Lal Sharma v Monica* (2009) 10 SCC 604, 2009 (10) JT 109 : 2009 (10) Scale 744 .

85 *Ram Narain Poply v Central Bureau of Investigation* 2003 Cr LJ 4801 (SC), AIR 2003 SC 2748

86 *Jayant Kumar Jaiswal v Bihar State Financial Corporation* 2006 Cr LJ 3972 (Pat) ; *Mahesh Prasad Manjhi and Anr v State of Bihar And Anr* (1999) 3 PLJR 90 .

87 *State of Madhya Pradesh v Pramode Mategaonkar* (1965) 2 Cr LJ 562, 1964 MPLJ 750 ; *State v Jage Ram* AIR 1951 Punj 103 ('entrusted', in its most general significance, imports handing over the possession for some purpose which does not imply the conferring of any proprietary right at all); *Emperor v Ghanshyamdas* AIR 1928 Sind 106, 29 Cr LJ 431(2) ('entrusted', in s 405, is used in its legal, and not in its figurative or popular sense); *Thakarsi Damjee v Crown* ILR 1949 Nag 620 .

88 *State v Jageram* AIR 1951 Punj 103 ; *Rajkishore Bhuyan v State* AIR 1969 Ori 190, 1969 Cr LJ 995 (accused, collecting rent from tenants, by virtue of authority, delegated to him by the naib tehsildar, and not paying the same, is a person entrusted with money).

89 *Naki Ram v State of Haryana* (1974) 76 PLR 780 .

90 *KC Thomas v Avirah Varghese* 1974 Cr LJ 207, p 209 .

91 *P Raghunath Patra v State* 1977 OJD 390, p 394 ; **following***Chetoor Mankkal Narayan v State of Travancore & Cochin* AIR

1953 SC 478, 1954 Cr LJ 102 ; and *Jaswantrai Manilal Akhaney v State of Bombay* AIR 1956 SC 575, 1956 Cr LJ 1116 ; but **not following***Crown Prosecutor v John Melver* AIR 1936 Mad 1, 37 Cr LJ 142 ; and *State v Dayalal Dalpatram* AIR 1960 Bom 53, 1960 Cr LJ 217 .

1 *Sreenarayan Shraff v Sambhu Prasad Agarwal* (1974-75) 79 Cal WN 538; *NK Jhajaria v Chandar* 78 Cal WN 697 .

2 *K Lakshman Das v K Krishna Murty* 1981 CLR 60,p 63.

3 *Vijay Sharma v State of Bihar* 2011 (101) AIC 946, p 948 (Pat) .

4 *Shukla v State of Bihar* 2012 (116) AIC 362 (Pat) .

5 *Velji Raghvji Patel v State of Maharashtra* (1965) 2 Cr LJ 431, AIR 1965 SC 1433 .

6 *Bikram Singh v State* 1974 Cr LJ 418, p 420 ; *State of Maharashtra v Ouseph Varghese* 1975 Mah LJ 431 ; *MA Salam v Dangeti Cubbarao* (1973) 2 AP LJ 127, p 133 .

7 *Ira Juneja v State* 2004 Cr LJ 3664 (Del) .

8 *Dwarkadas Haridas v Emperor* AIR 1928 Bom 521, 30 Cr LJ 329 ; *Iderjit v State* 1973 Kash LJ 79, p 81 ; *Rajkishore Bhuyan v State* AIR 1969 Ori 190, 1969 Cr LJ 995 .

9 *Dwarkadas Haridas v Emperor* AIR 1928 Bom 521, 30 Cr LJ 329 ; *Jagdamba Prasad v State* AIR 1957 MB 33, 1957 Cr LJ 179 ; *Hira Lal v Emperor* 8 Cr LJ 492 .

10 *Gopalakrishnan v State of Kerala* 2009 (4) KLT 525 (Ker) .

11 *Rex v Krishnan* AIR 1940 Mad 329, 41 Cr LJ 824 .

12 *Vadivlan Chetty v Abdul Razak* 6 Cr LJ 334 .

13 *Tha Po v Emperor* 4 Cr LJ 466 ; *Jago v State* 1953 Cr LJ 835 (Raj), AIR 1953 Raj 117 ; *Nga Po Ywet v Emperor* 15 Cr LJ 452 ; *William Cecil Keymer v Emperor* 15 Cr LJ 284 ; *Kock Cheng and Co v Tha Ka Do* 14 Cr LJ 145 ; *Wong Yone Wain v Emperor* 13 Cr LJ 269 ; *Karamali Manji v Emperor* AIR 1938 Sind 57, 39 Cr LJ 399 .

14 *Kshitish Chandra Deb Roy v Emperor* AIR 1924 Cal 816, 25 Cr LJ 1235 .

15 *George Devadass v Luke D Asiravatham* (1968) 2 Mad LJ 612, p 614 .

16 *State of Gujarat v Jaswantlal Nathalal* AIR 1968 SC 700, 1968 Cr LJ 803 ; *State of Maharashtra v KV Nain* 1977 Cr LR 87, p 91-92 (Mah) .

17 *Satyendra Nath Mukherjee v Emperor* (1947) ILR 1 Cal 97 ; *Ram Niranjan Kajaria v State of Rajasthan* (1964) 1 Cr LJ 614 ; *Ghasiram Agarwalla v State* AIR 1967 Cal 568 (FB), 1967 Cr LJ 1599, dissenting from *State of Madras v Jayalakshmi Rice Mills Contractors Co* AIR 1959 AP 352 ; and *G Allaraiah v State of Andhra Pradesh* AIR 1963 AP 394 ; *Ajoy Kumar Roy v GM Wadwani* AIR 1965 Tripura 36, (1965) 2 Cr LJ 418 ; Re *PS Velayutham Chelty* 24 Cr LJ 332.

18 *Rex v V Krishnan* AIR 1940 Mad 329, p 339, 41 Cr LJ 824 ; *Ramakrishnayya v Pitchayya* 1955 An WR 537 ; *Jairani v Kishan Kumar Jauhari* 1985 Cr LJ 64 .

19 *Sheonarayan Jaiswal v State of Bihar* AIR 1953 Pat 225, p 229, 54 Cr LJ 1289 .

20 *Asoke Basak v State of Maharashtra* (2010) 10 SCC 660, 2010 (11) JT 123, 2010 (10) Scale 582, p 670 ; **see also***VP Srivastaqva v Indian Explosives Ltd* (2010) 10 SCC 361, 2010 (10) Scale 177 .

21 *Arun Kumar v State of Uttar Pradesh* 1980 Cr LR 45, p 47 (UP) .

22 *ML Chopra v Gurucharan Singh Giani* 1976 Ch LR 393 (P&H) ; *DN Senapati v Agarwal Trading Co* 1980 ALJ (NOC) 84 .

23 *Bhupinder Kaur v Ajaib Singh* (1981) 8 Cr LT 276, p 277 (Haryana) .

24 *Kanai Lal Dutta v State* AIR 1951 Cal 206, 52 Cr LJ 28 .

25 *Sat Narain v State of Punjab* (1973) 1 Cr LR 172, p 175 .

26 *Kamal Faker v Crown* 53 CWN (1 DR) 79; *Ramaswami Ready v Emperor* AIR 1931 Mad 235, 32 Cr LJ 743 .

27 *Sneh Lata v Swastika Agro Industrial Corporation Jalandhar* 2001 Cr LJ 4432 (P&H) .

28 Refer synopsis 19 under s 403, IPC .

29 *U Dhar v State of Jharkhand and Ors* 2003 Cr LJ 1224 (SC) .

30 *Khuman Chand v State of Rajasthan* 1998 Cr LJ 1670 (Raj) .

31 Refer synopsis 6 under s 404, IPC .

32 *RK Dalmia v Delhi Administration* AIR 1962 SC 1821, p 1833, (1962) 2 Cr LJ 805 ; *Daud Khan v Emperor* AIR 1925 All 673, p 674, 27 Cr LJ 17 ; *Natesa Mudaliar v Srinivasalu* 1932 MWN 1353 .

33 *Arjun Mahto v State of Jharkhand* 2009 Cr LJ 1911 (Jhar) .

34 *Manchersha Ardeshir v Ismail Ibrahim Patel* AIR 1936 Bom 167, p 171, 37 Cr LJ 577 ; *Shivanarayana Joshi v State of Maharashtra* AIR 1980 SC 439, p 441 .

35 *Emperor v Maula Bux* 27 All 28, 1904 AWN 153 .

36 *Ram Chand Gurwala v Emperor* AIR 1926 Lah 385, p 392, 27 Cr LJ 1383 .

37 *Suryalakshmi Cotton Mills Ltd v Rajvir Industries Ltd* (2008) 13 SCC 678, AIR 2008 SC 1683 .

38 Refer synopsis 6 under s 404, IPC .

39 *Dharamdas Lilaram v Emperor* AIR 1932 Sind 169, 34 Cr LJ 51 ; *Dwarkadas Haridas v Emperor* AIR 1928 Bom 521, 30 Cr LJ 329 ; Re *Venkata Guru Natha*AIR 1923 Mad 597, 24 Cr LJ 452 ; *Balthasar v Emperor* AIR 1915 Cal 266 .

40 *Suganmal Bhojraj v Emperor* AIR 1944 Sind 237, 46 Cr LJ 243 ; *G Sivanadan v State* AIR 1955 TC 271, p 272, 56 Cr LJ 1539 .

41 *Gopalakrishnan v State of Kerala* 2009 (4) KLT 525 (Ker) .

42 Refer synopsis 6 under s 403, IPC .

43 *Dutta Ram Kashinath Wagle v Emperor 10 Cr LJ 255; Rangi Lal v Emperor* AIR 1930 Oudh 321, p 323, 32 Cr LJ 1078 .

44 *Abdul Karim v Crown* 52 Cr LJ 1178, p 1182-83 ; *FS Hay v Emperor* AIR 1925 Oudh 469, p 472, 26 Cr LJ 1217 ('dishonestly' does not necessarily imply a wrongful gain to the accused himself); Re *Rambilas*AIR 1915 Mad 600, p 601, 15 Cr LJ 688 (wrongful loss or wrongful gain, whether actually resulted or not, is immaterial, the dishonest intention being the only dertermining factor).

45 *Ram Narain Poply v Central Bureau of Investigation* 2003 Cr LJ 4801 (SC), AIR 2003 SC 2748 .

46 Re *GD Joseph*AIR 1939 Mad 407, 40 Cr LJ 642 .

47 *Mohanlal Mulchand v Mehta Kanaiyalal Pranshanker* AIR 1950 Kutch 52, 51 Cr LJ 1139 .

48 *Uday Narayan Pande v State* (1978) 45 Cut LT 215 ; *Fakir Charan Behera v State* 1975 OJD 42 .

49 *Fakir Charan Behera v State* 1975 ODJ 42 .

50 *Gopi Nalh Tripathi v State of Orissa* 40 Cut LT 771 .

51 *Kotamsath Appanna v Koppoju* AIR 1950 Mad 49, 51 Cr LJ 330 .

52 *Nirmalabai Misalo v State* AIR 1953 Nag 310, 1953 Cr LJ 1586 ; *Rajendre Singh v State of Uttar Pradesh* AIR 1960 All 387, 1960 Cr LJ 857 .

53 *Emperor v Girji* 1 Cr LJ 1109 ; *Deochand v Madanlal* 70 Bom LR 280, p 285 ; *State v Tirath Das* AIR 1954 All 583, 1954 Cr LJ 1293 ; *Gulam Husain v Emperor* 20 Cr LJ 151 (accused not returning bond even after payment of loan and subsequently denying payment).

54 *R Venkatkrishnan v CBI* (2009) 11 SCC 737, AIR 2010 SC 1812 .

55 *Cardamom County Parks & Hotels (P) Ltd v Ansari* 2012 (2) KLJ 109 (Ker) .

56 *Bapi Das Roy v State of Jharkhand* 2012 (113) AIC 517 (Jhar) .

57 *Manni Lal v Emperor* 33 Cr LJ 866 (All), AIR 1932 All 324 ; *Rex v V Krishnan* AIR 1940 Mad 329, p 337, 41 Cr LJ 824 ; *Duli Chand Dalal v Emperor* AIR 1918 Cal 208, 18 Cr LJ 437 .

58 *Kalipada Mondal v Kali Kinkar Chatterjee* AIR 1936 Cal 674, 38 Cr LJ 113 .

59 61 CWN 210, 1957 An WN (Supp) 27.

60 *Maung Mya Gyi v MG Po Shwe* 15 Cr LJ 425 ; *CJ Cadd v Emperor* AIR 1923 All 598, 24 Cr LJ 620 ; *Silas Moses v Emperor* 16 Cr LJ 665 (assignment made in breach of the hire-purchase agreement held to be a criminal breach of trust); *Alec Aran*

Cohen v Sasi Bhusan Das Gupta 18 Cr LJ 728 ; *Mohammad Sulaiman v Mohd Ayub* AIR 1965 SC 1319, (1965) 2 Cr LJ 421 ; *Musa Mia v Dorabjee* 5 1C 969.

61 *Charanjit Singh Chadha and Ors v Sudheer Mehra* 2001 Cr LJ 4255 (SC) ; *Sunil Ranjan Ghosh Roy v Samer Ray* 1987 Cr LJ 1603 (GL) ; *HDFC Bank Ltd v State of West Bengal* (2011) 2 Cal LT 227, 2011 (104) AIC 804 (Cal) . For further commentary, see under the heading 'Removal of articles in case of Hire-purchase Transactions--whether theft' in s 378, *ante*.

62 *Hussainalli Mahomedali v Emperor* AIR 1929 Sind 119, 30 Cr LJ 735 .

63 *Puran v Emperor* AIR 1926 All 298, 27 Cr LJ 383 ; *Krishna Rao v Emperor* 24 Cr LJ 591 ; *Baijnath Marwari v Emperor* AIR 1933 Pat 554, 34 Cr LJ 915 .

64 *Ram Khelawan Thakur v Emperor* 20 Cr LJ 654 .

65 *Ram Krishnayya v Pitchayya* 1955 Andh WR 537, p 538-39 .

66 *Ravi B Jadega and Ors v State of Uttar Pradesh* 2001 Cr LJ 2892 (All) .

67 *Cranewell v Emperor* 48 CWN 734 .

68 *Mafizul Islam Mia v KP Sinha* AIR 1968 Tripura 36, 1968 Cr LJ 1120 .

69 *Sudhir Shantilal Mehta v CBI* (2009) 8 SCC 1, p 25, 2009 (11) Scale 217 .

70 *Sham Lal v State of Punjab and Ors* 2001 Cr LJ 2987 (P&H) .

71 *Rajesh Bajaj v State NCT of Delhi* AIR 1999 SC 1216, 1999 Cr LJ 1833 (SC), (1999) 3 SCC 259, 1999 AIR SCW 881 .

72 *CK Sreedharan v State of Kerala* 1999 Cr LJ 758 (Ker) .

73 *Bal Kishan Das v PC Nayar* AIR 1991 SC 1531, 1991 Cr LJ 1837 .

74 *Pratibha Rani v Suraj Kumar* AIR 1985 SC 628, 1985 Cr LJ 817, (1985) 1 Chand LR (Cri) 666 .

75 *State of Haryana v Nawabuddin Khan* 1997 Cr LJ 1629 (P&H) (DB) .

76 *Sitaram Agarwal v State of West Bengal* 2010 (88) AIC 490, p 499 (Cal), (2010) 1 Cal LT 622 .

77 *Ranganyakalu Chetty v Gopala Chetty* AIR 1953 SC 439 ; *Raminder Kaur Bedi (Smt) v Shri Jatinder Singh Bedi* (1989) 16 DRJ 154 (Del) .

78 *Missy Lal v Tata Ram* 1984 RLR 125 (Del) ; *Charanjiv Pratap Ahluwalia (Shri) v State (Delhi Admn)* 1997 Cr LJ 333 (Del) .

79 *Kanhaiya Lal v Emperor* AIR 1937 Oudh 331, p 334, 38 Cr LJ 491, **overruled** in *Mahendra Pal v State* 1965 ALJ 538, p 544 (DB) on different point ; *Abdul Karim v Crown* 52 Cr LJ 1178, p 1182-83 ; *Nirmalabai Misal v State* AIR 1953 Nag 301, 1953 Cr LJ 1586 .

80 *Nga Po Seik v Emperor* 13 Cr LJ 888 ; *Wong Yone Wain v Emperor* 13 Cr LJ 269 ; *Mukhlal Rai v Emperor* 27 Cr LJ 949 ; *Supdt and Remembrancer of Legal Affairs v Birendra Chandra Chakravarty* 1974 Cr LJ 341 ; *Rajesh Pal v Mohd Ali* 1973 Pat LJR 504

81 *Gopal Krishan Majumdar v State of Tripura* AIR 1955 Tripura 35, p 38, 1955 Cr LJ 1636 ; *Halimuddin Ahmed v Ashoka Cement Ltd* 1976 Cr LJ 449, p 451 ; *Hanmant Murhar Desh Pande v State of Mysore* (1973) Mad LJ (Cr) 420 .

82 *Jaswantrai Manilal Akhaney v State of Bombay* AIR 1956 SC 575, p 582, 1956 Cr LJ 1116 ; *Nelson Loo v ML Gupta* (1962) 1 Cr LJ 411, AIR 1962 Cal 197 ; *Arjun Panigarahi v State* (1974) 1 Cut LR (Cr) 203 ; Re *MD Kuppuswamy*1966 Cr LJ 1096, (1966) 1 Mad LJ 409, p 410; *Mafizul Islam Mia v KP Sinha* 1968 Cr LJ 1120, AIR 1968 Tripura 36 .

83 *Commercial Bureau v NR Ghoshal* AIR 1948 Cal 1, p 2, 48 Cr LJ 552 ; *Bihar State Khadiand Village Industries Board v Daud Toppo* 1975 BLJR 448 ; *Hit Narain Mahton v Bed Narain Mistry* AIR 1946 Pat 125, 48 Cr LJ 107 .

84 *Abhinash Chandra Sarkar v Emperor* 37 Cr LJ 439 ; *Louis Edouard Lanier v King* 15 LJ 305 ; *Ram Chandra Nanda v State of Orissa* (1978) 45 Cut LJ 338 .

85 *Rangi Lal v Emperor* AIR 1930 Oudh 321, 323, 31 Cr LJ 1078; *Nurul Hasan v Emperor* AIR 1920 Pat 168 ((2)), 21 Cr LJ 509 ; *Parmod Ban Behari Saran v Emperor* 29 Cr LJ 90 ; *Agadhe Misra v State* ILR 1958 Cut 589 ; *Gani Setti v Venkanna* 1957 MLJ (Cr) 535 ; *Mathura Prasad v Emperor* AIR 1917 All 273, 18 Cr LJ 655 (although it raises a very serious doubt about the *bona fides* against the accused); *Empress v Ganpat Tapidas* (1886) ILR 10 Bom 256 .

86 *Munuswami Nainar v Emperor* AIR 1930 Mad 507, 31 Cr LJ 1198 (2); *Gunananda Dhone v Santi Prakash Nandy* AIR 1925 Cal 613, p 615, 26 Cr LJ 725 .

87 *Parveen Kumar v State and Anor* 1998 Cr LJ 1693 (Raj) .

88 *Radha v State of UP* 2014 (2) All LJ 637 (All) .

89 *Rahul Gupta v State of UP* 1 (2013) DMC 528 (All) .

90 *Khatizam Bi Sikander Khan v Rahimal Bi Khan* 2010 Cr LJ 331 (Bom) .

91 *Sardar Singh v State of Haryana* AIR 1977 SC 1666, 1977 Cr LJ 1158 ; *CJ Shah and Ors v Brij Mohan Wadhwa and Anor* 1991 Cr LJ 1906 (Bom) .

92 *Emperor v U Maung Gele* AIR 1926 Rang 171, 27 Cr LJ 1088 .

93 *Kudral Nath v Crown* AIR 1923 Lah 295(1), 24 Cr LJ 879

94 *Surendra Pal Singh v State* AIR 1957 All 122, 1957 Cr LJ 170 .

95 *Labhu v Emperor* AIR 1930 Lah 408, 32 Cr LJ 300 ; *Empress v Emdad Khan* (1886) ILR 8 All 120 .

96 Re *Sumander Singh*ILR 1956 Raj 942.

97 *Harry Jones v Emperor* AIR 1924 Cal 908, 25 Cr LJ 1053 .

98 *Empress v Khande Rao Rat* Unrep Cr C 700; *Raj Kishore Pattar v Joy Krishna* 28 Cal 362 .

1 *CHICEL Pharma Ltd and Ors v State of Andhra Pradesh and Ors* 2000 Cr LJ 2566 (AP)

2 *Ira Juneja v State* 2004 Cr LJ 3664 (Del) .

3 *Alagiri and Anor v State* 1996 Cr LJ 2978 (Mad) .

4 *Velji Rahavji Patel v State of Maharashtra* AIR 1965 SC 1433, p 1435, (1965) 2 Cr LJ 431, approving *Bhuban Mohan Das v Surendra Mohan Das* AIR 1951 Cal 69 (FB), 52 Cr LJ 723; *State of Bombay v Devakinandan Kanhyalal Agarwal* AIR 1959 Bom 486, 1959 Cr LJ 1302, dissenting from *Jaikrishna v Crown* AIR 1950 Nag 99, 51 Cr LJ607 (holding rather broadly that a partner cannot be guilty of criminal breach of trust or misappropriation); *State of Maharashtra v Gopal Chunimal Podar* 1978 Cr LJ 425 (Bom) ; *State of Gujarat v Vora Jayantilal Chhotelal* 1975 Guj LR 661 ; *Atluri Silaramdoss v State* (1975) 1 APLJ 119 ; *Sri Ram v Parshadi Lal* AIR 1982 All 60 (DB) ; *Prabhu Dayal v Satish Chandra* 1978 All Cr R 382 .

5 *Bhuban Mohan Das v Surendra Mohan Das* AIR 1951 Cal 69 (FB), 52 Cr LJ 723; confirming *Queen v Okhoy Coomar* 21 WR (Cr) 59 (Cal) (FB); *Bhudhar Mal Marwari v Ramchander Marwari* AIR 1920 Pat 112, 21 Cr LJ 338 ; *RK Dalmia v Delhi Aaministration* AIR 1962 SC 1821, p 1837, (1952) 2 Cr LJ 805 ; approving *Jagannath Raghunathdas v Emperor* 1932 Bom 57, 33 Cr LJ 317 ; *Devidutt v Ram Niwas* 1977 Raj Cr C 219, p 222, 1977 Cr LR 44 (Raj) ; *Jaibhai Gordhanbhai Patel v Hasmukhlal Kalidas Patel* 1972 Guj LR 617 ; *Mohammad Abdul Sattar v State of Andhra Pradesh* AIR 1958 AP 555, 1958 Cr LJ 1114 ; *Prabhu Dayal v Satish Chandra* 1978 All Cr R 382 ; *Mandavalli Satyanarayanamurthi v Kotha Manitryala Rao* AIR 1940 Mad 265, 41 Cr LJ 398 ; *Basdeo Sharma v Dhanraj Gupta* 1981 Cr LJ (NOC) 22 (Cal) ; *Jagannath Raghunathdas v Emperor* AIR 1932 Bom 57, 33 Cr LJ 317 ; *State of Bombay v Devaki Lal* AIR 1939 Lah 406, 40 Cr LJ 942 ; *Janki Prasad v Pyarelal* AIR 1956 VP 7 ; *Sobha Singh v Jai Singh* AIR 1954 HP 46, 1954 Cr LJ 1202 ; *Velagala Venkata Reddy v Kovvuri Chinna Venkata Reddy* AIR 1941 Rang 342, 43 Cr LJ 263 ; *Alagari v State* 1996 Cr LJ 2078 (Mad) .

6 *Velji Raghavji Patel v State of Maharashtra* AIR 1965 SC 1433, p 1435, (1965) 2 Cr LJ 431, **approving***Bhuban Mohan Das v Surendra Mohan Das* AIR 1951 Cal 69 (FB) .

7 *Bhupendra Nath Sinha v Girdharilal Nagar* AIR 1933 Cal 583, 34 Cr LJ 958 ; *Jethabhai v Bipinchandra* 8 Guj LR 640 ; *Abhai Singh v Sanjay Singh* 1980 Cr LJ (NOC) 98 (All), 1980 Cr LR 129 (UP) ; *SAQ Hashmi v State* (1980) 2 Cal HC Notes 88, 1980 Cr LJ 1030 ; *OP Bansal v State* 1980 Chand LR 18, p 23 (Del) ; *KV Subbiah v T Chalapati Rao* 1971 LW (Cr) 13, p 15, (1971) 2 MLJ 246 ; *Debabrata Gupta v SK Ghosh* 1971 MLJ (Cr) 104 (SC) ; *Devi Dutta v Ram Niwas* 1977 Cr LR 44, p 48 (Raj) .

8 *Man Mohan Das v Mohendra Bhowal* AIR 1948 Cal 292, 49 Cr LJ 543 ; *Chiranjilal Sharma v Raja Ramsingh* AIR 1964 Raj 267, (1964) 2 Cr LJ 730 .

9 *M Rahaman v RD Khambatta* AIR 1949 Cal 89, 50 Cr LJ 154 ; *G Koorathalwar Chetty v Emperor* AIR 1920 Mad 150, 21 Cr LJ 309 .

10 *Nandlal Lakhotia v State of Bihar and Ors* 2001 Cr LJ 1900 (Pat) .

11 *Hardev Singh v Karam Dad Khan* AIR 1959 J&K 19, 1959 Cr LJ 322 ; *Girdharidass Kimatrai v Kewalram Dewandas* 36 Cr LJ 1112 .

12 *VR Dalal v Yogendra Naranji Thakkar* AIR 2008 SC 2793, 2008 AIR SCW 4634 .

13 *Devinder Singh Sabharwal v State* 2011 Cr LJ 4478, 2011 (106) AIC 932 (Ori) .

14 *Anil Saran v State of Bihar* 1996 Cr LJ 408 (SC) .

15 *Bhutan Mohan Das v Surendra Mohan Das* AIR 1921 Cal 69, p 73-74 (FB), 52 Cr LJ 723 ; *Velji Raghavji Patel v State of Maharashtra* AIR 1965 SC 1433, (1965) Cr LJ 431 ; *Kishan Chand v State* (1984) 2 Crimes 827 .

16 *RK Dalmia v Delhi Administration* (1962) 2 Cr LJ 805, **approving***Jagannath Raghunathdas v Emperor* AIR 1932 Bom 57 ; *Anil Saran v State of Bihar* 1996 Cr LJ 408 (SC), (1995) 2 BJLR 1383 (SC) .

17 *Ashok Kumar Singhal v State of Punjab* 2001 Cr LJ 1043 (P&H) .

18 *Thermax Ltd (M/s) v KM Johny* 2012 Cr LJ 438 (SC), 2011 AIR SCW 5952 .

19 *Standard Chartered Bank v Directorate of Enforcement* AIR 2005 SC 2622, 2005 AIR SW 2829

20 *Abdul Motalib v State* AIR 1950 Cal 523 .

21 *Abinash Chandra Kumar v Dhani Buksh Mohammad* AIR 1936 Cal 673, 38 Cr LJ 118 .

22 *Sankari Narasingulu v State* AIR 1955 Ori 145, 1955 Cr LJ 1371 ; *Ladi Changavaju v Rayaprolu Visweswar Rao* (1984) 2 Crimes 176 .

23 *Abinash Chandra Kumar v Dham Buksh Mohammad* AIR 1936 Cal 673, 38 Cr LJ 118 ; *Jaswantrai Manilal Akhaney v State of Bombay* AIR 1956 SC 575, p 582-83, 1956 Cr LJ 1116 ; *Yeditha Subbaya v Emperor* 13 Cr LJ 453 ; Re *Gurumahanty Appolasomy* 1 Weir 464 (1).

24 *Ram Dayal Many Lal v King* AIR 1942 Rang 62 ; *Om Prakash Jain v State of Orissa* (1980) 49 Cut LT (SN) 6 .

25 Re *Gokauarapu Peravya*AIR 1917 Mad 414 ((2)), 18 Cr LJ 34 .

26 1 Weir 461.

27 *Sarju Parshad v Emperor* AIR 1922 Oudh 280, 24 Cr LJ 10 .

28 Re *Nemichand Parakh*AIR 1938 Mad 551, 39 Cr LJ 716 ; *Ramdayal Mangli Lal v King* AIR 1942 Rang 62 .

29 *State v Mithala* AIR 1956 Raj 20, 1956 Cr LJ 107 .

30 *Ghanshyam v State of Rajasthan* (2014) 2 SCC 683, (2014) 133 AIC 54 (SC), 2014 (1) Crimes 100 (SC) .

31 *Reg v Babaji* BHCR 16 (Cr).

32 *Amritlal v Bajranglal* (1963) 2 Cr LJ 474 ; *Emperor v Barmanand* AIR 1936 All 691, 37 Cr LJ 1075 .

33 *Indar Singh v Emperor* AIR 1926 All 302, 27 Cr LJ 297 .

34 *Indrajit Singh Kohli v State* AIR 1967 Cal 460, 1967 Cr LJ 1136 .

35 *Chanan Singh v Emperor* AIR 1935 Lah 31, 36 Cr LJ 119 ; *Ram Narayan v Jhankari Shukla* 1972 All Cr R 2(4).

36 *Harnam Singh v Emperor* AIR 1918 All 406 ((1)), 19 Cr LJ 975 ; *Rampat Roy v State* AIR 1960 All 380, 1960 Cr LJ 780 ; *Dalsingh v State of Madhya Pradesh* (1961) 2 Cr LJ 496 .

37 *Sardar Khan v Emperor* AIR 1933 Lah 235(1), 34 Cr LJ 1163 (1); *Ram Khilawan v State of Madhya Pradesh* (1977) 1 FAC 236, p 237 .

38 *Shashi Bhushan Maity v State* AIR 1957 Cal 148, 1957 Cr LJ 367 .

39 *Jayant Kumar Jaiswal v Bihar State Financial Corpn* 2006 Cr LJ 3972 (Pat) .

40 *Veer Prakash Sharma v Anil Kumar Agarwal* 2007 Cr LJ 3735 (SC), 2007 (5) All LJ 321, (2007) 7 SCC 373, 2007 (5) Scale 502 .

41 *Kundan Kumar v State of Bihar* 2010 (85) AIC 924 (Pat) .

42 *Suryalakshmi Cotton Mills Ltgd v Rajvir Industries Ltd* (2008) 13 SCC 678, AIR 2008 SC 1683 .

43 *State of Karnataka v Mazhar Alim* 2000 Cr LJ 2534 (Kant) (DB) .

44 *Jaswant Manilala Akhaney v State of Bombay* AIR 1956 SC 575, p 581, 1956 Cr LJ 1116 .

45 *Emperor v Chaturbhuj Narain Choudhury* AIR 1936 Pat 350, 37 Cr LJ 877 .

46 *Emperor v Tulsidas Chhaganlal* 5 Cr LJ 5 .

47 1 Weir 464(2); Re *Ponnambalam Pillai* 1 Weir 462(1).

48 *Local Government v Madho Patwari* AIR 1923 Nag 146, p 147, 23 Cr LJ 557 .

49 *Emperor v Daya Shankar* AIR 1926 Oudh 398, 27 Cr LJ 598 .

50 *Chandra Prasad v Emperor* 27 Cr LJ 611, AIR 1926 Pat 299 .

51 *Desai Champaklal Nemchand v State* (1961) 1 Cr LJ 654, p 655 . For further commentary, see under s 403, *ante*.

52 *State of Himachal Pradesh v Karanvir* 2006 Cr LJ 2917 (SC) .

53 Section 405, illusts (a) and (e) to; 1 Weir 460(2).

54 *Sushil Kumar Gupta v Joy Shankar Bhattacharjee* AIR 1971 SC 1543, p 1546 .

55 *Sudhir Shantilal Mehta v CBI* (2009) 8 SCC 1, p 25, (2009) 3 SCC (Cri) 646 ; *Mir Nagvi Askari v CBI* (2009) 15 SCC 643 .

56 *Sheonarayan Jaiswal v State of Bihar* 1953 Cr LJ 1289, AIR 1953 Pat 225, p 230 .

57 Re *China Koruppa* 1 Weir 463; *Nga Te v Emperor* 1 Cr LJ 730 (FB) ; *Emperor v Po Twe* 1881 SJLB 130 .

58 *Mahadev Koshti v Narayan* AIR 1927 Nag 225, 28 Cr LJ 506 .

59 *KR Uppasini v Emperor* AIR 1927 Mad 425, 28 Cr LJ 381 .

60 *Gobardhan Chandra v Kanai Lal* (1953) ILR 2 Cal 133 .

61 *State of Madhya Pradesh v Pramode Mategaonkar* (1965) 2 Cr LJ 562, p 565, 1964 MPLJ 750 ; *Lal Chand v State* AIR 1950 Ajmer 76 ; *Emperor v Sultan Mahmud* AIR 1939 Lah 340, 40 Cr LJ 910 .

62 *Surendra Nath Satpathy v State* AIR 1958 Ori 194, p 196, 1958 Cr LJ 1071, p 1073 ; *Narendra A Dalal v State of Gujarat* 1984 Cr LR 406 (Guj) .

63 *Thakor Prasad Tribhovandas Panda v State of Gujarat* 1972 Guj LR 785 ; *Om Prakash Gupta v State of Uttar Pradesh* AIR 1957 SC 458, p 464, 1957 Cr LJ 575 .

64 *Subhash Chandra Bebanta v State of Orissa* (1973) 2 Cut WR 1407, 1973 Cut LT 1221 ; *Surendra Nath Sathpathy v State* AIR 1958 Ori 194, 1958 Cr LJ 1071 .

65 *Kedarnath v State* AIR 1965 All 233, p 236, (1965) 1 Cr LJ 539 ; *Abdus Salam v Emperor* AIR 1936 Pat 108, 37 Cr LJ 219 .

66 *Shiv Prakash Misra v State* 1980 Cr LR 78, p 80-81 (UP) .

67 *Sreenarayan Shraff v Shambhu Prasad Agarwal* 1974-75 CWN 538; *Balgopal Goenka v State of West Bengal* 1983 Cr LJ 570 (Cal) .

68 *Nathmull Poddar v Salil Kumar Chakraborty* AIR 1971 Cal 93, 1971 Cr LJ 361 .

69 *State of Kerala v Haridas* 1969 Ker LT 906, **dissenting** from *Akbarbhai Nazarali v Mohd Hussainbhai* AIR 1961 MB 37 ; *Prosecutor v K Narayanaswami Naidu* AIR 1956 Mad 6 .

70 *Ahmed Ramlam v Gertie Mathias* 1977 Cr LJ 309, p 312 (Kant) .

71 *Harihar Prasad Dubey v Tulsi Das Mundhra* 1980 Cr LJ 1329, 1980 SCC (Cr) 93 .

72 *Rajendra Singh Lodha and Anor v Arbindo Dey and Anor* 1997 Cr LJ 4613 (Cal) .

73 *Employees State Insurance Corporation v Ashutosh Adhikary* 1987 Cr LJ 1812 (Cal)

74 Re *M/s Jenson and Nicholson (India) Ltd*2013 (127) AIC 472 (Cal).

75 *Arvind Rgghavan v Employees State Insurance Corporation* 2011 (131) FLR 884 (Kant) .

76 Employees' Provident Funds and Miscellaneous Provisions Act (19 of 1952), s 2(e) .

77 *BP Gupta and Ors v State of Bihar* 2000 Cr LJ 781 (Pat) .

78 *Employees State Insurance Corporation v SK Agarwal* AIR 1998 SC 2676, 1998 Cr LJ 4027 (SC) .

79 *BP Gupta and Ors v State of Bihar* 2000 Cr LJ 781 (Pat) .

80 *Sushil Kumar Bagla v State of West Bengal* 2004 Cr LJ 171 (Cal) ; *Sunil Kumar Poulti v State of West Bangal* 2009 (79) AIC

646 (Cal) .

81 *Pramod Parmeshwailal Banka v State of Maharashtra* 2011 Cr LJ 4906 (Bom) .

82 *KKA Nambiar and Ors v CEI Corporation, Bangalore* 1998 Cr LJ 196 (Kant) .

83 *Sham Sunder v State of Haryana* AIR 1989 SC 1982 .

84 *ESIC v S Narayana Rao* (1992) ILR Kant 3380, 1993 Cr LJ 255 .

85 *Ashwin Nambhai Vyas v State of Maharashtra* AIR 1967 SC 983 .

86 *Subamma v Kannanpachari* AIR 1969 Mys 221, 1970 Cr LJ 59 (Mys) ; *AR Balasubramaniam v Palavi* 1969 Cr LJ 1297 (Mad) ; *M Govindaiah Naidu v Y Kamalamma* 1984 Cr LJ 1326 (AP) ; *Mannath Balchandran v Fortes Cambell and Co Ltd, Bombay and Ors* 1996 Cr LJ 2131 (Bom) .

87 *Mannath Balchandran v Forbes Cambell and Co Ltd, Bombay and Ors* 1996 Cr LJ 2131 (Bom) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL BREACH OF TRUST

S. 406.

Punishment for criminal breach of trust.--

Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.3501

Comments

1. Scope

The pre-requisite for the applicability of s 406 of IPC would be fulfilment of the condition under s 405 .[88] This section deals only with the punishment for the offence of criminal breach of trust which has already been defined in the preceding s 405 . The following three sections, *i.e.*, ss 407, 408 and 409, IPC, relate to the aggravated forms of criminal breach of trust and punishment thereof. They being a specific section, all the cases which are not covered by those sections, fall within the purview of this section.

An agreement to the effect, that if there is embezzlement, the person who embezzles, will not be prosecuted and the matter will be referred to arbitration, cannot exclude the applicability of this section, the reason being that to permit such an agreement to operate would be contrary to s 23 of the Indian Contract Act 1872.[89] Similarly, the fact that the amount involved in a case is petty, cannot be a reason for not taking cognizance under this section.[90] Likewise, the fact that the employer had taken a bond for the amount misappropriated, will not prevent the prosecution or conviction of the accused under this section.[91] Where a teacher having worked in an educational institution for several years, resigns, the education institution has no right to retain the original testimonials of the teacher, refusal to return original

testimonials would constitute an offence under s 406 IPC .[92] Similarly, a criminal complaint cannot be thrown out merely because a remedy to recover the amount through civil courts is open to the complainant. [93]

As all the aspects as to the ingredients, which constitute the offence of criminal breach of trust, have been dealt with under the commentary of the preceding section, the commentary under this section is more or less confines to practice and procedure only.

2. Procedure

The offence under this section is cognizable, non-bailable, compoundable, by the owner of the property, in respect which the breach of trust has been committed, with the permission of the court, before which the prosecution for such offence is pending, and triable by a magistrate of the first class.

An accused had obtained a loan of Rs 22,000 under the literate unemployment scheme and the goods purchased by this loan were hypothecated, but the accused sold the goods and committed criminal breach of trust. During pendency of trial under s 406, the accused compromised with the complainant and paid the loan amount to the complainant. On the basis of the compromise, the trial court acquitted the accused of the charge under s 406, IPC . The state filed the appeal on the ground that under s 320(2), CrPC, permission for compounding the offence under s 406, IPC, can only be granted where the value of property does not exceed Rs 250, which was not the case before the trial court. Without expressing the opinion on merits the Rajasthan High Court declined to interfere with the trial court order as the accused3502 was acquitted on the basis of compromise and since payment was made outside the court and no purpose will be served in proceeding further against the accused.[1]

A prosecution of the secretary of a co-operative society for an offence of criminal breach of trust can be initiated either at the instance of the authority of the society or that of the registrar.[2] However, the offence under this section not being within the purview of s 195(1)(b), CrPC 1973, the court has no jurisdiction to make a complaint under s 340(1) of the said Code.[3]

3. Limitation

Under s 468(2)(c), CrPC, the period of limitation is 3 years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. For the offence under s 406, IPC, the maximum punishment provided is imprisonment for 3 years or fine or both. Under s 469, CrPC, the limitation shall commence from the date of offence. The offence under s 406, IPC, would be committed by the accused as and when the accused refused to return the dowry articles to the complainant and misappropriated the same. When there is nothing on record to show that more than 3 years prior to filing of the complaint, the accused had refused to return the dowry articles to the complainant, it cannot be said that on that account, the complaint had become time barred.[4]

So far as the provision of s 406, IPC, is concerned, till the articles are resumed or accounted for, the cause of action will continue. To this demand the question of limitation of 3 years would not apply.[5]

4. Sections 206 and 406, IPC --Difference Between

Commentary under the same heading in s 206, vol. 2, may be referred to.

5. Jurisdiction

Offences are ordinarily triable by a court within the local limits of whose jurisdiction the offence is committed.[6] Where a person is, however, accused of the commission of any offence by reason of anything, which has been done, and of any consequence, which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued.[7] The gravamen of the offence of criminal breach of trust lies in dishonest misappropriation.

Mere entrustment, with no dishonest misappropriation, would not make the offence complete to give jurisdiction to the court where entrustment of property was made. The offence under s 406, IPC, may be inquired into or tried by a court within whose local jurisdiction the offence was committed or dishonest misappropriation of entrusted property was done.[8] Where the accused, an area manager of a branch office, was to remit an account for money to the company received by him3503 to the head office, the police station having territorial jurisdiction over the place of the head office can investigate the offence in view of s 181(4), CrPC .[9] In respect of offences of criminal misappropriation and criminal breach of trust, a specific provision has been made in s 181(4) of the Code of Criminal Procedure 1973. The offence may be tried by a court within the local limits of whose jurisdiction:

(a) any part of the property, which is the subject of the offence, was received or retained by the accused; or
(b) the offence was committed.

Where there is no evidence to show when and where the offence of criminal breach of trust in respect of the goods, which were entrusted to the accused, who failed to deliver them intact, was committed, the place of delivery must be presumed to be the place where the offence took place unless the accused proves that the offence was not committed at that place.[10] In *State v Gulabchand Swarupchand* ,[11] a trust, with its head office at Bombay, owned temples in Rajasthan. The trustees sent some money to the accused who were the honorary managers and constructive trustees of those temples. The accused were prosecuted under s 406 at Bombay, with the allegations that the accused had spent only a fraction of the amount on the construction work in the temples and had misappropriated the remainder and also sold silver bars and sheets sent to them in Rajasthan. It was held that as the allegations did not disclose that any offence of criminal breach of trust was committed at Bombay, the Bombay court had no jurisdiction to entertain the complaint. In *Ram Charon v Devendra Kumar* ,[12] the accused, a commission agent at Delhi, sent certain goods to the complainant at Najibabad in Bijnor district under a railway receipt, consigned to self to be obtained through a bank, which was an agent of the accused, and the payment, though made to a bank in Bijnor district, was received at Delhi, it was held that the accused had received the amount within the jurisdiction of the Bijnor court and the case was triable there. In *Sundar Lal v Emperor* ,[13]it was held that the accused could be tried by a court within the local limits of whose jurisdiction any part of the property was received by him. The offence is not triable at a place where neither the entrustment nor any positive act of conversion of the money takes place.[14]

6. Jurisdiction--Dowry/*Stridhan* Cases

Where the complaint under s 498-A, s 406, s 506, IPC against the husband and in-laws was filed at place 'A', the complainant after marriage resided with the opposite3504 party at place 'B', the complaint alleging offences alleged to have taken place at place 'B', the complainant left her husband's place and was residing at place 'A', the FIR did not disclose any demand of dowry or commission of any acts constituting the offence at place 'A', thus logic of s 178(c) relating to continuing offence does not apply. Since no part of the cause of action arose at place 'A', the complaint filed at place 'A' is not maintainable.[15] In the case of *Y Abraham Ajith v Inspector of Police, Chennai* ,[16] the Apex Court dealt with a similar set of facts. In the said case, the Hon'ble Supreme Court has clearly held that the crucial question is 'whether any part of the cause of action arose within the jurisdiction of the concerned Court. In terms of s 177 of the Code, it is the place where the offence was committed. In essence it is the cause of action for initiation of the proceedings against the accused.' It further held that the expression 'cause of action' is, therefore, not a stranger to criminal cases. The cause of action consists of a bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent, it must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise.

7. Jurisdiction--Failure to Render Account--Cases

On the question whether the failure to render accounts at a particular place would give jurisdiction at that place, there is some controversy. Analysing the provision of s 405, the Allahabad High Court observed, in *Mohru Lal v Emperor* ,[17] thus:

> This section falls into two parts. The first part is a positive part and deals with dishonest misappropriation or conversion of property, to charge a person under this part of the section, there should be an allegation that, at a particular time and place, that person had dishonestly misappropriated, or converted to his own use, the property which was entrusted to him. Now, the second part of the section may be a negative part. It consists of dishonestly using or disposing of the property in violation of (a) any direction of law, or (b) any legal contract touching the discharge of the trust.

Thus, where the direction of law or the contract requires that the accused should dispose of the property at a particular place, then the court having jurisdiction at that place will have jurisdiction to try the offence of the second part of s 405, IPC, if there is a charge to the effect that the accused has failed to comply with the direction of the law, or the legal contract, and has failed to carry out his duty at that place.[18] The view expressed in the last cited case, was doubted in *Hira Lal v State* ,[19] in which it was observed that both parts of s 405 are positive in nature. In the first case, the positive part consists in criminal misappropriation and conversion of the property, and in the second case, the positive act consists in dishonestly using or disposing of the property in violation of any direction of law or prescribed mode of trust of legal contract. The using or disposing of property dishonestly are definitely acts, and not3505 omissions.[20] The view taken in *Hira Lal v State* ,[21] was followed in Madras where it was held that where the charge is of non-accounting and there is no specific' allegation of misappropriation at any particular place, the venue of the trial will be the place where the accounting has got to be done and has not been done.[22] In Lahore also, it was held that where an accused is under a liability to render accounts at a particular place and fails to do so by reason of having committed an offence of criminal breach of trust, which is alleged against him, the court, within the local limits of whose jurisdiction the place is situated, may enquire into and try the offence under s 181(4) of the Code of Criminal Procedure 1973.[23]

A contrary view has, however, been taken by some other High Courts. It has been held in Calcutta that neither failure to account, nor breach of contract, however dishonest, is actually, and in itself, an offence, which s 405 defines, but merely evidence of that offence. The court, having jurisdiction at a place, where the accused fails to account, cannot have jurisdiction.[24]

8. Quashing of Complaint/FIR

While the exercising power under s 482, CrPC, the High Court has to look at the object and purpose for which such power is conferred on it under the said provision; the exercise of inherent power is available to the High Court to give effect to any order under the Code of Criminal Procedure or to prevent abuse of the process of any court or otherwise to secure the ends of justice. This being the position, the exercise of power under s 482, CrPC, should be consistent with the scope and ambit of the same. In appropriate cases, to prevent judicial process from being an instrument of oppression or harassment in the hands of frustrated or vindictive litigants, exercise of inherent power is not only desirable but necessary also, so that the judicial forum of court may not be allowed to be utilized for any oblique motive. When a person approaches the High Court under s 482, CrPC, to quash the very issue of process, the High Court on the facts and circumstances of a case has to exercise the powers with circumspection to really serve the purpose and object for which they are conferred.[25] An FIR cannot be quashed merely on the ground that the petitioner has been wrongly shown as an offender in the FIR. If the FIR discloses a *prima facie* case of cognizable offence, it cannot be quashed merely on the ground that someone has been wrongly arrayed as an accused or that in law no such case is maintainable against a particular accused though it is maintainable against some other accused. In such a case only remedy available to an accused is to pray for discharge after chargesheet is filed against him.[26]3506

The position of law regarding quashing of criminal proceedings by taking recourse to s 482, CrPC, has

been crystalised in the celebrated judgment in *State of Haryana v Ch Bhajan Lal* ,[27] wherein following guidelines have been enumerated by the Hon'ble judges of the Apex Court:

(a) Where the allegations made in the FIR of the complaint, even if they are taken at their face value and accepted in their entirely do not *prima facie* constitute any offence or make out a case against the accused.
(b) Where the allegations in the first information report and other materials, if any accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under s 156(1), CrPC except under an order of a magistrate within the purview of s 155(2), CrPC .
(c) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
(d) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a magistrate as contemplated under s 155(2), CrPC .
(e) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
(f) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
(g) Where a criminal proceeding is manifestly attended with *mala fide* and/or where the proceeding is maliciously instituted with ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

Where allegations in the complaint did constitute a cognizable offence justifying registration of a case and investigation thereon and did not fall in any of the categories of cases enumerated above, calling for exercise of extraordinary power or inherent powers, quashing of FIR was not justified.[28]

The complainant alleged that he entrusted Rs 5000 to the accused, Mayawati, who was vice-president of a political party (Bahujan Samaj party) on her assurance that she would give him a party ticket but the said purpose was not found mentioned in3507 the receipt relied upon. The case of the accused, on the other hand, was that the complainant being the district president of that party had deposited the said amount in the party's account to meet election expenses. On these facts, the Allahabad High Court was of the view that no offence under s 406, IPC, is made out so the order taking cognizance of the said offence by the trial court was quashed by taking recourse to s 482, CrPC .[29] However, in a case where the cheques issued by the accused company to another company were dishonoured and there was admission of the accused company that it issued cheques to the complainant company in spite of knowledge of insufficient funds, the investigation into the offence was not complete and the chargesheet was also yet to be filed so the prayer for quashing of proceedings under s 406, IPC, *etc*, was declined.[30] In the face of specific allegations that after the maturity of amount in fixed deposits the accused persons have neither paid the principal amount nor interest, it cannot be said that the accused, a director of a finance company was in any way concerned with the alleged collection of deposit of amount from the public at large so the criminal proceeding against them under ss 406 and 420, IPC cannot be quashed.[31] When the materials collected are sufficient for raising strong suspicion to form a presumptive opinion as to the existence of the factual ingredients constituting offences of criminal breach of trust and criminal conspiracy *etc.*, the order forming charge against the accused cannot be quashed by taking recourse to s 482, CrPC .[32]

A complaint was filed against the accused under ss 405 and 420, IPC . It was not the case of the complainant that the accused had been entrusted with the amount in the chit fund in any manner directly or indirectly, nor there was any agreement between the complainant and the accused in respect of money deposited by him in the chit fund. There was no allegation that the accused ever induced the complainant

to enroll as a member of the chit fund established by her brother. Therefore, the allegations in the complaint did not disclose commission of any offence either under s 405 or under s 420, IPC . The complaint was found liable to be quashed under s 482, CrPC .[33] When the averment made in the complaint do not show that the accused person were entrusted with any property which they dishonestly misappropriated or converted to their own use, the order taking cognizance of the offence under s 406, IPC, against the accused was quashed.[34]

9. Quashing of Criminal Proceedings--Dowry/*Stridhan* Cases

When there are inherent improbabilities regarding entrustment of dowry articles to the accused persons, the allegations in the complaint if taken on face value show inherent contradictions, showing that the accused person were dragged in the complaint merely due to their relationship with the husband of the complainant, the complaint under ss 406 and 498A read with s 34, IPC, against them was quashed.[35]

Where the documents on record falsified averments made by the complainant in her FIR that she was harassed or maltreated by accused persons in connection with3508 dowry demand, and, the complainant admitted in her letter that she had brought all her belongings at the time of leaving her matrimonial home, the criminal proceedings against the accused and the in-laws of the complainant under ss 498A / 406, IPC, and ss 4 and 6, Dowry Prohibition Act were quashed.[36]

When the complainant, on account of destruction of her marital life has tried to involve all close relatives of her husband, including his mother and sisters by alleging that dowry articles were entrusted to all the accused persons, the allegations were found to have been made with an oblique motive to rope in his close relatives in order to wreck vengeance from the husband, the complaint *qua* all the accused except the husband of the complainant and his brother were quashed.[37] When in the summoning orders it is not disclosed as to how *primafacie* any criminal liability can be fastened on the accused and no reason has been given while summoning the accused persons for the offence under ss 406 / 34, IPC, on the face of it, the sketchy and non-speaking order cannot stand the test of judicial scrutiny and is therefore liable to be quashed.[38] In the complaint under s 406, IPC, the complainant alleged that the ornaments of his sister were handed over to her husband and her parents for safe custody as proposed by them while they were staying at his house and they misappropriated the ornaments, but it was not stated who handed over the ornaments, either the sister of the complainant or the complainant himself or his father. The complainant's sister whose ornaments were alleged to have been misappropriated by the accused persons had neither made any complaint, nor was she examined before the inquiring officer in support of the complaint case. The complainant was not examined for four months after the filing of a divorce case by the husband of the complainant's sister. The allegations contained in the complaint were not found to constitute any specific offence against the accused persons so the proceedings were quashed against the accused person under s 482, CrPC .[39] Allegations were that the husband and the appellants in-laws did not return the dowry ornaments. Complaint was filed after nine years of marriage. If the articles were in possession of the husband, there was no question of the present appellants being in possession of the dowry ornaments, there was no mention of the date on which the said ornaments, if any, were entrusted to the appellants or even the date when they were demanded back and were refused to be given back by the appellants or any one of them. As regards the offence under s 498A, IPC was concerned, the Court did not find any material or allegation worth the name against the appellants. All the allegations were against the husband. The proceedings against the appellants in-laws were quashed.[40]

It was alleged in the complaint that the accused husband and father-in-law ill-treated the complainant for non-fulfilment of dowry demand and retained her stridhan. There was no averment about entrustment of any kind of property by the complainant to the accused and that the accused persons misappropriated the same. Charge sheet also stated that the complainant had refused to take articles back when the offer was made to her by the Investigating Officer. Held, the very pre-requisite of entrustment of the property and its misappropriation by the appellants were lacking3509 in the case. Charge sheet against the accused persons was quashed on petition filed under s 482, CrPC .[41]

Parties were married in the year 2000. When dispute between the parties arose in the year 2003, the wife

filed complaint against the husband for offence under ss 406 and 420, IPC for misappropriation of dowry articles given at the time of marriage and cheating. Held, the allegations made in the FIR were for harassing the accused residing in Canada. The articles of dowry must be in the possession of the complainant. FIR was quashed on petition filed under s 482, CrPC .[42]

From the allegations made in the complaint it was clear that the appellants, father-in-law, mother-in-law and husband were entrusted with the property and had exercised dominion over the property belonging to the respondent complainant and further that the appellants had unlawfully retained the same. The complaint also alleged retention of cash and other gifts received by the respondent-complainant at the time of her marriage to the accused appellant no. 2 husband. In the face of the said averments made in the complaint petition, it could not be said the complaint filed by the respondent was short of the necessary allegations to *prima facie* sustain the case of commission of the offence under s 406 by the appellants. Complaint was not quashed on petition filed under s 482, CrPC .[43]

When the property/dowry articles are alleged to be entrusted to the accused persons at the time of marriage of the complainant and is not returned on demand of the same, *primafacie* material against the accused for the offence under s 406, IPC, is present. Therefore, taking cognizance against the accused persons by the court is not illegal.[44]

10. Quashing of Criminal Proceedings--Compromise in Non-compoundable Offence

The whole scheme of compounding the offence is dealt with and regulated by s 320 of CrPC . The provisions of s 320, CrPC are exhaustive in nature and sub-s 9 of s 320, CrPC, is couched in a mandatory form and it lays down that no offence shall be compounded except as provided by this section. The offences punishable under ss 498A / 406, IPC, are non-compoundable. In *Ram Lal v State of Jammu and Kashmir* ,[45] it was held by the Apex Court that an offence which the law declares to be non-compoundable, even with the permission of the court, cannot be compounded at all. This judgment has been cited with approval in the decision of the Supreme Court in *SN Mohanty v State of Orissa* ,[46] that criminal proceedings in respect of non-compoundable offence cannot be terminated on the ground of mutual settlement between the parties as it would run in the teeth of the statutory prohibition contained in sub-s 9 of s 320, CrPC . Thus, what is prohibited or interdicted by the legislature in3510 direct terms cannot be obviated in an indirect manner by invoking provision of s 482, CrPC .[47]

Thus, when the wife *primafacie* discloses offences under ss 498A / 406 / 34, IPC, the criminal proceedings in respect of the said offences cannot be quashed under s 482, CrPC, on the basis of a compromise between the parties.[48] However, such a compromise is a mitigating factor for awarding the sentence on the lower side.[49]

The earlier position that criminal proceedings or FIR or complaint cannot be quashed under s 482, CrPC, in cases where parties have compromised an offence which is non-compoundable under s 320, CrPC, has now been changed. Recently, the Apex Court has held that a High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint, and s 320, CrPC 1973, does not limit or affect the powers under s 482, CrPC .[50] Relying upon this decision, the Full Bench of the Delhi High Court has also held that the High Court by its inherent powers can quash criminal proceedings if parties have compromised the matter in matrimonial cases such as offences under ss 498A and 406, IPC .[51]

11. Quashing of Complaint--Civil Dispute Regarding Non-payment of Amount under Contract *etc*[52]

There were two independent contracts, one between the principal company and the contractor company, and another between the contractor company and the sub-contractor. On completion of work, the sub-contractor demanded payment from the contractor company due to the non-payment of the same, filed a criminal complaint, alleging that the contractor company through its person in-charge/ accused

having received the payment from the principal company has misappropriated his (sub-contractor's) money. When admittedly, two contracts were independent of each other and payment under one has no relevance *qua* the other, therefore, even if the principal company has made the payment to the contractor company, under its contract with latter, it will not give rise to plea of misappropriation of money, because the money is not money or movable property of the sub-contractor/ complainant. It cannot be said that there was any dishonest intention on the part of the accused persons/contractor company/office bearer of the contractor company or they have misappropriated or converted the movable property of sub-contractor/ complainant to their own use. Further, the dispute being about recovery of money was purely of a civil nature. Since, the basic ingredient of ss 403, 406 and 420, IPC, were not satisfied, the order, taking cognizance of offence and issuance of summons to the office bearers of the contractor company was quashed.[53]

The allegations in the complaint under ss 406 and 420, IPC, were of non-payment for construction work done under the agreement. The plea of the accused was that the part payment was already done and the balance amount was withheld due to sub-standard work. The controversy between the parties appeared to be a civil dispute as3511 there was total absence of criminal dishonest intention to do the contract right from the inception of the agreement. The order taking cognizance of offences was found illegal and liable to be quashed.[54]

If from the overall reading of the complaint, it can easily be measured that if at all there is anything, it is only a breach of agreement which would lead to civil litigation and not a criminal case, the order passed by magistrate directing police investigation under s 156(3), CrPC, is liable to be quashed.[55] Where the allegations were that the accused persons refused to execute sale deed after taking money, there was no evidence on record to show that the intention of the accused was dishonest and to misappropriate the amount, the complainant had not proved *mensrea*, a mere failure to keep promise subsequently cannot be presumed to be an act leading to cheating. Further, the complainant had not given his correct address thereby creating doubt. The criminal proceedings under ss 406, 415 were quashed.[56]

Where, there were business dealings between parties in which the complainant had been supplying goods to the accused on making payment by cash/draft/cheque, and one such cheque issued by the accused was dishonoured, the complaint under ss 406 / 420, IPC, was filed, there was no entrustment of goods and the transaction was of mere sale of goods, the criminal prosecution by the complainant was found to be an abuse of the process of the court so the complaint was quashed.[57] When, it was a dispute between principal and agent of accounting, the dispute was of civil nature and there was total absence of *mensrea* and criminal offence of misappropriation was not made up, the agent cannot be harassed for such a dispute by resorting to criminal proceedings, so the proceedings were found liable to be quashed.[58]

It is a well-settled principle of law that the allegations relating to a *bona fide* civil dispute, even assuming the facts to be substantially correct, should be quashed in exercise of the High Court's inherent powers.[59] The entrustment of raw materials to the accused was made in pursuance of an agreement between the parties and not on account of trust or safe custody, the consequent failure of the accused to account for raw materials supplied would constitute a civil wrong/breach of contract but not attract the ingredients of ss 420 and 406, IPC . Such a criminal complaint is liable to be quashed.[60]

12. Quashing of Complaint--When Instead of Civil Suit Complaint is filed

When on reading both the complaints, it is clear that the complaints are filed only in order to recover outstanding dues of the complainant, the complainant instead of drafting a plaint has filed aforesaid complaints before the learned magistrate by changing its nomenclature from civil suit to criminal case, and nowhere, in the3512 aforesaid complaints, the complainant has stated as to on which date the incident in connection with ill-treatment to his manager had taken place, even nothing is stated as to on which date the manager of the complainant went to the office of the accused for the purpose of demanding money, the dispute in question is nothing but a dispute regarding non-payment of dues of the complainant, which can be said to be the dues of an unpaid seller. The complainant, therefore, after affixing appropriate court fee stamp, as required by law, should have filed money suit for obtaining money decree. Instead of that

the complainant has rushed to the criminal court. so the complaint is liable to be quashed.[61] Where the offences of criminal breach of trust and cheating are not made out in a matter of cancellation of dealership and appointment of another person as dealer when the security is duly refunded to the complainant firm, such a grievance is purely of civil nature. Crafty drafting of a civil dispute may give colour of a criminal dispute, but that does not make a dispute amenable to criminal court. Such disputes are not to be encouraged. In such cases, the entire criminal prosecution is liable to be set aside.[62]

13. Quashing of Complaint/FIR When both Civil and Criminal Remedies Exist

The law is now well-settled. The civil profile which is discernable from the factual matrix of the case should not outweigh the criminal outfit.

Merely because a given set of facts would give rise to a civil profile as well as a criminal profile, the criminal case cannot be quashed at the thresh-hold on that premise, in as much as each is an independent remedy but not mutually exclusive.[63] A guilty intention is an essential ingredient of the offence of cheating and the criminal breach of trust. The prosecution must establish the *mens rea*on the part of the accused. Every act of breach of trust may not result in a penal offence of criminal breach of trust, unless there is evidence of manipulating act of fraudulent misappropriation. An act of breach of trust involves a civil wrong in respect of which the person may seek his remedy for damages in civil courts, but any breach of trust with a *mensrea* gives rise to a criminal prosecution as well.[64] A criminal case may arise even when breach of contract is also there and there is no bar for the prosecution under the criminal law.[65] Where the respondent accused was alleged to have misappropriated paddy entrusted for milling, the respondent could not be acquitted merely on the ground that the dispute arose out of breach of contract.[66]3513

The case of breach of trust or cheating are both a civil wrong and a criminal offence, but under certain situations where the act alleged would predominantly be a civil wrong, such an act does not constitute a criminal offence.[67]

14. Quashing of Criminal Proceedings-- Section 167(5) , CrPC (West Bengal) Amendment by Act 24 of 1988

Under s 167(5), CrPC (West Bengal) Amendment, it is provided that if in any case exclusively triable by a sessions court or a case under ch XVIII of IPC, the investigation is not concluded within the period of three years from the date of arrest of the accused, the magistrate shall make an order stopping further investigation into the offence and shall discharge the accused unless the officer making the investigation satisfies the magistrate that for special reasons and in the interest of justice, the continuation of the investigation beyond the period mentioned in the sub-section is necessary. The law on this question, however, has now been settled by the Apex Court by means of a number of recently pronounced judgments. In *Durgesh Chandra Shah v BC Saha* ,[68] it has been held that the above provisions of s 167(5), CrPC, would be applicable in a case where the investigation is still pending and not where it has been completed. Investigation had been completed but the investigating officer was not being able to submit the report in final form for the technical reason that the sanction order required for the starting of the prosecution against the accused, a public servant, from the government was being awaited by him. In substance, therefore, the investigation has been made complete. Hence, strictly viewed, having regard to the spirit underlying the above decision of the Supreme Court, the provision of s 167(5), CrPC, should not be made applicable to the facts of the present case.[69]

However, the Apex Court has pronounced a more radical interpretation of the language of this section in a Division Bench judgment reported in *Nirmal Kanti Roy v State of West Bengal* .[70] It has been held by the Hon'ble Supreme Court therein that the order stopping further investigation into the offence and the consequential order of discharge are not intended to be an automatic sequel to the failure to complete the investigation within the period fixed in the sub-section. It is further held that the succeeding words in the sub-section confer power on the court to refrain from stopping such investigation, if the investigating officer satisfies the magistrate of the fusion of the two premises namely,

(a) that in the interest of justice it is necessary to proceed with the investigation beyond the period shown in the sub-section; and
(b) that there are special reasons to do so, and the Apex Court took the view that the time schedule shown in s 167(5) of the CrPC was not to be treated with rigidity and it was not mandatory that on the expiry of the period indicated therein the magistrate should necessarily pass the order on the accused.

On the other hand, before passing an order of stoppage of investigation the magistrate shall consider whether on the facts of that case, further investigation would be necessary to foster interest of criminal justice. The magistrate at that stage3514 must look into the record of investigation to ascertain the progress of the investigation so far registered, and if a substantial part of the investigation was by then over, the magistrate should seriously ponder over the question whether it would be conducive in the interest of justice to stop further investigation and discharge the accused.[71]

15. Quashing of Criminal Proceedings against Director of Company

Where the allegations against the directors of a company were that they had not deposited ESI contributions deducted by them from wages of the employees of company, the directors cannot be regarded as 'principal employer'. Therefore, the proceedings for criminal breach of trust against them are liable to be quashed.[72]

16. Quashing of Complaint against Company

Mensrea is necessary to constitute the offence under ss 406, 420 . A company being a juristic person and not a natural person cannot be said to have the requisite *mens rea*. So, the complaint alleging the said offences against the company is liable to be quashed.[73]

17. Liability of Managing Director, employee(s)

For supply of goods demand drafts were drawn in the name of the company. The prosecution case was that the goods were not supplied. Complaint for offence under s 406, IPC was filed against the Managing Director of the company. Held, in the absence of any provision in the statute the Managing Director or the employees of the company cannot be held vicariously liable for the offence of the company. The prosecution was quashed.[74]

18. Procedure

Offences under ss 406, 494 and 498A are triable by a Magistrate, First Class and as all these offences are punishable with imprisonment for a term exceeding two years, the case has to be tried as a warrant case. The procedure for trial of warrant case by a Magistrate instituted on a police report is provided under ch XIX, Pt A of the Code of Criminal Procedure 1973.[75]

19. Charge

The following form of the charge may be adapted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused*) as follows:

That you, on or about the...day of..., were entrusted with... (*mention the amount or property*) between... day of...and...day of..., were entrusted (*specify the amount or the different items, where they are more than one*) and committed criminal breach of trust3515 in respect of the said money or property, and thereby committed an offence under s 406 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 405 covers dishonest misappropriation, dishonest conversion, dishonest use or disposal in violation of a direction of law or a legal contract, and dishonestly suffering any other person to do so. Where a charge under this section does not indicate which of these several offences is intended and does not state who made the alleged entrustment, or who suffered from the alleged breach of trust, it is indefinite and embarrassing.[76] When the charge neither mentions the date of entrustment, nor of the misappropriation, but refers to 13 July 1957 as the date on which the accused was in employment, the implication is that it is on or about that date that the entrustment or misappropriation took place.[77]

20. Alternative Charges under Section 406 to Section 409 and Section 420 --Not Illegal

Commentary under the same heading in s 409, post, may be *referred* to.

21. Joint Trial

If two or more persons embezzle money jointly in respect of several items, they can be tried jointly as the offence is committed in the course of the same transaction.[78]

22. Proof

In order to establish a charge under this section, the prosecution must prove[79] that:

(a) the accused was, in any manner, entrusted with:

(i) property, or
(ii) any dominion over property;

(b) he:

(i) misappropriated it, or
(ii) converted it to his own use, or
(iii) used, or disposed of, the property, or
(iv) wilfully suffered any person so to do;

(c) he did so in violation of:

(i) any direction of law, prescribing the mode in which the trust was to be discharged, or
(ii) any legal contract, express or implied, which he had made, touching the discharge of the trust; and

(d) he did so dishonestly.

The onus of proving never shifts,[80] and the prosecution must prove, beyond reasonable doubt, the guilt of the accused.[81] There must be a definite finding of a3516 definite sum, traced to the accused, in order to form the basis of his conviction.[82] The prosecution must prove entrustment by adducing cogent evidence.[83] It is not, however, necessary to prove that any specific sum of money, received on particular dates from particular person, has been embezzled. It is sufficient that a general deficiency is found.[84] However, the mere fact that the accused fails to account for the money, entrusted to him, is not, in law, sufficient to establish that he committed the offence of criminal breach of trust, in the absence of other evidence, unless some kind of conversion, *i.e.*, a wrongful diversion to his own purpose or the purpose not consistent with the law of contract, is proved.[85] Similarly, the mere fact that, after honouring the *hundies*, amounts have not been paid to the complainant, is not sufficient to come to the conclusion that the accused have acted dishonestly with an intention of misappropriation or converting the amounts in question for their own use. This would, at the most, amount to a breach of contract between the parties.[86] It would be illegal to place the onus on the accused and convict him because he fails to discharge it. Where the accused pleads that he had rendered accounts as an agent and had paid the sum in question, the prosecution must prove that the sums were not paid.[87] The prosecution cannot rest content with proving merely false entries, to bring home to the accused that money had been misappropriated, without further evidence to prove that the accused attempted to suppress all traces of his embezzlement.[88] The mere fact that certain amounts were in the hands of the accused and the accounts submitted were incorrect, would not lead to the inevitable inference that the accused committed the offence of criminal breach of trust in respect of those items.[89] However, it is not necessary for the prosecution to prove in what manner money, alleged to have been misappropriated, has actually been disposed of by the accused. If it is shown that the money, entrusted to the accused, was not accounted for, nor returned by him in accordance with his duty, if unspent, it lies on the accused to prove the defence.[90] Once it has been proved that the money was entrusted to a person, the burden rests on him to show as to what he did with the money, and if he3517 completely denies having received the money, the presumption is that he misappropriated or converted it to his own use.[1] If any explanation, which the accused chooses to give, is not proved beyond doubt, he cannot claim to be innocent; but if his explanation throws any reasonable doubt on the prosecution story, he would be entitled to an acquittal not because he proves the facts and circumstances but because the prosecution has failed to establish his guilt beyond reasonable doubt.[2] In such a case, the benefit of doubt must go to the accused.[3] However, if the prosecution has made out a case overwhelmingly, there can be no reasonable doubt on the mere ground that the accused is ready with an explanation.[4] It is, however, not fair for the prosecution to press a case of criminal breach of trust against an accused when the complainant is not a witness.[5]

In a prosecution for criminal breach of trust, direct evidence of dishonest conversion to the accused's own use of the money, entrusted to him, can seldom be found and such dishonest intention and conversion have to be inferred from the proved facts and circumstances of each case.[6] Intention can only be inferred from the circumstances. In a case of criminal breach of trust, failure to render a satisfactory account on the part of the accused is a circumstance pointing to the guilt of the accused.[7] a false explanation by the accused may be sufficient to prove an element of dishonesty required for his conviction for an offence of criminal breach of trust.[8] However, mere retention of money is not, by itself, sufficient to conclude that the accused is guilty of criminal breach of trust. Where it is not clear from the evidence what the accused did with the money when it was in his possession, it cannot be assumed, in the absence of the evidence to show, or the circumstances to infer, that he misappropriated the amount dishonestly.[9] Whether such an inference should be drawn would depend on the particular facts of an individual case.[10] Wrong entries in accounts may raise strong suspicion, but they cannot justify a conviction.[11]

The accused had taken loan under hire purchase agreement from the Corporation for five machines. He did not repay the total amount of loan but sold one cutting3518 machine worth Rs. 80,007/- which was the property of the Corporation. Held, the accused committed an offence under s 406, IPC .[12]

Where the guarantors gave power to the bank to set off/and or adjust the loan amount from the FDS, in case the debtor did not repay the loan and accordingly the bank adjusted FDS amount toward the loan amount, bank was not guilty of offence under s 406, IPC .[13]

23. Repayment of Amount by Accused--Effect

The fact that repayment has been made, in itself is not an indication of lack of dishonest intention. Sometimes, it so happens that with a view to create confidence the repayments are made so that for the future transactions the money can be dishonestly misappropriated. This is a part of the scheme and the factum of repayment cannot be considered in isolation. The repayment can be a factor to be considered while awarding sentence, but cannot be a ground for proving innocence of the accused.[14] Subsequent remittance of defaulted provident fund money, even if accepted, would not condone the offence.[15]

24. Conviction

When more than one accused are convicted on a charge under this section, it is necessary to consider the case of each accused separately.[16]

The decision of a criminal case should not wait till civil cases are decided because the criminal case is not one in which the court is concerned with the interest of the complainant or with any dispute between the complainant and the accused.[17]

25. Alteration of Conviction from Section 406 to Section 403

When it is definitely proved that the accused dishonestly misappropriated, or converted to his own use, the sum of money, which it was not his responsibility to realize, he can be held guilty under s 403, but not under s 406, IPC .[18] If the accused are charged under s 406, but it is found that the case does not fall under this section, there being no entrustment, the accused can be convicted under s 403 if there is dishonest misappropriation.[19]

26. Probation

Usually, imprisonment should be given in a case of embezzlement, but if the benefit of s 360, CrPC 1973, is given to the accused, the discretion need not be interfered with after lapse of much time.[20] When a huge amount has been misappropriated by a3519 white collar person, and the offender on account of his young age, or on account of it being his first offence, is released on probation, it is customary on the court to insist upon the accused to repay the amount to the aggrieved complainant.[21]

27. Sentence

The fact that the accused is a man of some status, is no ground to show leniency in the matter of sentence. Where the accused, a secretary of a co-operative society, was convicted under s 406, it was held that a sentence of Rs 175 and imprisonment till rising of the court was an inadequate punishment entirely.[22]

The accused convicted under s 406, IPC, for committing criminal breach of trust in respect of a truck was sentenced to undergo rigorous imprisonment for a period of four years.[23] Where the accused faced trial for a period of two decades, their sentence under ss 406 and 120B, IPC, was reduced to the period of imprisonment already undergone by them.[24]

In *Chahajulal v State of Rajasthan* ,[25] the sentence of one year rigorous imprisonment, in default of fine, passed by a *munsif* magistrate, was, however, held to be in excess of his power.

Where the accused were convicted in respect of criminal breach of trust of dowry articles and other offences but the parties compromised and the husband and wife sorted out their differences taking a lenient view, the sentence of rigorous imprisonment of six months and fine of Rs 500 was reduced to the sentence of the period of imprisonment already undergone by the accused.[26]

88 *Kripa Shankar v State of Bihar* 2006 Cr LJ 3535 (Pat) .

89 *Mohendra Pal v State* 1965 ALJ 538, p 543, **overruling***Kanhaiya Lull v Emperor* AIR 1937 Oudh 331, 38 Cr LJ 491 .

90 *PC Pahuja v Radhey Shyam* 1974 BLJR 49 .

91 *Zamindar of Ettiyapuram v Ramasamy* 1 Weir 465(1); Re *Mayandi Pillai* 1 Weir 462 (2).

92 *A John Paul v State* 2013 (1) Crimes 200 (Mad), 2012 (118) AIC 659).

93 *Wahid Ali v Eshwariah* (1957) 1 Andh WR 242, 1957 MLJ (Cr) 235 .

1 *State of Rajasthan v Akhlesh Kumar Sharma* 2002 Cr LJ 2347 (Raj) .

2 *Shyam Bihari Rai v State of Bihar* 1973 BLJR 427, p 430 .

3 *Mulchand R Thacker v Kamla Bai* AIR 1967 Pat 166, p 168, 1967 Cr LJ 641 .

4 *Hussan Lal and Anor v State of Punjab* 2002 Cr LJ 2436 (P&H) .

5 *Chandra Prakash v State* 1996 Cr LJ 3443 (Del) .

6 Code of Criminal Procedure 1973, s 177 .

7 Code of Criminal Procedure 1973, s 177, s 179 .

8 *Vijay Kumar and Ors v Sunita and Ors* 2000 Cr LJ 4116 (MP) .

9 *Jahangir Joiya v State of Rajasthan* 1999 Cr LJ 154 (Raj) .

10 *Public Prosecutor v Pedimonu Beary* AIR 1928 Mad 1136, p 1138, 31 Cr LJ 245 .

11 *State v Gulabchand Swarupchand* AIR 1962 Bom 78, (1962) 1 Cr LJ 401 .

12 *Ram Charon v Devendra Kumar* AIR 1954 All 648, 1954 Cr LJ 1356 ; *Hira Lal Choudhary v State* AIR 1956 All 619, 1956 Cr LJ 1165 ; Re *Jivandas Savchand*AIR 1930 Bom 490, p 495 (FB), 32 Cr LJ 331 .

13 *Sundar Lal v Emperor* AIR 1932 All 26, 33 Cr LJ 127 .

14 *Daityari Tripatiy v Subodh Chandra Choudhary* AIR 1942 Cal 575, 44 Cr LJ 132 ; *Gunananda Dhone v Shanti Prakash Nandy* AIR 1925 Cal 613, 26 Cr LJ 725 ; *Paul De Flondor v Emperor* AIR 1931 Cal 528, 32 Cr LJ 1167 ; *State of Uttar Pradesh v Santosh Kumar Capoor* 1974 ALJ 724, 1974 All Cr Cas 286 ; *Debendra Nath Sen v Rajendra Chandra Roy* AIR 1955 Cal 498, 56 Cr LJ 1257 ; *Sri Krishnamachari v Show Wallace and Co* (1916) ILR 39 Mad 779, 16 Cr LJ 491 (**dissenting** from Re *Rambilas* 15 Cr LJ 688); *Ali Mohamed Kassim v Emperor* AIR 1931 Rang 164, 32 Cr LJ 1120 ; *Gawkaran Lal v Sarjoo Saw* AIR 1921 Pat 85 ; *Bangshilal Bhora v Rowtmal Patwari* AIR 1951 Assam 131 (FB), 1951 Cr LJ 1388 ; *Mukhi Tirathdas v Jethanand Matoalomal* AIR 1937 Sind 68 (FB), 38 Cr LJ 512; *Abdul Haq v Emperor* AIR 1924 Lah 353, 23 Cr LJ 743(2) .

15 *Gurmeet Singh v State of Madhya Pradesh* 2006 Cr LJ 1390 (MP) ; *Rajesh Kumar v State of Rajasthan* 2006 Cr LJ 2062 (Raj) ; *Dinesh Kumar Sharma v State of Rajasthan* 2007 Cr LJ (NOC) 194 (Raj) .

16 *Y Abraham Ajith v Inspector of Police, Chennai* AIR 2004 SC 4286, 2004 Cr LJ 4180 (SC) ; **See also***Rajesh Kumar v State of Rajasthan* 2006 Cr LJ 2062 (Raj) .

17 *Mohru Lal v Emperor* AIR 1936 All 193, p 196 (FB), 37 Cr LJ 284, p 286 .

18 *Mohru Lal v Emperor* AIR 1936 All 193, p 195 (DB), 37 Cr LJ 284 .

19 *Hira Lal v State* AIR 1956 All 619, p 626, 1956 Cr LJ 1165 .

20 *Hira Lal v State* AIR 1956 All 619, p 626, 1956 Cr LJ 1156 .

21 *Ibid*.

22 *S Arunachala Goundan v KS Akhileshwara Ayyar* AIR 1952 Mad 158, 53 Cr LJ 308 .

23 *Ram Sahai v Krishna Lal* AIR 1926 Lah 119, 27 Cr LJ 900 ; *Gunananda Dhone v Santi Prakash Nandy* AIR 1925 Cal 613, 26 Cr LJ 725 .

24 *Daityari Tripatty v Subodh Chandra Choudhury* AIR 1942 Cal 575, 44 Cr LJ 132, **dissenting** from *Mohru Lal v Emperor* AIR 1936 All 193, and also from the earlier decisions in *Paul De Flondor v Emperor* AIR 1931 Cal 528, 32 Cr LJ 1167 ; *GN Pascal v*

Raj Kishore Mathur AIR 1931 Cal 521, 32 Cr LJ 1042 ; *Gunananda Dhone v Santi Prakash Nandy* 26 Cr LJ 725, AIR 1925 Cal 613 ; *Debendra Nath Sen v Rajendra Chandra Roy* AIR 1955 Cal 498, 56 Cr LJ 1257 ; *Sultan Chand v Yogindra Nath Raz* AIR 1944 Pesh 25, 45 Cr LJ 749 ; *Vasanji Khimjee v Kanji Tokersey* AIR 1938 Rang 94, 39 Cr LJ 529 .

25 *SN Palanitkar and Ors v State of Bihar* 2001 Cr LJ 4765 (SC) .

26 *Sushil Kumar Bagla v State of West Bengal* 2004 Cr LJ 171 (Cal) .

27 *State of Haryana v Ch Bhajan Lal* AIR 1992 SC 604, 1992 Cr LJ 527 (SC) ; *Ramnarayan Soni v Ajay* 2011 (103) AIC 852 (MP) ; *Basavaraju v State of Karnataka* 2011 Cr LJ 3665 (Kant) ; *Zandu Pharmaceutical Works Ltd v Md Sharaful Haque* (2005) 1 SCC 122, (2004) 3 KLT 789, 2005 Cr LJ 92, p 97 (SC) ; *Reshma Bano v State of UP* (2008) 5 SCC 791, p 793, 794, (2008) 3 All LJ 607, (2008) 3 SCC (Cri) 86 ; *Digam Bikshapati v State of AP* (2008) 2 SCC 403, p 407, 408, AIR 2008 SC 527, 2008 Cr LJ 724 ; *CBI v Ravishankar Prasad* 2009 (6) SCC 351, p 358, 359 (SC) ; *Rajiv Thapar v Madan Lal Kapoor* 2013 AIR SCW 784, 2013 Cr LJ 1272 ; *Surya Baksh Singh v State of UP* (2014) 14 SCC 222, (2013) 132 AIC 195 (SC) ; *N Soundaram v PK Ponuraj* (2014) 10 SCC 616 ; *Rishipal Singh v State of UP* (2014) 7 SCC 215, AIR 2014 SC 2567, 2014 (5) All LJ 13 .

28 *State of Haryana v Ch Bhajan Lal* AIR 1992 SC 604, 1992 Cr LJ 527 (SC) .

29 *CL Sugar (Advocate) v Mayawati (Ms) and Ors* 2003 Cr LJ 690 (All) .

30 *Jasmin B Shah v State of Jharkhand* 2003 Cr LJ 621 (Jhar) .

31 *Farooq Dadabhai v State of Karnataka* 2002 Cr LJ (NOC) 310 (Kant), 2002 AIR Kant SCR 2066 .

32 *Tuncuy Alankus v Union of India* 2000 Cr LJ 3280 (Del) .

33 *Seema v Satish Sachdeva* 2002 Cr LJ 2125 (P&H) .

34 *Ram Chandra Prasad Keshri and Ors v State of Uttar Pradesh* 2000 Cr LJ 3047 (All) ; *Fulwati Agarwal (Smt) and Ors v Sri Naresh Kumar* 2000 Cr LJ 3236 (Kant) .

35 *Asha Devi v Suman Lata* 1997 Cr LJ 4442 .

36 *Rupinder Kaur (Mrs) v State (NCT of Delhi)* 2000 Cr LJ 1520 (Del) .

37 *Kamla Rani and Ors v Saroj* (1991) 2 RCR (P&H) 279.

38 *JK Sood v Kuldip Singh Sahin* (1992) 1 CC Cases 111 (P&H).

39 *Bharat Lal and Ors v Mohan Lal Barnawal* 1988 Cr L 1405 (Pat) .

40 *Neelu Chopra v Bharti* 2010 Cr LJ 448, p 449 (SC), 2009 AIR SCW 6683, 2009 (13) Scale 313 .

41 *Onkar Nath Mishra v State* 2008 Cr LJ 1391 (SC), 2007 (14) Scale 403, (2008) 2 SCC 561 .

42 *Harmanpreet Singh Ahluwalia v State of Punjab* 2009 Cr LJ 3462, p 3467 (SC), 2009 AIR SCW 3976, 2009 (7) Scale 85 .

43 *Bhaskar Lal Sharma v Monica* 2014 Cr LJ 1848, p 1850, 1851, (2014) 3 SCC 383, (2014) 2 SCC (Cri) 185, 2014 AIR SCW 2543, (2014) 4 Scale 195 .

44 *Maqsood Mian v Rukhsana Tazeem* 1999 Cr LJ 681 (All) ; *Bhaskar Lal Sharma v Monica* 2014 Cr LJ 1848, (2014) 3 SCC 383 ; *Nirmal Singh v State of Punjab* 2014 Cr LJ (NOC) 65 (P&H) (FIR against husband under s 406 and s 498A, IPC --Matrimonial dispute between wife and husband accused amicably settled--Proceedings quashed).

45 *Ram Lal v State of Jammu and Kashmir* (1999) 2 SCC 213, 1999 Cr LJ 1342 (SC) .

46 *SN Mohanty v State of Orissa* (1999) 3 JT 408 (SC), 1999 Cr LJ 3496 (SC) .

47 *Kamal Dhawan v State* Cri M(M) No 681/96 decided on 6 September 1999 by Delhi High Court.

48 *Pyarelal Gupta v State* 2000 Cr LJ 1019 (Del) .

49 *Gopal v State* 1999 Cr LJ 3939 (Mad) ; *Rampujan v State of Uttar Pradesh* AIR 1976 SC 2418, 1973 Cr LJ 1612 ; *Vilvamani v State* (1998) 2 CTC 598 (Mad) .

50 *BS Joshi v State of Haryana* (2003) 3 JT 277(SC); *Pawan Kumar v State of Haryana* (2010-2) Punj LR 128 (P&H).

51 *Ramesh Kumar v State* 2003 IV AD 377 (Del) ; *Firoz Khan v State* (2003) 105 DLT 64 (Del) .

52 Refer synopsis note 19 of s 403 and synopsis note 14 of s 405, IPC .

53 *U Dhar v State of Jharkhand and Ors* 2003 Cr LJ 1224 (SC) .

54 *Gautam Sinha and Ors v State of Bihar* 2003 Cr LJ 635 (Jhar) .

55 *Nandakishore and Ors v State* 2002 Cr LJ 2746 (Kant) .

56 *Satish Jain v State of Uttaranchal* 2006 Cr LJ 1172 (Utr) ; *Sidharth v State of Rajasthan* 2013 (1) Crimes 138 (Raj) .

57 *Sneh Lata v Swastika Agro Industrial Corporation (M/s), Jalandhar* 2001 Cr LJ 4432 (P&H) .

58 *SK Agarwal v Manoj Dalmia* 2001 Cr LJ 3343 (All) ; *Ramesh Kumar Verma v State of Bihar and Ors* 1999 Cr LJ 4371 (Pat) ; *Suptd v Chandra Chakravarty* AIR 1974 SC 290, 1974 Cr LJ 341 ; *Ashok Chaturvedi v Shitul H Chancham* AIR 1998 SC 2796 .

59 *Trilok Singh v Satya Deo Tripathi* AIR 1979 SC 850, 1980 Cr LJ 822 .

60 *K Srinivas v State of Andhra Pradesh* 1997 Cr LJ 3997 (AP) .

61 *Kuber Rolling Mill Private Limited v State of Gujarat* 2006 Cr LJ 2350 (Guj) .

62 *Amrit Sagar Mittal v State of Bihar* 2007 Cr LJ (NOC) 206 (Pat) .

63 *E Arvind Rao and etc v State of Andhra Pradesh* 2002 Cr LJ 4487 (AP) ; *Jaya Chandran v State of Karnataka* 2001 AIR Kant HCR 1313 (Kant), (2001) 6 Kant LJ 389 ; *Trisuns Chemical Industry v Rajesh Agarwal* (1999) 8 SCC 686, 199 Cr LJ 4325 (SC) ; *Lalmuni Devi (Smt) v State of Bihar* 2001 AIR SCW 2504, (2001) 1 Andh LT (Cri) 219 (SC) ; *Vitauri Pradeep Kumar v Kaisula Dharmaiah* 2001 AIR SCW 2286, 2001 Cr LJ 4948 (SC) ; *M Narasimhulu v State of Andhra Pradesh* 2002 Cr LJ (NOC) 32 (AP), (2001) 1 Andh LT (Cri) 267 (SC) ; *Bal Kishan Das v PC Nayar* AIR 1991 SC 1531, 1991 Cr LJ 1837 (SC) ; *Sham Lal v State of Punjab and Ors* 2001 Cr LJ 2967 (P&H) ; *State of Punjab v Pritam Chand* 2009 Cr LJ 1742, (2009) 16 SCC 769 .

64 *Satish Jain v State of Uttaranchal* 2006 Cr LJ 1172 (Uttaranchal) .

65 *State of Punjab v Pritam Chand* 2009 Cr LJ 1742, (2009) 16 SCC 769 .

66 *State of Punjab v Pritam Chand* 2009 Cr LJ 1742, (2009) 16 SCC 769 ; see also *Rajesh Bajaj v State NCT of Delhi* (1999) 3 SCC 259, 1999 AIR SCW 881 .

67 *GHCL Employees Stock Option Trust (M/s) v M/s Indian Infoline Ltd* 2013 Cr LJ 2044, p 2049, AIR 2013 SC 1433, (2013) 4 SCC 305, (2013) 125 AIC 88 (SC) .

68 *Durgesh Chandra Shah v BC Saha* 1996 Cal Cr LR 203 (SC), 1996 Cr LJ 1137 (SC) .

69 *Santimoy Chatterjee v State of West Bengal and Ors* 2000 Cr LJ 2406 (Cal) .

70 *Nirmal Kanti Roy v State of West Bengal* 1998 Cal Cr LR 216 (SC), 1998 Cr LJ 3282 .

71 *Santimoy Chatterjee v State of West Bengal and Ors* 2000 Cr LJ 2406 (Cal) .

72 *RL Kanoria v State of West Bengal* 2004 Cr LJ 867 (Cal) .

73 *Natural Sugar and Allied Industries v Razzak Gaffar* 2006 Cr LJ 3680 (Bom) .

74 *SK Alagh v State of UP* 2008 Cr LJ 2256, p 2258 (SC), AIR 2008 SC 1731, (2008) 5 SCC 662, 2008 (2) Scale 523, 2008 (3) All LJ 588 ; *Sabitha Ramamurthy v RBS Channabasavaradhya* AIR 2006 SC 3088, (2006) 10 SCC 581 ; *Maksud Saiyed v State of Gujarat* 2007 (11) Scale 318, 2008 (5) SCC 668 .

75 *K Neelaveni v State* 2010 Cr LJ 2819, p 2821, AIR 2010 SC 3191, (2010) 11 SCC 607 .

76 *Abhinash Chandra v Emepror* 63 Cal 18 .

77 *Kantilal Ganda Lal Shah v State of Gujarat* 1973 Cr LR 786 (SC) .

78 *Wazir Singh v Emperor* AIR 1942 Oudh 89, p 92, 43 Cr LJ 153 ; *Raghunath Sahai v Phool Singh* 1959 MPLJ (Notes) 85 . Refer also s 409, IPC .

79 *Organike Chemicals Corporation v Muniakad Chemicals Co* (1980) 24 MLJ (Cr) 229 (Kant) .

80 *Krishna Dayal v Emperor* AIR 1946 All 227, 47 Cr LJ 1041 ; *State of Orissa v Prafulla Kumar Sharma* AIR 1964 Ori 46, (1964) 1 Cr LJ 339 ; *Piran v Emperor* AIR 1923 Lah 321, 26 Cr LJ 615 .

81 *Krishna Dayal v Emperor* AIR 1946 All 227, 47 Cr LJ 1041 .

82 *Khirode Kumar Mukerji v Emperor* AIR 1925 Cal 260, p 261, 26 Cr LJ 532 .

83 *Sidheswar Dhal v State* 1980 Cut LT (Cr) 263, p 266 (mere suspicion cannot take the place of proof) ; *Dadarao v State of Maharashtra* AIR 1974 SC 388, 1974 Cr LJ 447 (mere entry in the books of account, unsupported oral evidence cannot prove entrustment); *Ramkhilawan v State of Madhya Pradesh* (1977) 1 FAC 236, p 237 (MP) (accused must be acquitted of the

charge of criminal breach of trust when neither entrustment, nor any dishonest misappropriation or conversion or use, has been proved).

84 *Empress v Khellie* 17 All 153, 1895 AWN 37 ; *Vanamber Maharana v State* (1966) 32 Cut LT 31, p 34 ; *Gurbakhsh Singh v Emperor* AIR 1936 Lah 907, 37 Cr LJ 581 .

85 *Rex v V Krishnan* AIR 1940 Mad 329, p 335-36, 41 Cr LJ 824 ; Re *Ganisetti Venkanna*1958 Cr LJ 1460, AIR 1958 AP 765 ; *Bolai Chandra v Bishnu Bejoy* AIR 1934 Cal 425, 35 Cr LJ 715 .

86 *Organike Chemicals Corporation v Munirabad Chemical Co* (1980) 24 Mad LJ (Cr) 229 (Kant) .

87 *Empress v Ram Chander Rat* Unrep Cr C 860; *Empress v Hari Dagdu Rat* Unrep Cr C 872; *Mangilal v State* ILR 1953 Raj 703, 1955 NUC 127 .

88 *Rama Rao v Sub-Inspector* 1937 MWN 566 .

89 *Vasudeo Kulkarni v Surya Kant Bhatt* AIR 1977 SC 1331, 1977 Cr LJ 1000 .

90 *Emperor v Kadir Bux* 1901 ILR 23 All 240; *Vijay Narayan Pande v State* (1978) A5 Cut LT 215; *Ravunni Menon v State* 1959 Ker LT 549, 1959 Ker LT 729 ; *Jaikrishandas Manohardas Desai v State of Bombay* AIR 1960 SC 889, p 891, 1960 Cr LJ 1250 ; *Kedarnath v State* AIR 1965 All 233, (1965) 1 Cr LJ 539 ; *Emperor v Kadir Baksh* (1911) ILR 33 All 249, 8 ALJ 88 ; *Krishan Kumar v Union of India* AIR 1959 SC 1390, 1959 Cr LJ 1508 ; *State v Sarat Chandra* ILR 1963 Cut 877 ; *RK Dalmia v Delhi Administration* AIR 1962 SC 1821, (1962) 2 Cr LJ 805 ; *Bhagaban Mohanty v Sudarshan Naik* (1974) 1 Cut WR 176, 1974 Cut LT 873 ; *Vanamber Maharana v State* (1966) 32 Cut LT 31, p 34 ; *State of Kerala v VT John* (1963) 2 Cr LJ 216 (Ker) ; *Emperor v Chaturbhuj Narain Choudhury* AIR 1936 Pat 350, 37 Cr LJ 877 ; *Vishwanath v State of Jammu and Kashmir* AIR 1983 SC 174, 1983 Cr LJ 231, (1983) 1 SCC 215 .

1 *Jago v State* AIR 1953 Raj 117, 54 Cr LJ 835 ; *Bapurao Annaji v Emperor* AIR 1936 Nag 160, ILR 1937 Nag 38 .

2 *State of Orissa v Prafulla Kumar Santra* AIR 1964 Ori 46, (1964) 1 Cr LJ 339 ; *Piran v Emperor* AIR 1923 Lah 321, 26 Cr LJ 615 .

3 *State of Himachal Pradesh v Mirza Hussain Beg* AIR 1954 HP 33, 1954 Cr LJ 833 ; *Namdeo Bhagaji Vaidya v Vithal Shripatrao Sheike* 1977 Cr LR 217, p 218 (Mah) .

4 *NN Burjorjee v Emperor* AIR 1935 Rang 453, 37 Cr LJ 190 .

5 *Rex v V Krishnan* AIR 1940 Mad 329, 41 Cr LJ 824 .

6 *Ashutosh Roy v State* AIR 1959 Ori 159, p 165, 1959 Cr LJ 1197 ; *HAL Girsham v Mutusamy* 11 Cr LJ 44 .

7 *Bineshwari Prasad Jayaswal v Emperor* AIR 1949 Pat 69, 50 Cr LJ 108 ; *Jaikrishnadas Ramanath Khemka v State* AIR 1958 Pat 272, 1958 Cr LJ 665 ; *Harikrishna Mahatab v Emperor* AIR 1930 Pat 209, 31 Cr LJ 249 ; *State v Banchhanidhi Mehar* AIR 1957 Ori 165, 1957 Cr LJ 899 .

8 *Desai Champaklal v State* (1961) 1 Cr LJ 654 ; *State of Orissa v Surendra Nath Patnaik* (1974) 40 Cut LT 690, 1974 Cut LR (Cr) 105 ; *Abhiram Jagadeb v State* 1977 Cut LR (Cr) 161, p 164, 1977 OJD 197 ; *Banamber Maharana v State* (1966) 32 Cut LT 31, p 34 ; *Chandra Prasad v Emperor* AIR 1926 Pat 299, 27 Cr LJ 611 ; *Brahmananda Mohanty v State* 1967 Cr LJ 1168, AIR 1967 Ori 135 .

9 *P Durugappa v State of Mysore* AIR 1956 Mys 40, 1956 Cr LJ 630 ; *Ravunni Menon v State* 1959 Ker LT 549, 1959 Ker LJ 729 ; *Parmod Ban Behari Saran v Emperor* 29 Cr LJ 90 ; Re *Venkatasubbayya*AIR 1956 Mad 452, p 453, 1956 Cr LJ 1079 .

10 *Karnam Siddapa v State of Mysore* AIR 1958 Mys 82, 1958 Cr LJ 784 .

11 *Chandika Prasad v Emperor* AIR 1930 Oudh 324, p 327, 31 Cr LJ 1081 . For further commentary, see under the same heading in s 409, *post*.

12 *Hriday Narain Pandey v State of UP* 2012 (114) AIC 296 (All) .

13 *Sarkar v State of Bihar* 2012 (112) AIC 936 (Jhar) .

14 *Ram Narain Poply v Central Bureau of Investigation* 2003 Cr LJ 4801 (SC), AIR 2003 SC 2748 . For further commentary, see under the same heading in s 409, *post*.

15 Re *M/s Jenson and Nicholson (India) Ltd.*2013 (127) AIC 472 (Cal).

16 *Jagannath v State* 1975 UJ 916 (SC) .

17 *Panna Lal v Emperor* AIR 1943 All 14, 44 Cr LJ 278 .

18 *Kalicharan v State* 1973 All Cr Cas 409 .

19 *Rajendra Singh v State of Uttar Pradesh* AIR 1960 All 387, p 394, 1960 Cr LJ 857 ; *Kundanlal and Anor v State of Maharashtra* 2001 Cr LJ 2288 (Bom) .

20 *Emperor v Khairari Lal* AIR 1928 Lah 926, 29 Cr LJ 291 ; *Shri Kumar v State of Rajasthan* 1984 Cr LRC 601 (Raj) .

21 *State v Acharya Navinchandra Prabhashanker* (1980) 17 Guj LT (SN) 149 .

22 *Emperor v Ahmed Dital Khan* AIR 1943 Sind 164, 44 Cr LJ 798 (fine enhanced).

23 *State of Uttar Pradesh v Sin Ram alias Khurbur* 1998 Cr LJ 4225 (All) .

24 *Ramanlal Saldevdas Shah v State of Gujarat* AIR 1992 SC 1916, 1992 Cr LJ 3161 .

25 *Chahajulal v State of Rajasthan* 1972 Cr LJ 1184, AIR 1972 SC 1809 .

26 *Gopal and ors v State* 1999 Cr LJ 3939 (Mad) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL BREACH OF TRUST

S. 407.

Criminal breach of trust by carrier, etc.--

Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This and the following two sections relate to the more aggravated forms of criminal breach of trust, by reason of the offender holding a particular office, for which higher punishments have been prescribed. However, the fact that the accused held the particular office in question and that he received the property in that capacity, has to be proved. This section deals with the cases of persons, who are in the nature of3520 bailees, to whom certain goods are entrusted for the purpose of safe storage or for conveyance of the goods to other places.

2. 'With Property'

Commentary under the related headings in s 405, *ante*, may be *referred* to.

3. 'Carrier'

The expression 'carrier', in this section, includes all types of carriers, whether a common carrier or a

private carrier.[27] A carrier is one who holds himself out as a carrier of the goods of all persons, who think him fit to employ him for hire, the goods tendered for carriage being in the nature of goods which he publicly professes to carry.[28] The term 'carrier' has been defined in the Carriers Act 1865, as 'a person, other than the government, engaged in the business of transporting, for hire, property from place to place by land or inland navigation, for any person indiscriminately'. Railways are also carriers, but their civil liability is defined and limited by law under the provisions of the Indian Railways Act 1890. Therefore, any individual railway servant, responsible for criminal misappropriation, may be independently prosecuted, but not as a carrier under this section.

To bring a case under this part of the section, it is necessary to prove that the goods were entrusted to the accused as a carrier, failing which the accused, if his criminal breach of trust is established, can only be convicted under s 406, and not under this section.

4. 'Wharfinger'

'Wharfinger' means the occupier of a wharf, and a 'wharf includes all wharves, quays, docks and premises in which goods when landed from ships, may be lawfully placed.[29] a wharfinger necessarily remains in charge of goods, while they are in transit, and they have to be transferred after being loaded or unloaded.

5. 'Warehouse-keeper'

A warehouse is a place licensed for the storage of goods under some statute. Warehouses are either public or private. Private warehouses are simply places of business for businessmen or tradesmen, compelled to keep large stock of goods, *e.g.*, even a shed with tarpaulin roof used for the shelter of goods in warehouse.[30] Goods, such as grains, excisable commodities, or other materials, are kept in godowns which would be warehouses, and if they are entrusted to the keepers thereof, they would be covered by this section.

6. Procedure

The offence under this section is cognizable, non-bailable, compoundable, by the owner of the property, in respect of which the breach of trust has been committed,3521 with the permission of the court, before which the prosecution is pending, and triable by a magistrate of the first class.

7. Jurisdiction

On a close reading of the provisions of sub-s 4, of s 181, CrPC in respect of the offence of criminal misappropriation or criminal breach of trust, the court within whose local jurisdiction the offence was committed or any part of the property which is the subject-matter of the offence was received, retained or was required to be returned or accounted for by the accused person gives jurisdiction to the court to try the offence, in other words, the court in whose local jurisdiction the place of entrustment is made or place of misuse or misappropriation takes place or the place where delivery is to be effected in each of the courts in whose local jurisdiction any one of the contemplated contingencies take place, will have jurisdiction to try the offence.[31]

8. Charge

The following form of the charge may be adopted:

I (*name and office of Magistrate, etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the...day of..., at..., you were entrusted with... (*specify the property*), as a carrier/wharfinger/warehouse keeper, and you committed criminal breach of trust in respect of that property, and thereby committed an offence, punishable under s 407 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

The veracity of the statement of witnesses recorded by the police which forms part of the final report cannot be disbelieved at the stage of framing of charge. The said documents bear a *primafacie* incriminating material to enable the court to frame a charge.[32]

9. Proof

To establish a charge under this section, prove that:

(a) the accused was entrusted with property in question;
(b) the said property was entrusted to him as a carrier/wharfinger/or warehouse-keeper; and
(c) he committed a criminal breach of trust in respect of that property.

10. Conviction

Where the accused, a driver of truck, killed the representative of the consignor travelling in the truck along with consignment of goods and concealed his body and clothes, the evidence of cleaner establishing the said facts, his evidence was found reliable and corroborated in all material particulars, the evidence of the owner of truck, consignor and other witnesses also corroborated the evidence of the cleaner,3522 the recovery of goods was effected on the basis of the statement of the accused. The conduct of the accused in making false statements regarding the deceased and the consignment of goods further substantiated the prosecution case. The conviction of the accused for murder and breach of trust in respect of goods entrusted to him was found proper.[33]

27 *Kanhayalal Baid v Rajkumar Agarval* 1981 Cr LJ 824, p 826 (Kant) ; *Emperor v Parabhu Ghatgeapp* 5 Cr LJ 235, 1 Weir 437 (private carrier not treated as a 'carrier' in this case).

28 *Johanson v Midland Railway* 4 Ex Rep 367 ; *Dickson v GN Railway* LR 18 QBD 176 .

29 English Merchant Shipping Act 1894.

30 *Watson v Cotton* 17 LJ CP 68 ; *R v Edmundson* 28 LJMC 213 .

31 *Jijo and Anor v State* 2003 Cr LJ 256 (Kant) . For further commentary, see under the same heading in s 406, *ante*.

32 *Ibid*.

33 *Aadam Kasam Shaikh v State of Maharashtra* 2006 Cr LJ 4585 (Bom) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL BREACH OF TRUST

S. 408.

Criminal breach of trust by clerk or servant.--

Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This is an aggravated form of the offence of criminal breach of trust which has already been defined in s 406, IPC . By virtue of the position of a clerk or servant, enjoying a position of confidence, protection to the public is offered, against an abuse of such position, under this section.

Mens rea is essential to constitute the offence under this section.[34] If a servant above the age of 12 years commits criminal breach of trust, he can be held guilty under this section.[35] Criminal breach of trust committed by a regular salaried employee of a registered co-operative society, would fall under this section, and not under s 409, IPC, as he is not in any of the persons enumerated in s 409, IPC .[36] a person can also be charged for abetment of criminal breach of trust by a servant under this section if the essential elements which constitute abetment exist.[37]

Demand or collection of excess profit, does not amount to cheating or criminal breach of trust.[38]

2. 'Clerk or Servant'[39]

A person, to whom the work of making purchases is given by a firm and who is remunerated for his services by a commission on the purchases made by him, would3523 be a servant of the firm.[40] Even a working partner, who has not contributed anything to the partnership business and to whom capital is entrusted by other partners, at their discretion, in such sums at such times, as they thought fit, would be a servant or clerk within the meaning of this section.[41] a broker, *i.e.*, a person who brings together a buyer and a seller, is not necessarily a servant.[42] However, the president of a co-operative society, though an agent, and not a servant, according to its bye laws, should be charged under this section.[43] Similarly, the secretary,[44] or the salesman,[45] of a co-operative society can be charged under this section.

3. 'In any Manner'

Commentary under the same heading in s 405, *ante*, may be *referred* to.

4. 'Entrusted'

Entries in books of accounts without any oral evidence, as to the nature of business and mode of keeping accounts are not sufficient to prove entrustment.[46]

5. 'Property'

Commentary under the same heading in s 405, *ante*, may be *referred* to.

6. 'Commits Criminal Breach of Trust'

Commentary of s 405, *ante*, may be referred to.

The prosecution case was that the petitioner had not taken steps for the preparation of the pension papers of the complainant. There was nothing to show/infer that the petitioner was entrusted with any property which he used dishonestly. There was no evidence to show that the accused had threatened to destroy the pension papers of the complainant. No case under s 408, IPC*primafacie* was made out, cognizance and process issued against the petitioner were set aside.[47]

7. Procedure

The offence under this section is cognizable, non-bailable, compoundable, by the owner of the property, in respect of which the breach of trust has been committed, with the permission of the court, before which the prosecution is pending, and triable by a magistrate of the first class.

8. Revisional Jurisdiction of the High Court

In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of3524 supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. However, the said revisional power cannot be equated with the power of an appellate court, nor can it be treated as a second appellate court jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the magistrate as well as the sessions judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice.[48]

9. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about... the day of ..., at..., you were a clerk/servant of (*or were employed, as a clerk/servant, by*) *AB* and were, in such capacity, entrusted with the property or with any dominion over that property)... (specify the property), and that you committed a criminal breach of trust in respect of that property and thereby committed an offence, punishable under s 408 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Where the accused, working as head secretary of the society for one month was alleged to have misappropriated a sum of Rs 6,759 and 65 paise and had deposited the said amount before the audit was completed, there was a considerable delay of about 7 years in framing a charge, which was vague and without material on record in support of framing the charge, the charge was misconceived, so the same was quashed.[49]

10. Clubbing and Joinder of Charges

Clubbing of charges on consolidated transactions for a period of five years does not vitiate the trial when there is neither failure of justice, nor prejudice to the accused.[50]

The joinder of two charges, one under s 408, IPC (for committing criminal breach of trust by a servant) and the other under s 465, IPC (for making false documents for committing criminal breach of trust) would be valid when the two offences arise out of the same transaction.[51] However, the joinder of a charge under s 408 for criminal breach of trust, which is first completed, with an offence of cheating which is committed afterwards, against two separate persons is illegal.[52] Charges under ss 408 and 477A, IPC can, however, in the circumstances of a particular case, be tried together and the joint trial of all the accused under these sections will be proper and lawful.[53]3525

11. Proof

To establish an offence under this section, prove[54] that:

(a) the accused was, or was employed as, a clerk or servant of the person reposing trust in him;
(b) the accused, in the said capacity, was entrusted, in any manner, with the property in question or with domain over it; and
(c) the accused dishonestly misappropriated that property, or converted it to his own use, or used it, or disposed it of, or wilfully suffered some other person so to do, in violation of:

(i) any direction of law, prescribing the mode, in which such trust was to be discharged, or
(ii) any legal contract, express or implied, which he had made, touching the discharge of such trust.

The only circumstance that the key of the store used to remain during the night with the accused, the president of a co-operative society, is not sufficient to prove charge under s 408, IPC, beyond a reasonable doubt against him.[55]

12. Entries in Books of Account--Evidentiary Value

In the absence of any oral evidence to show that the books of account were regularly kept in the course of business as required under s 34, Evidence Act and/or any other oral evidence to prove the entrustment of the amount with the accused, the charge of breach of trust under s 408, IPC, cannot be said to have been established against him.[56] Mere admission of signatures made by the accused below debit entries in the books of account is not sufficient to conclude that the amount was handed over to the accused when such an admission is made by the accused in the statement under s 342, CrPC 1898 (now s 313, CrPC 1973) as such a statement should be read as a whole and should not be dissected and considered only in part where that part is inextricably connected with the other part which is not taken into consideration.[57]

13. Conviction

There must be evidence of dishonest misappropriation before a clerk or servant can be convicted under this section. He cannot be convicted on the basis of any presumption.[58] He cannot also be convicted on the basis of inadmissible evidence.[59] However, the mere fact that other co-accused have been acquitted, is no ground for acquitting an accused.[60] In *Kantilal Gandalal Shah v State of Gujarat* ,[61] a wrong cross-entry was made by the accountant on the instructions of the manager who was3526 in charge of the funds of the co-operative society. It was held that this fact was susceptible of the inference that the manager (*i.e.*, the accused) wanted to misappropriate the amount with the result that he could be convicted under this section. In *Nga Aung Thein v Emperor* ,[62] a railway servant who was supplied a water proof coat for his use by the railway department, pawned it. It was held that the delivery of the waterproof coat was an entrustment, made to the servant, and he was, therefore, guilty of the offence for pawning it. In *Wazir Singh v Emperor* ,[63] the accused who received money in the capacity of an accountant and general agent of the Ramnagar State, failed to account for a deficiency in the accounts. He was held guilty under this section. It was further held, in *Wazir Singh v Emperor* ,[64] that persons who show deficiency in accounts, can be convicted of criminal misappropriation even when it cannot be shown that they had misappropriated any specific sum. However, where an employee of a *zamindar* handed over the account paper to his master at the time of leaving his service and showed the money, which he had put in as a security for his service and had withdrawn it as an item of expenditure, it was held that there was no dishonest intention and he was not guilty under this section.[65]

14. Probation

Keeping in view the facts and circumstances of the case and a favourable report of the probation officer based on data collected by him, the benefit of the Probation of Offenders Act can be extended to the accused.[66]

The accused, a secretary of Mandali (co-operative society), who misappropriated the amount of the Mandali, for which villagers had deposited out of their earnings after putting their hard labour, is not entitled to the benefit of probation.[67]

15. Sentence

The punishment provided in this section is a sentence of imprisonment of either description for a term which may extend to seven years, accompanied with a fine. The circumstances of any particular case, may, however, warrant for a lenient view. In a case, where the accused was a young man and a law graduate and had never committed any misappropriation before, it was held that a serious notice of the lapse need not be taken and a sentence of one month rigorous imprisonment and a fine of Rs 500 would be adequate.[68] Where the incident took place nearly 13 years ago, the accused had been in jail for few days, the amount involved mainly of Rs 9,341 was a petty one and as a result of prosecution, the accused had lost his job, although the acquittal recorded by the trial court was not found proper, yet the High Court3527 declined to interfere bearing in mind the larger interest of justice and the mitigating factors referred to before.[69]

However, when the accused, being a secretary of Mandali (co-operative society), who misappropriated the amount of the Mandali, which the villagers had deposited out of their earnings after putting their hard labour, the sentence of 1 year rigorous imprisonment and fine of Rs 5,000 awarded to the accused was found just and reasonable and not seen as a harsh sentence.[70]

Accused convicted under s 408, IPC had been facing trial, appeal and revision for last 31 years. Accused belonging to respectable family had become old. Sentence of imprisonment was reduced to the period already undergone.[71]

16. Alteration of Conviction from Section 408 to Section 403

An accused charged with an offence under s 408, IPC can be convicted under s 403 by the trial court. If the trial court has convicted the accused under s 408, but the offence under s 408 is not proved against the accused, though the offence under s 403 is established, the conviction of the accused under s 408 recorded by the trial court can be altered to s 403, IPC .[72]

34 *Dinanath v Hansraj* 1973 Sim LJ 254, p 256 (HP) .

35 *Kalka Prasad v State* AIR 1959 All 698, 1959 Cr LJ 1264 .

36 *Harjinder Singh v State of Punjab* (1980) 7 Cr LT 106 (Punj) .

37 *Balgobinda Shaha v Empress* 4 CWN 309 .

38 *Muraleedharan v State of Kerala* 2011 (106) AIC 300, 2011 (3) KLT SN 97 (Case No . 97 (Ker)).

39 Refer synopsis note 2 under s 381 .

40 *Pyo Gyi v Emperor* 20 Cr LJ 513 .

41 *Bhikchand Gangaram v Emperor* AIR 1934 Sind 22, 36 Cr LJ 818 ; For a contrary view, *refer* to *Abdul Ghafur v Daimullah Ahmed* 1952 Cr LJ 291 (working partner not servant merely because his contribution in the partnership business in nothing but his labour).

42 *Maung Chan Sein v King* AIR 1941 Rang 189, p 190, 42 Cr LJ 776 .

43 *Public Prosecutor v Bheemanathi Ventaka Seshaiah* 1968 Cr LJ 983 .

44 *Somsetti Lakshmi Narsimayya v State of Andhra Pradesh* 1972 Cr LJ 558, p 560 .

45 Re *AK Ramchandran*1972 Cr LJ 698, p 699, 1971 Mad LW (Cr) 228.

46 *Dadarao v State of Maharashtra* AIR 1974 SC 388, 1974 Cr LJ 447 (SC) . For further commentary, see under the same heading in s 405, *ante*.

47 *Dukhabandhu Sahoo v Anant Charan Naik* 2009 Cr LJ 4626, 2010 (86) AIC 564 (Ori) .

48 *State of Kerala v Puttumana Illath Jathavedan Nambeediri* 1999 Cr LJ 1443 (SC) .

49 *Ganpati Dayanu Patil v State of Maharashtra* 1997 Cr LJ 485 (Bom) .

50 *HA Boregasea v State of Mysore* 1973 MLJ 111, p 114 (Ori)

51 *Emperor v Lalji Bhanji* 13 Cr LJ 50 .

52 *Parmeshar Lal v Emperor* 10 Cr LJ 476 .

53 *Sushil Kumar Gupta v Joy Shankar Bhattacharjee* AIR 1971 SC 1543, p 1548, (1970) 2 SCJ 461 .

54 *State of Orissa v Surendranath Patnaik* 1974 Cut LT 690, 1974 Cut LR (Cr) 105 .

55 *Jagan Nath v State* AIR 1976 SC 1132, 1976 Cr LJ 847 (SC) . For further commentary, see under the same heading in s 406, *ante*.

56 *Dadarao v State of Maharashtra* AIR 1974 SC 388, 1974 Cr LJ 447 .

57 *Ibid*. See commentary under the heading 'Entries in Stock Register of Society--Need corroboration' in s 409, *post*.

58 Re *Ganissetti Venkanna*AIR 1958 AP 765, 1957 MLJ 535 (Cr) ; *S Hanumanthappa v State of Mysore* (1969) 1 Mys LJ 492 ; *Roshan Lal v Emperor* AIR 1935 All 922, 37 Cr LJ 308 .

59 *Motilal Roy v Panchi Biti* AIR 1964 Cal 440 .

60 *Sushil Kumar Gupta v Joy Shankar Bhattacharjee* AIR 1971 SC 1543 .

61 *Kantilal Gandalal Shah v State of Gujarat* AIR 1974 SC 222, 1974 Cr LJ 310 .

62 *Nga Aung Thein v Emperor* AIR 1934 Rang 41, 35 Cr LJ 788(2).

63 *Wazir Singh v Emperor* AIR 1942 Oudh 89, 43 Cr LJ 153 ; Re *Theophilus Ramappa* 13 Cr LJ 15; *Emperor v Bimla Charan* (1913) ILR 35 All 361, 11 ALJ 369 ; *State of Kerala v Kunhikannan Nair* AIR 1958 Ker 103, 1958 Cr LJ 518 ; *Watson and Co v Golab Khan* 10 WR (Cr) 28 ; *Emperor v Sri Krishan* AIR 1935 All 970, 37 Cr LJ 135 ; *Keshavrao Bhilaji Patil v Emperor* AIR 1935 Bom 30, 36 Cr LJ 522 ; *State v Banchhanidhi Mehar* AIR 1957 Ori 165, 1957 Cr LJ 899 .

64 *Wazir Singh v Emperor* AIR 1940 Oudh 89, 43 Cr LJ 153 .

65 *Abdul Majid Khan v Emperor* AIR 1936 Cal 520, 38 Cr LJ 56 ; *Surendra Nath Basu v Emperor* AIR 1938 Cal 451, 39 Cr LJ 691 .

66 *Jagtar Singh v State of Punjab* (1986) 1 Crimes 183 (P&H) .

67 *Nayak Prahladbhai Bhogilal v State of Gujarat* 2001 Cr LJ 1202 (Guj) .

68 *Gurdar Singh v State of West Bengal* AIR 1979 SC 1195, p 1198 ; *Arunachalam v State of Kerala* 1974 Ker LT 7 .

69 *State of Maharashtra v Bhuvanendra Mallapa Akinwate* 1997 Cr LJ 177 (Bom) (DB) .

70 *Nayak Prahladbhai Bhogilal v State of Gujarat* 2001 Cr LJ 1202 (Guj) .

71 *Narayan v State of Rajasthan* 2014 Cr LJ (NOC) 86 (Raj) .

72 Code of Criminal Procedure 1973, s 222(2) ; Re *Marudayya*AIR 1957 Mad 722, 1957 Cr LJ 1284 (2)

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL BREACH OF TRUST

S. 409.

Criminal breach of trust by public servant, or by banker, merchant or agent.--

Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.3528

Comments

1. Scope

This section also relates to an aggravated form of criminal breach of trust which has already been defined in s 405, IPC . In the commission of the offence of criminal breach of trust, two distinct parts are involved. The first consists of the creation of an obligation in relation to the property, over which dominion or control is acquired by the accused, while the second part deals with the misappropriation of the said property dishonestly and contrary to the terms of the obligation created.[73]

In order to sustain conviction under s 409, IPC, two ingredients are to be proved; namely, (i) the accused,

a public servant or a banker or agent was entrusted with the property of which he is duty bound to account for; and (ii) the accused has3529 committed criminal breach of trust. What amounts to criminal breach of trust is provided under s 405, IPC .[74]

This section can be invoked only if it can be shown that the accused, being in any manner entrusted with property or with dominion over property in his capacity as a public servant, committed criminal breach of trust in respect of that property.[75] However, it is not necessary that misappropriation must necessarily take place after the creation of a legally correct entrustment or dominion over property. The entrustment may arise in 'any manner whatsoever'. That manner may, or may not, involve fraudulent conduct of the accused. This section covers dishonest misappropriation in both types of cases, *i.e.*, those cases where the receipt of property is itself fraudulent or improper and those cases where the accused misappropriates what may have been quite properly and innocently received. All, that is required, is that may be described as 'entrustment' or acquisition of dominion over-property in the capacity of a public servant who, as a result of it, becomes charged with a duty to act in particular way or at least honestly.[76] It is wrong to say that a mistaken receipt or money in official capacity does not create an obligation upon the receiver as a public servant. It is enough if the payment is made by a person, dealing with a public servant in his capacity as a public servant, even if it is made on an erroneous assumption which the public servant concerned does nothing to remove. Section 409 , IPC, is meant for the protection, among others, of those dealing with public servants purporting to have the authority to act in a certain way in exercise of their official capacities. A legal defect in the scope of the ostensible authority of a public servant does not prevent an entrustment to, or an obligation to be fastened upon, a public servant in his capacity as a public servant if the fact of the case establishes the required nexus or connection between acts which create the obligation and the capacity.[77]

In the case of criminal breach of trust by a public servant, the acquisition of dominion or control over the property must also be in the capacity of a public servant. This is not the same thing as having the authority, as a public servant, to get the control or dominion over property annexed with an obligation. The 'entrustment' results from what the person, handing over money or property, is made to think, understand, and believe about the purpose for which he hands over money or property to a public servant if this takes place because, and due to exercise of the official authority, the requirements of s 409, IPC, are satisfied. Ordinarily, it is the ostensible or apparent scope of a public's authority when receiving property, and not its technical limitations under some internal rules of the department or office concerned, and the use made by the servant of his actual official capacity which would determine whether there is a sufficient nexus or connection between the acts complained of and the official capacity so as to bring it within the ambit of this section.[78]3530

Prosecution case was that the appellant accused, an Assistant Inspector in Agricultural department, had misappropriated the seeds and manures kept in the godown of which the appellant was incharge. However, the prosecution failed to prove the exact quality of receipt of seeds and manure kept in the godown. The evidence did not prove that the appellant had dishonestly or fraudulently misappropriated the seed or the manure kept in the godown. The appellant was acquitted of the charge under s 409, IPC .[79]

Where an offence, alleged to have been committed by a public servant, falls within the ambit of this section and also under s 5(1)(c) of the Prevention of Corruption Act 1947, it is open to the prosecution to prosecute him either under this section (*i.e.*, under the general law) or under s 5(1)(c) of the said Act, and it is not necessary that the prosecution must prosecute him under the said s 5(1)(c) which provides for a light punishment.[80]The fact that an act may fall both under s 409, IPC, and under s 16(7) of the Madras Pawn Brokers Act, does not take away the weight to prosecute the accused under a more onerous provision like s 409 of the IPC .[81]

2. Intention to Misappropriate at a Future Date

This section (*i.e.*, s 409, IPC) does not include an intention to misappropriate at a future date. Where the accused, who was the president and the treasurer of a co-operative society, made certain entries, intending to make it possible for him, at a later date, to appropriate the moneys of the society, but nothing

was then misappropriated, it was held that the accused could not be held guilty of an offence under this section.[82]

3. Crucial Word

So far as the offence under s 409, IPC is concerned, it must be proved that a person entrusted with property or with any dominion over property, in his capacity as public servant commits criminal breach of trust in respect of such property, as defined in s 405, IPC, meaning thereby that he dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do. The crucial word used in s 405, IPC is 'dishonestly' and, therefore, it implies the existence of *mensrea*, that is to say a guilty mind.[83]

4. Breach of Condition of Loan Agreement

Once a security is delivered to the creditor, and merely on the pretext of breach of the conditions of the loan agreement, such security or part thereof is disposed of without the knowledge and/or consent of the debtor, it could amount to a case of criminal breach of trust. However, when, the proceeds from the sale of the securities were3531 credited to the account of the debtor to discharge his liability in respect of the debt arising out of the loan agreement, and there was no retaliation of whatsoever nature by the debtor in relation to such acts on the part of the creditor, it cannot be said that the disposal of such part of the securities would *per se* amount to criminal breach of trust or cheating.[84]

5. Award Passed by Arbitrator

Once undisputedly the court was seized with the matters and the parties were before the court and the claim by the creditor in proceedings before the court was restricted to the amount due and payable under the unchallenged award lawfully passed in the arbitration proceedings, there can be no case of either criminal breach of trust or cheating and certainly not in relation to the subject-matter of the transaction in which the arbitration award was passed and followed by the proceedings for recovery of the amount on account of dishonour of the cheques which were deposited by the creditor towards the repayment of the loan amount obtained by the debtor under the loan agreement, duly confirmed by the arbitration award.[85]

6. Abetment

In an appropriate case, the conviction of an accused may probably be altered to one of abetment for an offence under s 409, IPC . However, such an alteration of conviction under s 409, IPC, into one of abetment thereof is not desirable as the same would imply a definite finding of guilt against an accused who is not before the court, despite the fact that evidence of such abetment is established on record.[86]

7. 'In any Manner'

Section 409, IPC, covers dishonest misappropriation in both types of cases:

(a) where the receipt of property is improper or fraudulent, and
(b) where receipt of property is proper and honest.

What is required is 'entrustment'.[87]

8. 'Entrusted with Property'

One of the essential conditions of the offence of criminal breach of trust is that the property, which is the

subject-matter of the offence, must have been entrusted to the accused and trust of some kind is necessary.[88] 'Entrustment', in s 409, is used in a wide sense and includes all cases in which property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to the terms on which possession has been handed over to the accused.[89] In view of the wider sense given to the term 'agent', even an independent contractor who dishonestly disposes of the3532 property entrusted can be treated as an agent and so liable under s 409, IPC .[1] An offence under this section presupposes an entrustment or bailment.[2] Money, handed over to the postal money order clerk for remittance, in his capacity as the money order issue clerk of the post office, would be an entrustment.[3] The entrustment of money by a person to the post master for opening a new savings bank account would amount to 'entrustment' within the meaning of this section.[4] Similarly, the supply of postage stamps to extra departmental vendors is an entrustment, pure and simple.[5] Money, collected by a person, authorised to collect it on behalf of another, is similarly an entrustment.[6] The expression 'entrustment' carries with it the implication that the person, handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further, the person handing over the property must have the confidence in the person taking the property so as to create a juridical relationship between them.[7] Entrustment to a person is virtually the same thing as placing the money under charge of such person, in *Amrut Sakharam Sanap v State of Maharashtra* ,[8] the appellant had taken charge of the treasury with all the cash therein, but on a day of holiday, he gave the key to accused number 1, and the evidence was that the appellant opened the currency chest the previous day. It was held that the mere giving of the key did not amount to giving charge of the treasury and that the appellant was himself liable for the loss of money from the chest. If a police officer takes charge of the property of a dying person and misappropriates it, he must be deemed to have been entrusted with the property in his capacity as a public servant.[9] It is not necessary that the property, in respect of which criminal breach of trust is committed, should be the property of the government; the only requirement is that it should be entrusted to a public servant in his capacity as such.[10] However, where the goods were entrusted to a firm and there was no personal entrustment of the goods to the manager, it was held that he could not be criminally liable under s 409, IPC .[11]

Where a public servant fails to pay the revenue collected into treasury within a reasonable period of time, it can be concluded that he used the money fraudulently for his own use and is guilty of breach of trust.[12]

Charge against the accused was that he violated the directions issued in a Circular Order regarding verification of loan applications. Unless the circular order has been communicated, accused cannot be held guilty for offence under s 409, IPC .[13]

Allegation was that the Chairman of the Electricity Board had directed not to return the money deposited by the complainant with the Board, the complainant was deprived of its use, attracting offence under s 409, IPC . There was no allegation that3533 the complainant entrusted the money to the accused, which was converted by the Chairman of the Board to its own use. No offence under s 405, IPC was made out.[14]

Where money or other property is obtained by deception, there can be no question of entrustment.[15] The mere fact that the senior officer had taken a bank draft and that authorisation had been given in his favour by his superior officer, would not establish entrustment or his dominion over the property (diesel oil). However, when oral and documentary evidence showed that the delivery of diesel oil was given to junior officer who in token thereof had signed not only on the cash memo but also on the register itself, establishes entrustment or dominion of the property upon the junior officer.[16]

9. Fair price shop dealer -- Selling rice in open market

The appellant accused, an agent entrusted with the distribution of rice under the 'Food for Work Scheme' (FFWS) to the workers on production of coupons, sold rice in open market without ration cards. Appellant accused was convicted under s 409, IPC .[17]

10. Entrustment with Property--Firm with Chief Minister as Partner Purchasing Land of Government Company

The chief minister was charged under s 409, IPC for her firm having purchased a plot belonging to TANSI, a government company. The properties in question belongs to TANSI, a corporation which is a separate and distinct entity from the government. and the properties are held by it as owner and has complete control over the same except when the said properties are to be alienated, approval of the government has to be obtained as provided under the Articles of Association of the said corporation. In a case of this nature, where there is no dominion over the properties by a chief minister or a minister, it cannot be treated as entrustment of the properties creating a trust which is an obligation annexed to the ownership of the properties and arises out of the confidence reposed and accepted by the owner. Indeed there is no material in the whole case to come to the conclusion that any such trust has been or deemed to have been created in respect of the said properties and that the relationship between chief minister and TANSI is one of trustee and beneficiary. Therefore, the ingredients of s 409, IPC are not attracted to the case at all. There is absolutely no entrustment of the properties in any manner, which allows a dominion over it except approving or disapproving, an act on the part of the corporation either to sell or to alienate the properties. It cannot be said that a public servant who holds a particular portfolio and has an element of supervisory control in certain matters, has a dominion over the property so as to exercise any legal incidents attached to the right of ownership. Therefore, there was no entrustment of the said properties and it cannot be said that chief minister had dominion over the said properties either as the chief minister or as the minister of industries and in any case, the evidence does not3534 establish the ingredient of dishonest disposal or conversion of property for personal use. Thus the charge under the aforesaid section is not established.[18]

11. Entrustment with Property -- Fortuitous or Intervening Situation Incapacitating Accused--Effect

If due to a fortuitous or intervening situation, a person to whom money is entrusted is incapacitated from carrying out the job, that will not bring in application of s 405, IPC, unless misappropriation, or conversion to personal use or disposal of property is established.[19]

12. Prosecution not to prove Actual Manner of Misappropriation

It is fairly well settled position in law that actual mode of entrustment or misappropriation is not to be proved by the prosecution. Once entrustment is proved, it is for the accused to prove as to how the property entrusted was dealt with.[20]

13. On Proof of Entrustment Accused to Account for the Property

The law is well settled that once entrustment of property is proved, the prosecution is no longer obliged to establish the precise mode of conversion or misappropriation by the accused of the property entrusted to him. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, but where he is unable to account or renders an explanation for his failure to account which is untrue, inference of misappropriation with dishonest intent may readily be made.[21]Once it is proved that the amount was entrusted to the accused, then under s 106 of the Evidence Act it has to establish as to what happened to the said amount and that fact lies within the knowledge of the accused, the burden of establishing the fact is upon him.[22]

14. Mere Retention of Property--Temporary Retention

The gist of the offence of criminal misappropriation is dishonest intention. Mere retention of property is not enough. It is, however, necessary that the prosecution must establish that there was intention on the part of the accused to retain the amount permanently. Temporary retention is also sufficient.[23] Temporary embezzlement by the accused clerk employed in the office of Deputy Superintendent of Police of a paltry sum *viz*. Rs. 1839/- for a period of 21 days was held covered by s 95, IPC . The accused was granted benefit of s 95, IPC, and acquitted of charges under ss 409, 471, 477, IPC .[24]3535

15. 'Public Servant'

The secretary of a co-operative society under the Karnataka Co-operative Societies Act 1959 (11 of 1959) being a paid employee of the society is a public servant.[25] a *patwari*, whose duty is to collect land revenue and cases due on the land in his village under the land revenue code, is a public servant.[26] Similarly, a *naib nazir*,[27] or the president of a municipality, where he is not removable except by the local government,[28] or the *pradhan* of a *gram sabha*under the Uttar Pradesh Panchayat Raj Act,[29]*gram sachiv* of *panchayats* in the State of Haryana,[30] or a receiver in an insolvency case,[31] is a public servant within the meaning of this section. However, the president of a co-operative society,[32] or its secretary,[33] or a village shroff, whose duty is to assist in collecting the public revenue in cash and to give receipts, but not authorised to receive the public revenue in kind,[34] or the *kurnam* of a government village receiving moneys from certain raiyats as revenue on unassessed lands,[35] or a person authorised to sell food grains under the direction of the government to be distributed among the members, constituting a local unit in pursuance of an agreement, entered into by them with the government, under which they merely act as arhatiyas,[36] or a person, who is temporarily carrying on the duties of a branch postmaster purely as a nominee of permanent extra departmental branch postmaster without any authority being given by the government by a letter of appointment,[37] or the son of a person who is an extra departmental agent of a post officer accepting certain amount from a party for being remitted to another person but misappropriating it,[38] is not a public servant within the meaning of this section. For further commentary, s 21, vol 1, may be referred to.

16. Mere negligence of a public servant

Mere negligence of a public servant does not amount to criminal breach of trust punishable under s 409, IPC .[39]

17. Public servant -- Exonerated in departmental proceedings

Where the accused public servant has been exonerated in departmental proceedings on the same charges on which FIR has been filed, criminal proceedings would be quashed on petition filed under s 482, CrPC .[40]3536

Departmental proceedings and criminal proceedings can go on simultaneously. After the acquittal of an employee in a criminal proceeding, departmental proceedings against the employee can be initiated.[41]

18. Inducing Subscriber of Mobile Phone

Admittedly, a subscriber is given a mobile phone instrument and connection with an understanding that the subscriber has exclusive right to use the phone. If the accused allegedly induced the subscriber to opt for the services provided by Tata Tele Services Limited (TTSL), an offence under s 409 of IPC, cannot be said to have made out. Section 405 of IPC, defines 'criminal breach of trust'. The offence of criminal breach of trust requires entrustment with property and dishonest use or disposal of the property by the person to whom the property is entrusted. Both these things are absent. There is no allegation that the property in respect of which the second respondent has right was entrusted to TTSL or its employees who are the petitioners herein.[42]

19. 'Banker'

The word 'banker', used in s 409, IPC, signifies any person who discharges any of the functions of the customary business of banking.[43] The relationship between a depositor and a bank is the simple relationship of a creditor and a debtor. It cannot be said that there is an entrustment to the bank for any particular purpose.[44] Money, when paid into a bank, ceases altogether to be the money of the customer; it is then the money of the banker who is bound to return in equivalent, by paying a similar sum to that deposited with him, when he is asked for it. The money placed in the custody of a banker, is for all intents and purposes, the money of the banker to do with it as he pleases.[45] Similarly, no criminal proceedings can lie against the manager of a bank for having used the money for the purpose of other business.[46] There are, however, many cases in which a banker may also be a trustee and his case may fall under s

409, IPC . Thus, when a bank takes deposits from its customers, it takes it on the understanding that the deposit is not to be used to pay dividend to the shareholders at a time when the bank being insolvent, cannot legally pay dividend.[47] Where the managing director of a bank got his son to present a pronote for Rs 3,000 to the bank, treating it as an addition to the profits reducing his remuneration on paper from Rs 4,050, and thus deceiving; the shareholders into declaring dividend larger than the profits warranted; it was held that the accused was3537 guilty under a 409.[48] Where a municipal committee endorsed a war bond to a bank with the instruction to sell it at its market value but the director of the bank pledged it with another bank against cash payment and the amount was utilised to meet some urgent; demands made on their bank, it was held that making use of the amount in a manner, which was contrary to the instructions, was an offence under s 409, IPC .[49]

20. Banker's Lien

The Madras High Court in *N Mohammad Hussain Sahib v Chartered Bank Madras* held:[50]

> The general lien of bankers over any goods bailed to them is embodied in s 171 of the Contract Act . The question is whether any such lien may be over money deposited by the customers... Whether the right of the bank is called a lien or set off, the said right can be exercised only by the bank by getting the funds deposited in its branch by the customer transferred to it with the consent of the customer. It is held that it is not open to the customer to call upon the bank to exercise any such lien or set off. In *Canara Bank v Taraka Prabhu Publishers Pvt Ltd* ,[51] the Andhra Pradesh High Court has held that in a case of recovery of loan by a bank, the bank can transfer the amount deposited in the current account to its loan account for set- off. The bank has right of set-off in terms of contract to recover the debt due to it. In *Punjab National Bank v Surendra Prasad Sinha* ,[52] wherein their lordships have held that adjustment of FDR securities deposited by a guarantor thereafter by the bank on maturity of the said deposits is not a criminal breach of trust. Their lordships have observed that the creditor has right of adjustment in view of the liability still subsisting and there is no dishonest intention in adjusting the amount. From the above decisions and also when from the averments made in the complaint, it is abundantly clear that there existed a relationship of creditor and debtor and the demands are mutual and between the same parties. Therefore, the bank has a lien or right of set off and there can be no dishonest intention on the part of the bank to misappropriate the amount to constitute an offence under s 409, IPC .[53]

21. Should the Bank Enforce Liability against Principal first and then against the Guarantor?

In *State Bank of India v Indexport Registered M/s* ,[54] a decree was obtained and executed. The said order was challenged before their lordships on the ground that the decree holder had first exhausted the remedy by way of executing a mortgage decree loan and then proceeded against the guarantor. Negativing this contention their lordships overruled the decision, in *Union Bank of India v Manku Narayana* ,[55] and held:

> The decree for money is a simple decree against the judgment-debtors including the guarantor and in no way subject to the execution of the mortgage decree against the judgment-debtor no 2. If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree-holder to proceed against the mortgaged property3538 first and then to proceed against the guarantor. It appears the above quoted observations in *Manku Narayan's case*,[56] are not based on any established principles of law and or reasons, and in fact, are contrary to law. It, of course, depends on the facts of each case how the composite decree is drawn up. But if the composite decree is a decree which is both a personal decree as well as a mortgage decree, without any limitation on its execution, the decree-holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree along and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree.

Where the complainant was the guarantor of the bank and he has debited the amount, and subsequently

after the case was filed before the debt recovery tribunal, the said amount was remitted back to the account of the complainant. It may be true that subsequent conduct of the bank's directors in remitting back the amount may not be a mitigating circumstances to proceed against the bank's directors *etc*, but the fact clearly discloses that there was no dishonest intention on the part of the bank's directors *etc*, to misappropriate this amount for themselves.[57]

22. Adjustment of FDR Securities of Guarantor by Bank against Time-bound Loan--No Offence under Section 409

Section 3 of the Limitation Act only bars the remedy but does not destroy the right which the remedy relates to. The right to the debt continues to exist notwithstanding the fear that the remedy is barred by limitation. Therefore, when the principal debtor did not repay the bank loan, the bank as creditor can adjust it at maturity of the fixed deposit receipt deposited by the guarantor with the bank as security, though the debt became barred by limitation at the time of maturity of the said FDRS, it is not obligatory to file a suit to recover the debt. Such adjustment would not amount to offences punishable under ss 109, 114 and 409, IPC .[58]

It is also salutary to note that the judicial process should not be an instrument of oppression or needless harassment. When the complaint was made important impleading the chairman, the managing director of the bank by name and a host of officers, there lies a responsibility and duty on the magistrate to find whether the concerned accused should be legally responsible for the offence charged for vindication of justice and maintenance of law and order, but it would not be the means to wreck personal vengeance. Therefore, in case of default of payment of bank loan, when the debt became time-barred and the bank had adjusted the debt from the FDRS in its possession which were deposited by the guarantor by way of security, after their maturity, any complaint made by the guarantor impleading the chairman, managing director of the bank and a host of officers on the charges under ss 109, 114 and 409, IPC, the complaint being filed as vendetta to harass the persons needlessly, the complaint was quashed.[59]

23. Civil Suit Filed by Bank Compromised--Complaint under Sections 409 and 420 Quashed

Where in a complaint filed against the accused for offences of criminal breach of trust and cheating it was alleged that a floating charge was made by accused-debtor on the3539 goods by way of security in favour of the bank to cover up credit facility and the goods were deposited, the offence of cheating cannot be said to have been made out because the property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused or the beneficial interest in or ownership of it must be in some other person and the offender must hold such property in trust for such other person or for his benefit. Moreover, as the case was basically a matter of civil dispute and the banks had already filed suits for recovery of dues of the banks on account of credit facility and the said suits had been compromised on receiving payments from the concerned companies, the compromise decrees passed in the suits instituted by the banks, for all intents and purposes, amounted to compounding of the offence of cheating. Consequently, the complaint for both offences under ss 409 and 420, IPC, was liable to be quashed. It was more so when the banks had not chosen to file any case against the debtor and though the FIRS were filed in the years 1987 and 1989, investigation was not completed though there was no impediment in completing the investigation.[60]

24. 'Agents'

The relationship of principal and an agent may be constituted by:

(a) express appointment of the principal or by a person duly authorized by the principal to make such appointment,
(b) implication of law from the conduct or the situation of the parties or from the necessity of the

cases, or

(c) subsequent ratification by the principal, of acts done on his behalf.[61]

The 'director of a company' is not only an agent but is also in the position of a trustee, and being a trustee of the assets which have come to his hands, he has control and dominion over the same.[62] The trustee or manager of a temple is the agent of the deity. If such trustee or manager misappropriates temple jewels, he is guilty under s 409, and not of theft.[63] However, the position of the *lambardar* is not that of a trustee in order to make him liable for criminal breach of trust if he does not hand over, to the government the money received from the landowners. His position is similar to that of a lessee and the dispute, relating to the payment of the money, is that of a civil nature.[64] The mere fact that a stockist of cement is under the control and supervision of the government under the provisions of any Control Order, would not make him an agent of the government.[65]

Though a person charged may have been entrusted with the property in his capacity of an agent, yet it is not necessary that he should continue as an agent at the time of committing the criminal breach of trust.[66]3540

25. Agent and Servant--Distinction

An agent is not a servant as a servant acts under the direct control and supervision of the master and is bound to confirm to all reasonable orders, given to him in the course of his work, while the agent, though bound to exercise his authority in accordance with all the lawful instructions, which may be given to him from time to time by his principal, is not subjected, in its exercise to the direct control or supervision of the principal.[67]

The difference between the relationship of master and servant and principal and agent may be said to be this--A principal has the right to direct what work the agent has to do, but a master has the further right to direct how the work is to be done. The position is further clarified in *Halsbury's Laws of England*.[68]

An agent is to be distinguished on one hand from a servant and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given to him in the course of his work; an independent contractor, on the other hand, is entirely dependent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct-control or supervision of the principal. An agent as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant.[69]

26. Section 477A and Section 409 --Distinction

Commentary under the same heading in s 477A, post may be referred to.

27. Section 409 Distinguished from Section 105Insurance Act

Commentary under the similar heading in s 405, *ante*, may be referred to.

28. Theft and Criminal Breach of Trust by Public Servant

Commentary under the same heading in s 378, *ante*, may be referred to.

29. Acquittal under Section 409 --Accused cannot be Convicted under Section 5(1)(c) of the Prevention of Corruption Act

When the allegations in the FIR are not substantiated by oral evidence and the accused are acquitted for

the offence under s 409, IPC, their conviction under s 5(1)(c) of the Prevention of Corruption Act 1947, which is based on similar ingredients cannot be sustained.[70]3541

30. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

31. Two FIRS

When two FIRS are lodged with different investigating agencies and the offences under both the FIRS are one and the same, it is only then that the second FIR is not maintainable.[71] However, when the two FIRS do not contain common factors as to the offences in question, it cannot be said that the second FIR should be discarded,[72] and quashed.[73]

When the second FIR is lodged for the harassment of the accused, it is liable to be quashed to prevent the abuse of process of law.[74]

32. Identification of Accused

Where the accused was a *sarpanch* of a *gram panchayat* and a public figure in the locality and the prosecution witness identified him in court, no further evidence was necessary like an identification parade to connect the offence with the accused.[75]

33. Inordinate Delay in Filing Complaint--Proceedings Quashed

Where the amount for which the accused was charged with criminal breach of trust was received by the bank with interest within one month of commission of offence, the complainant was terminated from service on account of the aforesaid Act within 7 to 8 months of the offence, the filing of the complaint after a gap of five years, *prima facie* appeared to be intentional and only to harass the accused. It is true that the period of limitation is prescribed for each kind of offence and since the offence under s 409, IPC, is punishable with life imprisonment or imprisonment which may extend to 10 years, the complaint filed by the complainant was within limitation, but filing a complaint within limitation cannot itself be justified in the peculiar fact and circumstances, after five years.[76]

34. Sanction to Prosecute--Essential if Offence Committed in the Discharge of Official Duty

Under s 197(1), CrPC 1973, when any public servant, who is not removable from his office save by or with the sanction of the government, is accused of any offence, alleged to have been committed by him while acting, or purporting to act, in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction of the Central Government or of the state government, as the case may be. It is not, however, every offence committed by a public servant that requires sanction for prosecution under s 197(1), CrPC, nor even every act done by him while he is actually engaged in the performance of his official duties. If the act3542 complained of is directly concerned with his official duties, so that, if questioned, it can be claimed to have been done by virtue of the office, then sanction would be necessary, and that would be so irrespective of whether it was in fact a proper discharge of his duties because that would really be a matter of defence on merits which could have to be investigated at the trial and cannot arise in the grant of sanction which must precede the institution of the prosecution.[77] a public servant can only be said to act or purport to act in the discharge of his official duty if his act is such as to lie within the scope of his official duty. The test may well be whether the public servant, if challenged can reasonably claim that what he does, he does by virtue of his office.[78] In explaining the test for determining the necessity of sanction, the Supreme Court observed, thus:

> The offence, alleged to have been committed, must have something to do or must be related, in some manner, with the discharge of official duty...There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of duty as this question will arise only at a later stage when the trial proceeds on merits. What we must find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of the official duty though possibly in excess of needs and requirements of the situation.[79]

35. Sanction to Prosecute--Discharge of Official Duties

It is not, however, that every offence committed by a public servant requires sanction for prosecution under s 197(1), CrPC, nor even every act done by him while he is actually engaged in the performance of his official duties. If the act complained of is directly concerned with his official duties so that, if questioned, it can be claimed to have been done by virtue of the office, then sanction would be necessary, and that would be so, irrespective of whether it was in fact a proper discharge of his duties because that would really be a matter of defence on merits which could have to be investigated at the trial, and cannot arise in the grant of sanction which must precede the institution of the prosecution.[80] A public servant can only be said to act or purport to act in the discharge of his official duty if his act is such as to lie within the scope of his official duty. The test may well be whether the public servant, if challenged, can reasonably claim that what he does, he does by virtue of his office. In explaining the test for determining the necessity of sanction, the Supreme Court observed thus:

> The offence, alleged to have been committed, must have something to do or must be related, in some manner, with the discharge of official duty...There must be a reasonable connection between the act and the official duty. It does not matter even if the act3543 exceeds what is strictly necessary for the discharge of duty as this question will arise only at a later stage when the trial proceeds on merits. What we must find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of the official duty though possibly in excess of needs and requirements of the situation.[81]

The sanction of the appropriate government or competent authority would be necessary to protect a public servant from needless harassment or prosecution. The protection of sanction is an assurance to a honest and sincere officer to perform his public duty honestly and to the best of his ability. The threat of prosecution demoralizes the honest officer. The requirement of sanction by the competent authority or appropriate government is an assurance to the honest officer who does his public duty to further the public interest. However, the performance of official duty under the colour of public authority cannot be camouflaged to commit crime, since, his public duty may provide him an opportunity to commit crime. The court while it proceeds in the trial or inquiry, as the case may be, applies its mind and records a finding that the crime and the official duty are not integrally connected.[82]

36. Sanction to Prosecute--Cases

In *Shreekantiah Ramayya Munipalli v State of Bombay* ,[83] the three accused, who were in charge of military stores and to whom they had been entrusted in various capacities, were alleged to have entered into a conspiracy to defraud the government of those properties by selling them to a particular person who subsequently became the approver. It was alleged that the money had been paid and then the stores were passed out to the depot and the money was pocketed by the accused, and not credited to the government. It was evident that the entrustment was in the official capacity and there could be no disposal, lawful or otherwise, save by an act done, or purporting to be done, in an official capacity. In these circumstances, it was held that the sanction to prosecute them was necessary. However, in *Jaimi Veerabhadraswamy*,[84] it was held that no sanction to prosecute the president of a *panchayat* board, who had collected subscriptions for the war fund and subsequently misappropriated them, was necessary

because the collection of subscriptions for the war fund could not be deemed to be an official duty which had to be performed by the president of the *panchayat* board. Similarly, in *Gumshidayya Shantivirayya Kulkarni v Emperor* ,[85] no sanction was held to be necessary where an officiating *kulkarni* of a village used money, collected on account of revenue, for his own purpose, instead of sending it to the treasury, because he could not be said to be acting in the discharge of his official duty. Likewise, where the accused embezzled funds entrusted to him by various depositors for crediting into their savings bank account, it was held that as the accused intended to act in direct opposition to his duty and his office merely3544 provided him with the opportunity of committing it, no sanction was necessary.[86] Similarly, in *Shamboonath Mishra v State of Uttar Pradesh* ,[87] it was held:

> When the public servant is alleged to have committed the offence of fabrication of record of misappropriation of public fund, etc, it cannot be said that he acted in discharge of his official duties because it is not the official duty of the public servant to fabricate the false records and misappropriate the public funds, etc in furtherance of or in discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the transaction.

37. Sanction not Condition Precedent

As noted in *State of Madhya Pradesh v MP Gupta* ,[88] sanction under s 197 of the Code of Criminal Procedure 1973 is not a condition precedent for an offence under s 409, IPC .[89]

38. Sanction--Determination of Necessity from Stage to Stage

The complaint may not disclose that the act constituting the offence, was done or purported to be done in the discharge of official duty, but the facts, subsequently coming to light on a police or judicial enquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction. Whether sanction is necessary may have to be determined from stage to stage. The necessity may reveal itself during the progress of the case.[90]

39. Public Servant not Removable with Prior Sanction of Government--no Sanction Required

A bare perusal of s 197(1), CrPC 1973[91] shows that before the accused can challenge his prosecution on the ground of want of sanction, he has to show that he was a public servant not removable from the office except by or with the prior sanction of the government. When undoubtedly the accused was a public servant but there is nothing on record to show that he could be removed from his office only by the government or with the prior sanction of the government, he cannot be convicted under s 409, IPC .[92] The question whether the accused are removable from their office save by or with the sanction of the government is a question of fact, which can be dealt with by the trial court after objection is taken before it and parties are given the opportunity of being heard.[93]3545

40. Acquittal of Accused for want of Sanction--No Bar under Section 300 , CrPC 1973 for fresh Trial

Section 300, CrPC 1973 provides that a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence.[94]

In *Yusofalli Mulla Noorbhoy v The King* [95] wherein the accused appellant was tried in the court of

presidency magistrate under s 13(1) read with s 5 of the ordinance for the offence of hoarding. He was also separately charged under s 13(1) read with s 6 of the ordinance for the offence of profiteering. He pleaded not guilty. The magistrate proceeded with the case. Thereafter, the accused was acquitted on the ground that this chargesheet was filed without proper sanction. Thus, it is the incompetence of the prosecution to proceed against the accused without sanction as provided for in law. Thereafter, fresh prosecution was initiated against the accused appellant for the same offences and on the facts after obtaining fresh prosecution sanction, but the learned magistrate acquitted the appellant holding that the fresh prosecution was barred under s 403 of CrPC). The privy council following the decision of the federal court delivered in *Basdeo Agarwalla v King Emperor* [96] came to the conclusion that sanction was bad and the prosecution incompetent, hence the order of acquittal was passed without jurisdiction and could only operate as order of discharge and thus fresh prosecution was not barred. Similar view was taken by the Hon'ble Supreme Court in *Baij Nath Prasad Tripathi v State of Bhopal* ,[97] wherein it was held that the whole trial was null and void in absence of prosecution sanction and it cannot be said that there was any conviction or acquittal in force within the meaning of s 403, CrPC 1898 (new s 300, CrPC 1973). Such a trial does not bar a subsequent trial. Following the view of the Privy Council and the Supreme Court, the Hon'ble Apex Court held in *Mohammad Safi v State of West Bengal* ,[98] that where the accused, was tried earlier by a special judge on the basis of a chargesheet under s 409, IPC, was acquitted after the conclusion of the trial not on merits but on the erroneous conclusion that the court had no jurisdiction to take cognizance of the offence on the police *challan*, the subsequent trial and conviction of the accused for the same offence by the court were not barred by the provisions of s 403, CrPC . The earlier trial was no trial at all and the order passed therein was not an order of acquittal as contemplated by s 403(1) of old CrPC . Thus, the judgment was not on merits and the accused petitioner was acquitted only on account of improper sanction, s 300(1), CrPC is not attracted.[99]

41. Sanction to Contain Necessary Facts

Ordinarily, the facts constituting the offence charged, should be shown in the sanction. If, however, such facts are not shown on the face of the sanction, the prosecution must prove by extraneous evidence, that those facts were placed before3546 the sanctioning authority and it was only after examining those facts that the authority granted the necessary sanction to prosecute the accused.[1]

42. Non-examination of Authority Granting Sanction

When the sanctioning authority accords sanction to prosecute the accused who was not available in India, but another prosecution witness, who was acquainted with the signatures of the sanctioning authority to prove the sanction order and she also gave the details mentioned in the sanctioning order regarding the various documents placed before the sanctioning authority who in turn perused all the records and accorded sanction after proper application of mind, it was not obligatory on the part of the prosecution to examine the sanctioning authority.[2] When the sanction order clearly revealed that the sanctioning authority had applied its mind after careful examination of the materials and accorded sanction to prosecute the accused, the failure to examine the sanctioning authority would not vitiate the legality of the sanction order.[3]

43. Gazette Notification under Section 6 of Delhi Special Police Establishment Act (25 of 1946)--Not Mandatory

Under s 3 of the Delhi Special Police Establishment Act 1946 (DSPE Act), the Central Government is required to empower or specify the offences or class of offences which are to be the subject-matter of investigation by the Delhi Police establishment and this has to be done only by publication of notification in the Official Gazette. However, no such mandatory requirements is there insofar as the extension of power under s 5 or the consent of the state government under s 6 is concerned. Provision of s 3 of the DSPE Act does not control or is a parental provision so far as the ss 5 and 6 are concerned. As the words under ss 5 and 6 denote, the power under these provisions can be exercised by just an order or communication, as the case may be. Under s 5 of the DSPE Act there is no requirement of gazette notification by the Central Government for extending the area of operation of the special force and as per s 6 of the DSPE Act it is

left to the wisdom of the state government whether to accept such extension. The Gazette publication in this regard either under s 5 or s 6 is not at all necessary. Therefore, in the absence of Gazette notification under s 6 of the DSPE Act, filing of the case or the investigation does not automatically become *void ab initio*.[4]

44. Jurisdiction

By virtue of s 181(4), CrPC 1973, an offence of criminal misappropriation, or of criminal breach of trust, may be inquired into, or tried by a court within whose jurisdiction the offence was committed or any part of the property, which is the subject of the offence, was received or retained, or was required to be returned or accounted for, by the accused person.

In *HS Tiwari v State of West Bengal* ,[5] the complaint was filed under ss 408 and 409, IPC regarding misappropriation of sales tax amount of a company. The offence3547 was non-accounting and there was no specific allegation of misappropriation in any particular case. It was held that the venue of the trial will be the place where the accounting has to be done and has not been done.

In *Brij Kishore v Chandrika Prasad* , the accused was the *Zilledar* of a *Zamindar* who was a resident of Lucknow. The accused used to make collections of rent in villages owned by the *Zamindar* in Partapgarh and Allahabad districts. He did not account for the moneys realised by him, to the widow of the deceased *Zamindar* in spite of repeated demands. It was held that the accused, being under a duty to keep accounts and deposit the amounts at Lucknow, committed the offence at Lucknow and the court of Lucknow was, therefore, competent to try the case. For further commentary, the same heading in s 406, *ante*, may be *referred* to.

45. Jurisdiction--Special Court

The jurisdiction of the special court under s 83A of the Andhra Pradesh Co-operative Societies Act 1964 (7 of 1964) extends to taking cognizance of the offence under the said Act only. However, the jurisdiction of the same special court under s 83 of the said Act extends to any offence whether punishable under the said Act or under the IPC . Similarly, cognizance of offence under ss 120B and 409, IPC, by the special court is not barred.[6]

Sub- section 3 of s 4 of the Prevention of Corruption Act empowers a special judge to try any offence, other than an offence specified in s 3 with which the accused may, under CrPC, be charged at the same trial. Under s 220, CrPC, if one of a series of acts so connected together as to form the same transaction, and more offences than one are committed by same person, he may be charged with and tried at one trial for every such offence, and under s 223, CrPC, persons accused of the same offence committed in the course of the same transaction, as well as persons accused of an offence and persons accused of abetment, or of an attempt to commit such an offence may be charged and tried together. Thus, the special judge has jurisdiction to try the offences punishable under ss 420 / 409 / 120B, IPC, together, with the offences punishable under the Prevention of Corruption Act.[7]

46. Anticipatory Bail

Where the allegations against the accused are serious and the embezzled amount is very high, the chances are that in case the accused is arrested and subjected to custodial interrogation, some misappropriated amount may be recovered at the instance of the accused, there being no good grounds for enlargement of the accused on anticipatory bail.[8]

47. Bail

Where the amount misappropriated by the accused was very large, the trial reached the final stage and was likely to conclude soon, the enlargement of the accused on bail at that stage may result in their fleeing from justice to avoid higher punishment3548 and facing recovery proceedings at the hands of the

complainants, the bail was therefore refused.[9]

Accused accountant in Treasury alleged to have passed bills not in accordance with the provisions of Bihar and Financial Rules was not enlarged on bail.[10]

48. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the... day of at..., you were entrusted with property (*or dominion over property*)... (*specify the property*) in your capacity of a public servant (*or in the way of your business as a banker/merchant/factor/broker/attorney/or agent*) and that you committed criminal breach of trust in respect of that property and thereby committed an offence, punishable under s 409 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

If there is no mention in a charge, against two persons, under s 409 read with s 34, IPC, that there was joint entrustment of property, the charge of criminal misappropriation of property in furtherance of common intention must fail. Criminal misappropriation of property entrusted is not such a criminal act which can be done by several persons in the absence of evidence to prove joint entrustment.[11] However, the fact that relevant provision of the handbook is not mentioned in the charge, would not invalidate it.[12] If criminal breach of trust relates to several separate entrustment during a year, it is better to frame the charge regarding each of the separate deliveries, showing the dates of each entrustment separately, but failure to do so does not vitiate the trial, unless it is shown that such a defect in the charge has occasioned the failure of justice.[13] The findings of the disciplinary authority in the departmental inquiry conducted against the accused is not relevant at the stage of framing charge under s 409, IPC .[14]

Where the accused, a power of attorney holder of a firm of which his brother was a proprietor submitted the quotation for supply of a generator set and it was supplied and was found to be defective, and the accused did not take any steps for supply of new generator set nor did he return the amount, and instead he had deposited the entire quotation amount in the bank account of the firm but subsequently withdrew it and closed the account, it was held that *primafacie* case under s 409 / 420 was made out against him, and the accused, through the power of attorney holder cannot absolve himself of civil and criminal liability.[15]3549

49. Joinder of Charges under Sections 409 and 477A

If an accused is charged with several offences under s 409, IPC, and some offences under s 477A, IPC, and they arise out of the same acts and form part of the same transaction, the charge would not be invalid if no prejudice is caused to him.[16] The several acts of falsification of accounts, committed to conceal embezzlement, can be regarded as part of the same transaction.[17] If false entries are made for the purpose of covering a defalcation, their plurality would not preclude them from being joined in one charge.[18] a charge of criminal breach of trust, in respect of a lump sum of money, made of different items,

can, therefore, be linked to charges of falsification of accounts under s 477A, IPC, in respect of each of the items.[19] However, the offence of fabrication of false evidence, relating it to items, partly or wholly unconnected with the charge of criminal breach of trust, is undoubtedly a distinct offence.[20]

Where the accused is charged under ss 409, 468 and 477A, IPC but is convicted only under s 409, and the legality of the charges is challenged in appeal, only the charge under s 409 has to be seen as to whether it is properly framed.[21]

50. Alternative Charges under Section 406 to Section 409 and Section 420 --Not Illegal

It is always open for a criminal court to frame charges alternatively. A person can alternatively be charged under ss 406 to 409 or under s 420, IPC . The offence under ss 406, 408 or s 409 and the offence under s 420 could not go together, but if the alternative charge is framed, it could not be said that the alternative charge is illegal or invalid.[22]

51. Proof

In order to secure a conviction under this section, the prosecution must prove[23] that:

(a) the accused was either a public servant or a banker, merchant, factor, broker, attorney or agent;
(b) he was, in such a capacity, entrusted with property in question or with dominion over it;[24] and
(c) he committed criminal breach of trust in respect of that property.[25]

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Circumstances of strong suspicion without very definite evidence, are not sufficient to justify a conviction even though the accused offers no explanation for them.[26] Absence of an explanation by the accused for the shortage of the articles, kept in the godowns, cannot be presumed to be a misappropriation of those articles by the accused. The prosecution must prove the factum of misappropriation of the entrusted articles.[27] Criminal liability can be fastened only when it is established that the goods have been dishonestly misappropriated, and not otherwise. A lapse in the discharge of official duty, which may be either due to inadvertence, negligence or overwork, stands on different footing and must be clearly distinguished from criminal liability.[28] A mere error of judgment would not constitute offence of criminal breach of trust.[29]Proof of *mensrea* is essential.[30] It is essential to show that actual loss was sustained. When there is absence of any reliable and independent material and it was impossible to arrive at a finding whether any loss at all had been sustained as a result of the alleged misappropriation, the material on record falls of short of bringing home the guilt to the accused.[31]

In cases of criminal breach of trust/failure to account for money, proved to have been received by the accused, or giving of a false account as to its use is generally considered to be a strong circumstance against the accused, but it is not conclusive.[32] However, retention, for a sufficiently long time, of money, entrusted to the accused to be used for a particular purpose, would justified the inference that the accused had dishonest intention.[33] Where, however, he has given a reasonable explanation for such retention, no case of criminal breach of trust against him can be sustained.[34]Where, therefore, the clerk of a cattle-pound had temporarily retained money with him, as his father and wife were ailing and he himself was not on the date of deposit, it was held that mere retention of money was enough to bring the act of the accused under s 409 .[35] However, where a registration clerk in a post office failed to give any explanation for the shortage in money, advance to him for the purchase of stamps, it was held that he was guilty of criminal breach of trust.[36] The conduct of a postman, who repaid the misappropriated amount of money order, after a complaint against him had been lodged with his higher authorities, was held to be a clear indicator of his dishonest misappropriation.[37] However, mere non-production of money, which3551 was

rightly in the hand of the accused, was not held to amount to a crime of misappropriation when he was never asked to hand over the balance.[38] However, the making of false entries in the *kharidi* of the tehsil and other papers, embezzling various sums of money at different times by not crediting them to the bank, or the making of entries regarding false expenditure, was held to be an offence of criminal breach of trust in *State v Sheikh Dadan* .[39]

Where a public servant removes public property from office to his own house for personal use and fails to account for it, he commits offence under s 409, IPC .[40]

The appellant was the Chairman of the Maharashtra State Electricity Board (MSEB), respondent no. 2 was a company which had entered into various contracts with MSEB for installation of low tension load management system. Respondent 2 had deposited an amount of Rs. 5 lakh with MSEB as security deposit in lieu of bank guarantee to be used for tenders to be filed by respondent 2 from time to time in the future. As dispute arose between the MSEB and the respondent 2, the latter informed MSES that they were not interested in participating in any tender and sought refund of the said amount of Rs. 5 lakhs. The Chief Engineer MSEB informed respondent 2 that the deposit of Rs. 5 lakhs had been adjusted by MSEB against the dues payable by respondent 2 to MSEB. On receipt of the said communication, respondents 2 to 4 filed complaint against the appellant and other senior officials of MSEB under ss 405 and 409 read with s 34, IPC . Held, the amount of Rs. 5 lakhs was deposited by the complainant company with MSEB and there was nothing in the complaint which may even remotely suggest that the complainant had entrusted any property to the appellant or that the appellant had dominion over the said money of the complainant, which was dishonestly converted by him to his own use, so as to satisfy the ingredients of s 405, IPC . The complaint did not disclose the commission of offence by the appellant under s 405, IPC punishable under s 409, IPC . The complaint against the appellant was quashed on petition under s 482, CrPC .[41]

Where the accused working as postal assistant, a public servant, entrusted with the money of the depositors, made false entries in the pass books of the depositors in his possession, misappropriated the amount of deposit of depositors, he was convicted under ss 409 and 477, IPC .[42]

52. Onus of Proof on Prosecution and Accused--Distinction

The onus lies on the prosecution to prove not only that money was paid to the accused in trust but also that he did not apply it for the purpose, for which it was given,[43] and dishonestly misappropriated, or converted, to his own use, that money.[44] In cases of criminal breach of trust, the prosecution must always prove dishonest misappropriation. It is not enough if it merely establishes that the accused received3552 money.[45] The mere fact of there being a large deficit of salt without distinct proof of a criminal misappropriation is not sufficient to convict the accused under this section,[46] because criminal liability has to be strictly proved, and it cannot be based upon conjectures or probabilities.[47]

The onus of proving all the ingredients of an offence is always upon the prosecution and it never shifts to the accused.[48] Prosecution has to prove them beyond reasonable doubt.[49] Where, however, a fact is specially within the knowledge of the accused, it is he who has to prove it.[50] However, the burden on the accused is not a higher one and it can be discharged even by reason of the fact that the explanation offered by him is reasonable and palpable,[51] the test being whether the defence version is reasonably probable.[52] It is governed by the theory of balance of probabilities. If the explanation of the accused is reasonably probable, then he is entitled to an acquittal even though he does not establish his case beyond reasonable doubt.[53] However, if the court finds that his explanation, regarding the amount in question is false, an inference of misappropriation with dishonest intention can reasonably be drawn against him.[54] If, however, on the material on record, the conclusion is that the accused has failed to establish that he, in fact, paid the amount, entrusted to him, for fish fries and the prosecution has failed to establish that the version of the accused is untrue, the accused is entitled to the benefit of doubt as the onus on the accused is not as heavy as it is on the prosecution.[55] Where, therefore, there is a doubt whether the conduct of the accused was dishonest or merely negligent, the benefit of doubt must go to the accused.[56]

It is not necessary or possible in every case to prove as to in what precise manner the accused had dealt with or appropriated the goods. In a case of criminal breach of trust, the failure to account for the money, proved to have been received by the accused or giving a false account of its use is generally considered to be a strong circumstance against the accused. Although onus lies on the prosecution to prove the charge against the accused, yet where the entrustment is proved or admitted it would be difficult for the prosecution to prove the actual mode and manner of misappropriation and in such a case the prosecution would have to rely largely on the truth or falsity of the explanation given by the accused.[57]3553

53. Repayment of Amount by Accused--Effect

When there is only delay in payment by the accused, criminal liability is not attracted.[58] However, after committing the criminal breach of trust in respect of the money over which the accused had complete dominion, the refund of the amount after detection would not absolve him of the offence.[59] Return of amount misappropriated by public servant would not absolve him of the offence of criminal breach of trust.[60]

54. Entries in Stock Register of Society--Need Corroboration[61]

Entries in books of accounts without any oral evidence as to the nature of the business and mode of keeping accounts are not sufficient to prove entrustment.[62] When the entries in the stock register of the society were produced before the trial court but it was not known as to who made these entries and on which date and under what circumstances, s 34 of the Evidence Act comes into play for the reason that none of the entries has been proved nor any corroboration done by the prosecution. On this evidence the conviction of accused under s 409, IPC, is not proper.[63]

55. Acquittal

Where the accused being incharge of a godown was alleged to have misappropriated fertiliser bags and disposed them dishonestly, and he was not in exclusive charge of the goods which he used to keep at the siding after unloading the same from the railway wagon, and the oral and documentary evidence on record did not show the manner in which verification of stock was made and how it accounted for torn and damaged bags of fertilizer. The evidence also showed that all bags unloaded, except six bags, were transported to godown and for the shortage of six bags recovery had already been made from the transport contractor, under such circumstances the accused was found entitled to be acquitted.[64]

In charge for embezzlement of funds under s 409, IPC and acceptance of illegal gratification under s 13(1)(c) of Prevention of Corruption Act, on comparison the signatures of the accused were found on the receipt issued by him, but the amount mentioned in the receipt did not reconcile with the amount alleged to be embezzled. The charges against the accused were not proved beyond reasonable doubt, the accused was acquitted of the charges.[65]

Allegation was that the accused incharge of seed Centre misappropriated sale deeds of the Centre. Only oral evidence was filed to show that the accused was incharge of seed Centre, no documentary evidence was filed. The prosecution also3554 did not prove stock registers, sale registers, though they had been seized. Acquittal of the accused on charge of s 409, IPC was held proper.[66]

56. Conviction

The accused, a sub-post master, did not deposit the amount collected by him for depositing it with the post office and did not make the relevant entries in the post office record, the non- deposit of amounts was detected in inspection of relevant records and no proper explanation was given by the accused. The conviction of the accused was found proper.[67] Where the accused, who were entrusted with certain amount for purchasing some shares of some companies, failed to deliver the share's scripts, it was held that the accused were guilty of an offence under s 409 .[68] A public servant, misappropriating whole, or part of, money, entrusted to him in the capacity of a public servant, is guilty of the offence of criminal

breach of trust.[69] A court *amin*, collecting a large sum but not paying the same into the court for five months, was held guilty under this section.[70] Where a postman, who was under a duty to return VP parcels to the post master if they were not delivered to the addressees, himself signed the postal receipts and made it appear that they were received by some person for, or on behalf of, the addresses and retained them for himself, it was held that he was guilty of criminal breach of trust.[71] Where the head constable of a police station, entrusted with a sum for the purpose of building some quarters at the police station, obtained materials free of cost and appropriated a part of the amount to himself as the price, he was held to be guilty under this section.[72] A constable, dishonestly misappropriating, to his own use, the pay of his *thana* police, entrusted to him, was held guilty of criminal breach of trust.[73] In *Emperor v Ganga Prasad* ,[74] the clerk in a record room made over a document, forming a part of record in his custody, to a person, who though entitled to the documents, had to present an application on stamped paper in order to secure its return in a legal manner. It was held that the clerk was guilty under this section. However, where it was proved that some money was handed over to the money order issued in a post office and he was thus entrusted with the money, but it was not proved that he had misappropriated the sum, the accused was not held guilty.[75] In *ReMuthusami Udayanm*,[76] a village *munsif* collected two small amounts, one on 15 March 1937 and another on 17 April 1937, and remitted the amounts, to the treasury, on 21 May 1937, and 24 April 1937, respectively, before any complaint was received. It was held that the retention of the3555 amounts in the interval did not justify a conviction under s 409 . In *Chandika Prasad v Emperor* ,[77] the accused, who was a head clerk of a government school and had dominion over a sum of money, appropriated money drawn from the bank for payment of a particular bill towards the payment of another bill of the same firm. It was held that this did not amount to embezzlement though it was the violation of the account rules on the subject. Where the money was intact with the brother of the accused and that, on that very day, when the accused was arrested, the entire amount was surrendered to the sub-inspector for the disbursement of salary of the three constables, it was held that it was not safe to uphold the conviction under s 409, IPC .[78]

57. Conviction for falsification of Account and Misappropriation of Fund

Commentary under the same heading in s 477-A, *post*, may be referred to.

58. Probation

The offence under s 409, IPC is punishable with imprisonment for life or with imprisonment for a term which may extend to ten years and also with fine. In that view of the matter the benefit of probation under s 360, IPC, cannot be made applicable to an accused convicted under s 409, IPC .[79]

59. Sentence

The sentence for an offence under s 409, IPC, is imprisonment for life or imprisonment of either description for a term which may extend to ten years and also fine. However, the measure of the sentence is usually governed by the nature of offences committed and the circumstances of their commission and it cannot be laid down as a hard and fast rule that a sentence is not to exceed a certain period of imprisonment when the law itself has laid down the extent up to which a sentence can be inflicted for a certain offence, and has left the discretion to the court to adjust the sentence according to the circumstances of each case,[80] though, of course, the imposition of a sentence of imprisonment is made compulsory.[81]

60. Sentence (Deterrent)

The Supreme Court, in *Shivanarayan Luxminarayan Joshi v State of Maharashtra* ,[82] held that the appellate court while considering the question of sentence, must bear in mind the gravity of the offence also, which has its impact on the public, and particularly the persons who are deprived of their deposits. It should not reduce the sentence on the ground that the accused have practically served out about a year and3556 after a lapse of eight years it would not be desirable to send them back to jail. An offence of criminal breach of trust by a person, in charge of public moneys, is one of a serious nature crime and calls

for a severe sentence.[83] Where the accused was a public servant and the offence, committed by him, was a serious one, a sentence of rigorous imprisonment for a term of one year and a fine of Rs 200, and, in default, a rigorous imprisonment for one month more, was held to meet the ends of justice.[84] Similarly, where an accused was sentenced in separate trials for offences of criminal breach of trust regarding various items and the sentences, totaling eleven years, ran consecutively, it was held that the sentence could not be said to be severe.[85] When the secretary of a co-operative society misappropriated large sums of money, and on detection by an audit committee paid the amount, the argument on behalf of the accused that he was the only bread-earner in the family and a lapse of 15 years would be a good ground for a lenient view *etc*, was found unsustainable.[86] The mere lapse of time cannot *ipsofacto* entitle the accused to reduction of sentence. Imposition of sentence of two years rigorous imprisonment and fine of Rs 5000 upon the accused who misappropriated the amount to the tune of Rs 74,000 is not arbitrary, unreasonable, unduly harsh or excessive with the offence involved.[87] Where accused is found guilty and convicted under s 409, IPC for selling the food grains of fair price shop(s) in open market, in such cases no leniency in awarding sentence should be shown.[88]The sentence of imprisonment till rising of the court and a fine of Rs 500 in default of payment of fine and rigorous imprisonment for six months, imposed on the accused convicted under s 408, IPC, for committing breach of trust of 1500 quintals of paddy entrusted to him is inadequate.[89]

61. Sentence (Lenient)

Where the offence was committed 15 years ago by the accused who was now of 60 years of age, and he had deposited the misappropriated amount with interest even before the FIR was filed, only the sentence of fine of Rs 4000 was imposed on the accused.[90] However, where the offence under s 409, IPC, was merely a technical one, a sentence of simple imprisonment till rising of the court and a fine of Rs 500 and, in default, a further sentence of one month rigorous imprisonment was held to be adequate.[91] In *State v Mangal Khan* ,[92] a constable, using uniform after dismissal from service, was sentenced to simple imprisonment till the rising of the court. Where a high public official, who was liable to be dismissed from his office, was convicted, it was held that a sentence of one day's rigorous imprisonment and fine of3557 ten thousand rupees would meet the ends of justice.[1] Where the offence was committed sixteen years ago in 1963 and the amount misappropriated by the appellant was only a sum of Rs 120, it was held that ends of justice would be met by reducing the sentence of three months rigorous imprisonment to the period of one month's imprisonment, already undergone by the appellant.[2] The sentence of eighteen months for a senior member of the Bar, aged sixty, convicted under this section, was reduced to nine months in *NN Burjorjee v Emperor.* [3] In *Ganeshbhai Shankarbhai v State of Gujarat* ,[4] the accused, who, after his acquittal, secured another employment, was convicted by the High Court in an appeal against acquittal. The Supreme Court reduced the sentence to that already undergone. A sentence of five years for an accused, charged in respect of property of a value of less than one hundred rupees, after a protracted trial for more than six years, was reduced to one year in *Velayudhan Nair v State* .[5] The incident took place about 15 years ago and the accused faced the agony of the trial before the trial court as well as the appeal inquiry before the High Court, the sentence of imprisonment under s 409, IPC, was reduced from two years rigorous imprisonment to 1½ years, *i.e.*, 18 months.[6] The accused convicted on the allegation that he misappropriated a sum of Rs 13,400 from the bank having remitted the entire amount misappropriated to the bank, the sentence of rigorous imprisonment for one year awarded to the accused was therefore reduced to the period of imprisonment already undergone by the accused.[7] The *Gram Sachiv* for *gram panchayats* in Haryana was convicted under s 409, IPC, for collecting amount towards house tax and committing breach of trust and was sentenced to 6 months rigorous imprisonment and fine. He had already undergone custody for 4½ months rigorous imprisonment. The Apex Court reduced the sentence of imprisonment to the period already undergone.[8] The accused Manager and Assistant Manager of a Co-operative society had misappropriated amount by forging documents. The High Court had sentenced the accused to one year S.I. and a fine of Rs.10,000/-. As per direction of the Court the appellants deposited the entire embezzled amount, were now aged 74 years, also not keeping good health, the sentences imposed were reduced to the period already undergone.[9]The trial court sentenced the accused to undergo six years rigorous imprisonment with fine of Rs 2500. The offence was committed 20 years ago so the sentence of imprisonment reduced to the period of custody already undergone by the accused, but the fine was enhanced to Rs 10,000 in default of which the accused was

to undergo rigorous imprisonment for six months.[10] The accused aged 50 years lost his employment so he engaged himself privately for a part-time job to earn income for his family, so the sentence of imprisonment was3558 reduced from two years rigorous imprisonment to six months rigorous imprisonment.[11]

62. Sentence--Fine of three Times of Amount involved achieve three-fold Objective

Traditionally, a conviction under s 409, IPC, would invariably attract a jail sentence of varying duration according to the amount involved; the inevitable result being that the accused spends a period of time in jail at state expense, the benefit by virtue of retention of the property, and the complainant or the aggrieved institution is the worst effected having to write off the loss that has occurred. In our considered view, a court must aim at offsetting these factors while in no certain terms conveying the message that crime does not pay by ensuring that there is no unjust enrichment occurring to the accused and that the party is made to part with much more than what has been taken away. In property offences and where misappropriation of money is involved, an accused would cheerfully sit in jail at state expense and then come out and benefit from the unjust enrichment and it is this aspect that the courts need to take cognizance of. While it is unfair and unnecessary to burden the state by maintaining the accused in a jail for years together and increasing the number of unemployed thereafter. It appears far more rational to us that the threefold objective would be achieved by imposing a fine on accused of at least three times the amount involved in the offence and by not prescribing the default sentence because again, experience has shown that many an accused would find it more profitable to stay in jail for some time rather pay up a heavy fine. Similarly, by following such a procedure the aggrieved party or the institution can be adequately compensated. Undoubtedly, this formula is a departure from the prevalent procedure but one which is most essential in the present context.[12]

63. Concurrent Sentence in Several Cases

Sentence in a number of cases against the same accused with respect to acts committed at different places and at different times may be ordered to run concurrently, and not consecutively, as the cumulative effect would be too severe.[13]

64. 'And shall also be Liable to Fine'

The expression does not mean that a sentence of fine must be imposed in every case of conviction under this section; it only means that there is a liability to be fined. Such an expression has been used in the IPC only in connection with those offences where the legislature has provided that a sentence of imprisonment is compulsory. In regard to such offences, the legislature has left a discretion for the courts to impose also a sentence of fine in appropriate cases in addition to the imposition of a sentence of imprisonment which alone is obligatory.[14]3559

65. Alteration of Conviction When not Done--Cases

The conviction of the accused for an offence under s 409 and in the alternative under s 427, IPC, is bad, in as much as mischief is not a minor form of criminal breach of trust.[15] Where an accused was charged with an offence under s 409, IPC, but the facts indicated that the offence committed was of cheating, it was held that the conviction could not be altered to one under s 420, which is not an offence minor to the offence under s 409, IPC .[16]

66. Alteration of Conviction from Section 409 to Section 403

The offence under s 403, IPC, is a minor offence compared with the one under s 409, IPC .[17] Therefore, when the offence under s 409 is not proved but that under s 403 is established, the conviction of the accused under s 409 recorded by the trial court can be altered to one under s 403, IPC, by the appellate court, even though no charge under s 403 is framed against the accused.

Where joint family firm of two brothers, one of whom was the accused, was appointed as a government stockist of food grains and the stock was found short by a certain quantity, it was held that the accused was guilty under s 403 and not under s 409, IPC .[18]

67. Alteration of Conviction from Section 409 to Section 420

In the case of *Sunil Kumar Paul v State of West Bengal* ,[19] the chargesheet framed against the accused was only under s 409, but the appellate court had found the accused guilty of the offence punishable under s 420 instead of s 409, IPC, and convicted the accused under that section and the said decision has been approved by the Apex Court by observing as under:

> Where a public servant was charged and tried by the Special Court for an offence under section 409 , IPC, but a charge under section 420,IPC, could have been framed by the Special court under section 236 , CrPC on the basis of the allegations in the charge-sheet, the trial court or the appellate court can, in law, convict the accused of that offence instead of an offence under section 409 , IPC, if it be of the view that the offence of cheating had been established. This would be in accordance with the provisions of section 237 , CrPC .[20]

68. Alteration of Conviction from Section 409 to Section 406

The accused, a president of a co-operative society was proved to have dishonestly retained the money belonging to the society, was not found to be a public servant, so his conviction under s 409, IPC, was altered to one under s 406, IPC .[21]3560

73 *Supdt and Remembrancer of Legal Affairs v SK Roy* 1974 Cr LJ 678, p 681, AIR 1974 SC 794 .

74 *Sadhupati Nageswara Rao v State of Andhra Pradesh* 2012 Cr LJ 4317 (SC), AIR 2012 SC 3242, 2012 AIR SCW 4445, 2012 (7) Scale 62 .

75 *Sardar Singh v State of Haryana* 1977 Cr LJ 1158, AIR 1977 SC 1766 ; *Asoke Basak v State of Maharashtra* (2010) 10 SCC 660, p 670, 2010 (10) Scale 582 ; **see also***VP Srivastaqva v Indian Explosives Ltd* (2010) 10 SCC 361, 2010 (10) Scale 177 ; *Rekha Dey v State of West Bengal* (2010) 3 Cal LT 366, 2010 (94) AIC 575 (Cal) .

76 *Supdt and Remembrancer of Legal Affairs v SK Roy* 1974 Cr LJ 678, p 681, AIR 1974 SC 794 ; *Jaswantrai Manilal Akhaney v State of Bombay* AIR 1956 SC 575, 1956 Cr LJ 1116 ; *Channulal Dhaketra v State of Madhya Pradesh* (1980) 2 (MP) WN 47 .

77 *Supdt and Remembrancer of Legal Affairs v SK Roy* 1974 Cr LJ 678, p 682, AIR 1974 SC 794 ; *State of Uttar Pradesh v Babu Ram Upadhya* AIR 1961 SC 751, (1961) 1 Cr LJ 773 ; *Som Nath Puri v State of Rajasthan* 1972 Cr LJ 897 .

78 *Supdt and Remembrancer of Legal Affairs v SK Roy* 1974 Cr LJ 678, p 681, AIR 1974 SC 794 .

79 *Tilak Dhari Singh v State of UP* 2014 (1) All LJ 183 (All) .

80 *Chandrakant Vishwanath Jakkal v State of Maharashtra* 1978 Cr LJ 431, p 437 (Bom) ; *Gopal Das v State* AIR 1954 All 80, 1954 Cr LJ 96 ; *State v Sahebrao* AIR 1954 Bom 549, 55 Cr LJ 1745 ; *Zahoor Ahmad v State of Rajasthan* 1975 Cr LJ 978, p 980 .

81 Re *Jeewan Lal*AIR 1966 Mad 368, 1966 Cr LJ 1150 .

82 *Emperor v Ahmad Din* AIR 1934 Lah 843, 36 Cr LJ 165 .

83 *L Chandraiah v State of Andhra Pradesh* 2004 Cr LJ 365 (SC) .

84 *Kotak Mahindra Bank Ltd v Nobiletto Finlease and Investment Pvt Ltd* 2005 Cr LJ 3500 (Bom) (DB) .

85 *Ibid.*

86 *Bhagat Ram v State of Punjab* AIR 1954 SC 621, 1954 Cr LJ 1645 (SC) .

87 *State of Rajasthan v Maga Ram* 2002 Cr LJ 3307 (Raj) . For further commentary, see under the same heading in s 405, *ante*.

88 Re *Ayyaduria Devar*1981 Cr LJ 258, p 259 (Mad).

89 *Som Nath Puri v State of Rajasthan* AIR 1972 SC 1490, 1972 Cr L] 897 ; Re *Ayyadurai Devar*1981 Cr LJ 258, pp 259-60 (Mad); *Sadashiva Rao v State of Andhra Pradesh* 2002 Cr LJ 2110 (AP) .

1 *Sadashiv Rao v State of Andhra Pradesh* 2002 Cr LJ 2110 (AP) .

2 *Emperor v Jodha Ram* 1960 All LJ 808, 1951 AWR (HC) 85 .

3 *State v Jugal Kishore Narsa* AIR 1957 Ori 268, 1957 Cr LJ 1431 .

4 *Shob Nath v State* 1975 Cr LJ 1122 (All) .

5 *State v Banke Behari* 1960 AWR (HC) 415 .

6 *Som Nath Puri v State of Rajasthan* AIR 1972 SC 1490, 1972 Cr LJ 897 .

7 *State of Gujarat v Jaswantlal Nathalal* AIR 1968 SC 700, 1968 Cr LJ 803 .

8 *Amrut Sakharam Sanap v State of Maharashtra* 1970 UJ (SC) 545, p 549, (1971) 3 SCC 918 .

9 *Bhag Singh v Crown* 1876 PR 24 .

10 Re *Ram Sounder Poddar* 2 CLR 515.

11 *SC Guha v Emperor* 32 Cr LJ 149, AIR 1930 Rang 332 ((2)) ; *Tilak Ram v State of Uttar Pradesh* 1969 Cr LJ 682 .

12 *Balchandra Kaimal v State of Kerala* 2011 (3) KLJ 575 (Ker) .

13 *Sreedharan v Dy SP of Police* ILR 2011 (2) Ker 918 (Ker) .

14 *Asoke Basak v State of Maharashtra* JT 2010 (11) SC 123, (2010) 10 SCC 660 .

15 *Duttahari Mohapatra v Republic of India* 36 Cut LT 39, p 52 .

16 *Jiwan Das v State of Harayana* 1999 Cr LJ 2034 (SC) . For further commentary, see under the related headings in s 405, *ante*.

17 *Sadhupati Nageswara Rao v State of Andhra Pradesh* 2012 Cr LJ 4317 (SC), (2012) 8 SCC 547, AIR 2012 SC 3242 .

18 *R Sai Bharathi v J Jayalalitha* 2004 Cr LJ 286 (SC) .

19 *Kailash Kumar Sanwatia v State of Bihar* 2003 Cr LJ 4313 (SC), AIR 2003 SC 3714 .

20 *N Bhargavan Pillai v State of Kerala* 2004 Cr LJ 2494 (SC) . For detailed commentary, see under the same heading in s 405, *post*.

21 *Jai Krishnadas Manohardas Desai v State of Bombay* 1960 Cr LJ 1250 (SC), AIR 1960 SC 889 ; *State of Sikkim v Kul Chandra Baral* 2005 Cr LJ 1027 (Sikkim) .

22 *S Jayaseelam v State* 2002 Cr LJ 732 (Mad) ; *State of Himachal Pradesh v Karanvir* 2006 Cr LJ 2917 (SC) .

23 *State of Rajasthan v Maga Ram* 2002 Cr LJ 3307 (Raj) .

24 *NK Illiyas v State of Kerala* AIR 2012 SC 3790, 2012 AIR SCW 2496, 2012 Cr LJ 2418 (SC) .

25 *MC Gangadharappa v State* 200 Cr LJ 2755 (Kant) .

26 *Local Government v Madho Patwari* AIR 1923 Nag 146, 23 Cr LJ 557 .

27 *Empress v Mahmood Hussein* 2 WNP 298 .

28 *Emperor v U Maung Gale* AIR 1926 Rang 171, 27 Cr LJ 1088 .

29 *Basant Lal Gir v State of Uttar Pradesh* 1968 AWR (HC) 117 .

30 *Bachchu Singh v State of Haryana* 1999 Cr LJ 3528 (SC) .

31 *State of Orissa v Ganesh Prasad Dutta* (1962) 1 Cr LJ 658 .

32 *Karnam Siddeppa v State of Mysore* AIR 1958 Mys 82, 1958 Cr LJ 784 ; *Shridhar Mahadeo Pahtak v Emperor* AIR 1935 Bom 36, 36 Cr LJ 532 ; *Shanmugham v State* 1997 Cr LJ 2042 (Mad) .

33 *Arunachalam v State of Kerala* 1974 Ker LT 7 ; *Somsetti Lakshini Narsimayya v State of Andhra Pradesh 1* 972 Cr LJ 558, p 560.

34 1 Weir 465 (2).

35 Re *Rangaswami Aiyanger* 1 Weir 466.

36 *Mohammad Pasha v State of Hyderabad* AIR 1956 Hyd 180, 1956 Cr LJ 1320 .

37 *Elahi Bux Khan v State* AIR 1955 Cal 482, 56 Cr LJ 1253 .

38 *State of Orissa v Bins Kishore Naik* AIR 1964 Ori 202, (1964) 2 Cr LJ 325 .

39 *Haresh A Patel v State of Gujarat* 2015 (2) Crimes 728 (Guj) .

40 *Anil Kumar Singh v State of Jharkhand* 2012 (119) AIC 477 (Jhar) .

41 *Keshab Chandra Saha v United Commercial Bank* (2012) 1 Cal LT 269, 2012 ILR 362 (Cal) .

42 *Syed Asifuddin v State of Andhra Pradesh* 2005 Cr LJ 4314 (AP) .

43 *Nadir Ali Barqa Zaidi v State of Uttar Pradesh* AIR 1960 All 103, p 112, 1960 Cr LJ 188 ; *Raushan Rai v Emperor* 32 PR 1901 ; *Jodha Ram v State* 1951 AWR (SC) 85, 1950 ALJ 808 ; *Attorney-General of Canada v Attorney-Genaral of Qubec* AIR 1947 PC 44, p 47 .

44 *Santosh Kumar v Emperor* AIR 1952 Cal 193, 53 Cr LJ 552 ; *S Parkashi v Emperor* AIR 1941 Cal 713, 43 Cr LJ 521 ; *Gopesh Chand Pal v Nirmal Kumar Das Gupta* AIR 1950 Cal 57, p 58, 51 Cr LJ 388 .

45 *Valve v Hill* (1844-48) 2 HLC 28.

46 *Santosh Kumar v King* AIR 1952 Cal 193, 53 Cr LJ 552 ; *Foley v Hill* (1844-48) 2 HLC 28; *Nadir Ali Barqa Zaidi v State of Uttar Pradesh* AIR 1960 All 103, p 112, 1960 Cr LJ 188 ; *Ranssion Rai v Emperor* 32 PR 1901 ; *Jodha Ram v State* 1951 AWR (HC) 85, 1050 ALJ 808 ; *Attorney-General of Canada v Attorney-General of Qubec* AIR 1947 PC 47 ; *Gopesh Chand Pal v Nirmal Kumar Das Gupta* AIR 1950 Cal 57, p 58, 51 Cr LJ 388 .

47 *Empress v Moss* (1894) ILR 16 All 88 .

48 *Daulat Rai v Emperor* AIR 1915 Lah 471, 16 Cr LJ 437 .

49 *Ram Chand Gurwala v Emperor* AIR 1926 Lah 385, 27 Cr LJ 1383 ; *Mongol Sen v Emperor* AIR 1930 Lah 57, 30 Cr LJ 954 .

50 *N Mohammad Hussain Sahib v Chartered Bank Madras* AIR 1965 Mad 266 .

51 *Canara Bank v Taraka Prabhu Publishers Pvt Ltd* AIR 1991 AP 258 .

52 *Punjab National Bank v Surendra Prasad Sinha* AIR 1992 SC 1815, 192 Cr LJ 2916 .

53 *Bank of Baroda v Samrat Experts* 1998 Cr LJ 2773 (Kant) .

54 *State Bank of India v Indexport Registered M/s* AIR 1992 SC 1740 .

55 *Union Bank of India v Manku Narayana* AIR 1987 SC 2773 (Kant) .

56 *Manku Narayan's case*AIR 1987 SC 1078 .

57 *Bank of Baroda v Samrat Exports (M/s)* 1998 Cr LJ 2773 (Kant) .

58 *Punjab National Bank and Ors v Surendra Prasad Sinha* AIR 1992 SC 1815, 1992 Cr LJ 2916 (SC) .

59 *Ibid*.

60 *CBI v Duncans Agro Industries Ltd* 1996 Cr LJ 3501 (SC) .

61 *Bowstead on Law of Agency cited in SN Barick v State of West Bengal* AIR 1963 Cal 79, p 82

62 *Shivnarayan Luxminarayan Joshi v State of Maharashtra* AIR 1980 SC 439, p 440, 1980 Cr LR (SC) 1 ; *RK Dalmia and Ors v Delhi Admn* AIR 1962 SC 1821 .

63 Re *Muthusami Pillai* 1 Weir 432.

64 *Said Ahmad v Emperor* AIR 1937 Pesh 35, p 37, 38 Cr LJ 530 ; *Advocate-General v Mirrajan Shah Mir Azam* AIR 1938 Pesh 25, 39 Cr LJ 741 . For a **contrary** view refer to *Emperor v Sultan Mahumud* AIR 1939 Lah 340, 40 Cr LJ 910 ; *Lachhman Singh v Emperor* AIR 1931 Lah 468, 32 Cr LJ 811 .

65 *SN Barick v State* AIR 1963 Cal 79 .

66 *Emperor v Chaturbhuj Narain Choudhury* AIR 1936 Pat 350, p 356, 37 Cr LJ 877 .

67 *Chandi Prasad Singh v State of Uttar Pradesh* AIR 1956 SC 149, p 153, 1956 Cr LJ 322 citing *Halsbury's Laws of England*, third edn, vol 22, para 192.

68 *Halsbury's Laws of England,* Halisham edn, vol 1.

69 *Lakshminarayan Ram Gopal and Sons v Hyderabad Government* AIR 1984 SC 364 ; *Sadashiv Rao v State of Andhra Pradesh* 2002 Cr LJ 2110 (AP) .

70 *Madhusudan Singh and Anor v State of Bihar* AIR 1995 SC 1437 .

71 *TT Antony v State of Kerala* AIR 2001 SC 2637, 2001 Cr LJ 3329 (SC) .

72 *N Nagambikadevi (Dr) v CBI Bangalore* 2002 Cr LJ 1334 (Kant) .

73 *Jahangir Joiya v State of Rajasthan* 1999 Cr LJ 154 (Raj) .

74 *Harchand Singh v State of Rajasthan* 1998 CLR (Raj) 32 .

75 *Arun Parshuram Sutar v State of Maharashtra* 1999 Cr LJ 438 (Bom) .

76 *CD Verghese v MK Singhi and Anor* 1997 Cr LJ 3282 (Bom) .

77 *Amrik Singh v State of Pepsu* AIR 1955 SC 309, p 312, 1955 Cr LJ 865 ; *Hari Ram Singh v Emperor* AIR 1939 FC 43, 40 Cr LJ 468 ; *HHB Gill v King* AIR 1948 PC 128, 49 Cr LJ 503 ; *Albert West Meads v King* AIR 1948 PC 156, 49 Cr LJ 660 ; *Phanindra Chandra Neogy v King* AIR 1949 PC 117, 50 Cr LJ 395 ; *Ronald Wood Mathams v State of West Bengal* AIR 1954 SC 455, 1954 Cr LJ 1161 ; *Om Prakash Gupta v State of Uttar Pradesh* AIR 1957 SC 458, 1957 Cr LJ 575 ; *P Arulswamy v State of Madras* AIR 1967 SC 776, 1967 Cr LJ 665 .

78 *HHB Gill v King* AIR 1948 PC 128, p 133, 49 Cr LJ 503 .

79 *Matajog Dobey v HC Bhari* AIR 1956 SC 44, p 49, 1956 Cr LJ 140 .

80 *Amrik Singh v State of Pepsu* AIR 1955 SC 309, p 312, 1955 Cr LJ 865 ; *Hori Ram Singh v Emperor* 1939 FC 43, 40 Cr LJ 468 ; *HHB Gill v King* AIR 1948 PC 128, 49 Cr LJ 503 ; *Albert West Meads v King* AIR 1948 PC 156, 49 Cr LJ 660 ; *Phanindra Chandra Neogy v King* AIR 1949 PC 117, 50 Cr LJ 395 ; *Ronald Wood Mathams v State of West Bengal* AIR 1954 SC 455, 1954 Cr LJ 1161 ; *Om Prakash Gupta v State of Uttar Pradesh* AIR 1957 Cr LJ 575 ; *Arulswamy v State of Madras* AIR 1967 SC 776, 1967 Cr LJ 665 .

81 *HHB Gill v King* AIR 1948 PC 128, p 133, 49 Cr LJ 503 .

82 *Matajog Dobey v HC Bhari* AIR 1956 SC 44, p 49, 1956 Cr LJ 140 ; *Shambhoonath Mishra v State of Uttar Pradesh* 1997 Cr LJ 2491 (SC), 1997 SCC (Cri) 576 ; *Mohandass v State* 1998 Cr LJ 3409 (Mad) .

83 *Shreekantiah Ramayya Munipalli v State of Bombay* AIR 1955 SC 287, 1955 Cr LJ 857 .

84 *Jaimi Veerabhadraswamy*AIR 1947 Mad 190, 59 MLW 623 .

85 *Gumshidayya Shantivirayya Kulkarni v Emperor* AIR 1939 Bom 63, 40 Cr LJ 269 .

86 *Manzur Ali v Emperor* AIR 1939 Lah 1, 40 Cr LJ 252 ; *Om Prakash Gupta v State of Uttar Pradesh* AIR 1957 SC 458, 1957 Cr LJ 575 ; *P Arulswami v State of Madras* AIR 1967 SC 776, 1967 Cr LJ 665 ; *State v Talati Devraj Ruda* AIR 1955 Sau 100, 56 Cr LJ 1528 ; *Emperor v Maung Bo Maung* AIR 1935 Rang 263, 36 Cr LJ 1272 ; *Shanker Sahai v State* 1954 ALJ 627 ; *Gulabmiya Dagumiya v Emperor* AIR 1930 Bom 487, 32 Cr LJ 281 ; *Gumpana Hanumantha Rao v TS Rama Rao* AIR 1961 AP 493, (1961) 2 Cr LJ 5 .

87 *Shamboonath Mishra v State of Uttar Pradesh* 1997 Cr LJ 2491, 1997 All LJ 1089 (SC) .

88 *State of Madhya Pradesh v MP Gupta* (2003) JT 10 SC 32 .

89 *N Bhargavan Pillai v State of Kerala* 2004 Cr LJ 2494 (SC) .

90 *Matajog Debey v HC Bhari* AIR 1956 SC 44, p 50, 1956 Cr LJ 140 ; *JP Nath v Mohd Kalim* 1979 All Cr Cas 222, p 224, 1979

All WC 609 .

91 For details, see *Sohoni's Code of Criminal Procedure,* twenty-first edn, Lexisnexis.

92 *State of Uttar Pradesh v Syed Muzaffar Abbas* 1997 Cr LJ 3377 (All) .

93 *Daya Ram v State of Uttar Pradesh* 1998 Cr LJ 3800 (All) .

94 *Satish Chandra Mathur v State of Rajasthan* 2003 Cr LJ 3413 (Raj) .

95 *Yusofalli Mulla Noorbhoy v The King* AIR 1949 PC 264, (1949) 50 Cr LJ 889 .

96 *Basdeo Agarwalla v King Emperor* (1945) FCR 93, 1945 (46) Cr LJ 510, AIR 1945 FC 16 .

97 *Baij Nath Prasad Tripathi v State of Bhopal* AIR 1957 SC 494, 1957 Cr LJ 597 .

98 *Mohammad Safi v State of West Bengal* AIR 1966 SC 69, 1966 Cr LJ 75 .

99 *Satish Chandra Mathur v State of Rajasthan* 2003 Cr LJ 3413 (Raj) .

1 *Vasant Kher v State of Madhya Pradesh* 1981 Cr LR (MP High Court Notes) 272, p 275.

2 *V Ramanathan v State* 1999 Cr LJ 3885 (Mad) .

3 *Ibid*; *Rajasingh v State* 1995 Cr LJ 955 (Mad), (1995) 1 Mad LW (Cri) 48 .

4 *N Nagambiteaden (Dr) v CBI, Bangalore* 2002 Cr LJ 1334 (Kant) .

5 *HS Tiwari v State of West Bengal* 2001 Cr LJ 3773 (Cal) .

6 *V Nageswara Rao v State of Andhra Pradesh* 2002 Cr LJ 3323 (AP) ; *D Prabhakar Reddy v Distt Collector* (1997) 1 ALD 500 (AP) ; *P Narasaiah v P Raj Reddy* (1988) 2 ALD 248 (AP) .

7 *Tuncay Alankus and Anor v Union of India* 2000 Cr LJ 3280 (Del) .

8 *Ruchi Goel alias Kiran Goel v State* (2003) 104 DLT 347 (Del) ; *Manoj Rastogi v State* 2003 IV AD (Del) 37 .

9 *Jawad Ahmed Siddiqui v NCT of Delhi* 2003 III AD (Del) 185 .

10 *Bharteshwar Narain Lal Das v State of Jharkhand* 2009 Cr LJ 1015 (Jhar) .

11 *Kantilal Ambalal v State of Gujarat* 1967 Cr LJ 1429 .

12 *Prem Prakash v State of Rajasthan* (1971) 1 WLN 408, p 412 .

13 *Ramnath Khemka v State* AIR 1958 Pat 272, 1958 Cr LJ 665 ; *Vireshwar Rao v State of Madhya Bharat* (1968) 17 Jab LJ 76 (SN) (gross sum misappropriated and the dates should be mentioned in the charge).

14 *Jagdish Chandra Soni v State of Rajasthan* 1998 Cr LJ 1902 (Raj) .

15 *Jayendra C Shah v State of Orissa* 2006 Cr LJ 847 (Ori) .

16 *Chandi Prasad Singh v State of Uttar Pradesh* 1956 Cr LJ 322, p 325, AIR 1956 SC 149 .

17 *Vaghji Nanji v State* AIR 1955 Sau 91, 1955 Cr LJ 1520 .

18 *Dinkarray Raghunath v State* AIR 1963 Guj 15, (1963) 1 Cr LJ 162 ; *Ramakishoon Pershad v Emperor* AIR 1934 Pat 232, 35 Cr LJ 876 ; *Roman Behary Das v Emperor* AIR 1915 Cal 296, 15 Cr LJ 163 ; *BhuPrakash v Emepror* 1940 ALJ 796 ; *Emperor v Manant K Mehta* AIR 1926 Bom 110, 27 Cr LJ 305 ; *Nagendra Nath Sen Gupta v Emperor* AIR 1932 Cal 486, 33 Cr LJ 265 (2); *Emperor v Ram Autar* AIR 1942 Pat 401, 43 Cr LJ 625 .

19 *Michael John v Emperor* AIR 1931 Pat 349, 32 Cr LJ 1026 .

20 *Ramchandra Rango Sawkar v Emperor* AIR 1939 Bom 129, 138, 40 Cr LJ 579 .

21 *Vireshwar Rao v State of Madhya Bharat* (1968) 17 Jab LJ 76 (SN) . For further commentary, see under the same heading in s 477A, *post*.

22 *Ranjit Kumar Chakravarti v Co-operation Bank of Baroda Ltd and Ors* 1998 Cr LJ 216 (Guj) ; *Sunil Kumar Paul v State of West Bengal* AIR 1965 SC 706, (1965) 1 Cr LJ 630 .

23 *Balbir Singh v State of Haryana* 1975 CLR 206 ; *Surjamani Mishra v State* 34 Cut LT 554, p 557 ; *Mustafikhan v State of Maharashtra* (2007) 1 SCC 623, 2006 (13) Scale 222 ; *State of Rajasthan v Magaram* 2002 Cr LJ 3307 (Raj) ; *Sudhir Shantilal*

Mehta v CBI (2009) 8 SCC 1, p 25, 2009 (11) Scale 217 .

24 *Janeshwar Das Aggarwal v State of Uttar Pradesh* (1981) 3 SCC 10, p 11, 1981 Cr LR (SC) 303, p 304 .

25 *Ibid*.

26 *Hem Chandra Halder v Emperor* AIR 1934 Cal 407, p 408, 35 Cr LJ 1320 ; Re *MD Kuppuswami*1966 Cr LJ 1096; *Achuthan Nair v Padmanabhan* 1964 Ker LT 681, 1964 MLJ 719 (Cr) ; *State of Orissa v Khetra Mohan Singh* (1965) 2 Cr LJ 107, AIR 1965 Ori 126 ; *State of Orissa v Prasanna Kumar Panda* 2002 Cr LJ (NOC) 115 (Ori), (2001) 92 Cut LT 315 .

27 *Janeshwar Das Aggarwal v State of Uttar Pradesh* 1981 Cr LR (SC) 303, p 304, (1981) 3 SCC 10 ; *Suresh Tolani v State of Rajasthan* 2001 Cr LJ 1959 (Raj) ; *Luxman Singh v State of Rajasthan* 1986 Cr LR (Raj) 217 .

28 *State of Madhya Pradesh v Hari Mohan* 1976 Jab LJ 263, 1976 MPLJ 281 ; *Jagroop Singh v State of Punjab* 1980 Cr LJ 68, p 70-71 (Punj) ; *Gurdial Singh v State of Punjab* (1981) 8 Cr LT 298, p 300 (Haryana) .

29 *Sudhir Shantilal Mehta v CBI* (2009) 8 SCC 1, p 25 .

30 *State of Maharashtra v Raghunath Rajarani Patil* 1977 Cr LR (Mah) 374, p 376 .

31 *SF Jague v State of Orissa* (1971) 37 Cut LT 1130, p 1141 .

32 *Purna Chandra Behera v State* AIR 1966 Ori 106, 1966 Cr LJ 571 ; *OA Odayapa v KRO Odayapa Chettiyar* AIR 1937 Rang 505, 39 Cr LJ 194 ; *State of Orissa v Birabhar Panda* 1976 Cut LR (Cr) 169 .

33 *Akshay Chandra Base v Emperor* AIR 1934 Cal 532, 35 Cr LJ 1279 .

34 *Ram Bharosey v State of Uttar Pradesh* 1977 UP Cr Cas (All) 46, p 49 ; *Satya Sunder v State* 31 Cut LT 237 .

35 *State of Rajasthan v Satyanarayanan* 1968 Raj LW 601 .

36 *Adwait Kumar Das v State* AIR 1955 Cal 608, 1955 Cr LJ 1578 .

37 *Salig Ram v State* 1973 Cr LJ 1030, p 1033, (1972) 2 Sim LJ 335 ; *State v Bidhyadhar Rout* 31 Cut LT 523 .

38 *Manmath Nath Sirkar v Union Board* 37 Cr LJ 904, 40 CWN 128 .

39 *State v Sheikh Dadan* AIR 1958 AP 29, 1958 Cr LJ 15 ; *Albano Dias v State* 1981 Cr LJ 677, p 681 (Goa) .

40 *Antony Cardoza v State of Kerala* (2014) 4 Crimes 324 (SC) .

41 *Asoke Basak v State of Maharashtra* (2010) 10 SCC 660, p 670, 2010 (10) Scale 582 ; see also *VP Srivastaqva v Indian Explosives Ltd* (2010) 10 SCC 361, 2010 (10) Scale 177 .

42 *Vijay Kumar v State of Rajasthan* 2012 Cr LJ 2790, p 2796 (Raj) .

43 *ML Pritchand v Emperor* AIR 1928 Lah 382, p 392, 30 Cr LJ; *Janeshwar Das Aggarwal v State of Uttar Pradesh* (1981) 3 SCC 10, p 11, 1981 Cr LR (SC) 303, p 304 .

44 Re *Ashiq AH*1936 OWN 671; *Janeshwar Das Aggarwal v State of Uttar Pradesh* (1981) 3 SCC 10, p 11, 1981 Cr LR (SC) 303, p 304 .

45 *Mohommed Pasha v State of Hyderabad* AIR 1956 Hyd 180, 1956 Cr LJ 1320 ; Re *MD Kuppvswami*1966 Cr LJ 1096; *Robert Stuart Wauchope v Emperor* AIR 1933 Cal 800, 35 Cr LJ 156 ; *Lala Raoji Mahale v Emperor* AIR 1928 Bom 205, 29 Cr LJ 922 .

46 *Emperor v Brinbadhur* 5 WR (Cr) 21 .

47 Re *Vasudevan*(1971) 1 MLJ 240, p 241.

48 *Banubhai Rambhai v State of Gujarat* 1976 Guj LR 699 .

49 *Abhiram Jagadebv State*1977 Cut LR (Cr) 161, p 164, 1977 OLD 179; *Gurdial Singh v State of Punjab* (1981) 8 Cr LT 298, p 300 (Haryana) .

50 *Nilamber v State* AIR 1957 All 381, 1957 Cr LJ 620 ; *State v Bidhyadhar Rout* 31 Cut LT 523 ; *Brahmananda Mohanty v State* 1967 Cr LJ 1168, AIR 1967 Ori 135 .

51 *Bhanubhai Rambhai v State of Gujarat* 1976 Guj LR 699 .

52 *State v Raj Kishore Singh Samanta* (1966) 32 Cut LT 41 .

53 *Trilochon Mallick v State of Orissa* 1975 Cut LT 311, 1975 OLD 107 ; *Abhiram Jagadeb v State* 1977 Cut LR (Cr) 161, p 164,

1977 OLD 179 .

54 *Abhiram Jagadeb v State* 1977 Cut LR (Cr) 161, p 164, 1977 OLD 179 .

55 *Ram Krushna Patnaik v State* 33 Cut LT 1088, p 1090-91 ; *Balbir Singh v State of Haryana* 1975 CLR 206 .

56 *Shyam Sunder v State* 31 Cr LJ 237 . For further commentary, see under the heading 'Proof' in s 406, *ante*.

57 *Mustafikhan v State of Maharashtra* (2007) 1 SCC 623, p 626, 2006 (13) Scale 222 ; *N Bhargawan Pillai v State of Kerala* AIR 2004 SC 2317, (2004) 1 SCC 217 .

58 *Om Prakash v State of Haryana* AIR 1980 SC 476, 1980 Cr LJ 311 (SC) ; *Narendra Pratap Narain Singh v State of Uttar Pradesh* AIR 1991 SC 1394, 1991 Cr LJ 1816 (SC) ; *State of Orissa v Gopinath Panigrahi* 1995 Cr LJ 4095 (Ori) ; *S Jayaselan v State* 2002 Cr LJ 732 (Mad) .

59 *Vishwa Nath v State of J&K* AIR 1983 SC 174, 1983 Cr LJ 231 (SC) ; *S Jayaselan v State* 2002 Cr LJ 732 (Mad) . For further commentary, see under the same heading in s 406, *ante*.

60 *Srinivas Reddy v Government of AP* 2012 (4) ALT 99 (AP) .

61 *Refer* synopsis (11) under s 408, IPC .

62 *Dadarao v State of Maharashtra* AIR 1974 SC 388, 1974 Cr LJ 447 (SC) .

63 *N Nagarajan v State of Tamil Nadu* 1996 Cr LJ 1007 (Mad) . For further commentary, see under the heading 'Entries in Books of Account--Evidentiary Value' in s 408, *ante*.

64 *Vijayendra Kumar v State of Bihar* 2005 Cr LJ 2409 (Pat) .

65 *Karam Singh v State of HP* 2014 Cr LJ (NOC) 8 (HP) .

66 *State of Orissa v Artabandhu Patra* 2015 Cr LJ 538 (Ori) .

67 *Sakharam Pandusa Tapsi v State of Maharashtra* 2007 Cr LJ 2201 (Bom) ; *Vijay Kumar v State of Rajasthan* 2012 Cr LJ 2790 (Raj) .

68 *Birendra Prasad Lahiri v State* 1957 Cr LJ 265 (All), 1956 ALJ 480 .

69 *State v Dahyalal Dalpatram* AIR 1960 Bom 53, 1960 Cr LJ 217 ; *State of Uttar Pradesh v Babu Ram Upadhya* AIR 1961 SC 751, (1961) 1 Cr LJ 773 ; *Local Government v Abasalli* AIR 1935 Nag 139, 36 Cr LJ 867 ; *Emperor v Daya Shanker* AIR 1926 Oudh 398, 27 Cr LJ 589 ; *Hori Lal v Emperor* AIR 1923 All 480, 25 Cr LJ 209 ; *Vasant Moghe v State of Maharashtra* AIR 1979 SC 1008, 1979 Cr LJ 885 .

70 Re *Dewasikhamani Asari*AIR 1926 Mad 727, 27 Cr LJ 863 .

71 Re *Mahalingayya Muddayya Pnjari*AIR 1959 Mys 185, 1959 Cr LJ 882 .

72 *Mohiuddin v Emperor* AIR 1925 Pat 414, 26 Cr LJ 811 .

73 *Empress v Subedar Meeah* 3 WR (Cr) 44 .

74 *Emperor v Ganga Prasad* (1905) ILR 27 All 260 .

75 *State v Jugal Kishore Nanda* AIR 1957 Ori 268, 1957 Cr LJ 1431 ; *Kapildeo Narain v Emperor* AIR 1926 Pat 221, 31 Cr LJ 852 .

76 Re *Muthusami Udayanm*AIR 1941 Mad 761, 43 Cr LJ 445 .

77 *Chandika Prasad v Emperor* AIR 1930 Oudh 324, 31 Cr LJ 1081 ; *Lala Laoji Mahale v Emperor* AIR 1928 Bom 205, 29 Cr LJ 922 ; *Jagroop Singh v State of Punjab* 1980 Cr LJ 68, p 70-71 (Punj) .

78 *Pana Chand v State of Rajasthan* 1977 WLN 541, p 545, 1977 Cr LR (Raj) 690 .

79 *V Rana Shankar Patnaik v State of Orissa* (1988) 3 Crimes 526 (Ori) .

80 *Ranchhod Lal v Sate of Madhya Pradesh* AIR 1965 SC 1248, 1250, (1965) 2 Cr LJ 253 .

81 *Tetar Gope v Ganauri Gope* AIR 1968 Pat 287, 1968 Cr LJ 1108 ; *Ata Mohd v Crown* AIR 1950 Lah 199, p 222 ; Re *Venkata Rao* 17 Mys Lj 496; *Namdev v State of Maharashtra* 1977 Cr LR (Mah) 386 which is the only instance of cancellation of the sentence of rigorous imprisonment by maintaing that of an increased fine.

82 *Shivanarayan Luxminarayan Joshi v State of Maharashtra* AIR 1980 SC 439, 441-42, 1980 Cr LR (SC) 1 .

83 *Parma Nand v Emperor* 29 Cr LJ 1 (Lah) [embezzlement of Rs 50,000 from a bank (seven years)]; Re *Mahalingayya*AIR 1959 Mys 185, Cr LJ 881 [postman misappropriating parcels (three years)]; *Rup Ram v State* 1964 MPLJ (notes) 158 ; *Ashutosh Roy v State* 1959 Cr LJ 1197 .

84 *State of Mysore v Shankreppa Shivappa* (1972) 2 Mys LJ 35, 1972 MLJ (Cr) 507 .

85 *Ranchhod Lal v State of Madhya Pradesh* AIR 1965 SC 1248, p 1251, (1965) 2 Cr LJ 253 .

86 *NC Gangadharappa v State* 2002 Cr LJ 2755 (Kant) .

87 *Rais Ahmed v State* 1997 Cr LJ 4162 (Cal) .

88 *Sadhupati Nageswara Rao v State of Andhra Pradesh* 2012 Cr LJ 4317 (SC), (2012) 8 SCC 547, AIR 2012 SC 3242, (2012) 117 AIC 33 (SC) .

89 *Narindra Kumar Jain v State of Madhya Pradesh* 1996 Cr LJ 3200 (SC) .

90 *State of Himachal Pradesh v Karanvir* 2006 Cr LJ 2917 (SC) .

91 *Anantrao Sarotlamrao Vyavahare v Bhagwan antu Tipe* 1977 Cr LR (Mah) 316, p 317 ; *Azad Khan v Emperor* AIR 1930 Lah 1045, 32 Cr LJ 274 ; *State of Karnataka v Basappa* 2000 Cr LJ 2327 (Kant) (DB) .

92 *State v Mangal Khan* 5 DLR 7 (Bhop) .

1 *Ata Mohd v Crown* AIR 1950 Lah 199, p 222 (FB) ; *Ram Pratap v State* 1961 Raj LW 119 ; *State v Autar Singh* 1966 Jab LJ 99 (SN) .

2 *Ganga Sahai v State* 1980 Cr LR 3, p 4 (UP) ; *Krupasindhu Prusty v State of Orissa* 1987 Cr LJ 1426 (Ori) .

3 *NN Burjorjee v Emperor* AIR 1935 Rang 453, 37 Cr LJ 190 .

4 *Ganeshbhai Shankarbhai v State of Gujarat* AIR 1973 SC 1618, 1972 Cr LJ 1029 ; *Vishnu Datta Mishra v State of Madhya Pradesh* AIR 1979 SC 1618, 1979 Cr LJ 565 ; *Bhagwan v State of Maharashtra* AIR 1979 SC 1120 ; *Ved Prakash Handooja v Delhi Administration* AIR 1974 SC 2336, 1974 SCC (Cr) 632 .

5 *Velayudhan Nair v State* 1959 Ker LR 847 ; *Vasant Kher v State of Madhya Pradesh* 1981 Cr LR (MP High Court Notes) 272.

6 *S Jayaseelan v State* 2002 Cr LJ 732 (Mad) .

7 *Banela Swaminarham v State of Andhra Pradesh* 2000 Cr LJ 4996 (SC) .

8 *Bachchu Singh v State of Haryana* 1999 Cr LJ 3528 (SC) .

9 *Dayanand Ramkrishna v State of Karnataka* 2014 Cr LJ 2746, (2014) 14 SCC 26 .

10 *Arun Parshuram Sutar v State of Maharashtra* 1999 Cr LJ 438 (Bom) .

11 *Mohandass v State* 1998 Cr LJ 3409 (Mad) ; *Raj Singh v State of Uttar Pradesh* (1995) Supp 4 SCC 500 ; *State of Uttar Pradesh v Dalbir Singh* 1997 Cr LJ 3186 (All) ; *Ranjit Singh v State of Punjab* AIR 1995 SC 1959, 1995 Cr LJ 3615 (SC) .

12 *State v Hanamappa* 2000 Cr LJ 2428 (Kant) (DB) .

13 *State v Shaikh Dadan* AIR 1958 AP 29, 1958 Cr LJ 15 ; *Dayanidhi Guru v State* (1963) 5 Ori JD 294 .

14 *Tetar Gope v Ganauri Gope* AIR 1968 Pat 287, 1968 Cr LJ 1108 .

15 *U Ka Deo v Emperor* AIR 1930 Rang 158, p 159, 31 Cr LJ 799 .

16 *Surendra Pal Singh v State* AIR 1957 All 122, 1957 Cr LJ 170 .

17 *Purushtoha Mahanty Subramanyam v State of Andhra Pradesh* AIR 1956 AP 31, 1956 Cr LJ 37 (AP) .

18 *Bindeshwari Prasad Jayaswal v Emperor* AIR 1949 Pat 69, 50 Cr LJ 108 ; *Khandeswar Patra v State* AIR 1964 Ori 119, (1964) 1 Cr LJ 525 .

19 *Sunil Kumar Paul v State of West Bengal* AIR 1965 SC 706, (1965) 1 Cr LJ 630 (SC) .

20 As quoted in *Ranjit Kumar Chakravorty v Co-op Bank of Baroda Ltd and Ors* 1998 Cr LJ 216 (Guj) .

21 *Shanmugan v State* 1997 Cr LJ 2042 (Mad) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF THE RECEIVING OF STOLEN PROPERTY

S. 410.

Stolen property.--

Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property", whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

Comments

1. Scope

This section defines 'stolen property' by saying that the property:

(a) the possession whereof has been transferred by theft, or by extortion, or by robbery, or
(b) which has been criminally misappropriated, or in respect of which criminal breach of trust has been committed, is 'stolen property'.[22]

Where the transfer has been made, or the misappropriation or the breach of trust has been committed, in India, or without India, it ceases to be such stolen property if it subsequently comes into the possession of the person legally entitled to it.[23]

Property, which has been abandoned, would not be 'stolen property' within the meaning of this section, and the person in possession of it cannot be prosecuted under s 411 .[24] Likewise, the proceeds of stolen property do not constitute stolen property if their possession was not transferred by the theft, *etc*, in question and they have not been the subject-matter of an offence. Thus, the property would not continue to be stolen property if the form, in which it is received, has undergone a change. Consequently, money obtained upon forged money orders, is not stolen property.[25] Likewise, money received as a result of selling stolen property, would not be stolen property.[26] Similarly, property, into or for which stolen property has been converted or exchanged, is not stolen property.[27] On the other hand, the mere change of form of the property would not necessarily mean that the property is not stolen property. Mutton, obtained by killing sheep, which was stolen alive, would be stolen property.[28] Similarly, an ingot of gold or silver, obtained by melting gold or silver3561articles, which were stolen, does not cease to be stolen property.[29] Where, therefore, a servant, who was entrusted with a currency note of one thousand rupees, changed it into notes of smaller denominations and lost the exchanged notes at gambling to other accused, it was held that the accused were rightly convicted of an offence under s 411, IPC .[30]

2. 'Property'

Commentary under the relevant headings in s 378, *ante*, may be referred to.

Commentary under the same heading in s 405, *ante*, also may be referred to.

3. 'Whether the Transfer has been made, or the Misappropriation or Breach of Trust has been Committed, within India or without India'

This clause was inserted in 1882. Till then, the view was expressed in some early cases that if a theft or the offence of criminal breach of trust, or of criminal misappropriation, was committed outside India, the receiving of that property would not be covered by s 411, as it would not be stolen property within the meaning of this section, and the court in India would have no jurisdiction.[31] a contrary view was, however, taken in some cases that although the charge of theft or robbery, *etc*, by which the property was removed, could not be tried in India, the offence under s 411 could be tried here. Thus, where a Nepali subject, who had stolen cattle in Nepal, brought them into Indian territory, it was held that he could not only be tried for theft *per se* but could also be convicted of dishonestly retaining the stolen property.[32] It was to make the position clear that the above clause was added in 1882. After addition of the above clause, a person can be tried for retention of stolen property in India even if the offence of theft might have been committed outside India.[33]

4. When does Property Cease to be Stolen Property

Stolen property must be stolen property at the time of receipt. It ceases to be stolen property if, after the theft, it comes into possession of the person entitled to it. In that case, it loses its character as stolen property, and if it then passes into the hands of another person without being again stolen, the person who receives it would not be guilty under s 411, IPC, although, in such a case, he may be guilty of obtaining the property again through some other criminal offence like theft, extortion, *etc*.

The person, into whose lawful possession the stolen property subsequently passes, need not necessarily be the person from whom it was stolen.

22 *Mir Nagvi Askari v CBI* (2009) 15 SCC 643 .

23 *Emperor v Man Mohun Roy* 24 WR (Cr) 33 .

24 *Emperor v Nihal* (1887) ILR 9 All 348 .

25 *Empress v Mon Mohun Roy* 24 WR (Cr) 33 .

26 *Ram Narain v Central Bank of India* Ltd AIR 1952 Punj 178, 53 Cr LJ 744 .

27 *Emperor v Subha Chand* 39 PR 1881 ; *R Chapple* (1840) 9 Car and P 355; *Rex v Walkley* (1829) 4 Car and P 133 .

28 *Cowell v Green* (1796) 2 East 617 .

29 *Public Prosecutor v India China Lingiah* AIR 1954 Mad 433, 1954 Cr LJ 583 .

30 *Imperator v Maulabux* 11 Cr LJ 750 ; *Sugnomal Bhojraj v Emperor* AIR 1944 Sind 237, 46 Cr LJ 243 .

31 *Empress v Moorga Chetty* (1880-1881) ILR 5 Bom 339; *Reg v Adivigadu (*1876-1878) ILR 1 Mad. 171.

32 *Empress v Sunker Gope* (1881) ILR 6 Cal 307 following *Reg v Lakkya Govind* (1875-1877) ILR 1 Bom 50; which was not followed in *Empress v Moorga Chetty* (1880-1881) ILR 5 Bom 339.

33 *Empress v Abdul Latib* (1886) ILR 10 Bom 186 ; *Emperor v Baldewa* (1906) ILR 28 All 372, 3 Cr LJ 247 ; *Emoeror v Mul Chand* AIR 1943 Lah 162, 44 Cr LJ 706 ; *Jaffir Ali v Empress* 30 PR 1894 ; *Moheshwari Prasad Singh Deo v Emperor* AIR 1914 Cal 725, 15 Cr LJ 537 in which the contrary view was taken even after the amendment.

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF THE RECEIVING OF STOLEN PROPERTY

S. 411.

Dishonestly receiving stolen property.--

Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to3562 be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

STATE AMENDMENT

Tamil Nadu-- Section 411 of the principal Act shall be renumbered as sub-section (1) of that section and after sub-section (1), the following sub-section shall be added, namely--

"(2) Whoever dishonestly receives or retains any idol or icon stolen from any building used as a place of worship knowing or having reason to believe the same to be stolen property shall, notwithstanding anything contained in sub-section (1), be punished with rigorous imprisonment which shall not be less than two years but which may extend to three years and with fine which shall not be less than two thousand rupees:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than two years." [*Vide*Tamil Nadu Act 28 of 1993, s 3 .]3563

Comments

1. Scope

The preceding section explains as to what 'stolen property' is. This section prescribes punishment for a person who dishonestly receives, or dishonestly retains, any stolen property, knowing, or having reason to believe, the same to be stolen property. To constitute an offence under this section:

(a) the stolen property must be found in possession of the accused;
(b) some person, other than the accused, must possess that property before the accused got possession of the same; and
(c) the accused must dishonestly receive it, or must dishonestly retain it, knowing, or having reason to believe, that the said property is stolen property.[34]

However, the mere demand of gratification by the accused to help the complainant to recover his

buffaloes does not render him liable under this section.[35]

2. Relative Scope of Section 411 and Section 413

Commentary under the same heading in s 413, post, may be *referred* to.

3. Section 411 Distinguished from Section 412

Sections 411 and 412, IPC, overlap in the sense that they punish the person who receives, or retains, a property, knowing, or having reason to believe, it to be stolen. Section 412 is, however, an aggravated form of s 411 because it punishes a receiver or retainer of stolen property who has come in possession thereof through a dacoity or knowing that it was the subject of a dacoity, whereas, s 411 punishes a person who has come in possession of the property through a thief or knowing that it was the subject of a theft. Dacoity is an aggravated form of theft.[36] In s 412, the prosecution has to prove that the accused knew that the article in question were stolen in dacoity. It is an essential ingredient of s 412, as compared to the ingredient of s 411, IPC .[37]

4. Section 411 Distinguished from Section 124, Bombay Police Act (22 of 1951)

An offence under s 124, Bombay Police Act 1951 (22 of 1951), is an offence of a minor character, while an offence contemplated by s 411, IPC, is an offence of a serious nature. The facts which are required to be proved under s 124, are not the same which are required to be proved under s 411, IPC . There is no section under the Bombay Police Act giving the police discretion either to charge under s 124, Bombay Police Act or s 411, IPC . If an offence falls within s 411, IPC, the police would not charge the accused under s 124, Bombay Police Act.[38]3564

5. 'Dishonestly'

Where a person is accused of an offence under this section, he cannot, where the circumstances do not raise a presumption that he received the property, knowing the same to be stolen, be convicted of the offence merely because he is found to be in possession of the stolen property and does not account for his possession. The prosecution must prove that the property was stolen and the accused dishonestly received it, or, having received it honestly, dishonestly retained it. In either case, the accused must receive it from another person.[39] The finding of the court must be that the accused has either dishonestly received, or has dishonestly retained the stolen property.[40] Similarly, a conviction under this section is possible only if the court comes to the conclusion that the accused either received, or retained the stolen property with dishonest intention.[41] Where stolen property is found with a person, who admits its receipt, it may be fairly presumed that the receipt was a dishonest one unless the receiver's conduct is satisfactorily explained.[42] Usually, the possession of stolen property is a sufficient fact upon which the court can draw the inference of dishonest intention.[43]

6. 'Receives or Retains'

In the term 'retention', dishonesty supervenes after the act of possession, while in the case of 'reception' dishonesty is contemporaneous with the act of acquisition.[44] The offence of dishonest retention of stolen property is, therefore, complete without any guilty knowledge at the time of receipt.[45] If a person has honestly come into possession of stolen property and then retains it after discovering that it was stolen property, he would be guilty under this section.[46] However, the prosecutor need not prove that the property was dishonestly received as distinct from dishonestly retained; it is enough to prove the facts which justify the inference that the accused either dishonestly received the property or, having received it honestly, dishonestly retained it.[47] A man who dishonestly receives property and then retains it, must obviously continue dishonestly to retain it. It would be different, however if the reception of property is innocent. Then it would be for the prosecution to show at what stage the guilty knowledge of the receiver supervened to make the retention dishonest.[48]

7. 'Stolen Property'

Commentary of s 410, *ante*, may be referred to.

The expression 'stolen property' covers property obtained by theft, robbery, extortion, criminal misappropriation and criminal breach of trust.[49]3565

8. 'Knowing or having Reason to Believe'

Mere possession of stolen property by the accused is not sufficient for a conviction under this section unless the court records a finding to the effect that the accused possessed the stolen article dishonestly, knowing, or having reason to believe, that they were stolen articles.[50]

The word 'knowledge' means a 'mental cognition' and not necessarily a 'visual perception'. It implies a notice to the receiver of such facts as could not but have led him to believe that the property was stolen and could not but have been dishonestly obtained.[51] The word 'believes' is much stronger than the word 'suspect' and involves the necessity of showing that the circumstances were such that a reasonable man must have felt convicted in his mind that the property with which he was dealing was stolen property.[52] It lies on the prosecution to prove the presence of certain facts from which the accused can be said to have drawn the inevitable conclusion that the property was stolen property. It may be sufficient to show that the circumstances were such as to make him believe that the property was stolen.[53] Mere suspicion is, however, not enough.[54] It is not also sufficient to show that the accused was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired.[55] a person who has purchased stolen property openly in the presence of others, cannot be said to have purchased it knowing it to be stolen or having reason to believe that it is stolen.[56] Where two persons, going in a rickshaw, were found with stolen property and one of them implicated the other in a confession, it was held that the presence of such accused with some stolen goods with the other accused was highly suspicious, but was not incompatible with his innocence.[57] Where a person in possession of an animal sold it, the mere fact of his denial of possession will not be sufficient.[58] Where the only evidence against the accused was that he was with his co-accused before and after the theft, it can hardly warrant his conviction under s 411, IPC .[59]

Likewise, where the only evidence against the accused was that he had taken some stolen oxen to his well and put up there for the night, and that he subsequently promised to have the oxen restored to the complainant, it was held that this was not sufficient for a conviction under this section.[60]3566

The ten accused persons were labourers, had committed dacoity and had collected silver chips and cash *etc*. Accused 8 presented four silver chips (weighing 1 kg. each) to the appellant, a jeweler for sale. Held, for an agricultural labourer, to present four silver chips, weighing 1 kg. each at the shop of a jeweler, would clearly result in a grave suspicion that the same did not belong to him. For a labourer, it would be unthinkable to own 4 kg. of silver. As such when the appellant, a jeweler, received 4 kg. of silver from an agricultural labourer, it was obvious to him (the appellant), to infer that the same did not belong to accused 8, the appellant had sufficient cause to entertain a reasonable belief that the same was stolen property. As there was no reason for the appellant to infer that the silver chips were obtained during commission of dacoity, the appellant was convicted under s 411, IPC and not under s 412, IPC .[61]

9. Procedure

The offence under this section is cognizable, non-bailable, compoundable, by the owner of the property stolen, with the permission of the court before which the prosecution for such offence is pending, and triable by a magistrate, and may be tried summarily where the value of the property does not exceed two hundred rupees.

10. Jurisdiction

A charge of receiving stolen property may be inquired into, or tried by a court within whose local jurisdiction the offence was committed or the stolen property was possessed by any person who received, or retained, it, knowing, or having reason to believe, it to be stolen property.[62] Where property was found to have been stolen at Patna and the offence of receiving stolen property was committed at Calcutta, it was held that the Patna court had jurisdiction in respect of the case under s 411 .[63] Where, however, a person was not prosecuted for thefts committed in British India, and property was found in his possession outside British India, it was held that he could not be tried in British India under s 411 .[64] Where property in respect of which criminal breach of trust was said to have been committed, was handed over by the complainant at Imphal but the offences under ss 407 and 411, IPC, were committed at Gauhati, it was held that the court at Imphal had no jurisdiction to try the case under s 411, IPC .[65] Where property was stolen in a running train and was recovered at three place outside the jurisdiction of the court and it was not established at which place the theft was actually committed, it was held that the magistrate had no jurisdiction to try the offence.[66]

11. Charge

The following form of the charge may be adopted:

> I (*name and office of the magistrate, etc.*) hereby charge you (*name of accused person*) as follows:
>
> 3567That on or about the...day of...at...you dishonestly received (*or retained*) stolen property... (*specify the property*), belonging to AB, knowing (or having reason to believe) that the said property was stolen property, and that you thereby committed an offence, punishable under s 411 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

The charge should set forth that the accused knew, or had reason to believe, that the property, which he received, or retained, was stolen property,[67] but an omission to mention this fact will not vitiate the trial.[68] The charge should also state that the articles found in possession of the accused were the property of a certain person.[69]

When a distinction in the locality is made in bangles and *churies* and the recovery memo describes the article as bangles but in the charge they are described as *churies*, the conviction of the accused cannot be sustained.[70]

As both receiving and retaining constitute one offence, the accused is not entitled to claim the nature of his offence specified and it is sufficient if he is charged for receiving or retaining and evidence is adduced to prove the guilty knowledge at some period antecedent to its recovery by the police. Similarly, no material prejudice can be said to have been caused by the omission to mention that the accused persons dishonestly received the incriminating stolen articles.[71]

12. Effect of Non-framing of Charge

When no charge was framed against the accused under s 411 of the IPC or any section relating to dishonest misappropriation or receiving of stolen property, his conviction under s 411, IPC is illegal and

unsustainable.[72]

13. Proof

In order to secure conviction under this section, the prosecution must prove,[73] that:

(a) the property in question was the 'stolen property' within the meaning of the preceding s 401, IPC ;
(b) the accused received, or retained, the said stolen property, knowing, or having reason to believe, the same to be stolen property;
(c) before the accused received the said stolen property, it was in possession of somebody else; and
(d) the accused received, or retained, the said stolen property dishonestly.3568

14. Property Recovered must be Stolen Property

The prosecution must prove, first of all, as a fact that the property in question was the stolen property. It must prove that it was the very property,[74] and not the similar property, which was stolen from a certain person. Where the evidence produced on behalf of the prosecution was to the effect that the articles recovered were similar to those that were stolen and no identification proceedings in respect of them were conducted before a magistrate, it was held that it was not possible to hold that the articles recovered were the very articles that were said to have been stolen and the accused were entitled to benefit of the doubt and acquittal.[75] The mere fact that some cereals found in the house of the accused, corresponded with the alleged stolen cereals, would not be sufficient to establish the identity of the stolen cereals.[76] Likewise, the mere fact that certain medicinal ampoules, marked with government hospital identity marks, were found in a chemist shop, is not sufficient to convict the owner of the shop under s 380 or s 411, IPC . There must be evidence that the ampoules of the particular description were found missing or remained unaccounted for in the hospital stores.[77] If the prosecution does not discharge, by satisfactory evidence, its burden of proving that the article alleged to have been sold by the accused was stolen property, the other question, whether the accused knowingly sold it, would not arise.[78] a person receiving property, which is not stolen property within the meaning of the preceding s 410, would not be guilty of an offence under s 411, IPC, although he erroneously believed it to be stolen when he received it.[79] Unless the alleged stolen property is clearly shown to have been of the complainant's and to have formed part of what has been stolen, a conviction under this section is not sustainable.[80]

In the absence of sufficient evidence of theft, an accused cannot be convicted under s 411 .[81] There can be no offence of dishonestly receiving stolen property unless the property, which is alleged to be the subject of such receiving, answers the description of 'stolen property' under s 410, IPC . Only such property, possession whereof has been transferred by theft or extortion or criminal misappropriation or other offences allied to them, as mentioned in s 410, falls within the definition of 'stolen property.'[82] However, once the property is proved to be stolen property, it would not be necessary for the prosecution to prove from where the accused received the stolen property or the time when he did receive that.[83] There must be a finding of fact that the property in possession of the accused is stolen property.[84] Where the accused was charged for having received rubber, the produce of the government forests, but it was3569 not proved that the rubber came from the government forests or that it was the stolen property, it was held that the conviction under s 411 was not maintainable.[85] a person cannot be convicted of an offence under s 411, IPC, merely on showing that he was in possession of certain property and failed to account for its possession. The prosecution must prove that the property was stolen and that the accused received or retained it dishonestly.[86] The mere fact that some fish-plates were found in possession of the accused, would not be sufficient if it is not proved that they were stolen property.[87] Where articles are such as any cloth merchant might stock and sell, the accused cannot be convicted unless it is established, beyond all possible doubt, that the bundles, containing the cloth, were stolen from his shop.[88] Where

goods, dispatched by railway, were found missing and large quantities of shawls, mufflers, bed sheets, *etc*, were recovered, within a few days, at the instance of the accused and there was no adequate explanation for the presence of such large quantities of articles with silk and paper labels of the consignor on most of the shawls and mufflers and certain manuscript writings, on the labels of the bed-sheets, written by someone, connected with the consignor, it was held that the circumstances were sufficient to justify the finding that the property was stolen property.[89] However, it is impossible to identify sweets and, therefore, conviction, under s 411, IPC, in respect of stolen sweets cannot be maintained.[90] Similarly, currency notes are unidentifiable properties and if there is no evidence that they had any mark of identification, the conviction on the mere production of currency notes cannot be sustained.[91] Where the property, alleged to be stolen, is of an ordinary make (like an *arsi* or toe ring), the uncorroborated evidence of the complainant as to its identification is not sufficient. Identification of ordinary articles, which are commonly possessed by other people, is not of much value.[92] It is the duty of the prosecution to establish that the goods recovered from the possession of the accused belong to somebody else.[93] Conviction cannot be based on evidence of recovery alone if the recoveries are not, in any way, sufficient to connect the accused with the crime.[94] If stolen property is recovered not from the house of the accused but from the house of another person (a woman), and the memorandum of seizure is honestly and faithfully prepared to record the fact as to from whom the seizure was made, it is incumbent on the prosecution to establish the connection of the accused with the other person (the woman) so as to fasten the seizure on the accused.[95]3570

Where the accused No. 3, a broker, had received Rs. 32 lacs as stolen property from the Canara Bank by cheating, he was convicted under s 411, IPC .[1]

15. Knowledge of the Accused that he Received Stolen Property

It must be proved that the accused had knowledge, or reason to believe, that the article, which he received, or retained, was a stolen article.[2] Even if stolen property is shown to have been directly brought into shop of the accused from the place of theft, the prosecution has still to prove that in respect of the property recovered from his possession, the accused had reason to believe that it was stolen property. The mere fact that the partner of the accused paid the cartman who brought the goods is not sufficient; nor the presence of the accused in the shop proves his complicity in the crime.[3] The onus is on the prosecution to prove beyond doubt the guilt of the accused. The onus never changes.[4] Recovery of articles from the tunes of an old house accessible to all and sundry, will not conclusively establish the fact of recovery from the possession of the accused.[5]

16. Possession of Property by Someone else before Accused Received it

In case the recovery is recent, then it is not necessary to prove that some person other than the accused had possession of the property before the accused got possession of it. If, however, the recovery is not recent, then it is necessary to prove that some person, other than the accused, had possession of the property before the accused got possession of it.[6]

17. Accused not Required to prove that he Received or Retained the Property Honestly

It is for the prosecution to prove that the accused received, or retained, the stolen property dishonestly, and the onus is not on the accused to show that he received, or retained, it honestly.[7] It is not upon the accused to prove how he came to possess the property which is said to be stolen property.[8]The prosecution must establish its case that there were different acts of receiving and the burden is not on the accused to establish that there was only one act of receiving when he was found with the property forming the subject matter of different thefts.[9] In cases in which the accused cannot be called upon to offer an explanation, his failure to account for the possession does not relive the prosecution of the burden of proving that his3571 possession was dishonest.[10] The presumption of guilty knowledge of an accused cannot be made against an accused from an exculpatory statement made by a co-accused against him.[11]

18. Presumption under Illustration (A) to Section 114 of the Indian Evidence Act 1872

Illustration (a) to s 114 of the Indian Evidence Act 1872, shows that where the accused is found to be in possession of stolen property, a presumption may be made either of his being a thief or having received the property knowing it to be stolen. Which of the presumption should be drawn in any particular case, whether of theft or of receipt of stolen property, would depend on the circumstances, the length of time that has elapsed after the theft, how much stolen property is found in the possession of the person in question, the circumstances which lead to the discovery and other facts connected with the discovery of the property.[12] For instance, if a person is found near about the place of commission of theft immediately before or after the commission of the crime and is subsequently found to be in possession of the stolen property which he fails to give any satisfactory explanation, the presumption may be drawn that he is a thief. However, if the only evidence against him is his recent possession of stolen property, the better presumption would be that he was a receiver of the stolen property.[13] If a person is found in possession of stolen property two months after the theft and gives no account of how he came into possession of it, but denies his possession, he should be convicted under s 411, and not s 379 .[14] Where, soon after commission of a theft, a person is found in possession of stolen property, the position that ordinarily arises is not that he has received it knowing it to be stolen, but that he has stolen. The inference that he is a receiver ought not to be drawn unless there is some circumstances to show that he had not obtained it direct from the owner or the person in possession, but from some other person who was himself the actual thief.[15] Where the prosecution failed to establish that some articles, proved to be stolen property, found in the possession of the accused, were received at different times and from different persons or from the same person at different times, and there was room for doubt that they may have been received at one and at the same time, it was held that the accused was receiver of stolen property knowing it to be stolen.[16]

Where an accused does not explain his possession of stolen properties, presumption would be drawn that he is either a receiver of stolen property or a thief.[17]3572

19. Proof of Necessary Facts to Attract Presumption Under Illustration (A) to Section 114, Evidence Act

In order that a presumption under illust (a) to s 114 of the Indian Evidence Act 1872, may be drawn, the prosecution should establish that:

(a) the article recovered was a stolen property,
(b) the accused had the exclusive possession of the said stolen property,
(c) the said possession of the accused was a recent one, and
(d) there was forthcoming no proper explanation from the accused when he was called upon to account for it.

Unless the prosecution proves that the articles recovered from the premises of the accused are stolen properties, no presumption under illusts' (a) to s 114 of the Evidence Act 1872, would arise.[18] Illustration (a) to s 114 of the Indian Evidence Act 1872, comes into play only if it is proved that the accused was in possession of the stolen property soon after the theft. The court may, in such a case, presume that he received it with the knowledge that it was stolen property.[19]Before a presumption under illust (a) to s 114 of the said Act is drawn, there must be proof on record that the articles found in possession of the accused had been stolen. In the absence of such proof, no presumption, as aforesaid, can be drawn from the mere recovery of certain ornaments from the possession of the accused.[20] It is the duty of the prosecution to establish that the goods recovered from the possession of the accused belong to somebody else. Unless and until such goods are produced in court and their identity is established by cogent evidence produced by the prosecution, the accused cannot be said to be in possession of the stolen property.[21] If articles recovered from the possession of an accused are identical with those mentioned in the list of stolen

properties given by the complainant, it cannot be doubted that he was in possession of such stolen property and he would be guilty under s 411, IPC .[22] In Re *Dakshinamoorthy*[23] the owner of the cycle had identified the dynamo light as his own and spoke of the initials found on the dynamo light. In view of the undoubted ownership of the dynamo light by the owner of the cycle, the legal presumption under illust (a) to s 114 of the Indian Evidence Act 1872, was drawn. However, when the identity of stolen property has been established, it is difficult to see how the accused can be convicted of the offence of receiving stolen property.[24]

20. Accused to be in Exclusive Possession to Attract Presumption under Section 114, Evidence Act [Illustration (A)]

As stated above, the second element to attract the applicability of illust (a) to s 114 aforesaid is that the accused must be found to be in the exclusive possession of the stolen property. If it is not so, the presumption under the above illustration cannot be drawn. Where the house from which the alleged recovery was made, had been in possession of other members, including the father of the accused, the accused was3573 held not to be in exclusive possession of the recovered property.[25] Similarly, when there is nothing to show as to which out of the three accused was in actual physical possession of the stolen property at the time of recovery, none of them can be convicted under this section.[26] When the recovery of a looted gun from the tenanted room of the accused was found doubtful, the accused was found entitled to be acquitted.[27] Where, however, the property was recovered at the instance of the accused only six days after the commission of the robbery from an uninhabited place which was covered with shrubs and bushes, the presumption against the accused was drawn.[28] Where the police recovered stolen property from a house at the instance of the accused, the fact that the house was not of the accused but was that of his brother-in-law would not absolve him.[29] However, when the recovery of stolen article from the accused is doubtful, the accused is not liable to be convicted.[30]

21. Time Gap Between Date of Offence and Recovery of Stolen Property--Effect

The presumption under illust (a) to s 114 of the Indian Evidence Act 1872, cannot arise unless the accused is in possession of the the goods soon after the theft. If several months have passed or if the accused is able to give a reasonable explanation, the presumption will not arise.[31]The length of time, though not the factor on which the presumption depends, is a matter of considerable importance and has frequently affected the making of, or refusing to make, a presumption. No hard and fast rule can, however, be laid down that after the expiry of any particular period, no presumption under illust (a) to s 114 of the Evidence Act 1872, can be drawn.[32] The question of recent possession of a stolen article depends not only on the lapse of time but also upon the nature of the property and the concomitant circumstances of each particular case.[33] The question as to what amounts to recent possession sufficient to justify a presumption in any particular case, varies according as the stolen article is, or is not calculated to ready possession from hand to hand. The importance to be attached to possession, as giving to possession, as giving rise to the presumption of guilt, must vary with the circumstances of each individual case. The strength and nature of presumption varies according to the seriousness of the offence and the nature of the property involved.[34] Thus, where valuable gold and silver jewellery of distinctive workmanship was found in possession of the accused buried under the earth, the efflux of eight months' time was not found to be sufficient to take the case out of the ambit of the illustration.[35] The recovery of jewels three weeks after the3574 dacoity and identified by the owners would, in the absence of, an explanation by the accused, be sufficient for conviction under s 411 .[36] Two and a half months after a dacoity is not a long time and where two articles, a *lota* (engraved with the name of the victim of dacoity) and a shirt/were recovered from the possession of the accused, the presumption against the accused was drawn.[37] Where a revolver was stolen in October and was recovered from the possession of the accused the following May, it was held that it was not possible to say that the distance of time between October and May is so short that a presumption under illust (a) to s 114 of the Evidence Act, must necessarily arise; but if the accused is not able to account for the possession of article which is not easily obtained in the market without extra caution, such a presumption can arise.[38] Where it was proved from the evidence that the accused was in possession of the article, shortly after they were stolen but they were recovered from him more than four years after the theft and conflicting explanations were given by the accused, it was held

that the accused must have known fully well that the article were stolen and was, therefore, rightly convicted under s 411 .[39] Where a loose diamond and a diamond ring, lost about two years ago, were found in possession of the accused and he gave a false explanation regarding their possession, the accused was held guilty under s 411, IPC .[40] Where the accused was found, soon after the theft, in possession of not only one or two articles but a very large number of stolen articles, it was held that he was himself the thief, and not the receiver of stolen articles.[41]Where the accused were found in possession of the goods within two days of the theft and they had not been able to furnish any explanation for their possession, illust (a) to s 114 of the Evidence Act was held applicable.[42] Such a presumption was drawn even when the recovery was made after eight months of the occurrence in *Alisher v State of Uttar Pradesh* .[43] Where, however, the accused, who were engaged in collecting arms and explosive substances, were found in possession of a stolen revolver and the theft of the revolver was not at all recent, it was held that the mere fact of possession was not sufficient for a conviction under s 411, IPC .[44] Recovery of watches after a period of four months from the time of the alleged theft was found to be insufficient for drawing a presumption under illust (a) to s 114 of the Indian Evidence Act in *Ravindran v State* . [45]

22. No Proper Explanation of Possession of Stolen Property by Accused--Effect--Section 114, Illustration (A), Evidence Act[46]

When the accused was found in the possession of stolen property after 3 days of incident, he is liable to be convicted under s 411 .[47] Where the accused did not give3575 any explanation whatsoever for the established fact that he was in possession of the stolen cycle within a short period of its thefts, the presumption under illust (a) to s 114 of the Evidence Act was drawn.[48] If there is no direct evidence to connect the accused with the murder of the deceased and the articles of the deceased are recovered from the possession of the accused without any explanation from the accused for their possession, he can be held guilty for an offence under s 411, IPC .[49] Where the gun, belonging to another person, was recovered from the possession of the accused and he gave no explanation for its possession, he was held to have been rightly convicted under s 411, IPC .[50] Where the prosecution evidence is that the witnesses, who had gone in search of the stolen bullocks, along with the complainant, saw the accused, at a distance of six miles from the residence of the complainant, driving the said bullocks, the accused can be convicted under this section, though not under s 457 .[51]Where the accused has raised the defence that the article was pledged with him, the Supreme Court held that pawn brokers are ordinarily and in normal course expected to maintain some books of account or some documents which would contain the particulars of the transactions, relating to the pledge, and if there is no indication or suggestion by the accused that he was maintaining any such books of account or documents, the court would be justified in holding that the explanation given by the accused could not reasonably be true, and, therefore, a presumption could immediately be drawn in accordance with illust (a) to s 114 of the Evidence Act .[52] The explanation of possession given by the accused whether true or not, must be so reasonably convincing as to throw a doubt on his guilt. A mere denial of the prosecution story, or any assertion inconsistent with facts proved by the prosecution, cannot amount to an explanation to make the presumption unavailable to the prosecution under illust (a) to s 114 of the Evidence Act .[53] Where property, sufficiently identified to be the property of one person, is found in possession of another person without leave or licence or any legal permission of the owner, it is for the party in whose possession it is found, to duly account for the possession; and unless he can do so, a court may fairly infer, in such circumstances, that it was with guilty knowledge that the accused took that which he knew not to be his own.[54] Where the stolen property is found with a person who admits having received it, it may be fairly presumed that the receipt was a dishonest one unless the receiver's conduct is satisfactorily explained.[55] Where a currency note was given to a person for being kept in his custody to be deposited in the treasury, and later on, the note was recovered from the outer courtyard of the accused, it was held it was for the accused to prove that the note belonged to him and that he took the possession over the note honestly.[56] It would not be sufficient for the accused to give an account, so shadowy in character as to require no rebuttal.[57] Where the accused, from whom stolen3576 property was recovered, and was not been able to give an account for his possession but gave three explanations at three different stages, the presumption was made against him.[58] Where the nature of the property or the circumstances indicate that possession is not in the natural course of things but is incriminatory, the fact that a false explanation for possession is given by the

accused, renders the prosecution case stronger.[59]

In a case where the court is to convict a person for his failure to offer an explanation for the possession of the goods, it is incumbent upon it to ask the accused to give his explanation and when the accused fails to offer a reasonable explanation, only then it should draw any presumption. The answer may be furnished by the accused on his own accord; and if he does not do so, the trying magistrate has to ask him under the provisions of s 313, CrPC 1973, to explain the circumstances appearing in evidence against him.[60] If an accused puts forward a reasonable explanation, the court must decide whether the story is reasonably enough to have put the prosecution upon enquiry. If it is reasonably enough to have put the prosecution upon enquiry, and is not proved false, accused must be acquitted.[61] Where the accused is not asked to offer an explanation, his conviction cannot be maintained.[62] The accused can, however, be called upon to offer an explanation only when there is a *prima facie* case against him. When there is no evidence at all as to his knowledge, the accused must be acquitted upon the evidence of prosecution without calling upon him to enter upon his defence.[63] In such cases, the fact that the accused, when asked to explain his possession, gives an explanation which may be held to be satisfactory, would not be a sufficient ground for his conviction.[64] Before any explanation can be expected from the accused, the prosecution must establish that the property was stolen property,[65] and that he was in possession of the stolen property.[66] Where the accused was deaf and dumb, it was held that no presumption could be drawn against him because the accused's infirmity prevented him from putting forward any explanation that he might have to offer as no one could communicate with him.[67]

23. 'Can Account for its Possession'

The word 'can account for its possession' does not mean that the accused must prove positively that he received the property in the manner indicated by him. If the explanation given is not inherently improbable or palpably false, and the court trying the case finds it to be reasonably true, the adverse presumption shall be deemed to have been rebutted. The meaning of the word 'reasonably true' appears to be that the explanation must be sufficient to cast a doubt on the guilt of the accused, and in that3577 case, the benefit of doubt shall go to him.[68] It is not necessary for the accused to prove affirmatively that he received the goods innocently. It is sufficient if he has given an explanation which might raise a doubt in the mind of the court as to his guilt.[69] Where the accused was found wearing a sweater stolen from a student, it was held that the presumption, arising against him, was sufficiently rebutted by the accused by giving, as his explanation, that he got possession of it by purchase from another person which fact was found to be correct.[70] If serious doubts are created in the mind of the court, the presumption would be rebutted.[71] If the explanation which the accused gives may possibly be true, the onus is still on the prosecution to prove the guilt of the accused.[72]

24. Presumption of Robbery

Commentary under s 392, *ante*, may be referred to.

25. Conviction

If the only piece of evidence against an accused is the recovery of stolen property and there is no other circumstance proved against him, he can properly be convicted under s 411 .[73] Where the only circumstance proved against the accused was that the ornaments recovered from his possession, were duly identified as belonging to the deceased, about a fortnight after his death, it was held that he could only be convicted under s 411, IPC .[74] The fact that a child has been tried for theft and discharged on the grounds of want of understanding, is no bar to the conviction of a person under s 411, IPC, for receiving the stolen property.[75] However, the mere circumstance that stolen property was recovered on information, supplied by the accused to the police, is not sufficient for convicting an accused under s 411, IPC .[76] To point out a stolen property from a place, which is accessible to others, would be insufficient for the conviction of the accused.[77]The mere knowledge of the place of concealment does not necessarily lead to the conclusion that the person having such knowledge, actually received the stolen properties or participated in the act of concealment.[78]3578 Where, however, the accused hands over the stolen

property to the police of his own accord in order to assist them in their investigation, the presumption would rather be that he had a clear conscience in the matter.[79] There may be circumstances in which a presumption may be made that the accused had guilty knowledge and may be convicted under s 411 . Where the accused, who had been declared to be an absconder, made a disclosure statement, in consequence of which certain articles identified to have been stolen, were discovered hidden in a forest, it was held that the presumption against him would be made.[80] Where the accused took the police to his field and dug out stolen property, a presumption was made against him.[81] Where stolen utensils were taken out from a public stream by the accused when others failed to do so from the place of concealment in the stream, it was held that this alone was sufficient to support the conclusion that it was within the exclusive knowledge of the accused as to where the utensils were kept concealed in the stream, and a presumption could be made against him.[82] Where the only presumption that can be drawn is that the accused knew that the goods which he held were stolen goods, and not that they were stolen in a dacoity, he can be convicted only under s 411, IPC .[83] There was no evidence to show that the appellants accused NR and A had full knowledge that the ornaments purchased by them were of subject to dacoity. These ornaments were recovered from them and accused N claimed the property as purchased from some person under receipt but that person was not examined as a defence witness. Held, accused NR and A can at best be charged under s 411, IPC for receiver of stolen property. Conviction of the aforesaid appellants accused under s 412, IPC was converted into one under s 411, IPC .[84]

In a charge against the accused of having committed offences under ss 380 and 457, it becomes essential to prove by some evidence that he has committed house-trespass by night or house-breaking by night. However, if there is no evidence to convict the accused with the preparation of the offence of house breaking and theft, except recovery of stolen property, then he cannot be convicted under ss 457 and 380, IPC, though it may be possible that he may be convicted under s 411 .[85]

26. Double Conviction

Theft and retention of stolen goods form one and the same offence and cannot be punished separately.[86] Similarly, if a person is proved to have dishonestly misappropriated property, he cannot be convicted for the offence of dishonestly retaining it.[87] A person who commits theft, robbery or dacoity cannot also be receiver of stolen property or receiver of property subject matter of dacoity, if he is convicted3579 under s 394 or under s 397, IPC, he cannot be convicted for offence under ss 411 or 412, IPC .[88]

27. Probation

Where the recovery of stolen articles from the possession of the accused was effected, and the accused was first offender and 20 years old on the day of conviction and the stolen articles recovered from his possession were not valuable, keeping in view that the accused belonged to a poor agriculturist family consisting of five brothers, sister and father, the accused was found entitled to be released on probation of good conduct.[89]

28. Sentence (Deterrent)

Cases under s 411, IPC, especially when property found is property stolen from a railway train, call for deterrent punishment.[90] The offence of receiving cattle, which are stolen property, should not be dealt with leniently. A sentence of fine would be a direct encouragement to indulge in cattle theft or in the sale of stolen property.[91]

29. Sentence (Lenient)

It is no ground for passing an enhanced sentence merely because the accused is a member of a criminal tribe.[92] A sentence of six months' rigorous imprisonment is not proper on a youthful first offender.[93] Where the accused was a college student, aged 19 years, when he committed the offence, his sentence was reduced to the period already undergone keeping, in view, his young age. It was remarked that youthful age is a factor which deserves consideration and a long period of incarceration in the present condition of

prisons may brutalize the boy and blunt his finer sensibilities so that the end product may perhaps be more criminal than the one at the point of entry.[94] Where a period of 12 years has elapsed from the date of the incident and the accused has remained in jail for a period of 10 months, the sentence of rigorous imprisonment for two years awarded by the trial court was reduced to the period of custody already undergone by the accused.[95] An accused found in possession of stolen copper pot containing Rs 200 in cash from a temple, though found entitled to a lenient view since the value of stolen property was Rs 600 only, but considering the fact that it was stolen from a temple, the sentence of fine alone of Rs 2000 and in default to undergo rigorous imprisonment for three months was imposed against the accused.[96] The offence was committed almost 19 years back when the accused was of the age 27-28 years. He had already suffered imprisonment for a period of about nine months. Therefore, the sentence of imprisonment of rigorous imprisonment for3580 two years awarded by the trial court was reduced to the period of imprisonment already undergone by the accused.[1]

The value of the property may be considered for sentence. When it is small, a light sentence may be passed.[2]

30. Alteration of Conviction

A person, who is charged under s 302, IPC, may be convicted under s 411, IPC, for having received ornaments which were removed from the body of the deceased and recovered from his possession. Where, however, the accused was originally charged under s 380, IPC, and was also charged under s 302 but the charge under s 380 was separated from the charge of murder and the accused was acquitted of the charge under s 380, it was held that although the charge under s 411 was a minor charge for an offence under s 380, IPC, the doctrine of *autre fois acquit* prevented the accused from being convicted of the lesser offence of s 411, IPC .[3] Where the accused was charged with the murder of a boy under s 302 and also under s 411, IPC, of being in possession of ornaments stolen from the boy, knowing them to be stolen, and he admitted that the deceased was at his house immediately before his death, but said that the boy fell from the roof, and that he subsequently threw his corpse into a tank, and produced the ornaments which the boy was wearing at the time of the occurrence, from a hole near the tank, it was held that the accused could not be convicted for murder for want of sufficient evidence, but he was guilty under this section.[4]

31. Alteration of Conviction from Section 454 and Section 380 to one under Section 411

Where, there was no evidence on record that the accused was seen near the house of the complainant on the day of death, the recovery of stolen property at the instance of the accused was effected after three months of alleged commission of theft, the conviction of the accused under ss 454 and 380, IPC, was altered to one under s 411, IPC .[5]

32. Alteration of Conviction from Section 457 to one under Section 411

Where the prosecution evidence was that the witnesses who had gone in search of the stolen bullocks, along with the complainant saw the accused at a distance of six miles from the residence of the complainant, driving the said bullocks along the road, it was held that the only conclusion, which could be drawn, was that he was in possession of stolen bullocks knowing them to be stolen, and, therefore, he could be convicted under this section, and not under s 457, IPC .[6]3581

33. Alteration of Conviction from Section 412 to one under Section 411

Commentary under the same heading in s 412, *post*, may be referred to.

34. Alteration of Conviction from Section 395 to one under Section 411

When the ornaments and coins recovered at the instance of the accused appellants, are of a nature, which are usually worn and kept by villagers, it was held that it was not safe to convict the accused under s 395, IPC, simply on the basis of the recovery of those articles after a period of 2½ months of the occurrence. Accordingly, the conviction of the accused from s 395, IPC, was altered to one under s 411, IPC .[7]

35. Alteration of Conviction from Section 396 to one under Section 411

Where the recovery of looted property was effected from the accused three days after the incident, the conviction of the accused under s 396 was altered to one under s 411, IPC .[8] Where the offence under s 396 was not established against the accused but the recovery of the looted firearm from the accused was established, the conviction of the accused under s 396, IPC, recorded by the trial court was altered to one under s 411, IPC .[9]

36. Alteration of Conviction from Section 411 to one under Section 380

Where, however, the accused was convicted for an offence under this section but on the facts found by the court, if the accused had been convicted under a wrong section, the High Court altered the conviction to one under s 380, IPC .[10]

37. Alteration of Conviction from Sections 454 and 380 to Section 411

Commentary under the same heading in s 380, *ante*, may be referred to.

38. Alteration of Conviction from Section 380 to one under Section 411

In *Biri Singh v State* ,[11] the bullocks were recovered from the accused only the next day of the theft, but there was also evidence to the effect that the bullocks were seen being taken the previous day by some other person. In these circumstances, the conviction under s 380, IPC, was altered to one under s 411, IPC . It was observed that in the absence of anything to justify a presumption of graver offence, presumption should be of a lesser offence. The maximum punishment completed in s 411, IPC, is imprisonment of either description for a term which may extend up to three years or fine or both. The sentence of rigorous imprisonment for a period of 18 months by no stretch of imagination can be said to be excessive when the fact that accused is not a first offender is taken into account.[12] The decision on appeal after about 10 years of recording conviction of the accused is not a good3582 ground to interfere with the sentence of imprisonment of three years imposed by the trial court.[13]

39. Alteration of Conviction from Section 382 to Section 411

Commentary under the same heading in s 382, *ante* may be referred to.

40. Alteration of Conviction from Section 392 to one under Section 411

Commentary under the same heading in s 392, *ante* may be referred to.

41. Alteration of Conviction from Section 392 read with Section 397 to One under Section 411

Commentary under the same heading in s 397, *ante*, may be referred to.

34 *Trimbak v State of Madhya Pradesh* AIR 1954 SC 39, p 40, 1954 Cr LJ 335 ; *Sahadat Ali v State* AIR 1957 Assam 35, 1957 Cr LJ 349 .

35 *Nazar Ali v State* 1977 All Cr R 63 .

36 *Jugal Kishore v State* 1980 (UP) Cr LR 605, p 607 (All) .

37 *Achut Das v State of Assam* AIR 1994 SC 968, 1994 Cr LJ 1119 ; *Shri Chandra and Ors v State of Madhya Pradesh* 1996 Cr LJ 296 (MP) .

38 *State v Fundan Lakhanmal and Ors* AIR 1960 Bom 377 (DB), 1960 Cr LJ 1186 .

39 *Bali Nath v State* (1916) 22 Cut LT 456 ; *Emoress v T Burke* (1884) ILR 6 All 224 ; *Giyan Chandra v Emperor* AIR 1937 All 47, 48 Cr LJ 196 .

40 *Jowaya v Empress* 46 PR 1887 ; *Najib Ullah v Empress* 18 PR 1884 .

41 *Sahadat Ali v State* AIR 1957 All 35, 1957 Cr LJ 349 .

42 Re *Ramjoy Kurmokar* 25 WR (Cr) 10.

43 Re *Majji Appalaswamy*AIR 1939 Mad 178, 40 Cr LJ 448 .

44 *Pakhar Singh v Crown* AIR 1950 EP 66, 51 Cr LJ 581 ; *Bama Jena v State* 1958 Cr LJ 657 .

45 Re *Begarayi Krishna Saranu* 1 Weir 469 (2).

46 *Shwe Thi v Emperor* 5 Cr LJ 413 ; *Khona v Empress* 31 PR 1879 .

47 *Muhammad v Emperor* 15 PR 1889 (Cr) .

48 *Emperor v Saifal* AIR 1937 Lah 700, p 701, 38 Cr LJ 1066 **dissenting** from *Najibullah Khan v Empress* 1884 PR 18 (Cr) .

49 *Mir Nagvi Askari v CBI* (2009) 15 SCC 643, AIR 2010 SC 528 .

50 *Arjun Das v Emperor* AIR 1923 Lah 340, 25 Cr LJ 291 ; Re *Bhimla*1958 Andh LT 476; *Empress v Smabuddin* 18 WR (Cr) 25 .

51 *Abdur Rahim v Emperor* AIR 1927 Nag 40, p 41, 27 Cr LJ 1144 ; *Mohammad Ibrahim v Emperor* 17 Cr LJ 25 .

52 *Empress v Rango Timji* (1881-82) ILR 6 Bom 402.

53 *Abdur Rahim v Emperor* AIR 1927 Nag 40, p 41, 27 Cr LJ 1144 ; *Muhammad Ibrahim v Emperor* 17 Cr LJ 25 ; *Babbu v State* 1967 AWR 811 ; *Aziz Ahmed v State* 1966 AWR 38, p 43 .

54 *Kannuppa Naicker v Emperor* 14 Cr LJ 591 ; *Bishoo Manji* 9 WR (Cr) 16.

55 *Empress v Rango Tamaji* (1881-1882) ILR 6 Bom 402; *State v Jaigivind* AIR 1951 Raj 89, 52 Cr LJ 646 ; *Archibald Edgecombe v Emperor* AIR 1928 Cal 264 ; *Bhaggun v Emperor* AIR 1935 Oudh 327, 36 Cr LJ 602 ; *Suraj Prasad v Emperor* AIR 1929 Oudh 213, 30 Cr LJ 969 ; *Emperor v Sankara Narayana Chetti* 17 Cr LJ 312 .

56 *Bharat Chandra Das v State* AIR 1950 Assam 193 .

57 *Badri Ram Didwania v State of Bihar* AIR 1967 Pat 283, 1967 Cr LJ 1179 .

58 *Allu v Emperor* 15 Cr LJ 654 .

59 Re *Sugasi Doraiswami Naidu*AIR 1939 Mad 765, 41 Cr LJ 96 (1); *Ram Bharosey v State* AIR 1952 All 481, p 485, 1952 Cr LJ 904 ; *Dharampal v State* 1967 AWR 615 .

60 *Ahmada v Emperor* 2 Cr LJ 189 .

61 *Pramod Bhanudas Soundankar v State of Maharashtra* (2013) 1 SCC 635, (2013) 1 SCC (Cri) 589 ; **see also***Hridyanand Shukla v Yadupati Chauhan* (2012) 13 SCC 427 .

62 Code of Criminal Procedure 1973, s 181(5) .

63 *Empress v Ghusoo Khan* 5 WR (Cr) 49 .

64 *Moheswari Prasad Singh Deo v Emperor* 15 Cr LJ 537 ; *Empress v Kripal Singh* (1887) ILR 9 All 523 .

65 *Rameswaralal Bhuramal v Dwarka Prasad* AIR 1958 Manipur 14, 1958 Cr LJ 393 .

66 *Munna Lal v State* AIR 1964 Raj 118, (1964) 1 Cr LJ 700 .

67 *Empress v Ichabur Dobey* 4 WR (Cr) 11 ; *Koti Darbar v Ram Chand* AIR 1949 HP 15, p 21, 51 Cr LJ 160 .

68 *Koti Darbar v Ram Chand* AIR 1949 HP 15, p 21, 51 Cr LJ 160 .

69 *Reg v Siddibin Balnath* 1 Bom HCR 95 .

70 *Naba Kumar Das v State of West Bengal* 1974 Cr LJ 512, AIR 1974 SC 777 .

71 *Bama Jena v State* 1958 Cr LJ 657, p 659 (Ori), AIR 1958 Ori 106 .

72 *Ram Kumar Nag v State of Orissa* 2006 Cr LJ 1322 (Ori) (DB) .

73 *Trimbak v State of Madhya Pradesh* AIR 1954 SC 39, p 40, 1954 Cr LJ 335 ; *Sahadat Ali v State* AIR 1957 Assam 35, 1957 Cr LJ 349 ; *Ram Chander v State of Haryana* (1973) 1 Ch LR 356 .

74 *Abdul Wahid v State* AIR 1951 Ajmer 50 ; *State v Shantibai* AIR 1960 MP 395, 1960 Cr LJ 1620 ; *Wasal v Emperor* AIR 1925 Lah 495, 27 Cr LJ 299 .

75 *Abdul Wahid v State* AIR 1951 Ajmer 50 ; *Bishan Singh v State of Punjab* 1974 Punj LR 317 .

76 *Sharafat v Emperor* 21 Cr LJ 673 .

77 *State v Shantibai* AIR 1960 MP 395, 1960 Cr LJ 1620 .

78 *Bishan Prasad v State of Bihar* 1968 Cr LJ 1670 .

79 *Empress v Issup* Ratanlal Unrep Cr Cas 389; *Masani v State* 1956 ALJ 764 .

80 *Maung E Gyi v Emperor* AIR 1924 Rang 91, p 92, 25 Cr LJ 618 ; *Kishan Singh v State* 1977 UP Cr Cas (All) 264, p 268 ; *Syed Basha v State of Karnataka* 2001 Cr LJ 1813 (Kant) .

81 *Mahomed Unus v Emperor* 1948 AWR (HC) 151 .

82 *Chandmal v State of Rajasthan* 1976 Cr LJ 679, AIR 1976 SC 917 ; Re *Boddu Sanyasi Patrudu*1957 Cr LJ 939, AIR 1957 AP 482 ; *Sudhakar Das v Dayanidhi Mohanty* 31 Cut LT 941, p 951, AIR 1965 Ori 114 .

83 *Koti Durbar v Ram Chand* AIR 1949 HP 15, p 18, 51 Cr LJ 160 .

84 *Devraj Daya v Joshi Vishanji* AIR 1950 Kutch 88 .

85 *Empress v Bajo Huri* 19 WR (Cr) 37 ; *Empress v Dussorut Dass* 18 WR (Cr) 63 .

86 *Empress v T Burka* (1884) ILR 6 All 224 ; *Bharos Ahir v Emperor* AIR 1924 All 192, 25 Cr LJ 942 ; *Sudhakar Das v Dayanidhi Mohanty* AIR 1965 Ori 114, (1965) 2 Cr LJ 541 .

87 *Empress v Buldeo Pershad* 2 NWP 187 .

88 *Wasal v Emperor* AIR 1925 Lah 495, 27 Cr LJ 299 ; *State of Madhya Pradesh v Gulabsingh* 1982 Cr LR (MP High Court Notes) 3, p 4.

89 *Ajendranath v State of Madhya Pradesh* AIR 1964 SC 170, p 172, (1964) 1 Cr LJ 129 .

90 *Lal v Emperor* 13 LJ 720 (2).

91 *Sadashiv Das v State* AIR 1958 Ori 51, p 57, 1958 Cr LJ 534 ; *Ram Charan Saha v Haji Meah Haji Abdulla* 14 Cr LJ 571 ; *Gobinda Maharana v Emperor* AIR 1942 Pat 304 ((1)), 43 Cr LJ 648 .

92 *Mani Ram v Emperor* 13 Cr LJ 555 ; *Mahabir Sao v State* AIR 1972 SC 642, 1972 Cr LJ 458 ; *Maung E Gyi v Emperor* AIR 1924 Rang 91, 25 Cr LJ 618 ; *Nari Santa v Emperor* AIR 1945 Pat 161, 46 Cr LJ 613 ; *Ram Sanehi v State* AIR 1963 All 308, (1963) 2 Cr LJ 1 ; *State v Wahid Bux* AIR 1953 All 314, 1953 Cr LJ 705 ; *State v Sarua Munni Dhimar* AIR 1954 VP 42 .

93 *Babu v State of Punjab* 1977 Ch LR 142, p 144 (P&H).

94 *State of Rajasthan v Parkhiya* 1977 Cr LJ (Raj) 214, p 217 .

95 *Kalyan Singh v State of Madhya Pradesh* 1969 Jab LJ 62 (SN) .

1 *B Raghubir Acharya v Central Bureau of Investigation* 2014 Cr LJ 1380, p 1383 (SC), (2014) 14 SCC 693, (2013) 128 AIC 231 (SC) .

2 *Shyam Sunder Tanti v State* 1973 BLJR 280 .

3 *Mohan Lal v State of Maharashtra* AIR 1979 SC 1718, 1979 Cr LJ 1328 .

4 *Satya Charan Manna v Emperor* AIR 1925 Cal 666, 26 Cr LJ 1155 ; Re *Wahib Basha*AIR 1961 Mad 162, (1961) 1 Cr LJ 533 ;

Hori Lal v Emperor AIR 1933 All 893, *Hatim Mondal v Emperor* 21 Cr LJ 545 ; *Narain Singh v Emperor* AIR 1928 Lah 687, 29 Cr LJ 464 ; *Lallo Kahar v Emperor* AIR 1942 Pat 439 ((2)), 43 Cr LJ 355 .

5 *Deep Chand v State* 1966 AWR 775, p 776 ; *Trimbak v State of Madhya Pradesh* 1954 Cr LJ 335, AIR 1954 SC 39 .

6 *Nakali v State* 1978 Cr LJ 379, p 381, 1978 All Cr C 62 .

7 *Kartar Singh v Emperor* 29 Cr LJ 594 (Lah) ; *Kapil Dev v State of Punjab* 1977 Ch LR 62, p 63 (Punj) .

8 *Ahibaran Singh v State* AIR 1953 All 493, p 494, 54 Cr LJ 1125 .

9 *Hayat v Emperor* AIR 1928 Lah 637, 29 Cr LJ 737 .

10 Re *Bhami Luxuman Shanbaga* 11 Cr LJ 571; *Guranditta v Emperor* AIR 1933 Lah 596 ((2)), 34 Cr LJ 957 .

11 Re *Hashim Ullah* 41 CWN 286.

12 Re *Gorla Kandungadu* 13 Cr LJ 140; *State of Orissa v Udahan* AIR 1965 Ori 123, p 124, (1965) 1 Cr L) 746 ; *Ganga Singh v State of Rajasthan* 1977 WLN 218, p 226, 1977 Raj LW 178 .

13 *State of Orissa v Udaya Pradhan* AIR 1965 Ori 123, p 124, (1965) 1 Cr LJ 746 ; *Sadashiv Das v State* AIR 1958 Ori 51, p 57, 1958 Cr LJ 534 ; *Rajjan v State* AIR 1959 All 718, 1959 Cr LJ 1271 ; *Kami Singh v State of Rajasthan* 1999 Cr LJ 1791 (Raj) .

14 Re *Madappa Tevan* 1 Weir 471 (1).

15 *Mahabir Singh v State* AIR 1951 Pat 296, p 297, 52 Cr LJ 154 ; *Limbaji v State of Maharashtra* 2002 Cr LJ 590 (SC) .

16 *Hira v Emperor* 9 ALJ 370, 13 Cr LJ 254 .

17 *Giriraj Singh Gaghela v State of AP* 2009 Cr LJ 1257 (AP) .

18 *Sudhakar Das v Dayanidhi Mohanty* 31 Cut LT 941, p 951 ; Re *Boddu Sanyasi Patmdu*AIR 1957 AP 482, 1957 Cr LJ 939 ; *Jasraj v State of Rajasthan* 1977 Cr LR (Raj) 255, p 257 .

19 *Ghanshyam v State* 1977 Raj Cr Cas 193, p 195 .

20 *C Jasraj v State of Rajasthan* 1977 Cr LR (Raj) 255, p 257, 259 .

21 *Babu v State of Punjab* 1976 Cr LT 681 (P&H) .

22 *Hausala Prasad v State* 1966 AWR 481 .

23 Re *Dakshinamoorthy*1972 LW (Cr) 223.

24 *Mahabir Sao v State of Bihar* 1972 Cr LJ 458, p 460, AIR 1972 SC 642 .

25 *Ram Chander v State of Haryana* (1973) 1 Ch LR 356, p 362 .

26 *Sheo Raj v State of Uttar Pradesh* 1972 All Cr R 109, p 111 ; *Mahfooz Husain v State of Uttar Pradesh* 1971 All Cr R 139 .

27 *State of Uttar Pradesh v Tek Chand* 2000 Cr LJ 3821 (All) (DB) .

28 *Babbu v State* 1967 AWR 811 .

29 *Pentapati Veerababu v State of Andhra Pradesh* 1998 Cr LJ 2505 (AP) .

30 *Shahul Hamid v State* 1998 Cr LJ 885 (Mad) .

31 *Giyan Chandra v Emperor* AIR 1937 All 47, p 48, 38 Cr LJ 196 ; *Sangara Singh v State* AIR 1964 Punj 400, (1964) 2 Cr LJ 338 .

32 *Chimna v State* AIR 1961 Raj 35, p 39, (1961) 1 Cr LJ 310 ; *Jwala v Emperor* AIR 1927 Oudh 277, 28 Cr LJ 638 .

33 Re *Muthu Veera Velon* 30 Cr LJ 542; *Amar Singh v Crown* 1949 EP 315, 50 Cr LJ 794 ; *Emperor v Ekabbor* AIR 1926 Cal 925, 27 Cr LJ 617 ; *Ina Skeikh v Empress* (1885) ILR 11 Cal 160 ; *Suchit Ahir v Emperor* AIR 1931 Pat 85, 32 Cr LJ 614 .

34 *Necha v Emperor* AIR 1928 Nag 213, p 214, 29 Cr LJ 609 ; *Baliram v Emperor* AIR 1945 Nag 1, 46 Cr LJ 448 ; Re *Muthu Veera Velan* 30 Cr LJ 542.

35 *Goga v State* AIR 1959 J&K 105, 1959 Cr LJ 1168 .

36 *Sen Raya Govindan v Public Prosecutor* 7 Cr LJ 30 .

37 *Jwala v Emperor* AIR 1927 Oudh 277, 28 Cr LJ 638 ; *Empress v Motee Jolaha* 5 WR (Cr) 66 ; *Akmat Ali v State of Tripura* AIR 1957 Tripura 48, 1957 Cr LJ 1457 .

38 *Reoti v Emperor* AIR 1933 All 461, 34 Cr LJ 1018 .

39 *Chimna v State* AIR 1961 Raj 35, (1961) 1 Cr LJ 310 .

40 *Ram Pershad v Emperor* AIR 1924 Rang 256, 25 Cr LJ 907 .

41 *Ayodhya Singh v State of Rajathan* 1972 Cr LJ 1696, p 1698, AIR 1972 SC 2501 ; *Aziz Ahmed v State* 1966 AIL WR 38, 43 .

42 *Virumal Mulchand v State of Gujarat* 1974 Cr LJ 277, p 279, AIR 1974 SC 334 .

43 *Alisher v State of Uttar Pradesh* 1974 Cr LJ 897, AIR 1974 SC 1830 .

44 *Dharani Kanta Chakraborty v Emperor* AIR 1933 Cal 594, 35 Cr CJ 226 .

45 *Ravindran v State* 1972 Ker LT 608, 1972 Mad LJ (Cr) 543 .

46 See commentary of s 114, ill (a) in *Woodroffe and Ameer Ali's Law of Evidence*, Lexisnexis Butterworths.

47 *Sheo Nath v State of Uttar Pradesh* 1970 Cr LJ 601, AIR 1970 SC 535 ; *Budh Ram v State of Uttaranchal* 2006 Cr LJ 1050 (Uttr) .

48 *Ganesh Sethi v State* 1973 Cut LT 941, (1973) 2 Cut WR 1368 .

49 *Phulabai v State of Madhya Pradesh* 1980 Cr LR (MP) 87, p 89 (Notes) (DB) ; *Nagappa Dondiba Kalal v State of Karnataka* 1981 Cr LR (SC) 160, p 161 ; *Onkar v State of Madhya Pradesh* 1974 Cr LJ 1200, p 1208 ; *Biri Singh v State* 1971 All WR 469, p 470 ; *Nazir v State* 2002 Cr LJ 4742 (Ker) .

50 *Ram Bharosey v State of Uttar Pradesh* 1977 UP Cr Cas (All) 46, p 49 ; *Sangam Singh v State of Rajasthan* 1977 WLN 379, p 407 .

51 *Ram Bharosey v State* 1968 AWR 549, p 552 .

52 *Satnarain Sao v State of Bihar* AIR 1972 SC 1561 .

53 *Lakshman v Government of Mysore* AIR 1952 Mys 83, p 84, 53 Cr LJ 1522 .

54 *Emperor v Shuruffooddeen* 13 WR (Cr) 26 ; Re *Turimelia Kurmanna* 17 Cr LJ 179

55 Re *Ram Roy Kurmokar* 25 WR (Cr) 10.

56 *Manipur State v Laisram Bokul Singh* 1954 Cr LJ 1713, AIR 1954 Manipur 13, p 15 .

57 *Emperor v Hari Raji* 5 Cr LJ 63 .

58 *Chimna v State* AIR 1961 Raj 35, (1961) 1 Cr LJ 310 .

59 *Babu Lal v State* AIR 1950 All 631 .

60 *Satchidananda Haldar v State* AIR 1958 Cal 414, 1958 Cr LJ 1012 .

61 *Fateh Mohd v Emperor* AIR 1948 Lah 80, 49 Cr LJ 147 .

62 *Baidyanath Mohanty v Emperor* AIR 1942 Pat 145, 43 Cr LJ 234 .

63 *Bharadwaj Singh v State* AIR 1952 Cal 616, 1952 Cr LJ 1298 .

64 *Narain Singh v Emperor* AIR 1928 Lah 687, 29 Cr LJ 464(1) ; *Keshabdeo Bagal v Emperor* AIR 1945 Cal 93, 46 Cr LJ 465 .

65 *Gobinda Maharana v Emperor* AIR 1942 Pat 304 ((1)), 43 Cr LJ 648 ; *Yasinkhan v Emperor* AIR 1924 Nag 48, 24 Cr LJ 1960 .

66 *Rameshwari Pasi v Emperor* AIR 1942 Pat 250, 43 Cr LJ 353 .

67 Re *Oomayan* 15 Cr LJ 578; Re *Bhupatiraju Ramaraju*AIR 1946 Mad 60, 47 Cr LJ 357 .

68 *Jagannath v Emperor* AIR 1945 All 19, p 21, 46 Cr LJ 233 ; *Pulpil Singh v State* AIR 1955 All 696, 1955 Cr LJ 1553 ; Re *Shaik Server*AIR 1957 AP 1006, 1957 Cr LJ 1393 .

69 *Rajendra Nath Laha v Emperor* AIR 1937 Pat 191, p 194, 38 Cr LJ 129 ; *Hingora Haji v Government of Kutch* AIR 1951 Kutch 10 ; *Bhutnath Mondal v Emperor* AIR 1931 Cal 617, p 618, 38 Cr LJ 40 ; *Baidyanath Mohanty v Emperor* AIR 1942 Pat

145, 43 Cr LJ 234 .

70 *Jhagru Kurmi v State* AIR 1950 All 497, 51 Cr LJ 1331 .

71 *Baleshwar v Emperor* AIR 1936 Oudh 380, 37 Cr LJ 907 (1).

72 Re *Dasan Gangaraju*AIR 1950 Mad 778, (1950) 1 MLJ 792 .

73 *Sanwat Khan v State of Rajasthan* AIR 1956 SC 54, 1956 Cr LJ 150 ; *Bama Jena v State* 1958 Cr LJ 657, p 660, AIR 1958 Ori 106 ; *Sheo Nath v State of Uttar Pradesh* 1970 Cr LJ 601, AIR 1970 SC 535 ; *State v Pareswar Ghasi* AIR 1968 Ori 20, 1968 Cr LJ 201 .

74 *Emperor v Rajani Kanto Koer* 1 Cr LJ 10 .

75 *Empress v Begarayi* (1884) ILR 6 Mad 373 .

76 *Hakiman v Emperor* 2 Cr LJ 230 ; *Empress v Gobinda* (1895) ILR 17 All 576 ; *Paimullah v Emperor* 13 Cr LJ 127 ; *Mangalya Ragho Mahar v Emperor* AIR 1934 Nag 54, 35 Cr LJ 381 ; *Mula Prasad v Emperor* AIR 1943 Oudh 298, 44 Cr LJ 473 ; *Sohan Singh v Emperor* AIR 1930 Lah 91, 31 Cr LJ 774 ; *Chouthmai v State* 1949 MPLJ (Notes) 176 .

77 *Public Prosecutor v Pakkiriswami* AIR 1929 Mad 846, 31 Cr LJ 449 ; *Beoparia v State* AIR 1955 Ajmer 10, 56 Cr LJ 595 ; *Inder Singh v Emperor* AIR 1921 Lah 385 ; *Pir Bakhsh v Emperor* 13 Cr LJ 28 (*nullah* in a jungle); *Hamada v Emperor* 4 Cr LJ 176 (field of another person); *Mehra v Emperor* 14 Cr LJ 602 (buried in a graveyard; *Pahali Dass v State* AIR 1952 Ori 162, 1952 Cr LJ 916 ; *Dasuram v State* AIR 1952 Raj 20 ; Re *Ramaswami*AIR 1947 Mad 195, 48 Cr LJ 720 .

78 *Emperor v Buta Singh* 18 Cr LJ 490 .

79 *Hate v Emperor* AIR 1943 Lah 4, 44 Cr LJ 186 .

80 *Chunilal v Union of India* AIR 1964 HP 27, (1964) 2 Cr LJ 293 .

81 *Hoorilal v State* AIR 1953 All 572, 1953 Cr LJ 1297 .

82 *Moti Lal v State* AIR 1959 Pat 54, 1959 Cr LJ 219 .

83 *Sheo Nath v State of Uttar Pradesh* AIR 1970 SC 535 ; *Bhurgiri v State* (1954) ILR 4 Raj 476, p 482-83, 1954 Raj LW 404, 1955 NUC Raj 262 .

84 *Narayan Prasad v State of MP* 2006 Cr LJ 123, p 125, AIR 2005 SC 204, (2005) 13 SCC 247, 2006 (9) Scale 109 .

85 *Samrath Singh v State of Madhya Pradesh* 1979 MPLJ 200, p 201, **following***Deo Chand v State of Madhya Pradesh* (1977) 1 WN 370 .

86 *Empress v Sreemunt Adup* 2 WR (Cr) 63 ; *Empress v Seeb Chum Haree* 11 WR (Cr) 12 ; *Empress v Shunkur* 2 NWP 312 ; *Pakhar Singh v Emperor* 51 Cr LJ 581 .

87 *Shwe Thi v Emperor* 5 Cr LJ 413 .

88 *Swapan Kumar Khan v State of West Bengal* (2014) 1 Cal LT 299 (Cal) .

89 *Rajiv Sandhu v State of Union Territory, Chandigarh* 2004 Cr LJ 4308 (P & H).

90 *Ahibaran Singh v State* AIR 1953 All 493, 1953 Cr LJ 1125 (nine months) .

91 *Bharadwaj Singh v State* AIR 1952 Cal 616, 1952 Cr LJ 1298 ; *Emperor v Nisar* AIR 1935 Pesh 100, 36 Cr LJ 1138 (sentence enhanced to one year's rigorous imprsionment).

92 Re *Thotohalija Puchala Somanna*AIR 1941 Mad 708, 42 Cr LJ 824 .

93 *Jagannath Chaubey v Emperor* AIR 1923 Pat 297 ((2)), 23 Cr LJ 1312 .

94 *Ashok Kumar v State (Delhi Administration)* AIR 1980 SC 636, 1980 Cr LJ 444 .

95 *Kanik Lal Thakur v State of Bihar* 2003 Cr LJ 375 (Pat) ; *Naroo Khan v State of Rajasthan* (1988) 1 Crimes 159 (Raj) ; *Rajababu v State of Maharashtra* 2000 Cr LJ 4072 (Bom) .

96 *State of Karnataka v Abdul Gaffar* 2000 Cr LJ 4456 (Kant) .

1 *Ram Kalyan v State of Rajasthan* 2000 Cr LJ 4670 (JC) .

2 *Chani v State* (1965) 2 Cr LJ 699 .

3 Re *Valliammal*AIR 1947 Mad 114, 48 Cr LJ 584, dissenting from *Daulat Ram v Emperor* AIR 1933 Oudh 315, 35 Cr LJ 10 ;

State v Miya Jani AIR 1961 Mys 158, (1961) 1 Cr LJ 827 .

4 *Emperor v Rajani Kanto Koer* 1 Cr LJ 10 ; *Public Prosecutor v Yesra Arjun* 1988 Cr LJ 179 (AP)(DB).

5 *Karni Singh v State of Rajasthan* 1999 Cr LJ 179 (Raj) .

6 *Ram Phal v State* 1966 AWR 549, p 552 .

7 *Balya alias Balaram v State of Rajasthan* 1977 Raj Cr C 289, p 292, 1977 Cr LR (Raj) 284 .

8 *Shinath v State of Uttar Pradesh* AIR 1970 SC 535, 1970 Cr LJ 601 .

9 *Khan Singh alias Ujagar Khan v State* 1997 Cr LJ 2305 (All) (DB) ; *Ram Karan and Another v State of Rajasthan* 1996 Cr LJ 3521 (Raj) (DB) .

10 *Soukhi Chand Sao v Emperor* 19 Cr LJ 884 (but the charge must be altered); *Empress v Karim Baksh* 1888 AWN 116 ; Re *Kuppan Ambalam* 5 Cr LJ 479.

11 *Biri Singh v State* 1977 All Cr R 365 .

12 *Nazir v State* 2002 Cr LJ 4742 (Ker) .

13 *Satish Chandra v State of Uttar Pradesh* AIR 1983 SC 347, 1983 Cr LJ 683 . For further commentary, see under the same heading in s 380, *ante*.

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF THE RECEIVING OF STOLEN PROPERTY

S. 412.

Dishonestly receiving property stolen in the commission of a dacoity.--

Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Comments

1. Scope

This section prescribes punishment for an aggravated form of the offence punishable under the preceding s 411, IPC . The section covers two classes of cases, *i.e.*--

(a) receiving or retaining property which the accused knows, or has reason to believe, to have been transferred at a dacoity (irrespective of the person, whether the dacoit himself or any other person, from whom the property has been received), and
(b) receiving property, which the accused knows, or has reason to believe, to be stolen property, from a person whom the accused knows, or has reason to believe, to belong, or to have belonged, to a gang of dacoits.

Receiving stolen property from such a person would be covered by this section, irrespective of whether it was transferred by commission of a dacoity or theft.3583

Knowledge possessed by the accused that possession of property in question was transferred by commission of dacoity, is one of the essential ingredient of an offence under this section and unless there is proof of such knowledge, no conviction can be sustained.[14] Therefore, before convicting a person under this section, the court must come to the conclusion that the dishonest receiver of the stolen property was in possession of the same, knowing or having reason to believe that its possession had been transferred by the commission of dacoity.[15] Where appellants accused are alleged to have misappropriated stolen property of dacoity, their conviction merely on the basis of possession of property would be improper.[16]Where the ornaments stolen as a result of dacoity, were recovered from the possession of the accused, it was held that these two facts, by themselves, were not sufficient to show that the accused either knew, or had reason to believe, that the ornaments had been transferred by the commission of a dacoity and, therefore, his conviction under this section was not sustainable.[17] However, if the articles, recovered, from the possession of the accused, very soon after the dacoity has taken place, have been proved to have been stolen in the course of the dacoity, the case of the accused would clearly fall within the ambit of this section, and not under s 395, IPC .[18]

If the recovery of property stolen in the commission of dacoity is not conclusively attributable to the accused, no offence under s 412 IPC is made out.[19]

2. Section 411 and Section 412 --Distinction

Commentary under the headings in s 411, *ante*, may be referred to.

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

4. Charge

The following form of the charge may be adopted:

I (*name and office of Sessions Judge, etc*) hereby charge you (*name of accused person*) as follows:

That you, on or about the...day of..., at..., dishonestly received (*retained*) stolen property... (*specify the property*) knowing (*or having reason to believe*) the said property to have been transferred by the commission of dacoity (or dishonestly received, from AB, whom you knew (*or had reason to believe*) to belong to (*or to have belonged to*) a gang of dacoits property... (*specify the property*), which you knew (*or had reason to believe*) to have been stolen), and that you thereby committed an offence,3584 punishable under s 412 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

5. Proof

In order to establish a charge under this section, the prosecution must prove[20] that:

(a) the property, which is the subject-matter of the charge, was stolen property;
(b) the accused knew, or had reason to believe, that it was stolen property, possession of which was transferred by the commission of dacoity;
(c) the accused had received or retained such property; and
(d) he did so dishonestly.

Or in the alternative that:

(a) the subject-matter of the charge was stolen property;
(b) the accused knew, or had reason to believe, that it was stolen property;
(c) the property was received from a person who belonged, or had belonged, to a gang of dacoits;
(d) the accused knew, or had reason to believe, that the transferor belonged, or had belonged, to a gang of dacoits; and
(e) the accused received the property dishonestly.

The recovery of looted articles from the house of the accused and the identification of currency notes was not supported by deposition of witnesses and there was no other admissible evidence regarding theft of currency notes, the accused was found entitled to benefit of the doubt. However, the co-accused from whose house the looted articles were recovered and identified by the informant during test identification parade, was found guilty under s 412 and his conviction for the said offence was found proper.[21] Where recovery of money from the house of the accused was not proved to be the same which was looted from the possession of the informant, the accused was found entitled to be acquitted under s 412, IPC .[22] Where the article seized from the accused were not proved to be looted property, the conviction of the accused under s 412, IPC, was set aside.[23] The prosecution has to prove that the accused knew that the articles recovered from the accused were stolen in the dacoity. That is an essential ingredient of s 412, IPC, as compared to the ingredient of s 411, IPC .[24] Where there was no material showing that the accused knew or had reason to believe that the articles recovered were stolen in the course of dacoity, and the investigating officer did not mention the place of recovery in the3585 recovery memo, the alleged recovery of stolen articles was not proved hence the accused were found entitled to the benefit of the doubt.[25]

When it is not proved that the accused had knowledge that the ornaments recovered by him are stolen property, accused cannot be convicted under s 412, IPC .[26]

6. Conviction

When two robbed items were recovered at the instance of the accused, his conviction under s 412 was found proper.[27] Where certain property taken away in a dacoity, was found in the possession of the accused, he was held guilty under s 412, IPC .[28] In the instant case three accused A3, A4 and A5 were convicted for receiving property found stolen in dacoity perpetrated by accused A1 to A5.[29] In *Chandrapal*

v State ,[30] it was held that if an accused is charged alternatively with an offence under ss 395 and 412, IPC, and the former charge fails, there are usually circumstances to show that applying the presumption under s 114, illust (a), Evidence Act 1872, he may be convicted under s 412, IPC .

7. Double Conviction

Separate convictions and sentences under ss 395 and 412, IPC, with respect to the same property, are improper.[31] If an accused is convicted under s 395, he cannot be subsequently convicted under s 412 in respect of the production of the articles taken in that dacoity.[32] A person who commits theft, robbery or dacoity cannot also be receiver of stolen property or receiver of property subject matter of dacoity, if he is convicted under s 394 or under s 397, IPC, he cannot be convicted for offence under ss 411 or 412, IPC .[33]

8. Sentence

The offence under this section is punishable with imprisonment for life or with imprisonment for a term which may extend to 10 years and accused is also liable to pay fine. Where the accused remained in jail for three years and there was only a single identification of looted articles against him, the sentence of imprisonment of five years and fine of Rs 5000 and in default of which to undergo rigorous3586 imprisonment for one year awarded by the trial court was reduced to the period already undergone by the accused, but the sentence of fine was maintained.[34]

9. Consolidation of Sentence/Concurrent Sentences in Different Cases

An accused found to have committed offences under ss 395, 412, 399, 400 and 402, IPC, in different places and at different times can be given the benefit of running the sentences concurrently, in the interest of justice.[35]

10. Alteration of Conviction from Section 412 to One under Section 411

Where there was no evidence showing that the accused persons had full knowledge that the ornaments purchased by them were the subject matter of dacoity, the said ornaments allegedly were recovered from them and were claimed to be purchased from some person under receipt but that person had not been examined as a defence witness, the accused persons could be charged only for dishonestly receiving stolen property, hence their conviction under s 412 was altered to one under s 411 .[36]

Where the knowledge of the accused that the articles were stolen in a dacoity was not established, the only presumption that could be drawn was that the accused knew that they were stolen articles, the conviction of the accused under s 412, was, therefore, altered to one under s 411, IPC .[37]

11. Alteration of Conviction from Section 395 to Section 412

Commentary under the same heading in s 395, *ante*, may be referred to.

12. Alteration of Conviction from Section 397 to Section 412

Commentary under the headings in s 397, *ante*, may be referred to.

14 *Tirsu v State* 1979 All Cr R 390 ; *Pramod Bhanudas Soundankar v State of Maharashtra* (2013) 1 SCC 635, (2013) 1 SCC (Cri) 589 ; *Sanjay Kumar Singh v State of Bihar* 2012 (118) AIC 713 (Pat) .

15 *Moinuddin Mazumdar v State of Assam* AIR 1972 SC 635, 1972 Cr LJ 456 ; *State v Pareshivar Ghasi* AIR 1968 Ori 20 ; *Sheo Nath v State of Uttar Pradesh* AIR 1970 SC 535, 1970 Cr LJ 601 .

16 *Bhaskar Chandra Nayak v State of Orissa* 2009 Cr LJ 3787 (Ori) .

17 *State v Pareswar Ghasi* AIR 1968 Ori 20, 1968 Cr LJ 201 ; *Sheo Nath v State of Uttar Pradesh* AIR 1970 SC 535, 1970 Cr LJ 601 ; *Pramod Bhanudas Soundankar v State of Maharashtra* (2013) 1 SCC 635, (2013) 1 SCC (Cri) 589 .

18 *Amar Singh v State of Madhya Pradesh* AIR 1982 SC 129 .

19 *Krishnapada Dutta v State of West Bengal* 2014 Cr LJ (NOC) 30 (Cal) (DB).

20 *Abdul Sukur v State of Assam* 1976 Cr LJ 378 (Gau) ; *Balaram v State of Rajasthan* 1977 Raj Cr Cas 289, p 291-92, 1977 Cr LR (Raj) 284 ; *Chamma v State of Rajasthan* (1971) 1 WLN 260, p 26 ; *Krishnapada Dutta v State of West Bangal* 2014 (2) Crimes 230 (Cal) (DB); *Sanjay Kumar Singh v State of Bihar* 2012 (118) AIC 713 (Pat) .

21 *Pawan Yadav and Anor v State of Bihar* 2001 Cr LJ 3626 (Pat) .

22 *Munna Mahto alias Munna v Sanjay Kumar* 2000 Cr LJ 3527 (Pat) .

23 *Rishipal and Ors v State of Uttar Pradesh* 1996 Cr LJ 3973 All*; Hridyanand Shukla v Yadupati Chauhan* (2012) 13 SCC 427 ; *Krishnapada Dutta v State of West Bengal* 2014 Cr LJ (NOC) 30 (Cal) (DB).

24 *Achyut Das v State of Assam* AIR 1994 SC 968, 1994 Cr LJ 1119 .

25 *Shri Chand and Ors v State of Madhya Pradesh* 1996 Cr LJ 296 (MP) ; *Krishnapada Dutta v State of West Bengal* 2014 (2) Crimes 230, p 232 (Cal) (DB), (2013) 4 Cal LT 473 ; *Sanjay Kumar Singh v State of Bihar* 2012 (118) AIC 713 (Pat) (Conviction set aside).

26 *Krishnapada Dutta v State of West Bengal* 2014 Cr LJ (NOC) 30 (Cal) (DB).

27 *Balbir Singh v State of Uttar Pradesh* 2005 Cr LJ 2747 (All) (DB) .

28 *Aziz Bakho v State of Bihar* 1980 Bih Cr Cas 20, p 23 (Pat) ; *Chhote Lal Singh v State of Madhya Pradesh* 1978 Cr LJ 1411, p 1412, AIR 1978 SC 1390 ; *Pramod Bhanudas Soundankar v State of Maharashtra* (2013) 1 SCC 635, (2013) 1 SCC (Cri) 589 .

29 *Hridyanand Shukla v Yadupati Chauhan* (2012) 13 SCC 427 .

30 *Chandrapal v State* AIR 1954 All 684, 1954 Cr LJ 1439 .

31 *Empress v Bahiru* Rat Unrep Cr Cas 312; *Empress v Abdool Hossein* 1 WR (Cr) 48 ; *Empress v Shahabut Sheikh* 13 WR (C) 42 ; *Narendra Kumar v State* AIR 1956 All 336, 1956 Cr LJ 662 ; *Abdul Jabbar Molla v Emperor* AIR 1944 Cal 39, 45 Cr LJ 468 .

32 *Bandhan Saa v State* 1960 BLJR 268 ; *Shakil v State of Uttar Pradesh* 1980 ALJ 924, p 926 .

33 *Swapan Kumar Khan v State of West Bengal* (2014) 1 Cal LT 299 (Cal) .

34 *Pawam Yadav and Anor v State of Bihar* 2001 Cr LJ 3626 (Pat) .

35 *Bandamedi Shankar v State of Andhra Pradesh* 2003 Cr LJ 2242 (AP) ; *Ammavasai v Inspector of Police* (2000) 9 SCC 759, 2000 Cr LJ 4662 (SC) ; *Venkateshwar v State of Andhra Pradesh* 1987 Cr LJ 1621 (AP) ; *Sher Singh v State of Madhya Pradesh* 1989 Cr LJ 632 (MP) (FB) .

36 *Narayan Prasad v State of Madhya Pradesh* 2006 Cr LJ 123 (SC) ; *Pramod Bhanudas Soundankar v State of Maharashtra* (2013) 1 SCC 635, (2013) 1 SCC (Cri) 589 .

37 *Achyut Das v State of Assam* AIR 1974 SC 968, 1994 Cr LJ 1119 ; *Pramod Bhanudas Soundankar v State of Maharashtra* (2013) 1 SCC 635, (2013) 1 SCC (Cri) 589 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF THE RECEIVING OF STOLEN PROPERTY

S. 413.

Habitually dealing in stolen property.--

Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.3587

Comments

1. Scope

This section provides for a higher punishment for a person who is not a mere casual receiver of stolen property, but does so as a profession. Habitual offenders are punishable with higher punishment under some other provisions of IPC also, for instance, under ss 371, 400 and 401 of the IPC . The punishment is determined by the frequency of the occasions on which stolen property is dealt with.

2. Relative Scope of Section 411 and Section 413

A bare perusal of s 411 and s 413 indicates that while s 411 prescribes a punishment for dishonestly receiving stolen property knowing the same or having reason to believe the same to be stolen property, s 413 prescribes a punishment for an accused who habitually receives or deals in property which he knows or has reason to believe to be stolen property. One act of receiving stolen property knowing the same to be stolen property can attract s 411 of IPC, whereas a person who receives stolen property habitually or deals in such property knowing or having reason to believe that the property is stolen property can be punished under s 413 of the IPC .[38]

3. 'Habitually'

Commentary under the same heading in s 400, *ante*, may be referred to.

4. 'Stolen Property'

Commentary under s 410, *ante*, may be referred to.

5. Habitual Receiver of Stolen Property

A person cannot be said to be a habitual receiver of stolen goods who may receive the proceeds of a number of different robberies from a number of different thieves on the same day. In order to support a conviction under s 413 of the IPC, of being a habitual receiver of stolen property, it must be shown that the property was received on different occasions and on different dates.[39]

6. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

7. Same Trial under Section 411 and Section 413 --Permissibility

A prisoner cannot be tried at the same trial for receiving or retaining and habitually receiving or dealing in stolen property. The proper course is to try the accused first for the offence under s 411, and if he is convicted, to try him under s 413 putting in evidence the previous convictions under s 411, and proving the finding of the rest of the property in respect of which no separate charge, under s 411 could be made or tried by reason of the provisions of s 453 of the Code of Criminal Procedure . A3588 charge under s 413 at this stage cannot be maintained unless the previous conviction of the accused for commission of offence under s 411 is proved.[40]

8. Charge

The following form of the charge may be adopted:

> I (*name and office of sessions judge, etc*) hereby charge you (*name of accused person*) as follows:
>
> That you were *A* habitual receiver (*or dealer*) in stolen property and that you, on or about the...day of..., at..., received (*or dealt with*) property, which you knew (*or had reason to believe*) to be stolen property, and you thereby committed an offence under s 413 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

The trial of a person both under ss 411 and 413, IPC, is bad. The proper course is to try the accused first for the offence under s 411 and, on his conviction thereunder, to try him under s 413 by putting in evidence the previous conviction under s 411 and proving the finding of the rest of the property for which no separate charge under s 411, IPC, could be made or tried.[41]

9. Framing of Charge both under Section 411 and Section 413 --Permissibility

It can very well be said that at the time of framing charge, the learned trial court, if evidence is on record with regard to number of cases pending or, in which the person accused is convicted can frame charge for offence under s 413, IPC along with s 411, IPC ; but, at the time of final adjudication, first of all, finding with regard to conviction for offence under s 411, IPC is required to be arrived at; and, thereafter, for the purpose of convicting the accused for habitually dealing in stolen property, after recording finding of guilt sentence can be awarded under s 413, IPC on the basis of established norms of habitually dealing in stolen property and the prosecution is required to prove the regular indulgence with regard to offence under s 411, IPC by way of producing the required evidence. Thus, at the stage of framing charge, it is not necessary that there must be conviction or finding against the accused for the purpose of framing charge under s 413, IPC .[42]

10. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused received, or dealt in, stolen property;
(b) he did so habitually; and

(c) he did so knowing, or having reason to believe, the property to be stolen.

A person who receives the proceeds of different robberies from a number of different thieves on the same day, is not a habitual receiver of stolen goods. In order to support3589 a conviction under this section, it must be shown that the property was received on different occasions and on different dates. The very essence of the offence is the habitual (constant) dealing which he knows, or has reason to believe, to be stolen.[43] Where the evidence did not establish that the appellant accused habitually dealt in or received the property which he knew or had reason to believe to be stolen property, his conviction under s 413, IPC recorded by the Court below was set aside.[44]

38 *Kotta Gopinarayan Choudhary v State of Orissa* 2003 Cr LJ 4050 (Ori)

39 *Queen-Empress v Baburam Kansari* (1891) ILR 19 Cal 190 ; *Kotta Gopinarayan Choudhary v State of Orissa* 2003 Cr LJ 4050 (Ori) ; *Mohd Azahar v State of UP* 2014 (2) All LJ 169 (All) .

40 *The Empress v Uttom Koondoo* (1882) ILR 8 Cal 634 ; *Kotta Gopinarayan Choudhary v State of Orissa* 2003 Cr LJ 4050 (Ori) .

41 *Emperor v Uttam Koondoo* (1882) ILR 8 Cal 634 ; *Emperor v Baburam Kansari* (1892) ILR 19 Cal 190 .

42 *State of Rajasthan v Waman Narayan Gheeya* 2007 Cr LJ 3614 (Raj) .

43 *Empress v Baburam Kansari* (1892) ILR 19 Cal 190 ; *Arjun Das v Emperor* AIR 1923 Lah 486, p 488, 33 Cr LJ 584 .

44 *Mohd Azahar v State of UP* 2014 (2) All LJ 169 (All) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF THE RECEIVING OF STOLEN PROPERTY

S. 414.

Assisting in concealment of stolen property.--

Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope and Applicability

This section brings within its scope persons who are not proved to be in possession of stolen property. The thief is naturally in possession of stolen property and so is the receiver of stolen property. However, there may be a category of persons who never get actual possession of the stolen property and yet they

assist in its disposal. It is this category of persons to which this section applies.[45] It, therefore, applies only to person who, not having such possession as would sustain a charge of himself concealing, disposing of, or making away with it, voluntarily renders assistance in such dealing.[46] When a person is shown to stand in such relation to stolen property as falls short of possession, his manner of dealing with the property may warrant a charge of assisting in concealing or disposing of, or making away with, the property with guilty knowledge.[47] The section, however, does not cover a case where a person receives and disposes of stolen property entirely on his own account.[48] a person who has dishonestly received stolen property, cannot possibly be charged and convicted of voluntarily concealing or disposing of that property.[49] The section does not also apply to the case of a man, spending money stolen by another.[50]3590

When receipt or intention, not necessarily for disposal, is dishonest, s 411 is the appropriate section to apply. If, on the other hands, dishonest receipt or intention cannot be proved, but only dishonest concealment or disposal, s 414 is more appropriate.[51]

2. 'Voluntarily Assists in Concealing, or Disposing of, or Making away with, Property which he Knows, or has Reason to believe, to be Stolen Property'

This section makes it an offence to render voluntary assistance in regard to concealment, disposal of, or making away. The three expressions 'concealing', 'disposing of' or 'making away' have been purposely and deliberately employed. 'Concealing' means doing something in a stealthily manner, *i.e.*, in a manner which is not open, natural, innocent and frank. The expression 'disposing of or 'making away' is meant to convey the idea of getting rid of a thing with an ulterior motive, *i.e.*, getting rid of a property not in the normal manner in the usual course of dealing, but in a sinister fashion to which criminality can be attributed. And it is in this context that the legislature has employed the expression 'knows, or has reason to believe to be stolen property' in regard to the offender. In other words, it has been made an offence for anyone to render assistance voluntarily, *i.e.*, with knowledge and consciousness and without any correction or compulsion. And it has been made an offence to voluntarily render assistance in regard to a property in respect of which he knows, or he has reason to believe, that it is stolen. More so when he is rendering this assistance by restoring to some duties or underhand means in a sinister fashion that is inconsistent with normal innocent conduct not tainted with any criminal significance.[52] In *Empress v Rango Tamaji* ,[53] it was observed that the word 'believe', in s 414, IPC, is much stronger than the word 'suspect' and involves the necessity of showing that the circumstances were such that a reasonable man must felt convicted in his mind that the property with which he was dealing was stolen property. It is not sufficient in such a case to show that the accused person was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired.

3. 'Voluntarily'

Commentary of s 39, vol. 1, may be referred to.

4. 'Assists'

Except in the colloquial sense, a man cannot be said to assist himself. There must be another person whom he assists.[54] Where a hired taxi stopped at one place and some passengers in it got down and then attacked, injured and robbed some person, and in3591 spite of the cries of the victim, the driver drove away the car as he could do, it was held that the driver was guilty under this section for assisting the robbers to make away with the property.[55] Where the accused voluntarily assisted in concealing stolen railway pins in a certain person's house and field, with a view to having such innocent person punished as an offender, it was held that the accused was guilty both under ss 414 and 193, IPC .[56]Where the only part played by the accused, was that he, at the request of some other culprit, threw the bundle of stolen goods into a well, it was held that his act fell within the purview of s 414, IPC .[57]

Where the sand was being transported on truck without valid permit, document, the petitioner owner of the truck is guilty of offence under s 414, IPC, which is a cognizable offence, the police cannot be debarred

from registering a case and investigating into the matter.[58]

Where the restrictions on the movement and storage of rice had already been abolished by the Government of India, the transport of rice from consignor to consignee from Delhi to Silliguri did not constitute any offence.[59]

5. 'Disposing of'

These words, in s 414, cannot be taken to include 'restoring to the owners'.[60]

6. Property

Dedicated bulls, being property can be the subject-matter of an offence under this section.[61]

7. Stolen Property

The appellant P was convicted for offence under s 414, IPC . The prosecution had not produced any material to establish the fact that the property recovered at his instance in fact belonged to the jeep which was stolen earlier or that the appellant had any prior knowledge that the goods recovered were actually stolen goods. Appellant P was questioned under s 313, CrPC but no specific question in regard to the ownership of the goods recovered was put to him. The Court did not found it safe to rely on the prosecution evidence to convict the appellant of the offence under s 414, IPC . The appellant was given benefit of doubt and acquitted of the charge under s 414, IPC .[62]3592

8. Procedure

The offence under this section is cognizable, non-bailable, compoundable, by the owner of the property stolen, with the permission of the court, before or which the prosecution for such offence is pending, and triable by a magistrate, and may be tried summarily where the value of such property does not exceed two hundred rupees.

9. Quashing of Criminal Proceedings/FIR

Where on account of an alleged offence of stolen coal without a licence, the coal in question was intercepted at the stage of transportation and both the trucks were seized and a case under ss 414 / 120B, IPC, and under s 7 of the Essential Commodities Act 1955 (10 of 1955) was registered against the accused person, and on completion of investigation the special judge took cognizance of the offences, the storage limit of coal was not prescribed at the relevant time so the violation of the provision of the unification order by the owner cannot arise, the allegation of theft of coal against the owner had also not been substantiated in the absence of specific evidence, the entire criminal proceedings and also the taking of cognizance by the special judge was quashed.[63] The petition under s 482, CrPC for quashing criminal proceedings, the Court is required to proceed on the presumption that the allegations made in the complaint are true and determine if the allegations so made disclose commission of any alleged offence.[64]

Where the criminal proceedings were instituted by one partner against another, alleging offence under ss 409 and 414, IPC, but the accused's domination as a result of entrustment or by special agreement was not proved, the dispute being of a civil nature the criminal proceedings were found not to be maintainable.[65]

10. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:

That you, on or about the...day of...,at..., voluntarily assisted in concealing (*or disposing or making away with*) the property... (*specify the property*), which you knew (*or had reason to believe*) to be stolen property, and thereby committed an offence under s 414 of the Indian Penal Code, and with in my cognizance.

And I hereby direct that you be tried by this court on the said charge.

3593

11. Proof

To establish a charge under this section, the prosecution must prove that:

(a) the subject-matter of the charge was stolen property;
(b) the accused knew, or had reason to believe, that that property was stolen property; and
(c) he voluntarily assisted in concealing, or disposing of, or making away with, that property.

The prosecution must establish that the accused voluntarily assisted in concealing, or disposing of, property which he knew, or had reason to believe, to be stolen property.[66] It must prove that the accused had actual knowledge, or had reason to believe, that the property was stolen property.[67] It is not, however, necessary to establish that the property was stolen property if it can be shown that there were reasons to believe objectively that the property was stolen property. In such an event, it is not necessary to establish from whom the theft was committed, when it was committed, how it was committed and who committed it.[68] It is not necessary for a person to be convicted under this section that another person must be traced and convicted for an offence of committing theft,[69] as nothing turns on the circumstance that the co-accused were acquitted.[70]

12. Conviction

When the accused are prosecuted under ss 380 and 457, IPC, their conviction under s 414, IPC, without a charge thereunder, is not maintainable.[71]

13. Double Conviction

An accused cannot be convicted of offences under ss 411 and 414,[72] or under ss 370 and 414, IPC,[73] separately regarding the same property, the acts of the accused being parts of one continuous transaction. He cannot also be convicted of theft and of attempting to conceal stolen property.[74]3594

45 *Ram Bharosey v State* AIR 1952 All 481, p 485, 53 Cr LJ 904 ; *Empress v Alu Kala* 1 Weir 469 (1).

46 *Emperor v Subha Chand* (1881) 31 PR 83, p 84 .

47 *Khona v Empress* (1879) 31 PR 83, p 84 .

48 *Emperor v Abdul Gani Bahadurbhai* AIR 1926 Bom 71, p 75, 27 Cr LJ 114(2) ; *Ram Bharosey v State* AIR 1952 All 481, p 485, 1952 Cr LJ 904, 907; *Kaushal Kishore v State of Uttar Pradesh* 1974 ALJ 220, 1974 All Cr Cas 81 .

49 *Emperor v Abdul Gani Bahadurbhai* 27 Cr LJ 114 (2), p 119, AIR 1926 Bom 71 .

50 *Amar Nath v Emperor* AIR 1935 Lah 587, 36 Cr LJ 1459 .

51 *Emperor v Abdul Gani Bahadurbhai* AIR 1926 Bom 71, p 75, 27 Cr LJ 114(2) .

52 *Hastimal Asaldas v State of Gujarat* 1975 Cr LJ 983, p 984 (Guj) .

53 *Empress v Rango Tamaji* (1881-1882) ILR 6 Bom 402 relied on in *Gian Chand v Emperor* 33 Cr LJ 764, p 765 (Lah), AIR 1932 Lah 434 .

54 *Ram Bharosey v State* 1952 Cr LJ 904, p 907, AIR 1952 All 481 .

55 *Hari Singh v Emperor* (1940) ILR 2 Cal 9 .

56 *Emperor v Rameshur Rai* (1875-1877) ILR 1 All 379.

57 Re *Boddhu Sanyasi Patrudu*1957 Cr LJ 939, pp 942-943, AIR 1957 AP 482 .

58 *Krishna Singh v State of Jharkhand* 2014 (4) Crimes 171 (Jhar) .

59 *Vinod Kumar Sinha v State of Bihar* 2010 (96) AIC 421 (Pat) .

60 *Nga Yan E v Emperor* 11 Cr LJ 493, p 494 . For further commentary, see under s 378, *ante*.

61 *Ananta Ram Koch v State* AIR 1952 Assam 123, 1952 Cr LJ 1141 . For further commentary, see under s 378, *ante*.

62 *Kailash v State of Rajasthan* (2009) 16 SCC 708, (2010) 3 SCC (Cri) 393 .

63 *Urmila Pande v State of Bihar* 2000 Cr LJ 3702 (Pat) .

64 *Ashish Deb v Dixit Wire Shop* 2012 (118) AIC 646 (Gauh) ; *State of Haryana v Bhajan Lal* AIR 1992 SC 604, 1992 Cr LJ 527, p 552, 1992 SCC (Cri) 426 ; *Zandu Pharmaceutical Works Ltd v Md Sharaful Haque* (2005) 1 SCC 122, (2004) 3 KLT 789, 2005 Cr LJ 92, p 97 (SC) ; *Reshma Bano v State of UP,* (2008) 5 SCC 791, p 793, 794, (2008) 3 All LJ 607, (2008) 3 SCC (Cri) 86 ; *Digam Bikshapati v State of AP* (2008) 2 SCC 403, p 407, 408, AIR 2008 SC 527, 2008 Cr LJ 724 ; *CBI v Ravishankar Prasad* 2009 (6) SCC 351, p 358, 359 (SC) ; *Rajiv Thapar v Madan Lal Kapoor* 2013 AIR SCW 784, 2013 Cr LJ 1272 ; *Surya Baksh Singh v State of UP* (2014) 14 SCC 222, (2013) 132 AIC 195 (SC) ; *N Soundaram v PK Ponuraj* (2014) 10 SCC 616 ; *Rishipal Singh v State of UP* (2014) 7 SCC 215, AIR 2014 SC 2567, 2014 (5) All LJ 13 .

65 *Alayri v State* 1996 Cr LJ 2978 (Mad) .

66 *Emperor v Budhankhan Inayarkhan* 13 Cr LJ 793, p 794 (Bom) ; *Emperor v Abdul Gani Bahadurbhai* AIR 1926 Bom 71, p 75, 17 Cr LJ 114(2), p 118; *Ajendranath v State of Madhya Pradesh* AIR 1964 SC 170, p 173, (1964) 1 Cr LJ 129, p 131-132 ; *Kailash v State of Rajasthan* (2009) 16 SCC 708, (2010) 3 SCC (Cri) 393 (Accused acquitted) .

67 *Appasaheb G Chavan v State of Maharashtra* 1977 Cr LR 377, p 378 .

68 *Hastimal Asaldas v State of Gujarat* 1975 Cr LJ 983, p 984 (Guj) ; *Emperor v Budhankhan Jnayatkhan* 13 Cr LJ 793, p 794 (Bom) ; *Emperor v Abdul Gani Kahadurbhai* AIR 1926 Bom 71, p 75, 27 Cr LJ 114(2), p 118.

69 *Ajendranath v State of Madhya Pradesh* AIR 1964 SC 170, p 173, (1964) 1 Cr LJ 129, p 131-32 .

70 *Hastimal Asaldas v State of Gujarat* 1975 Cr LJ 983, p 985 (Guj) .

71 *Bheemappa Bhemappa Korawar v State of Mysore* 1971 Cr LJ 125, 1970 Mad LJ (Cr) 262 .

72 *Empress v Alu Kala* Rat Unrep Cr Cas 553, 1 Weir 469; *Empress v Sakharam* Rat Unrep Cr Cas 449.

73 *Nga Po Kyan v Emperor* 1885 SJLB 334 .

74 *Zinda v Emperor* 15 PR 1896 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CHEATING

S. 415.

Cheating.--

Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Illustrations

Explanation.--A dishonest concealment of facts is a deception within the meaning of this section

(a) *A*, by falsely pretending to be in the civil service, intentionally deceives *Z*, and thus dishonestly induces *Z* to let him have on credit goods for which he does not mean to pay. *A* cheats.

(b) *A*, by putting a counterfeit mark on an article, intentionally deceives *Z* into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces *Z* to buy and pay for the article. *A* cheats.

(c) *A*, by exhibiting to *Z* a false sample of an article, intentionally deceives *Z* into believing that the article corresponds with the sample, and thereby dishonestly induces *Z* to buy and pay for the article. *A* cheats.

(d) *A*, by tendering in payment for an article a bill on a house with which *A* keeps no money, and by which *A* expects that the bill will be dishonoured, intentionally deceives *Z*, and thereby dishonestly induces *Z* to deliver the article, intending not to pay for it. *A* cheats.

(e) *A*, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives *Z,* and thereby dishonestly induces *Z* to lend money. *A* cheats.

(f) *A* intentionally deceives *Z* into a belief that *A* means to repay any money that *Z* may lend to him and thereby dishonestly induces *Z* to lend him money. *A* not intending to repay it, *A* cheats.

(g) *A* intentionally deceives *Z* into *A* belief that *A* means to deliver to *Z* a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces *Z* to advance money upon the faith of such delivery. *A* cheats; but if *A,* at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) *A* intentionally deceives *Z* into a belief that *A* has performed *A's* part of a contract made with *Z*, which he has not performed, and thereby dishonestly induces *Z* to pay money. *A* cheats.

(i) *A* sells and conveys an estate to *B*. *A,* knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to *Z*, without disclosing the fact of the previous sale and conveyance to *B,* and receives the purchase or mortgage money from *Z*. *A* cheats.3595

Comments

1. Scope

The offence of cheating, as defined in this section, contemplates two distinct forms of cheating, namely:

(a) a fraudulent or dishonest inducement of the person deceiving to act in one or the other of the two ways, specified in the section, in respect of his property, and
(b) an intentional inducement of the person deceived to act, or omit to act, to his injury.

Deception, which is the means of the offence, is common to both forms. Deception has in it the element of misleading, or of making a person to believe something which is not real. It implies causing of a person to believe as true something that is false.[75] To constitute an offence of cheating, the first and foremost element is deception. Unless there is deception, the offence of cheating cannot be made out.[76] In the explanation to the section, dishonest concealment of facts is a deception within the meaning of the section. Therefore, the prosecution must prove dishonest concealment of facts in order to secure a conviction for cheating.[77]

A misrepresentation from the very beginning is a *sine qua non* for constitution of an offence of cheating, although in some cases, an intention to cheat may develop at a later stage of formation of the contract.[78]

The offence of cheating is committed if property is obtained by a false statement or misrepresentation. It is no doubt true that to constitute deception, the false statement must be of an existing fact. However, a statement as to future conduct, which amounts to misrepresentation of fact, is nonetheless a statement of an existing fact. It follows that every promise by a person as to his future conduct implies a statement of intention about it. If a person makes a false representation regarding his future3596 conduct and thereby obtains property from another, the misrepresentation made by him would fall within the ambit of s 415, IPC . As already stated, the explanation to s 415, IPC, says that a dishonest concealment of facts is a deception within the meaning of the section. If an accused makes a false representation that he would deliver goods to the complainant on a future date which, he knows, he has no intention of doing, and thereby obtains property from the complainant, it would be reasonable to infer that the accused was acting dishonestly.[79] The language of the said s 415 makes it abundantly clear that where property is obtained by an accused by misrepresentation, it will be safe to infer that his intention was to deceive the other person into the belief that he would perform his part of the contract.[80] A promise as to future conduct not intended to be kept, amounts to cheating as much as a false representation to present intention.[81] A false representation by an accused with respect to future conduct amounts to cheating in terms of s 415, IPC .[82]

Money obtained by a person through deception may give rise to a civil liability, but that does not, and cannot, mean that he is immune from a criminal charge even if the prosecution succeeds in proving that he intended to dishonestly obtain money by misrepresentation.[83] It would be an error to suppose that the existence of civil proceedings between the parties,[84] or a civil remedy, should necessary exclude trial by a criminal court of a criminal offence. Where the accused obtained money on a hypothecation bond on a false representation that the property belonged to him, it was held that the accused was guilty under s 420, IPC .[85] It is only in case where the representation, on the basis of which money is obtained by the accused, was correct at the time when it was made, or was not false to the knowledge of the accused, and only subsequently the accused became dishonest or failed to carry out his part of the contract that the dispute can be said to be of a civil nature.[86]

No action can be initiated in criminal court unless intention to cheat is found present.[87]

2. Law of Singapore

Whoever by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person or consents that any person shall retain any property or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation of property is said to 'cheat'.

A dishonest concealment of facts is deception. Mere breach of a contract is not in itself sufficient to constitute original fraudulent intention.3597

Deception is the key element in the offence of cheating though deception is not specifically defined under the section the illustrations to the section suggest that it involves falsehood, misrepresentation both expressly and impliedly.[88]

Malaysia

As to the meaning of 'fraudulently', it refers to an act done with the intention to defraud. The phrase includes the *mens rea*, *i.e.* the intention to deceive and consequent injury or gain. However the loss need not necessarily be sustained by the person deceived.[89]

3. The Two Parts of Section 415 --Analysis

The section may be analysed as follows:[90]

Whoever, by deceiving any person, induces the person, so deceived,

(a) fraudulently or dishonestly:

(i) to deliver any property to any person, or
(ii) to consent that any person shall retain any property; or

(b) intentionally:

(i) to do, or omit to do, anything which he would not do, or omit, if he were not so deceived, and
(ii) such act, or omission, causes, or is likely to cause, damage or harm to that person in body, mind, reputation or property.

It would be found from the above analysis that there are the following two common elements in respect of cheating in either of the two ways:

(a) some person has been deceived, and
(b) as a result of such deception he is induced to do any of the acts specified in the section.

In other particulars, the two parts of the section are different. The main points of difference are as follows:

First Part

(a) It is necessary that the person deceiving acts fraudulently or dishonestly.[91]
(b) There must be reference to some property which the person deceived, delivers to any person or consents to its being retained by any person.
(c) A damage or harm is not necessary.

Second Part

(a) The act must be intentional.[92] The terms 'fraudulently' or 'dishonestly' do not find a place in the second part.3598
(b) No property may, at all, be involved.[93]
(c) Some damage or harm is necessary by any act or omission which the person deceived is induced to do or omit to do.

The form of cheating under the first part of the section consists of deceit coupled with fraudulent or dishonest inducing of the person deceived to do one or the other of the two things regarding the disposal of his property, whereas, the form of cheating under the second part of the section consists of deceit coupled with an intentional inducing of the person deceived to do, or omit to do, any act which act results, or which is likely to result, in damage or harm to that person in his body, mind, reputation or property. There are, thus the following two elements in the form of cheating under the second part:

(a) The person deceived is thereby intentionally induced to act, or to omit to act, in consequence of the deceit, *i.e*., there is deceit, followed by an action or non-action in consequence, which is intended by the deceiver. However, this by itself, is not cheating. The conduct contemplated by the deceiver, which follows in consequence of his deceit, may be to the advantage even of the person deceived. Deception in order to induce beneficial action is not cheating (a *pius fraus* is not fraud in law); and
(b) The act, or omission, of the person deceived, which is intended by the deceiver, must be one which is injurious to the person deceived, either in fact or in tendency, *i.e*., it must cause, or it must be likely to cause, 'damage or harm in body, mind, reputation or property'. These words have nothing to do with the first part of the section which deals with a delivery, or retaining, of property in consequence of the deceit. They refer only to the doing of, or omitting to do, anything else.[94]

The aforesaid distinction has been clearly brought out in the under noted cases.[95]

4. Essential Ingredients

To constitute an offence under this section, the following ingredients[96] must exist, namely:

(a) the accused must have deceived the complainant fraudulently or dishonestly or intentionally; and
(b) by means of such deceit, the complainant must have been induced to change his position:3599

    (i) by delivering any property to any person (including the accused himself) or by consenting that any person shall retain any property, or
    (ii) by doing, or omitting to do, anything which he would not do, or omit, if he were not so deceived, and such act, or omission, causes, or is likely to cause, damage or harm to the complainant in body, mind, reputation or property.

There must either be dishonest misrepresentation or dishonest concealment of facts on the basis of which the complainant (*i.e*., the person deceived) delivers any property to the offender or consents that the offender shall retain the property already delivered.[1] Deception is the quintessence of the offence under s 415 .[2]

Deception is a necessary ingredient for the offence of cheating under both parts of s 415, IPC .[3]

5. Mere Failure to Keep Promise is no Cheating

In order to constitute an offence of cheating the intention to deceive should be in existence when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise. Mere failure to keep the promise subsequently cannot be presumed as an act leading to cheating.[4]

6. Doctrine of Constructive Notice

What the court has to consider as to what were the facts and whether the person cheated did know the real facts or not. That he must be deemed to know certain facts because of the operation of law will not affect the case. That will only affect his right in the property which he acquires. The doctrine of constructive notice is intended to safeguard the interests of a third person, and not to exonerate the offender who obtains money by making a false representation.[5]

7. Wrongful Gain and Wrongful Loss

It must further be noted that as a result of the dishonest inducement of a person, there can be either wrongful loss to the complainant or wrongful gain to another person including the offender. Whether any one of these results follows on account of the deception practiced by the offender, then the offence of cheating would be complete.[6]3600

8. Requirement of Section 415

Section 415, IPC defines 'cheating'. The said provision requires: (i) deception of any person; (ii) whereby fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property; or (iii) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. Deception of any person is common to the second and third requirements of the provision. The said requirements are alternative to each other and this is made significantly clear by use of disjunctive conjunction 'or'. The definition of the offence of cheating embraces some cases in which transfer of property is occasioned by the deception and some in which no transfer occurs. Deception is the quintessence of the offence.[7]

9. Cheating Distinguished from Extortion

Extortion, like cheating, requires that there is dishonest inducement. The act must also be done intentionally. Both s 383 and the second part of s 415, IPC use the word 'intentionally'. In both cases, consent is given. Thus, inducement, intention and consent are common elements in both the offences. The difference, however, lies in the *modusoperandi*. In extortion, consent is obtained by putting a person in fear of any injury while in the case of cheating, consent is obtained by deception. In the case of cheating, consent is willingly given, though by reason of deception it is not a consent. In the case of extortion, consent is not intended to be given but is obtained by putting the victim in fear. However, the obtaining of decrees by means of forged documents is neither cheating nor extortion as defined in the IPC .[8]

10. Criminal Misappropriation Distinguished from Cheating

Commentary under the same heading in s 403, *ante*, may be referred to.

11. Criminal Breach of Trust and Cheating--Distinguished

A person, who obtains property by trick from another, bears no resemblance to a trustee under s 405, IPC . The property, acquired by trick, cannot be the subject matter of a trust so as to bring the offender under s 409, IPC, for the appropriation of that property to his own use. For a criminal breach of trust, the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. That confidence cannot arise when the property is acquired by the offender by some trick. Such a trick prevents true consent from arising. If property is obtained by trick, or by any other lawful means, then there cannot be any entrustment, and if the offender appropriates that property to his own use, he cannot be said to have committed an offence of criminal breach of trust, the reason being that in such a case, there is no trust created by the owner of the property.[9]3601

12. Cheating Distinguished from Breach of Contract

The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement, which may be judged by the subsequent act but of which the subsequent act is not the sole creation.[10] Every breach of contract cannot be cheating. The concept of deception should exist in cheating from the very start of the transaction. If that is wanting, there would be no offence of cheating even though there is no payment of price of the goods taken on credit. [11] A mere breach of contract cannot give rise to a criminal prosecution.[12] Likewise, a mere dishonouring of a cheque by a bank, issued by the accused is not sufficient to make out a case of cheating against him unless the complainant connects the giving of the cheque with placing of the order by the accused and the supply of the goods thereunder. Giving of a cheque is nothing but a promise to pay. If the promise is not fulfilled, the right of the aggrieved party is to sue and to seek civil remedy. It does not give rise to any criminal action. Subsequent refusal to pay the price of the goods, already delivered, does not *per se* give rise to a criminal action.[13] Where, therefore, there is no cheating at the time of the agreement, the failure to return consideration of the agreement would not amount to cheating. Remedy only by way of damages would be available.[14]

The question whether the material on record discloses only a breach of civil liability or a criminal offence of cheating will depend upon whether the complainant, in parting with his money, acted on the representation of the accused and believed the truth thereof and whether this representation, when made, was in fact false to the knowledge of the accused and he had a dishonest intention from the outset.[15] Lending of the amount by the complainant to the accused is a clear case of contract, and if the same is not paid, it can only give rise to a civil liability as a result of breach of the contract. The mere fact that subsequent to the lending of the said amount, a cheque was issued by the accused and it was later dishonoured, cannot convert the civil liability into a criminal liability.[16] Incurring a debt with a promise to pay back within a certain period and failure on the part of the debtor to pay back within the stipulated3602 period does not make it a criminal offence. It is a pure civil liability enforceable through the civil courts.[17]

Where the complainant owed money to the accused on three bonds and alleged that he had paid an amount in full satisfaction of those bonds but the accused returned only two bonds and kept the third saying that he had not paid the debt due on it, it was held that the dispute was of a civil nature.[18] Non payment of amount due under a contract does not amount to cheating.[19] Where there is no clear and conclusive evidence of criminal intention of the accused at the time when the offence is said to have been committed and where the party said to be aggrieved, has an alternative remedy in a civil court, the matter should not be allowed to be fought in a criminal court.[20] A criminal court should not be used to collect a civil debt.[21] Merely because the conduct of a debtor has been highly unethical, the criminal process cannot be used against him in order to compel him to discharge a civil liability.[22] When the accused obtained money for bringing about a marriage but failed to do so or to return the money, the case was held to be one of civil liability.[23]

Where the accused made a contract of the marriage of his daughter to the complainant's brother and obtained some money and performed some ceremonies but later it was found that the girl was being married to another person, it was held that there was only a refusal to marry the girl to the complainant's brother, and it was only a breach of contract.[24] If the circumstances change and something intervenes in between the placing of the order by the accused and his refusal to take delivery of the goods, it would not

be possible to draw an inference to the effect that the accused had no intention to take the delivery of the goods and honour the hundis of the complainant from the very beginning. If, in the meantime the market goes down and, therefore, the accused changes his mind not to take the goods under his order, it cannot be said that the accused had no intention of paying the price of the goods from the very start.[25] If, however, the circumstances continue unaltered from the beginning till the end, *i.e*., the *satusquo* continues till the final act or omission by the accused, it may be inferred that the accused had no intention of paying the price, from the very start of the transaction, when he ultimately refuses to take the delivery of the goods and honour the *hundis* of the complainant.[26] If, therefore, the evidence on the record shows that the complainant in parting with his money, had acted on the representations of the accused and in belief of the truth thereof and those3603 representations, when made, were in fact false to the knowledge of the accused and he (*i.e*., the accused) had dishonest intention from the very beginning, the offence of cheating is made out.[27] Where a girl, who was already married, was made to marry to another person from whom the accused had obtained money without disclosing that the girl was already married, it was held that he was guilty of cheating.[28] Where a person represented a girl to be the daughter of one woman when she was, within his knowledge, the daughter of another woman, it was held that he was guilty of the offence under s 416 .[29] Where the accused sold a minor married Rajput girl to the complainant representing her to be a Mahajan virgin, it was held that the accused were guilty of cheating.[30] Where an accused knows from the very beginning that the representation, which he is making to the complainant, is false and it is on the basis of that representation, that he obtains a certain sum of money from the complainant, the accused would be guilty of cheating. Such a willful misrepresentation of fact with the intent to defraud would clearly amount to cheating.[31]

To hold a person guilty of cheating, as defined in s 415, IPC, it is necessary to show that at the time of making the promise he had fraudulent or dishonest intention to retain the property or to induce the person so deceived to do something which he would not otherwise do. It must be shown that the accused had fraudulent or dishonest intention at the time of making the representation or promise and such a culpable intention right at the time of entering into an agreement cannot be presumed merely from his failure to keep the promise subsequently.[32] In the instant case the two appellants were senior employees of FCIL (Food Corporation of India Ltd) and it was alleged by IEL (Indian Explosive Ltd) that at the time of entering into the tripartite agreement, the appellants, by having suppressed the fact that FCIL was likely to be declared a sick company and was, in fact, declared to be so by BIFR, had dishonest intention to induce IEL to enter into the said agreement, which amounted to cheating. But there is not even a whisper let alone a specific averment that the appellants had dishonestly 'induced' IEL to enter into the said agreement/ arrangement. On the contrary, the complaint clearly revealed that IEL was fully conscious of the precarious financial health of FCIL at the time it had decided to enter into contract with FCIL and BCCL to ensure a regular supply of its basic raw material from FCIL so that its production of explosives did not suffer. A mere mention of the words 'defraud' and 'cheat' in the complaint, in the setting that these have been used, was not sufficient to infer that the appellants had dishonest intention right at the beginning when, demonstrably, after due deliberations a tripartite agreement was signed, which under the given circumstances at that juncture, was considered to be in the interest of all the three parties to the agreement. At best the present case was of breach of contract on the part of FCIL. No *primafacie* case was3604 made out against the appellants for offences under ss 420, 406 and 120B, IPC . The complaint was quashed on petition filed under s 482, CrPC .[33]

A person would not be convicted under ss 415 / 420, IPC if culpable intention of deceiving is found absent at the time when the initial promise was made.[34]

13. Criminal Breach of Trust Distinguished from Cheating, Theft and Criminal Misappropriation

Commentary under the same heading in s 405, *ante*, may be referred to.

14. 'Whoever'

A fraudulent representation may be made directly or indirectly. A fraudulent representation by a person

acting as an agent for the accused would be by and on behalf of the accused.[35]When guilty intention is made an ingredient of an offence, it postulates that the accused person must have prior knowledge of the circumstances under which he is acting. The action taken by him must be voluntary. Nobody, who is forced to do an act by an outside agency or is dishonestly induced by somebody else to do a particular act, can be said to have done that act with the intention of doing it.[36]

A bank, being a juridical person, and not an actual person having a physical body, cannot be charged with cheating as it cannot be said to have the *mensrea* requisite for the offence of cheating.[37] Similar is the case with a company as it cannot be punished with imprisonment.[38] In the word 'whoever' occurring at the beginning of ss 415 and 120-B, IPC cannot include in its sweep juridical person like a 'company' as it is incapable of having the requisite *mens rea* to commit the offence of cheating.[39]

15. 'By Deceiving any Person'

Generally speaking 'deceiving' is to lead into error by causing a person to believe what is false or to disbelieve what is true and such deception may be by words or by conduct. A fraudulent representation can be made directly or indirectly.[40] A person is deceived when he is induced to believe as true which is untrue. Deception is an essential ingredient of the offence of cheating. A person may be deceived quite innocently, but such deception does not amount to cheating. If the person, making the representation, honestly believes the representation to be true, there can be no question of cheating.[41] Where, however, a person is deceived knowingly, then the deception may well amount to cheating. If the offender knowingly makes a false representation with a view that the other person should act upon it, then that would3605 amount to cheating.[42] In *HS Gill v Manjit Singh* ,[43] the accused knew that there was one loan outstanding against the property in dispute, but he did not disclose it to the purchasers. He rather falsely represented to them that it was free from all encumbrances. It was held that it was a dishonest concealment of fact which amounted to deception within the meaning of this section. In *Sada Ram v Emperor* ,[44] the accused, a minor, representing himself to be a major, obtained a loan from another person. On a suit being filed against him for recovery of the amount, he said in his defence that he was a minor at the time when he borrowed the money. It was held that his case fell under illust (f) to this section, as his intention from the outset was dishonest. Inducing a person to purchase a mixture of groundnut oil with rock oil by making the purchaser to believe that he was buying clean groundnut oil would be a deception.[45]

Misleading statements which withhold the vital facts, for intentionally inducing a person to do or omit to do something, would amount to deception.[46]

Deception is the quintessence of the offence under s 415 of the IPC .[47]

The accused was found at the shop of jewellery dealer with pieces of yellow alloy with intention to sell them as articles of gold, represented them as gold with fraudulent and dishonest intention to cheat the shop owner. Dishonest concealment of facts is a deception within the meaning of cheating. Held, accused committed the offence of cheating.[48]

The means of deceit are false representations. False representations may be made by a writing, words, or conduct.[49] The section does not, in any manner, limit the mode in which the deception may take place, nor does it make it necessary that the deception should be by express words; it may be conduct or implied in the nature of the transaction itself.[50] It may be inferred from all the circumstances including the conduct of the accused in obtaining property.[51] As to what is sufficient to constitute deception must be decided in each case on its own merits.[52] Dishonest intention cannot be inferred from the mere fact that the accused could not fulfil his promise.[53] Where the accused obtained some amounts from the complainant by bribing a certain person in order to get a post for the complainant and the accused did spend a large amount in payment of the bribe and the complainant was called for an interview for3606 the post, it was held that in obtaining the money, the accused did not practice any deceit and, therefore, no offence of cheating was made out.[54]

Deception is necessary element of cheating.[55]

A, pretending to be a dairy man, orders, by letter, two milk cans, from a dairy supply company, which he obtains. This is deceit expressed in writing. *A*, a married man, tells *B*, a woman, that he is unmarried and proposes himself to be married to her, whereby he obtains money from her, promising to furnish a house therewith. This is deceit by words. *A* purchases goods from *B* giving him a cheque on a bank, in which he has no account, thereby representing that he has an account in the bank and the cheque will be paid. This is deceit by conduct.

The question whether there was intention to deceive must be answered with reference to the date when the contract was made.[56]The dishonest intention must either precede or accompany the act of dishonesty, and not one which follows after.[57] The evidence must establish the existence of a fraudulent or dishonest intention at the time of commission of the act in respect of which cheating is alleged.[58]It has to be shown that the representation made was false to the accused's knowledge at the time when it was made, and the act would not come within the definition of cheating if the representation has turned out to be untrue at a future date.[59] It must be shown that the money was received with preconceived intention of denying it later on. If the intention is changed subsequently, it would not be cheating.[60] The mere taking money one day and dishonestly, running away the next day without repaying the same is not necessarily cheating. There must be an intention to deceive and defraud at the time of taking the money. The subsequent conduct would only be evidence of this previous dishonest intention.[61] Where the accused obtained some money in advance from the complainant on the representation that he would supply some paddy within a certain date but the arrangement failed and paddy could not be supplied, it was held that it could not be said that the accused had not made arrangement for the supply and, therefore, he was not guilty of cheating.[62] The facts may, however, warrant an inference that the accused's representation was false at the time of making it and that he had no intention of carrying out the promise.[63]

16. 'Fraudulently or Dishonestly'

It is a settled law, by catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or3607 dishonest intention at the time of making promise or representation.[64] The word 'fraudulently', being used in the section, together with the word 'dishonestly', must mean, if it has any meaning at all, something different from 'dishonestly'. The two terms being separately defined in ss 24 and 25, IPC, the word 'fraudulently' is not confined to a transaction in which there is wrongful gain on the one hand and wrongful loss on the other, either actual or intended.[65] The word 'fraudulently' is used in a sense not covered by the word 'dishonestly'; it is not confined to a transaction of which deprivation of property forms a part.[66] Where no pecuniary question arises, the element of dishonesty need not be established and it would be sufficient to establish that the act was fraudulent. However, where the allegation is that a person has dishonestly induced another to part with property, something different has to be considered and that is whether he has thereby caused a wrongful loss to the person, who parted with property, or has made a wrongful gain to himself. These are the two facets of the definition of 'dishonestly' and it is enough to establish the existence of one of them. The law does not require that both should be established.[67] The ingredients of the section will be attracted if there was *mens rea* for the accused to induce the complainant to part with the money making him to believe that it will be adjusted towards the debt.[68] In *Ashutosh Mallick v Emperor* [69] the accused by making a false representation that he was an employee of the Calcutta Municipal Corporation, obtained ten rupees as subscription from the health officer of the corporation towards the fund of a charitable society. The accused duly made over the amount to the said society. It was held that he was not guilty of cheating as there was neither wrongful loss, nor wrongful gain. If an act is done under a *bonafide* belief and there is no wrongful gain to the accused or wrongful loss to the complainant and there is no fraudulent conduct on the part of the accused, the case would not fall under s 415 .[70] The accused bank manager informed the loanee prior to the liquidation of loan amount that the pledged ornaments will be returned after clearance by the controlling office due to her husband's involvement in fraud, who was a former bank employee. The bank manager refused to return the ornaments for want of such clearance, cannot be said to have the dishonest intention in inducing the loanee to pay loan for delivery of ornaments.[71] Where the accused produced in a civil court, a forged bond which was a facsimile of a genuine bond and it had not been proved that the genuine bond had been discharged, it was held that the accused's act was not dishonest; it was nevertheless fraudulent.[72]

Demand or collection of excess profit, does not amount to cheating or criminal breach of trust.[73]3608

17. 'Induced'

Mere making of fraudulent representation is not sufficient. It has to be established that the accused made some fraudulent representation and as a result of that fraudulent representation the complainant was induced to part with some property or to do some act, which would not have been otherwise done and which act caused, or was likely to cause, damage or harm to the complainant in body, mind, reputation or property.[74] It must further be noted that as a result of the dishonest inducement of a person, there can be either wrongful loss to the complainant or wrongful gain to another person, including the offender. Whether any one of these results follows on account of the deception practiced by the offender, then the offence of cheating would be complete.[75] Where no inducement was made by the accused company, in fact the complainant had approached the accused for grant of license for running a health clinic and had deposited license fee, no case of cheating was made out, and criminal proceedings were quashed.[76] Where the evidence did not show that the accused ever induced the complainant fraudulently or dishonestly to give his services, no offence under ss 406, 420, IPC was committed by the accused.[77]

A case would not be a case of cheating if there is no inducement. In *Sarda Saran v Emperor* ,[78] the accused who was a temporary clerk at Lucknow, went to Kanpur on casual leave. He was appointed there as a permanent head clerk in the Kanpur Cantonment. He applied for extension of his leave at Lucknow, but the leave was not granted. His services at Kanpur were terminated on payment of salary for one month. On joining at Lucknow, he again drew his pay, but he made it clear that he had already drawn pay for a month at Kanpur and he would have to return one of the two sums. It was held that the accused had not induced the Kanpur authorities to pay him the salary. There was, therefore, no inducement and the accused was not guilty. However, in *Swami Dhirendra Brahmchari v Shailendra Bhushan & Another* ,[79] the applicants deposited an amount having being led to believe by the advertisement that the yoga teachers training course is recognised by the government. The FIR and evidence collected during investigation clearly brought out the parting off of the amount on the basis of fraudulent misrepresentation, the ingredient of cheating was found to be established.

18. Proximate Connection between Deception and Inducement

It is necessary to show that there is a proximate connection between deception practiced on the complainant and his being induced to part with some property. If the connection is too remote or very indirect, it would be difficult to say that the offence of cheating would be complete.[80]If the result is a mere possibility, and not a necessary consequence of the act, an essential element of the offence would3609 not be satisfied. This has to be determined with reference to the facts and circumstances of a particular case.[81] If damage or harm is dependent upon the future act of some other person, then such damage or harm is too remote. The section contemplates that the act is in itself likely to cause damage or harm and it is not dependent upon an entirely problematical action of some other person. To use a trite phrase, the act done or omitted to be done, must be the *causa causans* of the harm caused or likely to be caused.[82] It is necessary that the person deceived must have acted under the influence of the deceit and the damage must not be too remote.[83]

19. Damage or Harm must be the Approximate and Natural Result

The damage or harm, as aforesaid, caused, or likely to be caused, to the complainant in mind, body, reputation or property must be the necessary consequence of the act done by reason of the deceit practiced or must be necessarily likely to follow therefrom.[84] The damage or harm must be the approximate and the natural result of the act or omission; it does not include fake and contingent injury.[85] In *AR Milton v Sherman* ,[86] the accused, a married man, falsely representing himself to be a bachelor, was accepted, for the marriage of his daughter by the complainant. The complainant, when he found out that the accused was a married man, asked his daughter to give up the accused. The daughter, however, left the complainant's house and went to the accused. It was held that the seduction having taken place after the deception had been detected, it could not be said that it was the natural consequence of the

deception and the accused was not guilty of cheating.

20. 'Person'

The government is a corporate body and comes under the definition of 'a person' in s 11, IPC . A government has to act through its servants. If the deception is practiced on a servant of the government and the servant is made to do anything which he would not have done if he had not been deceived, and the act causes damage to any property of the government, the act will amount to cheating.[87]

The person need not necessarily be ascertained when the false representation is made, *e.g.*, a false representation may be made by an advertisement addressed to the public.[88]3610

21. 'Property'

The term 'property', in this section, includes movable property like money[1] as well as immovable property.[2] Whether an article is property does not depend upon its possessing the monetary value or market value as such. It would still be property if it has some special value for the accused.[3] Thus, a motor driving licence,[4] an import licence,[5] a passport,[6] an export quota,[7] and an income tax assessment order[8] are all property. An admission card to sit in an examination is property.[9] Similarly, some certificates obtained from the deputy inspector of schools by stating untruly that the accused had passed an examination in a certain year,[10] or a health certificate obtained from a health officer,[11] would be property. A warrant of attachment, issued by a civil court, would also be property.[12]

It is not necessary that the property, which a person has been induced to deliver must be of the person on whom deception has been practiced.[13]

22. Delivery of Property

For a person to be convicted under s 420, IPC, it has to be established not only that he has cheated someone but also that by doing so, he has dishonestly induced the person who was cheated to deliver any property *etc*.[14] It is possible that the offence may not fall under s 420, IPC, when there was no delivery of any property or valuable security by the person to whom representation was made.[15] It is of essence in the offence of cheating that the delivery of property should be by the person who himself was deceived by the accused.[16]

The word 'possession' does not occur in s 415, IPC, and it may be said that a man cannot give delivery of property, the delivery of which is not in his power or at his order. However, it appears to us that a man can give delivery through another, of property within the meaning of s 415, IPC, which is not in his possession, but which is at his order. If, for instance, A had an agreement with *B* that *B* will give delivery of certain goods in his possession on account of A on the receipt of delivery note from *A*, and *C* by deception obtains a delivery note from *A* or *B* and thereby gets3611 possession of goods from *B*, it appears difficult to us to say that he has not got delivery of property from or through A directly as a result of his deception of *A*.[17]

Section 420 of IPC clearly stipulates that whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person shall be punished. The assertion made in the complaint petition as quoted above would clearly reveal that the mode of business was credit basis. Thus, there was no inducement or deception to deliver any property. Thus the allegations made in the complaint petition, even taken on their face value, do not satisfy the ingredients of the offence alleged.[18]

23. Delivery of Property--Not always Necessary

It is worth mentioning here that it is not correct to say that unless there is delivery of property to any person, no offence of cheating will be made out. The person deceiving, if he intentionally induces the person deceived to do or omit to do anything which he would not do, or omit, if he were not so deceived,

would nevertheless be guilty of the offence of cheating provided some damage or harm to that person is caused in body, mind reputation or property. Thus, where the accused dishonestly induced the complainant as well as his daughter to go into a ceremony of marriage by professing himself to be a bachelor and it was found that his first wife was alive and it resulted in damage or harm to the complainant and his daughter in body, mind, reputation or even property, the offence under ss 416 and 417, IPC, was held to have been made out.[19]

Where the accused, by making false promise to marry the victim, thereby inducing her to have sexual act with him which would undoubtedly cause harm to her mind and reputation, the offence of cheating is made out even though no parting of property is occasioned by deception.[20]

24. 'Intentionally'

A guilty intention is an essential ingredient of the offence of cheating. In other words, *mensrea* on the part of the accused must be established before he can be convicted of an offence of cheating.[21] In *Mahadeo Prasad v State of West Bengal* ,[22] it was held as follows:

> Where the charge against the accused is under s 420 in that he induced the complainant to part with his goods, on the understanding that the accused would pay for the same on delivery but did not pay, if the accused had at the time he promised to pay cash against delivery, an intention to do so the fact that he did not pay would not convert the transaction into one of cheating. However, if on the other hand he had no intention whatsoever to pay but merely said that he would do so in order to induce the complainant to part with the goods then a case of cheating would be established.3612

In *Hari Prasad Chamaria v Bishun Kumar Surekha & ors* ,[23] it was held that unless the complaint showed that the accused had dishonest or fraudulent intention at the time the complainant parted with the money it would not amount to an offence under s 420, IPC, and it may only amount to breach of contract. In *GV Rao v LHV Prasad & ors* ,[24] it was reiterated that guilty intention is an essential ingredient of the offence of cheating and, therefore, to secure conviction *mens rea* on the part of the accused must be established. It has been further held that in order to constitute the offence of cheating the intention to deceive should be in existence at the time when the inducement was offered. To hold a person guilty of the offence of cheating it has to be shown that his intention was dishonest at the time of making the promise. Such dishonest intention cannot be inferred from the mere fact that he could not subsequently fulfil the promise.[25] Under ss 420 and 415, IPC, the stage at which fraudulent or dishonest intention should exist in order to make out the offence of cheating, such intention must be shown to exist at the time of making of the inducement, otherwise, mere failure to keep a promise subsequently cannot be presumed as an act leading to cheating.[26] When the complainant himself stated that the accused who had taken the vehicle on hire-purchase had failed to pay certain instalments, the accused had no dishonest intention on the date of entering into the hire-purchase agreement to cheat or induce the complainant.[27]

The second part of the section does not refer to fraudulent or dishonest deception; it only requires that the inducement must be intentional and there must be an act which causes, or which is likely to cause, a damage or harm although the deceiver has not acted fraudulently.[28]

25. A Company and Corporate Bodies

The companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary *mensrea* for the commission of criminal offences. A corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring *mensrea*. The criminal liability of a corporation would arise when the offence is committed with regard to the business by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the

person or the body of persons.[29]Where the respondent company issued prospectus and invited large number of companies to make investments, but made misleading statements, withheld vital facts and caused loss to the investors to the amount of Rs. 500/- crores, it was held that the act of the respondent company amounted to offence of cheating3613 within the meaning of s 415, IPC . The order of the High Court quashing criminal proceedings under s 415, IPC was set aside.[30]

26. 'Act or Omission'

Commentary of s 33, vol 1, may be referred to.

27. Harm

Commentary of ss 87 and 95, vol 1, may be referred to.

28. Harm to the Person Deceived

It is not necessary to constitute an offence under s 415, IPC that the act, which the person deceived is induced to do, should actually cause harm to him. It is enough that the act, which the person deceived has been induced to perform, is likely to cause damage or harm to him. The dictionary meaning of the word 'likely' is 'probable'.[31] It is also not necessary that the accused should have intended to cause harm or damage. It is sufficient if the deceiver intentionally induces the person deceived to do, or omit to do, anything, and such act, or omission causes, or is likely to cause, damage or harm.[32]It is to be noted that all damage resulting, or likely to result, as a natural consequence of the induced act would make out a case of cheating.[33] If, however, no damage or harm is actually caused, nor is there any likelihood of its being caused, no case of cheating would be made out.[34]

Where a sanitary inspector asked the name and address of the accused for prosecuting him for causing nuisance and the accused gave a false name and address, it was held that the accused had not acted fraudulently in giving a false name and address nor could it be said that his act was likely to cause damage or harm to the reputation of the sanitary inspector as an efficient officer, and, therefore, no case of cheating was made out.[35] Similarly, an application for a loan to a bank with false particulars is not likely to cause any damage to the property of the bank.[36]

No offence of cheating can be said to have been committed if a third party on whom no deception has been practised, sustains pecuniary loss in consequence of the accused's act.[37] If a person is induced by deception to do, or omit to do, something and the act or omission causes, or is likely to cause, damage or harm to another person, no offence of cheating is committed.[38] a person, who practises deception on a3614 government servant which results in damage and harm to third party, cannot be punished under ss 419 and 420, IPC .[39]

29. 'Harm to...mind'

Damage or harm has not been defined in the IPC, but it covers both injury to the mental faculties and also mental pain just as damage and harm in body would cover wounds or other hurts and also physical pain.[40]

30. 'Harm to...Reputation'

Where, as a result of conspiracy among the accused, a doctor certifies a dying person as a first-class life, that act is likely to cause harm to his moral as well as to his professional reputation. It is something which the court will presume having regard to the natural events and human conduct.[41] However, in *Kanumukkala v State of Andhra Pradesh* ,[42] an accused, who was working on a temporary post in the medical services, applied for a permanent post to the public service commission making false representation as to his name, place of birth and father's name and also that he held a MBBS degree. After interview, he was selected for the post by the public service commission. It was held that there was

no likelihood of causing any damage to the reputation of the public service commission by such appointment and the case did not fall under the latter part of s 415 even though he had deceived the commission by representing himself to be a duly qualified candidate and thus induced it to select him for the post. He was, however, held to be guilty under s 419, IPC .

31. Explanation: Dishonest Concealment

A dishonest concealment of facts is a deception within the meaning of this section. The explanation refers to a dishonest concealment of facts which it is the duty of the person concealing them to disclose to the person with whom he is dealing.[43] Secondly, the explanation refers only to actual deception, and not to the concealment of deception by someone.[44] a vendor of immovable property cannot be convicted of cheating if he omits to mention that' there is an encumbrance on the property unless it is shown that he was asked by the vendees whether the property was so encumbered and he had replied that it was not or that he sold the property on the representation that it was unencumbered.[45] Where there is no pleading in complaint petition or in FIR that property was sold with a predetermined intention of cheating, no offence under s 420, IPC is made out; FIR/complaint would be quashed.[46] The prosecution case was that the accused promised to provide certain amenities/facilities3615 to the purchasers of the flats which they did not. Held, the element of deception was lacking in the case. The allegations disclosed breach of contract, which did not disclose criminal liability.[47] In *Ramkrishna Nandram v Ganesh Narain* ,[48] a person mortgaged a house to *A*, but prior to that he suffered a decree (passed against him) creating a charge upon the mortgaged property and the mortgage deed contained a recital that the mortgaged property was not under mortgage or sale anywhere. It was held that it did not amount to cheating as the mortgagor was not bound to disclose the charge. Where the person, whose title was defective, mortgaged a house and agreed that the mortgagor would make good money from other property if the mortgagee was not able to recover it from the mortgage rights, it was held that the mortgagor was not guilty of cheating even though he knew at the time of borrowing the money that his title was defective.[49] Where, however, the accused not only refrained from mentioning the fact of the prior hypothecation of movable property but also fabricated evidence to prevent the person advancing the money from becoming aware of it, it was held that they were guilty of cheating.[50] Where some persons issued a prospectus inducing the public to purchase shares suppressing material facts from the public, they were held guilty of cheating.[51] Where some land was sold on the representation that it was free from all encumbrances but the land was already mortgaged under a registered deed, it was held that the accused was guilty of cheating.[52] Misleading statements which withhold the vital facts for intentionally inducing a person to do or omit to do something would amount to deception.[53]*(*

In the instant case at the time of purchase meagre amount was paid by the accused. Cheque given to the complainant for the balance amount was dishonored. The intention of the accused right from beginning was not fair, but was to cheat the complainant. Cognizance taken for the offences under ss 406 and 420, IPC was held proper.[54]

Where a person sells property knowing fully well that he has no title to the property, he commits the offence of cheating.[55]

Where the accused entered into an agreement for the sale of a house to the complainant without disclosing to him at that time that, there was an injunction order of a civil court issued to them, under which they were prohibited from selling the property, and the complainant advanced money to the accused, it was held that it was the duty of the seller to inform the buyer that the accused could not then transfer the property to buyer in view of the injunction order, and that this amounted to dishonest concealment within the meaning of the explanation to s 415, IPC .[56] Where the accused first made a gift of his land to his son, whose name was mutated, and3616 subsequently sold it for consideration to the complainant without disclosing the gift, it was held that he was guilty under s 420, IPC .[57]

75 *PM Natarajan v Krishna Chandra Gupta* 1975 Cr LJ 899 (All) ; *Tarni Kumar Sen v Sachindra Kumar Deb Nath* 1980 Cr LJ

(NOC) 124 (Gau), (1979) 3 Ser LR 535 .

76 *PM Natarajan v Krishna Chandra Gupta* 1975 Cr LJ 899 (All) ; *Bhujang Fakirappa Karade v State of Karnataka* (1976) 2 Kant LJ 250 ; *Moolraj Sharma v Rajeev Dave* 1980 Cr I.R 325, p 327 (UP) (if, as a result of a breach of an agreement, any loss is caused to the complainant, it becomes purely a civil liability); *BS Ahluwalia v Mohinder Kumar Meattle* 1975 Ch LR 93 ; *Ramkrishna Baburao Maske v Kishan Shivraj* (1974) 76 Bom LR 424, 1974 Mah LJ 659 .

77 *Ramkrishan Baburao Maske v Kishan Shivraj* (1974) 76 Bom LR 424, 1974 Mah LJ 659 ; *BS Ahluwalia v Mohinder Kumar Meattle* (1975) 77 Punj LR 13, p 15 (Del) .

78 *Devendra v State of UP* (2009) 7 SCC 495, p 501, 2009 (7) SCALE 613 .

79 *Roopchand v State* 1966 Cr LJ 1367, p 1368, AIR 1966 All 594 .

80 *Ibid.*

81 *Roopchand v State* 1966 Cr LJ 1367, p 1369, AIR 1966 All 594 ; *Nadir Ali Barqa Zaidi v State of Uttar Pradesh* AIR 1960 All 103, p 111, 1960 Cr LJ 188 .

82 *Nadir Ali Barqa Zaidi v State of Uttar Pradesh* AIR 1960 All 103, p 111, 1980 Cr LJ 188 .

83 *Roopchand v State* 1966 Cr LJ 1367, p 1368, AIR 1966 All 594 ; *Arun Bhandari v State of UP* (2013) 2 SCC 801, 2013 AIR SCW 569 .

84 *Gopal Chauhan v Satya* 1979 Cr LJ 446, p 450 (HP) .

85 *Sakaria v Narayanan* (1962) 1 Cr LJ 649, 1962 Ker LT 318 .

86 *Budwar v State* 1957 All LJ 141, 1957 AWR (HC) 293 .

87 *Rama Devi v State of Bihar* (2010) 12 SCC 273, 2010 (9) SCALE 399 .

88 *Vide Halsbury's Law of Singapore.*

89 *Pasupathy v PP* 2005 1 MLJ 493 (*Vide Halsbury's Law of Singapore*).

90 *Setti Rangayya v Somappa* 25 Cr LJ 1193, AIR 1925 Mad 367 .

91 *Chauthi v State* 1978 AWC 187 ; *Jai Karan v State* 1980 Cr LJ (NOC) 2 (All) .

92 *Chuthi v State* 1978 AWC 187 .

93 *MNA Achar v DL Rajgopal* 1977 Mad LJ (Cr) 167, p 168 ; *GB Rao v LHV Prasad and Ors* 2000 Cr LJ 3487 (SC) ; *Iridium Indian Telecom Ltd v Motorola Incorporated* AIR 2011 SC 20, p 40, (2011) 3 SCC (Cri) 1201, 2010 96 AIC 105 (SC) .

94 *Isher Uass v Emperor* 8 Cr LJ 75 ; *GB Rao v LHV Prasad and Ors* 2000 Cr LJ 3487 (SC) .

95 *Luxman Ramchandra Suryavanshi v State of Mysore* (1962) 2 Cr LJ 559, p 560 ; *Pramod Ranjan Choudhury v State* (1963) 1 Cr LJ 716, p 720 (Tripura) ; *Kanumukkala Krishnamurthy v State of Andhra Pradesh* AIR 1965 SC 333, p 335, (1965) 1 Cr LJ 355 ; *Baburam Rai v Emperor* 2 Cr LJ 388 ; *Setti Rangayya v Somappa* AIR 1925 Mad 367, 25 Cr LJ 1198 ; *GB Rao v LHV Prasad and Ors* 2000 Cr LJ 3487 (SC) ; *Tammineedi Bhaskara Rao and Ors v State of Andhra Pradesh* 2007 Cr LJ 1204 (AP) .

96 *Emperor v Bholasingh Amersingh* 25 Cr LJ 1102, p 1103, 1104 (Bom) (DB), AIR 1924 Bom 303 ; *Emperor v Muhammad Shah* 20 Cr LJ 77, p 78 ; *State v Ramadas Naidu* 1977 Cr LJ 2048, p 2050 (Mad) ; *ML Gael v Mukhtar Singh* 1980 Chand LR 262, p 265-266 (Punj) ; *Mata Prasad v Emperor* 21 Cr LJ 362 ; *Satish Jain v State of Uttaranchal* 2006 Cr LJ 1172 (Uttr) .

1 *Prostolite of India Ltd v Munsif Magistrate* 1978 Cr LJ 538, p 539 (All) ; *Tammineedi Bhaskara Rao and Ors v State of Andhra Pradesh* 2007 Cr LJ 1204 (AP) ; *Iridium Indian Telecom Ltd v Motorola Incorporated* AIR 2011 SC 20, p 40, (2011) 3 SCC (Cri) 1201, (2010) 96 AIC 105 (SC) . For further commentary, see under the same heading in s 420, *post*.

2 *Bipul Medhi v State of Assam* 2008 Cr LJ 1099, p 1108 (Gauh) (DB), *Devender Kumar Singla v Baldev Krishan Singla* (2005) 9 SCC 15, 2004 Cr LJ 1774 .

3 *Iridium Indian Telecom Ltd v Motorola Incorporated* AIR 2011 SC 20, p 40, (2011) 3 SCC (Cri) 1201, (2010) 96 AIC 105 (SC) .

4 *Satish Jain v State of Uttaranchal* 2006 Cr LJ 1172 (Uttr) ; *Inder Mohan Goswami v State of Uttranchal* AIR 2008 SC 251, (2007) 12 SCC 1 ; *Vesa Holdings P Ltd v State of Kerala* 2015 (2) Crimes 114 (SC) ; *Dharmendra Singh v Sant Saran Gupta* 2011 (98) AIC 631 (All) ; *Chandrasekhar v State* 2011 Cr LJ 3444 (Mod) ; *Rameshchandra Bhojilal Patel v State of Gujarat* 2011 Cr LJ 1395 (Guj) ; *SVL Murthy v State* (2009) 2 SCC (Cri) 941, (2009) 6 SCC 77 ; *Babu v State of Kerala* 2013 (2) KLT 574, 2013 (2) KLJ 535 (Ker), *VP Shrivastava v Indian Explosives Ltd* (2010) 10 SCC 361, 2010 (10) Scale 177**relied on**).

5 *ML Gael v Mukhtiar Singh* 1980 Chand LR 262, p 265,266 (Punj) .

6 *State v Ramdas Naidu* 1977 Cr LJ 2048, p 2050 (Mad) .

7 *Devender Kumar Singla v Baldev Krishan Singla* 2004 Cr LJ 1774 (SC) .

8 *Emperor v Chuni* 16 Cr LJ 136 (2).

9 *Emperor v Melver* AIR 1936 Mad 353 (FB), 37 Cr LJ 637; *State v Radhakanta Patnaik* 1954 Cr LJ 1429, p 1432,1433, AIR 1954 Ori 213 ; *Rajendra Singh v State of Uttar Pradesh* AIR 1960 All 387, 1960 Cr LJ 857 ; *Udho Ram v State* 1977 All Cr R 133 ; *Iqbal Singh Randhawa v Satpaul Goyal* 1977 Cr LR 134, p 136 (P&H); *Harbhajan Singh v Sada Nand Sakuja* 1977 Ch LR 191, p 194 (P&H); *Rajesh Pal v Mohd Ali* 1974 BLJR 574, p 578 . For further commentary, see under the same heading in s 405, *ante*.

10 *Sheosagar Pandey v Emperor* 37 Cr LJ 38 ; *Raghunathan v Balasubramanayam* 1967 Ker LT 232, p 234 ; *J John v State* 1964 MLJ (Cr) 609, 1964 Ker LT 724 ; Re *BR Venkatachalapathi Chettiar*1971 LW (Cr) 252, p 254; *Mahadeo Prasad v State of West Bengal* AIR 1954 SC 724, 1954 Cr LJ 1806 ; *Asad Ali Tahsildar v Anwar Ali* AIR 1959 Tripura 40, p 41, 1959 Cr LJ 1216 ; *Ratantal Sharma v Mangeram Ghanshyam Das* 1976 LW (Cr) 162 .

11 *Harnarain Sah v Tribenilal* 1972 BLJR 40 ; *Harnam Singh v Emperor* 38 Cr LJ 845 ; *Jay Ram v State* 1971 All Cr R 588 ; *Ravindra Nath Gupta v Jagan Nath Ahuja* 1976 Ch LR 232 (Punj), 1976 Cr LJ 391 ; *Hari Shanker v Om Prakash* 1973 All Cr R 335 ; *Banchamani Saha v Kshir Babu* AIR 1959 Tripura 38, 1959 Cr LJ 1027 ; *Shruti Enterprises Ltd v State of Bihar* 2006 Cr LJ 1961 (Pat) .

12 *Chamalbangwalla v Ram Chandra Rao* (1957) 2 Andh WR 368, p 370, 1957 MLJ (Cr) 603 ; *Ram Niwas v Zafar Abbas* 1978 Cr LJ 706, p 708 ; *Jamadar Rai v Emperor* AIR 1930 Pat 504, 32 Cr LJ 2 ; *Ram Deo Singh v State of Bihar* 2013 Cr LJ 891 (Pat) . *Ram Bharose Singh v Emperor* AIR 1936 Oudh 372, 37 Cr LJ 907 (2); *Deputy Legal Remembrance v Ijiatulla Kazi* 4 Cr LJ 154 (Cal) ; *Deivanaiammal v Nachammal* 1973 Cr LJ 727, 1972 Mad LW (Cr) 227 ; *Asad Ali Tahsildar v Anwar Ali* AIR 1959 Tripura 40, 1967 Cr LJ 1216 ; *VP Srivastava v Indian Explosives Ltd* (2010) 10 SCC 361, 2010 (10) Scale 177 .

13 *Pretolite of India Ltd v Munsif Magistrate* 1978 Cr LJ 538, p 540 (All) ; *Surendra v Ramchandran Nair* 1967 Ker LT 804 .

14 *Ghulam Ahmad Sofi v Ghulam Mohd* (1964) 1 Cr LJ 374 .

15 *Chintaman v Dnyaneswar* 1973 Mah LJ 612 ; *Mobarak Ali Ahmad v State of Bombay* AIR 1957 SC 857, 1975 Cr LJ 1346 .

16 *Rajpal v State of Punjab* 1977 Cr LT 254, 1977 Ch LR 56, 59 ; *EJ Antony v Ram Kumar* 1975 Cur LJ 168 (Punj) .

17 *Satyabrata Bhattacharya v Jarnail Singh* 1975 Ori JD 445 ; *Krishna Deo Goenka v State* 75 CWN 325, p 331 .

18 *Mansa Rain v Emperor* 14 Cr LJ 524 ; *Emperor v Bishen Das* 12 Cr LJ 50 ; Re *Masgi Bitchanna*AIR 1969 AP 54, 1969 Cr LJ 156 ; *Khalil Ahmad v Pawan Kumar* 1975 Ch LR 530, p 532 ; *Dharam Narain v State of Uttar Pradesh* 1973 All Cr R 178 ; *Hari Prasad Chamaria v Bishnu Surekha* AIR 1974 SC 301, 1974 Cr LJ 352 ; *Hiralal Mundra v Ashok Kumar Rasiklal and Co* 1973 Cut LT 597 ; *Vasudeo Kulkarni v Suraya Kant Bhatt* AIR 1977 SC 1760, 1977 Cr LJ 1152 .

19 *Binod Kumar v State of Bihar* 2014 (4) Crimes 305 (SC) .

20 *Asad Ali Tahsildar v Anwar Ali* AIR 1959 Tripura 40, p 41, 1959 Cr LJ 1216 ; *Bageshwar Missar v Khandari Kuer* 1970 Cr LJ 228 ; *Sheosagar Pandey v Emperor* 1937 Cr LJ 38 .

21 *Faqir Chand v Karam Chand Hiteshi* AIR 1942 Lah 122, 43 Cr LJ 632 ; *Ramji Lakliamni v Harshadrai Nandlal Bhuta* AIR 1960 Bom 268, 1960 Cr LJ 812 .

22 *Ramudass v Muniammal* AIR 1965 Mad 452, p 453, (1965) 2 Cr LJ 514 .

23 *Sheosagar Pandey v Emperor* 37 Cr LJ 38 ; *Jumman v Emperor* AIR 1923 All 431 .

24 *Jamadar Rai v Emperor* AIR 1930 Pat 504, 32 Cr LJ 2 .

25 *PM Natarajan v Krishna Chandra Gupta* 1975 Cr LJ 899, p 900 (All) ; *Mahadeo Prasad v State* 1954 Cr LJ 1806 ; *Devia Ram v Ram Chand* AIR 1953 J&K 22, 1953 Cr LJ 1359 .

26 *Ibid.*

27 *Mobarak Ali Ahmed v State of Bombay* 1957 Cr LJ 1346, p 1352, AIR 1957 SC 857 ; *Khairati Ram v State* 1972 Cr LJ 254, p 256, AIR 1972 Del 13 ; *Somanath Mohanty v State* AIR 1968 Ori 79, 1968 Cr LJ 643 ; *Manik Das Vaishnav v State of Tripura* 2012 Cr LJ 1954 (Gauh) .

28 *Banamali Tripathy v Emperor* AIR 1943 Pat 212, 44 Cr LJ 590 .

29 *Empress v Dhunput Ojha* 7 WR (Cr) 51 .

30 *Raj Bahadur v Emperor* 19 Cr L 931 (Punj) ; *Emperor v Jhanda Singh* 19 Cr LJ 335 ; *Local Government v Jhamsingh* 21 Cr LJ 820 ; *Empress v Mohindra Chandra* 16 WR (Cr) 42 ; *Kshitish Chandra Chakraborty v Emperor* AIR 1937 Cal 214, 38 Cr

LJ 577 ; *Empress v Dhunput Ojhah* 7 WR (Cr) 51 .

31 *Skaria v Narayanan* (1962) 1 Cr LJ 650 (Ker) .

32 *VP Srivastava v Indian Explosives Ltd* (2010) 10 SCC 361, p 368, 369, 2010 (10) Scale 177 .

33 *VP Srivastava v Indian Explosives Ltd* (2010) 10 SCC 361, p 374, 2010 (10) Scale 177 .

34 *Harmanpreet Singh Ahluwalia v State of Punjab* 2009 Cr LJ 3462, (2009) 7 SCC 712 ; *VY Jose v State of Gujarat* (2009) 3 SCC 78, 2008 (16) Scale 167 .

35 *State of Uttar Pradesh v Joti Prasad* AIR 1962 All 582, (1962) 2 Cr LJ 722 .

36 *Gurbakshi v State of Punjab* 1975 CLR 303 .

37 *Sunil Chandra Banerjee v Krishna Chundra Nath* AIR 1949 Cal 689, p 690 .

38 *State of Maharashtra v Syndicate Transport Co (Pvt) Ltd* AIR 1964 Bom 195, p 197, (1964) 2 Cr LJ 276 ; *Esso Standard Inc v Udhamram* 1973 Mah LJ 1022, p 1033 .

39 *Motorola Incorporated v Union of India* 2004 Cr LJ 1576 (Bom) .

40 *Swami Dhirendra Brahamchari v Shailender Bhushan and Another* 1995 Cr LJ 1810 (Del) .

41 *Motilal Chakravarty v King* AIR 1949 Cal 586, p 587, 51 Cr LJ 115 ; *Ratindra Nath v State* AIR 1951 Assam 82 .

42 *Motilal Chakravarty v King* AIR 1949 Cal 586, p 587, 51 Cr LJ 115 ; *Sheonarayan Jaiswal v State of Bihar* AIR 1953 Pat 225, 54 Cr LJ 1289 .

43 *HS Gill v Manjit Singh,* (1976) 3 Cr LT 253 (Punj) ; *Chintamani v Dnyaneshwar* 1974 Cr LJ 542 .

44 *Sada Ram v Emperor* 21 Cr LJ 749 (All) .

45 *Jamnudas Vasanji v Emperor* 16 Cr LJ 433 ; *Emperor v Khusali* 4 Cr LJ 453 ; *Luxman Ramchandra v State of Mysore* (1962) 2 Cr LJ 559 ; *Emperor v Harishanker Gangaram* 1 Cr LJ 332 .

46 *Iridium Indian Telecom Ltd v Motorola Incorporated* AIR 2011 SC 20, p 40, (2011) 3 SCC (Cri) 1201, (2010) 96 AIC 105 (SC) .

47 *Bipul Medhi v State of Assam* 2008 Cr LJ 1099, p 1108 (Gauh) (DB) ; *Devender Kumar Singla v Baldev Krishan Singla* (2005) 9 SCC 15, 2004 Cr LJ 1774 .

48 *Raj Mangal Kushwaha v State of UP* 2010 Cr LJ 3611, p 3611 (All) .

49 *R v Hazelton* (1874) LR 2 CCR 134 ; *R v Cosnett* (1901) 20 Cox 6 ; *R v Parker* (1837) Mood 51 .

50 *Khoda Baksh v Bakeya Mundari* (1905) ILR 32 Cal 941, 2 Cr LJ 764 ; *Ram Chand v Jai Dial* 16 Cr LJ 657 ; *Ram Chand v Jai Dial* 13 Cr LJ 456 .

51 *Shivanarayan Kabra v State of Madras* AIR 1967 SC 986, 1967 Cr LJ 946 .

52 *Deodhari Mahto v Emperor* 22 Cr LJ 169, p 170 ; *Ramnath Kalapahar v Emperor* 3 Cr LJ 160 .

53 *Monoranjan Sinha v Bishamborlal Saboo* 1976 Cr LJ 1622, 1976 Assam LR 149 ; *Raj Kumar v State of Jharkhand* 2012 (114) AIC 765 (Jhar) .

54 *WE Gardnar v U Kha* AIR 1936 Rang 471, 38 Cr LJ 48 .

55 *Vinay Kumar Tiwari v State of Jharkhand* 2013 (127) AIC 502 (Jhar) .

56 *Emperor v Mohsinbhai Fatehali* AIR 1932 Bom 273, 33 Cr LJ 401 .

57 *Hemraj v Emperor* 11 Cr LJ 295 ; *Public Prosecutor v K Bhimeswara Rao* AIR 1948 Mad 258, 49 Cr LJ 433 .

58 Re *Viraswami* 1 Weir 478 (2); *Empress v Fazul* Rat Unrep Cr C 312; *Reg v Hargovandas* (1872) 2 BHCR 448 ; *Gopinathan Achari v Madhusoodanan* 2014 (3) KLJ 635 (Ker) .

59 *Amir Chand v Lok Nath* AIR 1952 J&K 26, 1952 Cr LJ 1230 ; *Ebrahimji Mulla Jeevanji v Emperor* 14 Cr LJ 232 .

60 *Devia Ram v Ram Chand* AIR 1953 J&K 22, 1953 Cr LJ 1359 ; *Public Prosecutor v KM Vedantam* AIR 1952 Mad 183, 53 Cr LJ 396 .

61 *Empress v Heera Mun Hulwye* 5 WR (Cr) 5 .

62 *Maung Po Lu v Emperor* AIR 1924 Rang 31, 25 Cr LJ 236 .

63 *Nga Po Yon v Mohr Bros* 13 Cr LJ 50 .

64 *Hridayan Ranjan Prasad v State of Bihar* AIR 2000 SC 2341 ; *Zee Interactive Learning Systems Ltd v State of Jharkhand* 2010 (85) AIC 801 (Jhar) .

65 *Baburam Rai v Emperor* 2 Cr LJ 388 ; *Empress v Lal Mohd* 22 WR (Cr) 82 .

66 *Empress v Abbas Ali* (1898) ILR 25 Cal 512 .

67 *Tulsi Ram v State of Uttar Pradesh* AIR 1963 SC 666, p 674, (1963) 1 Cr LJ 623, p 630 .

68 *Gorantla Venkateswara Rao v Kolla Veera Raghava Rao* 2006 Cr LJ 1 (AP) .

69 *Ashutosh Mallick v Emperor* 3 Cr LJ 244 ; *Empress v Ladka* Ratanlal Unrep Cr Cas 635.

70 *Deodhari Mahto v Emperor* 22 Cr LJ 169 .

71 *Uma Dutta (Smt) v G Mahadevan* 1993 Cr LJ 3231 (Ori) .

72 *Kedar Nath v Emperor* 5 CWN 897 (case under s 471, IPC) *Emperor v Tha Byaw* 9 Cr LJ 15 . For further commentary, see in ss 24, 25, vol I.

73 *Muraleedharan v State of Kerala* 2011 (106) AIC 300, 2011 (3) KLT SN 97 [Case No 97 (Ker)].

74 *Jai Narain Chandra Dutt v Mohammad Abdul Kuddus* 1972 All Cr R 23 ; *Vinay Kumar Tiwari v State of Jharkhand* 2013 (127) AIC 502 (Jhar) ; *Prag Boobha v State of Jharkhand* 2012 (116) AIC 733 (Jhar) .

75 *Sarda Saran v Emperor* AIR 1924 All 209 ((2)), 26 Cr LJ 213 ; *Ramanath Kalapahar v Emperor* 3 Cr LJ 160, p 166 ; *Thakur Mandal v Emperor* AIR 1942 Pat 53, 43 Cr LJ 65 .

76 *Appollo Health and Lifestyle Ltd v State of Jharkhand* 2011 (115) AIC 286 (Jhar) .

77 *State Bank of India v State of Bihar* (2012) 113 AIC 786 (Jhar) .

78 *Sarda Saran v Emperor* AIR 1924 All 209 ((2)), 26 Cr LJ 213 .

79 *Swami Dhirendra Brahmchari v Shailendra Bhushan & Another* 1995 Cr LI 1810 (Del) .

80 *Sarda Saran v Emperor* AIR 1924 All 209 ((2)), 26 Cr LJ 213 .

81 *Prem Chand v State* 1953 Cr LJ 815, AIR 1953 All 381 .

82 *Ayodhya Prasad Sital Prasad v Emperor* AIR 1938 Sind 193, p 194, 40 Cr LJ 61 ; *Mansa Ram v Emperor* 14 Cr LJ 524 .

83 *Mojey v Empress* (1890) ILR 17 Cal 606 ; *Mahadeo Lal v Emperor* 7 Cr LJ 342 ; *Seetharama Rao v Government of Mysore* AIR 1954 Mys 9, p 11, 1954 Cr LJ 136 .

84 *Mojey v Empress* (1890) ILR 17 Cal 606 ; *Emperor v Muhammad Shah* 20 Cr LJ 77, p 78 .

85 *Ratan Singh v Emperor* AIR 1934 Lah 833, p 834 ; *Harendra Nath Das v Jotish Chandra Dutt* AIR 1925 Cal 100, 26 Cr LJ 545 ; Re *EK Krishnan*AIR 1948 Mad 268, p 269, 49 Cr LJ 419 ; *Kapur Chand v Niranjan Lal* AIR 1918 Lah 248 .

86 *AR Milton v Sherman* 19 Cr LJ 781 ; *Ramji Lakhamsi Budhdev v Harshadrai Nandlal Bhuta* AIR 1960 Bom 268, 1960 Cr LJ 812 .

87 *Pramod Ranjan Choudhary v State* (1963) 1 Cr LJ 716 (Tripura) .

88 *R v Silverlock* 1894 LR 2 QB 766.

1 *Birendra Lal Bhaduri v Emperor* 1 Cr LJ 794 ; *N Devindrappa v State of Karnataka* 2007 Cr LJ 2949 (SC) .

2 *Shivnath Sahibram Kaul v Jethanand Moorijmal Bhagnari* AIR 1937 Sind 56, 38 Cr LJ 510 ; *RK Dalmia v Delhi Administration* AIR 1962 SC 1821, p 1832, 1833, 1962 2 Cr LJ 805 .

3 *Nasib Singh v State of Punjab* (1972) 74 Punj LR 585 .

4 *Ramchander v State* AIR 1966 Raj 182, 1966 Cr LJ 944 .

5 *Durgadas Tulsiram Sood v State* AIR 1955 Bom 82, 1955 Cr LJ 289 .

6 *Nrisingha Murari Chakraborty v State of West Bengal* AIR 1977 SC 1174, 1977 Cr LJ 961 .

7 Re *JS Dhas*AIR 1940 Mad 155, 41 Cr LJ 388 .

8 *Ishwarlal Girdharilal Parekh v State of Maharashtra* 1969 Cr LJ 271, AIR 1969 SC 40 .

9 *Abhyanand Mishra v State of Bihar* AIR 1961 SC 1698, (1961) 2 Cr LJ 822 ; *Empress v Appasami* (1889) ILR 12 Mad 151, 1 Weir 480 .

10 *Local Government v Ganga Ram* AIR 1922 Nag 229, 23 Cr LJ 443 .

11 Re *Packianathan* 21 Cr LJ 478.

12 *Emperor v Harishanker Gangaram* 1 Cr LJ 332 .

13 *Ram Charan v State* 1963 Raj LW 416 .

14 *Kuldip Sharma v State* 2000 Cr LJ 1272 (Del) .

15 *Develle Venknteshwarlu v State of Andhra Pradesh* 2000 Cr LJ 2929 (AP) ; *Phulwanti Agarwal (Smt) and Ors v Sri Naresh Kumar and Anor* 2000 Cr LJ 3236 (Kant) .

16 *Mangovinda Sahu v Samser Ali Khan* (1984) 2 Crimes 880 .

17 *Mohanlal Bhanalal Goel v Emperor* AIR 1937 Sind 293 .

18 *Satya Narayan Mohapatra v State of Orissa* 2004 Cr LJ 742 (Ori) .

19 *MNA Achur v DL Rajagopal* 1977 Cr LJ (NOC) 228 (Kant), 1977 Mad LJ (Cr) 167 .

20 *Md Jakir Ali v State of Assam* 2007 Cr LJ 1615 (Gau) .

21 *Jaswantrai Manilal Akhaney v State of Bombay* AIR 1956 SC 575, 1956 Cr LJ 575 ; *Surbir Singh v Mahender Kumar Rajput* 2000 Cr LJ 696 (Raj) ; *Arun Bhandari v State of UP* 2013 Cr LJ 1020, (2013) 2 All LJ 80, (2013) 2 SCC 801, (2013) 122 AIC 18 (SC) .

22 *Mahadeo Prasad v State of West Bengal* AIR 1954 SC 724, 1954 Cr LJ 1806 .

23 *Hari Prasad Chamaria v Bishun Kumar Surekha & ors* AIR 1974 SC 301 .

24 *GV Rao v LHV Prasad & ors* (2000) 3 SCC 693, 2000 Cr LJ 3487, 2000 AIR SCW 2600 .

25 *State of Kerala v A Pareed Pillai* AIR 1973 SC 326, 1972 Cr LJ 1243 (SC) ; *Ashish Deb v Dixit Wine Shop* 2012 (118) AIC 646 (Gauh) .

26 *SW Palanitkar v State of Bihar* AIR 2001 SC 2960, 2001 Cr LJ 4765 (SC), (2001) 1 SCC 241 .

27 *Mahesh Kumar KS v State of Karnataka* 2003 Cr LJ 528 (Kant) .

28 *Crown v Mohabat* 1889 PR 20 ; *Nand Lal v Empress* 36 PR 1888 ; *Mangeram v Chhatramohan Singh* AIR 1951 Nag 315 .

29 *Iridium Indian Telecom Ltd v Motorola Incorporated* AIR 2011 SC 20, p 37, (2011) 3 SCC (Cri) 1201, (2010) 96 AIC 105 (SC) ; **see also***Standard Chartered Bank v Directorate of Enforcement* AIR 2005 SC 2622, (2005) 4 SCC 405 (*Motorola Inc v Iridium India Telecom Ltd* 2004 Cr LJ 1576**reversed**).

30 *Iridium Indian Telecom Ltd v Motorola Incorporated* AIR 2011 SC 20, p 37, (2011) 3 SCC (Cri) 1201, (2010) 96 AIC 105 (SC) .

31 *Harish Chandra v Rex* 50 Cr LJ 31, AIR 1949 All 15, p 16, 17 ; **dissenting from***Emperor v Muhammad Shah* 20 Cr LJ 77 ; *KR Kumaran v State of Kerala* (1961) 2 Cr LJ 98 .

32 *Nand Lal v Emperor* 36 PR 1888 ; *Ram Charan v State* 1963 Raj LW 416 .

33 *Legal Remembrancer v Manmatha Bhushan Chatterjee* AIR 1924 Cal 495, 26 Cr LJ 330(1) ; *Ram Charan v State* 1963 Raj LW 416 .

34 *Hari Sao v State of Bihar* AIR 1970 SC 843, 1970 Cr LJ 849 ; *Dominion of India v Museram Kishunprasad* AIR 1950 Nag 85 ; *Baboo Khan v State* AIR 1961 All 639, (1961) 2 Cr LJ 759 ; *Union of India v SPL Lakhu Reddiar* AIR 1956 Mad 176 .

35 *Empress v Ladka* Ratanlal Unrep Cr C 635; *Empress v Punjia* Ratanlal Unrep Cr Cas 423; *HK Bhedwar v CSR Rao* AIR 1924 Cal 111, 24 Cr LJ 748 .

36 *Public Prosecutor v Thall Gangadharan* (1956) 2 Andh WR 805, 1956 Andh LT 678 .

37 *Sunder Singh v Emperor* 2 Cr LJ 126 .

38 *V Seetharama Rao v Government of Mysore* AIR 1954 Mys 9, p 11, 55 Cr LJ 136 ; *Baboo Khan v State* AIR 1961 All 639, 43 Cr LJ 254 .

39 *Muhammad Bakhsh v Emperor* AIR 1941 Lah 460, 43 Cr LJ 254 .

40 *Baboo Khan v State* AIR 1961 All 639, (1961) 2 Cr LJ 759 .

41 *KR Kumaran v State of Kerala* (1961) 2 Cr LJ 98, 1 Weir 477 .

42 *Kanumukkala v State of Andhra Pradesh* AIR 1965 SC 333, (1965) 1 Cr LJ 355 ; Re *K Rama Rao*AIR 1960 AP 441, 1960 Cr LJ 1181 .

43 *Emperor v Bishan Das* 1 Cr LJ 218, 2 ALJ 268 ; *Pradeep Kumar Mahopatra v State* III (2013) DMC 620 (Delhi) ; *Gendan Lal v Abdul Aziz Khan* 1 Cr LJ 1044 ; *Karachi Municipality v Bhojraj* 13 Cr LJ 706 ; *Iridium Indian Telecom Ltd v Motorola Incorporated* AIR 2011 SC 20, p 40, 2011 3 SCC (Cri) 1201, (2010) 96 AIC 105 (SC) .

44 *Nga Po Maung v Empress* (1892-1896) 1 UBR 255.

45 *Emperor v Bishan Dass* 1 Cr LJ 218, 2 ALJ 268 ; *Karachi Municipality v Bhojraj* 16 Cr LJ 705 ; *Gendan Lal v Ahdul Aziz Khan* 1 Cr LJ 1044 .

46 *Gopinath Achari v Madusoodanam* 2014 (3) Ker LJ 635 (Ker) ; **see also***Wilson v State of Kerala* 2014 (3) Ker LT Sn 19 (Ker) .

47 *Raj Kumar v State of Jharkhand* 2012 (114) AIC 765 (Jhar) .

48 *Ramkrishna Nandram v Ganesh Narain* AIR 1934 Nag 149, 35 Cr LJ 1063 ; *Mohd Hussain v State of Andhra Pradesh* AIR 1960 AP 405 ; *Radayal Mahto v Emperor* AIR 1928 Pat 337, 29 Cr LJ 700 .

49 *Hari Krishan v Emperor* 11 Cr LJ 610 (Punj) .

50 *Banwarilal v State* 1956 Cr LJ 664, AIR 1956 All 341, dissenting from *Karachi Municipality v Bhojraj* 16 Cr LJ 706 (Sind) .

51 Re *MK Srinivasan*AIR 1944 Mad 410, p 414, (1944) 1 MLJ 422 .

52 *Shivnath Sahibram Kaul v Jethanand Moorijmal Bhagnari* AIR 1937 Sind 56, 38 Cr LJ 510 ; *Kuldip Singh v State* 1954 Cr LJ 299, AIR 1954 Punj 31 [*Karachi Municipality v Bhojraj* 16 Cr LJ 706 (Sind) **doubted**].

53 *Iridium Indian Telecom Ltd v Motorola Incorporated* AIR 2011 SC 20, p 40, (2011) 3 SCC (Cri) 1201, (2010) 96 AIC 105 (SC) .

54 *Sita Ram Sharma v State of Bihar* 2012 (119) AIC 705 (Pat) .

55 *Mohd. Ibrahim v State of Bihar* (2009) 8 SCC 751, (2009) 3 SCC (Cri) 929 .

56 *Surendra Maneklal Kathia v Bai Narmada* (1963) 2 Cr LJ 369, AIR 1963 Guj 239 .

57 *Abdul Ali Mia v Abdulla* AIR 1959 Manipur 26, 1959 Cr LJ 740 ; *Dori Lal v Emperor* 20 Cr LJ 331 ; Re *Paruchury Venkatappayya Choudari* 18 Cr LJ 40.

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CHEATING

S. 416.

Cheating by personation.--

A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.--The offence is committed whether the individual personated is a real or imaginary person.

Illustrations

(a) *A* cheats by pretending to be a certain rich banker of the same name. *A* cheats by personation.
(b) *A* cheats by pretending to be *B*, *A* person who is deceased. *A* cheats by personation.

Comments

1. Scope

The preceding s 415, IPC defined cheating generally. This section defines a particular specie of cheating which is an aggravated form of ordinary or simple cheating. The offence under this section is committed if:

(a) the accused pretended to be some other person; or
(b) knowingly substituted one person for another; or
(c) represented that he or any other person is a person other than he, or such other person, really is.

It is not necessary that the person personated is an existing or known person, whether alive [illust (a)] or dead [illust (b)]. Such personated person may be wholly imaginary or non-existent. A false personation need not be made in express words. It may be made by conduct or acts.

The two elements of this offence are cheating and personation. Personation, by itself, is no offence.[58] The offence of cheating by personation is made when an accused assumes a different status or character even though he does not change his name at any stage. The offence of cheating by personation was held to have been made where the accused represented himself to be a bachelor to the complainant though he was not.[59]

2. Illustrative Cases

(1) Cases of false personation

(a) The two accused induced a *moharrir* at a fair to write out a certificate of sale of a mare, giving wrong names of the seller and the purchaser,3617 and one of them affixed his thumb mark to the receipt in the name of the person who was named as the seller, it was held that the accused were guilty under this section as they deceived the *moharrir* and induced him to write a false certificate.[60]
(b) Where the accused posed himself to be a police officer and cheated several villagers out of money, he was held guilty of cheating and also of falsely personating as a public servant.[61]
(c) In Re *Matameswara Rao*,[62] the accused used a railway seasonal ticket, issued in the name of a different person, by pretending to be that person. He was held guilty under

this section.

(d) Where a person, by falsely personating himself as another, dishonestly or fraudulently induced a health officer to deliver a health certificate to him, he was held guilty of an offence under this section.[63]

(e) The appellant personating as KK had forged two sale deeds. KK was the owner of the land and the sale deeds were executed in favour of one G. Held, the appellant committed the offence of cheating by personation punishable under s 419, IPC .[64]

(2) Cases of personation at examinations

(a) The accused sat for an examination and forged answer-books, purporting to be answered by another candidate, it was held that the accused was guilty of cheating by personating and also of forgery.[65]

(b) *A*, falsely representing himself to be *B* at a university examination, got a hall ticket under *B's* name and signed answer papers to questions with *B*'s name, he was held guilty of forgery and cheating by personation.[66]

(3) Cases in which no offence was held to have been committed under s 416

(a) Where a servant purchased a stamp paper for his master, giving his master's name as if it had been his own, it was held that a conviction under this section was bad because, though there might have been personation, there was no cheating as there had been no fraudulent intent.[67]

(b) In *Jagat Narayan v State* ,[68] a money order, in favour of Balmukand, the real elder brother of the accused, arrived at the post office. The3618 accused personating himself as Balmukund, demanded its payments and he signed on the money order form in the name of his brother Balmukand and another accused put his signature on it as a witness. However, on further inquiry before the payment was made, the accused disclosed that he was not Balmukand. It was in evidence that the accused lived jointly with his brother Balmukand and was authorised by him to receive payment. It was held that it could not be said that the accused had dishonest intention and the offence under s 419 was not committed.

(c) In *Thakur Mandal v Emperor* ,[69] one *M* was an employee in a workshop. His services were terminated on account of reduction in the establishment and he obtained, and was granted, a certificate of discharge. *M* handed over the certificate to another person *T* who promised him to get him re-employed in the workshop. After waiting for about ten months, *M* demanded the certificate back from *T*, but the latter had given the certificate to the accused who had obtain employment by handing over the certificate, falsely alleging it to be his at the time of his appointment and, thus, falsely personating himself as *M*. It was held that in the absence of evidence to show that the appointing authority was induced to appoint the accused on the basis of the false certificate produced by him, he could not be said to be guilty under s 419 .

(d) In Re *Loothy Bewa*,[70] a intended to register a deed, but was too ill to do so, and *B* who was known to A and had the deed registered in her name. It was held that in the absence of anything to prove that it was intended to defraud anybody, *B* was guilty not of cheating by personation under s 419, IPC, but of an offence under s 93 of the Registration Act 1866.

(e) In *Reg v Prema Bhika* ,[71] it was held that a witness, falsely deposing in the name of another, is not guilty of cheating by false personation, but of an offence under s 193, IPC .

(f) In *Emperor v Kutub Ali* ,[72] the accused was a daftari in the office of the Accountant-General. An auction sale of waste paper was held in the office. The accused made a bid for the purchase under an assumed name and the sale was concluded in his favour. It was held that there was no rule prohibiting the purchase of

such waste paper by an employee of the department and no offence of cheating by personation was committed.

58 *Empress v Appasami* 1 Weir 408, (1889) ILR 12 Mad 51 ; Re *Baburam Rai*(1905) ILR 32 Cal 25775; *State of Madhya Pradesh v Padam Singh* 1973 Cr LJ 877, p 878, 1973 MPLI 129 .

59 *MNA Achar v DL Rajagopal* 1977 Mad LJ (Cr) 167 .

60 *Ahmad v Emperor* AIR 1914 Lah 558, 16 Cr LJ 139(2) .

61 *Empress v Sadanand Dass* 2 WR (Cr) 29 ; *Sarwansingh Gajjan Singh Jat v State* AIR 1958 MP 230, 1958 Cr LJ 1039 .

62 Re *Matameswara Rao*AIR 1957 AP 4, 1957 Cr LJ 44 ; Re *Nga Po Lu*(1902) 1 LBR 356.

63 Re *Packanathan* 21 Cr LJ 478; *Baboo Khan v State* AIR 1961 All 639, (1961) 2 Cr LJ 759 ; *Emperor v Kirat Singh* 6 Cr LJ 426 ; *Jahana v Emperor* 2 Cr LJ 38 .

64 *Suresh Hingorani v State of Haryana* (2013) 123 AIC 161 (SC), (2013) 9 SCC 454 .

65 *Aswini Kumar Gupta v Emperor* AIR 1936 Cal 403, 37 Cr LJ 1156 (2); *Empress v Shashi Bhushan* (1893) ILR 15 All 210 .

66 *Empress v Appasami* (1889) ILR 12 Mad 51, 1 Weir 480 ; *Kotam Raju v Empress* (1905) ILR 28 Mad 90 (FB); *Empress v Ganesh Khanderao* (1889) ILR 13 Bom 506 .

67 Re *Karuppanna Pillai* 1 Weir 408 (1); *Girdhree v Crown* 16 PR 1876 .

68 *Jagat Narayan v State* 1967 Cr LJ 302, AIR 1967 All 123 .

69 *Thakur Mandal v Emperor* AIR 1942 Pat 53, 43 Cr LJ 65 ; Re *Sheik Basit* 1 Weir 479 (2).

70 Re *Loothy Bewa* 11 WR (Cr), 2 Beng LR 25.

71 *Reg v Prema Bhika* (1863) 1 BHCR 89 .

72 *Emperor v Kutub Ali* 1902 AWN 151 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CHEATING

S. 417.

Punishment for cheating.--

Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.3619

Comments

1. Scope

An offence of cheating has been defined in s 415, IPC, and the other three aggravated forms of cheating in ss 416, 418 and 420, IPC . Section 416 defines cheating by personation and s 419, IPC prescribes punishment for cheating by personation. Cheating, with knowledge that wrongful loss may ensue to the person whose interest the offender is bound to protect, is defined in s 418 in which punishment for this offence is also prescribed. And cheating, involving delivery of property or some valuable security, is defined in s 420, IPC which also prescribes the punishment for the offence. This section (*i.e*., s 417, IPC) provided for punishment for those cases of simple cheating which are not covered by any of the said sections, *i.e*., ss 419, 418 and 420, IPC .

Dishonest concealment by an accused is a deception punishable under this section.[73] Where there was deception and the deceiver's object was dishonest and fraudulent and he intended to retain wrongfully the excise duty, to which the state, under the statute, and notifications made thereunder, had a claim and which the state was entitled to recover under law, from a person who removed non-duty paid tobacco from a bonded warehouse to another bonded warehouse, it was held that he practiced deceit and, therefore, the offence under s 417, IPC, was made out against him.[74] However, no case against the appellant under s 417, IPC, was held to have been made out in *Gopal Musalgaonkar v State of Madhya Pradesh* ,[75] where the allegation against him was that he, representing himself to be an unmarried person, induced the complainant to have sexual intercourse with him. Her own evidence in the case was that she, prior to her marriage with him, was having intimacy with the appellant and also had sexual intercourse with him. In these circumstances, it was observed that it could not be believed that the complainant did not know about the appellant's relation whatsoever with another lady, and, therefore, no offence against the appellant under s 417, IPC, was made out.

2. Sections 417 and 420 --Distinction

Commentary under the headings in s 420, *post*, may be referred to.

3. Rape and Cheating

The accused allegedly posed as a police man and took the prosecutrix to a hut opposite a police station and committed offences under ss 376 and 417, IPC . Neither the prosecutrix, nor her companion raised any hue and cry or offer any resistance. After the said incident the prosecutrix went to the hospital instead of going to the police station. The facts and evidence given by the prosecutrix and her companion appeared very unnatural and disbelievable. The acquittal of the accused was found3620 proper.[76] The accused put vermilion on the head of prosecutrix and declared her as his wife with the assurance to accept her publically after getting a job. Thereafter, the prosecutrix who had initially resisted the accused, submitted herself to sexual intercourse. The prosecutrix was cheated in body, mind and reputation because of deception made by the accused with dishonest intention to sexually exploit her. Thus, a *primafacie* case existed against the accused for framing charge against him under s 417, IPC, and also under s 493, IPC .[77] The accused was alleged to have promised the victim of marriage and thereafter consent was given by her to have sexual intercourse with him. The evidence on record showed that the victim was an adult and the accused sincerely wanted to marry her but her parents were against it. It could not be said that the accused ever practiced any deception upon the complainant, nor it could be said that he made any attempt to create some false conception of facts in the mind of the complainant, on these facts the accused neither committed the offence of rape nor any offence of cheating under ss 376 and 420, IPC, respectively.[78] Evidence adduced in the case did not prove that the promise to marry the prosecutrix was false to the knowledge of the accused when the later made the false promise. Accused was acquitted of the charge under s 420, IPC . [79] However, in a somewhat similar situation, on account of a promise of marriage by the accused to the prosecutrix, he was held liable for the offence of cheating under s 417, IPC .[80]

Where an accused makes false promise to marry a woman, induces a woman to have sexual intercourse with him, he is guilty of offence of cheating punishable under s 417, IPC .[81]

Where the victim being a woman above 16 years of age, voluntarily consented to have sexual intercourse with the accused, she did not disclose anything to either the neighbours, villagers or to her parents till she was pregnant for three months, the evidence clearly establishes that there was no misconception of fact in the instant case and the victim was a consenting party and her conduct was nothing but an act of promiscuity on her part, she consciously consented to have sexual intercourse with the accused and her consent was not in consequence of any misconception of fact, it is clear, therefore, that the subsequent refusal by the accused to marry the victim would be of no consequence when it has not been established that the representation was false to the knowledge of the accused when it was made.[82] Accused appellant3621 was prosecuted on allegations that he wanted to marry the prosecutrix, on refusal he committed sexual intercourse on her. Later also he committed sexual intercourse with her. Held, if the promise of marriage was given and the girl had succumbed on that account, by itself, may not amount to cheating. Besides this, the girl has very specifically stated that even subsequently, she was ravished against her wishes. Therefore, the theory of promise of marriage and the consent for sexual intercourse will wither away. No offence under s 417, IPC was made out; appellant accused was acquitted of the charge under s 417, IPC .[83]

4. Procedure

The offence under this section is non-cognizable, bailable, compoundable, by the person cheated, with the permission of the court, before which the prosecution is pending for such offence, and triable by a magistrate, and may also be tried summarily.

5. Jurisdiction

Commentary under the same heading in s 420, *post*, may be referred to.

6. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case.

Where no prejudice is caused, to the accused, the mere fact that the charge mentioned that the accused deceived the postal authorities whereas s 415, IPC, envisages deceiving a person, does not vitiate the trial.[84]

Where the allegation was that accused had sexual intercourse with the prosecutrix on promise of marriage, but there was no allegation that such promise was made by the accused at the time of the commission of the intercourse, no presumption of deception to constitute cheating under s 415, IPC can be raised for the purpose of framing charge. The Court was not justified in framing charge under s 417, IPC against the accused.[85]

7. Proof

To secure a conviction under this section, the prosecution must prove[86] deception of any person by the accused by:

(a) fraudulently or dishonestly inducing him:

(i) to deliver any property to any person, or

(ii) to consent that any person shall retain any property; or3622

(b) intentionally inducing him to do, which he would not do, or to omit to do, which he would not omit to do, if he were not so deceived, and which act or omission caused, or was likely to cause, damage or harm to him in body, mind, reputation or property.

The letters were prepared by the accused, on the letter head of the minister, whereupon invitations were written to invite actors for a cultural show. The letters did not bear the signature of the minister. The act of the accused did not cause or was likely to cause harm to any person in body, mind or reputation. Similarly, the conviction of the accused under s 417, IPC, was set aside and he was acquitted instead.[87]

73 *P Bhanumathy v Prema Latha* (1978) 2 Andh LT 358 .

74 *Mohammad Riaz v State of Uttar Pradesh* 1980 Cr LJ 369, p 375 (All) .

75 *Gopal Musalgaonkar v State of Madhya Pradesh* 1976 Jab LJ 201, 1976 MPLJ 284 ; *VS Nair v Kan Singh* 1976 Raj Cr Cas 300 .

76 *Keerthi Suryanarayana v State of Andhra Pradesh* 2002 Cr LJ (NOC) 169 (AP), (2001) 2 Andh LT (Cri) 389 .

77 *Subhransu Sekhar Samantray v State* 2002 Cr LJ 4463 (Ori) ; *Palam Buddagandla Obaich v State of AP* 2011 Cr LJ 2276 (All) .

78 *Abhay Pradhan v State of West Bengal* 1999 Cr LJ 3534 (Cal) (DB) ; *Hari Majhi v State* 1990 Cr LJ 650 (Cal) (DB) ; *Deelip Singh v State of Punjab* 2004 (24) AIC 33 (SC), 2005 (1) SCC 88 (Court directed accused to pay compensation); *Durjoy Chakraborty v State of Tripura* 2012 (119) AIC 351 (Gauh) (Accused acquitted, was directed to pay Rs. 50,000/- as compensation to the prosecutrix).

79 *Mohd Shafi v State of Karnataka* 2013 Cr LJ (NOC) 452 (Kar) .

80 *Maran Chandra Paul v State of Tripura* 1997 Cr LJ 715 (Gau) ; *Badi Chinna Rao v State of Andhra Pradesh* 2004 Cr LJ 807 (AP) ; *State of Karnataka v KP Thimmappa Gowda* 2004 Cr LJ 4785 (Kant) (DB) ; *Md Jakir Ali v The State of Assam* 2007 Cr LJ 1615 (Gau) ; *Tajuddin v State of Assam and Anr* 2007 Cr LJ (NOC) 198 (Gau) .

81 *Bipul Medhi v State of Assam* 2008 Cr LJ 1099, p 1108 (Gauh) (DB), *Joleswar Kalita v State of Assam* (1988) 1 Gauh LR 128**overruled**.

82 *Md Mahasin v Sayeda Khatun Bibi* 2005 Cr LJ 3162 (SC) ; *Sri Nirman Sonowal v State of Assam* 2007 Cr LJ (NOC) 184 (Gau) ; *Karthick Theodre v State* 2015 (2) Crimes 435 (Mad) (Both prosecutrix and accused had entered into brothel ceremony, marriage date was also fixed, both living together in rented house--Accused acquitted); *Mohd Shafi v State* 2014 (1) Crimes 430 (Kant) (Both in deep love, accused acquitted); *Sankiran Tanti v State of Assam* 2010 (86) AIC 855 (Gauh) .

83 *Zindar Ali SK v State of West Bengal* 2009 Cr LJ 1324, p 1328 (SC), AIR 2009 SC 1467, 2009 (2) Scale 248 .

84 *Chandravali Jadav v Republic of India* 1976 Cut LR (Cr) 392 . See Code of Criminal Procedure 1973, s 25 .

85 *Goutami Prasadi v State of Tripura* 2013 (121) AIC 736 (Gauh) .

86 *P Bhanumathy v Prema Latha* (1978) 2 An LT 358, p 367 ; *Rajjan v State of Uttar Pradesh* 1971 Mad LJ (Cr) 527, p 529 .

87 *Jabrial Diwan v State of Maharashtra* 1997 Cr LJ 4070 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CHEATING

S. 418.

Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.--

Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope

This section is an example of the aggravated form of cheating, defined under s 415, IPC, *viz*, the intentional inducing of a person by means of deceit to do, or omit to do, something which is likely to cause injury to his property by causing a wrongful loss to him. The section provides for an abuse of trust by a person who is bound by law, or legal contract, to protect some interest. It is this fact which renders cheating an aggravated offence under this section. It presumes the existence of some position of confidence between the cheat and the person cheated. It may be noted that the section does not expressly define the kind of relationship between the parties (like trustee, banker, guardian, *etc*). All, that it requires, is that the position is one in which the offender stands in such a position as would necessarily involve, on his part, the protection of the interest generally of the person deceived. Where the directors, manager and accountant of a bank put, before the shareholders, balance sheets, which they knew to be materially false, misleading the public as to the true condition of the bank, and thereby induced the depositors to allow their money to remain on deposit, it was held that they were guilty of cheating under this section.[88] However, the guilty knowledge, which is essential for an offence under the section, cannot be presumed from the mere fact that the accused authorised the issue of a balance-sheet containing false entries. Such knowledge must be proved by the circumstances of the case.[89] Every breach of contract does not give rise to a criminal prosecution for cheating.3623 The element, which converts a breach of contract into an offence of cheating, is the dishonest or fraudulent intention of the accused which induces the complainant to enter into the contract. Mere non-payment by the purchaser of the price, or the balance of the price, of the articles purchased cannot constitute the offence of cheating in the absence of proof of any dishonest misrepresentation on the part of purchaser. If there is no proof of dishonest intention on the part of the accused at the time when he made the promise, which induced the complainant to do something which the complainant would not have done but for the promise, there can be no offence of cheating. Intention of an accused may no doubt be judged by his subsequent conduct, but mere subsequent conduct cannot be the sole creation to conclude his intention at the time of the initial promise.[90] Where a Mohammadan, with a view to secure a service with a Hindu, falsely represented himself to be an orthodox Hindu, who would not have engaged him if the fact that he was not a Hindu was known to him, it was held that he was guilty of an offence under this section.[91]

There was no fraudulent intention on the part of the petitioner (accused) at the very inception of the transaction, dispute between the parties arose only during the course of the transaction, dispute was purely of civil nature. The complaint was quashed on petition filed under s 482, CrPC .[92]

2. Principal of Mission School Placing Order of Books for his Private Business--Effect

Where the accused was the principal of a mission school, he placed order with various publishers for supply of books for his private business using the letter heads of the school making them believe that the order was placed by the school, the evidence on record neither suggested that the accused had made any willful representation to defraud any publisher, nor there was any suggestion in the entire evidence that the mission school was made liable for payment of books. The element of cheating was found absent from the entire evidence. No wrongful loss was caused to the mission school. Mere breach of trust by mis-utilising the post and the position as the principal of a school cannot attract criminal liability. The order of conviction and sentence under s 418 was held liable to be set aside.[93]

3. Procedure

The offence under this section is non-cognizable, bailable, compoundable, by the person cheated, with the permission of the court, before which the prosecution under this section is pending, and triable by a magistrate.

4. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (name of accused person) as follows:3624
>
> That on or about the...day of..., at..., you cheated AB by... (specify the act constituting the offence) with the knowledge that you were thereby likely to cause wrongful loss to the said AB, whose interest in the transaction, to which the cheating relates, you were bound by law (or by a legal contract) to protect, and that you thereby committed an offence, punishable under s 418 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

5. Proof

In order to establish a charge under this section, prove that:

(a) the accused cheated the complainant;
(b) the accused was bound either by law, or by legal contract, to protect his (*i.e*., the complainant's) interest;
(c) the said interest was in relation to the transaction to which the cheating related; and
(d) the accused had knowledge that he was likely thereby to cause wrongful loss to the complainant.

In addition to what is stated above, the essential requirements, to be proved for an offence under s 417, are also to be proved.

88 *R v Moss* 16 All 88 ; *GS Clifford v Emperor* 15 Cr LJ 80 .

89 *Giles Sesddon v SJ Loane* 11 Cr LJ 624 .

90 *Aitha Narasimham v Duvvuru Adisesha Reddy* 1977 Andh LT 316, p 319 ; *Raghunath Prasad v State* 1973 All Cr R 396 .

91 *Sherbaz v Emperor* AIR 1925 Sind 57 ((1)), 25 Cr LJ 789 .

92 *Gold Mohur Foods and Feeds Ltd v State of Jharkhand* 2014 (141) AIC 785 (Jhar) .

93 *Nahoom Minz v State of Bihar* 2007 Cr LJ 3573 (Jhar) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CHEATING

S. 419.

Punishment for cheating by personation.--

Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope

This section, which simply provides for punishment for an offence, defined in s 416, IPC, provides for punishment for the offence of simple cheating defined in s 415, IPC, which operates when all the ingredients of the offence of cheating under the said s 415 are made out.[1] Thus, though the mere giving out of a fictitious name may amount to personation, yet, in order to attract this section, there must be cheating in addition to personation. The prosecution must be for cheating as cheating is an essential ingredient of the offence.[2] Similarly, this section would cover cases of simple cheating by false personation.[3] If it, however, involves the delivery of property, which is covered by s 420, the offence would be punishable under that section, and not under this section. Thus, where *A*, representing himself to *B*,3625 obtained the delivery of some quantity of opium from an opium shop on *B*'s ticket, he was convicted under s 420, IPC .[4]

For as to what constitutes an offence of cheating by personation, the commentary under s 416, IPC may be *referred* to.

2. Distinction between Sections 170 and 419

Cheating by personation (s 419, IPC) is an offence of a general character under which a person may

pretend to be anyone other than what he really is. However, cheating by pretending to be a public servant (s 170, IPC) is a specific offence. It has all the ingredients of cheating by personation under s 419, IPC . However, when the personation is that of a public servant then the offence becomes one under s 170 .[5]

3. Procedure

The offence under this section is cognizable, bailable, compoundable, by person cheated, with the permission of the court, before which the prosecution for such offence is pending, and triable by a magistrate.

4. Nurse Acting in her Name, Pretending to be a Doctor--Effect

When the prosecution does not have a case that the accused pretended to be any other person existing or fictitious, and she was all the time during the alleged transaction, acting in her own name, though only a nurse, the accused had styled herself as a 'doctor' competent to treat patients. Even if she had pretended to be a doctor, though not really a doctor, she cannot be convicted for cheating by personation under s 419, IPC .[6]

5. Quashing of Criminal Proceedings

Where the allegations against the accused were that he made a representation to a railway retiring room attendant that he was an assistant commercial manager of the railways and the said attendant on the basis of such representation by the accused allotted him a room, *primafacie* an offence under s 419, IPC, was made out, so criminal proceedings cannot be quashed under s 482, CrPC .[7]

6. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (name of accused person) as follows:
>
> That you, on or about the...day of..., at..., cheated AB by pretending yourself to be CD (*or by knowingly substituting EF for CD* (*or by representing that EF was CD) and, by deceiving him fraudulently* (*or dishonestly*), induced him to deliver... (*describe the property*) (*or to consent that he shall retain...* (*describe the property*) (*or intentionally3626 induced him to do* (*or omit to do*)... (*name the act or the omission, as the case may be*) which he would not do (*or omit to do*) if he were not so deceived by you and which act (*or omission*) caused (*or was likely to cause*) damage (*or harm*) to him in body, mind, reputation or property), and thereby committed an offence, punishable under s 419 of the Indian Penal Code, and within by cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

Where the words 'cheated by personation' were not mentioned in the charge, it was held that no valid objection to the charge could be made when the entire recital was clear.[8]

7. Proof

To secure a conviction under this section, prove that the accused cheated the complainant by:

(a) pretending himself to be some other person, or
(b) knowingly substituting or representing one person for another.

In addition to the above, the prosecution has to further prove all that is required to be proved for establishing an offence under s 417, IPC .

To constitute an offence under s 419, IPC, all ingredients of s 415, IPC, must be present.[9]

A person by merely inducing the oath commissioner by wrong identification to attest the affidavit, does not commit an offence under s 419 as the act done by the oath commissioner of attesting the affidavit does not cause any damage or harm to the oath commissioner in body, mind, reputation or property.[10]

8. Acquittal

The accused took a loan of Rs 25,000 under an agreement, and gave the registration certificates of the lorry and motorcycle as security. The registration certificate of the lorry was in the name of the brother of the accused and the accused allegedly impersonated him. There was nothing in the agreement to show that the accused in any manner asserted that the lorry also belonged to him. The civil suit filed against the accused was decreed by the civil court. The dispute between the parties was of a civil nature, so the accused was found entitled to an acquittal.[11]

9. Conviction

The government appointed the accused to a post on its medical services on being induced by deception that he was fully qualified for the appointment. In consequence of the appointment, the government had to pay him a salary, which fell due. The accused, therefore, by deceiving the government, dishonestly induced the government to deliver property to him and thereby committed the offence of cheating under s 415, IPC, and since he had impersonated another person to secure the job, his3627 conviction under s 419, IPC, was maintained.[12] The accused procured a government job reserved for Scheduled Castes by producing a false caste certificate showing that he belongs to a Scheduled Caste. There was cogent and convincing evidence that the accused did not belong to the Scheduled Caste and had served the government for a period of 8 years, till the fraud and cheating was detected. The accused was found liable to be convicted under ss 419 and 468, IPC .[13] On account of supply of material to the company, the cheques were issued in the name of the supplier. The cheques were enclosed by accused A-1 by opening an account in a bank in the name of the supplier. The writing and withdrawal slip and signatures on it tallied with the handwriting of A-1, the other accused A-11, an account holder of the bank recommended A-1's forged name to the bank. As A-1 and A-11 worked in the same company, A-11 knew A-1's original name. Both A-1 and A-11 could be said to have jointly committed the offence, so their conviction under ss 419 *etc* was found proper.[14] Where the appellant representing hearsay as KK executed two sale-deeds in favour of a third person, he was convicted for offence under s 419, IPC .[15]

Appellant, accused A3, Monica Bedi obtained fake passport with the help of accused A4 to A9. The entire conspiracy was hatched for her benefit. Her conviction under ss 419, 420 and 120B, IPC was upheld.[16]

10. Sentence

Where the appellant representing himself as KK executed two sale-deeds in favour of a third person, he was convicted for offence under s 419, IPC . The appellant was aged 59 years, was suffering from osteoarthritis, had not derived any benefit by the execution of the sale-deeds, sentence of imprisonment was reduced to the period already undergone with fine of Rs. 50,000/-.[17] Appellant accused was convicted under ss 419 and 420, IPC for obtaining fake passport. As she had undergone more than two

years' imprisonment, sentence was reduced to the period already undergone.[18]

1 *Ram Jus v State of Uttar Pradesh* 1974 Cr LJ 1261, p 1263, AIR 1974 SC 1811 .

2 *State of Madhya Pradesh v Padam Singh* 1973 Cr LJ 877, p 878, 1973 MPL 129 ; Re *Karuppanna Pillai* 1 Weir 480 (1).

3 Re *Nga Po Lu*(1902) 1 LBR 356.

4 Re *Nga Po Lu*(1902) 1 LBR 356.

5 *Sarwan Singh Gajjan Singh Jat v State* AIR 1958 MP 230, 1958 Cr LJ 1039 . For further commentary, see under the same heading in s 170, vol 2.

6 *Radha Sasidharan v State of Kerala* 2006 Cr LJ 4702 (Ker), 2007 (4) KLT 268 .

7 *Develle Venkateswarlu v State of Andhra Pradesh* 2000 Cr LJ 2929 (AP) . See commentary under s 420, *post*.

8 *Yash Pal Mittal v State of Punjab* AIR 1977 SC 2433, p 2436, **distinguishing***Bhanwar Singh v State of Rajasthan* AIR 1968 SC 709, (1968) 2 Cr LJ 867 ; *State v Dilla Ram* 1976 Cr LJ 392, p 393 .

9 *Ram Jus v State of Uttar Pradesh* AIR 1974 SC 1811, 1974 Cr LJ 1261 .

10 *Ibid.*

11 *George Zacharai alias Raju Karuvamplakka v TK Varghese and Anor* (1994) 3 Crimes 758 (SC), 1994 AIR SCW 4848 .

12 *K Krishnamurthy v State of Andhra Pradesh* AIR 1965 SC 333, 1965 (1) Cr LJ 325 .

13 *State of Orissa v Rabindra Nath Saha* 2002 Cr LJ 2327 (Ori) .

14 *Vadivelu and Anor v State* 1999 Cr LJ 369 (Mad) .

15 *Suresh Hingorani v State of Haryana* (2013) 123 AIC 161 (SC), (2013) 9 SCC 454 .

16 *Monica Bedi v State of AP* 2011 Cr LJ 427, (2011) 1 SCC 284, (2011) 97 AIC 37 (SC) .

17 *Suresh Hingorani v State of Haryana* (2013) 123 AIC 161 (SC), (2013) 9 SCC 454 .

18 *Monica Bedi v State of AP* 2011 Cr LJ 427, (2011) 1 SCC 284, (2011) 97 AIC 37 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CHEATING

S. 420.

Cheating and dishonestly inducing delivery of property.--

Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to

fine.36283629

Comments

1. Scope

Cheating as defined in s 415, IPC, is made punishable under s 417, IPC, which deals with cheating generally. Section 420 , IPC, deals with that species of cheating which involves delivery of property or destruction of valuable security.[19] In other words, this section deals with the aggravated form of cheating where, by the cheating, there is dishonest inducement of the person cheated to deliver any property to any person or to make, alter or destroy the whole, or any part of a valuable security or anything which is signed or sealed and is capable of being converted into a valuable security.[20]

The section is attracted even to a case of sale of forged railway tickets.[21]

If forgery is not there, allegation under s 420, IPC would fail because, forgery is the principal allegation, cheating being a consequential offence. If forgery goes, cheating cannot stand.[22]

2. Sections 420 and 511

A person commits the offence of 'attempt to commit a particular offence', when:

(a) he intends to commit that particular offence, and
(b) he having made preparations and with the intention to commit the offence, does an act towards its commission.

Such an act need not be the penultimate act towards the commission of that offence, but must be an act during the course of committing that offence.[23] When the accused on the basis of a false graduation certificate obtained permission to appear at the MA examination in English to the Patna University, he was found guilty of an attempt to commit cheating, punishable under ss 420 / 511, IPC .[24]

3. Section 420 , IPC and Sections 78 and 79 of the Trade and Merchandise Marks Act 1958 (43 of 1958)[25]

In view of ss 78 and 79 of the Trade and Merchandise Marks Act 1958 providing penalty for applying false trade descriptions *etc* and selling goods to which a false trademark or false trade description is applied, a charge under s 420, IPC, becomes wholly inept.[26]

4. Section 420 , IPC and Section 146 (o) of the Maharashtra Co-operative Societies Act 1960 (24 of 1961)

Clause (o) of s 146 of the Maharashtra Co-operative Societies Act 1960 deals with an offence where an officer of the society wilfully recommends or sanctions for his own3630 personal use or benefit or for the use or benefit of a person in whom he is interested, a loan in the name of any other person. The real beneficiary under the loan is, therefore, not the person in whose name the loan is actually awarded. The beneficiary is either the officer himself or some other person in whom he is interested. It is, therefore, a different type of offence and has nothing to do with misappropriation, forgery or cheating which are offences under the IPC .[27]

5. Section 420 , IPC and Section 68 of the Railways Act 1890

Section 68 of the Railways Act 1890 points to contravention which is punishable under s 112(a) of the same Act. Section 68 prohibits the entering of a carriage as a passenger unless with a proper pass or ticket. Where a railway servant applied for and obtained a free pass for his wife and mother and handed over the pass to another woman, who was neither his wife nor his mother, and she used it, the railway servant is guilty under s 420, IPC, and not under s 68 of the Railways Act.[28]

6. Section 420 , IPC and Section 64 of the Post Office Act 1898

The proposition that where a particular set of acts or omissions constitute an offence under the general law and also under a special law, the prosecution should be under the special law, is consigned to cases where the offences are co-incident or practically so.[29] Where an accused was charged both under s 420, IPC, and s 64, Post Office Act, assuming that s 64, Post Office Act is a minor offence as compared to an offence under s 420, IPC, it would not be illegal to try the accused under the major offence of s 420, IPC, only.[30]

7. Section 420IPC and Essential Commodities Act 1955

Essential Commodities Act (EC Act) is a special provision, holds the field over the IPC . A person would not be simultaneously prosecuted under the IPC, when he is being prosecuted under the EC Act.[31]

8. Section 417 and Section 420 --Distinction

As already stated, s 417, IPC deals with cheating generally, prescribes punishment for simple cheating, while this section dealing with that species of cheating which involves delivery of property or destruction of valuable security, lays down the sentence for the aggravated form of the offence.[32] The latter kind of cheating being of a punishment. This section (*i.e*., s 420, IPC), being a special provision, is to be treated as an exception to the general rule enacted in s 417 . If a case falls within the ambit of any of the ss 418, 419 and 420, IPC, the offender must receive the punishment prescribed thereunder; he cannot claim that he should receive the lesser punishment provided for by s 417 .[33] The word 'fraudulently', used in s 415, finds no place in s 420 . *A*, for example, may, by a false representation, induce *B* to advance3631 money in such circumstances that he is exposing *B* to considerable risk of loss, but without the intention of causing wrongful loss. *A* would be acting fraudulently; and if he intended to cause wrongful loss, he would be acting dishonestly. In the former case, he would be punishable under s 417, and in the latter under s 420 .[34]

The vital difference between the offences under ss 417 and 420, IPC, is that whereas, an offence against the latter section is the cognizable one, that against a former is non-cognizable and investigation of it can only be undertaken by the police on the instructions of a magistrate, whereas in the other case, the police can act on their own motion under ss 154 and 156, CrPC .[35] Where, in pursuance of the deception, no property passes, the offence is one of cheating punishable under s 417, IPC . Where, however, in pursuance of the deception, property is delivered, the offence is punishable under s 420 .[36] It may also be noted that an offence under s 420, IPC, is a cognizable one while an offence under s 417, IPC, is only a non-cognizable offence.[37]

9. Cheating Distinguished from Breach of Contract

Commentary under the same heading in s 415, *ante*, may be referred to.

10. Essential Ingredients

To constitute an offence under the relevant section, the essential ingredients[38] are as follows:

(a) there must be deception (as contemplated in s 415, IPC) by the accused; and

(b) by the said deception, the accused must dishonestly induce the complainant:

(i) to deliver any property to any person, or
(ii) to make, alter or destroy the whole, or any part, of the valuable security or anything which is signed or sealed and which is capable of being converted into a valuable security.

The essential ingredients of the offence under s 420 are as follows:[39]

(a) There should be fraudulent or dishonest inducement of a person by deceiving him.3632
(b)
(i) The person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property; or
(ii) The person so induced to do anything which he would not do or omit if he were not so deceived; and
(iii) In cases covered by second part of (a), the act or omission should be one which caused or was likely to cause damage or harm to the person induced in body, mind or property.[40]

The essential ingredients to attract s 420, IPC are: (i) cheating; (ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security; and the (iii) *meansrea* of the accused at the time of making the inducement. The making of a false representation is one of the ingredients for the offence of cheating under s 420 .[41]

The two essential ingredients of the offence under this section are:

(a) deceit, that is to say, dishonest or fraudulent misrepresentation; and
(b) inducing the person deceived to part with property.[42]

The offence of cheating is complete the moment the cheat obtains delivery of property as a result of his deception. The fact that he long afterwards returned it under pressure, cannot, in any way, affect his criminality.[43]

11. Mens Rea

There can be no dispute of the fact that the offence of cheating involves *mensrea* as an essential ingredient. This is obvious from the use of the words 'fraudulently' or 'dishonestly' or 'wilful'.[44] It is settled law that for the purpose of holding a person guilty under s 420, the evidence adduced must establish, beyond reasonable doubt, *mensrea* on his part.[45]

No action can be initiated in criminal court unless intention to cheat is found present. One A acting as agent of B executed sale deed in favour of one C. It was found that D, brother of B had already sold that property in favour of E. In complaint filed by C against B, for offence under s 420, IPC, it was held that criminal action was not maintainable as A had no intention to cheat. Criminal proceedings were quashed on petition filed under s 482, CrPC .[46] The complainant filed complaint with allegations that he had supplied potato seeds to the accused, but the accused had not paid the due amount, hence, cheated the complainant. There was business3633 relationship between the complainant and the accused for the last ten years, dispute never arose between the parties. Mere breach of contract canot give rise to criminal

prosecution. There was absence of *mensrea* to cheat the complainant. The conviction of the accused appellant for offence under ss 406 and 420, IPC was set aside.[47]

12. 'Whoever'

Commentary under the same heading in s 415, *ante*, may be referred to.

13. 'Cheats'

Commentary under s 415, *ante*, may be referred to.

14. 'And thereby'

The words 'and thereby', in s 420, IPC, do not imply that some further act of delivery is necessary after the offence of cheating is completed because the offence of cheating is not complete unless the deception is effective. The said words are only designed to introduce a description of a particular sort of cheating, *i.e*., when the effect of cheating is to induce the delivery of the property or the making, alteration or destruction of a valuable security.[48]

15. 'Dishonestly'

If a transaction is entered into with a free volition of two parties but the representation subsequently turns out to be untrue, the case would not fall within the ambit of this section.[49] The section requires, as an essential ingredient of the offence, an *ab initio* dishonest intention on the part of the accused to knock out money from the complainant by means of fraudulent misrepresentation. This intention can be proved not only by the oral evidence of witnesses, but also by the surrounding circumstances, including those which precede and follow the transaction, whereby the complainant has been made to part with the money.[50] When the post-dated cheque, given by the accused for the price of the goods, sold to him, is dishonoured for want of sufficient amount in his account, the point for consideration is as to what was the intention of the accused at the time of the bargain. If, in spite of the dishonouring of the cheque, the accused is not in a position to pay off the amount, his conviction under s 420, IPC, is sustainable.[51] In *Re HB Shamsundariah*,[52] the accused was held guilty of cheating his superior officers when it was found that he gave a saving bank passbook with forged entries therein as security for his service. In *Nag Shan v Emperor* ,[53] the accused induced the complainant to pay him a ransom for3634 return of his stolen bullocks and thereafter, in spite of successive promises, failed to restore them. It was held that he could be convicted under s 420 . In *Sher Singh v Emperor* ,[54] the accused, by falsely pretending to be a pensioned *subedar*, deceived the complainant and dishonestly induced him to let the accused have, on credit, certain articles for which he did not intend to pay. He was held guilty under s 420, and not under s 417 . Where the accused, who had already sold his house to another person, executed a *bainapatra* in favour of the complainant and secured earnest money from him for the sale of the same house, it was held that the accused was guilty under this section.[55] Where the accused consigned smaller quantities of goods but by tampering with railway receipts showed larger quantities and the firms, to which the railway receipts were endorsed, drew large sums of money commensurate with the large quantities of goods specified in the forged receipts, it was held that the accused was guilty under s 420 .[56] When the accused made a fraudulent representation that his institution was recognised by the government and thereby induced persons to part with their money, it was held that he was guilty of an offence under s 420 .[57]

For the purpose of establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Merely because the vendor before execution of the sale deed surreptitiously demolished constructions existing on the plot sold to the complainant, did not constitute any offence. Proceedings for offence under s 420, IPC were quashed on petition filed under s 482, CrPC .[58]

As 'dishonestly' involves wrongful gain or wrongful loss, obviously the term does not apply to a case where no pecuniary question arises.[59]There would be no element of cheating in the act of a person who sells

some drugs in bottles containing a false statement as to the brand, *etc*, unless there is evidence to show that the buyers were induced to buy the drug by the representation that appeared on the label. [60] In *Yusuf Dehlavi v Laik Ahmed Hashmi* ,[61] the allegation of the complainant was that his son sent an all correct solution to a crossword competition run by the accused, but he was not awarded the first prize. It was held that the decision of the editor being final and binding under the rules, under which the editor was not to enter into any correspondence whatsoever with the competitors, there was no deception of any kind on the part of the accused. If the facts of the case, as disclosed in the complaint, do not admit of any other conclusion except that the goods supplied by the accused, were not according to the instructions of the complainant and were found to be defective, then no case is made out under s 420, IPC .[62] The admission that the accused paid a major part of the price and defaulted only in regard to the balance of3635 the price some time later, is rather an indication of absence of any motive of deception at the commencement of the business dealing.[63] Where the cheque was issued for the price of the goods, but the bank was subsequently instructed to stop payment, no offence of cheating was held to have been made out.[64] Similarly, the obtaining of a railway receipt, though by false representation, without causing any damage or harm to, or without imposing any additional liability upon, the railways, was held not to be an offence under s 420, IPC .[65]

After suit for ejectment had been passed against the accused in respect of the land under s 163 of the HP Land Revenue Act, he entered into conspiracy with the patwari of the area, and got his name entered over the land in respect of which ejectment decree had been passed. Accused was convicted under s 420, IPC .[66]

Where the accused, in the capacity of Bank Manager, wrongfully exceeded limit of discounted bill facility causing loss to the bank, no offence was committed as it was resorted to achieve projected targets of business by bank. Accused was acquitted of the charge under s 420, IPC .[67]

16. Mere failure to keep Promise

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under s 420 of the IPC can be said to have been made out.[68]

17. Hire Purchase Agreement

The breach of condition of hire-purchase agreement does not amount to an offence of cheating.[69] When the complainant has himself stated in the complaint that the accused had taken the vehicle on hire-purchase and had failed and neglected to pay certain instalments, in other words, the accused had paid certain instalments to the complainant after taking the vehicle on hire-purchase agreement. Therefore, there was no dishonest intention on the part of the accused on the date of entering into hire-purchase agreement to cheat or induce the complainant.[70]3636

18. Void Contracts

Criminal prosecution for cheating can be based even on an illegal contract.[71] If A induces *B* to part with a sum of money on assurance that he would exert his influence over the income-tax officer so as to persuade him to assess *B* in a particular manner, the criminal court has only to see what offence has been committed by *A*, and it is immaterial whether the offence involves an illegal or void contract which cannot be enforced in a civil court.[72] It would be wrong to say that a party should not be allowed to prosecute on a charge of cheating when he would not be entitled to obtain, from a civil court, any relief for breach of the contract.[73]

19. Arbitration Clause in the Agreement--No Effect on Offence

One of the clauses in the agreement of the parties provided for reference to arbitration under the Arbitration and Conciliation Act 1996 (26 of 1996) for reference to arbitration in case of disputes or controversies between the parties, and the said clause was wide enough to cover all sorts of disputes arising out of the agreement. Merely because there was an arbitration clause in the agreement, that cannot prevent criminal prosecution against the accused even if an act constituting a criminal offence is made out *primafacie*.[74]

20. Dishonoured Cheques

When a person issues a cheque or post dated cheque, he impliedly represents to the payee that in the ordinary course of events, the cheque on its presentation to the bank on or after the date, mentioned in the cheque would be met and the amount mentioned therein would be paid to the drawer or his agent.[75] It would depend on the totality of circumstances brought out on record whether the intention of the accused was to cheat or whether the cheques had been issued with the intention of making the payments, but subsequently funds could not be raised.[76] Giving of a cheque on a bank as payment for goods or in payment of a debt does not amount to representation that the person giving the cheque, has money in the bank when he issues the cheque; it does, however, amount to representation that he has authority to draw the cheque on the bank for that amount and the cheque is a good and valid order for the payment of its amount and the cheque will be paid, *i.e*., the existing state of facts is such that in that ordinary course the cheque will be met.[77] If the failure to meet payment of the3637 cheque is not accidental, it must be presumed that the accused had been aware that the cheque would be dishonoured and he would be guilty under s 420 .[78] The accused issued a cheque and induced the complainant to pass a receipt, therefore, knowing that the cheque would be dishonoured for want of funds. When the cheque was dishonoured, the complainant lodged a complaint against the accused for an offence under s 420, IPC, and the magistrate issued process. The High Court refused to interfere with the criminal proceedings under s 482, CrPC .[79]

A cheque was issued in discharge of an existing debt, though account was closed at that time, as there was no deception following the concealment, no offence under s 415, IPC was committed.[80]

The intention of drawer at the time, when the cheque is issued, is a material test and if it appears from the circumstances that the drawer did not expect that the cheque would be cashed in the normal course, it would be *primafacie* proof of his intention to cheat.[81] Similarly, in the case of a *hundi* negotiated as payable on sight and drawn on a firm which the accused knows would not pay the *hundi*.[82] In such cases the prosecution has to establish facts which point *primafacie* to the conclusion that the failure to meet the cheque was not accidental but a consequence expected and, therefore, intended by the accused. It will then be for the accused to establish any facts which may be in his favour and which are especially within his knowledge and as to which the prosecution cannot be expected to have any information.[83] Where the bank dishonoured a cheque on the ground of absence of a rubber stamp of the drawer and there was no evidence to show that the accused had deliberately omitted to put the rubber stamp on it, it was held that its absence would not be inconsistent with the innocence of the accused.[84] Where, under the rules, a cheque could not be accepted but it was offered and dishonoured, it was held that there was no question of dishonest intention in delivering the cheque.[85] When the cheque was issued by the accused for price of returned articles in a business transaction and there was nothing to show any dishonest or fraudulent intention on the part of the accused, the dishonour of the cheque does not attract s 420, IPC, as the ingredients of cheating are not attracted.[86] However, the mere fact that the postdated cheques were dishonoured does not make the accused guilty of cheating.[87]

The cheques issued by the appellant accused towards purchase price were dishonoured. There was neither any allegation nor any proof that the appellant had intention to cheat the respondent from the very beginning. Held, no offence of3638 criminal breach of trust or cheating was committed. Appellant was acquitted of the charges under ss 405 and 420, IPC .[88]

21. Dishonoured Cheque--Effect of Section 138, Negotiable Instruments Act 1881 (26 of 1881)

Even after the introduction of s 138 of the Negotiable Instruments Act 1881, prosecution under s 420, IPC, is maintainable in case of dishonour of cheques or postdated cheques issued towards payments of price of goods purchased or loan taken, or in discharge of an antecedent debt or towards payment of goods supplied earlier. If the charge-sheet contains an allegation that the accused had dishonest intention not to pay at the time of issuance of the cheque, and the act of issuing the cheque, which was dishonoured, caused damage to his mind, body or reputation, a private complaint or FIR alleging offence under s 420, IPC, for dishonour of cheques or postdated cheques cannot be quashed under s 482, CrPC, if the averments in the complaint show that the accused had a dishonest intention to cause damage to the complainant's mind, body or reputation, by issuing the cheque which was not honoured.[89] An offence under s 138, Negotiable Instruments Act, need not necessarily take within its wings the offence of cheating as defined under s 415, IPC, since issuance of a cheque without sufficient funds was not made an offence, unless it falls within s 415 and is also generally not regarded as morally wrong or corrupt. It could be said that the offence under s 138 of the Negotiable Instruments Act will not normally involve moral turpitude.[90] When after going through the contents and the ingredients of s 420, IPC, knowing fully well that the prosecution cannot be maintained thirty days after the waiting period from the date of issuing of notice, the accused approached the culprit dishonestly making a request to wait till a certain date promising that he would repay the amount, there is a *primafacie* case for the offence under s 420, IPC . Therefore, the prosecution in respect of s 420, IPC is not liable to be quashed.[91]

The cheques were post-dated ones; they were issued in the year 1996. They were presented before the bank on a much later date, only on 10 January 2001. When the cheques were issued, the accounts were operative. Even assuming that the accounts were closed subsequently, the same would not mean that the appellant had an intention to cheat when the post-dated cheques were issued. The ingredients of s 420, IPC were not satisfied in the case.[92]

22. Offences under Section 138, Negotiable Instruments Act 1881 and Section 420 --Principles of Double Jeopardy and Issue of Estoppel do not apply

The two offences covered by s 420, IPC and s 138, Negotiable Instruments Act are quite distinct and different offences even though sometimes there may be overlapping and sometimes the accused person may commit both the offences. The3639 two offences cannot be construed as arising out of same set of facts. Therefore, s 300, CrPC is not a bar for separate prosecutions for the offences punishable under s 420, IPC and s 138 of the Negotiable Instruments Act . The question of application of the principles of double jeopardy or rule of estoppel does not come into play. The acquittal of the accused for the charge under s 420, IPC does not operate as estoppel or *resjudicata* for a finding of fact or law to be given in prosecution under s 138 of the Negotiable Instruments Act . The issue of fact and law to be tried and decided in prosecution under s 420, IPC are not the same issue of fact and law to be tried in a prosecution under s 138 of the Act.[1] Pendency of civil suit for recovery of amount would not bar complaint under s 420, IPC for dishonor of cheque.[2]A person once tried for dishonour of cheque under s 138, NI Act, can be tried again for offence of criminal breach of trust, cheating and abatement; the bar contained in the doctrine of double jeopardy would not operate.[3]

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A person cannot be prosecuted again for offence of cheating under s 420, IPC when he had already been tried and convicted for the same offence on the basis of another cheque issued during the course of the same transaction.[5]

23. Admission in Government College Based on Fake Mark-sheet

Production of a fake mark list to obtain admission to a course in a government college amounts to dishonestly inducing the college authorities. The accused thus cheated and dishonestly induced the selection committee to make them believe that fake mark list was a true and genuine document. When the

first accused had, with knowledge produced a fake document in order to deceive the selection committee headed by the prosecution witness to obtain admission, he has committed the offence punishable under s 420, IPC .[6] It cannot be held that the property for the purpose of s 405, IPC would be non-corporeal property. It will have to be either movable or immovable property or the property which is transferable, consumable or capable of being spent and not one of the type of mark sheet which is intangible, non-transferable or nonexpendable. Mark sheet which is intangible, non-transferable and non-expandable is not property.[7]

24. Interpolations in Marks in Selection(s)

The accused, the Chairman and a member of a Subordinate Staff Selection Board in conspiracy with the third accused, a candidate, increased the numbers awarded in *vivavoce* test and included him in the list of selected candidates for pecuniary3640 benefits. The act of the three accused persons did not amount to an offence of forgery; the accused persons prepared false record of the final result also, committed cheating and hence were guilty of offence under s 218, s 420, s 477A and s 120B, IPC .[8]

25. Cheating by Delivery of Spurious Cold Drink

Section 420, IPC deals with cheating which must be proceeded with dishonest inducement to deliver any property as a consequence of such cheating. Even if the payment made by the informant for the cold drink in question be deemed to be delivery of property, it is essential to show that the informant has been cheated by delivery of a spurious cold drink. The matter then reverts back to the issue of the drink being spurious or not. The basic premises for prosecution on basis of the drink being spurious, would be the report of the public analyst which is wanting in the present case.[9]

26. Obtaining Allotment of Plot by Filing False Affidavit

Where the accused by concealing the facts made false averments in affidavits that he did not own any plot in his own name or his wife's name or any dependent member and got the allotment of plot under LIG Scheme, the conviction and sentence of accused under s 420 was found proper.[10]

27. Commercial Frauds

In mercantile transactions, consignments are delivered on credit and very often the payment cannot be made on the due date, but that does not attract penal consequences.[11] Where the financial schemes of the accused are of a highly speculative nature and there are fraudulent acts and omissions on the part of the accused in commercial transactions, they would be guilty of cheating. Where two partners of a firm, representing it to be a scheduled bank, published two bogus schemes under which persons making some deposits, were to receive much higher amounts in instalments and several false representations were made to the public and material facts were suppressed by the accused and a large number of persons were induced to make deposits, it was held that the accused were guilty of the offence under s 420 .[12] However, where the allegation against the accused was that they dishonestly induced the complainant to supply five truck-loads of flour and did not make full payment of price, the mere commercial transaction cannot be the sole reason to hold that no offence of cheating under s 420, IPC, was made out, however, when there was no material showing that other partner of the firm had taken an active part in inducing the complainant to supply the goods intending not to pay the price thereof, the order taking cognizance of offence under s 420, IPC, against them was not found proper.[13] In *Akhil Kishore Ram v Emperor* ,[14] the accused advertised a *gupt3641 mantra*, by reading which objects could be achieved without any efforts, and over twenty-five thousand clients paid good money for them, but while sending the *mantra*, the accused also sent instructions which could not be observed without long training and preparation, it was held that the accused was guilty under s 420 . However, the schemes for the grant of loan at cheap rates of interest, although highly speculative and somewhat chimerical or of a snowball nature, would not be dishonest or fraudulent if nothing is concealed from and everything is disclosed to the public regarding the scheme.[15]

In this case, the accused no. 3, the broker deceived Canbank Mutual Fund (CMF) by making a false representation and dishonestly induced the official of CMF to deliver Rs. 32.50 lakhs in his favour as brokerage and he dishonestly received the amount and thereby committed an offence under s 420, IPC . He was convicted under s 420, IPC and sentenced to 3 years' RI.[16]

If at the very initiation of the negotiations, it was evident that there was no intention to cheat, the dispute would be of civil nature. Such a conclusion would depend on the evidence to be led at the time of the trial.[17]

28. Fraudulent Transactions of Sales

Where the accused, a power of attorney holder of a firm of which his brother was the proprietor, submitted a quotation for the supply of generator set, the generator set which was supplied was found to be defective and he did not take any steps for the supply of new generator set, nor did he return the amount, the accused had deposited the entire quotation amount in the bank account of the firm but subsequently withdrew it and closed the account, *primafacie* case under ss 409 / 420, IPC was made out against him. The accused, through a power of attorney holder cannot absolve himself of civil and criminal liability.[18] Where the accused contracted to deliver fully made machine-ginned cotton but in fulfilment of the contract the accused delivered an admixture of inferior stuff, it was held that the accused was guilty under s 420, IPC .[19] Where liquor was sold by measuring with a glass not of prescribed measure and which fraudulently misrepresented the capacity, it was held that the accused could be more appropriately tried for the offence of cheating.[20] Selling of milk, adulterated with equal water, would be a case of cheating.[21] It has, however, been held that if watered milk and sweetmeats of inferior sort are sold, it would not be an offence if the purchaser knows and is told that the milk is watered and the purchaser has tested the sweetmeats before buying.[22] Where a mixture of saccharine and bicarbonate of soda was sold as genuine goods through a broker who made over the money to seller, it was held that the seller, but not the broker, was3642 guilty of the offence under s 420 .[23] Where the accused represented that the total land was jot land, executed sale deed, had received the consideration in money, but it was found that the land sold comprised khas land pathway, held, case of cheating was made out.[24]

To constitute an offence under s 420, IPC, there should not only be cheating but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or (ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security. Where a person executed a sale deed under the belief that he is the owner of the property and the transferee takes the sale deed under the same impression, the accused would not be convicted for the offence of cheating.[25]

Where the appellant accused induced the complainant and others, to purchase land, received amount from them as part payment of the sale deed in respect of the land which did not belong to the appellant, issued bogus receipt also, further neither executed the sale deed, nor delivered possession of the land; the act of the appellant amounted to cheating; the appellant had dishonest intention. He was convicted for offence under s 420, IPC .[26]

The accused, 'power of attorney holder' of main accused gave assurance to the complainant that the title of the accused to the property was clear and free from encumbrances and that the main accused was the sole owner of the property, while the title was not clear. *Primafacie* case of cheating was there, the complainant had a case to go to the trial. Complaint was not quashed.[27] Breach of agreement for sale would not be an offence under s 420, IPC .[28] Failure to execute sale deed in terms of agreement for sale would not be an offence punishable under s 420, IPC .[29]

A person selling liquor bottles with false labels representing them to be genuine would be guilty under s 420, IPC . The cheating is complete as soon as sale to the purchaser on the false representation is complete and the price paid.[30] Where, however, a house dealer refused an offer from a person for a mare but later on showed to the purchaser a telegram from his agent by which he induced the purchaser to give a higher price for the mare, it was held that no wrongful loss was caused to that person by reason of the

fact that he was induced to give a higher price for the horse and the offence under s 420 was not committed.[31] The complainant made the allegation that he was duped by the accused company. He supplied a consignment to the accused and there was no dispute regarding payment of price. The dispute related only to the non-conveyance of form 'H', the dispute being of a civil nature, the intention to deceive the complainant was not evident on the part of3643 the accused to attract s 420, IPC .[32] Complainant filed complaint under s 420, IPC with allegations that the accused withheld payment of certain material supplied to him. Held, the dispute was of civil nature, the complaint was filed to exert pressure on the accused for payment, no offence under s 420, IPC was committed.[33]

29. Bank loan

Appellant accused Bank Manager was alleged to have sanctioned loan for obtaining pecuniary advantage. Evidence showed that the loan sanctioned was secured by collateral security, the senior officer of the bank after conducting pre-sanction inspection had recommended the sanction of loan. Held, the appellant had not sanctioned loan dishonestly for obtaining pecuniary advantage. Appellant was acquitted of charges under ss 120B, 420 and 468, IPC .[34]

The accused Bank Manager had sanctioned loan to Government employees, without making any inquiry, without inspecting the site, the accounts of the Government employees were not opened, the loan amount sanctioned was credited to the accounts of the co-accused. Held, the accused Bank Manager and co-accused entered into conspiracy and defrauded Bank, their conviction under ss 420 / 120B, IPC was upheld.[35]

30. Non-payment of Bank Loan

In order to attract s 420, IPC, it is incumbent on the part of the prosecution to establish that the accused had deceived the bank while taking loan or that they had acted dishonestly or fraudulently. The accused persons had not given wrong address; the units in question did exist. Mere non-payment of the loan amount itself cannot be construed as satisfying the ingredients of s 420 of the IPC .[36]

31. Advocate on Bank Panel -- Prosecution

An advocate on a panel of bank giving legal opinion in loan cases cannot be mulcted with criminal prosecution unless evidence shows conspiracy between him and the conspirators accused. The liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. In the present case there was no such evidence. Charges framed against the accused advocate under ss 120B, 420, 467 *etc*. IPC were quashed.[37]

32. Introduction for Opening Account does not Amount to Abetment of Cheating done by Account-holder

Where the accused merely introduced the co-accused to a bank for opening an account, and the said co-accused after six months presented bogus drafts and3644 withdrew the amount, and there was no evidence showing involvement of the accused in the fraud committed by the co-accused nor did he instigate the co-accused to present the bogus drafts, and the bank passed a self cheque of the co-accused when there was no sufficient money in his credit by acting on bogus drafts, the accused cannot be held responsible for the loss sustained by the bank. So, the conviction of the accused for abetment of cheating was found not proper.[38]

33. Attesting Witness not Liable to be made Co-accused for Omissions in Sale-deed

Where in a case of cheating under s 420 read with s 120, IPC against the accused that inasmuch as the land was sold concealing the fact that a revenue suit was pending with respect to the said land, the

attesting witness was sought to be arraigned as the co-accused on the allegation that he persuaded the complainant to purchase the land, it was held that the mere fact that because the attesting witness had put his signatures on the sale deed as an attesting witness cannot be said that he was aware of the fact that a revenue dispute was pending with respect to the subject land. It was not for the attesting witness to verify the correctness of the contents of the document. So, the attesting witness was not liable to be arraigned with the co-accused for trial under ss 420 / 120, IPC .[39]

34. Fraud in the Matter of Tickets

Traveling in a railway carriage of a higher class than that for which the fare has been paid,[40] or giving of some luggage to a co-passenger to evade the charge for overweight,[41] or traveling without a ticket,[42] would not amount to cheating and would be punishable under the provisions of the Railways Act. Where the accused, a student, presented a certificate, issued to another student, who was entitled to travel by rail at reduced rates, and, on its basis, received a pass, it was held that the accused was not guilty of cheating, there being no rule prohibiting the transfer of student's ticket.[43] Where, however, a passenger produced an old pass with an altered date and number, it was held that he was guilty of an attempt to cheat.[44] Where a railway employee obtained a free pass for his wife and mother but handed it over to another woman who used it, it was held that the accused was guilty under s 420 .[45] Where, after traveling without ticket, the accused presented a forged railway pass in the name of the servant of an assistant auditor which was not meant for him, it was held that the accused was guilty under ss 419 and 511, IPC .[46]

35. Fraudulent Claim of Divine Healing Power

If somebody offers his prayers to God for healing the sick, there cannot normally be any element of fraud. However, if he represents to another that he has divine powers and either directly or indirectly makes that another person believe that he has such3645 divine powers, it is inducement referred to s 415, IPC . Anybody who responds to such inducement pursuant to it and gives the induced money or any other article and does not get the desired result, is a victim of fraudulent representation. The court can in such a situation presume that the offence of cheating falling within the ambit of s 420, IPC, has been committed. It is for the accused, in such a situation, to rebut the presumption.[47]

36. Promoting Speculative and Unworkable Scheme

Promoters of a financial snowball scheme, which could run only so long as there would be a continuous uninterrupted and enormously progressive increase in subscribers but which could not go on indefinitely, would not be guilty of cheating, in the absence of false representation and dishonest concealment of facts either in the prospectus issued or in the conduct of the promoters, calculated to deceive the public and thereby induce it to contribute money to the scheme.[48] In the absence of misrepresentation or suppression of any material facts with a view to defraud or cheat the public, the promoters of a money circulation scheme are not guilty of cheating even if the scheme is speculative and unworkable. It is for the legislature to intervene if it wants to protect people who participate in these schemes knowing that sooner or later the schemes are bound to fail.[49]

37. Filing of False Return

Filing of false return and evasion of tax may be punishable under s 46 of the Kerala General Sales Act, but does not constitute offence under s 420, IPC .[50]

38. Matrimonial Disputes

There has been an outburst of matrimonial disputes in recent times. Small matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in commission of heinous crimes, in which even elders of the family are involved with the result that those who could have been counseled are rendered helpless on their being arrayed as accused in a criminal case. There are many other reasons

which need not be mentioned here for not encouraging matrimonial litigation so that the parties may terminate their dispute amicably by mutual agreement instead of fighting it out in a court of law where it takes several years to conclude. Therefore, the Supreme Court may interfere in appropriate cases by exercising the powers under art 136 of the Constitution of India to give justice to parties.[51]

39. Palming Off Woman by Misrepresenting her Caste

In an old decision of the Allahabad High Court in *Empress v Sheoram* [52] it was held by Mahmood J:

> That to palm off a young woman as belonging to a caste different to the one to which she really belongs, with the object of obtaining money, amounts to the offence of3646 cheating by personation as defined in s 416 of the Indian Penal Code, which must be read in the light of the preceding, s 415 .

In an another decision in *Queen Empress v Ramka Kom Sadhu* ,[53] it was held that a prostitute may be charged for cheating under s 417 if the intercourse was induced by any misrepresentation on her part that she did not suffer from syphilis. In *Queen v Dabee Singh* ,[54] the Calcutta High Court convicted a person under s 417 who had brought two girls and palmed them off as woman of a much higher caste than they really were, and married them to two Rajputs after receiving the usual bonus. It was further held that the two Rajputs who married the two girls on the faith that they were marrying a woman of their own caste and status, were fraudulently and dishonestly induced by deception to do a thing (that is to say, to marry woman of a caste wholly prohibited to them) which but for the deception practiced upon them by the accused, they would have omitted to do. In another case which was almost similar to the one as mentioned above, namely *Queen v Puddomonie Boistobee* ,[55] a person was induced to part with his money and contract marriage under the false impression that the girl he was marrying was a Brahmin. The person who induced the complainant into marrying that girl was held liable for punishment under s 417, IPC .

Where the accused-respondent palmed off his sister as a woman of a much higher caste than she really was and the petitioner married her on the faith that he was marrying the woman of his own caste and status, the petitioner was said to have been fraudulently and dishonestly induced by deception to do a thing, *i.e*., marrying woman of caste wholly prohibited to him, which but for deception practiced upon him by accused respondent, he would have omitted to do. The offence committed by accused falls under the second part of s 415 and quashing of FIR filed by the petitioner under s 482 by the High Court on ground that s 415 necessarily relates to property, is incorrect.[56]

40. Rape and Cheating

Commentary under the same heading in s 417, *ante*, may be referred to.

41. 'Induced'

Commentary under the same heading in s 415, *ante*, may be referred to.

42. 'Person Deceived'

Commentary under the heading 'Person' in s 415, *ante*, may be referred to.

43. Inducement and Deception--Deception Need not be by Express Words

Section 420, IPC deals with cheating and dishonestly inducing delivery of property. The offence of cheating is made of two ingredients. Deception of any person and fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property. To

put it differently, the ingredients of the offence are that the person deceived delivers to someone a valuable3647 security or property, that the person so deceived was induced to do so, that such person acted on such inducement in consequence of his having been deceived by the accused, and that the accused acted fraudulently or dishonestly when so inducing the person. To constitute the offence of cheating, it is not necessary that the deception should be by express words, but it may be by conduct or implied in the nature of the transaction itself.[57]

44. 'Property'

Commentary under the same heading in s 415, *ante*, may be referred to.

45. Delivery of Property

Commentary under the same heading in s 415, *ante*, may be referred to.

46. Preparation of false Muster Roll

There was evidence that the appellant Junior Engineer entered into criminal conspiracy with the co-accused Assistant Engineer for preparation of false muster roll, and as such false muster rolls were prepared showing names of casual labourers who had not even worked. Accused appellant verified, consigned muster-rolls, gave false certificates. His conviction under ss 120B, 467, 468, 471 and 420, IPC was held proper.[58]

47. 'To Any Person'

Delivery of the property need not be to the same person who has made the representation or who has dishonestly induced the person deceived (*i.e*., the complainant) to deliver the property. Delivery of the goods can be made to any person.[59] He may be the offender himself; he may be his agent (like post office) also.[60] What is material is that the goods are parted with as a result of the dishonest inducement by the accused.[61]

The word 'delivery' conveys the import and implication of the change of hands of the property or its transfer from one person to another, either directly or indirectly. Where the accused induced the colliery manager to give away a jeep for use of some other party, who was known to the manager and who had not requisitioned the jeep, and the jeep was driven all along by a servant of the colliery manager, it was held that there was no delivery of the jeep to the accused, it being all along with the manager's driver, and the accused was guilty under s 417 and not under s 420 .[62] Property is delivered when something in the ownership or possession of one man is delivered into the ownership or possession of another.[63]3648

48. 'Valuable Security'

Commentary of s 30, vol 1, may be referred to.

49. Procedure

The offence under this section is cognizable, non-bailable, compoundable, with the permission of the court, before which the prosecution for such offence is pending, and triable by a magistrate of the first class.[64] Offence under s 420, IPC is a compoundable offence. Where the parties subsequently entered into compromise, the compounding petition was allowed.[65]

The provision of s 218, CrPC, would apply only in such case where the distinct offences for which the accused is charged are being tried before the same magistrate and not before a different magistrate. Further, the case where different persons are alleged to have been defrauded by the accused cannot be regarded as committing a single series of transaction as each offence was a distinct one, so s 220, CrPC,

also does not apply and the offences tried before the different magistrates cannot be directed to be transferred to be tried by a single magistrate.[66]

50. Compromise in Civil Suit does not Compound Offence of Cheating

A creditor, who files a complaint alleging cheating by the accused, is not precluded from seeking civil remedy for recovery of the amount advanced. In fact, he will be more interested in recovering his dues rather than in pursuing punitive action. In his endeavour to recover the money, he may enter into a compromise or arrangement for payment by the debtor in instalments. That automatically does not result in compounding of the offence. If a prayer is made for permission to compound the offence, the payment made in furtherance of such arrangement may be taken into consideration, while considering such prayer. The conduct of the debtor in meeting his obligation as per compromise before civil court is very much material. An offer of the debtor to repay the amount, when cornered is not sufficient to allow an offence to be compounded.[67]

51. Compounding of Offence under Tax Immunity Scheme--Subsequent Initiating of Criminal Proceedings is Double Jeopardy

The Kar Vivad Samadhan Scheme of 1998 sought to provide a quick and voluntary settlement of tax dues outstanding as on 31 March 1998, both in various direct tax enactments as well as indirect tax enactments by offering waiver of a part of the arrear taxes and interest and providing immunity against institution of prosecution and imposition of penalty. Immunity was granted to the persons in respect of whom the offence was punishable under ch IX or ch XVII of the IPC . In view of the compounding of criminal offence *qua* certificate obtained under the Kar Vivad Samadhan Scheme of 1998, the customs duty was paid by the accused Gujarat Cancer Society (GCS) and settled under Kar Vivad Samadhan Scheme. Despite acknowledging this fact, the CBI initiated criminal proceedings under the IPC against3649 GCS on the allegations of cheating the Government of India in terms of evasion of duty and by concealment of facts obtained customs duty exemption certificate, such proceedings initiated by CBI were held to be erroneous as they amounted to double jeopardy since pursuant to certificate granted to the accused under the said scheme alleged criminal liability stood compounded on the settlement with respect to civil issues.[68]

52. Jurisdiction

Chapter XIII, CrPC, deals with the jurisdiction of criminal courts in inquiries and trial. Section 177 , CrPC, stipulates general rule of jurisdiction whereas ss 178 to 182, CrPC, embody the exceptions. The general principle of law is that all crimes are to be tried by the court within the jurisdiction in which the offence had been committed. However, s 178, CrPC, says that when it was uncertain in which of several local areas an offence was committed or where an offence is committed partly in one local area and partly in another area, the court having jurisdiction over any one of such local area has the jurisdiction to try the offence. It means that the cases can be tried before either of the court and it is an exception to the general rule envisaged in s 177, Crpc . Section 182 , CrPC, is more specific regarding governing of the venue of trial in cases of cheating leading to delivery of goods. However, it does not say that the court wherein the property has been delivered alone have the jurisdiction to try the offence. It would indicate that the court within the jurisdiction of which the property had been delivered, also have jurisdiction to try the offence. By specifying the jurisdiction of a court by s 182(1), CrPC, the jurisdiction conferred on different courts in view of s 178, CrPC, is not all constrained or taken away. When part of the offence had been committed within the jurisdiction of one court and the remaining part within the jurisdiction of another court, both the courts have jurisdiction to try the offence in view of s 178, CrPC . The provisions of the statute should be read with as to harmonize one another and one section cannot be used to defeat another. The court has to give a harmonious construction to both the provisions so that the full effect may be given to both without one excluding the other there being no seeming conflict or repugnance in the two. When it was uncertain in which of several local areas an offence was committed or the offence has been committed partly within one local area, partly in another local area, both courts have jurisdiction to try the offence.[69] The matter had been considered by the Delhi High Court in *Bhola Nath Arora v State* ,[70] where it was held:

> In a case of cheating it could not be contended that s 182 being a more specific provision would only govern the venue of trial in cases of cheating leading to delivery of goods and as such it would exclude the general principle of jurisdiction under s 177 . On a mere juxta-position of the two ss 177 and 182 it is manifest that the latter provisions supplements and does not supplant the general rule. Therefore it is the duty of the court to give a harmonious construction to both the provisions so that full effect may be given to both without one excluding the other, there being no seeming conflict or repugnance in the two. Hence, when s 177 conveys a clear meaning it is not permissible to construe the same with reference to another section, *i.e*., s 182 for the purpose of controlling or diminishing the efficacy of the former.3650

In *K Satwant Singh v State of Punjab* [71] the question that had come up before the Supreme Court was whether the case can be tried either before the Lahore court or before the Simla court where the misrepresentation by the accused was at Simla and the consequence was at Lahore as the government of Burma was induced by the misrepresentation to deliver property at Lahore. There the Supreme Court held that the offence of cheating by the accused could have been tried either at Lahore or at Simla. In *Satvinder Kaur v State (Govt of NCT of Delhi)* ,[72] the Supreme Court held:

> A reading of ss 177 and 178, CrPC, would make it clear that section 177 provides for 'ordinary' place of enquiry or trial. Section 178,*interalia*, provides for place of enquiry or trial when it is uncertain in which of several local areas an offence was committed or where the offence was committed partly in one local area and partly in another and where it consisted of several acts done in different local area, it could be inquired into or tried by a court having jurisdiction over any of such local areas.

In view of s 178(a) and (d), CrPC, when it is uncertain in which of several local areas an offence was committed or where it consists of several acts done in different local areas, it may be inquired into or tried by a court having jurisdiction over any of such local areas. In the decision reported in *Navinchandra N Majithia v State of Maharashtra* ,[73] the Supreme Court had considered whether the Bombay High Court had jurisdiction to quash the complaint filed in Shillong. There the Supreme Court held that as part of the cause of action had occurred within the jurisdiction of the Bombay High Court, the Bombay High Court had the jurisdiction to quash the proceedings. Where the deception was practiced and inducement was made to the complainant for entering into an agreement relating to purchase of estate at place *C*, the court at place *C*, has jurisdiction to try the complaint pertaining to offence of cheating under ss 417 and 420, IPC .[74]

53. Jurisdiction of Gram Panchayat

Investigation of the case for offence under s 420, IPC is to be conducted by the police authorities where the allegations are of a serious nature and the appellants have duped the complainant of Rs. 30 lakhs. In such cases accused should be tried by the regular criminal Court only and not by the Gram Panchayat.[75]

54. Dropping of Proceedings by Magistrate

It is open to the accused to plead before the magistrate that process against him ought not to have been issued. The magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision is required for the magistrate to drop the proceedings or rescind the process. The order issuing process is an interim order, and not a judgment. It can be varied or recalled. The fact that process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused.[76] Where the allegations were that the accused fraudulently induced the complainant to purchase a3651 plot by falsely representing it to have been approved for commercial use, there was no evidence showing that the accused had any dishonest intention at the time the complainant paid the amount towards the sale consideration, the essential ingredients to prove the offence of cheating

were absent. Likewise, the order of the magistrate dropping proceedings cannot be interfered with in revision.[77]

55. Sanction for Prosecution of Government Servant

No sanction under s 197, CrPC, for prosecuting an accused under ss 420, 468, 471 and 486 read with s 34, IPC, is necessary. For an offence under s 420, IPC, *i.e*., cheating, no government servant can claim to be purported to have acted in the discharge of duties keeping in view, the inherent ingredients of the offence of cheating.[78] The question whether the accused was still in service or had retired is also immaterial.[79] If a government servant is prosecuted for the act of certification of false bills which were sent to him for verification, the act of thus abetting the principal offenders cannot be said to have possibly been done in the discharge of official duties as a public servant.[80] Where a process server, authorised to recover only process fees, recovered an excess amount on a false representation and made false entries in the counterfoils of receipt, it was held that no sanction was necessary.[81] Where, however, a government servant submitted a false bill for encashment purporting to do so in the discharge of his duties as a clerk of the office, it was held that a sanction for prosecution under s 197 was necessary as the act of false representation, which resulted in the offence of cheating, being completed, was done in the course of his official duties by him.[82]

56. Accused Employed with Government Company or Public Sector Undertaking--No Sanction Required

In *Mohd Hadi Raja v State of Bihar* ,[83] the Supreme Court has held that though the public sector undertakings and government companies are held as state within the meaning of art 12 of the Constitution of India, no sanction is necessary under s 197, CrPC, to prosecute a person belonging to such undertakings or government companies, because those undertakings and government companies, being a juridical person and a distinct legal entity, stand on a different footing than a government department. The aforesaid judgment of the Supreme Court reveals that while considering the question involved, the Supreme Court has taken into consideration the definition of word 'Public Servant' as given under s 21 of the IPC . The Supreme Court has further observed in the judgment as under:

> It will be appropriate to notice that whenever there was felt need to include other functionaries within the definition of 'public servant', they have been declared to be3652 'public servant' under several special and local Acts. If the legislature had intended to include officers of instrumentality or agency for bringing such officers under the protective umbrella of section 197 , CrPC, it would have done so expressly.

Therefore, the criteria that is laid down by the Supreme Court in this regard is that, firstly, the officers of the public undertaking or government companies are not public servants and even if they are so unless they are included in s 197, CrPC, the protection of obtaining sanction or requirements of obtaining sanction would not be applicable to them.[84]

57. Quashing of FIR/Complaint/Criminal Proceedings under Section 482 , CrPC

Commentary under the relevant headings in s 406, *ante*, may be referred to.

58. Criminal Proceedings Quashed under Section 482 , CrPC --Cases

In a simple money transaction between seller and purchaser, no provision of IPC can be said to have been attracted. So, the complaint under ss 420, 406, 114, 506, IPC is liable to be quashed.[85] The complaint was filed alleging that there was a conspiracy between officials of the state financial corporation and the accused persons for purchasing unit at a price lower than market value to run a technical institute by the trust. The accused, principal of the said technical institution, took the premises on hire from other

accused persons. There was no whisper about any role played by the said accused-principal in the said transaction. There was no *prima facie* evidence to establish conspiracy as alleged in the sale of the unit in favour of the accused persons. The proceedings against the accused-principal were quashed by the High Court taking recourse to s 482, CrPC .[86] The accused, a registered dealer, purchased certified seeds from a licensed company and sold the same to complainant at the fixed price. Merely because the seed does not give proper yield, it cannot be presumed that there was any cheating on the part of the accused who was neither having any dishonest intention to cheat, nor there was any wrongful gain to him. The basic ingredients of the offence under s 420 of the IPC were not made out. So, the complaint was quashed.[87] When neither any guilty intention can be attributed to the accused persons nor can there possibly be any intention on their part to deceive the complainant, no offence of cheating can, therefore, be said to have been committed by the accused persons and criminal proceedings against them are liable to be quashed.[88]

Mere non-payment of debt does not attract an offence under s 420, IPC, so the criminal proceedings are liable to be quashed.[89] When there was no allegation that the accused ever induced the complainant to enroll as a member of the chit fund established by the accused's brother, the allegations in the complaint did not disclose commission of an offence under s 420, IPC, the complaint was found liable to be quashed under s 482, CrPC .[90] When the complainant himself stated that the accused3653 had taken the vehicle on hire purchase from him had failed and neglected to pay certain instalments, the accused had no dishonest intention on the date of entry to cheat or induce the complainant and therefore complaint against the accused was quashed.[1] In a complaint against accused persons alleging non-payment of construction work done under the agreement, the plea was that part payment was already made by the accused and balance withheld alleging sub-standard work done. The controversy between the parties appeared to be a civil dispute since there was total absence of criminal dishonest intention to dupe the contractors right from the inception of the agreement. Therefore, the order taking cognizance of offence under ss 406 and 420, IPC, was quashed.[2] When the FIR does not disclose ingredient of offences alleged therein and punishable under s 420, IPC*etc*, it deserves to be quashed and set aside.[3] Where the averments in the complaint do not indicate that the complainants were fraudulently made to part with the amount, the complaint showed dishonouring of commitment and avoiding the contract by the accused, the dispute between the parties was wholly and purely of a civil nature alleging breach of contract, the FIR under s 420, IPC, was quashed.[4] When, in an essentially regular commercial transaction with no *mala fides* at all, the offence under s 420, IPC, is not attracted, the proceeding against the accused was quashed.[5] The complainant alleged that he was duped by the accused company. The complainant supplied the consignment to the accused but there was no dispute regarding payment of price. The dispute related only to non-conveyance of form 'H' and was of a civil nature. The criminal proceedings under s 420 *etc* were quashed.[6] The offence under s 468 is intimately connected with ss 422 and 465 . When the main allegation in the complaint is of forgery and cheating is the consequential offence, and if the offence of forgery goes, then the offence of cheating cannot stand and the complaint is liable to be quashed.[7]

The transaction between the parties was for supply of goods. Admittedly, except supply of Form IX-C, other terms and conditions of the contract had been complied with by them. *Per se*, supply or non-supply of Form IX-C of the Bihar Sales Tax Rules by the accused to the complainant had nothing to do with the transactions for which the parties had entered into a contract. Non-issuance of the said form *ex-facie* cannot give rise to commission of any offence, no offence under s 420, IPC is committed. If the appellant or their principal were obligated to act under a statute and failed to perform their duties, as the statute itself provides for a remedy, ordinarily3654 the same is required to be taken recourse to. Proceedings for offence under s 420, IPC on petition filed under s 482, CrPC were quashed.[8]

The complaint under s 420, IPC was instituted on allegations that the accused had no title to the property but had received Rs.60 lacs as advance from the complainant under agreement for sale. On the date of sale agreement, litigation about title to the suit property had not commenced, there was no *primafacie* case that the accused had deliberately suppressed information about dispute relating to the agreement property. Proceedings under s 420, IPC were quashed on petition filed under s 482, CrPC .[9]

59. Civil remedy

Merely because the allegations relating to transaction between the parties give rise to a civil action that would not be a bar to prosecution for commission of offence.[10] Where the facts of the case disclose a civil dispute and also criminal offence, criminal prosecution is not barred, cannot be quashed.[11] A civil dispute can give rise to both civil and criminal liability.[12] Pendency of a civil suit is not a bar for initiating criminal prosecution arising out of same set of facts. Both civil and criminal remedies are concurrent.[13]

60. Pendency of Civil Suit-- Complaint when Liable to be Quashed

Where the matter is purely of a civil nature and the ingredients of the offence of cheating have not been made out even as per the complaint, the suit between the parties is pending where even the accused persons have lodged counter-claims and, therefore, the complaint even *prima facie* does not disclose any offence allegedly committed by the accused persons under s 420, IPC, the summoning orders of the accused are liable to be quashed and the complaint of the complainant is liable to be dismissed.[14] The prosecution case was that the accused prepared a forged sale deed to usurp the land of the complainant. The purchasers had not filed a complaint. Question whether a person/vendor had a right to execute sale deed with regard to land is a pure question of civil nature. Proceedings for offence under s 420, IPC are abuse of the process of the Court.[15]

61. Criminal Proceedings not Quashed--Cases

Where the petitioner, a senior IPS officer was also the trustee of a charitable trust found by his family, a land, measuring about 26 *bighas* had been registered in the revenue records in the name of the trust and the petitioner's trust was beneficiary of such entries, the *prima facie* fraudulent action of land grabbing was done by the beneficiary in connivance of the revenue officials, the court should neither grant stay of arrest, nor the criminal proceedings can be quashed.[16] In the face of the admission3655 by the accused company that it issued cheques to the complainant company in spite of knowledge of insufficient funds and the fact that investigation by the police was still incomplete, the prayer for quashing the proceedings under s 420, IPC, was declined.[17] If a complaint in its entirety discloses commission of an offence, it cannot be quashed.[18] Inherent powers are meant to be exercised by the High court sparingly and with circumspection when there is reason to believe that process of law is being misused to harass a citizen.[19] The accused had received balls of cotton worth crores of rupees and sold the same to others and earned a huge profit, and even thereafter did not pay the money. Merely because the transaction was commercial and civil proceedings can be initiated against the accused, it cannot be said that the offence under s 420, IPC, is not made out against the accused. The order taking cognizance and issuance of process against the accused was found proper and the petition under s 482, CrPC, for quashing the same was dismissed.[20]

The allegations in the complaint were that the complainant-land owner was induced by BPCL-accused to lease out the land for opening a petrol outlet on the assurance that he will be given a dealership. The complainant was also made to give a bank guarantee of Rs 4 lakhs, but finally the scheme was changed and the dealership was given to some other person. On these facts it can be said that the intention of the accused was not *bonafide* since the very beginning, so the order of the magistrate taking cognizance, of the offence under ss 468, 420, *etc* was found proper and the petition for quashing the same, filed by the accused was dismissed.[21] The accused was alleged to have executed a sale deed on the strength of a fake power of attorney executed by an impostor. The accused was an active participant in the offence, so the High Court declined to quash under s 482, CrPC, the criminal prosecution of the accused under s 420, IPC .[22]

When the prosecutrix was cheated in body, mind and reputation because of deception by the accused with the dishonest intention to sexually exploit her and a *primafacie* case existed against the accused for framing charges under ss 417 and 493, IPC, the application of the accused under s 482, CrPC, for quashing the proceedings was dismissed.[23] The accused issued a cheque and induced the complainant to pass a receipt, therefore, knowing that the cheque would be dishonoured for want of funds. When the

cheque was dishonoured, the complainant lodged a complaint against the accused for an offence under s 420, IPC and the magistrate issued process. The High Court refused to interfere with the criminal proceedings under s 482, CrPC .[24] Where the allegations in the complaint showed that the accused while selling immovable property to the complainant made a representation that out of the sale consideration, he would pay the amount due to the3656 co-operative bank under the mortgage but did not pay the said amount, and accused further made a false representation by entering into another agreement in which he asserted that the amount due to the co-operative bank has been cleared, the ingredients of the offence of cheating, *primafacie* was made out, so the High Court declined to quash the criminal proceeding.[25] The accused used a false certificate and thereby made false representation regarding her eligibility and obtained an appointment. The offence under s 420, IPC, is therefore attracted, and the charge against the accused cannot be quashed.[26]

62. Pendency of Civil Suit--Criminal Case should be Stayed

Commentary under the same heading in s 405, *ante*, may be referred to.

63. Magistrate Ordering further Investigation--Accused need not be Heard

Power of the police to conduct further investigation, after laying the final report, is recognised under s 173(8) of CrPC . Even after the court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation. This has been so stated by this court in *Ram Lal Narang v State (Delhi Admn)* .[27] The only rider provided by the aforesaid decision is that it would be desirable that the police should inform the court and seek formal permission to make further investigation.

In such a situation the power of the court to direct the police to conduct further investigation cannot have any inhibition. There is nothing in s 173(8), CrPC to suggest that the court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. As law does not require it, we would not burden the magistrate with such an obligation.[28]

64. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (name of accused person) as follows:
>
> That, on or about the...day of..., at..., you cheated AB by dishonestly inducing him to deliver... (mention the property) to...(name the person to whom property in question was delivered) (or to make, alter or destroy the whole, or any part, of a valuable security or anything which is signed or sealed and which is capable of being converted into a valuable security), and that you thereby committed an offence, punishable under s 420 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.3657

Framing of alternative charge under ss 406 to 409 and s 420, IPC, is not illegal.[29] The court ought to make it clear in the charge in the first place that there was cheating and secondly that the person deceived was dishonestly induced either to deliver property to any person or to make, alter or destroy the whole, or any part, of a valuable security or anything which was signed or sealed and which was capable of being converted into a valuable security.[30] The charge should state that the property obtained was the property of the person deceived.[31] If the charge does not say that any person was deceived or any deceived person was dishonestly induced to deliver any property to any person, the charge is defective.

However, the defect is not material if the accused understands the charge and is not prejudiced.[32] If there is some apparent defect in the form of charge and there is no prejudice to the accused, it will not vitiate the trial.[33] Where the case set up against the accused was a general conspiracy to cheat the government of large sums of money but the allegations amounted to three charges of three different conspiracies, it was held that it was not a bad charge as the accused knew what the charge was.[34] Where the directors of a bank induced the depositors to make deposits in the bank, which was really insolvent, by means of false balance-sheets and false reports and were charged under s 420, it was held that the amendment of the charge, by adding the word 'and by intentionally keeping the bank open as a going concern after it had ceased to be solvent', was not bad in law and the accused were not thereby prejudiced in their defence.[35]

Where charge has been framed under s 409, IPC, but the evidence establishes the offence of cheating, the accused can be convicted under s 420, IPC instead of cheating.[36]

A charge under this section should mention the nature of the representation by which the accused was induced to make over goods.[37] It is not sufficient to set out, in the charge, only 'by deceiving with false representation and promises as well as by conduct'. Such an expression would be too vague and indefinite to give the accused proper notice of the manner of the deceit.[38] However, the trial of a case is not vitiated simply because the charge does not specify the instances of cheating and the manner thereof, vagueness of the charge being a mere irregularity.[39] If the charge makes an omission in giving the exact date but the month is given, the irregularity would be curable.[40] When, the complainant in his statement under s 161, CrPC stated that the accused, before the marriage, had informed that they originally belonged to the Parsi religion and later converted to Islam, the allegation of cheating by not disclosing3658 their original religion by the accused persons at the time of marriage was not well founded, so the order of the magistrate dismissing the petition for framing of charge under s 420, IPC, was found proper.[41] However, when the accused did not issue a qualifying certificate despite the fact that the complainant was declared successful in the examination and charges of misusing the money was *primafacie* established against the accused, the order framing charges under s 420, IPC, cannot be quashed.[42]

When the materials collected by the prosecuting agency are sufficient to raise a very strong suspicion to form a presumptive opinion as to the existence of the factual ingredients which constitute the offences under ss 420 / 120B, IPC, alleged to be committed by the accused persons, the circumstantial evidence on the record *prima facie* shows that the alleged criminal conspiracy was executed with ingenuity, deterring and adroitness, the order framing charge against the accused person was found proper.[43]

In a case of fraud and misappropriation of the government money, the charge against the accused was of dishonestly processing and verifying fake bills, the plea that the accused had signed the bills in question in the normal course of her duty and the accounts section was negligent in verifying them is not tenable because once a person signs on a document he or she is expected to make some enquiry before signing it.[44]

65. Proof

To establish a charge under this section, prove[45] that :

(a) the accused cheated some person (*i.e*., the complainant);

(b) he did so dishonestly; and
(c) he thereby induced the person deceived (*i.e.*, the complainant):

(i) to deliver any property to any person, or
(ii) to make, alter or destroy the whole, or any part, of a valuable security or anything which was signed or sealed and which was capable of being converted into a valuable security.

The prosecution must prove that the complainant was cheated and thereby he was dishonestly induced to deliver money to the accused. Merely parting with money will not amount to cheating.[46] In a case under s 420, IPC, the burden is on the prosecution to show that delivery of property was made as a consequence of some false statements made by the accused or on the basis of the accused causing the complainant to mislead as to a matter of fact or leading him to certain errors. The statements or assertions must be false to the knowledge of the accused.[47] The prosecution must show not only that the accused cheated someone, but also that by3659 doing so he dishonestly induced the person deceived to deliver any property *etc*.[48] Dishonest intention on the part of accused at the time of making the representation to the complainant, on the basis of which the complainant parts with his property, is an essential ingredient of the offence. *Mens rea* on the part of the accused must be established before he can be convicted for the offence of cheating.[49] In the absence of proof of *mensrea*, there can be no conviction under s 420, IPC . Similarly, the prosecution must establish that the accused acted dishonestly in inducing the victims to part with their property.[50] An error of judgment, or a breach of performance of duty, '*per se'*, cannot be equated with dishonest intention.[51]

A dishonest intention cannot be inferred to a reasonable certainty from the mere fact that the accused could not fulfil his promise.[52]It is true that subsequent acts and the conduct of the accused may furnish materials for judging the intention of the accused at the time of the alleged promise or inducement, but his subsequent act is not the sole criterion for judging the said intention. So long as the criminal intention of the accused at the time of the alleged inducement or promise is not established, the accused cannot be held guilty of an offence under s 420 .[53] Similarly, from the mere circumstances that six post-dated cheques of the accused were dishonoured by his bankers, the offence of cheating cannot be made out.[54] Similarly, when there was no false representation in regard to the selection of the accused as drawing master possessing the minimum qualification for appointment as such, no offence of cheating was held to have been constituted.[55]

The prosecution must show that when the accused entered into a transaction with the complainant, he had no intention to pay the money and that he was actuated by a dishonest intention to cheat the complainant.[56] However, once a finding is categorically recorded that the accused had submitted false claims to the government for obtaining payment of money, no burden can be placed on the prosecution to establish that the accused had knowledge of the bogus nature of his claims. Knowledge involves the state of mind of the accused and no direct evidence of that knowledge can possibly be given by the prosecution.[57] Intention can be gathered only from the surrounding circumstances.[58] Though the subsequent bare denial of a transaction by the accused may not lead to the inference of dishonest intention on his part at the time of the bargain, it is permissible to utilise that denial in conjunction with the other circumstances in the case to find dishonest intention. It is open to the prosecution to show that the acts charged against the accused were parts of, and series of, similar acts committed by him at or about the time in question. Evidence of3660 such other acts, whether previous or subsequent to the frauds charged, is relevant for showing whether the intention of the accused was honest or fraudulent.[59]

Where there was no overt act to show that the accused endorsed the stand, taken by the other accused, nor was there any legal evidence to the effect that he had any knowledge regarding activity of the other accused, it was held that the mere fact that he accompanied the other accused, was not sufficient to hold him liable under ss 420 / 471 / 34, IPC . It was the duty of the prosecution, before the accused could be convicted under ss 420 / 471 / 34, IPC, to prove that he knew, from before, that the receipts used by the other accused were forged and that he shared the fraudulent intention with the other accused in passing

as genuine, forged receipts, and obtaining donations from various persons on false pretexts.[60] Where the accused had sold some stolen shares on the false representation that they belonged to him, it was held that the prosecution had to show that the representation was false to the knowledge of the accused and was made in order to deceive the complainant and to induce him to buy.[61] If misrepresentation has to be proved for establishing a charge of cheating, it would be better to get the exact words used by the accused.[62] Where the accused persons, the employees of the municipal board, were alleged to have entered into conspiracy with private persons, for getting the land allotted to them thereby causing wrongful loss to the municipal board and the evidence on record showed that the allotment of land was in accordance with law, there was no evidence to show that any personal gain was obtained by the accused persons or there was any loss to the municipal board. The acquittal of the accused persons under ss 120B, 420 and 109, IPC, was therefore found proper.[63]

The appellant was not assigned any duty in respect of processing or signing the advertisement bills, but she in collusion with the co-accused processed and signed bogus bills worth Rs. 30,30,057 to cheat the Corporation, framing of charge against the accused under ss 420, 429, 468 and 471, IPC was held proper.[64]

Where prosecution evidence showed that accused made false documents for the purpose of cheating and these documents were used as genuine for obtaining passport, accused were convicted for offences under ss 120B and 420, IPC .[65]

66. Dishonest Intention must Exist from the very Beginning for Contract/ Agreement to be Fraudulent

Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction, *i.e*., the time when the offence is said to have been committed.[66] Mere breach of contract *simpliciter* dos not constitute an offence.[67] To hold a person guilty3661 of cheating, it is necessary to hold that he had fraudulent or dishonest intention at the time of making the promise.[68] When there is nothing in the complaint to show that the intention of the accused from the very beginning was fraudulent or dishonest, the criminal complaint under s 420, IPC, is liable to be quashed.[69] In order to attract the offence under ss 420 and 415, IPC, the stage at which fraudulent or dishonest intention should exist is at the time of making inducement, otherwise, mere failure to keep a promise subsequently cannot be presumed as an act leading to cheating.[70]

67. Expert Evidence

Section 45 of the Evidence Act which makes opinion of experts admissible lays down that when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinion upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identify of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.[71]

An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and materials furnished which form the basis of his conclusions.[72]

The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in court and has to face cross-examination. The Supreme Court in the case of *Hazi Muhammad Ikramul Haque v State of West Bengal* ,[73] concurred with the finding of the High Court in not placing any

reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons.[74] Where, in the scheme of the state government to purchase disease affected apples from its growers and destroy them, and allegations were that some growers had obtained payments by showing inflated quantities of scabbed apples and thereby cheated the state, the expert's evidence as to the fruit bearing capacity of orchards in question, belonging to said growers was obtained. The expert visited the orchards only during the succeeding year and that too after the apple season was over. The expert neither made any scientific study nor research in3662 such assessment, nor did he undertake such job earlier. He did not even state, whether, he had undertaken any such work, prior to the case in question. No doubt as an officer of the horticulture department of the state government, he might have acquired some experience in the matter, but that was not sufficient to make him an expert, in the field and to give the label of expert evidence to his testimony. The report of the expert was found unreliable and inadequate to establish charges against the accused.[75]

68. Accused Charged under Section 420 but Convicted under Section 419 by Trial Court cannot be Convicted under Section 420 in Appeal

The offence punishable under s 420, IPC for cheating is not a minor offence in terms of s 222 of the Code of Criminal Procedure 1973 to find the accused guilty under that section, instead of s 419 because the punishment provided for that offence under s 419 is imprisonment only for a term which may extend to three years, while that for the offence under s 420 may extend to imprisonment for seven years. When the accused is already acquitted by the trial court for the offence under s 420 and convicted under s 419 and the state had not filed an appeal against the order of acquittal under s 420, she cannot be convicted of the offence under s 420 in appeal.[76]

69. Conviction by Foreign Court -- If Bar?

Conviction of the accused by a foreign court for the offence would not bar prosecution of the accused under the Indian Penal Code .[77]

70. Acquittal

No conviction for cheating can be passed on mere surmises and conjectures.[78] The High Court can quash a conviction for cheating, even though there are concurrent findings of fact to the contrary, if there is nothing on the record to justify them.[79] If, for the purpose of an offence under s 477A, IPC, the court finds that the entries, made by the accused in the gate-passes, were made inadvertently and negligently, but not wilfully or with a view to defraud, and that finding becomes final, it would not be open to the court to find subsequently on the charge under s 420, IPC, that the entries on the gate-passes were not made inadvertently and negligently, but dishonestly. The findings of fact, to the effect that the gate-passes were made inadvertently and negligently, and not wilfully or with intent to defraud, which led to the acquittal of the accused on the charge under s 477A, IPC, must be that acquittal having become final, operate to the benefit of the accused and lead to his acquittal on the charge under s 420, IPC, also.[80] An accused cannot be convicted under ss 420 / 34, IPC, or under ss 471 / 34, IPC, when there is no evidence to establish that he had any knowledge regarding the activity of his co-accused and when the only evidence is that he merely accompanied the co-accused wherever the latter went for collecting donations.[81] Where there was no evidence at all to show that the accused practiced3663 any fraud on the complainant and thereby induced him to part with the cloth, nor was there any evidence to the effect that the accused knew that the complainant was not paid for the cloth, and the only circumstances was that he was the partner of the second accused and that they had hired a room where the cloth was stored, it was held that so much was not sufficient to show that the accused had any knowledge of the inducement, practiced upon the complainant by the second accused and, therefore, he could not be convicted under ss 420 / 34, IPC .[82] Unless there is evidence to show that the accused or any of them presented the bills in question at the treasury and took payment of the amount of those bills, it cannot be said that they had used those bills as genuine knowing them to be forged or that they had cheated the authorities in making the payment on the basis of these bills. In such a case, no charge under ss 420 and 471, IPC, can be sustained.[83] Similarly, if evidence is insufficient to prove the identity of the accused, alleged to have encashed the forged bill from

the bank, his conviction under ss 420 and 471, IPC, cannot be sustained.[84]

71. Conviction

A conviction under s 420, IPC, would be valid, even if the charge under s 420 read with s 34, IPC[85] is defective unless prejudice is shown to have been caused to the accused.[86] Where the accused induced the complainant and many others from parting with their money as a part payment for the sale of land not owned by him, and the bogus receipt were also issued by him, the accused's intention was dishonest, so the conviction of the accused under s 420 was found proper.[87]

Appellant, accused A3, Monica Bedi obtained fake passport with the help of accused A4 to A9. The entire conspiracy was hatched for her benefit. Her conviction under ss 419, 420 and 120B, IPC was upheld.[88]

Appellant accused A3 Monica Bedi had obtained fake passport with the help of accused A4 to A9. There was clear evidence that accused A8 took delivery of the article (envelop) which contained the address passport addressed to one S, representing that he knew S (assumed name of the appellant Monica Bedi) and delivered the same. Thus the evidence established that the accused A8 participated in the conspiracy in securing the passport for the appellant. The conviction of the accused A8 under ss 420, 419 and 468, IPC read with s 109, IPC was held proper.[89]

72. Admonition

Where the accused had obtained a loan from a bank by fraudulent representation, but had refunded the same along with interest thereon and the bank had suffered no loss, the accused were only admonished under s 3 of the Probation of Offenders Act 1958.[90]3664

73. Sentence--Juristic Person

Section 420, IPC provides that the accused shall be punished with imprisonment of either description for a term, which may extend to 7 years. The word 'shall be punished' makes it compulsory for the court to impose punishment with imprisonment, if the accused is found guilty. To a juristic person like a construction company, punishment of imprisonment cannot be avoided, hence the prosecution of such a company under s 420, IPC, does not appear to be legal, permissible and justified.[1]

74. Sentence (Deterrent)

Some sentence of imprisonment is imperative under this section, and the court has discretion to add, or refrain from adding, a fine.[2] A sentence under the section being a matter of discretion, the higher court should not interfere with it, unless the discretion has been improperly exercised.[3] When the appellate court had already shown some leniency and reduced the substantive term of rigorous imprisonment from three years to two years, the fine had also been reduced from Rs 5,000 to Rs 3,000 with corresponding reduction in the default sentence from one year to six months, the High Court declined to show further lenience in the revision petition filed by the accused against the order of the appellate court (sessions court).[4]

75. Sentence (Lenient)

The circumstances may justify a lenient consideration.[5] A severe sentence should not be passed when the accused moves about in a business community as any severe sentence may ruin and destroy his credit in the market.[6] Where bigger persons are involved in a fraud for which the accused is tried and they are not brought to book, the circumstances will have a bearing on the question of sentence.[7] The Supreme Court speaking through VR Krishna Iyer J in *Mohammad Giasuddin v State of Andhra Pradesh* ,[8] has emphasised the need on the part of the judges to see that sentencing ceases to be downgraded to the cinderella status, and stated that there was need to personalise the sentence from a reformative angle. In *Bhagwandas Keshwani v State of Rajasthan* ,[9] the offences under s 420, IPC, and s 5(1)(d) read

with s 5(2) of the Prevention of Corruption Act 1947, now s 13 of Prevention of Corruption Act 1988 (49 of 1988) with which the accused were charged, were committed more than 12 years ago and the amount involved in the offence was merely a sum of Rs 21.89, The accused had undergone some rigorous imprisonment also, in these circumstances, one year rigorous imprisonment was reduced to the period already3665 undergone. In *Triloknath Yadav v Republic of India* ,[10] the petitioner was convicted under ss 420 and 471, IPC, and was sentenced to undergo rigorous imprisonment for one year on each count. The petitioner was aged about twenty-nine years and no previous conviction was proved against him. The case continued from June 1970, and the petitioner lost his job also. In the said circumstances, the sentence of imprisonment was reduced to one month on each count. In *Babu Lal v State* ,[11] the offence of cheating, committed by the petitioners, was more than four years old. It was also not disputed that the petitioners had already served sentence of imprisonment for a period of more than a month and one of the petitioners has also in all probability lost his job on account of his conviction. Keeping in view all the circumstances of the case, the sentence of imprisonment, awarded to the petitioners, was reduced to that already undergone.

Where the accused appellants were convicted for offences of criminal conspiracy, cheating and forgery, the occurrence took place 15 years before, the appellants had remained in custody for about one month, sentence was reduced to the period already undergone.[12]

The occurrence took place 17 years ago, one of the accused was sick and his movements were restricted through a wheel chair. The other accused had committed the offence when he was a student and thereafter he got married and had a wife and children. The sentence of rigorous imprisonment of one year was therefore reduced to three months rigorous imprisonment.[13] The accused working as a development officer in LIC was found guilty of introducing false and fake insurance proposals to the corporation with a view to inflate business and gain promotion. The occurrence took place 20 years ago, so the sentence of two years rigorous imprisonment was reduced to six months rigorous imprisonment.[14]

The accused, an officiating bank manager defrauded the bank. The offence was committed 10 years ago and the accused was dismissed from service. He has a wife and two children and had deposited the entire amount. The sentence of rigorous imprisonment for two years was reduced to one year rigorous imprisonment, while maintaining the sentence of fine.[15] Where the offence was committed 30 years before, which is a long time and the outlook of a man may have changed entirely, the sentence of imprisonment was reduced from one year rigorous imprisonment to the period of custody already undergone by the accused but the sentence of fine of Rs 15000 and in default to undergo rigorous imprisonment for six months was maintained.[16]

Offences under ss 420, 464, 468 and 471, IPC, for which accused was convicted, were of such nature that the accused could be released on probation. Accused had reached the age of 60 years, had been under suspension and faced trial for more than 12 years. Sentence imposed was reduced to the period already undergone.[17]3666

76. Sentence on Two Different Counts should Run Concurrently

Substantive sentence, if awarded for two offences under s 420, IPC, on two different counts, should run concurrently, and not consecutively, otherwise it would mean that the accused will suffer substantive imprisonment for double period.[18]

19 *Skaria v Narayanan* (1962) Cr LJ 649, p 650 (Ker) ; *State v Somappa* 25 Cr LJ 1193 (Mad) .

20 *Pramode Ranjan Choudhury v State* (1963) 1 Cr LJ 716, p 720 (Tripura) ; *State v Bhanwar Lal Bansal* 1973 Cr LJ 1749, p 1755 (Raj) .

21 *Naresh Chandra Agarwal v State* 1978 Cr LJ 546, 1978 All Cr R 60 .

22 *Rameshchandra Bhogilal Patel v State of Gujarat* 2011 Cr LJ 1395, p 1404 (Guj) (*Guru Bipin Singh v Chongtham Manihar Singh* AIR 1997 SC 1448, **followed**).

23 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698, (1961) 2 Cr LJ 822 .

24 *Ibid.*

25 Now ss 103 and 104 of the Trade Marks Act, 1999 (47 of 1999).

26 *Syed Kaleem v Mysore Laxmi Bidi Works* 1993 Cr LJ 232 (Kant) ; *Zahir Ahmed v Azain Khan* 1996 Cr LJ 290 (Cal) .

27 *Woman Sambhaji Duke v Narhari Sambhajirao Phatale* AIR 1968 Bom 124 (DB), 1968 Cr LJ 305 (Bom) (DB) .

28 *Ram Dayal v King Emperor* AIR 1925 Oudh 479, 1926 Cr LJ 1164 (Oudh) .

29 *Suchit Raul v Emperor* AIR 1930 Pat 622, 1931 Cr LJ 934 (Pat) (DB) .

30 *Ibid.*

31 *Umesh Prasad v State of Bihar* 2009 (79) AIC 896 (Pat) .

32 *Setti Rangayya v Somappa* 25 Cr LJ 1193 (Mad), AIR 1925 Mad 367 .

33 *Sher Singh v Emperor* AIR 1928 Lah 935, p 936

34 *Ba Shein v Emperor* 1992 LB 106, 22 Cr LJ 721 .

35 *Emperor v Khwaja Nazir Ahmed* AIR 1945 PC 18, 1946 Cr LJ 413 .

36 *Anilesh Chandra v State* AIR 1951 Assam 122 ((2)), 52 Cr LJ 1222 ; *Reg v Bavaji* Ratanlal Unrep Cr Cas 96; *Gobinda Biswas and Ors v State* AIR 1951 Assam 122 .

37 *Emperor v Nazir Ahmed* AIR 1945 PC 18, 46 Cr LJ 413 .

38 *State of Bihar v Kailash Prasad Sinha* AIR 1961 Pat 451, (1962) 2 Cr LJ 677, p 682 (DB) ; *Jageshwar Singh Rastogi v State of Madhya Pradesh* AIR 1980 SC 366, 1980 Cr LJ 323 ; *SK Gupta v State of Uttar Pradesh* 1967 AWR 527 ; *D Surya Row v Liyakat Ali Khan* (1974) 40 Cut LT 57, p 63 ; *State v Sant Prakash Sahai* 1977 MLW (Cr) 26, p 41 ; *Hiralal Mundra v Ashok Kumar Rasiklal and Co* 1973 Cut LT 597 ; *Chellam Chetty v Emperor* 29 Cr LJ 633, AIR 1928 Mad 224 .

39 *Kailash Chand Gupta v State of Rajasthan and Another* 2002 Cr LJ 2439 (Raj) ; *Anil Ritolia v State of Bihar* 2008 Cr LJ 353, p 355 (SC), 2007 AIR SCW 6332, 2007 (6) Supreme 429, 2007 (11) Scale 4011 ; *Veer Prakash Sharma v Anil Kumar Agarwal* 2007 Cr LJ 3735 (SC), 2007 (5) All LJ 321 .

40 *RS Nayat v AR Antulay* (1986) 2 SCC 716, 1986 SCC (Cr) 256, 1986 Cr LJ 1922 ; *Mobarak Ali v State* AIR 1957 SC 857, 1957 Cr LJ 1346 .

41 *Bashirbhai Mohamed-bhai v State of Bombay* AIR 1960 SC 979, 1960 Cr LJ 1383 (SC) ; *Devender Kumar Singla v Baldev Krishan Singla* 2004 Cr LJ 1774 (SC) .

42 *RS Nayat v AR Antulay* (1986) 2 SCC 716, 1986 SCC (Cr) 256, 1986 Cr LJ 1922 ; *Mobarak Ali v State* AIR 1957 SC 857, 1957 Cr LJ 1346 .

43 *Emperor v Debendra Prasad* 10 Cr LJ 487, 13 CWN 728 . For further commentary, see under the same heading in s 415, *ante*.

44 *Natural Sugar and Allied Industries v Razzak Gaffar* 2006 Cr LJ 3680 (Bom) .

45 *Anand Mahindra v State of Jharkhand* 2006 Cr LJ 4204 (Jhar) ; *Koppula Ramachandra Rao v State of AP* 2010 Cr LJ 2636 (AP) . For further commentary, see under the heading 'Intentionally' in s 415, *ante*.

46 *Rama Devi v State of Bihar* 2010) 12 SCC 273.

47 *Ram Deo Singh v State of Bihar* 2013 Cr LJ 891 (Pat) ; *Bhusan Prasad v State of Bihar* 2012 (115) AIC 957 (Pat) (Dispute of Civil native, summoning order set aside).

48 *Sanwaldas v Emperor* 18 Cr LJ 990, p 991 (Sind) .

49 *C Fazlur Rahman v Surinder Kumar* 1976 Cr LT 457, p 461 .

50 *Kailash Nath v State* 71 Punj LR 247, p 250 ; *Mankori v State of Rajasthan* 1977 Raj Cr Cas 54, p 56-57 (such intention need not be drawn from the mere fact that the accused could not subsequently fulfil his promise) ; *Ramesh Kumar Jain v Raghubans Mani Prasad* 1977 Cr LJ 463, p 465 (Pat) ; *Jatinder Nath Kaile v Devender Pal Arora* 1976 Ch LR 81 (HP) ; *Upendranath Das v State* 1974 Cut LT 1073 .

51 *Sita Ram v State* 1965 All WR (Supp) 14, (1965) 76 Punj LR 474 .

52 *Re HB Shamsundariah*1968 Cr LJ 1149, (1968) 1 Mys LJ 294.

53 *Nag Shan v Emperor* AIR 1923 Rang 37, 24 Cr LJ 529 .

54 *Sher Singh v Emperor* AIR 1928 Lah 935, (1929) ILR 10 Lah 513 .

55 *Paresh Nath Koyal v Emperor* AIR 1974 Cal 32, 47 Cr LJ 710 ; Re *Venkatagurunatha Sastri*AIR 1923 Mad 597, 24 Cr LJ 432 ; *Aswini Kumar v Emperor* AIR 1921 Cal 119, 25 Cal WN 618 ; *N Devindrappa v State of Karnataka* 2007 Cr LJ 2949, AIR 2007 SC 1741, (2007) 5 SCC 228, 2007 (6) Scale 553 .

56 *Tulsi Ram v State of Uttar Pradesh* AIR 1963 SC 666, (1963) 1 Cr LJ 623 .

57 *State of Uttar Pradesh v Jyoti Prasad* AIR 1962 All 582, (1962) 2 Cr LJ 722 .

58 *B Suresh Yadav v Sharifa Bee* 2008 Cr LJ 431, p 431 (SC) ; **see also***SVL Murthy v State* (2009) 6 SCC 77, (2009) 2 SCC (Cri) 941 .

59 *Sanjiv Ratnappa v Emperor* AIR 1932 Bom 545, p 547, 34 Cr LJ 357 .

60 *S Dutta v State* AIR 1959 Cal 427, 1959 Cr LJ 829 ; *Sudheo Jha v State of Bihar* AIR 1957 SC 466, 1957 Cr LJ 583 .

61 *Yusuf Dehlavi v Laik Ahmed Hashmi* AIR 1956 Pat 256, 1956 Cr LJ 916 .

62 *Vishwa Nath v Mohan Lal Jain* 1976 Cr LT 554 (P&H) .

63 *Hiralal Mundra v Ashok Kumar Rasiklal and Co* 1973 Cut LT 597 .

64 *Bihari Lal v Rumesh Chandra* 1978 All Cr R 216 ; *Sanwal Ram Kajriwal v State* 1965 AWR 53 .

65 *Hari Kumar v State of Bihar* (1972) SCJ 87 ; *K Narayanswami v PN Vishwanathan* 1974 Cr LJ 1524, p 1526, 1973 Mad LW (Cr) 210 ; *RK Poddar v MP Sinha* 1973 Cr LJ 1065, p 1068, 1973 BLJR 181 ; *State of Madhya Pradesh v Mir Basit Ali Khan* AIR 1971 SC 1620, 1971 Cr LJ 1184 . See commentary of s 24, vol I and s 415, *ante*.

66 *Sher Singh v State of HP* 2011 Cr LJ 4440 (HP) .

67 *Banwar Lal Lodha v State of Punjab* 2011 Cr LJ 1192 (P&H) .

68 *Harmanpreet Singh Ahluwalia v State of Punjab* 2009 Cr LJ 3462, p 3467 (SC), 2009 AIR SCW 3976, 2009 (7) Scale 85 .

69 *Abdul Rahim v Inspector of Police* 1992 Cr LJ 370 (Mad) ; *Charanjit Singh Chadha and Ors v Sudhir Mehra* 2001 Cr LJ 4255 (SC) .

70 *Mahesh Kumar KS v State of Karnataka and Ors* 2003 Cr LJ 528 (Kant) . For further commentary, see s 378, *ante*.

71 *Rama Shankar Shukla v Rishab Kumar Jain* AIR 1952 All 428, 1952 Cr LJ 747 ; *Public Prosecutor v Bhimeshwara Rao* AIR 1948 Mad 258, p 260, 49 Cr LJ 443, p 445 ; *Emperor v Raghunath* AIR 1941 Oudh 3, p 5, 41 Cr LJ 881 (DB) ; *Meera v Emperor* 18 Cr LJ 362 ; *Yaccob v Emperor* AIR 1933 Rang 199, 34 Cr LJ 1255 ; *Ganesh v State* 1978 Cr LJ 1403, p 1406 (All) ; *Nagireddy v State* (1973) 1 APLJ 200, p 204,205 . For a **contrary** view, refer to *Emperor v Jani Hira* 13 Cr LJ 521 (Bom) .

72 *Rama Shankar Shukla v Rikhab Kumar Jain* 1952 Cr LJ 747, AIR 1952 All 428 ; *Ganesh v State* 1976 Cr LJ 1403, p 1406 (All) .

73 *Emperor v Raghunath* AIR 1941 Oudh 3, p 6 (DB), 41 Cr LJ 881 ; *Ganesh v State* 1976 Cr LJ 1403, p 1406 (All) .

74 *SN Palanitkar and Ors v State of Bihar* 2001 Cr LJ 4765 (SC) ; *State of Punjab v Pritam Chand* 2009 Cr LJ 1742, (2009) 16 SCC 769 .

75 *OPTS Marketing Pvt Ltd and Ors v State of Andhra Pradesh and Ors* 2001 Cr LJ 1489 (AP) (FB) .

76 *Varinder Kumar v State of Punjab* (1972) 74 Punj LR 578, 1972 Cr LJ 975 .

77 *Keshavji Madhavji v Emperor* AIR 1930 Bom 179, p 181, 31 Cr LJ 1096 ; *Shantilal v State* AIR 1956 MB 19, 1956 Cr LJ 68 ; *Srethara Kamath v Jwala Prasad Gupta* 1970 Ker LT 145 .

78 *Kunwar Sen v Emperor* AIR 1933 Oudh 86, p 90, 34 Cr LJ 124 .

79 *Ramaprasad Chatterjee v Mohd Jakir Qureshi* 1987 Cr LJ 1485 (Cal) .

80 *Chandran v Ponnappa Moothan* 2012 (4) Ker LJ 373 (Ker) .

81 *Shanti Lal v State* AIR 1956 MB 19, 1956 Cr LJ 68 ; *TK Kanungo v State of Bihar* (1998) 3 Crimes 419 (Pat) .

82 *Emperor v Uttamlal Narottamdas* 11 Cr LJ 305 .

83 *Keshavji Madhavji v Emperor* AIR 1930 Bom 179, 31 Cr LJ 1096 ; *Ajodhya Prasad v Chiranjitlal* AIR 1957 All 246, 1957 Cr LJ 438 ; *Bholanath v State* 1982 Cr LJ 1482 (Del) .

84 *RP Khanna v State* AIR 1957 Cal 663, 1957 Cr LJ 1252 ; *K Surendran v Ramachandran Nair* 1967 Ker LT 804 .

85 *Lakhmi Narain Kaira v State* AIR 1955 SC 544 .

86 *Nemichand Swaroopchand Shah v TH Raibhagi Firm* 2001 Cr LJ 4301 (Kant) ; *Sneh Lata v Swastika Agro Industrial Corp* 2001 Cr LJ 4432 (P&H) ; *P Eswana Reddy v State of Andhra Pradesh* 1986 Cr LJ 1207 (AP) .

87 *HICEL Pharma Ltd and ors v State of Andhra Pradesh* 2000 Cr LJ 2566 (AP) .

88 *Veer Prakash Sharma v Anil Kumar Agarwal* 2007 Cr LJ 3735 (SC), 2007 (5) All LJ 321, (2007) 7 SCC 373, 2007 (5) Scale 502 .

89 *OPTS Marketing Pvt Ltd and Ors v State of Andhra Pradesh and Ors* 2001 Cr LJ 1489 (AP) (FB) ; *Rajendra Vasantrao Khode v Laxmikant Shnatilal Chaudhari and Another* 2000 Cr LJ 1195 (Bom) .

90 *C Sareendrari Nair v General Manager (Operation) State Bank of Travancore, Thiruvananthapuram and Ors* 1996 Cr LJ 4289 (Ker) (DB) .

91 *MC Engineering and Technology v Mohd Salahuddin Ghori* 2006 Cr LJ 4407 (AP) .

92 *Subodh S Salaskar v Jayprakash M Shah* 2008 Cr LJ 3953, p 3959 (SC) .

1 *V Kutumba Rao v M Chandrasekhar Rao* 2003 Cr LJ 4405 (AP) ; *Man Mohan Hari Prakash v State of AP* 2011 ACD 898 (AP) ; *Mohammed Kunji v Andru* 2009 Cr LJ 1938, 2009 (1) KLT 528 ; *Lee Kun Hee v State of UP* AIR 2012 SC 1007, 2012 Cr LJ 1551, (2012) 3 SCC 132 .

2 *Lee Kun Hee v State of UP* AIR 2012 SC 1007, 2012 Cr LJ 1551, (2012) 3 SCC 132 .

3 *Sangeetaben Mahendrabhai Patel v State of Gujarat* 2012 Cr LJ 2432, p 2440 (SC), AIR 2012 SC 2844 .

4 *Sangeetaben Mahendrabhai Patel v State of Gujarat* 2012 Cr LJ 2432, p 2440 (SC), AIR 2012 SC 2844 .

5 *Mohammad Kunji v Andru* 2009 (1) KLT 528, 2009 Cr LJ 1938 (Ker) .

6 *Motty Philipose v State of Kerala* 2006 Cr LJ 2271 (Ker) (DB) .

7 *Sunil Kumar v State of Maharashtra* 2009 Cr LJ 2599, p 2604 (Bom) .

8 *Rakesh Kumar Chhabra v State of HP* 2012 Cr LJ 354, p 357 (HP) .

9 *Kripa Shankar v State of Bihar* 2006 Cr LJ 3535 (Pat) .

10 *Karamjit Singh v State (UT) Chandigarh* 2005 Cr LJ 1306 (P&H) .

11 *AL Panian Shanmughan v State of Andhra Pradesh* 1999 SCC (Cri) 84 ; *Yaduhala Lawrence v State of Andhra Pradesh* 1997 Cr LJ 4580 (AP) .

12 *Nadir Ali Barqa Zaidi v State of Uttar Pradesh* AIR 1960 All 103, 1960 Cr LJ 188 ; *Empress v Prra Raju* (1890) ILR 13 Mad 27, 1 Weir 545 .

13 *Ram Chandra Prasad Keshre v State of Uttar Pradesh* 2000 Cr LJ 3047 (All) .

14 *Akhil Kishore Ram v Emperor* AIR 1938 Pat 185, 39 Cr LJ 442 .

15 *Durgadas Radhakishan v Emperor* AIR 1934 Bom 48, 35 Cr LJ 644 ; *Jatindra Nath Sircar v Emperor* AIR 1936 Cal 440 ; *Maung Ba Thwin v King* AIR 1938 Rang 301, 40 Cr LJ 20 ; *WA Da Costa v JP Deefholts* AIR 1925 Cal 605, 26 Cr LJ 921 ; *Radha Ballav v Emperor* AIR 1939 Cal 327, 40 Cr LJ 600 .

16 *B Raghubir Acharyta v Central Bureau of Investigation* 2014 Cr LJ 1380, p 1388 (SC), (2014) 14 SCC 693, (2013) 128 AIC 231 (SC) .

17 *SP Gupta v Ashuthosh Gupta* (2010) 6 SCC 562, p 565, 2010 (5) Scale 639, 2010 (4) Supreme 510, 2010 (4) SLT 533, 2010 Cr LJ 3428 .

18 *Jayendra C Shah v State of Orissa* 2006 Cr LJ 847 (Ori) .

19 *Emperor v Kanji Shivji* 13 Cr LJ 285 (2).

20 *Emperor v Nurodin* Ratanlal Unrep Cr Cas 386.

21 *Empress v Nana* Ratanlal Unrep Cr Cas 145.

22 *Empress v Kalee Modock* 18 WR (Cr) 61 .

23 *Empress v Bholasingh Amarsingh* AIR 1924 Bom 303, 25 Cr LJ 1102 .

24 *Bijit Nagar Choudhary v State of Tripura* 2013 (125) AI 441 (Gauh) .

25 *Md Ibrahim v State of Bihar* 2010 Cr LJ 2223 (SC), 2010 AIR SCW 405, 2009 (12) Scale 250, 2009 (8) SCC 751 .

26 *N Devindrappa v State of Karnataka* 2007 Cr LJ 2949, AIR 2007 SC 1741, (2007) 5 SCC 228, 2007 (6) Scale 553 .

27 *SP Gupta v Ashutosh Gupta* 2010 Cr LJ 3428, p 3440 (SC), 2010 AIR SCW 3683, (2010) 6 SCC 562 .

28 *Devadathan v State of Kerala* ILR 2012 (1) Ker 892, 2012 (1) KLJ 809 (Ker) .

29 *George Thomas v State of Kerala* 2012 (1) KLT 876 (Ker) .

30 *JE Gubbay v Emperor* AIR 1940 Cal 205, 41 Cr LJ 556 .

31 *GW Dick v Emperor* 16 Cr LJ 49 .

32 *Ravi B Jadeja and Ors v State of Uttar Pradesh* 2001 Cr LJ 2892 (All) .

33 *Jagdeep Singh v State of Jharkhand* 2011 (111) AIC 637 (Jhar) ; **see also***Rev Fr Joseph Mudassery v Michael* 2012 (1) KLJ 806, 2012 (1) KLT 910 .

34 *Rajeevan Aswathy v Superintendent of Police* 2011 Cr LJ 2801 (Ker) .

35 *NV Subba Rao v State* 2013 Cr LJ 953 (SC), 2013 (2) SCC 162 .

36 *Ismail Khan Shah v State by CBI/Spl Police Establishment, Bangalore* 2012 Cr LJ 2649, p 2655 (Kant) (Accused appellants acquitted of charge under s 420, IPC).

37 *Central Bureau of Investigation Hyderabad v K Naryana Rao* 2012 Cr LJ 4610 (SC), 2012 AIR SCW 5139, (2012) 9 SCC 512, 2012 (9) Scale 228 .

38 *Manoranjan Das v State of Jharkhand* 2004 Cr LJ 3042 ((SC).

39 *Haji Shaukat Ali v State of Rajasthan* 2004 Cr LJ 4074 (Raj) .

40 *Reg v Dayabhai Parjaram* 1 Bom HCR 140 ; Re *BG Horiman* 34 Cr LJ 239.

41 *Paras Ram v Emperor* 25 PR 1903 .

42 *Kuloda Prasad Majumdar v Emperor* 4 Cr LJ 439 .

43 Re *James Fletcher* 11 Cr LJ 339 (2).

44 *Crown v Gunpat* 6 PR 1868 .

45 *Ram Dayal v Emperor* AIR 1925 Oudh 479, 26 Cr LJ 1164 .

46 Re *Govinaswamy Naidu* 12 Cr LJ 406 (1).

47 *Sri Bhagwan Samardha Sripada Vallabha Venkata Vishanandha Maharaj v State of Andhra Pradesh and Ors* 1999 Cr LJ 3661 (SC) .

48 *Hari Das Barat v Emperor* (1939) ILR 2 Cal 81 .

49 *State of Madhya Pradesh v Mir Basit Ali Khan and Ors* AIR 1971 SC 1620 .

50 *Abdul Nazar v State of Kerala* 2009 (4) KLT 739 (Ker) .

51 *GV Rao v LHV Prasad and Ors* 2000 Cr LJ 3487 (SC) .

52 *Empress v Sheoram* 1882 All WN 237 .

53 *Queen Empress v Ramka Kom Sadhu* (1887) ILR 2 (Bom) 59.

54 *Queen v Dabee Singh* (1867) Weekly (Cri) 55 (Cal) .

55 *Queen v Puddomonie Boistobee* (1866) 5 Weekly (Cri) 98 .

56 *GV Rao v LH Prasad* 2000 Cr LJ 3487 (SC) .

57 *Ram Narain Poply v Central Bureau of Investigation* 2003 Cr LJ 4801 (SC), AIR 2003 SC 2748 .

58 *Kuldeep Sharma v State of HP* 2011 Cr LJ 2678 (SC), AIR 2011 SC 1895, 2011 (4) Scale 256 .

59 *Chandraprakash Tulsidas Parikha v Mulchand* 1979 Cr LJ 321, p 324, 325 (Mah) .

60 *MA Kaleek v Emperor* AIR 1927 Mad 544, 28 Cr LJ 452(2) .

61 *Chandraprakash Tulsidas Parikha v Mulchand* 1979 Cr LJ 321, p 324, 325 (Mah) .

62 *Mohammad Yasin v State* 1967 Cr LJ 1116 (Ori) .

63 *Legal Remembrance v Manmatha Bhusan Chatterjee* AIR 1924 Cal 495, 26 Cr LJ 330, p 334, (1924) ILR 51 Cal 250 .

64 *Deva Ram v State of Rajasthan* JT 2014 (8) SC 355 ; **see also***CBI ACB Mumbaiv Narnadra Lal Jain* 2014 AIR SCW 1603, (2014) 5 SCC 364, 2014 (136) AIC 1 (SC) (Proceedings quashed).

65 *RN Tewari v State of Uttaranchal* 2014 Cr LJ (NOC) 23 (Utr) .

66 *State of Punjab and Anor v Rajesh Syal* 2003 Cr LJ 60 (SC) .

67 *Ramesh Babulal Baheti v Central Bureau of Investigation, Bangalore* 2004 Cr LJ 2274 (Kant) .

68 *Hira Lal Hari Lal Bhagwati v Central Bureau of Investigation, New Delhi* 2003 Cr LJ 3041 (SC), AIR 2003 SC 2545 .

69 *R Mohandas and Anor v M Jayarajan* 2001 Cr LJ 3853 (Ker) .

70 *Bhola Nath Arora v State* 1982 Cr LJ 1482 (Del) .

71 *K Satwant Singh v State of Punjab* AIR 1960 SC 266, 1960 Cr LJ 410 (SC) .

72 *Satvinder Kaur v State (Govt of NCT of Delhi)* (1999) 8 SCC 728, 1999 Cr LJ 4566 (SC) .

73 *Navinchandra N Majithia v State of Maharashtra* (2000) 7 SCC 640, AIR 2000 SC 2966 .

74 *R Mohandas and Another v M Jayarajan* 2001 Cr LJ 3853 (Ker) .

75 *Sharanjit Kaur v State of Punjab* AIR 2013 SC 2745, 2013 Cr LJ 3859 .

76 *KM Mathew v State of Kerala* (1992) 1 SCC 217, 1992 Cr LJ 3779 (SC) .

77 *S Surbir Singh v Mahendra Kumar Rajput and Ors* 2000 Cr LJ 696 (Del) .

78 *Ravi Nandan v Gurbachan Singh* (1981) 8 Cr LJ 311, p 312 (Punj) **following***K Satwant Singh v State of Punjab* AIR 1960 SC 266 and *Bakhshish Singh Dhaliwal v State of Punjab* AIR 1967 SC 752 ; *State of Andhra Pradesh v T Rajagopalachari* 1972 Cr LJ 1267, p 1269 ; *Mohinder Singh v State of Punjab* 2001 Cr LJ 2329 (P&H) .

79 *Mohinder Singh v State of Punjab* 2001 Cr LJ 2329 (P&H) ; *IP Chopra v Ram Sahai* 1984 CLR (Raj) 107 .

80 *Bakhshish Singh Dhaliwal v State of Punjab* AIR 1967 SC 752, p 757 ; **following***K Satwant Singli v State of Punjab* AIR 1960 SC 266, 1960 Cr LJ 410 .

81 *State v Laba* 1964 ILR Cut 248, 30 Cut LT 253 .

82 *Sunil Kumar Paul v State of West Bengal* AIR 1965 SC 706, (1965) 1 Cr LJ 630 .

83 *Mohd Hadi Raja v State of Bihar* (1998) 3 Scale 308, 1998 Cr LJ 2836 (SC) .

84 *Essar Constructions Ltd v CBI and Ors* 1999 Cr LJ 1861 (Bom) .

85 *Kuber Rolling Mill Private Limited v State of Gujarat* 2006 Cr LJ 2350 (Guj) .

86 *Saroj Kumar Sahoo v State of Orissa* 2003 Cr LJ 1872 (Ori) .

87 *Ved Parkash v Bhana* 2004 Cr LJ 3237 (P & H).

88 *Ajay Mitra v State of Madhya Pradesh and Ors* 2003 Cr LJ 1249 (SC) ; *Ram Chandra Prasad Keshri v State of Uttar Pradesh* 2000 Cr LJ 3047 (All) .

89 *Ahmed Moosa v Inspector of Police Jagtial* 2000 Cr LJ 660 (AP) .

90 *Seema v Satish Sachdeva* 2002 Cr LJ 2125 (P&H) .

1 *Mahesh Kumar KS v State of Karnataka* 2003 Cr LJ 528 (Kant) ; *Charanjit Singh Chadha and Ors v Sudhir Mehra* 2001 Cr LJ 4255 (SC) .

2 *Gautam Sinha and Ors v State of Bihar* 2003 Cr LJ 635 (Jharkhand) ; *Shashi Pratap Singh v State of Uttar Pradesh* 2001 Cr LJ 3900 (All) ; *Bharat B Kurbetti and Ors v State of Karnataka* 2000 Cr LJ 4216 (Kant) .

3 *Kailash Chand Gupta v State of Rajasthan and Anor* 2002 Cr LJ 2439 (Raj) .

4 *Uniplas India Ltd v State and Anor* 2002 Cr LJ 3488 (Del) ; *Phulwanti Agarwal and Ors v Sri Naresh Kumar* 2000 Cr LJ 3236 (Kant) ; *Nageshwar Prasad Singh alias Sinha v Narayan Singh and Anor* 1999 Cr LJ 598 (SC) ; *K Srinivas v State of Andhra Pradesh* 1997 Cr LJ 3997 (AP) ; *Yadahula Lawrence v State of Andhra Pradesh* 1997 Cr LJ 4580 (AP) ; *CBI v Duncan Agro Industries Ltd* 1996 Cr LJ 3501 (SC) ; *Sidharth v State of Rajasthan* 2013 (1) Crimes 138 (Raj) .

5 *Nemichnad Swaroopchand Shah and Anor v TH Raibhagi Firm* 2001 Cr LJ 4301 (Kant) .

6 *Ravi B Jadeja and Ors v State of Uttar Pradesh* 2001 Cr LJ 2892 (All) ; *Elamma John v Mercy* 2001 Cr LJ 869 (Ker) ; *Sneh Late v Swastika Agro Industrial Corporation* 2001 Cr LJ 4432 (P&H) .

7 *Guru Bipin Singh v Chongtham Manihar Singh* 1997 Cr LJ 724 (SC), AIR 1997 SC 1448, JT 1996 (9) SC 516, 1996 (7) Scale 694, (1996) 11 SCC 622 .

8 *Anil Ritolia v State of Bihar* 2008 Cr LJ 353, p 356 (SC), 2007 AIR SCW 6332, 2007 (6) Supreme 429, 2007 (11) Scale 401 .

9 *Angishetty Chandra Shekar v State of Andhra Pradesh* 2014 Cr LJ (NOC) 101 (AP) .

10 *Renuka Gupta v State of Chhattisgarh* 2014 Cr LJ 2659, p 2664 (Chh) (Case law referred) .

11 *Raj Gupta v State of Jharkhand* 2012 Cr LJ 564, 2012 (108) AIC 859 (Jhar) .

12 *Joginder Manohar Dange v State of Gujarat* 2010 Cr LJ 4121, 2010 (86) AIC 220 (Guj) .

13 *Balan v State of Kerala* 2009 (4) KLT 283 (Ker) .

14 *OS Pasricha v State* 2007 Cr LJ 861 (Del) ; *Ram Sudhar Tiwari v State of UP* 2012 (112) AIC 939 (All) .

15 *Abdul Raqib v State of Bihar* 2011 (108) AIC 908 (Pat) .

16 *Narendra Singh Rana v State of Uttar Pradesh* 2006 Cr LJ 231 (All) (DB) .

17 *Jasmin B Shah v State of Jharkhand* 2003 Cr LJ 621 (Jhar) .

18 *Rajesh Bajaj v State (NCT of Delhi)* AIR 1999 SC 1216, (1999) 2 JT 112 (SC) ; *Medchel Chemicals and Pharma Pvt Ltd v Biological Ltd* AIR 2000 SC 1869, (2000) 2 JT 426 (SC) ; *Vijay Prakash v State of Uttar Pradesh* 2000 Cr LJ 4157 (All) (DB) ; *Ram Lal Budharam v State of Gujarat* 2000 Cr LJ 2707 (Guj) ; *C Nagaswara Rao v K Mallikarjuna Rao* 2000 Cr LJ 3278 (AP) ; *Anju Industries v South Indian Lucifer Match Works* 1999 Cr LJ 181 (Mad) .

19 *LV Jadhav v Shankarrav Abasaheb Pawar* AIR 1983 SC 1219 .

20 *Meenakshi Sundaram v State of Jharkhand* 2003 Cr LJ 1736 (Jhar) .

21 *Ranjit Pani and Ors v State of Jharkhand* 2003 Cr LJ 1736 (Jhar) .

22 *Sardar Harbhajan Singh and Ors v State of Bihar and Ors* 2001 Cr LJ (NOC) 74 (Pat) ; (2000) 2 East Cri C 892 .

23 *Subhransu Sekhar Samantray v State* 2002 Cr LJ 4463 (Ori) .

24 *Ramaprasad Chaterjee v Mohd Jakir Qureshi* 1987 Cr LJ 1485 (Cal) .

25 *C Nagaeswara Rao v K Mallikarjuna Rao* 2000 Cr LJ 3278 (AP) .

26 *Premlata (Smt) v State of Rajasthan* 1998 Cr LJ 1430 (Raj) .

27 *Ram Lal Narang v State (Delhi Admn)* AIR 1979 SC 1791, 1979 Cr LJ 134 (SC) .

28 *Sri Bhagwan Samardha Sripada Vallabha Venkata Vishanandha Maharaja v State of Andhra Pradesh and Ors* 1999 Cr LJ 3661 (SC) .

29 *Ranjitkumar Chakravarti v Co-operative Bank of Baroda Ltd and Ors* 1998 Cr LJ 216 (Guj) .

30 *Pramode Ranjan Choudhury v State* (1963) 1 Cr LJ 716 .

31 *Empress v Willams* 1 Weir 471 (2).

32 *Pramode Ranjan Choudhury v State* (1963) 1 Cr LJ 716 .

33 *State of Bihar v Kailash Prasad Sinha* AIR 1961 Pat 451, (1961) 2 Cr LJ 477 ; *PV Govindan Nair v State* 1967 Ker LJ 689, (1968) 1 Ker ILR 6 ; *Tulsi Ram v State of Uttar Pradesh* AIR 1963 SC 666, (1963) 1 Cr LJ 623 .

34 *PE Billinghurst v Emperor* AIR 1924 Cal 18, 25 Cr LJ 1313(2) .

35 *CS Clifford v Emperor* 15 Cr LJ 80 .

36 *B Raghubir Acharya v Central Bureau of Investigation* 2014 Cr LJ 1380, p 1383 (SC), p (2014) 14 SCC 693, (2013) 128 AIC 231 (SC) .

37 *Kanwar Sain v Emperor* AIR 1939 Lah 95, 40 Cr LJ 494 ; *Gokul Khatik v Emperor* AIR 1925 Cal 674, 26 Cr LJ 906 .

38 *Kedar Nath Chakravarti v Emperor* AIR 1925 Cal 603, 26 Cr LJ 849 .

39 *Jagannath Ray v State* (1972) 1 Cut LT 870, p 876 .

40 *Farzand Ali v Emperor* AIR 1926 Pat 347, 27 Cr LJ 909 .

41 *Mohd Gynsuddin v Jahangeer Karanjaiah* 2003 Cr LJ 966 (AP) .

42 *Jimmy R Jagtani v State of Haryana* 2002 Cr LJ 2397 (P&H) .

43 *Tuncay Alankus v Union of India* 2000 Cr LJ 3280 (Del) .

44 *Soma Chakravarty v State (Through. CBI)* 2007 Cr LJ 3257 (SC) .

45 *Hiralal Mundra v Ashok Kumar Rasiklal and Co* 1973 Cut LT 597 ; *Chellam Chetty v Emperor* AIR 1928 Mad 224, 29 Cr LJ 633, p 634 (Mad) .

46 *State of Kerala v Thiraviyam Panicker* (1962) 1 Cr LJ 654, 1961 Mad LJ (Cr) 350 .

47 *Tarni Kumar Sen v Sachindra Kumar Deb Nath* 1980 Cr LJ (NOC) 124 (Gau) ; (1979) 3 Serv LR 535 .

48 *Tulsi Ram v State of Uttar Pradesh* AIR 1963 SC 666, (1963) 1 Cr LJ 623, p 628 ; *D Surya Rao v Liaquat Ali Khan* 1974 Cut LT 57 .

49 *Sanwal Ram v State* 1965 All LJ 272, 274 .

50 *Devi Shanker Pandey v State* 1980 Cr LR 190 (UP) .

51 *Anil Kumar Bose v State of Bihar* AIR 1974 SC 1560, 1974 Cr LJ 1026 .

52 *Sola alias Chandra Naik v State* (1973) 2 Cut WR 1531 ; *Hari Chamarai v Vishnu Kumar Surekha* 1973 SCC (Cr) 1082, (1973) 2 SCC 823 ; *VVLN Chary v NA Martin* 1983 Cr LJ 106 .

53 *Upendranath Das v State* 1973 Cut LT 1073 ; *Ram Das Chhedi v State* 1972 Cr LJ 57 .

54 *Anand Kumarson v Kasturi Lal* (1973) 75 Punj LR 254, 1973 Ch LR 352 .

55 Re *Sadagopan*1973 Cr LJ 113, p 114, 1972 Mad LW (Cr) 144.

56 *K Veeranna v NS Maston* AIR 1960 AP 31, 1960 Cr LJ 787 .

57 *Bakhshish Singh Dhaliwal v State of Punjab* AIR 1967 SC 752 ; 1967 Cr LJ 656 .

58 *Nadir Ali Barqa Zaidi v State of Uttar Pradesh* AIR 1960 All 103, p 112, 1960 Cr LJ 188 ; *State v Laba* 1964 Cut LT 253 .

59 *Girdhari Lal v Emperor* 11 Cr LJ 428 ; *Somnath Mohanty v State* AIR 1968 Ori 79, 1968 Cr LJ 643 .

60 *Dasrathlal Chandulal Joshi v State of Gujarat* AIR 1979 SC 1342 .

61 *Motilal Chakravarty v King* AIR 1949 Cal 586, 51 Cr LJ 115 ; *Empress v Kalipudda* 23 WR (Cr) 43 .

62 *Chandra Narain Jha v Emperor* AIR 1940 Pat 603, 41 Cr LJ 523 ; *Nilkantan Nambessan v Emperor* 1940 MWN 537 .

63 *State of Rajasthan v Govind Ram Bagdiya and Ors* 2002 Cr LJ 1169 (Raj) .

64 *Soma Chakravarty v State* AIR 2007 SC 2149, 2007 Cr LJ 3257, p 3262 (SC), (2007) 5 SCC 403, 2007 (4) Supreme 280 .

65 *Hema v State* AIR 2013 SC 1000, 2013 Cr LJ 1011 .

66 *Hridaya Ranjan Prasad Verma v State of Bihar* AIR 2000 SC 2341, 2000 Cr LJ 2983 (SC) ; *VP Srivastava v Indian Explosives Ltd* (2010) 10 SCC 361, 2010 (10) Scale 177 .

67 *All Cargo Movers India (P) Ltd v Dhanesh Badramal Jain* (2007) 14 SCC 776, AIR 2008 SC 247 .

68 *All Cargo Movers India (P) Ltd v Dhanesh Badramal Jain* (2007) 14 SCC 776, AIR 2008 SC 247 .

69 *Shashi Pratap Singh v State of Uttar Pradesh* 2001 Cr LJ 3900 (All) ; *Mahesh Kumar KS v State of Karnataka* 2003 Cr LJ 528 (Kant) ; *Gautam Sinha v State of Bihar* 2003 Cr LJ 635 (Jhar) ; *HICEL Pharma Ltd v State of Andhra Pradesh* 2000 Cr LJ 2566 (AP) .

70 *SW Palatkar v State of Bihar* AIR 2001 SC 2960, 2001 Cr LJ 4765 (SC) ; *Mewa Ram alias Mewa Singh v State of Rajasthan and Anr* 2007 Cr LJ 522 (Raj) .

71 *State of Himachal Pradesh v Jai Lal* 1999 Cr LJ 4294 (SC) .

72 *State of Himachal Pradesh v Jai Lal and Ors* 1999 Cr LJ 4294 (SC) .

73 *Hazi Muhammad Ikramul Haque v State of West Bengal* AIR 1959 SC 488 .

74 *State of Himachal Pradesh v Jai Lal and Ors* 1999 Cr LJ 4294 (SC) .

75 *State of Himachal Pradesh v Jai Lal and Ors* 1999 Cr LJ 4294 (SC) .

76 *Radha Sasidharan v State of Kerala* 2006 Cr LJ 4702 (Ker) .

77 *Manoharan v State* 2012 (2) KLJ 378 (Ker) .

78 *Bhikalal Ramjibhai Zaveri v State of Maharashtra* 1979 Cr LJ 458 (SC), 1979 UJ 670 (SC) .

79 *Stub Das v Emperor* 11 Cr LJ 97 .

80 *Amritlal Ratilal Mehta v State of Gujarat* AIR 1980 SC 301, p 303, 1980 Cr LJ 214 .

81 *Dasrathlal Chandulal Joshi v State of Gujarat* AIR 1979 SC 1342 .

82 *Bhikalal Ramjibhai Zaveri v State of Maharashtra* AIR 1981 SC 476, 1980 Cr LJ 1474 .

83 *Amar Singh v State* 1980 Cr LR 113, p 114 (UP) .

84 *Jugal Kishore Swarnakar v State of Uttar Pradesh* 1980 (UP) Cr LR 594, p 595-596 (All) .

85 See *Willie (William) Slaney v State of Madhya Pradesh* AIR 1956 SC 116 .

86 *Mobarik Ali Ahmed v State of Bombay* AIR 1957 SC 857, 1957 Cr LJ 1346, p 1354 .

87 *N Devindrappa v State of Karnataka* 2007 Cr LJ 2949 (SC) .

88 *Monica Bedi v State of AP* 2011 Cr LJ 427, (2011) 1 SCC 284, (2011) 97 AIC 37 (SC) .

89 *Monica Bedi v State of AP* 2011 Cr LJ 427, (2011) 1 SCC 284, (2011) 97 AIC 37 (SC)

90 *State v Ramdass Naidu* 1977 Cr LJ 2048 (Mad) .

1 *Essar Construction Ltd v CBI and Ors* 1999 Cr LJ 1861 (Bom) .

2 *Emperor v Durg* AIR 1929 All 260, 30 Cr LJ 340 .

3 *Dharamdas Hukmatrai Dorwani v State of Bombay* AIR 1960 SC 734, p 738, 1960 Cr LJ 1148 .

4 *Aravindakhan Nair alias Rajan v State of Kerala* 2001 Cr LJ 431 (Ker) .

5 *Soloman Ezekiel v Emperor* AIR 1939 Cal 376, 41 Cr LJ 255 ; *Mohanlal Bhanalal Goela v Emperor* AIR 1937 Sind 293, 39 Cr LJ 123 ; *Dwijendro Shirishbhai Manek v State of Gujarat* 2006 Cr LJ 1413 (Guj) .

6 *Ajodhya Prasad v Chiranjilal* AIR 1957 All 246, 1957 Cr LJ 438 .

7 *K Damodaran v State of T&C* AIR 1953 SC 462, 1953 Cr LJ 1928 .

8 *Mohammad Giasuddin v State of Andhra Pradesh* AIR 1977 SC 1926, p 1931,1932, 1977 Cr LJ 1557 .

9 *Bhagwandas Keshwani v State of Rajasthan* AIR 1974 SC 898, 1974 Cr LJ 751 ; *Barir Uddin Laskar v State of Assam* 2002 Cr LJ 4629 (Gau) .

10 *Triloknath Yadav v Republic of India* 1976 Cut LR (Cr) 176 .

11 *Babu Lal v State* 1975 Ch LR 384 .

12 *Naresh Himmat Lal Joshi v State of Bihar (now Jharkhand)* 2007 Cr LJ (NOC) 30 (Jhar) .

13 *AS Krishnan v State of Kerala* 1998 Cr LJ 207 (Ker) (DB) .

14 *Ram Prakash Singh v State of Bihar* 1998 Cr LJ 502 (SC) .

15 *Joginder Pal Dhiaman v Union of India* 2002 Cr LJ 677 (HP) .

16 *Kuldip Sharma v State* 2000 Cr LJ 1272 (Del) ; *Joginder Lal v State (Delhi Admn)* 1998 Cr LJ 3175 (Del) ; *Surinder Kumar Garg v State of Uttar Pradesh* 1993 Cr LJ 2085 (SC), 1993 AIR SCW 1716 .

17 *Ram Bahadur Das v State of Sikkim* 2014 Cr LJ (NOC) 67 (Sikk) .

18 *Brij Basi Lal v State of Uttar Pradesh* AIR 1981 SC 1384, 1981 Cr LJ 1032 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY

S. 421.

Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.--

Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditor or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

Sections 421 to 424, are very similar to ss 206 to 210, IPC . They all relate to frauds, and some of the offences under these sections would fall under ss 206 to 210, IPC . Under ss 206 to 210, however, the forbidden acts constitute frauds upon courts of justice whilst those, forbidden under ss 421 to 424 are frauds upon creditors. It may be noted that ss 206 to 208, and s 210 deal with cases in which any forfeiture of fine or some decree or order is involved. Another fact to note is that those sections refer to fraudulent acts. The term 'dishonestly' has not been used in those sections. On the other hand, in ss 421

to 424, the words used are 'dishonestly or fraudulently'. These sections are mainly intended to protect a fraudulent or dishonest evasion of the claims of creditors. The section would not apply to the cases of creditors whose claims against the property are secured. It is only the unsecured creditors whose interest can be easily defeated by any fraudulent acts of the insolvent. The section covers benami transactions in fraud of creditors.[19]

2. 'Dishonestly and Fraudulently'

Commentary of ss 24, 25, vol 1, may be referred to.

3. 'Any Property'

The word 'property', in this section, is wider enough to include a chose-in-action. Movable property in a foreign state, belonging to the insolvent, will ordinarily vest in the receiver in insolvency, and if a dishonest or fraudulent transfer, removal or3667 concealment, or delivery, of such property is made by the insolvent without adequate consideration so as to prevent its distribution among his creditors according to law in India, the offence under s 421 would be established.

A contract for cutting of trees to be converted into charcoal is an agreement relating to movable property.[20]

4. Procedure

The offence under this section is non-cognizable, bailable, and compoundable, by the affected creditors, with the permission of the court, before which the prosecution for such offence is pending, and triable by a magistrate, and may also be tried summarily.

5. Jurisdiction

The jurisdiction of a magistrate is not affected by the provisions of the Insolvency Act. Where the Insolvency Act creates an offence, it is the insolvency court which has jurisdiction as to it. As to the offence under the IPC, the ordinary jurisdiction of the criminal courts cannot be held to be excluded unless expressly or by necessary implication the Insolvency Act repeals IPC for the purpose of those offences. Sections 421 to 424, so far from being replaced are recognised by the said Act as being operative and the prosecution of the insolvent for the offences, created by them, is distinctly contemplated. [21]

6. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case. Section 251 , CrPC, may be referred to.

7. Proof

In order to establish a charge under this section, prove that:

(a) the accused removed, or concealed, the property in question, or delivered, or transferred, or caused to be transferred, the property in question to any person;
(b) the said property was delivered or transferred without adequate consideration;
(c) he did as above dishonestly or fraudulently; and
(d) he thereby intended to prevent, or he knew it to be likely that he will thereby prevent, the distribution of the property among his creditor or the creditors of any other person.[22]

The property of a debtor cannot be distributed according to law save after the provisions of the relevant

enactments have been complied with. It cannot be held without further proof that a shopkeeper, who has stocked his shop with goods obtained on credit and who sells those goods without making any payment to his3668 credit, has committed an offence, punishable under s 421, IPC . It has to be shown that the debtor acted dishonestly. It is not sufficient to show that his action may deprive the creditors of a recourse of which if they had acted in time, they might have availed themselves.[23]

19 Re *Abdul Gani Suleman*1899 PJLB 593.

20 *Manchersha Ardeshir Devierwala v Ismail Ibrahim Patel* AIR 1936 Bom 167, p 169, 37 Cr LJ 577 . For further commentary, see under heading 'Property' in s 405, *ante*.

21 *Emperor v Mulshankar Harinand Bhat* 11 Cr LJ 548 ; *U Mo Gaung v U Po Sin* AIR 1929 Rang 14, 30 Cr LJ 345 ; *Segu Baliah v N Ramasamiah* 18 Cr LJ 992 .

22 *Ramautar Choukhamy v Hari Ram Jodi and Anor* 1982 Cr LJ 2266 (Gau) .

23 *Ismail Peer Mohamed v King* AIR 1938 Rang 242, 39 Cr LJ 767 .

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Chapter XVII

Of Offences Against Property

OF FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY

S. 422.

Dishonestly or fraudulently preventing debt being available for creditors.--

Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

The proceeding s 421, IPC dealt with the dishonest or fraudulent acts of removal, concealment, delivery or transfer of property for preventing there distribution thereof among the creditors. This section provides for any dishonest or fraudulent acts, calculated to prevent any claims by way of debt or demand, *i.e*., some chose-in-action, due to the accused or to any other person from being made available, according to law, to his creditors or to the creditors of that other person. The section, however, does not place any specific limitation on the manner in which the payment of a debt may be prevented.

2. 'Dishonestly and Fraudulently'

The mere transfer of his interest by a mortgagor cannot be said to be fraudulent or dishonest merely because he has, as a matter of fact, previously mortgaged his property.[24] In Re *Nobin Chancier Mullick,*[25] the accused entered into an agreement with the complainant to the effect that he would not compromise a certain suit between himself and another party, which was then pending, the reason being that he had assigned the benefit of this suit to the complainant as a security for the due payment of some monthly instalments of money.

Notwithstanding this agreement, he did afterwards compromise the suit. It was held that the accused could not be convicted under this section unless the compromise was made dishonestly or fraudulently. When a cheque, given in consideration of sale of property, is dishonoured but accused is prepared to pay cash, no offence under this section or under s 420 can be said to have been committed.[26]3669

3. 'Debt or Demand'

The term 'demand' is wider than 'debt'. It would cover all actionable claims as defined in s 3 of the Transfer of Property Act 1882, but is not continued to them. Unliquidated damages will, of course, not be covered by the term.[27]

4. Procedure

The offence under this section is non-cognizable, bailable, compoundable, by the affected creditors, with the permission of the court before which the prosecution for such offences is pending, and triable by a magistrate, and may also be tried summarily.

5. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case. Section 251 , CrPC 1973, may be *referred* to.

6. Proof

In order to establish a charge under this section, prove that:

(a) some debt or demand was due to the accused or to any other person;
(b) the accused prevented its being made available, according to law, for payment of his debts of such other person; and
(c) he did so dishonestly or fraudulently.

24 *Musai Lal v Kashi Prasad* 14 Cr LJ 141 .

25 *Nobin Chancier Mullick* 22 WR (Cr) 46; *Hara Kumary Chowdhurani v R Savi* (1901) ILR 28 Cal 314 .

26 *Keshava Prasad Gupta v Tareshwar Ram* 1977 (All) Cr R 105 . For further commentary, see ss 24, 25, vol 1.

27 Re *Nobin Chander Muddack* 22 WR (Cr) 46.

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Chapter XVII

Of Offences Against Property

OF FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY

S. 423.

Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.--

Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section, like the preceding two sections, requires dishonesty or fraud as a necessary ingredient. It refers to some deed or instrument which involves a transfer3670 or the creation of any charge or interest in some property. Fraudulent deeds, which are covered by this section, relates to frauds of two kinds, namely, any false statement relating to:

(a) the consideration for the transfer or charge, or
(b) the person or persons for whose use or benefit it is really intended to operate.

Not only the actual executants of a deed or instrument of transfer, but also those, who become parties to any fraudulent or dishonest deed or instrument, fall within operation of this section. Similarly, even an attesting witness, who may be acting dishonestly or fraudulently, comes within the scope of the section. Similarly, transfers covered by the section, would include not only sale, mortgage or charge, but also leases creating such interest. For the operation of this section, it is, however, necessary that the deed or instrument must be one purporting to transfer, or subjecting, to any charge, any property or interest therein. Thus, where the accused executed a registered document, purporting to be a *kabuliyat*, in favour of the complainant, in respect of a certain land, which contained recitals designedly false, and, according to the accused, this *kabuliyat* was accepted by the complainant, it was held that though the case fell under s 193, IPC, it was not an offence under this section because the *kabuliyat* is not a document which purport to transfer, or which subjects, to any charge, any property or interest therein.[28]

If a case involve a question which may involve a right of a civil nature, it is not necessary that a civil suit must be instituted and determined as a condition precedent to invoke the provisions of this section.[29] Where the judgment-debtor, whose 28.90 acres of land was got attached by the complainant in execution of a decree executed a sale deed of only 6.70 acres of land in his favour with a false recital in the sale deed that the complainant had agreed to it as a compromise for satisfaction of the decree, it was held that the action of the accused judgment-debtor clearly fell within the purview of this section.[30] Similarly, also, where fraudulent transactions are resorted to defeat the claims for presumption, the accused are guilty of an offence under section.[31] It is, however, necessary that in such cases it must prove that there was a

right for presumption in respect of the property sold. If the property is not subject to such a right, there would be no offence.[32]

2. Ingredients

The scope of s 423, IPC deals with two specific frauds in the execution of deeds or instruments of transfer or charge, namely, (i) false recital as to consideration; and (ii) false recital as to the name of beneficiary. These two ingredients should be present in the complaint petition and in the statements made on oath by the complainant and his witnesses.[33]3671

3. Dishonestly or Fraudulently

Commentary under the headings in s 415, s 422 *ante*, may be referred to.

4. 'False Statement'

The law does not make a false statement, contained in an instrument of transfer, punishable. It must be a statement relating to the consideration or to the person to be benefited thereby.[34] If a false statement does not relate to the consideration for the transfer, it would not fall under this section.

Where the accused created a charge in some land on taking a loan from the government by making a false statement as to the area of the land in their possession, it was held that the accused were not guilty under this section as the false statement did not relate to the consideration for this charge.[35] In *Shibarani Debi v Ratnamala Debi* ,[36] a Hindu widow, claiming to be the wife of one *Dashrathi*, executed some transfers of certain properties, left by the father of *Dashrathi*, which should have devolved on her in the ordinary course. It was alleged that she had married a second time and was, therefore, not *Dashrasthi*'s widow and that she had made certain false statements, in the conveyances relating to the person or persons for whose use or benefit the documents were really intended to operate. It was held that the case did not fall under this section because the 'person or persons', in this section, must mean the purchasers, and not the vendor. However, in *Legal Remembrancer v Ahi Lal Mandal* ,[37] the accused tried to marry a woman, but failed. He executed a conveyance, transferring some property to the woman on account of her dower, in which the woman was described as his wife and the date, on which the marriage was also mentioned. It was found that no marriage had taken place and that the woman was the wife of another person. In these circumstances, it was held that the accused had acted fraudulently as there was an intention to deceive and mislead and that he was guilty under this section and also under s 193 .

5. Procedure

The offence under this section is non-cognizable, bailable, compoundable, by the person affected, with the permission of the court, before which the prosecution for such offence is pending, and triable by any magistrate, and may also be tried summarily.

6. Pendency of Civil Suit is no Ground for Staying Criminal Proceedings

Where the complainant filed a civil suit based on the title of the property, the pendency of the civil suit is no ground to stay the criminal complaint filed by her under ss 193, 423, 468, 471 read with s 34, IPC, against the accused till the disposal of the civil suit wherein the defendant had based his claim on the agreement to sell. Both civil and criminal proceedings can go parallel to each other.[38]3672

7. Conviction in Time Barred Case is *Non Est*

Sub-section (1) of s 468, CrPC states that except as otherwise provided elsewhere in the Code, no court shall take cognizance of an offence of the category specified in sub-s 2 after the expiry of the period of limitation. Imprisonment for two years or fine or both is the punishment prescribed for an offence under s

423, IPC . The period of limitation is three years for taking cognizance of an offence under s 423, IPC (*vide* s 468(2) (c), CrPC). The provision is mandatory. For the reasons aforesaid, the cognizance having been taken beyond the period of limitation, the consequent trial leading to the conviction is without jurisdiction and *non est* in the eye of law.[39]

8. Quashing of Criminal Proceedings

Where the allegations against the petitioner, who was the head of a company were that the company floated a scheme, 'Reliance India Mobile Kar Lo Duniya Mutthi Mein' which agreed to provide certain services to the customers, it lured the general public to enter into an agreement and thereafter violated the terms of agreement as no service was provided under the said scheme, but there was no false recital in the said agreement as to consideration or as to the name of beneficiary, therefore, the said allegations made do not come within mischief of s 423 .[40]

9. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case. Section 251 , CrPC 1973, may be *referred* to.

10. Proof

In order to establish a charge under this section, prove that:

(a) there was a deed or instrument;
(b) it purported to transfer, or it subjected, to any charge, the property in question or an interest therein;
(c) it contained a false statement relating:

  (i) to the consideration for such transfer or charge, or
  (ii) to the person or persons for whose use or benefit it was really intended to operate;

(d) the accused had signed or executed it or had become a party to it; and
(e) he did so dishonestly or fraudulently.

28 *Mohammad Kajim Ali v Jarabdi Nashkar* AIR 1919 Cal 430, 20 Cr LJ 574 .

29 *Emperor v Umrao Singh* (1883) 3 AWN 209 .

30 *Amiri Singh v Emperor* AIR 1933 Pat 495, 34 Cr LJ 846 .

31 *Lachhman Das v Emperor* 6 Cr LJ 111 ; *Gurditta Mal v Emperor* 10 PR 1902 (Cr) ; Re *Mahabir Singh*(1903) ILR 25 All 31.

32 *Chhajju v Emperor* 8 Cr LJ 486 .

33 *Mukesh Dhirubhai Ambani v State of Orissa* 2005 Cr LJ 2902 .

34 Re *Mania Goundan* 12 Cr LJ 547.

35 *Mathura Nath Sah Deo v Biria Uraon* AIR 1952 Pat 285, 53 Cr LJ 1089 .

36 *Shibarani Debi v Ratnamala Debi* AIR 1958 Cal 130, 1958 Cr LJ 370 .

37 *Legal Remembrancer v Ahi Lal Mandal* AIR 1921 Cal 226, 23 Cr LJ 340 .

38 *Urmila Devi v Surinder Pal* (1999) 1 RCR 670 (P&H), (1999) 1 Chand LR (Civ Cri) 81 (P&H); *JaswinderPal Singh v State of Punjab* (1997) 4 RCR (Cri) 629 (P&H).

39 *Lakpa Sherpa v State of Sikkim* 2004 Cr LJ 3488 (Sikkim) .

40 *Mukesh Dhirubhai Ambani v State of Orissa* 2005 Cr LJ 2902 (Ori) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY

S. 424.

Dishonest or fraudulent removal or concealment of property.--

Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.3673

Comments

1. Scope

The section is connected with the preceding ss 421 to 423, IPC . Those cases, which are not covered by ss 421 and 422, IPC but which contain elements of dishonesty to fraud in dealing with property, fall within the purview of this section. The section contemplates two classes of cases, namely:

(a) concealing or removing any property or assisting in doing so (this must be either dishonest or fraudulent), and
(b) releasing any demand or claim to which the accused is entitled (this must be fraudulent, even though not dishonest).

The scope of this section is wider than that under ss 421 and 422, IPC, which deal with cases of fraud on creditors, because this section covers cases of persons other than creditors also. Therefore, concealment by debtor themselves is an offence. Similarly, taking away property by others with a view that it may not be attached if done with a dishonest intention would fall under the section.[41]

One of the necessary elements of s 424, IPC is that some dishonesty or fraud should be made out against the accused. If no dishonesty or fraud can be imputed, there would be no offence under this section.[42] In Re *Ananda Muttussami Aiyam,*[43] the accused had been in the habit of paying a money-rent to their landlords. The landlords resolved for their own advantage to devoid the produce and ordered the accused not to reap the crops except in the presence of the servants of the former. The accused did not agree to

the alteration in the mode of paying the rent and proceeded to reap the crops as usual. It was held that the accused could not be convicted under this section. If the *raiyats*, holding on *varam* tenure, remove crops for the purpose of protecting them from injury or damage owing to delay or refusal on the part of the landlord to perform his part in the harvesting or division, such removal would not be dishonest within the meaning of this section.[44] If, however, the removal of property is dishonest, it may amount to an offence under this section.[45] If, therefore, a *raiyat* dishonestly removes or conceals the produce preventing the landholder from taking his due share, he is guilty of an offence under this section.[46] The mere fact that the accused removed a property in broad daylight, would not necessarily make the removal honest.[47] Where, however, the accused has openly taken the property in3674 exercise of his *bonafide* claim to inherit it, no offence under this section would be made out.[48]

A partner cannot be prosecuted under s 424, IPC for dishonestly and fraudulently concealing or removing the books of the partnership because the partners, being the joint owners of books, are entitled to retain them and the complaining partner has no more right to the books than the partner who has them in his possession.[49]

2. 'Dishonestly or Fraudulently'

Commentary under the headings in ss 415, 422, *ante* and commentary in ss 24, 25 vol I, may be referred to.

3. 'Dishonestly or Fraudulently Conceals or Removes any Property of Himself or any other Person'

Where there is a legal attachment, a third party, claiming to be the owner of movable attached, would be guilty of an offence under s 424 or s 379, IPC, as the case may be, if he removes them from the possession of the court or its agent.[50] Therefore, a judgment-debtor, cutting and removing the property, validly, attached in execution of a decree against him, commits an offence under this section.[51] If, however, the property is attached by a person, having no authority to attach it, the matter would be different because the attachment would then be without jurisdiction.[52] Where, therefore, the warrant, attaching the property, is an illegal one, the removal of the property attached cannot amount to an offence under s 424, IPC .[53] a judgment-debtor is entitled to remove his crops, which have not been validly attached, and the mere fact, that he has removed the crops, does not prove that he has done so dishonestly.[54] The word 'dishonestly', in this section, is used in a technical sense which is at variance with its popular significance as implying deviation from probity.[55]Intention has got to be proved. A dishonest intention may be presumed only if an unlawful act is done or if a lawful act is done by unlawful means.[56] In *Wali Muhammad v Emperor* ,[57] on the question, whether intention should be determined irrespective of the attachment being legal or illegal, the court observed that if a party, believing that an attachment has been legal, removes the property nevertheless, his object is to commit a wrongful object. However, if, in fact, there has been no attachment, or the3675 attachment, by reason of patent defects, is ineffectual, he deceives no one else but himself. A person cannot be said to do anything dishonestly within the meaning of the word, as defined in the IPC, if he has merely an intention to cause wrongful loss to someone when he cannot, or does not, in fact, cause any such wrongful loss. Consequently, no conviction under this section can be sustained if no dishonesty or fraud, under the circumstances of a case, can be imputed to the accused.[58]

4. Procedure

The offence under this section is non-cognizable, bailable, compoundable, by the affected person, with the permission of the court, before which the prosecution for such offence is pending, and triable by a magistrate, and may also be tried summarily.

5. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons

case. Section 251 , CrPC 1973, may be referred to.

6. Proof

In order to establish a charge under this section, prove that:

(a) the accused:

(i) concealed or removed the property in question, or
(ii) assisted in the concealment or removal of the property in question, or
(iii) released any demand or claim to which he was entitled and

(b) he did so dishonestly or fraudulently.

41 *Pinnamraju Rajamraju v Potturi Tirupatiraju* AIR 1930 Mad 670, p 671, 31 Cr LJ 1086 .

42 *Emperor v Halim-un Nissa* AIR 1936 Oudh 195, 37 Cr LJ 1037 ; *Teeka v State of Uttar Pradesh* (1961) 1 Cr LJ 859, p 862 (SC), AIR 1961 SC 803 .

43 Re *Ananda Muttussami Aiyam* 1 Weir 484.

44 *Subudhi Rantho v Balrama Pudi* (1903) ILR 26 Mad 481 .

45 *Lekhraj v Imambux* 12 Cr LJ 611 ; *Subudhi Rantho v Balarama Pudi* (1903) ILR 26 Mad 481 .

46 Re *Shianupandia Thevan*AIR 1914 Mad 398, 15 Cr LJ 295 ; *Kuldip Pandey v Ramnath Singh* AIR 1916 Pat 232, 17 Cr LJ 315 ; *Empress v Lala Gopal* 18 Cr LJ 687 .

47 *Bishen Sarup v Bachchu* 4 DLR 3 (Luck) .

48 *Nand Kishore v Emperor* AIR 1939 All 710, 41 Cr LJ 111 ; *Keshvan Moosad v State* 1965 MLJ (Cr) 139 (Ker) .

49 *Man Mohan Das v Mohendra Bhowal* AIR 1948 Cal 292, 49 Cr LJ 543 ; *Subbrayadu v Sri Krishan* (1964) 2 Andh LT 138 ; 1964 MLJ (Cr) 518, dissenting from 21 WR (Cr) 10.

50 *Teeka v State of Uttar Pradesh* AIR 1961 SC 803, (1961) 1 Cr LJ 859, p 863 (SC), **overruling***Emperor v Ghasi* AIR 1930 All 329, 31 Cr LJ 711 .

51 *Tara Ram v Emperor* AIR 1938 All 449, 39 Cr LJ 840, p 841 .

52 *Tika Ram v State* AIR 1960 All 453, 1960 Cr LJ 1040, p 1042 (All), **affirmed** in *Teeka v State of Uttar Pradesh* AIR 1961 SC 803, (1961) 1 Cr LJ 859 (SC) ; *Emperor v Gurdial* AIR 1933 All 46 .

53 *Chelli Latchnna v Emperor* AIR 1942 Pat 480, 43 Cr LJ 795, p 796 (Pat) ; *Fattu v Emperor* AIR 1932 All 692, 34 Cr LJ 455 ; *Mohini Mohan Banerji v Emperor* AIR 1916 Pat 272, 18 Cr LJ 39 .

54 *Wali Muhammad v Emperor* AIR 1936 Sind 20, 37 Cr LJ 485, p 489 ; *Sansar Singh v Emperor* AIR 1934 All 711, 35 Cr LJ 1307 **doubted** in *Ram Bahal Ahir v Emperor* 37 Cr LJ 675, AIR 1936 All 364 .

55 *Wali Muhammad v Emperor* AIR 1936 Sind 20, 37 Cr LJ 485, p 489 ; *Sarsar Singh v Emperor* AIR 1934 All 711, 35 Cr LJ 1307 .

56 *Wali Muhammad v Emperor* AIR 1936 Sind 20, 37 Cr LJ 485, 489; *Sarsar Singh v Emperor* AIR 1934 All 711, 35 Cr LJ 1307, p 1308 .

57 *Wali Muhammad v Emperor* AIR 1936 Sind 20, 37 Cr LJ 485, p 489 .

58 *Emperor v Halim-un-Nissa* AIR 1936 Oudh 195, 37 Cr LJ 1037 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 425.

Mischief.--

Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

Explanation 1.--It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.--Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations

(a) *A* voluntarily burns a valuable security belonging to *Z* intending to cause wrongful loss to *Z*. *A* has committed mischief.3676
(b) *A* introduces water into an ice-house belonging to *Z,* and thus causes the ice to melt, intending wrongful loss to *Z*. *A* has committed mischief.
(c) *A* voluntarily throws into a river a ring belonging to *Z*, with the intention of thereby causing wrongful loss to *Z*. *A* has committed mischief.
(d) *A*, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to *Z,* destroys those effects, with the intention of thereby preventing *Z* from obtaining satisfaction of the debt, and of thus causing damage to *Z*. *A* has committed mischief.
(e) *A*, having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. *A* has committed mischief.
(f) *A* causes a ship to be cast away, intending thereby to cause damage to *Z* who has lent money on bottomry on the ship. *A* has committed mischief.
(g) *A*, having joint property with *Z* in a horse, shoots the horse, intending thereby to cause wrongful loss to *Z*. A has committed mischief.
(h) *A* causes cattle to enter upon a field belonging to *Z*, intending to cause and knowing that he is likely to cause damage to *Z's* crop. *A* has committed mischief.

Comments

1. Scope

This section defines the offence of mischief and the next section provides the punishment therefore. Mischief, like most crimes, comprises a mental and a physical, element. To mental element is the intention, express or implied, to cause 'wrongful loss or damage'. The physical element is an act of destruction or injurious change to property.[59] While the mental element is the same in all kinds of mischief, the physical element, the act of destruction or change, may be of any kind of that physical element, the act of destruction or change, may be of any kind of that species of acts, and if the act is of the kind, specified in ss 427 to 440, IPC, the mischief is aggravated and, therefore, more severely punished than under s 426 .[60]

There are 14 aggravated offences of mischief,[61] which may be classified, as under by reason of:

(a) amount of damage caused (s 427, IPC);3677
(b) mischief in regard to animals (ss 428 and 429, IPC);
(c) mischief in regard to water supply and public works (ss 430 to 434, IPC);
(d) mischief by fire (ss 435 and 436, IPC);
(e) mischief in regard to decked vessels (ss 437 and 438, IPC);
(f) mischief in regard to any vessel, with intent to steal (s 439, IPC); and
(g) mischief with preparation for causing death, hurt, or wrongful restraint, or fear, of such death, hurt or wrongful restraint (s 440, IPC).

It will be clear from this analysis that the offence of mischief has to be considered from the following three different points of view, *i.e*.,

(i) value of the property (s 427, IPC);
(ii) nature of the property such as animals (ss 428 and 429, IPC), water supply, public roads, bridges and waterways, *etc* (ss 430 to 437, IPC); and
(iii) manner of causing mischief (ss 438 to 440, IPC).

The causing of wrongful loss by destruction, or change, of property does not, in all cases, become an offence under this section. A criminal liability may not arise if:

(a) there is no intention of knowledge requisite under the section;
(b) the act was the result of any accident;
(c) there was negligence in the performance of the act;
(d) there was a *bonafide* dispute about the property; or;
(e) there was a *bonafide* claim of right.

2. Ingredients

This section necessitates three things, *viz*:

(a) an intention, or knowledge or likelihood, to cause wrongful loss or damage to the public or to any other person;
(b) causing the destruction of some property or any change in it or in situation; and
(c) such change must destroy or diminish its value or utility, affect it injuriously.

No mischief can, therefore, be committed where the acts complained of amount to an invasion of civil

right.[62] The mere fact, that any wrongful loss or damage is caused to property would not constitute mischief unless the intention of the alleged offender is to cause wrongful loss or damage to the person concerned. It is the duty of the criminal court, in such a case, to determine what was the intention of the alleged offender; if it comes to the conclusion that the accused was attempting to assert a *bonafide* claim of his right, then he cannot be found guilty of the offence of mischief.[63] If an accused honestly believes that he has a right to do what he does even though he does not, in law, have that right, he cannot be said to have had the necessary intention or knowledge that he was likely to cause wrongful loss or3678 damage. His claim should not, however, be a mere pretence or a colourable one; it must be one in assertion of a *bonafide* right.[64]*Mens rea* being an essential ingredient of the offence of mischief, the evidence of the same may be inferred from the overt act done by the accused.[65] If a person deals injuriously with property in a *bonafide* belief that it is his own, he cannot be convicted of mischief.[66] Where each of the contending parties claims ownership of the property in respect of which the offence is alleged to have been committed, it is unsafe to uphold the conviction.[67] Where the accused, acting in good faith and under a *bonafide* belief that he was entitled to the possession of a certain land, delivered to him by the court in consequence of his purchase at an auction sale, cut away a ripe crop, it was held that he was not guilty of the offence of mischief.[68] Where the accused was in the habit of taking the water from an opening to his fields under a permit out on one occasion he cut open the bound anticipating the grant of the permit, it was held that the accused could not be convicted of mischief because he acted in the *bona fide* belief that he would get the permit.[69]

3. Disputes of Tree and Crops

There are frequent disputes between landlords and tenants in respect of trees and crops. If a tenant, in the *bona fide* assertion of a customary right, cuts down an old tree, admittedly standing on his holding, he cannot be convicted of the offence of mischief.[70] Where a tree was removed under the order of the landlord and the servants removed it *bona fide* without any criminal intention, it was held that their conviction was bad in law.[71] Where the landlord, on surrendering a holding by a *raiyat*, uprooted the seeds sown by the under-*raiyat*, it was held that as the action of the landlord was a *bona fide* claim of right, his conviction was illegal.[72]

4. Claim of Right

The expression 'claim of right' does not refer to actual legal right. It means belief in a legal right.[73] However, so far as the offence of mischief is concerned, a claim of right, believed to exist, even though unreasonably, is a valid defence.[74] The question in cases in which the accused pleads a claim of right is whether there is semblance of such right, and only to this extent the criminal court would be within its right in3679 discussing the point.[75] Where water, draining from the complainant's mill, was polluting the water supply, damaging the crops and rendering the water unfit for drinking, it was held that the accused, in taking steps to prevent the contamination, acted under colour of right.[76] Where the accused removed some projected poles of a scaffolding over his land and threw down the cement which was on it, it was held that the must be deemed to have acted in *bonafide* exercise of what he believed to be his right and was not guilty of mischief.[77] Where, in the exercise of *bonafide* claim of right to bury a deceased person, the members of a congregation broke open the gate of a graveyard which they believed, was wrongfully closed against them by the priest, it was held that they committed no offence.[78]

5. Theft Distinguished from Mischief

Commentary under the same heading in s 378, *ante*, may be referred to.

6. 'Whoever Causes'

The physical element in mischief is an act causing destruction of, or change in, some property as the immediate result thereof, *i.e*., a direct result. The act itself must, in fact, constitute the injury;[79] it must not be too remote thereto. The illustration to the sections show that it is not intended to cover cases of negligence.[80]In each of the illustrations to the section, the loss or injury is the immediate result of the act

in question.[81] 'Causes' involves some act done, some willful conduct.[82] The section contemplates some direct action on the part of the mischief done, either personally or through someone else, which leads to any of the results mentioned in the section. Where the damage to the complainant's wall is the result of the accumulation of water due to abnormal heavy rains, it cannot be said that the accused caused the destruction of the complainant wall by storing earth and other materials.[83]

7. 'Wrongful Loss'

'Wrongful loss', contemplated in s 425, IPC, need not, necessarily, consist in the infringement of an existing, present and complete right; it may be caused by, an act done now with the intention of defeating and rendering infructuous a right about to come into existence. Any person, who contracts to purchase property and pays a portion of the purchase money, has such an interest in that property although his title may not be complete; the destruction of such property may cause to him wrongful loss within the meaning of s 425 .[84] If a person cuts off the electric supply of another, the intention to cause wrongful loss to the opposite party is clearly there.[85] In3680*Mahadeo Singh v Emperor* ,[86] over the *chabutra* of a mosque, there was an image of a Hindu God which was surrounded by a wall. The accused widened the doorway in the wall by demolishing a part of the wall on both sides of the doorway. The wall around the image was the property of the Mohammedans and the Hindus whitewashed the wall from the outside. It was held that by breaking the wall and taking out the bricks, the accused caused wrongful loss to the Mohammadan public and, therefore, an offence under s 425, IPC, was committed. Where the accused removed the fishing stakes of the complainant from the sea but did not appropriate them, it was held that it amounted to mischief as it caused the wrongful loss of the fish, which the complainant would have caught, and the accused knew that his act was likely to cause that loss.[87] The dominant owner's action in removing the obstruction, willfully placed by the servant owner, amounts to mischief.[88] In *Zipru Tanaji Patil v Emperor* ,[89] the accused obtained a decree restraining the complainants from obstructing his right of way to certain land. The complainants obstructed the way in spite of the decree by putting in some dams across the way. The accused removed the dams. It was held that he was not justified in taking the law in his own hands, and as there was wrongful loss, the accused was guilty of mischief.

8. Wrongful Loss by Unlawful Means

The word 'damage', in s 425, IPC, is not superfluous and/or redundant. It is indicative of the fact that the purview of the offence of 'mischief' is not intended to be confined only to cases of 'wrongful loss'; it also covers, within it, all such cases of damages by unlawful means.[90]

Wrongful loss in s 425 must mean loss by unlawful means. There is nothing unlawful in the accused installing an oil-engine on his own property and its working causes damage to a neighbour's property, the accused may be liable to a civil suit for damages.[91]

9. Loss by Unlawful and Lawful Acts

It is neither unlawful (however malicious), nor an offence, to remove lateral support and cause damage unless the right to support has been acquired by prescription of 20 years.[92] The cutting off of those portions of the trees, growing on the neighbour's land, which overhang the house of the accused, is not mischief.[93]When the statement of complainant himself sowed that there was no plaster on the wall at the time of occurrence, the question of accused causing damage to the plaster of the wall by act of alleged digging of drain does not arise.[94] Digging a trench on one's own land,3681 though causing loss to another's adjacent land, cannot be said to be a mischief.[1] Where a joint owner of a parcel of land erected, on it, an edifice without the consent, and against the will, of another joint owner, who, after obtaining a decree for mandatory injunction from the civil court, got the edifice pulled down, it was held that there had been no causing of wrongful loss and the accused was not guilty of mischief.[2] A decree-holder got a decree for possession of land. He took out execution but, before it was concluded, the judgment-debtor raised a crop on the land which was taken away by servants of the decree-holder. It was held that they were not guilty of mischief as the crop, though raised by the judgment-debtor, really belonged to the decree-holder whose right thereto had been declared by a competent court.[3] Where a person obstructs a

right of watercourse to which another person is entitled, and if the person, whose right is obstructed, destroys the obstruction, the loss, which may be caused in doing so, cannot be considered to be a wrongful loss.[4] Where the complainant is not legally entitled to the land or crop on it, the act of the accused in allowing his cattle to graze on the land is not wrongful loss and offence of mischief is not committed.[5] A mortgagee, openly cutting a few trees on the land, mortgaged to him, in order to repair another part of the mortgaged premises is not guilty of mischief.[6]

10. Damaging One's Own Estate

A man may commit mischief by damaging his own estate if he does so in order to cause, or knowing it to be likely to cause, wrongful loss to somebody else. However, it can hardly be said that a person commits mischief by causing damage to his own estate when it is under the court of wards whose only object is to preserve the estate for the benefit of the owner.[7]

The accused removing rocks from his own land for commercial purpose cannot be said to have committed mischief.[8]

The principal ingredients of an offence under s 425, IPC, is that there must be an intention to cause wrongful loss or damage to the public or to any person, meaning thereby that the mischief must be done to the property belonging to another person though act, whereby mischief is done, may have reference to the property belonging to the person committing the mischief.[9] The case of *Empress v Rajcoomar Singh* ,[10] is an obvious illustration of a person, having his right declared by civil court, destroying the property without being guilty of any mischief. No offence of mischief3682 is committed when a person pulls down his own wall and then rebuilds,[11] or puts his own *chhan* on fire and tried to falsely implicate others.[12]

11. Owner of a Land

It the owner of a land finds a trespasser on his land using the owner's tools, the owner would, no doubt, commit no offence of mischief in destroying, or removing, those tools even though by doing so he may deprive the trespasser of the means of benefiting by his trespass. However, the owner of the land would have no right, merely because of the trespass, to destroy whatever property of the trespasser he finds upon the premises. Such an act of his would amount to mischief.[13] Even if the owner of a land has a right to eject the trespasser, he has no right to destroy whatever property of the trespasser the owner finds on his land.[14] In *Abdul Hussain Ibrahimji v Emperor* ,[15] a well was dug by the complainant in the land which belonged to him. The accused, without proper inquiry, went recklessly upon the land and damaged the well by throwing stones and earth into it. It was held that even if accused delivered in good faith that the well was in his land and the complainant was a trespasser, he had no right whatever to damage the complainant's property in the fashion he did. However, the demolition of a wall, constructed by a trespasser upon the land of the complainant, was held not to amount to mischief in *Empress v Shanker Lal.* [16] If the site is a public path, and the complainant obstructs it wrongfully by building a wall upon it, the loss caused to him by the member of the public, who pull it down in order to exercise their right of way through the site, cannot be considered wrongful loss.[17]

12. Damage

The word 'damage', in s 425, IPC, is not superfluous and/or redundant. It is indicative of the fact that the purview of the offence of 'mischief' is not intended to be confined only to cases of 'wrongful loss'; it also covers, within it, all such case of damages by unlawful means.[18]

13. 'With Intent to Cause or Knowing that he is Likely to Cause'

The first and the foremost essential element of the offence of mischief is the intention to cause or knowledge that the accused is likely to cause wrongful loss or damage to the public or to any person.[19] Before a conviction can be filed for mischief under s 425, IPC, it must be proved that the accused intended to cause, or knew that he was likely to cause, wrongful loss to the public or to any person. If no intention

or knowledge, requisite under the section, is established, no offence of mischief can be3683 said to have been made out.[20] The grazing of cattle on lands, rented from government, without payment of the capitation fee, which the grass-renter is entitled to collect, does not amount to mischief.[21] In *Empress v Kaikhusro Cursedhi* ,[22] an agent of a landlord, accompanied by a bailiff, broke open the door of a room, in the possession of a tenant, in execution of a distress warrant issued against the tenant for non-payment of rent. It was held that the conviction could not stand because the bailiff, if he improperly broke open the door, was acting mistakenly in what he supposed to be his duty and the landlord's agent, who assisted him, had neither the intention nor the knowledge which is an essential element for an offence of mischief. The gist of the offence of mischief lies in the intention. Where it was alleged that the injury to the property of the complainant was the result of an accident caused by the accused's stupidity, it was held that the question was one for adjudication solely in the civil court.[23] Where, owing to a collision of a lorry and a jeep caused by the rash and negligent driving of the lorry, hurt was caused to an occupant of the jeep, it was held that the offence of mischief was not committed as the requisite *mens rea* was absent.[24]

14. Intention not Necessary in Every Case

Intention is not necessary in every case. The terms of s 425, IPC, would be satisfied when there is a distinction on the point of the accused's knowledge, in which case the question of intention is material only as regards the sentence.[25] When a person drives a heavy vehicle, like a lorry, with hopelessly poor lights, it must be imputed that he had the knowledge that he was likely to cause wrongful loss or damage to any person though there could be no intention to cause wrongful loss or damage to any person.[26] Where the accused, after driving out a cow from his master's field, after it had reached the boundary, threw two stones at it, one of which fractured its leg, it was held that the accused was guilty of mischief.[27] It has, however, to be proved that the accused had caused destruction of, or change in, property as contemplated by the section. Unless such result of the accused's act is established, his intention or knowledge need not be considered.[28]

15. Intention and Knowledge

Mischief involves intention/knowledge of likelihood to cause wrongful loss or damage. It does not unnecessarily contemplate damage of a destructive character.3684 Mischief involves a mental act with a destructive *animus*, destruction with the object of creating wrongful loss or damage is obligatory to be established.[29]

A plain reading of s 425, IPC, would reveal that the offence described in the said section imports the act done willfully or with the knowledge that the said act is likely to cause injury. Therefore, mere negligence or carelessness on the part of the accused is not sufficient to constitute the offence described in the section.[30]

16. Owners of Cattle

Owner of cattle, who, knowing that their animals, not properly provided with fodder, are accustomed to stray in search of food, intentionally omit to secure their cattle or neglect to take reasonable precautions for their care and custody, may be guilty of the offence of mischief.[31] The omission or neglect, however, must be such as to have an active effect in conducing to the result as a link in a chain of fact from which an intention to bring about the result may be inferred.[32] In Re *Gurram Liddugadu,*[33] the accused grazed their cattle on waste lands on which the government had, by notification, prohibited the public from grazing cattle. The grazing caused a destruction of government property, *viz*, grass, and the accused knew that their action caused wrongful loss to the government. It was held that they were rightly convicted of mischief. The straying of cattle, causing loss or damage to some property by reason of negligence, would not, however, be a criminal offence.[34] The owner of an animal, which strays on another's land and causes damage to the crop thereon, does not, unless he has wilfully driven it upon the land, commit the offence of mischief.[35] It is not sufficient to show that the owner of cattle, which caused damage, was guilty of carelessness in allowing them to stray. The prosecution is bound to show that there was an intention to cause wrongful loss or damage.[36]

17. Negligent Act of Servant--Master not Liable

In the case of mischief, the master cannot be held vicariously liable if any damage is caused to the complainant by the careless and negligent act of the master's servant when no intention or knowledge, requisite for an offence of mischief, is proved against the master.[37]

If the damage is the result of the servant's negligence, his master is not criminally liable for it.[38]3685

18. Property

The word 'property', in s 425, IPC, means some tangible property capable of being forcibly destroyed; it does not include an incorporeal or intangible property such as an easement.[39] Further, the section has no application to an ownerless property. Where no one has any property or right in an animal, the killing of that animal does not come within the purview of s 425, IPC . The killing of a rhinoceros would not amount to mischief.[40] A bull left at large after branding it for public utility would be *res nullius* and killing of it would not amount to mischief.[41] However, a young calf, branded at the *shradha* of the father of the complainant and fed and kept by him, would not cease to be his property and killing of it would be mischief.[42] The tearing of a receipt of a registered article after taking delivery from a postmaster would be mischief.[43] Where the accused dug up some graves and removed the stones placed over them in order to extend his cultivation, it was held that the graves might be treated as property, and that the accused was guilty of mischief.[44] The value of the property involved is immaterial. Any value, however trifling it may be, is quite sufficient for an offence of mischief.[45]

19. 'Destruction of any Property'

As already pointed out, the property, which can be the subject of mischief, must be the one which can be destroyed and the section does not apply to cases of incorporeal or intangible rights, such as easements.

Grazing of cattle on land, which the government has prohibited to public from grazing cattle, causes a destruction of government property, *i.e*., grass.[46] A person commits mischief if he cuts bamboos on land which he claims, but of which possession, after an execution sale, has been legally made over to another person without any objection or formal intervention on his part.[47] Where the branches of complainant's trees are cut at the instance of the accused who knows that the cutting of the branches is likely to cause wrongful loss or damage to the complainant, the offence of mischief is complete.[48] As to the cutting of crops, it has been held that to3686 cut ripe crops, which are grown to be cut, is not to destroy them or affect them injuriously within the meaning of s 425 .[49] The taking may cause wrongful loss to the grower, and if it be dishonest, a conviction may be had for theft. However, it cannot be mischief.[50] If however, the crops, are not ripe, their cutting may amount to mischief.[51] The destruction of a document evidencing an agreement void for immorality may constitute an offence of mischief.[52] Where a lessee of the government held rights of fishery in a particular stretch of river and the accused, by diverting the water of that river, caused very large quantities of fish, both mature and immature, to be destroyed, it was held that when the accused deliberately changed the course and condition of the river in that manner to the detriment of the lessee, he was guilty of the offence of mischief.[53] If earth is dug from a land by digging into it to the depth of a man's height and heaped on another portion of the land so as to raise the level of that portion which has a lower level, mischief is caused.[54] However, the thinning out of common rides between different lands is an essential part of agriculture operations by cultivators at the time of ploughing or transplantation. Where the prosecution fails to adduce any evidence that by such an act of thinning cut, the accused intended to cause wrongful loss or damage to the complainant and there is also no proof that there was destruction of the ridge or any change in it to destroy or diminish its utility, the ingredients of the section are not made out.[55]

20. 'Change in any Property, or in the Situation thereof, as Destroys or Diminishes its Value or Utility'

The use of the word 'its' shows that destruction or damage should be in the same property which is either destroyed or the value thereof is diminished or is injuriously affected.[56]

The expression 'change in any property, or in the situation thereof, as destroys or diminishes its value or utility', in this section, does not necessarily mean a change in character, composition or form. If something is done to the property contrary to its natural use and serviceableness that destroys or diminishes its value or utility, it will amount to 'mischief'. It is not necessary for the purpose of s 425, IPC, that there must be material change in the property itself, nor does the said section require that value or utility of the property means its market value or utility. This position may be clarified by an example. If a miscreant loosens the nuts and bolts fixing the tyre of a motor car thereby making it impossible for the owner to drive the vehicle, he cannot certainly, in an indictment for 'mischief', be allowed to say that by his act, he did not change the nuts and bolts so as to destroy or diminish their value or utility because their market value or utility remains the same and they can be used in the self-same motor car by tightening them up again. If, therefore, the water supply is stopped by a positive act in the shape of turning the main pipe through operation of a wrench valve key, that would amount to bring3687 about some change in the property (*i.e.*, pipeline), which diminishes its value or utility for the purpose for which it was being used, namely, supply of water and such an act would be 'mischief' within the meaning of s 425 .[57] Where a landlord cut off the electric connection of his tenant as the tenant had refused to pay the enhanced electric charges demanded by him, it was held that the cutting of the electric connection was with the intention of causing wrongful loss to the complainant and the same had resulted in causing such destruction of the property or such change in the property or diminution in its value or utility as to clearly come within the definition of s 425, IPC .[58] In *Pothan v George* ,[59] the accused removed the fuse from the metre and thereby diminished the flow of electricity to the room of the complainant. The accused was held guilty of mischief under s 425, IPC . Where the accused blocked a drain, through which the sullage water of the complainant's house passed from time immemorial, and obstructed the flow of the water, it was held that a drain was a property and the act of the accused in blocking it amounted to causing a change in the drain or its situation so as to destroy its utility to the complainant and, therefore, the accused was guilty of mischief.[60] In a case where large pieces of bricks are wantonly thrown at a house, it may be taken that the house, having been hit, is, to some extent, altered in condition and damaged, and thereby wrongful loss or damage is caused to the owner.[61] However, ploughing and sowing of fallow land covered with babla plants in possession of the complainant is not covered by s 425 .[62]Similarly, getting cattle put into cattle-pound is not causing such a change in the situation of property as diminishes its utility or value; the act does not do so *per se*, and the cattle when released are as useful as ever.[63] Certain Hindus present at a caste dinner, had sat down to partake of the food, which had been served to them, when certain other members of the caste came and threw down a shoe amongst the men who were seated. Their action had polluted the food and had, from a Hindu religious point of view rendered it unfit to be eaten. It was held that s 426 can have no application to the case. It deals only with a physical injury from a physical cause.[64]

21. Utility

'Utility' for the purpose of s 425, IPC, is utility as conceived by the owner, and not utility as conceived by the accused. The owner or possessor is entitled to his notion of utility of his goods and nobody can force his ideas of utility on him by taking his property from him and altering it in a manner in which he disapproves it.[65] The dumping, by the landlord's men, of a stall, which a fisherman had the right to3688 occupy, to prevent her from exercising her right would diminish the utility of the property to her and would amount to mischief.[66]

22. Breach or Violation of any Easementary Right

A breach or violation of any easementary right such as light and air will not amount to an offence of mischief as defined in s 425, IPC .[67]

23. 'Affects it Injuriously'

The digging of graves would injuriously affect them.[68] Where the accused caused injuries to a cow,

belonging to the complainant, by stabbing it with a sharply pointed stake, it was held that the act of the accused affected the cow injuriously.[69] In *B Sri Ram v Emperor* ,[70] the accused dug out some earth from a plot, over which a clear cartway had been allowed under a compromise decree, and dug a new ditch on it, it was held that it could not be said that the land had not been affected injuriously by the creation of a pit on it.

24. Explanation 1

In view of expln 1 to this section, it is immaterial whether the land in question belonged to the complainant, or it was in possession of someone else, when the accused committed mischief by demolishing construction on it.[71]

25. Explanation 2

According to expln 2 to this section, mischief may be committed by an act affecting property belonging to the person who committed the act, or to that person and others jointly. In *Baboo Lal v Emperor* ,[72] the accused demolished the *parda* (*i.e*., common) wall, which, according to him, belonged to him exclusively and was constructed by him at his own cost. It was found that the disputed wall belonged to the complainant and accused both, and as the accused demolished it with intent to cause wrongful loss or damage to the complainant, he was guilty of mischief. It is worth mentioning here that the principal ingredient of the offence of mischief is that there must be an intention to cause wrongful loss or damage to the public or to any person, meaning thereby that mischief must be done to the property belonging to another person though the act, whereby mischief is done, may have reference to the property belonging to the person committing the mischief.[73] If a person blocks up a channel of water at a spot within his own land, preventing the complainant from irrigating his own land, he would be guilty of the offence of mischief.[74]3689

59 Refer synopsis notes under ss 429 to 440, IPC .

60 *Public Prosecutor v Semalai Pannadi* 1960 Cr LJ 834, p 836 (Mad) (DB), AIR 1960 Mad 240 .

61 *Ibid.*

62 *Sailen Sardar v State* AIR 1958 Cal 668, 1958 Cr LJ 1396 ; *Gopalakrishna Kediloya v Krishna Bhatta* AIR 1960 Ker 74, 1960 Cr LJ 228 ; *Vishwavir v State* 1966 All WR (HC) 703 .

63 *Ramachandra Govind Take v State* AIR 1969 Bom 20, 1969 Cr LJ 112, p 115 ; *Emperor v Budh Singh* 2 All 101 .

64 *Maheswar Kar v Paluni Dihya* 1975 Cut LT 228, 1975 OJD 68 ; *Sukh Lal v State of Himachal Pradesh* 1976 Ch LR 15 (HP) .

65 *Gopinath Jena v Abhimanyu Jena* 34 Cut LT 411 .

66 *Emperor v Budh Singh* (1878-1880) ILR 2 All 101.

67 *Girish Chandra Roy v Akhay Kumar Sardar* 22 Cr 507 ; Re *Daniel Grove* 1 Weir 489; *Pappu v Domodaran* AIR 1968 Ker 126, 1968 Cr LJ 625 ; *Sebastian Lobo v Mingel D'Souza* AIR 1932 Mad 676, 33 Cr LJ 655 ; *Balkrishna Narhar Vellankar v Emperor* AIR 1924 Bom 486, 26 Cr LJ 254 ; Re *Jagannathan* 1 Weir 490; Re *Athinarayanasawy Pillai* 1 Weir 505.

68 *Talehar Chowdhry v Emperor* 18 Cr LJ 750 ; *Sada Panigrahi v Raghunath Das* AIR 1950 Ori 196, 51 Cr LJ 1333 .

69 *Kullappa Naicker v Palaniammall* 21 Cr LJ 137 ; Re *Kondi Chethi* 11 Cr LJ 566(1).

70 *Pitam Singh v Emperor* 21 Cr LJ 828 ; *Sardar Singh v Emperor* 19 Cr LJ 339 ; *Sham Lal Lohar v Emperor* 19 Cr LJ 729 .

71 *Sarat Chand Sen v Yaqub* 26 Cr LJ 194 .

72 *Har Prasad Singh v Hulsan Chamar* 29 Cr LJ 642 (Pat) .

73 *Pappu v Damodaran* AIR 1968 Ker 126, 1968 Cr LJ 625 ; *Hanuman Das Patel v Jayalet Patel* 1974 Cut LT 1083 .

74 *Pappu v Damodaran* AIR 1968 Ker 126, 1968 Cr LJ 625 .

75 *Manikchand Birdhichand Sharma v State of Maharashtra* 1975 Cr LJ 1044, p 1046 .

76 *Tatiparti Beeraswami v Sanom Kanakayya* AIR 1929 Mad 833, 31 Cr LJ 225 .

77 *Jambulingam Pillai v Ponnnuswami Pillai* AIR 1939 Mad 400, 40 Cr LJ 656 ; Re *Gollakotta Suryanarayanamurthi*AIR 1940 Mad 747, 41 Cr LJ 807 .

78 *Viagula Fernandez v Revd AM Amirthanathasami* 1 Weir 489 .

79 7 MHCR, App xxxix; 4 MHCR App xv; 1 Weir 512.

80 *Shah Jeychand Gopalji v Thakar Bawa Virji* 1 Cr LJ 488 .

81 *Public Prosecutor v Semalai Pannadi* AIR 1960 Mad 240 (DB), 1960 Cr LJ 834 ; *Nagendra Nath Mondal v State of West Bengal* AIR 1972 SC 665, 1972 Cr LJ 482, p 486 .

82 *Empress v Shaik Raju* (1885) ILR 9 Bom 173 .

83 *Karim Bux v Rex* AIR 1950 All 464, 51 Cr LJ 1242 .

84 *Dharma Das Ghose v Nusseruddin* (1886) ILR 12 Cal 660 .

85 *Vishwavir v State* 1966 All WR (HC) 703 .

86 *Mahadeo Singh v Emperor* AIR 1926 All 704, 27 Cr LJ 898 .

87 *Reg v Kastya Rama* 8 BHCR 63 ; *Ningombam Kula Singh v Union Territory of Manipur* AIR 1971 Manipur 13, 1971 Cr LJ 480 ; *Soshil Bhushan Bose v Gohind Chandra* 7 CWN 663 .

88 Re *Rao Nihalkaran*AIR 1958 MP 341, 1958 Cr LJ 1316 ; *Haribilash Show v Naraindas Agarwalla* AIR 1938 Cal 669, 40 Cr LJ 10 ; *Munuswami Chetti v Muniswami Chetti* AIR 1948 Mad 477, 49 Cr LJ 716 .

89 *Zipru Tanaji Patil v Emperor* AIR 1927 Bom 363, 28 Cr LJ 476 .

90 *Arjuno Goudo v State* AIR 1969 Ori 200, 1969 Cr LJ 999 ; *Gopinath Nayak v Lepa Majhi and Ors* 1996 Cr LJ 3814 (Ori) .

91 *Punjali Bapuji Bagul v Emperor* AIR 1935 Bom 164, 36 Cr LJ 940 .

92 Re *Arthi Ayyar*AIR 1921 Mad 322, 14 MLW 728 .

93 *Ouseph Thommen v Joseph Anthony* 1957 Cr LJ 166 .

94 *Khetrabasi Mohapatra v Prafulla Kumar Senapati and Ors* 1998 Cr LJ 3590 (Ori) .

1 *Sukumaran Nadar v Sadasivan* 1972 Ker LT 1063, **dissented from***Ouseph v State of Kerala* 1981 Cr LJ 1362 (Ker), in which it was held that merely because an act also amounts to an act of invasion of civil right or tort, it does not cease to be a crime. Opening of the sluices and allowing water to flow into the complainant's land, even if it be an invasion of civil right, may amount to a criminal offence.

2 *Empress v Rajcoomar Singh* (1877-1878) ILR 3 Cal 573.

3 *Jang Bahadur Singh v Emperor* AIR 1926 Pat 244, 27 Cr LJ 392 ; *Arman Shaik v Namuddin Shaikh* AIR 1936 Cal 157, 37 Cr LJ 524 ; *Nga Sri v Crown* 1 Cr LJ 668 .

4 *Deocharan Singh v Ramsunder Sahu* AIR 1938 Pat 538, 40 Cr LJ 89 .

5 *Kolathukara Vaiyapuri Goundan v Kuppuswami Goundan* AIR 1948 Mad 473, 49 Cr LJ 711 ; *Bhima Mahopatra v Krishna Chandra Rath* (1966) 32 Cut LT 788 .

6 Re *CM Ramasamier* 15 Cr LJ 290 (1).

7 *Parmeshwar Singh v Emperor* 11 Cr LJ 532 (Cal) (DB).

8 *Harichandran v State* 1997 Cr LJ 41 (Mad) .

9 *Ram Krishana Singh v Emperor* 23 Cr LJ 321, p 323, 324 (Pat) (DB) .

10 *Empress v Rajcoomar Singh* (1877-1878) ILR 3 Cal 573.

11 Re *Saravana Pillai* 11 Cr LJ 533 (Mad).

12 *Raj Singh v State of Haryana* 2003 Cr LJ 1588 (P&H) .

13 *Emperor v Dinkar Chintaman Patkar* 2 Cr LJ 55, p 57 (Bom) (DB) .

14 *Ouseph Muni v State* 1964 Mad LJ (Cr) 627, 1964 Ker LT 757 .

15 *Abdul Hussain Ibrahimji v Emperor* AIR 1943 Sind 127, 44 Cr LJ 654 .

16 *Empress v Shanker Lal* (1887) 7 AWN 101 .

17 Re *Dharmalinga Mudali* 15 Cr LJ 723. For further commentary, see s 23, vol I.

18 *Arjuna Goudo v State* AIR 1969 Ori 200, 1969 Cr LJ 999 ; *Gopinath Nayak v Lepa Majhi and Ors* 1996 Cr LJ 3814 (Ori) .

19 *Murugappa v Morangamuthu* 1937 MWN 1238 .

20 *Empress v Denoo Bundhoo Biswas* 12 WR (Cr) 1, 3 Beng LR 17 ; *Narain Singh v Emperor* 3 Cr LJ 107 ; *Bhagwan Rana v State* AIR 1953 Sau 158, 1953 Cr LJ 1350 ; *Hukum Chand v Emperor* AIR 1923 All 544, 24 Cr LJ 693(1) .

21 1 Weir 497 (2).

22 *Empress v Kaikhusro Cursedhi* Ratanlal Unrep Cr Cas 949.

23 *Rex v Sharma* Ratanlal Unrep Cr Cas 88; *Emperor v Nandeyappagowda Sniddangowda* 4 Cr LJ 466 ; *Arjun Singh v State* AIR 1958 Raj 347, 1959 Cr LJ 87 .

24 *Fiduhusen Abdulali v State* AIR 1962 Guj 318, (1962) 2 Cr LJ 760 (1) ; Re *Akidullah* 15 1C 806 (Sind), 5 SLR 263.

25 *Empress v Rev Singh* Rat Unrep Cr Cas 690; *Hari Singh v Kanchan Mahto* 20 Cr LJ 612 ; *Ouseph v State of Kerala* 1981 Ker LT 153, p 157, dissenting from *Sukumaran Nadar v Sadasiivan* 1972 Ker LT 1063 .

26 Re *P Appayya*AIR 1957 AP 100, 1957 Cr LJ 627 ; *Kastur Chand v Emperor* AIR 1934 Pat 221, 35 Cr LJ 1304 ; *Deputy Superintendent v Chulha Ahir* 13 Cr LJ 138, 16 CWN 263 .

27 *Mahadeo v Emperor* 18 Cr LJ 286 .

28 *Emperor v Fateh Din* 11 Cr LJ 65 .

29 *Nagendranath Roy v Dr Bijoy Kumar Dasburma* 1992 Cr LJ 1871 (Ori), (1992) 2 CCR 1254 (Ori) .

30 *Suyambu Nader and Ors v State* 1999 Cr LJ 394 (Mad) ; *Saday Ram v Upendra Malakar* (1963) 2 Cr LJ 112 (Tri) . For further commentary, see under the same heading in s 429, *post*.

31 Re *Thoronotti Mawathil* 1 Weir 495; *Emperor v Punjagodad* 20 Cr LJ 387 (Bom) ; *Palaniandar Mutthiran v Ramaswamy Reddy* AIR 1942 Ma4d 724 (1), 44 Cr LJ 140.

32 Re *Thoronotti Madanthil* 1 Weir 495.

33 Re *Gurram Liddugadu* 1 Weir 492.

34 1 Weir 487 (3).

35 *Empress v Shaikh Raju* (1885) ILR 9 Bom 173 .

36 *Emperor v Bai Baya* (1883) ILR 7 Bom 126 ; *Major Forbes v Grish Chunder* 14 WR (Cr) 31 ; Re *Araz Sircar* 10 WR (Cr) 29; *Sashi Bhusan Chakraborty v Birendra Kumar Sil* AIR 1953 Tripura 7 ((2)), 1953 Cr LJ 1460 .

37 *Saday Ram Malakar v Upendra Malakar* (1963) 2 Cr LJ 112 (Tripura) .

38 *Sirish Chandra Sircar v Emperor* 20 Cr LJ 299 (All) .

39 *Empress v Kern* Ratanlal Unrep Cr Cas 387; *Aturu Srinivasulu v TP Somiah Chetty* 1967 Cr LJ 1227, (1965) 2 An LT 345 ; *Banarsi Das v Emperor* AIR 1923 Lah 92, 25 Cr LJ 525 ; *Punjaji v Murori Wangoji* AIR 1952 Nag 193 ((1)) ; *Ram Roop v Emperor* AIR 1939 Oudh 38, 40 Cr LJ 138 .

40 *Nabin Chandra Gagoi v State* AIR 1961 Assam 18, (1961) 1 Cr LJ 226 .

41 *Harnandan Thakur v State of Bihar* AIR 1966 Pat 141, 1966 Cr LJ 575 .

42 *Sulaiman Shah v Emperor* AIR 1937 Pat 406, 38 Cr LJ 407 .

43 *Emperor v Sukha Singh* 2 Cr LJ 242 .

44 Re *Rumala Nagayya* Weir 496; Re *Chottuwali*(1879-1880) ILR 4 Bom 463, in which it was held that the taking of the tombs of the forefathers of the complainant, which stood on his own land, was not an offence under s 426, IPC .

45 *Golam Ahia v Lutfal Hoda* AIR 1955 Cal 558, 1955 Cr LJ 1357 . For further commentary, see under the same heading in s 415, *ante*.

46 Re *Gurram Siddigandir* 1 Weir 492; *Palaniandi Muttirian v Rama Swami Reddy* AIR 1942 Mad 724 ((1)), 44 Cr LJ 140 **dissenting from***TS Raghupathi Iyer v Narayana Goundan* AIR 1929 Mad 5, 30 Cr LJ 315 .

47 *Sonai Sunlar v Bukhtar Surdar* 25 WR (Cr) 46 ; *Shakur Mahomed v Chunder Mohun Sha* 21 WR (Cr) 38 .

48 *Muhammad Hasan v Emperor* AIR 1927 All 610, 29 Cr LJ 275 ; *Sarat Chandra Sen v Yaqub* AIR 1924 Cal 805, 26 Cr LJ 194 (cutting of a dead jackfruit tree does not amount to its destruction or to such a change in the property or its situation as destroys or diminishes its utility); *Sardar Singh v Emperor* 19 Cr LJ 339 (Pat) (cutting down of a tree does not amount to mischief unless it destroys or diminishes its value).

49 *Pahalwan Singh v Emperor* AIR 1934 Oudh 182, 35 Cr LJ 797 .

50 *Mahomed Fiyaz v Khan Mahomed* 18 WR (Cr) 10 ; Re *Nga Si*(1903) 10 Bur LR 126. But **see also***Ram Birich Mahto v Bishwanath Missir* (1961) 2 Cr LJ 265 (2), 1960 BLJR 713, **dissenting from** the observations in *Talebar Chowdhry v Emperor* 18 Cr LJ 750 .

51 Re *Miras Chowkidar* 7 CWN 713; *Arjuno Goundo v State* AIR 1969 Ori 200, 1969 Cr LJ 999 .

52 *Empress v Vyapuri* (1882) ILR 5 Mad 401, 1 Weir 490 .

53 *Emperor v Chanda* 2 Cr LJ 801 ; *Shoshi Bhushan v Gobind Chandra* 7 CWN 663 .

54 *Aswini Kumar Gupta v State of West Bengal* 1968 Cr LJ 116 (Cal) .

55 *Raghunath Naik v Baya Bejo* 33 Cut LT 748, p 710 .

56 *Pratap Singh and Ors v State of Uttar Pradesh* 1996 Cr LJ 2387 (All) (DB) .

57 *Byomkesh Bhattacharya v Lakshmi Narayan Datta* 1978 Cr LJ 848, p 851 (Cal) ; *Gopi Naik v Somnath Sinai Priolkar* 1977 Cr LJ 1665 (Goa) .

58 *Brojo Lakshmi Paul v Sailendra Nath Banerjee* AIR 1959 Cal 260, 1959 Cr LJ 446 ; *Vishwavir v State* 1966 All WR (HC) 703 ; *Abdul Rahman v Emperor* AIR 1928 Sind 49 ((1)), 28 Cr LJ 960 ; *CS Mani v Vijaya Pillai* (1965) 1 Mad LJ 347 ; *IH Khan v AM Arathovn* 1969 Cr LJ 242 (Cal) .

59 *Pothan v George* 1967 Ker LT 14 (SN) .

60 *Aluru Srinivasulu v TP Somiah Chetty* 1967 Cr LJ 1227, (1965) 2 Andh LT 345 .

61 *Ma Nyein Gale v Nga Sein* 10 Cr LJ 552, p 553 (LB) (FB) .

62 *Bata Krishna Ghose v State* AIR 1957 Cal 385, 1957 Cr LJ 719 .

63 *Emperor v Ram Jiawan* 1881 AWN 158 ; *Dayal v Emperor* AIR 1943 Oudh 280, 44 Cr LJ 640 ; *K Ramchandra Mudaliar v Eswara Devarajan* 1973 LW (Cr) 192, (1975) 1 Mad LJ 19 .

64 *Emperor v Motilal* (1902) ILR 24 All 155, 1901 AWN 212 ; *Public Prosecutor v Semalai Pannadi* AIR 1960 Mad 240, 1960 Cr LJ 834 .

65 *Sumerchand Trilokechand v State* (1962) 2 Cr LJ 692, 1962 MPLJ 822 .

66 *Lalta v State* AIR 1954 Cal 192, 1954 Cr LJ 551 .

67 *Pratap Singh v State of Uttar Pradesh* 1996 Cr LJ 2387 (All) (DB) .

68 Re *Rumala Nagayya* 1 Weir 496.

69 *Gopalakrishna Kediloya v Krishna Bhatta* AIR 1960 Ker 74, 1960 Cr LJ 228 .

70 *B Sri Ram v Emperor* AIR 1948 Oudh 97, 49 Cr LJ 114 .

71 *Chotey Lal v State* 1972 Cr LJ 59 .

72 *Baboo Lal v Emperor* AIR 1953 All 409, 1953 Cr LJ 905 .

73 *Ram Krishna Singh v Emperor* 23 Cr LJ 321, p 323, 324 (Pat) (DB) .

74 *Dwarka Prasad v Ram Nath Modi* AIR 1951 VP 1 ; *Gobinda Bharati v Adhikari Bharati* (1972) 1 Cut LT 496, p 497,498 ; *Kesho Singh v Emperor* AIR 1924 Oudh 132 ((1)), 24 Cr LJ 467(1) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 426.

Punishment for mischief.--

Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Comments

1. Scope

This section provides only for punishment for mischief defined in the preceding s 425, IPC . The section covers only the cases of the simplest form of mischief in respect of property the value of which does not exceed Rs 50. If, however, the value of Rs 50 or upwards, the case would fall under s 427, IPC . Similarly, if there is a sort of mischief which is covered by any other section, relating to mischief (ss 428-440, IPC), the punishment would not be determined by this section.

For a conviction under the section, the law does not requires a finding as to the quantum of damage.[75]

2. Sanction for Prosecution

Commentary of s 197, CrPC 1973 may be referred to.[76]

3. Procedure

The offence under this section is non-cognizable, bailable, compoundable by the person to whom the loss or damage is caused, and triable by a magistrate, and may also be tried summarily.

4. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case. Section 251 , CrPC 1973, may be referred to.

5. Proof

In order to establish a charge under this section, prove[77] that:

(a) the accused

(i) caused:

(1) destruction of the property in question, or
(2) such change in the property in question, or in the situation thereof, as destroyed or diminished its value or utility, or

(ii) affected the property in question injuriously; and3690

(b) he did so with intent to cause, or knowing that he was likely to cause, wrongful loss or damage to

(i) the public, or
(ii) the person in question.

A conviction for mischief cannot be sustained if there is no evidence of the required intent.[78] There must be clear proof of intention.[79] The question, whether there was intention to cause wrongful loss to the complainant, is one of drawing the necessary inference.[80] The knowledge, gathered by the court at the time of the inspection, may be used for appreciating the evidence in order to draw the necessary inference, but not for arriving at a finding.[81] Where, in a case regarding mischief to land, the defence raises a *bonafide* plea of right to land, the magistrate should determine whether the accused acted with any such an intent as is mentioned in s 425 .[82]

6. Conviction

The owner of a house, in which another person is in possession, is not entitled to demolish the wall of the house and trespass into it. His conviction under ss 426 and 448, IPC, would be justified.[83] Similarly, accused charged under s 379 [84] or s 452 [85] can be convicted under s 426 if he knew the case, for which he was being tried, and is not prejudiced. However, the accused, charged under ss 143 and 447, IPC, cannot be convicted under s 426 because the offence of mischief under s 426, IPC, is a totally independent offence.[86]

7. Double Conviction

Whether a person, charged under s 379, and also under s 426, IPC, can be convicted in respect of both offences, there is a conflict of opinions. One view says that killing of an animal, after theft of it has been committed, does not merit a double conviction for both the offences. This view has been taken by the Patna,[87] Madras,[88] Sind,[89] Burma,[90] Rangoon,[91] and Calcutta,[92] High Courts. A contrary view was, however, taken by the Bombay High Court. It was held that the stealing of a calf and subsequently killing it were two distinct offences and separate sentences for each were quite legal.[93]3691

8. Probation

In appropriate cases the benefit of s 6 of the Probation of Offenders Act 1958 should be given to the accused.[1] Accused was not a habitual offender, incident was 15 years old. Sentence of one year simple imprisonment imposed by Courts below was substituted by sentence of fine.[2]

9. Sentence

A person, who, behaving in a shocking and reckless manner, commits mischief, does not deserve a

lenient sentence.[3]

10. Alteration of Conviction from Section 426 to Section 24 of Cattle Trespass Act 1871

Where in a case under s 24 of the Cattle Trespass Act the trying magistrate held that the cattle of the accused damaged the crop of the complainant but another ingredient, normally, 'seizure of cattle' was not proved and therefore convicted the accused under s 426, IPC, the appellate court took a different view and held that s 426, IPC, did not apply to the facts of the case and on the facts proved altered the conviction of the accused from s 426, IPC, to one under s 24 of the Cattle Trespass Act. The order of the appellate court was confirmed by the Orissa High Court on a revision being filed before it.[4]

75 *Gopinath Jena v Abhimanyu Jena* 34 Cut LT 411, p 415, 416 .

76 For detailed commentary, see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

77 *Gopalkrishna Kediloya v Krishna Bhatta* AIR 1960 Ker 74, 1960 Cr LJ 228 .

78 1 Weir 497 (2).

79 Re *Ram Golam Singh* 6 WR (Cr) 59; Re *Ishur Chunder* 25 WR (Cr) 65.

80 *Kanniah Chettiar v Kupuswami* (1961) 2 Cr LJ 501, 1961 Mad LJ (Cr) 273 .

81 *Manikchand Birdhichand Sharma v State of Maharashtra* 1975 Cr LJ 1044, p 1047 .

82 *Empress v Mahadshet* Ratanlal Unrep Cr C 432; Re *Pran Nath Saha* 25 WR (Cr) 69; *Empress v Denoo Bundhoo Biswas* 12 WR (Cr) 1 .

83 *Bahadul Thanpati v State* 1980 Cut LT (Cr) 173, p 174 .

84 *Kastur Chand v Emperor* AIR 1934 Pat 221, 35 Cr LJ 1304 .

85 *M Munnay Mirza v The King Emperor* AIR 1925 Oudh 89, 1925 Cr LJ 1087 (Oudh) .

86 *Saday Ram Malakar v Upendra Malakar* (1963) 2 Cr LJ 112 .

87 *Hussain Buksh v Emperor* AIR 1925 Pat 34, 26 Cr LJ 277 .

88 Re *Madar Saheb* 1 Weir 197.

89 *Jairo v Emperor* AIR 1916 Sind 77, 17 Cr LJ 239 .

90 *Empress v Nga Pank Hamave* (1892-1896) UBR 241; *Empress v Nga Aung* (1893-1900) LBR 633.

91 *Nga Paw Din v King* AIR 1938 Rang 138, 39 Cr LJ 607 .

92 *Bichuk Aheer v Auhuck* 6 WR (Cr) 5 (double sentence for theft and mischief is illegal and improper).

93 *Emperor v Bhawan Surji* AIR 1936 Bom 172, 37 Cr LJ 553 ; *Empress v Krishna* Ratanlal Unrep Cr Cas 430; *Reg v Narayan Krishna* 2 Bom HCR 392 ; *Empress v Genya* Ratanlal Unrep Cr Cas 129; *Emperor v Ramia Ratanji* 5 Bom LR 460 .

1 *Musakhan and Ors v State of Maharashtra* AIR 1976 SC 2566, 1976 Cr LJ 1987 (SC) .

2 *Diwakar Maniram Kohala v State of Maharashtra* 2010 Cr LJ 1411 (Bom) .

3 *Raghubir Singh v State* 1968 Cr LJ 681 (Del) .

4 *Damel Sethi and Ors v Udi Behera* AIR 1954 Ori 145, 1954 Cr LJ 883 (Ori) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 427.

Mischief causing damage to the amount of fifty rupees.--

Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

The offence under this section is an aggravated form of the offence punishable under the preceding s 426, IPC, the only distinction between the two offences being the extent of the damage done.[5]

If a person puts a lock illegally and wrongfully and prevents the rightful owner to enter his house, the person, so obstructed illegally and wrongfully, has a right3692 to break open the lock and enter into his house. If he does, it amounts to a rightful act to thwart a wrongful act and if, in doing so, the lock is broken, he cannot be made liable for mischief. In a case when the unlawful encroachments are stealthily made and constructions set up to destroy or demolish the rightful title or interest of a party by a trespass, it is not an offence to remove it or to throw it out. The person in rightful possession has every right to dispossess or throw out a trespasser while the trespasser is in the act or process of trespassing. The act of dispossession or throwing out includes throwing of the material objects with which the trespass is committed. It is undoubtedly true that the trespasser may be thrown out. It would be equally true to say that if any articles or things are put in, in the process of trespassing, the person in rightful possession of the property has a right to throw away or to 'dispossess' the trespass or the symbolic articles put in by the trespass. Once the symbolic articles, put by the trespasser, are permitted to remain there, the act of trespassing may amount to assertion of right by the trespasser and, in order to throw the articles out, the true owner may be required to take recourse to the long and arduous remedies as provided under the law. Under these circumstances, if any unlawful constructions are made by a rank trespasser, the true owner, or person in rightful possession of land, has the right to throw out the materials and/or constructions. In such a case, no *bonafide* act of an accused can amount to that offence.[6]Where the accused cut away the branches of a tree, over hanging his paddy field, it was held that his act was neither mischief under s 447, nor trespass under s 447 of the IPC .[7] Where, however, some land, buildings and vats for manufacture of indigo were sold in execution of a mortgage decree and the mortgagors demolished the building and removed the vats, before the sale was confirmed, it was held that they were guilty under this section.[8]

The accused driver was driving the bus, the bus took deviation at the spot of the accident and hit the house. The injured passenger, PW, did not depose that the accused was driving the bus rashly and negligently. The defence version was that a boy was crossing the road and to avoid accident, the deceased driver drove the vehicle to the other side of the road and hit the house. The defence version being probable was believed, the accused appellant was acquitted of the charges under ss 279, 337, 338 and 427, IPC .[9]

2. Section 427 Distinguished from Sections 441 and 447

There is no nexus between the provisions of this section and those of ss 441 and 447, IPC, except that both fall under the chapter describing offences against property. In so far as this section is concerned, possession of the property, in relation to which the offence, described in it, is committed, is immaterial while the main ingredient of the offence under ss 441 and 447 is the disturbance of possession.[10]3693

3. Abetment

Where the accused was held guilty under s 167, IPC, and also under s 5 of the Prevention of Corruption Act 1947, (now s 13 of Prevention of Corruption Act 1988), considering all the facts and circumstances the accused was also held guilty under ss 427 / 109, IPC, as he did aid and abet in committing the mischief which caused a loss to the government.[11]

4. 'Loss or Damage to the Amount of Fifty Rupees or Upwards'

It is the loss, suffered by the complainant, the value of which has to be considered for the purpose of this section. Thus, where some fishing stakes of the complainant were removed from the sea by the accused, but were not appropriated by him, it was held that the loss, suffered by the complainant, was the pecuniary loss, the value of which was the fish which he would have caught and sold.[12]

The loss arising out of destruction, contemplated by this section, must be in reference to some other person, and not to the owner himself. Therefore, if the crop on the land has been sown by the petitioner and it has been destroyed by him without any intention of putting any body else to loss or injury, that, itself, would not amount to mischief within the meaning of this section.[13]

5. Procedure

The offence under this section is non-cognizable, bailable, but compoundable, by the person to whom the loss or damage is caused, and triable by a magistrate, and may also be tried summarily.

6. Quashing of Prosecution

Where on account of failure of power supply to the flour mill, the prosecution lodged a complaint under s 42(b) of the Electricity Act 1910 (9 of 1910) and ss 166 and 427, IPC, against the electricity board and its officers, the allegations in the complaint did not make out any of the offences alleged against the accused, the prosecution was pending for more than 12 years and was therefore liable to be quashed.[14] Where the complaint petition and submission showed that the prosecution is not *bonafide* and has been brought about only to wreak personal vengeance on account of delivery of possession effected against the complainant in execution of decree, to secure the ends of justice, the impugned order issuing summons against the accused persons was set aside.[15] Where the allegations were that the accused persons on instigation of the main accused committed criminal trespass and demolished the wall, the order of cognizance against the main accused was set aside by the High Court. Therefore, the order of cognizance against the co-accused was found liable to be quashed.[16]3694

7. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case. Section 251 , CrPC 1973 may be *referred* to.

The accused admittedly was the owner of land, he removed rocks for commercial purpose from his own land. On these facts no *prima facie* case against accused under s 427, IPC, is made out.[17]

8. Proof

To establish a charge under this section, the same facts must be proved as for a charge under the

preceding s 426, IPC, and it must further be proved that the value of the property was of Rs 50 or upwards.

Where the complainant had no right to a certain ridge but he charged the accused of cutting the ridge, it was held that no charge of mischief was proved.[18]

The allegation against the accused was that he caused damage to the plaster of the wall of the complainant who was his neighbour by digging a drain along the wall. The statement of the complainant before the court showed that there was no plaster on the wall at the time of the occurrence. Therefore, there was no question of causing damage to the plaster of the wall by the act of alleged digging of drain by the accused. The incident took place 13 years ago and the parties maintained good neighbourly relations. The acquittal of the accused was found proper.[19] The allegation against the accused was that, he illegally constructed a boundary wall, encroaching upon and causing damages to the plinth and roof of the building of the complainant. The accused was constructing the boundary wall over his own roof, so the complainant was not justified in raising a protest over such construction. The complainant did not take any step either by local inspection or investigation to establish the fact of encroachment by the accused on his land, nor any step had been taken to measure or to know the extent of the so called damage. The acquittal of the accused was found justified.[20]

9. Acquittal

Where charges against the accused persons were of criminal trespass and causing damages to crops, admittedly the land in question was actually in the possession of opposite party and they were ploughing it, even though allegedly by force, the trial court found that the witnesses were ignorant as to who were in possession of the land in question, and for well considered reasons disbelieved the evidence of the complainant. There was also a litigation pending between the parties as regards the same land. On the consideration of evidence, the accused persons were acquitted by the trial court which decision was confirmed in the revision filed by the complaint.[21] Where the accused only removed a tea stall under the direction of the executive engineer, and the charge-sheet and the materials on record did not show that the3695 ingredients of s 427 stood satisfied, it was held that the accused did not commit an offence under s 427 .[22]

10. Sentence

Where the accused, belonging to a poor section of society, were facing criminal proceedings for more than six years and were not previous convicts, it was held that it would be in the interest of justice to reduce the sentence of fine awarded to them.[23]

Accused was convicted for uprooting 10,000 saplings planted by Van Panchayat. Conviction recorded by trial court was upheld, however sentence of one month RI imposed by trial Court was set aside and fine of Rs.100/- imposed was enhanced to Rs.500/-.[24]

5 *Arunachala Reddy v Sellamuthu Goundan* AIR 1942 Mad 594, 43 Cr LJ 760 .

6 *Akonti Bern v State of Assam* 1980 Cr LJ 138, p 141,142 (Gau) ; *Nga Si v Crown* (1904) 1 Cr LJ 668 (Low Bur) ; *Ilar Prasad Singh v Hulsan Chamar* (1928) 29 Cr LJ 624 (Pat) ; *Sada Panigrahi v Raghunath Das* (1950) 51 Cr LJ 1333 (Ori) .

7 *Lonappan Palu v Janaki Amma* 1978 KLT 441 .

8 *Basdeo Lal v Bindeshri Prasad* AIR 1937 Pat 646 .

9 *Durgappa v State of Karnataka* 2009 Cr LJ 226, p 228 (Kant) .

10 *Municipal Committee v Pharaya Lal* 1973 Cr LJ 556, 1973 Cur LJ 761 .

11 *Krishna Govind Patil v State of Maharashtra* AIR 1973 SC 1388, 1973 Cr LJ 1130 (SC) .

12 *R v Kasturama* 8 BHCR 63 .

13 *Gobardhan Malik v Rasananda Patnaik* AIR 1968 Ori 18, 1968 Cr LJ 200, 201 .

14 *Bihar State Electricity Board and Anor v Nand Kishore Tamakhuwala* AIR 1986 SC 1653, 1986 Cr LJ 1246 (SC) .

15 *Mannu Lal Sharma v State of Bihar* 2006 Cr LJ 3094 (Pat) .

16 *Ali Mohammed v State of Jharkhand* 2005 Cr LJ 442 (Jhar) .

17 *Hari Chandran v State* 1997 Cr LJ 41 (Mad) .

18 *Bhima Mahopatra v Krishna Chandra Rath* (1966) 32 Cut LT 788 .

19 *Khetrahasi Mohapatra v Prafulla Kumar Senapati* 1998 Cr LJ 3590 (Ori) .

20 *Ram Chandra Singh v Nabrang Rai Burma* 1998 Cr LJ 2156 (Ori) .

21 *Awadhesh Kumar v State of Jharkhand* 2006 Cr LJ 1889 (Jhar) .

22 *Jayasingh v KK Velayutham* 2006 Cr LJ 3272 (SC), AIR 2006 SC 2407 .

23 *Ram Khiladi v State of Rajasthan* 1977 Cr LR 594, p 595 (Raj) .

24 *Bachhi Ram v State of Uttarakhand* 2014 Cr LJ (NOC) 85 (UTR) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 428.

Mischief by killing or maiming animal of the value of ten rupees.--

Whoever commits mischief by killing, poisoning, maiming or rendering useless, any animal or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section and the next provide for cases of mischief towards animals. This section is a general section dealing with animals. The cases, which do not fall under the next s 429, IPC, would be covered by this section if the value of the animal in question is Rs 10 or upwards, but does not exceed Rs 50.

2. 'Poisoning'

Poisoning is itself sufficient to bring a case under s 428 or s 429, IPC, as the case may be. It is not

necessary that as a result of the poisoning, the animal may be rendered useless or maimed. It is an offence complete by itself even if the injury caused may not have any serious effect.

3. 'Maiming'

Commentary under the same heading in s 429, *post*, may be referred to.3696

4. 'Rendering Useless'

The expression 'rendering useless' differs from 'diminishing utility', the expression used in the definition of 'mischief'.[25] Rendering temporarily useless would not be sufficient.[26] Causing of abrasions or scratches on the surface of the skin with *lathi* blows would neither render the animal useless, nor maim it. It would be an offence only under s 426 .[27]

5. 'Animal'

As 'Animal' denotes any living creature, other than a human being, within the meaning of s 47, IPC, a hen is an animal for the purpose of this section though it falls within the category of a bird in common parlance.[28]

6. Procedure

The offence under this section is cognizable, bailable, compoundable, by the owner of the animal, with the permission of the court before which prosecution for such offence is pending, and triable by a magistrate, and may also be tried summarily.

7. Charge

Framing of a formal charge is not necessary, the offence under this section being triable as a summons case. Section 251CrPC 1973 may be referred to.

8. Proof

In order to secure conviction under this section, the prosecution must prove that:

(a) the accused committed mischief (s 425) by killing/poisoning/maiming or rendering useless the animal in question; and
(b) the value of the said animal was Rs 10 or more, but less than Rs 50, at the relevant time.

If the mischief is not proved to have been committed within the meaning of s 425, there would be no criminal offence. Where the accused threw a stone, or a lump of mud, at a buffalo, to drive it out of her backyard, and the animal, after running some distance, fell down and died, and the sole intention of the accused appeared to have been to drive the buffalo out of her backyard, it was held that the conviction of the accused under this section was not sustainable.[29] However, where the accused were using even *dandas* to strike on animal and kept on doing it for some time, it was held that they must be deemed to have knowledge of the possible consequence of their act and if the *dandas*, striking the leg of a mare, fractured the bone, it could not be said that there was no intention to maim the animal.[30]3697

25 *Bahawal v Empress* 7 PR 1891 .

26 *R v Haywood* 1801 R&R 16 .

27 *Sukhei Behera v State* (1960) 26 Cut LT 342 .

28 *Syed Ali v State* 1972 All Cr R 590 .

29 1 Weir 497, Re *Obammal* 1 Weir 502.

30 *Angus v Emperor* AIR 1948 Oudh 113, 49 Cr LJ 112 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 429.

Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees.--

Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Comments

1. Scope

The preceding s 428, IPC enacts the general provision for cases of mischief by injury to animals. This section makes the same provision for two kinds of cases, namely:

(a) certain specified animals; and
(b) animals of the value of fifty rupees or more.

The cases of animals of the value of less than fifty rupees and more than Rs 10 would be covered by the preceding s 428 and animals of higher value will fall under this section. However, so far as the specified animals are concerned, this section is made specifically applicable to them, irrespective of their value.

The words 'elephant', 'camel', 'horse', 'mule' and 'buffalo', *etc.*, in this section, have been used to indicate both the male and female of the species. Thus, a mare is covered by the word 'horse'.[31] Similarly, their age is also immaterial. Thus, bull and cow would also include their young ones.[32]

A person, killing a buffalo, dedicated to a deity, is guilty under this section.[33] However, where a bull has been left, after branding it, for public utility and has not been dedicated to any deity, the killing of such a bull would not be a mischief within the purview of this section.[34] Where, however, a young calf was branded as a bull at the *shradh* of the complainant's father and it used to be kept at the complainant's own place even thereafter, it was held that as the bull had not ceased to be the property of complainant, the

killing of such a bull was an offence under this section.[35]

Seizure of a wild animal by the two accused when they were transporting the same constitutes offence under s 429, IPC and the case can be registered under s 429, IPC, apart from the provisions of Wild Life Protection Act 1972.[36]3698

2. Ingredients

There are three ingredients to be proved against a person, who is charged for the offence punishable under s 429, IPC :

(a) the accused committed mischief as defined under s 425, IPC ;
(b) the mischief was committed by killing or maiming or rendering useless;
(c) a mischief was committed on the animals including goats of the value of Rs 50 or upwards.[37]

3. Section 429 , IPC and Section 51 of the Wildlife Protection Act 1978--Distinction

The offence envisaged by s 9(1) read with s 2(16) and s 51 of the Wild Life (Protection) Act 1972, in its ingredients and content is not the same or substantially the same as s 429, IPC . The ingredients of the offence under s 9(1) read with s 51 of the said Act require for its establishment certain ingredients, which are not part of the offence under s 429, IPC, and vice versa. Therefore, in the case of killing of the elephant, the fact that the police after due investigation, filed a final report stating that, no offence was made out under s 429, IPC, would not bar the initiation of fresh proceedings against the accused under s 9(1) read with s 51 of the Wild Life (Protection) Act 1972.[38]

4. 'Poisoning'

Commentary under the same heading in s 428, *ante*, may be referred to.

The prosecution case was that the accused mixed poison in a pond as a result of which the fishes died. Post mortem report of the fishes and report of the chemical analyst were not filed in the case. Conviction of the accused appellant on charge of offence under s 429, IPC was set aside.[39]

5. 'Maiming'

In its primitive meaning, the verb 'to maim' involves the notion of privation of some part of the body, useful for fighting.[40] It involves the notion of the privation of the use of some limb or member, involving a permanent injury, and not a mere disfigurement.[41] 'Maiming' now, thus, means the privation of the use of a limb or member, and implies a permanent injury. It does not mean merely 'wounding', but wounding or otherwise injuring, so as to entail a permanent injury.[42] To constitute a maiming, a permanent injury must be inflicted on the animal, but to constitute wounding the injury need not be permanent. This and the preceding section provide for killing, poisoning, maiming and rendering useless. Causing of wounds would not fall under these sections though that would fall under the general s 246 .[43] The3699 expression would fairly include the amputation of any member, or the injury of an animal, by which its speed, or endurance, or use, is permanently diminished. Where a pony's ribs were broken in such a way as to permanently diminish its usefulness and value, it was held that it had been 'maimed'.[44] Similarly, where accused cut the ears of asses clean off at their base so as to affect the hearing of the animals, it was held that they were guilty of 'maiming' the animal.[45] So also, where the accused poured some nitrous acid into the left ear of a mare and perhaps also into the left eye, which occasioned the immediate blindness of the eye, it was held that the injury done, to the eye of the mare, in the said manner, was maiming.[46] However, where nearly one-half of one ear of an animal is cut off without impairing its sense of hearing, the injury does not amount to 'maiming' within the meaning of the section.[47]

6. 'Rendering Useless'

Commentary under the same heading in s 428, *ante*, may be referred to.

7. 'Any other Animal'

The word 'any other animal', in this section, do not mean an animal of the kind already mentioned; they refer to an animal of a different genus altogether, such as a dog or a goat, but in respect of other kind of animals, not specified, the section would not apply unless the particular animal in question is shown to be of the value of Rs 50 or upwards.[48]

8. Intention and Knowledge

Mischief involves intention/knowledge of the likelihood to cause wrongful loss or damage. It does not unnecessarily contemplate damage of a destructive character. Mischief involves a mental act with a destructive animus. Destruction with the object of creating wrongful loss or damage has to be established.

The elements of mischief, as defined in s 425, have to be proved. If there is no intention or knowledge, required by s 425, this section will not be applicable.[49]

Merely because an accident has taken place on a public highway, would not be sufficient to prove the charge for the offence under s 429, IPC, unless evidence has been lead that the accused driving the vehicle had any grudge against the complainant or had the required intention or knowledge in causing the accident.[50]3700

9. Negligence

Negligence does not necessarily amount to mischief. However, negligence coupled with intention to cause wrongful loss or damage may, amount to mischief in certain circumstances.[51]

10. Procedure

The offence under this section is cognizable, bailable, compoundable, by the owner of the cattle or animal, with the permission of the court, before which the prosecution for such offence is pending, and triable by a magistrate of the first class.

11. Charge

The following form of the charge may be accepted:

> I (name and office of Magistrate, *etc*) hereby charge you (name of accused person) as follows:
>
> That, on or about the...day of..... at...., you committed mischief by killing/or poisoning/or maiming/or rendering useless an animal, to wit,....(mention/animal, if specified in the section, and its value of Rs 50 or more if not so specified), and thereby committed an offence, punishable under s 429 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

12. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed mischief (s 425, IPC) by killing/poisoning/maiming or rendering useless the animal in question; and
(b) the said animal was an elephant, camel, horse, mule, buffalo, bull, cow, or ox (irrespective of the value), or any other animal of the value of Rs 50 or upwards.

Where, there was no identification of the dogs which had bitten the goats, the intention or knowledge of or any role played by the accused was not established, the accused was found entitled to an acquittal.[52]

In the absence of evidence of the cow being killed or poisoned or maimed or rendered useless, the offence under s 429, IPC, is not established even assuming that some injuries were caused to the cow.[53]

13. Double Conviction

The offence under this section being different from the offence under s 116 of the Motor Vehicles Act 1939, s 26 of the General Clauses Act 1897, does not invalidate the simultaneous conviction under both the sections.[54] However, where an accused3701 has already been tried and convicted under s 5 of the Prevention of Cruelty to Animal Act 1890, he cannot be subsequently convicted under this section.[55]

31 *Angus v Emperor* AIR 1948 Oudh 113, 49 Cr LJ 112 .

32 *Hari Mandle v Jafar* (1895) ILR 22 Cal 457 .

33 *Abdul Qayum v Emperor* AIR 1945 All 430, 1946 ALJ 27 ; Re *Nalla* 1 Weir 498 (2), (1888) ILR 11 Mad 145; *Sukhei Behera v State* (1960) 26 Cut LT 342 .

34 *Harnandan Thakur v State of Bihar* AIR 1966 Pat 141, 1966 Cr LJ 575 .

35 *Sulaiman Shah v Emperor* AIR 1937 Pat 406, 38 Cr LJ 407 .

36 *Benoy Varghese v Deputy Registrar* 2013 (3) KLT 600, p 601, (2013) 3 KLJ 756 (Ker) .

37 *Snyambhu Nadar and Ors v State* 1999 Cr LJ 394 (Mad) .

38 *State of Bihar v Murad Ali Khan and Ors* AIR 1989 SC 1, 1989 Cr LJ 1005 (SC) ; **See also***Benoy Varghese v Deputy Ranger* 2013 (3) KLT 600, 2013 (3) KLJ 756 (Ker) .

39 *Balram Tudu v State of Jharkhand* 2011 Cr LJ 4560 (Jhar) .

40 *Empress v Nga Yun* (1872-1892) SJLB 404.

41 *Anna Laxman Bhintade v Emperor* 17 Cr LJ 253 .

42 *Marigowda v Srinivasa* (1912) ILR 35 Mad 594 ; *Bahawal v Empress* 7 PR 1891 ; *Fatteh Din Emperor* 33 PR 1881.

43 *Emperor v Subrao Sukhad* 3 Bom LR 503 .

44 *Empress v Nga San Yun* (1872-92) SJLB 404.

45 Re *Rangasani Goundan*AIR 1918 Mad 638 ((1)), 18 Cr LJ 620 ; *Marigowda v Srinivasa* (1912) ILR 35 Mad 594 ; *Empress v Nga San Yun* (1872-92) SJLB 404.

46 *R v Owens* (1828) 1 Mood 205 .

47 *Anna Laxman Bhintade v Emperor* 17 Cr LJ 253 ; *Naraibn Singh v Emperor* 3 Cr LJ 107 .

48 *Hari Mandle v Jafar* (1895) ILR 22 Cal 457 .

49 *Majid Ali v State* 1957 ALJ 123 .

50 *State of Rajasthan v Nauratan Mal and Ors* 2002 Cr LJ 348 (Raj) ; *Pawan Kumar Sharma v State of Uttar Pradesh* 1996 Cr LJ 369 (All) ; *Arjunsingh v State* AIR 1958 Raj 347, 1959 Cr LJ 87 ; *Fiduhusen Abdulali v State* AIR 1962 Guj 318, (1962) 2 Cr LJ 760 . For further commentary, see ss 415 and 422, *ante* and ss 24, 25, vol 1.

51 *Nagendranath Roy v Bijoy Kumar Dasburma (Dr) and Anor* 1999 Cr LJ 1871 (Ori), (1992) 2 OCR 1254 (Ori) .

52 *Snyambu Nadar and Ors v State* 1999 Cr LJ 394 (Mad) .

53 *Sunny v State* (1988) 3 Crimes 584 (Ker) .

54 Re *P Appayya*AIR 1957 AP 100, 1957 Cr LJ 627 .

55 *Kalu v State* 1966 Raj LW 356 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 430.

Mischief by injury to works of irrigation or by wrongfully diverting water.--

Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Comments

1. Scope

A condition precedent to prove an offence under this section is that the accused has committed mischief as defined in s 425 .[56] It is not sufficient to show that wrongful loss has been caused to the complainant.[57] This section is intended to prevent a diminution of the supply of water for agricultural purposes or for drinking for human beings or animals. The offence is treated more seriously as an aggravated form of mischief.

2. 'Mischief'

Section 425,*ante,* and commentary under it may be referred to.

3. 'Act'

An 'act' includes an illegal omission which is equivalent to an illegal act.[58] Thus, where a bund was lawfully cut for irrigation by proper authorisation for twenty hours but it was kept open for some time more, it was held that it was an illegal omission for which the accused could be held guilty under this section.[59]

4. 'Diminution of the supply of Water for Agricultural Purposes', *etc.*

Before a person can be held to have committed an offence under this section, it must be shown that he has caused a diminution of the supply of water for agricultural purposes, *etc*.[60] If there is no evidence to show that any diminution of the supply of3702 water for agricultural purposes, *etc.*, was caused, or was likely to be caused by the act done, by the accused, the accused would not be guilty under this section even if he may be found guilty under s 426, IPC .[61] Where wrongful loss is caused from diminution in the supply of water, the damage should not be presumed, but proved.[62] The placing, across the channel, of an embankment causes a change in the channel, which diminishes or destroys its value, and may cause a diminution of the supply of water for agricultural purposes.[63] Where there was evidence to show that the accused filled up the channel to cause diminution in the supply of water, it was held that it was sufficient for holding him guilty under this section.[64] Where the accused cut a bund, belonging to the complainant, which held water and which he required for the irrigation of his field, and let out some of the water and the supply of water was thereby diminished, they were held guilty under this section.[65] Where the accused not only dammed up a supply channel of water, but also diverted the water, the intention to cause wrongful loss was held to have been made out.[66] Where, however, the accused closed a water-course, without obtaining any permission to do so, thereby preventing water from finding its way to certain fields, below the place where he closed it, but there was nothing on the record to show that the person, to whom lower fields belonged, had any legal right to the water, intercepted by the accused, it was held that the offence of mischief was not made out.[67] However, where the accused formed an unlawful assembly with the object of enforcing, by criminal force or show of criminal force, their supposed right to take water against the order, as to turns issued by the *tahsildar*, it was held that they were rightly convicted of the offence of mischief under s 430 .[68] The taking of water which can only mean taking without any sort of right, is within this section and such taking evidences the intention to cause wrongful loss.[69] It is enough if the accused knew that by blocking a channel, through which the complainant had right to take water, wrongful loss would be caused to the complainant.[70]

The words 'diminution of the supply of water for agricultural purposes', in this section, cannot be limited to those cases only where the water had been allowed either to go waste or has been delivered for non-agricultural purposes. The section read as a whole, also refers to cases where the water is intended for use by particular persons for particular purposes, and is diverted by an accused person for his own purposes though of a like nature.[71]3703

5. Offence--When not Committed

Where there is a genuine dispute between the two parties in regard to a channel, the act of closing the channel is not an offence under this section.[72] Where the accused prevented the complainant from opening a sluice, which had been closed about a fortnight before the date of occurrence, it was held that this would not amount to an offence under this section.[73] Where the accused closed a water-course, by which water had been supplied to the complainant's land, but no damage was alleged to have been caused by the stoppage of water to any crop in the land, was held that no mischief had been committed by diminution of the supply of water.[74] Where the accused persons were alleged to have trespassed land in which a well was excavated by the ancestors of the complainant and were alleged to have demolished the well and constructed the wall of the tank of latrine on it, but the evidence of the witnesses produced by the complainant proved that the portion of the land in question was already sold to the accused persons who after purchase got the right over the said land. Regarding the mischief by restraining complainant in taking water for drinking purpose, it could not be proved as the well was damaged since the last ten years and was not in use of the villagers. Under the circumstances, the accused persons cannot be said to have committed the offence under s 430 .[75]

6. Matter which could only be decided by Civil Court

Where the complainant, in a complaint, filed against the accused for cutting supply of water, claimed that his ancestors had put up the bund which had been cut by the accused, it was held that the question, as to whether the bund was put up, or was not put up, by the ancestors of the complainant and whether the complainant was the only person entitled to the water and nobody else, was a matter, which could be decided only by the Civil Court, and it was not covered by this section.[76]

7. Procedure

The offence under this section is cognizable, bailable, compoundable, by the person to whom the loss or damage is caused, with the permission of the Court, before which the prosecution for such offence is pending and triable by a magistrate of the first class.

8. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate,etc*) hereby charge you (*name of accused person*) as follows
>
> That, on or about the...day of..., at..., you committed mischief by doing an act, to wit.....(*describe it*), which caused (*or which you knew to be likely to cause*) a diminution of the supply of water of AB for agricultural purposes (*or for food or drink, etc*), and3704 that you thereby committed an offence, punishable under s 430 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this Court on the said charge.

9. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed mischief under s 425, IPC ; and
(b) the said mischief caused, or the accused knew that it was likely to cause, a diminution of the supply of water:

(i) for agricultural purposes, or
(ii) for food or drink for human beings or for animals, which are property, or
(iii) for cleanliness, or
(iv) for carrying on any manufacture.

The mere fact that the accused, by cutting through a bund and permitting a portion of the water to escape,

caused thereby a diminution in the supply of water for agricultural purposes to other persons, is not sufficient unless it is proved that wrongful loss or damage resulted to some person from diminution in the supply of water.[77]It is essential to show that the act had been done with intent to cause wrongful loss or damage to the public, or to any person or persons, or with knowledge on the part of the person, who does the act, that he is likely to cause such wrongful loss or damage.[78] No offence under this section can be said to have been committed unless the complainant shows that he had some right to carry water to his fields through the channel, and there was an intention on the part of the accused to cause wrongful loss.[79] A person cannot commit mischief upon himself.[80] Where the accused had cut a dam, which had been put up by the complainant with the sanction of the canal authorities, but it was not found that there was the required intent or knowledge or that there was any diminution of the supply of water for agricultural purposes, it was held that the conviction under this section could not be sustained.[81] Similarly, where the accused cut a tank bund in order to build a new sluice there, the existing sluice being out of order, it was held that this would be an offence under this section only if the intention, specified in s 425, IPC, as well as the other requisites of this section are established.[82]

10. Probation

Where the accused was convicted because he was found committing theft of canal water by inserting a plastic pipe in the canal, with the other end of it towards the paddy fields of his father, the accused aged 25 yrs was a first offender and had3705 already undergone sentence of nearly 1 month, so he was ordered to be released on probation for a period of 1 year on his furnishing a personal bond of Rs 5000, with one surety of the like amount.[83]

11. Sentence

Under this section, a sentence of daily fine for offence, which may be committed in future, is illegal,[84] because it is an adjudication in respect of an offence which has not been committed when such order is made.[85] In *Baburao v Municipal Committee* ,[86] it was observed that since no person can be punished for a thing which he has not done, but which he may possibly do in future, a daily fine, until the accused complies with the order, passed against him, is illegal. The proper course in a case of continuing breach, therefore, is to issue a notice to the accused for the days during which the breach continued, afford him an opportunity to defend himself and in case the offence is proved, punish him according to law. However, the imposition of recurring fine is clearly illegal.[87]

Interference with an acquittal in a case under s 430 would be justified only for substantial and compelling reasons evident from the record.[88]

56 *Emperor v Fateh Din* 11 Cr LJ 65 ; *Mohammad Raja v Emperor* AIR 1937 Lah 196 ((1)), 38 Cr LJ 430 .

57 *Krishna Iyer v Ayyappa Naick* AIR 1925 Mad 577, 26 Cr LJ 1100 .

58 Refer synopsis under s 32 .

59 Re *Nallappa Udayan* 1 Weir 505 (2). See s 32, vol 1 and its commentary.

60 *Ismail Biswas v Emperor* AIR 1930 Cal 289, 31 Cr LJ 751 .

61 *Bansi v Emperor* (1912) ILR 34 All 210, 13 Cr LJ 141 ; *Hem Narayan v Chamroo* 1936 MPLJ (Notes) 216 .

62 *Daman Singh v Ramratan Satnami* (1968) 16 Jab LJ 48 (SN) .

63 Re *Nalla Narayanasami* 1 Weir 504; Re *Aiyannagowd* 1 Weir 507 (1).

64 *Bhagabat Prasad Mohanty v Chemmi Jena* (1969) 35 Cut LT 1176 ; *Deenabandhu Rajaguru v Vshwarasrai Lachanna Dora* AIR 1924 Mad 176, 24 Cr LJ 830 .

65 *Raghunath Thakur v Emperor* AIR 1932 Pat 224, 33 Cr LJ 313 ; *Emperor v Sheikh Ariff* 7 Cr LJ 367 .

66 *Athimoolan Pillai v Palaniandi Ambalam* AIR 1921 Mad 536, 22 Cr LJ 270 .

67 *Tun Aung v Emperor* 7 Cr LJ 448 .

68 *P Chengama Naidu v Emperor* 12 Cr LJ 551 (1); *Basdeo Singh v Emperor* AIR 1924 Pat 704, 26 LJ 258 .

69 *Chidambaram Pillai v Muhamad Khan* AIR 1918 Mad 72, 19 Cr LJ 356 ; *Basdeo Singh v Emperor* AIR 1924 Pat 704, 26 Cr LJ 258 ; *Ram Krishna Chetti v Palianiyandi* (1876-1878) ILR 1 Mad 262 (FB).

70 *Kanniah Chettiar v Kupuswami Chettiar* (1961) 2 Cr LJ 501, 1961 Mad LJ (Cr) 273 ; *Vadavalli Narasimha Rao v V Ayyanna Rao* AIR 1939 Mad 794, 41 Cr LJ 88 .

71 *Emperor v Lukman* 1927 Sind 39, 27 Cr LJ 1233 .

72 *Athinaryanasamy Pillai v Subbier* 1 Weir 505 (1).

73 Re *Kasireddi Appanna*AIR 1940 Mad 144, 41 Cr LJ 558 .

74 Ratanlal Unrep Cr C 217.

75 *Rajendra Pandey v State of Jharkhand* 2004 Cr LJ 2730 (Jhar) (DB) .

76 *Gulab Singh v Emperor* AIR 1927 All 112, 27 Cr LJ 1354 ; *Deputy Legal Remembrancer v Mutukdhari Singh* 17 Cr LJ 9 .

77 *Mohammad v Emperor* 11 Cr LJ 168 .

78 *Crown v Nga Myat Aung* 1 Cr LJ 663 .

79 Re *Budda Reddi*AIR 1923 Mad 111, 23 Cr LJ 655 ; *Ashutosh Ghose v Emperor* AIR 1930 Cal 318, 31 Cr LJ 940 .

80 *Emperor v Chimandas Dhanomal* AIR 1943 Sind 130, 44 Cr LJ 607 .

81 *Nafar Chandra Bhattacharjee v Helaluddin* 1 Cr LJ 245 ; Re *Vattu Karan* 1 Weir 507; Re *Muruga Pillai* 1 Weir 508.

82 *TVR Indra Talwar v R Narasimha Rau* AIR 1916 Mad 1021, 16 CJ LJ 542(2) ; *Banwari Karmakar v Gosto Behari Karmarkar* AIR 1920 Cal 835, 22 Cr LJ 415 ; *Nanda Kamaria Venkata Reddi v Kumari Rae* 14 Cr LJ 209 .

83 *Hardev Singh v State of Punjab* (1996) 2 Chand Cri Cases 471 (P&H), (1996) 1 Cur LJ (OCR) 651.

84 *Anant Ram v Panchayati Adalat* AIR 1970 J&K 31, 1970 Cr LJ 303 .

85 *Ram Krishna Biswas v Mahendra Nath* (1900) ILR 27 Cal 671 ; *Anant Ram v Panchayati Adalat* AIR 1970 J&K 31, 1970 Cr LJ 303 ; *Pancham Sao v Emperor* AIR 1925 Pat 322, 25 Cr LJ 1357 ; *Nilmani Ghatak v Emperor* (1904) ILR 31 Cal 671, 11 Cr LJ 540 ; *Aisha v Emperor* AIR 1926 Lah 248, 27 Cr LJ 465 ; *Jai Singh Pyara Singh v Gram Panchayat* AIR 1965 Punj 232 .

86 *Baburao v Municipal Committee* AIR 1924 Nag 66, 24 Cr LJ 318 .

87 *Jai Singh Pyara Singh v Gram Panchayat* AIR 1965 Punj 232 ; *Anant Ram v Panchayat Adalat* AIR 1970 J&K 31, 1970 Cr LJ 303 .

88 *Kanniah Chetiar v Kupuswami Chettiar* (1961) 2 Cr LJ 501, (1961) 1 MLJ 372 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 431.

Mischief by injury to public road, bridge, river or channel.--

Whoever commits mischief by doing any act which renders or which he knows to be likely to render any public road, bridge, navigable river or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Comments

1. Scope

This and the following sections provide for aggravated form of mischief by reason of the mischief involved being of a serious character. This section provides for mischief by injury to public road, bridge, river or channel. Causing obstruction on a public road by holding public meeting on, or at the side of it, is an offence punishable under ss 431 and 339, IPC .[89]3706

2. 'Public Road'

The words 'public road', used in this section, are public road, and not public way. A track to a jungle would not be a public road.[90] The word 'public' indicates the user, to which it is put; it does not indicate ownership.[91]

3. 'Bridge'

A bridge would cover any viaduct or aqueduct as is expressly mentioned in s 33 of the Malicious Damage Act 1861 (UK Act).

4. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

5. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate*, *etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the...day of..., at...you committed mischief by doing an act, to wit.... (*describe the act*), which rendered (or which you knew to be likely to render) a public road (*or bride, or a navigable river, or a navigable channel*), to wit... (*describe it*), impassable (*or less safe for travelling or conveying property*), and that you thereby committed an offence, punishable under s 431 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this Court on the said charge.

6. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed mischief (s 425, IPC); and
(b) it was committed by doing an act which rendered, or which the accused knew to be likely to render, the public road, bridge, navigable river, or navigable channel, in question, impassable or less safe for travelling or conveying property.

To establish an offence under this section, it is necessary to show that a mischief within the meaning of s 425, IPC was committed. If the act does not amount to mischief under s 425, it would not be an offence under this section.[92] Where the accused dug a trench on waste land, bordering upon the public road, in order to protect his land from drainage water and thereby incidentally caused damage to the public road, it was held that this was not sufficient to constitute the offence of mischief.[93] Where, however, the accused cut a road to allow water, accumulated in their field, to flow away, it was held that they committed offence under s 431 as by3707 cutting they had made the road impassable or less safe for travelling or conveying property.[94]

89 *Chief Secretary to Government v Khalid Mundappilly* 2010 (3) KLT 757, ILR 2010 (3) Ker 699 (Ker) .

90 Re *Nga Shwe Laukke*1899 PJLB 629.

91 *Azamkhan v State of Andhra Pradesh* (1972) 2 Andh WR 288, 1972 MLJ (Cr) 674 .

92 Re *Malayan Kalan* 1 Weir 510.

93 Re *Kairthadi Anantha Bhattar* 1 Weir 511.

94 *Paryag v State* 1967 AWR 572 .

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Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 432.

Mischief by causing inundation or obstruction to public drainage attended with damage.--

Whoever commits mischief by doing any act which causes or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Comments

1. Scope

This section is confined only to those acts mischief which cause an inundation or an obstruction to any public drainage. Public drainage would cover both natural and artificial drainage.

2. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

3. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate*, *etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the...day of...,at..., you committed mischief by doing an act, to wit...(*describe it*), which caused (*or which you knew to be likely to cause*) an inundation (*or an obstruction*) to a public drainage, to wit...(*describe it*), attended with injury (*or damage*), and that you thereby committed an offence, punishable under s 432 of the Indian Penal Code, and within my cognizance.
>
> And I hereby direct that you be tried by this Court on the said charge.

4. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed mischief (s 425, IPC);
(b) the said mischief caused, or which the accused knew he was likely to cause, was an inundation or an obstruction to a public drainage in question; and
(c) the said inundation or obstruction was attended with injury or damage.

It must be proved that the inundation or obstruction was attended with injury. Where the accused erected a dam across a river but it did not injuriously affect the3708 property dammed, namely, the river, it was held that there was no offence under this section. The mere fact that it threatened damage to any property, did not constitute an offence.[1] It must also be proved that there was the requisite intention or knowledge. Where the accused, while extending a garden and laying the foundation of a house, encroached upon the inner slope of a river embankment, it was held that the house and the garden of the accused himself was the first to be swept away in the event of the dreaded breach and, therefore, guilty knowledge or intent could not be reasonably inferred.[2]

5. Acquittal

Where the accused were convicted for obstructing the natural flow of water causing inconvenience, due to the construction of the *bandh* in front of the house of the complainant, it was not proved that obstruction to public drainage would cause injury or damage or that, it was in the knowledge of the accused, that it would cause such injury, the conviction of the accused under s 432, IPC, was not found proper, so the accused was acquitted.[3]

1 (1868) 4 MHCR App XV.

2 Re *Pran Nath Shaha* 25 WR (Cr) 69.

3 *Charan Singh and Ors v State of Punjab and Anor* 1982 Chand Cri Cases 86 (P&H), (1982) 84 Punj LR 55 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 433.

Mischief by destroying, moving or rendering less useful a light-house or sea-mark.--

Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, sea-mark, buoy or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Comments

1. Scope

This section makes provision for mischief by destroying, moving or rendering less useful a light-house or a sea-mark, *etc*. It is intended to provide for safety of navigation by sea.

2. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

3. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*), as follows:3709

That, on or about the.... day of.....at, you committed mischief by destroying (or moving) a light-house (or the light used as a sea-mark/or the sea-mark/or the buoy, or thing, to wit....(describe it), placed as guide for navigators) (or you did an act, to wit.... (describe it), which rendered such light-house, *etc*, less useful as a guide for navigators), and that you thereby committed an offence, punishable under s 433 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

4. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed mischief (s 425, IPC); and
(b) the said mischief was committed:

(i) by destroying or moving the light-house, or the light, used as a sea-mark, or a sea-mark, or a buoy, or any other thing, placed as a guide for navigators, or
(ii) by an act which rendered such light-house, *etc.*, less useful as a guide for navigators.

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Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 434.

Mischief by destroying or moving, etc., a land-mark fixed by public authority.--

Whoever commits mischief by destroying or moving any land-mark fixed by the authority of a public servant, or by any act which renders such land-mark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Comments

1. Scope

This section, being complementary to the preceding s 433, IPC, which relates to destruction or moving of a sea mark, deals with the destruction, or moving, of a land mark. The consequences of an offence under this section being less serious in comparison to an offence under s 433, the punishment is also light.

2. 'Fixed by the Authority of a Public Servant'

The offence under this section can be committed only if the land mark, in respect of which the offence is said to have been committed, was fixed by the authority of a public servant. Thus, the destruction, or removal, or boundary pillars, got fixed by a magistrate to demarcate land in a case under this section.[4] Similarly, the removal, by an accused, of a barricade, placed by the municipality on a piece of land in front of his house, which impaired the ingress to, and egress from, his house, was also not held to be an offence under this section.[5] If, however, the land mark has been fixed3710 by a public authority, any procedural irregularity in fixing it would not be a ground for the accused to take the law in his own hands.[6]

3. Procedure

The offence under this section is non- cognizable, bailable, non-compoundable, and triable by a magistrate, and may also be tried summarily.

4. Charge

The offence under this section being triable, framing of a formal charge is not necessary. Section 251 of Criminal Procedure Code 1973 may be referred to.

5. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed mischief (s 425, IPC);
(b) it was committed by destroying or moving a land-mark or by doing an act which rendered it less useful as such; and
(c) the land-mark was fixed by the authority of a public servant.

4 *Emperor v Rameshar* 1 Cr LJ 1042, 1 ALJ 619 ; *Asaram v State* 1967 AWR 707 .

5 *Empress v Abdul Aziz* Ratanlal Unrep Cr C 745.

6 *Kannan Pillai v Mohammad Ismail* 1962 MLJ (Cr) 23, 1961 Ker LT 656 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 435.

Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural procedure) ten rupees.--

Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards [7][or (where the property is agricultural produce) ten rupees or upwards], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section contemplates an offence of mischief brought about by fire or explosive substance. The essential ingredient of the offence is intention on the part of the accused to cause, or knowledge on his part that he will, by his act, cause damage to any property, to an amount of rupees ten or more in case of agricultural procedure, or to an amount of rupees one hundred or more in any other case. The value, specified in the section, is in relation to the extent of damage suffered by the owner of the property;[8] it has no bearing on the value of the property itself. It makes no difference if the subject matter of mischief existed on land the ownership whereof is in dispute.3711 If a trespasser has left his walking stick or a watch on the field of another, the latter will not be justified in damaging or destroying those articles by fire. Therefore, an accused, setting fire to the complainant's hut on the disputed land, is liable to conviction under this section.[9]

If mischief by fire is caused to any property which attracts s 435, but with an intention to cause or with the knowledge that it is likely to cause destruction of any building, s 436 will be attracted, though only damage as contemplated in s 435 resulted. What is important is the intention or knowledge as mentioned in ss 435 and 436, IPC . Whether or not the intention or knowledge was to damage property mentioned in s 435 or building mentioned in s 436 is the relevant question. If mischief by fire is caused with intention or knowledge to damage property, s 435 is attracted. On the other hand, if the intention or knowledge is to cause destruction of any building, then s 436 would be attracted.[10]

This section covers cases which do not fall within the scope of ss 436, 437 and 438, IPC .

2. Part I of Section 285 Distinguished from Section 435,IPC

Commentary under the same heading in s 285, vol 2, may be referred to.

3. 'Mischief by fire or Explosive Substance'

The Indian Penal Code makes provision for mischief by fire or explosive substance in respect of:

(a) agricultural procedure to the amount of Rs 10 or upwards (s 435, IPC);
(b) any property to the amount of Rs 100 or upwards (s 435, IPC);
(c) building (s 436, IPC); and
(d) a decked vessel or a vessel of a burden of atleast 20 tons (ss 437 and 438, IPC).

4. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

5. Charge

The following form of the charge may be adopted:

I (*name and office of magistrateetc*) hereby charge you (*name of accused person*) as follows:

That, on or about the...day of..., at..., you committed mischief by fire (*or an explosive substance*), intending thereby to (*or knowing it to be likely that you will thereby*) cause damage to a property, to wit... (*describe it*), to the amount of Rs 100 or more (*or Rs 10 or more if the property is agricultural produce*), and that you thereby committed an offence, punishable under s 435 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.3712

6. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed mischief (s 425, IPC);
(b) the said mischief was caused by fire or by an explosive substance;
(c) the damage caused thereby amounted to:

(i) Rs 10 or upwards if it was agricultural produce, or
(ii) Rs 100 or upwards if property is of any other kind.

7. Acquittal

Where the prosecution case was that the accused set fire to the rubber plantations of the complainant, it was alleged that he first put fire to dry leaves and carried the burning leaves in his hands to the plantation of the complainant, the distance between the two plantations was about 30 acres, there was unexplained delay of more than 5 years in lodging the FIR and the names of eyewitnesses were not mentioned in it, the accused was found entitled to the benefit of the doubt.[11]

Where there was a dispute between the management and the workers, and the workers set the official car on fire, causing serious burn injuries to the occupant of the car, resulting in the death of one such occupant, the descriptive particular of the culprit was not given in the statement of witnesses recorded on the date of occurrence, the prosecution failed to examine the witnesses escaping with negligible burns, the incident having occurred within seconds, so it could not be said that the witnesses were able to identify the culprits. The accused persons were found entitled to the benefit of the doubt and so were acquitted of the offences under s 302 and 435, IPC .[12]

7 Inserted by Act 8 of 1882, s 10 .

8 *Babulal v State* AIR 1952 All 146, 1952 Cr LJ 299 .

9 *Ram Chandra v Narayan* 1971 Mah LJ 647, p 651-652 .

10 *Shanid v State* 2012 (111) AIC 393, p 395, 2012 (1) KLJ 119, 2012 (1) KLT 23 (Ker) .

11 *Areekkaltu Moidu Haji v State of Kerala* 1996 Cr LJ 1036 (Ker) .

12 *State of Maharashtra v Subhaiya Kansk Maniah & ors* 1994 Cr LJ 238 (SC), AIR 1993 SCW 3625 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 436.

Mischief by fire or explosive substance with intent to destroy house, etc.--

Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with [13][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.3713

Comments

1. Scope

This section deals with mischief by fire or explosive substance with intent to destroy a house, *etc*. The offence consists of not intentionally committing mischief by fire and thereby causing the destruction of a building, *etc.*, but committing mischief by fire with the intention of causing the destruction of a building, *etc*. The intention is the most important element to constitute an offence under this section.[14] The mere neglect or carelessness on the part of the accused to prevent fire straying into the government forest will not come under this section.[15] Where, however, the accused, angry with his wife, went out and set fire to the eves of his house thereby causing risk to house owners in the neighbourhood but doing no actual mischief, it was held that the case fell under this section, and not under s 285 .[16] In *Babu v Rex* ,[17]it was observed that if the accused knew that he was likely, by his act, to destroy any neighbouring house, *etc.*, an offence under this section was complete.

The essential ingredients of s 436 are:

(i) commission of mischief,
(ii) by fire or any explosive substances,
(iii) intending to cause or knowing that it is likely to cause destruction of the building,
(iv) which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property.[18]

Actual destruction of the building is not always necessary to attract s 436 of the Indian Penal Code . It is also not necessary that the building should be destroyed by fire or severely damaged. It is sufficient if there was every likelihood of the building being destroyed by fire by the criminal act of mischief by fire. The intention to destroy any building or the knowledge of the likelihood of destruction of the building, are all matters for evidence. Intention or knowledge is a state of mind which could be decided only on appreciation of evidence or on consideration of the materials on record or both.[19]

2. Abetment

Under the Indian law, for an offence of abetment, it is not necessary that the offence should have been committed. A man may be guilty as an abettor, irrespective of whether the offence is committed.[20] Where the accused instigated another to commit the offence under s 436, IPC, the offence was committed not by the person instigated, but by someone else, the accused instigating the commission of offence was guilty of the offence of abetment, not under s 436 read with s 109, IPC, but under s 436 read with s 115, IPC, since the commission of the offence was not the consequence of his abetment.[21] Where, the accused was found to have given orders to3714 one *B* to set fire to the hut, the hut was set fire to and burnt, the charge against *B* under s 436, was not proved, so *B* was acquitted, but the accused was found guilty under s 436 read with s 109, IPC .[22]

3. 'Building'

The word 'build' in its ordinary dictionary meaning means, to erect as a house or bridge, to form or construct. Similarly, 'building' would necessarily mean a structure.[23]

The term 'building' occurs also in ss 380 and 442, IPC . The cases, relating to offence under ss 380 and 442, have been dealt with under those sections. They may also be referred to for the interpretation of the word 'building' in this section. The term has not been defined in the Indian law as the term is very indefinite.

The thatch-wall of an enclosure, in which there are several thatched huts, is a building'.[24]

Even a *Kachcha*, *Jhumpa* with a thatched roof closed by doors and shutters in which the grain and other articles were stored, comes within the meaning of 'building'.[25]

A structure, made of straw, and not of bricks and mortar, may be considered a building if it has got the necessary furnishings such as doors, bars, *etc*. However, a double-thatched shed, resting on bamboos or wooden pillars, having no door, *etc.*, cannot be treated as a building.[26] But the definition of building does not include *chappar* or *chhan* (thatched roof).[27]

A cabin which is removable which might be made of wood will not be covered under the meaning 'building', which necessarily means the structure or an erection which is of permanent nature and is erected on the earth and some portion of it is embedded in the earth.[28] Similarly, a thatched sheltering place meant for temporary rest to keep watch over the harvested crop, stacked in the adjacent *khaligram* where there was no brick and mortar of even a finished wall, and, instead it was merely a thatched shed without any bars, doors, *etc.*, do not come within the definition of building.[29] For further commentary, the text under the same heading in s 380, *ante* and s 442, *post* may be referred to.3715

4. Damage to joint property of Complainant and Accused

The dispute between the accused and the complainant about the ownership of the *pardha* wall would not entitle the accused to demolish the wall, when it is found that the wall was the common property of both.[30] Where the house was admittedly a joint property of the parties and the demolition of the wall and setting fire of the house which was in exclusive occupation of the informant by the accused persons cannot be said that as a mistake of law or a mistake of fact the wall of the said house was demolished and the house was set on fire by the accused persons rather the accused persons had taken law in their own hand and, therefore, liable to be convicted under s 436 .[31]

5. 'Ordinarily Used'

In order to convict an accused under this section, it is absolutely necessary to prove that the building, which the accused destroyed, came within one of the classes, mentioned in the section, and the words 'ordinarily used' do not mean that other buildings are, from time to time, used for such purposes; they mean that the particular building was itself used.[32]

6. 'Place of Worship'

For purposes of this section, mosques, temples, churches, synagogues, gurdwaras and other places, where the persons of different religions carry on their worship, would be places of worship. It is, however, important to note that before s 436, IPC can be attracted; there must be some building in which the worship is carried on. A case of the destruction by fire or explosive substance of any place of worship, for which there is no regular building, would fall under s 426 of IPC, and not under this section. A *kyaung* or *nagoda* would be a place of worship.[33] For further commentary, the text under the same heading in s 295, vol 2, may be referred to.

7. Mistake of fact or Law as to title or Possession

A claim of right as to ownership or possession of property may stem from a mistake of law or a mistake of fact or of both. A mistake as to title or possession, whether it arises from mistake of law or of fact, negatives mens rea. A person who puts forward a claim of right founded on mistake or ignorance of civil law pertaining to the matter need not necessarily establish that the mistake or ignorance arose inspite of reasonable diligence. The only thing necessary is that the mistake must be one which leads the accused to claim that he has a right to act as he does. A mistake as to criminal law only will not give rise to a claim of right; an error as to civil law may do so. So far as the offence of mischief is concerned, a claim of right believed to exist, even though unreasonably is a valid defence.[34]3716

8. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions. Offence under s 436, IPC is non-compoundable; and it cannot be compounded on the basis of

compromise between the parties.[35]

9. Charge

The following form of the charge may be adopted:

> I (*name and office of session judge, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the...day of..., at..., you committed mischief by fire (*or by an explosive substance*), to wit... (*describe it*), intending to cause (*or knowing it to be likely that you would thereby cause*) the destruction of the building, to wit... (*describe it*), which was ordinarily used as a place of worship (or as a human dwelling or as a place for the custody of property), and that you thereby committed an offence, punishable under s 436 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this Court on the said charge.

In case of mischief by fire, with intent to cause the destruction of a dwelling house, the charge should lay the intent as an intent to cause destruction of a house used as a human dwelling, and not of a house simply.[36]

The allegations against the two shop owners were that they were negligent in switching off the main switch in their shops as a result of which fire broke out causing damage to an adjoining shop. The fact of the case showed that the shop was allotted to a second owner and was run by a first owner. The second owner was, therefore, not liable for the offence under s 436, IPC, and framing of charge against him was not found proper. However, there was a strong suspicion of commission of the offence by the first owner, so his discharge by the Trial Court was found improper.[37]

10. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed mischief as defined in s 425, *ante*;
(b) the said mischief was caused by fire or by explosive substance;
(c) the accused intended to cause, or he knew that he was likely to cause, destruction of a building which was ordinarily used as a:

(i) place of worship, or
(ii) human dwelling, or
(iii) place for the custody of property.3717

Where the evidence of the prosecution witnesses clearly showed that the accused persons have set fire to the house of the deceased, causing destruction to the property, the conviction of the accused persons under s 436, IPC, was found proper.[38]

Offence under s 436, IPC is a serious offence. Harsher being the punishment, stricter is the proof required to hold/convict the accused for offence under s 436, IPC .[39]

When the accused each and every time threatened to teach a lesson by setting fire to the complainant's house, it is clear that the accused had already made up his mind to destroy the house by fire.[40] Where the victim found that the appellant accused, standing in the front of her house, had set fire to the house and ran away, she had raised alarm which attracted other witnesses whose evidence was found consistent and reliable; the accused was convicted under s 436, IPC .[41]

Where the house of the deceased was set on fire, and one of the eyewitnesses was a widow of the deceased, and the other was her sister-in-law and their evidence was found to be truthful, some of the accused persons, named by them had been attributed with specific overt acts, so their conviction under ss 402 and 436 read with s 149, IPC, was found proper. However, some other accused persons, whose names were not given by the widow of the deceased, and who were only identified for the first time in court were found entitled to an acquittal.[42] Where the accused persons sprinkled and poured kerosene oil on the deceased's shop as well as on the person of the deceased, and set fire on the deceased and to the shop, the dying declaration of the deceased and the evidence of eyewitnesses were found reliable, the acquittal of the accused of the charges under ss 402 / 34 IPC, and ss 436 / 34, IPC, was found not proper and so was set aside, and the accused were convicted of the said offences.[43]

Where it was established that the accused persons were members of an unlawful assembly, and with a common object, they set houses on fire and killed 4 persons; the common object of the accused person, however, was proved to setting the houses on fire and not committing murder, the conviction of the accused person under ss 302 and 149, IPC was set aside, while that under ss 436 and 149, IPC, was confirmed.[44]

11. Group clashes/Arson -- Evidence

When an unlawful assembly or a large number of persons take part in arson or in a clash between two groups, in order to convict a person, at least two prosecution witnesses have to support and identify the role and involvement of the persons concerned. The normal test is that the conviction could be sustained only if it is supported by two or more witnesses who give a consistent account of the incident in question.[45]3718

12. Acquittal

No conviction under this section can be sustained in the absence of proof that the accused committed mischief by fire.[46] It is not safe to allow a conviction to stand if the Trial Court has laid considerable stress upon the previous chain of events which is not admissible in evidence.[47] When nothing incriminating has been found in the possession of the accused, nor any witness has seen them putting fire to the hut in question, they cannot be convicted under s 436 read with s 34, IPC .[48]

Where the sole eyewitness lodged an FIR after an unexplained long delay and deliberated with other witnesses before lodging the FIR, his claim of being injured while trying to extinguish the fire was not supported by medical evidence, the evidence of the sole eyewitness was not found reliable and the acquittal of the accused was found proper.[49]

Where the accused was alleged to have set fire to the hut of the complainant and the prosecution examined only a child witness who did not understand the sanctity of oath, the independent witness though available was not examined and there was old enmity between the complainant and the accused and the complainant was also involved in criminal cases, the acquittal of the accused was found proper.[50]

When a wooden cabin burnt by the accused, does not come within the definition of 'building', the accused cannot be convicted for the offence under s 436, IPC .[51] Where, merely a temporary structure for resting and supervision of the harvested crop by the side of the *khalihan* was raised, which was set ablaze in the

absence of other evidence, bringing the said *kucha* and temporary structure within the encompass and definition of 'building' as defined under s 436, IPC, meant for human dwelling, the acquittal of the accused was found proper.[52]

The accused was alleged to have set fire to the hut. The presence of eyewitnesses at the spot at the time of occurrence was found doubtful. The evidence of the main eyewitness of seeing the accused at the spot was found improbable and his statement that the accused continued to stand at the scene of the occurrence after setting fire to the hut was found completely unreliable. There was also a possibility of false implication of the accused, so the acquittal of the accused was held proper.[53] Where the version given by the prosecution witnesses conflicted with each other regarding their perception of flight of culprits who had set the fire, the conviction of the accused in the circumstances could not be sustained.[54] Where other pieces of circumstantial evidence were found not proved, mere motive and conduct of the respondent were held not sufficient to record the conviction of the respondent for offence under s 436, IPC .[55]3719

The accused stated that it was none else but she herself who had set fire to the dwelling house of the informant. Held, it amounted to admission of fact on the part of the accused. Accused was convicted under s 436, IPC .[56]

13. Acquittal under Section 342 is No Bar to Trial under Section 436

Commentary under the same heading in s 342, vol 3, may be referred to.

14. Conviction

Where it was found that the accused, who was the member of an unlawful assembly, gave the order to set fire to a hut and the hut was actually set fire to by one member or another of the unlawful assembly, though the unlawful assembly, as a whole, did not have any common object of setting fire to the hut, it was held that the conviction of the accused for the offence under s 436 read with s 109, IPC, was not bad in law.[57]

The accused setting fire to the house of the victim is liable to be convicted under s 436, IPC .[58]

When the accused, the process servers of court, had set ablaze files in the subordinate judge court, and the *chowkidar* on duty on court premises had heard the accused abusing the judicial officers and uttering that they had set the files on fire, and he had rushed to the concerned court and saw the files burning, his version was fully corroborated by the other witnesses, some judges and court officials, and all the three accused were present in the court premises even after the duty hours without any justification, although the court work had been suspended on that day, they were under the influence of liquor which indicated their attitude towards their work place, their careless and indisciplined behavior. The fire had been lit by them with the intention to destroy the judicial record; therefore, the conviction of the accused was proper.[59]

15. Probation

Where the case has amicably been settled between the parties, the accused should be granted the benefit of probation.[60]

16. Sentence (Deterrent)

Setting fire to a residential building but, belonging to another, being a serious offence, capable of endangering lives of persons and destroying property, the court must take a serious view of the matter in the absence of extenuating circumstances.[61] In *Ghafoor Khan v Emperor* ,[62] the court refused to reduce a sentence of five years rigorous imprisonment by observing that arson in an Indian village is a crime which3720 cannot be too lightly punished as it causes incalculable damage to innocent persons, who can

ill afford to lose the little property that they possess.

The accused persons who set the house of victim on fire were sentenced by the Apex Court to undergo rigorous imprisonment for seven years for the commission of the offence under ss 436 / 149, IPC .[63]

17. Sentence (Lenient)

The fact, that the accused is very old and suffering from paralysis, may be taken into consideration for giving a low sentence.[64] When the accused was an old man of 50 years of age facing trial for more than 4½ years, the sentence of imprisonment was reduced to two years instead of rigorous imprisonment for three years.[65]

Where the accused was a young boy aged about 19 years at the time of occurrence of the sentence of one year, rigorous imprisonment was awarded to him to meet the ends of justice.[66] Where the accused was a person belonging to the Scheduled Tribe and was a labour by profession and was not even in a position to pay the fine amount, the sentence of imprisonment already undergone by him was found quite sufficient to meet the ends of justice.[67]

Where the accused remained in custody as an under-trial prisoner for about three months, and he had been facing the agony of the prosecution for the last about sixteen years, there was no material on the file to show that after having been being released on bail, the accused had indulged in any such or similar activity. Considering all the circumstances of the case, the sentence of imprisonment imposed upon the accused was reduced to that already undergone by him, however, fine of Rs 2000 imposed upon the accused by the trial court was enhanced to Rs 60,000.[68] Offence under s 436, IPC is non-compoundable, but in view of the compromise arrived at between the parties, to maintain peace and harmony between them, sentence was reduced to the period already undergone.[69]

13 Substituted by Act 26 of 1955, s 117 and Schedule for 'transportation for life' (wef 1-1-1956).

14 *Empress v Akal Mohamed* (1865) 3 WR (Cr) 18 .

15 *Emperor v Nandeyappagowda Shiddangowda* 4 Cr LJ 446 .

16 *Empress v Hari* Ratanlal Unrep Cr Cas 126.

17 *Babu v Rex* AIR 1949 All 620, 50 Cr LJ 944 ; *Ram Pratap v Emperor* AIR 1944 All 167, 45 Cr LJ 728 .

18 *Pankaj Borah v State of Assam* 2013 (131) AIC 502, p 504, 505 (Gauh) .

19 *Shanid v State* 2012 (111) AIC 393, p 395, 2012 (1) KLJ 119, 2012 (1) KLT 23 (Ker) .

20 *Fagnna Kanta Nath v State of Assam* AIR 1959 SC 673, 1959 Supp (2) SCR 1 ; *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1 .

21 *Jamuna Singh v State of Bihar* AIR 1967 SC 553 .

22 *Gallu Sah v State of Bihar* AIR 1958 SC 813, 1958 Cr LJ 1352 .

23 *Rajoo v State* 1997 Cr LJ 837 (Raj) .

24 68 PLR 1903.

25 *Rajoo v State* 1997 Cr LJ 837 (Raj) .

26 *Babulal v State* AIR 1952 All 146, 1952 Cr LJ 299 ; *Jeshmero v State of Haryana* 1980 Cr LJ Punj 46 (NOC), (1979) 81 PLR 420 (if fire is set to such an structure, the accused cannot be convicted under this section though he can be convicted under the preceding s 435 if the damage caused falls within the amount specified therein); *Chunchun Chaudhary v Padmanand Chaudhary* 1975 BLJR 436, p 437 (a hut like structure, with a *jaffari* shutter, meant for storing *bhusa* is a building); *Rajoo v State of Rajasthan* 1977 Cr LJ 837, p 842 ; *State of Gujarat v Vedva Vaghari Moti Nagji* 1973 Cr LJ 148 .

27 *Raj Singh v State of Haryana* 2003 Cr LJ 1588 (P&H) ; *Jashmero v State of Haryana* (1979) 81 Pun LR 420, 1980 Cr LJ 46

(NOC) .

28 *Bherulal and Anor v State of Rajasthan* 1999 Cr LJ 4257 (Raj) .

29 *State of Rajasthan v Bhirajram and Ors* 1998 Cr LJ 3791 (Raj) .

30 *Baboo Lal v State* AIR 1953 All 409, 1953 Cr LJ 905 .

31 *Chaturbhuj Pandit v State of Bihar* 2005 Cr LJ 1812 (Jhar) .

32 *Khanjun v Emperor* AIR 1934 All 781, 25 Cr LJ 1190 .

33 1894 UBR 198.

34 *Chaturbhuj Pandit v State of Bihar* 2005 Cr LJ 1812 (Jhar) ; *Pappu v Damodaran* AIR 1968 Ker 126, 1968 Cr LJ 625 .

35 *Amar Nath Shukla v State of Uttranchal* (2009) 9 SCC 390, 2009 (11) Scale 48, 2009 (6) Supreme 34, 2010 (1) SCC (Cr) 7, 2009 (3) Crimes 347 (SC)).

36 *Empress v Durbarro Police* (1867) 8 WR (Cr) 30 .

37 *Ushman & Anor v State* 1997 Cr LJ 2457 (Mad) .

38 *State of Madhya Pradesh v Pattu alias Pratap Singh* 2001 Cr LJ 3217 (MP) (DB) ; *Dalel v State of Haryana* (1998) 2 Crimes 595 (P&H) .

39 *Abdul Majid v State of Punjab* 2014 (138) AIC 840 (P&H) .

40 *Vittal Babani Sangolkar v State* (1987) 2 Crimes 866 (Bom) .

41 *Dinesh Singh v State of Bihar* 2013 Cr LJ 1429 (Pat) .

42 *Govind and Ors v State of Madhya Pradesh* AIR 1994 SC 826, 1994 Cr LJ 938 (SC) .

43 *State of Assam v Muhim Barkataki and Anor* AIR 1987 SC 98, 1987 Cr LJ 152 .

44 *Mukteshwar Rai and Ors v State of Bihar* AIR 1992 SC 483, 1992 Cr LJ 518 (SC) ; **See also***Busi Koteswara Rao v State of AP* 2013 Cr LJ 418, AIR 2013 SC 515, (2012) 12 SCC 711 .

45 *Busi Koteswara Rao v State of AP* AIR 2013 SC 515, (2012) 12 SCC 711, 2013 Cr LJ 418, p 421, (2012) 12 SCC 711 ; *Masalti v State of Uttar Pradesh* AIR 1965 SC 202, 1965 (1) Cr LJ 226 ; **see however***State of UP v Dan Singh* (1997) 3 SCC 747, AIR 1997 SC 1654) (Safe to convict when persons responsible are identified by at least four witnesses.

46 *Prahlad v Mohanlal* 1982 Cr LR 17, p 18 (MP High Court Notes) .

47 *Todan Mir v Emperor* 17 Cr LJ 421 .

48 *Mangla v State of Madhya Pradesh* 1981 Cr LR 205, p 206 (MP High Court Notes) ; *Sukhvant Singh v Union Territory* (1973) 1 CLR 629 .

49 *Public Prosecutor v Chadaram Srinivasa Rao Sreenu* 1996 Cr LJ 4412 (AP) .

50 *State of Gujarat v Babubhai K Saint* 2002 Cr LJ 372 (Guj) (DB) .

51 *Bherulal and Anor v State of Rajasthan* 1999 Cr LJ 4257 (Raj) .

52 *State of Rajasthan v Bhirajran and Ors* 1998 Cr LJ 3791 (Raj) .

53 *State of Rajasthan v Vishan Singh* 1997 Cr LJ 1443 (Raj) (DB) .

54 *Sukhram v State of Madhya Pradesh* AIR 1989 SC 772, 1989 Cr LJ 838 (SC) .

55 *State of HP v Rajinder Singh* (2008) 17 SCC 737 .

56 *Saleha Khatun v State of Assam* 2010 Cr LJ 3329 (Gauh) .

57 *Gullu Sah v State of Bihar* AIR 1958 SC 813, 1958 Cr LJ 1352, **distinguished** in *Jamuna Singh v State of Bihar* AIR 1967 SC 553, 1967 Cr LJ 541 .

58 *State of Uttar Pradesh v Dan Singh and Ors* 1997 Cr LJ 1150 (SC) .

59 *Om Parkash v State of Haryana* 2004 Cr LJ 1932 (P&H) .

60 *Harvir v State of Rajasthan* 1977 Raj Cr Cas 112, 113 .

61 *State v Bhogilal Gordhandas* AIR 1956 Bom 180, 1956 Cr LJ 386 (DB) ; *Abdul Majid v State of Punjab* 2014 (138) AIC 840 (P&H) .

62 *Ghafoor Khan v Emperor* AIR 1931 Oudh 116, 32 Cr LJ 694 .

63 *Ghafoor Khan v Emperor* AIR 1931 Oudh 116, 32 Cr LJ 694 .

64 *State v Bhogilal Gordhandas* AIR 1956 Bom 180, 1956 Cr LJ 386 (3 months rigorous imprisonment).

65 *Bechania v State of Madhya Pradesh* 2005 Cr LJ 3413 (MP) .

66 *Ibid.*

67 *Sakharan v State of Madhya Pradesh* (1986) 3 Crimes 47 (MP) .

68 *Manoj v State of Haryana* 2006 Cr LJ 3005 (P&H) .

69 *Amar Nath Shukla v State of Uttaranchal* (2009) 9 SCC 390, 2009 (11) Scale 48, 2009 (6) Supreme 34, 2010 (1) SCC (Cr) 7, 2009 (3) Crimes 347 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 437.

Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden.--

Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine3721

COMMENTS

1. Scope

Under this section, mischief to a decked vessel or an undecked vessel of a burden of twenty tons or upwards, with intention to destroy or render it unsafe, has been treated as a serious kind of mischief and has been made severely punishable. The coasting crafts in some areas of India have got decked vessels, but in other places they are undecked. Those of substantial size are intended to be covered by this section. It is not intended to cover the cases of small crafts, like boats and canoes, *etc*.

Under this section, attempt to commit a mischief stands on the same footing as committing a mischief.

A ship is covered by the term 'vessel'.[70]

2. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

3. Charge

The following form of the charge may be adopted:

I (*name and office of session judge,etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the...day of..., at..., you committed mischief, to wit... (*specify it*), to a decked vessel (*or to a vessel of a burden of...tons*), to wit... (*specify it*), intending to destroy (*or render unsafe*) the said vessel (*or knowing it to be likely that you will thereby destroy it or render it unsafe*), and that you thereby committed an offence, punishable under s 437 of the Indian Penal Code, and within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the said charge.

4. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed mischief (s 425, IPC) against the vessel in question;
(b) the said vessel was either decked or of a burden of an least 20 tons; and
(c) by mischief the accused intended to, or he knew it to be likely that he would thereby, destroy it or render it unsafe.

70 Refer to Indian Penal Code 1860, s 48 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 438.

Punishment for the mischief described in section 437 committed by fire or explosive substance.--

Whoever commits, or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with [71][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.3722

COMMENTS

1. Scope

The causing of mischief to vessels by fire or explosive substance being more serious, this section provides punishment only for the aggravated form of the same offence which has been made punishable under the preceding s 437 .

2. Procedure

Commentary under the same heading in s 437, *ante* may be referred to.

3. Charge

The charge would be in the same form as under the preceding s 437, IPC, with the only exceptions that it has also to be mentioned that the mischief was committed by fire or by an explosive substance and that ' s 438, IPC ' has to be substituted for ' s 437 '.

4. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed, or attempted to commit, mischief (s 425, IPC);
(b) the said mischief was committed, or attempted, by fire or by an explosive substance;
(c) it was committed, or attempted to be committed, to a decked vessel or an undecked vessel of a burden of twenty tons or upwards; and
(d) by the mischief the accused intended to, or he knew it to be likely that he would thereby, destroy the said vessel or render it unsafe.

71 Substituted by Act 26 of 1955, s 117 and Schedule for 'transportation for life' (wef 1-1-1956).

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 439.

Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.--

Whoever intentionally runs any vessel aground or ashore, intending to commit theft of any property contained therein or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

1. Scope

This section provides punishment for running a vessel aground or ashore with a criminal intention either to commit theft or misappropriate any property, contained therein, or with the criminal intention that such theft or misappropriation is committed. The offence may be committed by the person, who runs the vessel, or by3723 any other person of whom the person, running the vessel, or by any other person of whom the person, running vessel, would be an abettor. The intentional stranding of the vessel in question is the condition for the operation of the section.

2. Procedure

Commentary under the same heading in s 437, *ante* may be referred to.

3. Charge

The following form of the charge may be adopted:

> I (*name and office of session judge*, *etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the... day of ..., at..., you intentionally ran the vessel, or wit... (*describe it*), aground (*or ashore*) with the intention to commit theft of (or to dishonestly misappropriate) any property, contained therein, or with intent that such theft (*or dishonest misappropriation*) may be committed, and that you thereby committed an offence, punishable under s 439 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

4. Proof

To secure a conviction under this section, the prosecution must prove that:

(a) the accused ran aground or ashore the vessel in question; and
(b) he did so with intent to commit theft, or criminal misappropriation, of the property, contained in the said vessel, or with intent that such theft, or misappropriation, of property might be committed.

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF MISCHIEF

S. 440.

Mischief committed after preparation made for causing death or hurt.--

Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

COMMENTS

1. Scope

This section provides punishment for an offence of mischief aggravated by reason of the intent or motive for which the mischief is committed. The various offences, with the intention to commit which the mischief is committed, have been specified in the section. The offence under s 427, IPC is comparatively a minor offence against the offence under this section.[72]3724

2. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

3. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate*, *etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the... day of...,at..., you committed mischief after having made a preparation, to wit... (*describe it*), for causing to AB, death/or hurt/or wrongful restraint/or fear of death/or free of hurt/or fear of wrongful restraint, and that you thereby committed an offence, punishable under s 440 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you tried by this court on the said charge.

4. Proof

In order to establish a charge under this section, the prosecution must prove[73] that:

(a) the accused committed mischief as defined in s 425, IPC ; and
(b) the said mischief was committed after making a preparation for causing, to the person in question, death/or hurt/or wrongful restraint/or fear of death/or fear of wrongful restraint.

While proving mischief, care should be taken to show:

(i) intention, or knowledge of likelihood, to cause wrongful loss or damage to the person concerned;
(ii) causing of the destruction of some property or any such charge in any such charge in any property or in the situation thereof; and
(iii) such charge resulting in destruction or diminishing of the value or utility or any property or affecting it injuriously.

Thus for proving mischief, either destruction of property, or some change in the property or in its situation, which had the effect of destroying or diminishing the value or utility, or in any event affecting it injuriously, has necessarily to be proved.[74]

72 *Jagdish v State* 1961 RLW 191 .

73 *Abid Ali Khan v Prabhakara Rao H Mawle* 1961 Cr LJ 398, p 401 (AP) .

74 *Ibid*.

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 441.

Criminal trespass.--

Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

is said to commit "criminal trespass". 3725

STATE AMENDMENTS

Orissa--For s 441, substitute the following section, namely--

" **S. 441 . Criminal trespass.--** Whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

or, having lawfully entered into or upon such property, remains there with the intention of taking unauthorised possession or making unauthorised use of such property and fails to withdraw such property or its possession or use, when called upon to do so by that another person by notice in writing, duly served on him,

is said to commit 'criminal trespass'".--[*Vide* Orissa Act 22 of 1986, s 2 (w.e.f. 6-12-1986)].

Uttar Pradesh.--For s 441, substitute the following new section, namely--

" **S. 441 . Criminal trespass.--**Whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

or, having entered into or upon such property, whether before or after the coming into force of the Criminal Laws (Uttar Pradesh Amendment) Act, 1961, with the intention of taking unauthorised possession or making unauthorised use of such property fails to withdraw from such property or its possession or use, when called upon to do so by that another person by notice in writing, duly served upon him, by the date specified in the notice,

is said to commit 'criminal trespass'". [*Vide* Uttar Pradesh Act 31 of 1961, s 2 (w.e.f. 13-11-1961)].

COMMENTS

1. Scope

Ordinarily, trespass into, or upon, the property of another person is an infringement of a civil right. However, if it is committed with criminal intention of a certain kind, it is treated as a criminal offence. This section defines criminal trespass as:3726

(a) entering into, or upon, property in the possession of another, or
(b) having entered into, or upon, such property lawfully, remaining there unlawfully, with intent either:

(i) to commit an offence, or
(ii) to intimidate, insult or annoy any such person.[75]

There are three aggravated forms of this offence, namely:

(i) 'house-trespass' aggravated on account of the nature of the property concerned,
(ii) 'lurking house-trespass' aggravated by reason of the manner of entering, or leaving, the property, and
(iii) 'house-breaking' aggravated by reason of the means of entering, or remaining, and by reason of the particular intention of the trespasser.

There are five further aggravated forms of each of these three kinds of offences for which separate punishments are prescribed.[76]

To constitute an offence of criminal trespass, there must be an unauthorised 'entry', or if the entry has been lawfully and legitimately obtained, there must be an unlawful 'remaining', either directly or constructively, against the will of the person in possession. In either case, the unlawful entry, or unlawful remaining, must be with intent to:

(a) commit an offence, or
(b) intimidate,
(c) insult, or
(d) annoy, any person in possession of the property.[77]

Where there is unlawful entry without the necessary intent followed by unlawful remaining with one of the intentions prescribed or unlawful entry with the necessary intent followed by unlawful remaining also with the necessary intent, neither type is covered by the plain words of this section.[78] It is, however, immaterial whether the criminal intention accompanies or succeeds the entry. An unlawful remaining must follow a lawful entry.[79] A trespass is not criminal unless it is done with intention to commit an offence or to intimidate, insult, or annoy any person in the possession of property.[80] Intimidation, insult, or annoyance, *etc.*, as contemplated by this section, must be the aim, and not a natural consequence, of the unauthorised entry or unlawful remaining.[81] Mere knowledge on the part of the accused, that he was likely3727 to cause annoyance, would not, by itself, be sufficient unless the evidence of such knowledge, coupled with other facts, is such as to lead the court to infer therefrom the requisite intent. Thus, intention is the *sine qua non*.[82] Where it was found that the striking workmen unlawfully remained in the factory premises after working hours and intended to intimidate, insult, or annoy, and commit offences, with the ultimate object of bringing pressure on their employers to concede their demands, it was held that the workmen committed criminal trespass.[83] It was stated in *Jaipur Spinning and Weaving Mills Ltd v State of*

Rajasthan ,[84] that when the workmen entered the premises of the mills in three shifts every day after the mills had been closed by the declaration of lockout, they could be said to have no other intention except to cause annoyance or throw insult to the employers, thereby attracting s 441, IPC . If, however, the entry be *bona fide*, there is no offence.[85] However, the plea of bona fide claim can only arise where the trespass is not of an aggravated kind and is supported at least by a plausible show of title, or by such circumstances, as would justify an inference that the intention of the accused was not to commit an offence or to intimidate, insult, or annoy, the person in possession, but merely to vindicate what they conceived to be their legal right.[86]

2. Section 427 Distinguished from Sections 441 and 447

Commentary under the same heading in s 427, *ante* may be referred to.

3. 'Enters into or Upon'

It is not necessary that entry should be personally effected by the accused. It may be an entry by any agent under his order. Thus, when the accused got people to build on the land of the complainant in spite of protests, it was held that he committed criminal trespass even if he did not personally set foot on the land.[87] A contrary view3728 was taken in *Shwe Kun v Emperor* [1] wherein it was held that the mere sending of a servant to plough in land would not be an entry by the master, who cannot be convicted of the substantive offence, and this view was followed in *Maung New v Maung Po Hla* ,[2] in which it was said that in such a case, the principal or the master would be guilty of abetment. It is submitted that the view, taken by the Allahabad High Court seems to be correct. When a person, who trespasses upon the property of another, is a servant and acts in so doing under the orders of his master for the purpose of his employment, s 447, IPC, would not apply,[3] because none of the intents, mentioned in s 441, may be attributed to him.[4] It is the intention of the accused that is the deciding factor to constitute the offence of criminal trespass under s 441 .[5]

Remaining in possession of property after unlawful entry is not a fresh offence of criminal trespass. The offence is complete as soon as there is unlawful entry,[6]there being no fresh act of trespass on a subsequent date.[7] Therefore, an accused cannot be prosecuted again for remaining thereon if he has already been convicted under s 441 . The plea of *autre fois convict* will be open to the accused in such cases.[8]

4. 'Property'

The word 'property', in this section, does not mean only immovable corporal property; it includes also a ferry-boat. Where the accused made an attack on the lessee of a ferry, drove him away and then forcibly occupied and took possession of the ferry-boat, it was held that he was guilty of criminal trespass.[9]

Property, which cannot be the subject-matter of theft and mischief, cannot be the subject-matter of criminal trespass. Thus, taking fish from a public river is no offence under s 379, or s 447, IPC, even if the complainant may have fishery rights, the river being not in his possession.[10] The section has no application where incorporeal rights are concerned.[11]

5. 'In Possession of Another'

'Possession', in s 441, IPC, means actual physical possession of some person other than the alleged trespasser.[12] A person has to be in possession of the property in3729 question in the sense that he is entitled to exclude another if that other person enters it[13] because the act, intended to be done, which makes the trespass criminal, must be done to the person in possession and on the property. The fact, that the house in question was allotted to the complainant under an award, is, therefore, of no material consequence,[14] the reason being that the offence of criminal trespass can only be committed against a person who is in actual possession of the land in question,[15] and has not merely a power of control such as a trust scheme vests in a trustee,[16] because it is an offence against possession over property, and not

against the ownership thereof.[17] Mere occupation even if illegal cannot be criminal trespass.[18] When the accused was found in possession of disputed land before to its allotment to the complainant, the offence of criminal trespass is not made out.[19] If the intention of the3730 accused is to intimidate, insult or annoy a person who is not in possession of the property, then the essential ingredient of criminal trespass would be lacking.[20] However, a person can be in possession through his wife, servant, agent, licensee or other person, *i.e.*, a tenant.[21] If a person has only a right to some property, he is not in actual possession within the meaning of s 441 .[22] In *Mahadeo v Emperor* ,[23] it was held that the trespass can be committed if the intent is to annoy a person who is in possession of the property through his tenants. Where a person enters upon property in the possession of a tenant with intent to commit an offence or to intimidate, insult or annoy that tenant, he is guilty of the offence of criminal trespass, and a complaint by the landlord is sufficient to set the law in motion just as much as a complaint by the tenant.[24] Similarly, the disturbance of the tenant's right to cultivate by the landlord is an offence and the entry into the property with an intention to intimidate, insult or annoy the person in possession would amount to criminal trespass.[25] However, once the tenant has left the property and it is lying vacant, the real owner has a right to enter upon the land and take possession. He commits no offence in doing so.[26] Where an owner enters into his own land, permissively used or occupied by someone else but not in the possession of another, he commits no offence.[27] Likewise, a member of joint family does not commit an offence of criminal trespass by entering the house which forms the joint property; he may be guilty of this offence when he enters the room, ordinarily occupied by another member of the family.[28] If a person is himself in possession of the property which he kept locked, entry therein would constitute criminal trespass if it is to intimidate, insult or annoy the person in possession.[29] However, the mere taking of unlawful possession will not amount to either criminal trespass or house-trespass unless it is with intent to commit an offence or to intimidate, insult or annoy the person in possession of the property in question.[30] Where the field in which the assault took place was in the exclusive possession of the accused persons, the accused cannot be termed as trespassers.[31]

6. Possession

The term 'possession', may have different meaning in different contexts. It has not been possible to work out any precise definition of 'possession', which can be3731 uniformly applicable to all situations in the context of all statutes.[32] In this regard, it would be useful to refer to the observations made by the Supreme Court in *Superintendent and Remembrancer ofLegal Affairs v Anil Kumar Bhunja* :[33]

> 'Possession' is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of 'possession' uniformly applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorizing it is that of 'possession'. Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, twelfth edn, 1966) caused by the fact that possession is not purely a legal concept. 'Possession', implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control.'

According to Pollock and Wright, 'when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regard other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

While recognising that 'possession' is not a purely legal concept but also as matter of fact, Salmond (twelfth edn, p 52) describes 'possession, in fact', as a relationship between a person and a thing. According to the learned author, the test for determining 'whether a person is in possession of anything is whether he is in general control of it.

7. Possession through Court

Possession, obtained in due course of law through court, even for few minutes constitutes possession within the meaning of s 441 .[34]Possession is not lost because trespassers come and plough the land in an almost impossible position if, after getting possession of the land through civil court, a single act of trespass is deemed sufficient to take away his possession and to deprive him of recourse to the criminal courts.[35] Where formal possession is delivered by the civil court to a decree-holder in execution of a decree, the possession of the judgment-debtor is at an end.[36] Possession delivered to the complainant in execution of the decree is sufficient to show that it was the complainant who was in peaceful possession of the portion of the house which had been locked by him.[37]

8. Joint Possession

A co-sharer, who builds a house on the common land in spite of the flat refusal of permission by other co-sharers, is not guilty of an offence under s 447 .[38] Ex-communication from caste per se does not deprive a Hindu wife of her right of joint3732 enjoyment of her husband's house so as to make her trespasser if she enters his house to claim maintenance.[39] If the managing partner dies, the firm or the remaining partners must then collectively be considered to be in possession for purposes of this section.[40] However, a joint owner of land, who enters upon the land with the intention of doing a wrongful act to his fellow-owners, does commit trespass.[41] In *Emperor v Gopalrao Venkatesh* ,[42] the accused, in company with eight other persons disguised as his tenants and labourers, entered the land, of which one of the accused was joint owner, and overawed the complainant and bullied him and his workman and tried to expel them. It was held that a joint-owner of property is entitled to have joint possession restored to him in a civil court, but he is not justified to take the law into his own hands to recover the possession; if he does so, he becomes liable for criminal trespass.

9. Presence of the Complainant not necessary at the time of entry of the Accused

The law does not require that the intention of the accused must be to annoy a person who is actually present at the time of criminal trespass.[43] In *Rash Bihari Chatterjee v Fagu Shaw* ,[44] the complainant, after protected litigation, took delivery of possession, and obtained actual physical possession, of the land in dispute from the accused on 3 February 1963. For two weeks, *i.e.*, from 3 to 17 February 1963, the complainant was in possession of the land. The accused were on the land on the night of 16 February 1963, and on 17 February 1963; they were found making preparations for construction of bamboo structures on the same land and some bamboo pegs had already been posted. In these circumstances, it was held that even if the land in dispute was lying vacant, its actual possession was with the complainant and there was no doubt that the intention of the accused was to annoy the complainant, who was in possession of the land, and, therefore, the accused committed and offence of criminal trespass. In *Veerathaiah v Ramaswami Iyengar* ,[45] it was held that neither s 441, nor s 442, IPC, requires that the person in possession of the building must be present at the time of entry. Where the complainant was in peaceful possession of the house in dispute and, when, after locking it up, he was temporarily absent, the accused broke the wall as well as the lock and effected forcible entry into it, it was held that the possession of the complainant over the house was not interrupted even when he was temporarily absent at the time of forcible entry.[46] It is not correct to say that no annoyance is caused if the owner is not present at the time of trespass.[47] The intention 'to annoy' may be there in spite of the fact that the person, against whom the intention is held, may not be actually present at the time of entry.[48]3733

10. Property sealed by Municipal Corporation--Breaking seal by Owner

The premises were sealed by officers of municipal corporation. The petitioner or anybody else on his behalf, was excluded from having access to the premises by operation of sub- ss 1 and 3 of s 345A of the Delhi Municipal Corporation Act 1957.[49]Thus, the de facto control and dominion over the premises was transferred to the deputy commissioner of Delhi Municipal Corporation or the complainant. The accused may be the owner, but he ceased to be in possession of the premises. The act of sealing the premises involved the power to control and intent to control. The moment the premises were sealed by the officers of the Delhi Municipal Corporation, in exercise of their lawful duty, they assumed possession and actual control of the premises. Sub- section 3 of s 345A of Delhi Municipal Corporation Act clearly provided that

no person is entitled to remove seals except by an order of the commissioner or by the Appellate Tribunal or by the administrator. Admittedly, no such order was passed by any of these authorities. That being so, the offence of criminal trespass as defined under s 441 and punishable under s 448, is made out.[50]

11. Possession of Tenant--Orissa Act (22 of 1986)

The rigour of s 441, IPC, as amended by the Orissa Act 22 of 1986 shall not be applicable to the following cases:

(a) Statutory tenants whose tenancy is governed by any statute. They are protected by tenancy laws like Public Premises Eviction Act, *etc*.
(b) Tenant who has entered into possession by virtue of a lease. Rights of such a tenant are governed under the provision of the Transfer of Property Act and the Specific Relief Act and he acquires a right of possession. After determination of tenancy by notice, he would become 'tenant holding over', 'tenant on sufferance' or 'tenant at will', as the case may be. His possession being juridical, is protected. He can be evicted only in *due process of law*. The possession of such tenant cannot be equated with that of trespassers).
(c) Person who has entered into possession by virtue of some covenant like, agreement to sell, Will *etc.* and/or put forth a genuine right over the property possessed.

If a person claims a right of title coupled with possession, till the dispute is adjudicated, his possession cannot be conclusively said to be that of a trespasser and his right to possess would be subject to the result of the suit or legal proceeding.

However, the said section shall be applicable to the following category of persons:

(a) Person who was permitted to possess a property for a particular period and after lapse of the said period, he was called upon to handover possession by issuance of quit notice.
(b) Person, who was put possession by means of a 'licence' and who fails to handover possession after expiry of the term of licence and/or after receiving quit notice from the landlord.3734
(c) Person who was in 'permissive possession' and who fails to handover possession even after receiving a notice to quit.[51]

The possession of a tenant does not become illegal or unlawful, but is in the nature of a 'judicial possession' and as such even after expiry of tenancy cannot be evicted except in accordance with law. Since the possession is not illegal or unlawful but juridical, the possession of such tenant cannot be said to be that of a trespasser.[52]

The Court directed the State Government to initiate prosecution of certain persons.[53]

12. Importance of Notice--Uttar Pradesh Criminal Law (Amendment) Act 1961

In order to apply this section, as amended in Uttar Pradesh, it is necessary to find that the intention of the accused was to take unauthorised possession of land or to make unauthorised use of it.[54] No offence under this section would be committed if the allegations, made in the complaint, do not show that the trespasser had dispossessed the complainant from land with the intent to intimidate, insult or annoy him.[55] However, it is nowhere insisted that the complainant must categorise the elements of the offence sought to be charged against the accused.[56] Before a person is convicted of an offence under s 447, IPC, by invoking the first part of s 441, IPC, the prosecution should prove the dominant intention of the accused. It is immaterial that he had, or could have, the knowledge that his conduct or action might result in annoyance or intimidation.[57] The second part of s 441, IPC, would be attracted if the prosecution has

been able to prove that the notice was duly served.[58] It must necessarily be proved that service of notice was sufficient.[59] If the trespasser is found to have taken possession of a property in possession of another during the absence of that another while the property was lying uncared for, an offence of 'criminal trespass' will be made out if it is proved that the accused had entered into, or upon, the property with the intention of taking unauthorised possession, or making unauthorised use, of such property and he failed to withdraw from such property when the person, in constructive possession, served, on the trespasser, a notice calling upon him to withdraw from the property.[60]Section 441, as amended in Uttar Pradesh thus, provides for a civil trespass getting converted into a criminal trespass on the service of notice on the trespasser to vacate the property.[61] Where the accused wrongly occupied a house of complainant and did not vacate even after notice given to him, it was held that the accused would be guilty under s 441, but the occupation3735 did not amount to house-trespass, under s 442, by continuing in occupation of the house.[62] However, if the accused continues in possession of the disputed premises in assertion of his bona fide title, he commits no offence of criminal trespass.[63]

The notice, contemplated by s 441, cannot be given by a police officer with whom a report might have been lodged about the trespass.[64]

13. 'Data Specified in Notice'--Uttar Pradesh Criminal Law (Amendment) Act 1961

If a specific date is not specified in the notice, compliance of the provisions of s 441 of the IPC as amended by Uttar Pradesh Criminal Law (Amendment) Act 1961 will be lacking.[65] The notice, referred to in s 441, IPC, as amended in Uttar Pradesh, is required to specify the date calling upon the trespasser to vacate the property and if he fails to do so by the date, he will be deemed to be a trespasser and liable to be convicted and sentenced under s 447, IPC . The expression 'by the date specified in notice' contemplates that the date must be specified and it is not sufficient that it should be left for calculation. If date is not specified, then it will not be a proper compliance of the provisions of s 441, as amended by the Uttar Pradesh Criminal Law (Amendment) Act 1961.[66] In a case, where the entry is lawful, it may become unlawful if the person in possession fails to withdraw from such property or its possession or use when called upon to do so by that another person by notice in writing, by the date, specified in the notice.[67]

14. Possession of Tenant after Termination of Lease

In the case of *MC Cholkalingam v V Manickavasagam* ,[68] the Hon'ble Supreme Court considered the meaning of the words 'lawful possession' used in r 13 of the Madras Cinemas (Regulation) Rules 1957 in relation of a tenant or a licensee while disposing of a civil appeal. The following view of the Hon'ble Supreme Court makes the position clear:

> 'Lawful possession cannot be established concomitant existence of a lawful relationship between the landlord and the tenant. This relationship cannot be established against the consent of the landlord unless, however, in view of special law, his consent becomes irrelevant. Lawful possession is not litigious possession and must have some foundation in a legal right to possess the property which cannot be equated with a temporary right to enforce recovery of the property in case a person is wrongfully or forcibly dispossessed from it. This court in *Lallu Yeshwant Singh's case,*[69] had not to consider whether juridical possession in that case was also lawful possession. We are clearly of opinion that judicial possession is possession protected by law against wrongful dispossession but cannot per se always be equated with lawful possession.'3736

A Division Bench of Andhra Pradesh High Court also considered the nature of possession of a tenant after the termination of lease while deciding a second appeal in the case of *Mogilipuvvi Annapurnaiah v Malampati Narasimha Rao* :[70]

> After a lease is terminated if the tenant continues in possession without the consent or acquiescence of the lessor,

> such a tenant is a 'tenant by sufferance.' He cannot be deemed to be 'holding over' when there is no proof of extension of lease in his favour. Possession of a tenant by sufferance is a 'judicial possession', the possession of such a tenant should be protected by the courts. It is always better that a 'person' is driven to a court of law rather to permit him to forcibly evict a tenant. A tenant by sufferance is entitled to remain in possession of the demised premises till he is evicted in the course of law. Thus he is entitled to a decree for permanent injunction restraining the landlord from interfering with his possession.

Section 6 of the Specific Relief Act envisages that persons are not permitted to take forcible possession. They must obtain such possession as they are entitled to through a court. A person, who has no due including trespasser, cannot be evicted by force even by a person who has a right to occupy the land.

In the case of *Ramnath v Angan* ,[71] the Hon'ble Supreme Court reiterated that if tenant continues to occupy the premises even after expiry of period of lease without consent of landlord, he becomes tenant by sufferance and he is liable to pay rent for the period of his occupation and a suit filed for ejectment of such tenant within 12 years from the termination of the tenancy is not barred by time.

The question whether possession after termination of the lease is lawful possession or is unauthorised possession definitely arises not only in civil cases, but also in criminal cases. Section 441 , IPC does not definitely relate to a dispute of landlord and tenant in regard to the recovery of possession and damages, but it excludes such cases by intentional ingredient in its phraseology if a person enters into or upon a property with intention of taking unauthorised possession or making unauthorised use of such property fails to withdraw after receiving a written notice, only then he is said to commit criminal trespass.[72]

Mere serving a notice in writing upon accused/tenant to deliver the possession of the premises on a specified date and time does not establish an effect to constitute the offence of criminal trespass. Such a dispute is dispute of rend and ejectment cognizable by a civil court on a motion by landlord. It does not at all fall within the ambit of s 441, IPC . The possession of tenanted premises after expiry of period of lease is not unauthorised, and the tenant cannot be said to have committed trespass in such a situation.[73]

The possession of a tenant does not become illegal or unlawful, but is in the nature of a 'judicial possession' and as such even after expiry of tenancy cannot be evicted except in accordance with law. Since the possession is not illegal or unlawful but juridical, the possession of such tenant cannot be said to be that of a trespasser.[74]3737

15. 'With Intent'

In the absence of any evidence of any criminal intent on the part of accused, no offence of criminal trespass can be held to have been made out against the accused.[75] This section speaks of intention, and not of knowledge.[76] It would be utterly wrong to import the element of knowledge into s 441 .

The court has to look to the state of the mind of the accused and see whether his conduct was such as to lead to the inevitable conclusion that he acted with one or other of the intents specified in s 441 .[77]In order to establish that the entry on the property was with intent to annoy, intimidate or insult, it is necessary for the court to be satisfied that causing such annoyance, intimidation or insult was the aim of the entry; it is not sufficient for that purpose to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult, and that this likely consequence was known to the person entering. In every case, where entry causes annoyance or insult, it cannot be said to be actuated by the intention to cause the said insult. There is distinction between knowledge and intention, and that distinction must be kept in mind in deciding whether, in a particular case, entry was with the requisite intention. As the said intention has always to be gathered from the circumstances of the case, it cannot be accepted that the likely consequence of the act and its possible knowledge must necessarily import the corresponding intention.[78] Where the accused crept into the house late in the night on the invitation of an unmarried and *sui juris* daughter of the complainant with whom he intended to have sexual intercourse, it was held that the mere fact, that he knew, or ought to have known, that, if discovered, his presence in the house might cause annoyance to the owner or other inmates of the house, is, by itself, not sufficient to bring his case within s 441 .[79] Similarly, where there was no evidence to the effect that the re-entry of the accused, *i.e.*,

the evicted tenant, into the house of the landlord was with the intention of committing any offence or of intimidating, insulting or annoying the landlord, it was held that even if the re-entry of the accused was unlawful, such unlawful taking of the house was neither criminal trespass, nor house trespass and3738 even the knowledge of the accused was not material.[80] An intention to commit an offence or to annoy, insult or intimidate may be inferred from circumstances.[81] Intention, which is a state of mind, can never be proved as a fact; it can only be inferred from facts which are proved. It may well be that in doing a particular act, a man may have more intentions than one. Therefore, to bring a case within s 441, the intention being the essential ingredient,[82] it must be proved before a conviction is recorded under s 447 .[83] Where the dominant intention of the accused was to take possession of a house after some civil litigation, and not to commit any offence or to intimidate, insult or annoy the complainant, it was held that the case did not fall under s 448 .[84] However, where the relationship of master and servant has ceased, any assertive action, attended with threats of injury and violence on the part of the labour with a view to prevent the willing workers from entering into the factory premises and the supervisory staff of the management from looking after their property, and further their unauthorised occupation of the premises, to the exclusion of the management, cannot but be regarded as disclosing an intention to commit offences.[85]

16. Criminal Intent--Inference may vary from case to Case

The circumstances, from which criminal intent may be inferred, may vary from case to case. The conditions, under which a presumption of fact may arise, may be indicated, but they cannot be rigidly laid down. If a man occupies premises without any shadow of right, knowing fully well that he has no right, and, if he evinces hostility or violence in the act of occupation or in continuing in possession, after having been prohibited by the person authorised to exclude him from possession, the natural inference is that the required criminal intention is there. Where, however, the facts and circumstances of a case indicated that the accused was likely to have occupied a property with the knowledge or reasonable belief, that he has some right, and continues to occupy it for some period of time without any show of force or hostility on either side or any objection by the person entitled to exclude him from possession, the more natural inference will be that the criminal intention was absent. In each case, the question is one of fact.[86]

17. 'To Commit an Offence'

Where the judgment-debtors entered the house of the decree-holder with intent to remove the attached cattle constituting an offence under s 424, they were held guilty3739 of the offence under s 441 .[87] The cultivation of waste land in a village, contrary to the orders of the revenue authorities, may amount to criminal trespass.[88] The existence of a bona fide claim of right does not always exclude the presumption of a criminal intent. An entry with the intention of causing wrongful restraint is sufficient to support a conviction.[89] Similarly, an entry by one man on another's property, accompanied by the cutting down of trees in that property, is a criminal trespass.[90] Likewise, entering a cattle-pound with intent to commit an offence under s 24, Cattle Trespass Act, amounts to criminal trespass.[91] If, however, the entry is *bonafide*, no offence is committed.[92] In taking a minor child by the father from the custody of the mother, no offence is committed as the dominant intent of the accused in entering the house is not to commit an offence or to intimidate, insult or annoy, but the *bonafide* exercise of a right.[93] Where the accused persons execution creditors, in company with an authorised bailiff, broke open complainant's door before sunrise with intent to distrain his property, it was held that they were not guilty of the offence of criminal trespass, there being no finding of any of the intents, required to constitute the offence of criminal trespass.[94]

18. 'To Intimidate'

The word 'intimidate', in this section, must be understood, in its ordinary sense, to 'overawe, to put in fear, by a show of force or threats or violence', and it may include the use of actual force unaccompanied by threats.[95] Entering the house of the complainant and throwing his servant out is not only intimidating the complainant or his servants, but also causing annoyance to him. The criminal intent can be gathered from these very acts.[96] In *Gopal Pandey v Boddam* ,[97] during a civil suit brought by *A* against *B*, certain persons on behalf of *A* went armed on premises belonging to *B*, without his leave, for the purpose of

getting materials for a hostile application against *B*. It was held that they intended to intimidate *B*'s servants and that their trespass was3740 criminal. In *State ofMaharashtra v Tanba Sadashio Kunbi* ,[1] the accused, Vice-Chairman of the School Committee, beat two of the boys in the absence of the Headmaster. When the Headmaster returned, he reprimanded the accused. The accused started abusing him and tried to catch hold of his shirt and was about to use physical force and also threatened him physical harm as soon as he came out of the school. It was held that this was clear evidence of the accused having the criminal intention which makes the trespass a criminal trespass within the meaning of ss 441 and 442, IPC . In *Jaladhar v Bhubaneswar* ,[2] the accused entered a newly built house during the temporary absence of the complainant and when the complainant returned and remonstrated them, they chased him out with *lathis*. It was held that the possession of the house was with the complainant and the accused clearly intimidated him. If a person encroaches upon a substantial portion of the land acquired by a municipal board, removes the wire-fencing done by that board, resists the re-fencing of the same and becomes prepared to beat the employees of that board, his action, per se, can be said to be with an intention to intimidate, insult and annoy the municipal employees within the meaning of this section.[3] However, the cultivation of Government land without permission does not amount to criminal trespass unless there is evidence that the entry upon the land was with any of the intents specified in s 441 .[4] Similarly, if the land, acquired by the Government, has not been demarcated and the person in occupation has not been evicted, such occupation, as continued, does not amount to criminal trespass.[5] Where a person, having some easementary right of passage though the property, squatted there and the complainant questioned him regarding the propriety of his conduct, it was held that intimidation could not be inferred from these facts.[6] An encroachment on Government land by building a *pyal* thereon,[7] or enclosing a public pathway,[8] would not constitute criminal trespass if the intent to commit an offence, or to intimidate, insult or annoy is lacking. When a man's intention is to save his family and property from imminent destruction, it cannot be said that because he commits civil trespass on his neighbour's land and cuts a portion of his neighbour's property, which he ordinarily would not be justified in doing, he is guilty of any criminal offence.[9] Where, during very serious communal disturbance, the complaint left the premises padlocked, never communicated with the landlord and never paid any, rent, and the accused landlord entered the premises by removing the padlock, it was held that the landlord must have believed that the tenant had abandoned the premises and could not, therefore, be convicted for criminal trespass.[10]Where the accused's intention in doing the act complained of was to assert his title and gain and hold possession of the premises as against the complainant, it was held that he was not guilty.[11] Where the complainant entered upon the land of the accused to effect repairs to a fence serving as boundary between the lands of3741 parties with no intention to annoy, *etc,*[12] or where the accused, armed with weapons, rushed into a house to rescue his companion, who had gone unarmed to point out the house to the police, when the companion shouted on being attacked or apprehending attack,[13] or where the complainant was entertaining the Chief Minister and the accused, who was the landlord, entered the house to complain about the non-payment of rent by the complainant for a long period,[14] or where some accommodation was vacated by a tenant and the landlord took possession but refused to give possession to an allotee, to whom the accommodation was allotted by the rent controller (even if the new allotment had been made prior to the landlord's taking possession),[15] or where a tenant, who had been duly ejected by process of law, re-entered upon the land and cultivated it without consent of the ejector, but without the required intention,[16] or where the accused entered upon the land with a view to remove the crops planted by him,[17] or where the accused entered upon a vacant land with the consent of a person asserting his title thereto and put up a *water-pandal* on it,[18] or where the accused entered into a land, unyoked the bullocks of his tenant and drove them away,[19] it was held that no offence of criminal trespass was committed.

19. 'To Annoy'

The word 'annoy' must be taken to mean annoyance that would generally and reasonably affect an ordinary person, and not what would specially and exclusively annoy a particular individual.[20] The term 'annoyance' cannot be equated with uncertainty.[21] The annoyance is not intended to be instantaneous, *i.e.*, at the moment of entry. It may happen subsequently.[22]

An intention to annoy, which must be distinguished from an intention to obtain improper gain, does not follow necessarily from an intention to obtain land unlawfully, but must be made out by some independent

evidence.[23] It must be a question of fact in each case whether the intention was to annoy.[24] When an offender for the first time comes upon the land of the rightful owner to dispossess him forcibly without any semblance of legal right, the entry into the property is to annoy the person in possession of such property.[25] When a person takes his loaded cart into the field of another in which crop is standing, there is bound to cause annoyance to the owner of the field.[26] When the accused, knowing that another person is lawfully in possession of property, illegally enters into possession of it in the absence of that person, his intention cannot be anything else but that of annoyance to the person in3742 possession.[27] Where the possession has been delivered to the complainant in due course of law, re-entry, by the accused, into the property by placing, inside the premises, the goods which had earlier been taken out in the course of said delivery of vacant possession, is only a criminal trespass with the intention of causing annoyance to the complainant.[28] The presumption of the necessary intention may be drawn where a person, who has absolutely no interest in land in possession of others, forcibly takes possession inspite of the protests of the owner.[29] Where, however, the object of the meeting, which was held inside the area, set apart for the office compound of the sub-divisional officer, was not to cause any annoyance to the sub-divisional officer or his staff but was only to carry on canvassing for the election through propaganda, it was held that the case did not come within the mischief of s 441 .[30] Where the sole intention of the striking employees was to put pressure on their employers to concede their demands, it was held that even if the strikers might know that the strike may annoy the employers, it is difficult to say that such knowledge would necessarily lead to the inference of intention requisite for constituting criminal trespass.[31] In *Shambhu Nath v Ram Kanud Guho* ,[32]*A*, who claimed certain land as his own, built a hut thereon. *B* likewise claimed the land. It was held that *A* was not to annoy *B*. In *Sukhdeo Sharma v State* ,[33] an advocate entered the office-room in the house of a magistrate at night and surreptitiously inspected papers in a pending file without any desire to tamper with the file. His intention was to leave without allowing an opportunity, to the magistrate, of coming to know of his action. It was held that there was no deliberate intent to annoy and he was not guilty of criminal trespass.

20. 'Unlawfully Remains there with Intent...To Commit an Offence'

The remaining must be unlawful.[34] The second part of s 441 would apply where the entry is lawful, but subsequently the trespasser insists on remaining in possession with intent thereby to intimidate, insult or annoy the person in possession of the property.[35] Where the accused, who was a tenant on sufferance, entered the quarter by right, but remained there unlawfully, it was held that this would not, without proof of the requisite intent, make his wrongful stay punishable as a criminal trespass.[36] If a person enters a house at the invitation of another and thereafter a quarrel breaks out between them in the house, no offence of house trespass is committed.[37] If the dominant intention was merely to make an entry peacefully, no offence of criminal3743 trespass would be made out. If any offence is committed after the entry is made, the person, committing the offence, would be guilty of it, but not of criminal trespass unless the court is also able to find that the intention was, from the very beginning, to commit that offence. Where the original entry on the property was lawful but the accused remained there to gamble, and then created a row afterwards and caused annoyance, it was held that the accused was not guilty of criminal trespass.[38] However, in Re *Bashika*, it was held that where the entry in the house was lawful but accused remained there unlawfully and committed an offence, *i.e.*, assault, he was guilty of house-trespass.[39]

Where the accused lawfully entered the house but unlawfully remained there, intimidated, insulted and annoyed the owner of the house, offence under s 441, IPC was made out.[40]

21. No Conviction for Civil Trespass by a Criminal Court

Trespass, if not accompanied by any of the intentions, mentioned in s 441, IPC, is not only a civil trespass. If it is, however, committed with any of the said intentions, it is criminal trespass. Similarly, one of the criminal intentions, referred to in s 441, IPC, must be present to constitute a criminal trespass.[41] Where, in the absence of the complainant, the accused makes an unlawful entry into his (*i.e.*, complainant's) room, his (*i.e.*, accused's) initial trespass is civil. If, however, he subsequently threatens the complainant, while continuing to occupy the room after being asked by the complainant to quit the same, his subsequent act converts the civil trespass into a criminal trespass.[42] Where the accused trespassed upon the field of the

complainant and the finding was that the intention of the accused primarily was to take possession of the field in dispute,[43] or where, in spite of a notice served upon the accused by chairman of the municipality not to hold meeting at a certain place, the accused held the meeting to pass a resolution of condolence on the death of a leader's wife,[44] or where the complainant, a *zamindar*, obtained only a formal possession of holding of the accused in execution of a decree but the accused entered on the holding and subsequently succeeded in appeal,[45] it was held that no offence of criminal trespass was committed. If a person is allowed to enter the house by the house owner, he commits no criminal trespass. If he overstays, the remedy to the house owner is by way of a suit for eviction in the civil court.[46] Similarly, where a person, who has promised to vacate the house in his possession within the period, specified in the notice, served on him by the new house owner, fails to do so, he commits no criminal trespass.[47] Where the accused all along asserted their prescriptive right to fish in a lake free of rent and the complainant failed to establish the relationship of landlord and tenant,[48] or where the accused admittedly had a claim of right to the land of3744 which he took possession (*vis*, that he was a lessor entitled to re-enter on the expiry of a lease),[49] or where the accused went on a land with the sanction of the person who asserted his title to the property as against the complainants,[50] or where a tenant claimed to be in possession and the landlord trespassed to take possession over the land and no criminal intention was attributed to him,[51] or where the accused entered the field claiming as an occupant on the basis of a sale from the original occupant while the complainant was her mere sub-tenant (*shikmi*-holder) for the previous year,[52] or where the accused entered into possession of the land again, after having been in possession for a period of eight years, having been dispossessed for only one year, in exercise of a bona fide claim of right,[53] it was held that the dispute was of a civil nature.

22. Disputed Rights--Duty of the Criminal Court

It is not the function of the criminal court to decide any question of disputed right. Its primary duty is to determine whether the offence complained is made out by the evidence produced before it.[54] The mere assertion of a claim of right, however, not a sufficient defence to a charge of criminal trespass; it must be a claim made in good faith, that is to say, it must be a claim in which the person must have himself believed that it cannot be legally untenable.[55] The criminal court has to see whether the claim of the accused is *bona fide*, if the claim is not *bona fide* and it is a mere cloak to cover the real intent, it would be of no avail, if it finds the claim to be *bona fide*, it has to consider the question of the entry and decide it with reference to the circumstances and facts of the case.[56] Where the complainant was admittedly in possession of a plot of land and the accused, having entered the land, caused widespread damage to the *rabi* cultivation of the complainant, it was held that even if the accused believed, *bona fide*, that they were entitled to possession of the land, that could not give them any right to cause damage to the standing crop of the complainant and their entry; on the land under the possession of the complainant for the said purpose could only be regarded as an act of criminal trespass.[57]3745

23. Civil Courts' Finding--Not Binding on Criminal Court

The finding in a civil suit being not binding on a criminal court, an injunction, passed by a civil court, does not debar the criminal court from going into the same question again.[58] The criminal court may not be competent to adjudicate on civil rights or title to the property but to say that pendency of a civil suit will automatically oust the jurisdiction of the criminal court, is too broad a proposition of law to meet with approval.[59]

75 Re *David*1972 LW (Cr) 200; *Ayyappan Pillai v State of Kerala* 2013 (3) KLJ 561 (Ker) .

76 Refer to Indian Penal Code 1860, ss 441 to 460 .

77 *In the matter of Gobind Prasad*(1878-1880) ILR 2 All 465; *Emperor v Budh Singh* (1878-1800) ILR 2 All 101; *Sant v Union Of India* AIR 1962 HP 1, (1962) 1 Cr LJ 31 ; *Rashid Ahmad v Kashidan* 1980 ALJ 939, p 940 ; *Bishen Singh v Emperor* AIR 1924 Lah 525, 24 Cr LJ 90 ; *Santan Naik v State* 36 Cut LT 212, p 214 ; *Krishna Ballabh Misra v State* 1973 All Cr R 404 .

78 *Sunil Kumar Pal v Sadan Chatterjee* AIR 1951 Cal 297 . It is submitted that this decision seems to be doubtful.

79 *Brindera Chandra De v State* AIR 1957 Assam 168, 1957 Cr LJ 1231 ; *Mysore Machinery Manufacturers v State of Mysore* 1969 Ker LT 621 .

80 *Arjuno Pnndi v Jura Dalal* 24 Cut LT 310 ; *Maung San Myin v Emperor* 25 Cr LJ 699 ; Re *Harish Chandra Samaddav*(1957) ILR 1 Cal 518; *Kunjan Ammini v State of Kerala* 1967 Ker LT 621 ; *Ayyappan Pillai v State of Kerala* 2013 (3) KLJ 561 (Ker) .

81 *State of Orissa v AV Savapati* 1974 CLR (Cr) 402, p 405 ; *State of Madhya Pradesh v Rama Ram* (1985) 1 Crimes 80 .

82 *Sambaru Jal v Niladri Jal* 1977 Cut LR (Cr) 231, p 234, (1977) 44 Cut LT 321 ; *Mathri v State of Punjab* AIR 1964 SC 986, p 990, (1964) 2 Cr LJ 57 .

83 *Chelpark Co Ltd v Commissioner of Police* AIR 1968 Mad LJ 458, AIR 1969 Mad 33, p 38 .

84 *Jaipur Spinning and Weaving Mills Ltd v State of Rajasthan* (1972) 1 WLN 1097, p 1108 .

85 *Lalman Shivnath v State of Madhya Pradesh* 1971 Cr LJ 175, p 179, 1970 Jab LJ 610 ; *Baburam v State* 1971 ALJ 4, p 11 (a plea of *bonafide* claim of right to possess property as a defence to a prosecution for criminal trespass is similar to a plea of an exception from criminal liability); *Ramchandra v State* AIR 1969 Bom 20 (no criminal trespass if the offender asserts a *bona fide* claim of his right, however ill-founded in law the claim may be); Re *Devarasetti Gangaiya* 1 Weir 516 (1); Re *Oodayanasary* 1 Weir 516 (2); *Gani Mallik v Nakul Charan Sahu* 1974 Cr LJ 216 ; *Ramkishun Agarwalla v Emperor* AIR 1938 Pat 131, 39 Cr LJ 361 (the doing of an act, which the accused has been restrained from doing by an order under s 144, CrPC, is relevant for testing the *bona fide* of the accused's claim); *Sinnasamy Salvanayagam v King* 52 Cr LJ 172 (PC) ; *KG Varghese v Annamma* 1967 Cr LJ 1419, 1967 Ker LT 497 (no criminal trespass if accused's claim is *bona fide*, even if ill founded in law--prosecution must prove that any claim of right is a mere cloak to cover the real intent); *Reajaddin Molla v Emperor* AIR 1915 Cal 236, (cultivators asserting grazing rights *bona fide*); *Silla Ramulu v State* 1971 Cr LJ 1401, p 1402, (1971) 1 Cut WR 271 ; *Jurakhan Singh v Emperor* 7 Cr LJ 312 ; *Emperor v U Kyaw Zan* AIR 1937 Rang 132, 38 Cr LJ 759 ; *SM Fazlul Haq v State* AIR 1964 All 103, (1964) 1 Cr LJ 324 ; *Devi Dayal v Emperor* AIR 1925 Pat 167, 25 Cr LJ 1047 ; *Mohan Singh v Rana Pratap* AIR 1960 Punj 160 ; *Jagan Dubey v Emperor* AIR 1918 Pat 639, 19 Cr LJ 629 ; *Emperor v Abdul Latif* 13 Cr LJ 27 ; *Akshoy Singh v Rameshwar Bagdi* AIR 1917 Cal 705, 17 Cr LJ 339 ; *Emperor v Budh Singh* (1878-1880) 2 All 101; *S D'Cunha v Emperor* AIR 1936 Bom 15, 37 Cr LJ 309 .

86 *Dharmaraj v Thillainathan* 1977 Mad LJ (Cr) 300, p 302 (Mad) .

87 *Ghasi v Emperor* (1917) ILR 39 All 722, 19 Cr LJ 46(2) .

1 *Shwe Kun v Emperor* 5 Cr LJ 415 .

2 *Maung New v Maung Po Hla* AIR 1937 Rang 117, 38 Cr LJ 764 .

3 *Nga Shwe Kyi v Emperor* AIR 1923 Rang 135(1), 25 Cr LJ 684 .

4 *Maung Po Thet v Emperor* AIR 1937 Rang 201, 38 Cr LJ 776 ; *Shwe Kun v Emperor* 5 Cr LJ 415 .

5 *Safor Ali v Emperor* AIR 1931 Cal 264, 32 Cr LJ 568 .

6 *Saibaj v Gaffoor* AIR 1932 Nag 112, 33 Cr LJ 861, **dissenting** from *Emperor v Bandhu Singh*AIR 1928 Pat 124, 29 Cr LJ 99 ; *Ahmad Khan v Emperor* AIR 1936 Nag 176 ; *Anantram v Emperor* AIR 1940 Nag 117, 41 Cr LJ 315 .

7 *Yohannan Isreal v Poulose Pathrose* 1971 MLJ (Cr) 56, p 58 .

8 *Ponnuswamy v Mahipathy* AIR 1951 Mad 55, 1950 MWN 875 (2) .

9 *Dhananjay Dhara v Provat Chandra Biswas* AIR 1934 Cal 480, 35 Cr LJ 949 .

10 *Naya Ram Surma v Nichala* (1888) ILR 15 Cal 402 ; *Bhagiram v Abar Dome* (1888) ILR 15 Cal 388 ; *Emperor v Charu Nayaih* (1876-1877) ILR 2 Cal 355.

11 *Banarsi Das v Crown* AIR 1923 Lah 92 . For further commentary, see s 378, *ante*.

12 *Gurdial Singh v Abhey Dass* AIR 1967 Punj 244, 1967 Cr LJ 909, p 916 ; *Basanta Kumar Gon v State* AIR 1956 Cal 118, 1956 Cr LJ 524, p 526 ; *Motilal v Emperor* 26 Cr LJ 1273, p 1274, AIR 1925 All 540 ; Re *Abdul Salam*ILR 1950 All 163 (complainant not in sufficient possession of the house when he locks it after the tenants in it have left for Pakistan and the accused breaks open the lock); *In the matter of Gobind Prasad*(1878-1880) ILR 2 All 465; *Kunjilal v Emperor* 14 Cr LJ 633 (All) ; *Lal Chand Pitulal v Emperor* 35 Cr LJ 270, p 272, AIR 1933 Sind 396 ; *Satish Chandra v King* AIR 1949 Cal 107, 50 Cr LJ 161 ; *State v Abdul Sukur* 1960 Cr LJ 342, AIR 1960 Cal 189 ; *Mahadeo v Emperor* AIR 1934 All 1025, 36 Cr LJ 328, p 329 . For a **contrary** view, see *Sant v Union of India* AIR 1962 HP 1, (1962) 1 Cr LJ 31, p 32, in which it has been held that 'possession', in s 441, is wide enough to include not only actual physical possession, but also constructive possession; *Hyder Sahib v Sabjan Sahib* AIR 1931 Mad 560, 33 Cr LJ 145 (1).

13 *Basanta Kumar Gon v State* AIR 1956 Cal 118, 1956 Cr LJ 524, p 526 (an officer cannot be deemed to be in possession of his office for purposes of s 441); *Nga Po Ya v Emperor* AIR 1923 Rang 145, 25 Cr LJ 653 (even if the court-room happens to be the presiding officer's house, it is doubtful whether he is in 'possession' of it when he is holding a trial); *Gurdial Singh v*

Abhey Dass AIR 1967 Punj 244, 1967 Cr LJ 909, p 916 ; Re *Avadayappa Mudaliar*AIR 1924 Mad 40, 24 Cr LJ 824 (court compound not in possession of officer-in-charge); *Sudarshan Jena v State of Orissa* (1973) 1 Cut WR 195 (public office is a place where anybody can go); *Motilal v Emperor* AIR 1925 All 540, 26 Cr LJ 1273, p 1274 ; *In the matter of Gobind Prasad* 2 All 465; *Kunjilal v Emperor* 14 Cr LJ 633 (All) ; *Lalachand Pitulal v Emperor* AIR 1933 Sind 396, 35 Cr LJ 270, p 272 ; *Satish Chandra v King* AIR 1949 Cal 107, 50 Cr LJ 161 ; *State v Abdul Sukur* 1960 Cr LJ 342, AIR 1960 Cal 189 ; *State v Hari Ballabh* AIR 1963 Raj 19, (1963) 1 Cr LJ 223 (an officer is in actual physical and immediate possession of his officer premises--public may go to a government officer for its official business; such a right is not enough to preclude the officer-in-charge of that office from having actual physical possession of his office to deprive him of a right to exclude all interference with it, if necessary); *Birendra Chandra Dey v State* AIR 1957 Assam 168, 1957 Cr LJ 1231 (officer-in-charge of a *thana* is in possession of it); *State of Goa v Pedro Lopes* 1996 Cr LJ 256 Bom .

14 *Lalchand Pitumal v Emperor* AIR 1933 Sind 396, 35 Cr LJ 270, 272 .

15 *Bismillah v Emperor* AIR 1929 Oudh 369, 29 Cr LJ 745, 746; *Rabi Kumar Agarwal v State of West Bengal* 2003 Cr LJ 1342 (Cal) ; *MohdNurul Haque v State of Assam* 1983 Cr LJ 59 .

16 *To Gyi v Emperor* 1917 LB 155, 17 Cr LJ 378 (it is the person in actual possession whose feelings have to be considered); *Soram Parijat Singh v Thongram Men Singh* AIR 1960 Manipur 17, 1960 Cr LJ 631 (1) (persons, who merely have a right to graze cattle on another's land or to take fuel growing on it for their personal needs or entitled to rights of easements or other incorporeal rights, cannot be said to be persons in possession of the property).

17 *Jaimini Kumar Ghose v Sudhir Ranjan Poddar* AIR 1971 Tripura 24, 1971 Cr LJ 507 ; *Gurdial Singh v Abhey Dass* AIR 1967 Punj 244, 1967 Cr LJ 909, (possession alone is relevant for deciding whether criminal trespass is committed); *Empress v Surwan Singh* 11 WR (Cr) 11 (criminal trespass may be committed in respect of a property in the possession of a person even though has possession may not have originated in right); *Public Prosecutor v Ponnusami Pillai* 1 Weir 522 (2) (superior title in the accused will not, by itself, convert the complainant in a mere trespasser so as to justify him to eject the complainant if the latter be in possession, otherwise than as a mere trespasser); *Empress v Ram Dayal* 7 WR (Cr) 28 (2) (court should look to the possession only without reference to the question in whom the title of the land may ultimately be found); Re *Chimna Ram*1954 Raj LW 110; *Suresh Chandra Bhowmik v Haridas Dev Nath* AIR 1960 Tripura 4, 1960 Cr LJ 120 ; *Khaija Waiphei v Ngalthang* AIR 1963 Manipur 15 ; *Ram Kali v Gaya Prasad* AIR 1950 All 653, 51 Cr LJ 1167 ; *Ram Nath v State* 1952 AWR (HC) 388 .

18 *Kanwal Sood v Nawal Kishore* AIR 1983 SC 159, 1983 Cr LJ 173 .

19 *State of Rajasthan v Dipti Ram* 2001 Cr LJ 3910 (Raj) .

20 *Mahadeo v Emperor* 36 Cr LJ 328, p 329, AIR 1934 All 1025 .

21 *Bansidhar v Emperor* 43 Cr LJ 162 (Oudh) ; *Motilal v Emperor* AIR 1925 All 540, 26 Cr LJ 1273 .

22 *Bansidhar v Emperor* 43 Cr LJ 162 (Oudh) .

23 *Mahadeo v Emperor* AIR 1934 All 1025, 36 Cr LJ 328 ; Re *Daga Bhika Kunbi*AIR 1928 Bom 221, 29 Cr LJ 977 .

24 *Fakir Chand v Fakir* 23 Cr LJ 699 ; *Prayag Singh v Morgan* AIR 1921 Cai 627, 22 Cr LJ 494 .

25 *PT Mohammed Ali v Hami Bappu* 1967 KLT 485 .

26 *Sondu v Rama* AIR 1933 Lah 734, 35 Cr LJ 77, p 78 .

27 *Gurdial Singh v Abhey Dass* AIR 1967 Punj 244, 1967 Cr LJ 909, p 916 ; Re *Daniel Groves* 1 Weir 521 (2).

28 *Lalchand Pitumal v Emperor* AIR 1933 Sind 396, 34 Cr LJ 270, p 272 ; *Prankisto Chander v Bissonath Chunder* 15 WR (Cr) 6 (2).

29 *Ravji Govindji v State* AIR 1951 Kutch 76, 52 Cr LJ 1477, p 1478 ; *Hyder Sahib v Sabjan Sahib* AIR 1931 Mad 560, 33 Cr LJ 145 (1); *Mohanta Lal Das v Monmohan Sarma* 51 Cr LJ 1496, AIR 1950 Cal 410 (accused, during the short absence of the complainant, taking possession of his three rooms by breaking open the padlocks and refusing to vacate them on complainant's asking on his return, held guilty under s 448); *Mata Din Singh v State* AIR 1964 Punj 145, (1964) 1 Cr LJ 427 (mere temporary absence of the person in possession would not make any difference if the ingredients of s 441 are established).

30 *Satish Chandra v King* AIR 1949 Cal 107, 50 Cr LJ 161, 162 .

31 *State of Rajasthan v Pura & Ors* 2000 Cr LJ 2615 (Raj) .

32 *Kishore Jain v State* 2002 Cr LJ 1154 (Del) .

33 *Superintendent and Remembrancer ofLegal Affairs v Anil Kumar Bhunja* AIR 1980 SC 52, 1979 Cr LJ 1390 (SC) .

34 *Sitaram Khapre v Tilokchand* AIR 1933 Nag 36, 34 Cr LJ 145 .

35 *Emperor v Amru* 37 Cr LJ 720 ; *Kanbi Gobind Hira v State* AIR 1954 Sau 156, 1955 Cr LJ 77 ; *State v Adra* AIR 1958 Raj 52, 1958 Cr LJ 222 .

36 *Thakurdas v Narayan* AIR 1936 Nag 192, 38 Cr LJ 307 ; Re *Chowdiah* 14 Mys LJ 81; Re *Sadasivan Pillai*ILR 1959 Ker 652.

37 *Subhana v State* AIR 1954 All 193, 1954 Cr LJ 413 .

38 *Ram Sarup v Emperor* AIR 1914 All 490, 15 Cr LJ 584(2) .

39 *Empress v Narimuttu* (1882) ILR 4 Mad 243 .

40 Re *Gopala Iyer*1935 MWN 48.

41 *Emperor v Ram Prasad* (1911) ILR 33 All 773 .

42 *Emperor v Gopalrao Venkatesh* 7 Cr LJ 309 .

43 *Rash Bihari Chatterjee v Fagu Shaw* AIR 1970 SC 20, 1970 Cr LJ 4, p 5 .

44 *Ibid*.

45 *Veerathaiah v Ramaswami Iyengar* AIR 1964 Mys 11, (1964) 1 Cr LJ 52 .

46 *Baldeo Prasad v Emperor* AIR 1954 Oudh 281, 35 Cr LJ 964 .

47 *Sant v Union of India* (1962) 1 Cr LJ 31, AIR 1962 HP 1 .

48 *Subhona v State* AIR 1954 All 193, 1954 Cr LJ 413 ; *Chinna Venkateshu v Pedda Kesamma* AIR 1931 Mad 231, 32 Cr LJ 749 ; **distinguishing** 1 Weir 580 (2); *Vangaveti v Madar Khan* AIR 1944 Mad 473, (1944) 2 MLJ 380 ; *Bala Krishna Chose v State* AIR 1957 Cal 385, 1957 Cr LJ 719 ; *Satish Chandra v King* 50 Cr LJ 161, AIR 1949 Cal 107 ; *State v Abdul Sukur* AIR 1960 Cal 189, 1960 Cr LJ 342 ; Re *Chinna Thoyi* 1 Weir 518 (2).

49 Delhi Municipal Corporation Act 1957 (66 of 1957).

50 *Kishore Jain v State* 2002 Cr LJ 1154 (Del) .

51 *Akapati Bhaskar Patro v Trinath Sahu and Anor* 2002 Cr LJ 3397 (Ori) .

52 *Ibid.*

53 *SD Bandi v Karnataka SRTC* (2011) 15 SCC 718, 2007 (9) Scale 677 .

54 *Pargan Chandra v State of Uttar Pradesh* 1977 All Cr C 175, p 176-177, 1977 Cr LJ 903 .

55 *Man Singh v State* 1980 All Cr Cas 56, p 59 ; *RP Kapur v State of Punjab* AIR 1960 SC 866, 1960 Cr LJ 1239 ; *Srichand Gobindram Nagpal v M Lakshmanan* 1971 Cr LJ 1400 ; *Khusrod v State* 1978 All Cr R 285 .

56 *Kunju Moideen Methararu v Kandan* 1959 Cr LJ 588, p 589 (DB), AIR 1959 Ker 146 .

57 *Sridhar Gupta v State* AIR 1977 All 329, 1977 All Cr C 137, p 139-141 .

58 *Ibid*.

59 *Sheo Shankar v PWD, Ballia* 1971 All Cr R 454 .

60 *State of Uttar Pradesh v Raja Ram* 1976 All Cr C 80, 1976 Cr LJ 1222 ; *Rashid Ahmad v Rashidan* 1980 ALJ 939, p 940, 1980 Cr LR 540 (UP) .

61 *Mahabir Prasad v State* 1976 Cr LJ 245, p 246, 1975 All Cr C 368 ; *Rajju Mal v State* 1975 All LR 592 .

62 *Sher Ardil v State* 1964 ALJ 166 .

63 *DP Titus v LW Lyall* 1981 Cr LJ 68, p 70-71 (All) ; *Chhidda Lal v Bal Swarup* 1981 Cr LJ 1705 (3), p 1707-1709 (All) .

64 *Ram Bahal Pandey v Ram Nand Gupta* 1976 Cr LJ 290 (All), (1975) 1 All LR 515 .

65 *Kishori Lal Agarwal v Ram Chandra Sindhi* 2003 Cr LJ 2299 (All)

66 *Ram Swarup v State* 1977 All Cr C 165, p 166-167 ; *Man Singh v State* 1979 Cr LJ 1433 (All) ; *DP Titus v LW Lyall* 1981 Cr LJ 68, p 71 (All) ; *Kishori Lal Agarwal v Ram Chandra Sindli & anor*2003 Cr LJ 2299 (All).

67 *Kabool Chand v Phool Chand* 1981 Cr LJ (NOC) 132 (All) .

68 *MC Cholkalingam v V Manickavasagam* AIR 1974 SC 104 .

69 *Lallu Yeshwant Singh's case*AIR 1968 SC 620, [1968] 2 SCR 203 .

70 *Mogilipuvvi Annapurnaiah v Malampati Narasimha Rao* AIR 1982 AP 253 .

71 *Ramnath v Angan* (1984) 2 All RC 290 .

72 *S Suhramanium & ors v State of Uttar Pradesh* 1996 Cr LJ 929 (All) .

73 *Ibid.*

74 *Akapati Bhaskar Patro v Trinath Sahu and Anor* 2002 Cr LJ 3397 (Ori) .

75 *Md Sahabuddin v Sayed Monomer Hussain* 1999 Cr LJ 349 (Gau) .

76 *State v Abdul Sukur* AIR 1960 Cal 189, 1960 Cr LJ 342 ; *Mathri v State of Punjab* AIR 1964 SC 986, p 990, (1964) 2 Cr LJ 57 ; *Bala Bariha v Kathu* 1970 Cr LJ 476, AIR 1970 Ori 47 ; *Rameshwar Nath v State* 1965 ALJ 747 ; *Satish Chandra v King* AIR 1949 Cal 107, 50 Cr LJ 161 ; *Kunjan Ammini v State* (1967) ILR 1 Ker 636, 1967 MLJ (Cr) 786 ; *Krishan Bhuyan v Gurubori Naik* (1971) 37 Cut LT 121, p 123 (proposition, that every person intends the natural consequences of his acts though a convenient and helpful rule to ascertain the intention of persons while doing a particular act, is not a binding rule which must prevail on all occasions and in all circumstances).

77 *Bala Krishna Ghose v State* AIR 1957 Cal 385, 1957 Cr LJ 719 .

78 *Man Singh v State* 1980 All Cr Cas 56, p 59-60 ; *Prempal Singh v Mohan Lal* 1981 Cr LJ 1208, p 1210 (HP) ; *Paras Ram v State* 1972 Cr LJ 1093 (HP) .

79 *Abdul Majid v Emperor* AIR 1938 Lah 534 (FB), 39 Cr LJ 756 (**cases to the contrary overruled**); *Asa Ram v Emperor* AIR 1925 Lah 23, 25 Cr LJ 761 ; *Emperor v Chhotelal* AIR 1919 All 249 ; *Gaya Bhar v Emperor* AIR 1916 All 152, 17 Cr LJ 419 ; *Emperor v Rupa* AIR 1919 Oudh 402, 20 Cr LJ 610 ; *Empress v Rayapadyachi* (1896) ILR 19 Mad 240 ; Re *Venkataramanuja Reddy* 10 Cr LJ 384; *S Vullappa v S Bheema Row* AIR 1918 Mad 136, 19 Cr LJ 162 (FB) ; *BP Nagi Reddy v Panyam Sanjeeva Reddy* AIR 1942 Mad 532 ((2)), 43 Cr LJ 755 ; *Subramaniam v Mari* (1966) 2 MLJ 99, 1966 MLJ (Cr) 553 ; *SD'Cunha v Emperor* AIR 1936 Bom 15, 37 Cr LJ 309 ; Re *Sivaratri Guravaiya* 1 Weir 536; *Emperor v Takbirullah Washidullah*AIR 1941 Pesh 79, 42 Cr LJ 96 ; *Ambika Charan v Emperor* 4 Cr LJ 144, 4 Cr LJ 150 ; *State v Sidney Rodrigues* AIR 1954 Nag 18, 1954 Cr LJ 9 ; *Sellamuthu v Pattamuthu* 12 Cr LJ 30 ; *Emperor v Lakshman Raghunath* 4 Bom LR 280 ; Re *Veda Gurukkal* 1 Weir 535.

80 *Byamma v N Pillappa* 1981 Cr LJ (NOC) 205 (Kant) .

81 *Mahadeo v Emperor* 36 Cr LJ 328, p 330 (All) .

82 *Madhuben v Thakarda Lakhaji Sendhaji* 1971 Cr LJ 1013 .

83 *Mathura Rai v Emperor* AIR 1928 All 671, 29 Cr LJ 570 ; *Surendra Nath Sen v Sudhir Kumar Ghose* 1966 AWR 395, p 397 ; Re *Kalinauth Nag Chowdhry* 9 WR (Cr) 1; *BP Nagi Reddy v Panyam Sanjeeva Reddy* 43 Cr LJ 755, AIR 1942 Mad 532 ((2)) ; *Damodar Das v Emperor* 23 Cr LJ 94 ; *Upendra Nath v Bankim Chatterjee* 48 Cr LJ 785 ; *Empress v Chooramoni* 14 WR (Cr) 25 ; Re *Venkataramanuja* 10 Cr LJ 384.

84 *Phul Kumari v Sheodahin Tiwary* AIR 1965 Pat 507, (1965) 2 Cr LJ 798 .

85 *Mysore Machinery Manufacturers v State of Mysore* (1969) 1 Cr LJ 221, AIR 1969 Mys 51 ; *Dura Ranbida v State* (1974) 1 Cut WR 111 ; *KG Varghese v Annamma Mariamma* 1967 KLT 497 .

86 *Surendra Natli Sen v Sudhir Kumar Ghosh* 1966 AWR 395, p 397, 398 ; *Jodha Ram v State* 1955 AWR 519 ; *Keshar Singh v Rex* 1950 AWR 19, AIR 1950 All 157 ; *Kunju Moideen Methararu v Kandan* 1959 Cr LJ 588, AIR 1959 Ker 146 ; *Matadin Singh Bharun Singh v State* AIR 1964 Punj 145 ; *Veerahaiah v Ramaswamy Iyenger* AIR 1964 Mys 11, (1964) 1 Cr LJ 52 ; *Mojamta Lal Das v Monmohan Sarma* 1950 Cr LJ 1496 (Cal) ; *Bishan Dayal v Brij Behari* 1933 Cr LJ 1014 (Oudh) ; *S Vullappa v Bheema Row* 19 Cr LJ 162 (FB) (Mad).

87 *Teeka v State of Uttar Pradesh* AIR 1961 SC 803, p 807, (1961) 1 Cr LJ 859 ; 1 Weir 522 (1).

88 1 Weir 513(1).

89 Re *Arunachala Achari* 1 Weir 520 (3).

90 *Empress v Jeenut Bebee* 1 WR (Cr) 46(2).

91 *Emperor v Bhola* AIR 1927 Lah 495, 28 Cr LJ 665 ; *Lalman Shivnath v State of Madhya Pradesh* (1970) 19 Jab LJ 610, AIR 1983 SC 159, 1983 Cr LJ 173 ; *Prafulla Kumar Ghosh v State* AIR 1959 Tripura 49, 1959 Cr LJ 1487 .

92 *Lalman Shivnath v State of Madhya Pradesh* 1970 Jab LJ 610 ; *Empress v Varthappa* (1882) ILR 5 Mad 382, 1 Weir 518(1) (entry into a local fund market through the fence of the market with intent to evade payment of market dues not a criminal trespass); 1 Weir 519; Re *Singara Babu*AIR 1944 Mad 445, 45 Cr LJ 805 (if a customer, suspecting the measures of his trader, enters into his shop to see whether he has correct measures, he commits no criminal trespass); *Chunder Narain v JG Farqhoarson* (1879) ILR 4 Cal 837 (no criminal trespass if a person, having shot a deer near the boundary of the complainant's

land and deer having run on the complainant's land follows it on such land for the purpose of killing it); *Emperor v Jangi Singh* 1 Cr LJ 362 ; *Emperor v Bazid* 1 Cr LJ 919 ; *Emperor v Nga U Thit* 11 Cr LJ 57 (driving a cart over a government waste land, in respect of which the municipal board puts a notice prohibiting cart traffic, does not involve any of the intentions requisite to constitute the offence of criminal trespass); *Ghanshayam v State* 1978 All Cr R 415 (no criminal trespass if a person enters a *khandar* to ease himself, and not to annoy anyone).

93 *Ismail Aboobakar v State of Kerala* AIR 1968 Ker 21, (1968) 1 Cr LJ 62 .

94 Re *Jotharam Davay* 1 Weir 525.

95 *TH Bird v Emperor* AIR 1934 Pat 158, 35 Cr LJ 1421 ; *Brundaban Kar v State* (1966) 32 Cut LT 266, p 270 .

96 *Chandrappa v Meghraj* AIR 1952 Hyd 38, 1952 Cr LJ 343 .

97 *Gopal Pandey v Boddam* (1889) ILR 16 Cal 715 .

1 *State ofMaharashtra v Tanba Sadashio Kunbi* AIR 1964 Bom 82, (1964) 1 Cr LJ 395 ; *KD Upadhyaya v Bhagbati* AIR 1964 Tripura 69, (1965) 1 Cr LJ 86 .

2 *Jaladhar v Bhubaneswar* 1957 Cut LT 157 ; *Rameshwar Nath v State* 1965 ALJ 747 .

3 *Manni Pahalwan v State* 1966 AWR 842, p 843 .

4 1 Weir 512 (2).

5 *Krishna Ballabh Misra v State* 1974 Cr LJ 434, 1973 All Cr R 404 (2) .

6 *Krishnan Moothan v VKA Krishnankutty Moothan* 1969 Cr LJ 1464, AIR 1960 Ker 348 .

7 Re *Erabasawa Talari* 1 Weir 521 (1).

8 1 Weir 514 (1).

9 *Emperor v Mudan Mondal* AIR 1915 Cal 292, 15 Cr LJ 155 .

10 *Nizamuddin v Jinnat Hossain* AIR 1948 Cal 130, 49 Cr LJ 120 .

11 *Moti Lal v Emperor* AIR 1925 All 540, 26 Cr LJ 1273 .

12 *Govind Chandra v Baidhar* ILR 1964 Cut 706 .

13 *Dhoora v State* ILR 1963 Raj 789, 1963 Raj LW 436 .

14 *Kaushalya Rani v State* 65 Punj LR 953 .

15 *Narendra Kumar Agarwal v Kallan Beg* 1966 All WR (HC) 570, 1966 All Cr R 345 .

16 *Shah Mohammed v Ganesh Dass* 2 Cr LJ 83 .

17 Re *Appanda Nath* 16 Cr LJ 271.

18 Re *Jambulinga Chetty*AIR 1924 Mad 862, 26 CR LJ 219 .

19 *Kor Singh v State* AIR 1965 J&K 90, (1965) 2 Cr LJ 504 .

20 *In the matter of Gobind Prasad*(1878-1880) ILR 2 All 465, p 467.

21 *Surendra Nath Sen v Sudhir Kumar Ghosh* 1966 AWR 395, p 398 .

22 *Jodha Ram v State* AIR 1954 All 67, 1954 Cr LJ 77 .

23 *Empress v Ganpat* Ratanlal Unrep Cr C 390.

24 *S Vullappa v Sbheema Row* AIR 1918 Mad 136 (2) (FB), 19 Cr LJ 162 ; *Bhagwant v Kedari* (1901) ILR 25 Bom 202, p 226, **approved** in *Mathri v State of Punjab* AIR 1964 SC 986, p 990, (1964) 2 Cr LJ 57 .

25 *Dura Ranbida v State* 1973 Cut LT 1303 .

26 *Ram Prakash v State* 1971 All WR 592, p 594 .

27 *Jodha Ram v State* AIR 1954 All 67, 1954 Cr LJ 77 ; *Jamuna Das v Emperor* AIR 1945 All 26 ; *Subhana v State* AIR 1954 All 193, 1954 Cr LJ 413 ; *Harakanta Biswas v Suvakl Singh* (1951) ILR 2 Cal 357 .

28 *PA Chinnaswamy v Chandra Rao S Kathavukar* 1975 Cr LJ 1535, p 1538-1539, 1975 Mad LW (Cr) 10 .

29 *Kunju Maiden Methararu v Kandan* AIR 1959 Ker 146, 1959 Cr LJ 588 .

30 *Lengu Satchindanand v State* ILR 1965 Cut 71 .

31 *Punjab National Bank Ltd v All India Punjab National Bank Employees Federation* AIR 1960 SC 160, p 176 .

32 *Shambhu Nath v Ram Kanud Guho* 13 CLR 912 .

33 *Sukhdeo Sharma v State* AIR 1961 All 637, (1961) 2 Cr LJ 756 ; *Narain Das v Emperor* AIR 1919 All 300 ((1)), 20 Cr LJ 463 .

34 *Adalat Sah v Emperor* AIR 1945 Pat 492 .

35 *Jamuna Das v Emperor* AIR 1945 All 26, 46 Cr LJ 211 ; *Baldewa v Emperor* AIR 1933 All 816, 35 Cr LJ 347 ; *Appukuttan v State of Kerala* 2010 Cr LJ 3186 (Ker), 2010 (1) Crimes 920, ILR 2009 (4) Kerala 231, 2009 (3) KLJ 360 .

36 *Khursetji Nanabhoy v Emperor* AIR 1927 Sind 159, 28 Cr LJ 349 .

37 *Ahmad Khan v Emperor* AIR 1936 Nag 176 .

38 *Emperor v Punjab Singh* (1881) ILR 6 Cal 579 .

39 Re *C Bashika* 1 Weir 528.

40 *Appukuttan v State of Kerala* 2010 Cr LJ 3186 (Ker), 2010 (1) Crimes 920, ILR 2009 (4) Kerala 231, 2009 (3) KLJ 360 .

41 *Naurang v Janta* AIR 1952 HP 27, 1952 Cr LJ 542 ; *Meajan v Sharafatullah Khan* 13 Cr LJ 783 .

42 *Abdul Hossain v Masadul Haq* 1972 Cr LJ 1499, p 1501 (Cal) .

43 *Bishan Dayal v Brij Behari* AIR 1933 Oudh 179, 34 Cr LJ 1014 .

44 *B Sundar Lal Gupta v Emperor* AIR 1937 Oudh 273, 38 Cr LJ 188 .

45 *Bhagwan Din v Emperor* AIR 1918 All 365, 19 Cr LJ 704 .

46 *Subhan v State* 1974 Cr LJ 731 (All) .

47 *Mangal Ram Bhagat v State* 1976 Cr LJ 362 (All) .

48 *Sristeedhur v Indrobhossun* 18 WR (Cr) 25 (1).

49 *Ramchandra v Ratho* 9 Cr LJ 561 (Nag) ; *Moti Lal v Emperor* AIR 1925 All 540, 26 Cr LJ 1273 .

50 *Jambulinga v Emperor* AIR 1924 Mad 862, 26 Cr LJ 219 .

51 *Marotrao Ganpatrao Jadhav v State* AIR 1960 Bom 481, 1960 Cr LJ 1425 .

53 *Maung Chan Tha v Emperor* AIR 1936 Rang 11, 37 CR LJ 527 .

54 *Sri Narain v Emperor* AIR 1936 All 146, 37 Cr LJ 244 ; *Parameshwara v Mrithuijaya* 1964 MLJ (Cr) 97, 1963 Ker LT 210 ; *Shiwe Kun v Emperor* 5 Cr LJ 415 (criminal court need not entertain complaints where complainant can obtain possession under the provision of the Specific Relief Act unless any of the intentions, referred to in s 441, IPC, is clearly made out); *Jasvantsinghji Bapubha v Gordhandas Dhanji Malviya* AIR 1952 Sau 22, 1952 Cr LJ 1098 .

55 *Chandrappa v Meghraj* AIR 1952 Hyd 38, 1952 Cr LJ 343 ; *Nila Majhi v Uda* 28 Cut LT 382 .

56 *Jaswanmal v Bhanwari* AIR 1958 Raj 214, 1958 Cr LJ 1099 ; *Emperor v Budh Singh* (1878-1880) ILR 2 All 101; *Dwarka Singh v Ram Krishan Singh* AIR 1917 Pat 542, 18 Cr LJ 402 ; *Ghuletan Dube v Kamlapati Sukla* AIR 1950 Pat 564, 51 Cr LJ 1565 ; *Garasia Jourubha v State* AIR 1954 Sau 110 ; *Kanbi Govind Hira v State* 56 Cr LJ 77, AIR 1954 Sau 156 ; Re *Arunachala Achari* J Weir 520(3); *Crown v Gill* 1 Cr LJ 1068 ; *Siddi Yakub v State* (1967) 2 Cr LJ 856, AIR 1967 Bom 229 ; *Jadeja Bapubha v Korshi Ranji* AIR 1951 Kutch 49, 52 Cr LJ 672 ; *Chhakoo Mandal v Emperor* 5 Cr LJ 278 ; *Kailash Chose v Jugal Lohar* 2 Cr LJ 161 ; *Habib Musalman v Emperor* AIR 1928 Nag 79, 28 Cr LJ 952 .

57 *Bhadra Kanta Das v State of Assam* 1981 Cr LJ (NOC) 91 (Gau) .

58 *Kunhayan v State of Kerala* 1967 KLT 14 (SN) .

59 *Parameshwar v Mrithunjaya* 1964 MLJ (Cr) 97, 1963 Ker LT 210 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 442.

House-trespass.--

Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

Explanation.--The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

COMMENTS

1. Scope

'House-trespass', which is defined in this section, is only an aggravated form of 'criminal trespass' inasmuch as that the punishment under it is severer.[60] There are five aggravated forms of the offence of house-trespass, four of them by reason of the gravity of the offence, for committing which there was the intention to commit trespass (ss 449-451, IPC), and the fifth by reason of making preparation for causing hurt, *etc*., or fear of it (s 452, IPC). The essential ingredients of the offence under this section are as under:

(a) the accused must commit criminal trespass as defined in the preceding s 441, IPC ; and
(b) the criminal trespass must be in any building, tent or vessel used as a human dwelling or any building used as a place for worship or as a place for the custody of property. In other words, the building should be the building used as a human dwelling or as a place for worship or as a place for the custody of property, while the tent or the vessel should be used as a human dwelling only.

As stated in the commentary under the preceeding s 441, IPC, *mens rea* is an essential ingredient to constitute the said offence of criminal trespass. In the absence of any evidence of criminal intent on the part of the accused no offence of criminal trespass can be held to have been made out against the accused, and in the absence of evidence of criminal trespass no offence of house-trespass under s 442, IPC, can be3746 held to have been established against the accused.[61] In *Kamalammal v Menakshi Ammal* [62] the accused, who had obtained a civil court decree for possession, broke open the lock without legal process of execution and got into the upstairs portion of the house. It was held that the undoubted civil right, vested in the accused was sufficient to negative the *mens rea*, which was necessary to constitute the offence under s 442, IPC, and, therefore, the accused was entitled to acquittal. Where the owner in charge of a house professed to be an accomplice and invited another to his house to commit an offence,[63] or where, for execution of a decree, the accused went with the civil court *amin* for the purpose

of attaching the cattle,[64]or where a sub-inspector searched the accused's house for cocaine but omitted to record his reasons, as required by s 53 of the Excise Act for not first obtaining a search warrant from a magistrate,[65] it was held that it did not amount to house-trespass as the requisite intention was not there. Where the accused entered a lock-up with the intention of conveying food to a prisoner detained there, it was held that this was not house-trespass as this was not punishable under the Prisons Act.[66] An accused, who is in the habit of visiting the casualty ward and seeing the doctor often, cannot be said to commit house-trespass.[67] Where, during the absence of the complainant, certain persons came in possession of the house and established there a boy, alleged to be the adopted son of the father of the complainant, it was held that there was no house-trespass.[68] However, where *A* enters *B*'s house under a forged warrant of arrest and takes away *B*, he commits house-trespass as here *A* intended to commit an offence under s 339 .[69] Where a police officer entered the house of a suspicious character at midnight to see if he was at home, it was held that he was guilty of an offence under this section such conduct being annoying and insulting.[70]

As mentioned in the second paragraph above, the accused must enter into, or remain in, any building tent or vessel, used as a human dwelling.[71] In *Hiralal v State* ,[72] it was held that an entry, and remaining, upon roof of a house does not constitute house-trespass though it may constitute house-breaking (s 445, IPC), but the above case, which does not lay down any general preposition, was dissented from, in *Dinesh Thakur v State of Bihar* ,[73] on the ground that the roof is part of the building, and this dissenting note was confirmed in *Sathe Tanti v State of Bihar.* [74] The latter decision justifies its dissent, and it does so correctly, on the reasoning that roofs of houses in villages are are to be used for the purpose of storing and drying things, theft of which has to be held as theft in a dwelling house.3747

The introduction of any part of the criminal trespasser's body entering is sufficient. To put in hand,[75] or finger,[76] or to put a foot over the threshold, is a sufficient entry. To remove a trap-door does not, however, amount to a house-trespass as to constitute this offence the introduction of some part of the criminal trespasser's body is necessary.

In an offence under this section, it is not within the province of the magistrate to decide whether the complainant has title to the land in question or not; he is only concerned with the question of possession of the complainant as far as the offence of criminal trespass is concerned.

2. 'Building'

Whether a particular property comes within the definition of a 'building' is a matter which must be decided on the facts of each case.[77] In *Makkhan v Emperor* ,[78] it was observed that what is a building within the meaning of s 422 must always be a question of degree and circumstances, and it is, therefore, impossible to lay down a general definition. However, the ordinary meaning of the word 'building' is an enclosure of brick or stonework covered in by a roof.[79] However, it is not necessary that either bricks or stones should be used to make the walls of a house before it can be called a 'building' because it may well be made of mud.[80]

A thatched hut built for the purpose of residence is a building.[81]

The determining factor as to whether a place is part of building, used as a human swelling, is not the existence of shutters, or the fact that the door was shut or open, at the time of entry by the accused, but the nature of the structure as a whole, and the purpose for which it was intended to be, and was being, used.[82] The mere rigging up an awning without any thatch or iron roof,[83] or tin-shed open on three sides adjoining a shop,[84] or the mere surrounding of an open space of ground by a wall or fence of any kind,[85] will not make it a building. Similarly, an open space before a thatched house with some thorny bushes placed round about the with no roof above and with no door or gateway, even of thorn, is not a building.[86]

3. *Sahan*--Whether a Building

Judicial opinion is divided whether a walled compound of a house is a building. The Allahabad High Court

says that an open unroofed space, which is the outer *sahan* of the house, with some sort of *kacha* boundary wall having no doors or door-levels,[87]3748 or a courtyard formed by some thorns to mark the boundary of the courtyard in front of a thatched house,[1] is not a building. Similarly, the Lahore High Court observes that a walled courtyard not provided with a door,[2] or a courtyard enclosed by low walls on three sides only,[3] or a courtyard partly surrounded on the front by a mud wall with no roof over it, nor any door or gateway,[4] is not a building or a house. On the other hand, it has been held in several cases that *sahan* would come within the meaning of the term 'building', *i.e.*, an unroofed courtyard in an Indian house, which is surrounded, on all sides, by rooms, is a building.[5] So also, the courtyard of a house where the complainant lived and tethered his cattle,[6] or a courtyard consisting of a walled enclosure with four *kothas* or chambers opening into it, and an outer door or a gate leading into a side street[7] would be a building.

4. Compound--Whether a Building

The word 'compound' is not included in the expression 'building...used as a human dwelling'.[8] Similarly, entering into an ordinary compound is not a house-trespass.[9] However, where a *wara* formed an indivisible part of the building and was surrounded on all the four sides by a wall and entrance and exit were effected through a small gate of *phalla* which was kept locked at night, it was held that though the *wara* was unroofed, it was a 'building' within the meaning of s 442 .[10]

5. Outer Verandah--Whether a Building

An extreme view, that every outer verandah is necessarily a building used as a human dwelling or as a place for custody of property or that it can never be such a building, should be avoided and cannot be accepted. The question, whether a particular outer verandah answers the requirements of s 442, IPC, should be determined on the general considerations with due regard to the actual user of the verandah as also its adaptability to user for residence or custody of property having due regard to the general notions of the people in relation to residence and custody of the property.[11]

6. *Dalan*, Porch or Portico--Whether a Building

Dalan, or an entrance hall, surrounded by a wall with two doorways, without doors used for the custody of property, would be a 'building'.[12] Similarly, entering into a porch or portion of a building, enclosed by walls, would be a house-trespass.[13]3749

7. Enclosure for Cattle--Whether a Building

Where the accused made his way into the cattle enclosure, entrance being effected by making a hole in the hedge, his intention being to commit theft of the cattle, it was held that a cattle fold or pen with a thorn hedge around it was not a building and the accused was not guilty under s 442, but only under ss 379 / 511 .[14] However, in *Empress v Duillee* ,[15] it was held that a cattle yard, which was originally walled on four sides and in which in one side there was a gap stopped with thorns, was a building, used as a place for the custody of property, within the meaning of s 442 .

8. *Dehlij*--Whether a Building

Dehlij, by itself, indicates nothing more than an entrance into a building and it cannot be regarded as the building itself. At the most, it can be said that it is an entrance which leads to ingress and egress from the building itself.[16]

9. *Wehara*--Whether a Building

A *wehara* used for the custody of property is a building.[17]

10. 'Tent'

Commentary under the same heading in s 380, *ante*, may be referred to.

11. 'Vessel'

A ferry-boat is not a vessel within the meaning of s 442, IPC as it is not used as a human dwelling.[18]

12. 'Used as a Human Dwelling'

Commentary under the same heading in s 380, *ante*, may be referred to.

60 *Makkhan v Emperor* AIR 1945 All 81, 46 Cr LJ 750 .

61 *Mohd Sahabuddin v Sayed Monowar Hussain* 1999 Cr LJ 349 (Gau) .

62 *Kamalammal v Menakshi Ammal* 1971 Cr LJ 1483, p 1484, 1971 Mad LW (Cr) 116 .

63 Re *P Kamaraju* 1 Weir 534.

64 *Bhikam Singh v Emperor* AIR 1918 All 374 ((2)), 19 Cr LJ 46(1) ; *Abdul Sattar v Moti Bibi* AIR 1930 Cal 720, 31 Cr LJ 1223 .

65 *Ali Abbas v Subha Singh* AIR 1925 Oudh 505, 26 Cr LJ 1205(1) .

66 *Emperor v Lalai* (1878-1880) ILR 2 All 301.

67 *Chackoi George v State of Kerala* AIR 1968 Ker LT 219, p 222 .

68 *Soita Biswal v Dochi Stri* 7 Cr LJ 108 .

69 *Empress v Nundmohan* 12 WR (Cr) 33 .

70 *Dorasami Pillai v Emperor* (1904) ILR 27 Mad 52, 1 Weir 529 .

71 *Puran Singh v State of Punjab* 1976 Cr LJ 683 (Punj) .

72 *Hiralal v State* 1951 ALJ 46 ; *Ali Bux v Emperor* 9 PR 1887 ; *Fazla v Emperor* 9 PR 1890 ; *Nanhun v Emperor* AIR 1933 Lah 433(1), 34 Cr LJ 1181 ; Re *Mullua*1900 AWN 151, 1 Weir 435.

73 *Dinesh Thakur v State of Bihar* 1970 Cr LJ 1199 .

74 *Sathe Tanti v State of Bihar* 1974 Cr LJ 76, 1973 Pat LJR 367 .

75 *R v Gibbons* 1752 Fost 107 ; *R v O'Brein* (1850) 4 Cox CC 398 .

76 *R v Davis* 1823 R & R 499; *R v Bailey* (1888) 8 R & R 341.

77 *Ramjee Kahar v State* AIR 1961 Pat 409, (1961) 2 Cr LJ 540 .

78 *Makkhan v Emperor* AIR 1945 All 81, 46 Cr LJ 750 .

79 *Moir v Williams* (1892) 1 QB 254, per Lord Eshar.

80 *Ramjee Kahar v State* AIR 1961 Pat 409, (1961) 2 Cr LJ 540 .

81 *Salig Ram v Emperor* 17 Cr LJ 536 .

82 *Bhag v Emperor* AIR 1930 Lah 414, 31 Cr LJ 268 .

83 *Emperor v Shankar Dayal* AIR 1938 Oudh 263, 39 Cr LJ 957 .

84 *Dal Chand v State* (1956) 1 Cr LJ 236, (1964) ILR Raj 114 .

85 *Kohmi v Emperor* AIR 1914 Lah 584 ((2)), 16 Cr LJ 1 ; Re *Palani Goundar* 1 Weir 523.

86 *Munshi v Emperor* AIR 1928 All 607 ((1)), 29 Cr LJ 766 . For further commentary, see under same heading in ss 380 and 436 *, ante*.

87 *Makkhan v Emperor* AIR 1945 All 81 .

1 *Munshi v Emperor* AIR 1928 All 607 ((1)), 29 Cr LJ 766 .

2 *Buta v Emperor* AIR 1924 Lah 623, 25 Cr LJ 457 .

3 *Mul Chand v Emperor* AIR 1925 Lah 279(2), 26 Cr LJ 383 .

4 *Sunder v Emperor* AIR 1919 Lah 333, 20 Cr LJ 240 .

5 *Ramjee Kahar v State* AIR 1961 Pat 409, (1961) 2 Cr LJ 540 .

6 *Kartar Singh v State* AIR 1956 Punj 122, 1956 Cr LJ 654 .

7 *Shera v Emperor* 35 PR 1879 (FB) .

8 *Empress v Rama* Ratanlal Unrep Cr C 484.

9 *Thet v Emperor* 4 LBR 24 .

10 *Ismail v Emperor* AIR 1926 Lah 28, 27 Cr LJ 38 .

11 *Dalchand v State* (1966) 1 Cr LJ 236, 1964 Raj LW 524 ; *Sit Hon v Emperor* 18 Cr LJ 81 ; *Naga Pan Hlaing v Emperor* 16 Cr LJ 2 .

12 *Dad v Crown* 10 PR 1879 .

13 Re *Gholam Jelani* 16 PR 1869.

14 *Kohmi v Emperor* AIR 1914 Lah 584 ((2)), 16 Cr LJ 1 ; *Emperor v Ramzan* 2 Cr LJ 420 ; *Suchja Singh v Emperor* 57 PR 1887 .

15 *Empress v Duillee* 6 NWP 307 .

16 *Joddan v State* 1973 Cr LJ 490, p 492, 1972 ALJ 986 .

17 *Niamat v Emperor* AIR 1925 Lah 117, 26 Cr LJ 753 .

18 *Dhananjoy Dhara v Provat Chandra Biswas* AIR 1934 Cal 480, p 482, 35 Cr LJ 949 . For further commentary, see under same heading in s 380, *ante*.

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 443.

Lurking house-trespass.--

Whoever commits house-trespass having taken precautions to conceal such house-trespass from some person who has a right to exclude or reject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house-trespass".

COMMENTS

1. Scope

House-trespass, which has been defined in the preceding s 442, IPC, may be aggravated by being committed in a surreptitious, or in a violent manner. The former3750 aggravated form of house-trespass is designated as lurking house-trespass, and the latter as house-breaking. Again house-trespass in every form may be aggravated by the time at which it is committed. Trespass of this sort has always, for obvious reasons, been considered as a more serious offence when committed by night than when committed by day. Thus, there are four aggravated forms of house-trespass, *i.e.*, lurking house-trespass, house-breaking, lurking house-trespass by night, and house-breaking by night. It may be further be stated that there are five aggravated forms of the offence of lurking house-trespass, *vis*, (i) by reason of its being committed during night; (ii) by the gravity of the offence; (iii) by reason of being accompanied by preparation; and (iv) for causing grievous hurt or attempting to cause death or grievous hurt.

Lurking house-trespass, which is defined in this section, *i.e.*, s 443, IPC, is made punishable under s 453, IPC, and punishments are enhanced according to the gravity of the offence for committing which it was made (ss 454 and 455, IPC). Another aggravated form is the one in which grievous hurt is caused or an attempt is made to cause death or grievous hurt (s 459, IPC). In such cases, all person, jointly concerned in lurking house-trespass, become punishable (s 460, IPC).

A house-trespass must have all the elements of the offence of criminal trespass as defined in s 441, IPC, *i.e.*, there must be the intention to commit an offence or to intimidate, insult or annoy. However, in committing the offence of lurking house-trespass, the question of criminal trespass with the intention to intimidate, insult or annoy can hardly arise, although it is not wholly inconceivable. Generally, the offender enters a house to commit an offence after taking precautions against detection. Hiding in a corner of a porch is within the definition of this section.[19] In order to constitute lurking house-trespass, the offender must take some active means to conceal his presence.[20] Where the accused, seeing the *chaukidar* asleep in the verandah, snatched a pair of shoes from under the bed and then ran away, when the *chaukidar* was in the process of waking, and there was nothing to indicate that he took any active steps to conceal his presence, his conviction was altered to one under s 451, IPC .[21]

2. 'Right to exclude or Reject'

These words have not been used in s 441, IPC where the words used are 'property in the possession of another'. In this section, the offence is committed if precautions are taken to conceal the house-trespass 'from some person who has a right to exclude or reject'. It appears that such a right can be exercised by the owner or joint owner and perhaps also by those who are interested in possession. It is not clear if taking precautions to conceal from other persons would be covered by the section.3751

19 *Ghulam Jelani v Emperor* 16 PR 1889 .

20 *Budha v Emperor* 17 Cr LJ 304 ; *Nasiruddin v State of Assam* AIR 1971 SC 1254, p 1256, 1971 Cr LJ 1073 ; *Raghusingh v State of Madhya Pradesh* 1980 Cr LR (MP) 69, p 71 (notes) ; *Jaldeep Singh v State* 1953 Raj LW 243 ; *Chhadami v Emperor* AIR 1940 All 259, 41 Cr LJ 623 ; *Mosahed Dome v Emperor* AIR 1940 Pat 14, 40 Cr LJ 833 (2).

21 *Chhadami v Emperor* AIR 1940 All 259, 41 Cr LJ 623 ; *Mosahed Dome v Emperor* AIR 1940 Pat 14, 40 Cr LJ 833 (2).

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 444.

Lurking house-trespass by night.--

Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night".

COMMENTS

1. Scope

Lurking house-trespass by night is considered to be more serious form of the offence and is punishable under s 456, IPC . Higher punishments are prescribed in respect of the offence again according to the gravity of the offence which was intended to be committed.

By 'night' is meant the period between sunset and sunrise.

In order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. The mere fact that a house-trespass was committed by night, does not make the offence one of lurking house-trespass by night.[22] Where the accused entered a dwelling-house to steal clothes and utensils and removed some of the articles, but before he could take them away, an alarm was made and he was caught, it was held that his conviction ought to have been under s 380, and not under s 457, IPC .[23] If the house-trespass is a 'lurking house-trespass' because the offender had taken some active steps and means to conceal his presence, it becomes automatically lurking house-trespass by night under this section if it is committed after sunset and before sunrise.[24] Where an assistant sub-inspector entered the office of the *thana* in the darkness of the night in an unearthly hour and participated in the commission of theft, it was held that it amounted to lurking house-trespass by night, and the case clearly came within the scope of s 457, IPC .[25]

22 *Budha v Emperor* 17 Cr LJ 304 ; *Prem Bahadur v State of Sikkim* 1978 Cr LJ 945, p 950 ; *Jaldeep Singh v State* 1953 Raj LW 243 ; *Chhadami v Emperor* AIR 1940 All 259, 41 Cr LJ 623 ; *Mosahed Dome v Emperor* AIR 1940 Pat 14, 40 Cr LJ 833 (2).

23 *Bhagwana v Emperor* 19 Cr LJ 699 ; *Gangadhar Jena v State of Orissa* 1981 Cr LJ (NOC) 209 (Ori) .

24 *Prem Bahadur v State of Sikkim* 1978 Cr LJ 945, p 950 .

25 *Birendra Chandra De v State* AIR 1957 Assam 168, 1957 Cr LJ 1231 .

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Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 445.

House-breaking.--

A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence, or having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say--

First.--If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly.--If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance, or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly.--If he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.3752

Fourthly.--If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.--If he effects his entrance or departure by using criminal force or committing an assault or by threatening any person with assault.

Sixthly.--If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation.--Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations

(a) *A* commits house-trespass by making a hole through the wall of *Z's* house, and putting his hand through the aperture. This is house-breaking.
(b) *A* commits house-trespass by creeping into a ship at a port-hole between decks. This is house-breaking.
(c) *A* commits house-trespass by entering *Z's* house through a window. This is house-breaking.
(d) *A* commits house-trespass by entering *Z's* house through the door, having opened a door which was fastened. This is house-breaking.
(e) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in door. This is house-breaking.
(f) *A* finds the key of *Z's* house door, which *Z* had lost, and commits house-trespass by entering *Z's* house, having opened the door with that key. This is house-breaking.
(g) *Z* is standing in his doorway. *A* forces a passage by knocking *Z* down, and commits house-trespass by entering the house. This is house-breaking.
(h) *Z*, the door-keeper of *Y*, is standing in *Y's* doorway. *A* commits house-trespass by entering the house, having deterred *Z* from opposing him by threatening to beat him. This is house-breaking.

COMMENTS

1. Scope

House-breaking is only an aggravated form of house-trespass inasmuch as the punishment under it is severe still.[26] There are two forms of this offence, namely:

(a) house-trespass effected by an entry in any one of the six ways specified in the section; and3753
(b) leaving the house in any of the six specified ways after being there for the purpose of committing an offence or after committing an offence there.

The two forms of the offence may, thus, be analysed as follows:

(a) (i) an entry in any one of the six ways specified in s 445, IPC, (ii) into property as specified in s 442, IPC (subject to the explanation to s 445, IPC), and (iii) with one of the intents specified in s 441, IPC ; and
(b) the person so leaving had the intention to commit, or had committed, an offence punishable under the IPC or under any special or local law (s 40, IPC).

2. Law of Canada

The following are offences under the Code:

- breaking and entering a place with intent to commit an indictable offence therein,
- breaking and entering a place and committing an indictable offence therein, or
- breaking out of a place after committing an indictable offence therein, or entering the place with intent to commit an indictable offence therein.

Actus reus

'Break' means to break any part, internal or external, or to open any thing that is used or intended to be used to close or to cover an internal or external opening. Entry through an open door wide enough to allow the accused to enter without any further opening is not 'breaking'. Entry through a public entrance during store hours with intent to hide and remain until store is gets closed in order to then commit theft is not 'breaking'.

A person 'enters' as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered into; and a person shall be deemed to have broken and entered if he obtained entrance by a threat or an artifice or by collusion with a person within, or he entered without lawful justification or excuse by a permanent or temporary opening. The Code's provision is constitutional, except for the reverse onus that is inoperative. Entering an underground parking garage of an apartment building by following in a tenant's car constitutes obtaining entrance into the building by 'artifice'. Entry through a public entrance during store hours with intent to hide and remain until store is closed in order to then commit theft is not 'breaking'. 'A permanent or temporary opening' was held to include a doorway that was uncovered and open in a partly-built house because the door had not yet been installed.

'Place' means:

- a dwelling house;
- a building or structure or any part thereof, other than a dwelling house;
- a railway vehicle, a vessel, an aircraft or a trailer; or
- a pen or an enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes.

An area enclosed by a permanent fence and building is a 'place'. A tent is a 'place'. If it is used as a temporary residence by persons to sleep, it is a 'dwelling house'. A partly-built house is not a dwelling house within the meaning of s 2 of the Criminal Code of Canada for the purposes of s 348(1)(a), where the 'house' had not yet been occupied as a dwelling house because it was only partially completed. An unoccupied, parked motorhome is not a 'place' under s. 348(3)(b) .3754

'Structure' in s 348(3) of the Criminal Code does not include a lot that could be entered simply by walking around a chain barrier.

Doctrine of recent possession

The unexplained recent possession of stolen goods standing alone will permit the inference that the possessor stole the goods. The inference is not mandatory. It may, but need not be drawn. If an explanation is offered for such possession that could reasonably be true, no inference of guilt may be drawn even where the trier of fact is not satisfied of the truth of the explanation. The Crown would have to prove guilt beyond a reasonable doubt by other evidence. The doctrine applies equally to charges of possession of stolen property and to breaking and entering and committing theft. Where the circumstances are such that the issue arises whether the accused is the thief or merely a possessor, it will be for the trier of fact to decide in light of all the evidence which, if either inference should be drawn. The doctrine requires proof of possession by the accused. Explanations for possession made by the accused to the police upon being found in possession can be brought out in cross-examination of the police witnesses. Recency is a question dependent upon all the circumstances, including the nature of the goods and how quickly they would pass into innocent commerce. The doctrine of recent possession does not offend s 11(d) of the Charter.

Presumed intent

Evidence that an accused broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein. Similarly, evidence that an accused broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after committing an indictable offence therein, or entering with intent to commit an indictable offence therein. This latter presumption contravenes s 11(d) of the Charter, but is saved by s 1 .

These presumptions merely establish a *prima facie* case. The burden of proof does not shift. The accused need only raise a reasonable doubt with evidence that is not rejected or disbelieved. The presumption is not available where the indictment specifies a particular indictable offence. The point of entry is the time at which the accused's intention is to be ascertained. The application of the presumption at that point, in the absence of evidence to the contrary, supplies the proof of the requisite intent. Evidence of alcohol and drug consumption and irrational behaviour is 'evidence to the contrary' tending to negative the requisite intent. The fact the accused did not commit an offence after entering the premises does not constitute 'evidence to the contrary'.

Defence

Intoxication is not a defence to a charge under s 348(1)(b), an offence of general intent (unless a specific intent for an indictable offence is alleged), but is a defence under s 348(1)(a) .

Procedure and punishment

If the offence is committed in relation to a dwelling house, the offence is indictable and the maximum sentence on conviction is life imprisonment. If the offence is committed in relation to a place other than a dwelling house, then the accused is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years or of an offence punishable on summary conviction. A home invasion3755 scenario is an aggravating circumstance on sentencing. Therefore, if the dwelling house is occupied and that the accused knew or was reckless as to whether the dwelling house was occupied and that the accused used violence or threats of violence in committing the offence, he would be guilty of an indictable offence and would be punished with imprisonment for a term not exceeding 10 years.

Home invasion

'Home invasion' cases call for a particularly nuanced approach to sentencing. They require a careful examination of the circumstances of the particular case in question, of the nature and severity of the criminal acts perpetrated in the course of the home invasion, and of the situation of the individual offender. Whether a case falls within the existing guidelines or range -- or, indeed, whether it may be one of those exceptional cases that falls outside the range and results in a moving of the yardsticks -- will depend upon the results of such an examination. In cases of this nature, the objectives of protection of the public, general deterrence and denunciation should be given priority, although the prospects of the offender's rehabilitation and the other factors pertaining to sentencing must also be considered. A stiff penitentiary sentence is generally called for.

Included offences

A charge of breaking and entering with intent to commit an indictable offence includes a charge of being unlawfully in a dwelling-house. A charge of breaking and entering and theft does not include the offence of possession of property obtained by crime. The offence of breaking and entering with intent to commit an indictable offence was found to be a 'lesser included offence' on a count of break and enter and aggravated assault and a count of break and enter and assault causing bodily harm. Being unlawfully in a dwelling house with intent to commit an indictable offence is a 'lesser but included offence' in comparison to the offence of unlawfully breaking and entering a dwelling house and committing assault causing bodily harm.

In *R v Ausland* ,[27] it was observed: 'It is apparent from these latter cases that the courts, in dealing with the break and enter sections of the *Code,* have interpreted the word 'structure' to include, in certain circumstances, spaces enclosed by a fence. In our view, however, to extend the meaning further to include unenclosed spaces, like the yard in the present case, would go too far and rob the word 'structure' of any effective meaning. At the very least, a structure must be something that can be broken into and entered. In this case, entry to the lot could have been gained by simply walking around the barrier created by the chain. As the Nova Scotia Court of Appeal noted in *Thibault*, a structure that is not also a building consists of the area enclosed and the thing that encloses it - in that case, a fence. Here, both elements are missing. The fact that the yard is patrolled does not convert an open space into a structure.'

In *R v Rodney* ,[28] it was stated: 'We agree with the submission of the respondent that the purpose of the combination of the offence of breaking and entering with intent and the presumption created by s 348(2)(a) is to deal precisely with the situation where the accused has broken and entered, yet committed no offence. Here, the appellant offers nothing more than the fact no offence was committed. To say that that constitutes evidence to the contrary would be to ignore the presumption and essentially gut it of any meaning.'3756

3. Specified ways of House-breaking

There are six ways in which an entry or an exit may be made to make an offence of house-breaking. Each of them has been explained by illustration to the section. They may be classified as follows:

(a) by some act of the offender, or his abettor, by:

(i) making a passage [cl firstly, illust (a)], or
(ii) opening a passage by any means by which it was not intended by the occupier to be opened [cl thirdly, illust (e)], or
(iii) by opening any lock [cl fourthly, illust (f)], or
(iv) by unfastening a passage fastened against entrance or departure [cl sixthly, illust (d)];

(b) by adoption of some abnormal passage not otherwise intended (*e.g.,* scaling or climbing any wall) [cl secondly, illusts (h) and (c)]; and
(c) by use of criminal force or committing or threatening an assault [cl fifthly, illusts (g) and (h)].

4. Clause Firstly

Making a hole through a wall for passage or exit would bring the case under this clause [refer to illust (a)]. However, where a hole is made in a wall but the passage is blocked by beams and the hand is not put right through the hole, the offence would be only of an attempt to commit house-breaking and the illustration would not apply to the case.[29]

5. Clause Secondly

For example, apertures intended solely for the admission of light or air [refer to illusts (b) and (c)]. A window intended likewise to serve as a door would not come under this clause. Apertures, constructed for the purpose of receiving goods into a cellar or warehouse,[30] or chimneys, may be cited as further examples of passages not intended for human entrance. It is immaterial whether the passage in question is open or close when the trespasser seeks to enter.

Effecting an entrance into a house at night by scaling a wall constitutes house-breaking by night under s 445, IPC .[31]

6. Clause Thirdly

The passage must have been opened by the trespasser or by one abetting him. Therefore, to enter through a door or window intended for human entrance, which the trespasser finds open, is not house-breaking, and it has been held that a further opening so as to admit of the entrance of the person in question does not constitute a breaking.[32] However, a door or window is not open if it is shut, though not fastened. To push, or pull open, it is a breaking.[33]3757

7. Clause Fourthly

Commentary under s 442, *ante*, may be referred to.

8. Clause Fifthly

Where the accused, who entered into a house at night with a vessel under his arm, effected his departure from the house after knocking down a person who stood in the doorway, it was held that the conviction of the accused for house-breaking by night was good.[34]

9. Clause Sixthly

If the door is unfastened by turning the key of a lock, the entry thereby effected falls under cl 'fourthly'. Loosening/unfastening any other fastening, which the owner has provided, as the drawing or lifting up a

latch, would be house-breaking under the English law[35] and would fall under this clause.

The term 'fastened' implies something more than being closed, such as chaining the shutters or tying them with a rope or bolting them or locking the door. Where the accused entered into the house by merely pushing in the shutters of the door, it was held that this does not come under any of the six clauses of s 445, and the case would fall under s 451, IPC .[36]

10. Explanation

The property entered must be of the kind specified in s 442, IPC ; but if it is a dwelling-house, it will, for the purpose of this offence, include only the actual house and buildings occupied with it, and connected with it, by 'an immediate internal communication'.

26 *Makkhan v Emperor* AIR 1945 All 81, 46 Cr LJ 750 .

27 *R v Ausland* 2010 AJ No 41 .

28 *R v Rodney* 2007 OJ No 1626 (*Vide Halsbury's Law of Canada*).

29 *Ghulam v Emperor* AIR 1923 Lah 509, 25 Cr LJ 398 .

30 *R v Russel* (1833) 1 Mood 377 ; *R v Browne* (1799) 2 East PC 487 .

31 *Empress v Emda Ally* 2 WR (Cr) 65 (2).

32 *R v Smith* (1827) 1 Mood 178 .

33 *R v Haines* (1821) R&R 451 ; *R v Hyams* (1836) 7 C & P 441.

34 Re *Solai* 1 Weir 530. For further commentary, see the commentary under s 442, *ante*.

35 *R v Owen* (1827) 1 Lew 35 .

36 *Ledga v Emperor* AIR 1922 Nag 26, 23 Cr LJ 278 .

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Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 446.

House-breaking by night.--

Whoever commits house-breaking after sunset and before sunrise, is said to commit "house-breaking by night".

COMMENTS

1. Scope

'House-breaking', as contemplated by the proceeding s 445, IPC, if committed after sunset and before sunrise, is 'house-breaking by night'. Therefore, the commentary under the preceding section may be referred to.

2. Conviction for House-breaking by Night and Murder

Where the accused persons, being police constables, allegedly committed the offences of house breaking by night and murder of the deceased, and the evidence of3758 the eye-witnesses including the injured witnesses proved the participation of the accused, though the name of the accused persons was not mentioned in the FIR, their complicity was proved by the investigating officer and the use of the official rifles by the accused in the incident was established and the recovery of fire-arms and empty cartridges further proved culpability of the accused persons. All the three accused were found missing from the place of duty after the incident and each one of them had played active role. In view of the said evidence, it would not be necessary to prove motive on the part of the accused persons. The conviction of the accused persons under ss 446 and 302, IPC was found proper.[37]

37 *Sarup Singh v State of Punjab* 2005 Cr LJ 4518 (SC) .

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Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 447.

Punishment for criminal trespass.--

Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

COMMENTS

1. Scope

The preceding ss 441 to 446, IPC define the various kinds of the offence of criminal trespass. This and the following sections prescribe punishment for those offences. This section provides for punishment for the simplest kind of criminal trespass in which there are no aggravating features of the offence as defined in

ss 442 to 446, IPC . If there is criminal trespass and it is not of a kind covered by ss 442 to 446, it would be punishable under this section. Where, however, the Court does not give a specific finding that the trespass was for committing one of the acts, mentioned in s 441, IPC, the conviction is bad in law as it is not every trespass which is punishable.[38] In deciding criminal intention, the court has to take all the circumstances into consideration. When all, that the accused did, was to plough the land and spread manure asserting that one of them was in possession of the land in lieu of his wages, it was held that it was not reasonable to conclude that the dominant intention of making the entry was to annoy the complainant.[39] Where the accused had a customary right to draw water from a particular well and they went there variously armed to assert their legal right when the opposite party enclosed the entire land by thorny bushes to close their (accused's) access to the well in order to infringe their right, it was held that they had committed no criminal trespass because they had only3759 asserted their legal right to draw water from a well.[40] However, the mere assertion of a claim of right to the property in dispute is not in itself a sufficient answer to the charge under this section. If the Court reaches the conclusion that the accused was not acting in the exercise of a *bonafide* claim of right while entering upon the land in dispute, it will have no option but to convict the offender if the other ingredients of criminal trespass are established.[41]

2. Essentials

In order to satisfy the conditions of s 441, IPC, it must be proved that the person entered in possession over the premises with an intent to commit an offence. Mere occupation even if illegal cannot amount to criminal trespass.[42]

3. Section 427 Distinguished from Sections 447 and 448

Commentary under s 427, *ante*, may be referred to.

4. Sections 447 and 448

Commentary under the heading in s 448, *post*, may be referred to.

5. Procedure

The offence under this section is cognizable, bailable, compoundable by the person in possession of the property trespassed upon, and triable by a magistrate, and may also be tried summarily. The Court cannot acquit the accused under this section without taking evidence despite the absence of accused and prosecution witnesses.[43]

6. Person Competent to make a Complaint of an Offence under Section 447

Any person is competent to make a complaint for an offence under this section even if he may have not been in possession of the property trespassed upon, and even if the offence may have been committed against a third person.[44]There is no authority for taking the offence of mischief and trespass out of the general rule which allows any person to complain of a criminal act.[45]

7. Bar under Section 84(2) of Delhi Land Reforms Act 1954

A bare reading of s 84(2) of the Delhi Land Reforms Act 1954 makes it abundantly clear that where a person against whom a decree of ejectment has been executed and he re-enters or attempts to enter upon such land, he shall be presumed to have committed an offence within the meaning of s 441 of IPC . This section is not a *carte blanche* for any person to walk into and trespass upon anyone's property, be it3760 agricultural land or otherwise. The section is a deeming provision in case of admitted re-entry after a decree of ejectment has been executed. The same is not a bar to taking action in case of trespass under s 441, IPC . Therefore, when the accused intentionally encroached upon the *gram sabha* land, the order framing charge against him under s 447, IPC and the proceedings emanating therefrom are not barred under s 84(2) of the Delhi Land Reforms Act 1954.[46]

8. Charge

The offence under this section being triable as a summons-case, framing of a formal charge is not necessary. Section 251 of CrPC 1973 may be referred to.

9. Proof

In order to establish an offence under this section, the prosecution must prove that:

(a) the property in dispute was in the possession of a person other than the accused;
(b) the accused entered into, or upon, that property or remained there unlawfully after entering the same lawfully; and
(c) the accused did so with intent:

(i) to commit an offence, or
(ii) to intimidate, insult or annoy such person.

10. Possession of Complainant

In a prosecution for criminal trespass, the complainant must establish beyond reasonable doubt that he was in possession of the disputed plots.[47] In such case, it is necessary to determine whether the accused had been in possession prior to, and up to, the date of occurrence.[48] The complainant/injured was a *khatedar* of the field and the accused persons entered into it for grazing cattle with the intention to annoy the complainant, and so were guilty of the offence under s 447, IPC .[49] However, where there is ample evidence to hold that there is dispute between the parties over the possession of the disputed land, the entry of an accused over the disputed land cannot be said to be criminal trespass.[50] Where the field at which the assault took place, was in the exclusive possession of the accused person, they cannot be termed as trespassers and their acquittal under s 447, IPC, is proper.[51] If it is found that the accused were the joint tenants, perhaps it cannot be stated that they committed the offence of criminal trespass because, being the joint tenants, they had every right to go over their land and to grow crops.[52] Where, however, the right and title of the complainant to a tamarind tree was established in a civil suit and the accused took away its usufruct, it was held that the criminal court was not entitled to disregard the decree of the civil court declaring rights to the property and, therefore, the acquittal3761 of the accused was had in law.[53] However, the finding, given on the question of possession in proceedings under s 145, CrPC, cannot be treated as conclusive and binding on the court trying the offence under s 447, IPC, even if the two cases are based on the same occurrence. The court trying the offence of criminal trespass, must come to its own conclusion on the material placed before it. It may be relevant for such court to consider the order, made under s 145, CrPC, but, without anything else, no conviction can be justifiably founded upon such order or the findings related to it.[54]

A complaint was filed against accused appellant under ss 447, 427 and 506, IPC with allegations that the accused appellant demolished the compound wall existing on the complainant's land and was harassing and threatening. The complainant's evidence showed that the complainant was not in possession of the disputed plot on the date of alleged incident, as such the allegation of demolition of compound wall was baseless. There was no allegation of threats or intimidation in the complaint. The complaint filed in the case was frivolous; it was a total abuse of process of law. Complaint was quashed on petition filed under s 482, CrPC .[55]

11. Right of Private Defence

When the evidence on record shows that the accused persons were in possession of the land, and their defence probabilised that they were defending their possession when attacked by the prosecution party, it was held that they have a right of private defence of property as well as of person.[56]

12. Intention

Intent of the accused being the essence of the offence of criminal trespass, it is not enough to show that the accused entered into the property in the possession of another person; it must further be shown, or found from the evidence in record, that the main intention was to commit an offence or to intimidate, insult or annoy such person.[57] One or the other of the said intents must be expressly found upon evidence and must not be left to inference.[58] There must be a clear finding as to intention of the accused. The antecedent circumstances, as also the conduct of the parties, must be considered in such a case.[59] Unless there is a finding that the accused persons entered on the land with the intention of cutting the betel leaf creepers, or with the intention of causing annoyance to the complainant, or that mischief was done, there can be no conviction under either s 447, or s 427, IPC .[60] It is, however, impossible to produce direct evidence of intention, unless the accused himself gives expression to it. It has, in most of the cases, to be inferred from circumstances.[61] Where the applicant entered into possession of the disputed land on the basis of issue of CH Form no 23, it was held that there could be no intention on the part of the applicant to3762 enter upon the disputed land either to intimidate, or to cause annoyance to, the complainant.[62] Likewise, where there was a *bonafide* dispute of a civil right and the accused exercised his right of way, it was held that he had no criminal intent to commit the offence of criminal trespass.[63]

13. Quashing of Proceedings

When the allegations were that the accused persons on instigation of the main accused committed criminal trespass and demolished the wall and the order of cognizance against the main accused was set aside by the High Court, the order of cognizance against the co-accused is also liable to be quashed.[64]

14. Acquittal

Where admittedly the land in question was actually in possession of the opposite party and they were ploughing it, even though allegedly by force, the trial court found that the witnesses were ignorant as to who were in possession of the land in question, and there was litigation pending between the parties as regards the same land, hence the acquittal of the accused persons was found proper.[65] When the accused persons, after purchase, get the rights over the plot, s 447, IPC is not attracted.[66]

15. Conviction

An offence under s 447, IPC, being distinct and separate from other offences, the accused can be convicted under s 447 even if they may have been acquitted of the charges under ss 143, 294 and 426, IPC .[67] If, however, the accused, charged with stealing rice plants, is acquitted, his conviction for criminal trespass would be inconsistent with his acquittal for theft.[68] Where the accused were charged with the commission of an offence under s 147 but were convicted under s 47 for trespass without being called upon to plead to the case of trespass, it was held that the conviction of the accused under s 447, IPC, was illegal.[69] Where the evidence showed that the accused went to the offices of the collectorate not with any intention to cause any annoyance or injury to the persons present there, but to put forth their grievances, to those persons, regarding the rise of prices of essential commodities, it was held that they could not be held guilty of an offence under this section.[70] Where, however, the dominant intention of the accused was to intimidate the complainant to cause alarm and prevent him from laying any foundation to construct the house on the site and to coerce him to come to terms, it was held that he could be convicted under s 447, IPC, for criminal trespass.[71]3763

16. Double Conviction

Where once an accused is convicted of criminal trespass, he cannot be convicted of a trespass by

remaining on the land after the previous conviction.[72] Similarly, where the accused entered on forest land and cut down some reserved trees, it was held that the accused could not be held guilty of offences both under s 32, Forest Act, and s 447, IPC, the offence under the latter section being included in that under the former.[73] There is, however, nothing wrong in convicting and sentencing a person separately under ss 143 and 447, IPC . Criminal trespass committed by the members of an unlawful assembly cannot be said to be a part of the offence of being a member of the unlawful assembly.[74]

17. Probation

The accused persons were convicted under ss 447, 325 / 34, 324 / 34, IPC*etc.*, keeping in view the nature of the offence, the character of the offenders and the fact that the incident took place about 20 years ago, the accused were directed to be released on probation of good conduct under s 4 of the Probation of Offenders Act 1958.[75] In appropriate cases, when releasing an accused on probation on account of their suffering prolonged litigation, compensation under s 5 of the Probation of Offenders Act 1958 (20 of 1958) can also be awarded.[76]

18. Sentence

The punishment should be governed by the circumstances attending the commission of the offence and the nature of the offence.[77] Considering the high-handedness of the accused in not only taking forcible possession of the house but also forfeiting the goods belonging to a third person lying there, the sentence of fine of Rs 10 and Rs 25 for offences under ss 47 and 379, IPC, respectively, were enhanced to one month's rigorous imprisonment for each offence in addition to the sentence of fine passed by the Trial Court.[78] However, where the accused who were poor agriculturists were convicted under s 447, IPC, for trespassing on the land of the complainant and ploughing over the paddy grown by the complainant and cutting the boundaries of the *'Ails'*, it was held that in view of the nature of the offence and the status of the accused persons the sentences of rigorous imprisonment for one month and fine of Rs 100 each were much too severe and should be reduced to fine of Rs 100 each.[79]

Inadequate sentences can do harm to the system. Law must meet the challenges that criminalisation offers. Maudlin sentiments bordering on tottering weakness cannot masquerade or reformative sentiments cannot do service, for a rational sentencing system. Misconceived liberation cannot be countenanced.[80] Where the accused persons in furtherance of their common intention caused grievous hurt to the3764 victim requiring hospitalisation for about four weeks and thus committed offences punishable under ss 447, 323, 324 and 326 read with s 34, IPC, the imposition of sentence by the magistrate till rising of the Court would be a 'flea bite' or worse, so the sentence imposed by the Trial Court was set aside and case was remitted to it for imposition of an appropriate sentence.[81]

19. Alteration of Conviction from Section 448 to Section 447

Commentary under the same heading in s 448, *post*, may be referred to.

38 *Purna Chandra Parida v Ganeswar Parida* (1969) 35 Cut LT 1105 .

39 *Dala Bariha v Kuthu Bariha* (1969) 35 Cut LT 957 .

40 *Hathi Singh v State of Rajasthan* 1980 Cr AR 170, p 172 (SC) .

41 *Jamini Kumar Ghose v Sudhir Ranjan Poddar* AIR 1971 Tripura 24, p 25, 1971 Cr LJ 507 ; *Krishna v Jhanardhana* 1973 Mah LJ 438 .

42 *Kaumual Sood v Namal Kishor* AIR 1983 SC 159, 1983 Cr LJ 173 ; *State of Rajasthan v Daulal Singh* 2001 Cr LJ 3464 (Raj) .

43 *E Bhashanam v Polla Malliah* 1974 Cr LJ 157, 1973 Mad LJ (Cr) 665 .

44 *Nga Possession Tok v Emperor* 20 Cr LJ 115 .

45 *Prayag Singh v Morgan* 22 Cr LJ 494 ; **explaining***Chandi Persad v Evans* (1895) ILR 22 Cal 123 .

46 *Sumant Sareen v State* 2004 Cr LJ 2326 (Del) .

47 *Dhruha Charan v State* 1957 Cut LT 39 ; *Mi Shah Ma* (1892-1896) 1 UBR 262.

48 Re *Manitripragada Venkataramma Rao* 18 Cr LJ 761.

49 *Sujya and Ors v State of Rajasthan* 2003 Cr LJ 1612 (Raj) .

50 *State of Rajasthan v Daulat Singh* 2001 Cr LJ 3464 (Raj) .

51 *State of Rajasthan v Pura and Ors* 2000 Cr LJ 2615 (Raj) .

52 *Mudakappa Veerupaxappa Kori v Channabasappa Rudrappa Kori* (1977) 2 Kant LJ 104 .

53 *Varadaraja Chettiar v Swami Maistry* AIR 1948 Mad 49, 48 Cr LJ 1002 (1).

54 *Dhani Ram v State* 1976 Cr LJ 152 (J&K) . See also related headings in s 441, *ante*.

55 *Gorige Pentaiah v State of AP* 2009 Cr LJ 350, p 355 (SC), 2008 AIR SCW 6901, (2008) 12 SCC 531 .

56 *Vajrapu Sambayya Naidu v State of Andhra Pradesh* AIR 2003 SC 3706, 2003 Cr LJ 4433 (SC) .

57 *Bali Kisan v State* (1968) 34 Cut LT 975, p 978 ; *Mathri v State of Punjab* AIR 1964 SC 986 .

58 Re *Durgaiya* 1 Weir 524; *Basant Kumar Gon v State* AIR 1956 Cal 118, 1956 Cr LJ 524 .

59 *Bhagwant Rao v Champat Rao* AIR 1925 Nag 50, 25 Cr LJ 1004 .

60 *Arjuno Pandi v Jura Dalai* 24 Cr LT 310 .

61 *Kesar Singh v Rex* AIR 1950 All 157, 51 Cr LJ 496 .

62 *Pashupati Rai v State* 1974 All Cr R 83 .

63 *Sukh Lal v State of Himachal Pradesh* 1976 CLR 15 (HP) .

64 *Ali Mohammed v State of Jharkhand* 2005 Cr LJ 442 (Jhar) .

65 *Awadhesh Kumar v State of Jharkhand* 2006 Cr LJ 1889 (Jhar) .

66 *Rajendra Pandey v State of Jharkhand* 2004 Cr LJ 2730 (Jhar) .

67 *S Donaganna v State* 1973 Cut LT 796 .

68 *Reg v Oomerkhan* Ratanlal Unrep Cr C 4.

69 *Ariff Munshi v Emperor* 15 Cr LJ 188 (2).

70 *Harihar Das v State* (1967) 33 Cut LT 414, 418 ; *Mathri v State of Punjab* AIR 1964 SC 986 .

71 *Aribam Chhatradhwaja Sharma v Namban Luhindra* AIR 1968 Manipur 28, 1968 Cr LJ 189 .

72 *Ma Hla Ya v Emperor* 8 Cr LJ 474 .

73 *Rup Deb v Emperor* 14 Cr LJ 424 .

74 *Elangbam Chandra Singh v Yensembam Maimu Singh* AIR 1962 Manipur 23 .

75 *Sujya and Ors v State of Rajasthan* 2003 Cr LJ 1612 (Raj) .

76 *Kesara Ram (since deceased) and Ors v State of Rajasthan and Ors* 1999 Cr LJ 1451 (Raj) (DB) .

77 *The Kutch Government v Bapubha Govindji and Ors* AIR 1951 Kutch 58, 1952 Cr LJ 461 .

78 *The Kutch Government v Bapubha Govindji and Ors* AIR 1951 Kutch 58, 1952 Cr LJ 461 .

79 *Guddam Buchi Reddy v State of Andhra Pradesh* 1978 Cr LJ NOC 290 (AP), (1978) 2 Andh LT 275 .

80 *Raman and Anr v Francis and Ors* 1988 Cr LJ 1359 (Ker) .

81 *Raman and Anr v Francis and Ors* 1988 Cr LJ 1359 (Ker) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 448.

Punishment for house-trespass.--

Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

COMMENTS

1. Scope

Under s 443, IPC lurking house-trespass and house-breaking are aggravated forms of ordinary house-trespass. Sections 448 to 452, IPC prescribe punishments for ordinary house-trespass, the offences of lurking house-trespass and house-breaking being treated on the same footing.

This section provides for punishment for the simplest form of house-trespass which is the first aggravated form of the criminal trespass.[82]Section 448, IPC protects any and every house from trespass.[83]

In a case of criminal trespass, the dominant intention of the accused must be to commit an offence, or to intimidate, insult or annoy the person in possession of the property trespassed upon. If and when the trespasser has such blameworthy mind in effecting the entry into the property in possession of someone else, he is said to have committed the offence of criminal trespass. However, the mere entry upon land, made under a *bonafide* claim of right, however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant.[84] If the police has locked a room as a result of a dispute between the parties and the lock has beer broken open for removing the articles inside the room, it cannot be said that an offence under s 448, IPC, has not been3765 disclosed.[85] However, no offence of house-trespass can be said to have been committed when the officers and employees of the electricity board, under proper authority and for the performance of their public duties, enter the premises of a house to remove meters as any intent to commit an offence, or to intimidate, insult or annoy the person in possession of the property would in such a case be lacking on the part of the officers and employees.[86] For similar reasons, this section does not cover the entry of municipal board's authorities for purpose of demolition of an unauthorized structure,[87]or the act of a tenant in demolishing wall of the landlord ordered so to be demolished by the municipality,[88] the former being an act in exercise of the lawful authority, and the latter being for the protection of the tenant's own interest. Where, on refusal of the discharged employee of an institution to vacate his quarter, another man of the institution had to break open the lock of the discharged employee to take possession of the quarter, it was held that no offence under s 448, IPC, had been constituted.[89] However, where the complainant went to the house on the date of the occurrence and was threatened and driven away by the accused and his

companions, who had unlawfully trespassed into the house after its possession had been duly delivered to the complainant through the court *amin*, it was held that the accused committed an offence under s 448, read with the second part of s 441,[90] because entering into somebody's house with the purpose of causing annoyance amounts to an offence of criminal trespass and entering into his/her house with that object amounts to house-trespass.[91] However, a husband entering the house where his wife is residing cannot be an offence under s 448, when there was neither judicial separation between the two, nor any other order of a competent court banning him from entering the conjugal house.[92]

2. Section 447 and Section 448

It is needless to say that s 48 takes in all the legal ingredients of s 447, IPC . Therefore, ss 448 and 447 cannot be said to be distinct and separate offences, where one is an aggravated form of the other. Infact, normally an offence under s 448 cannot be committed without trespass into the property in which the house in question is situated. Therefore, when an offence which is inherently connected and integrated with an offence is proved, it is upto the Court to convert the offence according to the facts disclosed in such cases.[93]

3. Section 427 Distinguished from Sections 447 and 448

Commentary under s 427, *ante*, may be referred to.

4. Availability of Civil Remedy--Effect

On account of pendency of the existing land dispute between the parties, it cannot be inferred that the criminal proceedings under ss 148, 379 and 448, IPC, were initiated3766 by the complainant to harass the accused persons, particularly when the proceedings before the magistrate are at the initial stage. In such circumstances, the inherent powers of the High Court under s 452, CrPC, should not be exercised to quash the criminal proceedings.[1] The fact that civil remedy is available to the complainant is hardly a ground to throw away the prosecution of the accused for the criminal offence under s 448, IPC .[2] However, when the dispute between the parties is about some adoption, possession and succession to property, and facts appear to be essentially of civil nature, and the complaint under ss 448 and 506, IPC, does not disclose any offence alleged in the complaint, the criminal proceedings are liable to be quashed under s 482, CrPC .[3] One *S* gifted his property to a trust with condition that he would stay in the house till his death and the trust can take over possession after his death. During his lifetime he invited his brother's wife who was a widow to stay in the house with him. After the death of *S*, the widow continued to stay and she was served with a notice to quit by the trust. On her failure to comply with the notice, a complaint under s 447, IPC, was filed. On these facts the Apex Court opined that it was essentially a civil matter which could be properly adjudicated upon by a competent civil court. To initiate criminal proceedings, in the circumstances, appears to be only an abuse of process of the court.[4]

5. Procedure

The offence under this section is cognizable, bailable, compoundable by the person in possession of the property trespassed upon, and is triable by a magistrate, and may also be tried summarily.

6. Charge

The offence under this section being triable as a summons-case, framing of a formal charge is not necessary. Section 251 , CrPC 1973, may be referred to.

7. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) criminal trespass, as defined in s 441, IPC, was committed;
(b) the property, in respect of which trespass was committed, was a building, tent or vessel; and
(c) if the property, in respect of which criminal trespass was committed, was a building, such building was used:

(i) as a human dwelling, or
(ii) as a place for worship, or
(iii) as a place for the custody of property; or

(d) if the property, in respect of which the criminal trespass was committed, was a tent or a vessel, such tent or vessel was used as a human dwelling only.3767

In order to constitute the offence of criminal trespass, there must be proof of intention to commit an offence or to intimidate or insult or annoy the person in possession of the disputed property. When a person enters, without any legal justification, upon property in the established possession of another, he must be referred to have had an intention to annoy the person in possession.[5] In the absence of a definite finding that some specific offence was intended to be committed by the accused, the element of s 448, relating to intent to commit an offence, cannot be said to be established.[6] Where, therefore, there is no express finding that the accused intended to cause annoyance, the conviction under this section is unsustainable.[7] When the entry is made *bonafide* without any intent on the part of the accused to insult, annoy or intimidate, no offence is made out. Mere knowledge, that such entry might result in such consequences, is not enough.[8] The accused was alleged to have trespassed into his family house and attacked his mother with a knife. There was no evidence to show that the entry of the accused into the family house was unlawful. The acquittal of the accused was found proper.[9]

The complainant was allotted a shop by the rehabilitation department in his capacity as a displaced person. He was not allowed to enter into his own shop by the accused persons. The accused persons though entered into the shop lawfully, but retained it unlawfully and dishonestly for more than 37 years. Thus, they were guilty of offence under s 448 read with s 34, IPC .[10] Where the evidence proved that tenant entered the house and committed rape; the prosecutrix committed suicide, the appellant was convicted under ss 448 and 354, IPC .[11]

The complainants were the owners of the shops and were carrying wholesale business of crockery in the shops. Evidence proved that the accused persons taking advantage of the riots, trespassed into the premises by breaking open locks and committed theft of property kept in the shops and continued in illegal possession of shops for two years. Their conviction for offence under ss 379 and 448, IPC was held proper.[12]

8. Landlord Tenant Disputes

In a proceeding under this section, if the accused takes the plea that he was the tenant of the landlord (complainant), the landlord (complainant) can show that there was infact no relationship of landlord and tenant between the parties.[13] The accused was a tenant in the house of the complainant and was alleged to have occupied one more room illegally. The complainant, however, denied in evidence the factum of any door being there in that room, so the question of its having broken by the accused does not arise. The pendency of the earlier civil litigation between the parties was also not3768 disclosed before the court, so the acquittal of the accused under s 448, IPC, was found proper.[14] If an owner got into possession of an accommodation as soon as it is vacated by one tenant and does not allow another to occupy it, the accommodation can never be said to be in the possession of the other, and the owner cannot be said to have been guilty of an offence under this section.[15]

9. When Dominant Intention of Accused is to Cause Hurt and not Trespass

Where it has been found out that the dominant intention of the accused was to cause hurt, the offence under s 448, IPC, is well established.[16]

10. Quashing of Proceedings

Where on perusing the complaint petition and considering the submissions of the learned counsel for the accused, it was found by the High Court that the prosecution is not *bonafide* and has been brought about only to wreck personal vengeance on account of delivery of possession effected against the complainant in execution of the decree, in order to secure the ends of justice, the order of Trial Court summoning the accused was set aside.[17]

11. Probation

The accused persons entered into the shop lawfully but retained it unlawfully and dishonestly for more than 37 years. On the facts and circumstances of the case the release of the accused persons on probation was found proper.[18] However, when the accused persons, below 21 years of age, were evicted from the house in question in execution of the decree of the court with police help, then re-entered the house and caused damage, the benefit of probation was declined as they took the law in their own hands.[19] When the accused has acted like a ruffian while committing house-trespass and started living in the house in open defiance of law, no leniency in sentence deserved to be shown to the accused and no benefit of probation should be extended as it is not meant for ruffians.[20] However, keeping in view the fact that they were first offenders, the accused persons convicted under ss 323, 342 and 448, IPC, which are not grave or tenuous offences, the benefit of probation was extended to them by the Punjab and Haryana High Court.[21]

12. Sentence

This section provides for imprisonment or fine or both, the imprisonment extending to one year and the fine to one thousand rupees. Discretion has been vested in the court to give suitable and adequate sentence within the limits set by law. Where the facts warrant a deterrent sentence to be given, judicial discretion must be applied and3769 such sentence, as would be appropriated, should be awarded.[22] If an ex-tenant quietly re-enters the premises with the intention of asserting his rights, he does not deserve any indulgence of the court to take a lenient view on the point of sentence.

The sentence of fine of Rs 200 in such a case is not excessive.[23] When the accused committed the offence under s 448, IPC, in a very high-handed manner soon after delivery of possession of the house in favour of the complainant effected by the civil court, serious notice should be taken of his said act. Only a sentence of fine would not do in such a case. Similarly, the accused was sentenced to undergo rigorous imprisonment for one month and pay a fine of Rs 100. In default of payment of fine he was to undergo rigorous imprisonment for a further period of 15 days.[24] Where the accused took the law in his own hands and acted like a ruffian by breaking open the lock of the house and started to live in it with his family in open defiance of the law, the sentence of fine of Rs 1000, in default rigorous imprisonment for three months was declined to be reduced and the benefit of probation was also declined to the accused.[25]

13. Alteration of Conviction from Section 448 to one under Section 447

Section 448, IPC, is an aggravated form of s 447, IPC . Therefore, when an offence inherently connected and integrated with an offence, is proved, it is upto the court to convert the offence according to the facts disclosed in such cases. Therefore, when an accused is charged with offences under s 448 read with s 149, IPC but commission of the offence under s 447 read with s 34, IPC, is proved on record of the case, the conviction of the accused recorded by the trial court under s 448 read with s 148, IPC can be altered or one under s 447 read with s 34, IPC .[26]

82 Refer to text under s 442, IPC .

83 *Pasupuleti Siva Ramakrishna Rao v State of Andhra Pradesh* 2014 Cr LJ 1677, p 1681, (2014) 5 SCC 369, (2014) 137 AIC 129 .

84 *Giribala Shau v Prova Misra* 1974 Cr LJ 172, p 174 (Cal) ; *Sinnasamy Selvanayagam v Emperor* (1951) 55 Cal WN 1 (PC) .

85 *Ram Kumar v State* 1971 Cr LJ 427, p 429 (Del) .

86 *Nagendra Prasad Sinha v Brij Nandan Prasad* 1977 PLJR 73, p 76 .

87 *State of Maharashtra v Moreshwar* 1971 Mah LJ 852 .

88 *Badrul Islam v State of Uttar Pradesh* 1978 All Cr R 388 .

89 *Akhauri Ramesh Chandra Sinha v State of Bihar* 1972 Pat LRJ 59 .

90 *Rameshwar Nath v State* 1965 ALJ 747, p 753 .

91 *Lakhan Karan v Kolei Karaniani* 1980 Cut LR (Cr) 85, p 88 .

92 *Noble Mohandass v State (*1989) 1 Crimes 73 (Mad).

93 *Kiran M Kandolkar v State and Ors* 1996 Cr LJ 1429 (Bom) .

1 *Nagendra Nath Verma and Ors v State of Bihar and Anor* 1977 Cr LJ 45 (Pat) .

2 *Ram Narain v State* (1980) 17 DLT 230 (Delhi) .

3 *S Ramaswami and Anor v SI of Police, Palyankottai and Ors* 1989 Cr LJ NOC 11 (Mad), (1988) 17 Reports 416 (Mad) .

4 *Kanwal Sood v Nawal Kishore and Anor* AIR 1983 SC 159, 1983 Cr LJ 173 (SC) . See commentary under the related headings in s 441, *ante*.

5 *Brajaraj Pradhan v State* 34 Cut LT 1015, p 1017 .

6 *Mohd Shafique v Malika Khatun* 60 CWN 440, p 443 .

7 *Tharu v Emperor* 12 Cr LJ 148 ; *Nawab v State of Punjab* 1975 CLR 421 (no conviction under s 448, IPC, if entry of the accused on the vacant plot of land is not with the intention of intimidating, insulting or annoying the complainant, the complainant can seek proper remedy for civil trespass in a different forum).

8 *Ratta v State* 1967 RLW 149 .

9 *State v Tulasidaran* 2000 Cr LJ 3115 (Kant) (DB) .

10 *Kirpal Singh v Wazir Singh and Ors* 2001 Cr LJ 1566 (Del) .

11 *SK Nagoor v State of AP* AIR 2008 SC 1500, (2008) 15 SCC 471 ; **See also***Surjit Singh v State of Punjab* (2007) 15 SCC 391, 2007 (7) Scale 440 (Accused convicted under ss 302 and 450, IPC .

12 *Ashi Devi v State (NCT of Delhi)* 2014 Cr LJ 3238, (2014) 12 SCC 591 .

13 *Chhidda Lal v Bal Swarup* 1981 Cr LJ 1705 (3), p 1707 (All) .

14 *Kishori Lal Agarwal v Ram Chandra Sindhi and anor* 2003 Cr LJ 2299 (All) .

15 *Narendra Kumar Agarwal v Kallan Beg* 1966 AWR 570, p 571-572 .

16 *Buduka Kalita v State of Assam* 1972 Cr LJ 1627 (Gau) .

17 *Mannu Lal Sharma v State of Bihar* 2006 Cr LJ 3094 (Pat) .

18 *Ibid.*

19 *Bimal Ram and anor v State of Bihar* 1997 Cr LJ 2846 (Pat) .

20 *Tirumal v State of Madhya Pradesh* (1992) 2 Crimes 186 (MP) .

21 *Nirmaljit Singh and Ors v State of Punjab* (1987) 1 RCR 381 (P&H), (1987) 1 All Cr LR 462 (P&H).

22 *State v Narayan Bisoi* 1974 Cut WR 710, 1974 Cut LT 711 .

23 *Raviji Govindji v State* AIR 1951 Kutch 76, 1952 Cr LJ 1477 .

24 *Dhani Dibiya v Kasinath Nanda* 1979 Cr LJ 1297 (Ori) .

25 *Tijulal v State of Madhya Pradesh* (1992) 2 Crimes 186 (MP) .

26 *Kirun M Kandolkar v State and Ors* 1996 Cr LJ 1429 (Bom) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 449.

House-trespass in order to commit offence punishable with death.--

Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with [27][imprisonment for life], or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

COMMENTS

1. Scope

This and the following two sections provide for aggravated form of house-trespass to be determined by the gravity of the offence for which house-trespass is committed. Lower punishments are prescribed in the next two sections by reason of the lesser3770 seriousness of the offence. This section prescribes the highest punishment for house-trespass committed in order to commit the most serious offence, namely, the offence which is punishable with death.

2. 'In order to the Committing of any Offence'

An act can be said to be committed 'in order to the committing of an offence' even though the offence may not be completed. If a person commits a house-trespass with the purpose of the committing of theft, but has failed to accomplish the purpose, it will be proper to say he has committed the house-trespass in order to the committing of theft. The words 'in order to' have been used to mean 'with the purpose of'. If the purpose in committing the house-trespass is the commission of an offence punishable with death, the house-trespass becomes punishable under this section. If the purpose in committing the house-trespass is the commission of an offence punishable with imprisonment for life, the house-trespass is punishable under s 450, IPC . Similarly, ss 451, 454 and 457, IPC will apply if the house-trespass, or lurking house-trespass, or lurking house-trespass by night, or house breaking by night is committed for the purpose of the offence indicated in the said sections. Whether the purpose was actually accomplished is quite irrelevant in these cases. Therefore, the fact, that the murder was not actually committed, will not affect the applicability of this section.[28]

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

4. Charge

The following form of the charge may be adopted:

> I (name and office of sessions judge, *etc*.) hereby charge you (name of accused person) as follows:
>
> That, on or about the...day of..., at..., you committed house-trespass by entering into (or unlawfully remaining in) the building/tent/vessel of AB, to wit... (describe it), used as a human dwelling/place of worship/place for the custody of property, to wit...(specify it), in order to the committing of the offence of...(specify it), which is punishable with death, and that you thereby committed an offence, punishable under s 449 of the Indian Penal Code, and within the cognizance of this Court.
>
> And I hereby direct that you be tried by this Court on the said charge.

5. Trespass and Murder

Where the accused persons allegedly trespassed into the shop of the deceased and assaulted him with knife and iron rod, the eye-witnesses though related to the deceased had narrated the alleged incident and the subsequent events on the same lines, the presence of the eye-witness at the scene of the offence was established and their evidence was corroborated in all material particulars. The accused persons had developed a grudge against the deceased due to illicit relationship between the deceased and the wife of the main accused. The conviction and sentence of the3771 accused persons under ss 449, 302 and 34, IPC was found proper.[29] Where the prosecution case was that the accused remained in the house of the deceased on the fateful night and committed murder of the deceased and looted the amount and thereafter fled away after locking the house from outside, the key found at the instance of the accused was the key of the lock which was put from outside on the door of the deceased. The evidence of recovery of stolen money of the deceased was also found to be reliable. Besides this, there was recovery of blood stained clothes of the accused person on the basis of the disclosure statement of the accused. The motive behind the commission of offence was that the deceased was denying to return back the amount of the accused. Hence, the conviction of the accused was found proper.[30] Where the purpose of the house trespass committed was to commit robbery and not any offence punishable with death, it was held that the offence under s 449, IPC was committed.[31]

6. Trespass and Rape

Where the appellant accused working as a mason in the house of the prosecutrix entered into the house of the prosecutrix, raped her and committed the murder of the brother of the prosecrtrix, his conviction under ss 302, 376 and 449, IPC was upheld.[32]

7. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed house-trespass as defined in s 441, IPC ; and
(b) he did so in order to the committing of an offence punishable with death.

8. Acquittal

Where the accused, being the relative of the deceased and his wife, is stated to have been living with them in one and the same house having a common mess, the question of trespass into the house by the accused does not arise at all and the conviction and sentence held and awarded by the trial court under s 449, IPC had was done away by the High Court.[33] Where the purpose of the house trespass committed was to commit robbery and not any offence punishable with death, held offence under s 449, IPC was committed.[34]

9. Conviction

The accused was alleged to have entered into the hut of the deceased and killed him by inflicting axe injuries. The witness proved that the accused was seen coming out of the hut of the deceased with an axe. The recovery of weapons of offence at the instance of the accused was proved. The conviction of the accused under ss 304 and 449, IPC, was found proper.[35] Where the prosecution evidence clearly established3772 beyond reasonable doubt that the three accused persons entered into a criminal conspiracy to commit robbery of valuables belonging to the deceased-victim and for that purpose committed criminal trespass into the victim's house and robbery, the conviction of the accused persons under ss 449, 392 and 120B, IPC, was found proper.[36]

10. Sentence

When an accused is convicted under ss 304 and 449, IPC, it is not necessary to award separate sentence under s 449, IPC .[37] Where the accused committed criminal trespass and robbery and other offences, the sentence of rigorous imprisonment for 5 years under s 449, IPC, was found proper, but directed to run concurrently with the sentence of imprisonment awarded for the other offences.[38] The accused was convicted under ss 302 and 449, IPC, and the sentence of rigorous imprisonment of 10 years awarded to the accused under s 449, IPC, was found proper.[39] When the accused was sentenced to life imprisonment and a fine of Rs 5,000/- was imposed under s 302, and was sentenced to four years rigorous imprisonment and a fine of Rs 1,000 was imposed under s 449, IPC and the accused was in custody, his wife and mother had passed away and his minor children were rendered destitute, in view of the said factors and also the fact that the accused was under suspension from service and must have been in financial crisis, the order of sentence with regard to fine was set aside.[40]

27 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

28 *Matiullah Sheikh v State of West Bengal* AIR 1965 SC 132, (1965) 1 Cr LJ 126 .

29 *Kunduru Vinaya Reddy v State of Andhra Pradesh* 2005 Cr LJ 3896 (AP) (DB) .

30 *Harun Ilani Mulani v State of Maharashtra* 2004 Cr LJ 2462 (Bom) (DB) .

31 *Kunjumon v State of Kerala* (2012) 13 SCC 750, 2012 (11) JT 381, 2012 (11) Scale 212 .

32 *B Kumar v Inspector of Police* (2015) 2 SCC 346, 2014 (12) Scale 372 : 2015 (1) SLT 140 .

33 *Veeraiyan v State* 2005 Cr LJ 563 (Mad) (DB) .

34 *Kunjumon v State of Kerala* (2012) 13 SCC 750, 2012 (11) JT 381, 2012 (11) Scale 212 .

35 *Satrughana Lohar v State* 1998 Cr LJ 1508 (Ori) .

36 *Santosh and Anor v State of Kerala* 1991 Cr LJ 570 (Ker) (DB) .

37 *Satrughana Lohar v State* 1998 Cr LJ 1508 (Ori) .

38 *Santosh and Anor v State of Kerala* 1991 Cr LJ 570 (Ker) (DB) .

39 *Ramesh v State of Madhya Pradesh* 1996 Cr LJ 2656 (MP) (DB) .

40 *Dil Bahadur Tamang v State of Sikkim* 2005 Cr LJ 786 (Sikkim) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 450.

House-trespass in order to commit offence punishable with [41][imprisonment for life].--

Whoever commits house-trespass in order to the committing of any offence punishable with [42][imprisonment for life], shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

COMMENTS

1. Scope

The preceding section prescribes punishment for house-trespass in order to commit the most serious offence, namely, the offence which is punishable with death. This section prescribes punishment for house-trespass in order to commit the next lower grade of the offence, *i.e.*, the offence which is punishable with imprisonment for life.3773

2. 'In order to the Committing of any Offence'

Commentary under the same heading in s 449, *ante*, may be referred to.

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

4. Charge

The charge is the same as in the case of an offence under the preceding s 449 with the only exception that the nature of the offence, in order to commit which the house trespass was committed, is to be varied and specified.

5. Non Consideration of charge under Section 450 in Rape Case--Effect

The non-consideration of charge of house trespass under s 450, IPC, by the sessions court, while ordering acquittal under s 376, IPC is immaterial. When the purpose for which the accused is said to have entered the house of victim itself does not constitute an offence falling under s 376, IPC, this aspect may fall into insignificance and evidently that may be the reason why this aspect was not adverted to by the trial judge. Even otherwise, it will not alter the situation in any way and hence the mere non-consideration of charge under s 450, IPC may not be of any serious consequence.[43]

6. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed house-trespass as defined in s 442, IPC ; and
(b) he did so in order to the committing of any offence punishable with imprisonment for life.

The accused was proved to have trespassed into the house to commit rape on the prosecutrix, and then committed rape on her. His conviction under s 376 and s 450, IPC, was found proper.[44] Where the appellants had forcibly entered the house of the deceased, they were convicted under s 450, IPC .[45] The quarrel took place between the accused and the deceased who was his younger brother for the partition of their parental house. The accused entered into their parental house and inflicted injuries on the head of the deceased thereby causing his death. The evidence showed that the said house was not inaccessible to the accused and his family members, since fire-wood, food-grains *etc.*, were lying stored/collected in the said ancestral/parental house so no offence of criminal trespass was made out. The accused though convicted under s 304, Pt II was acquitted under s 450, IPC .[46] Where prosecution case was that the accused persons entered the house, threatened the prosecutrix a3774 minor girl, and raped her, there was consultation and deliberation filing FIR, medical evidence in the case did not support the prosecution's version, accused persons were acquitted of the charges under ss 450, 506 and 376, IPC .[47]

7. Sentence

The normal sentence for an offence appears to be one-third of the prescribed sentence, however, it is subject to the facts and circumstances of each case.[48] A sentence of 5 years rigorous imprisonment under s 450, IPC, is not harsh.[49] The accused was found guilty of offences under ss 376 and 450, IPC . After the incident, the accused lost one half of his lower limbs and also his employment on account of his conviction. Keeping in view the facts and circumstances of the case the accused was sentenced to undergo rigorous imprisonment for seven years under s 376, IPC, and rigorous imprisonment for five years under s 450, IPC . Both the sentences were directed to run concurrently.[50] The accused was found guilty under ss 354 and 450, IPC . He had remained in jail for about 8 months. For the offences under ss 354 and 450, IPC, the accused was sentenced to the period already undergone by him in custody.[51]

Where the accused had trespassed into the house during midnight to commit the offence of rape, there appeared to be certain exaggerations in the evidence of the prosecution regarding the incident, on the facts and circumstances of the case the sentence of 10 years rigorous imprisonment awarded to the accused under s 450, IPC, by the trial court was reduced to three years rigorous imprisonment.[52]

41 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

42 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

43 *Public Prosecutor, Andhra Pradesh High Court v Yejjala Ramaswamy* 2004 Cr LJ 4528 (AP) .

44 *Shyam Ratan v State of Madhya Pradesh* 1998 Cr LJ 1301 (MP) ; *Moti Lal v State of MP* 2008 Cr LJ 3543, p 3545, 3546 (SC), 2008 (10) Scale 81, (2008) 3 SCC (Cri) 950, 2008 AIR SCW 4846 .

45 *Surjit Singh v State of Punjab* 2007 Cr LJ 2768, 2007 (4) Supreme 285, (2007) 15 SCC 391, [2008] 8 SCR 32 .

46 *Har Chand v State of Rajasthan* 1997 Cr LJ 345 (Raj) (DB) ; *Surjit Singh v State of Punjab* (2007) 15 SCC 391 (Accused convicted under s 302, IPC).

47 *Ramesh v State of AP* 2011 Cr LJ 3816 (Mad) .

48 *Padigi Narusimha v State* 1996 Cr LJ 2997 (AP) .

49 *Ibid.*

50 *Santosh Kumar Pachori v State of Madhya Pradesh* 2001 Cr LJ 2981 (MP) (DB) .

51 *Bali alias Bahal Singh v State of Rajasthan* 2001 Cr LJ 909 (Raj) .

52 *Ibid.*

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Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 451.

House-trespass in order to commit offence punishable with imprisonment.--

Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

COMMENTS

1. Scope

This section is applicable to cases in which house-trespass is committed for any offence (other than the one punishable with death or imprisonment for life) which is punishable3775 with imprisonment, the extent of the imprisonment being immaterial. The punishment is severe if the offence, intended to be committed by house-trespass, is theft which is punishable with imprisonment for three years under s 379, IPC and with greater punishment under the subsequent sections. The punishment prescribed under this section is the lowest as against that prescribed in the two preceding sections.

For the applicability of this section, any offence, punishable under the IPC, is an 'offence' even if it is not

punishable with imprisonment for more than six months.[53] If an accused enters the house, when the house-owner is away, with the intention of committing sexual intercourse with the wife of the house-owner, he commits the offence under this section.[54]

There is nothing in s 452, IPC to suggest that the use to which the house is put makes any difference. It is not the requirement of s 452, IPC that for a trespass to be an offence the house must be a private place and not an office.[55] Where the accused appellant entered the Lottery Workers Union Office and assaulted the complainant, the appellant accused was convicted under ss 452 and 307, IPC . The acquittal of the accused of charge under s 452, IPC merely on the ground that the incident occurred in Lottery Workers Union Office and not at any private place was not sustainable under s 452, IPC .[56]

A person who commits house trespass can be convicted under the section only if he is found guilty of committing any offence punishable with imprisonment. If criminal trespass into a dwelling house is committed with the intention of committing any offence punishable with imprisonment then the offence punishable under s 451, IPC is complete even if the offender does not succeed in committing the offence he intended to commit.[57]

Offence under s 451, IPC is complete when criminal trespass into a dwelling house has been committed with the intention of committing any offence punishable with imprisonment.[58]

2. 'In order to the Committing of any Offence'

Commentary under the same heading in s 449, *ante*, may be referred to.

3. Procedure

The offence under this section, if committed in order to the committing of an offence (other than the theft) punishable with imprisonment, is cognizable, bailable, compoundable, with the permission of the court before which the prosecution for such offence is pending, by the person in possession of the house trespassed upon, and triable by a magistrate, and may also be tried summarily. If, however, the offence under this section is committed in order to commit a theft, it is cognizable, non-bailable, non-compoundable, and is triable by a magistrate3776

4. Charge

The offence under this section, if committed in order to commit an offence (other than the theft) punishable with imprisonment, being triable as a summons case, framing of a formal charge is not necessary (s 251, CrPC 1973). If, however, the offence is committed in order to commit a theft, the charge, though framed by the magistrate, and not by the sessions judge, would be in the same form as under s 449, except that the nature of the offence, for committing which the house-trespass was committed, is to be varied and specified.

5. Proof

In order to establish a charge under this section,the prosecution must prove that:

(a) the house-trespass, as defined in s 442, IPC, was committed; and
(b) it was done in order to the committing of an offence punishable with imprisonment or theft.

Facts of such a nature as would justify the inference that some offence, punishable with imprisonment, was intended over and above the house-trespass itself, has to be proved.[59] A strong suspicion as to the motive, with which the accused entered another person's house, is insufficient to warrant a finding of conviction for the offence punishable under this section.[60] The accused voluntarily entered the house of

the deceased and caused injuries by giving a *lathi* blow on his head causing his death. The conviction of the accused under s 304, Pt II, s 451, IPC was found proper.[61]

Evidence of prosecution witnesses proved that the accused persons armed with sticks went to the house of the complainant for assaulting him; the accused persons were convicted for offence under s 451, IPC .[62]

6. Trespass in order to Commit Adultery--Cases

When the prospective offence is adultery, it is necessary to show that there was no consent or connivance on the part of the husband of the woman concerned.[63] The onus to show that there was no consent, or connivance, of the husband is on the prosecution.[64] However, where the husband caught hold of the accused and fought with him until the father of the accused intervened and took him away, it was held that it can safely be presumed that the husband neither consented to, nor connived at, the offence of adultery.[65] Similarly, in some cases, it has been held that a man, who enters the house of another at night with intent to commit adultery with his wife, is guilty of an offence under s 451, IPC if, in such a case, it is shown that the husband was, at the time of the occurrence, absent from the house in the legitimate pursuit of his occupation, the reason being that it can then safely be presumed that he neither3777 consented to, nor connived at, any adultery or immorality on the part of his wife.[66] Where, however, the husband was not the complainant and did not eventually appear to give evidence as a witness and there was nothing in the findings to indicate that there was no connivance or consent on the part of the husband of the woman, it was held that the charge under s 451 could not be sustained.[67] Where the accused admittedly entered for adultery and the complainant refused to lay a complaint, it was held that the magistrate had rightly refused to convict the accused of the charge of house-trespass.[68]

7. Conviction

Where the complainant charged the accused with house-trespass with the intention of committing theft and the magistrate disbelieved the allegation as to theft, it was held that the offence, which the accused had the intention of committing, was a substantial ingredient of the offences under s 451 and s 457, IPC and a conviction under these sections could not be maintained, unless there was an express finding on this point, and, therefore, the conviction was altered to one under s 448 .[69] Where an accused is charged both under s 380 and s 451, conviction under s 380 to separate conviction under s 451 is called for, the ingredients of both the sections being the same.[70]

The prosecution case was that when PW2, daughter of the complainant, was sleeping in her room inside the house at night, the appellant along with two other co-accused, entered the house of the complainant and committed theft of the golden chain which PW2 was wearing. FIR was lodged sixteen days after the incident when the police came to the complainant with that golden chain. The complainant or PW2 did not know about the theft of the chain even though PW2 was wearing the chain when it was stolen. Held, the chain in question was being worn by PW2. It was stated to have been stolen while she was sleeping. It was inconceivable that she would not realize that she had lost her chain. The appellant was acquitted of the charges under ss 380 and 451, IPC .[71]

8. Probation

One accused was convicted under ss 451 and 323, IPC, while the other under s 451, IPC . The remaining accused persons were convicted for the serious offence under s 304, Pt II alongwith ss 451 and 323, IPC . The occurrence took place 18 years back, so the first two accused persons were convicted under s 451 and s 323, IPC, and under s 451, IPC, respectively, and were released on probation.[72] However, where the accused did not spare even a 12 year old girl, entered her house and started running3778 his hand upon her shoulder with a view to gratify his lust, the court declined to release the accused on probation of good conduct.[73]

9. Sentence

The accused were convicted under s 304, Pt II, ss 451 and 323, IPC, and sentenced to undergo rigorous imprisonment for 2 years and fine of Rs 2000 in default six months rigorous imprisonment, rigorous imprisonment for six months and fine of Rs 250 and in default one month rigorous imprisonment and a fine of Rs 250 in default 1 month rigorous imprisonment, respectively. The occurrence took place 18 years back so the sentence of imprisonment under ss 304, Pt II and s 451, IPC, was reduced to the period already undergone by the accused. The sentence of fine under all three counts, however, was maintained.[74] The trial court convicted the accused under ss 354 / 451 / 323, IPC, and sentenced him to undergo rigorous imprisonment for one year under s 451, IPC, and also to pay a fine of Rs 2000, in default to undergo rigorous imprisonment for 4 months, sentence of imprisonment was to run concurrently with the sentence of imprisonment awarded for the other offences. Keeping in view the fact that the accused faced trial for the last six years, the sentence of imprisonment was slashed and brought down to rigorous imprisonment for six months by the High Court.[75]

10. Alteration of Conviction from Section 354 to one under Section 451

Commentary under the same heading in s 354,vol 3, may be referred to.

11. Alteration of Conviction from Section 452 to Section 451

Commentary under the same heading in s 452, *post*, may be referred to.

53 *Harikishan Lal v Emperor* AIR 1931 Lah 405, 32 Cr LJ 732 (2).

54 *State v Bhanwaria* AIR 1965 Raj 191, (1965) 2 Cr LJ 673 .

55 *Pasupuleti Siva Ramakrishna Rao v State of Andhra Pradesh* 2014 Cr LJ 1677, p 1681, (2014) 5 SCC 369, (2014) 137 AIC 129 .

56 *Pasupuleti Siva Ramakrishna Rao v State of Andhra Pradesh* 2014 Cr LJ 1677, p 1681, (2014) 5 SCC 369, (2014) 137 AIC 129 .

57 *Appukuttan v State of Kerala* 2010 Cr LJ 3186, p 3189 (Ker) .

58 *Appakuttan v State of Kerala* ILR 2009 (4) Ker 231 (Ker) .

59 *Mansoor Husain v Emperor* AIR 1919 All 258, 20 Cr LJ 347 .

60 *Safdar v State* 1974 All Cr R 10, 1974 All WR 26 .

61 *Rupeng and Ors v State of Rajasthan* 1999 Cr LJ 724 (Raj) .

62 *State of Maharashtra v Tatyaba Bajirao Jadhav* 2011 Cr LJ 2717 (Bom) .

63 *Luxman Bakaram v State of Maharashtra* 1971 Cr LJ 1234, p 1237, 1971 Mah LJ 33 ; *Brij Basi v Empress* (1897) ILR 19 All 74 ; *Ibrahim Hussainji v State* AIR 1956 MB 69, 1956 Cr LJ 231 .

64 *Waroo v Emperor* AIR 1948 Sind 40, 49 Cr LJ 72 .

65 *Luxman Bakaram v State of Maharashtra* 1971 Cr LJ 1234, p 1237, 1971 Mah LJ 33 .

66 *Khanoon Ram v Emperor* AIR 1920 Lah 62, 22 Cr LJ 266 ; *Kola Ram v Emperor* AIR 1925 Lah 635, 26 Cr LJ 1343 ; *Chatter Singh Damai v Emperor* 1920 UB 50, 21 Cr LJ 435 ; *Jhallar v State* AIR 1954 All 17, 1953 Cr LJ 1882 ; *Emperor v Dhantua Lodhi* AIR 1917 Nag 90, 19 Cr LJ 881 ; *Mohammed Yar v Emperor* AIR 1938 Lah 514, 39 Cr LJ 734 ; *Anant Ram v Emperor* AIR 1920 Lah 464 ((1)), 22 Cr LJ 118 ; *Balaram Kundu v Emperor* AIR 1925 Cal 160, 25 Cr LJ 1186 ; *State v Bhanwaria* AIR 1965 Raj 191, (1965) 2 Cr LJ 673 .

67 *Jagannath v Emperor* AIR 1914 Oudh 182, 15 Cr LJ 351 .

68 1 Weir 532.

69 *Emperor v JP Henezia* 10 Cr LJ 410 .

70 *Dhoi v State* (1966) 32 Cut LJ 1083, p 1088 .

71 *Azeez v State of Kerala* (2013) 2 SCC 184, p 187, 2013 (1) Scale 710, 2013 (1) Supreme 529, 2013 (1) SLT 612, 2013 (1) SCC (Cr) 910, 2013 (1) Crimes 211 (SC .

72 *Rupeng and Ors v State of Rajasthan* 1999 Cr LJ 724 (Raj) .

73 *Satpal alias Satta v State of Haryana* (1999) 3 RCR 454, (1999) 2 Chand Cri C 208 (P&H).

74 *Ibid*

75 *Ibid.*

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OF CRIMINAL TRESPASS

S. 452.

House-trespass after preparation for hurt, assault or wrongful restraint.--

Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

1. Scope

Making preparation for the commission of an offence has always been treated as an aggravated form of that offence. Thus, the committing of theft after making3779 preparation for causing death, hurt or restraint is made specifically punishable under s 382 . Similarly, lurking-house trespass, or house-breaking, after making preparation for hurt, *etc.*, is made punishable under s 455, IPC, and the same offences, when committed at night, are made punishable under s 458, IPC . This section prescribes punishment for committing house-trespass after making preparation (a) for causing, to any person, hurt, assault, or wrongful restraint; or (b) for putting him (*i.e.*, any person) in such fear (*i.e.*, fear of hurt, assault, or wrongful restraint). The offence under this section can be committed only in relation to the person in whose possession the house is.[76]

For a conviction under this section, it is necessary to prove that the dominant intent of the accused was to cause hurt to, or to assault, or to wrongfully restrain, any person, or to put him in such fear.[77] There must be clear evidence of preparation for causing hurt, *etc*. The fact, that a person enters another man's house and commits an assault, does not necessarily mean such preparation because it may be a case of *post hoc ergo propter hoc*.[78] Trespassing into the shop of the complainant for the purpose of assaulting him would not be sufficient to support a conviction under this section though it might be for a conviction under s 448 .[79] Where the accused went armed to the house of his father-in-law primarily for the purpose of forcibly taking away his wife, and not to cause hurt to, or to assault, her and, by going armed, the accused

intended to intimidate the inmates of the house and thus facilitate his object of taking away his wife with him, it was held that the accused could be held guilty only under s 448, IPC .[80] Similarly, where the accused entered the house of the complainant to intimidate him to withdraw a case filed by him and a scuffle took place resulting in injuries to two persons, but there was no evidence to prove that the house-trespass was committed after making preparation for causing hurt, it was held that the accused was guilty of offences under ss 324 and 448, and not under s 452 .[81] Where, however, the accused went with a forged warrant for the arrest of a prostitute and took her away, it was held that entry into the house with a forged warrant constituted house-trespass and as she was put in fear of arrest and there was wrongful restraint, the accused was guilty of the offence under this section.[82]

Criminal trespass is committed by the accused when they entered the house of an individual with a view to insult, intimidate or annoy such owner of the house/property. If the accused entered the house of an individual to insult, intimidate or annoy any person other than the owner of the property, it would not constitute criminal trespass. Once the conduct of the accused is not criminal trespass, it would not be house trespass and would not become punishable under s 452, IPC .[83]

2. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate.3780

3. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate*, *etc*.) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the...day of..., at ..., you committed house-trespass by entering into (*or unlawfully remaining in*) a building/tent/vessel, to wit ...(*describe it*), of AB, used as a human dwelling/place of worship/place for custody of property, to wit... (*specify it*), having made preparation for causing hurt to (*or for assaulting/wrongfully restraining*) the said AB (*or for putting him in such fear*), and that you, thereby committed an offence, punishable under s 452 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

4. Accused Charged under Section 452 can be Convicted under Section 426

The accused charged under s 452, IPC, can be convicted under s 426, IPC .[84]

Accused charged under ss 452 / 149 can be convicted under ss 452 / 34 .

Where the accused persons were charged under ss 300 / 149 but the charge under ss 300 / 149 was not proved as less than five accused were convicted, they can be convicted for the offence under s 452 with the aid of s 34 of the IPC .[85]

5. Intimately Connected Charges and Failure to Prove Common Object

In *Passang Lama v State of Sikkim* ,[86] the charges against the accused under s 147 for rioting, under s 448 for house breaking, and under s 452 for house-trespass after making preparation for causing hurt were all intimately connected with the charge, under s 302, of having formed unlawful assembly in prosecution of the common object to cause the death of a constable. It was found that there was no common object of the accused to cause such death. It was held that, because of this finding, the other charges, including those under ss 448 and 452, automatically fell down.

6. Proof

Before an accused can be convicted of an offence under s 452, IPC, he should be found by the court to have entered into a building, tent, or vessel, used as a human dwelling. Where, in the FIR filed soon after the incident, there was no mention that there existed *chhappar* on the disputed land and that the accused had entered into that *chhappar*, and it was only during the course of evidence that it was developed that a *chhappar* existed and the accused had entered into that *chhappar*, it was held that he could not so convicted of an offence under s 452, IPC .[87]

7. Right of Private Defence

The allegations in the complainant were that the accused persons alongwith another group of persons raided the house and committed house trespass. A cross FIR was3781 lodged by the accused persons alleging house trespass and causing hurt by the complainant party. In view of the registered sale deed in their favour, the probability was that the accused persons were in possession of the disputed house being its purchaser, and so there was the probability that the complaint raided the disputed house by inflicting fire arm injuries and took its possession from the accused persons. Therefore, the right of private defence was available to the accused persons. The accused persons were found entitled to the benefit of the doubt and were acquitted of the charge under s 452, IPC .[88]

8. Acquittal

The allegation against the accused persons were that they armed with a *lathi* and crow-bar entered into the house of the complainant and assaulted the deceased. The eyewitness wife of the deceased did not support the prosecution case. There was no explanation for the delay of five days in the FIR reaching the court. The parties were on inimical terms so the uncorroborated evidence of the interested eyewitness also made the prosecution case suspicious. The conviction of the accused under ss 452, 304, Pt II read with s 149, IPC, was not found proper.[89] The allegations were that the accused alongwith other persons came and threw acid on the informant and assaulted the inmates of the house. The name of the ocular witness stated that the accused persons assaulted the inmates inside the house. The prosecution was pending for more than 22 years, so the accused persons were found entitled to be acquitted.[90]

Prosecution case was that five persons including the appellant accused persons armed with lathi, revolver and knife entered the temple, tied the priest (complainant) of the temple with rope and took away collection box. Admittedly, no injury was caused to the complainant. The testimony of the complainant and the sole witness examined in the case was inconsistent and contradictory. Conviction of the appellant accused under ss 452, 392 and 397, IPC was set aside.[91]

9. Conviction

The accused persons forcibly entered into the house of the deceased, broke open the room which was bolted from inside, and thereafter, assaulted him. Their conviction under s 452, IPC, was found proper.[92] The occurrence took place in a house where the accused attacked the injured by firing a shot. Both eye witnessed were undisputedly present in the house at the time of the incident. Their evidence was found reliable and the conviction of the accused under ss 307 and 452, IPC, was found proper.[93] Accused A1

along with some others armed with weapons entered the house of the complainant PW1, inflicted knife injuries and looted articles. The prosecution evidence established that the gathering of mob outside the house of PW1 was an unlawful assembly, which was armed with deadly weapons. The same would3782 clearly fall within the ambit of ss 141 and 148, IPC . Accused A1 was convicted for offences under ss 148, 392 and 452, IPC .[1]

10. Probation

An accused aged 20 years was convicted under ss 452 and 397, IPC . The report of the probation officer showed that the accused belonged to a middle class respectable family, but fell into undesirable company and was influenced by movies eulogising crime. The accused was held entitled to the benefit of the Probation of Offenders Act 1958 (20 of 1958).[2] Where the incident took place in a fit of anger, and all the parties were educated and also distantly related and the incident was not such as to direct the accused to undergo the sentence, the accused were released on probation by directing them to execute a bond of one year for good behaviour.[3]

11. Sentence (Deterrent)

Deterrent punishment should be awarded under this section.[4] A prison sentence being compulsory under this section, imposing only a sentence of fine is an error of law.[5] The sentence, that has to be imposed under this section, is to be one of imprisonment, and it is optional for the court to impose fine or not.[6] A sentence of two years rigorous imprisonment could not be considered to be excessive where one of the offenders was armed with pistol and two with spears.[7]

12. Sentence (Lenient)

The accused was convicted under ss 325 and 452, IPC, but during the pendency of civil appeal before the Supreme Court he was acquitted under s 325, IPC, on account of a compromise with the injured. The offence under s 452, IPC, was not compoundable, but the sentence of the accused under s 452 was reduced to the period already undergone by him.[8]

The accused persons were acquitted of the offences under ss 322 / 149, IPC, in view of the said offence lawfully compounded by the parties, but their conviction under ss 147 and 452, IPC, was found proper as these are non-compoundable offences. Keeping in view the facts that the incident took place 20 years ago and the accused persons were in custody as convicts for at least six days and had already deposited the fine, their sentence was reduced from six months rigorous imprisonment under s 452, IPC, to the period of imprisonment already undergone by them.[9] Where the incident took place almost 20 years ago and the cause of incident was a simple altercation about loss caused to the crops of the accused by donkeys belonging to the prosecution party, since all accused were of 60 to 65 years old of age, the sentence of imprisonment awarded by the trial court was reduced to the period already undergone3783 by them.[10] Keeping in view the very old age of the accused who was more than 77 years of age, the sentence of four years rigorous imprisonment was reduced to six months rigorous imprisonment and made concurrent with the sentence awarded under s 323 read with s 34, IPC .[11]

Appellant accused No. 7 along with other accused, armed with deadly weapons, entered the house of the deceased, killed two persons and inflicted multiple injuries on the injured persons. Reduction of sentence from 3 years to one year by the High Court was wholly unjustified. The sentence of three years awarded by the trial court was restored.[12]

13. Alteration of Conviction from Section 452 to one under Section 451

When there was nothing to show that the accused had trespassed into the house of the victim to commit an offence under s 354, IPC, by making the requisite preparation to commit the said offence, the conviction of the accused was altered from s 452 to s 451, IPC .[13]

76 *Sharawan Kumar v State of Madhya Pradesh* 1980 Cr LR (MP) 72, p 73 (Notes) .

77 *Pirmohammad Kukaji v State of Madhya Pradesh* 1960 Cr LJ 83 ; *Chatra v State* AIR 1957 MP 217, 1957 Cr LJ 1405 (2) .

78 *Dal Chand v State* 1964 Raj LW 524 .

79 *Fakir Chand De v Emperor* AIR 1921 Cal 556, 25 Cr LJ 168 .

80 *Pirmohammad Kukaji v State of Madhya Pradesh* AIR 1960 MP 24, 1960 Cr LJ 83 ; *Chatra v State* AIR 1957 MP 217, 1957 Cr LJ 1405 (2) .

81 *Chandra Bhushan Duhey v State* 1964 BLJR 660 .

82 *Empress v Nund Mohan Sircar* 12 WR (Cr) 33 .

83 *Koduri Venkata Rao v State of AP* 2011 Cr LJ 3512, p 3514 (AP) .

84 *M Munnay v The King Emperor* AIR 1925 Oudh 89, 1925 Cr LJ 1087 (Oudh) .

85 *Tulshiram Bhanudas Kambale v State of Maharashtra* 2000 Cr LJ 1566 (Bom) (DB) .

86 *Passang Lama v State of Sikkim* 1975 Cr LJ 1350, p 1354 .

87 *Rajendra Singh v State* 1980 Cr LR 125, p 126 (UP) .

88 *Ragunandan Prasad and Ors v State* 1998 Cr LJ 1571 (All) .

89 *Siddheswar Paswan v State of Bihar* 2002 Cr LJ 332 (Jharkhand) .

90 *Bhagelu Sail v State of Bihar* 2002 Cr LJ 4185 (Pat) .

91 *Dilawar Singh v State of Delhi* 2007 Cr LJ 4709, p 4717 (SC), AIR 2007 SC 3234, (2007) 12 SCC 641 .

92 *Shyam Lal and Ors v State of Himachal* Pradesh 2002 Cr LJ 3178 (HP).

93 *Vijay Kumar v State of Punjab* 1999 Cr LJ 592 (SC) .

1 *Mohammed Ishaq v S Kazam Pasha* 2009 Cr LJ 3063, p 3068 (SC), 2009 AIR SCW 3705, 2009 (7) Scale 575 .

2 *Masarullah v State of Tamil Nadu* AIR 1983 SC 654, 1983 Cr LJ 1043 .

3 *State of Maharashtra v Jagmohan Singh Kuldip Singh Anand* 2004 Cr LJ 4254 (SC) .

4 *Rangnath Prataprao Jadhav v State of Maharashtra* 2006 Cr LJ 3438 (Bom) .

5 *Alakh Singh v State of Bihar* (1965) 2 Cr LJ 832 (1) (Pat) .

6 *Rajeswar Prasad v State of Bihar* AIR 1972 Pat 50, 1972 Cr LJ 258, p 259 .

7 *Kartar Singh v State* AIR 1956 Punj 122, 1956 Cr LJ 654 .

8 *Rajinder Singh v State (Delhi Admn)* AIR 1980 SC 1200 .

9 *Chotan Giri and Ors v State of Uttar Pradesh* 1999 Cr LJ 2986 (All) ; *Shokin and Ors v State of Rajasthan* 1996 Cr LJ 4222 (Raj) .

10 *Mangu and Ors v State of Rajasthan* 1999 Cr LJ 1541 (Raj) .

11 *Sheozada v State of Uttar Pradesh* AIR 1981 SC 2008, 1981 Cr LJ 1689 (SC) .

12 *State of Maharashtra v Tulshiram Bhanudas Kamble* 2007 Cr LJ 4319, p 4326, AIR 2007 SC 3042 .

13 *Ram Pratap v State of Rajasthan* 2002 Cr LJ 1430 (Raj) .

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Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 453.

Punishment for lurking house-trespass or house-breaking.--

Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

COMMENTS

1. Scope

This section prescribes punishment for the offences of lurking house-trespass and house-breaking, defined under ss 443 and 445, IPC respectively. As all the aspects of the said offences have been discussed under the said sections, the relevant commentary there may be referred to.

2. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate, and may also be tried summarily.

3. Charge

The offence under this section being triable as a summons case, framing of a formal charge is not necessary. Section 251CrPC, 1973 may be referred to.

4. Proof

To establish a charge under this section, the prosecution must prove, in respect of lurking house-trespass, that:3784

(a) the accused committed house-trespass as defined in s 442, IPC, and
(b) he did so after taking precautions to conceal such house-trespass from some person who had a right to exclude or reject him (s 442, IPC);

or in respect of house-breaking, that:

(a) the accused committed house-trespass as defined in s 442, IPC, and
(b) he effected his entrance into the house, or any part of the house, in any of the six ways, described in s 445, IPC, or if he was there for the purpose of committing an offence, or he had committed an offence there, he quit the said place in any of the said six ways.

The prosecution must prove that the accused had the intention to commit an offence or to intimidate, insult or annoy the person in possession of the property trespassed upon.[14]

14 *Babu v State* 1971 All LJ 4, p 10 .

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Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 454.

Lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment.--

Whoever commits lurking house-trespass or house-breaking, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

STATE AMENDMENT

Tamil Nadu-- Section 454 of the Act, shall be renumbered as sub-section (1) of that section and after sub-section (1) as so renumbered, the following sub-section shall be added, namely--

"(2) Whoever commits lurking house-trespass or house-breaking in any building used as a place of worship, in order to the committing of the offence of theft of any idol or icon from such building, shall notwithstanding anything contained in sub-section (1), be punished with rigorous imprisonment which shall not be less than three years but which may extend to ten years and with fine which shall not be less than five thousand rupees:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three years."--[*Vide* TN Act 28 of 1993, s 4 (wef 13-7-1993)].

COMMENTS

1. Scope

This section, which corresponds to s 451, IPC, which prescribes punishment for the same kind of offences in respect of simple house-trespass, provides for higher punishment for similar offences in respect of lurking house-trespass (s 443, IPC) and3785 house-breaking (s 445, IPC). It covers the case of the first aggravated form of the said offences. While this section deals with lurking house-trespass or

house-breaking by day, s 457, IPC deals with those offences when committed by night. Lurking house-trespass, or house-breaking, if intended to commit the offence of theft, is made more severely punishable. The case would be covered under this section if the offence of theft is not intended, but is also actually committed.[15]

2. Section 454 and Section 11 of the Public Premises (Eviction) Act (40 of 1971)--Distinction

The ingredients of offences under s 454, IPC, and under s 11 of the Public Premises (Eviction of Unauthorised Occupents) Act 1971 are quite different. In the first case, the entry must be to commit an offence or to cause insult, intimidation or to annoy the occupant, and in the second case there is re-entry after having been evicted from a public premises under the Act.[16] Both in case of art 20(2) of the Constitution of India as well as under s 26 of the General Clauses Act, to operate as a bar, the second prosecution and the consequent punishment thereunder must be for the same offence, *i.e.*, an offence whose ingredients are the same. Thus, the discharge of the accused under s 454, IPC, is not proper.[17]

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate when the lurking house-trespass, or house-breaking, is committed in order to commit an offence (other than the theft) punishable with imprisonment, and by a magistrate of the first class when the lurking house-trespass, or house-breaking, is committed in order to commit a theft.

4. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate*, *etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the...day of..., at..., you committed lurking house-trespass by entering into (*or remaining in*) a house in the possession of AB used as a human dwelling in order to the commission of the offence, to wit...(*mention it*), punishable with imprisonment, and that you thereby committed an offence, punishable under s 454 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

5. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed lurking house-trespass, as defined in s 443, or house-breaking, as defined in s 445 ; and
(b) he did so in order to commit an offence, punishable with imprisonment, or for committing a

theft.3786

Intention being the gist of the offence under this section, it must be proved in all cases. Where there was no evidence to prove that the complainant was the tenant of the accused in respect of the shop in question, the possession of the room in question remained with the accused, so the conviction of the accused under s 454, IPC, was not found proper.[18]

6. Conviction

Where the accused was caught with some jewels, while he was leaving the house, but there was neither any evidence of house-breaking, nor of the essential elements of lurking house-trespass, it was held that the accused was guilty of an offence under s 380, and not of an offence under this section.[19] Similarly, when a boy of about 11 or 12 years of age was found in a room which contained only some ordinary papers, it was held that no offence was made out against the boy.[20] If there is no evidence on record that accused was seen near the house of complainant on the day of theft and stolen property was recovered at the instance of accused 3 months after the incident, the accused is liable to be convicted under s 411, IPC, and not under ss 454 and 380, IPC .[21] However, where, under the order of a magistrate under s 145, CrPC, the police locked the house in question and handed over the key to the *supurdar* and the accused, on refusal of the *supurdar* to give the key to him on his demand, broke open the lock and took forcible possession of the house, it was held that the accused had rightly been convicted under s 454, IPC .[22]

Offence under s 454, IPC includes offence under s 380, IPC . Where accused is convicted under s 380, IPC, separate conviction under s 454, IPC is not required.[23]

7. Alteration for Conviction from Sections 454 and 380 to Section 411

Commentary under the same heading in s 380, *ante*, may be referred to.

15 *Empress v Zor Singh* (1888) ILR 10 All 146 .

16 *Steel Authority of India Ltd v Aelhmesh Rein and Ors* 1984 Cr LJ 1284 (MP), 1984 MPLJ 408 .

17 *Ibid.*

18 *Kana Ram State of Rajasthan*2002 Cr LJ 1867 (Raj).

19 *Khuda Bux v Emperor* 10 PR 1886 .

20 *Gopal v State of Uttar Pradesh* 1971 All Cr R 284 .

21 *Karni Singh v State of Rajasthan* 1999 Cr LJ 1791 (Raj) .

22 *Ram Samujh v State* AIR 1967 All 579, 1976 ALJ 267 .

23 *KE Lokesha v State of Karnataka* 2012 Cr LJ 2120 (Kant) .

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Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 455.

Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.--

Whoever commits lurking house-trespass, or house-breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.3787

COMMENTS

1. Scope

This section corresponds to s 452, IPC which deals with offences of similar kind in respect of house-trespass. The committing of the offences of lurking house-trespass and house-breaking are treated as more serious offences when committed by night than those committed by day. No such distinction has been made in respect of house-trespass. Similarly, while s 451, IPC deals with the offence of house-trespass, whether committed by day or by night, ss 455 and 458, IPC deal with offences of lurking house-trespass or house-breaking when comitted by day and by night respectively.

The offences under ss 454 and 455, IPC are cases of aggravated forms of criminal trespass and an entry in or upon a property in order to be a crime must be shown to have been made with the intent to commit the same or to insult or annoy or intimidate the complainant. It is necessary to show that causing of such annoyance, intimidation or insult was the aim of the entry.[24]

2. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

3. Pendency of Civil Proceedings--Criminal Proceedings not to be Stayed

The criminal proceedings are not to be stayed during pendency of civil proceedings simply because identical facts will be tried in both the proceedings, reason being that objects and approaches in the two types of proceedings are different and criminal proceedings need an early disposal.[25]

4. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate*, *etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the...day of..., at..., you committed lurking house-trespass/house-breaking, in the building in

possession of *AB*, and used as a human dwelling (*or used for the custody of property*), having made preparation for causing hurt to *AB* (*or for assaulting any person/for wrongfully restraining any person/for putting any person in fear of hurt or assault or wrongful restraint*), and that you thereby committed an offence punishable under s 455 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

Though a conviction under s 457, IPC, cannot be sustained without specification of the intention in the charge, a conviction under s 455 is not vitiated due to the want of specification of the intention in the charge.[26]3788

5. Proof

In order to establish a charge under this section, the procesution must prove that:

(a) the accused committed lurking house-trespass (s 443, IPC) or house-breaking (s 445, IPC); and
(b) he did so after making preparation for causing hurt to, or assaulting, or wrongfully restraining, some person, or for putting some person in fear of hurt, assault or wrongful restraint.

Where the accused persons armed with various weapons entered the police wireless station after breaking open the doors and windows and assaulting the inmates, they must be deemed to have shared the common object of committing lurking house-trespass and therefore liable to be convicted under s 455 read with s 149, IPC .[27]

24 *Kishore Kumar and Ors v State* (1983) 23 DLT 121 (Del) .

25 *Ibid*.

26 *Ram Dayal v State* 1962 MPLJ 337 (notes) .

27 *Chonampara Chellappan v State of Kerala* AIR 1979 SC 3761, 1979 Cr LJ 1335 (SC) .

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Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 456.

Punishment for lurking house-trespass or house-breaking by night.--

Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENTS

1. Scope

This section corresponds to s 453, IPC which prescribes punishment for lurking house-trespass by day, or house-breaking by day, while this section prescribes punishment for the same offence when committed during the night. Neither of these two sections deals with other aggravated forms of these offences.

2. Ingredients

The necessary ingredients for an offence under s 456, IPC, are entry into any building, tent or vessel, used as a human dwelling, with any of the following intents, namely:

(a) to commit an offence, or
(b) to intimidate, insult or annoy any person in possession of such property, after having taking precautions to conceal such house-trespass from some person, who has a right to exclude or eject the trespasser from the building, tent or vessel, and such trespass was after sunset and before sunrise.

Similarly, entry with any of the intents, specified in s 441, IPC, is the primary ingredient to constitute an offence under s 456, IPC . Unless the entry into the house was with any of the intents, specified in s 442, IPC, there cannot be any offence under s 456, IPC .[28]3789

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate.

4. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:

That, on or about the...day of..., at..., you committed lurking house-trespass by night (*or house-breaking by night*) by entering into the house (*or unlawfully remaining in the house*) in the possession of *AB*, and used as a human dwelling, after sunset and before sunrise, and that you thereby committed an offence, punishable under s 456 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct you be tried by this court on the said charge.

To sustain a conviction under this section, it is not necessary to specify the criminal intention in the charge as it should be in a charge under s 457, IPC ; it is sufficient if a guilty intention, as is contemplated in s 441, IPC, is proved.[29] Similarly, a conviction under s 456, IPC would not be bad for want of specification of the intention in the charge.[30]

5. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed lurking house-trespass (s 443) or house-breaking (s 445, IPC); and
(b) it was committed after sunset and before sunrise.

To sustain a charge under s 456, IPC, the court must come to a definite finding as to what was the particular intention, with which the entry effected, and if the intention was to annoy the inmates, such a finding should be clearly mentioned in the judgment, and if, on the other hand, the intention was to commit some other offence, such as adultery or unnatural offence with the inmates of the house, a finding to that effect must be recorded, based on evidence, and a vague statement, that the accused must have intended to annoy or insult the inmate, would not suffice.[31]

Mere presence of the accused in the house of the complainant would not constitute offence under s 456, IPC In the instant case the accused at an odd time was found present in the house of the complainant. There was lack of evidence showing that the accused went to the house of the accused with an ulterior motive and intention. The accused was acquitted of the charge under s 456, IPC .[32]

Though the prosecution must prove the existence of one or more of the intentions mentioned in s 441, the proof need not be direct. It will be enough if it is proved, like3790 any other fact (and the existence of intention is a fact), by the evidence of conduct and of surrounding circumstances.[33] In *Mulla v Emperor* ,[34] the accused who was a complete stranger, was found inside the complainant's house at 2 am having entered the house by a door which the complainant had taken care to secure at night. The accused alleged that he went with the intention of pursuing an intimacy with a widow. He was held guilty under this section. In *Ishri v Emperor* ,[35] the accused was found inside the house of the complainant at midnight and his presence was discovered by the wife of the complainant crying out that a thief was taking away her *hansuli*. The accused was not there with the consent, or at the invitation, or for the pleasure, of the complainant. It was held that the accused was properly convicted under this section, it being for him to show that his intention was, under the circumstances, innocent.

6. Legality of Conviction under Section 456 when charge is under Section 457

On the question whether, in cases in which the charge against the accused is under s 457, the conviction of the accused can be made under s 456 by reason of the offence being a minor offence, there is a difference of opinion. In an early Calcutta case, *Jharu Sheikh v Emperor* ,[36] it was held that a charge, under s 456, of entering the house with an object, not specified, but which is presumed to be criminal, cannot be sustained when the person is being tried for the specific charge, under s 457, IPC, of theft in a dwelling house and house-breaking with intent to commit theft. He would be seriously prejudiced by not knowing what really is the charge against him. This view was followed, in Calcutta, in later cases. It was held that when a charge has been definitely framed under s 457, in which theft is alleged, the accused cannot be convicted, under s 456, IPC, of house-trespass with some other object without an amendment of the original charge, unless the court is satisfied that he was not, in any way, been prejudiced in his defence by the omission to amend the charge.[37] Where the magistrate found that the charge of theft, or the charge of house-breaking with a view to commit theft, broke down and it appeared that there was another object, it was held that he was duty-bound to give the accused notice by drawing up a charge,

clearly stating what it was, that he was accused of doing.[38] In Patna and Sind also, the above view was followed and it was held that it is illegal for a Court of Appeal to alter a conviction under s 457 to one under s 456 .[39]

On the other hand, in a Calcutta case, *Karali Prasad Guru v Emperor* [40] it was held that although the specific intent, mentioned in the charge, namely, the intent to commit theft, may not be established, yet it is competent to the court to convict the accused under s 456 in conformity with s 238 of CrPC 1898 (corresponding to new s 222 o) of 1973 CrPC, and the only consideration is whether the accused had been prejudiced at the trial by the conviction for a minor offences. In dealing with the case3791*Jharu Sheikh v Emperor* ,[41] it was pointed out that it must be limited to its special circumstances. In *Narayanan v State of Kerala* [42] also the same view was taken. It was held that if the circumstances of a particular case warrant the inference that the entry was with intent to commit any offence within the meaning of s 441, IPC, conviction under s 456, IPC will be proper even if the charge may be under s 457 . To the same effect is the view taken in Punjab[43] and Allahabad.[44] In cases in Patna also, the contention, that when the charge indicates that the trespass was committed with the intention of committing theft, the accused should not be convicted for having committed trespass with the object of committing an offence, was rejected.[45] In Orissa, it was held that an offence under s 456 could be a minor offence if the intention, with which the entry was effected, as specified in the charge under s 457, and the intention, with which the entry was effected, as found, by the trying magistrate, for convicting an accused under s 456, have something in common. However, where the said two intentions differ fundamentally, it is always a question whether prejudice has been caused by convicting the accused of an offence involving an intention different from that specified in the original charge.[46] It is submitted that the latter view seems to be correct. If it is not, therefore, established that the accused trespassed into a house at night with the sole intention to commit a theft, he cannot be held guilty of the major offence under s 457, IPC . However, if it can be fairly presumed that the entry was made with intent to commit some other offence, he would be guilty of the minor offence under this section.[47]

7. Alteration of Conviction from Section 457 to Section 456

Commentary under the same heading in s 457, *post*, may be referred to.

28 Re *Shanmugham*(1980) 24 Mad LJ (Cr) 495, pp 496-497; *Sankarsan Boral v State* 1957 Cr LJ 286 ; *Lalit Kumar v State of Chhattisgarh* 2012 (109) AIC 585 (Chh) .

29 *State of Madhya Pradesh v Thakur Prasad Dhanai* 1976 MPLJ 433, 1976 Jab LJ 688 ; *Balmukand Ram v Ghansam Ram* (1895) ILR 22 Cal 391 .

30 *Ram Rang v Emperor* 2 Cr LJ 279 ; *Karali Prasad Guru v Emperor* AIR 1917 Cal 824, 17 Cr LJ 424 .

31 *Sankarsan Boral v State* 1957 Cr LJ 286 ; Re *Shanmughan*(1980) 24 Mad LJ (Cr) 495, p 497.

32 *Lalit Kumar v State of Chhattisgarh* 2012 (109) AIC 585 (Chh) .

33 *Balmukand Ram v Ghansam Ram* (1895) ILR 22 Cal 391, p 406 .

34 *Mulla v Emperor* AIR 1915 All 178, 16 Cr LJ 435 .

35 *Ishri v Emperor* 4 Cr LJ 291, 3 ALJ 652 ; *Premanundo Shaha v Brindabun Chung* (1895) ILR 22 Cal 994 ; *Kailash Chandra v Empress* (1889) ILR 16 Cal 657 .

36 *Jharu Sheikh v Emperor* 13 Cr LJ 224 .

37 *Hajari Sonar v Emperor* 24 Cr LJ 119 .

38 *Mahommed Hussein v Emperor* AIR 1914 Cal 663, 15 Cr LJ 190 .

39 *Raghu Singh v Emperor* AIR 1920 Pat 590, 21 Cr LJ 496 ; *Balkeswar Singh v Emperor* AIR 1422 Pat 5, 23 Cr LJ 114 ; *Waroo v Emperor* AIR 1948 Sind 40, 49 Cr LJ 72 .

40 *Karali Prasad Guru v Emperor* AIR 1917 Cal 824, 17 Cr LJ 424 .

41 *Jharu Sheikh v Emperor* 13 Cr LJ 224 .

42 *Narayanan v State of Kerala* AIR 1962 Ker 81, (1962) 1 Cr LJ 433 .

43 *Ram Rang v Emperor* 2 Cr LJ 279 .

44 *Mulla v Emperor* AIR 1915 All 178, 16 Cr LJ 435 ; *Ishri v Emperor* 4 Cr LJ 291, 3 ALJ 652 .

45 *Nihara Kahar v Emperor* AIR 1935 Pat 129, 36 Cr LJ 829 ; *Jadav Mahton v Emperor* AIR 1921 Pat 217 .

46 *Sankarsan Boral v State* 1957 Cr LJ 286 .

47 *Bhaskar Chandra Sahu v State* 1969 Cr LJ 578 (Ori) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 457.

Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment.--

Whoever commits lurking house-trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

STATE AMENDMENTS

Tamil Nadu--Section 457 of the Act, shall be renumbered as sub-section (1) of that section and after sub-section (1) as so renumbered, the following sub-section shall be added, namely--

"(2) Whoever commits lurking house-trespass by night or house-breaking by night in any building used as a place of worship, in order to the committing of the offence of theft of any idol or icon from such building, shall, notwithstanding anything contained in sub-section (1), be punished with rigorous imprisonment3792 which shall not be less than three years but which may extend to fourteen years and with fine which shall not be less than five thousand rupees:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three years." [*Vide* TN Act No 28 of 1993, s 5 (wef 13-7-1993)].

Uttar Pradesh--Section 457 of the principal Act shall be renumbered as sub-section (1), of that section and after sub-section (1) as so renumbered, the following sub-section shall be added, namely--

"(2) whoever commits lurking house-trespass by night or house-breaking by night in any building used as a place of worship in order to the committing of the offence of theft of any idol or icon from such building, shall, notwithstanding anything contained in sub-section (1), be punished with rigorous imprisonment

which shall not be less than three years but which may extend to fourteen years and with fine which shall not be less than five thousand rupees:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three years." [*Vide* Uttar Pradesh Act No 24 of 1995, s 11].

COMMENTS

1. Scope

This section prescribes punishment for yet another aggravated offence of lurking house-trespass or house-breaking. The section corresponds to s 454, IPC which deals with the same offence when committed by day, while this section deals with it if committed by night. The offence under this section is graver than that under s 456, IPC also as that section makes the offence punishable ordinarily while an offence would fall under this section only if the offence, for committing which the lurking house-trespass or house-breaking was committed, is punishable with imprisonment or is an offence of theft itself. House-breaking by night with the purpose of abducting a woman, being an offence punishable with imprisonment, will be covered by this section.[48]

2. Ingredients

Following are the ingredients for the offence under s 457, IPC :3793

(a) there was lurking house-trespass by night or house-breaking by night; and
(b) the house-trespass or house-breaking was in order to commit an offence punishable with imprisonment.[49]

3. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

4. Quashing of Complaint

The complainant was earlier booked by the forest officers under the Forest Act and stated to have no complaint against the forest officers in the said case. Five days after the registration of the case under the Forest Act, the complainant (accused) filed a complaint against the forest officers alleging offences under ss 447, 457, 323 read with s 34, IPC . The facts showed that the complaint was lodged as a counter measure and was vague also, so the same was found liable to be quashed.[50]

5. Joint Trial

Offences under ss 380 and 457, IPC, committed at different times, are not offences of the same kind and they cannot, therefore, be charged together and tried at one trial.[51] However, a person, accused of an offence under s 457, can be legally charged and tried with persons accused of receiving or retaining stolen property under s 411 .[52]

6. Principle of Joint Criminal Liability not Applicable to this Section

Offence under this section is not of such a nature to which the principle of joint criminal responsibility, embodied in s 34, IPC, is applicable.[53]

7. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate*, *etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the...day of..., at..., you committed lurking house-trespass by night (or house-breaking by night) by entering into the house belonging to AB, and used as a human dwelling (*or used for the custody of property)*, after sunset and before sunrise, in order to commit the offence of...(mention it), and that you thereby committed an offence, punishable under s 457 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

Failure of the prosecution to *prima facie* show that the disputed room and the furnitures and fixtures contained therein were in possession of the *de facto* complainant prior to the incident, showed that the major ingredient of the offence3794 remained unfilled, so the order of the trial court framing charge under ss 457 and 380 against the accused person was found illegal.[54]

8. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed either lurking house-trespass (s 443, IPC) by night (s 444, IPC) or house-breaking (s 445) by night (s 446, IPC); and
(b) he did so in order to commit an offence of theft or any other offence punishable with imprisonment.

Where, however, the discovery of the stolen articles, at the instance of the accused, not only proved that he knew where the incriminating articles were, but also materially supported the story given by the approver, it was held that the conviction of the accused both under s 457, and s 380, IPC, was justified.[55] Where the door of a shop was found broken open, it was held that the conviction should be for house-breaking by night, and not simply for lurking house-trespass by night.[56] Where the accused, with a view to support a fraudulent claim of title to a house, broke into it during the temporary absence of the owner, assaulted the owner's servant, who was in charge of the house, and took forcible possession of it, it was held that he was rightly convicted of the offence of house-breaking under s 457 .[57] Reliance placed on the statement of hostile witness in a case under this section, read with s 380, was not found unjustified when the testimony of those witnesses generally supported the prosecution case.[58]

9. Concealing Presence by Accused is a Must

A mere unnoticed entry in the house, though sufficient to raise a suspicion that such entry would have

been by sealing or climbing over, the wall cannot be one with having taken precautions to conceal the house-trespass from occupants of the house.[59]

In order to constitute lurking house-trespass the offender must take some active means to conceal his presence. In order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. Where the accused made no attempt to conceal himself, offence punishable under s 457 is not committed.[60]

10. Acquittal

Where the criminal intention is an ingredient of an offence, it is on the prosecution to prove that intention just as much as any other ingredient. The entry of one person into the house of another will not be presumed criminal at all, unless there are3795 circumstances from which an inference of criminality can be drawn.[61] The mere fact that the accused was with the party of burglars in the village, is no proof that he was one of the burglars.[62] The accused persons were alleged to have committed lurking house-trespass with intention to commit theft. The prosecution failed to prove that articles recovered from accused persons were stolen articles. The conviction of accused persons were found nor proper.[63] From the mere possession of stolen goods, a presumption of an offence of lurking house-trespass by night, or of house-breaking by night, as is contemplated in this section, cannot be drawn though a person, found in possession of stolen goods soon after the theft, may be presumed to be either a thief or a receiver of the stolen goods, unless he can account for his possession.[64]

The prosecution case was that the complainant was running a medical shop on a rental basis. The owner of the shop was alleged to have broken open the lock of the shop and had given its possession to other accused persons for running the beetal shop. However, the evidence on record showed that the accused persons were in possession of the said shop since 1983 and the medicine shop was closed in the year 1982. The accused was found to be entitled to the benefit of the doubt.[65] It is difficult to believe that the accused entered the room at midnight only to commit an offence under s 323, IPC, so the conviction of the accused under ss 323 and 457, IPC, was set aside.[66] When there was no direct or circumstantial evidence to show that the accused was found in a nearby place where the alleged incident took place, the acquittal of the accused was found proper.[67]

11. Conviction

The conviction should be based on evidence which is reliable and believable.[68] When the movements of the accused near the scene of crime at or about the time of occurrence are not spoken to by any witness, there can be no particle of evidence in support of the conviction.[69] In *Ghasita v Emperor* ,[70] the accused made his way into an open thronged enclosure in which goats and sheep were kept. The owner was disturbed before the accused was able to carry out his object and he fled. It was held that the only offence, of which he could be convicted, was one of attempted theft under ss 379 / 511, IPC, and not under s 457 . Unless there is evidence to show that the accused has committed a house-trespass by night, or house-breaking by night, he cannot be convicted under s 457 .[71] If there is no evidence to connect the accused with the preparation of the offence of house-breaking and theft, except the recovery of stolen property, he cannot be convicted under ss 457 and 389, IPC .[72] If an accused is charged for entering into a house with the intention of committing theft and such3796 intention is not proved, the court cannot convict him of the offence of having made the entry with some other object such as causing annoyance to the inmates even if the accused knew that his presence may cause annoyance.[73] If, a cattle-shed, which was broken open, was used for custody of agricultural implements, the conviction under s 457, IPC, would not be illegal.[74]

Three accused persons entered the house of the victim forcibly, lifted her, carried her to the shop of one accused, committed rape on her; the testimony of the prosecutrix was found reliable and the accused were convicted under ss 366 / 457, 376 / 34, IPC .[75]

12. Double Conviction

This section makes punishable lurking house-trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, and if the offence, intended to be committed, is theft, the punishment is higher while s 380 makes punishable a theft committed in a dwelling-house. The two offences do not fall under s 71, IPC, and, therefore, the conviction under both the sections is not illegal.[76] In *Emperor v Ajudhia* ,[77] it was held that it was better to concentrate on the gravest offence and accordingly the court convicted the accused under s 457, but acquitted him under s 380 . In *Emperor v Zor Singh* ,[78] the court, explaining its previous view, observed that it did not rule that a conviction and sentence under each of the ss 380 and 457 for offences, arising out the same transaction, was absolutely illegal; it did so only in the interest of simplicity and convenience. In an Oudh case, *Sital v Emperor* ,[79] it was held that there is no connection between ss 457 and 380 and, an offence of theft being no part of an offence under s 457, separate conviction under both the sections is proper. In a Patna case, *Idris v Emperor* ,[80] it was held that there was nothing to prevent the court from passing separate sentences under ss 457 and 380 . Similarly, in a Madras case, Re *Natesa Mudaliar,*[81] it was held that there was no prohibition of separate sentences being passed under ss 380 and 457 . In an Assam case, *Birendra Chandra De v State* ,[82] also, a conviction both under ss 457 and 380 was upheld.

An offence under s 457, IPC, as also an offence under s 380, IPC, will be said to have been committed where the thief commits the theft by breaking open the house during night if breaking open the house is inevitable for committing the theft.[83]

13. Legality of Conviction under Section 456 when charge is under Section 457

Commentary under the same heading in s 456, *ante*, may be referred to.3797

14. Probation

An accused was convicted under ss 457 and 354, IPC . Taking into consideration the gravity of the offence and also the fact of brutal commission of such offence it was not considered expedient to give them the benefit of the Probation of Offenders Act 1958 (20 of 1958).[84] Burglary is a serious offence. Whenever it is detected, the person concerned must be given a deterrent punishment. It is not proper to release the burglar on probation of good conduct.[85]

15. Sentence (Deterrent)

Where the rigorous imprisonment for a period of two years is the sentence imposed and the set off for the period undergone was also granted, the sentence imposed was held absolutely justified.[86] Where a policeman was convicted of a serious offence of burglary, it was held that sentence of five years rigorous imprisonment was not excessive.[87] The accused was found guilty under ss 376 and 323, IPC, and also under s 450, IPC, by the trial court. The High Court in appeal maintained the conviction and sentence of the accused under ss 376 and 323, IPC, but altered his conviction from one under s 458 to one under s 457, IPC, and sentenced him under s 457, IPC, to undergo five years rigorous imprisonment and to pay a fine of Rs 1000 and in default of it to undergo one month's imprisonment.[88] Where the accused took an active part in abducting and torturing the complainant and also demanded ransom like his confederates and was convicted under ss 365 and 457, IPC, the sentence of three years rigorous imprisonment awarded to the accused under s 457 was not reduced for want of any just ground.[89]

16 Sentence (Lenient)

Where, the accused was not successful in committing theft of any article, a substantive sentence of rigorous imprisonment for nine months was held to be too severe, and was reduced to three months.[90] The occurrence took place 15-16 years ago and the accused faced the ordeal of a very long trial, so the sentence of one year's rigorous imprisonment awarded under s 457, IPC, was reduced to rigorous imprisonment for three months.[91] When retrial is ordered with regard to the plea of guilty, a sentence higher than the one, passed at the original trial cannot be passed. Higher sentence, in a retrial, can be passed only when retrial is ordered on any other ground.[92]

17. Alteration of Conviction from Section 458 to one under Section 457

Commentary under the same heading in s 458, *post*, may be referred to.3798

18. Alteration of Conviction from Section 457 to one under Section 380

If an accused, charged under s 457, IPC, is not found guilty of lurking house-trespass, he may not be convicted under s 457, IPC, but his conviction can be altered into one under s 380, IPC .[93]

19. Alteration of Conviction from Section 457 to one under Section 456

Where the accused in the dead of night was found concealing himself in another man's house where some amount was kept, he cannot be convicted under s 457, IPC, unless it is shown that the amount was kept there to the knowledge of the accused. However, on the failure of the accused to justify his presence there, the presumption could be drawn that he made the entry with intent to commit some offence to make him liable to be convicted under s 456, IPC . Therefore, under the circumstances, the conviction of the accused was altered from s 457, IPC, to one under s 456, IPC .[94]

20. Alteration of Conviction from Section 459 to one under Section 457

When the accused entered into the complainant's house after breaking window of house, he was apprehended when a neighbour came to the spot by over-powering him, while trying to escape from the clutches of complainant, the accused caused simple injuries with scissors, but there was no evidence on record that the accused caused grievous hurt to the complainant while committing lurking house trespass, so he was liable to be convicted under s 457, and not under s 459 .[95]

48 *Nasiruddin v State of Assam* AIR 1971 SC 1254, p 1256, 1971 Cr LJ 1073 .

49 *Nasiruddin v State of Assam* AIR 1971 SC 1254, p 1256, 1971 Cr LJ 1073 .

50 *HN Venakesh and Ors v State of Karnataka* 2002 Cr LJ 328 (Kant) .

51 *Krishnaji Anant Dange v Emperor* AIR 1932 Bom 277, 33 Cr LJ 619 .

52 *Emperor v Nawab* AIR 1937 Lah 463, 38 Cr LJ 1061 .

53 *Ratna v State of Madhya Pradesh* 1980 Cr LR 80, p 81 (MP) (Notes) .

54 *Rabi Kumar Agarwal v State of West Bengal* 2003 Cr LJ 1342 (Cal) .

55 *Birendra Chanara De v State* AIR 1957 Assam 168, 1967 Cr LJ 1231 .

56 *Empress v Kenaaram Bousee* 4 WR (Cr) 19 .

57 *Sella Muthu v Pallamuthu* (1912) ILR 35 Mad 186 .

58 *Deonarayan v State of Uttar Pradesh* 1972 All Cr R 98, p 99 .

59 *Dassai Kandu v State* (1979) 27 BLJR 11 ; *State of Rajasthan v Vinod* 2002 Cr LJ 1308 (Raj) .

60 *Akhaya Behera v State of Orissa* 1996 Cr LJ 334 (Ori) .

61 *Mosaheb Doma v Emperor* AIR 1940 Pat 14, 40 Cr LJ 833 (2); *Prempal Bagh v State* 1984 Cr LJ 828 .

62 *Mewa Singh v Emperor* 18 Cr LJ 657 .

63 *Santu and Anor v State of Madhya Pradesh* 2001 Cr LJ 4455 (Chatisgarh) .

64 *Hazara Singh Hukim Singh v State* AIR 1960 Punj 286, 1960 Cr LJ 653 ; *State of Karnataka v Abdul Gaffar* 2000 Cr LJ 4456 (Kant) .

65 *Raghabacharan Panda v T Dindayal Patra and Ors* 2003 Cr LJ 1397 (Ori) .

66 *Mohd Siddique Hussain v State of Assam* 2003 Cr LJ 1487 (Gau) .

67 *State of Karnataka v Abdul Gaffar* 2000 Cr LJ 4456 (Kant) .

68 *Machhia v Emperor* AIR 1915 Lah 386, 16 Cr LJ 737(1) ; *Mewa Singh v Emperor* 18 Cr LJ 657 .

69 *Rajamanickam v State* 1971 Cr LJ 1493, 1971 Mad LW (Cr) 65 .

70 *Ghasita v Emperor* AIR 1919 Lah 163 ((1)), 20 Cr LJ 492(2) .

71 *Samrath Singh v State of Madhya Pradesh* 1980 Cr LR 21, p 22 (MP) .

72 *Deochand v State of Madhya Pradesh* (1977) 1 WN 370 ; *Samrath Singh v State of Madhya Pradesh* 1980 Cr LR 21, p 22 (MP) .

73 *Bhabagrahi Behera v State of Orissa* 1980 Cr LJ (NOC) 169 (Ori) .

74 Re *Pullabhotla Chinniah*AIR 1918 Mad 709, 18 Cr LJ 469 .

75 *Balwan Singh v State through P/s Katra* 2013 Cr LJ (NOC) 553 (J&K).

76 *Udai Bhan v State* AIR 1962 SC 1116, (1962) 2 Cr LJ 251 ; *Kanchan Main v Emperor* AIR 1925 Cal 1015, 26 Cr LJ 1253 ; *Emperor v Yeshaba Sakhoba Patil* AIR 1938 Bom 463, 40 Cr LJ 48 .

77 *Emperor v Ajudhia* (1878-1880) ILR 2 All 645.

78 *Emperor v Zor Singh* (1888) ILR 10 All 146 .

79 *Sital v Emperor* AIR 1942 Oudh 214, 43 Cr LJ 252 .

80 *Idris v Emperor* AIR 1939 Pat 349, 40 Cr LJ 751 .

81 Re *Natesa Mudaliar*AIR 1945 Mad 330, 47 Cr LJ 157

82 *Birendra Chandra De v State* AIR 1957 Assam 168, 1957 Cr LJ 1231 .

83 *Rattan v State of Madhya Pradesh* 1980 Cr LR 80, p 81 (MP) (Notes) .

84 *Kanhu Charan Patra v State of Orissa* 1996 Cr LJ 1151 (Ori) .

85 *Emperor v Sardara* AIR 1932 Lah 258, 33 Cr LJ 500 .

86 *Ayyappan v State of Kerala* 2005 Cr LJ 57 (Ker)

87 *Sardara v Emperor* AIR 1930 Lah 667, 31 Cr LJ 877 .

88 *Satyanarayan v State* 2000 Cr LJ 2529 (Raj) ; *Keshav Baliram Naik v State of Maharashtra* 1996 Cr LJ 1111 (Bom) .

89 *Ranchhod v State of Madhya Pradesh* AIR 1979 SC 1493, 1979 Cr LJ (NOC) 169 .

90 *Ramjee Kahar v State* AIR 1961 Pat 409, (1961) 2 Cr LJ 540 .

91 *Qddus v State* 1996 Cr LJ 3201 (All) .

92 *Bassappu S Sagoti v State* 1973 Cr LJ 1374, p 1375 (Goa) .

93 *Bhagwana v Emperor* 19 Cr LJ 609 (All) .

94 *Bhaskar Chandra Sahu v State* 1969 Cr LJ 578 (Ori) ; *MP v Thakur Prasad* 1976 Cr LJ 1442 (MP) (DB) .

95 *Hasmat Ullah Khan v State of Uttaranchal* 2005 Cr LJ 2266 (Uttar)

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 458.

Lurking house-trespass or house-breaking by night after preparation for hurt, assault, or wrongful restraint.--

Whoever commits lurking house-trespass by night, or house-breaking by night, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine

COMMENTS

1. Scope

This section applies to an aggravated form of the offences under ss 452 and 455, IPC . Section 452 deals with cases of simple trespass after preparation for causing hurt, or assault, or wrongful restraint, to any person or putting any person in such fear. Section 455 deals with a similar case of lurking house-trespass, or house-breaking,3799 by day, while this section deals with the same offences when committed by night.[1] This section applies only to the house-breaker who has himself actually made preparation for causing hurt, or assault, or wrongful restraint, to any person, and not to his companions who have not themselves made such preparation.[2] Where the accused dug a hole in the wall of the complainant's dwelling-house, during the night, in order to make their entry to commit a theft in the house, but the accused were interrupted before they could complete it, it was held that the accused's acts did, in law, amount to an attempt, and not a mere preparation.[3]

2. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

3. Joint Trial

Where one of the accused was charged under s 458 and the other under s 411, IPC and the magistrate found that s 458 was not applicable to the former, it was held that he should have tried the two accused separately.[4]

4. Charge

Same as in the case of an offence under s 455, IPC, with the only changes that words 'by night' would be added after the words 'lurking house-trespass', or 'house-breaking', as the case may be, and ' s 458, IPC ' would be substituted for ' s 455, IPC '.

Section 458, IPC is not a cognate offence for the offence prescribed under s 398, IPC . Conviction of the appellant accused under s 458, IPC, where charge was framed under s 398, IPC, without framing charge under s 458, IPC was not justified; the conviction was therefore, set aside.[5]

5. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed lurking house-trespass by night (s 444, IPC) or house-breaking by night (s 446, IPC); and
(b) he did so after having made preparation for:

(i) causing hurt to any person, or
(ii) assaulting any person, or
(iii) wrongfully restraining any person, or
(iv) putting any person in fear of hurt, or assault or wrongful restraint.

6. Acquittal

The accused were charged under s 458 alongwith major charges under ss 366, 323, 342 and 376, IPC . The trial court convicted the accused under s 458, but acquitted3800 them of all other charges. When the major charges against the accused are not proved, it cannot be said that accused entered the house after making preparation for causing injuries or for wrongfully restraining the prosecutrix. Thus, the Appellate Court acquitted the accused persons of the charge under s 458, IPC, also.[6]

7. Conviction

Where the accused, whose house was about two miles away from the place of the complainant, entered the complainant's house at night by jumping a wall, or removing the door chain, and was caught armed with a firearm, it was held that the accused had no purpose except to commit theft and that he was guilty under s 458 .[7]

8. Alteration of Conviction from Section 458 to one under Section 457

Where there is no evidence on record that the accused had committed lurking house-trespass having made preparation to assault, the conviction of the accused is liable to be altered from s 458, IPC, to one under s 457, IPC .

9. Compensation

Once the Court has imposed fine as part of the sentence for offence under s 458, IPC, the Court by applying the provisions of s 357(3), CrPC cannot direct the accused convict to pay further compensation to the victim.[8]

1 *Raghusingh v State of Madhya Pradesh* 1980 Cr LR 69, p 70 (MP) (Notes) .

2 *Ghulam v Emperor* AIR 1923 Lah 509, 25 Cr LJ 398 .

3 *Emperor v Chandkha Salabatkha* (1913) ILR 37 Bom 553 .

4 *Jagga v Emperor* 3 Cr LJ 76 .

5 *Manik Mian v State of Tripura* 2013 (131) AIC 379 (Gauh) .

6 *Pania and Ors v State of Rajasthan* 2002 Cr LJ 3050 (Raj) .

7 *Mahendra Singh v State* AIR 1959 MP 6, 1959 Cr LJ 47 .

8 *Manik Miah v State of Tripura* 2013 Cr L J 1899 (Gauh) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 459.

Grievous hurt caused whilst committing lurking house-trespass or house-breaking.--

Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, shall be punished with [9][imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

1. Scope

This section provides for a further aggravated form of the offence for which provision has been made in ss 455 and 458, IPC for committing lurking house-trespass or house-breaking by day and by night respectively. There, the offence results from making preparation for causing hurt, *etc*. For an offence under this section, whether committed by day or by night, the accused must cause, or attempt to cause, grievous hurt, or must attempt to cause death, to any person. This section does not require the making of preparation for committing the offence as required under ss3801 455 and 458. This and the following sections prescribe the highest term of imprisonment in cases of house-trespass and house-breaking.

This section is not applicable where a grievous hurt is caused after the offence has been committed.[10]The offence is complete when the act of entering into the house is complete. A person, who has completed a forcible entry into a house, should not be deemed, by reason of violence, subsequently used, to have used violence while house-breaking, and, therefore, the offence under s 459 would not be committed.[11] The causing of the grievous hurt, or the attempt to cause death or grievous hurt, must be done in the course of the commission of the offence of lurking house-trespass or house-breaking, and at the time when such lurking house-trespass, or house-breaking, is being committed. The section will not be applicable where the act of the accused is no more than an attempt. Thus, where the accused, while engaged in making a hole in the wall of the house of the complainant, immediately, upon being disturbed by the *chaukidar*, attempted to make their escape, one of the accused firing off a pistol and the other two attempting to prevent their apprehension by using their *lathis,* it was held that the accused were not guilty under ss 459 / 511 or ss 460 / 511, but only under ss 452 / 511, IPC .[12] Where the accused had committed criminal trespass in a house and caused grievous hurt while struggling with the complainant in the courtyard of his house and it was not clear from the evidence whether the courtyard was a part of the

house, in which there was criminal trespass, it was held that the accused could be convicted only under s 457, and not under s 459 .[13]

2. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

3. Charge

The following form of the charge may be adopted:

> I (*name and office of session judge*, *etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the...day of..., at..., you, while committing lurking house-trespass/house-breaking, caused grievous hurt to AB (*or attempting to cause death or grievous hurt to AB*) and that you thereby committed an offence, punishable under s 459 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

4. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused committed lurking house-trespass or house-breaking;
(b) he caused grievous hurt, or attempted to cause death or grievous hurt to some person; and3802
(c) he did so whilst engaged in committing lurking house-trespass or house-breaking.

The murder was committed on a *chowk* which was not exclusively owned and possessed by the complainant party and the accused also had right of way through it. The trial court did not frame any charge under s 460, IPC . The accused cannot be convicted either under s 460 or s 459, IPC, under these circumstances.[14]

5. Sentence

Where the accused was in jail since about 4 years, the sentence of imprisonment was reduced from 10 years' rigorous imprisonment to five years' and the fine imposed upon the accused was also reduced from Rs 5000 to Rs 3000.[15]

6. Alteration of Conviction from Section 459 to one under Section 457

Commentary under the same heading in s 457, *ante*, may be referred to.

9 Substituted by Act 26 of 1955, s 117 and Schedule for 'transportation for life' (wef 1-1-1956).

10 *Imam Uddin v Crown* 17 PR 1876 ; *Jaffir v Emperor* 2 PR 1882 .

11 *Said Ahmad v Emperor* AIR 1927 All 536, 28 Cr LJ 554 ; *Kapur Singh v State* 65 Punj LR 17, 1963 All WR (Supp) 21 .

12 *Empress v Ismail Khan* (1886) ILR 8 All 649 ; *Saifuddin v Crown* 16 PR 1874 .

13 *Enayet Ali v Emperor* AIR 1934 Cal 557, 36 Cr LJ 619 .

14 *Dharampal Singh and Anor v State of Rajasthan* 1998 Cr LJ 372 (Raj) (DB) .

15 *Lalji v State of Madhya Pradesh* 2004 Cr LJ 2640 (MP) .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 460.

All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them.--

If, at the time of the committing of lurking house-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with [16][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

1. Scope and Applicability

This section does not provide for an offence; it merely lays down a principle of constructive liability.[17] It prescribes enhanced penalty for the joint offenders who commit, or who are concerned in, house breaking by night, or lurking house-trespass by night, in the course of which death or grievous hurt is caused or is attempted to be caused. To attract this section, it matters a little as to who actually causes the death or3803 the grievous hurt.[18] It does not exclude, from such enhanced penalty, the person who caused or attempted to cause, death or grievous hurt. The words 'every person, jointly concerned in committing such lurking house-trespass by night, or house-breaking by night, shall be punished' establish beyond doubt, that all persons, who commit house-breaking by night, or lurking house-trespass by night, whatever other offences they might have also committed, would be liable to be punished under this section.[19] This section can be invoked only if, from the evidence, it is clearly possible to conclude that, before the commission of the lurking house-trespass by night, or house-breaking by night, the offenders did not have the common

intention to commit any other offence and one of them, during the course of commission of the offence, caused death of, or grievous hurt to, any person.[20]

Under s 460, IPC, constructive liability is imposed on persons jointly concerned in committing house trespass at night, in the course of which death or grievous hurt is caused. The section applies to persons who actually committed house trespass at night and the act of causing death or grievous hurt by any one of the intruders would make others, who did not cause the injury, equally liable.[21]

Where an accused commits lurking house trespass or housebreaking by night and also commits murder, he would be convicted under s 302, IPC even if he is not convicted under s 460, IPC .[22]

2. Essential Ingredients

To constitute an offence under this section, two things are necessary, namely, the person charged should have been committing lurking house-trespass by night, or house-breaking by night along with some other person, and while the person charged was so committing lurking house-trespass by night, or house-breaking by night, he, or some other person, committing such offence along with him, voluntarily caused or attempted to cause death of, or grievous hurt to, some person.[23]

3. Time Duration of Offence

The offence, to which this section applies, must be limited to the time during which the criminal trespass continues; it cannot be extended so as to include any offence, committed prior, or subsequent, to the commission of house-breaking by night, or lurking house-trespass by night.[24] Where the accused committed house-breaking by night and, on alarm being raised, they left the house and stabbed a person who was trying to seize them in the courtyard, it was held that as the stabbing was done after the house-breaking was complete, s 460 did not apply and the accused were guilty of the offences under ss 456, 458 and 326, IPC,[25] and not under s 460 .3804

4. The Section does not apply to Single Individual

The section will not apply to the case of a single individual who alone commits lurking house-trespass by night, or house-breaking by night, and during such commission, causes, or attempts to cause, death of, or grievous hurt to, any person.[26]

5. Section does not apply to a Person not Committing Lurking House-trespass or House-breaking

On the analysis of s 460, IPC, it can be said that this section applies to those persons who have actually committed lurking house trespass at night and not to those who may have accompanied their associates, but did not commit the offence. Indeed, it applies to actual doers, and not the others.[27] The section applies to those persons who have actually committed lurking house-trespass at night, or house-breaking at night, and not to those persons who may have accompanied their associates only, but did not commit the offence.[28]

6. Common Intention not Necessary

If all, or any of, the persons, committing lurking house-trespass by night, or house-breaking by night, in which death has been caused, are charged under s 302, or s 304, the necessary intention, requisite under the said sections, must be proved against them. To establish an offence under s 460, it may not be necessary for the prosecution to establish common intention or object. Suffice it will be establish that the accused jointly and committed the offences stated in s 460, IPC .[29] In *Muhammad v Emperor* ,[30] several accused, armed with *dangs* and *chhavis*, stealthily entered a house at night with the preliminary intention of forcibly taking away a woman. While in the house, some of them caused death and grievous hurt and

then they went away after scaling the wall of the courtyard of the house. It was held that the common intention to commit an offence under s 302, or s 304, IPC, could not possibly be imputed to them, and they were guilty only under s 460, IPC .

7. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by the court of sessions.

8. Charge

The following form of the charge may be adopted:

> I (*name and office of session judge*, *etc*) hereby charge you (*name of accused person*) as follows:3805
>
> That, on or about the...day of..., at..., you were jointly concerned with other persons in committing lurking house-trespass by night (*or house-breaking by night*) by entering into the house in the possession of AB, and used as a human dwelling, and that, at the time of doing so, any of the persons, so jointly concerned, voluntarily caused death of (or attempted to cause death of, or grievous hurt to), the said AB, and that you thereby committed an offence, punishable under s 460 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

When a charge under s 460, IPC, is not framed by the trial court against the accused, he cannot be convicted under s 460, IPC .[31]

9. Proof

Before holding a person to be guilty of offence under s 460, IPC, the prosecution must prove that:

(i) that the accused committed lurking house trespass by night; or house breaking by night;
(ii) that he caused, or attempted to cause, death or grievous hurt;
(iii) that he did above whilst engaged in committing lurking house trespass by night or house breaking by night;[32]
(iv) that two or more persons were jointly concerned in committing the said offence.

The accused were alleged to have entered into the house of the deceased during the night, and assaulted the deceased and hung him with a rope and caused the death of his daughter. The confessional statement made by one accused was found reliable. The motive of the crime was that the deceased had sought temporary injunction restraining the accused from opening the gate, window and drainage towards the disputed land of the deceased. The accused were held guilty of offences punishable under ss 460 and 302 read with s 34, IPC .[33]

The offence committed was lurking house-trespass and murder. Offence was committed between 1 a.m.

to 4 a.m. Sole eye-witness of the occurrence disclosed the name of the accused after three days, he was not able to see after evening, his testimony was found not reliable; conviction of the accused for offence under ss 302 and 460, IPC recorded by the Court below was not proper, and was set aside.[34]

10. Conviction

Section 460, IPC not being an exception to s 302, IPC, if a person, committing house-breaking by night, also actually commits murder, he must attract the penalty for the latter offence under s 302 . He cannot escape the punishment provided for murder merely because the murder was committed by him while he was committing the offence of house-breaking.[35] It was never intended that a person, who commits murder, whilst committing a burglary, should be punished merely for burglary, and3806 not for murder.[36] If, on the other evidence the court is satisfied that the accused is guilty of murder, then s 460, IPC, is out of place.[37]

11. Double Conviction

A person cannot be convicted of offences both under ss 460, and 304/34, IPC, as the charge under s 460, IPC .[38]

12. Sentence

The accused entered the house of the deceased during night time where he assaulted the deceased and hung him with a rope and also caused the death of his daughter. On being convicted under ss 460 and 302 read with s 34, IPC, they were sentenced for each offence with a sentence of life imprisonment and fine of Rs 10,000 each. In default of payment of fine, they were to further undergo rigorous imprisonment for one year.[39] The accused persons convicted under ss 460 and 382, IPC were already in jail for six months. They had gone through a lot of mental and financial strain during the prolonged proceeding lasting eleven years. The sentence of three years rigorous imprisonment awarded to them by the trial court was reduced to the period already undergone by them in jail and they were also sentenced to pay fine of Rs 1000 each and in default to undergo rigorous imprisonment for six months.[40] The accused was sixteen and a half years old at the time of commission of the offence. He became a victim of bad company and was also in jail for three and a half years. Therefore, the substantive sentence of seven years rigorous imprisonment awarded to the accused was reduced to the period already undergone by him.[41]

13. Alteration of Conviction from Section 302 to Section 460

If the evidence against the accused is not sufficient to justify a conviction for murder and if the actual offender cannot be ascertained, the conviction may be made under this section.[42]

16 Substituted by Act 26 of 1955, s 117 and Schedule for 'transportation for life' (wef 1-1-1956).

17 *Bahadari v Emperor* AIR 1940 Lah 281, 41 Cr LJ 779*; Abdul Aziz v State of Rajasthan* (2007) 10 SCC 283, p 285, 2007 (6) JT 397, 2007 (6) Scale 588 .

18 *Sohan Singh Kesar Singh v State* AIR 1964 Punj 130, (1964) 1 Cr LJ 353 ; *Chatur v Emperor* 12 Cr LJ 395, 8 ALJ 574 ; *Kallu v State* 1959 ALJ 694, 1959 AWR (HC) 500 .

19 Re *Katta Ram Krishna Reddi alias Krishna Ready*(1974) 1 Andh WR 358; *Jagdeo v State* 1954 Cr LJ 168, AIR 1954 All 99 .

20 Re *Singaram*AIR 1954 Mad 152, 1954 Cr LJ 115 .

21 *Abdul Aziz v State of Rajasthan* (2007) 10 SCC 283, p 285, 2007 (6) JT 397, 2007 (6) Scale 588 .

22 *Abdul Aziz v State of Rajasthan* (2007) 10 SCC 283, p 285, 2007 (6) JT 397, 2007 (6) Scale 588 .

23 *Bhutta Shah v State* 1954 Cr LJ 4, AIR 1954 Pat 37 .

24 *Jaffir v Emperor* 2 PR 1882 ; *Muhammad v Emperor* AIR 1921 Lah 94 .

25 *Sed Rasul v Emperor* 18 Cr LJ 350 .

26 *Jagdeo v State* 1954 Cr LJ 168, AIR 1954 All 99 . **Contrary view** was taken in *Empress v Lukhun Dass* 2 WR (Cr) 52, seems to be wrong.

27 *Badri Prasad Prajapati v State of Madhya Pradesh* 2005 Cr LJ 1856 (MP) ; *Jaynal Mir v State of West Bengal* (1987) 3 Crimes 540 ; *Asst Collector of Customs, New Delhi v Harbans Lal Sharat* 1980 Cr LJ 618 (Del) .

28 *Faiz Baklish v Emperor* AIR 1947 Lah 188, 48 Cr LJ 269 .

29 *Hardhan Das v State of West Bengal* (2013) 2 SCC 197, p 199, 2013 (1) Crimes 340 (SC) .

30 *Muhammad v Emperor* AIR 1936 Lah 911, 38 Cr LJ 30*; Haradhan Das v State of West Bengal* (2013) 2 SCC 197, 2013 (1) Crimes 340 (SC) .

31 *Dharampal Singh and Anor v State of Rajasthan* 1998 Cr LJ 3372 (Raj) (DB) .

32 *Badri Prasad Prajapati v State of Madhya Pradesh* 2005 Cr LJ 1856 (MP)

33 *State of Madhya Pradesh v Bhagwan Singh* 2002 Cr LJ 3169 (MP) ; *State of Madhya Pradesh v Kalli* 2012 Cr LJ 2399 (MP) .

34 *Mati Ratre v State of Chhattisgarh* 2013 Cr LJ 560 (Chh) .

35 *Sohan Singh Kesar Singh v State* AIR 1964 Punj 130, (1964) 1 Cr LJ 353 .

36 *Chatur v Emperor* 12 Cr LJ 395, 8 ALJ 574 .

37 Re *Singaram*1951 Cr LJ 115, AIR 1954 Mad 152 .

38 *Jinaram Kuchari v State* AIR 1951 Assam 60, 52 Cr LJ 390 (1).

39 *State of Madhya Pradesh v Bhagwan Singh and Ors* 2002 Cr LJ 3169 (MP) .

40 *Mohan Manjhi and Anor v State of Bihar* 2000 Cr LJ 4482 (Pat) .

41 *Wilson Abrahim Chouriappa v State of Maharashtra* 1995 Cr LJ 4042 (Bom) (DB) .

42 *Umar Din v Empress* 1 PR 1891 ; *Jaffir v Empress* 2 PR 1882 .

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 461.

Dishonestly breaking open receptacle containing property.--

Whoever dishonestly or with intent to commit mischief, breaks open or unfastens any closed receptacle which contains or which he believes to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.3807

COMMENTS

1. Scope

This section deals with the opening of any fastened receptacle either dishonestly (such as for committing theft) or merely for committing mischief. This would be an offence by the mere fact of opening a fastened receptacle independently of the offence of theft or mischief which may be committed after the opening.

2. 'Dishonestly'

Commentary under s 24, vol 1, may be referred to.

3. 'Mischief'

Commentary under s 425, *ante*, may be referred to.

4. 'Breaks open or Unfastens'

The words 'breaks open or unfastens' would indicate that although there may be no lock, there must be some other manner in which the receptacle must be so closed by some device like a chain or bolt which has to be unfastened or break open. There would be offence if it is done dishonestly or with the intent to commit mischief. Where the accused, who was an inmate of his uncle's house, broke open the chest and picked out property from it, it was held that he was guilty under this section and s 379, and not under s 457 .[43]

5. 'Receptacle'

The term 'receptacle' indicates that which receives or holds anything for rest or deposits; a storing place, depository, a container, any space, open or close, that serves for reception and keeping.[44] However, the meaning of the word 'receptacle' cannot be extended to shops.[45] It would, however, include a safe or box, chest, *etc.*, and may also include a room.[46]

6. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate, and may also be tried summarily.

Under the old Code of Criminal Procedure, the offences under this and the next sections were bailable offences. Under the Code of Criminal Procedure 1973, the offence under the next section, *i.e.*, s 462, IPC, is bailable as it was previously. However, the offence under this section is non-bailable. It does not seem to be correct that the aggravated form of an offence under s 462, IPC, is made bailable while a simple offence under s 462, IPC, which is triable as a summons case, is made non-bailable. It is submitted that the legislature should remove this defect in the First Schedule of the Code of Criminal Procedure 1973, as soon as possible.3808

7. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC 1973 may be referred to.

8. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) there was a closed receptacle;
(b) it contained property or the accused believed that it contained property;
(c) the accused broke it open or unfastened it; and
(d) he did so dishonestly or with intent to commit mischief.

43 *Empress v Tasuduk Hussain* 6 NWP 302 .

44 Refer to Century Dictionary.

45 *Bisheshwar Ram Rajwar v State of Bihar* 1976 Pat LJR 60 .

46 *Ibid.*

Indian Penal Code (Act XLV of 1860)

Chapter XVII

Of Offences Against Property

OF CRIMINAL TRESPASS

S. 462.

Punishment for same offence when committed by person entrusted with custody.--

Whoever, being entrusted with any closed receptacle which contains or which he believes to contain property, without having authority to open the same, dishonestly, or with intent to commit mischief, breaks open or unfastens that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

1. Scope

The proceeding section and this section deal with the same offence, namely, the opening, or unfastening, of any closed receptacle. This section is only a more aggravated form of the offence. It involves an element of trust, and a person, to whom the receptacle is entrusted, is punished more severely if he opens it without authority, and with a dishonest or mischievous intention.

An offence under s 462, IPC is an aggravated form of the offence made punishable under s 461, IPC . If somebody dishonestly or with intent to commit mischief breaks open or unfastens any closed receptacle which contains or which believes to contain property can be punished under s 461, IPC, and if he was entrusted with the custody of the said receptacle, he can be punished under s 462, IPC .[47]

2. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate.

3. Quashing of Proceedings

The accused while applying for a succession certificate was alleged to have intentionally excluded the complainant from being impleaded as a legal heir. The3809 dispute raised was purely of a civil nature, so the filing of the criminal case was found to be an abuse of the process of law, therefore, the complaint filed under ss 427, 462 and 467, IPC, was quashed.[48]

4. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate*, *etc*.) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the...day of..., at..., you being entrusted with a closed receptacle, to wit... (*describe it*), by AB, which contained (*or which you believed to contain*) property, to wit ...(*mention it*), dishonestly (i) broke open (*or unfastened*) the said receptacle, without having authority to open the same, and that you thereby committed an offence, punishable under s 462 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

5. Proof

In order to establish a charge under this section, besides proving the facts mentioned for an offence under s 461, IPC, the prosecution must prove that:

(a) he accused was entrusted with the receptacle in dispute; and
(b) he opened or unfastened the receptacle without having authority to open the same.3810

47 *Yamunabai and Ors v State of Maharashtra* (1994) 2 Crimes 284 (Bom) .

48 *Yamunabai and Ors v State of Maharashtra* (1994) 2 Crimes 284 (Bom) .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [1][* * *] Property Marks

TOPICAL INTRODUCTION

This chapter, headed as 'Of Offences Relating to Documents and to Property Marks', contains thirty-one sections divided into three groups. The first group of ss 463 to 477A relates substantially to forgery. The second group of ss 479 to 489 deals with offences in respect of property and other marks. The third group of ss 489A to 489E sets out offences pertaining to currency-notes and bank-notes.The penalty for the offences in the first group, namely ss 463 to 477A, varies according to the gravity of the offence. Thus, forgery of the record of a court of justice, or of a public register of the kind, specified in s 466, ranks with forgery for the purpose of cheating, provided for in s 468, because both the offences are punishable with imprisonment which may extend to seven years. However, under s 463, forgery for the purpose of harming reputation is regarded as a less serious offences entailing the punishment of imprisonment for three years while, under s 465, forgery of valuable security, will, *etc.*, is deemed to be a grave offence meriting the punishment of imprisonment which is also the punishment for the offence of fraudulent cancellation, *etc.*, of will, authority to adopt, or valuable securityunder s 477 .By s 91 read with the First Schedule of the Information Technology Act 2000 (21 of 2000), the legislature has inserted the words 'electronic record' in ss 463, 464, 466, 468 to 471, 474, 476, 477A, *etc.*, to make these offences applicable to forged electronic record in addition to the forged documents. However, there seems to be no recorded case as yet decided by any High Court or Supreme Court, so the effect of these amendments is yet to come by way of authoritative judgments of the High Court.[2]

1 The words 'TRADE OR or' omitted by Act 43 of 1958, s 135 and Schedule (wef 25-11-1959).

2 Refer synopsis under s 463, IPC .

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 4/Chapter XVIII Of Offences Relating to Documents and to Property Marks/S. 463.

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 463.

Forgery.--[3][

Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury], to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied3811 contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Comments

1. Scope

The term 'forgery' as used in the statute is used in its ordinary and popular acceptation.[4] Forgery is the making of a false document or false electronic record in order that it may be used as genuine. Blackstone defines it as the fraudulent making or alteration of a writing to the prejudice of another man's right.[5] At Common Law, the making of a written instrument, which purports to be that which it is not, in order to defraud is forgery.[6]For purpose of the (English) Forgery Act 1913, forgery is the making of a false document in order that it may be used as genuine, and in the case of seals and dies, mentioned in the Act, the counterfeiting of a seal or die.[7] This definition is substantially the same as in our IPC . The forgery of a certified copy falls within the terms of this section.[8]

An accused can be punished for committing forgery only if he falls within the meaning of 'whoever makes'. The prosecution has, therefore, to establish that only the particular person, charged with having committed forgery, has committed the forgery.[9] The original document should be placed before the court to establish the offence of forgery. A photostat copy which has came into being as a result of improvement in scientific photographs of the document is not sufficient for this purpose.[10]3812

2. Law of Canada

It is an offence to commit forgery by making a false document, knowing it to be false, with intent:

- that it should in any way be used or acted on as genuine, to the prejudice of any one whether within Canada or not,
- or that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.

Forgery is complete as soon as a document is made with such knowledge and intent notwithstanding that the person who makes it does not intend that any particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything. Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted on as genuine. Authorized signings, including those that do not expressly indicate the proxy signatory, do not constitute the offence of forgery. Such documents lack the falsity inherent in a forgery.

False Document

A 'document' refers to any paper, parchment or other material on which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device, and includes a credit card, but does not include trade-marks on articles of commerce or inscriptions on stone or metal or other like material. A 'false document' means a document:

- the whole or a material part of which purports to be made by or on behalf of a person who did not make it or authorize it to be made, or who did not in fact exist,
- that is made by or on behalf of the person who purports to make it but is false in some material particular,
- that is made in the name of an existing person, by him or under his authority, with a fraudulent intention that it should pass as being made by a person, real or fictitious, other than the person who makes it or under whose authority it is made.

A document that merely contains a lie is not always a 'false document', and thus a forgery under ss 366 and 368 . However, a document that is false in reference to the very purpose for which it was created is one that is false in a material particular within s 321 and may be a forgery.

A 'false document' is a document that is false in some material particular, including the very purpose for which it was created. For an offence to lie, the document must be 'forged', not merely false. Documents, although false, are not 'forged' within the meaning of the offence, absent evidence of prejudice, or of intent to cause prejudice. The intent to cause prejudice requires an element of moral blameworthiness that goes beyond negligence or incompetence. A document that merely contains a lie is not always a 'false document'.

Making a false document includes:

- altering a genuine document in any material part;3813
- making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or
- making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

A person does not, however, commit forgery if he or she in good faith, makes a false document at the request of a police force, the Canadian Forces or a department or agency of the Federal Government or of a provincial government.

Uttering Forged Document

With regard to a document that a person knows or believes is forged, it is an offence to:

- use, deal with or act on it as if it were genuine;
- cause or attempt to cause any person to use, deal with or act on it as if it were genuine;
- transfer, sell or offer to sell it or make it available, to any person, knowing that or being reckless as to whether one of the preceding offences will be committed; or
- possess it with intent to commit an offence under any of the preceding offences.

The place where a document was forged is not material. A 'document' refers to any paper, parchment or other material on which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device, and includes a credit card, but does not include trade-marks on articles of commerce or inscriptions on stone or metal or other like material. This offence requires only an intent to deceive, not an intent to defraud or cause prejudice. Simply because a document is false it does not constitute a forged document. Forged documents require proof of an intention to cause prejudice.

Example Situations

A valid cheque becomes a forged document when an unauthorized endorsement is placed upon it. An authorized proxy signature does not constitute a forgery even where it does not indicate on its face that the signatory is acting for another. Such authorized signings may be technically misleading but they lack the essential falsity which is inherent in a forgery.

Making Forgery Instruments

It is an offence to make, repair, buy, sell, export, import or possess any instrument, device, apparatus, material or thing that they know has been used or know is adapted or intended for use by any person to commit forgery.

Actions by Public Officer

A public officer will not be guilty of a forgery offence if he or she committed the relevant actions for the sole purpose of establishing or maintaining a cover identity in the course of employment.[11]3814

3. Law of Australia

In New South Wales, the offence of forgery is committed by a person who makes a false document with the intention that the person or another will use it:

(1) to induce some person to accept it as genuine; and
(2) because of its being accepted as genuine:
    (a) to obtain any property belonging to another,
    (b) to obtain any financial advantage or cause any financial disadvantage; or
    (c) to influence the exercise of a public duty.

Inducing a person to accept a false document as genuine includes a reference to causing a machine to respond to the document as if it were a genuine document. It is not necessary to prove that the accused intended so to induce a particular person to accept a false document as genuine. Using or possessing a false document, knowing that it is false, for the purposes listed above, is also an offence.

It is a further offence for a person to:

(1) make, or have in his or her possession, any equipment, material or other thing designed or adapted for the making of a false document:
    (a) knowing that it is so designed or adapted; and
    (b) with the intention that the person or another person will use the equipment, material or other thing to commit the offence of forgery;

(2) without reasonable excuse, make or have in his or her possession any equipment, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted; or
(3) possess any equipment, material or other thing that is capable of being used to make a false document, with the intention that the person or another person will use the equipment, material or other thing to commit the offence of forgery.

These further offences apply to equipment, material or another thing designed or adapted for the purpose of making a false document whether or not it is also designed or adapted for another purpose. They also apply to a person who intends to commit such an offence even if committing the offence concerned is impossible, or the offence is to be committed at a later time. However, it is not an offence to attempt to commit such an offence.

The essence of the crime of 'making a false document' contrary to s 83A(1) is not simply that the document is false in the sense that it contains material untruths about past facts; rather its essence is to be found in the fact that the document 'tells a lie about itself' in the sense that it purports to be something which it is not (that is, not 'an authentic document'). Thus the gravamen of the offence is to be found in sub s(6) which sets out the various ways in which a document can be 'made false' for the purposes of the offence which marks the offence out from related offences, such as false accounting (s 83) and 'obtaining financial advantage by deception' (s 82).[12]3815

4. Effect of Amendments made by the Information Technology Act 2000

Section 91 read with First Schedule of the Information Technology Act 2000 (21 of 2000) the amendments pertaining to electronic record have been incorporated in ss 463, 464, 466, 468 to 471, 474, 476, 477A IPC*etc*. These offences are triable by the courts of magistrates and the appeal against the judgment of the trial court lies before the sessions court, so the practical position is that it would take someone to push the cases pertaining to electronic record from the trial court *viz.* the sessions court to the High Court and Supreme Court to get authoritative law/judgments on these sections.

It is perceived that digital technology, electronic record and new communicating systems which though have taken their roots in cities of this country but their large scale exploitation is yet to take effect. With the spread of electronic governance, new communication system and digital technology, a revolution would occur in business transaction by increasing use of computers. This would obviously lead to offences pertaining to forgery of electronic record in some cases as is prevalent in documents which are tackled in existing law. The legislature, therefore, had to take precaution in the matter and make necessary amendments in the IPC with the help of s 91 read with Sch I of the Information Technology Act 2000. However, the law in regard to these amendments is yet to take off due to a dearth of cases pertaining to electronic record. However, in due course of time, results of these amendments would have a salutary effect and it is expected that the offences of forgery *etc* pertaining to electronic record would be interpreted similarly as offences pertaining to documents.

5. Essential Ingredients

In order to constitute forgery, the first essential is that the accused should have made a false document. The false document must be made with an intent to cause damage or injury to the public or to any class of public or to any community.[13] To constitute a offence under this section, the following elements of the offence are necessary, namely:

(a) the making of a false document or false electronic record or part of a document or electronic record; and
(b) such making should be with intent:
    (i) to cause damage or injury to the public or to any person, or
    (ii) to support any claim or title, or
    (iii) to cause any person to part with property, or
    (iv) to cause any person to enter into any express or implied contract, or
    (v) to commit fraud of that fraud may be committed.

From the above, it is clear that apart from making a false document or a part of a document, the accused should intend to cause damage or injury either to the public or to any person, *etc*.[14] Thus, the making of a part of a document with intent to commit fraud or that fraud may be committed it constitutes 'forgery'.[15] To constitute the offence of forgery under this section, it is not enough to prove that the person3816 charged with the offence knew that the document might be damaging or injurious to another; it must also be proved that such was his intention.[16]

The basic elements of forgery are: (1) the making of a false document or part of it and; (2) such making should be with such intention as is specified in the section *viz*: (a) to cause damage or injury to: (i) the public, or (ii) any person; or (b) to support any claim or title; or (c) to cause any person to part with property; or (d) to cause any person to enter into an express or implied contract; or (e) to commit fraud or that fraud may be committed.[17]

6. Three Questions

The definition of the offence of forgery declares the offence to be completed when a false document or false part of a document is made with specified intention. The questions are: (i) is the document false? (ii) is it made by the accused? and (iii) is it made with an intent to defraud. If at all the questions are answered in the affirmative, the accused is guilty.[18]

7. Two Different Classes of Intent

The section contemplates two quite different classes of intent. The words, in the section, relating to intent are every wide and of far-reaching import.[19] The fabrication of false document is criminal only when certain intentions can be attributed to the person who fabricates it. The question of intention is one of fact.[20]It is no forgery if the act is done under the honest belief that the party doing it had right to do it, although in point of that fact he had really no such authority.[21] Of two probable intentions, one more immediate and probable and the other remote and less probable, the court should not attribute to the accused the remoter intention.[22]

8. Definition in Section 463 is subject to Section 464

The definition in s 463 is itself subject to the definition in s 464, IPC in which the two essential elements are that the act should be done 'dishonestly or fraudulently'. In other words, whichever of the intents in s 463, IPC may be applicable, the act itself must be done dishonestly or fraudulently to sustain a conviction for forgery.[23] Where there is an intention to deceive and by means of the deceit to obtain an advantage, there is fraud; and if the document is fabricated with such intent, it is forgery.[24] Where, however, the accused abstracted a certain document from the3817 judicial record in order to substitute another in its place, and his intention was only to weaken a criminal case, brought against him, by discrediting the witnesses, produced by the complainant, it was held that he could not be convicted of forgery in respect of the document as he did not make it with any of the intents mentioned in s 463 . The offence committed by him would be one of fabricating false evidence.[25]

9. Distinction between Sections 463, 465 and 471 and Sections 193 and 196, IPC

It is true that some of the ingredients of the act of fabricating false evidence which is penalised under s 193, IPC and of making a false document and thereby committing forgery within the meaning of ss 463 and 464, IPC are common. A person by making a false entry in a book or record or by making any document containing a false statement may, if the prescribed conditions of s 463 are fulfilled, commit an offence of forgery. However, the important ingredient which constitutes fabrication of false evidence within the meaning of s 192, IPC beside causing a circumstance to exist or making a false document--to use a compendious expression--is the intention that the circumstance so caused to exist or the false document made may appear in evidence in a judicial proceeding, or before a public servant or before an arbitrator and lead to the forming of an erroneous opinion touching any point material to the result of the proceeding.[26]

10. Sections 463 , 464, 465, 471IPC and Section 146(p) of the Maharashtra Co-operative Societies Act (23 of 1961)--Distinction

Commentary under the same heading in s 465, *post*, may be referred to.

11. Document

Section 29 and its commentary in vol 1, may be referred to.

12. Electronic Record

Section 29A, vol 1 may be referred to.

13. 'Makes any False Document or False Electronic Record or Part of a Document or Electronic Record'

Under this section, not only the maker of a forged document but also the maker of a part of such document is declared guilty of forgery if he has made any such document or any part of it, with the required intent. It is, therefore, immaterial whether the person, who makes a part of the forgers statement, was present at the time when the forged document was completed.[27] However, until a false document is made either in whole or in part, there cannot be any forgery. Mere preparation for the commission of a possible crime of forgery cannot, by itself, be forgery or the abetment of forgery.[28] Similarly, a charge of forgery cannot lie against a person who3818 was not the writer of the forged document or who did not sign the forged name. If a *kabuliyat*, which need be signed by two witnesses, is signed by a third witness, it can have no effect on the validity of the document even if the name was fictitious; and if the third signature was intended to be used in future as evidence that the third witness (the *zamindar*) himself was a witness to the *kabuliyat*, that might bring the case within the definition of fabricating false evidence for the purpose of being used in a judicial proceeding or it might be a preparation for the offence of cheating; but it certainly does not amount to forgery.[29] If, however, a date is appended to a document but it was written on a later date, the offence of forgery would be complete.[30]

The production, in court, of a writing would be 'evidence' within the meaning of s 29 and the writing is a document within the meaning of s 29, and s 463, IPC .[31]

For the purpose of a charge of forgery, it is immaterial that a document contains recitals which are false in other respects. The question, whether a sale, recited in a document, did take place on the date specified, has no bearing on the question whether the document is a false one within the meaning of s 464 .[32]

14. Document must be made Dishonestly or Fraudulently

In order to constitute an offence of forgery, the documents must be made dishonestly or fraudulently. But dishonest or fraudulent are not tautological. Fraudulent does not imply the deprivation of property or an element of injury. In order to be fraudulent, there must be some advantage on the one side with a corresponding loss on the other. Every forgery postulates a false document either in whole or in part, however, small.[33]

15. False Description in Document

The intent to commit forgery involves an intent to cause injury. A person makes a false document who dishonestly or fraudulently signs with an intent or cause to believe that the document was signed by a person whom he knows it was not signed. A false description makes a document of forgery when it is found that the accused by giving such false description intended to make out or wanted it to believe that it was not he that was executing the document but another person.[34]

16. 'With Intent to Cause Damage or Injury to the Public or to any Person'

The connection between the forgery and the injury must not be too remote.[35] The mere fact of damage or fraud affecting the person committing it is immaterial, *eg*, forgery by a partner, if it affects other persons besides.[36] It is the intention which3819 constitutes the gist of offence; it is immaterial whether damage, injury or fraud is actually caused.[37] If a person signs a telegram in another name and there is nothing to show that it was done with intent to injure him and, in fact, it did not injure him, there can be no conviction for forgery.[38] Where an application for permission for construction of premises was filed by a person under a direction or instruction of another with a mistaken name, there was no finding that signatures by the said person were made on the application to cause harm to the person on whose behalf they were made or without their knowledge or that they were untrue, the

mere denial of signature by the person on whose behalf it is purported to be made was not found sufficient to warrant the conclusion that the person submitting the application had committed the forgery.[39]

The intents, recited in this section, include, among various alternatives, an intent to cause damage or injury; but the phrase does not govern other intents. It is an intent complete in itself.[40] If an accused, in order to make good a false defence and to cause justice to miscarry, fabricates a document by putting false dates and spurious postmarks on an envelope, he does it with one of the intents referred to in s 463, IPC . He makes a false document with the intention of causing injury to the complainant or to the public.[41]

17. 'With Intent...to Support any Claim or Title'

The term 'claim' is not limited, in it's application, to property only,[42] nor is the term limited, in its application, to a claim to property.[43] The claim may be a claim to anything, as, for instance, a claim to the custody of a child, or a claim to a woman as the claimant's wife, or a claim to the custody of a child as being the claimant's child, or a claim to be admitted to attendance at a law class in a college or university or other examination, or a claim to the possession of immovable or any other kind of property.[44] There is no difference in principle between the case of a man making a false certificate in order to obtain employment[45] and the case of a false certificate in order to obtain admission to law class.[46] If, in order to support even a true claim or a genuine title, a false document is created, it is forgery. Whether a document is a false document, does not depend upon the adjudication of the court on the claim or title which is intended to be propped up by the false document.[47] Even if a document is fabricated by an accused person to confirm an existing title to property, the execution of the document would be dishonest or fraudulent and the document would be a3820 forgery.[48] Where the accused realised that his claim was likely to be an unenforceable one unless he altered the date of the *bahi*, which he did, it was held that his intention was infact to convert an illegal or doubtful claim into an apparently legal one. As this action was dishonest within the meaning of the IPC, he was convicted for forgery.[49]

18. 'With Intent to Cause any Person to Part with Property'

This is the usual intention in forgery and all the illustrations to s 464, IPC, with the exception of illust (k), afford examples of a forgery with such an intention though the more immediate intention in illusts (f), (g), (h) and (i) is to support a title to the property in question. However, it is not an essential quality of the fraud, mentioned in this section, that it should result in, or aim at, the deprivation of property.[50] It is also not necessary to constitute a forgery that the property, intended to be taken away by means of forgery, should be in existence when the false document is made.[51]

19. 'With Intent... to Cause any Person... to Enter into any Express or Implied Contract'

Where a person makes a false document and uses it with the object of obtaining a situation in the police force, it is made and used with intent to cause a person as a police officer. The act of the person, therefore, comes within the terms of s 463 and is, indeed, the precise illust (k) given under s 464 .[52]

20. 'With Intent to Commit Fraud or that Fraud may be Committed'

The expression 'intent to defraud' implies conduct coupled with intention to deceive or thereby to cause injury. In other words, defraud involves two conceptions namely, the deceit and injury to the person deceived, *ie*, infringement of some legal right possessed by him, but not necessarily deprivation of property.[53] Unless there is an element of fraud, the making of a false document does not amount to be forgery, the reason being that one of the intents, contemplated by s 463, IPC, is that the false document must be made with intent to commit fraud or that fraud may be committed.[54] In the

absence of element of fraud, no case of forgery can, therefore, be said to have been made out.[55] Where there is an intention to deceive and by means of the deceit to obtain an advantage, there is fraud; and if a document is fabricated with such intent, it is forgery.[56]3821

The offence of forgery is complete if a false document is, infact, made with intent to commit fraud though it may not have been made with any of the other intents, specified in s 463 .[57] In *Empress v Muhammad Saeed Khan* ,[58] false entries in the character roll of the accused were held to be made with the intention of committing fraud as the intention was to deceive the superior officer of the accused and by means of such deception to secure his advancement in the service and, thus, gain an advantage for him at the sacrifice to others. The entries were, therefore, a forgery within the meaning of s 463 .

21. Intention to Cause Injury--If Essential

The expression 'intent to defraud' implies conduct coupled with intention to deceive and thereby to injure. In other words, 'defraud' involves two conceptions, namely, deceit and injury to the person deceived, *ie*, infringement of some legal right possessed by him, but not necessarily deprivation of property.[59] It was pointed out, in *Emperor v Abdul Hamid* ,[60] that the observations of Mookerjee J in *Emperor v Surendra Nath Ghosh* ,[61] do not lend support to the view that in the absence of proof of injury, no conviction for forgery can be sustained. Where fraud is the element relied upon for the application of both ss 463 and 464, it is sufficient to prove that the accused wanted to secure advantage to himself, but not also that he intended to cause injury to another.[62] It is immaterial for the fraudulent character of a deception for criminal purposes that loss, injury or risk of loss to someone else be proved unless the nature of the fraud committed is definitely expressed to be with the intention of causing damage or injury, as being one of the intents of s 463 . It is not essential that the element of injury should always be proved.[63] However, in *Abdul Razak v Empress* ,[64] an element of injury was regarded as an essential ingredient of the offence of forgery. Forgery for the purpose of a competitive examination necessarily imports the risk of injury to other candidates.[65] However, in *Nga Tun Sein v Emperor* ,[66] a process-server, who forged the names of a certain person, on whom he was to serve notice, was not held guilty of the offence of forgery because forgery3822 involves something more than deceiving; intent to commit fraud involves an intent to cause injury. In another case from Rangoon, *Maung Tint v King* ,[67] it was held that the element of risk or injury to the public is not an essential ingredient in the definition of forgery. The intention to gain an advantage is a necessary constituent of fraudulent intention in the absence of intention to cause injury. In Madras, the majority of a Bench of five judges was inclined to take the view that either an intention to secure a benefit on the one hand or to cause loss or detriment on the other, by means of deceit, is an intent to defraud, but on the facts of the case they held that both the intentions were present in the case.[68] Where the accused made an endorsement on a deed of mortgage, which it did not bear at the time when it was filed in the criminal court, and the endorsement, if genuine, would have been a full discharge of the debt due on the mortgage, it was held that it must be concluded that the accused made the endorsement with two intents, one of which was to get rid of liability under the deed, and this was, at least, an intent to cause damage or injury or, at least, to commit fraud.[69]

Appellant accused A3, Monica Bedi, had obtained fake passport with the help of accused A4 to A9. However, three was no evidence that accused A7 prepared false document with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express implied contract or with intent to commit fraud. The ingredients of s 463, IPC were not satisfied in the case. The conviction of the accused A7 under s 465, IPC was found not sustainable.[70]

22. Concealment of Fraud

It is a fraud to conceal fraud, that has already been committed, and to make a party believe that no fraud has been committed. Any document made with the intention of advancing such a purpose is made fraudulently and with intent to commit fraud.[71]

3 Substituted by the Information Technology Act, 2000 (21 of 2000), s 91 and First Sch. for the words, 'whoever makes any false documents or part of a document, with intent to cause damage or injury' (wef 17-10-2000).

4 *Ram Narain Poply v Central Bureau of Investigation* 2003 Cr LJ 4801 (SC), AIR 2003 SC 2748 .

5 Sir William Blackstone, *Commentaries on the Laws of England*, vol IV, p 245.

6 *Halsbury's Laws of England*, fourth edn, vol II, p 707, para 1324.

7 *Halsbury's Laws of England*, fourth edn, vol II, p 710, para 1326.

8 *Rama Shankar Lal v State of Uttar Pradesh* 1970 SCD 471, p 478 .

9 *Amar Nath v State* 1971 Cr LJ 1335, p 1339 ; *Empress v Abbas Ali* (1897) ILR 25 Cal 512, 1 CWN 225 (FB) ; **overruling***Empress v Haradhan* (1892) 19 Cal 380 ; *Mahesh Chandra Prasad v Emperor* 45 Cr LJ 292, AIR 1943 Pat 393, p 396 .

10 *AVR Iyyenger v State of Andhra Pradesh* (1988) 2 Crimes 882 .

11 *Vide Halsbury's Law of Canada*.

12 *Dpp v Logan-Pye* (2007) NSWSC 1492 (*Vide Halsbury's Laws of Australia*).

13 *Ram Narain Poply v Central Bureau of Investigation* 2003 Cr LJ 4801 (SC), AIR 2003 SC 2748 .

14 *RR Diwakar v B Gutal* (1974) 1 Kant LJ 328 .

15 *Nedi Ram v State of Haryana* (1974) 76 Punj LR 780 .

16 *Feda Hussain v Empress* 10 CLR 184*; Monica Bedi v State of AP* 2011 Cr LJ 427, (2011) 1 SCC 284, (2011) 97 AIC 37 (SC) .

17 *Sushil Suri v CBI* 2011 Cr LJ 2939, p 2946 (SC), AIR 2011 SC 1713, (2011) 5 SCC 708, (2011) 5 Scale 412 .

18 *Ram Narain Poply v Central Bureau of Investigation* 2003 Cr LJ 4801 (SC), AIR 2003 SC 2748 .

19 *Empress v Abbas Ali* (1897) ILR 25 Cal 512, 1 CWN 225 (FB) ; *Mahesh Chandra Prasad v Emperor* 45 Cr LJ 292, AIR 1943 Pat 393, p 396 .

20 *Chandulal v Emperor* 42 Cr LJ 247, AIR 1940 All 551, p 552 .

21 *Pramatha Nath v State* 52 Cr LJ 1480, AIR 1951 Cal 581, p 583 .

22 *Empress v Kedar Nath* 1892 AWN 243 ; *Empress v Girdhari Lal* (1886) ILR 8 All 653, (1886) 6 AWN 264 .

23 *Emperor v Abdul Humid* 46 Cr LJ 341, AIR 1944 Lah 380, p 382 .

24 *Empress v Mohammad Saeed Khan* (1899) ILR 21 All 113, p 115, (1898) 18 AWN 197 (forging of orders from district superintendent of police to subordinate officials); *Empress v Soshi Bhushan* (1893) ILR 15 All 210, (1873) 13 AWN 96 .

25 *Radha Kishan v Emperor* 26 Cr LJ 847, AIR 1925 Lah 327, 328.

26 *Babulal v State of Uttar Pradesh* AIR 1964 SC 725, (1964) 1 Cr LJ 555 . For further commentary, see under the same heading in s 196, vol 2.

27 *Moolchand Bachoamal v Emperor* 34 Cr LJ 305(2), AIR 1933 Sind 37 .

28 *Pramatha Nath v State* 52 Cr LJ 1480, AIR 1951 Cal 581, p 583 .

29 *Haider All Pradhania v Emperor* 14 Cr LJ 129, p 131 .

30 *Rao Shiv Bahadur Singh v State of Uttar Pradesh* 1954 Cr LJ 910, AIR 1954 SC 322, 332.

31 *Dharmendra Nath Shastri v Rex* 50 Cr LJ 550, AIR 1949 All 353, p 355 .

32 *State Government of Madhya Pradesh v Hifzul Rahaman* 1952 Cr LJ 98, AIR 1952 Nag 12, p 15 ; *Gunjor Mohammed v Shuruz Ali* 23 Cr LJ 723, 69 1C 451; *Public Prosecutor v Thall Gangadharadu* 1956 Andh LT 678, 1956 Andh WR 805 ; *Mupparaju Brahmayya v Pinnika Chiuna Ramachandriah* (1958) 2 Andh WR 489, 1958 MLJ (Cr) 854 .

33 *Ram Narain Poply v Central Bureau of Investigation* 2003 Cr LJ 4801 (SC), AIR 2003 SC 2748 .

34 *Ibid.*

35 1 Weir 539.

36 *Emperor v Lalloo Ghella* 1 Cr LJ 757 .

37 *Kalanmal v Emperor* 38 Cr LJ 233, AIR 1937 Nag 89, p 90 ; *Krishnarao Raojirao v State of Madhya Pradesh* 1953 Cr LJ 979, AIR 1953 Nag 165, p 166 .

38 *Kali Prasad Banerjee v Emperor* 16 Cr LJ 76 (Cal), AIR 1915 Cal 786 (2) .

39 *TN Rugmani v C Achutha Menon* AIR 1991 SC 983, (1991) 1 JT 265 .

40 *Emperor v Abdul Hamid* 46 Cr LJ 341, AIR 1944 Lah 380, p 382 .

41 *Crown v Ahmad Khan* 43 Cr LJ 905, AIR 1943 Sind 46, p 49 .

42 *Empress v Abbas Ali* (1898) ILR 25 Cal 512, 1 CWN 255 (FB), **overruling***Empress v Haradhan* (1892) ILR 19 Cal 381 ; *Emperor v Chanan Singh* 30 Cr LJ 900, AIR 1929 Lah 152, p 154 .

43 *Empress v Soshi Bhushan* (1893) ILR 15 All 210, p 217, 1893 AWN 96 ; **dissenting** from *Empress v Haradhan* (1892) ILR 19 Cal 381 ; *Emperor v Chanan Singh* 30 Cr LJ 900, AIR 1929 Lah 152, p 154 .

44 *Empress v Soshi Bhushan* (1893) ILR 15 All 210, p 217 ; **dissenting** from *Empress v Haradhan* (1892) ILR 19 Cal 380 ; *Katamraju Venkatrayadu v Emperor* (1905) ILR 28 Mad 90, p 98, 1 Weir 538 (FB) (to be admitted to a university examination is a claim).

45 Refer to synopsis notes to s 464, IPC .

46 *Empress v Soshi Bhushan* (1893) 1LR 15 All 210.

47 Re *Sivananda Mudali* 27 Cr LJ 994, AIR 1926 Mad 1072, p 1074 ; *Krishnarao Raojirao v State of Madhya Pradesh* 1953 Cr LJ 979, AIR 1953 Nag 165, p 166 .

48 Re *Somasundaram Pillay* 10 Cr LJ 397, **not following** Chandra Das v Crown 6 CWN 382.

49 *Kalyanmal v Emperor* 38 Cr LJ 233, AIR 1937 Nag 89, p 90 .

50 *Empress v Abbas Ali* (1898) ILR 25 Cal 512, p 521, 1 CWN 255 (FB) ; **overruling***Empress v Haradhan* (1892) ILR 19 Cal 380 ; *R v Toshack* (1894) 4 Cox CC 33, 1 Den CC 492 .

51 *Empress v Soshi Bhushan* (1893) ILR 15 All 210, p 218, (1893) 13 AWN 96 (a written certificate is property within the meaning of s 463).

52 *Empress v Khandusingh* (1896) ILR 22 Bom 768, p 769 ; *Abdul Hamid v Empress* (1886) ILR 13 Cal 349 ; *Empress v Vithal Narayan* (1889) ILR 13 Bom 506, **referred to** with approval in *Empress v Ganesh Khanderao* (1889) ILR 13 Bom 506 ; *Empress v Soshi Bhushan* (1893) ILR 15 All 210, (1893) 13 AWN 96 .

53 *Ram Narain Poply v Central Bureau of Investigation* 2003 Cr LJ 4801 (SC), AIR 2003 SC 2748 .

54 *Nandram Agarwalla v State of West Bengal* 1957 Cr LJ 442, AIR 1957 Cal 222, p 224 .

55 *Tul Mohan Ram v State* 1981 Cr LJ (NOC) 223 (Del) .

56 *Empress v Muhammad Saeed Khan* (1898) ILR 21 All 113, p 115, (1899) 18 AWN 197 ; *Empress v Soshi Bhushan* (1893) ILR 15 All 210, (1893) 13 AWN 96 (as there was no proof that the accused himself committed the forgery, he was rightly convicted of the abetment of the offence); *Emperor v Ali Hasan* (1906) ILR 28 All 358 .

57 *Kotamraju Venkatrayadu v Emperor* (1905) ILR 28 Mad 90, p 95, 1 Weir 538 (FB), per Sir Arnold White CJ.

58 *Empress v Muhammad Saeed Khan* (1898) ILR 21 All 113, p 115, (1899) 18 AWN 197 ; *Empress v Vithal Narayan (*1889) ILR 13 Bom 515; *Lalit Mohan Sarkar v Empress* (1894) ILR 22 Cal 313 ; *Haycraft v Creasy* (1801) 2 East 92 .

59 Per Mookerjee J in *Emperor v Surendra Nath Ghosh* 11 Cr LJ 505 ; *Ram Chand Gurwala v Emperor* 27 Cr LJ 1383, AIR 1926 Lah 385, p 387 ; *S Dutt v State of Uttar Pradesh* AIR 1966 SC 523, 1966 Cr LJ 459 (SC) ; *Om Prakash v State of Haryana* AIR 1979 SC 1266, 1979 Cr LJ 857 ; *Vimla v Delhi Administration* (1963) 2 Cr LJ 434 (SC), AIR 1963 SC 1572, **distinguished** in *GS Bansal v Delhi Administration* AIR 1963 SC 1577, (1963) 2 Cr LJ 439 .

60 *Emperor v Abdul Hamid* AIR 1944 Lah 380, 383, 46 Cr LJ 341.

61 *Emperor v Surendra Nath Ghosh* 11 Cr LJ 505 .

62 *RR Chari v State* 1959 Cr LJ 256, AIR 1959 All 149, p 159 (in this case, it was held that the facts established also damage or

injury to the complainant); *LK Siddappa v Lalithamma* 1954 Cr LJ 1235, AIR 1954 Mys 119, p 121 .

63 *Emperor v Abdul Hamid* 46 Cr LJ 341, AIR 1944 Lah 380, p 383 (**citing,** with approval, the definition of fraud, in *Haycraft v Creasy* (1801) 2 East 92, 6 PR 380, by Le Blanc, J, that 'by fraud is meant an intention to deceive; whether it be from an expectation of advantage to the party himself, or from ill-will towards the other, is immaterial').

64 *Abdul Razak v Empress* 2 PR 1895 (Cr) ; *Sanjiv Ratnappa v Emperor* AIR 1932 Bom 545, p 550, 34 Cr LJ 357 ; *Emperor v Balkrishna Vaman Kulkarni* 14 CR LJ 518 ; *Emperor v Harjivan Vaiji* 27 Cr LJ 1335, AIR 1926 Bom 231 .

65 *Emperor v Chaman Singh* AIR 1929 Lah 152, 30 Cr LJ 900 .

66 *Nga Tun Sein v Emperor* 36 Cr LJ 1025, AIR 1935 Rang 203, p 204 .

67 *Maung Tint v King* 40 Cr LJ 552, AIR 1939 Rang 156 .

68 *Kotamraju Venkatrayadu v Emperor* (1905) ILR 28 Mad 90, 1 Weir 538 (FB) ; *Emperor v Abbas* (1896) ILR 25 Cal 512, 1 CWN 255 (FB) ; *PL Causley v Emperor* 17 Cr LJ 69 ; *Emperor v Surendra Nath Ghosh* 11 Cr LJ 505 ; *Emperor v Mohit Kumar Mukherjee* AIR 1926 Cal 89, 27 Cr LJ 177 .

69 *Abdul Rashid Khan v Emperor* 15 Cr LJ 221, AIR 1914 All 337, p 338 .

70 *Monica Bedi v State of AP* 2011 Cr LJ 427, (2011) 1 SCC 284, (2011) 97 AIC 37 (SC) .

71 *Empress v Sabapati* (1888) ILR 11 Mad 144 ; *Lolit Mohan Sarkar v Empress* (1894) ILR 22 Cal 313 ; *Emperor v Rash Behari Das* (1908) ILR 35 Cal 450 ; *Woodward v Emperor* 27 Cr LJ 257, AIR 1925 Sind 233, p 235 ; *Emperor v Balkrishna Vaman Kulkarni* 14 Cr LJ 518 ; *Empress of India v Jiwanand* (1881) ILR 3 All 221 ; *Empress v Mazhar Hussain* (1881) ILR 5 All 553 ; *Empress v Girdhari Lal* (1886) ILR 8 All 653 ; *Empress v Shankar* (1880) ILR 4 Bom 657 ; *Maung Tint v King* AIR 1939 Rang 156, 40 Cr LJ 552 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 464.

Making a false document.--

[72][A person is said to make a false document or false electronic record--3823

First.--Who dishonestly or fraudulently--

(a) makes, signs, seals or executes a document or part of a document;
(b) makes or transmits any electronic record or part of any electronic record;
(c) affixes any [73][electronic signature] on any electronic record;
(d) makes any mark denoting the execution of a document or the authenticity of the [73][electronic signature],

with the intention of causing it to be believed that such document or part of document, electronic record or [73][electronic signature] was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly.--Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made,

executed or affixed with [73][electronic signature] either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly.--Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his [73][electronic signature] on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.]

Illustration

(a) *A* has a letter of credit upon *B* for rupees 10,000 written by *Z. A*, in order to defraud *B*, adds a cipher to the 10,000 and makes the sum 1,00,000 intending that it may be believed by *B* that *Z* so wrote the letter. *A* has committed forgery.

(b) *A*, without *Z's* authority, affixes *Z's* seal to a document purporting to be a conveyance of an estate from *Z* to *A*, with the intention of selling the estate to *B* and thereby of obtaining from *B* the purchase-money. *A* has committed forgery.

(c) A picks up a cheque on a banker signed by *B*, payable to bearer, but without any sum having been inserted in the cheque. *A* fraudulently fills up the cheque by inserting the sum of ten thousand rupees. *A* commits forgery.

(d) *A* leaves with *B*, his agent, a cheque on a banker, signed by *A*, without inserting the sum payable and authorises *B* to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. *B* fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. *B* commits forgery.3824

(e) *A* draws a bill of exchange on himself in the name of *B* without *B's* authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on its maturity. Here, as *A* draws the bill with intent to deceive the banker by leading him to suppose that he had the security of *B*, and thereby to discount the bill, *A* is guilty of forgery.

(f) *Z*'s will contains these words--"I direct that all my remaining property be equally divided between *A*, *B* and *C*". A dishonestly scratches out *B*'s name, intending that it may be believed that the whole was left to himself and *C*. A has committed forgery.

(g) *A* endorses a Government promissory note and makes it payable to *Z* or his order by writing on the bill the words "Pay to *Z* or his order" and signing the endorsement. *B* dishonestly erases the words "Pay to *Z* or his order" and thereby converts the special endorsement into a blank endorsement. *B* commits forgery.

(h) *A* sells and conveys an estate to *Z*. *A* afterwards, in order to defraud *Z* of his estate, executes a conveyance of the same estate to *B*, dated six months earlier than the date of the conveyance to *Z*, intending it to be believed that he had conveyed the estate to *B* before he conveyed it to *Z*. A has committed forgery.

(i) *Z* dictates his will to *A. A* intentionally writes down a different legatee from the legatee named by *Z*, and by representing to *Z* that he has prepared the will according to his instructions, induces *Z* to sign the will. *A* has committed forgery.

(j) *A* writes a letter and signs it with *B's* name without *B's* authority, certifying that *A* is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from *Z* and other persons. Here, as *A* made a false document in order to induce *Z* to part with property, *A* has committed forgery.

(k) *A* without *B's* authority writes a letter and signs it in *B's* name certifying to *A's* character, intending thereby to obtain employment under *Z. A* has committed forgery inasmuch as he intended to deceive *Z* by the forged certificate, and thereby to induce *Z* to enter into an express or implied contract for service.

Explanation 1.--A man's signature of his own name may amount to forgery.

Illustrations

(a) *A* signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. *A* has committed forgery.
(b) *A* writes the word "accepted" on a piece of paper and signs it with *Z's* name, in order that *B* may afterwards write on the paper a bill of exchange drawn by *B* upon *Z*, and negotiate the bill as though it had been accepted by *Z*. *A* is guilty of forgery; and if *B*, knowing the fact, draws the bill upon the paper pursuant to *A*'s intention, *B* is also guilty of forgery.
(c) *A* picks up a bill of exchange payable to the order of a different person of the same name. *A* endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable: here *A* has committed forgery.
(d) *A* purchases an estate sold under execution of a decree against *B*. *B*, after the seizure of the estate, in collusion with *Z*, executes a lease of the estate to *Z* at a nominal rent and for a long period, and dates the lease six months prior to the seizure, with intent to defraud *A*, and to cause it to be believed that the lease was granted before the seizure. *B*, though he executes the lease in his own name, commits forgery by antedating it.
(e) *A*, a trader, in anticipation of insolvency, lodges effects with *B* for *A*'s benefit, and with intent to defraud his creditors; and in order to give a colour to the transaction, writes a promissory note binding himself to pay to *B* a sum for value received, and antedates the note, intending that it may be believed to have been made before *A* was on the point of insolvency. *A* has committed forgery under the first head of the definition.3825

Explanation 2.--The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in the lifetime, may amount to forgery.

Illustration

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. *A* commits forgery.

[74][*Explanation 3.*--For the purposes of this section, the expression "affixing [75][electronic signature]" shall have the meaning assigned to it in clause (d) of sub-section (1) of section 2 of the Information Technology Act 2000].

Comments

1. Scope and Applicability

This section, being a part of the definition of forgery, defined in the preceding s 463, IPC, has to be read with that section as it answers the question 'when is a false document or false electronic record made?' meaning thereby that the section defines the first element in forgery, *viz*, making a false document or false electronic record. A false document or false electronic record can be made in the following three ways, namely:

(a) by making, signing, sealing or executing a document; or
(b) by alteration of a document; or
(c) by causing a person, who is innocent of the contents, or nature of the alteration, of a document, to sign it.3826

A person is said to have made a 'false document', if: (i) he made or executed a document claiming to be someone else or authorized by someone else; or (ii) he altered or tampered a document; or (iii) he

obtained a document by practicing deception, or from a person not in control of his senses.[76]

In whichever of the said three ways the document is made, it must be so made with a dishonest or fraudulent intent.[77] Moreover, if the making takes the first form, *viz*, that of execution, there must be a further intention, *viz*, to cause it to be believed that the document was executed by the person by whom, or at the time at which, it purports to have been executed.

Reading ss 463 and 464, IPC together, the following elements are necessary to constitute the offence of forgery:

(a) 'making' of a false document or false electronic record in one of the above three ways specified in s 464, IPC (a false document is not 'made' until it has been executed or altered;
(b) accompanying dishonest or fraudulent intention, *ie*, an intention by means of the making to cause wrongful loss or wrongful gain to someone or injuriously to deceive someone, though the person in question need not necessarily be the same person who will ultimately suffer from the forgery;[78]
(c) it is the execution of the document which is false, the specific intention therein stated and referred to above; and
(d) a principal or ulterior intent of one or other of the kinds specified in the preceding s 463, IPC .

Every false or fabricated document is not a forged document; there must be acts that constitute the document a false or fabricated one, that is to say, the case must fall within the definition of making a false document in s 464 and such false document must also possess the character or tendency described in s 463 .[79] Similarly, in order to constitute an offence of forgery under ss 463 and 464, the document must be made dishonestly or fraudulently and these words must be read in the sense in which they are defined in IPC in ss 24 and 25, respectively.[80] The disjunctive use of the two words 'dishonestly' and 'fraudulently' inclines in favour of the view that the latter word 'fraudulently' is not a mere surplusage.[81] The offence of forgery is complete as soon as a false document has been made though no use of the document is, as a fact, ever made.[82] Of course, until false document is made in part or in whole, there cannot be any forgery. Mere preparation for a possible crime of forgery without false document in part or in whole, cannot, by itself, be either forgery or abetment of3827 forgery.[83] Similarly, mere filling in of the body of a permit will not amount to making of a false document unless it be also shown that when the accused wrote out the body of the permit, he did so dishonestly or fraudulently and that he had the intention of causing it to be believed that such part of the permit was made by a person, by whom, or by whose authority, it was not, to his knowledge, made.[84] Likewise, the mere making of a false statement in a document would not bring the same within the ambit of s 464, IPC, and would not amount to forgery.[85] Same is the position when the signature on the certificate is genuine and authorship of the certificate is established.[86]

Section 464 of IPC which defines the offence of 'forgery: encompasses a dishonest or fraudulent act of a person in making a document with the intention of causing it to be believed that such document was made, signed, sealed *etc* by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed *etc*. The action of the accused SK in making the endorsement in the Investment Renewal Form of Vyasa Bank, in the light of the surrounding facts and circumstances noted, *prima facie*, amounted to making of a document with an intention of causing it to be believed that the same was made by or by the authority of the joint account holder S.[87]

To constitute the offence of preparation of a false documents, document should be made or executed claiming to be some one else or authorized by somebody else. Where document is executed by a person without claiming to be some one else or authorized by somebody else, it will not be a false document, it will not be a forgery also. Where a person sells a property knowing that it does not belong to him and thereby defrauds person who purchases property, person defrauded has a right to

complain fraudulent act of cheating. However, that does not mean that when such a purchaser complains of defrauding, it is a false document or that forgery was committed.[88]

2. Sections 463 , 464, 465, 471, IPC and Section 146(p) of the Maharashtra Co-operative Societies Act (23 of 1961)--Distinction

Commentary under the same heading in s 465, *post*, may be referred to.

3. Effect of Amendments made by the Information Technology Act 2000

Commentary under the same heading in s 463, *ante*, may be referred to.

4. Document

Section 29, and its commentary in vol 1, may be referred to.

5. Electronic Record

Section 29A, vol 1, may be referred to.3828

6. To make a False Document

The word 'makes' does not mean anything more than makes, that is to say, creates or brings into existence.[89] This view is consistent with illustration (c) to this section.[90]Under this section, making of a false document is not restricted to the act of signing it.[91] In Re *Riasal Ali*,[92] it was, however, observed that the 'making of a document or part of a document' does not mean writing or printing it, but signing or otherwise executing it; it is the fixing of the seal or the signature of some person to the document or part of a document knowing that the seal or the signature is not of him and that he gave no authority to affix it. However, this last cited authority is a weak one as it did not consider the definition of 'document' in s 29 .[93]

7. Causing False Document to be made--Distinct from Making it

A person to be guilty of forgery, under the first clause of this section, must make a false document or part of a false document and not merely cause it to be made. Making a false document is one thing and causing it to be made is another.[94]

8. Untrue or False Statement in Document--Not Amounting to Making of False Document

The making of a document, untrue in certain particulars, is not necessarily the making of a false document within the meaning of the IPC . To constitute such a document a false document, it must be shown that it was made with such an intention as is implied in the term 'fraudulently' or in the term 'dishonestly'. A mere intention to deceive is not sufficient.[95] The mere making of false statement in a document would not make it a false document.[96] The fact that a document contains false recitals or statements, which induce a person so deceived to part with property, would not make it an offence of forgery.[97] Therefore, when false pay bills were prepared by the accused containing false claims, the offence committed cannot be said to be forgery because the accused had not made signatures or writings of another or had not unauthorisedly altered the pay bills in material particular. When the pay bills in question were written and signed by the accused himself, the same could not be said to be false documents and hence no offence of forgery can be said to have been committed by the accused.[98]3829

9. Importance of Nature and use of Document--Cases

What constitutes the 'making' of document depends entirely upon the nature and use it is intended for. In *LK Siddoppa v Lalithamma* ,[1] the accused got printed marriage invitations in the names of two persons without authority from either of them and issued the invitations to friends and relations notifying the celebration of marriage of the accused to the complainant, an eligible, handsome and young woman, inheriting considerable property. It was held that there was clearly possible injury or risk of injury to the complainant, and the marriage invitations, being forged documents, fell within the definition of a false document in s 464 . Where a person forges a copy of a fictitious resolution of a co-operative society by copying only the body of the resolution, he makes part of a false document and prepares, therefore, a false document.[2] If, however, it is not proved that the accused knew that the resolution of the co-operative society, which he copied, did not exist, he cannot be convicted under s 464 .[3] Where the maker of a copy has no authority to make its copy, a false copy is not a false document.[4] A wrong entry of payment in a muster-roll will not make the document a forged one.[5] Where a Mohammadan executes a *kabirnama* in favour of a woman, who is not his wife, with the intention of supporting a claim to her property, the document is not a false document within the meaning of s 464 .[6]

10. Document Prepared to Conceal Fraud

If a document is prepared with the intention of concealing a fraud, that had already been committed, and, thus, to enable the person, who made 'wrongful gain', to retain the property that he had acquired by unlawful means, it amounts to a false document and the person, making it, is guilty of forgery.[7] The Supreme Court in *RK Dalmia v Delhi Administration* ,[8] a case where false entries were made to cover up the diversion of funds and to conceal further the dishonest act, already committed, agreed with the observations in *Emperor v Ragho Ram* .[9] Therefore, the cases, holding that in such a case no false document is made, cannot be considered to be good law.[10] If a person3830 executes a false valuable security to render inoperative a genuine valuable security, the act is a forgery. In such a case, fraud is committed for the purpose of counter-acting fraud and the person using the false document cannot make use of such a defence to charge of forgery.[11]

11. 'Dishonestly'

For the purpose of forgery, it is sufficient to show that there was a criminal intention to cause wrongful gain to one or wrongful loss to another. It is not necessary that wrongful gain or wrongful loss should actually be caused.[12]

12. 'Fraudulently'

The expression 'defraud' involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss and it will include any harm whatever caused to any person in body, mind, reputation or such other. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived.[13] Where, therefore, a document is prepared with the intention to deceive and by means of deceit, an advantage is obtained then there is fraud, and judged from this standpoint the preparation of a forged bail order by the utilisation of which the person concerned obtained an advantage of being released by deceiving the courts and society at large cannot but be said to have made the document fraudulent thereby attracting s 466, IPC .[14] In order to do a thing fraudulently, it is not necessary that the person, doing it, should intend, or the doing of it should have, the necessary consequence of causing wrongful loss to any person. To ascribe, to the word 'fraudulently', the meaning, given to the word 'dishonestly', would be attributing redundancy to the legislature.[15]The decisions, which proceed on the ground that an act is not fraudulent unless it causes, or is intended to caused loss to someone, would seem to take too narrow a view of the meaning of the word 'fraudulently' as used in the IPC .[16] Except so far as loss or detriment is necessarily involved when an advantage is obtained, and intention of causing loss in a matter of remote inference.[17] Where it is found that the element relied on for the application of both ss 463 and 464, it is sufficient to prove that the accused wanted to secure an advantage to himself; it is not necessary to show that he intended to cause injury to another.[18] To3831 constitute, in law, an intent

to defraud, there must be a possibility of some person being not only deceived, but also injured, by the forgery.[19] In *Sanjiv Ratnappa v Emperor* ,[20] the accused, a sub-inspector of police, altered the case diary after the inception of proceedings against him in order to create evidence in his own favour. It was held that no offence under s 465, IPC was committed because the element of fraud, as defined in the IPC, was absent. There was no question of any injury being caused to the deputy superintendent of police who was inquiring into the case as a result of alteration of the case diary. It was emphasised that the word 'defraud' involves two conceptions, deceit and injury, to the person deceived, *ie*, and infringement of some legal right of that person. In *Kotamraju Venkatrayudu v Emperor* ,[21] a certificate for admission to a university examination was forged. The majority of the judges held that 'there was intent to obtain advantage and the corresponding injury to the university' and, therefore, the act may be said to have been done fraudulently. The making of a false certificate with intent to procure employment in government service is fraudulent within the meaning of s 474 .[22] In *Chothamal Narayanji v Ramchandra Govindram* ,[23] the accused, a tenant, submitted an application in the name of his landlord and forged the signature of the landlord's son to a statement to the effect that the landlord had no objection to the grant of electricity in the premises of the tenant. It was laid down that in order that an act may be done fraudulently, there must be deception actual or intended, and injury or risk of injury, though not to any particular person. As the act of the accused involved deception and injury risk of injury to the electric department by way of litigation by the unwilling owner, the accused was held guilty of forgery. Commentary under s 25, vol 1, may be referred to.

13. Intention to Defraud

The term 'fraudulently' is equivalent to 'with intent to defraud'.[24] An intent to defraud means something more than deceit. The object, for which deceit is practised, has to be considered. The advantage, intended to be secured, must be something to which the party, perpetrating the deceit, is not entitled either legally or equitably.[25] An intention to defraud being an essential ingredient, it is rally. An intention to defraud or not is a question of fact to be determined with reference to the special circumstances of each case.[26] Certificates (honorary degrees without examinations), though false in material particulars and given by the accused, running bogus institutions, would be false documents in law only if they were made dishonestly or fraudulently *vis-a-vis* the persons who received them.[27] Where the accused altered3832 the date of birth in an original certificate, granted by the university to successful candidates at the matriculation examination, in order to qualify for appearance at a competitive examination, the original document so altered was held to be a false document.[28] In *Naga Ba Thein v Emperor* ,[29] the accused, who made an application for appointment in the land records department containing false statement, attached several certificates to the application, one of which was clearly a forgery, with the intention to obtain a lucrative appointment by means of the deception, namely, to cause wrongful gain to himself. It was held that the act of the accused being dishonest, he was rightly convicted under ss 465 and 471, IPC .

14. 'With the Intention of Causing it to be Believed'

The first clause of this section requires that the making of the false document should be with the intention of causing it to be believed that the document, or a part of it, was made, signed, sealed or executed, (a) by, or by the authority of, a person by whom, or by whose authority, he (*ie*, the accused) knew that it was not made, *etc*; or (b) at a time, at which he (*ie*, the accused) knew that it was not made, *etc*. The section will not apply to cases where a public officer, or a person, acting for a public officer, whose duty it is to make entries in public books, knowingly makes a false entry; it would, however, certainly apply to cases where the document is forged by some unauthorised person with a view to make it appear that it was duly issued by a public officer.[30] Therefore, in order to bring the case in the first clause of s 464, IPC, it must be proved that a document or part of it has been made with the intention of causing it to be believed that it was so made by, or by the authority of, a person by whom, or by whose authority, he (*ie*, accused) knew that it was not made.[31] Where a written statement, filed in court, is removed and another substituted to make it appear that the substituted one is the sufficient to show that there was an intention to defraud gene original, the case is covered by the first clause of this section.[32] Where, however, a person, the executant of a document, attaches a

false description to his name and it is not possible to say that he, in the circumstances, intended to make out that it was not he, who was executing the document, but a fictitious person, he does not come within the purview of this section.[33] In order to bring a document within the four comers of the first clause, the document must be created with a view to make it appear that it was made by some other person, who, the accused knows, did not make it.[34] In *Empress v Appasami* ,[35] the accused, by falsely representing himself to be one3833 VAD, induced the officer of the Madras university to deliver, to him, a ticket, entitling him to enter the examination room for the matriculation test, the papers of VAD. It was held that as, by writing the examination paper, the accused made a false document with the intention of causing it to be believed that the document was made by VAD, he was guilty of forgery under s 465, IPC . In *Venkaraju Venkatasami v Emperor* ,[36] certain persons, however, signed a bail bond in names, which were not their own, after informing the magistrate that their names were those with which they subsequently signed. There was no intention to cause the magistrate to believe that the bail bond was signed by any person, real or fictitious, other than those persons. The conviction for forgery was, therefore, set aside.

15. Accused not Writer of or Signatory to Document--Effect

A charge of forgery cannot lie against a person who is not the writer of the forged document or who has not signed the forged name.[37] Where forgery is committed not by the hand of the accused himself, but by witness in the case, the accused cannot be convicted of forgery unless it is proved that he himself made a document, or part of it, with the intention of causing it to be believed that such document, or part of such document, was made by the authority of a person by whose authority, he knew, it was not made.[38]

16. 'Signed, Sealed, or Executed, by, or by the Authority of a Person'

For forgery, a signature must be made by a person who knows that he has not got authority from the person whose signature he purports to make on the document.

Where, therefore, *A* was present when *B* made a signature for *A* on a document, it was held that there could be no question of want of authorisation, or forgery, in law.[39] If, in a petition for transfer of a lease of fishery, the son signs his father's name, the document is not a false document unless the son writes his name dishonestly or fraudulently. If the son has his father's authority to sign and there is no suggestion that the has acted fraudulently, he cannot be convicted for forgery.[40] In very case of forgery, where the question of authority is raised, it is essential to prove not only the lack of authority, but also the dishonest intention, with probably more that usual care. Mere abuse of authority would not necessarily lead to the conclusion that there is forgery. It is not forgery where the act is done under the honest belief that the party, doing it, has a right to do it although, in point of fact, he had no such authority.[41] Where, however, the accused fraudulently made a false order, purporting to be from a district superintendent of police to subordinate officials, with the intention of causing it to be believed that it was made with the authority of the district superintendent of police, knowing that it was not made with his authority, and intended thereby to commit fraud, or that fraud may be committed, it was held that3834 he was guilty of forgery.[42] Filling in, without any authority or with an excess of authority, the body of a blank cheque, to which a signature is attached, is forgery.[43] The signing of a *vakalatnama* in the name of co-decree-holders, without their authority to do so, and delivering it with instructions to file a petition, to the effect that the debt had been satisfied and that the case may be struck off the file, is forgery as it is made with intent to commit fraud.[44]However, a person, who consents to act under a *mookteamamah* and attaches his own name in token of such consent, does not, thereby, become the maker of the *mookteamamah* or a forger if the *mookteamamah* turns out to be forged.[45]

17. Attesting a Forged Document/Signature

A person, who merely attests a forged signature on a document of receipt, cannot be convicted of forgery. Before attestation can amount to forgery, one of the essential requirements is that it must be

made or signed by a person by whom it does not purport to be made or signed. In the case of a forged attestator, it cannot be said that the document was signed by a person by whom it does not purport to be made or signed.[46] The bare fact of attestation is not sufficient to justify an inference that the attestator knew that he was attesting a forged document unless there are facts besides the mere fact of attestation, to show that it was probable that the attestator had the guilty knowledge imputed to him.[47]

18. 'At a Time at Which...it was not made, Signed, Sealed or Executed'

The words 'at a time at which he knows that it was not made, signed, sealed or executed' are to be read distributively, and are not to be governed by the preceding words 'by, or by the authority of, a person', *etc*.[48] To execute a document purporting to have been executed on a date other than the one on which it was actually executed is itself a forgery.[49] In order to make a false document, the date, put on a document, must differ from the date on which the document was prepared.[50] If a date is appended to a document, but it was written on a later date, the offence of forgery would be complete.[51] It is forgery to make a deed fraudulently with a false date, when the date is material, although the deed is, infact, made and executed by and between the persons by and between whom it purports to be made and executed.[52] Where, however, there is no evidence that the endorsement, made on a bill by the accused, was made dishonestly or fraudulently with the intention of causing it to be believed that the endorsement was made at a time at which he knew that it was not3835 made, the accused cannot be held to have made a false document.[53] A document does not become false merely because it is ante-dated unless it was made dishonestly or fraudulently.[54] If there is nothing to show that the ante-dating of the document had, or could have had, any operation to the prejudice of anyone, the necessary element of dishonestly or fraud is wanting.[55] A document, ante-dated to defeat the provisions of an Act, does not in the absence of proof that this was done dishonestly or fraudulently regarding the persons, affected by it, is not making a false document under s 464 .[56] Where the accused altered the date of a document (a lease) under the impression that only by so doing the document would be received in evidence, but the alteration not only by so doing the document would be received in evidence, but the alteration not only did not help his case, but actually ruined it, it was held that as there was no element of dishonesty or fraud on the part of the accused, he could not be convicted under s 471 .[57] Where all that was proved, was that a forged Will was admittedly written long after the date, which was inserted in the body of the Will as the date of execution, but there was no evidence to raise a presumption against the accused of complicity in a fraud, the accused was not held guilty of forgery.[58] The mere fact, that the document was written on a paper, which bore a small embossed stamp, denoting a later date, would not be conclusive evidence, that the paper was not made at an earlier date, and would not be sufficient to support a charge of forgery.[59]

A complainant, who alleges forgery in respect of a document by ante-dating it, is not obliged to confine himself to the evidence of witnesses named on the petition of complaint.[60]

19. 'Alters a Document in any Material Part'

In order to fall within the ambit of the second clause of this section, there must be alteration of a document by cancellation or otherwise after it has been made or executed.[61] The alteration to be material must be one which alters, or attempts to alter, the character of the instrument itself, which affects, or may affect, the contract which the instrument contains or of which it furnishes the evidence.[62] The interpolation of the name of the witness in a document, which need not be attested, is not a material alteration so as to render the document void and bring the case within3836 the second clause of s 464 .[63] However, the alteration of the date in a bond is an alteration in a material part thereof though the alteration is not made for the purpose of saving limitation.[64] Likewise, the alteration of the date in a bond, in order to bring the bond within time for registration, is not forgery if it is not done 'dishonestly or fraudulently', and there is no intention to support a false claim by a false bond.[65] Similarly, alteration of a sale-deed, subsequent to its registration, by substitution of the right number of the plot sold for the wrong number, without affecting the identity of the property, conveyed by the deed, cannot be a false document within the meaning of s 464 .[66] However, deliberate tampering with

a document to support a claim in court, however just that claim may be, is a fraud, both upon the Court and the opposite party, though done to counteract another fraud.[67]

20. Mere Alteration in Document does not Constitute Offence of Forgery

To attract the second clause of s 464 there has to be alteration of document dishonestly and fraudulently. So in order to attract the clause 'secondly' if the document is to be altered, it has to be for some gain or with such objective on the part of the accused. Merely changing a document does not make it a false document. Therefore, presuming that the figure '1' was added as was done in this case, it cannot be said that the document became false for the simple reason that the appellant had nothing to gain from the same. She was not going to save the bar of limitation. Proceedings against the appellants for offences under ss 420, 467 468 and 471 were quashed on petition under s 482 CrPC .[68]

21. Altered Document need not be Legally Effective and Valid

Nothing in this section requires that a document, altered within the meaning of the section, should be legally effective and valid in order that the alteration should, in the circumstances set out, constitute the offence of making a false document.[69] A document, which has not been completed and remains ineffective, can nevertheless attract the provisions of the second clause of s 464 .[70]

22. 'Cause any Person to Sign, Seal, Execute or Alter a Document'

In this class another, who is innocent of the contents of the document or the nature of alteration, by reason of: (a) unsoundness of mind, or (b) intoxication, or (c) deception practised on him, is made to sign, seal, execute or alter a document. If a person inserts a paper in a heap of papers, placed before an officer for his signature, and there is no sort of deception, practised on the officer, to prevent him from knowing3837 the nature of the document, the paper is not a false document within the third clause of this section and he is not guilty of an offence of forgery.[71]

23. Explanation 1

Explanation I embodies the rule that a person may commit forgery even when he signs in his own name.[72] The fraudulent intent, with which such a signature is appended to a document, renders the document false. This is strikingly brought out in illust (d) where *B* executes the lease in his own name, but as it was ante-dated to defraud a purchaser of the same property, sold under execution of a decree against *B*, by causing it to be believed that the lease was granted before the seizure of the property by the purchaser, *B* committed forgery by ante-dating the lease. Another example in illust (e) and it illustrates the rule generally enunciated in the first clause of this section. Where a bill of exchange, payable to Henry Davis got into the hands of another person, who endorsed it to Mead, who discounted it in good faith, it was held that such false endorsement, made with a view to defraud, was undoubtedly a forgery because it purported to have been endorsed by a different person from the man who actually endorsed it.[73] An instrument may be false by reason of the defendant representing his own signature thereon to be that of some other person, existent or non-existent, or by reason of the defendant having filled blanks therein a manner different from that authorised or after his authority had expired.[74]

From the two illusts (h) and (e) and expln I it will be clear that the legislature intended to cover cases under the offence of forgery whenever the person was the creator of a document even though the document was made by himself in his own name and signed in his own name. These two illustrations with expln I, therefore, make the scope of definition 'making a false document' very wide and it cannot be said that Pt I of s 464 is the only provision defining the words 'making the false document'.[75] In illust (d) to this section, the forgery consists in exceeding the authority given.

The five illustrations to the explanation show the working of the rule embodied in it.

The act of an accused in selling the property in the absence of any authority is covered by the definition of making a false document within the meaning of s 464, cl first, illust (b).[76]

24. Explanation 2

By this explanation, a false document may be made in the name of a fictitious person or a deceased person,[77] the intention being to cause it to be believed that the document:

(a) if made in the name of a fictitious person, was made by the real person,[78] or3838
(b) if made in the name of a deceased person, was made by the deceased in his lifetime.

A perusal of explanation 2 of s 464 shows that for the offence to get attracted 'making of a false document is essential'. When this aspect is missing in the complaint, the complaint against the accused under ss 465 and 468 is liable to be quashed.[79] As to a charge of forgery, it is wholly immaterial whether the name forged is that of a fictitious person, who never existed, or of a real person. It is as much forgery in the one case as in the other provided the fictitious name is assumed for the purpose of fraud in the case under trial.[80] Where, however, the accused signed a document as a *patwaree*, but he was not a *patwaree* at the relevant time, it was held that the assigning, the accused, the character of a *patwaree* was not equivalent to the making of a false document in the name of a fictitious person.[81] Where, before signing a bail bond, the accused gave their names to the magistrate and signed the bail bond in those very names, it was held that there was no intention to cause the magistrate to believe that the bail bond was signed by any person, real or fictitious, other than the accused even though they signed the bond with names which were not their own. The conviction for forgery was, therefore, set aside.[82]

An idol being a 'person' within the meaning of s 11, if a person signs a document in the name of an idol, he commits forgery under this section.[83]

25. Explanation 3

This explanation classifies the expression 'affixing digital signature' which shall have the same meaning assigned to it in cl (d) of sub-s 1 of s 2 of the Information Technology Act 2000 which is as follows:

(d) "Affixing electronic signature", with its grammatical variations and cognate expressions means adoption of any methodology or procedure by a person for the purpose of authenticating an electronic record by means of digital signature.

As per s 2(1)(p) of the said Act

(p) "digital signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with provision of section 3 .

Section 3 of Information Technology Act 2000 is as below:

S. 3 . Authentication of electronic records.--

(1) Subject to the provision of this section, any subscriber may authenticate an electronic record

by affixing his digital signature.

(2) The authentication of the electronic record shall be effected by the use of asymmetric crypto system and hash function which envelop and transform the initial electronic record into another electronic record.

Explanation.--For the purposes of this sub-section, "hash function" means an algorithm mapping or translation of one sequence of bits into another, generally smaller, set3839 known as "hash result" such that an electronic record yields the same hash result every time the algorithm is executed with the same electronic record as its input making it computationally infeasible--

(a) to derive or reconstruct the original electronic record from the hash result produced by the algorithm;

(b) that two electronic records can produce the same hash result using the algorithm.

(3) Any person by the use of a public key of the subscriber can verify the electronic record.

(4) The private key and the public key are unique to the subscriber and constitute a functioning key pair.

72 Substituted by the Information Technology Act, 2000 (21 of 2000), s 91 and First Sch. (wef 17-10-2000) for the following:'A person is said to make a false document--*First*--Who dishonestly or fraudulently makes, signs, seals or execute a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or *Secondly*--Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, 'whether such person be living or dead at the time of such alteration; or *Thirdly*--Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration'.

73 Substituted by the Information Technology (Amendment) Act, 2008 (10 of 2009), s 51 for the words 'digital signature' (wef 27-10-2009).

74 Inserted by the Information Technology Act, 2000 (21 of 2000), s 91 and First Sch. (wef 17-10-2000).

75 Substituted by the Information Technology (Amendment) Act, 2008 (10 of 2009), s 51 for the words 'digital signature' (wef 27-10-2009).

76 *Md Ibrahim v State of Bihar* 2010 Cr LJ 2223, p 2226 (SC), 2010 AIR SCW 405, 2009 (12) Scale 250, 2009 (8) SCC 751 .

77 Refer to synopsis notes under ss 24, 25, 378 and 463, IPC .

78 Refer to synopsis notes under s 464, IPC .

79 *Badan Singh v Emperor* 25 Cr LJ 337, AIR 1923 Lah 11 .

80 *Sanjiv Ratnappa v Emperor* 34 Cr LJ 357, AIR 1932 Bom 545, p 547 ; Re *Guddappa* 1 Weir 542; *Emperor v Bisheshar Dayal* 25 AWN 93, 1 Cr LJ 234 ; *Chothmal Narayanji v Ramchandra Govindram* 1954 Cr LJ 788, AIR 1954 MB 73, p 74 .

81 *Empress v Abhas Ali* (1897) ILR 25 Cal 512, p 521, 1 CWN 255 (FB) .

82 *Kotamraju Venkatrayadu v Emperor* 2 Cr LJ 283 (FB) ; *Raghunath Naik v State* 1975 OJD 18, 1975 Cut LT 1085 ; Re *Sheefait Ally* 10 WR (Cr) 61, p 62, (1869) 2 Beng LR (App) 12, p 14; *Bajrang Lal v State of Rajasthan* 1976 Cr LJ 727, AIR 1976 SC 1008 ; *Halsbury's Laws of England*, third edn, vol 10, p 839, para 1615.

83 *Pramatha Nath v State* 52 Cr LJ 1480, AIR 1951 Cal 581, p 583 .

84 *Satya Bhusan Shome v State* 1973 Cr LJ 76 (Gau) .

85 *Thakar Singh v State of Punjab* 1976 Cr LT 451 (Har), 1976 CLR 322 .

86 *Premlata (Smt) v State of Rajasthan* 1998 Cr LJ 1430 (Raj) .

87 *Satish Mehra v State (NCT of Delhi)* AIR 2013 SC 506, 2013 Cr LJ 411, (2012) 13 SCC 614 .

88 *Hydru Haji v State of Kerala* 2011 (1) KLT 63, 2011 (1) KLJ 209 .

89 *Chatru Malik v Emperor* 29 Cr LJ 851, AIR 1928 Lah 681, p 686 ; *Province of Biter v Surendra Prasad Ojha* 52 Cr LJ 771, AIR 1951 Pat 86, p 89 ; *Puttaraju v State of Mysore* 1964 MLJ (Cr) 395 ; *Ranjit Sinha v State* (1963) 2 Cr LJ 36, AIR 1963 Pat 262 .

90 *Queen v Batmar* (1845) 1 Cox CC 186 .

91 *Ranjit Sinha v State* (1963) 2 Cr LJ 36, AIR 1963 Pat 262 .

92 Re *Riasal Ali*(1881) ILR 7 Cal 352, 356.

93 *Province of Bihar v Surendra Prasad Ojha* 52 Cr LJ 771, AIR 1951 Pat 86, p 89 ; *LK Siddappa v Lalithamma* 1954 Cr LJ 1235, AIR 1954 Mys 119 .

94 *Panchanan Maity v State* 1953 Cr LJ 1826, AIR 1953 Cal 798, p 799 .

95 Re *Guddappa* 1 Weir 542, p 543; *Emperor v Bisheshar Dayal* 2 Cr LJ 234, 25 AWN 93 .

96 *Motisinh Ghambirsinh v State* (1961) 2 Cr LJ 76, AIR 1961 Guj 117 ; *M Brahmavya v P China Ramachandriah* (1958) 2 Andh WR 489, 1958 MLJ (Cr) 854 .

97 *Public Prosecutor v Thall Gangadharadu* 1956 Andh LT 678, p 682, 1956 Andh WR 805 ; *Gulab Singh v State of Punjab* (1984) 2 Crimes 869 .

98 *Shankarlal Vishwakarma v State of Madhya Pradesh* 1991 Cr LJ 2808 (MP) (DB) .

1 *LK Siddoppa v Lalithamma* 1954 Cr LJ 1235, AIR 1954 Mys 119, p 120-21 .

2 *Puttaraju v State of Mysore* 40 Mys LJ 880, 1964 MLJ (Cr) 395 ; *Manmohan Singh Johal v State* 1969 Cr LJ 932, AIR 1969 Punj 225 ; *Essan Chander Dutt v Prannath Chowdhry* (1863) WR (Cr) 71 (FB) ; *Empress v Nujun Ali* (1866) 6 WR (Cr) 41 .

3 Re *M Gangadhariah*1967 Cr LJ 787, AIR 1967 Mys 86 ; Re *Gopala Krishna Geggade* 11 Cr LJ 401.

4 *Lachman Lal v Emperor* 20 Cr LJ 142, AIR 1919 Pat 407, p 408 (a paper purporting to be a printed reproduction of certificates from former employees) ; *Ali Hasan v Emperor* 3 Cr LJ 249 (the accused not only knew that the document, which he was copying, was false, but also was a *muharrir* having authority to issue copies of authentic documents).

5 *Ram Ghulam Singh v Emperor* 30 Cr LJ 408, AIR 1929 All 396, p 398 .

6 *Gunjar Mohammad v Shuruz Ali* 23 Cr LJ 723, AIR 1924 Cal 536 (2), p 537 .

7 *Emperor v Ragho Ram* 34 Cr LJ 1053, AIR 1933 All 525, p 528 ; *Empress v Sabapati* (1888) ILR 11 Mad 411, p 413, 1 Weir 549 ; *Lalit Mohan Sarkar v Empress* (1894) ILR 22 Cal 313, p 322 ; *Emperor v Rash Behari Das* (1908) ILR 35 Cal 450, 12 CWN 584 ; **dissenting** from *Abdul Humid v Empress* (1886) ILR 13 Cal 349 ; *Emperor v Balkrishna Vaman Kulkarni* 14 Cr LJ 518 .

8 *RK Dalmia v Delhi Administration* (1963) 1 SCR 253, p 400, 401, AIR 1962 SC 1821 .

9 *Emperor v Ragho Ram* 84 Cr LJ 1956, AIR 1933 All 595, p 598 .

10 *Shuja-ud-itin Ahmad v Emperor* 23 Cr LJ 258, AIR 1922 All 214 (false entries made in delivery book with intention of screening past guilt); *Empress of India v Jiwanand* (1882) ILR 5 All 221, 1882 AWN 236 ; *Empress v Girdhari Lal* (1886) ILR 8 All 653, 1886 AWN 264 (false entries in account books to conceal criminal breach of trust already committed); *Queen v Lal Gumul* (1870) 2 NWP 11 ; *Empress v Jageshur Pershad* (1874) 6 NWP 56 ; *Empress v Mazhar Hussain* (1883) 3 AWN 133 (public servant in charge of documents unable to produce certain documents fabricating them to screen himself from punishment); *Empress v Shankar* (1880) ILR 4 Bom 657 (concealment of past fraud); *Jyotish Prasad Mukerjee v Emperor* 10 Cr LJ 581 (alteration of accounts for screening previous criminal misappropriation but showing liability of accused for screening previous criminal misappropriation but showing liability of accused and true state of affairs); *Abdul Hamid v Empress* (1886) ILR 13 Cal 349 (a letter made to screen the accused from detection of fraud already committed by him by two previous letters).

11 *Fakir Mohammad v Empress* 4 PR 1885 (Cr) .

12 *Chunku v Emperor* 32 Cr LJ 599, AIR 1931 All 258 . See commentary under s 24, vol 1.

13 *State of Uttar Pradesh v Ranjit Singh* 1999 Cr LJ 1830 (SC) .

14 *State of Uttar Pradesh v Ranjit Singh* 1999 Cr LJ 1830 (SC) .

15 Re *Sivananda Mudali* 27 Cr LJ 994, AIR 1926 Mad 1072, pp 1074 and 1077 ; per Maclean CJ, in *Empress v Abbas Ali* (1898) ILR 25 Cal 512, p 521, CWN 255 (FB); **overruling Empress v Haradhan**(1892) ILR 19 Cal 380.

16 *Kotamraju Venkatrayadu v Emperor* (1905) ILR 28 Mad 90, p 95, 2 Cr LJ 283 (FB) .

17 *Baij Nath Bhagat v Emperor* AIR 1940 Pat 486, p 491, 41 Cr LJ 427 .

18 *RR Chari v State* 1959 Cr LJ 268, AIR 1959 All 149, p 157, 158 ; *Empress v Vithal Narayan* (1889) ILR 13 Bom 515 ; *Abdul Ghafur v Emperor* AIR 1921 All 356, p 357-58, 22 Cr LJ 56 .

19 *R v Bhavani Shankar* (1874) 11 Bom HCR 3 ; *Nur Ahmad v Joges Chandra Sen* 36 Cr LJ 385, AIR 1934 Cal 838, p 842 ; *Aparti Charan Ray v Emperor* 31 Cr LJ 1126, AIR 1930 Pat 271, p 272 ; *Ram Sarup v Emperor* 19 Cr LJ 236, AIR 1918 Pat 640, p 642 .

20 *Sanjiv Ratnappa v Emperor* 34 Cr LJ 357, AIR 1932 Bom 545, per Barker J; *Emperor v Surendra Nath Ghosh* 11 Cr LJ 505, **followed** in *Ahmed Ali v Emperor* AIR 1926 Cal 224, 26 Cr LJ 1574 ; *Empress v Sheo Dayal* (1885) ILR 7 All 459, (1885) 5 AWN 85 .

21 *Kotamraju Venkatrayudu v Emperor* (1905) ILR 28 Mad 90, 2 Cr LJ 283 (FB) .

22 *Abdul Razak v Emperor* 2 PR 1895 .

23 *Chothamal Narayanji v Ramchandra Govindram* AIR 1954 MB 73, 1954 Cr LJ 788 .

24 *Baij Nath Bhagat v Emperor* 41 Cr LJ 427, AIR 1940 Pat 486 .

25 *Manika Asari v Emperor* 16 Cr LJ 246, AIR 1915 Mad 826, p 827 ; *Ali Hasan v Emperor* 3 ALJ 149, 3 Cr LJ 249 ; *Ma Ko Gyi v Emperor* 37 Cr LJ 1059, AIR 1936 Rang 380, p 382 ; *Empress v Nga Aung Ba* (1897-1901) 1 UBR 356; *Kotamraju Venkatrayudu v Emperor* (1905) ILR 28 Mad 90, 2 Cr LJ 283 (FB) .

26 *Empress v Peru Raju* (1897) ILR 13 Mad 27, 1 Weir 545 .

27 *State of Uttar Pradesh v Joti Prasad* (1962) 2 Cr LJ 722, AIR 1962 All 582 .

28 *Emperor v Chanan Singh* 30 Cr LJ 900, AIR 1929 Lah 152 .

29 *Naga Ba Thein v Emperor* 25 Cr LJ 129 (Burma) ; *Empress v Khanusingh* (1898) ILR 22 Bom 768, p 769 ; *Russell on Crime,* 1964, twelfth edn, vol 1, p 1239; *Kotamraju Venkatrayudu v Emperor* (1905) ILR 28 Mad 90, 2 Cr LJ 283 (FB) .

30 *Mupparaju Brahmayya v Pinnikka China Ramachandriah* (1958) 2 Andh WR 489, 1958 MLJ (Cr) 489 ; *State v Parasram* (1965) 1 Cr LJ 213, AIR 1965 Raj 9 ; *Mohammad Sirdar v Emperor* 16 Cr LJ 19, AIR 1914 Lah 586 ; *Satish Mehra v State (NCT of Delhi)* AIR 2013 SC 506, 2013 Cr LJ 411, (2012) 13 SCC 614 .

31 *Prempal Singli v Phool Singh* 1980 Cr LJ (NOC) 160 (Raj) .

32 *Dharmendra Nath Shastri v Rex* 50 Cr LJ 550, AIR 1949 All 353, p 355 .

33 *Roman v Adakalammal* (1908) ILR 32 Mad 90, 9 Cr LJ 85 ; *Emperor v Fazal Din* 4 Cr LJ 355 ; *Empress v Kunju Nayar* (1889) ILR 12 Mad 114, p 115 .

34 Re *Venkatasuryanarasimha Rao*1955 Cr LJ 769, AIR 1955 AP 82, p 83 ; *Mertinale v Emperor* AIR 1925 Cal 14, p 22, 26 Cr LJ 401 (no forgery if evidence shows that the accused, in making out a cheque intended to pass it off as a genuine cheque drawn by himself in his own favour); *Jwala Ram v Empress* 12 PR 1895 (Cr) .

35 *Empress v Appasami* (1888) ILR 12 Mad 151, p 152, 1 Weir 480 ; *Aswini Kumar Gupta v Emperor* AIR 1936 Cal 403, 37 Cr LJ 1156 (2).

36 *Venkaraju Venkatasami v Emperor* 1940 MWN 232, 11 Cr LJ 440, 441; *Jwala Ram v Empress* 12 PR 1895 (Cr) .

37 *Haider Ali Pradhania v Emperor* 17 CWN 354, 14 Cr LJ 129, p 131 ; *Empress v Muhammad Saeed Khan* (1898) ILR 21 All 113, (1898) 18 AWN 197 .

38 *Empress v Ram Gopal Dhur* (1868) 10 WR (Cr) 7 .

39 *Lakshmi Das v Lakho Ram* 1935 ALJ 651, AIR 1935 All 410 ; Re *Venkatasuryanarasimha Rao*1955 Cr LJ 769, AIR 1955 AP 82, p 83 .

40 *Emperor v Po Shin* 6 Cr LJ 283 .

41 *Pramatha Nath v State* 52 Cr LJ 1480, AIR 1951 Cal 581, p 583 (document purporting to withdraw an appeal) .

42 *Emperor v Ali Hasan* (1906) ILR 28 All 358 .

43 *Russell on Crime*, twelfth edn, vol 2, p 1231, **citing***R v Kinder* (1800) 2 East PC 255 .

44 *Empress v Gyanee Ram* (1866) 6 WR (Cr) 78 .

45 *Empress v Burjo Barick* (1866) 5 WR (Cr) 70 .

46 *Motisinh Gambhirsinh v State* (1961) 2 Cr LJ 76, AIR 1961 Guj 117 ; *Emperor v Ram Nath* AIR 1925 All 230, 26 Cr LJ 362 ; *Ambar Ali v Emperor* AIR 1929 Cal 539, p 542, 31 Cr LJ 564 .

47 *Chinna Vira Reddi v Emperor* 41 Cr LJ 11, AIR 1939 Mad 730 .

48 *Empress v Ganesh Vhikaji* Ratanlal Unrep Cr C 772.

49 *Rangaswami Cheeyar v Mang Po Ku* 29 Cr LJ 599, AIR 1928 Rang 117 (stamped sheet of the mortgage deed purchased only on 16 September, but mortgage deed, presented for registration of the 18 September, purported to have been executed on 19 June 1926); *Empress v Sookmay Ghose* (1868) 10 WR (Cr) 23 ; *Ramautar Mistri v Rajindra Singh* (1961) 2 Cr LJ 139, 1961 BLJR 369 .

50 *Aher Samat Bhima v State of Gujarat* 1967 Cr LJ 1717 .

51 *Rao Shiv Bahadur Singh v State of Vindhyachal Pradesh* 1954 Cr LJ 910, AIR 1954 SC 322, p 332 .

52 *Halsbury's Laws of England*, third edn, vol 10, p 837, **citing***R v Ritson* (1869) LR 1 CCR 200 ; and **referring** to *R v Lewis* (1754) Fost 116 and *R v Wells* (1939) 2 All ER 169 (CCA) .

53 *Hurjee Mull v Imam Ali Sircar* 8 CWN 278 (FB), 1 Cr LJ 124, p 126 ; *Nandram Agrawalla v State of West Bengal* 1957 Cr LJ 442, AIR 1957 Cal 222, p 224 .

54 *Sudarsan Behara v Emperor* 27 Cr LJ 1263, AIR 1927 Pat 87, p 88 .

55 *Emperor v Gobind Singh* 27 Cr LJ 1308, AIR 1926 Pat 535, p 536 ; *Mongal Singh v State* 1956 Cr LJ 646, AIR 1956 Pat 154, p 158 ; *R v Ritson* (1869) LR 1 CCR 200, 39 LJMC 10, 11 Cox CC 352, **referring to** the definition of forgery in *Bacon's Abridgement* and **relying on***Salway v Wale* (1619-1621) Moo KB 655, 72 ER 819.

56 *State of Uttar Pradesh v Joti Prasad* 1962 Cr LJ 722, AIR 1962 All 582 .

57 *Kalidin v Emperor* 30 Cr LJ 573, AIR 1919 All 387 (2) .

58 *Emperor v Durga Prasad* 17 Cr LJ 540, AIR 1916 Oudh 112, p 115 .

59 Re *Seshacharlu* 1 Weir 540.

60 *Hanuman Sahay v Emperor* AIR 1936 Pat 531, p 532, 38 Cr LJ 72 .

61 *Prempal Singh v Phool Singh* 1980 Cr LJ (NOC) 160 (Raj) .

62 Per Mookerjee J, in *Emperor v Surendra Nath Ghosh* 11 Cr LJ 505, **relying on***Vazeer Ali Khan v Surya Narayana* (1891) 1 MLJ 388, and *Venkatesh Prabhu v Baba Suhraya* (1890) ILR 15 Bom 447 ; *Priyanath Gupta v Laljhi Chowkidar* 24 Cr LJ 396, AIR 1923 Cal 596 ; *Baij Nath Bhagat v Emperor* AIR 1940 Pat 486, 41 Cr LJ 427 (alteration held to be forgery and use of the certified copy fraudulent).

63 *Emperor v Surendra Nath Ghosh* 11 Cr LJ 505 ; *Haider Ali Pradhania v Emperor* 17 CWN 354, 14 Cr LJ 129, p 131 .

64 *Ram Narain v Empress* 1881 PR (Cr) No 14, p 21, 22 .

65 *Empress v Mir Ekrar Ali* (1880) ILR 9 Cal 481, p 483 ; *Emperor v Bisheshar Dayal* 2 Cr LJ 234 ; *Hiralal Hariprasad v State* (1955) 8 Sau LR 226, p 227, 1955 NUC (Au) 5991 .

66 *Empress of India v Fateh* (1882) ILR 5 All 217, p 220, (1882) 2 AWN 227 .

67 *Gobinda Mal v Emperor* 6 PR 1895 (Cr) ; *Emperor Shama Charan* 13 Cr LJ 588 (Cal).

68 *Parminder Kaur v State of UP* 2010 Cr LJ 895 (SC), 2009 AIR SCW 7371, 2009 (13) Scale 424 .

69 *Ramaswami Iyer v Emperor* 19 Cr LJ 177, AIR 1918 Mad 150 .

70 *Emperor v Jawahir Thakur* (1916) ILR 38 All 430 ; *Charu Malik v Emperor* 29 Cr LJ 851, AIR 1928 Lah 681 ; *Emperor v Krishtappa Khandappa* AIR 1925 Bom 327, 26 Cr LJ 1014 ; *Province of Bihar v Surendra Prasad Ojha* AIR 1951 Pat 86, p 89, 52 Cr LJ 771 ; *LK Siddaooa v Lalithamma* AIR 1954 Mys 119, 1954 Cr LJ 1235 . **Contrary view** in *Empress v Riasat Ali* (1881) ILR 7 Cal 352, is only a weak authority.

71 *Empress v Nujeebutoolah* (1868) 9 WR (Cr) 20 ; *Empress v Dwarkanath Ghose* (1873) 20 WR (Cr) 49 .

72 *Bharat Hiralal Sheth v Jaysin Amarsingh Sampat* 1997 Cr LJ 2509 (Bom) .

73 *Russell on Crime,* 1964, twelfth edn, vol 2, p 1224, **citing Mead v Young**(1790) 4 TR 28.

74 *Halsbury's Laws of England*, third edn, vol 10, para 1612, pp 837-838.

75 *Bharat Hiralal Sheth v Jaysin Amarsingh Sampat* 1997 Cr LJ 2509 (Bom) .

76 *Solomen Smith v State of Rajasthan* 2013 (123) AIC 785 (Raj) .

77 Re *Sheefait Ally*(1868) 10 WR (Cr) 61.

78 *PV Govindan Nair v State of Kerala* 1969 Ker LT 1 (SC), **affirming**1968 Ker LT 984 and **distinguishing** Re *Venkatasuryanarasimha Rao*AIR 1955 AP 82 .

79 *Guru Bipin Singh v Chngtham Manihar Singh and Anor* 1997 Cr LJ 724 (SC) .

80 *Empress v Peru Raju* (1897) ILR 13 Mad 27, 1 Weir 545 .

81 *Joy Kurn Singh v Man Putuck* (1874) 21 WR (Cr) 41, p 43 .

82 *Venkaraju Venkatasami v Emperor* 1910 MWN 232, 11 Cr LJ 440 .

83 Re *Vedivelu Arsuthiyar* 48 Cr LJ 405, AIR 1944 Mad 77, p 78 ; *PV Govindan Nair v State of Kerala* 1969 Ker LT 1 (SC), **affirming**1968 Ker LT 984 and **distinguishing** Re *Venkatasuryanarasimha Rao*AIR 1955 AP 82 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 465.

Punishment for forgery.--

Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

The aggravate forms of forgery are made punishable under ss 466 to 469, IPC . This section provides a mild punishment for the offence of forgery not falling in the said ss 466 to 469, IPC .

2. Sections 463 , 464, 465, 471, IPC and Section 146(p) of the Maharashtra Co-operative Societies Act (23 of 1961)--Distinction

It is clear from a perusal of s 146(p) of the Maharashtra Co-operative Societies Act 1960 and ss 463 and 464, IPC, that they are two distinct offences which are capable of being committed with different intentions by different sets of persons and it could not be contemplated by the legislature of the state of Maharashtra who intended to repeat pro tonto the provisions of ss 465, IPC, by enactment of s 146 of the Maharashtra Co-operative Societies Act. Hence, the sanction of the registrar under s 148(3) of the Maharashtra Co-operative Societies Act is not necessary before the magistrate who can take cognizance on a private complaint of offences under ss 465 3840 and 471, IPC, alleged to have been

committed by a party to any proceeding before the registrar's nominee.[84]

3. Distinction between Sections 463, 465 And 471 and Sections 193 and 196, IPC

Commentary under the same heading in s 463, *ante* and s 196, vol 2, may be referred to.

4. Procedure

The offence under this section is non- cognizable, bailable, non-compoundable and triable by a magistrate of the first class, and may also be tried summarily.

5. Complaint--When to be filed by the Court

Section 195(1)(b)(ii) of the Code of Criminal Procedure 1973, provides that no court shall take cognizance of any offence described in s 463, IPC, when such offence is alleged to have been committed in respect of a document, produced, or given in evidence, in a proceeding in any court except on the complaint, in writing, of that court,[85] or of some other court to which that court is subordinate.

If, however, the prosecution is confined to an offence under s 463, IPC, committed prior to production of the disputed document in court, no complaint of the court is required.[86]

Complaint to institute criminal proceedings should not be refused on the ground that the document, denounced as forgery, was only tendered in evidence, and not judicially considered by the court. However, it is necessary, before complaint can be filed, to see whether there are *prima facie* good grounds for holding criminal proceedings. If there are no such grounds, no complaint by the court should be filed.[87]

A sub-registrar under the Registration Act is not, for general purposes, a court. Therefore, the complaint of the sub-registrar is not necessary for forgery in respect of a forged document presented for registration in his office.[88] However, an income-tax collector is a revenue court and his complaint will be required for offences specified in s 195(1)(b)(ii), CrPC 1973.[89]3841

6. Forgery before Production of Document in Court--Complaint should not be made by the Court

Commentary under the same heading in s 468, *post*, may be referred to.

7. Civil Profile and Criminal Outfit

The law is now well settled. The civil profile which is discernible from the factual matrix of the case should not outweigh the criminal outfit. Merely because a given set of facts would give rise to a civil profile, the criminal case cannot be quashed at the threshold on that premise, as each is an independent remedy, but not mutually exclusive.[90] Therefore, when the acts alleged against the accused persons come within the expression 'mismanagement' for which there is an effective remedy under s 11 of the Andhra Pradesh (Telangana Area) Public Societies Registration Act 1350F, it will not denude of its criminal outfit for the alleged misappropriation of funds of the club. Therefore, criminal proceedings initiated under ss 405, 465 and 420, IPC, against the accused persons cannot be quashed on the ground of availability of an alternate civil remedy.[91]

8. Quashing of Complaint

The allegations in the complaint were that the accused had represented some writing to be that of the

Maharaja, which was not so in fact. For making a false document, the person concerned has to make, sign, seal or execute the same. However, it was not alleged in the complaint that the accused has himself written the manuscript and represented it to be that of the Maharaja. The allegations made in the complaint, even if true, did not make out the case of forgery punishable under s 465, IPC . The complaint was, therefore, quashed.[92] But where the complainant entrusted the accused to look after the title suit instituted by her in the court, and the accused forged the signatures of the complainant with a view to falsely induce the court to believe that the said signatures were genuine signatures of the complainant and, obtained the order by adopting such deceitful means causing loss to the party concerned against whom the order of injunction was obtained, therefore, *prima facie* the offence of forgery was made out against the accused and the criminal complaint against the accused could not be quashed.[93]

9. Joint Trial

The joint trial of the user of a forged receipt, the scribe, and the attesting witnesses is illegal, and not a mere irregularity curable under s 465(1), CrPC 1973.[94] Where, however, the offences of forgery, abetment of cheating are committed by the accused in pursuance of a conspiracy and the charges are based on a series of acts, committed by them with one continuous purpose and design, and the acts are so connected together in point of time that they really form one transaction, all the accused can be jointly tried.[95]3842

10. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC 1973, may be referred to.

11. Discharge

If the accused and the party, whose signature is alleged to have been forged, contend that there is no forgery, the accused is entitled to be discharged.[96] When the material on record revealed that the signatures were forged but neither handwriting expert nor the witnesses stated that they were forged by the accused, the order framing the charge was quashed.[97]

12. Proof

As there are three classes of a false document, the points requiring proof of an offence under this section, may be divided into the following three classes, set out below alternatively under A, B and C.

A

The prosecution must prove that:

(a) the accused made, signed, sealed, or executed the document, or electronic record or any part of the document, or electronic record or made a mark denoting execution thereof;
(b) he did as above with the intention of causing it to be believed that such document, or electronic record or any part of such document, or electronic record was made, signed, sealed or executed:
    (i) by, or by the authority of, a person by whom, or by whose authority, he knew that, it was not made, signed, sealed or executed, or
    (ii) at a time, at which, he knew that, it was not made, signed, sealed or executed;

(c) such other person did not make, sign, seal or execute the disputed document, or

electronic record or did not authorise such making, *etc*, or such making, *etc*, was not at the particular time;

(d) the accused knew that the document or electronic record was not made, signed, *etc*, by, or by the authority of, the other person or that it was not so done at the particular time; and

(e) the accused did as in (a) and (b) dishonestly or fraudulently and with any of the intents specified in s 463, IPC .

B

The prosecution must prove that:

(a) the document or electronic record was made or executed by the accused himself or by another person;3843

(b) subsequent to the making or execution of the document or electronic record, the accused altered it by cancellation or otherwise;

(c) such alteration was in a material part of the document or electronic record;

(d) the accused had not lawful authority to make the alteration; and

(e) the accused did as in (a) and (b) dishonestly or fraudulently and with any of the intents specified in s 463, IPC .

C

The prosecution must prove that:

(a) the accused caused a person to sign, seal, execute or alter a document or electronic record;

(b) such person, when doing as in (a), did not know the contents of the document or electronic record or the nature of the alteration;

(c) such ignorance was due to unsoundness of mind or intoxication or the deception practised upon him;

(d) the accused knew of such ignorance and the reasons therefore; and

(e) the accused, when causing the person to sign, seal, *etc*, acted dishonestly or fraudulently with any of the intents specified in s 463, IPC .

In order that a charge of forgery under s 465, IPC can be sustained, it has to be proved in the first instance that there was forgery within the meaning of s 463 which again implies that there was the making of a false document in terms of s 464 .[1] Where a document is relied on by the accused, it is his duty to prove it; but when the prosecution alleges it to be forged, it is the duty of the prosecution to prove the forgery beyond all reasonable doubt.[2] In a prosecution for forgery, it is not enough to show that the genuineness of the document is improbable; it should be proved for a certainty that it is forged.[3] Likewise, it is not enough to prove that the accused wrote the body of the false document; it must be further proved that the accused fraudulently obtained the signatures of the persons, who signed the document, or made those signatures himself.[4] The accused prepared letters on the letter head of the minister whereupon invitations were written to invite actors for cultural show, but the letter did not bear signatures of minister, the conviction of the accused under ss 465 and 471, IPC, was not found proper.[5] The allegations were that the accused entered into a criminal conspiracy with the co-accused, the object of which was to cheat the government by sale of tools to ITI at inflated rates. There was no evidence showing that the co-accused had purchased the tools from ITI at inflated rates from the firm of the accused. The stock register containing entries on the basis of original bills cannot

be relied upon when the original bills are not produced on these facts, the conviction of the accused was thus set aside.[6]3844

13. Handwriting Expert's Evidence--Value

To base a conviction upon the evidence of an expert in handwriting is, as a general rule, very unsafe.[7] Mere similarity of handwriting without any other evidence of complicity in the conspiracy, in pursuance of which the forgery is committed, is insufficient to justify a conviction for forgery.[8] A court ought not to accept blindly the evidence of a handwriting expert and should usually require substantive evidence before making it the basis of a conviction.[9] It is no doubt true that there is nothing, in law to prevent a court from recording a conviction on expert evidence alone. However, as a rule of caution, it is imprudent to convict a person, charged with forgery, solely on the basis of experts testimony. If, in a case of forgery, the evidence of the handwriting expert is materially corroborated and confirmed by other evidence, there is nothing, in law, to debar the court from recording a conviction on the basis of such expert testimony.[10] In *Lalta Prasad v Emperor* ,[11] the court refused to convict the accused on the uncorroborated evidence of the handwriting expert.

14. Accused taking Shelter of 'Market Practice'

The accused persons may try to take shelter behind what they may describe as 'market practices'. Such practices even if existing, cannot take the place of statutory and regulatory functions. There is no public interest involved in such practices and they cannot be a substitute for compliance with the regulatory or statutory prescriptions. An attempt may be made to show that there was subsequent disapproval of the market practices: at the point of time when the transactions took place there was no embargo. It may be their stand that the practices were a part of accepted norms. But there is nothing plausible in these explanations. A practice even if was prevailing, if wrong, is not to be approved. The subsequent clarifications do not in any way put seal to the approval of the practices adopted in the past, on the other hand, it condemns it.[12]

15. Conviction

Where the accused was charged on three counts under ss 419, 420 and 465, IPC, and the magistrate refused to believe the only evidence of fraud and consequent dishonestly, implied in the charges under ss 419 and 420, IPC, it was held that there could be no fraudulent intent, which is an essential ingredient of s 465, and a conviction under s 465 on the same evidence could not survive.[13]

Proof of fraud by positive and express evidence cannot be expected in the large majority of cases and in such cases circumstantial evidence is the only means available. However, such evidence must not fall short of proof and no conviction can3845 rest on mere suspicion and conjecture, however strong those may be.[14] When the prosecution has not satisfactorily proved its case against the accused, he must be acquitted of the offences under ss 466 and 471, IPC .[15] If a person writes the body to a forged bail bond and is in possession of the genuine bail bond, there can be very little doubt that he forged it.[16]

16. Probation

The accused was convicted under s 465, IPC, for making forged endorsements regarding identification and attestation of sureties and signatures of advocates. Keeping in view the fact that the offence was a serious one, the benefit of s 360, CrPC, was not extended to the accused.[17]

17. Sentence

The offence of forgery, being serious and difficult to detect, calls for a deterrent punishment.[18] In *Velayuathan Nair v State* ,[19] the accused was convicted under ss 409, 463 and 477A, IPC, and sentenced to rigorous imprisonment for five years. Considering the circumstances that the amount

involved was only a sum of Rs 100, that the crime was committed more than six years ago, and that the accused had to bear the suspense of a protracted trial, the sentence was reduced to one year rigorous imprisonment. Where a tenant forged an application to the electric department in the name of his landlord in order to obtain connection in his premises, it was held that the consideration, that the tenant will be paying for the electricity consumed in the portion of the leased premises and no material injury would result to the landlord from the electric connection, may effect the sentence.[20] In *Jalaluddin v State* ,[21] the accused, a postmaster, received a certain money order at his post office but, instead of paying the amount due thereunder to the payee, committed criminal breach of trust of the same. In order to show that the amount was paid to the claimant, the accused forged certain entries in the relevant register. He was also alleged to have put his own thumb-impression on the money order form stating that it was that of the claimant. The accused was convicted under ss 409 and 465, IPC . For the offence under s 465, he was sentenced to one year rigorous imprisonment and a fine of Rs 100, and, in default of payment of fine to further rigorous imprisonment for 15 days. This sentence was held not be excessive. In *Ireagbam Nabakumar Singh v Government of Manipur* ,[22] the accused had been convicted under ss 420 and 465, IPC, in five cases in respect of offences, committed in relation to five different persons, and was sentenced consecutively in each of the cases. Considering the nature and the number of offences committed by the accused, the High Court refused to order the sentence to run concurrently.3846

Where the offence was committed 20 years ago and the accused was in jail for a few months, the sentence of rigorous imprisonment for one year was reduced to the period already undergone by the accused.[23]

18. Alteration of Conviction from Section 471 read with Section 467 to one under Section 471 read with Section 465

Commentary under the same heading in s 471, *post*, may be referred to.

84 *Ramrao v Narayan* AIR 1969 SC 724, 1969 Cr LJ 1069 (SC) .

85 *Kantilal Khimchand v State* (1963) 2 Cr LJ 558, (1963) 4 Guj LR 647 ; *Gobindram Sunderdas v Emperor* 43 Cr LJ 612, AIR 1942 Sind 62 (words 'produced' or 'given in evidence' are disjunctive); Re *Bhau Vyankatesh Chakorkar*AIR 1925 Bom 433, p 434-435, 27 Cr LJ 69 ; *Gulabchand Rupji v Emperor* AIR 1925 Bom 467, 27 Cr LJ 251 ; *Ramautar Mistri v Rajinder Singh* (1961) 2 Cr LJ 139, 1961 BLJR 369 (successor-in-office competent to make complaint in respect of forgery committed before his predecessor); *Haridas Saha v Dulal Chandra Shadhu Khan* AIR 1943 Cal 103, p 104, 44 Cr LJ 332 (in respect of a forged document in proceedings before an additional district judge, a district judge is not, ordinarily speaking, entitled to make a complaint).

86 *Emperor v Lalta Prasad* (1912) ILR 34 All 654, p 656 ; *State of Gujarat v Ali Bin Rajak* ILR 1967 Cuj 1091 (FB), (1968) 9 Guj LR 1; *State of Gujarat v Vora Saifuddin Akbarali* AIR 1969 Guj 195 ; *Sanjiv Ratnappa v Emperor* AIR 1932 Bom 545, p 546, 34 Cr LJ 357 .

87 *Guru Chanran Shaha v Girija Sundari Dassi* 7 CWN 112 ; *S Dutt v State of Uttar Pradesh* AIR 1966 SC 523, 1966 Cr LJ 459 .

88 *Empress v Tulja* (1887) ILR 12 Bom 36 .

89 Re *Punam Chand Maneklal*(1914) ILR 38 Bom 642, 16 Bom LR 446 (FB); Re *R Nataraja Iyer*(1913) ILR 36 Mad 72, 23 MLJ 393. See also commentary under the same heading in s 467, *post*.

90 *Trishuns Chemical Industry v Rajesh Agarwal* AIR 1999 SC 3499, 1999 Cr LJ 4325 (SC), (1999) 8 SCC 686, 1999 AIR SCW 3492 .

91 *E Arvind Rao v State of Andhra Pradesh* 2002 Cr LJ 4487 (AP) .

92 *Guru Bipin Singh v Chontham Mawher Singh and Anor* 1997 Cr LJ 724 (SC) .

93 *Ashok Kumar Yagnik v State of West Bengal* 2005 Cr LJ 3620 (Cal)

94 *Gunwant v Emperor* 18 Cr LJ 339 (Nag), **following***Subramania Iyer v Emperor* (1902) ILR 25 Mad 61 (PC), 11 MLJ 233.

95 *Emperor v Ramrao Mangesh Burde* 33 Cr LJ 666, AIR 1932 Bom 406, p 407 .

96 *State v S Santhanaraman* 1980 Cr LJ (NOC) 87 (Mad) .

97 *Sankarananda Naik v State of Orissa* 2002 Cr LJ (NOC) 114 (Ori), (2001) 1 Ori LR 107 .

1 *Adhi Mallick v State* AIR 1955 Cal 473, p 474, 56 Cr LJ 1246 ; *Luchmi Singh v Emperor* 19 Cr LJ 344, AIR 1917 Pat 111, p 116 .

2 *M Ata Mohammed Khan v Crown* AIR 1950 Lah 199, p 221 (FB) .

3 *Empress v Bayaji Natha* Ratanlal Unrep Cr C 917.

4 *Mohammad Kabir Uddin v Emperor* 20 Cr LJ 534 (Pat) .

5 *Tivrial Diwan v State of Maharashtra* 1997 Cr LJ 4070 (SC) .

6 *Sardari Lal v State of Punjab* 2003 Cr LJ 383 (P&H) .

7 *Srikant v Emperor* 2 Cr LJ 353 ; *Kali Charan Mukerji v Emperor* 9 Cr LJ 498 ; Re *Venkata Row*(1913) ILR 36 Mad 159, p 165.

8 *Mohammad Kabir Uddin v Emperor* 20 Cr LJ 534 (Pat) .

9 *Girdhari Led v Emperor* 26 Cr LJ 929, AIR 1925 Oudh 413, p 415 ; *Ishar Das v Emperor* 8 Cr LJ 75 ; *Hari Singh v Lachhmi Devi* 12 PLR 1921 ; *Prabh Dial v Emperor* 33 Cr LJ 593 (1), AIR 1932 Lah 490(1) .

10 *Manmohan Singh Johal v State* 1969 Cr LJ 932, AIR 1969 Punj 225 .

11 11 Cr LJ 114; *Jassu Ram v Emperor* 25 Cr LJ 375, AIR 1923 Lah 622, p 623 ; *Bazari Hajam v Emperor* AIR 1922 Pat 73, 23 Cr LJ 638 (cases of thumb-marks).

12 *Ram Narain Poply v Central Bureau of Investigation* 2003 Cr LJ 4801 (SC), AIR 2003 SC 2748

13 *Adhi Mullick v State* 1955 Cr LJ 1246, AIR 1955 Cal 473, p 474 .

14 *Gowardhan Lal v Emperor* 34 Cr LJ 714, AIR 1933 Lah 308, p 310 .

15 *State v Khatri Abdul Gaffar Abdulla* AIR 1950 Sau 9, p 10 ; *Jashanmal J Gulrajani v Emperor* 40 Cr LJ 818 (2), AIR 1939 Sind 222, p 225 .

16 *PS Narayana Ayyar v Emperor* 15 Cr LJ 417, AIR 1914 Mad 323 .

17 *Sharvan Kumar v State of Uttar Pradesh* AIR 1985 SC 1663, 1986 Cr LJ 15 (SC) .

18 *Emperor v Jorabhai Kishanbhai* 27 Cr LJ 1173, AIR 1926 Bom 555, p 557 (the sentence of one year rigorous imprisonment was enhanced only to two years as the accused was a sub-inspector of police with 25 years service and the conviction could deprive him of his pension).

19 *Velayuathan Nair v State* 1959 Ker LR 847, p 851, 852 .

20 *Chothmal Narayanji v Ram Chandra Govindram* 1954 Cr LJ 788, AIR 1954 MB 73, p 76 .

21 *Jalaluddin v State* 1968 All Cr R 375, 1968 AWR (HC) 590 .

22 *Ireagbam Nabakumar Singh v Government of Manipur* 1973 Cr LJ 311, p 313 .

23 *Arun Parshuram Sutar v State of Maharashtra* 1999 Cr LJ 438 (Bom) ; *Nauvan Kumar v State of Uttar Pradesh* AIR 1985 SC 1663, 1986 Cr LJ 15 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 466.

Forgery of record of Court or of public register, etc.--[24][

Whoever forges a document or an electronic record], purporting to be a record or proceeding of or in a court of justice, or a register of birth, baptism, marriage or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[25][*Explanation.*--For the purposes of this section, "register" includes any list, data or record of any entries maintained in the electronic form as defined in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000.]

Comments

1. Scope

This section deals with a graver form of forgery than that dealt with in the preceding s 465, IPC . The gravity is due to the importance of the document forged. The offence has, however, to be distinguished from that punishable under s 167, though the words 'purporting to be', in this section, are somewhat vague. The section is not, however, intended to apply to a public officer, or a person acting for a public officer, whose duty it is to make entry; it is intended to apply to cases where a certificate, or other document described in the section, is forged by some unauthorised person with a view to make it appear that it was duly issued by a public officer. The former is provided for by s 192 .[26] It has, however, been held, by the former Chief Court of Punjab in *Man Singh v Empress* ,[27] that whoever, whether a public servant or a private individual, tampers with a public register so as to commit forgery is punishable under this section. It is, of course, necessary that the element of fraud or dishonestly, as3847 explained in IPC, must be present in the mind of the offender to bring his act under this section and s 471 [28] to tamper with the record of a proceeding in a court of justice in order to obtain, from that court, a decision, which otherwise it would not make, is a public mischief, falling within the scope of this section.[29]

2. 'Document'

When the document which is alleged to have been forged is a letter addressed by the Assistant Executive Engineer, BDA, to the President, Nandini Layout BDA Site Allottees Association (Regd), Rajajinagar, Bangalore, the document squarely falls within the description of 'the document purporting to be made by a public servant in his official capacity' as enumerated under s 466 of IPC .[30] But a rough sketch of a pedigree of the accused's family which, in a tentative way, bore the forged signatures of two deputy collectors, serving as practice for a finished forgery, is not a document falling within the description in ss 466 or 467, IPC .[31]

3. Electronic Record

Section 29A, vol 1 may be referred to.

4. 'Court of Justice'

A plaint is a part and parcel of the record of a suit in a court of justice and once it is filed in court, it cannot be altered, or amended, without the special sanction of the court. Alterations and substitutions,

in such plaint, after it is filed, constitute an offence under this section.[32]

5. 'Register of marriage'

Forging a document purporting to be a 'register of marriage' falls under s 466 although the register is a private one, and is not kept by a public servant as such.[33]

6. 'To Constitute or Defend a Suit...to Confess Judgment'

The expression 'to institute or defend a suit, or to take proceedings therein, or to confess judgment' has to be associated with the word 'authority' preceding the expression. The expression cannot be associated with other documents indicated in the section.[34]

7. Procedure

The offence under this section is non-cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.3848

8. Limitation

The offence under s 466, IPC entails maximum punishment of seven years and no limitation is prescribed under s 468(1), CrPC for the offences punishable above three years. So the bar contained under s 468(1) of CrPC is not attracted.[35]

9. Complaint--When to be filed by the Court

Though s 466, IPC, is not mentioned in s 195, CrPC, there can be no dispute that the offence under s 466, IPC, is an aggravated form of forgery, described in s 463, and, therefore, if the rest of the conditions, specified in the said s 195, are satisfied, an offence under s 466, would fall within the ambit of the above s 195 and a prosecution would be barred at the instance of a private individual.[36]

10. Charge

The following form of the charge may be adopted:

> I (name and office of magistrate, etc) hereby charge you (name of the accused person) as follows:
>
> That you, on or about the...day of...., at..., forged the document, Ex..., which purported to be a record (or proceeding) of/in a court of justice (or a register of birth/baptism/marriage/burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a Suit, or a take any proceedings therein, or to confess judgment or a power of attorney), and that you thereby committed an offence, punishable under s 466 of the Indian Penal Code, and within the cognizance, of this court.

And I hereby direct that you be tried by this court on the said charge.

11. Proof

To establish an offence under this section, the prosecution has to prove that:

(a) the document or electronic record in question was a forgery;
(b) the accused forged the same; and
(c) the said document or electronic record was one of the kinds mentioned in this section.

Where, therefore, a document is prepared with the intention to deceive and by means of deceit, an advantage is obtained, then there is a fraud and judged form this standpoint the preparation of a forged bail order by the utilisation of which the person concerned obtained an advantage of being released deceiving the courts and the society at large cannot but be said to have made the document fraudulently thereby attracting s 466, IPC .[37]

12. Acquittal

The prosecution cannot be permitted to take an indefinite stand by saying that somebody else might have committed forgery, and the accused might have abetted3849 him.[38] If there is no evidence to the effect that the accused had himself forged document in question, no offence under this section can be said to have been committed by him.[39] Where the Chief Minister antedated his order by overwriting, but the concerned file did not leave the office of the Chief Minister, there was no evidence that anyone was unduly favoured or anyone seemed to gain undue advantage by use of such overwriting, the Chief Minister cannot be held guilty for offences under s 453 or s 466, IPC .[40]

13. Conviction

If a person commits two offences, he can be convicted of each of them, more especially when they are separate transactions and the commission of one does not necessarily involve the commission of the other. Similarly, a forger can be convicted both of forgery and of using, as genuine; the forged document.[41] However, the court should not convict the accused both under ss 466 and 467, IPC it may choose whichever of the two sections appears to it to be more suitable.[42]

14. Probation

The accused, a stenographer of the High Court prepared a forged bail order with the help of which the person concerned was released from jail and accused was convicted under ss 466 and 468, IPC . However, in view of the fact that the incident took place 27 years ago and accused had no bad antecedents and the trial court had extended to benefit of probation to the accused, though the High Court acquitted the accused, the apex court granted the benefit of probation to the accused.[43]

24 Substituted by the Information Technology Act, 2000 s 91 and First Sch. (wef 17-10-2000).

25 Inserted by the Information Technology Act 2000, s 91 and First Sch. (wef 17-10-2000).

26 Re *Juggan Lal*(1881) 7 Cal LR 356, p 361.

27 *ML Sivaramakrishna Ayyar v Seshappa Naidu* AIR 1929 Mad 172, p 175, 30 Cr LJ 396 .

28 *Relly v Emperor* (1901) ILR 28 Cal 434, p 440, 5 CWN 609 ; *Nga Pye v Emperor* 1 Cr LJ 1124 .

29 *Mahesh Chandra Prasad v Emperor* 45 Cr LJ 292, AIR 1943 Pat 393 .

30 *C Rama Gowda v Registrar (Vigilance), Karnataka High Court* 2006 Cr LJ 1839 (Kant)(DB).

31 *Empress v Abaji Ramachandra* (1891) ILR 16 Bom 165, p 172 . See also commentary under s 29, vol 1.

32 *Emperor v Shama Charan* 13 Cr LJ 588, p 590 (All) . See also commentary, under s 20, vol 1.

33 Re *Bacha Miah*(1892) 1 Weir 541; *Yashin Sheikh v Emperor* 2 Cr LJ 8, 9 CWN 69 .

34 *State v Parasram* (1965) 1 Cr LJ 213, AIR 1965 Raj 9 .

35 *C Rama Gowda v Registrar (Vigilance), Karnataka High Court* 2006 Cr LJ 1839 (Kant)(DB).

36 *Dina Nath v Hansraj* 1974 Cr LJ 198, p 200, 1973 J&K LR 367 .

37 *Ibid.*

38 *Gohind Prasad v State* 1971 All WR 345, p 350 .

39 *State of Uttar Pradesh v Ramdhani Pandey* (1980) 17 All Cr Cas 296, p 299, 1980 (UP) Cr LR 375 .

40 *Sheo Nandan Paswan v State of Bihar* AIR 1987 SC 877, 1987 Cr LJ 793 (SC) .

41 *Gajanan Sukhram v Emperor* 25 Cr LJ 473, AIR 1924 Nag 162 ; *Empress v Unarao Lal* (1900) ILR 23 All 84, p 85, 20 AWN 205 .

42 *Girdhari Lal v Emperor* AIR 1925 Oudh 413, p 416, 26 Cr LJ 929 .

43 *State of Uttar Pradesh v Ranjit Singh* 1999 Cr LJ 1830 (SC) .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 467.

Forgery of valuable security, will, etc.--

Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest, or dividends thereon, or to receive or deliver any money, moveable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with [44][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.3850

Comments

1. Scope and Applicability

This section deals with a class of documents, broadly nine in number, different from those specified in the preceding s 466, IPC . The law regards this class of documents as more important. This is reflected in the severe punishment provide for the offence in this section. The section applies if the document forged purports:

(a) to be:
  (i) a valuable security,[45] or

(ii) a Will, or
(iii) an authority to adopt a son; or

(b) to give authority, to any person:
(i) to make, or transfer, any valuable security, or
(ii) to receive the principal, interest or dividends on a valuable security, or
(iii) to receive, or deliver, any money, moveable property or valuable security; or

(c) to be:
(i) an acquittance, or receipt, for acknowledging the payment of money, or
(ii) an acquittance, or receipt, for the delivery of any movable property or valuable security.

This section, embracing a number of documents, provides punishment for forgery not only of a document purporting to be a valuable security, but also of any document which purports to give authority, to any person, 'to receive or deliver any money'.[46] A clerk, putting false entries in his savings bank passbook in order to make up the requisite balance for giving the same as security for his service, was held guilty of an offence under the section.[47]3851

Where the accused, the supervisor of a society, made a false debit entry to the effect, that a sweeper had been paid Rs 2, obtained the thumb impression of his nephew and certified that the thumb-impression was that of the sweeper, it has been held that accused was guilty under s 467, IPC .[48] The forgery of a document, even if the person, for whom it was forged, had no intention of using it, was held to be an offence under this section.[49] Where the accused, desiring to get the impersonator's affidavit to be attested by an oath commissioner, identified the impersonator as deponent, it was held that his conviction under s 467 read with s 114, IPC, was justified.[50] Similarly, where it is well established that the sale-deed in question is a forgery and the only person to be benefited by the forgery is the accused himself, it is impossible to hold that forgery was committed without his instigation.[51] However, the writer of the body of a forged receipt cannot be convicted of an offence under s 467, IPC in the absence of evidence that he was present at the execution of the receipt or that he helped any person to use it.[52] In the absence of evidence to show that the accused wrote the signature of the landlord on a disputed rent-receipt, his admission, that he wrote the body of the document, is not sufficient to support a charge under s 467 .[53]

Execution of such document (purporting to convey some property of which one is not the owner) is not execution of a false document as defined under s 464, IPC . If what is executed is not a false document, there is no forgery. If there is no forgery, then neither s 467 nor s 471, IPC is attracted.[54]

2. Blank Paper Signed by a Partner and used by Other Partner

The use of a blank paper, signed by a partner of a firm, by another partner, having *carte blanche* to use such blank paper as he chose, for the firm's business is legitimate; such user will not constitute offences under ss 467 and 471, IPC .[55]

3. Document

Section 29, and its commentary in vol 1, may be referred to.

4. Accused taking Shelter of 'Market Practice'

Commentary under the same heading in s 465, *ante*, may be referred to.3852

5. 'Forges A Document'

If a person attests a forged Will and writes an attestation clause to show that the attestation was at the instance of the alleged testator, such written attestation is not only a part of the document, purporting to record the attested Will, but is also, in itself, a document, having regard to its definition in s 29, IPC .[56]

6. 'Purports to be a Valuable Security'

The words, in this section, are 'which purports to be', and not 'which is', a valuable security.[57] An unregistered document may not be a valuable security until it is registered; it still purports to be a valuable security.[58] Deed of agreement for purchase of shares is not a valuable security.[59] The certificates, which the accused has been found to have forged, to get admission in the college of the university could not be described as, 'valuable security'.[60] Even though a document (receipt or pronote) does not contain the signature of the executant across the adhesive stamps, not the adhesive stamps otherwise cancelled, the document, as it stands, purports to be a valuable security within the scope of this section.[61] The document under this section must, therefore, purports to be a valuable security; its validity or invalidity, in law is not relevant.[62] To constitute an offence under ss 466 / 477, IPC, the nature of the user is immaterial.[63] A lottery ticket, the product of which would enable the holder thereof to receive amount of the prize,[64] purports to be a valuable security even though it is product out of time, and payment thereon may be refused. Forgery of such a ticket (by altering the numerals on it) falls under this section.[65] A *kabuliyat*, even if the period, for which it extend, has passed away, may be a valuable security.[66] A *hundi* is a valuable security and the offence of forging is falls under s 467, IPC .[67] A document, which purports to be one whereby tenants acknowledge themselves liable to pay enhanced rent, is a valuable security.[68] A deed of divorce is valuable security, presenting such a document for registration and obtaining registration would be 'using' within the meaning of s 471, IPC .[69] A discharge certificate, purporting to have been signed by a fictitious nominee in an insurance3853 policy, is, on the face of it, a valuable security or 'document purporting to be an acquittance or receipt, acknowledging the payment of money' within the meaning of s 467 .[70] However, the deed of agreement for purchase of shares of a company is not valuable security. For further commentary, s 30, vol 1, may be referred to.

7. Copy of Valuable Security

It is the original document which is a valuable security, and not a copy of it, the accused cannot be convicted under s 467 for forging a copy of a valuable security.[71] The copy of a valuable security is not itself a valuable security.[72]

8. 'Will'

Commentary under s 31, vol 1, may be referred to.

9. Procedure

The offence under this section is cognizable, when the valuable security is a promissory note of the Central Government, and non-cognizable in any other case, non-bailable, non-compoundable, and triable by a magistrate of the first class.

10. Sanction for Prosecution of Government Servant

Commentary under the same heading in s 420, *ante*, may be referred to.

11. Anticipatory Bail

Commentary under the same heading in s 471, *post*, may be referred to.

12. Complaint--When to be filed by the Court

Section 463, IPC defines 'forgery', while ss 464, 466 and 469, IPC are penal provisions under different set of facts. All complaints in respect of 'forgery', as defined in s 463, IPC, if detected in respect of a document, which has already been filed in any proceeding in any court, can be taken cognizance of only in accordance with s 195(1)(b)(ii) of CrPC .[73] The expression 'forgery' is used as a general term in the said s 463 and this section (*ie*, s 463, IPC) is referred to in a comprehensive sense in s 195(1)(b)(ii), CrPC, so as to include all the species of forgery and this includes a case falling under s 467, IPC .[74] A court cannot, therefore, take cognizance of an offence under s 467, IPC, against an accused in violation of the said provisions of s 195(1)(b)(ii) .[75]3854

13. Charge

The following form of the charge may be adopted:

> I (name and office of magistrate, etc) do hereby charge you (name of accused person) as follows:
>
> That, on or about the...day of..., at..., you forged a document Ex..., purporting to be a valuable security (or a will made by... (or an authority, given by... to..., to adopt a son; or an authority, given by... to..., to make, or transfer, a valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, moveable property, or valuable security (or a document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security) to wit...), and that you thereby committed an offence, punishable under s 467 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

A charge under s 467 is vitiated if the intention is nowhere set out.[76] The mere fraudulent preparation of a deed of sale, with intent to cause injury to certain persons, does not amount to forgery of a valuable security, unless that document be a false document.[77]

There must be a separate charge for every alleged item of forgery; this means that there must be independent evidence of user of each document.[78] If an accused forges two withdrawal cheques on two different dates, there should be two distinct charges or one charge with two heads.[79] An offence under s 467, read with s 109, namely, abetment of forgery, is distinct from the user of the document which is an offence under s 471, IPC . The former offence is complete when the document is written and signed. Where the user of the document is a subsequent act, it is a distinct and separate offence for which an accused is entitled to be separately charged.[80]

14. Proof

The prosecution has to prove that:

(a) the accused committed forgery (*vide* s 465, IPC); and
(b) the document falls within one of the kinds specified in this section.

To justify a conviction under s 467, IPC, the accused must be shown to have made a false document. It is an essential ingredient in the making of a false document that it should be made dishonestly or fraudulently and with one of the intents set out in s 463, IPC . The prosecution must give some evidence from which the dishonestly, or fraudulency, of the transaction and some, or one, of the intents set out in s 463, IPC can be legitimately inferred.[81] The accused was an officiating manager in a nationalised bank. He was proved to have forged signatures on two FDRS, and an another FDR he obtained signatures of the victim by misrepresentation.3855

The plea that the accused was a good person and increased business of the bank *etc* were found irrelevant to discredit documentary evidence proved on record. The conviction of the accused was found proper.[82] If what is executed is not a false document, there is no forgery. If there is no forgery, then neither s 467 nor s 471, IPC is attracted.[83]

The accused an accounts clerk in the bank withdrew money from the complainant-account holder's account by using a withdrawal form and misappropriated the form. The forged signature on the withdrawal form was not proved to be made by the accused, but the signatures on the reverse of the withdrawal form acknowledging the receipt of money, however, was proved to be made by the accused. The accused was held liable to be convicted under s 467 read with s 109 and s 471, IPC .[84] The accused, a bank employee, took a blank bank draft. The second accused forged the signature of the agent on it. The third accused opened the account in the name of a fictitious person, and encashed the forged bank draft. All three accused were found guilty under ss 467, 468, 420, 120B, IPC .[85] In a case of encashment of forged bank draft, the co-conspirator-accused admitted to have a forged signature on a blank bank draft, his plea that he only tried to oblige the other accused and did not know anything more about the offence was not found acceptable.[86]

15. Benefit to Accused, Loss to Any One

Section 467, IPC does not require the prosecution to prove that the accused, who commits forgery, has benefited thereby or any loss has occasioned to anyone thereby.[87]

16. Proof--Importance of Handwriting Expert's Report

Where, besides the testimony of the handwriting expert, there are intrinsic good reasons in the document itself which prove the document conclusively to be a forged document and there remains no doubt that the document was scribed by the accused for the dishonest motive of defeating a certain suit, the accused can be convicted of an offence under s 467, IPC .[88] To establish a case of forgery it is incumbent on the prosecution to obtain opinion, regarding the document, of the handwriting expert.[89]

However, when the signature of the complainant is proved to be forged, merely because the handwriting expert could not positively say that which of the accused persons committed the forgery, the accused persons are not entitled to be acquitted.[90] The conviction cannot be based, merely on the basis of the handwriting expert's opinion.[91] However, when the forensic report as to the writing of the accused,3856 matched with that of the disputed writing on the forged document, the charges under ss 409 and 467, IPC cannot be quashed.[1]

17. Proof--Forging Valuable Security

Section 467, IPC relates to the offence of forgery of a document which purports to be a valuable security. If the body of a blank paper ticket, giving details of the journey and the cost of the ticket is filled in without the signature of the station master, or a person authorised by him, appended thereon, such a document cannot be deemed to be a valuable security. Thus, if in such a case, the prosecution fails to lead evidence that the signature at the place of the station master was in the handwriting of the accused, or, in other words, it was forged by the accused, the accused cannot be held guilty under s 467, IPC, because in the absence of any such proof, it cannot be said that the accused was guilty of

forging a valuable security.[2] A deed of agreement for purchase of shares is not a valuable security.[3] The certificates which the accused has found to have forged, to get admission in a college of the university could not be described as, 'valuable security'.[4]

18. Presence of Accused

The writer of a forged receipt cannot be convicted of an offence under s 467, IPC (simpliciter) in the absence of evidence that he was present at the execution of the receipt or that he helped any person to use it.[5] Such evidence has to be a strong evidence because the oral evidence, which runs counter to an admission, contained in writing, signed by a party, in the very nature of things, is a very weak piece of evidence and cannot be accepted without a grain of salt.[6]

19. Proof--Accused Entitled to Plead want of Dishonest or Criminal Intention

There is no estoppel which bars an accused from pleading that he had no dishonest or criminal intention or in other words that he was only foolish, and not criminal.[7]

20. Acquittal

Considering the fact that nearly 18 years had elapsed and mental agony was suffered by the accused, the acquittal of the accused by the Trial Court need not be disturbed.[8] A person cannot be convicted under s 467, IPC, unless his act is shown to have been done dishonestly or fraudulently as required by s 464 .[9] Where the charge that the accused forged a *nikah* form did not mention the circumstance in which it was forged and thus was vague, even when the oral evidence was adduced at the trial no3857 evidence was produced to prove that charge, there was no legal evidence on the basis of which the accused would be convicted, for these reasons the conviction of the accused under s 467, IPC, was set aside.[10]

21. Conviction

None can be convicted under s 467, IPC, unless it is found that he participated, in any manner, in the act of forging a disputed document.[11] If the accused is not proved to have forged the document, under consideration, within the meaning of s 463 read with s 464, IPC, he cannot be convicted under s 467, IPC . In *Swaminath v State* ,[12] there was no evidence worth the name that the appellants had actually thumb-marked the sale-deed in place of the complainants and the prosecution had not proved any sign or seal of the appellants on the sale-deed in question. In these circumstances, it was held that the appellants had not forged the sale-deed and, therefore, none of them could be convicted under s 467, IPC .

If the charges against a person is that he abetted the offence of forgery by another and abetment is proved against that person, he must be convicted of the charge under ss 467 and 109, IPC, even though the prosecution is not successful in establishing the particular means, or instrument, selected for the abetment of the offence of forgery.[13] A person, who has not made, signed, or executed a false document but has been instrumental in getting the false document dishonestly or fraudulently made, cannot be convicted under s 467 . He is guilty of abetment and his conviction under s 467 may be altered to one under s 467 read with s 109, IPC .[14] However, if an accused is not found guilty on the charge under ss 467 / 109, IPC, he cannot be convicted of the charge under ss 467 / 471, IPC, because the offence of abetment of forgery is plainly quite different form the offence of using a forged document as genuine.[15] Where, however, charges are framed against the accused under ss 120B / 467, IPC, for the offence of conspiracy to forge a valuable security as well as for abetment under ss 467 / 109, and after the recording of evidence, the charge under ss 120B / 467 is cancelled, the accused can still be convicted, under s 109, IPC, for abetment by conspiracy.[16]

There was evidence that the appellant Junior Engineer entered into criminal conspiracy with the co-accused Assistant Engineer for preparation of false muster roll, and as such false muster rolls were

prepared showing names of casual labourers who had not even worked. Accused appellant verified, consigned muster-rolls, gave false certificates. He was convicted under ss 120B, 467, 468, 471 and 420, IPC held proper.[17]

22. Relative Scope of Conviction under Section 467 and Section 471

Commentary under the same heading in s 471, *post*, may be referred to.3858

23. Relative Scope of Conviction under Section 468 and Section 467

Conviction under s 468, IPC, cannot be converted into a conviction under s 467, IPC, the reason being that the term of imprisonment, under s 467, being larger, s 467, cannot be said to be a minor offence of s 468, IPC .[18]

24. Relative Scope of Conviction under Section 167 and Section 467 / 471

Commentary under the same heading in s 471, *post*, may be referred to.

25. Separate Conviction for Separate Offences

An accused can be convicted, at one and the same time, of forging a document under s 467 and of using the same as genuine under s 471 .[19] The offences are separate offences and separate sentences may be passed on an accused.[20] However, a person cannot be convicted both under the provisions of s 167 and ss 467 / 471, IPC, as the offence under s 167 is included in the latter offence.[21]

26. Sentence (Deterrent)

Section 467 requires that some imprisonment should be awarded if a person is convicted under the section. A sentence of fine alone is not in accordance with law.[22] Where an accused, a reader holding MSC and Phd degrees was convicted for offences of attempting to issue counterfeit university degrees, it was held that the award of sentence by the sessions court, till rising of the court was too lenient, the award of sentence by the High Court for 3 years was found just and reasonable.[23] In another case, where the accused was found guilty of forging a money-order and collecting file amount, it was held that though the offence was committed out of sheer economic compulsion, the gravity of the offence fully justified 6 months imprisonment.[24] In *Ram Narain v State of Punjab* ,[25] the accused was convicted for the charge under s 467 read with s 471, IPC and sentenced to 4½ years rigorous imprisonment.

A sentence of five years rigorous imprisonment under s 467 is not too severe for an offence of deliberate forgery of will.[26]

27. Sentence (Lenient)

Where a postman was convicted under ss 409 and 467, IPC, and the sum embezzled was only a petty sum of Rs 10, the circumstances, that he had lost 10 years of3859 service, pension and gratuity, were taken into consideration and the sentence of six months rigorous imprisonment on each count, which was to run consecutively, was altered to one which was to run concurrently.[27] In *Mangleshwari Prasad v State of Bihar* ,[28] the sentence of seven years rigorous imprisonment awarded to the accused under s 409, IPC, and four years rigorous imprisonment under s 467, IPC, were considered excessive and, having regard to the particular circumstances of the case, it was deemed just to reduce the sentences to those of three years rigorous imprisonment each with respect to those offences. In *Pirabhu Dial v Emperor* ,[29] maintaining the conviction of an accused under s 467, the Punjab Chief Court, having regard to the facts that the accused was a man who had previously

enjoyed a good reputation, reduced the sentence from two years rigorous imprisonment (including one month's solitary confinement) to one year rigorous imprisonment (with one month's solitary confinement). Where the accused, who was convicted under s 467 and sentenced to one year rigorous imprisonment, was only a tool in the hands of the principal offender, who was still absconding, and the accused had been in jail for seven months from the date of his conviction and had been in remand for another eight or nine months prior to conviction, it was considered just by the High Court to reduce the sentence to the period already undergone.[30] The accused Manager and Assistant Manager of a Co-operative Society had misappropriated amount by forging documents. The High Court had sentenced the accused to one year SI and a fine of Rs 10,000/-. As per direction of the court the appellants deposited the entire embezzled amount, were now aged 74 years also not keeping good health, the sentences imposed were reduced to the period already undergone.[31]

The accused, an officiating manager in a nationalised bank with a wife and two children, committed the offence 10 years ago. He was dismissed from service. He also deposited the entire amount involved in the case. The sentence was therefore reduced from 2 years rigorous imprisonment to one year rigorous imprisonment.[32] Where the offence was committed 20 years ago, the sentence of 2 years rigorous imprisonment awarded by the trial court was reduced to the period already undergone by the accused.[33] The accused was 50 years old and had also lost his employment so the sentence of two years rigorous imprisonment was reduced to six months rigorous imprisonment.[34]

28. No Separate Sentence for Forged Alternative Drafts

Forged documents, which are alternative drafts of one document, do not call for separate punishment.[35]3860

29. Alteration of Conviction from Section 471 read with Section 467 to One under Section 471 read with Section 465

Where the certificates which the accused was found to have forged, to get admission into college could not be described as a valuable security, the conviction of the accused under s 471 read with s 467 was altered to one under s 471 read with s 465, IPC .[36]

44 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

45 *Chanthi v State* 1978 AWC 187 (accused, by personating as complainant, put thumb-mark on a sale-deed which purported to belong to the complainant).

46 *Sachchidanand Prasad v Emperor* 34 Cr LJ 892, AIR 1933 Pat 488, p 492 .

47 Re *HB Shamasundariah*1968 Cr LJ 1149, (1968) 1 Mys LJ 294; *GS Sivanandan v State* 1955 Cr LJ 1539, AIR 1955 TC 27 .

48 *Keshavrao Bhllaji Patil v Emperor* 36 Cr LJ 572, AIR 1935 Bom 30 ; Re *Mahalingayya Muddayya Pujari*AIR 1959 Mys 185 ; *Chandulal v Emperor* AIR 1940 All 551, 42 Cr LJ 247 ; *Nga Ba Sein v Emperor* AIR 1924 Rang 331, 25 Cr LJ 1378 .

49 *Surat Bahadur v Emperor* 25 Cr LJ 1162, AIR 1925 Oudh 158, p 162 ; *Haradhan Maiti v Empress* (1887) ILR 14 Cal 513 (FB).

50 *Calcutta Singh v State* 1977 Punj LR 592, p 596, 597, 1977 Cr LT 310 ; *Molar v State of Haryana* (1973) 2 SCC 430 .

51 *Udayanath Sahu v State of Orissa* 1976 Cut LT 288, 1976 Cut LR (Cr) 198 ; *Swaminath v State* 1980 All Cr Cas 50, p 52-53 ; *Jogidas Basil v Emperor* 23 Cr LJ 264, AIR 1922 Bom 82 ; *Gangs Dibya v Emperor* 44 Cr LJ 652, AIR 1943 Pat 227 ; *Onkar Shamu Marathe v Emperor* AIR 1945 Nag 200, 1945 NLJ 231 ; *GS Ramasami Iyer v Emperor* AIR 1918 Mad 150, p 155, 19 Cr LJ 177 ; *Abdul Rashid Khan v Emperor* AIR 1914 All 337, 15 Cr LJ 221 .

52 *Imdad Mia v Emperor* 25 Cr LJ 1253, AIR 1925 Cal 192 .

53 *Trilochan Misra v Munsif, Nilphamari* AIR 1949 Dacca 9, 50 Cr LJ 776 .

54 *Md Ibrahim v State of Bihar* 2010 Cr LJ 2223, p 2228 (SC), 2010 AIR SCW 405, 2009 (12) Scale 250, 2009 (8) SCC 751 .

55 *Gurulingiah v Emperor* 1932 MWN 117 .

56 *Chatru Malik v Emperor* 29 Cr LJ 851, AIR 1928 Lah 681, p 696 .

57 *Kashi Nath Naek v Empress* (1897) ILR 25 Cal 207, p 210, 1 CWN 681 .

58 *Ibid*; *Empress v Ramasami* (1888) ILR 12 Mad 148 .

59 *AK Khosla v TS Venkatesan* 1992 Cr LJ 1448 (Cal) .

60 *Shaikh Noor Mohammad Shaikh Fazal v State of Maharashtra* AIR 1981 SC 297, 1980 Cr LJ 1345 .

61 *Jawahir Thakur v Emperor* (1916) ILR 38 All 430 ; High Court proceedings, 5 August 1873: (1873) 7 MHCR App xxvi (document unstamped and therefore not admissible in evidence, nevertheless, a valuable security); *Empress v Ramasami* (1888) ILR 12 Mad 148 .

62 *GS Ramasami Iyer v Emperor* 10 Cr LJ 177, AIR 1918 Mad 150, p 155, per Philips); *Ratan Chand Radhakishandas v State* AIR 1960 Bom 146, p 150-151, 1960 Cr LJ 461 .

63 *Superintendent and Remembrancer of Legal Affairs v Daulatram Mudi* 33 Cr LJ 685, AIR 1932 Cal 390 (where a transit pass is in original as well as in copies, the original document, bearing the signature of the issuing officer, is the operative document).

64 *Jeeta Ram v State* (1971) 1 WLN 147, p 150 .

65 *Chacko v State of Kerala* 1970 Ker LT 358 .

66 *Ismail Panju v Emperor* 26 Cr LJ 1115, AIR 1926 Nag 337 ; *Russell on Crime*, twelfth edn, 1964, vol 2, p 1237, **citing** 2 East (PC) 956; *R v M'dntosh* (1800) 2 East (PC) 942 ; *Empress v Rughoonundun Puttronuvees* (1871) 15 WR (Cr) 19 (blank stamp paper, or a bond barred by limitation does not fall within the purview of s 467); *Jan Mohammad v Empress* (1884) ILR 10 Cal 584 (a *sanad*, conferring a certain dignity upon the grantee, is not a valuable security).

67 *Lekhraj v Emperor* 11 Cr LJ 639 .

68 *Emperor v Nasiruddin* 1883 AWN 59 .

69 *Empress v Azimoddeen* (1869) 11 WR (Cr) 15, p 16 .

70 *Harol Narmada Pratap Singh v State of Vindyachal Pradesh* 1956 Cr LJ 1246, AIR 1956 VP 30, p 32 .

71 *Gobinda Prasad Parui v State* (1962) 1 Cr LJ 316, AIR 1962 Cal 174 ; *Reg v Naro Gopal* (1868) 5 BHCR (Cr C) 56 ; *Budhu Ram v State of Rajasthan* (1963) 1 Cr LJ 698 .

72 *Reg v Khushpal Hirman* (1906) 4 Bom HCR 28 ; *Emperor v Naro Gopal* (1868) 5 BHCR (Cr C) 56 .

73 *Suresh Chandra Srivastava v State* 1980 Cr LR 155, p 161 (UP) .

74 *Empress v Tulja* (1887) ILR 12 Bom 36, p 41 ; *Teni Shah v Bolahi Shah* 11 Cr LJ 280 ; *Assistant Sessions Judge, North Arcat v Ramammal* (1911) ILR 36 Mad 387, p 389 .

75 *Suresh Chandra Srivastava v State* 1980 Cr LR 155, p 161 (UP) ; *Gopalkrishna Menon v D Raja Reddy* 1983 Cr LJ 1599 . For further commentary, see under same heading s 465, *ante*.

76 *Haider Ali Pradhania v Emperor* 14 Cr LJ 129 .

77 (1866) 5 WR (Cr) 2.

78 *Jang Bahadur Lal v Emperor* 13 Cr LJ 62 .

79 *Suchchindanand Prasad v Emperor* 34 Cr LJ 892, AIR 1933 Pat 488 .

80 *Harun Rashid v Emperor* 27 Cr LJ 606, AIR 1926 Cal 581 .

81 *Kailash Chandra Das v Crown* 6 CWN 382 .

82 *Joginder Pal Dhiman v Union of India* 2002 Cr LJ 677 (HP) .

83 *Md Ibrahim v State of Bihar* 2010 Cr LJ 2223, p 2228 (SC), 2010 AIR SCW 405, 2009 (12) Scale 250, 2009 (8) SCC 751 .

84 *Bank of India v Yehiri Maredi Shanker Rao* AIR 1987 SC 821, 1987 Cr LJ 722 .

85 *Anicete Lobo v State* AIR 1994 SC 1613, 1994 Cr LJ 1582 .

86 *Ibid.*

87 *Suresh Hingorani v State of Haryana* (2013) 9 SCC 454, p 458, (2013) 123 AIC 161, 2013 (1) Scale 225 .

88 *Mohammad Sadiq Ali v Emperor* AIR 1936 Oudh 381, p 382 ; *Tolapuri v State of Rajasthan* 1984 CCR 616 (Raj) .

89 *Binayak Das v State of Orissa* 1974 Ch LR 545, p 553 .

90 *Mallinath Ambanna Shedjala v Purushottam Vasudeo Somshetty* 2002 Cr LJ 506 (Bom) .

91 *Dalpat Singh v State of Rajasthan* 1996 Cr LJ 3921 (Raj) .

1 *Shanker Lal v State of Rajasthan* 1996 Cr LJ 4217 (Raj) .

2 *Jagdish Prasad Verma v State* 1980 Cr LR 284, p 286-87 (UP) .

3 *AK Khosla v TS Venkatesan* 1992 Cr LJ 1448 (Cal) .

4 *Shaikh Noor Mohammad Shaikh Fazal v State of Maharashtra* AIR 1981 SC 297, 1980 Cr LJ 1345 . See also commentary under s 30, vol 1.

5 *Imdad Mian v Emperor* 25 Cr LJ 1253, AIR 1925 Cal 192 .

6 *Mohinder Singh v State of Haryana* 1974 Cr LJ 742, p 746, AIR 1974 SC 873 .

7 Re *Chinna Vira Reddi* 41 Cr LJ 11, AIR 1939 Mad 730, p 732 .

8 *State v Subramanian* 2006 Cr LJ 1219 (Mad) .

9 *Khuda Bakhsh v Emperor* 29 Cr LJ 1031 (1) (Lah); *Jagat Narayan v State* 1967 Cr LJ 302, AIR 1967 All 123 .

10 *Hasan Ali v State of Madhya Pradesh* AIR 1983 SC 352 (2), 1983 Cr LJ 691(2) .

11 *Chait Ram v State of Haryana* 1980 SCC (Cr) 243, p 245, (1980) 1 SCC 460 .

12 *Swaminath v State* 1980 Cr LJ (NOC) 78 (All), 1980 All Cr C 50, p 52 .

13 *Emperor v Chhotalal Babar* 13 Cr LJ 542, p 544 .

14 *Diledad v Emperor* AIR 1929 Lah 210, 30 Cr LJ 5 ; *Kashi Nath Naek v Empress* (1897) ILR 25 Cal 207, 1 CWN 681 ; *Haider Ali Pradhania v Emperor* 14 Cr LJ 129 ; Re *Sheikh Mohammad Hussain*AIR 1957 Mad 47, 1957 Cr LJ 73 (2) .

15 *Ali Ahmed v Emperor* 34 Cr LJ 39 (2), AIR 1932 Cal 545 .

16 *Yawar Bakhat Chowdhury v Emperor* 41 Cr LJ 719, AIR 1940 Cal 277 .

17 *Kuldeep Sharma v State of HP* 2011 Cr LJ 2678 (SC), AIR 2011 SC 1895, 2011 (4) Scale 256 .

18 *Sunderlal v State* 1980 Cr LR 267, p 269 (UP) .

19 *Emperor v Badri Prasad* (1912) ILR 35 All 63, p 64, 10 ALJ 473 .

20 Re *TR Sriramalu Naidu* 30 Cr LJ 983, AIR 1929 Mad 450, p 451, **disagreeing** with *Empress v Umrao Lal* (1900) ILR 23 All 84, 1900 AWN 205 ; Re *Madu Chinngi Reddi* 17 Cr LJ 73, p 75; *Gajanan Sakharam v Emperor* 25 Cr LJ 473 (Nag) ; **contrary view** in *Mokand Lal v Emperor* 26 PR 1901 (Cr) ; *Pirbhu Dial v Emperor* 14 Cr LJ 183 ; *Ismail Panju v Emperor* 26 Cr LJ 1387 (Nag) ; *Digambar v Emperor* 26 Cr LJ 1275, AIR 1925 Nag 440, it is submitted, seems to be incorrect.

21 *Gulzari Lal v Emperor* 28 Cr LJ 90, AIR 1926 Oudh 615 .

22 Re *Chinna Vira Reddy* 41 Cr LJ 11, AIR 1939 Mad 730 (sentence not enhanced to one of imprisonment in this case as no prejudice was caused to the accused).

23 *Madhav Hayawadanrao Hoskot v State of Maharashtra* AIR 1978 SC 1548, 1978 Cr LJ 1678 (SC) .

24 *Kishan Lal v State of Delhi* AIR 1976 SC 1139, 1976 Cr LJ 854 (SC) .

25 *Ram Narain v State of Punjab* AIR 1955 SC 322, p 324, 1955 Cr LJ 871 .

26 *Mohammad Sadiq Ali v Emperor* AIR 1936 Oudh 381 .

27 *Rupram v State* 1964 MPLJ 158 (notes) .

28 *Mangleshwari Prasad v State of Bihar* AIR 1954 SC 715, 1954 Cr LJ 1797 .

29 *Pirabhu Dial v Emperor* 14 Cr LJ 183 .

30 Re *Amir Sultan*1957 Cr LJ 1424, AIR 1957 Mad 796, p 798 ; *Mohinder Singh v State of Punjab* 1974 Ch LR 641 .

31 *Dayanand Ramkrishna Set v State of Karnataka* 2014 Cr LJ 2746, (2014) 14 SCC 26 .

32 *Joginder Pal Dhiman v Union of India* 2000 Cr LJ 677 (HP) .

33 *Arun Parshuram Sutar v State of Maharashtra* 1999 Cr LJ 438 (Bom) ; *Joginder Pal v State (Delhi Admn)* 1998 Cr LJ 3175 (Del) .

34 *Mohandas v State* 1998 Cr LJ 3409 (Mad) .

35 *Surat Bhadur v Emperor* 25 Cr LJ 1162 ; *Kishan Lal v State of Delhi* 1975 Cr LR 497 (SC), 1975 UJ 663 (SC) .

36 *Shaikh Noor Mohammad Shaikh Fazal v State of Maharashtra* AIR 1981 SC 297, 1980 Cr LJ 1345 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 468.

Forgery for purpose of cheating.--

Whoever commits forgery, intending that the [37][document or electronic record forged] shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

Probably, the scope of this section cannot be more adequately denned than by referring to the observations, made in *Bisheswar Dayal v State of Uttar Pradesh* ,[38] that a document can be said to be forged only if it purports to be signed or sealed by a person who, in fact, never signed or sealed it. Similarly, when an accused issues the receipts in question and has also the authority to issue the same, the charge under this section cannot be made out.

The offence under this section being an aggravated form of the offence of forgery, simpliciter, defined in s 463, IPC, the section does not require that the cheating should be by the forger himself. He can, therefore, be convicted of an offence under this section even if he is not found guilty of cheating.[39] When a person makes a false document, as contemplated by ss 463 and 464, IPC by signing and issuing the passengers' tickets, he can be convicted both under ss 467 and 468, IPC .[40] A schoolmaster, who forges an attendance register for the purpose of obtaining a3861 government grant, is punishable under this section.[41] There may be no direct evidence to the effect that the accused forged the signatures on the receipts of the persons concerned. However, once it is proved that those persons did not exist, then the only conclusion to be drawn is that the signatures do not purport to be of the persons, in whose names they stand, and such a case is clearly covered by the

preceding s 467, and also by this section if it was done for cheating.[42]

The offence under this section is complete as soon as there is a forgery with the intent mentioned in the section. When the intended cheating, or an attempt to cheat, takes place, another distinct offence is committed.[43]

It is only that person who commits forgery, thereby creates a document with an intention of using that document for the purpose of cheating, who comes within the scope of such section and not the person who has impersonated another.[44]

2. Accused taking Shelter of 'Market Practice'

Commentary under the same heading in s 465, *ante*, may be referred to.

3. Document

Section 29 and its commentary in vol 1, may be referred to.

4. Electronic Record

Section 29A and its commentary in vol 1, may be referred to.

5. 'Document forged shall be used for the purpose of Cheating'

'Forgery', committed for the purpose of cheating, falls within the purview of this section,[45] as when a person's object is to deceive his employer by falsifying the account-books in his custody and such deception is likely to cause damage to his employer, he can be convicted of forgery with intent to cheat.[46] However, 'forgery' committed subsequent to cheating, does not come within the scope of this section. In *Hurmukh Rai v Crown* ,[47] the accused falsely read out to an octroi inspector, the contents of an invoice so as to make it appear less than what it was, and afterwards altered the invoice so as to make it correspond with what he dictated to the octroi inspector. It was held that as the alteration was made, after the offence of cheating was complete, for the purpose of saving himself or concealing the offence of cheating, the accused was not liable to be punished for forgery for the purpose of cheating under s 468, IPC .[48]

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.3862

Offence under this section is non-compoundable so *lok adalat* has no jurisdiction to pass order in a case involving this and other non-compoundable offences.[49]

6. Anticipatory Bail

Commentary under the same heading in s 471, *post*, may be referred to.

7. Complaint--When to be filed by the Court

Commentary under the same heading in s 467, *ante*, may be referred to.

8. Forgery before Production of Document in Court--Complaint should not be made by the Court

The bar contained in s 195 (1)(b)(ii), CrPC, is not applicable to a case where forgery of a document was committed before the document was produced in court. The scope of preliminary inquiry

envisaged in s 340(1), CrPC, is to ascertain whether any offence affecting the administration of justice has been committed in respect of a document produced in court or given in evidence in a proceeding in that court. In other words, the offence should have been committed during the time when the document was in *custodia legis*.[50] Therefore, when the forgery of a document is alleged to have been committed before the document was produced in the court, the bar contained under s 195, CrPC is not attracted and the magistrate can take cognizance of the offence under s 468, IPC, pursuant to the chargesheet filed by the police against the accused.[51] To say that irrespective of the fact, whether such an offence was committed at a point of time before which the document was either produced or given in evidence before the court or after the production or giving in evidence of such a document in a judicial proceeding, it is only the court, which received such a document that could complain, is inconsistent with the scheme of s 195 of CrPC . In a given case if document is forged and a party who is likely to be affected by the creation of such a document makes complaint, before such a document is actually used by the maker for deriving any benefit out of such a document by producing the same before a court or some other public authority, the prosecution would certainly be legal, if such a document is to be produced before a court subsequent to the initiation of the prosecution, there is nothing in the law, which prohibits the continuation of the prosecution.[52]

9. Quashing of Criminal Proceedings

The accused was alleged to have a forged power of attorney in respect of sale of property to the complainant. The case of the accused throughout was that he never sold the property in dispute, so the question of execution of the alleged power of attorney did not arise. There was a compromise in which the complainant himself stated that he did not claim any right or title in the property in dispute, on the basis of an agreement to sell. The complainant also had no objection to the quashing of criminal proceedings. Under the circumstances, the FIR registered under3863 ss 420 / 468 / 471, IPC, against the accused as well as proceedings emanating therefrom were quashed.[53] If bald allegations are made in the complaint that shares of the complainant have been transferred on forged signatures, but there is not an iota of material to indicate how all or any of the accused were involved in the alleged forgery, the complaint made under ss 406, 420, 467, 468 and 120B, IPC, is liable to be quashed.[54]

10. Complaint not Quashed under Section 482 , CrPC 1973--Cases

The allegations were that the complainant land owner was induced by the accused (BPCL) to lease out his land for opening a petrol outlet on the assurance that he will be given a dealership, the complainant was also made to give a bank guarantee of rupees four lakhs, but finally the scheme was changed and the dealership was given to some other person. On these facts it could not be said that intention of the accused was bonafide since the very beginning so the order of the magistrate taking cognizance of the offence under ss 468, 420 *etc* was found proper.[55]

11. Revision--Power of the High Court

In its revision jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. However, the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the magistrate as well as the sessions judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice.[56] Therefore, the High Court while exercising revisional jurisdiction cannot while acquitting the accused direct that the accused must be deemed to have been in continuous service without break and should be paid his full pay and allowances during the period of his suspension.[57]

12. Charge

The following form of the charge may be adopted:

> I (*name and officer of magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the... day of..., at..., you forged a document, Ex..., intending that it shall be used for the purpose of cheating, and that you thereby committed an offence, punishable under s 468 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.3864

An FIR was lodged against the accused and no allegations were made against the co-accused, the branch manager of a bank, who was impleaded as the co-accused in the trial of the accused for commission of forgery. The accused admitted his guilt before the trial court but did not state anything against the co-accused. The trial court dismissed the application of the co-accused made under s 239, CrPC, but did not discuss as to what 7 witnesses (PW1 to PW7) stated against the co-accused. Therefore, the order of the trial court rejecting the prayer of discharge of the co-accused was quashed and the matter was remitted to the trial court for passing a fresh order in accordance with law.[58]

13. Report of Finger Print Expert not put to Accused in his Statement under Section 313 , CrPC -- Effect

Section 313, CrPC provides that the accused is required to be given an opportunity to explain any circumstance appearing in the evidence against him. If the prosecution intends to use the finger print report of expert as a piece of evidence, as circumstance appearing against the accused persons, then it should have been put to the knowledge of the accused by the court by pointing out the accused about the said report so that the accused persons could have explained the circumstances.[59]

14. Proof

The prosecution has to establish (i) that the accused committed forgery; and (ii) that he did so with an intention that the document forged shall be used for the purpose of cheating. The object of s 468, IPC was to find out as to whether the accused deceived someone by making false documents. If the prosecution were to establish forging of the documents and intending to use such forged documents for the purpose of cheating, then only the accused is liable for being convicted.[60]

Prosecution is required to prove that:

(a) the disputed document a electronic record is a forged document;
(b) the accused forged the document, (*vide* s 465, IPC); and
(c) he did so intending that the document or electronic record forged shall be used for the purpose of cheating (*vide* s 417, IPC).

To secure a conviction under s 468, IPC, a heavy burden lies upon the prosecution to prove the ingredients of s 463 . If there is no convincing evidence to show that the alleged forged permits were signed by the accused, he cannot be convicted under s 468, IPC .[61] Where an accused is charged with an offence of forgery, it is not for the prosecution to establish all the ingredients of forgery. It is not for the accused to show that the signatures on the disputed document are of genuine persons.[62] When once, however, it has been found that there was a conspiracy and, in the course of the conspiracy and in order to achieve the object of the conspiracy, the certificates at the back of AR 3s were forged in order to give impression to the excise officer of the place, from where the goods had been transported, that the goods were received at the destination, all the conspirators, irrespective of the identity of the man, who3865 forged the certificates, shall be guilty of the offence. To prove conspiracy, it is not necessary that there should be direct communication between each conspirator and every other but the criminal design alleged must be common to all. Viewed in that light and having regard to the circumstance that the forging of the certificates was not extraneous to the object of the conspiracy, the conspirators are criminally responsible for the offence under s 468, IPC .[63]

Accused A5, head constable, had submitted false inquiry report on application for passport, he was convicted under ss 419, 420, 468, read with ss 109 and 120B, IPC .[64]

15. Acquittal

If there is no evidence to show that the handwriting on the cheque in dispute was of the accused or that he was connected with the forgery and presentation of the forged cheque, he cannot be convicted on the basis of mere recovery of the bank token.[65] Where the accused, an LIC agent, was charged with cheating LIC, by entering into conspiracy with the co-accused, a development officer, on the ground that insurance policies were got issued on the basis of fake and forged documents and received premium commission and bonus in respect of those policies, the accused was found entitled to be acquitted when the forging of the documents was done by the co-accused and there was no acceptable evidence that the co-accused did that with the knowledge and consent of the accused.[66] Where the accused was alleged to have forged hall tickets to enable some other students to appear for examination in place of actual students, the hall tickets seized from accused were not of relevant examination in progress, and there was no evidence to show as to for what purpose hall tickets were used, the accused was acquitted.[67]

Where the accused, a bank employee, was charged with the offence of misappropriation of money of its account holders and there was nothing to show that he alone was responsible for the transactions, the prosecution had not established that the accused destructed or altered the records, and the account holders from whose accounts the accused was alleged to have mis-appropriated the funds were not examined, further the relevant ledgers and folios were not produced in the court to prove the withdrawal of money by the accused, and the witnesses not supporting the prosecution case were not declared hostile, there was no evidence on record to show that the signatures on the documents were that of the accused, on these facts, the acquittal of the accused was found proper.[68] Appellant accused, Bank Manager, was alleged to have sanctioned loan for obtaining pecuniary advantage. Evidence showed that the loan sanctioned was secured by collateral security, the senior officer of the bank after conducting pre-sanction inspection had recommend the sanction of loan. Held, the appellant had not sanctioned loan dishonestly for obtaining pecuniary advantage. Appellant was acquitted of charges under ss 120B, 420 and 468, IPC .[69] Where the co-accused BDO on the loan applications verified by the accused Gram Sewak, sanctioned loan and the co-accused Branch Manager of the bank disbursed3866 the loan, there was no evidence of any conspiracy between the three accused, the two co-accused BDO and the Branch Manager were acquitted of the charge under s 120B, IPC . The accused Gram Sewak was guilty of forging loan application under s 468, IPC, for the purpose of cheating under s 471, IPC .[70] The prosecution case was that the appellant accused had written the challans, but there was no evidence to prove that the said challans were prepared by the accused for his own interest and the property *ie* the amount mentioned in the challans were transferred in favour of the accused appellant or the same was used for his personal purposes. Held, no case was made out against the appellant accused for offence under ss 468 and 471, IPC .[71]

The accused chairman and member of a subordinate staff selection board in conspiracy with the accused, a candidate, increased the numbers awarded in *viva voce*test and included him in the list of selected candidates for pecuniary benefits. The act of the three accused persons did not amount to offence of forgery, the accused persons prepared false record of the final result and committed cheating, they were guilty of offence under s 218, s 420, s 477A and s 120B, IPC .[72]

16. Conviction

When the accused being an accounts clerk-cum-cashier allegedly manipulated cash memos, AC bills *etc* for passing amount for payments therein, the accused in his statement under s 313, CrPC, admitted that the writings on the cash-memos were in his hand and handwriting expert also opined, and the evidence of other witnesses showed that the cash-memos and other documents in question were forged to inflate the respective amounts shown therein with an intention to use such documents for cheating, the conviction of the accused was found proper.[73] The accused, working as an *upvaid* in ayurvedic *aushadhalaya*, was proved to have prepared bogus medical bills for government servants. There were concurrent findings of the courts below, that a trap was laid and tainted money was recovered from the accused. The conviction of the accused under ss 120B and 468, IPC, was found proper.[74] The first accused, a bank employee, took a blank bank draft. The second accused forged the signature of the agent on it. The third accused, opened a bank account in the name of a fictitious person and encashed the forged draft. All three accused were found guilty under ss 467, 468, 471 etc.[75] The accused procured a government job reserved for Scheduled Castes by producing a false caste certificate that he belonged to the Scheduled Caste. He served the government for a period of 8 years till the fraud was detected. There was cogent and convincing evidence on record that the accused did not belong to that caste. The accused was found liable to be convicted for offences under ss 419 and 468, IPC .[76] The accused, a stenographer of the High Court prepared a forged bail order by utilisation of which the person concerned obtained the advantage of being released from jail. The accused was found guilty under ss 466 and 468, IPC .[77]3867

There was evidence that the appellant junior engineer entered into criminal conspiracy with the co-accused assistant engineer for preparation of false muster roll, and as such false muster rolls were prepared showing names of casual labourers who had not even worked. Accused appellant verified, consigned muster-rolls, gave false certificates. He was convicted under ss 120B, 467, 468, 471 and 420, IPC held proper.[78]

Where the accused forged income tax refund vouchers and enchased them, he was convicted for offences under ss 468 and 486, IPC .[79]

17. Relative Scope of Conviction under Section 468 and Section 467

Commentary under the same heading in s 467, *ante*, may be referred to.

18. Relative Scope of Conviction under Section 468 and Section 471

Commentary under the same heading in s 471, *post*, may be referred to.

19. Probation

The accused, a stenographer of the High Court prepared a forged bail order with the help of which the person concerned was released from jail and the accused was convicted under ss 466 and 468, IPC . However, in view of the fact that the incident took place 27 years ago and the accused had no bad antecedents and the trial court had extended the benefit of probation to the accused, the High Court acquitted the accused, however, the apex court granted the benefit of probation to the accused.[80]

20. Sentence (Severe)

A sentence of six months rigorous imprisinment, passed on an accused under ss 419 and 468, was not considered severe, in *Aswini Kumar Gupta v Emperor* ,[81] in view of the gravity of the offence (forging answer-papers at the university examination). In *Madhavan Ayyappan v State* ,[82] the accused, who executed a sale-deed of property, belonging to the complainant, in favour of another person, was awarded a sentence of one year rigorous imprisonment. The High Court raised it to two years rigorous imprisonment. In *Jagan Nath v Emperor* ,[83] in view of the particular circumstances of the case, a sentence of five years rigorous imprisonment, imposed on the accused, at whose instance another person forged a letter purporting to be from a governor for defrauding an officer, was maintained. Where an accused, a reader holding M Sc and Phd degrees was convicted for offences of attempting to issue, counterfeit university degrees, it was held by the Supreme Court that the award of sentence, by the sessions court, till rising of the court, was too lenient and award of sentence by the High Court for 3 years' was just and reasonable.[84]3868

21. Sentence (Lenient)

The offence of production of forged documents in court took place about 9 years before, so the sentence of rigorous imprisonment for 6 months was reduced to that of two months rigorous imprisonment.[85] In view of the lapse of 30 years from the date of the incident, the sentence of imprisonment for 3 years was reduced to the period already undergone by the accused.[86] Where the accused committed the offence 20 years ago and had also deposited, the disputed amount with the aggrieved corporation, the sentence of imprisonment was reduced to the period already undergone by the accused, but a fine of Rs 2000/-was imposed and in default the accused was to undergo rigorous imprisonment for 1 month.[87] Where the accused aged about 68 years had no family and had weak economic conditions, there was no material showing that the accused was involved in any other or similar offences, and he had almost undergone the substantive sentence of imprisonment, looking at the age, economic position and the family background of the accused while maintaining the conviction and the sentence of imprisonment, the sentence of fine was modified and the fine was reduced from Rs 5,000/- to Rs 1,000/- for each of the offences and in default thereof to undergo 7 days rigorous imprisonment.[88] Where the accused was on the verge of retirement and had school going children and was not a previous convict, the sentence of one year rigorous imprisonment was reduced to 3 months rigorous imprisonment.[89]

Where the accused appellants were convicted for offence of criminal conspiracy, cheating and forgery, the occurrence took place 15 years before, the appellants had remained in custody for about one month, sentence was reduced to the period already undergone.[90]

37 Substituted by the Information Technology Act, 2000, s 91 and First Sch. for the words 'document forged' (wef 17-10-2000).

38 *Bisheswar Dayal v State of Uttar Pradesh* 1971 All WR 507, p 509 .

39 *Jogan Nath v Emperor* AIR 1927 Lah 724, 28 Cr LJ 461 ; *Parminder Kaur v State of UP* 2010 Cr LJ 895, AIR 2010 SC 840, (2010) 1 SCC 322 .

40 *Krishna Kumar Sinha v State of Bihar* 1972 Bih LJR 293 .

41 Re *Kuppana Pillai* (1885) Weir (third edn) 336.

42 *Bhagwat Singh v State of Rajasthan* 1976 Raj Cr C 250 .

43 *Samuel Hauanah v Emperor* 25 Cr LJ 475, AIR 1924 Nag 120 .

44 *Geetha v Sub-Inspector of Excise, Mudigere* 2007 Cr LJ 3496, p 3499, 2007 (4) Kar LJ 619 (Kant) .

45 *Mohammad Rafiq v Emperor* 33 Cr LJ 41, AIR 1931 Sind 116, p 117 ; Re *Kamatchinatha Pillai*AIR 1919 Mad 654, 20 Cr LJ 287 ; *Empress v Banessur Biswas* (1872) 18 WR (Cr) 46 .

46 *Empress v Banesssur Biswas* (1872) 18 WR (Cr) 46 .

47 *Hurmukh Rai v Crown* 15 PR 1876 (Cr) .

48 *Hurmukh Rai v Crown* 15 PR (1876) (Cr). For further commentary, see under s 29, vol 1.

49 *Sukhal v State of Uttar Pradesh* 2002 Cr LJ 1523 (All) .

50 *Sachida Nand Singh v State of Bihar* AIR 1998 SC 1121, 1998 Cr LJ 1565, 1998 AIR SCW 932 ; *Patel Laljibhai v State of Gujarat* AIR 1971 SC 1935 .

51 *Sinivas Rao v State of Andhra Pradesh* 2002 Cr LJ 3880 (AP) .

52 *Karnati Bhaskar v State of Andhra Pradesh* 2000 Cr LJ 3983 (AP) .

53 *BK Sondhi v State (NCT of Delhi)* 2001 Cr LJ 421 (Del) (DB) .

54 *Ashok Chaturvedi v Shitul H Chanchani* 1998 Cr LJ 4091 (SC) .

55 *Ranjit Pani v State of Jharkhand* 2003 Cr LJ 1736 (Jhar) .

56 *State of Orissa v Pultumana Watch Jathavedan Nambordiri* 1999 Cr LJ 1443 (SC) .

57 *State of Uttar Pradesh v Ranjit Singh* 1999 Cr LJ 1830 (SC) .

58 *Binod Bihari Rajwar v State of Bihar* 2001 Cr LJ 2726 (Jhar) .

59 *Chauthu Ram v State of Rajasthan* 2005 Cr LJ 1051 (Raj)

60 *TK Sriramappa v State of Karnataka* 2006 Cr LJ 1851 (Kant), (2006) 2 KCCR 804 .

61 *Sunderlal v State* 1980 CR LR 267, 269 (Uttar Pradesh) .

62 *Balram Singh v State* 1980 Rajdhani LR 324 .

63 *Mohammad Riaz v State of Uttar Pradesh* 1980 Cr LJ 369, p 375 (All) .

64 *Monica Bedi v State of AP* 2011 Cr LJ 427, (2011) 1 SCC 284, (2011) 97 AIC 37 (SC) .

65 *Pilambar Bhuyan v State of Assam* 1980 Cr LJ (NOC) 151 (Gau) .

66 *Nand Kumar Singh v State of Bihar* AIR 1992 SC 1939, 1992 Cr LJ 3587 (SC) .

67 *TK Sriramappa v State of Karnataka* 2006 Cr LJ 1851 (Kant), (2006) 2 KCC R 804 .

68 *Public Prosecutor, High Court of Andhra Pradesh, Hyderabad v P Hanumantha Rao* 2006 Cr LJ 1675 (AP) .

69 *Rajeevan Aswathy v Superintendent of Police* 2011 Cr LJ 2801 (Ker) .

70 *State of HP v Sukh Ram* 2012 Cr LJ 464, p 468 (P&H).

71 *Kajal Dey v State of Tripura* 2014 Cr LJ 3367, p 3382 (Tri) (DB) .

72 *Rakesh Kumar Chhabra v State of HP* 2012 Cr LJ 354, p 357 (HP) .

73 *Mendiram Boro v State* 2003 Cr LJ 1399 (Gau) .

74 *Narain Lal Nirala v State of Rajasthan* AIR 1994 SC 118, 1993 Cr LJ 3911 .

75 *Anicete Lobo v State (Goa, Daman & Diu)* AIR 1994 SC 1613, 1994 Cr LJ 1582 .

76 *State of Orissa v Ravindranath Sahu* 2002 Cr LJ 2327 (Ori) .

77 *State of Uttar Pradesh v Ranjit Singh* 1999 Cr LJ 1830 (SC) .

78 *Kuldeep Sharma v State of HP* 2011 Cr LJ 2678 (SC), AIR 2011 SC 1895, 2011 (4) Scale 256 .

79 *Malik v State of Gujarat* 2010 (3) Guj LR 1963 (Guj) .

80 *State of Uttar Pradesh v Ranji Singh* 1999 Cr LJ 1830 (SC) .

81 *Aswini Kumar Gupta v Emperor* AIR 1936 Cal 403, 37 Cr LJ 1156 (2).

82 *Madhavan Ayyappan v State* 1953 Cr LJ 275, AIR 1953 TC 34 .

83 *Jagan Nath v Emperor* AIR 1927 Lah 724, 28 Cr LJ 461 .

84 *Madhav Hayawadanrao Hoskot v State of Maharashtra* AIR 1978 SC 1548, 1978 Cr LJ 1678 (SC) .

85 *Srinivas Rao v State of Andhra Pradesh* 2002 Cr LJ 3880 (AP) .

86 *Joginder Lal v State (Delhi Admn)* 1998 Cr LJ 3175 (Del) .

87 *Surender Kumar Garg v State of Uttar Pradesh* 1993 Cr LJ 2085 (SC), 1993 AIR SCW 1716 (SC) .

88 *Dwijendro Shirishbhai Manek v State of Gujarat* 2006 Cr LJ 1413 (Guj) .

89 *Mendi Ram Boro v State (CBI)* 2003 Cr LJ 1399 (Gau) .

90 *Naresh Himmat Lal Joshi v State of Bihar (now Jharkhand)* 2007 Cr LJ (NOC) 30 (Jhar) .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 469.

Forgery for purpose of harming reputation.--

Whoever commits forgery, [91][intending that the document or electronic record forged] shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Comments

1. Scope

The section punishes a person who commits forgery with (1) intent that the document or electronic record forged shall harm the reputation of any party; or (2) knowledge that the said document or electronic record is likely to be used for that purpose. 3869

Accused was charged under s 469, IPC for sending forged e-mail, he intended to harm the reputation of the complainant. The message did not disclose intent to harm the reputation of the complainant. The accused was discharged.[1]

2. 'Document'

Commentary under s 29, vol 1, may be referred to.

3. Electronic Record

Section 29A, vol 1, may be referred to.

4. 'Harm the Reputation'

In this section, 'harm' is to the reputation of the aggrieved party.[2]

5. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

6. Complaint--When to be filed by Court

Commentary under the same heading in s 465, and s 467 *ante*, may be referred to.

7. Charge

The following form of the charge may be adopted:

> I (name and office of magistrate, *etc*) hereby charge you (name of accused person) as follows:
>
> That, on or about the ... day of .... at ..., you forged a document. Ex ..., intending that the same shall harm the reputation of AB (or knowing that it is likely to be used for the purpose of harming the reputation of AB), and that you thereby committed an offence, punishable under s 469 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge

8. Proof

The prosecution has to prove that:

(a) the document in question is a forgery (*vide* s 465);
(b) the accused forged it; and
(c) the accused did so intending that the said forged document should harm the reputation of any party or that he knew that it was likely to be used for that purpose. 3870

91 Substituted by the Information Technology Act 2000 (21 of 2000), s 91 and First Sch. for the words 'intending that the document forged' (wef 17-10-2000).

1 *Rajesh v State of Kerala* 2014 Cr LJ 204, p 209 (Ker) .

2 *Veeda Menezes v Yusuf Khan Haji Ibrahim Khan* 1966 Cr LJ 1489, AIR 1966 SC 1773, p 1775 . See commentary under s 499, *post*.

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Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 470.

Forged [3][document or electronic record].--

A false [3][document or electronic record] made wholly or in part by forgery is designated "a forged [3][document or electronic record]".

Comments

1. Scope

A document may be false, either wholly or in part, and if it is made with any of the intents, specified in s 463, the offence of forgery is committed. As a corollary, this section defines 'a forged document' to make use of such 'a forged document' as genuine punishable as an offence under the next s 471 .

This section is inclusive of other ss 465 to 471, which define an aggravated form of forgery.[4]

3 Substituted by the Information Technology Act, 2000 (21 of 2000), s 91 and First Sch. for the words 'document' (wef 17-10-2000).

4 *Vishnu Kumar v State of Andhra Pradesh* 1980 Cr LJ 1361 (AP) .

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Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 471.

Using as genuine a forged [3][document or electronic record].--

Whoever fraudulently or dishonestly uses as genuine any [3][document or electronic record] which he knows or has reason to believe to be a forged [3][document or electronic record], shall be punished in the same manner as if he had forged such [3][document or electronic record].

Comments

1. Scope

This section punishes the dishonest or fraudulent use of a false document as genuine when there is evidence of its use by the offender. The offence of using, as genuine, a3871 forged document is complete once the document is produced or given in evidence.[5] According to the Allahabad High Court, the concluding words 'as if he had forged such document', in the section, indicate that the section is directed against some person other than a person proved to be the actual forger. Accordingly, a forger cannot be punished both for forging a document (s 465, IPC) and for using it as genuine (s 471, IPC).[6] The former Punjab chief court took the same view.[7] The Madras High Court dissented from this view and held that s 471 only lays down that the sentence, that can be imposed for the offence of using a forged document as genuine, is the same as the sentence that can be imposed for the offence of forgery and that separate sentences may be passed on an accused person who had been convicted at the same trial of both the offences.[8] However, the Madras High Court has held that a person, who abets the forgery of a document, sought to be used by him as genuine, cannot be convicted under s 471 .[9] The view of the former judicial commissioner's court at Nagpur is not uniform. It took the Madras view that a person can be convicted both of forgery and of using as genuine a forged document.[10] It also took the contrary view in *Digambar v Emperor* ,[11] and *Ismail Panju v Emperor* ,[12] following the Allahabad view in *Empress v Umrao Lal* .[13] The Mysore High Court also took the view of the Madras High Court.[14] It is submitted that the Madras and Mysore view is to be preferred and that separate sentences may be passed on an accused person who has been convicted, at the same trial, of both the offence, *ie*, an offence under s 465 and an offence under s 471, IPC .

Where the co-accused BDO on the loan applications verified by the accused Gram Sewak sanctioned loan and the co-accused Branch Manager of the bank disbursed the loan, there was no evidence of any conspiracy between the three accused, the two co-accused BDO and the Branch Manager were acquitted of the charge under s 120B, IPC . The accused Gram Sewak was guilty of forging loan application under s 468, IPC, for the purpose of cheating under s 471, IPC .[15]

2. Blank Paper Signed by a Partner and used by Other Partner

Commentary under the same heading in s 467, *ante*, may be referred to.

3. Distinction between Sections 463, 465 and 471 and Sections 193 and 196, IPC

Commentary under the same heading in s 463, *ante* and s 196, vol 2, may be referred to.3872

4. Section 471 Distinguished from Section 182

The offence under this section is complete the moment the document is filed and it is not dependent upon the public servant's action upon the document whereas for bringing it within the ambit of s 182, IPC, one has to go a step forward and to show that the public servant has acted upon that document. The ingredients of both the sections are, therefore, different. In other words, it means that the offence under s 471, IPC, is distinct from the offence under s 182, IPC, and as such the bar of filing complaint by the public servant in accordance with s 195, CrPC, can have no application.[16]

5. Sections 463 , 464, 465, 471IPC and Section 146(P) of the Maharashtra Co-operative Societies Act (23 of 1961)--Distinction

Commentary under the same heading in s 465, *ante*, may be referred to.

6. Essential Ingredients

The ingredients of s 463 of IPC and the ingredients of s 471 of IPC are separate and distinct.[17] The essential elements[18] of an offence under this section are as follows:

(a) the document (or electronic record) in question must be a forged document or (electronic record;);
(b) the accused must have used the same as genuine; and
(c) he must have so used the same fraudulently, or dishonestly,
(d) he knew, or had reason to believe, that it (*i.e.*, the document or electronic record) was a forged document or (electronic record).

The prosecution case was that the appellant accused had written the challans, but there was no evidence to prove that the said challans were prepared by the accused for his own interest and the property *ie* the amount mentioned in the challans were transferred in favour of the accused appellant or the same was used for his personal purposes. Held, no case was made out against the appellant accused for offence under ss 468 and 471, IPC .[19]

7. Accused taking Shelter of 'Market Practice'

Commentary under the same heading in s 465, *ante*, may be referred to.

8. 'Fraudulently or Dishonestly uses as Genuine any Document'

Dishonesty or fraud is a necessary ingredient of an offence punishable under this section.[20] There must be a fraudulent or dishonest use of a forged document as3873 genuine before a conviction can be had under the section.[21] The word 'fraudulently' is used, in this section and s 464, together with the word 'dishonestly', and presumably in a sense not covered by the latter word.[22] It must mean something different from 'dishonestly' and must be taken to mean 'with intent to defraud'.[23] The Calcutta High Court, in *Lolit Mohan's* case, dissented from the Allahabad rulings in *Empress v Jiwanand* ,[24] and *Empress v Girdhari Lal* .[25] Another Allahabad decision, belonging to this group, is *Empress v Mazahar Hussain* .[26] If *AB*, knowing that a bill is forged, utters it to *CD* and means that *CD* should believe it to be genuine, the court is bound to infer that *AB* did it with intent to defraud.[27] It is worth mentioning here that however good a person's title to property may be, yet if, in the course of an action brought against him, he uses the forged document by way of supporting his title, though there may be no necessity for the use of it, he clearly uses it fraudulently.[28] If a party to a suit sets up two different titles and supports one of them with a false document, he commits an offence under s 471, IPC, even if it be found that the other title is good.[29] Where the accused knowing that the mark list in question was not a genuine document, made use of that forged document to get admission for an MBBS course, it was held that he committed the offence punishable under s 471 .[30] Where, however, the evidence showed that the offender had ante-dated a document and his only object was to clear up the position between himself and his brothers, and there was neither dishonesty, nor fraud on his part, he was not held guilty under ss 465 and 471 .[31]

The term 'fraudulently', in this section, does not necessarily connote injury to the person deceived; it may, but it need not, do so.[32]An act may be fraudulent even though it does not cause any loss or injury or intended loss or injury to any one.[33] Neither the acquisition, not the deprivation, of property is an essential ingredient of an offence under this section.[34] The section applies to the case of a person

who appears before some other person, or before a court, and endeavours to induce that person or court to do some act which he or it would not do if he or it knew of the3874 forgery.[35] If a person, by deceiving another, derives any advantage from the deceit, which he could not have had if the truth had been known, and thereby causes injury to the mind, body or reputation of the deceived, he commits fraud.[36] In *Empress v Abbas Ali* ,[37] the accused, for the purpose of appearing in an examination and to secure a certificate of fitness to serve as an engine-driver of ocean-going steamers, forged a testimonial of service and good character. He was held guilty under s 471, IPC . A bench clerk received a sum of money paid as fine and misappropriated it. He forged a false receipt for the purpose of misappropriating that money. His conviction under ss 467 and 471, IPC, was upheld.[38] An offence is committed under s 471 whenever a document, known, or believed, by the accused to have been forged, is used as genuine with the intention that some person thereby should be deceived.[39] The fact that the accused held a decree which was capable of execution on the date, on which it was filed, namely, 21 July 1938, does not prevent the alterations in the certified copy of the decree, filed on behalf of the accused from being fraudulent or the accused's user of it from being fraudulent.[40] Where, however, the alteration of the date of a document not only did not help the accused, but actually ruined his case, the element of 'dishonestly' or 'fraud', as required under the provisions of s 464, was held to be wanting, and, therefore, the accused could not be convicted under s 471, IPC .[41]

9. Document

Section 29 and its commentary in vol 1, may be referred to.

10. Electronic Record

Section 29A, vol 1, may be referred to.3875

11. 'Uses'

The expression 'uses...any document', in this section, is apparently used in the sense of its being put forward in some way for one of the purposes mentioned in s 463, IPC .[42] It must be shown that the accused used the document as genuine with full knowledge that it was a forged one. The use is very necessary.[43] It is, however, not necessary that the forged document should be used in judicial proceedings. Since the section is in general terms, the use of a forged document can be made anywhere.[44] It is also not at all necessary that the court should accept the document produced before it or filed in court. If a person puts forward a document as supporting his claim in any matter, whether the document is acted upon by the court or used in evidence is immaterial.[45] It is also not necessary that the user must be an effective one.[46] To constitute an offence under ss 467 / 471, IPC, the nature of the user is not material.[47] Whether there has been user must depend upon the circumstances of each case.[48]

12. Used Document must be Fraudulent or Dishonest

The use of a document as genuine must be fraudulent or dishonest. The use of a forged document, which is contemplated by this section, is such use as causes wrongful loss. The use of a forged document will be fraudulent and dishonest under this section even though the document itself is unnecessary for the case of the party, who uses it, and though he, infact, has a perfectly good title without it. Therefore, in order to bring a person within the purview of s 471, it is enough if he files a forged document which he knows or has reason to believe that it is a forged document.[49] It is incorrect to say that even though the other elements, envisaged by s 471, IPC, are satisfied, the person, filing the document, would not be guilty of an offence under s 471, IPC, if there is nothing to show that the forged document, admittedly filed by the offender and intended to be used as evidence subsequently in support of his case, was 'exhibited' as a document and the court had an opportunity to record its finding as to whether it was a genuine or a forged document. Similarly, the mere filing of a document is enough to bring the party, filing it, within the mischief of this section.[50] In *Idu Jolaha v*

Emperor ,[51] it was held that the filing of forged documents with a plaint is user of them within the meaning of this section. It was observed that inasmuch as documents, filed with a plaint, may be rejected or their use refused at a3876 subsequent stage of the case and the first step forwards admission being the filing of them with the plaint, the filing of documents with a plaint is user. In *Baju Jha v Emperor* ,[52] it was held that s 471, IPC, applies to a user of a document for the purpose of securing an acquittal, and its applicability is not restricted to user for the purpose of producing material gain or material loss to another, and that the obtaining of an acquittal is very distinctly the obtaining of an advantage and brings the case within the definition of 'dishonestly' in s 24, IPC . It was, therefore, held that s 471, IPC, applies not only in cases where the document has been given in evidence, but also in cases where it has been produced, and that the ambit of the word 'produced' is very wide as to include documents filed or presented, but either rejected or not taken into account by the court. In *Mobarak Ali v Emperor* ,[53] it was held that the filing of a forged document as the basis of a plaint or as a necessary sequel to the pleas in the plaint constitutes a user of it within the meaning of s 471, IPC, and it is incumbent on the person, using it, to show that he filed the document in all good faith believing it to be genuine. However, the mere fact, that a litigant is interested in establishing the contents of a forged document, filed by him, in support of his case, does not raise the presumption that he filed it knowing it to be forged. There must be the using of a document by a person who knows or has reason to believe that it is forged. The element of fraud or dishonesty must be present in the mind of the accused.[54] At least, in certain circumstances, mere filing of a document may constitute a user.[55] It is so when the accused files the document in a court with the intention of relying on it at the trial even though the document itself is not actually used.[56] Of course, the mere filing of a list of (forged) documents is not the same thing as the filing of the document themselves.[57] Likewise, a mere statement, that a document is a genuine document, does not amount to using it as genuine.[58] Where an accused mentions a document in his affidavit of this document in his possession and is forged, by the opposite party, to refer to this document in his evidence, it is not a user of the document. All, that can be inferred from the mention of the document, is that the accused, at the particular stage, has made preparation for using the document.[59] However, the use of a forged document, clearly referred to in another document, to support a false claim constitutes an offence under s 471 .[60] Presentation of forged3877 document (of sale) before a sub-registrar is sufficient evidence of user.[61] An accused person may not have physically presented a forged document for registration but if the evidence shows that he actively participated in the process of presentation, he can be properly convicted under s 471, IPC .[62] It is user whether a party files a document personally or, as more usually happens, through a legal representative. Further, such legal representative will be presumed to have filed the document with the knowledge and authority of his client until the contrary is shown.[63] The mere production of the document in support of the claim made by the accused is sufficient for the purpose of determining the guilt under this section. It matters a little whether the document was presented by the accused himself, or by his agent expressly authorised in that behalf, or whether it was produced by the accused of his own motion or pursuant to the order to the court.[64] However, if the accused's pleader has cross-examined upon some document produced and put, in evidence, by the prosecution, the accused, by such action, does not make himself liable to be prosecuted for using a forged document under s 471, IPC .[65]

13. Use of Document must be Voluntary

The use of a document contemplated by s 471 must be a voluntary one, and not the mere production of the document in compliance with an order of the court.[66] The production, voluntarily and mainly to secure the accused's ends, of a forged title-deed in answer to a citation, in which no particular deed is specified, is user within the meaning of s 471, IPC .[67] Where the accused was told to produce copies of revenue records in support of his complaint of trespass and it was found that the accused had knowingly produced forged copies as genuine, the accused was held guilty under s 471, IPC .[68] In *Emperor v Mohil Kumar Mukerjee* ,[69] Page J, not acquiescing in the reasoning of the Madras decisions,[70]observed that if the person, who had been served with the summons, fails to disclose that he believes that the document is forged document and fraudulently or dishonestly puts forward the document as being a genuine document, he does not act involuntarily; he deliberately uses the document of a criminal purpose. To hold otherwise would be to afford a ready method by which the

provision of s 471 can be evaded. It is submitted that if the Calcutta view is to be followed, a person will be impelled on the horns of a dilemma; if he fails to produce the forged document in obedience to a summons, he3878 would be punishable under s 175, IPC and if he does produce, in the circumstances, the forged document, he would run the risk of prosecution of an offence under s 475, IPC . The correct view seems to be that the production contemplated by s 471, is a voluntary one as reflected in the decisions of the Madras High Court. The Supreme Court, in *S Dutt v State of Uttar Pradesh* ,[71] appears to have approved the view that there can be no user of document within the meaning of s 471 unless the document is produced voluntarily. Their lordships of the Supreme Court cited the authorities in assistant session judge, *North Arcot v Ramammal* ,[72] and *Ma Ain Lon v Ma On Lu* ,[73] and concluded that even if the document was used, the use was neither dishonest nor fraudulent and the expert's conduct did not come within the purview of s 471, IPC . However, the Supreme Court has held, in *Jagannath Prasad v State of Uttar Pradesh* ,[74] that a person, who produces documents, cannot be heard to say that because he was required to prove his case by the best evidence, he produced forged documents. It cannot be said in such a case that the forged documents were not 'used', the production of a document (*kabuliyat*) is voluntary when the forged document is produced in a civil suit by conspiracy between the accused, one of them being made the custodian of the document to get over some technical difficulty. In such a case, the accused can be held guilty of using the forged document as genuine.[75]

14. Use of Copy or Attested Copy of a Document

Section 471, IPC does not lay down that the use, contemplated by it, can only occur when the original itself is produced. Where it is possible to produce an attested copy which will serve the purpose of the original document, there would be use of the forged document as genuine though through the attested copy.[76] When a person files a copy of a document, he is using, in substance, the original itself if the filing is with the knowledge that the copy is a copy of a forged document. The filing of a certified copy with the knowledge that it is copy of a forged document amounts to user of the document.[77] The copy of a forged document is not itself a forged document though its user in certain conditions may amount to an offence under s 471, IPC .[78] Thus, where the offender uses a copy of a document, knowing, or having reason to believe, that the entries in the original documents were forgeries, he would be guilty of an3879 offence under s 471, IPC .[79] It is worth mentioning here that it is necessary to prove that the use has been dishonest or fraudulent and that the person, putting in the copies, knew, or had reason to believe, that the originals were forged.[80]

15. 'Which he knows or Has Reason to believe to be a Forged Document'

To constitute an offence under s 471 of IPC, that there must be a false document made wholly or in part by forgery, is designated as a forged document.[81] Before a conviction can be had under this section, it is necessary to prove that the accused knew, or had reason to believe, that the document used was a forgery.[82] If the document is known to be not genuine and it is used, it is sufficient for holding him guilty of an offence under this section.[83] Where the mark sheet was forged by the father of a student so as to be used for securing admission in a medical course, the total marks in the forged mark sheet were showing more marks than that which the student could get even if he secured cent percent marks, the said mark sheet purported to have been drawn up after re-valuation, however, indicated the same date of seal as that of the original mark sheet, the plea thus, by the accused, *ie*, student and his father about their not knowing the said mark sheet to be forged was found not sustainable.[84] Appellant accused knowing that the marks list was a forged document was not a genuine document, made use of marks list, to get admission for MBBS course. Held, the appellant committed the offence punishable under s 471, IPC .[85] A person, who, in a civil suit, used, as genuine, a document (purporting to be a receipt in which he fraudulently altered the dates and added witnesses), knowing it to be a forged document, commits an offence under s 471, and not under s 196, IPC .[86] If a person, as the guardian of his minor daughter, causes a forged Will to come into existence intending that such Will may cause the judge, before whom the suit is filed, to form an opinion that the Will is a genuine one and therefore his minor daughter is entitled to the property, he is guilty of an offence under ss 467 and 471, IPC .[87] A clerk forged entries in his savings bank

pass-book, with a view to enhance his bank balance, and gave the same as security for his service. He was held guilty of the offence under this section.[88] If a person negotiates a *hundi*, knowing it to be a forged document, he is guilty of an offence under s 471, IPC .[89]

Where the accused, after obtaining a prescription from a doctor for one tube of morphia, altered the words, 'one tube' to 'four tubes', presented the prescription to a chemist and obtained from him four tubes of morphia, it was held that the accused used, as genuine, a document which he knew to be forged, and, therefore, his3880 conviction under ss 465 / 471, IPC, was justified.[90] Presentation of a forged deed of divorce for registration and obtaining registration thereof is an offence under this section.[91] However, the mere fact, that the purchaser of a property is in possession of a document, which is shown to be a forgery would be no evidence of the guilt of the purchaser;[92] it would not show that he knew, or he had reason to believe, that it was a forged document in the absence of sufficient material on the record.[93] In the case of *Chait Ram v State of Haryana* ,[94] it was emphasised that the accused must have the requisite guilty knowledge of the forged character of the document at the time when such forged document is presented by him; it is immaterial if, at a subsequent point of time, he comes to know its forged character. The mere fact, that the document was forged, would not conclude the matter unless it is also established that the accused knew, or be had reason to believe, that the document was a forged document.[95] The mere fact, that the suspicions of a person ought to have been aroused by the sight of the document, is *prima facie* evidence that he knew, or he had reason to believe, that the document was a forged document.[96] In order to punish a person under s 471, it is not necessary that the accused himself should have made or created the forged document.[97]

Where the accused placed a forged draft before bank for its encashment, knowing fully well that it was a forged document, he committed offence under s 471, IPC .[98]

16. Jurisdiction

Where a complaint was filed by a partner of a firm alleging that a forged document, *viz*, dissolution deed was filed in the High Court of Calcutta by another partner in a pending proceeding, the metropolitan Magistrate at Calcutta had territorial jurisdiction to take cognizance of the said complaint. The facts that the said document was forged outside Calcutta or that the production of document was not voluntary but in response to the direction of the High Court were immaterial. Further, how far the use of document was voluntary cannot be decided while testing territorial jurisdiction.[99]3881

17. Abetment

When, the endorsements on a certain passport have been made with a view to help the person having his photograph on the passport, to travel to foreign countries, to which he is not entitled to travel, such endorsements are obviously made dishonestly and fraudulently and therefore, the offence under s 471 read with s 109, IPC, must be deemed to have been committed.[1] Where, however, the endorsement on the passports are not satisfactorily proved to be in the handwriting of the accused, nor it has been showed that he had any connection with the passport holders, he cannot be held liable under s 471 read with s 109, IPC .[2]

18. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by the magistrate of the first class.

19. Sanction for Prosecution of Government Servant

Commentary under the headings in s 409 and s 420 *ante*, may be referred to.

20. Anticipatory Bail

The accused was a tenant of a disputed property. The allegations were that he constructed a false document of an agreement to sell the tenanted property. The CBI investigation was pending. The landlady disputed the execution of the alleged agreement to sell, and the expert report showed that her signatures on the photocopy of agreement produced were forged. The accused successfully acquired title to the property, through process of the civil court by using that document. Under these circumstances, the anticipatory bail was declined to the accused, against whom the offence under ss 420 / 467 / 468 / 471 read with 120B, IPC, were alleged in the FIR registered by the CBI.[3]

21. Complaint--When to be filed by Court

According to s 195(1)(b)(ii), CrPC, no court shall take cognizance of an offence punishable under s 471, IPC, when such offence is alleged to have been committed in respect of a document, produced, or given in evidence, in a proceeding in a court except on a complaint, in writing, of that court or of some other court to which that court is subordinate. Similarly, when an offence under s 471, IPC, is alleged to have been committed in respect of a document, produced, or given in evidence, in a proceeding in a court, a complaint by the court is essential.[4]Section 195(1)(b)(ii), CrPC, is not, however, confined to cases in which the offence under s 471, IPC, mentioned in the clause, is committed in respect of the disputed document after it has been so produced, or given in evidence, in a proceeding in a court, meaning thereby that the offence under s 471, IPC, may have been committed in respect of the document in question when it was in the custody of the court. Complaint by the court will be necessary even when the offence under s 471, IPC, may have already been3882 committed in respect of that document outside the court, and later on produced, or given in evidence, in court in a proceeding between the parties,[5] with the result that if there is breach of the provisions of s 195(1)(b)(ii), CrPC, the proceedings are illegal and ought to be quashed.[6] However, the necessity for a complaint by the court would not arise when the offence under s 471, IPC, is alleged to have been committed in respect of a document, not produced, or not given in evidence, in a proceeding in court.[7] If, during the course of proceedings which are subsequently declared *ultra vires* and illegal, an offence under s 471, IPC, is alleged to have been committed, it cannot be said that it was committed in relation to a judicial proceeding.[8] A complaint by the court is, similarly, not necessary when the offence under s 471, IPC, is said to have been committed in respect of the copy of a forged document, produced, or given in evidence in a proceeding in court. By the production of a copy of a forged document in evidence, the forged document itself cannot be said to be given in evidence.[9]

It is well settled that where an accused commits some offences which are separate and distinct from those contained in s 195, s 195 will affect only the offences mentioned therein unless such offences form an integral part so as to amount to offences committed as a part of the same transaction, in which case the other offence also would fall within the ambit of s 195, CrPC . Thus, where the accused had removed the used court-fees stamps and reused some of them in new cases and they were charged for the offences under ss 262, 263, 467, 471, 420, 120B, IPC, however on the facts narrated by the registrar of the High Court in his complaint, no offence under ss 467, 471 and 120B, IPC, was at all revealed, consequently the proceedings against the accused were quashed by the High Court under s 482 as far as offences under ss 467, 471 and 120B, IPC, were concerned, not because they were converted by s 195, CrPC, but because allegations contained in the complaint did not constitute those offences and the High Court further directed that other offences mentioned above did not require a complaint under s 195, CrPC, and would have to be tried, the order of the High Court was legal and fully justified. The fact that some persons aided and abetted the detaching of the used stamps from the old files, re-using them in the other cases does not involve any process of forgery or use of a forged document.[10]

If a complaint is filed only under s 193, IPC, but it contains facts which constitute an offence under s 471, IPC, the omission specifically to refer to s 471, IPC, does not prevent the court, trying the case, from holding that on those facts, an offence under s 471, IPC, has been made out.[11]3883

22. Quashing of Criminal Proceedings

The accused obtained an appointment on the basis of a false certificate. The said certificate was issued by the head master of the school whose signature on the certificate was found genuine and his authorship of the certificate was established. The contents of the certificate were, therefore, not forged, though they may be incorrect. The proceedings under ss 464 and 471, IPC, were quashed.[12] The accused was authorised to send telex messages in the discharge of his duty and accordingly he sent the telex message in his own name using his own powers and not in the name of his superiors, nor in the name of somebody else in the bank. As he was duly authorised or empowered to send such a message, therefore, even from the allegations in the complaint, no offence under ss 463 and 471, IPC, was made out against the accused. The accused was first chargesheeted in a departmental inquiry and was terminated from service within one year of the alleged offence. Everything that was necessary for filing a complaint was available at the end of one year but there was unreasonable delay in filing the complain. The complaint and order of issue of process against the accused was, therefore, quashed.[13] When the execution of power of attorney is in the name of a dead person, the complaint filed by the legal heirs is maintainable and it cannot be quashed on the ground that the complainant was not a person directly affected.[14]

23. Joint Trial

Where a person commits forgery and another abets it and uses the forgery document as genuine, the offences are parts of the same transaction, and both can be tried together.

24. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about the... day of..., at..., fraudulently (or dishonestly) used, as genuine, a document. Ex..., which you knew (or which you had reason to believe), at the time when you used it, to be a forged document, and that you thereby committed an offence, punishable under ss 465 (or 466 or 467) and 471 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

This section does not specify the punishment but declares that the offender 'shall be punished in the same manner as if he had forged such document', *ie*, as forgery of the document to which the offence related. Thus, a charge under this section should not be laid under this section alone, but under this section coupled with s 445 or s 466 or s 467 according to the nature of the document used.[15] The charge should, as far as possible, follow the penalty section which, in the case of an offence under s 471, is3884 s 465, but all the definitions of forgery need not be imported into the charge.[16] Offence under s 471, IPC is an inferior offence of similar nature to the offence punishable under s 467, IPC . Where an accused is charged under s 467, IPC, he can be convicted under s 471, IPC, even though no charge under s 471, IPC has been framed.[17]

In *Empress v Raghunath Das* ,[18] the accused was charged under s 471 for using, as genuine, eleven forged rent receipts. These receipts were put in by him in three sets in three suits, pending against

him, on different occasions. The receipts in each set were put in each suit simultaneously together with a written statement in the particular case. Three charges were framed against him in respect of each set of receipts. He was convicted and sentenced on the said three charges. It was contended, on appeal, that a separate charge should have been made for each one of the documents and that, consequently, the trial should be set aside as being contrary to law, inasmuch as it was really a trial of eleven offences of using forged receipts. It was held that the using charged were merely the putting of each set of documents, in each suit, simultaneously together with the written statement in each case, and as there was nothing to show that any of them was used at any other time, there was no valid ground for questioning the correctness of the conviction.

A person, who fabricates false evidence for the purpose of being used at any stage of a judicial proceeding, commits an offence under s 193 . No useful purpose is served by prosecuting a person, under s 193 or s 196, and also under s 471, in respect of the same document. In such a case, if, at the discretion of the court, a complaint is filed, *inter alia*, under ss 193 and 471 and process is ordered to issue under those sections, the magistrate would be right in discharging the accused under s 471 on the prosecution not pressing the complaint under s 471 .[19]

25. Proof

To secure a conviction under this section, the prosecution must prove that:

(a) the document or electronic record in question was forged document or electronic record (*vide* s 465);
(b) the accused used the said forged document or electronic record as a genuine document or electronic record;
(c) he knew, or he had reason to believe, that it was a forged document or electronic record when he used it; and
(d) he used it fraudulently or dishonestly.

The prosecution must prove, first of all, that the document in question was a forged document, and not merely that it was a false document.[20] It is not sufficient for the prosecution to establish that the disputed document was not genuine document.[21] Consequently, it is necessary for the prosecution to prove that the accused had made3885 the forged document, or that somebody else had made it, with one of the intentions, stated in s 463 .[22]

When an accused person has been booked under s 471, IPC, the prosecution ought to have established that a forged document has been used by him as a genuine one. In the absence of the proof with regard to the forgery, which is attracted by s 467, no conviction under s 471, IPC would be based.[23] To establish an offence under s 471, IPC, the prosecution must adduce cogent and convincing proof that the accused knew, or had reason to believe, that the document, which he used, was a forged document.[24] The prosecution must affirmatively show that the accused either knew, or he had reason to believe, that the document in question was a forged document when he used it.[25] In a case in which the accused was charged for dishonestly using as genuine a *pattah* (lease) which he knew to be forged and in which there was a fraudulent insertion of a certain word (*pahar*), it was held that it was not necessary to prove that he personally inserted the word; it was sufficient if it was inserted with his knowledge.[26]

To constitute an offence under s 471, IPC, the prosecution must prove the following ingredients:

(i) That the document was forged one.
(ii) That the accused person used such document fraudulently or dishonestly.
(iii) That the accused used the document, in question, as a genuine one.

(iv) That the accused knew or had reason to believe that it was a forged document.[27]

26. Acquittal

The accused prepared letters on the letter head of the minister whereupon invitations were written to invite actors for a cultural show but the letters did not the bear signatures of the minister, the conviction of the accused under ss 465 and 471, IPC, was not found proper.[28] In the revision petition, the company being the respondent was represented by a named person who was the assistant secretary of the complainant company before its amalgamation and general manager in the new company. In these circumstances, if that person signed a *vakalatnama* without mentioning his designation and name of the company, he could not be said to have committed offences under ss 467, 471 or 193, IPC .[29] The accused, an assistant manager in a financial corporation was alleged to have provided a loan to a small scale enterpreneur who had made a false claim of purchase of new machinery which was infact old machinery purchased by him. No part of the mortgage deed, however, suggested that the loanee, the small scale enterpreneur, was required to purchase new3886 machinery. Machinery, even, if, an old one was found sufficient to meet the liability of the financial corporation. The inspection report prepared by the accused nowhere mentioned that plant and machinery was new so the inspection report cannot be said to be a false or a forged document. The conviction of the accused was not found proper and so was set aside.[30] Temporary embezzlement by the accused clerk employed in the office of Deputy Superintendent of Police of a paltry sum *viz* Rs 1839 for a period of 21 days was held covered by s 95, IPC . The accused was granted benefit of s 95, IPC, and acquitted of charges under ss 409, 471, 477, IPC .[31]

27. Conviction

Where the appointment on compassionate ground was obtained by producing forged documents/testimonials, the conviction of the accused was found proper.[32] Where the acts, found by the magistrate, for which the accused was committed for trial, to the session court, for which he was tried by the court and for which he defended himself, and which were raised for consideration on appeal to the High Court, are all one and the same, the High Court as a of appeal, can come to the conclusion that the acts constitute the substantive offence under s 471, rather than an attempt of which the accused had formally been charged and convicted, provided the accused is not prejudiced by alteration of the findings.[33] Where the accused used the forged certificates by handing them over to the victims, which led them to believe that they were genuine appointment letter, it was held that a clear case under s 471, IPC, was made out.[34] When, however, the prosecution has failed to prove entrustment of the cheque book to the accused or the forgery of the cheque in question, he cannot be convicted under s 471, IPC .[35]

Where, in respect of serious defaulcation of properties of a co-operative society, entering into conspiracy by the accused to cause defaulcation was one of the charges which failed, the conviction of the chairman of the managing committee of the society under ss 408, 409, 467 and 471, IPC, on the basis of vicarious liability was improper when he was not charged under s 120B and there was no direct evidence convicting the accused-chairman with the acts of commission and omission for which he was convicted.[36]

There was evidence that the appellant junior engineer entered into criminal conspiracy with the co-accused assistant engineer for preparation of false muster roll, and as such false muster rolls were prepared showing names of casual labourers who had not even worked. Accused appellant verified, consigned muster-rolls, gave false certificates. His conviction under ss 120B, 467, 468, 471 and 420, IPC held proper.[37]

The accused forged a document alleged to be a confidential letter issued by the director of education directing payment of salary of others to be paid to the accused. The alleged signatory of the letter in his statement before the court stated that the document did not bear his signature so there was no

need to send the document for3887 expert examination. A number of incriminating documents and seals were also recovered from the possession of the accused. The conviction of the accused under s 471, IPC, was found proper.[38] The accused was proved to have submitted a bill regarding leave travel concession without actually undertaking travelling and therefore was found guilty under s 471, IPC .[39] The cheques issued in the name of the supplier were encashed by accused no 1 by opening the account in the bank in the name of the supplier. The writings on the withdrawal slip and signatures on it tallied with that of accused no 1. The pass book issued by the bank in the name of supplier was seized from accused no 1. The other accused no 2, an account holder of the bank, recommended accused no 1's forged name to the bank. As accused no 1 and accused no 2 worked in the same company, accused no 2 knew accused no 1's correct name. The connection of both accused no 1 and accused no 2 under ss 419, 468 and 471, IPC, was found proper.[40] If the accused persons knowing the mark list to be forged, use it for the purpose of obtaining a seat in the medical college, their conviction under s 471 was held proper.[41]

28. Relative Scope of Conviction under Sections 468 and 471

A charge under s 471, IPC, is wholly dependent upon the charge under s 468, IPC, and, therefore, if a charge of forgery under s 468 fails, the one of use of forged document as genuine cannot survive.[42] If an accused is charged and convicted under s 468 by the trial court, the conviction cannot be altered to one under s 471 because an offence under s 471 is entirely different from that under s 468 and the accused, not having had notice thereof, would be prejudiced.[43] However, where the allegations against the accused are of such a nature that it is doubtful whether he has committed the offence under s 468 or whether it is doubtful whether he has committed the offence under s 468 or whether he is also guilty of the offence under s 471, he can be convicted of the cognate offence under s 471, though he is only charged for the offence under s 468, IPC .[44] Where, however, a document (a receipt), alleged to be produced at an octroi *naka*, is proved to be a forgery but there is no evidence that the accused actually forged it, or that he even knew, when he presented it, that it was forged and it was shown as to how the forged document, if it did, came into his hands, and further the accused contends that the case was false and malicious, there is a large margin of doubt to the benefit of which the accused is entitled. The conviction under s 468 or s 471 cannot, therefore, be allowed to stand.[45]

29. Relative Scope of Conviction under Sections 467 And 471

Where the accused was charged for an offence under s 467, IPC and it appeared in evidence that he committed an offence under s 471, IPC, for which he might have been charged under s 221(1), CrPC, he may be convicted of the offence under s 471 3888 though he is not charged with it.[46] Where, however, the charge has been framed under s 467, and not under s 471, IPC, and the charge does not even mention that the accused used the sale deed in question as genuine, they cannot be convicted under s 471, IPC .[47] Where the charge was for abetment of forgery, an offence which was complete when the document was written and signed, and the conviction was for the subsequent act of user which was a distinct and separate offence, the accused was held entitled to be separately charge.[48] If the certificates, which the accused is found to have forged to seek admission in a college, cannot be said as 'valuable security' within the meaning of s 3, he cannot be convicted under s 471, read with s 467, IPC, though he can be convicted under s 471, read with s 465, IPC .[49]

A person, who has been convicted under ss 467 / 109, IPC, cannot be further convicted of the independent offence under s 471 .[50]

30. Relative Scope of Conviction under Sections 471 and 474

Convictions under ss 471 and 474, IPC, cannot also stand together; they must be charged in the alternative and there cannot be convictions for both.[51]

31. Relative Scope of Conviction under Sections 167 and 467 / 471

The offence under s 167, of a public servant, framing an incorrect document with intent to cause injury, is included in the offence, under s 471, of using, as genuine, a document. A person, therefore, cannot be convicted both under the provision of s 167 and ss 467 / 471, IPC .[52]

32. Sentence

No specific sentence is presented under this section and accused found guilty under s 471, IPC, is liable to be punished with sentence under ss 465, 469, as the case may be. If a document is used fraudulently or dishonestly and if it purports to be a valuable security, the punishment provided by s 467, and not that provided by s 465, would be that to which the accused would be liable under s 471, IPC .[53] A person, who dishonestly uses as genuine a forged document, can be punished under s 471 with the punishment provided by s 465 .[54] Under ss 467 and 471, fine is compulsory and when there is defaulcation of particular amount, the fine should be a good multiple of the amount, unless there is an independent recovery or reimbursement.[55]3889

33. Sentence (Severe)

The offence under s 471, IPC is a grave one which requires to be repressed with the severest punishment allowed by law.[56] However, the extenuating circumstances can legitimately be taken into account while considering the quantum of sentence to be imposed.[57] Protracted criminal litigation is sometimes a factor which calls for reduction of punishment, but the same cannot be laid down as a universal proposition.[58] Where one accused was convicted under s 471 and sentenced to four years' rigorous imprisonment and another accused was convicted for abetment of the same offence and another accused was convicted for abetment of the same offence and sentenced to 2½ years rigorous imprisonment, die sentences were considered to be not at all severe.[59] In *Satya Narain Mishra v State* ,[60] the accused, on the basis of information supplied by him, obtained a certain appointment. Certificates, in support of the information produced later, proved to be forged, and not genuine ones. The accused was found guilty of an offence under s 471 and sentenced to six years rigorous imprisonment and a fine of Rs 2,000. In view of the facts and circumstances of the case, the sentence was not considered severe. In *Madhav Hayawadaur Hoskot v State of Maharashtra* ,[61] a sentence of three years was considered just and proper when a reader, holding MSC and Phd degrees was convicted for attempting to issue counterfeit University degrees.

34. Sentence (Lenient)

Where, the accused had already been punished for the major offence under s 406, his sentence for an offence under s 471, IPC was reduced from eighteen months' rigorous imprisonment to six months' imprisonment.[62] In *Boni Hampana Gowda v Emperor* ,[63] the court, while confirming a conviction under s 471 as the accused was found technically guilty of the offence, took, into consideration, the fact that the accused did not make effective use of the forged documents and allowed an *ex parte* decree to be passed against him, and, therefore, a sentence of three years' rigorous imprisonment was considered unduly sever, and it was reduced to the period already undergone (one month). In *Sajan Lall Biswas v Emperor* ,[64] a person, acting under the influence of this master, filed, before the police, a forged document, basing a claim to possession thereon, to influence the police, but withdrew it as soon as the case came before the magistrate. A sentence of six months rigorous imprisonment for an offence under s 471, IPC, was considered just and proper.

The forged Will was prepared and executed in favour of the accused, but the accused neither took any benefit on the basis of said forged Will not the said forged3890 Will was acted upon in any civil proceedings. The accused faced trial for more than 26 years and also remained in jail for a period of more than 7 months.

On these facts the sentence of 3 years rigorous imprisonment awarded to the accused was reduced to the period of imprisonment already undergone by him.[65] The accused, an officiating manager in nationalised bank was having wife and two children, the offence was committed by him 10 years back.

He was dismissed from service. He also deponent entire amount involved in the case. The sentence was therefore reduced from 2 years rigorous imprisonment to one year rigorous imprisonment.[66]

The accused used tampered marksheet as a true certificate and got admission in polytechnic course. The past and present record of the accused student was good and he had already lost his career and was now married so the sentence of imprisonment of the accused was reduced to the period already undergone by him.[67] The accused submitted a bill regarding leave travel concession without actually undertaking the traveling. The offence was committed about 10 years before and accused had undergone 3 months rigorous imprisonment. Under these circumstances the sentence of imprisonment was reduced to 6 months rigorous imprisonment to the period already under gone by the accused, while maintaining the sentence of fine Rs 500/- in default of payment of which, accused was to undergo rigorous imprisonment for 2 months.[68]

If a document is used fraudulently or dishonestly and if it purports to be a valuable security, the punishment provided by s 467, and not that provided by s 465, would be that to which the accused would be liable under s 471 .[69] A person, who dishonestly uses as genuine a forged document, can be punished under s 471 with the punishment provided by s 465 .[70] Under ss 467 and 471, IPC, fine is compulsory and when there is defalcation of particular amount, the fine should be a good multiple of the amount unless there is an independent recovery or reimbursement.[71]

35. Alteration of Conviction from Section 471 read with Section 467 to One under Section 471 read with Section 465

Where the certificates, which the accused was found to have forged, to get admission into college could not be described as valuable security, conviction of accused under s 471 read with s 467 was altered to one under s 471 read with s 465, IPC .[72]

3 Substituted by the Information Technology Act, 2000 (21 of 2000), s 91 and First Sch. for the words 'document' (wef 17-10-2000).

5 *M Fazal Iliahi v Mohan Lal* 24 Cr LJ 383, p 384 .

6 *Empress v Umrao Lal* (1900) ILR 23 All 84, p 85, 20 AWN 205 ; for **contrary view**, refer to *Emperor v Badri Prasad* (1912) ILR 35 All 63, 10 ALJ 473, wherein the attention of the court was not drawn to *Umrao Lal*'s case.

7 *Pirbhu Dial v Emperor* 14 Cr LJ 183 ; *Mokand Lal v Emperor* 26 PR (Cr) 1901 .

8 Re *TR Sriramalu Naidu* 30 Cr LJ 983, AIR 1929 Mad 540 ; Re *Madu Chinnagi Raddi* 17 Cr LJ 73, AIR 1971 Mad 147, p 149 (forgery of a promissory note and using it as genuine) .

9 Re *Authoor Valappil Syed Ahmad Musaltyar* 15 Cr LJ 568, AIR 1915 Mad 144 (2) .

10 *Gajanan Sakharam v Emperor* 25 Cr LJ 473, AIR 1924 Nag 162 .

11 *Digambar v Emperor* 26 Cr LJ 1275, AIR 1925 Nag 440 .

12 *Digambar v Emperor* 26 Cr LJ 1387, AIR 1925 Nag 137 .

13 *Empress v Umrao Lal* . (1900) ILR 23 All 84, p 85, 23 AWN 205 .

14 Re *SV Rama Rao*1967 Cr LJ 559, AIR 1967 Mys 59, p 64 .

15 *State of HP v Sukh Ram* 2012 Cr LJ 464, p 468 (P&H).

16 *Madan Mohan Sharma v Renuka Sharma* 1981 BLJR 509, p 517, 1981 Cr LJ 1301 ; *Basir-ul-Haq v State of West Bengal* AIR 1951 SC 293, 1953 Cr LJ 1232 .

17 *State of Karnataka v GM Sumanabai* 2004 Cr LJ 4112 (Kant) .

18 *Empress v Abbas Ali* (1897) ILR 25 Cal 512, p 520, 1 CWN 225 (FB) ; *State of Bihar v Kailash Prasad Sinha* (1961) 2 Cr LJ 677, AIR 1961 Pat 451, p 456 ; *Ramautar Mistri v Rajindra Singh* (1961) 2 Cr LJ 139, p 142 (Pat) .

19 *Kajal Dey v State of Tripura* 2014 Cr LJ 3367 (3382) (Tri) (DB).

20 *Sudarshan Behara v Emperor* 27 Cr LJ 1263, AIR 1927 Pat 87, p 88 .

21 *Empress v Jaha Bux* (1867) 8 WR (Cr) 81, p 82 ; *Ram Prosad Maity v Emperor* 12 CWN 1113, 8 Cr LJ 418 .

22 *Empress v Abbas Ali* (1897) ILR 25 Cal 512, p 521, 1 CWN 255 (FB) .

23 *Lolit Mohan v Empress* (1894) ILR 22 Cal 313, p 321, 322 ; *Empress v Vithal Namin Joshi* (1880) ILR 13 Bom 515 ; *Emperor v Balkrishna Vaman Kulkarni* 11 Cr LJ 518, p 521 ; *Deputy Legal Remembrancer v Rash Behary Das* 7 Cr LJ 378 ; *Empress v Sabapathi* (1888) ILR 11 Mad 411, 1 Weir 549 .

24 *Empress v Jiwanand* (1882) ILR 5 All 221, (1882) AWN 236 .

25 *Empress v Girdhari La* (1886) ILR 8 All 653, (1886) AWN 264 .

26 *Empress v Mazahar Hussain* (1882) ILR 5 All 553, 1883 AWN 133 .

27 *Halsbury's Laws of England*, third edn, vol 10, page 871, fn (t), **citing***R v Hill* (1838) 2 Mood CC 30 CCR . The same principle is enunciated in *Russell on Crime*, 1964, twelfth edn, vol 2, at pp 1241, 1242; *Chunku v Emperor* 32 Cr LJ 559, AIR 1931 All 258 .

28 *The Empress v Dbunum Kazee* (1882) ILR 9 Cal 53, p 62 ; *Daya Ram v Empress* 16 PR 1885 (Cr) .

29 Re *Sivananda Mudali* 27 Cr LJ 994, AIR 1926 Mad 1072, p 1078 .

30 *Motty Philipose v State of Kerala* 2006 Cr LJ 2271 (Ker)(DB).

31 *Sudasan Behara v Emperor* 27 Cr LJ 1263, AIR 1927 Pat 87, p 88 ; *Jan Mohammad v Empress* (1884) ILR 10 Cal 584 .

32 *Emperor v Mohit Kumar Mukherjee* 27 Cr LJ 177, AIR 1926 Cal 89, p 92 .

33 Per Benson J, in *Kotamraju Venkatayudu v Emperor* (1905) ILR 28 Mad 90, p 113, 1 Weir 538 (FB) .

34 *Emperor v Mohit Kumar Mukherjee* AIR 1926 Cal 89, 27 Cr LJ 177 ; *Empress v Abbas Ali* (1897) ILR 25 Cal 512, p 522, 1 CWN 255 (FB), **overruling***Empress v Haradhan* (1892) ILR 19 Cal 380 .

35 *Astmuddi v Emperor* 11 CWN 838, 5 Cr LJ 351, p 352 ; *Sajan Lall Biswas v Emperor* 22 Cr LJ 274, AIR 1920 Pat 800, p 801 ; *Monika Asari v Emperor* 16 CR LJ 246 ; *Krishnaroa Raojiraoi v State of Madhya Pradesh* 1953 Cr LJ 979, AIR 1953 Nag 165, p 166 ; *Empress v Sheo Dayal* (1883) ILR 7 All 459 ; *Kailash Chadra Das v Crown* (1902) 6 CWN 382 ; *RR Diwakar v B Guttal* 1975 Cr LJ 90, 1974 Mad LJ (Cr) 73 .

36 *Daniel Hailey Walcott v State* AIR 1968 Mad 349, 1968 Cr LJ 1282 .

37 1 CWN 255 (FB); *Emperor v Chanan Singh* AIR 1929 Lah 152, 30 Cr LJ 900 ; *Kotamraju Venkatrayudu v Emperor* 1 Weir 538 (FB) ; *Empress v Soshi Bhusan* 1893 AWN 96 ; *Satya Narain Mishra v State* (1965) 2 Cr LJ 394, AIR 1965 Pat 364 ; *Empress v Khandi Singh* (1898) ILR 22 Bom 768 .

38 *Nga Ba Sein v Emperor* 25 Cr LJ 1378, AIR 1924 Rang 331 ; *Empress v Sabapathi* (1888) ILR 11 Mad 411, 1 Weir 549 .

39 *Emperor v Mohit Kumar Mukherjee* 27 Cr LJ 177, AIR 1926 Cal 89, p 92 ; *Empress v Mohammad Saeed Khan* (1898) ILR 21 All 113, 1898 AWN 197 ; *Chandulal v Emperor* AIR 1940 All 551 ; *Empress v Sabapathi* (1888) ILR 11 Mad 411, 1 Weir 549 (in this decision, the cases to the **contrary,** namely *Empress of India v Fateh* (1882) ILR 5 All 217 ; *Empress of India v Jiwanand* (1882) ILR 5 All 222, 1882 AWN 236 (cases of false document made to hide prior guilt, were not followed).

40 *Nath Bhagat v Emperor* 41 Cr LJ 427, AIR 1940 Pat 486 ; *Emperor v Abdul Ghaffur* AIR 1921 All 356, (1921) ILR 43 All 225 .

41 *Kalidin v Emperor* 20 Cr LJ 573 ; *Ram Prosad Maity v Emperor* 8 Cr LJ 418 ; *Empress of India v Fateh* (1882) ILR 5 All 217, (1882) 2 AWN 27 ; *Empress v Syed Hussain* (1885) ILR 7 All 403, 5 AWN 84 .

42 *Assistant Sessions Judge, North Arcot v Ramammal* 13 Cr LJ 35 .

43 *Girasia Lakhubha Pathubha v State of Gujarat* (1966) 7 Guj LR 700, p 701, 1966 Cr LJ 727 .

44 *Shiva Prasad v State* 1971 Cr LJ 1574, p 1576 ; Re *Sithava Naik* 16 Cr LJ 703 (Mad); *Ramautar Mistri v Rajindra Singh* 1961 BLJR 369, (1961) 2 Cr LJ 139 ; *Jabbar Ali v Emperor* AIR 1929 Cal 203, p 204, 30 Cr LJ 656 ; Re *Ramappo Hebbara* 1 Weir 550.

45 *Emperor v Bansi Sheikh* AIR 1924 Cal 718, 26 Cr LJ 24 ; *Ibrahim v Emperor* 29 Cr LJ 849 (Cal) ; *Ramautar Mistri v Rajindra Singh* (1961) 2 Cr LJ 139, 142 (Pat) .

46 *Shivaji Narayan Shvde v State of Maharashtra* 73 Bom LR 215, p 221 ; *Jabbar Ali v Emperor* AIR 1929 Cal 203, p 204, 30 Cr LJ 656 (filing of a document for the purpose of a suit in advance of a trial amounts to using the document though the document is not given in evidence); *Emperor v Bansi Sheikh* AIR 1924 Cal 718, 26 Cr LJ 24 .

47 *Superintendent and Remembrancer of Legal Affairs v Daulatram Mudi* 33 Cr LJ 685, AIR 1932 Cal 390, p 393 ; *Ramautar Mistri v Rajindra Singh* (1961) 2 Cr LJ 139, p 142 (Pat) ; *Emperor v Sagarmal Agarwalla* AIR 1924 Cal 960, 25 Cr LJ 1217 .

48 Per Page J, in *Emperor v Mohit Kumar Mukerjee* 27 Cr LJ 17, AIR 1926 Cal 89, p 90 .

49 *Ramautar Mistri v Rajindra Singh* (1961) 2 Cr LJ 139, p 142 (Pat) .

50 *Ibid*; *Idu Jolaha v Emperor* AIR 1918 Pat 274, 19 Cr LJ 709 ; *Baju Jha v Emperor* AIR 1929 Pat 60, 30 Cr LJ 236 ; *Mobarak Ali v Emperor* 13 Cr LJ 449 (DB), 17 CWN 94 .

51 *Idu Jolaha v Emperor* AIR 1918 Pat 274, 19 Cr LJ 709 .

52 *Baju Jha v Emperor* AIR 1929 Pat 60, 30 Cr LJ 236 .

53 *Mobarak Ali v Emperor* 13 Cr LJ 449 (DB), 17 CWN 94 .

54 *Mobark Ali v Emperor* 13 Cr LJ 449, p 450 (Cal) (DB) .

55 *Rati Jha v Emperor* 13 Cr LJ 201 ; *Mobark Ali v Emperor* 13 Cr LJ 449 ; *Krishna Proshad Mandal v Rabindra Nath Dinda* 13 Cr LJ 6 ; *Asrabuddin Sarkar v Kati Dayal Mullick* 16 Cr LJ 309, p 310 .

56 *Krishna Proshad Mandal v Rabindra Nath Dinda* 13 Cr LJ 6, p 7 (Cal) (DB) ; *Kedar Nath v Emperor* AIR 1935 All 521, 36 Cr LJ 1199 (in this case, *Ambika Prasad Singh v Emperor* 8 Cr LJ 398 (Cal) (DB), was **referred to,** but the facts in the two cases were considered to be not exactly similar), in which the accused-defendant, in suit for arrears of rent, placed certain rent-receipts before the plaintiff for admission or denial and, on the denial by him (*i.e.*, the plaintiff), did not put in appearance and made no attempt to prove the rent-receipt, the accused was held to have used the forged documents because if the plaintiff had admitted them on deception, the accused would have achieved his object.

57 *Rati Jha v Emperor* 13 Cr LJ 201, p 202 (Cal) (DB), **explaining***Ambika Prasad Singh v Emperor* 8 Cr LJ 398 (Cal) (DB).

58 Re *Muthiah Chetty* 2 Mad LJ 381; *Asimuddi v Emperor* 5 Cr LJ 351 .

59 *Ahdul Sattur Abdul Aziz v King* 39 Cr LJ 592, AIR 1938 Rang 194, p 196 ; *Ma Ala Lan v Ma On Nu* 26 Cr LJ 509, AIR 1925 Rang 191 ; *N Damodaran Nair v State* AIR 1960 Ker 29, 1960 Cr LJ 75 ; *Emperor v Mohit Kumar Mukerjee* 27 Cr LJ 177, AIR 1926 Cal 89 .

60 Re *Sithava Naik* 16 Cr LJ 703.

61 *Chela Mahto v Emperor* AIR 1924 Pat 128, p 131, 24 Cr LJ 790 ; *Kewal Ram v Emperor* AIR 1935 Pat 515, p 520, 36 Cr LJ 1354 .

62 Re *TR Sriramalu Naidu* 30 Cr LJ 983, AIR 1929 Mad 450 .

63 *Ali Ahmed v Emperor* 34 Cr LJ 39(2), AIR 1932 Cal 545, p 546 ; *Boni Hampana Gowd v Emperor* 37 Cr LJ 421, AIR 1936 Mad 280 (*vakil* preparing written statement and producing it along with forged receipts); *Lain Ojha v Empress* 3 Cal WN 653 ; *Emperor v Mohit Kumar Mukerjee* AIR 1926 Cal 89, p 90, 27 Cr LJ 177 .

64 *Harbans Singh Ghai v BD Khurana* 1975 CLR 274 ; *Rati Jha v Emperor* 16 CWN 623 .

65 *Emperor v Tarak Nath Baidya* AIR 1935 Cal 687, p 688, 37 Cr LJ 30 .

66 *Kedar Nath v Emperor* 37 Cr LJ 46, AIR 1935 All 940, p 941, 942 .

67 *Digambar Chkravarti v Ram Tarun Mitter* 18 Cr LJ 839, **distinguishing** Re *Muthiah Chetty*(1913) ILR 36 Mad 392, 22 MLJ 381, where the production was involuntary.

68 *Ishar Das v Emperor* AIR 1925 Lah 333, 26 Cr LJ 1171(1), **distinguishingAssistant Session Judge, North Arcot v Ramammal** 13 CR LJ 35, wherein the person had a forged document, in his possession, which he did not intend to use, but which the court forced him to produce.

69 27 Cr LJ 177, AIR 1926 Cal 89, p 90 .

70 *Assistant Session Judge, North Arcot v Ramammal* 13 CR LJ 35 ; Re *Muthiah Chetty* 13 Cr LJ 46 (Madras view followed in *Mia Ain Lon v Ma On Nu* AIR 1925 Rang 191), holding the **contrary view**.

71 *S Dutt v State of Uttar Pradesh* AIR 1966 SC 523, p 528, 1966 Cr LJ 459 .

72 *North Arcot v Ramammal* 13 Cr LJ 35 .

73 *Ma Ain Lon v Ma On Lu* AIR 1925 Rang 191 .

74 *Jagannath Prasad v State of Uttar Pradesh* AIR 1963 SC 416, p 419, (1936) 1 Cr LJ 330 .

75 *Madhav Bhagwant v Emperor* 26 Cr LJ 1093, AIR 1925 Nag 345, p 348 .

76 *Budhu Ram v State of Rajasthan* 1963 SCD 186, (1963) 2 Cr LJ 698 .

77 *Jai Narain Singh v State* 1956 Cr LJ 1091, AIR 1956 Pat 354, p 357 **distinguishing***Ambika Prasad Singh v Emperor* 8 Cr LJ 398 (Cal) (DB), where it was held that mere filing of a copy of a forged document may not amount to user of the forged document; *Emperor v Mulai Singh* 3 Cr LJ 255 (user of copies of forged *khasras*); *Empress v Nujum Ali* 6 WR (Cr) 41 (**referred** to in *Krishna Govinda Pal v Emperor* AIR 1917 Cal 676, in which the accused did not use the copy of a forged document knowing it to be forged); *Hayat Khan v Emperor* 33 Cr LJ 452, AIR 1932 Sind 90 ; *Girdhari Lal v Emperor* 26 Cr LJ 929, AIR 1925 Oudh 413 ; Re *Gopalakrishna Heggade* 11 Cr LJ 401 (Madras) (a very short judgment without discussion); *Emperor v Raja Mustafa Ali Khan* 2 Cr LJ 653, where the plaintiff filed a certified copy of a document, alleged to be a forgery, calling upon the defendant to produce the original and the defendant neither appeared to defend the suit nor produced the original.

78 *Krishna Govinda Pal v Emperor* 17 Cr LJ 130 (Cal), **citing***Empress v Nujum Ali* 6 WR (Cr) 41 ; *Emperor v Mulai Singh* 3 Cr LJ 255 .

79 *Empress v Nujum Ali* 6 WR (Cr) 41 ; *Emperor v Mulai Singh* 3 Cr LJ 255 ; *Lala Ojha v Empress* 3 CWN 653 ; *Empress v Kherode Chunder Mozumdar* (1880) ILR 5 Cal 717 .

80 *Mathura Prasad v Emperor* 27 Cr LJ 402, AIR 1926 Oudh 255, p 256 .

81 *State of Karnataka v GM Sumanabai* 2004 Cr LJ 4112 (Kant) .

82 *Ramaswamy Chetty v Maung Shiwe Bon* 11 Cr LJ 749 (1) (Rang); *Empress v Bholay Pramanick* (1872) 17 WR (Cr) 32 ; *Kachrulala v PH Mawle* AIR 1952 Hyd 7 .

83 *Fulchi Mandal v State of Bihar* 1971 Cr LJ 1799, p 1801, 1971 BLJR 596 .

84 *AS Krishnan v State of Kerala* 2004 Cr LJ 2833 (SC) .

85 *Mottty Philipose v State of Kerala* 2006 Cr LJ 2271, p 2277 (Ker) (DB), 2006 (1) KLT 732 .

86 *Empress v Kherode Chunder Mozumdar* (1880) ILR 5 Cal 717, p 718, 6 CLR 118 ; *Public Prosecutor v Ramarazu Venkatappayya* 16 Cr LJ 701 (2).

87 Re *VVL Narasimhamurthy*1955 Cr LJ 716, ILR 1955 Mad 237, pp 238, 239.

88 Re *HB Shamasundariah*(1968) 1 Mys LJ 294.

89 *Arum Mal v Emperor* 17 CR LJ 474 .

90 *CJ Robinson v Emperor* 22 Cr LJ 681, p 682 (Lah) ; *Empress v Raghoo Barrick* (1869) 11 WR (Cr) 44 ; *Ratanchand Radhkisondas v State* AIR 1960 Bom 146, 1960 Cr LJ 461 ; Re *Mahalingayya Muddayya Pujari*AIR 1959 Mys 185, 1959 Cr LJ 881 ; *Mahendra Singh v State of Rajasthan* AIR 1971 SC 2593, 1972 Cr LJ 34 ; *Mohan Lal Anang v State (Delhi Administration)* 1975 Cr LR 253, p 254 (SC) .

91 *Empress v Azimooddeen* 11 WR (Cr) 15 ; *Empress v Sabapati* (1888) ILR 11 Mad 411, 1 Weir 549 ; *Lolit Mohan Sarkar v Empress* (1894) ILR 22 Cal 313 (altering *challans* for payment of revenue to make it appear that much larger amount had been paid in than was the fact).

92 *Kachrulal v PH Mawla* AIR 1952 Hyd 7 ; *Krishnan Kesavan v State of Kerala* 1957 Cr LJ 755, AIR 1957 Ker 78, p 79 .

93 Re *Ramaswamy Chetty* 50 Cr LJ 581, AIR 1949 Mad 434, p 435 .

94 *Chait Ram v State of Haryana* AIR 1979 SC 1890, p 1895 ; *Karimdad v Emperor* 14 Cr LJ 667 .

95 *Madhavlal Manishanker Trivedi v State of Madhya Pradesh* AIR 1960 MP 269, 1960 Cr LJ 1217 (2) ; *Abdul Karim Madar Sahab v State of Mysore* AIR 1979 SC 1506, p 1507 .

96 Re *Ranchhoddas*(1896) ILR 22 Bom 317; *Abdul Rahim Khan v Emperor* AIR 1940 Nag 360, p 362, 41 Cr LJ 753 ; *Gajar Chinna Hanumiha v State of Hyderabad* 53 Cr LJ 152, AIR 1952 Hyd 6 .

97 *AM Chakraborty v Ved Vrant (Dr)* (1986) 2 Crimes 49 (Del) .

98 *Ram Kesh Patel v State of MP* 2013 (128) AIC 388 (MP) .

99 *Shew Kishan Agarwalla v State* 2003 Cr LJ 1866 (Cal) .

1 *Mahendra Singh v State of Rajasthan* AIR 1971 SC 2593, 1972 Cr LJ 34 (SC) .

2 *Ibid*. See commentary under s 107, vol 1.

3 *Jagdish Prasad Sharma v CBI* 1996 Cr LJ 946 (Del) .

4 *Asrabuddin Sarcar v Kali Doyal Mullick* 16 CR LJ 309 (2).

5 *Hayat Khan v Emperor* AIR 1932 Sind 90, p 91, 33 Cr LJ 452 ; *Nalini Kanta Laha v Anukul Chandra Laha* 18 Cr LJ 522 (Cal) ; *Kanhaiya Lal v Bhagwan Das* AIR 1926 All 30, 26 Cr LJ 1485 ; Re *K Parameshwara Nambudri* 16 Cr LJ 721 (Mad); *State of Gujarat v Vora Saifuddin Akharali* AIR 1969 Guj 195 ; *Noor Mohammed v Kaikhosru* 4 Bom LR 468 ; *Abdul Gani v Emperor* 16 Cr LJ 617 (Cal) .

6 *Kanhaiya Lal v Bhagwan Das* AIR 1926 All 30, 26 Cr LJ 1485 ; *Bhawani Das v Emperor* 2 ALJ 747, 1905 AWN 254 .

7 *Superintendent and Rememberancer of Legal Affairs v Bishwambhar Brahman* AIR 1929 Cal 633, 31 Cr LJ 125 .

8 *Sumat Prasad v Emperor* AIR 1942 All 11, 43 Cr LJ 319 .

9 *Budhu Ram v State of Rajasthan* (1963) 2 Cr LJ 698, 1963 SCD 183 .

10 *State of Uttar Pradesh v Suresh Chandra Srivastava* AIR 1984 SC 1108 .

11 *Boni Hampana Gowd v Emperor* 37 Cr LJ 421, AIR 1936 Mad 280 . For further commentary, see under same heading in s 465 and s 467 *ante*.

12 *Premlata v State of Rajasthan* 1998 Cr LJ 1430 .

13 *CO Verghese v MK Singhi* 1997 Cr LJ 3282 (Bom) .

14 *Sailendra Pradhan v Vipparla Jyoti* 2006 Cr LJ 1483 (Ori) . For further commentary, see under the same heading in s 468, *ante*.

15 *Empress v Issan Mudle* (1865) 3 WR (Cr L) 8 ; *Reg v Gangaram Malji* (1869) 6 BHC (Cr C) 43 .

16 *Empress v Dhurrani Dutt Rai* (1867) 8 WR (Cr L) 7 .

17 *Ram Kesh Patel v State of MP* 2013 (128) AIC 388 (391) (MP) .

18 *Empress v Raghunath Das* (1893) ILR 20 Cal 413 .

19 *Lakhmichand Ghandamal v Emperor* AIR 1947 Sind 49 .

20 *Krishna Prosad Mandal v Ravindra Nath Dinda* 13 Cr LJ 6 ; Re *Bhagavatty Perumal Pillay* 13 Cr LJ 862 (Mad); *Moni Lal Mittar v Emperor* 72 Cr LJ 46, p 49 ; *Mahendra Singh v State of Rajasthan* AIR 1971 SC 2593, 1972 Cr LJ 34 (in the absence of such evidence, accused must be acquitted).

21 *Radhika Prasad Singh Deo v Emperor* 38 Cr LJ 235, 236 (Pat) .

22 *Krishna Prosad Mandal v Ravindra Nath Dinda* 13 Cr LJ 6 ; *Arjun Singh v Hazora Singh* AIR 1979 SC 1236 ; *Dasrathlal Chandulal Joshi v State of Gujarat* AIR 1979 SC 1342 .

23 *Lt Commr, Bombay v Gwalior Rayon Silk Manufacturing Co Ltd* 1992 SCC (Cri) 1786 ; *Manilal v State of Kerala* 1998 Cr LJ 3785 (Ker) .

24 *Chatt Ram v State of Haryana* 1980 SCC (Cr) 243, p 245 ; *Arjan Singh v Hazara Singh* 1980 SCC (Cr) 309, AIR 1979 SC 1236 .

25 *Radhika Prasad Singh Deo v Emperor* 38 Cr LJ 235, p 236 (Pat) ; *Shambhu Singh v State of Rajasthan* 1977 Cr LR 174, p 176, 177 and 178 (Raj) .

26 *Queen v Hemoruddi Mundul* (1868) 9 WR (Cr) 22 .

27 *Rupa Bania v State of Assam* 2006 Cr LJ 3455 (Gau) .

28 *Tivrial Diwan v State of Maharashtra* 1997 Cr LJ 4070 (SC) .

29 *Mannath Balchandran v Forbes Campbell and Co Ltd, Bombay* 1996 Cr LJ 2131 (Bom) .

30 *YK Gupta v State of Uttar Pradesh* 2001 Cr LJ 339 (All) .

31 *NK Illiyas v State of Kerala* AIR 2012 SC 3790, 2012 AIR SCW 2496, 2012 Cr LJ 2418 (SC) .

32 *Rupa Bania v State of Assam* 2006 Cr LJ 3455 (Gau) .

33 *Lain Ojha v Empress* (1899) ILR 26 Cal 863, 3 CWN 653 .

34 *State of Uttar Pradesh v Ram Dhani Pandey* (1980) 17 All Cr Cas 296, p 299 .

35 *Abdul Karim Madan Sahab v State of Mysore* 1980 SCC (Cr) 140, p 141, (1979) 4 SCC 595 .

36 *Jethsur Surangbhai v State of Gujarat* AIR 1984 SC 151, 1984 Cr LJ 16 .

37 *Kuldeep Sharma v State of HP* 2011 Cr LJ 2678 (SC), AIR 2011 SC 1895, 2011 (4) Scale 256 .

38 *Jata Shanker Jha v State of Rajasthan* 2000 Cr LJ 2108 (Raj) .

39 *Manjur Faiju Inamdar v State of Maharashtra* AIR 1993 SC 2322, 1993 Cr LJ 2832 .

40 *Vadivelu v State* 1999 Cr LJ 369 (Mad) .

41 *AS Krishnan v State of Kerala* 1998 Cr LJ 207 (Ker) (DB) .

42 *Balram Singh v State* 1980 Rajdhani LR 324, p 328 .

43 *Akbar Hussain v Emperor* 26 Cr LJ 1358, AIR 1925 Nag 294 ; *Yakub Ali v Lethu Thakur* (1903) ILR 30 Cal 268 .

44 *Ram Charan v State* 1963 Raj LW 416 ; *Jagdeo Parshad v Emperor* 21 Cr LJ 410 (All) .

45 *Akbar Hussain v Emperor* 26 Cr LJ 1358, AIR 1925 Nag 294, p 295 .

46 *Jagdeo Parshad v Emperor* 18 ALJ 442, 21 Cr LJ 410, p 412 .

47 *Swaminath v State* 1980 All Cr Cas 50, p 52 .

48 *Harun Rasllid v Emperor* 27 Cr LJ 606, AIR 1926 Cal 581, p 582 .

49 *Bhausaheb Kalu Patil v State of Maharashtra* 1980 Cr LJ 1312 (SC), AIR 1981 SC 80 .

50 *Ismail Panju v Emperor* 26 Cr LJ 1387, AIR 1926 Nag 137, **following** the principle enunciated in *Badri Prasad v Emperor* (1913) ILR 35 All 63 ; *Empress v Umrae Lal* (1900) ILR 23 All 84 ; *Mokand Lal v Emperor of India* 26 PR 1901 (Cr) .

51 *Empress v Nazur Ali* 6 NWPH (Cr) 39 ; *Mobarak Ali v Emperor* 13 Cr LJ 449 .

52 *Gulzari Lal v Emperor* 28 Cr LJ 90, AIR 1926 Oudh 615 .

53 *Emperor v Sagarmal Agarwalla* 25 Cr LJ 1217, AIR 1924 Cal 960, p 963 ; *Surja Rani v State of Rajasthan* 1974 Raj LW 257, 1974 WLN 277 .

54 *Umrao Khun v Emperor* AIR 1927 Oudh 630, p 632, 29 Cr LJ 631 .

55 Re *Shankar Rao Govindrao Bhonsle*1966 Cr LJ 970 (MP).

56 *Empress v Mahesh Chandra Sircar* (1865) 3 WR (Cr) 13 .

57 *Sher Singh v State of Rajasthan* 1977 Raj Cr C 52, pp 53 and 54 .

58 *Surja Ram v State of Rajasthan* 1974 Cr LJ 1160, p 1162 .

59 *Kasim Alt Molia v Mohammad Tafazzal Hossain* 30 Cr LJ 401, AIR 1929 Cal 204 ; *Jit Bhadur Chetri v State of Arunachal* 1977 Cr LJ 1833 .

60 *Satya Narain Mishra v State* (1965) 2 Cr LJ 394, AIR 1965 Pat 364 ; *State of Madhya Pradesh v KK Shivhare* (1968) 17 Jab LJ 548, 556, 1968 Cr LJ 1373 .

61 *Madhav Hayawadaur Hoskot v State of Maharashtra* AIR 1978 SC 1548, 1978 Cr LJ 1678 .

62 *Chandulal v Emperor* AIR 1940 All 551, 42 Cr LJ 247 .

63 *Boni Hampana Gowda v Emperor* AIR 1936 Mad 280, p 282, 37 Cr LJ 421 ; *Manilal Girdharilal Shah v State of Gujarat* AIR 1979 SC 1343 .

64 *Sajan Lall Biswas v Emperor* 22 Cr LJ 274 (Pat) .

65 *Jagdish v State of Rajasthan* 2002 Cr LJ 2171 (Raj) ; *Joginder Lal v State (Delhi Admn)* 1998 Cr LJ 3175 (Del) ; *Arun Parshuram Sutar v State of Maharashtra* 1999 Cr LJ 438 (Bom) ; *AS Krishnan v State of Kerala* 1998 Cr LJ 207 (Ker) (DB) ;

Surender Kumar Garg v State of Uttar Pradesh 1993 Cr LJ 2085 (SC), 1993 AIR SCW 1716 (SC) .

66 *Joginder Pal Dhiman v Union of India* 2000 Cr LJ 677 (HP) .

67 *Tulsibhai Jivabhai Changani v State of Gujarat* 2001 Cr LJ 741 (SC) .

68 *Manjur Faiju Inamdar v State of Maharashtra* AIR 1993 SC 2322, 1993 Cr LJ 2832 .

69 *Emperor v Sagarmal Agarwalla* 25 Cr LJ 1217, AIR 1924 Cal 960, p 963 ; *Surja Rani v State of Rajasthan* 1974 Raj LW 257, 1974 WLN 277 .

70 *Umrao Khan v Emperor* AIR 1927 Oudh 630, p 632, 29 Cr LJ 631 .

71 Re *Shankar Rao Govindrao Bhonsle*1966 Cr LJ 970 (MP).

72 *Shaikh Noor Mohammad Shaikh Fazal v State of Maharashtra* AIR 1981 SC 297, 1980 Cr LJ 1345 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 472.

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under section 467 .--

Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the3891 same shall be used for the purpose of committing any forgery which would be punishable under section 467 of this Code, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with [73][imprisonment for life], or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

By this section, any person, who makes or counterfeits, or has, in his possession, any seal, plate or other instrument for forging a valuable security, Will, *etc*, specified in s 467, is liable to punishment.

2. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

3. Charge

The following form of the charge may be adopted:

I (*name and officer of the magistrate, etc*) charge you (*name of accused person*) as follows:

That, on or about the... day of..., at..., you made (or counterfeited) a seal (or a plate or an instrument), Ex..., for making an impression, intending that the same shall be used for the purpose of committing a forgery, punishable under s 467 of the Indian Penal Code (or had, in your possession, a seal (*or a plate or an instrument*), Ex..., intending that the same shall be used for the purpose of committing a forgery, punishable under s 467 of the Indian Penal Code), and that you thereby committed an offence, punishable under s 472 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

4. Proof

The prosecution has to prove that:

(a) the accused made, or counterfeited, the seal, plate, *etc.*, or he had the same in his possession knowing the same to be counterfeit;
(b) such seal, plate, *etc.*, was made for making an impression;
(c) he intended to use such seal, plate, *etc.*, for the purpose of committing forgery; and
(d) such forgery was punishable under s 467 .3892

5. Conviction

Where the accused, found in possession of counterfeit seals and forged documents, could give no satisfactory explanation as to how he became possessed of them, it was held that it could be reasonably inferred that he kept them with an intention to defraud and, therefore, his conviction under s 472, or s 473, could be maintained alternatively.[74]

73 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

74 *Empress v Kisto Soonder Deb* (1865) 2 WR (Cr) 5 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 473.

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable otherwise.--

Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this chapter other than section 467, or with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section punishes a possessor, a maker, or a counterfeiter of a seal, plate or an instrument when his intention is to commit a forgery punishable under any section, other than s 467, of ch XVIII of the IPC . If his intention is to commit a forgery punishable under s 467, his offence is punishable under the proceeding s 472 .

2. 'Counterfeits'

Section 28 and commentary under it in vol 1, may be referred to.

3. 'Possession'

Related headings in s 27, vol 1, may be referred to.

4. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

5. Charge

The form of charge under the preceding s 472, IPC may be adopted substituting 'any section of Ch XVIII, other than s 467 of the Indian Penal Code ' for the words ' s 467 of the Indian Penal Code ', wherever they occur, and ' s 473 for s 472, IPC '.3893

6. Proof

The prosecution has to prove that:

(a) the accused made, or counterfeited, the seal, plate, *etc.*, or he had the same in his possession knowing the same to be counterfeit;
(b) such seal, plate, *etc.*, was made for making impression;
(c) he intended to use such seal, plate, *etc*, for the purpose of committing forgery; and
(d) such forgery was punishable under any section of ch XVIII, other than s 467, IPC .

7. Conviction

Where the accused, found in possession of counterfeit seals and forged documents, could give no satisfactory explanation as to how he became possessed of them, it was held that it could be reasonably inferred that he kept them with an intent to defraud and his conviction under s 472, or s 473, alternatively, could be maintained.[75] In *Emperor v Krishnappa Khandappa* ,[76] in a government reserve forest the accused was found near the sandalwood trees with the counterfeit mark in his possession. It was held that it must be taken that he had the intention of using the same for the purpose of imprinting the tress with false marks and was, therefore, guilty under this section.

75 *Empress v Kisto Soonder Deb* (1865) 2 WR (Cr) 5 ; *Empress v Goluck Chunder* (1870) 13 WR (Cr) 16 .

76 *Emperor v Krishnappa Khandappa* AIR 1925 Bom 327, 26 Cr LJ 1014 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 474.

Having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine.--

[77][Whoever has in his possession any document or electronic record, knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine, shall, if the document or electronic record is one of the description mentioned in section 466 of this Code], be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the document is one of the description mentioned in section 467, shall be punished with [78][imprisonment for life], or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.3894

Comments

1. Scope

By this section, a person, having possession of a forged document of the description (record of court or of public register, *etc*), mentioned in s 466, knowing that such document is forged and 'intending that the same shall fraudulently or dishonestly be used as genuine', incurs the punishment prescribed. It is not necessary that the document should be used in the said sense by very person who has possession of it; such user may well be by other person to whom the document had been disposed of for fraudulent use.

The making of a false certificate with intent to procure an employment in a government service is

fraudulent within the meaning of s 25, and the certificate is a forged document within the meaning of s 474 .[79]

2. 'Possession'

Related headings in s 27, vol 1, may be referred to.

3. 'Document'

Section 29 and its commentary in vol 1, may be referred to.

4. Electronic Record

Section 29A, vol 1, may be referred to.

5. 'Knowing the same to be Forged'

For a conviction under this section, it has to be shown that the accused knew that the disputed document, which was found in his possession, was a forged one.[80] However, the mere fact, that the disputed document, found in the possession of the accused, was a forged one, is not sufficient for drawing a conclusion that the accused knew this fact when it was in his possession.[81]

6. 'Fraudulently'

Commentary under the same heading in s 464, *ante*, may be referred to.

7. 'Dishonestly'

Commentary under the same heading in s 464, *ante*, may be referred to.

8. Procedure

The offence under this section is non-cognizable, when the document in question is of a description, mentioned in s 467, and cognizable in any other case, bailable, non-compoundable, and triable by a magistrate of the first class.3895

9. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*.) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the... day of..., at ..., you had, in your possession, the document... (*describe it as mentioned in s 466, or s 467, of the Indian Penal Code*), knowing the same to be forged and intending that the same shall fraudulently (*or dishonestly*) be used as genuine, and that you thereby committed an offence, punishable under s 474 of the Indian Penal Code, and within the cognizance of this court.

And I hereby that you be tried by this court on the said charge.

10. Proof

To support a charge under this section, it is necessary for the prosecution to prove that:

(a) the document or electronic record in question was forged (*vide* s 465);
(b) the accused was in possession of the said document or electronic record;
(c) he knew that it (*ie*, the said document or electronic record) was a forged document or electronic record;
(d) he intended that the said document or electronic record shall fraudulently or dishonestly be used as genuine; and
(e) the document or electronic order was of the description mentioned either in s 466, or s 467, IPC .[82]

The intention can seldom be proved by direct evidence. An intention to use a forged document as genuine may, however, be inferred from the facts of the case and the conduct of the accused.[83] However, the guilty intent cannot be inferred from suspicions and surmises.[84]

11. Conviction

A conviction for an offence under this section cannot stand if the forged document concerned is not a document of the descriptions mentioned in s 466, or s 467, IPC .[85]

12. Relative Scope of Conviction under Section 471 and Section 474

Commentary under the same heading in s 471, *ante*, may be referred to.

77 Substituted by the Information Technology Act, 2000 (21 of 2000), s 91 and First Sch. for the words 'whoever has in his possession any document, knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine, shall, if the document is one of the description mentioned in s 466 of this Code' (wef 17-10-2000).

78 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

79 *Abdul Razak v Empress* 2 PR 1895 (Cr) .

80 *Empress v Abaji Ramchandra* (1891) ILR 16 Bom 165, p 168 .

81 *Krishan Kesavan v State of Kerala* AIR 1957 Ker 78, p 79, 1957 Cr LJ 755 .

82 *Empress v Abaji Ramchandra* (1891) ILR 16 Bom 165, p 168 .

83 *Empress v Hatim Moonshee* 8 WR (Cr) 11 ; Re *Somasundram Pillay* 6 MLT 266 **not following***Kailash Chandra Das v Crown* 6 CWN 382 .

84 *Empress v Loknath Shaha* (1864) WR (Cr) 12 .

85 *Radha Kishan v Emperor* 26 Cr LJ 847, AIR 1925 Lah 327 ; *Empress v Abaji Ramchandra* (1891) ILR 16 Bom 165, p 168 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 475.

Counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material.--

Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document described in section 467 of this Code, intending that such device or mark shall be used for the3896 purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with [86][imprisonment for life], or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section makes it an offence to counterfeit device or mark for authenticating documents, mentioned in s 467, IPC, namely, a valuable security, a Will, an authority to adopt a son, *etc*, as well as the possession of counterfeit-marked material, (in either case) with the intention of giving authenticity to the document in question, then forged or to be forged. The section is supplementary to s 472, IPC and is another instance of making mere preparation, which may be necessary for forging a document of the kind, mentioned in s 467, punishable as an offence. The provisions of this section, which are likely to overlap sometimes those of s 472 and other sections, create a special offence and prescribe the penalty therefor. The section is to be invoked in a proper case arising under it. Where the document is one which is not mentioned in s 467, the next section would be attracted.[87]

A document is authenticated by affixing the signature or seal of the executing. The object of the section is to prevent the forgery of a person's signature by engraving it on a plate or other substance or forging it on a paper so that it may be used for the purpose of forging a document. If the substance is a seal or a plate, the offence would also come within the terms of s 472, but this offence may be committed in circumstances not covered by that section, when a person forges only the signature of another upon a document which is forgery. However, whatever the substance on which the authentic device or mark has been counterfeited, the document must be of the kind which is mentioned in s 467 .

The counterfeiter must intend that the counterfeiting device or mark shall be used for this purpose of giving the appearance of authenticity to a document described in s 467 then forged or thereafter to be forged, on material counterfeited by the device or mark or the counterfeiter must have, in his possession, such material with the same intent. Without proof of such intention, there can be no conviction under this section. Thus, an innocent agent cannot be guilty of the offence.[88] However, there must be reliable evidence to trace the document and seals found in the possession of the accused.[89] It is not enough to show that documents, found in the accused's3897 possession, were forgeries; it must be further established that the accused intended that the documents should be fraudulently and dishonestly used as genuine.[90]

2. Possession

Related headings in s 27, vol 1, may be referred to.

3. Mere Possession not Enough

The possession, by an accused, of a number of documents, suspected to be forged, is no evidence that he has forged the particular document, with the forgery of which he is charged. The documents, which are evidence not of a crime, actually proved, but only of one suspected, cannot be properly admitted as evidence and must be excluded from consideration.[91] The discovery of certain suspicious documents in the possession of a witness for the accused and alleged to belong to the same faction can be no evidence against the accused.[92]

4. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

5. Complaint--When to be Filed by the Court

In view of s 195(1)(b)(ii), CrPC, no court can take cognizance of any offence, described in s 475, or s 476 of the IPC, when such offence is alleged to have been committed in respect of a document, produced, or given in evidence, in any court, except on the complaint, in writing, of that court, or of some other court to which that court is subordinate.

The statutory power of the police to investigate cognizable offences; under ss 471, 475 or 476, IPC, is in no way barred by virtue of the provisions of s 195(1)(b)(ii), CrPC (2 of 1974).[93]

6. Charge

The following form of the charge may be used:

> I (*name and office of magistrate, etc.*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the... day of..., at..., you counterfeited, upon (*or in the substance of*) a material, to wit ... (*describe it*), a device (*or mark*), to wit..., used for the purpose of authenticating a document, to wit..., being a document described in s 467 of the Indian Penal Code (or you had, in your possession, a material, to wit..., *upon* (*or in the substance of*) which a device (*or mark*), to wit..., had been counterfeited, for the purpose of authenticating a document, to wit..., being a document, describes in s 467 of the Indian Penal Code), intending that such device (*or mark*) shall be used for the purpose of giving3898 the appearance of authenticity to such a document, then forged (*or thereafter to be forged*) on such material, and that you thereby committed an offence, punishable under s 475 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

A charge under this section should be framed in the terms of that part of the section which is applicable to the case, and should distinctly specify the particular papers, bearing a counterfeit mark or device, which it is alleged that the accused had in his possession with the intent mentioned in the section.[94]

7. Proof

The points, requiring proof when the offence falls under the first part of the section, are that:

(a) the accused counterfeited a device or mark upon, or in the substance of, any material;
(b) such device or mark was used for the purpose of authenticating any document described in s 467, IPC ;
(c) the accused intended to use it for giving the appearance of authenticity to such document; and
(d) such document was then forged or was thereafter to be forged.

The points, requiring proof when the offence falls under the second part of the section, are that:

(a) the accused was in possession of the document described in s 467, IPC and referred to in the charge;
(b) the device or mark had been counterfeited on such document;
(c) the device or mark was such as was used for the purpose of authenticating a document described in s 467, IPC ; and
(d) the accused intended that the device or mark should be used for the purpose of giving the appearance of authenticity to any document either then forged or thereafter to be forged.[95]

86 Substituted, by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

87 *Empress v Abaji Ramchandra* (1891) ILR 16 Bom 165, p 172 .

88 *R v Bannen* (1844) 1 Car&K 295, 2 Mood CC 309, 8 JP 628; *Rusell on Crime*, twelfth edn, 1964, vol 1, p 130; *Empress v Kisto Soonder Deb* (1865) 2 WR (Cr) 5, p 6 .

89 *Empress v Rughoonundan Puttronuvees* (1871) 15 WR (Cr) 19 .

90 *Empress v Abaji Ramchandra* (1891) ILR 16 Bom 165, 168 .

91 *Reg v Parbhudas* (1874) 11 Bom HCR 90 .

92 *Empress v Abaji Ramchandra* (1890) ILR 15 Bom 189, p 193 . For further commentary, see under the same heading in s 489-B and s 489-C, *post*.

93 *Karnail Singh v State of Punjab* 1983 Cr LJ 713 (P&H) . See commentary under the same heading in s 465 & 467 *ante*.

94 *Empress v Abaji Ramchandra* (1890) ILR 15 Bom 189, p 193 .

95 *Empress v Abaji Ramchandra* (1890) ILR 15 Bom 189, p 194 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 476.

Counterfeiting device or mark used for authenticating documents other than those described in section 467, or possessing counterfeit marked material.--

Whoever counterfeits upon, or in the substance of any material, any device or mark used for the purpose of authenticating [96][any document or electronic record] other than the documents described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to [97][any document or electronic record] then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either3899 description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

This section is almost exactly the same as the preceding one, the only difference being that the document or electronic record in respect of which the offence is committed is 'any document or electronic record other than the documents or electronic record described in s 467, IPC . The section is intended to prescribe a reduced penalty for the offence dealt with in the preceding section as the document or electronic record in respect of which it is committed, is not as important as the documents described in s 467, IPC . Otherwise, the two offences are identical and the commentary under the preceding section may be read as a commentary under this section also.

2. Procedure

The offence under this section is non-cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class. It is strange that the more serious offence under s 475, IPC is bailable, while a simple offence under this section is non-bailable.

3. Electronic Record

Section 29A, vol 1, may be referred to.

4. Complaint--When to be filed by Court

Commentary under the same heading in ss 465, 467, *ante*, may be referred to.

5. Charge

The form of charge given under s 475, IPC may be adopted, substituting 'being a document other than those described in s 467 of the Indian Penal Code ' for the words 'being a document described in s 467 of the Indian Penal Code ', and 'punishable under s 476 of the Indian Penal Code ' for the words 'punishable under s 475 of the Indian Penal Code '.

6. Proof

The points, requiring proof for an offence under this section, are the same as those stated under the preceding one, with the only difference that instead of proving that such device or mark was used, or

was such as was used, for the purpose of authenticating a document or electronic record described in s 467 of the IPC, it has to be proved that such device or mark was used, or was such as was used, for the purpose of authenticating a document or electronic record other than those described in s 467 of the IPC .3900

96 Substituted by the Information Technology Act, 2000 (21 of 2000), s 91 and First Sch. for the words 'any document' (wef 17-10-2000).

97 Substituted by the Information Technology Act, 2000 (21 of 2000), s 91 and First Sch. for the words 'any document' (wef 17-10-2000).

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

S. 477.

Fraudulent cancellation, destruction, etc., of will, authority to adopt or valuable security.--

Whoever fraudulently or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys or defaces, or attempts to cancel, destroy or deface, or secretes or attempts to secrete any document which is or purports to be a will, or an authority to adopt a son, or any valuable security, or commits mischief in respect to such document, shall be punished with [1][imprisonment for life], or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Comments

1. Scope

The section is hardly an instance of forgery, the essence of which is making a false document, and not its fraudulent cancellation or destruction. In fact, no offence under this section is committed by the destruction of a document which is a forgery.[2] Where the accused, who executed a *kabala* in favour of the complainant and presented it for registration, took it back from the sub-registrar on some pretext and tore the same to pieces, it was held that it was inadvisable that a charge under s 477, IPC, *inter alia*, should be inquired into by a criminal court.[3] An offence under this section is committed when the cancellation, destruction, *etc*, is done fraudulently or dishonestly or with intent to cause damage or injury to the public or to any person. The essential ingredients[4] of an offence under this section are as under:

(a) there must be a document which is, or which purports to be, a Will, or an authority to adopt a son, or a valuable security;

(b) the accused must have:
(i) cancelled, destroyed, defaced, or secreted such document; or
(ii) attempted to cancel, destroy, deface, or secret such document; or
(iii) committed mischief in respect of such document; and

(c) the accused must have done such act fraudulently or dishonestly or with intent to cause damage or injury to the public or to any person.

2. 'Fraudulently'

Section 25 and its commentary in vol 1, may be referred to.3901

3. 'Dishonestly'

Section 24 and its commentary under s 24, vol 1, may be referred to.

4. 'Damage'

Damage means pecuniary damage.[5]

5. 'Injury'

Section 44 and its commentary in vol 1, may be referred to.

6. 'Public'

Section 12 and its commentary in vol 1, may be referred to.

7. 'Person'

Section 11 and its commentary in vol 1, may be referred to.

8. Document

Section 29 and its commentary in vol 1, may be referred to.

9. 'Secretes or Attempts to Secrete any Document'

A person may secrete a document not only when the existence of the document is unknown to other person and for the purpose of preventing the existence of the document coming to the knowledge of anybody, but also when the existence of the document is known to others. In the latter case, he may secrete it for the purpose, for example, of preventing it from being produced in evidence or for the purpose of raising difficulties in the way of its being produced in evidence. However, it is not necessarily enough to show that on an occasion, upon which it became his duty to produce the document, he failed to discharge that duty though that may be a cogent piece of evidence in certain circumstances. The fact that a man injures himself by denying the existence of a document, which, to his knowledge, is in his custody, would be a still more cogent piece of evidence. However, whether the offence of secreting a document is committed or not must depend, in each case, upon the facts.[6]

10. 'Purports to be'

The section uses the words 'purports to be', and not 'is'; this is significant. It is not necessary that the document in question must be valid and enforceable. This section is attracted even if the document is

not sufficiently stamped.[7]3902

11. 'Will'

The fraudulent secretion of any document purporting to be a Will, quite apart from its validity, constitutes an offence within the meaning of this section.[8]

12. 'Valuable Security'

In order that the accused may be *prima facie* guilty of the offence under this section, the document destroyed must be a valuable security.[9] The tearing up of a *patta* (lease),[10] or a promissory note,[11] or a paper being a rough account showing indebtedness,[12] or account stated in which balance is admitted to be due,[13] or a *bahi* bearing thumb-impressions of accused,[14] or a registered conveyance,[15] amounts to the destruction of a valuable security within the meaning of the section. It is immaterial that the document is unstamped and inadmissible for enforcement of a legal claim,[16] or is invalid for want of consideration.[17]

13. 'Mischief'

Commentary under s 425, *ante*, may be referred to.

14. Procedure

The offence under this section is non-cognizable, non-bailable, non-compoundable, and triable by a magistrate of the first class.

15. Sanction for Prosecution under Section 477 --Whether Necessary

Where the offence under this section is no part of the duty of a public servant, nor committed while he was acting in the discharge of his official duty, no sanction is necessary for his prosecution.[18]

16. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc.*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the ...day of..., at..., you fraudulently (*or dishonestly*) (or with intent to cause damage (*or injury*) to AB (or to the public) cancelled (or destroyed/defaced/secreted/attempted to cancel/attempted to destroy/attempted to deface/attempted to secret/committed mischief in respect to) a document. Ex..., which is (*or which purported to be*) a will (*or an authority to adopt a son/a valuable security*),3903 and that you thereby committed an offence, punishable under s 477 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

17. Proof

To establish an offence under this section, the prosecution must prove that:

(a) the document in question is, or purports to be, a Will, or an authority to adopt a son, or a valuable security;
(b) the accused cancelled, destroyed, defaced, or secreted, it, or attempted to cancel, destroy, deface or secrete the same, or committed mischief in respect to it; and
(c) he did so fraudulently or dishonestly or with intent to cause damage or injury to the public or to any person.

In the absence of proof of the said intention, the charge under this section must fail.[19] In the prosecution of a honorary accountant of a co-operative housing society for an offence under s 471 read with ss 468, 408 and 477, IPC, when, certain important aspects of the case were overlooked by the trial court, the High Court was justified in having a reappraisal of evidence and coming to its own conclusions on these points contrary to those of the trial court.[20]

Temporary embezzlement by the accused clerk employed in the office of Deputy Superintendent of Police of a paltry sum *viz*. Rs. 1839/- for a period of 21 days was held covered by s 95, IPC . The accused was granted benefit of s 95, IPC, and acquitted of charges under ss 409, 471, 477, IPC .[21]

18. Sentence

If the act of an accused, which constitutes forgery and is the basis of his conviction under s 467, IPC, is the same as the act which amounts to fraudulent destruction or defacement or cancellation and is the basis of his conviction under s 477, IPC, it is erroneous to treat the act as constituting two separate offences for which two separate sentence can be awarded.[22] It is submitted that the authority of this decision is weak. For further commentary, same heading in s 471 *ante*, may be referred to.

1 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

2 *Akbar Hussain v Emperor* 43 CWN 222 .

3 *Hira Lal Ghose v Makhan Lal Daw* 21 Cr LJ 16, AIR 1920 Cal 47 (1) .

4 *KK Pandey v Narpet Singh* 1973 Cr LJ 1640 (Raj) .

5 *Prayag Das v State* AIR 1963 All 131, (1963) 1 Cr LJ 279 .

6 *Susen Behary Roy v Emperor* 32 Cr LJ 841 (FB), AIR 1931 Cal 184, p 187, 188 (secretion of a Will) ; *Nukur Chandra Sarkar v Ranjit Kumar Mullick* 35 Cr LJ 716, AIR 1934 Cal 217 (no secretion of Will); *Subramania Ghanapati v Empress* (1881) ILR 3 Mad 261, 1 Weir 409 ; *Empress v Muhammed Shah Khan* (1898) ILR 20 All 307, 1898 AWN 52 (last two cases under s 204).

7 7 Mad HCR xxvi.

8 *Mali Muthu Servay v Emperor* AIR 1926 Rang 202, 27 Cr LJ 1230 . See s 31 and its commentary in vol 1.

9 *Emperor v Sher Alam Khan Sahib* 35 Cr LJ 479, AIR 1933 Bom 494 .

10 *Empress v Nittar Mundle* (1865) 3 WR (Cr) 38 .

11 Re *Madurai*(1888) ILR 12 Mad 54, 2 Weir 22.

12 *Empress v Ramaswami* (1888) ILR 12 Mad 148, 1 Weir 533 .

13 Re *Kapalavaya Saraya*(1864) 2 Mad HCR 247.

14 *Ram Pershad v Dhanna* AIR 1939 Lah 513 .

15 Re *Kotha Goundan*(1890) 1 Weir 554.

16 *Empress v Ramaswami* (1888) ILR 12 Mad 148, 1 Weir 533 .

17 Re *Kotha Goundan*(1890) 1 Weir 554. See s 30 and its commentary in vol 1.

18 *Shankar Sahai v State* 1954 ALJ 627 .

19 *Ram Harakh Pathak v Emperor* AIR 1926 All 57, p 58, 26 Cr LJ 1617 .

20 *Barjure Khaikhogroo Marfatia v State of Maharashtra* AIR 1978 SC 434, 1978 Cr LJ 507 .

21 *NK Illiyas v State of Kerala* AIR 2012 SC 3790, 2012 AIR SCW 2496, 2012 Cr LJ 2418 (SC) .

22 *Pirbhu Dial v Emperor* 14 Cr LJ 183, p 184 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[23][S. 477A.

Falsification of accounts.--

Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any [24][book, electronic record, paper, writing], valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the3904 omission or alteration of any material particular from or in, any such [25][book, electronic record, paper, writing], valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.--It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.]

Comments

1. Scope

By this section, falsification of accounts with intent to defraud is made punishable even if there is no evidence to prove misappropriation of any particular sum on any particular occasion. The section is divided into two parts as it speaks of two offences which are distinct, and not interdependent. The first part makes the falsification of account, *etc*, an offence even if it may cover several entries,[26] and the second part makes it an offence to make a false entry in, or to omit or to abet the omission or alteration of any material particular from, or in, any book, paper, writing, valuable security or account.

27

2. Object

This section, introduced, for the first time, by s 4 of Act 3 of 1895, was added to remove a glaring defect in law, noticed in an unreported Calcutta case of *Shama Churn Sen*, in which the accused, who was shown to have defrauded a bank to the extent of 3 lakh rupees, had nevertheless to be acquitted because it was not proved3905 that the said three lakhs of rupees had been abstracted upon any one particular occasion or in any particular sum. The section was consequently enacted to meet such cases and to make the falsification of accounts punishable even though there is no evidence to prove misappropriation of any specific sum on any particular occasion.[28]

3. Section 477A and Section 409 --Distinction

A comparison of the ingredient of an offence under s 409, IPC, with that of s 477A, IPC, makes it apparent, that the ingredients of the two offences are different from each other and the only common point is the capacity of the accused being that of an employee. In one case, he dishonestly misappropriates the property in violation of the trust and in the other he falsifies the account with intent to defraud, etc.[29] The trial of the accused for offences under s 477A, IPC, cannot be held to be barred by his conviction for an offence under s 409, IPC, in respect of the same transaction.[30]

4. Essential Ingredients

The essential ingredients to constitute an offence under this section are as follow:

(a) the offender must be a clerk, officer or servant or employed, or acting, in the capacity of a clerk, officer or servant; and
(b) he must wilfully, and with intent to defraud;
  (i) destroy, alter, mutilate or falsify any book, paper, writing, valuable security or account which:
    (1) belongs to, or is in possession of, his employer; or
    (2) has been received by him for, or on behalf of, his employer; or

  (ii) make, or abet the making of, any false entry in, or omit or alter, or abet the omission or alteration of any material particular form, or in, any book, paper, writing, valuable security or account.

5. 'Clerk Officer or Servant': A Partner, Whether can be held liable under Section 477A

The term of s 477A, IPC, apply not only to a clerk, officer or servant, but also to a person acting in the capacity of a clerk, officer or servant. The section speaks of a person who is 'employed, or acting, in the capacity of a clerk officer or servant'. That being so, the scope of the section extends to persons who act in the above capacities, and it is not confined to persons who are employed in the said capacity.[31] Under s 477A, IPC, if a person, even if he be a partner in a firm, fills the capacity of its clerk or servant, he comes within the purview of the section. If a partner, as such partner, is appointed to manage the business of the firm or to write its accounts and if3906 he, acting as its servant, falsifies the accounts, he would be liable under the section.[32] If a partner has dishonestly falsified the books of accounts of the firm and has tried to defraud his partners, he can charged with the commission of an offence under s 477A, IPC .[33] On the other hand, according the decision in *CV Krishnan v Virji Kunverji* ,[34] the section applies, in terms, to falsification of accounts by a clerk, officer or servant

employed under somebody else, and it is not applicable to the case of falsification of accounts by a partner. According to this decision, if a partner cannot, in the absence of a special agreement, be charged with an offence of criminal breach of trust, it would be difficult to say that he can be found guilty of falsification of accounts which can only be committed by a clerk, officer or servant in respect of his employer's books of account. Similarly, a partner cannot be clearly guilty of the offence of falsification of accounts and the offence can only be committed by somebody in the employ of another person as a clerk, officer or servant, and the falsification can only be committed in respect of the books of accounts of the employer. According to the Allahabad High Court in *Hari Prasad v State* ,[35] only such a person would be guilty under s 477A, IPC, who is employed by the partnership firm in any of the capacity namely as a clerk, officer or servant. According to this decision, there has to be some basis of service; it may be honorary or on remuneration. If a person, who is a partner, has also taken upon himself the status of a clerk, servant or officer of the partnership firm, he can be held guilty of an offence under s 477A, IPC, if other ingredients of the offence are made out against him. It is submitted that the view, expressed in *CV Krishnan v Virji Kunverji* ,[36] and *Hari Prasad v State* ,[37] overlooks the clear language of the section which speaks of a person 'being a clerk, officer or servant, or employed, or acting, in the capacity of a clerk, officer or servant' and these words are wide enough to include a person acting in the capacity of a 'clerk, officer or servant', though not employed as such, that is to say, 'the basis of service' is not the crux of the matter as held in the Allahabad case. Nor, regard being had to the words, can it be held, from decisions in cases under s 406 or s 420, IPC, as was done in the Calcutta cases, that a partner cannot be held guilty of an offence under s 477A . A person, who is a partner of a firm, can also act in the capacity of a clerk officer or servant. The contrary view, expressed in the above two cases, would lead to the startling result that a partner of a firm, though appointed as the manager of a partnership firm and charged with the duty of keeping the documents of the firm, can with impunity, falsify the accounts of the firm. As pointed out by Ramaswami J, in *Abdul Azeez v State* ,[38] the emphasis is on the words 'in the capacity of a clerk, officer or servant', and if a partner is appointed as such to manager the business of the firm or to write its accounts, he acts as its servant; and if he falsifies the accounts, he is liable to be punished under s 477A, IPC . It is sufficient to satisfy the words of the section that the person charged under it is one who undertakes to perform, and does perform, the duties of a clerk or servant, etc,3907 whether in fact he is a clerk or servant, though he is under no obligation to perform such duties and receives no remuneration.[39] Therefore, as held in *Momindra Mohan Biswas v Srish Chandra Das* ,[40] the mere fact, that a partnership existed, is no answer to a property proved case to a charge of falsification of accounts by one partner, who is in charge of the account books, though he is not a clerk, or servant, *etc*. There may be occasions when a person, who is not a regular servant, may yet be acting as such.[41]

6. Employment with more than one Employer

To be a full-time servant of a certain employer does not bar a person to become a servant of any other employer. An agent of an insurance company, even if he is a full-time servant of some other company, is a servant of the insurance company as he, as agent of the insurance company, receives payment for doing work.[42]

7. 'Wilfully'

To constitute an offence under this section, the falsification of accounts, *etc*., should be made wilfully as well as with an intent to defraud.[43] 'Wilfully' means 'intentionally' or 'deliberately',[44] and not accidentally or inadvertently,[45] whereas the expression 'with intent to defraud' contains, two elements, *viz*, deceit and injury.[46] A person is said to deceive another when, by practicing *suggestio false* or *suppressio veri* or both, he intentionally induces another to believe a thing to be true which he knows to be false or does not believe to be true. 'Injury' denotes any harm whether illegally caused to any person in body, mind, reputation or property.[47] The deprivation of property, actual or intended, is not a necessary ingredient to defraud.[48] Where an accused prepares a false traveling allowance bill, presents it to a sub-treasury and withdraws the amounts, he commits an offence under s 477A, IPC, and the mere fact, that he subsequently returns the entire amount, is not a matter to be considered.[49]Where, however, the intention of the manager of a company, in offering a bribe to an

electric inspector, was not to cause injury to the company but, on the contrary, to promote its interests, the act of the accused was held not to fall within the ambit of s 477A, IPC .[50]3908

8. 'With Intent to Defraud'

The expression 'intent to defraud' should not be restricted only to cases of 'deceit and injury to the person deceived' or to exclude all cases where the deception is intended to secure advantage to the deceiver.[51] Where, by me falsification of accounts, the accused derived an advantage for sometime, which he could not have derived if the books had been falsified, and the falsification was with intent to defraud, his conviction under s 477A, IPC, was held to be justified.[52] An act, that is calculated to conceal fraud already committed and to make the party defrauded believe that no fraud had been committed, is a fraudulent act and the person, responsible for the acts, acts 'with intent to defraud'.[53] Accordingly, falsification of accounts to cover immediate or remote commission of criminal breach of trust falls within the mischief of s 477A .[54]

Intent to defraud can be established both by false entries and omission to make entries in the accounts.[55] Where, as against the actual payment of Rs 254.48, the deposit, in the relevant receipt, was entered as Rs 110 only, the accused, a head clerk cum accountant, was held to have falsified the receipt with an intent to defraud.[56]

9. 'Falsifies'

The expression 'falsify' applies to the preparation of a new document containing false information. To 'falsify' means 'to render falls' and a new document, containing false information, is correctly described as a false document and the act of operating such a document is called the falsification of the document.[57] If a person falsifies the balance-sheet of a bank by showing as profit a certain sum which was not profit, he falsifies them.[58] Where the accused, an official for the procurement of paddy entrusted with a certain sum of money for the purpose, purchased paddy from a party, showed, in the counterfoil of his receipt book, a quantity less than the quantity shown correctly in the receipt issued to the party, for covering misappropriation of the difference, and falsified the accounts which he was bound to maintain, he was held guilty of an offence under s 477A .[59] Where the accused, after the commencement of an inequality against him, made false entries, in the register, showing payments to the credit of the collector, for concealing non-payment, it was held that they were made with intent to defraud.[60] Where the falsification of accounts by a sub-postmaster was in furtherance of a prior fraud, namely, criminal breach of trust, it was held that me intention of the accused was to defraud, and, therefore, he3909 was guilty of the offence under s 477A, IPC .[61] Where, however, a *patwari*, in flagrant disregard of revenue rules, made unauthorised entries in the revenue registers, but there was a strong presumption of his bonafides, it was held that he could not be said to have fraudulently altered any book or register within the meaning of s 477A, IPC .[62]

Where the accused working as postal assistant, a public servant, entrusted with the money of the depositors, made false entries in the pass books of the depositors in his possession, misappropriated the amount of deposit of depositors, he was convicted under ss 409 and 477, IPC .[63]

10. Falsification--How Effected

The falsification, punishable under this section, may be effected by:

(a) destruction; or
(b) alteration; or
(c) mutilation; or
(d)
    (i) the making of a false entry, or

(ii) omission or alteration of a material particular, or
(iii) abetment of (i) or (ii) above noted.

11. Falsification must be Willful or Fraudulent

Whatever be the nature and extent of the falsification, it must not have been due to mere carelessness or negligence; it must be made both wilfully and fraudulently.[64]If a person, bound to maintain a register, omits to make certain entries therein and the omission is intentional so that a false balance may be shown and the real surplus may not be disclosed, it is a positive act of falsifying accounts.[65] However, mere omission to make an entry cannot necessarily lead to the conclusion that the document in question has been falsified.[66] If the conduct of an accused merely points to negligence on his part in the performance of his duties, he cannot be said to have committed an offence of falsification of accounts.[67]

12. 'Any Book, Electronic Record, Paper, Writing, Valuable Security or Account which belongs to, or is in Possession of, the Employer, or has been received by him for, or on behalf of, his Employer'

The falsification, punishable under this section, must be of any 'book, paper, writing, valuable security or account' and they must were at the time when they were3910 falsified.[68] If the papers, in which falsification is alleged, cannot be regarded as belonging to, or being in possession of, the offender's employer, no case under s 477A, IPC, can be said to have been made out.[69]

13. Electronic Record

Section 29A, vol 1, may be referred to.

14. 'Valuable Security'

Section 30 and its commentary in vol 1, may be referred to.

15. 'Abets'

Section 109 and its commentary in vol 1, may be referred to.

16. 'Omission'

Section 33 and its commentary in vol 1, may be referred to.

17. Explanation to the Section

By virtue of the explanation to the section, it is sufficient to allege a general intent to defraud. In a prosecution for an offence under this section, it is not necessary to prove that any particular person or persons were defrauded by a statutory report. It is sufficient if, in the opinion of the court, the report had that tendency.[70]

18. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

19. Sanction for Prosecution under Section 111, Karnataka Co-operative

Societies Act (11 of 1959)

Section 111 of the Karnataka Co-operative Societies Act 1959 (11 of 1959) mandates that before the sanction is accorded, the accused must be given an opportunity of being confronted with the charges against him and of tendering an explanation if the authority is satisfied that the accused has acted in good faith, that the sanction shall not be granted.[71] Since the consequences of a prosecution are extremely serious, the law mandates that a proper enquiry following the rules of natural justice be held prior to the grant of sanction and this is a mandatory safety provision from the point of view of the accused, but it is of equal importance to the department and the society in order to avoid unnecessary legal proceedings. When this mandatory pre-condition is not followed, then the prosecution will be vitiated.[72]3911

20. Revision--Power of the High Court

Commentary under the same heading in s 468, *ante*, may be referred to.

21. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc.*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the ...day of..., at..., you, being a clerk (*or an officer, or a servant, or employed or acting in the capacity of a clerk, officer or servant*) wilfully, and with intent to defraud, destroyed (*or altered, mutilated or falsified*) a book (*or paper, writing, valuable security or account*), to wit..., which belonged to (or which was in the possession of) your employer AB (*or which was received by you for, or on behalf of, your employer AB*) (or you wilfully, and intent to defraud, made (*or abetted the making of*) a false entry, to wit..., in (or you omitted/altered/abetted the omission or alteration of a material particular from, or in,) a book (*paper/writing/valuable security/account*), to wit...), and that you thereby committed an offence, punishable under s 477A of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

This section refers to two kinds of offences, namely, (a) falsification of accounts; and (b) making of a false entry. The two offences are distinct, and not interdependent. The offence of falsification of accounts is one offence although it may cover several entries. Therefore, where, in a case, there were eight items of falsification, eight charges for falsification of accounts were not required, and a single charge under s 477A was held to be sufficient.[73]

22. Joinder of Charges under Sections 477A and 409

If the act, constituting the offence under s 409, IPC, and those constituting the offence under s 477A, are 'so connected together as to form the same transaction' within the meaning of s 220(1), CrPC, an offence under s 409, IPC, can be joined in the same charge with an offence under s 477A, IPC . The real and substantial test is the continuity of action and purpose.[74]

23. Proof

Since the section is in two parts, there are two distinct and independent offences,[75] and, therefore, the points, requiring proof, depend upon the offence falling within the particular part of the section. If the offence falls within the first part of the section, the prosecution must prove that:

(a) the accused was a clerk, officer or servant, or he was employed, or he acted, in such capacity;3912
(b) the accused destroyed, altered, mutilated or falsified the book, paper, writing valuable or account in question;
(c) the book, paper, *etc*, belonged to, or was in the possession of, his employer or was received by him (*ie*, the accused) for, or on behalf of, his employer; and
(d) the accused did as in point (b) above wilfully and with intent to defraud.

If, however, the offence falls within the latter portion of the section, prove points (a), (c) and (d) in the above manner. So far as point (b) is concerned, prove that the accused made, or abetted the making of, any false entry in, or altered, or abetted, the omission or alteration of some material particular from, or in, the book, paper, writing, valuable security or account in question.

It must not only be proved that false entries were made, but also that they were made with an intent to defraud.[76]

When a person is charged with the falsification of accounts any number of falsifications may be proved in order to sustain the principal charge of falsification.[77] It is, however, necessary to produce, in evidence, the document alleged to be falsified. Where the very important document, whereof falsification has been missing, it will be impossible to hold the accused guilty of the offence under this section.[78] In a case of alleged criminal conspiracy and forgery of Rs 52,000/- belonging to the High Court, it was not established that the accused was entrusted with receipt of stamps by the Registrar of the High Court. No evidence was produced before the trial court to show that the accused has in any manner conspired with the accused and had made false entries in the register. The Registrar of the High Court was not examined as a witness. The conviction of the accused under ss 477A and 120B, IPC, was set aside.[79] The evidence of employees of the concerned branch of the bank cannot be rejected merely on the ground that they were working under the accused branch manager.[80]

24. Acquittal

Accused no 1, a student having secured less marks in the examination, applied for revaluation of the examination sheets. Accused no 2, the dealing clerk, sent the answer script of another in place of Accused no 1, by giving a confidential code. The revaluation was done and accused no 1 stood benefited. Accused no 1 was tried separately and was acquitted, it was not possible to say that accused no 1 obtained any benefit or there was any *mens rea* involved, in so far as accused no 2 is concerned, in sending the answer script for revaluation of another student instead of accused no 1. No appeal was filed by the state against acquitted of accused no 1. The entire case had become rather doubtful due to his acquittal. Accused no 2 was, therefore, also given the benefit of the doubt and acquitted of the charges under ss 477A, 420 and 120B, IPC .[81] In Re *M Gangadhariah*,[82] the false entries in the3913 current deposit book were admittedly made by another accused who was not charged with the offence of having made those entries or with an offence under s 477A, IPC . It was held that the charge, that the accused made those entries, could not be sustained, especially when there was no evidence to the effect that the other accused made the entries under instructions from the accused. Unless it is proved that the alterations made by a person (a money order issue clerk in a sub-post office) in the money order issue journal as also in the copy of the hand to hand receipt book are in the handwriting of that person, he cannot be convicted under s 477A, IPC .[83] If an accused is charged under this section for substituting used court-fee stamps in place of the new stamps on

requisitions and *vakalatnama* under the Public Demands Recovery Act, but there is no alteration or falsification of any register or form of account, the acts of the accused cannot be brought within the scope of s 477A, IPC .[84]

25. Conviction

A charge under s 477A, IPC, is more or less dependent on the charge under s 467, IPC . If, therefore, an accused is not found to have an intention to defraud anybody by falsifying the account books, no case under s 477A, IPC, is made out.[85] Similarly, where the charge of criminal breach of trust fails, the charge of falsification of accounts must also fails.[86] Where, however, the facts, on which the allegation rests, are not so integrally related that if a part of the case is not proved, the rest must fail, the accused can be convicted even if a part of the prosecution case is not proved.[87] Where the accused's writing on the questioned documents has been proved not only by the experts, but also by some other persons, well acquainted with the writing of the accused, and the court also finds a large measure of similarly and clear resemblance in almost all the characteristics in his disputed and admitted writings, conviction under s 477A, can be sustained.[88] Where the charge, framed under s 467 at the trial, mentions about entries of false or imaginary sale notes and other false entries in transport permits with intent to defraud the government of its revenues, then even if there should be some doubt as to whether the permit in question amounts to falsification of accounts, there may be a case to be tried on the question whether the entries, made therein, were false and thereby the latter part of s 477A was contravened. A conviction of the accused for such contravention would not be illegal.[89]

The accused chairman and member of a subordinate staff selection board in conspiracy with the accused a candidate increased the numbers awarded in *viva voce*test and included him in the list of selected candidates for pecuniary benefits. The act of the three accused persons did not amount to offence of forgery, the accused3914 persons prepared false record of the final result and committed cheating, they were guilty of offence under s 218, s 420, s 477A and s 120B, IPC .[90]

26. Conviction for Falsification of Accounts and Misappropriation of Funds

The accused was an accountant in the company and was responsible for accounts and amounts received and entrusted to him. The entrustment of the amount and making of false accounts in respect of amounts received from a dealer firm was established against the accused, so the accused was found guilty under ss 409 and 477A, IPC .[91] Where the evidence on record showed that the accused was the custodian of cash and account books, the handwriting of the accused was also proved by the witness who was acquainted with it and the report of the Accountant-General clearly showed that there was manipulation in entries made by the accused, the fact that the accused had sometimes deposited money after the detection of misappropriation supported the allegation of misappropriation, thus conviction of the accused was found proper.[92]

27. Sentence (Deterrent)

Where the accused were in league and omissions and commissions in accounts were resorted to with the common objective of defrauding the payment of sales tax, *etc*, and indulging in black-marketing activities, a deterrent sentence was held to be called for and the High Court confirmed the sentence of fine which was proportionate to the means of the accused and the gravity of the offences.[93] In *State v Atmaram Vaikunth Bhende* ,[94] the accused was sentenced under s 477A on three charges to two months rigorous imprisonment and a fine of Rs 1,000 or in default to four months rigorous imprisonment. The accused requested, in appeal, that the substantive sentences, passed on him, may be enhanced and the sentences, awarded in default of payment of fine, may be reduced in order to get the advantage of remissions under the Jail Rules. The High Court held that this was not a sufficient ground for reducing the sentences, awarded to the accused, in default of payment of fine.

28. Sentence (Lenient)

Where the accused deposited the amount found short in the office cash, taking a lenient view, as the incident occurred 18 years ago, the sentence imposed against the accused was reduced from rigorous imprisonment for three years to rigorous imprisonment for one year.[95]

An accused aged 50 years had lost his employment and therefore he engaged himself privately for a part-time job and was the only bread earner of the family, therefore, the sentence of 2 years rigorous imprisonment was reduced to 6 months rigorous imprisonment.[96] Keeping in view the fact that the accused faced trial and appeal for a total period of about 14 years, the sentence of imprisonment was reduced3915 from 2 years rigorous imprisonment to 18 months.[1] In a case of technical breach arising out of shortage of amount, the entries made by the accused post master did not reflect a certain amount. The accused was not found with any disproportionate assets to his known source of income. He faced the agony of trial for a period of ten years and lost his job. He fully reimbursed the entire amount found to be short. As a result of his conviction he lost his job which is synonymous with 'economic death'. Therefore, the accused deserved maximum leniency in grant of sentence and sentence of fine of Rs 200 in default rigorous imprisonment for 2 months was found proper.[2] Where the accused was young and immature at the time of commission of the offence, the offence was committed about 18 years ago, the sentence of one year's rigorous imprisonment was substituted for 2 years rigorous imprisonment imposed on the accused.[3]

23 Added by Act 3 of 1895, s 4 .

24 Substituted by the Information Technology Act, 2000 (21 of 2000), s 91 and First Sch. for the words 'book, paper, writing' (wef 17-10-2000).

25 Substituted by the Information Technology Act, 2000 (21 of 2000), s 91 and First Sch. for the words 'book, paper, writing' (wef 17-10-2000).

26 *Ambalal Asharam Joshi v State of Gujarat* 6 Guj LR 925 .

27 *Prafulla Chandra Kharghoria v Emperor* 32 Cr LJ 318, 319, AIR 1931 Cal 8 .

28 Per Ramaswamy J in *Abdul Azeez v State* 1953 MWN 772, 1953 MWN (Cr) 260, p 262 .

29 *State v Shrinath* AIR 1963 Raj 14 (DB) ; *Prosecutor v Rama Iyenger* AIR 1955 NUC (Mad) 3922, (1963) 1 Cr LJ 218 (Raj) (DB) .

30 *State v Shrinath* AIR 1963 Raj 14 (DB), (1963) 1 Cr LJ 218 (Raj) (DB).

31 *State of Bombay v Devakinandan Kanhyalal Aganval* AIR 1959 Bom 486 (DB), 1959 Cr LJ 1302, p 1305-1306 **distinguishing***Hari Prasad v State* AIR 1953 All 660, 1953 Cr LJ 1496 in which it was held that a partner cannot be held guilty under s 477A, IPC, unless he is employed by the partnership in the capacity of a clerk, officer or servant.

32 *Emperor v Lalloo Ghella* 1 Cr LJ 757, p 758(Bom)(DB), 6 Bom LR 553; *Mohomed v Mohamed Idris* AIR 1925 Sind 328, p 329 (DB), 26 Cr LJ 1101 .

33 *State of Gujarat v Voro Jayantilal Chhotalal* 1975 Guj LR 661**overruling***Jasbhai Gmdhanbhai Patel v Hasmukhlal Kalidas Patel* 1972 Guj LR 617 .

34 *CV Krishnan v Virji Kunverji* 1959 Cr LJ 964, p 965, AIR 1959 Cal 498 **relying** on *Bhuban Mohan Das v Surendra Mohan Das* AIR 1951 Cal 69 (FB), 52 Cr LJ 723 and *Man Mohan Das v Mohendra Bhowal* AIR 1948 Cal 292, 49 Cr LJ 543 (DB) .

35 *Hari Prasad v State* 1953 Cr LJ 1496, p 1497-1498 (DB), AIR 1953 All 660 .

36 *CV Krishnan v Virji Kunverj* AIR 1959 Cal 498, 1969 Cr LJ 964 .

37 *Hari Prasad v State* AIR 1953 All 660, 1953 Cr LJ 1496 (DB) .

38 *Abdul Azeez v State* 1953 MWN (Cr) 260, p 263, 1953 MWN 772, p 775 .

39 Re *Annasami Aiyangar*(1901) 1 Weir 554, p 555.

40 *Momindra Mohan Biswas v Srish Chandra Das* AIR 1932 Cal 564, 33 Cr LJ 597, 598 (DB).

41 *Russell on Crime,* twelfth edn, 1964, vol 1, p 1067, **citing** among other cases *R v Foulkes* (1875) LR 2 CCR 150 ; Re

Annasami Aiyanger(1901) 1 Weir 554.

42 *RK Dalmia v Delhi Administration* (1962) 2 Cr LJ 805, p 837 (SC), AIR 1962 SC 1821 ; *EA Morley v Emperor* 37 Cr LJ 927, p 930, AIR 1936 Rang 299 in which it has been held that an agent is not the servant as he has the power to act on his own initiative while a servant does not have such power.

43 *Maung Tint v King* 40 Cr LJ 552, p 554, AIR 1939 Rang 156 .

44 *Harnam Singh v State (Delhi Administration)* 1976 Cr LJ 913, p 918, AIR 1976 SC 2140 ; *Kedarnath v State* (1965) 1 Cr LJ 539, p 541, AIR 1965 All 233, p 236 .

45 *Kedamath v State* (1965) 1 Cr LJ 539, p 541, AIR 1965 All 233, p 236 .

46 *Harnam Singh v State (Delhi Administration)* 1976 Cr LJ 913, 918, AIR 1976 SC 2140 .

47 *Ibid*. *R Madhavan v State* 1973 Cr LJ 1534, 1973 Ker LT 689 .

48 *R Madhvan v State* 1973 Cr LJ 1534, 1973 Ker LT 689 ; *Empress v Abbas Ali* (1898) ILR 25 Cal 512, p 522, 1 CWN 255 (FB) ; *R v Toshack* (1849) 4 Cox CC 38 .

49 *R Madhvan v State* 1973 Cr LJ 1534, p 1536-1537, 1973 Ker LT 689 .

50 *Ong Boon Hock v Emperor* 38 Cr LJ 887, AIR 1937 Rang 280, p 282 .

51 *Maung Tint v King* 40 Cr LJ 552, p 555, AIR 1939 Rang 156, p 159 .

52 *Emperor v Ragho Ram* AIR 1933 All 525, p 528, 34 Cr LJ 1056 .

53 *Ibid.*

54 *Banamber Maharana v State* 32 Cut LT 31 ; (1965) 7 OJD 281 ; *RK Dalmia v Delhi Administration* (1962) 2 Cr LJ 805, AIR 1962 SC 1821 ; Re *Doraiswami Reddier*AIR 1951 Mad 894, p 895, 52 Cr LJ 1093 .

55 *Abdul Azeez v State* 1953 MWN 772, 1953 MWN (Cr) 260, p 263 .

56 *State v Tribikram Bohinder* (1971) 37 Cut LT 659 .

57 *Ram Chand Gurwala v Emperor* 27 Cr LJ 1383, AIR 1926 Lah 385, p 389 ; *Abdul Azeez v State* 1953 MWN 772, 1953 MWN (Cr) 260 ; *Adwait Prasad Naik v State* (1969) 35 Cut LT 1266 .

58 *Daulat Rai v Emperor* 16 Cr LJ 473 .

59 *G Sivanandan v State* 1955 Cr LJ 1539, AIR 1955 TC 271 ; *Gnanaprakasam Barnabas v State* AIR 1953 TC 537, p 538, 1953 Cr LJ 1777 .

60 *Deputy Legal Remembrancer v Rash Behary Dass* 7 Cr LJ 378, p 381, 12 CWN 581 ; *Narain Dutt Tewari v Rudra Dutt Bhatt* AIR 1925 All 654, 26 Cr LJ 1384 ; Re *Annasami Aiyanger* 1 Weir 554.

61 Re *V Kandasami Ayer*AIR 1927 Mad 626, 28 Cr LJ 552 ; *Emperor v WC Das* 11 Cr LJ 185 (UB) ; *Sukhamoy Maitra v Emperor* 39 Cr LJ 374, AIR 1938 Pat 165 ; *Keshavrao Khilaji Patil v Emperor* 36 Cr LJ 522, AIR 1935 Bom 30 ; *Deputy Legal Sarkar v Empress* (1884) ILR 22 Cal 313 ; *Empress v Ramaswami* (1880) 1 Weir 554 ; *Delhi Administration*(1962) 2 Cr LJ 805, AIR 1962 SC 1821 ; *Budh Singh v State of Haryana* 1974 Cr LJ 614, p 615, AIR 1974 SC 1351 .

62 *Muhammad Sirdar v Emperor* 16 Cr LJ 19 .

63 *Vijay Kumar v State of Rajasthan* 2012 Cr LJ 2790, p 2796 (Raj) .

64 *Abdul Azeez v State* 1953 MWN 772, 1953 MWN (Cr) 260, p 268 .

65 *Hori Ram Singh v Emperor* 40 Cr LJ 468, 1939 FC 43, p 53 per Sulaiman J ; *RK Dalmia v Delhi Administration* (1962) 2 Cr LJ 805, AIR 1962 SC 1821 .

66 *Adwait Prasad Naik v State* (1969) 35 Cut LT 1266 .

67 *Dhanya Naik v State* (1976) 2 Kant LJ 163 .

68 *Abdul Azeez v State* 1953 MWN 772, 1953 MWN (Cr) 260, p 268 .

69 *EA Morley v Emperor* 37 Cr LJ 927, p 930, AIR 1936 Rang 299 .

70 *Ram Chand Gurwala v Emperor* AIR 1926 Lah 385, 27 Cr LJ 1383, p 1386 .

71 *State of Karnataka v Gangayya Veerayya Gadigeppanavar* 2004 Cr LJ 2271 (Kant) (DB) .

72 *State of Karnataka v Gangayya Veerayya Gadigeppanavar* 2004 Cr LJ 2271 (Kant) (DB) .

73 *Ambalal Ashram Joshi v State of Gujarat* 6 Guj LR 925 ; *Fitmaurice v Emperor* AIR 1926 Lah 193, p 195, 27 Cr LJ 793 ; *Emperor v Manant K Mehta* AIR 1926 Bom 110, 27 Cr LJ 305 ; *GS Rameshan v Emperor* AIR 1935 Nag 178, 36 Cr LJ 1216 .

74 *Amhalal Ashram Joshi v State of Gujarat* 6 Guj LR 925, p 931 ; *Debi Prasad v Emperor* AIR 1944 Oudh 122, 45 Cr LJ 538 ; *Dubri Misir v Emperor* AIR 1931 Oudh 86, 32 Cr LJ 540 . For further commentary, see under the same heading in s 409, *ante*.

75 *Prafulla Chandra Khargoria v Emperor* 32 Cr LJ 318, p 319, AIR 1931 Cal 8 .

76 *R v Drewett* (1904) 69 JP 37, TLR 164 (CCR).

77 *Prafulla Clwndra Khargoria v Emperor* 32 Cr LJ 318, AIR 1931 Cal 8 ; *Roman Behary Das v Emperor* 15 Cr LJ 153 .

78 *Rasul Mohammed Hanif Gulandaj v State of Maharashtra* 1972 Cr LJ 313, AIR 1972 SC 521 .

79 *Sharif Masih v State (Union Territory of Chandigarh)* 1998 Cr LJ 1689 (P&H) .

80 *PS Rao v State of Andhra Pradesh* AIR 1994 SC 1407 .

81 *D Sarojini v State of Andhra Pradesh* (2000) JT 2 SC 22 .

82 In Re *M Gangadhariah*AIR 1967 Mysore 86, 1967 Cr LJ 787 .

83 *State v Jugal Kishore Nanda* 1957 Cr LJ 1431, AIR 1957 Ori 268 .

84 *Emperor v Bibhudananada Chakravarti* 21 Cr LJ 188 (Cal) .

85 *Teji Chand v State of Uttar Pradesh* 1977 UP Cr C 281, p 285 (All) .

86 *Rasul Mohammed Hanif Gulandaj v State of Maharashtra* 1972 Cr LJ 313, AIR 1972 SC 521 ; *Ram Chandra Nanda v State of Orissa* (1978) 45 Cut LT 338 ; *Bhanubhai Ramhhai v State of Gujarat* 1976 Guj LR 699 ; *CN Krishan Murthy v Abdul Subhan* AIR 1965 Mysore 128, (1965) 1 Cr LJ 565 ; *Joy Shanker Bhattacharjee v Sushil Kumar Gupta* AIR 1969 Tripura 31, 1969 Cr LJ 791 .

87 *Phanindra Prasad Shukla v State of Madhya Pradesh* 1981 Cr LJ 420, p 421 (SC), AIR 1981 SC 721 .

88 *Ram Pyarelal Shrivastava v State of Bihar* AIR 1980 SC 1523 .

89 *GD Sharma v State of Uttar Pradesh* 1960 Cr LJ 541, AIR 1960 SC 400, p 402 .

90 *Rakesh Kumar Chhabra v State of HP* 2012 Cr LJ 354, p 357 (HP) .

91 *Inder Sain Jain v State of Punjab* AIR 1994 SC 1065, 1994 Cr LJ 1224 .

92 *Ramanandan Prasad v State of Orissa* 2004 Cr LJ 4366 (Ori) .

93 *Abdul Azeez v State* 1953 MWN (Cr) 260, p 264, 1953 MWN 772, p 776 .

94 *State v Atmaram Vaikunth Bhende* AIR 1956 Bom 671, p 672, 1956 Cr LJ 1195 .

95 *Ramanandan Prasad v State of Orissa* 2004 Cr LJ 4366 (Ori) .

96 *Mohandass v State* 1998 Cr LJ 3409 (Mad) .

1 *S Jayaseelan v State* 2002 Cr LJ 732 (Mad) .

2 *State of Karnataka v Baappa* 2000 Cr LJ 2327 (Kant) (DB) .

3 *Phanindra Prasad Shukla v State of Madhya Pradesh* AIR 1981 SC 721, 1981 Cr LJ 420 ; *Ayub v State of Uttar Pradesh* AIR 1994 SC 1064, 1994 Cr L) 2102 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[4][OF] [5] [* * *] PROPERTY AND OTHER MARKS]

S. 478.

Trade marks.-- ;

[Rep. by the Trade and Merchandise Marks Act, 1958 (43 of 1958), s 135 and Sch (wef 25-11-1959).]

4 Substituted by Act 4 of 1889, s 3, for the original heading and ss 478 to 489 .

5 The word 'Trade' omitted by Act 43 of 1958, s 135 and Schedule (wef 25-11-1959).

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF] [* * *] PROPERTY AND OTHER MARKS]

S. 479.

Property mark.--

A mark used for denoting that moveable property belongs to a particular person is called a property mark.

Comments

1. Scope

This section defines 'property mark'. A 'property mark' is a mark which is used for denoting that the property, impressed with that mark, belongs to a particular person.[6] In other words, the property mark signifies a right of property, the object of it being to protect one's goods against fraudulent imitation by another. The mark may be used by a manufacturer as well as a merchant. A property mark may be put on any article owned by a person. It is, however, not confined to that article; it extends to all kinds of movable property, belonging to the person, owning the property mark, whether the property is of one kind or of different kind. A mark, used at the time when it is fixed, does not cease to be a property mark if the ownership of the article ceases.[7]

2. 'Property Mark' Distinguished from 'Trademark'

Concept of a ' trademark' is distinct from 'property mark'. The function of a trademark is to give an

indication, to a possible purchaser, as to the manufacture or quality of the goods, or the trade source from which the goods come, or the trade hands through which they pass on their way to the market. On the other hand, a3916 property mark means a mark used for denoting that a movable property belongs to a particular person. The distinction is that whereas the former denotes the manufacturer or quality of the goods to which it is attached, the latter denotes the ownership in them. The former concern the goods themselves, while the latter concerns the proprietor.[8]

3. 'Movable Property'

The term 'movable property' in this section is intended to include a class or category of properties falling under one ownership, not merely the parts of it which may pass from the hands of the owner into other hands. The class is stable though the units are ambulatory. The term, as used in the section, is intended to include collective class noun, *ie*, nouns that express a number of objects of the same class together. Thus, in the case of a bank selling bars of gold, their property consists not merely of the gold which they import, but of other movable properties also, falling into one class--movable property of the bank.[9]

4. Intending Purchaser, Need not Actually be Deceived

Section 480, IPC, does not necessarily require that any intending purchasers, should actually be deceived, it is sufficient, if the deception in question is reasonably calculated to cause it to be believed that the goods, so have a connection with the course of trade of a person with whom they have not any connection. If it is clear, from a simple look, that the get-up of the offending labels or wrappers is closely similar to the get-up of the complainant's goods, and in general appearance, labels and colour selection and other essential details of the wrappers of the offending mark so closely resemble those of the complainant's mark, that they are likely to deceive an unwary purchaser who is acquainted with the trademark and who trusts his memory, in such a case such use is an offence of counterfeiting trademarks punishable under the IPC .[10] It is not necessary to prove actual sale for the purpose of bringing the charge under s 482 or s 485, IPC, home to the appellant. It would be enough if circumstances are proved to establish that the tins were actually stored for sale.[11] It may be observed that the elements of the offences charged do not require proof of any person having actually deceived. It is enough if the circumstances proved are sufficient to establish that prospective buyers were likely to be deceived.[12]

6 *Locumal v Emperor* 16 Cr LJ 230, p 231 .

7 *Emperor v Dhayabhai Chakasha* 1 Cr LJ 581 .

8 *Sumat Prasad Jain v Sheojanan Prasad* 1972 Cr LJ 1707, p 1709, AIR 1972 SC 2488 .

9 *Emperor v Dhayabhai Chakasha* 1 Cr LJ 581, p 583 . For further commentary, see under same heading in s 481, *post* and the commentary in s 22, vol 1.

10 *Jogeswar Patel v Ramnivas Agarwal* AIR 1962 Ori 51, (1962) 1 Cr LJ 358 (Ori) .

11 *Madan Lal Arora v State* AIR 1961 Cal 240 (DB), (1961) 1 Cr LJ 488.

12 *Ibid*.

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF] [* * *] PROPERTY AND OTHER MARKS]

S. 480.

Using a false trade mark.--

[Rep. By the Trade and Merchandise Marks Act, 1958 (43 of 1958), s 135 and Sch. (Wef 25-11-1959).]

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF] [* * *] PROPERTY AND OTHER MARKS]

S. 481.

Using a false property mark.--

Whoever marks any moveable property or goods or any case, package or other receptacle containing moveable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such3917 receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

Comments

1. Scope

The section defines what is meant by using a false property mark. The substance of the offence consists in user of the mark in a manner calculated to make it appear that the movable property or goods, *etc*, so marked, or the movable property or goods, contained in any case, package, or receptacle so marked, belong to a person to whom they do not belong.

2. Essential Ingredients

The essential ingredients of an offence under this section are as under:

(a) the accused must mark any movable property, or goods, or any case, package or other receptacle, containing such movable property or goods, or use any case, package or other receptacle having any mark thereon; and
(b) such marking or using must be in a manner reasonably calculated to cause it to be believed that the property or goods, *etc*., so marked, or the movable property or goods contained in any case, package, or receptacle so marked, belong to a person to whom they do not

belong.

3. 'Movable Property'

Movable property would mean corporeal property, and not incorporeal property, in this section.[13]

4. 'Property Mark'

Commentary under s 479, *ante*, may be referred to.

13 *Amarnath Bihari v Uma Shanker Bahadur* 56 Cr LJ 832, AIR 1955 Pat 228 . For further commentary, see under the same heading in 479, *ante*.

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF] [* * *] PROPERTY AND OTHER MARKS]

S. 482.

Punishment for using a false property mark.--

Whoever uses [14][***] any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.3918

Comments

1. Scope

This section provides punishments for 'using a false property mark' which has been defined in the preceding s 481, IPC . Such 'using' becomes punishable unless the person, so using the false property mark, can show that he acted 'without intent to defraud'. The maker of an article, who uses, on that article, the mark of another maker intending thereby to induce a belief in the purchasers that the article was made by such other maker, becomes amenable to this section. The offender cannot say in defence that his article is as good as, if not superior to, similar article made by the other maker if the offender intends to practice deception and use the mark for this purpose. If the property marks differ from each other to such an extent that there can be no deception to anyone, no offence is committed.

2. 'Whoever'

The word 'whoever', in this section, means the same thing as 'every person who' and shows that the provisions of the section apply to persons generally. In law, a corporation (which includes a limited company) is a person. Therefore, a body corporate can be lawfully prosecuted and, on conviction, punished for an offence under the section.[15]

3. 'Without Intent to Defraud'

There is no intent to defraud if there is a *bona fide* dispute as to the right to use a mark. In such a case, action should be taken in a civil court.[16]

4. Procedure

The offence under this section is non-cognizable, bailable, compoundable, with the permission of the court before which the prosecution for such offence is pending, by the person to whom loss or injury is caused by the use of false property mark, and triable by a magistrate, and may also be tried summarily.

5. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC may be referred to.

6. Duty of the Court

In all cases where it is alleged that the same kind of goods are being sold off under a counterfeit trademark, it is the duty of the court to find out whether the mark is counterfeit having due regard to the similarly or otherwise of the marks and the circumstances connected with the case. It may also be mentioned that normally a customer does not see two similar labels or marks side by side--in order to make a comparison and note the difference between the two. It is only a general notion that he may have heard about the labels and the designs on them and when he is offered something as being goods that he wants, he uses his ordinary recollection in order to arrive at a conclusion whether he gets the goods that he asks for. The principle in all these3919 cases is, what is the effect of the particular trademark on an unwary purchaser, and whether that purchaser would be deceived by the use of that particular trademark.[17]

7. Proof

The prosecution should prove that:

(a) the accused marked movable property, or goods in question, or some case, package or receptacle, containing movable property or goods, or the accused used some case, package or receptacle bearing such mark;
(b) the accused did as above in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or the movable property or goods, contained in some case, package or receptacle, so marked, belonged to some person; and
(c) such property or goods, *etc*, did not belong to that person.

8. Burden of Proof

Subject to certain recognised exceptions, the principle of criminal jurisprudence is that the prosecution must prove the guilt of the accused beyond all reasonable doubt.[18] However, this principle has been departed from in this section which places, upon the accused, the burden to prove that he is innocent and that he acted without intent to defraud. The receptacles which were found on search of the shop of the

accused were genuine receptacles used by company *A* for selling their product. The allegation was that the stuff manufactured by *A* was abstracted from the tins and spurious stuff was put in its place. The mark of the company *A* was maintained in the receptacles and only the stuff inside was changed. The receptacles had on it the registered trademark of company *A*. It was proved that the company had exclusive right to the use of the mark and the invented word thereon. On these facts it was held that the charges under ss 482 and 485, IPC, were established against the accused and the burden was on accused to prove that he had acted without intent to defraud.[19]

9. Settled Position of Law

The settled position in law is that, where a manufacturer is selling his goods under a certain trademark, the question, whether another manufacturer of such goods using similar mark is likely to deceive public that they are purchasing the goods so manufactured by the former, is a question of fact to be decided on the evidence adduced; the vital element in such a case is the likelihood or possibility of deception or confusions; this may depend on a number of matter as well as the question of similarity of the marks or of the get up; witnesses can be called to prove the circumstances and place in which the articles are sold, the classes of person, who buy them and whether they include persons who are illiterate or ignorant or the reverse, the manner in which the public are accustomed to ask for the article and any other matters which will assist the court to decide whether deception is probable; evidence of actual deception may be available and if available may be very valuable; there is no such person as an expert in human nature, and a witness cannot be called to say that it is likely that purchaser of the goods will be deceived; the test of comparison of3920 the marks side by side is not a sound one, since a purchaser will seldom have two marks actually before him when he purchases; the marks, with many difference may yet have an element of similarly which will cause deception, more especially if the goods are in practice asked for by a name which denotes the mark or the device on it. Section 480 , IPC, does not necessarily require that any intending purchasers should actually be deceived; it is sufficient, if the deception in question is reasonably calculated to cause it to be believed that the goods so marked have a connection with course of trade of a person whom they have not any such connection; if it is clear, from a simple look, that the get-up of the offending labels or wrappers is closely similar to the get-up of the complainant's goods and in general appearance, labels and colour selection and other essential details of the wrappers of the offending mark so closely resemble those of the complainant's mark, that they are likely to deceive an unwary purchaser who is acquainted with the trademark and who trusts his memory, in such a case such use is an offence of counterfeiting trademark punishable under the IPC ; the matter must be considered from the point of view of the ordinary unwary purchaser and the totality of the impression gained on seeing the labels and wrappers in question when offered for sale.[20]

10. Proof of Actual Sale--Not Necessary

It is not necessary to prove actual sale for the purpose of bringing the charge under s 482 or s 485, IPC, home to the accused. It would be enough if circumstances are proved to establish that the tins bearing counterfeit trademark were actually stored for sale. The elements of the offences charged do not require proof of any person having been actually deceived. It is enough if the circumstances proved are sufficient to establish that prospective buyers were likely to be deceived.[21]

11. Conviction

The fact that the complainant who had not registered his title 'Basant Bahar' as a trademark, but loosely used the word trademark in his averments, did not affect the case.[22] If the facts alleged by the complainant are proved, the mere wrong mention of the provision of law will not absolve the accused.[23] Where, the complainant had successfully put into the market a scent 'Basant Bahar', packed in a carton with distinctive features, the accused who originally put another scent into the market, titled as 'Pushpa Raj', finding that it was not being sold, copied the title 'Basant Bahar', with all the distinctive features, on the carton, with the difference, that he put his own manufacturers name, and when it was proved that his scent was inferior in quality and sold with the intention of palming off his scent as the one manufactured by the complainant, the accused was found guilty under ss 482 and 486, IPC .[24]3921

12. Sentence

The measure of punishment for an offence under this section should be the damage caused to the complainant.[25]

14 The words 'or any false trade mark or' omitted by Act 43 of 1958, s 135 and Schedule (wef 25-11-1959).

15 *Seena M Haniff and Co v Liptons Limited* 15 Cr LJ 337 ; *PA Pakir Mohammed v Emperor* AIR 1929 Rang 322, p 324 .

16 *Surja Prasad v Mohahir Prasad Tribedy* 11 CWN 887, 6 Cr LJ 151 .

17 *Abdul Sattar Mohammed Hussain v Badrinarayan Bansilal* AIR 1962 Bom 29 (DB) .

18 *Woolmington v Director of Public Prosecutions* 1935 AC 462, p 481 (HL) .

19 *Madan Lal Arora v State* AIR 1961 Cal 240 (DB), (1961) 1 Cr LJ 488.

20 *Jogeswar Patel v Ramnivas Agarwal* AIR 1962 Ori 52, (1962) 1 Cr LJ 358 (Ori) ; *Thomas Bear and Sons (India) Ltd v Prayag Narain* AIR 1940 PC 86 ; *Mohd Mahhoob v Bibhuti Bhusan Gupta* AIR 1960 Cal 63 ; *Haveli Ram v State* AIR 1956 All 132 .

21 *Madan Lal Arora v State* AIR 1961 Cal 240 (DB), (1961) 1 Cr LJ 488.

22 *Sumat Prasad Jain v Sheojanan Prasad (dead) by LRS & State of Bihar* AIR 1972 SC 2488, 1972 Cr LJ 1707 (SC) ; *Sheojanam Prasad v Sumat Prasad Jain* AIR 1971 Pat 124 (DB) .

23 *Hariprasad Lal Chand v Nanoo Khan Hussain Bux* 1968 Cr LJ 1435, AIR 1968 MP 234 ; *Shameen Ahmed v Mohan Lal* AIR 1967 All 346, 1967 Cr LJ 840 .

24 *Sumat Prasad Jain v Sheojanan Prasad (dead) by LRS and State of Bihar* AIR 1972 SC 2488, 1972 Cr LJ 1707 (SC) .

25 *Girdharilal Marwori v Emperor* 38 Cr LJ 35, AIR 1936 Pat 579, p 581 . See also commentary under the same heading in s 485, *post*.

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF] [* * *] PROPERTY AND OTHER MARKS]

S. 483.

Counterfeiting a property mark used by another.--

Whoever counterfeits any [26][***] property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

Section 483 is restricted to the offence of counterfeiting property marks.

2. 'Counterfeits'

Section 28 and its commentary in vol 1, may be referred to.

3. Procedure

The offence under section 483 , IPC is non-cognizable, bailable, compoundable, with the permission of the court before which the prosecution for such offence is pending by the person whose trade or property mark is counterfeited, and triable by a magistrate, and may also be tried summarily.

4. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC, may be referred to.

5. Duty of the Court

Commentary under the same heading in s 482, *ante*, may be referred to.

6. Proof

The prosecution has to prove that:

(a) the accused counterfeited the property mark in question;
(b) the said property mark was the property of some other person; and
(c) it was so used by that other person.3922

7. Settled Position of Law

Commentary under the same heading in s 482, *ante*, may be referred to.

26 The words 'trade mark or' omitted by Act 43 of 1958, s 135 and Schedule (wef 25-11-1959).

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Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF] [* * *] PROPERTY AND OTHER MARKS]

S. 484.

Counterfeiting a mark used by a public servant.--

Whoever counterfeits any property mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Comments

1. Scope

The offence under this section is an aggravated form of the offence punishable under the preceding s 483 . The aggravation is due to the property mark being that of a public servant. In other respects, it generally follows the last two sections.

The section is made up of two offences, namely, (i) counterfeiting a property mark of a public servant, and (ii) using counterfeit property mark as genuine. The terms of the section are wider than those of the preceding two sections which deal only with property marks, while this section deals not only with property marks as such but also with other used by a public servant to denote certain things with reference to a property. It, thus, protects all marks, whether property marks or other marks, if they are used by a public servant to denote that:

(a) Any property has been manufactured by,

(i) a particular person; or
(ii) at a particular time or place.

(b) The property is of a particular quality; or
(c) The property has passed through a particular office; or
(d) The property is entitled to any exemption.

A property mark used for any other purpose will be outside the protection intended by this section. The 'Agmark' label (prescribed by the government to denote a certain grade to *ghee*) is really a label prescribed by the Central Government and cannot be said to be a public servant. A person, counterfeiting such a label, cannot be held to have committed an offence under this section.[27]

A familiar example of a property mark used by a servant is the broad arrow exclusively used by government to denote that the property, to which it is affixed, is the property of government, for instance, military vehicles display this mark. Since the Government of India is a manufacturer or merchant, it has to protect its manufacture or merchandise by using appropriate property marks. In some cases, the3923 use of a mark by government is necessary to protect its customs and other duties so that if a person, in order to get exemption from such duties, uses a false government mark on his goods thereby inducing officers of government to pass the goods free of duty, he commits the offence under the section.

2. 'Counterfeits'

Section 28 and its commentary in vol 1, may be referred to.

3. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

4. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc.*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the ... day of ..., at ..., you counterfeited a mark (*or property mark*), to wit ..., used by a public servant, to wit ..., to denote that some property was manufactured by a particular person (*or at a particular time or place*), to wit ... (or that the property is of a particular quality, to wit ..., or that the property has passed through a particular office, to wit... or that the property is entitled to a particular exemption, to wit ...) (or used, as genuine, a mark (*or property mark*), to wit ..., knowing the same to be counterfeit), and that you thereby committed an offence, punishable under s 484 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

5. Proof

The prosecution has to prove that:

(a) the accused counterfeited the mark or property mark in question;
(b) such mark was used by a public servant; and
(c) the said mark was used to denote that the property had been manufactured by a particular person or at a particular time or place, or that the property was of a particular quality, or that the property had passed through a particular office, or that the property was entitled to a certain exemption;

or prove that:

(a) the accused used the mark or property mark in question;
(b) such mark was used by a public servant;
(c) the said mark was used to denote that the property had been manufactured by a particular person or at a particular time or place, or that the property was of a particular quality, or that the property was entitled to a certain exemption;
(d) the accused used the said mark as genuine; and
(e) when the accused used it, he knew the same to be a counterfeit.3924

6. Settled Position of Law

Commentary under the same heading in s 482, *ante*, may be referred to.

27 *Chottey Lal v State* 1959 Cr LJ 38, AIR 1959 Cal 32, p 35 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF] [* * *] PROPERTY AND OTHER MARKS]

[28][S. 485.

Making or possession of any instrument for counterfeiting a property mark.--

Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a property mark, or has in his possession a property mark for the purpose of denoting that any goods belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.]

Comments

1. Scope

The section follows the line of ss 235, 265 and 472, IPC, which relate to possession of instrument for counterfeiting coins, stamps, and forging documents. The IPC regards the possession of instruments for counterfeiting coins and making, or possession of, any instrument for counterfeiting a property mark as equally serious though it regards counterfeiting of stamps as more serious. All the four sections embody the principle that it is better to punish preparation for an offence than to wait for the consummation of the offence itself.

The section falls into two parts. The first part constitutes the act of making, or of possessing, an instrument of counterfeiting a property mark, an offence and the second part makes the possession of a property mark for denoting goods as belonging to a person, to whom they do not belong, an offence.

2. 'Any Die, Plate or Other Instrument'

Even though a mark may be a combination mark, possession of moulds for counterfeiting a part of the mark will amount to an offence under this section.[29]

3. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable, and tribal by a magistrate of the first class.

4. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc.*) hereby charge you (*name of accused person*) as follows:3925
>
> That, on or about the ... day of ..., at ..., you may (or had in your possession) a die (or plate or instrument), to wit ..., for the purpose of counterfeiting a property mark, to wit ... (or had, in your possession, the property mark. Ex ..., for the purpose of denoting that certain goods, to wit ..., belonged to AB, to whom they did not belong). And that you thereby committed an offence, punishable under s 485 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

5. Duty of the Court

Commentary under the same heading in s 482, *ante*, may be referred to.

6. Proof

The prosecution has to either prove that:

(a) the accused made, or had, in his possession, the die, plate or other instrument in question, and
(b) such die, *etc*, was for the purpose of counterfeiting a property mark;

or prove that:

(a) the accused had, in his possession, the property mark in question,
(b) he possessed such property mark for the purpose of denoting that goods, bearing such mark, belonged to some person, and
(c) such goods did not belong to that person.

The onus of establishing the elements of the offence under the section rests entirely upon the prosecution. It can, however, in the circumstances of a case, discharge this onus by praying, in aid, explanation 2 to s 28 . The foundation for the presumption under the said explanation must be laid by the prosecution by

calling relevant evidence.[30]

7. Settled Position of Law

Commentary under the same heading in s 482, *ante*, may be referred to.

8. Proof of Actual Sale--Not Necessary

Commentary under the same heading in s 482, *ante*, may be referred to.

9. Double Jeopardy

It may be that a person may be in possession of different sets of counterfeit labels of trademark on different occasions at different places. If such a person be found in possession, he will be deemed to have committed a distinct and separate offence under s 485, IPC in respect of each set of counterfeit labels found with him at different places. It cannot be said that a second prosecution in respect of another set of counterfeit labels found with a person would amount to a prosecution for the same3926 offence twice, violating s 403, CrPC 1898[31] or Art 20 (2) of the Constitution of India .[32]

10. Sentence

No protection can be afforded if the accused is let off with light fines for such offences, though there may be cases, when the offence is committed inadvertently in which case, a small fine may be justified. When, however, there is a systematic policy of pursuing another in using his trademark, it becomes a different matter, and a higher fine should be imposed.[33]

28 Substituted by Act 43 of 1958, s 135 and Schedule, for the original section (wef 25-11-1959).

29 *Abdul Sovan v Ramani Mohan Chatterjee* 32 Cr LJ 136, AIR 1930 Cal 664 (a case under the old section relating to trademark).

30 *Superintendent and Remembrancer of Legal Affairs v Prafulla Kumar* AIR 1954 Cal 277, p 279, 1954 Cr LJ 841 .

31 Now s 300, Cr PC 1973 (Act of 1974).

32 *Chintamanrao Balajirao v Digram Badluram* AIR 1960 MP 149, 1960 Cr LJ 609 .

33 *Abdul Sattar Mohhmed Hussain v Badrinarayan Bansilal* AIR 1962 Bom 29 (DB) .

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Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF] [* * *] PROPERTY AND OTHER MARKS]

S. 486.

Selling goods marked with a counterfeit property mark.--

[34][Whoever sells, or exposes, or has in possession for sale, any goods or things with a counterfeit property mark] affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves--

(a) that, having taken all reasonable prosecutions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and
(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or
(c) that otherwise he had acted innocently,

be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Comments

1. Scope

The provisions of this section are aimed at a retailer who connives with a fraudulent wholesaler or manufacturer in palming off on an unsuspecting public goods which purport to be other than what they are.[35] A person who makes no attempt at substitution but only offers the spurious article at a lower price as being a different and cheaper article, does not come within the mischief of the section.[36] In order to fall within the ambit of the section, it is not necessary that the mark in question should be the exclusive property of anybody. The only consideration of importance3927 under the section is whether the mark in question has come to be so identified with the goods of another person using the mark as to be regarded as a distinctive mark to denote those particular goods.[37]

Mens rea in its ordinary sense, that is to say, in the sense of a dishonest intention or an intention of deceiving or cheating, does not form an essential ingredient for an offence under this section.[38]It is sufficient to show that there was an intention on the part of the accused to do the act forbidden by the section.[39] A finding, that the prosecution has failed to prove that there was any intention on the part of the accused to defraud or to cheat, is not inconsistent with the existence of *mens rea* in the sense of an intention to do a thing forbidden by law.[40]Every man is presumed to intend the consequences of his act. The very fact that the accused has kept, in his ship, goods, containing counterfeit marks, would show, by necessary implication, that he had an intention to do an act which is forbidden by the statute.[41]

2. 'Whoever'

The word 'whoever' means 'every person who' and would include a limited company or a corporation. A body corporate can lawfully be prosecuted and, on conviction, punished for an offence under s 482 or s 486, IPC .[42]

3. 'Possession'

Section 27 and its commentary in vol 1, may be referred to.

4. 'Goods'

'Goods' in this section, include books.[43]

5. 'Counterfeit Property Mark'

A counterfeit property mark is one, by means of whose resemblance to a genuine article it is intended to

deceive or lead a purchaser to imagine that the counterfeit is, in reality, the genuine article.[44] Mere differences in detail may not prevent two marks from being essentially the same. What degree of resemblance is necessary is a matter incapable of definition *a priori*.[45] The test, therefore, is whether there is such a resemblance as to deceive a purchaser using ordinary caution.[46] If there is no doubt that the intention of the accused was to deceive and the accused are unable to bring themselves within the exceptions in s 486, it is clearly a case of 'counterfeit' within the meaning of s 28 .[47] A thing is not ordinarily counterfeit unless it bears, on the face3928 of it, the resemblance of validity, and such as to deceive an average person on an ordinary observation. Where the differences are patent and obvious on ordinary observation to an unintelligent person, the offence under this section is not committed.[48]

6. Procedure

The offence under this section is non-cognizable, bailable, compoundable, with the permission of the court before which the prosecution for such offence is pending, by the person whose trade or property mark is counterfeited, and triable by a magistrate, and may also be tried summarily.

7. Charge

The offence under this section being liable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC, may be referred to.

8. Duty of the Court

Commentary under the same heading in s 482, *ante*, may be referred to.

9. Burden of Proof

Under this section, the onus is not thrown upon the complainant to show that the accused acted dishonestly; the onus is thrown upon the accused to bring himself within the exceptions stated in cll (a) and (b), read together, or cl (c). If the accused discharges the onus, he commits no offence under the section. The onus arises as soon as the essential ingredients of the offence are proved.[49] Where marks on articles, recovered from a person, are not proved to be counterfeit, there is no question of the person proving his innocence.[50]

10. Proof

The prosecution has to prove that:

(a) the accused sold, or exposed for sale, or had, in his possession, for sale, the goods or things in question;[51]
(b) such goods or things, or the case, package or other receptacle, in which such goods were contained, had some property mark, affixed to, impressed upon, them; and
(c) such property mark was a counterfeit.3929

11. Settled Position of Law

Commentary under the same heading in s 482, *ante*, may be referred to.

12. Conviction

Commentary under the same heading in s 482, *ante*, may be referred to.

34 Substituted by Act 43 of 1958, s 135 and Schedule, for certain words (wef 25-11-1959).

35 *Sumat Prasad Jain v Sheojanan Prasad* 1973 SCC (Cr) 186 .

36 *Local Government v Motilal Jain* AIR 1937 Nag 341, p 345, 39 Cr LJ 109 .

37 *Sri Narayan v Mohammed Abu Saleh* 41 Cr LJ 836, AIR 1940 Cal 351, p 352 .

38 *Shantilal Uttamram Mehta v Dhanji Kanji Shah* (1961) 2 Cr LJ 66, AIR 1961 Bom 203, p 207 .

39 *Pranjivandas Sunderji v State of Bombay* 54 Cr LJ 408, AIR 1953 Bom 85, p 87 .

40 *Shantilal Uttamram Mehta v Dhanji Kanji Shah* (1961) 2 Cr LJ 66, AIR 1961 Bom 203, p 207 .

41 *Ibid.*

42 *Seeha M Hansiff and Co v Liptons Ltd* 15 Cr LJ 337 (DB) .

43 *Kanai Das Bairagi v Radha Shyam Basack* (1898) ILR 26 Cal 232, 3 CWN 97 .

44 *Prayag Das v Emperor* (1963) 1 Cr LJ 279, AIR 1963 All 131, p 134 .

45 *Roshan Singh v Emperor* 42 Cr LJ 352, AIR 1941 All 87, p 91 .

46 *Swadeshi Mills Co Ltd v Juggi Lal Kamlapat* AIR 1927 All 81, **affirmed** by the Privy Council, in AIR 1929 PC 11 ; *Kundan Lal Agarwal v State* 1958 Cr LJ 1102, AIR 1958 All 643, p 645 ; *Haveli Ram v State* AIR 1956 All 132, p 133, 1956 Cr LJ 183 .

47 *Nilmoney Nag v Durga Pado Banerjee* 16 Cr LJ 719, AIR 1916 Cal 538, p 548 .

48 *Lokumal v Emperor* 16 Cr LJ 230, AIR 1914 Sind 163, p 164 . See also commentary under s 28 in Vol 1.

49 *Holland Bombay Trading Co v Buktear Mull* 1 Cr LJ 300, p 304 ; *Local Government v Motilal Jain* AIR 1937 Nag 341, p 343, 344, 39 Cr LJ 109 ; *Dasarath Singh v State* 1956 Cr LJ 738, 1956 Cr LJ 738, AIR 1956 Cal 260, p 262 .

50 *Dina Nath Kapoor v State* (1963) 1 Cr LJ 282, AIR 1963 All 133, p 134 .

51 *Kollapalli Subramanyam v Emperor* 42 Cr LJ 28, AIR 1940 Mad 822, p 823 (the signature of a person in a forwarding note does not necessarily prove that he was in possession of the goods which bore a counterfeit mark and his conviction under s 486 cannot be sustained).

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF] [* * *] PROPERTY AND OTHER MARKS]

S. 487.

Making a false mark upon any receptacle containing goods.--

Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real

nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Comments

1. Scope

This section is framed in general terms and would include offences punishable under other sections, for instance, under s 482, IPC . The section aims mainly at punishing smugglers of contraband goods without payment of duty by using false marks. A person, who imports goods into this country and makes a false mark thereon to cause it to appear that the goods are not dutiable, is liable to punishment under this section, while one who makes use of goods so marked is liable to punishment under the next section.

This section is more comprehensive than s 482 or s 486, IPC . It punishes the false marking of a case, package or receptacle, containing goods, in a manner reasonably calculated to deceive a public servant or any other person. It is not required that the mark should be trademark or property mark. The criminally of the act arises from the nature of the mark and the purpose for which it was made on the case, package or receptacle, containing the goods. The false belief, sought to be induced, is:

(a) that the receptacle contains goods which it does not contain, or
(b) that it does not contain goods which it does contains, or
(c) that the goods, so contained, are of a nature or quality different from the real nature or quality thereof.

The intention need not be proved for it is presumed from the mark and the manner of using it. The presumption can be rebutted by the accused by proving that he acted without intent to defraud. A person, making a false mark upon any receptacle, containing goods, can escape punishment under the section only if he proves that he acted without intent to defraud.[52]3930

2. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable, and triable by a magistrate.

3. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc)* hereby charge you (*name of accused person*) as follows:

That, on or about the ... day of ..., you made a false mark, to wit..., upon a case (*or package or other receptacle*), to wit ..., containing goods, in a manner reasonably calculated to cause a public servant (*or any other person*), to wit..., to believe that such receptacle contained goods, to wit .... which it did not contain (*or that it did not contain goods, which it did contain*) (that the goods, contained in such receptacle, were of a nature (*or quality*) different from the real nature (*or quality*) thereof) and that you thereby committed an offence, punishable under s 487 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

4. Proof

The prosecution has to prove that:

(a) the accused made some mark upon some case, package or other receptacle containing goods;
(b) such mark was a false mark; and
(c) the accused did as in point (a) above in a manner reasonably calculated to cause some public servant, or some other person, to believe that:

(i) the receptacle contained goods which it did not contain, or
(ii) it did not contain goods which it did contain, or
(iii) the goods, contained in the receptacle, were of a nature or quality different from the real nature or quality thereof.

The accused may prove in defence that he acted without intent to defraud.

5. Settled Position of Law

Commentary under the same heading in s 482, *ante*, may be referred to.

52 *Chottey Lal v State* 1959 Cr LJ 38, AIR 1959 Cal 32 .

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Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF] [* * *] PROPERTY AND OTHER MARKS]

S. 488.

Punishment for making use of any such false mark.--

Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence

against that section.3931

Comments

1. Scope

The section punishes a person who makes use of a false mark in any manner prohibited by the previous section, namely, s 487, IPC . As in other relevant sections, the section does not require that the user of the mark should actually defraud anyone; it is sufficient if the use is reasonably calculated to cause any person to believe the goods so marked or any goods, contained in a receptacle, were of a nature or quality different from the real nature.[53]

2. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable, and triable by a magistrate.

3. Quashing of Criminal Proceedings

Where the allegation against the accused were of storage of rice in a railway wagon for obtaining transit permit by using false documents, there was no material in the FIR to show such allegations. The admission by the deputy secretary of Food and Supply Department, was that he had issued the transit permit under his signature, negated the allegation regarding commission of the offence. The FIR and investigation commenced thereon for offences under ss 463, 465 and 488, IPC, were quashed.[54]

4. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc.*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the ... day of ..., at ..., you made use of a false mark, to wit.... upon a case (*or package or other receptacle*), to wit..., containing goods, in a manner reasonably calculated to cause a public servant (*or any other person*), to wit ..., to believe that such case contained goods, to wit ... which it did not contain (*or that it did not contain goods which it did contain*) (or that the goods, contained in such receptacle, were of a nature (*or quality*) different from the real nature (*or quality*) thereof), and that you thereby committed an offence, punishable under s 488 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

5. Duty of the Court

Commentary under the same heading in s 482, *ante*, may be referred to.

6. Proof

The prosecution has to prove that:

(a) the accused made use of some mark upon some case, package or receptacle, containing goods;3932
(b) such mark was a false mark; and
(c) the accused did as in point (a) above in a manner reasonably calculated to cause some public servant, or some other person, to believe that:

(i) the receptacle contained goods which it did not contain, or
(ii) it did not contain goods which it did contain, or
(iii) the goods, contained in the receptacle, were of a nature or quality different from the real nature or quality thereof.

7. Settled Position of Law

Commentary under the same heading in s 482, *ante*, may be referred to.

53 *Abdul Sattar Mohammed Hussain v Badrinarayan Bansilal* (1961) 2 Cr LJ 871, p 872, AIR 1962 Bom 29, p 32 .

54 *Shouvik Exports Pvt Ltd v Inspector General of Police* AIR 2000 Cal 25 . For further commentary, see s 420, *ante*.

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF] [* * *] PROPERTY AND OTHER MARKS]

S. 489.

Tampering with property mark with intent to cause injury.--

Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Comments

1. Scope

Tampering with any property mark is motivated by a criminal intention, the object being to remove the identity of the property and conceal the crime committed. The section is confined only to property marks. A familiar example of a mark is the broad arrow mark on property to denote that it is the property of the government.

Unlike other sections in the group of ss 479 to 489, IPC, a criminal intention or knowledge is an essential ingredient of the offence punishable under this section. When a property mark is removed, destroyed or defaced, or added to, with the intention or knowledge that thereby injury may be caused to any person, the offence described in the section is committed.

2. 'Property Mark'

Commentary under s 479, *ante*, may be referred to.

3. 'Injury'

Where the term of a contract, between an author and a publisher, assigning the copyright of books of the author to the publisher, are so wide that it is difficult for the court to hold, on the facts of the case, that, in removing the name of the author from the books, the intention of the publisher was nothing but to cause injury to the author, and not to exercise a right, which, the publisher honestly believed, was available to him under the contract, a charge under s 489, IPC, cannot stand against the publisher.[55]3933

4. 'Person'

Commentary under s 11, vol 1, may be referred to.

5. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable, and triable by a magistrate and may also be tried summarily.

6. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC, may be referred to.

7. Proof

The prosecution has to prove that:

(a) the mark in question is a property mark;
(b) the accused removed, destroyed, defaced, or added to, such mark; and
(c) he did so intending thereby to cause injury to some person or he did so knowing that he might cause injury to some person.

8. Settled Position of Law

Commentary under the same heading in s 482, *ante*, may be referred to.

55 *Amarnath Bihari v Uma Shanker Bahadur* 56 Cr LJ 832, AIR 1955 Pat 228, p 231 . For further commentary, see under s 44, vol 1.

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[56][OF CURRENCY-NOTES AND BANK-NOTES]

S. 489A .

Counterfeiting currency-notes or bank-notes.--

Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with [57][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.--For the purpose of this section and of sections 489B,[58][489C, 489D and 489E], the expression "bank-note" means a promissory note or engagement for the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or sovereign power, and intended to be used as equivalent to, or as a substitute for, money.3934

Comments

1. Scope

This section is similar to ss 231 and 255, IPC, which deal with the same offence with respect to a coin and a stamp respectively, penalises a person who counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note. The expression 'currency-note' is large enough in its amplitude to cover the currency notes of 'any country'.[59]

2. Object

Sections 489A to 489E deal with various economic offences in respect of forged or counterfeit currency notes or bank notes. The object of legislature in enacting these provisions is not only to protect the economy of the country, but also to provide adequate protection to currency notes and bank notes.[60] Possession of fake currency is a direct threat to the economy of the country.[61] It is an offence against symbol of sovereignty and does not deserve any sympathy of the court in matter of sentence.[62]

3. Pith of the Offence

The pith of the offence under s 489A, IPC is that it is not necessary to show that the deception actually took place, rather the intention to practice deception by causing one thing to resemble another is quite

sufficient and the counterfeit must be of such a character that it would be possible to palm it of as genuine.[63]

4. Absence of Security Thread from Currency Notes --Effect

It is a matter of common knowledge that genuine currency notes have security thread and absence of the same by itself would show that the currency notes were counterfeit in nature.[64]

5. 'Counterfeits'

From the definition in s 28, IPC, of the word 'counterfeit', it is clear that counterfeit is a process by which one thing is caused to resemble another thing. It supposes that there is an original. The act of counterfeiting is the effect of producing another so as to resemble the original and the object of which is to practise deception or knowing it to be likely that the deception will thereby be practised. In other words, counterfeit does not connote an exact reproduction of the original counterfeited. The difference between the counterfeit and the original is not, therefore, limited to a difference existing only by reason of faulty reproduction. For the purpose of the IPC there can be counterfeiting even though the imitation is not exact and though there are differences in detail between the original and the imitation so long as the resemblance is so closed that the deception may thereby be practised.[65]3935

6. Detecting Counterfeit Currency

Forged or counterfeit currency can be ascertained by the following facts:

(a) Water mark was totally absent in the said currency notes.
(b) The quality of the paper was inferior.
(c) Security thread was absent.
(d) Number panels were not in alignment.
(e) There were more notes than one bearing the same number.
(f) The quality of the printing was inferior.[66]

Fake currency notes can be detected by the fact that the notes were photo copies as per the report of the Reserve Bank of India, their paper was rough and thick, size of the notes was slightly shorter than that of genuine ones, water mark was not available and the colour of the notes was different.[67]

7. 'Performs any Part of the Process of Counterfeiting'

Section 489A not only deals with complete act of counterfeiting, but also covers the case where the accused performs any part of the process of counterfeiting. Therefore, if the material shows that the accused knowingly performed any part of the process of counterfeiting, s 489A becomes applicable.[68] These words would mean 'part of any process which could have ended in producing a counterfeit'.[69] A clumsy and crude attempt to produce the impression of a currency-note only to cheat another person of his money cannot be called a process of counterfeiting so as to constitute one of the elements of the offence under this section.[70]

8. Explanation

A traveler's cheque issued by a bank to its customer is not a 'bank-note'.[71]

9. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and triable by the court of sessions.

10. Charge

The following form of the charge may be adopted:

> I (*name and office of sessions judge, etc.*) hereby charge to (*name of accused person*) as follows:
>
> That you, on or about the ... day of ..., at..., counterfeited (*or knowingly performed a part of the process of counterfeiting, to wit* ...) a currency-note (*or a bank-note*) of the value of ... rupees, and thereby committed an offence, punishable under s 489A of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.3936

11. Proof

The prosecution has to prove that:

(a) the note in question is a currency-note or bank-note; and
(b) the accused counterfeited it or knowingly performed any part of the process of counterfeiting it.

For convicting a person under s 489A, IPC, the prosecution is required to prove that the accused was knowingly performing any part of the process to counterfeit currency notes. For proving the offence of conspiracy, there must be some convincing evidence of the prosecution to prove that it was pre-arranged plan of all or some of the accused either for preparing fake currency or for their circulation. Only on the basis of circumstance like some persons were found in possession of counterfeit currency notes at or about the same time, inference cannot be drawn that all of them had engaged themselves in a conspiracy. However, if an accused is found in possession of counterfeit currency notes, it is upto him to furnish satisfactory explanation regarding the possession. This proposition is also applicable in respect of the material which can be used for preparing fake currency notes and the process which can be used for making fake currency notes. If there is no such explanation, a person found in possession of such material and counterfeit currency notes can be convicted for offence under s 489A of IPC .[72]

When the prosecution witness was working as the treasurer in the Reserve Bank of India and treasurer has expertise to detect fake and counterfeit currency notes, he had given valid grounds on the basis of which he had come to the conclusion that the currency notes were counterfeit and in one of them security threat was absent, his evidence should be believed.[73]

The very existence of the fake notes amounting to lakhs and lakhs of rupees indicate that all the accused under a criminal conspiracy are bent upon selling and introducing the fake notes in the market.[74]

12. Acquittal

A conviction under this section cannot stand unless it is proved that the accused counterfeited a

currency-note or a bank-note or he knowingly performed a part of the process of counterfeiting a currency-note or a bank-note.[75] Where there is total lack of evidence on the record that the three accused persons had counterfeited the currency notes or knowingly performed any part of the process of counterfeiting it and conviction under s 489A, IPC cannot be maintained unless it is proved that the accused persons really intended to counterfeit and either did counterfeit or performed any part of the process of counterfeiting, and there is also total lack of any evidence that the three accused persons have conspired together with the main accused in counterfeiting currency notes or knowingly participated in performing any part of the process of counterfeiting currency notes, the conviction of the three accused persons under ss 489A and 120B, IPC is illegal in view of the evidence on the record and the same was liable to be set aside.[76] Where the evidence did not establish that the3937 material recovered from the accused appellant could be used for printing currency notes, the accused appellant was acquitted of the charges under ss 489A, 489C and 489D .[77]

Charge against the accused was of making forged currency note of Rs 100/- and 50/-. Co-accused placed in similar situation and facing same charge already acquitted. The accused was also entitled to acquittal of the charge under ss 489A, 489C and 489D, IPC .[78]

13. Conviction

When the evidence of the investigating officer and an artist was providing material to corroborate the evidence of the accomplice, it clearly meets the requirements of s 114(b) in the background of s 133 of the Indian Evidence Act 1872. Thus, the accused can be convicted.[79] Where an accused is found in possession of counterfeit currency notes he can explain his possession, if he fails to furnish any explanation he would be convicted under s 489A, IPC .[80] If the accused persons do not furnish explanation that they were in possession of fake currency notes for other purpose, the court would infer that the accused intended to use the fake currency notes as genuine one.[81]

From the accused appellants fake currency notes, and machinery used for preparing fake currency notes were recovered, they were found guilty and convicted under ss 489-A, 489-B, 489-C and 489-D, IPC .[82] Where the accused was in possession of counterfeit currency notes and the material which revealed that he was involved in the preparation of fake currency notes, he was convicted under s 489A .[83]

56 Added by Act 12 of 1899, s 2 .

57 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

58 Substituted by Act 35 of 1950, s 3 and Schedule II for '489C and 489D'.

59 *State of Kerala v Mathai Verghese* AIR 1987 SC 33, 1987 Cr LJ 308 (SC) . See also commentary under s 230, vol 2.

60 *K Hasim v State of Tamil Nadu* 2005 Cr LJ 143 (SC) .

61 *Abdul Qayyam v Union of India* 2011 Cr LJ 2008 (All) .

62 *Krukshetra Sena v state of Chhattisgarh* 2011 Cr LJ 2493 (Chhat) .

63 *Golo Mandla Ram Rao v State of Jharkhand* 2004 Cr LJ 1738 (Jhar) (DB) .

64 *Bharti v State of Maharashtra* 2003 Cr LJ 2583 (Bom) .

65 *Golo Mandla Ram Rao v State of Jharkhand* 2004 Cr LJ 1738 (Jhar) (DB) . See s 28 and its commentary in vol 1. See also s 231 and its commentary in vol 2.

66 *Bharti v State of Maharashtra* 2003 Cr LJ 2583 (Bom) .

67 *Pirthi Singh v State of Punjab* 2006 Cr LJ 1393 (P&H) .

68 *K Hasim v State of Tamil Nadu* 2005 Cr LJ 143 (SC) .

69 *Meera v Emperor* 18 Cr LJ 362, 1917 LB 105, p 107 .

70 *Ibid*.

71 *Yog Raj v State of Haryana* (1973) 75 Punj LR 351, 1973 Ch LR 286 .

72 *Narayan Maruti Wagmode v State of Maharashtra* 2011 Cr LJ 3318, p 3320 (Bom) (DB) .

73 *Bharti v State of Maharashtra* 2003 Cr LJ 2583 (Bom) .

74 *Liyakat Ali v State of Rajasthan* 2010 Cr LJ 2450, p 2461 (Raj) .

75 *Meera v Emperor* 18 Cr LJ 362, 1917 LB 105 .

76 *Golo Mandla Ram Rao v State of Jharkhand* 2004 Cr LJ 1738 (Jhar) (DB) .

77 *Jash Hang Subba v State of Sikkim* 2014 (2) Crimes 683 (Sikk), 2014 Cr LJ 613 .

78 *Jash Hang Subba v State of Sikkim* 2014 Cr LJ 613 (Skk) (DB) .

79 *K Hasim v State of Tamil Nadu* 2005 Cr LJ 143 (SC) .

80 *Narayan Maruti Wagmode v State of Maharashtra* 2011 Cr LJ 3318 (Bom) .

81 *Kurukshetra Sena v State of Chhattisgarh* 2011 Cr LJ 2493 (Chhat) .

82 *Liyakat Ali v State of Rajasthan* 2010 Cr LJ 2450, p 2461 (Raj) .

83 *Narayan Maruti Wagmode v State of Maharashtra* 2011 Cr J 3318, p 3320 (Bom) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF CURRENCY-NOTES AND BANK-NOTES]

S. 489B .

Using as genuine, forged or counterfeit currency-notes or bank-notes.--

Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with [84][imprisonment for life], or with imprisonment of either description for a term which may be extend to ten years, and shall also be liable to fine.3938

Comments

1. Scope

This section punishes traffic in forged or counterfeit currency-notes or banknotes or using them as genuine. Similar offence, relating to coins, is punishable under ss 239 and 241, IPC, and that, relating to stamps, under s 258, IPC . This section, thus, resembles ss 239, 241 and 258, IPC . The offence under this section is committed only when the false currency is distributed as if it were a genuine currency. [85]A person, who purchases, for value, a forged note, knowing it to be forged, is ordinarily expected to make

money out of the transaction by circulating the note as a genuine one. A perfectly honest man such as a mere collector of curios, who does not intend to put the instrument into circulation, may come within the ambit of the section.[86] It will be noticed from the language of the section that the buyer and seller of a forged currency-note are punishable under this section.

The main distinction between s 489B and 489C, IPC is that in order to establish a charge under s 389B, the prosecution is required to prove the sale, purchase, receipt, trafficking or use of counterfeit currency as genuine, whereas to prove a charge under s 489C of IPC, the prosecution has to prove possession of counterfeit currency with the requisite knowledge and with intention to use the same as genuine or intending that the same may be used as genuine. If in a given case, someone finds currency notes lying somewhere and picks them up with intention to use the same as genuine, while believing the same to be counterfeit currency, he would be guilty of the offence punishable under s 489C of IPC . If however someone consciously receives such counterfeit currency from another person with the requisite knowledge, he will be guilty of the offence punishable under s 489C of the IPC . The question as to whether possession of counterfeit currency in a particular case falls within the purview of s 489B or 489C of IPC, depends upon facts of each case including the explanation, if any, given by the accused as to how he came into possession of counterfeit currency notes.[87]

2. Object

Section 489B, IPC relates to using as genuine forged or counterfeited currency notes or bank notes. The object of the legislature in enacting this section is to stop the circulation of forged notes by punishing all persons who knowing or having reason to believe the same to be forged, do any act which could lead to their circulation.[88]

3. 'As Genuine'

The words 'as genuine' govern only the verb 'uses' which immediately precedes it, and not all other verbs used in the opening portion of the section.[89]

4. 'Knowing or Having Reason to believe the same to be Forged or Counterfeit'

Mens rea is very essential for conviction of economic offences under ss 489B and 489C of IPC . These provisions are not meant to punish unwary users or possession of3939 fake currency notes and bank notes.[90] The knowledge or reason to believe that the note was forged has to be proved to fix the liability under ss 489B and 489C . Unless it is found that the accused had the knowledge or reason to believe that the said questioned note was a forged one, the question of his palming it off as genuine could not arise.[91] The *mens rea* of offences under ss 489B and 489C is, 'knowing or having reason to believe the currency notes or bank notes are forged or counterfeit'.

Without this *mens rea*, selling, buying or receiving from another person or otherwise trafficking in or using as genuine forged or counterfeit currency-notes or bank-notes is not enough to constitute an offence under s 489B, IPC .[92] Where the prosecution fails to establish that the accused was either knowing or having reason to believe that the currency notes which have been recovered by the Police are forged or counterfeited, the accused cannot be convicted. In the instant case the counterfeit notes were not recovered from the physical possession of the accused passenger but from the back seat of the commercial vehicle, co-accused driver of the vehicle had already been acquitted, the accused was entitled to benefit of doubt and acquitted of the charge under s 489B, IPC .[93] Under ss 489B and 489C, guilt is sought to be fastened on the accused on the ground of 'knowledge' or 'reason to believe' that any currency-note or bank-note is forged or counterfeited. The two expressions are more or less *ejusdem generis* though 'knowledge' will stand on a slightly higher plane than 'reason to believe'. Suspicion or doubt cannot, however, be raised to the level of 'reason to believe' so as to foster liability on a person under s 489B or s 489C . If an uneducated rustic person in the usual course of business gets a currency-note, which he finds to be suspicious, and tries to get rid of the note, he will not be guilty either under s 489B, or s 489C, IPC .[94] An ordinary prudent man would not be in position to make out that the

notes in his possession are counterfeit or fake. Where it could not be said that the appellant possessed the requisite *mens rea* of selling, buying or receiving from other person or otherwise trafficking forged or counterfeited currency notes as genuine, he was acquitted of the charges under ss 489B and 489C, IPC .[95]

In this case, allegation was that appellant accused had come to deposit fake and counterfeit notes in bank. There was no evidence on the record to show that the appellant accused had culpable knowledge that the notes were fake. After it was detected by the machine that the notes were fake, the appellant accused continued to stay in bank on the askance of the Bank Manager, till the Police arrived. The envelope containing fake notes was not kept under sealed cover in *Malkhana*, was sent to CFSL after twenty days. Possibility of the tampering of notes at *Malkhana* could not be ruled out. Conviction of the appellant accused under ss 489B and 489C, IPC was set aside.[96]3940

The appellant accused was a passenger in a vehicle from which fake currency notes were recovered. There was no evidence that the appellant accused had kept the fake currency notes in the vehicle. Other passengers travelling in the vehicle were not examined. Co-accused driver of the vehicle was already acquitted in the case. Conviction of the appellant accused under ss 489B and 489C, IPC was found not sustainable and was accordingly set aside.[1]

5. Sections 489B , 489C, IPC, and Provisions of the Passport Act--Distinction

The offences under the Passport Act are distinct offences from the offences under ss 489B and 489C, IPC . Therefore, when the prosecution has not been able to establish the entry of the accused into Pakistan and return therefrom, contrary to the provisions of Passport Act, this fact would not affect the basis of charge under ss 489B and 489C, IPC . Since they are distinct and separate offences, the acquittal of accused under the Passport Act has thus no effect on his prosecution under ss 489B and 489C, IPC .[2]

6. Detecting Counterfeit Currency

Commentary under the same heading in s 489A, *ante*, may be referred to.

7. Procedure

The procedure is the same as in the case of an offence under the preceding s 489A, IPC .

8. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc.*) hereby charge you (*name of accused person*) as follows:
>
> That you, on or about the ... day of ..., at ..., sold, to *AB* (*or bought, or received, from AB, or trafficked in, or used, as genuine*) a forged (*or counterfeit*) currency-note (*or bank-note*), to wit ..., knowing (*or having reason to believe*) the same to be forged (*or counterfeit*), and that you thereby committed an offence, punishable under s 489B of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

9. Mere Possession not Enough

Under s 489B, IPC the burden is on the prosecution to prove that at the time when the accused was passing the note he knew that it was a forged one. The mere possession of it by him does not shift the burden to the accused to prove his innocent possession of the forged note.[3]3941

10. Proof

The prosecution is required to prove[4] that:

(a) the currency-note or bank-note in question was forged or counterfeit;
(b) the accused sold to, or bought, or received, from, some person, or trafficked in, or used, as genuine, such note; and
(c) when he did so, he knew or had reason to believe such note to be forged or counterfeit.

Before a person can be convicted for an offence under section, it has to be established that he was aware of the forged or counterfeit nature of the currency-note, or bank-note, which he offered for sale or exchange.[5] Mere possession of counterfeit notes is not essential, intention to use counterfeit currency notes is essential ingredient of offence under s 489B, IPC . Where there was no evidence which suggested that the appellant accused made effort to use the counterfeit currency notes, he was acquitted of the offence under s 489B, IPC .[6] If the currency-note or bank-note is of the kind and quality which any innocent person may take and present innocently, the prosecution must show that the accused was criminally in possession of such note.[7] The fact that the note was fake was confirmed only after examining five experienced persons in that field, will clearly go to show that there is no apparent sign in the note or any ordinary man to come to the conclusion that it is a counterfeit note. Therefore, when the accused, an ordinary man who is not in the field of examining notes every day was found in mere possession of counterfeit note, the presumption that the accused had knowledge that note was counterfeit cannot be drawn.[8] The accused was found in possession of forged currency notes, and did not offer explanation as to where they came from, the silence on the part of the accused in such circumstances which would weigh against him in the consideration of the prosecution evidence lead before him. Therefore, the conviction of the accused under ss 489B and 420, IPC, was found proper.[9]

Where no independent witness to prove recovery was examined, the official witnesses examined in the case had made contradictory statements regarding the place of seizure, time and manner of seizure, appellant was acquitted of the charge under s 489C, IPC .[10]

No independent witness was examined to prove the recovery of notes from the accused. The prosecution witnesses did not state that the notes after seizure from the accused were sealed. The notes were not subjected to any chemical or electronic test.3942 Held, the prosecution failed to prove the guilt of the accused. Accused was entitled to benefit of doubt and acquitted of the charges under s 489B and 489C, IPC .[11] The prosecution case was that 1040 currency notes were recovered from the possession of the accused but government record showed 1038 currency notes only. The inspector deposed about the hurry in counting of currency notes and possibility was one or more notes might be less. Mere defect in investigation was no ground for acquittal of the accused.[12]

11. Conviction

In a case of trafficking in currency-notes in pursuance of a conspiracy on a charge under s 489B read with s 120B, IPC, the fact that several conspirators played different roles, is wholly irrelevant in considering the charge. The several incidents should not be separated and considered in isolation. In such a case, if one

of the accused is convicted under s 489B, it is redundant to convict him under s 489C, IPC also.[13] Where the CBI in presence of independent witnesses recovered huge amount of counterfeit currency notes from the possessions of the accused and report of the expert sufficiently corroborated that those notes were really counterfeit notes and from the evidence of prosecution witness sufficient reasons to hold that accused had not only in his possession those counterfeit currency notes, but he had the real intention to put those currency notes into circulation for his material gain and thereby having regard to the prosecution evidence the accused was found guilty of both the offence under ss 489B / 511 of the IPC as well as s 489C of the IPC .[14] Where an accused is found in possession of counterfeit currency notes he can explain his possession, if he fails to furnish any explanation he would be convicted under s 489A, IPC .[15] If the accused persons do not furnish explanation that they were in possession of fake currency notes for other purpose, the court would infer that the accused intended to use the fake currency notes as genuine one.[16]

12. Sentence

The accused convicted under this section is liable to be punished with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years and the accused is also liable to pay fine.

The offence of counterfeiting currency notes for using them as genuine or trafficking in them, or possessing them are all grave offences, and cannot be lightly viewed. Such offences vitiate the economy of the country and are matters of serious concern. They are rarely detected and are perhaps a tip of the iceberg. The award of 7 years imprisonment cannot be said to be on the higher side.[17] A sentence of 7 years is not disproportionately severe depending upon the facts and circumstances of the case.[18] Where an accused is found guilty of manufacturing, selling and introducing3943 fake currency notes, in such heinous offence, the accused should serve the sentence of imprisonment imposed upon him for full term.[19]

13. Sentence (Lenient)

The accused was about 60 years of age at the time of his conviction by the trial court and was an old man of 73 years of age at the time of decision in appeal by the Supreme Court. He was also suffering from diabetes and also met with an accident and was unable to walk without a support, so the sentence of imprisonment of 7 years rigorous imprisonment was reduced to 3 years rigorous imprisonment.[20]

84 Substituted Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

85 *Karim Kunju v State* 1972 Cr LJ 292, p 297, 1972 MLJ (Cr) 23 .

86 *Bhika Ram v Emperor* 27 Cr LJ 638, AIR 1926 Lah 72, p 73 .

87 *Anis v State of NCT of Delhi* 2010 (88) AIC 879 315, p 318, 319 (Del) .

88 *K Hasim v State of Tamil Nadu* 2005 Cr LJ 143 (SC) .

89 *Ibid*.

90 *Umashankar v State of Chhatisgarh* (2001) 4 Crimes 83, 2001 Cr LJ 4696 (SC) ; *Peer Mohammed v State* 2004 Cr LJ 45 (Mad) .

91 *Madan Lal Sarma v State* 1990 Cr LJ 215 (Cal) (DB), **see also***Peer Mohammed v State* 2004 Cr LJ 45 (Mad) ; *State of HP v Rafiq Mohammod* 2012 (1145) AIC 458 (HP) .

92 *Umashanker v State of Chattisgarh* 2001 Cr LJ 4696 (SC) ; *Raghubir Singh v State of Delhi* 2013 Cr LJ 3032 (Del) .

93 *Sambhu Chakraborty v State of Tripura* 2014 Cr LJ 87, p 93, 96 (Tripura) .

94 *Humid Ali v State* (1961) 2 Cr LJ 801, AIR 1961 Tripura 46, p 48, 49 ; *Madan Lal Sarma v State* 1990 Cr LJ 215 (Cal) (DB) . See s 28 and its commentary in vol 1. See also s 231 and its commentary in vol 2.

95 *Raghubir Singh v State of Delhi* 2013 Cr LJ 3032 (Del) .

96 *Md Muktarul Islam v State of West Bengal* 2014 (141) AIC 291 (Cal) (DB), (2014) 2 Cal LT 260 (Cal); **see also***Mohd Farooque Yusuf Chiwala v State of Maharashtra* 2011 (4) Mah LJ (Cri) 389 (Accused acquitted).

1 *Sambhu Chakraborty v State of Tripura* 2014 Cr LJ 87 (Tri) .

2 *Rayab Yusah Sama v State of Gujarat* 1999 Cr LJ 942 (Guj) (DB) .

3 *Madan Lal Sarma v State* 1990 Cr LJ 215 (Cal) (DB) ; *Humid Ali v State* (1961) 2 Cr LJ 801, AIR 1961 Tripura 46, p 48, 49 ; *Madan Lal Sarma v State* 1990 Cr LJ 215 (Cal) (DB) ; *Ashu Mondal v State of West Bengal* 2013 Cr LJ 715, p 719 (Cal) ; *Jiban Sasmal v State of West Bengal* (1987) 2 Cal HN 430, **relied on**). *Panna Lal Gupta v State of Sikkim* 2010 (90) AIC 879 (Sikk) . See also commentary under the same heading in s 475, *ante* and s 489C, *post*.

4 *Girdharilal v State of Madhya Pradesh* 1982 Cr LR (MP High Court Notes) 39; *Santi Tarafdar v State of West Bengal* 2014 (1) Crimes 258 (Cal) (Accused acquitted).

5 *Ramesh Kant v State* 1974 Ch LR 335 .

6 *Ashu Mondal v State of West Bengal* 2013 Cr LJ 715, p 719 (Cal) ; *Jiban Sasmal v State of West Bengal* (1987) 2 Cal HN 430, **relied on**.

7 *Emperor v Habu* 25 Cr LJ 935 (Sind) ; *Raghubir Singh v State of Delhi* 2013 Cr LJ 3032 (Del) .

8 *Abdul Majed Abdul Rehman Sarkhot v State of Maharashtra* 2002 Cr LJ 720 (Bom) ; *TJ Mohan v State* (1995) 3 Crimes 842 (Mad), (1995) 2 Andh LT (Cri) 581 ; *Mohd Yasin v State of Uttar Pradesh* 1997 Cr LJ 3188 (All) ; *Karunakaran Nader v State* 2000 Cr LJ 3748 (Ker) ; *Madan Lal Sarma v State* 1990 Cr LJ 215 (Cal) ; *Veera Swamy Shanmugam Sundaram v State of Andhra Pradesh* 2001 Cr LJ 3787 (AP) ; *Umashanker v State of Chattisgarh* 2001 Cr LJ 4696 (SC) ; *Eonnusuwamy v State* 1995 Cr LJ 2658 (SC), 1995 AIR SCW 1788 (SC) .

9 *Ibid*.

10 *Santi Tarafdar v State of West Bengal* 2014 (1) Crimes 258 (Cal), (2014) 1 Cal LJ 160, 2014 (136) AIC 475 .

11 *Inthiyas v State of Karnataka* 2011 Cr LJ 4802 (Kant) ; **see also***State of HP v Rafiq Mohammad* 2012 (114) AIC 458 (HP) .

12 *Tej Pratap Singh v State* 2012 Cr LJ 486 (Del) .

13 *V Govindrajulu v State of Mysore* (1962) 2 Cr LJ 765, AIR 1962 Mysore 275, p 278 .

14 *Narayan Prasad Sen v State of West Bengal* 2007 Cr LJ 1 (Cal) (DB) .

15 *Narayan Maruti Wagmode v State of Maharashtra* 2011 Cr LJ 3318 (Bom) .

16 *Kurukshetra Sena v State of Chhattisgarh* 2011 Cr LJ 2493 (Chhat) .

17 *Abdul Fakirsaheb Mamtule v State of Maharashtra* 2001 Cr LJ 3396 (Bom) ; *Krukshetra Sena v State of Chhattisgarh* 2011 Cr LJ 2493 (Chhat) .

18 *Rayeb Jasub Sama v State of Gujarat* 1999 Cr LJ 942 (Guj) (DB) .

19 *Liyakat Ali v State of Rajasthan* 2010 Cr LJ 2450 (Raj) .

20 *Rayeb Jasub Sama v State of Gujarat* 1999 Cr LJ 942 (Guj) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF CURRENCY-NOTES AND BANK-NOTES]

S. 489C .

Possession of forged or counterfeit currency-notes or bank-notes.--

Whoever has in his possession any forged or counterfeit currency-notes or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Comments

1. Scope

Section 489C deals with possession of forged or counterfeit currency notes or bank notes. It makes possession of forged and counterfeited currency notes or bank notes punishable. Possession and knowledge that the currency notes were counterfeited notes are necessary ingredients to constitute offence under ss 489C and 489D .[21]

The section punishes the possession of any forged of counterfeit currency-note or bank-note, knowing, or having reason to believe, the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine. Similar provisions are contained in ss 242, 243 and 259, IPC .[22]

2. Object

Commentary under the same heading in s 489A, *ante*, may be referred to.3944

3. Sections 489B , 489C, IPC, and Provisions of the Passport Act--Distinction

Commentary under the same heading in s 489B, *ante*, may be referred to.

4. Detecting Counterfeit Currency

Commentary under the same heading in s 489A, *ante*, may be referred to.

5. Section not Restricted to Indian Currency

As was observed by the Supreme Court in *State of Kerala v Mathai Verghese* ,[23] the expression 'currency notes' is large and wide enough in its amplitude to cover the currency notes of any country. Section 489C is not restricted to Indian currency notes alone, but it includes dollar also and it applies to American dollar bills.[24]

6. 'Possession'

The term 'Possession' as used in s 489C, IPC, bears a sense at variance from that in civil law. It would amount to criminal possession if the possessor had knowledge or reason to believe that the notes were forged and if his continued possession was with the intention of paying it on to the public. If the notes were of such a nature that a mere look at them would convince anybody that they were fake notes, it can be presumed that he had knowledge or reason to believe that they were counterfeit currencies.[25]

7. 'Forged or Counterfeit Currency-note'

The expression 'any forged or counterfeit currency-note', used in this section, takes, within its ambit, not only forged or counterfeit Indian currency-note, but also forged or counterfeit foreign currency-note. If the

conditions, specified in the section, are satisfied, the possession of forged or counterfeit foreign currency-notes would be an offence under this section.[26] Therefore, the contention that s 489C will not apply to American dollar bills is not well-founded.[27]

8. Mere Possession is not Enough

Mere possession of forged currency-notes or bank-notes is not an offence. It becomes criminal only when it is coupled with an intention to use them as genuine. The prosecution must establish affirmatively all the ingredients of the offence under the section.[28] Therefore, when the accused, an ordinary man who is not in the field of examining one every day was found in mere possession of counterfeit note, the presumption that the accused had knowledge that note was counterfeit cannot be3945 drawn.[29] It should be borne in mind that mere possession of forged notes is not an offence under the IPC and in order to bring the case within the purview of s 489-C of IPC . It is not only necessary to prove that the accused was in possession of forged notes, but it should be further established (a) that at the time of his possession he knew the note to be forged or had reason to believe them to be so; and (b) that he intended to use them as genuine or that they might be used as genuine.[30]

Where the evidence did not establish that the material recovered from the accused appellant could be used for printing currency notes, the accused appellant was acquitted of the charges under ss 489A, 489C and 489D .[31]

9. Mere Possession not Enough for Presumption that Currency is Counterfeit or Forged

Whether the accused knew, or had reason to believe, that the currency-notes, in his possession, were forged or counterfeit is not a matter of presumption as the Supreme Court has held, in *M Mammutti v State of Karnataka* ,[32] that when there is no evidence of any witness to show that the counterfeit notes were of such a nature or description that a mere look at them would convince any person of average intelligence that they were counterfeit notes, such a presumption cannot reasonably be drawn. It must be established that (a) the accused was in exclusive possession of the counterfeit currency-notes; and (b) the accused was in possession thereof with knowledge of their being counterfeit.[33] The fact that the note was fake was confirmed only after examining five experienced persons in that field, will clearly go to show that there is no apparent sign in the note or any ordinary man to come to the conclusion that it is a counterfeit note.[34]

Driver of the vehicle cannot be prosecuted for offences under ss 489B and 489C, IPC unless evidence shows that he was one of the accused persons, and the3946 counterfeit currency notes seized were in their possession with the knowledge of the driver.[35]

10. Special type of *Mens Rea*

When the notes were obviously forgeries, this is something which is not in doubt at all. Even a gullible person would not be fooled into believing that these notes were genuine. The size of the notes was different and so was their colour. Many of them had the same number. In this view of the matter possession of such poor quality forged notes would not require any special type of *mens rea* for the purpose of conviction.[36]

11. Procedure

The offence under this section is cognizable, bailable, non-compoundable, and triable by the court of sessions.

12. Separate Trial

An offence under this section being distinct from an offence of receiving stolen property under s 411, IPC, the two offences should be tried separately.[37]

13. Charge

The following form of the charge may be adopted:

> I (*name and office of sessions judge, etc.*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the ... day of ..., at ..., you had, in your possession, a forged (*or counterfeit*) currency-note (*or bank-note*), to wit .... knowing (*or having reason to believe*) the same to be forged (*or counterfeit*) and intending to use the same as genuine (*or that it may be used as genuine*), and that you thereby committed an offence, punishable under s 489C of the Indian Penal Code and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

14. Proof

The prosecution has to prove[38] that:

(a) the currency-note or bank-note in question was forged or counterfeit;
(b) the accused was in possession of the same;
(c) at the time of his possession, he knew, or he had reason to believe, that it was forged or counterfeit; and
(d) he intended to use it as genuine or that it might be used as genuine.3947

The onus lies on the prosecution to prove circumstances which lead clearly, indubitably and irresistibly to the inference that the accused had the intention to foist the currency-note or bank-note on the public.[39] A person would not become punishable even when the requirements in the opening part of the section are established unless it is proved that he also intended to use the forged or counterfeit currency-note or bank-note as genuine or that it may be used, if not by himself, then by someone else, as genuine.[40] Where it was clear that the accused was aware that the large number of currency-notes, which were found in his possession, were counterfeit, it was held that the only reasonable inference to be drawn was that the accused was in possession of the notes with the intention of using them as genuine or that they might be used as genuine.[41] However, if the case for the prosecution itself is that the accused got counterfeit notes, made or manufactured with the express object of foisting them on a third person, an enemy of theirs, the requisite intention under this section would be absent.[42]

Where two number of one thousand and thirty seven number of one hundred rupees notes of Indian currency were alleged to be recovered from the possession of the appellant accused, but the evidence of the police where the alleged currency notes were recovered was full of contradictions and inconsistencies, the two public witnesses did not support the recovery, were declared hostile, accused appellant was acquitted of the charges under ss 489C and 489B, IPC .[43]

The printing press on which the fake printing notes were being printed was functional at the time when the raid was committed. Due to passage of time the printing press lying in Police *malkhana* became non-functional. It did not affect the prosecution case and it could not be held that no offence was committed.[44]

15. Conviction

If on the facts proved, it is a matter of some doubt, whether the accused can be charged under s 489B, IPC, or, in addition, alternatively under s 489C, IPC and this, for some reason, has not been done, ss 221 and 222, CrPC, may be invoked to convict the accused under s 489C, IPC, which is a minor offence as compared to the one under s 489B, provided it appears, from the evidence, that he committed it and no prejudice to the accused is caused thereby.[45] From the accused appellants fake currency notes, and machinery used for preparing fake currency notes were3948 recovered, they were found guilty and convicted under provisions of ss 489A, 489B, 489C and 489D IPC .[46]

Where fake currency notes were recovered from the possession of the appellants accused, seizure lists were prepared in the use, the appellants in their statement made under s 313, CrPC did not furnish any explanation as to how they came into possession of the currency notes, the conviction of the three appellants under s 489C, IPC was upheld.[47]

16. Acquittal

Charge against the accused was of making forged currency note of Rs 100/- and Rs 50/-. Co-accused placed in similar situation and facing same charges already acquitted. The accused was also entitled to acquittal of the charge under ss 489A, 489C and 489D, IPC .[48] In the instant case the counterfeit notes were not recovered from the physical possession of the accused passenger but from the back seat of the commercial vehicle, co-accused driver of the vehicle had already been acquitted, the accused was entitled to benefit of doubt and acquitted of the charge under s 489C, IPC .[49]

17. Sentence

The accused was of about 60 years at the time of his conviction by the trial court and was an old man of 73 years at the time of decision in appeal by the Supreme Court. He was also suffering from diabetes and had also met with an accident and was unable to walk without a support so the sentence of imprisonment of 7 years rigorous imprisonment was reduced to 3 years rigorous imprisonment.[50]

21 *K Hasim v State of Tamil Nadu* 2005 Cr LJ 143 (SC) .

22 *Vijay Kumar Bindra v State* 1975 Ch LR 224 .

23 *State of Kerala v Mathai Verghese* AIR 1987 SC 33, 1987 Cr LJ 308 (SC) .

24 *K Hasim v State of Tamil Nadu* 2005 Cr LJ 143 (SC), AIR 2005 SC 128 .

25 *M Mammutti v State of Karnataka* AIR 1979 SC 1705, 1979 Cr LJ 1783 (SC) ; *Vijyanalies Kochmora v State of Kerala* 2002 Cr LJ 187 (Ker) . See also commentary under s 27, vol 1.

26 *Vijay Kumar Bindra v State* 1975 Ch LR 224, p 230 ; *State of Kerala v Mathai Verghese* AIR 1987 SC 33, 1987 Cr LJ 308 (SC) .

27 Re *Mohd Yusuf*1986 Cr LJ 2011 (Mad). See also commentary under s 28, vol 1.

28 *Kanshi Bhagat v State* 1960 BLJR 242 ; *M Mammutti v State of Karnataka* (1980) 24 Mad LJ (Cr) 225, p 226 (SC) ; *Gafirg v State of Kerala* (1987) 2 Ker LT 730 (Ker) ; *Umashankar v State of Chhattisgarh* (2001) 4 Rec Cri R (Cri) 444, 2001 Cr LJ 4696 (SC) .

29 *Abdul Majid Abdul Rehman Sarkhot v State of Maharashtra* 2002 Cr LJ 720 (Bom) ; *TJ Mohan v State* (1995) 3 Crimes 842 (Mad), (1995) 2 Andh LT 581 (Ori) ; *Mohd Yasin v State of Uttar Pradesh* 1997 Cr LJ 3188 (All) ; *Karunakaran Nader v State*

2000 Cr LJ 3748 (Ker) ; *Madan Lal Sarma v State* 1990 Cr LJ 215 (Cal) ; *Veera Swamy Shanmugam Sundaram v State of Andhra Pradesh* 2001 Cr LJ 3787 (AP) ; *Umashanker v State of Chaltisgarh* 2001 Cr LJ 4696 (SC) ; *Md Muktarul Islam v State of WB* (2014) 2 Cal LT 260, 2014 (141) AIC 291 (Cal) .

30 *Bur Singh v Emperor* (1931) 32 Cr LJ 351 ; *Peer Mohammed v State* 2004 Cr LJ 45 (Mad) ; *State of HP v Rafiq Mohd* 2013 (1) Crimes 40 (HP) (No evidence that the accused had reason to believe that the currency notes in his possession were not genuine - Acquittal held justified); *Ashu Mondal v State of West Bengal* 2013 Cr LJ 715, p 719 (Cal) ; *Jiban Sasmal v State of West Bengal* (1987) 2 Cal HN 430, **relied on** (Accused convicted under s 489 IPC); *Baishakhi Sheikh v State of West Bengal* 2012 (118) AIC 495 (Cal) (Accused convicted). For further commentary, see under the same heading in s 489B and s 475, *ante*.

31 *Jash Hang Subba v State of Sikkim* 2014 (2) Crimes 683 (Sikk), 2014 Cr LJ 613 .

32 *M Mammutti v State of Karnataka* AIR 1979 SC 1705 ; *Vijayan alias Kochoman v State of Kerala* 2002 Cr LJ 187 (Ker) .

33 *State of Karnataka v KS Ramdas* 1976 Cr LJ 228, p 237, 238 ; *Vijayan alias Kochoman v State of Kerala* 2002 Cr LJ 187 (Ker) ; *Kiran Kumar K Khanda v State of Maharashtra* 2011 Cr LJ 2748 (Bom) .

34 *Abdul Majid Abdul Rehman Sarkhot v State of Maharashtra* 2002 Cr LJ 720 (Bom) ; *TJ Mohan v State* (1995) 3 Crimes 842 (Mad), (1995) 2 Andh LT 581 (Ori) ; *Mohd Yasin v State of Uttar Pradesh* 1997 Cr LJ 3188 (All) ; *Karunakaran Nader v State* 2000 Cr LJ 3748 (Ker) ; *Madan Lal Sarma v State* 1990 Cr LJ 215 (Cal) ; *Veera Swamy Shanmugam Sundaram v State of Andhra Pradesh* 2001 Cr LJ 3787 (AP) ; *Umashanker v State of Chaltisgarh* 2001 Cr LJ 4696 (SC) .

35 *Nijil v Station House Officer* 2010 (1) KLT SN 58 (CN 73) .

36 *Pirthi Singh v State of Punjab* 2006 Cr LJ 1393 (P&H) .

37 *Mohendra Kumar Nath v Emperor* (1902) ILR 29 Cal 387 .

38 *Vijay Kumar Bindra v State* 1975 Ch LR 224 ; *Rousenara Begum v State of Assam* (2015) 2 Gauh LR 435, p 440 (Gauh) ; *Pankaj Kumar v State NCT of Delhi* 2014 (209) DLY 574, 2014 (6) AD (Delhi) 386 .

39 *Bur Singh v Emperor* 32 Cr LJ 351, AIR 1931 Lah 24, p 25 ; *Bachan Singh v State of Punjab* 1982 Cr LJ 32, 1979 Cr LJ 1383 .

40 *Ved Pattan Arya v State* 1974 RLR 50 ; Re *Basi Reddy*1972 Cr LJ 1141, p 1145, 1972 Mad LJ (Cr) 118; *Ragho Saran Sao v State* (1961) 2 Cr LJ 536, AIR 1961 Pat 405 ; Re *N Gopalakrishna Murthy*(1966) 1 Andh WR 161, 1966 Mad LJ (Cr) 178.

41 *Public Prosecutor v Rowthula Kondal Rao* AIR 1939 Mad 96, 40 Cr LJ 458 ; Re *Basi Reddy*1972 Cr LJ 1141, p 1145, 1972 Mad LJ (Cr) 118; Re *Satyanarayana*(1961) 1 Cr LJ 617, AIR 1961 AP 213 ; Re *Ameerjan*AIR 1951 Mysore 34, 1951 Cr LJ 415 ; *Govind Ram v State* (1987) 1 Crimes 49 (Cal) (DB); *Abdul Fakirsaheb Mamtule v State of Maharashtra* 2001 Cr LJ 3396 (Bom) .

42 *Velayaudham Pillai v State Emperor* AIR 1937 Mad 711, 39 Cr LJ 51 .

43 *Santi Tarafidar v State of West Bengal* 2014 (4) Crimes 14 (Cal), (2014) 1 Cal LT 160, 2014 (136) AIC 475 .

44 *Surinder Pal v State of Punjab* 2009 Cr LJ 4100 (P&H) .

45 *Tulash Singh v State* (1964) 15 Raj LW 404, p 406 ; Re *N Gopalakrishna Murthy*(1966) 1 Andh WR 161, 1966 Mad LJ (Cr) 178.

46 *Liyakat Ali v State of Rajasthan* 2010 Cr LJ 2450, p 2461 (Raj) .

47 *Rousenara Begum v State of Assam* (2015) 2 Gauh LR 435, p 440 (Gauh) .

48 *Jash Hang Subba v State of Sikkim* 2014 Cr LJ 613 (Sikk) (DB) .

49 *Sambhu Chakraborty v State of Tripura* 2014 Cr LJ 87, p 93, 96 (Tripura) .

50 *Tulash Singh v State* (1964) 15 Raj LW 404, p 406 ; Re *N Gopalakrishna Murthy*(1966) 1 Andh WR 161, 1966 Mad LJ (Cr) 178.

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF CURRENCY-NOTES AND BANK-NOTES]

S. 489D .

Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes.--

Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has in his possession, any machinery, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting any currency-note or bank-note, shall be punished with [51][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.3949

Comments

1. Scope

The wording of s 489D, similar to that in ss 233, 234, 256, 257 and 485, IPC is wide and would cover a case where a person is found in possession of a machinery, instrument or material for the purpose of being used for counterfeiting currency-notes even though the machinery, instrument or material, so found, are not all the article required for the purpose of counterfeiting.[52] To constitute an offence under this section, it is not necessary that the accused should be in possession of a complete outfit for the manufacture of counterfeit notes. The possession of even a single implement will suffice if it is shown that such implement was intended to be utilised for the work of counterfeiting.[53] From materials of counterfeiting in his possession which the accused cannot explain but which, in the opinion of the expert, can be used to counterfeit a five-rupee currency-note, the dishonest intention of the accused can be presumed.[54] The intention must, in almost every case, depend on facts, particularly on the nature and number of the articles found, the suitability for counterfeiting work and for innocent purpose. If the nature of the articles is such as to render them peculiarly suitable for counterfeiting work and useless for any other purpose can be suggested, the intention to use them for counterfeiting may be fairly inferred subject, of course, to rebutment by the accused. There may be cases, where, though the ultimate object of the possessor may clearly be counterfeiting the particular articles found are of such crude or imperfect nature as to indicate unmistakably that the work was only in an experimental stage and that they could not be intended for utilization in the preparation of the counterfeit.[55]

In the case of counterfeiting of a currency-note, both ability and materials of a particular kind are required. If those materials and ability are not present, it cannot be said that an act, performed without the ability to counterfeit and without materials which may help to a useful counterfeiting, would be an attempt.[56]

Where the computer printer and CD are discovered at the instance of the accused, the demonstration of methodology adopted for printing counterfeit currency notes in the presence of the panchas, given by him would not be regarded as his confession, but would be treated as discovery of fact within the meaning of s 27, Evidence Act.[57]

2. Object

Commentary under the same heading in s 489A, *ante*, may be referred to.3950

3. 'Possession'

Commentary under s 27, vol 1, may be referred to.

4. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable, and triable by the court of sessions.

5. Charge

The following form of the charge may be adopted:

> I (*name and office of sessions judge, etc.*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the ... day of ..., at ..., you made (*or performed any part of the process of making, or bought or sold or disposed of, or had, in your possession,*) a machinery (*or instrument or material,*) to wit ..., for the purpose of being used (or knowing or having reason to believe that it was intended to be used) for forging (*or counterfeiting*) a currency-note (*or bank-note*), to wit..., and that you thereby committed an offence, punishable under s 489D of the Indian Penal Code, and within the cognizance of this court.
>
> And I direct that you be tried by this court on the said charge.

6. Proof

The prosecution has to prove that:

(a) the thing in question was a machinery, instrument or material, necessary for, or used in, forging or counterfeiting a currency-note or bank-note;[58]
(b) the accused made, or performed, some part of the process of making, or bought, or sold, or disposed of, or had, in his possession,[59] the machinery, instrument or material in question; and
(c) the intention of the accused was that such machinery, instrument or material might be used for the purpose of forging or counterfeiting currency-notes or bank-notes or that he knew, or he had reason to believe, that the same was intended to be used for such purpose.

The burden lies on the prosecution to prove the state of mind of the accused that he had possession of materials for the purpose of counterfeiting a currency-note.[60]3951

Where the evidence did not establish that the material recovered from the accused appellant could be used for printing currency notes, the accused appellant was acquitted of the charges under ss 489A, 489C and 489D .[61]

Charge against the accused was of making forged currency note of Rs 100/- and 50/-. Co-accused placed in similar situation and facing same charge already acquitted. The accused was also entitled to acquittal of

the charge under ss 489A, 489C and 489D, IPC .[62]

7. Sentence

An offence under this section being rather serious in nature and anti-social in character apart from the question of loss of revenue, it must be put down with a stern hand and the offender must be dealt with adequately. Accordingly, a sentence of rigorous imprisonment for three years was considered light and it was enhanced to five years while maintaining the fine.[63] However, where no fine is imposed on the other accused and when a substantial term of imprisonment has been awarded to one of the accused, it is not necessary to attach a sentence of fine to it.[64]

51 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

52 *Kadar Baksh Waroo v Emperor* AIR 1939 Sind 190, p 192, 40 Cr LJ 810, **relying** on *Abdul Rahman v Emperor* 12 Cr LJ 377, p 382 per Sundara Aiyar J on a difference of opinion between Abdul Rahman J and Avling J ; *Panna Lal Pal v State* 25 Cut LT 307 (a case where a person was found in possession of articles, some of which according to expert opinion could be used for the purpose of counterfeiting currency-notes and the conviction under this section was upheld); *K Hasim v State of Tamil Nadu* 2005 Cr LJ 143 (SC), AIR 2005 SC 128 .

53 *Abdul Rahman v Emperor* 12 Cr LJ 377, p 378 per Ayling J ; *Kalakoti Somireddy v State* 1959 Andh LT 562, p 572 .

54 *Ayyub v Emperor* 30 Cr LJ 47, AIR 1928 All 759, p 760, 1928 ALJ 1391**distinguishing***Abdul Rahman v Emperor* 12 Cr LJ 377 where no expert evidence was produced; *Kalakoti Somireddy v State* 1959 Andh LT 562, p 572 .

55 *Abdul Rahman v Emperor* 12 Cr LJ 377, p 379 **explaining and distinguishing***Public Prosecutor v Tirumala Reddi* 1 Weir 219 (rudimentary and experimental dies incapable of being used to produce a passable counterfeit).

56 *Jwala Rahman v Emperor* AIR 1928 All 754, p 755, 30 Cr LJ 690 .

57 *Prabhakar Narayan Pathola v State of Maharashtra* 2011 Cr LJ 738 (Bom) .

58 *Abdul Rahman v Emperor* 12 Cr LJ 377 per Abdul Rahman J (in some cases, a mere inspection of the articles would satisfy the court that are capable of being used in the making of counterfeit-notes. However, where that is not the case, it is the duty of the prosecution to give evidence of a competent and qualified witness who may be able to explain, to the court, the process by which the instruments or materials in question could be used in making a counterfeit note. Instruments and materials, which may be useful in making correct drawing of the outlines of the designs and figures of a currency note, may be of no use whatever in manufacturing counterfeit notes).

59 *Thomman Kunju Naina v State* AIR 1953 Travancore 225, p 227, 1953 Cr LJ 1249 (the burden is on the prosecution to show that the accused was accupying the house from which articles for manufacturing counterfeit currency-notes were recovered and that he had control, or joint control, over them).

60 *Abdul Rahman v Emperor* 12 Cr LJ 377 ; *Ayyub v Emperor* 30 Cr LJ 47, AIR 1928 All 759, p 760 .

61 *Jash Hang Subba v State of Sikkim* 2014 (2) Crimes 683 (Sikk), 2014 Cr LJ 613 .

62 *Jash Hang Subba v State of Sikkim* 2014 Cr LJ 613 (Skk) (DB) .

63 *Panna Lal Pal v State* 25 Cut LT 307, p 314 .

64 *Thomman Kunju Naina v State* 1953 Cr LJ 1249, AIR 1953 Travancore 225, p 228 .

Indian Penal Code (Act XLV of 1860)

Chapter XVIII

Of Offences Relating to Documents and to [* * *] Property Marks

[OF CURRENCY-NOTES AND BANK-NOTES]

[65][S. 489E.

Making or using documents resembling currency-notes or bank-notes.--

(1) Whoever makes, or causes to be made, or uses for any purpose whatsoever, or delivers to any person, any document purporting to be, or in any way resembling, or so nearly resembling as to be calculated to deceive, any currency-note or bank-note shall be punished with fine which may extend to one hundred rupees.

(2) If any person, whose name appears on a document the making of which is an offence under sub-section (1), refuses, without lawful excuse, to disclose to a police-officer on being so required the name and address of the person by whom it was printed or otherwise made, he shall be punished with fine which may extend to two hundred rupees.

(3) Where the name of any person appears on any document in respect of which any person is charged with an offence under sub-section (1) or on any other document used or distributed in connection with that document it may, until the contrary is proved, be presumed that person caused the document to be made.]

Comments

1. Scope

In a country like India, with a large mass of illiterate and ignorant persons, it was considered undesirable that photo-prints and other reproductions of currency-notes and bank-notes should be permitted to go uncharged before it menaces the safety of3952 the currency. This section puts a stop to this practice by making it a punishable offence. Even non-furnishing of information to police about the particulars of a person who printed an apparently fake document is made punishable under sub-s (2) of s 489E, IPC . Under s 39(ix) of CrPC, every person, aware of the commission of, or the intention of any other person to commit, any offence punishable under s 489A to s 489E, IPC, both inclusive (that is to say, offences relating to currency notes and bank notes) shall, in the absence of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest magistrate or police officer of such commission or intention. However, the punishment provided under s 489E(1) and s 489E(2), IPC is a paltry sum of Rs 100 and Rs 200 respectively. There is an urgent need to enhance the monetary punishment prescribed in this section.

2. Object

Commentary under the same heading in s 489A, *ante*, may be referred to.

3. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable, and triable by a magistrate, and may also be tried summarily.

4. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC, may be referred to.39533954

65 Inserted by Act 6 of 1943, s 2 .

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Indian Penal Code (Act XLV of 1860)

Chapter XIX

Of the Criminal Breach of Contracts of Service

[S. 490.

Breach of contract of service during voyage or journey.--

Rep. by the Workmen's Breach of Contract (Repealing) Act, 1925 (3 of 1925), s 2 and Sch.]

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 4/Chapter XIX Of the Criminal Breach of Contracts of Service/S. 491.

Indian Penal Code (Act XLV of 1860)

Chapter XIX

Of the Criminal Breach of Contracts of Service

S. 491.

Breach of contract to attend on and supply wants of helpless person.--

Whoever, being bound by lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

Comments

1. Scope

Generally, contracts are matters of civil law and do not attract the applicability of criminal law. Some breaches of contract are, however, very likely to cause evil, such as no damage, or very high damage, can repair and are also very likely to be committed by person from whom it is exceedingly improbable that any damage can be obtained. Such breaches of contract are, it is conceived, proper subject, for the penal law. Persons, who contract to take care of infants, of the sick and of the helpless, lay themselves under an obligation of a very peculiar kind, and may, with property, be punished if they

omit to discharge their duty. The misery and distress, which their neglect may cause, is such as the largest pecuniary payment would not repair; they generally come from the lower ranks of life and would be unable to pay anything. To such a situation, this section is attracted.

2. 'Lawful Contract'

The applicability of this section is attracted in the case of contracts when they are legal. The lawfulness of the contract has to be determined according to the provisions of the Indian Contract Act 1872. One of the conditions of a valid contract is that it must be for consideration. A purely gratuitous contract for attending on, or for supplying the wants of a disabled or helpless person will not bring it within the purview of this section.3955

In *Empress v Soloman* ,[1] the complainant engaged the accused as an ordinary cook. When the complainant's wife was seriously ill, the accused left the complainant's service for the reason that his own child was ill. Though he left in the morning, he sent, in the evening, another cook to do his work. There were, apparently, other persons, procurable without much trouble, who could cook for the complainant's wife. In these circumstances, it was held that the contract was not one as contemplated by this section.

3. 'Voluntarily'

Commentary under s 39, IPC, vol 1, may be referred to.

4. Procedure

The offence under this section is non-cognizable, bailable, compoundable by the person with whom the offender has contracted, and triable by a magistrate, and may also be tried summarily.

5. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC, may be referred to.

6. Proof

To prove an offence under this section, it must be proved that:

(a) the accused entered into a lawful contract;
(b) such contract was to attend on, or to supply the wants of, a person;
(c) such person was then helpless or incapable of providing for his own safety or of supplying his own wants;
(d) such helplessness or incapacity was by reason of:

    (i) youth, or
    (ii) unsoundness of mind, or
    (iii) disease, or
    (iv) bodily weakness; and

(e) the accused voluntarily omitted to attend on, or to supply wants to, such person.

1 *Empress v Soloman* Ratanlal Unrep Cr Cas 354.

R A Nelson's Indian Penal Code, 11e 2015/R A Nelson's INDIAN PENAL CODE/Volume 4/Chapter XIX Of the Criminal Breach of Contracts of Service/S. 492.

Indian Penal Code (Act XLV of 1860)

Chapter XIX

Of the Criminal Breach of Contracts of Service

S. 492.

Breach of contract to serve at distant place to which servant is conveyed at master's expense.--

[Rep. by the Workmen's Breach of Contract (Repealing) Act 1925 (3 of 1925), s 2 and Sch.]3956

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Indian Penal Code (Act XLV of 1860)

Chapter XX

Of Offences Relating to Marriage

TOPICAL INTRODUCTION

This chapter consists of six offences relating to marriage. It aims at securing purity and sanctity of marriage. Traditionally, in Indian society, much importance is attached to faithfulness of the marriage partners. The offences under this chapter penalise conjugal infidelity. This chapter consists of the following six offences:

(a) Section 493 : Cohabitation caused by a man deceitfully inducing a belief of lawful marriage;
(b) Section 494 : Marrying again during lifetime of husband or wife;
(c) Section 495 : Bigamy with concealment of former marriage from the person with whom the subsequent marriage is contracted;
(d) Section 496 : Marriage ceremony fraudulently gone through without lawful marriage;
(e) Section 497 : Adultery;
(f) Section 498 : Enticing or taking away or detaining with criminal intent a married woman.

In addition to the above six sections of this chapter, s 304B, s 375 (read with exception), s 376B, s 406 (when offence relates to breach of trust of *stridhan* and dowry articles *etc.*) and s 498-A, IPC also deal with offences relating to marriage. Out of the six offences, both husband and wife are equally liable under s 494, IPC, if either of them marries again during subsistence of marriage. As against it, though a woman is a consenting party in the offence of adultery, it is only the man who is liable. When a woman is not a consenting party then the offence is rape and not adultery under s 497, IPC . However, despite being a consenting party and, even if she has seduced and instigated the man to commit adultery, she is not guilty of abetment by virtue of the last line of s 497, IPC .

Indian Penal Code (Act XLV of 1860)

Chapter XX

Of Offences Relating to Marriage

S. 493.

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.--

Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.3957

Comments

1. Scope

This section punishes the offence committed when a man, either married or unmarried, induces a woman to become, as she thinks, his wife, but in reality his concubine. If a person deceives a woman to believe that a certain ceremony, which he causes to be performed by some accomplice, constitutes a valid marriage and, thus, induces her to cohabit, or to have sexual intercourse, with him, he commits an offence under this section.[1] For attracting the provisions of this section, it is not at all necessary that the woman must be of, at least, sixteen years of age at the time of commission of the offence. Whether the woman, upon whom the deceit is practised by the man, is a minor or a major is, therefore, irrelevant. A minor can be induced to believe, or deceived, just as much as an adult can be induced to believe or deceived. A minor may be deceived more easily than an adult.[2]

2. Section 493 and Section 496 --Distinction

Commentary under the same heading in s 496, IPC, *post*, may be referred to.

3. Ingredients

The basic ingredients necessary to be established for bringing home the offence under s 493, IPC, are catalogued as follows:

(a) the accused practised deception;
(b) such deceit was to induce the woman to believe that she was lawfully married to him;
(c) there was cohabitation or sexual intercourse as a result of the deception.[3]3958

4. Essence of the Section

Section 493, IPC, is one of the offences relating to marriage. The section does not penalise mere cohabitation or sexual intercourse with a woman who is not lawfully married to him. The section is

attracted only when certain other ingredients are also associated therewith. The section envisages the case when a man deceitfully induces a woman to have sexual intercourse with him causing her to believe that she is lawfully married to him. The essence of the section is therefore the deception caused by a man on a woman in consequence of which she is led to believe that she is lawfully married to him while infact, they are not lawfully married. In order to establish deception, there must first be allegations that the accused falsely induced her to believe that she is legally wedded to him.[4] The appellant had filed a complaint for offence under s 493, IPC, the respondent husband had obtained *ex parte* decree of divorce, but the *ex parte* decree of divorce was recalled such that the marital ties continued to exist between the parties, and there was no question of deceit or deception on the part of the respondent. No case for offence under s 473, IPC was made out against the respondent husband.[5]

Intercourse with wife would not fall in the category of rape. But if intercourse has been committed under suppression of fact of first marriage, it would amount to offence under ss 493 and 495, IPC .[6]

Prosecution case was that the appellant accused accepted the complainant as his wife, ill treated and assaulted her. The complainant was not the legally married wife of the appellant, and she also admitted that no cohabitation took place with her in the house of the appellant at any point of time. Appellant was acquitted of the charge under s 493, IPC .[7]

5. Lower Caste of Prosecutrix no Ground for Dominating her will by Accused

Merely becasue the prosecutrix is a member of the Scheduled Caste it cannot be said that the accused was in a position to dominate her will and exploit her sexually.[8]

6. Position of Husband

The husband may be in a position to dominate the will of his wife. But it cannot be said that the husband sexually exploits his wife for the reason that he is in a dominating position.[9]

7. Autre Fois Acquit

Even when the marriage of both parties is bigamous, the spouse of both being alive, there is only one offence. Thus, where *N*, having a living wife *G*, married a woman3959*P*, who had a living husband *D*, and a complaint, filed by *D* against *N* and *P* was allowed to be compounded with the permission of the trial court, it was held that although the magistrate's granting of permission to *D* to compound the offence without giving a hearing to *G* was clearly improper and erroneous, another complaint by *G* was not maintainable because it was barred by the principle of *autre fois acquit*. As only one offence had resulted from the second marriage, there could be no question of a second prosecution with respect to the same offence.[10]

8. Section 493 and Clause Fourthly of Section 375 --Distinction

This section is closely analogous to s 375 (clause fourthly), IPC, which provides that sexual intercourse with a woman would be rape if done 'with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married'. The said s 375 (clause fourthly) provides for cases in which the woman believes the man to be 'another man' when the man knows that he is not that other man. It is, thus, a case of false impersonation. On the other hand, s 493, IPC, does not contemplate a case of false impersonation. It is not a case in which the woman considers the man to be 'another man'. It is applicable only to those cases in which the man deceitfully creates a belief in a woman, who is not lawfully married to him, to the effect that she is lawfully married to him. This would not be a case of impersonation. The cases of impersonation would be covered under s 375 (clause fourthly), IPC . However, both ss 375 (clause fourthly) and 493, IPC, relate to cases in which the consent is obtained by fraud. The difference lies in the nature of the fraud. Under the former section, the fraud lies in

impersonation for another man. In the latter section, there is no question of difference of personality. It is the same man who deceitfully induces the belief of a valid marriage between him and the woman.

9. 'Who by Deceit Causes any Woman...to believe that she is Lawfully Married to Him'

Section 493, IPC, envisages the case when a man deceitfully induces a woman to have sexual intercourse with him causing her to believe that she is lawfully married to him. The essence of the section is therefore the deception caused by a man on a woman in consequence of which she is led to believe that she is lawfully married to him, while in fact they are not lawfully married. In order to establish deception there must first be allegations that the accused falsely induced her to believe that she is legally wedded to him. In a case where both the man and woman fully knew that they are not husband and wife and no ceremony of marriage took place between them, there is no question of one of them believing otherwise.[11] The prosecutrix alleged that the accused misled her that she was married to him and had sex with her. On the other hand, the evidence showed that the prosecutrix had gone with the accused of her own free will and resided with the accused at different places for several days. Evidence was lacking to show that the accused had misled the complainant. Held, no offence under s 493, IPC was made out.[12]3960

This section is not intended to punish a person for contracting a marriage which turns out to be illegal. It punishes him only for obtaining the body of the woman by deceitfully assuring her that he had acquired that right by *jus mariti*. If it is found that the woman was lawfully married to the accused and the circumstances of the case show that no deception was practised on her, he cannot be convicted under this section.[13] The essence of the offence under this section consists in the practice of deception by a man on a woman, in consequence of which she is led to believe that she is lawfully married to him even though, in fact, they are not lawfully married. To prove deception, it must be conclusively established that the accused, either dishonestly or fraudulently, concealed certain facts or made a false statement knowing it to be false if for instance it can be found that the accused knew that the ceremonies, which he, with the complainant, underwent, did not constitute a valid marriage, the necessary guilty intention may be inferred.[14] However, the subsequent conduct in deserting the complainant and in even repudiating the marriage though an important piece of evidence, would not suffice, by itself, to show that the accused, when he participated in the ceremonies, intended to deceive the complainant.[15]

10. 'To Cohabit or have Sexual Intercourse'

Both the terms 'cohabit' and 'have sexual intercourse' are connected by the word 'or'. Ordinarily, the term 'cohabit' is often treated as conveying the idea of sexual intercourse; but here it seems that the words are not exactly identical. Cohabitation, which means living together, may under this section, be deemed to cover the taking of marital liberties, even short of sexual intercourse.

11. Cohabitation with Woman by Promising her Marriage

The evidence that the accused had cohabitation with the woman by promising her marriage or by indicating to others that she was his wife does not constitute proof of the fact that he by deceit caused the said woman to believe that she was lawfully married to him.[16]

12. Procedure

The offence under this section is non-cognizable, non-bailable, non-compoundable, and triable by a magistrate of first class.

13. Complaint--By whom to be made

Under s 198, CrPC, no court shall take cognizance of an offence under s 493, IPC, except upon a complaint made by the aggrieved person, provided that where such person is under the age of eighteen years, or is an idiot or a lunatic, or is, from sickness or infirmity, unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may with the leave of the court, make a complaint on her behalf.3961 However, if proper complaint has been made and, pending enquiry, the complainant dies, the enquiry would not abate on account of the complainant's death. The mother of the complainant can be allowed to conduct the prosecution.[17] As made clear by s 198, CrPC, for all or any of the offences under ss 493, 494, 495, 496, 497 and 498, IPC, an aggrieved person can be either the husband or the wife and none else other than those falling under the proviso to s 198(2), CrPC . Complaint filed by a third person would not be maintainable.[18]

14. Quashing of Criminal Proceedings

The allegations against the accused were that on a promise of marriage he performed sexual intercourse with the informant for about one year. In the meanwhile the informant became pregnant and when she requested the accused for marriage, he stalled the matter and denied paternity of the child. The informant lodged an FIR. However, the informant neither in the FIR, nor in her statement under s 161, CrPC, alleged that she was induced by the accused and made to believe that she was married to the accused nor she ever believed that a ceremony of marriage was performed between her and the accused. Thus, the basic requirement of deception leading to consent by the woman for sexual intercourse was not made out and charge framed against the accused under s 493, IPC, was quashed.[19]

The accused was alleged to have married the complainant by exchanging garlands in a temple and living with her for some days. Later, the accused allegedly asked her to bring money and threatened to kill her in case she returned empty handed. He manhandled her and drove her out of his house. The ingredients of the offence under s 493, IPC, relating to cohabitation intending to deceive about marital status were *prima facie* not present, so, the order of the magistrate taking cognizance under s 493, IPC, was set aside.[20]

15. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate,etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the...day of..., at..., you, by deceit, caused a woman AB, who was not lawfully married to you, to believe that she was lawfully married to you and to cohabit (*or to have sexual intercourse*) with you, and that you thereby committed an offence, punishable under s 493 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

Section 493, IPC, provides punishment for the offence of co-habitation caused by a man deceitfully inducing a belief of lawful marriage. Therefore, there must be *prima facie* evidence on record to show

that:

(a) accused cohabited with prosecutrix;3962
(b) at the time of such cohabitation, he knew that he was not legally married to her;
(c) the prosecutrix consented to cohabitation believing that she is his wife; and
(d) such belief in her was induced by deceit on the part of the accused.[21]

Where in the FIR it is not stated in so many words about the belief in the mind of the prosecutrix about a lawful marriage but in her statement under s 161, IPC, prosecutrix has stated that when the accused embraced and kissed her she resisted but when he put vermilion on her head and declared her as his wife with the assurance to accept her publicly after getting a job thereafter, she submitted for sexual intercourse. The aforesaid statement of the prosecutrix is sufficient to satisfy the requirements of law as provided in s 493, IPC, to constitute that offence. Under such circumstances accused's contention about absence of a *prima facie* case for the offence under s 493, IPC, is without any merit. Therefore, framing of charge against the accused was found proper.[22]

Where the prosecutrix was conscious of the fact that the accused was married with someone else and was residing with her, there was no deception on the part of the accused for inducing the prosecutrix to believe that she was his lawfully wedded wife. The framing of charge under s 493, IPC, against the accused was found improper.[23]

16. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused cohabited, or had sexual intercourse, with the woman in question;
(b) the accused was not lawfully married to the said woman;
(c) the accused, by deceit, caused the said woman to believe that she was lawfully married to him; and
(d) the said woman cohabited, or had sexual intercourse, with him in that belief.

It is not necessary to establish the factum of marriage according to personal law but the proof of inducement by a man deceitfully to a woman to change her status from that of unmarried to that of a lawfully married woman and then make that woman cohabit with him establishes an offence under s 493, IPC .[24]

17. Acquittal

Where admittedly the complainant used to have sexual intercourse with the accused even before the alleged exchange of garlands, the only witness brought on record in support of exchange of garlands had not corroborated fully that the accused and the complainant actually exchanged garlands in his presence, and there was no material on record to support the prosecution version that actually any marriage took place to give an impression that the complainant was legally married wife of the accused, and further the accused has denied such a relation and decided not to accept the3963*panchayati* made by the villagers, therefore, it could not be said that she was induced to believe by the accused to be his legally married wife and to submit herself to sexual intercourse. So, the accused was entitled for acquittal.[25]

18. Conviction

Where the evidence of the prosecution witnesses disclosed that the accused by coming to the residence of the victim girl in the absence of her parents put vermilion on her forehead and induced

her to believe that by such putting of vermilion on her forehead he has married her and thus, obtaining consent, caused sexual intercourse with her, thus the evidence on record amply proved that the prosecution had been liable to prove that the accused had practiced deceit and by that deceit made the prosecutrix, who is not his wife, believe herself to be lawfully wedded to him and thereby she had sexual intercourse with the accused. The accused was convicted under s 493, IPC .[26]

Upon being acquainted with the complainant, the accused had developed a close relationship with the complainant. He used to visit the complainant from time to time and he promised the complainant that he would marry her. The appellant accused had got a form with regard to marriage registration signed by the complainant. The form was signed by the appellant accused and he also induced the complainant to sign the form so as to get married. The afore-stated fact made the complainant believe that the appellant accused had married her and, therefore, she had started residing with him as his wife. In fact, the appellant did not marry the complainant. The persons related to the complainant and the accused were also made to believe that the complainant was the wife of the appellant, though rituals necessary for Hindu marriage had never been performed. Admittedly, no marriage had taken place between the complainant and the appellant but only on the basis of the documents signed by the complainant at the instance of the appellant accused, the complainant was made to believe that she was the lawfully married wife of the appellant accused. The appellant was convicted for offence under s 493, IPC .[27]

1 *Raghunath Padhy v State* AIR 1957 Ori 198, 1957 Cr LJ 989 .

2 *Kartick Kundu v State* 1967 Cr LJ 1411, p 1417 (Cal) .

3 *Ravinder Kaur v Anil Kumar,* 2015 (2) Crimes 326 (SC), 2015 (5) SCALE 417, 2015 (5) SLT 104, 2015 Cr LJ 2839 . *Dayanidhi Nayak v State of Orissa and Ors* 2002 Cr LJ 371 (Ori) ; *Raghunath Pandey v State* AIR 1997 Ori 198, 1957 Cr LJ 989 ; *Janaki Kumar Das v Yajendra Das* (1990) 3 OCR 367 ; *Amruta Vadhia v Trilochan Pradhan* (1993) 6 OCR 14, 1993 Cr LJ 1022 ; *Maideenkutty Haji v Kunhikove* AIR 1987 Ker 184 (FB), 1986 Cr LJ 1106 ; *Muna Begum v Jula Mohammed and Anor* 1998 Cr LJ 3244 (Ori) ; *Summan v State of Madhya Pradesh* 1988 Cr LJ 498 (MP) ; *Suren Orang v State of Assam* 2005 Cr LJ 3402 (Gau) ; *Ram Chandra Bhagat v State of Jharkhand* (2013) 1 SCC 562, 2013 (1) RCR (Criminal) 178, 2012 (11) Scale 115 .

4 *Moideenkutty Haji and Ors v Kunhikoya and Ors* AIR 1987 Ker 1848 (FB) ; **See also***Rughunath Padhy v State* AIR 1957 Ori 198, 1957 Cr LJ 989 ; *Dayanidhi Nayak v State of Orissa* 2002 Cr LJ 371 (Ori) .

5 *Ravinder Kaur v Anil Kumar* 2015 (2) Crimes 326 (SC), 2015 (5) Scale 417, 2015 (5) SLT 104, 2015 Cr LJ 2839 .

6 *Mahesh Kumar Dhawan v State of MP* 2012 Cr LJ 1639, 2012 (115) AIC 534 (MP) .

7 *Dushasan Mahato v State of Jharkhand* 2011 Cr LJ 3392 (Jhar) .

8 *Ravi v State of Kerala* 2004 Cr LJ 3075 (Ker) .

9 *Ibid*.

10 *Nilkanth Rao v Ganga Bai* ILR 1966 Bom 877, 68 Bom LR 286 .

11 Clause Fourthly of s 375 remained unchanged even after amending Act 43 of 1983 made effective from 25 December 1983.

12 *B Suresh v State of Karnataka* 2013 Cr LJ (NOC) 444 (Kar) .

13 Re *Abdul Khader*(1970) 1 MLJ 410.

14 *Rughunath Padhy v State* AIR 1957 Ori 198, 1957 Cr LJ 989 ; *Dayanidhi Nayak v State of Orissa* 2002 Cr LJ 371 (Ori) .

15 *Ibid.*

16 *Sammun v State of Madhya Pradesh* 1998 Cr LJ 498 (MP) . See also commentary under the heading 'Prosecutrix consenting to sexual intercourse on false promise of marriage' in s 376, vol 3 and the heading 'Rape and Cheating' in s 417, *ante*.

17 *Ashwin Nanubhai Vyas v State of Maharashtra* AIR 1967 SC 983, 1967 Cr LJ 943 .

18 *Urmila Devi v Yadhuvir Singh* (2013) 15 SCC 624, JT 2013 (14) SC 262, 2013 (4) RCR (Criminal) 899 .

19 *Dayanidhi Nayak v State of Orissa and Ors* 2002 Cr LJ 371 (Ori) ; *Moideenkutty Hazi v Kunhikaya* AIR 1987 Ker 184 (FB), 1987 Cr LJ 1106 .

20 *Gautam Sahn and Ors v State of Orissa and Anor* 1999 Cr LJ 838 (Ori) . For further commentary, see under the related headings in ss 406 and 420, *ante*.

21 *Subhransu Sekhar Samantray v State* 2002 Cr LJ 4463 (Ori) .

22 *Ibid.*

23 *Akhaya Kumar v State of Orissa* 1998 Cr LJ 1757 (Ori) .

24 *Ram Chandra Bhagat v State of Jharkhand* (2013) 1 SCC 562, 2012 (11) Scale 115 .

25 *Falguni alias Anirudh Pradhan v State of Bihar* 2007 Cr LJ 451 (Jhar) ; **see also***Sarjan Kheti v State of Orissa,* 2015 (2) Crimes 344 (Ori) (Accused acquitted).

26 *Suren Orang v State of Assam* 2005 Cr LJ 3402 (Gau) .

27 *Ram Chandra Bhagat v State of Jharkhand* (2013) 1 SCC 562, 2012 (11) Scale 115 .

Indian Penal Code (Act XLV of 1860)

Chapter XX

Of Offences Relating to Marriage

S. 494.

Marrying again during lifetime of husband or wife.--

Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.--This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction,

Nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.3964

STATE AMENDMENT

Andhra Pradesh-- In Andhra Pradesh, the offence under s 494, IPC, which is not a cognizable offence is made cognizable, non-bailable in view of the State amendment brought to the First Schedule appended to CrPC 1973. [*Vide Andhra Pradesh Act No 3 of 1992, s 2 (wef 15-2-1992*).]3965

Comments

1. Scope

This section makes the offence of bigamy punishable both as regards a person, having a wife living, marrying another, and as regards a wife, having her husband living, remarrying, in any case in which such remarriage would be void by reason of its taking place during the life of such wife or husband. If a woman, having a living husband, marries another man, the person, to whom the woman is remarried, cannot be punished under this section. He can only be charged with abetment of the offence of bigamy.[28]Section 494,IPC, aims to encourage monogamy, and to deprecate/discourage practice of polygamy.[29] Where a spouse contracts a second marriage while the first marriage is still subsisting, the spouse would be guilty of bigamy if it is proved that the second marriage was a valid one in the sense that the necessary ceremonies, required by law or by custom, had been actually performed.[30] The section would come into play only if the second marriage becomes void by virtue of the fact that it had taken place in the lifetime of one of the spouses.[31] The section would not be attracted to a marriage between a man, who has a living wife, and woman, who has a living husband, with whom her marriage subsists, such a marriage being no marriage at all.[32] If the second marriage of a Hindu cannot be said to have been solemnized, that marriage will not be void by virtue of s 17 of the Hindu Marriage Act 1955, and, therefore, the provisions of this section cannot be attracted.[33]

Judges should be particularly careful to see that ss 494, 497 and 498, IPC, are not abused for the purpose of private spite or persecution.[34]

2. Bigamy--Non-filing of complaint by wife

Where the husband contracts second marriage during the lifetime of the first wife, the non-filing of the complaint under s 494, IPC by the first wife does not mean that the offence is wiped out, and monogamy sought to be achieved by means of s 494, IPC merely remains in the statute book.[35]

3. Applicability

As regards its applicability, the section makes no distinction on the basis religion.[36] The section applies to Hindu,[37] Christians,[38] Jews,[39] and Parsis,[40] of either sex, and3966 Muslim females. A Muslim wife, marrying during the subsistence of an earlier marriage, can be punished under this section. Similar is the case with a Muslim husband who marries a fifth wife during the subsistence of four earlier marriages. Again, a Muslim, who marries under the Special Marriage Act 1954, is liable to punishment under the section if he marries during the subsistence of the first marriage.[41] It may be noted that the section applies only to those cases in which a second marriage is 'void' during the lifetime of a spouse. It does not apply to cases in which the polygamous marriages are permitted. However, the punishment, provided by this section, cannot be evaded by pleading Islam, unless the plea is founded on some exemptions recognised by law.[42]

The provisions of the Hindu Marriage Act are not applicable to the Gond community, second marriage in the community is valid as per customary law, and the provisions of s 494, IPC, are not attracted.[43]

4. Section 494 and Section 496 --Distinction

Commentary under the same heading in s 496, *post*, may be referred to.

5. Section 494 and Section 498A --Distinction

The offence under s 494, IPC, is a distinct offence from s 498A, IPC . These two offences are not cognate offences and therefore, one cannot be considered to be a major offence and the other to be a minor offence, and so would not attract the legal position that the person can be convicted for the minor offence if the major offence is not established.[44]

6. Section 494 , IPC And Sections 11 and 15 of the Hindu Marriage Act 1955

Section 494 , IPC, will only apply in case either spouse having the other spouse living, again marries and such marriage is void by reason of it taking place during the lifetime of the first wife under s 11 of the Hindu Marriage Act, a marriage solemnised in contravention of the conditions specified in cll (i), (iv) and (v) of s 5 of the Hindu Marriage Act is null and void and can be so declared by a decree of nullity on a petition presented by either party thereto, there is no provision in the Act making a marriage solemnised in contravention of s 15 of the Act as void. A marriage solemnised in contravention of s 15 of the Hindu Marriage Act is not void and therefore, even *prima facie* no case under s 494, IPC, is made out.[45]

7. Section 494 , IPC and Article 25 of the Constitution

The rule of monogamous marriage amongst Hindus was introduced with the proclamation of Hindu Marriage Act 1955. Section 17 of the Hindu Marriage Act provided that any marriage between two Hindus solemnised after the commencement3967 of the Act shall be void if at the date of such marriage either party had a husband or wife living, and the provisions of ss 494 and 495 of the IPC (45 of 1860), shall apply accordingly. The second marriage solemnised by a Hindu during the subsistence of first marriage is an offence punishable under the IPC . Freedom guaranteed under art 25 of the Constitution is such freedom which does not encroach upon a similar freedom of the other persons. Under the constitutional scheme, every person has a fundamental right not merely to entertain the religious belief of his choice, but also to exhibit his belief and ideas in a manner which does not infringe the religious right and personal freedom to others.[46]

Making a convert Hindu, who has taken second wife after conversion, liable for prosecution under s 494, IPC is not against Islam, the religion adopted by such person upon conversion. Saying that it would be against Islam demonstrates the ignorance about the tenets of Islam and its teachings. The concept of Muslim law is based upon the edifice of Shariat. Muslim law as traditionally interpreted and applied in India permits more than one marriage during the subsistence of one, though capacity to do justice between co-wives in law is condition precedent. Even under the Muslim law plurality of marriage is not unconditionally conferred upon the husband. It would, therefore, be doing injustice to Islamic law to urge that the convert is entitled to practice bigamy, notwithstanding the continuance of his marriage under the law to which he belonged before conversion. The violators of law who have contracted the second marriage cannot be permitted to urge that such marriage should not be made subject-matter of prosecution under the general penal law prevalent in the country.[47]

8. Essential Ingredients

To constitute an offence under this section, the following essential ingredients[48] must exist:

(a) the accused spouse must have contracted the first valid marriage;
(b) the accused spouse must have also contracted a second marriage when the previous valid marriage was subsisting, meaning thereby that there must be, at the time of second ceremony of marriage, a previous valid subsisting marriage;[49] and
(c) both marriages must be valid in the sense that the necessary ceremonies, required by the personal law, governing the parties, had been duly performed.[50]

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In the absence of any of the said ingredients, no offence under this section would be committed, *i.e.*, if the first marriage is null and void, there would be no offence of bigamy in contracting a second marriage.[51]

9. Precedent

In the case of *State of Punjab v Surinder Kumar* [52] while considering the question of precedents, the Supreme Court has observed that 'a decision is available as a precedent only if it decides a question of law'.

In the case of *Amica Quarry Works v State of Gujarat* [53] the Supreme Court has laid down that:

> The ratio of any decision must be understood in the background of the facts of the case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.

A three-judge Bench of the Supreme Court in the case of *State Financial Corporation v Jagdamba Oil Mills* ,[54] has observed thus:

> Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact-situation of the decision on which reliance is placed. Observations of the Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for the judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. Circumstantial flexibility on additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

Similarly in the case of *Divisional Controller, KSRTC v Mahadeva Shetty* ,[55] the Apex Court has observed thus :

> The decision ordinarily is a decision on the case before the Court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the Court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into facts, it cannot be assumed whether a similar direction must or ought to be made as measure of social justice. Precedents sub silentio and without argument are of no moment. Mere casual expressions carry no weight at all. Nor every passing expression of a Judge, however, eminent, can be treated as an *ex cathedra* statement having the weight of authority.

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Keeping in view these well settled principles along with the basic fact that in criminal cases normally the law of precedent is not applicable, as facts of each case always differ, except in respect of technical pleas like jurisdiction, limitation, *etc.*, any pronouncement whether of Apex Court or High Court in a criminal case is mainly based on appreciation of evidence and may not have the effect of binding precedent but have to be considered as guidelines or guiding principles of the Supreme Court. It is not as if none of the pronouncements of the Supreme Court in respect of criminal cases have binding precedent. Even in criminal cases where the Supreme Court declares law regarding question of jurisdiction of court, law of limitation, procedural aspect, *etc*, it may have binding precedent effect in other cases wherein similar situation is placed. But the fact remains that even in these latter cases, the court is required to see the facts and circumstances of each case and only if they are similar or on parity, it has to implement or follow the binding precedent of the Supreme Court.[56]

In the case of *Naib Singh v State of Punjab* ,[57] the Apex Court has made it clear that there is nothing like precedent in criminal case but there are certain guiding principles. In the case of *Shankarlal v State of Maharashtra* ,[58] the Supreme Court has observed that 'legal principles incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment'.

Considering all these decisions of the Supreme Court on the question of precedents or binding nature of its pronouncement, it has to be reiterated that though normally under art 141 of the Constitution of India, the pronouncement of the Supreme Court, which is the law of the land, has binding force on all other courts in the country, it is only the law declared which would be binding on other courts. Hence, so far as the pronouncements of the Apex Court in criminal cases especially like in respect of sentence, amount of compensation, etc, are concerned, normally they do not have any binding force on other courts except being considered as guidelines or guiding principles.[59]

10. Religion--Marriage under Hindu Law

Religion is a matter of faith stemming from the depths of the heart and mind. Religion is a belief which binds the spiritual nature of man to a supernatural being, it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If a person feigns to have adopted another religion just for some wordly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a scared institution. Under Hindu law, marriage is a sacrament. Both have to be preserved.[60]3970

11. Islam--A Progressive and Pious Religion--Effect on a Hindu Converting To Islam

The plea that making a convert Hindu liable for prosecution under the IPC would be against Islam, the religion adopted by such person upon conversion, if raised, demonstrates the ignorance about the tenets of Islam and its teachings. The word 'Islam' means peace and submission. 'In its religious connotation it is understood as submission to the will of god'. According to Fyzee,[61] in its secular sense, the establishment of peace. The word 'Muslim' in Arabic is the active principle of Islam, which means acceptance of faith, the noun of which is Islam. Muslim law is admittedly to be based upon a well recognised system of jurisprudence providing many rational and revolutionary concepts, which could not be conceived by the other systems of law in force at the time of its inception. Sir Ameer Ali in his book *Mohammedan Law*[62] has observed that the Islamic system, from a historical point of view was the most interesting phenomenon of growth. The small beginnings from which it grew up and the comparatively short space of time within which it attained its development marked its position as one of the most important judicial systems of the civilised world. The concept of Muslim law is based upon the edifice of Shariat. Muslim law as traditionally interpreted and applied in India permits more than one marriage during the subsistence of one, though capacity to do justice between co-wives in law is a condition precedent. Even under the Muslim law, plurality of marriage is not unconditionally conferred upon the husband. It would, therefore, be doing injustice to Islamic law to urge that the convert is entitled to practice bigamy notwithstanding the continuance of his marriage under the law to which he belonged before conversion. The violators of law who have contracted the second marriage cannot be permitted to urge that such marriage should not be made subject-matter of prosecution under the general penal law prevalent in the country. The progressive outlook and wider approach of Islamic law cannot be permitted to be narrowed by unscrupulous litigants, who apparently are found to be guilty of the commission of the offence under the law to which they belonged before their alleged conversion. It is nobody's case that any such convertee has been deprived of practising any other religious right of the attainment of spiritual goals. Islam which is pious, progressive and respected religion with rational outlook cannot be given a narrow concept as has been tried to be done by the

alleged violators of law.[63]

12. A Muslim Woman, when not Liable under this Section

A Muslim woman, marrying, during the lifetime of her husband, during the period of *iddat*, would not be guilty of bigamy.[64] In *Abdul Gani v Azizul Haq* ,[65] the marriage was dissolved by the apostasy of a Mohammedan husband and the woman married during the *iddat*. It was held that as the second marriage was not a legal marriage, the woman cannot be said to have gone through the form of second marriage, when her legal husband was alive, and, therefore, she was not guilty of bigamy under s 494, IPC . In *Badal Aurat v Empress* ,[66]*B*, a Mohammedan girl, whose father was dead,3971 was given in marriage by her mother to *J* some years before she attained puberty. Prior to her attaining puberty, *J* was sentenced to a term of imprisonment for theft. The marriage with *J* was never consummated. *B* then married *P*. On being released from jail, *J* requested *B* to return to him, but she refused to do so. It was held that she had the option of either ratifying or repudiating the marriage with *J* on attaining puberty, and that no offence under s 494, IPC, is proved.

13. Apostasy--Effect on Marriage under Hindu Law

The first marriage has to be proved to be subsisting at the time of the second marriage. In most cases, the change of religion by one of the parties does not involve a dissolution of marriage. There are, however, cases in which the change of religion by one party automatically results in termination of the first marriage. In such cases, a subsequent marriage would be taken out of the purview of s 494, IPC . The previous marriage would not be deemed to be subsisting any longer. This depends upon the religion to which the parties to the marriage belong. According to Hindu law, marriage is not dissolved by apostasy. When a Hindu becomes a Mohammedan, his status is not allowed to be governed by the laws of the new faith, but continues to be subject to the law and custom to which he was originally subject.[67] The conversion of a Hindu wife to Mohammedanism does not *ipso facto* dissolve her marriage with her husband and she cannot, during his lifetime, enter into a valid contract of marriage with another person.[68] The marriage of a *chamar* woman is not dissolved with her *chamar* husband by her becoming a convert to Islam and if she marries a second time during the lifetime of her *chamar* husband, she would be guilty of an offence under s 494, IPC .[69] The rights of a Hindu husband are not affected, in any way, by the conversion, to Islam, of his wife and she cannot refuse to live with him.[70] Where a Hindu woman was duly married according to Hindu rites and, subsequent to the marriage, the woman became a convert to Mohammadanism and then married a Mohammedan, it was held that there is no authority in Hindu law for the proposition that an apostate is absolved from all civil obligations, and, so far as the matrimonial bond is concerned, the same would be contrary in the sprit of that law which regards it as indissoluble, and that the marriage is not, under the Hindu law, dissolved by conversion of the wife to Mohammadanism.[71] In another case, it was held that a marriage, solemnised in India according to one personal law, cannot be dissolved according to another personal law simply because one of the parties has changed his or her religion.[72] Where a Brahmin went through a Hindu marriage ceremony with a Brahmin girl but converted to Christianity, it was held that she continued to be his wife.[73] Now, under s 13 of the Hindu Marriage Act 1955, the husband or wife is entitled to, get the marriage dissolved if the other party ceases to be a Hindu by conversion to another religion. Till then, conversion *per se* does not operate as dissolution of the marriage. Where the marriage of the complainant with the accused was admitted and there was nothing to show that the parties had taken recourse to3972 s 13 of the Hindu Marriage Act 1955, or had secured a valid divorce according to the custom, the marriage must be considered to be subsisting.[74]

14. Apostasy--Effect on Marriage under Christian Law

A Christian marriage is also not dissolved by the apostasy of one of the parties. Where, therefore, the accused, a Christian wife, renounced Christianity and embraced Islam and then married a Mohammedan, it was held that the subsequent marriage was bigamous.[75]

15. Apostasy--Effect on Marriage under Mohammedan Law

Muslim law took strict view of apostasy, till a change in the law was made under s 4 of the Dissolution of Muslim Marriage Act 1939. Under the Muslim law, so far as the apostasy of the husband was concerned, there was no doubt that it led to the dissolution of marriage.[76] This law was recognised to be the Muslim law prior to passing of the Act and is still in force. The apostasy of the husband to any religion other than Islam was, and is, sufficient to dissolve the marriage. Thus, where the husband apostatised and the wife contracted another marriage, it was held that she was not guilty of bigamy as the marriage stood dissolved by apostasy of the husband.[77] On the question as to whether the apostasy of the wife caused a dissolution of the marriage, there was some difference of opinion amongst the Muslim jurists. They are discussed by Ameer Ali[78] who was of the view that the marriage of a Muslim with a *Kitabi* woman (such as Jew and Christian) should not affect the status of marriage by apostasy to such a religion. This view was, however, not accepted by the High Courts in India and it was held that apostasy of either party to any religion dissolved the marriage. Apostasy to any non-*Kitabi* religion like Buddhism,[79] or Hinduism,[80] would, of course, dissolve the marriage. Thus, a marriage stood dissolved on apostasy to Christiantity,[81] or if Islam is renounced and no religion is professed.[82]The Dissolution of Muslim Marriage Act 1939, has however, made a provision in respect of the apostasy of the wife. Under s 4 of the Act, the apostasy of a Muslim woman 'to a faith other than Islam' shall not now operate to dissolve the marriage except in the case of a woman converted to Islam who re-embraces the former faith, whether *Kitabi* or non-*Kitabi*.

16. 'Marries'

The word 'marries', in the section, means marries by some form of marriage known to, or recognised by, the personal law of the parties concerned.[83]3973

Similarly, the expression 'whoever...marries', in this section, means whoever marries validly or whoever marries and whose marriage is a valid one.[84]

17. Second Marriage--When Bigamous

There is some difference between the first marriage, the subsistence of which gives the complainant a right to file a complaint under this section and a second marriage, which can be said to be bigamous for the purpose of the section. In the case of first marriage, it has to be proved that the marriage was legally valid, *i.e.*,

(a) there were no legal impediments to the contracting of such marriage; and
(b) the marriage was performed according to the minimum ceremonies necessary for its validity.

If the marriage is not found to be valid according to either of the said test, no offence of bigamy will be made out. On the other hand, in the case of a second marriage, it is not necessary that the marriage should be otherwise valid according to law apart from the fact that a spouse is living (the fact, that parties are within the prohibited degrees, will not prevent the marriage from being bigamous), but it is necessary that the ceremonies, essential to a marriage, are duly performed. Thus, while the absence of legal impediments is required for determining the validity of the first marriage, the impediments are not to be considered for treating a second marriage as bigamous. The section does not refer to a valid marriage. A bigamous marriage cannot be a valid marriage.[85] If the first marriage is valid, it would be bigamy to marry again, notwithstanding any special circumstances, which, independently of the bigamous character of the marriage, may constitute a legal disability in the parties or make the form of marriage resorted to inapplicable to their case.[86] It was held, in *Payari v Faqir Chand Alakha* ,[87] that the section does not require that the second marriage with the person concerned must otherwise be valid according to law. However, the validity of form of marriage is required in the case of both the

marriages. Where, therefore, either of the two marriages is found to be not duly solemnised, the position would be that in the eyes of law, there is only one legal and valid marriage making the charge of bigamy unsustainable.[88]

While it is not necessary, in order to attract the provision of this section, to prove that the second marriage was legally valid (*i.e.*, without any legal impediments), it is necessary to prove that the accused went through some form of marriage the parties is a must for a conviction on a charge of bigamy; which, but for the existence of the impediment of the first marriage, would have been recognised as marriage, valid in form by the law, under the form, of which it was celebrated.[89] In other words, in order that an offence under this section may be committed, it is necessary, atleast, that all the ceremonies, which are necessary to be performed in order that a valid marriage may take place, ought to be performed and, ordinarily, all these ceremonies3974 would amount to a valid marriage, but for the fact that the marriage becomes void on account of the existence of a previous wife.[90]

Where a spouse contracts a second marriage when the first marriage is still subsisting, the spouse would be guilty of bigamy under s 494, IPC, if it is proved that the second marriage was a valid one in the sense that the necessary ceremonies, required by law or by custom, have been actually performed. The voidness of the marriage under s 17 of the Hindu Marriage Act 1955, is, in fact, one of the essential ingredients of s 494, IPC because the second marriage will become void only because of the provision of s 17 of the Hindu Marriage Act.[91] Merely going through certain ceremonies, with the intention that parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom.[92] Similarly, mere keeping of a concubine or mistress is not sufficient to attract the provisions of the section.[93] If there is no satisfactory evidence of the performance of ceremonies of a valid marriage, no offence under s 494, IPC, would be made out.[94] Proof of getting the marriage registered at a caste organisation by payment of necessary fees is not sufficient to prove that the marriage in question was contracted.[95]

The test for deciding whether all the necessary ceremonies for a valid marriage were performed is: will the union through the alleged marriage constitute a valid marriage if the other spouse were not living? This can be determined by a applying the test: will the wife, if former wife were not living, be entitled to claim maintenance as a married wife and will the children, born of the union, be deemed born in or out of wedlock? If these tests are satisfied, it will be open to the court, while considering the facts of an individual under this section, to presume that all the necessary ceremonies had been undergone.[96] If the marriage is valid according to the customary rites, it would be complete and binding. In the Reddy community in Telangana area, the essential ceremonies must be tying of *mangalsutra* and putting the toe-ring, throwing rice over each other's head and the ceremony connected with the yoke. If these ceremonies are performed, the marriage of a Reddy couple gets completed and is binding on the parties.[97]3975

18. First Marriage under Mohammedan Law--Second Marriage under Special Marriage Act 1954 is Bigamous

Section 43 of the Special Marriage Act 1954 is given below:

> **S. 43 . Penalty on married persons marrying again under this Act.--**Save as otherwise provided in Chapter III, every person who, being at the time married, procures a marriage of himself or herself to be solemnised under this Act shall be deemed to have committed an offence under section 494 or section 495 of the Indian Penal Code, 1860 (45 of 1860), as the case may be, and the marriage so solemnised shall be void.

It is no doubt true the personal law applicable to Muslims in India does contemplate of four marriages by a muslim male. Notwithstanding the fact that personal law permits a Muslim male to contract four marriages, if a second marriage is contracted under the Special Marriage Act 1954*vis-à-vis* the fact that a Muslim male has a legally wedded wife who has been married to him under the Mohammedan

law, s 494, IPC, has to claw at the erring male. The accused cannot take refuge behind the falacious contention that he had contracted the second marriage with a Muslim woman by virtue of the exception enshrined in Mohammedan law. Mohammedan law does not claim precedence over Special Marriage Act 1954 keeping in view that the accused solemnised his first marriage under Mohammedan law and he contracted his second marriage under the Special Marriage Act. There being no saving clause for the accused to purge him of the charges under s 494, IPC, the accused is liable to be punished under s 494, IPC .[1]

19. First Marriage under Special Marriage Act 1954--Second Marriage under Mohammedan Law is Bigamous

Section 44 of the Special Marriage Act lays down:

> **S. 44 . Punishment of bigamy.--**Every person whose marriage is solemnized under this Act and who, during the lifetime of his or her wife or husband, contracts any other marriage shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code, 1860 (45 of 1860), for the offence of marrying again during the lifetime of a husband or wife, and the marriage so contracted shall be void.

Dealing with a case arising under s 16 of the Old Special Marriage Act 1872, which is in *pari materia*with s 44 of the present Act, a Division Bench of the Madras High Court in *Vaidyanathan v Abdul Allam* [2] held:

> Section 16, Special Marriage Act, provides that a person married under it, who, during the lifetime of his or her wife or husband contracts another marriage, shall be subject to the penalties provided in ss 494 and 495, Penal Code, for the offence of marrying again during the lifetime of a husband or wife, whatever may be the religion which he or she professed at the time of the second marriage. Therefore, a person married under the Special Marriage Act commits bigamy if he marries again during the lifetime of his spouse, and it matters not what religion he professes at the time of the second marriage... The Special Marriage Act clearly only contemplates monogamy and a person married under the Act cannot escape from its provisions by merely changing his religion.

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If a Muslim male marries under the Special Marriage Act 1954 and then enters into a second marriage under Mohammedan law, he would be liable to be prosecuted for the offence of bigamy.[3]

Where the parties are Muslim, charge of bigamy would fail.[4]

20. Second Marriage must be Void in Law

To constitute an offence of bigamy, the second marriage must be void by reason of its taking place during the lifetime of a former legal wife or husband, as the case may be. The void nature of the second marriage is, in fact, one of the essential ingredients of this section.[5]

The voidness of the marriage under s 17 of the Hindu Marriage Act is in fact one of the essential ingredients of s 494, IPC, because the second marriage will become void under this provision of law. What s 17 of the Hindu Marriage Act contemplates is that the second marriage must be according to the ceremonies required by law. If the marriage is void, its voidness would only lead to civil consequences arising from such marriage. Section 17 of the Hindu Marriage Act has to be read in harmony and conjunction with s 494, IPC . Therefore, merely because the second marriage is void under s 17 of the Hindu Marriage Act, it cannot be said that s 494, IPC, will not be attracted.[6]

However, the word 'void' is not to be used in the technical sense in which it is used in the Mohammedan law. The IPC makes no distinction between a void marriage and an invalid marriage, and the term 'void' used therein covers marriages of both classes.[7] A second marriage would not be bigamous (*i.e.*, void) when the accused spouse contracts it (a) after the marriage with the former husband or wife has been declared void by a court of competent jurisdiction; or (b) during the life of a former husband or wife if such husband or wife, at the time of subsequent marriage, shall have been continually absent from such person (*i.e.*, the accused spouse) for the space of seven years and shall not have been heard of by such person (*i.e.*, the accused spouse) as being alive within that time and the person contracting such subsequent marriage (*i.e.*, the accused spouse) has, before the second marriage has taken place, informed the person, with whom such marriage is contracted, the real facts so far as the same are within his or her knowledge. In the latter case, all that is necessary to prove is this that the spouse had been continuously absent for seven years and had not been heard of as alive by the accused,[8] and the facts above mentioned had not been concealed from the second husband or the second wife.[9] However, it is immaterial whether the accused made any inquiries or had reasonable ground for believing the spouse to be dead.[10]3977

21. Second Marriage Solemnised before Coming into Force of the Hindu Marriage Act--No Bigamy

The Hindu Marriage Act 1955 came into operation on 18 May 1955. It is only after that by virtue of s 17 of the Act that a second marriage by a Hindu during subsistence of the first marriage would attract the provisions of ss 494 and 495, IPC . Therefore, bigamy was not an offence prior to coming into force of the said Act, so the second marriage solemnised before coming into force of the said Act does not attract the provisions of s 494, IPC .[11]

22. Want of *Mens Rea*--Whether a Good Defence to a Charge of Bigamy

This section makes no reference to intention, knowledge, fraud or deceit; it constitutes the mere contracting of the second marriage a crime. However, it does not mean that the normal presumption, that a penal statute requires *mens rea* even though it contains no express words to that effect, should not be given effect to.[12]

Mens rea, *i.e.*, guilty knowledge, is a necessary ingredient of the offence under s 494, IPC .[13]

An honest belief on reasonable grounds as to invalidity of previous marriage, just as an honest belief on reasonable grounds that the spouse is dead, is a good defence.[14] Such *bona fide* belief is not, however, sufficient unless proper and reasonable enquiry had, in fact, been made,[15] and if, by reason of a mistake of facts, it was thought that the previous marriage had been declared void by a court of competent jurisdiction the accused cannot be said to have committed an offence of bigamy.[16] Similarly, if a person, charged with bigamy, believes that he was legally free to marry again, it cannot be said that the crime was committed either intentionally or recklessly and the question whether the belief was unreasonable is irrelevant.[17] The plea of the accused, that he entered into the second marriage in all good faith and after the honest impression that his earlier marriage with the complainant had been put an end to by the order of dissolution, passed by a court of competent jurisdiction, was accepted as a valid defence in *Janki Amma v Padmanabban* .[18] In *Kachu Muhammad Kunja Ismail v Mohammad Kadeja Umma* ,[19] the accused took learned opinion that she could effectively divorce the complainant and went through with the formalities thereof. She then gave notice to the complainant, waited for some time and then married the co-accused. It was held that there could be no criminal knowledge that her first marriage with the complainant was subsisting when she entered into the second marriage and so the accused were not guilty. It has been held, in *Surinder Kaur v Mohinder Singh* ,[20]3978 that the *bona fide* belief of the accused, that he was not married previously, would constitute a valid defence.

23. Abetment

When the record does not disclose any material relating to abatement on the part of the accused persons in the alleged second marriage, the complaint as against them is liable to be dismissed on merits.[21] When the prosecution witnesses whispered nothing in their testimony about the part played by the accused nos 3 to 8 in the performance of marriage between accused nos 1 and 2, except stating that they blessed the couple, *viz*., accused nos 1 and 2, the blessings will not tantamount to the abetment of the commission of the offence of bigamy under s 494 read with s 109, IPC .[22] Just because the mother of the accused was present at the time of marriage could not be said that she was there only to commit abetment of the offence to be committed or committed by the accused. The accused persons, in the absence of any material to show that there was an instigation or that there was any intention either in aiding or in commissioning of the offence, cannot be said to have abetted the offence on mere association with the accused persons.[23] Merely allowing one's premises to be used for the purpose of marriage, does not prove abetment of a bigamous marriage.[24]

Evidence of PW3 showed that the accused A1 re-married with accused A5 in the presence of the other co-accused, after his marriage with the complainant was dissolved, but the other co-accused (A3 and A4) had no knowledge that the decree of divorce had already been set aside by the Court. The other co-accused (A3 and A4) could not be held guilty of abetment of bigamy. They were held entitled to benefit of doubt. Their conviction under s 494 read with s 109, IPC was set aside.[25]

Prior knowledge of the existence of first marriage is necessary. In the absence of knowledge of first marriage, a person cannot be convicted for the offence of abetment of offence under s 494 read with s 109, IPC .[26]

If the complainant has specifically stated that the accused alongwith others abetted the act of main accused to commit the offence of bigamy punishable under s 494, IPC, there was sufficient ground for the magistrate to issue process against the accused under ss 494 / 109, IPC .[27]

24. Procedure

The offence under this section is non-cognizable, bailable, compoundable, with the permission of the court before which the prosecution for such offence is pending, by the husband or wife of the accused spouse, and triable by a magistrate of the first class. The complaint should be made by the aggrieved person to the magistrate, who shall follow the procedure laid down in s 200, CrPC onwards and it does not include3979 a police report, *i.e.*, report under s 173(2), CrPC . No doubt, in the explanation to s 2(d), CrPC, a report by police officer, which discloses a non-cognizable offence, shall be deemed to be a complaint, but this explanation is not applicable in cases under ch XXII of the IPC .[28]

As made clear by s 198, CrPC, for all or any of the offences under ss 493, 494, 495, 496, 497 and 498, IPC, an aggrieved person can be either the husband or the wife and none else other than those falling under the proviso to s 198(2), CrPC . Complaint filed by a third person would not be maintainable.[29]

Section 494 of IPC provides the sentence, which may extend to seven years. Therefore, the magistrate is required to follow the procedure which has been indicated for the trials connected with warrant case procedure.[30]

25. Compounding of Offence

The accused was convicted and sentenced under s 494, IPC . In the appeal before the Supreme Court, the parties compromised, and the Supreme Court permitted compounding of the offence and directed the accused to pay Rs 40,000 to the complainant-wife as compensation besides awarding cost of Rs 5000.[31]

26. Interpretation of Law by the Supreme Court Relates back to the Date of the

Law

The decision in *Sarla Mudgal v Union of India* [32] holding that the second marriage of a Hindu husband after conversion to Islam without having his first marriage dissolved under law, would be invalid, the second marriage would be void in terms of the provision of s 494, IPC and the apostate-husband would be guilty of the offence under s 494, IPC, does not lay down any new law. It cannot be said that the second marriage by a convert male Muslim has been made offence only by judicial pronouncement. The court has only interpreted the existing law which was in force. It is settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgment because concededly the court does not legislate, but only give an interpretation to an existing law. It cannot therefore be said that the decision in *Sarla Mudgal v Union of India* has to be given prospective operation and that the decision cannot be applied to persons who have solemnised marriage in violation of the mandate of law prior to the date of judgment.[33]

27. Complaint--By Whom to be Filed

Under s 198, CrPC, no court shall take cognizance of any offence falling under ss 493 to 498, IPC, (both inclusive) except upon a complaint made by some person3980 aggrieved by such offence.[34] The section specifies certain circumstances under which the person, other than the aggrieved husband or the aggrieved wife, can file a complaint for prosecuting the accused spouse under ss 493 to 498 aforesaid. Non-compliance of the provisions of s 198 of CrPC, is fatal to the proceedings under s 494, IPC . If a person, other than the aggrieved person, initiates proceedings under s 494, IPC, he must comply with the provision of the proviso to s 198(1), CrPC . Merely because the court took cognizance of the offence under s 494, IPC, alleged against the accused persons, it cannot be presumed or implied that the court granted the required leave. In the absence of anything on record to show that the leave was asked for by the complainant and granted by the court which took cognizance of the said offence and in view of the mandatory provision of s 198, CrPC, and the absence of anything to show that the complainant was really an aggrieved person in the case, the court cannot take cognizance of the offence under s 494, IPC, and abetment thereof alleged against the accused person. Accordingly,[35] the court has no *locus standi* but to dismiss such a complaint.

Section 494,IPC, does not say that the complaint for commission of offence under the said section can be filed only by wife living and not by the woman with whom subsequent marriage takes place during the lifetime of the wife living and which marriage is void by reason of its taking place during the lifetime of such wife. The complaint can also be filed by the person with whom second marriage takes place which is void by reason of its taking place during the lifetime of the first wife. The woman with whom second marriage is performed can file complaint for offence under s 494, IPC .[36] A second wife can also file a complaint.[37]

In prosecution for bigamy, complaint by aggrieved person is necessary, charge cannot be framed on the basis of police report. Police report cannot be treated as complaint. Cognizance of offence on police report and conviction under s 494, IPC was found unsustainable, and was set aside.[38]

Section 495 deals with the offence of bigamy where it is found that subsequent marriage is contracted by concealing former marriage. In such a case, the second wife is the aggrieved person and can file a complaint.[39]

28. Second Complaint

The second complaint would not be completely barred. There is no statutory bar in filing a second complaint on the same facts. In a case where a previous complaint is dismissed without assigning any reasons, the magistrate under s 203, CrPC may take cognizance of an offence and issue process if there are sufficient grounds for proceeding. Second complaint could be dismissed after a decision has been given3981 against the complainant in the previous matter upon a full consideration of his case.

Further, second complaint on the same facts could be entertained only in exceptional circumstances, namely, where the previous order was passed on an incomplete or on a misunderstanding of the nature of complaint or it was manifestly absurd, unjust or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced.[40]

29. Filing of Complaint--Effect of Andhra Pradesh State Amendment

What was non-cognizable offence under s 494, IPC, was made cognizable in view of state amendment brought to First Schedule appended to CrPC . State amendment having received assent of President is valid and would prevail even in wake of any repugnancy between state law and Central law in so far as the state of Andhra Pradesh is concerned. Offence under s 498A, IPC, is cognizable but it is not cognizable elsewhere in the country. In view of the state amendment, the investigating agency is entitled to investigate offence alleged under s 494, IPC . There are certain limitations for court to take cognizance. Section 198 , CrPC bars the court from taking cognizance of any offence falling under ch XX of IPC and relating to institution of marriage with avowed object of preserving institution of marriage. This bar enjoined under s 198, CrPC, is for the court and not for the investigating agency. Although the agency is at liberty to register a case and conduct investigation into an offence under s 494, IPC, the court is precluded from taking cognizance of said offence in view of mandatory provisions of s 198, CrPC . There has been no amendment to s 198, CrPC, so as to bring same in consonance with state amendment brought to s 494, IPC, as has been done in respect of offence under s 498A by incorporating s 198A, Crpc . Section 198 , CrPC being a legislation of Parliament would prevail in the event of any inconsistency between the state law and Central law since both subjects pertain to the Concurrent List. Thus when initial cognizance taken by court, being bad in law, it results in acquittal of the accused.[41]

30. Filing of Complaint--First Husband or Wife Proper Person

Ordinarily, the proper person to make the complaint, in the case of bigamy, is the first husband or the first wife, as the case may be.[42] When the offence of bigamy is committed by the husband, the first wife is the aggrieved party. She is, in such a case, competent to file a complaint.[43] A complaint by the wife against her husband or committing bigamy is maintainable even if her marriage with him was in violation of the provisions of s 5(iii) of the Hindu Marriage Act 1955, the reason being that the contravention of the same, does not render the marriage void ab initio or voidable.[44]3982

31. Complaint by other Person--Validity

A complaint can be filed by another person with the leave of the court if the complainant is a *pardanashin* lady and does not want to appear in public.[45] However, when the aggrieved party, whether the first husband or the first wife, is already dead, a complaint on his or her behalf is not maintainable.[46] Where, however, the complainant died after filing the complaint, the mother of the complainant was allowed to conduct the prosecution.[47] However, a complaint by the father,[48] or the mother,[49] or the brother,[50] of the first husband was not held to be maintainable, neither of them being aggrieved persons.

As per proviso (c) to sub-s 1 of s 198, CrPC, where the person aggrieved by an offence punishable under s 494, or s 495, IPC, is the wife, the complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister or with the leave of the court by any other person related to her by blood, marriage or adoption. Therefore, although when the person aggrieved by the offence is the wife, the complaint can be filed by her or without leave of the court by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister. The complaint can be made by any person related to her by blood, marriage or adoption but only with the leave of the court. Thus, the complaint filed by the mother's brother of the aggrieved wife without leave of the court is valid by virtue of proviso (c) to sub-s (1) of s 198, CrPC .[51]

32. Complaint on Suggestion of Police or Secondcomplaint--Validity

A complaint in respect of an offence under s 494, IPC, is not bad because it was written on the suggestion of the police.[52] However, a second complaint cannot be entertained when the first complaint, made by the complainant, was dismissed on the ground that the complainant failed to prove his alleged marriage with the accused spouse.[53]

33. Investigation of any Cognizable Offence with Offence under Section 494, by the Police--Complaint under Section 198 , CrPC not Necessary

Sub- section 4 of s 155, CrPC, creates a legal fiction and provides that although a case may comprise several offences of which some are cognizable and others are not, it would not be open to the police to investigate the cognizable offence only and omit the non-cognizable offences. Since the whole case (comprising cognizable and non-cognizable offences) is to be treated a cognizable, the police had no option but to investigate the whole of the case and to submit a chargesheet in respect of all the3983 offences, cognizable or non-cognizable both, provided it is found by the police during investigation that the offences appear, *prima facie*, to have been committed.

Sub- section 4 of s 155, CrPC, is a new provision introduced for the first time in the Code of 1973. This was done to overcome the controversy about investigation of non-cognizable offences by the police without the leave of the magistrate. The statutory provisions are specific, precise and clear and there is no ambiguity in the language employed in sub-s 4. It is apparent that if the facts reported to the police disclose both cognizable and non-cognizable offences, the police would be acting within the scope of its authority in investigating both the offences as legal fiction enacted in sub-s 4 provides that even non-cognizable case shall, in that situation, be treated as cognizable.[54]

The Supreme Court in Praveen Chandra *Mody v State of Andhra Pradesh* [55] has held that while investigating a cognizable offence and presenting a chargesheet for it, the police are not debarred from investigating any non-cognizable offence arising out of the same facts and including them in the chargesheet.

The High Court was thus clearly in error in quashing the charge under s 494, IPC, on the ground that the trial court could not take cognizance of that offence unless a complaint was filed personally by the wife or any other near relation contemplated by cl (c) of the proviso to s 198(1), CrPC .

Therefore, when the police has investigated the offences punishable under ss 498A, 109, 494 and 120B, IPC, taking cognizance by the additional chief judicial magistrate of the offences including the offence under s 494, IPC, on the basis of the police report is not without jurisdiction.[56]

34. Allegations in Complaint

There must be specific allegation, by the husband or wife, of the charge of bigamy.[57] It is not however, necessary that the complainant should specify precisely the section under which the person, complained against, should be charged and it would be sufficient if he has laid, before the magistrate, matter which, if proved, would be sufficient to warrant a conviction under s 494, IPC .[58] Where a complaint was made for taking or keeping the wife of the complainant, but, in the course of the proceedings, it appeared that the wife had committed bigamy, it was held that the magistrate could proceed under s 494, IPC, without a further complaint.[59]

35. Transfer of Cases

Separate cases were filed in different courts of the state for the offence of bigamy by the first wife as well as the second wife and her father, against the accused persons as a result of an alleged second marriage. The cases were at different stages and pending disposal since long. Observing that it would

be inconvenient and expensive to the complainant parties, if either case is transferred to another city at such a belated3984 stage, the Rajasthan High Court declined the transfer petition of the accused filed under s 407, CrPC (2 of 1974).[60]

36. Limitation

Section 494,IPC, is punishable with imprisonment for seven years, so in view of sub-s 3 of s 468, CrPC, the limitation provided in s 468, CrPC, is not applicable to the offence under s 494, IPC .[61]

37. Quashing of Complaint

Where a complaint was filed against the accused for having committed the offence of bigamy alleging that the complainant after hearing the chanting of *shlokas* and *mantras* went near the assembly and inferred that her husband was marrying another woman, there was no averment in the complaint that customary rites and ceremonies prevalent in the caste or tribes were performed, the order of issuing process under ss 494 and 109, IPC, was quashed by the High Court by exercising jurisdiction under art 226 of the Constitution of India and s 482, Crpc 1973 (2 of 1974).[62]

When the allegations in the complainant disclose an offence of bigamy, mere pendency of dispute about the legitimacy of the marriage between the complainant wife and the accused-husband in a civil suit cannot be a ground to quash the complaint.[63]

First wife filed complaint for offence under s 494, IPC and ss 3 and 4 of the Dowry Prohibition Act 1981 after the *ex parte* decree of divorce against him had become final. Allegations of demand of dowry and harassment were made after the expiry of two years from the date of the alleged incident. Complaint was quashed on petition filed under s 482, CrPC .[64]

38. Jurisdiction

The question of jurisdiction is governed by s 182(2) of CrPC . The provision is reproduced below:

S. 182 . Offences committed by letters,*etc*.--

(1) Any offence which includes cheating may...
(2) Any offence punishable under section 494 or section 495 of the Indian Penal Code (45 of 1860) may be inquired into or tried by a court within whose local jurisdiction the offence was committed or the offender last resided with his or her spouse by the first marriage, or the wife by the first marriage has taken up permanent residence after the commission of the offence.

It may be noticed that s 182(2), CrPC, as it originally stood, conferred jurisdiction only on the court within whose local jurisdiction the offence was committed or the offender last resided with his or her spouse by the first marriage. The clause 'or the wife by the first marriage has taken up permanent residence after the commission of3985 the offence' was incorporated by the Amending Act of 1978. Eventually this was done to facilitate the first wife to file a complaint at a place where she had taken up residence after the husband married again. The intention of the Parliament clearly is to make it convenient for the deserted wife to prosecute the offending spouse. A hypertechnical view is likely to defeat the very spirit of the Act. If there is sufficient material from which permanent residence of the first wife can be inferred at a place within the jurisdiction of the court, then the court ought to decide the question of jurisdiction in favour of wife notwithstanding the fact that her written complaint does not specifically make such averments.[65]

The words 'has taken up permanent residence after commission of offence' in s 182(2), CrPC, would

not mean only after commission of the offence of bigamy. If the wife was living permanently at her maternal town even before the alleged offence of bigamy was committed by her husband, the complaint by the wife filed in the court at her maternal town is maintainable.[66]

It is necessary for a court to satisfy itself on the point of jurisdiction before it entertains a complaint under s 494, IPC .[67] The court must itself see that it has got jurisdiction. If the complaint petition does not disclose the existence of territorial jurisdiction, the magistrate has got power to dismiss it; he can drop the proceedings even after issue of process without giving further opportunity for adducing evidence. If, however, the complaint petition and the statement, on oath are silent as to facts, relating to the existence of territorial jurisdiction, the magistrate cannot drop the proceeding after issue of process without giving further opportunity to the parties to lead evidence to establish existence, or otherwise, of territorial jurisdiction.[68]

39. Jurisdiction--Meaning and Importance of Words 'Offender' and 'Last Resided'

The court, within whose jurisdiction the offence takes place, or where the offender last resided with his/her spouse by first marriage, has jurisdiction to try the offence.[69] A reading of sub-s (2) of s 182, CrPC, as a whole indicates that to bring a case within the second limb of sub-s (2) of s 182, CrPC, the offender must have last resided with his spouse of the first marriage within the jurisdiction of the court in which the complaint is filed. The word 'offender' is a general word and therefore, it must receive the general construction and meaning. The legislature has carefully used the word 'offender' here and not the word 'husband'. A husband becomes an offender so far as the wife is concerned in the matrimonial matter when he marries another woman during the subsistence of the first marriage. The word 'offender' must be read, it is submitted, as offending husband. However, for the commission of the second marriage, during the subsistence of the first marriage, either of the spouses would not become an offender. If the significance and importance for the word 'offender' as used in the section, is given effect to, then, it can only mean that a complaint can be laid in a court within whose jurisdiction the offender (husband), after the commission of the offence, last resided with his wife of the first marriage3986 and otherwise not. The context in which the word 'offender' is used also gives help to understand this word.[70]

The words 'last resided' would mean the place of stay after contracting the second marriage and not the place of stay prior to it. The stay of the accused with the first wife within the jurisdiction of a court, before contracting the second marriage, cannot be equated to mean offender having 'last resided' within the meaning of s 182(2), CrPC . Therefore, the court within whose jurisdiction the accused stayed with his first wife has no jurisdiction to take cognizance of the complainant under s 494, IPC .[71]

40. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate, etc*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the...day or..., at..., you already having a wife (*or husband*). A living, married B, marriage with whom was void by reason of its taking place during the lifetime of A, and that you thereby committed an offence, punishable under s 494 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

The charge should mention the place where the bigamous marriage was performed.[72]

41. Proof

In order to secure a conviction under this section, it must be proved[73] that:

(a) the accused was already married to some person;
(b) the person, to whom he or she was married, was living on the date of subsequent marriage;
(c) the accused married second person; and
(d) the subsequent marriage was void by reason of its taking place during the lifetime of the first spouse.

Where the evidence of the witnesses examined to prove the second marriage showed that essential ceremonies had not been performed, the accused could not be convicted on the charge of bigamy. Admission of second marriage made by the accused is no evidence for the purpose of proving marriage in an adultery or bigamy case.[74]

42. Valid and Subsisting First Marriage

The prosecution must show first of all that at the time of subsequent marriage, the first valid marriage was subsisting. Where proof of either marriage is unsatisfactory, there ought to be no conviction.[75] Where the evidence was found to be interested,3987 discrepant and unreliable, the order of acquittal was upheld.[76] Due solemnisation of the bigamous marriage, complained of, with all the necessary ceremonies and rites has to be established as a fact by the complainant and even the factum and validity of the complainant's own marriage with the accused has also to be proved in case the same is not admitted by the accused.[77] It is incumbent upon the complainant to establish that both the marriages, pleaded by him or by her, were solemnised in accordance with the customary rites and ceremonies either prescribed by the Hindu law governing the parties or recognised by the custom, obtaining the community of which the parties belong. An admission of either the first or the second marriage by the accused is no evidence of marriage.[78] The first marriage of the complainant and his alleged wife or husband must be strictly proved.[79] There must be, at the time of subsequent marriage, a previous subsisting valid marriage.[80] The prosecution must prove that the person, who remarried had contracted a first marriage and that the husband or wife of the first marriage was living on the date of subsequent marriage.[81] The onus is heavy upon the prosecution to prove that the complainant was a legally married wife of the accused and that, during the subsistence of the marital tie, the accused entered into another marriage duly solemnized in accordance with law.[82] The allegation of a prior marriage by a man with a woman giving the status of a wife to the woman must be seen if the alleged prior marriage had been solemnised after due observance of the rites and ceremonies. If it be found that the alleged prior marriage has not been so solemnised, the mere fact that the accused had lived with such a woman with whom some ceremonies of marriage had been performed, will not satisfy the essential ingredient to prove the charge under s 494, IPC, that there was a wife living as obviously such woman cannot claim the status of a legally married wife.[83] There must be proper proof of the solemnization of not only the first marriage, but also of the second marriage in accordance with the essential religious rites applicable to the parties.[84] It is the prosecution who has to prove both the marriages.[85]

43. Proof of Second Marriage with Essential Ceremonies--Necessity of

In the prosecution for bigamy, the second marriage has to be proved as a fact and it has also to be proved that the necessary ceremonies and rites had been performed. In a bigamy case, second

marriage as a fact, that is to say, the rites and ceremonies, constituting it, must be proved.[86] Proof of solemnisation of second marriage is3988 imperative.[87] The prosecution must establish that the essential ceremonies for a valid marriage were gone through by the accused on a date on which either party to the marriage had a living spouse.[88] Both the marriages of the accused must be valid in the sense that the necessary ceremonies required by the personal law governing the parties must have been duly performed.[89] If adequate proof is not adduced by the complainant of a valid marriage, a conviction under s 494, IPC, cannot be made.[90] The essential ceremonies, constituting second marriage, must be proved as a matter of fact.[91] It must be shown that the subsequent marriage was solemnised upon due performance of the essential ceremonies upon which only a marriage becomes a valid marriage.[92] The second marriage being an essential ingredient of the offence of bigamy, that marriage has to be clearly proved by the prosecution.[93] It is not, however, the law that such proof must be by direct evidence, and not by other means. Besides the direct and circumstantial evidence, the court can take, into consideration, opinion evidence, the pre-trial admissions of the accused and the statement of the accused, made by him under s 313 of CrPC, the condition however being that on the basis of opinion evidence alone the court cannot hold the factum of marriage to be proved. In *Rabindra Kumar Bhattacharjee v Prativa Bhattacharjee*,[94] the court negatived the contention that the ceremony of *saptapadi* in the second marriage must be proved by convincing proof. Where there is celebration or solemnisation of a marriage, which has been intended by the party to be binding on them, and the form is not wholly opposed or against the custom of the community or caste of the parties, the presumption, that the ceremonies were complete and the marriage is legal, arises.[95] The fact that a report was made mentioning the first marriage and expressing the apprehension of accused's intention to marry the girl again, is a strong corroboration of the truth of the prosecution evidence.[96] There is a strong presumption in favour of the validity of a marriage if, from the time of such marriage, the parties are recognised by the people concerned as man and wife and such presumption applies also as to the question whether the formal requisites of a valid marriage ceremony were satisfied.[97] A marriage may be established by preponderating repute and by conduct even though the repute may be divided.[98] However, the mere tying of *thali* is not enough to establish that the marriage has been3989 solemnised.[1] Likewise, a marriage cannot be proved by statements which relate to the existence of any relationship or by the opinion of any person given out or even expressed by conduct as to the existence of such relationship of any person, although that person has special means of knowledge of the subject, or by the admissions made by the parties to the marriage, who may, at times, be actuated by ulterior motives, but, if, in addition thereto, or independently, any evidence of parents of the parties, regarding celebration or solemnisation of a marriage is available, it would go a long way in establishing the factum of marriage.[2] If the fact of the ceremony having taken place is proved, the law will presume that the ceremony was complete and regular in every respect. It is then for the person, seeking to invalidate the marriage ceremony on the ground of some vital defect or omission, to prove such defect or omission.[3]

44. Admission of Accused about Second Marriage--Effect

Mere admission of an accused, that he contracted second marriage, is not enough.[4] In the absence of any evidence to show that any of the material ceremonies, which are necessary to be performed in a *saklang* marriage, had been performed, mere admission by the accused, that he married the woman, will not satisfy the ingredients necessary to be established by the prosecution in an offence under this section.[5] Similarly, the statement of one witness, that he was present at the time of marriage, is not sufficient to prove a formal marriage.[6]

45. Mere Statement of Prosecutrix about Second Marriage is not Enough

A mere statement of the prosecutrix that her marriage with the accused was solemnised as per Hindu rites is not enough when she has not deposed anything as to how the marriage was solemnised and whether the essential ingredients of *saptapadi* and *homa* were performed or not particularly when no other witness of the prosecution has deposed as to how the complainant had married the accused and whether the essential ceremonies were gone through, these facts show that that the prosecution has failed to prove the performance of valid marriage between the complainant/prosecutrix and the

accused.[7]3990

46. Evidence of Relationship under Section 50 of the Evidence Act not Admissible for Offence under Sections 494 to 498

In the case of *Rabindra Kumar Bhattacharjee v Prativa Bhattacharjee* ,[8]it was held that in view of the proviso of s 50 of the Evidence Act, the above section cannot be invoked to prove the factum of solemnisation of so-called second marriage. Therefore, the evidence under s 50 is not admissible in a proceeding before a court under s 494, IPC .[9]

47. Marriage Contracted under Section 7A, Hindu Marriage Act (1955) (As Inserted by Madras Act 21 of 1967)--Proof of Second Marriage in Accordance with Religious Rites and Ceremonies not Necessary

The provision of s 7A(1) of Hindu Marriage Act 1955 was made applicable to Tamil Nadu with effect from 7 January 1968. According to this section, where a marriage is solemnized in the presence of relatives or friends of other persons by a declaration by the parties to the marriage that each other takes the other to be his spouse or by garlanding each other or putting the ring upon any finger of the other or by the tying of *thali* such a marriage is valid. The exchange of garlands or putting the ring on the finger or tying the *thali* are traditionally recognized as various stages of a marriage ceremony among a majority of the people, who live in the villages bringing into existence a binding marriage, and such marriages are convered by s 7(A)(1) of the Hindu Marriage Act. Even a mere oral declaration in any language understood by the parties that each takes the other to be his wife without any other act or ceremony will be a valid marriage under s 7(A)(1) of the Hindu Marriage Act. Execution of a document by the spouses will amount to a declaration within the meaning of this section (*vide* the commentaries of the learned author Justice Alladi Kuppuswami in his book *Mayne's Hindu Law and Usage*[10]). In view of the change in law in s 7A of Hindu Marriage Act with effect from 7 January 1968, the proof of solemnisation of second marriage in accordance with the essential religious ceremonies and rites applicable to parties is not a must for conviction for the offence of bigamy.[11]

Section 7A of the Hindu Marriage Act as inserted by Madras Act XXI of 1967 indicates four kinds of valid marriage and it includes a mere oral declaration or garlanding each other or putting the ring on the finger or by tying *thali.* It is therefore clear that an oral declaration without exchange of garlands or the tying of *thali* or without any other ceremony could be a valid marriage. Under s 7A(1) of the Hindu Marriage Act as amended by Madras Act XXI of 1967 it is not necessary that the mere oral declaration should also be accompanied by exchange of garlands or by putting the ring on the finger or by tying of *thali.* The various sub-cll of s 7A(1) of Hindu Marriage Act as amended by Madras Act XXI of 1967 are disjunctive.[12]

48. Civil Court Finding that Wife failed to Prove Second Marriage of the Husband Binding on Proceeding under Section 494

The finding of the civil court recorded in a petition under s 9 of the Hindu Marriage Act, that no second marriage took place between the accused-husband, the3991 complainant and the alleged second wife would be binding on the criminal court dealing with the complaint for bigamy filed by the complainant's first wife, irrespective of the fact that the appeal filed by the first wife in civil proceedings was pending.[13]

49. Value of Certificate of Marriage

In some cases, there are statutory provisions for certificates of marriage. A certificate of marriage is, however, not the only way of proving a marriage; but it is usually the best way.[14] The production of the marriage certificate has sometimes been insisted upon.[15]It should, however, be proved that the

pastor, who solemnised the marriage, was person authorised, by s 5 of the Christian Marriage Act, to do so.[16] In the case of a Christian marriage, the evidence of the clergyman, who solemnized the marriage, and an extract from the marriage register were found to be sufficient.[17] Where, however, the marriage has not taken place before the marriage officer, the certificate, granted by him under s 16 of the Special Marriage Act 1954, based merely on declaration of the parties, cannot be said to be any proof of marriage because the certificate merely records the declaration which is itself no proof of marriage.[18]

However, recitals or the contents of the Hindu marriage register extract, kept under s 8(1) of the Hindu Marriage Act are admissible in evidence with regard to the declaration made by the accused husband and wife that they are married, which would squarely come within the purview of s 7(A)(1) of the Hindu Marriage Act 1955 as amended in the state of Tamil Nadu and the extract of marriage register is a public document within the meaning of s 74 of the Evidence Act and can satisfactorily establish the fact that the marriage between accused husband and wife was a valid marriage under s 494, IPC .[19]

50. Acquittal

The allegation of the wife was that her husband performed marriage with another lady in a Kali Temple by the exchange of garlands, but no evidence was adduced on behalf of the complainant to show that at the time of marriage *saptapadi* around the sacred fire was performed which was an essential element of solemnisation of marriage under Hindu law. So, the order acquitting the accused was found proper.[20]

51. Decree of Divorce Obtained by the Accused--Effect

The question of bigamy arises if a person marries again, while the first marriage is still subsisting and the first wife is living.[21] Where a legally divorced husband agrees for marriage with another lady, no offence under s 494, IPC is committed.[22]3992

The contested or *ex parte* decree of divorce passed by a competent court entitles the divorced husband and wife to remarry without attracting the offence under this section. Thus, where allegations against the accused-wife were that she had remarried and was living with her second husband in adultery, and the wife produced the *ex parte* decree of dissolution of her first marriage, it was held that till the *ex parte* decree of divorce was set aside, the earlier marriage of the accused-wife stood dissolved and the accused-wife committed no offence in remarrying.[23] But when the wife remarries during the pendency of the appeal against the decree of divorce inspite of the knowledge of the pendency of the appeal, such remarriage is not permissible and she can be punished for bigamy. An order issuing process against her for the offences under s 494 is justified.[24] However, when an attempt is made to introduce the theory of divorce by an unregistered document, it is not divorce in the eyes of law,[25] and so cannot help the accused. Under s 13 of the CPC, the judgment of the foreign court is binding on the courts in India, except under certain circumstances. If the marriage of the accused-husband with the complainant wife is dissolved by a decree of divorce by the district court at Sweden and no appeal is preferred by the complainant-wife, the marriage of the accused-husband with another lady after expiry of the period for preferring an appeal does not amount to a bigamous marriage.[26]

52. Conviction

When the complaint is under s 498, IPC, the court cannot convict the accused under s 494, IPC .[27] In *KPAhmed Koya v KP Ameena Beebi* ,[28] the accused entered into the second alliance in the *bona fide* hope and belief that she is doing the right thing as her former alliance was no longer subsisting. In these circumstances, she was exonerated.

53. Sentence (Deterrent)

Bigamy being a serious offence, the court should not take a lenient view regarding sentence once it is proved.[29] In this country, it is not infrequent that the husband marries a second wife and leaves the first wife to her fate to lead a life of untold miseries for the rest of her life. No sympathy can be shown to such a person. The attitude of such persons, who marry a second wife, is not only a cavalier one, but also a wanton one. Such persons allow themselves to be under the impression that the long arm of the law cannot touch them inasmuch as there can be no proof of the solemnisation of the second marriage. This luxury of marrying a second wife at the cost of the first wife must be dealt with sternly.[30]3993

54. Sentence (Lenient)

A nominal sentence should, however, be given when offence committed is largely technical, arisen purely on vindictive motive.[31] In *Narotam Singh v State of Punjab* ,[32] VR Krishna Iyer J, directed the offender to pay Rs 40,000 to the victim's wife to be regarded as sufficient repatriation and also awarded costs in a sum of Rs 5,000 as compensation for accused husband's sexual aberration to serve as correctional responsibility on him. This direction was made in view of the fact that the offence was permitted by the Supreme Court to be compounded and that the appellant was a businessman most likely to wreck his business if imprisoned for two years as confirmed by the High Court. In another case, considering the age of the husband, who was twenty-two years old and who undertook to keep his first wife with him, it was not thought to be appropriate to send him immediately to jail. It was thought proper to give him an opportunity of becoming a better citizen by releasing the accused on probation for a period of one year. It was stated that the rationale of the offence under s 494, IPC, is to deter a spouse from breaking the home by taking another spouse. A second marriage, where it is prohibited by law, in effect amounts to disowning the first marriage. If the accused is sent to jail, the wrong will not be remedied and the gap between the husband and wife will get still more enlarged and will become unbridgable. On the other hand, if they live together, the wrong done to the wife will get undone and the effect of the crime will be nullified.[33]

The accused suffered the agony of a trial for 14-15 years and also lost his job due to conviction for the offence. The sentence of imprisonment under the circumstances was reduced from 1 year rigorous imprisonment to one month simple imprisonment.[34] The first marriage of the accused with the complainant was celebrated during their childhood. The second marriage of the accused was performed at the instance of the parents of the accused and the second wife. These circumstances call for a lesser sentence to be awarded to meet the ends of justice. Therefore, the sentence of imprisonment of two years rigorous imprisonment awarded to the accused-husband was reduced to six months rigorous imprisonment while maintaining sentence of fine of Rs 2000.

The sentence of rigorous imprisonment for six months to the parents of the accused was reduced to the imprisonment till the rising of the court while maintaining the sentence of fine of Rs 1,500 each.[35] Where a custom prevailed in the community for bigamy which is prohibited under law, keeping in view this fact and other attending circumstances, including the fact that the accused had already undergone 15 days imprisonment, the sentence of 1 year imprisonment was reduced to the period already undergone by the accused and in lieu of the remaining sentence, a fine of Rs 1,000 was imposed which was to be paid to the complainant, in default of which, the accused was to undergo rigorous imprisonment for 6 months.[36]

28 *Munir v Emperor* 17 Cr LJ 101, p 102, AIR 1926 All 189 .

29 *A Subash Babu v State of AP* 2011 AIR SCW 4702, AIR 2011 SC 3031, 2011 (7) Scale 671, (2011) 7 SCC 616 .

30 *Gopal Lal v State of Rajasthan* AIR 1979 SC 713, p 715, 1979 Cr LJ 652 ; *P Nandakumar v Lalitha* 2015 (2) Crimes 657 (Mad) ; *Mohansundaram v Institute of Chartered Accountants of India* (2013) 4 Mad LJ 641 (Mad) ; *Laxmibai v Anasuya* II (2013) DMC 166 (Kant) .

31 *Ibid.*

32 *CG Rangabashym v Ranjani Murugan* 1980 LW (Cr) 174, 1981 Cr LJ 577 ; *Nilkanthrao v Gangabai* (1965) 68 Bom LR 286 .

33 *Andher Singh v Deokaran* 1981 Cr LR 157, p 160 (MP) (Notes) .

34 *Kalan v Emperor* AIR 1938 Sind 127, 39 Cr LJ 656 ; *Dal Chand v Ram Lal* AIR 1925 Oudh 60, 25 Cr LJ 39 .

35 *A Subhash Babu v State of AP* 2011 Cr LJ 4373, p 4379 (SC), AIR 2011 SC 3031, (2011) 7 SCC 616, 2011 (7) Scale 671 .

36 *Gogireddy Sambireddy v Gogireddy Jayamma* AIR 1972 AP 156, p 158 (FB), 1972 Mad LJ (Cr) 284 .

37 Hindu Marriage Act 1955, s 17 .

38 Indian Christian Marriage Act 1972.

39 *Rachel Benjamin v Benjamin Solomon* AIR 1926 Bom 169, 28 Bom LR 328 .

40 Parsi Marriage and Divorce Act 1936.

41 *Gogireddy Sambireddy v Gogireddy Jayamma* AIR 1972 AP 156, p 159 (FB), 1972 Mad LJ (Cr) 284 .

42 *Shihabuddin Imbichi Koya Thangal v Ahammed Koya* 1971 KLT 68 .

43 *Deepak Marwari v Kala Bai* 2014 Cr LJ 2449 (MP), 2014 (1) MPHT 182, 2014 (3) RCR (Civil) 764, (Complaint quashed).

44 *CH Narender Reddy v State of Andhra Pradesh* 2000 Cr LJ 4068 (AP) .

45 *Kailash Singh Parihar and Ors v Priti Parihar* 1982 Cr LJ 1005 (Raj), (1982) ILR 31 Raj 797 .

46 *Lily Thomas etc v Union of India and ors* 2000 Cr LJ 2433 (SC) .

47 *Lily Thomas etc v Union of India and ors* 2000 Cr LJ 2433 (SC) .

48 *Gopal Lal v State of Rajasthan* AIR 1979 SC 713, 1979 Cr LJ 652 ; *Lingari Obulamma v L Venkata Reddy* AIR 1979 SC 848 ; *Baby v Jayant Mahadeo Jagtap* AIR 1981 Bom 283, p 293 ; *Gopal Anant Musalgapnkar v State of Madhya Pradesh* (1976) 2 Cr LJ 1333, 1976 Jab LJ 201, 1976 MPLJ 284 ; *Lily Thomas etc v Union of India and Ors* 2000 Cr LJ 2433 (SC) ; *D Vijayalakshmi v D Sanjeeva Reddy* 2001 Cr LJ 1583 (AP) ; *Pashaura Singh v State of Punjab* 2010 Cr LJ 875 (SC), 2009 AIR SCW 7226 (FIR for offence under s 494 being frivolous, was quashed).

49 *Padi v Union of India* AIR 1963 HP 16, (1963) 1 Cr LJ 760 ; *Usman v Budhu* AIR 1942 Sind 92, 43 Cr LJ 647 ; *Benodini Howladar v Emperor* AIR 1927 Cal 480, 28 Cr LJ 327 .

50 *Surinder Kaur v Mohinder Singh* (1978) 80 Punj LR 12 ; *KP Ahmad Koya v KP Ameena Beobi* 1972 Mad LJ (Cr) 129, 1972 Ker LJ 189 ; *P Nandakumar v Lalitha* 2015 (2) Crimes 657 (Mad) ; *Kerabai v Ramarao* II (2014) DMC 98 (All) ; *Kerabai Ramarao Nakhate v Ramarao Laxman Nakhate* 2014 (4) Bom Cri 559 (Bom) .

51 *Padi v Union of India* (1963) 1 Cr LJ 760, p 761, AIR 1963 HP 16 .

52 *State of Punjab v Surinder Kumar* AIR 1992 SC 1593 .

53 *Amica Quarry Works v State of Gujara* AIR 1987 SC 1073 .

54 *State Financial Corporation v Jagdamba Oil Mills* AIR 2002 SC 834, 2002 AIR SCW 500 .

55 *Divisional Controller, KSRTC v Mahadeva Shetty* AIR 2003 SC 4172 .

56 *Mahalingappa v Kenchamma* 2004 Cr LJ 4953 (Kant)(DB).

57 *Naib Singh v State of Punjab* 1986 Cr LJ 2061 (SC), AIR 1986 SC 2192 .

58 *Naib Singh v State of Punjab* AIR 1981 SC 765, 1981 Cr LJ 325 .

59 *Mahalingappa v Kenchamma* 2004 Cr LJ 4953 (Kant) (DB) .

60 *Lily Thomas etc v Union of India and ors* 2000 Cr LJ 2433 (SC) .

61 Fyzee, *Outlines of Mohammedan Law*, second edn.

62 *Tagore Law Lectures*, fourth edn, vol 1.

63 *Lily Thomas v Union of India* 2000 Cr LJ 2433 (SC) .

64 Re *Sabiba* 9 Bom LR 207.

65 *Abdul Gani v Azizul Haq* 13 Cr LJ 257 .

66 (1892) ILR 19 Cal 79; *Ghulam Mohammad v Emperor* AIR 1933 Lah 88, 34 Cr LJ 77 ; *Shafi Ullah v Emperor* AIR 1934 All 589, 35 Cr LJ 1053 ; *Hajul v Palio* AIR 1936 Sind 189, 38 Cr LJ 88 .

67 *Budams Rowther v Fatima Bi* AIR 1914 Mad 192, (1914) 26 MLJ 260, 1914 MWN 278 ; *Ahmad Bux v Nathu* AIR 1969 All 75 ; *Lily Thomas v Union of India and Ors* 2000 Cr LJ 2433 (SC) .

68 *Government of Bombay v Ganga* (1879-1880) ILR 4 Bom 339; *Gul Mohammad v Emperor* AIR 1947 Nag 121, 48 Cr LJ 43 .

69 *Nandi v Emperor* 22 Cr LJ 1, AIR 1920 Lah 379 .

70 *Jamna Devi v Mulraj* 49 PR 1907 .

71 Re *Ram Kumari*(1891) ILR 18 Cal 264, **dissenting** from *Rahmed Beebee v Rokaya Beebee* 1 Norton's Leading cases on Hindu Law, 12.

72 *Avesha Bibi v Subodh Chakravarty* AIR 1949 Cal 436, 49 CWN 439 ; *Sayeda Khatoon v M Obadiah* 49 Cal WN 745 .

73 *Administrator-General v Anandchari* (1886) ILR 9 Mad 466 ; Re *Millard* 10 Mad 218, 1 Weir 566.

74 *Mina Dei v Abdhut Biswas* 30 Cut LT 294, 1964 All WR (Supp) 33 .

75 *Emperor v Ruri* 20 Cr LJ 3 .

76 *Hedaya 66*.

77 *Abdul Gani v Azizul Haq* (1912) ILR 39 Cal 409 .

78 *Mohammadan Law II,* fifth edn, pp 391, 392.

79 *Sonallah v Ma Kin* 46 1C 719; *Ali Asghar v Mi Kra* 36 IC 279 (LB) .

80 *Karan Singh v Emperor* AIR 1933 All 433, 34 Cr LJ 869 ; *Allah Baksh v Amir Begam* 61 PR 1891 .

81 *Sardaran v Allah Baksh* AIR 1934 Lah 976 ; *Rahmate v Nikka* AIR 1928 Lah 954 ; AIR 1936 Lah 666 ; *Saidan v Sharaf* AIR 1937 Lah 759 ; *Bakho v Lal* AIR 1924 Lah 397 ; *Rashid Bibi v Tufail Ahmad* AIR 1941 Lah 291 ; *Ghaus v Fajji* 2 IC 857 (Punj) ; *Iqbal Ali v Hatima* (1939) ILR All 296, 1939 ALJ 65 .

82 *Resham Bibi v Khuda Bux* AIR 1938 Lah 482 .

83 *Alphonsa v Paul Sanker* 1977 LW (Cr) 192, p 195-198, 201 and 202 ; *Kalan v Emperor* AIR 1938 Sind 127, 37 Cr LJ 656, 657; *Chandra Bahadur Subba v State* 1978 Cr LJ 942**relying** on *Bhaurao Shankar Lokhande v State of Maharashtra* AIR 1965 SC 1564, (1965) 2 Cr LJ 544 .

84 *Kiran Devi v Thakur Das* 1977 Ch LR 79 (Raj) .

85 *Ibid*; *Kerbai v Ramrao* II (2014) DMC 98 (All) .

86 *Gurbaksh Singh v Shama* 19 PR 1886 .

87 AIR 1961 Punj 167, (1961) 1 Cr LJ 549, **dissenting** from *Swapua Mukherjee v Basanta Ranjan Mukherjee* AIR 1955 Cal 533, 1955 Cr LJ 1347 .

88 *Ravindra Nath Dutta v State* AIR 1969 Cal 55, 1969 Cr LJ 164 ; *Modi Bala Krishna Ramaraju v Bodi Thimpathamma* 1975 Cr LJ 208, p 211, 1973 Mad LJ (Cr) 740 (proof of second marriage in accordance with the essential religious rites applicable to the parties is a must for a conviction on a charge of bigamy); *Abdul Hamid v Asghari* 1972 All Cr R 387, 1972 All Cr C 205 .

89 *Shankuntala v Nilkanth* 1973 Mah LJ 310 .

90 *Malan v State of Bombay* AIR 1960 Bom 393, 1960 Cr LJ 1189 ; *Phankari v State* AIR 1965 J&K 105, (1965) 2 Cr LJ 640 ; *Kapila Ventaka v Kapila Paroathanarayana* 1969 Cr LJ 836 (AP) ; *Kalan v Emperor* AIR 1938 Sind 127, 39 Cr LJ 656 ; *Gopal Lal v State of Rajasthan* AIR 1979 SC 713, 1979 Cr LJ 652 ; *Uphapal Singh v Mohinder Kaur* (1991) 3 RCR 646 ; *Somkar Singh v Vimla Devi* (1992) I RCR 268 ; *Tej Kaur v Amarjit Kaur* (1993) I RCR 310 ; *P Satyanarayana v P Mallaiah* (1996) 6 SCC 122, 1996 AIR SCVV 4000 ; *Gomti v Bahadur* (1997) 2 RCR 705 ; *Tayab Hussain v Kanchan Sharma* (1997) 2 RCR 707 ; *Sham Singh v Sarvjit Kaur* (1998) 3 RCR 784, 1998 Cr LJ 4788 .

91 *Gopal Lal v State of Rajasthan* 1980 Bih Cr Cas 128, p 131 (SC) ; *Bhaurao Shankar Lakhande v State of Maharashtra* AIR 1956 SC 1564, (1965) 2 Cr LJ 544 ; *Priya Bala Ghosh v Suresh Chandra Ghosh* 1971 SCC (Cr) 362, 1971 Cr LJ 939 ; *Kanwal Ram v Himachal Pradesh Administration* AIR 1966 SC 614, 1966 Cr LJ 472 .

92 *Bhaurao Shankar Lokhande v State of Maharashtra* AIR 1965 SC 1564, (1965) 2 Cr LJ 544 ; *Kanwal Ram v Himachal*

Pradesh Administration AIR 1966 SC 614, 1966 Cr LJ 472 ; *Priya Bala Ghosh v Suresh Chandra Ghosh* AIR 1971 SC 1153, 1971 Cr LJ 939 ; *Venkata Subbarayadu Chetty v Tanguturu Venkatiah Shresti* AIR 1968 AP 107, 1968 Cr LJ 440 ; *Trailokya Mohan Nath v State* AIR 1968 Assam 22, 1968 Cr LJ 896 ; *Boloram Baruati v Surya Baruati* 1969 Cr LJ 858, AIR 1969 Assam 90 ; *Rabindra Nath Dutta v State* AIR 1969 Cal 55, 1969 Cr LJ 164 ; *Kapila Venkata Laxmi v Kapila Paroathanarayana* 1969 Cr LJ 836 (AP) .

93 *Mina Dei v Abdhu Biswas* 30 Cut LT 294, 1947 All WR (Supp) 33 .

94 *Ratnakar Nanda v Ramesh Kumar* 1963 ILR Cut 464 .

95 *Mukta Jesing v Vallabhadas Kalidas* 1974 Cr LJ 121, p 123, 14 Guj LR 707 .

96 *Sindhiya Devi v State of Uttar Pradesh* 1974 All Cr Cas 341, 1974 Cr LJ 1403 .

97 Re *Raghava Reddy*AIR 1968 AP 117, 1968 Cr LJ 447 ; *Sivarama Suppu v State* 1962 Ker LT 487, 1964 MLJ (Cr) 35 .

1 *Anwar Ahmed v State of Uttar Pradesh and Anor* 1991 Cr LJ 17 (All) .

2 *Vaidyanathan v Abdul Allam* AIR 1946 Mad 446 .

3 *S Radhika Sameena v The SHO Habeebnagar Police Station, Hyderabad and Ors* 1997 Cr LJ 1655 (AP) (DB) .

4 *Sherin v State of Kerala* 2014 (3) Crimes 382 (Ker) .

5 *Gopal Lal v State of Rajasthan* AIR 1979 SC 713, 1979 Cr LJ 652 .

6 *Ibid*; *Priya Bala Ghosh v Suresh Chandra Ghosh* AIR 1971 SC 1153, 1971 Cr LJ 939 ; *Bhanrao Shankar Lokhande v State of Maharashtra* AIR 1965 SC 1564, 1965 Cr LJ 544 ; *Durga Charan v State of Delhi and Anor* 2000 Cr LJ 3530 (Del) ; *Lily Thomas v Union of India and Ors* 2000 Cr LJ 2433 (SC) .

7 *Allah Din v Emperor* AIR 1928 Lah 844 (1), 29 Cr LJ 701 .

8 Re *Muhammad Nisa* 1 PR 1900.

9 *Empress v Enai Beebee* 4 WR (Cr) 25 .

10 Re *Muhammad Nissa* 1 PR 1900.

11 *Jagdish Chandra Dixit and Ors v Rabindra Dixit and Ors* 1991 Cr LJ 1697 (All), 1991 All LJ 618 .

12 *Kochu Muhammad Kunju Ismail v Mohammad Kadeja Umma* AIR 1959 Ker 151, 1959 Cr LJ 591 .

13 *Sankaran Sukumaran v Krishnan Saraswathy and Anor* 1984 Cr LJ 317 (Ker) .

14 *R v King* (1963) 3 All ER 561 ; *Sankaran Sukumaran v Krishnan Saraswathy and Anor* 1984 Cr LJ 317 (Ker) .

15 *R v Thomas* (1905) 70 JP 6 .

16 *Karim Baksh v Emperor* 19 Cr LJ 680 .

17 *Kochu Mohammad Kunju Ismail v Mohammad Kadeja Umma* AIR 1959 Ker 151, 1959 Cr LJ 591 .

18 *Janki Amma v Padmanabban* 1954 Ker LT 977, AIR 1955 TC 137 ; *Jiyatbai Jethmal v Milkiram Deepchand (*1961) 2 Cr LJ 469 (Guj); *Samkaran Sekumaran v Krishnan Saraswathi* 1984 Cr LJ 317 .

19 *Kachu Muhammad Kunja Ismail v Mohammad Kadeja Umma* AIR 1959 Ker 151, 1959 Cr LJ 591 ; *Abdul Gani v Azizul Haq* 13 Cr LJ 257 (Cal), for a **contrary** view, refer to *Reg v Shambhu Raghu* (1875-1877) ILR 1 Bom 347; *Narantakath Avullah v Parakkal Mammu* AIR 1923 Mad 171, 24 Cr LJ 17, p 29 .

20 *Surinder Kaur v Mohinder Singh* (1978) 80 Punj LR 12 .

21 *Tulsamma v Jagannath* 2004 Cr LJ 4272 (Kant) .

22 *Manjula v Mani and Ors* 1998 Cr LJ 1476 (Mad) .

23 *Muthammal and Ors v Maruthathal* 1981 Cr LJ 833 (Mad), 1981 Mad LJ (Cri) 287 ; *CS Varadachari v CS Shanti* 1987 Cr LJ 1048 (Mad) .

24 *Malan and Ors v State of Bombay and Anor* AIR 1960 Bom 393, 1960 Cr LJ 1189 (Bom) .

25 *Kannan v Selvamuthukani* AIR 2012 SC 1217, 2012 AIR SCW 1278, 2012 (2) Scale 9, 2012 (5) SCC 570, 2012 Cr LJ 1576, p 1578 .

26 *Rupa v State of UP* 1 (2014) DMC 226 (All) .

27 *Malti Ghosh v State* (1987) 2 Crimes 284 (Cal) .

28 *Suraj Lal Jaiswal v State of Uttar Pradesh* 2006 Cr LJ 3323 (All) .

29 *Urmila Devi v Yadhuvir Singh* (2013) 15 SCC 624, JT 2013 (14) SC 262, 2013 (4) RCR (Criminal) 899 .

30 *Balasaheb Reghunath Katad v Gayabai Balasaheb Katad* 2003 Cr LJ 2343 (Bom) ; *K Neelaveni v State* 2010 Cr LJ 2819, p 2821, AIR 2010 SC 3191, (2010) 11 SCC 607 .

31 *Narotam Singh v State of Punjab and Anor* AIR 1978 SC 1542, 1978 Cr LJ 1612 ; *Ravinder Kaur v Anil Kumar* 2015 (2) Crimes 326 (SC), 2015 (5) Scale 417, 2015 (5) SLT 104, 2015 (2) Crimes 326 (SC), 2015 (3) JCC 1569, 2015 Cr LJ 2839 .

32 *Sarla Mudgal v Union of India* AIR 1995 SC 1531, 1995 Cr LJ 2926, (1995) 3 SCC 635, 1995 AIR SCW 2326 .

33 *Lily Thomas v Union of India and Ors* 2000 Cr LJ 2433 (SC) .

34 *Suraj Lal Jaiswal v State of Uttar Pradesh* 2006 Cr LJ 3323 (All) ; *Banmali Tripathy v Emperor* AIR 1943 Pat 212, 44 Cr LJ 590 (attempts and abetments are also covered by s 198, CrPC); *Jit Mal v Emperor* 4 PR 1888 (magistrate should not take cognizance of the abetment of an offence of bigamy without complaint); *Babubhai Madavlal Patel v State of Maharashtra* 9 Guj LR 963 .

35 *Jogendra Malta v Khira Dei* 1980 Cr LJ 631, p 635-36 (Ori) .

36 *A Subhash Babu v State of AP* 2011 Cr LJ 4373, p 4380 (SC), AIR 2011 SC 3031, (2011) 7 SCC 616 (*Reema Aggarwal v Anupam* (2004) 3 SCC 199, AIR 2004 SC 1418, 2004 Cr LJ 892, 2004 (1) Scale 264, **applied**).

37 *Babu Ram Saini v State of Uttaranchal* 2013 Cr LJ 1986 (Utr) .

38 *Krishnakanta Nag v State of Tripura* 2012 Cr LJ 2179 (Gauh) ; *Suraj Lal Jaiswal v State of Uttar Pradesh* 2006 Cr LJ 3323 (All) **relied on**.

39 *Subhash Babu v State of AP* 2010 Cr LJ 2523 (AP), 2008 (11) Scale 20, (2008) 8 SCC 232 .

40 *Mahesh Chand v B Janardhan Reddy* 2002 AIR SCW 5385, 2003 Cr LJ 866 (SC) ; *Tulsamma v Jagannath* 2004 Cr LJ 4272 (Kant) .

41 *D Vijayalakshmi v D Sanjeeva Reddy* 2001 Cr LJ 1583 (AP) .

42 *Banamali Tripathy v Emperor* 44 Cr LJ 590, AIR 1943 Pat 212 ; Re *Ujjala Bewa* 1 CLR 523; *Deputy Legal Remembrancer v Sarna Kahmi* (1899) ILR 26 Cal 338 ; *Empress v Rukshmani* (1886) ILR 10 Bom 340 .

43 *State v Gangamma* AIR 1965 Mys 235, (1965) 2 Cr LJ 376 ; *Umo Shankar v Radha Devi* AIR 1967 Pat 220 .

44 *Pinninri Venkataramana v State* AIR 1977 AP 43 (FB), 1977 Cr LJ 368, **overruling***Panchireddi Appala Suromma v Gadela Ganapatlu* AIR 1975 AP 193 (DB) and **dissenting** from *Krishni Devi v Tulsan Devi* AIR 1972 Punj 305 .

45 *Sushila Devi v Sarda Devi* (1961) 1 Cr LJ 819 (MP) ; *Ramesh Ch Choudhury v Mokheswar Khatania* (1961) 1 Cr LJ 464, AIR 1961 Assam 53 .

46 *State v Gangamma* AIR 1965 Mysore 235, (1965) 2 Cr LJ 376 .

47 *Ashwin Nanubhai Vyas v State of Maharashtra* AIR 1967 SC 983, 1967 Cr LJ 943 .

48 *Emperor v Lain* 11 Cr LJ 51, 7 ALJ 10 ; *Daem Sardar v Baru Dhali* 3 Cr LJ 187 in which father of the first husband was held competent to file a complaint as the husband of the woman being a lunatic, the woman, subsequently married to the accused, was taken away from his protection.

49 Re *Sessions Judge Godaveri* 2 Weir 231 (2).

50 *Empress v Rukshmani* (1886) ILR 10 Bom 340 ; *Emperor v Imtiazan* (1903) ILR 25 All 132, 22 AWN 198 .

51 *D Vijayalakshmi v D Sanjeeva Reddy* 2001 Cr LJ 1583 (AP) .

52 *Emperor v Run* 20 Cr LJ 3 .

53 *Budh Singh v Soman* AIR 1929 Lah 544 .

54 *State of Orissa v Sharad Chandra Sahu* AIR 1997 SC 1, 1996 Cri LR 786 (SC) .

55 *Mody v State of Andhra Pradesh* AIR 1965 SC 1186, (1965) (2) Cri LJ 250 .

56 *Suresh Kumar and Ors v State of Rajasthan and Ors* 1998 Cr LJ 601 (Raj) .

57 *Ram Kali v State* 1957 AWR (HC) 13, p 15 .

58 *Emperor v Ali* (1893) ILR 15 All 209 ; Re *Ujjala Beioa* 1 CLR 523.

59 Re *Ujjala Bewa* 1 CLR 523.

60 *Bhagwan Swaroop Srivastava v Asha Srivastava and Ors* 1998 Cr LJ 265 (Raj) .

61 *Suresh Kumur and Ors v State of Rajasthan and Ors* 1998 Cr LJ 601 (Raj) .

62 *Balasaheb Raghunath Katad and Ors v Sou Gayabai Balasaheb Katad* 2003 Cr LJ 2343 (Bom) ; *Kulwant Singh v Surjit Kaur* 2002 Cr LJ 3443 (P&H) .

63 *Deva Prasad Reddy v Kamini Reddy* 2000 Cr LJ 3745 (Kant) . For further commentary, see under the same heading in ss 406, 420, *ante.*

64 *Priya Vrat Singh v Shyam Ji Sahai* 2008 Cr LJ 4367, p 4369 (SC) .

65 *Usha Gurubaxani v Lalit Gurubaxani and Ors* 2001 Cr LJ 4305 (MP) .

66 *P Nagalakshmi v K Premavathi (Dr) and Ors* 1997 Cr LJ 808 (Mad) ; *Tekumalla Nuneiah and Ors v Chittari Babumuri Ammanamma and Anor* 1991 Cr LJ 548 (AP) .

67 *MH Alexander v Claim Alexander* AIR 1959 All 67, 1959 Cr LJ 14 .

68 *Debi Rani Chowdhury v Rama Chandra Choudhury* 32 Cut LT 423 .

69 *Saroj Ganesh Kale v Ganesh Manikrao Kale* 2007 Cr LJ (NOC) 101 (Bom), (2007) 1 AIR Bom R 42 .

70 *S Eleng v S Ravindran* 1998 Cr LJ 3095 (Mad) .

71 *Ibid.*

72 *MH Alexander v Craira Alexander* AIR 1959 All 67, 1959 Cr LJ 14 .

73 *Lingari Obulamma v L Venkata Reddy* AIR 1979 SC 848 ; *Baby v Jayant Mahadeo Jagtap* AIR 1981 Bom 283, p 293 ; *Ram Kali v State* 1967 AWR (HC) 13 ; *Gopal Anant Musalgaonkar v State of Madhya Pradesh* 1976 Cr LJ 1333, 1976 Jab LJ 201, 1976 MPLJ 284 ; Re *Mussamut* 7 CLR 354.

74 *Trilochan Sahoo v Sarala Sahoo* 2009 (78) AIC 876 (Ori) .

75 *Gopal Anant Musalgaonkar v State of Madhya Pradesh* 1976 Cr LJ 1333, 1976 Jab LJ 201, 1976 MPLJ 284 ; *Hajul v Palio* AIR 1936 Sind 189 .

76 *Channa Ram v Indro* (1974) 2 CLR 475 .

77 *Durgawati v State* 1981 Cr LJ (NOC) 191 (All) .

78 *Kakarala Puinachandrarao v Kakaral Sita Devi* 1980 Cr LJ (NOC) 118 (AP), (1979) 1 APLJ (HC) 339 ; *Amalammal v Rayarswami* 1983 Cr LJ 1719 .

79 *Emperor v Pitambar Singh* (1880) ILR 5 Cal 566 ; *Empress v Shivana* Rat Unrep Cr Cas 190.

80 *Padi v Union of India* AIR 1963 HP 16, (1963) 1 Cr LJ 760 ; *Usman v Badhu* AIR 1942 Sind 92, 43 Cr LJ 647 ; *Benodini Howladar v Emperor* AIR 1927 Cal 480, 28 Cr LJ 327 .

81 *Shafi Ullah v Emperor* AIR 1934 All 589, 35 Cr LJ 1053 ; *Alam Shah v Jewan* 27 PR 1878 .

82 *Ravindra Nmh Dutta v State* AIR 1969 Cal 55, 1969 Cr LJ 164 .

83 *Ibid.*

84 *Hahib Mir v Shah Mali* 1980 Cr LJ 651, p 653 (J&K); *Lingari Obulamma v L Ventata Reddy* AIR 1979 SC 848 ; *Baby v Jayant Mahadeo Jagtap* AIR 1981 Bom 283, p 293 .

85 *Rajalaxmi Mahapatra v Prafulla Kumar Mahapatra* 1974 Cut LT 1145 ; *Surinder Kaur v Mohinder Singh* (1973) 80 Punj LR 12 .

86 *Baby v Jayant Mahadeo Jagtap* AIR 1981 Bom 283, p 295 ; *Bhaurao Shankar Lokhande v State of Maharashtra* AIR 1965 SC 1564 ; *Kanwal Ram v Himachal Pradesh Administration* AIR 1966 SC 614 ; *Priya Bala Ghosh v Suresh Chandra Ghosh* AIR 1971 SC 1153 .

87 *Kiran Devi v Thakur Das* 1977 Cr LR 79, p 81 (Raj) ; *Empress v Pitambur Singh* (1880) ILR 5 Cal 566, p 568 **referred to** in *Sarojini v Doravsomi Chettiar* 1971 LW (Cr) 201, p 204 .

88 *Laxmawa v Hanamappa Bhimappa* (1967) 1 Mys LJ 553 ; *Ram Sanehi Singh v State of Madhya Pradesh and Anor* 2000 Cr LJ 3252 (MP) ; *Manju Devi v State of Bihar and Ors* 2000 Cr LJ 3382 (Pat) .

89 *A Subhash Babu v State of AP* (2011) 7 SCC 616, AIR 2011 SC 331 .

90 *Sita Ram v Jagannath* 1959 Raj LW 60 ; *Lingari Obulamma v L Venkata Reddy* AIR 1959 SC 848, p 849 .

91 *Kanwal Ram v Himachal Pradesh Administration* AIR 1966 SC 614, 1966 Cr LJ 472 ; *Rabindra Kumar Bhattacharjee v Prativa Bhattacharjee* 1970 Cr LJ 838, AIR 1970 Tripura 30 .

92 *Rabindra Nath Dutta v State* AIR 1969 Cal 55, 1969 Cr LJ 164 ; *Boloram Baruati v Surya Baruati* AIR 1969 Assam 90 ; *Surekha Murdangia v Ramahari Murdangia* 2005 Cr LJ 3847 .

93 *Siyarama Suppu v State* (1962) ILR 2 Ker 89, 1962 Ker LT 487 ; *Sitaram v Jagannath* 1961 Raj LW 60 ; *Syed Mohammad Hasan v Hafiz Abdul Naeem* 1965 ALJ 85, p 87, 1965 AWR 122 .

94 AIR 1970 Tripura 30, 1970 Cr LJ 838.

95 *P Mutyala Paradeshi v P Subbalakshmi* AIR 1962 AP 311, (1962) 2 Cr LJ 308 (such presumption of marriage can only be rebutted by strong, satisfactory and conclusive evidence).

96 *Hub Ali v Emperor* AIR 1923 All 329, 21 ALJ 127 .

97 *Rabindra Nath Dutta v State* AIR 1969 Cal 55, 1969 Cr LJ 164 .

98 *Imambandi v Motasuddi* 15 CLJ 621 .

1 *Venkata Subbarayudi Chetty v Tanguturu Venkatiah Shresti* AIR 1968 APRADESH 107, 1968 Cr LJ 440 .

2 *P Muryala Paradeshi v P Subbalakshmi* AIR 1962 AP 311, (1962) 2 Cr LJ 303 ; *Trailokya Mohan Nath v State* 1968 Cr LJ 896, p 898 (DB), AIR 1968 Assam 22 .

3 *Kastori Devi v Chiranji Lal* AIR 1960 All 446 .

4 *Hamir Kaur v Atul Singh* 1974 CLR 288 ; *Abdul Hamid v Asghari* 1973 Cr LJ 1710, p 1712 relying on *Kanwal Ram v Himachal Pradesh Administration* AIR 1966 SC 614, 1966 Cr LJ 472 (where, in prosecution for offence under ss 494 and 119, IPC, the evidence of the witness, called upon to prove marriage ceremonies, showed that the essential ceremonies had not been performed, the conviction of the accused persons on statement of the alleged bridegroom, that he had sexual relationship with the alleged bride, and on admission of the accused in a written statement that the parties married after the first marriage was dissolved, would not be justified); *Priya Bala Ghosh v Suresh Chandra Ghosh* 1971 Cr LJ 939, AIR 1971 SC 1153 ; *Bolorame Baruati v Suriya Baruati* AIR 1969 Assam 90 ; *Talep Ali v Sabdar Khan* 45 CWN 84 ; *Yelamanchali Nageshwari v Yelamanchali Venkate Prasad Rao and Anor* 1998 Cr LJ 4128 (AP) ; *P Satyanarayana and Anor v P Mallaiah and Ors* 1997 Cr LJ 211 (SC) .

5 *Bolosam Baruati v Surya Baruati AIR* 1969 Assam 90, 1969 Cr LJ 858 .

6 *Talep Ali v Sabdar Khan* 45 CWN 84 .

7 *Gopal Lekharu v State of Assam* 2005 Cr LJ 4719 (Gau) .

8 *Rabindra Kumar Bhattacharjee v Prativa Bhattacharjee* AIR 1970 Tripura 30, 1970 Cr LJ 838 (Tripura) .

9 *Gopal Lekharu v State of Assam* 2005 Cr LJ 4719 (Gau) .

10 Justice Alladi Kuppuswami, *Mayne's Hindu Law and Usage*, fourteenth edn, 1996, Bharat Law House, New Delhi, pp 192, 193.

11 *Manjula v Mani and Ors* 1998 Cr LJ 1476 (Mad) .

12 *Manjula v Mani and Ors* 1998 Cr LJ 1476 (Mad) .

13 *Sham Singh and Ors v Sarbjit Kumar* 1998 Cr LJ 88 (P&H) .

14 *Kastori Devi v Chiranji Lal* AIR 1960 All 446 .

15 *CL Dale v Enid Dale* AIR 1963 Rang 398 .

16 *Gyung Yang v N Khum Gam* AIR 1936 Rang 429 .

17 *Rathnammal v Manikam* (1893) ILR 16 Mad 455 .

18 *Baby Kar Roy v Ram Rati Devi* 1975 Cr LJ 835, p 838, (1973-1974) 78 CWN 799.

19 *Manjula v Mani and Ors* 1998 Cr LJ 1476 (Mad) .

20 *Surekha Murdangia v Ramahari Murdangia* 2005 Cr LJ 3847 (Ori) .

21 *T Venkateshwarlu and Ors v State of Andhra Pradesh and Ors* 1999 Cr LJ 39 (AP) .

22 *Arjundas Aswani v Madhuri* II (2013) DMC 769 (Delhi) .

23 *Sunita and Ors v State of Rajasthan* 2000 Cr LJ 2621 (Raj) .

24 *Sau Saroj Ganesh Kale v Ganesh Manikrao Kale* 2007 Cr LJ (NOC) 101 (Bom)

25 *Sridhar G Jingade alias SG Jingade and Ors v Satyavathi* 2000 Cr LJ 2862 (Kant) .

26 *T Venkateshwarlu and Ors v State of Andhra Pradesh and Ors* 1999 Cr LJ 39 (AP) .

27 *Faiz Ahmed v Emperor* 5 PR 1879 .

28 *KPAhmed Koya v KP Ameena Beebi* 1972 Ker LJ 189, 1973 MLJ (Cr) 129 .

29 *Gopal Lal v State of Rajasthan* AIR 1979 SC 713, p 715, 1979 Cr LJ 652 ; *Baby v Jayant Mahadro Jagtap* AIR 1981 Bom 283, p 299 .

30 *Baby v Jayant Mahadeo Jagtap* AIR 1981 Bom 283, p 299 .

31 *Ritha v Emperor* AIR 1926 Nag 127, 27 Cr LJ 74 .

32 *Narotam Singh v State of Punjab* AIR 1978 SC 1542, p 1543, 1978 Cr LJ 1612 .

33 *Sindhiya Devi v State of Uttar Pradesh* 1974 Cr LJ 1403 (All) .

34 Re *Sridher G Jingade alias SG Jingade and Ors*2000 Cr LJ 2862 (Kant).

35 *Kashiram and Ors v Somuathi and Ors* 1992 Cr LJ 760 (MP), (1992) 1 Crimes 303 (MP) .

36 *Tarachand alias Taroo v Punibai and Ors* (1987) 2 Crimes 523 (MP) .

Indian Penal Code (Act XLV of 1860)

Chapter XX

Of Offences Relating to Marriage

S. 495.

Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.--

Whoever commits the offence defined in the last preceding section having concealed from the person with3994 whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

STATE AMENDMENT

Andhra Pradesh-- In Andhra Pradesh, the punishment is imprisonment for 10 years and fine. The offence is cognizable, non-bailable, triable by the Magistrate of First Class and non-compoundable. --

[*Vide s 2 of the Andhra Pradesh Act 3 of 1992 (wef 15-2-1992)*]

Comments

1. Scope

This section provides for a higher punishment for the same offence, which is committed under the preceding s 494, IPC, by reason of an aggravated factor. The authors of the IPC have justified the making of the punishment more severe by illustrating the difference made in the case where, in contracting a subsequent marriage the fact of the former marriage is concealed. They observed:

> The married man, who, by passing himself off as unmarried, induces a modest woman to become, as she thinks, his wife, but in reality his concubine, and the mother of an illegitimate issue, is guilty of one of the most cruel frauds than one can be conceived. Such a man should be punished with exemplary severity.

A woman, who does not use all reasonable means in her power to inform herself of the fact of her first husband's alleged demise and contracts a second marriage within sixteen months after cohabitation with her for husband, without disclosing the fact of the former marriage to her second husband, is liable to enhanced punishment under this section.[37]

If there is no offence within the meaning of the preceding s 494, the provisions of this section will not be attracted.

2. Evidence of Relationship under Section 50 of the Evidence Act not Admissible for Offence under Sections 494 to 498

Commentary under the same heading in s 494, *ante*, may be referred to.

3. 'Having Concealed from the Person with whom the Subsequent Marriage is Contracted'

Concealment may be made in different ways, but this section requires that there should be an element of deceit in not giving the necessary information. This would3995 require a proper understanding. Thus, where a child of ten years married again during the lifetime of her husband, the marriage being negotiated and caused to be performed by the mother of the accused, the child was held not to have attained sufficient maturity of understanding to judge the nature and consequences of her conduct on the occasion of the second marriage.[38]

4. Procedure

The offence under this section is non-cognizable, bailable, non-compoundable, and triable by a magistrate of the first class.

5. Complaint--By Whom to be Filed

Under s 198 of CrPC, no court can take cognizance of an offence under s 495, IPC, except upon a complaint made by the aggrieved person subject to some specified exceptions. Section 198 of CrPC may be referred to.[39]

As stated above, in the case of bigamy, the first wife is the aggrieved person. It is she who can object

to the bigamous conduct of her husband in entering into a marriage with another woman during her lifetime. A complaint, filed by the second wife, is not competent, she being not falling under the category of the aggrieved persons.[40] However, when the husband contracted second marriage keeping second wife in dark about the first marriage, the second wife is aggrieved person within the meaning of s 198, CrPC, and competent to lodge the complaint against her husband under s 495, IPC .[41] The brother of the husband of the woman, who commits bigamy, is also not an aggrieved person and, therefore, incompetent to file a complaint.[42]

As made clear by s 198, CrPC, for all or any of the offences under ss 493, 494, 495, 496, 497 and 498, IPC, an aggrieved person can be either the husband or the wife and none else other than those falling under the proviso to s 198(2), CrPC . Complaint filed by a third person would not be maintainable.[43]

6. Quashing of Complaint

Where the connected matter remained pending for years before the court and after its disposal, the complaint under s 497, IPC, has been filed, the delay itself cannot be a ground for quashing the proceedings.[44] If the complaint is filed by a legally competent person in terms of s 198, CrPC, and the trial court took cognizance of offences including the offence under s 495, IPC, on the basis of *prima facie* evidence on record, the complaint cannot be quashed by taking recourse to s 582, CrPC .[45] The complaint was filed by the wife against the accused under ss 420, 406 and 495, IPC . Her father assured the accused that his daughter would withdraw the complaint. On3996 this assurance, the accused withdrew the complaint which he filed. However, his wife did not withdraw the complaint. As there was no legal or moral obligation on the part of the wife to withdraw the complaint, the criminal proceedings or the complaint cannot be quashed on the ground that the father of the complainant had assured the accused that the complaint against him would be withdrawn.[46]

7. Jurisdiction

A plain reading of s 177 and sub-s 2 of s 182, CrPC, shows that sub-s 2 of s 182, CrPC, is a provision complete by itself regarding the place of inquiry and trial of offences punishable under s 494 or 495, IPC . Sub- section 2 provides three venues for inquiry and trial of the offences under s 494 or s 495, IPC, *viz*., the court within whose local jurisdiction the offence was committed, or the offender last resided with his or her spouse by the first marriage, or the wife by the first marriage has taken up permanent residence after the commission of the offence. Out of these, the first venue that is the court within whose local jurisdiction the offence was committed is the same as the venue stipulated under s 177, CrPC, dealing with the ordinary place of inquiry or trial. In order to decide whether a court has jurisdiction to try offences under s 494 or s 495, IPC, one need require to consider the application of sub-s 2 of s 182, CrPC . There is no need to consider the application of s 177, CrPC, as it is covered under the first venue stipulated in sub-s 2. In this view, sub-s 2 cannot be said to be supplemental to s 177, CrPC, but supplement to it unlike sub-s 1 of s 182, CrPC, which is supplemental to and not supplement to s 177, CrPC .[47]

8. Charge

The charge would be in the same form as the one under the preceding s 494 with the addition of the words 'that you concealed, from B, the fact of the former marriage with A', and substitution of ' s 495 ' for ' s 494 '.

9. Proof

The requirements of the proof would be the same as in the preceding s 494 with the addition that it has also to be proved that the accused had, before contracting the subsequent marriage, concealed the fact of the former marriage.

Unless both the marriages are established along with the fact of concealment, the charge under s 495, IPC, cannot be established. If the second marriage is not established, the main ingredient of the offence would be lacking and, therefore, the charge under this section cannot be found to have been established.[48] However, if there is an admission of both the marriages by the accused, then strict proof of both the marriages would not be required.[49]

37 *Empress v Enai Beebee* 4 WR (Cr) 25 .

38 *Empress v Godi* Ratanlal Unrep Cr C 876.

39 For detailed commentary, see *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

40 *Jarnail Singh v Swaran Kaur* 1976 Cr LJ 680 (Punj) ; *Sarada v Gopalaswami Rao* 1967 MLJ (Cr) 550, (1967) 2 Andh WR 8 .

41 *Ishwar Kumar Mehta v Varsha Rani and Anor* (1986) 2 RCR 429 (P&H) ; *Balbir Singh v Darshan Kumari* (1972) 2 MLJ 462 (P&H) (DB); *Revanasidaswami HM v State Public Prosecutor and Anor* 1990 Cr LJ 1001 (Kant) .

42 *Haruman v Emperor* 7 Cr LJ 457 .

43 *Urmila Devi v Yadhuvir Singh* (2013) 15 SCC 624 ; *Subhash Babu v State of AP* 2010 Cr LJ 2523 (AP) .

44 *Balbir Singh and Anor v Amarjit Kaur* (1995) 1 Chand Cri Cases 428 (P&H).

45 *Balbir Singh and Anor v Amarjit Kaur* (1995) 1 Chand Cri Cases 428 (P&H).

46 *Nand Kishm Gera v Anita alias Savita* (1997) 4 RCR (Cri) 403 (P&H).

47 *Ningappa Shivappa Gouri and Ors v Kalavathi and Anor* 1986 Cr LJ 1719 (Kant) . For further commentary, see under the same heading in s 494, *ante*.

48 *Rajalakshmi Mohapatra v Prafulla Kumar Mohapatra* 1947 Cut LT 1145 .

49 *Karuppiah Servai v Nagavalli Ammal* 1981 LW (Cr) 336, p 338 (Mad) .

Indian Penal Code (Act XLV of 1860)

Chapter XX

Of Offences Relating to Marriage

S. 496.

Marriage ceremony fraudulently gone through without lawful marriage.--

Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married,3997 shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

STATE AMENDMENT

Andhra Pradesh-- In Andhra Pradesh, the punishment is imprisonment for 7 years and fine. The offence is cognizable, non-bailable, triable by the Magistrate of First Class and non-compoundable.--[*Vide s 2 of the Andhra Pradesh Act 3 of 1992 (wef 15-2-1992)*]

Comments

1. Scope

This section, analogous to s 493, IPC, appears to apply to cases in which a ceremony is gone through which would, in no case, constitute a marriage and in which, one of the parties is deceived by the other into the belief that it does constitute a marriage or effect is sought to be given by the proceeding to a collateral fraudulent purpose. If the ceremony gone through would, but for the previous marriage, have constituted a lawful marriage, and if both parties were aware of the circumstances of the previous marriage, s 494, and not this section, applies.[50] A case of bigamy is not contemplated by this section.[51] Where it is intended that there should be a valid marriage, and not that there should be only a show of marriage for some ulterior and fraudulent purpose, the case does not come under this section.[52] The essence of the offence is that the marriage ceremony should be fraudulently gone through and that there should be no lawful marriage.[53] To establish a charge under s 496, it is enough to show that the marriage may be set aside on the ground of fraud or declared a nullity; it is incumbent upon the prosecution to go further to prove that the accused knew that there was no valid marriage and he had gone through a show of marriage with a fraudulent or ulterior object in view.[54]

2. Section 494 and Section 496 --Distinction

An offence under s 494 is different from an offence under s 496, IPC . If the accused intends that there should be a valid marriage and honestly goes through the necessary ceremonies during the lifetime of the other spouse, then it may be a case under s 494, IPC, but if the accused only intends that there should only be a show of marriage and3998 dishonestly or fraudulently goes through the marriage ceremony knowing fully well that he is not legally married, then it is an offence under s 496, IPC .[55]

3. Section 493 and Section 496 --Distinction

The nature of the offence under s 493, is different from that under this section and is distinguishable in the following respects:

Section 493	*Section 496*
(a) It prescribes a punishment for the man only.	(a) Both man and woman may be punishable.
(b) It makes no reference to any particular ceremony being performed.	(b) The performance of some ceremony known to be insufficient is a condition.
(c) To cohabit or to have sexual intercourse is a necessary ingredient.	(c) There is no reference to it. Going through a mock marriage is itself sufficient.
(d) The word used is 'deceit'.	(d) The mock marriage must be made 'dishonestly or with a fraudulent intention'. There may be dishonest or fraudulent intention on the part of both the parties to cause wrongful loss or wrongful gain to some other person.

Under s 493, IPC, what is required is that by deceitful means, the accused must induce a belief of lawful marriage and then make the woman cohabit, or have sexual intercourse, with him. Under s 496, IPC, the offence consists in dishonestly, or with a fraudulent intention going through the ceremony of being married, knowing that he is not thereby lawfully married. The offence under the former consists in giving a false assurance of marriage to a woman and thereby procuring sexual intercourse with her, whereas the offence under the latter consists in fraudulently going through the ceremony itself knowing that it was not lawful.[56]

4. Evidence of Relationship under Section 50 of the Evidence Act not Admissible for Offence under Sections 494 to 498

Commentary under the same heading in s 494, *ante*, may be referred to.

5. Conduct and Character of Accused

The conduct and character of the accused cannot be the sole consideration in reaching a conclusion as to whether the accused had deceitfully induced the complainant woman to believe that legal marriage was performed, and that on such a3999 belief the woman was induced to cohabit with him. The conduct of the accused, though reprehensible, cannot *per se*, lead to a finding of guilt of the accused in the matter of commission of the alleged offence under s 493 and s 496, IPC . In any case it cannot be decisive of the matter.[57]

6. 'Dishonestly'

Commentary under s 24, vol 1, may be referred to.

7. 'With a Fraudulent Intention'

Commentary under s 25, vol 1, may be referred to.

8. 'Goes through the Ceremony of Being Married'

Some sort of ceremony is necessary. In Re *Vellai Mudali,*[58] the accused seized the girl, pushed her down and tied a *tati* round her neck, and then let her go. He had intended to marry her, but he was rejected and she was about to be married to somebody else. The accused acted in the above manner apparently to spite the girl and her parents. It was held that the act of the accused in tying the *tati* round the neck, in the said circumstances, did not amount to going through the ceremony of being married, knowing that he is not thereby lawfully married, within the meaning of this section. The accused must be presumed to have known fully well that, according to the custom of the community, that act did not constitute a ceremony of being married.

9. Procedure

Commentary under the same heading in s 495, *ante*, may be referred to.

10. Complaint--By whom to be Filed

Commentary under the same heading in ss 494, 495, *ante*, may be referred to.

11. Charge

The following form of the charge may be adopted:

I (*name and office of magistrate, etc.*) hereby charge you (*name of accused person*) as follows:

That, on or about the ... day of ..., at ..., you dishonestly (*or with a fraudulent intention*) went through the

ceremony of being married to AB, knowing that you were not thereby lawfully married, and that you thereby committed an offence, punishable under s 496 of the Indian Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

12. Proof

In order to establish an offence under this section, it must be proved that:

(a) the accused went through a ceremony of being married to the complainant;
(b) the said accused, at that time, knew that he/she was not thereby married; and4000
(c) the said accused did so dishonestly or with a fraudulent intention.

In order to convict an accused of an offence under this section, the evidence must be sufficiently clear to show that the accused had deceitfully induced a belief of lawful marriage in the complainant and it was in such belief that she had cohabited with him.[59]

13. Sentence

The sentence under this section is imprisonment of either description which may extend to seven years, and also a fine. However, a lenient view may be taken in the peculiar facts and circumstances of a particular case. In *Ashwin NanabhaiVyas v State of Maharashtra* ,[60] the Supreme Court, keeping in view the facts that the trial lasted nearly seven years involving a lot of expenses, that the litigation must have also caused mental agony to the accused, that the complainant had died, and the tribulation suffered by complainant who subsequently became wife of the accused, reduced the sentence of one year's rigorous imprisonment to that already undergone by him.

50 *Reg v Rama* Ratanlal Unrep Cr C 77.

51 *Sheikh Altmuddin v Emperor* 4 Cr LJ 152 .

52 *Ibid*; *Queen v Kudum* 1864 WR (Cr) 13 ; *Reg v Rama* Ratanlal Unrep Cr C 77.

53 *Sheikh Atimuddinh v Emperor* 4 Cr LJ 152 .

54 *Kshitish Chandra Chakraburty v Emperor* AIR 1937 Cal 214, 38 Cr LJ 577 .

55 *Kailash Singh Parihar and Ors v Priti Parihar* 1982 Cr LJ 1005 (Raj), (1982) ILR 31, p 797 (Raj) .

56 *Kompella Ammanna v Josyula Ramalakshimi* (1971) MLJ (Cr) 604, p 606, (1971) 1 Andh WR 278 .

57 *State of Gujarat v Batuk Hiralal Mehta* 1974 Guj LR 391 .

58 Re *Vellai Mudali*AIR 1947 Mad 193, 48 Cr LJ 842 .

59 *State of Gujarat v Batuk Hiralal Mehta* 1974 Guj LR 391 .

60 *Ashwin NanabhaiVyas v State of Maharashtra* AIR 1970 SC 1998, 1970 Cr LJ 1668 .

Indian Penal Code (Act XLV of 1860)

Chapter XX

Of Offences Relating to Marriage

S. 497.

Adultery.--

Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

STATE AMENDMENT

Andhra Pradesh-- In Andhra Pradesh, the punishment is imprisonment for 5 years, or fine, or both. The offence is cognizable, bailable, triable by the Magistrate of First Class and non-compoundable. --[*Vide s 2 of the Andhra Pradesh Act 3 of 1992 (wef 15-2-1992)*]4001

Comments

1. Scope

Adultery is an offence which is committed by a third person against a husband in respect of his wife and of which a man alone can be held guilty,[61] meaning thereby that it is an infringement of the rights of a husband towards his wife and the law of this country regards it as an offence.[62] The object of the law is to inflict punishment on those who interfere with the sacred relation of marriage,[63] the reason being that as adultery is an anti-social and illegal act, no peace loving citizen or person of good morals would like that it should be permitted to be indulged in.[64] This is the reason that this section makes it punishable and all classes of persons, irrespective of their caste, creed and colour, if they commit this offence, are governed by the section.[65]

'Living in adultery', as stated in s 13(1)(i), Hindu Marriage Act 1955,[66] or in s 125, CrPC,[67] in matrimonial cases, has a different and wider meaning than 'adultery' in this section.

Enticement and detention are not ingredients of an offence under this section.[68] It is sexual intercourse which is a necessary ingredient of the offence under this section. Nothing short of it would justify a conviction for adultery.[69] In a case of adultery, sexual intercourse must be proved,[70] the sexual intercourse required for adultery being identical to the sexual intercourse required for rape.[71]

2. Section 497 and Section 22 Indian Divorce Act 1869

Only one form of adultery has been made punishable by s 497 . It will be noted that under that provision a married woman is not guilty of adultery even as an abettor. If there is consent or connivance of the husband, then there will be no offence of adultery. There is no reason why this specialised definition of adultery should be extended to the interpretation of s 32 of the Indian Divorce Act 1869. It may be noted that under that section the husband may obtain a decree of judicial

separation on the ground of adultery committed by the wife, though as we have seen under s 497, IPC, the wife will not be guilty of the offence of adultery under s 497, IPC . This itself shows that the narrow definition of adultery in s 497, IPC, cannot be applied to the interpretation of the terms of s 22 of the Indian Divorce Act 1869. Further, the principle underlying the relief of judicial separation on the ground of adultery of the spouse, makes it immaterial whether the woman with whom the husband has sexual relationship is a married woman. The offence under s 497, IPC, is against the husband with whose wife another man has committed adultery. However, wider considerations apply when a husband or wife seeks judicial separation or dissolution4002 of the marriage on the ground of adultery. In the latter case, it is the violation of the marriage tie which is relevant.[72]

3. Section 497 , IPC and Section 23, Indian Contract Act 1872

In England, adultery is not an offence under criminal law, whereas in India it is. If the adultery, past or future, is the consideration for an agreement entered into in India, this would make it not merely an immoral but an illegal agreement and the contract would be void.[73]

4. Evidence of Relationship under Section 50 of the Evidence Act not Admissible for Offence under Sections 494 to 498

Commentary under the same heading in s 494, *ante*, may be referred to.

5. 'Connivance'

Connivance, as applied to matrimonial cases, may be defined as the willing consent to a conjugal offence or a culpable acquiescence in a course of conduct reasonably likely to lead to the offence being committed.[74] As pointed out by Lord Chelmsford, in *Gipps v Gipps* ,[75]connivance is a figurative expression meaning a voluntary blindness to some present act or conduct, or to something going before the eyes, or to something which is known to be going on, without any protest or desire to disturb or interfere with it. To constitute connivance, the facts established must lead to a direct and necessary inference that adultery would be committed with the person charged.[76] If a husband permits the adulterer, knowing him to be such, to visit his wife, he will be guilty of active connivance.[77] Where there exists a state of things as would raise a reasonable apprehension in the mind of a reasonable man that adultery may result and yet the husband does not interfere, he would be guilty of connivance.[78] Where it was admitted that the husband was aware of his wife's adultery and, being fully apprised of what was going on, took no active steps to prevent it and acquiesced in it, it was held that there had been connivance on the part of the husband, on his wife confessing, on the very night of the marriage, her guilt of adultery, left her in her parental home and did not object to her living with the co-respondent as husband and wife and further, when she wanted to marry the co-respondent, he not only not objected to it but also was a willing and consenting party thereto, it was held that the husband had connived in the so-called marriage of the wife with the co-respondent.[79]

Mere toleration, after adultery had begun, is not connivance,[80] nor is abstention from taking steps to prevent adultery.[81] From the fact, that the husband had left his wife about ten years ago and was living with his new wife and did not care to take her back, no inference of connivance can be drawn.[82] Where a man entered the house4003 of another at night with intent to commit adultery with his wife and her husband was absent in the legitimate pursuit of his occupation, it was held that it may safely be presumed that such husband neither consented to, nor connived at, any adultery or immorality on the part of his wife.[83] Where the husband, returning from his legitimate pursuit, caught the accused coming out of his house at 10 pm in the night and the accused was rescued only by the intervention of his father and the matter was later reported also to the police, it was held that the husband had not consented to, nor connived at, adultery by the accused.[84]

6. 'In such case the Wife shall not be Punishable as an Abettor'

Ordinarily, the wife would, in cases of adultery, be an abettor and could have been tried as such. This

section, however, makes an express exception in the case of the wife who shall not be punishable as an abettor. The framers of the IPC explain as to why this course was adopted. They point out that it would be weighing the scale against woman, which scale was already too much depressed, by making women punishable for committing the offence of adulator. Women, according to them, were more often than not mere passive tools in the hands of men and placed as they were, it was impossible for them to assist the blandishments that men might hold out against them.[85] The married woman cannot commit the offence of adultery or its abetment. So far as she is concerned, adultery is only a serious breach of marital tie according to the social ideas of the community.[86]

7. Trespass in Order to Commit Adultery--Cases

Commentary under the same heading in s 451, *ante*, may be referred to.

8. Wife cannot be Prosecuted for Adultery

Only a man can be proceeded against and punished for the offence of adultery. A woman is completely immune to the charge of adultery and she cannot be proceeded against for that offence.[87]

9. Wife not Punishable as an Abettor--Constitutional Validity

Gender is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for a special provision in that case of women and children by cl 3 of art 15 of the Constitution . Articles 14 and 15 of the Constitution of India thus read together validate the last sentence of s 497, IPC, which prohibits women from being punished as an abettor of the offence of adultery.[88]4004

Section 497, IPC cannot be said to be violative of art 14 of the Constitution on the ground that it makes an irrational classification between men and women in that:

(a) section 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery;
(b) section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and
(c) section 497 does not take in cases where the husband has sexual relations with an unmarried woman, with the result that husbands have, as it were, a free license under the law to have extra-marital relationship with unmarried woman.

It cannot be said that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is the seducer, and not the woman. This position may have undergone some change over the years, but it is for the legislature to consider whether s 497, IPC should be amended appropriately so as to take note of the transformation which the society has undergone. True, the forty-second report of the Law Commission shows that there can be two opinions on the desirability of retaining a provision like the one contained in s 497 on the statue book. However, the section cannot be struck down on the ground that it is desirable to delete it.[89]

The fact that a provision for hearing the wife is not contained in s 497 cannot render that section unconstitutional as violating art 21 .[90]

10. Procedure

The offence under this section is non-cognizable, bailable, compoundable by the husband of the

woman, and triable by a magistrate of the first class.

11. Quashing of Criminal Proceedings

The allegations against the accused-wife were that she had remarried and was living in adultery with her second husband. The wife produced the *ex parte* decree of dissolution of her first marriage. Till the *ex parte* decree of divorce was set aside, the earlier marriage of the accused-wife stood dissolved, so no offence was committed by the accused-wife by remarrying. Therefore, the proceedings initiated against the accused-wife and others on the FIR was quashed.[91]

12. Complaint--By whom to be Filed

If the offence, alleged to have been committed by the accused, is one falling either under s 497, or under s 498, IPC, then a complaint by the aggrieved party is a must and in the absence of such a complaint, no court can take cognizance of the complaint. Under s 498(2) of the CrPC, for the purpose of s 198(1), CrPC, no person other than the husband of the woman shall be deemed to be aggrieved by an offence punishable either under s 497, or s 498, IPC .[92]4005

The report, made by the husband of the woman, to the police cannot be regarded as a complaint, the reason being that it is not made to the magistrate and the subsequent appearance of the husband before the magistrate and making statement in support of the police case cannot amount to a complaint within the meaning of s 2(d) of the CrPC and cognizance of an offence under s 497, IPC, without a complaint made by the husband is barred by s 198, CrPC .[1] If an accused is acquitted of rape on the finding that it was a case only of adultery, the accused cannot be convicted under this section if there was no complaint by the husband to give jurisdiction to the magistrate.[2]

If a complaint, made by the husband, described in its heading as one under ss 366 and 368, fulfills all the requirements of a complaint under s 497, IPC, and clearly makes an accusation of an offence under this section, then if the adultery complained of is proved, a conviction under this section will not be illegal on the ground that there has been no complaint as required by s 198, CrPC .[3] However, a complaint for an offence under this section, if it does not anywhere state facts which constitute adultery as contemplated by the section but merely mentions the section, does not amount to a complaint as required by s 198, CrPC . Such an invalid complaint will not entitle a magistrate to take cognizance and proceed further.[4]

If a marriage is proved, the desertion of the husband by the wife for one year will not dissolve the marriage tie and a complaint by the husband for adultery will be maintainable.[5]

13. Wife of Adulterer cannot Prosecute her Husband--Yawning Gap in Section 198 , CrPC 1973

Although the husband of adulteress is given a right to prosecute the adulterer, the wife of the adulterer is not given the right to prosecute her husband in view of the bar under s 198(2), CrPC, and this section is not even discriminatory.[6] There is yawing gap as contained in the provisions of s 198, CrPC, which can be only filled by the legislature.

In view of Punjab and Haryana High Court, right should be conferred on the wife so as to move a legitimate complaint under s 497 or s 498, IPC against her husband who had betrayed and had withdrawn from her society and company by becoming disloyal to her. This type of yawning gap has become more necessary to fill when the society is thinking of giving due rights to the women with the passage of time. A copy of order of Punjab and Haryana High Court was declared to be sent to the Ministry of Law to look into this matter so as to make proper amendment in s 198, CrPC . A copy of the order was also to be sent to the National Commission for4006 Women (New Delhi) with a request to take up this matter with the Ministry so as to examine whether suitable amendment can be brought about in s 198, CrPC .[7]

14. Right of Hearing of Married Woman/Wife of Adulterer

Although s 497, IPC does not contain a provision for hearing the married woman with whom the accused is alleged to have committed adultery, that does not justify the proposition that she is not entitled to be heard at the trial. If the wife makes an application in the trial court that she should be heard before a finding is recorded on the question of adultery, the application would receive due consideration from the court. There is nothing either in the substantive or the adjectival criminal law, which bars the court from affording a hearing to a party, which is likely to be adversely affected, directly and immediately, by the decision of the court. In fact, instances are not unknown in criminal law where, though the prosecution is in the charge of the public prosecutor, the private complainant is given permission to oversee the proceedings. One more step, and the wife could be allowed a hearing before an adverse finding is recorded that, as alleged by her husband the accused had committed adultery with her. The right of hearing is a concomitant of the principles of natural justice, though not in all situations. That right can be read into the law in appropriate cases.[8]

15. Charge

The following form of the charge may be adopted:

> I (*name and office of magistrate,etc.*) hereby charge you (*name of accused person*) as follows:
>
> That, on or about the ... day of ..., at..., you had sexual intercourse with *AB*, who is the wife of CD and whom you knew (*or had reason to believe*) to be the will of CD, without the consent (*or connivance*) of her husband CD, and that you thereby committed an offence, punishable under s 497 of the Indian Penal Code, and within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the said charge.

In a charge of adultery under s 497, IPC, it is not always possible, nor indeed necessary, to specify the date. It is enough if the charge specifies the dates between which the offence was committed.[9] The omission to state the precise dates cannot, therefore, prejudice the accused.[10] However, the omission to state s, which constitute adultery, as contemplated by s 497, IPC, would invalidate a complaint disentitling the magistrate to take cognizance and proceed further.[11]

16. Proof

In order to establish a charge under this section, the prosecution must prove that:

(a) the accused had sexual intercourse (not amounting to rape within the meaning of s 375, IPC) with a woman;4007
(b) such woman was the wife of another person;
(c) the accused knew, or he had reason to believe, that the said woman was the wife of another person; and
(d) the said sexual intercourse was without the consent or connivance of that another

person, meaning thereby the husband of the woman and complainant in the case.

If the only direct evidence produced against the accused is found unreliable and untrustworthy and the other evidence on record is not sufficient to prove the charge of adultery, the accused is entitled to be acquitted.[12] When a person makes allegations of adultery, burden lies on him to establish the same.[13]

17. Direct Proof Rarely Possible

Direct proof of adultery is rarely possible.[14] It does not, however, mean that idle gossip would prove adultery.[15] There must be more evidence showing opportunity and desire to commit the offence or access by the man to the woman, *etc*.[16] What establishes an accusation of adultery is, among other matters, evidence of prior or subsequent acts of undue familiarity and opportunities for adultery in the context of other evidence of a circumstantial nature.[17] Where there was considerable attachment between the woman and the accused, and they slept in the same bed for 15 nights, it was held that there was sufficient evidence to hold that sexual intercourse took place between them. The act of sexual intercourse is not committed in public or in the presence of witnesses.[18] The admission of the accused coupled with the evidence of the witnesses to the effect that the two lived together as husband and wife, leads to the inevitable presumption that acts of adultery must have been committed.[19] Where, the woman was seen alone in a naked condition with the accused who also was naked, it was held to have been clearly established that the accused was having sexual intercourse with her.[20] Where a young man found, in the company of a young woman, whose husband was away, and had been, on more occasions than one seen together and in suspicious circumstances, the prosecution version was accepted.[21] However, no inference of adultery can be drawn from the mere fact of residence of the woman with her children in the house of the man with whom she is alleged to have committed adultery. Such an inference can be drawn if it is established that the man and woman used to occupy the same room, if not the same bed.[22] Where the4008 only evidence was a letter written affectionately by the complainant's wife to the accused, it was held that conviction on such evidence was bad.[23]

18. Proof--Marriage between Complainant and Woman

In a prosecution under s 494, and s 497, IPC, it is absolutely necessary on the part of the prosecution to give strict proof of legal marriage between the complainant and the woman, the reason being that a presumption, arising under the first part of s 50 of the Indian Evidence Act 1872, as to the marriage is particularly excluded in cases in which relationship of husband and wife is in issue. In the absence of such evidence, mere statement of the complainant, that he was legally married to the woman under consideration, cannot, therefore, be relied upon.[24] The absence of a denial, on the part of an accused, on such a point as marriage between the parties in a criminal trial for adultery, would not, by itself, be sufficient to establish the existence of marriage between the complainant and the woman under consideration.[25] The question, whether there was a valid marriage between the two persons, is a question of fact, and not a question of law.[26] The marriage must be proved as an event which took place, and not merely as the state in which the parties were living, and if it is sought to prove it by oral evidence, that evidence must, in accordance with s 60 of the Indian Evidence Act 1872, be direct, that is to say, must be the evidence of an eyewitness.[27] It will have to be proved that the woman was married on one of the approved forms of marriage, recognised as valid by the law and custom governing the parties. Mere statements of witnesses, that she was the wife of a certain person, would not be enough.[28] Similarly, there is very little value in the statements of the husband and the wife for proving the marriage.[29]

19. Proof--Accused's Knowledge that Woman is Wife of Another Person

The third essential element, which the prosecution has to prove, is that the accused knew, or had reason to believe, that the woman was the wife of another person.[30] It is, however, not necessary that the adulterer should know whose wife the woman is. It would be sufficient if he knows that the woman is a married woman.[31] If an accused alleges that he had contracted *natra* with the woman according

to the customs of his caste, the court should determine whether the accused honestly believed that the woman was the wife of another man.[32] Where the accused has reason to believe that the woman is the married wife of another person, sexual4009 intercourse by him with her, whether with or without her consent, would be an offence under s 497, IPC .[33]

20. Proof--Sexual Intercourse by Accused with Wife of Complainant

In addition to what has been stated earlier, the complainant has further to establish that the accused had sexual intercourse with his wife without his consent or connivance.[34] Adultery *per se* is not an offence in India. To come under s 497, IPC, the adultery must be without the consent or connivance of the husband of the woman.[35] The court has to satisfy itself, before convicting a person of an offence under s 497, IPC, that there was no consent or connivance by the complainant.[36] Strict proof is, however, not necessary. Whether the prosecution succeeds in proving the absence of consent or connivance must, in the ultimate analysis, be a question of fact to be answered in the context of facts and circumstances of individual cases.[37]

21. Conviction

If an accused is charged only under s 498 and evidence fails to establish that charge but the same is found sufficient to establish a charge under this section, the provision of s 221(2), CrPC, can be availed of for the purpose of convicting him under this section.[38] However, an accused, charged under ss 376 and 452, IPC, cannot be convicted under ss 497 and 452, IPC, when the offence of rape under s 376, IPC, has not been established.[39] Likewise, a person convicted of adultery under this section need not be convicted under s 498, IPC .[40]

Every act of sexual intercourse amounts to an offence of adultery; if a person has several sexual intercourses with a woman, it cannot be said that the offence is a continuing offence.[41] The act of the accused in subsequent acts of adultery would be distinct offences for which he would be convicted and sentenced.[42] It is, however, undesirable that there should be successive prosecutions.[43]

22. Sentence

The sentence prescribed for the offence by the law in force, when it was committed, must be taken into account in determining the sentence.[44]

61 *Gansapalli Appalamma v Gantappali Yeliayya* (1897) ILR 20 Mad 470, 7 Mad LJ 303 ; *Olga Comes v M Gomes* AIR 1959 Cal 451 .

62 *Empress v Emaji* Rat Unrep Cr Cas 150; *Alamgir v State of Bihar* 1959 Cr LJ 527, p 529, AIR 1959 SC 45 .

63 Re *Rathna Padayachi*AIR 1917 Mad 220, 17 Cr LJ 363 .

64 *Hatim Khan v State* AIR 1963 J&K 56, (1963) 2 Cr LJ 621 .

65 *EG Hunter v Emperor* 22 Cr LJ 382 .

66 *Chanda v Nandu* AIR 1965 MP 268, 1965 MPLJ 583 .

67 *Olga Gomes v M Gomes* AIR 1959 Cal 451 .

68 *Chaudhary v Devi Ram* AIR 1951 HP 25 .

69 *WJ Phillips v Emperor* AIR 1935 Oudh 506, 36 Cr LJ 1298 .

70 *State v Tek Ram* 1951 All WR (HC) 312 .

71 *Empress v Madhub Chancier* 21 WR (Cr) 13 .

72 *Samraj Nadar v Abraham Nadachi* AIR 1970 Mad 434 .

73 *Naraini v Pyare Mohan* AIR 1972 Raj 25 .

74 *Clarance v Raicheal* AIR 1964 Mysore 67 .

75 *Gipps v Gipps* (1864) 11 HCL 1 .

76 *Munir v Emperor* AIR 1928 All 189, 27 Cr LJ 101 .

77 *William v William* (1859) 28 LPJ 97 .

78 *Allen v Allen* 30 LPJ 2 ; *Rodgers v Rodgers* 3 Hagg Ecc 57 ; *Stone v Stone* 1 Rob 101 .

79 *Clarance v Raichel* AIR 1964 Mysore 67 .

80 *Stevenson v Stevenson* 1947 WN 83 .

81 *Mudge v Mudge* AIR 1950 Pat 173 .

82 *Pothi Gollari v Ghanni Mondal* AIR 1963 Ori 60, (1963) 1 Cr LJ 312 .

83 *Khanoon Ram v Emperor* AIR 1920 Lah 62, 22 Cr LJ 266 ; *Kala Ram v Emperor* AIR 1925 Lah 635, 26 Cr LJ 1343 ; *State v Bhanwaria* AIR 1965 Raj 191, (1965) 2 Cr LJ 673 .

84 *Lakshman v State of Maharashtra* 1971 Mah LJ 33, p 37 .

85 *Yusuf Abdul Aziz v State* AIR 1951 Bom 470, 1952 Cr LJ 23 .

86 *M Kanniappan v Akilandammal* AIR 1954 Mad 427, 55 Cr LJ 516 ; *Madan Mohan v Niladari Devi* (1966) 32 Cut LT 827 .

87 *W Kalyani v State Thru Inspector of Police* AIR 2012 SC 497, p 498, (2012) 1 SCC 358, 2012 (109) AIC 161 (SC) .

88 *Yusuf Abdul Aziz v State of Bombay* AIR 1954 SC 321, 1954 Cr LJ 886 ; *Madan Mohan Rao v Niladri Dei* (1966) 32 Cut LT 827 .

89 *Sowmithri Vishnu v Union of India* AIR 1985 SC 1618, 1985 Cr LJ 1302 .

90 *Ibid.*

91 *Sunita and Ors v State of Rajasthan* 2000 Cr LJ 2621 (Raj) .

92 *Parappa Sidram Karlati v Dundawwa* (1980) 24 Mad LJ (Cr) 56, p 58-59 (Kant) ; *Semon Joseph v State of Arunachal Pradesh,* 2011 (104) AIC 956 (Gauh) .

1 *Tej Singh v State* (1965) 2 Cr LJ 455, AIR 1965 All 508 (DB) **not following***Bhawani Dutt v Emperor* AIR 1916 All 307, 17 Cr LJ 72 ; *Emperor of India v Kallu* (1883) ILR 5 All 233 ; *Jagdamba Prasad v Emperor* AIR 1933 All 626, 34 Cr LJ 1227 ; *Haider Ali v Emperor* AIR 1940 All 201, 41 Cr LJ 499 ; *Tara Prasad Laha v Emperor* (1903) ILR 30 Cal 910 (FB) **disapproving***Jalva Sheikh v Reazat Sheikh* (1893) ILR 20 Cal 483 ; *Bangari Asari v Emperor* 27 Mad 61 ; *Alien E Ker v Pramotha Nath Sarkar* 37 Cr LJ 825 ; *F Bwye v Kirk* AIR 1928 Lah 50, 29 Cr LJ 382 ; *WJ Phillips v Emperor* AIR 1935 Oudh 506, 36 Cr LJ 1298 .

2 *Nga Po Thaw v Emperor* 14 Cr LJ 284 ; *Rahmatulla v Emperor* 10 PR 1883 ; *Emperor v Kallu* (1883) ILR 5 All 233 ; *Baji v Emperor* AIR 1933 Oudh 163, 34 Cr LJ 496 .

3 *Sain v Emperor* AIR 1934 Lah 945, 36 Cr LJ 789 .

4 *Sureshchandra Vadilal Shah v Shantilal Shankarlal* 1968 Cr LJ 117 .

5 *Them Pe v U Pet* 3 LBR 175 ; *Maung Kala v Nagakin* 38 UC 433 . For further commentary, see under the same heading in s 495, *ante*.

6 *V Revathi v Union of India* AIR 1988 SC 835 .

7 *Ravinder Singh v Balbir Kaur* (1999) 2 RCR (Cri) 497 (P&H).

8 *Sowmithri Vishnu v Union of India* AIR 1985 SC 1618, 1985 Cr LJ 1302 .

9 *Konbi Karasan Varan v Daiya Naran* AIR 1951 Kutch 17 .

10 *WJ Phillips v Emperor* AIR 1935 Oudh 506, 36 Cr LJ 1298 ; *Bhola Nath Mitter v Emperor* AIR 1924 Cal 616, 25 Cr LJ 997 .

11 *Sureshchandra Vadilal Shah v Shantilal Shankarlal* 1968 Cr LJ 117 .

12 *Kulamani Bag v Ganeshram Suhula* 2003 Cr LJ (NOC) 102 (Ori), (2003) 24 OCR 111 .

13 *Kanti Devi v Pabitra Mohan Behadi* 1 (2014) DMC 715 (Ori) .

14 *BD Charles v Nara Benjamin* AIR 1979 Raj 156, p 159 (DB) ; *Vedavalli v MC Ramaswami* AIR 1964 Mysore 280, (1964) 2 Cr LJ 686 ; *RM Watson v FN Watson* AIR 1926 Cal 703 .

15 *Madan Mohan Rao v Niladri Dei* (1966) 32 Cut LT 827, p 832 ; *Jodhan Sahu v Kulwanti Kaur* AIR 1948 Pat 285, 49 Cr LJ 323 .

16 *Jodhan Sahu v Kulwanti Kuer* AIR 1948 Pat 285, 49 Cr LJ 323 ; *Madan Mohan Rao v Niladri Dei* 32 Cut LT 827 .

17 *Vedavalli v MC Ramaswami* AIR 1964 Mysore 280, (1964) 2 Cr LJ 686 ; *Queen v Madhub Chander* 21 WR (Cr) 13 .

18 *EG Hunter v Emperor* 22 Cr LJ 382 ; *Davidson v Davidson* (1856) 164 ER 526, 4 WR (Cr) 590 ; *RM Watson v FN Watson* AIR 1926 Cal 703 ; *Phillips v Emperor* AIR 1935 Oudh 506, 36 Cr LJ 1298 .

19 *Empress v Kallychur Potial* 7 WR (Cr) 59 .

20 *Chaman Ltd Monga v Haji Sabir Ali* 1973 Cr LJ 1249, p 1254 .

21 *Dova v State* (1961) 2 Cr LJ 459 (Assam) .

22 *Sunil Kanto Nandy v State of Bihar* (1964) 1 Cr LJ 250 (Pat) .

23 *Dona v Stanislaw* AIR 1928 Cal 248 .

24 *Bhunda Sukru v Chtram Pyarelal* 1976 MPLJ 600 ; *Ganga Patra v Emperor* AIR 1928 Pat 481, 29 Cr LJ 1045 ; *Gopal v Emperor* AIR 1925 Rang 328, 27 Cr LJ 651 ; *Gul Mohammad v Emperor* AIR 1934 Sind 10, 35 Cr LJ 816 ; *Akbar Khan v Empress* 40 PR 1882 ; *Empress v Smith* 4 WR (Cr) 31 ; *Emperor v Pitambar Singh* (1880) ILR 5 Cal 566 ; *Emperor v Bhagu Dhouli* 17 Bom LR 75 .

25 4 WR (Cr) 10; *Ganga Patra v Emperor* AIR 1928 Pat 481, 29 Cr LJ 1045 .

26 *Wadhwa v Fatek Mohd* 5 PR 1894 ; *Imperator v M Peters* 10 Cr LJ 235 .

27 *Aziz Khan v Ekram Hussain* 38 Cr LJ 213, AIR 1937 Pat 219 .

28 *State v Tekram* 1951 AWR (HC) 312 ; *Brij Lal Bishnoi v State and Anor* 1996 Cr LJ 4289 (Del) .

29 *Ganga Patra v Emperor* AIR 1928 Pat 481, 29 Cr LJ 1045 ; *Aziz Khan v Ekram Hussain* AIR 1937 Pat 219, 38 Cr LJ 213, 4 WR (Cr) 10 (evidence of the woman is, by no means conclusive and should be received with great caution).

30 *State v Tek Ram* 1951 AWR (HC) 312 .

31 *Empress v Madhub Chander* 21 WR (Cr) 13 .

32 *Reg v Manohar Raiji* 5 BHCR 17 .

33 *Gul Mohammad v Emperor* AIR 1947 Nag 121, 48 Cr LJ 43 .

34 Re *CS Subramanaim*AIR 1953 Mad 422, 1953 Cr LJ 765 ; *Ghanshyam v Mula* 1962 MPLJ (Notes) 339 .

35 *Sita Devi v Gopal Saran* AIR 1928 Pat 375 .

36 *Balaram Kundu v Emperor* AIR 1925 Cal 160, 25 Cr LJ 1186 .

37 *State v Bhanwaria* (1965) 2 Cr LJ 673, AIR 1965 Raj 191 .

38 *Gobinda Chandra Singha Roy v Haru Chandra Singha Roy* 1968 Cr LJ 1352 .

39 *Joginder Singh v State of Haryana* 1974 Cr LJ 117, p 118, 75 Punj LR 466 .

40 *Empress v Pechu Chung* 2 WR (Cr) 35 .

41 Re *Shankar Tulshiram Navia* 30 Cr LJ 54, AIR 1928 Bom 530 .

42 *Empress v Emaji* Rat Unrep Cr C 150.

43 *Rewa v Crown* 1941 NLJ 606 .

44 *Kanbi Karasan Naran v Daiya Naran* AIR 1951 Kutch 17 .

Indian Penal Code (Act XLV of 1860)

Chapter XX

Of Offences Relating to Marriage

S. 498.

Enticing or taking away or detaining with criminal intent a married woman.--

Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent4010 that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

The provisions of this section, like those of the preceding s 497, IPC, are intended to protect the rights of the husband, and not those of the wife. The gist of the offence under this section appears to be the deprivation of the husband of his custody and proper control over his wife with the object of having illicit intercourse with her.[45]The offence under this section is complete if it appears that the accused went away with the woman in question in such a manner as to deprive her husband of the control of his wife; the fact, that the woman accompanied the accused of her own free will, does not diminish the criminality of the act.[46]

It would not be within the ambit of this section to hold the woman guilty of abetment. In spite of the absence of express exemption, she must be treated as exempt because this offence is, as compared to adultery under the preceding s 497, a minor offence and it would be inconsistent to exempt her from the one without exempting her from the other.[47]

2. Section 366 Distinguished from Section 498

Commentary under the same heading in s 366, vol 3, may be referred to.

3. Section 498 and Section 366 --Comparison and Contrast

Section 366, IPC deals with cases where the woman kidnapped or abducted is an unwilling party and does not respond to the criminal intention of the accused. In such4011 cases, the accused intends to compel the victim afterwards to marry any person against her will or to force or seduce her to illicit intercourse. In other words, s 366, IPC is intended to protect women from such abduction or kidnapping. If it is shown that the woman, who is alleged to have been abducted or kidnapped, is a major and gave her free consent to such abduction or kidnapping, it may, *prima facie*, be good defence to a charge under the said s 366, IPC . On the other hand, s 498, IPC is intended to protect

not the rights of the wife, but those of her husband; and so *prima facie*, the consent of the wife to deprive her husband of his proper control would not be material. It is the infringement of the rights of the husband, coupled with the intention of illicit intercourse, that is the essential ingredient of the offence under s 498, IPC . It may also be pointed out that the offence under s 498, IPC is a minor offence as compared with the offence under s 366, IPC .[48]

4. Evidence of Relationship under Section 50 of the Evidence Act not Admissible for Offence under Sections 494 to 498, IPC

Commentary under the same heading in s 494, *ante*, may be referred to.

5. Essential Ingredients

In *Alamgir v State of Bihar* ,[49] the Supreme Court pointed out three ingredients of an offence under this section. They may be stated as under:

(a) the offender must take, or entice away,[50] or conceal, or detain, the woman of another person from such person or from any other person having the care of her on behalf of the said person;
(b) the offender must know, or he must have reason to believe, that the said woman is the wife of another person; and
(c) the taking, enticing, concealing, or detaining, of the said woman must be with the intent that she may have illicit intercourse with any person.

It may be pointed out that if the intention of illicit intercourse is not proved, the presence of the first two ingredients would not be enough to sustain the charge under this section. It is only if the said intention is proved that it becomes necessary to consider whether the two other ingredients are proved.[51]

What has been stated above is sufficient to make it clear that four kinds of cases are contemplated in this section. A woman may be taken away, or enticed away, or concealed, or detained. In either of the said four classes of cases, the consent of the woman would not matter if it is shown that the said consent is induced or encouraged by the offender by words or acts or otherwise. Whether any influence, preceding from the offender, has operated on the mind of the woman or has co-operated with or encouraged her inclinations, would always be a question of fact. If, on evidence, the court is satisfied that the act of the woman in leaving her husband was caused either by the influence of allurement, or blandishment, proceeding from the offender, that may be enough to bring his case within either of the three classes of cases mentioned in this section. In this connection, when the consent or free will of the woman is4012 relied upon in defence, it is necessary to examine whether such alleged consent or free will was not due to allurement or blandishment or encouragement preceding from the offender.[52]

The taking or enticement of the wife must be from the control of the husband before an offence can be convicted under s 498 . If, however, there is no such control of the husband over the wife, then it is difficult to say that the enticement of the wife would be punishable under this section.[53] However, a wife, living in her husband's house, or in a house, hired by him at his expenses, for her occupation, is, during his temporary absence, living under his protection so as to bring the case within the ambit of this section.[54] If the wife goes to her parents house with the intention of returning to her husband's house and is enticed away while staying at the parent's house, she can be said to have been taken away from a person, having the care of her on behalf of her husband, and the accused would be guilty under s 498, IPC .[55] Where, however, a husband has openly discarded his wife for many years and the wife has been recognised as an agent to go anywhere she likes and she is enticed away by the accused from there, it cannot be said that her father had care of her on behalf of her husband.[56]

6. 'Takes'

The main ingredient of the offence under this section is taking or enticing away the wife from the husband by a person.[57] There is no definition, in the IPC, of the word 'taking'. It is apparently intended to mean something different from 'enticing'. It cannot, however, mean 'taking by force' because this would amount to abduction.[58] Where the accused not only provided the means, namely, a boat, in which the complainant's wife was taken away from the complainant's relation's house, but also brought it to the house and himself went away with her in the boat from the house, it was held that he 'took' her away within the meaning of this section.[59] The offence is complete if the accused 'takes away' another man's wife with the intent that she may have illicit intercourse with him.[60] Where a woman, unwilling to live with her husband, may be even for good reasons, goes away and lives with another person who is willing to take her as his wife, the other person should be held to have 'taken' her within the meaning of this section.[61] There must be some influence, physical or moral, brought to bear, by the accused, to induce the wife to leave her husband in order that her leaving may amount to taking away by the accused. When there is no evidence of any physical or moral persuasion on the part of the accused and the wife left her husband because he was ill-treating her, it was held that the offence, under4013 this section was not committed.[62] It is not enough that the woman left her husband's house, or that she was afterwards seen passing alone with the accused, if it is not shown that she left by reason of any act or assistance proceeding from the accused.[63]

7. 'Entices'

The main ingredient of s 498, IPC, is taking or enticing away the wife from the husband by a person.[64] Where the accused told the wife of the complainant that he could not continue the liaison in the house of her husband any longer and if she wanted to maintain the friendship, she would have to agree to desert her husband's roof and go over to the accused and live with him, in which case he would keep her as his mistress, it was held that it amounted to enticement.[65] In *Empress v Poddee* ,[66] the woman did not care for her husband and was perfectly willing to exchange her life of drudgery and hard living for that of a prostitute. Likewise, she would have had no opportunity of doing so and, but for the accused, an old procuress, she would have remained quietly, if not contentedly, in her husband's house. It was held that the accused was guilty of enticing the woman and she was convicted under s 498, IPC . It is enough if the woman is induced to actually leave her husband's protection with the intent that she may have illicit intercourse with any person. It does not matter whether the person, enticing her away, is her paramour or only a third party or whether she will meet a paramour.[67] However, the fact, that the woman was living in the same house with the accused and his relatives, would not prove that she was enticed away by any or all of them.[68] Similarly, the mere fact, that the wife, who went away of her own accord from her husband's house, was in the company of the accused in a part of her way, is not sufficient to show that the accused took or enticed the woman away within the meaning of the section. There must be some tangible evidence of taking or enticing.[69] Where a woman, who had been discarded by her husband and was living with her father and brother, eloped with the accused, it was held that the elopement was a joint adventure and that there was no enticement.[70]

8. 'Any Woman who is, and whom he Knows or has Reason to believe to be, the Wife of Any Other Person'

Before a conviction can take place under this section, it must be established that the accused knew or had reason to believe that the woman, taken, or enticed, away, was the wife of some other man.[71] There must be evidence of some kind from which the inference may be drawn that the accused knew the woman to be a married woman. Mere presumption, that he must have known this fact, is not sufficient.[72] Where the4014 accused lived in a neighboring village and belonged to the same brotherhood as that of the woman, it was held that he must be presumed to have the necessary knowledge that the woman was a married woman.[73]

9. 'With Intent that she may have Illicit Intercourse with any Person'

The essential ingredient of the offence under this section is that the wife may be taken, or entice, away, concealed, or detained, with the specific intent that she may have illicit intercourse with any person.[74] It must established beyond all reasonable doubt that the accused took away the woman with the intention of having illicit intercourse with her.[75]

Sexual intercourse between the woman and any person other than the one to whom she has been given in marriage, during the lifetime of her husband, would be illicit intercourse within the meaning of this section.[76] Even if the re-marriage of a married woman is only invalid, any intercourse between the re-married woman and the person, whom she remarries, would be illicit, and if the intention of the person, enticing the woman away, is to re-marry her, his intent should be that she would have illicit intercourse.[77]

10. 'Conceals'

Commentary under the heading 'Wrongfully Conceals or Confines' in s 368, vol 3, may be referred to.

11. 'Detains'

The word 'detains' may denote detention of a person against his or her will. However, detention, in the context of this section, must mean keeping back a wife from her husband, or from any other person, having the care of her on behalf of her husband, with the requisite intention. Such keeping back may be by force; but, it need not be by force. It can be the result of persuasion, allurement, or blandishment, which may have either caused the willingness of the woman, or encouraged her initial inclination, to leave her husband.[78] The persuasion, allurement, or blandishment necessary to make out such detention, must be with the intent to have illicit intercourse.[79] To keep any person's wife with the promise of marriage or upon the understanding that she will be married is an allurement and persuasion.[80]4015

12. 'Such Woman'

The words 'such woman', in this section, means such woman whom the accused knows, or has reason to believe, to be the wife of any other man; the detention of such a woman with the requisite intent is an offence made punishable under this section.[81]

13. Procedure

The offence under this section is non-cognizable, bailable, compoundable by the husband of the woman,[82] and triable by a magistrate, and may also be tried summarily.

Once a compromise is made in respect of an offence under this section, any further proceedings before the magistrate on the ground that the complainant had been forced into the compromise would be ultra vires.[83]

14. Complaint--By whom to be made

Cognizance of offences under Ch XXI, IPC can be taken only on complaint of an aggrieved person.[84]

A report of an officer is not a complaint where there is no complaint to a magistrate by the husband or guardian.[85] Where a complaint was filed by the father of the woman and the husband, when he came into the witness box, approved of the complaint, it was held that the conviction under s 498 was bad in law in the sense that the complaint had been made by a person who was not authorised, in law, to make such a complaint at all.[86] Where the complaint was of the offences of kidnapping a minor girl and theft of her jewels and there was no complaint of an offence of enticing away a married woman for the purpose of having illicit intercourse with her, it was held that there was no complaint under s

198 of CrPC .[87] If, however, a petition contains an allegation of facts, which if proved by evidence would constitute an offence under s 498, such petition is a complaint. The fact that there are also other allegations which constitute a more serious offence, such as an offence under s 366,[88] or under s 494,[89] will not make the complaint any the less a complaint. It is not necessary that the complaint should specify also the section under which it has been made. What is necessary is only this much that the complaint should mention the allegations which, if proved, would constitute an offence under s 498, IPC .[90] Similarly, where the husband was not a complainant, but it appeared4016 from his deposition when he appeared as a witness in a case under s 366, IPC, that he wanted the conviction of the accused for committing adultery with his wife, it was held that the deposition of the husband was a complaint on which the accused could be convicted under s 498, IPC .[1] A contrary view has, however, been expressed in other cases. The fact that the husband appeared as a witness in the prosecution of the offence of rape, cannot be regarded as amounting to the institution of a complaint for adultery.[2]

15. Charge

The offence under this section being triable as a summons case, framing of a formal charge is not necessary. Section 251 , CrPC, may be referred to.

16. Proof

In order to establish a charge under this section, it must be proved[3] that:

(a) the woman, in relation to whom the offence has been committed, was the wife of another person;
(b) the offender knew, or he had reason to believe, that the said woman was the wife of another person;
(c) the said woman was taken, or enticed away, or concealed, or detained, from--

    (i) that man, or
    (ii) a person having the care of her on behalf of that man; and

(d) the said taking, enticing, concealing, or detaining, was with intent that the said woman may have illicit intercourse with any person.

17. Proof--Complainant is to be the Lawful Husband

A complainant is incompetent to prosecute another man under s 498 for enticing away a woman unless he establishes that he is the lawful husband.[4] If the marriage of the woman to the complainant was violable, and not void, and could, under certain circumstances, be repudiated by her, the elements of an offence under this section would not be established.[5] In *Karan Singh v Emperor* ,[6] it was held that when the woman, who renounced the faith of Islam, ceased to be the wife of the complainant, the accused were at liberty to take her away from the house of her father. Similarly, the marriage of a woman, before expiry of the period of *iddat*, would be null and void.[7] Where a Mohammadan complainant admitted that he had married six times, but had pronounced divorces of two of his wives which were revocable, it was held that the complainant was not the husband of the sixth woman so married.[8] However, *chadar andazi* marriage with a widow is recognised as valid among some Rajputs of Kangra district in Punjab,[9] and a complaint by the husband under this section would4017 be maintainable.[10] A marriage with a maternal aunt by *chadar andazi* ceremony is, however, not valid among the Aroras of Punjab.[11] A person, who has purchased a married woman, is not competent to file a complaint.[12] However, an inter-caste marriage between persons of different

castes, especially when recognised by the caste, to which the husband belongs, would be valid, and a complaint by such a husband would be maintainable.[13] Divorce is permitted among Khatiks and a *karewa* of the divorced woman with the complainant would be valid for a complaint under this section.[14] The marriage of a Mohammadan girl, performed during her minority by her mother, would be subsisting till she exercises the option of repudiating the marriage after puberty, and a person, enticing her for the purpose of having illicit intercourse before the exercise of such option, would be guilty under this section.[15]

18. Proof--Validly Married Wife

The expression 'wife', in ss 497 and 498, IPC means a legally and validly married wife, and, therefore, in a prosecution under these sections, the factum as well as the legality and validity of the marriage must be strictly proved beyond any reasonable doubt.[16] The evidence of the complainant and the woman would not be sufficient even though there is admission of the accused.[17] The evidence of the complainant and two witnesses, to the effect that the marriage, in the *nikah* form, was solemnised by applying vermilion on the forehead of the bride followed by a feast, was held to be insufficient in *Prahlad Barman v Emperor.* [18] Proof only of the factum of the marriage is not sufficient. It must also be proved that the marriage had been celebrated strictly in accordance with the requirement of customs and law applicable to the parties.[19]*Chadar andazi* form of marriage is not a legal marriage, unless custom is proved justifying such a marriage.[20] There may arise a presumption that by cohabitation for a period of 18 years, a marriage has taken place, but persons cannot be convicted on a presumption of this kind.[21] No amount of evidence as to habit and repute can establish a marriage in a case where no valid marriage is possible.[22]4018

19. Proof--Valid Marriage

Marriage is a mixed question of law and fact, and when a marriage has to be proved, the witnesses must depose to the facts and leave the court to decide whether they constitute a valid marriage.[23] Where no proof was adduced as to the marriage of the woman with the complainant except that she was referred to as his wife, it was held that the prosecution must fail for want of strict proof of marriage.[24] The legality of the marriage would, however, be satisfactorily proved by the unrebutted evidence of the woman, the husband and their parents, describing the marriage in detail.[25] Where there was the evidence of the complainant, the woman, and her mother, who were aware of the fact of the marriage, and the accused neither cross-examined the witnesses as to the fact or validity of the marriage, nor otherwise impugned it, it was held that the marriage was sufficiently proved.[26] Where the evidence consisted of the statements of the husband and the wife regarding the marriage and the evidence was not subjected to cross-examination by the accused, it was held that the evidence was sufficient to establish the relationship of husband and wife.[27]

20. Proof--Enticement and Illicit Intercourse

The enticement, *etc*, for illicit intercourse must be proved. Intention or knowledge is, however, not a tangible thing; it has to be gathered from the facts and surrounding circumstances.[28] Where the woman deposed that she was removed in a car to Bangalore and was kept there in a house where they lived as man and wife for a number of days, it was held that this clear evidence showed that the accused did so with intent to have illicit intercourse with the woman.[29] The fact that the accused and the woman stayed together at night at the house of a relation of the accused, was held to be sufficient to show that there was criminal intent.[30] The intention may be held to be proved from the spirit of love letters written by the accused to the complainant's wife.[31] However, the mere fact, that the woman in question was seen outside the house of the accused, is not sufficient to hold the accused guilty under this section.[32]

21. Conviction

When it is neither proved nor shown that the enticement was for the purpose of having illicit

intercourse, no conviction under s 498, IPC, is sustainable.[33] A person, who is prosecuted under ss 366 and 376, IPC, cannot be held guilty of having committed an offence under s 498, IPC, if the offence with which he was charged, is not established.[34] Where the accused are charged under s 366A, IPC, they cannot be convicted under s 498, IPC, if no complaint is made.[35]4019

22. Sentence (General)

The determination of the right measure of punishment depends on various factors, which cannot be dealt with exhaustively. Nor is it possible to lay down any mathematical formula to measure the penalty in each case, except laying down some guidelines by way of illustration. The determination of the right measure of punishment in a particular case, though guided by variety of considerations, not excluding the predilection of the presiding judge, is a matter of discretion. However, it is a judicially balanced discretion and, therefore, the courts should always bear in mind the necessity of proportion between an offence and the penalty. Punishment fall broadly into two classes:

(i) those in which the courts have favored the passing of lenient sentence and the observance of moderation; and
(ii) those in which the courts have encouraged the passing of heavy or deterrent sentence.

Under the first category will come sentences which are technically 'corrective' or 'normal', while under the latter category--'exemplary' or 'deterrent' and 'punitive'. In deciding the measurement of punishment, the court ought to take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender and his age, character, means, culture and the antecedents.[36] The question of sentence is normally in the discretion of the trial court. It is for the trial court to take into account, all relevant circumstances and decide what sentence would meet the ends of justice in a given case. Though the High Court has, in its revisional jurisdiction, power to enhance such sentence, this power can be properly exercised only if the High Court is satisfied that the sentence imposed by the trial court is unduly lenient or that in passing the order of sentence, the trial court had manifestly failed to consider the relevant facts. It would not be right for the High Court to interfere with the order of sentence, passed by the trial court, merely on the ground that if it had tried the case, it would have imposed a slightly higher or heavier sentence.[37]

23. Sentence (Lenient)

Ordinarily, corrective punishments are given when the offender is of immature understanding and might have committed the offence on the spur of the moment due to temporary lapse. Awarding severe sentence in such a case would not be in the interest of the society, for it would convert mere delinquents into hardened criminals, thus defeating the purpose of law. Nominal punishment is awarded when the offence is purely technical without the necessary *mens rea* of a criminal.[38] A light sentence was held to be sufficient to meet the ends of justice when the abducted woman was an active abettor,[39] or where the woman was not on good terms with her husband and went to the accused of her own accord,[40] or where the woman of undoubtedly bad character, married to an immature boy, was abducted and detained not against her4020 wishes,[41] or where the woman was of loose moral character and was dissatisfied with the complainant and was willing to marry the accused.[42]

24. Sentence (Deterrent)

A deterrent sentence is proper, when the offence is the result of deliberation and pre-planning, is committed for the sake of personal gain at the expense of the innocent, is a menace to the safety, health or is difficult to be detected or traced.[43] The prevalence of a particular crime in a particular area or during a particular period should also be taken into account. For example, theft of cycle, though ordinarily is not such a grave offence, yet may call for exemplary punishment if it becomes widespread

at any time in any place. A deterrent sentence is wholly justifiable when the offence is the result of deliberation and pre-planning, is committed for the sake of personal gain at the expense of the innocent, is a menace to the safety, health, or moral well being of the community, or is difficult to be detected or traced.[44] When the accused had enticed away a married woman, the punishment of fine of Rs 200 was found grossly inadequate and was enhanced to 6 months rigorous imprisonment.[45] Where the accused, who had promised to return the complainant's wife, did not do so but concealed her, it was held that a sentence of six months rigorous imprisonment was not excessive.[46]40214022

45 *Alamgir v State of Bihar* AIR 1959 SC 436, 1959 Cr LJ 527, p 529 .

46 *Emperor v Jan Mahomed* 4 Bom LR 435 ; *Alamgir v State of Bihar* 1959 Cr LJ 527, p 531, AIR 1959 SC 436 .

47 *Phulla v Jiwan* 6 PR 1871 ; Re *Natha Singh* 11 PR 1883; *Mohun v Gunsham* 8 PR 1871 **overruling** Re *Syed Ahmed* 17 PR 1868; Re *Balabai* 1 Weir 574; *Basir Mohammad v Peer Khan* 1972 WLN 139 .

48 *Alamgir v State of Bihar* 1959 Cr LJ 527, p 529, AIR 1959 SC 436 .

49 *Alamgir v State of Bihar* 1959 Cr LJ 527, 531, AIR 1959 SC 436 .

50 *Natarajan v Ramanujan* 1997 Cr LJ 389 (Mad) .

51 *Alamgir v State of Bihar* 1959 Cr LJ 527, p 530, AIR 1959 SC 436 ; *Prem Nath Laroiya v State* 1973 Cr LJ 1281, p 1284 .

52 *Alamgir v State of Bihar* 1959 Cr LJ 527, p 530, AIR 1959 SC 436 ; *Adikanda Samal v Madhubananda Naik* 1973 Cr LJ 1735 (Ori) ; *DR Kumthekar v State* AIR 1967 Punj 330, 1967 Cr LJ 919 ; *Abdul Kayam v Emperor* AIR 1934 Sind 72, 35 Cr LJ 1254 .

53 *Gul Mohhamed v Emperor* AIR 1934 Sind 10, 35 Cr LJ 816 .

54 *Mutty Khan v Mungloo Khansama* 5 WR (Cr) 50 .

55 *Kankanala Veikateshwarlu*1968 MLJ (Cr) 299, (1968) 1 Andh WR 380.

56 *Pahlwan Emperor* 16 Cr LJ 216.

57 *Natrajan v Ramanujan* 1997 Cr LJ 389 (Mad) .

58 *Jnanendra Nath Dey v Kshitish Chandra Dey* 37 Cr LJ 28, AIR 1935 Cal 677 ; Re *Akkirayu Sanyasi* 51 Cr LJ 228, AIR 1950 Mad 18 ; *Chhotey Lal v State* 1955 ALJ 894 .

59 *Jnanendra Nath Dey v Kshitish Chandra Dey* 37 Cr LJ 28, AIR 1935 Cal 677 .

60 Re *Akkirayu Sanyasi* 51 Cr LJ 228, AIR 1950 Mad 13 ; *Empress v Kumarami* 1 Weir 569 (1) (even if the advances and solicitations proceed from the woman and the accused had, for some time, refused to yield to her request); *Ram Chandra Chintama v State* (1966) 32 Cut LT 5, p 8 .

61 *Ramaswami Udayar v Raju Udayar* 54 Cr LJ 607, AIR 1953 Mad 333 .

62 *Mahadeo Rama v Emperor* 44 Cr LJ 584, AIR 1943 Bom 179 .

63 *Hossaini Mvlhor v Emperor* AIR 1937 Cal 460, 38 Cr LJ 986 ; *Chhotey Lal v State* 1955 ALJ 984 . See also commentary under the same and relevant headings in s 361, vol 3.

64 *Natarajan v Ramanujan* 1997 Cr LJ 389 (Mad) .

65 Re *Tirumal Raju*AIR 1947 Mad 368 .

66 1 WR (Cr) 45.

67 *Empress v Gunman* 9 PR 1899 .

68 *Luqman v Emperor* AIR 1934 Lah 86, 35 Cr LJ 1032 .

69 *Norman O'Connor v Emperor* AIR 1935 Cal 345, 37 Cr LJ 73 .

70 *Ramnarayan Baburao Kapur v Emperor* 38 Cr LJ 769, AIR 1973 Bom 186 . For further commentary, see under the same heading in s 361, vol 3.

71 *Hamad v Emperor* AIR 1931 Lah 194, 32 Cr LJ 1210 ; *Pahlwan v Emperor* 16 Cr LJ 216 ; *Lachman Chamar v Emperor* 21 Cr LJ 417 .

72 *Batiram Keot v Bhandaram Keot* 22 Cr LJ 412, AIR 1920 Cal 979 ; *Akshey Kumar Maiti v Emperor* AIR 1933 Cal 880, 34 Cr LJ 1092 .

73 *Fazal Dad v Emperor* AIR 1928 Lah 898, 29 Cr LJ 762 .

74 *Ganesh Ram v Gyan Chand* 21 Cr LJ 139 .

75 *Dittu v Emperor* 30 Cr LJ 195 ; *Dori v Emperor* 34 Cr LJ 1196 ; *Hari Kishan v State of Himachal Pradesh* AIR 1954 HP 39, 1954 Cr LJ 845 .

76 *Naurang v Emperor* 16 Cr LJ 315 .

77 *Hamad v Emperor* AIR 1931 Lah 194, 32 Cr LJ 1210 ; *Anuara Begum v Habit Mea* (1962) 2 Cr LJ 159 (Tripura) .

78 *Alamgir v State of Bihar* 1959 Cr LJ 527, p 530, AIR 1959 SC 436 ; *Emperor v Mahiji Tula* AIR 1933 Bom 489, p 490, 35 Cr LJ 376 ; *Prithi Missir v Harak Nath Singh* 38 Cr LJ 180 (2); *Niyamat Khan v Gaffar Khan* 1976 Raj Cr C 30 ; *Prem Nath Laroiya v State* 1973 Cr LJ 1281, p 1284 .

79 *Prem Nath Laroiya v State* 1973 Cr LJ 1281 (HP) .

80 *Niyamat Khan v Gaffar Khan* 1976 Raj Cr C 320 ; *Chaman Lal Monga v Haji Sabir Ali* 1973 Cr LJ 1249, p 1253 .

81 *Empress v Niadar* (1888) ILR 10 All 580 ; *Emperor v Jagannath Gir* AIR 1937 All 353, 38 Cr LJ 621 ; *Ala Bukhsh v Emperor* 16 PR 1891 ; *Bipad Bhajan Sarkar v Emperor* AIR 1940 Cal 477, 41 Cr LJ 954 ; *Alamgir v State of Bihar* 1959 Cr LJ 527, AIR 1959 SC 430 .

82 *Mir Alam v Emperor* 23 Cr LJ 690 ; *Harnam Dass v Sam Dass* 24 Cr LJ 120 agent acting for the husband not entitled to compound the offence); *Mahbub Ali Khan v Emperor* 24 Cr LJ 780 .

83 *Emperor v Harnam Singh* 11 Cr LJ 366 .

84 *Simon Joseph v State of Arunachal Pradesh* 2011 (104) AIC 956 (Gauh) .

85 *Bhana v Emperor* 12 Cr LJ 50 .

86 *Mahandi v Emperor* 36 Cr LJ 423, AIR 1934 Lah 122 ; *Hatem Ali v Emperor* AIR 1946 Cal 493, 47 Cr LJ 325 .

87 *Arunachalam Chetty v Emperor* 24 Cr LJ 837 .

88 *Mohan Singh v Emperor* 36 Cr LJ 404, AIR 1934 All 472 .

89 *Brahma Dat v Emperor* 22 Cr LJ 742, AIR 1921 Oudh 149 ; *Emperor v Hashmat* 19 PR 1882 .

90 *Shyam Lal v State* 1958 Cr LJ 11, AIR 1958 All 76 ; Re *Pedda Anjinigadu* 22 Cr LJ 762.

1 *Bhawani Dutt v Emperor* 17 Cr LJ 72 ; *Emperor v Imankhan Rasulkhan* 14 Bom LR 141 ; *Sureshchnndra Vadilal Shah v Shantilal Shankerlal* 1968 Cr LJ 117 .

2 *Cheman Garo v Emperor* (1902) ILR 29 Cal 415 ; *Emperor v Kallu* (1883) ILR 5 All 233 . For further commentary, see under the same heading in s 497, *ante*.

3 *Dalip Singh v Rex* AIR 1949 All 237, 50 Cr LJ 359 ; *Alamgir v State of Bihar* AIR 1959 SC 436, 1959 Cr LJ 527 .

4 *Nihala v Emperor* 11 Cr LJ 155 .

5 *Bulanda v Emperor* 11 Cr LJ 664 .

6 AIR 1933 All 433, 34 Cr LJ 869.

7 *Isa v Ranon* 13 Cr LJ 136 .

8 *Rub Nawaz Khan v Crown* 1 PR 1875 .

9 *Deoki v Ramdhan* 98 PR 1890 ; *Gobindu v Emperor* 20 Cr LJ 554 ; *Nihala v Emperor* 11 Cr LJ 155 .

10 *Deoki v Ramdhan* 98 PR 1890 .

11 *Saudagar v Emperor* AIR 1928 Lah 165, 29 Cr LJ 210 .

12 Re *Mughlu*(1925) 26 PLR 382.

13 *Emperor v Madan Gopal* (1912) ILR 34 All 389 .

14 *Bholar v Emperor* 15 Cr LJ 539 (1).

15 *Fazal Dad v Emperor* AIR 1928 Lah 898, 29 Cr LJ 762 .

16 *Chandra Buhadur v State* 1978 Cr LJ 942**relying** on *Bhaurao Shanker Bakhande v State of Maharashtra* AIR 1965 SC 1564, (1965) 2 Cr LJ 544 ; *Dalip Singh v Ram* AIR 1949 All 237, 240, 50 Cr LJ 359 ; *M Ramanathan v Emperor* 28 Cr LJ 268 ; *Ramdhani Gope v Jageshwar Mahto* AIR 1941 Pat 520 ; *Empress v Dal Singh* (1898) ILR 20 All 166 ; *Buddhu v Emperor* 21 Cr LJ 368 .

17 *Emperor v Phiku* AIR 1925 Oudh 701, 26 Cr LJ 1376 ; *Emperor v Kallu* (1883) ILR 5 All 233 ; *Wadhwa v Patch Mohammad* 5 PR 1894 ; *Pujari v Aryan Bissovi* 1980 Cut LR (Cr) 89, p 91 (it is not necessary for the prosecution to prove all the ceremonies constituting the legal marriage of the woman with another man ; it is sufficient if the accused admits the fact of the marriage of the woman with another man).

18 AIR 1930 Cal 447, 31 Cr LJ 1091.

19 *Akshay Kumar Maiti v Emperor* AIR 1933 Cal 880, 34 Cr LJ 1092 .

20 *Gian v State* 1966 Cr LJ 477, 1965 Kash LJ 39 ; *Deoki v Ramdhan* 98 PR 1890 (it is recognised as valid manage among some Rajputs of Kangara district in Punjab); *Gobindu v Emperor* 20 Cr LJ 554 ; *Nihala v Emperor* 11 Cr LJ 155 .

21 *Vir Singh v Emperor* AIR 1930 Lah 230, 30 Cr LJ 1051 ; *Emperor v Arshed Ali* (1883) 13 Cal LR 25 ; *Keraga v Empress* 1 Weir 560 ; *Gul Mohammad v Emperor* AIR 1934 Sind 10, 35 Cr LJ 816 ; *Empress v Wazeerah* 1 WR (Cr) 5 (marriage must be presumed from the fact of man and woman living together and from their own evidence (altogether unrebutted) that she is his legally married wife).

22 *Inder Singh v Thakur Singh* AIR 1921 Lah 20 ; *Bhagu Dhondi v Emperor* 16 Cr LJ 213 (Bom) ; *Emperor v Phikku* AIR 1925 Oudh 701, 26 Cr LJ 1376 ; *Raghupat Singh v Emperor* 28 Cr LJ 31, AIR 1927 Oudh 140 .

23 *Imperator v M Peters* 10 Cr LJ 235 ; *Dalip Singh v Rex* AIR 1949 All 237, p 240, 50 Cr LJ 359 .

24 *Imperator v M Peters* 10 Cr LJ 235 ; *Emperor v Bechar* 13 Cr LJ 541 .

25 *Nazir Khan v Emperor* 15 Cr LJ 78 .

26 *Empress v Subbarayan* (1886) ILR 9 Mad 91, 1 Weir 572 .

27 *Syed Munir v Emperor* 18 Cr LJ 1016 .

28 *Abid Ali Khan v Prabhakar Rao M Mawle* 1968 Cr LJ 398 (AP) ; *Adikanda Samal v Madhabananda Naik* 1973 Cr LJ 1735 .

29 *Venkataramana v Government of Mysore* AIR 1952 Mysore 34, 53 Cr LJ 705 .

30 *Jnanendra Nath Dey v Kshitish Chandra Dey* AIR 1935 Cal 677, 37 Cr LJ 28 .

31 *Ram Chandra v State* 32 Cut LT 5 .

32 *Deonandan v Emperor* 21 Cr LJ 383 .

33 *Adikanda Samal v Madhabananda Nayak* 1980 SCC (Cr) 108, p 109, (1979) 4 SCC 488 .

34 *Haider Ali v Emperor* AIR 1940 All 201, 41 Cr LJ 499 ; *Empress v Srimotee Poddee* 1 WR (Cr) 45 ; *Satya Narain Bhagat and Anor v State of Bihar* 1985 Cr LJ 747 (Pat) .

35 *Jagdamba Prasad v Emperor* 34 Cr LJ 127, AIR 1933 All 626 .

36 *Adikanda Samal v Madhabananda Naik* 1973 Cr LJ 1735 (Ori) .

37 *Alamgir v State of Bihar* 1959 Cr LJ 527, p 533, AIR 1959 SC 436 .

38 *Adikanda Samal v Madhabananda Naik* 1973 Cr LJ 1735 (Ori) .

39 *Lal Khan v Emperor* 15 Cr LJ 524 ; *Chandgi v Emperor* AIR 1927 Lah 91, 28 Cr LJ 52 .

40 *Rasul Khan v Emperor* 11 Cr LJ 597 (1).

41 *Ram Chand v Emperor* 12 Cr LJ 500 .

42 *Alamgir v State of Bihar* 1959 Cr LJ 527, p 538, AIR 1959 SC 436 .

43 *Adikanda Samal v Madhabananda Naik* 1973 Cr LJ 1735 (Ori) .

44 *Ibid.*

45 *Ghulam Muhammad v Emperor* AIR 1933 Lah 932, 35 Cr LJ 16 .

46 *Ibid.*

Indian Penal Code (Act XLV of 1860)

Chapter XX-A[1]

Of Cruelty by Husband or Relatives of Husband

TOPICAL INTRODUCTION

Section 498A has been engrafted in the IPC in a situation where the national conscience was disturbed by the intensity and volume of instances of wife beating, bride burning and cruelty of different degrees and variations directed against women that necessitated a law to punish such acts. Whereas religion and custom prescribed marriage to be a bond founded on love and the concept of sharing, local experience indicated, in some strata of society particularly, that it had been transformed into a license to ill-treat. Law as an instrument of fostering social order is also required to be used as a channel for doing good and conversely for curbing evil.[2]It was by the Criminal Law (Second Amendment) Act 1983 (46 of 1983), which received the President's assent on 25 December 1983, that s 498A was inserted in the IPC . The statement of objects and reasons of the said amending Act referred to the increasing number of dowry deaths, which was a matter of serious concern. The extent of the evil was commented upon by the joint committee of both the Houses to examine the working of the Dowry Prohibition Act 1961. It was found that cases of cruelty by the husband and relatives of the husband which culminate in suicide by, or murder of, the hapless woman concerned, constitute only a small fraction of cases involving such cruelty. An offence in the nature of abetment to commit suicide may also attract the provisions of s 306, IPC, which was already in the statue book. It was, therefore, proposed to suitably amend the IPC, Crpc, and the Indian Evidence Act 1872 to effectively deal with not only the cases of dowry deaths, but also the cases of cruelty to a married woman by the relatives of her husband. It was with a view to achieving this object that, *inter alia*, s 498A was inserted in the IPC . The other amendments effected by Criminal Law (Second Amendment) Act 1983 were to ss 174 and 176 of the CrPC and the insertion of s 198A of the CrPC and s 498A of the IPC thereof. As far as the Indian Evidence Act 1872 is concerned, after s 113, s 113A was inserted raising a presumption against the husband that he or his relative had abetted the suicide by the married woman.[3] The legislature has tried to amend the law in order to curb the vice of husband or the married woman by their husband or the relatives of her husband which may culminate in suicide by or murder of the hapless woman concerned. It can be safely said that this amendment of the criminal law and the rule of procedure was necessitated to meet the social challenge to save the married4023 woman from being ill-treated or forced to commit suicide by the husband or relatives of the husband generally in order to coerce her to fetch more dowry or on her refusal to do so kill herself keeping in view that the ill-treatment of married woman is usually confined within the four walls of her matrimonial home which in most of the cases are located far away from the home of her parents and there is no likelihood of availability of any evidence. The legislature in its wisdom has rightly enacted s 113A of the Evidence Act, raising a presumption against the husband or the relatives of the husband for the abetment of suicide by a married woman within a period of seven years of her marriage if she has been treated with cruelty by her husband or such a relation in order to coerce her to fetch more dowry or on her refusal to do so. Thus, it cannot be said by any stretch of imagination that s 498A of the IPC or s 113A of the Evidence Act has introduced invidious classification *qua* the treatment of a married woman by her husband or relatives of her husband *vis-à-vis* the other offenders.[4] This chapter consists of only

one section, *viz*, s 498A, IPC but the importance of this chapter and section can be judged by the fact that these are in rampant use in matrimonial cases. The basic purpose underlying this chapter is to prevent woman from cruelty at the hands of their husband and his relatives. However, it is seen that the provisions of this chapter are sometimes misused by the victim-wife to unnecessarily implicate the relatives of the husband, the tendency of which should be discouraged. This view finds support from the under mentioned authorities.[5]

1 Inserted by the Criminal Law (Second Amendment) Act, 1983 (46 of 1983), s 2 (wef 25-12-1983).

2 *State of Maharashtra v Vasant Shankar Mhasane and Anor* 1993 Cr LJ 1134 (Bom) (DB) .

3 *Balkrishan Pandurang Moghe v State of Maharashtra* 1998 Cr LJ 4496 (Bom) (DB) .

4 *Krishna Lal and Ors v Union of India* 1994 Cr LJ 3472 (P&H) (DB) .

5 *Kans Raj v State of Punjab* 2000 Cr LJ 2993 (SC) ; *Savitri Devi v Romesh Chand* 2003 Cr LJ 2759 (Del) .

Indian Penal Code (Act XLV of 1860)

Chapter XX-A

Of Cruelty by Husband or Relatives of Husband

[6][S. 498A.

Husband or relative of husband of a woman subjecting her to cruelty.--

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.--For the purposes of this section, "cruelty" means--

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]40244025

Comments

1. Scope

Section 498A was grafted in the IPC specifically to deal firmly and effectively with all cases of cruelty towards and harassment of women.[7] The section, however, is especially worded in order to

encompass even the class of cruelty committed through the litigate process.[8] The definition of 'cruelty' figuring in the explanation appended under s 498A, IPC is not vague as the perusal of cl (a) would show that the prosecution has to establish, first the wilful conduct of the offender, secondly, that the nature of such conduct was likely to drive a woman to commit suicide or to cause grave injury or danger to life or limb (whether mental or physical). Thus, on proof of these facts to the satisfaction of the court under the circumstances of a particular case the husband or relatives of the husband shall be presumed to have treated the woman with cruelty. The wilful conduct certainly implies the establishing of a motive to treat such a woman with cruelty. The gravity of such conduct is also reflected in the wording of cl (a) of the explanation that such conduct should be likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of a woman. Consequently, the definition under cl (a) cannot be said to be vague as it rules out minor differences between the wife and husband or the latter's relatives. In cl (b), the definition of cruelty pertains to harassment of a married woman with a view to coercing her or any person related to her to meet the unlawful demand of dowry or for any property or valuable security or on account of her failure of any person related to her to meet such a demand. Thus, on the given facts of a particular case the court has first to form an opinion that as a matter of fact such harassment has close nexus with coercing a married woman to meet the unlawful demand of her husband or relatives of the husband *qua* any property or valuable security. Thereafter the presumption of treating her with cruelty will arise. Obviously, the legislature has defined the term 'cruelty' while keeping in view the object which was required to be achieved. Thus, the ordinary dictionary meaning of 'cruelty' would not be applicable to hold that it is vague being interpreted in so many ways.[9]

This section has no retrospective application[10] and does not violate art 14 of the Constitution of India .[11] The *mens rea* is an essential ingredient of offence under s 498A, IPC .[12] The refusal to return *streedhan* despite repeated requests attracts the continuing offence, so fresh limitation will start running from the day the wife makes a demand from the accused for the return of *streedhan*.[13] It is not every harassment or4026 every type of cruelty that would attract s 498A, IPC . It must be established that the beating and harassment was with a view to force the wife to commit suicide or to fulfil illegal demands of her husband and his relatives.[14]

Cognizance of offences under ch XXI, IPC can be taken only on complaint of an aggrieved person.[15]

There is gross abuse of the provisions of s 498A ; often resorted to harass the husband and his relatives. As observed by the Supreme Court in a case[16] a serious relook of the entire provision is warranted by the legislature. It is also a matter of common knowledge that exaggerated versions of the incident are reflected in a large number of complaints. The tendency of over implication is also reflected in a very large number of cases. The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the court but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law.

2. Amendment

Section 498A is the only section in ch XXA and both were inserted in the IPC by the Criminal Law (Second Amendment Act) 1983 (46 of 1983). The assent of the President was received on 25 December 1983 and publication in the Gazette of India, (Extra) was made on 26 December 1983.

3. Statement of Objects and Reasons

The statement of objects and reasons of the Criminal Law (Second Amendment) Act 1983 (46 of 1983) opens with the following observations:

Statement of Objects and Reasons

> The increasing number of dowry deaths is a matter of serious concern. The extent of the evil has been commented upon by the joint committee of the House to examine the working of the Dowry Prohibition Act 1961. Cases of cruelty by the husband and relatives of the husband which culminate in suicide by or murder of the hapless woman concerned, constitute only a small fraction of the cases involving such cruelty. It is therefore, proposed to amend the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by their in-laws.

After setting out the above, para 2 mentions the proposed changes. The Indian Penal Code was proposed to be amended by making cruelty to a woman by her husband, or any relative of her husband, punishable with imprisonment for a term which may extend to three years and also with fine. Wilful conduct of such a nature by husband or any relative of the husband as is likely to drive the woman to commit suicide or cause grave physical or mental injury to her and harassing a woman by her husband or any relative of her husband with a view to coercing her or any of her relatives to meet any unlawful demand of property was to be made punishable as cruelty. That is4027 why s 498A came to be inserted in the IPC . A perusal of the said provisions makes it clear that what is made penal is the conduct of the husband or the relative of the husband who subjects such a woman to cruelty. The word 'cruelty' has been defined in the explanation to s 498A, IPC . Clause (a) thereof deals with any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman. Clause (b) deals with harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. It is common knowledge that despite prohibition of the pernicious social evil of demand or payment of dowry under the Dowry Prohibition Act 1961, number of dowry deaths was escalating. It had become a subject of grave concern to the enlightened section of the society. It therefore, received anxious consideration of the joint committee of both the houses of Parliament. As a result of constant harassment, humiliation etc. at the hands of the husband or his relatives, the married woman used to become helpless and being unable to bear with it, was driven to commit suicide. The existing law was found to be inadequate even though s 306, IPC, stood on the statute book and Dowry Prohibition Act 1961 was enacted. It was in this background that s 498A was inserted in the Penal Code.[17]

4. Constitutional Validity

The provision of s 498A of the IPC is not unconstitutional and *ultra vires*.[18] The classification of the husband and his relatives, of a married woman, as a separate class under s 498A, IPC, is not at all discriminatory and there is no violation of the guarantee enshrined under art 14 of the Constitution . There is a valid justification for classifying the husband and his relatives as a separate class for the purposes of s 498A, IPC . Normally, in the offences committed within the four walls of the matrimonial home, where others have no easy access, there is no discrimination or anything obnoxious to the doctrine of equality, so as to violate the guarantee enshrined in art 14 of the Constitution .[19]

5. Object

The object of the provisions is prevention of the dowry menace.[20]

6. Section 498A has Prospective Application

According to art 20 (1) of the Constitution of India :

> (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a4028 penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
>
> ...

The penal provision, therefore, can have no retrospective effect.[21] A bare perusal of s 498A, IPC, leaves no doubt that the legislature intended the operation of this provision to be prospective in nature and not retrospective because in the latter case, it would have specifically stated so. Thus, these penal provisions of s 498A are certainly prospective in nature and would not be attracted where the alleged act of cruelty towards the wife by the husband or the latter's relatives took place prior to the insertion of s 498A in the IPC . These acts may otherwise be punishable under the then existing provisions of the IPC,[22] if according to the chargesheet, the offence of s 498A, IPC, was committed between 11 March 1976 and 11 December 1983. Chapter XXA containing s 498A has been introduced in the IPC by the Amending Act 46 of 1983, which came into force on receipt of the assent of the President on 20 December 1983. It is, therefore, clear that s 498A, IPC, at the time when the offence is said to have been committed.[23]

7. Section 498A and Section 304B --Distinction

Section 304B and s 498A, IPC are not mutually exclusive. These provisions deal with two distinct offences. It is true that 'cruelty' is a common essential to both sections and has to be proved. The explanation to s 498A, IPC gives the meaning of 'cruelty'. In s 304B, IPC there is no such explanation about the meaning of 'cruelty' but having regard to the common background to these offences the meaning of 'cruelty' or 'harassment' will be the same as given in the explanation to s 498A under which 'cruelty' by itself amounts to an offence and is punishable under s 304B . It is 'dowry death' that is punishable and such death should have occurred within seven years of the marriage. No such period is mentioned in s 498A and the husband or his relatives would be liable for subjecting the woman to 'cruelty' anytime after the marriage.[24]Section 498A to some extent overlaps with s 304B but it cannot be said that sufficient provision has already been incorporated in the IPC in the shape of s 498A so as to deprive the court from recording the conviction under s 304B read with s 116, IPC .[25] The ingredients of s 304B are totally different than that of s 498A, IPC . The scope of s 498A is wider as compared to s 304B, IPC .[26]

8. Section 498A and Demand of Dowry

Section 498A has nothing to do with demand of dowry.[27]4029

9. Section 498A and Section 306 --Distinction

The basic difference that lies between the two sections is that of 'intention' under s 498A, IPC, where cruelty committed by the husband or his relations compels the woman to commit suicide, while under s 306, IPC, suicide is abetted and intended.[28]

10. Mens Rea

The intent to injure is the most important element of cruelty contemplated under s 498A, IPC .[29] The sole constituent of the offence under s 498A is 'cruelty' which means 'wilful conduct'. The word wilful contemplates obstinate and deliberate behavior on the part of the offender for it to amount to cruelty.

Thus *mens rea* is an essential ingredient of the offence.[30] Though intention to cause injury is not an essential ingredient, regard may be had as to the actual intention or knowledge on the part of the offending spouse as to actuator probable effect whether it would cause injury to physical or mental health. Again acts or conduct should be judged from the angle of a person possessing ordinary intellectual capabilities.[31] Lord Denning, a celebrated and legendary judge of this century, says:[32]

> When the conduct consists of direct action by one against the other, it can then properly be said to be aimed at the other, even though there is no desire to injure the other or to inflict misery on him. Thus, it may consist of a display of temperament emotion or perversion whereby the one gives vent to his or her own feelings, not intending to injure the other, but making the other the object at whose expense the emotion is relieved.

> When there is no intent to injure they are not to be regarded as cruelty unless they are plainly and distinctly proved to cause injury to health... when the conduct does not consist of direct action against the other but only of misconduct indirectly affecting him order, such as drunkenness, gambling or crime, then it can only properly be said to be aimed at the other when it is done not only for the gratification of the selfish desires of the one who does it, but also in some part with an intention to injure the other or to inflict misery on him or her. Such an intention may readily be inferred from the fact that it is the natural consequence of his conduct, specially when the one spouse knows, or it has already been brought to his notice, when the consequence will be, and nevertheless he does it, careless and indifferent whether it distresses the other spouse or not. The court is, however not bound to draw the inference. The presumption that a person intends the natural consequences of his acts is one that may not be drawn.

> If in all the circumstances it is not the correct inference, then it should not be drawn. In cases of this kind, if there is no desire to injure or inflict misery on the other, the conduct only becomes cruelty when the justifiable remonstrances of the innocent party provoke resentment on the part of the other, which evidence itself in actions or words actually or physically directed at the innocent party.4030

11. Abetment

The allegation against the accused that because he was having doubt in his mind that his wife eloped with someone for a particular period and so he was rarely talking to his wife are not sufficient to hold that the act of the accused be considered as an abetment or the accused was guilty under s 498A or s 306, IPC .[33] Where the main offence is not proved, there would be no question of abetment as envisaged by s 114, Evidence Act.[34]

12. Limitation

When s 498A, IPC, is brought to use, in the case of cruelty on a woman, the law of limitation is not that rigid so as to not suit the aggrieved wife. A fair dose of liberalism is warranted, so that the law as an instrument comes in aid of the aggrieved due to gender inequalities.[35] Therefore, when the predominant reason which weighed with the trial court to dismiss the complaint under ss 420 and 498A, IPC, was that it was belated by two years and the four prosecution witnesses were interested in nature, and the order of trial court was confirmed by the High Court, the Supreme Court set aside the order of the High Court and remanded the matter back to it to dispose of the matter in appeal to merit after issuing notice to the accused.[36] The essence of the offence under s 498A, IPC, is cruelty as defined in the explanation appended to this section. It is a continuing offence and on each occasion on which the wife was subjected to cruelty, she would have a new starting point of limitation.[37] The

refusal to return the *streedhan* despite repeated requests attracts the continuing offence. In the case of a continuing offence, a fresh limitation will start running from the day the wife makes a demand from the accused for the return of *streedhan* and their refusal to do so.[38]

Limitation period for taking cognizance for offence under s 498A, IPC is three years.[39]

13. Jurisdiction

If ill-treatment is given to the wife by the husband and his relatives at a different place, but the complaint is filed by the wife in court of the magistrate having jurisdiction where wife is living with her mother, the court of the magistrate has no jurisdiction to take cognizance of the alleged offence.[40] Simply because the husband and others did not call the wife to the matrimonial home, it cannot amount to harassment. These facts cannot clothe the magistrate's court within whose local jurisdiction the wife's parents' house is situated, with jurisdiction to entertain a complaint by her under s 498A, IPC .[41] However, if the offence under s 498A, IPC, was not committed at the place of abode of the wife where she was residing with her4031 parents and the husband belonged to and lived in another district of another state, the complaint filed by the wife in the court having jurisdiction at the place where she was residing, was competent as the consequences of the offence ensued upon the complainant at her present place of abode.[42] If one of the incidents pertaining to s 498A, IPC, took place in the territorial jurisdiction of the court, the said court is justified in entertaining the case.[43]

14. Acquittal in Police Case Bars Retrial in Complaint Case

Where there is a complaint case against the relatives of the husband on the same allegations against which the husband was earlier acquitted in the police case, and the accused were residing at a different place and no overt act was attributed to them in the complaint, it was held that when for the same incident another case had been instituted against the husband which ended in his acquittal, the same cannot be retried on the basis of complaint.[44]

15. When Complaint is not Maintainable Against the Husband, It is not Maintainable against other Accused

When in the complaint, the allegations were primarily directed to the husband, if that is not triable then the complaint as a whole becomes non-maintainable.[45] But the fact that the other accused persons, *i.e.*, the mother-in-law and the father-in-law of the deceased are acquitted can be no ground to extend the benefit of the doubt to the accused husband.[46]

16. FIR

It is not unusual that a person acquitted under s 302 may be found guilty under s 498A read with s 306, IPC . Therefore, when a woman died within seven years of marriage and, though there were definite allegations by her father against his son-in-law and the latter's sister about the harassment of the deceased on the question of dowry, the registration of the case only under s 302, IPC, is not proper. The case ought to have been registered under s 498A read with s 306, IPC, besides s 302, IPC .[47] Each and every aspect of cruelty inflicted on the victim need not be mentioned in the FIR.[48]

17. Investigation

In view of sensitivity of such offences and viewing this problem from human and social point of view, and the law as it stands today, it is required that the investigation into these offences be vested in civil authorities like the executive magistrate and after his finding as to the commission of the offence, cognizance4032 should be taken. Till such a mechanism is evolved, no police officer below the rank of assistant commissioner of police for the offences under ss 498A / 406, IPC, and the deputy commissioner of police for the offence under s 304B, IPC, *i.e.*, dowry death, should be vested with

investigation and where minor school going children are named, they shall not be arrested and be sent to the court for taking cognizance and further proceedings. Their arrest ruins their future life and lowers them in their self esteem. The courts have dealt with the bail applications and prosecution of children merely for the fact that their names also figured in the complaint lodged by the wife. In certain cases, even grandparents of the husband who are in their eighties and nineties suffer this traumatic situation.[49]

18. Bail

Commentary under the same heading in s 304B, vol 3, may be referred to.

19. Offences under Section 498A / Section 406 should be made Bailable and Compoundable

To check misuse, s 498A, IPC could be made compoundable by the aggrieved under s 320(2), CrPC with permission of court. The court could then always refuse to grant permission to compound the offence where it is of the opinion that the application for compounding appears to be coerced or it is not bonafide, or where after a similar compromise on an earlier occasion, the present incident has occurred, and again the matter is being sought to be closed by a compromise. Need for permission by court before permitting compounding could obviate any malafide recourse to this provision.[50]

The desirability of making offences under s 498A, IPC compoundable under s 320, CrPC has also been emphasised in a Division Bench decision of the Allahabad High Court in the case of *Madhurima Bhargava v State of Uttar Pradesh* .[51] The following observations have been made in that decision:

> Although this is beyond our scope in this reference to suggest to make the offences in relation to marriage or married life compoundable, yet it would not be out of place to mention that in every provision of law relating to marriage, it has been provided that the Court shall first try to reconcile the dispute between the parties, i.e., husband and wife, to the marriage and if reconciliation is not possible then to proceed with the case. Reconciliation is nothing else but a compromise of compounding between the parties. The Family Court Act, in which all the family disputes are covered is specific example of this fact. This is with a view to maintain a matrimonial home than to break it and in view of these facts we can only suggest than an offence pertaining to marriages should be made compoundable.

In the light of all these observations and the facts and circumstances alluded to in this judgment, it would be proper to suggest to the Law Commission to consider the appropriateness of making offences under s 498A, IPC compoundable under s 320, CrPC, albeit with the permission of the court.[52]4033

The marital offences under ss 498 / 406, IPC be made bailable, if no grave physical injury is inflicted and necessarily compoundable. If the parties decide to either settle their disputes amicably to salvage the marriage or decide to put an end to their marriage by mutual divorce, they should be allowed to compound the offences so that criminal proceedings do not chase them if they want to start their marital life afresh or otherwise. The past should not haunt them nor should the hatchet they have buried be allowed to be dug up and mar their present life or future married life.[53]

20. Withdrawal from Prosecution

Where the public prosecutor has pleaded that there were bleak chances for the prosecution to succeed but has not stated in the application that it was in the public interest to withdraw from the prosecution, it shows that the public prosecutor was guided by the order of the Government of Andhra Pradesh and he had not considered the matter independently. The order by a magistrate showing non-application of mind on his part in allowing withdrawal from prosecution is illegal. More so, when

the state government itself had revoked the withdrawal order subsequently.[54]

21. Concept of Dowry

The concept of dowry is intermittently linked with a marriage, and the provisions of the Dowry Prohibition Act 1961 apply in relation to marriages. If the legality of the marriage itself is an issue further legalistic problems do arise. If the validity of the marriage itself is under legal scrutiny, the demand of dowry in respect of an invalid marriage would be legally not recognizable. Even then the purpose for which ss 498A and 304B, IPC and s 113B of the Indian Evidence Act 1872 were introduced cannot be lost sight of. Legislations enacted with policy to curb and alleviate some public evil rampant in society and effectuate a definite public purpose or benefit positively requires to be interpreted with certain element of realism too and not merely pedantically or hyper technically. The obvious objective was to prevent harassment to a woman who enters into a marital relationship with a person and later on, becomes a victim of the greed for money. Can a person who enters into a marital arrangement be allowed to take a shelter behind a smokescreen to contend that since there was no valid marriage the question of dowry does not arise? Such legalistic niceties would destroy the purpose of the provisions. Such hairsplitting legalistic approach would encourage harassment to a woman over demand of money. The nomenclature 'dowry' does not have any magic charm written over it. It is a label given to demand of money in relation to marital relationship.[55] Mere monetary demand is not in the nature of dowry and it attracts s 498A, IPC .[56]

22. Presumption of Marriage--Duty of the Court

It is the duty of the court to give effect to the legislative amendment which was directed towards punishing husbands who indulge in atrocities against their spouses and in the absence of evidence to the contrary all these provisions will have to be applied on the footing that the marriage is presumed to be a valid one and the parties4034 are presumed to be husband and wife unless the contrary is established. Unless this view is enforced it will lead to an atrocious situation with double injustice being done to the victim woman who led through ceremonies of marriage and imparted the status of wife in situation where she is not aware of te possible impediments and if those impediments are upheld to the benefit of the wrong doer husband, it would lead to the unthinkable and untenable conclusion of allowing a party to take advantage of his own wrong. That is not the scheme of the law and consequently, the provisions both of the IPC and the Dowry Prohibition Act would apply in all cases where there is evidence of a marriage between the parties unless and until it is established that the marriage in question was a void marriage. Even as far as the latter position is concerned drawing a parallel with the provisions relating to legitimacy of children in the case of void or voidable marriages, it would, in the interest of justice, perhaps be permissible to construe that even in cases where a marriage was declared void at a point of time after the commission of the offence that the court would still treat the parties as having deemed to be husband and wife as on the date of commission of the offence.[57]

23. Valid Marriage

In the absence of a valid marriage, s 498A does not come into operation.[58]

24. Proof of Marriage--Relative Position in Sections 498A , 494, IPC and Section 125 , CrPC

A plain reading of s 498A, IPC would go to show that the ingredients of the offence do not require the prosecution to strictly prove validity of a marriage in question inasmuch as in such a proceeding the main focus is on the elements of 'cruelty' within the meaning of that section which is alleged to have been perpetrated upon the women. This provision has nothing in common with the scope and objective of s 494, IPC, where main focus is on a second marriage during lifetime of a spouse. Thus, ingredients of such an offence under s 494 being purely related to incident of a second marriage required a stricter proof which is not the case in a proceeding under s 498A . If it is found that the

parties were living together and a child was born out of their relation as in the present case, nothing more is required about their marital status in a proceeding under s 498A for the court to decide the question of cruelty on her and whether an offence under s 498A has been committed. The standard of proof as is required in a proceeding under s 494 is not at all necessary in a proceeding under s 498A, the objects and ingredients of the two provisions being entirely different. Thus, only *prima facie* proof of marriage as is required in a proceeding under s 125 of IPC would serve the purpose in a proceeding under s 498A .[59]

25. 'Relative of the husband'

The word 'relative' in s 498A would include father, mother, husband or wife, son, daughter, brother, sister, nephew or niece, grandson or granddaughter of an individual or the spouse of any person. It principally includes a person related by4035 blood, marriage or adoption. It would not include girl friend or concubine of the husband. As such a girl friend or concubine of the husband cannot be prosecuted for offence under s 498A, IPC .[60]

The expression relative of the husband further came up for consideration in the case of *Vijeta Gajra v State of NCT of Delhi* [61] and while approving the decision of the Supreme Court in *U Suvetha*, it was held that the word relative would be limited only to the blood relations or the relations by marriage.

The word 'relative of the husband' in s 304B, IPC would mean such persons, who are related by blood, marriage or adoption.[62]

The respondent, the brother of the aunt of the deceased, was held not to be a relative of the deceased's husband.[63]

Section 498 is a penal provision; hence its provision shall be construed strictly. A girl friend or a concubine is not a relative of the husband within the meaning of s 498A, IPC .[64]

26. Husband

The legislative intent is clear from the fact that it is not only the husband but also his relations who are covered by s 498A, IPC . Legislature has taken care of children born from invalid marriages. Section 16 of the Hindu Marriage Act 1955 deals with legitimacy of children of void and voidable marriages. Can it be said that legislature which was conscious of the social stigma attached to children of void and voidable marriages closed its eyes to the plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship. If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to marriages. The first exception to s 494, IPC has also some relevance. According to it, the offence of bigamy will not apply to 'any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction'. It would be appropriate to construe the expression 'husband' to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any manner or for any of the purposes enumerated in the relevant provisions, ss 304B / 498A, IPC, whatever be the legitimacy of the marriage itself for the limited purpose of ss 498A and 304B, IPC . Such an interpretation, known and recognised as purposive construction has to come into play in a case of this nature. The absence of a definition of 'husband' to specifically include such persons who contract marriages ostensibly and cohabitate with such woman, in the purported exercise of his role and status as 'husband' is no ground to exclude them4036 from the purview of s 304B or 498A, IPC, viewed in the context of the very object and aim of the legislations introducing those provisions.[65]

Husband in ss 304B and 498A need not be a legally married person.[66]

27. Wife

For the purpose of s 498A, IPC, which is peculiar to Indian families, the victim spouse is always the 'wife' and the guilty is the husband and his relatives both near and distant, living together or separately.[67] If on the date of the alleged cruelty, the informant/victim ceased to be the wife of the accused on the basis of pronouncement of *talaq* by a written divorced deed and factum of *talaq* is admitted by the wife and allegation of cruelty being false and concocted, the FIR as well as the chargesheet against the accused is liable to be quashed.[68] Under r 64(ii) of the principles of *Mohammadan Law*,[69] it was stated that a *shia* male is permanently prohibited to the woman whom he has divorced by triple *talaq*.[70] Therefore, when both the parties are *shias* and undisputedly the accused-husband had divorced the complainant (wife), even if the complainant and accused were living together, they cannot be called as husband and wife, so the provisions of s 498A, IPC, and ss 4 and 6 of the Dowry Prohibition Act are not applicable to these facts.[71]

28. Second Wife

The prohibitory words 'woman... .of her marriage' and '...by her husband' used in s 304B, IPC and 'husband of a woman' used in s 498A, IPC, undoubtedly cover only a legally wedded woman and her husband having a valid marriage, and they also fit in the object and the policy of the two amending statutes (by which these two sections were inserted), and as such their import cannot be extended so as to include a woman married in fact, but whose marriage is void in law.[72] However, the expression 'wife' in s 498A, IPC must receive the same interpretation as in s 125, CrPC . If there is no evidence that the first marriage was legally performed in accordance with Hindu rites, it cannot be said that the victim (alleged second wife) was not the wife of the accused.[73] Second wife can be treated as the relative of the accused husband within the meaning of s 498A .[74] Even if the deceased wife is second wife not legally wedded of the accused, the provisions ss 304B and 498A, IPC are attracted.[75] The fact that the deceased was the second wife and not the legally4037 wedded wife of the accused is no ground to hold that the conviction under ss 304B and 498A is not attracted.[76]

29. Mistress

There is no reason why s 498A, IPC, cannot be applied to a case where a person inflicts such cruelty and harassment as to lead his mistress to commit suicide.[77] However, if the prosecution evidence at the best indicates that the deceased woman was living in the house of the accused as his woman but there was no evidence to indicate that she had married the accused or that her earlier marriage was not subsisting on that date to infer a relationship between the deceased and the accused husband and wife, the requirement of s 498A, IPC, is not fulfilled.[78] A person cannot be charged for offence under s 498A, IPC at the instance of a lady who is a kept or a concubine but not a wife.[79]

30. Foster sister

A foster sister is not relative of the husband by blood, marriage or adoption; she therefore cannot be prosecuted for offence under s 498A, IPC .[80]

31. Cruelty--Meaning

The New Webster's Dictionary has given the meaning to the word 'cruel' as follows, 'Disposed to give pain to others in body or mind; destitute of pity, compassion, or kindness; applied to persons; exhibiting or proceeding from cruelty, causing pain, grief or distress; inhuman, tormenting, vexing.'[81]

However, the ordinary dictionary meaning of 'cruelty' would not be applicable to hold that 'cruelty' figuring in the explanation appended to s 498A is vague.[82] It is not every harassment, every type of cruelty that would attract s 498A, IPC . It must be established that the beating and harassment was with a view to force the wife to commit suicide or to fulfil illegal demands of the husband and his relatives.[83] It is difficult to straightjacket the term 'cruelty' by means of a definition, because cruelty is a relative term. What constitutes cruelty for one person may not constitute cruelty for another person.[84] The expression 'cruelty' postulates such treatment as to cause reasonable apprehension in the mind

of the wife that her living with the husband4038 will be harmful and injurious to her life. Therefore, to decide the question of cruelty the relevant factors are the matrimonial relationship between the husband and the wife, their cultural and status in life, their state of health, their interaction in daily life which dominate the aspect of cruelty.[85] Parameters of what constitutes cruelty in matrimonial affairs have been well carved out in American Jurisprudence.[86] These are:

The question whether the misconduct complained of constitutes cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person complaining of the acts. The question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse. That which may be cruel to one person may be laughed off by another, and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances. Thus, to ascertain marital cruelty though ordinarily whole series of acts or conduct should be weighed to infer cruelty yet an isolated act can lead to inference of cruelty if its gravity or seriousness or of such a magnitude that it is likely to cause grave injury to physical or mental health of victim spouse. Composite picture should be drawn as to the acts, incident or conduct for ascertaining whether these amount to cruelty, physical or mental. Unless such kinds of physical or mental ill-treatments when taken together lead to the inference of persistent cruelty, charge of cruelty cannot stick.[87]

Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman, depriving her of economic sources or essential amenities of life.[88]

32. Elements of Cruelty

A bare perusal shows that the word 'cruelty' encompasses any of the following elements:

(i) any 'wilful' conduct which is of such a nature as is likely to drive the woman to commit suicide; or
(ii) any 'wilful' conduct which is likely to cause grave injury to the woman; or
(iii) any 'wilful' act which is likely to cause danger to life, limb or health, whether physical or mental of the woman.[89]

33. Cruelty--Two Parts of

The expression 'cruelty' has been defined for the purpose of s 498A of the IPC . It is in two parts. The first part envisages the wilful conduct on the part of the husband or his relatives towards the woman, which may likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical). The expression willful conduct, therefore, requires to be understood in conjunction with the other requirement *viz.* the consequence of such a conduct on the4039 wife. The second part contemplates the harassment of the woman, which harassment shall be with a view to coerce the woman or any person related to her to meet any unlawful demand for any property or valuable security or is on account of their failure to meet such demand. Therefore, harassment must be accompanied by unlawful demand for property or valuable security.[90]

34. Cruelty--Question of Fact

Whether one spouse has been guilty of cruelty to the other is essentially a question of fact. The impact of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education *etc*. Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words,

each case has to be decided on its own facts to decide whether the mental cruelty was established.[91]

35. Cruelty under Section 498A

A new dimension has been given to the concept of cruelty. The explanation to s 498A, IPC provides that any wilful conduct which is of such a nature as is likely to drive a woman to commit suicide would constitute cruelty. Such wilful conduct which is likely to cause grave injury or danger to life, limb or health (whether mental or physical of the woman) would also amount to cruelty. Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security would also constitute cruelty.[92] Cruelty would mean any willful conduct which was of such a nature as was likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical to the woman.[93]

The cruelty as contemplated under s 498A, IPC, denotes the state of conduct, which is painful and distressing to the victim.[94] The basic purport of the statutory provision is to avoid 'cruelty' which stands defined by attributing a specific statutory meaning attached thereto as noticed herein before. Two specific instances have been taken note of in order to ascribe a meaning to the word 'cruelty', as is expressed by the legislatures: Whereas, expln (a) involves three specific situations *viz.*,

(i) to drive the woman to commit suicide; or
(ii) to cause grave injury; or
(iii) danger to life, limb or health, both mental and physical, and thus involving a physical torture or atrocity.4040

In expln (b) there is absence of physical injury but the legislature thought it fit to include only coercive harassment which obviously as the legislative intent expressed is equally heinous to match the physical injury: whereas one is patent, the other one is latent, but equally serious in terms of the provisions of the statute since the same would also embrace the attributes of cruelty in terms of s 498A .[95]

The ingredient of cruelty is common to s 304B and 498A, IPC, but the width and scope of the two sections is different, inasmuch as s 304B deals with cases of death as a result of cruelty or harassment within seven years of marriage, while s 498A has a wider spectrum and it covers all cases in which the wife is subjected to cruelty by her husband or relative of the husband which may result in death by way of suicide or cause grave injury or danger to life, limb or health (whether mental or physical) or even harassment caused with a view to coerce the woman or any person related to her to meet unlawful demand for property or valuable security. A person charged under s 304B can be convicted under s 498A, IPC also.[96]

36. Cruelty--Its Definition under Section 498A is not Vague

The definition of 'cruelty' figuring in the explanation appended under s 498A, IPC is not vague as the perusal of cl (a) would show that the prosecution has to establish firstly the wilful conduct of the offender, secondly that the nature of such conduct was likely to drive a woman to commit suicide or to cause grave injury or danger to life or limb (whether mental or physical). Thus, on proof of these facts to the satisfaction of the court under the circumstances of a particular case the husband or relatives of the husband shall be presumed to have treated the woman with cruelty. The wilful conduct certainly implies the establishing of a motive to treat such a woman with cruelty. The gravity of such conduct is also reflecting in the wording of cl (a) of the explanation that such conduct should be likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of a woman. Consequently, the definition under cl (a) cannot be said to be vague as it rules out minor differences between the wife and husband or the latter's relatives. In cl (b), the definition of

'cruelty' pertains to harassment of a married woman with a view to coercing her or any person related to her to meet the unlawful demand of dowry or for any property or valuable security or on account of her failure or failure of any person related to her to meet such a demand. Thus, on the given facts of a particular case the court has first to form an opinion that as a matter of fact such harassment has close nexus for coercing a married woman to meet the unlawful demand of her husband or relatives of the husband qua any property or valuable security. Thereafter the presumption of treating her with cruelty will arise. Obviously, the legislature has defined the term 'cruelty' while keeping in view the object which was required to be achieved. Thus, the ordinary dictionary meaning of 'cruelty' would not be applicable to hold that it is vague being interpreted in so many ways.[97]4041

37. Cruelty-- Section 498A , IPC and Section 113A, Evidence Act

By virtue of explanation to s 113A of the Evidence Act, for the purpose of s 113A Evidence Act, 'cruelty' shall have the same meaning as in s 498A, IPC .[1]In a nut shell, the first requisite for attracting the presumption under s 113A of the Evidence Act, it must be proved that the wife was subjected to 'cruelty' as defined in s 498A, IPC .[2] Prosecution evidence did not prove that the deceased was subjected to cruelty by the accused. Simply because the accused husband and the deceased in the past used to quarrel, it by itself was not sufficient to attract the provisions of s 498A, IPC .[3]

38. Cruelty--What Constitutes--Relevant Factors

Section 498A of the IPC extends protection to the woman from the whims and caprices of man. This section was incorporated in the statute to fill in the lacuna in the existing law, so that if the wife commits suicide, the guilty does not escape. 'Cruelty' as defined in s 498A means any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb, or health whether mental or physical of the woman, or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand, for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. The expression 'cruelty' takes within its sweep both mental and physical agony and torture. The concept of cruelty varies from place to place and individual to individual and according to the social and economic status of the person involved. The question whether the act complained of was an act of cruelty has to be determined from the whole fact and relationship between the parties. The cultural and temperamental state of life among them is factors from where the cruelty has to be inferred and will depend on the facts of each case. The expression cruelty postulates such a treatment as to cause reasonable apprehension in the mind of the wife that her living with the husband will be harmful and injurious to her life. Therefore, to decide the question of cruelty the relevant factors are the matrimonial relationship between the husband and wife, their cultural and temperament status in life, state of health, their interaction in their daily life which dominate the aspect of cruelty.[4]

39. Cruelty--No Straitjacket Mould

The concept of cruelty varies from individual to individual also depending upon the social and economic status to which such person belongs. 'Cruelty' for the purposes of constituting the offence under s 498A, IPC need not be physical and even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case.[5] It would also be unwise to categorise specific acts or conduct which are4042 capable of amounting to cruelty as such categorisation cannot be put in straitjacket mould. In this regard one is reminded of words of wisdom of Lord Tucker[6] who said:

> ...Judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purpose of matrimonial suits and experience has shown the wisdom of this course. It is, in my view, equally undesirable if not impossible by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in

> cases where no physical violence is averred. Every such act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse, and the offenders knowledge of the actual or probable effect of his conduct on the other's health are all matter which may be decisive in determining on which side of the line a particular act or course of conduct lies, it is, generally speaking not possible to compartment acts for the purposes of relevance as being gross so as to constitute cruelty or less gross so as to constitute cruelty, though there may be extreme cases where the acts in themselves are so trivial as to justify dismissal of an action for lack of relevance without proof, it is with regard to the sufficiency of the facts and matters relied on as amounting in the aggregate to cruelty that I think consistorial causes are so different from many other types of action.

40. Cruelty--Relative Scope under Sections 498A, 306 and 304B

A single act of cruelty of a person can fall within the mischief of various offences. He can be guilty under s 498A, under s 306, IPC and that very act can further bring within the mischief of s 304B, IPC . It is true that expln (a) added to s 498 has some common elements with the provisions of s 306, but it cannot be said that s 498A alone has the compatibility with s 306, IPC . Explanation (b) added to s 498A would further show that this section has also the comparability which can lead to the offence under s 304, IPC . If harassment to a woman has been caused with a view to coercing her or any person related to her in order to meet any unlawful demand for any property or valuable security or on account of failure by her or any person to meet such demand, such harassment would amount cruelty under s 498A, IPC . Thus the legislature has drafted expln (b) which is more near to the provisions of s 304B so far as the demand of dowry *etc*. is concerned. Thus the short meaning of s 498A is that if a woman is subjected to maltreatment and such treatment can likely lead her to commit suicide or to cause herself grave injury or danger to her life, limb or health, such conduct on the part of the husband, whether mental or physical, will be considered as cruelty. If the husband surcharges the atmosphere of the family and that of the matrimonial home to such an extent that a self-respectable woman takes into her head to finish herself instead of daily sufferings, such an act will definitely come under s 498A, IPC . However, if in that direction the lady steps forward and tries to finish herself under the stress of cruelty, the husband is also guilty for cruelty attracting s 306 besides s 498A . If on account of cruelty and harassment under s 498A, a woman dies under abnormal circumstances within seven years of her marriage and it is shown that she was subjected to cruelty by her husband or his relative in connection with demand of dowry, the person can be convicted both under s 498A read with s 304B, IPC .[7]4043

41. Cruelty--Presence of Husband and his Relatives is not Necessary

If repeated demands for dowry are made and harassment is meted out to a woman, which may be physical or mental, it is an act of cruelty. It is not necessary that the husband or his relatives must be present at the time when the housewife is subjected to cruelty. If their act/conduct, omission/commission is of such a nature which results in mental and physical harassment, it will amount to an act of cruelty to a woman and it is immaterial that the woman is living at that relevant time at her matrimonial home or at her parents' house.[8]

42. Cruelty--Second Wife can be treated as Relative of Husband

The test under s 498A, IPC is whether in the facts of each case, it is probable that a woman is treated by friends, relatives, husband or society as a 'wife' or as a mere 'mistress'. If from the pleadings and evidence the court finds that the woman concerned is regarded as wife and not as a mere mistress, she can be considered to be a 'wife' and consequently as 'the relative of the husband' for purpose of s 498A, IPC . Proof of a legal marriage in the rigid sense as required under civil law is unnecessary for establishing an offence under s 498A, IPC . The expression 'marriage' or 'relative' can be given only a diluted meaning which a common man or society may attribute to those concepts in the common parlance, for the purpose of s 498A, IPC . A second wife who is treated as wife by the husband, relatives, friends or society can be considered to be 'the relative of the husband' for the purpose of s 498A of IPC . If she inflicts cruelty on the legally-wedded wife of the husband, an offence under s

498A, IPC will lie against her.[9]

43. Cruelty as a Ground for Divorce

The cruelty simpliciter is now a ground for divorce under s 13 of the Hindu Marriage Act (Act 25 of 1955). Section 13 provides, so far as it is material:

> **" S. 13 . Divorce.**--
>
> (1)Any marriage solemnised whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--
>
> (i)...
>
> (i-a) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or
>
> ..."

Section 13(1)(i-a) of the Hindu Marriage Act uses the words 'treated the petitioner with cruelty'. The word 'cruelty' has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem to determine it. It is a question of fact and degree. If it is mental, the problem presents difficulty. First the inquiry must begin as to the nature of the cruel treatment. Second the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the4044 other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and *per se* unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be inquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.[10]

It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. The judges and lawyers, therefore, should

not import their own notions of life. As Lord Denning said in *Sheldon v Sheldon* 'the category of cruelty are not close'.[11] Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the realm of cruelty.[12]

These preliminary observations are intended to emphasise that the court in matrimonial cases is not concerned with ideals in family life. The court has only to understand the spouses concerned as nature made them and consider their particular grievance. As Lord Reld observed in *Gollins v Gollins* :[13]

> In matrimonial affairs we are not dealing with objective standards; it is not a matrimonial offence to fall below the standard of the reasonable man for the reasonable woman. We are dealing with this man or this woman.[14]

Justice Chandrachud (as he then was) in *Narayan Ganesh Dastane v Sucheta Narayan Dastane* [15] said:

> The court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court, for, even if they may not be able to draw their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures.[16]

Cruelty's definition has been adopted from English law, though for the purpose of divorce on the ground of cruelty, Indian law defines it as a conduct as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party. Element that cruelty should be of such nature as to cause 'danger' to life, limb or health or as to give rise to4045 reasonable apprehension of such a danger does not exist in Indian laws of divorce. This ingredient is of much sterner and higher degree.[17] Supreme Court in *NG Dastane (Dr) v S Dastane (Mrs)* [18] has referred to this aspect of cruelty like this:

> The inquiry therefore has to be whether the conduct charged as cruelty is of such a character as to cause in mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English law that the cruelty must be of such a character as to cause 'danger' to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other.

44. Cruelty--Standard of Proof Higher in Criminal Law than in Civil Law

The principles are that:

(a) the standards of proof of cruelty are higher in degree in criminal law than in civil law under the matrimonial causes;
(b) the intention or *mens rea* on the part of one spouse to injure the other is not necessary element of cruelty in civil law for matrimonial causes while it is an essential element in

criminal law;

(c) it is enough if cruelty is proved by preponderance of probabilities in civil law while in criminal trial the conduce of cruelty has to be proved beyond all reasonable doubt;

(d) it is immaterial in civil law whether the respondent's conduct was aimed at the other spouse or is due to warranted indifference attributable, perhaps, to selfishness or laziness while it is very much material in criminal proceedings; and

(e) for the relief of matrimonial cause in civil law the conduct of the spouse need not necessarily result in danger of life, limb or health, but a reasonable apprehension of such a danger is enough, whereas s 498A, IPC, contemplates such a conduct besides being 'wilful' to result in the likelihood of driving the woman to commit suicide to cause grave injury or danger to a life, limb or health.[19]

As stated earlier, for the purpose of s 498A, IPC, which is peculiar to Indian families, victim spouse is always the 'wife', and the guilty party is the husband and his relatives near or distant, living together or separately. Ingredients of cruelty as contemplated under s 498A are of much higher and sterner degree than the ordinary concept of cruelty applicable and available for the purposes of dissolution of marriage, *i.e.*, divorce in constituting 'cruelty' contemplated by s 498A, IPC, the acts or conduct should be either such that may cause danger to life, limb or health or cause 'grave' injury or of such a degree that may drive a woman to commit suicide. Not only that such acts or conduct should be 'wilful', *i.e.*, intentional. Similarly, to invoke provisions of s 498A, IPC, the tests are of stringent nature and intention is the most essential factor. The only test is that acts or conduct of guilty party should have4046 the sting or effect of causing grave injury to the woman or are likely to cause danger of life, limb or physical or mental health.[20]

45. Cruelty--Denial or Deprivation of Conjugal Rights

In order to arrive at a finding of cruelty by reason of denial or deprivation of conjugal rights where the husband and wife were living together, the court must have sufficient particulars before it. The mere fact that the couple did not have any issue inspite of a married life for four years does not necessarily indicate denial of conjugal life. In the absence of necessary particulars regarding the alleged denial of conjugal life, it will not be proper to record a finding of cruelty on the ground of such denial.[21]

46. Usual and common domestic discord

Usual and common domestic discord in matrimonial home(s), cannot amount to cruelty within the meaning of s 498A, IPC .[22]

47. Cruelty--Petty Quarrels

The evincing interest by the accused-husband in political activities, and the omnibus allegation such as, the accused-husband was ill-treating the deceased by beating, insulting and demanding her to bring money, would not come within the meaning of cruelty as defined under s 498A, IPC . In any marital life, it cannot be said that there was total harmony and it is not uncommon between the wife and husband to have some petty quarrels. Such petty quarrels cannot be termed as 'cruelty' to attract the provisions of s 498A, IPC .[23]

48. Cruelty--Suicide Note--Judicial Scrutiny

If in the entire writings contained in the suicide note a serious castigation is made against the victim's husband for being an addict to narcotic drugs, and she has made a general allegation against her mother-in-law and in a lesser degree towards the appellant. However, unfortunately she did not advert to any concrete instance which can be termed as cruelty as defined in s 498A of the IPC . The utterances said to have been made by the accused towards the deceased had been taken very seriously and in the suicide note she described such utterances as not worthy of reproduction.

It is not enough that the deceased felt those words hurting, it must be subjected to judicial security and the court must be in a position to hold that those words were sufficiently hurting enough as to amount to 'cruelty' falling within the parameters fixed in s 498A of the IPC . The area remains grey and vague. Not a single word said to have been spoken to be the appellant as against the deceased had been put on record by the deceased in the suicide note in spite of the fact that the said note is a very lengthy letter running into several paragraphs. The tenor and language of the suicide note would reflect that she was not an illiterate lady. As the court is rendered helpless to judge whether the words which accused heard from the accused would4047 amount to cruelty, it is far from possibility for the criminal court to hold that she is guilty of the offence of cruelty as envisaged in the section. It is also to be pointed out that the deceased did not mention a single deed which the accused would have done against her. All that is said against the accused is that he spoke something which she found objectionable. In the aforesaid circumstances, an offence against husband has not at all been proved.[24]

49. Mental Cruelty

Explanation (a) to s 498A, IPC specifically includes mental cruelty within the ambit of 'cruelty'. Causing mental torture to a wife to such an extent that it becomes unbearable would amount to cruelty. The husband should behave and conduct himself in the same manner which he expects from his wife. He should not exhibit male chauvinism and treat his wife like a chattel or slave. If he does so he would be guilty of cruelty under s 498A, IPC .[25] The Supreme Court has held in *Pawan Kumar v State of Haryana* [26] that cruelty or harassment need not be physical. Even mental torture in a given case would be a case of cruelty and harassment within the meaning of s 498A, IPC . Explanation (a) to s 498A itself refers to both mental and physical cruelty. 'Cruelty' in s 498A, IPC means such willful conduct by a person which is likely to drive a woman to commit suicide, cause grave injury or danger to her life or health which includes both mental and physical health.[27]

The Supreme Court of India laid down the following definition of 'mental cruelty' in *V Bhagat v Mrs D Bhagat* :[28]

> Mental cruelty can be broadly defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for the party to live with the other. In other words 'mental cruelty' must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner.

> The word 'cruelty' is to be used in relation to human conduct or human behaviour. It is the conduct in relation or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional.

In *S Hanumanta Rao v S Ramani* [29] Supreme Court observed as under:

> Mental cruelty broadly means, when other party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and the husband and as a result of which it becomes impossible for the party who has suffered to live with the other party.

Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the

degree of courage or endurance to withstand such mental cruelty.4048 In other words, each case has to be decided on its own facts to decide whether mental cruelty was established.[30]

50. Harassment

The offence of 'harassment' is peculiar to Indian conditions and society where evil of dowry and its perpetuation through customary gifts or demands is widely prevalent and is eating the very vitals of matrimony and tearing the social fabric apart. To curb this evil, the acts of not only the husband but the entire household have been brought within the net of 'harassment of woman' if done to coerce her or her relatives to fulfil the unlawful demands for property of valuable security.[31] But the fact that the accused husband was given in adoption and after marriage, the accused husband and the deceased were living with the adoptive father falsified the story of harassment by natural parents.[32]

The word 'harassment' in ordinary sense means to torment a person subjecting him or her through constant interference or intimidation. If such tormentation is done with a view to coerce any person and in this case, the wife to do any unlawful act and in this case to meet the unlawful demand of property or valuable security, it amounts to 'harassment' as contemplated by s 498A, IPC . Word 'Coercion' means persuading or compelling a person to do something by using force or threats. Thus to constitute 'harassment' following ingredients are essential:

(a) woman should be tormented, *i.e.*, tortured either physically or mentally through constant interference or intimidation;
(b) such act should be with a view to pursuade or compel her to do something which she is legally or otherwise not expected to do by using force or threats; and
(c) intention to subject the woman should be to compel or force her or her relatives to fulfil unlawful demands for any property or valuable security.[33]

Harassment need not be in the form of physical assault and even mental harassment also would come within the purview of s 498A, IPC .[34]

Mere absence of the nature of harassment is not enough to discard the evidences of near and dear ones of the deceased and non-mentioning of the details of harassment is not at all fatal to the case of prosecution to establish the charge under s 498A .[35] Harassment simpliciter is not cruelty, unless it is committed for the purpose of coercing a woman or any other person related to her to meet an unlawful demand for property *etc.*[36]

Evidence showed that the deceased wife was harassed for not giving consent for second marriage by the accused husband. She consumed poison and committed suicide. Husband accused was convicted under ss 306 and 498A, IPC .[37]4049

Where as per custom the complainant and the accused had entered into registered agreement of divorce, had been living separately for the last ten years, the complaint for harassment filed under s 498A, IPC was dismissed as devoid of substance.[38]

Even mental harassment would fall within the purview of s 498A, IPC .[39]

51. Criminality Attached to Harassment

So far as criminality attached to word 'harassment' is concerned, it is independent of 'cruelty' and is punishable in the following circumstances:

(a) where the harassment of woman is with a view to coercing her or any person related to

her to meet any unlawful demand for any property or valuable security, or

(b) where the harassment is on account of failure by her or any persons related to her to meet such demand.[40]

52. Cruelty--Nexus with Harassment

Sub-clause (b) of the expln to s 498A, IPC provides that cruelty means harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. Sub-clause (b) does not make each and every harassment cruelty. The harassment has to be with a defined object, namely to coerce the woman or any person related to her to meet any unlawful demand. Hence, mere harassment by itself is not cruelty. Mere demand for property *etc.* by itself is also not cruelty. It is only where harassment is shown to have been committed for the purpose of coercing a woman to meet the demands that is cruelty and this is made punishable under the section. In other words, it is not every harassment or every type of cruelty that would attract s 498A . It must be established that the beating or harassment was with a view to force the wife to commit suicide or to fulfil illegal demands of the husband or his relatives.[41]

The deceased wife committed suicide by hanging at her matrimonial house. The allegation was that suicide was committed on account of unbearable torture on her mental and physical being by her husband and in-laws appellants. The deceased had been to her father's house with appellant husband on 15.10.2000 and they together stayed there till 20.10.2000. On 21.10.2000, the victim allegedly committed suicide at 8.30 a.m. During her stay in her paternal house with the appellant husband, she did not demand any money or her husband also had not given any hints that he demanded money through deceased by creating pressure on her to write a letter to her father. There was no history of torture or harassment caused to the deceased. There was no nexus between the death of the deceased and any overt act on the part of the accused appellants. The conviction of the appellants for offences under ss 304B and 498, IPC was found not sustainable; it was set aside.[42]4050

53. Cruelty--Nexus with Suicide

The term cruelty has been defined in the explanation to s 498A, IPC . Hence, it is not any and every cruelty that is made punishable, but only the cruelty as defined under the explanation. Explanation (a) provides that cruelty means any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman. Hence, under cl (a) the cruelty was to be of such a gravity as is likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health. If cruelty is by itself established and the fact of suicide is also established, it would not be sufficient to bring home the guilt of committing cruelty as defined in expln (a). A reasonable nexus had to be established between the cruelty and the suicide in order to make good the offence of cruelty. Alternately, the cruelty established has to be of such a gravity as is likely to drive a woman to commit suicide, *etc*. If suicide is established it has further to be established that it was occasioned on account of cruelty which was of sufficient gravity so as to lead a reasonable person placed in similar circumstances to commit suicide.[43]

The conduct that is likely to drive the woman to commit suicide is of much graver nature than that causing grave injury or endangering life, limb or physical or mental health. It involves series of systematic, persistent and wilful acts perpetrated with a view to make the life of the woman so burdensome or insupportable that she may be driven to commit suicide because of having been fed up with marital life.[44]

However, if there is a gap of three to four years between the incidents of cruelty and the suicide by the wife, it cannot be said that nexus or inter-connection between the two has been established.[45]

54. Cruelty--Sporadic Incidents of Ill-treatment

Sporadic incidents of ill-treatment by the husband do not attract the definition of cruelty. When it was no case of the prosecution that the wife committed suicide, and the alleged sporadic incidents of cruelty were aimed at pressuring the wife for divorce and not aimed at pressuring her to satisfy the demand of property, s 498A is not attracted.[46]

55. Cruelty--Instances

In the following instances, the accused husband/relatives of the husband were found liable to be convicted on the ground that they caused cruelty to the victim/wife:

(a) The husband was of a highly suspicious nature and made life difficult for the deceased wife by demeaning her, insulting her, calling her a prostitute, not allowing her to meet others, denying her family life and comforts.[47]

(b) The malicious and vexatious litigation were instituted against the wife out of vindictiveness. The wife was humiliated and tortured through execution of search warrants and seizure of her personal property.[48]4051

(c) The habit of taking drink and coming late at home much against the will of the wife, coupled with beatings and demanding dowry and harassment to bring money.[49]

(d) Physical/mental harassment to the wife, by her husband/parents-in-law.[50]

(e) Turning out the bride from matrimonial home and compelling her to reside in the house of her parents is also an act of cruelty under s 498A, IPC .[51]

(f) False allegations by the husband in the divorce petition, regarding the incapability of the wife to conceive amounts to cruelty under s 498A, IPC .[52]

(g) The accused harassed and coerced the deceased wife not only for the balance of the agreed dowry but also demanded additional dowry, the accused was found guilty of subjecting the deceased to cruelty within the meaning of cl (b) of expln to s 498A, IPC .[53]

(h) The failure of the parents of the deceased woman to meet the demand of scooter by her husband and father-in-law on the occasion of marriage of the deceased woman which was the immediate cause of her death would fall in the definition of the term 'cruelty'.[54]

(i) The minor child was taken away by the husband and his relatives from the custody of her mother in order to coerce her to meet her illegal demand for dowry.[55]

(j) The accused-husband and accused mother-in-law of the victim continuously taunted or teased the victim on one ground or the other drawing her to end her life. The victim-wife was forced to live in her parent's house and out of 11 months of her married life, she could live with her husband for a period of two months in different spells. Both the accused did not try to save the victim when she committed suicide by burning herself.[56]

(k) Cruel conduct of mother-in-law.[57]

(l) The act of the accused-husband in disregarding his basic duty to provide the wife and infant child with elementary means of sustenance inspite of having sufficient means which the accused deliberately and irresponsibly squandered on gambling and other vices and virtually starved his wife and infant child to death, amounts to matrimonial cruelty under s 498A, IPC .[58]4052

(m) Constantly nagging and harassing the deceased woman by her in-laws (accused) for not doing any work and to earn more money amounts to harassment and cruelty under s 498A, IPC .[59]

(n) The act of the accused mother-in-law along with the other two accused in harassing the deceased woman and refusing to send her to her parents house amounts to mental torture and agony punishable under s 498A, IPC .[60]

(o) The victim-wife had undergone tubectomy operation and so was unable to do household work. She was constantly beaten by the accused for her said inability which fact was

also confirmed by medical evidence. The beating by the husband would amount to cruelty under s 498A .[61]

(p) The accused husband used to get drunk and beat his wife and abuse her consistently. The act of the accused constitutes cruelty within the meaning of s 498A, IPC .[62]

(q) Torture, harassment and insult to the victim-wife on account of suspicion by her in-laws of her pre-marital love.[63]

(r) Conduct of the accused-husband and his father in not accepting the wife and new born baby-girl for nine months after her delivery amounts to cruelty.[64]

(s) The act of the accused in keeping his concubine as his wife and bringing up a child constitutes cruelty within the definition as encompassed in s 498A .[65]

(t) Illicit relationship of husband with another woman.[66]

(u) Husband indulging in illicit relationship with maid servant in the presence and knowledge of wife.[67]

(v) The wife was tortured and harassed for not giving the articles demanded.[68]

(w) Most of the letters proved on record pertain to the demands made by the accused-husband.[69]

(x) Mere monetary demand is not in the nature of dowry and it attracts s 498A .[70]

(y) When the demand of money for purchasing motor cycle and the construction of house was proved by the evidence of independent4053 witnesses and the complainant was locked inside the house and assaulted by the accused.[71]

(z) The accused was habitual of beating his wife which amounts to cruelty within the meaning of the explanation to s 498A .[72]

(za) Where the father and the mother of the deceased deposed, corroborated by the dying declaration that the accused husband had demanded Rs. 1 lac for running piggery farm and as the demand was not fulfilled the deceased was subjected to harassment and so she committed suicide.[73]

(zb) Demand of money by the accused for repayment of loan is unlawful. The accused husband was convicted under s 498A, IPC .[74]

(zc) Husband, his parents and sister subjecting the complainant to cruelty with a view that she should leave the matrimonial home, so that the husband may marry his girl friend.[75]

(zd) Accused husband caused mental and physical trauma to deceased.[76]

56. Acts not Amounting to Cruelty--Instances

In the following cases the acts of the accused were not found to be amounting to cruelty within the meaning of s 498A, IPC :

(a) The taking of drink and coming home late much against the will of the wife may not, *per se*, amount to cruelty.[77]

(b) When it is not established conclusively that the beating and harassment meted out to the wife was with a view to force her to commit suicide or to fulfil the illegal demands of the accused.[78]

(c) Mere beating on one occasion is not sufficient to constitute cruelty under s 498A, IPC .[79]

(d) Simply, because the husband and the others did not call the wife to the matrimonial home, it cannot amount to harassment.[80]

(e) The accused asking his wife to get some money from her brothers so as to enable him to purchase a car for running it as a taxi, does not amount to a demand for dowry[81] or cruelty.

(ee) Husband asking wife to bring some article of insignificant value on stray occasion is not covered by cl (b) of expln to s 498 A and does not amount to cruelty.[82]4054

(f) The act of the husband of taking away his minor child without the consent of the mother, *i.e.*, his wife does not amount to cruelty to the mother of the child under s 498A .[83]

(g) The accused having a doubt in his mind about his wife having eloped with someone for a particular period and therefore was rarely talking to her.[84]

(h) The act of the accused in telling his wife not to attend to the kitchen so as to prevent wastage does not amount to cruelty.[85]

(i) The accused-husband inserted his fingers and a stick in the vagina of his wife as a result of which she sustained severe bleeding injury.[86]

(j) Seeking divorce from the wife by alleging in the divorce petition that the wife was suffering from cancer, which turned out to be baseless, does not amount to cruelty under s 498A .[87]

(k) The allegation that the husband was friendly with another girl in the form of suggestion cannot be an aspect of cruelty.[88]

(l) The mere fact that the accused mother-in-law and sister-in-law of the victim wife had sympathised with accused-husband of the victim-wife for a demand of dowry does not satisfy the requirement of harassment on their part under s 498A, IPC .[89]

(m) The statement in the dying declaration of the victim-wife that she wanted to live separately but her husband was not prepared, and on that score he had beaten her in the afternoon the previous day, coupled with the statement that her grandmother disliked her, are not sufficient to substantiate the prosecution case that the victim-wife was meted out with ill-treatment punishable under s 498A, IPC .[90]

(n) Even if the accused has demanded as Rs 15,000 from his wife to be brought from her parents, it will not bring the case either within ambit of s 304B or s 498A, IPC, in the absence of evidence that she was being treated with cruelty on account of such demand.[91]

(o) The accused and deceased had lived for almost six years after the marriage. For a sheer half *tola* of gold, it is preposterous to expect the accused to inflict cruelty on deceased and it is unnatural to believe that version.[92]

(p) The admission by the brother of the wife that on returning to her maternal home for the first time after wedding, she did not complain of anything, but told that everything was normal completely demolishes the prosecution story of harassment on account of demand for dowry soon after her marriage.[93]4055

(q) As per the dying declaration of the deceased, she committed suicide following a quarrel with her brother-in-law one day prior to the said incident. However, in her dying declaration the deceased did not mention that the said quarrel or assault was in connection with any demand for dowry.[1]

(r) Where the evidence on record only disclosed that the husband entertained suspicion about his wife's chastity and therefore harassed her.[2]

(s) Dying declaration showing that the victim-wife had not breathed a word with regard to any 'torture' or 'harassment' by the accused persons on her and rather attributed the cause of death to her parents.[3]

(t) Ill-treatment by the husband suspecting fidelity of his wife and suspecting that his wife was pregnant through somebody else.[4]

(u) Father of the deceased categorically stated that the accused had never demanded any cash or property from him.[5]

(v) Where the accused husband having two wives permits the first wife to enter the house of the second wife, with a new born child, the act of the husband does not amount to cruelty.[6]

(w) The mere fact that the husband has developed some intimacy with another woman, during the subsistence of marriage and failed to discharge his marital obligations as such would not amount to 'cruelty' but it must be of such a nature as is likely to drive the spouse to commit suicide to fall within the expln to s 498A, IPC .[7]

(x) Wife wrote to the police that the accused husband was financially exploiting her and she was on the verge of starvation. Held, the said letter was not proof of cruelty, in the absence of any other evidence. Conviction of the accused husband under s 498A, IPC was set aside.[8]

(y) There was no allegation of any kind of physical torture. The evidence with regard to

cruelty was absolutely sketchy and not convincing. It was alleged that the mother-in-law used to rob the deceased of her money which she earned as wages. As regards appellant no. 4 there was only one singular allegation that at one public place she had threatened the deceased that she would be divorced by her husband. The conviction of the appellants for offences under ss 498A and 306, IPC was found not sustainable and therefore, was set aside.[9]4056

(z) Allegation of illicit relation with other woman would be illegal and immoral, but not cruelty under s 498A, IPC .[10]

(za) Failure of the husband accused to take his wife to his place of duty/posting is not cruelty.[11]

(zb) Single act of cruelty would not attract the provisions of s 498A, IPC .[12]

(zc) Manhandling the deceased wife in the presence of her mother for not meeting demand of dowry.[13]

6 Inserted by the Criminal Law (Second Amendment) Act, 1983 (46 of 1983), s 2 (wef 25-12-1983).

7 *Madhuri Mukund Chitnis v Mukund Martend Chitnis and Anor* 1992 Cr LJ 111 (Bom) (DB), (1991) 1 RCR 505 (Bom) (DB).

8 *Madhuri Mukund Chitnis v Mukund Martend Chitnis and Anor* 1992 Cr LJ 111 (Bom) (DB), (1991) 1 RCR 505 (Bom) (DB).

9 *Krishan Lal and Ors v Union of India* 1994 Cr LJ 3472 (P&H) (DB) .

10 *K Subramaniam v State* (1988) 3 Crimes 633 (Mad) ; *Arvind Dhawan v State of Haryana* (1998) 3 RCR (Cri) 593 (P&H).

11 *Balkrishana Pandurang Moghe v State of Maharashtra* 1998 Cr LJ 4496 (Bom) (DB), (1998) 3 Mah LJ 331 (Bom) ; *Krishan Lal v Union of India* 1994 Cr LJ 3472 (P&H) (DB), (1994) ILR 2 P&H 422.

12 *Veerudu v State of Andhra Pradesh* 1989 Cr LJ (NOC) 52 (AP), (1989) 2 Andh LJ 70 ; *Savitri Devi v Ramesh Chand and Ors* 2003 Cr LJ 2759 (Del) .

13 *Renu and Ors v State of Haryana* 1991 Cr LJ 2049 (P&H), (1990) 1 Chand LR (Cri) 561 (P&H).

14 *Sarla Prabhakar Waghmare v State of Maharashtra* 1990 Cr LJ 407 (Bom) .

15 *Simon Joseph v State of Arunachal Pradesh* 2011 (104) AIC 956 (Gauh) .

16 *Preeti Gupta v State of Jharkhand* AIR 2010 SC 3363, (2010) 7 SCC 667 .

17 *Balkrishna Pandurang Moghe v State of Maharashtra and Anor* 1998 Cr LJ 496 (Bom) (DB) .

18 *Sushil Kumar Sharma v Union of India* 2005 Cr LJ 3439 (SC), AIR 2005 SC 3100, 2005 AIR SCW 3569, (2005) 6 SCC 281, (2005) Supp (2) SCR 730, 2005 Cr LJ 3439 .

19 *Balkrishan Pandurang Moghe v State of Maharashtra and Anor* 1998 Cr LJ 4496 (Bom) (DB), (1998) 3 Mah LJ 331 (Bom) ; *Krishan Lal and Ors v Union of India and Ors* 1994 Cr LJ 3472 (P&H) (FB), 1994 ILR 2 (P&H) 422; *Inder Raj Malik v Sunita* 1986 RLR 220 (Del) ; *Polavarapu Satyanarayan v Kolavarapu Saundaryavalli* (1987) 3 Crimes 471 (AP) (DB).

20 *Sushil Kumar Sharma v Union of India* 2005 Cr LJ 3439 (SC) ; **see also***Gurdip Singh v State of Punjab* (2013) 10 SCC 395, 2013 (11) Scale 122, 2013 (4) Crimes 96 (SC) .

21 *K Subramanian and Ors v State* (1988) 3 Crimes 633 (Mad) ; *Arvind Dhawan v State of Haryana* (1998) 3 RCR (Cri) 593 (P&H).

22 *Renu and Ors v State of Haryana* 1991 Cr LJ 2049, (1990) 1 Chan LR (Cri) 561 (P&H); Re *Prusanna Kumarv Dhanlakshmi*1989 Cr LJ 1829 (Mad), (1988) 2 Crimes 896 (Mad).

23 *K Subramanian & Ors v State* (1988) 3 Crimes 633 (Mad), (1988) 18 Reports 19 .

24 *Shanti v State of Haryana* AIR 1991 SC 1226, 1991 Cr LJ 1713 (SC) ; **see also***Gurdip Singh v State of Punjab* (2013) 10 SCC 395, 2013 (11) Scale 122, 2013 (4) Crimes 96 (SC) .

25 *Satvir Singh v State of Punjab* (1999) 1 RCR (Cri) 27 (P&H).

26 *State of Haryana v Sunil Kumar* (1999) 2 RCR (Cri) 749 (P&H), 1999 MCR 478 (P&H). For further commentary, see under

the same heading in s 304B, vol III.

27 *Ghusabhai Raisangbhai Chorasiya v State of Gujarat* 2015 (2) Crimes 169 (SC), AIR 2015 SC 2670, 2015 Cr LJ 3613, 2015 (2) Scale 500 .

28 *Girijashanker and Ors v State of Madhya Pradesh* 1989 Cr LJ 242 (MP), (1989) Cur Cri 72 (MP) ; *Satish Kumar Batra v State of Haryana* 2009 Cr LJ 2447, p 2450, AIR 2009 SC 2180, 2009 (5) Scale 280 . For further commentary, see under the same heading in s 306, vol III.

29 *Rajamal and Ors etc v State* 1993 Cr LJ 3029 (Mad) (DB) .

30 *C Veerudu and Anor v State of Andhra Pradesh* 1989 Cr LJ (NOC) 52 (AP), (1989) 2 Andh LT 17 ; *Ch Narender Reddy v State of Andhra Pradesh* 2000 Cr LJ 4068 (AP) .

31 *Savitri Devi v Ramesh Chand and Ors* 2003 Cr LJ 2759 (Del) .

32 *Kaslepsky v Kaslepsky* (1950) 2 All ER 398, as **quoted** in *Savitri Devi v Ramesh Chand and Ors* 2003 Cr LJ 2759 (Del) .

33 *Rameshbhai Dalaji Godad v State of Gujarat* 2003 Cr LJ 2445 (Guj) .

34 *State of Gujarat v Gajendrabhai Amruttal Parmar* 1 (2014) DMC 338 (Guj) .

35 *Vijaya v Laxmanrao and Anor* 1999 Cr LJ 5012 (SC) .

36 *Ibid*.

37 *Arun Vtas and Anor v Anita Vyas* 1999 Cr LJ 3479, AIR 1999 SC 2071 .

38 *Renu and Ors v State of Haryana* 1991 Cr LJ 2049, (1990) 1 Chand LR (Cri) 561 (P&H).

39 *Kamlesh Negi v State of Rajasthan* 1 (2014) DMC 182 (Raj) .

40 *Rajaram Venkatesh and Ors v State of Andhra Pradesh and Ors* 1993 Cr LJ 707 (AP), (1993) 2 Crimes 208 (AP) .

41 *Tasram Singh and Ors v Amrit Kaur* 1995 Cr LJ 3560 (P&H) .

42 *Om Pal Singh v Sunita and Anor* (1992) 1 Chand Cri C 331 (P&H); *Kapoor Singh Ahluwalia v Anita* (1990) 3 RCR 555 ; *Vijay Ratan Sharma and Ors v State of Uttar Pradesh and Anor* 1988 Cr LJ 1581 (All) ; *Jagdish and Ors v State of Rajasthan and Anor* 1998 Cr LJ 554 (Raj) .

43 *Anil Kumur Airi v State of Punjab* (1998) 2 RCR (Cri) 681 (P&H); *Charanjit Singh v State of Haryana* (1996) 3 RCR 233 (P&H) .

44 *Md Mahmood Alam and Ors v State of Bihar* 2007 Cr LJ (NOC) 326 (Pat) : (2006) 4 East Cri C 449 .

45 *Ibid*.

46 *Bajirao v State of Karnataka* 2007 Cr LJ 3176 (Kant) .

47 *Dayaram Chandramohan Kanswal v Inspector of Police* 1997 Cr LJ 2713 (Bom) (DB) .

48 *Shunmugn Sundaran v State* 1997 Cr LJ 499 (Mad) (DB) .

49 *Savitri Devi v Ramesh Chand* 2003 Cr LJ 2759 (Del) .

50 *Rajeev Verma v State of Uttar Pradesh* 2004 Cr LJ 2956 (All) (DB) .

51 *Madhurima Bhargava v State of Uttar Pradesh* (1999) 38 All Cr C 367, 1999 All LJ 75, 1999 Cr LJ 685 (All) (DB) .

52 *Rajeev Verma v State of Uttar Pradesh* 2004 Cr LJ 2956 (All) (DB) .

53 *Savitri Devi v Ramesh Chand* 2003 Cr LJ 2759 (Del) .

54 *M Balakrishna Reddy and Ors v Principal Secretary to Government Home Deptt and Ors*1999 Cr LJ 3566 (AP).

55 *Reema Aggarwal v Anupam* 2004 Cr LJ 892 (SC) .

56 *Havgirao v State of Karnataka* 2007 Cr LJ (NOC) 79 (Bom) .

57 *State of Karnataka v Shivraj and Anor* 2002 Cr LJ 2741 (Kant) (DB) .

58 *State v Prasanna Kumar Senapati* 2007 Cr LJ 1344 (Ori) ; *Atma Ram v State of Chhattisgarh* 2014 (138) AIC 794, 2014 Cr LJ 3828 (Chh) ; *Suprabha v State of Kerala* 2013 (3) KLT 514, 2013 (3) KLJ 447 (Ker) .

59 *Biswanath Sarkar v Swapna Dey* 2006 Cr LJ 1340 (Gau) .

60 *U Suvetha v State by Inspector of Police* 2009 Cr LJ 2974, p 2977 (SC), 2009 AIR SCW 3491, 2009 (7) Scale 149, (2009) 6 SCC 757 .

61 *Vijeta Gajra v State of NCT of Delhi* (2010) 11 SCC 618, AIR 2010 SC 2712, 2010 AIR SCW 4290 .

62 *State of Punjab v Gurmit Singh* 2014 Cr LJ 3586, p 3588, AIR 2014 SC 2561, (2014) 9 SCC 632 .

63 *State of Punjab v Gurmit Singh* 2014 Cr LJ 3586, p 3588, AIR 2014 SC 2561, (2014) 9 SCC 632 .

64 *Anita Jha v State of Jharkhand* (2010) 10 SCC 190, 2010 (9) Scale 395, 2010 (6) Supreme 565, 2010 (6) SLT 578, 2010 (3) SCC (Cr) 1252, 2010 (4) Crimes 116 (SC) .

65 *Reema Aggarwal v Anupam* 2004 Cr LJ 892 (SC) ; *Koppsetti Subharao v State of AP* 2009 Cr LJ 3480, p 3485 (SC), AIR 2009 SC 2684, 2009 (6) Scale 528 .

66 *Koppsetti Subharao v State of AP* 2009 Cr LJ 3480, p 3485 (SC), AIR 2009 SC 2684, 2009 (6) Scale 528 .

67 *Savitri Devi v Ramesh Chand* 2003 Cr LJ 2759 (Del) .

68 *Azaz Hussain v J&K State* 2003 Cr LJ 2582 (J&K) ; *Ram Dulari Gupta v State of Bihar* 2011 (104) AIC 857 (Pat) .

69 Dr Nishi Purohit, second edn, 1998, as quoted in *Syed Hyder Hussain and Ors v State of Andhra Pradesh and Anor* 2002 Cr LJ 3602 (AP) .

70 *Rashid Ahmad v Mt Anisa Khatun* AIR 1932 PC 25 .

71 *Syed Hyder Hussain and Ors v State of Andhra Pradesh and Anor* 2002 Cr LJ 3602 (AP) .

72 *Ramnarayan and Ors v State of Madhya Pradesh* (1998) 3 Crimes 147 (MP), (1998) 1 CCR 542 (MP) ; *Atma Ram v State of Chhattisgarh* 2014 Cr LJ 3828, 2014 (138) AIC 794 (Chh) ;

73 *Madhusudan Hazra v State* 1990 Cr LJ (NOC) 138 (Cal) (DB).

74 *John Idiculla v State of Kerala* 2005 Cr LJ 2935 (Ker) .

75 *Havgirao v State of Karnataka* 2006 (6) Kar R 450).

76 *Havgirao v State of Karnataka* 2007 Cr LJ (NOC) 79 (Bom) .

77 *Vungarai Tedukondalu v State of Andhra Pradesh* 1988 Cr LJ 1538 (AP) (DB) .

78 *Madari v State of Madhya Pradesh* (1998) 3 CCR 606, 1998 Cr LJ 212 (MP) ; *Mahesh Kumar Dhawan v State of MP* 2012 Cr LJ 1639, 2015 (115) AIC 534 (MP) (Complainant second wife, s 498A, IPC inapplicable); *Vasant Bhagwat Patil v State of Maharashtra* 2012 Cr LJ 65, 1 (2012) DMC 738 (Bom) ; *Jogeshwar Rao v State of Jharkhand* 2012 (112) AIC 395 (Jhar) .

79 *Atma Ram v State of Chhattisgarh* 2014 Cr LJ 3828 (Chh), (*State v Prasanna Kumar Senapati* 2007 Cr LJ 1344 (Ori) **followed**.

80 *Vijeta Gajra v State of NCT of Delhi* 2010 Cr LJ 3841, p 3843 (SC), AIR 2010 SC 2712, 2010 (6) Scale 533 .

81 College edn, 1998, as **quoted in***Sunagala L Hegde v Laxminarayan Anant Hegde and Anor* 2003 Cr LJ 1418 (Kant) .

82 *Krishna Lal and Ors v Union of India* 1994 Cr LJ 3472 (P&H) (DB) .

83 *Sarla Prabhakar Waghmare v State of Maharashtra and Ors* 1990 Cr LJ 407 (Bom) ; *Arun v Sttae of Maharashtra* 1 (2013) I DMC 145 (Bom) ; *Nripendra Nath Dubey v State of West Bengal* 2012 (120) AIC 699, II (2013) DMC 289 (Cal) ; *State of MP v Rajesh Kumar* 2013 (124) AIC 394 (MP) ; *State of HP v Rajesh Sharma* III (2013) MC 106 (HP) ; *Kantilal Martaji Pandor v State of Gujarat* (2013) 8 SCC 781, 2013 Cr LJ 3866, AIR 2013 SC 3055).

84 *G V Siddaramesh v State of Karnataka* (2010) 3 SCC 152, 2010 Cr LJ 1649 (SC) .

85 *Sarojakshah Shankaran Nayor and Ors v State of Maharashtra* 1995 Cr LJ 340 (Bom) (DB) ; *Sumangala L Hegde v Laxminarayan Anant Hegde and Anor* 2003 Cr LJ 1418 (Kant) .

86 *American Jurisprudence* second edn, vol 24, p 206.

87 *Savitri Devi v Ramesh Chand and Ors* 2003 Cr LJ 2759 (Del) . For further commentary, see under the heading 'Cruelty' in s 304B, vol 3.

88 *Surinder Singh v State of Haryana* 2014 (1) Crimes 355 (SC) .

89 *Ibid*; *Benumadhab Padhi Mohapatra v State* 2004 Cr LJ 505 (SC) .

90 *Besai Venkata Ramana Murthy v State* 2003 Cr LJ 4708 (AP) ; *Bhaskar Lal Sharma v Monica* 2014 Cr LJ 1848, p 1850, (2014) 2 SCC (Cri) 185, 2014 (2) Scale 394, (2014) 3 SCC 383 .

91 *Mohd Hoshan and Anor v State of Andhra Pradesh* 2002 Cr LJ 4124 (SC) .

92 *Shoba Rani v Madhukar Reddy* AIR 1988 SC 121 ; *Samir Samanta v State* (1992) 1 Crimes 850 (Cal) (DB); *Ravindra Pyarelal Bidlan and Ors v State of Maharashtra* 1993 Cr LJ 3019 (Bom) ; *State of AP v Madhusudan Rao* (2008) 15 SCC 582, 2008 (14) Scale 118, 2009 (3) SCC (Cr) 1123, 2008 (4) Crimes 350 (SC) ; *Bhaskar Lal Sharma v Monica* (2009) 10 SCC 604, 2009 (10) JT 109, 2009 (10) Scale 744 ; **see also***Manju Ram Kalita v State of Assam* (2009) 13 SCC 330, 2009 (7) JT 485, 2009 (8) Scale 794 .

93 *Nachhatar Singh v State of Punjab* 2011 Cr LJ 2292, 2011 AIR SCW 1946, 2011 (3) Scale 411, (2011) 11 SCC 542 .

94 *D Surender Reddy and Ors v State of Andhra Pradesh* 2002 Cr LJ 2611 (AP) .

95 *Girdhar Shankar Tawade v State of Maharashtra* 2002 Cr LJ 2814 (SC) .

96 *Dinesh Seth v State of NCT of Delhi* 2008 Cr LJ 4345, p 4352 (SC), 2008 AIR SCW 5639 ; *Balwant Singh v State of HP* 2008 Cr LJ 4683, p 4684 (SC), 2008 AIR SCW 6372 (Cruelty is common in both the offences); *Gurnaib Singh v State of Punjab* 2013 Cr LJ 3212, (2013) 7 SCC 108 (Cruelty includes mental cruelty).

97 *Krishan Lal and Ors v Union of India and Ors* 1994 Cr LJ 3472 (P&H) (FB), (1994) ILR 2 P&H 422; *Balkrishan Pandurang Moghe v State of Maharashtra and Anor* 1998 Cr LJ 4496 (Bom) (DB), (1998) 3 Mah LJ 331 (Bom) .

1 *K Prema S Rao and Anor v Yadav Srinivasa Rao and Ors* 2003 Cr LJ 69 (SC), 2003 MLR 172 (SC) .

2 *Jagdish Chander v State of Haryana* (1988) 2 RCR 225 (P&H) .

3 *Ravan Balu Indalkar v State of Maharashtra* 2011 Cr LJ 4067 (Bom) .

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Indian Penal Code (Act XLV of 1860)

Chapter XX-A

Of Cruelty by Husband or Relatives of Husband

[S. 498A.

Husband or relative of husband of a woman subjecting her to cruelty.--

57. Tendency of Roping in Relatives of Husband should be Discouraged

The object of the provision is prevention of the dowry menace. But many instances have come to light where the complaints are not bonafide and have been filed with oblique motive. In such cases acquittal of the accused does not in all cases wipe out the ignomy suffered during and prior to trial. Sometimes adverse media coverage adds to the misery. The question, therefore, is what remedial measures can be taken to prevent abuse of the well-intentioned provision. Merely because the provision is constitutional and *intra vires*, does not give a licence to unscrupulous persons to wreck personal vendetta or unleash harassment. It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with. Till

then the courts have to take care of the situation within the existing frame work.[14] For the fault of the husband, the in-laws or the other relatives cannot, in all cases, be held to be involved in the demand of dowry. In cases where such accusations are made the overt acts attributed to persons other than husband are required to be proved beyond reasonable doubt. By mere conjectures and implications such relations cannot be held guilty for the offence relating to dowry deaths. A tendency has, however, developed for roping in all relations of the in-laws of the deceased wives in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution even against the real culprits. In their over enthusiasm and anxiety to seek conviction for maximum people, the parents of the deceased have been found to be making efforts for involving other relations which ultimately weakens the case of the prosecution even against the real accused.[15] Only the husband, his parents or at best close family members may be expected to demand dowry or to harass the wife but not distant relations, unless there is tangible material to support allegations made against such distant relations. Mere naming of distant relations is not enough to summon them in the absence of any specific role and material to support such role.[16]

The provision under ss 498A, 406 and 306, IPC were enacted with good intentions but the implementation has left a very bad taste and the move has been counter productive. There is a growing tendency amongst the women which is further4057 perpetuated by their parents and relatives to rope in each and every relative including, minors or distant relatives and in some cases against every person of the family of the husband whether living away or in another town or abroad or as many as 10 to 15 or even more relatives of the husband. Once a complaint is lodged under ss 498A / 406, IPC, whether there are vague, unspecific or exaggerated allegations or there is no evidence of any physical or mental harm or injury inflicted upon the woman that is likely to cause grave injury or danger to life, limb or health, it comes as an easy tool in the hands of the police and agencies like Crime Against Women Cell till they can obtain anticipatory bail as the offence has been made cognizable and non-bailable. Thousands of such complaints and cases are pending and are being lodged everyday.[17]

There is growing tendency to come out with inflated and exaggerated allegations roping in each and every relation of the husband and if one of them happens to be of higher status or of vulnerable standing, he or she becomes an easy prey for better bargaining and blackmailing.[18]

These grounds realities have persuaded the Delhi High Court to recommend to the authorities and law makers to review the situation and the legal provision.[19]

58. Remedy Worse than Perils or Disease

From time immemorial, cruelty, desertion and adultery have been grounds for divorce which were to be proved in civil courts. Now the police (and that too its lower functionaries) have been made the decision making authority to conclude whether the harassment or the cruelty as brought out in the statement of the complainant wife is sufficient to put all the relatives including school going minor brothers and sisters of the husband behind bars. Such was neither the intention nor the object of the legislation.[20]

It is rightly said sometimes that the remedies are worse than perils or disease. Time has come to take stock and review the provision. In one metropolis alone, thousands of divorce cases arising from the cases under ss 498A / 406, IPC, are pending in courts. There are equal or more number of marriages which are in limbo. What else is it if not a social catastrophy? This should be a matter of concern for social scientists, law makers and judges also. Sterner provisions have failed to make any dent. The menace and evil of dowry is still looming large.[21] In the words of the Supreme Court in *Pawan Kumar's case*[22] that in spite of stringent measures; sections of society are still boldly pursuing this chronic evil to fulfil their greedy desires.

59. Procedure

The offence under this section is cognizable, non-bailable, non-compoundable and triable by a magistrate of the first class. The case pertaining to this section is a warrant case.[23] Where the allegation was of demand of dowry, the accused applicant, elder brother of the deceased, not beneficiary of demand of dowry, was released on4058 bail.[24] Where FIR is filed for offences under ss 498A and 406, IPC, registration of FIR is mandatory.[25]

60. Arrest in cases under Section 498A , IPC --Supreme Court Guidelines

In the case of the *Arnesh Kumar v State of Bihar* [26], to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorize detention casually, and mechanically, the Supreme Court issued the following guidelines :

(1) All the State Government to instruct its police officer not to automatically arrest when a case under Section 498A , IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 , CrPC .;
(2) All police officers be provided with a check list containing specified sub-clause under Section 41(1) (b) (ii) ;
(3) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest while forwarding/producing the accused before the Magistrate for further detention;
(4) The Magistrate while authorizing detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorize detention;
(5) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;
(6) Notice of appearance in terms of Section 41A of CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;
(7) Failure to comply with the directions aforesaid shall apart from rendering the police officer concerned liable for departmental action, they shall also be liable to be punished for contempt of Court to be instituted before High Court having territorial jurisdiction.
(8) Authorizing detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

The directions aforesaid shall not only apply to the cases under s 498A, IPC or s 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offences is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

61. Quashing of Criminal Proceedings

In complaint for offence under s 498A, IPC allegation against the husband and her parents were for harassing the complainant for dowry which compelled the latter to leave her matrimonial home. The question whether the complainant in fact had been harassed and treated with cruelty is matter of trial, but at this stage it could not be4059 said that no case was made out. The quashing of proceedings before the trial is not permissible. The proceedings were not quashed on petition under s 482, CrPC .[27]

The brother-in-law and sister-in-law of the complainant were minors at the time of her marriage and also at the time of lodging the FIR. Neither of the two persons was alleged to have been entrusted with any dowry article nor did they allege to have ever demanded any dowry article. No specific allegation of demand of dowry, harassment or beating given to the complainant by these two accused persons has been made. Therefore, the FIR quo these two accused was quashed.[28] Where the Court did not find any material or allegation worth the name against the appellants, about cruelty all the allegations were against the husband, the proceedings against the appellants in-laws were quashed.[29]

The appellants sister-in-law and brother-in-law were residing at a different place, never resided with the complainant and her husband, their prosecution was malicious, hence was quashed under s 482, CrPC .[30]

Where there was no mention of specific dates as to when the alleged illegal demands of dowry were made and the complaint contained only vague allegations without any details, the complaint filed for the offence under ss 498A / 34, IPC, was quashed by the High Court by taking recourse to s 482, CrPC .[31] If on the date of the alleged cruelty, the informant or victim ceased to be the wife of the accused on the basis of pronouncement of *talaq* by a written divorced deed and factum of *talaq* is admitted by the wife and allegations of cruelty being false and concocted, the FIR as well as the chargesheet against the accused is liable to be quashed.[32] If the victim-wife and accused-husband are Mohammedan and prior to the date of the alleged cruelty, the accused-husband had already given *talaq* to the victim-complainant, the provisions of s 498A, IPC, are not attracted and the complaint or criminal proceedings against the accused are liable to be quashed.[33] The affidavit filed by wife nowhere stated about demand of dowry. FIR for offence under s 498A, IPC being frivolous was quashed.[34]

Where the wife had been living separately from accused husband since April 2011 due to strained relationship, the husband had already withdrawn petition for restitution of conjugal rights, the allegations of demand of dowry, criminal intimidation were devoid of force, the criminal proceedings were quashed on petition filed under s 482, CrPC .[35]4060

62. Quashing of Criminal Proceedings--Compromise in Non-Compoundable Offence

In some cases,[36] it was held that settlement of matrimonial disputes between parties of non-compoundable offences like ss 498A and 406, IPC which are non-compoundable under s 320, CrPC, is not a ground for quashing criminal proceedings by taking recourse to s 482, CrPC, by the High Court. However, later, the Apex Court has held that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and s 320, CrPC, does not limit/affect the powers under s 482, CrPC .[37] The court by exercising its inherent powers can quash criminal proceedings when parties have compromised the matrimonial case pertaining to offences under ss 498A and 406, IPC .[38] But still some High Courts have not permitted quashing of proceedings despite the compounding of offences between the parties.[39] However, in the absence of a genuine settlement between the parties, the complaint cannot be quashed in exercise of the inherent powers under s 482, CrPC .[40]

In the case of *K Srinivas Rao v DA Deepa* ,[41] the Supreme Court observed -

> We, therefore, feel that though offence punishable under Section 498A , IPC is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal Court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation. This is,

> obviously, not to dilute the rigour, efficacy and purport of Section 498A , IPC, but to locate cases where the matrimonial dispute can be nipped in bud in an equitable manner. The Judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law. During mediation, the parties can either decide to part company on mutually agreed terms or they may decide to patch up and stay together. In either case for the settlement to come through, the complaint will have to be quashed. In that event, they can approach the High Court and get the complaint quashed. If, however, they choose not to settle, they can proceed with the complaint. In this exercise, there is no loss to anyone. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the4061 burden on the Courts which will be in the larger public interest. Obviously, the High Court will quash the complaint only if after considering all circumstances it finds the settlement to be equitable and genuine. Such a course, in our opinion, will be beneficial to those who genuinely want to accord a quietus to their matrimonial dispute.[42]

The accused husband and his relatives were convicted under s 498A, IPC . During pendency of appeal the parties entered into compromise. The Supreme Court exercising powers under art 142 of the Constitution of India quashed the proceedings under s 498A, IPC against the accused husband.[43]

63. Charge

> I, (*name and particulars of the magistrate*) hereby charge you (*name and particulars of the accused*) as follows:
>
> That you being husband or/and relative of the husband of the woman... (*particulars of the woman*) subjected the said woman to cruelty by wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or caused grave injury or danger to life, limb or health (*details of mental or physical cruelty be given here*) of the woman, or harassed the said woman with a view to coerce her or any person related to her (*give particulars of the person*) to meet any unlawful demand for any property or valuable security (*details of property or valuable security be given*), and you have thereby committed an offence punishable under s 498A, IPC and within my cognizance.
>
> And I hereby direct that you be tried by this court on the said charge.

Sd/-

Magistrate I Class

Court--Seal.

The settled principle is that the material on record has to be considered to arrive at the conclusion whether there are sufficient grounds for proceeding against the accused. At this stage, the statements are to be accepted as they are. If the statements would result in conviction if they remain unrebutted, then the charge can be framed against the accused. The inquiry envisaged at this stage is not a roving inquiry. The approach has to be pragmatic.[44]Section 239, CrPC, provides that the magistrate while framing the charge should consider the documents placed by the police under s 173, CrPC, make such examination as may be necessary, and after giving the prosecution and the accused an opportunity of being heard he shall proceed to consider the framing of the charge.[45]

The charges under ss 306 and 498A, IPC, are independent of each other and acquittal in one does not lead to acquittal in the other. The acquittal on a charge under s 306 though not by itself a ground

for acquittal under s 498A, but some cogent evidence is required to bring home the charge of s 498A as well without which the charge cannot be said to be maintained.[46]4062

However, the accused charged under s 302, IPC, cannot be convicted under s 304B or s 498A, IPC, in the absence of charge framed against him.[47]

64. Omission or Defect in Charge

Mere omission or defect in framing charge does not disable the criminal court from convicting the accused for the offence which is found to have been proved on the evidence on record. The CrPC has ample provisions to meet a situation like that. If from the statement of charge framed under s 304B and in the alternative s 498A, it is clear that all facts and ingredients for framing charge for offence under s 306, IPC, existed in the case, the mere omission on the part of the trial judge to mention s 305 with 498A, IPC, does not preclude the court from convicting the accused for the said offence when found proved. If in the alternate charge framed under s 498A, IPC, it has been clearly mentioned that the accused subjected the deceased to such cruelty and harassment as to drive her to commit suicide, the provisions of s 221 of CrPC take care of such a situation and safeguard the powers of the criminal court to convict an accused for an offence with which he is not charged although on facts found in evidence he could have been charged for such offence.[48]

The provision of sub-s 2 of s 221 read with sub-s 1 of the said section can be taken aid of in convicting and sentencing the accused no 1 of offence of abetment of suicide under s 306, IPC, along with or instead of s 498A, IPC .[49]

Section 215 allows criminal court to ignore any error in stating either the offence or the particulars required to be stated in the charge, if the accused was not, in fact, misled by such error or omission in framing the charge and it has not occasioned a failure of justice.[50]

65. Discharge

The accused, who is neither the husband nor the relative of the victim-woman, cannot be charged under s 498A, IPC .[51] If there is no allegation in the complaint that the harassment by the husband towards the complainant was to extract money or valuable security unlawfully from the complainant, the essential ingredients for constituting an offence under s 498A, IPC, being not alleged in the complaint by the wife, the framing of charge under s 498A, IPC, is liable to be set aside.[52] In cases attracting both ss 304B and 498A, IPC, from the point of view of practice and procedure and to avoid technical defects, it is necessary to frame charge under both the sections, but no separate sentence need be awarded under s 498A in view of the substantive sentence being awarded for the major offence under s 304B, IPC .[53] In no way, the incidents of harassment/cruelty that might have occurred two decades ago can be made a ground for punishing a person after 25 years and that to in a4063 matrimonial dispute. The order framing charge under s 498A, IPC, in such a case is liable to be set aside.[54]

If the magistrate has taken cognizance of the offence without taking note of the fact that the complaint was time-barred, finds that the complaint was barred by time because of which he cannot frame the charge, he can discharge the accused.[55] Where no specific allegation of torture and assault were made against the other accused persons in the complaint and the statement under s 161 of CrPC, the other accused persons were entitled to be discharged.[56]

The discharge of the accused for the offence under s 498A, IPC, on the ground that cruelty to which the complainant was subjected to was not in connection with or related to the demand of dowry, is not proper when the trial court and the appellate court failed to examine whether cruelty to which the complainant was alleged to have been subject to by the accused was of such a nature as was to likely to drive her to commit suicide or cause grave injury or danger to life, limb or health (whether mental or

physical), and such an order of discharge is liable to be set aside.[57] There is not always a direct nexus between an offence under s 498A, IPC, and s 4 of the Dowry Prohibition Act .[58]

At the stage of framing of charge, the prosecution case cannot be thrown out merely by observing that the averments or the allegations in the complaint/FIR are vague and indefinite in as much as the necessary particulars regarding the year, month, date or time have not been mentioned. If from a bare reading of the FIR it is evident that there are clear accusations of causing harassment and cruel treatment to the daughter of the complainant on account of insufficient dowry as well as further demands regarding refrigerator, cooler and coloured television *etc.*, the discharge of the accused for the alleged offence under s 498A, IPC, is not proper.[59] Where the suicide note of the victim-woman showed that the main reason for suicide was suspicion of the husband about her fidelity, and there was no mention of the sister-in-law and her husband making any demand of dowry or subjecting the deceased to cruelty, the allegation against them by the relatives of the deceased woman were vague and do not give date or nature of cruelty or harassment for demand of dowry, the order framing the charge under s 498A read with s 34, IPC, against the sister-in-law and her husband was quashed.[60]

66. Proof

In order to prove the offence under this section the prosecution has to prove that:

(a) the accused is the husband or the relative of the husband of the victim woman; and
(b) he subjected the woman to cruelty by,4064

(i) any wilful conduct which was of such a nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman;
(ii) harassment of the woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.[61]

To establish the offence under s 498A, IPC the prosecution has to prove beyond reasonable doubt that the husband or his relative has subjected the victim to cruelty as defined in cll (a) and (b) of the expln to s 498A, IPC .[62]

If there is no mention in the FIR about any demand of dowry by the husband and the evidence of the prosecution witness is also vague, the offence under s 498A, IPC, is not proved.[63] In order to bring home guilt to the accused to offence under s 498A, IPC, it is imperative for the prosecution to establish (1) that there was unlawful demand by him; and (2) the victim, *i.e.*, wife was subjected to harassment with the definite object, *i.e.*, to coerce her to meet unlawful demand. It is in this sense that the prosecution has to establish evidence on record of the factum of cruelty as well as harassment on account of non-fulfillment of demand.[64] The best evidence is of close friend or mother of the deceased. Naturally, a married girl would confide in to a close friend or mother. A mother, on the other hand, may not bring everything to the notice of her husband on the belief that things will improve.[65] Where no specific particulars regarding time, place and manner of any beating, cruelty or harassment of deceased for demand of dowry were given, the accused were acquitted of the charge under s 498A, IPC .[66]

Where evidence adduced in the case does not show that the deceased was subjected to cruelty and harassment before death, the accused (husband) would be acquitted of the charge under s 498A, IPC . The order of acquittal of accused husband for offence under s 498A, IPC passed by the trial court was held proper.[67]

Appellant was prosecuted on allegation that he tortured the deceased for non-fulfilment of the demand of dowry. The evidence of the witnesses on what the deceased told them about the demand of dowry would not be admissible under s 32(1), Evidence Act; the accused cannot be convicted under s 498A, IPC on the basis of such evidence.[68]

If the wife died within one year of marriage by consuming poison and there was no evidence to prove that there was any ill-treatment or cruelty on the deceased after her marriage for/on account of non-fulfilment of dowry demand soon before her death or any point of time, the deceased during her stay at her parents place never stated about4065 the alleged ill-treatment or harassment, the dying declaration was not worthy of credence as the same was made by her in an unconscious state of mind, the charges under ss 304B and 498A, IPC, were found not proved.[69] Where, no evidence was produced by the prosecution to show that the deceased-wife was treated with cruelty immediately prior to the occurrence by the accused, and the defence version was that the deceased had taken a poisonous substance for effecting an abortion, appeared to be probable, the conviction of the accused under s 498A was not found proper.[70] In view of the improvements in evidence adduced in the case, the accused no. 1 (husband) was convicted under s 498A, while accused no. 2 (father-in-law) and 3 (mother-in-law) were acquitted of the charge.[71]

The wife died of burn injuries while she was preparing tea, but prosecution evidence showed that the deceased was subjected to harassment in connection with the demand of dowry by the appellants, husband, his mother and brother's wife. The fact that the appellant brother's wife was living separately from the deceased was immaterial. The conviction of the three appellants under s 498A, IPC was held proper.[72]

The plea that there was no electricity in the village, therefore, there cannot be a demand for a TV set is not tenable since TV sets can be operated by using a battery.[73] The performance of *muklawa* of the younger sister of the victim-wife does not belie the case of harassment alleged against the accused. The non-production of the letters written by the deceased wife about ill-treatment is not sufficient to disprove the prosecution case.[74] Each and every aspect of cruelty inflicted on the deceased need not to be mentioned either in the FIR or spoken to by every witness put into the witness box. The infliction of cruelty is a continuous course of conduct and if one or the other of the witnesses have omitted to mention any one part of infliction of such cruelty, it would only show their retentive memory and cannot wipe out the case of infliction of cruelty altogether.[75] Merely because there is no consistency as to the exact amount demanded by the husband at different times, it is no ground to reject the evidence of such witnesses.[76] Death of the deceased was caused by strangulation and burning within seven years of her marriage at her matrimonial home. Evidence of the father and other relatives of the deceased about the persistent demand for Maruti car and harassment and cruelty meted out to the deceased was found reliable and believed. Both the husband and mother-in-law were convicted under ss 304B and 498A, IPC .[77]

The only evidence against the appellant husband was of a neighbor who was examined after about two months of the alleged date of occurrence. Though the evidence appeared to be sufficient to bring in application of s 498A, there was4066 definite inadequacy of evidence to attract s 304B, IPC . Conviction of the appellant husband under s 498A, IPC was maintained.[78]

Even if the accused has demanded Rs 15000 from his wife to be brought from her parents, it will not bring the case either within the ambit of s 304B or s 498A, IPC, in the absence of evidence that she was being treated with cruelty on account of such demand.[79]

67. Suicide Note

Suicide note written by the deceased in her handwriting signed by her exculpated the accused husband and in-laws. Reasonable doubt was created about prosecution story. Accused husband was acquitted of the charge under s 304B and s 498A, IPC .[80]

68. Non-examination of Neighbours and Independent Witnesses and Examination of close Relatives

The abuse and insult hurled at the daughter-in-law usually is not expected to be made public so that the neighbours may have occasions to criticise the improper conduct of the accused and hold them with disrespect and contempt.[81] Ordinarily, it is not expected that physical torture or the abuses hurled at the wife by the husband and the mother-in-law should be made in such a way as to be noticed by the tenant living in the adjoining portions of the house when it is also not the case of the prosecution that the deceased was physically assaulted so violently that the neighbours came to know about such assault and it is also not the case that abuses used to be hurled loudly so that the tenants had occasions to hear them. It was therefore not necessary to examine neighbour or tenants to prove the prosecution case.[82] The offence of ill-treatment, cruelty to the wife is committed in closed door, where one can hardly expect any witness, much less independent witness. While deciding whether a woman was ill-treated by her husband or his relatives, various factors and circumstances are to be considered by the Courts. The demand of dowry, physical or mental cruelty shown towards wife, conduct of the husband and also the conduct of the relatives, conduct complained of, are all relevant.[83]

Merely because the independent witnesses are not examined, by itself, will not be a ground to discard the consistent and trustworthy testimony of close relatives of the deceased, notwithstanding the fact that the independent witnesses are present at the time of marriage and negotiation.[84] In such cases only the relatives can be witnesses.[85] If the evidence about physical and mental torture of the deceased has come from the mother, elder brother and the close relations, such depositions by close relations, who may be interested in the prosecution of the accused, need not be4067 discarded simply on the score of the absence of corroboration by independent witness. Whether the evidence of interested witness is worthy of credence is to be judged in the special facts of the case.[86]

In cases of harassment and cruel treatment to the wife, the events can occur only within the precincts of the matrimonial abode and the plausibility or possibility of such an occurrence, being known to persons other than the members of the family-fold, is rather bleak, if not impossible and to expect proof of such event by gathering evidence from independent quarters, is to look for something, which in the ordinary course of events, cannot at all be expected to happen. In such a situation, the best person, expected to speak is the victim of harassment and cruelty, namely, the wife, and the other members of the family-fold cannot be expected to support the cause of such a suffering wife. The other possible evidence could be the testimony of the parents of the victim or other kith and kin, provided the victim was able to contact or communicate with them about the suffering and harassment meted out to her, immediately after the occurrence, serving as *res gestate* or all relevant facts for the purpose of proving the facts in issue.[87]

In a dispute involving close family members, independent witnesses are seldom forthcoming. Moreover, it cannot be ignored that independent witnesses are not available these days and the prosecution has to call upon close relatives or friends to come support its case.[88]

69. Incriminating Evidence not put under Section 313 , CrPC --Effect

If an incriminating statement is not put to the accused in his examination under s 313, CrPC, the entire statement has to be eschewed from consideration.[89] If the incriminating statement of the deceased-wife made against the accused had not been put to them in their examination under s 313, CrPC, requiring them to offer an explanation in that regard, it shall vitiate the conviction of the accused under s 498A, IPC, and the other accused person under s 302, IPC, when the conviction was recorded on the sole basis of the said incriminating statement.[90]

70. Acquittal

When the main ingredients of s 498A, *i.e.*, subjecting a woman to cruelty for non-fulfillment of demand of dowry is absolutely missing in the case as against some of the accused persons, they are entitled to acquittal.[91] In the absence of direct evidence regarding harassment or ill-treatment by the accused towards his wife, the conviction of the accused under s 498A is liable to be set aside.[92] Where the version of the wife was that the accused-husband after consuming liquor gave beatings to her resulting in injuries to her on the head whereby she could not open her eyes, the medical report, however, indicated her injuries to be simple in nature, the mother of the complainant-wife4068 gave an exaggerated version about her alleged injuries, there were improvements and contradictions in the version given in the FIR and none of the villagers were produced to support the allegations of habitual beatings by the accused-husband, the order acquitting the accused for the offence under s 498A, IPC was found proper.[1] If the parents of the deceased-wife did not lodge any police complaint about the alleged demand and torture for the same but filed the complaint only after the death of the deceased-wife and there was complete inaction on the part of the village *panchayats*, elders of family, *etc.*, the acquittal of the accused after giving them the benefit of the doubt under ss 3 and 4 of the Dowry Prohibition Act and under s 498A, IPC, is proper.[2] Where there was no specific allegation of harassment or cruelty and no evidence was adduced to connect husband and father-in-law with offence under s 498A, IPC, both the husband and his father were acquitted of the charge under s 498A, IPC .[3] In a dowry death case where there was no evidence showing that the accused aunt of the husband of the deceased made dowry demand or was present when any such demand was raised, she was acquitted of the charge under s 498A, IPC .[4]

Prosecution evidence about the demand of dowry *viz.* a thin gold chain made after six years of marriage was full of inconsistencies and as such was not found reliable. The medical evidence adduced showed that the deceased was suffering from mental depression, had mental, epilepsy and psychosis problem. The husband and his relatives, respondents were acquitted for offences under ss 306 and 498A, IPC .[5]

The father deposed that there was no ill-treatment by the husband and parents-in-law, only brother-in-law and sister-in-law ill treated her. The husband and parents of the deceased were acquitted of the charges under ss 304B, 306 and 498A, IPC .[6]

If the evidence on record showed that the deceased woman was undergoing mental suffering and unhappiness largely due to incompatibility of temperament and attitude and there was no evidence that the accused persons subjected the deceased to any cruelty, the conviction of the accused under s 498A, IPC, was not proper.[7] The deceased wife died due to poisoning. There was no evidence showing demand of dowry or harassment. Letter written by the deceased to the appellant prior to death showed cordial relations between the two. Accused husband was acquitted for offence under s 498A, IPC .[8]

Except the bald statements of the mother and brother of the deceased, there was no other evidence showing that the deceased had been subjected to cruelty and harassment prior to her death, which compelled the deceased to commit suicide. The accused husband and other relatives were acquitted of charges under ss 304B and4069 498A, IPC .[9] Evidence did not prove demand of dowry, ill-treatment or harassment. The deceased had received 99% burn injuries, was suffering from mental illness, her dying declaration was also not found reliable. Accused appellant was acquitted of charges under ss 304B, 306 and 498A, IPC .[10]The deceased wife died of poisoning within seven years of marriage. There was no evidence that the deceased prior to her death was subjected to cruelty. Presumption under s 113B of Evidence Act could not be drawn. The husband, his father and mother were acquitted of charges under ss 304B, 306, IPC and 498A IPC .[11] Where the woman had committed suicide at her husband/in-laws place within three years of her marriage, the allegations were against husband and in-laws of causing harassment to the deceased in connection with demand of dowry, the prosecution evidence did not inspire confidence, appellants were acquitted of charge under ss 498A and 306, IPC .[12]

Where the medical evidence proved that the deceased-wife died due to consumption of a poisonous pesticide, and there was categorical admission by the parents of the deceased that the accused-husband had a liking for the deceased, and the evidence of the prosecution witnesses were full of inconsistencies, there was no specific evidence against the main accused, *i.e.*, husband of the deceased for the offence under s 498A, IPC, all other accused were acquitted by the trial court, the accused-husband was also found entitled to be acquitted.[13] The complaint was lodged by the wife after filing a suit for divorce by the accused-husband. The complainant wife did not make any allegation of cruelty/harassment in reply to the divorce petition. The decree of divorce was passed by the family court in the meantime and application for reconciliation of marriage was rejected. The complainant-wife was living with her mother for a long time, on these facts the accused was liable to be acquitted for charges under ss 498A and 406, IPC .[14] If there is no sufficient evidence of the dowry demand and even less the evidence of cruelty available on record and no independent person has been called to give evidence and the evidence of interested witness was tainted, the charge against the accused person cannot be sustained.[15]

Deceased daughter-in-law set fire to herself; she committed suicide within two years of her marriage. There was evidence that the deceased was unhappy as her husband was poor and illiterate. The mother-in-law used to ask the deceased to run hand driven flour mill. There was no direct evidence that the accused abetted the deceased to commit suicide. The mother-in-law was given benefit of doubt and acquitted of the charge under ss 306 and 498A, IPC .[16]

See also the undermentioned cases where the accused was/were acquitted of the charge under s 498A, IPC .[17]4070

71. Conviction

Where the bride committed suicide within four months of marriage, the evidence of her father that the accused-husband and the brother-in-law of his daughter demanded a tape recorder and cash soon after the marriage was corroborated by the evidence of other witnesses. The deceased on several occasions within a short span of four months of her marriage informed her father about the constant harassment by the accused-husband and her brother-in-law, and showed marks of beating. These facts clearly established that the accused created such difficult and hostile environment that she was compelled to commit suicide. There was direct and reasonable nexus of commission of suicide with the act of cruelty. So, the conviction under ss 498A and 306, IPC was found proper.[18]Where soon before her death, the deceased wife was subjected to harassment in connection with demand to give consent for second marriage, and the result of such harassment persistently pestering the deceased wife to give consent for second marriage is spoken to by the witness, the same is acceptable and can be acted upon. The deceased wife had become frustrated, and she administered poison to her three minor sons and ended her life by consuming poison and committed suicide due to the act of the accused/husband on these facts. The acquittal of the accused was liable to be set aside by convicting him for the offence under ss 498A and 306, IPC . The court should also take judicial note of the fact that no wife will be prepared to give consent for second marriage and it is always their habit to possess their husband.[19] Where there was torture and assault to the victim lady by the husband and in-laws because of non-fulfillment of the demand of wrist-watch as a dowry after the marriage, which was proved by the evidence of witnesses, the conviction of the accused under s 498A and ss 3 and 4 of the Dowry Prohibition Act 1961 was proper.[20] When there was reliable evidence of the elder sister, grand father of the deceased, complainant and neighbours that the deceased was mentally harassed for dowry, cruelty was meted out to the deceased before the death, conviction of the appellant for offence under ss 498A, 304B and 306, IPC was held proper.[21]

There was reliable evidence of the father and also the dying declaration of the deceased establishing harassment meted out to the deceased by the appellant husband, his conviction under s 498A, IPC was held proper.[22]

Testimony of the father of the deceased that the accused husband and sister-in-law tortured the deceased for non-fulfillment of dowry demand was corroborated by FIR and the letter written by the deceased prior to death. Conviction of the two accused under s 498A, IPC was held justified.[23]4071

Where the wife for failure to satisfy dowry demand raised by her appellant husband was subjected to cruelty and set herself on fire, the theory of accidental fire by kerosene stove was ruled out, the appellant did not take any step to save her, the appellant was convicted under ss 306 and 498A, IPC .[24]

See also the cases where the accused was/were convicted on the charge under s 498A, IPC .[25]

Ordinarily, a woman is subjected to cruelty and physical violence by the husband, a married sister-in-law would not join her brother in giving beating to his wife. The father-in-law, mother-in-law, and married sister for want of evidence were acquitted of the charges under ss 498A and 304B, IPC .[26]

72. Accused Acquitted for other Offences cannot be Convicted under Section 498A on the same set of Evidence

The accused persons should not be convicted under s 498A, IPC on the basis of same set of evidences, which were not found trustworthy by the trial court for acquitting the appellants of the charges under ss 307 and 406 of the IPC and s 4 of the Dowry Prohibition Act 1961.[27]

73. Accused Charged with and Acquitted under Section 302 cannot be Convicted under Section 306 and Section 498A

The accused charged with s 302, IPC, and acquitted of the said charge, cannot be convicted under ss 306 and 498A, IPC . The reason is that the offences under s 498A and 306, IPC, are of distinct and different categories. While the basic constituent of an offence under s 302, IPC, is homicidal death and those of s 306 read with s 498A, IPC, is suicidal death and abetment thereof, the offences under ss 306 and 498A, IPC, are not minor offences in relation to the offence under s 302, IPC .[28]

74. Accused Charged under Section 302 or Section 304B cannot be Convicted under Section 306 or Section 498A

Commentary under the headings in s 304B, vol 3, may be referred to.

75. Accused Acquitted under Section 302 can be Convicted under Section 498A --Power of the Supreme Court under Article 142 of Constitution

If the police had framed chargesheet against the accused under s 302, IPC, and also alternatively under s 498A, but the trial court framed charge under s 302 which is4072 obviously for a graver offence and did not think it fit to frame any charge under s 498A, but the evidence on record clearly attracts the said charge under s 498A though the charge under s 302, IPC, is not established, the Supreme Court in exercise of the powers under art 142 of the Constitution of India instead of remanding the proceeding for re-trial after framing charge under s 498A and to obtain protraction of trial and multiplicity of proceedings against the accused, can convict the accused under s 498A, IPC .[29]

76. Accused Acquitted under Section 304B can be Convicted under Section 498A

If the accused is charged of causing dowry death under s 304B, IPC and also harassment and cruelty under s 498A, IPC but are found not guilty under s 304B, the offence under s 498A does not fail. If the charge under s 498A is established, the accused can be convicted under s 498A, IPC .[30] As the charge under s 498A, IPC is distinct from the offence under s 304B, IPC, an accused acquitted of charge under s 304B, IPC can be convicted under s 498A, IPC .[31]

77. Accused Charged under Section 498A can be Convicted under Section 306 as well

If the accused is convicted under s 498A for subjecting his wife to cruelty, on the same evidence, he can be convicted for abetment of suicide of his wife under s 306, IPC, with the aid of s 221, CrPC, and the presumption under s 113A, Evidence Act, can be raised against him. The fact that the specific charge under s 306 was not framed against the accused would not preclude the court from convicting the accused for the offence under s 306, IPC, found proved against the accused.[32] However, if only charges under s 498A and 304B, IPC, are framed against the accused, the conviction of the accused under s 306, is not proper, as s 306, IPC, cannot be said to be a minor offence in relation to s 304B, IPC, within the meaning of s 222, CrPC .[33]

78. Conviction under Section 498A, Section 306 and Section 304 --No Double Jeopardy

Commentary under the same heading in s 304B, vol 3, may be referred to.

79. Sentence--General

Dealing with the concept of corrective jurisprudence, Roscoe Pound[34] had observed that law regulates social interests, arbitrates conflicting interests, claims and demands. Criminal law reflects the wishes of interest groups, Friedman[35] observed that, 'State of Criminal law continues to be--as it should be--a decisive reflection of social consciousness of a society.' Jerome Hall[36] states that, 'Security of person and4073 property of all citizens is an essential requisite of good Government, and this can be achieved through the instrumentality of criminal law.'

It is true that the corrective machinery makes itself felt through its sentencing process, by deft modulation of sentences, stern where it should be, and tempered with mercy where it warrants to be. This is an area where precise scales or evaluation standards are not available. A computerised situation cannot be thought of. Changing vicissitudes have reigned the sentencing scene. From a draconian sentencing process which led to the hanging of a nine-year old girl in the sixteenth century, extreme attitudes of reformation and curative process had gained currency. As Jack Gibbs[37]stated, 'Any legal theory of behaviour must assume that people by and large do not want to be punished and will act so as to avoid fines, jail, whipping or electric chair. That means a threat of real punishment will deter.'

The classical school of criminology was based on hedonistic psychology. Man governs his behaviour by considerations of pleasure and pain.

John Spenser said[38] 'Algebric sum of pleasure and pain must be balanced.' Undoubtedly, there is a cross cultural conflict, where living law must find answers to new challenges and courts are required to evolve new heads of public policy. Viscount Simonds highlighted the imperatives and identified new

heads of public policy in what is known as the Lady's Directory Case,[39] wherein it was observed that 'Reformative and curative jurisprudence have been found to be not entirely responsive. Deterrence is surely a component of the sentencing system.' In other words:[40]

> If one rascal out of 20 men might aggress at will, the higher forms of control would break down. Man after man would be detached from the honest majority. This deadly contagion of lawlessness would spread till social order lay in ruins. Law therefore is still the comer-stone of the edifice of order.

There appears to be further support from several other learned authors who explain the view that deterrence must form part of the sentencing process. In the words of Parker, CJ, 'protection of society and stamping out of criminal adventures must be the object of law and this must be achieved through a proper sentencing policy.' The same view was voiced by Butler J of the US *Supreme Court Nice v Minnesota* (sic):[41]

> Society could not long endure under such threats. If the courts did not protect the injured, the injured parties would then resort to private vengeance.

There can be little doubt, therefore, that overzealous judicial dispensation can invite ridicule.[42] Our Supreme Court, in the case of *State of Punjab v Mann Singh* ,[43] has observed:

> It is the duty of the court in every case to award proper sentence having regard to the nature of the offence, and the manner in which it was committed. There is no4074 compulsion that a jail sentence must be awarded and it is for this reason that the option of awarding either a jail sentence or a fine or both is left to the discretion of the court. If it appears to the court on an overall view of the case that a jail sentence would serve the ends of justice, such a punishment would be in order.

While awarding the punishment, the consequences of such punishment and the point of time when it is awarded are relevant. If it appears to the court that a heavy fine would be more in consonance with the facts of the case, like for instance where the wife has complained that she has suffered gravely, it may be some form of retribution to direct the husband to compensate her monetarily.[44]

80. Sentence (Lenient)

There is no compulsion that a jail sentence must be awarded and it is for this reason that the option of awarding either a jail sentence or a fine or both is left to the discretion of the court,[45] under s 498A, IPC . In appropriate cases the imposition of imprisonment till rising of the court and payment of fine of Rs 150, in default to suffer rigorous imprisonment for one month do not call for any interference.[46] Where the accused was convicted and sentenced under s 498A, he and the victim both remarrying and living happily with their families, the accused had remained in custody for a little over 2 months, the sentence of 6 months simple imprisonment imposed on him was reduced to the period already undergone.[47] Where the trial continued for about 11 years and thereafter the appeal remained pending for about 8 years, the sentence was reduced to the period already undergone.[48] Where the accused husband convicted under s 498A, IPC had aged parents and also three children from the second wife, who are to be educated, the sentence of six months imposed by the Courts below was reduced to the period already undergone.[49] The husband appellant convicted under s 498A and sentenced to three years RI had already undergone sentence of two years and eight months, his sentence was reduced to the period already undergone.[50]

Considering the age of the father-in-law and mother-in-law found guilty and sentenced to one year RI for offence under s 498A, the sentence was reduced to the period already undergone.[51]

In a case of cruelty and alleged dowry death in which s 304B, IPC was not found to be attracted, the sentence of the accused under s 498A, IPC was reduced from three years imprisonment to three months imprisonment in the interest of the children of the accused and their safety in society.[52] In another case where the harassment to the wife was not complained of immediately, the sentence of imprisonment was reduced4075 to the period already undergone by the accused.[53] The prosecution was launched more than a decade before. The accused father-in-law and mother-in-law of the victim were aged 80 years and 75 years respectively. The accused had already undergone custody during pre and post trial period. Keeping in view the mitigating circumstances the sentence of imprisonment of 1½ years awarded to the accused person was reduced to the period already undergone by them.[54]

Where the incident took place about 14 years ago and both the accused-husband and his mother were in custody for about two months and the said accused-mother was aged 60 years, the sentence of imprisonment was reduced to the period already undergone.[55] Where, the complaint was recalcitrant to some extent in resolving dispute between the parties, the sentence of rigorous imprisonment of three years was reduced to rigorous imprisonment for six months.[56] The accused-husband was convicted under s 498A and sentenced to undergone imprisonment for six months. The aggrieved wife filed an affidavit in the court stating that she had the apprehension that if the sentence is to be undergone by him for the remaining period, the expected peace would allude the couple. Therefore, the Apex Court reduced the sentence to the period already undergone by the accused.[57]

81. Sentence(s) to Run Concurrently

Where the appellant husband was employed in Gulf countries, paid casual visits in India, there were differences between the appellant and the wife deceased, on the day of the incident, mediation was to take place, however, the wife committed suicide same day, the sentences awarded to the accused for offences under ss 498A and 306, IPC were ordered to run concurrently.[58]

82. Sentence (Deterrent)

The fact that the accused is neither a habitual criminal nor does he have any criminal antecedents is hardly any argument available while dealing with matrimonial cruelty, because, undoubtedly, in most cases the husband will not have a criminal record.[59] The essence of prescribing punishment for matrimonial cruelty in the IPC will be frustrated in unproven instances of cruelty where a court was to bend to the multifarious pleas for leniency. A proper and meaningful application of law will not permit misguided clemency.[60] The legislature has by amending the IPC and Evidence Act made penal law more strident for dealing with and punishing offence against married women. Such strident laws would have a deterrent effect on the offenders4076 only if they are so stridently implemented by the courts to achieve the legislative intent.[61] This is a class of offences which can only be categorised as atrocious. The court cannot be oblivious to the horrifying levels of suffering that the wife has been subjected to over a long period of time, the unpardonable level to callousness and brazenness that are involved in the infliction of such levels of cruelty which indicate that it is a reaction on the human mind, *i.e.*, the mental torture undergone by the wife which is far more painful than even the worst forms of physical torture and that the commission of the suicide itself is indicative of the utter desperation to which the victim is subjected.[62]

A young girl in her early twenties ending her life with 100% burns within eight months of her marriage due to ill treatment by mother-in-law cannot be overlooked to show sympathy towards the mother-in-law found guilty for offences under ss 498A and 304B, IPC .[63]

If it appears to the court that the sentence imposed on the accused is grossly inadequate having regard to the gravity of the offence, it will not hesitate to impose an adequate sentence on the accused even though the effect of its order will be to send the accused back to jail once more.[64]

It was observed by the court in *Roman v Francis* :[65]

> Inadequate sentences can do harm to the system. Law must meet the challenges that criminalisation offers. Maudlin sentiments, bordering on tottering weakness cannot masquerade or reformative sentiments cannot do service for a rational sentence system. Misconceived liberalism cannot be countenanced.

The accused, a police officer and an educated person subjected his wife to incessant cruelty to the point of leaving no option but to commit suicide, was sentenced to undergo rigorous imprisonment for two years and pay a fine in the sum of Rs 10000, in default to undergo simple imprisonment for six months under s 498A, IPC .[66]

83. Accused Sentenced under Section 304B need not be Sentenced under Section 498A

From the point of view of practice and procedure and to avoid technical defects, it is necessary in cases attracting ss 304B and 498A, IPC to frame charges under both the sections. If the case is established the accused can be convicted under both the sections but no separate sentence need be awarded under s 498A in view of the substantive sentence being awarded for the major offence under s 304B, IPC .[67]

84. Appeal

In an appeal from an order of acquittal the powers of the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an4077 order of conviction, yet, as a rule of prudence, it should always give proper weight and consideration to such matters as:

(a) the views of the trial judge as to the credibility of the witnesses;
(b) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial;
(c) the right of the accused to the benefit of any doubt; and
(d) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Where two reasonable conclusions can be drawn on the evidence on record, the High Court should as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the court below. In other words, if the main grounds on which the court below has based its order acquitting the accused, are reasonable and plausible, and cannot be entirely and effectively dislodged or demolished, the High Court should not disturb the acquittal.[68]

85. Second Revision at the Instance of the State--*Suo Motu* Powers of the High Court

Under s 397(1) read with s 401, CrPC, the revisional powers can be exercised by the High Court either on a petition made by a party or *suo motu* by the court. The bar contained under sub-s 3 of s

397, CrPC, would only debar a party from invoking the revisional powers of this court for second time having once availed such a remedy before the sessions judge. This bar will not operate to exercise *suo motu* powers by the High Court.[69] The Supreme Court in *Krishnan v Krishnaveni* ,[70] while dealing with the question whether the inherent powers of the High Court were still available under s 482, CrPC, in view of the bar of the second revision petition under sub-s 3 of s 397, CrPC, held that ordinarily when revision has been barred under s 397(3) of the CrPC, a person-accused/complainant cannot be allowed to take recourse to revision to the High Court under s 397(1), CrPC or under the inherent powers of the High Court under s 482, CrPC, since it may amount to circumvention of the provisions of s 397(3) or s 397(2), CrPC . It was further observed that the High Court has *suo motu* power under s 401 and continuous supervisory jurisdiction under s 482, CrPC . Similarly, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of the process of the courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensure.

In view of the observations made by the Supreme Court in the above referred case, the *suo motu* powers under s 397 read with s 401, CrPC, have been preserved and the bar under sub-s 3 of s 397, CrPC, would not operate to exercise of such *suo motu* powers of the High Court.[71]4078

There is yet another significant aspect of the case when second revision petition has been preferred by the state. The Supreme Court in *Krishnan v Krishnaveni* ,[72] while dealing with words 'any person', appearing in sub-s 3 of s 397, CrPC, has held that the state does not fall within the ambit of 'any person' and, therefore, a second revision petition at the instance of the state would not be barred under sub-s 3 of s 397, CrPC .[73]

86. Alteration of Conviction from Section 302 to Section 498A

If the charge against the accused for murdering his mistress was not established, but as per the case of the accused the deceased committed suicide, and in the circumstances of the case it could only be held that she committed suicide being unable to bear the cruelty and harassment meted out by the accused, the conviction of the accused under s 302, IPC, recorded by the trial court is liable to be altered to s 498A, IPC .[74]

87. Alteration of Conviction from Section 304B to Section 498A

Commentary under the same heading in s 304B, vol 3, may be referred to.

88. Alteration of Conviction from Section 306 to Section 498A

If the ingredients of abetment are totally found lacking in the commission of suicide by the wife, but the harassment to the deceased-wife by the accused is established, the conviction of the accused under s 306, IPC, is liable to be altered to s 498A, IPC, though the accused was charged with s 306 only and not under s 498A, IPC .[75]

89. Juvenile accused

Accused convicted under s 498A, IPC, was aged 17 years on the date of filing of FIR, her case ought to have been sent to Juvenile Board, her trial stood vitiated; as such her order of conviction was set aside.[76]40794080

14 *Sushil Kumar Sharma v Union of India* 2005 Cr LJ 3439 (SC) .

15 *Nand Raj v State of Punjab and Ors* 2000 Cr LJ 2993 (SC) ; *Kaleem v State of AP* III (2014) DMC 99 (AP) (Complainant implicated all relatives of husband, married, unmarried, even those residing abroad. Held, misuse of s 498A, IPC); *Nalini v State of Karnataka* III (2013) DMC 512 (Kant) .

16 *Kailash Chandra Agarwal v State of UP* 2015 (1) All LJ 309, p 310 (SC), 2014 AIR SCW 6152 .

17 *Savitri Devi v Ramesh Chand and Ors* 2003 Cr LJ 2759 (Del) .

18 *Ibid*.

19 *Ibid*.

20 *Ibid*.

21 *Ibid*.

22 *Pawan Kumar v State of Haryana* AIR 1998 SC 958, 1998 Cr LJ 1144 .

23 *K Neelaveni v State* 2010 Cr LJ 2819, p 2821, AIR 2010 SC 3191, (2010) 11 SCC 607 .

24 *Mahendra Verma v State of UP* 2011 (107) AIC 282 (All) .

25 *In Re The Matter of Matrimonial Disputes*2012 (3) KLT SN 49 (CN 50) (All).

26 *Arnesh Kumar v State of Bihar* 2014 Cr LJ 3707, p 3712, AIR 2014 SC 2756, (2014) 8 SCC 273 .

27 *Taramani Prakash v State of MP* 2015 Cr LJ 2031 (SC), 2015 (2) Crimes 104 (SC), I (2015) DMC 764 SC, 2015 (2) RCR (Criminal) 445, 2015 (3) Scale 616 (Scope of s 482, CrPC discussed, case law **referred**).

28 *Bhupinder Kaur and Ors v State of Punjab and Ors* 2003 Cr LJ 3394 (P&H) .

29 *Neelu Chopra v Bharti* 2010 Cr LJ 448, p 449 (SC), 2009 AIR SCW 6683, 2009 (13) Scale 313 .

30 *Preeti Gupta v State of Jharkhand* 2010 Cr LJ 4303 (SC), AIR 2010 SC 3363, 2010 AIR SCW 4975, 2010 (7) SCC 677, 2010 (8) Scale 131 .

31 *Tarsem Singh and Ors v Amrit Kaur* 1995 Cr LJ 3560 (P&H) .

32 *Azaz Hussain v J&K State* 2003 Cr LJ 2582 (J&K) .

33 *Ibid*; *Syed Hyder Hussain and Ors v State of Andhra Pradesh and Anor* 2002 Cr LJ 3602 (AP) . For further commentary, see under the same heading in ss 406, p 420, *ante*.

34 *Pashaura Singh v State of Punjab* 2010 Cr LJ 875 (SC), 2009 AIR SCW 7226, AIR 2010 SC 922, 2009 (13) Scale 703, (2010) 11 SCC 749 .

35 *Swapnil v State of MP* (2014) 13 SCC 567, (2014) 140 AIC 243, 2014 (6) Scale 590, 2014 (5) Supreme 317, 2014 (4) SLT 797, 2014 (3) Crimes 200 (SC) .

36 *Ram Lal v State of J&K* (1999) 2 SCC 213, 1999 Cr LJ 1342 (SC) ; *SN Mohanty v State of Orissa* (1999) 3 JT (SC) 408, 1999 Cr LJ 3496 SC ; *Pyarelal Gupta and Ors v State and Anor* 2000 Cr LJ 1019 (Del) ; *Madunuri Surya Narayana Raja and Anor v State and Anor* 2003 Cr LJ (NOC) 75 (Kant), 2002 AIR Kant HCR 3196 ; *Anil Kumar Panda v State of Orissa and Ors* 2001 Cr LJ 4359 (Ori) ; *Neeta Sanjay Tagade v Vimal Sadashiv Tadage and Ors* 1997 Cr LJ 3263 (Bom) ; *State of Karnataka v HS Srinivasa Iyengar* 1996 Cr LJ 3103 (Kant) ; *Hariram v State of Madhya Pradesh* 2006 Cr LJ 1764 (Chhat) ; *Ajeya Verma v State of Bihar* 2006 Cr LJ 3520 (Pat) .

37 *BS Joshi and Ors v State of Haryana and Ors* (2003) JT 3 SC 277, 2003 Cr LJ 2028 (SC) ; *K Srinivas Rao v D A Deepa* (2013) 5 SCC 226, AIR 2013 SC 2176 .

38 *Ramesh Kumar v State* 2003 IV AD 377 (Del) ; *Firoz Khan v State* (2003) 105 DLT 64 (Del) ; *Chanda Papa Rao and Ors v State and Anor* 2003 Cr LJ (NOC) 62 (AP), (2002) 1 Andh LT (Ori) 300 (DB) ; *Asish Mohapatra v Priyadarsini Banik* II (2014) DMC 100, 2013 (132) AIC 377 (Orissa) ; *Bijukumar v State of Kerala* 2013 (2) KLJ 38 (Ker) (Proceedings can be quashed even at revisional stage). *Manoj Kumar v State of Rajasthan* 1999 Cr LJ 10 (Raj) ; *Kishore Kumar v State of Rajasthan* 1997 Cr LJ 2058 (Raj) ; *Sanjoy Menon Rajan v State of Sikkim* 2006 Cr LJ 2311 (Sikkim) ; *Kiran Tulshiram Ingale v Anupama P Gaikwad* 2006 Cr LJ 4591 (Bom) (DB) ; *Maruthi and Ors v State Through Shahpur Police Station* 2014 (1) Crimes 519 (Kant) (Matrimonial offences can be compounded).

39 *Hariram v State of Madhya Pradesh* 2006 Cr LJ 1764 (Chhat) ; *Ajeya Verma v State of Bihar* 2006 Cr LJ 3520 (Pat) .

40 *Nazimunnisa v State of Karnataka* 2006 Cr LJ 1573 (Kant) . For further commentary, see under the same heading in s 406, *ante*.

41 *K Srinivas Rao v DA Deepa* (2013) 5 SCC 2256, AIR 2013 SC 2176, 2013 (124) AIC 228 (SC), [2013] 2 SCR 126, 2013 (2) Scale 735 .

42 *K Srinivas Rao v DA Deepa* (2013) 5 SCC 226, AIR 2013 SC 2176 .

43 *Arvind Barsaul v State of Madhya Pradesh* 2009 Cr LJ 331, p 332, (2008) 5 SCC 794, 2008 AIR SCW 6814, 2008 (7) Scale 358 (SC) .

44 *Ramdas Kachru Wadkar v State of Maharashtra* 2006 Cr LJ 1156 (Bom) ; *Dilawar v State of Maharashtra* AIR 2002 SC 564 .

45 *Anil Kumar Airi v State of Punjab* (1998) 2 RCR 681 (P&H) .

46 *Girdhar Shankar Tawade v State of Maharashtra* 2002 Cr LJ 2814 (SC) .

47 *State of Karnataka v Thippeswamy* 2001 Cr LJ 2704 (Kant) (DB) .

48 *K Preme S Rao and Anor v Yadla Srinivasa Rao and Ors* 2003 Cr LJ 69 (SC) ; *Batool and Ors v State of Rajasthan* 2003 Cr LJ 3286 (Raj) (DB) .

49 *K Preme S Rao and Anor v Yadla Srinivasa Rao and Ors* 2003 Cr LJ 69 (SC) ; *Batool and Ors v State of Rajasthan* 2003 Cr LJ 3286 (Raj) (DB) .

50 *Ibid*.

51 *Saroj Sharma v State of Rajasthan* 1998 Cr LJ 3419 (Raj) .

52 *Daud Mohamad Ago v State* Cr LJ 2947 (Bom).

53 *Shanti and Anor v State of Haryana* AIR 1991 SC 1226 .

54 *Basant Kaur and Ors v State (NCT of Delhi)* 2003 Cr LJ 803 (Del) .

55 *Arun Vyas v Anita Vyas* 1999 Cr LJ 3479 (SC) .

56 *Raj Kishore Roy v State of Jharkhand* 2004 Cr LJ 4397 (Jhar) .

57 *State of Himaclml Pradesh v Kewal Kumar* 2002 Cr LJ 3807 (HP) .

58 *Basanti Devi and Ors v State of Bihar and Anor* 2002 Cr LJ 161 (Pat) .

59 *Ajit Singh and Ors v State of Haryana* 1997 Cr LJ 659 (P&H) .

60 *Rani and Anor v State* 1996 Cr LJ 1026 (Del) ; *VN Sharma and Ors v State* 1996 Cr LJ 1116 (Del) .

61 *Ranu Bairagya v State of WB* III (2013) DMC 558 (Cal) .

62 *IS Bind v State of Gujarat* 2013 (125) AIC 102, p 103, (2013) 14 SCC 678, 2013 (10) JT 459, 2013 (4) Scale 569 (Accused acquitted).

63 *Keshav Chandra Panda v State* 1995 Cr LJ 174 (Ori) .

64 *Ganesh Y Bhutekar v State of Maharashtra* 2005 Cr LJ 1221 (Bom) .

65 *Ananda Mohan Sen v State of West Bengal* 2007 Cr LJ 2770, p 2774 (SC), 2007 (7) Scale 254, 2007 AIR SCW 3219 .

66 *Jalam v State of MP* 2014 Cr LJ 360 (MP) ; *Balawant Daulat Patil v State of Maharashtra* III (2014) DMC 135 (Bom) .

67 *Venkatesan v Rani* AIR 2013 SC 3320, 2013 Cr LJ 4208 .

68 *Bhairon Singh v State of Madhya Pradesh* 2009 Cr LJ 3738, p 3743 (SC), AIR 2009 SC 2603, 2009 AIR SCW 4526 .

69 *S Tripat Patra and Ors v State of Orissa* 2003 Cr LJ 1591 (Ori) .

70 *Lalmani Mahato v State of Bihar* 2003 Cr LJ (NOC) 1 (Jhar), (2002) 3 JLJR 576 .

71 *Satish Kumar Batra v State of Haryana* 2009 Cr LJ 2447, p 2450 (SC), AIR 2009 SC 2180, 2009 (5) Scale 280, 2009 AIR SCW 2869 .

72 *Devinder v State of Haryana* (2012) 10 SCC 763 .

73 *Sarju Modi and Ors v State of Bihar* 2003 Cr LJ 631 (Jhar) .

74 *Ram Kumar and Anor v State of Haryana* 1999 Cr LJ 462 (SC) .

75 *Shunmugasundaram v State* 1997 Cr LJ 499 (Mad) (DB) .

76 *State of Karnataka v K Gopalakrishna* 2005 Cr LJ 1436 (SC) .

77 *Satya Narayan Tiwari v State of UP* 2011 Cr LJ 445, p 455 (SC), 2010 AIR SCW 7144, (2011) 97 AIC 246, (2010) 13 SCC 689, (2011) All LJ 539 .

78 *D Jayana v State of Karnataka* 2009 Cr LJ 3977 (SC), (2009) 6 SCC 675, 2009 (8) Scale 8 .

79 *State of Himachal Pradesh v Yog Raj* 1997 Cr LJ 2033 (HP) (DB) .

80 *Vipin Jaiswal v State of AP* 2013 Cr LJ 2095, AIR 2013 SC 1567, (2013) 3 SCC 684 .

81 *State of West Bengal v Sri Orilal Jaiswal and Anor1* 994 Cr LJ 2104 (SC).

82 *Ibid*.

83 *S Mahaboob Basha v State of Karnataka* (2014) 10 SCC 244, p 247, 2014 (12) JT 158, 2014 (11) Scale 516 .

84 *State of Karnataka v Muniyappa* 2006 Cr LJ 3146 (Kant) (DB) ; *S Mahaboob Basha v State of Karnataka* (2014) 10 SCC 244, 2014 (12) JT 158, 2014 (11) Scale 516 (Examination of independent witnesses cannot be insisted).

85 *Joshinder Yadav v State of Bihar* 2014 (1) Crimes 195 (SC), AIR 2014 SC 1043, [2014] 1 SCR 567, (2014) 4 SCC 42, 2014 Cr LJ 1175, 2014 (2) SCC (Cr) 255 .

86 *State of West Bengal v Sri Orilal Jaiswal and Anor* 1994 Cr LJ 2104 (SC) .

87 *Balaji alias Sovasubramaniam v State* (1992) 3 Crimes 172 (Mad) .

88 *Ram Chander v State of Haryana* (1996) 3 RCR 619 (P&H), (1997) 1 DMC 189 (P&H) .

89 *Sharad Biurdichand Sarda v State of Maharashtra* AIR 1984 SC 1622, 1984 Cr LJ 1738 ; *Thota Panduranga Rao v State of Andhra Pradesh* (1998) 1 Andh LT (Cri) 641 .

90 *Galabeli Vekateswara Rao and Anor v State of Andhra Pradesh* 1999 Cr LJ 4329 (AP) (DB) .

91 *Pankaj Bibhuti v State of Jharkhand* 2006 Cr LJ 926 (Jhar) .

92 *Satya Narayan and anor v State* 2003 Cr LJ NOC 185 (MP), 2002 Cr LR (SC&MP) 820; *Bhargav Kundalik Salunkhe v State of Maharashtra* 1926 Cr LJ 1228 (Bom) (DB) ; *Sunkara Suri Babu v State of Andhra Pradesh* 1996 Cr LJ 1480 (AP) .

1 *State of Himachal Pradesh v Ashok Kumar* 2002 Cr LJ 3606 (HP) .

2 *State of Karnataka v Neelaawwa* 2002 Cr LJ 3981 (Kant) (DB) .

3 *State of MP v Amar Singh* (2014) 13 SCC 749, 2013 (9) Scale 667 ; *Satish Chandra v State of MP* 2014 Cr LJ 2737, (2014) 6 SCC 723 (Husband given benefit of doubt and acquitted of charge under s 498A, IPC).

4 *Noorjahan v State* AIR 2008 SC 2131, (2008) 3 SCC (Cri) 915), (2008) 11 SCC 55, 2008 (6) JT 220 .

5 *Sunil Kumar Sambhudayal Gupta v State of Maharashtra* 2011 Cr LJ 705, 2010 AIR SCW 7049, 2010 (11) Scale 696, (2010) 13 SCC 657 .

6 *Bhaskar Ramappa Madar v State of Karnataka* 2009 Cr LJ 2422, p 2432 (SC), 2009 AIR SCW 2624, 2009 (5) Scale 100 .

7 *State of Karnataka v HA Ramaswamy and Ors* 1996 Cr LJ 2628 (Kant) (DB) .

8 *Anil Kumar Gupta v State of UP* 2011 Cr LJ 2131 (SC), 2011 AIR SCW 1825, 2011 (3) Scale 453, (2011) 11 SCC 24 .

9 *Durga Prasad v State of MP* 2010 Cr LJ 3419, p 3422 (SC), 2010 AIR SCW 3673, 2010 (6) Scale 18, (2010) 9 SCC 73 .

10 *Shanta w/o Babu Malaganvi v State of Karnataka* 2013 Cr LJ (NOC) 381 (Kar) .

11 *Harjit Singh v State of Punjab* 2006 Cr LJ 554 (SC), AIR 2006 SC 680, (2006) 1 SCC 463 .

12 *State of Gujarat v N G Lakhwara* 2015 (2) Guj LR 1273 (Guj) .

13 *Shiekh China Buda v State of Andhra Pradesh* 2002 Cr LJ 526 (AP) .

14 *State v Dhruv Kumar Singh and Anor* 2002 Cr LJ 1315 (Raj) .

15 *Arvind Singh v State of Bihar* 2001 Cr LJ 2556 (SC) ; *State of Karnataka v Venugopal alias Gopi and Anor* 2001 Cr LJ 4354 (Kant) (DB) .

16 *Rajbabu v State of MP* 2008 Cr LJ 4301, p 4306 (SC), AIR 2008 SC 3212, 2008 (10) Scale 437 .

17 *State of AP v Madhusudan Rao* (2009) 15 SCC 582 ; *Manju Ram Kalita v State of Assam* (2009) 13 SCC 330, 2009 (7) JT 485, 2009 (8) Scale 794 ; *Hazarilal v State of MP* (2009) 13 SCC 783, 2007 (9) JT 566, 2007 (8) Scale 555 ; *Shivcharan Lal Sharma v State of MP* (2007) 15 SCC 369, 2010 (3) SCC (Cr) 729, 2002 (2) Crimes 177 (SC) ; *Shindu v State of Karnataka* (2009) 7 SCC 246, 2009 (14) JT 96, 2009 (8) Scale 820 .

18 *Sahebrao v State of Maharashtra* 2006 Cr LJ 2881 (SC) ; *Sahebrao v State of Maharashtra* 2006 Cr LJ 2881, p 2886, AIR 2006 SC 2002, (2006) 4 Supreme 94 ; *Laxman Ram Mane v State of Maharashtra* (2010) 13 SCC 125, (2011) 97 AIC 135 (SC), 2010 (12) Scale 376, 2011 (5) SLT 132, 2011 (1) SCC (Cr) 782 .

19 *State of Karnataka v Anni Poojary* 2005 Cr LJ 2662 (Kant) .

20 *Tahrul Islam v State of Jharkhand* 2007 Cr LJ (NOC) 43 (Jhar) .

21 *Amrutlal Liladharbhai Kotak v State of Gujarat* 2015 (89) AIC 603 (SC) ; *AK Devaiah v State of Karnataka* 2015 (1) Crimes 53 (SC), 2015 (1) SCC 752, 2014 (13) JT 188 (Unnatural death within one year of marriage, mental and physical cruelty proved, conviction under s 304B and 498A, IPC held proper).

22 *Pradeep Kumar v State of Haryana* 2014 (4) Crimes 106 (SC), 2014 Cr LJ 3806, (2014) 7 SCC 395 ; **See also***Harish Kumar v State of Haryana* (2015) 2 SCC 601, 2014 (14) Scale 66, 2014 (10) SLT 342, 2015 (1) Crimes 199 (SC) .

23 *Babu v State of Tamil Nadu* 2013 AIR SCW 3963, (2013) 8 SCC 60, 2013 Cr LJ 3649, (2013) 8 SCC 60, (2013) 128 AIC 93 .

24 *Jamnalal Pande v State of Madhya Pradesh* 2010 Cr LJ 538 (MP) .

25 *Narendra v State of Karnataka* (2009) 6 SCC 61, AIR 2009 SC 1881 ; *Krishna Ghosh v State of WB* (2009) 2 SCC 413, AIR 2009 SC 2279 ; *Krishangiri Mangalgiri Goswami v State of Gujarat* (2009) 4 SCC 52AIR 2009 SC 1808, 2009 Cr LJ 1720 ; *Balwant Singh v State of HP* (2008) 15 SCC 497 2008 Cr LJ 4683; *Milind Bhagwanrao Godse v State of Maharashtra* (2009) 3 SCC 699, AIR 2009 SC 1828, 2009 Cr LJ 1736 ; *Vijay v State of Maharashtra* (2009) 2 SCC 87, AIR 2009 SC 1217 ; *Rajendran v Commissioner of Police* (2008) 17 SC 501, AIR 2009 SC 855 ; *Undavalli Narayan Rao v State of AP* (2009) 14 SCC 588, AIR 2010 SC 3708, [2009] 11 SCR 660, 2009 (9) JT 573 .

26 *Yogesh Kumar v State* 2014 (3) Crimes 212 (Del) .

27 *Anupam Pathak v State of Jharkhand* 2006 Cr LJ 916 (Jhar) .

28 *Thangapprndian v State* 1998 Cr LJ 993 (Mad) .

29 *Balram Prasad Agrawal v State of Bihar and Ors* 1997 Cr LJ 1640 (SC) .

30 *State of Karnataka v Balappa and Anor* 1999 Cr LJ 3064 (Kant) (DB) .

31 *Rajedran v State Assistant Commissioner of Police Law & Order* 2008 AIR SCW 8162 .

32 *K Prema S Rao and Anor v Yadia Srinivasa Rao and Ors* 2003 Cr LJ 69 (SC), 2003 MLR 243 (SC) .

33 *Dasrath Sao and Ors v State of Bihar* 2001 Cr LJ 4336 (Jhar) .

34 As quoted in *Madhuri Mukund Chitnis v Mukund Matand Chitnis and Anor* 192 Cr LJ 111 (Bom) (DB), (1991) 1 RCR 505 (Bom) (DB).

35 *Law in Changing Society*, as quoted in *ibid*.

36 *Studies in Jurisprudence and Criminal Theory,* as quoted in *ibid*.

37 *Crime, Punishment and Deterrence*, as quoted in *ibid*.

38 *White Collar Crime*, quoted in *Madhuri Mukund Chitnis v Mukund Matand Chitnis and Anor* 192 Cr LJ 111 (Bom) (DB), (1991) 1 RCR 505 (Bom) (DB).

39 *Shaw v DPP* (1961) 2 All ER 446 .

40 EA Ross, *Social Control*, as quoted in *Madhuri Mukund Chitnis v Mukund Maland Chitnis and Anor* 192 Cr LJ 111 (Bom) (DB), (1991) 1 RCR 505 (Bom) (DB).

41 *Nice v Minnesota* 283 IS 697 as quoted in *ibid*.

42 *Madhuri Mukund Chitnis v Mukund Matand Chitnis and Anor* 192 Cr LJ 111 (Bom) (DB), (1991) 1 RCR 505 (Bom) (DB).

43 *State of Punjab v Mann Singh* AIR 1983 SC 172, 1983 Cr LJ 229 .

44 *Madhuri Mukimd Chitnis v Mukund Matand Chitnis and anor* 192 Cr LJ 111 (Bom) (DB), (1991) 1 RCR 505 (Bom) (DB).

45 *Ibid*.

46 *Balaji alias Sirasubramanium v State* (1992) 3 Crimes 172 (Mad) .

47 *BT Jayaram v State of Karnataka* 2006 Cr LJ 2141 (SC), AIR 2006 SC 1799, 2006 (3) Scale 168(1) .

48 *Tahrul Islam v State of Jharkhand* 2007 Cr LJ (NOC) 43 (Jhar) .

49 *S Mahaboob Basha v State of Karnataka* (2014) 10 SCC 244, 2014 (12) JT 158, 2014 (11) Scale 516 .

50 *Amarchand Tiwari v State of MP* 2012 Cr LJ 1028, 2012 AIR SCW 290, (2011) 15 SCC 105 .

51 *Balwant Singh v State of HP* 2008 Cr LJ 4683, p 4685 (SC), 2008 AIR SCW 6372, 2008 (13) Scale 50, (2008) 15 SCC 497 .

52 *Malyala Vishwanatha Rao v State of Andhra Pradesh* 2003 Cr LJ (NOC) 11 (AP), (2002) 1 Andh LT (Cri) 499 ; *Balkrishna Pandurang Moghe v State of Maharashtra and Anor* 1998 Cr LJ 4496 (Bom) (DB), (1998) 3 Mah LJ 331 (Bom) .

53 *Komidela Madhusudhan alias Madhu v State of Andhra Pradesh* 2003 Cr LJ NOC 172 (AP), (2003) Andh LT (Cal) 823 .

54 *Chandra Kala Devi and Ors v State of Bihar* 2003 Cr LJ 3146 (Pat) ; **See also***Mahadeo Ganpati Sutar and Anor v State of Maharashtra* 2001 Cr LJ 1375 (Bom) (DB) ; *State of Karnataka v Balappa and Anor* 1999 Cr LJ 3064 (Kant) (DB) ; *Bajrang and Ors v State of Rajasthan* 1998 Cr LJ 134 (Raj) ; *Mahru Mahto v State of Bihar* 2007 Cr LJ (NOC) 88 (Jhar) .

55 *Mohd Hoshan and Anor v State of Andhra Pradesh* 2002 Cr LJ 4124 (SC) .

56 *Basanti Devi and Ors v State of Bihar* 2002 Cr LJ 161 (Pat) .

57 *Raghumunde Satya Narayana v State of Andhra Pradesh* 2000 Cr LJ 2779 (SC) ; *Gopal and Ors v State* 1999 Cr LJ 3939 (Mad) ; *Surya Narayan Panda v State of Orissa* 1998 Cr LJ 3050 (Ori) .

58 *OM Cherian v State of Kerala* (2015) 2 SCC 501 (512), AIR 2015 SC 303, 2015 Cr LJ 593, 2014 (4) Crimes 262 (SC) .

59 *State of Maharashtra v Vasant Shankar Mhasane* 1993 Cr L 1134 (Bom) (DB), 1992 (2) Cr LC 865 (Bom) .

60 *Ibid*.

61 *K Prema S Rao and Anor v Yadla Srinivasa Rao and Ors* 2003 Cr LJ 69 (SC) .

62 *State v Siddaraju and Ors* 2000 Cr LJ 4220 (Kant) .

63 *Tarabai v State of Maharashtra* (2015) 3 SCC 530, p 535, 2015 (1) Scale 521, 2015 (2) SLT 39, 2015 Cr LJ 1326, 2015 (1) Crimes 157 (SC) .

64 *State v Pritamdas* AIR 1956 Bom 559, 1956 Cr LJ 984 .

65 *Roman v Francis* 1988 Cr LJ 1359 (Ker) .

66 *State of Maharashtra v Vasant Shankar Mhasane* 1993 Cr LJ 1134 (Bom) (DB), (1992) 2 Cri LC 865 (Bom) .

67 *Shanti and Anor v State of Haryana* AIR 1991 SC 1226, 1991 Cr LJ 1713 (SC) .

68 *State of Rajasthan v Kesav and Ors* 2002 Cr LJ 432 (Raj) .

69 *State of Himachal Pradesh v Kewal Kumar* 2002 Cr LJ 3807 (HP) .

70 *Krishnan v Krishnaveni* (1997) 4 SCC 241, 1997 Cr LJ 1519 .

71 *State of Himachal Pradesh v Kewal Kumar* 2002 Cr LJ 3807 (HP) .

72 *Krishnan v Krishnaveni* (1997) 4 SCC 241, 1997 Cr LJ 1519 .

73 *State of Himachal Pradesh v Kewal Kumar* 2002 Cr LJ 3807 (HP) .

74 *Vungaria Yedukndalu v State of Andhra Pradesh* 1988 Cr LJ 1538 (AP) (DB) ; *Chanda Lakshminarayana v State of Andhra Pradesh* 1996 Cr LJ 2670 (AP) (DB) .

75 *Ramesh Chand v State of Haryana* (1998) 2 CC Cases 316 (P&H). For further commentary, see under the same heading in s 306, vol 3.

76 *Amarchand Tiwari v State of MP* 2012 Cr LJ 1028, 2012 AIR SCW 290, (2011) 15 SCC 105 .

Indian Penal Code (Act XLV of 1860)

Chapter XXI

Of Defamation

TOPICAL INTRODUCTION

It is a fundamental principle, long established that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom. Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become a scourge of the republic.[1]Freedom of speech and expression under art 19(1)(a) of the Constitution cannot be taken to mean absolute freedom to say or write whatever a person chooses recklessly and without regard to any person's honour and reputation. Indeed the right has its own natural limitation. Article 19(2) of the Constitution in this behalf contains safeguards of reasonable restrictions on the exercise of the right.[2]Under s 499, IPC, only such imputation as are malicious and reckless and not for public good, tranquillity or peace or public security or as are not made in good faith, have been brought within the definition of defamation which is but the abuse of the freedom of speech and expression punishable under s 500, IPC . Therefore, the provisions of s 499, IPC cannot be said to place any unreasonable restriction on the freedom of speech or expression. Hence, s 499, IPC, is not violative of art 19 of the Constitution . The Constitution does not grant immunity from all punishments of abuse of freedom of speech and the accused can be put to answer criminally for the breach of reasonable restrictions on his freedom of speech or for his abuse of the freedom of speech. Punishment is not a restriction in itself, but is indeed a consequence of the breach of restriction which the defaulter cannot escape.[3]Section 499, IPC has a large number of exceptions. They cover the entire field of privileges available in cases of defamatory statements. In fact, these privileges represent the freedom of speech and expression which is the foundation of all democratic institutions. However, while a considerable latitude is allowed in respect of these privileges, they are also subject to a large number of conditions. Loss of life and loss of reputation are two things which cannot be compensated in terms of money. Reputation, especially is something which is a treasure to a person.[4] The4081 provisions of this chapter act as deterrent against the commission of the offence of defamation. However, due to restrictions imposed in s 199, CrPC, it is the aggrieved person and when he is incapable, a proper person on his behalf can set the criminal law in motion against the person accused. The chapter consists of the following four sections:

(a) Section 499 : It defines the offence of defamation along with four explanations and three illustrations. The section also has ten exceptions to the offence of defamation.
(b) Section 500 : The offence of defamation as defined under s 499 is punishable under this section with simple imprisonment which may extend upto two years, or with fine, or with both.
(c) Section 501 : The offence under this section is distinct from an offence under s 500 .[5] Printing or engraving matter known to be defamatory is made punishable under this section though the sentence prescribed is the same as prescribed in the preceding section.
(d) Section 502 : The sale of printed or engraved substance containing defamatory matter is made punishable under this section. The sentence prescribed is the same as in the

preceding two sections.

1 *Benjamin Gitlow v People of the State of New York* (1923) 69 Law Ed 1138 .

2 *KV Ramaiah v Special Public Prosecutor* AIR 1961 AP 190 (DB) .

3 *KV Ramaiah v Special Public Prosecutor* AIR 1961 AP 190 (DB) .

4 *Dhyandevrao L Waghmode v Allabaksh Gulab Nadaf* 1999 Cr LJ 1754 (Bom) .

5 *Crown v Uma Shankar* 18 PR 1889 .

Indian Penal Code (Act XLV of 1860)

Chapter XXI

Of Defamation

S. 499.

Defamation.--

Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.-- It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.-- It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.-- An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.-- No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations

(a) *A* says--"*Z* is an honest man; he never stole *B's* watch"; intending to cause it to be believed that *Z* did steal *B's* watch. This is defamation, unless it fall within one of the exceptions.

(b) *A* is asked who stole *B's* watch. *A* points to *Z*, intending to cause it to be believed that *Z*

stole *B's* watch. This is defamation, unless it fall within one of the exceptions.4082

(c) *A* draws a picture of *Z* running away with *B's* watch, intending it to be believed that *Z* stole *B's* watch. This is defamation, unless it fall within one of the exceptions.

First Exception.-- Imputation of truth which public good requires to be made or published.--It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.-- Public conduct of public servants.--It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception.-- Conduct of any person touching any public question.--It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception.--Publication of reports of proceedings of courts.--It is not defamation to publish a substantially true report of the proceedings of a court of justice, or of the result of any such proceedings.

Explanation.-- A justice of the peace or other officer holding an enquiry in open court preliminary to a trial in a court of justice, is a court within the meaning of the above section.

Fifth Exception.--**Merits of a case decided in court or conduct of witnesses and others concerned.**--It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a court of justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustration

(a) A says--"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest". A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(b) But if A says--"I do not believe what Z asserted at that trial, because I know him to be a man without veracity;" A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's conduct as a witness.

Sixth Exception.--**Merits of public performance.--** It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the4083 character of the author so far as his character appears in such performance, and no further.

Explanation.-- A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations

(a) A person who publishes a book, submits that book to the judgment of the public.
(b) A person who makes a speech in public, submits that speech to the judgment of the public.
(c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.
(d) A says of a book published by Z--"Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind." A is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.
(e) But if A says--"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine". A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Seventh Exception.--**Censure passed in good faith by person having lawful authority over another**.--It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration

A judge censuring in good faith the conduct of a witness, or of an officer of the court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier--are within this exception.

Eighth Exception.--**Accusation preferred in good faith to authorised person**.--It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration

If A in good faith accuses Z before a magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father,--A is within this exception.

Ninth Exception.--**Imputation made in good faith by person for protection of his or other's interests.**--It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.4084

Illustrations

(a) A, a shopkeeper, says to B, who manages his business--"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty". A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.
(b) A, a magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

Tenth Exception.--**Caution intended for good of person to whom conveyed or for public good.--** It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.4085

Comments

1. Scope

This section defines the offence of defamation with the aid of four explanations and ten exceptions with more explanations and illustrations appended to the exceptions.[6] The framers of IPC observed that the essence of the offence of defamation consists in its tendency to cause that description of pain, which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures, and those inconveniences to which a person, who is the object of such unfavourable sentiments, is exposed.[7]

The criminal law of India with regard to defamation depends on the construction of this section, and not on what is the English law on the subject.[8]4086

Whether the publication of defamatory words or uttering defamatory words, heard and listened to by people takes place in a proceeding in a court room or outside the court precincts does not matter as long as the defamatory words are intended to harm the reputation of another.[9]

2. Law of Canada

It is an indictable offence to publish a defamatory libel, or s 300 where the accused knows the libel to be false. A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published. The libel may be expressed directly or by insinuation or irony in words legibly marked on any substance, or by any object signifying a defamatory libel otherwise than by words. The definition must be read in the context of the statutory purpose to protect the reputation of individuals. As a criminal statute, the Code must be interpreted so as to give the accused the greatest protection possible. The phrase 'or that is designed to insult the person' should be read as requiring proof of a grave insult. Defamatory libel is defined in a manner that provides an intelligible standard of conduct. The phrase 'is likely to injure' was constitutionally valid, and there was no need to show actual injury. A person 'publishes' a libel when he shows or delivers it, or causes it to be shown or delivered, with an intent that it should be read or seen by any other person.

Purpose

Parliament's primary aim was the protection of reputation rather than that of preventing breaches of the peace. The goal of protecting reputation is a pressing and substantial objective in Canadian society. Common law concepts and principles of libel are useful in interpreting ss 298-300 . The basic definition of libel is the publication to a third person of words or matter containing an untrue imputation against the reputation of another. There are two aspects of the *mens rea* of the offence: First, did the accused intend to defame the complainant? Secondly, did the accused knew that the statements they published were false?[10]

3. Section 499 is not Violative of Article 19 of the Constitution

Under s 499, IPC, only such imputations as are malicious and reckless and not for public good, tranquillity or peace or public security or as are not made in good faith, have been brought within the definition of defamation which is but the abuse of freedom of speech and expression punishable under s 500, IPC . Therefore, the provisions of s 499 cannot be said to place any unreasonable restriction on the freedom of speech or expression. Hence, s 499, IPC, is not violative of art 19 of the Constitution of India .[11]

4. Distinction between Defamation (Section 499) and Section 171G

Commentary under synopsis note 4 of s 171-G, IPC, vol II, may be referred to.4087

5. Section 504 Distinguished from Section 499

Commentary under the same heading in s 504, *post*, may be referred to.

6. Ingredients

The offence of defamation consists of three essential ingredients:[12]

(a) there must be a making or publishing of an imputation concerning a person;
(b) such imputation must have been made by words, either spoken or intended to be read, or by signs or by visible representations; and
(c) the said imputation must have been made with the intention to harm, or with knowledge or reasonable belief that it will harm, the reputation of the person concerned.

For detailed commentary, text under the same heading in s 500, *post*, may be referred to.

Unless *mala fide* intention is specifically alleged, no offence under s 499, IPC is disclosed, especially when positive allegation is otherwise.[13]

7. Mens Rea

For the purpose of attracting the offence under s 499, IPC, *mens rea* is an ingredient to be proved. No offence of defamation will lie if there is no *mens rea.*[14] Where the accused is a bank, registered under the provisions of the Indian Companies Act and it is only a juristic person and not a real person, in such cases, *mens rea* cannot be attributed to a juristic person. If *mens rea* cannot be attributed to such person, then, no offence under s 500 of the IPC can be attracted against such persons.[15]

One of the essential ingredients to constitute an offence under s 499, IPC is either intention to harm or knowledge or reasons to believe that such imputation will harm the reputation of the other. Therefore, an artificial/juristic persons cannot be prosecuted for offence under s 500, IPC .[16]

Commentary under the same heading in s 300, vol 3, may be referred to.

8. Defamation and Contempt of Court

It has to be always kept in mind that the law of defamation under the IPC cannot be equated with the law of contempt of court in general terms.[17] The Privy Council in *Surender Nath v Chief Justice and Judges of the High Court* ,[18] observed that 'although contempt may include defamation, yet an offence of contempt is something4088 more than mere defamation and is of a different character'. Approving the aforesaid view Supreme Court in *Bathina Ramakrishna Reddy v State of Madras* held:[19]

> When the act of defaming a Judge is calculated to obstruct or interfere with the due course of justice or proper administration of law, it would certainly amount to contempt. The offence of contempt is really a wrong done to the public by weakening the authority and influence of courts of law which exist for their good. As was said by Willmot CJ Wilmot's Opinion p 256; *Rex v Davis* 30 at pp 40-41,'attacks upon the judges excite in the minds of the people a general dissatisfaction with all judicial determinations...and whenever man's allegiance to the laws is so fundamentally shaken it is the most fatal and dangerous obstruction of justice and in my opinion claim out for a more rapid and immediate redress than any judges as private individuals but because they are the channels by which the King's justice is conveyed to the people.

What is made punishable in the IPC is the offence of defamation as defamation and not as contempt of court. Contempt of court proceedings can certainly be taken under s 2, Contempt of Courts Act, quite apart from the fact that other remedy may be open to the aggrieved officer under s 499, IPC . However, a libel attacking the integrity of a judge may not in the circumstances of a particular case amount to a contempt at all, although it may be the subject-matter of libel proceeding. This is clear from the observation of the Judicial Committee in the case of the matter of a special reference from the Bahamas Islands.[20]

Even a person claiming the benefit of second exception to s 499 of the IPC, is required to show that the opinion expressed by him was in good faith which related to the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character appears in that conduct. Under the law of contempt, statements made in pleading, petitions and affidavits of the parties, in a number of cases, have been held defamatory statements amounting to offences under the section, unless it is shown that they fall within any of the exceptions.[21] The statements made in an affidavit filed in the court was held to amount to a criminal contempt by this court in Re *Sanjiv Datta Deputy Secretary's Ministry New Delhi & ors.*[22] The benefit of the exception even under the law of defamation much less in contempt proceedings may not be available if the insinuations are made against an institutions of the state and not restricted to the person as an individual or a collection of persons.

9. 'Whoever'

Under this section, a wife can complain against the husband, and *vice versa*, if there is a defamation,[23] on the principle that the wife and husband do not constitute a single person for the purposes of criminal law.[24] However, a company cannot be held to have committed an offence under this section.[25]4089

10. 'By Signs or by Visible Representations'

Defamation of a person may caused by words, spoken or intended to be read, or by signs, or by visible representations. Words 'by signs or by visible representations' are wide enough to convey defamatory statements in the form of a statute, caricature, or effigy, *etc*. Thus, making and publicly exhibiting an effigy of a person, calling it by the person's name and beating it with shoes, would be defamatory.[26] A photo, published in a newspaper with a false caption depicting the complainant as one of the soldiers of *goonda* war, was held to be defamatory.[27]

11. 'Makes'

The word 'makes' has been used in s 499, IPC, in its etymological sense as connoting to make public or to make known to people in general.[28] The gist of the offence of defamation lies in the dissemination of the harmful imputation. When a defamatory statement is published, it is not only the publisher, but also the maker, who becomes responsible.[29] Even if a journalist types only from the written materials, received from a person or persons who remain anonymous, and gives shape to the article, he would still be held to be the maker of the article.[30] However, it has been held, in *Sunilakhaya Chowdhury v HM Jadwet* ,[31] that the word 'makes' is intended to refer to the originator of the imputation. The mechanic, or the compositor, or the press neither 'makes', nor 'publishes', the matter that may be impugned as defamatory.

In a petition under s 500, IPC, the question before the court is whether the respondent made the allegations, against the petitioner, as alleged in the petition, and, if made, whether they were false. Similarly, the burden is on the petitioner to prove that the respondent did make the allegations and that they were false. It is not upon the respondent to show that he did not make the allegations or that they were not false.[32]Section 499, IPC, brings under the criminal law, the person who makes defamatory imputation. There can be no offence of defamation unless the defamatory statement was either made or published by the accused. If there is no evidence that the accused has either made or

published the defamatory imputation, the matter comes to an end and the further question of justification or whether there was express malice would not arise.[33]

12. 'Publishes'

The word 'publishes' means to make known to others. Though, in common parlance the word 'publication' is usually understood in the sense of making the contents known to the public, yet the meaning of this expression is not limited in law.[34] Publication of defamatory matter involves the communication of it to some person4090 other than the person to whom the defamatory matter relates.[35]For publication, it is sufficient if the accused intentionally does an act which has the quality of communicating the alleged libel to a third person or third persons generally.[36] The dictation of a letter by the writer of it is publication,[37] or imputations concerning a person, calculated to harm his reputation in a plaint,[38] or in a sworn affidavit in court,[39] or in an application to an officer,[40] would be sufficient publication. When the report is made to the police, it is certainly made known to a person other than the plaintiff and this would be sufficient publication.[41] When the accused instructs his lawyer to put the questions, which are put to the witness in court, it would certainly be publication by the accused. In other words, though it is the voice of the lawyer which puts the questions, it is mind and intent of the client--accused which make or publish the defamatory questions.[42] Similarly, the communication, by the accused, of the alleged and utterly irrelevant defamatory matter in a letter to the complainant's pleader amounts to publication to a third person within the purview of the section.[43] However, the mere posting of an allegedly defamatory letter would not constitute any part of the offence.[44]

The statement alleged to be defamatory is to be judged by standard of an ordinary, right thinking member of society. In the instant case it was not inferred that due to assertions in pleadings/evidence adduced in the case the complainant was lowered in estimation of right thinking members of society generally.[45]

Complainant, an auto-rickshaw driver was pelting stones at passing vehicles and caught on the spot. His pants came down when he was being pulled by his associates from the police jeep. Publication of the photograph of the complainant in the newspaper did not amount to defamation.[46]

Likewise, merely attesting the written statement or counter of a client to enable it to be filed in court, without anything more would not be sufficient to make out the offence of defamation against the lawyer where there is no allegation that the accused had anything to do with the preparation of the counter.[47] It may be stated here that the word 'publishes' in s 499, IPC, does not contemplate that the communications, which one is bound to make to others in the normal course of his legal duties, should fall within the ambit of this section, otherwise every officer, clerk and superintendent and everybody, who has to deal with a document and pass it on to others, would be taken to publish the same.[48] No publication can be said to have taken place for the counsel to give the contents of a written statement to his own client or to his own clerk in the4091 ordinary discharge of his duties as a lawyer or to handover the envelope, containing the written statements, to a clerk of another counsel.[49]

Where the alleged defamatory statement was telecast and re-telecast on T.V. Channel and news item appeared in the newspaper next day, prosecution of the newspaper for defamation without prosecuting the T.V. Channel was an abuse of the process of the Court.[50] Where the bank sent a telegram to the complainant, expressing concern of the bank to get dues cleared in time, held *mens rea* of offence was missing in the case, the act of the bank was in good faith, thus, no offence under s 499, IPC was committed.[51]

Publication includes pleadings, affidavits *etc*. when filed in Courts. Filing of an affidavit in Court is publication, as affidavit filed in Court is not a secret document.[52]

The dictation given by a lawyer to his clerk and transcription made by him of a *per se* libellous matter cannot amount to publication.[53]

Mere telecast of an alleged imputation by itself would not constitute offence of defamation unless it was intended to harm the reputation, notwithstanding such imputation will harm the reputation of the complainant.[54]

Publication--Freedom of Speech

Publishers, editors, journalists and reporters forming part and parcel of freedom of speech and expression, which no doubt includes freedom of press as well, are entitled to ventilate their views only within the permissible limits, permissible by law and not beyond thereto. They are expected to be careful and cautious while proceeding with publication of the matter and they cannot claim any special privilege as far as the law relating to defamation is concerned. It may be part of their lawful duties, but at the same time they also owe a duty to be careful and diligent in verifying such statements with care and caution before publishing them. Negligent and reckless allegations constituting defamatory statements can never be protected under the guise of any of the exceptions.[55]

Publication--May not always be made with Clarity

A libellous statement may not always be made with clarity. A degree of indirectness or innuendo may be there and this can very well be expected since defamation is an offence. It is reasonable to think that he who defames is not anxious to invite legal consequences and would be looking for loopholes. That, however, does not protect him from prosecution.[56]4092

Publication--Imputation *per se* Defamatory or Otherwise--Effect

The only effect of an imputation being *per se* defamatory is that it would relieve the complainant of the burden to establish that the publication of such imputations has lowered him in the estimation of the right thinking members of the public. However, even if the imputation is not *per se* defamatory, that by itself would not go to the advantage of the publisher for, the complaining person can establish on evidence that the publication has in fact amounted to defamation even in spite of the apparent deficiency. Similarly, the accused cannot contend that he is entitled to discharge on the ground that the imputations in the extracted publication were not *per se* defamatory.[57] Once a statement in the written statement has been filed in a court of law, that statement can be taken as published. If such a statement amounts to *per se* defamatory, it is the duty of the accused to establish that they are justified in making such a statement under any of the exceptions to s 499, IPC .[58]

Publication--Communication between Husband and Wife--Comparative Position in UK and India

In England the rule appears to be well-settled that except in certain well defined matters, the husband and wife are regarded as one and an action for libel disclosure by the husband of the libel to his wife is not publication. In *Wennhak*'s case,[59] Manesty J observed: 'the maxim and principle acted on for centuries is still in existence *viz*, that as regards this case, husband and wife are in point of law one person'.

The learned judge examined the foundation of the rule and stated that it was, after all, a question of public policy or social policy.

However, the rule that husband and wife are one in the eye of law has not been adopted in its full force under our system of law and certainly not in criminal jurisprudence.[60]

In *Queen-Empress v Buthi* ,[61] it was held that there is no presumption of law that the wife and husband constitute one person in India for the purpose of the criminal law. If the wife, removing the husband's property from his house, does so with dishonest intention, she is guilty of theft.

In *Abdul Khadar v Taib Begum* ,[62] the Madras High Court again held that there is no presumption of

law in India that a wife and husband constitute one person for the purpose of criminal law, and therefore the English Common Law doctrine of absolute privilege cannot prevail in India.

It must be remembered that the IPC exhaustively codifies the law relating to offences with which it deals and the rules of the Common Law cannot be resorted to for inventing exemptions which are not expressly enacted.

In *Tinuvengada Mudali v Tripurasundari Ammal* ,[63] a Full Bench of the Madras High Court observed that the exceptions to s 499, IPC, must be regarded as4093 exhaustive as to the cases which they purport to cover and recourse cannot be had to the English Common Law to add new grounds of exception to those contained in the statute. A person making libelous statements in his complaint filed in court is not absolutely protected in a criminal proceeding for defamation, for under the Eighth exception and the illustration to s 499, the statements are privileged only when they are made in good faith. There is, therefore, authority for the proposition that in determining the criminality of an act under the IPC the courts will not extend the scope of special exception by resorting to the rule peculiar English Common Law that the husband and wife are regarded as one.[64]

Publication--Communication to even one Person Sufficient

Publication does not require proof of communication to more persons than one.[65] A libel is deemed to be published as soon as the manuscript has passed out of the possession of the writer.[66]

Publication--Proof by Direct or Circumstantial Evidence

The question, whether there is publication, is one of fact, and the question may be decided either on direct evidence or on the circumstances of the case.[67] Where the officer, to whom an alleged defamatory letter was addressed, was not produced and there was no evidence at all on behalf of the prosecution to show that the letter was actually read by the addressee, it was held that the prosecution had failed to prove that there was publication of the imputation alleged.[68]

Publication--Communication to Complainant--No Defamation

Communication of a defamatory matter to the person defamed does not amount to publication and is, therefore, not an offence.[69] Where, in answer to a notice sent by the complainant demanding the price of certain ornaments, the accused not only denied the purchase of ornaments but also made highly defamatory allegation against the complainant, it was held that as the communication was made to the complainant himself, and not to a third person, and, therefore, it did not amount to publication and the accused was not guilty.[70] Similarly, where some villagers held a meeting and resolved to have no religious associations, in future, with the complainant because he had been ex-communicated, it was held that sending a copy of the resolution to the complainant was not defamation.[71] Where, however, the writer knows that the person defamed cannot read the defamatory matter and it has to be read by a third person, it4094 would be publication.[72] However, where there is nothing on the record to show that the accused knew that the complainant could not read the defamatory matter and it was to be read by some other person, the accused cannot be held guilty for publication of the defamatory matter.[73]

Publication--Communication to Spouse of Defamed Person Sufficient

Communication of the defamatory matter to the husband or wife of the person defamed is a sufficient publication. Where the accused wrote letters to the husband of a woman in which he alleged that she was a witch and by her secrecy she had caused the death of some relations of the accused, it was held that there was sufficient publication of defamatory matter.[74]

Publication--Both Originator and Repeater Liable

The mere fact that some similar accusation against the complainant had been made by some other

person as well, would not be a valid defence for the accused. A wrong is not to be justified or excused by another wrong. Because one man does an unlawful act to a person, another is not permitted to do similar act to the same person.[75] The publisher of a libel is clearly responsible, irrespective of the fact whether he is the originator of the libel or is merely repeating it.[76] But where there was reproduction of an article of one newspaper by another newspaper and the newspaper publishing the original article tendered apology subsequently, which was also published by the newspaper in question, and the defamatory article in question was regarding a public question, it was the brain child of the newspaper first publishing it and not the newspaper in question which merely reproduced it. The offence of defamation was not made out and hence, the acquittal was proper.[77] The IPC makes no exception in favour of a second or third publication as compared with a first.[78] Exception 3 is not to be used so as to justify a writer repeating, in any circumstances, with impunity, the highly defamatory mis-statements of another, based on mis-statements of facts.[79] Where, after the distribution of certain leaflets which contained imputation against the complainant and which were clearly defamatory, the editor of a newspaper published them in the form of questions and required the complainant to clear himself by answering the questions, it was held that it amounted to a re-publication of the defamatory statements in the leaflets.[80] Merely because the accused did not himself utter the words complained of, he cannot escape liability for defamation. Even assenting to a third party's defamatory statements would be sufficient.[81] When a man is charged with an offence and acquitted after trial, the man, who repeats the charge, has to be on very sure ground if he wishes to plead that he repeats this charge in good faith.[82]4095

Every repetition of defamatory matter is a fresh publication and constitutes a fresh cause of action.[83] There is no bar to the prosecution of a person making a defamatory statement out of court on the ground that he repeated the statement, when appearing as a witness, and committed perjury.[84] In *Jai Debi Kaur v Emperor* ,[85] the accused presented an application to the Lt Governor in which she charged the complainant, a deputy collector, with instigating her opponent to bring false charges against her. On inquiry, she repeated the same statements before two magistrates. It was held that the statements, made by her to the two magistrates, were clearly publications of the original defamatory statement and there were thus three separate publications of the libel.

Publication--Notice to Employee to Join Inquiry

Where the public notice was issued asking the delinquent employee to receive the report of disciplinary inquiry, it being a legal requirement, without which the company could not have completed the departmental action, it was held that the publication of notice to fulfill such requirement cannot be treated as defamatory and the order summoning the accused was held liable to be quashed.[86]

13. 'Imputation'

An imputation ordinarily implies an accusation or something more than an expression of a suspicion. It is, however, rather difficult to draw the line. An expression of a suspicion may have the same effect, on the same mind of the person to whom the suspicion is communicated, as an accusation would have. Where the accused made a report at the police station that some property of his had been stolen from his threshing floor and that he suspected the complainant and the report resulted in the searching of complainant's house by the police, it was held that the accused must be deemed to have made an imputation within the meaning of this section.[87] Mere making of an imputation concerning a person is, however, not enough. It must, at the same time, be proved that the writing of the defamatory statement was intended to be read by person or persons other than the person to whom it was written and that it was published.[88] While it is correct that public spirited persons, residing in a locality, should not be discouraged and made to face protected prosecution if they, in good faith, believe that an activity of a person, residing there, is having influence or effect on others, and he or she, by his or her presence, is proving to be a veritable nuisance in the area, a balance has to be struck so that such acts of public good are not converted into hyper puritanism or licenciousness, which unfortunately has much come in vogue these days, or recklessly make all sorts of aspersions without due care and attention on others or for setting personal scores against them.[89]

However, calling any person *shatir* who is not a chess player is highly objectionable and offending, though not necessarily defamatory.[90]4096

Imputation--First and Foremost Question

The first and foremost question, which a court dealing with a criminal prosecution, involving the offence of defamation, must, therefore, answer, is whether the alleged material, described as defamatory, amounts to imputation within the meaning of this expression as used in s 499, IPC . Imputation ordinarily implies an accusation.[91] Imputation or accusation alone will, however, not suffice. To constitute the offence of defamation, the prosecutor will have to prove that the imputation or accusation was made with an intention or knowledge or belief as mentioned in ingredient (c) above. A person is not guilty of defamation by making the imputation or accusation unless he intends to harm, or he knows or has reason to believe that thereby he would harm, the reputation of another person. In other words, an imputation or accusation simpliciter without proof of the requisite intention, knowledge or belief, as covered by ingredient (c) of the definition, will not constitute the offence of defamation.[92]

Imputations *Per Se* Defamatory--Effect

It is trite that when a complaint is filed for offence under s 500 of IPC, court has to consider the material produced in support of it, its admissibility and circumstances and the context under which such imputation has been made besides the intention, if any, to make such imputation and whether the accusations made can be believed to have harmed the complainant's reputation. The only effect of an imputation being *per se* defamatory is that it would relieve the complainant of the burden to establish that the publication of such imputations has lowered him in the estimation of the right thinking members of the public.[93]

Imputation Defamatory or Not--Mixed Question of Fact and Law

The question whether an imputation or accusation is defamatory is a mixed question of law and fact. If there is a controversy as to whether the material, complained of, is defamatory, the court will first have to decide, as a question of law, as to whether the said material is capable of being understood in a defamatory sense. If the court decides this question in the affirmative, it will then only, proceed to determine whether the said material, containing a defamatory potential, had, in fact, harmed the reputation of the complaint within the ambit of the definition of such harm as given in expln 4. If the material is defamatory *per se*, for example, where the accused imputed commission of a felonious crime to the complainant, there is no difficulty in deciding the question of law mentioned above. The court will, at once, answer it by saying that the imputation of commission of felony by the accused is capable of being understood in no other but a defamatory sense. In such a situation, the court will be justified in taking the parties to evidence with a view to determine, as a question of fact, whether the said imputation had harmed the reputation of the complainant within the four corners of expln 4. If, on the other hand, the words of the alleged imputation are ambiguous, it becomes a question of some difficulty for the court to decide whether those words are capable of being understood in a defamatory sense. If the court decides, in the context of a particular complaint, that the words, in4097 question, are reasonably capable of bearing a defamatory meaning, it is only thereafter that it will address itself to the question of fact regarding harm to the reputation of the complainant.[1]

Imputation--Facts to be Considered by Court

Where the words are obviously defamatory, the court has to consider the following facts for arriving at a decision whether the words are defamatory:

(i) **Circumstances and context**: The court must be put in possession, not only of the words used, but also of the context in which they were used in order to find the intention

and the effect of the words.[2] Spoken words, divorced from their context and surroundings, may appear to be slander, which, when controlled by the context and surroundings, are nothing of the sort.[3] The court should have regard to the time and place of publication, the relationship between the parties, and, in fact, the whole circumstances of the case.[4]

(ii) **Words should be considered as a whole**: Where some passages in a petition are alleged to be defamatory, the document should be read as a whole with a view to find out the main purport, and too much importance should not be attached to a few isolated passages here and there.[5] The accused is entitled to know specifically as to what are the words which are considered to be defamatory. Attention of the accused must be drawn pointedly to the expression considered to be defamatory.[6]

(iii) **Alleged defamatory words,*etc*, should be interpreted in a manner in which a reasonable man would do**: The test is, whether, under the circumstances in which the writing was published, reasonable man, to whom the publication was made, would be likely to understand it in the libellous sense.[7] Standard opinion is that of a reasonable man of normal intelligence possessed of a degree of the knowledge of circumstances of the case.[8] It is not sufficient that persons in one section only of the community might so understand them. The test to apply is reasonableness, whether the hearers or the readers, as the case may be, are few or many, expert or inexpert.[9] The court must consider what might be conveyed by the notice to a reasonable fair-minded man, and not what might be inferred from it by a man of a morbid or suspicious mind.[10]4098

Imputation regarding Insolvency

An imputation of insolvency against a person in the way of his trade is *per se* defamatory.[11]

Imputation Regarding Trade or Business

To say that a person indulging in black-marketing on an extensive scale all over the world,[12] or that he had been dishonest in the management of the affairs of the company and was trying to conceal that dishonesty by methods that were themselves dishonest,[13] would be defamatory. Where a letter sent by the accused, who had purchased a watch from a company, suggested that the company gave guarantees which were worthless, that it was a deceitful company and that persons, dealing with this company, should be on their guard take particular care to see that they are not cheated, it was held that such imputations were undoubtedly defamatory.[14] An imputation of dishonesty to a tradesman is actionable *per se*.[15] To ask a witness in cross-examination whether he was indulging in opium smuggling business or cloth smuggling trade is *per se* defamatory.[16]

Imputation Regarding Profession

To say in respect of an instructress in physical culture and dancing, that the future, including the social, religious and moral future, of the girls would be spoiled by attending the classes of the type, which she conducted, is to impute, to the complainant, an unfitness which is worse than attributing mere incapacity.[17]

Where the accused called the council *badmash* in an open court, the offence does not come under s 499, IPC, and the acquittal of the accused for the offence under s 500, IPC, is legal.[18] However, a statement made against a lawyer that after accepting the brief he betrays his clients' confidence and let his clients down is highly libellous.[19] An election poster against a rival candidate, a barrister, with the heading 'the hollowness of Mr--s' capacity as a barrister has been exposed' would amount to making a serious aspersion upon his professional status and is calculated to lower him in the eyes of the public as a barrister.[20] It is defamatory to publish an unskillful reproduction of an artist's work.[21]

Imputation Regarding Criminal Offence

The imputation of a criminal offence would be defamatory. Where the accused alleged that the complainant did harm to the poor, would not shrink from murder, appropriated government money, committed forgery, and so forth, it was held that he4099 could be convicted under s 500, IPC .[22] If a person is falsely charged with theft, he can prosecute the accused for defamation even though he is a man of low caste.[23] A charge of bribery and corruption would be defamatory.[24] Where an article in a newspaper alleged that a public servant had amassed a tidy amount by way of bribe, it was held that it was calculated to harm the reputation of the officer concerned and was defamatory.[25]

Imputation against Chastity

It would be defamatory to make any imputation against the chastity of a woman. To state that an unmarried well-connected Brahmin girl had not preserved her virgin purity,[26] or that a woman had miscarriage without any knowledge whether she was married or not,[27] or that the complainant, an unmarried Brahmin girl, aged thirty years, was the concubine of some persons,[28] would be defamatory. In *Bola Nath v Emperor* ,[29] the complainant, a European lady, was living with the son of the accused, a military officer, as his wife and subsequently married him after the death of her husband. She had made several attempts either for her suicide or for the murder of her husband. During interviews with the authorities, the accused said that she was of unsound mind and was, therefore, likely to murder her husband and that she was of loose moral character. It was held that there was no justification for charging the complainant with sexual immorality and the accused was guilty of the offence of defamation in respect of the second allegation.

Where the accused alleged that the complainant was having illicit connection with *goondas*, her paramours frequently coming to her at nights, and that her immoral activities reflected badly on the locality in which the accused lived, it was held that the accused was guilty under this section.[30]

The description of a person as illegitimate is a very serious imputation to make and such an imputation harms the reputation of the person against whom it is made. It also affects the reputation of the mother of the person and the mother's father. The imputation is all the more damaging when the parties concerned are people of high social status.[31] Similarly, when imputations of unchastity are made against a girl, the reputation of her father is naturally affected. There might be direct defamation and there might be indirect defamation. When an imputation is made against a particular person, that particular person is directly defamed. On the other hand, when an imputation is made, say, against the daughter of a person, that person is certainly indirectly defamed.[32]4100

Imputation against Caste

Statements have often been made which become a matter of importance for the member of the caste to consider their defamatory effect. Two questions have arisen frequently for consideration:

(i) whether the statements are defamatory; and
(ii) whether the statements are privileged under any of the exceptions.

The first question has been dealt here with respect to the statements about castes being or not being defamatory. The question of privilege has been discussed later under different exceptions.

Among Hindus, it would cause the gravest harm to allege that a man was out of caste. It is defamatory and is not covered by s 95, IPC .[33] To say so would bring about disastrous consequences, such as deprivation of religious and social communication, and would be *prima facie* defamatory.[34] To say that to associate with the complainant will entail ex-communication of brotherhood and that after association with him, the members of the brotherhood will only be re-admitted to caste privileges on consenting to give up all connection with him in future and on performing proper penance,[35] or calling a *parsutia kayestha,kori chamar* with the result that none of the priests attended a religious ceremony at the complainant's house,[36] was held to be defamatory. However, unless the words used in respect of a Hindu are tantamount to saying 'you have become an outcaste or you have been

ex-communicated from your caste', the words are not defamatory.[37]

Imputation Amounting to Vulgar Abuses

When the facts of a case clearly prove that the words uttered were only vulgar abuses without any intention to cause harm, no offence under this section is made out.[38] Where the defamatory words, *prima facie* libellous, are used in a street quarrel and are mere vulgar abuses, there is no deliberate intention to harm the reputation of the person defames.[39] Abuses having reference to the daughter or sister of the complainant, cannot be regarded as conveying any imputation as can, in any way, harm the reputation of the complainant.[40] To say that the complainant is *beiman* and *badmash*,[41] or is *pichhiag* and *lawaris* (which does not mean illegitimate),[42] or is *chandal*[43] or is dishonest or fraudulent,[44] does not lead to an offence under this4101 section. In *Jagannath Misra v Ram Chandra Deo* ,[45] at a meeting, convened by the complainant *zamindar*, to which the accused was not invited, the accused cried out loudly that the complainant was not only a liar but also ungentlemanly, barbarous and tyrannical. It was held that the words used were not defamatory. Of course, they amounted to an insult under s 504 . A remark, that the complainant had amassed wealth by sucking the blood of poor, is insulting and abusive, but not defamatory in law.[46] Where, however, vulgar abuses are uttered in the circumstances which tend to lower the person addressed in the estimation of the people present or to bring him into ridicule and contempt, they would amount to defamation.[47] In *Bhewati v Umabai* ,[48] there was a quarrel between *A* and *B* over their children in which *A* said to *B* that she was the wife of the former's husband. Similarly *C*, who was mother-in-law of *A*, said that *B* was the wife of her son. It was held that the imputation was a deliberate statement of fact and as it was made in the presence of several persons, it amounted to defamation. The fact, that the words, used by the writer of an article, are those of an abuse, does not, by itself take the article out of the definition of defamation.[49] The use of language of an obscene and insulting nature about a respectable *mukhtar*, amounting to saying that he was a worthless and despicable black guard, would harm the reputation of the *mukhtar*.[50]

Imputations not Amounting to Abuses

In all the representations made by the accused against the complainant, the words used are 'by wrongly guiding', 'wrongly informing', 'by irrelevant argument', 'abusive language', 'indecently', 'baseless allegation', 'not behaving in the manner required', 'as liked', 'insulting by abusive words', 'giving up the dignity and respect of Advocates', 'behaving improperly', 'uncivilized', 'shouted using abusive words' and 'insulted as liked'.[51] The said words cannot be said to be abusive words. Even if taken as abusive words, mere allegation that the accused had used abusive words or language cannot be taken to hold that the accused had used abusive words or language as the actual word(s) of abuse or abusive language is not spelled out.[52] So, when neither the abusive words, nor the words, which could tantamount to insult are spelled out in the complaint or in the sworn statement of the complainant (accused in the complaint alleging defamation), it cannot be said that by any insulting abusive words in the complaint, he defamed the complainant.[53]

Imputation--Superior Officers Noticing that Subordinate has Used Objectionable Language

It is well established that only such imputations as are malicious and reckless and not for public good, tranquillity, peace or public security or as not made in good faith, can be brought within the definition of defamation. The writing made must convey some imputation against the complainant with the intention to harm reputation. The4102 intention on the part of the accused to harm reputation or knowledge or reasonable belief that such an imputation will harm reputation of person concerned, is an essential ingredient of offence under s 499, IPC .[54] Where a bare reading of the entire noting sheet shows that the superintending engineer in exercise of superior authority had noted down that work order be finalised as the payment was not made to the contractor for the last one year in order to avoid legal complications, thereafter, the complainant had clearly used harsh language and in that background the senior officer, *i.e.*, superintending engineer might have made the remarks 'who is this immature person to write such a language on the file', a superior officer's noting that a subordinate had used objectionable language in the file would not, in any manner, bring the remarks within the

ambit of defamation punishable under s 500, IPC .[55]

Defamatory Imputation--Instances

It would be defamatory to characterise a person as *goonda,*[56] or to allege that the complainant sings indecent songs in the public, or is a drunkard and abuses girls and women and is a *goonda*,[57] or to describe a person in the heading of a defamatory pamphlet as *sharif badmash*,[58] or to say that Netaji Subhash Chandra Bose was a traitor,[59] or to call a person 'worthless' and 'despicable blackguard'.[60] A statement in an objection to the nomination of the complainant that the complainant was a drunkard, being in no way relevant to the election, was held defamatory to the complainant.[61] Where the accused called the complainant, who was named as one of his witnesses by the other party, a rogue, it was held that the expression used by the accused was defamatory.[62] The remark, that the complainant was a sort of a professional witness, whose evidence could be purchased, is clearly defamatory.[63]

The accused husband had filed petition for divorce against his wife, the daughter of the respondent no. 2. In the rejoinder and additional submission to the written statement, the accused made some serious allegations about the character of the respondent no. 2 and his wife, lowering their reputation in the society. Held, *prima facie* case for summoning the accused for offence under s 500, IPC was made out.[64]

14. 'Concerning any Person'

The defamatory matter to be actionable must be such that it contains an imputation concerning some particular person or persons whose identity can be established,[65] though it is not necessary that the matter should describe the complainant accurately by name.[66] A newspaper, however, in some cases, involves defamation of those who4103 are responsible for its publication.[67] A complaint for defamation is, therefore, maintainable by a corporation. However, certainly the scope of such a complaint by a corporation is not the same as that by individuals. If the management is bad, there is bound to be accusation of inefficiency and nepotism, *etc*. Such an attack does not amount to defamation.[68] The complainant must prove that the defamatory words refer to him[69] or where a name is mentioned, that it would be understood by those who know him to refer to him.[70] It would not be defamation if there is nothing in the writing to connect it with the complainant.[71] If the words complained of contain no reflection on a particular individual or individuals, and they equally apply to others belonging to the same class, an action for defamation will not lie. Where the accused published, in a paper, an account of an outrage on a woman, alleged to have been perpetrated by two constables of a *thana*, in which four constables were stationed, it was held that in the absence or proof that it was intended to charge any particular and identifiable constable with the alleged offence, the accused could not be convicted for defamation.[72]

Whether the words alleged refer to some ascertained or ascertainable person is a question of fact and the standard to be applied is--would reasonable people so understand it?[73] The cardinal rule is that the offence consists in using language which others, knowing the circumstances, would reasonably think to be defamatory of the person complaining of any injury by it.[74] Though the attack may be general, yet it may convey an innuendo at some particular person, and then, of course, a person so aggrieved can prosecute.[75] Where the words and picture designated the complainant in such a way as to let those who knew him understand that he was the person, the conviction of the accused was held to be proper.[76]

Where publication contains general allegations regarding certain persons of a class generally, it would not attract a definite class of persons to enable them to file a complaint under s 500, IPC .[77]

15. 'Intending to Harm, or Knowing or Having Reason to Believe that such Imputation Will Harm, the Reputation of such Person'

The essence of the offence of defamation is that the imputation must have been made either with the intention of causing harm, or with the knowledge or belief that the imputation would cause harm, to the reputation of the person defamed.[78] Mere publication of an imputation, concerning a person does not, of itself, constitute defamation. A person is not guilty of defamation unless he intends that4104 the words spoken should harm the reputation of a person or he knows, or he has reason to believe, that his words would harm the reputation of a person.[79] However, no intent to defame is necessary; it is sufficient if the imputation is published intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of the complainant.[80] To constitute 'defamation' under s 499, IPC, there must be an imputation and such imputation must have been made with the intention of harming or knowing or having reason to believe that it will harm the reputation of the person about whom it is made. In essence, the offence of defamation is the harm caused to the reputation of a person. It would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant, irrespective of whether the complainant actually suffered directly or indirectly from the imputation alleged.[81] Where, immediately after the termination of a criminal case, the accused, on being asked, told his pleader in ordinary voice in conversation that the trouble arose out of a particular alleged elopement, it was held that he had not made any imputation with the intention of harming the reputation of anybody and had answered a very natural question, put to him by his legal adviser, and was, therefore, not guilty.[82]A distinction has, however, to be made between an attempt on the part of the accused to exaggerate their own position and their act of casting reflection on the complainant. What the prosecution has to establish is not that the accused have indulged in exaggeration, or even falsehood, in respect of their own position and importance, but that the imputation was calculated to harm his/her reputation.[83] It may be further noted that malicious publication, in the sense of active ill-will against the person defamed, is not a necessary constituent of the offence of defamation under s 499, IPC .[84] An imputation against another person, although made in the absence of actual ill-will, is not, on that account, to be accepted as being *bona fide*. Conscious violation of law to another's prejudice is sufficient, though there may be no malice in fact. When defamatory words are *prima facie* libelous, legal malice must be presumed until a case of privilege is made out.[85] To bring the publication of a scandalous imputation under the penal law, it is not necessary to prove that it was done out of any ill-will or malice or that the complainant had actually suffered from it.[86] If the statements are not *prima facie* libelous, evidence of malice would be inadmissible.[87]

Where the accused sent a letter to his brother complainant which contained certain imputation but there was no intention to cause harm to the reputation of the complainant, held the letter was not defamatory.[88]4105

Where the intention behind uttering the alleged defamatory words by the accused bank officers was not to harm/defame the complainant but to realize the unpaid amount from the complainant, no offence under s 499, IPC was made out.[89]

Proof of Actual Harm to Complainant--Not Necessary

To sustain a charge of defamation, it is not necessary to prove that the complainant actually suffered directly or indirectly from the scandalous imputation alleged; it is sufficient to show that the accused intended that the imputation should harm, or that he knew or had reason to believe that imputation made by him would harm, the reputation of the complainant.[90] A person who commits defamation, is not to be excused from the penalties attached to the offence merely because he has composed himself in respect of the modes of giving expression to the defamatory matter in such a way that little real injury results from the offence.[91] A person, who publishes defamatory matter against another in a case, not covered by any of the exceptions, cannot escape punishment on the ground that the reputation of the person attacked was so good, or that of the persons attacking so bad, that serious injury to the reputation was not in fact caused.[92] Explanation 4 merely describes the quality or nature of the imputation and not its actual effects.[93] It is not necessary to show that the words, as found to have been used by the accused, lowered the prestige of the complainant in the estimation of others.[94] It is sufficient if it is proved that the harm to the reputation of the complainant was intended,[95] whether

the effect as intended or probable, is produced.[96]

16. Intention or Knowledge

In judging whether the accused had the requisite intention or knowledge, the circumstances under which, and the main object with which, the defamatory statements were made, and the background of the dispute between the parties should all be considered.[97] Where the tenor of a document shows that the publication tends to harm the reputation of a person, the court would be justified in gathering from the terms of the matter itself that the publishers intended to harm, or they knew or had reason to believe that the imputation would harm, his reputation.[98]

17. 'Harm'

'Harm' has to be to the reputation itself of the person defamed.[99] Words which do not disparage a man's reputation but occasion a pecuniary loss to him do not amount to4106 defamation.[1] Where a notice was published by the auctioneers that they would sell by public auction some goods on account, and at the risk, of the plaintiff, who, in spite of repeated demands and notice, had failed to pay for, and take delivery of, the goods which he had purchased, it was held that the words did not bear a defamatory meaning.[2] Even a false claim on a postcard, that the complainant should pay a certain sum of money to the accused, which the complainant owes to him, is not *prima facie* defamatory.[3] Indulging in exaggeration, or even falsehood, by the accused in respect of their own position and importance is not defamation. It must be proved that the imputation was calculated to harm the reputation of the complainant.[4] Mere denial from parenthood of bridegroom by a person whose name as father of bridegroom was printed on invitation card, was held to be no defamation.[5]

18. 'Reputation'

Reputation is a *jus in rem*, a right absolute and against all the world. A man's reputation is his property.[6] Hence, nobody can so use his freedom of speech or expression as to injure another's reputation.[7]

The term 'character', 'reputation' and 'rumour' are prone to be confused. 'Character' is what a person actually is and 'reputation' is what neighbors say, what he is. Thus, though a man may have, in fact, a good character, yet he may suffer from a bad reputation or *vice versa*. 'Reputation' is the common knowledge of the community or a general opinion in respect to a person. 'Reputation' being the community's opinion, is distinguished from mere rumor in two respects. On the one hand, reputation implies the definite and final formation of opinion by the community, while rumor implies merely a report that is not yet finally credited. On the other hand, a rumor is usually thought of as signifying a particular act or occurrence, while a reputation is predicated upon a general trait of character. A man's reputation, for example, may declare him honest and yet today's rumor may have circulated that this reputed honest man has defaulted yesterday in his accounts.[8] In other words, character is an expression of very wide import which takes in all the traits, special and particular qualities, impressed by nature of habit, which serve as an index to the essential intrinsic nature of a person. Character also includes reputation, but character and reputation are not synonymous.[9]

A civil dispute in a Civil Court was pending between the complainant and the accused about the property where a school run by the complainant was situated. Accused displayed a hoarding informing the parties about the pendency of the dispute in Civil Court and cautioned them to take admission in the school at their own risk. Held, there was no imputation actionable under s 499, IPC .[10]4107

19. Explanation 1

In order to amount to defamation under expln 1 to this section, the imputation alleged must not only harm the reputation of the person concerned if he were living, but also be 'intended to be hurtful to the feelings of his family or other relatives'.[11] This explanation would not be attracted if any of the said two

elements is lacking.

20. Explanation 2

Company

As in the case of natural persons, reputation is an asset to companies, corporations and other bodies of persons and they are also entitled to the protection of their reputation. However, the reputation of a corporation is not, in all cases, similar to that of natural persons. A corporation cannot well suffer damage in mind or body.[12] An incorporated company may have a reputation for the good conduct of the business or undertaking of the company, and the company's reputation may be quite distinct from that of any of its officers, however highly placed.[13] A municipal board *per se* has hardly any reputation. If, however, a person makes any imputation so as to cause any special injury to the property of the board, then the board can maintain a complaint under s 500 .[14] It cannot, however, maintain a prosecution for words which reflect upon its members individually, and not upon it as a body, unless special damage has thereby been caused to it.[15] To use words which reflects upon it (*i.e.* the company) in the way of its property or trade or business would be defamatory.[16] If a company is defamed, one of the members may file a complaint on its behalf. If, however, the complaint is of an individual as such expln 2 has no application.[17]

Publisher cannot be absolved of liability for defamation on the mere ground that the Chief Editor and the Editor have not been prosecuted.[18]

Association or Collection of Persons

An association may be defamed by an imputation which lowers the moral character of the members of the association collectively. Thus, making such imputations about a student's welfare association would amount to a defamation of the members of the association as such, and the accused would be guilty under this section.[19] Where the accused published an article, in his paper '*Kaliyug*', containing the expressions:

> How the justice stands at a distance as a helpless spectator of the show as to be manner, in which the illicit bribe money from plaintiffs and defendants enters into the pockets of4108 Public Prosecutors and Assistant Public Prosecutors, and the extent to which it reaches and to which use it is put.

It was held that the prosecuting staff of Aligarh, or, as a matter of fact, the prosecuting staff in the state of Uttar Pradesh, is certainly such as an identifiable group of collection of persons as is covered by expln 2.[20] Where the writer of the article in a paper implied that the girls of a particular college were habitually guilty of the misbehavior described in the articles, the inevitable effect on the reader must be to make him believe that it is habitual with the girls of the college to behave in this way. All the girls in the college collectively, and each girl individually, must suffer in reputation.[21] However, if a person complains that he has been defamed as a matter of a class, he must satisfy the court that the imputation is against him personally and that he is the person aimed at before he can maintain an action for defamation.[22] The test for the application of expln 2 is that the class or the association of persons must not be unidentifiable. If it is identifiable in the sense that it is definite, then the remarks in an article about it are defamatory of the class. And if the class collectively and individually will suffer in reputation on account of the article, a complaint by an individual member of that class is maintainable.[23] The imputation alleged against Syrian Christian community as a whole, which is an unascertainable body of persons, no member of that community could say that he was individually defamed or was an aggrieved person competent to file a complaint for defamation under s 499, IPC .[24]

The Supreme Court, in *GNarasimhan v TV Chokkappa* ,[25] held that the question which must be

decided is, which was the class or body in respect of which the defamatory words were used and whether that body was a definite and an identifiable body or class so that the imputation in question can be said to its individual components enabling an individual members of it to maintain a complaint.

The article published by the accused highlighting ideological differences existing between members of the Christian group and the accused and members of a Christian fellowship centre, the accused having a different religious belief, does not amount to defamation.[26] The Kerala police is not a definite or determinable body, but it is an ever-changing body. Members of the police force are not static. Police personnel retire and new persons are enrolled. The character and composition of the Kerala police changed every now and then. Similarly, it cannot be said that the Kerala police is a definite and determinable body to attract explns 2 to 8 of s 499, IPC . A member of the Kerala police, therefore, is not entitled to file a complaint under expln 2 of s 499, IPC .[27]4109

Lawyers as a Class

The real test appears to be whether the class or body in respect of which the defamatory words have been used is a definite or determinate body so that the imputation in question can be said to relate to its individual members or components enabling an individual member of it to maintain a complaint. If the class or body in respect of which the defamatory words have been used is not a definite and determinate body, an individual member of such body cannot maintain an action for defamation unless he satisfies the court that the imputation has been made against him personally and he is the person aimed at.[28] Therefore, in order to maintain the prosecution for defamation as a member of the class that is the 'district lawyers' he must satisfy the court that the imputation is against him personally and that he is the person aimed at.[29] The advocates as a class are incapable of being defamed. If any publication can be shown to refer specifically to particular individual, then alone an action for defamation may lie, not otherwise. The portrayal of the lawyers in the film 'Nadan' does not have any relevance to lawyers as a class. The dialogues and visible representations point out only to advocates who indulge in such practices and the impugned portions of the film cannot lead any reasonable person to form an opinion that advocates are a despicable bunch.[30]

The words or imputations complained of must relate to some particular person or persons whose identity can be established. If such statement does not show any imputation aimed at any particular individual or individuals, but equally apply to others although belonging to the same class, it will not amount to defamation.[31] If the editorial did not refer to complainant personally or to any other individual but referred to the lawyers as a class and thus the alleged defamation could not refer to a determinate identifiable section/class of lawyers as distinguished from the rest of members of lawyers fraternity, such a complaint is not maintainable.[32]

21. Explanation 3

The essence of defamation is that it conveys a discreditable imputation. It is, therefore, immaterial in what medium the discreditable imputation is made. For example, a play, which is woven out of the imagination of an author, can possibly contain more deadly imputations against real persons than a mere narrative.[33] Where, in an article in department with his own underlings, the minister had made the appointment of a particular person and that this was but the prelude to further appointments of the like nature, it was held that the caption. 'So prospers the incorrupt administration of Minister Krishna Iyer' was obviously an ironical statement implying that the minister's administration was a bad administration riddled with corruption and nepotism.[34]4110

22. Explanation 4

The conjoint reading of s 499, IPC, with this expln 4, would make it clear, that in the complaint, there shall be an averment to the effect, that because of the imputation, the complainant's reputation had been lowered in the estimation of others.[35] Explanation 4 implies a fallen reputation, and, therefore, a person, who does not stand in high estimation of others, cannot get a fall if the imputation be such as may not bring his reputation to a level, below the one he enjoys.[36] Imputation communicated to the

prosecutor only, cannot be treated as defamatory.[37] However, the defamatory words, uttered at a meeting in the presence of the complainant, a *sarpanch*, were held to be intended to defame the complainant.[38] If the words are *prima facie* defamatory, then one need not find out as to whether the imputation was likely to lower the moral or intellectual character of person defamed mentioned in expln 4.[39] Where, however, the meaning of the words, spoken or written, is doubtful as to its significance and some evidence is necessary to decide what the effect of the expression used would be and whether it is calculated to harm a particular person's reputation, it is possible that the principle, enunciated in expln 4, may, with propriety, be applied.[40]

Where the news published in the newspaper stated that there was illicit relationship between the Principal, teaching staff and students, and even amongst staff and students in the hostel, a *prima facie* case of defamation was made out, the defence plea that imputation was made in good faith, and as to whether expln 4 to s 499, IPC was attracted in the case was to be seen during the trial of the case. Proceedings under ss 500 and 501, IPC were not quashed on petition filed under s 482, CrPC .[41]

23. Exceptions to Section 499

This section has got a large number of exceptions. They cover the entire field of the privileges available in cases of defamatory statements. In fact, these privileges represent the freedom of speech and expression which is the foundation of all democratic institutions. However, while a considerable latitude is allowed in respect of these privileges, they are also subject to a large number of conditions.

There are many points, in respect of which the question is one which relates to a number of exceptions generally. One such point, relates to burden of proof. When an accused claims the benefit of any of the exceptions, the burden of proof is upon him.[42] In such a case, though the evidence, which the accused is required to produce to discharge this burden, is not of an that standard as is required of tile prosecutor, yet there must be material on the record to show that this burden has been discharged.[43] His plea is taken as established if a preponderance of probability is established, in favour of his plea, either by the evidence led by him or from the other4111 evidence on record.[44] Before dealing with each exception separately, points, which require consideration generally in respect of various exceptions, are noted below under the following heads:

(a) analysis of the exceptions;
(b) good faith generally;
(c) excessive publication;
(d) fair comments and related headings;
(e) definition and liability of editor and publishers *etc*, of newspapers in different headings.

The protection under exceptions 1 and 4 is not available when process is being issued in a defamation case.[45]

6 *NCERT v PD Bhatnagar* 1980 Raj Cr Cas 392, p 396, 1981 Cr LJ (NOC) 57 (Raj) .

7 *Ibid.*

8 *Greene v Delanny* (1870) 14 WR (Cr) 27 ; *Isuri Prasad Singh v Umrao Singh (*1900) ILR 22 All 234; Re *Ganga Prasad*(1907) ILR 29 All 685; *Champa Devi v Pirbhu Lal* 27 Cr LJ 253, AIR 1926 All 287 ; *Satish Chandra Chakravarti v Ram Doyal De* (1921) ILR 48 Cal 388 (SB); Re *Nagarji Trikamji*(1895) ILR 19 Bom 340; *Abdul Hakim v Tej Chandar Mukerji* (1881) ILR 3 All 815 ; *Tiruvengada Mudali v Tripurasundari Ammal* (1926) ILR 49 Mad 728 (FB).

9 *Praninchand Jaggiuandas Gandhi v Ibrahim Mohammed Merchant* 1987 Cr LJ 1795 (Bom) .

10 *VideHalsbury's Law of Canada.*

11 *KV Ramaniah v Special Public Prosecutor* AIR 1961 AP 190 (DB), (1961) 1 Cr LJ 601.

12 *Sunlakhya Chowdhury v HM Jadwet* AIR 1968 Cal 266, p 271, 1968 Cr LJ 736 ; *Prem Pal Singh v Mohan Lal* 1981 Cr LJ 1208, p 1211 (HP) ; *NCERT v PD Bhatnagar* 1980 Raj Cr Cas 392, p 397, 1981 Cr LJ (NOC) 57 (Raj) .

13 *Surya TV v State of Kerala* 2009 (1) KLT SN 2 (Ker) ; **see also***VS Achuthanandan v Kamalamma* 2008 (2) KLJ 417, 2008 (3) KLT 346 .

14 *South Indian Bank Ltd v Paul Vareed Cheruvathoor* 2014 Cr LJ 701, p 704 (Ker), 2013 (4) KLJ 815 .

15 *South Indian Bank Ltd v Paul Vareed Cheruvathoor* 2014 Cr LJ 701, p 704 (Ker), 2013 (4) KLJ 815 .

16 *Chief Education Officer v Parents Teacher Association* 2013 (1) Crimes 172, p 178, 179 (Mad) .

17 Re *Arudhati Roy*2002 Cr LJ 1792 (SC).

18 *Surender Nath v Chief Justice and Judges of the High Court* (1884) ILR 10 Cal 109 .

19 *Bathina Ramakrishna Reddy v State of Madras* AIR 1952 SC 149 .

20 1989 AC 188.

21 Re *Arundhati Roy*2002 Cr LJ 1792 (SC).

22 *Sanjiv Datta Deputy Secretary's Ministry New Delhi & ors*, (1995) 3 SCC 619.

23 *Abdul Khadar v Taib Begum* AIR 1957 Mad 339, (1957) 1 MLJ (Cr) 149 ; *MC Verghese v TJ Ponnan* AIR 1970 SC 1876, 1970 Cr LJ 1651 **reversing***TJ Ponnen v MC Verghese* AIR 1967 Ker 28, 1967 Cr LJ 1511 .

24 *Empress v Butchi* (1894) ILR 17 Mad 407, 1 Weir 409 .

25 *Suniakhaya Chowdhury v HM Jadwet* AIR 1968 Cal 266, 1968 Cr LJ 736 ; *Tiraveiamuthu Pillai v Municipal Council* AIR 1961 Mad 230 .

26 *Pitumber Dass v Dwarka Pershad* 2 NWP 436 .

27 *Chellappan Pillai v Karanjia* (1962) 2 Cr LJ 142, AIR 1961 Ker LJ 1212 (each and every member photographed can file a complaint); *Raj Kapoor v Narender Naranbhai Bagardas* 1974 Guj LR 125 .

28 *Amar Singh v KS Badalia* (1965) 2 Cr LJ 693 (Pat) .

29 Re *Bhulliram Jalani*(1962) 2 Cr LJ 760 (2), AIR 1962 MP 382 ; *Empress v Janardhan Damodhar* (1895) ILR 19 Bom 703 .

30 *Pal Sharpe v Dwijendra Nath Bose* (1964) 1 Cr LJ 367 (Cal) .

31 *Sunilakhaya Chowdhury v HM Jadwet,* AIR 1968 Cal 266, 271, 1968 Cr LJ 736 .

32 *Mangal Sahu v Sukratibai* 1980 Cr LJ 431 (MP) .

33 *Filomeno Pereira v Joao Lourenco Fernandes* 1981 Cr LJ 117, p 118 (Goa) .

34 *Lachman v Pyarchand* AIR 1959 Raj 169, 1959 Raj LW 222 .

35 *Kundamal v Empress* AIR 1943 Sind 196, 95 Cr LJ 105 ; *Amar Singh v KS Badatia* (1965) 2 Cr LJ 693 ; *C Doratsami Naidu v Kanniappa Chetty* AIR 1931 Mad 487, 32 Cr LJ 767 .

36 *Sukhdeo v Emperor* AIR 1933 All 210, 34 Cr LJ 952 (2).

37 *S Soosai Naidu v Father Darrientorr* 1 Weir 579(2).

38 *Thangavelu Cheyyiar v Ponnammat* 1966 Cr LJ 1149, AIR 1966 Mad 363 .

39 *Bhikachand v Emperor* AIR 1927 Sind 54, 27 Cr LJ 1276 .

40 *Kanwal Lal v State of Punjab* AIR 1963 SC 1317, (1963) 2 Cr LJ 345 .

41 *Luchman v Pyarchand* AIR 1959 Raj 169, 1959 Raj LW 222 .

42 *Ayeasha Bi v Peerkhan Sahib* AIR 1954 Mad 741, p 753, 55 Cr LJ 1239 .

43 *J v Sher Singh* 11 Cr LJ 281, 284 .

44 *Tribikrama Misra v Chandramani Narayanswamy* 1972 Cut LT 319 ; Re *Bhulliram Jalam*(1962) 2 Cr LJ 760 (2);

Nagarathinam (Dr) v M Kalirajan 2001 Cr LJ 3007 (Mad) .

45 *MP Singh Sahni v State* 2013 (2) Crimes 630 (Del) .

46 *Jacob Mathews v Manikantan* 2012 (3) KLT 824 (Ker) .

47 *MK Parameswara Kurup v N Krishna Pillai* 1966 Cr LJ 1269, AIR 1966 Ker 264 .

48 *Brij Ballabh Goyal v Satya Dev* 1960 Cr LJ 1136, AIR 1960 Raj 213 ; *Mohinder Singh Dhillon v Ganga Dhar Sharma* (1975) 77 Punj LR 716 .

49 *Ajit v Radha Kishan* 32 PLR 772 ; *Keshab Lal v Provet Chandra* AIR 1938 Cal 667 .

50 *Jayarajan v Surendran* 2010 (91) AIC 644, 2010 (2) KLT 505 (Ker) .

51 *Standard Chartered Bank v Vinay Kumar Sood* 2010 Cr LJ 1277 (Del), 157 (2009) DLT 368 .

52 *Shybimon v Haridas* 2010 (2) KLT 158, 2010 (90) AIC 580 (Ker) .

53 *PR Rama Krishnan v Subbramma Satrigal* AIR 1988 Ker 18, 1988 Cr LJ 124, (1987) ILR 1 Ker 547 .

54 *Surya TV v State of Kerala* 2009 (1) KLT SN 2 (Ker) ; **see also***VS Achuthanandan v Kamalamma* 2008 (2) KLJ 417, 2008 (3) KLT 346

55 *Sultan Salahuddin Owaisi v Syed Vigaruddin* 2005 Cr LJ 2726 (AP) .

56 *MN Meera v AC Mathew* 2002 Cr LJ 3845 (Ker) .

57 *John Thomas v K Jagdeesan (Dr)* 2001 Cr LJ 3322 (SC) .

58 *MK Prabhakaran v TE Gangadharan* 2006 Cr LJ 1872 (Ker) .

59 *Wennhak*'s case [1888] 20 QBD 635.

60 *MC Versese v TJ Ponnan* AIR 1970 SC 1876 .

61 *Queen-Empress v Buthi* (1894) ILR 17 Mad 401 .

62 *Abdul Khadar v Taib Begum* AIR 1957 Mad 339 .

63 *Tinuvengada Mudali v Tripurasundari Ammal* (1917) ILR 40 Mad 722, AIR 1926 Mad 906 .

64 *MC Verghese v TJ Ponnan and Anor* AIR 1970 SC 1876 .

65 *Govindan Nair v Atchuta Menon* (1916) ILR 39 Mad 433 .

66 *R v Burdett* (1820) 2 And Ald 95, p 143 .

67 *Khima Nand v Emperor* 38 Cr LJ 806, 1937 ALJ 128 .

68 *Hasdevi Malkani v State* AIR 1969 All 423, 1969 Cr LJ 1089 .

69 *Empress v Taki Hussain* (1885) ILR 7 All 205 ; *Abdul Aziz v Mohammad Arab* AIR 1935 Cal 736, 37 Cr LJ 133 ; *Sanatan Daw v Dasarathi Tah* 1959 Cr LJ 1310, AIR 1959 Cal 677 ; *Empress v Sadashiv Atma Ram* (1894) ILR 18 Bom 250 ; *Sukhdeo Vithal Pansare v Prabhakar Sukhdeo Pansare* 1974 Mah LJ 777, 1974 Cr LJ 1435, p 1437-1438 ; *Nagarathiam (Dr) v M Kalirajan* 2001 Cr LJ 3007 (Mad) .

70 *Babu Singh v State* 1951 AWR (HC) 257 ; *Mohammad Ismail Khan v Mohammad Tahir* 6 NWP 38 ; *Komal Chandra Bose v Nobin Chandra Ghose* 10 WR (Civil) 184 .

71 *Naga On Thi v Emperor* 23 Cr LJ 240, AIR 1923 Rang 16 ; *Bishwanath Das v Keshab Gandhabanik* (1903) ILR 30 Cal 402, 7 CWN 74 ; *Empress v Sankara* (1884) ILR 6 Mad 381, p 396 (communication of a sentence of ex-communication by a spiritual superior to the complainant by a card through the post is a publication).

72 *Kundanmal v Emperor* AIR 1943 Sind 196 .

73 *Mahender Ram v Harnandan Prasad* AIR 1958 Pat 445, 1958 Pat LR 106 .

74 *Shoobhagi Keori v Bokhori Ram* 4 C LJ 390 .

75 *TG Goswami v State* AIR 1952 Pepsu 165, 53 Cr LJ 1553 .

76 *G Chandrashekhara Pillai v K Karthikeyan* (1964) 2 Cr LJ 549, AIR 1964 Ker 277 .

77 *Sultan Salahuddin Owaisi v Syed Vigaruddin* 2005 Cr LJ 2726 (AP)

78 Re *Howard*(1888) ILR 12 Bom 167.

79 *MU Abbasi v Emperor* AIR 1941 Sind 92, 42 Cr LJ 684 .

80 *Radha Govinda Dutta v Soila Kumar Mukherjee* AIR 1950 Cal 343, 51 Cr LJ 1293 .

81 *Basina Appanna v Peta Akkana* AIR 1925 Mad 320, 26 Cr LJ 521 .

82 *U Aung Pe v King* AIR 1938 Rang 232 . 39 Cr LJ 663 .

83 *Duke of Branswick v Harmer* (1849) 14 QBD 185 ; *G Chandrashekhara Pillai v K Karthikeyan* (1964) 2 Cr LJ 549, AIR 1964 Ker 277 .

84 Re *Periyasami Kotasami* 1 Weir 580.

85 *Jai Debi Kaur v Emperor* 16 Cr LJ 482.

86 *VK Bagga v OP Arora* 2007 Cr LJ 1101 (Del) .

87 *Thambu v Emperor* AIR 1926 Lah 278, 27 Cr LJ 899 .

88 *Pat Sharpe v Dwijendra Nath Bose* (1964) 1 Cr LJ 367 ; *Krishna Kanta v Geeta Roy* 1982 Ch Cr Cas 54, p 60 (Del) .

89 *Krishna Kant a v Geeta Roy* 1982 Ch Cr Cas 54, p 61 (Del) .

90 *Harbans Sinyh v State of Rajasthan and Anor* 1998 Cr LJ 433 (Raj) .

91 *NCERT v PD Bhatnagar* 1981 Raj Cr Cas 392, p 397, 1981 Cr LJ (NOC) 57 (Raj) ; *Prem Pal Singh v Mohan Lal* 1981 Cr LJ 1208, p 1211 (HP) (imputation means accusation against a person and it implies an accusation of fact, and not merely a term of abuse).

92 *NCERT v PD Bhatnagar* 1980 Raj Cr Cas 392, p 397, 1981 Cr LJ (NOC) 57 (Raj) ; *JM Roy v Surinder Kumar Sher* 1975 Kash LJ 358 .

93 *SP Bobati v Mahadev Virupaxappa Latti* 2005 Cr LJ 692 (Kant) .

1 *NCERT v PD Bhatnagar* 1980 Raj Cr Cas 392, p 397, 1981 Cr LJ (NOC) 57 (Raj) ; *S Nihal Singh v Aryan Das* 1983 Cr LJ 777 .

2 *Bhola Nath v Emperor* AIR 1929 All 1, p 3, 30 Cr LJ 101 .

3 *Broome v Agar* (1928) 138 LT 698, p 702 .

4 *Churchill v Gedney* 85 JP 471 .

5 *Choitan Charan Das v Raghunath Singh* 1959 Cr LJ 1006, AIR 1959 Ori 141 ; *Cassem Kurrim v Jonus Hadjee Seedick* 9 CWN 195, 2 Cr LJ 47 .

6 *Rukamani Bai v Radha Ballabh* 1955 NUC 469 .

7 *Capital and Counties Bank v Henty* (1882) 7 AC 741, 47 LT 662, 52 LJ QB 232 ; *Lachmi Narain v Shambhu Nath* AIR 1931 All 126, 1931 ALJ 16 .

8 *Holdsworth v Associated Newspapers Ltd* (1937) 3 All ER 872 ; *Lews v Daily Telegraph* (1963) 2 WLR 1063, (1963) 2 All LR 151, p 154 .

9 *Tolley v Fry and Sons Ltd* (1930) 1 KB 467, **affirmed** in 1931 AC 333.

10 *Keogh v Incorporated Dental Hospital of Ireland* (1910) 2 Ir R 166, cited in *Lachmi Narain v Shambhu Nath* AIR 1931 All 126 .

11 *Bhikachand v Emperor* AIR 1927 Sind 54, 27 Cr LJ 1276, on appeal from AIR 1926 Sind 258, 27 Cr LJ 868 ; *Tikamdas v Emperor* AIR 1927 Sind 58, 27 Cr LJ 947 .

12 *Purshottam Lal v Prem Shanker* AIR 1966 All 377 .

13 *Madhorao Gangadhar Chinavis v Narayan Bhaskar Khore* AIR 1927 Nag 17, 27 Cr LJ 1119 .

14 *CTNR Narayanan Chettiyar v Emperor* AIR 1935 Rang 509, 37 Cr LJ 328 .

15 *Rahim Baksh v Bachcha Lall* AIR 1929 All 214 .

16 *Deepchand v Sampathraj* AIR 1970 Mysore 34, 1970 Cr LJ 260 ; *National Sugar Mills v Ashutosh* AIR 1962 Cal 27, p 28 .

17 *Mitha Rustomji Murzban v Nuseerwanji Nowroji* AIR 1941 Bom 278, p 281, 43 Cr LJ 17 .

18 *Sirajuddin Ali v Mujtaba Ali and Anor* 2001 Cr LJ NOC 125 (AP) .

19 *Raghunath Singh v Makundi Lal* AIR 1936 All 780, 1936 ALJ 1014 .

20 *Panna Lal v Emperor* AIR 1936 Lah 294, 37 Cr LJ 1033 .

21 *Krishnappa v Swami Akhandanand* 42 CWN 1045 .

22 Re *AS Radhakrishna Ayyar*AIR 1932 Mad 511, 33 Cr LJ 665 .

23 *Empress v Nabin Dome* 2 WR (Cr) 35 (2).

24 *Nga Poona v Emperor* 17 Cr LJ 213 .

25 *Sohan Lal v State* (1962) 2 Cr LJ 520, 1961 All LJ 967 ; *Sukhdeo v Emperor* AIR 1933 All 210, 34 Cr LJ 952 .

26 *Edara Venkayya v Kalipattapu Chitti* AIR 1940 Mad 879, 1940 MWN 892 .

27 *Kashi Ram v Emperor* AIR 1930 All 493, 32 Cr LJ 435 .

28 *Thangavelu Chettiar v Ponnammal* 1966 Cr LJ 1149, AIR 1966 Mad 383 .

29 *Bola Nath v Emperor* AIR 1929 All 1, 30 Cr LJ 101 .

30 *Kunwal Lal v State of Punjab* AIR 1963 SC 1317, (1963) 2 Cr LJ 345 ; *Baga Mahar v Emperor* 25 Cr LJ 169, AIR 1924 Nag 172 .

31 *Nongthombam Kanhai Singh v Bhaskar Singh* (1964) 1 Cr LJ 408, AIR 1964 Manipur 20 .

32 *Hardevi Malkani v State* 1969 Cr LJ 1089, AIR 1969 All 423 .

33 *Mohan Lal v Ram Charan* AIR 1928 All 213, 29 Cr LJ 451 ; *Bhanwarsingh v Sukhramsingh* AIR 1940 Nag 283, 41 Cr LJ 585 ; *Babulal v Tundilal* AIR 1932 Nag 97, 33 Cr LJ 835 ; *Girdhari Lal v Punjab Singh* AIR 1933 Lah 727, 34 PLR 1071 (it amounts to mere verbal abuse).

34 *Cooppoosami Chetty v Duraisami Chetty* (1910) ILR 33 Mad 67, p 69 .

35 *Mukund Ram v Emperor* 9 Cr LJ 535, 5 ALJ 472 .

36 *Bachcha Paragwal v Emperor* 11 Cr LJ 413 .

37 *Vengala Venkayya v Thallam* 28 MLJ 58, 17 MLT 369 ; Re *Venkata Reddi* 1 Weir 575.

38 *S Seetharama Iyer v KC Ramulu alias Ramanathan* 1972 LW (Cr) 226 ; *Grish Chunder Mitter v Jatadhari* (1899) ILR 26 Cal 653, 3 CWN 551 ; *Bhoomi Money v Natober Biswas* (1910) ILR 28 Cal 452, 5 CWN 659 ; *Suraj Narain v Sita Ram* AIR 1939 All 461, 1939 ALJ 394 (these cases not approved).

39 Re *Anthony Rodgers* 1 Weir 607.

40 *Emperor v Behari* 1883 AWN 36 .

41 *Bakhtwar Lal v Crown* AIR 1922 Lah 459 (1), 4 LLJ 480 .

42 *Thakaria v Puran Singh* 23 Cr LJ 429, AIR 1922 Lah 452 .

43 *Sarat Chandra Das v State* 1952 Cr LJ 1640, AIR 1952 Ori 351 .

44 *Rukmani Bai v Radha Ballabh* 1955 NUC 472, 1953 Raj LW 203 .

45 *Jagannath Misra v Ram Chandra Deo* AIR 1945 Pat 450 .

46 *Purushottam Lal v Prem Shanker* AIR 1966 All 377 .

47 *Harakh Chand v Ganga Prasad* AIR 1925 All 371, 23 ALJ 151 ; *Dhruba Charan Khandal v Dinabandhu Patri* AIR 1966 Ori 15, 1966 Cr LJ 42 .

48 *Bhewati v Umabai* 1962 MPLJ (notes) 112 .

49 *Inayat Shah v Emperor* 30 Cr LJ 4 .

50 *Raju Ram Singh v Emperor* 19 Cr LJ 669 .

51 *SP Bobati v Mahadev Virupaxappa Latti* 2005 Cr LJ 692 (Kant) .

52 *Ibid.*

53 *Ibid.*

54 *MS Ahuja v Ami Chand* 2006 Cr LJ 1503 (P&H) .

55 *Ibid.*

56 *Chellapan Pillai v Karanjia* (1962) 2 Cr LJ 142, 1962 MLJ (Cr) 635 ; *Yeshwant Singh v Kushwah* 1955 NOC 3695 (MB) .

57 Re *Bhulliram Jalam*(1962) 2 Cr LJ 760 (2), AIR 1960 MP 382 .

58 *Ram Narain v Emperor* AIR 1924 All 566, 26 Cr LJ 23 .

59 *Pat Sharpe v Dwijendra Nath Bose* (1964) 1 Cr LJ 867, 68 CWN 654 .

60 *Raja Ram Singh v Emperor* 19 Cr LJ 669 .

61 *Hori Lal v Vishwanath Bhately* 1957 Cr LJ 1360, AIR 1957 All 777 .

62 *Esufalli Abdul Hussain v Emperor* 19 Cr LJ 731 .

63 *Purshottam Lal v Prem Shanker* AIR 1966 All 377 .

64 *Sanjay Mishra v Govt of NCT (Delhi)* 2012 (115) AIC 652 (Del) .

65 *Roman Numboodri v Govindan Nair* (1963) 1 Cr LJ 535, 1962 Ker LJ 796 ; *Devki Nandan v K Narinder* (1963) 1 Cr LJ 706 ; *MP Habib Bhai v Payre Lal* AIR 1964 MP 62 .

66 *P Ramaswamy v SB Adityan* 1971 LW (Cr) 83, p 84 .

67 *Maung Sein v Emperor* 28 Cr LJ 139, AIR 1927 Rang 43 .

68 *Municipal Board v Ganesh Prasad Chaturvedi* 1952 Cr LJ 282, AIR 1952 All 114 .

69 *Shaw v London Express Newspapers Ltd* (1925) 41 TLR 475 ; *Knupfer v London Express Newspapers Ltd* (1944) 1 All ER 495, 1944 AC 116 .

70 *Advocate Co Ltd v Arthar Leslie Abraham* AIR 1946 PC 13, (1946) 1 MLJ 152, 1946 ALJ 289 .

71 *K Burke v TCW Skipp* AIR 1924 Mad 340, 25 Cr LJ 641 .

72 *Government Advocate v Gopalbandhu Das* AIR 1922 Pat 101, 23 Cr LJ 433 .

73 *Le Fanu v Malcolmson* (1848) 1 HLC 637 per Compbell CJ.

74 Per Lord Loreburn LC in *E Hulton & Co v Jones* 1910 AC 20, 70 LJKB 198 .

75 *Surendra Bharadwaj v State* 1957 Cr LJ 454, AIR 1957 MP 4 .

76 *Ahmedali Adamali v Emperor* AIR 1938 Sind 88, p 92, 39 Cr LJ 518 ; *Sreenivasa Doss v Vanamamalai* 9 Cr LJ 425 ; *Munshi Ram v Mela Ram Wafa* AIR 1936 Lah 23 .

77 *Jacob Mathew v State of Kerala* 2013 KLJ 823, ILR 2013 (3) Ker 547 .

78 *Chitan Charan Das v Raghunath Singh* 1959 Cr LJ 1006, AIR 1959 Ori 141 ; *Jeffrey J Diermeier v State of WB* (2010) 6 SCC 243, p 254, 2010 (5) Scale 695 .

79 *Jainaram Singh v Emperor* AIR 1941 Pat 9, 41 Cr LJ 814 ; *Pat Sharpe v Dwinjendra Nath Bose* (1964) 1 Cr LJ 367 ; *Krishna Kanta v Geeta Roy* 1982 Ch Cr Cas 54, p 60 (Del) .

80 *U Aung Pe v King* AIR 1938 Rang 232, 39 Cr LJ 663 ; *TG Goswami v State* AIR 1952 Pepsu 165, p 167, 53 Cr LJ 1553 ; *Sunilakhaya Chowdhury v HM Jadwet* AIR 1968 Cal 266, 1968 Cr LJ 736 (intention *sine qua non*).

81 *Jeffrey J Diermeier v State of WB* (2010) 6 SCC 243, p 254, 2010 (5) Scale 695 .

82 *Debendra Nath Shaha v Bhagirath Shaha* 10 Cr LJ 475 .

83 *Genda Ram v Emperor* AIR 1936 All 143, 37 Cr LJ 258 .

84 *Muhammad Nazir v Emperor* AIR 1928 All 321, p 324, 30 Cr LJ 766 .

85 Re *Palani Asari* 1 Weir 613 (2).

86 *TC Goswami v State* AIR 1952 Pepsu 165, p 167, 53 Cr LJ 1553 ; *Chellappan v Karanjia* 1961 Ker LT 1006, (1962) 2 Cr LJ 142 ; *Kewala Nandgir v Emperor* 14 Cr LJ 606 .

87 *Narsinga v Katurisanga* 9 IC 279 .

88 *MM Chandrasekharan Namboodri v State of Kerala* 2014 (4) Ker LJ 268 (Ker) .

89 *Rekha v Vinodini* 2009 (82) AIC 745, 2009 (3) KLT SN 71 (Ker) .

90 *Empress v Thakur Dass* 6 NWP 87 ; *Govinda Prasad Pande v Garth* (1901) ILR 28 Cal 63 ; *Amar Singh v Badalia* (1965) 2 Cr LJ 693, p 697 (Pat) ; *Dhruba Charan Khandal v Dinabandhu Patri* AIR 1966 Ori 15, 1966 Cr LJ 42 ; *MP Narayan v MP Chako* 1986 Cr LJ 2002 (Ker) ; *Dhyandevrao L Waghmode v Allbaksha Gulab Nadaf and Ors* 1999 Cr LJ 1754 (Bom) .

91 *Senthinathaiyar v Gnanamuthu Nandan* 1 Weir 594 .

92 *Ram Narain v Emperor* AIR 1924 All 566, 22 ALJ 639 .

93 *Anandrao Balkrishan Rangnekar v Emperor* 16 Cr LJ 177 .

94 *Jagannath Misra v Ram Chandra Deo* AIR 1945 Pat 450 .

95 *KS Namjundaiah v Setti Chikka Thippanna* AIR 1952 Mysore 123, 53 Cr LJ 1633 .

96 1 Weir 575 (1); Re *Venkata Reddy* 1 Weir 575 (2).

97 *Chaitan Charan Das v Raghunath Singh* 1959 Cr LJ 1006, AIR 1959 Ori 141 .

98 *Deohrat Shastri v Rang Bahdur* AIR 1950 Pat 545 .

99 *Amar Singh v KS Badalia* (1965) 2 Cr LJ 693, p 697 ; *Veeda Menezes v Yusuf Khan* 1966 Cr LJ 1489, AIR 1966 SC 1773 ; *Empress v Taki Hussain* (1885) ILR 7 All 205, p 220 ('harm' has to be understood in the special sense given to it by the statute).

1 *Ratcliffe v Ibans* (1892) 2 QB 524 .

2 *Lachmi Narnin v Shambhu Nath* AIR 1931 All 126, 1931 ALJ 16 .

3 *Abdulla v C Clarke* 9 Cr LJ 154 .

4 *Genda Ram v Emperor* AIR 1936 All 143, 37 Cr LJ 258 .

5 *R Palaniswamy v M Rasu Chettiar* 1974 Cr LJ 1209 .

6 *Dixon v Holden* LR 7 Eq 488, 20 LT 357 ; *Rahim Bakhsh v Bachcha Lall* AIR 1929 All 214, (1929) ILR 51 All 509 .

7 *MB Kauwar v State* (1963) 1 Cr LJ 609, AIR 1963 Punj 201 .

8 *Harbhajan Singh v State of Punjab* (1961) 1 Cr LJ 710, p 722, AIR 1961 Punj 215 .

9 *D Ram Subha Reddy v PVS Rama Das* 1970 Cr LJ 83, p 88 .

10 *Rajendra Vishwanath Chaudhary v Nayantara Durgadas Vasudeo* 2012 Cr LJ 1363 (Bom) .

11 *NJ Nanporia v Brojendra Bhowmick* (1974-75) 79 Cal WN 531; *Emperor v Parwari* 17 ALJ 24 ; *Pat Sharpe v Dwijendra Nath Bose* (1964) 1 Cr LJ 367 .

12 *Legal Remembrancer v Manmatha Bhusan Chatterjee* AIR 1924 Cal 495, 26 Cr LJ 330 ; *APC Marketing Society Ltd v MK Mohamed Ali* 1969 Cr LJ 701 .

13 *Legal Remembrancer v Manmatha Bhusan Chatterjee* AIR 1924 Cal 495, 26 Cr LJ 330 .

14 *Municipal Board v Ganesh Prasad Chaturvedi* 1952 Cr LJ 282, AIR 1962 All 114 .

15 *Maung Chit Toy v Maung Tun Nyun* AIR 1935 Rang 108, 36 Cr LJ 953 .

16 *Union Benefit Guarntee Co v Thakur Lal* AIR 1936 Bom 114, 119 .

17 *Ahmedali Adamali v Emperor* AIR 1938 Sind 88, 39 Cr LJ 518 .

18 *Jayarajan v Surendran* 2010 (2) KLT 505, 2010 (91) AIC 644 (Ker) .

19 *Santosh Kumar Chatterjee v Radhika Ghoshal* 66 CWN 24 ; *Sukamai Kanil Ghose v Shoulmari Ashram* 1970 Cr LJ 809, p 810, AIR 1970 Cal 248 ; *Dhirendra NathSen v Rajat Kanti Bhadra* AIR 1970 Cal 216, 1970 Cr LJ 662 .

20 *Sahib Sing Mehra v State of Uttar Pradesh* (1965) 2 Cr LJ 434, AIR 1965 SC 1451 .

21 *Wahid Ullah Ahrari v Emperor* AIR 1935 All 743, 36 Cr LJ 816 .

22 *Pratap Chandra Guha Roy v Emperor* AIR 1925 Cal 1121, 26 Cr LJ 1519 ; *Ankaraju Subbaraya v Batuk Prasad* AIR 1937 All 677, 38 Cr LJ 1086 ; *Habib Bhai v Pyare Lal* 1963 MPLJ 891 .

23 *Tek Chand Gupta v RK Karanjia* 1968 ALJ 450, 1969 Cr LJ 536 ; *Sahib Singh Mehra v State of Uttar Pradesh* AIR 1966 SC 1451, (1965) 2 Cr LJ 434 ; *Wahid Ullah Ahrari v Emperor* AIR 1935 All 743 ; *Mahim Chandra Roy v AH Watson* AIR 1929 Cal 191 ; *Sukamal Kanti Chose v Shoulmari Ashram* 1970 Cr LJ 809, p 810, AIR 1970 Cal 248 ; *Dhirendra Nath Sen v Rajat Kanti Bhadra* AIR 1970 Cal 216, 1970 Cr LJ 662 ; *Sasikumar B Menon v S Vijayan and Anor* 1998 Cr LJ 3973 (Ker) .

24 *MP Narayan Pillai v MP Chacko* 1986 Cr LJ 2002 (Ker) .

25 *G Narasimhan v TV Chokkappa* AIR 1972 SC 2609, 1973 Cr LJ 52 ; *J Taniguchi v K Gopi* 2002 Cr LJ 1730 (Mad) ; *Sasikumar B Menon v S Vijayan and Anor* 1998 Cr LJ 3973 (Ker) ; *Jacob Mathew v State of Kerala* 2013 KLJ 823, ILR 2013 (3) Ker 547 .

26 *Zac Ponen v Hidden Tresure Litrature in Corporated in Canada and Anor* 2002 Cr LJ 481 (Kant) .

27 *Sasikumar B Menon v S Vijayan and Anor* 1998 Cr LJ 3973 (Ker) .

28 *MJ Akbar v Nurul Alam* (1985) 2 Cal HN 477 ; **see also***Ananda Bazar Patrika (P) Ltd v State of West Bengal* 2005 Cr LJ 1126 (Cal) .

29 *Ibid.*

30 *Asha Parekh v State* 1977 Cr LJ 21 (Pat) ; *Ananda Bazar Patrika (P) Ltd v State of West Bengal* 2005 Cr LJ 1126 (Cal) .

31 *Ananda Bazar Patrika (P) Ltd v State of West Bengal* 2005 Cr LJ 1126 (Cal) .

32 *Narrotam Das L Sha v Patel Maganbhai Ravibhai* 1984 Cr LJ 1790 (Guj) .

33 Re *MKT Subramanik*1971 LW (Cr) 131, p 135.

34 *R Shanker v State* 1959 Cr LJ 464, AIR 1959 Ker 100 .

35 *J Jayalalitha v Arcot N Veerasamy* 1997 Cr LJ 4585 (Mad) .

36 *Ram Subhag Pandey v State* 1971 All LJ 1005, p 1012 .

37 *Empress v Taki Husain* (1885) ILR 7 All 205, p 220 .

38 *Dhuuba Charan Khandal v Dinabandhu Pritim* 31 Cut LT 879, p 889, **distinguishing***Philip Rangel v Emperor* AIR 1932 Bom 193 .

39 *Amar Singh v KS Badalia* (1965) 2 Cr LJ 693 ; *Empress v Mccarthy* (1887) ILR 9 All 420 ; *Mohan Lal v Ram Charan* AIR 1928 All 213, 29 Cr LJ 451 .

40 *Empress v Mccarthy* (1887) ILR 9 All 420 .

41 *HN Dinesh v Malendau Abhivrudhdhi Prathisthana* 2014 Cr LJ (NOC) 49 (Kant) .

42 *Jagdish B Rao v State* 1974 Cr LJ 1358 (Goa) ; *Amar Singh v Mohinder Singh* 68 Punj LR 4 (SN) ; *Haribhajan Singh v State of Punjab* (1980) 24 Mad LJ (Cr) 373, p 374 (DB) .

43 *Jagdish B Rao v State* 1974 Cr LJ 1358 (Goa) .

44 *Pitabar Guru v Ambika Charan Sharma* (1974) 1 Cut LR (Cr) 116 ; *Bhimanagouda Mallangouda Patil v Malleshappa Basappa Konnur* (1980) 24 Mad LJ (Cr) 373, 374 (DB).

45 *SM Katwal v Virbhadra Singh* 2014 Cr LJ 3036 (HP), 2014 (II) Shimlc 730 .

Indian Penal Code (Act XLV of 1860)

Chapter XXI

Of Defamation

S. 499.

Defamation.--

Analysis of the Exceptions

All the exceptions under this section may be classified in five groups,[46] all relating to occasions as to which qualified privilege is recognised:

(a) Exception 1 relates to the plea of justification;
(b) Exceptions 2, 3, 5 and 6 relate to the plea of fair comment on a matter of public interest;
(c) Exceptions 7 and 8 cover the cases of censure by a lawful authority passed in good faith and accusation made to a person in lawful authority in good faith;
(d) Exceptions 9 and 19 cover the cases of imputation made in good faith, by a person for the public good, and the case of caution intended for the good of the person to whom it is conveyed or for the public good; and
(e) Exception 4 covers the plea of fair report of the public proceedings.

Proof of Exceptions

Commentary under the same heading in s 500, *post*, may be referred to.

Good Faith Generally

It may be stated that good faith finds place in all the exceptions to this section except exceptions 1 and 4. Cases falling under the different exceptions have been dealt with there. The general features of good faith, which apply to the various exceptions, have been dealt with under s 52, IPC, which provides: 'Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention.'[47] The said s 52 excludes the element of negligence from the purview of 'good faith'. It implies not only an upright mental attitude which shows that ordinary prudence has been exercised according to the standards of a reasonable person. It contemplates an4112 honest effort to ascertain the facts, upon which exercise of the power must rest.[48] Mere subjective belief without any objective basis is not a dependable criterion. An unnecessary aspersion is indicative of want of good faith.[49] Due care and attention means that the libeler should show that he had taken particular steps to investigate the truth and had satisfied himself from his inquiry, as a reasonable man, that he had come to a true construction,[50] even though, on further searching investigation, it may not be found to be true.[51] An imputation against another person, although made in the absence of actual ill-will, is not, on that account, to be accepted as being made *bona fide*.[52] Simple belief or actual belief in the truth by itself is not enough. The accused can only succeed on producing proof of the truth of matter charged as libelous, and not by leading evidence to his own belief in its truth.[53] It is not good faith to make reckless and imaginary criticism on a man with charge of misconduct without any foundation or authority to justify the same.[54] There cannot be good faith when there is express malice or evidence of culpable negligence or recklessness in making defamatory statements, the plea of good faith can be negative on the ground of recklessness and want of due care and caution.[55]

Whether good faith has been proved is a question of fact.[56] A plea of good faith would be a question to be considered on facts and circumstances of each case,[57] and must be decided with reference thereto.[58] The court will consider, in view of what is said about good faith in s 52, IPC, whether the accused acted with due care and attention.[59] Allowances should be made for the intelligence of the accused, his capacity to reason, the circumstances under which he was placed, and the occasion which necessitated his making the imputation.[60]4113

Excessive Publication

A privilege under s 499, IPC, is destroyed if the publication has been unnecessarily wide and is published among persons who cannot be possibly interested in the statements made.[61] The manner in which an imputation is made and the nature of the medium that is selected for making it are very much material.[62] Publication, in newspaper, of a charge of bribery against a magistrate is not for protection of any person or for public good. The privilege would be destroyed because public action in the newspaper in such a case, is excessive.[63] Where the accused felt some suspicion about corruption in a society from the audit report and thought that the publication was necessary, but the accused made some embellishments, additions, *etc.*, in the article in a newspaper, it was held that it was clearly a case of excessive publication which would take the case out of the privilege conferred by exception 9.[64] A court may find that an imputation is true and made for the public good, but, on considering the manners of the publication, it may hold that the particular publication is not for the public good and is, therefore, not privileged.[65] An excessive publication may destroy a caste privilege. The circulation of a warning to members of the caste against associating with the complainant till expiation for having crossed the seas would certainly be privileged. However, publication of the statement scattered and broadcast amongst people generally would destroy the privilege.[66]

Fair Comments and its Doctrine

Honest criticism ought to be, and is, recognised in any civilised system of law as indispensable to the efficient working of any public institution or office and as salutary for private persons who make themselves or their work the object of public interest.[67] The defense of fair comment is established if the facts on a matter of public interest have been truly stated. The test is whether the opinion, which is expressed in the comment, however exaggerated, obstinate or prejudiced it may be, was honestly held by the writer.[68] The doctrine of fair comment is based on the hypothesis that the publication in question is one which, broadly speaking, is true in fact, and is not made to satisfy a personal vendetta, and further the fact, stated therein, are such as would serve public interest.[69]

Fair Comments--Principles

Principles,[70] in respect of fair comment, may be stated as under:

(i) no kind of privilege attaches to the profession of press as distinguished from the members of the public;4114
(ii) in the context of a welfare state, the role of a newspaper editor is to give outlet to public feelings, to analyse public opinion and to create and educate healthy public opinion. This must be kept in mind in judging their liability;
(iii) defense of fair comment applies only to expression of opinion or imputation of character, but not to facts; and
(iv) fair comment cannot be built upon facts which are not truly stated.

If facts are themselves defamatory, they can be justified only by their truth.

The principles have been summarised by Garley thus:

'In order that a comment may be fair, the following conditions must be satisfied:

(i) it must be based on facts truly stated;
(ii) it must not contain imputations of corrupt or dishonorable motives on the person, whose conduct or work is criticized, save in so far as such imputation are warranted by the facts; and
(iii) it must be the honest expression of the writer's real opinion.'[71]

Fair Comments--Expression of Opinion Protected not the Assertion of Facts

A fair comment must be an expression of opinion, and not an assertion of facts. The defense of fair comment only protect statements of opinion; it does not extend to defamatory allegation of facts.[72] The distinction cannot be too clearly borne in mind between comment or criticism and allegation of facts, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon, or criticise even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.[73] Comment, in order to be justifiable as fair comment, must appear as comment, and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment.[74] Where a person makes the public conduct of a public man the subject of comment and it is for the public good, he is not liable for any action if the comments are made honestly and he honestly believes the facts to be as he states them and there is no wilful misrepresentation of facts or mis-statement which he must have known to be a mis-statement if he had exercised ordinary care.[75] Where the factual allegations against the minister (and the government) were all true, it was observed: 'it is certainly in public interest that anything shaky or unjust or improper in the conduct of a minister in making appointments should be brought to the notice of the country at large. It is in fact, criticism without which any democratic system is deemed to failure, and ministers inevitable suffer absolute corruption by their unscrutinised exercise of power'.4115

It was held to fall within the ambit of 'fair comments' and was saved by the second and third exceptions.[76] While a substantial latitude is permitted for fair comments, there are distinct recognised limitations to comments claimed to be fair.

In *S Khushboo v Kanniammal* ,[77] the accused appellant in a statement published in 'India Today' published in September 2005 endorsed pre-marital sex and called for its acceptance by the society. Held, it did not amount to offence of defamation under s 499, IPC .

Fair Comment--Unsubstantiated or False Statement of Facts

A plea of fair comment does not protect any false statement of facts, even if made in good faith.[78] There is a distinction between fair comment based on well-known or admitted facts and the assertion of unsubstantiated facts for comment. Where comment is made on allegation of facts which do not exist, the very foundation of the plea disappears.[79]

Fair Comments--'Public Interest', 'Public Good'

Defense of fair comment on matter of public interest cannot arise in respect of statements which are libelous and which are pointedly false.[80] In criminal cases, which are governed by the provisions of s 499, IPC, the words 'public interest' have not been used. The words used are 'public good'. This has been dealt with in exceptions 1, 9 and 10. To understand whether a libel is for public good, it is necessary to find out the circumstances that led to its publication,[81] and the court ought not to weigh any comment on it in a fine scale. Some allowance must be made for even intemperate language, provided, however, that the writer keeps himself within the bounds of substantial truth and does not

misrepresent or suppress any facts.[82] Where the occasion is privileged, it is not necessary to justify every detail of the charge if the gist of the libel is proved to be, in substance, correct and the details, *etc.*, which are not justified produce no different effect on the mind of the reader than the actual truth would do.[83]

Fair Comments--Position of Newspapers and Journalists

In the matter of defamation, the position of newspaper is not in any way different from that of the public in general. The responsibility, in either case, is the same.[84]4116 Journalist has no more, and certainly no less, freedom of opinion than is available to any other citizen.[85] He cannot, ordinarily, claim to belong to a privileges class entitled to special treatment.[86] However, a journalist is not necessarily deprived of his privilege merely because there are slight unimportant deviations from absolute accuracy of statement if those deviations do not affect the general fairness of the comment.[87] The editor of a local journal, controlling a media of publicity, helps in moulding the public opinion and his responsibility in the matter of publication is great. However, he can claim no better privilege in the matter of publication of libelous statements than his next door neighbor can claim.[88] The degree of care and attention is way less in the case of newspaper publication than that required from ordinary men.[89] The newspaper world should confine itself to allegations of facts which, before they are made public, have been thoroughly investigated and are reasonable believed by them to be capable of proof by responsible people willing to give evidence.[90] In *Bibhuti Bhusan Das Gupta v Sudhir Kumar Mazumdar* ,[91] in an issue of a weekly journal, a statement regarding the complainant was made that during the last municipal election he managed to get through the scrutiny of his nomination paper by taking recourse to falsehood. It was held that due care and attention should have dictated further inquiries into the allegation and as no such inquiry was made, the editor must be deemed to have acted irresponsibly. If the impugned statement is defamatory, absence of malice will not be a valid plea even for a journalist unless he can establish that his plea come within one of the exceptions to s 499, IPC .[92] Even subsequent contradiction would serve no purpose. If the accused has acted on a gossip and the complainant is thereby defamed, he cannot escape consequences on the ground that he has promptly contradicted the incorrect report.[93] A correction may prove want of malice, but it is not enough to prove good faith. The offence is committed with the publication of the libel and subsequent correction, which takes away the sting there from, may only go to mitigate the sentence.[94]

Where reports/articles published in the newspapers are defamatory, the accused have to face trial, the newspapers do not have any additional privilege.[95]4117

24. Definition of Editor and other Relevant Provisions of the Press and Registration of Books Act 1867

Section 1(1) of the Press and Registration of Books Act[1] defines 'Editor' as a person who controls the selection of the matter that is published in a newspaper.[2]Section 3 provides that every book or paper printed within India shall have printed legibly on it the name of the printer and the place of printing, and (if the book or paper be published) the name of the publisher and the place of publication. Section 5(1) says that:

> (1) Without prejudice to the provisions of section 3, every copy of every such newspaper shall contain the names of the owner and editor thereof printed clearly on such copy and also the date of its publication.
>
> ...

Sub-section (2) of s 5 makes it incumbent on the printer and publisher to appear before the authorities mentioned in that section and make a declaration. Section 6 provides authentication of every such declaration. Section 7 which is material, reads thus:

> **S. 7 . Office copy of declaration to be*prima facie*evidence.**--In any legal proceeding whatever, as well civil as criminal, the production of a copy of such declaration as is aforesaid, attested by the seal of some Court empowered by this Act to have the custody of such declarations, or, in the case of the editor, a copy of the newspaper containing his name printed on it as that of the editor shall be held (unless the contrary be proved) to be sufficient evidence, as against the person whose name shall be subscribed to such declaration, or printed on such newspaper, as the case may be that the said person was printer or publisher, or printer and publisher (accordingly as the words of the said declaration may be) of every portion of every newspaper whereof the title shall correspond with the title of the newspaper mentioned in the declaration, or the editor of every portion of that issue of the newspaper of which a copy is produced.

Section 8 provides the procedure of new declaration by persons who have signed the declaration and subsequently ceased to be the printers or publishers of newspaper. Section 8A says that where any person's name has appeared as an editor in a paper although he was not an editor, he shall within two weeks of his becoming aware that his name has been so published, appear before district presidency or sub-divisional magistrate and make a declaration that his name has been incorrectly published and get a certificate from the magistrate that the provisions of s 7 shall not apply to him. A conjoint reading of said provisions would reveal that legislature had taken into account the inconvenience and hardship to which a person aggrieved from a publication would be put if he is required to make fishing or roving inquiry about the person who personally would be responsible for making or publishing of a defamatory matter.[3] The presumption under s 7 of the Press and Registration of Books Act is not available against the person(s) holding the post other than that of an editor.[4]4118

Chairman of Newspaper Company

Merely because the accused is the chairman of a newspaper company, he cannot be imputed with knowledge of publication.[5] The complaint filed under s 501, IPC, is not maintainable against the chairman publishing the newspaper.[6]

Executive Editor

The word 'Executive Editor' is conspicously absent in the Press and Registration of Books Act 1867 (25 of 1867). In the absence of allegation showing that the accused-executive editor controlled selection of matter, the presumption under s 7 of the Press Act is not attracted.[7] Executive editor is supposed to have requisite knowledge in publication of objectionable matter and, therefore, process could be issued against him.[8]

Managing Editor, Resident Editor or Chief Editor of a Newspaper

Where there was no positive averment in the complaint that the managing director was having knowledge of, or he was directly responsible for publication of defamatory imputation, the order issuing process against him would be liable to be quashed, since the managing director of the newspaper could not be said to be concerned with the publication of news items, unless there is material on record to come to such conclusion.[9]The managing editor, resident editor or chief editor of a newspaper are not immune from prosecution for libellous matter published in the newspaper. Under s 7 of the 1867 Act, there is a presumption that the editor whose name is printed in the newspaper as editor shall be held to be the editor in any civil or criminal proceedings in respect of that publication and the production of a copy of the newspaper containing his name printed thereon as editor shall be deemed to be sufficient evidence to prove that fact, and as the 'Editor' has been defined as the person who controls the selection of the matter that is published in a newspaper, the presumption would go to the extent of holding that he was the person who controlled the selection of the matter that was published in the newspaper. However, at the same time, this presumption contained in s 7 of the

Press and Registration of Books Act is a rebuttable presumption and it will be deemed as sufficient evidence unless the contrary is proved. That does not mean that there is statutory immunity against the managing editor, resident editor or chief editor against any prosecution for the alleged publication of any matter in the newspaper over which these persons exercise control. Though, a similar presumption cannot be drawn against the chief editor, resident editor or managing editor, nevertheless the complainant can still allege and prove that they had knowledge and they were responsible for the publication of the defamatory news item. Even the presumption under s 7 is a rebuttable presumption and the same could be proved otherwise. That by itself indicates that somebody other than editor can also be held responsible for selecting the matter for publication in a newspaper.[10]4119

The Karnataka High Court in *Prabhu Chawla v AU Sheriff* ,[11] has held as under:

> As per the definition of 'editor' in s 1(1) of the Act, 'Editor' means the person who controls the selection of the matter that is published in a newspaper. There is no reference to Resident Editor, Executive Editor, Managing Editor in the Act. There are no allegations against petitioners 1 to 3 in the complaint to show that they have any hand in selection of the matter that is published in the Indian Express Newspaper. In the absence of positive averments against the petitioners 1 to 3 who are described as 'Executive Editor', 'Managing Editor' and 'Resident Editor' and in the absence of presumption available under s 7 of the Act against them, the learned Magistrate could not have ordered process for the alleged offence under s 500, IPC . To ask the Executive Editor, Managing Editor and Resident Editor to undergo the trial because of issuing process against them would be oppressive.

From the scheme of the Press and Registration of Books Act (25 of 1867), it is evident that it is the Editor who controls the selection of the matter that is published in a newspaper. Every copy of the newspaper is required to contain the names of the owner and the Editor and once the name of the Editor is shown, he shall be held responsible in any civil and criminal proceeding.[12] Where the respondent editor had a hand in the publication of the defamatory news against the complainant, the order of the High Court quashing the complaint on petition under s 482, CrPC was set aside, and proceedings were restored.[13]

Unless there is positive allegation/evidence that the Chief Editor was responsible for selection, publishing and printing of alleged defamatory article, Chief Editor cannot be prosecuted for offence under s 499, IPC .[14]

Liability of an Editor and Publisher of a Newspaper

The duty of an editor is clear. He should be most watchful not to publish defamatory attacks upon individuals unless he first takes reasonable pains to ascertain that there are strong and cogent grounds for believing the information, which is sent to him, to be true, that proof is readily available, and that in the particular circumstances, his duty to the public requires him to make the facts known.[15] It is the duty of an editor of a newspaper to check up the news, or the information, that is supplied to him, before publishing the same in his paper, especially when the news might be of a defamatory nature because ultimately it is editor who would be held responsible for publishing any defamatory material in his paper. If he does not do that, he has to suffer the consequences for his neglect and remissness.[16] The plea of the editor that he was merely a publisher and not an author of the matter is not tenable.[17] There could be a presumption against the editor that he committed the offence, however, it is not so not against the chief editor and such presumption is a rebuttable4120 presumption.[18] However, it would be a sufficient answer to a charge if the editor proves that the libel was published in his absence and without his knowledge and that he had, in good faith, entrusted the temporary management of the newspaper during his absence to a competent person.[19] When the editor is on leave and has entrusted his duties to a responsible person who has accepted the full responsibility for the publication of the libel, the editor cannot be held to be criminally liable.[20] Where, on the material date, the accused editor had gone out and the news item was not printed by him, it

was held that although the matter published was defamatory, the accused could not be held criminally liable.[21] When the news item reporting that the management of an education trust suspended the principal of a law college on the charges of dereliction of duty, is based on the report said to have been given by the secretary of the trust, and the editor of the newspaper had made no allegation against the principal nor did he have anything to do with the allegations made against the principal by secretary of trust, the editor cannot be held to have defamed the principal and such publication made in good faith does not attract the offences under s 499 and s 501 of IPC .[22]

Where a defamatory statement is published, whether in a newspaper or in pamphlets, or in books, the author, publisher, editor and owner are also liable.[23]

Where a defamatory statement is published, persons who are the actual source of information cannot escape the consequences of being liable for libel, since all persons who contribute in the commission of the offence are jointly and severally liable.[24]

Owner's Liability as Abettor

When the editor is appointed in good faith and is noted for his ability and honesty, the proprietor of the newspaper is not bound to scrutinise the articles that appear daily and cannot be convicted of abetment for the publication of the defamatory matter.[25] The owner in order to be liable under this section has to have direct responsibility for the publication of the defamatory statement and he must also have the intention to harm, or knowledge or reason to believe that the imputation will harm the reputation of the person concerned. The owner's liability will be attracted provided it can be shown that he was responsible for the publication with the necessary intent, knowledge or reasonable belief in the matter.[26] When the complainant himself did not allege in the complaint that owner/partner of the firm running daily newspaper had conspired with other accused (*i.e.*, reporter, publisher4121 and editor) in defaming the complainant, issuance of non-bailable warrant against accused owner/partner of the said firm is not proper and so is liable to be quashed.[27]

25. Exception 1

In order to invoke the applicability of this exception, there are two conditions, namely that the alleged imputation regarding the complainant must be true and it must be made or published for the public good. It is a good defence in criminal cases that the words complained of are true and that it is for public benefit that the matters charged be published though the actual motive for publication was malevolence.[28] It is, however, to be noted that if any of the two conditions is not satisfied, exception 1 would not be attracted. Similarly, though the truth of a defamatory matter is a complete defence to an action for damages in a civil suit, it is not so in a prosecution for the crime of defamation.[29] No amount of truth will justify a libel unless its publication was for the public good.[30] Similarly, unless the justification of the articles alleged to be defamatory is conclusively established, even if they had been written for the public good, the case cannot fall under the first exception.[31]

Exception 1--Truthful Imputation

As stated earlier, the accused has to establish that the alleged imputation was true. If what is said is true, then justification is a good defence. On the other hand, if there is a doubt as to whether it is true, there is no defence at all.[32] If a statement contains only the truth but is incomplete and misleading, the accused cannot plead that the imputation, made by him on the complainant's character, was made in good faith or for the public good.[33] When truth is set up as a defence, it must extend to the entire libel and it is not sufficient that only a part of the libel is proved to be true.[34] In respect of a plea under this exception, Mears CJ, in *Muhammad Nazir v Emperor* ,[35] observed:

> The facts may be so strong that occasionally it may happen that counsel can advise the client to 'justify' (Exception 1 to s 499, Indian Penal Code). That most dangerous plea should never be put forward unless

there is practical certainty of success.

The accused must be prepared to prove that all, that he has said, is true in substance and in fact.[36] In a case for appointment of a *mukhia*, a statement was made by the accused that the complainant was of bad character and a previous convict. It was proved that the complainant had committed adultery with his sister-in-law, by whom he was the father of an illegitimate child, and that he ought to have been convicted under s 497, IPC, and the statement was substantially true. It was held that the first exception in s 499, IPC, applied to the case.[37]4122

Exception 1--Public Good

The first exception exempts any imputation made or published for the public good. However, on consideration of the manner of the publication, *ie*, in a newspaper, the publication may not be for the public.[38] Whether the conduct of a particular individual should be publicly criticised and such criticism would be in public interest would vary with the circumstances of each case,[39] because whether it is for public good is a question of fact.[40] In a printed leaflet, it was stated that the complainant, the manager of a school, was, from the very beginning, withholding a portion of the salaries, due to the teachers, and that even after the system of direct payment, he induced the headmaster to deduct a portion of the amount from their salaries. The students, political parties and the public of different shades of opinion agitated in the matter. It was held that the publication was made for the public good.[41]

The question of public good has to be considered from the point of view of the good of the general public as contradistinguished from that of an individual.[42]

26. Exception 2

Whosoever fills a public position renders himself open thereto. He must accept an attack as a necessary, though unpleasant, appendage to his office,[43] because exposing the conduct of a public servant in discharge of his public duties as being unsatisfactory or reprehensible cannot but be said to be for public good.[44] Whenever a person accepts government service or a public office, he must try to imbibe the spirit of toleration and forbearance so as not to be carried away by emotion and sentiment and get provoked by the slightest criticism of his conduct in the discharge of his public duties. He should not be too hypersensitive so as to feel hurt by any and every imputation that is made against him; he should try to stand up to any fair comments, that are made in the interest of public good, even though the comments may not be palatable to the government official.[45] However, public affairs cannot be conducted by men of honour with a view to the welfare of the country if we were to sanction attacks upon them destructive of their honour and character and made without any foundation.[46] The accused published in his newspaper continuously a series of defamatory statements and personal criticisms upon the complainant, a collector. It was held that it was not good faith to make reckless or imaginary criticisms, on a man, with charge of misconduct without any foundation or authority to justify the same.[47] Where, however, it was alleged that the complainant, as *patel*, was guilty of acts of oppression against the villagers and had been taking bribes and4123 it was found that the accused did exercise due care and attention before he expressed his opinion and that the imputations were made in good faith for the public good, it was held that the accused was not guilty.[48]

Exception 2--Accused to Show 'Good Faith' also

Even a person claiming the benefit of the second exception to s 499, IPC is required to show that the opinion expressed by him was in good faith which related to the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character appears in that context.[49]

Exception 2 and Contempt of Court

A broad and general proposition that a reply submitted to a contempt notice, in no case, amounts to

contempt of court in the light of the second exception to s 499, IPC, which is contrary to the law of contempt as adjudicated upon by the courts from time to time and the limits prescribed by the Act and the judicial pronouncements. It has to be always kept in mind that the law of defamation in the IPC cannot be equated with the law of contempt of court in general terms.[50]

27. Exception 3

In respect of this exception, the authors of IPC observed:

> There are public men who are not public functionaries; persons, who hold no office, may yet... take a very active part in urging or opposing the adoption of measure in which the community is deeply interested. It appears clear to us that every person ought to be allowed to comment, in good faith, on the proceedings of these volunteer servants of the public with the same freedom with which we allow him to comment on the proceedings of the official servants of the public.[51]

In an Allahabad newspaper, an advertisement was published by the complainant in which he solicited the public to subscribe to a hospital of which he was the surgeon in charge, stating the number of successful operations which had been performed. It was held that as such advertisement had the effect of making such hospital a 'public question' and of submitting it to the 'judgment of the public', the accused, who had expressed himself in good faith in criticising the advertisement as unprofessional, was within the third, sixth and ninth exceptions to this section.

28. Exception 4

This is one of the two exceptions which do not make a reference to good faith. What is needed is that the report of the proceedings of a court of justice, or the result of any such proceedings, should be substantially true even though it may not be for public good.[52] In other words, the publication should be a substantially true report. It need not be true absolutely word by word; but taking the whole thing, it must be a4124 substantially true account.[53] If based on the contents of the FIR that impugned news item has been published, whether the allegations made are true or false need not concern the journalist while publishing the same. When the public authorities had taken cognizance of the complaint and have initiated necessary legal action and any of the proceedings relating to the crime that occured and if the report is published in the newspaper, it would not amount to defamation and squarely fall within the fourth exception to s 499, IPC .[54] It is also not necessary that the report should be contemporaneous, the reason being that law-books and reports of decisions, *etc.*, are not published on the same day, or, very often, soon after the delivery of judgment in court.[55] In view of the above, only two things have to be proved by the accused, *i.e.*, (a) that the report is substantially true account of the proceedings or the result of such proceedings; and (b) that the proceedings are of a court of justice.

The explanation, appended to exception 4, shows that the phrase 'court of justice' has been given a very wide interpretation by the section itself.[56]

This exception would apply not only to judgments and orders, but also to complaints and pleadings made by the parties concerned.[57]

29. Exception 5

This Exception, confined only to comments on cases which have been decided, and not on cases which are *sub judice*, deals with two classes of cases, *viz.*,

(a) with opinion respecting the merits of any civil or criminal case; and
(b) with the conduct of person connected with judicial proceedings and character deducible therefrom.

A declaration or an opinion expressed in his judgment by a magistrate or a judge is open to searching and severe observations, and may be freely criticized and commented upon by the editor of a newspaper. However, where the criticism is converted into an attack upon the judge or magistrate as a conspirator against justice, a traitor to his oath, a trickster, or a man who had maneuvered his procedure so as to defeat the truth, it is for the person, who has uttered these things, to justify them, or, under the IPC, to establish affirmatively that he believes them to be true, and that too an reasonable grounds.[58] Thus, where the accused made a petition to the deputy commissioner charging a *munsif* with conspiracy with the plaintiff to set up a false case in this court against the accused, who was a defendant in the case, it was held that the accused was guilty.[59]

30. Exception 6

This exception covers a wide range of subjects. The object of the exception is that the public should be aided by comments, in its judgment, of the public performance submitted to its judgment. Comment, otherwise defamatory, is justified on this4125 ground alone.[60] Good faith is an essential condition for claiming the benefit of this exception. The right involves two essentials, first, that the imputations should be commented on the work criticized, and secondly, that it should be fair, that is to say, that if it professes to be an inference drawn from the contents of that work, it must be an inference which it is possible to draw therefrom. It would be monstrous, for instance, for a critic to suggest as an inference from a mere grammatical inaccuracy in a work that its author was a swindler or a libertine. The excuse of fair comment may be forfeited by reason of mere recklessness in making an unwarrantable assertion. Good faith does not, however, require logical infallibility.[61]

A prospectus of a company, which invites the public to deal with the company, is not a matter merely for the prospective shareholders of the company, it is a scheme or a project placed before the public. The conduct of a private business, if it is of a sufficiently large extent, or if it concerns a sufficiently large number of persons, is a matter of public interest.[62]

31. Exception 7

This exception allows a privilege for censure by one person against another. The requirements for it are that:

(a) the person, passing the queasier, has authority over the other person;
(b) such authority was conferred by law or it arose out of a lawful contract made with that person;
(c) the conduct was in a matter to which such lawful authority related; and
(d) it was passed in good faith.

The lawful authority, contemplated by the exception, is fairly wide as would be evident from the illustration to the exception. Such authority may be deemed to be vested in a variety of relationships. Judge or any other judicial authority may be protected by some statutes or may gain the benefit of exception 9. This exception makes the position clear and the case may also be covered by this exception. A municipal engineer reported to the vice-chairman of the municipality that he had found that some stocks of metal had been taken away and he learnt on inquiry that the complainant, who was the contractor, had done this. It was held that if the report was made in good faith, the engineer was entitled to the benefit of the seventh and eighth exceptions.[63] Similarly, the adverse remarks given by a sub-divisional officer, regarding the work of a storekeeper, in the annual confidential report, sent to the chief engineer, were held as no defamation.[64] The accused, the *guru* or spiritual guide of

the caste, to which the complainant belonged, issued a letter to the effect that as complainant's wife had been caught with a man of low caste, no one of her co-religionists should have any social intercourse with her, and in effect that she should be outcast. It was held that so far as the statement implied a censure on the conduct of the complainant's wife, they were justified by the authority, with which the4126 accused was vested as spiritual head of the community, and, therefore, the case came within the seventh exception.[65]

32. Exception 8

Under this exception, a legitimate complaint against a person to a person in authority is no defamation. A *bona fide* complaint to the postmaster-general to obtain redress for a grievance against a postal employee is privileged.[66] One, who wants to bring himself within this exception, must affirmatively establish that the complaint was preferred in good faith and that it was preferred to a person who had authority over the person complained against.[67] The accused must prove that the person, to whom the complaint was made, had lawful authority over the person complained against in respect of the subject-matter of the accusation.[68] Similarly, where the accusations were made, in a complaint, by the accused to the superior authority of the complainant, it was held that even if the complaint contained defamatory matter, it was privileged by exception 8 to this section.[69] When a counsel of the court, duly instructed by his client, thinks it necessary to state facts in a petition for the purpose of affording redress to him, he is protected under the eighth exception.[70] Where, however, the defamatory matter was contained in a communication, addressed by the accused, who was a member of the police force, to the district *panchayat* officer, alleging that the complainant was a woman of loose character and was having illicit connection with *goondas*, her paramours coming to her frequently at nights, it was held that the officer had no such lawful authority.[71] Accusation before the public by publication in a newspaper is not the sort of lawful authority contemplated by the exception.[72] No doubt, in political theory in the democratic form of government, a minister is, in the long run, responsible to the public. However, that is not the sort of lawful authority contemplated by the exception.[73]Likewise, where the accused informed the police and other persons that he suspected a respectable shopkeeper and his family of having committed or instigated the commission of burglary and theft, it was held that if there was good faith, the statements were privileged as the police had power to act upon them, but the privilege did not attach to the statements made to other persons.[74] Similarly, a complaint to a police constable is not privileged.[75]

As already mentioned earlier, the eighth exception would apply only if the statements complained of, are made in good faith.[76] Exceptions 8 and 9 would not4127 apply to a case if the accused has acted recklessly and without due care and caution.[77] Where the accused stated that the complainant was actuated by personal ill-will and malice against the accused in passing an order and it was found that the complainant by his previous conduct had given ample reason to the accused for believing, rightly or wrongly, that he was acting with personal ill-will against him, it was held that the accused was protected by exceptions 8 and 9.[78] A complaint was made to the president of a local board. It was suggested that the complainant was suffering from leprosy in order to disqualify him from nomination. The complainant had white marks on his foot. The president gave the matter his judicial consideration and ultimately decided that the complainant was a leper. It was observed that the case came very near to exceptions 8 and 9 to s 499, IPC .[79] In *Romesh Roy v King* ,[80] after a meeting, some 42 members of the locality presented a petition to the deputy commissioner of police stating that the complainant was living an immoral life and that a young girl was not his wife, but his mistress, and further that he and one other person were using the girl as a prostitute and living on her earnings. No enmity was proved and no motive ascribed as to why the accused should defame the complainant in this manner. It was held that the accused was entitled to the benefit of this exception. However, no plea of good faith can be advanced for claiming benefit under this exception in respect of a manner which is false within the knowledge of the person making it. Once the accusation is found to be false, it follows that it was not made in good faith.[81]

The accused and members of a housing society received letters which contained obscene material against the daughter of the accused. The accused and other members of the society approached the

police authorities for guidance. Held, the approach made to the police was in good faith, and case was covered by exceptions 8 and 9 of s 499, IPC . No case for defamation was made out.[82]

33. Exception 9

Scope

Under this exception, it is not a defamation to make an imputation on the character of another if the imputation is made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.[83] The ingredients of this exception are that the imputation must be made in good faith and it must be for the protection of the interests of the person making it, or of any other person, or for the public good.[84] Good faith ends where malice begins.[85] Therefore, if one invokes4128 the aid of this exception on the ground that he published the impugned article in good faith and for the public good, he has to establish both good faith and public good.[86] If good faith is not established, it is not necessary to consider whether public good is involved.[87] The failure to prove good faith would exclude the application of the ninth exception in favour of the accused even if the requirement of public good is satisfied.[88] In other words, unless good faith is proved, an accused is not entitled to invoke the aid of this exception.[89] However, if defamatory statements are made in good faith and for public good, they are entitled to be protected under this exception even if they are found to be baseless and incorrect.[90] The truth of the imputation need not be proved by the accused for claiming the benefit of this exception.[91] If the impugned imputation has been made in good faith, *i.e.*, after due care and caution, and the move behind it to safeguard the interest of his daughter, and not to defame the complainant, this exception would be attracted.[92] If having regard to facts and circumstances within his knowledge, the accused might, as an ordinary reasonable and prudent man, have drawn the conclusions which he has expressed in defamatory language for the protection of his own interests, he may fairly be held to have made out his good faith.[93] In *KM Cherian v D Johnson* ,[94] the report in connection with an offence, published in a daily, was made with the best of intentions and for the public good. It was factually true and the comment, if any, was based on the facts and supported by good faith. It was held that the accused was protected by the ninth exception.

This exception would cover not only such allegations of facts as can be proved true, but also expressions of opinion and personal inference.[95] The comment based on facts and supported by good faith would be protected by this exception.[96] However, if the allegations in a complaint are found to be false and made without due care and caution, they are not saved by the ninth exception.[97]4129

Actual loss of reputation is not required to be proved. An accused taking shelter of exception 4 to s 500, IPC, must show that the imputation alleged to be defamatory was made in good faith.[1]

Exception 9--Ingredients

The ingredients of the nineth exception are that (1) the imputation must be made in good faith; and (2) the imputation must be for the protection of the interests of the person making it or of any other person or for the public good.[2]

Exception 9--Burden of Proof of Exception is on Accused

A magistrate cannot, soon after examining the complainant and recording his/her statement, dismiss the complaint on the ground that the imputation falls under the ninth exception to s 499, IPC, because the burden, that the case comes under any exception, is on the accused.

Without there being any material in the complaint or in the sworn statement of the complainant, it is premature for a magistrate to hold that exception 9 to s 499, IPC, would apply.[3] It is for the accused to plead that he is protected under exception 9 to s 499, IPC . The burden to prove that his case falls within the ambit of the said exception is on him.[4]

Where the accused takes plea that the imputation/allegation alleged to be defamatory was made in

good faith, the burden to prove the same lies on him. The said question cannot be decided by the High Court in proceedings under s 482, CrPC .[5]

Exception 9 Distinguished from Exception 1

The two requirements of the first exception are that the impugned statement must be shown to be true and that its publication must be shown to be for public good. The proof of truth, which is one of the ingredients of the first exception, is not an ingredient of the ninth exception. What the ninth exception requires an accused to prove is that he made the statement in good faith. Proof of truth of the impugned statement is not an element of the ninth exception as it is of the first. In dealing with the claim of the accused under the ninth exception it is not necessary and, indeed, it is immaterial, to consider whether the accused had strictly proved the truth of the allegations made by him.[6]

Exception 9 Distinguished from Exception 8

The point of difference between exception 8 and exception 9 is that whereas in the former the person, to whom the complaint is made, must have lawful authority to4130 deal with subject-matter of the complaint and take proceedings against that person (*i.e.*, complainant), there is no such requirement to exception 9 where it is sufficient if a communication is made to a person for the protection of one's own interest in which the other also has an interest. This is clearly brought out by the illustrations to the exception.[7]

Exception 9--'Good Faith'

'Good faith' has to be proved by the accused.[8] Whether good faith has been proved by an accused person in his defense to a charge of defamation under s 500, IPC, is basically a question of fact,[9] and matter of evidence.[10] The law treats the onus as discharged if he succeeds in proving a preponderance of probability. As soon as that is established, the burden shifts to the prosecution which has still to discharge its original onus. In reality, the onus on the accused may well be compared to the onus on a party in civil proceedings.[11] However, before the onus can be said to have been shifted on the prosecution, there must be evidence to show that the accused acted with due care and attention. He has to establish as a fact that he made inquiry before he made the imputation and he has to give reasons and facts to indicate that he acted with due care and attention and was satisfied that the imputation was correct. The proof of the truth of the statement is not an element of the ninth exception as that of the first exception to s 499 . In the ninth exception, the person, making the imputation, has to substantiate that his inquiry was attended with due care and attention and he was thus satisfied that the imputation was true.[12] Simple belief or actual belief by itself is not enough. It must be shown that the belief in the impugned statement had a rational basis, and was not just a blind simple belief. It is so where the element of due care and attention plays an important role. If, before making a statement, the accused does not show due care and attention, that would defeat his plea of good faith. However, it must be remembered that good faith does not require logical infallibility. It is not possible to lay down any rigid rule or test for deciding whether an accused person acted in good faith. The question has to be considered on the facts and circumstances of each case, what is the nature of the implication made, under what circumstances did it come to be made, what is the status of the person who made the same, was there any malice in his mind when he did so, was any inquiry made by him before that, are there any reasons to accept his story that he acted with due care and attention, even in the absence of personal malice.[13] If it is quite apparent that what the accused has published in his newspaper was an accurate and true report of the proceedings of the assembly, the involvement of the complainant was disclosed by the preliminary inquiry made by the government, if the accused *bona fide* believing the version of the minister to be true published the report4131 in good faith, it cannot be said that they intended to harm the reputation of the complainant, so the offence of defamation is not made out against the accused.[14]

Exception 9--'For the Protection of the Interests of the Person making it, or of any other Person'

If the alleged imputation is not for the protection of the interests of the accused himself, or of some other person, or for the public good, the benefit under this exception cannot be claimed.[15] The protection of interest need not necessarily be the protection of one's own interest. It would be sufficient for purpose of this exception that the imputation may be made for the protection of interest of any other person.[16] Whether the accused was, protecting his interest is a question of fact to be decided by the court keeping in view the peculiar circumstances of a particular case.[17] Where the accused postman went to deliver a letter to the complainant but did not find the complainant at home, and on the second day the complainant misbehaved with him and hurled abuses at him, again on the third day the complainant misbehaved with the accused and hurled abuses, the endorsement made by the accused on the envelope about the conduct of the complainant that the complainant misbehaved and hurled abuses on the basis of his experience was held in good faith for the protection of his own interest and the said endorsement was covered under the ninth exception to s 499 and did not amount to defamation.[18] In a divorce suit filed against the wife on the ground of adultery, statements made by the accused against his father-in-law who was not a party to the suit and was not at all required to prove the matrimonial suit, cannot be claimed to have been made by the accused in the protection of his interest.[19] The accused was watching a civil case on behalf of his partner. The complainant, though not a witness, went and sat with the witnesses and began talking to them. The accused asked the court to stop it lest he should tamper with the witnesses. It was held that facts of the case showed that he was acting in good faith in the interest of his partner, who was the defendant in the suit, and the case was covered by exception 9.[20] Where the accused, in a civil suit, instituted by him, stated, when examined as a witness, that he did not want to examine the complainant as his witness as he had been bought by the other side, it was held that as the accused made the said imputation for the protection of his own interests, he was protected by the ninth exception of this section.[21]4132

Exception 9--'Public Good'

The words 'public good' find place in exceptions 1, 9 and 10 to s 499, IPC . Except in these three cases, the question, whether the alleged imputation was for public good, does not arise, at all, for consideration. 'Public good', contemplated in the said exceptions, must be of the general public as contradistinguished from what is regarded as a spiritual benefit by a particular act.[22]

Exception 9--'Public Good'--Instances

As specified in exception 1, whether it is for the public good is a question of fact to be decided by the court in view of the peculiar circumstances of a particular case.[23] If it is quite apparent that what the accused had published in his newspaper was an accurate and true report of the proceedings of the assembly, and it was a report in respect of public conduct of public servants who were entrusted with public funds intended to be used for public good and the news items were published for public good, the offence of defamation is not made out against the accused.[24] The accused, a regional manager of the Andhra Bank, issued a confidential circular to branch managers of his region that they should be vigilant while dealing the complainant and some other persons in their business transactions. The said circular had emanated after investigation by the vigilance department of the central office of Andhra Bank and was issued at the instance of the central and zonal office. There cannot be any doubt that such a circular was issued only in good faith and also for public good and to safeguard the interest of the public at large. The accused in such cases is protected under exception 9.[25] Where the accusation against the accused was that they were all opposed to the complainant on his being appointed as a village *munsif* and had written that the complainant was a rowdy and a law breaker, it was that the accused had acted in good faith for protecting the interests of the public.[26] Where, in a handbill, an appeal was issued by the accused dissuading the public from giving any subscription to the complainant, who neither maintained nor supervised the accounts of a society, it was held that it was for the public good that the society should be safe from being deprived of its money.[27] In *Sanatam Daw v Dasarathi Tah* ,[28] the accused, editor of a weekly paper, criticised the mismanagement of an electric company, of which the complainant was the director and managing partner, using the word *chora karbari,* by which is meant 'black marketing'. It was found that the company was the most inefficient and ill-managed company which charged the consumers at a very

high rate. It was that the publication was made for the public good. If a statement made by a witness in a judicial proceeding is true in fact and also relevant to the matter under investigation, it is for the public good that it should be made.[29] In *L Soma v Abraham Naidu* ,[30] in a suit, filed by a Roman Catholic, for recovery of some money from the complainant, who was in charge of a fund called 'choir fund', during4133 a talk about compromise, the accused, who had attended the court as a witness, opposed the suggestion of the complainant's advocate that the money might continue with the complainant and stated that the complainant was heavily involved in debt and was an insolvent. It was held that the object of using the words was not to defame the complainant, but to protect the choir fund, and was, therefore, covered by exception 9.

The accused and members of a housing society received letters which contained obscene material against the daughter of the accused. The accused and other members of the society approached the police authorities for guidance. Held, the approach made to police was in good faith, and case was covered by exceptions 8 and 9 of s 499, IPC . No case for defamation was made out.[31]

Exception 9--Instances of Cases not Covered under 'Public Good'

Where, however, the accused had published in a newspaper, having a wide circulation, that the complainant along with other persons will attempt in some way or other to endanger his life and if he becomes the victim of a sudden tragedy or calamity, those persons should be considered as the cause, it was held that the publication was not for the public good.[32] Similarly, the advance publication of news with bold headings, in a newspaper, against the complainant when suspected case of murder against him is under investigation,[33] or the publication of a charge of bribery against a magistrate in a newspaper,[34] or the making of a defamatory report against a person by a police officer,[35] or denouncing of a brahmin as a *maleksha* for providing an alcoholic refreshment at a wedding reception for those of his guests who desired to partake of such beverages,[36] cannot be said for the public good.

Exception 9 and Statement made to Police

A statement made to the police under s 161 of the CrPC 1973 is not an 'absolutely privileged statement', but only 'qualified privilege' and the said statement does not come under the exception 9 of s 500 of the IPC .[37]

Applicability of Exception 9 to Advocates

A counsel owes a duty to his client and he must carry out faithfully his client's instructions. If his client makes serious allegations against another party in a suit, it is counsel's duty to plead those allegations in the plaint or written statement or other pleading. A counsel, however, must perform his duty with discretion. Quite clearly, he should not plead what are obviously irrelevant, wanton, wild and reckless allegations. On the other hand, it must be remembered that the counsel is not a judge in the case, and it is not for him to decide whether the allegations, made by his client, are true or false. He is bound, except in very exceptional circumstances, to accept his client's words.[38] Similarly, in the absence of express malice (which is not to be4134 presumed), a pleader is protected by exception 9.[39] When an advocate is charged with defamation in respect of words spoken or written by him in the performance of his professional duty, the court will presume that he acted in good faith unless there is cogent proof to the contrary, and the burden lies on the prosecution, in such a case, to prove the absence of good faith. The privilege, enjoyed by counsel in this respect, is, of course, not absolute, but so long as there is no material before the court to suggest that an advocate was actuated by malice or improper potties in making the imputation which form the subject-matter of the charge, he is presumed to have acted in good faith and is entitled to the benefit of the ninth exception.[40] When a lawyer is acting in the course of his professional duties and is compelled, subject to the disciplinary action of the court, to put forward every thing which may assist his client, good faith is presumed and bad faith is not to be assumed merely because the statement is *prima facie* defamatory.[41] The court, having due regard to public policy, would be extremely cautious before it deprives an advocate of the protection of exception 9.[42] A pleader, acting upon his own recollection of the evidence given by a witness two

years before, is not deprived of the protection of this exception unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken, by him, of his position as a pleader for an indirect purpose.[43] There may, however, be circumstances which may show that the question or remark objected to was made wantonly or from private motive, but the greatest care ought to be taken to inquiry into the circumstances.[44] Even if the circumstances suggest recklessness or malice, further inquiry should be made and an opportunity if possible, should be given to a practitioner to offer an explanation before summons is issued.[45] It is the duty of a court when complaint is made against an advocate for having used defamatory words to presume that the remark or question objected to was made on instructions and in entire good faith. A pleader, who files a petition, containing defamatory statements on behalf of his client, cannot be prosecuted under s 500, IPC, where there is no allegation of any malice or absence of good faith on his part,[46] or where it is admitted that the pleader had no malice or grudge.[47] There can be no defamation unless the circumstances show that the remark was made wantonly or from a malicious or private motive.[48] Even the presence of malice will not override the presumption of good faith when the statement was obviously necessary in the interest of the client.[49] To rebut this presumption it is not sufficient merely to allege that the client knew the imputation to be untrue. There must be convincing evidence4135 that the pleader was actuated by an improper motive, personal to himself, and not be a desire to protect the interest of his client in the cause.[50]

Advocate Representing a Party as Counsel when not Protected by Exception 9

However, if it is specifically alleged that the advocate bears private malice towards the complainant and that the defamatory matter has been written and published wantonly, there would be a *prima facie* case for framing a charge.[51] An advocate, who makes defamatory statements in the conduct of a case, has no wider protection than a layman, that is to say, he has to bring his case within the terms of exception 9 to s 499, IPC, and s 105 of the Indian Evidence Act 1872.[52] If serious and untrue allegations are made by him, he brings himself open to a prosecution for defamation.[53] He has no absolute privilege on the prosecution for defamation.[54] It cannot be said that when a lawyer puts a question on the instructions of his client to a witness in cross-examination which is defamatory in character without there being any reasonable ground, it is a communication made for the purpose of the employment as lawyer. There must be a reasonable ground for putting a question, which is defamatory in character, and if there is no basis for putting such question, then it is difficult to state that such a communication, which is defamatory in character, is a professional communication and its disclosure is protected under s 126 of the Indian Evidence Act 1872.[55] A pleader must use a certain amount of common sense and caution in asking a defamatory question. Where the complainant, when he went into the witness-box, was asked whether he was a gambler, whether he was a thief and whether his wife was leading the life of a prostitute, *etc.*, with utter recklessness and without regard to seeing whether there was any truth and the questions were asked not for the good of the case, set up by the complainant but with no other view than publicly to injure the reputation of the complainant, it was held that these questions were asked in absolutely bad faith and the pleader was guilty.[56] Bad faith may be inferred from entirely irrelevant defamatory remarks of a gratuitous nature. If made with a malicious intent, such remarks would not protect counsel from criminal defamation.[57]

A Pleader not Acting as a Counsel--Not Protected by Exception 9

A pleader would be liable for prosecution in making a defamatory averment in a pleading if he was not acting in his capacity as a counsel for his client.[58] Where a pleader for the complainant in a case wrote a letter to the trying magistrate to inquire when he would take up the case for trial, describing the accused a 'notorious4136 wrong-doer', it was held that the imputation was not made as a pleader and he was guilty under this section.[59]

Applicability of Exception 9 to a Client for Defamatory Statements of his Counsel

If the publication of an imputation concerning a third person is by the lawyer, the client cannot be charged directly with the offence of defamation because the client is, at the most, an abettor. It may happen in a particular case that the lawyer has a good defense, whereas the client might be still liable for abatement.[60]

Where an insinuation, that the complainant had been implicated in a case of robbery, was put in a question, asked by the pleader, who defended the accused, it was held that it was not proved that the question was put under his instructions, and even if it had been so put, the accused could not be convicted.[61] Where the accused's advocate, in cross-examining one of other part's witnesses, asked a defamatory question which was objected to by the witness and disallowed by the judge, and there was nothing to show that the imputation was not made in good faith with the belief that it was open for them to do so, it was held that the accused were entitled to the benefit of exception 9.[62] The court cannot assume against the client that he instructed the counsel in definite terms used by the counsel in his argument.[63] In a reply sent by the lawyer for the accused to a notice sent by complainant, the father-in-law of the accused, allegation of unchastity of the wife of the accused was made and it was also alleged that the complainant knew about her immoral conduct and also positively helped her in her immoral ways, it was held that the presumption, that the accused might be taken to have given instructions therefore, was not inevitable seeing that counsel's volition had intervened and it was unsafe to found criminal liability on the accused on such basis.[64]

If imputation, conveyed by the question to a witness in cross-examination by a lawyer on instructions of his client, are *per se* defamatory without there being reasonable ground for thinking that the imputations were well founded, the client is a principal offender, and not an abettor,[65] because defamation can be committed by proxy through the mouth of the lawyer.[66]

Applicability of Exception 9 to a Witness

So far as civil cases are concerned, the principle of absolute privilege to a witness has been recognised. The Privy Council laid it down that it concerns the public and the administration of justice that witnesses, giving evidence on oath in a court of justice, should not have, before their eyes, the fear of being harassed by a suit for damages; the only penalty, which they should incur, if they have given their evidence falsely, should be an indictment for perjury.[67] It was accordingly held by most of the High4137 Courts[68] that the statements made by witnesses in civil cases, are absolutely privileged. However, this doctrine of absolute privilege has not been applied in respect of witnesses in criminal cases. Their cases are governed by s 499, IPC . Thus, it has been held by the Madras High Court that a witness does not have the absolute privilege as regards the statements made by him; he has only a qualified privilege under exception 1 or exception 9 to s 499, IPC .[69] The same view was expressed in Allahabad,[70] Nagpur,[71] Calcutta,[72] Rangoon,[73] Madhya Pradesh[74] and Bombay.[75] In all these cases, the question as to whether a witness is entitled to the benefit of the exception has been considered on merits.

Applicability of Exception 9 to Pleadings, Petitions and Complaints, *etc.*

A complainant, making libelous statements in his complaint, is not absolutely protected so far as criminal proceedings are concerned.[76] Statements in an application for transfer against a magistrate are not absolutely privileged in criminal prosecution;[77] the benefit of this exception may be claimed if the statements fall within it.[78] Where allegations of adultery were made in a petition for divorce filed by the accused after his wife had left his house for the protection of the accused's interests, good faith may be presumed and the case would fall within the ninth exception.[79] The position is the same in respect of pleadings in civil courts. Thus, if false statement is made maliciously in a plain in a civil court, the statement would not be privileged.[80] Similarly, statement made in written statements in civil suits are not absolutely privileged; they may be proved to be such as to entitle the accused to the benefit of this exception. Where the allegation of the accused was that they were prosecuted at the instance of *M* who had kept the wife of one of the prosecution witnesses as his mistress, it was held that the statement, connecting any prosecution witness with *M*, should be deemed to have been made for the prosecution of the interest of the accused and was protected by exception 9 to s 499, IPC, if it was made in good faith.[81] The same would be the case with any application made in civil suits,[82] or affidavits filed by parties in judicial proceedings.[83]4138

34. Exception 10

This exception deals with cases, for instance, where one warns another against employing a third person in his service saying that he is a dishonest person.[84] To bring a case within this exception, it must be proved that the accused intended, in good faith, to convey a caution to one person against another, that such caution was conveyed by the proper means.[85] The gist of the tenth exception is that the imputation must be made in good faith,[86] and for the good of the person to whom it was conveyed and for the public good.[87] Where the complainant was put out of caste by a meeting of his caste fellows and the accused warned certain other members of the caste that if they took water from the hands of the complainant, they would also be liable to be put out of caste, it was held that the action of the accused was covered by the tenth exception.[88]

In order to bring a case within the scope of the tenth exception, it must be proved that the statement/publication was intended in 'good faith' to convey a caution to one person against another; that such caution was intended for the good of the person to whom it was conveyed, or of such person in whom that person was interested, or for the 'public good'.[89]

Where to the charge of defamation under s 500, IPC, the accused invokes the aid of tenth exception to s 499, IPC, 'good faith' and 'public good' have both to be established by him. The mere plea that the accused believed that what he had stated was in 'good faith' is not sufficient to accept his defence and he must justify the same by adducing evidence. However, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt.

The degree and the character of proof which an accused is expected to furnish in support of his plea cannot be equated with the degree of proof expected from the prosecution in a criminal trial. The moment the accused succeeds in proving a preponderance of probability, onus which lies on him in this behalf stands discharged. Therefore, it is neither feasible nor possible to lay down a rigid test for deciding whether an accused person acted in 'good faith' and for 'public good' under the said exception.

The question has to be considered on the facts and circumstances of each case, having regard to the nature of imputation made; the circumstances on which it came to be made and the status of the person who makes the imputation as also the status of the person against whom the imputation is allegedly made. These and a host of other considerations would be relevant and required to be considered for deciding the appellants' plea of 'good faith' and 'public interest'. Unfortunately, all these are questions of fact and matters for evidence.[90]4139

46 *Potaraju Venkata Reddy v Emperor* 13 Cr LJ 275, p 279-80 .

47 Re *P Ramaswami*1971 LW (Cr) 63.

48 *Harbhajan Singh v State of Punjab* (1961) 1 Cr LJ 710, AIR 1961 Punj 215 **reversed** on facts in 1966 Cr LJ 82, AIR 1966 SC 97 ; *G Chandrasekhara Pillai v K Karthikeyan* (1964) 2 Cr LJ 549, AIR 1964 Ker 277 ; *State v D Packiarj* AIR 1951 TC 105, 52 Cr LJ 623 .

49 *G Chadrasekhara Pillai v K Karthikeyan* (1964) 2 Cr LJ 549, AIR 1964 Ker 277 **citing***Joyant v Cycle Trade Publishing Co* (1904) 2 KB 292, 73 LJKB 752 .

50 *G Chandrasrkhara Pillai v K Karthikeyan* (1964) 2 Cr LJ 549, AIR 1964 Ker 277 **citing***Arnold v Emperor* AIR 1914 PC 116 ; *Samanta Biswanath Roy v Jhari Bewa* 1977 Cut LR (Cr) 353 ; *Bhagolelal v Emperor* AIR 1940 Nag 249, 41 Cr LJ 734 .

51 *Paduram Saliu v Biswambar Sahu* AIR 1958 Ori 259, 1958 Cr LJ 1426 ; *Mohammed Vali Ahmed Sahib v Syed Sulaiman* 1972 LW (Cr) 60, *Deivasigamani v MS Kamruddeen Rowther* 1977 MLJ (Cr) 86, p 96 ; *Emperor v Abdool Wadool Ahmad* (1907) ILR 31 Bom 293, 5 Cr LJ 237 .

52 Re *Palani Asari* 1 Weir 613 (2).

53 *Harbhajan Singh v State of Punjab* (1961) 1 Cr LJ 710, AIR 1961 Punj 215 **reversed** on facts in AIR 1966 SC 97, 1966 Cr LJ 82 .

54 *Bhagwan Das v Emperor* 27 Cr LJ 1361, AIR 1927 All 116 ; *Jagdish B Rao v State* 1974 Cr LJ 1358 (Goa) .

55 *Amar Singh v KS Badalia* (1965) 2 Cr LJ 693 (Pat) ; *Anthoni Udayar v Velusami Thevar* AIR 1948 Mad 469, 49 Cr LJ 724 ; *Chamanlal v State of Punjab* AIR 1970 SC 1372, 1970 Cr LJ 1266 ; *Madappa Goundan v Emperor* 19 Cr LJ 115 ; *Pannalal v Basante* (1965) 14 Jab LJ 67 (SN) ; *P Balasubramania v C Rajagopalchariar* AIR 1944 Mad 484, 46 Cr LJ 71 ; *Charming Arnold v Emperor* 15 Cr LJ 309 (PC), 18 CWN 785 .

56 *Harbhajan Singh v State of Punjab* AIR 1966 SC 97, 1966 Cr LJ 82 on appeal from 1961 Punj 215.

57 *Thangavelu Chettiar v Ponnaninal* 1966 Cr LJ 1149, AIR 1966 Mad 363 ; *Paras Das v Paras Das* 71 Punj LR 162, p 165 (Del) .

58 *Anandrao Balkrishan Rangnekar v Emperor* 16 Cr LJ 177 .

59 *Sasadhar Banerjee v Prahlad Chandra Dutta* AIR 1949 Cal 292, 50 Cr LJ 541 ; *LC Randhir v Girdhari Lal* 1978 Cr LJ 879, p 882 ; *Chaman Lal v State of Punjab* AIR 1970 SC 1372, 1970 Cr LJ 1266 .

60 *Yadali v Emperor* AIR 1929 Cal 779, 81 Cr LJ 831 ; *Emperor v Abdool Wadood* (1907) ILR 31 Bom 293, 5 Cr LJ 237 ; *Anthoni Udayar v Velasami Thevar* AIR 1948 Mad 469, 49 Cr LJ 724 ; Re *Hari Narain Buddhram*AIR 1963 MP 60, (1963) 1 Cr LJ 186 .

61 *Sreenivasa Doss v Vanamamalai* 9 Cr LJ 425 ; *Emperor v Shivgowda* 3 Bom LR 188 .

62 *Talangare Mamunhi v Abdul Rahiman* AIR 1949 Mad 524, 50 Cr LJ 710 .

63 *State v D Packiaraj* 52 Cr LJ 623, AIR 1951 TC 165 ; *Jaffar Fadu v Emperor* 11 Cr LJ 588 .

64 *G Chandrashekhar Pillai v K Karthikeyan* (1964) 2 Cr LJ 549, p 556, AIR 1964 Ker 277 .

65 *K Rama Rao v Emperor* AIR 1943 Oudh 1, 44 Cr LJ 33 .

66 *Thiagaraya v Krishnasami* (1892) ILR 15 Mad 214, 1 Weir 617 ; *Vinayak Atmaram Pathare v Shantaram Janardan Pathare* AIR 1941 Bom 410, 43 Cr LJ 174 ; *Empress v Sankara* 6 Mad 381, 1 Weir 595 .

67 *Winfield's Law of Tort*, seventh edn, pp 611, 612.

68 *Silkin v Benverbook Newspapers* (1958) 2 All ER 516 ; *Nazeem Bavakunja v State of Kerala* 1988 Cr LJ 487 (Ker), (1987) 2 Ker LT 755 .

69 *Vishan Sarup v Nardeo Shastri* (1965) 2 Cr LJ 334, AIR 1965 All 439 .

70 *Durga Pershad Chowdhury v State of Rajasthan* (1969) Raj LW 202 .

71 *Gutley on Libel and Slander*, third edn, p 378 cited in *NB Khare v MR Massani* AIR 1942 Nag 117, 43 Cr LJ 856 ; *Nadir Shaw v Piroj Shaw* 15 Bom LR 180 ; *Radhanath Rath (Dr) v Balakrishna Swain* (1985) 59 Cut 226 (Ori) .

72 *TG Goswami v State* AIR 1952 Pepsu 165, 1952 Cr LJ 1553 .

73 Per Lord Herschell LC in *Davis v Shepstone* (1886) 11 AC 187, p 190 ; *R Shankar v State* 1959 Cr LJ 464, p 468, AIR 1959 Ker 100 ; *Dakhv v Laboucher* (1908) 2 KB 325 ; *Subhash Chandra v Knight and Sons* (1902) ILR 29 Cal 69, 32 CWN 490 .

74 *Hunt v Star Newspaper Co Ltd* (1908) 2 KB 309, 77 LJKB 732 ; '*Truth' and 'Sportsman' v GS Thompson* AIR 1933 PC 36, 1933 ALJ 625 .

75 *Howards v Mull* (1866) 1 Bom HCR (App) 85 .

76 *Purushottam Vijay v State* (1961) 2 Cr LJ 114, AIR 1961 MP 205 ; *P Balasubramania Mudaliar v C Rajgopalachari* AIR 1944 Mad 484, 46 Cr LJ 71 .

77 *S Khushboo v Kanniammal* 2010 Cr LJ 2828 (SC), AIR 2010 SC 3196, 2010 (4) Scale 462, (2010) 5 SCC 600 .

78 *Thomas v Bradbury, Agnew and Co* (1906) 2 KB 627, p 638 ; *Hunt v Star Newspaper Co* (1908) 2 KB 309 ; *R v Flowers* (1880) 44 JP 377 .

79 *Allahbux Khan v Emperor* AIR 1929 Sind 90, 30 Cr LJ 548 ; *TG Goswami v State* AIR 1952 Pepsu 165 ; *Subhash Chandra Bose v Knight and Sons* AIR 1929 Cal 69 .

80 *Raghunath Singh v Mukundi Lal* AIR 1936 All 780, 1936 ALJ 1014 .

81 *AM Kuttysakara Nair v PV Kumaran Nair* (1965) 1 Cr LJ 699, AIR 1965 Ker 161 .

82 *Emperor v FP Fernandes* 12 Cr LJ 595 citing *Edmondton v Birch and Co Ltd* (1907) 1 KB 371, p 380 ; *Sanatan Daw v Dasarathi Tah* 1959 Cr LJ 1310, AIR 1959 Cal 677 .

83 *Murlidhar Jeramdas v Narayandas* 16 Cr LJ 141 .

84 *Dongarsingh v Krishna Kant Vyas* 1957 Cr LJ 1143, AIR 1957 MP 162 ; *Emperor v JM Chatterjee* AIR 1933 All 434, 33 Cr LJ 926 ; *P Balasubramania v C Rajagopalchariar* AIR 1944 Mad 484, 46 Cr LJ 71 .

85 *Purushottam Vijay v State* (1961) 2 Cr LJ 114, AIR 1961 MP 205 ; *TG Goswami v State* AIR 1952 Pepsu 165 ; *Vishan Sarup v Nardeo Shastri* AIR 1965 All 439, (1965) 2 Cr LJ 334 ; *Sewakram Sobhani v RK Karanjia* 1981 Cr LJ 894, p 898, AIR 1981 SC 1514 ; *Gour Chandra Rout v Public Prosecutor* AIR 1962 Ori 197, (1962) 2 Cr LJ 617 .

86 *John Manjooran v CM Stephen* 1973 Ker LJ 403, 1973 Cr LJ 1722 ; *Sewakram Sobhani v RK Karnjia* 1981 Cr LJ 894, p 898, AIR 1981 SC 1514 ; *Channing Arnold v Emperor* 15 Cr LJ 309, p 322 .

87 *Surajmal v Hariman* AIR 1917 Bom 62, p 80 ; *Purushottam Vijay v State* (1961) 2 Cr LJ 114, p 117, 1961 MP 205 .

88 *Bibhuti Bhusan Das Gupta v Sudhir Kumar Mazumdar* 1966 Cr LJ 986, AIR 1966 Cal 472 ; *WK Males v Smiles* AIR 1937 Rang 105 ; *MB Kunwar v State* (1963) 1 Cr LJ 609, AIR 1963 Punj 201 .

89 *Dongarsingh v Krishan Kant Vyas* 1957 Cr LJ 1143, AIR 1957 MP 162 .

90 *Emperor v Jhabbar Mal* AIR 1928 All 222, p 230, 30 Cr LJ 530 ; *K Rama Rao v Emperor* AIR 1943 Oudh 1, 44 Cr LJ 33 ; *Ramesh Chander v State* AIR 1966 Punj 93, 1966 Cr LJ 292 .

91 *Bibhuti Bhusan Das Gupta v Sudhir Kumar Mazumdar* AIR 1966 Cal 473, 1966 Cr LJ 986 .

92 *John Manjouran v CM Stephen* 1973 Ker LJ 403, 1973 Cr LJ 1722 ; *NJ Nanporia v Brojendra Bhowmik* (1974-75) 79 Cal WN 531; *Canning Arnold v Emperor* 15 Cr LJ 309, p 322 .

93 *Donagarsingh v Krishna Kant Vyas* 1957 Cr LJ 1143, AIR 1957 MP 162 .

94 *Bibhuti Bhusan Das Gupta v Sudhir Kumar Mazumdar* AIR 1966 Cal 473, 1966 Cr LJ 986 .

95 *Dilip Babasaheb Londhe v State* 2014 Cr LJ (NOC) 106 (Bom) .

1 Press and Registration of Books Act, 1867 (25 of 1867).

2 *Gautam Adhikari v Shri Jagir Singh* 2002 Cr LJ 911 (Del) .

3 *Gautam Adhikari and Anor v Shri Jagir Singh* 2002 Cr LJ 911 (Del) .

4 *Ibid*; *Haji CH Mohammad Koya v TKSMA Muthukoya* AIR 1979 SC 2206, 1992 Cr LJ 3779 (SC) ; *Prabhu Chawla v AV Sheriff* 1995 Cr LJ 1922 (Kant), (1995) 3 CCR 631 (SC) ; *KM Mathew v Ashok Tanwar* (1995) 4 CCR 543 .

5 *Udayan Telugu Daily v State* 1987 Cr LJ 145 (AP) .

6 *Dasari Narayan Rao v RD Bhagwandas* 1986 Cr LJ 888 .

7 *Gautam Adhkari and Anor v Shri Jagir Singh* 2002 Cr LJ 911 (Del) .

8 *Vijay Jawaharlalji Darda v Laxmikanth C Gupta* 2005 Cr LJ 1886 (Bom) .

9 *Vivek Goenka v State of Maharashtra* 2003 Cr LJ 4058 (Bom) .

10 *KM Mathew v KA Abraham* 2002 Cr LJ 4111 (SC) .

11 *Prabhu Chawla v AU Sheriff* 1995 Cr LJ (Kant) 1922, ILR 1995 Kant 39 ; *CB Solanki v Srikante Parashar and Ors* 1997 Cr LJ 3050 (Kant) .

12 *Gambhirsingh R Dekare v Falgunbhai Chimanbhai Patel* 2013 Cr LJ 1757, p 1760, (2013) 3 SCC 697, AIR 2013 SC 1590

13 *Gambhirsingh R Dekare v Falgunbhai Chimanbhai Patel* 2013 Cr LJ 1757, p 1760, (2013) 3 SCC 697, AIR 2013 SC 1590 .

14 *Surya TV v State of Kerala* 2009 (1) KLT SN 2 (Ker) ; **see also***VS Achuthanandan v Kamalamma* 2008 (2) KLJ 417, 2008 (3) KLT 346 .

15 *Muhammad Nazir v Emperor* AIR 1928 All 321, p 324, 30 Cr LJ 766 ; *Sodhi Gurbachan Singh Koshan v Babaram* AIR 1969 Punj 201 .

16 *Sodhi Gurbachan Singh Koshan v Babaram* AIR 1969 Punj 201 .

17 *KV Ramesh and Ors v HC Ramesh* 2001 Cr LJ 3556 (Kant) .

18 *M Malla Reddy v T Venkatrama Reddy and Ors* 2000 Cr LJ 1086 (AP) .

19 *Ramaswami v Lokananda* (1886) ILR 9 Mad 387 .

20 *State v D Packiaraj* 52 Cr LJ 623, AIR 1951 TC 105 .

21 *Narayan Singh v Rajmal* (1961) 1 Cr LJ 91, AIR 1961 MP 12 .

22 *Editor, Deccan Herald v MS Ramaraju* 2005 Cr LJ 2672 (Kant) .

23 *Sevakram Sobhani v RK Karanjia* AIR 1981 SC 1514, 1981 Cr LJ 894 ; *BRK Murthy v State of UP* 2013 Cr LJ 1602, p 1609 (AP), 2013 (3) ALT (Cri) 144 .

24 *Sujatha v Krishna Kumar* 2010 (86) AIC 526 (Ker) .

25 *Mokand Ram v Emperor* 12 PR 1883 .

26 *Bhagat Singh Akali v Lachman Singh Akali* 1968 Cr LJ 759, AIR 1968 Cal 296 ; *Jayanta Baruah v Dilip Baruah* 2014 Cr LJ 3349, 2014 (136) AIC 657 (Gauh) . (Unless there is evidence that the owner of the newspaper had prior knowledge or was somehow connected with the publication of the defamatory news item, no adverse presumption can be drawn).

27 *T Venkatram Reddy v M Malta Reddy and Anor* 1999 Cr LJ 1473 (AP) .

28 *Jaffar Fadu v Emperor* 11 Cr LJ 588 .

29 *Raghunath Damodar v Janardhan Gopal* (1891) ILR 15 Bom 599 ; *Lachmi Narain v Shambhu Nath* AIR 1931 All 126, 1931 ALJ 16 .

30 *KM Kuttysankaran Nair v PV Kumaran Nair* (1965) 1 Cr LJ 699, 702, AIR 1965 Ker 161 .

31 *Girdhari Lal v State* 1969 Cr LJ 1318, 1969 Cut LJ 227 .

32 *Lalmohan Singh v King* 51 Cr LJ 1288, AIR 1950 Cal 339 .

33 *Imperative v Kakde* (1879-1880) ILR 4 Bom 298.

34 *G Chandrashakhara v K Karthikeyam* (1964) 2 Cr LJ 549, AIR 1964 Ker 277 .

35 *Muhammad Nazir v Emperor* AIR 1928 All 321, p 325, 30 Cr LJ 766 .

36 *TG Goswami v State* AIR 1952 Pepsu 165, p 167, 1952 Cr LJ 1553 .

37 *Emperor v Murat Singh* AIR 1934 All 904, 36 Cr LJ 260 .

38 *Empress v Janardhan Damodhar* (1895) ILR 19 Bom 703 ; *Samarathmal Marwari v Emperor* AIR 1932 Nag 158, 34 Cr LJ 154 ; *Vinayak Atmaram Pathare v Shantaram Janardhan Pathare* AIR 1941 Bom 410, 43 Cr LJ 174 .

39 *John Manjooran v CM Stephen* 1973 Cr LJ 1722, 1973 Ker LJ 403 .

40 *Umed Singh v Emperor* AIR 1924 All 299, p 301, 25 Cr LJ 327 ; *Chaman Lal v State of Punjab* AIR 1970 SC 1372, 1970 Cr LJ 1266 .

41 *KM Kuttyasankaran Nair v PV Kumaran Nair* (1965) 1 Cr LJ 699, p 702, AIR 1965 Ker 161 .

42 *Paras Das v Paras Dass* 71 Punj LR 162, p 165 (Del) .

43 Per Bramwell B in *Kelley v Sherlock* (1866) 1 QB 686, p 689 ; *Kartar Singh v State of Punjab* AIR 1956 SC 541, 1956 Cr LJ 945 ; *Jaswantlal Shoubhagya Chand Shah v State of Gujarat* 1984 Cr LR 348 (Guj) .

44 *Brahmadeo Singh Sharma v State of Bihar* 1972 BLJR 187, p 191 .

45 *Narsingdas Nargis v Bansi Lal* 1974 Kash LJ 198 .

46 *R Sankar v State* 1959 Cr LJ 464, AIR 1959 Ker 100 .

47 *Bhagwan Das v Emperor* 27 Cr LJ 1361, AIR 1927 All 116 .

48 *K Kelu Nair v TS Thirumampu* AIR 1948 Mad 266, 49 Cr LJ 447 ; *Girdhari Lal v State* 1969 Cr LJ 1318, 1969 Cut LJ 227 .

49 Re *Arundhati Roy Contemnor*2002 Cr LJ 1792 (SC), AIR 2002 SC 1375, 2002 (2) Scale 538, (2002) 3 SCC343, [2002] 2 SCR 213.

50 Re *Arundhati Roy Contemnor*2002 Cr LJ 1792 (SC), AIR 2002 SC 1375, 2002 (2) Scale 538, (2002) 3 SCC343, [2002] 2 SCR 213.

51 Note R, pp 182-183; *Murlidhar Jeramdass v Narayandas* 16 Cr LJ 141 .

52 *Annada Prasad v Monotosan Roy* AIR 1953 Cal 503, 54 Cr LJ 1168 .

53 *Annada Prasad v Manotosan Roy* AIR 1953 Cal 503, 54 Cr LJ 1168 ; Re *Singaraju Nagahhusanam*(1903) ILR 26 Mad 464, 1 Weir 611.

54 *T Satish Pai v Narayan Nagappa Nayak* 2002 Cr LJ 4416 (Kant) .

55 *Annada Prasad v Manotosan Roy* 54 Cr LJ 1168 .

56 *Ibid.*

57 *K Narendra v Amrit Kumar* 1973 Raj LW 66, 1973 Cr LJ 1637 .

58 *Charming Arnold v Emperor* 15 Cr LJ 309 (PC), 18 CWN 785 .

59 *Kirpa Ram v Emperor* 21 PR 1887 .

60 *Emperor v Abdool Wadood Ahmed* (1907) ILR 31 Bom 293, 5 Cr LJ 237 .

61 *Ibid.*

62 *UB Guarantee Co v Thakorlal* AIR 1936 Bom 114, p 124, 37 Bom LR 1033 .

63 *Jotindra Nath Mukherjee v Radha Krishna Buddhia* AIR 1934 Pat 548, 36 Cr LJ 285 .

64 *Mohindra Singh Dhillon v Ganga Dhar Sharma* (1975) 77 Punj LR 716, p 718 ; *ADM Stubblings v Shellamuthu* 1972 Cr LJ 968, 1972 MLJ (Cr) 108 .

65 *Basumati Adhikari v Budram Kolita* (1895) ILR 22 Cal 46 ; *Empress v Vidya Sankara* (1883) ILR 6 Mad 381, 1 Weir 595 ; *Empress v Bhikaji* Ratanlal Unrep Cr Cas 387; *Sukralendra Thirtha Swami v MN Prabhu* 24 Cr LJ 325, AIR 1923 Mad 587 .

66 *Woodward v Lander* (1834) 6 C and F 548 ; *Blake v Pilford* 1 M and R 198.

67 Re *Karumara Anjaneyalu* 17 Cr LJ 381, 383; *Empress v Dhum Singh* (1884) ILR 6 All 220 .

68 *Kanwal Lal v State of Punjab* (1963) Cr LJ 345, AIR 1963 SC 1317 .

69 *Roshan Singh v Mahesh Chandra* 1970 All Cr R 356 ; *Nga Poona v Emperor* 17 Cr LJ 213 ; *Chaitan Charan Das v Raghunath Singh* 1959 Cr LJ 1006, AIR 1959 Ori 141 .

70 *Hari Shankar Joshi v Shyam Sunder* 1972 All Cr R 480 .

71 *Kanwal Lal v State of Punjab* (1963) 2 Cr LJ 345, AIR 1963 SC 1317 .

72 *G Chandrashekhara Pillai v K Karthikeyan* (1964) 2 Cr LJ 549, p 556, AIR 1964 Ker 277 .

73 *R Sanker v State* 1959 Cr LJ 464, p 468, AIR 1959 Ker 100 .

74 1 Weir 607 (2).

75 Re *Kakumara Anjaneyalu* 17 Cr LJ 381.

76 *Thiruvengada Mudali v Thipurasundari Ammal* AIR 1926 Mad 906, p 909, 27 Cr LJ 1026 ; *Satis Chandra Chakrabarti v Ram Dayal De* 22 Cr LJ 31, p 35 .

77 *Modappa Goundan v Emperor* 19 Cr LJ 115 ; *Champaklal v Khushaldas Ratanshi* 1955 Cr LJ 259, AIR 1955 Sau 19 .

78 *Anandrao Balkrishna Rangnekar v Emperor* 16 Cr LJ 177 .

79 *C Doraisami Naidu v Kanniappa Chetty* AIR 1931 Mad 487, 32 Cr LJ 767 .

80 *Romesh Roy v King* AIR 1952 Cal 228, 53 Cr LJ 611 .

81 *Haji Ahmed Hussain v State* AIR 1960 All 623, 1960 Cr LJ 1296 ; *Bulchand Ramchand v Emperor* 15 Cr LJ 675 .

82 *Yadav Motiram Patil v Rajiv G Ghodankar* 2011 Cr LJ 528 (Bom) .

83 *Sukhdeo Vithai Pansare v Prahhakar Sukhdeo Pasare* 1974 Cr LJ 1435 (Bom), 1974 Mah LJ 777 ; *Chinnammal v A Subramanyam* (1980) 24 Mad LJ (Cr) 47, p 50 (Mad) .

84 *Pitamber Guru v Ambika Charan Sharma* (1974) 1 Cut LR (Cr) 116 ; *Sukra Mahto v Basdeo Kumar Mahto* AIR 1971 SC

1567, p 1568 ; *Sewakram Sohhani v RK Karanjia* 1981 Cr LJ 894, AIR 1981 SC 1514 .

85 *Ramanaya Kama v Venugopala Rao* 1987 Cr LJ 2000 (AP) .

86 *Pitamber Guru v Ambika Charan Sharma* (1974) 1 Cut LR (Cr) 116 ; *IG Chandrashekhara Pilial v K Karthikeyan* (1964) 2 Cr LJ 549, p 550, AIR 1964 Ker 277 ; *Shivage Gowda v Narayana* (1967) 2 Mys LJ 1 ; *Ramesh Chandra v State* 1966 Cr LJ 292, AIR 1966 Punj 93 ; *Krishna Kanta v Geeta Roy* 1982 Ch Cr Cas 54, p 60 (Del), 1982 Cr LJ (NOC) 3 ; *Harbhajan Singh v State of Punjab* AIR 1966 SC 97, 1966 Cr LJ 82 .

87 *Atwadhkar v Parvathibai* 1971 MLJ (Cr) 575, p 577 .

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92 *Balai v Heerji* AIR 1969 Raj 119, 1969 Cr LJ 513 .

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Indian Penal Code (Act XLV of 1860)

Chapter XXI

Of Defamation

S. 500.

Punishment for defamation.--

Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section provides the penalty for the simple and plain act of defamation as defined in the preceding s 499, IPC .[91] Filing of private complaint under s 500, IPC, which ultimately was quashed would not amount to defamation. Equally, it cannot be stated that the service of summons on the said complaint would amount to defamation, as the service of summons was only in pursuance of the order of the court.[92] Accused had lodged complaint *bonafidely* as to demand for bribe. Complaint was dismissed and accused was acquitted giving benefit of doubt. Whenever any investigation is made on information supplied in good faith or without any *mala fide* intention, then the person who made the

report cannot be prosecuted for the offence under s 500, IPC . No case for defamation under s 500, IPC was made out, and accused was acquitted of the charge under s 500, IPC .[93]4140

The maxim *'action personalis mortur cum persona'* does not apply to criminal proceedings for offence of defamation punishable under s 500, IPC .[1]

2. Ingredients

So far as the ingredients of s 500, IPC, are concerned the complainant has to make out a case of:

(a) making any imputation concerning the complainant by the accused;
(b) that such imputation was made by words spoken or written or by sign or visible representations; and
(c) that such imputation was made with the intention of harming or with the knowledge or having reason to believe that it would harm the reputation of the complainant against whom such statement was made.[2]

3. Mens Rea

On a careful reading of the commencing portion of s 499, IPC, it is clear that to satisfy the ingredients, the requisite *mens rea* also would be essential.[3] A close reading of ss 499 to 501 of the IPC would reveal that the person publishing the matter must have the intention of defaming or he must have the knowledge or good reason to believe that such matter is defamatory to any person, group or any religion, *etc*.[4]

Artificial/Juristic Person

One of the essential ingredients to constitute an offence under s 499, IPC is either intention to harm or knowledge or reasons to believe that such imputation will harm the reputation of the other. Therefore, artificial/juristic persons cannot be prosecuted for offence under s 500, IPC .[5]

4. Section 500 and Section 504

The offence under ss 500 and 504, IPC, can co-exist and they are distinct offences committed in the cause of some transaction and the test is whether a normal person, in the position of the person insulted would have reacted to the use of the particular insulting words, by retaliating, in a violent manner whereby a breach of peace would have been caused.[6]

Where the accused called the counsel *badmash* in open court, the offence does not come under s 499, IPC, and acquittal of the accused for the offence under s 500, IPC, is legal. Perhaps the words have been articulated so as to cause harm to the person, in which case it might amount to an offence under s 504, IPC .[7]4141

5. Section 120B and Sections 500, 501 and 502

Commentary under the same heading in s 502, *post*, may be referred to.

6. Procedure

The offence under this section is non-cognizable, bailable, compoundable, and triable by the court of session if offence is committed against the President or the Vice-President or the Governor of a State or Administrator of the Union Territory or a minister in respect of his conduct in the discharge of his

public functions when instituted upon a complaint made by the public prosecutor, and by a magistrate of the first class in any other case, and may also be tried summarily.

7. Power under Section 311CrPC --When not to be Exercised

The provisions of s 311 CrPC, are essentially intended in the interests of justice to bring to court all necessary evidence in respect of the case that is being tried by the court, and it is not intended to bring in any evidence before the court to implicate persons who were made parties to the proceedings at a very belated stage and long after prosecution against him is barred by time under the provisions of s 468, CrPC .[8]

8. Vicarious Liability

If a letter is issued on the letter pad of a partnership firm and if a person complains that the letter is defamatory and comes to the court for criminal prosecution for offences under ss 499 / 500, IPC, there cannot be any general vicarious criminal liability on the rest of the partners who did not sign the letter unless it is averted in the statements under ss 200 and 202, CrPC that the persons not signing the letter had also the criminal intent of defaming the complainant.[9]

9. Filing of Complaint, Issuing of Process against Accused is no Defamation

It cannot be contended that filing of private complaint under s 500, IPC, which ultimately was quashed, would amount to defamation. Equally, it cannot be stated that the service of summons on the said complaint which was taken on file by the judicial magistrate also, would amount to defamation, as the service of summons was only in pursuance of the order of the court.[10]

10. Complaint and its Contents

A complaint must contain the facts relied on as constituting the offence of defamation though it is not necessary to quote the section of the IPC . It is for the court to determine, on the facts, stated in the complaint, what offence has *prima facie* been committed. Where, on a complaint, purporting to be under ss 193 and 211, IPC, the magistrate, after hearing the evidence, framed a charge under s 500, IPC, and convicted him, it was held that the conviction was sound.[11] The complaint is good if the charge is quite specific and contains the words alleged to be defamatory. Matter,4142 need be made in a complaint of defamation.[12] The absence of averments in the complaint that because of alleged imputation in the news item, the complainants reputation had been lowered in the estimation of others leads to dismissal of complaint.[13] In *Mohammed Gul v Fazley Karim* ,[14] the complainant, filing a complaint with the allegation that the accused had filed a petition falsely implicating him in the specified acts and cases in order to disgrace him, made a prayer for an inquiry into the allegation and it was added that the complainant 'reserves' the right of bringing the case of defamation against the accused in future. It was held that it was a proper complaint. Where a complaint was made to the magistrate under s 211, IPC, that the accused had made a false charge, against him (the complainant), of poisoning his daughter-in-law with a view to injure his reputation, it was held that the magistrate could deal with it under s 500, IPC .[15]

Complaint--Infirmity in Filing of

The expression 'or from sickness or infirmity unable to make complaint' in the proviso[16] is in this context of crucial significance. Such 'infirmity' need not be on account of reasons of health or age alone. Any debility, disability, difficulty or inability must therefore fall within the sweep of the expression 'infirmity' appearing in the proviso. A larger meaningful, interpretation has got to be given for the proviso if the proviso were to be read and understood to cover such complaints in the name of the complainant being preferred by some other person holding the power of attorney of the complainant. The expression 'infirmity' cannot be read down to mean infirmity resulting from ill-health or age. The expression 'infirmity' in language cannot also be understood in any limited or restricted

sense. 'A personal falling' is as per the *Websters Dictionary* 'infirmity' in language. The dictionary refers to AJ Toynbee's famous statement that 'one of the besetting infirmities of living creatures is egotism'. Infirmity under the proviso to s 199(1), CrPC, must therefore be held to hold within its sweep any deficiency, debility, disability, impossibility, difficulty or inadequacy, which the court finds to be reasonable and sufficient to dispense with the personal appearance of the complainant to present the complaint. Such a vibrant interpretation must be given to the expression 'infirmity' considering the purpose and purport of the proviso to sub-s 1 of s 199, CrPC .[17]

Complaint--Person Aggrieved

In cases other than those falling under s 199(2) of the CrPC, no court shall take cognizance of an offence of defamation except upon a complaint of the person aggrieved by the offence,[18] provided that where such person is under age of eighteen years, or is an idiot or lunatic, or is, from sickness or infirmity, unable to make a complaint, or is a woman, who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may with the leave of the court, make a complaint on his or her benefit.[19]4143

The person, actually defamed, is, of course, a person aggrieved. An order, throwing out a complaint on the ground that it is not by a 'person aggrieved' because the complainant's name has not been directly referred to in the news item, complained of, would be unjustified.[20] But the Andhra Pradesh High Court has held that if the name of ther complainant is not referred in the news item, he is not a person aggrieved and the complaint filed by the complainant merely because he was one of the accused in a crime regarding appropriation of amount is not maintainable.[21] In the case of a co-operative bank, the manager, who is primarily concerned with the day-to-day management of the bank, is a person aggrieved.[22] In the case of defamatory matter published in a newspaper report, involving the proceedings of a conference, the chairman of the reception committee was, in his capacity as an active member, held to be a person aggrieved competent to file a complaint.[23] The true rule is that if a person complains that he has been defamed as a member of a class, he must satisfy the court that the imputation is against him personally and he is the person aimed at before he can maintain a prosecution for defamation.[24] The question, as to whether a person, who files a complaint of defamation, is aggrieved, is a question which should be determined with reference to the nature of the accusation and the special circumstances of each case. In the following synopsis the legal position of a complaint as person aggrieved depending upon his relationship with person defamed, is considered on the basis of case laws.

A complaint for defamation under s 500, IPC can be filed by an organization through its office bearers. A trust can be 'a person' aggrieved for the purpose of filing complaint for defamation.[25]

Where imputation made in public speech published in newspaper relates to a person, such a person is 'aggrieved person' who can file a complaint for offence under s 500, IPC .[26]

Complaint--Duty of Magistrate Taking Cognizance

The definition which has been given in s 499, IPC is to be read as a whole while considering the allegations made by the complainant in the complaint, and the magistrate has to consider whether the complainant has made out a *prima facie* case, for him to take cognizance of the complaint presented in his court and to issue a process by calling the accused indicated in the said complaint to court.[27]

Spiritual Head of Community Defamed--Complaint by an Individual of the Community

Where the editor of a paper made highly defamatory attack on the spiritual head of a certain community, an individual of that community was held not to be an aggrieved person.[28]4144

Wife Defamed--Complaint by Husband

If, one alleges of a person that his wife is a prostitute, that would amount to defaming him within the meaning of s 499, IPC . In such a case, the husband can maintain the complaint even in the absence of a complaint by the wife.[29] In *Sukhendu Bikash Guha v Mahim Chandra Guha Deb Barman* ,[30] it was, however, held that the court had no jurisdiction to take cognizance of a complaint by the husband of the woman unless the case came within the purview to s 198, CrPC 1898 [corresponding to the proviso to s 199(1), CrPC 1973]. Similarly, while the husband is entitled to file a complaint in the case of an imputation of unchastity of his wife, the question would be whether a husband can file a complaint where the imputation is not one involving chastity. In some cases, it has been held that the husband has such a right. Thus, it was held that it is undoubtedly defamatory of a high class *thakur* lady to state that she is *ahirin*, but the statement also defames her husband. It implies that the husband did not act, disgraceful in itself, in having the relationship of husband with a woman who was not a member of his own caste.[31] The imputation, the complainant's wife was a witch, practised witchcraft and destroyed the crops of the accused, was an imputation, affecting the complainant-husband, and he could validly make a complaint.[32] On the other hand, it has been held that while, on an imputation of unchastity, the party 'aggrieved' includes also the husband or other relative whose reputation is also affected and suffers injury, an allegation against a female, that she has stolen property, does not harm the personal reputation of her husband in any way and the husband cannot file a complaint without the leave of the court.[33]

Hindu Widow Defamed--Complaint by Brother

Where the alleged offence was defamation imputing unchastity to a Hindu widow, her brother, with whom she was residing at the time, was held to be a person aggrieved by such imputation.[34]

Daughter Defamed--Complaint by Father

However, where a woman had left her husband and was living separately by herself, her father was not held to be an aggrieved person.[35] In the case of a minor daughter, the case is, however, different. Where some persons presented a petition to the police containing defamatory allegations against a person's minor daughter, it was held that both the father and the daughter could file separate complaints. The defamatory allegations, with reference to the daughter, were calculated to harm the father's reputation also and could, therefore, legitimately form the subject-matter of his complaint.[36] If, however, the accused is acquitted on a compromise made by him4145 with the father of the girl, there would be no legal bar to a complaint by the girl.[37]

Person with Unknown Whereabouts Defamed--Complaint by Nephew

Where the whereabouts of the person defamed (Netaji Subhash Chandra Bose) were not known or he had not been heard of for a long time, a complaint made by his nephew was held to be competent as he lived in the same family and in joint mess with him and suffered incarceration for a number of years in the cause held dear by him.[38]

***Pardanashin* Lady *etc.* Defamed--Complaint by Other Person**

If the person aggrieved is a woman, who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, after obtaining express leave of the court, make a complaint on her behalf.[39] Thus, in the case of a defamed *pardanashin* lady, a complaint by her servant would be sufficient if he is duly authorised by her, even if the authorisation be oral.[40]

Company or Partnership Firm *etc.* Defamed--Complaint by Director or Partner *etc.*

The question as to who can be the complainant in cases where the defamation pertains to an association of persons or a body, corporate, has to be answered by reference to s 199 of the CrPC . The collocation of the words 'by some persons aggrieved' in s 199, CrPC, definitely indicates that the complainant need not necessarily be the defamed person himself. Whether the complainant has reason to feel hurt on account of publication is a matter to be determined by the court depending upon

the facts of each case. If a company is described as engaging itself in nefarious activities, its impact would certainly fall on every director of the company and hence he can legitimately feel the pinch of it. Similarly, if a firm is described in a publication as carrying on offensive trade, every working partner of the firm can reasonably be expected to feel aggrieved by it, when the imputation of being engaged in trafficking of human kidneys is against the hospital which is a private limited company, it is too far fetched to rule out any one of its director, feeling aggrieved on account of pejorative hurled at the company.[41]

Association or Collection of Persons Defamed--Complaint by its Member

In order to attract expln 2 of s 499, IPC, an association or collection of persons must be a definite and determinable body, but it is an ever changing body. When the Kerala police is defamed, the complaint by a member of the Kerala police is not maintained.[42] If the imputations made was against the senior Christian community as a whole, the complaint filed by a member of that community who was not a person individually affected by the imputations, was not found maintainable.[43] Where the4146 allegation was against the Indian National Congress (I) and the complaint was filed by a member of the party against whom there was no individual accusation, the complaint was not found maintainable.[44]

Person Living Abroad Defamed--Complaint Through Attorney

The Madras High Court,[45] has taken the view that the mere residence of the complainant abroad does not justify his power of attorney holder making a complaint alleging commission of offence under the proviso to s 199(1), CrPC . However, recently Kerala High Court,[46] has taken a contrary view and has held that merely because a person is abroad and is hence unable to lodge a complaint within the time stipulated under the relevant provisions relating to limitation, no accused person can claim an unjustified advantage. In such a case, the word 'infirmity'[47] under the proviso to s 199 must certainly take into account the inability of the complainant to appear personally in court to present the complaint himself. Such a complainant can file complaint through his power of attorney.

Before a complaint can be dismissed as not maintainable, the court should be satisfied that the complaint is barred by any provision of law, and such provision may be contained either in the CrPC itself or in any other law.[48]

11. Necessity of Sanction under Section 197 , CrPC 1973

No sanction under s 197 of CrPC, is necessary unless the judge, magistrate or public servant commits the offence of defamation in his judicial or official capacity.[49] Where a judge was charged with using defamatory language to a witness during the trial of a suit, it was held that the complaint could not be entertained by the magistrate without prior sanction under s 197 of the CrPC as the judge was then acting in his official capacity and the words uttered by him were uttered as a judge, and not as a private individual.[50] The sanction of the court, appointing a receiver, is not, however necessary in order to proceed against him for a breach of the ordinary criminal law of the country, *i.e.*, defamation.[51] If, the sanction for prosecution under ss 383 and 500, IPC, is clearly called for and when the accused is being prosecuted for these two offences alongwith the third offence under s 504, IPC, together, prior sanction under s 197, CrPC, would be necessary for the prosecution of the accused jointly for all the three offences.[52]

12. Stage for Deciding Question of Sanction

The Apex Court in the case of *PK Pradhan v State of Sikkim* [53] has observed:

It is well settled that question of sanction under s 197 of the Code of Criminal Procedure can be raised any

> time after the cognizance; may be immediately after4147 cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused that the act that he did was in course of the performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality the question of sanction should be left open to be decided in the main judgment which may be delivered upon the conclusion of the trial.[54]

In view of the aforesaid dictum laid down by the Apex Court, the question of prior sanction can even be decided by the court either before trial, during the course of trial or at the time of delivering the judgment on the basis of the evidence to be recorded.[55]

13. The Complaint without Naming the Accused--Validity

Where there was publication of a report in a newspaper without specific name or explicit reference about the complainant, the contention that the identity of the complainant should be established, had been raised it was held that it is not always necessary to name the person. If the description and attendant circumstances suggest, with fair certainly, the identity of the person intended, that is sufficient to attract the offence. Explanation 3 to s 499, IPC states that an imputation in the form of an alternative or expressed ironically, may also amount to defamation. Defamation by innuendo is also not unknown to law. Therefore, the reference need not be explicit and if the description is such that a reasonable person, in the context in which it is made, would be able to understand it as a reference to a particular person, that would suffice.[56]

14. Death of Complainant--Effect

When certain defamatory allegations against a police officer as well as the police force in general are made, the only way, after the death of the complainant, is to continue with the trial and not to discharge the accused.[57] However, in criminal jurisprudence 'complainant' means only the person who makes complaint to the magistrate and who is examined as the complainant under s 200, CrPC . No one else can be deemed to be complainant, however interested he may be in the case and when the complainant dies the magistrate has no option but to acquit the accused in the summons case instituted in the complaint. The legal heir of the complainant in such a case cannot prosecute the case after the death of the complainant.[58] However, an appeal filed by the complainant against the acquittal of the accused of the offence under s 500, IPC, does not abate on the death of the complainant/appellant.[59] Where the complaint was filed regarding publication of defamatory statements affecting the complainant personally as well as his family, on the death of the complainant, the4148 allowing of an application by the wife of the complainant to continue the prosecution was found proper.[60]

15. Quashing of Complaint

The question regarding falsity or good faith is not required to be decided at the initial stage, because the fact that the allegations are false is to be proved by the accused by substantial evidence and allegations are made in good faith can be a defence of the petitioner and if pleaded during trial before the trial court and on substantial evidence alone the trial court can decide whether the imputations are made in good faith. Therefore, the complaint cannot be quashed.[61] The question about the date of commission of offence, for the purpose of limitation is to be considered by the trial courts, the aspect of good faith is a question of fact and matter of evidence, so the contention of protection of the accused under exceptions 8 and 9 to s 499, IPC, has to be dealt by the trial court and the complaint cannot be quashed by the High Court by taking recourse to s 482, CrPC .[62] However, when the complaint is filed under s 500 and the facts do not attract ss 34 and 120B, IPC, and there is no specific complaint against some of the accused persons, the process issued against them needs to be recalled and proceedings against them is liable to be dropped.[63] If the allegation, against the accused are that, he defamed the complainant by addressing in a public meeting that the person with the long

moustache was a corrupt person, but the complaint did not show that the complainant, was the only member of the party, who was having long moustache, the alleged defamatory statement was absent in the newspaper report of the public meeting, the offence under s 500, IPC, was not made out and the order taking cognizance of the offence was found liable to be quashed.[64] If in the letter sent by a superior officer of the insurance company to the immediate officer of the complainant states about the misbehaviour by the complainant with the staff in the office of an insurance company and there is nothing *per se* defamatory in the letter nor any speaking circumstances are pointed out in the complaint itself, the complaint under s 499 read with ss 500 and 34, IPC, is liable to be quashed.[65]

Where complaint filed for offence under s 500, IPC, contains imputation which is likely to cause harm to the reputation of the accused, complaint would not be quashed at the thresh-hold.[66]

In writ petition filed by the respondent bank employee challenging his dismissal, the respondent nos. 10 and 11 filed affidavit representing the appellant bank, respondent filed complaint for offence under s 500, IPC alleging that the counter affidavit was defamatory. The respondent nos. 1 to 9, proposed accused are the directors of the bank. Held, the respondent nos. 1 to 9, directors of the company living at different places, could not be said to have shared common intention with the respondent nos. 10 and 11 in the preparation of the draft to defame the complainant. Section 34IPC, was held to be not attracted in the case. The proceedings of4149 complaint against the respondent nos. 1 to 9, directors of the company, were quashed on petition filed under s 482, CrPC .[67]

The accused was working as an executive editor at the time of the alleged publication of the defamatory article in the newspaper. There was no allegation showing that the accused controlled selection of the matter. The presumption under s 7 of the Press and Registration of Books Act is available in respect of the editor and not the executive editor or any person other than the editor. Therefore, the complaint for the alleged offence under s 500, IPC, including the summoning order of the accused was quashed.[68] If the complainant has concealed the material facts from the courts by reproducing only a portion of the sentence used by the accused, the criminal complaint under s 500, IPC, and order of summoning the accused are an abuse of process of the court and so are liable to be quashed.[69] If the connection of some of the accused persons with the disputed publication is too remote, the prosecution against them is liable to be quashed.[70] If the words or passages found in the defamatory articles are only verbatim reproduction of materials collected and relied upon by the CBI during investigation, no *prima facie* case is made out under ss 500, 501 and 502 read with s 341, IPC, and the complaint against the accused person is liable to be quashed.[71]

A complaint was filed for offences under s 499 and 502, IPC alleging that the report of the fact finding committee which dealt with farmers' deaths due to exposure to pesticides in Warangal district of Andhra Pradesh violated the provisions of ss 499 and 502, IPC . Held, the fact finding committee was not aimed at doing health study or in-depth scientific investigation, but to do an indicative study which would lead to a larger health study. The general tenor of the report indicated that the report was meant to focus on the harmful effects of exposure to pesticides. The report was not meant to harm, hurt or defame any individual or the manufacturing company. The complaint filed under ss 120B, 34, 500, 501 and 502, IPC lacked basic ingredients.[72]

When the complaint is not filed by an aggrieved person, the cognizance of the offence by the trial court is not competent so the complaint being barred by s 199, CrPC, is liable to be quashed.[73] If the complainant himself has not alleged in the complaint that the partner of the firm running the daily newspaper conspired with the other accused in defaming the complainant, the non-bailable warrant issued against the accused partner of the said firm is liable to be quashed.[74] The interview published in a film magazine may be defamatory against the Marwari community, but when the allegations in the complaint do not constitute the offence defined under s 499, IPC, and made punishable under s 500, IPC, the complaint and process issued against the court of magistrate is liable to be quashed.[75] The specific allegation made in the petition for divorce regarding adultery committed by the wife on a particular day does not amount to defamation when the matter whether the wife had committed4150 adultery was pending decision before the matrimonial court, therefore taking cognizance of the

offence under s 500, IPC, and process issued against the husband was quashed.[76]

An advocate issuing reply notice on the instruction of his client in good faith, *bona fide* and without motive or private malice to harm the reputation of the complainant is protected by exception 9 to s 499, IPC, so the complaint under s 500, IPC, against him on the basis of averments in the reply notice is liable to be quashed.[77] In the absence of imputation constituting the offence of defamation in the complaint, the complaint is liable to be quashed.[78] Where the petitioner, a charitable trust, alleged that the co-accused spread defamatory statements against it *via* telephone, though no direct act was attributed to the accused, process was issued against her under s 499 read with s 34, IPC under the guise that she aided and abetted the co-accused, which was not proper, and the accused was living in a different town than the co-accused, she can hardly be held guilty of aiding and abetting defamation on the basis of vague statements of the complainant, the quashing of process issued against the accused was found proper.[79]

The question whether the alleged incriminating imputation has been made in good faith is purely a question of fact to be dealt with only by the court at the conclusion of the trial on the basis of materials placed before it. The proceedings, therefore, cannot be quashed under s 482, CrPC .[80] Where the accused has alleged that the school building was unsafe, and there was indiscipline amongst students and that the said school was a meeting place for both sexes and the principal was turning a deaf ear towards the character of the students, and they by making this type of poisonous propaganda the accused wanted that parents should not send their ward to such an institution, the action of the accused not being in good faith attracted the exception to s 499, IPC, the complaint against the accused cannot be quashed. If the averments in the complaint under s 500, IPC, make out a *prima facie* case, the applicability of the exceptions to s 499, IPC, can be gone into only during trial of the complaint and so, the complaint cannot be quashed by taking recource to s 482, CrPC .[81]

16. Limitation

There is no bar to the accused person raising the issue of limitation in the High Court in proceedings under s 482, CrPC and the same would be done at the earliest and if raised, ought to be adjudicated upon as a preliminary issue, and it cannot also be said that cognizance having originally been taken by one court and thereafter the case having been transferred to another court, the issue of limitation cannot be raised. The question of limitation can be raised not only at the earliest point of time before the trial court, but also even before this High Court to have the matter adjudicated in full.[82] Ordinarily, a complaint for defamation under s 500, IPC, should be filed within a period of three years from the date of commission of the offence [see4151 s 468(2) of the CrPC]. It is so when the complaint is made by the aggrieved person or by a person on his/her behalf with the leave of the court [s 199(1) read with s 199(6) of CrPC]. However, if the offence of defamation is alleged to have been committed against the President of India, the Vice-President of India, the Governor of a State, the Administrator of a Union Territory or a Minister of the Union or of a State or of a Union Territory, or any other public servant, employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions, the public prosecutor, with the requisite previous sanction [s 199(4) of the CrPC], makes a complaint, in writing to the court of session, the same shall not be taken cognizance of by the said court unless it is made within six months from the date on which the offence is alleged to have been committed [s 199(5) of the CrPC].

Commencement of Limitation Period

On the basis of false complaint made by the opposite party making false charges, the period of three years of limitation would start running from the date of the alleged false complaint and not from the date of dismissal or withdrawal of the alleged false complaint.[83] In *Surinder Mohan Vikal v Ascharj Ltd Chopra* ,[84] the allegation in the complaint was that the defamatory matter against the complainant was contained in a complaint under ss 406 / 420, IPC . It was held that the period of limitation commenced to run from the date of the complaint under ss 406 / 420, IPC, and not from the date of acquittal thereunder.

If the complainant had knowledge in 1982 of the existence of the commission of the offence of defamation by the accused by publishing defamatory remarks, but the complaint is filed in the year 2000, there is an inordinate delay in filing the complaint against the accused, before the court, then the same is barred by limitation as required under ss 468 and 469, CrPC .[85] If an offence is made out in complaint under s 500, IPC, for defamation, s 468(2), CrPC, is attracted and the cognizance of offence should be taken within a period of three years from the date of occurrence. Thus, where the date of offence under s 500, IPC, was identified in as much as the defamation remarks were made against the applicant in a complaint filed before police by the accused, the starting point of limitation would be the date of complaint given to the police and not the date on which the evidence was given by the party before the magistrate nor the date of knowledge of the applicant about filing of such complaint when no such date of knowledge had been spelt out by the applicant in a private complaint filed by him for defamation. Two sub-cll to s 469, CrPC, provide only to the authorities under the law to investigate, and not to the private persons.[86] The period of limitation is to be determined from the date of presentation of the complaint and not with regard to the date when thr process is ordered to be issued by the magistrate.[87]

17. Jurisdiction

Where the transfer petition earlier filed before the Supreme Court was dismissed in limine and not on merits, the trial court has jurisdiction to go into the merits of the4152 issue pertaining to the territorial jurisdiction.[88] In case of defamation under s 499, IPC, the jurisdiction of the court in view of s 179, CrPC, will be at the place where the news item was printed and published.[89] The court at the place where the offending publication was delivered to and read by complainant where he was serving at the relevant time has jurisdiction under ss 179 and 190, CrPC, to try the offence under s 500, IPC .[90] The place where the newspaper containing the defamatory article is circulated gives jurisdiction to the court of that area to adjudicate upon the complaint under s 500, IPC .[91]

When the interview containing defamatory matter was published in newspaper, the prosecution for defamation can be launched by exercising jurisdiction over any one of the places where circulation of such newspaper is made.[92]

Section 179, CrPC, applies to those offences which, by their very definition, consist of an act and its consequence. In short, the act and its consequence must together constitute an offence. The offence of defamation consists not only of the incriminating statement alleged to have been made, but also its publication. The publication is a consequence of the statement said to be made by the accused. Therefore, the courts at the place where the alleged statement is made or published have jurisdiction to try the complaint.[93] In a defamation case the venue of the trial could be at the place where the letter was written and posted or also at the place where the letter was received and read.[94]

18. Bail

An offence under s 500, IPC, is a bailable offence. The Court is not bound to issue notice to the complainant and hear him before granting bail. Bail granted to the accused for offence under s 500, IPC, would not be cancelled merely because the complainant was not heard before releasing the accused on bail.[95]

19. Prosecution--Essentials

It is well-settled that a prosecution for defamation cannot be actually instituted unless the following *sine qua non* stand fulfilled, *viz*:

(a) an offence has been committed;
(b) its commission has become known; and

(c) its offender is identified.

A prosecution otherwise would be a still-born process which is bad *ab initio*.[96]4153

20. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary.

When there are defamatory allegations and *prima facie* material is available to proceed against a particular person, the discharge under s 204, CrPC, of accused by the magistrate is not proper and correct.[1]

21. Discharge under Section 258 , CrPC

One of the normal rules in summons cases is that once trial started, it should reach its normal culmination. Section 258 is included in ch 20 of the CrPC in the form of an exception to the aforesaid normal progress chart of the trial in summons cases. However, by s 258, CrPC, the power of court to discharge an accused at midway stage is restricted to those cases instituted otherwise than on complaints wherein no material witness was examined at all. Summons cases are generally of two categories. Those instituted upon complaints and those instituted otherwise than upon complaints. The latter category would include cases based on police reports. Section 256 is intended to cover those cases belonging to one category alone, *i.e.*, 'summons cases instituted otherwise than upon complaints'. The segment separated at the last part of the section by the words 'and in any other case' is only a sub-category or division consisting of 'summons cases instituted otherwise than upon complaints.' That sub-category is not intended to cover all summons cases other than those instituted on police report. In fact, s 258, CrPC bifurcates only 'summons cases instituted otherwise than on complaints' into two divisions. One division consists of cases in which no evidence of material witness was recorded. The section permits the court to acquit the accused prematurely only in those summons cases instituted otherwise than on complaints wherein the evidence of material witnesses was recorded.

However, by s 258, CrPC, the power of court to discharge an accused at midway stage is restricted to those cases instituted otherwise than on complaints.[2] The only effect of an imputation being *per se* defamatory is that it would relieve the complainant of the burden to establish that the publication of such imputations has lowered him in the estimation of the right thinking members of the public. However, even if the imputation is not *per se* defamatory, that by itself would not go to the advantage of the publisher, for the complaining person can establish on evidence that the publication has infact amounted to defamation even inspite of the apparent deficiency. Thus, the accused cannot contend, at midway stage of trial that he is entitled to discharge on the ground that the imputations in the extracted publication were not *per se* defamatory.[3]

22. Proof

In order to secure a conviction for defamation under s 500, IPC, the prosecution must prove that:4154

(a) an imputation against a person (*i.e.*, the complainant) was made or published by the accused;
(b) the said imputation was made by:

(i) word, spoken or intended to be read, or
(ii) signs, or

(iii) visible representations; and

(c) by the said imputation, the accused intended to harm, or he knew or he had reason to believe that such imputation would harm the reputation of the said person (*i.e.*, the complainant).

The general remarks made by some authority regarding the competence of a subordinate would not amount to defamation.[4] This proof of exact words used in necessary only when the defamation depends solely on the shade of the meaning of the words used and their context. Where the exact words used and their context are not necessary, even the purport of the defamatory remarks would suffice.[5] In a defamation case, it is incumbent on the prosecution to prove affirmatively that the accused published the libel complained of, as this is one of the essential ingredients necessary to establish the guilt of the accused.[6] However, where it is alleged that publication was made by the handing over of the manuscript libel to the printer, publication is sufficiently proved by the production of the printed copy.[7] To prove publication of a libel through newspapers, it is sufficient to prove that the paper was delivered within the postal area under which the court had jurisdiction and it need not be proved that the article was read by some particular person.[8] Where, however, publication is made by a letter, it must be proved that the letter was published by the accused. If it is sent by post, it is essential to prove that the accused posted the letter.[9]

Secondly, before an offence under s 500, IPC, can be said to have been committed, it must affirmatively be proved by the prosecution that an imputation was made intending to harm, or knowing, or having reason to believe that such an imputation will harm, the reputation of the complainant.[10] However, the intention of a person has to be gathered from various circumstances as it cannot be possibly established by any direct evidence.[11] The intention may be properly inferred from articles in a newspaper themselves from the circumstances under which they were published.[12] Where the words or representations are *per se* harmful to complainant's reputation, the author thereof must be presumed to have intended this necessary result of his conduct.[13] In such a case, one need not find out as to whether the imputation was likely to lower the moral or intellectual character of the person defamed.[14]4155

The accused abused the complainant in the vilest terms consciously. The act of the accused harmed the reputation of the complainant and also lowered his prestige in the estimation of the society. Accused was convicted under s 500, IPC .[15]

23. Publication of Errata

Mere publication of errata by accused is not sufficient. The accused should also express regret for the original publication.[16]

24. When two Interpretations/Views are Possible

The words, from which an innuendo is to be extracted, must be fairly susceptible of the meaning sought to be put upon them by the innuendo. If there are two interpretations possible, that meaning which is not defamatory, should be preferred.[17] When two views are possible, one in favour of the accused and another to the contra, it is needless to say that benefit always to go in favour of the accused, and not in favour of the prosecution.[18]

25. Proof of Exceptions

The proof of exceptions and discharge of burden in relation thereto and the standard of proof required cannot be weighed in golden scales and the discharge of burden in such a case just cannot be equated with that of discharge of burden on the part of the prosecution.[19]

26. Evidence in Cases of Defamation

Before a petition under s 500, IPC, can be dismissed, the complainant is entitled to an opportunity to prove that the allegations made by the accused were really *mala fide* statements.[20] While the complainant is entitled to lead evidence to prove intention or knowledge required under the section, the accused is entitled to produce evidence, or to put questions in cross-examination of the complainant or his witnesses, to rebut it. However, he cannot lead evidence of, or put questions relating to, rumours and suspicions.[21] The accused should cross-examine the complainant upon every matter upon which evidence is intended to be brought to prove the truth of defamatory matter. If he does not do so, it would be a subject of serious consideration whether he should subsequently be allowed to tender proof as to the material incidents which he has not cross-examined.[22]

In a defamation case based on an allegation that a woman had illicit pregnancy, she cannot be compelled to submit to medical examination against her consent and her refusal to do so is no evidence against her.[23]4156

27. Acquittal

When there was no material showing the accused was author of the letter containing scurrilous remarks against complainant, acquittal of accused was found proper.[24] When there is 'no evidence of like making and publishing of the alleged defamatory statements by the accused, the gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under s 313, CrPC . The omission to prove the making and publishing by the accused is more than an irregularity and is a defect which vitiates the conviction.[25] Where there was reproduction of article of one newspaper by another newspaper and the newspaper publishing the original article tendered apology subsequently which was also published by the newspaper in question, and the defamatory article in question was regarding a public question, it was the brain child of the newspaper first publishing it and not the newspaper in question which merely reproduced it. The offence of defamation was not made out and hence, the acquittal was proper. [26]

28. Probation

The accused was convicted under s 500, IPC, for making utterances intending to harm the reputation of the complainant. The offence was committed more than seven years ago and the accused was not a habitual offender, nor was he involved in any other criminal proceeding. Looking to the age, conduct, character and antecedents and all other relevant circumstances, the accused was directed to be released on probation on his entering into a personal bond of Rs 5,000 for maintaining good conduct for a period of two years.[27]

29. Sentence

Deterrent

Loss of life and loss of reputation are two things which cannot be compensated in terms of money. Especially reputation is some thing which is a person's treasure.[28] The editor of a newspaper, who does not express regret and makes serious allegations against the complainant, deserves a severe sentence.[29] A mere sentence of fine in the case of a journalist, publishing scandalous articles, getting wide publicity, will not, at all, be adequate.[30] When articles are published with a malicious motive to malign and damage the reputation of the complainant, the sentence to accused journalist till rising of court and fine of Rs 500 is too low. The object of sentence is reformative as well as deterrent and may be achieved in a particular case when the fine of Rs 500 is enhanced to Rs 10,000.[31] If the facts found by the court dispel any semblance of good faith and on the contrary indicate lack of prudence and dignity with which a person occupying the office of president of municipal committee (convicted under s 500, IPC) should act, the reduction of simple imprisonment from three months to4157 two months so that it would save him from disqualification of or continuing as president of the municipality was not warranted.[32] If the husband had made wanton allegations against his wife that she was not virgin at the time of marriage with accused and that she married the accused husband during

subsistence of her marriage with former husband from whom she had a child and she had committed theft, do not warrant a lenient view to be taken against the accused. The accused was therefore sentenced to undergo simple imprsionment for two months and pay a fine of Rs 3000 and in default to undergo simple imprsionment for one month in each of the two cases.[33] Reckless comments are to be avoided. When one is proved to have made defamatory comments with an ulterior motive and without the least justification motivated by self interest, he deserves a deterrent sentence.[34] Where a series of defamatory statements and personal criticism of a public servant published without good faith, the maximum punishment should be awarded.[35]

Lenient

The courts should, at the time of passing sentence, keep in view, the position of the parties for not awarding a heavy sentence.[36] Where the accused had not been prompted by any malice or ill-will nor had they acted with wanton carelessness in allowing the mischievous statement to be at large without contradicting the same but, on the other hand, promptly published the contradiction the very next day,[37] or where the paper, in which the defamatory publication was made, had poor circulation and the accused had not been shown to be a habitual blackmailer and had also tendered a written apology,[38] a light sentence was held to be sufficient. Where the editor and publisher of a newspaper had nothing personal against the minister, to whom the alleged defamatory matter related, and the article was published ten years ago and the editor was 68 years old, the sentence of eight months' imprisonment, in the light of the said mitigating factors, was reduced to 13 days as already undergone.'[39]

Where the defamatory article in the newspaper was published in 1977 and appeal against the acquittal under s 500, IPC, was allowed in 1990, it was held that to send the accused editor to prison would be to make martyr of him so a sentence of fine of Rs 2000 and in default 4 months simple imprsionment was imposed.[40]

When the respondent editor of the newspaper convicted under s 500, IPC, was above the age of 74 years, and had closed down the business, he himself was not the author of the defamatory article, hence, sentence till the rising of the Court and fine of Rs 10,000/- was found sufficient.[41]

91 *Ramesh Chander v State* AIR 1966 Punj 93, 1966 Cr LJ 292 .

92 *Surendra Choudhary v State of Bihar and Ors* 2003 Cr LJ 2596 (Pat) .

93 *Bashir Ulla Khan v Mohd Rafi* 2006 Cr LJ 3549, p 3551 (MP) .

1 *Hazzan v Hanisabi* 2008 (4) KLT 481, ILR 2008 (4) Ker 529 .

2 *Goutam Sahu and Ors v State of Orissa and Anor* 1999 Cr LJ 838 (Ori) . For further commentary, see under the same heading in s 499, *ante*.

3 *Sultan Salahuddin Owaisi v Syed Vigaruddin* 2005 Cr LJ 2726 (AP) .

4 *Express Publications (Madurai) Ltd v State of Orissa* 2006 Cr LJ 2548 (Ori) .

5 *Chief Education Officer v Parents Teacher Association* 2013 (1) Crimes 172, p 178, 179 (Mad) .

6 *Nagendran Servai v Balakrishnan Servai* (1996) 1 Mad LW (Cri) 18 ; *J Taniguchi v K Gopi* 2002 Cr LJ 1730 (Mad) .

7 *Sirajuddin Ali v U Mujtaba Ali and Anor* 2001 Cr LJ NOC 125 (AP) . For further commentary, see under the heading ' Section 504 distinguished from Section 499 ' in s 504, *post*.

8 *PM Abubacker v PJ Alexander* 2000 Cr LJ 1168 (Ker) .

9 *Narender Kapoor v Ramesh C Bansal and Ors* 1998 Cr LJ 1863 (Del) .

10 *V Palani v SP Chandrabose* 2003 Cr LJ 2594 (Mad) .

11 *Naurati v Emperor* AIR 1925 Lah 631, 27 Cr LJ 769 .

12 *K Burke v TCW Skipp* AIR 1924 Mad 340, 25 Cr LJ 641 .

13 *J Jayalalitha v Arcot N Veerasamy* 1997 Cr LJ 4585 (Mad) .

14 *Mohammed Gul v Fazley Karim* AIR 1929 Cal 346, 31 Cr LJ 369 .

15 *Nur Aslam v Emperor* 24 PR 1884 .

16 Sub-section (1) of s 199, CrPC .

17 *Fr Thomas Maniankerikalam v Thomas J Padiyath* 2003 Cr LJ 945 (Ker) .

18 *Chand Mal Oswal v Shree Nath Bohra* 1972 Cr LJ 1400 ; *Harigangabri v State of Gujarat* 1984 Cr LRC 360 (Guj) .

19 Refer to s 199, CrPC 1973.

20 *Devki Nandan v Ram Chandar* (1963) 2 Cr LJ 706, 65 Punj LR 14 .

21 *MVR Sastry v Mohd Zahed Ali* 2006 Cr LJ 3826 (AP) .

22 *Beobrat Shastri v Rang Bhadur* AIR 1950 Pat 545 .

23 *Frank Moreses v TV Chokappa* 1971 LW (Cr) 256 .

24 *Pratap Chandra Guha Roy v Emperor* AIR 1925 Cal 1121, p 1127, 26 Cr LJ 1539 .

25 *Dilip Babasaheb Londhe v State* 2014 Cr LJ (NOC) 106 (Bom) .

26 *SM Katwal v Virdbhadra Singh* 2014 Cr LJ 3036 (HP), 2014 (II) Shimlc 730 .

27 *VM Telang v State of Maharashtra* 2003 Cr LJ 3653 (Bom) .

28 *Hosseinbhoy Ismaiiji v Emperor* AIR 1934 Sind 188, 36 Cr LJ 108, **confirmed** in 36 Cr LJ 975, AIR 1935 Sind 98 ; *Dhirendra Nath Sen v Rajat Kanti Bhadra* AIR 1970 Cal 216, 1970 Cr LJ 662 ; *Barjinder Singh Hamdard v Mohinder Singh* 1997 Cr LJ 4195 (P&H) .

29 *Biswanath Bubna v King* AIR 1949 Cal 567, p 571, 50 Cr LJ 972 ; *Dwijendra Nath Talukdar v Makhon Lal* AIR 1973 Cal 564, 45 Cr LJ 123 ; *Chhote Lal v Natha Bhal* (1901) ILR 25 Bom 151, 2 Bom LR 665 ; *Gurdit Singh v Emperor* AIR 1924 Lah 559, 26 Cr LJ 342 ; *Chellam Naidu v Ramasamy* (1891) ILR 14 Mad 379, 1 MLJ 242 ; *Anantha Goundan v Emperor* 2 Cr LJ 381, 15 MLJ 224 ; *Subbanna v Lakshman Murti* 10 Cr LJ 263 ; *Daood v Emperor* 22 PR 1884 .

30 47 Cr LJ 717.

31 *Gaya Din Singh v Mahabir Singh* AIR 1926 Oudh 363 .

32 *Gahru Ram Ramkumar v Rambaran Thakuri* 1958 Cr LJ 1191, AIR 1958 MP 278 .

33 *Kamal Chand v Amer Chand* AIR 1952 MB 180, 53 Cr LJ 1647 .

34 *Thakur Das v Adhar Chandra Missri* 32 Cal 425, 8 CWN 515 ; *Ramdhani v Swamidin* 54 Cr LJ 963, AIR 1953 VP 9 .

35 *Sampuran Singh v State* AIR 1953 Punj 82, 54 Cr LJ 575 .

36 *Harbans Kaur v Lahari Ram* AIR 1938 Lah 739, 40 Cr LJ 131 .

37 *Harbans Kaur v Lahari Ram* AIR 1938 Lah 739, 40 Cr LJ 131 .

38 *Pat Sharpe v Dwijendra Nath Bose* (1964) 1 Cr LJ 367, 68 CWN 654 .

39 *MA Jalil v Sayed Iqbal Ali* AIR 1969 Ori 204 ; *Jagdish Narain v Shams Ara Begum* 1935 Oudh 6, 36 Cr LJ 116 ; *Kamal Chand v Amer Chand* AIR 1952 MB 180, 53 Cr LJ 1647 .

40 *Sheo Karan Lal v Bandi Prasad* AIR 1943 Pat 117, 44 Cr LJ 391 .

41 *Uniplas India Ltd and Ors v State (Govt of NCT of Delhi) and Anor* 2001 Cr LJ 3326 (SC) .

42 *Sasikumar B Menon v S Viyayababd and Anor* 1998 Cr LJ 3973 (Ker) .

43 *Narayana Pillai v Chacko* 1980 Cr LJ 2002 (Ker), 1986 Ker LT 1005 .

44 *Karunakaran v Jayasooryan* 1992 Cr LJ 3540 (Ker), (1992) 2 Ker LT 33 .

45 *Sambandam v G Naresan* AIR 1966 Mad 183, 1966 Cr LJ 554 (Mad) .

46 *Fr Thomas Maniankerikalam v Thomas J Padiyath* 2003 Cr LJ 945 (Ker) .

47 Refer the heading 'Complaint--Infirmity in filing of' under s 500, *ante.*

48 *Chand Mal Oswal v Shree Nath Bohra* 1972 Cr LJ 1400 .

49 *Nando Lal Basik v NN Mitter* (1899) ILR 26 Cal 852 .

50 Re *Gulam Mohammed*(1886) ILR 9 Mad 439, 2 Weir 213; *Amir Singh v Emperor* 29 PR 1904 ; *Girdhari Lal v State* 1969 Cr LJ 1318, 71 Punj LR 322 .

51 *Nagendra Nath Srimoney v Jogendra Nath Srimoney* 13 Cr LJ 491 ; *Anath Nath Dey v Mohendra Nath Srimoni* 13 Cr LJ 489 .

52 *Pawan Kumar v Ruldu Ram and Anor* 1983 Cr LJ 180 (P&H) .

53 *PK Pradhan v State of Sikkim* 2001 SCC (Crl) 1234, AIR 2001 SC 2547, 2001 Cr LJ 3505 .

54 *PK Pradhan v State of Sikkim* 2001 SCC (Crl) 1234, AIR 2001 SC 2547, 2001 Cr LJ 3505 .

55 *Sudhir Kumar v G Lakshman* 2005 Cr LJ 4173 (Kant) .

56 *Subair v Sudhakaran* (1987) 1 Ker LT 291, 1987 Cr LJ 736 ; *MN Meera v AC Mathew* 2002 Cr LJ 3845 (Ker) .

57 *U Tin Maung v King* AIR 1941 Rangoon 202, (1941) 42 Cr LJ 801 .

58 *Jagdish v Jagni* (1991) 2 Raj LR 402 (Raj) ; *Ratan Singh and Ors v Chain Singh* 2000 Cr LJ 2736 (Raj) .

59 *Bhageerathi Amma and Ors v Jeevan Kumar* 1982 Cr LJ 91 (Ker) .

60 *Dharma Yash Dev and Anor v Late Shri Sanjay Gandhi* 1981 Cr LJ (NOC) 99 (Del) .

61 *KA Ravindranathan v K Ravindra Nair* 2005 Cr LJ 3828 (SC) .

62 *Beem Singh and Anor v S Ramayajam* 2003 Cr LJ (NOC) 61 (Mad), 2002 Mad LJ (Cri) 351 .

63 *Ibid.*

64 *CL Sagar (Advocate) v Mayawati* 2003 Cr LJ 690 (All) .

65 *Dilip Ranjan Sinha v Manoj Bhai Bhaishankar Chandaliya* 2002 Cr LJ 3229 (Guj) .

66 *M Ramugam v Kittu @ Krishnamoorthy* 2008 AIR SCW 7367 .

67 *South Indian Bank Ltd v Paul Vareed Cheruvathoor* 2014 Cr LJ 701, p 705 (Ker) .

68 *Gautam Adhikari v Sh Jagir Singh* 2002 Cr LJ 911 (Del) .

69 *Maj Gen (Retd) Atma Singh v Lt Col (Retd) Parminder Singh* 2002 Cr LJ NOC 327 (P& H), (2001) 2 Chand Cri C 170; *MP Narayana Pillai v MP Checko* 1986 Cr LJ 2002 (Ker) .

70 *Vivek Goenka and Ors v YR Patil* 1986 Cr LJ 2002 (Ker) .

71 *N Ram v Siby Mathew and Anor* 2000 Cr LJ 3118 (Ker) .

72 *Rajesh Rangarajan v Crop Care Federation of India* (2010) 15 SCC 163, 2010 (9) Scale 23 .

73 *Swamy Aroopandanda v Bagmisri Nilamadhaboa Bramha and Ors* 2000 Cr LJ 4296 (Ori) .

74 *T Venkatram Reddy v M Malla Reddy* 1999 CR LJ 1473 (Andhra Pradesh) .

75 *Sharughna Prasad Sinha v Rajbhau Surajmal Rathi and Ors* 1997 Cr LJ 212 (SC) .

76 *Gopi R Mallya v Pushpa* 1997 Cr LJ 4692 (Kant) .

77 *N Jothi v V Rajamani* 1996 Cr LJ 2435 (Mad) ; *Rev Tr Bernad Theltil v Ramachandran Pillai* 1987 Cr LJ 739 (Ker) .

78 *Kalyanam v Ramesh* 2003 Cr LJ 3390 (Mad) .

79 *Sanatan Sanstha v State of Goa* 2007 Cr LJ 2216 (Bom) .

80 *Nagarathinam (Dr) v M Kalirajan* 2001 Cr LJ 3007 (Mad) ; *MN Damani v SK Sinha and Ors* 2001 Cr LJ 2571 (SC) ; *Vir Sanghvi v State of Haryana* 2006 Cr LJ 1079 (P&H) .

81 For further commentary, see under the same heading in s 420, *ante.*

82 *Dogar Singh and Anor v Shobha Gupta and Anor* 1998 Cr LJ 1541 (P&H) .

83 *Rajkumar Indarchand Agrawal v State of Maharashtra* 2005 Cr LJ 4673 (Bom) .

84 *Surinder Mohan Vikal v Ascharj Ltd Chopra* 1978 Cr LJ 764, AIR 1978 SC 986 .

85 *M Chandran v F Fanthome* 2003 Cr LJ 2173 (Sikkim) .

86 *PM Kathiresan v Shanmugham* 1995 Cr LJ 2508 (Mad) .

87 *Hari Jai Singh v Suresh Kumar Gupta* 2004 Cr LJ 3768 (HP) .

88 *Martin Lottery Agencies Ltd v S Manimaran* 2005 Cr LJ 3146 (Sikkim)

89 *CS Sathya v State of Karnataka* 1994 Cr LJ 1954 (Kant) .

90 *Dilip Kumar Hazarika and Anor v Nalin Ch Buragohin* 2002 Cr LJ 1608 (Gau) .

91 *S Bangarappa v Ganesh Narayan* 1984 Cr LJ 1618 (Kant) ; *Subramaniam Swamy v PS Pai* 1984 Cr LJ 1329 (Bom) ; *KM Mathew and Ors v KA Abraham* 1998 Cr LJ 327 (Ker) .

92 *Subhiksha Trading Service Ltd v Azim H Premji* 2011 Cr LJ 2769 (Mad), 2011 (4) RCR (Criminal) 623 .

93 *Shankatali Ibrahim Rangrez and Ors v Mohd Siraj and Anor* 1997 Cr LJ 1352 (Bom) .

94 *Rekhabai v Dattatraya* 1986 Cr LJ 1797 (Bom) .

95 *Rasiklal v Kishore Khanchand Wadhwani* 2009 Cr LJ 1887, p 1890 (SC), (2009) 4 SCC 446, AIR 2009 SC 1341 .

96 *M Chandran v F Fanthome* 2003 Cr LJ 2173 (Sikkim) .

1 *KM Selvaraj v A Amarlal* 2002 Cr LJ 3811 (Mad) . See s 251, Cr PC 1973.

2 *John Thomas v K Jagadeesan (Dr)* 2001 Cr LJ 3322 (SC) .

3 *Ibid.*

4 *Harsh Mendiratta v Maharaj Singh (Dr) and Ors* 2002 Cr LJ 1894 (Del) .

5 *Mohanlal v Ram Charan* (1968) 17 Jab LJ 71 (SN) .

6 *GG Jeremiah v FS Vas* (1911) 2 MNW 576 .

7 *S Soosai Naidu v Revd Father Darrientort* 1 Weir 579 (1).

8 *Emperor v Jhabbar Mal* AIR 1928 All 222, 30 Cr LJ 530 .

9 *PA Mariana v Emperor* 1 Cr LJ 982 .

10 *Narsingdas Nargis v Bansi Lal* 1974 Kash LJ 198 .

11 *Dhruba Charan Khandal v Dinabondhu Patri* 1966 Cr LJ 42, AIR 1966 Ori 15 .

12 *R v Tibbits* (1902) 1 KB 77, p 88, 71 LJKB 4, 66 JP 5 .

13 *R v Harvey* (1823) 2 B and C 257 .

14 *Amar Singh v KS Badalia* (1965) 2 Cr LJ 693 (Pat) .

15 *Mohan Lal v State of HP* 2011 Cr LJ 2413 (HP) .

16 *Tankasala Ashok v State of AP* 2010 Cr LJ 2074 (AP), 2010 (1) ALT (Cri) 383 .

17 *Hales v Smiles* AIR 1937 Rang 105 ; *Habih Bhai v Pyare Lal* AIR 1964 MP 62, 1963 MPLJ 891 ; *Board of Directors v Niblett* AIR 1957 All 219 .

18 *Sultan Salahuddin Owaisi v Syed Vigaruddin* 2005 Cr LJ 2726 (AP) .

19 *Ibid.*

20 *Manindra Nath v Anil Chandra* AIR 1953 Cal 689, 1953 Cr LJ 1592 ; *Mahim Chandra Roy v AH Watson* AIR 1929 Cal 191, 30 Cr LJ 407 ; *Periyaswami v Kotaswami* 1 Weir 580 .

21 *Munnalal v DP Singh* AIR 1950 All 455, 51 Cr LJ 964 .

22 *Empress v Dhum Singh* (1884) ILR 6 All 220 .

23 *Empress v Pudmon* Ratanlal Unrep Cr Cas 474; *Nathu Mal v Abdul Haq* AIR 1930 Lah 159, p 163, 31 Cr LJ 584 .

24 *Madhab Charan Dash v Amiya Prasad Mishra* 1997 Cr LJ 4253 (Ori) .

25 *Mohindeen Abdul Kadir v Emperor* (1904) ILR 27 Mad 238, 2 Weir 408 ; *Basant Kumar v Empress* (1899) ILR 26 Cal 49 .

26 *Sultan Salahuddin Owaisi v Syed Vigaruddin 2005* Cr LJ 2726 (AP).

27 *Pyarelal Maganlal Jaiswal v State of Maharashtra and Ors* 1996 CR LJ 989 (Bom) .

28 *Dhyandevrao L Waghmode v Allabaksha Gulab Nadaf and Ors* 1999 Cr LJ 1754 (Bom) .

29 *Mohammed Nazir v Emperor* AIR 1928 All 321, 30 Cr LJ 766 (six months).

30 *Jagdish Rao v State* 1974 Cr LJ 1358 (Goa) .

31 *Sumalabai Vinayak Deo v Nand Kumar Deshpande* 1990 Cr LJ 2136 (Bom) .

32 *Chaman Lal v State of Punjab* AIR 1970 SC 1372 .

33 *Madhuri Mukund Chitnis v Mukund Marand Chifnis and Anor* 1990 Cr LJ 2084 (Bom) .

34 *Sahib Singh Mehra v State of Uttar Pradesh* (1965) 2 Cr LJ 434, p 438, AIR 1965 SC 1451 .

35 *Bhagwan Das v Emperor* 27 Cr LJ 1361, AIR 1927 All 116 .

36 *Kewala Nandgir v Emperor* 14 Cr LJ 606 .

37 *Dongar Singh v Krishna Kant* 1958 Cr LJ 1036, AIR 1958 MP 216 .

38 *TG Goswami v State* AIR 1952 Pepsu 165, 1952 Cr LJ 1553 .

39 *Shyam Narain v State of Rajasthan* 1974 Cr LJ 1006, 1974 Raj LW 250 .

40 *Sumalabai Vinayak Deo v Nand Kumar Deshpande* 1990 Cr LJ 2136 (Bom) .

41 *Ram Prakash v DN Srivastava* 2015 Cr LJ 226 (Del), 2014 VI AD (Delhi) 713 .

Indian Penal Code (Act XLV of 1860)

Chapter XXI

Of Defamation

S. 501.

Printing or engraving matter known to be defamatory.--

Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple4158 imprisonment for a term which may extend to two years or with fine, or with both.

Comments

1. Scope

An offence under this section is distinct from an offence under the preceding s 500, IPC .[42] What is made punishable under that section is defamation, whether verbal or written.[43] However, if the matter is otherwise defamatory, the mere printing or engraving of it would fall under this section if the offender has good reason to believe that such matter is defamatory.[44] This section does not expressly refer to the publication of defamatory matter or to any intention to cause harm to the reputation of the person against whom imputations are made. One person may be guilty of defamation and another person, who prints or engraves it, would be only an abettor of that offence. By the provisions of this section, such abetment has been made an independent offence by itself. It is however, possible that a person may be guilty of both offences under ss 500 and 501, IPC, if he not only makes or publishes defamatory matter, but also prints or engraves it. If the publisher is also the printer of the newspaper, the case against him would also be covered by this section, it would not, in any way, affect his liability as a publisher under the preceding s 500, IPC . The publisher cannot escape his liability for the offence under s 500, if the case be otherwise proved against him, merely because of his having got the issue in question printed.[45] He cannot also escape his liability by alleging that he had entrusted the selection of news items to the editor.[46] In *Gour Chandra Rout v Public Prosecutor* ,[47] the accused, the editor printed and publisher of a newspaper, published statements, grossly defamatory of the Governor, which were not true, and the accused published the statement neither in good faith nor for the public good. It was held that the conviction of the accused as editor under s 500 and as the printer and publisher under s 501 was correct. Where, however, a declared printer was absent in good faith and the defamatory article appeared without his knowledge, it was held that this was sufficient for his acquittal.[48]

2. 'Good Reason to Believe'

In this section, there is an express provision that before a person can be held guilty, it must be shown that he knew, or he had 'good reason to believe', that the matter was defamatory. The expression 'reason to believe' has been expressly defined in s 26,4159IPC . It has, however, to be noted that the word 'good' has been further added. This evidently implies that there must be something more than what may be barely sufficient cause to believe within the meaning of the said s 26 . If the matter is *per se* defamatory, there is no need to prove that the printer knew that it was defamatory,[49] but if the accused is unable to read the language in which the matter is printed, it cannot be said that he understood the nature of the matter printed and would not, therefore, be guilty.[50]

Merely because the accused happens to be the chairman, he cannot be imputed with any knowledge about the publication of a defamatory statement, nor can he be made responsible for the same.[51] The complaint filed under s 501, IPC, is not maintainable against the chairman for publishing the newspaper.[52]

3. Procedure

The offence under this section is non-cognizable, bailable, compoundable by the person defamed, and triable by the court of sessions if the offence is committed against the President or Vice-President or the Governor of a State or Administrator of a Union Territory or a Minister in respect of his conduct in the discharge of his public functions when instituted upon a complaint made by the public prosecutor, and by a magistrate of the first class in any other case, and may also be tried summarily.

In case of a complaint made in respect of an offence under this section, the court is not competent to alter or amend the complaint and to treat it as one under the preceding s 500, IPC, the elements of the two offences being different.[53]

4. Section 120B and Sections 500, 501 and 502

Commentary under the same heading in s 502, *post*, may be referred to.

5. Complaint, its Contents, by Whom it is to be Made, and the Manner in which it is to be Made

Section 199, CrPC, may be referred to.[54]

6. Quashing of Complaint

Commentary under the same heading in ss 406, 420 and 500, *ante*, may be referred to.

7. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC, may be referred to.4160

8. Proof

In order to establish a charge under this section, prove that:

(a) the accused printed or engraved any matter;
(b) the said matter was defamatory; and
(c) he did so knowing, or having good reason to believe, that it was defamatory of a person.

Under s 7 of the Press and Registration of Books Act 1867, a declaration, made by a person, to the effect that he is the printer of a newspaper, shall be sufficient evidence (unless the contrary be proved), as against that person, that he was the printer of every portion of every issue of the newspaper named in the declaration.[55] Such presumption may, however, be rebutted.[56]

9. Sentence

In *KD Ghouri v Bhojo Motawani* ,[57] the editor of the newspaper, besides publishing a contradiction to the effect that the news of arrest and detention of the complainant, published in his newspaper earlier, was baseless and wrong, expressed regret and felt sorry by saying that he had been misled by the correspondent and that he had no personal grudge against the complainant nor any intention to defame him by publishing the impugned news. It was, however, held that, looking at the harm and mental agony, which was caused to the complainant, who occupied a responsible post in the police department, a sentence of Rs 50 was too lenient and, therefore, it deserved to be enhanced.

10. Destruction of Defamatory Matter

Commentary under the same heading in s 502, *post*, may be referred to.

42 *Crown v Uma Shanker* 18 PR 1889 .

43 *Shah Jethalal Laiji v Khimji M Bhujuria* (1974) 76 Bom LR 270, p 277 .

44 *Emperor v JM Chatterji* AIR 1933 All 434, 34 Cr LJ 926 .

45 *Ramesh Chander v State* 1966 Cr LJ 292, p 294, AIR 1966 Punj 93 .

46 *Ibid.*

47 *Gour Chandra Rout v Public Prosecutor* (1962) 2 Cr LJ 617, AIR 1962 Ori 197 .

48 *Emperor v Muhammad Siraj* AIR 1928 All 400, 29 Cr LJ 201 .

49 *Sardar Dayal Singh v Emperor* 8 PR 1891 .

50 *Sankaran Chettiar v Ramkrishna Pillai* 1960 Cr LJ 479, AIR 1960 Ker 141 .

51 *Udayam Telugu Daily v State of Andhra Pradesh* 1987 Cr LJ 145 (AP) .

52 *Dasai Narayana Rao v RD Bhegmandas* 1986 Cr LJ 888 .

53 *Crown v Uma Shanker* 18 PR 1889 .

54 For detailed commentary, refer to *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

55 *Emperor v Muhammad Siraj* AIR 1928 All 400, 30 Cr LJ 201 ; Re *Ramasami Pillai* 1 Weir 576; *Chellappan Pillai v Karanjia* (1962) 2 Cr LJ 142, 1962 MPLJ (Cr) 635 .

56 *Gadicherla v Emperor* (1909) ILR 32 Mad 338 ; *Narayan Singh v Rajmal* AIR 1961 MP 12, (1961) 1 Cr LJ 91 .

57 *KD Ghouri v Bhojo Motawani* 1972 Cr LJ 1658 .

Indian Penal Code (Act XLV of 1860)

Chapter XXI

Of Defamation

S. 502.

Sale of printed or engraved substance containing defamatory matter.--

Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

Section 499, IPC, *ante*, deals with the general offence of defamation, punishment for which is prescribed in s 500, IPC . Under the preceding s 501, a person, who prints or4161 engraves any matter, knowing, or having reason to believe, that such matter is defamatory, is made punishable. And this section deals with the offence of selling, or offering to sell, any printed or engraved substance, containing defamatory matter, knowing that it contains such matter. To constitute an offence under this section, in spite of the fact that the printed or engraved matter, sold or offered for selling, is a defamatory matter, it is essential that the offender should then know that the printed or engraved matter, which he sold, or which he offered for selling, contained defamatory matter. In the absence of such knowledge, no offence under this section is made. It is possible that the seller may not have the

requisite knowledge though he might have sold a certain defamatory matter.

2. Procedure

The offence under this section is non-cognizable, bailable, compoundable by the person defamed, and triable by the court of sessions if the offence is committed against the President or Vice-President or the Governor of a State or Administrator of a Union Territory or a Minister in respect of his conduct in the discharge of his public functions when instituted upon a complaint made by the public prosecutor, and by a magistrate of the first class in any other case, and may also be tried summarily.

3. Section 120B and Sections 500, 501 and 502

Where the accused were charged under s 120B read with ss 500, 501 and 502, IPC, and also under ss 500, 501 and 502, IPC, although the charge under s 120B could not be entertained by the magistrate for want of sanction required under s 196, CrPC, the magistrate could proceed with the trial in respect of the allegation of commission of the substantive offence under ss 500, 501 and 502, IPC .[58]

4. Complaint, its Contents, by Whom it is to be Filed, and the Manner in which it is to be Made

Section 199, CrPC may be referred to.[59] The complaint alleging offences under ss 499, 500, 501 and 502, IPC, need not disclose all the ingredients of the offences and if any fraudulent intention is alleged, that would be a matter of evidence, and in case any offence is committed by publishing the articles in the newspaper, there could be a presumption against the editor that he committed such offence, but not against the chief editor and such presumption is a rebuttable presumption.[60] Similarly, when a chairman of the board of directors of the company and its general manager are not shown as the editor, printer and publisher, the presumption under s 7 of the Press and Registration of Books Act 1867 (25 of 1867) for publication of defamatory news-item does not arise.[61]

5. Quashing of Complaint

Commentary under the same heading in ss 406, 420 and 500, *ante*, may be referred to.4162

6. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC, may be referred to.

7. Proof

In order to establish a charge under this section, prove that:

(a) the accused sold, or offered for sale, any printed or engraved substance;
(b) the said substance contained defamatory matter; and
(c) he then knew that it contained such defamatory matter.

8. Destruction of Defamatory Matter

In exercise of the powers under s 455 of the CrPC, the court may, on a conviction under this section or under the preceding section, order the destruction of all the copies of the thing in respect of which

the conviction was made, and which are in the custody of the court or which remain in the possession or power of the convict. When, however, certain passages in a book are found to be defamatory, an order for destruction of all the copies of the entire book, and not merely the pages, containing defamatory passages, is illegal. Only the pages, containing defamatory passages, should be ordered to be destroyed.[62]41634164

58 *KM Mathew and Ors v PK Thungan* 1990 Cr LJ 244 (Gau) .

59 For detailed commentary, refer to *Sohoni's Code of Criminal Procedure*, twenty-first edn, Lexisnexis.

60 *M Malla Reddy v T Venkatrama Reddy and Ors* 2000 Cr LJ 1086 (AP) (DB) .

61 *Ashok Kumar Jain and Ors v State of Maharashtra* 1986 Cr LJ 1987 (Bom) .

62 *Chilukuri Veerabhadra v Surpada Krishnamurthy* AIR 1940 All 953 .

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Chapter XXII

Of Criminal Intimidation Insult and Annoyance

TOPICAL INTRODUCTION

The offences under this chapter are amongst the minor offences in the IPC . Except s 509, all the offences under this chapter are non-cognisable offences. Therefore, no FIR (First Information Report) is registered or matter investigated by the police, unless directed by a judicial magistrate, in respect of these non-cognisable offences. An investigation in respect of offences under this chapter is often preceded by private criminal complaints filed before judicial magistrates.This chapter consists of following 8 sections:

(a) Section 503 :	This section defines 'criminal intimidation'.
(b) Section 504 :	It pertains to punishment for intentional insult to provoke breach of peace.
(c) Section 505 :	This section makes statements conducing to public mischief, creating or promoting enmity, hatred or ill-will between classes whether committed at place of worship or otherwise, punishable under this section.
(d) Section 506 :	This section makes the offence of criminal intimidation as defined in s 503 punishable under this section. The latter part of this section being a more severe offence than the former is punishable with imprisonment for a term which may extend for seven years or fine or both, as against the former part of this section which is made punishable with imprisonment for two years or with fine or both.
(e) Section 507 :	It makes criminal intimidation by anonymous communication, punishable under this section.
(f) Section 508 :	The punishment for causing or attempt to cause an

	act, by inducing any person to believe that he will be rendered an object of divine displeasure is prescribed under this section.
(g) Section 509 :	The uttering of word, gesture or act intended to insult the modesty of a woman is made punishable under this section.
(h) Section 510 :	The punishment for misconduct in public place by a drunken person is prescribed under this section.4165

Indian Penal Code (Act XLV of 1860)

Chapter XXII

Of Criminal Intimidation Insult and Annoyance

S. 503.

Criminal intimidation.--

Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.-- A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration

A, for the purpose of inducing *B* to desist from prosecuting a civil suit, threatens to burn *B's* house. *A* is guilty of criminal intimidation.

Comments

1. Scope

Criminal intimidation, which is defined in this section, seems to imply that the threat must be one which can be put into execution by the person threatening as the section speaks of avoiding the execution of the threat.[1]It is not, however, necessary that the injury should be one to be inflicted by the offender; it is sufficient if he can cause it to be inflicted by another and the infliction of it could be avoided by some act or omission that the person threatening desires.[2] In other words, there should be a clear indication as to what the accused would do and the complainant must feel as a reasonable man that the accused would convert his words into action if he fails to do what is required of him by the accused.[3] An accused cannot, however, be discharged on the score that his dominant intention in entering upon the land was that in his capacity as its owner, he had a right to do so.[4]

It is not necessary that the threat must be in the presence of the person threatened. If the threat is uttered in the presence of some person,[5] or is addressed to a neighbour with a view to be communicated to the person threatened,[6] it would be criminal intimidation of such person. When a man conveys threats to the pleader of a person, who is executing a decree against him, he may reasonably be presumed, in the4166 absence of evidence to the contrary, to intend those threats to be communicated by the pleader to his employer.[7] Whether, as a matter of fact, anyone was actually frightened cannot affect the question of the liability under s 503, IPC . It is the intention of the speaker that has to be considered in deciding whether what he stated comes within the mischief of the section.[8] Where the threats were given to the complainant not with an intention to alarm him, but with a view to deterring him from interfering with what the accused believed to be his exclusive right of passage through a door, it was held that the essential ingredients of intention of the accused to alarm the complainant was wanting.[9] Where an old and sick man of 74 years got excited and said that he would kill the complainant, it was held that nobody would take him seriously and nobody would get alarmed.[10] Where, upon a quarrel between two brothers, one of them ran off and fetched a sword, but the sword was snatched from his hands and he threatened to kill the complainant if he was free, it was held that the accused was not guilty under s 506, IPC, as the words, used by the accused, were uttered under circumstances which negatived any intention to intimidate.[11]

If the threat is held out to several persons to get them injured either in person, or in reputation or property, the person making the threat would be guilty of an offence under this section.[12] A firm cannot commit an offence under this section.[13]

2. Gist of the Offence

The gist of the offence is the effect which the threat is intended to have upon the mind of the person threatened, and before it can have any effect upon his mind it must be either made to him by the person threatening or communicated to him in some way. It would not be sufficient if the threat is not made to the person threatened and there is no evidence that it was intended that the words should be communicated to the complainant for the purpose of influencing his mind.[14]

3. Two Parts of the Offence

The offence of criminal intimidation is defined in this section. The section is in the following two parts:[15]

(a) the first part refers to the act of threatening another with injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested; and
(b) the second part refers to the intent, with which the threatening is done, and it is of the following two categories:

(i) the first is intent to cause alarm to the person threatened; and4167
(ii) the second is to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat.

Ingredients of offence of 'criminal intimidation' as defined in s 503, IPC and punishable under s 506, IPC are as under:

(a) Threatening a person with any injury;

(i) to his person, reputation or property; or
(ii) to the person or reputation of any one in whom that person is interested.

(b) Threatening a person with injury;

(i) to cause alarm to that person, or
(ii) to cause the person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat, or
(ii) to cause that person to omit to do any act which that person is legally entitled to do so as the means of avoiding the execution of such threat.[16]

4. Criminal Intimidation Distinguished from Extortion

Criminal intimidation, contemplated by this section, and extortion, defined in s 383, IPC, *ante*, though analogous, are distinct in the following manner:

Criminal Intimidation (s 503)

(a) Threatened injury is confined to:

(i) the person or reputation or property of the person threatened, or
(ii) the person or reputation of any person in whom the person threatened is interested.

(b) Threat must be to the person threatened or to any person in whom he is interested.
(c) Wrongful gain or loss may not be necessarily involved.
(d) Threat must be given with intent to:

(i) cause alarm to the person threatened, or
(ii) make that person, illegally to do, or omit to do, something.

Extortion (s 383)

(a) A person may be put in fear of (any) injury as defined in s 44, *ante*.
(b) Fear of injury not only to the person put in fear but to any other person is sufficient.
(c) Putting into fear must be done dishonestly (i.e., for wrongful gain or loss).
(d) Putting into fear must be intentional but the intention must be to induce delivery of some property, valuable security, etc.4168

5. No Criminal Intimidation without Threat of Injury

Section 44, IPC, defines 'injury' as any harm whatever illegally caused to any person in body, mind, reputation or property. Section 43 , IPC, declares that the word 'illegal' is applicable to everything

which is an offence or which is prohibited by law or which furnishes ground for a civil action. Threatened harm should be shown to be illegal.[17] If the words, uttered by the accused, furnish, to the complainant, a ground for a civil action, there would be criminal intimidation, otherwise the accused must be acquitted.[18] The complainant must satisfy the court that the act complained of is an illegal act. A proposal by the managing committee of a society to refer, to the judgment of the general body, an act done by one of its members cannot be regarded as a threat to cause any illegal harm.[19] Where the accused told the complainant that he had come from the *sarkar* and would get him six month's imprisonment if he did not let his younger sister go, it was held that these words did not constitute either criminal intimidation (there having been no threat of injury) or any other offence known to law.[20] A thereat of getting a police constable dismissed from the police service is not such a threat of injury as is punishable under s 506, IPC .[21]A threat to commit suicide, if another person refuses to do a particular act, is not criminal intimidation unless the person be interested in the person making the threat.[22] In *TG Studderi v JF Logan* ,[23] the accused, after he was no longer in the employment of a company, adopted the course of circularising a number of firms and government departments making *prima facie* defamatory accusations against his former employer. For the purpose of self-protection, the firm instructed their solicitors, who warned the complainant, by letter, of the consequences of continuing to issue the said statements. It was held that the letter could not be regarded as a threat within the meaning of this section. A mere threat would not constitute the offence of criminal intimidation, unless it is a threat of an injury to the complainant causing him an alarm.[24] Mere abuse will not attract this section unless the essentials of the section are satisfied.[25] The commonly used word *beiman* may not, in the situation and circumstances of a particular case, amount to an offence under this section.[26]

6. Threat to Police

The section would have no application where the accused is charged with having threatened the police in general. However, where the threat is held out by the accused not to the police force in general, but to the members of the police force stationed at a particular place, the section would be applicable. It is not necessary for the speaker to know that any member, or the group of persons, who is intended to be frightened by the speech, was present among the audience.[27] In *Nirmal Singh v Emperor* ,[28] a police4169 officer, empowered to conduct an investigation, carried out a search, but not according to the provisions of the CrPC, and the accused resisted his doing so and compelled him under threats to draw up a search list saying that a search had been made and that nothing had been found. They were held guilty under s 506, IPC, though they were acquitted of the charge under ss 147 and 332, IPC .

7. Illustrative Cases of Criminal Intimidation

Criminal intimidation was held to have been caused where a municipal commissioner threatened a butcher that if he bought a cow from a Hindu, he would have him sent to the jail and would make it impossible for him to continue to live in the town, thus causing apprehension to him that he would be interfered with in the discharge of his lawful business in case he disobeys the municipal commissioner,[29] or where the accused, for the purpose of inducing the revenue inspector to desist from distraining his properties, threatened to kill him,[30] or where the accused took indecent photographs of girl by showing false love to her and threatened her father, in letters written to him, with publication of the photographs with intent to extort money from the latter,[31] or where the accused held out threats to both Hindus and Muhammadans to get them implicated and imprisoned if they kept to the terms of an *ikramama* (entered into by the parties to keep the peace during the Moharram festival),[32] or where the accused issued a notice, signed by himself as president of arbitration court, calling on the complainant to appear on a certain date and answer a claim, brought against him, failing which an ex parte decree would be passed against him,[33] or where the accused abused the complainant in such a way that he began to run away and was pursued by the accused with a brickbat in his hand and it was only the intervention of others that prevented the accused going any further,[34] or where a threat was given to bring a false charge against a person and to support it by fabricating false evidence.[35]

8. Illustrative Cases in which Criminal Intimidation was Held not to have been Caused

(a) Threat of Litigation

In *Jowahir Pattak v Parbhoo Ahir* ,[36] the accused threatened to ruin the complainant by cases. It was observed that it could not be assumed that by cases the accused meant false cases. If the cases were not false, the mere fact, that they were instituted for the purposes of prosecuting the complainant, would not bring them within the term of 'injury'. It was, however, held that if the threat was to ruin the complainant by false cases, the offence of criminal intimidation would be committed. However, in4170 a Bombay case,[37] it was held that the communication by a person that he was going to take revenge by false complaints cannot amount to threat or criminal intimidation.

(b) Threat of Social Boycott

Where the accused were trying to improve their lot by bargaining with the *mirasdars* to obtain better conditions and trying to persuade their fellow labourers not to work until they had secured better terms, it was held that they were entitled to enforce a social boycott against those who decided to work because that would not amount to an injury within the meaning of s 44, IPC, as this is not illegal.[38] Where the conviction was based upon two threats that the complainant would be socially boycotted and after his death no one would carry his dead body to the place of burial, if he continued to deal in foreign cloth; it was held that the conviction based upon these threats could not be sustained.[39]

(c) Threat about Caste

A mere threatening to bring a matter before the caste in order to get one expelled does not amount to criminal intimidation.[40] Where the accused said to the complainant 'give us your field or we will put you out of caste and injure you in person and reputation' and, on his refusal to do so, his ex-communication was pronounced, it was held that this did not amount to criminal intimidation, the injury threatened not falling within the definition of s 44, IPC .[41]

(d) Threat to go Away From Garden

Asking a person not to work in a private garden and threatening him to go away from the garden would not satisfy the requirements of ss 503 / 506, IPC .[42]

(e) Threat of Colleagues of Accused to Kidnap the Victim

If the prosecutrix, a major, has married the accused of her own free will and love and the offences under ss 363 and 366, IPC, are not made out, the fact that the colleagues of the accused had threatened to kidnap the victim does not *prima facie* constitute commission of the offence under s 506, IPC .[43]

(f) Threat Without Implementation

If the accused give only threats to cause death or grievous hurt but he does not act in pursuance thereof, the offence of criminal intimidation is not made out.[44]

(g) Mere threat causing No Alarm

The use of mere threat causing no alarm to the complainant is not an offence under ss 503 / 506, IPC .[45]4171

1 Re *Doraswami Iyer*AIR 1925 Mad 480, 26 Cr LJ 755 .

2 *Ibid*.

3 *Habibulla Kherullah v State* 1961 MPLJ 1190, 1961 Jab LJ 557 .

4 *Chingangbam Ibocha Singh v Okram Tombi Singh* 1970 Cr LJ 360, AIR 1970 Manipur 23 .

5 *Chandi Charan Dutta v Bhabataran Dey* (1964) 2 Cr LJ 85 (Cal) .

6 1 Weir 622 (2); Re *Palani Goundan* 1 Weir 623 (1).

7 *Syed Mahmud v Sarwar Khan* 5 CPLR (Cr) 50 .

8 Re *AK Gopalan* 50 Cr LJ 258, AIR 1949 Mad 233 .

9 *Abdul Rehman v Gulam Nabi* (1964) 1 Cr LJ 40, AIR 1964 J&K 4 .

10 *Jogendra Kumar Sarkar v Hem Chandra Roy* (1964) 1 Cr LJ 255 (Tripura) .

11 *Data Ram v Empress* 45 PR 1882 .

12 *Empress v Ata Hussain* 1886 AWN 41 ; Re *AK Gopalan*AIR 1949 Mad 233, 50 Cr LJ 258 .

13 *TG Studdert v JF Logan* 38 Cr LJ 924, AIR 1937 Cal 367 .

14 *Ganga Chunder Sen v Gour Chunder Banikya* (1888) ILR 15 Cal 671, p 673 ; *Bavisetti Venkata v Nadipati Muthayya* AIR 1964 AP 382, (1963) 2 Andh WR 403 ; *Habibullah Kherullah v State* 1961 MPLJ 1190, 1961 Jab LJ 557 .

15 *Romesh Chandra Arora v State* AIR 1960 SC 154, 1960 Cr LJ 177, 180 (1927) .

16 *Narendra Kumar v State* 2004 Cr LJ 2594 (Del) .

17 *Nga Shwe Wang v Empress* (1897-1901) 1 UBR 352; *Jowahir Pattak v Purbhoo Ahir* (1903) ILR 30 Cal 418, 7 CWN 116 .

18 *Reg v Alya Dhurma* Rat Unrep Cr C 37 (2).

19 *Jhamandas Thawerdas v Khemchand Gellaram* AIR 1933 Sind 196, 34 Cr LJ 884 .

20 *Reg v Maroba Bhaskarji* 8 BHCR (Cr) C 101.

21 *Empress v Dada Hammant Dani* (1896) ILR 20 Bom 794 .

22 *Nubi Buksh v Oomra* 109 PR 1886 .

23 *TG Studderi v JF Logan* AIR 1937 Cal 367, 38 Cr LJ 924 .

24 *Bhika Biswal v Jaginath Sahu* (1969) 35 Cut LT 691 .

25 *Sriram Chandra Das v Krushna Chandra Roy* 1970 Cr LJ 264 .

26 *Brandawan Agrawal v Mohan Lal* 1968 Jab LJ 114 (SN) .

27 Re *AK Gopalan*AIR 1949 Mad 233, 50 Cr LJ 258 .

28 *Nirmal Singh v Emperor* 20 Cr LJ 695 .

29 *Nand Kishore v Emperor* AIR 1927 All 783, 28 Cr LJ 589 .

30 Re *Annakamu Chettiar*AIR 1959 Mad 342, 1959 Cr LJ 1084 .

31 *Romesh Chandra Arora v State* 1960 Cr LJ 177, AIR 1960 SC 154 .

32 *Empress v Ata Hussain* 1886 AWN 41 .

33 *Priyanath Gupta v Laljhi Chowkidar* 24 Cr LJ 396, AIR 1923 Cal 596 .

34 *Nivas Singh v Amar Sao* AIR 1953 Pat 188, 54 Cr LJ 1132 ; *Kishori Lal v Emperor* AIR 1933 Lah 497, 34 Cr LJ 1167 .

35 *Chithraputtra Pillai v Parvathi* 1 Weir 623 (2); *Raghubar Dayal Misra v Emperor* AIR 1931 All 263, 132 Cr LJ 465 ; *Muhammad Ahmad Khan v Emperor* AIR 1936 All 171, 37 Cr LJ 212 .

36 *Jowahir Pattak v Parbhoo Ahir* (1903) ILR 30 Cal 418 .

37 *Empress v Govind Rooji* 1 Bom LJ 55 .

38 Re *Selathu*AIR 1949 Mad 546, 50 Cr LJ 797 .

39 *Ghulam Muhammad v Emperor* AIR 1931 Lah 288, 32 Cr LJ 1176 .

40 *Empress v Fakirappa* Rat Unrep Cr Cas 186.

41 *Reg v Alya Dhurma* Rat Unrep Cr Cas 37; *Empress v Sri Vidya Sankara* (1883) ILR 6 Mad 381, 1 Weir 595 ; Re *Paul De Cruz*(1885) ILR 8 Mad 140, 2 Weir 249.

42 *Saraswati and Anor v State* 2002 Cr LJ 1420 (Mad) .

43 *Shamsher Alam alias Sheru and Anor v State of Uttar Pradesh* 2002 Cr LJ 3588 (All) (DB) .

44 *Subramaniam Swamy (Dr) v State* 2001 Cr LJ (NOC) 48 (Mad), (2000) 2 Mad LW (Cri) 646 .

45 *Amitabh Adhar and Anor v NCT of Delhi and Anor* 2000 Cr LJ 4772 (Del) ; *VM Sanghi v Rammorath Gourishankar Tiwari* (1988) 3 Crimes 319 (Bom) .

Indian Penal Code (Act XLV of 1860)

Chapter XXII

Of Criminal Intimidation Insult and Annoyance

S. 504.

Intentional insult with intent to provoke breach of the peace.--

Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

1. Scope

This section provides a remedy for abusive and insulting language and requires an intention to insult and thereby to give provocation to the person insulted and an intention that such provocation should cause, or the knowledge that such provocation is likely to cause, the person so insulted to break the public peace or commit any other offence.[46] The section does not merely deal with an insult or, at any rate, a gross insult. The section is intended to deal with persons who are as responsible for breaches of peace or the commission of offences as those who openly abet or incite them. To abuse a rowdy or bad-tempered person, who would be sure to respond with violence, is much more likely to be an offence than to abuse a helpless woman.[47] A person comes within the ambit of this section if the provocation offered by him is of such a character as to cause the person provoked to break public peace or to commit any other offence.[48] The requirements of the law is fulfilled if the insult is of a kind calculated to cause the other party to lose his temper and say or do anything violent. The public peace can be broken by angry words as well as by deeds.[49] A man, who pulls the beard of a Mohammedan in the public street, intentionally insults him, human nature being what it is, nothing is more likely than

that a self-respecting person, who has his beard pulled, or his nose pulled, or is subjected to any other painful and humiliating treatment in public, should lose his temper and attempt to strike his assailant or retaliate.[50] However, if an official asks an outsider to vacate the inner counter of his office, he commits no offence under s 500, IPC, or under this section even if his subordinate may have permitted him. Even when some4172 subordinate has permitted him, the higher officer cannot keep quiet over an irregular work or improper conduct of a subordinate.[51]

For an offence under s 504, IPC, the complainant should disclose in the complaint the actual words uttered by the accused.[52] Where the accused persons abused and intimidated the complainant in a room and not within public view, no offence under s 504, IPC was committed, cognizance taken was held bad.[53]

Where, the accused calls the counsel badmash in open court, the offences under ss 499 and 500, IPC, is not made out, perhaps the words have been articulated so as to cause harm to the person and in which case it might amount to an offence under s 504, IPC .[54] However, mere abuse without the intention to insult or cause breach of peace is not an offence under this section.[55]

2. Section 504 Distinguished from Section 499

Although defamatory expressions are often involved in offences under both these sections, the object and purpose of the two sections and the ingredients of offences under the two sections are different. The following points of difference may be noted:

(a) Section 499, IPC, requires that there should be a publication of defamatory statement to a person other than the one defamed. In a case under this section, an insulting expression to the person insulted would be, and in most cases is, sufficient for bringing the case within the scope of the section.
(b) Both sections refer to intention and knowledge of the accused, but the elements in the two cases are different. Under s 499, IPC, there must be an intention or knowledge of harming the reputation of a person. Under this section, the question of reputation does not arise. All, that is required, is that there should be intention or knowledge about the words causing breach of the peace or the commission of some other offence by the person insulted.

In some cases under s 499, IPC, truth is a defence if there is a public good. In a case under this section, absolute truth and even public good would not be a sufficient defence. For further commentary, text under the heading ' Section 500 and Section 504 ' in s 500, *ante*, may be referred to.

3. Essential Ingredients

The essential ingredients to constitute an offence under this section are as follows:

(a) there should be an act or conduct on the part of the accused which may amount to an intentional insult;
(b) the said intentional insult, so caused, should be such as to give provocation to the person insulted and the provocation given should be of such a nature4173 as would cause the person, who is given provocation, to break the public peace or to commit any other offence; and
(c) the person, giving the insult, must intend, or know, that his act would cause a provocation of the nature mentioned above.

4. 'Intentionally Insults'

It is necessary that insult,[56] by which provocation is caused, should either be intended, or known to be likely, to lead to a breach of the public peace or the commission of some other offence by the person insulted. Without it, the insult, however provocative it may be, will not bring the offender within the mischief of this section.[57] What is material is not the reaction of the complainant, which might vary according to the sensitiveness of the individual insulted, but the intention of the offender to provoke, or his knowledge that he is likely to provoke, the person insulted to commit an offence[58]The intentional insult must be of such a degree that should provoke a person to break the public peace or to commit any other offence. The person who intentionally insults intending or knowing it to be likely that it will give provocation to any other person and such provocation will cause to break the public peace or to commit any other offence, in such a situation, the ingredients of s 504 are satisfied. One of the essential elements constituting the offence is that there should have been an act or conduct amounting to intentional insult and the mere fact that the accused abused the complainant, as such, is not sufficient by itself to warrant a conviction under s 504, IPC .[59]

If no allegation has been made in the complaint that the intentional insult was such as to give provocation for any breach of the peace, the section will have no application.[60] When the complainant simply says that when he presented his written objections before the accused, he tore them and abused him, no case under this section is made out.[61] Similarly, mere abuse, rudeness or insolence may not amount to an intentional insult within the meaning of this section if it does not have the necessary element of being likely to incite the person insulted to commit a breach of the public peace or any other offence.[62] The provision in this section clearly visualises that the intentional insult will have, in its background, the intention or the knowledge that such intentional insult would either provoke the person, to whom it is offered, to break public peace or to commit any other offence.[63] In *Kishori Mohan v State of Bihar* ,[64] taking a photograph with a garland of shoes in the neck, which photograph was shown neither to the public nor to the complainant, was not held to be a provocation as to induce the complainant to break public peace or to commit any4174 other offence. In *Ram Dutta v Kripa Singh* ,[65] refusal by some Hindus to have social intercourse with some Hindu *sonars* and excluding them from use of wells was not held to amount to an offence under this section.

The complainant had taken his father (patient) to the clinic of the appellant doctor, the appellant gave three injections to the patient, and the patient died. The complainant filed complaint for offence under ss 504 and 506, IPC . In the order issuing summons passed by the Magistrate, there was no mention of any threat extended by the accused to the complainant. Held, the accused could not have been summoned for offences under ss 504 and 506, IPC .[66]

5. Abusive Language and Intention to Cause

Abusive language, used with intention to cause provocation to the person to break public peace or to commit any other offence would come within the mischief of the section.[67] However, mere abuse, unaccompanied by an intention mentioned above, would not come within the purview of this section.[68] It is common experience that when rustic people have some quarrel or difference amongst themselves, they generally hurl insulting, abusive and/or filthy words against each other. Thus, from the mere use of such words in heated moments, it cannot always be inferred that the said words were used with the requisite intention stated in this section. An offence under this section by spoken words cannot be made out so long as it is not proved that those words were uttered with the specific intention of insulting a man and the offender intended by that insult to provoke the other person to break the public peace or to commit any other offence.[69] It is sufficient for the complainant to prove that the abusive language was such as would ordinarily provoke the man or woman, his or her decision to commit breach of peace.[70] The court has not to judge the temperament or the idiosyncrasy of the individual concerned. It should try to find out what, in the ordinary circumstances, would have been the effect of the abusive language used. The offence would be committed if the

abusive language used is such as might ordinarily result in broken limbs or, at least, in an affray, and consequent breach of the peace.[71] Whether mere abuse on the public road would amount to an offence under this section would depend on several circumstances, such as the respective status of the parties, nature of the abuse and other factors.[72] Abusive words in the background, atmosphere and circumstances, in which they are used, may be likely to provoke a breach of the peace.[73]4175

6. Absence of Person Insulted--Effect

For an offence under this section, it is necessary that the insult should be delivered to the person insulted with the intention that he may be there and then provoked to commit an offence.[74] Where an accused, in the course of addressing a meeting, abuses certain persons, not present in the meeting, his conviction under this section is not sustainable.[75] If there is no evidence to show that the utterer asked the persons, before whom he uttered the abuse, to convey his insulting words, uttered in his absence, to the complainant, there is no offence committed under this section, such a request being essential.[76] In *Mohammed Ibrahim Maracayar v Ismail Maracayar* ,[77] it was held that the likelihood of the breach of the peace, contemplated by this section, must be immediately after the provocation or so soon afterwards that it must form part of *res gestae*. Where a father in Vellore wrote an insulting and provocative letter to his daughter in Madras, it was held that there was no likelihood of the breach of the peace contemplated by the section. To break the peace, the complainant would have to go all the way from Madras to Vellore.[78]

7. Forbearance or Restraint *etc*. by Person Insulted--Effect

The mere forbearance of the person insulted being provoked is not sufficient to protect the offender.[79] The offence cannot be taken away from the purview of the section simply because the insulted person exercised self-restraint or being terrified by the offensive attitude of the accused, he did not actually break the public peace or commit some other offence.[80] The fact that the complainant did not accept the provocation because he was a peacefully disposed man, would not make the accused any the less guilty if the insult offered was such as would be sufficient to the mind of an ordinary person to provoke a breach of the public peace.[81] The complainant, due to his attitude, culture, position, or other personal reason, may have exercised restraint and may not have reached to the words.[82] An offence under this section is committed if the accused intentionally insults and thereby gives provocation to any person, intending, or knowing it to be likely, that such provocation will cause him to break the public peace or to commit any other offence. Thus, the actual reaction, conduct and attitude of the person, on the occasion when he is insulted, are not relevant factors in a case of this nature.[83] However, the offence under this section does not depend upon the mere sensitive feeling of the offended, but upon the intention or knowledge of the offender.[84]4176

8. *Per se* Insult

If addressing a person by the words used by the accused *per se* goes to show that the person has been intentionally insulted and provocation has been caused to him, there is sufficient ground to proceed against the accused under s 504, IPC .[85]

Where the very words are filthy and abusive, the court can infer that the accused could not but intend by the use of such abuses that they wanted to provoke the complainant to break the public peace.[86]

9. Illustrative Cases falling under Section 504

Where an advocate, while cross-examining a witness, uses filthy words, exhibiting disrespect or indignity towards the witness's mother,[87] or where the word *behuda* was addressed to the complainant, who occupied the responsible and respectable position of the President at the meeting of a municipal committee, to which the complainant sharply reacted,[88] it was held that the case fell within the ambit of this section. Where seven accused went upon the land of the complainant, prevented him from irrigating his fields, and, when remonstrated, used abuse and threatened to strike,

[89] or where the accused gave abuse to the complainant involving aspersions on the chastity of his mother and sister,[90] or where the accused, without any justification, first used the offensive expression *pahle munh se bakko* towards a police official, who had been instructed by the district authorities to serve a notice upon shopkeepers in the bazar,[91] it was held that there was intentional insult giving provocation to commit a breach of the public peace. The conduct of a barrister calling a witness a pig and threatening to kick him would amount to an offence under this section.[92] Calling a man *beiman* and *badmash* would fall under this section, and not under s 500, IPC .[93] In *KD Upadhayaya v Bhagabati Chouhan* ,[94] the accused entered the verandah of the dwelling-house of the complainant, abused him in filthy language, and threatened to beat him with shoes and later went into the courtyard and then went to the road near the house and continued to abuse him for about an hour and ultimately went away saying that they would come the next Sunday with more persons and recover the money due to them from him. It was held that the charge under this section was fully made out.

In the instant case, the accused attempted to destroy/desecrate the puja room of the complainant to cause hurt to religious sentiments of the complainant. Held, a *prima facie* case for initiation of proceedings under s 504, IPC was made out.[95]

Where the accused in the presence of other members of the family called the victim a prostitute, he was convicted under ss 504 and 509, IPC .[96]4177

10. Illustrative Cases not falling under Section 504

Mere discourtesy and bad manners do not amount to a criminal offence for which a person can be criminally punished.[1] When the charge is an insult by words, the words must amount to something more than what is called 'mere vulgar abuse'.[2]

Abusive words *sala madhurchod* are generally used in case of petty quarrels between the parties and by that it cannot be inferred that the accused intentionally expressed such abusive words so as to insult the complainant and also give provocation to him so as to break the public peace.[3]

Where the accused said to an assistant sub-inspector of police, during an investigation, 'You are a tyrant; justice cannot be expected from you',[4] or where the accused called Arora a Kirar, which word has sometimes a somewhat contemptuous signification,[5] it was held that the offence under this section was not committed. If an insult is only incidental, and not intentional, the case would not be covered by the section, particularly when the accused is not charged under this section.[6] Where the accused shouted at the complainant 'shameless fellow', 'I will sue you',[7] or where the complainant came to the shop wherein he became engaged in a dispute with its owner as a result of which he was asked to leave the shop,[8] it was held that no case under this section was made out.

Where the words uttered are mere vulgar abuses, a complainant under this section should be dismissed at the outset on the principle *de minimis non curat lex* which is contained in s 95, IPC .[9] Saying to the complainant 'you are telling a lie' would, on the same principle, be covered by s 95, IPC .[10] Where the accused said, in an insolent tone, to a deputy magistrate upon his expressing an unfavourable opinion at a local inquiry, 'Then, why do you make an enquiry, go away quietly.' it was held that the said s 95 covered the case.[11] Readiness to apologise is not an indication of the accused's guilt.[12]

Section 504 refers to intentional insult with intent to provoke breach of peace. The allegation in the complainant was that when he enquired from accused 1 and 2 about the sale deeds, they asserted that they will obtain possession of land under the sale deeds and he can do whatever he wants. The statement attributed to accused 1 and 2 cannot be said to amount to an 'insult with intent to provoke breach of peace'. The statement attributed to accused, even if it was true, was merely a statement referring to the consequence of execution of the sale deeds by first appellant in favour of the second appellant. No offence under s 504, IPC was made out.[13]4178

11. Procedure

The offence under this section is non-cognisable, bailable, compoundable by the person insulted, and triable by a magistrate, and may also be tried summarily.

12. Sanction to Prosecute

The expression acting or purporting to act in the discharge of his official duty 'must be interpreted liberally, otherwise strictly speaking there can be no case which can come within the scope of s 197, CrPC .[14]

The accused a public servant who was removable from service only by an order of the government asked the complainant, salesman of a co-operative society under his charge, to deposit certain amount to make up loss due to shortage of goods. Upon his depositing the amount he was again directed to deposit a further amount as price of certain articles misappropriated by him. When the complainant, went to the office with his written objection, the accused lost his temper, tore it, abused the complainant and said something which was not directed against the complainant. The complainant then filed a complaint under s 504 .

It was held: (a) that in the circumstances of the case sanction to prosecute under s 197, CrPC was necessary and the complaint was not maintainable in law for want of such sanction; (b) that even on the allegation in the complaint and the evidence no case was made out against the accused for being prosecuted under s 504 .[15]

Where the allegation in the complaint under s 504, IPC, is that insulting language was used by the magistrate while he was holding his coat and while the complainant was in the witness box, the absence of sanction is a bar to taking cognisance of the complaint, the test is whether the officer at that particular moment was actually engaged in or purporting to be engaged in the discharge of his official duty.[16] If the accused is prosecuted for the offences under ss 383 and 500, IPC, for which sanction for prosecution is clearly called for and simultaneously the accused is being prosecuted for these two offences along with the third offence under s 504, IPC, prior sanction under s 197, CrPC would be necessary for the prosecution of the accused jointly for all the three offences.[17]

13. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC, may be referred to.

14. Commission of Heinous Offence by Assault--Charge under Section 504 Need Not be Framed

The offence punishable under s 504, IPC, is a distinct offence which comes under the category of misdemeanours. It is a non-cognisable offence. Using foul and provocative language against any person which has a tendency of provoking the person to commit an offence is punishable under s 504, IPC . In the natural course of events when any heinous offence is committed by assault, it is but natural that the4179 offender uses filthy and abusive language and technically such abusive words may attract the ingredients of offence under s 504, IPC, by overlapping. However, such act of use of abusive words should not be construed as a distinct offence. It has to be read and understood as a part of the higher offence committed by the accused and it does not warrant framing of a charge under s 504, IPC . Therefore, whenever higher offences are committed and in the course of the commission of an offence filthy and abusive language is used, which has the tendency of provocating the victim to indulge in retaliatory acts, no charge under s 504, IPC, need be framed. The said conduct is to be construed as a part of the higher heinous offence.[18]

15. Proof

In order to establish a charge under this section, the prosecution must prove[19] that:

(a) the accused intentionally insulted some person;
(b) he thereby gave provocation to that person; and
(c) he then intended, or he then knew it to be likely, that the provocation will cause him:

(i) to break the public peace, or
(ii) to commit any other offence.

Where the charge of insult is based on spoken words, it is necessary to refer the actual words used otherwise, the court would not be in a position to decide whether the words used amounted to intentional insult.[20] If the evidence, led on behalf of the complainant, does not specify the actual words, alleged to have been used by the accused in abusing the complainant, the charge under this section will not be proved.[21] Where, however, the insult may arise out of the conduct or action of the offender, irrespective of the words spoken, the proof of actual words may not be necessary.[22]

It is not the law that the actual words or language should figure in the complaint. One has to read the complaint as a whole and, by doing so, if the Magistrate comes to a conclusion, *prima facie*, that there has been an intentional insult so as to provoke any person to break the public peace or to commit any other offence, that is sufficient to bring the complaint within the ambit of s 504, IPC . It is not the law that a complainant should verbatim reproduce each word or words capable of provoking the other person to commit any other offence. The background facts, circumstances, the occasion, the manner in which they are used, the person or persons to whom they are addressed, the time, the conduct of the person who has indulged in such actions are all relevant factors to be borne in mind while examining a complaint lodged for initiating proceedings under s 504, IPC .[23]4180

The complainant did not mention in his complaint the abuse words used by the accused. The accused, a public servant, was entitled to the protection of s 197, CrPC . Processes issued against the accused were quashed on petition filed under s 482, CrPC .[24]

16. Acquittal

Mere allegation, that the accused abused the complainant in filthy language, is not sufficient to sustain a charge under this section.[25]

17. Conviction

When, from the evidence on record, it is absolutely clear that the complainant was abused by the accused in filthy language which, in the ordinary course of nature, is sufficient to insult to the extent required for the purpose of constituting an offence under this section, the conviction of the accused will be well founded.[26]

18. Sentence

A substantial fine, which was within the means of the accused to pay, was held proper when the accused, while under the influence of liquor, abused another person.[27]

46 *Chainrai Valiram v Emperor* 36 Cr LJ 1461, p 1462, AIR 1935 Sind 107 (1) .

47 *Allipuram Subbiah v Bojja Ventaka Subbamma* 44 Cr LJ 10 (Mad), AIR 1942 Mad 672 .

48 *Gul Muhammad v Akbar Ali* 28 Cr LJ 172,173, AIR 1927 Lah 129 .

49 *Emperor v Chunibhai Dahyabhai* 4 Bom LR 78 .

50 *Bhagwan Das v Sadiq Ahmad* AIR 1925 All 318 (1), 26 Cr LJ 703 ; *Emperor v Goolab Rasul* 5 Bom LR 597 .

51 *M Thomas Varghese v Chandra Sekhar Rath* (1980) 49 Cut LT 532, 536 .

52 *Ram Kumar Mishra v State of Bihar* 2010 (86) AIC 799 (Pat) .

53 *Girinath Singh v State of Jharkhand* 2010 Cr LJ 4006, 2010 (89) AIC 839 (Jhar) .

54 *Sirajuddin Ali v Mujtaba Ali and Anor* 2001 Cr LJ (NOC) 125 (AP) .

55 *Ram Chandre Singh v Nabrang Rai Burma* 1998 Cr LJ 2156 (Ori) .

56 *Chakradhar Patnaik v Benudhar Patnaik* 1973 Cut LT 1186 ('insult' is meant to treat a person with offensive disrespect and/or to offer indignity to a person).

57 *Mohammad Sabed Ali v Thulesvar Borah* 1955 Cr LJ 1318, AIR 1955 Assam 211 .

58 *Ibid*; *Abrahim v State* 1960 Cr LJ 910, AIR 1960 Ker 236 .

59 *Fiona Shrikhande v State of Maharashtra* 2013 (130) AIC 257, p 260, (2013) 14 SCC 44 .

60 *KP Sinha v Aftabuddin* AIR 1955 Pat 453, 56 Cr LJ 1382 ; *Ram Karan v State of Uttar Pradesh* (1984) 2 Crimes 27 (All)

61 *Jagjit Chandra v Avtar Singh* 1971 Cr LJ 300, p 305, 1971 Kash LJ 89 .

62 *Karumanchani Veerangaiah v Katta Mark* 1976 Andh LT 295, 1976 Cr LJ 1690 ; *Philip Rangel v Emperor* AIR 1932 Bom 193, 33 Cr LJ 463 ; *Ram Chandra Nayak v State* 32 Cut LT 776 ; *Patel Narottam Tulsidar v State of Gujarat* 1973 Guj LR 522 .

63 *Jugal Kishore v State* 1973 Cr LJ 371 (Del) ; *Kondapalli Kutumba Rao v State* (1971) MLJ (Cr) 704, p 705 .

64 *Kishori Mohan v State of Bihar* 1976 Cr LJ 654, p 655, 1975 BLJR 523 .

65 *Ram Dutta v Kripa Singh* 3 PR 1883 .

66 *Madhav Prasad Kaushik v State of UP* 2008 AIR SCW 7026 .

67 *Ram Chandra Navak v State* (1966) 32 Cut LT 776, p 781 ; *Mani Malik v Krishna Chandra Dolai* (1973) 1 Cut WR 105 .

68 *Pukhraj v State* 1954 Cr LJ 1010 (Raj) ; *Silvester Vaz v Louis Dias* AIR 1930 Bom 120, 31 Cr LJ 846 ; Re *S Kuppusami Aiyar* 16 Cr LJ 477; *Devi Ram v Mulakh Raj* (1962) 2 Cr LJ 543 (HP) ; *Sriram Chandra Das v Krushna Chandra Roy* (1969) 35 Cut LT 788, 1970 Cr LJ 264 ; *Muhammad Sabed Ali v Thulesvar Borak* AIR 1955 Assam 211, 1955 Cr LJ 1318 ; *Abdul Majid v State of Rajasthan,* 2013 (2) Crimes 599 (Raj) .

69 *Sadananda Kishan v Lalit Mohan Patel* 1971 Cut LT 574, 1972 Cr LJ 1685 .

70 *L Usha Rani v State* 2014 Cr LJ 692, p 695 (Ker), 2013 (4) KLT 909 .

71 *Guranditta v Emperor* AIR 1930 Lah 344, 32 Cr LJ 62 (1).

72 *Bata Behera v Devendra Nath Bhol* 1960 Cr LJ 1353, AIR 1960 Ori 178 .

73 *Serei Behera v Bipin Behari Roy* AIR 1959 Ori 155, 1959 Cr LJ 1096 .

74 *Gaurishanker v Bachha Singh* AIR 1939 Pat 27, 39 Cr LJ 980 (1).

75 Re *Vasireddi Sivalinga Prasad*AIR 1941 Mad 683, 42 Cr LJ 827 .

76 *M Munuswami Naicker v P Kanniappa Naicker* 51 Cr LJ 704, AIR 1950 Mad 273 .

77 51 Cr LJ 173, AIR 1949 Mad 760 ; *RM Siffles v MR Dixit* AIR 1924 Nag 121, 25 Cr LJ 1079 . For a contrary view, *refer* to *Gul Muhammad v Akbar Ali* AIR 1927 Lah 129, 28 Cr LJ 172 ; *Silvester Vaz v Louis Dias* AIR 1930 Bom 120, 31 Cr LJ 846 ; following *Queen v Adams* (1899) 22 QBD 66 .

78 *Mohammed Ibrahim Maracayar v Ismail Maracayar* 51 Cr LJ 173, AIR 1949 Mad 760 .

79 Re *S Gopal*1953 Cr LJ 744, AIR 1953 Mad 413 ; Re *Chidambara Pillai* 1 Weir 620 (1).

80 *Pukraj v State* 1954 Cr LJ 1010 ; Re *Karri Jogayya* 1 Weir 620, 10 Mad 353; *Guranditta v Emperor* AIR 1930 Lah 344, 32 Cr LJ 62 (1); *Kanshi Ram v Razal Muhammad* AIR 1932 Lah 480, 33 Cr LJ 548 ; *Smith v Chandramani Mohanty* 20 Cut LT 180, 1955 NUC 970 .

81 *Habib Khan v Mazhar-ul-Haque Khan Mazhar Haque Khan* 18 Cr LJ 436 ; *KD Upadhyay v Bhagabati Chouhan* AIR 1964 Tripura 69, (1965) 1 Cr LJ 66 ; Re *Syed Mahomed* 1 Weir 622 (1); Re *Sooraparasu* 1 Weir 621; *Bheema Rao v Ventak Rao* AIR 1964 Mysore 285, (1964) 2 Cr LJ 692 .

82 *Arkhita Swain v State of Orissa* 1973 Cut LT 1263 .

83 *Chakradhar Patnaik v Benudhar Patnaik* 1973 Cut LT 1186 .

84 *Abdul Aziz v Mohammad Arab* AIR 1935 Cal 736, 37 Cr LJ 133 .

85 *Ramesh Kumar v Sushila Srivastava* 1997 Cr LJ 282 (Raj) .

86 *Pukhraj v State* 1954 Cr LJ 1010 .

87 *Bheema Rao v Venkat Rao* (1964) 2 Cr LJ 692, AIR 1964 Mysore 285 .

88 *Mahadeo Jagoba v Ramlal Gowrdhen Das* AIR 1934 Nag 239, 35 Cr LJ 1420 .

89 *Habib Khan v Mazhar-ul-Haque Khan* 18 Cr LJ 463 .

90 *State v Kurbanali Akbarali* 1956 Cr LJ 500 (2), AIR 1956 Bom 239 .

91 *Shankar Lal v Emperor* 28 Cr LJ 821, AIR 1927 Lah 702 .

92 *KB Tikekar v Piarelal* 19 Cr LJ 666 .

93 *Bakhtawar Lal v Crown* AIR 1929 Lah 459 (1) ; *Brandawan Agarwal v Mohanlal* 1966 Jab LJ 114 (SN) .

94 *KD Upadhayaya v Bhagabati Chouhan* (1965) 1 Cr LJ 86, AIR 1964 Tripura 69 .

95 *Fiona Shrikhande v State of Maharashtra* 2013 (130) AIC 257 (260), (2013) 14 SCC 44 .

96 *Rihan v State of Jharkhand* 2014 Cr LJ 2671 (Jhar) .

1 *Rahim Bakhash v Emperor* 21 Cr LJ 451 .

2 *Philip Rangel v Emperor* AIR 1932 Bom 193, 33 Cr LJ 463 ; *Abraham v State* AIR 1960 Ker 236, 1960 Cr LJ 910 .

3 *Ram Chandra Singh v Nabrang Rai Burma* 1998 Cr LJ 2156 (Ori) .

4 *Nasir Khan v Emperor* AIR 1935 Pesh 122, 36 Cr LJ 1210 .

5 *Muhammad Bakhsh v Emperor* AIR 1922 Lah 455, 23 Cr LJ 171 .

6 *Emperor v Motilal* (1903) ILR 25 All 155, 1901 AWN 212 .

7 *Pitchai Pillai v TR Ramaswami Iyengar* AIR 1940 Mad 681, 42 Cr LJ 48 .

8 *Chainrai Valiram v Emperor* AIR 1935 Sind 107 (1), 36 Cr LJ 1461 .

9 *J Nash Fireman Bina v V Vanspall* 37 Cr LJ 296 .

10 *Sdananda Jash v Shibakali Hazra* 1954 Cr LJ 890, AIR 1954 Cal 288 .

11 *Jaykrishna Samanta v Emperor* 18 Cr LJ 17 .

12 Re *Abdul Rahiman Khan Sabid* 17 Cr LJ 462; *Maro Balwant Marathe v Emperor* 15 Cr LJ 14 .

13 *Md Ibrahim v State of Bihar* 2010 Cr LJ 2223 (SC), 2010 AIR SCW 405, 2009 (12) Scale 250, 2009 (8) SCC 751 .

14 *Jagjit Chandra v Th Avtar Singh* 1971 Cr LJ 300 (J&K) .

15 *Jagjit Chandra v Th Avtar Singh* 1971 Cr LJ 300 (J&K) .

16 *Sutchdeo v Emperor* AIR 1934 All 978 .

17 *Pawan Kumar v Ruldu Ram* 1983 Cr LJ 180 (P&H) .

18 *Baby Kumar alias Janardhana v State of Karnataka* 2003 Cr LJ 1425 (Kant) .

19 *Govinda Das Panda v State of Orissa* (1981) 52 Cut LT 326 ; *L Usha Rani v State* 2014 Cr LJ 692, p 695 (Ker) .

20 *KP Sinha v Aftabuddin* AIR 1955 Pat 453, 56 Cr LJ 1382 ; *Sugarthan Ammal v Vedavalli* 1940 MWN 389 ; *Vatalia v State of Gujarat,* 2012 (111) AIC 366 (Guj) .

21 *Devi Ram v Malakh Raj* (1962) 2 Cr LJ 543 (HP) ; Re *Karumuri Venkataratnam* 48 Cr LJ 970 (a finding by the court as to the actual word used is necessary); *Fiona Shrikande v State of Maharashta* 2013 (4) Crimes 55 (SC), 2013 AIR SCW 6639, AIR 2014 SC 957, [2013] 9 SCR 240, 2013 (14) SCC 44, 2013 (10) SCALE 535 ; *Ram Kumar Mishra v State of Bihar* 2010 (86) AIC 799 (Pat) .

22 *Habib Khan v Mazhar-ul-Haque Khan* 18 Cr LJ 463 .

23 *Fiona Shrikhande v State of Maharashtra* 2013 (130) AIC 257, p 260, (2013) 14 SCC 44 .

24 *Vatalia v State of Gujarat* 2012 (111) AIC 366 (Guj)

25 *Hiralal Dutta v Joygapal Dey* 1981 Cr LJ (NOC) 195 (Cal) .

26 *Brajabandhu Das v Guni Bewa* 1973 Cut LT 1034 .

27 *Chet Singh v Emperor* 12 Cr LJ 435 .

Indian Penal Code (Act XLV of 1860)

Chapter XXII

Of Criminal Intimidation Insult and Annoyance

S. 505.

Statements conducing to public mischief.--

(1) Whoever makes, publishes or circulates any statement, rumour or report--
  (a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of India to mutiny or otherwise disregard or fail in his duty as such; or
  (b) with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity; or
  (c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community;

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Statements creating or promoting enmity, hatred or ill-will between classes.-- Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or caste or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both.4181

(3) Offence under sub-section (2) committed in place of worship, etc.-- Whoever

commits an offence specified in sub-section (2) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

Exception.-- It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it in good faith and without any such intent as aforesaid.

STATE AMENDMENT

Andhra Pradesh-- In Andhra Pradesh the offence is cognizable *vide* G.O. Ms. No. 732, dated 5-12-1991.

Comments

1. Scope

This section is of a statement miscellaneous in character. It may be noted that the chapter, in which this section is included, is headed 'Of Criminal Intimidation, Insult and Annoyance'. Sections 503 and 506 to 508, IPC, deal with criminal intimidation, s 504, IPC with insults, ss 509 and 510, IPC with annoyances, and this section is not covered by any of these heads. It deals with the security of the state or public order.[28] However, legitimate ventilation of grievance, which some section of the public may have against the local authorities, is not to be checked by initiating a prosecution under this section.[29]

2. Sections 153A and 505 Considered together

Commentary under same heading in s 153A, vol 1, may be referred to.

3. Constitutional Validity of Sub- section 1 of Section 505

Sub- section 1 of this section, as it exists presently, is free from the vice of unconstitutionality.[30]

4. 'Class'

The word 'class' is insignificant. Any definite or ascertainable class of citizens of India will come within this section.[31]4182

5. Exception

No doubt the statements, rumours and reports, referred to in this section, are of a highly mischievous character, but, having regard to the condition under which modern journalism and the discussion of public questions are necessarily carried on, it would be going too far to require the person, who publishes it, to prove its actual truth when the statement, rumour or report is published without any criminal intent. To require strict proof would be throwing an impossible burden upon him. It would, therefore, be sufficient for him to show that he had reasonable grounds for believing it, as, for instance, by showing that he made due inquiry before he published it. The exception grants immunity from prosecution if the accused had reasonable grounds for believing the allegations to be true and if he did not have the necessary intention as required in the section. Unless the contents of pamphlet amount to 'incitement of an offence', the persons, who have published and circulated the same, cannot be held guilty under this section.[32]

6. Procedure

The offence under this section is cognisable when the false statement, rumour or report is made, published or circulated with intent to create enmity, hatred or ill-will between classes and non-cognisable in any other case, non-bailable, non-compoundable, and triable by a magistrate.

7. Sanction of the Central or State Government Necessary before Cognisance of the Offence is taken by the Court

Under s 196(1) of CrPC, no court shall take cognisance of an offence punishable under this section (*i.e.*, s 505, IPC) except with the previous sanction of the Central Government, or of the state government, who may, before according sanction under s 196(3) of CrPC, order a preliminary investigation by a police officer not being below the rank of an inspector.

8. Charge

The following form of the charge may be adopted:

I (*name and office of Magistrate, etc*) hereby charge you (*name of accused person*) as follows:

[if the offence is under s 505(1)(a)]

That you, on or before the...day of..., at..., made (*or published or circulated*) a statement (*or rumour or report*), to wit... (*mention the particulars*), and that you did so with intent to cause, or which was likely to cause, an officer (*or soldier or sailor or airman*), to wit... (*mention the designation of the officer, etc*), in the Army

(*or Navy or Air Force*) of India to mutiny (or disregard, or fail in, his duty) as such officer, etc.

[if the offence is under s 505(1)(b)]

That you, on or before the... day of..., at..., made (*or published or circulated*) a statement (*or rumour or report*), to wit... (*mention the particulars*), and that you did so with intent to cause, or which was likely to cause, fear (*alarm*) to the public (*a section4183 of the public*), to wit.. .(*specify it*), whereby any person might be induced to commit an offence against the State (*or public tranquillity*),

[if the offence is under s 505(1)(c)]

That you, on or before the...day of..., at..., made (*or published or circulated*) a statement (*or rumour or report*), or wit... (*mention the particulars*), and that you did so with intent to incite, or which was likely to incite, a class (*or community*) or persons, to wit... (*specify it*), to commit an offence against another class (*or community*), to wit... (*specify it*),

[if the offence is under s 505(2)]

That you, on or before the...day of..., at..., made (*or published or circulated*) a statement (*or report*), containing rumour (*or alarming news*), to wit... (*mention it*), with intent to create (*or promote*), or which was likely to create (*or promote*), on grounds of religion (*or race or place of birth or residence or language or caste or community, or on any other ground whatsoever*), feelings of enmity (*or hatred or ill-will*) between different religious (or racial or language or regional) groups (*or castes or communities*).

[if the offence is under s 505(3)]

That you, on or before the... day of..., committed an offence, specified in s 505 (2) of the Indian Penal Code, in... (*mention the place*), a place of worship (or in an assembly, to wit..., engaged in the performance of religious worship or religious ceremonies),

and thereby committed an offence, punishable under s 505 of the Indian Penal Code, and within the cognisance of this court.

And I hereby direct that you be tried by this court on the said charge.

9. Proof

In order to secure a conviction under this section, prove that:

[if the offence falls under s 505(1)(a), IPC]

(a) the accused made, published, or circulated, a statement, rumour or report; and
(b) he did so with intent to cause, or which was likely to cause, an officer (or soldier or sailor or airman) in the Army (or Navy or Air Force) of India:

(i) to mutiny, or
(ii) otherwise disregard, or fail in, his duty as such officer,

[if the offence falls under s 505(1)(b), IPC]

(a) the accused made, published, or circulated, a statement, rumour, or report;
(b) he did so with intent to cause, or which was likely to cause, fear (or alarm) to the public (or to a section of the public); and
(c) thereby a person was induced to commit an offence against the:

(i) State, or
(ii) public tranquillity,

[if the offence falls under s 505(1)(c), IPC]

(a) the accused made, published, or circulated, a statement, or rumour, or report; and
(b) he did so with intent to incite, or which was likely to incite, a class (or community) of persons to commit an offence against another class or community,4184

[if the offence falls under s 505(2), IPC]

(a) the accused made, published, or circulated, the statement (or report), containing rumour (or alarming news), in question; and
(b) he did so with intent to create, or which was likely to create, feelings of enmity or ill-will between different religious, racial, language or regional groups or castes or communities on grounds of:

(i) religion,
(ii) race,
(iii) place of birth,
(iv) residence,
(v) language,
(vi) caste or community, or on any other ground whatsoever

[if the offence falls under s 505(3), IPC]

(a) same as in the case of an offence under s 505(2), IPC ;
(b) same as in the case of an offence under s 505(2), IPC ; and
(c) the place, where the offence in question was committed, was a place of worship or an assembly which was engaged in the performance of religious worship or religious ceremonies.

Prosecution case was that the accused petitioner published a news item in the newspaper that some explosives were received from the house of the relative of the then Chief Minister of the State to malign the Chief Minister, to create communal disharmony in the State. Merely inciting the feeling of one community or group without any reference to any other community or group cannot attract the provision of ss 153-A or 505 . In the entire news item there was no reference to the two communities for the purpose of inciting the feeling of one community against the other. It only narrated about para-military forces operating in that area and recovering certain arms from the possession of persons including Ganga Charan Debbarma. Except the activity of the para military force and the role of certain persons including Ganga Charan Debbarma there is nothing to incite any community against the other. Ingredients of offence under s 153A and 505, IPC were not made out in the State.[33]

28 *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955, (1962) 2 Cr LJ 103 .

29 *Kali Charan Mohapatra v Srinivas Sahu* 1960 Cr LJ 97, AIR 1960 Ori 65 .

30 *Kedar Nath Singh v State of Bihar* AIR 1962 SC 955, (1962) 2 Cr LJ 103, p 118 .

31 *Gangadhar v State* 1963 Jab LJ 915, 1963 MPLJ (notes) 24 .

32 *Kali Charan Mohapatra v Srinivas Sahu* AIR 1960 Ori 65, 1960 Cr LJ 497 .

33 *Subal Kumar Dey v State of Tripura* 2007 Cr LJ 1195, p 1200 (Gauh) .

Indian Penal Code (Act XLV of 1860)

Chapter XXII

Of Criminal Intimidation Insult and Annoyance

S. 506.

Punishment for criminal intimidation.--

Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both,

If threat be to cause death or grievous hurt, etc.-- And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

4185STATE AMENDMENTS

Uttar Pradesh--The following amendments were made by Notification No. 777/VIII 9-4(2)-87, dated 31-7-1989, published in U.P. Gazette, Extra, Part-4, Section (Kha) dated 2-8-1989.

"Any offence punishable under Section 506 , IPC, when committed in any district of Uttar Pradesh, shall be notwithstanding anything contained in the Code of Criminal Procedure, 1973 be cognizable and non-bailable."

Andhra Pradesh--In Andhra Pradesh the offence is non-bailable if committed in A.P. *vide* G.O. Ms. No. 732, dated 5-12-1991.

Comments

1. Scope

As to what constitutes criminal intimidation has already been discussed under s 503, IPC . This section provides only for the punishment of an offence of criminal intimidation. The punishment under this section has been divided into two categories by reason of the gravity of the offence involved, i.e., punishment extending to two years' imprisonment of either description in ordinary cases and punishment extending to seven years' imprisonment of either description in cases of threats of more

serious offences.

A threat administered, but hedged by certain condition, does not bring a case within the mischief of this section.[34]

Asking a person not to work in a private garden and threatening that person to go away from the garden would not satisfy the requirements of s 506, IPC .[35]But where the accused threatens to commit suicide, in case complainant takes legal action against him for the amount legally recoverable, such an act attracts the ingredients of the offence under s 503, IPC punishable under s 506, IPC .[36]

Offences under s 506, IPC and s 27(i) of the Indian Arms Act, are independent and mutually exclusive under different penal laws.[37]4186

2. Ingredients

Commentary under in s 503, *ante*, may be referred to.

Mere allegation of extending threat to kill would not be enough to attract the provisions of s 506(2), IPC, the depth and gravity of the words uttered by the person extending threats are to be seen.[38]

3. Intention to Cause Alarm

In order to attract the ingredients of s 506, IPC the intention of the accused must be to cause alarm to the victim. Mere expression of words, without any intention to cause alarm, would not suffice. To constitute an offence under s 506, IPC, it must be shown that the person charged actually threatened another with injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with the intention to cause alarm.[39] To hold a person guilty for offence under s 506, IPC, it is not necessary to prove that the other person whom accused threatened got frightened by result of the act done by the accused.[40]

Where in complaint it is not even mentioned that the accused had intimidated or threatened the complainant or any one else, in absence of basic ingredients of the section in the complaint, no case under s 506, IPC can be sustained.[41]

4. Procedure

The offence under this section is non-cognisable, bailable, compoundable by the person intimidated when it falls under the former part of the section and non-compoundable when it falls under the latter part of the section, triable by a magistrate when it relates in the former part of the section and by a magistrate of the first class. When it relates to the latter part of the section, and may also be tried summarily.

Although an offence under the latter portion of this section cannot be legally compounded under s 320 of the CrPC, yet a withdrawal from the prosecution may be allowed in a proper case.[42]

5. Sanction for Prosecution

It is only when all the three clauses of s 197, CrPC co-exist that the requirements of that section are fulfilled under which the ban imposed on the court from taking cognisance without a valid sanction from the concerned appointing or dismissing authority comes into operation. Merely because the accused is a public servant is not itself to place the complainant under the clutches of the provisions of s 197, CrPC . The protection under s 197, CrPC, cannot be extended in respect of accusations which tend to show that the act of the accused had absolutely no nexus whatsoever with his official duty.[43]4187

6. Notification of Uttar Pradesh State Government making Offence under Section 506 Cognizable and Non-bailable is Illegal

Section 506, IPC, as mentioned in the First Schedule to the CrPC, is declared to be a non-cognisable and bailable offence. However, it appears that by the Uttar Pradesh Government notification No 777/VIII 9-4(2)-87, dated 31 July 1989 published in the Uttar Pradesh Gazette, Extra Part 4, s (kha) dated 2 August 1989, it was declared to be a cognisable and non-bailable offence. The above notification purports to have been issued under s 10 of the Criminal Law Amendment Act 1932.

Section 10 of the Criminal Law Amendment Act 1932 gives power to the state government to declare certain offences including s 506, IPC to be cognisable and non-bailable, and on issuance of the said notification the Code of Criminal Procedure 1898 shall stand amended accordingly.

Section 10 of the Criminal Law Amendment Act 1932 does not give power to the state government to amend by a notification any part of the CrPC of 1898 has been repealed by s 484 of the Crpc, s 10 of the Criminal Law Amendment Act 1923 has become redundant and otiose. Hence, no notification can now be made under s 10 of the Criminal Law Amendment Act 1932. Any such notification is illegal for the reason given above. Hence, notification no 777/VIII 9 4(2)-87, dated 31 July 1989, published in the Uttar Pradesh Gazette, Extra Part 4, Section (kha), dated 2 August 1989 by which s 506, IPC, was made cognisable and non-bailable was declared to be illegal. Section 506 , IPC, has to be treated as bailable and non-cognisable offence.[44]

7. Notification of Chief Commissioner, Delhi Making Offence under Section 506 Cognizable and Non-bailable Made Imperative Wef January 2004

Right from 1898 and even when new Code was enacted in 1973, the legislature has not considered it imperative or necessary to convert the offence under s 506 from 'non-cognisable' and 'bailable' to 'cognisable' and 'non-bailable' which itself shows that s 10 of Criminal Law Amendment Act 1932 was a sort of temporary measure empowering the state government to declare this offence as cognisable and non-bailable having regard to the conditions prevailing in a particular area and at particular time. Had it not been so, the Parliament itself would have amended the schedule in 1973 categorizing this offence as 'cognizable' and 'non-bailable.' It is astonishing that the Delhi Government has continued to rely on the notification issued in 1933 and has never accorded any thought to see as to whether it has served the purpose or not and not even in 1973 when new CrPC was enacted repealing the old Code of 1898 and has bartered the liberty of citizens for flimsy allegation of an oral threat without any overt or covert act. Continuation of a notification for such a long period spanning for 70 long years without periodical review of the prevailing conditions amounts to denial of benefit of a law made by Parliament to the public at large and has practically nullified the original law enacted by the Parliament of India which even in 1973 had retained the character of offence under s 506, IPC as 'non-cognisable' and 'bailable.' This was neither the object of Criminal Law Amendment Act of 1932, nor the implication thereof. Section 10 of the Criminal Law Amendment Act empowers a state government to4188 meet out a particular situation and is a sort of curative measure to meet a particular situation and not a provision for subverting and nullifying the law enacted by the Parliament. The Division Bench of Delhi High Court has in *Sant Ram v Delhi State* [45] held that the effect of the passing of the CrPC was not to terminate the effect of the said notification as all notifications and laws previously in force are continued by s 484(2) of the new Code of 1973 and, therefore, in any case the notification issued under the Criminal Law Amendment Act 1932 is not at all affected by the repeal of the Criminal Procedure Code of 1898 in 1973. Legal validity of a notification under the provisions of ancillary law is one thing. Its justification and need is another thing, particularly when the nature of notification as in the instant case is such which is by way of temporary arrangement to meet out a particular situation. That is why the Delhi High Court did not propose to quash it but intends to recommend to the authorities for a review as to its necessity. Therefore, the Delhi High Court ordered that notification no 232-Home dated 11 January 1933 issued by the then Chief Commissioner of Delhi declaring the offence punishable under s 506, IPC as 'cognisable' and 'non-bailable' which has continued for 70

long years without any review of the factors and conditions that necessitated it, shall cease to be in operation from 15 January 2004 till the government reviews the overall situation and decides as to the necessity of its continuation.[46]

8. Quashing of Criminal Proceedings

If the complainant has not alleged in the complaint that the threats given by the accused caused alarm to her, the offence under s 506, IPC, is not made out against the accused and is liable to be set aside.[47] The investigation into the non-cognisable offence by a police-officer without order of the metropolitan magistrate is contrary to the provisions of s 155(2), CrPC, and, therefore, the investigation, filing of chargesheet and framing of charge under s 506, IPC, all are vitiated and as such the proceedings are liable to be quashed.[48]

9. Charge

As stated earlier, the offence under this section may be tried summarily [s 260(1)(vi), CrPC], and an offence, which is tried summarily, being triable as a summons-case, the framing of formal charge is not necessary (s 251 and 262 (1), CrPC).

10. Proof

In order to establish a charge under this section, prove that:

(a) the accused threatened some person;
(b) the said threat was of some injury to his (*i.e*., the said person's) person, reputation or property (or to the person or reputation of some other person in whom he (*i.e*., the said person) was interested); and4189
(c) he did so with intent:

(i) to cause alarm to that person; or
(ii) to cause that person to do any act which he was not legally bound to do, or to omit to do any act which he was legally entitled to do, as a means of avoiding the execution of such threat.

It is not essential for the prosecution to reproduce the exact words of the threat.[49]

11. Acquittal

If there is delay in filing a report and the complainant has embellished and exaggerated the case, the accused is entitled to the benefit of doubt.[50]

If the accused has entered the house of the victim on her invitation and there is an exchange of letters between the two, it could not be said that the accused trespassed and criminally intimidated the victim, so his conviction under ss 451, 506, 509, IPC, is improper.[51] The fact that colleagues of the accused had threatened to kidnap the victim does not *prima facie* constitute commission of the offence under s 506, IPC .[52] When the prosecution witnesses have failed to state that the accused had given a threat to the complainant and her children, the conviction of the accused for the offence under s 506, Pt II, cannot be sustained.[53]

The prosecutrix did not state in her testimony in positive manner that accused criminally intimidated her or threatened to kill her or threatened to cause her hurt. In face of such evidence it was found not

expedient in the ends of justice to convict the accused for offence under s 506, IPC .[54]

12. Conviction

Where the accused substantially committed only one offence of criminal intimidation, but was charged under two heads and the magistrate convicted him under ss 506 and 507, IPC, and imposed punishments for both offences, it was held that his conviction under one of the sections was bad.[55] However, if a person at one time criminally intimidates three different persons and each person brings a separate charge against him, there will be an offence committed as against each person, and, therefore, the accused would be liable to conviction and sentence on each offence.[56]

There was evidence that the accused showed pornographic films on handicam containing nude photographs of the prosecutrix. The handicam and the cassettes were recovered from the house of the accused appellant. When the prosecutrix demanded the cassette from the accused, he refused to return and threatened with dire consequences. Accused appellant was convicted for offences under ss 292 and 506, IPC .[57]4190

13. Accused Convicted under Section 302 read with Section 34 cannot be Convicted under Section 506 read with Section 34

The court convicting the accused under s 302 read with s 34, IPC, should not also convict them under s 506 read with s 34, IPC, particularly when the charge under s 506 read with s 34, IPC, is with respect to the accused threatening the deceased.[58]

14. Probation

Looking at the object of the Probation of Offences Act 1958 and the trend of modern penology and criminal jurisprudence, the accused should not be deprived of the benefit of an order under s 4 of the said Act. The accused convicted under s 506 (1), IPC, was, therefore, released on probation.[59] In another case, taking into consideration the overall circumstances of the case, age, antecedents and the fact that the accused convicted under ss 451 and 506, IPC, had to support his family including his two sisters who were of marriageable age, the accused was directed to be released on probation of good conduct in terms of s 4(1) of the Probation of Offenders Act .[60]

15. Compensation

The accused being dissatisfied with the treatment given to his brother at the government hospital, gave a fist-blow resulting in dislocation of a tooth of the victim-assistant surgeon and was convicted for offences under ss 333 and 506, IPC . Although the benefit of probation under the Probation of Offenders Act 1958 was declined but keeping in view that the occurrence took place about 14 years ago, the sentence of imprisonment on both counts was reduced to the period already undergone but a fine of Rs 50000/- was added under s 357, CrPC, for the offence under s 333, IPC, to be paid to the victim-doctor as compensation.[61]

16. Sentence

A bare perusal of s 506, IPC makes it clear that Pt II of the section deals with a graver form of the offence of criminal intimidation which is punishable with imprisonment of either description for a term which may extend to seven years, or with fine or with both. The punishment prescribed for the offence under Pt I of s 506 is imprisonment of either description for a term which may extend to two years, or with fine or with both.[62]

A deterrent sentence should not be awarded unless there are waves of initiative crime or public tumult, or there is danger of a wide breach of the public peace or security.[63]

34 *Sitaram v State* (1974) 76 Punj LR 421, p 423 .

35 *Saraswati and Anor v State* 2002 Cr LJ 1420 (Mad) .

36 *Kolla Srinivas v State of Andhra Pradesh* 2005 Cr LJ 2440 (AP) .

37 *Azzi v State of Kerala* 2013 (4) KLT 439, 2013 (4) KLJ 445 (Ker) .

38 *Dharampal v State of Uttrakhand* 2012 (115) AIC 588 (Utr) .

39 *Tammineedi Bhaskara Rao and Ors v State of Andhra Pradesh and Another*2007 Cr LJ 1204 (AP).

40 *Azzi v State of Kerala* 2013 (4) KLT 439, 2013 (4) KLJ 445 (Ker) .

41 *Gorige Pentaiah v State of AP* 2009 Cr LJ 350, p 355 (SC), 2008 AIR SCW 6901 .

42 *Empress v Vithoba* Ratanlal Unrep Cr Cas 330 **following***Reg v Devamma* 1 Bom 64 .

43 *Mary Kutty Thomas v Pawan and Anor* 1983 Cr LJ 1654 (Bom) .

44 *Virendra Singh and Ors v State of Uttar Pradesh and Ors* 2002 Cr LJ 4265 (All) (DB) .

45 *Sant Ram v Delhi State* (1980) 17 Delhi LT 490 .

46 *Narendra Kumar v State* 2004 Cr LJ 2594 (Del) .

47 *Amitabh Adhar and Anor v NCT of Delhi and Anor* 2000 Cr LJ 4772 (Del) .

48 *Prabhakar Pandurang Sauzgiri v State of Maharashtra* (1986) 1 Crimes 168 (Bom) . For further commentary, see under the same heading in s 406 and s 420, *ante*.

49 *Mohammad Ishaq v State* (1961) 2 Cr LJ 443, AIR 1961 All 522 .

50 *Bachaspatimayum v State of Manipur* AIR 1967 Manipur 30, 1967 Cr LJ 1343 .

51 *D Venkatta Subba Rao and Ors etc v State* 2002 Cr LJ NOC 217 (AP), (2001) 2 Andh LT (Cri) 260 .

52 *Shamsher Alam alias Sheru and Anor v State of Uttar Pradesh* 2002 Cr LJ 3588 (All) (DB) .

53 *Inacio Manuel Mirayda v State of Goa* 1999 Cr LJ 422 (Bom) .

54 *State of Himachal Pradesh v Vipin Kumar* 2015 Cr LJ 1812, p 1824 (HP) (DB) .

55 *Reg v Zora Karubeg* 4 BHCR (Crown Cases) 12.

56 Re *Goolzar Khan Petitioner* 9 WR (Cr) 30.

57 *Vijay Sood v State of Himachal Pradesh* 2009 Cr LJ 4530 (P&H) .

58 *Raja Sharnappa Zinge and Ors v State of Maharashtra* 1997 Cr LJ 450 (Bom) (DB) .

59 *Ramnaresh Pande v State of Madhya Pradesh* AIR 1974 SC 35, 1974 Cr LJ 153 (SC) .

60 *Manohar Lal Constable v State of Punjab* (1994) 1 RCR 242 (P&H) .

61 *Siyasaran v State of Madhya Pradesh* 1995 Cr LJ 2126 (SC) .

62 *Ramnaresh Pandey v State of Madhya Pradesh* AIR 1974 SC 35 .

63 *Gossain Missir v Emperor* 22 Cr LJ 679, AIR 1922 Pat 14 (sentence under this section reduced to fine).

Indian Penal Code (Act XLV of 1860)

Chapter XXII

Of Criminal Intimidation Insult and Annoyance

S. 507.

Criminal intimidation by an anonymous communication.--

Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from4191 whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

STATE AMENDMENT

Andhra Pradesh--In Andhra Pradesh the offence is cognizable *vide* G.O. Ms. No. 732, dated 5-12-1991.

Comments

1. Scope

This section supplements the preceding section which provides for punishment for criminal intimidation. This section deals with what is considered to be a more aggravated offence. This would be so:

(a) where communication is anonymous, or
(b) where the accused has taken precautions to conceal his name or abode.

The difficulty in ascertaining the person, who sends a threat, has been considered to be a good ground for awarding enhanced punishment. Communication, whether anonymous or pseudonymous, or containing wrong description and address, to prevent detection would all be covered by this section. The punishment of two years under para (1), and seven years in para (2), of the preceding s 506, IPC is, in each case, to be enhanced by two years under this section.

The sending of anonymous letters with a threat to the effect, that 'if you don't pay me the money demanded. God is going to punish you and your family with ruin and death', would not fall under this section as it would not be a criminal intimidation as defined in s 503, IPC which implies that the threat must be one which can be put into execution by the person threatening and the injury can be avoided by some act or omission of that person.[64]

2. Procedure

The offence under this section is non-cognisable, bailable, non-compoundable, and triable by a magistrate of the first class, and may also be tried summarily.

3. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251 , CrPC, may be referred to.

4. Proof

In order to secure a conviction under this section, besides the points, which are required to be proved for establishing a charge under the preceding s 506, IPC, it has to be proved that the communication was anonymous or that precaution had been taken to conceal the name or abode of the person giving the threat.4192

64 Re *Doraswami Iyer* 26 Cr LJ 755, AIR 1925 Mad 480 .

Indian Penal Code (Act XLV of 1860)

Chapter XXII

Of Criminal Intimidation Insult and Annoyance

S. 508.

Act caused by inducing person to believe that he will be rendered an object of the divine displeasure.--

Whoever voluntarily causes or attempts to cause any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Illustrations

(a) *A* sits dhurna at *Z's* door with the intention of causing it to be believed that, by so sitting he renders *Z* an object of divine displeasure. *A* has committed the offence defined in this section.

(b) *A* threatens *Z* that, unless *Z* performs a certain act, *A* will kill one of *A's* own children, under such circumstances that the killing would be believed to render *Z* an object of divine displeasure. *A* has committed the offence defined in this section.

Comments

1. Scope

The section is analogous to s 503, IPC . It is a variety of criminal intimidation although the provisions are somewhat different. Under this section, there is no reference to any injury to the person, reputation or property of any person. It is only in respect of acts or omissions that this section becomes applicable if the result is brought about by creating a belief, in the complainant, of divine displeasure in case of non-compliance. Where the accused voluntarily attempted to cause a person to

omit to do what he was legally entitled to do by inducing, in that person, a belief that he would be rendered, by the act of the accused, an object of divine displeasure if he did the thing which it was the object of the accused to cause him to omit to do, the act was held to be an offence under this section.[65] However, a threat to the effect, that 'if you don't pay me the money demanded from you. God is going to punish you and your family with ruin and death', cannot be brought under this section because the section requires that by some act of the offender the person warned must be led to believe that he will become, or will be rendered, an object of divine displeasure. The words 'by some act of the offender' would be read only with the words 'will be rendered' immediately preceding them and not with the words 'will become'.[66] On the same principle, a mere threat at large, that if a debts is not paid, then by the operation of divine laws, by the working out of destiny or *karma*, divine displeasure will fall upon the debtor, will not attract the section.[67] A person, who is4193 ex-communicated from the caste by the spiritual head or guru,[68] or who is given a warning of ex-communication by a priest,[69] does not become an object of divine displeasure by an act of the *guru* or priest. Where the accused left her illegitimate child exposed at the door of the house of its putative father in order to induce him to give her food for herself and her infant, it was held that she was not liable for conviction under this section as the woman's intent was to subject him to human, and not to divine displeasure.[70] However, where, in an election case, the candidate and his agent represented to the persons that he (i.e., the candidate) was Chalanti Vishnu and as such the representative of the Lord Jagannath and if the persons do not vote for him, they would be sinning the God and would also be committing sacrilege against *dharma*, it was held that the representation fell within the scope of this section.[71]

2. Procedure

The offence under this section is non-cognisable, bailable, compoundable by the person against whom the offence is committed, and triable by a magistrate, and may also be tried summarily.

3. Charge

The offence under this section being triable as summons case, the framing of a formal charge is not necessary. Section 251 , CrPC, may be referred to.

4. Proof

In order to establish a charge under this section, prove that:

(a) the object of the accused was to cause a person to do, or omit to do, something;
(b) that person was not legally bound to do or omit to do that thing;
(c) the accused induced, or attempt to induce, that person to believe that he (or any person in whom he was interested) will become, or will be rendered, the object of divine displeasure;
(d) this would be so by some act of the accused; and
(e) he (*i.e.*, the accused) did so voluntarily.

65 *Empress v Mhadnack* Ratanlal Unrep Cr Cas 376.

66 Re *Doraswami Iyer*AIR 1925 Mad 480, 26 Cr LJ 755 .

67 *Tanumal Udhasing v Emperor* AIR 1944 Sind 203, 46 Cr LJ 149 .

68 *Empress v Sri Vidya Sankara* (1883) ILR 6 Mad 381, 1 Weir 595 .

69 Re *Paul Decruz and JR Biber*(1885) ILR 8 Mad 140, 2 Weir 249.

70 *Empress v Gangi* 1886 AWN 63 .

71 *Raj Deb v Gangadhar Mohapatra* AIR 1964 Ori 1, (1964) 1 Cr LJ 57 .

Indian Penal Code (Act XLV of 1860)

Chapter XXII

Of Criminal Intimidation Insult and Annoyance

S. 509.

Word, gesture or act intended to insult the modesty of a woman.--

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, [72][shall be punished with simple imprisonment for a term which may extend to three years, and also with fine].4194

Comments

1. Scope

The IPC has made various provisions for the protection of women at different stages. The outraging of modesty, by assault or use of criminal force, on any woman is made punishable under s 354, IPC . In case of an unsuccessful attempt at rape, the offence is one under s 376 read with s 511, IPC . In the case of a completed offence of rape, the offence is punishable under s 376 . In case of annoyance caused by obscene acts or words in a public place, the offence is punishable under s 294 . That section, however, applies to men and women both. Intended insult to modesty of a woman is made punishable by this section. Every woman is presumed to be modest until the contrary is clearly proved. And even woman, immodest by profession or character, might still be insulted by the grossness of the offender's conduct or by reason of the publicity of the place where they are at the relevant time. This section makes intention to insult the modesty of a woman an essential ingredient of the offence. However, the question of an intention to insult the modesty of a woman would depend upon the terms of familiarity between the parties. Where the accused, in the middle of the night, entered the room of the complainant, a woman with whom he had previous acquaintance and who used to speak to strangers and give *paansupari* to visitors, it was held that the offence under this section was not committed.[73] Where, however, the accused entered into a woman's apartment and tried to catch hold of her and to persuade her by removing her garments, it was held that it constituted an offence under this section.[74] Likewise, where the accused sent, by post, to the complainant, an English nurse, a letter containing indecent overtures and containing the most lewd and filthy suggestions, it was held that an inference arises that the accused intended to insult the modesty of the complainant, who was an unmarried woman, who had no previous acquaintance with the accused, and who was not of a loose character, and he was, therefore, held guilty under this section.[75]

To constitute an offence under this section, there must be some individual woman whose modesty

has been outraged. It is, of course, not necessary that individual woman or women should make a complaint. However, there must be an allegation that the action complained of has insulted the modesty of some particular woman or women, and not merely of any class or section of women, however small.[76] A4195 reading of the title of s 509, IPC itself shows that the section deals with an offence involving word, gesture or act which are intended to insult modesty of a woman. The offence under the said section will be attracted if a person intending to insult the modesty of a woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman.[77]

The accused petitioner, Vicar of the Church, in public asked the complainant 'Daisy, why are you peeping, why are you standing here? For peeping, nothing is being done here'. Held, the words uttered by the accused did not intrude upon the privacy of the complainant. Simply because the complainant thinks that the words uttered by the accused carried some other meaning, it cannot be said that the accused be put to trial. The proceedings initiated for offence under s 509, IPC were quashed.[78]

2. Legislative Changes

The words 'Shall be punished with simple imprisonment for a term which may extend to three years, and also with fine' in the section have been substituted by the Criminal Law (Amendment) Act 2013 (13 of 2013), s 10 (wef 3-02-2013) for the words 'shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both'.

3. Legislative Object

The legislature found that a woman must be protected not only from physical aggressions made in the course of outraging her modesty, but she should also be shielded from various other acts which do not involve even a touch. Legislature was quite aware that a woman's modesty can be insulted or outraged in various ways. A mere word, a wink, a touch or even a look would suffice to insult the modesty of a woman. Physical advances may not be necessary in all cases. Everything depends on the intention of the mischief maker and the manner in which he conveys his intentions. It is evident that legislature intended that any aggression into a woman's modesty whether by any word, deed, touch or look needs to be curbed and deterred. That is why even a verbal attack on a woman, a gesture and other acts stated in s 509, IPC were brought under the said section. It is clear from a reading of s 509, IPC that by introducing the said provision, legislature intended that any sort of aggression into a woman's modesty whether by any word, deed or act should be deterred, as evident from the title to the section itself. Thus, the acts which are done intending to insult the modesty of a woman which may not necessarily involve even any physical advances are also brought within the sweep of a separate provision *viz.*, s 509, IPC .[79]

4. Title of Section 509

A reading of the title of s 509, IPC itself shows that the section deals with an offence involving word, gesture or act which are intended to insult modesty of a woman. The offence under the said section will be attracted if a person intending to insult the4196 modesty of a woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman.[80]

The appellant accused, Director General of Police of the State of Punjab, in a dinner hosted by the Secretary to the Government of Punjab, gently slapped on the posterior of the prosecutrix in the presence of some guests. This act on the part of the accused did constitute the ingredient of s 354, IPC . The accused used criminal force with intent to outrage the modesty of the complainant and he knew fully well that gently slapping on the posterior of the prosecutrix in the presence of other guests would embarrass her. Knowledge can be attributed to the accused that he was fully aware that touching the body of the prosecutrix at that place and time would amount to outraging her modesty.

He was convicted under ss 354 and 509, IPC . However, he was granted probation and directed to pay Rs. 2 lacs as compensation to the prosecutrix.[81]

5. 'Gesture'

The word 'gesture' is ordinarily used to refer to making of body signs implying movement of the limbs etc. It is used to refer to body-language. But, writing of letters does not involve any body language and hence it may apparently appear that such act will not amount to 'making gesture' as referred to in s 509, IPC . But, what does the expression 'gesture' actually mean? Lord Denning, an English Judge cautioned in *Seaford Court Estate's* case[82] that 'the English language is not an instrument of mathematical precision'. To an Indian judge, English is even more intrinsic, being a foreign language. The meaning of the word 'gesture' as per the *Concise Oxford Dictionary*[83]is, 'a significant movement of a limb or the body; the use of such movements especially to convey feeling or as a rhetorical device; an act to evoke a response or convey intention'. It is thus clear from the above discussion that the word 'gesture' refers not merely to body signs. Though the word 'gesture' is ordinarily used to mean movement of the limbs or body to convey a person's feelings, it can also connote an act done by a person to convey his intentions. According to the dictionary meaning, an act done by a person to express his attitude or intentions also is a 'gesture'. A person can express his attitude or convey his intentions in a number of ways. For example, by speaking, giving, looking, writing etc. In that sense of the word, a person can make a gesture by doing an act without involving any body signs. Any act done by a person to express his attitude or convey his intentions is a gesture.[84]

6. 'Making a Gesture'

The writing of letter' to a woman, intending to insult her modesty can be construed as 'making a gesture' under s 509, IPC .[85] Also, going by the dictionary meaning, it4197 has to be concluded that writing of a letter can be treated as 'making a gesture' since by such act, the writer expresses his attitude or conveys his intentions.[86]

7. Section 509 and Section 376 Read with Section 511 and Section 376 --Relative Scope

When a person makes entry into an apartment occupied by a lady, the first and foremost rational inference that can be drawn in the circumstances must be that it was with the intention of committing some offence in relation to that lady. If it is only making gestures and uttering words requesting her to agree to commit some sexual offence, or remove any garment, then, in that event, it would amount only to an offence under s 509, IPC, but if he proceeds further and thereafter forcibly tries to commit rape, then the offences committed will be under s 376 read with s 511, IPC, and the last step would be when he actually succeeds in committing rape, then it would be an offence under s 376, IPC .[87]

8. Procedure

The offence under this section is cognisable, bailable, compoundable, with the permission of the court before which the prosecution for such offence is pending, by the woman whom it was intended to insult or whose privacy was intruded upon, and triable by a magistrate, and may also be tried summarily.

9. Quashing of Criminal Proceedings

Offence relating to the modesty of a woman not being trivial, s 95, IPC, is not attracted. If the allegations in the FIR make out offences under ss 354 and 509, IPC, quashing of the FIR and complaint by the High Court is illegal in the absence of the finding that the allegation made in FIR were abused and inherently improbable.[88]

10. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. A charge under s 509, IPC does not call for interference in revision if it is founded on *primafacie* materials to show unnatural conducts of the accused, who allegedly by word, gesture and act intended to insult the modesty of the deceased, his daughter-in-law.[89]

11. Proof

In order to establish charge under this section, prove that:

(a) the accused uttered any word, or made a sound or gesture, or exhibited any object to a woman intending that it may be heard or seen by that woman, or he intruded upon the privacy of the woman; and
(b) he did so with the intention to insult the modesty of that woman.

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If there is a serious difference between the evidence of the complainant and her husband regarding the words used by the accused to insult the modesty of a Scheduled Caste woman, the accused is entitled to the benefit of doubt.[90]

12. Proof--Intention to Insult the Modesty of a Woman

The intention to insult the modesty of a woman is the essential ingredient of the offence. Similarly, if the court, on a consideration, of the evidence on record in its entirety and the overall facts and circumstances of the case disclosed therefrom, arrives at the finding that the accused had the aforesaid intention and for that he said something or uttered some words, it can justly hold the accused guilty under this section, no matter the exact words uttered by the accused are not placed on the record.[91]

Of course, the prosecution should make an honest effort to place, before the court, all materials showing the nature of the words complained of. Better it is, if the exact words are placed on record so that it may be easier for the court to assess therefrom whether the requisite ingredients of this offence are satisfied. However, this rule of fair practice should not be carried so far as to say that on the mere absence of the precise abusive or insulting words on records, even though the said omission is accidental or unintentional, the accused is entitled to an acquittal. If there is convincing evidence on record that actually obscene and slanderous words were uttered with the intention of insulting the modesty of a woman, then it would be improper, nay illegal, to reject such convincing evidence, and/or not to act on the same merely because the precise abusive words uttered by the accused are not placed before the court.[92]

13. Possibility of Two Versions--Effect

If two versions are possible, the one supporting the accused has to be preferred.[93]

14. Acquittal

If the accused has entered the house of the victim on her invitation and there has been an exchange of letters between the two, it could not be said that the accused trespassed and criminally intimidated the victim, and so his conviction under ss 451, 506, 509, IPC is improper.[94]

15. Probation

An accused convicted under ss 354 and 509, IPC, was extended the benefit of probation besides payment of Rs 2 lakh as compensation to the victim.[95]4199

16. Alteration of Conviction From Section 376 read with Section 511 to One under Section 509

Intruding upon the privacy of a woman and making indecent gestures would be a common ingredient both of s 509 and of s 376 ; and s 509, IPC, would be a minor offence compared to the offence under s 376 . Hence, the conviction of the accused under s 376 read with s 511, IPC, can be converted to one under s 509, IPC .[1]

17. Alteration of Conviction from Section 376 to one under Section 509

Commentary under the same heading in s 376, vol III, may be referred to.

72 Substituted for the words "shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both" by the Criminal Law (Amendment) Act, 2013 (13 of 2013), s 10 (wef 3-2-2013).

73 *Emperor v Phiaz Mohamad* 5 Bom LR 502 .

74 *Bankey v State* (1961) 1 Cr LJ 330, AIR 1961 All 131 ; *Thomas Hopper v Emperor* 6 PR 1892 (to constitute an intrusion upon the privacy of a woman, the intruder must intend to insult the modesty of that woman); *Balmakand Ram v Ghansam Ram* (1895) ILR 22 Cal 390 ; *Premanundo Shaha v Brindahun Chung* (1895) ILR 22 Cal 994 .

75 *Tarak Das Gupta v Emperor* AIR 1926 Bom 159, 27 Cr LJ 455 .

76 *Khair Mahomed v Emperor* 26 Cr LJ 904, AIR 1925 Sind 271 .

77 *MM Haries v State of Kerala* 2005 Cr LJ 3314 (Ker) .

78 *Mathew Pu limoottil Epicospa v State of Kerala* 2014 Cr LJ 2394, 2014 (2) KLT 1, 2014 (2) KLJ 175 (Ker) .

79 *Lakhan v State of Maharashtra* 2003 Cr LJ 4424 (Bom) .

80 *Lakhan v State of Maharashtra* 2003 Cr LJ 4424 (Bom) .

81 *Kanwar Pal S Gill v State (Admn UT Chandigarh)* 2005 Cr LJ 3443 (SC), 2005 SC (Cri) 1420, AIR 2005 SC 3104 .

82 *Seaford Court Estate's* case [1949] 2 All ER 155.

83 *Concise Oxford Dictionary*, eighth edn.

84 *MM Haries v State of Kerala* 2005 Cr LJ 3314 (Ker) .

85 *Lakhan v State of Maharashtra* 2003 Cr LJ 4424 (Bom) .

86 *MM Haries v State of Kerala* 2005 Cr LJ 3314 (Ker) .

87 *Bankey v State* 1961 Cr LJ 330, AIR 1961 All 131 .

88 *Rupan Deal Bajaj and Anor v Kanwar Pal Singh Gill and Anor* 1996 Cr LJ 387 (SC) . For further commentary, see under same heading in s 406, s 420 *ante*.

89 *Omprakash Agrawal v State of Madhya Pradesh* 2003 Cr LJ 4138 (MP) . See s 251, CrPC 1973.

90 *Haridas v State of Maharashtra* 1997 Cr LJ 122 (Bom) .

91 *Sohanlal Nayak v State of Orissa* 1973 Cut LT 1037 .

92 *Ibid*.

93 *Ashok Kumar Nayyar v State* 2007 Cr LJ 3065 (Del) .

94 *D Venkatta Subba Rao and Ors etc v State* 2002 Cr LJ NOC 217 (AP), (2001) 2 Andh LT (Cri) 260 .

95 *Kanwar Pal Singh Gill v State (Admn of Union Territory, Chandigarh* (1998) 4 RCR 664 (P&H) .

1 *Bankey v State* AIR 1961 All 131, (1961) 1 Cr LJ 330 .

Indian Penal Code (Act XLV of 1860)

Chapter XXII

Of Criminal Intimidation Insult and Annoyance

S. 510.

Misconduct in public by a drunken person.--

Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both.

Comments

1. Scope

This section is intended to apply to cases in which annoyance is caused, in the state of intoxication, to any person. Intoxication and causing annoyance, in that state, to any person are the only elements in the offence. No *mensrea* is necessary. If, however, intoxication is involuntary and without the accused's knowledge or against his will, the accused may not be held guilty, under this section, for his annoying conduct because there would be no reason to inflict punishment under this section when the advantage of s 85, IPC, can be claimed even in respect of the worst type of offences. In fact, any act falling under that section would be no offence at all, that section being a general exception applying to all offences of any kind.

The section applies not only to public places, but also to private places in which the accused would be deemed to commit a trespass. This is not confined to cases of criminal trespass. If a person has no right to visit a place as of right, he would be guilty if he causes annoyance, in the state of intoxication, at such place, to any person. Merely being intoxicated would, of course, not amount to an offence. It is mainly the annoyance which brings the case under this section.

2. Section 510 , IPC and Section 34 of the Police Act (5 of 1861)

The difference between the two sections, namely, s 34 of the Police Act and s 510 of the IPC is that whereas under s 34 of the Police Act the fine can be extended to Rs 50 and imprisonment for eight days, under the latter section the fine can be only up to Rs 10 and the maximum imprisonment can be of 24 hours. Then s 34 of the Police Act categorically lays down that the police can arrest a person *challaned* under the4200 section without warrant whereas in the case of an offence under s 510, IPC there is no such power.[2]

3. Procedure

The offence under this section is non-cognisable, bailable, non-compoundable, and triable by a magistrate and may also be tried summarily.

4. Charge

The offence under this section being triable as a summons case, the framing of a formal charge is not necessary. Section 251CrPC, may be referred to.

5. Proof

In order to establish a charge under this section, prove that:

(a) the accused was in a state of intoxication;
(b) he appeared in a public place or committed trespass; and
(c) he caused annoyance there to any person.42014202

2 *Sh Padam Dev and Anor v State of Himachal Pradesh and Ors* 1989 Cr LJ 383 (HP) (DB) .

Indian Penal Code (Act XLV of 1860)

Chapter XXIII

Of Attempts to Commit Offences

TOPICAL INTRODUCTION

In every crime, there is first, an intention to commit it, secondly preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section 511 , IPC is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.[1]A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word 'attempt' is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of s 511, IPC require. An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission.[2]The intention or *mens rea* alone is not punishable, but in some

cases the second stage of action approaching crime, *viz.*, 'preparation' is made punishable.[3] The third stage towards commission of offence is dealt with here.Section 511, IPC is the solitary provision included in the last chapter of the IPC under the title 'Of Attempts to Commit Offences'. It makes attempts to commit an offence punishable. The offence attempted should be one punishable by the Code4203 with imprisonment. The conditions stipulated in the provision for completion of the said offence are:

(a) The offender should have done some act towards commission of the main offence.
(b) Such an attempt is not expressly covered as a penal provision elsewhere in the Code.[4]

Besides s 511 there are several express provisions in IPC dealing with attempt to commit some specific offences.[5]

1 *Aman Kumar v State of Haryana* 2004 Cr LJ 1399 (SC), AIR 2004 SC 1497, 2004 (2) Scale 356, (2004) 4 SCC 379, [2004] 2 SCR 237 .

2 *Aman Kumar v State of Haryana* 2004 Cr LJ 1399 (SC), AIR 2004 SC 1497, 2004 (2) Scale 356, (2004) 4 SCC 379, [2004] 2 SCR 237 .

3 Refer to ss 122, 351 and 399, IPC .

4 *Satvir Singh & ors v State of Punjab & anor* 2001 Cr LJ 4625 (SC) .

5 See commentary under the heading 'Express provisions of IPC dealing with attempts' in s 511 .

Indian Penal Code (Act XLV of 1860)

Chapter XXIII

Of Attempts to Commit Offences

S. 511.

Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.--

Whoever attempts to commit an offence punishable by this Code with [6][imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with [7][imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both.

Illustrations

(a) *A* makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.
(b) *A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Z's* pocket. *A* fails in the attempt in consequence of *Z's* having nothing in his pocket. *A* is guilty under this

section.4204

Comments

1. Scope

This section deals with attempts to commit offences which are punishable with any imprisonment under this Penal Code and in respect of which no express provision has been made, by this Code, for punishment. It means that the section would not cover cases in which the offender has attempted to commit an offence which is not an offence under s 40, IPC . An attempt to commit an offence which is an offence under a local law (*i.e.*, an offence under the Bengal Food Adulteration Act), but which is not an offence under the Indian Penal Code, does not fall within the ambit of this section.[8]

The 'attempt' on the part of the accused is *sine qua non* for the offence under s 511, IPC .[9] The very policy underlying s 511, IPC seems to be for providing it as a residuary provision.[10]

Every offence, before it reaches its peak, passes through four stages, *i.e.*:

(a) the stage of possessing the intention to commit an offence,
(b) the stage of preparation to commit an offence,
(c) the stage of an attempt to commit an offence, and
(d) if the third stage is successful, the final stage of the commission of the offence itself.[11] Intention alone, or intention followed by preparation, is not sufficient to constitute an attempt to commit an offence.[12]

A person commits the offence of attempt to commit a particular offence when

(a) he intends to commit that particular offence; and
(b) he, having made preparations and with the intention to commit the offence, does an act towards its commission, such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.[13]

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However, intention, followed by preparation, and further followed by an 'act done towards the commission of the offence' is sufficient.[14]There will be no offence unless there is some act or deed towards the commission of the offence. Besides proving that the accused was actuated by the intention (the *mensrea*) to commit a specific crime, the prosecution has further to prove that the offender's physical conduct reached the point which the law prohibits (the *actus reus*), *i.e.*, there must be proof of something done by the offender, a deed which marks the commission of the particular offence. To constitute an attempt, there must be evidence of some overt act.[15]However, an attempt, once begun and a criminal act done in pursuance of it towards the commission of the act attempted does not cease to be a criminal attempt because the person, committing the offence, does repent before the attempt is completed,[16]or prevents its completion by doing some other act in pursuance of a changed intention.[17] If an accused is, at one stage, guilty of an attempt to cheat, nothing, that transpires, can subsequently affect his guilt.[18]

2. Conditions Stipulated

Section 511, IPC is the solitary provision included in the last chapter of the IPC under the title 'Of Attempts to Commit Offences'. It makes the attempt to commit an offence punishable. The offence attempted should be one punishable by the Code with imprisonment. The conditions stipulated in the provision for completion of the said offence are:

(a) The offender should have done some act towards commission of the main offence.
(b) Such an attempt is not expressly covered as a penal provision elsewhere in the Code.[19]

3. Policy Underlying Section 511

The very policy underlying s 511 seems to be providing it as a residuary provision. The corollary, therefore, is that if the action of the accused attracts and is covered by any of the offences prescribed in the Penal Code, he cannot be convicted under s 511 on account of the acts alleged against him. The act of the accused in asking the victim-woman to go and commit suicide had driven her to proceed to the railway track and end her life, the act being expressly made punishable under s 498A, IPC, the accused cannot be convicted under s 511 read with s 304B, IPC .[20]

4. Section 511 and Section 307 --Distinction

See commentary under same heading in s 307, Vol 3.4206

5. Stages of Crime

The act of an accused has to pass through four stages before a crime is committed. These stages are intention to commit crime, preparation to commit crime, attempt to commit crime and when the attempt is successful the crime is committed. The attempt is therefore the third stage of the crime. The attempt begins where preparation for crime ends but the crime is yet to be committed. Broadly speaking all crimes which consists of commission of affirmative acts are preceded over by some overt act or conduct which may be divided into three stages.

The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be 'criminal' need not to be the penultimate act towards the commission of the offence. It is sufficient if such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence.[21]

A culprit first intends to commit the offence, then makes preparation for committing the offence and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if he fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment a culprit commences to do an act with the necessary intention, he commences his attempt to commit the offence.[22]

6. Intention

See the relevant headings of ss 124 and 81, Vol 1.

7. Preparation

See commentary of s 399, *ante*.

8. Attempt--Definition

The word 'attempt' is not itself defined, and must therefore, be taken in its ordinary meaning. This is exactly what the provisions of s 511 require.[23] An attempt to define 'attempt' has to be a frustrating exercise. Nonetheless a search to discover the characteristics of an attempt, if not an apt definition of attempt, has to be made.

In England, Parke B described the characteristics of an 'attempt' in *Reg v Eagleton* ,[24] as follows:

> the mere intention to commit a misdemeanor is not criminal. Some act is required and we do not think that all acts towards committing a misdemeanor indictable. Acts remotely leading towards the commission of the offence, are4207 not to be considered as attempts to commit but acts immediately connected with it are...

The dictum of Parice B is considered as locus classics on the subject and the test of 'proximity' suggested by it has been accepted and applied by English courts, though with occasional but audible murmur about the difficulty in determining whether an act is immediate or remote, vide, Lord Goddard CJ, in *Gardner v Akeroyd* :[25]

> ... it is sometimes difficult to determine whether an act is immediately or remotely connected with the crime of which it is alleged to be an attempt.

Parke B, himself appeared to have thought that the possible act before the achievement of the end constituted the attempt. This was indicated by him in the very case of *Reg v Eagleton* where he further observed:

> ...and if, in this case... any further step on the part of the defendant had been necessary to obtain payment... we should have thought that the obtaining credit... would not have been sufficiently proximate to the obtaining the money. However, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself towards the payment of the money and therefore it ought to be considered as an attempt.

As general principle the test of the last possible act before the achievement of the end would be entirely unacceptable. If that principle be correct, a person who has cocked his gun at another and is about to pull the trigger but is prevented from doing so by the intervention of some one or something cannot be convicted of attempt to murder.[26] In *Stephen's Digest of Criminal Law*,[27] 'attempt' is defined thus:

> An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts, which could constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case. An act done with intent to commit a crime, the commission of which in the manner proposed was in fact, impossible, is an attempt to commit that crime. The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself.

Another attempt at definition was made by Professor Turner in (1934) 5 Cambridge Law Journal, at p

230, and this was substantially reproduced in *Archbold's Criminal Pleading, Evidence and Practice*, 36th edn. Archbold's reproduction was quoted with approval in *Davey v Lee* and was as follows:

> ...the *actus reus* necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of a specific crime which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime.

The Supreme Court held that it was not noticed in Archbold's (36th edn) nor was it brought to the notice of the divisional court which decided *Davey v Lee.* Prof Turner was himself not satisfied with the definition propounded by him and felt compelled to modify it as he thought that to require that the act could not reasonably be4208 regarded as having any other purpose than the commission of the specific crime went too far and it should be sufficient to show *primafacie* the offender's intention to commit the crime which is charged with attempting.[28] Editing 12th Edition of *Russell on Crime* and 18th Edition of *Kenny's Outlines of Criminal Law*, Professor Turner explained his modified definition as follows:

> It is therefore suggested that practical test for the *actusreus* in attempt is that the prosecution must prove that the steps taken by the accused must have reached the point when they themselves clearly indicate what was the end towards which they were directed. In other words, the steps taken must themselves be sufficient to show, *primafacie*, the offender's intention to commit the crime which he is charged with attempting. That there may be abundant other evidence to establish his *mens rea* (such as a confession) is irrelevant to the question of whether he had done enough to constitute the *actus reus*.

The Supreme Court was unable to see any justification for excluding evidence aliened on the question of *mens rea* in considering what constitutes the *actusreus*. That would be placing the *actus reus* in too narrow a pigeon-hole.[29] Well then, what is an 'attempt'? Kenny in his *Outlines of Criminal Law* defined 'attempt' to commit a crime as the 'last proximate act which a person does towards the commission of an offence the consummation of the offence being hindered by circumstances beyond his control.' This definition is too narrow. What constitutes an 'attempt' is a mixed question of law and fact, depending largely on the circumstances of the particular case. 'Attempt' defies a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some overt or covert conduct which may be divided into three stages.[30] In India, while attempts to commit certain specified offences have themselves been made specific offences, (*e.g.*, ss 307, 308, IPC*etc*.) an attempt to commit an offence punishable under the Penal Code, generally, is dealt with under s 511, IPC . However, the expression 'attempt' has not been defined anywhere.[31]

9. Attempt--Its Description--Legislative Intent

An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummation, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in s 511, IPC clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.[32]4209

10. 'Attempts'--British and Indian Position--Settled Position

Under the English law, an act amounts to an attempt only when it reaches a stage when it must end in the commission of the offence if not interrupted, *i.e.*, when it has reached the penultimate stage of the

commission of the offence. This principle of the English law was applied in some early cases, but it was held in other cases that it was not applicable to cases under this section, *i.e.*, s 511, IPC .

The controversy on this point is clearly brought out in two cases. In *Empress v Riasat Ali* ,[33] the accused gave orders to a press to print one hundred receipt forms similar to those which were formerly used by a coal company. He corrected one proof of those forms and was suggesting further correction in a second proof to assimilate them to the form then used by the company. It was held that he would not be guilty of an attempt at forgery till he had written at least a word in the name of the company upon the printed form because 'the actual transaction would have commenced which would have ended in the crime of forgery, if not interrupted'. This case was followed later in other cases.[34]

The contrary view was expressed in an Allahabad case,[35] in which the Calcutta view was dissented from and it was observed:

> The question is not one of mere proximity in time or place. Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point.[36] The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practiced upon him may be a very considerable interval of time. There must be the interposition of inquiries and other acts upon his part. The act, whereby those preparations may be brought to bear upon the mind, may be several in point of number, and yet the first act, after preparation completed will, if criminal in itself, be, beyond all doubt, equally an attempt with the ninety and ninth act in the series.[37]

In the same case, Blair J observed:

> It seems to me that the section uses the word 'attempt' in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts, done towards the commission of the offence, that is, conducive to its commission, is itself punishable and though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act, which would form the final part of an attempt in the large sense, is the only act punishable under the section. It says expressly that whosoever in such attempt, obviously using the word in the large sense, does any act, *etc*, shall be punishable. The term 'any act' excludes the notion that the final act, short of actual commission, is alone punishable, and the notion that any of the other acts would be without the range of this section is probably derived from the rulings in the English cases.

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This case[38] was followed in other cases.[39] In some cases, however, even though the principle in the Allahabad case[40] was followed, it was held that it must, in every case, be a question depending upon the circumstances whether a particular act, done with the requisite intention towards the commission of an offence, is sufficiently proximate to its commission to constitute an attempt or is so remote as merely to constitute preparation for its commission.[41]

The question has now been settled by the Supreme Court. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence.[42] The Supreme Court summarised the position thus:

> A person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that

> particular offence, and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence, but must be an act during the course of committing that offence.[43]

According to this statement of the law laid down by the Supreme Court, a person would be guilty of attempt to commit an offence, if the commission of the offence is not possible, even if the accused is not interrupted in his act.

11. Attempt, how Made?

A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if he fails due to reasons beyond his control, he is said to have attempted to commit the offence.[44]

12. When Act Accomplished is not possible or is not Crime--Position of its Attempt

An act, done with intent to commit a crime, the commission of which in the manner proposed is, in fact, impossible, is an attempt to commit that crime. The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself.[45] The position would, however, be different in the case of attempting to do that which, if achieved, would not constitute a crime at all. Steps on the way to the commission of what4211 would be a crime, if the acts were completed, may amount to attempt to commit the crime, to which, unless interrupted, they would have led; but steps on way to the doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime.[46] It is possible to attempt to commit an impossible theft because theft is itself an offence under the Indian Penal Code . However, no criminal liability can be incurred under the Penal Code by an attempt to do an act, which, if done, would not be an offence under the Indian Penal Code .[47]

13. 'Attempt' Distinguished from 'Preparation'

Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards commission after the preparation has been made.[48] There is a greater degree of determination in an 'attempt' as compared with a 'preparation'.[49]Mere intention, not followed by any act, cannot constitute an offence, and an indirect preparation, which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence, or an attempt or abatement of the same.[50]

There is no sharp or clear cut distinction between the two. The one shades into the other and the dividing line can only be decided with reference to the facts of each particular case.[51] In *Re R Maccrea*,[52] it was observed that it is very difficult to frame a satisfactory and exhaustive definition which may lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. In fact, definitions in such matters are dangerous things, and the only safe way of deciding, in any particular case, whether an 'attempt' to commit a crime has been made or not is to consider the facts of that case and to decide in accordance with the dictates of commonsense.[53]The test for determining whether an act constitutes an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless.[54] The Supreme Court, in an earlier case, held that there is a thin line between the preparation for, and an attempt to commit, an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his4212 control, he is said to have attempted to commit the offence.[55] It was further pointed out in the last cited case that the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it.[56] Commentary under the

same heading in s 122, Vol 1 and s 307, Vol 3 may be referred to.

14. Intention, Preparation and Attempt--Relative Scope and Distinction

It is true that mere intention to commit an offence is not a crime unless such intention is followed by an act. Mere intention is not suggestive of attempt.[57] An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing or effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under s 122 (waging war against the Government of India) and s 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.[58]

15. Beginning of Attempt

Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence.[59]

16. 'Offence'

See commentary under s 40, vol 1.

17. 'Any Act'

The expression 'any act' excludes the final notion; the final act, short of actual commission, is alone punishable. The expression does not mean that the last act,4213 which would form the final part of an attempt in the large sense, is the only act punishable under this section.[60]

18. 'Does any Act Towards the Commission of the Offence'

A person commits the offence of attempt to commit a particular offence when:

(a) he intends to commit that particular offence; and
(b) he, having made preparation and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.[61]

In order to constitute 'an attempt' firstly, there must be an intention to commit a particular offence, secondly, some act must have been done which would necessarily have to be done towards the commission of the offence, and, thirdly, such act must be proximate to the intended result. The measure of proximity is not in relation to time and action but in relation to intention. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation and intention, as distinguished from a mere desire or object, to commit the particular offence though the act by itself may be merely suggestive or indicative of such intention, but that it must be, *i.e.*, it must be indicative or suggestive of the intention.[62]

Therefore, the conclusion can conveniently be drawn, when a person intends to commit a particular offence and then conducts himself in such a manner which clearly indicates his desire to translate that intentional action and in pursuance of such an intention if he does something which may help him to accomplish that desire, then it can safely be held that he committed an offence of attempt to commit a particular offence. It is not necessary that the act which falls under the definition of an attempt should in all circumstances be a penultimate act towards the commission of that offence.[63]

19. 'Where no Express Provision is made by this Code'

Section 511, IPC is attracted when there is a no express provision made by the Penal Code for punishment of attempt to commit an offence. Therefore, when attempt to commit the offence of murder punishable under s 302, IPC or attempt to commit culpable homicide punishable under s 304, IPC is made punishable expressly under ss 307 and 308, IPC, respectively, the recourse to s 511 read with s 302 or s 304, IPC, cannot be taken.

20. Express Provisions of the Indian Penal Code Dealing with Attempts

The following are the express provision of the Penal Code dealing with attempts to commit offence:

(a) section 121 --attempt to wage war against the Government of India;4214
(b) section 124 --attempts wrongfully to restrain or overawe the President or Governor *etc*., to refrain them from exercising in any manner any of the lawful process;
(c) section 125 --attempts to wage war against any Asiatic power in alliance or at peace with the Government of India;
(d) section 130 --attempts to rescue state prisoner or prisoners of war;
(e) section 153A --attempts to promote disharmony or feeling of enmity *etc* between different religious groups or castes *etc*;
(f) section 196 --attempts to use as true or genuine evidence known to be false or fabricated;
(g) section 198 --attempts to use any certificate as true knowing the same to be false;
(h) section 200 --attempts to use any declaration knowing the same to be false;
(i) section 213 --attempts to obtain any gratification to screen an offender from punishment;
(j) section 239 --attempts to induce any person to receive any counterfeit coin;
(k) section 240 --attempt to induce any person to receive a counterfeit Indian coin;
(l) section 241 --attempt to induce any person to receive as genuine a counterfeit coin, which, when first possessed, the deliverer did not know to be counterfeit;
(m) section 307 --attempt to commit murder;
(n) section 308 --attempt to commit culpable homicide;
(o) section 309 --attempt to commit suicide;
(p) section 385 --attempt to put any person in fear of any injury to commit extortion;
(q) section 387 --attempt to put any person in fear of death or grievous hurt to commit extortion;
(r) section 389 --attempt to put any person in fear of any accusation in order to committing of extortion;
(s) section 391 --attempts to commit robbery conjointly by five or more persons;
(t) section 393 --attempt to commit robbery;
(u) section 394 --attempt to commit robbery and voluntarily causing hurt;
(v) section 398 --attempt to commit robbery or dacoity armed with deadly weapon; and
(w) section 460 --attempt to cause death or grievous hurt to any person while committing lurking house-trespass by night or house-breaking by night.

21. Theory of Change of Mind

The time for giving necessary thought to effect change of mind is a consideration which cannot be lost sight of.[64] If the truck loaded with paddy being seized at4215 Samalkha is well inside the Punjab boundary there was no 'export of paddy' within the meaning of para 2(a) of the Punjab Paddy (Export Control) Order, 1959. There was merely a preparation on the part of the accused to commit the offence of export. It was quite possible that the accused might have been warned that they had no licence to carry the paddy and they might have changed their mind at any place between Samalkha Barrier and Delhi-Punjab boundary and not have proceeded further in their journey. The accused, therefore, cannot be convicted for attempt under s 7 of Essential Commodities Act 1945.[65] However, this test propounded by the Supreme Court should be understood with reference to the facts of the case. The offence alleged to be contemplated was so far removed from completion in that case[66] that the offender had ample time and opportunity to change his mind and to proceed no further, his earlier acts being completely harmless. The test is propounded with reference to particular facts of a case and not as a general rule. Otherwise, in every case where an accused is interrupted at the last minute from completing the offence, he may always say that when he was interrupted he was about to change his mind.[67] If the theory of change of mind is pressed to illogical ends, there would hardly be any space for the Penal clause of attempt to cover the distance between preparation and actual commission of the offence.[68] Therefore, where a truck carrying smuggled goods was intercepted at a place in Haryana from where the Punjab border was only 50 yards away, the accused was prosecuted for attempting to smuggle bajra from Haryana to Punjab, the theory of change of mind was not found applicable.[69]

22. Attempt--Series of Acts

An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this.[70] Whenever the legislature declares a series of acts to constitute a crime, any person who has entered upon that series of acts must from that moment stay his hand, and if he proceeds to the completion of the series of acts, he is guilty of the crime.[71] The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case.[72]

23. Illustrative Cases of Attempt to Commit Offence Classified under Different Heads

The question as to whether certain acts amount to an attempt to commit an offence or they amount only to preparation or some other offence has been discussed, in a large number of cases, in respect of different offences. Some of those cases are separately discussed below.4216

(a) Cheating

In *Sudhir Kumar Mukherjee v State of West Bengal* ,[73] the appellant was in the habit of signing chalans of lime stone in a company, without actually receiving the goods, and of getting the same verified by an officer of the company. It was held that this was the most important and crucial step towards cheating. However, when there is no proof that the accused himself forged the cash memo or caused it to be forged by any other person, his conviction under s 420, read with s 511, IPC, is liable to be set aside.[74] Where the accused presented some bills to the government knowing that they contained false representations as regards the number of gallons of linseed oil supplied, it was held that the presentation of each of the bills was an application for the payment of money under false pretense, and as soon as any of such bills was presented, the offence of attempt was committed.[75] Where the accused manufactured spurious trinkets and asked a goldsmith to buy them saying that they were of gold and that they were stolen property, which was also not true,[76] or where the accused sent railway receipts to A to Bombay for 300 bales of cotton, when he had only 200 bales, inducing A to pay the maximum amount which he would have naturally advanced in respect of 300 bales,[77]or where the accused informed the octroi superintendent that there was 16 mounds of sugar in his cart, whereas there was only 6, and by this act he attempted to deceive the superintendent and to induce

him to grant a refund of 16 mounds of sugar instead of 6 mounds of sugar,[78] or where the accused, a nominee under a policy of life insurance, made false claim for the policy amount on the fraudulent misrepresentation, supported by false documents that the insured had died and false claim was put in the course of transmission by post,[79] or where the accused, having contracted to deliver a certain quantity of good cotton, delivered instead cotton heavily adulterated with rubbish and adulterated in such a manner that the fraud would be likely to escape the usual inspection but an agent, to whom delivery was offered, suspected the character of the goods and declined to accept them,[80] it was held that the offence of attempt at cheating was complete and the accused was guilty under s 420, read with s 511, IPC . In Re *MacCrea*,[81] the letters of administration were granted to one A, which letter of administration recited that a certain lost government promissory note was the property of one H. The accused knew this fact to be false and made use of these letters of administration and, with fraudulent intent, sent them to the Public Debt Office as the foundation for an application for payment of the money. It was observed that the accused not only intended to cheat, but had done an act towards that cheating. In *Rahmat Ali v Emperor* ,[82] the accused sold some silver coins to J and told him that he had in his possession 10,000 silver rupees which he had found buried in the ground. Later on, the accused brought a bag of coins and some coins were delivered while others were still in the bag. All the coins were not silver coins, but contained mixture of lead and zinc. It was held that the offence of attempt to cheat was fully established. In4217*Abhayanand Mishra v State of Bihar* ,[83] the accused applied to a university for permission to appear at the MA Examination representing that he was a graduate and that he had been teaching in a certain school. In support of his application, he attached certain forged certificates. The university authorities accepted the statements and gave permission, and proper admission card for him was dispatched. It was held that the preparation was complete when he had prepared the application for the purpose of submission to the university. The moment he dispatched it, he entered the realm of attempting to commit the offence of 'cheating'. He did succeed in deceiving the university and inducing it to issue the admission card. He just failed to get it and sit for the examination because the university was informed about his being neither a graduate nor a teacher. In *Bashirbhai Mohamedbhai v State of Bombay* ,[84] the accused represented to the complainant that he could duplicate currency notes. The complainant gave two currency-notes of Rs 100 each to the accused. The accused was trapped by the police. It was held that an attempt to commit the offence had actually been made and it could not be said that the accused had only made a preparation. The fact that the complainant had not been taken in and that the accused had failed in their attempt, is irrelevant in considering whether they had committed the offence of attempting to cheat. In *Empress v Dhundi* ,[85] at the Central Octroi Office, the accused made false representations with the object of obtaining a certificate to obtain a refund of octroi duty, but the octroi officers, finding the representations to be untrue, issued no certificate. It was held that the accused had only made preparation for attempt to cheating as he still had a *locus poenitentiae*.

If the accused had made the name-board on his nursing home with questionable educational degrees which he did not possess or if the accused got the prescribed slips printed describing himself as the holder of such degrees, then perhaps, such acts would only have reached the stage of preparation. However, when he released such prescription-slips to others or when he exhibited such name-board for others to read, he crosses the stage of preparation and transgresses into the realm of attempt attracting the offence under s 511 read with s 417, IPC .[86]

(b) Smuggling

In *King v Hari Baisakh* ,[87] the accused was found boarding a train, at Cuttack, with some handloom cloth, the transport of which, without permit beyond the province, was punishable. He had a ticket for Howrah, but the luggage was unbooked. It was held that in the absence of anything to indicate as to where the luggage was being transported, the accused could not be convicted of attempt to transport it beyond the province because it was just possible that he might have unburdened himself of the luggage at a wayside station. In *State v Narain Singh* ,[88] the accused carried cart-load4218 of jwar and wheat without permit towards border of the state and was stopped by authorities on the road at two furlongs from the border. It was held that in the absence of any evidence to show the intention of the accused to export the wheat and jwar, they could not be held guilty of the offence of attempt to

export. In *Malkiat Singh v State of Punjab* ,[89] truck, carrying paddy from Punjab side to Delhi, was stopped at a distance of 32 miles from Delhi and the Delhi-Punjab border was, at that time, at a distance of 18 miles from Delhi. The export of paddy outside Punjab without a permit was prohibited at that time. It was held that there was no export and there was only a preparation, and not an attempt because it was quite possible that the accused might have been warned that they had no licence to carry the paddy and, on such warning, they might have changed their mind at any place between the place where the truck was stopped at the Delhi-Punjab border. In *State v Haricharan Rakshit* ,[90] the accused was travelling in the Puri-Howrah Express, with new cloth which was in excess of the permitted quantity for export to any place outside Orissa. It was held that the only reasonable inference that could be drawn was that he intended to take those articles also with him to Howrah and, therefore, he was guilty of attempt to transport cloth in contravention of the notification in question. In *Vaikuntham Jaganadham v State of Orissa* ,[91] the accused, a merchant of Salur in Madras Presidency loaded some bags of rice in a lorry in Orissa State and himself sat in it and, while it was proceeding towards Salur, it was stopped about 28 miles away from Madras border by the police and the rice was seized as transport outside Orissa was prohibited. It was held that there was a clear case of attempt to transport rice in question without a proper permit. The mere possibility, that before the lorry crossed Orissa border the accused might have changed his mind and thrown away the rice somewhere in Orissa, would not suffice to indicate that the act complained of was still in a preparatory stage, and had not ripened into an attempt. In *State of Uttar Pradesh v Ram Chandra* ,[92] the accused was transporting wheat by ferry boat from one block to another across the river and was stopped midstream. He was prosecuted for contravention of cl 3 of the Uttar Pradesh Wheat (Restriction on Movement) Order 1949. It was held that the act of the accused amounted to an attempt to transport the grain.

In *State of Maharashtra v Mohd Yakub & ors* ,[93] silver was transported in jeep and truck and the two vehicles halted near a bridge at a creek. Some small and heavy bundles were removed from the truck and kept on the ground. The customs officers surrounded them. At the same time, the sound of the engine of the mechanised sea-craft from the side of the creek was heard by the officers. There were a number of silver ingots lying under saw-dust bags in the truck. The Apex Court held that the accused had committed the offence of attempting to export silver out of India by sea in contravention of the provisions of the Customs Act and Foreign Exchange Regulation Act.4219

(c) Forgery

Where the accused, intending to procure a forged document, purporting to be executed by one *C* procured the attendance of a writer, purchased the stamp paper, caused another person to represent himself to the stamp vendor as *C* and the stamp vendor made an endorsement on the stamp, it was held that the accused had not gone beyond the stage of preparation.[94] To prepare, with the aid of others, a copy of an intended false document, to buy a stamped paper for the purpose of writing such false document, and to ask for information as to a fact to be inserted in such false document, do not constitute forgery nor an attempt to commit forgery as the law allows a *locus poenitentiae*.[95] Where, for obtaining a temporary appointment, the accused presented a paper, purporting to be a printed reproduction of a certificate from his former employer, which was never given, but it was not found that there was any intention to cause it to be believed that the printed paper was made by the authority, express or implied, of the person giving the certificate, it was held that the reproduction of the certificate did not constitute forgery.[96] On the other hand, it has been held in other cases that the acts amounted to forgery or an attempt at forgery. In *Empress v Kalyan Singh* ,[97] one *A*, calling himself *B*, accompanied by a man *C*, went to a stamp-vendor and purchased a stamp from him in the name of *B*. The two men then went to a petition-writer whom they asked to write for them a bond for Rs 50 payable by *B* to *C*. The petition-writer commenced to write the bond, but, his suspicion being aroused, did not finish it. It was held that *C* was rightly convicted of an attempt to commit the offence defined in s 467, IPC, and *A* of abetment of the said attempt. Where a forged document was filed by the accused, in a court, to support his plea of payment, it was held that the accused had done everything that was necessary to enable him to tender the document in evidence at the trial and, therefore, his prosecution had been rightly ordered under s 471 read with s 511, IPC, even though the

document had not been actually tendered in evidence.[98] Where the accused instigated another person to personate *C* and to purchase, in *C's* name, certain stamped paper, in consequence of which the vendor of the stamped paper endorsed *C's* name on such paper as the purchaser of it and the accused did so with the intention that such endorsement might be used against *C* in a judicial proceeding, it was held that the offence of fabricating false evidence was complete and that *M* was properly convicted of abetting the commission of such offence rather than an attempt to commit it.[99]

(d) Illegal gratification

To ask for a bribe is an attempt to obtain one, and a bribe may be asked for as effectual in implicit as in explicit terms. Where *B*, who was employed as a clerk in the Pension Department, in an interview with *A*, who was an applicant for a pension, after referring to his own influence in that department and instancing two cases in which by that influence increased pensions had been obtained, proceeded to intimate that anything might be effected by 'kar-rawai', and, on the overture being rejected,4220 concluded by declaring that *A* would repent the rejection of it, it was held that the offence of attempting to obtain a bribe was consummated. The mere fact, that the accused might have foregone his intention, would not make it unconsummated.[1] The demand of some money by a civil court peon for serving summons on witness as identifier would be an attempt at obtaining illegal gratification.[2] When once a proposal has been made for the payment of an illegal gratification, whether it is completed by an agreement or not, the offence of an attempt to commit an offence is complete.[3] In *Hargyan v Emperor* ,[4] the accused made a proposal to *G* that if he paid Rs 200 and promised to say nothing about the payment of money and took no steps to trace the thieves, he would get him back his stolen buffaloes. *G* did not accept the proposal. It was held that the accused could not have done anything more and was guilty of an attempt to commit an offence under s 215, IPC, read with this section.

(e) Theft

Where the accused was caught, in night time, in the vicinity of some cattle which had been tethered on the complainant's square and near which complainant and his brother were sleeping, it was held that he could not properly be held guilty of an attempt to commit theft, but he had committed the offence of criminal trespass.[5] A person, entering an enclosure, which is not a building, with intent to commit theft of cattle cannot be convicted under s 457, IPC . He is, however, guilty of an offence under ss 379 / 511, IPC, as the attempt to commit theft may be said to have begun when he entered the enclosure.[6] Where the accused, who made his way into an open thorned enclosure in which goats and sheep were kept, fled away as the owner was disturbed before the accused was able to carry out his object, it was held that he could be convicted of attempted theft, but not of criminal trespass by night in a house or building.[7] When the accused tried to take a purse out of the pocket of a person, who however seized the purse when it was out of his pocket, it was held that the accused was not guilty of theft as he was unable to move the purse out of the possession of that person, but was guilty of an attempt.[8]

(f) House-breaking

In *Walidad v Emperor* ,[9] the accused was found on the roof of the complainant armed with an implement used for the purpose of committing burglary. There was no evidence to show that he had either commenced to dig a hole on the roof for the purpose of effecting his entrance inside the room or had otherwise commenced any act for jumping or getting into any portion of the premises. In these circumstances, it was held that the accused was guilty of criminal trespass punishable under s 447 and under ss 457 / 511, IPC . Where the accused, on reaching the roof of a house, started going down a ladder but retracted his foot-steps and jumped down from the back of4221 the roof, it was held that he was guilty of attempt to commit the offence of house-breaking.[10]

(g) Abduction

In *Allu v Emperor* ,[11] the accused, armed with *chhavi*, came to the roof of a woman, sleeping with her

husband, and asked her to accompany them, to which she replied in the negative. They then lifted her up in order to carry her away, but upon her raising an alarm, dropped her on the roof. The accused were held guilty under s 366 read with s 511, IPC .

(h) Causing Disappearance of Evidence

Where the accused, who had brought a civil suit on the basis of a forged promissory note, removed it from the file when the file was at the house of an official, it was held that they were guilty under ss 201 / 511, IPC .[12]

Where the accused persons were found carrying the dead body of a murdered man and on being confronted and questioned, the accused left the body at a place which was near a public park and disappeared, the offence committed was held only as an attempt to cause disappearance of evidence of murder punishable under s 201 read with s 511, IPC .[13]

(i) Fabricating False Evidence

Facts, showing that the accused had dug a hole, intending to place salt therein, in order that the discovery of the salt so placed might be used in evidence against his enemy in a judicial proceeding, would justify his conviction of an attempt to fabricate false evidence as the accused had done an act towards the commission of the offence.[14] It is not, however, enough to justify the conviction of a police officer of an offence under ss 195 / 511, IPC, for taking the photographs of some persons, arrested in connection with a dacoity, on the surmise or probability that the photographs may have been taken with a view to the procuring of false evidence. It cannot be said that the taking of photograph was an act done 'towards the commission of the offence'.[15]

(j) Criminal Misappropriation

Where an accused, who was in charge of a godown, removed some bags of grain from a part of the godown and put them in another room in order that they might be clandestinely removed and sold to some dealer and the sale proceeds misappropriated, but without manipulating the registers accordingly, it was held that this was merely an act of preparation.[16]4222

(k) Bigamy

An act of causing the publication of banns of marriage is an act done in the preparation to marry, but does not amount to an attempt to marry. It would not amount to an attempt inasmuch as the accused may, before any ceremony of marriage is commenced, change his intention to marry.[17]

(l) Dowry Death

If the attempt by the wife to commit suicide failed, though there was a persistent demand of dowry, and it was also not the prosecution case that the accused were driving her intentionally to put an end to her life, the offence under s 304B read with s 511, IPC is not made out though s 498, IPC, is attracted.[18]

(m) Rape

If the acts of the accused result into pre-penetration emission, his act would be an act of attempt to commit rape.[19] The accused took the prosecutrix to his house, undressed her and rubbed his male organ on her private parts and the victim admitted in her cross-examination that when accused rubbed his male organ some white colour material leaked out. In the facts and circumstances, the accused was found liable for attempt to commit rape punishable under ss 376 read with s 511 IPC .[20] Where the prosecutrix, a girl of 11 years alleged full penetration, but medical evidence did not corroborate her evidence, yet injury was found near her private parts, the accused was found guilty under s 376 read with s 511, IPC, and not under s 376, IPC .[21] The accused put the prosecutrix on the bed, undressed

himself and the prosecutrix at which the prosecutrix shouted and a person came there so the accused could not commit rape. The accused was found guilty of an offence of attempt to commit rape punishable under ss 376 and 511, IPC .[22] The accused forcibly tore the clothes of the prosecutrix, threw her on the ground and tried to force himself on her body from the legs side, the conviction of the accused for an attempt to commit rape was found proper.[23] It is essential that the testimony of the prosecutrix who alleges commission of rape by the accused should find corroboration through medical evidence. If no spermatozoa is found in the vaginal swab of the prosecutrix, the conviction of the accused under s 376, is liable to be altered to one under ss 376 / 511, IPC .[24] The prosecutrix deposed that the accused made her sit forcibly on his thighs, removed her underwear and tried to insert his private part into her private parts. The lady doctor who examined the prosecutrix deposed that there was no penetration in the private parts of the victim. Held, no offence under ss 376 / 511, IPC was made out, accused was convicted for offence under s 354, IPC .[25] The prosecutrix, a dumb witness, by signs indicated that the accused by lifting her lehenga and making her lie down 'did4223 something' in her private parts but she did not state that there was any penetration of penis in her vagina, the accused was held liable for attempt to commit rape under s 511 read with s 376, IPC .[26]

Accused was prosecuted on allegations that the accused conductor kidnapped the victim girl and raped her in bus. The medical evidence did not show that sexual intercourse was committed. Evidence showed that attempt was made by the accused appellant to commit rape. Accused was convicted for attempt to commit rape under ss 376 / 511 and 366, IPC .[27]

The accused charged with s 376, IPC, can be convicted under s 376 read with s 511, IPC, though he was not charged with the latter offence separately.[28] For further commentary, see under the heading 'attempt to commit rape' in s 376, Vol III.

In order to find an accused guilty of an attempt to commit rape under ss 376 / 511, IPC the Court has to satisfy itself that the accused when he laid hold of the victim, not only desired to gratify his passions upon her person, but that he intended to do so at all events and notwithstanding any resistance on her part.[29]

The charge of rape was not proved against the accused teacher. However, charge under ss 354 and 506, IPC was proved against the accused. Accused was convicted under ss 354 / 506, IPC .[30]

Evidence of the prosecutrix and other witness to whom the prosecutrix informed immediately after the incident proved that the accused committed rape on the complainant at knife point. Accused appellant was convicted under s 376 and s 511, Pt II, IPC .[31]

There was no evidence that the accused penetrated his private part into the private part of the prosecutrix. Medical evidence did not establish sexual intercourse. The accused merely put his finger into the private part of the prosecutrix. Held, no offence under s 376, IPC was made out. Accused was convicted under s 354, IPC .[32]

(n) Abetment of Suicide

The offence of abetment or attempt is made out when the offence abetted is committed in consequence of the abetment. If the wife of the accused had tried to commit suicide by jumping into the river due to cruelty of her husband but was saved, no offence under ss 306 / 511, IPC could be said to have been made out.[33]

(o) Slaughter

Making an animal ready for slaughter by tying it with a rope and throwing it down on the ground is nothing more than mere preparation for its slaughter. An attempt to slaughter must imply some act more proximate to the actual killing. Similarly,4224 merely arming oneself with a knife would only amount to preparation. The stage of attempt would be reached when the knife is raised or pointed at

the animal with the intention of inflicting the fatal blow.[34]

(p) Adulteration

The act of *S* inviting *P* to come the next day to purchase diesel from his pump which did not contain sufficient quantity to fulfil the demand of *P* and the act of the other accused persons of mixing kerosene with the diesel to deliver that admixture to *P* is sufficient to attract the application of s 511 in which the word 'attempt' has been used in a larger sense so as to include any of the series of acts committed by the accused persons which may go to complete the offence as described in s 511, IPC, attracting s 420 read with s 511, IPC, and also s 23(c) of the Petroleum Act 1934.[35]

(q) Crossing the Border

There is no presumption that anybody who moved towards the border wanted to cross-over. The offence would commence only when a step was taken towards crossing the border and before that the action would amount to a mere preparation and not attempt to cross the border. Where a woman was going towards the border with the intention to cross-over to Pakistan but was arrested when she had 160 yards more to cover, it was held that offence under s 3 of the Ordinance Jammu & Kashmir Egress and Internal Movement (Control) Ordinance was not complete.[36]

(r) Sedition

Commentary of s 124-A, vol 1, may be referred to.

24. Procedure

The offence under this section:

(a) if committed by attempting to commit an offence punishable with imprisonment for life or imprisonment, is cognisable or non-cognisable, and bailable or non-bailable, according as the offence attempted is cognisable or non-cognisable, and bailable or non-bailable, and triable by the court by which the offence attempted is triable,
(b) if committed by attempting to commit an offence punishable with death, imprisonment for life, or imprisonment for more than seven years, is cognisable, non-bailable, and triable by the court of sessions,
(c) if committed by attempting to commit an offence punishable with imprisonment for three years and upwards but not more than seven years, is cognisable, non-bailable, and triable by a magistrate of the first class, and
(d) if committed by attempting to commit an offence punishable with imprisonment for less than three years or with fine only, is non-cognisable, bailable, and triable by a magistrate.4225

25. Sanction to Prosecute an offender under this Section--When Required

Where a sanction is required under any of the provisions of ss 195 to 199 of the Code of Criminal Procedure 1973, for prosecution for any offence, a trial for attempt at committing such an offence should also not be maintainable without sanction. Therefore, no prosecution for an attempt at fabricating false evidence before a court would be maintainable without a sanction under s 195 of the said Code.

26. Charge

The following form of the charge may be adopted:

> I (*name and office of Magistrate (or Session Judge*), *etc*), hereby charge you (name of accused person) as follows:
>
> That you, on or about the..., day of..., at..., attempted to commit the offence, to wit... (*specify the offence attempted*), and, in such attempt, did a certain act, to wit... (*specify the act done*), towards the commission of the said offence, and that you thereby committed an offence, punishable under... (*specify the section punishing the offence attempted*), read with s 511 of the Indian Penal Code, and within the cognisance of this Court.
>
> And I hereby direct that you be tried by this Court on the said charge.

This section, *i.e.*, s 511, has to be mentioned in the charge along with the principal offence attempted.[37]

27. Proof

In order to establish a charge under this section, prove that:

(a) the accused attempted to commit some offence punishable with imprisonment under the Indian Penal Code or he attempted to cause such offence to be committed; and
(b) in such attempt, he did some act towards the commission of that offence.

28. Sentence

There can be no precedent in a discretion. The concept of punishment is multi-faced. What can suit one situation may wholly be unsuitable to another.[38]

Section 75, IPC, does not apply to an offence punishable under this section *i.e.* s 511, but previous conviction can be taken into account for a much higher sentence imposed for the offence.[39]

Where the offence of attempt to commit theft had taken place about 16 years back, the sentence of imprisonment for six months was modified paying fine only of Rs 1000.[40] The accused attempted to draw the pension of his uncle, a freedom fighter, by submitting forged papers but did not succeed and was convicted under ss 419 and 420 read with s 511, IPC . Keeping in view that the accused faced the agony of trial for about seven years and was in custody since 11 January 1995 to4226 31 March 1995, the sentence of RI for six months on each count was reduced to imprisonment for three months on each count of the charges.[41]

29. Attempt to Commit Rape

Sentence-General

Attempt to commit rape is definitely a serious offence. It touches the dignity and honour of a woman.[42] As per s 511, IPC, in a case of attempt to commit an offence, the extent of punishment would be half the sentence prescribed under the main offence.[43] The minimum sentence under s 376, would not be less than seven years, and in view of s 511, such sentence may be upto half the sentence imposable for the offence under s 376, IPC .[44]

Where accused is found guilty under ss 376 / 511, IPC for offence of attempt to commit rape, it would be appropriate to impose half of the punishment as envisaged under s 511, IPC, which comes to imprisonment for a period of 10 years.[45]

Sentence-Lenient

The occurrence took place about seven years back and keeping in view the possibility of social ostracisation, the young age of the accused who were in their early twenties and the fact that they were daily wagers, the sentence of RI of six months was awarded to them.[46] The accused were of tender age of 18-19 years and were not habitual offenders so the sentence of five years RI awarded under s 376 read with s 511 was reduced to 15 months imprisonment.[47] In another case, keeping in view the fact that the accused was a young boy, the sentence of imprisonment awarded to him by the sessions court was reduced to the period already undergone by him.[48] Where the case was pending for the last 16 years, the accused was sentenced to undergo RI for two years and a fine of Rs 5000 which was to be paid as compensation to the prosecutrix, in default of payment of fine, the accused was to further undergo imprisonment for 18 months.[49] Where the accused was in his early twenties and was a daily wage earner, the occurrence took place seven years back, the sentence of the accused was reduced from five years RI to custodial sentence of six months.[50] In another case, where the accused was in custody for about four months and seven days during trial and some after conviction on 10 September 1994 till disposal of appeal on 6 May 1996, was behind bars, the sentence was reduced to the period already undergone.[51]4227

Sentence-Deterrent

Attempt to commit rape is definitely a serious offence. It touches the dignity and honour of a woman.[52] The fact that the incident took place 11 years back, and the accused has a wife and children and he has already undergone 8/9 months imprisonment, are not adequate and special reasons to reduce the sentence. When the accused, a mature and married person committed rape on the prosecutrix who is below the age of 16 years, the minimum sentence of 3½ years imprisonment should be awarded.[53] Where the evidence on record showed that the accused attempted to commit rape on a girl of tender age of 12 years and he himself had a daughter aged eight years at the time of commission of the offence, it was held that the sentence of five years RI and fine of Rs 40,000 would meet the ends of justice.[54] When delay in disposal of the case is entirely attributable to the accused who had absconded with a view to evade trial and punishment immediately after the commission of the offence and was apprehended after about 7½ years, the delay in disposal of the case cannot be treated as a mitigating circumstance in the case. The sentence of RI for three years and fine of Rs 3000 was held justified.[55] In another case, an accused was sentenced to undergo RI for three years and pay a fine of Rs 5000 and in default, to suffer RI for three months.[56]

Alteration of Conviction from Sections 376 / 511 to one under Section 354

The act of the accused catching hold of the prosecutrix and making her fall down cannot be said to be an attempt to commit rape. Though it amounts to assault or use of force to outrage the modesty of the victim, the conviction of the accused is therefore, liable to be altered from s 376 read with s 511, IPC to one under s 354, IPC .[57] The accused seduced the prosecutrix for forcible intercourse, she resisted and her cries attracted witnesses at which the accused fled away. However, physical and psychological potency of the accused to commit sexual intercourse was not substantiated from the record. The higher degree of determination required to commit rape was found lacking. The conviction of the accused was, therefore, altered from s 376 read with s 511, IPC, to one under s 354, IPC .[58] For further commentary, see under the same heading in s 376, Vol 3.4228

6 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation for life' (wef 1-1-1956).

7 Substituted by Act 26 of 1955, s 117 and Schedule, for 'transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one-half of the longest term provided for that offence' (wef 1-1-1956).

8 *Ram Charita Bhakat v Chairman of District Board* AIR 1937 Cal 710, 39 Cr LJ 252 ; *Boston v Emperor* 12 Cr LJ 116 .

9 *Satvir Singh v State of Punjab* 2001 Cr LJ 4625 (SC), AIR 2001 SC 2828, 2001 (6) Scale 513, (2001) 8 SCC 633 .

10 *Ibid*.

11 *State of Maharashtra v Mohd Yakub* AIR 1980 SC 1111, 1114-1115 .

12 *R v Robinson* (1915) 2 KB 342 ; *Empress v Baku* (1900) ILR 24 Bom 287, 291, 1 Bom LR 678 ; *R v Morgan* (1952) 1 All ER 803 ; *R v Woods* (1930) 22 Cr App R 41 .

13 *Abhyanand Mishra v State of Bihar* AIR 1961 SC 1698, 1961 Cr LJ 822 (SC) .

14 *Asgarali Pradhania v Emperor* AIR 1933 Cal 893, 35 Cr LJ 97 ; *Sudhir Kumar Mukherjee v State of West Bengal* AIR 1973 SC 2655, 1973 Cr LJ 1798 ; *State of Uttar Pradesh v Ram Charan* AIR 1962 All 359, (1962) 2 Cr LJ 161 ; Re Maragatham AIR 1961 Mad 498, (1961) 2 Cr LJ 781, 784 .

15 *R v Linnekar* (1906) 2 KB 99, 75 LJ (KB) 385 ; *R v Eagleton* (1885) Dears 515 .

16 Re *R Maccrea*(1893) ILR 15 All 173, 180.

17 *State v Haricharan Rakshit* AIR 1950 Ori 114, 51 Cr LJ 914 .

18 *Emperor v Raghunath* AIR 1941 Oudh 3, 6, 41 Cr LJ 881.

19 *Satvir Singh v State of Punjab* 2001 Cr LJ 4625 (SC), AIR 2001 SC 2828, 2001 (6) Scale 513, (2001) 8 SCC 633 .

20 *Satvir Singh v State of Punjab* 2001 Cr LJ 4625 (SC), AIR 2001 SC 2828, 2001 (6) Scale 513, (2001) 8 SCC 633 .

21 *State of Maharashtra v Mohd Yakub* AIR 1980 SC 1111, 1980 Cr LJ 793 (SC) .

22 *Ramkripal v State of Madhya Pradesh* 2007 Cr LJ 2302, p 2304 (SC), 2007 (5) Supreme 297, 2007 (4) Scale 438 .

23 *Ramkripal v State of Madhya Pradesh* 2007 Cr LJ 2302 (SC), 2007 (5) Supreme 297, 2007 (4) Scale 438, (2007) 11 SCC 265 .

24 *Reg v Eagleton* 1854 Dears CC 515 .

25 *Gardner v Akeroyd* (1962) 2 All ER 306 .

26 *State of Maharashtra v Mohd Yakub & ors* AIR 1980 SC 1111, 1980 Cr LJ 793 (SC) .

27 *Stephen's Digest of Criminal Law*, ninth edn, as quoted in *Abbyanand Mishra v State of Bihar* AIR 1961 SC 1698, (1961) 2 Cr LJ 822 (SC) ; *State of Maharashtra v Mohd Yakub* AIR 1980 SC 1111, 1980 Cr LJ 793 (SC) .

28 As quoted in *Abbyanand Mishra v State of Bihar* AIR 1961 SC 1698, (1961) 2 Cr LJ 822 (SC) ; *State of Maharashtra v Mohd Yakub* AIR 1980 SC 1111, 1980 Cr LJ 793 (SC) .

29 As quoted in *Abbyanand Mishra v State of Bihar* AIR 1961 SC 1698, (1961) 2 Cr LJ 822 (SC) ; *State of Maharashtra v Mohd Yakub* AIR 1980 SC 1111, 1980 Cr LJ 793 (SC) .

30 *Ibid*.

31 As quoted in *Abbyanand Mishra v State of Bihar* AIR 1961 SC 1698, (1961) 2 Cr LJ 822 (SC) ; *State of Maharashtra v Mohd Yakub* AIR 1980 SC 1111, 1980 Cr LJ 793 (SC) .

32 *Ramkripal v State of Madhya Pradesh* 2007 Cr LJ 2302 (SC) ; *Aman Kumar v State of Haryana* 2004 Cr LJ 1399 (SC) .

33 *Empress v Riasat Ali* (1881) ILR 7 Cal 352 .

34 *Chandi Pershad v Abdur Rahman* (1895) ILR 22 Cal 131 ; *Surat Bahadur v Emperor* 25 Cr LJ 1162, AIR 1925 Oudh 158 .

35 Re *R Maccrea*(1893) ILR 15 All 173.

36 *Empress v Riasat Ali* (1881) ILR 7 Cal 352 .

37 Re *R Maccrea*(1893) ILR 15 All 173, pp 179-80.

38 Re *R Maccrea*(1893) ILR 15 All 173, 181.

39 *Empress v Kalyan Singh* (1894) ILR 16 All 409 ; *Emperor v Shib Charan* AIR 1928 Lah 551, 29 Cr LJ 780 ; *Mange Ram v Chhatra Mohan Singh* AIR 1951 Nag 315 ; *Queen v Anant Puranik* (1901) ILR 25 Bom 90 ; *Modak v Emperor* (1910) ILR 34 Bom 378 ; *Abdullah v Emperor* 15 Cr LJ 265 .

40 Re R Maccrea (1893) ILR 15 All 173.

41 *GVW Jones v Emperor* 27 Cr LJ 916, AIR 1925 Rang 247 .

42 *Abhayanand Misra v State of Bihar* (1961) 2 Cr LJ 822, 824, AIR 1961 SC 1698 ; approving Re *R Maccrea*(1893) ILR 15 All 173.

43 *Abbyanand Misra v State of Bihar* (1961) 2 Cr LJ 822, p 827, AIR 1961 SC 1698 ; *State of Maharashtra v Mohd Yakub* AIR 1980 SC 1111, p 1114-15 ; *Om Prakash v State of Punjab* AIR 1961 SC 1782, (1961) 2 Cr LJ 848 .

44 *Ramkripal v State of Madhya Pradesh* 2007 Cr LJ 2302 (SC), 2007 (5) Supreme 297, 2007 (4) Scale 438, (2007) 11 SCC 265 .

45 *Abhayanand Misra v State of Bihar* (1961) 2 Cr LJ 822, 827, AIR 1961 SC 1698 .

46 *Per Birkett J in R v Percy Dalton* (1949) 33 Cr App R 102, 65 TLR 326 .

47 *Empress v Mangesh Jivaji* (1887) ILR 11 Bom 376 .

48 *Malkiat Singh v State of Punjab* AIR 1970 SC 713, 1970 Cr LJ 750 ; *Empress v Peterson* (1875-1877) 1 All 316; *Reg v Padala Venkatsami* (1881) ILR 3 Mad 4, 1 Weir 543 ; *Lakshami Prasad v Emperor* 23 Cr LJ 108, AIR 1923 Pat 307 ; *Jain Lal v Emperor* AIR 1942 Pat 82, 44 Cr LJ 337 .

49 *State of Bihar v Jagdish Narain Singh* AIR 1959 Pat 376, 1959 Cr LJ 1014 ; *State of Madhya Pradesh v Muratsingh Har Prashad* 1971 Cr LJ 1804, 1971 MPLJ 960, 965; Re *Uppari Nallanna* 972 Cr LJ 433. 1971 Mad LJ (Cr) 520 (an attempt is a stage of preparation to commit an offence which is very near to the stage of actual commission and from which an intention to commit the offence can be inferred).

50 *Empress v Baku* (1900) ILR 24 Bom 287, 290 ; *Abdullah v Emperor* 15 Cr LJ 265, p 267 ; *Asgarali Pradliania v Emperor* AIR 1933 Cal 893, 35 Cr LJ 97 ; *Parasram Ji v Imtiaz* (1962) 1 Cr LJ 7, AIR 1962 All 22 ; *Ganapathi Udayar v TA Chinnayya Mudaliar* 1953 Cr LJ 152, AIR 1953 Mad 609 ; *State of Madhya Pradesh v Ram Charan Kishan* 1969 Cr LJ 748, AIR 1969 MP 96 .

51 *Parasram Ji v Imtiaz* (1962) 1 Cr LJ 7, AIR 1962 All 22 .

52 *InRe R Maccrea*, (1891) ILR 15 All 173, p 179.

53 *Abdullah v Emperor* 15 Cr LJ 265, p 267 ; *Asgarali Pradhania v Emperor* AIR 1933 Cal 893, 35 Cr LJ 97 .

54 *Malkiat Singh v State of Punjab* 1970 Cr LJ 750, AIR 1970 SC 713 .

55 *Abhyanand Mishra v State of Bihar* (1961) 2 Cr LJ 822, p 824, AIR 1961 SC 1698 .

56 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698, (1961) 2 Cr LJ 822 ; Re *R Maccrea*(1893) ILR 15 All 173, p 180; *Parasram Ji v Imtiaz* AIR 1962 All 22, (1962) 1 Cr LJ 7 ; Re *Munirathnam Beddi*1955 Cr LJ 917, AIR 1955 AP 118 .

57 *Gulam Ahmed v State of Himachal Pradesh* 2006 Cr LJ 2361 (HP) .

58 *Ramkripal v State of Madhya Pradesh* 2007 Cr LJ 2302 (SC), 2007 (5) Supreme 297, 2007 (4) Scale 438, (2007) 11 SCC 265 .

59 *Ramkripal v State of Madhya Pradesh* 2007 Cr LJ 2302 (SC), 2007 (5) Supreme 297, 2007 (4) Scale 438, (2007) 11 SCC 265 .

60 *Sudhir Kumar v State of West Bengal* 1973 Cr LJ 1798, 1800, AIR 1973 SC 1655 .

61 *Snethir Kumar Mukherjee & anor v State of West Bengal* AIR 1973 SC 2655, 1973 Cr LJ 1798 (SC) ; *Abhyanand Mishra v State of Bihar* AIR 1961 SC 1698, 1961 (2) Cr LJ 822 .

62 *State of Maharashtra v Mohd Yakub* AIR 1980 SC 1111, 1980 Cr LJ 793 (SC) .

63 *Yash Pal v State of Haryana* 1998 (1) RCR (Ori) 411, (1997) 24 Cri LT 699 (P&H).

64 *Darbara Singh v State of Haryana* 1980 Cr LJ 1157 (P&H) .

65 *Malkiat Singh & anor v State of Punjab* AIR 1970 SC 713, 1970 Cr LJ 750 (SC) .

66 *Ibid*.

67 *State of Maharashtra v Mohd Yakub* AIR 1980 SC 1111, 1980 Cr LJ 793 (SC) .

68 *Darbara Singh v State of Haryana* 1980 Cr LJ 1157 (P&H) .

69 *Ibid*.

70 *Ramkripal s/o Shyamlal Charmakar v State of Madhya Pradesh* 2007 Cr LJ 2302 (SC) ; *Aman Kumar v State of Haryana* 2004 Cr LJ 1399 (SC) .

71 *Frederick Edmed Hooper v Emperor* AIR 1917 Mad 937 .

72 *Stephen's Digest of Criminal Law*, ninth edn, as quoted in *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698 and also in *Malkiat Singh & anor v State of Punjab* AIR 1970 SC 713, 1970 Cr LJ 759 (SC) ; and *State of Maharashtra v Mohd Yakub* AIR 1980 SC 1111, 1980 Cr LJ 793 (SC) .

73 *Sudhir Kumar Mukherjee v State of West Bengal* 1973 SCC (Cr) 1007, p 1010 .

74 *Shambhu Singh v State of Rajasthan* 1977 Cr LR 174, p 178, 179 (Raj) .

75 *PE Billinghurst v Emperor* AIR 1924 Cal 18, 25 Cr LJ 1313 .

76 *Abdullah v Emperor* 15 Cr LJ 265 .

77 *Shiamji v Emperor* 23 Cr LJ 210, AIR 1922 Nag 40 .

78 *Bhagwan Das v Emperor* 2 Cr LJ 788, 2 ALJ 718 .

79 Re *Panduranga Rao*(1962) 2 Cr LJ 21, AIR 1962 AP 257 .

80 *Emperor v Mansing Daji Patil* 14 Cr LJ 433 .

81 In Re *MacCrea*, 15 All 173.

82 *Rahmat Ali v Emperor* 28 Cr LJ 680, AIR 1927 Lah 634 .

83 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698, (1961) 2 Cr LJ 822 .

84 *Bashirbhai Mohamedbhai v State of Bombay* 1960 Cr LJ 1383, AIR 1960 SC 979 ; *Government of West Bengal v Umesh Chander Mitter* (1889) ILR 16 Cal 310 ; *Emperor v Raghunath* AIR 1941 Oudh 3, 41 Cr LJ 881 ; *Rahmat Ali v Emperor* AIR 1927 Lah 634, 28 Cr LJ 680 ; *Ram Nath v State* AIR 1951 MB 100, 52 Cr LJ 95, AIR 1927 Mad 77 ; *Sheo Prasad v Emperor* AIR 1926 Pat 267, 27 Cr LJ 609 .

85 *Empress v Dhundi* (1886) ILR 8 All 304 ; *Brijraj Marwari v Emperor* 14 Cr LJ 120 ; Re *E Raman Chettiar* 28 Cr LJ 95, AIR 1927 Mad 77 ; *Sheo Prasad v Emperor* AIR 1926 Pat 267, 27 Cr LJ 609 .

86 *State of Kerala v CK Bharathan (Dr)* 1989 Cr LJ 2025 (Ker), (1989) 1 Ker LJ 659 .

87 *King v Hari Baisakh* AIR 1950 Ori 88, 51 Cr LJ 853 .

88 *State v Narain Singh* 1953 Cr LJ 1381, AIR 1953 MP 216 ; Re *Narayanaswami Pillai*AIR 1932 Mad 507, 33 Cr LJ 582 ; Re *Bavaji*AIR 1950 Mad 44 .

89 *Malkiat Singh v State of Punjab* AIR 1970 SC 713, 1970 Cr LJ 750 .

90 *State v Haricharan Rakshit* AIR 1950 Ori 114, 51 Cr LJ 914 ; *King v Tustipada Mandal* AIR 1951 Ori 284, 25 Cr LJ 837 .

91 *Vaikuntham Jaganadham v State of Orissa* 1952 Cr LJ 918, AIR 1952 Ori 164 .

92 *State of Uttar Pradesh v Ram Chandra* (1962) 2 Cr LJ 161, AIR 1962 All 359 .

93 *State of Maharashtra v Mohd Yakub* AIR 1980 SC 1111, 1980 Cr LJ 793 (SC) .

94 *Empress v Ramsaran Chowbey* 4 NWP 47 .

95 *Reg v Padala Venkatasami* (1881) ILR 3 Mad 4, 1 Weir 543 .

96 *Lachman Lal v Emperor* 20 Cr LJ 142 (accused was however not charged for attempt to cheat); *Emperor v Riasat Ali* (1881)

ILR 7 Cal 352 .

97 *Empress v Kalyan Singh* (1894) ILR 16 All 409 .

98 *Krishna Prasad Mandal v Rabindra Nath Dinda* 13 Cr LJ 6 ; *Emperor v Shiv Charan* AIR 1928 Lah 551, 29 Cr LJ 780 .

99 *Emperor v Mula* (1878-1880) ILR 2 All 105.

1 *Emperor v Baldeo Sahai* (1878-1880) ILR 2 All 253.

2 *Ratan Mani Dey v Emperor* 9 CWN 547, 2 Cr LJ 204 .

3 *Emperor v Nga Nyo* 1 Cr LJ 1116 .

4 *Hargyan v Emperor* AIR 1923 All 83, 25 Cr LJ 127 .

5 *Nauranga v Emperor* AIR 1924 Lah 223, 24 Cr LJ 248 .

6 *Kohmi v Emperor* 16 Cr LJ 1 .

7 *Ghasita v Emperor* 20 Cr LJ 492 (2); *Jaimal v Emperor* 26 Cr LJ 1424, AIR 1996 Lah 147 .

8 Re *Duraiswamy Mudali*AIR 1942 Mad 521, 44 Cr LJ 501 .

9 *Walidad v Emperor* 6 Cr LJ 444 .

10 *Nahun v Emperor* AIR 1933 Lah 433 (1), 34 Cr LJ 1181 ; *Mohammad Hussain v Emperor* 29 Cr LJ 4, 29 PLR 54 .

11 *Allu v Emperor* AIR 1925 Lah 512, 26 Cr LJ 943 .

12 *Sheo Nandan v Emperor* 16 Cr LJ 791 .

13 Re *Parasa Mangadu & ors*AIR (36) 1949 Mad 270, 1950 Cr LJ 374 (Mad) .

14 *Empress v Nunda* 4 NWP 133 .

15 *Gulab Singh v Emperor* 17 Cr LJ 431 .

16 *Province of Bihar v Bhagwat Prasad* AIR 1949 Pat 326, 50 Cr LJ 682 .

17 *Empress v Peterson* (1875-1977) ILR 1 All 316.

18 *Satvir Singh & ors v State of Punjab & anor* 1998 Cr LJ 405 (P&H) .

19 *Dhanesh alias Konda Banjare v State of Chhattisgarh* 2007 Cr LJ 3328 (Chhat) .

20 *Kamla Nand v State of Himachal Pradesh* 2003 Cr LJ 547 (HP) ; *Madan Lal v State of J&K* 1998 Cr LJ 667 (SC) ; *Bhursa alias Bhusa Kira alias Prahallad Malik v State* 2000 Cr LJ 2722 (Ori) .

21 *Nand Lal v State of Himachal Pradesh* 2000 Cr LJ 3160 (HP) ; *Ramdil v State of Madhya Pradesh* 2002 Cr LJ 861 (Chattisgarh) ; *Amarjit v State of Haryana* (1996) 3 RCR 612 (P&H) .

22 *Yash Pal v State of Haryana* 1998 (1) RCR (Cri) 411 (P&H), (1997) 24 Cr LJ 699 (P&H).

23 *Sulekhan Singh & ors v State* 1999 Cr LJ 3798 (Raj) .

24 *Manik Debnath v State of Tripura* 1999 Cr LJ 607 (Gau) ; *Ram Narayan Jha v State of Assam* 1998 Cr LJ 4650 (Gau) .

25 *State of MP v Surendra Singh* 2015 Cr LJ 763, p 767 (MP

26 *Public Prosecutor,High Court of Andhra Pradesh v Linqisetty Sreenu* 1997 Cr LJ 4003 (AP) .

27 *Arjun Singh v State of HP* 2009 Cr LJ 1332 (SC) .

28 *State of Maharashtra v Rajendra Jawanmal Gandhi* 1997 Cr LJ 4657 (SC) .

29 *Kailash Laxman Khamkar v State of Maharashtra* 2010 Cr LJ 3255, p 3266 (Bom), 2010 (1) Crimes 792, 2010 (2) Bom CR (Cri) 337 .

30 *State of Himachal Pradesh v Prem Singh* 2009 Cr LJ 786, p 786, 787 (SC) .

31 *Swaroop Singh v State of MP* 2013 Cr LJ 3106 (SC), 2013 AIR SCW 3190 (SC) .

32 *S Ishwar Bhat v State* 2010 Cr LJ (NOC) 479 (Kant) .

33 *Shiv Prasad Pandey v State of Uttar Pradesh & anor* 2003 Cr LJ 1838 (All) .

34 *Parasram Ji v Intiaz* AIR 1962 All 22, (1962) 1 Cr LJ 7 (All) .

35 *State v Parasmal & ors* AIR 1969 Raj 65, 1969 Cr LJ 437 (Raj) .

36 *MT Noor Bibi v State* AIR 1952 J&K 55, 1953 Cr LJ 166 (J&K) .

37 1 WR (Cr) L 10; *Darbara Singh v State of Haryana* 1980 Cr LJ 1157 (P&H) .

38 *Darbara Singh v State of Haryana* 1980 Cr LJ 1157, 1159 (Punj) .

39 Re *Duraiswamy Mudali*AIR 1942 Mad 521, 44 Cr LJ 501 .

40 *Zo Khuma & ors v Union Territory of Mizoram* 1989 Cr LJ (NOC) 190 (Gau) .

41 *Amrik Singh v State of Haryana* (1996) 1 RCR 75 (P&H) .

42 *Fagu Bhoi & anor v State of Orissa* (1992) 1 Crimes 10 (Or) .

43 *Amarjit Singh v State of Haryana* (1996) 3 RCR 612 (P&H) .

44 *Public Prosecutor High Court of Andhra Pradesh v Linqisetty Sreenu* 1997 Cr LJ 4003 (AP) .

45 *Syed Ghouse v State of Andhra Pradesh* 2009 Cr LJ 311, p 315 (AP) (DB) .

46 *Fagu Bhai & anor v State of Orissa* (1992) 1 Crimes 10 (Ori), 1992 Cr LJ 1808 (Ori) ; *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* AIR 1983 SC 753 .

47 *Papiya & anor v State of Rajasthan* (1994) 2 Crimes 651 (Raj) .

48 *Bhursa alias Bhursakira alias Prahallad Malik v State* 2000 Cr LJ 2722 (Ori) .

49 *State of Madhya Pradesh v Udhe Lal* 1996 Cr LJ 3202 (DB) (MP) .

50 *Gananath Jena v State of Orissa* 1996 Cr LJ 229 (Ori) .

51 *Amarjit Singh v State of Haryana* (1996) 3 RCR 612 (P&H) .

52 *Gananath Jena v State of Orissa* 1996 Cr LJ 229 (Ori) ; *Fagu Bhoi v State of Orissa* (1992) 1 Crimes 10 (Ori) .

53 *Barkatullakha v State of Maharashtra* 2002 Cr LJ 427 (Bom) ; *Ramdil v State of Madhya Pradesh* 2002 Cr LJ 861 (Chattisgarh) .

54 *State of Maharashtra v Rajendra Jawannal Gandhi* 1997 Cr LJ 4657 (SC) .

55 *Nand Lal v State of Himachal Pradesh* 2000 Cr LJ 3106 (HP) .

56 *Public Prosecutor High Court of Andhra Pradesh v Lingisetty Sreenu* 1997 Cr LJ 4003 (AP) .

57 *Shiv Shankar v State of Uttar Pradesh* 2002 Cr LJ 2673 (All) .

58 *Subli Hajam v State* 2003 Cr LJ 281 (J&K) .

Indian Penal Code (Act XLV of 1860)

REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW [*Relevant Extracts*]

Relevant Extracts from the Report of the Committee on Amendments to Criminal Law[1]

Introduction

"Woman is the companion of man, gifted with equal mental capacities. She has the right to participate in the minutest details in the activities of man, and she has an equal right of freedom and liberty with him. She is entitled to a supreme place in her own sphere of activity as man is in his. This ought to be the natural condition of things and not as a result only of learning to read and write. By sheer force of a vicious custom, even the most ignorant and worthless men have been enjoying a superiority over woman which they do not deserve and ought not to have. Many of our movements stop half way because of the condition of our women."

--Mahatma Gandhi[2]

1. Rape, sexual assault, eve-teasing and stalking are matters of serious concern - not only because of the physical, emotional and psychological trauma which they engender in the victim, but also because these are practices which are being tolerated by a society ostensibly wedded to the rule of law.
2. The fundamental rights to life with human dignity,[3] to equality,[4] and to work in ones chosen profession or trade[5] inherently include protection from sexual harassment. It is indubitably the position that the Constitution guarantees fundamental freedoms to women. In view of Article 15(3), which enables the State to make special provisions for women and children, the equality of women and children is firmly enshrined in Article 14 as well as Article 15(1) of the Constitution . It is also necessary to note that Article 21 applies equally to women. Article 21A, which guarantees the right to education applies to 'all children' irrespective of gender. Article 23 prohibits traffic in human beings and forced labour. Article 24 protects children and enjoins that no child below the age of 14 years will be employed to work in any factory or mine or hazardous employment. It may also be noticed that4231 Article 51A(e) provides that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women.
3. In fact, the Preamble to the Constitution guarantees social, economic and political justice which, in the view of the Committee, would include gender justice, liberty of thought, expression, belief, faith and worship; equality of status and opportunity that would again reinforce the theory of equality; while fraternity enjoins citizens to treat each other with respect and dignity, regardless of gender.
4. The right to be protected from sexual harassment and sexual assault is, therefore, guaranteed by the Constitution, and is one of the pillars on which the very construct of gender justice stands.[6]
5. This right is buttressed by the directive principles of State policy contained in Articles 38, 39 and 39A of the Constitution, which are to be construed harmoniously with the fundamental rights in Part III; and these fundamental principles bind the State in performance of its task of governance of the country.
6. Every person invested with public power remains primarily a citizen who is duty bound to perform the fundamental duties of every citizen with the added public duty of implementing the directive principles of securing a social order for the promotion of welfare of the people.
7. A *fortiori*, the duty of the State, therefore, is to provide a safe environment, at all times, for women, who constitute half the nation's population; and failure in discharging this

public duty renders it accountable for the lapse. The State's role is not merely reactive to apprehend and punish the culprits for their crimes; its duty is also to prevent the commission of any crime to the best of its ability. Crimes against women are an egregious violation of several human rights demanding strict punishment with deterrence to prevent similar crimes in future by the likeminded.

8. The National Human Rights Commission has also held the government accountable and responsible for the violation of human rights within its jurisdiction, observing:

> "...it is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all of those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights."[7]

9. This Committee has proceeded to perform its task on the basis of the above constitutional obligation and juristic principles enunciating the State's responsibility for the protection of the right to life with all aspects of human dignity of women. This is also the demand of the fundamental rights in Articles 14, 15 and 19 of our Constitution as indicated above. The substantive laws must meet these standards and the machinery prescribing the procedure for their implementation must be adequately equipped for it.4232

10. The purpose of laws is to prescribe the standard of behaviour of the people and to regulate their conduct in a civilized society. Faithful implementation of the laws is of the essence under the rule of law for good governance. In the absence of faithful implementation of the laws by efficient machinery, the laws remain mere rhetoric and a dead letter.

11. Dr. Rajendra Prasad, while moving the motion for adoption of the Constitution in the Constituent Assembly, had said:

> "...Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. If the people who are elected, are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them...
>
> It requires men of strong character, men of vision, men who will not sacrifice the interests of the country, at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance..."[8]

Is the fervent hope belied? If so, the faith has to be restored.

12. Amartya Sen in 'The Idea of Justice' echoed the same sentiment, in the following words:

> "...There is no automatic guarantee of success by the mere existence of democratic institutions...The success of democracy is not merely a matter of having the most perfect institutional structure that we can think of. It depends inescapably on our actual behaviour patterns and the working of political and social interactions. There is no chance of resting the matter in the 'safe' hands of purely institutional virtuosity. The working of democratic institutions, like all other institutions, depends on the activities of human agents in utilizing opportunities for reasonable realization..."[9]

13. In short, 'institutional virtuosity' by itself is not enough without 'individual virtuosity'.
14. The most perfect laws also would remain ineffective without the efficiency and 'individual virtuosity' of the human agency for implementing the laws, namely, the law enforcement agencies. The mechanism has to be supported by the complementary role of civil society as envisaged in the fundamental duties of the citizens under Article 51A of the Constitution .
15. The fundamental duties of every citizen specified in Article 51A of the Constitution include the duties 'to renounce practices derogatory to the dignity of women' in clause (e), and the foremost duty 'to abide by the Constitution and respect its ideals' in clause (a). These fundamental duties are merely a reiteration of the values of the Indian ethos, which needed a reminder in the waning moral structure of the society, more prevalent in the institutions of governance. Aristotle, in his ancient and seminal work 'Politics', emphasized the significance of 'education of citizens in the spirit of the Constitution', thus:4233

> "The greatest of all means...for ensuring the stability of Constitutions--but which is nowadays generally neglected--is the education of citizens in the spirit of the Constitution..."[10]

The significance of this observation has to be sustained.

16. Thus, if these are guaranteed freedoms under the Constitution, how do they become real freedoms and how do they enable women to possess requisite capabilities which would lead to the fulfilment of their potential as individual citizens under India's liberal and democratic framework? In this respect, the Committee finds great support in the 'capability approach' postulated by Dr. Amartya Sen, who points out:

> "The idea of 'capability' (i.e. the opportunity to achieve valuable combinations of human functionings -- what a person is able to do or be) can be very helpful in understanding the opportunity aspect of freedom and human rights. Indeed, even though the concept of opportunity is often invoked, it does require considerable elaboration, and capability can help in this elucidation. For example, seeing opportunity in terms of capability allows us to distinguish appropriately between (i) whether a person is actually able to do things she would value doing, and (ii) whether she possesses the means or instruments or permissions to pursue what she would like to do (her actual ability to do that pursuing may depend on many contingent circumstances)."[11] (Emphasis supplied)

17. While the Committee is of the view that there is merit in the capability approach propounded by Prof. Amartya Sen, it must also be borne in mind that the ability to dictate needs and desires (including the capacity and ability for consumption as well as income generation) are not irrelevant factors. The Committee is unable to disregard the subjugation of women, which has been occasioned in India on account of the lack of financial independence and security. Hence, while acknowledging that the capability approach does address a series of other issues in relation to women, it is necessary, as

a part of the overall change of consciousness, that women must be made equally capable and productive for the purpose of becoming self-sufficient financially, which would be one of the intrinsic safeguards for 'feeling' and 'perceiving' equality. Naturally, this cannot detract from the reality that political power, domestic violence, education and social status are indeed vital concerns.

18. The Committee is of the view that capabilities are indeed crucial to the people's potential functioning, as observed by Prof. Sen. But how do we arrive at that stage in respect of women, when it is evident that women have been kept away from reaching that stage for no fault of their own? This brings us to the vexed question that unless and until the State pursues a policy of avowed determination to be able to correct a historical imbalance in consciousness against women, it will not be possible for men and indeed women themselves, to view women differently and through the prism of equality. It is not enough that women occupy a few symbolic political positions to evidence true empowerment of women in this country. In the view of this Committee, the ethos of empowerment of women does not limit itself to political equality, but also extends, in equal terms, to social, educational, and economic equality.4234

19. If true empowerment of women were to mean anything, it is necessary that law, as well as public policy, must be capable of engaging substantially with women's rights, opportunities, acquisition of skills, the ability to generate self-confidence and insist on total equality in relationships, both with society and the State. It is the inability of women to claim equality in society which has led to a slant against women as a consequence of which there has been a latent bias against women in the prosecution of crimes including its prevention. One wonders if the following words penned by Mahbub-ul-Haq hold true for Indian women:

> "As we approach the 21st century, we hear the quiet steps of a rising revolution for gender equality. The basic parameters of such a revolution have already changed. Women have greatly expanded their capabilities over the last few decades through a liberal investment in their education. At the same time, women are acquiring much greater control over their lives through dramatic improvements in reproductive health. They stand ready and prepared to assume greater economic and political responsibilities. And technological advances and democratic processes are on their side in this struggle. Progress in technology is already overcoming the handicaps women suffer in holding jobs in the market, since jobs in the future industrial societies will be based not on muscular strength but on skills and discipline. And the democratic transition that is sweeping the globe will make sure that women exercise more political power as they begin to realize the real value of the majority votes that they control. It is quite clear that the 21st century will be a century of much greater gender equality than the world has ever seen before."[12]

20. We also revisit the report submitted by one of us in *Sheela Barse (infra)*, which pithily states:

> "Thus the meaning of law and the empowerment which law gives and the clothing of man with such Constitutional rights is only to make sure that whether it be State or whether it be man, and after all the State contains men, that with Pausanius, King of Sparta, a man feels confidently that "laws should have an authority over men, not men over laws" in order to see that a human right is also accompanied by an enforcement modus effectualis, it is necessary to give it in the first instance the prime importance which it deserves and which is merited to it in law, after all law itself recognises the high dimensions and dyophysite existence of rights, the one absolute impregnable and the other subject to social regulation by valid statute law."

21. It is an admitted fact that women in India have suffered in various aspects of life and physical health, mental well-being, bodily integrity and safety, social relations, political empowerment, education and knowledge, domestic work and non-market care, paid work and other projects, shelter and environment, mobility, leisure activities, time autonomy, respect, religion, and if we may add, self-esteem / self-autonomy. We are of the opinion that Indian women have substantially suffered on most of these counts as a consequence of which the de facto equality guaranteed by the Constitution has not become a reality for them.

22. The achievement of empowerment and equality of women has to be necessarily a conjoint effort of the individual and the State. Cases of individual women performing well are not indicative of the empowerment of women as a collective responsibility under the Constitution. The nation also suffers from, on the other hand, dismal sex ratios in several states such as Punjab and Haryana. The nation suffers from the existence of chauvinistic institutions like khap panchayats, which, unfortunately, are politically so powerful that they overrule, with impunity, the4235 constitutionally mandated administration of equality in favour of women, by using extra constitutional, oppressive methods of punishment.

23. It is shocking to note that even after the recent horrific incident of gang rape, many political leaders, including members of Parliament/State legislatures, spiritual gurus with large followings and other eminent persons have been making statements reinforcing the gender bias. Some have even blamed the victim for having facilitated the rape by her own behaviour. Some of the worst examples are:

    (i) **Shri Anisur Rahman** (Communist Party of India (Marxist) - West Bengal): "We have told the chief minister in the assembly that the government will pay money to compensate rape victims. What is your fee? If you are raped, what will be your fee?"

    (ii) **Shri Asaram Bapu:** "Only 5-6 people are not the culprits. The victim is as guilty as her rapists... She should have called the culprits brothers and begged before them to stop... This could have saved her dignity and life. Can one hand clap? I don't think so,"

    (iii) **Shri Om Prakash Chautala** (INLD - Haryana): "We should learn from the past... specially in Mughal era, people used to marry their girls to save them from Mughal atrocities and currently a similar situation is arising in the state. I think that's the reason khap has taken such a decision and I support it."

    (iv) **Shri Sri Prakash Jaiswal** (Congress): "New victory and a new marriage have their own significance. The memory of your victory fades with time, the same way one's wife becomes old and loses her charm"

    Many of them have reflected this gender bias contrary to the constitutional mandate after swearing 'to bear true faith and allegiance to the Constitution of India', in addition to their fundamental duty 'to abide by the Constitution and respect its ideals'. These deep rooted prejudices have to be eliminated for the efficacy of any laws on the subject. The time has come to enact laws providing for the subsequent disqualification of elected representatives on this ground alone.

24. This begs the question - does the Indian State live at two levels? One which comprises those who are affluent and who have access to the Constitution and its machinery, and the other comprising those who live in the silent domination of the superior will of tradition, customs and practices which are derogatory to women?

25. In our view, unless and until each one of these pernicious models is deconstructed by the collective will of not only Parliament, but also of the people of India, gory incidents, such as those which have been reported in recent times (and which continue to be reported) from across the country, will continue to shake the faith of the people. Each violent incident against an Indian woman is causing greater provocation. It is causing greater provocation not simply because it is a shameful incident, but also because it appears that there is a vast disconnect between equality and respect and the obligations

of those who administer the law.

26. These indeed compel us to admit to only one answer that whatever be the political orientation, the Indian State has failed to look at this issue in a substantive manner. While we acknowledge and greatly applaud the concerns of feminists and various persons who have spoken in support of women, we still feel distressed to say that all organs of the State have, in varying degrees, failed to fulfil the promise of equality in favour of women. We also notice that the high instances of female4236 foeticide and infanticide, poor maternity and child care, women's diseases turning chronic, women being subjected to malnutrition, are outrageous stains on a free India. They disclose the inbuilt subconscious bias of those who rule against women. The Committee would like to remind the State that gender equality and safeguarding of human rights is a Millennium Development Goal (to be achieved by the year 2015) under the United Nations Millennium Declaration.

27. If these problems exist - and there have been consistent studies by sociologists which establish this fact - the mere setting up of Ministries for the social empowerment of women is highly inadequate. The immediate requirement is, therefore, that there should be minimal guaranteed rations in respect of women, compulsory access to education for women, free education in respect of women up to the undergraduate level, preferential opportunities to single women, rehabilitation of destitute women, prevention of trafficking in women and a host of measures which would show that the Indian society is serious in reinforcing gender equality.

28. A *fortiori* the need for good governance is of a credible and efficient mechanism for law enforcement and justice delivery coupled with performance of the fundamental duties by every citizen.

29. Implicit in the terms of reference, this forms an integral part of the Report.

30. In our tradition bound society, structured on the basis of conservative values, when a woman is subjected to sexual assault in any form, it translates into a multiple crime. She is raped at home (literally and figuratively) and in public, followed by demeaning medical examination, examination and cross-examination by the police and in court, in salacious media reports, and in the insensitive response of society, including family and acquaintances. In sum, the victim suffers intermittent rape in full public glare.

31. Another humiliating aspect of the crime against women is that her status in the patriarchal structure of society also impedes her access to justice. The inequities of social status, caste prejudices, and economic deprivation further compound the gender injustice.

32. Despite the well-known Bhanwari Devi case, which led to the *Vishakha* judgment, full justice continues to elude the victim of sexual harassment and sexual assault even after two decades. The most appalling feature of the case is that the trial court acquitted the accused observing that the rapists were middle-aged and respectable persons of a higher caste who could not have raped a lower caste woman. The mindset of the judiciary also needs to be improved by their education in gender sensitivity. The women's tragedy is to face the compounding of gender and social injustice contrary to the constitutional promise to 'secure a social order in which justice, social, economic and political, shall inform all the institutions of national life', and the State's obligation 'to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people'.[13]

33. Education to correct gender bias and to cure the mindset of the prejudices influencing the law enforcement agencies has also to be a part of this exercise. A holistic view of the entire issue has to be taken by addressing the root causes and not merely the symptoms of the malady. Education has to begin at birth in the home, in formal education, personal behaviour, social interaction, and it has to continue4237 life-long. The process may take time for its completion, but it must commence forthwith. The Report has, therefore, to deal with this aspect as well.

34. Women must enjoy freedom and should not be intended to act as carriers of 'perceived honour' any differently from male children. Thus, the excessive control over women,

which has been exercised over the last few decades and its acceptance in India in recent years, is simply outrageous. We are also of the opinion that the rape of Nirbhaya and the sacrifice of her life only reinforces that India requires de facto equality, freedom from superstition, renunciation of arcane, misogynist traditions and practices which are at variance with the Constitution, which seek to debilitate and handicap women.

35. On the contrary, it is necessary that the State must practice equality in matters of all such opportunities which it affords in public employment, the employment of women which would include even employment in other positions where women could completely show their ability to perform.

36. It is indeed tragic that the brutal gang rape of a young, defenseless woman on December 16, 2012 by a group of perverted men in the heart of the nation's capital was needed to bestir the government into action realizing the gravity of the situation, which could no longer countenance delay in taking necessary steps to provide adequate measures for the safety and protection of the womenfolk in the country. The setting up of this Committee is a step in that direction, and we hope, at the very outset, that the three arms of governance, viz, the executive, the judiciary and the legislature, will take the recommendations made herein to their logical conclusion.

37. We must note, with some satisfaction, that during the formulation of this Report, the Executive has taken steps to implement measures to ensure the safety of women in public transport.[14] The judiciary has also come down heavily in several instances, and, as reported in the media, the Supreme Court has, on January 11, 2013, taken cognizance of a PIL filed seeking directions in respect of women's safety in Delhi.[15] We hope that the impetus generated by the December 16 incident and the ensuing protests will continue in the future.

38. The involvement of civil society led by the youth in the spontaneous country-wide peaceful protest, demanding prompt measures by the government to protect the dignity of women has lent greater urgency to the long felt need. To quote Pratap Bhanu Mehta:

> "The disenchantment with the state often expresses itself in the thought that those who wield state power are not accountable."[16]

39. To achieve this reality, stages of change do not have to be, in the Darwinian sense, mere steps in evolution but can be fast forwarded by fundamental changes of attitude. We are glad to note that the voices of protest raised post the December 16, 2012 incident have symbolised the potential of the youth of the nation, and, perhaps, their need to disregard past perceptions in relation to women. In the view of the Committee, the protests are clearly a call to modern India to renounce old ways of looking, thinking and acting towards women and are a strong, positive move towards true empowerment.4238

40. Demand of accountability by the civil society of those responsible to provide good governance to curb the menace of sexual harassment escalating to assault on women in any form is the discharge of people's participatory role in republican governance. This is a positive fallout of the unfortunate incident. Sexual assault degenerates to its gravest form of rape beginning with uncontrolled sexual harassment in milder forms, which remain uncontrolled. It has, therefore, to be curbed at the initial stage.

41. The Report, therefore, deals with sexual crimes at all levels; and with the measures needed for prevention as well as punishment of all acts with sexual overtone that are an affront to human dignity. To go a step further, this Report also deals with the construct of gender justice in India and the various obstructions thereto, which prevent this nation of more than a billion persons from achieving the objectives stated in the Preamble to the Constitution.

42. The expressions 'aggravated sexual assault', 'Criminal Law', and 'speedier justice' used in the terms of reference contained in the Notification dated December 23, 2012

constituting the Committee, have to be interpreted expansively to serve the object of this exercise.

43. The expression 'aggravated sexual assault' must include all stages of affront to human dignity which is the quintessence of human rights, beginning with any act with a sexual overtone. The expression 'Criminal Law' must include all gender related laws: criminal, civil or electoral. The expression 'speedier justice' must include all institutions of the justice delivery system, which are meant to provide speedy justice to enforce the right to life with dignity guaranteed in Article 21 of the Constitution of India .

44. In short, a holistic view is to be taken of the unrealized and seriously threatened constitutional promise of the universally recognized human right of gender justice.

45. This is the scope of the Committee's Report.

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Chapter Three

Rape and Sexual Assault

1. The statutory definition of the offence of "rape" is found under section 375 . It reads thus:

> **"375. Rape.--** A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--
>
> *First*.--Against her will.
>
> *Secondly*.--Without her consent.
>
> *Thirdly*.--With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
>
> *Fourthly*.--With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.4239
>
> *Fifthly*.--With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
>
> *Sixthly*.--With or without her consent, when she is under sixteen years of age.

> *Explanation*.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
>
> *Exception*.--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

2. Simply put, the offence of rape is "ravishment of a woman" without her consent or against her will by force, fear or fraud and also includes the "carnal knowledge" of a woman.[17]
3. "Carnal Knowledge" means penetration to any slightest degree. This ingredient of rape has been statutory incorporated under the Explanation to Section 375 .

Ingredients of the offence

Consent

4. In order to bring home the charge of rape against a man, it is necessary to establish that the "sexual intercourse" complained of was either against the will or without her consent. Where the consent is obtained under the circumstances enumerated under clauses *firstly* to *sixthly*, the same would also amount to rape.
5. In *Dileep Singh v State of Bihar* [18] the Supreme Court observed that "though will and consent often interlace and an act done against the will of the person can be said to be an act done without consent, the Indian Penal Code categorizes these two expressions under separate heads in order to as comprehensive as possible."
6. The difference between the two expressions was brought out by the Supreme Court in *State of UP v Chottey Lal* [19] in the following words:

> "15. Be that as it may, in our view, clause Sixthly of Section 375IPC is not attracted since the prosecutrix has been found to be above 16 years (although below 18 years). In the facts of the case what is crucial to be considered is whether clause Firstly or clause Secondly of Section 375IPC is attracted. The expressions "against her will" and "without her consent" may overlap sometimes but surely the two expressions in clause Firstly and clause Secondly have different connotation and dimension. The expression "against her will" would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. On the other hand, the expression "without her consent" would comprehend an act of reason accompanied by deliberation. (Emphasis supplied)"

7. It must be noted that the Courts have followed the tests laid down under Section 90 of the IPC for establishing "consent". Section 90 reads thus:

> **"90. Consent known to be given under fear or misconception.--** A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the4240 act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

> **[Consent of insane person]** if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or
>
> **[Consent of child]** unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

8. In this context the decision of Supreme Court in *State of H.P. v Mango Ram* [20] is noteworthy. The Court observed as follows:

> "13.....The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. From the evidence on record, it cannot be said that the prosecutrix had given consent and thereafter she turned round and acted against the interest of the accused. There is clear credible evidence that she resisted the onslaught and made all possible efforts to prevent the accused from committing rape on her. Therefore, the finding entered by the learned Sessions Judge that there was consent on the part of the prosecutrix is without any basis."

9. The United Nations Handbook points out that the definitions of rape and sexual assault have evolved over time, from requiring use of force or violence, to requiring a lack of positive consent.
10. The United Nations recommends that the definition of rape should require the existence of 'unequivocal and voluntary agreement' as well as proof by the accused of steps taken to ascertain whether the complainant was consenting.[21] This has the advantage of shifting the burden to the defence to prove that such steps were taken. This approach was endorsed by the CEDAW committee in its views in Vertido v The Philippines,[22] which made it clear that such a definition would assist in minimizing secondary victimization of the complainant/survivor in proceedings.
11. Similarly, under Canadian law, the accused cannot argue that there was belief in consent if the accused did not take reasonable steps to ascertain that there was consent to the specific sexual activity. It is not enough that the accused subjectively believed there was consent. He must also demonstrate that he took reasonable steps to ascertain it.[23]
12. Under the law of England and Wales, a person consents if he or she 'agrees by choice and has the freedom and capacity to make that choice.'[24] There are certain statutory presumptions regarding consent. For example, lack of consent is assumed if violence was used or threatened or the accused had induced a fear of violence; the complainant was unlawfully detained, asleep or unconscious; or the accused had administered a substance capable of causing the complainant to be stupefied or overpowered. Lack of consent is conclusively proved if the defendant intentionally4241 deceived the complainant as to the nature or purpose of the relevant act, or induced consent by impersonating a person known to the complainant.[25]The underlying principle is that consent to sexual activity 'requires a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act.'[26] There are some similar presumptions in the Indian statute. We have defined consent keeping the above in mind.

Penetration

13. The section further clarifies that mere penetration is sufficient to constitute the offence of rape.

14. In *Koppula Venkatrao v. State of AP* [27] the Supreme Court held as follows:

> "12. The *sine qua* non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of "rape" as contained in Section 375IPC refers to "sexual intercourse" and the Explanation appended to the section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection."

15. Pursuant to the aforesaid observation the offence of 'attempt to commit rape' also need elaboration. Section 376 read with Section 511 of IPC penalizes the offence of 'attempt to rape'.

Attempt to commit rape

16. In *Koppula Venkatrao* (*supra*) the Supreme Court, with respect to the applicability of section 511 to the offence of rape, held the following:

> "8. The plea relating to applicability of Section 376 read with Section 511IPC needs careful consideration. In every crime, there is first, intention to commit, secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.
>
> 9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word "attempt" is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere4242 intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to

commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

11. In order to find an accused guilty of an attempt with intent to commit a rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect."

Evidence and proof

17. It is well settled that the evidence of the victim of rape is on the same footing as the evidence of an injured complainant or witness. Her testimony alone is sufficient for conviction. In prosecutions of rape, the law does not require corroboration. It is only by way of abundant caution that the court may look for some corroboration so as to satisfy its conscience and rule out any false accusation.
18. However, the above principle of presumption while prosecuting rape cases emerged in the aforesaid background.
19. In *Tukaram v State of Maharashtra* [28] the Supreme Court had disbelieved the statement of the victim of rape, on the ground that the circumstantial evidence did not lead to the inference of guilt and "in fact derogates in no uncertain measure from the inference drawn by it."[29]
20. The facts were these - Mathura was a young girl labourer of 14-16. Her bother and she were brought to their local police station to record their statements in respect4243 of a complaint lodged by her brother. While at the police station, Mathura was raped by Head Constable Tukaram and Constable Ganpat, a fact which she reported to a crowd that had gathered outside the police station. Mathura was then examined by a doctor, who advised her to file a police complaint, which complaint was registered by the police after some hesitation and protests from the crowd.
21. Mathura's medical examination revealed no injuries and evidence of prior intercourse. Presence of semen was detected on her clothes and the pyjama of Ganpat. The Trial Court, however, refused to convict the accused. The High Court reversed the finding and sentenced Tukaram to rigorous imprisonment for one year and Ganpat for five years. The High Court held that both these 'gentlemen' were perfect strangers to Mathura and that it was unlikely that 'she would make any overtures and invite the accused to satisfy her sexual desires' The High Court came to the conclusion that Mathura did not consent to intercourse. The Supreme Court reversed the High Court verdict and held that as

there were no injuries shown by the medical report, the story of 'stiff resistance having been put up by the girl is all false' and the alleged intercourse was a peaceful affair. The Court further held that crimes and alarms were a concoction on her part. The Court further held that under Section 375 only the "fear of death or hurt" could vitiate consent for sexual intercourse.

22. Following this verdict a nation-wide protest was launched for inclusion of custodial rape within the legislative provision. The Supreme Court's judgment was criticised by four eminent law teachers - Upendra Baxi, Vasudha Dhagamdar, Raghunath Kelkar, and Lotika Sarkar - who posed the following questions in an open letter to the Supreme Court--

(a) Was this not a decision which violated human rights of women under the law and the Constitution?
(b) The judgment provided no cogent analysis as to why the factors which weighed with the High Court were insufficient to justify conviction for rape?
(c) The fact remains that Mathura was asked to remain in the police station even after her statement was recorded and her friends and relations were asked to leave. Why?
(d) Why were the lights put off and the doors shut?

23. The decision of *Tukaram v State of Maharashtra* ,[30] is a relevant case to show how public opinion and various organisations have espoused the rights of women.

24. Accordingly the Criminal Law Amendment Act, 1983 was passed which included situation of "aggravated rape" under section 376A to E. Further, the India Evidence Act, 1872 was also amended by the Criminal Law Amendment Act, 1983 and section 114A was incorporated which imposed the burden of proving "consent" upon the accused in the aforesaid cases of aggravated rape. This was an exception of the general rule of presumption of innocence of the accused.

25. However, even before the above amendments came in to force in the case of *Bharvada Gohinbhai Hirjibhai v State of Gujarat* ,[31] the Supreme Court reversed the trend and came to a conclusion that it was open to the Court to rely upon the evidence of a complainant even without seeking corroboration if corroboration by4244 medical evidence is available. We also notice that the said judgment seems to have stereotyped Indian and Western women in a somewhat unorthodox way:

> "9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opiniated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplate it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the Western Society that a female may level false accusation as regards sexual molestation against a male for several reasons such as:
>
> (1) The female may be a 'gold digger' and may well have an economic motive to extract

money by holding out the gun of prosecution or public exposure.

(2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.

(8) She may do so upon being repulsed.

10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assualt on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :(1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be4245 difficult to secure an alliance. With a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12 The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent".

26. As a listing of these characteristics, we regret that there is a profiling of an Indian girl which has taken place which is an overgeneralisation and it would neither be accurate nor scientific to test the testimony of an Indian women with reference to the criteria which are mentioned in paragraph 10 above. But what is important is that the judgment, in a certain sense, discloses how a woman is viewed in India.

27. We feel that it is the duty of the State as well as civil society to deconstruct the paradigm of shame-honour in connection with a rape victim. Rape is a form of sexual assault just like any other crime against the human body under the IPC . While we agree that it has its distinguishing characteristics, we do not think that there is any basis for society or the State and much less the police/doctors to treat a rape victim as a victim of any other crime. In other words, we are of the opinion that while the said paragraph quoted illustrates the misplaced juxtaposition of shame and honour with the crime of rape, the juxtaposition is clearly a matter of reality and at the same time we think that it is necessary for this to be deconstructed. It also shows that women have been looped into a vicious cycle of shame and honour as a consequence of which they have been attended with an inherent disability to report crimes of sexual offences against them.

28. In other words, a woman seems to be risking her reputation and honour by reporting a crime of sexual assault against herself. This view must change and while the above passage shows the fundamental misconceptions which are inbuilt in society dealing with

women, we are more concerned with the observations in so far as they describe the position of women in Indian society, not in as much as women in the context of rape. In fact, we believe that equality before law, which is guaranteed under the Constitution, invariably means the eschewing of irrelevant considerations and we do believe that many of these considerations must be viewed as irrelevant in a changing society. However, we do notice that the above characteristics are completely inconsistent with fundamental rights which are guaranteed to a woman under the Constitution. We further believe that these cannot be the basis for the purpose of defining the rights of women under the law.

29. At this stage, we notice in *Rafique v State of UP* ,[32] where Krishna Iyer, J. made the following observations:--

> "There are several "sacred cows" of the criminal law in Indo-Anglian jurisprudence which are superstitious survivals and need to be re-examined. When rapists are4246 revelling in their promiscuous pursuits and half of humankind-womankind-is protesting against its hapless lot, when no woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative testimony, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. In this case, the testimony has commanded acceptance from two courts. When a woman is ravished what is inflicted is not merely physical injury, but "the deep sense of some deathless shame".
>
> A rape! a rape!...
>
> Yes, you have ravish'd justice;
>
> Forced her to do your pleasure."
>
> "Hardly a sensitized judge who sees the conspectus of circumstances in its totality and rejects the testimony of a rape victim unless there are very strong circumstances militating against is veracity. None we see in his case, and confirmation of the conviction by the courts below must, therefore, be a matter of course. Judicial response to human rights cannot be blunted by legal bigotry."

30. The effect of the Criminal Law Amendment of 1983 was examined by the Supreme Court[33] and it was observed as follows:

> "15. In spite of the decision of this Court that (depending upon the circumstances of the case) corroboration of the prosecutrix was not necessary, the cases continued to end in acquittal on account of mishandling of the crime by the police and the invocation of the theory of 'consent' by the courts who tried the offence. To overcome this difficulty, the legislature intervened and introduced Section 114-A in the Evidence Act by Act No. 43 of 1983 reading as under:

"114-A. Presumption as to absence of consent in certain prosecutions for rape.-- In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."

16. This section enables a court to raise a presumption that the woman who was the victim of rape had not consented and that the offence was committed against her will. The situation, however, has hardly improved. Conviction rates for rape are still lower than any other major crime and the women continue to argue even today that in rape cases the victimised women, rather than the rapists, were put on trial. A large number of women still fail to report rapes to the police because they fear embarrassing and insensitive treatment by the doctors, the law enforcement personnel and/or the cross-examining defence attorneys. The fear has to be allayed from the minds of women so that if and when this crime is committed, the victim may promptly report the matter to the police and on a charge-sheet being submitted, the trial may proceed speedily without causing any embarrassment to the prosecutrix who may come in the witness-box without fear psychosis."

31. Further in *State of Maharashtra v Chandraprakash Kewalchand Jain* , the Court observed:[34]

"15. It is necessary at the outset to state what the approach of the court should be while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex offences. Is it essential that the evidence of the prosecutrix should be corroborated in material particulars before the court bases a conviction on her testimony? Does the rule4247 of prudence demand that in all cases save the rarest of rare the court should look for corroboration before acting on the evidence of the prosecutrix? Let us see if the Evidence Act provides the clue. Under the said statute 'Evidence' means and includes all statements which the court permits or requires to be made before it by witnesses, in relation to the matters of fact under inquiry. Under Section 59 all facts, except the contents of documents, may be proved by oral evidence. Section 118 then tells us who may give oral evidence. According to that section all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Even in the case of an accomplice Section 133 provides that he shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, illustration (b) to Section 114, which lays down a rule of practice, says that the court 'may' presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus under Section 133, which lays down a rule of law, an accomplice is a competent witness and a conviction based solely on his uncorroborated evidence is not illegal although in view of Section 114, illustration (b), courts do not as a matter of practice do so and look for corroboration in material particulars. This is the conjoint effect of Sections 133 and 114, illustration (b).

16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness

under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation.4248

17. We think it proper, having regard to the increase in the number of sex violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge

concerning her chastity.

18. But when such a crime is committed by a person in authority, e.g. a police officer, should the court's approach be the same as in any other case involving a private citizen? By our criminal laws wide powers are conferred on police officers investigating cognizable offences. The infrastructure of our criminal investigation system recognises and indeed protects the right of a woman to decent and dignified treatment at the hands of the investigating agency. This is evident from the proviso to sub-section (2) of Section 47 of the Code which obliges the police officer desiring to effect entry to give an opportunity to the woman in occupation to withdraw from the building. So also sub-section (2) of Section 53 requires that whenever a female accused is to be medically examined such examination must be under the supervision of a female medical practitioner. The proviso to Section 160 stipulates that whenever the presence of a woman is required as a witness the investigating officer will record her statement at her own residence. These are just a few provisions which reflect the concern of the legislature to prevent harassment and exploitation of women and preserve their dignity. Notwithstanding this concern, if a police officer misuses his authority and power while dealing with a young helpless girl aged about 19 or 20 years, her conduct and behaviour must be judged in the backdrop of the situation in which she was placed. The purpose and setting, the person and his position, the misuse or abuse of office and the despair of the victim which led to her surrender are all relevant factors which must be present in the mind of the court while evaluating the conduct evidence of the prosecutrix. A person in authority, such as a police officer, carries with him the awe of office which is bound to condition the behaviour of his victim. The court must not be oblivious of the emotional turmoil and the psychological injury that a prosecutrix suffers on being molested or raped. She suffers a tremendous sense of shame and the fear of being shunned by society and her near relatives, including her husband. Instead of treating her with compassion and understanding as one who is an injured victim of a crime, she is, more often then not, treated as a sinner and shunned. It must, therefore, be realised that a woman who is subjected to sex violence would always be slow and hesitant about disclosing her plight. The court must, therefore, evaluate her evidence in the above background.

32. We are of the opinion that these factors are to be kept in mind as we go forward. We do think that the criterion that 'a stigma attaches to the rape victim in Indian society.' is a counter-productive basis of appraisal. We do not think the victim4249 suffers a stigma. It is a stigma against society. The rights of women in the context of the Constitution are clearly intended to overcome all negative perceptions generated against them. We do think that the reiteration of the theory of stigma and shame has itself led to an 'unintended' diminution of the status of the victim. In other words, the victims can and ought to recover like any other victims from an accident, but that is possible only when there is a due discharge of the functions by the State. Except for this caveat, we think that the formulation by Lodha, J. has substantially aligned itself with modern psychological and scientific understanding of psychosocial trauma.

33. There is some degree of substance in the criticism which we have heard from women's organisations that women do not need sympathy, empathy or charity. They are equal per se. In other words, they claim what general human rights and the Constitution guarantees as their natural space to live freely and effect decisions based on individual judgment. We are unable to discountenance this argument. On the contrary this is entirely correct. The fundamental attitude, based on paternalism, must be discarded. We also think that the judgments of courts can sometimes be misconstrued as suggestive of sympathetic consideration in a criminal trial. We also think that the right to justice is a fundamental right under the Constitution and must not be earned out of a sympathy having regard to the social malaise which exists in society. In other words, we advocate an approach that if the juxtaposition between honour and shame on the one hand and

the crime of rape is deconstructed, people would be able to step forward and be heard. Such crimes should be registered immediately and investigated impartially and in respect of which we propose to make recommendations in the succeeding paragraphs. If an impartial investigation brings offenders to book, it is going to add to the confidence of not only the individual victim but also to women in society that such crimes can be brought to book. No woman in India must feel a sense of shame or stigma in the event of sexual assault. She is entitled to the redressal of that injury and that offence and she is therefore statutorily and constitutionally capable of access to the rule of law.

34. We believe that there is no danger and no shame or loss of honour in a victim seeking redressal by filing complaints and must in fact exercise, consistent with fundamental rights of women, the right to file complaints and bring offenders to book. We also think that it is the duty of the State to encourage such a climate and also to make available such resources that enable them to file such complaints.

35. If the depiction of the Indian society is what is depicted by Thakkar, J. in 1983, we must change the situation. We are indeed impressed by the reasoning of Lodha, J. who, although relying upon the decision of Thakkar, J. in Bharwada Bhoginbai Hirjibai, has correctly elucidated the psychological factors. We think that the scientific alignment adopted by Lodha, J. is the correct way to fashion the attitude of society towards a rape victim, which is to administer to her not only justice, but also such psychological therapeutic intervention as is necessary for rediscovery of the self and increased self-affirmation.

36. Many people who have faced accidents have overcome the disability caused by those accidents and have proceeded with life in a positive way. We must be able to teach the same rehabilitative methodology to rape victims. But in order to do that, it is necessary that they must be encouraged to report such crimes of sexual violence. In fact, it is the process of reporting such crimes which will be a forward looking step in being able to assert and demand justice. The demand of justice is not a personal aspiration. The demand of justice is a fundamental charter of freedom which is guaranteed under the Constitution to every individual. In the context of a woman, it4250 is all the more necessary that we snap the link between shame and honour, on the one hand, and the crime itself. We urge every victim to have the requisite courage to go forward and we exhort civil society to support all such cases where people who are filing complaints genuinely are given massive support to bring perpetrators to book.

37. We do notice that this concept of shame has somehow led the police to have an upper hand. The police have become arbiters of honour. The police, without registering even a FIR, assume that they have the moral capacity to pronounce upon the rights and wrongs of the rapist as well as the rape victim. This is simply deplorable and it is inconceivable in a modern society, which is governed by republican values. We think that it is necessary for the police officers to be completely sensitised against the honour-shame theory, and to treat every woman complainant as an individual in her own right capable of asserting her grievance. In other words, we feel that an indirect validation of police inaction in rape crimes has taken place as a result of - a) amorphous attribution of women's position in Indian society; b) the theory of shame-honour; and c) the policeman, 'being the male' in a 'patriarchal society, ought to be 'the moral judge'. It not only skews the justice delivery system at the stage of lodging the complaint, but it has a strongly debilitating effect resulting in direct violation of fundamental human freedoms and rights under the Constitution and the various international instruments.

38. We wish to take this point further. When a woman complains of rape, it is not the physical part of the woman which is directly the focus of attention. It is the offence and the offence against the bodily integrity of the woman as a person which is the offence in question. We therefore think that we need a woman to be viewed as a whole and not as a physical centre of sexual congress. At the same time it must not be viewed that a woman, while making a complaint, is in any way acting less honourably or in any way disturbing what is considered as the repository of honour of the family, community and others.

39. An offence against a person is very different from offence against a community. We think that there has been a completely erroneous connection which is being made between a woman and a community. In other words, we feel very strongly that an assault on a woman is an assault on the person of the woman. In this regard, we would like to quote Sohaila Abdulali, a rape victim, who recounts her experience which took place 32 years ago in Mumbai:

> "Rape is horrible. But it is not horrible for all the reasons that have been drilled into the heads of Indian women. It is horrible because you are violated, you are scared, someone else takes control of your body and hurts you in the most intimate way. It is not horrible because you lose your "virtue." It is not horrible because your father and your brother are dishonored. I reject the notion that my virtue is located in my vagina, just as I reject the notion that men's brains are in their genitals.
>
> If we take honor out of the equation, rape will still be horrible, but it will be a personal, and not a societal, horror. We will be able to give women who have been assaulted what they truly need: not a load of rubbish about how they should feel guilty or ashamed, but empathy for going through a terrible trauma."[35]

40. We are given to understand that the Government of India had brought out a Criminal Law Amendment Bill, 2012. We notice that a detailed critique of the said4251 Bill was submitted on behalf of women's groups and other stakeholders. We, too, have had the opportunity of examining the said Bill, which is presently pending before Parliament.
41. While we feel that the Criminal Law Amendment Bill, 2012 has provisions that are somewhat protective of the right of safety of women, we feel that the said Bill is far from complete. It needs a series of revisions, many of which we propose to recommend at a later stage in this Report.
42. At this juncture, we would like to revisit the recommendations made by previous Law Commissions on various issues pertaining to crimes against women.
43. We begin with the 84th Law Commission Report.[36] The said report was submitted on 25th April 1980 by the 42nd Law Commission presided over by Mr. Justice P.V. Dixit, former Chief Justice of the Madhya Pradesh High Court. It was pointed out in the said report that:

> "1.1 During recent years, the impact on the criminal justice system on victims of rape and other sexual offences has received considerable attention both in legal circles and amongst organizations and individuals connected with the welfare of women. In the field of criminology, an increasing interest has been shown in the victim and his or her position with the criminal justice system. In consequence, greater attention has now been paid to female victims of the sexual offence. Psychologists have, for some times past, been studying the effects of rape and other sexual offences upon women or girls and their personality."

44. We agree with the following observations of the 84th Report of the Law Commission:--

> "1.2 It is often stated that a woman who is raped undergoes two crisis, the rape and the subsequent trial. While the first seriously moves her dignity, curbs her individual, disturbs her sense of security and may often run her physically, the second is no less potent of mixture, in

> as much as it not only forces her to relive through the traumatic experience, but also does so in the grudge of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focused upon her."

45. We also agree with the following observation of the 42nd Law Commission regarding the purpose of criminal law:

> "Thus, we acknowledge that criminal law is the chief legal instrument to prevent anti-social acts of a serious character. The object is sought to be achieved, in the first instance, by the legislative command embodying that aspect of punishment which is called "general deterrence". Once a crime - whether sexual or any other crime - has been committed, this aspect is, at least for the time being, exhausted in regard to that particular criminal act. The fact that the particular crime has been committed shows that the object of deterrence has failed to prevent the particular criminal act."

46. We must point out that the Law Commission of India in its 42nd Report[37] as well as the 69th Report[38] has also made certain suggestions to the IPC and the Evidence Act. With reference to the IPC, it was suggested that where the4252 circumstances are such that a male may be able to take undue advantage of the situation and seduce the woman to illicit intercourse, the Commission recommended the insertion in the Code of three specific sections, intended respectively to deal with illicit intercourse - a) by a person having custody of a woman, with that woman; b) by superintendent of an institution with an inmate of an institution; and c) by a person in-charge of a hospital, with a mentally disordered patient.

47. We are indeed shocked to note that notwithstanding the fact that these Law Commission Reports were made decades ago, very little attention has been paid to the implementation of these recommendations. We also note that the National Legal Vision Document (drafted by one of us) in fact wanted a separate office of the Attorney General and Solicitor General to be established which would study the implementation of recommendations of the Law Commission. This, unfortunately, has also not been carried out.

48. The 42nd Law Commission (in the 84th Report) recommended that Sections 375 to 376E be redrafted.

49. While the Law Commission in its 84th Report made recommendations in the context of forcible and fraudulent sexual intercourse as well as illicit sexual intercourse by way of seduction, the 84th Report proceeded further. It examined the issue of 'consent'. According to the Law Commission, the statutory definition of rape in India emphasized the element of absence of consent. In fact, absence of consent is an important aspect. Barring cases where consent is irrelevant and the age of the girl is the only crucial factor (because of the statutory requirement of minimum age), want of consent becomes infructuous as a determining factor in most prosecutions for rape. It is also the factor to which the law has devoted its most detailed attention.

50. We agree with the 84th Report that:--

> "2.6 Consent is the anti-thesis of rape. Even if some may find any discussion on consent, it is too complicated. The matter cannot consistently with the needs of the subject be put in simple one phrase formulation. When circumstances in life present an infinite variety, the law must be well equipped to deal with them, nuances of consent are therefore unavoidable."

51. It may also be noted that the 84th Report of the Law Commission therefore dealt with the substantial law relating to the law of consent in the context of rape. Consent must be real. Often, it is vitiated by circumstances which take away the freedom of choice. Section 90 of the IPC runs thus:--

> "A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows or has reason to believe, that the consent was given in consequence of such fear or conception; or if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gave his consent; or unless the contrary appears from the context if consent is given by a person who is under 12 years of age."

52. Thus the 84th Law Commission Report observed as follows:

> "2.9 The modifications recommended by us in the third clause vitiate consent not only when a woman is put in fear of death or hurt, but also when she is put in fear of any injury being caused to any person (including herself) in body mind, reputation or property and also when her consent is obtained by criminal intimidation, that is to say, by any words or acts intended or calculated to put her in fear of any injury or danger to herself or to any person in whom she is interested or when she is threatened with any4253 injury to her reputation or property or to the reputation of any one in whom she is interested. Thus, if the consent is obtained after giving the woman a threat of spreading false and scandalous rumours about her character or destruction of her property or injury to her children or parents or by holding out other threats of injury to her person, reputation or property, that consent will also not be consent under the third clause as recommended to be amended."

53. The 84th Law Commission Report correctly said that violence was not mandatory.

> "**2.11. Overt violence, if necessary.--** While these are the main amendments on the point of consent, we may also mention a few points that have been raised during the suggestions made to us, concerning the concept of consent. There is a suggestion that the definition of "rape" should make it clear that the crime can take place without overt violence. We have given careful thought to this aspect, but we do not think that the law needs any clarification in this regard. Overt violence, or, for that matter, violence of any particular category, is not a necessary element of rape as defined in S. 375 . The cardinal fact is absence of consent on the part of the woman."

54. There can be cases of consent even when there is no violence. Violence--or, for that matter, marks of resistance--are not conclusive of consent. In any case, after a clarification is made in S. 375 on the lines recommended by us, this point would lose much of its practical importance.

55. The 84th Report further recommended that the minimum age should be increased to 18 years and observed as follows:

> **"2.20. Increase in minimum age.--** The question to be considered is whether the age should

> be increased to 18 years. The minimum age of marriage now laid down by law (after 1978) is 18 years in the case of females and the relevant clause of S. 375 should reflect this changed attitude. Since marriage with a girl below 18 years is prohibited (though it is not void as a matter of personal law), sexual intercourse with a girl below 18 years should also be prohibited.

56. On the question of Section 354 relating to outraging modesty of women and indecent assaults, the 84th Report suggested that Section 354A must be inserted regarding indecent assault on a minor. The 84th Report also opined that eve teasing was amply covered under Section 509 of the IPC, and observed as follows:

> "**2.31. Recommendation as to Section 354 -A, Indian Penal Code .--** Accordingly, we would recommend that, while incorporating S. 354 -A in the Indian Penal Code, after the words "obscene manner", the words "with or without the consent of the minor" should also be added.
>
> **XVI. Indecent gestures**
>
> **2.32. Section 509IPC --** We may mention here that acts which do not amount to an "assault"--acts such as indecent gestures and acts that have come to be known as "eve teasing"--are amply covered by S. 509 of the Indian Penal Code . The matter strictly does not fall within the purview of rape or assault, but we refer to it because one of the women's organisations with whom we held discussions was anxious that the law should penalise such behaviour in public places or on public transport vehicles particularly."

57. Where there is physical contact or threat of physical contact, the offender can be charged under S. 354 of the same Code, punishing a person who "assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty". The punishment is imprisonment of either description up to two years or fine or both. Both the offences are, as the law now stands, cognizable4254
58. We notice that many other recommendations have been made in respect of female victims of sexual offences. In particular, we have also noticed the suggestion contained in paragraph 3.15 of the 84th Report that a new sub-section be added in Section 160 of the CrPC to require the statement of female victims of sexual assault under the age of 12 to be recorded by a woman police officer. It is unfortunate that it is only in 2012, in the Protection of Children from Sexual Offences Act, 2012, that an attempt has been made by Parliament to provide special measures for the recording of statements of children who are victims of sexual offences.
59. We also notice in the 84th Report that the medical report is a document of vital importance and deserves attention.
60. We notice that the medical examination report of the accused in a case of rape or attempt to commit rape is an important document, and we have dealt with this aspect at some length later in this Report. We also think that any delay in reporting rape will result delay in the commencement of the investigation. But at the same time, the police are duty bound to register such cases and must not insult or harass or refuse to hear the victim or the complainant.
61. We notice that the following recommendations were made for the purpose of recording

of reasons by inserting Sections 53(1A) , (1B), (1C) and (1D) in the CrPC :--

> "4.7. Recommendation as to Section 53CrPC .--It is very important that reasons should be given for the opinion expressed in the report. Accordingly, we recommend the insertion in S. 53 of the Code of Criminal Procedure, of the following sub-sections:
>
> Ss. 53(1-A), (1-B), (1-C) and (1-D) Code of Criminal Procedure, 1973 to be inserted.
>
> (1-A) When a person accused of rape or an attempt to commit rape is arrested and an examination of his person is to be made under this section, he shall be forwarded without delay to the registered medical practitioner by whom he is to be examined.
>
> (1-B) The registered medical practitioner conducting such examination shall without delay examine such person and prepare a report specifically recording the result of his examination and giving the following particulars:
>
> (i) the name and address of the accused and of the person by whom he was brought,
> (ii) the age of the accused,
> (iii) marks of injury, if any, on the person of the accused, and
> (iv) other material particulars in reasonable detail.
>
> (1-C) The report shall state precisely the reasons for each conclusion arrived at.
>
> (1-D) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in S. 1973 as part of the documents referred to in cl. (a) of sub-s. (5) of that section."

62. We are of the view that Section 417A suggested by the 84th Report requires to be enacted, as suggested below:

> "When a woman is arrested and there are no suitable arrangements in the locality for keeping her in custody in a place of detention exclusively meant for women she shall be sent to an institution established and maintained for the reception, care, protection and welfare of women or children licensed under the Women's and Children's Institutions (Licensing) Act, 1956 or an institution recognized by the State Government except in4255 cases where any special law requires that she should be sent to a protective home or other place of detention authorized for the purposes of such special law."

63. What is most surprising is that Parliament has ignored the recommendation of the 84th Report, which calls for the punishment of a station-in-charge who fails to register information of a cognisable offence given to him. In this respect the 84th Report recommended as follows:

> *"X. Non-recording of information relating to cognizable offences*

3.29. Section 167 -A IPC --Refusal to register case of rape.-- We now come to another matter concerning the stage of investigation. During our oral discussions with the representatives of women's organisations, it was stated that in some cases the police fail to register a case of rape reported to them even when the full facts are communicated to them. We have not been able to gather statistics of the number of such cases, as the collection of the relevant figures would take considerable time and the present Report deals with a matter of urgency. We hope that the percentage of such cases would not be high. Nevertheless, we do take the view that in principle, the law should contain a specific provision dealing with refusal (or failure without sufficient cause) to register such cases. The offence of rape is a cognizable offence and if the police fail to register it, it is a clear violation of the provisions of the Code of Criminal Procedure, 1973 in this regard. Cognizable offences reported to the police are "registered"--as the popular usage goes--under S. 154(1) of the Code of Criminal Procedure . If the officer in charge of a police station refuses to record the information reported relating to a cognizable offence, there is a remedy already provided in the Code of Criminal Procedure, the relevant provision being in the following terms:

"(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-s. (1) [of S. 154] may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

3.32. Insertion of Section 167 -A, Indian Penal Code recommended.--Having regard to what we have stated above, we would recommend the insertion of a specific penal provision, say, as S. 167 -A, in the Indian Penal Code on the subject. In view of the general scheme adopted in that Code, the proposed provision would not be confined to refusal to register the offence of rape and would cover other cognizable offences as well. The following is a rough draft of the provision that we recommend:

"167-A.-- Whoever, being an officer-in-charge of a police station and required by law to record any information relating to the commission of a cognisable offence reported to him, refuses or without reasonable cause fails to record such information shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

64. Section 375 of the Indian Penal Code has raditionally defined rape in narrow terms as 'sexual intercourse' or 'penetration' in the circumstances defined in the statute. The Indian Criminal Law Amendment Bill 2012 proposes replacing the offence of 'rape' with that of 'sexual assault'. However, while the new provisions widen the definition of 'penetration' beyond vaginal penetration, the new offence remains limited to that of 'penetration'. Other types of sexual assault are not subject to appropriate legal sanction.

65. Two contrasting positions on this issue have been taken in other jurisdictions examined here.4256

(a) A wide definition of sexual assault to replace the offence of rape and indecent assault:

(i) The UN Handbook recommends that existing offences of 'rape' and 'indecent assault' be replaced with a broad offence of 'sexual assault' graded according to harm.[39] However, its definition of 'sexual assault' is significantly wider than that of the proposed Indian approach. The Handbook recommends that 'sexual assault' be defined as a violation of bodily integrity and sexual autonomy. Moreover, it recommends the removal of any requirement of proof of penetration.

(ii) This follows the approach in Canada, which does not have a separate definition of rape. Instead, s. 271 of the Criminal Code in Canada prohibits 'sexual assault'. Section 265 defines 'sexual assault' as non-consensual touching in circumstances of a 'sexual nature'.[40] The law does not distinguish between different types of touching from groping to penetration. All are sexual assaults and criminal offences.

(iii) The advantage of this approach is that it does not require complex definitions of 'penetration', which are inevitably unable to capture the full range of violations to which a woman could be subject. Such definitions also considerably increase the evidential burden of the prosecution to prove penetration.

(iv) The disadvantage of this approach is that the epithet 'rape' continues to bring with it a high degree of moral and social opprobrium, which is not conveyed by the words 'sexual assault.' By removing the epithet 'rape', there is a risk of diluting the extent of moral condemnation.

(b) Retaining an offence of 'rape' within a wider offence of sexual assault.

(i) This approach retains the specific offence of rape but includes it in a cluster of offences under the category of sexual assault. This is the approach of the legislation in England and Wales, which specifies offences of 'rape', 'assault by penetration', 'sexual assault' and 'causing a person to engage in sexual activity without consent'.

1. 'Rape' occurs when a person (A) 'intentionally penetrates the vagina, anus or mouth of another person (B) with his penis' without consent. This carries a maximum sentence of life imprisonment.[41]
2. 'Assault by penetration' occurs when (A), without consent, 'intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,' and the penetration is sexual. This carries a maximum sentence of life imprisonment.[42]4257
3. 'Sexual assault' occurs when (A) 'intentionally touches another person (B),' and the touching is sexual. This carries a maximum sentence of 10 years' imprisonment.[43]
4. 'Causing a person to engage in sexual activity without consent' occurs when (A) intentionally causes another person (B) to engage in a sexual activity without consent.[44] Where the activity is equivalent to rape or assault by penetration, the maximum sentence is life imprisonment. In other cases, the maximum sentence is 10 years.

(ii) A similar approach is taken by the South African legislation, which

distinguishes between rape and other forms of sexual assault. Under South African law,[45]

1. 'Rape' is defined as all penetrative offences. 'Sexual penetration' is defined in broad and gender-neutral terms which go well beyond the prior common law restriction to penile-vaginal penetration.[46]
2. 'Sexual assault' replaces the common law offence of 'indecent assault'. Section 5 of the Act provides that sexual assault is committed where a person ('A') unlawfully and intentionally sexually violates a complainant ('B'). 'Sexual violation' has a wide definition.
3. The advantage of this approach is that it retains the moral opprobrium attached to the common understanding of rape. Notably the separation of rape from other forms of sexual assault was supported by the South African Law Reform Commission in its 1999 Discussion Paper on the reform of South African sexual violence laws.[47] The Commission argued that sexual violence involving the penetration of the body using sexual organs is qualitatively different from non-penetrative forms of sexual assault and therefore should be treated as a more severe offence.[48] To combine penetrative acts with non-penetrative acts in a single offence, it argued, would reduce the gravity of the offence. Furthermore, it argued that the division between penetrative and non-penetrative sexual offences would provide a better guide to judicial officers in sentencing.[49]

(iii) The disadvantage of this approach is that there will still be disputes as to when an act is penetrative and when it is not, potentially making it more difficult to prove a rape case.

66. **The meaning of 'sexual':** In both cases it is necessary to give some guidance as to when an assault is a sexual as against any ordinary assault.4258

(a) The Canadian Criminal Code is silent as to the definition of 'sexual'. The Supreme Court of Canada in *R v Chase* gave a broad definition: 'viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer.'[50] Courts will examine the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, threats, intent of the accused and any other relevant circumstances.[51] However, it is not a pre-requisite that the assault be for sexual gratification. The motive of the accused is just 'simply one of many factors to be considered.'[52]

(b) The UK legislation has a statutory definition, which like the Canadian, relies on the way in which a 'reasonable observer' might view the activity. Under s. 78, an activity is sexual if a reasonable person would consider that it is 'because of its nature sexual' or that 'because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.'

67. We are of the considered opinion that in the Indian context it is important to keep a separate offence of 'rape'. This is a widely understood term which also expresses society's strong moral condemnation. In the current context, there is a risk that a move to a generic crime of 'sexual assault' might signal a dilution of the political and social commitment to respecting, protecting and promoting women's right to integrity, agency and autonomy. However, there should also be a criminal prohibition of other, non-penetrative forms of sexual assault, which currently is not found in the IPC, aside

from the inappropriate references to 'outraging the modesty' of women in Sections 354 and 509 . We recommended the enactment of Section 354 in another form while we have recommended the repeal of Section 509 .

68. We have kept in mind that the offence of rape be retained but redefined to include all forms of non-consensual penetration of a sexual nature. Penetration should itself be widely defined as in the South African legislation to go beyond the vagina, mouth or anus.

69. An offence of sexual assault should be introduced to include all forms of non-consensual non-penetrative touching of a sexual nature. It is recommended here that the Canadian approach be followed, according to which the 'sexual nature' of an act is established if: 'viewed in the light of all the circumstances... the sexual or carnal context of the assault [is] visible to a reasonable observer.'[53] Courts will examine the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, threats, intent of the accused and any other relevant circumstances. It should not be a pre-requisite that the assault be for sexual gratification. The motive of the accused is 'simply one of many factors to be considered.'[54]

70. In this background it is necessary to examine the Criminal Law Amendment Bill, 2012. The offence of rape falls under Chapter XVI dealing with "offences affecting human body". Sections 375 to 376D are put under the category of "sexual offences". While Courts have often used the expression "sexual assault" in dealing4259 with not only rape cases but also cases of sexual abuse, the IPC did not define the said expression. The definition of "assault" is found under section 351 .

71. By virtue of the Amendment, the legislature has sought to widen the scope of the offence under section 375 to 376D by substituting the expression rape with "sexual assault". While we feel that the proposed Bill (as placed before Parliament) proposes some welcome changes to the law, there is still much ground that needs to be covered. Accordingly, this Committee has recommended amendments (appended to this Report) to the Criminal Law Amendment Bill 2012, which should be considered and enacted by Parliament at the earliest possible, if not immediately. In any event, we feel that the same ought to be promulgated by the Government as an ordinance.

Marital Rape

72. The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, Sir Matthew Hale declared: 'The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract'.[55]

73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, 'marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.'[56]

74. Our view is supported by the judgment of the European Commission of Human Rights in *C.R. v UK* , which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom.[57]This was given statutory recognition in the Criminal Justice and Public Order Act 1994.[58]

75. We find that the same is true in Canada, South Africa and Australia. In Canada, the provisions in the Criminal Code, which denied criminal liability for marital rape, were

repealed in 1983.[59] It is now a crime in Canada for a husband to rape his wife. South Africa criminalised marital rape in 1993, reversing the common law principle that a husband could not be found guilty of raping his wife. Section 5 of the Prevention of Family Violence Act 1993 provides: 'Notwithstanding anything to the4260 contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.' In Australia, the common law 'marital rape immunity' was legislatively abolished in all jurisdictions from 1976.[60] In 1991, the Australian High Court had no doubt that: 'if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.'[61] According to Justice Brennan (as he then was): 'The common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse.'[62]

76. These jurisdictions have also gone further and recognised that consent should not be implied by the relationship between the accused and the complainant in any event. In the Canadian 2011 Supreme Court decision in *R v. J.A.* , Chief Justice Mclachlin emphasised that the relationship between the accused and the complainant 'does not change the nature of the inquiry into whether the complaint consented' to the sexual activity.[63] The defendant cannot argue that the complainant's consent was implied by the relationship between the accused and the complainant.[64]In South Africa, the 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act ('Sexual Offences Act') provides, at s. 56 (1), that a marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation.

77. Even when marital rape is recognised as a crime, there is a risk that judges might regard marital rape as less serious than other forms of rape, requiring more lenient sentences, as happened in South Africa.[65]In response, the South African Criminal Law (Sentencing) Act of 2007 now provides that the relationship between the victim and the accused may not be regarded as a 'substantial and compelling circumstance' justifying a deviation from legislatively required minimum sentences for rape.

78. It is also important that the legal prohibition on marital rape is accompanied by changes in the attitudes of prosecutors, police officers and those in society more generally. For example, in South Africa, despite these legal developments, rates of marital rape remain shockingly high. A 2010 study suggests that 18.8% of women are raped by their partners on one or more occasion.[66] Rates of reporting and4261 conviction also remain low, aggravated by the prevalent beliefs that marital rape is acceptable or is less serious than other types of rape.[67] Changes in the law therefore need to be accompanied by widespread measures raising awareness of women's rights to autonomy and physical integrity, regardless of marriage or other intimate relationship. This was underlined in Vertido v The Philippines, a recent Communication under the Optional Protocol of the Convention on the Elimination of Discrimination Against Women (CEDAW), where the CEDAW Committee emphasised the importance of appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner.[68]

79. We, therefore, recommend that:

(i) The exception for marital rape be removed,
(ii) The law ought to specify that:

(a) A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;
(b) The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
(c) The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

80. We must, at this stage, rely upon Prof. Sandra Fredman of the University of Oxford, who has submitted to the Committee that that "training and awareness programmes should be provided to ensure that all levels of the criminal justice system and ordinary people are aware that marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife".

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Chapter Five

Other offences Against Women

EveTeasing

1. Another important aspect of sexual harassment is the horrendous practice of eve-teasing. In a recent judgment in *DIG v S. Samudiram* ,[69] the Supreme Court has referred to eve-teasing as a euphemism, which attracts penal action. In this case, a policeman was caught eve teasing a married woman. It led to his dismissal from service and the initiation of criminal proceedings. The aggrieved employee challenged the dismissal order before the Tamil Nadu Administrative Tribunal, Chennai. While the said application was pending before the Tribunal, the Judicial Magistrate, Tenkasi rendered a judgment acquitting the respondent of all charges.4262 The Tribunal noticed that no reliance could be placed on the judgment of the Criminal Court and upheld the order of dismissal from service, which was eventually upheld by the Supreme Court.
2. Since the case was in the context of eve teasing, the following observations of Radhakrishnan, J. are very important. In our view, the learned Judge perceptively has looked at not only sexual harassment at workplaces but the safety of women in all places. We are of the opinion that the safety of women in all places is again a fundamental guarantee which is enforceable against the State. We note the Supreme Court's observations which are as follows:--

> "26. We may, in the facts and circumstances of this case, wish to add some aspects which are also of considerable public importance. We notice that there is no uniform law in this country to curb eve-teasing effectively in or within the precinct of educational institutions, places of worship, bus stands, metro-stations, railway stations, cinema theatres, parks, beaches, places of festival, public service vehicles or any other similar place. Eve-teasing generally occurs in public places which, with a little effort, can be effectively curbed. Consequences of not curbing such a menace, needless to say, at times disastrous. There are many instances where girls of young age are being harassed, which sometimes may lead to serious psychological problems and even committing suicide. Every citizen in this country has right to live with dignity and honour which is a fundamental right guaranteed under Article 21 of the Constitution of India . Sexual harassment like eve-teasing of women amounts to violation of rights guaranteed under Articles 14, 15 as well. We notice in the absence of effective legislation to contain eve-teasing, normally, complaints are registered under Section 294 or Section 509 IPC .
>
> ... ...

28. It is for the prosecution to prove that the accused committed any obscene act or the accused sang, recited or uttered any obscene song; ballad or words and this was done in or near a public place, it was of obscene nature and that it had caused annoyance to others. Normally, it is very difficult to establish those facts and, seldom, complaints are being filed and criminal cases will take years and years and often people get away with no punishment and filing complaint and to undergo a criminal trial itself is an agony for the complainant, over and above, the extreme physical or mental agony already suffered.

... ...

30. The burden is on the prosecution to prove that the accused had uttered the words or made the sound or gesture and that such word, sound or gesture was intended by the accused to be heard or seen by some woman. Normally, it is difficult to establish this and, seldom, woman files complaints and often the wrong doers are left unpunished even if complaint is filed since there is no effective mechanism to monitor and follow up such acts. The necessity of a proper legislation to curb eve-teasing is of extreme importance, even the Tamil Nadu Legislation has no teeth.

31. Eve teasing today has become pernicious, horrid and disgusting practice. The Indian Journal of Criminology and Criminalistics (January-June 1995 Edn.) has categorized eve teasing into five heads viz. (1) verbal eve teasing; (2) physical eve teasing; (3) psychological harassment; (4) sexual harassment; and (5) harassment through some objects. In *Vishaka and Others v. State of Rajasthan* (1977) 6 SCC 241, this Court has laid down certain guidelines on sexual harassments. In *Rupan Deol Bajaj and Another v K.P.S. Gill* (1995) 6 SCC 194, this Court has explained the meaning of 'modesty' in relation to women. More and more girl students, women etc. go to educational institutions, work places etc. and their protection is of extreme importance to a civilized4263 and cultured society. The experiences of women and girl children in over-crowded buses, metros, trains etc. are horrendous and a painful ordeal.

32. The Parliament is currently considering the Protection of Woman against Sexual Harassment at Workplace Bill, 2010, which is intended to protect female workers in most workplaces. Provisions of that Bill are not sufficient to curb eve-teasing. Before undertaking suitable legislation to curb eve-teasing, it is necessary to take at least some urgent measures so that it can be curtailed to some extent. In public interest, we are therefore inclined to give the following directions:

(1) All the State Governments and Union Territories are directed to depute plain clothed female police officers in the precincts of bus-stands and stops, railway stations, metro stations, cinema theatres, shopping malls, parks, beaches, public service vehicles, places of worship etc. so as to monitor and supervise incidents of eve-teasing.

(2) There will be a further direction to the State Government and Union Territories to install CCTV in strategic positions which itself would be a deterrent and if detected, the offender could be caught.

(3) Persons in-charge of the educational institutions, places of worship, cinema theatres, railway stations, bus-stands have to take steps as they deem fit to prevent eve-teasing, within their precincts and, on a complaint being made, they must pass on the information to the nearest police station or the Women's Help Centre.

(4) Where any incident of eve-teasing is committed in a public service vehicle either by the passengers or the persons in charge of the vehicle, the crew of such vehicle shall, on a complaint made by the aggrieved person, take such vehicle to the nearest police station and give information to the police. Failure to do so should lead to cancellation of the permit to ply.

(5) State Governments and Union Territories are directed to establish Women' Helpline in various cities and towns, so as to curb eve-teasing within three months.

(6) Suitable boards cautioning such act of eve-teasing be exhibited in all public places including precincts of educational institutions, bus stands, railway stations, cinema theatres, parties, beaches, public service vehicles, places of worship etc.

(7) Responsibility is also on the passers-by and on noticing such incident, they should also report the same to the nearest police station or to Women Helpline to save the victims from such crimes.

(8) The State Governments and Union Territories of India would take adequate and effective measures by issuing suitable instructions to the concerned authorities including the District Collectors and the District Superintendent of Police so as to take effective and proper measures to curb such incidents of eve-teasing."

3. We have recommended insertion of provisions in the IPC to criminalise the act of eve-teasing.

AcidAttacks

4. We understand that a most heinous form of attack on women, which is commonplace in several Asian and African countries, is the throwing of acid on women for a multitude of reasons, including alleged adultery, turning down advances from men, and also as a form of domestic violence. Acids and other corrosive substances are thrown on women or administered to them, thereby causing death or physical and psychological damage with unfathomable consequences. The 226th4264 Report of the Law Commission of India, which dealt particularly with this offence stated:

> "Though acid attack is a crime which can be committed against any man or woman, it has a specific gender dimension in India. Most of the reported acid attacks have been committed on women, particularly young women for spurning suitors, for rejecting proposals of marriage, for denying dowry etc. The attacker cannot bear the fact that he has been rejected and seeks to destroy the body of the woman who has dared to stand up to him".[70]

5. In a certain sense, the aggressor is conscious that self-worth and self-esteem of a woman often lies in her face, which is a part of her personality. The dismemberment of the face or the body is not merely an offence against the human body but will cause permanent psychological damage to the victim. What happens when there is permanent physical and psychological damage to a victim, is a critical question and law makers have to be aware that offences are not simply based on the principle of what might be called offence against the body, i.e., damage of the body, but they must take into account the consequences on the right to live with dignity which survives the crime. This is an important consideration both in the fields of criminology and also in the field of sociology.

6. The Law Commission studied instances of acid attacks and also laws to deal with the offence in various countries including Australia, Bangladesh, Cambodia, China, El Salvador, Ethiopia, Italy, Laos, Malaysia, Nepal, Pakistan, Thailand, Sri Lanka, Uganda, UK, USA and Vietnam. However, the incidence in Bangladesh, India, Pakistan, Cambodia and Uganda are much higher and are on the rise. The Bangladesh Government therefore enacted a law called the Acid Offences Prevention Act, 2002. The Law Commission after examining the law in various jurisdictions, came to the conclusion that a separate Act should be proposed for dealing with compensation to victims of acid attacks, rape, sexual assault, kidnapping.

7. Traditionally, the offence is dealt with under Section 326 of the IPC which deals with 'Voluntarily causing grievous hurt by dangerous weapons or means'. This provision also deals with causing grievous hurt using 'corrosive substances' which include acids.

8. In fact in *Sachin Jana v State of West Bengal* ,[71] a case involving acid attack which had caused disfigurement of the victim, the Supreme Court applied Section 307IPC (Attempt to murder) read with Section 34 on the basis that to justify a conviction under Section 307 it was not essential that 'bodily injury capable of causing death was inflicted'. The Section made a distinction between the act of the accused and its result. Therefore it was not necessary that the injury actually caused to the victim should be sufficient under ordinary circumstances to result in death. The court is only required to see whether the act, irrespective of its result, was done with the intention or knowledge mentioned in Section 307 . It was sufficient if there was intent coupled with an overt act in execution thereof. The Supreme Court in this case, also relied upon the decision in *State of Maharashtra v Balram* .[72]
9. The gender specificity and discriminatory nature of this offence does not allow us to ignore this offence as yet another crime against women. We recommend that4265 acid attacks be specifically defined as an offence in the IPC, and that the victim be compensated by the accused. However in relation to crimes against women, the Central and State governments must contribute substantial corpus to frame a compensation fund. We note that the existing Criminal Law (Amendment) Bill, 2012, does include a definition of acid attack.

Offences against women in border areas / conflict zones

10. We now address a very important, yet often neglected area concerning sexual violence against women - that of legal protections for women in conflict areas. Our views on this subject are informed by the plight of a large number of women from areas in Kashmir, the North-East, Chhattisgarh, Odisha and Andhra Pradesh who were heard at length in the course of preparing our report. We are indeed deeply concerned at the growing distrust of the State and its efforts to designate these regions as 'areas of conflict' even when civil society is available to engage and inform the lot of the poor. We are convinced that such an attitude on the part of the State only encourages the alienation of our fellow citizens.
11. At the outset, we notice that impunity for systematic or isolated sexual violence in the process of Internal Security duties is being legitimized by the Armed Forces Special Powers Act, which is in force in large parts of our country. It must be recognized that women in conflict areas are entitled to all the security and dignity that is afforded to citizens in any other part of our country. India has signed the International *Convention for the Protection of All Persons from Enforced Disappearance*,[73] which has to be honoured. We therefore believe that strong measures to ensure such security and dignity will go a long way not only to provide women in conflict areas their rightful entitlements, but also to restore confidence in the administration in such areas leading to mainstreaming.
12. To this end, we make the following recommendations for immediate implementation:

    (a) Sexual violence against women by members of the armed forces or uniformed personnel must be brought under the purview of ordinary criminal law;
    (b) Special care must also be taken to ensure the safety of women who are complainants and witnesses in cases of sexual assault by armed personnel;
    (c) There should be special commissioners - who are either judicially or legislatively appointed - for women's safety and security in all areas of conflict in the country. These commissioners must be chosen from those who have experience with women's issues, preferably in conflict areas. In addition, such commissioners must be vested with adequate powers to monitor and initiate action for redress and criminal prosecution in all cases of sexual violence against women by armed personnel;
    (d) Care must be taken to ensure the safety and security of women detainees in police stations, and women at army or paramilitary check points, and this should be a subject under the regular monitoring of the special commissioners

mentioned earlier;

(e) The general law relating to detention of women during specified hours of the day must be strictly followed;4266

(f) Training and monitoring of armed personnel must be reoriented to include and emphasize strict observance by the armed personnel of all orders issued in this behalf;

(g) There is an imminent need to review the continuance of AFSPA and AFSPA-like legal protocols in internal conflict areas as soon as possible. This is necessary for determining the propriety of resorting to this legislation in the area(s) concerned; and

(h) Jurisdictional issues must be resolved immediately and simple procedural protocols put in place to avoid situations where police refuse or refrain from registering cases against paramilitary personnel.

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Conclusions and Recommendations

In view of the above, we come to the following conclusions and make the following recommendations:

Part I--Conclusions

1. The existing laws, if faithfully and efficiently implemented by *credible law enforcement agencies*, are sufficient to maintain law and order and to protect the safety and dignity of the people, particularly women, and to punish any offenders who commit any crime. This is not to say that the necessary improvements in the law, keeping in mind modern times, should not be enacted at the earliest.
2. Speedy justice is not merely an aspect of the right to life with dignity, but is essential for efficacy of the law and its desired impact, as well as for prevention of its violation.
3. Available personnel of the judiciary and the infrastructure, with a few systemic changes can, at least, reduce half the burden of arrears in courts contributing to delays in enforcing the law of the land. Judge strength can be increased in phases without diluting their quality. Our suggestion of eminent retired judges being appointed as ad hoc judges will solve this problem.
4. More effective control of the subordinate judiciary by the responsibility vested in the High Courts would ensure improved performance of the subordinate judiciary, which is the cutting edge of the justice delivery system. The High Courts have the pivotal role in the administration of justice by virtue of Article 235 of the Constitution . They have to lead by practice in addition to precept. The restatement of values of judicial life is a charter of faith for every judicial functionary at all levels.
5. Police reforms that are recommended and directed for the autonomy and better quality of the police force must be urgently implemented for the preservation of the rule of law, which is a basic feature of our Constitution.[74]
6. Law enforcement agencies must be insulated from any political or other extraneous influence, which impedes their performance. Law enforcement agencies must not become tools at the hands of political masters.4267
7. Transparency in the performance by all institutions of governance is necessary to enable the 'people' to discharge their participatory role in governance of the republic, and to enforce accountability of the public functionary when needed.
8. Performance appraisal for career progression must be objective, i.e. based on commitment to the constitutional values and to prevent the upward mobility of the undeserving.
9. Practically every serious breach of the rule of law can be traced to the failure of

performance by the persons responsible for its implementation. The undisputed facts in public knowledge relating to the Delhi gang rape of December 16, 2012 unmistakably disclose the failure of many public functionaries responsible for traffic regulation, maintenance of law and order and, more importantly, their low and skewed priority of dealing with complaints of sexual assault.

10. Disputes relating to the jurisdiction of the police over the area of the crime are often a cause of delay in initiating the process of taking cognizance of the crime and providing medical aid to the victim.
11. Delay in giving the necessary medical aid to the victim/injured person in a medico-legal case is also because of the practice of approaching only a government hospital and not the nearest available hospital. This continues in spite of the clear duty of every medical doctor (even a private practitioner) to attend to an injured person and to save such person's life.
12. The peculiarity of the Government of NCT of Delhi not having any control over the police force, which control vests only in the Ministry of Home Affairs of the Government of India (through the Lieutenant Governor) is the reason given publicly by the Chief Minister of Delhi for the absence of responsibility of her government. This ambiguity must be removed forthwith so that there is no divided responsibility in Delhi in respect of maintenance of law and order. Such a step is also essential to maintain accountability.
13. The apathy of civil society is evident from the inaction of passers-by and bystanders, who failed in their citizenship duty of rendering help to the victim of the December 16 gang-rape and her companion, who were both lying badly injured and disrobed on the roadside for a considerable amount of time. The misbehaviour of the police towards any samaritan is often the cause for such apathy. But this must not deter citizens from doing their duty. A change in the behaviour of the citizenry will also improve the conduct of the police. This effort must be promoted.
14. It is clear that denial of political rights to women will cast a shadow on democratic right to a free and fair election.
15. The nation has to account for all its missing children.
16. The lathi charge on peaceful demonstrators after the December 16 gang rape has scarred the Indian democracy.
17. The brutalities of the armed forces faced by residents in the border areas have led to a deep disenchantment, and the lack of mainstreaming of such persons into civil society. Serious allegations of persistent sexual assault on the women in such areas and conflict areas are causing more alienation.
18. The nation has to account for the tears of millions of women and other marginalized sections of the society which has been ignored owing to institutional4268 apathy. At this closing juncture we wish to reiterate the promise of a 'tryst with destiny' that Pandit Nehru made to the nation on the eve of independence:

> "Freedom and power bring responsibility. The responsibility rests upon this Assembly, a sovereign body representing the sovereign people of India. Before the birth of freedom, we have endured all the pains of labour and our hearts are heavy with the memory of this sorrow. Some of those pains continue even now. Nevertheless, the past is over and it is the future that beckons to us now. That future is not one of ease or resting but of incessant striving so that we might fulfil the pledges we have so often taken and the One we shall take today. The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us but as long as there are tears and suffering, so long our work will not be over."

19. Unless the promises made at the birth of the nation are fulfilled, the India that our founding fathers dreamt of will never become a reality. Recent events indicate that the

patience of the disillusioned youth is running out.

Part II--Recommendations

1. The equality of women, being integral to the Constitution, its denial is a sacrilege and a constitutional violation. Sustained constitutional violations mean that governance is not in accordance with the Constitution. A fortiori, all limbs of the State - the executive, the legislature as well as the judiciary - must respect women's rights and must treat them in a non-discriminatory manner.
2. As a primary recommendation, all marriages in India (irrespective of the personal laws under which such marriages are solemnised) should mandatorily be registered in the presence of a magistrate, which magistrate will ensure that the marriage has been solemnised without any demand for dowry having been made and that the marriage has taken place with the full and free consent of both partners.
3. The manner in which the rights of women can be recognised can only be manifested when they have full access to justice and when the rule of law can be upheld in their favour. The proposed Criminal Law Amendment Act, 2012, should be modified as suggested, and to secure public confidence, be promulgated forthwith. Since the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a realitythe provisions have to be cognizant of the same.
4. In respect of certain categories of cases, such as those where the victim is in custody of persons in authority including police and armed personnel, certain statutory presumptions must apply under Section 114A of the Indian Evidence Act, 1872. Every complaint of rape must be registered by the police and civil society should perform its duty to report any case of rape coming to its knowledge.
5. Any officer, who fails to register a case of rape reported to him, or attempts to abort its investigation, commits an offence which shall be punishable as prescribed. We have also taken into account offences of eve teasing, voyeurism, stalking as well as sexual assault and unsolicited sexual contact.
6. A special procedure for protecting persons with disabilities from rape, and requisite procedures for access to justice for such persons is also an urgent need. Amendments to the Code of Criminal Procedure, which are necessary, have been suggested.4269
7. The protocols for medical examination of victims of sexual assault have also been suggested, which we have prepared on the basis of the best practices as advised by global experts in the fields of gynaecology and psychology. Such protocol-based, professional medical examination is imperative for uniform practice and implementation.
8. The insensitivity of the police to deal with rape victims is well known. The police respect a patriarchal form of society, and have been unable to deal with extraordinary cases of humiliation and hardship caused by the *khap panchayats*, as is evident from various judgments of the Supreme Court. The police are involved in trafficking of children (including female children) and in drug trade. To inspire public confidence, it is necessary that there must not only be prompt implementation of the judgment of the Supreme Court in *Prakash Singh*, but also police officers with reputations of outstanding ability and character must be placed at the higher levels of the police force. In the present context, and in view of the facts revealed to us, it is necessary that every police commissioner and director general of police of this country must be selected in accordance with the directions of the Supreme Court in Prakash Singh's case, who can lead by example. The leader makes all the difference. As such, all existing appointments need to be reviewed to ensure that the police force has the requisite moral vision.
9. It is settled law that every policeman is bound to obey the law and any order of a superior officer, which is contrary to law, is no defence for his illegal action, which may be a punishable offence. Accordingly, any political interference or extraneous influence in the performance of the statutory duty by a policeman cannot be condoned. This principle has to be clearly understood by every member of the police force - their

accountability is only to the law and to none else in the discharge of their duty. Dereliction of this duty has to be punished according to the service rules and applicable law.

10. Authentic figures of missing children in India are not available for obvious reasons of the complicity of law enforcement agencies. Children have been driven into forced labour, sex abuse, sexual exploitation as well as made victims of illegal organ trade. Our report includes the testimonies of children (whose identities have been concealed for their safety) to verify facts from their personal experience. As a small gesture, this Committee has (at its own cost) taken necessary steps for proper rehabilitation and education of one of these children, payment of the minimum wages due to the said child, her safe passage and reintegration with her family, psychotherapeutic intervention, and to fulfil her educational aspirations. The Committee expects similar treatment by the State of all such deprived children.
11. Every District Magistrate is responsible for carrying out a census of missing children within his district. Having regard to the apathy shown by the district magistrates and the police in the matter of missing children, evident from advisories issued by the Ministry of Home Affairs as late as on 30th January 2012, this issue needs immediate attention. This is necessary also for the credibility of the political establishment.
12. The judiciary has the primary responsibility of enforcing fundamental rights, through constitutional remedies. The judiciary can take *suo motu* cognizance of such issues being deeply concerned with them both in the Supreme Court and the High Court. An all India strategy to deal with this issue would be advisable. The Chief Justice of India could be approached to commence appropriate proceedings on the4270 judicial side. The Hon'ble Chief Justice may consider making appropriate orders relating to the issue of missing children to curb the illegal trade of their trafficking etc. Social activists involved in curbing this menace could assist the court in the performance of this task. The question of award of compensation and rehabilitation could also be considered in such cases by the court.
13. Juvenile homes in the country, i.e. child homes, and observation homes, are not being run in a manner consistent with the spirit of the Juvenile Justice Act. To ensure that the constitution of the Child Welfare Committee, Juvenile Justice Board, the infrastructural facilities in a home, the quality of food, the quality of counselling and psychotherapy required for a child to wipe out the scars of abuse and deprivation in early childhood and to mainstream him/her in society and to educate him/her fully requires a deeper and profound engagement of the State and civil society. This is the primary duty of the State, which is found wanting. We are shocked to note that so many of these children have been forced into bonded labour and beggary, which is in violation of Article 23 of the Constitution . India should not permit cheap child labour to be an incentive for foreign investment to boost our economy.
14. It is time for the judiciary to step in to discharge the constitutional mandate of enforcing fundamental rights and implementation of the rule of law. In performance of this obligation, the Chief Justice of the High Court in every State could devise the appropriate machinery for administration and supervision of these homes in consultation with experts in the field. For the safety and physical security of children, women, persons with disabilities, inmates of mental homes and widows, monitoring by the judiciary is necessary. The immediate and ultimate guardianship of such persons has to be with the court, founded on the principle of *parens patriae*.
15. To augment the police force, there is a need to develop community policing by involving the local gentry, which would also motivate them to perform their duty as citizens. Respectable persons in each locality could also be appointed Special Executive Magistrates under Section 21,Cr.P.C . and invested with powers to deal with the traffic offences and other minor offences. In addition, to assisting the maintenance of law and order in the locality, their presence would inspire greater confidence of safety in the locality.
16. Street lighting everywhere would provide more safety since dark areas are more prone

to facilitate crimes. There is great wisdom in the words of the American Judge Louis Brandeis, that "Sunlight is said to be the best of disinfectant; electric light the most efficient policeman".

17. Street vending should be encouraged to make the bus stops and footpaths safe for communities and pedestrians, in addition to providing street food for the common man.

18. We recommend the creation of a new constitutional authority akin to the Comptroller and Auditor General for education, non-discrimination, in respect of women and children.

19. Reforms in respect of the political establishment:

(a) Reforms are needed in the Representation of People Act, 1951 to deal with criminalisation of politics and to ensure true representation of people by elimination of those with criminal antecedents. This is also essential to avoid any conflict in the discharge of their legislative functions.4271

(b) Having regard to the fact that there is no verification of the affidavits which are filed by candidates under Section 33A of the Representation of People Act, 1951, we have suggested amendments to the said Section 33A requiring the making of a declaration about the pendency of any criminal case, whether cognizance has been taken of it. A certificate from the Registrar of the High Court should be necessary for the validity of the nomination.

(c) We also suggest that, in the event cognizance has been taken by a magistrate of an offence mentioned in Section 8(1) of the Representation of People Act, 1951, the candidate ought to be disqualified from participating in the electoral process.

(d) We further suggest that Section 8(1) of the Representation of People Act, 1951 be amended and should include all heinous offences as suggested.

(e) A candidate who fails to disclose a charge or the commission of an offence should be disqualified subsequently. It is alleged that a minister of the Andhra Pradesh Cabinet had failed to disclose an offence and there is presently a complaint pending against such minister under Section 125A of the Representation of People Act, 1951. We request the Chief Minister of Andhra Pradesh to dismiss the minister immediately from the Cabinet if it is correct that he did not disclose the offence for which he was charged.

(f) Scrutiny and verification of the disclosures made by candidates in respect of their assets may be made by the CAG with necessary follow up action in the case of such disclosures being found to be incorrect or false. Such discrepancies should be a ground for subsequent disqualification under the Representation of People Act, 1951.

(g) If all those in Parliament and State Legislatures, who have any criminal case pending against them in respect of heinous offences, vacate their seats as a mark of respect to Parliament and to the Constitution (which they have sworn to uphold), it would be a healthy precedent and would raise them in public esteem. This would be consistent with the principle of institutional integrity emphasised by the Supreme Court in the P.J. Thomas case judgment.[75]

(h) It is the least to expect that political parties do not nominate any candidates for election who have any criminal antecedents. Failure to do so is likely to set in motion social urges of inestimable dimensions. It has been established in the oral interactions of the Committee with the stakeholders that the fielding of such candidates leads to women being deterred from exercising their right to vote.

(i) Legislation be enacted for compulsory registration of all political parties as indicated earlier.

20. Even though the scope of the terms of reference of this Committee was to look at all criminal laws including laws relating to aggravated sexual assault, we have also studied the related laws which have a bearing upon the administration of criminal justice, including the exercise of enacting legislation.4272

21. These recommendations are to be read along with the various other recommendations

contained in the body of the report relating to specific matters.

22. The recommendations made in this report, unless urgently implemented, will end the exercise conducted by this Committee in futility.

We pay our tribute to the departed soul of Nirbhaya which has occasioned this exercise.42734274

1 Report of the Committee on Amendments to Criminal Law, constituted in view of the brutal gang rape in Delhi on 16 December 2012, for providing quicker trial and enhanced punishment for criminals committing sexual assault of extreme nature against women. This committee, consisting of Justice Leila Seth and Gopal Subramaniam was headed by Justice JS Verma, and submitted its report on 23 January 2013. The full text of the report is available at: http://www. prsindia. org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf (Last accessed on 19 October 2015).

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3 Article 21Constitution of India , .

4 *Ibid* Articles 14 and 15 .

5 *Ibid* Article 19(1)(g) .

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17 *Bhupendra Sharma v State of HP* (2003) 8 SCC 551 [para 10-11].

18 *Dileep Singh v State of Bihar* (2005) 1SCC 88 (para 14).

19 *State of UP v Chottey Lal* (2011) 2 SCC 550 .

20 *State of H.P v Mango Ram* (2000) 7 SCC 224 .

21 *Ibid*.

22 See note 69, p 4262.

23 Canadian Criminal Code s. 273.2 .

24 Sexual Offences Act 2003 (UK), s. 74 .

25 Sexual Offences Act 2003, ss 75 and 76 .

26 *R v J.A.* (see note 64, p 4261).

27 *Koppula Venkatrao v. State of AP* (2004) 3 SCC 602 .

28 *Tukaram v State of Maharashtra* (1979) 2 SCC 143 .

29 *Ibid* (para 17).

30 *Tukaram v State of Maharashtra* (1979) 2 SCC 143 .

31 *Bharvada Gohinbhai Hirjibhai v State of Gujarat* (1983) 3 SCC 217 .

32 *Rafique v State of UP* 1981 SCR (1) 402 .

33 *Shri Bodhisatwa Gautam v. Shubra Chakraborty* 1996 SCC (1) 490 .

34 *State of Maharashtra v Chandraprakash Kewalchand Jain* (1990) 1 SCC 550 .

35 *I Was Wounded; My Honor Wasn't* - Sohaila Abdulali, New York Times, January 7, 2013 http://www.nytimes.com/2013/01/08/opinion/after-being-raped-i-was-wounded-my-honor-wasnt.html?_r=0.

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37 Law Commission of India, *42nd Report on the Indian Penal Code*. 1971. http://lawcommission ofindia.nic.in/1-50/Report42.pdf.

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39 *Handbook for Legislation on Violence against Women*, 2009, UN http://www.un.org/women watch/daw/vaw/handbook/Handboo_k%20for%20legislation%20on%20violence %20against%20 women.pdf.

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42 Sexual Offences Act 2003 (UK), s. 2 .

43 Sexual Offences Act 2003 (UK), s. 3 .

44 Sexual Offences Act 2003 (UK), s. 4 .

45 Sexual Offences Act 2007 (SA), s.3.

46 See *Masiya v Director of Public Prosecutions, Pretoria and Another* (2007) ZACC 9 ; 2007 (5) SA 30 (CC) para 26.

47 SALRC, 'Project 105: Sexual Offences, Discussion Paper 85: Sexual Offences -The Substantive Law' (1999) <http://salawreform.justice.gov.za/dpapers/dp85.pdf> accessed 12 January 2013.

48 *Ibid* p. 4244.

49 *Ibid*.

50 *R v Chase* (1989) 2 SCR 293 para 11, citing *R v Taylor* (1985), 44 CR (3d) 263 at p 269.

51 *Ibid*.

52 *Ibid*.

53 *R v Chase* (n 78).

54 *Ibid*.

55 Sir Matthew Hale. *History of the Pleas of the Crown*, 1 Hale PC (1736) 629. See further S. Fredman *Women and the Law* (OUP, 1997) pp. 55-57.

56 *R. v R* (1991) 4 All ER 481 at p .484.

57 *C.R. v UK Publ* . ECHR, Ser.A, No. 335-C; see Palmer Feminist Legal Studies Voi. V no.1 [1997] pp. 1-7.

58 S. 142 abolished the marital rape exception by excluding the word 'unlawful' preceding 'sexual intercourse' in s. 1 of the Sexual Offences Act 1956.

59 R.S.C. 1985, c. C-46.

60 Criminal Law Consolidation Act 1935, s. 73(3) . See also s. 73(4) which provides that 'No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.' The Crimes (Sexual Assault) Amendment Act 1981 (NSW) inserted s. 61A(4) into the Crimes Act 1900 (NSW), which provided that the fact that a person is married to a person on whom an offence of sexual assault is alleged to have been committed is no bar to conviction for that offence. The Crimes (Amendment) Ordinance (No 5) 1985 (ACT) inserted s 92R into the Crimes Act1900 (NSW), as it applied to the ACT, which provided that the fact that a person is married to a person upon whom an offence of sexual intercourse without consent contrary to s. 92D is alleged to have been committed shall be no bar to the conviction of the first-mentioned person for the offence. In Victoria, the Crimes (Amendment) Act 1985 (Vic) substituted for s 62(2) of the Crimes Act 1958 (Vic) a new sub-section providing that the existence of a marriage does not constitute, or raise any presumption of, consent by a person to a sexual penetration or indecent assault by another person.

61 *R v L* (1991) HCA 48 ; (1991) 174 CLR 379 at p. 390 per Mason CJ, Deane and Toohey JJ.

62 *R v L* (1991) HCA 48 ; (1991) 174 CLR 379 at p. 402.

63 [2011] 2 SCR 40, para 64.

64 Ibid para 47.

65 See, for example, *S v Moipolai* (2004) ZANWHC 19 (Mogoeng J) and *S v Modise* (2007) ZANWHC 73 .

66 Gender Links and the South African Medical Research Council, 'The War at Home' (2010) <http://www.mrc.ac.za/gender/gbvthewar.pdf> accessed 12 January 2013.

67 See further Gemma Hancox, *'Marital Rape in South Africa: Enough is Enough'* (2012) BUWA Journal on African Women's Experiences 70 <http://www.osisa.org/buwa/south-africa/marital-rape-south-africa> accessed 12 January 2013.

68 *Vertido v The Philippines Communication* No. 18/2008, Committee on the Elimination of Discrimination against Women July 2010.

69 *DIG v S. Samudiram* (2012) 11 SCALE 420 .

70 *'Proposal for the inclusion of acid attacks as specific offences in the Indian Penal Code and a law for compensation for victims of crime'*, Law Commission of India, July 2008 at p. 3.

71 *Sachin Jana v State of West Bengal* (2008) 3 SCC 390 .

72 *State of Maharashtra v Balram* (1983) 2 SCC 28 .

73 http://www2.ohchr.org/english/law/disappearance-convention.htm

74 See, *Police Reform*, in the Report.

75 *Centre for PIL & Another v Union of India* Judgment dated March 3, 2011 in Writ Petition (C) No. 348 of 2010.